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Spring 4-1-2011

## The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry

Gail M. Deady

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### Recommended Citation

Gail M. Deady, *The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry*, 17 Wash. & Lee J. Civ. Rts. & Soc. Just. 515 (2011). Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol17/iss2/7>

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# The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry

Gail M. Deady\*

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### I. Introduction

In October, 2008, an op-ed article appeared in the *San Francisco Chronicle* entitled "Muck, Inc."<sup>1</sup> The article, while gently poking fun at various propositions appearing on the San Francisco city voting ballot that November, focused on Proposition K, which, if passed, would decriminalize prostitution within city limits.<sup>2</sup> Instead of participating in the traditional argument over whether prostitution is work or inherently violence against women, the author offered the following sentence:

[B]y decriminalizing prostitution and prohibiting the city from seeking funds to go after human trafficking, Prop. K would protect human traffickers, legitimize street prostitution and make it less likely for authorities to intervene when adults peddle young teens for the sexual pleasure of dirty old men. In passing this measure, the city would be rolling out the welcome mat for those who would pimp out 14-year-old girls and boys, as well as those who traffic in the human sex-slave trade. This isn't compassion. It is human exploitation.<sup>3</sup>

This sentence exemplifies the new argument against decriminalizing prostitution: that prostitution is inherently linked to sex trafficking and by criminalizing the profession, the government can better protect potential victims.

Throughout the world, there are three general legal approaches to the regulation of the prostitution industry: criminalization, legalization and decriminalization.<sup>4</sup> In criminalized jurisdictions, it is not legal to engage in prostitution.<sup>5</sup> Such jurisdictions are divided into two groups: prohibitionist and abolitionist.<sup>6</sup> In prohibitionist jurisdictions, "all forms of prostitution are unacceptable and therefore illegal."<sup>7</sup> Abolitionist criminalized jurisdictions do not ban the sale of sexual

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1. See Debra J. Saunders, Op-Ed., *Muck, Inc.*, *S. F. Chron.*, October 14, 2008, at B7 (encouraging readers to vote against Proposition K).

2. *Id.*

3. *Id.*

4. Elaine Mossman, *International Approaches to Decriminalising or Legalising Prostitution*, VICTORIA U. OF WELLINGTON CRIME AND JUSTICE RES. CENTER 5 (2007)

5. See *id.* ("Criminalisation [sic] makes prostitution illegal with related offences appearing in the criminal code. It seeks to reduce or eliminate the sex industry and is supported by those who are opposed to prostitution on moral, religious or feminist grounds.")

6. *Id.*

7. *Id.* The prohibitionist approach is exemplified by laws in the United States.

services, but related activities such as keeping a brothel or solicitation are illegal.<sup>8</sup> In legalized jurisdictions, "prostitution is controlled by government and is legal only under certain state specified conditions."<sup>9</sup> Finally, decriminalized jurisdictions do not criminalize prostitution, but they also do not have prostitution-specific statutes that regulate the industry.<sup>10</sup> Instead, decriminalized jurisdictions control prostitution like any other profession: through employment and health regulations.<sup>11</sup>

All aspects of prostitution have been illegal in most jurisdictions of the United States since the conclusion of World War II, and American feminists have been debating the legitimacy of prostitution as a profession for decades.<sup>12</sup> In the final two decades of the twentieth century, feminist academic discourse generally focused on the subject of whether prostitution is work or exploitation.<sup>13</sup> One contingent—self-identified as "radical feminists"—takes the position that prostitution always involves male domination and exploitation of women, that violence is omnipresent in prostitution, and that legalization or

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8. *See id.* ("Making these related activities illegal effectively criminalises [sic] prostitution as it is virtually impossible to carry out prostitution without contravening one law or another."). This approach is currently taken in Canada and the United Kingdom. *Id.* Sweden is the only country so far to criminalise [sic] the buyers of sex rather than sex workers. *Id.* (emphasis in original).

9. *Id.* at 6. "The underlying premise is that prostitution is necessary for stable social order, but should nonetheless be subject to controls to protect public order and health." *Id.* This accomplished through regulations, such as "licensing, registration, and mandatory health checks." *Id.* Several Australian states, Denmark, The Netherlands and some counties of Nevada currently employ this approach. *Id.*

10. *See id.* ("Decriminalisation involved repeal of all laws against prostitution, or the removal of provisions that criminalised all aspects of prostitution."). "The key difference between legalization and decriminalisation is that with the latter there are no prostitution-specific regulations imposed by the state." *Id.*

11. *See id.* ("[R]egulation of the industry is predominantly through existing 'ordinary' statutes and regulations covering employment and health for instance.").

12. *See generally* Jody Freeman, *Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)Possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75–76 (1989–1990) (discussing the conflict between radical feminists and liberal feminists on the validity of prostitution as an employment choice for women); LAURIE SHRAGE, *MORAL DILEMMAS OF FEMINISM: PROSTITUTION, ADULTERY AND SLAVERY* (Routledge, 1994) (contemplating the historical roles of prostitution in different cultures and attempting to draw lessons from this analysis).

13. *See* Ronald Weitzer, *The Growing Moral Panic over Prostitution and Sex Trafficking*, 30 THE CRIMINOLOGIST 1, 1 (Sept./Oct. 2005) ("Sometimes referred to as the 'sex wars,' the two most prominent camps are radical feminism and the sex-as-work perspective.").

decriminalization would make these problems worse.<sup>14</sup> The radical feminist position is largely based on the writings of Catherine MacKinnon, Andrea Dworkin, and Kathleen Barry.<sup>15</sup> Radical feminists also created several prominent anti-prostitution organizations, such as the Coalition Against Trafficking in Women (CATW).<sup>16</sup>

Another contingent of feminists—identifying as "liberal feminists"—argues that prostitution is a respectable choice of employment and denies any significant connection between prostitution and sex trafficking.<sup>17</sup> The prostitute labor union movement has embraced this position.<sup>18</sup>

During the first decade of the twenty-first century, the argument against decriminalization gained support as prostitution became linked with the growing awareness of global sex trafficking.<sup>19</sup> There is evidence,

14. *See id.* at 1, 3 (detailing the radical feminist position on prostitution and sex trafficking).

15. *See id.* at 1 ("The version of radical feminist theory to which I refer is 'extreme' in the sense that it is absolutist, doctrinaire, and unscientific. The well-known writings of Andrea Dworkin, Catherine MacKinnon, and Kathleen Barry exemplify this approach."). *See, e.g.*, Catherine MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 13 (1993) ("Women in prostitution are denied every imaginable civil right in every imaginable way, such that it makes sense to understand prostitution as consisting in the denial of women's humanity, no matter how humanity is defined."); Andrea Dworkin, Speech at the University of Michigan Law School (October 31, 1992), <http://prostitution.procon.org/viewanswers.asp?questionID=001315#answer-id-007473> (last visited October 3, 2010) ("Prostitution in and of itself is an abuse of a woman's body.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

16. *See* Weitzer, *supra* note 13, at 1 (noting that the creation of these organizations flowed from the writings of radical feminists).

17. *See generally* LAURIE BELL, *GOOD GIRLS/BAD GIRLS* (Canadian Scholar's Press 1987) (discussing the confrontation between the concept of feminism and the reality of prostitution); DELORES FRENCH & LINDA LEE, *WORKING: MY LIFE AS A PROSTITUTE* (E.P. Dutton 1989) (employing a first-hand account of prostitution to describe and defend the rights of prostitutes).

18. *See, e.g.*, The Erotic Service Providers Union Web Site, <http://espu-ca.org/wp/> (last visited October 3, 2010) ("The [ESPU] seeks to gain agency on by and for all erotic service providers regarding our occupational, social, and economic rights through affiliating with organized labor.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice); The International Union of Sex Workers Web Site, <http://www.iusw.org/node/1> (last visited October 3, 2010) ("The [IUSW] campaigns for the human, civil and labour rights of those who work in the sex industry.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

19. *See* Weitzer, *supra* note 13, at 4 ("High figures and anecdotal horror stories are being used to demonstrate that there is a worldwide epidemic of coerced prostitution and to justify condemnation of all forms of prostitution everywhere."); Nick Davies, *Prostitution and Trafficking—The Anatomy of a Moral Panic*, *GUARDIAN (London)*, Oct. 20, 2009, at 6 (noting that the religious group Churches Alert to Sex Trafficking Across Europe (CHASTE) misused statistics from a University of North London sex trafficking report to

however, that the close connection between prostitution and sex trafficking so strongly asserted in "Muck, Inc." may not be as close as it seems.<sup>20</sup> The Global Alliance Against Trafficking in Women (GAATW), which undertook an investigation into international trafficking in women at the request of the United Nations Special Rapporteur On Violence Against Women in 1997, claimed that "finding reliable statistics on the extent of trafficking in women was virtually impossible."<sup>21</sup> The GAATW report stated that this problem was due to a lack of systematic research methods, the absence of a "precise, consistent and unambiguous definition of the phenomena" of trafficking in women, and the illegal and criminal nature of prostitution and trafficking.<sup>22</sup> Despite the problems with accurate data collection, the United States Department of State published a "fact sheet" in 2004 asserting that of "the estimated 600,000 to 800,000 people trafficked across international borders annually, 80 percent of victims are female, and up to 50 percent are minors. Hundreds of thousands of these women and children are used in prostitution each year."<sup>23</sup> Several notable academics criticized the report's purported connection between sex trafficking and prostitution, claiming that

[A]s the US government is well aware, in many countries, no data exist on the trafficking of men because many governments and researchers use a definition of 'trafficking' that is limited only to women, or only to women in prostitution. Data collected according to such limited definitions of trafficking cannot support the fact sheet's assertions.<sup>24</sup>

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assert that "1,420 women were trafficked into the UK in 2000"). The statistic originally asserted, admittedly speculative by the authors, was that seventy-one women had been identified as "trafficked" in 2000, but the authors "guessed" that the true total was about 1,420. *Id.*

20. See Saunders, *supra* note 1, at B7 (stating that the legalization of prostitution will welcome human traffickers).

21. Jo Doezema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, 18 GENDER ISSUES 23, 32 (2000).

22. See *id.* (citing MARJAN WIJERS & LIN LAP-CHEW, TRAFFICKING IN WOMEN: FORCED LABOUR AND SLAVERY-LIKE PRACTICES IN MARRIAGE, DOMESTIC LABOUR AND PROSTITUTION 15 (Women Ink 1997)).

23. U.S. DEP'T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING 2 (2004), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1037&context=humtraff> data (last visited October 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

24. Letter from Ann Jordan, et al., to Ambassador John Miller (April 21, 2005), [http://www.soros.org/initiatives/health/focus/sharp/articles\\_publications/publications/compendium\\_20070319/impliimplica/miller\\_20070403.pdf](http://www.soros.org/initiatives/health/focus/sharp/articles_publications/publications/compendium_20070319/impliimplica/miller_20070403.pdf).

Despite the absence of an accurate evidentiary link between prostitution and sex trafficking, anti-trafficking groups continually advanced this position during three specific prostitution debates between 2008 and 2010. First, opponents of Proposition K, a 2008 voter referendum to decriminalize prostitution in San Francisco, argued that decriminalization would flood the city with sex trafficking victims.<sup>25</sup> Next, proponents of the United Kingdom's Policing and Crime Bill of 2009 used the link between sex trafficking and prostitution to argue that criminalizing demand for prostitution would reduce sex trafficking into the United Kingdom.<sup>26</sup> Finally, anti-trafficking groups in Rhode Island claimed that prostitutes working in massage parlors and spas in Providence were sex trafficking victims in order to bolster support for a 2009 law criminalizing all forms of prostitution in the state.<sup>27</sup> While each of these campaigns are discussed in depth later in this Note, it is important to acknowledge early in this analysis that there is a widespread campaign against prostitution in the United States and the United Kingdom fueled by faulty statistics and misguided assertions. More importantly, criminalization laws prevent prostitutes from receiving basic employment rights and drive prostitution operations underground, further exacerbating problems with sex trafficking victim identification.

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25. See, e.g., Mark Wexler, *Voting No on San Francisco's Prop K*, NOT FOR SALE, Nov. 3, 2008, <http://www.noforsalecampaign.org/news/2008/11/03/voting-no-on-san-francisco-prop-k/> (last visited Oct. 3, 2010) (quoting San Francisco District Attorney Kamala Harris as saying that "[m]any people in the commercial sex trade have been trafficked and forced to participate in commercial sex. This measure would attempt to provide safe harbor to their traffickers") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

26. See, e.g., Joan Smith, Opinion, *Make No Mistake: Sex Trafficking is Real*, INDEPENDENT (London), Oct. 29, 2009, at 32 ("Campaigners for legalised prostitution fear the testimonies of trafficking victims because they explode the notion that selling sex is a pleasant job, made risky only by its illegal status.").

