

# Moral Crimes Post-*Mellouli*: Making a Case for Eliminating State-Based Prostitution Convictions as a Basis for Inadmissibility in Immigration Proceedings

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## INTRODUCTION

Beginning in 2014, the Obama administration issued a series of Executive Actions stating that it would shift the focus of immigration enforcement to removing individuals that posed a threat to “national security and public safety,” and thereby reduce immigration action against families and otherwise law-abiding non-citizens.<sup>1</sup> An unfortunate consequence has been an increase in deportations of individuals who have committed minor or non-violent offenses.<sup>2</sup> Donald Trump made promises throughout his

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1. Press Release, White House Office of the Press Sec’y, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

2. See HUMAN RIGHTS WATCH, A PRICE TOO HIGH: US FAMILIES TORN APART BY DEPORTATIONS FOR DRUG OFFENSES (2015), <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses>. Prior Human Rights Watch studies of deportations showed that of the 900,000 non-

campaign to deport two to three million immigrants with criminal backgrounds, suggesting that this trend will at least continue, if not increase.<sup>3</sup> Jeff Sessions, in his prepared remarks during his first trip to the border as Attorney General, focused on the threat posed by criminal aliens, stating “it is here on this sliver of land, where we first take our stand against this filth.”<sup>4</sup> He focused largely on those with gang affiliations and histories of violent crime, but also those who re-enter illegally, and more broadly, anyone with a “criminal history.”<sup>5</sup> This Comment focuses on the risk of deportation and inadmissibility for one particular group of non-citizens with criminal histories—those who have engaged in prostitution. Convictions for prostitution stand as a barrier to admissibility under the Immigration and Nationality Act (INA), either as a Crime Involving Moral Turpitude (CIMT),<sup>6</sup> or as evidence of a pattern of “engag[ing]

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citizens with criminal convictions deported between 1997 and 2007, seventy-two percent were deported for non-violent offenses. *Id.* (citing HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES (2009), [https://www.hrw.org/sites/default/files/related\\_material/forced\\_apart\\_charts\\_final.pdf](https://www.hrw.org/sites/default/files/related_material/forced_apart_charts_final.pdf)). The total number of deportations under the Obama administration has increased dramatically with Human Rights Watch noting an eighty percent increase between 2008 and 2014 in deportations of individuals with criminal convictions. *Id.* Despite this overall increase, in 2013, only twelve percent of deportees had committed a serious offense, suggesting that those with minor offenses continue to be the primary target of current immigration policy. *See id.*

3. Julie Hirschfeld Davis & Julia Preston, *What Donald Trump's Vow to Deport Up to 3 Million Immigrants Would Mean*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/us/politics/donald-trump-deport-immigrants.html>. Immigration advocates dispute Trump's claims that there are two to three million immigrants with criminal histories living in the United States. *Id.*

4. Jeff Sessions, Attorney General, Remarks Announcing the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement, Nogales, Arizona (Apr. 11, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed>.

5. *Id.*

6. 8 U.S.C. § 1182(a)(2)(A)(i) (2012).

in prostitution.”<sup>7</sup> The Board of Immigration Appeals (BIA or the “Board”) and Immigration Judges (IJs) apply what is known as the “categorical approach” to state convictions, to determine whether a state statute categorically aligns with a generic federal crime, such as a CIMT, as defined in the INA.<sup>8</sup> The categorical approach allows the IJ or BIA to look only at the statute of conviction, as written, rather than to the evidence or circumstances of conviction.<sup>9</sup> This simplifies the determination process, makes it more predictable for all parties, and prevents the government from digging into the trial record to find a basis for inadmissibility, but it also limits the IJ or BIA’s ability to consider mitigating factors.<sup>10</sup>

This Comment addresses the use of state-based prostitution convictions in immigration proceedings. It begins with an overview of the Board’s treatment of prostitution activity. It then presents two arguments that call upon the BIA and the Administrative Appeals Office (AAO) to reconsider the use of these convictions in immigration proceedings. First, it argues that CIMTs are defined by contemporary moral standards, which have shifted such that prostitution should no longer be viewed as morally wrong. Second, it addresses two recent developments in the categorical approach that have the potential to alter the use of prostitution convictions in immigration proceedings. These developments are (1) the 2015 Supreme Court’s decision in *Mellouli v. Lynch*,<sup>11</sup> which further restricted the application of the categorical approach; and (2) the consequences of that holding for the BIA in light of Attorney General Holder’s order, issued several months prior to the Court’s decision in *Mellouli*, requiring the BIA to clarify its analysis of CIMTs, and resolve a circuit court split

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7. *Id.* § 1182 (a)(2)(D)(i).

8. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

9. *Id.* at 1986.

10. *Id.* at 1987.

11. *Id.*

on the matter.<sup>12</sup> Finally, this Comment will consider the impact of these arguments on victims of trafficking who face barriers to qualifying for a T or U visa (the visas available to victims of human trafficking and victims of other qualifying federal crimes, respectively). While there is likely only a small number of victims who cannot meet the requirements of the T or U, they are nonetheless unjustly held accountable for prostitution-related convictions that can only be waived through the T or U visa application processes. Thus, even if they qualify for some other kind of status, their record of conviction resulting from their trafficking will remain a barrier to gaining lawful status. Ultimately, these arguments support the contention that the BIA, the AAO, and IJs should adopt a per se rule that prostitution convictions cannot serve as a basis for inadmissibility or removability.

#### I. ADMINISTRATIVE AGENCY PERSPECTIVES ON PROSTITUTION

This Part looks at several BIA decisions involving prostitution related activity and analyzes the BIA's handling of these cases. Section I.A describes a 1956 BIA decision and a 2009 AAO decision, both of which involved applicants raising duress defenses to their prostitution activity, and discusses the disparate outcomes handed down by the administrative entities adjudicating the cases. Section I.B discusses another recent BIA decision that indicates the BIA may be open to reconsidering its views on prostitution.

##### A. *Agency Responses to Duress Defenses Regarding Prostitution Activity*

In 1955, a woman referred to simply as "M" in her immigration record was placed in deportation proceedings after she admitted to having engaged in prostitution in Mexico for several months before arriving in the United

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12. See Silva-Trevino, 26 I. & N. Dec. 550, 550 (Att'y Gen. 2015) (vacating the opinion in Silva-Trevino, 24 I. & N. Dec. 687 (Att'y Gen. 2008)).

States.<sup>13</sup> Engaging in prostitution was then, and continues to be, a barrier to admissibility.<sup>14</sup> M appealed the deportation order, claiming that she was forced to engage in prostitution and “that her fall from grace was brought about by fraud, deceit, duress, and coercion.”<sup>15</sup> The BIA, in its decision, recounted the details of her testimony,<sup>16</sup> and a story emerged that today would likely be categorized as a form of human trafficking under the Trafficking Victims Protection Act (TVPA).<sup>17</sup> The Board’s decision states that M and her five siblings were orphaned, and it fell to M to provide for her family.<sup>18</sup> She was approached by two women at the restaurant where she worked in Magdalena, Sonora and was persuaded to move to Naco, Sonora to work as a waitress under the guise that she would earn more money.<sup>19</sup> Upon arriving in Naco, she was told that she owed a debt to those who arranged her travel.<sup>20</sup> She was forced to work in a brothel as a prostitute, yet she was never compensated enough to pay her debt or pay for meals.<sup>21</sup> She made several attempts to escape, but permanently escaped only after she had a promise of marriage from the man who later became her husband.<sup>22</sup> The Board believed M’s account, and accepted her duress defense, finding that “those to whom respondent was indebted reduced her to such a state of mind that she was actually prevented from exercising her free will through

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13. M–, 7 I. & N. Dec. 251, 251 (B.I.A. 1956).

14. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(12), 66 Stat. 163, 182–83 (1952).

15. M–, 7 I. & N. Dec. at 251.

16. *Id.* at 251–52.

17. Trafficking, as defined in the TVPA, includes inducing another person to engage in sex work through “force, fraud, or coercion.” 22 U.S.C. § 7101(b)(2) (2012).

18. M–, 7 I. & N. Dec. at 251.

19. *Id.* at 251–52.

20. *Id.* at 252.

