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COOPERATIVE RAPE

Gabriel M. Glasser*

In 1991, two men forced a teenager off of a main road and into an abandoned house, where they beat her with their fists, cut her with broken glass, and alternated between holding a shard of glass to her throat and raping her.¹ At Defendant Taylor’s trial, the Court applied a “sexual battery by multiple perpetrators” statute, which enhanced the defendant’s sentence from a second-degree felony (punishable by up to fifteen years’ imprisonment) to a first-degree felony (punishable by up to thirty years’ imprisonment).²

In contrast, consider the following hypothetical: Suppose that only one perpetrator, Phillip, forced the teenage victim, Victoria, off of a main road and into an abandoned house. Once inside the house, Phillip attacked Victoria, resulting in the same injuries that Taylor inflicted on his victim: a “contusion[,] swollen cheek[,] laceration on her neck, and multiple linear lacerations to both forearms.”³ However, Phillip did not rape Victoria, but rather threatened to kill her if she did not return to the main road and prostitute herself.⁴ Victoria—visibly beaten and distraught—stood on the side of the road. Jones, a passerby, then approached and propositioned Victoria. He ignored the tears, bruises, and blood, led Victoria back into the abandoned house, and committed a penetrative sex act on Victoria.

In both instances, extreme coercion enabled the sexual penetration of a victim, two offenders were involved, and each offender needed the other to accomplish the resulting harm.⁵ Because Defendant Taylor’s offense involved multiple perpetrators, he faced up to thirty years’ imprisonment as a rapist. In the hypothetical case, Phillip would likely face a severe penalty: up to fifteen years’ imprisonment for aggravated battery, five years’

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¹ Taylor v. Florida, 619 So. 2d 1017, 1018 (Fla. Dist. Ct. App. 1993).

² FLA. STAT. § 794.023 (1991); Taylor, 619 So. 2d at 1018; see also FLA. STAT. § 775.082(3)(b), (d) (2017).

³ See Taylor, 619 So. 2d at 1018.

⁴ In this proposal, “prostitute” broadly refers to any person who participates in sexual acts as part of a financial transaction.

⁵ Phillip’s actions enabled Jones’ nonconsensual sex acts for Phillip’s financial gain, which, in turn, relied upon Jones’ cooperation. See *Concerted Action*, BLACK’S LAW DICTIONARY (10th ed. 2014).

imprisonment for coercing another to become a prostitute, or even stiffer sentences under state or federal human trafficking laws.⁶

Significantly, Jones—who knowingly, or at least recklessly, committed the penetrative sex act on a victim subject to extreme coercion by another—would face less than one year’s imprisonment, if any imprisonment; pay some fines; and participate in a rehabilitative program.⁷ The law views Jones as merely a “john.”⁸ He cannot be charged as an accomplice to Phillip, unless he intended to promote or facilitate Phillip’s crimes of aggravated battery, coercing another to become a prostitute, or human trafficking.⁹ The facts here do not suggest that Jones cared whether Phillip battered, coerced, or trafficked the Victoria. However, he did know, or was at least aware of the substantial risk, that someone had harmed Victoria to coerce her compliance to the penetrative sex act, and that is extremely culpable behavior. This disconnect between culpability and punishment forms the basis of this proposal.

To capture Jones’ culpability, legislatures must criminalize “cooperative rape.” Cooperative rape occurs where one perpetrator coerces a victim into prostitution;¹⁰ and another perpetrator, knowing or aware of the substantial risk that coercion was used, commits a penetrative sex act on the victim. As applied to the hypothetical, Phillip coerced Victoria into prostitution; and Jones, ignoring the coercion, or at least the obvious signs of such coercion, committed a penetrative sex act on Victoria. While existing law captures Phillip’s culpable behavior, criminalization of cooperative rape would capture Jones’ participation in what amounts to a rape, rather than an illicit transaction. Further, criminalization of cooperative rape would acknowledge that Victoria survived a rape, rather than willingly participated in prostitution.

