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Clients' strict liability towards victims of sex-trafficking

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In this paper, we argue that clients who purchase commercial sex from victims of forced prostitution should be strictly liable in torts towards the victims. Such an approach is both normatively defensible and doctrinally feasible. Fairness and equality demand that clients would compensate victims, even if one refuses to acknowledge that purchasing sex from a prostitute who might be a victim is a faulty behaviour. Clients profit from the activity of purchasing commercial sex, so fairness demands they will bear the costs they impose on victims who are unable to refuse the contact. Strict liability will bring about desirable distributive results along the lines of sex, class and race. Imposing strict liability will ensure consistency of the English law of trespass and it is supported by several instrumental considerations.

Such strict liability could be grounded in battery, despite the appearance of apparent consent by the victim to sell sexual services to the client. This is so for two main reasons. First, the extreme coercion operated on the victim renders her consent void so that an innocent third party cannot rely on the appearance of consent. Secondly, the client should be considered as having constructive notice with respect to the trafficker's coercion. Our argument is supported by – but does not hinge upon accepting – the insight that the client's behaviour is ultimately faulty.

> 'Why do you come here? Is it possible – is it possible you don't understand how horrible it is? Your medical books tell you that every one of these women dies prematurely of consumption or something; art tells you that morally they are dead even earlier. Every one of them dies because she has in her time to entertain five hundred men on an average, let us say. Each one of them is killed by five hundred men. You are among those five hundred! If each of you in the course of your lives visits this place or others like it two hundred and fifty times, it follows that one woman is killed for every two of you! Can't you understand that? Isn't it horrible to murder, two of you, three of you, five of you, a foolish, hungry woman! Ah! isn't it awful, my God!' (Anton Chekhov, *A Nervous Breakdown*)

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INTRODUCTION

On 19 November 2008, the Home Office Secretary Jacqui Smith announced draft legislation intended to criminalise the purchase of sex from a prostitute who is 'controlled for another person's gain'. This definition targets not only trafficked women but also those who work for a pimp. The offence will be punishable by a heavy fine and will carry a criminal record. According to the proposal, a plea of ignorance is no defence for men facing prosecution.[1] This proposal follows the Swedish model (which in fact goes further by criminalising any purchase of sexual service)[2] and forms part of a global tendency to target demand.[3] In this paper, we will not evaluate the merits of this proposal;[4] rather, we will examine the civil liability aspects of purchasing sex from a forced prostitute.

Although much has been written about the horrors of modern slavery and forced prostitution, little research was done on civil liability in this matter, neither generally, nor specifically with respect to civil liability of clients.[5] This paper begins to fill in this gap by defending the following claim: clients who purchase sex services from a forced prostitute should be strictly liable for the violation of the victim's bodily integrity and the resulting harm. Liability is warranted even if the client could not have known that the victim is a forced prostitute. For reasons of style, we call victims of forced prostitution (whether trafficked or not) 'victims'; prostitutes who are not forced, 'workers',[6] and a prostitute who might or might not be a victim, 'prostitute'.

The inquiry conducted in this paper is part of a broader inquiry regarding the scope of tort liability of clients towards victims. We limit the discussion to the question of whether clients should be liable for the direct sexual contact with a forced prostitute (as opposed to liability for failure to rescue her from further future enslavement and for creation of demand for indiscriminate commercial sex which contributes to the

1. A Travis and A Sparrow *New Law to Criminalise Men who Pay for Sex with Trafficked Women*, available at http://www.guardian.co.uk/society/2008/nov/16/prostitution-women-lapdancing. According to the proposal, a man who knowingly purchases sex from a trafficked woman could face a charge of rape. As an aside, we believe that such behaviour is already covered by ss 1(1)(c), (1)(d), 3(1)(d), 4(1)(d), 1(2), 2(2), 3(2) and 4(2) of the Sexual Offences Act 2003. These sections go as far as determining that an honest yet unreasonable mistake with respect to the existence of the claimant's consent to the sexual contact is not a defence and that 'Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents'.
2. Swedish Criminal Code, Ch 6, s 11.
3. See, eg, Council of Europe Convention on Action against Trafficking in Human Beings 2005, Art 6.
4. It has been promptly attacked on several grounds, including that it ignores the interests of prostitutes themselves. See, eg, C Stephens *Propose Less, Listen More*, available at http://www.guardian.co.uk/commentisfree/2008/nov/19/prostitution-humantrafficking.
5. For civil liability of traffickers see 'Note: remedying the injustices of human trafficking through tort law' (2006) 119 Harv L Rev 2574; T Keren-Paz 'An essay on banalization of slavery, devaluation of sex-workers' labor and deprivation of victims of trafficking' in F Raday and N Levenkron (eds) *Trafficking in Persons – Human Rights Boundaries* (Aldershot: Ashgate, forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980075; T Keren-Paz '*AT v Dulghieru* – compensation for victims of trafficking, but where is the restitution?' (2009) Torts Law Journal (forthcoming) (Keren-Paz, AT); N Levenkron 'Civil suits of victims of trafficking against the traffickers: and yet, it does move' in G Mundlak and Mimi Ajzenstadt (eds) *Law, Society and Culture: Empowerment* (2008) p 451 (in Hebrew).
6. For the blurred boundaries between the two categories, see pt 1 below.

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phenomenon of forced prostitution). Similarly, we examine neither the scope of liability of other actors (such as the state) towards victims, nor the scope of liability of clients towards workers, or towards victims of trafficking outside of the sex industry. We argue that it is normatively justified to impose strict tort liability on clients who purchased sex from victims, and that liability could be grounded doctrinally. We do not cover in this paper issues of scope of liability (apportionment and measurement of damages), and refer only briefly to socio-legal questions (what would be the effect of imposing liability on clients, victims and workers?). Let us dwell shortly on the last point. When we previously presented the paper, we were often criticised that the idea is not practical and that forced prostitutes are not likely to sue. There are several responses to this critique. One must distinguish between the questions 'is civil liability of clients going to be an effective regulatory response?' and 'do victims have the right to sue?' From a rights-based perspective, the fact that a civil response is not likely to deter clients or to benefit many victims is not a reason to deny a right which should otherwise exist. No one should be the victim's guardian and decide for her whether she should try and sue. One advantage of a civil response framework is that it empowers victims and gives each of them the choice whether to sue or not. In addition, one should not undermine the intrinsic and expressive value of recognising victims' right to sue. This, of course, necessitates an inquiry whether a victim should have, and has in fact, a valid claim against an ignorant client; this is what we try to explore in this paper.

Secondly, the answer to the question whether civil liability is an effective regulatory response is simply unknown and we should not assume that the answer is necessarily in the negative. A sceptical approach should not serve as a reason to pre-empt the calls for imposition of liability; otherwise, there is a vicious circle of silencing and marginalising victims. While victims who contemplate suing face formidable obstacles, these obstacles might be overcome. For example, in many respects victims' suits against traffickers are even harder to pursue, due to the added risk of violent retaliation and the difficulty of recovering awards, while problems of proof and access to justice are similar. And yet, the English and Israeli experiences show that victims were able successfully to sue traffickers in civil courts following a conviction of the trafficker.[7] A similar result was achieved in England in the context of trafficking for domestic purposes in *Godwin v Uzoigwe*[8] based on the tort of intimidation.

The major difficulty with respect to suing clients which is unique to them – identification – might be solved when the client is arrested or found in a police raid,[9]

7. In *AT v Dulghieru* [2009] EWHC 225 (QB), the defendants, who trafficked the four claimants for purposes of sexual exploitation, were liable – based on unlawful conspiracy – to pay £601,000 in damages. The period of enslavement was between 1 and 2 months and the award was based on pain and suffering, aggravated damages and (meagre) exemplary damages. For evaluation see Keren-Paz, AT, above n 5. For the Israeli experience, see LaA 480/05 *Ben-Ami v M* (8 July 2008), aff'm *La (Be'er She'va)* 4634/03; *M v Salsrevski, Tak-Av* 2005 (3) 97 (2005) (minimum wage and non-pecuniary damages awarded in the labour court); CC (Tel Aviv) 2191/02 *K v Jaack, Tak-Meh* 2006 (1) 7885 (2006), aff'd in 3806/06 *Jaack v K* (26 May 2009, Supreme Court) (damages award to a victim of trafficking based, inter alia, on battery). While these decisions are not without their problems, they are a step in the right direction. Victims, though, still face problems of recovering the awards.
8. [1993] Fam Law 65.
9. See below n 129 and accompanying text.

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when the client is a celebrity whose identity is well known[10] or due to the phenomena of 'Black Books' that are often kept by traffickers and pimps, detailing the client's name, his sexual preferences, methods of payment and sometimes also a phone number or an address.

Successful claims by victims will require the provision of legal aid, the alleviation of access to justice barriers[11] and answering complex questions about apportionment of liability. There is no reason to assume a priori, however, that these obstacles cannot be overcome. Another issue that has to be considered is the impact of clients' civil liability on the well-being of women in the sex industry, who might need to go underground in order to protect their clients. We plan to deal with these and other difficulties in future research (however, we make some tentative analysis in pt 2(d)). Nevertheless, despite the great difficulties awaiting those trying to apply the ideas advanced in this paper, we endorse the words used by Julia O'Connell Davidson to end her book: it is better to light one candle than to curse the darkness.[12]

Part 1 clarifies our definition of forced prostitution and consent and presents some data on clients' contribution to the exploitation of workers and victims. Part 2 defends the imposition of strict liability from a normative perspective, mainly based on fairness and equality. Part 3 grounds such liability in battery, while explaining why no apparent consent by the victim to have sex with the client should be inferred. The final part concludes.