21. *Id.*

22. *Id.*

the use of wrongful, oppressive threats or unlawful means.”<sup>23</sup> The Board relied on prior decisions involving duress and ultimately terminated M’s deportation order holding that “prostitution committed under duress would not support a charge laid under section 241(a)(1) of the Immigration and Nationality Act.”<sup>24</sup>

More recently, a 2009 decision by the AAO distinguished the BIA’s 1956 decision in *Matter of M-* from another case in which the applicant claimed she “engaged in prostitution under duress.”<sup>25</sup> The applicant had been convicted four times under New York State law for prostitution-related offenses.<sup>26</sup> The applicant claimed that she was coerced to engage in prostitution over a period of five years, and was made to believe that her family would be harmed if she did not comply.<sup>27</sup> Her attorneys argued that she was subjected to duress, and thus, was not inadmissible under the Board’s reasoning in *Matter of M-*.<sup>28</sup> The AAO disagreed, and distinguished *Matter of M-*, stating that it was a case in which the applicant admitted to engaging in prostitution, but had no convictions.<sup>29</sup> Here, the AAO reasoned that the record of convictions meant that a defense of duress was not applicable, but did not elaborate as to why this distinction was warranted.<sup>30</sup> Even so, the AAO waived the finding of inadmissibility on the grounds that the convictions had occurred over ten years before the application, and thus did

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23. *Id.*

24. *Id.*

25. [Identifying Information Redacted by Agency] Petition: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), 2009 WL 1742009, at \*2 (Dep’t of Homeland Sec. Jan. 16, 2009).

26. *Id.* at \*1.

27. *Id.* at \*2.

28. *Id.*

29. *Id.*

30. *Id.*

not present a bar to admission.<sup>31</sup>

These decisions are not easily reconciled, and it is not obvious from the written record why a duress defense should apply to one prostitution case, but not another. The 1956 decision evinces a concern that holding an individual accountable for an action forced upon them would be unjust.<sup>32</sup> Yet, it is also possible that the Board was largely influenced by the age of the applicant when she was forced into prostitution—the decision notes that she was under 18 at the time.<sup>33</sup> Another possible explanation is that the 2009 case followed the passage of the Trafficking Victims Protection Act of 2000.<sup>34</sup> That Act was intended to provide immigration options for individuals induced to provide labor or sexual services through force, fraud, or coercion.<sup>35</sup> The existence of a viable legal option for individuals who meet the federal definition of trafficking arguably vitiates the need for administrative fixes to promote justice.

#### B. *The BIA Acknowledges Changing Views on Prostitution*

There is no statutory definition of a Crime Involving Moral Turpitude, but the BIA has defined it as “an act which is per se morally reprehensible and intrinsically wrong or *malum in se*.”<sup>36</sup> The BIA has also described it as “an act of baseness, vileness or depravity.”<sup>37</sup> The determination is not based solely on “the seriousness of the offense nor the severity of the sentence imposed . . . . It is rather a question of the offender’s evil intent or corruption of the mind.”<sup>38</sup>

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31. *Id.*

32. M–, 7 I. & N. Dec. 251, 252 (B.I.A. 1956).

33. *Id.*

34. 22 U.S.C. § 7101 (2012).

35. 22 U.S.C. § 7101(b).

36. Serna, 20 I. & N. Dec. 579, 581–82 (B.I.A. 1992) (quoting Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980)).

37. *Id.* at 582 (quoting 37 Op. Att’y Gen. 293, 294 (1933)).

38. *Id.*

While the BIA and the Circuit Courts have found crimes to be CIMTs without evil intent,<sup>39</sup> it is generally accepted that some kind of willfulness is required.<sup>40</sup> Put simply, a CIMT “requires two essential elements: reprehensible conduct and a culpable mental state.”<sup>41</sup>

The Board’s 2014 decision in *Sehmi* offers insight into the BIA’s views on prostitution-related offenses.<sup>42</sup> In that case, the BIA clarified that the act of soliciting a prostitute was not morally distinct from the act of promoting, or working as a prostitute.<sup>43</sup> The Board found the applicant had committed a CIMT based on his solicitation convictions under Florida law.<sup>44</sup> However, the court noted

it has been many years since the Board has addressed, in a precedent decision, the issue of whether an offense involving prostitution represents a crime involving moral turpitude. In the intervening period, views regarding prostitution have indeed undergone a transformation in our society, and simple prostitution in some states has become a regulatory offense and is a quality of life crime to prevent public disorder.<sup>45</sup>

While the Board pulled back slightly from openly calling for the re-categorization of prostitution offenses as CIMTs—the Board upheld solicitation as a CIMT, citing to the difficulty of ensuring consent between parties and the risk of trafficking and related exploitation<sup>46</sup>—the discussion

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39. Lopez-Meza, 22 I. & N. Dec 1188, 1192–93 (B.I.A. 1999).

40. See Gonzalez-Alvarado v. INS, 39 F.3d 245, 246 (9th Cir. 1994) (“A crime involving the willful commission of a base or depraved act is a crime involving moral turpitude”); Grageda v. INS, 12 F.3d 919, 922 (9th Cir. 1993) (“[I]t is the combination of the base or depraved act and the willfulness of the action that makes the crime one of moral turpitude.”).

41. Silva-Trevino, 26 I. & N. Dec. 826, 834 (B.I.A. 2016).

42. *Sehmi*, 2014 WL 4407689, at \*7 (B.I.A. 2014) (unpublished, non-precedential decision).

43. *Id.* at \*6.

44. *Id.* at \*7.

45. *Id.*

46. *Id.*

indicates that the BIA may be open to new perspectives on prostitution convictions under immigration law. This Comment seeks to offer a justification for barring prostitution related offenses from being categorized as CIMTs. This justification is based on evolving moral standards, concerns of racial and gender bias in prostitution enforcement, and evidence indicating that the decision to engage in prostitution is frequently an economic decision, not a moral one, thereby undermining the basis for assuming evil intent from a prostitution conviction.

The remainder of this Comment addresses the two elements of CIMTs noted above—“reprehensible conduct and culpable mental state.”<sup>47</sup> Part II of this Comment seeks to address why prostitution is not per se morally reprehensible. Part III addresses the emergence of human trafficking vacatur laws and what these laws imply about the substantive and mental elements of prostitution convictions. In particular, Part III explains why state prostitution convictions may not incorporate the necessary criminal elements to qualify as CIMTs or as instances of “engaging in prostitution” under the INA.

## II. VIEWS ON PROSTITUTION IN THE UNITED STATES—PAST AND PRESENT

Views on prostitution have changed drastically since the early twentieth century. Even so, there is still significant stigma attached to sex work, and major racial and gender disparities evident in law enforcement efforts directed at prostitution. This Part discusses these changing views and circumstances. Section II.A provides a history of prostitution laws and societal views toward prostitutes in the United States. Section II.B describes the recent movement to legitimize sex work and promote the rights of sex workers, and the implications of this movement on the assumption that prostitution is a moral crime.

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47. See *supra* note 41 and accompanying text.

A. *A History of Prostitution in the United States*

Even in colonial America, prostitutes were viewed as a public nuisance—called out as “fallen women” who lacked virtue.<sup>48</sup> From the colonial period up through much of the nineteenth century, many states lacked prostitution laws, but criminalized the behavior under public lewdness and night walking statutes.<sup>49</sup> Before prostitution was formally criminalized by state statutes, the term “prostitute” had varied meanings beyond one who sold sex for money—it included women who had sex with men of a different race, or who traded sex for goods.<sup>50</sup> Prostitution was dealt with by community members through “sporadic and unofficial harassment.”<sup>51</sup> From mid-nineteenth century into the early twentieth century, several factors led to the statutory criminalization of prostitution. First, the formation of police departments and professionalization of policing passed the responsibility for maintaining social order onto police.<sup>52</sup> Next, the second wave of industrialization that expanded job opportunities for men, but not women, and the corresponding urbanization increased perceptions that prostitution was at “epidemic” levels.<sup>53</sup> Finally, the emergence of “social purity and abolitionist groups” concerned about societal morals and “white slavery” formed the basis of the Progressive Era movement to “abolish prostitution through the intervention of the state.”<sup>54</sup>

William W. Sanger authored a seminal study on the history of prostitution and included his own research of

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48. Elizabeth M. Johnson, *Buyers Without Remorse: Ending Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 721 (2014).

49. *See id.* at 720–21; RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900–1919*, at 2 (1982).

50. ROSEN, *supra* note 49, at 1.

51. *Id.* at 4.

52. *See id.* at 4–5.

53. *Id.* at 39.

