

PROSTITUTION POLICIES AND SEX TRAFFICKING

Assessing the use of prostitution-based policies as tools for combating sex trafficking.

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INTRODUCTION

Anna was a pretty, blond 25 year old Russian woman who had trained to be a[n] exhibition ballroom dancer in her native town. . . [S]he was recruited to be a dancer in Germany by answering an ad in a Russian newspaper. She was transported to Germany through Poland by a bus where she was taken to an apartment, locked in a room and told that she would be working as a prostitute. There was another Russian girl in the apartment who had been horribly beaten for having resisted forced prostitution. Anna was terrified and she initially agreed to work for the German pimps—but after being repeatedly raped by over 20 male “clients” during her first day, she refused to cooperate any further. She was beaten with a metal pipe for resisting. Both of her arms were broken before she was systematically raped by the pimps.¹

Stories like Anna’s are not rare: trafficking human beings for the purpose of sexual exploitation “has exploded into a sophisticated industry that generates billions of dollars in profit every year yet devastates the lives of millions of innocent victims.”² Although the international definition of human trafficking also includes forms of exploitation such as forced labor and organ trading, trafficking for commercial sexual exploitation (sex trafficking) attracts the most international media attention.³ Due to the highly organized and secretive nature of human trafficking, accurate statistics on the scope and extent of human trafficking in general and sex trafficking in particular are unavailable.⁴ The United States government, however, estimates that as many as 800,000 people are trafficked across international borders each year and that even more are trafficked internally.⁵ The United States government estimates that at least eighty percent of these approximately 800,000 trafficked persons are victims of trafficking for sexual exploitation.⁶ Additionally, the International Labor Organization (ILO) estimates that there are

¹ *Germany’s World Cup Brothels: 40,000 Women and Children at risk of Exploitation Through Trafficking: Hearing before the Subcomm. On Africa, Global Human Rights and International Operations of the H. Comm. on International Relations*, 109th Cong. 38 (2006) [hereinafter *Hearings*] (prepared statement of Juliette Engel, M.D., Director, MiraMed Institute, Moscow, Russia).

² Iris Yen, Comment, *Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand through Educational Programs and Abolitionist Legislation*, 98 J. Crim. L. & Criminology 653 (2008).

³ Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal and Procedural Failures to fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 355 (2007)

⁴ Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Anti-Trafficking in Persons Policy*, 14 TUL. J. INT’L & COMP. L. 269, 284 (2006)

⁵ Office of the Under Sec’y for Global Affairs, U.S. Dep’t of State, *Trafficking in Persons Report 8* (2008) [hereinafter *TIP Report*], available at <http://www.state.gov/documents/organization/105501.pdf>.

⁶ *Id.*

2.45 million people working in forced labor as a result of human trafficking at any given time, with forty-three percent of the 2.45 million working in forced labor for sexual exploitation.⁷

In general, media coverage of human rights issues focuses inordinately on “abuses that contain an element of sex, sexuality and gender.”⁸ Media coverage of trafficking is no different: although the international definition of human trafficking includes other forms of exploitation, trafficking for commercial sexual exploitation attracts the most international media attention.⁹ Stories about “the damsels in distress, the innocents lured across borders”¹⁰ (young girls and women lured into trafficking by the promise of legitimate work abroad who are then sexually exploited by their traffickers) sell whereas stories about men and boys trafficked for sexual exploitation and stories about both men and women trafficked for labor exploitation do not.¹¹ Similarly, the media fails to report on the social and economic disparities that allow trafficking to exist.¹² Because stories of trafficking focus almost exclusively on its sexual element, prostitution’s role in trafficking is the most prominent in public discourse.

This paper explores the relationship between prostitution and sex trafficking, examining the use of prostitution-based policies as a tool for combating sex trafficking and assessing the value of focusing on these prostitution-based policies in the battle against sex trafficking. The first section describes the international definition of trafficking in human beings and its position on regulating prostitution. The second section outlines the four general approaches to prostitution legislation: complete criminalization, partial decriminalization, decriminalization, and legalization. The third section explores the practical application of a partially decriminalized regime in Sweden and a legalized regime in the Netherlands. The fourth section argues that the relationship between prostitution policies and sex trafficking is manufactured by nations using the issue of sex trafficking to validate their own societal beliefs about

⁷ Int’l Labor Org., *A Global Alliance Against Forced Labor*, Report I(B), at 14 (2005)

⁸ Haynes, *supra* note 3, at 355.

⁹ *Id.*

¹⁰ Jennifer Block, *Sex Trafficking: Why the Faith Trade is Interested in the Sex Trade*, Conscience, Summer-Fall 2004, http://www.catholicsforchoice.org/conscience/archives/c2004sum_sextrafficking.asp

¹¹ Haynes, *supra* note 3, at 356.

¹² *See Id.* at 355-56

prostitution. Each country adopts the approach to regulating prostitution that best suits its cultural mores and values. The issue of sex trafficking is then used as a justification for the chosen approach to regulating prostitution. This section uses the United States' completely criminalized prostitution regime and its global approach to combating sex trafficking as an overt example of this phenomenon. The paper concludes that, although adopting an approach to regulating prostitution based on morality and cultural mores is relatively harmless, manipulating the cause of sex trafficking to uphold those regulations on prostitution can be harmful to combating human trafficking in general.

This paper uses gendered language (i.e., the term "prostitute" instead of "sex worker" and references to prostitutes as female) because discourse about prostitution and sex trafficking is generally gendered, focusing on women who are bought or trafficked for "the purposes of men's sexual gratification."¹³ Although there are male prostitutes and men and boys are sometimes trafficked for commercial sexual exploitation, the majority of prostitutes and victims of sex trafficking are female.¹⁴ Similarly, most clients of prostitutes are male—even male prostitutes are frequented primarily by male clients.¹⁵ This paper does not intend to discount the issue of male sex trafficking or perpetuate myths that all prostitutes are female. Because the dominant discourses on prostitution and sex trafficking are gendered, however, the paper explores these gendered discourses using the same gendered language.

I. THE INTERNATIONAL DEFINITION OF HUMAN TRAFFICKING

Perhaps unsurprisingly, the drafting of the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)* was embroiled in debates regarding prostitution policies.¹⁶ One faction argued that the term trafficking should encompass all forms

¹³ Joyce Outshoorn, *The Political Debates on Prostitution and Trafficking of Women*, 12 *Sexual Politics: Int'l Studies in Gender, State, and Society* 141, 147 (2005).

¹⁴ *Id.*

¹⁵ Kathleen D. Vohs and Jannine LaSaleta, *Heterosexual Sexual Behavior is Governed by social Exchange and Bais Economic Principles: Sexual Economics Theory*, 9 *MINN. J. L. SCI. & TECH.* 785, 792 (2008).

¹⁶ Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 *MICH. J. INT'L L.* 437, 442 (2006).

of prostitution, including prostitution that is often considered “voluntary.”¹⁷ “Voluntary” prostitution, they argued, was as morally reprehensible as forced prostitution and should be outlawed along with other forms of trafficking.¹⁸ From their perspective, no woman ever truly *chose* to become a prostitute, but rather found herself *forced* into prostitution either through direct coercion (what is traditionally known as “forced prostitution”) or by “poverty, inadequate education, homelessness, drug dependency and sex- and racial discrimination.”¹⁹ Opponents to this approach argued that some women did freely choose prostitution as a form of economic livelihood and should not be penalized for that decision.²⁰ They argued that laws penalizing voluntary prostitutes violated the individual liberty of the prostitutes.²¹

Ultimately, the *Palermo Protocol* eschewed the debate and defined “trafficking in persons” as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.²²

Broken down, the offense of trafficking in persons, as defined in the *Palermo Protocol*, consists of three elements:

1. **Acts** (the recruitment, transportation, transfer, harbouring or receipt of persons);
2. **Means** (by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person);
3. **Intent** (for the purpose of exploitation; “exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”²³)

The mental element of the crime refers to the purpose or intent of the perpetrator, not the actual achieved results. When the means set forth in the second element of the offense are used, the alleged consent of the

¹⁷ *Id.* at 443.

¹⁸ *Id.*

¹⁹ SWEDEN’S MINISTRY OF INDUSTRY, EMPLOYMENT AND COMMUNICATION, FACT SHEET: PROSTITUTION IN TRAFFICKING AND HUMAN BEINGS (2005) [hereinafter FACT SHEET].

²⁰ Chuang, *supra* note 16, at 443

²¹ *Id.*

²² Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art 3(a), Nov. 15 2000, S. Treaty Doc. No. 108-16 (2004), 40 I.L.M. 335 [hereinafter Palermo Protocol].

²³ *Id.*

victim is irrelevant.²⁴ In the case of children under the age of eighteen, the second element is assumed and only the acts element and the mental element are required.²⁵ Crossing an international border is not required; men, women, and children can be trafficked within their own countries.²⁶

The language in the *Palermo Protocol* left the prostitution issue open by declining to define “exploitation of prostitution of others” and “other forms of sexual exploitation.”²⁷ Accordingly, parties to the *Palermo Protocol* are free to choose whether or not to criminalize all forms of prostitution: “[t]he terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the Protocol, which is therefore without prejudice to how State Parties address prostitution in their domestic laws”²⁸

II. APPROACHES TO LEGISLATION ON PROSTITUTION

The *Palermo Protocol*'s refusal to create a working definition of prostitution allows countries to adopt differing approaches to regulating prostitution. Four general approaches to regulating prostitution have emerged: complete criminalization, partial decriminalization, decriminalization, and legalization.²⁹ Practical arguments exist both for and against each approach, but objective assessment is often difficult because the issue of prostitution is intertwined with “fundamental questions about the kind of society one wishes to see, how one understands gender equality, and what it means to sell sex.”³⁰ Accordingly, discourse on the varying approaches to prostitution laws tends to be “polarized and intolerant” and approaches are often summarily dismissed without meaningful consideration of the possible benefits of

²⁴ *Id.* at art. 3(b)

²⁵ *Id.* at art. 3(c)

²⁶ Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 173 (2006).

²⁷ Chuang, *supra* note 16, at 445

²⁸ Interpretative Notes for the Official Records (travaux préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, 64, U.N. Doc. A/55/383/Add.1

²⁹ Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 336 (2006); partial decriminalization is also referred to as abolitionist criminalization. ELAINE MOSSMAN, INTERNATIONAL APPROACHES TO DECRIMINALISING OR LEGALISING PROSTITUTION 5-6 (New Zealand Ministry of Justice 2007).

³⁰ JULIE BINDEL & LIZ KELLY, EVIDENCE RECEIVED FOR PROSTITUTION TOLERANCE ZONES (SCOTLAND) BILL STAGE 1 (London Metropolitan University 2003).

each approach.³¹ The following is an overview of the four dominant regulatory schemes, ranging from a rigid intolerance for prostitution (as found in completely criminalized and partially decriminalized schemes) to a rigid tolerance of prostitution (legalized schemes) to an open tolerance of prostitution (decriminalized schemes). This overview attempts to provide a basic but meaningful understanding of the positions taken by the advocates and opponents of each approach.

A. Complete Criminalization

In a completely criminalized regime (such as in almost every state in the United States) all aspects of prostitution—both the sale and purchase of sex, as well as all third party involvement—are illegal and appear as offenses in the criminal code.³² The goal of complete criminalization is to eradicate the sex industry completely.³³ This position is generally supported by those who have moral, religious, or feminist objections to prostitution.³⁴ Moral and religious objections to prostitution are often based on the belief that prostitution violates the Christian moral principal of abstinence outside of marriage.³⁵ From this perspective, prostitution should be condemned on all fronts as a moral nuisance that threatens public health and leads to other forms of criminal activity.³⁶ Feminist objections to prostitution are based on the belief that prostitution is a form of male patriarchy over women.³⁷ Complete criminalization sets norms for society, emphasizing that the sale and purchase of sex is not socially acceptable and that “the state authority finds prostitution so appalling and injurious to those involved that they should be stigmatized as criminals.”³⁸ By completely criminalizing prostitution, a state attempts to reduce both supply and demand of prostitution by deterring both prostitutes and their clients.³⁹

³¹ NOMI LEVENKRON, THE LEGALIZATION OF PROSTITUTION: MYTH AND REALITY 13 (Ella Kerren ed., Shaul vardi trans., The Hotline for Migrant Workers 2007).

³² See Mossman, *supra* note 29, at 5; Halley et al., *supra* note 29, at 339.

³³ See Mossman, *supra* note 29, at 5.

³⁴ *Id.*

³⁵ Berman, *supra* note 4, at 283.

³⁶ Nicole A Hough, Comment, *Sodomy and Prostitution: Laws Protecting the “Fabric of Society,”* 3 PIERCE L. REV 101, 103-04 (2004).

³⁷ Berman, *supra* note 4, at 270.

³⁸ PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS 14-15 (Working Group on the legal regulation of the purchase of sexual services 2004) [hereinafter NORWEGIAN REPORT] (abbreviated English version).

