An Unholy Trinity? Non-Consent, Coercion and Exploitation in Contemporary Legal Responses to Sexual Violence in England and Wales

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In a liberal society, the law’s regulation of sexual behaviour is – or at least should be – driven by a desire to strike an appropriate balance between the positive and negative aspects of sexual integrity.1 In more minimalist accounts, this entails granting individuals the freedom to engage in sexual acts wherever they appear to be voluntarily entered into, whilst protecting them from any sexual contact that has clearly been imposed upon them against their will. Such an approach delimits the terrain of state intervention into sexual decision-making and affords a primacy to the existence of tokens of agreement which are issued by parties in the absence of any obvious constraint (such as physical force or fraud).2 It provides a (deceptively) simple formula for maximising sexual autonomy that can be enforced by third parties with minimal

* An earlier version of this paper was presented on 14 January 2010 at the School of Laws, University College London. An abbreviated version was also presented at the Gerald Gordon Seminar on Criminal Law at the University of Edinburgh on 10 June 2010. I am grateful to participants and audience members at both events for their insightful contributions. With the usual caveats, my thanks are also due to Sharon Cowan, Clare McGlynn and Jane Scoular for their comments on an earlier draft.

1 For further discussion of sexual integrity and the role of the criminal law in its protection, see, for example, N Lacey, ‘Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law’ in Unspeakable Subjects: Feminist Essays in Legal and Social Theory (Oxford: Hart, 1998), 98–124.

2 For further discussion of so-called ‘minimalist’ approaches to consent, see, for example, A Wertheimer, Consent to Sexual Relations (Cambridge: Cambridge University Press, 2003).
levels of scrutiny. And yet, it is precisely for this reason that it has also been challenged by other commentators who emphasise the need to interrogate critically the concept of ‘voluntariness’ in this context. More demanding accounts have thus emerged, which seek to impose an evaluative dimension. These insist that individuals should be protected from harmful sexual interactions, and that this extends, in some circumstances, to interactions that have not been objected to, and may \textit{prima facie} appear to have been welcomed, by the parties themselves. What is required, under this approach, is a critical engagement with the contexts in which sexual choices are made, to ensure not only an absence of obvious constraint but also an absence of certain more subtle, but equally determinative, pressures and power relations, which can work to reduce a person’s (perceived) alternatives and/or undermine ‘wantedness’.\textsuperscript{3}

The law in this arena is required to tread a fine, and often precarious, line between respecting sexual self-expression – in the myriad circumstances and manners in which this might be operationalised – and protecting individuals from the abuses and violations that might (and, lamentably, too often do) occur between those who interact in intimate contexts. While, in principle, such a balancing approach may be largely unobjectionable, when attempts are made to translate this lofty ideal into detailed rules designed to regulate sexual decision-making in specific situations, complexity soon abounds. In everyday life, we make, or are denied from making, choices about our sexual behaviour in profoundly messy contexts, within which gender power dynamics, socio-economic stratifications, inter-personal relations and contradictory impulses of desire often coalesce. This constructs and constrains both our substantive decisions as well as our perception of the options available to us to choose from. Only the most abstract and detached understanding of sexual autonomy can ignore this reality; and yet, once this fact is acknowledged, the standards against which voluntariness and harm are to be evaluated become both complex and contested. This, in turn, ensures that determining the proper boundaries of criminalisation in the arena of sexual integrity becomes controversial.

The phenomena of, and legal responses to, rape, prostitution and sex trafficking – in different, albeit often related, ways – have brought these complexities into sharp focus. Though the existence of a causal connection between them has been the source of considerable, and ongoing, dispute, a number of feminist commentators have convincingly argued that these phenomena are interrelated.\(^4\) In a context in which power, which remains disproportionately possessed by men, is both exercised and symbolically represented through sexuality, it is submitted that these (and other) instances of sexual violence are embedded within, and cannot be understood in abstraction from, patriarchal structures. Though the dynamics at play are diverse, and the perspectives engaged are multiple, it is argued that, collectively, these practices support a structural reduction of women’s sexuality to something alienable, which can be bought, owned or stolen by men. These practices are envisaged as inhabiting different, and often fluctuating, spaces on a continuum of sexual violence: while equating them too closely would ignore crucial distinctions in the structural, environmental and interpersonal conditions out of which they arise, acknowledging their connections – both to each other and to underlying patriarchal power dynamics – is seen to be crucial to their understanding and challenge.

Though this broader lens of structural analysis has thus informed much of contemporary feminists’ conceptual engagement, the fact that the nature of the constraints and harms to be considered in each context may vary markedly, and that the way in which individual women experience either unwanted intercourse or the commercial sale of sex may differ, means that providing an appropriate normative response (in law and beyond) has posed distinctive challenges. This, in turn, has led many researchers, practitioners and support-providers to narrow their focus to specific practices, dealing with these phenomena in relative isolation, notwithstanding that the everyday lives of many women are framed by a complex interaction of different, but not unconnected, forms of gender violence. This process has been bolstered, moreover, by the existence of regulatory and monitoring structures in academia and in legal practice, and by the dependency of many support organisations on state funding priorities, which have all promoted increased specialism.

Though not always couched in the feminist language of patriarchal power structures, it is apparent that this dialectical and dynamic relationship between the broader context, and specific manifestations, of sexual violence has also informed the development of contemporary legal policy responses. On the one hand, the law has developed targeted responses that seek to address each of these phenomena in distinctive ways and through reliance upon divergent regimes of criminalisation and/or state regulation. But at the same time, underpinning these *prima facie* divergent regimes, a number of parallel strategies have been used, and – as I will argue in this article – abused, in these contexts. More specifically, expansive concepts of non-consent, coercion and exploitation have been invoked at policy level in England and Wales. This policy rhetoric often appears to accept the existence of some kind of interconnecting continuum of sexual violence and acknowledges its link to certain broader socio-economic factors (albeit amongst other influencing conditions, such as deviance). And yet, this should not be taken to indicate that the laws developed in England and Wales to date are coherent or consistent across these arenas. Indeed, there are myriad ways in which contemporary policy responses to these phenomena are both connected and in tension with one another.

