Modern Prostitution Reform and the Return of Volitional Consent

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Modern Prostitution Legal Reform & the Return of Volitional Consent

By Amanda Peters

I. Introduction

Prostitution laws in America are undergoing a modern transformation after remaining virtually unchanged for a century.¹ Thirty-eight states have newly enacted prostitution-specific safe harbors, affirmative defenses, and expunction laws.² The Department of Justice, the American Bar Association, and human rights activists are encouraging the remaining states to amend their laws.³ This modern reform is occurring for one of the same reasons that criminal prostitution laws were first enacted: to address the concerns of forced prostitution.⁴


² See infra notes 71-72, 95-96, 111 and accompanying text.


⁴ David J. Langum, Crossing Over the Line 41-42 (1994) (the House Committee on Interstate and Foreign Commerce report of 1909 stated that the underlying intent of the Mann Act, which would outlaw interstate travel for purposes of engaging in prostitution, was to attack forced prostitution); Janie A. Chuang, Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy, 158 U. Pa. L. Rev. 1655, 1667-68 (2010) (“white slavery” concerns generated many international anti-prostitution laws in the early 20th Century). Whereas international efforts to eradicate human trafficking center on human rights law, the United States uses a law enforcement legal model. Jonathan Todres, Law, Otherness, and Human Trafficking, 49 Santa Clara L. Rev. 605, 650 (2009).
The reform accomplishes the federal government’s legal mandate to treat involuntary sex workers as victims rather than criminal defendants.\(^5\) States are now attempting to distinguish between voluntary and coerced prostitution. Voluntary actors\(^6\) will continue to be prosecuted under traditional prostitution criminal laws whereas involuntary actors may be protected from arrest, trial, and conviction. The new laws protect minors and adults who are forced, deceived, or coerced into the profession.\(^7\)

What is interesting about this prostitution reform, however, is not that it aligns prostitution criminal laws with federal anti-trafficking laws, which is the goal of the reform, but that it has restored the concept of volitional consent to prostitution laws. In the past, law and policy makers distinguished between voluntarily and involuntary prostitution.\(^8\) Over time, the distinction has largely been lost. Now the crime is treated like a strict-liability, contractual offense: once a seller enters into an agreement to provide sexual services for a fee, the criminal offense is complete.\(^9\) Law enforcement officials, attorneys, and judges focus solely on the rhetoric of the agreement made between the parties to determine contractual consent. The

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\(^6\) The author, where possible, has tried to use gender-neutral descriptors because women, girls, men, and boys engage in the commercial sex industry. \textit{See generally}, Samuel Vincent Jones, \textit{The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking}, 2010 \textit{Utah L. Rev.} 1143 (2010) (boys and men are frequently ignored as human trafficking victims and as participants in the commercial sex market).

\(^7\) “With respect to juveniles, the federal government’s position is that ‘children can never consent to prostitution. It is always exploitation.”’ Moira Heiges, \textit{From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad}, 94 MINN. L. REV. 428, 440 (2009) (quoting Exploiting Americans on American Soil: \textit{Domestic Trafficking Exposed: Hearing on H.R. 972 Before the Comm. on Security and Cooperation in Europe}, 109th Cong. 6 (2005) (statement of Chris Swecker, Assistant Director, Criminal Investigation Division, FBI)).

\(^8\) \textit{See infra}, Section V.

\(^9\) Even treatises and scholars liken prostitution to a contractual or commercial offense. \textit{E.g.}, 2 \textit{WHARTON, CRIMINAL LAW} § 272 (14th ed. 1979) (“It is the commercial aspect of prostitution, entailing the concomitant evils of professional vice, which attracts the attention of the criminal law.”); \textit{HILARY EVANS, HARLOTS, WHORES, AND HOOKERS: A HISTORY OF PROSTITUTION} 16-17 (1979) (describing prostitution as a sales transaction: “a preliminary negotiation of terms, followed by the fulfillment of the contract”); Meredith M. Render, \textit{The Law of the Body}, 62 EMORY L. J. 549, 597 (2013) (prostitution transforms a human body, which itself is legally incapable of being considered a commodity, into a tradable entity); Marjorie E. Murphy, \textit{A Question of Procurement, Not Prostitution}, 87 COLUM. L. REV. 1075, 1078 (1987) (book review) (describing anti-prostitution laws as attempts to interrupt a prostitute’s business, which involves contact with customers, the formation of contracts, and the delivery of services).
reform restores traditional *mens rea* and issues of autonomy, culpability, and coercion to prostitution laws, notions that have long existed in criminal law. The reform compels the fact finder to assess the volitional consent of the prostitute, not just the contractual consent.

This Article does not assess the wisdom of anti-prostitution criminal laws or determine whether prostitution can legitimately be chosen as a profession; these topics have already been explored in prostitution scholarship. Instead, the Article examines modern reform’s emphasis on volitional consent over contractual consent. This Article is the first to recognize the consent distinction and the legal and policy ramifications of substituting traditional *mens rea* with contractual offer and acceptance.

The next four sections of the Article explore the need for and impact of the reform. Section two of this Article briefly examines the common-law origins of prostitution criminal law and America’s first anti-prostitution legislation. Section three explores pre-reform prostitution laws, the substitution of contractual consent for volitional consent, and the increasing strict-liability nature of the offense. Section four highlights the initial resistance to reform and the newly-enacted, prostitution-specific safe harbors, affirmative defenses, and expunction laws. It also predicts the reform’s broad impact on the criminal justice system. Section five discusses the history of prostitution laws in relation to the voluntary-involuntary consent distinction. French, English, and Ancient Roman prostitution laws – even early American anti-prostitution legislation – demonstrate that the modern reform is more legally faithful to prostitution jurisprudence than the nation’s pre-reform laws were. In the end, the Article asserts that the consent distinction must be made, not just in light of forced prostitution concerns, but because volitional consent has been and should continue to be an element of the criminal offense of prostitution.
II. The Creation of Prostitution Laws in America

To understand what the new laws accomplish, it is important to briefly examine the development and state of the laws pre-reform. Prostitution is a fairly new criminal offense. It was not itself a crime under English common law, nor was it generally a crime in colonial America.\(^{10}\) Indeed, the word “prostitution” had no definition in common law before 1900.\(^{11}\) Early American court opinions disagreed as to whether “prostitute” described a promiscuous woman, a woman who had sex for hire, or both.\(^{12}\) These early court decisions reflect the judiciary’s attempt to identify prostitutes before attempting to criminalize their actions.

When public concerns arose over morality, “white slavery,” and venereal disease in the early 1900s,\(^{13}\) social hygiene organizations and investigative vice coalitions formed in cities nationwide to examine the prevalence of prostitution.\(^{14}\) What was once tolerated in designated

\(^{10}\) LANGUM, supra note 4, at 122.

\(^{11}\) Id.; State v. Cavalluzzi, 92 A. 937, 938 (Me. 1915) (“it is probable that the word ‘prostitution’ has no legal meaning at common law”).

\(^{12}\) E.g., United States v. Bitty, 208 U.S. 393, 401 (1908) (prostitution refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men); Commonwealth v. Cook, 53 Mass. 93, 97-98 (1846) (a man guilty of enticing a woman into prostitution must cause her to work in a house of ill repute or have sex without hire with a number of men); State v. Stoyell, 54 Me. 24, 27 (1866) (“A prostitute is a female given to indiscriminate lewdness for gain. In its most general sense, prostitution is the setting one's self to sale…. In its more restricted sense, it is the practice of a female offering her body to an indiscriminate intercourse with men; the common lewdness of a female.”); People v. Berger, 169 N.Y.S. 319, 321 (N.Y. Gen. Sess. Ct. 1918) (“A prostitute is a female given to indiscriminate lewdness; a strumpet” or “a woman submitting to indiscriminate sexual intercourse, which she solicits, whether she does or does not receive compensation for the act.”); State v. Clark, 43 N.W. 273, 273 (Iowa 1889) (stating that even though some argue that “prostitution consists in sexual commerce for gain… we think if a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act, or any device, she is a prostitute”).

\(^{13}\) LANGUM, supra note 4, at 22-23 (describing medical breakthroughs in tracing the spread of venereal disease and the discovery that these diseases could spread from philandering husbands to their wives and children). The phrase “white slavery” refers to American concerns in the early 1900s that Caucasian women were being abducted and forced into prostitution. The fears were largely exaggerated and were based upon anti-immigration sentiments with many believing immigrant men were kidnapping American women for sexual servitude. E.g., Jennifer M. Chacon, Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking, 74 FORDHAM L. REV. 2977, 3013 n. 211 (2006) (tracing the origins of the phrase “white slavery” and its anti-immigration sentiments); Geneva O. Brown, Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes, 57 CATH. U. L. REV. 471, 479 (2008) (describing the “hysteria that eventually led to legislation controlling the movement of women across state lines and disallowing women to engage in non-marital sexual relationships.”).

\(^{14}\) LANGUM, supra note 4, at 15, 23-25 (“Over thirty-five local, state, and national [vice] commissions probed the causes, practice, and possible eradication of prostitution” forming 18 social hygiene organizations by 1912.).
red light districts across the country\(^\text{15}\) was now deemed a threat to middle-class morals, the public’s health, and the American family.\(^\text{16}\) The vice investigation findings ultimately led the federal government, through the Mann Act of 1910 and the Standard Vice Repression Law of 1919, along with every state in the nation, to criminalize prostitution before 1925.\(^\text{17}\) Prostitution laws changed very little between their enactment and modern reform.\(^\text{18}\)

### III. Prostitution Laws Pre-Reform: Contractual Consent & the Absence of Mens Rea

Prostitution statutes criminalize agreements to exchange sexual acts for a fee. Most states categorize prostitution as a crime of general intent,\(^\text{19}\) not one of specific intent.\(^\text{20}\) In the majority of states, it does not matter if a defendant intends to go through with the agreement, but rather

\(^{15}\) Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* 3 (1980) (during the Progressive Era, nearly every city in America with a population over 100,000 had a red-light district; large cities had several). Sometimes brothels were deemed public nuisances and prostitutes were charged with vagrancy, but most cities tolerated their presence as long as they were confined to a specific area of the city. Ann M. Lucas, *Race Class, Gender and Deviancy: The Criminalization of Prostitution*, 10 Berk. W. L. J. 47, 51 (1995).

\(^{16}\) Biny, 208 U.S. at 401 (in 1908, the United States Supreme Court stated that prostitution threatened the noble and stable American family); Lucas, *supra* note 15, at 53 (“Prostitution, which seemed to subvert values of family, community, domesticity, morality, sobriety, purity, and thrift, symbolized all of these threats to an older way of life.”).


