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# WOMEN AND CHILDREN LAST: THE PROSECUTION OF SEX TRAFFICKERS AS SEX OFFENDERS AND THE NEED FOR A SEX TRAFFICKER REGISTRY

GENEVA BROWN\*

**Abstract:** Sex trafficking is a moral and legal tragedy that affects thousands in the United States and abroad. The U.S. State Department estimates that human traffickers bring between 14,500 and 17,500 persons annually into the United States for various avenues of exploitation, including involuntary servitude and forced prostitution. Human traffickers are highly organized into criminal syndicates that reap exponential profits exploiting vulnerable women and children. Individual states struggle to prosecute traffickers and must rely on federal prosecution of trafficking enterprises. International cooperation with local law enforcement is essential in combating trafficking, especially in the sex trade. This Article proposes that an international database be maintained to track the whereabouts of prosecuted traffickers, similar to the sex offender registry in the United States. Like the U.S. sex offender laws, which seek to dramatically decrease recidivism among sex offenders, an international registry could have a deterrent effect on trafficking. Limiting and monitoring the travel of convicted traffickers would be a new avenue that international law enforcement and governing bodies could use to contain the pernicious practice of trafficking.

## INTRODUCTION

Human sex trafficking is a moral and legal tragedy that affects thousands in the United States and abroad.<sup>1</sup> The International Labour Organization estimates that 1.39 million domestic and transnational victims of forced labor are also victims of commercial sex servitude.<sup>2</sup> As

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<sup>1</sup> See Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. & POL'Y 309, 312 (2008); *Trafficking in Persons Report*, U.S. DEPARTMENT OF STATE, 10 (2004), <http://www.state.gov/documents/organization/34158.pdf> [hereinafter *Trafficking in Persons Report*].

<sup>2</sup> See INT'L LABOUR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOUR 12 (2005), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

many as 17,500 people are trafficked into the United States every year.<sup>3</sup> Inside the United States, trafficking victims are subjected to various forms of exploitation including involuntary servitude and forced prostitution.<sup>4</sup> The difficulty in quantifying the number of trafficking victims is just one example of the complexity and mystery behind human trafficking.<sup>5</sup> In addition, human traffickers are part of highly organized criminal syndicates that profit from the exploitation of vulnerable women and children.<sup>6</sup> To date, law enforcement is unable to combat human trafficking effectively and is failing to keep pace with its growth.<sup>7</sup> Many states struggle to prosecute traffickers and must rely on federal prosecution of trafficking enterprises.<sup>8</sup> To better address hu-

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<sup>3</sup> See *Trafficking in Persons Report*, *supra* note 1, at 23. The United States is one of the three largest markets for human sex trafficking. See Green, *supra* note 1, at 312; see also Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: the Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 128 (“[T]he United States is one of the primary destination points for trafficked women . . .”).

<sup>4</sup> See *Trafficking in Persons Report*, *supra* note 1, at 6. Trafficking victims forced to work in the sex trade face greater suffering than other trafficking victims, commonly suffering from trauma, depression, and anxiety. See Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 114–17 (2006); see also FRANCIS T. MIKO & GRACE (JEA-HYUN) PARK, CONG. RESEARCH SERV., RL 30545, TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE 4 (2002), available at <http://fpc.state.gov/documents/organization/9107.pdf> (“[M]any victims suffer mental break-downs and are exposed to sexually-transmitted diseases . . .”).

<sup>5</sup> See Tiefenbrun, *supra* note 3, at 126 (“Statistics on trafficking are unreliable and difficult to verify because of the secrecy of the sex trafficking industry and the social stigma attached to the activity.”); *Trafficking in Persons Report*, *supra* note 1, at 23 (“Estimates of the number of trafficking victims found throughout the world are inherently difficult to produce. Trafficking in persons, like drug trafficking and arms smuggling, is a clandestine activity made even harder to quantify by its numerous forms.”).

<sup>6</sup> See *Trafficking in Persons Report*, *supra* note 1, at 6, 14; see also Nidhi Kumar, *Reinforcing Thirteenth and Fourteenth Amendment Principles in the Twenty-First Century: How to Punish Today’s Masters and Compensate Their Immigrant Slaves*, 58 RUTGERS L. REV. 303, 304–07 (2005) (“The ‘trafficking industry has become . . . one of the . . . most lucrative and fastest growing criminal enterprises.’”) (quoting Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 992 (2002)); Louise Shelley, *Trafficking in Women: The Business Model Approach*, 10 BROWN J. WORLD AFF. 119, 121 (2003) (“Smuggling and trafficking are undeniably part of organized crime activities. The high profits, low risk of detection, and minor penalties involved have made the human trade attractive to crime groups . . .”).

<sup>7</sup> See MIKO & PARK, *supra* note 4, at 8; Kumar, *supra* note 6, at 305–06; Tiefenbrun, *supra* note 3, at 130.

<sup>8</sup> See Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 439–42 (2009).

man sex trafficking, a greater level of cooperation among international, federal, and state enforcement agencies is needed.<sup>9</sup>

In order to improve the international response to trafficking, it is necessary to devote additional attention to the plight of women and children being trafficked across borders for sexual exploitation.<sup>10</sup> With greater public awareness of the problematic nature of sex trafficking, the public will to prosecute offenders should coalesce with law enforcement efforts to combat trafficking.<sup>11</sup> U.S. sex offender laws provide a model for the creation of an international trafficking registry that would both increase public support for the prosecution of trafficking offenders and potentially deter sex trafficking on a global scale. U.S. sex offender laws seek to dramatically decrease recidivism of sex offenders and their application to sex traffickers could have the same deterrent effect.<sup>12</sup> The utility of sex offender laws is already evident in the United States, where sex offender registration requirements are extended to convicted sex traffickers.<sup>13</sup> Yet, the application of a sex offender registry alone is not sufficient. Although traffickers in the United States who specialize in the exploitation of children are being treated as sex offenders, it has not curtailed the trafficking of children.<sup>14</sup> It is evident that U.S. laws need to go further in treating sex traffickers as sex offenders and restrict civil liberties such as travel and occupation.<sup>15</sup> In addition, an international registration requirement would help the international community track the whereabouts of sex

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<sup>9</sup> See *id.*; *Fact Sheet: Trafficking in Human Beings*, INTERPOL (2009), <http://www.interpol.int/Public/ICPO/FactSheets/THB02.pdf> [hereinafter *Fact Sheet*]; Muireann O'Briain et al., *Sexual Exploitation of Children and Adolescents in Tourism*, ECPAT INT'L, 50 (2008), [http://www.ecpat.net/worldcongressIII/PDF/Publications/CST/Thematic\\_Paper\\_CST\\_ENG.pdf](http://www.ecpat.net/worldcongressIII/PDF/Publications/CST/Thematic_Paper_CST_ENG.pdf).

<sup>10</sup> See e.g. Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sex Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187, 1189–91, 1202 (2004) (describing national campaign in Sweden to “increas[e] public awareness of prostitution and trafficking in women” as part of a “comprehensive . . . strategy to combat prostitution and trafficking in human beings”).

<sup>11</sup> See *id.*

<sup>12</sup> See *No Easy Answers: Sex Offender Laws in the U.S.*, HUM. RTS. WATCH, 4, 59–61 (2007), <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers-0>.

<sup>13</sup> See 18 U.S.C. § 2423 (2006); 42 U.S.C. § 16911 (3) (A) (iii) (2006).

<sup>14</sup> See Green, *supra* note 1, at 312 (noting that the United States must initiate exceptional measures to eradicate harm of child sex trafficking).

<sup>15</sup> See 42 U.S.C. § 16921 (b). The community notification provision requires that, immediately after a sex offender registers or updates a local registration, a local official must provide the information in the registry to the Attorney General; local law enforcement agencies; jurisdictions where the sex offender resides, works, or is a student; social services entities; volunteer organizations; and persons who request such notification pursuant to procedures established by the jurisdiction. *Id.*

traffickers and is a strong step towards treating human traffickers as sex offenders. A trafficking registry will liken traffickers to sex offenders and cause traffickers to suffer the same stigma that sex offenders do, which will garner much needed public awareness of the problem and help law enforcement agencies prevent and prosecute sex trafficking.<sup>16</sup>

This Article will provide a review of the current, growing problem of human sex trafficking and survey the landscape of law enforcement responses. It will also explore U.S. sex offender laws and suggest that sex offender laws be applied to sex trafficking. This Article is divided into five sections. Part I provides an overview of human trafficking and its impact on women and children. Part II identifies the different perspectives that influence government responses. Part III provides an overview of international legal responses, focusing on Europe and Asia. Part IV looks at U.S. trafficking laws and problems that law enforcement agencies face in prosecuting traffickers. This section also reviews U.S. sex offender laws and the use of a national registry. Finally, Part V suggests that the creation of an international sex trafficker registry will aid the global response to human trafficking.

## I. THE PROBLEM OF HUMAN TRAFFICKING

Various governmental and non-governmental entities have wrestled with the definition of human trafficking.<sup>17</sup> The United Nations initially focused on prostitution when drafting the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.<sup>18</sup> Although the 1949 Convention did not define trafficking, it included an agreement to punish any person who “procures, entices or leads away, for purposes of prostitution, another person.”<sup>19</sup> The United Nations later provided a more detailed definition of human trafficking with the Convention Against Transnational Crimes in 2000. The 2000 Convention defined “trafficking in persons” as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the

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<sup>16</sup> *See id.*

<sup>17</sup> *See* 22 U.S.C. § 7102 (2006); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 [hereinafter Convention on the Suppression of the Traffic in Persons].

<sup>18</sup> Convention on the Suppression of the Traffic in Persons, *supra* note 17, art. I.

<sup>19</sup> *Id.*

abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs . . . .<sup>20</sup>

Meanwhile, the U.S. government, in the Trafficking Victims Protection Act, defines “severe forms of trafficking in persons” as “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.”<sup>21</sup> The Act also differentiates sex trafficking from human trafficking, defining sex trafficking as a commercial sex act induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained eighteen years of age.<sup>22</sup>

The trafficking of women and children for prostitution is one of the fastest growing areas of international criminal activity.<sup>23</sup> This growing phenomenon is a cause for alarm to the United States and the international community.<sup>24</sup> More than 700,000 people are trafficked worldwide each year, with 50,000 people trafficked to the United States.<sup>25</sup> Seventy percent of people trafficked across international borders are female and fifty percent are children.<sup>26</sup> At least 100,000 female illegal immigrants work in the United States as prostitutes.<sup>27</sup>

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<sup>20</sup> Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, 55th Sess., Rep. on its 1st to 11th Sess., at 54–55, U.N. Doc. A/55/383 (Nov. 2, 2000) [hereinafter Ad Hoc Comm.].

<sup>21</sup> 22 U.S.C. § 7102(8)(B).

<sup>22</sup> *Id.*

<sup>23</sup> MIKO & PARK, *supra* note 4, at 1.

<sup>24</sup> *See id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Trafficking in Persons Report*, *supra* note 1, at 15; *see also* Tiefenbrun, *supra* note 3, at 113–14 (discussing ways to eradicate sex trafficking in women, incorporating economic theory).

<sup>27</sup> U.N. Dep’t of Pub. Info., *Tenth U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, New Global Treaty to Combat “Sex Slavery” of Women and Girls*, UNITED NATIONS (Feb. 2000), <http://www.un.org/events/10thcongress/2098.htm> [hereinafter *New Global Treaty*]. Official U.S. government statistics from 2003 placed the number of trafficked people entering the United States at 18,000 to 20,000 annually. LIANA SUN WYLER & ALISON SISKIN, CONG. RESEARCH SERV., RL 34317, *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 26* (2010), available at [http://assets.opencrs.com/rpts/RL34317\\_20100804.pdf](http://assets.opencrs.com/rpts/RL34317_20100804.pdf).

Women are most at risk for being trafficked.<sup>28</sup> According to statistics compiled by the U.S. Department of Justice (DOJ), between January 1, 2007 and September 30, 2008, ninety-four percent of all human trafficking victims were female.<sup>29</sup> More astoundingly, ninety-nine percent of all sex trafficking victims were female.<sup>30</sup> Most women who are trafficked are done so as part of the sex trade.<sup>31</sup> Sex trafficking accounted for eighty-three percent of all reported trafficking incidents, due in part to the fact that sex trafficking is the most lucrative type of human trafficking.<sup>32</sup>

Trafficked women often have backgrounds of poverty, illiteracy, civil strife, and low social and political status.<sup>33</sup> Traffickers exploit these conditions by luring women into traveling to unknown regions with the promise of high wages and civilized working conditions.<sup>34</sup> Then, after arriving at their destination, women may be subjected to slave-like wages, inhumane working conditions, and debt bondage.<sup>35</sup> Women who are trafficked for the sex industry fare worse than other trafficking victims.<sup>36</sup>

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<sup>28</sup> TRACEY KYCKELHAHN ET AL., U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2007-08, at 8 (2009). The DOJ Human Trafficking Reporting System provides data on human trafficking incidents investigated between January 1, 2007 and September 30, 2008. *Id.* Data in the report represents a snapshot of the investigations opened by thirty-eight federally funded human trafficking task forces. *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* Furthermore, the age of sex trafficking victims reveals their vulnerability. *See id.* An overwhelming majority of human trafficking victims were under twenty-five years of age. *Id.* Over one-quarter of such victims were under the age of seventeen. *Id.*

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*; *see* SIDDHARTHA KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY 19 (2008).