In the following sections, I will trace the nature of this relationship in further detail, exploring some of the key parallels and dissonances therein. I will suggest that the concepts of non-consent, coercion and exploitation, which are deployed – often differentially – in these contexts, are marked by a profound malleability. Their potential for expansive and inclusive (indeed, often over-inclusive) interpretation has lent the recent policy rhetoric in these areas a contextualised and progressive feel. However, when it comes to the law’s concrete implementation, I will illustrate and problematise the extent to which such policy rhetoric is frequently undermined, subverted or challenged, as restrictive interpretations that re-insert hierarchies of victimhood and require evidence of coercion narrowly defined prevail. I will suggest that this not only risks injustice in individual cases and distracts from crucial questions – about agency, constraint and construction – that need to be addressed, but also serves to insulate the law from internal critique. The use of ill-defined concepts such as consent, freedom, capacity, vulnerability or exploitation within official frameworks has masked the extent of this ‘double-speak’ and, in the final analysis, I
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will suggest that it is in this – and in the potential that this generates for confusion, duplicity and regressive outcomes – that the greatest commonality lies between the legal responses developed in these arenas to date.

Before embarking on that discussion, there are, however, a couple of important preliminary points that must be made. First, this article focuses exclusively on the law’s responses to female experiences of rape victimisation, engagement in prostitution or being trafficked for commercial sexual purposes. This is not to deny that men too are raped and increasingly involved in the sale of sex. Nor is it to dispute that women have been found to be complicit in rape or that some women purchase sex from male escorts. It is, however, to reflect the reality that rape, prostitution and sex trafficking continue to be, and are typically treated by policy-makers as, highly gendered phenomena. In the vast majority of cases, the person who is raped, prostituted or trafficked for sexual purposes is female while the person who rapes, buys sex, pimps or traffics is male.

Likewise, it is important to forewarn that the discussion here only addresses the position of, and responses to, adult women. Distinctions associated with age are, of course, arbitrary in many ways, and one should never underestimate the extent to which adult women who experience rape, prostitution or trafficking may have a history of childhood abuse, which cannot be neatly separated out from the circumstances in which they now find themselves. At the same time, however, the legal frameworks, policies and practices for responding to sexual activity involving children are often – and arguably quite rightly in many cases – different from those dealing with adults, with the role played by the concepts of consent, coercion and exploitation in particular diverging in significant

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ways. As such, they raise unique questions and merit their own distinct consideration.6

A Distinction Without a Difference?
Rape, Coercion and Non-Consent

Historically, the tendency to conceive of female chastity or fidelity in terms of (male) status value, together with a palpable unease at the prospect of a woman’s false allegation,7 led to the creation of national laws which defined the offence of rape to require the use of physical force to overpower the victim’s resistance. This entrenched in law an expectation that a victim of rape would resist unwanted contact with utmost vigour, and retained a trigger for criminalisation which lay in the forceful actions of the assailant, rather than in the wantedness or otherwise of the encounter from the victim’s perspective. But in the mid-nineteenth century, this insistence on force was formally abandoned in England and Wales in preference for a focus on the absence of the victim’s consent.8

Though not without its detractors,9 and certainly not without its problems when it comes to its implementation, the reliance upon consent and belief in consent to distinguish criminal wrongdoing


8 R v Camplin (1845) 1 Cox CC 220.

from unproblematic – and, in many circumstances, valorised – heterosexual interaction has been widely endorsed.\(^\text{10}\) This approach reflects the subjective experience of violation and disregard of sexual autonomy that victims often articulate. It formally acknowledges a reality in which many women do not fight back or resist their attackers as a result of fear, shock or a calculation that to do so would generate further harm, and in which many assailants do not use, or even threaten, violence since broader power relations, especially between those who have been intimate or acquainted, often make this unnecessary.\(^\text{11}\) At the same time, the precise way in which the concept of consent is to be understood here has remained, until recently at least, remarkably opaque.

There have been limited attempts to give definitional clarity to this concept. Judicial statements have indicated that it is the absence of consent rather than the presence of dissent that is crucial, and the Court of Appeal has asserted that there is a difference between consent and mere submission, with the latter being insufficient to absolve the defendant of liability.\(^\text{12}\) Beyond this, however, determination of the parameters of consent has been left to the jury, applying their good sense, experience and knowledge of human behaviour. It has been assumed that consent needs no detailed explanation since an ordinary person will know it


when she sees it. The difficulty with this, of course, is that the actual understanding of what counts as consent may still vary from person to person.

In an effort to improve the position, the Sexual Offences Act 2003 provided a statutory definition – a person consents if she agrees by choice and has the freedom and capacity to make a choice. In addition, it set out two circumstances in which consent will be deemed to have been absent – where the complainant is deceived by the defendant as to the nature or purpose of the sexual act or where the complainant is induced to participate as a result of the defendant’s deliberately impersonating another. The Act also stipulated circumstances in which consent will be presumed to have been absent, but where this presumption can be rebutted. This includes where the complainant was asleep, where force or the threat of force has been used, or where she has involuntarily ingested a stupefying substance, and the defendant knows that one of these conditions obtains.

