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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.¹ The International Labour Organization estimates that 1.39 million domestic and transnational victims of forced labor are also victims of commercial sex servitude.² As

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¹ 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*].

² 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.³ Inside the United States, trafficking victims are subjected to various forms of exploitation including involuntary servitude and forced prostitution.⁴ The difficulty in quantifying the number of trafficking victims is just one example of the complexity and mystery behind human trafficking.⁵ In addition, human traffickers are part of highly organized criminal syndicates that profit from the exploitation of vulnerable women and children.⁶ To date, law enforcement is unable to combat human trafficking effectively and is failing to keep pace with its growth.⁷ Many states struggle to prosecute traffickers and must rely on federal prosecution of trafficking enterprises.⁸ To better address hu-

³ 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 . . .”).

⁴ 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 . . .”).

⁵ 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.”).

⁶ 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 . . .”).

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

⁸ 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.⁹

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.¹⁰ 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.¹¹ 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.¹² The utility of sex offender laws is already evident in the United States, where sex offender registration requirements are extended to convicted sex traffickers.¹³ 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.¹⁴ 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.¹⁵ In addition, an international registration requirement would help the international community track the whereabouts of sex

⁹ 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.

¹⁰ 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”).

¹¹ See *id.*

¹² 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>.

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

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

¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ 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.”¹⁹ 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

¹⁶ *See id.*

¹⁷ *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].

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

¹⁹ *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 organs²⁰

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.”²¹ 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.²²

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

²⁰ 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.].

²¹ 22 U.S.C. § 7102(8)(B).

²² *Id.*

²³ MIKO & PARK, *supra* note 4, at 1.

²⁴ *See id.*

²⁵ *Id.*

²⁶ *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).

²⁷ 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.

Women are most at risk for being trafficked.²⁸ 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.²⁹ More astoundingly, ninety-nine percent of all sex trafficking victims were female.³⁰ Most women who are trafficked are done so as part of the sex trade.³¹ 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.³²

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

²⁸ 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.*

²⁹ *Id.*

³⁰ *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.*

³¹ *Id.* at 2.

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

³³ 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").

³⁴ 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.*

³⁵ Tiefenbrun, *supra* note 3, at 118; Gold, *supra* note 34, at 110.

³⁶ 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.³⁷ In the United States, for instance, Asian prostitutes are sold for as much as \$20,000 each.³⁸ Trafficked women are reluctant to seek help from law enforcement officials because they fear retaliation from their traffickers.³⁹ 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.⁴⁰

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

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).

³⁷ Gold, *supra* note 34, at 119.

³⁸ *New Global Treaty*, *supra* note 27, at 2.

³⁹ Hyland, *supra* note 33, at 45.

⁴⁰ *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).

⁴¹ 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).

⁴² *Id.* at 431.

⁴³ 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; 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).

⁴⁴ Estes & Weiner, *supra* note 43, at 8.

⁴⁵ O'Briain et al., *supra* note 9, at 8–9.

use of “runaway” and “throwaway” children.⁴⁶ Like trafficked women, children trafficked into and out of the United States are financially beholden to their traffickers.⁴⁷ Often, they are required to pay their traffickers for the services received such as transportation, shelter, employment, and false identity papers.⁴⁸ Additionally, children in the sex industry suffer exposure to HIV/AIDS and other sexually transmitted diseases.⁴⁹ Indeed, younger children are targeted and procured to protect clients from HIV exposure.⁵⁰ 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.”⁵¹ According to UNICEF, one million children enter the global sex trade each year.⁵²

II. PERSPECTIVES ON SEX TRAFFICKING

There is no uniform global approach to combating sex trafficking.⁵³ 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.⁵⁴ Groups develop different strategies to reduce or eliminate sex trafficking enterprises that are aligned with their understanding of the issues and actors involved.⁵⁵

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.⁵⁶ High profits of sex trafficking, combined with inadequate law enforcement responses, are increasingly attracting organized enterprises to the sex trade.⁵⁷ The vast profits of sex trafficking have attracted “crime groups that previously trafficked in other commodities and . . . new

⁴⁶ Estes & Weiner, *supra* note 43, at 4.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.*

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

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 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.

⁵³ *Id.* at 16.

