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Decriminalizing Victims of Sex Trafficking

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Michelle Madden Dempsey

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 U.S. continue to treat sex trafficking victims as criminals. This paper 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 victims of sex trafficking. 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 this 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. No matter what the resolution to debates regarding 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.

These general observations regarding the proper function of the criminal justice system, while uncontroversial, have not held true when it comes to sex trafficking. Instead, the criminal law has too often been used to penalize victims, rather than penalizing those who victimize them.¹ Specifically with regard to criminal laws prohibiting prostitution and related activities such as solicitation, police and

¹ See United Nations Human Rights Committee, CONCLUDING OBSERVATIONS ON THE FOURTH REPORT OF THE UNITED STATES OF AMERICA, CCPR/C/USA/CO/4 (March 2014) (expressing concern regarding the continued "criminalization of [trafficking] victims on prostitution-related charges" in the United States). See also Kate Mogulescu, "The Public Defender as Anti-Trafficking Advocate, An Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking," 15 CUNY L Rev 471 (2012). While the practice of arresting child sex trafficking victims is in decline in recent years, these victims have long been criminalized for prostitution related offenses as well. See Jody Miller, "Prostitution" in *The Oxford Handbook of Crime and Public Policy*, Michael Tonry (ed.) (OUP 2009) at p. 555 (noting a "dramatic increase" in the rate of arrest of prostituted children for prostitution-related offenses between 1999 and 2006).

prosecutors have spent 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 in which trafficking takes place.²

While this situation is beginning to change in some states and localities within the United States, the vast majority of jurisdictions continue to criminalize victims of sex trafficking.³ Despite the U.S. having ratified 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.⁴

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 a tremendous amount of debate.⁵ While this section does not attempt to offer 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 18 years constitutes sex trafficking. Indeed, the use of age as a definitional stipulation is the clearest and most well-accepted method of demarcating those persons who *certainly* count as victims of sex trafficking (prostituted children) from those who *may*

² While police and prosecutors have also targeted victims for prosecution under laws prohibiting conduct such as immigration offenses, passport or visa fraud, etc., this paper will focus exclusively on decriminalizing victims for engaging in prostitution-related activities. On the inequality in law enforcement patterns and the failure to target buyers, see Catharine MacKinnon, "Prostitution and Civil Rights" 1 Mich J Gender & L 13 (1993) (cases cited at fn 21).

³ 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS: SAFE HARBOR - PROTECTING SEXUALLY EXPLOITED MINORS (Polaris Project, August 2013) available at <http://www.polarisproject.org/storage/2013-Analysis-Category-6-Safe-Harbor.pdf>.

⁴ Id. For discussion of U.S. obligations under international law, see section II (A) below.

⁵ See Janice G. Raymond, GUIDE TO THE NEW UN TRAFFICKING PROTOCOL 3-4 (2001), available at http://action.web.ca/home/catw/attach/Guideun_protocolENG.pdf (describing the process that led to the definition of "trafficking"); Michelle Dempsey, Carolyn Hoyle, and Mary Bosworth, "Defining Sex Trafficking in Domestic and International Law: Mind the Gaps," 26 Emory Int'l L J 137 (2012).

count as victims of sex trafficking, if other conditions are present (as is the case with prostituted adults). As such, in cases where children under the age of 18 years are being prostituted, they necessarily count as victims of sex trafficking by definition, irrespective of whether they self-identify as victims.

At the national and international levels, the legal definitions of trafficking recognize that prostituted children under the age of 18 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 18 years within the scope of victims of “severe forms of trafficking.”⁶ Similarly, the United Nations Protocol for the Prevention, Protection and Prosecution of Trafficking in Persons, Especially Women and Children (hereinafter, the “Palermo Protocol”), defines trafficking as including the exploitation of prostitution of children under the age of 18 years.⁷

Despite widespread agreement and well-grounded legal recognition that child prostitution counts as sex trafficking, only 18 U.S. states have laws explicitly prohibiting the criminalization of child sex trafficking victims.⁸ 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.

In the 32 states (and Washington DC) where “safe harbor” laws have not been enacted, child victims of sex trafficking continue to be treated as criminals, and police continue to arrest child victims of sex trafficking.⁹ As a result of this failure to identify prostituted children as victims of sex trafficking, they are either judged delinquent or prosecuted in the adult criminal justice system.¹⁰

⁶ TRAFFICKING VICTIMS PROTECTION ACT, 22 U.S.C. § 7102 (9).