⁶ See 22 U.S.C. §§ 7102, 7109 (2018); FLA. STAT. §§ 775.082(3)(d), 784.045(1)(a)(2), 787.06(3)(b), 796.04 (2018).

⁷ See FLA. STAT. §§ 775.082(4)(a), 775.083(1)(d), 796.07(5)(a)(1) (2018). For consistency, both *Taylor* and the hypothetical were analyzed under Florida law, but this disconnect exists nationally. See, e.g., ALA. CODE § 13A-11-9 (2018); CAL. PENAL CODE § 647.1 (Deering 2018); N.Y. PENAL LAW §§ 70.15(2), 80.05(2), 230.00 (Consol. 2018).

⁸ “John” is shorthand for one who engages a prostitute. The term “emphasizes the temporary namelessness granted patrons in the context of prostitution . . . [T]he anonymity of prostitution offers an escape from accountability.” Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes’ Patrons*, 49 VAND. L. REV. 1525, 1529–30 (1996).

⁹ “By definition an accomplice must be a person who acts with the purpose of promoting or facilitating the commission of the substantive offense for which he is charged as an accomplice.” *Accomplice*, BLACK’S LAW DICTIONARY (10th ed. 2014) (quoting MODEL PENAL CODE § 2.06 annot. (AM. LAW INST. 1997)).

¹⁰ This proposal focuses on coerced prostitution, but the framework may be expanded to encompass other situations.

This proposal will show that the societally normalized transaction between a prostitute and a john sometimes conceals an underlying rape, and that this concealment allows some johns to escape punishment that matches their culpability. The proposal offers a solution by advancing the elements of cooperative rape. In doing so, the proposal reviews the current state of coercion in rape law and in prostitution, the current relationship between culpability and sentencing for perpetrators in the sex trade, and the argument that criminalization of cooperative rape will result in better proportionality of culpability to justice.

Most simply defined, “rape” is a penetrative act perpetrated without the victim’s consent. “Consent” is best defined as “a person’s willingness to engage in a specific act,” which may be inferred, established, withdrawn, or overridden by communication, action, inaction, or behavior.¹¹ A recent Model Penal Code Tentative Draft provides clear examples of factors a fact-finder might consider in determining consent, such as prior history between the parties, displays of affection, intoxication, or incapacitation.¹² As Schulhofer put it: “Ordinary citizens know what it means to have permission, express or implied, and they know that it is unacceptable to take liberties with someone’s person or property without permission.”¹³ Furthermore, coercion, just like physical force, precludes consent.¹⁴

My proposal would only criminalize knowledge, or recklessness as to the risk, of extreme coercion: force or the threat of force. The majority of jurisdictions already recognize coercion as a form of force, or at least as invalidating consent.¹⁵ The most restrictive definition, which is nearly

¹¹ MODEL PENAL CODE § 213.0(4) (AM. LAW INST., Tentative Draft No. 2, 2016). An alleged victim’s “willingness” is a factual question to be determined in the usual contextual, totality of the circumstances fact-finding inquiry. *See id.*

¹² MODEL PENAL CODE § 213.0(3) cmt. (AM. LAW INST., Tentative Draft No. 2, 2016) (commenting on relevant factors to a fact-finder’s inquiry into consent).

¹³ Stephen J. Schulhofer, *Consent: What It Means and Why It’s Time to Require It*, 47 U. PAC. L. REV. 665, 681 (2016).

¹⁴ *See, e.g.*, MODEL PENAL CODE § 213.0(3) cmt. (AM. LAW INST., Tentative Draft No. 2, 2016) (indicating that consent must be “voluntary,” that is, “freely given” rather than a result of duress, extortion, or some other cognizable pressure).