1. PROSTITUTES AND CLIENTS

(a) Forced prostitutes

The argument we make for strict liability of clients is limited to those forced into prostitution. This raises the question of what forms of pressure will count as vitiating the prostitute's consent. 'Consent' is a fuzzy term. We do not think that pointing a gun to a woman's head is the only way to force her into doing something she would not do in other circumstances. There is a wide spectrum – especially in modern day society – between the two extremes of women who can really *choose* prostitution and survive it, and those women who are outright forced. For the purpose of this paper, we will distinguish between three levels of coercion. At one extreme there is coercion that is manifested by violence, threats of violence and isolation. Our argument applies to the first category. Women in this category cannot choose to exit prostitution due to illicit pressure by the trafficker. The pressure might be manifested by violence, threat of violence, psychological intimidation, confiscation of travelling documents, deceit about what awaits the victim if caught by the police, false imprisonment and similar tactics of intimidation. Usually these women do not have control over the number of clients they 'serve' and the practices they have to engage in. Typically, they do not decide how much to demand for their sexual services and how much of it remains in their hands; at times the money is paid directly to the trafficker and the victim receives

10. Ibid. The actor Hugh Grant and former New York Governor Eliot Spitzer are but two examples of celebrities who purchased sex (although apparently not from forced prostitutes).
11. Prostituted women have usually no social or legal power, they know neither the law nor their rights, and they hesitate before they would try to assert their rights even if they are raped, beaten or robbed. They see the police as an enemy rather than a place where they can get help.
12. J O'Connell Davidson *Prostitution, Power and Freedom* (Oxford: Polity Press, 1998) p 210.

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(if at all) an amount reflecting 17% of what the client has paid. From this amount, the trafficker often deducts unilaterally sums reflecting fines for 'violations' by the victim and inflated expenses such as rent and food. Victims trafficked across borders typically receive nothing in the first months after they arrive to reflect the costs of 'purchasing' the victim and bringing her into the country. Often victims are sold from one trafficker to another and then for a few months victims will receive nothing in order to cover the purchase price. Many victims will receive nothing throughout the period of their enslavement, which can vary from a few months to 2 years.[13]

'Middle ground' coercion involves drug addiction and consent given by minor prostitutes. There is much to be said for applying the argument also to prostitutes from the second category. Drug addiction seriously compromises one's faculties and free will. It arguably undermines one's freedom and capacity to make a choice.[14] Similarly, minority undermines consent for commercial sex. However, those refusing to acknowledge that drug addicts and minors should be classified as forced into prostitution, still could and should accept the validity of the argument presented here with respect to victims whose coercion is the result of illicit intimidation by traffickers. Our argument does not apply, in itself, to economically-induced coercion, which is the third category of coercion. By this we do not argue that workers necessarily cannot sue clients for battery or negligence, based on economic duress; if such a claim could be defended, a different argument might need to be advanced.

The debate about coercion and choice is reflected in the attempts made to define trafficking for prostitution in the legal field, both nationally and internationally, such as in the UN protocol.[15] In general, trafficking occurs whenever a person loses her freedom, and her body or its products belong to others. Although there is a tendency to view trafficking as something that happens across national borders, in fact internal trafficking is prevalent, where local women, especially drug-addicts and minors, are

13. For the English experience, see *AT v Dulghieru*, above n 7, at [1]–[40]; *R v Maka* [2005] EWCA Crim 3365 at [3]–[5]; Home Office and Scottish Executive, *UK Action Plan on Tackling Human Trafficking* (2007) pp 14–15, available at http://www.homeoffice.gov.uk/documents/human-traffick-action-plan?view=Binary (p 14: 'Once in the UK their personal freedom is severely curtailed and they are often controlled through the removal of their documentation, unrealistic debt-bonds, threats of violence against them or their families and physical, sexual and/or emotional abuse'); S Dickson, The POPPY Project *When Women are Trafficked: Quantifying the Gendered Experience of Trafficking in the UK* (2004); R Kotak, The Anti Trafficking Legal Project Coordinator, email correspondence with author, 25 November 2008 ('re the amount women get paid, I think it greatly varies – the majority I have represented have been paid nothing throughout their entire time, sometimes a couple of years'). For the Israeli experience, see text accompanying cases cited in nn 23–25 below; Parliamentary Inquiry Committee *Trafficking in Persons: Intermediate Report* (2002), available at http://www.knesset.gov.il/committees/heb/docs/sachar15-4.htm#1 (in Hebrew); Parliamentary Inquiry Committee *Trafficking in Persons: Final Report* (2005), available at http://www.knesset.gov.il/committees/heb/docs/sachar_final2005.htm (Parliamentary Report) (in Hebrew); Y Dahan and N Levenkron *Women as Commodities: Trafficking in Women in Israel* (Hotline for Migrant Workers, Isha L'Isha – Haifa Feminist Center, Adva Cente, 2003), available at http://www.hotline.org.il/english/pdf/Women_as_Commodities_Trafficking_in_women_in_Israel_2003_Eng.pdf; Levenkron, above n 5; Keren-Paz, above n 5.

14. Sexual Offences Act 2003, s 74. See the discussion in pt 3(d) below.

15. See J Chuang 'Redirecting the debate over trafficking in women: definitions, paradigms, and contexts' (1998) 11 Harv Hum Rts J 65 at 80–84; E Bernstein 'What's wrong with prostitution? What's right with sex work? Comparing markets in female sexual labor' (1999) 10 Hastings Women's LJ 91 at 91–92.

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held in slavery-like conditions. Our argument is applicable to all forced prostitutes, including those forced domestically. It applies also to women who knew they were going to work as prostitutes. What makes a woman a forced prostitute is the lack of free exit and the lack of control over her 'working' conditions. Unlike international documents about trafficking, our focus is not on the circumstances which led women to become trafficked, but rather the circumstances which prevent their exit (although the two are usually connected).

If it is hard to define forced prostitution, it is nearly impossible to have any reliable numerical estimation of it. This is the result of mainly two factors: The existence of so many different definitions of prostitution and trafficking, and the fact that the people implicated in them are a 'hidden population', who dislike to expose their participation in these activities, since they are criminalised or, at least, stigmatised.[16] Yet, many articles, reports and newspapers include 'estimated' figures about the number of victims and workers, without supporting these figures with any clear evidence.[17] The official government estimate of trafficked women in the UK is 4000,[18] while non-governmental organisation estimations are much higher.[19] The Metropolitan Police estimated that 70% of the 88,000 prostitutes in England and Wales are trafficked.[20] In our opinion, the only accurate figures that can be found, when it comes to prostitution and trafficking, are of women who were arrested, deported, or who testified against their pimps and traffickers. However, it is impossible to extrapolate from these figures how many women are involved in the sex industry in a certain country, and how many of them are 'victims' or 'workers'.

While the number of trafficked women is disputed, their existence should not be. In the Australian case of *R v Tang*,[21] the accused was convicted according to the anti-trafficking provision which criminalises anyone who 'intentionally possesses a slave or exercises over a slave any of the other powers attaching to the right of ownership'.[22] In Israel, one complainant 'was subjected to an examination which could only be compared to one done to an animal sold in the market';[23] another was told by the trafficker that she 'must have sex with condom and oral sex without a condom, and to allow the client what he wants to do',[24] while many were sold from one trafficker to

16. About the difficulties in this kind of research, see D Brenan 'Methodological challenges in research with trafficked persons: tales from the field' in F Laczko and E Gozdziak (eds) *Data and Research on Human Trafficking: A Global Survey, Special Issue of International Migration* (New York: United Nations, 2005).
17. See, eg, the TIP report, published by the US State Department every year, available at www.state.gov/g/tip/rls/tiprpt. For a critique of this phenomenon in which '[N]umbers take on a life of their own, gaining acceptance through repetition, often with little inquiry into their derivations', see J Sanghera, Office of the High Commissioner for Human Rights *Churning out Numbers: Trafficking and Statistics*, Working Paper No 16, http://www.unece.org/stats/documents/2004/10/gender/wp.16.e.pdf.
18. Action Plan, above n 13, p 14.
19. Violence against Women estimates the number of trafficked women to be 10,000: Kotak, above n 13.
20. Travis and Sparrow, above n 1. This might be based, however, on a more relaxed definition of trafficking.
21. *R v Tang* [2008] HCA 39.
22. Criminal Code (Cth), s 270.3(1)(a).
23. BS (Haifa) 4891/00 *State of Israel v Rabi'ee* (1 January 2001).
24. SCrC1210/01 *State of Israel v Yosef* (15 January 2003).

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another.[25] In England, one victim was sold several times from one trafficker to another, raped and forced to work in prostitution.[26]

One final word needs to be said about the relationship between forced and non-forced prostitution. The social value of prostitution in general is hotly debated within and outside feminist circles.[27] This value should depend on the proportion of victims among prostitutes and on valuing the extent to which workers who are not victims are nonetheless exploited. We adhere to the view that prostitution is an inherently objectionable phenomenon which harms those who practise it, seriously and irreversibly. However, to accept the argument developed in this paper, there is no need to accept this premise. While this premise slightly strengthens our argument, devaluating prostitution is not essential for supporting strict liability of clients to victims.[28]

(b) Clients

In both case-law and research about prostitution, the client is relegated to the backstage. Serious academic research about clients started only in the last few years. It shows that clients come from all socio-economic levels. Clients receive diverse education, have different occupations and levels of income, and are from different cultures, age groups and family status.[29]

Different stereotypes, in different cultures, present the client as a lonely man, usually a stranger, who has no friends or family, and who cannot have sex without paying for it. Yet, clients are not only the deviants or the strangers. They are each and every one of us. The absence of research and discussion about the role of the client in the sex industry only makes it easier for the client to act and cause more injury. The silence must be broken, and this paper should be only one step in the process.