<sup>33</sup> Kelly E. Hyland, *Protecting Victims of Human Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 35 (2001); *see also* MIKO & PARK, *supra* note 4, at 2 (noting that economic hardships following the collapse of Communism in the former Soviet Union and Eastern Europe hampered opportunities for a better life abroad and made "many women and girls especially vulnerable to entrapment by traffickers").

<sup>34</sup> *See* Fara Gold, Comment, *Redefining the Sex Trade: Current Trends in International Trafficking of Women*, 11 U. MIAMI INT'L & COMP. L. REV. 99, 110 (2003); *see also* Tiefenbrun, *supra* note 3, at 118. Tiefenbrun explains that trafficking is accomplished by various means, including enticement, kidnapping, selling a loved one, the illegal use of legitimate travel documents, the use of imposter passports, and entry without inspection. *Id.* "They recruit women abroad through advertisements and employment, travel, model, or match-making agencies. Recruiters also target beauty contest winners and entice them with phony work offers." *Id.*

<sup>35</sup> Tiefenbrun, *supra* note 3, at 118; Gold, *supra* note 34, at 110.

<sup>36</sup> *See* Farley, *supra* note 4, at 114-17.

Posttraumatic stress disorder (PTSD) commonly occurs among prostituted women, and is indicative of their extreme emotional distress. PTSD is characterized by anxiety, depression, insomnia, irritability, flashbacks, emotional numbing, and hyperalertness. In nine countries, sixty-eight percent of those in prostitution met criteria for a diagnosis of PTSD, a prevalence that was

For example, the large smuggling fees associated with the sex trade keep trafficked women indebted to their traffickers.<sup>37</sup> In the United States, for instance, Asian prostitutes are sold for as much as \$20,000 each.<sup>38</sup> Trafficked women are reluctant to seek help from law enforcement officials because they fear retaliation from their traffickers.<sup>39</sup> Returning home is not a safe option for trafficked women either, as they may face retribution from organized crime groups or from their native country's law enforcement.<sup>40</sup>

Child sex trafficking, in particular, is a growing concern for law enforcement.<sup>41</sup> First, the trafficking industry has a direct association with child pornography.<sup>42</sup> Second, the sexual exploitation of children is a lucrative business that has ties to organized crime and local profiteers.<sup>43</sup> Child traffickers can earn as much as \$30,000 per trafficked child.<sup>44</sup> Sex tourists travel globally to gain access to young girls and boys and are willing to pay premium prices for access to them.<sup>45</sup> The thriving child sex industry is based on several factors including poverty and the

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comparable to battered women seeking shelter, rape survivors seeking treatment, and survivors of state-sponsored torture. Across widely varying cultures on five continents, the traumatic consequences of prostitution were similar.

*Id.* at 116–17 (footnotes omitted).

<sup>37</sup> Gold, *supra* note 34, at 119.

<sup>38</sup> *New Global Treaty*, *supra* note 27, at 2.

<sup>39</sup> Hyland, *supra* note 33, at 45.

<sup>40</sup> *Id.* at 43.

Thai victims in California feared returning home to Thailand after learning that their traffickers had been looking for them. Government authorities in the home country, instead of providing protection, may penalize returning victims with arrest and detention for having illegally migrated.

Returning victims also may face ostracism from family and friends. A trafficked woman's husband or family may disown her upon her return if she engaged in prostitution.

*Id.* (footnotes omitted).

<sup>41</sup> See generally Silvia Scarpa, *Child Trafficking: International Instruments to Protect the Most Vulnerable Victims*, 44 FAM. CT. REV. 429 (2006) (explaining that children compose a large percentage of trafficking in persons, the fastest growing form of organized crime).

<sup>42</sup> *Id.* at 431.

<sup>43</sup> See Richard J. Estes & Neil Alan Weiner, Univ. of Penn, Sch. of Soc. Work, *The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico*, PENN SCHOOL OF SOC. POL'Y & PRAC., 8 (2003), [http://www.sp2.upenn.edu/restes/CSEC\\_Files/Exec\\_Sum\\_020220.pdf](http://www.sp2.upenn.edu/restes/CSEC_Files/Exec_Sum_020220.pdf); see also Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 218 (2006) (explaining that the role of children is underestimated in the profitable enterprise of trafficking for sexual exploitation).

<sup>44</sup> Estes & Weiner, *supra* note 43, at 8.

<sup>45</sup> O'Briain et al., *supra* note 9, at 8–9.



use of “runaway” and “throwaway” children.<sup>46</sup> Like trafficked women, children trafficked into and out of the United States are financially beholden to their traffickers.<sup>47</sup> Often, they are required to pay their traffickers for the services received such as transportation, shelter, employment, and false identity papers.<sup>48</sup> Additionally, children in the sex industry suffer exposure to HIV/AIDS and other sexually transmitted diseases.<sup>49</sup> Indeed, younger children are targeted and procured to protect clients from HIV exposure.<sup>50</sup> Human Rights Watch reports that “[p]rostituted children can be raped, beaten, sodomized, emotionally abused, tortured, and even killed by pimps, brothel owners, and customers.”<sup>51</sup> According to UNICEF, one million children enter the global sex trade each year.<sup>52</sup>

## II. PERSPECTIVES ON SEX TRAFFICKING

There is no uniform global approach to combating sex trafficking.<sup>53</sup> The ideological paradigms of governments, non-governmental organizations (NGOs), and legal and human rights communities influence the choice of how to view and combat sex trafficking.<sup>54</sup> Groups develop different strategies to reduce or eliminate sex trafficking enterprises that are aligned with their understanding of the issues and actors involved.<sup>55</sup>

Regardless of how different nations approach the problem, it is important for all law enforcement agencies to recognize the growing presence of organized crime groups involved in human trafficking.<sup>56</sup> High profits of sex trafficking, combined with inadequate law enforcement responses, are increasingly attracting organized enterprises to the sex trade.<sup>57</sup> The vast profits of sex trafficking have attracted “crime groups that previously trafficked in other commodities and . . . new

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<sup>46</sup> Estes & Weiner, *supra* note 43, at 4.

<sup>47</sup> *Id.* at 8.

<sup>48</sup> *Id.*

<sup>49</sup> Sara Dillon, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN’S L.J. 121, 128 (2008).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> UNICEF, PROFITING FROM ABUSE: AN INVESTIGATION INTO SEXUAL EXPLOITATION OF OUR CHILDREN 20 (2001), available at [http://www.unicef.org/publications/files/pub\\_profiting\\_en.pdf](http://www.unicef.org/publications/files/pub_profiting_en.pdf).

<sup>53</sup> *Id.* at 16.

<sup>54</sup> *See id.* at 14–16.

<sup>55</sup> *See id.*

<sup>56</sup> *See Shelley, supra* note 6, at 121.

<sup>57</sup> *See id.*

groups which have developed recently.”<sup>58</sup> Behind the instances of human trafficking “lie intricate enterprises, each with business characteristics that influence the severity of the human rights violations.”<sup>59</sup> Trafficking enterprises often operate “with the complicity of professionals in receiving countries that knowingly provide services to the human smugglers and traffickers.”<sup>60</sup> Indeed, “[t]he vast profits of this business allow them to develop high-level expertise just as the drug trafficking organizations have done in recent decades.”<sup>61</sup>

Professor Louise Shelley stated, “The trade in human beings is not a uniform business and operates very differently in diverse cultural and political contexts.”<sup>62</sup> Shelley has identified six different business models of trafficking.<sup>63</sup> The first model is the “natural resources” model.<sup>64</sup> For example, post-Soviet organized crime groups “sell women as if they were a readily available natural resource,” focusing their business on “the recruitment of women and their sale to intermediaries who deliver them to the markets where they will ‘serve clients.’”<sup>65</sup> The second model is the “trade and development model” used by Chinese and Thai traffickers.<sup>66</sup>

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<sup>58</sup> *See id.*

<sup>59</sup> *Id.* at 119; *see also* Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT’L L.J. 131, 132 (2008) (exploring “how the reticence by some governments to balance economic development and integration with combating human trafficking impedes the international resolve to deter this phenomenon”).

<sup>60</sup> Shelley, *supra* note 6, at 121. The business of human trafficking necessarily implicates the involvement of government actors in the trafficking trade. *See* Nagle, *supra* note 59, at 161. Trafficking enterprises could not exist without corrupt law enforcement, consular officials, and cooperative lawyers involved in the trade. *See* Shelley, *supra* note 6, at 129.

<sup>61</sup> Shelley, *supra* note 6, at 121; *see also* Sheldon Zhang & Ko-Lin Chin, *The Declining Significance of Triad Societies in Transnational Illegal Activities*, 43 BRIT. J. CRIMINOLOGY 469, 469 (2003) (presenting a conceptual framework to argue that “triad’s entrenched culture and patterns of organization, which have served them well for centuries, are incompatible with conditions necessary for entering into present-day transnational criminal activities”).

<sup>62</sup> Shelley, *supra* note 6, at 122.

<sup>63</sup> *See id.* at 123. Shelley’s findings are based on research by scholars in Russia and Ukraine under the sponsorship of the Transnational Crime and Corruption Center and published in the volumes of *Torgovlye Liudmi* [*Trade in People*]. This growing business of trafficking is fueled by “traffickers from poor and violence-ridden societies” and their “high-paid facilitators in the west.” *Id.* at 121. For instance, during the post-socialist transition in Eastern Europe and the former Soviet Union, where women were displayed as part of the worldwide feminization of poverty, crime groups largely targeted women for trafficking. *See id.* at 122.

<sup>64</sup> *See id.* at 123.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 124 (“[Shelley’s] analysis of Chinese organized crime is based on a variety of law enforcement sources apart from the academic sources and the case materials of prosecuted cases,” including “[m]aterials of actual investigations of the business side of Chinese organized crime . . .”).

In this model, traffickers organize and “control the smuggling at all stages—from recruitment through debt bondage and eventually to an assignment in a brothel,” which generates significant profits.<sup>67</sup> The third model is the “supermarket model,” based on a low cost and high volume model of human trafficking.<sup>68</sup> This approach is seen in the trafficking trade between the United States and Mexico.<sup>69</sup> There, “trade in women is part of a much larger trade that involves moving large numbers of people across the border at low cost.”<sup>70</sup> The trade “may require multiple attempts” and “significant profit sharing with local Mexican border officials.”<sup>71</sup> The fourth model is a “violent entrepreneur model” utilized by Balkan crime groups.<sup>72</sup> This model “involves large numbers of women from the Balkans and those sold off to Balkan traders by crime groups from the former Soviet Union and Eastern Europe.”<sup>73</sup> In addition, “Balkan groups take over existing markets in continental Europe and Great Britain by use of force against already established organized crime groups.”<sup>74</sup> The fifth model combines “traditional slavery and modern technology” and is used by traffickers moving women out of Nigeria and West Africa.<sup>75</sup> Women are trafficked as part of Nigerian organized crime groups, “in which the trade of women is only one part of their criminal activities,” and where “[c]hildren are abandoned in re-

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<sup>67</sup> See Shelly, *supra* note 6, at 124; see also Louise I. Shelley, *Post-Communist Transitions and the Illegal Movement of People: Chinese Smuggling and Russian Trafficking in Women*, 14 *ANNALES OF SCHOLARSHIP* 71, 80 (2000).

<sup>68</sup> See Shelley, *supra* note 6, at 125.

<sup>69</sup> See *id.*; see also Joseph Nevins, *The Remaking of the California-Mexico Boundary in the Age of NAFTA*, in *WALL AROUND THE WEST: STATE BORDERS AND IMMIGRATION CONTROLS IN NORTH AMERICA AND EUROPE* 99, 99–107 (Peter Andreas & Timothy Snyder, eds. 2000).

<sup>70</sup> Shelley, *supra* note 6, at 125; see also Louise Shelley, *Corruption and Organized Crime in Mexico in the Post-PRI Transition*, 17 *J. CONTEMP. CRIM. JUST.* 213, 226 (2001).

<sup>71</sup> See Shelley, *supra* note 6, at 125.

<sup>72</sup> *Id.* at 126; see Conference Report, U.N. Interregional Crime & Justice Research Inst., *Trafficking, Slavery and Peacekeeping: The Need for a Comprehensive Training Program* (May 9–10, 2002), 10, [http://policy-tracc.gmu.edu/publications/TIP&PKO\\_EWG\\_Report\\_Final.pdf](http://policy-tracc.gmu.edu/publications/TIP&PKO_EWG_Report_Final.pdf) [hereinafter U.N. Conference Report].

<sup>73</sup> Shelley, *supra* note 6, at 126; see also *The Balkans: Assessing the Progress and Looking to the Future: Hearing Before the Subcomm. on Eur. of the H. Comm. on Int'l Relations*, 108th Cong. 20 (2003) (prepared statement of Mark Wheeler, Bosnia Project Manager, International Crisis Group).

<sup>74</sup> Shelley, *supra* note 6, at 126; see also *Global Trends in Trafficking and the “Trafficking in Persons Report:” Hearing Before the Subcomm. on Int'l Terrorism, Nonproliferation and Human Rights of the H. Comm. on Int'l Relations*, 108th Cong. 63 (2003) (statement of Gary A. Haugen, President, CEO, and Founder, International Justice Mission).

