ARTICLES

DECRIMINALIZING VICTIMS OF SEX TRAFFICKING

Michelle Madden Dempsey*

INTRODUCTION ........................................... 208

I. WHAT COUNTS AS SEX TRAFFICKING? ............................. 209
   A. Child Prostitution ........................................... 210
   B. Prostitution Induced by “Force, Fraud or Coercion” .... 212
   C. Prostitution Induced by “Abuse of Power or a Position of Vulnerability” ................................... 213
   D. Conceptual Debates ........................................ 214

II. WHY WE SHOULD DECRIMINALIZE VICTIMS OF SEX TRAFFICKING . . . . . . . . . . . . . . 216
   A. Our Obligations Under International Human Rights Law Require It ...................................... 216
   B. We Tell Other Countries to Do It ..................... 217
   C. Principles of Criminalization Require It ........ 219

III. FOUR METHODS OF DECRIMINALIZING VICTIMS OF SEX TRAFFICKING ........................................ 223
   A. Safe Harbor Laws for Children: An Incomplete Solution . . . . . . . . . . . . . . 223
   B. Screening and Diversion Upon Arrest: Too Little, Too Late . . . . . . . . . . . . . . . . . . . . . . . . . . 224
   C. Decriminalizing Everyone Involved in Commercial Sex: A Failed Experiment . . . . . . . . . . . . . . . . . . . 225

* Associate Dean for Faculty Research and Development and Professor of Law, Villanova University School of Law; Co-Director, Criminal Law Theory Program, Robina Institute for Criminal Law & Criminal Justice, University of Minnesota School of Law; D.Phil. (Ph.D.), Law, University of Oxford (2007); LL.M., London School of Economics (2003); J.D., University of Michigan School of Law (1996); B.A., University of Illinois. I am grateful to the audience and workshop participants at the Robina Institute’s “Future of Criminal Law” Conference on April 25–26, 2014, where a draft of this paper was previously presented. Thanks in particular to Ragna Aarli, Gustavo Beade, Darryl Brown, Elizabeth Brown, Vincent Chiao, John Child, John Choi, Jennifer Daskal, Donald Dripps, Antony Duff, Chad Flanders, Richard Frase, Steve Garvey, Charlie Gerstn, Stuart Green, Zach Hoskins, Doug Husak, Cecelia Klingele, Ambrose Lee, Ian Loader, Arlie Loughman, Sandra Marshall, Matt Matravers, Perry Moriearty, JaneAnne Murray, Fionnuala Ni Aolain, Hadassa Noorda, JJ Prescott, Kevin Reitz, Alice Ristroph, Laura Roth, Roger Shiner, Carol Steiker, Alec Walen, Kit Wellman and Ekow Yankah. I am especially grateful to Brad Colbert and Thomas Weigend for their detailed and helpful comments on the previous draft. My thanks as well to helpful research assistance from my research assistant, Christopher Brolley, and the exceptional librarians at the Villanova University School of Law, especially Amy Spare. © 2014, Michelle Madden Dempsey.
D. The Nordic Model: Decriminalizing Victims, Without Increasing Trafficking ................................................. 227

CONCLUSION ................................................................................................................. 229

ABSTRACT

Despite the United States’ commitment to decriminalizing victims of sex trafficking and the obvious injustice of subjecting these victims to criminal penalties, the majority of jurisdictions throughout the United States continue to treat sex trafficking victims as criminals. This essay argues that the criminal law must abandon this practice. Part One presents a brief account of definitional and conceptual debates regarding what counts as sex trafficking. Part Two explains why we must decriminalize its victims. Part Three outlines four methods of decriminalizing sex trafficking victims, and defends what has come to be known as the “Nordic model” as the most effective means of achieving decriminalization.

INTRODUCTION

Generally speaking, a properly functioning criminal justice system spends most of its resources targeting those who victimize others, and aims to provide some measure of protection, vindication, or at least expressive support to those who are victimized.1 Whatever the resolution of debates as to whether any so-called “victimless crimes” may justifiably be criminalized, the following remains true: in cases where someone is indeed victimized, the criminal law should generally seek to punish the victimizer, not the victim.2

These general observations about the proper function of the criminal justice system, while uncontroversial, have not held true when it comes to sex trafficking. Instead, the criminal law too often penalizes victims, rather than those who victimize them.3 Specifically with regard to criminal laws prohibiting prostitution


2. See Darryl K. Brown, Criminal Law Theory and Criminal Justice Practice, 49 Am. Crim. L. Rev. 73, 88 (2012) (noting differences in criminal theories, but that generally “many criminal law theorists” adopt the view that “criminal law is justified both by a commitment to punish[ing] offenders based on their desert and a commitment that criminal law should serve some instrumental function, typically crime (or harm) prevention or preservation of order”).

and related activities like solicitation, police and prosecutors spend far more time and money targeting those who sell sex, often under conditions amounting to sex trafficking, rather than targeting those who profit from or drive demand for the commercial sex markets where trafficking takes place.\(^4\)

While this situation is beginning to change in some states and localities in the United States, the vast majority of jurisdictions continue to criminalize victims of sex trafficking.\(^5\) Despite U.S. ratification of international agreements requiring the decriminalization of sex trafficking victims, thirty-two states within the U.S. continue to treat child victims as criminals, and no states have comprehensively decriminalized adult victims of sex trafficking.\(^6\)

The continued criminalization of sex trafficking victims in the United States is a tragedy, an embarrassment, and a breach of our obligations under international law. The future of criminal law in this country must confront this issue and move swiftly toward decriminalizing victims of sex trafficking. This essay provides a roadmap for doing so, by identifying what counts as sex trafficking, explaining why we should decriminalize its victims, and outlining four methods for so doing.

I. WHAT COUNTS AS SEX TRAFFICKING?

The question of what counts as sex trafficking has been hotly contested and continues to generate tremendous debate.\(^7\) Three points are widely accepted. First,
sex trafficking involves commercial sexual exploitation. Second, sex trafficking “is a gendered phenomenon whose victims are overwhelmingly women.”8 Third, sex trafficking includes both international and domestic cases, in which there is no border crossing.9

Beyond these limited points of agreement, however, there is no ‘one size fits all’ description of sex trafficking, and persistent disagreement surrounds the scope and size of this phenomenon.10 In particular, there remains a substantial lack of clarity and agreement about the nature of exploitation and the conditions under which commercial sex amounts to commercial sexual exploitation.11

While this section does not attempt a final resolution to the complex issues that underpin these debates, it does seek to identify points of agreement and illuminate considerations that may prove relevant to identifying what counts as sex trafficking.