³⁹ *Id.*

Completely criminalized regimes legislatively place the prostitute and the client in similar situations with equal degrees of criminal culpability.⁴⁰ When put in practice, however, laws prohibiting the *sale* of sex are more rigorously enforced than those prohibiting the *purchase* or *accommodation* of its sale.⁴¹ Additionally, among prostitutes, only the poorest and most marginalized (generally the street prostitutes) are subject to arrest, weakening the effectiveness of criminalization.⁴²

Critics of criminalization argue that legislation against prostitution improperly mandates morality.⁴³ Some argue that this morality-driven legislation deprives women of their civil rights by denying them the right to choose their own profession.⁴⁴ They argue that many women choose to become prostitutes for economic reasons, noting that “given their lack of social, economic, and political power prostitution is a practical option for women foreclosed from the paid labor market because it requires little skill and it generates quick needed cash.”⁴⁵ Moreover, opponents of criminalization argue that criminalization is not effective in reducing prostitution, noting that prostitution continues to exist under criminalized regimes.⁴⁶ Arresting and prosecuting a prostitute, they argue, increases the likelihood that she will have to remain in prostitution for economic reasons because the conviction on her record decreases her access to legal jobs and education.⁴⁷

Advocates of criminalization argue that criminalization deters sex trafficking because traffickers conduct rational cost-benefit analyses and the risk of arrest and prosecution can outweigh the expected

⁴⁰ Dorchen Leidholdt, *Prostitution: A Violation of Women’s Human Rights*, 1 CARDOZO WOMEN’S L.J. 133, 134 (1993).

⁴¹ DONNA M. HUGHES, THE DEMAND FOR VICTIMS OF SEX TRAFFICKING 17 (2005); see Leidholdt, *supra* note 40, at 134 (discussing how the United States legal system “judges prostitutes as culpable and lets johns off the hook”); Halley et al., *supra* note 29, at 414 (discussing how the Indian legal system contains “a substantive bias in the law that explicitly scapegoats the victims of commercial sexual exploitation, namely sex workers, but does not criminalize customers”).

⁴² Phyllis Coontz & Anne Stahl, *Revisiting Anti-Prostitution Sanctions: An Argument for Changing Policy*, 43 CRIM. LAW BULLETIN 1, 2 (2007).

⁴³ Hough, *supra* note 36, at 103.

⁴⁴ Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 136 (2006).

⁴⁵ Phyllis Coontz & Anne Stahl, *supra* note 42, at 1.

⁴⁶ See *Id.* (analyzing prostitution-arrest data in the United States).

⁴⁷ HUGHES, *supra* note 41, at 39.

profit yield.⁴⁸ Opponents of this position rely on economic literature that “tends to show that abolition of illicit products and services can have the effect of exacerbating the harms they cause.”⁴⁹ While criminalization may deter small-time criminals, they argue, it increases the market equilibrium price, creating incentives for organized criminals to enter the market.⁵⁰ Criminalization, they argue, actually increases trafficking because it decreases the supply of women who choose to work as prostitutes in a certain country, which provides an opportunity for traffickers to meet that demand.⁵¹ When demand for prostitution continues, as it often does because laws criminalizing the sale of sex are more strictly enforced than those criminalizing the purchase of sex, an insufficient supply leads to an explosion in the trafficking industry. When the demand for prostitution exceeds the supply, traffickers use the opportunity to move women and girls into countries with insufficient supply.⁵² For example, in Southeast Asia in the 1960s the arrival of American soldiers demanding prostitutes far exceeded the existing supply of prostitutes and caused a boom in regional sex trafficking.⁵³ Furthermore, opponents argue that criminalizing prostitution causes prostitution to become more coercive, “by increasing the vulnerability of women who are prostitutes, and . . . entrenching the institution of trafficking in part because of their intensified vulnerability.”⁵⁴ When prostitutes fear being punished for the crime of prostitution, they are easier to coerce and victimize.⁵⁵

B. Partial Decriminalization—Decriminalizing the Prostitute

In a partially decriminalized regime (such as in Sweden) the activities of the actual prostitutes are decriminalized, but all other prostitution-related activities, such as purchasing sex or facilitating prostitution, remain criminalized.⁵⁶ The rationale behind this approach is that prostitution is an inherently

⁴⁸ *Id.* at 10.

⁴⁹ *Id.*

⁵⁰ Halley et al., *supra* note 29, at 392.

⁵¹ See Yen, *supra* note 2, at 666 (arguing for an approach that decreases demand for prostitution rather than penalizing the prostitutes).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Halley et al., *supra* note 29, at 391.

⁵⁵ *Id.* at 392.

⁵⁶ *Id.* at 398.

evil practice in which “sex workers are vulnerable victims of systematic patriarchal exploitation.”⁵⁷ Although buying sex is an offense, prostitutes are not viewed as culpable for selling sex.⁵⁸ Even women who claim to be voluntary prostitutes are viewed as victims of unfair socio-economic circumstances that “forced” them into prostitution.⁵⁹ From this perspective, prostitution is a form of male violence against women and a hindrance to achieving gender equality.⁶⁰ Rather than punish the victims of what is seen as an unjust society, this scheme focuses on decreasing demand and aiding the victims.⁶¹

Whereas complete criminalization focuses on the supply-side of prostitution (by aggressively prosecuting prostitutes but not clients), advocates for partial decriminalization argue that it decreases the *demand* for trafficked women by criminalizing the purchase of a prostitute.⁶² Advocates also claim that victims of trafficking are more likely to assist the authorities in investigating trafficking when they do not risk penalization themselves.⁶³

Opponents of partial decriminalization argue that partial decriminalization is demeaning to women and paternalistic because it views prostitutes as “passive victims in need of rescuing” and denies women of their “right to choose whether to work in prostitution.”⁶⁴ Some even argue that prostitution can be liberating because it allows a woman to control what she does with her own body.⁶⁵ Proponents of this view argue that any governmental approach that views prostitutes as passive victims denies these women of their liberty and agency.⁶⁶ They also argue that, although the prostitute is not criminalized, the law criminalizing the purchase of sex penalizes the prostitute by decreasing her client base, effectively forcing

⁵⁷ *Id.* at 339.

⁵⁸ NORWEGIAN REPORT, *supra* note 38, at 45.

⁵⁹ FACT SHEET, *supra* note 19.

⁶⁰ BINDEL & KELLY, *supra* note 30, at 13.

⁶¹ *Id.*

⁶² Gunilla Eckberg, *The Swedish Law that Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN 1187, 1200-01(2004).

⁶³ See TIP Report, *supra* note 5, at 235 (discussing Sweden’s policy of allowing victims of trafficking to remain in the country if they assist in police investigations).

⁶⁴ BINDEL & KELLY, *supra* note 30, at 16.

⁶⁵ Halley et al., *supra* note 29, at 351.

⁶⁶ *Id.*

her out of her job.⁶⁷ Increased criminalization of non-prostitutes involved in the practice of prostitution, such as customers or brothel-keepers, may lead to more abusive conditions for the prostitutes because the increased costs for the customers and brothel-keepers will be transferred to the prostitutes.⁶⁸ For example, because customers know they risk prosecution they may feel entitled to engage in more violent sexual activities or unprotected sex.⁶⁹ Similarly, the decrease in demand caused by partial decriminalization increases competition among prostitutes and causes them to engage in riskier activities to please customers.⁷⁰

Opponents also argue that rather than decreasing human trafficking, partial decriminalization simply forces sex trafficking deeper underground and exposes victims of trafficking to even greater abuse.⁷¹ When trafficking is deeper underground, locating and assisting trafficked persons and other victims of abuse in the sex industry is more difficult.⁷² Prostitutes, they argue, are more likely to protect their clients than assist in their prosecution, and clients (who were previously a valuable tool in prosecuting traffickers) are unwilling to volunteer information when they fear criminal retribution.⁷³ Additionally, because all prostitutes are viewed as victims, the unique needs of victims of trafficking may be ignored under this approach.⁷⁴ Victims of trafficking have unique rehabilitative needs because they have been coerced and abused and may require special health services and education on how to avoid falling victim to trafficking again.⁷⁵ In addition, foreign victims of trafficking face the unique challenges

⁶⁷ See PETRA OSTERGREN, *SEX WORKERS CRITIQUE OF SWEDISH PROSTITUTION POLICY*, <http://www.petrostergren.com/content/view/44/108> (last visited Sept. 30, 2008) (describing the experiences of Swedish prostitutes).

⁶⁸ Halley et al., *supra* note 29, at 416.

⁶⁹ NORWEGIAN REPORT, *supra* note 38, at 12. In Sweden, for example, prostitutes reported engaging in more dangerous activities and an increased fear of violence from clients after the purchase of sex was criminalized. *Id.* at 13

⁷⁰ OSTERGREN, *supra* note 67.

⁷¹ Halley et al., *supra* note 29, at 396.

⁷² LEVENKRON, *supra* note 31, at 10.

⁷³ Nicole Fick, *Well Intended But Misguided? Criminalizing Sex Workers' Clients*, 22 SA CRIME QUARTERLY 33, 35 (2007). Clients can be a valuable tool in combating trafficking because they have insider knowledge on the prostitutes and may notice suspicious situations or have trafficking victims confide in them. *Id.*

⁷⁴ Halley et al., *supra* note 29, at 397.

⁷⁵ Stacey Antimone, *Sexual Trafficking: The United States' Response to a Growing International Problem*, 24 SUFFOLK TRANSNAT'L L. REV. 149, 174-75 (2000)

of deportation and reintegration into a home country that may shame or stigmatize them as sexually impure.⁷⁶

C. Complete Decriminalization

In a decriminalized regime, all laws concerning prostitution have been repealed and no prostitution-specific controls are imposed.⁷⁷ Sex trafficking, which is viewed as distinct from prostitution, continues to be criminalized, but all forms of what is considered consensual prostitution is decriminalized.⁷⁸ Theoretically, in a decriminalized regime, prostitution is considered a legitimate and normal business that is not differentiated from other businesses.⁷⁹ While legalization focuses on maintaining social order, decriminalization attempts to focus on the rights of prostitutes and their clients. Advocates for decriminalize argue that by imposing prostitution-specific controls legalization continues to stigmatize and punish female prostitutes, whereas decriminalization will help protect prostitutes and allow them escape stigmatization.⁸⁰ Despite the claimed advantages of a decriminalized regime, currently no country has completely decriminalized prostitution.⁸¹ New South Wales and New Zealand have attempted decriminalization, but both have elements of regulation and legalization in their regimes.⁸² In practice, because no country seems willing to allow prostitution to exist completely unchecked, decriminalization is “best understood as a transition phase or part of the process toward either legalization or abolition, but it is not an end point in itself.”⁸³ For example, New South Wales and New Zealand first decriminalized prostitution and then created regulatory restrictions, making their regimes legalized rather than decriminalized.⁸⁴

D. Legalization

⁷⁶ *Id.*

⁷⁷ MOSSMAN, *supra* note 29, at 12.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Ji Hye Kim, Comment, *Korea’s New Prostitution Policy: Overcoming Challenges to Effectuate the Legislature’s Intent to Protect Prostitutes from Abuse*, 16 PAC. RIM L. & POL’Y J. 493, 518 (2007).

⁸¹ MOSSMAN, *supra* note 29, at 13.

⁸² *Id.* For example, “brothel operators in New Zealand require certification; and street-based work in New South Wales is still prohibited.” *Id.*

⁸³ HUGHES, *supra* note 41, at 38.

⁸⁴ See MOSSMAN, *supra* note 29, at 13 (discussing the regulations on prostitution in New South Wales and New Zealand).

In a legalized regime, such as in Germany and the Netherlands, prostitution is allowed in certain conditions, as specified by the government.⁸⁵ Such regimes are also sometimes referred to as “regulated” because there is legislation regulating the sex industry through prostitution-specific controls.⁸⁶ These controls regulate the manner and conditions under which prostitution is allowed.⁸⁷ The controls may include, for example, a ban on brothels (or a requirement that all brothels be registered with the state) and that all prostitutes be licensed and submit to mandatory health examinations.⁸⁸

Each country’s regulatory scheme differs among three general categories of prostitution offenses: laws aimed at prostitutes, laws aimed at third parties, and laws aimed at those who purchase sex.⁸⁹ Notably, many countries with legalized prostitution continue to criminalize acts of third parties, such as pimping⁹⁰ and human trafficking.⁹¹ Similarly, legislation may differentiate between *kinds* of prostitution.⁹² For example, both the Netherlands and Turkey have legalized prostitution in state-registered brothels, but prohibit most street prostitution.⁹³

The basic premise behind most legalized regimes is that prostitution is a part of the social order, but needs to be controlled in order to protect public order and health.⁹⁴ An editor in the *Economist* exemplified this premise by opining that “wise governments will accept that paid sex is ineradicable, and concentrate on keeping the business clean, safe and inconspicuous.”⁹⁵ Even the International Labor

⁸⁵ *Id.* at 12.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 13.

⁹⁰ A “pimp” is “a person who solicits customers for a prostitute, usu. in return for a share of the prostitute’s earnings.” *Black’s Law Dictionary* 1186 (8th ed. 2004). Although a pimp is generally defined as being male, there are also female pimps. Wardell B. Pomeroy, *Some Aspects of Prostitution*, 1 J. OF SEX RES. 177, 178 (1965). A “madam” is not the female version of a pimp; a madam is a “woman in charge of a brothel.” *Webster’s New World College Dictionary* 861 (4th ed. 2000). Although some brothel owners, both male and female, act as pimps, some brothel owners simply own and manage the property and allow the prostitutes to work in the brothel as self-employed, renting a room in the brothel or otherwise contracting to control their own employment. See LEVENKRON, *supra* note 31, at 57 (discussing the way prostitutes in the Netherlands may choose to be self-employed in a brothel or work under the control of the brothel owner or manager).

⁹¹ See LEVENKRON, *supra* note 31, at 15-17 (discussing various approaches to legalizing prostitution).

⁹² MOSSMAN, *supra* note 29, at 14.

⁹³ *Id.* at Table 3.

⁹⁴ *Id.* at 12.