54. *Id.* at 12–13.

prostitution in New York City in the late nineteenth century.<sup>55</sup> The assumptions inherent in his methodology are an indication of the morality of his time. Sanger's description of a young woman entering prostitution assumes that women are drawn to prostitution due to some deficiency of moral character and their own vanity, and that over time they become beyond repair:

Take, for example, the career of a female who enters a house of prostitution at sixteen years of age. Her step is elastic, her eye bright, she is the "observed of all observers" The *habitués* of the place flock around her, gloat over her ruin while they praise her beauty, and try to drag her down to their own level of depravity while flattering her vanity. As the last spark of inherent virtue flickers and dies in her bosom, and she becomes sensible that she is indeed lost, that her anticipated happiness proves but splendid misery, she also becomes conscious that the door of reformation is practically closed against her. But this life of gay depravity can not last; her mind becomes tainted with the moral miasma in which she lives; her physical powers wane under the trials imposed upon them, and her career in a fashionable house of prostitution comes to an end; she must descend in the ladder of vice.<sup>56</sup>

Sanger notes that perhaps the most important question in his survey is "What was the cause of your becoming a prostitute?"<sup>57</sup> He states that "the replies lay open to a considerable extent those hidden springs of evil which have hitherto been known only from their results."<sup>58</sup> Of the 2000 women surveyed, the two most common answers were "inclination" (513 responses) and "destitution" (525 responses).<sup>59</sup> Sanger writes that "'inclination' . . . can only be understood as meaning a voluntary resort to prostitution in order to gratify the sexual passion."<sup>60</sup> Other authors have

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55. WILLIAM W. SANGER, *THE HISTORY OF PROSTITUTION: ITS EXTENT, CAUSES, AND EFFECTS THROUGHOUT THE WORLD* (1858).

56. *Id.* at 453.

57. *Id.* at 488.

58. *Id.*

59. *Id.*

60. *Id.*

noted that it is unclear whether the respondents understood the meaning that Sanger attached to the response.<sup>61</sup> He assumes that this “passion” cannot be the sole motivation for women to enter into prostitution as that “would imply an innate depravity” and argues, “the full force of sexual desise [sic] is seldom known to a virtuous woman.”<sup>62</sup> Thus, she must be morally corrupted even before her decision to enter into prostitution, because no decent woman would chose such a life.

By the early twentieth century, perspectives had shifted slightly, or perhaps broadened, in that some women in prostitution were viewed as victims in need of saving and rehabilitation.<sup>63</sup> The view of prostitution as a form of “white slavery” was championed by nineteenth-century abolitionists, and found national acceptance with the passage of the Mann Act of 1910.<sup>64</sup> The Act established a means to penalize the perpetrators of this crime against women.<sup>65</sup> The term “white slavery” was apt not only because it distinguished the modern form from the Atlantic slave trade, but also affirmed the race-based and xenophobic assumptions of social reformers at that time.<sup>66</sup> These assumptions found support from medical professionals like Sanger, whose study indicated that the majority of prostitutes in New York City were recent immigrants and vectors of disease, supporting conclusions that prostitutes were largely an immoral, “evil outside force, infecting and

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61. HARRY BENJAMIN & R.E.L. MASTERS, *PROSTITUTION AND MORALITY: A DEFINITIVE REPORT ON THE PROSTITUTE IN CONTEMPORARY SOCIETY AND AN ANALYSIS OF THE CAUSES AND EFFECTS OF THE SUPPRESSION OF PROSTITUTION* 84 (1964).

62. SANGER, *supra* note 55, at 488–89.

63. *See* Johnson, *supra* note 48, at 722.

64. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)).

65. Mann Act of 1910, ch. 395, sec. 2, 36 Stat. 825 (criminalizing the act of bringing a person across state borders for the purpose of prostitution).

66. *See* ROSEN, *supra* note 49, at 49.

invading the body politic.”<sup>67</sup> The belief that prostitutes were primary vectors of disease led the United States to step up anti-prostitution enforcement near military bases to protect the moral and physical health of officers.<sup>68</sup> This practice was repeated in the time leading up to World War II, despite evidence that most soldiers contracted venereal disease from sex with women known to them—not prostitutes.<sup>69</sup> By 1925, every state had criminalized prostitution, though enforcement was often discriminatory<sup>70</sup> and some state statutes were gender specific.<sup>71</sup> Discriminatory enforcement of prostitution statutes was present even up into the 1970s.<sup>72</sup>

With the emergence of the gay rights movement in the 1970s, sex workers continued to find themselves labeled as “deviant,” and not deserving of the same rights that gay and lesbian individuals found themselves fighting so vigorously for.<sup>73</sup> The 1980s brought with it the AIDS epidemic, and sex workers found themselves again labeled as vectors of disease<sup>74</sup>—irresponsible and incapable of making sound decisions for themselves.<sup>75</sup> They were viewed as the primary culprits for infecting society (no matter that their clients were equally responsible for ensuring safe sex practices

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67. *See id.* at 10, 13, 49.

68. *Id.* at 34.

69. ALISON BASS, *GETTING SCREWED: SEX WORKERS AND THE LAW* 23 (2015).

70. Johnson, *supra* note 48, at 720 (discussing how some states prosecuted primarily women sellers of sex but not male sellers or purchasers).

71. *Id.* at 723 n.42.

72. *See, e.g.*, MELINDA CHATEAUVERT, *SEX WORKERS UNITE: A HISTORY OF THE MOVEMENT FROM STONEWALL TO SLUTWALK*, 70–71 (2013) (discussing how a San Francisco, California judge dismissed thirty-seven prostitution cases because police had arrested only women selling sex, but no male johns.)

73. *See id.* at 10–11.

74. *See* CHATEAUVERT, *supra* note 72, at 85–86; Priscilla Alexander, *Prostitutes Are Being Scapegoated for Heterosexual AIDS*, in *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* 248–63 (Frédérique Delacoste & Priscilla Alexander eds., 1987).

75. *See* Alexander, *supra* note 74, at 248.

through condom use).<sup>76</sup> Even the CDC opted to focus on high risk groups of people, rather than high risk behaviors, adding weight to the assumption that prostitutes, long viewed as a risk to the nation's moral fabric, also posed a threat to its health and safety.<sup>77</sup>

B. *Prevailing Views of Prostitution Undermine the Argument for Its Moral Reprehensibility*

In recent years, there has been increasing recognition of the rights of sex workers, and calls to decriminalize prostitution. This Section addresses this emerging view and the implications for continuing to treat prostitution as a moral crime. It also considers an argument that state courts have erased the *mens rea* requirement from prostitution criminal proceedings,<sup>78</sup> and posits how that erasure further calls into question the use of these convictions as a basis for inadmissibility as CIMTs.

1. Sex Work as an Economic, Not a Moral Choice

In August 2015, the International Council to Amnesty International passed a resolution asking the board to adopt a policy to promote the rights of sex workers through decriminalization.<sup>79</sup> This decision followed two years of research based on recommendations from the “World Health Organization, UNAIDS, and the UN Special Rapporteur on the Right to Health,” and incorporated input from international sex worker rights groups, anti-trafficking organizations, HIV/AIDS prevention organizations, women's

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76. *See id.* at 256.

77. *See* CHATEAUVERT, *supra* note 72, at 85–86, 94, 100.

78. *See* Amanda Peters, *Modern Prostitution Legal Reform & the Return of Volitional Consent*, 3 VA. J. CRIM. L. 1, 16 (2015).

79. Int'l Council, *Decision on State Obligations to Respect, Protect, and Fulfill the Human Rights of Sex Workers*, AMNESTY INT'L, <https://www.amnesty.org/en/policy-on-state-obligations-to-respect-protect-and-fulfil-the-human-rights-of-sex-workers/> [hereinafter Amnesty International Decision] (last visited Apr. 4, 2017).

rights groups, and LGBTQ rights organizations.<sup>80</sup> The International Council urged the International Board of Amnesty International to pursue decriminalization based on

[e]vidence that sex workers often engage in sex work due to marginalisation and limited choices, and that therefore Amnesty International will urge states to take appropriate measures to realize the economic, social and cultural rights of all people so that no person enters sex work against their will or is compelled to rely on it as their only means of survival, and to ensure that people are able to stop sex work if and when they choose.<sup>81</sup>

The Council urged that this position was consistent with Amnesty International's goals of recognizing and furthering the basic human rights of all people, and working to end discrimination in all its forms, further noting that discrimination is often a driving force behind the decision to enter into sex work.<sup>82</sup>

Following Amnesty International's announcement, a D.C. council member discussed putting forth a proposal calling for the decriminalization of sex work in the nation's capital.<sup>83</sup> New Hampshire has also considered decriminalization.<sup>84</sup> The proposed New Hampshire legislation would have removed sections from the state's prostitution and related offenses statutes that criminalize solicitation, provision, purchasing, or profiting from consensual commercial sex, while maintaining the

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80. *Global Movement Votes to Adopt Policy to Protect Human Rights of Sex Workers*, AMNESTY INT'L NEWS (Aug. 11, 2015), <https://www.amnesty.org/en/latest/news/2015/08/global-movement-votes-to-adopt-policy-to-protect-human-rights-of-sex-workers/>.