27. See Lynn Arditi, *Sex Workers Testify at Senate Hearing on Prostitution Bill*, PROVIDENCE J. (Rhode Island), Sept. 17, 2009, available at [http://www.projo.com/news/content/PROSTITUTION\\_BILL\\_06-19-09\\_UIEPAKU\\_v59.3cd847f.html](http://www.projo.com/news/content/PROSTITUTION_BILL_06-19-09_UIEPAKU_v59.3cd847f.html) (last visited Oct. 3, 2010) (describing testimony in opposition to the bill) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). One woman, who identified herself as "Jul," admitted to performing sexual services for men who were "depressed or just couldn't meet girls." *Id.* Jul asserted that she made more money working in prostitution than she could in a "normal" job because she lacked education and skills. *Id.* When asked if she was forced into prostitution, she said, "You guys think people are forcing us? I want to make money!" *Id.*

While this Note recognizes that human trafficking is a serious problem worldwide,<sup>28</sup> it argues that by continuing to criminalize prostitution, the United States and the United Kingdom are exacerbating the problem of sex trafficking rather than solving it. Further, by denying prostitutes employment law remedies against wrongful dismissal, the United States deters prostitutes from reporting themselves and others as sex trafficking victims. To support these assertions, Part I of this Note examines the history of prostitution laws in the United States from their origin in Colonial America to the most recent federal anti-trafficking legislation. Part II compares three campaigns against the decriminalization of prostitution conducted during the first decade of the twenty-first century, all of which were driven by the alleged connection between prostitution and sex trafficking. Part III describes different forms of prostitution laws in place in the United States, Australia, the United Kingdom and New Zealand. Finally, Part IV recommends that the United States follow the example of New Zealand and completely decriminalize all aspects of prostitution.

This Note will conclude by arguing that the United States is misguided in its emphasis of the connection between sex trafficking and the commercial sex industry. This misguidance is reflected in the legal history of prostitution laws as well as current trafficking and criminal legislation. This Note will also assert that criminal laws discourage prostitutes from reporting sex trafficking victims in two ways: First, prostitutes risk being arrested for admitting they work as a prostitute or being caught in a police raid. Second, prostitutes risk losing their employment for reporting their employers for sex trafficking. Instead of continuing to criminalize prostitution, the United States should look to other countries for guidance concerning which criminal and employment laws most effectively encourage prostitutes to report human trafficking in their communities. Finally, this Note will advance the position that the United States should decriminalize all forms of prostitution, allow prostitutes to organize into collective bargaining structures without fear of arrest, and provide wrongful termination employment remedies. By doing so, prostitution may be sterilized by the sunlight by driving underground operations into the public arena, and sex-trafficking laws will be strengthened by removing barriers to reporting trafficking victims from within the sex industry.

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28. *See generally* UNITED NATIONS OFFICE ON DRUGS AND CRIME, HUMAN TRAFFICKING: AN OVERVIEW (2008), <http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf> (describing the severity of trafficking in persons).

## II. Defining the Group

Although most jobs in the sex industry involve using some aspect of sexuality for economic gain, this Note focuses solely on individuals who exchange sex acts for money. The term "prostitute" is used in this work to describe such individuals. This Note also takes a gender neutral approach to the term "prostitute." While the great majority of scholarship on prostitution and sex trafficking focuses on women and children, this Note acknowledges that many men provide commercial sexual services and should be included in the debate concerning the legality of their profession. Further, this Note does not distinguish between gay, straight, or transsexual "prostitutes." All types of commercial sexual services should be viewed as "work" and will be regarded as such in this Note. However, given the subject matter of this paper and the general focus of anti-trafficking groups on women's vulnerability, this Note will not engage in an in-depth analysis of the problems facing male "prostitutes" specifically. Although each individual prostitute's experience is different, deterrents to reporting victims of sex trafficking exist across all types of commercial sex work in criminalized jurisdictions.

## III. Legal History of Prostitution

It is common practice to call prostitution "the world's oldest profession."<sup>29</sup> Early regulatory efforts aimed at prostitutes in Europe often resulted from attempts to control the spread of venereal disease and were directed toward the preservation of healthy armies as opposed to moral control over the sale of sex.<sup>30</sup> Eventually, states began trying to regulate

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29. See, e.g., Valerie Jenness, *From Sex as Sin to Sex as Work: COYOTE and the Reorganization of Prostitution as a Social Problem*, 37 SOC. PROBLEMS 403, 416 (1990) ("[P]rostitution has existed in every society for which there are written records . . ."); NILS JOHAN RINGDAL, *LOVE FOR SALE: A WORLD HISTORY OF PROSTITUTION* 10 (Richard Daly trans., Grove Press 2004) (noting that a deity named Ishtar featured in the four thousand-year-old Babylonian epic *Gilgamesh* was the first prostitute to appear in literature); WILLIAM W. SANGER, *THE HISTORY OF PROSTITUTION: ITS EXTENT, CAUSES AND EFFECTS THROUGHOUT THE WORLD* 35 (1858) ("[P]rostitution is coeval with society . . . . It is constantly assumed as an existing fact in Biblical history. We can trace it from the earliest twilight in which history dawns . . .").

30. See J.G. MANCINI, *PROSTITUTES AND THEIR PARASITES* 26–27 (D.G. Thomas trans., Elek 1969) (describing an ordinance passed in 1665 by Louis XIV authorizing the whipping and public exhibition on wooden horses of prostitutes as a reaction to the spread of venereal disease weakening his army at Versailles).

prostitution to prevent disease "without inhibiting soldiers' access to prostitutes."<sup>31</sup> Thus, the practice of regulating brothels spread from the military to the general public.<sup>32</sup> In colonial America, prostitution was generally legal, but highly discouraged.<sup>33</sup> Early Puritan settlements in New England attempted to control prostitution through ordinances addressing fornication, brothels, street walking, and adultery.<sup>34</sup> Vagrancy and disorderly conduct ordinances—although not declaring prostitution illegal per se—punished sexual misconduct with fines.<sup>35</sup> Despite these deterrents, prostitution continued to thrive in the United States throughout the nineteenth century, especially in saloons and brothels in the American West.<sup>36</sup>

The bustling prostitution business, however, led to the emergence of a perceived "white slave trade"<sup>37</sup> in the late nineteenth century, involving "[c]ommercial procurers taking innocent young girls and women by force and holding them captive with threats to their lives."<sup>38</sup> The outburst against white slave traffic stemmed from the Progressive Era belief system that women "were naturally chaste and virtuous, and that no woman became a whore unless she had first been raped, seduced, drugged, or deserted."<sup>39</sup> Although the white slave trade garnered significant media attention that rose to hysterical levels,<sup>40</sup> in reality, many of the women involved in the

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31. KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 14 (New York University Press 1979).

32. *Id.*

33. See HOWARD B. WOOLSTON, *PROSTITUTION IN THE UNITED STATES* 226–30 (The Century Co. 1921) (describing the legal framework in place regarding prostitution in the American colonies).

34. See *id.* at 227 (noting that a prostitute could be charged "as one involved in notorious and repeated acts of fornication and adultery").

35. See *id.* at 228 (stating that "it was usual to administer a fine of a few dollars only").

36. See VERN BULLOUGH & BONNIE BULLOUGH, *WOMEN AND PROSTITUTION: A SOCIAL HISTORY* 218–20 (Prometheus Books 1987) (describing the history of prostitution in the American West).

37. See VERN BULLOUGH, *PROSTITUTION: AN ILLUSTRATED HISTORY* 245 (Crown Publishers 1978) (explaining the historical emergence of the term "white slave trade" as coined by former Illinois assistant state's attorney Clifford G. Roe).

38. Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 *GEO. L.J.* 1111, 1112 (1984).

39. *Id.*

40. See DAVID LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT* 27 (The University of Chicago Press 1994) ("Panic quickly spread to the rest of the nation. Soon a substantial segment of the population believed that young girls in America's cities were being lured to brothels by false pretenses, or pricked by poisoned darts or hypodermic needles and then dragged off to dens of iniquity."). Reputable publications

"white slave trade" were willing participants in prostitution.<sup>41</sup> Nonetheless, the practice of transporting women across state and national borders became an international concern.<sup>42</sup>

As was common with Progressive Era activists, they tackled the perceived problem of prostitution with reform measures.<sup>43</sup> Progressive Era activism, combined with white slave trade hysteria, influenced the passage of the first major federal act directed at the prostitution industry: The Mann Act.<sup>44</sup> The Mann Act, also known as the White Slave Traffic Act of 1910, originally "penalized 'any person' who transports, or aids or assists in the transportation, of a 'woman or girl' for a prohibited purpose or intent, in interstate or foreign commerce, or 'in' any territory or the District of Columbia."<sup>45</sup> Although the statute was intended to have a narrow purpose,<sup>46</sup> "the federal courts have consistently interpreted the statute as criminalizing the actual transportation accompanied by bad intent of the transporter, regardless of what happened at the destination."<sup>47</sup> For nearly

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such as the *New York Times* and the *San Francisco Examiner* also printed stories validating the existence of the "white slave trade" between 1910 and 1913. *Id.* at 28.

41. *See id.* at 159 ("[I]n many instances the victims willingly consent to the practices in which they are engaged.").

42. *See Agreement between the United States and Other Powers for the Repression of the Trade in White Women*, 2 *Am. J. Int'l L.* 363, 364 (1910) ("Each of the Governments agree to exercise a supervision for the purpose to find out, particularly in the stations, harbours of embarkation and on the journey, the conductors of women or girls intended for debauchery."). The agreement was signed by the state leaders of Switzerland, Sweden and Norway, Russia, Portugal, France, the Netherlands, Italy, Belgium, Denmark, Spain, and the United Kingdom (including its dominions overseas, Ireland, and India). *Id.* at 364. "This treaty obligation would become the basis of Section 6 of the Mann Act." LANGUM, *supra* note 40, at 23.

43. *See* LANGUM, *supra* note 40, at 6 (noting that Progressives regarded drugs, vice, and insobriety as "social problems that could be solved" and by "the proper use of social engineering, often employing the coercion of the federal government, individual human behavior could be controlled and changed through legislation").

44. White Slave Traffic Act of 1910 [Mann Act], 18 U.S.C. §§ 2421–24 (1998).

45. *See* LANGUM, *supra* note 40, at 45 (citing White Slave Traffic Act of 1910, 18 U.S.C. 395, § 2 (1910)).

46. *See id.* at 42 (quoting H.R. Rep. No. 61-47 (1909)).

The characteristic which distinguishes 'the white-slave trade' from immorality in general is that the women who are the victims of the traffic are unwillingly forced to practice prostitution. The term 'white slave' includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude.

*Id.*

47. *Id.* at 65. *See, e.g.,* *Caminette v. United States*, 242 U.S. 470, 487 (1917) (holding that the phrase "for any other immoral purpose" in the Mann Act was not limited to

seventy years, the Mann Act was interpreted broadly and could be used to prosecute a man for driving his girlfriend across state lines, "hoping for sexual romance that evening."<sup>48</sup> The broad "for any immoral purpose" language was not removed from the Mann Act until 1986.<sup>49</sup>

In addition to the Mann Act, the model Standard Vice Repression Law of 1919 "criminalized prostitution entirely, making the United States one of the few countries in the world to adopt such an approach. By 1925, every state had passed legislation criminalizing prostitution."<sup>50</sup> The current exception in the United States, Nevada, continues to allow counties to decide whether they want to "outlaw" prostitution or legalize it.<sup>51</sup> In legalized counties, a "licensed brothel must subject its employees to weekly medical examinations, prohibit patronage of any person under eighteen, and refuse to employ any male except for purposes of maintenance. Failure to comply with any of these requirements may result in the revocation of the house's license, fines, and even imprisonment."<sup>52</sup>

#### IV. *Twenty-first Century Campaigns against Prostitution in the United States*

##### A. *The Trafficking Victims Protection Acts*

Nearly a century after the Mann Act was put into effect, the House Committee on International Affairs noted that "the U.S. intelligence community estimates that 45,000 to 50,000 women and children are trafficked annually into major cities in the United States, primarily from the former Soviet Union and Southeast Asia."<sup>53</sup> The Trafficking Victims Protection Act of 2000 (TVPA)<sup>54</sup> estimated that at least "700,000 persons

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prostitution, but included immoral purposes such as debauching a woman, or making her a mistress or concubine).

48. *Id.*

49. Pub. L. 99-628, 100 Stat. 3511 (1986).

50. Charles Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 243 (2000) (citing JOHN DECKER, PROSTITUTION: REGULATION AND CONTROL 211 (Fred B. Rothman & Co. 1979)).

51. *See* Whitebread, *supra* note 50, at 243 ("Prostitution is not illegal per se in Nevada; rather, each county has the choice whether to 'outlaw' the trade.").