⁵⁴ *See id.* at 14–16.

⁵⁵ *See id.*

⁵⁶ *See Shelley, supra* note 6, at 121.

⁵⁷ *See id.*

groups which have developed recently.”⁵⁸ Behind the instances of human trafficking “lie intricate enterprises, each with business characteristics that influence the severity of the human rights violations.”⁵⁹ Trafficking enterprises often operate “with the complicity of professionals in receiving countries that knowingly provide services to the human smugglers and traffickers.”⁶⁰ 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.”⁶¹

Professor Louise Shelley stated, “The trade in human beings is not a uniform business and operates very differently in diverse cultural and political contexts.”⁶² Shelley has identified six different business models of trafficking.⁶³ The first model is the “natural resources” model.⁶⁴ 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.’”⁶⁵ The second model is the “trade and development model” used by Chinese and Thai traffickers.⁶⁶

⁵⁸ *See id.*

⁵⁹ *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”).

⁶⁰ 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.

⁶¹ 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”).

⁶² Shelley, *supra* note 6, at 122.

⁶³ *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.

⁶⁴ *See id.* at 123.

⁶⁵ *Id.*

⁶⁶ *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.⁶⁷ The third model is the “supermarket model,” based on a low cost and high volume model of human trafficking.⁶⁸ This approach is seen in the trafficking trade between the United States and Mexico.⁶⁹ There, “trade in women is part of a much larger trade that involves moving large numbers of people across the border at low cost.”⁷⁰ The trade “may require multiple attempts” and “significant profit sharing with local Mexican border officials.”⁷¹ The fourth model is a “violent entrepreneur model” utilized by Balkan crime groups.⁷² 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.”⁷³ In addition, “Balkan groups take over existing markets in continental Europe and Great Britain by use of force against already established organized crime groups.”⁷⁴ The fifth model combines “traditional slavery and modern technology” and is used by traffickers moving women out of Nigeria and West Africa.⁷⁵ 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-

⁶⁷ 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 ANNUALS OF SCHOLARSHIP 71, 80 (2000).

⁶⁸ See Shelley, *supra* note 6, at 125.

⁶⁹ 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).

⁷⁰ 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).

⁷¹ See Shelley, *supra* note 6, at 125.

⁷² *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 [hereinafter U.N. Conference Report].

⁷³ 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).

⁷⁴ 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).

⁷⁵ 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.”⁷⁶

The final business model applies to the host country rather than to a trafficking group.⁷⁷ 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.”⁷⁸ State regulations require certain conditions to be met for a brothel owner to continue operating, such as legal workers and decent conditions.⁷⁹ In case of violations, “the license can be withdrawn, the brothel closes, and prosecution ensues,” which incentivizes compliance with state regulations.⁸⁰

International, national, and local law enforcement must grasp the multi-tiered, cross-border complexity of sex trafficking and coordinate efforts to successfully prosecute traffickers.⁸¹ 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.”⁸² Government efforts to combat the increasingly complex prob-

⁷⁶ 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*].

⁷⁷ See Shelley, *supra* note 6, at 127.

⁷⁸ 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).

⁷⁹ See Shelley, *supra* note 6, at 127.

⁸⁰ *Id.* at 128.

⁸¹ 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.”).

⁸² *Id.*

lem of trafficking fall into one of two models.⁸³ The models are determined by components such as whether the trafficking victims are seen as offenders in the sex trade or as duped victims.⁸⁴ 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.⁸⁵

A. *The Migrant Model*

The Migrant Model is a law and order approach that does not fully recognize trafficked persons as victims.⁸⁶ 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.”⁸⁷ For instance, the United Nations distinguishes between the voluntary smuggling of persons and the involuntary trafficking of persons across borders.⁸⁸ 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.”⁸⁹ Indeed, there exists an “overlap between irregular migration, smuggling, and trafficking.”⁹⁰ Often, “migrants’ experiences actually involve a degree of de-

⁸³ 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>.

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

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

⁸⁶ See Jordan, *supra* note 83, at 29–30.

⁸⁷ 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).

⁸⁸ 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).