The 2003 Act thus gives some additional structure in assessing the presence or absence of consent, and assists the jury in deciphering its meaning by indicating that it requires the existence of freedom, choice and capacity. But this does not necessarily take us much further forward. Given that we all operate with relative rather than complete sexual freedom, or at least we do wherever we wish to fit into social structures or preserve relationships, simply asserting that the complainant should have the freedom to make a choice tells us little about what sort, or level, of freedom suffices. Similarly, the insistence that the complainant has the capacity to make a choice about intercourse gives no guidance as to how

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13 In the Scottish case of *Marr v HMA* (1996 SCCR 696: 699), the trial judge, quoted by Lord Justice-Clerk Ross on appeal, expressed this judicial assumption particularly clearly: ‘the definition of consent is a common, straightforward definition of consent. It’s the common English word given its normal meaning. And I am afraid that is it. Consent is consent.’ For further discussion, see S Cowan, ‘All Change or Business as Usual? Reforming the Law of Rape in Scotland’ in C McGlynn and V Munro (eds) *Rethinking Rape Law*, 154–68.

14 Sexual Offences Act 2003, s 74.

15 Sexual Offences Act 2003, s 76.

16 Sexual Offences Act 2003, s 75.

capacity is to be assessed.\textsuperscript{18} For example, is it dependent upon the woman’s ability to understand the nature of sex, or its meaning and consequences? Is it determined by her ability to evaluate her choices, communicate her wishes, or – in the case of an intoxicated complainant – to conduct herself in line with her sober preferences? The courts have begun to grapple with some of these issues within the confines of individual cases,\textsuperscript{19} but clear principles capable of broad application have yet to emerge.

Though ill-defined in these regards, the Sexual Offences Act 2003 does offer the potential to embrace an expansive and progressive approach, which would require critical exploration of the circumstances in which a woman submits to intercourse, in order to ensure not simply that a token of agreement was communicated but that this was expressed in circumstances in which it can be seen as meaningful. Despite this, however, when it comes to the concrete implementation of these rape laws, it is apparent that this more progressive rhetoric about a woman requiring both freedom and capacity to make a choice, and indeed about the defendant’s belief in consent having to be reasonable in light of steps that he has taken to ascertain its existence, is often undermined. Although non-consent is a required element in many crimes, critics point out that, in rape law, it is operationalised in a context of suspicion of female sexuality.\textsuperscript{20} This has encouraged a disproportionate focus on the will and behaviour of the complainant at the expense of a focus on the defendant. Data on attrition suggests that women who behave in ways that challenge traditional gender norms, for example, by drinking alcohol, dressing provocatively or initiating intimacy, risk being deemed – by defendants, police, prosecutors and jurors – to have sent out signals of sexual interest that cannot then easily be revoked.\textsuperscript{21} Social attitude surveys illustrate the existence of a


\textsuperscript{19} See, for example, \textit{R v Bree} [2007] EWCA Crim 256 and \textit{R v C} [2009] UKHL 42.


pervasive belief that such complainants do, and should, bear at least some level of responsibility for their subsequent victimisation, which can often serve to mitigate condemnation of defendants.\textsuperscript{22} And even where such ‘victim-precipitation’ beliefs are not directly relied upon, the existence of flirtatious behaviour between the parties, for example, blurs the boundary between ‘rape’ and ‘normal sex’ in a way that troubles many third-party observers, encouraging them to rely on evidence of force and unequivocal physical resistance in order to re-assert the categorical distinctions that they (often ill-advisedly) presume to exist.\textsuperscript{23} Indeed, research on decision-making by police, prosecutors and (mock) jurors in rape cases indicates that, regardless of the fact that force no longer forms a doctrinal element of the offence, its use by the assailant, together with physical resistance and the suffering of non-trivial injuries by the victim, remain crucial evidential preoccupations, particularly in scenarios of acquaintance or intimate rape allegations, to the extent that securing a conviction in their absence is often difficult, if not impossible.\textsuperscript{24}

\textsuperscript{22} A number of such surveys have been conducted in the UK, yielding similar results. See, for example, Amnesty International, \textit{Sexual Assault Research: Summary Report (2005)} (available at \texttt{<http://www.amnesty.org.uk>}). At the same time, caution should be exercised in uncritically extrapolating from such social attitude studies to jury deliberations – see L Ellison and V Munro, ‘A Stranger in the Bushes or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study’ (2010) 13\textit{(4)} \textit{New Criminal Law Review} 781–801; and I Anderson and K Doherty, \textit{Accounting for Rape. Psychology, Feminism and Discourse Analysis in the Study of Sexual Violence} (London: Routledge, 2008).

\textsuperscript{23} See, further, for example, L Ellison and V Munro, ‘Of Normal Sex and Real Rape: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation’ (2009) 18\textit{(3)} \textit{Social and Legal Studies} 1–22; and H Firth, ‘Sexual Scripts, Sexual Refusals and “Date Rape”’ in M Horvath and J Brown, \textit{Rape: Challenging Contemporary Thinking} (Cullompton: Willan Publishing, 2009), 99–122.

Official rhetoric has thus jettisoned force in favour of a consent threshold in rape law, but the operation of that threshold depends upon the meaning attributed to surrounding concepts of freedom, choice and capacity, each of which lacks definitional clarity. This in turn has created a legal and policy regime that can both expand and contract substantially across time, context and political will. It is a regime that offers the potential to commit to a progressive, and enriched, conception of sexual agency, but at the same time retains the scope to condone more regressive, and minimalist, accounts. At the point of practical implementation, moreover, it is the latter response that has most often prevailed to date. Notwithstanding the broader concepts of freedom and capacity to make a choice, the centrality of overt coercion often continues to be reasserted to assist decision-makers in distinguishing acceptable from unacceptable forms of sexual aggression, and in identifying, in turn, those ‘deserving’ victims who have experienced ‘real’ harm.