52. *Id.*

53. H.R. Rep. No. 106-487 (2000).

54. Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–10 (2000) [hereinafter TVPA].

annually, primarily women and children, are trafficked within or across international borders."<sup>55</sup> The stated purpose of the TVPA, a bipartisan effort promoted by a mixture of radical feminists, conservative Republicans, and evangelicals,<sup>56</sup> was "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."<sup>57</sup> The text of the TVPA asserts that laws currently standing in the United States and abroad are incapable of adequately punishing human traffickers.<sup>58</sup> Because trafficking involves a series of acts, namely kidnapping, transportation of a minor or illegal alien across state and national borders, slavery, and false imprisonment,<sup>59</sup> traffickers usually received comparatively light punishments because they were only charged with one or two of these crimes.<sup>60</sup> Plus, many trafficking victims were unwilling to cooperate in the prosecution of their captors due to fear of deportation and the consequences of returning to their home country.<sup>61</sup>

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55. TVPA, 22 U.S.C. § 7101. Currently, there is not a standardized method for estimating the number of trafficked persons worldwide. The United Nations Office on Drugs and Crime sponsors a Global Initiative to Fight Human Trafficking, and in its publication *Human Trafficking: An Overview*, *supra* note 28, it notes that there are four organizations that have databases on trafficking in persons: the United States Government, ILO, IOM, and UNODC. *Id.* at 6. None of them produce the same estimation of victims of trafficking each year. *Id.* at 6–7.

56. See Edi Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKELEY J. GENDER L. & JUST. 158, 160 n.10 (2006) ("[A]n odd but effective coalition of liberal Democrats, conservative Republicans, committed feminists, and evangelical Christians . . . pushed a law through Congress' focused on prosecuting traffickers and protecting victims.").

57. TVPA, 22 U.S.C. § 7101 (2000).

58. See TVPA, 22 U.S.C. § 7101(b)(14) (2000) ("Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved.").

59. See TVPA, 22 U.S.C. § 7101(b)(10) (2000) ("Trafficking also involves violations of other laws, including labor and immigration codes and laws against kidnapping, slavery, false imprisonment, assault, battery, pandering, fraud, and extortion.").

60. See TVPA, 22 U.S.C. § 7101(b)(14) (2000) ("No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.").

61. See TVPA, 22 U.S.C. § 7101(b)(17) (2000) ("Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves.").

Congress passed the TVPA to make the complicated crime of "trafficking" a federal offense punishable by a possible life imprisonment.<sup>62</sup> It also created safe harbors and special visas for victims of trafficking.<sup>63</sup> The crime of "serious trafficking" combined various offenses understood to qualify as "trafficking": forced labor,<sup>64</sup> knowingly recruiting, harboring, transporting, providing, or obtaining by any means, any person for forced labor or services,<sup>65</sup> and sex trafficking of children by force, fraud, or coercion.<sup>66</sup> "Sex trafficking" is defined as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."<sup>67</sup> These crimes generally require a penalty of up to twenty years of imprisonment upon conviction, but if death results, punishment can reach life imprisonment.<sup>68</sup> The TVPA was reauthorized as the Trafficking Victims Protection Reauthorization Acts of 2003 and 2005 (TVPRA)<sup>69</sup> and again in 2008 as the William Wilberforce Trafficking

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62. See 18 U.S.C. § 1589 (2000) (permitting life imprisonment "[i]f death results from a violation of this section, or if the violation includes kidnapping, an attempt to kidnap, aggravated sexual assault, or an attempt to kill").

63. See TVPA, 22 U.S.C. § 7105 (2000) (listing various services available to victims of human trafficking available from the federal government).

64. 18 U.S.C. § 1589 (2000).

65. 18 U.S.C. § 1590 (2000).

66. 18 U.S.C. § 1591 (2000).

67. TVPA, 22 U.S.C. § 7102(9) (2000).

68. 18 U.S.C. § 1589–90 (2000), 106 P.L. 386 § 112(1)–(3). The statute reads as follows:

Whoever knowingly provides or obtains the labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

*Id.*

69. Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (1st Sess. 2003) (enacted); Trafficking Victims Protection Reauthorization Act of 2005, H.R. 972, 109th Cong. (1st Sess. 2006) (enacted) [combined hereinafter TVPRA].

Victims Reauthorization Act of 2008 (Wilberforce Act).<sup>70</sup> The Wilberforce Act will remain in effect until 2011.<sup>71</sup>

In the seven years prior to the TVPA's enactment, the Department of Justice (DOJ) prosecuted ninety-one suspected traffickers.<sup>72</sup> Between the Act's passage in October 2000 and the reauthorization hearings in 2008, the DOJ prosecuted 449 traffickers.<sup>73</sup> The DOJ has secured 342 convictions and guilty pleas since 2000, compared with 74 in the same period prior to the act.<sup>74</sup> There were 822 open DOJ trafficking investigations in 2008.<sup>75</sup>

The TVPA also created a system of monitoring foreign nations' law enforcement activities by imposing minimum standards for the elimination of trafficking.<sup>76</sup> As a requirement for the receipt of non-humanitarian aid, the TVPA and its reauthorization acts require foreign countries to adhere to the following mandates: First, they must prohibit and punish severe forms of trafficking in persons, as well as the knowing commission of any act of sex trafficking involving force, fraud, or coercion.<sup>77</sup> Next, countries must prohibit and punish crimes in which the victim of sex trafficking is a child incapable of giving meaningful consent, or one in which rape or kidnapping causes a death.<sup>78</sup> Further, the governments of each country receiving aid must prescribe punishments sufficiently severe to deter trafficking and "adequately reflect[] the heinous nature of the offense."<sup>79</sup> Finally, countries must make serious and sustained efforts to eliminate severe forms of

70. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 7311, 110th Cong. (2nd Sess. 2008) (enacted) [hereinafter Wilberforce Act].

71. See Elizabeth Kaigh, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139, 150 (2009) (stating that the Wilberforce Act "is currently in effect only until 2011").

72. 153 Cong. Rec. H10902 (2007) (statement of Rep. Christopher Smith, R-NJ).

73. *Id.*

74. *Id.*

75. *Id.*

76. TVPA, 22 U.S.C. § 7106 (2000).

77. *Id.* The Act defines "severe forms of trafficking in persons" in 22 U.S.C. § 7102 as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." *Id.*

78. TVPA, 22 U.S.C. § 7106 (2000).

79. *Id.*

trafficking in persons,<sup>80</sup> and are designated a "tier" according to their level of compliance with United States' requirements.<sup>81</sup>

Additionally, countries and organizations wishing to receive federal research grants or public health funding must take an "anti-prostitution" pledge guaranteeing that "no funds . . . be used to promote, support, or advocate the legalization or practice of prostitution"<sup>82</sup> and that "no funds . . . be used to implement any program . . . through any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution."<sup>83</sup>

Despite the TVPA's alleged success within the United States, its impact on the international community remains unclear. Scholars assert two primary criticisms of the TVPRA and its predecessor acts: First, the definition of "sex trafficking" is overly inclusive and views prostitution as being inherently linked with human trafficking.<sup>84</sup> Second, the requirement that countries take an anti-prostitution pledge in order to receive non-humanitarian aid ignores the validity of alternate methods of combating trafficking and harms organizations attempting to decrease the spread of HIV/AIDS within legal and decriminalized prostitution industries.<sup>85</sup> Further, when compared with the United Nations' stance on human trafficking, which lists sex trafficking as one of many human trafficking offenses and treats all forms with equal importance, the United States' legislation is predominantly occupied with *sex* trafficking.<sup>86</sup> This

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80. *Id.*

81. *Id.*

82. TVPRA, 22 U.S.C. § 7110(g)(1) (2003).

83. TVPRA, 22 U.S.C. § 7110(g)(2) (2003).

84. *See* Kaigh, *supra* note 71, at 149 ("The inherent problem with the statute is the definition of sex trafficking, which does not require coercion to distinguish it from common prostitution.").

85. *See generally* Kinney, *supra* note 56 (criticizing the result of the required anti-prostitution pledges in Thailand because it only marginalize sex workers and prevented organizations from operating effectively); CENTER FOR HEALTH AND GENDER EQUITY, IMPLICATIONS OF U.S. POLICY RESTRICTIONS FOR PROGRAMS AIMED AT COMMERCIAL SEX WORKERS AND VICTIMS OF TRAFFICKING WORLDWIDE (Nov. 2005), <http://www.aidswomencaucus.org/pdf/Implications-of-US-Policy-Restrictions-for-Programs-Aimed-at-Commercial-Sex-Workers-and-Victims-of-Trafficking-Worldwide.pdf> (describing the effect of the TVPRA and the Global Aids Act on policy decisions and implementation of those policies).

86. *See* UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 28, at 22 (listing crimes related to human trafficking as: slavery, involuntary servitude, debt bondage, forced marriage, forced abortion, forced pregnancy, torture, inhumane or degrading treatment, rape, sexual assault, bodily injury, murder, kidnapping, unlawful confinement, labor exploitation,

interpretation of the law is supported by speeches made by Congressmen, Congresswomen, and Senators during floor debates concerning both the original bill and its amendments.<sup>87</sup>

The United States overemphasizes the correlation between trafficking and the prostitution industry, going so far as to criticize tier one countries with decriminalized prostitution industries for failing to take increased measures to discourage demand for prostitution.<sup>88</sup> Also, by failing to add an element of coercion to its definition of "sex trafficking," scholars warn that the introduction of "sex trafficking" as an offense in the 2011 reauthorization of the bill could make prostitution a federal crime.<sup>89</sup>

### B. San Francisco's Proposition K

The ballot measure, known as "Prop K" in 2008, would have required the San Francisco Police Department to refrain from using public resources "for the purpose of depriving [prostitutes] their right to negotiate for fair wages and work conditions, regardless of their status as sex workers."<sup>90</sup> The proposition also called for the cessation of any resources used for "the investigation and prosecution of prostitutes for prostitution."<sup>91</sup> Further, Prop K would have decriminalized prostitution and prevented San

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forgery of documents, and corruption). While the United Nations acknowledges that "sex trafficking," as defined in the TVPRA, is a significant aspect of human trafficking, it emphasizes that it is a symptom of a bigger problem. *Id.* Section 101 of the TVPRA, listing the findings of Congress, is predominantly directed at addressing "sex trafficking" and mentions other aspects of human trafficking, such as forced labor, secondarily. TVPRA, 22 U.S.C. § 7101 (2003).

87. *See, e.g.*, 146 Cong. Rec. H2684 (2000) (statement of Rep. Christopher Smith) (describing the aims of the Trafficking Victims Protection Act almost exclusively in terms of sex trafficking and prostitution); 146 Cong. Rec. H2685–86 (2000) (statement of Rep. Pitts) (sharing the story of a young "sex slave" lured by traffickers with promises of a better life and nicer clothing).

88. *See, e.g.*, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 252 (2009), <http://www.state.gov/documents/organization/142979.pdf> ("During the year, [the government] did not run campaigns in New Zealand to raise public awareness of trafficking risks, nor did it take steps to reduce demand for commercial sex acts in the decriminalized commercial sex industry.").

89. *See generally* Kaigh, *supra* note 71 (describing potential statutory language which equates prostitution with sex trafficking as "discriminatory and unduly punitive").

90. California Proposition K, § 3 (2008), *available at* <http://www.bayswan.org/SFInitiative08/initiative.html> (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

91. *Id.*

Francisco's law enforcement agencies from applying or receiving federal and state monies that "institute racial profiling as a means of targeting alleged trafficked victims under the guise of enforcing the abatement of prostitution laws."<sup>92</sup> Prop K, if passed, would have redirected funds from prosecution, public defense, court time, legal system overhead, and incarceration of prostitutes towards services and alternatives for needy constituencies.<sup>93</sup> Prop K did not pass, but it received forty-one percent of the votes.<sup>94</sup> The most pervasive arguments against Prop K's passage came from anti-prostitution groups claiming that decriminalizing prostitution would increase instances of sex trafficking in San Francisco.<sup>95</sup>

### C. Rhode Island's Prostitution Bill

Rhode Island used to be one of the few states that made prostitution a felony.<sup>96</sup> In 1976, allegedly in response to a law suit filed by prostitute rights activist group COYOTE which challenged the constitutionality of the statute,<sup>97</sup> the Rhode Island legislature amended the law by reducing the

92. *Id.*

93. See SAN FRANCISCO TASK FORCE ON PROSTITUTION, FINAL REPORT 6 (1996), [http://www.apeleahawaii.org/Resources\\_For\\_Prost\\_Law/Additional\\_Materials/SFTask\\_Force\\_Prost.pdf](http://www.apeleahawaii.org/Resources_For_Prost_Law/Additional_Materials/SFTask_Force_Prost.pdf) (recommending that "the departments instead focus on the quality of life infractions about which neighborhoods complain and redirect funds from prosecution, public defense, court time, legal system overhead and incarceration towards services and alternatives for needy constituencies").