⁹⁵ *The Sex Business*, *ECONOMIST*, Feb. 14, 1998, at 17-18.

Organization has advocated “for prostitution and sex industries to be officially recognized as a legitimate economic sector because they are already ‘integrated into the economic, social and political life’ of countries and ‘contribute in no small measure to employment, national income and economic growth.’”⁹⁶

Advocates for legalization argue that it progressively allows women to choose how to use their own bodies.⁹⁷ Advocates also argue that legalized prostitution benefits society because it decreases violence against prostitutes by allowing women to report abuse without fear of repercussion, frees women from pimps, allows women to control their own sex businesses, decreases the stigmatization of prostitutes, reduces sexually transmitted diseases among prostitutes and their clients, creates revenues for the state through taxes, and allows police to focus their attention on more serious crimes, such as trafficking and child prostitution.⁹⁸ In regards to human trafficking, advocates of legalization argue that legalization decreases trafficking because voluntary prostitutes fill the supply-side of local sex markets, putting traffickers out of business.⁹⁹ Moreover, they argue, clients of prostitutes will be more likely to report cases of trafficking because they will not fear legal repercussions.¹⁰⁰ Ideally, under a legalized regime, prostitution becomes a safe regulated industry where women choose to be prostitutes rather than be forced into prostitution.¹⁰¹

Opponents of legalization argue that the alleged benefits of legalization are illusory. They claim that legalization expands the sex industry instead of controlling it, increases the demand for prostitution, and increases stigmatization by forcing women to register, submit to mandatory health examinations and otherwise be known and subjected to prostitution specific controls.¹⁰² Moreover, they argue that sexually transmitted diseases continue to plague prostitutes because clients are not subjected to mandatory health

⁹⁶ HUGHES, *supra* note 41, at 10 (internal quotation omitted).

⁹⁷ Hanh Diep, Comment, *We Pay—The Economic Manipulation of International and Domestic Laws to sustain Sex Trafficking*, 2 LOY. U. CHI. INT’L L. REV. 309, 329 (2005).

⁹⁸ BINDEL & KELLY, *supra* note 30, at 7.

⁹⁹ LEVENKRON, *supra* note 31, at 11.

¹⁰⁰ See Fick, *supra* note 73, at 35 (describing how clients can be a valuable asset in identifying victims of trafficking so long as they do not fear criminal sanctions for their use of prostitutes).

¹⁰¹ LEVENKRON, *supra* note 31, at 11.

¹⁰² JANICE G. RAYMOND, 10 REASONS FOR NOT LEGALIZING PROSTITUTION (Mar. 25 2003), http://www.rapereliefshelter.bc.ca/issues/prostitution_legalizing.html (last visited Nov. 20 2008).

examinations.¹⁰³ Instead of creating a safe industry for prostitutes, legalization creates a safe haven for traffickers.¹⁰⁴ They argue that legalization leads to police investigating the sex industry less stringently, which causes a decrease in the number of detected cases of sex trafficking but not a decrease in the number of actual cases of sex trafficking.¹⁰⁵ Social and ethical barriers to prostitution deteriorate in legalized regimes, causing the sex industry to expand.¹⁰⁶ As prostitution becomes legally and socially acceptable, “men, who would not ordinarily engage in illegal prostitution [become] encouraged to solicit prostitutes.”¹⁰⁷ Brothels, strip clubs, and massage parlors that facilitate prostitution create a constant demand for “new merchandise” that drives international trafficking.¹⁰⁸ According to this line of reasoning, the increasing demand for prostitutes outgrows the local supply of volunteer prostitutes, creating a sex-worker deficit that can be filled by illegal trafficking.¹⁰⁹

Additionally, the sexual tastes of men often dictate demand, and volunteer prostitutes may not be able to satisfy these tastes.¹¹⁰ Specifically, men may have preferences for specific racial or ethnic backgrounds.¹¹¹ For example, different markets exist in the United States for Chinese, Spanish-speaking, and Russian-speaking women, and in Liberia there is a market for white and/or Arabic-speaking women.¹¹² Furthermore, men who purchase sex are often looking for sex in a context where they can “humiliate, degrade, and hurt the woman or child.”¹¹³ Volunteer prostitutes may not be willing to subject themselves to this treatment, whereas trafficked women are more easily manipulated and forced into this treatment.¹¹⁴

¹⁰³ *Id.*

¹⁰⁴ Diep, *supra* note 97, at 329.

¹⁰⁵ Anne Marie Tavella, Comment, *Sex Trafficking and the 2006 World Cup in Germany: Concerns, Actions and Implications for Future International Sporting Events*, 6 NW. U. J. INT’L HUM. RTS. 196, *30 (2007).

¹⁰⁶ Yen, *supra* note 2, at 681.

¹⁰⁷ *Id.* at 682.

¹⁰⁸ MONICA O’CONNOR & GRAINNE HEALY, THE LINKS BETWEEN PROSTITUTION AND SEX TRAFFICKING: A BRIEFING HANDBOOK 10 (2006).

¹⁰⁹ Yen, *supra* note 2, at 682.

¹¹⁰ HUGHES, *supra* note 41, at 24.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 7.

¹¹⁴ *Id.* at 59

Further, critics argue, men who use prostitutes cannot be expected to act proactively to prevent or report human trafficking.¹¹⁵ These men, they argue, do not care if the girl or woman has been forced into prostitution, trafficked, or even of legal age.¹¹⁶

Critics also believe that legalization makes work easier for traffickers because they can obtain valid work permits for the women they are trafficking for sexual exploitation.¹¹⁷ The traffickers obtain valid work permits for their victims and coach them to describe themselves as “migrant sex workers” rather than victims of trafficking.¹¹⁸ This allows the trafficker to absolve himself of the crime of trafficking.

III. PARTIAL DECRIMINALIZATION AND LEGALIZATION IN PRACTICE

Many countries are currently reexamining their prostitution laws and striving to find effective methods handling prostitution and combating human trafficking.¹¹⁹ No consensus exists on the best approach to regulating prostitution.¹²⁰ While the general trend is toward legalization,¹²¹ the abolitionist approach is increasingly being considered, as well.¹²² Accordingly, academics and governmental working groups are scrutinizing the approaches taken by the Netherlands and Sweden¹²³ because the Netherlands’ policy is considered the “purest” form of legalization and Sweden’s policy is the “purest,” and only, abolitionist/partial decriminalization approach.¹²⁴ This section explores the regimes practiced in Sweden and the Netherlands: examining their emergence, the social values and beliefs that underlie them, and the practical effects they have on prostitution and sex trafficking.

A. Partial Decriminalization in Sweden

¹¹⁵ O’CONNOR & HEALY, *supra* note 108, at 10.

¹¹⁶ *Id.* at 10-11.

¹¹⁷ *Id.* at 16.

¹¹⁸ *Id.*

¹¹⁹ *See, e.g.*, MOSSMAN, *supra* note 29, at 1 (preparing a report on the different approaches to regulating prostitution for New Zealand’s Ministry of Justice and stating that Norway and Finland are also reconsidering their approaches).

¹²⁰ BINDEL & KELLEY, *supra* note 30, at 10.

¹²¹ Don Kulick, *Sex in the New Europe: The Criminalization of Clients and Swedish Fear of Penetration*, 3 ANTHROPOLOGICAL THEORY 199, 200 (2005).

¹²² *Once Mocked, Sweden’s pioneering prostitution law attracts world interest*, INT’L. HERALD TRIBUNE, Mar. 15 2008, available at <http://www.iht.com/articles/ap/2008/03/15/news/Sweden-Prostitution.php>.

¹²³ *See, e.g.*, NORWEGIAN REPORT, *supra* note 38 (report prepared for Norway’s Ministry of Justice); MOSSMAN, *supra* note 25 (report prepared for New Zealand’s Ministry of Justice)

¹²⁴ Halley et al., *supra* note 29, at 362.

Sweden is both a destination and transit country for sex trafficking.¹²⁵ As a destination country, Sweden is the end point for approximately between 400 and 600 women and children, primarily from the Baltic countries, Eastern Europe, and Russia, trafficked for sexual exploitation.¹²⁶ As a transit country, some trafficked women and children are transferred through Sweden to other destination countries, such as Denmark, Germany, Norway, and the United Kingdom.¹²⁷

The Swedish Government views prostitution and sex trafficking as intrinsically connected, insisting that “international trafficking in human beings could not flourish but for the existence of local prostitution markets where men are willing and able to buy and sell women and children for sexual exploitation.”¹²⁸ Sweden’s legislation regarding prostitution and sex trafficking is an integral part of Sweden’s greater objective of gender equality between men and women.¹²⁹

Believing that prostitution, itself, is a form of male violence against women and children, as well as a gross violation of a woman’s integrity, the Swedish government passed legislation on January 1, 1999 that criminalizes the purchase or attempted purchase of sexual services, but does not criminalize the prostitute.¹³⁰ The Swedish Penal Code provides that:

A person, who . . . obtains a casual¹³¹ sexual relation in return for payment, shall be sentenced for *purchase of sexual service* to a fine or imprisonment for at most six months.

The provision[s] of the first paragraph also apply if the payment was promised or given by another person.¹³²

The Swedish Penal Code also outlaws promoting prostitution:

A person who promotes or improperly financially exploits a person’s engagement in casual sexual relations in return for payment shall be sentenced for procuring to imprisonment for at most four years.

¹²⁵ TIP Report, *supra* note 5, at 235.

¹²⁶ FACT SHEET, *supra* note 19.

¹²⁷ TIP Report, *supra* note 5, at 235.

¹²⁸ FACT SHEET, *supra* note 19.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ It is unclear what the exact definition of a “casual sexual relation.” For example, it is unclear whether it would include “long term relationships” with a prostitute (i.e., men who frequently visit the same prostitute). Kulick, *supra* note 121, at 202.

¹³² Swedish Penal Code 1962:700) Chapter 6, Section 11 published Apr. 4, 2005 (translation at <http://www.regeringen.se/sb/d/3926/a/47455> provided by Government Offices of Sweden).

If a person who, holding the right to the use of premises, has granted the right to use them to another, subsequently learns that the premises are wholly or to a substantial extent used for casual sexual relations in return for payment and omits to do what can reasonably be requested to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be held criminally responsible in accordance with the first paragraph.¹³³

The Law that Prohibits the Purchase of Sex (the Law) intends to eradicate prostitution in Sweden completely by destroying the market.¹³⁴ Supporters argue that criminalizing the client causes the demand for prostitution to decrease because potential clients fear punishment.¹³⁵ This decreased demand, in turn, makes prostitution less lucrative, thus decreasing the number of new candidates recruited into prostitution.¹³⁶ Although the Law uses gender-neutral language, the Swedish government's policy assumes that the client is male and that the prostitute is female.¹³⁷ The main rationale for the Law is that prostitution is "another patriarchal tool of oppression that has deleterious effects on the women and girls who are induced and kept in prostitution, as well as an extreme form of male violence used to control female human beings as a class."¹³⁸ Women are not criminalized for being prostitutes because they are viewed as victims.¹³⁹ The Swedish Government's official view is that "no prostitution can be said to be voluntary."¹⁴⁰ Women who appear to have chosen prostitution were really forced into prostitution by unfair circumstances such as "poverty, inadequate education, homelessness, drug dependency and sex- and racial discrimination."¹⁴¹ The Swedish government adopted the Law under these premises and under the belief that so long as men sexually exploit women, the greater societal goal of gender equality can never be achieved.¹⁴²

¹³³ *Id.* at § 12.

¹³⁴ NORWEGIAN REPORT, *supra* note 38, at 47.

¹³⁵ Eckberg, *supra* note 62, at 1187.

¹³⁶ See NORWEGIAN REPORT, *supra* note 38, at 22; Eckberg, *supra* note 62, at 1187.

¹³⁷ Eckberg, *supra* note 62, at 1191.

¹³⁸ *Id.*

¹³⁹ NORWEGIAN REPORT, *supra* note 38, at 45.

¹⁴⁰ *Id.*

¹⁴¹ FACT SHEET, *supra* note 19.

¹⁴² NORWEGIAN REPORT, *supra* note 38, at 45.

Opponents to the Law argue that it is demeaning to women because it views them as “passive victims in need of rescuing” and denies them of their “right to choose whether to work in prostitution.”¹⁴³ Instead of viewing at least some prostitutes as rational women who willingly chose their career, the Law casts all prostitutes as unwilling victims.¹⁴⁴ Although prostitutes are not criminally liable under the Law, the Law in effect punishes the prostitutes by decreasing demand and making the field less profitable.¹⁴⁵ Moreover, opponents argue that rather than eliminating prostitution, the Law forces prostitution deeper underground, placing prostitutes in more perilous situations.¹⁴⁶

Arguments have also been made that the Law was motivated by factors other than a desire for gender equality, specifically that “the law is a response to Sweden’s entry into the [European Union (EU)]. For a variety of reasons, anxiety about Sweden’s position in the EU is articulated through anxiety about prostitution.”¹⁴⁷ Proponents of this argument view Sweden’s approach to prostitution as demonstrating that “sexuality is one site where boundaries and roles in the new Europe are being imagined and negotiated.”¹⁴⁸ In the late 1990s, Swedish society was becoming uneasy about a dramatic increase in foreign prostitutes arriving in Sweden.¹⁴⁹ Fears arose that if Sweden joined the EU a flood of foreign prostitutes would invade Sweden.¹⁵⁰ Media articles focused on this theme and one report claimed that “100,000 ‘Eastern Bloc’ women were gathering like storm clouds on the horizon, waiting to get into Sweden and spread HIV.”¹⁵¹ As the rest of Europe was moving towards legalization of prostitution, Sweden was sending a message of moral righteousness to its neighbors.¹⁵²

A desire to decrease sex trafficking through the Law was not expressed when the Law was first enacted.¹⁵³ Critics of the Law argued that the Law ignored the unique plight of victims of sex trafficking

¹⁴³ BINDEL & KELLEY, *supra* note 30, at 16.