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

⁹⁰ *Id.* at 207.

ception, coercion, abuse of vulnerability, or exploitation”⁹¹ “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”⁹²

The migrant model fails properly to address the role of trafficked people as victims of the sex trade.⁹³ For example, the European Union has adopted two legal instruments to combat human trafficking.⁹⁴ 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.⁹⁵ The European Commission eventually addressed the problem by drafting the Directive on Short-Term Residency Permits for Trafficking Victims.⁹⁶ 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.⁹⁷ 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.⁹⁸ Once the conditions are met, residence permits are granted and renewed based on the same three considerations.⁹⁹ The

⁹¹ *Id.* at 206–07.

⁹² *Id.* at 207.

⁹³ *See id.*

⁹⁴ *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).

⁹⁵ *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.

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

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

⁹⁸ *See* Council Directive, *supra* note 97, art. 8.

⁹⁹ *See id.*

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

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.¹⁰¹ Residence permits can be withdrawn or denied renewal depending upon the continued cooperation of the trafficking victim, leaving the victim in legally tenuous circumstances.¹⁰² This approach wrongly views sex trafficking victims as co-conspirators and illegal immigrants.¹⁰³ Thus, trafficking victims face deportation unless they cooperate with law enforcement.¹⁰⁴

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.

¹⁰⁰ *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.

¹⁰¹ *See id.* art. 8.

¹⁰² *Id.* art. 14.

¹⁰³ *See* Council Directive, *supra* note 97, art. 14.

¹⁰⁴ *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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷

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

¹⁰⁵ D'Cunha, *supra* note 83, at 4.

¹⁰⁶ *Id.* at 9.

¹⁰⁷ *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.

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Id.*

¹¹⁰ 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.¹¹¹ 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.¹¹² States would then be obliged to ensure that private persons and institutions respect, protect, and promote the practical realization of human rights.¹¹³ Second, there is an individual empowerment dimension, where knowledge and participation empower victims to “access remedies and claim rights” for themselves.¹¹⁴ Ultimately, such a rights-based approach will ensure that appropriate

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).

¹¹¹ 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.*

¹¹² 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).

¹¹³ *See Hidden Slaves*, *supra* note 112, at 69–70.

¹¹⁴ 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.¹¹⁵

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.¹¹⁶ 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.¹¹⁷ Companies have taken advantage of this globalization by relocating or outsourcing operations to “low-wage economies” abroad.¹¹⁸ In turn, low-skilled laborers are traveling to foreign markets to fulfill the new labor demands.¹¹⁹ A major consequence of this labor migration is human trafficking.¹²⁰ 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.¹²¹

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.¹²² The growth of the commercial sex trade and sex tourism is increasing prevalence of sex traf-

¹¹⁵ *Id.* at 1.

¹¹⁶ 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.

¹¹⁷ Cameron & Newman, *supra* note 116, at 25.

¹¹⁸ *Id.* at 26.

¹¹⁹ *Id.* at 25.

¹²⁰ *Id.* at 25–29.

¹²¹ *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)).

¹²² 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 (follow “Providing Livelihood Options for Women and Adolescent Girls” hyperlink under “Promoting Gender Equality to Combat Trafficking in Women and Children” heading).

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

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.¹²⁵ 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.¹²⁶ Two European Union law enforcement agencies, Europol and Eurojust, have had some success in combating trafficking.¹²⁷ Europol handles criminal intelligence and supports member states as they combat human trafficking.¹²⁸ Eurojust, meanwhile, establishes uniform immigration and asylum policy and combats trans-border crime by consolidating cooperation among authorities.¹²⁹ As a whole, the European Union approach to human trafficking adopts the migration model that treats sex trafficking victims as illegal immigrants.¹³⁰ Individual European nations, however, have adopted divergent approaches in their attempts to prevent and prosecute sex trafficking.¹³¹

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

¹²³ *Id.* at 22.

¹²⁴ *Id.* at 23–24.

¹²⁵ *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).

¹²⁶ 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).

¹²⁷ 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).

¹²⁸ *Frequently Asked Questions*, *supra* note 127.

¹²⁹ See *The History of Eurojust*, *supra* note 127.

¹³⁰ See Askola, *supra* note 89, at 212.

¹³¹ See Ekberg, *supra* note 10, at 1189.

