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Dear John, You are a Human Trafficker

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DEAR JOHN, YOU ARE A HUMAN TRAFFICKER

Mary Graw Leary*

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* Professor of Law, The Catholic University of America, Columbus School of Law. Special thanks to Adam Bereston and Robbie Cain for outstanding research; to Steve Young for impeccable library support; Staca Sheehan and John Cotton Richmond for guidance, and the patient professional staff of the University of South Carolina Law Review. For all survivors of sex trafficking whose strength and courage is an example for us all.

Just a little girl I haven't got a clue. Angry and alone. If only they knew. People pass by, I wish they could see all the pain inside. I wish it was a dream, something I could forget. . . . Sometimes I wish I were as invisible as I feel. Maybe men would leave me alone if I was never here.

-Lexie, sex trafficking survivor¹

I. INTRODUCTION

Laws evolve over time to reflect contemporary social norms. The criminal law, which in a sense serves as a form of a moral code, also transforms as societies and their respective values develop and mature. As a civilization progresses, so too does its sense of justice and its recognition of different forms of harm. Consequently, criminal laws are repealed as behavior once thought harmful is now deemed a matter of autonomy. Conversely, as society identifies more forms of victimization, behaviors once thought to be inconsequential, or even favored, are now recognized for the exploitation and abuse that they are. While this trend has been critiqued at times as over-criminalization, such is not always the case. The process of constant re-evaluation allows for a more inclusive criminal law in which previously marginalized and devalued victims are now recognized as people worthy of protections. Similarly, those who previously harmed them with impunity are now held accountable for their actions.

Nowhere is this evolution more clearly manifested than in sex trafficking. While crimes of prostitution and other forms of sexual exploitation have existed for centuries,² societal understanding of them and their harms has evolved over the years. What was once primarily regarded as nothing more than a vice of men with willing women is now seen in its truer, harsher light. Today, sex trafficking is understood as the use of force, fraud, coercion, or the use of minors to engage in a commercial sexual act.³ Research has revealed the reality of domestic sex trafficking to be a violent

1. Jay Dow, *Sex-Trafficking Survivor Tells Her Story As Officials Warn of Super Bowl-Related Prostitution*, PIX 11 (Jan. 30, 2014), <http://pix11.com/2014/01/30/sex-trafficking-survivor-tells-her-story-as-officials-warn-of-super-bowl-related-prostitution/>.

2. See WILLIAM W. SANGER, *THE HISTORY OF PROSTITUTION: ITS EXTENT, CAUSES, AND EFFECTS THROUGHOUT THE WORLD* 35–36 (1910) (discussing prostitution in biblical times); *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 595 (9th Cir. 2010) (referring to prostitution in America “over the last 100 years”).

3. 18 U.S.C. § 1591(a) (2012 & Supp. 2015); 22 U.S.C. § 7102 (Supp. 2014).

world. The average age of entry for trafficked people is twelve- to thirteen-years-old,⁴ and once trafficked, some estimate that child's life expectancy to be ten years.⁵ Girls⁶ are brought into "the life" by traffickers who force them to experience over ten rapes a day, every day.⁷ Adult women and children are forced to continue this work through a variety of mechanisms including physical violence, drug dependence, threats to themselves or others, psychological coercion, and many other coercive measures that have been compared to the same measures suffered by slaves.⁸

In light of these facts, the United States Congress drafted a law to respond to this victimization.⁹ In 2000, Congress passed the Trafficking Victims Protection Act (TVPA), which identified sex trafficking as a

4. See Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI (Mar. 2011), <https://leb.fbi.gov/2011/march/human-sex-trafficking>.

5. Linda Burkle, *Understanding and Recognizing Human Trafficking*, THE SALVATION ARMY WESTERN DIVISION (Oct. 26, 2015), <http://www.heartlandunitedway.org/sites/heartlandunitedway.org/files/Human%20Trafficking%202010-15.pdf>.

6. Sex trafficking victimizes males and females, and particularly targets marginalized people and members of the LGBTQ community. Although all are victims, much of the research studies female victims. While this Article recognizes the diversity of victims and offenders, it is acknowledged that the vast majority of offenders are male and a significant majority of victims and survivors are female. See e.g., Catherine Mackinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 272, 291 (2011) ("[M]en are not found selling sex in anything like the numbers women are."). For purposes of continuity, this Article will primarily refer to victims and survivors as female and perpetrators as male, but recognizes significant numbers of male victims exist and should not be overlooked.

7. See *Leader of MS-13 Gang Sentenced to 50 Years in Prison for Sex Trafficking Multiple Teens*, DEP'T OF JUSTICE (June 1, 2012), <https://www.justice.gov/archive/usao/vae/news/2012/06/20120601amayanr.html> (stating that convicted sex trafficker's victims were forced to have sex with customers eight to ten times per day); Meena Hart Duerson, *42,000 Rescued from Slavery Last Year*, N.Y. DAILY NEWS (June 20, 2012), <http://www.nydailynews.com/news/world/tens-thousands-rescued-modern-day-slavery-millions-remain-bondage-report-article-1.1099059> (describing how a thirteen-year-old girl was forced to have sex with up to thirty men per day).

8. See, e.g., Michael J. Frank & G. Zachary Terwilliger, *Gang-Controlled Sex Trafficking*, 3 VA. J. CRIM. L. 342, 353–54 (2015) (citing *United States v. Pipkins*, 378 F.3d 1281, 1286 (11th Cir. 2004)) (stating that while sex traffickers may resort to physical violence, they are typically able to control victims through other non-violent means); Ryan Dalton, *Abolishing Child Sex Trafficking on the Internet: Imposing Criminal Culpability on Digital Facilitators*, 43 U. MEM. L. REV. 1097, 1105 (2013) (stating that human traffickers use methods such as psychological manipulation and physical violence to control their victims).

9. There is an active debate about whether people victimized by human trafficking are properly referred to as victims or survivors. Because this Article discusses this group as people who are currently victimized, it will refer to that group as victims, as they have not yet reached survival of this traumatic industry. Regardless, this Article shares the view that these individuals and those who have escaped trafficking are survivors in every sense of the word.

standalone federal crime.¹⁰ In the years since, Congress has continued to refine the Act to more precisely address the realities of human trafficking that emerge as a result of increased research and attention to the problem. Most recently, Congress explicitly recognized what was already in the law: people who purchase others for sex¹¹ can be considered human traffickers themselves.¹² Consequently, such individuals face significant penalties, and purchasers, whose role has historically been minimized,¹³ are recognized as the cause of much of this victimization.

While this revised view of purchaser as trafficker is a positive development in human trafficking law, it has resulted in some collateral difficulties. These are manifested in the very limited number of purchasers who have been prosecuted under this provision. This Article explores some of the problems with the amendment and its underutilization, and suggests a path forward that can allow this important provision of the TVPA, and the

10. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1487 (codified as amended at 18 U.S.C. § 1591 (2012 & Supp. 2015)).

11. A word about language is necessary. A “purchaser” of a trafficked person for sex has been given many labels such as: “customer,” “client,” or “john.” Such terms sanitize the nature of the crime. The terms “customer” or “client” are insufficient because they merely reaffirm the commercial nature of the exchange but eliminate from the description the exploitation. “John” is an innocuous label for the purchase of a victimized person by another. As will be discussed, under the TVPA, one who obtains, solicits, or patronizes a victim of sex trafficking for a commercial sex act is a trafficker. 18 U.S.C. § 1591 (2012 & Supp. 2015). However, distinctions need to be made between this and the trafficker who uses force, fraud or coercion to hold a person in sexual servitude, previously referred to as a “pimp.” “Third party trafficker” has been recommended to reference the “pimp.” This denotes that a third party is facilitating the purchase of a human being and profiting from the action. This Article will use third party trafficker and pimp interchangeably. “First party trafficker” has been used to describe one who obtains a person for sex, thus delineating both parties as sex traffickers, but with distinct roles. Mary Graw Leary, “*Modern Day Slavery*”—*Implications of a Label*, 60 ST. LOUIS U. L.J. 115, 138 (2015). “Purchaser of sex” has also been used, but such a term is also imperfect because it depersonalizes the offense. A purchaser is actually purchasing the human being, not just the sexual act. This Article will use the term First Party Trafficker or “purchaser” (delineating a purchaser of another for a sexual act) interchangeably. While imperfect, such labels more accurately denote the purchaser of another prostituted human being for a commercial sex act as a sex trafficker.