<sup>75</sup> See Shelley, *supra* note 6, at 126; see also Obi N. I. Ebbe, *The Political-Criminal Nexus: The Nigerian Case*, 4 *TRENDS IN ORGANIZED CRIME* 29, 36 (1999).

recipient countries and women are pressured to work in . . . the lowest end of the prostitution market.”<sup>76</sup>

The final business model applies to the host country rather than to a trafficking group.<sup>77</sup> The “rational actor model” applies where prostitution is legalized and government-regulated, such as in the Netherlands, and “presumes that the brothel owner is a rational businessman and seeks to maximize his profits.”<sup>78</sup> State regulations require certain conditions to be met for a brothel owner to continue operating, such as legal workers and decent conditions.<sup>79</sup> In case of violations, “the license can be withdrawn, the brothel closes, and prosecution ensues,” which incentivizes compliance with state regulations.<sup>80</sup>

International, national, and local law enforcement must grasp the multi-tiered, cross-border complexity of sex trafficking and coordinate efforts to successfully prosecute traffickers.<sup>81</sup> As Shelley notes, “High levels of human rights violations are associated with segmented businesses in which women are passed from one set of owners to another repeatedly.”<sup>82</sup> Government efforts to combat the increasingly complex prob-

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<sup>76</sup> Shelley, *supra* note 6, at 127; see *Annual Report 2000: Trafficking in Human Beings*, EUROPOL, <http://www.europol.europa.eu/index.asp?page=publar2000> (last visited Jan. 20, 2011) [hereinafter *Annual Report 2000: Trafficking in Human Beings*].

<sup>77</sup> See Shelley, *supra* note 6, at 127.

<sup>78</sup> See *id.*

An important spin-off of the policy is that it prevents human trafficking, which is characterized by exploitation, coercion and violence. The lifting of the ban on brothels makes prostitution a legitimate occupation and gives prostitutes the same rights and protections as other professionals. The labor laws offer the most effective protection against the exploitation, violence and coercion. The policy is based on the conviction that strengthening the position of women is the best way to combat sexual violence. Moreover, abuses are easier to detect when prostitutes operate publicly and legally rather than in a clandestine subculture.

The introduction of a municipal licensing system enables the police and other law enforcement agencies to conduct inspections of brothels, subject to the mayor’s consent. Through regular inspections to ensure that brothels conform to the licensing conditions, the police are in a position to pick up signs of human trafficking. They obtain invaluable information that can be used immediately to trace and prosecute offenders in both the regulated and unregulated sectors.

See *Dutch Policy on Prostitution: Questions and Answers 2004*, NETH. MINISTRY OF FOREIGN AFF., 16, <http://www.mfa.nl/contents/pages/743/prost.pdf> (last visited Jan. 20, 2011).

<sup>79</sup> See Shelley, *supra* note 6, at 127.

<sup>80</sup> *Id.* at 128.

<sup>81</sup> See *id.* at 129 (“The isolation and prosecution of the facilitators of trafficking both at home and abroad is as necessary as targeting the crime groups themselves.”).

<sup>82</sup> *Id.*

lem of trafficking fall into one of two models.<sup>83</sup> The models are determined by components such as whether the trafficking victims are seen as offenders in the sex trade or as duped victims.<sup>84</sup> Although the dominant model treats trafficking victims as co-conspirators, a more nuanced approach to sex trafficking is emerging that focuses instead on a rights-based discourse in developing a law enforcement response.<sup>85</sup>

#### A. *The Migrant Model*

The Migrant Model is a law and order approach that does not fully recognize trafficked persons as victims.<sup>86</sup> Currently, government and NGO responses are “embedded in morality” and “marked by class, gender, ethnic, nationality concerns, and restrictive and punitive strategies that violate human rights.”<sup>87</sup> For instance, the United Nations distinguishes between the voluntary smuggling of persons and the involuntary trafficking of persons across borders.<sup>88</sup> This delineation between those who are trafficked and those who are smuggled, however, “masks the reality in which the experience of exploitation resides within a rather more complex range of coercion and choice.”<sup>89</sup> Indeed, there exists an “overlap between irregular migration, smuggling, and trafficking.”<sup>90</sup> Often, “migrants’ experiences actually involve a degree of de-

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<sup>83</sup> See Ann D. Jordan, *Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings*, 10 GENDER & DEV. 28, 29–30 (2002); Jean D’Cunha, *Trafficking in Persons: a Gender and Rights Perspective*, UNITED NATIONS, 5 (Nov. 18–22, 2002), <http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/EP-DCunha.PDF>.

<sup>84</sup> See Jordan, *supra* note 83, at 29–30; D’Cunha, *supra* note 83, at 5.

<sup>85</sup> See Jordan, *supra* note 83, at 29–30; D’Cunha, *supra* note 83, at 5.

<sup>86</sup> See Jordan, *supra* note 83, at 29–30.

<sup>87</sup> D’Cunha, *supra* note 83, at 4; see also Jordan, *supra* note 83, at 28 (“A unique opportunity for non-governmental organizations (NGOs) and advocates to contribute to the development of a human rights-based response to the trafficking of human beings now exists. Many governments have signed a new international treaty on trafficking and are in the process of adopting domestic anti-trafficking laws.”). Such enforcement strategies are “largely reactive, focusing mostly on immediate post-trafficking assistance, and less on prevention.” D’Cunha, *supra* note 83, at 4; see also Mohamed Y. Mattar, *Incorporating Five Basic Elements of Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT’L & COMP. L. 357, 360 (2006) (listing a number of nations that codified anti-trafficking in human beings).

<sup>88</sup> See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003 with 117 signatories).

<sup>89</sup> Heli Askola, *Violence Against Women, Trafficking, and Migration in the European Union*, 13 EUROPEAN L.J. 204, 206 (2007).

<sup>90</sup> *Id.* at 207.

ception, coercion, abuse of vulnerability, or exploitation . . . .”<sup>91</sup> “Most typically, a person can initially consent to being assisted to migrate irregularly (or even to being smuggled), but become instead ‘trafficked’ if upon arrival to the country of destination, debt bondage, threats, or violence are used to coerce this person into forced labor . . . .”<sup>92</sup>

The migrant model fails properly to address the role of trafficked people as victims of the sex trade.<sup>93</sup> For example, the European Union has adopted two legal instruments to combat human trafficking.<sup>94</sup> Article 5(3) of the Charter of Fundamental Rights of the European Union prohibits and criminalizes trafficking, but it does not address the plight of trafficking victims.<sup>95</sup> The European Commission eventually addressed the problem by drafting the Directive on Short-Term Residency Permits for Trafficking Victims.<sup>96</sup> The Directive attempts to protect victims of trafficking and smuggling by offering short-term residency in the destination country in exchange for cooperation with competent authorities.<sup>97</sup> The granting of residence permits is subject to three considerations: (1) the necessity of having the victim present for investigation or judicial proceedings; (2) the victim’s clear intention to cooperate; and (3) the extent to which the victim has severed relations with suspected traffickers.<sup>98</sup> Once the conditions are met, residence permits are granted and renewed based on the same three considerations.<sup>99</sup> The

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<sup>91</sup> *Id.* at 206–07.

<sup>92</sup> *Id.* at 207.

<sup>93</sup> *See id.*

<sup>94</sup> *See* Charter of Fundamental Rights of the European Union art. 5, Dec. 18, 2000, 2000 O.J. (C 364) 9 (EC); Directive on Short-Term Residency Permits for Trafficking Victims, art. 2, COM (2002) 71 final (Nov. 2, 2002).

<sup>95</sup> *See* Charter of Fundamental Rights of the European Union, *supra* note 94, art. 5. Article 5 is the “Prohibition of Slavery and Forced Labor” and states: “1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour. 3. Trafficking in human beings is prohibited.” *Id.*

[T]he Framework Decision, finally adopted in July 2002, put this prohibition into practice by setting up a common framework of provisions on the criminalisation of trafficking (Articles 1–2), on effective, proportionate, and dissuasive penalties, along with a list of aggravating circumstances such as endangering the life of the victim (Article 3), on the liability of legal persons (Articles 4–5), and on jurisdiction and extradition (Article 6).

Askola, *supra* note 89, at 209.

<sup>96</sup> *See* Directive on Short-Term Residency Permits for Trafficking Victims, *supra* note 94, art. 2.

<sup>97</sup> *See id.*; *see also* Council Directive 2004/81/EC, art. 8, 2004 O.J. (L 261) art. 1 (EU) [hereinafter Council Directive].

<sup>98</sup> *See* Council Directive, *supra* note 97, art. 8.

<sup>99</sup> *See id.*

residence permit guarantees a minimum standard of living, including medical treatment and legal assistance.<sup>100</sup>

Nonetheless, requiring trafficked persons to meet these conditions of cooperation places a substantial burden upon them to prove that they are victims and not complicit members of the sex trade.<sup>101</sup> Residence permits can be withdrawn or denied renewal depending upon the continued cooperation of the trafficking victim, leaving the victim in legally tenuous circumstances.<sup>102</sup> This approach wrongly views sex trafficking victims as co-conspirators and illegal immigrants.<sup>103</sup> Thus, trafficking victims face deportation unless they cooperate with law enforcement.<sup>104</sup>

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The residence permit may be withdrawn at any time if the conditions for the issue are no longer satisfied. In particular, the residence permit may be withdrawn in the following cases:

- (a) if the holder has actively, voluntarily and in his/her own initiative renewed contacts with those suspected of committing the offences referred to in Article 2(b) and (c); or
- (b) if the competent authority believes that the victim's cooperation is fraudulent or that his/her complaint is fraudulent or wrongful; or
- (c) for reasons relating to public policy and to the protection of national security; or
- (d) when the victim ceases to cooperate; or
- (e) when the competent authorities decide to discontinue the proceedings.

*Id.* art. 14.

<sup>100</sup> *See id.* art. 7.

1. Member States shall ensure that the third-country nationals concerned who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment. They shall attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance.
2. Member States shall take due account of the safety and protection needs of the third-country nationals concerned when applying this Directive, in accordance with national law.
3. Member States shall provide the third-country nationals concerned, where appropriate, with translation and interpreting services.
4. Member States may provide the third-country nationals concerned with free legal aid, if established and under the conditions set by national law.

*Id.*; *see id.* art. 9.

<sup>101</sup> *See id.* art. 8.

<sup>102</sup> *Id.* art. 14.

<sup>103</sup> *See* Council Directive, *supra* note 97, art. 14.

<sup>104</sup> *See id.*

### B. *Gender and Rights Model*

A gender and rights perspective on trafficking seeks to reconfigure the current dominant discourse on human sex trafficking, which is largely focused on a national security and law and order approach.<sup>105</sup> The gender and rights approach acknowledges that women's and children's human rights are violated as a result of trafficking and focuses on protection and not criminalization.<sup>106</sup> United Nations advisor Jean D'Cunha notes that the key elements of a gender and rights perspective on trafficking include: (1) universality of rights; (2) nondiscrimination, equality, and equity; (3) attention to vulnerable groups; (4) recognizing and guaranteeing new woman-specific rights and special rights for children; and (5) rights as empowering.<sup>107</sup>

The final element underscores the relationship between rights and empowerment.<sup>108</sup> Empowerment contains two different aspects.<sup>109</sup> First, there is a structural dimension where legal, policy, and institutional environments generate a pervasive gender-and-rights-based culture.<sup>110</sup> This

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<sup>105</sup> D'Cunha, *supra* note 83, at 4.

<sup>106</sup> *Id.* at 9.

<sup>107</sup> *Id.* at 9–11. Jean D'Cunha defines the gender and rights perspective as distinguishing between concepts of sex and gender and their different social roles. *Id.* at 6. The gender and rights perspective recognizes that appropriate conduct for men and women is socially constructed and that the relationship status between men and women leaves women more disadvantaged. *Id.* She also notes that the prevailing gender stereotypes place less value on the social role of women and marginalize them from “ownership and control over the material (income, land) and non-material resources (time, political participation).” *Id.* Lastly, the gender and rights perspective holds that inequalities are socially conditioned and can be transformed in the direction of justice, equality, and fair participation between men and women. *Id.* at 6–7. “[A] gender and rights-based approach to development ensures fundamental human entitlements—social, economic and political—to expand choices, promote human well-being and empowerment in equitable and sustainable ways.” *Id.* at 30.

<sup>108</sup> *Id.* at 11.