⁷ PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, G.A. Res. 55/25, Annex II, art. 3, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

⁸ See n 3. For a critique of the limitations of these laws, see section III (A) below.

⁹ “Minors who are victims of commercial sexual exploitation and sex trafficking in the United States often are arrested and treated as perpetrators under state criminal and juvenile delinquency laws...” National Academy of Science’s Committee on the Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States (Ellen Wright Clayton and Richard D. Krugman, Co-Chairs), CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES (National Academies Press 2013), at p. 8.

¹⁰ “[I]f a state’s age of consent law is 16 years of age, victims of sex trafficking between 16 and 17 years old may not be identified and treated as such ...” Farrell, et. al., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES (Urban Institute, April 2012) at p. 190.

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

Another area of widespread agreement is that an adult who performs a commercial sex act that is induced by force, fraud, or coercion counts as a victim of sex trafficking. This definition of adult sex trafficking has been incorporated into the U.S. Trafficking Victims Protection Act,¹¹ many U.S. states’ anti-trafficking laws,¹² and it informs the framework for the U.S. State Department’s Annual Trafficking in Persons Report.¹³

Despite large scale recognition that adult prostitution induced by force, fraud or coercion constitutes sex trafficking, only 29 states require or even encourage law enforcement training to assist officers in identifying trafficking cases.¹⁴ The failure to mandate universal training for law enforcement regarding the identification of trafficking cases results in the continued criminalization of sex trafficking victims.¹⁵

The failure to screen prostitution cases for indications 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.”¹⁶

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 cases of adult prostitution,¹⁷ 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.¹⁸ In light of the U.S.’s ratification of the Protocol, there is a strong basis on which

¹¹ See n 6.

¹² See n 3, defining such cases as “severe forms of trafficking.”

¹³ Id.

¹⁴ See U.S. Dept. of State, Trafficking in Persons Report (2013)

¹⁵ In the first study of its kind, the Urban Institute recently analyzed case files in 396 closed prostitution incident reports from local law enforcement in 12 jurisdictions, to determine if law enforcement officers were adequately screening and investigating to identify trafficking cases. Clear indicators of human trafficking were identified in 10% of the cases, yet these victims were nonetheless treated as criminals. Moreover, as the researchers noted, this estimate of unidentified trafficking cases “is likely conservative, since our review only included the information available in incident reports. These reports may not have included important indicators of human trafficking if officers were not trained to look for them.” n 10. See also Mogulesu n 1.

¹⁶ Farrell, et. al., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES: EXECUTIVE SUMMARY (Urban Institute, April 2012) at p. 6.

¹⁷ 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, since all cases of child prostitution fall within the scope of sex trafficking on grounds of the victims’ age. See section I. A. above.

¹⁸ The definition in Article 3 states, in relevant part, as follows:

to argue that jurisdictions within the U.S. should include cases involving an “abuse of power or a position of vulnerability” within their definition of trafficking.¹⁹

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 to 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.²⁰

Despite its ratification of the Palermo Protocol, the U.S. continues to define trafficking in its domestic law according to the narrower criteria requiring proof of “force, fraud, or coercion.”²¹ Moreover, law enforcement training in the U.S. regarding the identification of sex trafficking victims continues to rely on the narrower criteria of

(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;

(d) “Child” shall mean any person under eighteen years of age.”

¹⁹ See Dempsey, et al. n 5.

²⁰ SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS ASPECTS OF THE VICTIMS OF TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND A GENDER PERSPECTIVE: REPORT OF THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS ASPECTS OF THE VICTIMS OF TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, para. 42, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) (by Sigma Huda).

²¹ n 6. Notably, the U.S. 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 Dempsey, et al. n 5.

“force, fraud, or coercion.” As such, adults who are prostituted by means of an “abuse of power or position of vulnerability” continue to be treated as criminals throughout the U.S., despite the fact that their experience constitutes sex trafficking under international law.