12. See 18 U.S.C. § 1591.

13. See, e.g., Elizabeth M. Johnson, *Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 718 (2014) (quoting *People v. Edwards*, 180 N.Y.S. 631, 635 (Ct. Gen. Sess. 1920)) (acknowledging that, when dealing with prostitution, it has been customary “to arrest the women and let the men go”); Jenifer B. McKim, *Despite Mass. Law, Sex Trade Clients Seldom Punished*, BOS. GLOBE (Dec. 9, 2013), <https://www.bostonglobe.com/metro/2013/12/09/despite-law-sex-trade-clients-are-seldom-punished/NGqgdBWxpaKWAzgFJjZVXJ/story.html> (stating that none of the state’s 11 district attorney’s offices could identify a case where a defendant has faced even the minimum fine of \$1000).

related Federal Sentencing Guidelines, to be realized and achieve the goal of effectively combatting sex trafficking. Part II of this Article examines the history of sex trafficking law. This includes a review of the most recent movement to emphasize combatting the demand for prostitution by targeting purchasers. Part III analyzes the role purchasers play in sex trafficking and affirms the recent legislation to elevate their role in sex trafficking to the level of human trafficker. Part IV explores some of the shortfalls of the legislation and sentencing regime currently in place. Outlining the tension between holding purchasers accountable for their role in sex trafficking and precisely measuring culpability vis-a-vis third party traffickers, this Article examines the sentencing regime for purchasers. Further, Part IV recognizes the historical pitfalls of both over-penalizing and under-penalizing such actors—particularly those who are in societal positions of power (educated, males with no prior record). Part V articulates a solution to these problems, focusing on the statutory mandatory minimum sentences and the Federal Sentencing Guidelines. Specifically, this Article calls for a graduated approach to sentencing, which focuses on the level of knowledge of the purchaser. Adopting such a regime will unlock the potential of these new and important TVPA provisions, thus holding more purchasers accountable and negatively impacting the market and industry of sex trafficking.

II. HUMAN TRAFFICKING AWARENESS AND LEGISLATION

A. *Recognizing Victimization*

Criminal law exists to respond to acts of victimization. It functions “to prevent injury to the health, safety . . . and welfare of the public.”¹⁴ Recognizing a behavior as a threat to the health and safety of either individuals or the public is a necessary predicate to criminal law intervention. Our history is replete with examples of actions today considered clearly harmful that were allowed or even supported earlier in our history. Marital rape, domestic violence, and slavery are all examples of behaviors condemned today that once were permissible and even state sanctioned. A shift in perspective toward the victims also often functions as a precursor to the enactment of such protective legislation. Not until wives were seen as raped people, women in abusive relationships as abused people, or slaves seen as enslaved people, was legislation drafted to protect those so victimized. It was not until society understood offender’s actions were not the proper exercise of property owners rights toward their property, but

14. WAYNE R. LAFAVE, CRIMINAL LAW 13 (5th ed. 2010).

rather affronts to the individual victim deserving of human dignity, that legislation emerged to protect the victims of such crimes.¹⁵

The same is true with the history of legislating against sex trafficking. This term—sex trafficking—is a modern one. Prior to the late 20th century, sexual exploitation was typically seen as a quality of life crime in which the people selling sex were the perpetrators and the victims were the neighborhoods negatively affected by prostitution. Little recognition existed that those involved in prostitution were often controlled by others who forced them to be victimized in this way through violence and abuse.¹⁶ Women were seen as the perpetrators of the crime of prostitution. This is so even with minor victims. If an adult has sexual contact with a minor, then the adult is severely punished. However, when money is exchanged, many states no longer considered that sexual abuse. Rather, they concluded that it was prostitution, and the victim of the statutory rape should be considered the offender.¹⁷

15. See DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES 146 (1985) (discussing New York legislative action declaring the marital rape exemption to be unconstitutional, Oregon legislation striking the exemption, and New Jersey legislation explicitly criminalizing marital rape); Anne L. Buckborough, *Family Law: Recent Developments in the Law of Marital Rape*, 1989 ANN. SURV. AM. L. 343, 343–44 (1990) (warning against the dangers associated with the marital rape exemption and its expansion into the context of non-married couples); U.S. CONST. amend. XIII (providing an example of legislation protecting the victims of slavery).

16. See, e.g., *The “Social Evil” Ordinance in St. Louis*, MISSOURI REPUBLICAN, July 12, 1870, at 2 (introducing St. Louis’s “Social Evil” Ordinance, which required physicians to inspect the “sanitary conditions” of prostitutes in his designated area on a weekly basis but failed to recognize any control by others); Jennifer Marie Schulle, *Fashion and Fallen Women: The Apparel Industry, the Retail Trade, Fashion, and Prostitution in Late 19th Century St. Louis*, 162–75 (2005), <http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=2589&context=rtd> (providing a more readable version of the “Social Evil” Ordinance in an appendix); S. Rep. No. 61-886, at 11 (1910) (“There are few who really understand the true significance of the term “white-slave trade.” Most of those who have given only a casual thought to the subject have the impression that women who lead immoral lives in public houses are there voluntarily, either because they are attracted by the excitement of such a life or because they have found it an easy way of earning a living. In many cases such is not the fact. The results of careful investigation into this subject disclose the fact that inmates of many houses of ill fame are made up largely of women and girls whose original entry into a life of immorality was brought about by men who are in the business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women and who, by means of force and restraint, compel their victims to practice prostitution. These investigations have disclosed the further fact that these women are practically slaves in the true sense of the word; that many of them are kept in houses of ill fame against their will; and that force, if necessary, is used to deprive them of their liberty.”).

17. See, e.g., G.A Res. 51/77, ¶ 56, U.N. Doc. A/RES/51/77 (Feb. 20, 1997) (calling for states to penalize sex trafficking offenders while ensuring that child victims of sex trafficking

Slowly, however, the power dynamic between the person sold for sex and her trafficker reached more clarity. Domestically, the crimes of prostitution pimping and pandering were largely addressed on the state level through criminal laws outlawing them.¹⁸ In the early twentieth century, however, a growing perceived concern emerged that Caucasian women were being lured into the sex trade. In 1910, Congress enacted the White Slave Act, which prohibited the interstate transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."¹⁹ Also known as the Mann Act, this legislation was originally aimed at protecting "weak" women from "men who were bad," as well as from themselves and their weak nature.²⁰ This Progressive Era legislation originally conceptualized the women involved in prostitution as victims.²¹ However, this perspective soon gave way to another, and prosecutors and the courts began using the Mann Act as more of a morality weapon against individuals—including the women it was originally intended to protect.²²

The Mann Act was eventually amended to prohibit the transportation of people across state lines for the purpose of engaging in prostitution or similar sexual crimes.²³ A legal patchwork developed in the United States to address prostitution. This patchwork was comprised primarily of state and

are not penalized, which indicates that child victims of sex trafficking have been penalized in the past); Juvenile Arrests 2004, Juv-Just. Bull., OJJDP3 (Dec. 2006).

18. E.g., S.C. CODE ANN. § 16-15-90 (2015) (originally enacted in 1942) (providing an example of a state law created to address the crime of prostitution); John Elrod, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961, 966 (2015); S. Rep. No. 61-886, at 9 (1910) (stating that due to the interstate nature inherent in trafficking a person, it is outside the bounds of the state legislature to regulate).

19. White-Slave Traffic (Mann) Act, ch. 395 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012 & Supp. 2015)).

20. *Wyatt v. United States*, 362 U.S. 525, 530 (1960) (citing *Denning v. United States*, 247 F. 463, 465 (5th Cir. 1918)) ("A primary purpose of the Mann Act was to protect women who were weak from men who were bad.").

21. See Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POL'Y. 99, 110 (1996) (citing *United States v. Holte*, 236 U.S. 140, 146 (1915) (Lamar, J., dissenting)) ("[T]he Mann Act was aimed only at panderers and procurers and treated the women as victims.").

22. Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1111–39 (1984). See also *United States v. Holte*, 236 U.S. 140, 145 (1915) (holding that the Mann Act applies to females involved in prostitution and stating that a conspiracy may be present "if we abandon the illusion that the woman is always the victim").

23. 18 U.S.C. §§ 2421–2424 (2012 & Supp. 2015).

local offenses prohibiting prostitution, which was aimed at people being sold for sexual acts, as well as local laws prohibiting pimping and pandering.²⁴

Two trends are worth noting. First, while such laws were on the local law books, a pattern emerged in which the bulk of arrests were of the people being prostituted, while their purchasers were rarely, if ever, arrested.²⁵ Although it was well understood that many of these women were controlled by “pimps” and organized crime, arrests of such individuals rarely occurred.²⁶ When they did occur, the criminal enterprise was seen as consisting of both the prostituted person and the pimp, and the framework for the offense was one of a quality of life crime—a form of a victimless crime where the harm was to members of the public exposed to it, not the people prostituted themselves. Second, the understanding of how people were often controlled by others to engage in sex trafficking or forced labor was stagnant. Force was still perceived as physical force or threats thereof, and the law initially failed to recognize that modern forms of enslavement have many different forms of control.

This trend slowed in 2000 when Congress passed the Trafficking Victims Protection Act as part of the Victims of Trafficking and Violence Protection Act (TVPA).²⁷ This Act, similar to its parallel international instrument, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children,²⁸ was designed to be a comprehensive response to the growing awareness of “severe forms of

24. See, e.g., *People v. Moore*, 127 N.Y.S. 98, 98–99 (1911) (affirming the conviction of a woman for prostitution based on a New York state law); *Studer v. State*, 19 Ohio C.D. 33, 34 (1905) (discussing the indictment of a woman under an Ohio state law for inducing, decoying and procuring female persons under eighteen years of age to enter a house of ill fame for the purpose of prostitution); H. Rockwell, Annotation, *Constitutionality and Construction of Pandering Acts*, 74 A.L.R. FED. 311 (1931) (discussing various cases related to prostitution, pimping and pandering where several cases were decided prior to the passing of the Mann Act in 1910 and were based on state or local laws); Conant, *supra* note 21, at 109 (citing U.S. IMMIGRATION COMM’N., IMPORTATION AND HARBORING OF WOMEN FOR IMMORAL PURPOSES, S. DOC. NO. 61–753, at 57 (3d Sess. 1910)) (“[The Mann Act’s] first aim was to strengthen the existing law against panderers and procurers in foreign commerce.”).