A. Child Prostitution

One point of widespread agreement is that the prostitution of children under the age of eighteen constitutes sex trafficking. Indeed, the use of age as a definitional stipulation is the clearest and most well-accepted method of distinguishing those persons who certainly count as victims of sex trafficking (prostituted children) from those who may count as victims of sex trafficking, if other conditions are present (as is the case with prostituted adults).12 The use of age in clearly demarcating cases of commercial sex as trafficking is widely accepted on grounds that children are typically considered incapable of freely choosing to engage in commercial sex.13 The widespread agreement on this point has lead states to adopt definitions of sex trafficking that, as a matter of legal stipulation, count underage prostitution as sex trafficking.14 As such, in cases where children under eighteen years of age are being prostituted, they count as victims of sex trafficking by

---

9. See id. at 13; see also Bridget Anderson, Trafficking, in The Oxford Handbook of Refugee and Forced Migration Studies 355 (Elena Fiddian-Qasmiyeh et al. eds., 2014).
10. See Dempsey et al., supra note 7, at 160 (examining the “continuing disagreement regarding the nature of sex trafficking”).
12. See Linda Smith & Samantha Healy Vardaman, A Legislative Framework for Combating Domestic Minor Sex Trafficking, 23 Regent U. L. Rev. 265, 266 (2011) (noting that “the age of the victim is the critical issue” in determining minor sex trafficking and that “there is no requirement to prove that force, fraud, or coercion was used to secure the victim’s actions”).
definition, irrespective of whether they self-identify as victims.¹⁵

Legal definitions of trafficking at the national and international levels incorporate the recognition that prostituted children under the age of eighteen years are victims of sex trafficking. In U.S. federal law, the Trafficking Victims Protection Act clearly includes all prostituted children under the age of eighteen within the scope of victims of “severe forms of trafficking.”¹⁶ Similarly, the United Nations Protocol for the Prevention, Protection and Prosecution of Trafficking in Persons, Especially Women and Children (hereinafter Palermo Protocol), defines trafficking to include the exploitation of prostitution of children under the age of eighteen years.¹⁷

Despite widespread agreement and well-grounded legal recognition that child prostitution counts as sex trafficking, only eighteen U.S. states have laws explicitly prohibiting the criminalization of child sex trafficking victims.¹⁸ These laws, colloquially referred to as “safe harbor” laws, call for a child-protective response to juvenile prostitution, granting full immunity to child victims for prostitution-related offenses and providing for specialized services to assist, rather than punish, these victims.¹⁹

In the thirty-two states (and Washington, DC) where “safe harbor” laws have not been enacted, child victims of sex trafficking continue to be treated as criminals, often arrested by police.²⁰ This failure to identify prostituted children as victims of

¹⁵. See Smith & Vardaman, supra note 12, at 277 (stating “minors under eighteen years of age exploited through commercial sex acts are per se victims of trafficking in persons”).


¹⁸. See POLARIS PROJECT, 2013 ANALYSIS, supra note 5. For a critique of the limitations of these laws, see infra Part III.A; For a “rating system” regarding eighteen states’ laws addressing sex trafficking, see POLARIS PROJECT, 2014 STATE RATINGS, supra note 5 and accompanying text.

¹⁹. See POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: SAFE HARBOR (Fall 2014), available at http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/2014/2014_Safe_Harbor_Issue_Brief_Final_1.pdf (noting that “safe harbor” laws should prevent minor victims of sex trafficking from being prosecuted for prostitution and protect child victims of sex trafficking by providing them with specialized services); see also In re B.W., 313 S.W.3d 818, 826 (Tex. 2010) (holding that child could not be prosecuted for sex trafficking because child could not legally consent to sex); Tessa L. Dysart, Child, Victim, or Prostitute? Justice through Immunity for Prostituted Children, 21 DUKE J. GENDER L. & POL’Y. 255, 282–83 (2014) (defining “safe harbor” laws as those treating prostituted minors as victims and containing the following features: “(1) a provision making minors immune from prosecution, including delinquency proceedings, for prostitution; (2) diverting prostituted minors from delinquency proceedings into specialized services, such as child protective services; (3) defining prostituted minors as victims of sexual exploitation or abuse; and (4) ensuring that prostituted children receive state services that are either focused on trafficking victims or are generally available for sexually abused children.”).

²⁰. See INST. OF MED. & NAT’L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 8 (Ellen Wright Clayton et al. eds., 2013) (“Minors who are
sex trafficking results in their being adjudicated delinquent or prosecuted in the adult criminal justice system.21

B. Prostitution Induced by “Force, Fraud or Coercion”

Another area of widespread agreement is that adults who perform a commercial sex act induced by force, fraud, or coercion count as victims of sex trafficking.22 This definition of adult sex trafficking has been incorporated into the U.S. Trafficking Victims Protection Act23 and many states’ anti-trafficking laws.24 It also informs the framework for the U.S. State Department’s Annual Trafficking in Persons Report.25

Despite large scale recognition that adult prostitution induced by force, fraud, or coercion constitutes sex trafficking, only twenty-nine states require or even encourage law enforcement training to assist officers in identifying trafficking cases.26 The failure to mandate universal training for law enforcement regarding the identification of trafficking cases results in the continued criminalization of sex trafficking victims.27 For, without adequate training to identify cases of trafficking,
police may mistakenly identify potential victims as simply engaged in the commercial sex trade—“prostitutes”—and thus arrest them and charge them with prostitution-related offenses.

The failure to screen prostitution cases for evidence of trafficking results not only in the unjust prosecution of victims but also in missed opportunities to prosecute their traffickers. As a recent Urban Institute report observes, “[v]ictims may . . . be afraid to identify themselves as victims due to prior interactions with the police. Moreover, in the rare cases where victims do self-identify to law enforcement, they are frequently treated as offenders and arrested.”

C. Prostitution Induced by “Abuse of Power or a Position of Vulnerability”

One point of debate regarding the definitional scope of sex trafficking, as it pertains to adult prostitution, concerns whether sex trafficking should be understood to extend beyond cases involving the use of “force, fraud or coercion” and encompass cases involving merely an “abuse of power or a position of vulnerability.” According to the definition of trafficking adopted in the Palermo Protocol, the answer is clearly yes. In light of U.S. ratification of this Protocol, there is a

nonetheless treated as criminals. Id. at 217. Moreover, as the researchers noted, this estimate of unidentified trafficking cases “is a conservative estimate . . . since our review only included the information available in incident reports, which may not have included trafficking indicators if officers were not trained to look for them.” Id.; see also Mogulescu, supra note 3, at 488 (explaining a lack of training for the New York City Police Department in regard to sex trafficking). For indications of human trafficking that law enforcement can hone in on, see Law Enforcement, U.S. DEP’T OF HOMELAND SEC. (Nov. 5, 2014), https://www.dhs.gov/blue-campaign/law-enforcement.