94. *Yes on Prop K, The Results*, Nov. 2008, <http://www.bayswan.org/SFInitiative08> (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

95. See, e.g., Patrick May, *Decriminalize Prostitution in San Francisco?*, SAN JOSE MERCURY NEWS, Nov. 1, 2008 (quoting Presbyterian minister Glenda Hope that "[t]he majority of trafficked women and kids are being held in brothels and massage parlors . . . . So if police can't go after prostitution, they won't be able to get into those places anymore to rescue the victims. "); Elizabeth Pfeffer and Angela Hart, *Proposition to Legalize Prostitution Strikes Chord in San Francisco*, CONTRA COSTA TIMES (California), October 20, 2008 ("City officials fear San Francisco will become a haven for human traffickers because of the provision that would prevent investigations based on racial profiling."); John Coté, *Prop. K Calls for Legal Prostitution in S.F.: Divisions Deep over Move City Task Force Recommended in '96*, S. F. CHRON., October 6, 2008, at B2 ("The danger of this measure is that it's definitely a wolf in sheep's clothing," said Heidi Machen, president of the City Democratic Club. "It promises to protect the very people it will end up hurting. The pimps and traffickers will have a free pass to San Francisco.").

96. R.I. GEN. LAWS § 11-34-5 (1890) (repealed) (establishing a maximum punishment of five years in prison for engaging in acts related to and consisting of prostitution).

97. COYOTE v. Roberts, 502 F. Supp. 1342, 1342 (D.R.I. 1980) (seeking attorney's fees on the theory that COYOTE's law suit, which challenged the constitutionality of the

crime of loitering for prostitution to a misdemeanor.<sup>98</sup> Also, while soliciting sex on the street or from a car remained a crime, simply selling sex in exchange for money was no longer criminal.<sup>99</sup> In 2005, articles began appearing in *The Providence Journal* calling for more stringent criminal punishment of all forms of prostitution as opposed to only street solicitation.<sup>100</sup> These articles often claimed that women working in Providence area massage parlors were victims of human trafficking.<sup>101</sup> The U.S. Attorney's Office in Rhode Island investigated twenty Rhode Island massage parlors during a 2006 sex-trafficking ring bust, but found no evidence of human trafficking.<sup>102</sup> In 2009, however, a law criminalizing all aspects of prostitution was presented in the Rhode Island General Assembly.<sup>103</sup> In response, Tara Hurley, a documentarian, gathered local massage parlor workers to testify before the Senate Judiciary Committee in opposition to the bill.<sup>104</sup> Testimony from those in favor of criminalizing

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statute, was partially responsible for amendments to the statute which effectively mooted the case).

98. See R.I. GEN. LAWS § 11-34-8(b) (2007) (repealed) ("Any person found guilty under this section shall be deemed guilty of a misdemeanor and shall be subject to imprisonment for a term not exceeding six (6) months, or by a fine of not less than two hundred fifty dollars (\$250) nor more than one thousand dollars (\$1,000), or both.").

99. See R.I. GEN. LAWS § 11-34-8(a) (2007) (repealed) ("It shall be unlawful for any person to stand or wander in or near any public highway or street, or any public or private place, and attempt to engage passersby in conversation, or stop or attempt to stop motor vehicles, for the purpose of prostitution or other indecent act, or to patronize, induce, or otherwise secure a person to commit any indecent act.").

100. See, e.g., Tracy Breton, *State Law Foils Efforts to Thwart Prostitution*, PROVIDENCE J. (Rhode Island), May 24, 2005, at A-1 ("Providence Police Chief Dean M. Esserman says that the places that his officers have raided in recent years are more than pay-for-sex businesses."). The police chief claims that the massage parlors are "part of human trafficking in which women—most often illegal Asian immigrants—'are locked in their rooms from the outside and not allowed to leave.'" *Id.*

101. See, e.g., Edward Achorn, *One Business R.I. Can Do Without*, PROVIDENCE J. (Rhode Island), April 11, 2007 ("The business is vicious and it is destroying the lives of our fellow human beings. Years after this problem first came to light, Rhode Island still refuses to ban houses of prostitution that rely on human trafficking, hoarding dollars from human misery.").

102. See Amanda Milkovits, *Federal Sweep Shuttters City Spa*, PROVIDENCE J. (Rhode Island), August 18, 2006 (noting that an investigation by U.S. Attorney's Office in Rhode Island during a 2006 sex-trafficking ring bust did not find evidence of human trafficking in twenty Rhode Island brothels).

103. An Act Relating to Criminal Offenses—Prostitution and Lewdness, R.I. GEN. LAWS § 11-34.1 (2009).

104. See Lynn Arditi, *Sex Workers Testify at Senate Hearing on Prostitution Bill*, PROVIDENCE J. (Rhode Island), Sept. 17, 2009 (describing the testimony of a "spa" employee who stated "I want to make money!").

prostitution, however, focused on the dangers of sex trafficking associated with massage parlors and clandestine prostitution operations.<sup>105</sup> Despite the sex workers' compelling testimony, the bill was passed and signed into law on November 3, 2009.<sup>106</sup>

V. *Comparative Approach: Prostitute Unions, Self-Regulation and "Sex Trafficking"*

As is evidenced by the language used both in the texts and debates surrounding recent criminal measures directed at prostitution, the United States is engaged in a trend toward further criminalizing prostitution, using sex trafficking as justification for doing so. Whether sex trafficking is essentially related to prostitution is the subject of much debate among legislators, scholars, and public figures.<sup>107</sup> From the perspective of labor organizers and prostitutes' rights advocates such as Maxine Doogan of San Francisco's Erotic Service Providers Union, vice laws make her goals much more difficult to achieve. Ms. Doogan echoes the claims of sex worker organizations in other countries by questioning the logic behind the laws: namely, it has become impossible in many jurisdictions for a prostitute to inform police that he or she is being "trafficked" or knows of a person who is "trafficked" without risking arrest.<sup>108</sup> The Rhode Island law was criticized by the Sex Worker Project at the Urban Justice Center (SWP), a sex worker rights organization operating out of New York City, for failing to create adequate safe harbor provisions for those who come forward as trafficking victims or are discovered during raids on spas or massage parlors.<sup>109</sup> When statistics showing the prosecution of prostitutes

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105. *See id.* (noting that Donna Hughes, a professor at the University of Rhode Island who has done extensive research on global human trafficking, testified in favor of the bill).

106. *See* R.I. GEN. LAWS § 11-34.1 (2009) (defining the crime of prostitution to include any location, creating punishments for individuals who would attempt to procure the services of a prostitute, and defining the crime of permitting prostitution within a premise).

107. *See generally* Elizabeth Bernstein, *What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN'S L.J. 91 (1999) (contrasting theories on prostitution with first-hand experience with what prostitution actually entails).

108. *See* Press Release, Int'l Union of Sex Workers, *infra* note 111 and accompanying discussion.

109. *See* Letter from Andrea Ritchie, Director, Sex Workers Project at the Urban Justice Center, to Chair McCaffrey and Honorable Senators (June 18, 2009), <http://www.sexworkersproject.org/downloads/2009/20090618-swp-statement-to-senate-judiciary-committee.pdf> ("We implore Rhode Island to continue to pursue the sound public

are taken into account, asserting the police will know the difference between a trafficking victim and a consenting prostitute is tenuous.<sup>110</sup>

The International Union of Sex Workers, a sex worker union based in the United Kingdom, includes an intriguing headline on the main page of its web site: "You're putting us in danger, Jacqui!"<sup>111</sup> The article is a response to a speech made by United Kingdom Home Secretary Jacqui Smith to the Labour Conference in which she unveiled government plans to "make kerb crawling"<sup>112</sup> punishable as a first offence,<sup>113</sup> "hand more power to police and councils to close brothels,"<sup>114</sup> and "outlaw paying for sex with someone controlled for another's gain."<sup>115</sup> IUSW Spokeswoman Catherine Stephens is quoted on the web site saying, "Brothel and agency owners and their clients are the most likely to see and report victims of trafficking—by continuing their criminalisation, and extending criminalisation to some clients, the government makes it less likely abuse will be reported, increasing the vulnerability of those they wish to help. Trafficking victims will pay the price."<sup>116</sup>

Catherine Stephens' argument that prostitutes are in the best position to identify victims of sex trafficking and have the most motivation to bring such victims to safety<sup>117</sup> is compelling. If prostitution is criminalized, does the law make it easy for prostitutes to come forward and report trafficking victims to the police without risking arrest or a fine?

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policy it has adopted—whether intentionally or inadvertently—and avoid the mistakes of other states which have failed to eradicate prostitution while causing severe harm to the very people they claim to be helping.").

110. *See id.* (stating that SWP "has worked directly with many victims of human trafficking who were arrested, prosecuted, and convicted"). *See generally* Phyllis Coontz & Anne Stahl, *Revisiting Anti-Prostitution Sanctions: An Argument for Changing Policy*, 43 No. 3 CRIM. L. BULL. Art. 7 (2007) (arguing that laws criminalizing prostitution are ill-founded and require revisiting).

111. Press Release, Int'l Union of Sex Workers, Thousands of Sex Workers Could be Endangered by Home Secretary's Proposed Changes in the Law, <http://www.iusw.org/2009/03/thousands-of-sex-workers-could-be-endangered-by-home-secretarys-proposed-changes-in-the-law/> (last visited October 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

112. "Kerb crawling" is used to describe clients' solicitation of street prostitutes in the United Kingdom, New Zealand, and Australia.

113. Press Release, Int'l Union of Sex Workers, *supra* note 111.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

Currently, there are four legal approaches to prostitution: criminalization of supply and demand, criminalization of demand only, decriminalization of supply and demand, and legalization.<sup>118</sup> The United States, with the exception of 13 counties in Nevada, currently criminalizes supply and demand.<sup>119</sup> The United Kingdom operates under a system that criminalizes demand only.<sup>120</sup> This means that prostitutes themselves may not be subject to criminal charges for performing commercial sexual services, but their customers can be arrested if it turns out the prostitute is being coerced or, "controlled for gain."<sup>121</sup> Several states in Australia have "legalized" and regulated brothels and escort services, making such entities legal and subject to regulation.<sup>122</sup> Finally, New Zealand has decriminalized brothels, street solicitation, and escort services.<sup>123</sup> This means that the state does not officially condone prostitution, but it does not prosecute anyone involved in a licensed brothel, escort service, or soliciting sexual services on the street unless they are

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118. See Elaine Mossman, *International Approaches to Decriminalising or Legalising Prostitution*, VICTORIA U. OF WELLINGTON CRIME AND JUSTICE RES. CENTER 11–15 (2007) (describing the four types of legislative approaches to prostitution regulation currently employed internationally).

119. See Coontz & Stahl, *supra* note 110 (noting that prostitution is criminalized in every state of the United States except thirteen counties of Nevada).

120. See CRIME AND POLICING ACT 2009, Ch. 26, § 14 (amending Sexual Offenses Act 2003, 2003 Ch. 42, § 53), *infra* note 179 and accompanying text. Elaine Mossman describes the criminalized system in the United Kingdom as "abolitionist," meaning the sale of sex itself is legal, but all related activities—such as soliciting, brothel keeping, and procurement—are illegal. Mossman, *supra* note 118, at 5. "The abolitionist approach often focuses on eliminating or reducing the negative impacts of prostitution." *Id.*

121. See *infra* note 179 and accompanying text.

122. See Victoria Prostitution Regulations, *infra* notes 156–158 and accompanying discussion. See also Mossman, *supra* note 118, at 6 ("[P]rostitution is controlled by government and is legal only under certain stat-specified conditions.") "The underlying premise is that prostitution is necessary for stable social order, but should nonetheless be subject to controls to protect public order and health." *Id.*

123. See NEW ZEALAND PROSTITUTION REFORM ACT OF 2003, *infra* note 198 and accompanying text. See also Mossman, *supra* note 118, at 6 ("Decriminalisation involved repeal of all laws against prostitution, or the removal of provisions that criminalised all aspects of prostitution."). "The aims of decriminalisation differ from legalisation [sic] in their emphasis." *Id.* "While the protection of social order is also relevant to decriminalisation, the main emphasis . . . is on the sex worker—respecting their human rights, and improving their health, safety, and working conditions." *Id.* "Decriminalisation is also recognised as a way of avoiding the two-tiered reality of legal and illegal operations, with the latter operating underground." *Id.*

found guilty of trafficking or forcing someone to perform commercial sexual acts against his or her will.<sup>124</sup>

In order to determine which legal system would be most conducive to achieving the goals of the prostitute labor movement and encourage prostitutes to report sex trafficking victims, this Note will ask the following question: What system is best able to encourage sex workers to help combat sex trafficking in their own industry?