Research done on clients reveals that clients believe they can identify victims of trafficking, but would not necessarily avoid (ab)using them.[30] Some of the clients expressed a belief that they can get 'better value' for their money from a victim and described migrant prostitutes as cheaper and more malleable in comparison to local women.[31] Clients also mentioned that victims were nicer to clients, didn't talk too

25. See eg, *M v Salsrevski*, above n 7, at paras 6–49; *K v Jaack*, above n 7, para 2. See above n 13 and accompanying text.
26. See *R v Maka*, above n 13. For the experience of other victims, see *AT v Dulghieru*, above n 7; Dickson, above n 13.
27. Contrast C Pateman *The Sexual Contract* (Oxford: Polity Press, 1988); A Dworkin 'Prostitution and male supremacy' (1993) 1 Mich J of Gender and L 1 with X Hollander *The Happy Hooker* (Tandem, 1975); J Nagle (ed) *Whores and Other Feminists* (London: Routledge, 1996). [Correction added after online publication 27 July 2009: 1 Mich of Gender and L was corrected to 1 Mich J of Gender and L.]
28. Contrast with the argument that clients' liability towards forced prostitutes should be based on objective fault: T Keren-Paz and N Levenkron 'Clients' fault-based liability for purchasing sex from forced prostitutes', draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115331. The fault argument is partially based on the assumption that the consumption of commercial sex in general has low social value. The recent proposal by the Home Office Minister and the Swedish model are based on such an assumption.
29. See below n 72.
30. B Anderson and J O'Connell Davidson *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study* IOM Migrant Research Series No 15 (2003).
31. Ibid, p 21.

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much, helped clients, and the fact that these women were isolated and lonely made them turn to the clients for some comfort and support.[32] Other clients preferred local prostitutes, because migrant prostitutes, in their opinion, looked dirty, uneducated and victims of abuse. When asked if they would report their suspicions if they encountered a victim of trafficking, at least 25% said they would try to help, and more than half said they would report it to the police.[33]

Even though traffickers and pimps very often use abusive tactics, most forced sexual intercourse happens with clients who do not know or do not care that the woman they purchased sex from is a victim of trafficking. Other than rape and beatings, victims suffer from threats, venereal disease and post-traumatic stress disorder. While most research does not distinguish between injury caused to victims by traffickers, pimps, clients and others,[34] clients significantly contribute to the injury suffered by victims.

2. POLICY

Clients' liability for the harm suffered by victims from the direct encounter between the two can be based on one of three grounds: knowledge that the victim is forced (subjective fault); negligence in not knowing that the victim is forced or, alternatively, in willingness to purchase commercial sex acts despite the inability to rule out the possibility that the prostitute is forced; or strict liability. While most clients could be found liable based on objective fault,[35] for reasons explained below, strict liability is to be preferred. Strict liability is justified based on mainly two considerations: fairness (section (b)) and egalitarianism (section (c)). In addition, strict liability might be justified based on several instrumental considerations, including a more efficient level of deterrence (section (d)). We will begin with another consideration: the importance of the claimant's interest and the need for consistency across the torts of trespass.[36]

32. Ibid, p 25.
33. Ibid, p 24. There is no doubt that in this kind of questions there will always be some gap between the statement the client makes during an interview and the way he would behave if this situation really happened. And, of course, a client might not tell about some of his sexual habits that might be considered deviant, such as paedophilia.
34. *The Health Risks and Consequences of Trafficking in Women and Adolescents* London School of Hygiene and Tropical Medicine (2003), available at: http://www.lshtm.ac.uk/hpu/docs/traffickingfinal.pdf; *Migration, Trafficking and Right to Health* Alliance News, Issue 23, July 2005, available at http://www.gaatw.net/index2.php?option=com_content&do_pdf=1&id=108; *The IOM Handbook of Direct Assistance for Victims of Trafficking 2007*, available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/CT%20handbook.pdf, pp 181–270; *Stolen Smiles: The Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe* London School of Hygiene and Tropical Medicine (2006), available at: http://www.lshtm.ac.uk/hpu/docs/Stolen%20Smiles%20-%20Trafficking%20and%20Health%20(2006).pdf.
35. Keren-Paz and Levenkron, above n 28.
36. The first argument might be viewed as a general and abstract corrective justice justification for strict liability for battery, while the next two arguments as more context dependent and as distributive justice justifications for strict liability towards victims. The last justification could be explained as based on either distributive or efficiency considerations. Endorsing this corrective/distributive classification is not essential for the argument.

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(a) The protected interest and trespass torts

The scope of tort liability is the combination of three factors: the claimant's protected interest, the type of defendant's behaviour and the mode of defendant's interference with the claimant's interest.[37] With respect to battery, two considerations weigh in favour of imposing strict liability on defendants. First, the defendant's activity (the touching) is intentional. As Robert Stevens recently explained:

> '[T]hat the law of torts does not require proof of fault where the defendant has acted intentionally, but generally does where the defendant's conduct is unintentional, is justifiable. We are responsible for our conscious choices and their consequences in a way which we are not where actions are unintentional.'[38]

As will be explained in the next section, this is an aspect of fairness. The defendant (client) is acting to further his own interest (reaching sexual gratification); he should bear the consequences when his conduct resulted with the victim being subject to sexual contact she did not consent to.

While strict liability might also be justified based on Richard Epstein's libertarian theory,[39] we do not pursue this avenue here since his libertarian premises are not shared by us. Moreover, Epstein's theory, which is causative-based, has been criticised for being indeterminate or leading to too broad liability.[40] This said, Epstein's (libertarian) reliance on notions of ownership (spelled out in terms of causation) is compatible with the view that greater liability should flow from intentional behaviour and is appropriate with respect to the tort of battery which protects one's self-ownership interest.[41]

Secondly, the interest in bodily integrity ought to receive the utmost protection by the legal system. This should be translated doctrinally to strict liability, which denies a defence of reasonable mistake. The more important the protected interest, the more it should be – and usually is – protected by the legal system. While this is true in general, it should especially be true in the context of sexual battery.[42] From the victim's perspective, there are few things which undermine one's autonomy, security, dignity and self-worth more than subjecting her (or him) to unwanted sexual contact.

Moreover, battery is a trespass to the person tort. While there are some doubts – discussed below – whether liability in battery is strict,[43] there is no doubt that the common law imposes strict liability for interference with the owner's right to possession. *Basely v Clarkson*[44] has set the rule that in trespass to land, an honest and

37. See, eg, P Cane *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997).
38. R Stevens *Torts and Rights* (Oxford: Oxford University Press, 2007) p 102.
39. See R Epstein 'A theory of strict liability' (1973) 2 J Leg Stud 151.
40. See S Perry 'The impossibility of general strict liability' (1988) 1 Can J L Jur 147.
41. Moreover, the quintessential experience of victims of trafficking is that they are treated as property. As one of us argues elsewhere, this justifies strict liability towards them which is grounded in the tort of conversion. See T Keren-Paz 'Poetic justice: why should sex-slaves be allowed to sue ignorant clients in conversion', to be presented at the SLS Annual Conference, Keele 2009).
42. Cf E Adjin-Tettey 'Protecting the dignity and autonomy of women: rethinking the place of constructive consent in the tort of sexual battery' (2006) 39 UBC L Rev 3.
43. See nn 79–91 below and accompanying text.
44. (1681) 3 Lev 37 (CP).

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reasonable mistake by the defendant with respect to title, the land's border or defendant's right to be on claimant's land is not a defence. Consistency demands that all the manifestations of trespass as an overarching tort relating to persons, chattels and land would afford the same protection: the protection of bodily integrity by battery would be equal to that afforded to property through trespass to land and chattels; all would lead to strict liability. This conclusion is especially compelling if one emphasises the defendant's mode of interference (direct and intentional) as the unifying rationale behind trespass torts which protect both bodily integrity and property. According to such view, self-ownership of one's body is another – indeed the ultimate – form of ownership.

If, on the other hand, one emphasises the importance of the protected interest, surely bodily integrity should receive at least the same (if not more) protection as that given to one's interest in protecting his property. On this view, if the common law generally protects one's property to a greater extent than it protects one's bodily integrity, this is problematic. If a reasonable mistake about title to land or to a wallet leads to liability, while a reasonable mistake about one's consent to a treatment excludes liability, or if a nuisance or *Rylands v Fletcher* claim (in England) allows the owner of land to recover, in the absence of fault, for damage to property, while personal injury is excluded,[45] then there is much to be said that something is wrong with the current set of priorities of the common law. It might be that a general reform is needed in order to, at minimum, equate the scope of protection to one's person with the protection to one's possession, or to reverse the current scheme of priority so as to afford broader protection to the interest in one's person. While some doctrinal changes required by adopting such view are likely to be left by the courts to Parliament,[46] as the discussion below reveals, strict liability for battery has considerable support in English courts.

