

REGULATED PROSTITUTION AS A COMPONENT IN THE FIGHT AGAINST HUMAN TRAFFICKING IN OREGON

JARED R. RAYBORN*

TABLE OF CONTENTS

I. INTRODUCTION	116
II. PROSTITUTION IN A VACUUM: TYPES, PERSPECTIVES, AND MODELS OF REGULATION.....	119
<i>A. A Brief History of Prostitution Regulation in the United States</i>	120
<i>B. The Different Categories of Prostitution.....</i>	123
<i>C. Social Perspectives of Prostitution.....</i>	126
<i>D. Models of Legalization.....</i>	127
1. Criminalization	127
2. Legalization	129
3. Decriminalization	131
a. International Example of Decriminalization: Sweden	131
b. International Example of Decriminalization: Netherlands	134
<i>E. Practical Effects of Legalizing Prostitution Generally.....</i>	137
III. FEDERAL AND STATE TRAFFICKING LAW IN A VACUUM.....	138
<i>A. Oregon's Deficiencies</i>	142
1. Prevention.....	142
2. Protection (and Assistance) of Victims	145
3. Punishment (Prosecution).....	149
a. Investigation.....	149
b. Witness Cooperation	150
c. Sentencing and Elements of the Crime	151

* J.D. 2013, Willamette University College of Law; B.A., B.B.A. 2010, Pacific Lutheran University. I want to thank the Willamette Law Review, and particularly Seth Nickerson, for very detailed editing and advice.

4. Would Federal Law Prohibit a Legalized Prostitution Market?	155
IV. REGULATED PROSTITUTION’S EFFECT ON TRAFFICKING ENFORCEMENT IN OREGON	156
A. <i>How Could Prostitution be Regulated in Oregon?</i>	157
B. <i>Prevention</i>	159
C. <i>Protection of Victims</i>	160
D. <i>Prosecution</i>	161
V. CONCLUSION	161

I. INTRODUCTION

The purpose of this article is not simply to advocate for the legalization of prostitution. Rather, its purpose is to analyze a model of legalization that may assist Oregon’s effort to prevent and punish the act of human sex trafficking. There are several viable ways to regulate a prostitution market, but finding a way to simultaneously control sex trafficking is a tricky task, both legally and practically. The premise of this article is aimed at eradicating sex trafficking,¹ and focuses mainly on female prostitutes, but the application of its principles of reform should extend to all prostitutes, regardless of gender. This article acknowledges that we live in a capitalist society, one where most individuals must find a job to make a living. Prostitution could be another option from which to *choose*, but it should never be compulsory, even implicitly.

Prostitution has surely evolved from its earliest recognition as a profession in 2400 B.C.E.² Indeed, it has evolved significantly over the last decade. With the proliferation of social networking and the increasingly cyber-savvy population of the U.S., finding a “john” to pay for sex, or a sex worker to provide sex, has become much easier to do in the comfort of one’s home.³ Authorities are not completely ignorant of this easy access to commercial sex. In fact, in 2010, eighteen state attorney generals demanded in a letter to the well-

1. A discussion of labor trafficking, even though it may constitute the majority of human trafficking, is not part of this analysis.

2. *Historical Timeline*, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000117> (last updated Aug. 28, 2013) (“The Sumerian word for female prostitute, *kar.kid*, occurs in the earliest lists of professions dating back to ca. 2400 B.C.”).

3. See, e.g., Sudhir Venkatesh, *Five Myths about Selling Sex*, WASH. POST (Sept. 12, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/10/AR2010091002670.html>.

known online resource Craigslist that the company remove its “adult services” section because it was being used as a “tool for prostitution.”⁴ It is questionable whether the shutting down of Craigslist’s “adult services” section will have any substantial effect on the practice of commercial sex, but this is an example of how commercial sex has continued to be as popular as it always has been and that, in the 21st century, criminal enforcement of voluntary, consensual prostitution may be a waste of resources.

The debate revolving around prostitution has many facets; some ideologies tie prostitution directly to human trafficking and others distinguish it from human trafficking.⁵ It is not the purpose of this article to suggest that prostitution is wholly unrelated to human sex trafficking, but it does suggest that the two can be conceptually separated by a “consent” and “no-consent” distinction that may allow for regulation of one and prosecution of the other. This discussion assumes that there is indeed much overlap between voluntary prostitution and involuntary sex trafficking. Therefore, the issue at hand is whether the arguably legitimate form of voluntary prostitution can be regulated in Oregon, while still providing reasonable methods and avenues to criminalize and prosecute involuntary sex trafficking of both adults and minors.

Oregon, like all other states, is obligated to adhere to federal acts and ratified treaties.⁶ The U.S. has adopted international anti-trafficking treaties and a federal statute to “strengthen the U.S. response to trafficking domestically and abroad.”⁷ The trafficking treaty, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children⁸ (Protocol), is linked to the Convention Against Transnational Organized Crime, of which the

4. David A. Fahrenthold, *Craigslist Stops Offering Links to “Adult Services” Ads*, WASH. POST (Sept. 4, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/04/AR2010090401719.html>.

5. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1662–73 (2010).

6. See U.S. CONST. art. VI, cl. 2 (Supremacy Clause); see also INT’L HUMAN RIGHTS CLINIC AT WILLAMETTE UNIV. COLL. OF LAW, MODERN SLAVERY IN OUR MIDST: A HUMAN RIGHTS REPORT ON ENDING HUMAN TRAFFICKING IN OREGON 8 (2010) [hereinafter WILLAMETTE REPORT] (discussing *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)).

7. WILLAMETTE REPORT, *supra* note 6, at 14.

8. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, to the Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, U.N. GAOR, 55th Sess., U.N. Doc. A/Res/55/25 (entered into force Dec. 25, 2003), *available at* http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf [hereinafter Trafficking Protocol].

U.S. is a party.⁹ These international initiatives impose specific requirements on the United States, which in turn bind Oregon to the same obligations.¹⁰ The obligations that derive from these instruments are separated into three categories, which are referred to as the “Three Ps: Prevent, Punish, and Protect.”¹¹

In 2000, Congress enacted the Trafficking Victims’ Protection Act (TVPA),¹² which reflected the principles of the Protocol’s Three Ps. It takes a victim-centered approach that recognizes criminality should not be attached to those who are forced to participate in the commercial sex market.¹³ Oregon also has its own state trafficking laws that make it a crime for a person to subject another to involuntary servitude and to traffic persons.¹⁴

Section II of this article will analyze the current state of prostitution legislation in Oregon, briefly discuss the history of prostitution regulation in the U.S., and compare theories of prostitution’s place in society. Additionally, it will compare regulatory models of prostitution to decipher why Oregon may benefit from a legalized commercial sex market. This section will also discuss the merits of prostitution in and of itself—the voluntary choice to provide sexual services for money—without regard to involuntary aspects, such as trafficking.

Section III will then explore what Oregon should be doing to comply with federal and international trafficking initiatives and whether those obligations and goals are commensurate with a regulated prostitution sector. Section IV, drawing upon the previous two sections, will suggest that state authorized prostitution could potentially provide a robust financial infrastructure for improved human trafficking enforcement. Aside from potential federal law barriers within the TVPA, it seems that, on at least a theoretical basis, legalizing prostitution could strengthen trafficking enforcement in Oregon in a variety of ways.

9. United Nations Convention Against Transnational Organized Crime, Jan. 8, 2001, U.N. Doc. A/RES/55/25, *available at* <http://www.unhcr.org/refworld/docid/3b00f55b0.html>.

10. WILLAMETTE REPORT, *supra* note 6, at 11–12; *Hauenstein*, 100 U.S. at 490.

11. *See* WILLAMETTE REPORT, *supra* note 6, at 12, 15.

12. Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., and 42 U.S.C.), *available at* <http://www.state.gov/g/tip/laws/61124.htm>.

13. TVPA § 102(a); WILLAMETTE REPORT, *supra* note 6, at 14.

14. S.B. 673 § 1, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (amending OR. REV. STAT. § 163.266); OR. REV. STAT. §§ 163.264, 163.263 (2011).

II. PROSTITUTION IN A VACUUM: TYPES, PERSPECTIVES, AND MODELS OF REGULATION

A “prostitute” in Oregon is “a male or female person who engages in sexual conduct or sexual contact for a fee.”¹⁵ “Sexual conduct” is sexual intercourse and “sexual contact” is “any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of the other party.”¹⁶ Thus, a person commits the crime of prostitution in Oregon if he or she “engages in, or offers or agrees to engage in, sexual conduct or sexual contact in return for a fee.”¹⁷

Although the statute does not specify a particular mens rea, a culpable mental state of “knowingly” is implicit in the definition of the crime—one’s knowledge that his acts constitute the making of the forbidden agreement puts him squarely within the act’s prohibition.¹⁸ Therefore, the statute criminalizes an offer or agreement to engage in sexual conduct for a fee without requiring that there be any further action to carry out the offer or agreement.¹⁹ It follows, then, that both the patron of sexual services and the provider of such services face criminal sanctions for engaging in prostitution.²⁰

Oregon treats prostitution between two adults as a class A misdemeanor.²¹ A violation of any misdemeanor crime cannot lead to a sentence of imprisonment that exceeds one year,²² which is the maximum sentence for a class A since it is the gravest of all misdemeanors.²³ Violation of a class A misdemeanor may also subject the perpetrator to a fine not to exceed \$6,250,²⁴ but in determining whether to impose a fine and the amount thereof, the court must take into consideration the financial resources of the

15. *Id.* § 167.002(2).

16. *See id.* § 167.002(4)–(5).

17. *Id.* § 167.007(1).

18. *State v. Huie*, 630 P.2d 382, 384 (Or. Ct. App. 1981).

19. *State v. Harris*, 256 P.3d 156, 157 (Or. Ct. App. 2011).

20. *See Harris*, 256 P.3d at 156–57 (individual who agreed to offer sexual services for a fee convicted under the prostitution statute); *State v. Nelson*, 180 P.3d 133, 134 (Or. Ct. App. 2008) (individual who offered to pay for sexual services convicted of attempted prostitution; the distinction from a conviction of simple prostitution seems immaterial).

21. OR. REV. STAT. § 167.007(2) (2011). Purchasing sex with a minor, however, is a Class B or C felony. *See* S.B. 673 § 4, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (to be codified at Or. Rev. Stat. §§ 163.355–427).

22. OR. REV. STAT. § 161.545 (2011).

23. *See id.* § 161.615(1).

24. *Id.* § 161.635(1)(a).

defendant and any burden that may arise from an imposition.²⁵ Like all other states in the U.S., except for certain counties in Nevada,²⁶ the practice of prostitution in Oregon subjects three classes of people to potential criminal convictions: the patron, the prostitute, and the pimp (if one exists).²⁷ Traditionally, however, state enforcement has focused heavily on women in prostitution, rather than their clients or pimps.²⁸

A. A Brief History of Prostitution Regulation in the United States

Prostitution has not always been illegal in the United States, but the fact that it was considered by many to be immoral and socially unacceptable eventually led to statutes that outlawed the practice of selling sex.²⁹ Although laws regarding single women and sex were created as early as 1692, for example a Massachusetts law making fornication a crime, prostitution was still tolerated for a significant period of time during colonial America.³⁰ Some of the early laws were concerned with women who acted as “sexual deviants” under the laws of adultery or “night walkers.”³¹ Yet, the central concern of these laws was fornication.³² Despite these laws, prostitution remained a “pervasive and lucrative profession in Colonial America” because of gender demographics.³³ The large number of men (and relatively smaller number of women) resulted in “a seller’s market” of women offering their services.³⁴

By the 1800s, “bawdy-houses” (i.e., brothels)³⁵ were closed not

25. *See id.* § 161.645(1).

26. Daria Snadowsky, Note, *The Best Little Whorehouse is Not in Texas: How Nevada’s Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217, 217 (2005).

27. *See State v. Harris*, 256 P.3d 156, 156–57 (Or. Ct. App. 2011); *State v. Nelson*, 180 P.3d 133, 134 (Or. Ct. App. 2008); OR. REV. STAT. § 167.012 (2011) (promoting prostitution).

28. 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, 438 (2009).

29. Jessica N. Drexler, Comment, *Governments’ Role in Turning Tricks: The World’s Oldest Profession in the Netherlands and the United States*, 15 DICKINSON J. OF INT’L L. 201, 203 (1996–1997).

30. *See id.* at 204 (observing that Massachusetts outlawed “fornication” in 1692).

31. *Id.*

32. Alysa Castro, Note, *Better in Theory: The Road to Prostitution Reform in Pennsylvania*, 9 RUTGERS J. OF L. & PUB. POL’Y 37, 41 (2012).