#### A. Criminalized Jurisdiction: The United States

"In the public discourse about prostitution various reasons have been given to justify criminalization, e.g., it is immoral; it threatens public health; it is a catalyst for other criminal activities; it is an immigration problem; and . . . it victimizes vulnerable women."<sup>125</sup> Since the Mann Act was passed in 1910, the response to these problems has been criminalization.<sup>126</sup> From a purely legal perspective, if a prostitute told a police officer that there was a trafficking victim working in her illegal brothel, the police officer would be bound to arrest the reporting prostitute because of ordinances like one in place in San Francisco that proclaims "it shall be unlawful for any person knowingly to become an inmate of, or contribute to the support of, any disorderly house or house of ill fame."<sup>127</sup> The reporting prostitute, having admitted to working in the brothel, would likely be fined under the ordinance or arrested for committing a misdemeanor.<sup>128</sup> Further, if the prostitute anonymously informed the police of the brothel, it is likely that she would be arrested for offering or agreeing to commit prostitution if caught in the sting operation.<sup>129</sup> In addition to the

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124. See REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003, *infra* note 204 and accompanying text.

125. See Coontz & Stahl, *supra* note 110 (citing LENORE KUO, PROSTITUTION POLICY: REVOLUTIONIZING PRACTICE THROUGH A GENDERED PERSPECTIVE 124 (2002)).

126. See *id.* (stating that the dominant policy in response to prostitution for nearly 100 years has been criminalization).

127. S. F., CAL., POLICE CODE, art. II, § 221 (2010), available at [http://library.municode.com/HTML/14140/level1/ART2DICO.html#ART2DICO\\_S221KNB EINCOSUHOILFAPR](http://library.municode.com/HTML/14140/level1/ART2DICO.html#ART2DICO_S221KNB EINCOSUHOILFAPR) (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

128. *Id.*

129. See *id.* at § 240 (2010) (stating that every person is guilty of a misdemeanor who: (a) Offers or agrees to commit any lewd or indecent act or any act of prostitution; or . . . (g) In any way aids or abets or participates in the doing of any of the acts prohibited by subdivisions (a) . . . of this Section).

risk of arrest, the prostitute would be putting her job and her customers at risk by reporting the trafficking victim.<sup>130</sup> Thus, there is not a great deal of incentive to report a victim of sex trafficking to the police.

In response to this scenario, one might wonder why the prostitute would want to continue working in the profession or for a brothel owner who participates in human trafficking. To answer this inquiry, it is necessary to examine the traps created by the criminal system in San Francisco that impede both a prostitute's escape from the industry and her particular brothel.<sup>131</sup> Women who become prostitutes do so primarily for financial reasons—because they have few marketable skills and would not be able to rise above the poverty level by working a "normal" job.<sup>132</sup> Others are immigrants with significant language barriers that may impede their ability to gain subsistence-level employment.<sup>133</sup> Still others choose to become prostitutes because they enjoy the work and see value in their profession.<sup>134</sup> Regardless of one's reasons for entering prostitution, it is unlikely one will escape arrest throughout his or her career.<sup>135</sup> With legal trends in the United States shifting toward further criminalization of prostitution, it is likely prostitutes will continue to be arrested in large numbers in the future.<sup>136</sup> Additionally, the "odds of arrest for a prostitution

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130. *See id.* at §§ 220, 225 (stating that it is unlawful for anyone to visit a house to engage in or observe lewd, indecent, or obscene behavior, and that it is unlawful for anyone to solicit, by word, act, gesture, sign, or otherwise, any person for the purpose of prostitution).

131. *See* Coontz & Stahl, *supra* note 110 (discussing the barriers faced by women in the prostitution industry generally).

132. *See id.* at 3 (stating that there are not many options for women in the formal economy).

133. *See id.* (stating that a significant number of prostitutes are from immigrant and poor populations).

134. *See* REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003, *infra* note 204 and accompanying text (citing research that states that people enter into prostitution for various reasons including curiosity, excitement, and glamour).

135. *See* Coontz & Stahl, *supra* note 110 (finding that 80.1% of offenders in the study were arrested).

136. *See id.* at 7 (showing a curvilinear trend in prostitution arrests between 1965 and 2000). The curvilinear trend line, which spikes between 1980 and 1985 (the same time period as the "war on drugs" peaked), indicates that "prostitution arrests are influenced by a host of external social, cultural, and political forces rather than by the effectiveness of criminal statutes." *Id.* "Thus, changes in the number of arrests are more likely to be influenced by changes in local policy shifts (e.g., rounding up street-level prostitutes during an election year), geographical changes in the market location, improved record keeping, or even greater standardization in the decision making processes of the police than in actual changes in the magnitude of prostitution." *Id.*

offender are about 30% greater in an incident involving more than one offense than an incident where there is only one offense reported."<sup>137</sup> These arrests create two types of traps for prostitutes: a cycle in which one is arrested, fined, and then must return to prostitution to pay the fine, or a situation in which one is arrested for a prostitution offense and is permanently prevented from obtaining other types of employment.

In the United States, there are simply too few incentives to encourage a man or woman engaged in prostitution to come forward and report the existence of sex trafficking in his or her community. The stigma created by the criminalized nature of prostitution combined with the dangerous and threatening existence of organized crime and gangs create additional roadblocks to reporting.<sup>138</sup> Further, the criminalized nature of the prostitution industry virtually ensures that a sex worker will lose his or her job as a result of reporting a trafficking victim to the police.<sup>139</sup> Thus, when critics of decriminalization claim that criminalization is the only way to prevent the increase in sex trafficking, they are ignoring an important ally in their own fight.

### *B. Legalized Jurisdiction: Victoria, Australia*

While prostitution laws in Australia are vague and vary from state to state,<sup>140</sup> working as a prostitute in a brothel is legal and subject to state regulation in the Australian Capital Territory,<sup>141</sup> Victoria,<sup>142</sup> New South

137. *Id.*

138. *See id.* at 3 (stating that women involved in prostitution often turn to criminal organizations).

139. *See supra* notes 127–130 (listing potential provisions under which a reporting prostitute could be arrested and exposing her actions to the public).

140. *See* Susan Pinto, Anita Scandia & Paul Wilson, *Prostitution Laws in Australia*, 22 Australian Inst. of Criminology Trends and Issues in Crime and Criminal Justice 1 (1990), available at <http://www.aic.gov.au/documents/F/B/5/{FB5E3FDC-1AB5-4F04-A1B8-9D4B5C30B42C}ti22.pdf> (stating that "[t]he confusion felt by law-makers about how best to cope with prostitution is reflected in prostitution laws themselves, which are clouded in ambiguity and contradiction").

141. *See* PROSTITUTION ACT, 1992 (ACT), A1992-64 (Austl.), available at <http://www.legislation.act.gov.au/a/1992-64/current/pdf/1992-64.pdf> (legalizing and regulating brothels and escort services, while criminalizing solicitation, street prostitution, and child prostitution).

142. *See* PROSTITUTION CONTROL ACT, 1994 (VIC), No. 102 of 1994 (Austl.), available at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pca1994295/](http://www.austlii.edu.au/au/legis/vic/consol_act/pca1994295/) (last visited Oct. 3, 2010) (legalizing and regulating brothels and escort agencies while criminalizing street solicitation and child prostitution) (on file with the Washington and Lee Journal of Civil Rights and

Wales,<sup>143</sup> and Queensland.<sup>144</sup> It is against the law to run a brothel in Tasmania, but laws protect individuals working as prostitutes.<sup>145</sup> It is also a crime to work as a prostitute in a brothel in South Australia, and various laws and ordinances make the practice of prostitution a crime even though it is not listed specifically as a criminal offense.<sup>146</sup> Western Australia passed a bill in the legislature in 2000, later amended in 2008, which would have decriminalized prostitution in brothels.<sup>147</sup> The law, however, remains inactive due to political infighting and changes in leadership.<sup>148</sup> Therefore, Western Australian brothels currently operate in a legal gray area.<sup>149</sup> Finally, the Northern Territory criminalizes brothels and street solicitation, but allows escort services to operate under licenses.<sup>150</sup> Street solicitation

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Social Justice).

143. See SUMMARY OFFENSES ACT, 1988 (NSW) (Austl.), available at [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/soa1988189/](http://www.austlii.edu.au/au/legis/nsw/consol_act/soa1988189/) (last visited Oct. 3, 2010) (legalizing and regulating brothels and escort services while criminalizing street solicitation) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). See also Mossman, *supra* note 118, at 6 (noting that New South Wales technically has a decriminalized scheme but street-based work is still banned).

144. See PROSTITUTION ACT, 1999 (QLD) (Austl.), available at [http://www.austlii.edu.au/au/legis/qld/consol\\_act/pa1999205/](http://www.austlii.edu.au/au/legis/qld/consol_act/pa1999205/) (last visited Oct. 3, 2010) (legalizing and regulating brothels while criminalizing street solicitation or unlicensed commercial sex services) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

145. See TASMANIA SEX INDUSTRY OFFENSES ACT, 2005, Act 42 of 2005 (Austl.), available at [http://www.austlii.edu.au/au/legis/tas/consol\\_act/sioa2005253/](http://www.austlii.edu.au/au/legis/tas/consol_act/sioa2005253/) (last visited Oct. 3, 2010) (criminalizing ownership of a commercial sexual services business) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). Prostitution is not illegal per se as the law outlines that it is illegal to assault a sex worker, to receive commercial sexual services, or provide or receive sexual services unless a prophylactic is used. *Id.*

146. See SOUTH AUSTRALIA CRIMINAL LAW CONSOLIDATION ACT, 1935, § 5 (Austl.), available at [http://www.austlii.edu.au/au/legis/sa/consol\\_act/clca1935262/s5.html](http://www.austlii.edu.au/au/legis/sa/consol_act/clca1935262/s5.html) (last visited Oct. 3, 2010) (criminalizing brothels specifically and essentially making the practice of prostitution criminal through various provisions) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

147. See WESTERN AUSTRALIA PROSTITUTION AMENDMENT ACT, 2008, No. 13 of 2008 (Austl.), available at [http://www.austlii.edu.au/au/legis/wa/num\\_act/paa200813o2008331/](http://www.austlii.edu.au/au/legis/wa/num_act/paa200813o2008331/) (last visited Oct. 3, 2010) (amending the Prostitution Act of 2000 to decriminalize brothels) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

148. See generally Ronald Weitzer, *Legalizing Prostitution: Morality Politics in Western Australia*, 49 THE BRIT. J. OF CRIMINOLOGY 88 (2009) (examining the legalization of prostitution in Western Australia and the struggle of morality politics in the state).

149. *Id.*

150. See NORTHERN TERRITORY PROSTITUTION REGULATION ACT, 2004 (Austl.), available at [http://www.austlii.edu.au/au/legis/nt/consol\\_act/pr317/](http://www.austlii.edu.au/au/legis/nt/consol_act/pr317/) (last visited Oct. 3, 2010) (criminalizing brothels and street solicitation, but legalizing and regulating escort

remains illegal in all seven states, but operating an escort service is legal in all seven jurisdictions.<sup>151</sup>

Because prostitution laws in Australia are complicated and diverse, this Note will focus on Victoria because its prostitution laws have received scholarly attention from anti-trafficking coalitions, prostitutes' rights organizations and prostitution abolitionists alike.<sup>152</sup> Sex worker rights organizations have generally condemned legalization schemes:

Government run brothels would be the prostitute's worst nightmare. I can think of nothing worse than having to work for a bureaucrat, especially in the sex industry, where there is already a long and well-documented history of abuse by the police, and prior to the criminalisation of prostitution at the turn of the century, by the licensing bureaucrats and the police.<sup>153</sup>

Under Victorian laws, "brothels have been able to apply for licenses since 1966, and from 1975 parlours have been able to be licensed in non-residential areas."<sup>154</sup> Despite an attempt at decriminalization in the mid-1980s,<sup>155</sup> prostitution is extensively regulated by the Prostitution Control Act of 1994,<sup>156</sup> the Prostitution Control Regulations of

services) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

151. See notes 141–150 and accompanying text (detailing the territorial statutes on criminalization of prostitution).

152. See, e.g., Mary Sullivan & Sheila Jeffreys, *Legalising Prostitution is Not the Answer: The Example of Victoria, Australia*, COALITION AGAINST TRAFFICKING IN WOMEN (AUSTRALIA) (2000), available at <http://action.web.ca/home/catw/attach/AUSTRALIAlegislation20001.pdf> (stating that "[l]egalisation was intended to eliminate organised crime from the sex industry. In fact the reverse has happened. Legalisation has brought with it an explosion in the trafficking of women into prostitution by organised crime."); Janice G. Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 VIOLENCE AGAINST WOMEN 1156, 1163 (2004) (stating that "[s]ince the onset of legalization of prostitution in Victoria, Australia, more men go to more and bigger brothels because legalization and decriminalization are out of control and, quite simply, are impossible to control"); Julie Bindel & Liz Kelly, *A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden*, CHILD AND WOMAN ABUSE STUDIES UNIT, LONDON METROPOLITAN UNIVERSITY 2–5 (2003) (discussing the history of prostitution legislation and comparing policy regimes).