¹⁴⁴ *Id.*

¹⁴⁵ OSTERGREN, *supra* note 67.

¹⁴⁶ Kulick, *supra* note 121, at 204.

¹⁴⁷ *Id.* at 199.

¹⁴⁸ *Id.*

¹⁴⁹ NORWEGIAN REPORT, *supra* note 38, at 20.

¹⁵⁰ Kulick, *supra* note 121, at 201.

¹⁵¹ *Id.* at 205.

¹⁵² *Id.* at 209-210.

¹⁵³ NORWEGIAN REPORT, *supra* note 38, at 16.

and failed to take responsibility for the “well-being, rehabilitation, and reintegration of victims of trafficking.”¹⁵⁴ For example, foreign prostitutes, who are likely to be victims of sex trafficking, were immediately deported after being found with a client; although these foreign prostitutes did not face criminal liability for being prostitutes, they were deported for not having a proper visa.¹⁵⁵ In fact, until July 1, 2002, Sweden had no legislation that specifically outlawed human trafficking for sexual exploitation.¹⁵⁶ Traffickers were subject to criminal liability as procurers of prostitution, but trafficking was not an offense.¹⁵⁷ On July 1, 2002, legislation that specifically outlawed human trafficking for sexual exploitation entered into force.¹⁵⁸ In 2004, the legislation outlawing human trafficking for sexual exploitation was amended to include trafficking for exploitation for other purposes as well.¹⁵⁹ Sweden’s current legislation regarding human trafficking is as follows:

Chapter 4. On Offences against Liberty and Peace

Section 1a

A person who, in a case other than those referred to in Section 1, by the use of unlawful coercion or deception, exploiting someone’s vulnerable situation or by some other such improper means recruits, transports, accommodates, receives or implements some other such measure with a person, and thereby assumes control over the person, with the aim that the person should be

1. subjected to an offence under Chapter 6, Section 1, 2, 3, 4, 5 or 6, exploited for causal sexual relations or in another way exploited for sexual purposes,
2. exploited in war service or compulsory work or other such compulsory condition,
3. exploited for the removal of organs, or
4. exploited in another way in a situation that involves a distressful situation for the vulnerable person,

shall be sentenced for trafficking in humans to imprisonment for at least two and at most ten years.

This also applies to a person who with such a purpose as referred to in the first paragraph,

1. passes over to another control over a person, or
2. from another person receives control over a person.

¹⁵⁴ Halley et al., *supra* note 29, at 397.

¹⁵⁵ Kulick, *supra* note 121, at 205.

¹⁵⁶ See FACT SHEET, *supra* note 19.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

A person who commits an act as referred to in the first paragraph against a person who has not attained the age of eighteen should be sentenced for trafficking in humans even where no such improper means as referred to there have been used.

If the offence referred to in the first to third paragraphs is less grave, a sentence of imprisonment for at most four years shall be imposed. (SFS 2005:90)¹⁶⁰

In 2004, the Swedish government also amended the Aliens Act, allowing for time-limited residence permits to be issued to women thought to be victims of human trafficking.¹⁶¹ These time-limited residency permits are only granted to women who agree to participate in police investigations of trafficking.¹⁶² Women who decline to participate in investigations continue to face immediate deportation.¹⁶³ The Swedish Government does not offer the option to remain in Sweden or removal to a neutral country to women who face adversity or retribution in their country of origin.¹⁶⁴

Sweden's legislation is in full compliance with the United States government's minimum standards for combating human trafficking and provides penalties that are commensurate with penalties imposed for other grave criminal offenses.¹⁶⁵ The Swedish Government considers the Law (not the anti-trafficking legislation), Sweden's greatest tool in its fight against sex trafficking because the Law addresses what the Swedish Government considers the root cause of sex trafficking: demand.¹⁶⁶

Sweden's National Rapporteur for Trafficking in Women at the National Criminal Investigation Department (NCID) asserts that the Law has been successful in limiting sex trafficking in Sweden.¹⁶⁷ Compared to neighbouring countries, such as Finland, Denmark, and Norway, the estimated number of women trafficked to Sweden each year is relatively low.¹⁶⁸ Approximately 400 to 600 women are trafficked into Sweden each year whereas approximately 2,750 to 3,900 women are trafficked to Denmark each year.¹⁶⁹ Additionally, Europol indicates that Sweden is no longer an appealing market for

¹⁶⁰ Swedish Penal Code Chapter 4 Section 1a.

¹⁶¹ Fact Sheet, *supra* note 19.

¹⁶² TIP Report, *supra* note 5, at 235.

¹⁶³ *Id.* at 236.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 235-36.

¹⁶⁶ See FACT SHEET, *supra* note 19.

¹⁶⁷ Eckberg, *supra* note 62, at 1199.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

traffickers.¹⁷⁰ The profit-loss analysis in Sweden is not favorable for traffickers because of the Law.¹⁷¹

Conversations recorded during crime investigations revealed the following frustrations among traffickers:

- Prostituted women must be escorted to the buyers, therefore giving less time to fewer buyers, and gaining less revenue for pimps that if women had been in street prostitution.
- Swedish men who want to buy women for prostitution purposes express serious fear of being arrested and prosecuted under the Law and hence demand absolute discretion from the pimps/traffickers.
- To minimize the possibility of exposure/detection, the pimps/traffickers are forced to operate apartment brothels in more than one location and to change locations regularly. Thus the mode of operation is expensive and requires that the pimp have local contacts.¹⁷²

The NCID's 2004 report concluded that the Law "continues to function as a barrier against the establishment of traffickers in Sweden."¹⁷³

Sex trafficking has not disappeared in Sweden and there is no conclusive evidence documenting a decrease in the number of women trafficked to Sweden.¹⁷⁴ In 2007, Sweden opened fifteen trafficking investigations.¹⁷⁵ Opponents to the Law argue that trafficking "did not disappear but rather went deeper underground and merely changed form," placing victims of trafficking in even worse working conditions and making them more vulnerable to abuse.¹⁷⁶ According to a report by the National Police Board, "there are indications that the law has made it *more* difficult to locate and prosecute traffickers and exploiters."¹⁷⁷ Before the Law was passed clients were often extremely helpful in police investigations of sex trafficking, but now that the men fear criminal liability they are less willing to cooperate.¹⁷⁸ Clients can be a useful asset to police because the victims of sex trafficking sometimes confide to their clients

¹⁷⁰ *Id.* at 1200.

¹⁷¹ *Id.* at 1200-1201.

¹⁷² *Id.* at 1201.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1200.

¹⁷⁵ TIP Report, *supra* note 5, at 236.

¹⁷⁶ Halley et al., *supra* note 29, at 396.

¹⁷⁷ Kulick, *supra* note 121, at 213 n.9 (citing Nord and Rosenberg, 2001; Tidningen Svensk Polis 02-04-18).

¹⁷⁸ *Id.* at 204.

that they are being exploited and held against their will, but, when the purchase of sex is criminalized, clients are less willing to come forward with information regarding the crime.¹⁷⁹

In regards to decreasing prostitution in general, it is also unclear whether the law has been effective. In the year following the enactment of the Law, the number of known street prostitutes was cut in half, but that number has remained constant since.¹⁸⁰ No report has conclusively held that prostitution has decreased and most indicate that passage of the Law led to a shift in where prostitution occurs, rather than an actual elimination of prostitution.¹⁸¹

Opponents of the Law argue that it is ineffective because there have been a “ludicrously” small number of convictions.¹⁸² Supporters of the Law counter that the number of convictions under the Law is not indicative of its effectiveness.¹⁸³ Because the Law aims to deter people from buying sex, a low number of arrests may actually indicate the Law’s success as a deterrent.¹⁸⁴ The value of this argument is weakened by evidence showing that the judicial system has been rather lenient with clients and that the number of convictions under the Law is far lower than the number of arrests under it.¹⁸⁵ For example, in the year 1999, ninety-one offense reports were filed, but by the beginning of 2007, only six convictions were made.¹⁸⁶ Convictions are complicated because it is extremely difficult to find enough evidence to prove the crime occurred; this is especially true because both the prostitute and the client deny that any crime has occurred.¹⁸⁷ Additionally, the courts and the police seem, at times, sympathetic to the men arrested under the Law, and often agree to send the summons to an address designated by the suspect—rather than his home address—to help protect the suspect from societal and familial repercussions.¹⁸⁸

¹⁷⁹ Fick, *supra* note 73, at 35.

¹⁸⁰ NORWEGIAN REPORT, *supra* note 38, at 9.

¹⁸¹ Kulick, *supra* note 121, at 204.

¹⁸² *Id.* at 205.

¹⁸³ Eckberg, *supra* note 62, at 1209

¹⁸⁴ *Id.*

¹⁸⁵ NORWEGIAN REPORT, *supra* note 38, at 49-50.

¹⁸⁶ Kulick, *supra* note 121, at 203.

¹⁸⁷ *Id.*

¹⁸⁸ Norwegian Report, *supra* note 38, at 49.

Many prostitutes are opposed to the Law because they “feel discriminated against, endangered by the very laws that seek to protect them, and they feel under severe emotional stress as a result of the [Law].”¹⁸⁹ Prostitutes assert that the decrease in demand has also decreased prices, causing more competition among prostitutes.¹⁹⁰ Increased competition leads the women to engage in unsafe sex and riskier sexual activities.¹⁹¹ Because they cannot conduct their business on the street, many of the prostitutes find themselves in more dangerous situations (e.g., going to strange locations or getting in stranger’s cars before they have had a chance to assess the situation).¹⁹² The Law also caused the profile of the clients to change, with negative effects for the prostitutes:

There are now fewer clients and it is therefore reckoned that a larger part of them are “dangerous.” For instance, they now want “rougher things” and have more peculiar demands (for instance more rough sex) or are prepared to pay more for unprotected sex.¹⁹³

Although there is not statistical data to support a conclusion that the Law has caused an increase in violence against prostitutes, there is evidence that it has, at a minimum, caused an increase in fear of violence among prostitutes.¹⁹⁴ Health officials have also voiced concern that the health of prostitutes is declining and that the spread of sexually transmitted diseases is increasing as prostitutes become more likely to engage in unprotected sex.¹⁹⁵ These negative repercussions felt by prostitutes in general can likely be attributed to victims of trafficking as well. As profits decrease for traffickers, they are likely to increase the violence they use against their victims and force the girls to engage in more dangerous sex to meet the needs of the remaining clients.¹⁹⁶

Although the Law has not eliminated prostitution and sex trafficking in Sweden—and has had an arguably negative impact on prostitutes—it has had symbolic success.¹⁹⁷ Soon after the enactment of the Law, the Gender Equality Unit of the Ministry of Industry, Employment, and Communications launched

¹⁸⁹ OSTERGREN, *supra* note 67.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² NORWEGIAN REPORT, *supra* note 38, at 13.

¹⁹³ *Id.* at 12.

¹⁹⁴ *Id.* at 13.

¹⁹⁵ *Id.* at 13.

¹⁹⁶ *See* HUGHES, *supra* note 41, at 59.

¹⁹⁷ NORWEGIAN REPORT, *supra* note 38, at 55.

several campaigns to promote the Law and the rationale behind it.¹⁹⁸ Eighty-one percent of the population views the Law favourably and it has been successful in both influencing and reinforcing attitudes among the Swedish population about prostitution.¹⁹⁹

As the years since the enactment of the Law pass, money is no longer being earmarked for enforcement of the Law and police are no longer dedicating as much effort to enforcing it.²⁰⁰ Police are instead focusing on fighting the more severe crime of sex trafficking.²⁰¹ This gradual shift away from enforcement of the Law indicates that, in practice, the Law may have little to do with efforts to combat sex trafficking in Sweden.

B. Legalization in the Netherlands

The Netherlands is a source, transit, and destination country for sex trafficking.²⁰² As a destination country, the Netherlands is an end point for women, children, and some men, primarily from Nigeria, Bulgaria, China, Sierra Leone, and Romania, who are used for sexual exploitation in the Netherlands.²⁰³ As a source country, men referred to as “lover boys” seduce young Dutch women and traffic them within the Netherlands for sexual exploitation.²⁰⁴

The extent of sex trafficking occurring in the Netherlands is unclear as differing sources provide vastly different figures.²⁰⁵ The United States State Department reports that a “significant percentage” of the estimated 25,000 women working in prostitution in the Netherlands are victims of sex trafficking.²⁰⁶ The Dutch National Rapporteur on Trafficking in Human Beings, on the other hand, maintains that many of the alleged victims of trafficking are actually legal migrants working voluntarily in the sex industry.²⁰⁷

¹⁹⁸ *Id.* at 48.

¹⁹⁹ *Id.* at 49.

²⁰⁰ *Id.* at 49.

²⁰¹ *Id.*

²⁰² TIP Report, *supra* note 5, at 191.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ LEVENKRON, *supra* note 31, at 63.

²⁰⁶ Office of the Under Sec’y for Global Affairs, U.S. Dep’t of State, Trafficking in Persons Report 187 (2006), available at <http://www.state.gov/documents/organization/66086.pdf>.