81. Amnesty International Decision, *supra* note 79.

82. *Id.*

83. Patrick Madden, *D.C. Councilmember Proposes Decriminalizing Sex Work*, WAMU (Aug. 14, 2015), [http://wamu.org/news/15/08/14/dc\\_council\\_member\\_proposes\\_decriminalizing\\_sex\\_work](http://wamu.org/news/15/08/14/dc_council_member_proposes_decriminalizing_sex_work).

84. Elizabeth Nolan Brown, *Prostitution Decrim Debated by New Hampshire Lawmakers*, REASON: HIT & RUN BLOG (Feb. 1, 2016, 11:00 AM), <http://reason.com/blog/2016/02/01/prostitution-decriminalization-debated-i>.

provisions criminalizing prostitution involving minors, and prostitution compelled through “force or intimidation.”<sup>85</sup> The proposal was the result of bipartisan efforts by three female legislators. In addition to numerous sex worker rights organizations dedicated to decriminalization,<sup>86</sup> the National Association of Social Workers (NASW), the professional organization for social workers in the United States, has taken a formal policy stance in support of decriminalization.<sup>87</sup>

Even before the Amnesty International decision, some U.S. municipalities had developed more realistic, human rights-focused responses to prostitution. In 2011, Seattle, Washington developed the nation’s first Law Enforcement Assisted Diversion (LEAD) program.<sup>88</sup> Designed primarily to deal with low-level drug offenders, it allowed police to choose to divert certain low-level offenders to services, rather than booking them post-arrest.<sup>89</sup> Those amenable to diversion are referred to case managers trained in harm-reduction principles, and who do not push abstinence as a primary goal for those with addictions issues.<sup>90</sup> The municipal government, police, and collaborating social service organizations opted to include those arrested for prostitution

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85. H.B. 1614-FN, 2016 Sess. (N.H. 2016) (proposing an amendment to N.H. REV. STAT. ANN. § 645:2 (Prostitution and Related Offenses)).

86. Examples include the Sex Workers Project, <http://sexworkersproject.org/>; Sex Worker Outreach Project, <http://www.new.swopusa.org/>; and Helping Individual Prostitutes Survive, <http://www.hips.org/>.

87. DARRELL P. WHEELER & ANGELO MCCLAIN, *Prostituted People, Commercial Sex Workers, and Social Work Practice*, in SOCIAL WORK SPEAKS: NASW POLICY STATEMENTS, (10th ed. 2015) [hereinafter NASW Sex Worker Policy].

88. KATHERINE BECKETT, SEATTLE’S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS 1 (2014) <http://static1.1.sqspcdn.com/static/f/1185392/24777541/1398287318543/2014-Lead-Process-Evaluation.pdf>.

89. *See id.* at 9.

90. *See id.* at 9, 11.

offenses among those eligible for diversion.<sup>91</sup> The city justified the program by noting that the use of arrests and convictions had done little to deter repeat offenders, and instead, had potentially exacerbated the problem by making it difficult for these individuals to access social services, housing programs, and employment due to their many criminal convictions.<sup>92</sup> Despite these shifts at the municipal and state levels, the United States remains “one of the few industrialized nations to criminalize prostitution.”<sup>93</sup>

These policy shifts are evidence of the evolution of societal views toward sex work and sex workers. The discourse surrounding these policies and legislative efforts centers on an understanding that sex work is sometimes a choice, and sometimes not—it can involve varying degrees of autonomy, risk, and violence. But most important, it recognizes that there are many underlying factors that lead people into sex work, such as poverty, addiction, abuse, and lack of viable employment opportunities, among others.<sup>94</sup> The choice is not inherently vile or depraved, rather, it can be a rational choice given available options and personal preference.

On the other side of the debate are those who express concern for women and men who engage in sex work based primarily on the assumption that all sex work involves coercion, and thus, all prostitutes are victims.<sup>95</sup> This seems

91. *See id.* at 9.

92. SUSAN E. COLLINS ET AL., LEAD PROGRAM EVALUATION: RECIDIVISM REPORT 4 (2015), <http://leadkingcounty.org/lead-evaluation>.

93. CHATEAUVERT, *supra* note 72, at 5. (“Sex work is legal in fifty nations, including Canada, Mexico, Brazil, Macau, the Netherlands, Austria, New Zealand, Israel, Germany, France, and England; it is legal with limitations in another eleven nations, including Australia, India, Norway, Japan, and Spain.”).

94. NASW Sex Worker Policy, *supra* note 87.

95. Catharine MacKinnon is among the proponents of this view. *See, e.g.*, Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 14 (1993). MacKinnon writes,

[a] recent study of street prostitutes in Toronto found that about ninety percent wanted to leave but could not. If they are there because they

to be the concern at the heart of the BIA's reluctance in *Ranjit* to definitively remove prostitution convictions as a basis for finding a CIMT.<sup>96</sup> But even this perspective on sex work does not support the conclusion that the decision to engage in sex work is an immoral one, rather, it views sex workers as being on the losing end of an institution that commodifies women and children for the sexual gratification of others.

In weighing the validity of the commodification perspective, it is essential to note the views of sex workers themselves in characterizing the work that they do and its social and economic value. First, it is important to note that sex workers do not live "outside" the rest of society, but in fact "typically have multiple roles . . . within family, more mainstream employment, educational institutions, and local organizations."<sup>97</sup> A 2005 study of thirty-seven sex workers by the Sex Workers Project (SWP) found that "[m]ost respondents entered the sex industry in times of financial vulnerability."<sup>98</sup> Others became involved due to addiction,<sup>99</sup> transgender discrimination, and other family and social

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cannot leave, they are sexual slaves. Need it be said: to be a slave is to be deprived of liberty, not to exercise it. To lack the ability to set limits on one's condition or to leave it is to lack consent to it

*Id.* As with the participants in Sanger's study, it is not clear that the respondents in the study MacKinnon referenced would attach the same meaning to their response that MacKinnon does.

96. See *Sehmi*, 2014 WL 4407689, at \*7 (Aug. 19, 2014) (unpublished, non-precedential decision).

97. JUHU THUKRAL ET AL., URBAN JUSTICE CTR., SEX WORKERS PROJECT, BEHIND CLOSED DOORS: AN ANALYSIS OF INDOOR SEX WORK IN NEW YORK CITY 18 (2005) [hereinafter BEHIND CLOSED DOORS].

98. *Id.* at 33.

99. JUHU THUKRAL & MELISSA DITMORE, URBAN JUSTICE CTR., SEX WORKERS PROJECT, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 31–32 (2003) [hereinafter REVOLVING DOOR]. It should be noted that the rate of addiction and homelessness were significantly higher for street-based sex workers than for indoor workers, suggesting that the experience and reasons for entering sex work vary by population. Compare *id.* with BEHIND CLOSED DOORS, *supra* note 97.

pressures including domestic violence.<sup>100</sup> In addition, many of the respondents did not regularly engage in sex work over long periods of time, but did so “in times of need.”<sup>101</sup> This points again to the fact that the decision to engage in sex work is not a moral decision, but an economic one. One respondent in the SWP report noted that the job provided her with financial stability.<sup>102</sup> Another respondent compared sex work to low wage work like waitressing, and noted that housewives provide childcare and sex to their husbands in return for financial support.<sup>103</sup> Thus, she did not see her work as much different from other low wage work, except that it paid better.<sup>104</sup> That is not to say, however, that sex workers are immune to the impact of stigma that the work brings with it—many respondents noted having “mixed feelings” about their involvement in sex work.<sup>105</sup> These perspectives of sex workers themselves contradict the assumptions underlying the work of Sanger, discussed above, and call into question the validity of relying on moral standards originally codified in the Immigration and Nationality Act of 1952<sup>106</sup> in assessing the economic decisions non-citizens (many of who are not authorized to work, and thus are prevented from working in legal sectors) make today to support themselves and their families.

The implications of discriminatory enforcement and violence toward sex workers, which often goes ignored because of their precarious legal status and assumptions about the moral worth of their work, are a true cause for concern. Sex workers experience high rates of violence, both

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100. See BEHIND CLOSED DOORS, *supra* note 97.

101. *Id.* at 38.

102. *Id.* at 34.

103. *Id.* at 33.

104. *See id.*

105. *Id.* at 35.

106. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

from customers<sup>107</sup> and police.<sup>108</sup> The NASW policy statement on Commercial Sex Work highlights several important facts that support a contention that enforcement of prostitution laws at the state level disproportionately impacts women, transgender women, and women of color.<sup>109</sup> Specifically, it cites to World Health Organization data that, demographically, commercial sex workers are ninety percent female, and of those women, ninety-two percent are women of color.<sup>110</sup> Customers are overwhelmingly male—approximately ninety percent.<sup>111</sup> This data reflects international trends in sex work, but U.S. based research points to a similar trend—that women of color are routinely profiled as sex workers.<sup>112</sup> A 2011 study involving 220 transgender male-to-female Latinas in Los Angeles, California, found that eighty percent had traded sex for money, food, or shelter at some point, with thirty-one percent identifying sex work as their primary form of employment.<sup>113</sup> Moreover, enforcement continues to be unequal, with johns receiving lighter treatment in certain municipalities than the workers themselves.<sup>114</sup> These disparities in enforcement

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107. BEHIND CLOSED DOORS, *supra* note 97, at 50–52.

108. *See* REVOLVING DOOR, *supra* note 99, at 36–38.

109. NASW Sex Worker Policy, *supra* note 87 (citing REGIONAL OFFICE FOR THE W. PAC., WORLD HEALTH ORG., SEX WORK IN ASIA 249 (2001)).

110. *Id.*

111. *Id.*

112. Noah Berlatsky, *Black Women Profiled as Prostitutes in NYC*, REASON (Oct. 1, 2014), <http://reason.com/archives/2014/10/01/nypd-profiles-sex-workers-too> (referencing a study by the Red Umbrella Project on Human Trafficking Intervention Courts in NYC). *See also* REVOLVING DOOR, *supra* note 99, at 35 (noting that women of color received more harassment from police than white women).

113. FRANK H. GALVAN & MOHSEN BAZARGAN, INTERACTIONS OF LATINA TRANSGENDER WOMEN WITH LAW ENFORCEMENT 1, 3, 4 (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Galvan-Bazargan-Interactions-April-2012.pdf>.

114. Nicholas Kristof, *Targeting the Johns in the Sex Trade*, N.Y. TIMES (Feb. 26, 2014), <http://www.nytimes.com/2014/02/27/opinion/kristof-targeting-the-johns-in-sex-trade.html>.

suggest that women of color and transgender women are more likely to suffer immigration consequences as a result of their participation in prostitution than white and cisgender women. The disparate impact on these women speaks in favor of removing prostitution as basis for inadmissibility, rather than continuing the current practice under an unproven assumption that criminalization protects victims of trafficking.

2. The *Mens Rea* Requirement for Prostitution Convictions Has Been Eroded, Thereby Undermining Their Categorization as CIMTs

In a recent piece of scholarship, Amanda Peters argues that prostitution offenses in the United States once incorporated a distinction between voluntary and involuntary prostitution that was lost over time, and consequently, the crime has devolved into a strict liability offense.<sup>115</sup> Presently, most courts adjudicating state prostitution statutes, look no further than “contractual consent” (i.e., did the accused party offer sexual services in exchange for compensation) and do not consider whether there was “volitional consent” (i.e. consent to engage in the illicit activity).<sup>116</sup> Peters contends that it is essential for courts to assess whether volitional consent is present because it serves as the “basis for appointing blame and moral culpability.”<sup>117</sup> In her view, the recent emergence of safe harbor laws, affirmative defenses, and vacatur/expunction laws that states have adopted in response to the TVPA has reintroduced the concept of volitional consent into criminal prostitution proceedings.<sup>118</sup>

An important question that remains is whether this

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115. Peters, *supra* note 78, at 16.

116. *See id.* at 11.

117. *Id.* at 13 (quoting Samuel Vincent Jones, *Human Trafficking Victim Identification: Should Consent Matter?*, 45 IND. L. REV. 483, 499 (2012)).

118. *See id.* at 35–38.

“volitional consent” has been reintroduced in such a way that can impact immigration proceedings. Because a CIMT necessarily involves some degree of willfulness, or *mens rea*,<sup>119</sup> strict liability crimes generally do not qualify as CIMTs, as criminal negligence is not sufficient.<sup>120</sup> Only certain limited crimes, such as statutory rape, qualify as CIMTs although they specify no *mens rea* requirement.<sup>121</sup> The fact that many state prostitution convictions may lack true volitional consent, calls into question whether they can reasonably serve as a basis for inadmissibility as CIMTs. If no meaningful element of “willfulness” is present in the statute by which the moral turpitude of the crime can be assessed, it cannot qualify as a CIMT.

This argument could only be applied on a case-by-case (or statute-by-statute) basis in immigration proceedings (as discussed in the following Part), but in conjunction with the argument outlined above—that the act of prostitution itself does not necessarily involve moral turpitude—it may provide a basis for categorically excluding certain prostitution statutes as a basis for inadmissibility under the INA.

### III. THE CATEGORICAL APPROACH, VACATUR LAW, AND STATE PROSTITUTION CONVICTIONS

Even if the BIA were to discontinue its categorization of prostitution-related offenses as CIMTs under the INA, “engaging in prostitution” would remain a basis for inadmissibility. This Part explores a potential argument that prostitution convictions should not serve as a basis for inadmissibility either as a CIMT or as proof of a pattern of “engaging in prostitution.” Following passage of the TVPA, it came to the attention of various human trafficking service providers that victims were often saddled with numerous convictions for prostitution offenses (as well as other

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119. See *supra* note 41 and accompanying text.

120. See *Perez Contreras*, 20 I. & N. Dec. 615, 618 (B.I.A. 1992).

121. See *Dingena*, 11 I. & N. Dec. 723 (B.I.A. 1966).

offenses) as a result of their trafficking, which prevented them from obtaining lawful employment once they left the trafficking situation. New York was the first state to pass a vacatur law to correct this systemic deficiency.<sup>122</sup> Many states have since adopted some form of vacatur or expunction law for trafficking victims. While useful for Trafficking Victims, these laws point to a deeper flaw in the criminal justice system—victims of trafficking, and other victims of coercion and duress are frequently convicted of crimes which they lacked the necessary intent to commit. This Comment argues that state vacatur laws for trafficking victims stand as legislative acknowledgment that the minimum conduct criminalized by state prostitution statutes does not meet the federal definitions of a CIMT<sup>123</sup> or “engag[ing] in prostitution,” and consequently, fails to satisfy the requirements of the categorical approach.<sup>124</sup> Stated differently, these statutes are proof of a realistic probability that the underlying prostitution statute criminalizes conduct (such as trafficking) that does not fall within the scope of a CIMT or “engaging in prostitution.” This argument is grounded in the Supreme Court’s recent analysis of the categorical approach in *Mellouli v. Lynch*. That decision, discussed in more detail below, narrowed the scope of the categorical approach and what inferences may be drawn from the underlying statute of conviction.

A. *The Supreme Court Narrowed the Application of the Categorical Approach in Mellouli v. Lynch*

Moones Mellouli was a Tunisian citizen who came to the United States on a student visa in 2004.<sup>125</sup> After receiving

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122. MELISSA BROUDO, SEX WORKERS PROJECT, VACATING CRIMINAL CONVICTIONS FOR TRAFFICKED PERSONS: A LEGAL MEMORANDUM FOR ADVOCATES AND LEGISLATORS 1 (2012), <http://sexworkersproject.org/downloads/2012/2012-0422-memo-vacating-convictions.pdf>.

123. 8 U.S.C. § 1182(a)(2)(A) (2012).

124. 8 U.S.C. § 1182(a)(2)(D) (2012).

125. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984 (2015).

master's degrees in economics and applied mathematics, he worked as an actuary and professor of mathematics at the University of Missouri-Columbia.<sup>126</sup> In 2011, he became a lawful permanent resident and was engaged to a U.S. citizen.<sup>127</sup> The year before, "Mellouli was arrested for driving under the influence and driving with a suspended license."<sup>128</sup> He was then found with four Adderall tablets hidden in his sock, and consequently, was charged with trafficking contraband in jail.<sup>129</sup> The charge was later reduced to a misdemeanor possession of paraphernalia charge, to which Mellouli pleaded guilty.<sup>130</sup> His attorneys made an effort to keep the description vague so as to avoid immigration consequences for their client—the complaint did not name the substance Mellouli had hidden in his sock, nor was it an element of the offense.<sup>131</sup> Nonetheless, after completing twelve months of probation, Mellouli was detained by Immigration and Customs Enforcement (ICE) and placed in deportation proceedings pursuant to 8 U.S.C. § 1227(a)(2)(B)(i) for having been "convicted of a violation of . . . any law or regulation of a State . . . relating to a controlled substance."<sup>132</sup> The BIA affirmed the order of the IJ, and the Eighth Circuit denied Mellouli's appeal.<sup>133</sup> The Supreme Court granted certiorari and subsequently vacated the decision of the IJ.<sup>134</sup>

The *Mellouli* decision clarified the approach used in immigration proceedings to assess whether state-level convictions qualify as generic federal crimes that would

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126. *Id.*

127. *Id.* at 1984–85.