\(^{18}\) There are two noteworthy mid-nineteenth century changes to prostitution laws. First, many statutes were amended to criminalize the actions of buyers of sex, rather than just sellers of sex. E.g., *Frieling v. State*, 67 S.W.3d 462, 469 (Tex. App. 2002) (detailing a 1977 legislative amendment to the Texas prostitution statute to “equally criminalize both parties” of the crime); *McNeil v. State*, 739 A.2d 80, 84-95 (Md. 1999) (thoroughly analyzing the laws in Maryland and elsewhere before concluding that Maryland’s prostitution statute applies equally to buyers and sellers of sex, to both men and women); Minouche Kandel, *Whores in Court: Judicial Processing of Prostitutes in the Boston Municipal Court in 1990*, 4 Yale J. L. & Feminism 329, 335-39 (1992) (Massachusetts’ prostitution statute was amended in 1983 to punish both buyers and sellers in prostitution cases, but through 1990, the law was almost never used in Boston against buyers). Second, many prostitution laws were amended to include gender-neutral pronouns to expand applicability to male prostitutes. Kate DeCoul, *U.S. Social Policy on Prostitution: Whose Welfare Is Served?*, 24 New Eng. J. On Crim. & Civ. Confinement 427, 435-37 (1998) (describing the fact that for years, males were ignored or overlooked as sellers of sex); Langum, *supra* note 4, at 244-50 (citing the Protection of Children Against Sexual Exploitation Act of 1977, the 1978 amendment to the Mann Act, the 1986 amendment to the Mann Act, and the Child Sexual Abuse and Pornography Act of 1986 as acts of legislation that implemented, for the first time, gender-neutral language).

\(^{19}\) E.g., *Glegola v. State*, 871 P.2d 950, 952 (Nev. 1994) (Nevada’s legislature intended its prostitution criminal laws require general intent, like most of the other prostitution laws nationwide).

\(^{20}\) E.g., *California v. Dell*, 283 Cal. Rptr. 361, 371 (Cal. Ct. App. 1991) (California’s prostitution statute requires “the specific intent to engage in either sexual intercourse or lewd acts in exchange for money or other consideration for the purpose of sexual arousal or gratification and [the defendant] takes some step in furtherance of that act”); *State v. Crisp*, 855 P.2d 795, 798 (Ariz. Ct. App. 1993) (prostitution ordinance “advises a reasonable person that if he or she urges, asks, entices, requests, commands or engages another person to perform sexual activity for payment, intending that the requested person comply and perform the activity, the requesting person has violated the ordinance”). *See also* Evans, *supra* note 9, at 181 (describing the earliest prostitution arrests as follows: “Once an offer was formally made, and the couple undressed, an offence had been legally committed.”).
whether the parties negotiated and reached an agreement.\textsuperscript{21} While defenses like entrapment and duress have been raised in solicitation of prostitution cases,\textsuperscript{22} there is less evidence of their use or success in standard prostitution cases.\textsuperscript{23} Courts have not been empathetic to prostitutes who have alleged necessity or a desire to retreat from the act of prostitution after an agreement was negotiated.\textsuperscript{24} Furthermore, most prostitutes would have difficulty proving imminent danger or an inability to escape coercive or violent circumstances, which are required to establish duress.

Criminal courts have long interpreted the consent element of prostitution as defining the agreement entered into by the parties, rather than the defendant’s consent to engage in the underlying acts of prostitution or willingness to participate in the profession itself. At trial, attorneys and fact finders listen carefully to the words exchanged between buyer and seller – sometimes recorded by undercover police officers – to determine whether the verbal exchange

\textsuperscript{21}E.g., People v. Kramer, 203 N.Y.S. 156, 159 (N.Y. App. Div. 1924) (“It is not merely inducing, enticing, or procuring a woman to consent to prostitution that constitutes the crime, but any attempt.”). \textit{But see Wooten v. Superior Court}, 113 Cal. Rptr. 2d 195, 203 (Cal. Ct. App. 2001) (“Without sexual contact, there can be no prostitution.”). Appellate courts have sometimes thinly stretched the concept of “agreement.” \textit{E.g., State v. Sampson}, 387 A.2d 213, 215-16 (Me. 1978) (promoter, who only profited from agreement, but did not negotiate agreement, was still a party to the offense, even where no act of prostitution was alleged in the charging document); \textit{Commonwealth v. Potts}, 460 A.2d 1127, 1135 (Pa. Super. Ct. 1983) (“‘sexual activity’ encompasses an agreement”).

\textsuperscript{22}E.g., Moreno v. State, 860 S.W.2d 612, 615-16 (Tex. App. 1993) (defense of entrapment raised unsuccessfully in solicitation of prostitution case); \textit{State v. George}, 602 A.2d 953, 955 (Vt. 1991) (defendant not entitled to entrapment defense where he was the first one to mention sex to undercover officer).

\textsuperscript{23}But see Glegola, 871 P.2d at 953 (defense of intoxication raised, but not successful); \textit{State v. Romano}, 155 P.3d 1102, 1109 (Haw. 2007) (defense of duress raised, but not credible); \textit{Ryan v. State}, 635 S.W.2d 159, 162 (Tex. App. 1982) (defendant not entitled to mistake of fact defense); \textit{State v. Williams}, 503 P.2d 1254, 1255 (Or. Ct. App. 1972) (defendant unsuccessfully raised entrapment defense); \textit{Washington v. United States}, 475 A.2d 1127, 1129-30 (D.C. 1984) (due process defense unsuccessful); \textit{Strong v. State}, 591 N.E.2d 1048, 1052 (Ind. Ct. App. 1992) (it was error for trial court to deny entrapment defense where police officer brought up sex first and defendant’s testimony indicated he merely got in the car to obtain drugs); \textit{Woodby v. INS}, 370 F.2d 989, 991 (6th Cir. 1965) \textit{judgment set aside on other grounds}, 385 U.S. 276 (1966) (in immigration case, though woman engaged in prostitution initially under duress, once child’s surgery had been paid for and performed, her continued acts of prostitution occurred without duress and thus, she violated the laws and was deemed deportable by the federal government); \textit{Commonwealth v. Sun Cha Chon}, 983 A.2d 784, 789 (Pa. Super. Ct. 2009) (defense of outrageous police conduct warranted overturning conviction for prostitution where vice officers paid informant to engage in sex acts on four separate occasions before arresting prostitutes). \textit{See also Symposium, Sex Work Explored: Rethinking the Laws Regulating Prostitution}, 8 GEO. J. GENDER & L. 995, 1006 (2007) (Carol Leigh, prostitution activist, stated that in New York, it is “almost impossible” to use an entrapment defense in standard prostitution cases).

\textsuperscript{24}E.g., Alexander v. DeAngelo, 329 F.3d 912, 915 (7th Cir. 2003) (“It is not a defense to prostitution for the prostitute to say, ‘My fee is $100 and I plan to use it to buy milk for my children.’”); \textit{Mattias v. State}, 731 S.W.2d 936, 938 (Tex. Crim. App. 1987) (the fact that defendant testified she never intended to go through with sex and set price unreasonably high to avoid it did not matter as intent to complete the act is irrelevant).
amounts to an offer of sexual services in exchange for a fee. 25 It is the formation of the agreement, not what happens afterwards, that creates a prima facie prostitution case in the majority of American jurisdictions.26 Courts rarely examine the effects threats, deception, and force play on contractual consent.27

In some ways, focusing on the agreement is understandable. There are numerous health, safety, and public policy reasons for law enforcement officers to affect an arrest after the agreement has been reached but before the sex act takes place.28 Courts have questioned the actions of police officers who waited until the completion of the sex act before making arrests.29

For example, an undercover agent for the Seattle Police Department visited a brothel and had sex


26 But see Dell, 283 Cal. Rptr. at 371 (California requires a step in furtherance of sex act after contract is negotiated).

27 It is also important to note that even where force is considered by judges, what constitutes force is widely debated. E.g., United States v. Castanada, 239 F.3d 978, 982 n.8 (9th Cir. 2001) (disputing allegations of foreign women who alleged they were tricked and then forced into prostitution because “there wasn’t a gun put to their head” despite credible evidence of economic coercion). Even within the confines of human rights and international human trafficking law, groups have debated whether protected prostitutes should encompass only those who were forced or also include those who were coerced into sex work. Chuang, supra note 4, at 1657; Beverly Balos, The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation, 27 HARV. WOMEN’S L.J. 137, 154-55 (2004) (recognizing the debate over the ability or inability to engage in prostitution voluntarily within the international legal community).

28 E.g., State v. Jing Hua Xiao, 231 P.3d 968, 975 (Haw. 2010) (police officers who make prostitution arrests before the offense takes place “‘enforce morals violations’”); State v. Emerson, 517 P.2d 245, 247 (Wash. Ct. App. 1973) (“The commission of crimes by police officers and their agents in the course of meeting the need for crime detection” creates “some concern.”); State v. Tookes, 699 P.2d 983, 987 (Haw. 1985) (actions of vice police officers in allowing paid informant to engage in sex acts with prostitutes to affect arrest did not “comport with the ethical standards which law enforcement officials should be guided”); Sun Cha Chon, 983 A.2d at 789 (”[T]he decision of the police vice squad” to send the citizen [informant] into Shiatsu Spa on four occasions for a smorgasbord of sexual activity violates principles of fundamental fairness. Neither prostitution activity inside Shiatsu Spa nor the police decision-making is to be condemned. We expect more from the police, and demand that they conduct their investigations and utilize their resources without resorting to such embarrassing investigative techniques. No adequate supervisory guidance was provided, no standards existed for this type of investigation, and some of the behavior by the participants was sophomoric.”); Kelley Frances Sieler, The Government Menage A Trois: Unraveling the Government Sex Partner in Undercover Prostitution Sings, 15 WASH. & LEE. J. CIVIL RTS. & SOC. JUST. 453, 464-65, 469 (2009) (identifying several problems with police officers having sex with prostitutes, including abuse of power, loss of public trust, unethical conduct, the loss of legitimacy and professionalism within the criminal justice system, and the commission of criminal acts in the process of investigating a crime).

29 E.g., Municipality of Anchorage v. Flanagan, 649 P.2d 957, 963 (Alaska Ct. App. 1982) (conduct of undercover officer in allowing woman to massage his penis before arresting her was “questionable”).
with prostitutes five times before the Department made any arrests. The reviewing appellate court expressed concern that the Department committed crimes in order to detect illegal activity. In a similar case, the Pennsylvania State Police paid an informant to have sex with prostitutes four times before arresting them. After calling the agency’s actions “embarrassing” and “sophomoric,” the appellate court reversed the sex worker’s conviction based upon the department’s outrageous conduct. In both cases, police officers crossed ethical and professional boundaries by not making arrests sooner. Arresting sellers and buyers of sex following the agreement is good policy. However, the timing of the arrest does not preclude the examination of volitional consent by the fact finder.

It is important to examine whether the defendant exercised volitional consent, in addition to contractual consent, in prostitution cases. Volitional consent is interconnected with mens rea. The presence or absence of the actor’s volitional consent to engage in any criminal act “is significant enough to act as a basis for apportioning blame and moral culpability.” Where there is no volitional consent, affirmative defenses should justify the defendant’s actions by providing exculpation or, at a minimum, mitigation of punishment.