The Cost(s) of Commercial Sex: Prostitution, Coercion and Exploitation

This pattern of developing a policy response that is potentially wide in remit, and apparently sensitive to conditions of patriarchy, but which can then be interpreted far more narrowly in practice, is also evidenced, it will be argued, in contemporary responses to prostitution in England and Wales. More so here than in rape law, there has been extended (and contentious) reflection on the structural factors that might obviate agency, promoting a focus on exploitation to delineate the problem and to determine a response. At the same time, this invocation of the concept of exploitation does not operate to the exclusion of reliance on concepts of non-consent and coercion; indeed, rather, its introduction often further complicates their meaning, both singularly and in inter-relation.

The position on prostitution in England and Wales remains largely as proposed by the Wolfenden Committee in the 1950s. Prostitution itself is not illegal, although many of the activities that facilitate or flow

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from both its street and off-street manifestations are criminalised. The Government’s 2004 Paying the Price consultation touted the possibility of a more holistic and decisive shift in prostitution policy, but its response declined to align itself wholeheartedly either with the legalisation approach adopted in the Netherlands, the decriminalisation approach recently adopted in New Zealand, or the abolitionist approach adopted, for example, in Sweden. Nonetheless, the overall tenor of this report and the so-called ‘Coordinated Prostitution Strategy’ that it gave rise to betrayed the policy-makers’ allegiance to a largely abolitionist philosophy. It produced a complex narrative comprised of a concern to protect communities from prostitution-related nuisance, to increase support for (or, some would argue, increase pressure on) women to leave prostitution, and to quash client demand for commercial sex. David Blunkett MP, the then Home Secretary, having previously asserted that the sex industry was a ‘sub-world of degradation and exploitation’ and a ‘terrible trade’ that ‘bedevils’ communities, introduced the consultation by insisting that prostitution per se involves exploitation, and that those who sell sex are often trapped in ‘a web of fear and deceit’.

A similar ideological perspective has also informed certain recent reforms in England and Wales, which were introduced via the Policing and Crime Act 2009. This Act makes it an offence to pay for sexual services, where those services are provided by a person who is subjected by a third party to exploitative conduct. Technically, this stops short of criminalising the purchase of all commercial sex, and does not dismiss the possibility that a woman might legitimately consent to sell sex in some circumstances (and that a client may, therefore, transact with

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26 This includes keeping a brothel (Sexual Offences Act 1956, s 33), causing, inciting or controlling prostitution for gain (Sexual Offences Act 2003, ss 52 and 53), soliciting for the purposes of prostitution (Street Offences Act 1959, s 1), and kerb-crawling (previously contained in Sexual Offences Act 1985, s 1, but now captured under the Sexual Offences Act 2003, s 51A).


30 Home Secretary’s Foreword to Paying the Price (London: HMSO, 2004), p 5.

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her without liability). The scope which this new law permits for such non-criminalised commercial sex transactions depends, however, on the meaning afforded to ‘exploitative conduct’. The Act does seek to provide some guidance here, stipulating that exploitation will involve deception, force, threats or any other form of coercion likely to induce or encourage prostitution. But this is of limited assistance.

As was evidenced above in the context of rape law, the concept of coercion in particular is capable of very broad, as well as very narrow, interpretation. To date, policy-makers have often tended to advocate an expansive (arguably over-expansive) approach, which makes the client’s avoidance of liability contingent on the woman enjoying a level of autonomy that is rarely experienced by any of us, and particularly not in the conditions of poverty, violence or addiction that may often surround prostitution. Baroness Howarth, for example, insisted during House of Lords debates on the Bill that the offence would, and should, cover the purchase of sex from a woman who engages in prostitution because she is poor and needs the money for her children. Reliance on the Baroness’ particular example may be problematic in a context in which the Act appears to require the existence of an exploitative third party to whom the conduct can be attributed. Guidance issued by the Home Office on these provisions affirms the need for an identifiable third-party coer-cer, but otherwise appears to support the Baroness’s wide interpretation, indicating that coercion is exercised where a person purposely exploits another’s vulnerabilities to incite or encourage their prostitution, and noting that these vulnerabilities could exist by virtue, amongst other things, of that person’s young age, their drug or alcohol dependency, history of victimisation, irregular or precarious immigration status, economic disadvantage, low social status or social exclusion.

Further, the Home Office supported the Court of Appeal’s assertion in *R v Massey* that a person who engages in prostitution as a result of emotional blackmail from a partner, or because someone has held out ‘the lure of gain or the hope of a better life’, can also be seen to have been coerced into engaging in prostitution, thereby now inducing client liability.

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35 *R v Massey* [2007] EWCA Crim 2664, per Toulson LJ at [20].
Such applications envisage a very wide remit for coercion and exploitation, which in turn risk over-inclusive and over-protectionist outcomes in individual cases where the dynamics at play (both structural and inter-personal) are more complex. At the same time, however, the benefit of this approach – in principle – is that it has the potential to acknowledge the difficult circumstances experienced by many women who engage in prostitution and to open up for critical interrogation the impact which those constraints may, or may not, have on the exercise of meaningful agency in relation to the sale of sex.

In this way, the policy rhetoric in this arena can be seen to parallel that in relation to rape under the Sexual Offences Act 2003 where a broad interpretation, grounded in contextual and structural considerations of freedom and capacity, is also potentially available. As the above discussion indicates, however, practice in the rape arena suggests that a far more restrictive approach is often likely to be adopted. In the context of prostitution, the question becomes one of whether there might also be reason to think that, the more grand claims of policy-makers notwithstanding, an interpretation which re-inserts a focus upon force or coercion narrowly defined, is also likely to prevail. Although these new prostitution laws are still in their infancy, there are indicators to support this prediction.