(b) Fairness

One distributive consideration which supports generally strict liability is the idea that those who benefit from a given activity should compensate those suffering from its negative consequences.[47] At times, when the loss is the result of two incompatible activities which each benefits one party, it could be hard to decide which activity should bear the costs of accident. Accordingly, in such cases, liability based on fault might be preferred.[48] In general, however, strict liability could be justified in two different types of scenarios. The first is when all participants stand, ex ante, to benefit to a similar degree from the activity, and are exposed, ex ante, to similar risks. The risks, however, materialise ex-post randomly. Fairness demands that the costs of the activity would be spread on all members of the group benefiting from the activity. Imposing strict liability will achieve this result, when the defendant is able to price the cost of liability on those benefiting from the activity leading to the defendant's

45. See *Hunter v Canary Wharf* [1997] AC 655; *Transco v Stockport Metropolitan BC* [2003] UKHL 61, [2004] 2 AC 1.
46. See, eg, *Transco*, ibid, at [43] (per Lord Hoffmann).
47. GC Keating 'Distributive and corrective justice in the tort law of accidents' (2000) 74 S Cal L Rev 193.
48. Ibid, at 217–218.

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liability. Such rationale stands, for example, behind enterprise liability,[49] nuisance,[50] vicarious liability,[51] no fault schemes for road accidents,[52] liability of the state for creation of active risks[53] and outside tort law, in the continental (and to a lesser extent American) tradition, behind contribution rules between co-owners who incur expense with respect to the property.[54]

A second scenario which justifies strict liability to even a greater extent is when those who benefit from an activity are different from those who bear its costs. If even ex-ante, potential victims do not benefit from the activity, it would be grossly unfair (egalitarian considerations aside) to require them to subsidise the activity which benefits potential defendants. This rationale, which was captured some 35 years ago by George Fletcher as the creation of non-reciprocal risk,[55] justifies strict liability in the following instances: (1) the creation of ultra-hazardous risks from the defendant's activity on his land (or the narrower English version of liability under *Rylands v Fletcher*[56] – the requirement for non-natural use is a manifestation of the logic of lack of reciprocity); (2) the American doctrine of incomplete privilege in instances of private necessity; under such doctrine the defendant needs to pay for the cost of his use

49. *Escola v Coca-Cola Bottling Co* 150 P.2d. 436, 441 (1944) (Traynor J concurring); J Stapleton *Product Liability* (London: Butterworths, 1994) ch 8; D Brodie 'Enterprise liability: justifying vicarious liability' (2007) 27 OJLS 493.
50. *Bamford v Turnley* 3 B&S 66 (1862 Exc, Ch) (Bramwell B).
51. P Atiyah *Vicarious Liability in the Law of Torts* (London: Butterworths, 1967) pp 17–18; Brodie, above n 49. Atiyah no longer finds this argument convincing, and other commentators question its ability to justify the expansion of employers' liability: PS Atiyah 'Personal injuries in the twenty-first century: thinking the unthinkable' in P Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon Press, 1996) pp 1, 16; C McIvor 'Re-inventing the doctrine of vicarious liability – again!' (2005) 21 Professional Negligence 283; Cf R Stevens Vicarious liability or vicarious action? (2007) 123 LQR 30. However, recent case-law in England and other commonwealth jurisdictions clearly endorses fairness as a major justification for vicarious liability: *Lister v Hesley Hall* [2002] 1 AC 215 at 243; *Dubai Aluminium v Salaam* [2003] 2 AC 366 at 395; *Bernard v A-G* [2005] IRLR 398 at 402; *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at [9]; *Bazley v Curry* (1999) DLR 174 (4th) 45 at 60. See Brodie, ibid, at 496–497. More Generally, the fact that fairness 'would justify the imposition of strict liability in a wide range of situations in which it is currently not imposed' (Cane, above n 37, p 46) is not a reason to oppose clients' strict liability for the following reasons. First, as we argue below, fairness justifies a major feature of tort liability: strict liability of proprietary torts. Secondly, in other contexts strict liability might be inappropriate due to the difficulty to allocate the costs to one of two incompatible activities; such problem does not exist in our context. Thirdly, clients' strict liability – similarly to vicarious liability – could be justified due to the combined effect of several policy considerations which might supplement fairness (equality and deterrence) or supplant it (protected interest). Finally, it might be that indeed other interactions, which currently are not governed by a strict liability rule, should; this is hardly a reason not to adopt one step in the right direction.
52. Keating, above n 47, at 215–216.
53. S Kneebone *Tort Liability of Public Authorities* (Sydney: Law Book Co of Australasia, 1998) p 41.
54. See H Dagan and M Heller 'The liberal commons' (2001) 110 Yale LJ 549 at 611–613; cf Restatement (First) Restitution (1937), s 105. For the unduly narrow English approach, see *Leigh v Dickeson* [1884–1885] 15 QB 60 (CA).
55. GP Fletcher 'Fairness and utility in tort theory' (1972) 85 Harv L Rev 537 at 544–550.
56. LR 3 HL 330 (1868); *Transco v Stockpot Metropolitan BC*, above n 45. For the American version see Restatement (Second) of Torts (1965), s 519.

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of the claimant's resource;[57] (3) the liability of air carriers for injury on the ground from falling aircrafts.[58]

The central doctrinal manifestation of the anti-externalisation rationale is the rule governing defendant's interference with the claimant's property; with respect to conversion, and trespass to land, the defendant acts at his peril.[59] Such liability is not based on the assumption that the defendant stood in a better position than the owner to prevent the accident resulting from the competing claims to the asset.[60] In fact, in many cases, the opposite is true. Rather, liability is based on the idea that the defendant is dealing with the asset in order to promote his self-interest. In most cases, this risk-taking would benefit him. If in the course of this activity, his dealing with the property is likely to injure the owner, who does not stand to benefit (in any significant way) from the defendant's activity, the former should bear the loss. Note that such a result is not based on the assumption that the defendant is likely to spread the loss better than the owner. It is fair to (merely) shift the loss (as opposed to having it spread), rather than leave it as it falls, because the defendant, rather than the claimant, stands to benefit from the defendant's activity.

Fairness-based liability does not hinge upon, though it does not exclude liability for, faulty behaviour by the defendant. It is based on the idea that if an activity is really beneficial from an overall social perspective, it would be fair, as a distributional matter, that winners would compensate losers. Translated to the context of trafficking, strict liability is justified under either version of the fairness rationale. Even if it could have been argued plausibly that clients and prostitutes all stand ex-ante to benefit equally from the commercial sex activity, still it would be fair to compensate those who are the victims of the (arguably) unavoidable accident of such activity: women who are forced into prostitution whom clients cannot identify. More realistically, since clients (overwhelmingly men) benefit from purchasing commercial sex, while victims (overwhelmingly women) bear its costs (by being subjected to non-consensual sex), it would be most unjust if clients would not compensate victims. Put differently, if, indeed, purchasing commercial sex is a socially desirable activity, and clients cannot be faulted for purchasing sex from victims, since there is no way to sort victims from workers, it is only fair that clients, who benefit from the activity would pay its costs and compensate the victims who bear the significant costs of this activity. These costs are, on the narrower view, the result of being subjected to non-consensual direct contact with clients and, on the broader view, the result of being enslaved in order to

57. *Vincent v Lake Erie Transportation* 124 NW 221 (Minn, 1910). The English position seems to absolve the defendant from the duty to compensate, although the interpretation of the cases is disputed. See *Romney Marsh v Trinity House Corp* (1870) LR 5 Ex 204; *Cope v Sharpe* [1912] 1 KB 496. See JF Clerk and WHB Lindsell *Clerk and Lindsell on Torts* (London: Sweet & Maxwell, 19th edn, 2006) p 1140, n 91 ('. . . necessity is not favoured by the courts, especially where the defendant acted to protect private . . . interest').

58. Restatement (Second) of Torts (1965), s 520A.

59. *Marfani v Midland Bank* [1968] 1 WLR 956 at 970–971 (Lord Diplock). For an application of this rationale see Keren-Paz, above n 41 (basing clients' strict liability on conversion). Conversion protects both possession and the immediate right to possess and is found on property, while trespass merely protects (and is found on) possession: *Ward v Macauley* (1791) 4 TR 489, at 490. This does not affect the conclusion of the analysis. At most (but we do not explore this point), one can conclude that a victim has a right to immediate possession of herself but no actual possession and therefore she can sue in conversion but not in trespass.

60. Cf M Mautner ' "The eternal triangles of the law": toward a theory of priorities in conflicts involving remote parties' (1991) 90 Mich L Rev 95.

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satisfy the demand for commercial sex. Since no one would dispute that the violation of victims' right, and the ensuing injuries are devastating, it will be most unfair to leave the costs where they are, rather than to shoulder them on clients, who benefit from the activity which created these costs.

Of course, the fact that the violation of victims' rights is so significant, casts doubt on the assumption that the activity as a whole is socially beneficial. Under the alternative assumption, the foreseeable risk to victims could be a good ground to forbid purchase of commercial sex at all, or at minimum to view each act of purchasing commercial sex as an unreasonable activity.[61] However, even if overall, purchasing commercial sex is desirable from a social perspective (under the assumptions that it benefits clients and workers and that the number of victims is very low), winners should compensate losers.

Whatever the assumption about the number of victims among all sex workers, liability towards victims is justified. If the proportion is high, the risk creation is negligent.[62] If it is low, the fairness argument provides a strong basis for compensation, since the alternative is to impose the significant costs of an activity which is overall beneficial to many, on the few who bear its cost.