Under international human rights anti-trafficking law, consent becomes irrelevant when the actor is exploited, coerced, or forced into the commission of criminal acts. In the American debate on prostitution, however, the issue of volitional consent has been

30 Emerson, 517 P.2d at 246.
31 Id. at 247.
32 Sun Cha Chon, 983 A.2d at 785-86.
33 Id. at 789.
34 Id.; Emerson, 517 P.2d at 247.
overshadowed by the questioned legitimacy of voluntary prostitution. Activists have often failed to move past voluntary-involuntary prostitution debates to recognize the element of volitional consent was omitted from criminal prostitution laws decades ago.

Not only is volitional consent substituted for contractual consent in prostitution statutes across the country, but sometimes *mens rea* is removed altogether. Several appellate courts have expressed little reservation about eliminating the element of culpability from prostitution cases. A trial court in Arizona determined that the charging document’s missing *mens rea* language was adequately substituted by the word “hires” in a solicitation of prostitution case. An Oregon appellate court viewed a prostitution charging instrument that excluded *mens rea* not fatally defective. The court supported the prosecution’s argument that “the word ‘knowingly’ … is surplusage ‘because the very word “agree” connotes a purposeful undertaking.’” In this way, the court failed to distinguish between volitional and contractual consent. A Connecticut court held that proof of intent or knowledge is irrelevant in proving prostitution’s prohibited conduct.

Moreover, a number of courts have asserted that even when the prostitution statute is missing

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38 See also, Chuang, *supra* note 4, at 1705-25 (identifying the negative implications of feminist debates on prostitution reform and anti-trafficking law and policy).

39 *State v. Huie*, 638 P.2d 480, 481 (Or. 1982) (en banc) (the prosecution argued that leaving the *mens rea* out of the prostitution charge was not fatal because the “agreement” element of prostitution “connotes a purposeful undertaking”); *State v. Butkus*, 424 A.2d 659, 661 (Conn. Super. Ct. 1980) (no specific intent need be pled where statute proscribes unlawful acts without specific intent); *State v. Parrish*, 465 N.E.2d 873, 874-75 (Ohio 1984) (despite the fact that the prostitution statute referenced no culpable mental state and judges were unwilling to impose one, the court asserted that prostitution was not a strict liability crime).

40 Crisp, 855 P.2d at 796.
41 *Huie*, 638 P.2d at 481.
42 *Id.*
43 *Butkus*, 424 A.2d at 661.
**mens rea** language, this does not make the crime a strict liability offense. These decisions suggest that **mens rea** is superfluous in prostitution cases; its presence or absence adds nothing of value.

One of the fundamental principles of criminal law is that individuals exercise free will in choosing their actions. Criminal charges follow actions that constitute a culpable awareness or a desire to commit a criminal act. On the other hand, when volitional choice is overborne by another’s actions or by force, fraud, or coercion, the actor is viewed as victim or is permitted to raise an affirmative defense.

Eliminating volitional consent from a criminal act creates a strict-liability crime; it removes the opportunity for an actor to assert a lack of free will. Choice is irrelevant. But choice should matter in prostitution laws. The reason is found in the law’s history: some of the first lawmakers to propose anti-prostitution laws in America distinguished between coerced and voluntary prostitution. Over the years, the nation has moved away from making voluntary-involuntary prostitution distinctions. However, prostitution was never meant to be a strict-liability crime. Yet, that is what it has become.

There are drawbacks to this phenomenon. Replacing volitional consent with contractual consent makes the underlying facts of each case irrelevant. Once an agreement is reached, regardless of the surrounding circumstances, the crime has been committed. This creates an impersonal criminal justice system that fails to carefully consider the facts of the individual’s

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45 **Jones**, supra note 35, at 500.


47 **Jones**, supra note 35, at 500.

48 See infra notes 152-55 and accompanying text.
case. Consent and the circumstances underlying the consent are closely linked.\(^{49}\) Criminal law must respect individual autonomy; it must ensure “that one is punished only for choices one has made, not for events one did not will or anticipate.”\(^{50}\) It is difficult to determine whether one chose to engage in the crime of prostitution when what is being examined is merely the offer and acceptance of the agreement. For all of the above reasons, pre-reform prostitution statutes needed to be redrafted to include the element of volitional consent.

**IV. Reformed Prostitution Laws: The Return of Volitional Consent**

Courts and lawmakers have long avoided the issue of volitional consent in prostitution statutes. Over the years, many groups have opposed all changes to state prostitution laws. District attorneys,\(^{51}\) law enforcement organizations,\(^{52}\) and even members of the judiciary\(^{53}\) opposed reform. Until recently, states were the largest opponents to prostitution legal reforms. States long believed they were entitled to regulate prostitution without interference from the federal government.\(^{54}\) They exercised this right by arresting in excess of 75,000 persons each year for prostitution offenses.\(^{55}\)

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\(^{49}\) Jones, *supra* note 35, at 507-08.


\(^{52}\) See Heiges, *supra* note 7, at 455-58 (detailing state law enforcement’s reluctance to permit federal involvement in the modification of low-level crimes).

\(^{53}\) Annitto, *supra* note 51, at 65 (judges want to retain the option of detaining juveniles where treatment alternatives in the community do not exist or are in short supply).

\(^{54}\) Heiges, *supra* note 7, at 455-58.

This resistance to change is slowly dying. With concerns that prostitution and human trafficking are connected, which is debatable, come admissions from those within the criminal justice system that perhaps it is time to reform the nation’s prostitution laws to address the issue of volitional consent. Modern reform returns volitional consent to prostitution laws for the first time since before the Mann Act was enacted in 1910. The reformed laws categorize defendants into voluntary and involuntary actors. A number of legal safe havens now protect forced or coerced actors, whereas voluntary actors continue to face criminal liability.

Following pressure from the U.S. Department of Justice and human rights activists, all states and the District of Columbia enacted human trafficking legislation that models the Trafficking Victims Protection Act (TVPA). These human trafficking laws offer protection from criminal liability to minors engaged in commercial sex work and adult prostitutes who meet the “force, fraud, or coercion” requirement. However, only some of this legislation specifically addresses forced prostitution.

Some scholars and prostitution activists accuse the anti-trafficking lobbies of attempting to create links to prostitution where none exist. E.g., Chacon, supra note 13, at 3032 (“very little research substantiates this link between prostitution and trafficking”); Sex Work Explored, supra note 24, at 1001 (Carol Leigh, sex worker activist, charges the anti-trafficking lobby with attempting “to negatively impact voluntary prostitution”); Weitzer, supra note 37, at 3 (asserting that anti-prostitution groups were working together to connect prostitution to human trafficking in an effort to combat all forms of prostitution). Others, particularly lawmakers, draw connections between prostitution, particularly teenage sexual exploitation, and human sex trafficking. E.g., In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary, 111th Cong. 16 (2010) (eliciting testimony from survivors of domestic sex trafficking, many of whom engaged in prostitution under force or threat of force).

The congressmen who supported the enactment of the Mann Act, one of the first prostitution-related pieces of legislation enacted in America, expressed concerns about forced prostitution. Langum, supra note 4, at 41-42. A report issued by the House Committee on Interstate and Foreign commerce reported that the proposed Act “does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.” Id. at 42.


Criminal laws failed to address fears of commercial sexual exploitation that arose during the last half century.\(^61\) When connections between prostitution and sex trafficking surfaced, it became imperative not only for states to enact human trafficking laws, but also for states to reform criminal prostitution laws. The majority of states have enacted some type of prostitution-specific reform. This section addresses these reform measures, which are designed to protect qualifying individuals before, during, and after trial.

**A. Pre-Trial Relief: Safe Harbor Laws**

Before the TVPA’s reauthorization in 2005, federal authorities were reluctant to decriminalize juvenile prostitution.\(^62\) Over the years, federal policymakers wrestled with the concept of consent when examining the sex acts of minors.\(^63\) Likewise, the majority of states

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\(^{61}\) Langum, *supra* note 4, at 239, 243 (concerns arose over forced and coerced sexual servitude during the 1960s and 1970s, when the federal government estimated that 600,000 of the two million prostitutes in America were teenagers and the FBI reported a 242 percent increase in the number of teenage girls and boys involved in prostitution).

\(^{62}\) Compare Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 N.Y.U. L.J. 913, 924-25 (2006) (detailing the government’s reservations, expressed at an international anti-trafficking meeting, about decriminalizing prostitution for minors) and U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL POLICY, DOJ POSITION ON H.R. 3887, 2 (2007), available at [http://www.justice.gov/olp/pdf/doi-position-on-hr3887.pdf](http://www.justice.gov/olp/pdf/doi-position-on-hr3887.pdf) (“Pimping, pandering, and other prostitution-related offenses are reprehensible crimes. But, along with other serious crimes, they have always been prosecuted at the state or local level unless some federal interest was present. Indeed, the nation's more than 3,000 local district attorneys and 17,000 local police departments effect [sic] 100,000 prostitution arrests annually. Nothing suggests that federal intervention is necessary or would be more effective.”) with Heather J. Clawson et al., U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *Human Trafficking Into and Within the United States: A Review of the Literature*, 3 (August 2009), available at [http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/index.shtml](http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/index.shtml) (“While most of the anti-trafficking efforts within the United States have historically focused on trafficking foreign nationals into the country, the 2005 reauthorization of the TVPA highlighted the need to address the trafficking of U.S. citizens and permanent residents, in particular minor victims of sex trafficking or the prostitution of minors, within U.S. borders.”) and Chacon, *supra* note 13, at 2992 (2005 State Department report “presented an impressive list of changes to the criminal law wrought by the TVPA”).

\(^{63}\) Tamar R. Birckhead, *The “Youngest Profession:” Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1065 n. 41 (2011) (a federal administrator in the Office of Juvenile Justice and Delinquency Prevention said that though child sexual exploitation is “rape,” it should not be legalized because teenagers need to be warned “that they are doing something that’s wrong.”); Kittling, *supra* note 62, at 913 (“America cannot make up its mind: Are juvenile girls who have sex victims or criminals? Do they need protection or prosecution? The laws surrounding this issue reflect the country’s internal strife, as the United States takes two very distinct positions with respect to juvenile prostitution.”); Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L. J. 96, 119-20 (2008) (one Florida official commented that “she might consider children as young as nine or ten years old as trafficking victims, but that young women who had reached sixteen years of age were prostitutes, not victims of trafficking”).
resisted early attempts to alter prostitution laws, even when those changes were proffered in light of human trafficking concerns.\textsuperscript{64} It is remarkable, then, that in the last few years, nearly half of all states have decriminalized the acts of minors engaged in prostitution.\textsuperscript{65}

Juveniles are increasingly being viewed as children incapable of legally consenting to commercial sex acts. Lawmakers are beginning to recognize the legal incongruence between statutory rape laws, which view minors as victims, and prostitution laws that view them as criminal defendants.\textsuperscript{66} Though it was not the intent of safe harbor laws to bring uniformity to the legal concepts of immaturity and contract principles, safe harbor laws have the effect of nullifying the contractual “agreement” of minors, who, under state law, may be legally incapable of contractual assent.\textsuperscript{67} Safe harbor laws bring together the interrelated legal concepts of infancy, maturity, sex, and the inability to contract – various legal protections available to minors – in ways that offer more protection than once existed.