33. *Id.*

34. *Id.*

35. *See* BLACK’S LAW DICTIONARY 173 (9th ed. 2009).

because prostitution was illegal, but because they were determined to be public nuisances.³⁶ Prostitutes and brothel owners faced prosecution for crimes, but only under vagrancy statutes and other misdemeanor charges.³⁷ Indeed, there was no statutory definition of prostitution in most American jurisdictions during the eighteenth and nineteenth centuries.³⁸ Thus, throughout most of the nineteenth century, prostitution continued to be legally tolerated in the United States, but some people were furious with the “unspoken tolerance by law enforcement” and began to organize a movement for the eradication of this “moral disorder.”³⁹

Industrialization and the Gold Rush created a high demand for prostitutes, which instigated the construction of bordellos and brothels in eastern and western cities.⁴⁰ While these establishments also began to thrive in rural areas, they remained primarily concentrated in urban centers.⁴¹ For example, in 1856, Philadelphia alone had 130 brothels.⁴²

After the Civil War, some cities created licensing schemes and “red light districts” for regulating prostitution.⁴³ Under such a scheme, prostitutes were segregated to certain areas of a city, required to register, and subjected to compulsory physical examinations.⁴⁴ Most cities did not succeed with this method of regulation, and the Women’s Suffrage Movement prevented the passage of some of the red light district laws.⁴⁵ In the cities and states that did allow the red light districts to remain, officials often tolerated the practice in order to maintain the appearance of control over prostitutes in their communities, even though the districts were usually illegal.⁴⁶ These districts became cesspools of police corruption.⁴⁷

36. Drexler, *supra* note 29, at 204.

37. Castro, *supra* note 32, at 42.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* It should be noted that Philadelphia had more brothels than most other eastern cities. *Id.*

43. *Id.* at 43.

44. *Id.*

45. *Id.*; Drexler, *supra* note 29, at 204.

46. Castro, *supra* note 32, at 43.

47. *Id.* at 43.

Threatening to penalize brothels for their infractions, law enforcement and municipal officials set up an unofficial protection network, whereby brothel owners

Moreover, some states passed laws prohibiting only adultery (but not prostitution) and others punished prostitutes under “open and gross lewdness” statutes.⁴⁸ The well-known federal Mann Act, which “prohibited any man from taking a woman across states lines for the purpose of prostitution or debauchery,” was passed in 1910.⁴⁹ The law was “in part [a] response to an increase in the number of ‘opium dens[,]’ which were used to entice young girls into prostitution.”⁵⁰ The ability of the federal government to regulate prostitution was significantly reduced in 1913 when the U.S. Supreme Court held that Congress could not regulate the act of prostitution alone because it was a crime to be regulated by the states.⁵¹ Rather, Congress was limited to regulation of “interstate travel for purposes of prostitution.”⁵²

The rampant police corruption that accompanied the red light districts gave rise to so-called “red light abatement” laws that were passed in the majority of states by 1920.⁵³ These laws allowed citizens to take legal action against brothels without law enforcement involvement, and they were a direct result of “public outcry against prostitution and police corruption.”⁵⁴ By 1925, every state prohibited prostitution in some form or another, and by 1971, prostitution was “completely illegal in the United States,” except for certain counties in Nevada (discussed below).⁵⁵ These laws have invariably remained

could buy police neglect. By paying off the police and ward politicians, all parties benefited—brothels could continue to reap large profits from the selling of sex, politicians gained a regular tribute system and could be assured that their own infidelities would be kept silent, and police officers could safely earn a second income without fear of political consequence.

Id. at 43–44 (quoting Sarah Bertozzi’s explanation of how the police corruption worked).

48. Drexler, *supra* note 29, at 204.

49. *Id.*

50. *Id.*

51. See Ione Curva, Note, *Thinking Globally, Acting Locally: How New Jersey Prostitution Law Reform Can Reduce Sex Trafficking*, 64 RUTGERS L. REV. 557, 565 n.58 (2012). Ms. Curva’s article discusses two cases: *Hoke v. United States*, 227 U.S. 308 (1913) and *Keller v. United States*, 213 U.S. 138 (1909). The Court in *Hoke* held that “Congress’ authority to prohibit interstate transportation of women for prostitution stemmed from its Commerce Clause powers.” *Hoke*, 227 U.S. at 323–25. Similarly, the Court in *Keller* held “that the federal government did not have the power to uphold a conviction of a defendant who ran a house of prostitution where a female immigrant worked because such a power was reserved to the states.” *Keller*, 213 U.S. at 144.

52. Curva, *supra* note 51, at 564–65.

53. Castro, *supra* note 32, at 44.

54. *Id.*

55. Drexler, *supra* note 29, at 204–05.

in force.⁵⁶ When one considers this evolution of prostitution regulation, it sheds light on the sex industry's forced adaptation to the public's disapproval and the accompanying body of law; as a practical result, prostitutes and patrons have sought to conduct commercialized sex out of the eyes of the public.

Prostitution today is purely a state law issue. The states' power to regulate prostitution derives from the Supreme Court's statement in *Barbier v. Connolly*, where the Court characterized state plenary, or "police," powers as those that "promote the health, peace, morals, education, and good order of the people."⁵⁷ There is no federal law that prohibits prostitution.⁵⁸

B. The Different Categories of Prostitution

Before delving into any discussion of prostitution policy, it is necessary to establish some basic knowledge about the sector. Prostitutes can be divided into four categories that distinguish how each offers his or her services.⁵⁹ It is important to keep in mind that these categories seem to fuse together at times and are mere generalizations.

First, the most familiar and socially recognizable category of prostitution is that of the street prostitute.⁶⁰ This is the lowest form of prostitution because it is very visible to the public (as well as police), and also subjects the worker to a higher risk of rape, robbery, and assault.⁶¹ Street prostitutes receive the most attention in the prostitution debate,⁶² yet the familiar stereotype of a woman in a bright red tube-top dress standing on four-inch translucent heels, while holding a leopard print purse, constitutes the minority of the sex worker industry.⁶³ Most prostitutes in America work in brothels,

56. *See id.* at 205 ("[D]uring the 1960s and 1970s, courts struck down laws concerning sexuality, including sodomy, birth control, and abortion; however, laws prohibiting prostitution remained in effect.").

57. *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

58. *Curva*, *supra* note 51, at 565.

59. *See* Nicole A. Hough, Note, *Sodomy and Prostitution: Laws Protecting the "Fabric of Society"*, 3 *PIERCE L. REV.* 101, 107 (2004).

60. *Id.*

61. *See* Susan E. Thompson, Note, *Prostitution—A Choice Ignored*, 21 *WOMEN'S RTS. L. REP.* 217, 226 (2000).

62. *Id.* at 225.

63. *See id.* at 225–26 ("[O]nly 10% to 20% of prostitutes actually work the streets. . . . [Whereas] [t]he remaining 80% to 90% work in the other formal establishments such as the brothels, 'massage parlors, or as independent call girls.'"); *see also* Robert Kolker, *The New*

massage parlors, or as independent escorts/call girls.⁶⁴ Nevertheless, eighty-five to ninety percent of arrested prostitutes work on the street,⁶⁵ although this figure may be changing because of the Internet and cyber access to sexual services. Additionally, not all prostitutes on the street have a pimp, although most probably do.⁶⁶ Another curious fact about street prostitutes is that they are disproportionately represented by “women of color,” which makes minority women “more susceptible to harassment and arrest by police.”⁶⁷

The second category consists of indoor prostitution, which can include massage parlors, brothels,⁶⁸ and prostitution under the guise of legal sex industry establishments⁶⁹ (e.g., strip clubs or adult entertainment centers). Massage parlors, which are “often disguised as health studios” where patrons get a massage plus a sexual service, are obviously less visible to the public and tend to generate less public criticism.⁷⁰ As discussed, brothels have a long history in the United States, and in 2005, thirty-six brothels had licenses to operate in select counties in Nevada; however, with the proliferation of Internet sex services, in 2013, sources place the number of open brothels at approximately eighteen to twenty-three.⁷¹ The Northwest in particular has experienced prostitution conducted under the guise of legitimate forms of sex industry services, such as strip clubs.⁷² The Oregon Constitution’s free speech clause gives the state’s sex

Prostitutes, N.Y. TIMES, OPINIONATOR (June 29, 2013), <http://opinionator.blogs.nytimes.com/2013/06/29/the-new-prostitutes/> (quoting Scott Cunningham, Baylor University Economist, who conducted a survey of 700 sex workers in the United States and Canada) (“The Internet is augmenting the sex market by bringing in women who would not have entered the sex market without the Internet.”); Venkatesh, *supra* note 3 (“[T]oday, only a few big cities, such as Los Angeles and Miami, still have a thriving outdoor street market for sex.”).

64. Thompson, *supra* note 61, at 226.

65. *Id.*

66. *Id.* (stating that approximately 40% of street prostitutes work independently).

67. *Id.*

68. *Id.* at 226–27.

69. See WILLAMETTE REPORT, *supra* note 6, at 39.

70. Thompson, *supra* note 61, at 226.

71. David Rosenberg, *The Precious Women of Nevada’s Brothels*, SLATE (June 17, 2013), http://www.slate.com/blogs/behold/2013/06/17/jane_hilton_precious_is_a_series_of_intimate_portraits_of_women_who_work.html (the 2013 figure of 23); David Knowles, *A Bad Economy and Independent Prostitutes Running Nevada Brothels out of Business*, NY DAILY NEWS (May 10, 2013), <http://www.nydailynews.com/news/national/bad-economy-shutting-nevada-brothels-article-1.1340972> (the 2013 figure of 18).

72. See, e.g., Paul Shukovsky, *Strip Club Raids Put Dancers in a Bind*, SEATTLE PI (June 4, 2008), <http://www.seattlepi.com/local/article/Strip-club-raids-put-dancers-in-a-bind-1275536.php>.

industry “significant liberty,”⁷³ which in part may be why “Portland has the highest number of sexually oriented businesses per capita of any city in the nation.”⁷⁴ This widespread existence of legitimate sexual services may be overshadowing the illicit sexual services occurring within.

The third category of prostitution is similar to the second in that it may be disguised as a legal establishment.⁷⁵ Escort agencies, as they are often called, essentially offer men the chance to spend a certain amount of time with a female companion while they hit the town together.⁷⁶ If the patron is on his best behavior, he may end up receiving some sort of sexual gratification at some point throughout the night.⁷⁷ This form of prostitution is elusive to law enforcement because any alleged misconduct will have to emerge from the escort herself,⁷⁸ which seems unlikely to happen due to fear of potential criminal charges.

The final category of prostitution describes a more independent form of prostitute. The major players in this category are call girls and dominatrices.⁷⁹ Call girls make up the majority of prostitutes, which consist of the most skilled and highest-paid workers.⁸⁰ Call girls are quite similar to escorts (the two categories probably overlap), but one difference is that call girls may not be associated with any organization and could simply be working from their homes using their own website for advertising.⁸¹ Domination is the “fastest growing and most lucrative” type of prostitution and involves “bondage, spanking, whipping, [and] painful stimulation . . . of the nipples and genitals.”⁸² This category has high potential to pull in major revenue because the dominatrix is more than your average sex worker; she is a professional who has learned “specialized techniques.”⁸³

73. WILLAMETTE REPORT, *supra* note 6, at 39.

74. *Id.*

75. Thompson, *supra* note 61, at 227.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 228.

80. *Id.*

81. *Id.*

82. *Id.* (quoting Liz Highleyman, *Professional Dominance: Power, Money, and Identity*, in *WHORES AND OTHER FEMINISTS* 145 (Jill Nagle ed., 1997)).

83. *Id.* at 229.

C. *Social Perspectives of Prostitution*

Theoretical justifications for legalization or criminalization of prostitution are contained within various perspectives and philosophies, many of them based upon moral theory. Here, we briefly touch on some basic, polar perspectives. The link between sexual conduct generally and immorality is relatively clear in Judeo-Christian moral philosophy.⁸⁴ Under this view, the “conservative moral approach,” prostitution is seen as a “danger to the social fabric”; in other words, the laws criminalizing prostitution are designed to protect society’s moral sanctity, regardless of any individual choice or will.⁸⁵ At the core of this perspective is an antiquated “vision of women, their sexuality, and the role of marriage.”⁸⁶ Sex is simply something that should not be sold and is limited to the confines of marriage.⁸⁷

At the other end of the spectrum is the “liberal feminist approach,” which suggests sex work is like any other work performed by an individual who is an autonomous being.⁸⁸ Under this view, there is no shared moral obligation to restrain one’s sexual desires within the constructs of marriage: women should be free to choose prostitution as a livelihood and society should support that choice.⁸⁹ If society were to recognize prostitution as work, it is possible that much of the current stigma surrounding it would be destroyed.⁹⁰ However, liberal feminists do recognize that other factors, such as socio-economic status, education, or personal experience can affect the legitimacy of the choice to sell sex, although they reject the notion that women should be dealt with as a social class, “rather than as intelligent and unique individuals” capable of determining what is right for themselves.⁹¹

84. See, e.g., *Leviticus* 20, *Exodus* 22, *Deuteronomy* 22.

85. See Thompson, *supra* note 61, at 229.

86. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 542 (2000).