¹³² See *id.*

¹³³ BROTTSBALKEN [BRB] [CRIMINAL CODE] 6:8 (Swed.).

“form of male sexual violence against women and children.”¹³⁴ 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.¹³⁵ 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.¹³⁶ As a result, Sweden is no longer an attractive market for sex traffickers.¹³⁷

Denmark also uses a gender and rights model.¹³⁸ 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.¹³⁹ There are between 5000 and 6000 prostitutes working in the country.¹⁴⁰ Nearly half of the prostitutes are foreign nationals and potential trafficking victims, but Denmark assists sex trafficking victims instead of criminalizing their actions.¹⁴¹ The

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.

¹³⁴ Ekberg, *supra* note 10, at 1189.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1193–94, 1210.

¹³⁷ *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).

¹³⁸ *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*].

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

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

Despite the assistance and rights-based approach to trafficking victims, the trafficking of children persists in Denmark.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ Indeed, Denmark did not recognize human trafficking as an offense until the European Council Framework decision on combating trafficking influenced Danish legislation as well.¹⁴⁶ Now, the Denmark penal code establishes a maximum eight year sentence for trafficking offenses, but police prosecuted only twenty-three trafficking cases in 2007.¹⁴⁷

Germany, in contrast, focuses on criminal prosecutions.¹⁴⁸ 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.¹⁴⁹ The largest number of sex trafficking victims are German nationals trafficked within the country.¹⁵⁰ Germany is not a destination for child sex tourism.¹⁵¹

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

¹⁴² *Id.*

¹⁴³ *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.*

¹⁴⁴ *Human Rights Report: Denmark*, *supra* note 138.

¹⁴⁵ *Id.*

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

¹⁴⁷ *Human Rights Report: Denmark*, *supra* note 138.

¹⁴⁸ 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*].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *Human Rights Report: Germany*, *supra* note 148.

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

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.¹⁵⁹ China and Thailand are two of the most egregious regions of sex trafficking.¹⁶⁰ In China, criminal groups traffic thousands of Chinese women from their points of origin into the global sex trade market.¹⁶¹ Chinese criminal networks regularly transport women abroad and coerce them into prostitution.¹⁶² The U.S. State Department reports that Chinese criminal organizations traffic between 10,000 and 20,000 women and children annually.¹⁶³ Although prostitution is illegal, it is estimated that between 1.7 and 6 million women are involved in the sex trade.¹⁶⁴ Chinese government poli-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

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

¹⁵⁹ 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*].

¹⁶⁰ See *Human Rights Report: China*, *supra* note 159; *Human Rights Report: Thailand*, *supra* note 159.

¹⁶¹ *Human Rights Report: China*, *supra* note 159.

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

¹⁶³ 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.

¹⁶⁴ See *Human Rights Report: China*, *supra* note 159.

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

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

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

¹⁶⁵ 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.

¹⁶⁶ 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).

¹⁶⁷ See *id.*

¹⁶⁸ *Id.* at 732.

¹⁶⁹ 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.*

¹⁷⁰ *Trafficking in Persons Report*, *supra* note 1, at 105.

¹⁷¹ *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.

¹⁷² See *Human Rights Report: Thailand*, *supra* note 159.

¹⁷³ See *id.*

¹⁷⁴ *Id.*

tution is practiced openly with local officials complicit in its allowance.¹⁷⁵ A Thailand government survey found that there are between 76,000 and 77,000 registered prostitutes in the country.¹⁷⁶ NGOs, however, estimate the number to be between 200,000 and 300,000 prostitutes.¹⁷⁷ 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.”¹⁷⁸

Despite the prevalence of sex tourism, Thailand criminalizes prostitution, sex trafficking, and child sex trafficking.¹⁷⁹ 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.¹⁸⁰ Despite the efforts of the Thai government, sex tourism remains a significant portion of the economy.¹⁸¹ Thailand’s estimated income from prostitution in the last decade of the twentieth century was between twenty-two billion and twenty-seven billion dollars.¹⁸²

IV. U.S. LEGAL RESPONSES

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

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Human Rights Report: Thailand*, *supra* note 159.

¹⁷⁸ *Id.*

¹⁷⁹ *See id.*

¹⁸⁰ *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; 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 (follow “English” hyperlink under “Agreements” heading).