Safe harbor statutes are a more humanitarian way to respond to child commercial sexual exploitation and human trafficking than traditional juvenile diversion. They direct government officials to view the child as a victim in want of services rather than a criminal defendant in need

\textsuperscript{64} E.g., Letter from Nat'l Ass'n of Attorneys Gen. to Sen. Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Mar. 7, 2008), available at \url{http://www.usdoj.gov/olp/pdf/naag.pdf} (38 state Attorneys General expressed reservations about the TVPA’s encroachment into state prostitution law enforcement); Karen Bravo, \textit{On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking}, 31 N. Ill. U. L. Rev. 467, 482 (2011) (“anti-trafficking policies have been slow to take hold at state and local levels at a time when soaring poverty rates are increasing the involvement of girls in commercial sexual exploitation”).

\textsuperscript{65} These changes follow an emphasis in the 1990s on increased punishment of juvenile criminal offenders and a downward decrease in crime worldwide. \textit{E.g.}, Jonathan Todres, \textit{Maturity}, 48 Hous. L. Rev. 1107, 1134 (2012) (listing several ways in which states sought to punish juveniles as adults beginning in the mid-1990s). \textit{See also}, \textit{Falling Crime: Where Have All the Burglars Gone?}, \textit{The Economist} (July 20, 2013), available at \url{http://www.economist.com/news/briefing/21582041-rich-world-seeing-less-and-less-crime-even-face-high-unemployment-and-economic} (global crime rates have dropped considerably despite high unemployment levels and economic problems worldwide, which have generally precipitated a rise in crime).

\textsuperscript{66} E.g., \textit{In re B.W.}, 313 S.W.3d 818, 822 (Tex. 2010) (“Given the longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex, it is difficult to see how a child's agreement could reach the ‘knowingly’ standard the statute requires. Because a thirteen-year-old child cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute.”). \textit{See also} Todres, \textit{supra} note 65, at 1110 (illustrating incoherence between state laws that reflect minors cannot consent to sex and the fact that in 2012, 40 states criminalized juvenile prostitution).

\textsuperscript{67} \textit{See} Todres, \textit{supra} note 65, at 1124-28 (discussing the protections that minimum-age contract laws afford to minors).
of punishment.\textsuperscript{68} Because American sex-trafficked minors are excluded from receiving federal protections and services offered through the TVPA,\textsuperscript{69} there is a legitimate need for states to protect and assist underage persons engaged in prostitution. Safe harbor laws bridge the gap between the lack of federal protections available and the resources that states have traditionally offered minors through child welfare services.

New York’s Safe Harbor for Exploited Children Act, which became effective in 2010, prevents minors from being charged with prostitution.\textsuperscript{70} Following the passage of this Act, seventeen states enacted laws to provide safe harbor to minors detained on suspicion of prostitution.\textsuperscript{71} Four other states – Arkansas, California, Oklahoma, and Texas – offer protections to a subset of juveniles or promise to enact safe harbor statutes in the near future.\textsuperscript{72}

This first type of reformed law may include any one or a combination of the following provisions. First, just as the name suggests, it may provide protection from prosecution for state

\textsuperscript{68} See Bergman, supra note 1, at 1387 (“By preventing prosecution of juveniles for prostitution offenses, Illinois has rejected the proposition that adjudication is the proper response to the problem of child exploitation.”).

\textsuperscript{69} Amanda Peters, \textit{Disparate Protections for American Human Trafficking Victims}, 61 \textit{CLEV. ST. L. REV.} \textbf{1}, 18 (2013) (federal protections are reserved for non-citizen trafficking victims only); \textit{FLA. STAT. ANN.} § 409.1678(1)(d) (West 2012) (Florida’s safe harbor law is available to minors who are excluded from protection under the TVPA).

\textsuperscript{70} \textit{N.Y. SOC. SERV. LAW} § 447-a (McKinney 2010).

\textsuperscript{71} \textit{CONN. GEN. STAT. ANN.} § 53a-82 (a) (West 2013) (girls under the age of 16 cannot be charged with prostitution); \textit{FLA. STAT. ANN.} § 409.1678 (West 2013); \textit{720 ILL. COMP. STAT. ANN.} 5/11-14 (West 2013) (first law to protect all minors under the age of 18 from prostitution arrests); \textit{KAN. STAT. ANN.} § 38-2232 (West 2013); \textit{KY. REV. STAT. ANN.} § 529.120 (West 2013); \textit{LA. CHILD. CODE ANN.} art. 725 (2013); \textit{MASS. GEN. LAWS ANN.} ch. 119, §39K-L (West 2013); \textit{MICH. COMP. LAWS ANN.} § 750.448 (West 2013) (protects only individuals who are under the age of 16); \textit{MINN. STAT. ANN.} § 609.325(4) (West 2013); \textit{NEB. REV. STAT. ANN.} § 28-801(5) (LexisNexis 2013); \textit{N.J. STAT. ANN.} §§ 2A:4A-42(h), 2A:4A-71(b)(11), & 2A:4A-74(b)(12) (West 2013); \textit{N.Y. SOC. SERV. LAW} § 447-a-b, and \textit{N.Y. FAM. CT. ACT} §§ 732(a)-(b) & 739 (McKinney 2013); \textit{OHIO REV. CODE ANN.} §§ 2152.021 & 2151.358 (E), (F) (West 2013); \textit{TENN. CODE ANN.} § 39-13-513(d) (West 2013); \textit{VT. STAT. ANN. tit. 13, §§ 2652 & 2658} (b) (West 2013) (victims of sex trafficking may not be charged with crimes of lewdness, prostitution, or obscenity); \textit{WASH. REV. CODE ANN.} §§ 13.32A.030 (5) & (17) & 13.32A.270 (West 2013); \textit{WYO. STAT. ANN.} § 6-2-708 (West 2013) (safeguards victims from prosecution for commercial sex acts).

profiteers through proposed and enacted safe harbor laws, some of which were passed as a subsection of human trafficking law violations. 73 Second, it may mandate that the state provide social services to juveniles. 74 In Florida, for example, minors detained for sexual exploitation are not arrested, but are directed to safe houses where social service officials conduct an evaluation before making further welfare decisions. 75 Third, the laws may require training for law enforcement officials and social workers to identify juvenile sex trafficking victims. 76 Unfortunately, many law enforcement officials and social workers still view these minors as delinquents, 77 so the training provided through safe harbor laws is critical. Finally, the laws may enhance penalties for adult buyers of juvenile sex and promoters of prostitution. 78

73 E.g., CONN. GEN. STAT. ANN. § 53a-82 (a)-(c) (West 2013) (barring prosecution of minors under the age of 16 and creating a presumption that minors between the ages of 16 and 17 were coerced into prostitution); TENN. CODE ANN. § 39-13-513(d)-(e) (West 2013) (requiring law enforcement officers to release minors suspected of prostitution into the custody of family members); VT. STAT. ANN. tit. 13, § 2652 (West 2013) (all persons under the age of 18 are immune from prosecution for prostitution).

74 E.g., VT. STAT. ANN. tit. 13, § 2652 (West 2013) (directing the state to regard minors arrested for prostitution and suspected of being human trafficking victims “as the subject of a child in need of care or supervision proceedings”); WYO. STAT. ANN. § 6-2-708 (West 2013) (qualifying minors “shall be deemed a child in need of supervision in accordance with the Children in Need of Supervision Act or a neglected child in accordance with the Child Protection Act”).


76 E.g., CAL. WELF. & INST. CODE § 18259(d)(2) (West 2008) (providing “training curriculum through multidisciplinary teams to law enforcement, child protective services, and others who are required to respond to arrested or detained minors who may be victims of commercial sexual exploitation”); MINN. STAT. ANN. § 609.3241 (West 2013) (assessing additional fees for defendants convicted of criminal solicitation to be used to offset the costs of police training, prosecution, and safe harbor social services); N.Y. SOC. SERV. LAW § 447-b (McKinney 2010) (providing, among other things, “[c]risis intervention services, short-term safe house care and community-based programming”).

77 E.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2013, 382, available at http://www.state.gov/documents/organization/210742.pdf (recommending that governments streamline screening procedures “to better identify trafficked persons, including adults and children arrested or detained for criminal offenses frequently associated with human trafficking, youth served through the child welfare system, and runaway and homeless youth being served through programs funded” through federal social service programs); U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2012, 363, available at http://www.state.gov/j/tip/rs/tiprpt/2012/index.htm (“Federal, state, and local law enforcement agencies face ongoing challenges in victim identification. The federal government conducted numerous trainings on victim identification for state and local law enforcement officials. Despite these increased trainings, laws, and regulations, NGOs noted that some federal, state, and local law enforcement officials were reluctant to identify individuals as trafficking victims when they have participated in criminal activity”); LOGAN MICHEEL ET AL., WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, THE COMMERCIAL SEXUAL EXPLOITATION OF YOUTH IN WASHINGTON STATE: 2010 SURVEY RESULTS AND RECOMMENDATIONS 1 (Jan. 2011), available at http://www.wcsap.org/sites/www.wcsap.org/files/uploads/documents/CSECSurveyReport2010.pdf (explaining that over half of surveyed service providers in Washington had not developed any protocols for identifying trafficked youth and only 34 percent of them knew that trafficked youth were seeking services from their agencies); HEATHER J. CLAWSON & LISA G. GRACE, U.S. DEP’T OF HEALTH AND HUMAN SERVS., FINDING A PATH TO RECOVERY: RESIDENTIAL FACILITIES FOR MINOR VICTIMS OF DOMESTIC SEX TRAFFICKING 2 (Sept. 2007), available at http://aspe.hhs.gov/hsp/07/HumanTrafficking/ResFac/fb.pdf (federal study reported there was a “lack of standard protocol” among law enforcement officials for identifying human trafficking victims, service workers often thought only foreigners and immigrants are susceptible to being trafficked, and “child protective services workers, and shelter providers believed that [sexually trafficked minors] had ‘chosen’ to become involved in prostitution and therefore should be held accountable for their ‘criminal’ actions.”).