128. *Id.* at 1985.

129. *Id.*

130. *See id.*

131. *See id.*

132. *Id.* at 1983–84.

133. *See id.* at 1985.

134. *See id.* at 1983, 1985.

render an immigrant inadmissible or deportable. This is referred to as the “categorical approach” which “looks to the statutory definition of the offense of conviction, not to the particulars of an alien’s behavior.”<sup>135</sup> Further, the categorical approach encompasses a “minimum conduct”<sup>136</sup> standard, under which the IJ must “presume that the conviction rested upon nothing more than the least of the acts criminalized.”<sup>137</sup> This standard emerged based on the language Congress chose to use in the INA—referencing inadmissibility based on convictions, not conduct.<sup>138</sup> Further, it has the benefit of simplifying the analysis that an IJ or the BIA must conduct during immigration proceedings and “promote[s] efficiency, fairness, and predictability.”<sup>139</sup>

The difficulty in Mellouli’s case centered around the fact that the record of conviction did not specify the drug Mellouli had concealed, and the Kansas State drug schedule did not perfectly match up with the federal schedule—that is, there existed a possibility that one could be convicted under Kansas State law for possession of a drug that would not be criminal under federal law. The government argued that because the Kansas schedule of controlled substances “substantially overlap[ped]” with the federal schedule, Mellouli’s state conviction was “relat[ed] to a controlled substance (as defined in section 802 of Title 21).”<sup>140</sup> Mellouli argued that because there were nine substances listed on the Kansas schedule that were not on the federal schedule, the government could not categorically show that his conviction was related to a federally controlled substance.<sup>141</sup> The Court

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135. *Id.* at 1986.

136. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013).

137. *Mellouli*, 135 S. Ct. at 1986 (quoting *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013)).

138. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i) (2012).

139. *Mellouli*, 135 S. Ct. at 1986–87.

140. *Id.* at 1984.

141. *See id.* at 1984.

ruled in favor of Mellouli, holding that the government must prove “a direct link between an alien’s crime of conviction and a particular federally controlled drug.”<sup>142</sup> The discrepancy between the state and federal drug schedule created a “realistic probability” that the Kansas law could lead to a conviction for crime that fell outside the scope of the activity defined in 8 U.S.C. § 1227(a)(2)(B)(i) and therefore, the conviction did not render Mellouli deportable. Instead, the Court found that the categorical approach required perfect overlap of the statutes in Mellouli’s case, because the record of conviction did not specify the drug, and the government could not show a direct link between the record of conviction and a federally controlled substance.

B. *Attorney General Holder Orders the BIA to Clarify Its Application of the Categorical Approach Regarding CIMTs*

Immigration advocates have hypothesized how the *Mellouli* holding, affirming a strict application of the categorical approach with respect to federal drug schedules, might be applied to other kinds of convictions that have implications for admissibility and removability, such as the INA’s CIMT provisions, or “engaging in prostitution,” for example.<sup>143</sup> The BIA, moving forward, will likely need to incorporate the *Mellouli* holding into both its revised approach to CIMTs and other applications of the categorical approach.

The *Mellouli* decision came at a time in which the BIA’s adjudicative process was arguably in flux. Just two months prior to the *Mellouli* decision, outgoing Attorney General Eric Holder issued an order to the BIA revoking a 2008 order from Attorney General Mukasey that had empowered the

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142. *See id.* at 1990.

143. *See* IMMIGRANT DEF. PROJECT, *MELLOULI V. LYNCH: FURTHER SUPPORT FOR A STRICT CATEGORICAL APPROACH FOR DETERMINING REMOVABILITY UNDER DRUG DEPORTATION AND OTHER CONVICTION-BASED REMOVAL GROUNDS* 13 (2015).

BIA to go beyond the record of conviction in assessing whether a state conviction qualified as a CIMT, and which had led to a circuit split.<sup>144</sup> The Mukasey order<sup>145</sup> advised the BIA to engage in the standard categorical inquiry to determine whether the statute necessarily involved moral turpitude, and then, if the Board was unable to arrive at a decision, it could employ a second step, termed the “modified categorical approach” that allowed the board to look to the record of conviction to determine if the individual was convicted of a CIMT.<sup>146</sup> Then, if the Board was still unable to determine if the crime constituted a CIMT, it was empowered to assess “any additional evidence the adjudicator determines is necessary or appropriate” to resolve the question.<sup>147</sup> The case that had generated the opinion, *Matter of Silva-Trevino*,<sup>148</sup> was sent back to the IJ, who looked to outside information and determined that the petitioner was inadmissible for having been convicted of a CIMT.<sup>149</sup> The BIA affirmed the IJ’s decision, but when the matter was passed up to the Fifth Circuit on appeal, the Court vacated the BIA’s decision, holding that Mukasey’s construction of the CIMT statute was not a permissible one.<sup>150</sup> In doing so, the Fifth Circuit joined four other circuit courts in rejecting Mukasey’s recommendation to look beyond the record of conviction.<sup>151</sup> In vacating Mukasey’s order, Holder advised the Board to address in future decisions the process for assessing CIMTs and to determine to what extent the modified categorical approach may be

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144. See *Silva-Trevino*, 26 I. & N. Dec. 550, 550 (Att’y Gen. 2015).

145. *Silva-Trevino*, 24 I. & N. Dec. 687 (Att’y Gen. 2008).

146. *Silva-Trevino*, 26 I. & N. Dec. 550 (Att’y Gen. 2008).

147. *Id.* at 551 (quoting *Silva-Trevino*, 24 I. & N. Dec. 687, 704 (Att’y Gen. 2008)).

148. *Silva-Trevino*, 24 I. & N. Dec. 687 (Att’y Gen. 2008).

149. *Silva-Trevino*, 26 I. & N. Dec. at 552 (Att’y Gen. 2015).

150. See *id.*

151. See *id.* at 552.

applied in doing so.<sup>152</sup>

The BIA issued its response in October 2016.<sup>153</sup> The Board concluded that the categorical approach and modified categorical approach were acceptable means of determining whether a state law qualified as a generic federal crime, but that it was not permissible to go beyond the record of conviction and look at other extrinsic evidence to determine whether or not an individual convicted under the state statute had committed a CIMT.<sup>154</sup> Further, the Board stated that it would adopt the realistic probability test to assess the minimum conduct necessary for conviction “unless circuit court law dictates otherwise” for a CIMT.<sup>155</sup> The Board noted that two circuits in particular apply slightly different versions of the minimum conduct analysis. The Third Circuit uses a test that looks at the elements of the crime to determine “the least culpable conduct hypothetically necessary to sustain a conviction.”<sup>156</sup> The Fifth Circuit, where the *Silva-Trevino* case arose, utilizes a “minimum reading” approach.<sup>157</sup>

Applying this test to the *Silva-Trevino* case, the BIA held that Silva-Trevino’s conviction for “indecenty with a child” under Texas law did not constitute a CIMT.<sup>158</sup> The court noted that because the Texas statute “is broad enough to punish behavior that is not accompanied by the defendant’s knowledge that the victim was a minor, the offense does not necessarily involve moral turpitude.”<sup>159</sup> The Board arrived at

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152. *See id.* at 553.

153. *Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. Oct. 12, 2016).

154. *Id.* at 830.

155. *Id.* at 831.

156. *Id.* at 832.

157. *Id.*

158. *Id.* at 827, 833–35. The Board noted that the 2004 law made it a criminal act to “engage in sexual contact with [a child younger than 17 years] or causes the child to engage in sexual contact.” *Id.* at 834 (citing TEX. PENAL CODE § 21.11(a)(1) (2004)).

159. *Id.* at 835.

this decision on the basis that a CIMT necessarily involves “reprehensible conduct and a culpable mental state.”<sup>160</sup> Because the underlying state statute did not include a *mens rea* element, the crime was categorically not a CIMT.

This analysis provides support for arguing that a prostitution conviction cannot form the basis of a CIMT, not only because the act itself is not reprehensible,<sup>161</sup> but because the underlying statute lacks the necessary *mens rea* elements. This argument, however, requires a close analysis of the state prostitution statute in question, and state-specific evidence to bring Peters’ argument to life—that the process of conviction in the state in question has erased the concept of volitional consent from the crime of prostitution.<sup>162</sup> The next Section addresses in greater detail how one might make such an argument.