Arguably, a fairness argument fails to justify imposing liability on clients, since liability would merely shift losses from one individual (the victim) to another (a client), rather than being spread on all those benefiting from the activity (clients, and arguably – but unconvincingly – workers). Such a result is still justified, since we deal with a category in which winners and losers do not overlap. In this, second, category of fairness, loss spreading considerations (which partially overlap with fairness considerations in the first category) play a much smaller role. When the activity benefits ex-ante the defendant and risks ex-ante the claimant the loss should be shifted to the former, even if he does not enjoy any advantage in comparison to the latter in terms of spreading the loss. As was explained above, this is the rationale behind imposing strict liability for unauthorised interference with property rights. Less importantly, shifting the loss from victim to client is justified since the client is better situated to prevent the loss from happening, by avoiding at all purchasing commercial sex. This seems to fall back on a notion of fault, but should not necessarily be equated with fault.[63]

On a deeper level, however, the idea that all clients should share the costs of compensating victims has some normative appeal. Clients as a group submit victims to the risk of non consensual sex. From clients' perspective, the materialisation of the risk of violating the victim's right is random. In a more[64] ideal world, all clients would share the costs of compensating victims. From clients' perspective, the problem is that there are no loss-spreading mechanisms such as purchase of insurance or methods of self-insuring. Theoretically, judges or legislatures can create collective liability of clients, which will be based either on joint and several or on proportional liability for

61. See nn 1–3 and accompanying text and Keren-Paz and Levenkron, above n 28.

62. Ibid, pt 5.A6. Recall that according to the estimation of the Metropolitian police, 70% of the prostitutes in England and Wales are trafficked: n 20 above and accompanying text. Even according to the more conservative estimation (4000 out of 88,000), still almost 5% of prostitutes are victims.

63. Cf G Calabresi and JT Hirschoff 'Toward a test for strict liability in tort' (1972) 81 Yale LJ 1055 (strict liability theory which is based on accident-prevention capacity).

64. In an ideal world, there would not be victims of trafficking, and prostitution.

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the creation of the risk.[65] Whether such a solution is desirable or feasible is a matter for a separate inquiry.[66] What should be clear from the discussion so far is that a solution which leaves victims to bear the cost is inferior to a solution which shifts the cost to clients, even if clients found liable cannot spread the cost.

(c) Equality

Elsewhere we defend the view that victims' vulnerability is a factor in assessing whether risking victims is unreasonable.[67] In this section, we maintain that one justification for strict liability could be that it results in progressive redistribution of wealth and entitlements in society. The approach that the tort rules' equality effects should be taken into account by rule makers had been defended recently by one of us at length[68] and would therefore be succinctly summarised here. In the absence of fault, strict liability can be justified based on considerations of distributive justice. Alongside fairness, egalitarianism can serve as a legitimate criterion to justify (at times) strict liability rules. Strict liability will be desirable if typically it will result in progressive redistribution of wealth (or other entitlements such as liberty or dignity) from the better-off to the disadvantaged. This view is based on the understanding that legal rules have inevitable distributive results. For those striving to decrease power gaps in society, the fact that the distributive result of a legal rule is progressive serves as an independent justification for adopting such a rule. The idea is that the victim's pre-existing vulnerability might increase the defendant's burden to take precaution, or otherwise the scope of liability is not foreign to the common law;[69] this logic could easily yield a conclusion that strict liability is warranted in order to protect the interest of the vulnerable.[70]

Turning to applying such framework to the forced-prostitution context, it is easy to see that imposing strict liability on clients would lead to desirable distributive results. First, the result is desirable along the gender axis. Clients are overwhelmingly men, while victims are overwhelmingly women. The result of strict liability is progressive transfer of wealth, possible enhancement of victims' liberty, autonomy and dignity in society, and, at the symbolic level, reinforcement of victims' (and more generally women's) self-worth and inviolability of rights. Protecting women's rights to bodily integrity and sexual autonomy under a regime of strict liability, not only is instrumental at the practical level in protecting these values, but has also intrinsic symbolic value by stressing the importance that society gives to these values and to women's well-being.

Similar analysis can be done according to the distributive axis of class, and often race and ethnicity. Those who are forced into prostitution are the most disenfranchised in society. They almost always come from a background of economic deprivation,

65. See, eg, CH Schroeder 'Corrective justice and liability for increasing risks' (1990) 37 UCLA L Rev 439; *Barker v Corus* [2006] UKHL 20, [2006] 2 AC 572.

66. If clients' liability for direct contact is established, difficult questions of apportioning liability among clients, and between clients and traffickers, arise. These questions are similar to those raised in the text. Our argument is not that clients should be liable in lieu of traffickers but rather that both should be liable.

67. Keren-Paz and Levenkron, above n 28.

68. T Keren-Paz *Torts, Egalitariansim and Distributive Justice* (Aldershot: Ashgate, 2007).

69. *Paris v Stepney Borough Council* [1951] 1 All ER 32 (HL); Keren-Paz, ibid, pp 127–28.

70. Cf Keren-Paz, ibid, pp 71–72, 175.

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often suffered from prior sexual, physical and emotional abuse, and are often immigrants.[71] Their otherness, and their common status as illegal immigrants from deprived backgrounds, render them even more vulnerable. On the other hand, research shows that clients who purchase commercial sex are heterogeneous and come from all ranks of society.[72] This suggests that imposing strict liability will bring about a progressive distributive result, since the receiving side is manifestly disadvantaged, while the giving side is heterogeneous.

(d) Instrumental considerations

Imposing strict liability on clients is also supported by several instrumental considerations. Strict liability internalises the costs of sex-purchasing activity and by this might bring about a more efficient (ie lower) level of consumption. We do not stress this point for two reasons. First, in the context of forced prostitution, when the rights involved are so fundamental, and when distributive considerations are so paramount, the concept of efficiency has less normative appeal. Secondly, the effects of imposing liability are not clear, for reasons partially discussed above.[73] However, both critiques should not be overstated. 'Inefficient level of sex consumption' simply means that the current level is too high since it ignores the rights' violation of victims and victims' ensuing suffering. While the deterrent effect of strict liability is far from clear, at worst, liability will not reduce sex consumption and, at best, it would somewhat reduce it. While it might be that general demand for commercial sex would be reduced rather than the demand for forced prostitution (if clients are unable to tell who is forced), this for itself is desirable, under our assumption that (almost) all sex-workers are exploited.

In this sense, adopting a strict liability regime has several advantages and one possible disadvantage over a fault-based regime. One advantage is that it is likely to bring higher deterrence since more clients are likely to be sued, and found liable under such a regime, than under a fault-based regime. Needless to say, the result that more victims would be compensated is desirable as well. Another advantage is that the considerable costs involved in proving or disproving fault are saved. This is desirable both from society's perspective and in terms of increased access to justice to vulnerable claimants. Under a strict liability rule, all that the claimant has to prove is the fact that she was forced into prostitution and had sex with the client.[74]

71. See S Saskia 'Women's burden: countergeographies of globalization and the feminization of survival' (2000) 53 Journal of International Affairs 503; SM Silbert and A Pines 'Early sexual exploitation as an influence in prostitution' (1983) 28 Social Work 285.

72. See, eg, A-M Martila *Consuming Sex – Finnish Male Clients and Russian and Baltic Prostitution* (2003), available at http://www.iiav.nl/epublications/2003/Gender_and_power/5thfeminist/abstract_111.pdf; MA Kennedy et al *Men Who Solicit Prostitutes: A Demographic Profile of Participation in the Vancouver Police Department's Prostitution Offender Program* (2004), available at http://www.jhslmbc.ca/pdf; C Ward et al 'Who pays for sex? Analysis of the increasing prevalence of female commercial sex contacts among men in Britain' (2005) 81 Sex Transmitted Infections 467.

73. See the Introduction and pt 1 above and Keren-Paz and Levenkron, above n 28. In addition, deterrence depends on clients' knowledge of the legal rule and their belief about the likelihood of enforcement.

74. The second requirement is not easy to meet, but is not insurmountable. Issues of apportioning the client's liability to the cumulative harm from being enslaved are another hurdle victims would have to face.

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The possible disadvantage in adopting a strict liability regime is diluting at the symbolic level clients' moral responsibility for violating the victim's harm, and possibly having lesser deterrent effect. Arguably, if indeed purchasing sex while taking the risk of victimising forced prostitutes is faulty, strict liability waters down the symbolic aspects of liability, and, therefore, a fault basis of liability is to be preferred. We are unconvinced by this argument for the following reasons. First, being sued for purchasing commercial sex in general, and from a forced prostitute in particular, is likely to bring about significant negative reputation effects to clients, so both deterrence and the symbolic effect of being found liable are likely to remain significant. Secondly, the relationships between the symbolic effects of strict liability and negligence regimes are more complicated than appear from the above argument.[75] Strict liability regimes will still stigmatise defendants found liable due to the pooling effect: under well-functioning strict liability, all defendants who would have been found liable under the negligence regime would still be liable, and, in addition, another group of defendants would be found liable. If members of the community are unable to know whether defendants found liable were negligent or not, they would be likely to stigmatise all defendants found liable, but the stigmatising effect would be lower. Whether this is a good result or not could be debated,[76] and the answer might depend on the context. In our context, the benefits from imposing liability on more clients and providing remedies to more victims, clearly outweigh any possible dilution of moral responsibility of clients. Of course, if one believes that (1) most clients cannot tell who is forced, (2) cannot be faulted for purchasing sex despite this inability to know, and (3) nevertheless victims deserve compensation for the violation of their rights, than one should support only a strict liability regime, so the arguable dilution of moral responsibility of clients becomes a non-issue. On the other hand, for those who believe – like us[77] – that most clients are likely to be found liable under a fault regime, the advantage of a strict liability regime is that it saves the litigation costs of proving fault, that in most cases would not change the result.