25. E.g., Heather Gregario, *More Than Johns, Less Than Traffickers: In Search of Just and Proportional Sanctions For Buyers of Sex With Trafficking Victims*, 90 N.Y.U L. REV. 626, 639 (2015) (quoting Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 556–59 (2000)) (stating that most johns have not been prosecuted, even under misdemeanors).

26. See ANURADHA KUMAR, HUMAN RIGHTS: GLOBAL PERSPECTIVES 236 (1st ed. 2002) (discussing the dynamics of bribery and organized crime with respect to prostitution in Pakistan).

27. Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101 (2012).

28. G.A. Res. 55/25 (Nov. 15, 2000).

trafficking.”²⁹ Regarding sex trafficking, the legislation reframed prostitution to recognize that many people involved in commercial sex are vulnerable women and children who are being exploited by human traffickers.³⁰ Labelling this crime “modern day slavery,” Congress articulated that current state and federal legislation failed to adequately appreciate the severity and breadth of human trafficking.³¹ More specifically, Congress noted that,

Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.

In the United States, the seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers.³²

Under this original legislation, a sex trafficker was one who “recruits, entices, harbors, transports, provides, obtains, advertises, maintains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation” in a sex trafficking venture.³³ Consequently, the TVPA implemented a mandatory minimum sentence of ten years for sex trafficking by way of force, fraud or coercion, or if the victim was a minor under eighteen but older than fourteen.³⁴ If the victim was under fourteen,

29. In drafting the TVPA, Congress could not reach agreement on whether to prohibit all forms of prostitution or only those that were the product of force, fraud, or coercion. Consequently, the legislation prohibited only the latter and did not define human trafficking *per se*. Instead, it simply defined severe forms of human trafficking to include both labor and sex trafficking. 18 USC § 1591.

30. 22 U.S.C. § 7101(b)(2). (“The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry.”).

31. 22 U.S.C. § 7101(b)(14).

32. 22 U.S.C. § 7101(b)(14)–(15).

33. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106–386, 114 Stat. 1464 (Oct. 28, 2000).

34. 18 U.S.C. § 1591(b)(1) (2012).

the trafficker served a mandatory minimum sentence of fifteen years' incarceration.³⁵

In recognizing that this landmark legislation was embarking into new territory, penalizing an underground criminal system which had previously been understudied, Congress designed the Act to be reauthorized every two years.³⁶ This provision was meant to ensure that as Congress learned more about this form of victimization, the law would be refined and amended to reflect this new knowledge.³⁷ In the years since its original passage, the TVPA has been amended five times in 2003, 2005, 2008, 2013, and 2015.³⁸

B. Emergence of a Demand Focused Movement

Many frameworks exist through which one can examine sex trafficking—all of which have their place and discipline. For example, human trafficking can be treated as a human rights issue,³⁹ a criminal law issue,⁴⁰ an economic issue,⁴¹ or a labor issue.⁴² Each of these disciplines provides a legitimate framework to draft anti-trafficking laws and examine their effectiveness.

In some ways, the TVPA reflects a multi-disciplinary approach to human trafficking. Although the focus of this Article is the criminal law provisions and resulting sentencing guidelines, it is important to note that the legislation explicitly identifies its goal of preventing human trafficking.⁴³ It attempts to do so by including numerous provisions regarding many

35. 18 U.S.C. § 1591(b)(2).

36. See 22 U.S.C. § 7110 (2012) (authorizing appropriations for two years).

37. *Id.*; see also OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 4 (2010) ("This report . . . describes the USG's comprehensive campaign to combat TIP during Fiscal Year 2010 (FY 2010), including efforts to carry out the 3P strategy to (1) protect victims by providing benefits and services; (2) investigate and prosecute human trafficking crimes; and (3) prevent further trafficking-related crimes . . . The report includes an assessment of USG activities based on improvements since the last annual report and recommendations made by agencies for further improvement.").

38. Pub. L. 108-21, 117 Stat. 653 (Apr. 30, 2003); Pub. L. 108-193, § 5(a), 117 Stat. 2879 (Dec. 19, 2003); Pub. L. 109-248, 120 Stat. 615 (July 27, 2006); Pub. L. 110-457, 122 Stat. 5069 (Dec. 23, 2008); Pub. L. 114-22, 129 Stat. 238, 247 (May 29, 2015).

39. Office of the U.N. High Comm'r. for Human Rights, Human Rights and Human Trafficking, Fact Sheet No. 36 (June 2014).

40. 18 U.S.C. § 1591 (2012).

41. EM Whaton, EJ Schauer & TV Galli, *Economics of Human Trafficking*, 48 INT. MIGRATION 114, 114-41 (2010).

42. STATE DEP'T, FACTS ABOUT HUMAN TRAFFICKING FOR FORCED LABOR (2005), <https://2001-2009.state.gov/documents/organization/51174.pdf>.

43. 22 U.S.C. § 7101(b)(2) (2012).

different components of human trafficking such as: prevention, education, awareness, and funding. The TVPA far exceeds Title 18 of the U.S. Code (criminal provisions), and crosses over several other titles, including, but not limited to, Title 42 (Public Health and Welfare) and Title 8 (Aliens and Nationality).

Notwithstanding this comprehensive approach to domestic and international human trafficking, from its inception, one segment of offenders has often been ignored in the fight against sex traffickers: purchasers. Although purchasers of people for sex drive the sex trafficking market, directly victimize trafficked people, and pose a major threat to the health and welfare of these people, purchasers have only recently become a target of the anti-trafficking movement. This movement to combat demand emerged in foreign legislation, civil society, American courts, and most recently, American legislation.

1. *The Nordic Model*

Although the problems of prostitution and sex trafficking have existed for centuries, it has been well-documented that human trafficking is a growing form of crime within the last half century.⁴⁴ While accurate numbers of human trafficking victims are impossible to ascertain, no dispute exists that it is in the millions. The United Nations Office on Drugs and Crime (UNODC) reports that this form of organized crime is second only to narcotics trafficking.⁴⁵ Many reasons exist for this surge, and they vary depending upon the region of the world and the form of trafficking.⁴⁶ With

44. Lindsay Strauss, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL'Y. 495, 536 (2010); U.N. OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 6 (2016).

45. GLOBAL REPORT ON TRAFFICKING IN PERSONS, UNODC (2011).

46. For example, Donna Hughes documented the effect of the fall of the Soviet Union in Eastern Europe, creating poverty, organized crime, and corruption—all of which fuel a robust human trafficking market. See Donna Hughes, *The "Natasha" Trade: Transnational Sex Trafficking*, NAT'L INST. OF JUSTICE JOURNAL, Jan. 2001, at 9. Mary Anne Layden wrote about the rise in pornography use in the United States, which directly relates to an increase in demand for sex trafficking. See Mary Eberstadt & Mary Anne Layden, *The Social Costs of Pornography: A Statement of Findings and Recommendations*, THE WITHERSPOON INSTITUTE, 33 (2010), <http://chastityproject.com/wp/wp-content/uploads/2013/05/Social-Costs-of-Pornography-Report.pdf>. The Middle East's problem with sex trafficking is connected to child brides. See Chandre Gould, *Sex Trafficking and Prostitution in South Africa*, 653 ANNALS AM. ACAD. POL. & SOC. SCI. 183 (2014); Swanee Hunt, *Deconstructing Demand: The Driving Force of Sex Trafficking*, 19 BROWN J. WORLD AFF. 225, 227 (2012-2013); *Sex Trafficking of African Migrants Is a "Modern Plague"* (PBS Newshour television broadcast Sept. 30, 2016).

all of these, however, there are what Louise Shelley calls push/pull factors. The push factors include a ballooning supply of victims largely driven by poverty or some other vulnerability.⁴⁷ The pull factors include a robust demand for cheap sex by a large enough population that makes sex trafficking profitable for traffickers.⁴⁸

Within this context, different countries have attempted different responses to both prostitution and sex trafficking, some of which are attempting to draw distinctions between prostitution and sex trafficking, while others are simply trying to respond to prostitution. The United States has remained consistent in criminalizing prostitution with the exception of some counties in Nevada.⁴⁹ Germany formally legalized prostitution and attempted to regulate it. In 1999, however, Sweden developed a new approach which has gained some attention and possible success.

Sweden brought a new framework for examining prostitution and sex trafficking to the forefront. Rather than looking at the prostituted person as a criminal, this model suggested that she was exploited. The power dynamic between a prostituted person and purchaser was dehumanizing, but not due to the acts of the prostituted person, but rather, those of her purchaser. As such, Sweden legalized prostitution, but criminalized the buying of another for sex.⁵⁰ In so doing, Sweden pivoted its focus in fighting both prostitution and sex trafficking from targeting the prostitute, to targeting the purchaser.⁵¹

The results appear to have been positive. Street prostitution has reportedly decreased in Sweden by over 50%.⁵² Human trafficking has, therefore, also decreased.⁵³ Police are able to focus their efforts on combatting human trafficking, identifying victims, and connecting them with victim services.⁵⁴

47. Louise Shelley, *Trafficking in Women: The Business Model Approach*, 10 BROWN J. OF WORLD AFF. 119, 122 (2003).

48. *Id.* See also Hunt, *supra* note 46, at 227.