87. Thompson, *supra* note 61, at 231.

88. See *id.* at 236.

89. See *id.* at 237.

90. *Id.* at 238.

91. See *id.* at 238 (author discussing her own views from the perspective of a liberal feminist).

D. Models of Legalization

Prohibitory regulations for such activities as gambling, alcohol consumption, abortion, and sodomy have failed many times in the U.S. These activities have all become widely accepted and are no longer banned (or old laws are not enforced) in many states.⁹² If one of the following occurs, prohibitory regulation has failed its purpose: (a) the majority of society no longer disapproves of the activity; (b) enforcement is impracticable and ineffective because the activity is so widespread; or (c) society's disapproval is outweighed by the benefits provided by the *regulated* activity.⁹³ One could challenge prostitution prohibition on all three grounds above, especially the latter two.⁹⁴ And even though it is doubtful that a societal majority now approves of legalized prostitution, with more knowledge and awareness of the distinction between prostitution and trafficking, a majority may become more tolerant to the individual choice to sell sex for a living.⁹⁵

1. Criminalization

Models of prostitution regulation lie on a spectrum that ranges from the most government control to the least.⁹⁶ The majority of U.S. states use criminalization, the form of prostitution regulation that is characterized by the most government control. Prostitution prohibitions have generally focused on preventing violence, stopping the spread of disease, and ending the objectification of women.⁹⁷ Prostitution is also prohibited because opponents claim it is immoral and inherently connected to other forms of crime, such as drug activity, organized crime, and corruption of public officials.⁹⁸ Arguments in favor of criminalization are quite similar to those advanced by conservative moralists discussed in Section II.C.⁹⁹

There are many downfalls to this type of regulation, including lack of protection for prostitutes. According to one study, the murder rate for prostitutes in Colorado Springs, Colorado was calculated at

92. Hough, *supra* note 59, at 104.

93. *See id.* (emphasis added).

94. *Id.*

95. *See id.* at 117.

96. *See* Thompson, *supra* note 61, at 239.

97. Hough, *supra* note 59, at 104.

98. *See* Thompson, *supra* note 61, at 240.

99. *See id.* at 239.

204 per 100,000 from 1967 to 1999.¹⁰⁰ This figure was significantly higher than that for women and men in the standard occupations that had the highest workplace homicide rates in the United States during the 1980s.¹⁰¹ Prostitutes also face the threat of assault, battery, and rape from police, patrons, and pimps.¹⁰² Legal recourse for prostitutes may technically be available in these situations, but it rarely happens because prostitutes are fearful of arrest and generally feel unprotected.¹⁰³ Furthermore, prostitutes are made more vulnerable by being driven underground to avoid arrest and subsequent criminal records.¹⁰⁴ Since having a criminal record can make it very hard to find legitimate employment, criminalization may actually trap the prostitute in her line of work.¹⁰⁵

Finally, as will be discussed throughout this article, criminalization of prostitution alone (aside from trafficking) is a waste of resources, ineffective, and focuses on prostitutes (who may be victims, not criminals). Using state resources to prosecute all forms of prostitution may miss many cases of trafficking but criminalize instances of voluntary, consensual commercial sex. In 2010, there were 62,700 arrests for “prostitution and commercialized vice” in the U.S.: sixty-nine percent of these arrests were of females, with a median age of 30 for females and 36 for males; two percent involved a juvenile.¹⁰⁶

100. John J. Potterat et al., *Mortality in a Long-Term Cohort of Prostitute Women*, 159 AM. J. OF EPIDEMIOLOGY 778, 783 (2004), available at <http://aje.oxfordjournals.org/content/159/8/778.full>. The authors of the study explain:

We collected data on 1,969 prostitute women in Colorado Springs. This large cohort, assembled over 30 years as part of routine sexually transmitted infection control efforts, afforded us the opportunity to generate approximate population-based mortality data on women who spent some time [as prostitutes]. Our analysis indicated that their high mortality was attributable primarily to violence and drug use.

See id. at 782.

101. *Id.* at 783 (4 per 100,000 for female liquor store workers and 29 per 100,000 for male taxicab drivers).

102. Thompson, *supra* note 61, at 240.

103. *See id.*

104. *See id.* at 241.

105. *Id.*

106. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ARREST IN THE UNITED STATES, 1990–2010, 4 (2012), available at <http://www.bjs.gov/content/pub/pdf/aus9010.pdf>.

Prostitution and commercialized vice” is defined as “[t]he unlawful promotion of or participation in sexual activities for profit, including attempts. To solicit customers

2. Legalization

Legalization is also characterized by a high degree of government control, although less than criminalization, and uses licensing, registration, and mandatory health check-ups to regulate prostitution.¹⁰⁷ Here, if there is any other form of prostitution occurring outside of the regulated sphere, it is illegal.¹⁰⁸ Nevada is the only U.S. state to allow any form of prostitution,¹⁰⁹ and it adheres to this form of regulation.¹¹⁰ Prostitution remains illegal in Nevada unless it is practiced within a “licensed house of prostitution”; if an individual attempts to practice or solicit prostitution outside of the licensed house, he or she is susceptible to a misdemeanor.¹¹¹ Nevada allows county licensing boards to regulate the creation and maintenance of brothels, but a county with a population exceeding 700,000 is not allowed to operate a brothel at all.¹¹²

The Nevada Administrative Code contains regulations to which all prostitutes and brothel owners must adhere.¹¹³ For example, any person who chooses to be employed as a prostitute in a brothel must first undergo tests for HIV, syphilis, gonorrhea, and chlamydia.¹¹⁴ Once the individual has passed these tests and begun working, she must continue to get HIV and syphilis tests monthly, and gonorrhea and chlamydia tests weekly.¹¹⁵ Additionally, a prostitute must require any patron to put on a condom prior to any touching of his genitals.¹¹⁶ These strict health requirements are cited as one of the significant benefits of a legalized market—“in 2000, the rate of infection from

or transport persons for prostitution purposes; to own, manage, or operate a dwelling or other establishment for the purpose of providing a place where prostitution is performed; or to otherwise assist or promote prostitution.

U.S. DEP’T OF JUSTICE, *Offense Definitions 2009*, http://www2.fbi.gov/ucr/cius2009/about/offense_definitions.html (last visited Sept. 26, 2013).

107. See Thompson, *supra* note 61, at 241–42.

108. *Id.* at 242.

109. *U.S. Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000119> (last visited Aug. 20, 2013).

110. Thompson, *supra* note 61, at 242.

111. See NEV. REV. STAT. § 201.354 (2011).

112. See *id.* § 244.345(8).

113. Thompson, *supra* note 61, at 242.

114. NEV. ADMIN. CODE §§ 441A.800(1)–(2) (2012).

115. *Id.* § 441A.800(3)–(4).

116. *Id.* § 441A.805.

AIDS and STDs for legal prostitutes in Nevada was zero.”¹¹⁷ The brothels also provide a safer work environment, which has resulted in a low incidence of crime committed against prostitutes.¹¹⁸

There are criticisms of this form of regulation, however, mainly that there is too much control over the women; the government plays the role of a pimp by controlling with whom, when, and where a prostitute engages in her services; and a licensing system stigmatizes the prostitute as a woman in need of regulation.¹¹⁹ There is some force behind the constraint of freedom argument, but the others appear to lack any substantial merit because they are generalizations of a strict form of legalization that can easily be remedied in a particular state or county. It is true that under this scheme the government controls much of what a prostitute does and takes away her freedom to exercise her career in the walls of her own home. Yet, to have control over the safety and health of prostitutes and their patrons to the extent desired, this seems to be the only way to do so. An unfortunate potentiality, however, is the possibility that registration requirements and restricted areas in which to practice prostitution may result in the birth of a black market for “independent” escorts.

Moreover, the issues of when the prostitute can work and whom she serves should be addressed in the same legislation that legitimizes prostitution. No prostitute should have to unwillingly have sex with a client, for whatever reason. This could be easily addressed with a “we have a right to deny you service” sign and codification of that principle in legislation. Of course, a legitimate reason for denial would be required, and Equal Protection would prevent discrimination on the basis of race, alienage, national origin, and likely other lesser-protected classifications.¹²⁰ In terms of when a prostitute works, brothel workers typically work fourteen-hour shifts every day for a few weeks.¹²¹ Once again, this is not a per se rule and could readily be modified with a statute, administrative rule, or a simple guideline.

The stigma argument is similarly weak. The fact that legalized

117. Thompson, *supra* note 61, at 242.

118. *See id.*

119. *See id.* at 242–43.

120. A discussion of which reasons for denial of services would meet strict scrutiny or intermediate scrutiny under U.S. Supreme Court case law is beyond the scope of this article.

121. Thompson, *supra* note 61, at 243.

prostitution requires registration and licensing is simply a necessary part of the scheme, similar to the licensing requirements for attorneys or doctors. Legalizing prostitution and accepting it as a profession may *reduce* the stigma associated with prostitutes as criminals and social deviants. Finally, although both legalization and decriminalization (below) would eliminate many of the health dangers and physical violence that prostitutes face, legalization may also give prostitutes access to health insurance through “employer-based” programs.¹²²

3. Decriminalization

Empowerment and preservation of one’s personal autonomy are the core bases of this model.¹²³ Decriminalization is characterized by the least government involvement and removes any laws or regulations regarding voluntary, consensual prostitution.¹²⁴ This also means that there is no law regulating voluntary relationships between prostitutes and their pimps.¹²⁵ The major benefit under this scheme is that prostitutes would theoretically be able to shape their own working conditions through professional standards and unions.¹²⁶ Decriminalization focuses significantly on the independence of the prostitute to work freely as any other entrepreneur in the U.S., and any laws that deal with prostitution are limited to safe working conditions and protection from abuse.¹²⁷

a. International Example of Decriminalization: Sweden

The decriminalization model of prostitution is exemplified by policies certain European countries have adopted within the last twenty years. Sweden has been recognized for its approach of criminalizing the purchase of sex but decriminalizing the selling of sex with its enactment of the Sex Purchase Act.¹²⁸ One of the main

122. See Tracy Clements, *Prostitution and the American Health Care System: Denying Access to a Group of Women in Need*, 11 BERKELEY WOMEN’S L.J. 49, 87 (1996) (simply removing criminal sanctions will not significantly improve prostitutes’ access to health care services).

123. Thompson, *supra* note 61, at 245.

124. *Id.* at 244.

125. *Id.*

126. *Id.* at 245.

127. *Id.* at 244–45.

128. Stephanie M. Berger, Note, *No End in Sight: Why the “End Demand” Movement Is the Wrong Focus for Efforts to Eliminate Human Trafficking*, 35 HARV. J. L. & GENDER

focuses of Sweden's philosophy is to "combat violence against women and [to promote] gender equality."¹²⁹ Thus, at the time of the law's passage, prostitution was understood as a forced occupation—the result of "structural, cultural, and personal inequality."¹³⁰ The Swedish government considered prostitution to be "closely related to violence against women," and by 2002, the government expressly defined prostitution as "men's violence against women."¹³¹

Sweden's model obviously appeals to those who see prostitution as an inherent evil; in other words, those who would oppose a societal recognition of the practice of selling sex for a living.¹³² Here, prostitution is seen as nothing more than an expression of men's sexual exploitation of women, which would make the law "a major breakthrough and an important step toward a more gender equal society."¹³³ Such individuals also believe that targeting the demand side of prostitution will effectively combat human trafficking.¹³⁴ This approach has not been without criticism, however. Those who view prostitution as a legitimate profession and an acceptable way of life have been especially critical.¹³⁵ There has also been criticism of the possible negative consequences for sex workers due to the law's inaccurate assumptions about prostitution and the power relations that accompany it.¹³⁶

Additionally, the empirical support for the efficaciousness of the Sex Purchase Act is unclear. For example, the alleged benefits of the law include a "dramatically reduc[ed]" number of women in prostitution in Sweden and a decrease of human trafficking into Sweden.¹³⁷ It is claimed that the law has prevented women from entering the arena of prostitution and encouraged those who work as

523, 548 (2012) (explaining the passage of the Sex Purchase Act in 1999).

129. *Id.*

130. May-Len Skilbrei & Charlotta Holmström, *Is there a Nordic Prostitution Regime?*, 40 CRIME & JUSTICE 479, 490 (2011).