D. Conceptual Debates

Underlying the definitional debates regarding the scope of sex trafficking lurk more complex issues regarding the meaning of the concepts employed in the definitions.²² For example, despite widespread agreement that adult prostitution induced by “force, fraud, or coercion” counts as sex trafficking, there is often little agreement regarding what counts as “force,” “fraud,” and/or “coercion” in the commercial sex industry. While one might hope that existing doctrines regarding the content of these concepts in the criminal law might go some way toward clarifying their meaning, the wide range of legal meanings attributed to such words resolves few difficulties.²³

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 prostituted 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 such terms, law enforcement officers, prosecutors and judges will be required to make their own determinations regarding whether such conditions obtain in any given case. While philosophers have offered illuminating reflections on such issues,²⁴ these concepts remain “essentially contested” and thus the scope of their proper application remains unsettled.²⁵ As suggested below, the lack of clarity and consensus regarding the meaning and range of these concepts, combined with a paucity of justification for criminalizing people who sell sex, even when they do so under conditions that do not

²² For the most part, these debates only concern the scope of adult sex trafficking, since 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 impossible.

²³ For example, consider the wide range of meanings attributed to the legal concept “force” in cases such as *Commonwealth v. Berkowitz*, 415 Pa. Super. 505 (1992) (“force” must entail physical force extraneous to penetration, despite an absence of consent by the victim), as compared to *In re: MTS*, 129 N.J. 422 (1992) (“force” includes penetration in the absence of consent).

²⁴ The philosophical literature on force, fraud, coercion and the related concept of consent is vast. For a small sampling of some important contributions, see, e.g., Frank G. Miller and Alan Wertheimer, (eds.), *THE ETHICS OF CONSENT: THEORY AND PRACTICE* (Oxford University Press 2010); Alan Wertheimer, *COERCION* (Princeton University Press 1987); Alan Wertheimer, *EXPLOITATION* (Princeton University Press 1996); Joel Feinberg, *HARMLESS WRONGDOING* (Oxford University Press 1988); Heidi Hurd, “The Moral Magic of Consent” 2 *Legal Theory* 121 (1996).

²⁵ W.B. Gallie, “Essentially Contested Concepts,” 56 *Proceedings of the Aristotelian Society* 167 (1956)

amount to trafficking, should lead us to err on the side of decriminalizing not only prostituted children but all prostituted adults as well.²⁶

II. Why We Should Decriminalize Victims of Sex Trafficking

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

One reason why criminal justice systems within the U.S. should decriminalize victims of sex trafficking is that our failure to do so likely violates our obligations under international human rights law. Indeed, in a recent review of the U.S.'s compliance with our treaty obligations under the International Covenant on Civil and Political Rights (I.C.C.P.R.), the U.N.'s Human Rights Committee expressed concern regarding the U.S.'s continued criminalization of victims of sex trafficking on prostitution-related charges.²⁷ The Committee criticized our current practices and directed the U.S. to "take all appropriate measures to prevent the criminalization of victims of sex trafficking."²⁸ 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."²⁹

In addition to our obligations under the I.C.C.P.R., our status as a State Party to the Palermo Protocol grounds further obligations that are, at best, inconsistent with the U.S.'s current practice of criminalizing victims of sex trafficking. 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."³⁰ Moreover, Article VI of the Protocol establishes a series of obligations regarding "[a]ssistance to and protection of victims of trafficking in persons."³¹ While the Protocol does not specifically prohibit criminalization in particular cases, the U.S.'s widespread failure to identify victims of sex trafficking, which results in their continued, indiscriminant criminalization, is surely inconsistent with the commitment "to assist and protect victims...with full respect for their human rights."³²

²⁶ See section III (A) below.

²⁷ See n 1.

²⁸ Id.

²⁹ CUNY School of Law, "U.N. Condemns Criminalization of Trafficking Victims as a Human Rights Violation" (March 27, 2014) available at <http://www1.cuny.edu/mu/forum/2014/03/27/u-n-condemns-criminalization-of-trafficking-victims-as-a-human-rights-violation-2>.

³⁰ See n 7, Art. II.

³¹ See n 7, Art. VI.

³² See n 7, Art. II.

B. We Tell Other Countries to Do It

Another strong reason weighing in favor of decriminalizing victims of sex trafficking throughout the U.S. is that we hold ourselves out as the “global sheriff” on trafficking, demanding that other countries refrain from criminalizing victims in their own criminal justice systems.³³ For nearly fifteen years, the U.S. has served as the world’s most powerful monitor of trafficking in persons, with the annual publication of the “Trafficking in Persons Report” (TIP Report).³⁴ The TIP Report ranks countries throughout the world on a multi-tier system, according to their compliance with “minimum standards for the elimination of trafficking in persons.”³⁵ If countries rank highly, they remain in good standing with the U.S. and receive our 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 U.S.³⁶

Amongst the many criteria used to assess whether a government has satisfied the “minimum standards for the elimination of human trafficking,” one speaks directly to the decriminalization of trafficking victims. Specifically, the U.S. 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.”³⁷ 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, throughout most jurisdictions in the U.S., sex trafficking victims continue to be incarcerated, fined, and otherwise penalized for the very same types of offense.