<sup>109</sup> *Id.*

<sup>110</sup> D'Cunha, *supra* note 83, at 11; *see also* Mattar, *supra* note 87, at 366. States are being held accountable through international instruments. Mattar, *supra* note 87, at 366. Mattar's article outlines these international instruments, including:

The 1994 Inter-American Convention on International Traffic in Minors, which mandates that “[t]he States Parties undertake to adopt effective measures, under their domestic law, to prevent and severely punish the international traffic in minors defined in this Convention.” The Joint Action To Combat Trafficking in Human Beings and Sexual Exploitation of Children adopted by the European Council “mandates that Member States ‘review existing law and practice’ to classify trafficking as a criminal offense, provide the appropriate penalties for such offense and take the necessary measures that . . . ‘ensure . . . appropriate assistance for victims.’” The European Parliament, in a May 19, 2000, resolution, called for “legislative action against trafficking



includes codifying the rights of trafficking victims and then developing appropriate enforcement strategies to give legal effect to those rights.<sup>111</sup> It also includes using international human rights law to hold states accountable for ensuring that such rights are realized through appropriate anti-trafficking laws and policies.<sup>112</sup> States would then be obliged to ensure that private persons and institutions respect, protect, and promote the practical realization of human rights.<sup>113</sup> Second, there is an individual empowerment dimension, where knowledge and participation empower victims to “access remedies and claim rights” for themselves.<sup>114</sup> Ultimately, such a rights-based approach will ensure that appropriate

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in human beings, including common definition, incriminations and sanctions.” The Economic Community of West African States (ECOWAS) Declaration of December 2001 on the Fight Against Trafficking in Persons calls upon Member States to “Adopt, as quickly as possible, such legislative and other measures . . . that are necessary to establish as criminal offences the trafficking in persons . . . .” The January 2002 South Asian Association for Regional Cooperation (SAARC) Convention on Prevention and Combating Trafficking in Women and Children for Prostitution mandates that “[t]he State Parties to the Convention shall take effective measures to ensure that trafficking in any form is an offence under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature.” The European Council Framework Decision of July 19, 2002, mandates that member states must take the necessary measures, no later than August 1, 2004, to criminalize trafficking in persons and provide the appropriate penalties, in addition to assisting victims of trafficking. The Organization for Cooperation and Security in Europe (OSCE) Declaration on Trafficking in Human Beings of December 2002 states, “We will consider adopting legislative or other measures that permit victims of trafficking to remain in our territory, temporarily or permanently, in appropriate cases, and giving consideration to humanitarian and compassionate factors.”

*Id.* at n.29 (citations omitted).

<sup>111</sup> D’Cunha, *supra* note 83, at 11; *see also* Carole Angel, *Immigration Relief for Human Trafficking Victims: Focusing the Lens on the Human Rights of Victims*, 7 MD L.J. RACE, RELIGION, GENDER & CLASS 23 (2007) (“To effectively address the trafficking phenomenon, policymakers must use a victim-centered approach that focuses on human rights, rather than ones that focus solely on narrowing of immigration laws or prosecution.”). Anti-trafficking laws promoting human rights would prevent violations and encourage anti-trafficking policies and programs. *See* Angel, *supra*, at 23–24. Once codified and defined, the rights would create a gender and rights-based culture which would then have the ability to hold states accountable. *See id.*

<sup>112</sup> D’Cunha, *supra* note 83, at 11; *see* Kumar, *supra* note 6, at 317; Free the Slaves, Wash. D.C. & the Human Rights Ctr. of the Univ. of Cal. Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 69 (2005) [hereinafter *Hidden Slaves*]; Theresa Barone, Note, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT’L & COMP. L.J. 579, 583 (2003).

<sup>113</sup> *See Hidden Slaves*, *supra* note 112, at 69–70.

<sup>114</sup> D’Cunha, *supra* note 83, at 11.

actions are taken to punish violators of trafficking laws and to provide easily accessible remedies and reparations to trafficking victims.<sup>115</sup>

### III. INTERNATIONAL LEGAL RESPONSES TO SEX TRAFFICKING

The rise of globalization has led to an unanticipated boom in human trafficking that international governments are struggling to combat.<sup>116</sup> The increase in cross-border trade, the demand for cheap, low-skilled labor, and an influx of mass-produced imports into developing countries is creating labor demands in foreign markets.<sup>117</sup> Companies have taken advantage of this globalization by relocating or outsourcing operations to “low-wage economies” abroad.<sup>118</sup> In turn, low-skilled laborers are traveling to foreign markets to fulfill the new labor demands.<sup>119</sup> A major consequence of this labor migration is human trafficking.<sup>120</sup> As Lorraine Corner has observed:

Economically marginalized people, particularly women, in developing countries are unable to realize their human right to a decent livelihood in their own country partly due to global inequities in trade. . . . The result is strong pressures in poor countries to migrate to industrialized economies in search of the means of livelihood [with people] often becoming victims of trafficking in the process.<sup>121</sup>

Sex trafficking is on the rise as the labor demands for migrant women—who are less skilled and educated—leave them vulnerable to trafficking and the commercial sex trade.<sup>122</sup> The growth of the commercial sex trade and sex tourism is increasing prevalence of sex traf-

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<sup>115</sup> *Id.* at 1.

<sup>116</sup> Sally Cameron & Edward Newman, *Trafficking in Humans: Structural Factors*, in *TRAFFICKING IN HUMANS: SOCIAL, CULTURAL AND POLITICAL DIMENSIONS* 21, 25 (2008); see Kumar, *supra* note 6, at 304–05.

<sup>117</sup> Cameron & Newman, *supra* note 116, at 25.

<sup>118</sup> *Id.* at 26.

<sup>119</sup> *Id.* at 25.

<sup>120</sup> *Id.* at 25–29.

<sup>121</sup> *Id.* at 27–28 (quoting Lorraine Corner, *A Gender Perspective to Combating Human Trafficking—An Integrated Approach to Livelihood Options for Women and Adolescent Girls* 13 (2002) (unpublished paper)).

<sup>122</sup> Lorraine Corner, *Providing Livelihood Options for Women and Adolescent Girls: An Integrated Approach*, UNITED NATIONS DEV. FUND FOR WOMEN, 19, 21–22 (2002), [http://www.unifem-eseasia.org/projects/migrant/mig\\_pub.htm](http://www.unifem-eseasia.org/projects/migrant/mig_pub.htm) (follow “Providing Livelihood Options for Women and Adolescent Girls” hyperlink under “Promoting Gender Equality to Combat Trafficking in Women and Children” heading).

ficking.<sup>123</sup> In response, international governments have begun to enact statutes and create other instruments to combat the rising scourge of sex trafficking.<sup>124</sup>

### A. Europe

The European Union began to develop policies on human trafficking in 1996 when the European Commission acknowledged the pervasive problem of trafficking in women for sexual exploitation.<sup>125</sup> Then, in 2002, the International Organization on Migrations, European Parliament, and the European Commission drafted the Brussels Declaration, detailing operations and mechanisms to curtail and prevent human trafficking.<sup>126</sup> Two European Union law enforcement agencies, Europol and Eurojust, have had some success in combating trafficking.<sup>127</sup> Europol handles criminal intelligence and supports member states as they combat human trafficking.<sup>128</sup> Eurojust, meanwhile, establishes uniform immigration and asylum policy and combats trans-border crime by consolidating cooperation among authorities.<sup>129</sup> As a whole, the European Union approach to human trafficking adopts the migration model that treats sex trafficking victims as illegal immigrants.<sup>130</sup> Individual European nations, however, have adopted divergent approaches in their attempts to prevent and prosecute sex trafficking.<sup>131</sup>

Sweden, for example, adheres to the gender and rights model of human trafficking.<sup>132</sup> The Swedish code criminalizes traffickers, procurers, and purchasers of sex.<sup>133</sup> Sweden recognizes prostitution as a

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<sup>123</sup> *Id.* at 22.

<sup>124</sup> *Id.* at 23–24.

<sup>125</sup> *Communication from the Commission to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation*, at 1, COM (96) 567 final (Nov. 20, 1996).

<sup>126</sup> The European Conference on Preventing and Combating Trafficking in Human Beings, Sept. 18–20, 2002, *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, 2–4, U.N. Doc. A/CONF.14981/02 (Nov. 19, 2002).

<sup>127</sup> See *Frequently Asked Questions*, EUROPOL, <http://www.europol.europa.eu/index.asp?page=faq> (last visited Jan. 20, 2011); *The History of Eurojust*, EUROJUST, <http://www.eurojust.europa.eu/about.htm> (last visited Jan. 20, 2011).

<sup>128</sup> *Frequently Asked Questions*, *supra* note 127.

<sup>129</sup> See *The History of Eurojust*, *supra* note 127.

<sup>130</sup> See Askola, *supra* note 89, at 212.

<sup>131</sup> See Ekberg, *supra* note 10, at 1189.

<sup>132</sup> See *id.*

<sup>133</sup> BROTTSBALKEN [BRB] [CRIMINAL CODE] 6:8 (Swed.).

“form of male sexual violence against women and children.”<sup>134</sup> It also recognizes that prostitution and human trafficking for sex purposes are harmful practices that are intrinsically linked and therefore should not be treated as separate entities.<sup>135</sup> Sweden’s policy of prosecuting merchants and customers of prostitution, rather than the prostitutes, has reduced the number of women in prostitution by thirty to fifty percent and has shown a corresponding decreased in the number of men purchasing sex.<sup>136</sup> As a result, Sweden is no longer an attractive market for sex traffickers.<sup>137</sup>

Denmark also uses a gender and rights model.<sup>138</sup> As part of a rights-based approach, the commercial sex trade operates legally in Denmark with restrictions on pimping, coercion into prostitution, soliciting a minor, and trafficking.<sup>139</sup> There are between 5000 and 6000 prostitutes working in the country.<sup>140</sup> Nearly half of the prostitutes are foreign nationals and potential trafficking victims, but Denmark assists sex trafficking victims instead of criminalizing their actions.<sup>141</sup> The

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A person who promotes or improperly financially exploits the casual sexual relations for payment of another person shall be sentenced for *procuring* to imprisonment for at most four years.

A person who, holding the right to the use of premises, grants the right to use them to another in the knowledge that the premises are wholly or to a substantial extent used for casual sexual relations for payment and omits to do what can reasonably be expected to terminate the granted right, he or she shall, if the activity continues or is resumed at the premises, be considered to have promoted the activity and shall be sentenced in accordance with the first paragraph.

*Id.*

<sup>134</sup> Ekberg, *supra* note 10, at 1189.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1193–94, 1210.

<sup>137</sup> *See id.* at 1209. Another effective component of Sweden’s law enforcement response is the existence of extraterritorial laws that allow Swedes to be charged, prosecuted, and convicted under Swedish laws for crimes committed in another country. *Id.* at 1196–97. Thus, Swedes traveling abroad for sex tourism face the same penalty for purchasing sex abroad as they would if they purchased sex in their home country. *Id.*; *see also* Roger Boyes, *Sweden-Denmark Link Boosts Red Light Trade*, *TIMES* (London), June 21, 2008, *available at* <http://www.timesonline.co.uk/tol/news/world/europe/article4183265.ece> (detailing the aggressive methods of the Swedish law enforcement in combating the sex trade, including wire tapping and video surveillance, against Swedes who travel fifteen minutes to Denmark to purchase sex legally).

<sup>138</sup> *See* Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: Denmark*, U.S. DEPARTMENT OF STATE (Feb. 25, 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119076.htm> [hereinafter *Human Rights Report: Denmark*].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

Dutch government helps trafficking victims return to their countries of origin and provides social, medical, and legal aid.<sup>142</sup>

Despite the assistance and rights-based approach to trafficking victims, the trafficking of children persists in Denmark.<sup>143</sup> In addition, Denmark is both a destination country and a transit point for women trafficked from the Baltic countries, Eastern Europe, Southeast Asia, West Africa, and Latin America.<sup>144</sup> The Copenhagen police have documented instances of women being lured to migrate with the promise of higher wages and a better quality of life, only to be coerced into a life of prostitution.<sup>145</sup> Indeed, Denmark did not recognize human trafficking as an offense until the European Council Framework decision on combating trafficking influenced Danish legislation as well.<sup>146</sup> Now, the Denmark penal code establishes a maximum eight year sentence for trafficking offenses, but police prosecuted only twenty-three trafficking cases in 2007.<sup>147</sup>

Germany, in contrast, focuses on criminal prosecutions.<sup>148</sup> Though prostitution is legal in Germany, the government has an aggressive approach to combating trafficking and the German criminal code prohibits all forms of human trafficking.<sup>149</sup> The largest number of sex trafficking victims are German nationals trafficked within the country.<sup>150</sup> Germany is not a destination for child sex tourism.<sup>151</sup>

German laws recognize that human traffickers are part of business enterprises and heavily penalize those involved in trafficking groups.<sup>152</sup> Law enforcement uses an integrated approach that leads to a large number of investigations and convictions.<sup>153</sup> In 2006, for example,

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<sup>142</sup> *Id.*

<sup>143</sup> *Trafficking in Children to Denmark*, SAVE THE CHILDREN DENMARK, 19 (2003), <http://www.childcentre.info/projects/traffickin/denmark/dbaFile11026.pdf> [hereinafter *Trafficking in Children to Denmark*]. A 2003 study of the Denmark child sex trade found that young girls are trafficked into Denmark and kept under wraps by their foreign pimps. *Id.* When Danish police encounter these minors, they are supplied with false identification. *Id.* The study also found that children are procured for sex via cell phone or the internet. *Id.*

<sup>144</sup> *Human Rights Report: Denmark*, *supra* note 138.

<sup>145</sup> *Id.*

<sup>146</sup> *Trafficking in Children to Denmark*, *supra* note 143, at 23–24.

<sup>147</sup> *Human Rights Report: Denmark*, *supra* note 138.

<sup>148</sup> See Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: Germany*, U.S. DEPARTMENT OF STATE (Feb. 25, 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119081.htm> [hereinafter *Human Rights Report: Germany*].

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See *Human Rights Report: Germany*, *supra* note 148.