¹⁵ *See, e.g.*, MODEL PENAL CODE, §§ 213.0(3)(e), 213.1 cmt. 2 (AM. LAW INST., Preliminary Draft No. 5, Sept. 8, 2015). However, a minority view fails to recognize coercion as force in rape cases. *See* MODEL PENAL CODE, § 213.1 cmt. (AM. LAW INST., Preliminary Draft No. 5, Sept. 8, 2015) (listing and contrasting state statutes). The minority view results from the historical emphasis on physical force and the sufficiency of a victim’s resistance, rather than the victim’s consent. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 17.3(a), at 1134 (6th ed. 2017). The historical emphasis demanded scientifically uncharacteristic behavior from victims and anticipated violent force in rapes committed by strangers, which are the least common sort of rape. *See* Rebecca Campbell, Professor of Psychology, Michigan State University, Lecture at Lewis & Clark Law School: The Neurobiology of Sexual Assault: Implications for the Legal System’s Response to Rape Survivors (Dec. 3, 2012) (transcript available at <http://www.nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx>); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected*

universally accepted, includes express or implied threats of physical force as coercion.¹⁶ Although traditionalists look to physical resistance and progressives look to whether the victim's will was overcome,¹⁷ threats of physical force suffice as solid legal ground for this proposal. Notably, implied threats are equally accepted grounds because force is merely a sufficient condition for rape, not a necessary one, as evidenced by the fact that “[n]ineteen states have eliminated a force requirement altogether.”¹⁸

Turning to the sex trade, coercion is a driving force in some forms of prostitution. The intersection of coercion and prostitution is very clear in some respects and hotly debated in others.¹⁹ This proposal is meant to address perpetrators that are culpable for the most coercive forms of prostitution, but not yet captured by current law.

Human trafficking presents the clearest examples of coercion in relation to the sex trade.²⁰ Congress enacted the Trafficking Victims Protection Act (TVPA),²¹ and its subsequent amendments,²² to address this serious problem. Accordingly, sentencing for offenses involving sexual abuse of trafficked persons reflects the culpability of perpetrators by enabling imprisonment “for any term of years or life” for a trafficker.²³ However, the TVPA does not

Rapists, 17 VIOLENCE & VICTIMS 73, 78 (2002), <http://www.davidlisak.com/wp-content/uploads/pdf/RepeatRapeinUndetectedRapists.pdf>.

¹⁶ See MODEL PENAL CODE, §§ 213.0(3)(e); 213.1 cmt. (AM. LAW INST., Preliminary Draft No. 5, Sept. 8, 2015).

¹⁷ Compare LAFAVE, *supra* note 15, with *State v. Brooks*, 317 P.3d 54, 64–65 (Kan. 2014).

¹⁸ MODEL PENAL CODE, § 213.1 cmt. (AM. LAW INST., Preliminary Draft No. 5, Sept. 8, 2015).

¹⁹ Compare Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 308 (2011) (arguing that prostitutes have not voluntarily chosen their work but are unfortunates with “no real options in a sex-discriminatory economic setting”) and Lauren Hersh, *Prostitution Is Not Just Another Job*, PROSTITUTION RES. & EDUC. (Mar. 30, 2016), <http://prostitutionresearch.com/2016/03/31/prostitution-is-not-just-another-job/> (“Prostitution is inevitable. Prostitution is about choice. Prostitution is empowering. These are the myths that those with a vested interest in the sex trade want you to believe.”), with Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes’ Groups, Law and Feminist “Truth”*, 4 COLUM. J. GENDER & L. 26, 38 (1994) (discussing “prostitution as work,” which prefers a laissez-faire perspective of freedom to prostitute).

²⁰ See, e.g., *United States v. Cortes-Meza*, 411 F. App’x 284, 286 (11th Cir. 2011) (describing allegations of a conspiracy that began with promises of legitimate immigration and job opportunities, and ended with coercion into prostitution through violence, assertion of debts, and other pressures).

²¹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

²² Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. See Lindsay Strauss, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL’Y 495, 500–04 (2010) (discussing how each amending act built upon the law to progress toward addressing domestic trafficking of all people for forced labor in addition to the forced prostitution of women and children).