### C. *Implications of Vacatur Law on the Categorical Approach*

Vacatur and expunction laws serve as legislative acknowledgement that certain state statutes criminalize trafficking-related conduct and therefore, do not *necessarily* criminalize conduct that is a CIMT or other generic crime. The Supreme Court, in its decision in *Mellouli v. Lynch*, affirmed a strict application of the “categorical approach” for analyzing state criminal convictions in immigration proceedings.<sup>163</sup> The Court explained that the “alien’s actual conduct is irrelevant to the inquiry, as the adjudicator must ‘presume that the conviction rested upon nothing more than the least of the acts criminalized’ under the state statute.”<sup>164</sup> The Supreme Court discusses this “minimum conduct”

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160. *Id.* at 834 (citing *Nino v. Holder*, 690 F.3d 691, 695 (5th Cir. 2012)).

161. *But see supra* Part II for arguments explaining why prostitution is not per se morally reprehensible.

162. *See Peters supra* note 78.

163. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015).

164. *Id.* (quoting *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013)).

standard in its decision in *Moncrieffe v. Holder*, stating

our focus on the minimum conduct criminalized by a state statute is not an invitation to apply “legal imagination” to the state offense; there must be a “realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.”<sup>165</sup>

However, under the reasoning in *Mellouli*, when a statute explicitly criminalizes conduct that both would and would not meet the requirements of a generic crime, the language itself proves that the statute is not *categorically* a generic crime under federal law.<sup>166</sup>

I argue that vacatur and expunction laws serve as proof of a “realistic probability” that certain state statutes criminalize trafficking-related conduct along with conduct that meets the definition of a generic crime. While the reasoning in *Mellouli* focuses on the language contained within the criminal statute itself and related controlled substance schedules, the holding does not preclude the BIA or AAO from referencing a criminal procedure statute (where vacatur and expunction laws are typically codified) as a basis for finding a realistic probability of conviction outside the scope of a generic crime. This view of the categorical approach has implications for determining whether a prostitution conviction is a CIMT or constitutes a pattern of “engaging in prostitution.”

Post-conviction remedies such as vacatur and expunction are available in a number of states.<sup>167</sup> Their use is relatively new,<sup>168</sup> and many victims do not take advantage of these

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165. *Moncrieffe*, 133 S. Ct. at 1684–85 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

166. *See Mellouli*, 135 S. Ct. at 1993–94.

167. *See* ADVOCATING OPPORTUNITY, FIFTY-STATE SURVEY: SAFE HARBOR LAWS AND EXPUNGEMENT, SEALING, AND VACATUR PROVISION, WITH RELATED STATUTES PERTAINING TO TRAFFICKED PERSONS (2015) (noting that thirty-nine states have vacatur or expungement laws in place).

168. New York passed the nation’s first vacatur law in 2010. *See* N.Y. CRIM. PROC. LAW § 440.10 (2016).

remedies<sup>169</sup> or face barriers to doing so (such as inability to afford an attorney to assist with the lengthy court process). Convictions vacated under state law are usually not held against the individual in immigration proceedings.<sup>170</sup> The New York vacatur law states that convictions for prostitution offenses can be vacated if the victim can show their “participation in the offense was a result of having been a victim” as defined under state or federal law.<sup>171</sup> In passing the New York vacatur law, the state legislature acknowledged that victims were frequently improperly convicted for prostitution offenses and sought to rectify that by offering an option to vacate.<sup>172</sup> The vacatur law stands as legislative acknowledgment that there is a realistic probability of a substantive defect in the underlying proceedings—specifically, the statute allows for a victim of human trafficking to be charged and convicted for engaging in prostitution.

Similarly, Nevada’s vacatur law specifically references the state prostitution statute as a crime which can be vacated if the convicted person was a victim of trafficking.<sup>173</sup> During a hearing on the Nevada vacatur bill, a Nevada Assemblyman noted that the bill would “attempt to terminate the continued victimization of these individuals . . . . Should a young man or woman be able to escape the trafficker, he most likely has been arrested for prostitution or other crimes related to human trafficking.”<sup>174</sup>

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169. New Jersey’s vacatur law was used for the first time in 2015. See *McCarter and VLJ Obtain First Vacatur Relief Under New Jersey Human Trafficking Prevention, Protection and Treatment Act*, MCCARTER & ENGLISH (June 24, 2015), <http://www.mccarter.com/McCarter-and-VLJ-Obtain-First-Vacatur-Relief-Under-New-Jersey-Human-Trafficking-Prevention-Protection-and-Treatment-Act-06-24-2015/>.

170. See Adamiak, 23 I. & N. Dec. 878, 879 (B.I.A. 2006).

171. N.Y. CRIM. PROC. LAW § 440.10(i) (2016).

172. See N.Y. Assemb. Memo, B. A7670.

173. See NEV. REV. STAT. ANN. § 176.515(5) (2014).

174. Minutes of the Meeting of the Assembly Committee on Judiciary, 76th

These statutes acknowledge that victims are convicted without having actually committed, for example, “an act of baseness, vileness or depravity,”<sup>175</sup> in the case of a CIMT, or “engaging in prostitution” which is defined as providing sexual services “primarily for financial gain or for other considerations of material value.”<sup>176</sup> Rather, they demonstrate an awareness that states convict people who were forced to engage in sex work, without proving the *mens rea* element of the crime—willfulness. These vacatur laws further evidence that, at least in some cases, states convict individuals of prostitution without proving the substantive elements of the crime—that is, without distinguishing between cases where one engages in prostitution for one’s own financial gain as opposed to being forced to engaged in prostitution because one is a victim of trafficking. As such, a conviction pursuant to a state statute covered by a vacatur or expunction law does not *necessarily* establish that the victim was convicted of a generic federal crime (either a CIMT or “engaging in prostitution”) and therefore, cannot form the basis for inadmissibility.

While vacatur and expunction laws were developed to address a complication for victims of trafficking,<sup>177</sup> they point to an underlying and widespread defect in criminal justice proceedings related to prostitution convictions. Using Peters’ language, this defect is a failure to prove “volitional consent.”<sup>178</sup> The effects of this failure are multiplied in immigration proceedings where there is an assumption (under the categorical approach) that the necessary *mens rea* element has been sufficiently proved at the state level, when

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Sess. (Nev. 2011) (Comments by Assemblyman John Hambrick, Clark County Assembly District No. 2).

175. Serna, 20 I. & N. Dec. 579, 581–82 (B.I.A. 1992) (citing 37 Op. Att’y Gen. 293, 294 (1933)).

176. 22 C.F.R. § 40.24(b) (2006).

177. See N.Y. Assemb. Memo, B. A07670 (2010).

178. See *supra* notes 115–18 and accompanying discussion.

quite often, it has not.<sup>179</sup> This underlying deficiency is concerning, as it calls into question the basic fairness of the categorical approach as it applies to an entire category of criminal behavior. IJs and the agency staff at the BIA and AAO would be right to question the fairness of using prostitution convictions as a basis for removability and move to adopt a per se rule excluding their use.

At least one case has come up in the circuit courts making a similar argument.<sup>180</sup> In 2006, Gomez-Gutierrez was charged and pled guilty to solicitation of prostitution under Minnesota law.<sup>181</sup> The law he was convicted of violating made it a crime to “solicit[] or accept[] a solicitation to engage for hire in sexual penetration or sexual contact while in a public place.”<sup>182</sup> Gomez-Gutierrez argued that Minnesota’s Safe Harbor law for trafficking victims provided a basis for arguing that there is a “realistic probability” of convicting outside the scope of the criminalized conduct—specifically, that because Gomez-Gutierrez could provide examples of victims of trafficking who had been convicted under the state’s prostitution laws, those prostitution laws involved “categorical overbreath” such that they could not form the basis of a CIMT.<sup>183</sup> However, Gomez-Gutierrez had been convicted of a solicitation offense, not prostitution (accepting a solicitation, per the Minnesota statute), making it difficult to analogize the argument regarding the Safe Harbor law and trafficking victims to the specifics of his situation.<sup>184</sup> In addition, the other, non-trafficking cases he used to make out his realistic probability defense included solicitation charges where one party withdrew consent before the transaction was completed, a line of argumentation

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179. See *supra* notes 115–18 and accompanying discussion.

180. See *Gomez-Gutierrez v. Lynch*, 811 F.3d 1053, 1058 (8th Cir. 2016).

181. See *id.* at 1056.

182. *Id.* at 1056 (quoting MINN. STAT. § 609.324, subd. 2 (2006)).

183. *Id.* at 1060–61.