Germany convicted 150 persons of trafficking.<sup>154</sup> Traffickers face as many as ten years imprisonment and German courts have imprisoned nearly one third of those convicted of trafficking.<sup>155</sup> The federal ministries coordinate anti-trafficking initiatives on the local, national, and international levels.<sup>156</sup> In addition, federal states have cooperation agreements with law enforcement, state welfare agencies, and NGOs to assist trafficking victims.<sup>157</sup> German law enforcement also shares intelligence information with Europol and Interpol.<sup>158</sup>

### B. Asia

Corruption, lenient law enforcement, and the lucrative nature of the sex trade comport to make Asia one of the most difficult regions in the world in which to combat sex trafficking.<sup>159</sup> China and Thailand are two of the most egregious regions of sex trafficking.<sup>160</sup> In China, criminal groups traffic thousands of Chinese women from their points of origin into the global sex trade market.<sup>161</sup> Chinese criminal networks regularly transport women abroad and coerce them into prostitution.<sup>162</sup> The U.S. State Department reports that Chinese criminal organizations traffic between 10,000 and 20,000 women and children annually.<sup>163</sup> Although prostitution is illegal, it is estimated that between 1.7 and 6 million women are involved in the sex trade.<sup>164</sup> Chinese government poli-

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Human Rights Report: Germany*, *supra* note 148. Germany also assists victims with repatriation. *Id.*

<sup>159</sup> See Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: China*, U.S. DEPARTMENT OF STATE (Feb. 25, 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm> [hereinafter *Human Rights Report: China*]; Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: Thailand*, U.S. DEPARTMENT OF STATE (Feb. 25, 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119058.htm> [hereinafter *Human Rights Report: Thailand*].

<sup>160</sup> See *Human Rights Report: China*, *supra* note 159; *Human Rights Report: Thailand*, *supra* note 159.

<sup>161</sup> *Human Rights Report: China*, *supra* note 159.

<sup>162</sup> See Shelley, *supra* note 6, at 124. Sex trafficking generates significant capital for Chinese organized crime because of the integrated business model. *See id.*

<sup>163</sup> See *Human Rights Report: China*, *supra* note 159. The U.S. State Department has tracked Chinese women held captive and forced into prostitution in Ghana. *See Trafficking in Persons Report*, *supra* note 1, at 142.

<sup>164</sup> See *Human Rights Report: China*, *supra* note 159.

cies only exacerbate the tenuous plight of women.<sup>165</sup> The one child policy, for instance, is zealously enforced by local government officials and belies a culture that does not value women.<sup>166</sup> Discrimination, poverty, and violence contribute to the secondary status of women in Chinese society and lead to high rates of suicide.<sup>167</sup> As a result, trafficking has become an extension of the diminished value of women in a society, where women are “bought, sold and murdered.”<sup>168</sup>

Although China has enacted laws to curtail human trafficking, enforcement remains a serious problem.<sup>169</sup> The U.S. State Department has placed China on its watch list because of the government’s inability to combat trafficking.<sup>170</sup> China has failed to enforce trafficking laws that protect both Chinese and foreign trafficking victims and has failed to improve victim assistance programs.<sup>171</sup>

Thailand is a global sex tourism destination.<sup>172</sup> Although prostitution is illegal in Thailand, the commercial sex trade operates with little to no interference from law enforcement.<sup>173</sup> In addition, the opportunity to engage in sex with underage girls is publicly advertised.<sup>174</sup> Prosti-

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<sup>165</sup> See *id.* According to the World Bank and the World Health Organization, there are approximately five hundred female suicides per day. *Id.*

The Beijing Psychological Crisis Study and Prevention Center reported that the suicide rate for females was three times higher than for males. Many observers believe that violence against women and girls, discrimination in education and employment, the traditional preference for male children, the country’s birth limitation policies, and other societal factors contribute to the high female suicide rate. Women in rural areas, where the suicide rate for women is three to four times higher than for men, are especially vulnerable.

*Id.*

<sup>166</sup> See Susan Tiefenbrun & Christie J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 *FORDHAM INT’L L.J.* 731, 733–34 (2009).

<sup>167</sup> See *id.*

<sup>168</sup> *Id.* at 732.

<sup>169</sup> See *id.* at 743. China enacted the “Decision Relating to the Severe Punishment of Criminal Elements Who Abduct and Kidnap Women and Children,” providing that “the abduction and the sale of women and children [are] separate offenses.” *Id.* China further permits those who purchase women for sex to “be tried for the crime of rape under the Chinese Criminal Code.” *Id.* at 743–44. “Article 236 of the Chinese Criminal Code provides a three to ten year sentence for rape . . . .” *Id.* at 744. The “sexual exploitation of girls under the age of fourteen, however, can carry a sentence of life imprisonment or the death penalty.” *Id.*

<sup>170</sup> *Trafficking in Persons Report*, *supra* note 1, at 105.

<sup>171</sup> *Id.* China must “closely examine its policy of returning North Korean migrants and refugees to ensure that trafficking victims are protected rather than subjected to the harsh treatment migrants receive on their return to North Korea.” *Id.* at 92.

<sup>172</sup> See *Human Rights Report: Thailand*, *supra* note 159.

<sup>173</sup> See *id.*

<sup>174</sup> *Id.*

tution is practiced openly with local officials complicit in its allowance.<sup>175</sup> A Thailand government survey found that there are between 76,000 and 77,000 registered prostitutes in the country.<sup>176</sup> NGOs, however, estimate the number to be between 200,000 and 300,000 prostitutes.<sup>177</sup> Sex trafficking in children is especially pernicious, and in 2007 the Thai government as well as university researchers and NGOs “estimated that there were as many as 60,000 prostitutes under age 18.”<sup>178</sup>

Despite the prevalence of sex tourism, Thailand criminalizes prostitution, sex trafficking, and child sex trafficking.<sup>179</sup> Thailand has also entered into memorandums of understanding with Laos and Cambodia to combat the tide of women and children crossing the border for sex trafficking, but enforcement remains questionable.<sup>180</sup> Despite the efforts of the Thai government, sex tourism remains a significant portion of the economy.<sup>181</sup> Thailand’s estimated income from prostitution in the last decade of the twentieth century was between twenty-two billion and twenty-seven billion dollars.<sup>182</sup>

#### IV. U.S. LEGAL RESPONSES

The United States is one of the largest receiving markets for sex trafficking.<sup>183</sup> Victims come from diverse areas of Asia, South America, and Eastern Europe.<sup>184</sup> Mexico, however, is the primary source of U.S. sex trafficking victims.<sup>185</sup> The United States has a complex interaction with Mexico regarding sex trafficking: American tourists travel to Mex-

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Human Rights Report: Thailand*, *supra* note 159.

<sup>178</sup> *Id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See* Memorandum of Understanding on Cooperation to Combat Trafficking in Persons, Especially Women and Children, Laos-Thai., July 13, 2005, *available at* [http://no-trafficking.org/content/pdf/thailao\\_mou\\_on\\_cooperation\\_to\\_combat\\_human\\_trafficking\\_eng.pdf](http://no-trafficking.org/content/pdf/thailao_mou_on_cooperation_to_combat_human_trafficking_eng.pdf); Memorandum of Understanding on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking, Thai.-Cambodia, May 31, 2003, *available at* [http://www.no-trafficking.org/resources\\_laws\\_thailand.html](http://www.no-trafficking.org/resources_laws_thailand.html) (follow “English” hyperlink under “Agreements” heading).

<sup>181</sup> *Trafficking of Women and Children in East Asia and Beyond: A Review of U.S. Policy: Hearing Before the Subcomm. on E. Asian and Pac. Affairs of the S. Comm. on Foreign Relations*, 108th Cong. 25 (2003) (testimony of Donna M. Hughes, Professor and Carlson Endowed Chair in Women’s Studies, University of Rhode Island).

<sup>182</sup> *See* THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA 137 (Lin Lean Lim ed. 1998).

<sup>183</sup> *See Trafficking in Persons Report*, *supra* note 1, at 57.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*



ico to engage in child sex tourism; at the same time, organized criminal networks traffic Mexican women and girls into the United States for sexual exploitation.<sup>186</sup> More than 20,000 children are victims of sex trafficking in Mexico, especially in tourist areas and border towns.<sup>187</sup>

#### A. Current Approach

Similar to the European Union, the United States uses the migrant model in combating human trafficking.<sup>188</sup> In 2000, Congress passed the Trafficking Victims Protection Act (TVPA) to combat the crisis of international trafficking of women to the United States.<sup>189</sup> The TVPA acknowledges the pervasive problem of trafficking and focuses both on prosecuting traffickers and aiding victims.<sup>190</sup> It also focuses on preventive measures and includes creative initiatives to educate women and girls on economic empowerment and the risks of human trafficking.<sup>191</sup>

The TVPA mandates that trafficking victims are given assistance.<sup>192</sup> It provides financial aid to local in-country NGOs for hotlines, protective shelters, and the creation of networks and databases to combat trafficking.<sup>193</sup> Repatriations are also available to trafficking victims.<sup>194</sup> U.S. victims of trafficking are eligible for benefits and services if they are victims of a severe form of trafficking.<sup>195</sup> Victims who cooperate with law enforcement also garner benefits from the Department of Health and Human Services.<sup>196</sup>

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<sup>186</sup> *Id.* at 206.

<sup>187</sup> *Id.*

<sup>188</sup> See Jordan, *supra* note 83, at 29, 30.

<sup>189</sup> Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18 U.S.C. and 22 U.S.C. (2006)). The TVPA recognizes and addresses the limitation of previous U.S. legislation that treated trafficked women as criminals and illegal aliens as opposed to the victims of a transnational criminal enterprise. 22 U.S.C. § 7101(b) (2006). The Act also recognizes the danger that trafficked women faced upon return to their native countries. *Id.*

<sup>190</sup> 22 U.S.C. § 7101(b)(1).

<sup>191</sup> *Id.* § 7104.

<sup>192</sup> *Id.* § 7105(b)(1).

<sup>193</sup> *Id.* § 7105(a)(1)(A).

<sup>194</sup> *Id.* § 7105(a)(1)(E).

<sup>195</sup> 22 U.S.C. § 7105(b)(1)(B). The term “victim of a severe form of trafficking in persons” is defined as a person who has been subjected to a commercial sex act induced by force, fraud, or coercion and who is either under eighteen years of age or the subject of a certification under section 7105(b)(1)(E). *Id.* §§ 7102(8), 7105(b)(1)(C).

<sup>196</sup> *Id.* §§ 7102(8), 7105(b)(1)(C); see also WYLER & SISKIN, *supra* note 27, at 35. Between 2001 and 2008, the Department of Health and Human Services certified 1696 people, 162 of whom were minors. WYLER & SISKIN, *supra* note 27, at 35. The Office of Refugee Resettlement also funds and facilitates several programs “to help refugees’ economic

Individual victims of trafficking in other countries receive assistance as well.<sup>197</sup> The TVPA provides financial support to NGOs that assist victims in other countries through social services and legal aid.<sup>198</sup> It also entitles victims to receive assistance in repatriation or reintegration through treatment, education, and training.<sup>199</sup>

Finally, the TVPA has a provision for the certification of trafficking victims who are in the country illegally and cooperate in the prosecution of traffickers.<sup>200</sup> Trafficking victims who choose to testify and who are deemed “victim[s] of a severe form of trafficking in persons” are allowed to remain in the United States during the prosecution of the trafficker under a T-visa or upon the determination of the Department of Homeland Security.<sup>201</sup>

Although the TVPA is a positive step for the United States in assisting trafficking victims, it fails to take a gender and rights approach to the problem.<sup>202</sup> Instead, the legislation maintains the migrant model that requires that trafficking victims provide legal cooperation before being granted protection and assistance.<sup>203</sup> A panoply of federally funded programs and services are available only after cooperation is established.<sup>204</sup> The lure of receiving a T-visa and aid puts trafficked women in precarious and dangerous predicaments.<sup>205</sup> Trafficked women who choose to cooperate with U.S. law enforcement risk violent reprisals.<sup>206</sup> Trafficked

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and social self-sufficiency in their new homes in the United States,” including temporary housing, independent living skills, cultural orientation, transportation needs, education programs, and legal assistance to the certified trafficked persons. *Id.* (internal quotation marks omitted).

<sup>197</sup> 22 U.S.C. § 7105(a)(1).

<sup>198</sup> *Id.* § 7105(a)(1)(B)–(D).

<sup>199</sup> *Id.* § 7105(a)(1)(E).

<sup>200</sup> *Id.* § 7105(b)(1)(E)(i)(I).

<sup>201</sup> *Id.* § 7105 (b)(1)(E)(i). T-visa certification entails cooperation in the investigation which includes: “(I) identification of a person or persons who have committed severe forms of trafficking in persons; (II) location and apprehension of such persons; (III) testimony at proceedings against such persons; or (IV) responding to and cooperating with requests for evidence and information.” *Id.* § 7105 (b)(1)(E)(iii). “Assistance to investigation” is clarified in section 7105 (b)(1)(E)(iv).

<sup>202</sup> *See* 22 U.S.C. § 7105.

<sup>203</sup> *See id.* § 7105 (b)(1)(E)(i).

<sup>204</sup> *See* WYLER & SISKIN, *supra* note 27, at 34–37. The Department of Justice provides aid to “precertification” trafficked victims with assistance for comprehensive services. *Id.* at 36. The vocational and legal needs of trafficking victims are addressed as well. *Id.* at 37. The Legal Services Corporation assists trafficking persons who have legal problems. *Id.* at 33.

<sup>205</sup> *See* Tiefenbrun, *supra* note 3, at 161.