153. Bindel & Kelly, *supra* note 152, at 16 (quoting COYOTE, *Prostitution-Decriminalization vs. Legalization—What's the Difference?*, <http://www.freedomusa.org/coyotela/decrim.html> (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice)).

154. GREGOR GALL, SEX WORKER UNION ORGANISING: AN INTERNATIONAL STUDY 124 (2009).

155. *Id.*

156. PROSTITUTION CONTROL ACT, 1994 (VIC) No. 102 of 1994 (Austl.), available at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pca1994295/](http://www.austlii.edu.au/au/legis/vic/consol_act/pca1994295/) (last visited Oct. 3, 2010) (on

2006,<sup>157</sup> and the Health (Infectious Diseases) Regulations of 2001.<sup>158</sup> Prostitution is defined as "the provision by one person to or for someone else of sexual services in return for payment or reward."<sup>159</sup> "Prostitution service providers" are defined as "person[s] carrying on business of a kind referred to as a brothel and/or an escort agency" and are only allowed to do so if they have a license.<sup>160</sup>

Despite the Victorian government's intentions to control negative influences on the prostitution industry, Australian brothels earn millions per week from illegal prostitution.<sup>161</sup> One problem contributing to the growth of the illegal sector is the requirement that women and men register with the government to work in licensed brothels.<sup>162</sup> While many prostitutes work in government licensed brothels or for escort services, just as many—and maybe more—work in illegal brothels and street solicitation conditions similar to those found in criminalized jurisdictions.<sup>163</sup> If a woman or a man is caught working as a prostitute for an illegal brothel or soliciting sexual services in public, he or she may receive a fine or imprisonment.<sup>164</sup>

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file with the Washington and Lee Journal of Civil Rights and Social Justice).

157. PROSTITUTION CONTROL REGULATIONS, 2006, S.R. No. 64/2006 (Austl.), *available at* [http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubStatbook.nsf/93eb987ebadd283dca256e92000e4069/966A6E5C644B84FBCA25718500127525/\\$FILE/06-064sr.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/93eb987ebadd283dca256e92000e4069/966A6E5C644B84FBCA25718500127525/$FILE/06-064sr.pdf).

158. HEALTH (INFECTIOUS DISEASES) REGULATIONS, 2001 (VIC) S.R. No. 41/2001 (Austl.), *available at* [http://www.austlii.edu.au/au/legis/vic/consol\\_reg/hdr2001362/](http://www.austlii.edu.au/au/legis/vic/consol_reg/hdr2001362/) (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

159. PROSTITUTION CONTROL ACT, 1994 § 3 (VIC), No. 102 of 1994 (Austl.), *available at* [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pca1994295/](http://www.austlii.edu.au/au/legis/vic/consol_act/pca1994295/) (last visited Oct. 3, 2010) (legalizing and regulating brothels and escort agencies while criminalizing street solicitation and child prostitution) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

160. *Id.* One or two people wishing to work as prostitutes out of their homes or apartments are allowed to be exempt from needing a license to legally provide commercial sexual services. *Id.*

161. Bindel & Kelly, *supra* note 152, at 15.

162. *See id.* at 14 (stating that "[w]omen have told Project Respect, an NGO in Melbourne, Australia, that they do not want an official record of the fact that they are involved in prostitution").

163. *See id.* ("The inherent problem in the regimes examined is that only one sector is legalised, and as it expands, so does the illegal: both illegal brothels and street prostitution.").

164. PROSTITUTION CONTROL ACT, 1994 § 13 (VIC), No. 102 of 1994 (Austl.), *available at* [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pca1994295/](http://www.austlii.edu.au/au/legis/vic/consol_act/pca1994295/) (last visited Oct. 3, 2010) (legalizing and regulating brothels and escort agencies while criminalizing street solicitation and child prostitution) (on file with the Washington and Lee Journal of Civil

While the legalization and regulation of brothels in Victoria has brought prostitution out into the open,<sup>165</sup> it is unclear how the system would facilitate the reporting of sex trafficking victims. Because it is legal to work in a brothel or for an escort service,<sup>166</sup> a prostitute would be able to report the existence of a trafficking victim without risking arrest or a fine. He or she would also have redress through a labor union or Victorian labor laws for wrongful dismissal.<sup>167</sup> However, the legalization system has not prevented illegal brothels from operating in Victoria.<sup>168</sup> Some estimates suggest that there is a "two-tiered" industry in Victoria—one legal, one illegal.<sup>169</sup> Thus, because a brothel owner risks criminal sanction and up to five years imprisonment for forcing a worker to perform sexual services against his or her will,<sup>170</sup> it is likely that sex trafficking victims in the

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Rights and Social Justice).

165. See Sullivan & Jeffreys, *supra* note 152, at 3–5 (describing the prevalence of prostitution advertisements in Victoria).

166. PROSTITUTION CONTROL ACT, 1994 (VIC), No. 102 of 1994 (Austl.), available at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pca1994295/](http://www.austlii.edu.au/au/legis/vic/consol_act/pca1994295/) (last visited Oct. 3, 2010) (legalizing and regulating brothels and escort agencies while criminalizing street solicitation and child prostitution) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

167. See AUSTRALIAN WORKPLACE RELATIONS ACT, 1996 (Austl.), available at <http://www.airc.gov.au/legislation/wra.htm> (last visited Oct. 3, 2010) (stating that labor unions in Victoria are governed by the Australian International Relations Commission (AIRC), which operates under the Act) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The Act defines an "employee" as "an individual so far as he or she is employed, or usually employed . . . by an employer, except on a vocational placement." *Id.* at § 5(1). Resistant employers in Victoria, however, have argued that "the prostitutes are independent contractors who rent facilities from them and, thus, are not employees in order to prevent the prostitutes from being able to benefit from applying to the [AIRC] for an award setting wages and conditions." GALL, *supra* note 154, at 127. This position can be counteracted by the fact that brothel owners exert significant control over their workers. *Id.* at 128. While this position is still in contention in Victoria, prostitute unions have successfully filed claims with the AIRC for unfair dismissals and to apply to government funded healthcare and benefit programs. *Id.* at 129.

168. See Bindel and Kelley, *supra* note 152, at 15 (noting that "estimates from the police and the legal brothel industry put the number of illegal brothels at 400, four times more than the legal ones").

169. See Roberta Perkins, *Working Girls: Prostitutes, Their Lives, and Social Controls*, THE AUSTRALIAN INST. OF CRIMINOLOGY (1991), available at <http://www.aic.gov.au/en/publications/previous%20series/lcj/1-20/working/chapter%20%20%20control%20regulation%20and%20legislation.aspx> (last visited Oct. 3, 2010) (stating that "[m]ost prostitutes are still working illegally (according to Victorian Police only 500 or about a quarter of prostitutes in the state are working in the legal brothels), while those in legal brothels complain about the increasing greed of licensed owners") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

170. See PROSTITUTION CONTROL ACT, 1994 (VIC) No. 102 of 1994, § 8 (Austl.),

Victorian prostitution industry would be located in illegal brothels or working on the streets. Therefore, some of the same restraints prostitutes in San Francisco face when reporting a victim of sex trafficking (being arrested for working in an illegal brothel or solicitation, losing one's employment, facing the wrath of an angry pimp or brothel owner) would apply to those working in the illegal sexual services industry in Victoria.<sup>171</sup>

In conclusion, while the legalization and regulation of brothels and escort services in Victoria has brought prostitution into the open<sup>172</sup> and provides some employment law resources to those working in legal brothels,<sup>173</sup> the stringent licensing procedures, requirements that prostitutes register with the state, and the failure to regulate the illegal prostitution industry may impede efforts toward eliminating sex trafficking by driving prostitution underground. When compared with a criminalized jurisdiction, however, it appears that at least some prostitutes in Victoria would be able to report a victim of sex trafficking to authorities without losing their employment or risking bodily harm.

### *C. Decriminalized Demand: The United Kingdom*

In the United Kingdom, which includes Great Britain, Northern Ireland, Scotland, and Wales, the act of prostitution is decriminalized,<sup>174</sup> but

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available at [http://www.austlii.edu.au/au/legis/vic/consol\\_act/pca1994295/s13.html](http://www.austlii.edu.au/au/legis/vic/consol_act/pca1994295/s13.html) (last visited Sep. 29, 2010) (explaining that a person must not induce another person to engage or continue to engage in prostitution, nor can he or she assault, threaten, intimidate, or make false representation to that person or any other person, or supply or offer to supply a drug of dependence) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

171. *See id.* § 15 (stating that "[a] person must not be found, without reasonable excuse, in or entering or leaving a brothel in respect of which there is not in force any license"). "A person must not for the purpose of prostitution intentionally or recklessly solicit or accost any person or loiter in or near . . . a place of worship . . . a hospital . . . a school, kindergarten or children's services centre . . . or . . . a public place regularly frequented by children and in which children are present at the time of the soliciting, accosting or loitering." *Id.* at § 13(a)–(d).

172. *See supra* note 162 and accompanying text (discussing the registration of licensed brothels). *But see* Bindel & Kelley, *supra* note 152, at 15 (stating that "[a]lthough the issue of 'employment rights' for women in prostitution is often cited as a significant incentive for legalisation . . . many women do not register").

173. *See* Bindel & Kelly, *supra* note 152, at 13 (noting "that levels of violence against women in prostitution would decrease, as women would be working in 'controlled' environments").

174. *See* SEXUAL OFFENSES ACT, 2003 (U.K.), available at [http://www.opsi.gov.uk/acts/acts2003/ukpga\\_20030042\\_en\\_4#pt1-pb13-11g52](http://www.opsi.gov.uk/acts/acts2003/ukpga_20030042_en_4#pt1-pb13-11g52) (last visited

it is an offense for a person to "intentionally cause or incite another person to become a prostitute in any part of the world . . . for or in the expectation of gain for himself of a third person."<sup>175</sup> A person is also guilty of an offense if he or she "intentionally controls any of the activities of another person relating to that person's prostitution in any part of the world" for the controller's own gain.<sup>176</sup> It is also illegal to keep a brothel used for prostitution,<sup>177</sup> or solicit sexual services on the street.<sup>178</sup>

In an effort to combat sex trafficking, the Policing and Crime Act of 2009 ("Crime Act") includes an offense for clients if they are caught paying for sexual services from a prostitute who is being "controlled for gain."<sup>179</sup> The new law creates a strict liability offense for the purchaser—meaning "an offence is committed regardless of whether the person paying . . . ought to know or be aware that the prostitute has been subject to exploitative conduct."<sup>180</sup> No mental element is required as long as the prostitute was "forced, threatened, coerced or deceived" by a third party.<sup>181</sup>

The Crime Act is the result of nearly a decade's worth of research and policy analysis of prostitution.<sup>182</sup> One of the proponents of the Crime Act,

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Oct. 3, 2010) (failing to enumerate providing sexual services for compensation as a separate criminal offense) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); POLICING AND CRIME ACT, 2009 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2009/26/contents> (last visited Oct. 3, 2010) (stating criminal sexual acts but not listing sexual services for compensation as a separate criminal offense) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

175. See SEXUAL OFFENSES ACT, 2003, c. 42, § 52(1)(a)–(b) (U.K.).

176. *Id.* at § 53(1)(a)–(b).

177. *Id.* at § 55 (amending Sexual Offences Act 1956, c. 69, § 33).

178. *Id.*

179. See POLICING AND CRIME ACT, 2009, c. 26, § 14 (U.K.) (amending SEXUAL OFFENSES ACT, 2003, c. 42, § 53 (U.K.)).

A person (A) commits an offence if—A makes or promises payment for the sexual services of a prostitute (B), a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B)." *Id.* "The following are irrelevant—where in the world the sexual services are to be provided and whether those services are provided, whether A is, or ought to be, aware that C has engaged in exploitative conduct." *Id.* "C engages in exploitative conduct if—C uses force, threats (whether or not relating to violence) or any form of coercion, or C practises any form of deception.

*Id.*

180. *Id.* at § 14, Explanatory Note.

181. *Id.* at § 51A.

182. See PAYING THE PRICE: A CONSULTATION PAPER ON PROSTITUTION 7 (July 2004), available at <http://www.eaves4women.co.uk/Documents/Consultations/Paying%20the%20>

the Poppy Project, is a non-governmental organization ("NGO") that receives government funding for its research and outreach services for victims of sex trafficking and prostitution.<sup>183</sup> In its briefing to the Policing and Crime Bill Committee ("PBC"), the Poppy Project claimed that criminalization of demand had been effective at reducing sex trafficking in Sweden, Norway and Finland, and lobbied in favor of pursuing a similar system in the United Kingdom.<sup>184</sup> The reduction of sex trafficking was a principal concern in the debates surrounding the Crime Act.