For one thing, while policy discourses around the provisions to criminalise clients support a broad approach to assessing the prostitute’s consent, it is a more restrictive conceptualisation that underpins another of the Act’s major initiatives, which introduces a new regime for dealing with women convicted of soliciting under the Street Offences Act 1959. Courts are now enabled to order such a woman to attend three meetings (in a six-month period) with a ‘supervisor’.36 These meetings are designed to address the causes of her prostitution and to find ways of ceasing her engagement in it in the future. But a woman who fails to attend meetings without reasonable excuse will be summonsed back to the court, which must then punish the original offence through other means, taking account of the extent to which she has (or presumably has not) complied with this rehabilitation.

Like its demand-criminalising counterpart, this disposal regime appears to support the presumption that prostitution is not genuinely chosen and would be abandoned enthusiastically were alternatives

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36 Policing and Crime Act 2009, s 17, amending Street Offences Act 1959, s 1.
available to those involved. At the same time, however, the prospect of imposing further censure upon those women who fail to comply with these rehabilitative meetings (either in relation to the soliciting that triggered the so-called ‘engagement and support order’ or in relation to future soliciting charges thereafter) ‘renders the notion of voluntarism highly questionable’ in this context.37 This is a strategy that seeks to ‘responsibilise’ the individual sellers of sex,38 but it underestimates the difficulties of imposing ‘order’ onto the frequently chaotic lives experienced by sex workers and distracts attention from the structural failure of the state to provide the material resources necessary as a prerequisite to such personal change. In the context of drug treatment orders for sex workers, for example, concerns have been expressed that women ‘are being asked to “stabilise” their lives by stopping their drug use while they remain in destabilised situations in relation to their housing and economic needs’.39 Despite this, the underpinning logic re-affirms that those who are not willing, or not able, to be helped, and in particular those who refuse help on the basis that they ‘choose’ to continue in prostitution – for whatever reason – are villains rather than victims. It follows that they should be held accountable for their decision to sell sex, and seen as agents in their own prostitution, who are to be punished for their transgressions.

This approach is problematic for a number of reasons. Such punishment is likely to be counter-productive, further limiting prospects for seeking routes out of sex work in the future.40 Moreover, at the


conceptual level, it supports the dubious distinction between deserving and undeserving victims that was also evidenced in the context of rape: this time by re-inserting a consent threshold in relation to rehabilitation. This, in turn, creates a legislative mixed message that subverts and undermines the overarching policy rhetoric, which formally insists on the existence of will-sapping constraint in prostitution. In so doing, it suggests potential for confusion and contradiction between policy and practice.

Such potential is amplified, moreover, by the fact that – controversially – this client offence operates on a strict liability basis. Those who are uneasy at this departure from normal standards of criminal mens rea will be able to reduce their concerns by demanding that, in practice, exacting standards are imposed on the forms of force, coercion, deception or threats capable of rendering the prostitute subject to exploitation.

The experience of other jurisdictions, where similar regimes have been implemented, certainly suggests low levels of enforcement. In Sweden, for example, where a ban on the purchase of all sex is in operation, it has been argued that many police officers continue to ignore such transactions or to trivialise clients’ criminality by issuing half-hearted reprimands.41 Likewise, in Finland, which has operated a strict liability offence for those who pay for sex from trafficked or procured prostitutes since 2006, there have been notably few prosecutions.42 At this early stage in the law’s operation, the possibility cannot be ruled out that police forces or individual officers in England and Wales will enforce their powers with greater vigour. This may well give rise its own difficulties, increasing surveillance and control over those involved in more visible forums of commercial sex at the expense of others in which


42 These comparative experiences led Paul Holmes MP to point out during the Commons debates on the Policing and Crime Bill that ‘such measures do not have a very good track record… and magistrates and judges in this country have expressed considerable doubt about achieving prosecutions using that concept’, Hansard, HC Deb, 12 November 2009, at col 392.
the forms of exploitation involved may be more serious, or exposing all prostitutes to greater risks by simply altering the conditions under which transactions take place. At the same time, it is clear that, in a UK context in which there is a large and established sex industry, the resources needed to apply the new laws on client demand according to their broadest possible interpretation would be substantial. It would also require a significant shift in both the mentality and operational practice of many UK police forces that have historically pioneered and defended the use of tolerance zones and a moderate response to what are considered to be well-managed brothels. Reflecting on this, Commander Gibson, Head of the Metropolitan Police’s Anti-Trafficking Unit, explained to the Home Affairs Committee that ‘there is a sense in which there is a tolerance of a certain level of prostitution in society. That is not just true of policing; it is true of the whole society’, and opined that a law criminalising the clients of controlled prostitutes may prove ‘very difficult to enforce’ as a result.

In practice, those who lack either the will or the resources to engage with these changes will be able to avoid, or at least substantially reduce, the pressure to do so by interpreting exploitation narrowly, so as to depend on force, deception or overt coercion. In this way, a pattern paralleling that identified in the context of rape law may also emerge:

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44 Although the precarious legal position of prostitution, and the fact that much of it is conducted in private, makes securing reliable statistics on the scale of the UK sex industry difficult, various estimates are available. A mapping exercise carried out by the UK Network of Sex Work Projects in 2005/6 estimated that there were between 50,000 and 80,000 female sex workers in the UK, of whom 28 per cent were street workers (Briefing Re: Criminal Justice and Immigration Bill and Review of Demand (Paying for Sexual Services) (London, 2008), discussed in H Kinnell, Violence and Sex Work in Britain (Cullompton: Willan, 2008), 67).

while in prostitution, the averred central concept is exploitation, and in rape it is consent, in both cases, at the level of implementation, force or overt coercion may remain pivotal. Significantly, moreover, just as the ambiguity associated with the concepts of choice, freedom and capacity in rape law allowed this narrower approach to be adopted without disruption of, or challenge to, the policy discourses within which the offence is framed, so too in the context of prostitution, the ambiguity associated with the concept of exploitation serves to mask divergent interpretations. This in turn generates an illusion of complementarity between policy and practice, as practitioners continue to invoke the language of exploitation to refer to its far narrower conceptualisation, and so appear to be in dialogue with policy-makers whilst in fact speaking past one another. It is a similar problem, I would argue, which has also plagued reliance on the concept of exploitation in recent national and international responses to sex trafficking, to which I will now turn.