²⁰⁷ DUTCH NATIONAL RAPPOURTEUR ON TRAFFICKING IN HUMAN BEINGS, TRAFFICKING IN HUMAN BEINGS—FOURTH REPORT OF THE DUTCH NATIONAL RAPPOURTEUR 140 (The Hague Bureau NRM 2006).

In 2007, the Dutch Government recorded 382 suspected victims of sex trafficking.²⁰⁸ Because of difficulties in detecting and documenting all cases of sex trafficking, it is estimated that the figures recorded with the Dutch government only reflect five percent of the actual figure.²⁰⁹

The Dutch Government draws a sharp distinction between voluntary prostitution (where women choose on their own volition to engage in prostitution) and sex trafficking (where women are coerced and exploited).²¹⁰ Prostitution is legal and regulated by the government, but sex trafficking is criminalized.²¹¹ Voluntary prostitution is acceptable because “sex for payment between consenting adults does not injure human dignity” and does not involve coercion or exploitation.²¹²

Although prostitution has been legal in the Netherlands since the turn of the nineteenth century, the operation of brothels²¹³ was prohibited until October 2000.²¹⁴ The police were lenient in enforcing the prohibition, creating “tolerance zones” or “red light districts” where brothels could operate so long as they did not create a nuisance for the general public.²¹⁵ As prostitution expanded in the Netherlands during the 1970s, the brothels became a nuisance and police were forced to enforce the law.²¹⁶ Feminists began to argue for the legalization of brothels in order to increase the security of women in prostitution and allow them the same rights as other workers.²¹⁷ Many believed that legalizing and regulating prostitution was both pragmatic and important for improving the situation of prostitutes:

Prostitution has been around for ever [sic] and it is not going to disappear regardless of how you may feel about it. That is one reason why it is important to organise [sic] prostitution as best as possible rather than forbidding it because then none of the problems related to prostitution are solved. In many countries prostitution is criminalized [sic]. Laws and various police actions against prostitutes force women and men to work in more dangerous and unhealthy situations. Prostitutes are being treated as criminals as if they should be ashamed of what they are doing. And we ask why this is? Because they are being paid for

²⁰⁸ TIP Report, *supra* note 5, at 191.

²⁰⁹ U.N. Office on Drugs & Crime (UNODC), *Trafficking in Persons: Global Patterns* (Apr. 2006).

²¹⁰ NORWEGIAN REPORT, *supra* note 38, at 27.

²¹¹ MOSSMAN, *supra* note 29, at Table 3.

²¹² LEVENKRON, *supra* note 31, at 56.

²¹³ A brothel is “a building or business where prostitutes ply their trade.” *Black’s Law Dictionary* 206 (8th ed. 2004).

²¹⁴ LEVENKRON, *supra* note 31, at 55.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

providing sexual services that are consensually given and received. Working in prostitution is their individual choice and there are no good reasons to interfere with this.²¹⁸

As awareness of sex trafficking increased in the 1990s, feminists and some policy makers argued for the legalization of brothels as a way of combating trafficking because “allowing individuals to become employed as prostitutes if they so wish, makes it easier to use administrative and legislative measure to prevent [exploitation and abuse].”²¹⁹ The Dutch Government’s primary objectives in lifting the ban on brothels were:

1. Control and regulation of the running of prostitution;
2. Improvement of the combat of exploitation of involuntary prostitution;
3. Protection of minors from sexual abuse;
4. Protection of the position of prostitutes;
5. Separation of prostitution and peripheral criminal phenomena;
6. Reduction in the scale prostitution by illegal migrants.²²⁰

In order to obtain these goals, the Dutch Government adopted a decentralized system for regulating prostitution.²²¹ National laws mandate that prostitutes must be age eighteen or above and be either citizens of the Netherlands or hold a valid legal residence permit, but local authorities retain power to regulate prostitution in their own municipalities.²²² The municipalities are also responsible for regulating prostitution according to their own by-laws.²²³ These by-laws include licensing provisions and laws related to hygiene and working conditions.²²⁴ Regulation within each municipality is “achieved through various local authorities in addition to the police, such as the fire department, the building control department, municipal medical and health services, and the tax and customs administration.”²²⁵ Although each municipality is free to create its own system of regulating prostitution, no municipality can prohibit

²¹⁸ Prostitute Information Center, <http://www.pic-amsterdam.com/picgb.html> (last visited Nov. 20 2008).

²¹⁹ NORWEGIAN REPORT, *supra* note 38, at 27.

²²⁰ *Id.* at 28.

²²¹ *Id.* at 29.

²²² LEVENKRON, *supra* note 31, at 56.

²²³ NORWEGIAN REPORT, *supra* note 38, at 29.

²²⁴ LEVENKRON, *supra* note 31, at 56.

²²⁵ Halley et al, *supra* note 29, at 398.

prostitution altogether.²²⁶ The Dutch Local Government Association constructed a model regulatory system that many municipalities have adopted in whole or in part.²²⁷

The Dutch regulatory system has been critiqued because the lack of synchronization between municipalities can frustrate effective implementation of the regulations.²²⁸ Further implementation difficulties can arise from a lack of collaboration among the various agencies involved.²²⁹ Sex traffickers may be able to benefit from the disparate supervision and enforcement among municipalities.²³⁰

Opponents to legalization argue that even if implementation was perfect, the Dutch Government's goals cannot be met because "legalization of prostitution will inevitably normalize an extreme form of sexual discrimination and violence and strengthen male domination of all female human beings."²³¹ The sex industry expands under a legalized regime because prostitution becomes legally and socially acceptable, encouraging "men, who would not ordinarily engage in illegal prostitution . . . to solicit prostitutes."²³² Rather than improve efforts at combating sex trafficking, they argue, legalization operates as a "pull factor" for traffickers, increasing the volume of women trafficked for sexual exploitation.²³³

Legalization is a pull-factor because

[t]raffickers know that the high demand that is present in a legalized prostitution structure cannot be met by the limited number of women operating without traffickers. They exploit the inevitable profit potential of the market by trafficking women and children at a lower cost and who will be forced to provide the types of sexual acts that those with greater levels of choice find to be unsafe, unhealthy, or dehumanizing.

As a result, legalization creates a safe haven for traffickers, rather than a safe industry for prostitutes.²³⁴

Sex trafficking, according to the opponents of legalization, can be combated only through decreasing the demand for prostitutes.²³⁵

²²⁶ LEVENKRON, *supra* note 31, at 56.

²²⁷ NORWEGIAN REPORT, *supra* note 38, at 29-30.

²²⁸ *Id.* at 31.

²²⁹ Halley et. al, *supra* note 29, at 399.

²³⁰ DUTCH NATIONAL RAPPOREUR ON TRAFFICKING IN HUMAN BEINGS, TRAFFICKING IN HUMAN BEINGS—FIFTH REPORT OF THE DUTCH NATIONAL RAPPOREUR 83 (The Hague: Bureau NRM 2007) [hereinafter Fifth Report].

²³¹ Eckberg, *supra* note 62, at 1190.

²³² Yen, *supra* note 2, at 682.

²³³ BINDEL & KELLY, *supra* note 30, at 8.

²³⁴ Diep, *supra* note 97, at 329.

Although the Dutch Government agrees that “prevention is better than cure,” it maintains that criminalizing prostitution is not the only technique for decreasing demand for sex trafficking.²³⁶ The Dutch approach to decreasing demand focuses on campaigns informing clients about sex trafficking and their role in helping to combat it by reporting any suspicious activity.²³⁷

The Dutch Government does not believe that legalizing and regulating prostitution alone will eliminate sex trafficking. Instead, the legalization of prostitution is intended only to assist in the fight against sex trafficking. Notably, the Netherlands was one of the first countries to appoint a National Rapporteur on Trafficking in Human Beings who studies the scope of trafficking in the Netherlands, issues reports on the status of the Netherlands’ efforts to combat trafficking, and advises the Government on trafficking policy.²³⁸ Legislation specifically designed to combat human trafficking for sexual exploitation is found in Article 273f of the Dutch Criminal Code²³⁹:

(I) Any person who:

1. By force, violence or other act, by the threat of violence or other act, by extortion, fraud, deception or the misuse of authority arising from the actual state of affairs, by the misuse of a vulnerable position or by giving or receiving remuneration or benefits in order to obtain the consent of a person who has control over this other person recruits, transports, moves, accommodates, or shelters another person, with the intention of exploiting this other person . . .;
2. ...
3. Recruits, takes with him or abducts a person with the intention of inducing that person to make himself/herself available for performing sexual acts with or for a third party for remuneration in another country²⁴⁰
4. ...
5. Induces another person to make himself/herself available for performing sexual acts with or for a third party for remuneration . . . or takes any

²³⁵ Donna Hughes, *The Demand: Where Sex Trafficking Begins*, Address at the Pontifical Gregorian University Conference: A Call to Action: Joining the Fight Against Trafficking in Persons (June 17, 2004), at http://www.uri.edu/artsci/wms/hughes/demand_rome_june04.pdf

²³⁶ 5TH REPORT, *supra* note 230, at 2-3.

²³⁷ *Id.* at 4.

²³⁸ General Assembly, Committee on Elimination of Discrimination against Women, 767th and 768th Meetings, Women’s Anti-Discrimination Committee examines Netherlands’ Policies on Prostitution, Domestic Violence, Trafficking (24 January 2007) WOM/1601/Rev.1 [hereinafter CEDAW].

²³⁹ Article 273f includes provisions outlawing other forms of trafficking of human beings, such as for labor purposes or organ removal, but only the sections pertaining to sex trafficking are provided here.

²⁴⁰ Although the Code indicates that trafficking only occurs intrastate (i.e. in another country), The Dutch National Rapporteur on Trafficking in Human Beings and the Foundation against Trafficking in Women include interstate trafficking in reports on trafficking in Netherlands indicating that interstate trafficking is also considered trafficking. See FIFTH REPORT, *supra* note 230, at 48 (providing statistic on reported cases of trafficking from 2001 to 2005).

action towards another person which he knows or may reasonably be expected to know that this will result in that other person making himself/herself available for performing these acts . . . when that other person has not yet reached the age of eighteen years;

6. Willfully profits from the exploitation of another person;
7. . . .
8. Willfully profits from the sexual acts of another person with or for a third party for remuneration . . . when this other person has not yet reached the age of eighteen years;
9. Forces or induces another person by the means referred to under (a) to provide him with the proceeds of that person's sexual acts with or for a third party .

..
 Shall be guilty of trafficking in human beings and as such liable to a term of imprisonment not exceeding six years and a fifth category fine,²⁴¹ or either of these penalties:

(II) Exploitation comprises at least the exploitation of another person in prostitution [or] other forms of sexual exploitation. . .

(III) The following offense shall be punishable with a term of imprisonment not exceeding eight years and a fifth category fine, or either of these penalties:

1. Offenses as described in the first paragraph if they are committed by two or more persons acting in concert;
2. Offenses as described in the first paragraph if such offenses are committed in respect of a person who is under the age of sixteen.

(IV) The offenses as described in the first paragraph, committed by two or more person acting in concert under the circumstances referred to in paragraph 3 under (b), shall be punishable with a term of imprisonment not exceeding ten years and a fifth category fine, or either of these penalties.

(V) If one of the offenses referred to in the first paragraph results in serious physical injury or threatens the life of another person, it shall be punishable with a term of imprisonment not exceeding twelve years and a fifth category fine, or either of these penalties.

(VI) If one of the offenses referred to in the first paragraph results in death, it shall be punishable with a term of imprisonment not exceeding fifteen years and a fifth category fine, or either of these penalties.

(VII) Article 251²⁴² is applicable mutatis mutandis.²⁴³

Additionally, Chapter B-9 of the Aliens Act provides for temporary stays in the Netherlands for foreign nationals who are suspected victims of sex trafficking and who are helping with the investigation

²⁴¹ A fifth category is a fine of a maximum of €67,000. *Id.* at 242.

²⁴² Article 251 “allows the courts to deprive individuals of certain rights and to stop them from exercising certain professions, in case of convictions for specific offenses, including the right to hold certain offices or to serve in the armed forces.” *Id.* at 14-15.

²⁴³ *Id.* at 241-42.

or prosecution of trafficking suspects.²⁴⁴ Victims of suspected sex trafficking are also offered a three month reflection period, where they can remain in the Netherlands while deciding whether to assist in the investigation and prosecution of the suspected offenders.²⁴⁵

This legislation is in full compliance with the minimum standards for eliminating trafficking.²⁴⁶ Article 273f is criticized, however, because it does not include a provision criminalizing “the conscious purchase of sexual services from individuals who are clearly acting under coercion.”²⁴⁷ The Dutch Government maintains that such a provision would be counterproductive because, if passed, “human traffickers, prostitutes and clients will withdraw further into the invisible and often illegal circuit in order to avoid arrest . . . Clients will be less inclined to report any signs of human trafficking and victimization if they run the risk of being punished.”²⁴⁸

Article 273f is also criticized for providing relatively light sentences for the offense of trafficking.²⁴⁹ Trafficking without any aggravating circumstances (such as serious injury or death) is punished by a maximum of six years imprisonment, which is light compared to punishments provided for crimes of similar gravity.²⁵⁰ In practice, the sentences actually imposed are even lighter—and often fall well below the six year maximum. Between 2003 and 2005, for example, the average sentence for non-aggravated trafficking was twenty-five months; in cases involving sexual violence the average sentence was just over five and a half years; and in cases including non-sexual violence the average sentence was just over six and a half years.²⁵¹

The Dutch National Rapporteur on Trafficking in Human Beings concedes that “more than six years after lifting the general ban on brothels, it appears that not enough measures have as yet been

²⁴⁴ *Id.* at 15.