28. See Farrell et al., supra note 21, at 1, 6 (noting that “reports indicate that fewer cases of human trafficking have been identified and prosecuted,” which implies that law enforcement and anti-trafficking laws enacted by government officials are inadequately addressing the issue of human trafficking). Furthermore, the study indicated that prosecutors describe “victim reluctance to testify or lack of cooperation as the biggest challenge they faced prosecuting human trafficking cases.” Id. at 8.

29. See discussion supra Part I.A. There is no need to prove either “force, fraud, or coercion” or an “abuse of power or a position of vulnerability” in cases involving children because all cases of child prostitution fall within the scope of sex trafficking on grounds of the victims’ age.

30. See G.A. Res. 55/25, supra note 17, art. 3 (including “an abuse of power or a position of vulnerability” in the definition for trafficking of persons).

31. See Dempsey et al., supra note 7, at 143. The definition in Article 3 states, in relevant part, as follows:

(a) “Trafficking in persons” shall mean 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation . . .

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
strong basis on which to argue that jurisdictions within the United States should include cases involving an “abuse of power or a position of vulnerability” within their definition of trafficking.32

Commenting on the breadth of the international legal definition of trafficking and the obligations it imposes on State Parties both to criminalize trafficking and not penalize victims, the former United Nations Special Rapporteur on Trafficking in Persons observed:

For the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person’s experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty. Put simply, the road to prostitution and life within “the life” is rarely one marked by empowerment or adequate options.33

Despite its ratification of the Palermo Protocol, the United States continues to domestically define trafficking according to the narrower criteria requiring proof of “force, fraud, or coercion.”34 Likewise, law enforcement training in the United States regarding the identification of sex trafficking victims continues to rely on the narrower criteria of “force, fraud, or coercion.”35 As such, adults who are prostituted by means of an “abuse of power” or “abuse of a position of vulnerability” continue to be treated as criminals throughout the United States, despite the fact that their experience constitutes sex trafficking under international law.36

D. Conceptual Debates

Underlying definitional debates over the scope of sex trafficking lurk more complex issues regarding the meaning of the concepts employed in the defini-

---

32. See Dempsey et al., supra note 7, at 143.
34. See Trafficking Victims Protection Act of 2000 § 103, 22 U.S.C. § 7102(8) (2012). Notably, the United States did not enter any reservation regarding the Palermo Protocol’s definition of trafficking—and yet, it nonetheless defined trafficking more narrowly in its own domestic law. See also Dempsey et al., supra note 7, at 153 (noting the failure of party states to adopt “tremendous breadth” of means elements of the Palermo Protocol).
35. See Dempsey et al., supra note 7, at 141 (“Despite their obligations under the Palermo Protocol to criminalize sex trafficking as it is defined in Article 3, many state parties have failed to do so, choosing instead to target a narrower scope of conduct.”).
36. See id. at 155 (stating that the U.S. narrow definition of sex trafficking fails to meet Palermo Protocol obligations).
tions. For example, despite widespread agreement that adult prostitution induced by “force, fraud, or coercion” counts as sex trafficking, there is often little agreement about what counts as “force,” “fraud,” and/or “coercion” in the commercial sex industry. While one might hope that existing doctrines in the criminal law would go some way toward clarifying these concepts, the wide range of legal meanings attributed to such words resolves few difficulties.

Any attempt to identify whether a prostituted-adult counts as a victim of sex trafficking will require not merely an empirical examination of the conditions in which she is prostituting, but an evaluation of whether those conditions amount either to “force, fraud, or coercion” or, more broadly, to an “abuse of power or a position of vulnerability.” Given the lack of clarity and consensus regarding the meanings of these terms, law enforcement officers, prosecutors and judges will be required to make their own determinations about whether such conditions obtain in any given case. While philosophers have offered illuminating reflections on such issues, these concepts remain “essentially contested” and thus the scope of their proper application remains unsettled. As suggested below, the lack of clarity and consensus about the meaning and range of these concepts, combined with a paucity of justification for criminalizing people who sell sex, even under conditions that do not amount to trafficking, should lead us to err on the side of decriminalizing not only prostituted-children but all prostituted-adults as well.

37. For the most part, these debates only concern the scope of adult sex trafficking, as the use of age as a bright line in defining child sex trafficking is largely uncontroversial and raises few conceptual difficulties. Of course, the use of age as a bright line indicator may raise practical difficulties in cases where the victim’s age is not easily determined. Yet, in the normal course, and especially in cases of domestic sex trafficking, the determination of a victim’s age will not prove insurmountable.

38. See Dempsey et al., supra note 7, at 155 (noting difference between definitions of sex trafficking involving “force, fraud, or coercion” in Australia and United States).

39. For example, consider the wide range of meanings attributed to the legal concept “force” in cases such as Commonwealth v. Berkowitz, 609 A.2d 1338, 1348 (Pa. Super. Ct. 1992) (holding that “force” must entail physical force extraneous to penetration, despite an absence of consent by the victim), as compared to In re MTS, 609 A.2d 1266, 1277 (N.J. 1992) (holding that “force” includes penetration in the absence of consent).

40. See Dempsey et al., supra note 7, at 152–53 (discussing Palermo Protocol’s twelve mutually independent and sufficient means for satisfying the definition of trafficking).

41. The philosophical literature on force, fraud, coercion and the related concept of consent is vast. For a small sampling of some important contributions, see, for example, Joel Feinberg, Harmless Wrongdoing (Oxford University Press 1988); Heidi M. Hurd, The Moral Magic of Consent, in 2 LEGAL THEORY 121 (1996); THE ETHICS OF CONSENT: THEORY AND PRACTICE (Frank G. Miller & Alan Wertheimer eds., Oxford University Press 2010); Alan Wertheimer, Coercion (Princeton University Press 1987); Alan Wertheimer, Exploitation (Princeton University Press 1996); see also Dempsey et al., supra note 7, at 149 (“While a number of state parties have complied with their Article 5 obligations to explicitly make consent of the victim irrelevant in all circumstances, many more have failed to do so.”).