131. *Id.*

132. See Berger, *supra* note 128, at 548–49; see also Skilbrei & Holmström, *supra* note 130, at 490 (Mona Sahlin, then minister for equality, explained to a journalist: "If you are a feminist, you cannot relate to prostitution in any other way than to see it as male domination.").

133. Skilbrei & Holmström, *supra* note 130, at 491.

134. Berger, *supra* note 128, at 549.

135. Skilbrei & Holmström, *supra* note 130, at 490.

136. *Id.* at 490–91.

137. Berger, *supra* note 128, at 549.

prostitutes to seek help to leave the profession.¹³⁸ One author states that two years after the Sex Purchase Act's passage, the estimated number of men purchasing prostitution had decreased by about seventy-five percent.¹³⁹ However, there have been questions surrounding the alleged successes of the Sex Purchase Act, and, in particular, the methodology behind some studies of the law.¹⁴⁰ Another author is convinced that the available research and reports show that the Sex Purchase Act "cannot be said to have decreased prostitution, trafficking for sexual purposes, or had a deterrent effect on clients to the extent claimed."¹⁴¹ It is argued that the public's attitude toward prostitution has not changed and adverse effects on the health and well-being of Sweden's sex workers result from the law.¹⁴²

Although decriminalization is attractive to those who grasp a Mill-influenced philosophy of life, there is a strong argument that the Sex Purchase Act isolates workers from each other and makes it more of a challenge for non-governmental organizations (NGOs) and other public health initiatives to reach them, which means there is an increased likelihood of sexually transmitted diseases.¹⁴³ It is true that the law may have some effect on demand, but in the face of less demand, those who supply are forced to adapt to the market in order to survive. This could mean negotiations are done in hidden areas and in a hurried fashion, which is not so different from a scenario in a criminalization model of regulation. The result is that sex workers are given little time to evaluate a client's propensity for harm, which can lead to an increase in violent encounters.¹⁴⁴ Other negative effects have been: (a) increased reliance on pimps since there are fewer clients looking for prostitutes; (b) a potential stigma against prostitutes as "weak and passive victims"; and (c) a decrease in sex workers "who seek help due to distrust of authority."¹⁴⁵

Overall, it seems the merits of the Swedish model are hard to decipher from the politicized debate surrounding prostitution, which

138. *Id.*

139. Heiges, *supra* note 28, at 459.

140. *See* Berger, *supra* note 128, at 549 (observing that some skeptics have claimed "that these studies were not objective and were ideologically biased").

141. *Id.*

142. *Id.*

143. *Id.* at 549–50.

144. *Id.* at 550.

145. *Id.*

makes it unclear whether the U.S. would benefit from such a model. Yet, if the studies suggesting adverse effects on sex workers are legitimate, it would appear that adopting this model would have only a marginal impact on the well-being of prostitutes and the attitude of society toward sex work, at best.¹⁴⁶ Most importantly, merely decriminalizing the selling of sex, while criminalizing the purchasing of sex, would not give a state or county the ability to control the market and conditions of the practice of prostitution that inevitably will continue.

b. International Example of Decriminalization: Netherlands

The Netherlands' approach to prostitution is different from Sweden in many ways; for example, a patron will not be subject to criminal penalties for purchasing sex.¹⁴⁷ In fact, it may now be a misnomer to characterize this model as "decriminalization." The Netherlands shifted from a more laissez-faire decriminalization perspective on prostitution, where prostitution was technically illegal although it was tolerated,¹⁴⁸ and lifted its ban on brothels and pimping in 2000.¹⁴⁹ The ban was lifted in order to "improve the sector as a whole and the position of sex workers by introducing licenses" and to "tackle abuses by taking firmer action against businesses operating without licenses."¹⁵⁰ Under the Netherlands' approach, there are health requirements, and all customers must wear condoms—as in the Nevada model.¹⁵¹ For safety, prostitutes are given a call button that is

146. *See id.*

147. DUTCH MINISTRY OF FOREIGN AFFAIRS, DUTCH POLICY ON PROSTITUTION 4 (2012), available at http://www.minbuza.nl/binaries/content/assets/minbuza/en/import/en/you_and_the_netherlands/about_the_netherlands/ethical_issues/faq-prostitutie-pdf—engels.pdf-2012.pdf; *see also* Drexler, *supra* note 29, at 216 (stating that the Netherlands has never prohibited prostitution in any way).

148. *FAQ Red Light District*, IAMSTERDAM.COM, <http://www.iamsterdam.com/en-GB/Media-Centre/city-hall/dossier-red-light-district/red-light-district-faq> (last visited Aug. 28, 2013).

149. DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 3. Prior to allowing brothels, the only laws that regulated prostitution were about labor safety, occupational safety, protection from abuse, and protection from crime. *See* Drexler, *supra* note 29, at 216–17. Thus, the practice of prostitution was essentially left alone but other illegal activities with which it is associated were still regulated. Thompson, *supra* note 61, at 244. Pimping, facilitating prostitutes, and running prostitution enterprises were all prohibited. *Id.*

150. DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 3.

151. *See* Hough, *supra* note 59, at 116; *see also* DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 5. Although medical checkups are "encourag[ed]" at least four times a year, they are not compulsory because they "reinforce the idea that sex workers transmit infections." DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 10.

wired to local police for protection from violent customers.¹⁵² In addition to brothels, prostitution can legitimately take place via hotels, bars, escort services, massage parlors, and street walking.¹⁵³

Legislation in the Netherlands makes it legal to run a business where men or women who are of the age to consent are voluntarily employed as prostitutes.¹⁵⁴ However, it is illegal for one “to exploit another person for the purpose of prostitution” or any other form of sexual exploitation.¹⁵⁵ A proposed national law makes licenses compulsory in order to standardize policy throughout the country, but as of 2012, the person running the business must obtain a license from the local authorities only if required.¹⁵⁶ In the absence of national uniformity, the Association of Netherlands Municipalities has created guidelines for the regulation of prostitution, covering topics such as brothels, sex shops, and streetwalkers.¹⁵⁷ Administrative sanctions, such as fines and withdrawal of licenses, do exist for brothels that fail to comply with any regulations; criminal sanctions also exist for prohibited forms of prostitution.¹⁵⁸ Law enforcement regularly inspects the brothels to ensure each is conforming to the licensing conditions and to keep an eye out for signs of human trafficking.¹⁵⁹

The purpose of legalizing brothels is to allow the government to exercise more control over the sex industry and enforce regulations.¹⁶⁰ In addition to mandatory licensing, the proposed bill would require mandatory registration of all prostitutes in order to “strengthen monitoring” by the localities, and not just police.¹⁶¹ Under the proposed bill, those who attempt to operate a brothel or similar business without a license would commit an offense under the

152. See Hough, *supra* note 59, at 116; see also DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 5.

153. DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 10–11. A license can be required for all of the aforementioned locations and streetwalking is allowed in some municipalities, but only in designated zones where monitoring can exist. *Id.*

154. *Id.* at 4.

155. *Id.*; see also Curva, *supra* note 51, at 584.

156. DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 4; see also Curva, *supra* note 51, at 584.

157. DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 5.

158. Curva, *supra* note 51, at 584; see also DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 8.

159. Curva, *supra* note 51, at 584.

160. DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 147, at 6.

161. *Id.*

Economic Offences Act and would be subject to penalty.¹⁶² Municipalities retain significant power and authority in their decisions of where to place brothels, and the new bill would increase that authority to allow banning brothels in the interest of public order.¹⁶³

Some of the benefits of regulated prostitution, according to the Dutch Ministry of Foreign Affairs, are published by-laws regarding safety, hygiene, and working conditions; forbidding brothels from forcing prostitutes to consume alcohol with patrons; and giving control to prostitutes regarding the work they are willing to perform.¹⁶⁴ Moreover, legitimizing prostitution as a recognized occupation gives sex workers “the same rights and obligations as other professionals.”¹⁶⁵ Employers in the sex industry now have to comply with labor laws, tax obligations, and social insurance obligations.¹⁶⁶ Studies on the impact of lifting the ban on brothels conducted in 2002 and 2007 show that relevant characteristics of the Netherlands’ sex industry have improved since 2000, yet trafficking does still exist.¹⁶⁷

Measures are taken to fight trafficking, such as regular inspections of brothels, hotlines for public reporting, and “strict[] enforce[ment]” of the criminal code.¹⁶⁸ One of the most interesting aspects of the Dutch fight against trafficking is that foreign nationals without “valid residence permits” are not allowed to practice prostitution in the Netherlands.¹⁶⁹ The Dutch Ministry of Foreign Affairs states “the labour laws offer the most effective protection [for prostitutes] against exploitation, violence, and coercion.”¹⁷⁰ Dutch policy on sexual violence is based on the premise that stronger rights and infrastructure for women in the sex industry are “the best way[s] to prevent sexual violence.”¹⁷¹ Transparent and legal prostitution certainly achieves this more effectively than a system that requires individuals to purchase and sell sex in the black market.

Critics of the Netherlands (and Nevada) model argue that these

162. *Id.* at 8.

163. *See id.*

164. *Id.* at 6.

165. *Id.*

166. *Id.* at 7.

167. *Id.*

168. *Id.* at 14.

169. *Id.* at 15.

170. *Id.* at 14.

171. *Id.*

efforts have made matters worse for trafficked women and children.¹⁷² One criticism is that legalization has simply resulted in a movement toward private pockets of commercial sex to avoid regulation, and that legalization has somehow “created a greater separation between legal prostitution and illegal prostitution.”¹⁷³ The crux of the argument is that the regulations only apply to the “small legalized sector” so that the majority of prostituted women are not covered, which results in an increase in “illegal, hidden, and street prostitution.”¹⁷⁴ Additionally, critics allege that legalization increases demand for prostitution, which in turn increases rates of trafficked women into legal prostitution.¹⁷⁵

There are, of course, legitimate concerns about the safety of sex workers and the effect that a state’s policy will have on their well-being. However, the argument that legalization creates a “greater separation between legal prostitution and illegal prostitution” is unconvincing because it necessarily suggests that outright criminalization is the better answer in order to avoid the “private pockets” of commercial sex that exist to avoid regulation. This argument simply ignores the reality, and human nature, of prostitution; it has existed for thousands of years and it will not cease. To ignore this fact is to ignore the best way to curb human trafficking: regulated and transparent prostitution. Furthermore, if increased trafficking into legalized prostitution has occurred, then the regulatory infrastructure allowing this to take place is insufficient. There must be ways to filter voluntary applicants to brothels from those who are being forced into the trade.

E. Practical Effects of Legalizing Prostitution Generally

No matter what form of regulation is utilized, there are general benefits that will evolve from not criminalizing prostitution. Instead of facing fear of legal repercussions, the regulated prostitute has the legal system at her disposal to seek civil or criminal remedies for any abuse by a client or pimp. There are also many health benefits that

172. Curva, *supra* note 51, at 586.

173. *Id.*

174. *Id.*

175. *Id.* at 587 (“The European nations that have legalized . . . have the highest numbers of trafficked women. . . . The increase in numbers of male buyers that results from legalization increases the demand for prostitution, which is met by the trafficking of women into both legal and illegal sectors”) (quoting SHEILA JEFFREYS, *THE INDUSTRIAL VAGINA: THE POLITICAL ECONOMY OF THE GLOBAL SEX TRADE* 191 (1991)).

should alleviate concerns of HIV and other diseases. Regular health checks ensure that prostitutes are safe, and thus the clients are safe as well. The argument that prostitution is inherently intertwined with other crime is diminished because crime associated with its practice often exists in the first place due to prostitution's illegality.¹⁷⁶ States would no longer expend limited resources jailing individuals who freely choose to sell sex for a living, and prostitutes would be able to obtain health insurance privately or through an employer without having to worry about being denied coverage because of the illegality of their profession.¹⁷⁷

III. FEDERAL AND STATE TRAFFICKING LAW IN A VACUUM

Much of the trafficking data used in this article is derived from a report titled *Modern Slavery in our Midst: A Human Rights Report on Ending Human Trafficking in Oregon*, written by the International Human Rights Clinic at Willamette University College of Law in June 2010 (the Willamette Report).¹⁷⁸ Additionally, in August 2013, a Portland State University professor authored a research memorandum titled *Commercial Sexual Exploitation of Children (CSEC) in the Portland Metro Area* (the PSU Research Memorandum), which supplements some of the Willamette Report's data.¹⁷⁹ The PSU Research Memorandum quantifies and analyzes trends among child victims of trafficking and compelled prostitution in the Portland Metro area.¹⁸⁰ The authors used data the Oregon Department of Human Services CSEC Unit (DHS) and the Sexual Assault Resource Center of Portland (SARC) generated from 2009 through 2013.¹⁸¹ Together, the Willamette Report and PSU Research Memorandum give insight into some of the human trafficking challenges that Oregon faces, and whether any progress has been made in the fight against its practice.