78 Connecticut, Illinois, Massachusetts, Minnesota, Tennessee, Vermont, and Washington increased punishments for clients and profiteers through proposed and enacted safe harbor laws, some of which were passed as a subsection of human trafficking
The new laws are remarkable because they protect an entire class of people from being charged with an offense, an uncommon occurrence in criminal law. Safe harbor laws protect minors based upon their age and the correlating legal concept of immaturity and their status as victim. Only two other criminal “defenses” – infancy laws and the legislative exemption doctrine – do the same.

It may appear that volitional consent and safe harbor legislation are antithetical, but they are not. Prostitution laws no longer presume that prostitutes, regardless of their age, willingly choose sex work. Instead, safe harbor laws recognize that juveniles engaged in prostitution are exploited. They align prostitution laws with long-standing legal concepts, both civil and criminal, that recognize minors are immature and thus unable to consent to exploitation or sex.

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80 The legislative exemption doctrine protects victims who are co-conspirators in a criminal act from being prosecuted. E.g., Gebardi v. United States, 287 U.S. 112, 114-23 (1932) (even though woman agreed to be transported across state lines in violation of the Mann Act, she could not be a co-conspirator to the violation since the Act sought to protect her from prosecution). Infancy laws set a minimum age for being criminally culpable. E.g., Colo. Rev. Stat. Ann. § 18-1-801 (West 2013) (children below the age of 10 are not criminally culpable); 720 Ill. Comp. Stat. Ann. 5/6-1 (West 2011) (children 12 and younger cannot be prosecuted for criminal offenses); Utah Code Ann. § 76-2-301 (West 2013) (children below the age of 13 are not criminally responsible).

81 See generally Todres, supra note 65 (examining all legal and cultural concepts that recognize minors as immature, including protections against the enforceability of contracts signed by minors, infancy laws, and protections of a child’s bodily integrity, among others).
Where minors have contractually “consented” to the sex act, their volitional consent is rendered legally invalid; they are thus spared the criminal consequences. They receive protection, social services, and rehabilitation instead of punishment.

Unfortunately, some safe harbor laws embody irreconcilable concepts of consent. Several safe harbor laws shield only the youngest minors from being charged with prostitution, while exposing older minors to arrest and prosecution.82 These distinctions could be justifiable if they mirrored the state’s other age-of-consent laws. For example, if a state’s contract laws legally recognize a 17-year old’s acquiescence to a binding contractual agreement, then it may be legally consistent to recognize the same assent in a prostitution case. However, it is important to remember that the TVPA states that anyone under the age of 18 is incapable of consenting to commercial sex work.83

More problematic are the safe harbor laws that only apply the first time a minor is suspected of prostitution.84 Under these laws, juveniles may be viewed as willing participants upon subsequent arrest, despite their immaturity to consent.85 These safe harbors demonstrate a lack of legislative understanding. If a minor’s consent is invalidated due to immaturity, it matters not the number of times the child “assents” to a sex act; the child’s agreement should be legally void until the age of majority. This qualified legislative clemency may illuminate a

82 Illinois’ safe harbor law was one of the few (and the first) to protect all minors under the age of 18 from being charged with prostitution. 720 ILL. COMP. STAT. ANN. 5/11-14(d) (West 2013). Minnesota, on the other hand, used to allow only 16 and 17-year olds protection under safe harbor laws. MINN. STAT. ANN. § 609.093 (West 2013), repealed by Laws 2013, c. 108, art. 3, § 48, par. (b), eff. May 24, 2013.
84 E.g., 720 ILL. COMP. STAT. ANN. 5/11-14 (West 2013) (permitting dismissal only if defendant has no prior prostitution convictions); MINN. STAT. ANN. § 609.093 (1)(a)(1) (West 2013) (safe harbor provision does not apply to a person who has previously been adjudicated delinquent for prostitution); Bravo, supra note 64, at 482 (noting that protections offered to minors who are viewed as incapable of contracting “may be removed where a minor has transgressed the criminal law”).
85 Id.; Anne Hamre, Safe Harbor, MINNESOTA WOMEN’S PRESS, available at http://www.womenspress.com/main.asp?SectionID=1&SubSectionID=1&ArticleID=3984 (last visited February 3, 2014) (Minnesota’s most recent safe harbor law, which will go into effect in 2014 “applies to all juveniles under 18, but after one encounter with the criminal justice system it applies differently to those 15 and under than it does to 16- and 17-year-olds”).
skepticism that would-be prostitution defendants do not yet look like victims to lawmakers, even if they are rendered children unable to consent under other state laws. In future revised incarnations of safe harbor laws, it is important for lawmakers to communicate a more consistent understanding of the parameters of volitional consent, especially in light of other invariable legal concepts of immaturity.

B. Trial Relief: Affirmative Defenses

Though many affirmative defenses have English common law roots that date back to the Middle Ages, affirmative defenses were traditionally proffered to mitigate punishment, not to exculpate the accused. Affirmative defenses like entrapment, necessity, self-defense, and duress, are generally not crime specific; they can be used as legal exculpation or justification for the commission of any number of offenses. Legislatures have rarely created new affirmative defenses over the last two hundred years; of the exceptions, many states have retreated from using them in the last few decades. Thus, the creation of new, prostitution-specific affirmative defenses is unusual.

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86 E.g., Attorneys General Letter, supra note 64 (“victim services … funds should be reserved for victims of human trafficking for sexual purposes as opposed to those engaged in ordinary prostitution”).

87 Leslie Yalof Garfield, Back to the Future: Does Apprendi Bar a Legislature’s Power to Shift the Burden of Proof Away from the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense?, 35 CONN. L. REV. 1351, 1383 (2003). It is important to note that though lesser-included offenses cannot be legally equated with affirmative defenses, the concept of granting mercy to the accused is present in both legal concepts through the mitigation of criminal culpability. One study demonstrated that police officers who arrest prostitutes often charge them with lesser-included offenses and judges frequently impose lighter sentences in prostitution cases. Kandel, supra note 18, at 332-40.

88 In fact, most criminal affirmative defenses appear in sections of criminal codes apart from the penal laws. Garfield, supra note 87, at 1385. There are few crime-specific affirmative defenses in existence; some states allow a defendant to raise an affirmative defense to felony murder while others have created gambling-specific affirmative defenses. E.g., N.J. STAT. ANN. § 2C:11-3 (West 2013) (affirmative defense for felony murder); N.Y. PENAL LAW § 125.25 (McKinney 2013) (affirmative defense for felony murder); WASH. REV. CODE ANN. § 9A.32.030(c) (West 2013) (affirmative defense for felony murder); ALASKA STAT. ANN. § 11.66.250 (West 2013) (affirmative defense to the offense of keeping a gambling record); HAW. REV. STAT. § 712-1231 (2013) (affirmative defense to gambling); TEX. PENAL CODE ANN. § 47.04(b) (West 2013) (affirmative defense for the offense of keeping a gambling place).

89 Garfield, supra note 87, at 1385, 1396.
While affirmative defenses like entrapment have been raised by sellers\(^90\) and buyers\(^91\) in prostitution cases, they have rarely been successful.\(^92\) That may change given new prostitution-specific affirmative defense laws. Twenty-two states recently enacted prostitution affirmative defenses.\(^93\) The American Bar Association is encouraging the remaining states to follow suit.\(^94\)

New prostitution affirmative defenses are raised at trial, after the defendant has been arrested and charged with prostitution. In states with safe harbor laws, this means that affirmative defenses would not apply to minors who are diverted away from arrest and criminal charges.

But in states without safe harbors, this may be the first reformed prostitution law available to juveniles. Though current or proposed laws in Louisiana, Massachusetts, and Oregon protect

\(^90\) E.g., State v. Ketter, 364 N.W.2d 459, 463 (Minn. Ct. App. 1985) (entrapment is an affirmative defense available to defendant-sellers charged with prostitution “where the criminal design originates with the State rather than with the accused”); Romano, 155 P.3d at 1109 (where defendant-seller had opportunities to summons help or leave, she was not entitled to jury instruction on duress even if undercover officer, posing as buyer, had a loud and threatening demeanor).

\(^91\) E.g., City of Dayton v. Clark, No. 19672, 2004 WL 67945, at *2 (Ohio Ct. App., Jan. 16, 2004) (though the undercover officer was the first to approach the buyer, the buyer was the first to ask about sex and a fee, thus he was not entrapped); Ferger, 764 N.E.2d at 271 (evidence established entrapment where “buyer” agreed to offer of sex for money, but drove away from undercover officer and never picked her up at their designated location).

\(^92\) But see Ferger, 764 N.E.2d at 271 (court held that defendant-buyer was entrapped); Sun Cha Chon, 983 A.2d at 791 (outrageous lack of officers’ and informant’s professionalism in prostitution sting warranted dismissal of the State’s case against the defendant-seller for prostitution on due process grounds).


\(^94\) ABA Resolution 104G, supra note 3; L. Bellows, Changing Lives Warped by Human Trafficking, Newsday (Jan. 11, 2013), available at http://www.newsday.com/opinion/oped/bellows-changing-lives-warped-by-human-trafficking-1.4436711 (discussing the ABA’s efforts to work with the Uniform Law Commission to create a uniform human trafficking law for states that incorporates affirmative defenses for people charged with prostitution who also meet the definition of human trafficking victim).
only minors engaged in acts of prostitution, all of the other states have affirmative defenses that apply to both adults and minors. Most of the affirmative defenses allow those charged with prostitution to justify the offense if they were coerced or forced into the act. For example, in Georgia, defendants can raise an affirmative defense to prostitution if they were coerced or deceived into committing acts of prostitution. In Minnesota, defendants can raise an affirmative defense if they were compelled to commit prostitution or acted under apprehension because of threats of physical

95 LA. REV. STAT. ANN. §§ 14:46.3, 14:82(G), 14:83.3(D), 14:83.4(C), & 14:89.2(D)(1) (2012) (affirmative defenses for minors built into several existing statutes addressing criminal commercial sexual acts); MASS. GEN. LAWS ANN. ch. 265, §57 (West 2013) (affirmative defense applies only to juveniles who establish coercion or duress); H.B. 2431, 2nd Sess., (Or. 2013), available at http://gov.oregonlive.com/bill/2013/HB2431/. Several states lacking safe harbor provisions that prohibit the prosecution of juveniles for prostitution nevertheless allow them to raise an affirmative defense at trial. E.g., ALA. CODE § 13A-6-159 (2013); GA. CODE ANN. § 16-3-6 (2013); IOWA CODE § 725.1 (2013); LA. REV. STAT. ANN. § 14:82 (2013). Connecticut and Washington, rather than enacting affirmative defenses that apply to juveniles, have enacted presumptions that the State must overcome before prosecuting them for prostitution. CONN. GEN. STAT. ANN. § 53a-82 (b) (West 2013) (state must overcome presumption that minor was coerced into committing act of prostitution before pursuing criminal charge); WASH. REV. CODE ANN. § 13.40.219 (West 2013) (presumption that upon arrest of minor for prostitution, arrestee is both a victim of severe trafficking, according to the TVPA, and a victim of commercial sex abuse).