Finally, it might be that civil strict liability of clients would better balance the interests of victims and clients. On this view, the proposed reforms intending to impose criminal responsibility for purchase of sex from prostitutes who are pimped are too harsh towards ignorant clients. Civil liability serves as a softer form of penalty – both in financial and expressive terms – while at the same time serving corrective and distributive justice by compensating victims. It is also possible that in terms of the law's potential to change its addressees' attitudes, the softer touch of civil liability is more effective than the harsher criminal responsibility.[78] Needless to say, that civil liability by clients is compatible with – and in fact might complement well – a reform which criminalises the purchase of commercial sex, either generally (from all prostitutes) or from forced prostitutes with or without knowledge or suspicion that the prostitute is forced. It follows that those who support the recent Home Office proposal to criminalise purchase of sex from (broadly defined) forced prostitutes should easily support civil liability of clients. Indeed, following a conviction, civil suit by the victim is likely to face higher chances of success. But even those who oppose criminalisation

75. See T Keren-Paz 'Liability regimes, reputation loss and defensive medicine' (work in progress).
76. Ibid.
77. Keren-Paz and Levenkron, above n 28.
78. See DM Kahan 'Gentle nudges vs. hard shoves: solving the sticky norms problem' (2000) 67 U Chi L Rev 607.

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of ignorant clients on the ground that criminalisation is too harsh to clients (or on the ground that the current suggested definition of forced prostitution is too broad) could still support strict liability in torts.

3. STRICT LIABILITY FOR BATTERY AND APPARENT CONSENT

In the context of battery, the claimant's consent to the touching needs to be free in order to negate liability.[79] Being forced into prostitution ipso facto negates the existence of free consent. Any woman who is subjected into forced prostitution is unable to form free consent to a sexual encounter with a client, since she does not have the alternative of saying no.[80] The difficulty with imposing liability in battery on clients is that the client might not know that the prostitute does not really consent to the sexual contact. If the mistake is unreasonable, no doubt that liability would be imposed. The two questions which have to be dealt with are whether a reasonable mistake about the lack of consent would exclude liability and whether the doctrine of apparent consent requires a conclusion that the victim indeed consented to the contact (according to the objective test) and, therefore, the client did not make a mistake about the woman's lack of consent.

Common law jurisdictions seem to give different answers to the question to what extent liability in battery is really strict, and even within a given jurisdiction the position is not always clear. England seems to be relatively hospitable to the idea that liability for battery should be strict. *Evans* is an authority, in the context of false imprisonment, that a reasonable mistake with respect to the legal authority to confine a prisoner is no defence to liability.[81] In *Hepburn*, in the context of assault, Sedley LJ stated more generally that 'an honest belief in a non-existent state of affairs does not excuse a trespass to the person'.[82] The position that a reasonable mistake about the victim's consent should not bar liability in battery is well accepted by English scholars.[83] Under that position, seemingly a victim who did not consent could sue successfully in battery (subject to the issue of apparent consent which will be discussed below), even if the client's mistake about the victim's lack of consent is deemed reasonable. However, recently in *Ashley*[84] the Court of Appeal decided that a reasonable mistake about the state of affairs does not deprive the defendant from the privilege of self-defence, and this approach is arguably incompatible with the approach in *Hepburn*. In the House of Lords, different dicta were made. Lord Scott of Foscote has voiced a strong preference towards strict liability (but formally left the possibility for adopting such a solution as open), unless the claimant is responsible for

79. See *Latter v Braddell* (1881) 44 LT 369.
80. For a more elaborate discussion, including of the question whether the client's mistake might ever be considered reasonable, see Keren-Paz and Levenkron, above n 28, pts 2–5B.
81. *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19.
82. *Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841 at [24].
83. Clerk and Lindsell, above n 57, at 15-08; Stevens above n 38, p 101; NJ McBride and R Bagshaw *Tort Law* (London: Longman, 2nd edn, 2005) p 248. But see WVH Rogers *Winfield and Jolowicz on Tort* (London: Sweet & Maxwell, 7th edn, 2006) at 25-3 (reasonable mistake, albeit in the context of apparent consent is effective).
84. *Ashley v CC Sussex Police* [2006] EWCA Civ 1085 (CA).

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the mistake. Interestingly, Lord Scott specifically mentioned mistake about consent to sexual contact (and not only mistake about the existence of self-defence, the issue litigated in *Ashley*):[85]

> 'I would start with the principle that every person is *prima facie* entitled not to be the object of physical harm intentionally inflicted by another . . . Why, for civil law purposes, should not a person who proposes to make physical advances of a sexual nature to another be expected first to make sure that the advances will be welcome?'

Lords Rodger of Earlsferry and Neuberger reserved their opinion on the issue without clearly indicating whether they support or reject strict liability.[86] Lord Carswell did not regard strict liability as 'possibly containing the correct principle'.[87] Lord Bingham of Cornhill was somewhat opaque but it seems that he thought that strict liability was not the rule and that the House should not change the existing rule.[88]

In Canada, the Supreme Court opined in dicta in *Scalera* that the defendant's reasonable mistake with respect to the claimant's consent for sex would exclude liability for battery.[89] Such approach was criticised by Elizabeth Adjin-Tettey, for reasons which partially parallel our approach.[90] Finally, US jurisdictions are split with respect to the question whether liability in battery should hinge on showing intent to injure or offend by the contact (such requirement will preclude strict liability), and such ambiguity is reflected in the Restatement (Second) of Torts.[91]

In any event, all common law jurisdictions seem nonetheless to accept the principle of apparent consent, according to which, behaviour which appears objectively to show that the claimant consented to the touching, would suffice as consent. Similar to contract law,[92] when a gap exists between a person's subjective lack of consent and the

85. [2008] UKHL 25, [2008] AC 962 at [20].
86. Ibid, at [55], [89]–[90].
87. Ibid, at [76].
88. Ibid, at [3].
89. *Non-Marine Underwriters, Lloyd's of London v Scalera* [2000] 1 SCR 551 (Can) paras [24] and [29].
90. Adjin-Tettey, above n 42. Adjin-Tettey's critique parallels ours with respect to the importance of the protected interest of sexual autonomy, and the existence of distributive considerations about women's status in society. Her paradigmatic case of non-commercial sex is different, however, from ours, and several possible conclusions might follow. First, it is less clear that in the context of non-commercial sex, it is just to shoulder the costs of the mistake on men. While we have no objection to such a rule, which could be supported by some of the arguments we present, we think there are stronger justifications for imposing strict (or fault-based) liability on clients. One obvious difference is that the social value of non-commercial sex is much higher to men and consenting women, than the social value of commercial sex. See Keren-Paz and Levenkron, above n 28. Another important difference is that the power gap between men and women in the non-commercial sex context is less significant than in our context. On the other hand, our context raises the difficulty of apparent consent to trade sex for money, which is not necessarily raised in the general context. Next, our suggestion elsewhere to ground strict liability in the tort of conversion is not open in the general context. See Keren-Paz, above n 41. Finally, Adjin-Tettey does not consider the possibility of imposing liability in negligence, rather than in battery, and, of course, the factors for deciding whether fault is involved in both contexts are different. See Keren-Paz and Levenkron, above n 28.
91. See KW Simons 'A restatement (third) of intentional torts?' (2006) 48 Ariz L Rev 1061 at 1066–1070.
92. See, e.g, *Paal Wilson & Co v Partnereederei Hannah Blumenthal* [1983] AC 854 (HL).

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objective appearance of consent, it is that person making the representation of consent who bears the consequences of that gap.[93] Thus, in the famous case of *O'Brien v Cunard*,[94] the claimant – an Irish immigrant teenager on a ship sailing to the US – who stood in the line for vaccination and extended her arm, was taken to consent to the vaccination according to the objective standard, so her battery claim against the ship's physician was precluded. Therefore, in order to impose liability on a client who purchased sex from a prostitute in circumstances where he could not have known she was a victim, there is a need to show why there is no apparent consent by victims, or, alternatively, why liability should be imposed despite the victim's apparent consent. The question which needs to be answered is whether third party duress which the defendant should not have a reason to know of ('third party duress') vitiates the claimant's consent.

In the context of battery, there is scant authority on this question. McBride and Bagshaw suggest there would be liability in such a case, but do not support this view with an authority.[95] The discussion of this point in both Clerk and Lindsell and in Winfield and Jolowicz is vague. Clerk and Lindsell maintain that 'consent affords no defence if the will of the consenting party was overpowered by force of the fear of violence . . . it is suggested that a claimant cannot give a real consent unless he has in fact the freedom to choose whether or not he should do so';[96] while Winfield and Jolowicz maintain that 'the consent . . . must be freely given'.[97] Neither text mentions whether claimants' lack of consent should be known to the defendant as a condition for liability. This goes to the heart of the role battery has to play in preserving human rights. According to the view that liability should be truly strict, the focus of the inquiry should be whether there was free consent to the contact, rather than was the defendant justified in believing that the claimant consented (despite that, in fact, she did not).

Third party duress has different effects in contracts and restitution law.[98] In contract law, the test for consent is objective, and, accordingly, if the pressure is not extreme and the third party had no notice of it, the contract cannot be rescinded. However, when the pressure is extreme the contract is void.[99] When softer pressures are involved, third party duress or undue influence can allow the claimant to rescind the contract if the other party has constructive notice of it. In mistaken payment cases, the test for consent is subjective so third party duress (even if not extreme) can support a claim for restitution.[100]

This framework suggests that clients should be liable for battery towards victims based on at least two rationales: the pressure operating on the victim is extreme so the appearance of consent is ineffective, or that the client should be deemed to have notice of the duress, so he cannot rely on the appearance of consent. In addition, we will explore the possibility to set aside the victim's consent based on (the Canadian version of) the unconscionability doctrine. We will begin the discussion with yet another rationale that in battery the *subjective* test for consent should be applied.