43. See discussion infra Part III.A.
II. **Why We Should Decriminalize Victims of Sex Trafficking**

A. **Our Obligations Under International Human Rights Law Require It**

One reason U.S. criminal justice systems should decriminalize victims of sex trafficking is that our failure to do so likely violates our obligations under international human rights law.\(^44\) Indeed, in a recent review of U.S. compliance with treaty obligations under the International Covenant on Civil and Political Rights (I.C.C.P.R.), the U.N. Human Rights Committee expressed concern over the United States’ continued criminalization of victims of sex trafficking on prostitution-related charges.\(^45\) The Committee criticized current practices and directed the United States to “take all appropriate measures to prevent the criminalization of victims of sex trafficking.”\(^46\) As Cynthia Soohoo, director of the International Women’s Human Rights Clinic at the City University of New York School of Law observed, the Committee sent “a clear message that criminalizing trafficking victims violates their fundamental human rights.”\(^47\)

In addition to our obligations under the I.C.C.P.R., our status as a State Party to the Palermo Protocol imposes further obligations that are, at best, inconsistent with the United States’ current practice of criminalizing victims of sex trafficking.\(^48\) For example, the stated purpose of the Protocol, set forth in Article II, includes the explicit aim “to protect and assist the victims of such trafficking, with full respect for their human rights.”\(^49\) Moreover, Article VI of the Protocol establishes a series of obligations regarding “[a]ssistance to and protection of victims of trafficking in

---

\(^{44}\) \textit{Organ for Sec. and Cooperation in Europe [OSCE], Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking} 9 (2013), available at http://www.osce.org/secretariat/101002?download=true (“The principle of non-punishment of victims is affirmed in a number of international standards, including legally and politically-binding instruments.”).

\(^{45}\) \textit{See U.N. Human Rights Comm., supra note 3, ¶ 14; see also Janie Chuang, The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking, 27 Mich. J. Int’l L. 437, 471 (2006) (“While the focus on a criminal justice response might be viewed as consistent with the priorities set by the Palermo Protocol, the relative absence of human rights protections is not.”).}

\(^{46}\) \textit{U.N. Human Rights Comm., supra note 3, ¶ 14.}

\(^{47}\) \textit{U.N. Condemns Criminalization of Trafficking Victims as a Human Rights Violation, CUNY SCHOOL OF LAW PUBLIC SQUARE} (March 27, 2014), http://www1.cuny.edu/mulaw/2014/03/27/u-n-condemns-criminalization-of-trafficking-victims-as-a-human-rights-violation/; \textit{see also OSCE, supra note 44, at 10 (“The principle of non-punishment derives its force not only from explicit recognition as a legally binding norm by States at the international level, in measures adopted by the Council of Europe and the European Union, but also through the application of human rights law generally.”).}

\(^{48}\) \textit{See OSCE, supra note 44, at 14 (“OSCE participating States have undertaken to “[e]nsuring that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including their freedom of movement.”).}

\(^{49}\) \textit{G.A. Res. 55/25, supra note 17, art. II (stating purposes of the Protocol as preventing and combating trafficking of women and children, protecting human rights and assisting the victims of such trafficking, and promoting cooperation among State Parties to obtain these objectives).}
While the Protocol does not specifically prohibit criminalization in particular cases, the United States’s widespread failure to identify victims of sex trafficking, which results in the continued, indiscriminant criminalization, is surely inconsistent with the commitment “to protect and assist victims . . . with full respect for their human rights.”

B. We Tell Other Countries to Do It

Another strong reason weighing in favor of decriminalization is that the United States holds itself out as the “global sheriff” on trafficking, demanding that other countries refrain from criminalizing victims in their own criminal justice systems. For nearly fifteen years, the United States has served as the world’s most powerful monitor of trafficking in persons, with the annual publication of the “Trafficking in Persons Report” (hereinafter TIP Report). The TIP Report ranks world countries on a multi-tier system, according to their compliance with “minimum standards for the elimination of trafficking.” If countries rank high, they remain in good standing with the United States and receive praise for appropriately tackling human trafficking. If countries rank poorly, they face a range of negative consequences, including the imposition of unilateral sanctions by the United States.

50. G.A. Res. 55/25, supra note 17, art. VI (defining specifically “[a]ssistance to and protection of victims of trafficking in persons”).
51. G.A. Res. 55/25, supra note 17, art. II. The Trafficking Victims Protection Act of 2000, U.S. federal law on trafficking, came into force on October 28, 2000, slightly before the U.N. Palermo Protocol was put out for signature or ratification in December 2000. In 2007, NGOs called for amending the definition of trafficking in U.S. anti-trafficking legislation to conform to the Protocol’s definition. See Raymond, supra note 11, at 28–29. An amended bill containing the wider definition of trafficking passed the House 405 to 2, but was stymied in the Senate. See id.
52. See Chuang, supra note 45, at 465 (“[T]he TVPA sanctions regime has become a convenient vehicle for the United States to export its domestic views and priorities on issues that were highly contested in Vienna and for which the Palermo Protocol effectively brokered a ceasefire.”).
54. Overview, supra note 53.
55. See Chuang, supra note 45, at 474 (“Because the U.S. minimum standards are too abstract to provide concrete guidance, the TIP Report country narratives and assessments provide a practical measure by which governments can gauge and improve upon their anti-trafficking efforts.”).
56. See id. at 485 (examining tier systems for countries to comply with regulations and stating “[o]nce on the Tier 3 list, a country has 90 days to take ‘significant steps’ to work with the U.S. government to try to comply with U.S. minimum standards and thereby avoid sanctions.”).
Amongst the many criteria used to assess governmental compliance with “minimum standards for the elimination of human trafficking,” one speaks directly to the decriminalization of trafficking victims. Specifically, the United States calls upon other countries to “ensure[] that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked.” Thus, if a foreign country were to arrest and prosecute a sex trafficking victim for prostitution or solicitation, that country would fail to comply with the “minimal requirements for the elimination of human trafficking” set forth in the TIP Report. And yet, in most U.S. jurisdictions, sex trafficking victims continue to be incarcerated, fined, and otherwise penalized for the very same type of offenses.

While the U.S. federal government encourages states and localities to identify and decriminalize sex trafficking victims, the widespread failure of state and local governments to do so results in a failure by the United States to comply with its own “minimal requirements for the elimination of human trafficking” articulated in the TIP Report. The continued criminalization of sex trafficking victims in many states and localities results in a situation where the federal government, holding itself out as “global sheriff,” hypocritically demands a level of compliance from foreign countries that it cannot effectively achieve within its own borders. Thus, to end this global hypocrisy, state and local governments throughout the United States must stop criminalizing sex trafficking victims for prostitution related offenses.