²³ 18 U.S.C. § 1590(a) (2018).

label the trafficker a rape facilitator, nor does it encompass the john's culpable behavior.²⁴ State human trafficking laws similarly focus on the perpetrator of the “force, fraud, or coercion.”²⁵

Other forms of prostitution may involve lesser forms of coercion, but, provided that the coercion involved violence or the threat of violence, cooperative rape would encompass them. “American culture generally portrays actual prostitution as an illegal institution practiced largely by desperate, young, drug-addicted female streetwalkers controlled by abusive pimps.”²⁶ While this oversimplification does not capture all iterations of prostitution, “streetwalkers,” meaning “prostitutes [who] solicit customers outdoors,”²⁷ often are the victims of serious coercion. Although human traffickers and pimps are legally distinguishable,²⁸ Elrod points out that “prostitution and sex trafficking are inherently linked.”²⁹ This is the result of human traffickers and coercive pimps taking advantage of the difficulty in distinguishing, at a distance, autonomous prostitutes from coerced victims.³⁰

“Street prostitution is considered the lowest level of prostitution,” and nearly 60% of streetwalkers worked for a pimp.³¹ Streetwalkers are often “kept subservient by pimps” and face great risk of continuing victimization.³² Significantly, “[80%] of street-based prostitutes interviewed had experienced or been threatened with violence while working[,] police did not take their complaints seriously and . . . 27% actually experienced violence at the hands

²⁴ *But see* Andrew Hall, *The Uniform Act on Prevention of and Remedies for Human Trafficking*, 56 ARIZ. L. REV. 853, 882 n.210 (2014) (indicating that some advocates have argued that in some instances a john may be prosecuted as a trafficker).

²⁵ *See, e.g.*, FLA. STAT. § 787.06 (2016).

²⁶ ANISE K. STRONG, *PROSTITUTES AND MATRONS IN THE ROMAN WORLD* 201 (Cambridge Univ. Press 2016).

²⁷ Daria Snadowsky, *The Best Little Whorehouse Is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217, 232–33 (2005).

²⁸ *See generally* John Elrod, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961 (2015). Elrod's article mainly focuses on the similarities of traffickers and pimps, thus, recognizing them as two distinct groups, and arguing for a more liberal construction of coercion regarding both crimes. *Id.* Elrod noted, “most johns seeking sex are willing to overlook any possibility of coercion in exchange for a lower price,” but did not directly address the problem of johns committing sex acts on such coerced victims. *Id.* at n.95 (citing GARY A. HAUGEN & VICTOR BOUTROS, *THE LOCUST EFFECT: WHY THE END OF POVERTY REQUIRES THE END OF VIOLENCE* 58 (2014)).

²⁹ *Id.* at 974–76. “[A] pimp functions as far more than just an agent for a prostitute—frequently, a pimp will also establish relationships with vulnerable individuals and work to recruit them into prostitution.” *Id.* at 978 (citing Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1023–29 (2013)).

³⁰ *See* Elrod, *supra* note 28, at 976–77.

³¹ Susan E. Thompson, *Prostitution: A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 225–26 (2000).

³² Snadowsky, *supra* note 27, at 233 (citing *Dinitz v. Christensen*, 577 P.2d 873, 875 (Nev. 1978)).

of police.”³³ The vast majority of streetwalkers face violence, or at least threats of violence,³⁴ and were threatened with a weapon, battered, and raped while prostituting.³⁵

Some prostitutes operate freely, or at least absent the sorts of extreme coercion discussed *supra*, and would not be encompassed by this proposal. Such prostitutes may exercise the right to choose or reject clients or participate in a regulated industry, and earn an annual salary rivalling middle-class forms of employment.³⁶ Some of these prostitutes work without a pimp and consider themselves more respectable than streetwalkers.³⁷ Furthermore, some feminists argue “prostitution can be a tool of empowerment” that enables economic freedom and sexual autonomy.³⁸ This proposal would not reach that class of prostitution.