93. Cf Stevens, above n 38, p 248.
94. 28 NE 266 (Mass, 1891).
95. McBride and Bagshaw, above n 83, pp 247–248.
96. Clerk and Lindsell, above n 57, p 942, at 15-102.
97. Rogers, above n 83, p 1059, at 25-3.
98. D Friedmann 'The objective principle and mistake and involuntariness in contract and restitution' (2003) 119 LQR 74 at 91.
99. Ibid, at 81. See section (b) below.
100. Ibid, at 91.

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(a) Reliance in torts, restitution and contracts

The application of the subjective test to restitution claims, and the objective, to contracts, is arguably based on the reliance interest of the other party to the contract, which is absent in mistaken payments. This might suggest that in battery claims, the objective test should be applied, since the defendant relies on the apparent consent of the claimant. On the other hand, two considerations support the adoption of a subjective test to battery claims. The first applies across claims for battery. The claimant's interest in bodily integrity is more significant than the claimant's interest in not being bound by a contract. Battery protects an interest that goes to the core of basic human rights of bodily integrity, personal autonomy and the interest in dignity. There is much to be said in support of a strict protection of this interest.[101] This might be even more so with respect to sexual autonomy. Violating sexual autonomy is one of the most serious violations of dignity. The second consideration applies to commercial sex (and has varying weight in other contexts of battery claims). The social value that should be accorded to the person relying on the appearance of consent changes with the context. In the contractual context, the need to ensure commercial stability weighs heavily to support the objective test. Purchasing commercial sex, on the other hand, is a much lower value activity[102] and, accordingly, the client's reliance should receive less protection. This suggests that battery is more akin to mistaken payments than to contracts, in the sense that the legitimate reliance interest by defendants (at least in the commercial sex context) is much lower.

(b) Void transactions under extreme duress

The pressures which typically operate on victims of trafficking are so extreme that they deprive victims of any choice.[103] When the pressure operating on the claimant was very intense, no legal consequences follow from the victim's apparent consent.[104] In *Lynch*, the House of Lords dealt obiter with contractual duress.[105] In general, the duress effect is to render the contract merely voidable.[106] However, obiter in consecutive cases clarifies that extreme cases of duress can render the transaction void.[107] Indeed, in cases in which extreme pressure – such as threats to life or to physical integrity – was made, the contract was void[108] so that in one case the taking of property under the void contract amounted to trespass to goods.[109] While these cases did not

101. Cf Adjin-Tettey, above n 42.
102. Keren-Paz and Levenkron, above n 28, pt 5.A3.
103. See pt 1(a) above.
104. Cf Friedmann, above n 98, at 82.
105. *Lynch v DPP of Northern Island* [1975] AC 653 at 680 and 695.
106. Ibid, at 695.
107. See *Pao On v Lau Yiu Long* [1980] AC 614 at 634–635. Cf H Beale *Chitty on Contracts* vol 1 (London: Sweet & Maxwell, 30th edn, 2008) at 7-003; however, the scope for a void transaction allowed for by Chitty is normatively too narrow and doctrinally not supported by the authorities. See below nn 108–109 and accompanying text.
108. *Barton v Amstrong* [1976] AC 104 at 120 (PC). Some commentators stress that the point was not argued before the Privy Council and that the result is as compatible with the contract being voidable as with it being void. See, eg, B Haecker 'Proprietary restitution after impaired consent transfers: a generalised power model' (2009) 68 Camb LJ 324 at 327.
109. *Friedeberg-Seeley v Klass* (1957) 101 SJ 275. Cf *Duke de Cadaval v Collins* (1836) 111 ER 1006 at 1009; *Grainger v Hill* (1838) 132 ER 769.

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involve third party duress, the inevitable result of the contract being void is that the owner retains his title as against innocent third parties.[110] Applied to the battery context, at least third party duress which nullifies the consent (as opposed to less extreme pressures which merely deflect the will) should subject the innocent defendant to liability.

The objective test for consent presumes the presenter's agency, which justifies shouldering on her the results of the gap between her apparent and real consent. Without such agency, the conduct (such as signing a contract) is not hers, so the appearance of consent should have no effect. The approach that physical violence makes the contract void also against the innocent third party was adopted in the Scottish case of *Balloch*,[111] and the Maryland case of *Bond*.[112] Even according to the stricter *Bond* formula which restricts void contracts to (fear of) violence risking serious physical injury or false imprisonment, victims' consent should be considered as vitiated.

Both cases involved spousal abuse in the context of receiving a loan from the bank. The gender aspect of the violence should lead to a conclusion that battery claims against clients by victims – who suffer much more extreme pressure than the wives in *Balloch* and *Bond* – should be accepted. Moreover, both cases arose in the context of 'sexually transmitted debt', in which, as discussed below, English courts developed the constructive notice doctrine, which allows wives to set aside voidable contracts against lenders, for reasons which are relevant also in the client–victim context.

(c) Clients' constructive notice

In England, the objective test for consent is qualified in the 'sexually transmitted debt' line of cases – mainly *O'Brien* and *Etridge*[113] – by the doctrine of constructive notice. When the wife stands surety for her husband's debts, the bank is deemed to have notice of undue influence of the husband over the wife (real, or in exceptional circumstances, presumed) unless it takes reasonable steps to satisfy itself that the wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.[114] This doctrine can be justified on several grounds. *First*, the bank is best placed to minimise the risk of undue influence by insisting on procedure which will ensure that wives (and, more generally, non-commercial guarantors) will enter the transaction freely. *Secondly*, the power gap between the parties makes it just to allocate the risk of duress or undue influence by the third party to the bank, as a matter of distributive justice. *Thirdly*, the bank benefits from the duress or undue influences extracted by the debtor on the claimant, by being provided with a guarantor. This too supports allocation of the risk to the bank. These considerations

110. Note, however, that in *Barton*, above n 108, their Lordships concluded that they express no view as to what (if any) effect the result may have on the rights or obligations inter se of the other parties to the deeds.
111. *Trustee Savings Bank v Balloch* (1983) SLT 240.
112. *United States for the Use of the Trane Company v Bond* 586 A.2d 734 (Md, CA, 1990).
113. *Barclays Bank v O'Brien* [1993] 4 All ER 417; *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449.
114. *Etridge*, ibid, at [44] and [54]. This could be done by ensuring the wife received independent advice from a solicitor: ibid, at [56]. Compare *Bond*, above n 112; DW Post 'Spousal abuse and the doctrine of duress' (2004) 26 Hawaii L Rev 469.

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could explain the doctrine as based on distributive considerations and strict liability.[115] They can also explain the doctrine as based on an implicit assumption of fault on the part of the lender, who has an interest to look the other way when the debtor pressures his wife to mortgage her property.

These considerations apply to a different extent also in the commercial sex context. True, clients, unlike banks, are not good loss spreaders. More importantly, clients have more limited ability, than banks do, to insist on procedures which reduce the risk that the woman they purchase sex from is coerced. However, other important factors make the rationale behind the constructive notice doctrine applicable here as well. *First*, clients benefit from the fact that women are coerced into prostitution by making commercial sex more available, and cheaper. Forced prostitutes are also more amenable to distasteful sexual practices demanded by clients, and rules of supply and demand suggest that the bargaining power of clients with respect to sex workers improves due to the existence of forced prostitutes. As such, clients have an interest in blinding themselves with respect to the existence of trafficking and research shows that many clients do deceive themselves.

Secondly, a significant power gap exists between clients and workers, let alone between clients and victims. A related point is that the creation of demand for commercial sex is factually linked to the fact that the claimants became sexually enslaved. While it is left to future research whether this fact can serve as an independent ground for clients' liability, this fact is relevant for allocating the costs of clients' mistake about the victim's consent to clients.

Thirdly, clients are better placed than victims to prevent the purchase of sex from victims. In some circumstances, the client can deduce from the circumstances that the claimant is trafficked. In other circumstances, the client can prevent the risk by simply refraining from purchasing commercial sex at all; the victim has much less ability to prevent this encounter. Critics of this approach might argue that in the context of lenders, banks are able to enforce procedures that will minimise the risk that guarantors are unduly influenced, while clients cannot enforce procedures that will minimise the risk of duress. This is probably true, but can hardly serve as a reason to impose the residual risk on victims, rather than on clients.[116] As was discussed above, in this context it is fair that clients who purchase commercial sex will act at their peril. Once again, the distinction between the social value of the risk-creating activities is crucial. In the lending context, there is a way nearly to eliminate the risk of vitiated consent. Regardless, given the social value of giving credit, it might be desirable (though this is by no means certain given banks' ability to spread the cost) to shoulder the residual risk on the guarantor, rather than on the bank. Since the social value of purchasing sex is much lower, one should conclude, to paraphrase Lord Reid in *Bolton v Stone*,[117] that if commercial sex cannot be purchased safely, it should not be purchased at all.[118]

115. Note that these considerations might support imposing the risk on the bank, even if it made reasonable effort to ensure that the wife's consent is free.

116. We do not oppose a solution allowing a client to sue the trafficker for contribution. The risk of failure to do so successfully, however, should lie with the client, rather than with the victim.

117. [1951] 1 All ER 1078 (HL).

118. For the conclusion that workers' interests should not prevent clients' liability towards victims, see Keren-Paz and Levenkron, above n 28, pt 5.A5.