49. Barbara G. Brents, *Nevada's Legal Brothels Make Workers Feel Safer*, N.Y. TIMES (Jan. 23, 2014); Lauren M. Davis, *Prostitution*, 7 GEO. J. GENDER & L. 835, 835–36 (2006).

50. *E.g.*, Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV 207, 227 (2015).

51. *Id.*

52. *Id.* at 228 (citing Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT'L L. 133, 146 (2011)).

53. *Id.*

54. *Id.* (citing Statens Offentliga Utredningar [SOU] 2010:49 Evaluation of the Prohibition of the Purchase of Sexual Services [government report series] (Swed.)) (acknowledging difficulty in estimating rates of trafficking, the Swedish government's review of the effect of the 1999 law concludes that it "has helped to combat prostitution and human trafficking for sexual purposes").

2. *Civil Society*

Sweden's success did not go unnoticed. Many domestic and international organizations called for a renewed focus on purchasers of sex. Recognizing that sex trafficking is a profitable business, these groups noted the heavy law enforcement emphasis on traffickers, but a continued failure to pursue the demand side of this profitable business.⁵⁵ The advent of the TVPA and statewide legislation made the incongruence of the perception of the victim as both a victim of human trafficking and offender of prostitution laws apparent.⁵⁶ While positive steps have been taken throughout the country to treat victims as victims and protect victims of human trafficking from criminal prosecution for their trafficking-related offenses, purchasers have continued to be treated as minor actors in this exploitation.⁵⁷

However, as the elements of the Palermo Protocol and the TVPA become institutionalized as the norms, there are voices calling for an equally vigorous attack on the demand side of human trafficking, particularly purchasers of others for sex.⁵⁸ Many scholars and members of civil society have voiced their concerns regarding this obvious gap in the American response.⁵⁹ Shared Hope reports that it is common for victims to be arrested and purchasers released.⁶⁰

Similarly, scholars have argued that the failure to pursue purchasers in a meaningful way is a longstanding problem in prostitution policy.⁶¹ In a typical roundup of prostitution arrests, the women being prostituted are often arrested, while the purchasers are not.⁶² When they are arrested, the purchasers are often afforded opportunities to avoid a criminal conviction by participating in diversion programs, while those prostituted are given no such opportunity.⁶³

55. *Id.* at 227.

56. SHARED HOPE INT'L, NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING, 19–20 (2009).

57. SHARED HOPE INT'L, DEMANDING JUSTICE REPORT (2014); *see also Demand Reduction Program*, GLOBAL CENTURION, <http://www.globalcenturion.org/programs/demand-reduction-program/> (last visited Feb. 11, 2017).

58. Hunt, *supra* note 46, at 225.

59. *See* Laura Lederer, *Addressing Demand: Why and How Policymakers Should Utilize Law and Law Enforcement to Target Customers of Commercial Sexual Exploitation*, 23 REGENT U. L. REV. 297, 298–99 (2011).

60. SHARED HOPE INT'L, *supra* note 56, at 19–20.

61. *See* Hunt, *supra* note 46, at 229.

62. *See* Dempsey, *supra* note 50, at 214; Donna Hughes, *A Perpetrator Focused Approach*, 6 U. OF ST. THOMAS L. J. 28, 39–40 (2008).

63. Hunt, *supra* note 46, at 237.

As prostitution policy has shifted more to sex trafficking policy, this has not changed.⁶⁴ Scholars have continued to call for a focus on demand as part of a comprehensive sex trafficking policy.⁶⁵

3. *Law Enforcement, Prosecution, and Courts*

With the advent of the TVPA, law enforcement was called upon to change its approach to sex trafficking.⁶⁶ Vice units, whose job was previously to arrest prostituted people, were now being asked to view them as victims.⁶⁷ While many departments struggled with this change in approach, prostituted people continued to be arrested or not afforded the victim services and relief available to them under the TVPA and parallel state statutes.⁶⁸

Many departments conduct aggressive efforts to rescue victims of human trafficking. These efforts can encompass raiding brothels and locations of known prostitution accompanied by victim service organizations.⁶⁹ They also include proactive investigations in which police identify potentially trafficked individuals being advertised online through websites such as backpage.com, pose as purchasers, and then rescue the victims upon their meeting.⁷⁰ Conversely, some departments set up reverse

64. Lederer, *supra* note 59, at 305.

65. Dempsey, *supra* note 50, at 229.

66. Hughes, *supra* note 62, at 36–37.

67. *Id.* at 37.

68. *Id.* at 37–38.

69. See Hunt, *supra* note 46, at 229; U.S. DEP'T OF JUSTICE, FY 2015 ENHANCED COLLABORATIVE MODEL TO COMBAT HUMAN TRAFFICKING COMPETITIVE SOLICITATION 6 (2015) (calling upon by the federal government of law enforcement and victim service providers to work collaboratively and noting previous years successes of the Enhanced Collaborative Model Task Forces); FBI, OPERATION CROSS COUNTRY: RECOVERING UNDERAGE VICTIMS OF SEX TRAFFICKING AND PROSTITUTION (2016), <https://www.fbi.gov/news/stories/operation-cross-country-x> (stating “[a]ll of the recovered U.S. minors were offered services by victim specialists who are part of the FBI’s Office for Victim Assistance. More than 100 victim specialists provided on-scene services that included crisis intervention as well as resources for basic needs such as food, clothing, shelter, and medical attention”); See also Jared S. Hopkins, *Adam Laroche, International Groups Go Undercover to Stop Human Trafficking*, CHICAGO TRIBUNE (Apr. 22, 2016), <http://www.chicagotribune.com/news/ct-adam-laroche-sex-trafficking-rescue-20160421-story.html> (describing the undercover operations abroad of Exodus Road and Operation Underground Railroad which are non-profit organizations dedicated to rescuing victims from sex trafficking by having volunteers and employees pose as sex tourists, capture the transactions, alert police of the trafficking, and provide medical care and recovery services).

70. *E.g.*, *United States v. Diaz*, 597 F.3d 56, 59 (1st Cir. 2010) (police posing as a purchaser).

stings in which they create advertisements purporting to provide victims who are available for commercial sex acts.⁷¹ As purchasers respond to the advertisement, they are arrested.⁷² Additionally, national days of arresting purchasers have occurred annually for over a decade. On such days, police across the nation simultaneously conduct operations targeting purchasers, in which they arrest hundreds of purchasers in a coordinated manner.⁷³ These efforts, however, do not necessarily impact human trafficking by treating these purchasers as traffickers.

Prior to 2015, the text of the TVPA included among traffickers those who recruit, entice, harbor, transport, provide, obtain, or maintain a person for a commercial sex act.⁷⁴ Many felt that these operative verbs of “obtain” and “entice” included purchasers. Among the early proponents of this view was the U.S. Attorney for the Western District of Missouri, who claimed to be the first to charge purchasers of sex with minors as first party traffickers.⁷⁵ While this approach was not taken by all prosecutor offices,

71. *E.g.*, *United States v. Jungers*, 702 F.3d 1066, 1067–68 (8th Cir. 2013) (discussing undercover sting in which law enforcement officers created online advertisements to apprehend individuals seeking to obtain children for sex); *United States v. Steele*, 513 F. App’x 834, 835 (11th Cir. 2013) (undercover investigation involving law enforcement creating Internet advertisements of children available for sex); *United States v. Slaughter*, No. 4:10-CR-24-01-HLM, 2011 WL 1337401, at *1 (N.D. Ga. Apr. 6, 2011) (posing as girls posting and on Craigslist Casual Encounters to buy beer); *United States v. Phillips*, Crim. No. 3:06-CR-47, 2009 WL 1918931, at *7 (N.D. W.Va. July 1, 2009) (undercover officers’ using MySpace to attract predators).

72. *E.g.*, *United States v. Orr*, 622 F.3d 864, 866–68 (7th Cir. 2010) (trying defendant who attempted to convince a male police officer posing as a woman to move to his state with her children to train them to be “sexual slaves”); *United States v. Calp*, 113 F. App’x 358, 359–60 (10th Cir. 2004) (using U.S. Customs Service created false website); *United States v. Robertson*, 350 F.3d 1109, 1111–12 (10th Cir. 2003) (posing police as child sex tourism trafficker and defendant ordered boys for sex and flew to Colorado to complete purchase).

73. *See, e.g.*, Hunt, *supra* note 46, at 229 (describing the National Day of John Arrests where “[o]ver 20 law enforcement agencies including the FBI worked together in 13 states, simultaneously conducting stings on the street, in hotels, in brothels, via the Internet, and elsewhere”); *Nearly 500 Sex Buyers Arrested in Nation Sex Trafficking Sting Operation*, Press Release, COOK COUNTY SHERIFF (Aug. 4, 2014), http://www.cookcountysheriff.com/press_page/press_NationalSexTraffickingSting2014_08_06_2014.html (describing the 2014 National Day of john arrests where “28 law enforcement agencies throughout 14 states” worked together to produce 496 arrests); Rachelle Blidner, *Nearly 600 Johns Arrested in Nationwide Sting Operation Before Super Bowl*, N.Y. DAILY NEWS (Feb. 4, 2015), <http://www.nydailynews.com/news/crime/600-johns-arrested-nationwide-sting-super-bowl-article-1.2102740> (describing the 2015 National Day of John arrests where law enforcement agencies across seventeen states worked together to arrest 570 Johns).