58. See id. at § 7106(b)(2).
59. See Overview, supra note 53 (stating “[f]reeing victims, preventing trafficking, and bringing traffickers to justice are the ultimate goals of the report and of the U.S. Government’s anti-human trafficking policy”).
60. See Dysart, supra note 19, at 266 (noting U.S. inconsistency in practice due to the continued criminalization of minors for prostitution).
61. See discussion infra Part III. Given principles of federalism and the fact that policing of prostitution-related offenses has typically been viewed as a matter falling within the state’s police powers, the U.S. government is limited in what it can do to decriminalize victims of sex trafficking in every state and locality. Ultimately, what is required is for states to reform their prostitution laws to eliminate penalties against sex trafficking victims.
63. See Dysart, supra note 19, at 267 (“The federal government’s approach to combating trafficking follows the formerly ‘3P,’ now ‘4P,’ framework—prevention, protection, and prosecution—which has been ‘used by governments around the world to combat human trafficking’ and is reflected in both the TVPA and the Palermo Protocol.”); see also The 3Ps: Prevention, Protection, Prosecution, U.S. Dep’t of State (June 2011), http://www.state.gov/documents/organization/167334.pdf (describing the “3P” approach).
C. Principles of Criminalization Require It

Those who support criminal prohibitions on the sale of sex traditionally justify such laws on grounds of public morality and nuisance.\(^\text{64}\) This section will explain why neither rationale provides an adequate justification for criminalizing sex trafficking victims and why sound principles of criminalization weigh in favor of decriminalizing victims.

Until recently, prostitution was largely viewed as a victimless crime—one that was prohibited primarily because the majority of the voting public viewed the conduct as immoral.\(^\text{65}\) As a matter of constitutional law, however, that rationale is no longer an adequate justification for criminalization.\(^\text{66}\) For, as Justice Kennedy confirmed in *Lawrence v. Texas*, “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.”\(^\text{67}\) Of course, the privacy-based rationale upon which *Lawrence* struck down anti-sodomy laws does not extend to prostitution-related offenses, and thus *Lawrence* in no way requires that prostitution laws be deemed unconstitutional on privacy grounds.\(^\text{68}\) But the holding in *Lawrence* does limit the range of justifications a state may rely upon in criminalizing conduct.\(^\text{69}\) Specifically, post-*Lawrence*, the fact that a practice has been traditionally deemed immoral is not sufficient to justify its criminalization.\(^\text{70}\)

---


65. See **Devlin**, *supra* note 64.

66. The fact that the U.S. Supreme Court has ruled public morality insufficient to justify criminalization does not entail that the conclusion is sound, but it does give political weight and legal effect to a core commitment of liberalism as applied to delineating the proper limits of the criminal law. For classic works in the philosophical liberal tradition defending such limits, see **Joel Feinberg**, *Harm to Others* 15 (1984); **H.L.A. Hart**, *Law, Liberty and Morality* 5 (1963); **John Stuart Mill**, *On Liberty and Other Essays* 14 (John Gray ed., Oxford Univ. Press 1998) (1859).


69. *See Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting) (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (“Our opinions applying the doctrine known as ‘substantive due process’ hold that the Due Process Clause prohibits states from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.”). But see *id.* at 598 (Scalia, J., dissenting) (“Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct.”).

70. See *supra* note 67 and accompanying text.
Another common justification offered in support of criminalizing prostitution-related activities is that such conduct creates a public nuisance. Yet, when applied, that rationale primarily targets those who sell sex under conditions that amount to sex trafficking—so-called “street walkers.” These people—street-level prostitutes—are likely subject to conditions of “force, fraud, or coercion” or the “abuse of power or position of vulnerability” that constitutes their status as victims of sex trafficking. To rely on a public nuisance rationale for criminalizing such people is akin to criminalizing a shooting victim for damage to public property on grounds that his blood stained the public walkway. In both cases, the victims are being criminalized for conduct that results directly from their experience of victimization. The far more just solution to such public nuisance problems is to target the use of the criminal law toward those who are engaging in victimization, while decriminalizing their victims.

In recent years, society has become increasingly aware that many people who sell sex do so under conditions that amount to trafficking. Moreover, even in

71. See The Wolfenden Report, supra note 64 (citing Chairman Mr. Hugh Macmillan, K.C. stating “[o]n the other hand, the law is plainly concerned with the outward conduct of citizens in so far as the conduct injuriously affects the rights of other citizens”).

72. While there is general agreement in the scholarly literature regarding the fact that much of street-level prostitution often entails conditions that amount to trafficking, there is disagreement regarding whether we should assume that conditions in indoor prostitution are significantly better. Compare Ronald Weitzer, Flawed Theory and Method in Studies of Prostitution, 11 VIOLENCE AGAINST WOMEN 934, 944 (2005) (stating that “street prostitutes are substantially more vulnerable to victimization than indoor workers”), with Melissa Farley, Prostitution Harms Women Even If Indoors: Reply to Weitzer, 11 VIOLENCE AGAINST WOMEN 950, 955 (2005) (“The social invisibility of indoor prostitution may actually increase its danger”).

73. See OSCE, supra note 44, at 10 (“All legal systems impose responsibility on persons who commit crimes and offences. Responsibility, and accountability, may however be averted where the person concerned has a recognized defence, acts under coercion or lacks capacity.”).

74. See id. at 15 (“The penalization of a person for acts that they have committed as a cause or direct consequence of being trafficked must be seen in that context: not only does it unjustly punish and stigmatise victims of serious crime; it would also violate these human rights objectives.”).

75. See discussion supra Part I. My point here is not simply that there is increased attention being paid to the issue, but that the U.S. is undergoing widespread societal consciousness-raising and norm shifting regarding this issue. Increasingly, people in the U.S. are recognizing that the conditions under which prostitution occurs often amount to exploitation by means of force, fraud, coercion, and/or an abuse of position of vulnerability, and that such conditions should be regarded as sex trafficking, when previously they were regarded as simply prostitution. Put another way, this “increasing awareness” signals a shift not only in our political understanding of prostitution and sex trafficking, but a shift in the philosophical concepts we rely upon to distinguish trafficking from non-trafficking as an empirical matter. For a discussion of political, philosophical and empirical methods of understanding prostitution and sex trafficking, see Michelle M. Dempsey, How to Argue About Prostitution, 6 CRIM. L. & PHIL. 65 (2012). As the U.N. Special Rapporteur on Trafficking in Persons put the point, there is an increasing awareness that:

For the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person’s experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability.

Special Rapporteur on the Human Rights Aspects of Victims of Trafficking in Persons, Especially Women and Children, supra note 33, at ¶ 42.
those "gray area" cases—where reasonable minds may differ as to characterizing a particular case as trafficking—"it is rarely, if ever, the case that the conduct of the prostituted-person is sufficiently blameworthy to merit criminalization. As Andrew Simister and Andreas von Hirsch have correctly observed:

The criminal sanction is the most drastic of the state’s institutional tools for regulating the conduct of individual[s] . . . [It] is distinctive because of its moral voice . . . Conduct is deemed through its criminalisation to be, and is subsequently punished as, wrongful behaviour that warrants blame.