184. See *id.* at 1056.

which Peters has noted, “[c]ourts have not been empathetic” toward.<sup>185</sup> The court did not reject Gomez-Gutierrez’s argument (that there is a realistic probability that the state conviction exceeds the scope of the federal generic crime) outright.<sup>186</sup> Rather, the court rejected the argument stating that petitioner failed to demonstrate that the BIA had abused its discretion in denying his motion to reopen.<sup>187</sup> This appears to leave the realistic probability line of argumentation open to those convicted of prostitution, and particularly, those who may also qualify as victims of trafficking.

#### IV. IMPLICATIONS FOR TRAFFICKING SURVIVORS

In addition to the rationales discussed above against using prostitution based convictions in immigration proceedings (based on evolving moral standards and a narrow application of the categorical approach), there is a separate justification as to why these kinds of convictions should not be applied to survivors of trafficking. Trafficking survivors are often forced to engage in criminal activity against their will.<sup>188</sup> When victims are forced into prostitution, they are at high risk of arrest for crimes such as prostitution,<sup>189</sup> loitering, and disorderly conduct. Traffickers may force or coerce the victim to steal, to participate in the trafficking enterprise, or to lie to police and immigration officials. Traffickers can then use the threat of arrest to maintain control over the victim.<sup>190</sup> When victims

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185. Peters, *supra* note 78, at 10.

186. See *Gomez-Gutierrez*, 811 F.3d at 1060–61.

187. See *id.* at 1061.

188. See *Oversight: Combating Sex Trafficking in NYC: Examining Law Enforcement Efforts—Prevention and Prosecution: Hearing Before the Comm. on Women’s Issues and Comm. on Public Safety*, N.Y. City Council 1–2 (Oct. 19, 2011) [hereinafter *Mogulescu Testimony*] (testimony of Kate Mogulescu and Katherine Mullen).

189. *Id.*

190. *Id.* at 7.

are arrested, their traffickers may be present during the court proceedings, and may even be paying the cost of the defense attorney.

Some states allow evidence of trafficking to be presented as an affirmative defense to a prostitution charge.<sup>191</sup> However, an affirmative defense is likely to have limited use to an immigrant victim of trafficking who, due to the force, fraud, and coercion they are subjected to, combined with limited language skills and knowledge of the American justice system, may not feel safe enough to communicate their situation to their defense attorney.<sup>192</sup> Some may not identify as victims, may blame themselves, and may not recognize that they were trafficked until after leaving the trafficking situation.<sup>193</sup> Even when victims are aware they are being exploited, they rarely have an opportunity to safely disclose their victimization, and are forced to plead guilty. Consequently, victims can accrue multiple convictions for crimes they were forced or coerced to commit during the course of their trafficking.<sup>194</sup> Those forced into prostitution are likely to accumulate prostitution convictions which may then be held against them in immigration proceedings as CIMTs or instances of “engaging in prostitution.”

While the T-visa allows victims to seek a waiver for criminal conduct related to their trafficking, it is not a viable option for all victims. But failure to qualify for a T-visa does

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191. See, e.g., N.Y. PENAL LAW § 230.01; Prostitution; affirmative defenses (“In any prosecution under section 230.00, section 230.03 or subdivision two of section 240.37 of this part, it is an affirmative defense that the defendant’s participation in the offense was a result of having been a victim of compelling prostitution under section 230.33, a victim of sex trafficking under section 230.34 of this article or a victim of trafficking in persons under the trafficking victims protection act”); see also ADVOCATING OPPORTUNITY, *supra* note 167 (listing eighteen states with statutes creating affirmative defenses for human trafficking victims).

192. See *The Victims and Traffickers*, POLARIS PROJECT, <https://polarisproject.org/victims-traffickers> (last visited Feb. 28, 2017).

193. See Mogulescu Testimony, *supra* note 188, at 6.

194. See *id.*

not mean an applicant is not a victim of a severe form of trafficking in persons. It may mean only that the victim does not meet each of the four criteria to establish T-visa eligibility, only one of which is that the applicant must meet the TVPA definition of a victim of a severe form of trafficking in persons.<sup>195</sup> The victim may not be present in the United States on account of the trafficking, may have declined to cooperate with law enforcement, or may not face severe hardship if returned to their country of origin.<sup>196</sup>

Victims should be able to seek other forms of relief that they qualify for without being held accountable for crimes committed against them during the course of their trafficking, yet victims seeking options outside the T-visa must show that they qualify for a section 212(h) waiver, or go through a lengthy and costly process of vacating their convictions. The 212(h) waiver requires the victim to show that the conduct occurred over fifteen years ago and prove rehabilitation, or have a family member that will experience severe hardship if the immigrant is removed.<sup>197</sup> While vacating convictions may be an option, it is only available in some states, and may only apply to certain enumerated offenses.<sup>198</sup> This has the effect of limiting immigration options on a state-by-state basis, for similarly situated applicants, based solely on their trafficking.

Protection from deportation and access to long term immigration status is essential to victims' physical safety, psychological well-being, and social recovery, as many victims face risk of serious harm or death if unable to remain in the United States.<sup>199</sup> When victims are penalized for

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195. See 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012).

196. See 8 U.S.C. § 1101(a)(15)(T) (2012).

197. See 8 U.S.C. § 1182(h) (2016).

198. See *ADVOCATING OPPORTUNITY*, *supra* note 167.

199. See *MELISSA DITMORE ET AL., URBAN JUSTICE CTR., SEX WORKERS PROJECT, THE ROAD NORTH: THE ROLE OF GENDER, POVERTY AND VIOLENCE IN TRAFFICKING FROM MEXICO TO THE US* 16 (2012).

trafficking-related conduct, it adds force to traffickers' threats that victims will be viewed as criminals, or will be deported if they try to escape, and undermines efforts to encourage victims to come forward. In the case of victims who qualify for some other form of immigration relief, the lack of a waiver option forces the victim to abandon their original claim. As such, the T-visa option does not fully satisfy the standards to combat trafficking globally set out by the United States in the TVPA to protect victims and ensure they are not "inappropriately . . . penalized solely for unlawful acts committed as a direct result of being trafficked."<sup>200</sup>

Holding a victim inadmissible for a CIMT is incompatible with a finding that the victim meets the TVPA definition of trafficking because the victim could not have acted with the necessary evil intent or moral reprehensibility. Where a victim has established that they meet the TVPA definition of a victim of trafficking, the BIA should be precluded from also finding that the immigrant has committed a CIMT. Traffickers often isolate victims from sources of support to render them "defenseless and vulnerable."<sup>201</sup> Traffickers also frequently use physical and sexual violence, threats of violence, psychological abuse, and coercion to force their victims to engage in conduct against their will.<sup>202</sup> A person acting under these circumstance is, like the petitioner in *Matter of M-*, "reduced . . . to such a state of mind that [the victim] was actually prevented from exercising [their] free will through the use of wrongful, oppressive threats or unlawful means." Thus, where a victim can show they meet the TVPA definition of a victim of a severe form of trafficking in persons, they necessarily lack the criminal intent (whether purpose, knowledge, recklessness or negligence) for culpability. Consequently, it is logically inconsistent to hold a victim of trafficking

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200. 22 U.S.C. § 7101(b)(19) (2012).

201. 22 U.S.C. § 7101(b)(5) (2012).

202. 22 U.S.C. § 7101(b)(6) (2012).

inadmissible for a CIMT. Moreover, to do so would frustrate the purpose and goals of the TVPA to not further penalize victims. As such, where a victim can show they meet the TVPA definition of a victim of trafficking, but seeks another form of relief, the BIA should not hold them accountable for prostitution based offenses that occurred during the course of their trafficking. The 2009 AAO decision discussed above fails to address this logical inconsistency,<sup>203</sup> leaving victims in a tenuous position, unless the general approach to prostitution in immigration proceedings is altered.

### CONCLUSION

Changing views of prostitution call into question the use of prostitution convictions as a basis for removability under the INA. Moreover, the widespread adoption of vacatur and expunction laws in recognition of the fact that courts regularly convict victims as perpetrators, raises serious questions about the fairness of using those convictions in immigration proceedings. The Supreme Court's decision in *Mellouli* provides an opportunity to make arguments that not only should these convictions no longer be used, but they *cannot* be used given that legislatures have acknowledged, by enacting these vacatur laws, that there is a "realistic probability" that these state prostitution statutes convict conduct outside the scope of "engaging in prostitution." For this reason, IJs and the adjudicators at the BIA and AAO should adopt a *per se* rule excluding the use of state-based prostitution convictions, at least those originating from states that have passed vacatur and expunction laws, as a basis for inadmissibility. To do so would go a long way toward promoting justice for vulnerable individuals, particularly women of color and transgender women, in the U.S. immigration system.

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203. See [Identifying Information Redacted by Agency] Petition: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), 2009 WL 1742009 (Dep't of Homeland Sec. Jan. 16, 2009).