74. 18 U.S.C. § 1591(a)(1) (2012 & Supp. 2015).

75. *See U.S. v. Mikoloyck*, 2009 WL 4798900, at *1 (W.D. Mo. Dec. 7, 2009); *Northland Man Sentenced to 15 Year for Attempted Sex Trafficking of a Child*, Press Release, F.B.I. (Jan. 6, 2011), <https://archives.fbi.gov/archives/kansascity/press-release/2011/>

circuit courts that examined the issue held or assumed that purchasers were considered traffickers under that version of the TVPA.⁷⁶

4. *United States Congress*

Notwithstanding the plain language of the TVPA, not every court agreed. In 2015, Congress amended § 1591 to clarify the issue, definitively establishing that all purchasers are, in fact, human traffickers.⁷⁷ The Justice for Victims of Trafficking Act of 2015 contained specific provisions for targeting demand.⁷⁸ In the section entitled “Reducing Demand for Sex Trafficking,” Congress specifically amended the definition of sex trafficking to include not only the arguably ambiguous “obtains,” but also “patronizing or soliciting” another for a commercial sex act.⁷⁹ In so doing, Congress stated that

the purpose of the amendments made by this section is to clarify the range of conduct punished as sex trafficking . . . [S]ection 108 of this title amends section 1591 of title 18, United States Code to add the words “solicits or patronizes” to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.⁸⁰

Therefore, under current law, a person who patronizes or solicits a person knowing that he or she is a victim of sex trafficking is a sex trafficker.⁸¹ The knowledge provision requires him to know that the person

kc010611.html; *Final Defendant Pleads Guilty to Sex Trafficking of a Child*, Press Release, F.B.I. (Dec. 18, 2009), <https://www.fbi.gov/kansascity/press.releases/2009/kc121809.htm>.

76. *See* *United States v. Jungers*, 702 F.3d 1066, 1072–75 (8th Cir. 2013); *United States v. Cooke*, 675 F.3d 1153, 1155 (8th Cir. 2012); *United States v. Strevell*, 185 Fed. App’x 841, 845 (11th Cir. 2006); *United States v. Roberts*, 174 Fed. App’x 475, 478–79 (11th Cir. 2006).

77. 18 U.S.C. § 1591 (2015); 22 U.S.C. § 7102 (2015).

78. Justice for Victims Trafficking Act of 2015, Pub. L. No. 114-22, § 1, 129 Stat. 227 (2015).

79. *Id.* at § 108.

80. *Id.* at §§ 108 & 114. The Trafficking Victims Protection Reauthorization Act of 2005 requires a biennial study of domestic sex trafficking and prostitution by the Attorney General to include demographic information regarding purchasers. It also added a country’s effort to combat demand as a measurement criterion for the Trafficking in Persons Annual Report. *Id.* at §§ 104 & 201(a)(1)(B).

81. 18 U.S.C. § 1591.

is involved in the commercial sex act due to force, fraud, or coercion, or that the person is a minor.⁸² However, when the prosecution has established that the defendant “has a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained maintained patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.”⁸³

The use of the qualifying language of “may be arrested” and “when this is merited” demonstrates that Congress has not demanded that all defendants arrested for purchasing victims of human trafficking be prosecuted as traffickers. Rather, it has given prosecutors the unequivocal power to do so. Congress noted not every case merits this action. Presumably Congress is recognizing that not every purchaser has a reasonable opportunity to observe the victim. This fact will be especially true in a sting operation where the purchaser arranges the meeting with the purported prostitute, and he never has an opportunity to discuss the age of the victim. However, many purchasers seek or disregard the fact that the victim is a minor.⁸⁴ In such cases, it would appear that charging the purchaser as a trafficker would be appropriate.

III. PURCHASERS OF PEOPLE FOR SEX ARE HUMAN TRAFFICKERS

The increased focus on classifying purchasers as traffickers is strongly supported by the reality of human trafficking. While much concern has been voiced about over-criminalizing activities in recent decades, this concern is misplaced when analyzing the prosecution of a purchaser as a trafficker when the purchaser knows or recklessly disregards the fact that the victim is a victim of human trafficking.⁸⁵ These purchasers play a significant role in the market of sex trafficking. Furthermore, they also directly perpetuate much of the barbarism and violence that characterizes this crime.

The criminal law serves many functions. One of them is to respond to threats to health and welfare by punishing those responsible for crime.⁸⁶

82. *Id.*

83. 18 U.S.C. § 1591(c).

84. SENATE RESEARCH OFFICE, FINAL REPORT OF THE COMMERCIAL SEXUAL EXPLOITATION OF MINORS JOINT STUDY COMMISSION 3 (2008).

85. See generally Ellen Pogdor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529 (2013). For a discussion on concerns regarding over criminalization of crimes in the United States, see Sanford Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM L.Q. 17 (1968).

86. See LAFAVE, *supra* note 14, at 14.

Another, however, is to prevent such social harms from occurring in the first place. A threshold consideration, therefore, is whether purchasers threaten societal health and welfare. Not only do they do so, but examining sex trafficking as a system indicates that purchasers constitute an integral component to this system of degradation.

Sex trafficking is a crime with many facets. It is modern slavery.⁸⁷ As such, it shares with slavery many of the same characteristics. It is a crime of humiliation and dehumanization of its victims.⁸⁸ It is a crime of violence.⁸⁹ It is also an economically driven crime.⁹⁰ Within this context, the purchaser plays an integral role—both systematically in the market and individually—as a source of violence.⁹¹

A. *Role in Market*

1. *Human Trafficking is a Business*

Human trafficking is the sale of human beings by other human beings. This takes many forms, from actual slave labor in industries such as Thai fishing boats or African cocoa farms,⁹² to more subtle forms such as debt servitude of domestic workers or psychological coercion of agricultural migrant farmers.⁹³ Sex trafficking also appears in many different forms and

87. See generally Leary, *supra* note 11, at 116 (2015), for the reasons human trafficking is classified as modern slavery.

88. OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, ADDRESSING THE INTERNAL WOUNDS: THE PSYCHOLOGICAL AFTERMATH OF HUMAN TRAFFICKING (2012).

89. *Id.*

90. Whaton, Schauer & Galli, *supra* note 41.

91. Hunt, *supra* note 46, at 225.

92. See Naomi Jiyoung Bang, *Casting A Wide Net to Catch the Big Fish: A Comprehensive Initiative to Reduce Human Trafficking in the Global Seafood Chain*, 17 U. PA. J.L. & SOC. CHANGE 221, 227 (2014) (citing WORLD VISION AUSTRALIA, FISHY BUSINESS: TRAFFICKING AND LABOUR EXPLOITATION IN THE GLOBAL SEAFOOD INDUSTRY (2013)) (discussing slave labor in the fishing industry); Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 12–13 (2011) (citing SUSTAINABLE TREE CROPS PROGRAM, INT'L INST. OF TROPICAL AGRIC., CHILD LABOR IN THE COCOA SECTOR OF WEST AFRICA: A SYNTHESIS OF FINDINGS IN CAMEROON, COTE D'IVOIRE, GHANA, AND NIGERIA 16 (2002)) (discussing children used as slave labor on African cocoa farms).

93. See *Baoanan v. Baja*, 627 F. Supp. 2d 155, 158–59 (S.D.N.Y. 2009) (describing a victim working for six months to pay off debt); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U.L. REV. 157, 164 (2007) (“Trafficking victims experience the same push factors as other migrants from their

utilizes various methods of recruitment, maintenance, and control of its victims. These include vast organized crime, loose networks of smaller criminal enterprises, individual traffickers controlling a small group of victims, or families trafficking one member for their financial gain.⁹⁴ No matter the structure of the sex trafficking business, it is a profit-driven criminal enterprise.

The UNODC reports that human trafficking is the largest organized crime sector in the world, second only to drug trafficking.⁹⁵ Many criminals migrate from other crimes to trafficking people because it is highly profitable and has a low risk of discovery. The ILO asserts that human trafficking is a \$150 billion dollar industry.⁹⁶ While exact numbers of profitability or victims are difficult to acquire, there can be no dispute that it is a multi-billion dollar sector with tens of thousands of victims throughout the world.

Sex trafficking is a profitable component of human trafficking. Unlike a narcotics trafficker's drug inventory, which is a finite product that can be sold just once, a trafficker can repeatedly sell a human being.⁹⁷ This creates nearly infinite profitability, which is a major motivation for engaging in this criminal business. In addition to high profit, sex trafficking also presents low risk of discovery. Traffickers can control their victims absolutely—physically, psychologically, and emotionally—to evade police detection and prevent them from ever cooperating with police. Police, in turn, fail to thoroughly investigate these cases to identify the third party traffickers. A crime which is highly profitable and relatively low risk is attractive to offenders. To maintain profitability, sex trafficking, like all markets, needs a high demand for its product and a plentiful supply to meet the needs of the market. It is well-documented that the global supply and demand picture is ripe throughout the world for a burgeoning sex trafficking market, with the

countries of origin, but have the necessary additional catalyst of trafficker force, fraud, or coercion.”).