This official moral condemnation . . . generates a truth-constraint. When labeling conduct as wrongful, and when labeling those it convicts as culpable wrongdoers, the state should get it right.

Since criminalization expresses moral condemnation, the criminal law should only target those who are morally blameworthy for their conduct. Let us call this the blameworthiness principle. We can apply that principle in discrete cases by asking whether an individual is sufficiently blameworthy for her conduct to merit criminalization. Indeed, such questions should and often do inform prosecutors’ decisions about whether to pursue criminal charges in particular cases. So, too, can we apply the blameworthiness principle across a range of cases, asking whether people who engage in that certain conduct are typically so blameworthy for so doing that they merit criminalization. This sort of question should, and presumably often does, inform legislators’ decisions to criminalize given types of conduct. To be clear, the question legislators should ask is not merely whether

76. See discussion supra Part I.C–D.
77. See OSCE, supra note 44, at 16 ("In order to ensure that victims of trafficking are not penalized or punished for acts caused or directly linked to their having been trafficked, as soon as there is a reasonable suspicion that they might have been trafficked, there must be a careful assessment of the circumstances of their case.").
79. See Antony Duff, Theories of Criminal Law, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2013), http://plato.stanford.edu/entries/criminal-law/#LawVoI ("[T]he central purpose of criminal law, as a distinctive kind of law marked out from the other kinds and aspects of law . . . is to define, and to declare the wrongfulness of, certain kinds of wrongdoing, in order not only to dissuade citizens from committing such wrongs, but also to provide appropriate responses to those who commit, or are alleged to have committed, such wrongs."); see also Michael S. Moore, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 183–188 (1997) ("[C]ulpable wrongdoers must be punished. This, by my lights, is enough to justify retributivism.").
80. For ease of exposition, the blameworthiness principle runs together concerns that fall under considerations of wrongdoing and desert. See DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 55–119 (2008) (describing what he coins the “wrongfulness constraint” and “desert constraint” as internal constraints on the justification of criminal law and punishment).
82. Id.
people who engage in certain conduct are sometimes so blameworthy as to merit criminalization, but whether that level of blameworthiness is typically present when people engage in such conduct.83

Applying the blameworthiness principle to the context of criminalizing the sale of sex calls for an evaluation of the conditions under which such conduct typically occurs. If conditions are such that individuals who sell sex are typically not so blameworthy as to merit criminalization, then they should not be criminalized.84

As many in the United States recognize, selling sex is not so blameworthy as to merit criminalization.85

On one set of views, selling sex is not wrongful in the first place and, thus, is never so blameworthy as to merit criminalization. This view is widely shared by those who otherwise find themselves in deep disagreement. For example, both those who view the sale of sex as merely another form of legitimate employment,86 as well as those who view the sale of sex as a form of discrimination and violence against women,87 nevertheless agree that the sale of sex is not blameworthy in the criminal sense.88

On another set of views, even if there is something morally wrong with some or all instances of selling sex,89 the conditions under which that conduct occurs renders it unworthy of blame in the typical case.90 Thus, on either
set of views, the criminalization of those who sell sex is unjustifiable under the blameworthiness principle.  

III. FOUR METHODS OF DECRIMINALIZING VICTIMS OF SEX TRAFFICKING

A. Safe Harbor Laws for Children: An Incomplete Solution

One increasingly popular way to decriminalize victims of sex trafficking in the United States are “safe harbor” laws, which call for protection, rather than prosecution, of children. At present, eighteen states have enacted some form of “safe harbor” and thus have begun to move toward decriminalizing child victims of sex trafficking.

However, this method of decriminalizing victims remains incomplete in three ways. First, despite the positive steps of eighteen states that have adopted such laws, it remains the case that thirty-two states continue to treat child victims of sex trafficking as criminals. Until a time when every state enacts “safe harbor” laws, child sex trafficking victims will continue to face criminal penalties. The lack of uniform legal efforts to decriminalize child sex trafficking victims is particularly troubling given that pimps and traffickers often transport child victims across state lines for the purpose of commercial sexual exploitation. Thus, for example, a child who may be protected from criminalization under her home state’s “safe harbor” laws may be transported by her pimp to another state to engage in prostitution. If the destination state does not have a “safe harbor” law, the child victim of sex trafficking risks arrest and prosecution in the destination state.

Second, several “safe harbor” laws are incomplete, insofar as they do not regard all prostituted children under the age of eighteen years as victims of sex traffick-

91. See Garcia, supra note 85, at 163 (“People on both sides of the debate understand that working in prostitution leaves women vulnerable to violence from police, pimps, and customers and without any health services, legal protection, or recourse.”).
92. See POLARIS PROJECT, 2013 ANALYSIS, supra note 5, at 1.
93. Id. at 2.
94. See Dysart, supra note 19, at 270 (“Holding minor sex trafficking victims criminally liable for prostitution is contrary to the policy interest advanced by the extensive federal and state legal regimes that protect such victims.”).
95. See id. at 274 (“Illinois, Kentucky, North Carolina, and Tennessee have the most protective provisions, which provide immunity to prostituted minors, regardless of the minor’s age.”).
96. See id. at 279 (stating that, despite recognizing the importance and effectiveness of immunity provisions for prostituted minors or victims, “few states have adopted robust immunity provisions”).
97. See id. at 266 (“Although many lawmakers and anti-trafficking advocates believe that prostituted minors are victims of trafficking, and . . . many states criminalize the prostitution of minors as trafficking, minors are still being arrested for prostitution.”).
99. See id. (“Legislators with the firm conviction that they must remain ‘tough on crime’ may do so with full integrity, and with greater accuracy, by simply redefining the subject of the crime.”).
For example, New York’s “safe harbor” law contains provisions that allow for the criminalization of child sex trafficking victims between the ages of sixteen and eighteen years, if the children refuse or fail to complete a diversion program. As one commentator rightly observes, “This approach fails to respect and protect the human rights of these juveniles as victims, instead implicating them as criminals [who] must take steps to be ‘better behaved’ to avoid an adjudication of delinquency.”