During testimony at the PBC hearings, Niki Adams, a representative for the English Collective of Prostitutes ("ECP"),<sup>185</sup> and Hilary Kinnell, a representative for the United Kingdom Network of Sex Worker Projects ("NSWP"),<sup>186</sup> argued that criminalizing the purchase of sex from a woman or man being "controlled for gain" would be detrimental to victims within

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Price%20Full.pdf (noting that the Home Office published a thorough review of sex offenses in 2000, which led to the overhaul and clarification of the law in the Sexual Offenses Act of 2003). PAYING THE PRICE primarily focused on the issue of street-based prostitution, but also addressed massage parlors, as well as video and film productions as "facades" for illegal commercial sex service businesses. *Id.* at 6. The Home Office published "A Coordinated Prostitution Strategy and a Summary of Responses" [hereinafter Coordinated Prostitution Strategy] to PAYING THE PRICE in January 2006 to analyze responses to PAYING THE PRICE and to make proposals for a "coordinated prostitution strategy." *Id.* at 1. The key objectives of the Coordinated Prostitution Strategy paper were to "challenge the view that street prostitution is inevitable and here to stay, achieve an overall reduction in street prostitution, improve the safety and quality of life of communities affected by prostitution, including those directly involved in street sex markets, and reduce all forms of commercial sexual exploitation." *Id.* Both publications were used during the debates concerning the passage of the Crime Bill. *Id.*

183. See The POPPY Project, [http://www.eaves4women.co.uk/POPPY\\_Project/POP\\_PY\\_Project.php](http://www.eaves4women.co.uk/POPPY_Project/POP_PY_Project.php) (last visited Oct. 3, 2010) (stating that "[t]he POPPY Project was set up in 2003. It is funded by the Office for Criminal Justice Reform (reporting to the Ministry of Justice) to provide accommodation and support to women who have been trafficked into prostitution.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

184. See TACKLING DEMAND FOR PROSTITUTION (POLICING AND CRIME BILL, PART TWO, CLAUSE 13) (Poppy Project 2008), available at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/policing/memos/ucm5302.htm> (last visited Oct. 3, 2010) (lauding the "Nordic System" of criminalizing demand while criticizing systems of legalization in Australia and the Netherlands as well as the new decriminalization laws in New Zealand) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

185. See Gall, *supra* note 154, at 96 (stating that "the ECP is not a union but rather a pressure group and one which does not seek to organise and represent sex workers *per se*").

186. UK Network of Sex Work Projects Web Site, <http://www.uknswp.org/> (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The UK Network of Sex Work Projects is a non-profit, voluntary association of agencies and individuals working with sex workers. *Id.*

the prostitution industry for several reasons. First, Ms. Kinnell asserted that:

Control for gain is a terribly indistinct definition, which applies both to the premises and to paying for the services of somebody who is controlled for gain. We fear that the police will be required to target such a wide range of individual clients and premises that places in which there is abuse, exploitation and coercion and clients who are violent and destructive will simply be lost in the mass.<sup>187</sup>

Second, she asserted that provisions of the bill concerning "controlling for gain" would actually work against the reporting of sex trafficking victims.<sup>188</sup> Finally, Ms. Adams argued that the Poppy Project's goal of eliminating prostitution, while valid in some respects, ignored many realities about women's economic positions in both the United Kingdom and abroad:

We would like to get rid of prostitution, but we know that it cannot be done until we have abolished women's poverty and dealt with the exploitative situations for women working in every other industry, when women's wages are so low . . . Until those economic conditions are dealt with and women can support their families in other jobs, women will be forced into prostitution.<sup>189</sup>

The collective positions of Ms. Adams and Ms. Kinnell show the flaws inherent in decriminalized demand jurisdictions generally: while they may be successful in reducing demand and causing a decline in victims trafficked into a country, they do not address many other issues associated with prostitution. Because the Crime Act was passed too recently to produce any scholarship or government research, a similar system in place in Sweden may provide insight into how decriminalized demand systems work.

Sweden changed its prostitution laws in 1998 to punish only sex industry consumers, not prostitutes.<sup>190</sup> The "aim of the law was to eliminate

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187. *Policing and Crime Bill Committee, 1st Sitting*, Response to Question 41, Jan. 27, 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/policing/090127/am/90127s01.htm> (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

188. *Id.* (response of Hilary Kinnell) (noting that many women who reported trafficking and coercion to the police were raided and then prosecuted for controlling others for gain).

189. *Id.* (response of Niki Adams).

190. See NEW ZEALAND AND SWEDEN: TWO MODELS OF REFORM 2 (Canadian HIV/AIDS Legal Network, 2005), available at [http://www.bayswan.org/swed/Canada\\_law\\_reform\\_models.pdf](http://www.bayswan.org/swed/Canada_law_reform_models.pdf) (stating that "[t]he person who, for payment, obtains a casual sexual relationship is penalised [sic]—unless the action entails punishment in

street prostitution and prevent new sex workers from entering prostitution."<sup>191</sup> The decriminalization act was part of a general initiative to eliminate all barriers to the equality of women in Sweden, and its purpose was based on the premise that prostitution is inherently violence against women, and that no woman consciously chooses to become a prostitute.<sup>192</sup> The Swedish government claims that prostitution and sex trafficking have decreased because of the new law.<sup>193</sup> The new system has also received favorable press, lauding it as a great success.<sup>194</sup> Prostitutes, however, have criticized the law as driving prostitution further underground:

The Swedish street prostitutes experience a tougher time. They are more frequently exposed to dangerous clients, while serious clients are afraid of being arrested . . . . They have less time to assess the client as the deal takes place very hurriedly due to fear on the part of the client. [The prostitutes] are exposed to violence and sexually transmitted diseases. If the client demands unprotected sex, many of the prostitutes cannot afford to say no. Harassment by the police has increased and the clients no longer provide tip-offs about pimps, for fear of being arrested themselves. The social workers working on the streets have problems reaching them. [The prostitutes] use pimps for protection.<sup>195</sup>

Thus, the argument that decriminalizing demand reduces prostitution and sex trafficking loses some of its validity when one considers that an illegal industry still exists.

In conclusion, a prostitute working in the United Kingdom who was aware of a trafficking victim working in her brothel would face significant obstacles to reporting his or her employer to the authorities: the

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accordance with the Penal Code—for the purchase of sexual services with fines or imprisonment for a maximum of six months").

191. *Id.*

192. *See* PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS: LEGAL REGULATION AND EXPERIENCES, AN ABBREVIATED ENGLISH VERSION, REPORT BY A WORKING GROUP—LEGAL REGULATION OF THE PURCHASE OF SEXUAL SERVICES 15–16 (Ministry of Just. and the Police 2004) [hereinafter *Purchasing Sexual Services*], available at [http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216purchasing\\_sexual\\_services\\_in\\_sweden\\_and\\_the\\_nederlands.pdf](http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216purchasing_sexual_services_in_sweden_and_the_nederlands.pdf) (examining the legislative history of the decriminalization act).

193. *See id.* (noting that "[t]he number of street prostitutes was halved the year after the law came into force").

194. *See, e.g.,* Thaddeus Baklinski, *Swedish Prostitution Ban An Apparent Enormous Success*, November 15, 2007, <http://www.lifesitenews.com/ldn/2007/nov/07111506.html> (last visited Oct. 3, 2010) (stating that Sweden has nearly eliminated prostitution) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

195. *Purchasing Sexual Services*, *supra* note 192, at 19.

"controlling for gain" language in the United Kingdom's criminal law creates a gray area that causes prostitutes working in all types of environments—street solicitation, escort services, massage parlors, and brothels—to be prosecuted.<sup>196</sup> Further, with their clients criminalized, prostitutes are less likely to admit to being trafficking victims for fear of losing business.<sup>197</sup>

#### *D. Decriminalization: New Zealand*

Prostitution, as well as promoting prostitution, owning a brothel or escort agency, and street solicitation, is decriminalized in New Zealand under the Prostitution Reform Act of 2003 ("PRA").<sup>198</sup> This means that the state neither promotes nor prohibits the act of providing sexual services in exchange for money or other types of rewards.<sup>199</sup> The primary purpose of the Act was to "create a framework that safeguards the human rights of sex workers and protects them from exploitation," and to promote their welfare, occupational health, and safety in a way that was conducive to public health.<sup>200</sup> The PRA also prohibits persons less than eighteen years of age from engaging in prostitution.<sup>201</sup>

Prior to 2003, keeping a brothel, living on the earnings of prostitution and procuring sexual intercourse were criminal offenses, attracting

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196. See *supra* note 186 and accompanying text (discussing the UK Network of Sex Work Projects).

197. See *Policing and Crime Bill Committee, 1st Sitting*, Response to Question 41, Jan. 27 2009, available at <http://www.publications.parliament.uk/pa/cm200809/cmpublic/policing/090127/am/90127s01.htm> (last visited Oct. 3, 2010) (inquiry of Mr. David Ruffley) (stating that "[i]t seems almost impossible to conceive of a sex worker—a female—answering [whether she is being coerced or controlled for gain] truthfully because the minute she does so she loses business and, if she has already been brutalised, she will face heaven knows what consequences for losing trade and money") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

198. See PROSTITUTION REFORM ACT, 2003, Part I, § 3 (N.Z.), available at <http://www.legislation.govt.nz/act/public/2003/0028/latest/whole.html#DLM197821> (last visited Oct. 3, 2010) (stating that "[t]he purpose of this Act is to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use)") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

199. See *supra* note 123 and accompanying text.

200. PROSTITUTION REFORM ACT 2003, Part I, § 3(a)–(c) (N.Z.).

201. *Id.* at § 3(d).

punishment by a penalty of up to five years imprisonment.<sup>202</sup> Solicitation of sexual services was also prohibited.<sup>203</sup>

The PRA is a detailed, all-inclusive plan for the decriminalization of prostitution, as opposed to a series of statutory provisions in a criminal code. The Act provides for the human rights of sex workers and declares that adults engaged in prostitution shall not be forced to perform sex acts against their will.<sup>204</sup> It also establishes that sex workers are required to adopt safe sex practices in the course of their employment,<sup>205</sup> and that they are "at work" while providing commercial sexual services for the purpose of the Health and Safety in Employment Act 1992.<sup>206</sup> The PRA also contains a section that specifically prohibits employers from coercing or forcing a sex worker to engage in prostitution, and explains that an employment contract cannot be used to force a worker to engage in a sex act against his or her will.<sup>207</sup> The Act also sets out a specific plan of action for preventing minors from entering the sex industry.<sup>208</sup>

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202. CRIMES ACT, 1961 §§ 147, 149 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html> (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

203. See SUMMARY OFFENSES ACT, 1981, § 26 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1981/0113/latest/DLM53348.html> (last visited Oct. 3, 2010) (stating that solicitation can be fined by up to \$200) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The actual provision of sexual services was not specifically listed as an offense. *Id.*

204. See REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003 45 (2008) [hereinafter LAW REVIEW COMMITTEE REPORT], available at <http://www.justice.govt.nz/policy-and-consultation/legislation/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf> ("The Committee concludes that section 3(a) safeguards the following rights: the right for adults not to be forced to engage in sex work, including the right to refuse a particular client or sexual practice . . .").

205. PROSTITUTION REFORM ACT 2003, Part I, § 9 (N.Z.), available at <http://www.legislation.govt.nz/act/public/2003/0028/latest/whole.html#DLM197821> (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

206. *Id.* at § 10. See also HEALTH AND SAFETY ACT, 1992, No. 96, § 6 (N.Z.), available at <http://www.legislation.govt.nz/act/public/1992/0096/latest/DLM279213.html#DLM279213> (last visited Oct. 3, 2010) (providing that "every employer shall take all practicable steps to ensure the safety of employees while at work; and in particular shall take all practicable steps to—(a) Provide and maintain for employees a safe working environment; and (b) Provide and maintain for employees while they are at work facilities for their safety and health . . .") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

207. PROSTITUTION REFORM ACT 2003, Part I, §§ 16, 17.

208. *Id.* at §§ 20–23.