94. See Shelley, *supra* note 47, at 121–23, 127.

95. See Int'l. Labour Org., *ILO Says Forced Labour Generates Annual Profits of US \$150 Billion*, U.N. (May 20, 2014), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang-en/index.htm. See INT'L. LABOUR ORG., PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR (2014), for a more detailed explanation of the UNODC report and growth of human trafficking; accord Hunt, *supra* note 46, at 226 (“Along with illegal arms, human trafficking is the world's most profitable criminal enterprise after drugs.”).

96. INT'L. LABOUR ORG., *supra* note 95, at 13.

97. Meredith Dank & Matthew Johnson, *The Hustle: Economics of the Underground Commercial Sex Industry*, URBAN INST., <http://apps.urban.org/features/theHustle/> (last visited Jan. 30, 2017).

supply fueled by desperate people lured into sex trafficking through a myriad of methods.⁹⁸ While few people freely choose sex trafficking as a way of survival, most victims of human trafficking have a vulnerability that has been exploited by traffickers to lure them into the sex trade. A trafficker may utilize economic desperation to bring a victim into the sex industry by promises of wealth, only to then force them into servitude where all the profits go to the trafficker.⁹⁹ Traffickers often also utilize narcotics as an invisible chain whereby the victim uses them to numb the trauma of repeated rapes, but relies on the trafficker for access to the narcotics on which she depends. Additionally, traffickers often also identify an emotional vulnerability, which a trafficker exploits by acting as boyfriend and then using the power attained through such a role to coerce a victim to engage in commercial sex acts and utilizes force to keep her in the servitude to him.¹⁰⁰

2. *Purchasers of Sex-Trafficked Victims Drive the Market*

The criminal law addresses all of these actions through the TVPA by including comprehensive provisions to capture many of these behaviors under the legal definitions of sex trafficking and commercial sex act.¹⁰¹ But that is only one side of the equation. What makes sex trafficking highly profitable are the millions of people willing to pay for another person to engage in a sex act.¹⁰² Those billions of dollars¹⁰³ come from these millions of buyers who demand the product of human beings.¹⁰⁴

These purchasers drive the market for sex trafficking victims. Men seeking to purchase people for sex and sexually-related businesses drive demand.¹⁰⁵ Some purchasers actually seek out victims of sex trafficking.

98. *Id.*

99. *Id.*

100. *Id.*; see also *Human Trafficking Trends in the United States*, POLARIS PROJECT, at 17 (2012), <https://polarisproject.org/sites/default/files/Human%20Trafficking%20Trends%20in%20the%20US%2011-21-13.pdf> (stating that as of 2012, in 51.42% or 163 cases reported to Polaris of cases, traffickers “show[ed] romantic interest acting as boyfriend, girlfriend, or intimate partner” in order to recruit victims).

101. See 22 U.S.C. § 7102(3), (9) (2012).

102. See Int’l Labour Org, *supra* note 95, at 5.

103. *Id.*

104. See Hunt, *supra* note 46, at 226 (discussing the commodification of the human body).

105. Samantha Healy Vardaman & Christine Raino, *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit Decision in United States v. Jungers*, 43 U. MEM. L. REV. 917, 921 (2013) (citing SHARED HOPE INT’L, DEMAND. A COMPARATIVE EXAMINATION OF SEX TOURISM AND TRAFFICKING IN JAMAICA, JAPAN, THE NETHERLANDS, AND THE UNITED STATES 3 (2007)).

Particularly when it comes to minors, there are preferential sex offenders who seek children to sexually abuse.¹⁰⁶ For example, a study in Georgia created a false advertisement for prostitution.¹⁰⁷ When purchasers contacted the telephone number, they were warned three times that the victim was a minor, yet 42% of callers continued to make the purchase.¹⁰⁸ Similarly, when police engage in undercover operations, they will frequently advertise their false victim as a child, using words clearly conveying that the victim is a minor.¹⁰⁹ Conversely, when examining the thousands of online advertisements for prostitution, police will often focus on those which indicate the person being sold is a minor,¹¹⁰ thus definitely a trafficking victim. An analysis of online ads indicated that ads which include language suggesting a minor or “barely legal” [which minors are not] receive increased attention by 1/3 to 1/4 more than those without such language.¹¹¹

Other purchasers may not necessarily seek out victims who are trafficked *per se*, but certainly know or recklessly disregard that their victim is controlled by another and, thus, a victim of trafficking.¹¹² These situational sex offenders are indifferent to the age or circumstance of the

106. See KENNETH LANNING, *CHILD MOLESTERS A BEHAVIORAL ANALYSIS* 37 (Nat'l Ctr. for Missing & Exploited Children, 5th ed. 2010); SHARED HOPE INT'L, *supra* note 105, at 3.

107. See generally, THE SHAPIRO GROUP, *MEN WHO BUY SEX WITH ADOLESCENT GIRLS: A SCIENTIFIC STUDY* (2009).

108. See *id.* at 12.

109. See *North Dakota v. Rufus*, 868 N.W.2d 534, 537 (N.D. 2015) (illustrating a defendant responded to a Craigslist advertisement placed by the police even after being informed the false victim was fourteen-years-old); *United States v. Larive*, 794 F.3d 1016, 1018 (8th Cir. 2015) (illustrating a defendant responded to a Craigslist advertisement with language offering a false victim as “fresh young thing” and fifteen-years-old); *United States v. Gollhofer*, 820 F.3d 979, 982 (8th Cir. 2016) (illustrating an advertisement posted by law enforcement that stated, “[h]ere for the [Biker] Rally with 2 younger girls that are down for most anything. Age makes no difference so don't be afraid to ask”); Louise Tickle, *How Police Investigators Are Catching Pedophiles Online*, THE GUARDIAN (Aug. 22, 2012), <https://www.theguardian.com/social-care-network/2012/aug/22/police-investigators-catching-paedophiles-online>.

110. See Derek Dawkins, *Backpage.com Shuts Down Adult Services Ads After Relentless Pressure from Authorities*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/01/10/backpage-com-shuts-down-adult-services-ads-after-relentless-pressure-from-authorities/?utm_term=.79dbc3a770cc.

111. See STATE OF GA. S. RESEARCH OFFICE, *FINAL REPORT OF THE COMMERCIAL SEXUAL EXPLOITATION OF MINORS JOINT STUDY COMMISSION 3* (2008).

112. See Vardaman & Raino, *supra* note 105, at 922 (citing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplement, art. 3, opened for signature Nov. 15, 2000, 2237 U.N.T.S. 319 and 22 U.S.C. § 7101(b)(2) (2012)).

victim. As such, they further ensure the violent control over the victim will continue.

The market reality is that even if purchasers do not seek out victims of trafficking, the high demand for illicit commercial sex thirsts for the supply.¹¹³ Traffickers will meet the demand in order to retrieve untapped profits. When they cannot fill the demand with “voluntary prostitutes,”¹¹⁴ they will use force, fraud and coercion to supply the rest of the product demand by the purchasers.

Therefore, the market for sex trafficking is driven by all purchasers regardless of whether they knowingly seek a sex trafficking victim, or are willing purchasers of whomever is provided. It is sex purchasers who demand prostitution, and increasingly demand sex with younger and younger victims. Just as with all other trafficking crimes, effective law enforcement must attack not only the supply side of the item trafficked, but the demand side as well. Disruption of the marketplace is essential for elimination of this crime. If buying people for sex becomes too dangerous, buyers will forego the activity and pimps will migrate to other more lucrative criminal enterprises.¹¹⁵

B. Role as Primary Assailants

The impact of purchasers is not solely felt as an impersonal economic force. It is also experienced first-hand by individual victims. Thousands of criminals are involved in sex trafficking businesses from the third party traffickers, to the facilitators, to the purchasers.¹¹⁶ As with other groups of criminals, no one description accurately applies to the entire group. However, when it comes to pimps, the level of violence used in sex trafficking is notorious. This contributes to the wide support across party

113. See Hunt, *supra* note 46, at 224.

114. There is an open debate as to whether this group truly exists. While there are organizations of “sex workers” who assert that they engage in this work willingly, the voluntariness of that action is often a matter of perception. With the average age of entry into sex trafficking as thirteen years of age, and some adult women are perhaps not currently pimp-controlled but unable to obtain employment in other industries, it is unclear of the label “voluntary” is entirely accurate. See, e.g., Melissa Farley, *Prostitution Trafficking and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J. OF FEMINISM 102 (2006); Catherine A. MacKinnon, *Trafficking, Prostitution and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271 (2011).

115. Charlotte Alter, *Catching Johns*, TIME MAGAZINE, <http://time.com/sex-buyers-why-cops-across-the-u-s-target-men-who-buy-prostitutes/> (last visited Jan. 28, 2017).