²⁴⁵ *Id.* at 15.

²⁴⁶ TIP Report, *supra* note 5, at 191.

²⁴⁷ FIFTH REPORT, *supra* note 230, at 4.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 211.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 145.

taken—or perhaps not enforced adequately enough—to free the sex industry from forced prostitution.”²⁵²

Although the number of legal, licensed sex businesses is decreasing, there is reason to believe that the illegal sector is expanding.²⁵³ Three sectors of the sex industry are identified in the Netherlands:

1. Licensed and site-specific sex business (e.g. licensed clubs, window prostitution and home workers);
2. Licensed non site-specific sex businesses (e.g. licensed escort bureaus); and
3. Unlicensed sex businesses that actually are required to have a license (site-specific or not) (e.g. businesses where the commercial sex is clandestine).²⁵⁴

The first category is regulated through systematic checks on the licensed brothels.²⁵⁵ Police and other agencies (such as the fire, hygiene, and tax departments) conduct systematic inspections of licensed brothels, as well as surprise inspections²⁵⁶ When regulations are broken, the brothel owner is held responsible and faces a range of sanctions, including “warnings, restrictions on the opening hours of the brothel, temporary or permanent closure, prosecution, and revocation of the license.”²⁵⁷ In general, authorities find it easier to close a brothel or revoke the owner’s license than to prosecute the owner.²⁵⁸

The police attempt to create good relations with licensed brothels, so that they can provide guidance for both the owners and the prostitutes about regulations and rights.²⁵⁹ By creating good relations, the police hope to get better information about sex trafficking and other abuses in the industry.²⁶⁰ Police have a duty to initiate an investigation if there is reason to suspect that sex trafficking is occurring at a brothel or that one of the prostitutes is a victim of trafficking.²⁶¹ Despite this, sex trafficking remains difficult to detect in the legal sector because victims may conceal their victim status out of fear of repercussion from their traffickers.²⁶² In addition, traffickers often fabricate false

²⁵² *Id.* at xx.

²⁵³ LEVENKRON, *supra* note 31, at 61.

²⁵⁴ FIFTH REPORT, *supra* note 230, at 80.

²⁵⁵ *Id.* at 84.

²⁵⁶ LEVENKRON, *supra* note 31, at 65.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ NORWEGIAN REPORT, *supra* note 38, at 37.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 37-38.

²⁶² FIFTH REPORT, *supra* note 230, at 90.

documents, creating the appearance that the victims are working legally.²⁶³ The fact that foreign nationals from European Union member states can reside in the Netherlands and work legally as self-employed prostitutes further frustrates police attempts to combat sex trafficking in the legal sector.²⁶⁴ Before migrant workers could legally work as prostitutes in the Netherlands, the police could take foreign prostitutes to the police station to question them about the possibility of being victims of sex trafficking.²⁶⁵ Now, women from countries such as Bulgaria and Romania—significant source countries for sex trafficking—can work legally as prostitutes in the Netherlands, and the police cannot routinely bring them in for questioning.²⁶⁶

The second category is a “grey zone” market that is difficult to regulate.²⁶⁷ This grey zone consists of escort services, sexual services arranged through the Internet, and non-brothel businesses that provide sexual services (such as saunas and massage salons).²⁶⁸ Not all municipalities require licenses for escort businesses, and businesses based in these municipalities can legally operate unlicensed in other municipalities that do require licenses.²⁶⁹ Even in municipalities where licensing is required for escort businesses, it is difficult to supervise these businesses because the sex occurs in various locations.²⁷⁰ Some methods for regulation have developed, such as “the ‘hotel procedure’ where a police officer pretends to be a client and orders an escort, whereupon he checks whether the prostitute is of age, the legality of her residential status, and whether she is working on her own free will.”²⁷¹ These methods are labor and time intensive, causing police to use them less frequently than checks on licensed brothels.²⁷²

The third category, the illegal sector, is extremely difficult to regulate.²⁷³ Because the illegal sector operates clandestinely it is difficult for the police to even ascertain where it exists, making

²⁶³ *Id.* at 84.

²⁶⁴ *Id.* at 81.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 84.

²⁶⁷ NORWEGIAN REPORT, *supra* note 38, at 38.

²⁶⁸ FIFTH REPORT, *supra* note 230, at 75.

²⁶⁹ *Id.* at 77.

²⁷⁰ *Id.* at 84.

²⁷¹ *Id.* at 80.

²⁷² *Id.*

²⁷³ *Id.* at 81.

regulation nearly impossible.²⁷⁴ This “encourages conditions that generally lead to an increase in severe exploitation.”²⁷⁵ It is in this illegal sector that sex trafficking and abuse can flourish.²⁷⁶ The lack of regulations and supervision can provide economic incentives for legal brothel owners to engage in some illegal operations.²⁷⁷ Pimps and traffickers can use the legal sector to create an appearance of legitimacy for their illegal operations by forging documents for trafficked person that work in legal brothels.²⁷⁸

The three identified sectors apply to indoor prostitution (prostitution that occurs behind closed doors in brothels, hotels, or unidentified clandestine places). Outdoor prostitution (also referred to as street prostitution) also exists in the Netherlands.²⁷⁹ Complaints that street prostitution disturbs the peace in some areas have led some municipalities to create “Street Zones” where street prostitution is legal.²⁸⁰ “Street Zones” are confined to designated areas where residential neighborhoods will not be disrupted.²⁸¹ Street prostitution outside of the Zones is prohibited and punishable by law.²⁸² Street Zones contain a fenced in parking area for clients where services can be performed and a “drop in center” for prostitutes to rest, buy condoms, and arrange for medical consultations.²⁸³ Some of these Zones have worked well, others have not.²⁸⁴ Many municipalities, including Amsterdam, have closed their Zones, partially because of allegations of rampant sex trafficking in the Zones.²⁸⁵ It is unknown whether the prostitutes in the former Zones quit working, moved to a municipality that allows Street Zones, or moved into the illegal sector.²⁸⁶ Advocates for Street Zones argue that, despite allegations of abuse and trafficking, the

²⁷⁴ *Id.*

²⁷⁵ LEVENKRON, *supra* note 31, at 61.

²⁷⁶ Halley et al., *supra* note 29, at 399-400.

²⁷⁷ LEVENKRON, *supra* note 31, at 66.

²⁷⁸ *Id.*

²⁷⁹ NORWEGIAN REPORT, *supra* note 38, at 32.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 33.

²⁸³ *Id.* at 32.

²⁸⁴ *Id.* at 33.

²⁸⁵ FIFTH REPORT, *supra* note 230, at 77.

²⁸⁶ *Id.*

Zones are constructive because “the social services and police can keep an eye on a group of prostitutes there, who would otherwise disappear from view.”²⁸⁷

The Dutch policy is based on “the idealized image of the strong, autonomous and emancipated woman who self-consciously decides she wants to be a prostitute.”²⁸⁸ Under this view, prostitution should be considered a job like any other and prostitutes should enjoy the same rights as other workers, such as a clean working environment, regular salary, and health and unemployment benefits.²⁸⁹

Opponents to legalization argue that the image of the prostitute as strong and autonomous is inaccurate because women who appear to have chosen prostitution were actually forced into prostitution by unfair circumstances.²⁹⁰ Moreover, opponents argue that treating prostitution as a normal profession “raises many questions about recruitment, benefits, and ease of escaping prostitution.”²⁹¹ Specifically, there are concerns that women may be refused unemployment benefits if they decline to work at a brothel or that they will receive no assistance if they decide to leave prostitution.²⁹²

The Dutch government insists that these concerns are invalid because prostitution is not viewed as a “normal profession” in the Netherlands.²⁹³ Employment offices do not offer jobs in the prostitution sector and unemployment benefits are given to women who do not take available jobs in the field.²⁹⁴ Additionally, the Dutch Government specifically endeavors to assist women who want to leave prostitution and aids them in finding other work, such as in restaurants.²⁹⁵ While this may relieve concerns about women being forced into prostitution because they cannot receive unemployment benefits, it challenges the position that legalization improves conditions for prostitutes.²⁹⁶ Partially because prostitution is not seen as a normal profession, prostitutes continue to be stigmatized in the

²⁸⁷ *Id.*

²⁸⁸ Hendrick Wagenaar, *Prostitution Policy is too morally charged* (March 04, 2008)

http://www.eukn.org/netherlands/news/2008/04/interview-hendrik-wagenaar_1023.html.

²⁸⁹ NORWEGIAN REPORT, *supra* note 38, at 27.

²⁹⁰ FACT SHEET, *supra* note 19.

²⁹¹ HUGHES, *supra* note 41, at 57.

²⁹² *Id.* at 59.

²⁹³ CEDAW, *supra* note 238.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ See LEVENKRON, *supra* note 31, at 69 (discussing constraints that prevent prostitution from being viewed as an ordinary job and the stigmatizing effect of these constraints on the prostitutes).

Netherlands.²⁹⁷ Regulations confining prostitution to certain areas and “defining minimum distances between prostitution and ‘respectable’ institution such as schools and churches” may feed prejudices against prostitutes.²⁹⁸ Insurance companies, for example, charge higher premiums to prostitutes because they consider them “high risk.”²⁹⁹

Currently, only an estimated ten percent of all prostitutes in the Netherlands work legally.³⁰⁰ Some of those working illegally are victims of trafficking, some are illegal migrant sex workers, and some are prostitutes who do not want to be regulated and stigmatized by the government.³⁰¹ Legalization probably has improved conditions for many women working legally in licensed brothels, but there continue to be reports that employers (i.e., brothel owners) refuse to negotiate with prostitutes and some of the women have signed contracts that require them to work as many as sixteen hours a day and deny them the right to refuse clients.³⁰²

It has only been eight years since the Netherlands lifted the ban on brothels, making it too early to determine with certainty the full consequences of the Dutch system of legalization.³⁰³ It is clear, however, that the Government’s goals have not been reached.³⁰⁴ Conditions have only improved for a small number of prostitutes and sex trafficking and abuse continue to exist.³⁰⁵ Nonetheless, the Dutch National Rapporteur on Trafficking in Human Beings remains optimistic that the legalized regime can be an effective tool in the fight against human trafficking.³⁰⁶

IV. IT’S NOT REALLY ABOUT SEX TRAFFICKING AFTER ALL

Although sex trafficking continues to exist in both Sweden and the Netherlands, each country insists that its approach to prostitution policy is superior in terms of dealing with both prostitution and sex

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 62.

³⁰⁰ *Id.* at 68.

³⁰¹ *Id.* at 62, 68.

³⁰² *Id.* at 61-2.

³⁰³ *Id.* at 68.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ FIFTH REPORT, *supra* note 230, at xix-xx.

trafficking.³⁰⁷ No empirical comparative study exists to confirm whether one approach truly is more effective at combating sex trafficking.³⁰⁸ It is clear, however, that neither approach has eliminated sex trafficking.³⁰⁹ Nonetheless, each country clings to its approach because morality, rather than pragmatism, drives the policy.³¹⁰

Rather than sex trafficking acting as the impetus for change in the legislative schemes regarding prostitution in Sweden and the Netherlands, sex trafficking has been used as a justification for legislation that perpetuates the moral and social values of those countries. Neither the Netherlands nor Sweden truly adopted its approach to regulating prostitution because of sex trafficking; the approach each country takes is, instead, a reflection of the society's moral and social values.³¹¹ Both countries are clearly committed to fighting sex trafficking—it is unlikely, however, that their prostitution policies were truly motivated by this concern. In fact, Sweden did not even cite sex trafficking as a basis for implementing its policy of criminalizing the purchase of sex.³¹² The issue of sex trafficking did not enter the political agenda until 2002, when Sweden passed legislation specifically prohibiting sex trafficking.³¹³ In contrast, the Netherlands did cite a desire to combat sex trafficking as part of its reasoning for lifting the ban on brothels and allowing regulated prostitution.³¹⁴ This change was largely symbolic, however, as prostitution and brothels were already tolerated in the Netherlands.³¹⁵ Rather than allowing the operation of brothels as a unique means of combating sex trafficking, legalizing brothels was merely an extension of the already lenient policy toward prostitution that existed in the Netherlands.³¹⁶

³⁰⁷ Wagenaar, *supra* note 288.

³⁰⁸ *Id.*

³⁰⁹ See LEVENKRON, *supra* note 31, at 68 (noting that sex trafficking continues to exist in the Netherlands); Halley at 397 (noting that sex trafficking continues to exist in Sweden).

³¹⁰ Wagenaar, *supra* note 288; see also Ronald Witzer, *The Growing Moral Panic Over Prostitution and Sex Trafficking*, 30 THE CRIMINOLOGIST 1 (discussing the “new moral panic over prostitution [that] has emerged, fueled by claims about sex trafficking”)

³¹¹ See Wagenaar, *supra* note 288 (discussing the way moral values frame prostitution policies in both the Netherlands and Sweden).

³¹² NORWEGIAN REPORT, *supra* note 38, at 16.

³¹³ See FACT SHEET, *supra* note 19 (discussing Sweden's policies regarding prostitution and trafficking in human beings).

³¹⁴ NORWEGIAN REPORT, *supra* note 38, at 28.

³¹⁵ LEVENKRON, *supra* note 31, at 55.