The final way that “safe harbor” laws remain incomplete is that the laws offer no protection for adult victims of sex trafficking. This fact is particularly troubling given research suggesting that the majority of prostituted-adults were once victims of child sex trafficking. Thus, even if a jurisdiction does enact a “safe harbor” law, once a child victim of sex trafficking reaches her eighteenth birthday, she no longer receives the protection of these laws and instead faces the full range of criminal penalties for prostitution-related offenses. While “safe harbor” laws are indeed a step in the right direction, much more is needed in order to achieve comprehensive decriminalization of both child and adult victims of sex trafficking.

B. Screening and Diversion Upon Arrest: Too Little, Too Late

A second method for decriminalizing victims of sex trafficking is to rely on law enforcement officials and/or prosecutors to identify victims and exercise their discretion to decline prosecution. This method, while an improvement over strategies that primarily target victims for enforcement action, remains inadequate

---

100. See Dysart, supra note 19, at 283 (noting New York’s “safe harbor” law has a caveat that “if the person is a minor previously adjudicated delinquent for a prostitution offense, is an adult, or is unwilling to cooperate in the receipt of specialized services, the court has discretion to continue with the delinquency proceedings”).

101. Id.


103. See Dysart, supra note 19, at 256 n.17 (“However, with respect to adult prostitutes, the TVPA requires the sex trafficking to be induced by ‘force, fraud, or coercion,’ making it more difficult to determine if an adult prostitute is a trafficking victim.”).

104. See Jody Raphael & Deborah Shapiro, Sisters Speak Out: The Lives and Needs ofProstituted Women in Chicago, CENTER FOR IMPACT RESEARCH 4 (Aug. 2002), http://www.impactresearch.org/documents/sistersspeakout.pdf (finding that one-third of the prostituted women in the study began prostituting before the age of fifteen years, while nearly sixty-two percent began before the age of eighteen years).

105. See Dysart, supra note 19, at 256 (noting those opposed to granting immunity to prostituted minors argue immunity “leave[s] them at the mercy of pimps and johns and without the judicial system to advocate for their treatment and rehabilitation’ and leads to increases in the prostitution of children.”).

106. See Alysa Castro, Note, Better in Theory: The Road to Prostitution Reform in Pennsylvania, 9 RUTGERS J.L. & PUB. POL’Y 37, 45 (2012) (“In most states in the United States, including Pennsylvania, a system of criminalization is employed by the legislature and law enforcement.”).
to address the scope of the problem for two reasons.\footnote{107}{See Mogulescu, supra note 3, at 474 (stating that the “anti-trafficking discourse” has failed to “permeate the spheres of urban policing and local criminal courts”).}

First, even with training, there remains too high a risk that law enforcement will fail to identify cases when the victim is being prostituted under conditions that amount to trafficking. This problem is particularly acute where people arrested for selling sex view themselves as being in a committed domestic relationship with their pimps.\footnote{108}{See id. at 480 (“Many trafficked people are unaware that their experience meets the legal criteria for sex trafficking, as their only experience with law enforcement has been their own arrest for prostitution activity, or they do not self-identify as victims of trafficking.”).}

If law enforcement officials view evidence of pimping as indicia of trafficking, they will likely miss relevant evidence due to the victim’s desire to protect her “boyfriend” and her associated lack of self-identification as someone who is being pimped.\footnote{109}{See id.}

As Kaethe Morris Hoffer observed based on her extensive work with prostituted women and girls, “A lot of girls and women in the sex trade, if you ask them, ‘Do you have a pimp?’ they’ll say no . . . But if you ask, ‘Do you have a boyfriend to whom you give all the money you make?’ they say yes.”\footnote{110}{Neil Steinberg, In Chicago, Amnesty International to Debate Legalizing Sex Trade, CHICAGO SUN-TIMES (Apr. 4, 2014, 7:56 PM), http://www.suntimes.com/news/steinberg/26613541-452/in-chicago-amnesty-international-to-debate-legalizing-sex-trade.html#.VJDIi4rF_dc.}

Moreover, as Kate Mogulescu has stated, “Despite a robust anti-trafficking discourse [in society generally], these notions have not permeated the spheres of urban policing and local criminal courts. Instead, many victims of sex trafficking are arrested and prosecuted for conduct that they are compelled to engage in.”\footnote{111}{Mogulescu, supra note 3, at 474.}

Second, by the time law enforcement can screen particular cases to identify potential victims of sex trafficking, the person is already subject to arrest and detention.\footnote{112}{See id. at 481–82 (noting similarity of subjecting victims to detention and arrest when screening for trafficking on the state level with undocumented victims of trafficking being concerned about deportation or immigration detention on the federal level).}

Given our obligations under international law to refrain from using the criminal law against victims of sex trafficking and our commitment to global norms ensuring that victims “are not inappropriately incarcerated,” adopting a method of decriminalization that presupposes the victim will be arrested and interrogated by law enforcement is a method that does too little, too late.\footnote{113}{See OSCE, supra note 44, at 11 (“The Council of Europe Convention on Action against Trafficking in Human Beings provides, at Article 26: ‘Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.’”)}

C. Decriminalizing Everyone Involved in Commercial Sex: A Failed Experiment

Another method of decriminalizing victims of sex trafficking is to decriminalize everyone involved in commercial sex, including the seller, buyer, pimp, brothel
owner, etcetera. Variations on this approach have been adopted in countries such as the Netherlands, Germany, parts of Australia, and Las Vegas.\textsuperscript{114} While levels of attempted regulation vary from place to place, the key similarity is that prostitution and related activities are regarded as legitimate forms of work and not subjected to criminalization \textit{qua} prostitution.\textsuperscript{115}

This method, while seemingly promising, fails to provide a plausible solution for two reasons. First, while this method does decriminalize victims of sex trafficking, it comes at a steep price. For, when prostitution is normalized through legalization, it results in an over-all increase in the amount of sex trafficking in the jurisdiction.\textsuperscript{116} In the most comprehensive empirical study to date on the impact of legalization, researchers from the German Institute for Economic Research, the KOF Swiss Economic Institute, and the London School of Economics and Political Science examined data from 150 countries with a range of policies regarding the legalization or prohibition of prostitution.\textsuperscript{117} The study concludes, “countries where prostitution is legal experience a larger reported incidence of human trafficking inflows,” which is to say, legalization of prostitution across the board increases sex trafficking.\textsuperscript{118} This result is not surprising, given the common sense insight that normalizing prostitution is likely to increase the market demand for commercial sex generally—and that this demand will be met, at least in part, by increasing the total amount of sex trafficking in the jurisdiction.\textsuperscript{119} Thus, despite its initial plausibility, the evidence strongly suggests that decriminalizing everyone involved in prostitution simply exacerbates the underlying problem by increasing sex trafficking.\textsuperscript{120}