116. See LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 229–64, 263 (CAMBRIDGE UNIV. PRESS 2010) (discussing that sex trafficking is a growing industry due to the high profitability and the limited chance of punishment).

lines of effective anti-trafficking legislation, not only through the TVPA but the now fifty states that passed their own anti-trafficking laws.¹¹⁷

A narrative exists, however, of a false dichotomy between purchasers and pimps. While the violence and coercion of pimps are widely accepted, purchasers are sometimes portrayed as innocent consumers.¹¹⁸ However, the reality is often quite different. All of the characteristics of sex traffickers and their violence is often a shared characteristic of those willing to purchase another for sex.¹¹⁹

Prostitution is an existence plagued with danger to those engaged in it. This danger often comes directly from the purchasers themselves. Prostituted people experience frequent physical assaults, sexual torture, rape, and homicide.¹²⁰ The life expectancy of a prostituted person is ten years after being brought into prostitution.¹²¹ They suffer from sexually transmitted diseases, PTSD, aborted pregnancy, and trauma. This danger is not only qualitative but quantitative. Adult victims of trafficking report being forced to participate in six to twenty commercial sex acts per day with daily financial quotas for their food and lodging.¹²²

This criminality is most obviously observed regarding child victims. Having sex with a minor is statutory rape. Research suggests the average minor victim is forced to be statutorily raped over ten times a day.¹²³ The perpetrators of these repeated rapes are the purchasers, many of whom have purposefully sought out minors due to a sexual perversion or a misplaced belief that children are healthier and more free from disease.¹²⁴ Thus, it is the purchaser who acts as a serial rapist to victims of traffickers.

117. See *State Laws and Issue Briefs*, POLARIS, <https://polarisproject.org/state-laws-issue-briefs> (last visited Jan. 20, 2017), for a comprehensive list of state laws.

118. See Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. TRAUMA PRAC. 315, 316 (2003).

119. See e.g., Norma Hotaling & Leslie Levitos-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 HASTINGS WOMEN'S L.J. 117, 124 (2002).

120. Melissa Farley et al., *Prostitution and Trafficking in Nine Counties: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRAC. 33, 34 (2003).

121. See *supra* text accompanying notes 4–5.

122. Vardaman & Raino, *supra* note 105, at 923–24 (citing JANICE RAYMOND & DONNA HUGHES, NAT'L CRIM. JUST. REFERENCE SERV., SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 69 (2001)).

123. SHARED HOPE INT'L., *supra* note 56, at 20 (2009).

124. *Id.* at 16 (quoting SHARED HOPE INT'L., *supra* note 105). INSTITUTE OF MEDICINE AND NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 114 (2013) (stating that while some purchasers seek younger victims due to their sexual preference, some evidence suggests that the overwhelming majority of individuals who solicit minors for sex are not pedophiles or hebephiles but instead may pursue a minor victim

Much of the violence experienced by victims is due to the nature of the commercial transaction. Purchasers of sex believe that the person they purchase is required to do what they demand.¹²⁵ Perhaps purchasers, who are mostly married, purchase sex because it allows them to demand dangerous or demeaning actions that they would be unwilling to demand of a voluntary sexual partner.¹²⁶ Regardless of the reason, this viewpoint of purchasers increases danger to victims.

The role of the purchaser, therefore, is not incidental to the sex trafficking. The entire industry rests upon buyers and their willingness to break the law and engage in illicit sexual trafficking. Moreover, characteristics of sexual violence, risk of death and injury, and sexually transmitted disease are directly attributable to them. As such, the criminal law properly includes them as significant actors in the sex trafficking enterprise.

IV. PROBLEM OF UNDER-PROSECUTION OF PURCHASERS AS TRAFFICKERS

Due to the 2015 TVPA amendments, prosecutors are now absolutely free to prosecute purchasers of sexually trafficked people as sex traffickers. Yet, after over a year of explicitly possessing this power, after six years of having the ability, according to *Jungers*, and after fifteen years of the TVPA, prosecutors seem rarely to proceed with charging buyers as traffickers.¹²⁷ This is despite not only Congressional intent for them to do so, but specific encouragement in the Justice for Trafficking Victims Act. Such inaction appears inapposite to the aforementioned and the well-documented role purchasers play in fueling the market of sex trafficking and directly inflicting harm on trafficked victims themselves.

because they perceive a lower chance of contracting sexually transmitted diseases; they do not care about the age of their victims, or they solicit sex indiscriminately); HUMAN RIGHTS WATCH, PROMISES BROKEN: AN ASSESSMENT OF CHILDREN'S RIGHTS ON THE 10TH ANNIVERSARY OF THE CONVENTION ON THE RIGHTS OF THE CHILD (1999), <https://www.hrw.org/legacy/press/199/nov/children.htm> (describing how younger and younger children are being sought by purchasers because they have a lesser chance of being exposed to HIV).

125. See MELISSA FARLEY ET AL., MEN WHO BUY SEX: WHO THEY BUY AND WHAT THEY KNOW 8 (2009).

126. VICTOR MALAREK, THE JOHNS: SEX FOR SALE AND THE MEN WHO BUY IT (2011).

127. Katie Rucke, *Mass. Sex Trafficking Law Not Used to Prosecute Johns*, MINTPRESS NEWS (Dec. 7, 2013), <http://www.mintpressnews.com/mass-sex-trafficking-law-used-prosecute-johns/175179/> (noting prosecutors are often "less than zealous" when they get cases involving johns).

This is a mistake. The history of this under-prosecution is a disturbing trend. Moreover, it is an error both practically and philosophically.

A. *The History of Under-Prosecution*

The criminal law is designed to respond to a social, health, or welfare problem by both holding those responsible for the social harm accountable and preventing future victimizations.¹²⁸ The punishment scheme has its roots in both utilitarian punishment theories including general deterrence, specific deterrence, incapacitation, and rehabilitation, as well as retribution.¹²⁹ Researchers have documented that, as a group, purchasers likely will be deterred from criminal conduct if the punishment is significant enough.¹³⁰ These men, many of whom have no prior record, disclosed that a certainty of punishment would deter them from re-offending.¹³¹ Assuming the demographic of perpetrators is consistent, it is reasonable to conclude that potential defendants would also be generally deterred by a public arrest and punishment as a human trafficker.¹³²

Yet, prosecutors on both the federal and state level fail to utilize this provision with any frequency. Although the stop demand movement has successfully encouraged law enforcement to increase their enforcement by arresting purchasers, this does not seem to translate into charging and prosecuting them as human traffickers on the federal or local level.¹³³

The reasons for this possible under-utilization are complex and vary with each case. Legitimate reasons may include the obvious evidentiary challenges in proving reckless disregard or knowledge of the status of the person as a human trafficking victim. A second reason involves the discretionary nature of federal prosecution and its limited resources. While federal prosecutors have greatly increased their caseloads, due to limited resources they continue to decline to prosecute a majority of sex trafficking

128. See LaFave, *supra* note 14, at 197–201. See generally Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U.L. REV. 857 (1994) (arguing that a function of criminal law is liability assignment).

129. See 22 U.S.C. § 7101 (2012).

130. See Vardaman & Raino, *supra* note 105, at 955 (citing THE SHAPIRO GROUP, *supra* note 107, at 22; see also Alter, *supra* note 115).

131. See Vardaman & Raino, *supra* note 105, at 955 (citing THE SHAPIRO GROUP, *supra* note 107, at 22).

132. See THE SHAPIRO GROUP, *supra* note 107, at 22; MELISSA FARLEY ET AL., *COMPARING SEX BUYERS WITH MEN WHO DON'T BUY SEX* 44 (2011).

133. See Rucke, *supra* note 127 (showing that relatively few buyers have been prosecuted since the passage of human trafficking law in Massachusetts).

cases brought to them.¹³⁴ This declination rate is over twice the average for federal offenses as a whole.¹³⁵ Prostitution, pandering and local pimping have often been the province of state and local prosecution.¹³⁶ Indeed, to successfully combat human trafficking, state and local law enforcement must vigorously arrest and prosecute purchasers with an aggressive focus on demand. Many states have included in their state human trafficking law provisions applying it to purchasers.¹³⁷ Thus, federal prosecutorial offices have often reserved the power of the federal government to prosecute the more significant offenders whose social impact is often in multiple states.¹³⁸ However, this alone cannot justify the lack of prosecution observed on both the federal and local level.

The United States Attorney's Manual allows prosecutors to proceed with charges for which they have probable cause.¹³⁹ The mens rea for sex trafficking requires the offender to know or recklessly disregard that the victim is a minor or is subject to force, fraud or coercion to engage in the commercial sex act.¹⁴⁰ While it may not be very challenging to prove that a pimp knew the true age of his victim or the fact that he forced her into prostitution, a purchaser will often be another matter. Only if the pimp or victim discloses this information or there is direct knowledge of the fact can the prosecution unequivocally establish this element. However, Congress has included a provision eliminating or greatly diminishing the need to prove this mens rea if the prosecution can establish the defendant had "a reasonable opportunity to observe" the victim.¹⁴¹ Situations exist, however, where it will not be helpful. In a sting operation case, for example, the purchaser will not have had that opportunity. Similarly, pimps often train their victims to lie about their age and true identity, thus directly deceiving the purchaser.¹⁴² Therefore, although the government is allowed to proceed

134. See KEVONNE SMALL ET AL., *URB. INST., AN ANALYSIS OF FEDERALLY PROSECUTED CSEC CASES SINCE THE PASSAGE OF THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000*, (2008), at 22.