¹⁸¹ *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).

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

¹⁸³ *See Trafficking in Persons Report*, *supra* note 1, at 57.

¹⁸⁴ *Id.*

¹⁸⁵ *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.¹⁸⁶ More than 20,000 children are victims of sex trafficking in Mexico, especially in tourist areas and border towns.¹⁸⁷

A. *Current Approach*

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

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

¹⁸⁶ *Id.* at 206.

¹⁸⁷ *Id.*

¹⁸⁸ See Jordan, *supra* note 83, at 29, 30.

¹⁸⁹ 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.*

¹⁹⁰ 22 U.S.C. § 7101(b)(1).

¹⁹¹ *Id.* § 7104.

¹⁹² *Id.* § 7105(b)(1).

¹⁹³ *Id.* § 7105(a)(1)(A).

¹⁹⁴ *Id.* § 7105(a)(1)(E).

¹⁹⁵ 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).

¹⁹⁶ *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.¹⁹⁷ The TVPA provides financial support to NGOs that assist victims in other countries through social services and legal aid.¹⁹⁸ It also entitles victims to receive assistance in repatriation or reintegration through treatment, education, and training.¹⁹⁹

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.²⁰⁰ 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.²⁰¹

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.²⁰² Instead, the legislation maintains the migrant model that requires that trafficking victims provide legal cooperation before being granted protection and assistance.²⁰³ A panoply of federally funded programs and services are available only after cooperation is established.²⁰⁴ The lure of receiving a T-visa and aid puts trafficked women in precarious and dangerous predicaments.²⁰⁵ Trafficked women who choose to cooperate with U.S. law enforcement risk violent reprisals.²⁰⁶ Trafficked

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).

¹⁹⁷ 22 U.S.C. § 7105(a)(1).

¹⁹⁸ *Id.* § 7105(a)(1)(B)–(D).

¹⁹⁹ *Id.* § 7105(a)(1)(E).

²⁰⁰ *Id.* § 7105(b)(1)(E)(i)(I).

²⁰¹ *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).

²⁰² *See* 22 U.S.C. § 7105.

²⁰³ *See id.* § 7105 (b)(1)(E)(i).

²⁰⁴ *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.

²⁰⁵ *See* Tiefenbrun, *supra* note 3, at 161.

²⁰⁶ *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.²⁰⁷ Once deported, they face a ten-year ban on reentering the United States.²⁰⁸ Even trafficked women who attempt to stay in the United States and cooperate with law enforcement may not be granted a T-visa.²⁰⁹ 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.²¹⁰ The Immigration and Customs Enforcement agency, meanwhile, may only issue up to 5000 special visas.²¹¹ 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.²¹² 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.²¹³

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.²¹⁴ The United Nations has acknowledged the plight of trafficked women by authoring principles and guidelines and

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).

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

²⁰⁸ 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).

²⁰⁹ 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>.

²¹⁰ See *id.*

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

²¹² See *id.*

²¹³ See KANSTROOM, *supra* note 208, at 10.

²¹⁴ 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.²¹⁵ These guidelines follow the gender and rights model, and emphasize the promotion and protection of the human rights of trafficked women.²¹⁶ The principles include decriminalizing the illegal entry into countries as a trafficked person and banning the practice of confining trafficked women in detention facilities.²¹⁷

The United Nations report additionally recommends that trafficked persons be protected from further exploitation and have access to adequate physical and psychological care.²¹⁸ 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.²¹⁹ 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.²²⁰ 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.²²¹ For these reasons, the United Nations aims to shift policy away from the U.S. model

²¹⁵ *Id.*

²¹⁶ 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).

²¹⁷ *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.

²¹⁸ *Id.* at 10–11.

²¹⁹ *Id.* at 9–10.

²²⁰ 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).

²²¹ *Id.* at 222, 228–29.

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

B. *Problems with Prosecuting Traffickers*

Global law enforcement numbers demonstrate that only a small percentage of traffickers are prosecuted.²²³ In the United States, prosecuting human trafficking has become a mandate for law enforcement agencies.²²⁴ Federal law enforcement has launched numerous trafficking initiatives to battle the mounting problem of human trafficking, with an emphasis on child sex trafficking.²²⁵ 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.²²⁶ Innocence Lost addresses the domestic sex trafficking of children by coordinating state and federal law enforcement agencies, prosecutors, and social service providers.²²⁷ The initiative was responsible for the arrest of 356 individuals and the recovery of twenty-one children in 2008.²²⁸ 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-

²²² 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).