While the U.S. Federal government encourages U.S. states and localities to identify and decriminalize sex trafficking victims, the widespread failure of state and local governments to do so results in the U.S. failing to comply with the “minimal requirements for the elimination of human trafficking” articulated in its own TIP Report.³⁸ The continued criminalization of sex trafficking victims throughout many states and localities within the U.S. results in a situation in which our Federal government, holding itself out as “global sheriff” to the world, hypocritically demands a level of compliance from foreign countries that it cannot effectively require within its

³³ Janie Chaung, “The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking,” 27 *Michigan J Int’l L* 437 (2006).

³⁴ See U.S. Department of State, *TRAFFICKING IN PERSONS REPORT* (2013) (“TIP Report”), available at <http://www.state.gov/j/tip/rls/tiprpt/>

³⁵ *Id.*

³⁶ Chaung, n 33.

³⁷ TIP Report, n 34

³⁸ 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. See section III below.

own borders. Thus, to put an end to this global hypocrisy, state and local governments throughout the U.S. must stop criminalizing sex trafficking victims for prostitution related offenses.

C. Principles of Criminalization Require It

Those who support criminal laws prohibiting the sale of sex have traditionally sought to justify such laws on grounds of public morality and nuisance.³⁹ This section will explain why neither of these rationales provides an adequate justification for criminalizing sex trafficking victims, and why sound principles of criminalization weigh in favor of decriminalizing these 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.⁴⁰ As a matter of U.S. Constitutional law, however, such a rationale is no longer an adequate justification for criminalization.⁴¹ 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;...”⁴² 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.⁴³ However, the holding in *Lawrence* does limit the range of justifications a state may rely upon in criminalizing conduct. Specifically, post-*Lawrence*, the fact that a practice has been traditionally deemed immoral is not sufficient to justify its criminalization.⁴⁴

³⁹ See Lord Patrick Devlin, *THE ENFORCEMENT OF MORALS* (OUP 1959) (defending prostitution related laws based on considerations of public morality); see also Robert George, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (Clarendon Press 1995); compare *WOLFENDEN COMMITTEE REPORT ON HOMOSEXUAL OFFENCES AND PROSTITUTION* (HMSO 1957) (defending the prohibition of prostitution-related activities on public nuisance grounds.) For an argument for prohibiting prostitution on paternalistic grounds, see Peter de Marneffe, *LIBERALISM AND PROSTITUTION* (OUP 2009).

⁴⁰ See Devlin, n 39.

⁴¹ Of course, 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 John Stuart Mill, *ON LIBERTY AND OTHER ESSAYS* 14 (John Gray ed., Oxford Univ. Press 1998) (1859); H.L.A. Hart, *LAW, LIBERTY AND MORALITY*, (Stanford University Press, 1963); Joel Feinberg, *HARM TO OTHERS* (OUP 1984).

⁴² *Lawrence v. Texas*, 539 U.S. 558, 577 (quoting Justice Stevens’ dissent in, and overturning, *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)).

⁴³ See Stacie Reimer Smith and Antoni Villaamil (eds.), “Prostitution and Sex Work,” 13 *Georgetown J of Gender and L* 333, 363 (2012) (“it does not seem likely that *Lawrence* will create a privacy right to engage in prostitution.”).

⁴⁴ See n 42.

Another common justification offered in support of criminalizing prostitution-related activities is that such conduct creates a public nuisance.⁴⁵ Yet, when such rationale is applied to people who are selling sex, it primarily targets those who are doing so under conditions that amount to sex trafficking - so-called "street walkers."⁴⁶ For these very people - street-level prostitutes - are likely to be subjected 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 criminal 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, of course, is to target the use of the criminal law toward those who are engaging in victimization, while *decriminalizing* their victims.