³¹⁶ *Id.*

Sweden and the Netherlands are not alone in allowing morality and social values to govern their approach to prostitution while citing sex trafficking as a justification for the approach. Prostitution is by its nature a very morally charged issue. Sweden and the Netherlands serve as examples of the way the issue of sex trafficking can be commandeered by a nation's government as justification for morality-driven policies. The United States' approach to combating human trafficking in general and sex trafficking in particular provides a more overt example of sex trafficking being used to uphold morality-driven policies.

In March 1998, President Clinton issued a memorandum pronouncing his administration's dedication "to combating trafficking in women and girls with a focus on the areas of prevention, victim assistance and protection, and enforcement."³¹⁷ While the Clinton Administration "established bilateral working relationships and anti-trafficking initiatives with numerous countries, and spearheaded the drafting of the *Palermo Protocol*," a Republican-controlled Congress created the United States' domestic anti-trafficking legislation.³¹⁸ An unusual coalition of evangelical Christian groups and abolitionist

³¹⁷ Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, PUB. PAPERS 358 (Mar. 11, 1998).

³¹⁸ Chuang, *supra* note 16, at 449. Prior to the introduction of the United States' domestic anti-trafficking legislation, the Mann Act of 1910 was used to prosecute human traffickers. The Mann Act was created to protect women and girls from "white slavery" and was updated in 1948 and 1986 and now reads "Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. § 2421 (2002). In *Hoke v. United States*, the Supreme Court upheld the validity of the Mann Act by holding that, under the Commerce Clause, Congress could regulate the interstate transportation of women for purposes of prostitution. 227 U.S. 308, 323 (1913). Although there are suggestions that the Mann Act is outdated in the face of global trafficking in human beings (*see* Sasha L. Nel, *Victims of Human Trafficking: Are They Adequately Protected in the United States?* 5 CHI.-KENT J. INT'L & COMP. L. 3 (2005)), the Mann Act is still in effect in the United States and is a useful tool for prosecuting trafficking because a Mann Act conviction does not require the (often difficult to provide) proof of force, fraud or coercion that the offense of "trafficking" requires. Letter from Jennifer Korn, Director, Office of Intergovernmental and Public Liaison, U.S. Dep't of Justice, to Dorchen Leidholdt, President, Coalition Against Trafficking in Women—International (Nov. 27, 2007) at <http://www.usdoj.gov/olp/pdf/coalition-letter.pdf>. In fact, 809 defendants were convicted of violating the Mann Act between fiscal years 2002 and 2006. *Id.* Because Mann Act convictions do not require proof of force, fraud or coercion, it cannot be determined whether all of these convictions are based on activities that could be considered trafficking. U.S. Department of Justice, assessment of U.S. Activities to Combat Trafficking in Persons 15 (Aug. 2003), available at <http://www.state.gov/documents/organization/23598.pdf>. Another important distinction between the Mann Act and the Trafficking Victims Protection Act (TVPA) is that the Mann Act does not provide provisions of victims assistance such as those provided in the TVPA. Compare 18 U.S.C. § 2421 (2002) with Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 199 Stat. 3558 (2006) [hereinafter 2005 TVPRA] (codified at 22 U.S.C. §§ 7101-7113).

feminists, united by a desire to eradicate prostitution, directly influenced Congress' stance on trafficking.³¹⁹ Although abolitionist feminists and evangelical Christians disagree on numerous issues, they found common ground in the belief that all prostitution was evil—for abolitionist feminists because it is a form of male patriarchy over women and for evangelical Christians because it's a violation of their moral principle of abstinence outside of marriage.³²⁰ Congressman Chris Smith, a conservative Republican from New Jersey, responded to this unusual coalition's lobbying by drafting an anti-trafficking bill that focused exclusively on the sexual exploitation of women and girls without regard to the exploitation of men and boys or of women and girls in other forms of forced labor.³²¹ Ultimately, the bill that was passed included other forms of exploitation, but the influence of the evangelical Christians and the abolitionist feminists remained.³²²

In October 2000, just weeks prior to the U.N. General Assembly's adoption of the *Palermo Protocol*, the United States enacted its domestic anti-trafficking legislation—the result of lobbying by the coalition of evangelicals and abolitionists—the Trafficking Victims Protection Act (TVPA).³²³ Whereas the *Palermo Protocol* (by purposely leaving the terms “exploitation of the prostitution of others” and “other forms of sexual exploitation” undefined) left the question of whether a distinction between forced and voluntary prostitution exists for individual nations to decide, the United States defines “commercial sexual exploitation” as “including, but not limited to pimping, pandering, procuring, profiting from prostitution, maintaining a brothel, child pornography.”³²⁴ By defining commercial sexual exploitation in this manner, the United States Government equates all commercial sex acts with sexual exploitation regardless of whether the sex act was obtained through force or coercion.

³¹⁹ Berman, *supra* note 4, at 283.

³²⁰ *Id.* at 270, 277.

³²¹ *Id.* at 283.

³²² *Id.*

³²³ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 § 2 A, 144 Stat. 1464 (2000) [hereinafter TVPA], as supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 [hereinafter 2003 TVRPA], and the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 199 Stat. 3558 (2006) [hereinafter 2005 TVPRA] (codified at 22 U.S.C. §§ 7101-7113).

³²⁴ Office to Monitor and Combat Trafficking in Persons, Legal Building Blocks to Combat Trafficking in Persons (Feb. 2004), available at <http://www.state.gov/g/trip/rls/19087.htm> (last visited October 18, 2008).

Although the Clinton Administration was not receptive to views of the evangelical/abolitionist coalition, the Bush Administration pandered to them.³²⁵ Charles “Tex” Colson, who became a born-again Christian while serving jail-time for his role in Watergate and is now the founder and chairman of Prison Fellowship Ministries, explains that “[t]here was no movement under Clinton. We couldn’t get anyone to talk us.”³²⁶ Dr. Richard L. Land, president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, adds: “[I]n this administration, they call us. They say, you know, ‘What do you think about this?’”³²⁷ Dr. Land and Mr. Colson take credit for pressing President Bush to publicly denounce prostitution and “sex slavery.”³²⁸ Accordingly, President Bush has pronounced the United State’s position that “prostitution is inherently harmful and dehumanizing, and fuels trafficking in persons, a form of modern-day slavery.”³²⁹

The Bush Administration considered itself morally obligated to fight prostitution and sex trafficking.³³⁰ In signing the 2006 Trafficking Victims Protection Reauthorization Act, President Bush articulated his view that “America has a particular duty to fight this horror because human trafficking is an affront to the defining promise of our country.”³³¹ Joseph E. Schmitz, the Bush-appointed inspector general of the Defense Department, explained:

Whatever else one might say about sex slavery in the 21st century . . . proactive measures taken by the U.S. . . reaffirm the “moral truth” that prostitution and human trafficking fall within those “dissolute and immoral practices” envisioned by our Continental Congress when it prescribed a duty to “guard against and suppress” such practices through, *inter alia*, vigilance by leaders in “inspecting the conduct of all persons who are placed under their command.”³³²

³²⁵ Elizabeth Bumiller, *Evangelicals Sway White House on Human Trade Issues Abroad*, N.Y. TIMES, Oct. 26, 2003, § 1, at 1; Block, *supra* note 10.

³²⁶ Bumiller, *supra* note 325.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Bureau of Pub. Aff., Dep’t of State, *The Link Between Prostitution and Sex Trafficking*, (Nov. 24, 2004), <http://www.state.gov/r/pa/ei/rls/38790.htm>

³³⁰ Press Release, U.S. Office of the Press Sec’y, *President Signs H.R. 972, Trafficking Victims Protection Reauthorization Act*, (Jan. 10, 2006) (<http://www.whitehouse.gov/news/releases/2006/01/20060110-3.html>).

³³¹ *Id.*

³³² Eartha Mezler, *Trafficking in Politics: Bush’s Strong Rhetoric on Sex Slavery Masks Policy Failures*, IN THESE TIMES, Mar. 14, 2005, available at <http://www.inthesetimes.com/site/main/article/2007/>.

Critics accused the Bush Administration of manipulating the cause of sex trafficking to justify policies based on the administration's deep conservative Christian ethics.³³³ By conflating prostitution with sex trafficking, the administration was able to exploit "the exploitation of women to funnel millions more taxpayer dollars toward the [Christian right's] already flush antiabortion, anti-condom, anti-sex campaign"³³⁴ Victims of trafficking become a symbol used to promote this agenda, enabling the administration to use trafficking as a means for enforcing conservative Christian norms regarding sex.³³⁵

Like the Swedish Government, the United States Government hopes to eradicate prostitution. Unlike the Swedish Government, the United States Government does not see prostitution as male violence against women; instead the United States Government views the seller and buyer of sex as equally culpable of the offense of prostitution.³³⁶ Accordingly, the United States completely criminalizes all aspects of prostitution. Prostitutes are generally viewed as "morally compromised women who casually engage in sex."³³⁷ Complete criminalization theoretically serves to protect the community from this undesirable immoral behavior.³³⁸ Complete criminalization also attempts to decrease the spread of sexually transmitted diseases and prevent street violence and other crimes associated with prostitution.³³⁹

Currently, all fifty states criminalize prostitution in most, if not all, instances, but each state created its own laws for criminalizing prostitution and set its own penalties³⁴⁰ Both Rhode Island and

³³³ Berman, *supra* note 4, at 292; see Edi C. M. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge*, 21 BERKLEY J. GENDER L. & JUST. 158, 168-70 (comparing the Bush Administration's approach to sex trafficking and prostitution to the moral panic surrounding "white slavery" in the beginning of the 20th century).

³³⁴ Block, *supra* note 10.

³³⁵ *Id.*

³³⁶ Leidholdt, *supra* note 40, at 134.

³³⁷ Berman, *supra* note 4, at 278.

³³⁸ *Id.* at 281.

³³⁹ Hough, *supra* note 36, at 104.

³⁴⁰ *Id.* at 433. Although many articles and books examining prostitution in the United States reference a Standard Vice Repression Law of 1919 that made conducting sex for commercial gain illegal and permitted states to prosecute the buyers, sellers, and procurers of sex, the law, itself, has not been located. See *McNeil v. Maryland*, 739 A.2d 80, 89 (Md. 1999) (citing R. SYMANSKI, *THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES* 83 (Butterworths, 1981) and explaining that, even with the assistance of the Maryland State Library and the Library of Congress, the Court was unable to locate the Standard Vice Repression Law.)

Nevada permit prostitution in limited circumstances.³⁴¹ Rhode Island permits prostitution between consenting adults behind closed doors.³⁴² In 2005, the Rhode Island legislature abandoned bills that sought to criminalize this form of prostitution.³⁴³ Nevada has permitted highly regulated brothels in some counties since 1987.³⁴⁴ In November 2008, San Franciscans voted on a proposition that would have prohibited local authorities from investigating, arresting, or prosecuting anyone for prostitution.³⁴⁵ Because the state of California criminalizes prostitution, San Francisco cannot decriminalize or legalize prostitution, but they can prohibit enforcement of the state law.³⁴⁶ Advocates for the proposal argued that criminalization is repressive and ineffective, while opponents argued that decriminalization would cause increases in both prostitution and sex trafficking.³⁴⁷ Although it was ultimately defeated,³⁴⁸ the proposition received support from many San Franciscans, including the Democratic Council City Committee and the Director of STD Control and Prevention for the city's Health Department.³⁴⁹

Rhode Island's recent refusal to outlaw indoor consensual prostitution and San Francisco's ballot question may indicate that American society's views about prostitution are changing and that Americans are less disapproving of prostitution today than they were in the past. As the population becomes less disapproving of prostitution, laws criminalizing prostitution may be threatened.³⁵⁰ Historically, laws prohibiting morally reprehensible conduct fail when:

1. The societal majority no longer disapproves of the activity;
2. Enforcement of the prohibition becomes impossible because the activity becomes so widespread; or

³⁴¹ Evelyn Nieves, *San Francisco Weighs Decriminalizing Prostitution*, THE EXAMINER, Oct. 21, 2008, <http://www.sfexaminer.com/ap/?id=957529>.

³⁴² Amanda Milkovits, *Legislators Drop Bid to Outlaw Brothels*, PROVIDENCE J., June 16, 2005 at A1, available at http://www.projo.com/news/content/projo_20050616_prost16.2376e31.html.

³⁴³ *Id.*

³⁴⁴ Mariss H.I. Luning, Comment, *Prostitution: Protected in Paradise?* 30 U. HAW. L. REV. 193, 215 (2007).

³⁴⁵ Juliana Barbassa, *S.F. rejects prostitution, energy measures*, SFGATE, Nov. 5, 2008, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/11/04/politics/p235359S31.DTL&type=politics>.

³⁴⁶ Nieves, *supra* note 341.

³⁴⁷ *Id.*

³⁴⁸ Barbassa, *supra* note 345.

³⁴⁹ John M. Glionna, *Ballot measure to decriminalize prostitution divides liberal San Francisco*, LA TIMES, Sept. 15, 2008, available at <http://articles.latimes.com/2008/sep/15/local/me-sfsex15>.

³⁵⁰ See Hough, *supra* note 36, at 124.