<sup>206</sup> *See id.* at 161. The trafficked women who assist in prosecution are vulnerable to government manipulation and risk their lives. *See id.* Juveniles also are coerced into testifying against potential pimps and traffickers by use of material witness holds. *See* Geneva O.

women who do not cooperate face detention and deportation, regardless of whether or not they are convicted for working in the illegal sex trade.<sup>207</sup> Once deported, they face a ten-year ban on reentering the United States.<sup>208</sup> Even trafficked women who attempt to stay in the United States and cooperate with law enforcement may not be granted a T-visa.<sup>209</sup> The number of T-visas granted by the U.S. government is limited: as of 2008, the Department of Homeland Security received 394 applications and only granted 247 T-visas.<sup>210</sup> The Immigration and Customs Enforcement agency, meanwhile, may only issue up to 5000 special visas.<sup>211</sup> In other words, very few trafficked women will ever be able to take advantage of the special immigrant visa or be able to “cooperate” with the Department of Homeland Security within the meaning of the TVPA.<sup>212</sup> The harshness of this migrant model leaves trafficked women few choices: either face deportation or cooperate and risk retaliation, both of which frustrate prosecution efforts.<sup>213</sup>

In contrast to other international migrant approaches that criminalize victims unless they cooperate, the United Nations takes a more progressive stance and recognizes trafficked women as victims and not criminal co-conspirators.<sup>214</sup> The United Nations has acknowledged the plight of trafficked women by authoring principles and guidelines and

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Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471, 497, 500 (2008).

<sup>207</sup> See Wendy M. Gonzalez, *Human Trafficking: Criminalization of Victims in the Sex Industry*, 11 BUFF. WOMEN'S L.J. 19, 23–24 (2002).

<sup>208</sup> See 8 U.S.C. § 1101 (2006); see also DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 10 (2007). Kanstroom notes, “Since 1997, more than 300,000 people have been deported from the United States because of post-entry criminal conduct . . .” KANSTROOM, *supra*, at 10. See generally Michael O’Connor & Celia Rumann, *The Death of Advocacy in Re-Entry After Deportation Cases*, CHAMPION MAG., Nov. 1999, <http://www.criminaljustice.org/public.nsf/ChampionArticles/99nov03?OpenDocument> (noting the changes in the law that force quick and problematic guilty pleas for immigrants who have a history of being deported from the United States, reenter the country, and face up to twenty year imprisonment penalties).

<sup>209</sup> See *Attorney General’s Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2008*, U.S. DEPARTMENT OF STATE, 35 (2009) [hereinafter *Attorney General Report*], <http://www.state.gov/documents/organization/125840.pdf>.

<sup>210</sup> See *id.*

<sup>211</sup> See 8 U.S.C. §§ 1101(a)(15)(s)(i)(I), 1153(b)(4) (2006).

<sup>212</sup> See *id.*

<sup>213</sup> See KANSTROOM, *supra* note 208, at 10.

<sup>214</sup> See Special Rapporteur on Trafficking in Persons, Especially Women and Children, *Integration of Human Rights of Women and the Gender Perspective*, Comm’n on Human Rights, U.N. Doc. E/CN.4/2005/71, ¶ 55 (Dec. 22, 2004) (by Sigma Huda) [hereinafter *Integration of Human Rights of Women and the Gender Perspective*].

establishing a Special Rapporteur on the trafficking of women and children.<sup>215</sup> These guidelines follow the gender and rights model, and emphasize the promotion and protection of the human rights of trafficked women.<sup>216</sup> The principles include decriminalizing the illegal entry into countries as a trafficked person and banning the practice of confining trafficked women in detention facilities.<sup>217</sup>

The United Nations report additionally recommends that trafficked persons be protected from further exploitation and have access to adequate physical and psychological care.<sup>218</sup> Rather than endorse the U.S. response that seeks cooperation but does not initially provide a support apparatus, the United Nations recognizes that law enforcement can assist trafficked women by providing shelter, protection from traffickers, and travel assistance to home countries.<sup>219</sup> In addition, the United Nations drafted the Optional Protocol to the Convention on the Rights of the Child in 2000 that addressed the sale of children, child prostitution, and child pornography.<sup>220</sup> The Protocol requests that all state parties take all necessary steps to strengthen international cooperation for the prevention, detection, investigation, prosecution, and punishment of persons involved in those activities.<sup>221</sup> For these reasons, the United Nations aims to shift policy away from the U.S. model

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<sup>215</sup> *Id.*

<sup>216</sup> See U.N. High Comm'r for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Rep. of the U.N. High Comm'r for Human Rights to the Econ. and Soc. Council*, U.N. Doc. E/2002/68/Add.1 (May 20, 2002).

<sup>217</sup> *Id.* at 3 ("Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons."). Other principles include:

Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centers, other detention facilities or vagrant houses.

*Id.* at 10.

<sup>218</sup> *Id.* at 10–11.

<sup>219</sup> *Id.* at 9–10.

<sup>220</sup> Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex I, U.N. GAOR, Supp. No. 49 (Vol. III), U.N. Doc. A/RES/54/263, at 222 (May 25, 2000).

<sup>221</sup> *Id.* at 222, 228–29.

that treats trafficked women and children as a “law and order problem” and penalizes victims with prostitution charges.<sup>222</sup>

### B. *Problems with Prosecuting Traffickers*

Global law enforcement numbers demonstrate that only a small percentage of traffickers are prosecuted.<sup>223</sup> In the United States, prosecuting human trafficking has become a mandate for law enforcement agencies.<sup>224</sup> Federal law enforcement has launched numerous trafficking initiatives to battle the mounting problem of human trafficking, with an emphasis on child sex trafficking.<sup>225</sup> In June 2003, the FBI, the DOJ Child Exploitation and Obscenity Section (CEOS), and the National Center for Missing and Exploited Children (NCMEC) launched the Innocence Lost National Initiative.<sup>226</sup> Innocence Lost addresses the domestic sex trafficking of children by coordinating state and federal law enforcement agencies, prosecutors, and social service providers.<sup>227</sup> The initiative was responsible for the arrest of 356 individuals and the recovery of twenty-one children in 2008.<sup>228</sup> In addition, U.S. Immigration and Customs Enforcement (ICE), the agency in charge of enforcing the TVPA, has the ability to arrest and hold traffickers under immi-

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<sup>222</sup> See Integration of Human Rights of Women and the Gender Perspective, *supra* note 214, at 6 (dismissing the sole use of the “law and order problem” in aiding sex-trafficking victims).

<sup>223</sup> See UNICEF, *supra* note 52, at 16. UNICEF estimates that nearly one million children are bought and sold each year in the sex trafficking industry. See *id.* at 20. Yet, in 2008, states initiated only 5212 prosecutions and garnered only 2983 convictions. See *Trafficking in Persons Report*, *supra* note 1, at 47.

<sup>224</sup> See Attorney General Report, *supra* note 209, at 1.

<sup>225</sup> See *id.*

<sup>226</sup> See *id.* at 36.

<sup>227</sup> *Id.*

<sup>228</sup> See *id.* The FBI also launched its own initiative, the Human Trafficking Initiative, in 2005 to further coordinate local law enforcement, NGO, and community group responses to human trafficking problems. *Id.* As part of the initiative, FBI field offices determine, via a threat assessment, the existence and scope of the trafficking problem in their region. *Id.* The field offices also participate in an anti-trafficking task force and establish and maintain relationships with local NGOs and community organizations. *Id.* The initiative focuses on conducting victim-centered investigations and reporting significant case developments. *Id.* In 2008, the FBI made 139 human trafficking arrests and garnered ninety-four convictions. *Id.*

gration charges.<sup>229</sup> In 2008, ICE investigated 432 human trafficking claims and arrested 128 persons for sex exploitation.<sup>230</sup>

Though federal law enforcement has made strides in identifying and containing this problem, local law enforcement agencies play the primary role in combating human sex trafficking because the majority of arrests for human trafficking are made at the state level.<sup>231</sup> Between 2007 and 2008, the DOJ noted that state law enforcement officials arrested sixty-eight percent of traffickers.<sup>232</sup> Consequently, the training of local law enforcement is critical and is a central component of combating sex trafficking, both nationally and internationally.<sup>233</sup> In recognition of this fact, the TVPA authorizes training for law enforcement to better identify victims of trafficking.<sup>234</sup>

Forty-two states have laws combating human trafficking, yet no uniform approach to prosecution or victim assistance exists.<sup>235</sup> Some states have no laws that identify human trafficking as a crime, whereas other states consider trafficking a felony and have dedicated trafficking task forces.<sup>236</sup> Eleven states have enacted laws providing victim assistance and protection.<sup>237</sup> Nine states provide mandatory restitution for trafficking victims.<sup>238</sup> Five states require asset forfeiture.<sup>239</sup> Even so, the ex-

<sup>229</sup> See *Attorney General Report*, *supra* note 209, at 38. The goal of ICE is “to disrupt and dismantle domestic and international criminal organizations that engage in human trafficking by utilizing all ICE authorities and resources in a cohesive global enforcement response.” *Id.* at 37.

<sup>230</sup> *Id.* The DOJ also focuses on prosecuting sex trafficking. In 2008, it investigated 183 trafficking cases, arrested eighty-two persons, and obtained seventy-seven convictions. *Id.* at 41–42. Fifty of the seventy-seven convictions were for sex trafficking. *Id.* at 42.

<sup>231</sup> See KYCKELHAHN ET AL., *supra* note 28, at 10.

<sup>232</sup> See *id.* The majority of these arrests involved sex trafficking. *Id.*

<sup>233</sup> See Mike Dottridge, *Child Trafficking for Sexual Purposes*, ECPAT INT’L, 22–23 (2008), [http://www.ecpat.net/WorldCongressIII/PDF/Publications/Trafficking/Thematic\\_Paper\\_Trafficking\\_ENG.pdf](http://www.ecpat.net/WorldCongressIII/PDF/Publications/Trafficking/Thematic_Paper_Trafficking_ENG.pdf). Internationally, education and training initiatives have increased the arrest and prosecution of sex traffickers. *Id.* at 22.

<sup>234</sup> 22 U.S.C. § 7105(c) (4) (2006).

<sup>235</sup> See *Enacted Laws by State*, CTR. FOR WOMEN POL’Y STUD., <http://www.centerwomenpolicy.org/programs/trafficking/map/statelist.cfm?linktype=1> (last visited Jan. 20, 2011) (listing AK, AR, AZ, CA, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OK, OR, PA, RI, SC, TN, TX, UT, WA, and WI as states that have laws combating human trafficking).

<sup>236</sup> See *Report Card on State Action to Combat International Trafficking*, CTR. FOR WOMEN POL’Y STUD., 5 (May 2007), <http://www.centerwomenpolicy.org/documents/ReportCardonStateActiontoCombatInternationalTrafficking.pdf> [hereinafter *Report Card on State Action to Combat International Trafficking*].

<sup>237</sup> See *id.* at 7 (CA, CT, FL, ID, IL, IN, IA, MN, MO, NJ, and WA).

<sup>238</sup> See *id.* at 12, 16, 30, 32, 34, 36, 56, 66, 82 (AZ, CA, ID, IL, IN, IA, MO, NJ, and PA).

<sup>239</sup> See *id.* at 32, 52, 66, 82, 100 (IL, MN, NJ, PA, and WA).

istence of trafficking laws does not guarantee enforcement.<sup>240</sup> States are reluctant to prosecute trafficking crimes because of the resources required to prove the legal requirements of force, fraud, or coercion.<sup>241</sup> To prosecute traffickers effectively, there must be a more comprehensive and targeted approach that encompasses international, federal, and state legal apparatuses.

### C. U.S. Sex Offender Laws

In addition to the TVPA, the United States uses sex offender laws to combat sex trafficking.<sup>242</sup> U.S. sex offender laws seek to decrease recidivism dramatically among sex offenders.<sup>243</sup> Though the sex offender category is rife with misunderstanding, the application of sex offender laws to sex trafficking could have a deterrent effect.<sup>244</sup> Sex offender laws apply to individuals who commit sex crimes, including child molestation, incest, exhibitionism, rape, and voyeurism.<sup>245</sup> Most state and fed-

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<sup>240</sup> See Heiges, *supra* note 8, at 437.

<sup>241</sup> *Id.*; see also Cal. State Assemb. Bill No. 22, 2005–2006 Sess. (2005), available at [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_0001-0050/ab\\_22\\_bill\\_20050921\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_22_bill_20050921_chaptered.pdf).

Existing law establishes the offenses of slavery and involuntary servitude. Existing law also makes it an offense to entice an unmarried female minor for purposes of prostitution, as specified, or to aid or assist with the same, or to procure by fraudulent means, any female to have illicit carnal connection with any man. Existing law also makes it a crime to take away any minor as specified, for purposes of prostitution. This bill would establish the crime of trafficking of a person for forced labor or services or for effecting or maintaining other specified felonies, and the crime of trafficking of a minor for those purposes, punishable by terms of imprisonment in the state prison for 3, 4, or 5 years, or 4, 6, or 8 years, respectively. The bill would permit a victim of trafficking to bring a civil action for actual damages, provide for restitution and punitive damages, and would establish a victim-caseworker privilege. By creating new crimes, this bill would impose a state-mandated local program.