²²³ 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.

²²⁴ See Attorney General Report, *supra* note 209, at 1.

²²⁵ See *id.*

²²⁶ See *id.* at 36.

²²⁷ *Id.*

²²⁸ 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.²²⁹ In 2008, ICE investigated 432 human trafficking claims and arrested 128 persons for sex exploitation.²³⁰

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.²³¹ Between 2007 and 2008, the DOJ noted that state law enforcement officials arrested sixty-eight percent of traffickers.²³² Consequently, the training of local law enforcement is critical and is a central component of combating sex trafficking, both nationally and internationally.²³³ In recognition of this fact, the TVPA authorizes training for law enforcement to better identify victims of trafficking.²³⁴

Forty-two states have laws combating human trafficking, yet no uniform approach to prosecution or victim assistance exists.²³⁵ 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.²³⁶ Eleven states have enacted laws providing victim assistance and protection.²³⁷ Nine states provide mandatory restitution for trafficking victims.²³⁸ Five states require asset forfeiture.²³⁹ Even so, the ex-

²²⁹ 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.

²³⁰ *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.

²³¹ See KYCKELHAHN ET AL., *supra* note 28, at 10.

²³² See *id.* The majority of these arrests involved sex trafficking. *Id.*

²³³ 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. Internationally, education and training initiatives have increased the arrest and prosecution of sex traffickers. *Id.* at 22.

²³⁴ 22 U.S.C. § 7105(c) (4) (2006).

²³⁵ 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).

²³⁶ 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*].

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

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

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

istence of trafficking laws does not guarantee enforcement.²⁴⁰ States are reluctant to prosecute trafficking crimes because of the resources required to prove the legal requirements of force, fraud, or coercion.²⁴¹ 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.²⁴² U.S. sex offender laws seek to decrease recidivism dramatically among sex offenders.²⁴³ Though the sex offender category is rife with misunderstanding, the application of sex offender laws to sex trafficking could have a deterrent effect.²⁴⁴ Sex offender laws apply to individuals who commit sex crimes, including child molestation, incest, exhibitionism, rape, and voyeurism.²⁴⁵ Most state and fed-

²⁴⁰ See Heiges, *supra* note 8, at 437.

²⁴¹ *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.

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.*

²⁴² 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].

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

²⁴⁴ See *id.* at 59–60.

²⁴⁵ 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.²⁴⁶

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).²⁴⁷ The Jacob Wetterling Act required states to create a sex offender registry.²⁴⁸ Sex offenders who failed to register faced criminal penalties.²⁴⁹ In 1996, Congress amended the Act to include a

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).

²⁴⁶ 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).

²⁴⁷ 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.

²⁴⁸ 42 U.S.C. § 14071(a)(1)(A).

²⁴⁹ *Id.* § 14071(d).

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

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

²⁵⁰ 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.*

²⁵¹ 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.

²⁵² 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.*

²⁵³ 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. 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.*

²⁵⁴ 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. 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.²⁵⁵ 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.²⁵⁶ Title I of the AWA created the Sex Offender Registration and Notification Act (SORNA).²⁵⁷ SORNA established new sex offender registration and community notification standards.²⁵⁸ It allows the public to readily research local sex offenders on the federal database.²⁵⁹ 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.²⁶⁰ Knowingly failing to register or update under SORNA could lead to a fine or imprisonment of up to ten years.²⁶¹

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."²⁶² The expansion requires juvenile sex offenders to register as sex offenders if the offense occurred when the offender was fourteen years old or older.²⁶³ It also creates a three-tier registration system where the registration length for offenders is dependent upon the seriousness of their offenses.²⁶⁴ Finally, the Act extended the sex offender definition to include sex crimes against children, including sex trafficking.²⁶⁵

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.

²⁵⁵ *Id.* at 12.

²⁵⁶ 42 U.S.C. §§ 16912(a), 16913(a).

²⁵⁷ *Id.* § 16901.