Slavery, Sex or Both? Trafficking, Exploitation and Non-consent

Though far from a new phenomenon, people trafficking activity has been the focus of renewed policy attention in recent years. It arises in a highly politicised context within which agendas associated with organised criminality and moral panics relating to illegal migration are influential.46 This has compounded the difficulties of defining and responding to this activity, which are brought about by its highly variable and often complex modes of operation. In broad terms, international people traffickers capitalise on global socio-economic disparities to facilitate migrants’ entry into destination countries. In exchange, they benefit from migrants’ labour or sexual services on arrival, and/or ‘sell’ the opportunity to benefit from this to a third party. The instances of people trafficking with which the media and policy-makers are often most interested are masterminded by organised criminal networks: they rely on the use of kidnap, deception or force in the recruitment stage, involve illegal entry into the destination country (often with

falsified documents), and expose vulnerable victims to servitude, control, debt bondage, hardship and physical and/or sexual violence upon arrival. But there are many patterns of behaviour, potentially classifiable as people trafficking, which do not fit this model. The facilitating networks involved may be localised and/or comprised of personal acquaintances or community figures. A migrants’ entry into and residence within the destination country may be perfectly legal. Their labour may be deployed in an industry that is perfectly legitimate (such as agriculture, factory, restaurant or domestic work). And where the migrant is put to work in an illicit industry (for example, the sex trade), she may have known about this in advance and agreed to it.47 This does not mean, of course, that she may not have harboured a more positive expectation in relation to the conditions of work, types of services to be provided, rates of pay or duration of indenture to the trafficker. Indeed, the trafficker may have encouraged this misconception. But it does suggest that the levels of agency and choice are highly variable here – and so too, it seems, are the types of treatment and levels of control that may be experienced on arrival.

A major factor in framing recent anti-trafficking responses in England and Wales, and elsewhere, has been the UN Optional Protocol on People Trafficking, which was opened in 2000. Article 3 of this insists that trafficking involves, by definition, the exploitation of persons; and this definition was also adopted in the subsequent Council of Europe Anti-Trafficking Convention.48 In line with this, ss 57–59 of the Sexual Offences Act 2003 make it an offence to move a person into, out of or within the UK for the purposes of commercial sexual exploitation. Here, the fact of having worked as, or having it intended that one would work as, a prostitute apparently suffices to establish exploitation.

And, in contrast to the provisions on UK labour trafficking, set out in the Asylum and Immigration (Treatment of Claimants) Act 2004, there is no mention of the need for force, threat or deception. In both of these regards, however, it can be argued that the domestic response developed to date is problematic. Defining the exploitation in sex trafficking by reference to the exploitation in prostitution is circular, and largely unhelpful in a context in which there are ongoing, and highly polarised, debates about the merits and demerits of the sale of sex. In addition, the fact that force is presumed – or alternatively its absence is rendered irrelevant – only in relation to sex trafficking suggests a prioritising of prostitution over other forms of exploitative labour. While this speaks to the ‘special relationship’ between prostitution and trafficking acknowledged in the UN Protocol, it sits at odds with a formal UK policy of complementarity.

As with recent prostitution policy initiatives, much of the difficulty with contemporary anti-trafficking responses in England and Wales lies in their formal reliance on a ‘fuzzy’ concept of exploitation. This is perhaps unsurprising in a context in which such prostitution reforms have often been specifically justified by policy-makers on the basis of (a particular interpretation of) international and regional anti-trafficking obligations. Asserting that a practice is exploitative and defining an offence by virtue of this does little to address pressing questions about what the objectionable essence of exploitation involves; and as Alan Wertheimer puts it, this risks deploying the concept as a ‘mere rhetorical placeholder for expressing disapproval’.

Must a person be harmed in order to have been exploited, for example, or can a person be exploited while simultaneously gaining as a result of a transaction? Must a person be forced or coerced to have been exploited or can a person be exploited despite her full consent? Must the coercion be inter-personal or can it also be structural in nature? These are crucial questions in the context of people trafficking, where agreement to the recruitment, movement and/or prostitution may have been present, but where a person’s options might


have been radically curtailed by economic necessity and social disem-
powerment; and where variable conditions and remuneration on arrival
mean that some women may see themselves, and be seen by others, as
better off – at least in some regards – as a result of their migration and
prostitution than they would have been had they stayed at home.51

But much contemporary policy has either side-stepped or fudged
these questions. Article 3 of the UN Protocol, despite stating that exploi-
tation is at the heart of trafficking and stipulating that the consent of
the victim to this exploitation shall be irrelevant, indicates that this will
only be the case where that consent has been secured as a result of threat,
coercion, fraud, deception, abuse of power, abuse of vulnerability or
the provision of payments or benefits to a controlling third party. This
effectively re-inserts the relevance of consent by maintaining that there
will be some circumstances in which the consent of the migrant will be
operative, removing from her the status of a victim of exploitation.

Of course, the concept of abuse of vulnerability in this Protocol could
be interpreted broadly to encompass the vast majority of cases, includ-
ing within its remit financial need, or the influence of family members,
for example. This interpretation appears to have been supported by the
Council of Europe Anti-Trafficking Convention, which explains that
abuse of vulnerability includes abuse of any situation in which a person
has no real and acceptable alternative to submitting to the abuse, and
stipulates that this may be as a result of any kind of physical, psychologi-
cal, emotional, family related, social or economic vulnerability.52 While
this points in the direction of an expansive and contextualised inter-
pretation, akin to that which – as discussed above – is also potentially
available at the policy level in relation to both rape and prostitution, it
leaves the crucial question of what constitutes a ‘real and acceptable’
alternative inadequately addressed.