*Id.*; see also *Report Card on State Action to Combat International Trafficking*, *supra* note 236, at 7. California leads the nation in trafficking law enforcement and victim assistance. See *id.* The Center for Women Policy Studies, which assesses state responses to trafficking, awarded California a grade of B in the area of “Victim Protection and Assistance.” *Report Card on State Action to Combat International Trafficking*, *supra* note 236, at 7. Three states received a grade of B (no A grades were achieved) for victim assistance and only seventeen states received a grade of B- or above in the category of “Criminalization Statutes.” *Id.*

<sup>242</sup> See, e.g., N.J. ATT’Y GEN., ATTORNEY GENERAL GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS I (1998) (revised Feb. 2007) [hereinafter ATTORNEY GENERAL GUIDELINES].

<sup>243</sup> See *No Easy Answers*, *supra* note 12, at 4, 59–61.

<sup>244</sup> See *id.* at 59–60.

<sup>245</sup> See R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1154–55 (2005); Gina Robertiello & Karen J. Terry, *Can We Profile Sex Offenders? A*

eral laws outline multiple categories of sex offenders, and an offender's punishment is dictated by the category of the crime.<sup>246</sup>

U.S. sex offender laws provide a model for the creation of an international trafficking registry that would both increase public support for the prosecution of trafficking offenders and potentially deter sex trafficking on a global scale.

### 1. Sex Offender Registration

Mandatory sex offender registration became a state and federal mandate in 1994 when Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Jacob Wetterling Act).<sup>247</sup> The Jacob Wetterling Act required states to create a sex offender registry.<sup>248</sup> Sex offenders who failed to register faced criminal penalties.<sup>249</sup> In 1996, Congress amended the Act to include a

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*Review of Sex Offender Typologies*, 12 AGGRESSION & VIOLENT BEHAV. 508, 509 (2007). The definition of rape includes stranger and acquaintance rape. TK Logan et al., *Differential Characteristics of Intimate Partner, Acquaintance, and Stranger Rape Survivors Examined by a Sexual Assault Nurse Examiner (SANE)*, 22 J. INTERPERSONAL VIOLENCE 1066, 1067 (2007). Rape is also further defined to include date rape, marital rape, and power rape. ENCYCLOPEDIA OF RAPE 54, 123, 166 (Merril D. Smith ed., 2004).

<sup>246</sup> See ENCYCLOPEDIA OF RAPE, *supra* note 245, at 509 (providing an overview and critique of U.S. federal and state sex offender laws that impose post-incarceration restrictions). For example, the state of New Jersey divides sex offenders into three risk assessment categories: (1) low risk of re-offense; (2) moderate risk of re-offense; and (3) high risk of re-offense. N.J. STAT. ANN. § 2C:7-8 (West 2007). If an offender is deemed a high-risk offender, the local prosecutor must notify law enforcement, community organizations, schools, and the public. ATTORNEY GENERAL GUIDELINES, *supra* note 242, at 23. High-risk sex offenders must also register on a publically accessible internet website. *Id.* For moderate-risk sex offenders, the local prosecutor must notify local law enforcement, local educational institutions, licensed daycare centers, and licensed summer camps. *Id.* at 22. The low-risk sex offenders must register with local law enforcement. *Id.* See generally Chiraag Bains, *Next Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L. L. REV. 483 (2007) (discussing constitutional challenges to sex offender laws).

<sup>247</sup> Pub. L. No. 103-322, 108 Stat. 2038 (codified as amended at 42 U.S.C. § 14071 (2006)). The Jacob Wetterling Act was enacted, partly in response to the abduction, sexual assault, and murder of child victims Jacob Wetterling and Megan Kanka. *Who We Are: History*, JACOB WETTERLING RES. CTR., <http://www.jwrc.org/WhoWeAre/History/tabid/128/Default.aspx> (last visited Jan. 20, 2011). In 1989, a masked gunman abducted and murdered eleven-year-old Jacob Wetterling. *Id.* Then, in 1994, a convicted child sex offender and neighbor raped and killed seven-year-old Megan Kanka. *Our Mission*, MEGAN NICOLE KANKA FOUND., <http://www.megannicolekankafoundation.org/mission.htm> (last visited Jan 20, 2011). The parents of both children demanded stricter laws relating to the public knowledge of sex offenders and to the release of sex offenders into communities. See Kevin Coyne, *For Megan's Dad, a Way to Make an Impact, Again*, N.Y. TIMES, Mar. 12, 2009, at NJ1.

<sup>248</sup> 42 U.S.C. § 14071(a)(1)(A).

<sup>249</sup> *Id.* § 14071(d).



public notification system commonly known as Megan's Law.<sup>250</sup> In 2005, Congress amended the Act again to include the Dru Sjodin National Sex Offender Public Website, a publicly accessible national sex offender registry.<sup>251</sup> The national registry provides quicker and easier access to states' individual sex offender registry websites.<sup>252</sup>

Sex offender legislation changed again in 2006 with the passage of the Adam Walsh Act (AWA).<sup>253</sup> The AWA comprehensively restructured sex offender laws.<sup>254</sup> The AWA increased registration requirements and

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<sup>250</sup> See Emily White, Note, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1788 (2008) (noting that Megan's law "removed the requirement that states treat registry data as private information" and "mandated that state law enforcement agencies release sex offender registry information necessary to protect the public"). The amended Act also created a national FBI database of registered sex offenders that provided information to the public. *Id.*

<sup>251</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 120, 120 Stat. 587, 597 (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C. (2006)). The Act was enacted partly in response to the 2003 torture and murder of Dru Sjodin by a sex offender who had been recently released from prison. Lara Geer Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 475-76 (2008). The sex offender who murdered Sjodin was not a sex offender registry participant. *Id.* at 475.

<sup>252</sup> See *Dru Sjodin National Sex Offender Public Website*, U.S. DEPARTMENT OF JUSTICE, <http://www.nsopw.gov/Core/Conditions.aspx> (last visited Jan. 20, 2011). The Dru Sjodin National Sex Offender Public Website, coordinated by the U.S. Department of Justice, is a cooperative effort between the state agencies hosting public sexual offender registries and the federal government. *Id.* This website is a search tool allowing a user to submit a single national query to obtain information about sex offenders through a number of search options. *Id.*

<sup>253</sup> 42 U.S.C. § 16901. After being kidnapped from a mall in 1981, Adam Walsh's remains were found two weeks later. *Adam Walsh Act Becomes Law*, AMERICA'S MOST WANTED (July 25, 2008), [http://www.amw.com/features/feature\\_story\\_detail.cfm?id=1206](http://www.amw.com/features/feature_story_detail.cfm?id=1206). Adam's father, John Walsh, became a television show host and advocate for tracking violent criminals. *Id.* On the twenty-fifth anniversary of Adam's disappearance, President Bush signed the Act into law. *Id.*

<sup>254</sup> Memorandum from Amy Baron-Evans & Sara Noonan, Nat'l Sentencing & Res. Counsel, to Defenders (Oct. 19, 2006), available at [http://www.fd.org/pdf\\_lib/Adam%20Walsh%20MemoPt%201.pdf](http://www.fd.org/pdf_lib/Adam%20Walsh%20MemoPt%201.pdf). Baron-Evans and Noonan summarized the major legislative changes:

[The AWA] established a complex . . . national sex offender registry law . . . and made significant changes to sexual abuse, exploitation and transportation crimes, including creating new substantive crimes, expanding federal jurisdiction over existing crimes, and increasing (often by a factor of two or greater) statutory minimum and/or maximum sentences. The Act did away with the statute of limitations for most sex crimes, placed . . . restrictions on discovery in child pornography cases, created new barriers to and strict conditions for pretrial release, added searches without probable cause as a discretionary condition of probation and supervised release for persons required to register as sex offenders, expanded the government's authority to take DNA from persons not convicted of any crime, and added a new provision for civil

sex offender classifications.<sup>255</sup> It places states under a federal mandate to register sex offenders and to maintain updated information on where the offender lives, works, or attends school.<sup>256</sup> Title I of the AWA created the Sex Offender Registration and Notification Act (SORNA).<sup>257</sup> SORNA established new sex offender registration and community notification standards.<sup>258</sup> It allows the public to readily research local sex offenders on the federal database.<sup>259</sup> SORNA's community notification standards require jurisdictions to inform schools, community organizations, and other entities that work with minors on sex offenders' whereabouts including their homes, schools, and workplaces.<sup>260</sup> Knowingly failing to register or update under SORNA could lead to a fine or imprisonment of up to ten years.<sup>261</sup>

AWA expanded the classification of a sex crime to include "a criminal offense that has an element involving a sex act or sexual contact with another."<sup>262</sup> The expansion requires juvenile sex offenders to register as sex offenders if the offense occurred when the offender was fourteen years old or older.<sup>263</sup> It also creates a three-tier registration system where the registration length for offenders is dependent upon the seriousness of their offenses.<sup>264</sup> Finally, the Act extended the sex offender definition to include sex crimes against children, including sex trafficking.<sup>265</sup>

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commitment of "sexually dangerous persons." It also enacted certain victim rights in state prisoner habeas proceedings and a right of sex crime victims to receive damages of \$150,000 in civil actions.

*Id.* at 1.

<sup>255</sup> *Id.* at 12.

<sup>256</sup> 42 U.S.C. §§ 16912(a), 16913(a).

<sup>257</sup> *Id.* § 16901.

<sup>258</sup> *Id.* § 16918. SORNA requires publicly accessible sex offender information on the internet. *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* § 16921. The community notification provision requires that, "immediately after a sex offender registers or updates a registration, an appropriate official . . . shall provide the information in the registry" to the Attorney General, local law enforcement agencies, jurisdictions where the sex offender resides, works, or is a student, social services entities, volunteer organizations, and persons who request such notification pursuant to procedures established by the jurisdiction. *Id.* § 16921(b).

<sup>261</sup> 18 U.S.C. § 2250(a)(3) (2006).

<sup>262</sup> 42 U.S.C. § 16911(5)(A)(1).

<sup>263</sup> *Id.* § 16911(8).

<sup>264</sup> *Id.* § 16911 (including relevant definitions such as the Amie Zyla expansion of sex offender definition and expanded inclusion of child predators).

<sup>265</sup> *Id.* § 16911(3)(A)(i).

## 2. Legal Challenges to Sex Offender Registries

Researchers and victims' advocates question the efficacy of sex offender categorizations.<sup>266</sup> Sex offender registration laws are most commonly challenged as *ex post facto* laws.<sup>267</sup> If a statute is retroactive and makes actions criminal that were not criminal during the commission of the offense, it violates the Ex Post Facto Clause of the Constitution.<sup>268</sup> Courts, though, have upheld sex offender registration laws that apply retroactively, holding that state control of future crimes is not a violation of a sex offender's constitutional rights.<sup>269</sup>

For a registration law to violate the Ex Post Facto Clause, it must meet the two-part test enunciated by Justice Thurgood Marshall in *Weaver v. Graham*.<sup>270</sup> First, the law "must be retrospective, that is, it must apply to events occurring before its enactment," by altering the legal consequences of events.<sup>271</sup> Second, the law must also disadvantage the offender.<sup>272</sup> The new law must assign a more disadvantageous criminal or penal consequence to an act than did the law in place when the act occurred.<sup>273</sup> In addition, to violate the Ex Post Facto Clause, the penalizing mechanism established by the law must be criminal and punitive in nature.<sup>274</sup> In *Kennedy v. Mendoza-Martinez*, the U.S. Supreme Court delineated seven criteria in determining whether a statute is punitive and thus potentially unconstitutional.<sup>275</sup>

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<sup>266</sup> Michael P. Griffin & Desirée A. West, Student Article, *The Lowest of the Low? Addressing the Disparity Between Community View, Public Policy, and Treatment Effectiveness for Sex Offenders*, 30 LAW & PSYCHOL. REV. 143, 145 (2006).

<sup>267</sup> See *id.* at 164.

<sup>268</sup> U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1.

<sup>269</sup> See *Smith v. Doe I*, 538 U.S. 84, 86–87 (2003); *State v. Noble*, 829 P.2d 1217, 1221–24 (Ariz. 1992); *In re Alva*, 92 P.3d 311, 312–17 (Cal. 2004); *People v. Castellanos*, 982 P.2d 211, 218 (Cal. 1999); see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (discussing criteria for upholding retroactive laws).

<sup>270</sup> *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 30 n.13.

<sup>274</sup> *United States v. Ward*, 448 U.S. 242, 248–49 (1980). In *United States v. Ward*, the Supreme Court announced a two-part test to determine whether a claim is criminal or civil in nature. *Id.* at 248–49. The court must "determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Id.* at 248. Where Congress intended a civil remedy, the court must determine "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Id.* at 248–49.

<sup>275</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168. The Court reviewed the criteria for scrutinizing whether a statute is punitive in nature and therefore unconstitutional:

Courts look to the *Mendoza-Martinez* criteria when determining whether a sex offender registration law violates the offender's constitutional rights.<sup>276</sup> In *Kansas v. Hendricks*, the U.S. Supreme Court upheld a Kansas civil commitment law under a *Mendoza-Martinez* analysis, finding the law was not punitive in nature.<sup>277</sup> In *Hendricks*, a sex offender who completed his prison sentence, but whom the Kansas courts then committed civilly, challenged the commitment.<sup>278</sup> The Court concluded that the statutory purpose of the commitment law—to treat dangerous sex offenders and protect society—was civil and non-punitive in nature.<sup>279</sup>

Alaska's Sex Offender Registration Act withstood a similar constitutional challenge.<sup>280</sup> The Alaska law required all sex offenders to register, including offenders whose crimes predated the act.<sup>281</sup> The Alaska Department of Public Safety maintained the registry and offenders who failed to register faced criminal prosecution.<sup>282</sup> In *Smith v. Doe*, the U.S. Supreme Court held that the purpose of the legislation was civil and not punitive.<sup>283</sup> The Court further cited *Hendricks* in determining that the law had a legitimate, non-punitive governmental objective.<sup>284</sup> The Court finally reviewed the *Mendoza-Martinez* factors and found that the law required no physical or affirmative restraints, that offenders were

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The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

*Id.* (footnotes omitted).