Trafficking in persons is a global trade with high demand; in

176. See Thompson, *supra* note 61, at 231.

177. Clements, *supra* note 122, at 67 (noting that health insurance is generally not available to cover loss resulting from illegal activity).

178. See WILLAMETTE REPORT, *supra* note 6.

179. See CHRISTOPHER CAREY & LENA TEPLITSKY, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN (CSEC) IN THE PORTLAND METRO AREA (Aug. 2013) [hereinafter PSU RESEARCH MEMORANDUM], available at http://www.justice.gov/usao/or/downloads/the_csec_report.pdf.

180. *Id.* at 1.

181. *Id.* at 2. Both of these agencies are discussed further below.

2010, it was the second largest criminal industry in the world.¹⁸² There are tens of thousands of individuals trafficked for sex and labor within the U.S. every year,¹⁸³ and the majority of victims in the U.S. are U.S. citizens.¹⁸⁴ Between 2009 and 2013, DHS and SARC identified and served 469 unduplicated CSEC victims in the Portland Metro Area alone, and as of July 2013, there were 159 active cases between the two agencies.¹⁸⁵

The PSU Research Memorandum places the average age of child victims at the time they were made known to DHS and SARC at 15.5 years.¹⁸⁶ The youngest victim was eight years old and the oldest was twenty-two.¹⁸⁷ Ninety-six percent of these victims were female, 3% were male, and 1% were transgender.¹⁸⁸ The ethnicity of the victims was: 41% Caucasian, 27% African American, and 5% Hispanic. The representation of African American youth was quite disproportionate: African Americans make up approximately 6% of Multnomah County's population and 2% of the state population, yet they accounted for 27% of the trafficking victims.¹⁸⁹ Statewide in Oregon, it was reported in 2009 that approximately 80% of the trafficked persons that law enforcement encountered were women and 50% percent were children.¹⁹⁰

Although the federal trafficking statute (TVPA) was not specifically enacted to meet the Protocol's obligations, its essential purpose is to enforce the Three Ps that originate from the Protocol—Prevent, Punish, and Protect.¹⁹¹ Thus, the TVPA is a proper basis for evaluating the status of human trafficking enforcement in Oregon,

182. WILLAMETTE REPORT, *supra* note 6, at 2.

183. *Id.*

184. Heiges, *supra* note 28, at 429–30.

185. PSU RESEARCH MEMORANDUM, *supra* note 179, at 3.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* The memorandum provides other interesting statistics of child victims from all (then) current open cases with SARC (59) and all cases, past and present, with DHS (302). For example, 16.6% of victims were parents themselves; 8.6% of victims were adopted; 6.4% were developmentally delayed; 62.1% of SARC victims were dealing with addiction issues; 49.1% of the youth served by both agencies have a gang connection, which means that they were part of a gang, exploited by a gang, or gang influence played a significant part in their lives; 11.1% of the victims had been exploited by a family member; and 19.9% of the victims came from families with a history of exploitation. *Id.* at 4.

190. Ed Langlois, *Human Trafficking Continues to Claim Victims in Oregon*, CATHOLIC SENTINEL (Jan. 29, 2009), <http://www.sentinel.org/node/9786>.

191. See WILLAMETTE REPORT, *supra* note 6, at 15.

since states are obligated to adhere to its guidelines. The Willamette Report provides a succinct outline of the deficiencies regarding trafficking protection, prevention, and prosecution in Oregon. Some of these deficiencies could be alleviated, but surely not cured, with the legalization and regulation of prostitution. Yet, the implementation of these suggested reforms would face fierce political and moral opposition, as well as some potential federal law barriers.

Congress reauthorized the TVPA in 2003, 2005, and 2008 to “strengthen victim access to protection and assistance, and to increase the capacity of law enforcement to prosecute traffickers.”¹⁹² Some key definitions that flow from the TVPA are as follows:

COERCION — The term “coercion” means:

- (A) threats of serious harm to or physical restraint against any person;
- (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (C) the abuse or threatened abuse of the legal process.¹⁹³

COMMERCIAL SEX ACT — The term “commercial sex act” means any sex act on account of which anything of value is given to or received by any person.¹⁹⁴

INVOLUNTARY SERVITUDE — The term “involuntary servitude” includes a condition of servitude induced by means of:

- (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
- (B) the abuse or threatened abuse of the legal process.¹⁹⁵

192. *Id.*; see also Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008). The TVPA was also amended by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, Title XII, 127 Stat. 54, 136-160 (2013).

193. TVPA § 103(2), 22 U.S.C. § 7102(2) (2012).

194. *Id.* § 7102(3).

195. *Id.* § 7102(5).

SEVERE FORMS OF TRAFFICKING IN PERSONS — The term “severe forms of trafficking in persons” means:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) 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.¹⁹⁶

SEX TRAFFICKING — The term “sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.¹⁹⁷

VICTIM OF TRAFFICKING — The term “victim of trafficking” means a person subjected to [a severe form of trafficking or sex trafficking].¹⁹⁸

Section 105(a) of the TVPA¹⁹⁹ and sections 101 and 102 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)²⁰⁰ established the Interagency Task Force to Monitor and Combat Trafficking. This task force is responsible for, *inter alia*, “measuring and evaluating the progress of the United States and other countries” in trafficking prevention, protection, and prosecution.²⁰¹ The task force then prepares an annual report for Congress that compiles various countries’ performances based on “minimum standards” and the Three Ps over the year.²⁰²

The Willamette Report assessed Oregon’s performance for the Three Ps and the proposed minimum standards for the United States and other countries within the TVPA.²⁰³ Section 108 of the TVPA sets out the minimum standards, which include the obligations to: (1)

196. *Id.* § 7102(8).

197. *Id.* § 7102(9).

198. *Id.* § 7102(13), (14).

199. *Id.* § 7103.

200. TVPRA §§ 101, 102, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified at 22 U.S.C. § 7103 (2012)), available at <http://www.justice.gov/olp/pdf/hr3887.pdf>.

201. 22 U.S.C. § 7103(d)(2).

202. *See id.* § 7107(b). For the 2013 report, see <http://www.state.gov/j/tip/rls/tiprpt/2013/index.htm>.

203. *See* WILLAMETTE REPORT, *supra* note 6, at 17 (section D discussing in depth Oregon’s performance measured by the minimum standards).

prohibit severe forms of trafficking;²⁰⁴ (2) prescribe commensurate punishment, for crimes such as rape, that adequately reflects the heinous nature of the crime, and deters potential perpetrators;²⁰⁵ and (3) make serious and sustained efforts to eliminate severe forms of trafficking.²⁰⁶

A. Oregon's Deficiencies

Oregon has faced several significant challenges in implementing the Three Ps and meeting the TVPA's minimum standards.

1. Prevention

The actions required to properly meet the "prevention obligations" under the Protocol and the TVPA include "[i]ncreased awareness, information sharing amongst various agencies, and increased training for individuals who work in an official capacity."²⁰⁷ Oregonians Against Trafficking Humans (OATH)—the education and awareness branch of the Oregon Human Trafficking Task Force (Oregon Task Force)—is responsible for raising awareness.²⁰⁸ Most of its focus is on sex trafficking of domestic minors.²⁰⁹ In the Portland area, there have been efforts to reestablish a "johns' school," which would serve as a diversion to criminal prosecution. Such "schools" educate the individual who has been caught soliciting sex for money about trafficking and prostitution generally.²¹⁰ Another awareness raising effort is the placing of stickers that advertise a trafficking hotline telephone number in restaurants and bars.²¹¹ The deficiencies: most of the awareness "efforts are directed toward Multnomah county and the surrounding tri-county area," and focus only on sex trafficking (as opposed to

204. 22 U.S.C. § 7106(a)(1).

205. *Id.* § 7106(a)(2)–(3).

206. *Id.* § 7106(a)(4).

207. WILLAMETTE REPORT, *supra* note 6, at 57.

208. *See id.* at 49.

209. *See id.*

210. *See id.* at 50. It seems these schools do now exist, as a matter of fact. For example, S.B. 673 requires attendance at one of these schools for first-time offenders of purchasing sex with a minor. It defines "John School" as "any course, class or program intended to educate and prevent recidivism of persons who have been arrested for, charged with or convicted of patronizing a prostitute or purchasing sex with a minor or attempting to patronize a prostitute or purchase sex with a minor." *See* S.B. 673 § 4, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (to be codified at Or. Rev. Stat. §§ 163.355–427).

211. *See* WILLAMETTE REPORT, *supra* note 6, at 50.

labor trafficking) of domestic minors.²¹² Sufficient funding for “johns’ schools” is also a major impediment.²¹³

Agency cooperation and communication are some of the key gateways to preventing trafficking within a state. The more a specific agency is aware of what role it is supposed to play in the prevention strategy, the more the “chances of victim identification, victim cooperation, and prosecution of traffickers increases.”²¹⁴ There are several agencies, such as the Oregon Task Force, that strive to coordinate the effort of prevention among “various interested stakeholders.”²¹⁵ “The [Oregon Task Force] is a collaboration of local, state, and federal law enforcement agencies working together with organizations providing comprehensive services to trafficking victims to identify and rescue victims of human trafficking and to proactively investigate, identify, apprehend[,] and prosecute those engaged in human trafficking.”²¹⁶ The director of the Oregon Task Force receives victim referrals from other agencies, nonprofit organizations, and legal organizations.²¹⁷

A variety of local law enforcement agencies, such as the Multnomah County District Attorney’s office, Multnomah County Sheriff’s Office, and the Portland Police Department, have worked closely in the prosecution process.²¹⁸ This collaboration seems to be limited to the Portland area, however. Furthermore, there is a lack of coordination between law enforcement and social service providers, such as Catholic Charities, a nonprofit organization that receives federal grants to assist victims and train others in identifying victims.²¹⁹ This in turn results in law enforcement agencies’ lack of knowledge of where to refer victims. Oregon has also worked with the FBI in setting up stings and other coordinated efforts of prevention.²²⁰

212. *See id.* at 57.

213. *See id.* at 50.

214. *See id.* at 44.

215. *See id.*

216. *See id.* (quoting the Dept. of Community Justice (DCJ), Multnomah County, OR (2009)) (internal quotations omitted).

217. *See id.* at 45.

218. *See id.* at 48.

219. *See id.* at 60.

220. *See id.* at 47. For a more recent example of FBI and local cooperation, see Rob Manning, *FBI: Four Oregon Children Rescued in Sex-Trafficking Sting*, OREGON PUB. BROAD. (July 29, 2013), <http://www.opb.org/news/article/fbi-four-oregon-children-rescued-in-sex-trafficking-sting/>.

The deficiencies: one of the most significant impediments of increased coordination amongst state agencies is the lack of a standardized record management system in Oregon.²²¹ There are a variety of information recording systems used in the state,²²² but the “cross-referencing” needed to track victims, witnesses, and prior or original arrest charges is impaired because information is not available within a single source.²²³ There is no uniform data system in patrol cars that police officers can access while in the field that “provides information on prior victim status or any indication of a pattern of arrests that might serve as an indicator of a potential trafficking situation.”²²⁴ So not only is this a problem for in-the-field investigation of trafficking, but it also poses a problem for law enforcement groups, such as the Criminal Justice Commission when it recommends stricter sentencing.²²⁵ The PSU Research Memorandum cites a similar problem as one of the main recommendations for improvement in the Portland area. It specifies that a centralized database containing information about victims is important to prevention and intervention.²²⁶ It follows that this deficiency has not improved much since the drafting of the 2010 Willamette Report. Funding for creating such a system would most certainly be an issue here as well.

Members of the anti-trafficking community also see a “major gap” in the training of law enforcement to recognize trafficking and trafficking victims.²²⁷ One reason that it may be such a significant deficiency is because “different agencies have varying views as to what constitutes trafficking in the eyes of the law,” and “trafficking is considered a ‘hidden crime’ because it is often entwined with other crimes, making identification difficult.”²²⁸ Training for other relevant

221. See WILLAMETTE REPORT, *supra* note 6, at 48.

222. See *id.* at 100 n.625 (discussing the various data bases used: OJIN (Oregon Judicial Information Network), NIBRS (National Instant Based Reporting System), and LEDS (Law Enforcement Data System)).

223. See *id.* at 48–49.

224. See *id.* at 49.

225. See *id.* at 100–01.

226. PSU RESEARCH MEMORANDUM, *supra* note 179, at 5 (stating that substance abuse information, juvenile records, and foster care status would be important to know). See also *Child Trafficking Report*, OREGON PUB. BROAD. (Aug. 6, 2013), <http://www.opb.org/thinkoutloud/shows/child-trafficking-report/>.