In recent years, U.S. society has become increasingly aware that the many people who sell sex are doing so under conditions that amount to trafficking.⁴⁷ Moreover, even in those "gray area" cases where reasonable minds may differ regarding whether to characterize a particular case as trafficking,⁴⁸ it is rarely if ever the case that the conduct of the prostituted person is sufficiently blameworthy to merit criminalization. As Andrew Simester and Andrew von Hirsch have correctly observed,

The criminal sanction is the most drastic of the state's institutional tools for regulating the conduct of individuals....[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

⁴⁵ See Wolfenden n 39.

⁴⁶ 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. See the debates set out in volume 11 of the cross-disciplinary journal, *Violence Against Women* (2005), especially Ronald Weitzer, "Flawed Theory and Method in Studies of Prostitution," 11 *Violence Against Women* 934, 944 (2005) (conceding that "street prostitutes are substantially more vulnerable to victimization than indoor workers;" compare 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.").

⁴⁷ See section I, above.

⁴⁸ See sections I (C) and (D) above.

labeling those it convicts as culpable wrongdoers, the state should get it right.⁴⁹

Since criminalization expresses moral condemnation, the criminal law should only be used to target those who are morally blameworthy for their conduct. Let us call this the blameworthiness principle. We can apply the blameworthiness 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 regarding whether to pursue criminal charges in particular cases. So, too, can we apply the blameworthiness principle across a range of cases, by asking whether people who engage in that type of conduct are *typically* so blameworthy for so doing that they merit criminalization. This sort of question should and often does inform legislators' decisions regarding whether to criminalize given types of conduct. To be clear, the question legislators should ask themselves is not merely whether people who engage in that type of conduct are sometimes so blameworthy that they merit criminalization, but whether that level of blameworthiness is *typically* present when people engage in that type of conduct.

Applying the blameworthiness principle in the context of criminalizing the sale of sex calls for an evaluation of the conditions under which such conduct typically occurs. If the conditions are such that people who sell sex are typically not so blameworthy as to merit criminalization for their conduct, then they should not be criminalized. While not representing a scientific survey of current views on the matter, to be sure, it is noteworthy that on the popular website "Pro/Con," which tracks public opinion regarding controversial social issues, the only view supporting criminalizing of people who sell sex was grounded in precisely the sort of public morality considerations deemed inadequate to justify criminal penalties in *Lawrence*.⁵⁰

Instead, views in the U.S. have transformed to a point of near universal agreement that selling sex is not so blameworthy as to merit criminalization. On one set of views, selling sex is not wrongful in the first place, and thus it is never the case that those who sell sex are typically so blameworthy as to merit criminalization for so doing. 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,⁵¹ as well as many who view the sale of sex as a form of discrimination

⁴⁹ Andrew Simester and Andreas von Hirsch, CRIMES, HARMS AND WRONGS (Hart 2011) at p. 19.

⁵⁰ "Should Prostitution Be Legal?" available at <http://prostitution.procon.org/view.resource.php?resourceID=000115> (citing Dorn Checkley, Director of the Pittsburg Coalition Against Pornography, "Prostitution as an institution is evil. It doesn't matter if it is the 'world's oldest profession', it is still wrong."). See also n 42 and accompanying text.

⁵¹ See, for example, Laura Maria Augustin, SEX AT THE MARGINS: MIGRATION, LABOUR AND THE RESCUE INDUSTRY (Zed Books 2007). Martha Nussbaum famously argued that using one's body to earn money through selling sex was indistinguishable in any important respect from the work performed by a

and violence against women,⁵² can nonetheless agree that the sale of sex is not so blameworthy as to merit criminalization. On another set of views, even if there is something morally wrong with some or all instances of selling sex,⁵³ the conditions under which such conduct is commonly performed render the conduct unworthy of blame in the typical case.⁵⁴ 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 way to decriminalize victims of sex trafficking that is gaining traction in the U.S. is to enact “safe harbor” laws, which call for protection, rather than prosecution, of child victims of sex trafficking.⁵⁵ At present, eighteen states have enacted some form of “safe harbor” and thus have begun to move toward decriminalizing this group of victims.

However, this method of decriminalizing victims of sex trafficking remains incomplete in three ways. First, despite the positive steps taken by the 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 such time as every state enacts “safe harbor” laws, child sex trafficking victims in the U.S. will continue to be subjected to criminal penalties. The lack of uniform legal reform 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 for prostitution related offenses 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 being arrested and prosecuted in the destination state.