51 See, further, V Munro, ‘Exploring Exploitation: Trafficking in Sex, Work and Sex
Work’ in V Munro and M Della Giusta (eds), Demanding Sex: Critical Reflections on
the Regulation of Prostitution (Aldershot: Ashgate, 2008); and V Munro ‘Of Rights and
Rhetoric: Discourses of Degradation and Exploitation in the Context of Sex Trafficking’
52 Paragraph 83, Explanatory Report – Action Against Trafficking in Human Beings,
16.V.2005 (Warsaw: Council of Europe Treaty Series No 197), available online at
<http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_
planatory+report&pr=Internet_D&prox=page&rorder=500&rrprox=750&rdfreq=500&
rwfreq=500&rlead=500&rdepth=250&sufs=1&rorder=r&mode=&opts=&cq=&sr=&id
=495e60e319>.
Vanessa E Munro

This, in turn, creates an opening for value-judgments, which are exercised from a privileged and distanced vantage point, to influence concrete outcomes. In a context in which irregular migration attracts considerable censure in the UK, there is reason to suspect that such judgments will tend towards a more restrictive approach. A number of human rights and asylum organisations have expressed ongoing concerns about the frequent failure of criminal justice and immigration practitioners properly to identify victims of trafficking: a failure which results in the victims’ expedited removal from the UK and return to home countries where their vulnerability may now be amplified.\(^{53}\) Indeed, a recent report has criticised the UK’s over-reliance on the discretion of officials who ‘receive minimal training’ and rely on ‘flawed legal guidance’, and who appear to put ‘more emphasis on the immigration status of the presumed trafficked person, rather than the alleged crime committed against them’.\(^ {54}\)

Policy statements notwithstanding, there is also evidence that those who respond to trafficking on the ground continue to construct hierarchies depending upon the level of overt coercion or deception that preceded the commercial sexual activity. This was reflected, for example, in a comment made by a senior police officer during fieldwork in the UK that I conducted a few years ago:

…the true victim who has been coerced and intimidated and is there doing something they don’t want to do, should have all the support and help we can give them…but there’s an awful lot of people that don’t fit into that category, that are victims to a degree, but I think they have to take some of the responsibility for them being in that position themselves, and at the time they wanted to come here.\(^ {55}\)


\(^{54}\) Anti-Trafficking Monitoring Group, *Wrong Kind of Victim*, at p 9.

That this remains an ongoing problem has been affirmed by the most recent Anti-Slavery report which concludes that ‘too often…the system creates a narrow, legally dubious, interpretation of a victim…[I]n numerous cases reviewed by the research, the authorities concluded that as the person concerned agreed to come to the UK for work, they could not have been trafficked, despite the fact that the deception and abuse should…render such consent irrelevant’.56

In this sense, then, the response to sex trafficking can be seen to parallel that which has been traced in both the rape and prostitution contexts. Though the respective forums and responses have distinctive characteristics, in each there has been a shift in policy discourse towards more expansive and holistic assessments of agency. Such approaches purport to jettison reliance on an abstract or tokenistic approach to consent, and to move beyond an obsession with establishing non-consent through the presence of force or overt coercion, in some cases going so far as to formally declare consent to be irrelevant, and focusing instead on exploitation. But in each context, this policy is at risk of being undermined by a lack of conceptual clarity, which in turn permits an ongoing commitment at the level of practice to hierarchies of victimhood that depend upon the level of the woman’s prior awareness of and submission to the activity, and that require evidence of force, deception or coercion narrowly defined, in order to establish a harm.

Towards an Alternative Outcome: Candour, Context and Critical Inquiry

There are a number of reasons why policy rhetoric that invokes broad notions of freedom, choice or non-exploitation may be useful in the context of sexual violence, particularly in terms of increasing the impact of gender-based, structural challenges and calls for reform. Equally, however, attempts to implement the fullest reach of these concepts risk being overly-protectionist, not to mention unrealistic. None of us operate with absolute freedom in the choices we make – whether about sex or any other matter.

The constraints and constructions that inform our decision-making come from a range of sources: and some will be both more welcome and

56 Anti-Trafficking Monitoring Group, *Wrong Kind of Victim*, at p 12.
more subtle than others. Moreover, at some point in our social engagements, all of us will be used, at least in part, as a means to another person’s end. To disregard any token of sexual consent that is issued in a context constrained by interpersonal or circumstantial pressures, or in which another person may disproportionately benefit as a result, is unfeasible; and to do so in a context in which a woman engages in sex in anticipation of benefits that she has critically endorsed as valuable is undesirable. Such an approach does not secure a fitting balance between the positive and negative aspects of sexual integrity. Instead, it risks paralysing women’s agency by trivialising their experiences and dismissing the ways in which they might negotiate options in their own circumstances. It also overstates the prospects for women’s untrammeled autonomy in any post-patriarchal world that we might achieve.

At the same time, this does not mean that we should tolerate any tendency at the level of practical implementation to revert to an extremely narrow understanding. We are not faced by an all-or-nothing choice here. On the contrary, the challenge is to engage with the messiness and complexity of the middle ground. Careful negotiation is required between rhetoric and intention, aspiration and implementation, mythical ideal and empirical/political reality. In order to understand and evaluate the frames and content of this process properly, we need to reduce the uncertainty that plagues current responses, bringing policy and practice into more genuine dialogue. It is only by doing so that we can hope to avoid the conceptual slippages between coercion, non-consent and exploitation that have too often been evidenced in recent UK responses to rape, prostitution and sex trafficking.