227. See WILLAMETTE REPORT, *supra* note 6, at 51.

228. *Id.*

agencies²²⁹ is lacking as well, but Catholic Charities essentially offers training to anyone who asks for it since it provides the majority of non-law enforcement trafficking training in Oregon.²³⁰

The main impediment to improvement here is a lack of funding and resources for increased training for law enforcement and employees of government agencies.²³¹ Additionally, there was no standard operating procedure for training purposes in 2010,²³² nor was trafficking awareness a required part of law enforcement training.²³³ Section 13 of Oregon Senate Bill 673 (S.B. 673), which took effect August 2013, has improved, but not remedied, the lack of training with its provision that gives the Board on Public Safety Standards and Training the *discretion* to require that “all police officers and certified reserve officers [be] trained to recognize, investigate[,] and report cases involving labor trafficking and sex trafficking of children and adults at any advanced training program”²³⁴ However, this author acknowledges that the Department of Public Safety Standards and Training has stated that it “will add information on this new law to [its] Basic Police Course and include as part of [its] 16-week class that all new officers attend. [It is] also working with OATH [and] the [Oregon Task Force], which is based [in] Portland, to collaborate on a training seminar on this important issue.”²³⁵

2. Protection (and Assistance) of Victims

A process for identification of victims is one of the “largest deficiencies” in Oregon’s attempt to protect victims, which makes

229. For example: the Department of Human Services, Oregon Judicial Department, and various nongovernmental organizations.

230. WILLAMETTE REPORT, *supra* note 6, at 54, 56.

231. *Id.* at 57.

232. *Id.*

233. *See id.* at 52.

234. S.B. 673 § 13, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (to be codified at OR. REV. STAT. §§ 181.612–712) (“The Board on Public Safety Standards and Training *may* require that all police officers and certified reserve officers are trained to recognize, investigate and report cases involving labor trafficking and sex trafficking of children and adults at any advanced training program operated or authorized by the Department of Public Safety Standards and Training”) (emphasis added).

235. Email from Eriks Gabliks, Director, Dep’t of Pub. Safety Standards and Training, to author (Oct. 8, 2013, 04:59 PST) (on file with author). The Department has “also included information on this new law in the legal update [it] create[s] after each session in partnership with the Police Chiefs, Sheriffs, and District Attorney’s associations which is used to maintain the knowledge of law enforcement officers around the state.” *Id.*

sense in light of the lack of law enforcement training for trafficking.²³⁶ Effective identification requires intensive fact finding through interviewing, and it also requires law enforcement getting over its “largest obstacle” with identification: treating the potential victim as a victim, not as a criminal (prostitute).²³⁷ If an adult is coerced into prostitution, but “consents” to an isolated sexual transaction, is she a victim or a prostitute? Only a thorough fact finding investigation and interview would reveal any coercive nature behind the face of the transaction.

This is especially important since a victim *over* the age of eighteen can legally consent to sex, which may put her in the category of prostitute, rather than victim.²³⁸ Under the TVPA, any person under the age of eighteen who is engaged in prostitution is a victim *per se*.²³⁹ By contrast, identifying adult victims is much harder. Prosecuting a victim for prostitution, whether a minor or not, reinforces the social stigma (and perhaps what her pimp has told her) that she is a criminal and is at fault.²⁴⁰ This in turn creates distrust for authority and dilutes any effective information gathering about trafficking. Furthermore, the victim’s comfort with law enforcement is crucial to identifying victims because there is a limited amount of time after initial contact with a victim in which he or she is willing to “open up to a case manager.”²⁴¹

NGOs and service providers, such as Oregon DHS, have more extensive training for identification than other members of the anti-trafficking community, but most of them still rely on reports from concerned citizens or other informal methods to actually identify victims.²⁴² Oregon DHS has identified the majority of reported cases because the agency operates a child welfare hotline where concerned citizens can report trafficking.²⁴³ The Willamette Report suggests that more minors are rescued from trafficking as compared to adults due to the difficulty of identification.²⁴⁴

236. See WILLAMETTE REPORT, *supra* note 6, at 58.

237. See *id.*

238. Cf. OR. REV. STAT. § 163.315 (2011) (establishing that a minor is incapable of giving consent to a sexual act).

239. TVPA § 103(8), 22 U.S.C. § 7102(8) (2012).

240. WILLAMETTE REPORT, *supra* note 6, at 68.

241. *Id.* at 58.

242. *Id.* at 60.

243. See *id.* at 82.

244. See *id.* at 81.

Since 2009, Oregon state agencies have cooperated with the FBI multiple times in its trafficking/prostitution stings (titled “Operation Cross Country”) to arrest traffickers of underage sex trafficking victims.²⁴⁵ A 2010 sting was particularly successful in that the FBI utilized the state DHS to set up a separate site for the victims to be given food, hygiene products, and an advocate, but still fell short of complete success for potential adult victims.²⁴⁶ The potential victims that were over age eighteen were not given the same help as the minors, i.e., they were treated as criminals and were arrested.²⁴⁷ The 2013 Operation Cross-Country had a similar outcome with adults, but the FBI states that the adult prostitutes that were arrested were “offered the opportunity to access help through victim services and the [state] social service partners.”²⁴⁸

These operations went well overall, but there was still a problem with ongoing case management—SARC is available for case management, but it has few staff and has a large caseload.²⁴⁹ SARC is able to help victims in the “short term,” but it cannot give the victims the attention and detail they need in the “long term” without an increase in funding and staff.²⁵⁰ The TVPA requires the federal government to provide certain services to victims, but Oregon does not mandate any victim services, not even for minors.²⁵¹ There is also no state agency or NGO to provide housing, transportation, individualized care, or physical and psychological therapy *specifically*²⁵² to trafficked girls once they are taken away from

245. *See id.* at 63 (the 2009 and 2010 operations); Beth Anne Steele, Press Release, *Oregon and Southwest Washington Law Enforcement Partners Rescue Three Young Victims of Commercial Sexual Exploitation*, FED. BUREAU OF INVESTIGATION (June 25, 2012), <http://www.fbi.gov/portland/press-releases/2012/oregon-and-southwest-washington-law-enforcement-partners-rescue-three-young-victims-of-commercial-sexual-exploitation>; Beth Anne Steele, Press Release, *Oregon and Southwest Washington Law Enforcement Partners Recover Two Young Victims of Commercial Sexual Exploitation*, FED. BUREAU OF INVESTIGATION (July 29, 2013), <http://www.fbi.gov/portland/press-releases/2013/oregon-and-southwest-washington-law-enforcement-partners-recover-two-young-victims-of-commercial-sexual-exploitation>.

246. WILLAMETTE REPORT, *supra* note 6, at 63.

247. *Id.*

248. Beth Anne Steele, Press Release, *Oregon and Southwest Washington Law Enforcement Partners Recover Two Young Victims of Commercial Sexual Exploitation*, FED. BUREAU OF INVESTIGATION (July 29, 2013), <http://www.fbi.gov/portland/press-releases/2013/oregon-and-southwest-washington-law-enforcement-partners-recover-two-young-victims-of-commercial-sexual-exploitation>.

249. WILLAMETTE REPORT, *supra* note 6, at 64.

250. *Id.*

251. *Id.* at 68–69.

252. Trafficked victims can be placed in other shelters, but placing a trafficked victim in

traffickers. The PSU Research Memorandum specifically recommends such a residential facility in order to improve prevention and better the assistance available to victims.²⁵³ Of the minor victims DHS served as of August 2013, the Memorandum states that forty were “identified by DHS case managers as likely to benefit from a six to eighteen month stay in a residential treatment facility, if one were to exist.”²⁵⁴

There is substantial disagreement about many sensitive factors that would have to be considered when developing such a facility, including whether facilities would be segregated by age or segregated by type of victimization, and whether stays would be compulsory or not.²⁵⁵ Many advocates agree that victims need to feel not only safe, but “empower[ed] and free from judgment.”²⁵⁶ In addition to a need for housing after the recovery process has begun, some victims (particularly minors) may require 24-hour supervision, due to the risk that they will return to their traffickers.²⁵⁷ Shelters for other types of victims cannot provide this level of service.²⁵⁸

Some service providers, such as Catholic Charities and SARC, do provide a level of support for victims, constrained by whatever amount of resources are available.²⁵⁹ There are severe funding limitations on the extent that these NGOs can assist the victims, and the most necessary types of assistance are the most expensive: provision of necessities, medical care, housing, job placement, and psychological care.²⁶⁰ Catholic Charities is the only “fully comprehensive” service provider in Oregon (meaning it can provide all of these services in-house), but is limited to foreign-born victims;

a domestic violence shelter, for example, may not give her the necessary attention; a lot of trafficked victims need to be given instruction regarding hygiene, grocery shopping, and other basic functions for everyday living. There is also a phenomenon between trafficking victims and other types of victims where trafficked victims are seen as less of a human being. This occurs because other victims feel empowered when they can find someone else who is “worse off” than they are, and thus impose a stigma of worthlessness on trafficking victims. *See id.* at 77 n.479.

253. *See* PSU RESEARCH MEMORANDUM, *supra* note 179, at 4–5.

254. *Id.* at 5.

255. *See* WILLAMETTE REPORT, *supra* note 6, at 67–68, 85 (discussing the potential damage to a trafficked individual from being forced to remain in a safe house and viewing the placement as punitive).

256. *See id.* at 98.

257. *See id.* at 64, 67.

258. *See id.* at 77.

259. *See id.* at 74.

260. *See id.*

this leaves domestic trafficking victims alone to navigate the system and find assistance from other organizations that offer specific resources.²⁶¹

The deficiencies: as was the case in 2010, the major limiting factor for service providers today is funding.²⁶² “The infrastructure is there, and while there are some targeted improvements that should be made (such as shelters and a case management system), the main functional limitation on Oregon’s ability to help trafficking victims is a lack of resources.”²⁶³ Oregon is minimally meeting the legal minimums the TVPA imposes for protection and assistance, likely because most of the responsibility is placed on the federal government.²⁶⁴ However, more is needed to allow Oregon to protect and assist victims, as well as meet its obligations to prevent and punish.²⁶⁵

3. Punishment (Prosecution)

a. Investigation

The main goal in prosecution should be to focus on the true criminal: the trafficker. As mentioned above, identifying adult victims is quite a challenge because of the consent versus no consent issue. In addition to a lack of an established and defined procedure for first response law enforcement to follow regarding identification of trafficking victims, there were no uniform investigatory procedures for trafficking in Oregon in June 2010, except for those the Portland Police Department (PPD) implemented.²⁶⁶ Of course, S.B. 673 will change this once the Board on Public Safety Standards and Training follows through on its statements and requires all police officers to be trained to recognize and investigate sex trafficking.

The PPD uses its Sex Crimes Unit,²⁶⁷ as opposed to its (and

261. *See id.* at 76.

262. *Child Trafficking Report*, OREGON PUB. BROAD. (Aug. 6, 2013), <http://www.opb.org/thinkoutloud/shows/child-trafficking-report/> (Erin Ellis, Executive Director of SARC, explains that for every one victim accepted for services, another one is denied services due to insufficient funding).

263. WILLAMETTE REPORT, *supra* note 6, at 75.

264. *See id.* at 79.

265. *See id.*

266. *See id.* at 82–83.

267. The PPD may have changed the name of the Sex Crimes Unit to the “Human Trafficking Unit.” *See How to Curb Child Sex Trafficking*, OREGON PUB. BROAD. (Apr. 1, 2013), <http://www.opb.org/thinkoutloud/shows/how-curb-child-sex-trafficking/> (guest speaker

other states’)²⁶⁸ former practice of utilizing the Vice Unit for trafficking and prostitution investigations.²⁶⁹ This change represents a shift in law enforcement perception of prostitutes as potential victims rather than criminals because the Vice Unit is more offense oriented (thus prostitutes were offenders), whereas the Sex Crimes Unit gives a trafficking case the same priority as a sexual assault case.²⁷⁰ The detectives of the Sex Crimes Unit are available 24 hours a day to assist an identified victim with eliciting information about a trafficker.²⁷¹ It is unclear whether these detectives also conduct any initial victim identification determinations. In addition to in-person investigations, state law enforcement conducts Internet investigations looking for traffickers and victims.²⁷²

b. Witness Cooperation

Prosecutors rely heavily on victim testimony and cooperation in order to successfully charge for trafficking or forced prostitution.²⁷³ Generally, felony charges must be filed within a week from a district attorney’s receipt of a police report in order for a grand jury to indict, and the victim is usually released until the indictment.²⁷⁴ When a minor victim is picked up in Multnomah County, however, the case is indicted within that same day, assuming there is sufficient evidence to do so.²⁷⁵ The fast turnaround for minors presumably helps alleviate one of the biggest obstacles to investigation and prosecution: the loss of witnesses.