96 ALA. CODE § 13A-6-159 (2010) (affirmative defense provided to human trafficking victims engaged in prostitution); CONN. GEN. STAT. ANN. § 53a-82 (b) (West 2013); GA. CODE. ANN. § 16-3-6(a)(3) & (b) (2013) (a person charged with sex crimes is not guilty if the act “was committed under coercion or deception while the accused was being trafficked for sexual servitude”); IOWA CODE §§ 710A.3 & 725.1 (2013); MINN. STAT. ANN. § 609.325(4) (West 2013) (affirmative defense available once it is established victim committed acts under compulsion or apprehension); N.H. REV. STAT. § 645:1IV (2013) (defense not restricted to minors); N.J. STAT. ANN. § 2C:34-1 (e) (West 2013) (adults can use defense if meet specific requirements, but those under 18 do not have the same requirements); OKLA. STAT. ANN. tit. 21, § 748 (West 2013) (defendant need only prove that he or she meets the state’s definition of “human trafficking victim” to qualify); R.I. GEN. LAWS ANN. § 11-34.1-2(d) (West 2013); S.C. CODE ANN. § 16-3-2020 (J) (2012); S.D. CODEFIED LAWS § 22-23-1.26 (2013) (defense applicable to all defendants charged with prostitution who committed the act of prostitution “under compulsion”); TENN. CODE ANN. § 39-13-513 (e) (2013) (defense applies to all persons accused of prostitution who can establish they were a victim of human trafficking); TEX. PENAL CODE ANN. § 43.02 (d) (West 2011); WASH. REV. CODE ANN. § 9A.88.040 (West 2012) (creating an affirmative defense through a presumption that the defendant is a victim of trafficking if “the actor is named as a current victim in an information or the investigative records upon which a conviction is obtained for trafficking, promoting prostitution in the first degree, or trafficking in persons”).

In Mississippi and New Jersey, affirmative defenses may even be raised by trafficking defendants who traffic others or promote prostitution. MISS. CODE. ANN. § 97-29-51 (3) (2013) (defense available to promoters of prostitution who themselves meet trafficking victim definition); MISS. CODE. ANN. § 97-3-54.1 (5) (2013) (defense available to human traffickers who meet human trafficking victim definition); N.J. STAT. ANN. §§ 2C:13-8 (3)(c) & 2C:13-9 (b) (West 2013) (affirmative defense to human trafficking available to individuals who themselves were also victims).

In states with safe harbor laws, affirmative defenses are not necessary to protect juveniles, at least in theory. After all, if minors cannot be arrested for or charged with prostitution, they do not need an affirmative defense because they will not face trial for prostitution. Having both laws protect minors, unless safe harbor laws are only applicable to first-time offenders, is redundant. However, six states currently have both affirmative defenses and safe harbor laws: Connecticut, Massachusetts, New Jersey, Tennessee, Texas, and Washington. See supra, notes 71-72 and 95-96.

97 See supra, notes 95-96.

98 GA. CODE. ANN. § 16-3-6(a)(3) & (b) (West 2013).
harm; successful defenses must be proven by a preponderance of the evidence.\textsuperscript{99} Because issues of force, coercion, threats, compulsion, and apprehension factor into many of the reformed laws, the prostitution affirmative defense most closely resembles the affirmative defense of duress.\textsuperscript{100} The defense often mirrors the TVPA’s language found in its definition of “severe forms of human trafficking” definition.\textsuperscript{101}

Not all prostitution-specific affirmative defenses coincide with the TVPA, however. Under the TVPA, though adults are required to prove their actions were the result of coercion, force, or fraud, minors are presumed to be trafficking victims when they engage in commercial sex acts, even absent indicia of duress.\textsuperscript{102} While the TVPA distinguishes between burdens of proof for adults and minors – adults must prove more to qualify as victims of severe forms of trafficking\textsuperscript{103} – several affirmative defenses, which apply to both minors and adults, do not make the same distinction. For example, the affirmative defenses in Massachusetts, Minnesota, Missouri, and South Dakota apply only to minors who acted under coercion or duress.\textsuperscript{104} Thus, these state laws provide fewer rights and a higher burden of proof than the federal law bestows.

Prostitution-specific affirmative defenses allow fact finders to examine the volitional consent of the actor. In a case where the affirmative defense is raised, the judge or jury is


\textsuperscript{100} Surprisingly, there are only a few appellate cases whereby defendants charged with prostitution or solicitation of prostitution raised affirmative defenses. \textit{E.g.}, \textit{Romano}, 155 P.3d at 1109 (defense of duress raised, but not credible); \textit{Woodby}, 370 F.2d at 991 (involuntary prostitution defense lost when actor voluntarily resumed prostitution after time of necessity ended); \textit{People v. White}, 69 N.Y.S.2d 599, 600 (N.Y. App. Div. 1947) (duress defense successful where police ordered woman charged with prostitution to answer phone calls inviting men up to her apartment).


\textsuperscript{102} \textit{Id.} (excluding victims of sexual exploitation who are younger than 18 years of age from the “force, fraud, and coercion” element of the definition of “severe form of human trafficking”).

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Mass. Gen. Laws Ann.} ch. 265, § 57 (West 2013) (affirmative defense only available for juveniles who establish coercion or duress); \textit{Minn. Stat. Ann.} § 609.325(4) (West 2013) (affirmative defense available once victim establishes acts committed under compulsion or apprehension); \textit{Mo. Rev. Stat.} § 566.223(2) (2013) (defense applies once coercion or threats are proven); \textit{S.D. Codified Laws} § 22-23-1.2.6 (2013) (defense applicable to all defendants charged with prostitution who committed the act of prostitution “under compulsion”).
permitted to go beyond the contractual consent of the parties to examine the defendant’s volitional consent. Not only does this type of consent matter, but the quality of that consent must be examined before the fact finder addresses issues of justification and culpability. Consent can be tainted through acts of coercion, force, or fraud.\textsuperscript{105} Prostitution-specific affirmative defenses render the actor’s volitional consent central to the guilt-innocence determination. With these defenses, volitional consent has once again become an element of prostitution.

\textbf{C. Post-Conviction Relief: Expunction & Vacating Laws}

Expunctions have traditionally provided post-conviction relief to a narrow group of defendants in limited instances: after an acquittal, following a pardon or limited forms of dismissal, or when the conviction was overturned.\textsuperscript{106} Following an order of expungement, national, state, and local law enforcement personnel are required to physically destroy the records and erase the defendant’s name from all public databases that pertain to the arrest, charge, and conviction.\textsuperscript{107} After an order is granted, “the conduct and conditions expunged are considered nonexistent and are to be treated as such upon inquiry.”\textsuperscript{108}

State legislators recognize that a prostitution criminal history can impede gainful employment.\textsuperscript{109} Thus, the newly enacted expunction laws give sex workers “exit options”\textsuperscript{110} by

\begin{footnotes}{105}Chuang, \textit{supra} note 37, at 65.\end{footnotes}

\begin{footnotes}{106}E.g., \textsc{Tex. Code of Crim. Proc. Ann.} art. 55.01 (West 2013) (permitting expunctions only when a person is acquitted, convicted but then pardoned, or had charges dismissed for enumerated reasons); Reza, \textit{supra} note 78, at 824 & n. 310 (citing exoneration, dismissal, or lack of probable cause as reasons for granting an expunction).\end{footnotes}

\begin{footnotes}{107}705 \textsc{Ill. Comp. Stat.} 405/5-915(0.05) (2013).\end{footnotes}

\begin{footnotes}{108}LA. \textsc{Child Code Ann.} art. 922 (2013).\end{footnotes}

\begin{footnotes}{109}Assemb. B. Memo 7670, 2009 Leg., Reg. Sess. (N.Y. 2009), \textit{available at} http://assembly.state.ny.us/leg/?default_fld=&bn=A07670&term=2009&Memo=Y. See also, Heiges, \textit{supra} note 7, at 441 (“In some states, victims charged with repeat offenses can receive felony upgrades that cannot be expunged, thus further restricting their options for leaving the sex industry.”); Mc\textit{Millan v. Pennsylvania}, 477 U.S. 79, 103 (1986) (Stevens, J., dissenting) (state must be limited in how it defines elements of a crime because of the “immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction”); \textit{Sex Work Explored}, \textit{supra} note 24, at 999-1000 (Robyn Few, sex worker rights activist, pondered “How can criminalization help us if we can’t get jobs and we can’t leave the industry?”).\end{footnotes}
erasing criminal records and vacating prostitution convictions. Twenty-two states have recently enacted laws that expunge or vacate convictions for those who were coerced, tricked, or forced into prostitution.\textsuperscript{111}

Obtaining an expunction is not easy; traditional expunction statutes are rife with conditions and deference to judicial discretion.\textsuperscript{112} Indeed, several new statutes include numerous conditions that make it unlikely most defendants convicted of prostitution will ever realize their benefit.\textsuperscript{113} Other laws grant a one-time expunction to juvenile offenders.\textsuperscript{114} Minors charged for a second time are barred from seeking a subsequent expunction.\textsuperscript{115}

\begin{itemize}
\item ARIZ. REV. STAT. ANN. § 13-921 (2013) (the court may, in its discretion, set aside, dismiss, or expunge the records of juvenile victims of sex trafficking who are convicted and placed on probation, provided they successfully complete the terms of probation); COLO. REV. STAT. ANN. § 19-1-306(d)(1) (West 2013) (qualifying juveniles may have prostitution records expunged); CONN. GEN. STAT. ANN. § 54-95c (2013) (motion to vacate); FLA. STAT. ANN. § 943.0582 (West 2013) (minors and adults may request that minority age arrest records be expunged); HAW. REV. STAT. § 712-1209.6 (2013) (person convicted of prostitution may have conviction vacated upon establishing that he or she was a victim of a severe form of human trafficking); 725 ILL. COMP. STAT. 5/116-2.1 (2013) (motion to vacate conviction may be used by trafficking victims to expunge prostitution convictions); KAN. STAT. ANN. §§ 21-6419(c) & 38-2312(a) (2013) (permitting minor domestic sex trafficking victims to request expungement of prostitution convictions); LA. CHILD CODE ANN. art. 918 & 923 (D) (2013) (expungement possible upon showing the defendant was a “victim of trafficking of children for sexual purposes” at the time of the offense); MD. CODE ANN., CRIM. PROC. § 8-302 (West 2011) (motion to vacate granted upon proving the person was acting under duress caused by an act of another at time of commission of offense); MISS. CODE. ANN. § 97-3-54.6 (West 2013) (in motion to vacate, official documentation from a federal, state or local government agency as to the defendant’s status as a victim at the time of the offense creates a presumption that the defendant's participation in the offense was a result of being a victim, but documentation not required in motion to vacate); MONT. CODE ANN. § 46-18-608 (2013) (court may vacate prostitution conviction if the person was a victim of human trafficking); NEV. REV. STAT. § 176.515 (2013) (if convicted, once a defendant ceases being a victim of human trafficking, as defined by the TVPA, the person may move to vacate a prostitution conviction); N.J. STAT. ANN. § 2C:34-1(e) (West 2013) (permitting the defense to be used by both minors and adults, with different burdens of proof for each category, much like the federal anti-trafficking legislation); N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2013) (expunction law may apply to both minors and adults, provide person meets definition of trafficking victim); N.C. GEN. STAT. § 15A-1416.1 (2013) (court permitted to grant a motion to vacate if the defendant committed the offense of prostitution while being a victim of human trafficking); OHIO REV. CODE ANN. § 2151.358(E) (West 2013) (expunction applies to child victim of human trafficking); R.I. GEN. LAWS ANN. § 11-34.1-5(a) (West 2013) (“any person” found guilty of prostitution, at the court’s discretion, can seek to have the record expunged after one year); WASH. REV. CODE ANN. § 9.96.060 (3) (West 2013) (permitting victims to vacate criminal records of prostitution); W. VA. CODE § 61-2-17 (6)(f) (2013) (human trafficking victims may seek expungement of prostitution convictions); WYO. STAT. ANN. § 6-2-708 (West 2013) (permits victims to vacate prostitution convictions and be safe from prosecution for commercial sex acts).