Policy shifts towards a richer understanding of agency are to be welcomed, since they offer the potential to investigate behind the existence of a token of agreement, to interrogate the conditions under which it was issued and its consequences in terms of a woman’s safety and integrity, as well as the extent to which she has engaged critically with the process and outcome of decision-making. But this journey of inquiry cannot demand unfettered freedom or autonomy in order to validate consent – for if it does, it will be no surprise that it is not engaged with meaningfully by those tasked with on the ground implementation. We need to find ways of articulating parameters for the concepts of choice, freedom, exploitation and so on, whilst recognising that how they will play out in individual cases will be heavily contingent on the concrete circumstances involved.
Our starting point should be to pay attention to the location and perspective of the woman – taking her seriously when she insists that, in the context of her own life, with the conditions on choice under which she operates, she has made decisions that, to her, weave together in a life narrative that is non-alienating. But at the same time, we must remain alert to situations in which, for a number of personal or circumstantial reasons, she might token agreement to a sexual exchange that she does not in fact endorse. Thus, while the presence of certain types of constraining circumstance – including poverty, displacement or a dominating partner – should put us on alert to the possibility that a person’s submission or token of consent may not be a genuine expression of choice, it should not be presumed that agency is absent simply by virtue of the fact of constraint.57

Such an approach acknowledges constraint and construction, without surrendering a woman to them, and without reducing the urgency with which we should challenge the broader distributions of social opportunity/capital that limit the choices of some individuals/groups more than others. It is an approach that lacks the apparent simplicity of a blanket finding of exploitation or, conversely, of choice in the absence of coercion, but it is one which demands that policy-makers and practitioners engage more concretely with one another, and more closely with the realities of women’s daily lives. It will still give rise to considerable complexity, for example, in terms of dealing with a woman’s adaptive preferences, not to mention translating this idea of endorsement into a mechanism that the law, as a notoriously blunt instrument, can usefully accommodate. But in rape cases where the question is increasingly one of ‘when does yes mean yes?’, in prostitution where there are heated debates over the extent to which selling sex can be entered into voluntarily and in sex trafficking where these debates are elevated by migrant women’s travel to the UK in the hope of securing a better life by engaging in the commercial sex trade, these are complexities that must be faced up to rather than ignored.

Concluding Remarks

In writing about *Current Legal Problems*, there is perhaps greater latitude for raising thorny questions to which the author does not purport to have the answers. Of course, it could be objected that the issues raised in this article are not really problems at all, or at least not problems of an abiding nature. It might be insisted that they simply reflect the fact that we are dealing here with new pieces of legislation and that, as with any statute or policy, the inherent vagueness of language and concepts entails that there will be a period of uncertainty pending development by the courts. There is, it has to be said, some truth in this – over time, the courts may well refine the parameters of these concepts, imposing upon practitioners more demanding standards, or alternatively explicitly narrowing the meaning of broad legislative provisions. Equally, however, it is clear that this cannot, and will not, resolve all of the difficulties and tensions implicated in these contemporary responses. The problems identified here go beyond the more routine difficulties associated with statutory interpretation, not least since the provisions and the surrounding policy rhetoric rely on concepts that are themselves deeply philosophically contentious.

What is more, and more problematic, such concepts are often defended on the premise that they are non-contentious, basic and familiar, and so require no further elaboration. In the context of sexual violence, the enterprise of giving guidance on the scope and meaning of these concepts will be complicated, and this tendency for policy-makers to deny its necessity has given judges (and practitioners) little incentive to embark upon it.

Demanding more of policy and practice in this arena will be an ongoing challenge. It will require us to engage explicitly with difficult questions, for example, about where to draw the boundaries between bad, immoral and illegal sex. It will also require us to reflect critically on what we can realistically hope to achieve through legal regulation. Significant changes are required both in institutional cultures and community norms – and such changes are rarely, if ever, secured exclusively through legal mandate.58 But

58 A number of commentators have emphasised the limits of law, and of legal reform; See, for example, C Smart, *Feminism and the Power of Law* (London: Routledge, 1989). For a recent defence of the relevance of law in the context of prostitution in particular, see J Scoular, ‘What’s Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work’ (2010) 37(1) *Journal of Law and Society* 12–39.
greater clarity in relation to the concepts of consent, coercion and exploitation – as invoked in statutes and policy – can reduce the terrain of ambiguity within which competing, and often reactionary, agendas are preserved. It can highlight and, in turn, impose a burden of justification upon, non-conformant practices. While the potential for misrepresentation to portray a façade of legal compliance can never be eliminated, well-crafted laws can reduce its scope, and calling practitioners to account for their implementation, or lack thereof, may assist in the emergence of fresh understandings.

The malleability of concepts of choice, freedom, exploitation and coercion have made them politically expedient in contexts, such as prostitution and trafficking, in which campaigners are polarised on how to conceptualise, frame and respond to the activities involved. Their progressive feel has also made them useful in the context of rape where there has been much criticism of conviction rates, tempered by evidential and fair trial concerns for defendants, as well as by acute sensitivity to the criminalisation of ‘normal’ heterosexual seduction practices, which still position women as sexual prey and men as sexual hunters. At the same time, the potentially broad and typically ill-defined remit of these concepts has created the opportunity for ‘double-speak’ and fostered complacency amongst those who, seeing the same notions invoked by different stakeholders, do not interrogate the meanings relied upon. That a more restrictive practice has been permitted to operate in the confines of purportedly broader policy frameworks should not, therefore, disguise the extent to which this is a tension that seriously undermines the law’s progressive potential; indeed, its operation ‘under the radar’ within these frameworks should be recognised as making it all the more troubling, and in need of critical review.