<sup>276</sup> See *Smith*, 538 U.S. at 86–87; *Noble*, 829 P.2d at 1221–24; *Alva*, 92 P.3d at 312–17; *Castellanos*, 982 P.2d at 218; see also Griffin & West, *supra* note 266, at 161 (discussing courts' reliance on *Mendoza-Martinez* criteria).

<sup>277</sup> *Kansas v. Hendricks*, 521 U.S. 346, 362–63, 371 (1997).

<sup>278</sup> *Id.* at 350.

<sup>279</sup> *Id.* at 360.

<sup>280</sup> See Griffin & West, *supra* note 266, at 161.

<sup>281</sup> *Smith*, 538 U.S. at 105–06.

<sup>282</sup> *Id.* at 90–91.

<sup>283</sup> *Id.* at 92.

<sup>284</sup> *Id.* at 93.

free to pursue jobs or change residences, and that the legislation's deterrent effect did not make it punitive.<sup>285</sup>

Federal legislation has also been challenged under the Ex Post Facto Clause.<sup>286</sup> Courts have determined that the AWA, and SORNA in particular, are not additional punishments inflicted upon sex offenders.<sup>287</sup> Even though SORNA's registration requirements apply to sex offenders whose offenses took place prior to its enactment, it does not violate the Ex Post Facto Clause because registration is not punitive: registration requirements are not historically regarded as punishment, they do "not 'impose [] an affirmative disability or restraint,'" and they do "not 'promote[] traditional aims of punishments.'"<sup>288</sup> Rather, courts note that registration "has a 'rational connection to a nonpunitive purpose:' and is not 'excessive with respect to this [nonpunitive] purpose.'"<sup>289</sup> Although SORNA requires detailed personal information and requires offenders to appear in person (so that the jurisdiction can take a personal photograph and verify information), SORNA is not a criminal punishment under ex post facto methodology.<sup>290</sup>

There has been one instance, however, where an individual provision of SORNA was found to be punitive.<sup>291</sup> In Michigan, the Attorney General sought to prosecute an offender who failed to register or report his travel, actions that occurred before the enactment of the AWA.<sup>292</sup> In the ensuing legal challenge, the Federal District Court for the Southern Division of Michigan held that the ten year penalty for failing to register for travel that fell outside the enforcement period violated the Ex Post Facto Clause.<sup>293</sup>

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<sup>285</sup> *Id.* at 100, 102.

<sup>286</sup> *See* United States v. Comstock, 130 S.Ct. 1949, 1955 (2010). Although an extensive discussion of civil commitment under the AWA is beyond the scope of this article, the U.S. Supreme Court recently decided *Comstock*, in which prisoners challenged the federal authority to authorize civil commitments. *Id.* The Court held that Congress had the constitutional authority to enact 18 U.S.C. § 4248, which allows court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial. *Id.* at 1954.

<sup>287</sup> United States v. Madera, 474 F. Supp. 2d 1257, 1265 (M.D. Fla. 2007), *rev'd*, 528 F.3d 852 (11th Cir. 2008).

<sup>288</sup> *Id.* at 1263–64 (citing *Smith*, 538 U.S. at 97).

<sup>289</sup> United States v. Samuels, 543 F. Supp. 2d 669, 676 (E.D. Ky. 2008).

<sup>290</sup> United States v. Mason, 510 F. Supp. 2d 923, 930 (M.D. Fla. 2007).

<sup>291</sup> United States v. Smith, 481 F. Supp. 2d 846, 853–54 (E.D. Mich. 2007).

<sup>292</sup> *Id.* at 848.

<sup>293</sup> *Id.* at 853–54.

SORNA remains good law even as it continues to be constitutionally challenged.<sup>294</sup> The legal challenges to sex offender registries demonstrate that state legislation and sweeping federal legislation such as the AWA must be crafted with a civil, non-punitive purpose and that enforcement must fall within the statutory guidelines.<sup>295</sup>

#### V. THE NEED FOR AN INTERNATIONAL SEX TRAFFICKING REGISTRY

Applying sex offender laws to sex traffickers on an international scale will further the international cooperation critical to combating increasingly organized trafficking enterprises.<sup>296</sup> The consequences of sex trafficking penetrate international borders and creating a trafficking registry database will help enforce trafficking laws and control the global flow of exploited women and children.<sup>297</sup>

The use of sex offender registries in the United States has proved effective in deterring repeat offenders.<sup>298</sup> As demonstrated, the registry requirements have withstood constitutional challenges.<sup>299</sup> An international sex trafficker registry based on the U.S. model would be both

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<sup>294</sup> See *United States v. Sallee*, No. CR-07-152-L, 2007 WL 3283739, at \*3 (W.D. Okla. Aug. 13, 2007); *United States v. Heriot*, Cr. No. 3:07-323, 2007 WL 2199516, at \*2 (D.S.C. July 27, 2007); *United States v. Muzio*, No. 4:07CR179 CDP, 2007 WL 2159462, at \*7 (E.D. Mo. July 26, 2007); *United States v. Barnes*, No. 07 Cr. 187, 2007 WL 2119895, at \*6 (S.D.N.Y. July 23, 2007); *United States v. Smith*, 528 F. Supp. 2d 615, 619–20 (S.D.N.Y. 2007); *United States v. Kapp*, 487 F. Supp. 2d 536, 542–43 (M.D. Pa. 2007); *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481, at \*5–6 (W.D. Okla. Feb. 7, 2007); *Madera*, 474 F. Supp. 2d at 1265.

<sup>295</sup> *Smith*, 538 U.S. at 92.

<sup>296</sup> See 42 U.S.C. §§ 16920, 14071. See generally Ad Hoc Comm., *supra* note 20 (convention on the “protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children”); MIKO & PARK, *supra* note 4 (studying sex trafficking issues in the United States and international community); Green, *supra* note 1 (detailing how exceptional measures must be taken to eradicate harm of child sex trafficking); *Annual Report 2000: Trafficking in Human Beings*, *supra* note 76 (discussing Europol’s collaborations with member states in combating sex trafficking); *New Global Treaty*, *supra* note 27 (discussing ways the United Nations will combat sex trafficking); U.N. Conference Report, *supra* note 72 (discussing trafficking in persons and peacekeeping operations).

<sup>297</sup> See *New Global Treaty*, *supra* note 27.

<sup>298</sup> See *No Easy Answers*, *supra* note 12, at 4, 59–61.

<sup>299</sup> See *United States v. Sallee*, No. CR-07-152-L, 2007 WL 3283739, at \*3 (W.D. Okla. Aug. 13, 2007); *United States v. Heriot*, Cr. No. 3:07-323, 2007 WL 2199516, at \*2 (D.S.C. July 27, 2007); *United States v. Muzio*, No. 4:07CR179 CDP, 2007 WL 2159462, at \*7 (E.D. Mo. July 26, 2007); *United States v. Barnes*, No. 07 Cr. 187, 2007 WL 2119895, at \*6 (S.D.N.Y. July 23, 2007); *United States v. Smith*, 528 F. Supp. 2d 615, 619–20 (S.D.N.Y. 2007); *United States v. Kapp*, 487 F. Supp. 2d 536, 542–43 (M.D. Pa. 2007); *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481, at \*5–6 (W.D. Okla. Feb. 7, 2007); *United States v. Madera*, 474 F. Supp. 2d 1257, 1265 (M.D. Fla. 2007), *rev’d*, 528 F.3d 852 (11th Cir. 2008).

legal and in line with the strategies endorsed by the United Nations.<sup>300</sup> There is no doubt that a sex trafficking registry would be part of the stronger and more unified international enforcement effort for which the United Nations is calling.<sup>301</sup>

The trafficking registry should contain pertinent information regarding known traffickers based on warrants issued by judicial bodies or on previous convictions.<sup>302</sup> This information sharing will assist in the worldwide prosecution of traffickers and help states seeking extraterritorial avenues to enforce trafficking laws.<sup>303</sup> Thus, a trafficking registry will provide additional information that will aid states attempting to prosecute actions that occur abroad, such as child sex tourism.<sup>304</sup>

A sex trafficking registry would be another weapon to assist Interpol and national and local agencies with the enforcement of international laws against sex trafficking and child sex tourism.<sup>305</sup> Already, Interpol has placed an emphasis on information sharing between law

<sup>300</sup> See *New Global Treaty*, *supra* note 27.

<sup>301</sup> See Integration of Human Rights of Women and the Gender Perspective, *supra* note 214, at 14–15; *supra*, notes 217–25 and accompanying text.

<sup>302</sup> See 42 U.S.C. § 16911 (2006); O’Brian et al., *supra* note 9, at 40; *supra* note 252 and accompanying text. Information provided for trafficking registries should meet an evidentiary standard or be reviewed by a judicial body. False allegations and incorrect information could be detrimental not only to the persons accused, but also to the integrity of the registry.

<sup>303</sup> See O’Brian et al., *supra* note 9, at 35–36, 50.

There are three types of extraterritorial jurisdiction. Some countries apply extraterritorial jurisdiction as a general principle to offences committed by their nationals abroad. The jurisdiction can be applied to a large number of offences. These countries do not need to have special provisions for crimes against children; the jurisdiction to try offenders for crimes committed abroad is simply there. Other countries already have the capacity to prosecute for offences committed abroad, but have legislated to facilitate the prosecution of offences against children. And some countries have introduced specific legislation allowing the use of extraterritorial jurisdiction for offences committed against children abroad.

*Id.* at 35–36 (footnotes omitted).

<sup>304</sup> *Id.*

<sup>305</sup> See 42 U.S.C. §§ 16920, 14071. See generally Ad Hoc Comm., *supra* note 20 (convention on the “protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children”); MIKO & PARK, *supra* note 4 (studying sex trafficking issues in the United States and international community); Green, *supra* note 1 (detailing how exceptional measures must be taken to eradicate harm of child sex trafficking); *Annual Report 2000: Trafficking in Human Beings*, *supra* note 76 (discussing Europol’s collaborations with member states in combating sex trafficking); *New Global Treaty*, *supra* note 27 (discussing ways the United Nations will combat sex trafficking); U.N. Conference Report, *supra* note 72 (discussing trafficking in persons and peacekeeping operations).

enforcement agencies on sex traffickers.<sup>306</sup> Interpol works against child sex tourism by identifying and locating perpetrators of crimes against children in the international arena.<sup>307</sup> With Project Childhood, Interpol addressed sex tourism by seeking partnerships with police authorities in the prosecution of child sex tourists and other abusers.<sup>308</sup> By disseminating data through a notice and diffusion system, law enforcement agencies are able to exchange information regarding wanted criminals.<sup>309</sup> This is the type of integrated legal response needed to combat sex trafficking more efficiently on a global scale.<sup>310</sup>

#### CONCLUSION

The growing phenomenon of human sex trafficking is a global problem that requires international cooperation and innovation. Current law enforcement responses are disjointed and a more uniform understanding and approach to the issues that underlie sex trafficking is necessary. Criminal trafficking enterprises are increasingly organized and intricate business operations. International and national bodies must implement new ideas and actions that take into account both the presence of organized crime groups and the plight of trafficking victims.

Although some governments, such as Sweden, have embraced the gender and rights model in combating human sex trafficking, other governments, such as the United States, still follow an outdated migrant model that unfairly burdens victims of the sex trade. If implemented uniformly, a rights-based approach—as adopted by the United Nations—will simultaneously serve the needs of trafficking victims and the necessity of prosecuting trafficking offenders.

One important step in improving the international response to sex trafficking is to create public awareness of this pernicious problem. Such awareness should give greater momentum to enacting laws and policies that effectively address trafficking. Developing an international sex trafficker registry is one strategy that will both increase public awareness of the problem and serve as an effective apparatus for law enforcement agencies to prevent and prosecute sex trafficking. Requiring sex traffickers to register in an international database—similar to current U.S. sex offender databases—will help create a social stigma for

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<sup>306</sup> O'Briain et al., *supra* note 9, at 40.

<sup>307</sup> *Id.*

<sup>308</sup> See *Fact Sheet*, *supra* note 9.

<sup>309</sup> *Id.*

<sup>310</sup> See O'Briain et al., *supra* note 9, at 40, 50.



traffickers and trafficking crimes that will lead to increased public desire to combat trafficking. A sex trafficking registry would also be an additional strategy for law enforcement. Collecting trafficker information and creating a database that is accessible to law enforcement agencies internationally will assist in the prosecutions of traffickers everywhere.

International law enforcement must find innovative approaches in its struggle against human trafficking. The current landscape, where sex trafficking victims are forced to risk their lives in assisting prosecutors as they garner convictions, is insufficient. The onus must be on states to create a new apparatus to combat sex trafficking. A starting point would be the creation of an international sex offender registry.