3. The societal disapproval is outweighed by the benefits the activity provides.³⁵¹

Historical examples of this include the reversal of gambling prohibitions when society's disapproval of gambling waned, the reversal of alcohol prohibitions when widespread alcohol use made the prohibition unenforceable, and the reversal of pre-viability abortion prohibitions when the benefits of allowing abortion outweighed society's disapproval.³⁵²

More recently, the prohibition of sodomy failed when the United States Supreme Court ruled that prohibitions on homosexual sodomy were unconstitutional in *Lawrence v. Texas*.³⁵³ Justice Kennedy's majority opinion in *Lawrence* recognized the "profound and deep convictions [opposed to homosexual sodomy that were] accepted as ethical and moral principles,"³⁵⁴ but rejected the notion that these beliefs justified legislation that infringed on individual liberties guaranteed in the Due Process Clause of the Fourteenth Amendment.³⁵⁵ Justice Kennedy explicitly endorsed Justice Stevens' dissenting opinion in *Bowers v. Hardwick* and agreed that "the fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."³⁵⁶ According to the Court, the governing majority's moral values could not justify infringing on the fundamental right to privacy, including private sexual conduct.³⁵⁷

The decision in *Lawrence* indicates that prohibition of homosexual sodomy failed because the benefits of guaranteeing fundamental rights outweighed societal disapproval of the activity. Arguments can be made that sodomy prohibitions also failed because society's disapproval of homosexual activity diminished and because the laws were generally unenforceable.³⁵⁸ These factors may have influenced the Court's willingness to reconsider the decision in *Bowers*.

³⁵¹ *Id.* at 104.

³⁵² Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 236 (2000).

³⁵³ 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

³⁵⁴ *Id.* at 571.

³⁵⁵ *Id.* at 578.

³⁵⁶ *Id.* at 577 (quoting *Bowers*, 478 U.S. at 216 (dissenting opinion)).

³⁵⁷ *Id.* at 578.

³⁵⁸ Hough, *supra* note 36, at 104.

Although the Court in *Lawrence* explicitly stated that the decision did not pertain to “public conduct or prostitution,” the *Lawrence* reasoning may be extended in the future to invalidate the prohibition of prostitution.³⁵⁹ Like the prohibition of sodomy, the prohibition of prostitution may be challenged because 1) society is less disapproving of the activity; 2) enforcement is impossible; and 3) societal disapproval is outweighed by the benefits of lifting the prohibitions.³⁶⁰ As Americans become less disapproving of prostitution, they begin to question the usefulness of laws prohibiting the activity.³⁶¹ Punishing prostitution may no longer serve society as Americans become more accepting of sex.³⁶² The laws are viewed by some as ineffective because prostitution continues to flourish in the United States, causing people to believe that it may be impossible to enforce any ban on prostitution.³⁶³ Additionally, many people believe that the human rights that would be awarded to individual prostitutes if prostitution were decriminalized outweigh the alleged benefits of the prohibition.³⁶⁴ Nonetheless, the religious moral majority is still staunchly opposed to prostitution.³⁶⁵ The conservative Christian right and the Bush Administration may have sensed that their justifications for the prohibition of prostitution were weakening, causing them to search for other means of justifying the prohibition and leading to the current strategy of conflating prostitution with sex trafficking.

The United States Government’s manipulation of sex trafficking to justify its own moral and social norms is similar to Sweden’s use of sex trafficking as a justification for its criminalization of purchasing sex and the Netherland’s use of sex trafficking as a justification for its legalization of prostitution. The United States Government believes that prostitution is a moral evil that must be eradicated. Similarly, the Swedish Government believes that prostitution is a form of male violence against women that must be eradicated. The Dutch Government, on the other hand, maintains that there is

³⁵⁹ *Id.* at 123.

³⁶⁰ *Id.* at 104.

³⁶¹ See Nieves, *supra* note 341 (discussing San Franciscans who are questioning the usefulness of laws prohibiting prostitution).

³⁶² Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare is Served?* 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 427, 433 (1998).

³⁶³ Hough, *supra* note 36, at 117.

³⁶⁴ Nieves, *supra* note 341.

³⁶⁵ DeCou, *supra* note 362, at 451.

nothing inherently wrong with consensual prostitution. Each country's government established a legislative approach to prostitution reflecting its beliefs concerning prostitution and maintains that its approach is best. While Sweden and the Netherlands publicly advocate their positions, the United States has gone further, using its political and financial power to influence other countries to adopt its position under the guise of combating global sex trafficking.³⁶⁶

To fulfill its perceived moral duty to combat the sex industry in its entirety, the Bush Administration uses its political and financial power to induce the global community to accept the view that the abolition of prostitution is the sole way to combat sex trafficking.³⁶⁷ A system of restricted funding and selective sanctions serve as the carrot and stick to induce international acceptance of the United States' position.³⁶⁸ Organizations working both domestically and internationally to combat human trafficking are enticed to oppose prostitution by the promise of grant funding that can be secured only through an anti-prostitution pledge and national governments face the threat of economic sanctions and international shaming if they fail to meet the United States' "minimum standards" for combating human trafficking.³⁶⁹

The TVPA mandates that the Secretary of State must issue an annual report that uses a three-tiered system to categorize countries by their level of compliance to United States' standards for combating human trafficking.³⁷⁰ The annual *Trafficking in Persons Report* lists countries as Tier 1 if they comply with the United States' standards, Tier 2 if they are making significant effort to meet them, and Tier 3 if they do not meet the standards and are not making significant efforts to meet them.³⁷¹ Additionally, countries that do not meet the minimum standards are placed on the Tier 2 Special Watch list if

³⁶⁶ Chuang, *supra* note 16, at 438.

³⁶⁷ *Id.*

³⁶⁸ Kinney, *supra* note 333, at 169-70.

³⁶⁹ *Id.*

³⁷⁰ TVPA, *supra* note 323, at § 110.

³⁷¹ TIP Report, *supra* note 5, at 12; Both Sweden and the Netherlands are ranked as Tier 1 countries in the 2008 TIP Report, although Report does contain a section entitled Topics of Special Interest that reaffirms the United States' stance that prostitution should be eradicated noting disapproval of the Netherlands' legalization of prostitution and noting that Sweden's policy should be examined further. *Id.* at 29.

a) [t]he absolute number of victims of severe forms of trafficking [in the country] is very significant or is significantly increasing; b) [t]here is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecutions, and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or c) [t]he determination that a country is making significant efforts to bring itself into compliance with the minimum standards was based on commitments by the country to take additional future steps over the next year.³⁷²

Countries listed in Tier 3 risk sanctions from the United States.³⁷³

The TVPA gives the president the power to:

instruct the United States Executive Director of each multilateral development bank and of the International Monetary Fund to vote against, and to use the Executive Director's best efforts to deny, any loan or other utilization of the funds of the respective institution to that country (other than for humanitarian assistance, for trade-related assistance, or for development assistance which directly addresses basic human needs, is not administered by the government of the sanctioned country, and confers no benefit to that government) for the subsequent fiscal year until such government complies with the minimum standards or makes significant efforts to bring itself into compliance.³⁷⁴

The wisdom of using unilateral sanctions in any situation is questionable and using them as tool for combating human trafficking is specifically criticized as being “profoundly counterproductive” because it decreases much-needed international cooperation and causes governments to downplay the seriousness of their trafficking problems in order to avoid sanctions.³⁷⁵ The Bush Administration is also accused of using these sanctions as a political tool, only sanctioning Tier 3 countries that the United States already has poor relationships with.³⁷⁶ In 2005, for example, only five of fifteen Tier 3 countries were sanctioned—Cuba, Burma, North Korea, Venezuela, and Cambodia—none of which are known for smooth relations with Washington.³⁷⁷

³⁷² *Id.* at 12-13.

³⁷³ *Id.* at 13-15.

³⁷⁴ TVPA, *supra* note 323, at § 110.

³⁷⁵ Chuang, *supra* note 16, at 456.

³⁷⁶ *Id.* at 484.

³⁷⁷ *Id.*

The United States Government also uses a system of funding policies to persuade domestic and international organizations to adopt an anti-prostitution stance.³⁷⁸ The Trafficking Victims Protection Reauthorization Act of 2003 (and every Reauthorization of the Act since then) includes a clause denying funding to any organization that has not “stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution.”³⁷⁹ The current administration has dedicated an estimated \$295 million to global anti-trafficking efforts, but to receive these funds organizations “fighting AIDS, trafficking, or addressing reproduction in any way (especially anything involving sex or condoms) [must] first pledge their opposition to prostitution and sex trafficking.”³⁸⁰ This stipulation applies to both foreign and domestic organizations, shifting funding away from anti-trafficking organizations that decline to take a stance on prostitution, and toward conservative, religious anti-prostitution and -trafficking organizations.³⁸¹

Critics of the TVRPA’s funding restrictions argue that funding is being shifted from competent non-judgmental organizations to religious organizations that are often less knowledgeable about trafficking and less capable of anti-trafficking work.³⁸² Many organizations argue that voicing opposition to prostitution will hinder their efforts because it will cause them to lose the trust of the very people they

³⁷⁸ Kinney, *supra* note 333, at 169.

³⁷⁹ TVRPA, *supra* note 323. This provision is reminiscent of the Regan-era Mexico City Policy that denied funding to NGOs providing reproductive health services and family planning if the NGO performed abortions or advocated for abortions as a form of family planning. President Clinton abolished this policy, but it was reinstated by President Bush. Kinney, *supra* note 333, at 172-73.

³⁸⁰ Berman, *supra* note 4, at 275; *see* 22 U.S.C. § 7110(g)(1) (2006) (stating that “no funds made available to carry out this chapter, or any amendment made by this chapter, may be used to promote, support, or advocate the legalization or practice of prostitution”); 22 U.S.C. § 7110(g)(2) (2006) (prohibiting funds to “any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution”); 22 U.S.C. § 7110(f) (2003) (stating that “no funds [allocated as part of the United States Leadership Against AIDS/HIV, Tuberculosis, and Malaria] may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking”).

³⁸¹ Grace Chang and Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 317, 324 (2007). The constitutionality of such provisions was asserted in *DKT International, Inc. v. United States Agency for International Development*, where a not-for-profit organization claimed that the restriction in the Global AIDS Act violated 1st Amendment rights and the District of Columbia’s Court of Appeals held that the restriction of funding was valid because “[w]hen [the Government] communicates its message, either through public official or private entities, the government can-and often must-discriminate on the basis of a viewpoint” 477 F.2d 758, 761 (2007).

³⁸² Chang & Kim, *supra* note 381, at 324.

are attempting to help.³⁸³ A letter signed by hundreds of “public health, human rights, faith-based and community-based organizations” was sent to President Bush in 2005, expressing deep concern that the restrictions in both the TVRPA and the Global Aids Act would “preclude recipients of U.S. funds from using the best practices at their disposal” and “exacerbate stigma and discrimination against already marginalized groups.”³⁸⁴

V. CONCLUSION

Developed countries such as Sweden and the Netherlands are free to impose their own moral values on their prostitution policies because they are not reliant on the United States for grant funding in their efforts to combat human trafficking. Poorer countries, on the other hand, may adopt the United States’ approach simply to avoid sanctions and obtain funding. Because countries naturally develop their prostitution policies based on moral and social values, the superimposition of the United States’ approach may contradict the country’s own values, lessening the chances the country will succeed. Imagine the Netherlands being forced to criminalize prostitution—because Dutch society is deeply entrenched in the idea that prostitution is harmless and that women have a right to engage in it, a policy of criminalization would fail. Similarly, forced legalization in Sweden or the United States would be ineffective so long as those societies continue to view prostitution as a social evil.

Allowing each country to develop its own approach to dealing with prostitution, as the *Palermo Protocol* allows, is not detrimental to combating human trafficking. Despite taking different approaches to prostitution, the Netherlands, Sweden, and the United States have all had some success in their campaigns to combat human trafficking. Using sex trafficking as a justification for morally or socially driven policies may be detrimental to combating human trafficking, however. Like the United States, Sweden and the Netherlands can be accused of “hi-jacking” the cause of sex trafficking to support their own agendas, as can numerous other countries who promote their approach to prostitution as the global

³⁸³ Human Rights Watch, “U.S.: Restrictive Policies Undermine Anti-AIDS Efforts; Letter to President Bush Opposing Mandatory ‘Anti-Prostitution Pledge,’ which Threatens Lives of sex Workers and Trafficking Victims,” May 18, 2005, http://hrw.org/campaigns/hiv-aids/hiv-aids-letter/#_edn3.

³⁸⁴ *Id.*

solution to sex trafficking. When governments manipulate sex trafficking to justify prostitution policies, they run the risk of unconsciously ignoring other forms of trafficking. Trafficking becomes viewed as a purely female phenomenon, which reinforces the gender stereotype that “men are smuggled; women are trafficked”—making it even more difficult for male victims of human trafficking to find assistance.³⁸⁵ In order to develop comprehensive strategies for combating trafficking in human beings—and not merely sex trafficking—governments must abandon the highly gendered, value-driven practice of conflating prostitution with human trafficking and develop gender-neutral policies that encompass all aspects of human trafficking. Treating human trafficking as a prostitution-based phenomenon discounts all other forms of exploitation. As countries struggle to rescue “damsels in distress,” they often ignore the plight of boys like Shen:

A man at a local train station offered 16-year old Shen, from a small Chinese farming community, a well-paying job in a nearby city which he eagerly accepted. Within hours, he and 12 others were bundled into a minivan and dumped at a brick yard where they were beaten, barely fed, and forced to perform heavy labor for 20 hours per day. Guards at the kiln would beat them with iron bars and wooden staves when they worked too slowly, at times smashing brick across a worker’s head or body. Guard dogs kept Shen and the other slaves living in fear. Shen often saw local uniformed police officers visit the brickyard. “They were paid off by the owner. The whole village was his,” Shen said. “It was very ‘black’,” he said, using the Chinese term for evil or corrupt.³⁸⁶

³⁸⁵ Kinney, *supra* note 333, at 186-87.

³⁸⁶ TIP Report, *supra* note 5, at 8.