Second, several of the “safe harbor” laws that have been adopted thus far are incomplete on their own terms, insofar as they do not necessarily regard all prostituted

massage therapist or philosophy professor. Martha Nussbaum, “Whether from Reason or Prejudice: Taking Money for Bodily Services,” 27 *Journal of Legal Studies* 693 (1998).

⁵² See Janice G. Raymond, *NOT A CHOICE, NOT A JOB: EXPOSING THE MYTHS ABOUT PROSTITUTION AND THE SEX TRADE* (Potomac Books 2013).

⁵³ See Ekow Yankah, “Liberal Virtue,” in *LAW, VIRTUE AND JUSTICE*, Amalia Amaya, Ho Hock Lai (eds.) (Hart 2011) (arguing that while “prostitution inflicts an objective moral harm on both the buyer and seller of sex...” it ought not to be criminalized.).

⁵⁴ See Michelle Madden Dempsey, “Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism” 158 *1729*, 1761-62 (2010) (arguing that even if some people who sell sex are complicit-in-fact in perpetuating the commercial sex market, which causes harm to victims of sex trafficking, the complicity of those who sell sex is rarely if ever blameworthy).

⁵⁵ See *Polaris*, n 3.

children under the age of 18 years as victims of sex trafficking. For example, Minnesota's "safe harbor" law, due to go into effect in August 2014, contains provisions that continue to allow for the criminalization of child sex trafficking victims between the ages of 16 and 18 years, if the children refuse or fail to complete a diversion program. As one commentator correctly 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.⁵⁶

The final way in which "safe harbor" laws remain an incomplete method of decriminalizing victims of sex trafficking is that these laws offer no protection for adult victims of sex trafficking. This fact is particularly troubling, given that the majority of victims of sex trafficking were first prostituted as children.⁵⁷ Thus, even if a jurisdiction does enact a "safe harbor" law, once a child victim of sex trafficking reaches her 18th birthday, she is no longer offered the protection of these laws, and is instead subject to 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 law enforcement strategies that primarily target victims for enforcement action, remains inadequate to address the scope of the problem for two reasons.

First, even with training, there remains too high a risk that law enforcement will fail to identify cases as trafficking when, in fact, the victim is being prostituted under conditions that amount to trafficking. This problem is particularly likely to arise in cases where people arrested for selling sex view themselves as being in a committed domestic relationship with their pimps. If law enforcement officials are looking for evidence of pimping as an indicator of trafficking, they are likely to miss relevant evidence due to the victim's desire to protect her "boyfriend" and her associated lack

⁵⁶ Melissa Golke, "The Age of Consent: How Minnesota's Safe Harbor for Sexually Exploited Youth Act of 2011 Falls Short of Fully Addressing Domestic Child Sex Trafficking," 33 *Hamline Journal of Public Law and Policy* 201, 223-224 (2011).

⁵⁷ See Jody Raphael and Deborah Shapiro, "Sister Speak Out: The Lives and Needs of Prostituted Women in Chicago" (2002), (finding that 1/3 of the prostituted-women in the study began prostituting before the age of 15 years, while nearly 62% began before the age of 18 years).

of self-identification as a someone who is being pimped. As Kaethe Morris Hoffer observes 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.”⁵⁸ Moreover, as Kate Mogulescu has observed, “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.”⁵⁹

Second, by the time law enforcement is in a position to screen particular cases to determine whether the person who has been arrested for prostitution-related offenses is a victim of sex trafficking, the person is already being subjected to arrest and detention. 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 that the victim will be arrested and interrogated by law enforcement is a method that does too little, too late.

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, etc. Variations on this approach have been adopted in countries such as the Netherlands, Germany, parts of Australia, as well as in Las Vegas. 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 are not subject to criminalization *qua* prostitution.

This method, while seemingly promising at first glance, fails to provide a plausible solution, for two reasons. First, while it is true that this method does achieve the goal of decriminalizing victims of sex trafficking, it comes with a heavy cost of increasing the over-all amount of sex trafficking in the jurisdiction, due to increases in demand for commercial sex that results when prostitution is normalized through legalization.⁶⁰ 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

⁵⁸ Neil Steinberg, “In Chicago, Amnesty International to debate legalizing sex trade” Chicago Sun-Times, April 4, 2014.

⁵⁹ Mogulescu, n 1 at p. 474.