Current law treats some rape-survivors as prostitutes, rape-facilitators as pimps, and cooperative-rapists as johns. Laws that address pimping tend to be proportional to culpability, but laws prosecuting johns do not. Generally, a human trafficker faces much more severe consequences than a streetwalker’s pimp, but johns face only misdemeanors.³⁹ The following table summarizes a representative, present punishment scheme.⁴⁰

Circumstance	Human Trafficker	Pimp	John
First Offense	20 years in prison	15 years in prison	1 year
Second Offense or Aggravating Factor	Life in prison	30 years in prison	5 years
Subsequent Offense or Aggravating Factor	Life in prison	30 years in prison, 10-year minimum	15 years

³³ *Revolving Door: An Analysis of Street-Based Prostitution in New York City*, SEX WORKERS PROJECT URB. JUST. CTR., <http://sexworkersproject.org/downloads/RevolvingDoorFS.html> (last visited Jan. 20, 2019).

³⁴ *Id.*

³⁵ Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS 33, 43 (Melissa Farley ed., 2003).

³⁶ *Coyote Publ’g, Inc. v. Miller*, 598 F.3d 592, 595–96 (9th Cir. 2010) (providing an overview of Nevada’s legal prostitution framework). Nevada’s regulation of prostitution is comparable to the ancient Roman system, in which the government taxed and protected prostitutes. STRONG, *supra* note 26, at 202; see Thompson, *supra* note 31, at 220.

³⁷ See Thompson, *supra* note 31, at 219.

³⁸ *Id.* at 217–18.

³⁹ See Heather C. Gregorio, Note, *More Than “Johns,” Less Than Traffickers: In Search of Just and Proportional Sanctions for Buyers of Sex with Trafficking Victims*, 90 N.Y.U. L. REV. 626, 637–39 (2015) (noting that some johns of trafficking victims have been prosecuted as traffickers, although most trafficking law is directed toward “pimps”).

⁴⁰ See 18 U.S.C. § 1590(a) (2018); FLA. STAT. §§ 775.082(3)(b), 796.05; (d); 796.07(5)(a) (2018).

Clearly, human traffickers and pimps face stern punishment; however, they escape the rape-facilitator label. Notably, pimps could be charged as principals under innocent-instrumentality accomplice liability, but johns would continue to evade appropriate punishment.⁴¹ The johns that this proposal targets would escape criminal liability under the innocent-instrumentality doctrine because they do not necessarily intend to commit nonconsensual sex acts, but rather intend to commit sex acts without regard to consent.⁴²

Johns must be prosecuted for cooperative rape when they commit penetrative sex acts knowing that the victim has been coerced into compliance or when they recklessly disregard indications of that fact. It has already been argued that “johns of trafficking victims [should be prosecuted] under legislation explicitly addressing this group,” and that “targeted legislation [should use] tailored *mens rea* standards and flexible penalties correlated to culpability.”⁴³ In terms of prostitution, although the line between coercive and voluntary prostitution may sometimes be blurred, in some scenarios signs of coercion will be so blatant that a john should be held accountable for ignoring them. This proposal only reaches such johns that act with a culpable *mens rea*. Specifically, cooperative rape captures johns that either knew their victim was subject to coercion or were reckless as to contextually obvious indications of coercion. Referring to the hypothetical, Jones committed penetrative sex acts on Victoria notwithstanding her tears, bruises, and blood, which clearly amounted to culpable and deviant conduct.

Accordingly, cooperative rape occurs when (1) a victim, such as Victoria, is coerced into prostitution by a pimp, such as Phillip; and (2) a john, such as Jones, knowingly or recklessly ignores the risk of such coercion preventing consent; (3) and commits a penetrative sex act on the victim. Significantly, where coercion is legally equivalent to physical force, such cooperative rape scenarios are more comparable to sexual battery by multiple perpetrators than an illicit transaction.⁴⁴

41 The innocent-instrumentality doctrine applies when the “person committing the physical acts that constitute the crime is (as the doctrine suggests) a tool of the coercive/manipulative party.” Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 431 n.21 (2008). For example, if a pimp coerced a victim into prostitution, and a john subsequently committed penetrative sex acts on that victim—without any indication that the victim was coerced and precluded from consent—the pimp would have caused a sexual assault. Specifically, the pimp caused a victim to be susceptible to nonconsensual sex acts, which he intended to occur by another person, who may lack the intent to commit a sexual assault. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.03(A)(2)(b) (7th ed. 2015).