\begin{thebibliography}{99}
\bibitem{} See Seo-Young Cho et al., \textit{Does Legalized Prostitution Increase Human Trafficking?}, 41 \textit{World Dev.} 67, 75 (2012) (referring to Germany’s more liberal prostitution laws and stating that “Germany is known to have one of the largest prostitution markets in Europe, with about 150,000 people working as prostitutes”).
\bibitem{} See id. (“Today, prostitution in Germany is regulated by law and regarded as a ‘regular job’ subject to tax payment and retirement schemes.”).
\bibitem{} Id., at 75–76. It is worth noting that while a non-peer-reviewed paper recently claimed that a brief period of legalization of prostitution in Rhode Island reduced rape, the methodology of this widely-quoted paper has been soundly critiqued by a wide-range of authors. See Maggie McNeill, \textit{No, Rhode Island Didn’t ‘Accidentally’ Decriminalize Prostitution}, \textsc{Reason.com} (Aug. 24, 2014), http://reason.com/archives/2014/08/24/rhode-island-prostitution-and-cunningham (observing that the paper’s methodology “is deeply flawed in a number of ways, and honesty demands that I not only refrain from promoting it but explain to others why they shouldn’t either”).
\bibitem{} See Cho et al., \textit{supra} note 114.
\bibitem{} Id. at 71–72.
\bibitem{} See Cho et al., \textit{supra} note 114, at 75–76 (discussing results from quantitative case studies of Sweden, Denmark, and Germany and stating “[i]n average, countries with legalized prostitution experience a larger degree of reported human trafficking inflows.”).
\end{thebibliography}
D. The Nordic Model: Decriminalizing Victims, Without Increasing Trafficking

The most promising method of decriminalizing victims of sex trafficking that has been implemented is the so-called “Nordic Model.” By decriminalizing people who sell sex and providing comprehensive social support programs for those who wish to exit prostitution, countries such as Sweden, Norway, Finland and Iceland have managed to decriminalize victims of sex trafficking without the unintended effect of increasing the total amount of trafficking that results from legalization of buyers, pimps, and others.121

The European Parliament recently endorsed this method of decriminalizing victims of sex trafficking, calling on other European countries to adopt the Nordic Model approach to prostitution.122 In relevant part, the European Parliament resolution

[s]tresses that prostituted persons should not be criminalised and calls on all Member States to repeal repressive legislation against prostituted persons;
[c]alls on the Member States to refrain from criminalising and penalising prostituted persons, and to develop programmes to assist prostituted persons/sex workers to leave the profession should they wish to do so;
[b]elieves that demand reduction should form part of an integrated strategy against trafficking in the Member States.123

Research regarding the impact of the Nordic Model demonstrates promising results.124 Prior to its implementation in Sweden (the first country to adopt the

---

The ban on purchasing sexual services has reduced demand for sex (sic) and thus contribute (sic) to reduce (sic) the extent of prostitution in Norway. The enforcement of the law, in combination with the laws against trafficking and pimping, makes Norway a less attractive country for prostitution based trafficking than what would have been the case if the law had not been adopted. Furthermore, the economic conditions for prostitution in Norway are reduced following the implementation of the law. These effects are in line with the intentions of the law and are thus not considered as unintended side effects. This report does not find any evidence of more violence against prostitutes after the ban on buying sex entered into force.

Id.; see also Gunilla Ekberg, The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings, 10 VIOLENCE AGAINST WOMEN 1187, 1199–1201 (2004); see also Protection of Communities and Exploited Persons Act, S.C. 2014, c. 25 (Can.)


123. Id. ¶ 26–28.

model), the Swedish government estimated that “there were approximately 2500 to 3000 prostituted women in Sweden, of whom 650 were on the streets.” A large-scale study evaluating the impact of the law, published in 2008, demonstrated a dramatic decrease in the number of people being prostituted in Sweden, estimating that “approximately 300 women were prostituted on the streets” (a decline of more than fifty percent), while only “300 women and 50 men were found in prostitution being advertised online.” While the Nordic Model has been criticized on grounds that it simply shifts street prostitution to internet-based or “hidden” prostitution venues, “no information, empirical evidence, or other research suggests that this has actually occurred.”

Supporters of the Nordic Model often invoke additional claims regarding the nature of prostitution, viewing all prostitution as violence against women. Indeed, this view of prostitution has widely informed and motivated the adoption of such laws. Yet, even if one rejects that view, the evidence is clear that the Nordic Model achieves two important goals: it decriminalizes victims of sex trafficking for prostitution-related offenses, and it does not result in an increase in the total amount of sex trafficking. On these grounds alone, the Nordic Model presents a more attractive option than across-the-board decriminalization of everyone involved in the commercial sex industry discussed above. Not only does this method remove criminal penalties from victims of sex trafficking, it does not unintentionally exacerbate the underlying problem by increasing sex trafficking. Moreover, given evidence that this model dramatically decreases prostitution in the jurisdictions where adopted, it seems likely that the decrease in prostitution generally has resulted in a concomitant decrease in sex trafficking as well.

126. Id. (citing Charlotta Holmström, Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduction [Prostitution and Trafficking for Sexual Purposes in Sweden: Extent, Occurrence, and Knowledge Production], in PROSTITUTION I NORDEN: FÖRSKNINGSRAPPORT [PROSTITUTION IN THE NORDIC: RESEARCH REPORT] (Charlotta Holmström & May-Len Skibrei eds., 2008)). The study’s authors acknowledge that this does not mean that we can estimate the number of people in prostitution in Sweden to be 650. Yet, the sharp decline in both street prostitution and online advertisements strengthens the conclusion that the Nordic Model has reduced the overall number of people being prostituted in Sweden. See Holmström, supra, at 314.
127. Waltman, supra note 124, at 147.
128. See, e.g., RAYMOND, supra note 11. For further elaboration regarding the notion that prostitution constitutes “violence against women,” see Dempsey, supra note 90, at 1747–49.
129. See Ekberg, supra note 121, at 1189.
130. See supra Part III.C.
CONCLUSION

Legislatures throughout the United States should decriminalize victims of sex trafficking. Our current practice of arresting and prosecuting victims for prostitution-related offenses is not only a profound injustice, it is a violation of our obligations under international law and, at the very least, an embarrassing hypocrisy. While some jurisdictions within the United States have taken steps toward decriminalizing child victims of sex trafficking, these efforts are inadequate. We should decriminalize all victims of sex trafficking—children and adults—and we should do so in a way that does not result in an overall increase in sex trafficking. In sum, we should adopt a model of prostitution regulation similar to the Nordic Model—in which those who sell sex are provided support in exiting the commercial sex trade while both pimps and buyers face criminal penalties—in order to avoid increasing demand.