Two states enacted expunction laws that apply to any and all crimes committed while the defendant was a human trafficking victim. OKLA. STAT. ANN. tit. 21, § 748(D) (West 2012); VT. STAT. ANN. tit. 13, §§ 2652 & 2658 (b) (West 2013) (victims of sex trafficking may vacate convictions committed while they were trafficked).

\textsuperscript{112}E.g., IND. CODE ANN. § 31-39-8-3 (West 2013) (in granting or denying request for record removal, judge may consider the best interest of the child, the defendant’s age, the nature of the charges, the case’s disposition, the defendant’s participation, or whether the defendant had any additional criminal history).

\textsuperscript{113} While some laws do not expressly limit expunctions to first-time offenders, practically speaking, there is little chance they would apply to second-time offenders, given their stipulations. E.g., OR. REV. STAT. § 419A.262(2) (2013) (limiting expunctions
These statutory limitations reflect legislative desires to extend only a modicum of criminal forgiveness to prostitutes. Where minors are concerned, the message these laws send is inconsistent: while states recognize the inability of minors to consent (either volitionally or contractually) and are willing to erase convictions based upon this premise, the consent barrier is overborn after repeat commercial sex acts.\(^\text{116}\) Fortunately, courts are more gracious than lawmakers.

Two cases from New York illustrate that judicial compassion may broaden the scope of the laws permitting expungement. In *New York v. G.M.*, a court not only granted the defendant’s motion to vacate prostitution convictions due to her status as trafficking victim at the time of the crimes’ commission, but also granted the motion to vacate other non-prostitution convictions, which exceeded the scope of New York’s statute.\(^\text{117}\) The court and the prosecutor supported the defendant’s motion to vacate in its entirety.\(^\text{118}\)

In contrast, in *New York v. Gonzalez*, the prosecutor opposed the defendant’s motion to vacate 87 prostitution convictions obtained over a three-year period.\(^\text{119}\) In granting the defendant’s motion to vacate all convictions, the court stated

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\(^{112}\) *ALA. CODE § 12-15-136(e) (2013)* (any juvenile convicted of a misdemeanor sexual offense shall have the sealed order for that offense nullified upon conviction of a second offense); *IOWA CODE § 232.150 (1)(a)(2) (2013)*; *MISS. CODE. ANN. § 99-19-71 (2013)* (allows for first-time minor offender expunction); *N.J. STAT. ANN. § 2A:4A-62(f) (West 2013)* (“if the juvenile is convicted twice of engaging in prostitution, the minor can be guilty of a fourth degree crime, resulting in possible barriers to expungement”); *N.C. GEN. STAT. §§ 15A-145, 15A-145.4-5 (2013)* (excluding anyone with felony and misdemeanor convictions from applying); *OKLA. STAT. ANN. tit. 10A, § 2-6-102(D) (West 2013)* (juvenile records are not confidential after subsequent convictions); *VT. STAT. ANN. tit. 3, § 163(e)-(f) (2013)* (subsequent expunction barred if applicant was convicted of a second offense, has pending proceedings, or has not been rehabilitated to the satisfaction of the court).

\(^{115}\) *Id.*

\(^{117}\) *See also Bravo, supra* note 64, at 482 (“The criminalization of prostituted minors, the victims of commercial exploitation, exemplifies society’s ambivalence toward minors who are perceived to be transgressors of its rules.”).

\(^{118}\) *Id.*

The defendant's testimony that she would ask the police to arrest her just so she could get off the street and not have to have sex with anyone those nights explains the very high number of convictions in such a short period. It is remarkable that since 1995, the defendant has not had another contact with the criminal justice system. Overall, the defendant's story was consistent with the generally accepted notion that victims of human trafficking are often too wary of authorities or too traumatized by their experiences to be able or willing to timely report their victimization. The People warn that granting this motion will “open the flood gates” of prior prostitution convictions insofar as those defendants can just come into court and claim that they were the victims of sex trafficking without any further corroboration and have their convictions vacated... The defendant's ability to continue putting her life back together after the horrendous ordeal that she experienced from 1993–1995 heavily outweighs any increased motion practice that may result hereafter.\(^\text{120}\)

These decisions demonstrate that judges may apply the new laws more broadly than written and may be more compassionate to individuals charged with prostitution, even persons with numerous convictions. Though some legislatures have attempted to confine the laws’ reach to first-time criminal offenders, the judiciary may apply the laws more liberally.

Perhaps lawmakers believe that defendants need to look more like human trafficking victims and less like repeat sex workers before being granted victim status and the accompanying legal privileges. Regardless, one-time expunction laws fail to recognize that minors have long been held incapable of consenting to sex and that adults who are acting under duress may violate the law many times before escaping coercive and violent circumstances.\(^\text{121}\) It takes time to self-identify as victim. Like the practitioners above who recognized this fact, new prostitution-specific expuction laws must do the same.

\textit{D. Result of Reform}

\(^{120}\) Id. at 570.

\(^{121}\) Self-identification for sex trafficking victims is difficult for a number of reasons. Peters, supra note 69, at 25-27 (citing loyalty to trafficker, myth that only foreigners are victims of human trafficking, and lack of identification by law enforcement officers and social workers as challenges to self-identification); Todres, supra note 4, at 635 (many victims of human trafficking are not recognized by governments “because they do not fit into the dominant view of what a victim should look like, a view built on distorted perceptions of the Other and the Other’s culture”).
At first glance, the reform may appear to affect only a small number of defendants charged with prostitution: those who are human trafficking victims. However, its potential impact is much broader than one might initially expect. Many people who engage in prostitution enter the profession at a young age. A 2002 Chicago study revealed that nearly 62 percent of the 222 prostitutes surveyed, regardless of their venue (e.g., street, escort service, exotic dance club, or massage parlor), entered the profession as minors. Three-fourths of all respondents were arrested at least once and nearly half were arrested for the first time as minors. In states with safe harbor laws, these minors would have been diverted from the criminal justice system to social service providers.

The reformed laws may also greatly influence adult prostitutes. Seventy-one percent of survey respondents in the Chicago study stated they were coerced for economic reasons to enter the profession. Others were forced into acts of prostitution. Fifty percent of the abuse that escort service and hotel sex workers encountered came from promoters and profiteers. The majority of surveyed respondents feared they would be hurt if they left the profession altogether. Many felt they had no choice but to continue selling sex due to physical violence and threats. Surveys of street prostitutes in New York City and Milwaukee reported that many entered prostitution as minors, were consistently threatened or abused by profiteers, and turned over most, if not all, of the money they earned to others. While this is not the experience of all

122 See also EVANS, supra note 9, at 23 (“Seduction indeed accounts for a number of recruits to prostitution”).
124 Id. at 28.
125 Id. at 15-17.
126 Id. at 19.
127 Id. at 21.
128 Id. at 31.
129 Kandel, supra note 18, at 348-49.
in the above cases, there was clearly an absence of volitional consent, even where prostitutes exercised contractual consent.

The reformed laws may have already impacted the number of persons arrested for prostitution annually. In the last decade alone, the total number of arrests for prostitution declined significantly. Whereas arrest rates for prostitution hovered between 71,000 and nearly 80,000 from 2006 to 2009, the number of arrests for prostitution in 2010 was 62,700, which is a twenty percent drop in arrests from 2006 to 2010. While there is no way to positively connect the drop in arrests to prostitution legal reforms, changes in prostitution laws have likely had an effect on the number of persons arrested, charged, prosecuted, and convicted and will continue to do so in the years to come, as more states welcome reform.

V. Historical Recognition of Volitional Consent

Each of the aforementioned types of reform is unusual in criminal law. When taken together, these laws, which protect qualifying persons before, during, and after trial, are novel. No other crime-specific set of criminal laws offers protection at each stage of the criminal process. Nevertheless, there is historical precedent for the reformation, particularly as it relates to volitional consent. This section analyzes laws throughout history that made distinctions

130 E.g., Heidi Fleiss & Nadya Labi, In Defense of Prostitution, LEGAL AFFAIRS, 35-36 (September/October 2003) (even though famous Malibu madam Heidi Fleiss “wouldn't recommend prostitution as a career because it doesn't have great long-term prospects,” she stated that several prostitutes she worked with willingly joined the profession for brief periods of time to earn large sums of money).

131 FBI Arrest Statistics, supra note 55. In the 1970s and 1980s, the FBI reported that the average number of prostitution arrests was nearly 89,000 and that in 1985, over 98,000 prostitution arrests were made. DeCou, supra note 18, at 428. The Bureau of Justice Statistics reported that the number of arrests for prostitution was $2,683 in 1994. Id. Therefore, the number of arrests for prostitution, despite the population’s growth, has gradually decreased during each of the last four decades.

132 The reformed laws will make it hard for researchers to assess how much they impact prostitution criminal law enforcement for a number of reasons. First, any data related to minors will likely not be made available to the public. Second, trials with successful prostitution-specific affirmative defenses will result in acquittals, which are typically expunged and unappealable by the state. Therefore, no record of acquittals will exist. Third, convictions that are vacated or expunged will likewise be wiped from all criminal databases. In other words, these laws will create an absence of evidence. As a result, perhaps the only “evidence” that researchers can use to establish whether these new laws are successful is arrest and conviction data.
between voluntary and involuntary actors in an effort to illustrate that the current reformation is more faithful to history than the last century of American prostitution jurisprudence has been.