42 See DRESSLER, *supra* note 41, at § 30.03(A)(3).

43 Gregorio, *supra* note 39, at 626.

44 Cf. FLA. STAT. § 794.023 (2018).

Application of cooperative rape requires only three steps: identifying the coercion; proving the perpetrator committed a sex act on the victim; and, the key to this proposal, identifying indicators that prove the john at least recklessly disregarded the consent-barring coercion while committing the sex act on the victim.⁴⁵ That is, the john “consciously disregard[ed] a substantial and unjustifiable risk,” which “involve[d] a gross deviation from [reasonable] conduct.”⁴⁶ Practically, this looks like Jones ignoring Victoria’s cuts, bruises, and tears. In such a scenario, the john and the pimp cooperated to accomplish a rape in that the john committed the penetrative sex act and the pimp restrained the victim via coercion.⁴⁷

This proposal will not subject “normal” men to criminal prosecution, but rather targets exceptional deviants.⁴⁸ A john without the requisite mental state for cooperative rape can simply demand that the prosecution prove the elements and argue that sufficient indicators of coercion were not present. The johns that would be successfully prosecuted under this proposal have at least recklessly disregarded the likelihood that a victim was subject to a sex act because of extreme coercion. Thus, the prosecution would have to prove to the fact-finder that the john noticed the victim’s pleas for help, bloody nose, bruised body, tears, or other indicators prior to the penetrative sex act. Johns that disregard such indicators grossly deviate from reasonable conduct.⁴⁹

Cooperative rapists are not widespread. In fact, Jones from the hypothetical displayed a rare sexual deviancy. In the United States, between 15% and 20% of men have paid “for sex at least once in their lifetimes.”⁵⁰ Although a 20% lifetime frequency may sound somewhat common, “only about 1%” of American men surveyed reported having paid for sex in the

⁴⁵ The last step presumes the victim was coerced; however, the element should not require that such coercion actually occurred because the emphasis is instead on the john’s *mens rea*.

⁴⁶ MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2015).

⁴⁷ Neither actor need act with specific intent, in that neither the pimp nor the john must intend for a nonconsensual sexual act to occur, *see id.* at § 2.02(2)(a); however, the pimp must be aware that the coercion was “practically certain” to cause rape, *see id.* at § 2.02(2)(b).

⁴⁸ Johns are often notably apathetic toward prostitutes suffering coercion. MELISSA FARLEY ET AL., MEN WHO BUY SEX: WHO THEY BUY AND WHAT THEY KNOW 16 (2009), <https://i1.cmsfiles.com/eaves/2012/04/MenWhoBuySex-89396b.pdf> (quoting a john as stating, “Some [prostitutes] are really made to or forced—like raped—and they find there is no other hope for them . . . I felt a little bit guilty when I was in saunas and massage parlours”).

⁴⁹ *See* MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 2015).

⁵⁰ *Percentage of Men (by Country) Who Paid for Sex at Least Once: The Johns Chart*, PROCON.ORG (Jan. 6, 2011, 3:00 PM), <http://prostitution.procon.org/view.resource.php?resourceID=004119>. Earlier studies had found up to 80% of American men have paid for sex, but those studies suffered from unrepresentative samples. *See* Martin A. Monto & Christine Milrod, *Ordinary or Peculiar Men? Comparing the Customers of Prostitutes with a Nationally Representative Sample of Men*, 58 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 802, 803 (2014).

previous year.⁵¹ Of that 1%, presumably at least some will have engaged in prostitution absent any indication that the victim was coerced. Thus, it is likely that cooperative rapists are an even smaller subset of that 1%.