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

²⁵⁹ *Id.*

²⁶⁰ *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).

²⁶¹ 18 U.S.C. § 2250(a)(3) (2006).

²⁶² 42 U.S.C. § 16911(5)(A)(1).

²⁶³ *Id.* § 16911(8).

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

²⁶⁵ *Id.* § 16911(3)(A)(i).

2. Legal Challenges to Sex Offender Registries

Researchers and victims' advocates question the efficacy of sex offender categorizations.²⁶⁶ Sex offender registration laws are most commonly challenged as *ex post facto* laws.²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

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*.²⁷⁰ First, the law "must be retrospective, that is, it must apply to events occurring before its enactment," by altering the legal consequences of events.²⁷¹ Second, the law must also disadvantage the offender.²⁷² 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.²⁷³ In addition, to violate the Ex Post Facto Clause, the penalizing mechanism established by the law must be criminal and punitive in nature.²⁷⁴ In *Kennedy v. Mendoza-Martinez*, the U.S. Supreme Court delineated seven criteria in determining whether a statute is punitive and thus potentially unconstitutional.²⁷⁵

²⁶⁶ 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).

²⁶⁷ See *id.* at 164.

²⁶⁸ U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1.

²⁶⁹ 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).

²⁷⁰ *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 30 n.13.

²⁷⁴ *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.

²⁷⁵ *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.²⁷⁶ 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.²⁷⁷ In *Hendricks*, a sex offender who completed his prison sentence, but whom the Kansas courts then committed civilly, challenged the commitment.²⁷⁸ 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.²⁷⁹

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

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).

²⁷⁶ 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).

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

²⁷⁸ *Id.* at 350.

²⁷⁹ *Id.* at 360.

²⁸⁰ See Griffin & West, *supra* note 266, at 161.

²⁸¹ *Smith*, 538 U.S. at 105–06.

²⁸² *Id.* at 90–91.

²⁸³ *Id.* at 92.

²⁸⁴ *Id.* at 93.

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

Federal legislation has also been challenged under the Ex Post Facto Clause.²⁸⁶ Courts have determined that the AWA, and SORNA in particular, are not additional punishments inflicted upon sex offenders.²⁸⁷ 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.'"²⁸⁸ Rather, courts note that registration "has a 'rational connection to a nonpunitive purpose:' and is not 'excessive with respect to this [nonpunitive] purpose.'"²⁸⁹ 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.²⁹⁰

There has been one instance, however, where an individual provision of SORNA was found to be punitive.²⁹¹ 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.²⁹² 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.²⁹³

²⁸⁵ *Id.* at 100, 102.

²⁸⁶ *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.

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

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

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

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

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

²⁹² *Id.* at 848.

²⁹³ *Id.* at 853–54.

SORNA remains good law even as it continues to be constitutionally challenged.²⁹⁴ 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.²⁹⁵

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.²⁹⁶ 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.²⁹⁷

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

²⁹⁴ 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.

²⁹⁵ *Smith*, 538 U.S. at 92.

²⁹⁶ 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).

²⁹⁷ See *New Global Treaty*, *supra* note 27.

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

²⁹⁹ 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.³⁰⁰ 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.³⁰¹

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

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.³⁰⁵ Already, Interpol has placed an emphasis on information sharing between law

³⁰⁰ See *New Global Treaty*, *supra* note 27.

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

³⁰² 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.

³⁰³ 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).

³⁰⁴ *Id.*

³⁰⁵ 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.³⁰⁶ Interpol works against child sex tourism by identifying and locating perpetrators of crimes against children in the international arena.³⁰⁷ With Project Childhood, Interpol addressed sex tourism by seeking partnerships with police authorities in the prosecution of child sex tourists and other abusers.³⁰⁸ By disseminating data through a notice and diffusion system, law enforcement agencies are able to exchange information regarding wanted criminals.³⁰⁹ This is the type of integrated legal response needed to combat sex trafficking more efficiently on a global scale.³¹⁰

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

³⁰⁶ O'Briain et al., *supra* note 9, at 40.

³⁰⁷ *Id.*

³⁰⁸ See *Fact Sheet*, *supra* note 9.

³⁰⁹ *Id.*

³¹⁰ 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.