A variety of factors, such as psychological bonds to the pimp, lack of self-esteem, threats, the social stigma associated with sex workers, and an inability to perceive an alternative lifestyle contribute to victims returning to their pimps and ceasing cooperation with police.²⁷⁶ These factors underscore the need to separate the victim from her trafficker, and reinforce the notion that victims need to be rehabilitated individually and carefully. They also raise the sensitive

is Mike Geiger, Sergeant with the Portland Police Bureau’s “Human Trafficking Unit”).

268. See Heiges, *supra* note 28, at 432.

269. See WILLAMETTE REPORT, *supra* note 6, at 83.

270. See *id.*

271. See *id.*

272. See *id.* at 82.

273. See *id.* at 85.

274. *Id.* at 88.

275. See *id.* at 84.

276. See *id.*

(and constitutional) issue of whether to require confinement in a safe place, with all the necessary services for rehabilitation, or to allow voluntary confinement.²⁷⁷ Allowing a victim to voluntarily enter such a facility has given district attorneys much hardship. For example, according to the Portland Police Department, “every minor they have relocated to a different county or state has either returned to her pimp or found another pimp.”²⁷⁸ The only way that a court would be able to impose state guardianship on a victim is if she has a severe drug problem or mental illness, there is a lack of parental involvement, or she engages in risky behavior.²⁷⁹

c. Sentencing and Elements of the Crime

When it comes to actual prosecution of trafficking cases in Oregon, state prosecutors have tended to use the state compelled prostitution statute,²⁸⁰ rather than the state trafficking statute,²⁸¹ because prior to August 2013,²⁸² the elements in the trafficking statute were harder and more time consuming to prove.²⁸³ Like the TVPA, compelled prostitution in Oregon does not require proof of force or coercion for a victim under the age of eighteen.²⁸⁴ The prosecutor

277. As the Willamette Report points out, this is an issue in and of itself. There is much debate in regard to how rehabilitation of victims should be carried out. *See id.* at 96–98.

278. *Id.* at 94.

279. *Id.* at 95.

280. OR. REV. STAT. § 167.017 (2011).

281. *Id.* § 163.266 (2011).

282. *See* S.B. 673 § 1, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (amending OR. REV. STAT. § 163.266).

283. WILLAMETTE REPORT, *supra* note 6, at 89, 92.

284. *See* OR. REV. STAT. § 167.017(1)(b), (3) (2011). The statute reads in its entirety as follows:

- (1) A person commits the crime of compelling prostitution if the person knowingly:
 - (a) Uses force or intimidation to compel another to engage in prostitution or;
 - (b) Induces or causes a person under 18 years of age to engage in prostitution;
 - (c) Aids or facilitates the commission of prostitution or by a person under 18 years of age; or
 - (d) Induces or causes the spouse, child or stepchild of the person to engage in prostitution.
- (2) Compelling prostitution is a Class B felony.
- (3) In a prosecution under subsection (1)(b) or (c) of this section, the state is not required to prove that the defendant knew the other person was under 18 years of age and it is no defense that the defendant did not know the person’s age or that the defendant reasonably believed the person to be older than 18 years of age.

Id.

need only show that the minor received money in consideration for sex to impose the minimum sentence.²⁸⁵ However, prior to S.B. 673, the Oregon trafficking statute failed to make the consent of a child irrelevant.²⁸⁶ Thus, traffickers could argue, as a defense, that the victim in fact consented to the acts underlying the exploitation. That aspect made it much harder for a prosecutor to charge a defendant with trafficking than with compelled prostitution.²⁸⁷

S.B. 673 has significantly increased the potential for effective prosecution under the Oregon state trafficking law when it comes to minor victims, but room for improvement remains.²⁸⁸ S.B. 673 now

285. WILLAMETTE REPORT, *supra* note 6, at 89.

286. Prior to S.B. 673, OR. REV. STAT. § 163.266 read as follows:

- (1) A person commits the crime of trafficking in persons if the person knowingly:
 - (a) Recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person knowing that the other person will be subjected to involuntary servitude as described in ORS 163.263 or 163.264; or
 - (b) Benefits financially or receives something of value from participation in a venture that involves an act prohibited by this section or ORS 163.263 or 163.264.

- (2) Trafficking in persons is a Class B felony.

OR. REV. STAT. § 163.266 (2011). S.B. 673 amended OR. REV. STAT § 163.266 to read as follows:

- (1) A person commits the crime of trafficking in persons if the person knowingly recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person and:

- (a) The person knows that the other person will be subjected to involuntary servitude as described in ORS 163.263 or 163.264;
- (b) The person knows or recklessly disregards the fact that force, fraud or coercion will be used to cause the other person to engage in a commercial sex act; or
- (c) The person knows or recklessly disregards the fact that the other person is under 15 years of age and will be used in a commercial sex act.

- (2) A person commits the crime of trafficking in persons if the person knowingly benefits financially or receives something of value from participation in a venture that involves an act prohibited by subsection (1) of this section or ORS 163.263 or 163.264.

- (3) As used in this section, “commercial sex act” means sexual conduct or sexual contact, as those terms are defined in ORS 167.002, performed in return for a fee or anything of value.

- (4) Violation of subsection (1)(a) or (2) of this section is a Class B felony.

- (5) Violation of subsection (1)(b) or (c) of this section is a Class A felony.

OR. REV. STAT. ANN. § 163.266 (West 2013).

287. WILLAMETTE REPORT, *supra* note 6, at 107.

288. Notably, S.B. 673 has greatly improved the state of the law in regard to the patrons

makes trafficking of a child victim a Class A felony²⁸⁹ (prior to S.B. 673, trafficking for all persons was a Class B felony),²⁹⁰ whereas compelled prostitution is a Class B felony for all victims regardless of age.²⁹¹ The maximum sentence of imprisonment for a Class A felony is 20 years, and the maximum for a Class B felony is 10 years.²⁹² Thus, there is now a potentially more severe sentence for an offender charged with trafficking a child instead of compelled prostitution.

Yet, one of the apparent deficiencies of S.B. 673 is that it does not go as far as the compelled prostitution statute in its protection of victims under age eighteen. As stated above, that statute does not require a showing of force or coercion for a victim under eighteen. S.B. 673 falls short of that protection because, even though it does not require a showing of force, fraud, or coercion for those under *age fifteen*, it exposes cases dealing with fifteen, sixteen and seventeen year old victims to the same challenges faced under the old trafficking statute.²⁹³ For adults, both the compelled prostitution²⁹⁴ and trafficking²⁹⁵ statutes require a showing of force or fraud to perform a service.

Under the TVPA, traffickers can be sentenced to twenty years for each victim, or a life sentence if aggravating circumstances exist—although the national average in June 2010 was 9.3 years.²⁹⁶ Prior to S.B. 673, the Oregon trafficking statute did not carry a specified sentence because the crime was unranked on the Oregon

of commercial sex with minors. Prior to S.B. 673, Oregon was one of only nine states in which it was not a felony to purchase sex from a minor. *See* Sanne Specht, *Stopping “The Kiddie Track,”* MEDFORD MAIL TRIBUNE (July 29, 2013), <http://www.opb.org/news/article/stopping-the-kiddie-track/>. Post-S.B. 673, it is now a felony to “purchase sex with a minor,” which is purchasing sex from a person under 18 years of age. Mandatory minimum fines and jail terms are imposed depending on the offender’s prior convictions. Moreover, registration as a sex offender can be required as well. *See* S.B. 673 § 4, 77th Leg. Assemb., Reg. Sess. (Or. 2013).

289. S.B. 673 § 1, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (amending OR. REV. STAT. § 163.266).

290. OR. REV. STAT. § 163.266 (2011).

291. OR. REV. STAT. § 167.017(2) (2011).

292. OR. REV. STAT. § 161.605 (2011).

293. S.B. 673 § 1, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (amending OR. REV. STAT. § 163.266).

294. *See* OR. REV. STAT. § 167.017(1)(a) (2011).

295. S.B. 673 § 1, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (amending OR. REV. STAT. § 163.266).

296. WILLAMETTE REPORT, *supra* note 6, at 92.

sentencing grid's Crime Seriousness Scale,²⁹⁷ and S.B. 673 does not seem to have altered that yet.²⁹⁸ When a person is convicted of a felony that is omitted from the Crime Seriousness Scale, the sentencing judge determines the appropriate crime category for the current crime of conviction and must state on the record the reasons for the offense classification he or she chooses.²⁹⁹

On the other hand, the compelled prostitution statute carries a minimum sentence of five years and ten months under Ballot Measure 11.³⁰⁰ Oregon's Ballot Measure 11 established mandatory minimum sentences for "serious crimes against persons";³⁰¹ compelling prostitution is within the scope of Measure 11, but trafficking is not. This means that sentencing for trafficking of persons is essentially within a judge's discretion, which further discourages prosecutors from charging defendants with trafficking.³⁰² Since the crime of trafficking is unranked, district attorneys are hesitant to risk a lighter sentence via a trafficking charge compared to a Measure 11 minimum sentence for compelled prostitution.³⁰³

An additional consequence of the trafficking statute lacking a rank is that the Oregon material witness statute³⁰⁴ does not apply to the crime.³⁰⁵ To use the statute, the district attorney must show probable cause that a crime has been committed and that there is a risk of the witness's flight.³⁰⁶ However, the material witness statute is used only for "serious cases," so the fact that trafficking is unranked with insufficient sentencing guidelines precludes the operation of compelled testimony.³⁰⁷

297. *Id.* at 89.

298. *See* OR. ADMIN. R. 213-017-0000 to 0011 (2013) (contains the eleven categories of crimes that are ranked on the Oregon Sentencing Grid's Crime Seriousness Scale, none of which include trafficking in persons under OR. REV. STAT. ANN § 163.266). However, this author acknowledges that the Oregon Criminal Justice Commission reviews all new legislation that creates new crimes or modifies existing crimes and has the authority to adopt by rule any necessary modifications to the crime seriousness scale of the guidelines to reflect the actions of the Legislative Assembly. *See* OR. REV. STAT. § 137.667 (2011).

299. OR. ADMIN. R. 213-004-0004 (2013).

300. OR. REV. STAT. § 137.700(2)(b)(C) (2011).

301. WILLAMETTE REPORT, *supra* note 6, at 92.

302. *Id.* at 93.

303. *See id.*

304. *See* OR. REV. STAT. § 136.608 (2011) (establishing the process to compel a witness to testify).

305. *See* WILLAMETTE REPORT, *supra* note 6, at 85, 100.

306. *Id.* at 100.

307. *See id.*

4. Would Federal Law Prohibit a Legalized Prostitution Market?

Even with a shared outrage about the issue of human trafficking, there are some splits of ideology within the fight against the practice. For example, “neoabolitionists” believe that prostitution is inherently coercive and thus is itself a form of trafficking.³⁰⁸ Some “nonabolitionists,” on the other hand, see prostitution as a liberating expression of sexuality and equality, but concede that it could be harmful.³⁰⁹ The TVPA’s definition of sex trafficking listed above does not contain any force or coercion element, which could mean that it encompasses voluntary prostitution as well. However, this definition “was, at best, a symbolic victory for the neoabolitionists” because the TVPA does not actually criminalize sex trafficking unless it involves “trafficking of children” or is “effected by force, fraud, or coercion.”³¹⁰ Thus, arguably, the TVPA would not preempt any state attempt to legalize prostitution. There are, however, other significant federal obstacles that Oregon would have to consider, such as denial of federal grants to NGOs.

In the reauthorizations of the TVPA, it became apparent that the neoabolitionist perspective on trafficking was bleeding through ideology, coagulating into law. For example, the 2003 TVPRA prohibits the use of U.S. funds for programs that “promote, support, or advocate the legalization or practice of prostitution,” and “any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution.”³¹¹ There are many issues wrong with such a stance that are beyond the scope of this article, but the question of whether fund preclusion would sufficiently deter a state from legalizing prostitution requires a cost–benefit analysis of forecasted revenues from regulated prostitution versus the amount of federal grants that certain organizations receive each year. There is also uncertainty as to whether these fund restrictions would even apply to a state-based NGO working domestically.³¹²

308. Chuang, *supra* note 5, at 1657–58.

309. *Id.* at 1670.

310. *See* TVPA § 112, 22 U.S.C. 7109 (2012); *see also* Chuang, *supra* note 5, at 1679 (explaining that the TVPA limits its application to “severe forms of trafficking”).

311. *See* TVPRA § 7, 22 U.S.C. § 7110(g)(1)–(2) (2012); *see also* Chuang, *supra* note 5, at 1683–84.