Cooperative rapists are not the “average American Joe.” According to Monto and Milrod’s study, the average American john is white; between forty and fifty-nine years old; low income, yet working full-time; married; and, curiously, finds extramarital sex to be “always wrong.”⁵² The data available, according to Monto and Milrod, “do not support the idea that customers are peculiar men,” rather than merely a smaller percentage of the population than is commonly assumed.⁵³ However, nearly half of johns surveyed believed that prostitutes were generally victims of coercion.⁵⁴ To rephrase, or perhaps interpret, this data: johns makeup a small percentage of the population, and many of them readily admit that they have paid to commit sex acts on victims they believed were coerced into compliance.

These johns form a small percentage of the population and, importantly, draw enjoyment from committing sex acts on a victim that is an apparent victim of coercion. That is abnormal and dangerous. Such johns are culpable for more than a misdemeanor.⁵⁵ The current structure fails to match justice to the level of culpability in cooperative rape. The current punishment scheme seems to be based more on traditional patriarchal perspective and the mistaken belief that johns are our friends and neighbors, who are not causing any real harm.

Criminalization of cooperative rape will ensure that cooperative rapists are distinguished from johns. Referring back to the hypothetical, criminalization of cooperative rape enacts punishment for Jones proportional to committing a penetrative sex act on a nonconsenting victim, instead of participation in an arguably *malum prohibitum* illicit transaction with a prostitute. Criminalization of cooperative rape further denies Phillip the opportunity to present his crime as merely facilitating such an illicit transaction, rather than cooperating in a rape.

The problem described was not immediately obvious because American society is quick to blame prostitutes. For example, brilliant legal sources have

⁵¹ Monto & Milrod, *supra* note 50, at 807, 815.

⁵² *Id.* at 810–11 (Table 2).

⁵³ *See id.* at 816.

⁵⁴ Gregorio, *supra* note 39, at 637 n.43 (citing FARLEY ET AL., *supra* note 48, at 14, 16).

⁵⁵ For a first offense, such johns generally face community service, rehabilitative programs, and a maximum of one-year imprisonment. *See, e.g.*, FLA. STAT. §§ 775.082(4)(a), 775.082(9)(a)(3)(d), 796.07(2)(f), 796.07(5) (2018). This is comparable to most states, which tend to classify solicitation for prostitution as a second-degree misdemeanor or similar low-level violation or offense. *See* Richard A. Leiter & William S. Hein & Co., *50 State Statutory Surveys: Prohibited Consensual Sexual Activity*, 0030 SURVS.14 (2007).

described prostitution as a “victimless crime,”⁵⁶ organized prostitution and pimping statutes under “Offenses against Public Order and Decency,”⁵⁷ regarded pimps as much less culpable than human traffickers,⁵⁸ allowed johns to all but escape criminal liability,⁵⁹ and disguised victims as prostitutes, and treated them like criminals. However, as sexual assault law continues to evolve, criminalization of cooperative rape will legitimize victims’ understanding of their victimization and provide just consequences to perpetrators. Once this has occurred, and normalized in society, the coercion standard in cooperative rape may continue to track the progressive, more expansive definitions of coercion. Ideally, the final iteration of cooperative rape will protect any victim kept subservient by any threats that overcame that victim’s will.

⁵⁶ *Alexander v. DeAngelo*, 329 F.3d 912, 915 (7th Cir. 2003) (deciding a civil rights claim).

⁵⁷ MODEL PENAL CODE § 251.2 (AM. LAW INST. 2015).

⁵⁸ *Compare* 18 U.S.C. § 1590(a) (2018), *with* FLA. STAT. §§ 775.082(3)(b), 775.082(3)(d), 796.05 (2018).

⁵⁹ *Compare* FLA. STAT. §§ 775.082(3)(b), 775.082(3)(d) (2018), *and* FLA. STAT. § 796.05 (2018), *with* FLA. STAT. §§ 775.082(4)(a), 775.082(9)(a)(3)(d), 796.07(2)(f), 796.07(5) (2018), *and* FLA. STAT. § 775.082(3)(d) (2018).