⁶⁰ Seo-Young Cho, Axel Dreher, Eric Neumayer, DOES LEGALIZED PROSTITUTION INCREASE HUMAN TRAFFICKING? 41 World Development 67 (2013).

prohibition of prostitution.⁶¹ The study concludes that “countries where prostitution is legal experience larger reported human trafficking inflows,” which is to say, legalization of prostitution across the board increases sex trafficking. This result, of course, 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. Thus, despite its initial plausibility, the evidence strongly suggests that decriminalizing everyone involved in prostitution simply exacerbates the underlying problem by increasing sex trafficking.

D. The Nordic Model: Decriminalizing Victims, Without Increasing Trafficking

The most promising method of decriminalizing victims of sex trafficking implemented thus far 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, 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, etc.⁶²

The European Parliament recently endorsed this method of decriminalizing victims of sex trafficking, calling on other European countries to adopt the Nordic Model’s approach to prostitution.⁶³ In relevant part, the European Parliament report

[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.⁶⁴

Research regarding the impact of the Nordic Model demonstrates promising results.⁶⁵ Prior to its implementation in Sweden (the first country to adopt the model), the

⁶¹ Id.

⁶² See 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 (2004).

⁶³ EUROPEAN PARLIAMENT RESOLUTION OF 26 FEBRUARY 2014 ON SEXUAL EXPLOITATION AND PROSTITUTION AND ITS IMPACT ON GENDER EQUALITY (2013/2103(INI)).

⁶⁴ Id. paras. 26-28.

Swedish government estimated that “there were approximately 2500 to 3000 prostituted women in Sweden, of whom 650 were on the streets.”⁶⁶ 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 50%), while only “300 women and fifty men were found in prostitution being advertised online.”⁶⁷ While the Nordic Model has been criticized on the grounds that it has simply resulted in a shift from street prostitution to internet-based or “hidden” prostitution venues, “no information, empirical evidence, or other research suggests that this has actually occurred.”⁶⁸

Supporters of the Nordic Model often invoke additional claims regarding the nature of prostitution, viewing all prostitution as violence against women.⁶⁹ Indeed, this view of prostitution has widely informed and motivated the adoption of such laws.⁷⁰ Yet, even if one rejects that view, the evidence is clear that the Nordic Model achieves two important goals: (1) it decriminalizes victims of sex trafficking for prostitution-related offenses, and (2) 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.⁷¹ For, not only does this method achieve the primary goal of removing criminal penalties from victims of sex trafficking, it does not have the unintended consequence of exacerbating the underlying problem by increasing sex trafficking. Moreover, given evidence that adoption of this model has resulted in a dramatic decrease in prostitution in the jurisdictions where it has been adopted, it seems likely that the decrease in prostitution generally has resulted in a concomitant decrease in sex trafficking as well.⁷²

⁶⁵ Max Waltman, “Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law” 22 *Mich J Int’l L* 133 (2011).

⁶⁶ *Id.* at p. 146.

⁶⁷ *Id.*, citing PROSTITUTION IN THE NORDIC: RESEARCH REPORT (Charlotta Holmström & May-Len Skilbrei eds., 2008).

⁶⁸ Waltman, n 65 at p. 146.

⁶⁹ See, e.g., Raymond, n 5. For an alternative account of the claim that prostitution constitutes “violence against women,” see Michelle Madden Dempsey, “Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism,” 158 *U Penn L Rev* 1729, 1747-49 (2010).

⁷⁰ See Ekberg n 62 at p. 1189.

⁷¹ See section III (C).

⁷² While acknowledging the difficulty in estimating rates of trafficking, the Swedish government’s review of the effect of the 1999 law concludes that it “has helped to combat prostitution and human trafficking for sexual purposes.” EVALUATION OF THE PROHIBITION OF THE PURCHASE OF SEXUAL SERVICES (Government Offices of Sweden 2010) available at <http://www.government.se/sb/d/13420/a/151488>.

Conclusion

The U.S. 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 likely a violation of our obligations under international law and, at very least, an embarrassing hypocrisy. While some jurisdictions within the U.S. have taken steps toward decriminalizing child victims of sex trafficking, these efforts are inadequate. We should decriminalize all victims of sex trafficking – child and adult – 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.⁷³

⁷³ This paper served as the basis for a full article to be published in Volume 52, Issue 2 of the *American Criminal Law Review*.