Finally, the Act establishes a certification procedure for brothels, street prostitutes, and Single Operator-Owned Brothels ("SOOBs").<sup>209</sup> The procedure is designed to make certification easy and inexpensive for brothel owners, while ensuring that anyone with a serious criminal record would be disqualified as a potential employer of prostitutes.<sup>210</sup> The PRA excludes individual sex workers and SOOBs with four or fewer workers from having to apply for a certificate—a concession meant to require only those controlling the labor of others to be subject to some form of scrutiny.<sup>211</sup> The easy certification process was designed to enable the New Zealand government to monitor those engaged in the sex industry while preventing a second, illegal sector from developing.<sup>212</sup> The failure of legalized brothels in Victoria, Australia—which led to the development of a bustling illegal sex industry—was a specific reason for making the certification process as simple, cheap, and convenient as possible.<sup>213</sup>

One of the most unique aspects of the PRA is that it openly solicits the aid of the New Zealand Prostitutes Collective ("NZPC")<sup>214</sup> and provides

209. *Id.* at § 19. "To be eligible for an operator's certificate, applicants must be over the age of 18, be a citizen or permanent resident of New Zealand or Australia, and not have any disqualifying convictions." LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 86. "A person in New Zealand who has a temporary or a limited purposes permit is not allowed to act as an operator of a New Zealand business of prostitution." *Id.* "In addition, a person who holds a provisional residency permit may have that permit revoked if they operate or invest in a business of prostitution." *Id.*

210. *See* LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 88 (providing a graphical explanation of the certification process for brothel owners).

211. *See* PROSTITUTION REFORM ACT 2003, Part I, § 34(1) (N.Z.) (stating that "[e]very operator of a business of prostitution . . . must hold a certificate"); *id.* at § 34(3) (stating that "[i]f a person . . . claims that he or she is not an operator because he or she is a sex worker at a small owner-operated brothel and is not an operator of any other business of prostitution, it is for the person charged to prove that assertion on the balance of probabilities"). "The purpose of requiring no certificates for SOOBs is that only people who have control over sex workers should be required to be certified . . . [but] if more than four sex workers work from the same premises it is no longer considered a SOOB, and one or all of the workers may require a certificate." LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 91–92.

212. *See* LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 94 (stating that "[t]he danger of a two-tier system of legal and illegal brothels developing must be avoided. Therefore, regulation should initially be kept to a minimum whilst still providing adequate checks on those managing sex workers.>").

213. *See* LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 90 (stating that "[t]he licensing system in Victoria has been criticised for being too restrictive, the application process too onerous, and the compliance costs too high. As a result, non-compliance is common and a two-tiered industry of legal (licensed) and illegal (unlicensed) brothels has developed").

214. *See id.* at 18 (recommending that the NZPC maintain a database of street based sex workers, as well as those working in brothels and SOOBs); *see also* New Zealand Prostitutes

remedies for unfair labor practices.<sup>215</sup> The NZPC was formed in 1987 in response to "the threat of an AIDS/HIV epidemic and the resultant need for the health and education authorities to communicate with the sex industry."<sup>216</sup> Interestingly, from its inception, the NZPC was supported and funded by the New Zealand Department of Public Health because it provided safe sex programs to sex workers.<sup>217</sup> The NZPC's membership alliance was also a major impetus for the passage of the PRA.<sup>218</sup> The employment provisions in the PRA give sex workers direct recourse against employers for violations of the Health and Safety Act so long as they are considered "employees" as opposed to "contractors."<sup>219</sup> The NZPC, despite not being an official union, is contracted to the Ministry of Health "to advocate for the rights, health, and well-being of sex workers" and its members provide "general support and advice to sex workers (including help preparing a Curriculum Vitae), and act as brokers to other agencies who can assist further with alternative career options."<sup>220</sup>

Because decriminalization was a significant departure from the prior laws, the PRA includes a provision appointing a Law Review Committee to produce a study of the law's effects.<sup>221</sup> Thus, in 2008, the Report of the

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Collective Web Site, <http://www.nzpc.org.nz/> (last visited Oct. 3, 2010) (stating that "NZPC is an organisation comprising past and present sex workers and our allies [which] advocates for the human rights, health and well-being of all sex workers") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

215. See LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 158 (stating that "the government has a duty to protect all its citizens, and the existence of formal contracts for sex workers helps to meet that duty by lessening the risk that they are the victims of exploitative employment conditions").

216. GALL, *supra* note 154, at 151.

217. *Id.* at 151.

218. *Id.* at 152.

219. PROSTITUTION REFORM ACT 2003, Part I, § 10 (N.Z.), available at <http://www.legislation.govt.nz/act/public/2003/0028/latest/whole.html#DLM197821> (last visited Oct. 3, 2010) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

220. LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 82.

221. See PROSTITUTION REFORM ACT 2003, Part 4, § 42 (N.Z.), (creating a Law Review Committee to "review the operation of this Act since its commencement; and assess the impact of this Act on the number of persons working as sex workers in New Zealand and on any prescribed matters relating to sex workers or prostitution"). The review committee was also charged with assessing:

the nature and adequacy of the means available to assist persons to avoid or cease working as sex workers and consider[ing] whether any amendments to this Act or any other law are necessary or desirable and, in particular, whether the system of certification is effective or could be improved, whether any other agency or agencies could or should administer it, and whether a system is

Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003 was published.<sup>222</sup> The report—which presents an objective study of the sex industry conducted by government committees, NGOs, and foreign academics—allowed the New Zealand government to discover whether decriminalization actually encourages vulnerable women to become prostitutes, increases commercial sex establishments, and creates a haven for sex traffickers.<sup>223</sup>

The Law Review Committee closely examined the effects of the law five years after it was put into effect. By interviewing those working in the prostitution industry, checking certificates and examining advertisements, the Law Review Committee determined that there was not a significant increase in the sex industry in the five years after the PRA was passed.<sup>224</sup> The Committee also concluded that the main reasons for entrance into the sex industry remained financial,<sup>225</sup> and that "the most effective way to ensure people do not enter the sex industry is to help them find other ways of earning money."<sup>226</sup> Thus, decriminalization did not lead to a massive influx of women choosing to become prostitutes. Further, the Committee found that, "contrary to public perception, coercion into the sex industry is extremely rare in New Zealand,"<sup>227</sup> and that "there is no link between the sex industry and human trafficking."<sup>228</sup>

New Zealand does not have a separate law specifically dealing with sex trafficking. Instead, the forcible movement of persons within the country is dealt with through kidnapping, slavery, and other related criminal laws.<sup>229</sup> The New Zealand Department of Labor reported that since the

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needed for identifying the location of businesses of prostitution.

*Id.* Further, the Committee must "consider whether any other amendments to the law are necessary or desirable in relation to sex workers or prostitution; and consider whether any further review or assessment of the matters set out in this paragraph is necessary or desirable; and report on its findings to the Minister of Justice; and carry out any other review, assessment, and reporting required by regulations made under this Act." *Id.*

222. *See generally* LAW REVIEW COMMITTEE REPORT, *supra* note 204 (stating the Committee's efforts to "not focus on the political or moral aspects of the sex industry" but rather to create a report "substantiated through evidence-based research").

223. *Id.*

224. *See id.* at 28 (stating that "based on the research undertaken for this review . . . the number of sex workers in New Zealand has not increased as a result of the passage of the PRA").

225. *Id.* at 39.

226. *Id.* at 61.

227. *Id.* at 45.

228. *Id.* at 167.

229. *See id.* (observing that New Zealand has a similar approach to all situations

PRA, no situations involving trafficking in the sex industry have been identified by the Immigration Service.<sup>230</sup> While this does not mean that sex trafficking does not occur in New Zealand, the Committee argues that "the prohibition on non-residents working in the sex industry, coupled with New Zealand's geographical isolation and robust legal system, provides a protection against New Zealand being targeted as a destination for human traffickers."<sup>231</sup> Despite these assertions, New Zealand was chastised by the United States Department of State in its 2009 Trafficking in Persons Report, which claimed that "[a]n assumption that all women engaging in prostitution in New Zealand do so willingly appears to underpin official policy and programs, and has inhibited public discussion and examination of indications that trafficking exists within both the decriminalized and illegal sex industries."<sup>232</sup> The Department of State Report also claimed that New Zealand demonstrated "inconsistent efforts to prevent human trafficking" in 2009 because it did not run campaigns to increase public awareness of trafficking or "take steps to reduce demand for commercial sexual acts."<sup>233</sup> Nonetheless, New Zealand was given the highest ranking as among the most effective countries in the world at combating human trafficking.<sup>234</sup>

In conclusion, the PRA would encourage a prostitute to report a victim of sex trafficking to authorities or the NZPC more than any other scheme of prostitution laws discussed in this Note. First, there is not a significant illegal sector in New Zealand,<sup>235</sup> so a prostitute would not face legal repercussions for (a) admitting she was a sex worker and (b) informing authorities or NZPC officials where she worked. Next, if the owner of her brothel terminated her for reporting the trafficking victim, she would have a legal remedy to sue for wrongful termination as long as she could prove she was an employee of the establishment.<sup>236</sup> Finally, if she did not want to

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involving "the forcible movement of persons").

230. *See id.* ("The Committee is satisfied . . . that during its period of investigation, there were no internationally trafficked women working as street-based sex workers in New Zealand.").

231. *Id.*

232. U.S. DEP'T OF STATE, *supra* note 88, at 223.

233. *Id.* at 222.

234. *Id.*

235. *See* LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 47 (stating that the PRA has safeguarded the right of sex workers to refuse particular clients and practices by removing the illegality of their work).

236. *See* PROSTITUTION REFORM ACT 2003, Part 2, § 10 (N.Z.), available at <http://www.legislation.govt.nz/act/public/2003/0028/latest/whole.html#DLM197821> (last

pursue a legal remedy against her employer, she would have other employment options because working on her own or joining another brothel would not entail exposing her work to authorities or facing a new employer engaged in criminal activity.<sup>237</sup> Therefore, the laws in New Zealand, in theory, provide sex workers with the tools necessary to police trafficking within their own industry. The absence of criminal records for prostitution and the presence of government funded organizations such as the NZPC also attempt to prevent women from becoming trapped in the profession.

### VI. Policy Recommendations

Prostitution has been criminalized in the United States since 1919.<sup>238</sup> In 2010, it remains a flourishing industry.<sup>239</sup> This Note argues that further criminalization of prostitution will not reduce the number of trafficking victims in the United States or abroad. The example of the PRA in New Zealand has dispelled warnings that decriminalization will lead to an increase in both the prostitution industry and sex trafficking victims.<sup>240</sup> On the contrary, based on the discussion above, it appears that the PRA provides a superior framework for encouraging prostitutes to be aware of sex trafficking victims, and report them to authorities without risking arrest or termination.<sup>241</sup> While the PRA is by no means perfect, the legislation is capable of encouraging the prostitution industry to operate in the legal sphere. Other types of legal schemes, such as criminalized demand and legalization, have failed to achieve this goal.<sup>242</sup> As a result, significant

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visited Oct. 3, 2010) (stating that a sex worker is at work for the purposes of the Health and Safety in Employment Act of 1992) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

237. See LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 69 (discussing the effects of the PRA on exiting the sex industry).

238. See Whitebread, *supra* note 50, at 243 (stating that criminalization began with the Mann Act and by 1925 all U.S. states had criminalized prostitution).

239. See House Report No. 106-487 (2000) (stating that 45,000 to 50,000 women and children are still trafficked into the United States annually).

240. See U.S. DEP'T OF STATE, *supra* note 88, at 223 (stating that New Zealand is one of the most effective countries in the world at combating human trafficking).

241. *Id.*

242. See Coontz & Stahl, *supra* note 110 (stating that criminalization has caused roadblocks to reporting prostitution); see also Purchasing Sexual Services, *supra* note 192, at 19 (stating that prostitutes believe the efforts in the United Kingdom have driven prostitution further underground); Bindel & Kelly, *supra* note 152, at 15 (stating that despite regulation

illegal prostitution markets exist in the United States, the United Kingdom and Victoria, Australia.

This Note asserts that the United States should consider adopting a prostitution law similar to the PRA in New Zealand. Prostitution has been criminalized in the United States for over a century. Trafficking has existed in the United States for over a century. It is time to recognize that morality and the notion that prostitution is inherently violence against women are not good reasons to continue criminalizing prostitution. It is well documented that women become trapped in the commercial sex industry in criminalized jurisdictions.<sup>243</sup> Exiting prostitution is not easy, even after five years of decriminalization in New Zealand.<sup>244</sup> But if preventing women from being forced into prostitution and combating sex trafficking are legitimate goals of the United States government, a new and creative solution to the problem must be developed. By decriminalizing prostitution, the United States would be better able to achieve the goals set out in the TVPA: preventing women from being forced into prostitution against their will, and finding current victims of sex trafficking.<sup>245</sup> Further, by amending criminal laws to decriminalize prostitution, prostitutes would be better able to access employment remedies. This would likely lead to safer working conditions for those who want to continue employment in the commercial sex industry, and it will encourage reporting employers in violation of sex trafficking laws.

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in Victoria, Australia brothels still make a large amount of money from illegal prostitution).

243. See LAW REVIEW COMMITTEE REPORT, *supra* note 204, at 75–77 (discussing the CJRC report on the barriers to exiting the industry).

244. See *id.* at 76 (stating that street sector workers should be encouraged to leave the business or move sectors but 78.8% remained in the street sector despite changes in policy).

245. TVPA, 22 U.S.C. § 7101(a) (2000).