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(d) Unconscionability

The objective test in the contractual context is further qualified by the doctrine of unconscionability. An instructive example is the Canadian Supreme Court decision of *Norberg v Wynrib* in which the claimant was a patient addicted to pain killers and the defendant a physician who exploited the claimant's vulnerability to enter into a sex-for-drugs relationship. The majority of the Canadian Supreme Court[119] allowed the patient's claim for battery, setting aside her consent based on the unconscionability doctrine.[120] The claimant's vulnerability and its exploitation by the defendant were the key factors in setting aside the claimant's consent and the court took into account both the claimant's addiction and the power-gap between the parties.[121]

In *Norberg*, the unconscionable behaviour was the product of the defendant's behaviour himself, so this was not a case of third party duress. However, the power gap between the physician and the patient, coupled with the claimant's vulnerability as being addicted to pain killers, led to the conclusion that the patient could sue for battery. We take *Norberg* as a further support to our approach, defended elsewhere,[122] that the inherent exploitation of sex workers by clients is another reason to impose the risk on clients. According to such an approach, the unconscionability involved in purchasing commercial sex from prostitutes serves as a reason to put clients on constructive notice with respect to third party duress. Accordingly, such duress, which operates on victims, allows them to set aside the appearance of consent, even if clients did not know that the specific claimant was operating under duress. Note that clients' fault in exploiting the vulnerability of prostitutes is different from the fault involved in the willingness to purchase sex despite the risk of submitting victims to non-consensual contact. Any client who purchases commercial sex should be aware, at minimum, that prostitution is exploitative of prostitutes (even if they are not forced). This exploitation should serve as a reason, according to the logic of *Norberg*, to allow *victims* to set aside the appearance of consent. Whether such exploitation is sufficient by itself to allow any worker to set aside her consent, is an issue we do not explore here.

Justice Sopinka, in his concurring judgment,[123] opined that unconscionability in contracts operates to interfere in the contract despite the consent, rather than to set aside the consent. According to him, then, the battery claim should have failed. We submit that even if Sopinka is right about the effects of unconscionability, still the apparent consent of victims of trafficking should be set aside, since they are subject to much more extreme pressures, than those faced by Norberg, and this approach seems to be supported by Sopinka himself.[124] Sopinka also criticised the majority for using the contractarian doctrine of *unconscionability* in the context of battery given the different ramifications (from the defendant's perspective) of setting aside the claimant's consent in contracts and in battery. We think, by contrast, that the interest in

119. La Forest, Gonthier and Cory JJ.
120. We leave aside the question whether undue influence, rather than unconscionability, better supports the court's result.
121. *Norberg v Wynrib* (1992) 92 DLR (4th) 449 (Can) at paras 40–45.
122. Keren-Paz and Levenkron, above n 28, pt 5.A5.
123. Despite the difference in approaches, all the justices in *Norberg* agreed that the physician should be liable. Sopinka J grounded liability in the physician's breach of professional duty, and McLachlin and L'Heureux-Dubé JJ grounded liability in breach of fiduciary duty.
124. *Norberg*, above n 121, at paras 121, 122, 127.

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bodily integrity deserves more protection than the interest in not being bound by unfavourable contract. Be it as it may, in the context of *duress* Sopinka's critique is irrelevant.

(e) Conclusion and caveat

The upshot of the analysis is that the victim should not be considered as consenting based on the apparent consent doctrine. Apparent consent is based on the logic of estoppel, which in turn is based on two complementing foundations. The first is that the claimant is at fault for creating a gap between her subjective preference and the objective appearance of her behaviour. At minimum, it is based on the assumption that it is fair to allocate the risk of a gap between apparent and real consent to the presenter, based on her responsibility for creating the gap.[125] The second foundation of apparent consent is that the defendant was justified to rely on the objective appearance of consent. The combination of these two factors makes it fair that the presenter, rather than the defendant, would bear the costs of the accident caused by the gap between real and apparent consent. In the context of trafficking, neither condition for imposing the risk on the presenter exists. First, the victim cannot be faulted, or held responsible for creating the appearance of consent, since she would put herself at great risk if she would convey the fact that she is forced (extreme duress logic). Secondly, given the realities of trafficking, the client's willingness (how convenient!) to take at face value the claimant's consent as real, could not be deemed as reasonable (constructive notice logic).

Arguably, the most faulty actor which is responsible for the gap between the victim's real lack of consent and appearance of consent is the trafficker. It might be just, therefore, that the client would have a right against the trafficker to be indemnified for the former's liability towards the victim. As a matter of just allocation of the risk between the victim and the client, however, the risk should lie with the client.

One caveat is in order. In extreme cases, the victim's behaviour might be considered as consent, or to amount to an estoppel. If, for example, the client tells the victim, 'please let me know if you are forced into prostitution, in that case I would not have sex with you and pay your fee nonetheless', and the victim tells him to go ahead, in such a case the victim (who is not likely to sue under this hypothesis anyway) should be estopped from suing the client based on either battery or conversion. This is so since (and to the extent that) the client has created a possibility for the victim to refuse contact with him, without suffering any negative consequences.[126] Under such conditions, the victim's consent is probably genuine (subjectively) and should be considered as such from an objective perspective, in order to protect the client's reliance, which under these circumstances could be considered as reasonable. But these cases are likely to be rare. Most clients do not bother to think whether the prostitute they

125. Similar rationale supports the allocation of the loss to the original owner in cases of identity mistakes. See Lords Nicholls of Birkenhead and Millet's dissenting views in *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919.

126. In this respect, this approach is not incompatible with the Home Office Minister's approach that a man would be committing an offence even if he asked a prostitute whether she had been trafficked and was told that she had not been. See Travis and Sparrow, above n 1. When the client does not give the victim an option to refuse a sexual contact with him without negative consequences for her (by not meeting her quota) strict liability is still fair, at least in the context of civil liability.

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purchase sex from indeed freely consents. In these don't-ask-don't-tell situations, the client should not be heard that by providing sex in exchange for money, the victim is estopped from claiming that her consent was not genuine.

CONCLUSION

Between the easy case for imposing liability on clients – where the client was aware (or at least should have been aware) of the victim's lack of consent[127] – and the difficult case – of economic hardship and drug dependency as arguably consent-vitiating factors[128] – lie cases in which the victim was forced by 'hard core' coercion methods of violence, false imprisonment, intimidation and isolation, and the client did not have a specific indication that the prostitute was forced. The gist of the argument made in this paper is that in such cases liability should be imposed.

In July 2006, the Israeli police raided a brothel in which four 'Moldavian call girls' (a euphemism for victims of trafficking) happened at the time to entertain the four venerable guests of a stud party: a megastar footballer, one of the most powerful men in the Israeli written media (and a relative of the bride), a high ranked sport bureaucrat, and his son – the groom.[129] The women were swiftly deported in the next couple of days in a manner inconsistent with standard procedures.[130] As this case demonstrates, not only (leaving the fault argument aside)[131] fairness and equality align to support the imposition of liability, but problems of identifying clients and access to justice could be overcome (of course, not deporting the victims would have helped).[132]

It is both normatively defensible and doctrinally feasible to hold clients liable in torts towards victims of forced prostitution. Fairness and equality demand that clients would compensate victims even if one refuses to acknowledge that purchasing sex from a prostitute who might be a victim is a faulty behaviour. Imposing strict liability will ensure consistency of [Correction added after online publication 27 July 2009: ensure consistency with was corrected to ensure consistency of.] the English law of trespass and is likely to reduce demand for (forced or otherwise) prostitution. Such strict liability could be grounded in battery,[133] despite the appearance of apparent

127. Cf CrA 11847/05 *State v Ploni* (23 July 2007) (Isr).
128. Cf CrC (Be'er Sheva) 8287/06 *State v Bokovza* (District Court, 7 March 2007) (Isr).
129. See 'Sport and media celebrities caught in a brothel' (12 June 2006), available at http://news.walla.co.il/?w=/1/938650.
130. These procedures require informing the woman of her rights to shelter, a visa and legal aid. Interested victims move into a shelter. If the victim is not interested, one of the organisations which help victims of trafficking should be contacted in order to talk with the victim.
131. But fault should not be left aside: the women who provided sex services to these four powerful men were victims of trafficking. These victims are smuggled to Israel across the Egyptian border, raped, subjugated. They lose their liberty and are controlled by others. The groom and company did not purchase these women, smuggle them, and perhaps did not rape or abuse them; however, all these violations were done for clients' sake and in order to benefit them; and, in any event, they did subject these women to non-consensual sexual contact. Taking the risk of submitting victims to non-consensual sex is a faulty behaviour which should lead to liability in battery, and alternatively in negligence. See Keren-Paz and Levenkron, above n 28.
132. We do not deal here with the question whether the clients might be liable in torts for the violation of the victims' rights by the immigration police.
133. For the argument that strict liability could be grounded in conversion, see Keren-Paz, above n 41.

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consent by the victim to sell sexual services to the client. One way or another – based on either notions of fault or distributive justice – the client must pay. If the percentage of victims among prostitutes is sufficiently high, the risk imposed on victims by clients purchasing commercial sex is faulty. This conclusion is bolstered if one adheres to the view that prostitution itself is exploitative. But even if one adheres to the rosy description of the sex industry pictured by some – in which the vast majority of prostitutes are happy and free – still winners should compensate losers. These losers are the tiny minority of victims whose suffering is the inevitable cost needed to be incurred in order for the sex industry – which is socially desirable, empowering to prostitutes and unexploitive – to continue to thrive.

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