The distinction of choice and consent made in modern prostitution reform has roots dating back to earlier legal systems. In ancient Rome, around the time of the first century, judges sought to ascertain whether prostitution was a choice for those who registered it as their profession. The law required prostitutes to make a record of their profession, name, and price with local officials for tax purposes. If a judge encountered a young woman who was seemingly respectable, he would question her decision and attempt to discourage her. If he was unable to dissuade her from becoming a prostitute, her name was registered into the log, and “[o]nce entered there, the name could never be removed, but must remain for all time an insurmountable bar to repentance and respectability.” In this way, the Romans sought to make sure women engaged in prostitution willingly chose the profession and understood its ramifications.

Centuries later, the Roman Empire continued to guard against involuntary prostitution. In the Sixth Century, the Roman Empire’s Empress Theodora, who herself was a prostitute before securing the love and hand of Emperor Justinian, made prostitution a criminal offense. The Empress sought to prevent the sale of children for sex and to punish traders who acted as profiteers. She protected prostitutes against retaliation from traders who were accused of

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133 PETRONIUS ARBITER, THE SATYRICON COMPLETE, Notes on Prostitution by W.C. Firebaugh (1922), available at http://www.gutenberg.org/files/5225/5225-h/5225-h.htm#linkPROSTITUTION. The law mentioned by Firebaugh, which dates back to approximately 150 B.C. may have been the earliest recorded prostitution law. DeCou, supra note 18, at 429 (stating the first recorded prostitution law dates back to 180 B.C.).

134 Id.; EVANS, supra note 9, at 44-45, 49.

135 Id.

136 Id.

137 NILS JOHAN RINGDAL, LOVE FOR SALE 99-100 (2004).

138 Id. at 100-01.
forcing women into sexual servitude and she created legal protections against the rape of prostitutes.\textsuperscript{139} She tried to prevent minors from entering the profession; for those who had already become prostitutes, she turned an imperial palace into a safe house where they could live permanently.\textsuperscript{140} Empress Theodora’s safe house was not the only one of its kind in history. In 1492, the Bishop of Paris created a safe-haven for “repentant prostitutes” that was so extravagant that “honest women began to prostitute themselves in order to qualify for admission.”\textsuperscript{141} These two officials recognized, much like the current reformed laws do, that prostitutes may need legal protection and a safe haven before they can successfully leave the profession.

There were other attempts to assist involuntary sex workers. King Henry II’s parliament passed a set of laws for brothels in 1161 that sought to, among other things, prevent brothels from holding prostitutes against their will.\textsuperscript{142} While the King’s laws allowed more freedom of movement and protection to those who chose to continue commercial sex work, they also gave the forced prostitute an opportunity to leave.\textsuperscript{143}

Historically, even the most religious and politically conservative felt a measure of compassion for those forced into commercial sex work. In the years leading up to the Victorian Era in England, while prostitution was increasingly viewed as a nuisance and a threat to moral society,\textsuperscript{144} there was a degree of sympathy for juveniles and adults who were forced into the

\textsuperscript{139} Id.
\textsuperscript{140} Id. at 101.
\textsuperscript{141} EVANS, supra note 9, at 58.
\textsuperscript{142} Id. at 60-61.
\textsuperscript{143} Id.
\textsuperscript{144} TREVOR FISHER, PROSTITUTION AND THE VICTORIANS, xii-xiii (2001) (“The issue being debated was whether society should tolerate prostitution as an inevitable phenomenon that should be regulated in the public interest – the public health position – or suppressed as an intolerable evil – the moral purity position.”).
profession. One London essayist from 1800 asserted that “unhappy” prostitutes were victims who had been abandoned or “seduced from a state of innocence” and “deceived by falsehood and villainy.”

These English citizens recognized that some prostitution is indeed coerced or forced.

In 1816, the London Times printed an editorial suggesting England should create asylums for those who “are obliged to continue in a state of … crime merely because they cannot obtain work to support themselves honestly.” Juvenile prostitution was also a concern in Victorian England. In 1839, a London physician labeled the commercial sex industry’s use of minors an “abominable system of traffic.” He viewed minors engaged in prostitution as victims acting at the behest of malevolent profiteers. Many of these sympathizers were conservative and religious Puritans, yet they recognized that while some people chose the profession, others were forced into it.

The above examples illustrate that both influential and ordinary people alike in the Roman Empire, France, and England identified volitional consent as a key issue within prostitution legal enforcement. Involuntary actors were given mercy, grace, and protection; they were treated like victims. Volitional consent played a more significant role in history than did contractual consent.


146 Fisher, supra note 144, at xvi (quoting Patrick Colquhoun, A Treatise on the Police of the Metropolis (1800)).

147 Id. at xxii.

148 Id. at 2 (quoting Dr. Michael Ryan, Prostitution in London, 118-21 (1839)).

149 Id.

150 Id.

151 Id. at 1-29.
It is not just legal paradigms taken from other times and places that illuminate the importance of volitional consent; three examples from United States history establish volitional consent once had roots in the nation’s prostitution laws. The first example is demonstrated in the legislative history of the Mann Act. In 1909, the House Committee on Interstate and Foreign Commerce issued a report in support of the Mann Act, which stated that the proposed legislation was not an attempt to regulate voluntary prostitution, but instead an effort to target procurers and profiteers who enticed young prostitutes against their will to enter the profession.\(^\text{152}\) The report identified these individuals as victims.\(^\text{153}\)

The second example is evidenced in a congressional report issued in 1909, which recognized that deception and coercion were at the heart of “white slavery” trade concerns.\(^\text{154}\) Congressman James Robert Mann, the namesake of the Act, stated, “The characteristic which distinguishes ‘the white-slave trade’ from immorality in general is that the women who are the victims of the traffic are unwillingly forced to practice prostitution.”\(^\text{155}\) Mann attempted to separate the forced victim from the immorality of the criminal offense. In this way, there was a clear distinction between persons who chose prostitution and those who were coerced into it.

In the third example, the Department of Justice created a sliding scale of culpability in 1914 when it compiled and analyzed a record of Mann Act convictions for transporting prostitutes across state lines.\(^\text{156}\) It noted that in 75 Mann Act convictions, the women had been unwilling victims of either force or fraud, in 129 convictions, the women became willing

\(^{152}\) H.R. Rep. No. 47, 61st Cong., 2d Sess. 9-10 (1909); Langum, supra note 4, at 42.

\(^{153}\) Id.

\(^{154}\) Dubler, supra note 17, at 780 (citing the U.S. Immigration Comm’n, Importing Women for Immoral Purposes: A Partial Report from the Immigration Comm. on the Importation and Harboring of Women for Immoral Purposes, S. Doc. No. 61-196 14, 16, 25 (1909)).


\(^{156}\) A. Bruce Bielaski, The United States Government and the White Slave Traffic, Light, 57-58 (1915); Langum, supra note 4, at 75.
participants only after the convicted profiteer-transporter initially forced or coerced them into the profession, and in 247 cases, the women were prostitutes before meeting the convicted profiteer-transporter.\textsuperscript{157} This record reflects that, at one time, the Department of Justice assigned culpability based upon the individual’s willingness to participate in commercial sex acts. Over the years, however, these distinctions blurred. For example, in 1921, one scholar noted that though the term “white slavery” had once been used to describe forced prostitution, it now described “practically the whole field of commercialized vice.”\textsuperscript{158} Eventually, the phrase “white slavery” was merely a “way of referring to the unmentionable evil of prostitution.”\textsuperscript{159} It appears that as the distinctions in the terminology grew murkier, so too did the concept of volitional consent. Nevertheless, it is important to remember that the first legislators who supported federal anti-prostitution laws made a distinction in culpability between those who volitionally consented to prostitution and those who did not. That distinction was lost sometime between the early 1900s and the early 2000s. By returning the element of volitional consent to prostitution laws, the reform recognizes that not all acts of prostitution are committed voluntarily.

\textbf{VI. Conclusion}

Legislators and participants within the criminal justice system fixated on the semantics of the contractual agreement between sex workers and their clients in pre-reform criminal prostitution cases. Issues of autonomy, consent, and coercion were substituted with matters of fees, services, and contract negotiation. Over time, traditional \textit{mens rea} was abandoned and affirmative defenses, like duress and necessity, became nearly impossible to prove. While public

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textsc{Langum, supra} note 4, at 159.

\textsuperscript{159} \textit{Id.}; \textsc{William Seagle, The Twilight of the Mann Act}, 55 \textsc{A.B.A. J.} 641, 642 (July 1969).
policy suggests that officers should make arrests after the contract is negotiated but before the sex act takes place, without the element of volitional consent, prostitution becomes a de facto strict liability crime.

Modern reform restores traditional mens rea to the criminal offense of prostitution; it requires prosecutors to prove both contractual and volitional consent. Safe harbor laws require the criminal justice system to respect standard legal notions like immaturity and age of consent. The laws restore the view that minors are simply too young to form contracts, especially those that will result in commercial sexual exploitation. Affirmative defenses permit defendants an opportunity to prove that though they may have assented to the terms of the contract, they acted under compulsion or duress at the time of the offense. The prostitution-specific affirmative defense is much easier to prove, and thus more accessible, than the affirmative defenses of duress and necessity. Expungement laws allow qualifying minors and adults opportunities to clear their criminal records, exit the profession, and pursue opportunities that may have been prohibitive with a prostitution conviction. It is significant to acknowledge that the reform is unique for two reasons: unlike any previous set of criminal legal protections, it is crime-specific and it guards against unjust convictions before, during, and after trial. Most importantly, the reform strengthens the culpability requirements of prostitution laws, even where it has occurred extra-statutorily.

The historical section of this Article demonstrates that there is precedent for making legal distinctions between voluntary and involuntary prostitution. In the past, law and policy makers treated involuntary prostitution differently. A King, an Empress, Ancient Roman judges, and even ordinary, religious citizens sought to protect individuals who were forced or coerced into prostitution, both from the profession itself and from its ramifications. They rescued, sheltered,
safeguarded, and restored prostitutes who entered the profession involuntarily. While American legislators initially sought to protect involuntary prostitutes from prosecution, over the last century, the legislative intent behind federal anti-prostitution laws was lost at the state level. Modern prostitution reform restores this legislative intent and returns the element of volitional consent to prostitution laws, where it has historically belonged.

This Article does not contend that defendants accused of prostitution can be neatly categorized into two groups: those who exercise volitional consent and those who do not. Perhaps more nuanced gradations of culpability should exist in modern prostitution statutes. Nevertheless, the benefit of these reformed laws is that they acknowledge that there is more to the commission of prostitution than contractual consent. Choice matters. The defendant’s volitional consent should be assessed before issues of culpability and justification are resolved. Volitional consent lies at the heart of the reform; it is the element that divides those who can lay claim to the new laws and those who cannot. Reform excises coerced or forced prostitutes from prosecution, appeasing groups that have long argued prostitutes should be treated more humanely. The goal of liberating those who have become victimized in work they did not choose is the cornerstone of prostitution’s modern legal reforms. Perhaps as more states enact and revise reformed prostitution laws, a greater number of individuals may claim their benefits.