312. *See* Chuang, *supra* note 5, at 1685 n.118 (explaining that these restrictions were originally only applied to foreign NGOs, but have been expanded to U.S. based NGOs working abroad).

IV. REGULATED PROSTITUTION'S EFFECT ON TRAFFICKING ENFORCEMENT IN OREGON

In order to better fulfill Oregon's trafficking obligations and goals, legalizing prostitution could provide for an improved trafficking enforcement infrastructure and a minimization of the negative effects that result from the prohibition of voluntary prostitution.³¹³ This author has taken a realist's approach to the issue of prostitution in that it is inevitable to occur, whether regulated or not. Under the dominant view of "work" in capitalist America, individuals are forced into careers as a condition of subsistence, and work is only a "means toward self-sufficiency separate from work."³¹⁴ This conflicts with the dominant and proper view of sex, which is based on mutual, informed consent.³¹⁵ It seems possible to harmonize these two concepts within a regulated prostitution arena, but there are many complex policy considerations, not all of which can be discussed in this article, that must be considered.

For example, there are many state and federal laws that protect employees, but not independent contractors.³¹⁶ Some of the protections that extend to an employee (as opposed to an independent contractor) include a minimum wage, worker's compensation, unemployment compensation, protection against sex discrimination, and the right to unionize.³¹⁷ Additionally, health insurance and pensions are frequently part of employment. The rest of this section assumes prostitutes would be treated as employees. Another critical issue is qualification for state and federal income assistance. There would have to be a welfare scheme that does not force women into prostitution simply because it is an available avenue to earn money.³¹⁸

313. Some of these recommendations are similar to those proposed in the Willamette Report. See WILLAMETTE REPORT, *supra* note 6, at 116–20 for more specific, detailed recommendations regarding trafficking enforcement improvement in Oregon.

314. Law, *supra* note 86, at 589.

315. *See id.* at 589–90.

316. *Id.* at 590.

317. *Id.* at 590–91. Many commercial sex workers are classified as independent contractors, which may allow higher income, but fewer protections. *See id.* at 591–99.

318. *See id.* at 601–08 (discussing Social Security benefits and the fact that one will not receive benefits if she is able to do any other work in the economy; suggesting that a way around requiring applicants to prostitute is to allow women to decline work that violates strongly held beliefs and values).

A. How Could Prostitution be Regulated in Oregon?

It does not seem particularly wise to exclusively commit to one of the polar categorizations of a regulated prostitution arena discussed above, but the reader will see that legalization is more conducive to achieving the level of oversight necessary for effective trafficking enforcement. Legalization would give the state complete control to experiment with legislation and the proper practices to achieve the safest and most effective regulated market. The rest of this section assumes that legalization is the most fitting scheme for regulated prostitution, but it does not suggest that it is the only type of regulation that could harmonize with trafficking enforcement.

Oregon could use Nevada, and in a sense, the Netherlands, as a model in terms of isolating regulated prostitution within state or county-sanctioned brothels, but could also make many improvements to give the workers more freedom as employees. Each prostitute would be considered a state or county employee who receives all the benefits that come along with such a status. Furthermore, rather than simply authorizing brothels, the state should exclusively run them as state agencies in order to dedicate any and all net profit to a fund that is used solely to support trafficking enforcement infrastructure in Oregon. Although only allowing the government to operate brothels cuts into the independent prostitute's realm of freedom, the state could always open the market to private enterprise, with significant taxation, after testing the effectiveness of a regulated market.

One of the most important aspects of a government-run prostitution market is consideration of the fact that this is a career that individuals may simply choose to pursue for financial security. In order to conscientiously legalize prostitution and finance trafficking enforcement with its proceeds, the state must ensure that it is not exploiting legitimate prostitutes by becoming a state-sanctioned pimp. In order to do this, a full-time Bureau of Labor and Industry worker's advocate should be employed in each brothel.

This advocate would be a mix between a human resources manager and a state auditor—the advocate would be expected to have his or her finger on the pulse of the brothel. He or she would be responsible for ensuring there are safety measures in place in the brothel, such as alarm buttons or video surveillance. The advocate would need to be trained to recognize and treat trafficking victims because he or she would serve as a liaison to law enforcement and the community regarding trafficking. As a counselor, he or she would

provide resources and guidance to any prostitute who was interested in leaving the brothel for other work. Of course, to avoid the problems regarding trafficking into legalized prostitution identified in the Netherlands discussion in section II.D.3.b above, the advocate would be required (and trained) to ensure that all applicants are voluntarily entering the field of prostitution.

As a general matter, in order to promote the legitimacy of the individual choice to sell sex, the act of prostitution within a government-run brothel must not have a criminal sanction. The act of prostitution outside of a brothel should also remain immune from criminal sanctions, but civil penalties should be discretionarily assessed for an infraction, such as practicing prostitution without a license. The purpose for not criminalizing out-of-brothel prostitution is to avoid treatment of potential trafficked victims as criminals and to eradicate any stigma of prostitution. However, in order to avoid the spread of a black market—as much as possible—pimping,³¹⁹ trafficking,³²⁰ and procuring nonbrothel prostitution³²¹ must remain crimes with tough consequences. In this respect, the legalization scheme would be somewhat similar to both Sweden's and the Netherlands' model.

If law enforcement finds an individual to be engaged in prostitution outside the regulated realm, a structured and uniform interview must be conducted to determine whether the individual is a trafficked victim or has truly chosen to prostitute outside of the legal arena. If she is being compelled to prostitute, then a trafficking investigation begins; if she is simply an unlicensed prostitute, she will be susceptible to a civil fine, with her economic condition taken into consideration. Other information may come to light through the victim determination analysis, such as whether she needs mental health assistance, or other DHS assistance. With this general scheme in mind, the rest of this section will address how regulated prostitution could alleviate some of the deficiencies present in Oregon's response to trafficking.

319. See OR. REV. STAT. § 167.012 (2011) (promoting prostitution; punishable as a Class C felony).

320. See S.B. 673 § 1, 77th Leg. Assemb., Reg. Sess. (Or. 2013) (amending OR. REV. STAT. § 163.266) (trafficking in persons; punishable as a Class A or Class B felony).

321. This would remain a misdemeanor under OR. REV. STAT. § 167.007 (2011), but perhaps imposing a felony would better deter purchasing sex outside of what the law would allow.

B. Prevention

Men who want to pay for sex are not usually aware of sex trafficking and generally do not intentionally want to utilize the services of a trafficked individual.³²² Thus, “johns’ schools” would be beneficial to implement for first-time offenders of procuring prostitution outside of a brothel and could also generally educate the community about trafficking. Such education has been “effective in reducing recidivism among arrested purchasers.”³²³ Since funding for these schools is a major issue, a designated portion of profit generated from brothels could be used to support them. If enough brothel profit is available, weekly classes held around the state informing Oregonians about the brothels, new laws, and trafficking could also be very helpful. Brothels, strip clubs, and the like should also be required to display stickers with a trafficking hotline in order to better facilitate reports of trafficking and to educate patrons of its existence.

Ideally, officers would be able to access victim information, such as prior arrests or charges, while in the field. Thus, implementing a statewide, shared law enforcement information recording system specifically dealing with trafficked victims and traffickers could alleviate Oregon’s communication and victim-identity deficiency. This system would be funded with profit from regulated prostitution as well. A uniform information recording system could also increase collaboration between law enforcement and other state agencies around the state.

In addition to uniform data compilation, mandatory uniform training of law enforcement, state agencies, and interested NGOs would surely increase the effectiveness of collaboration between these parties. Although S.B. 673’s delegation of authority to the Board on Public Safety Standards and Training, discussed above in section III.A.1, is a significant step to better prevention, one could argue that *requiring* the board to implement such training, and not simply giving it the discretion to do so, would be the more effective route to accurate and frequent identification of victims. As stated in section III.A.1, funding is the biggest impediment to mandatory training, which of course could be offset by any profit that is generated by the brothels. Uniform training standards and adequate information sharing, combined with legalized prostitution, would help strengthen

322. See Heiges, *supra* note 28, at 445, 465.

323. *Id.* at 465–66.

trafficking prevention and work toward the elimination of treating victims as criminals.

C. Protection of Victims

One of the most crucial stages in the trafficking investigation is the identification of the victim. A uniform and structured fact finding interview needs to be set up in order to determine if a person is being subjected to prostitution. Without the fear of criminal sanctions, logic suggests prostitutes may be more willing to cooperate with law enforcement in turning over her trafficker. Uniform training of law enforcement, state agencies, and NGOs would ensure this necessary fact finding interview would be a part of any seemingly run-of-the-mill prostitution offense.

If prostitution is legalized, the state will plausibly have many new allies on its side in the fight against trafficking: legalization will provide financial infrastructure for trafficking enforcement and increased training and awareness campaigns, thus bringing trafficking to the public's attention. Since most NGOs rely on reports from concerned citizens³²⁴ to identify victims, increased awareness among the community may contribute to an increase in citizen reports of trafficking. Additionally, there is an argument that some patrons of brothels may know the trafficking market better than any other citizen. Posting trafficking hotline numbers in brothels and perhaps requiring prostitutes to ask clients a routine series of questions about any information regarding trafficking violations could lead to increased reports of trafficking to the in-house Bureau of Labor and Industry worker's advocate.

Once a victim is identified, Oregon currently lacks resources through its state agencies and NGOs to provide a level of rehabilitation services and case management necessary for victim recovery. The severe lack of funding is what prevents the state from having a trafficking victims' shelter that can provide individualized care, while supplying medical and general necessities. Again, brothel profits could provide the foundation for these much-needed shelters. Aside from the many policy considerations that must be considered for a shelter, the ability to empower the victims with mental and physical support would be a huge improvement in Oregon's fight against human trafficking.

324. WILLAMETTE REPORT, *supra* note 6, at 60.

D. Prosecution

With prostitution legalized, law enforcement resources could be dedicated specifically to trafficking. Rather than looking for instances of prostitution with a mind-set of criminality, the mind-set of law enforcement should be focused on the coerced trade of victims. The Portland Police Department sets a good example with its Sex Crimes Unit handling trafficking cases, but if brothel revenue permitted, it would be ideal to have special trafficking units throughout the state. Brothel revenue could also help bolster the current Internet investigation teams.

Witness cooperation will heavily depend on how well the identification and training schemes work, but also upon how much time an advocate or therapist can spend with a victim after she is obtained. The issue of whether to require confinement is beyond this article, but the profits derived from the brothels could surely assist in setting up proper rehabilitation centers. A reduction in social stigma and the elimination of legal stigma likely would improve witness cooperation.

There are obvious problems with the Oregon trafficking statutes, but S.B. 673 is a significant improvement. Yet, the Oregon legislature needs to place its trafficking law at least on par with the TVPA and thus make consent irrelevant for anyone under eighteen, not fifteen. This would broaden the scope of protection for minor victims. Furthermore, it would make trafficking more straightforward to prosecute and avoid creating an odd range of ages where a prosecutor would rely on the state's compelled prostitution statute for victims older than age fifteen, but younger than age eighteen, while relying on the trafficking statute only for victims under age fifteen. More trafficking prosecutions will generate more public awareness. Second, the Oregon Criminal Justice Commission needs to rank the trafficking statute on the Oregon sentencing grid. The statute needs to be vamped up in order for prosecutors to be able to file charges with confidence. Once the crime is ranked, prosecutors may be able to use the material witness statute, which would increase the likelihood of witness testimony.

V. CONCLUSION

Although there is no easy answer to the difficult question of how to deal with the problem of human trafficking, addressing its status and relationship with prostitution is a crucial first step. The two acts

are very interrelated. However, they can be separated with legislation and policy that would likely produce a better conceptual understanding of the two. From this better understanding, the state can comprehend what should and should not be tolerated under the law. Stigma of prostitution is a big issue. As discussed in sections II and III, it can be an impediment to proper investigation of trafficking and prevents prostitutes from seeking legal recourse when they have been abused. Recognizing prostitutes as professionals, and trafficked persons as victims, is the stepping stone to societal acceptance of prostitution and a more effective interaction between law enforcement and sex workers.

Society has wrestled with issues of morality in a variety of acts such as gambling, alcohol consumption, pornography, homosexual sex, and most recently, recreational use of marijuana. These acts and others were once prohibited because it was thought they threatened the social moral fabric. Over time, the United States has come to accept these activities as simply another commodity, or has been forced to recognize them as part of fundamental human expression, and has allowed its citizens to be their own moral police. Our country has not become encrusted with sin and has not faltered (at least from any of these activities). Prostitution should not be any different, particularly in light of the opportunity to grasp it for a common goal: to curb human trafficking.