135. See *id.* at 22 n.19.

136. See Vardaman & Raino, *supra* note 105, at 934–35.

137. See *id.* at 966 (citing SHARED HOPE INT'L, *PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN 13* (2012)).

138. See *id.* at 934.

139. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL 9-27.200.

140. 18 U.S.C. § 1591 (2012 & Supp. III 2015).

141. *Id.* § 1591(c); *United States v. Robinson*, 702 F.3d 22 (2nd Cir. 2012) (holding § 1591(c) imposes strict liability). *But see United States v. Wilson*, 2010 U.S. Dist. LEXIS 75149 (S.D. Fla. July 27, 2010) (stating that government must still prove a recklessly disregarded victim's age).

142. *United States v. Jungers*, 702 F.3d 1066, 1067–68 (8th Cir. 2013).

under this provision, if the government has direct evidence to the contrary—such as an affirmative representation of majority—prosecutors may reasonably (and ethically) not proceed under such a theory.

Another historical reason exists for this incongruence between the legislative vision and practical implementation of this law. There is a longstanding legacy to oppress these marginalized victims and ignore the privileged purchasers.¹⁴³ It reflects a continued reluctance to hold purchasers responsible for the social harm they cause. There is a long legacy within prostitution, which predates present day understanding of contemporary human trafficking, in which purchasers were seemingly not regarded as criminals and acted with a sense of entitlement and immunity.¹⁴⁴

Prior to the advent of the TVPA, vice units existed in many police departments and they responded to complaints of prostitution.¹⁴⁵ When they conducted a raid the primary people arrested were the people being prostituted—not their pimps or their purchasers.¹⁴⁶ Police would also arrange stings to arrest purchasers, where an officer would engage in undercover work where he or she would portray herself to be a prostitute and when approached by a purchaser verbally agree on the terms of the sale of sex.¹⁴⁷ If enough was stated in the conversation to prove solicitation, then that person would be arrested and charged with solicitation, a misdemeanor crime.¹⁴⁸ Notwithstanding this effort, the vast majority of people arrested in connection with a prostitution investigation were the prostituted people. Little effort was made to utilize either of these avenues to arrest the pimp. Before the advent of the Internet, the reasons for this dearth of arrests were many and included the reality that investigations were time consuming and dangerous for police to act in such an undercover capacity.¹⁴⁹ Secondly, such a law enforcement framework toward prostitution was not a survivor

143. See Hunt, *supra* note 46, at 228 (“A historic lack of law enforcement has contributed to a sense of impunity among buyers.”).

144. See *id.*

145. See *About the Vice Division*, LOS ANGELES POLICE DEP’T, http://www.lapdonline.org/detective_bureau/content_basic_view/1987 (last visited Jan. 29, 2017).

146. See HOWARD SNYDER, U.S. DEP’T OF JUSTICE, ARRESTS IN THE UNITED STATES, 1990-2010 19 (2010) (noting in 2010, 43,000 “women” arrested for prostitution related offenses, but only 19,000 men including pimps, purchasers, and male prostitutes).

147. See, e.g., *United States v. Tharpe*, No. 13-CR166, 2013 WL 6524631, at *2 (E.D. Wis. Dec. 12, 2013) (describing officer acting as undercover prostitute).

148. See *id.*

149. Al Baker & Joseph Goldstein, *Police Working Under Cover, and Under Strain*, N.Y. TIMES (May 6, 2012), <http://www.nytimes.com/2012/05/07/nyregion/undercover-officers-under-strain-with-no-clear-way-off-the-beat.html>.

centered approach, but a crime reduction approach.¹⁵⁰ Therefore, the efforts targeted those being sold, rather than those purchasing them.

Several causes exist for this historical tradition. One additional reason is suggested by the demographics of offenders. Purchasers of prostituted people as a group stand apart from most criminal defendants.¹⁵¹ They often resemble the prosecutors and judges before whom they appear.¹⁵² They are more often married, employed, educated, and have no or a limited prior record.¹⁵³ Consequently, it could be argued that courts are hesitant to punish people who belong to the power class.¹⁵⁴ This appears to be the case when commercial sex was viewed as a “prostitution problem.” After it has been reframed into a human trafficking problem, courts appear willing to punish pimps as traffickers without hesitation, given society’s greater knowledge of the violence of the crime and the suffering of the victims.¹⁵⁵ However, this education has not translated to the punishment of purchasers, notwithstanding the laws’ clear intent.¹⁵⁶

This is consistent with all of sexual assault law. As Michelle Anderson has noted, when the law progresses and recognizes members of a privileged class as criminals, “one might predict a backlash designed to secure the privilege that the law is in the process of disrupting.”¹⁵⁷ The amendment to the TVPA disrupts the longstanding “privilege” many men afford themselves to buy others for sex.

It begins with normalization—not of being prostituted but of purchasing prostituted people. In an ironic example of compartmentalization, being

150. See Loretta Lynch, U.S. Att’y Gen., Remarks at the Meeting of the President’s Interagency Task Force to Monitor and Combat Trafficking In Persons (Oct. 24, 2016) (transcript available at <https://www.state.gov/j/tip/rls/rm/2016/263538.htm>).

151. See Vardaman & Raino, *supra* note 105, at 922–23 (citing SHARED HOPE INT’L., *supra* note 105, at 67).

152. See *id.*

153. See MICHAEL SHIVELY ET. AL, FINAL REPORT ON THE EVALUATION OF FIRST OFFENDER PROSECUTION PROGRAMS 10 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/221894.pdf>; Vardaman & Raino, *supra* note 105, at 922–23 (SHARED HOPE INT’L., *supra* note 105, at 67).

154. See Hunt, *supra* note 46, at 228 (citing THE SHAPIRO GROUP, *supra* note 107, at 8, 11) (“[M]ost of those who buy sex . . . are often respectable members of society, corporate employees, elected officials, religious leaders, military officials, and teachers.”).

155. See Marisa Gerber, *Crackdown on Pimps Fuels a Rise in Human Trafficking Charges in L.A. County*, L.A. TIMES, Nov. 27, 2015.

156. See SNYDER, *supra* note 146, at 25.

157. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1959 (2016).

prostituted is a marginalized life path not encouraged for women.¹⁵⁸ But purchasing prostituted people has been mainstreamed, even sanitized.¹⁵⁹ A form of normalization that is of particular concern is pornography. Not only are significantly large numbers of boys being exposed to unprecedented quantities of pornography, but the pornography they are viewing is increasingly violent and “hard core.”¹⁶⁰ These images not only reinforce the notions of commodifying women, but research indicates a correlation between pornography use, purchasing prostituted people, and acting violently toward them.¹⁶¹ The result of this normalization is the acceptance of the myth that men “need” and “have a right to” such a sexual release and women will always “be available” for it.¹⁶²

This normalization and privilege is apparent in the history of the United States government’s willful ignorance or actual encouragement of purchasing women as demonstrated by the number of brothels surrounding military installations.¹⁶³ It is also apparent in the treatment of public figures involved in the purchase of prostitutes, such as congressmen, senators, and state attorneys general¹⁶⁴—all of whom were involved in purchasing people for sex and none of whom were prosecuted for human trafficking. With

158. See Ginger Thompson & Philip Shenon, *Navy Officer Describes Working as a Prostitute*, N.Y. TIMES, Apr. 12, 2008 (discussing how engaging in prostitution ended the career of female officer).

159. See e.g., PRETTY WOMAN (Buena Vista Pictures 1990); Raleigh Blasdel, *Reel or Reality? The Portrayal of Prostitution in Major Motion Pictures* (Oct. 2015) (unpublished Ph.D. dissertation, University of South Florida) (available at <http://scholarcommons.usf.edu/cgi/>) (analyzing the inaccurate and incomplete portrayal of prostitution in the motion picture industry) viewcontent.cgi?article=7108&context=etd (analyzing the inaccurate and incomplete portrayal of prostitution in the motion picture industry).

160. See Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN 1065, 1079 (2010).

161. See THE SHAPIRO GROUP, *supra* note 107, at 22.

162. See Gregario, *supra* note 25, at 639 n.61.

163. See Jorene Soto, *We’re Here to Protect Democracy, We’re Not Here to Practice It*, 13 CARDOZO J.L. & GEND. 561, 562 (2007) (citing *Helsinki Comm’n, House Armed Services Comm. Examine Trafficking in Persons*, COMM’N ON SECURITY AND COOPERATION IN EUROPE 28 (Dec. 15, 2004)), (https://www.csce.gov/sites/helsinkicommission.house.gov/files/screen_2004_trafficking_forum.pdf). Notably, however, a major effort from the highest levels has occurred to cease this acceptance. In 2002, President George W. Bush issued a National Security Presidential Directive, which specifically commanded that no member of the United States Government, or military, engage in the purchasing of a commercial sex act. See *id.*

164. *A Timeline of Politicians and Prostitutes*, U.S. NEWS & WORLD REPORT (Mar. 11, 2008), <http://www.usnews.com/news/articles/2008/03/11/a-timeline-of-politicians-and-prostitutes>.

sexual crimes, often the person accused is a member of the dominant societal group—men, and the victim is a member of a subordinate group—women, homeless, drug addicted, LGBTQ, or otherwise marginalized.¹⁶⁵ That is to say, one of the reasons for resistance to this change has been that such reform movements threaten to hold accountable those previously unaccountable for their victimization of a subordinate group.

B. The Practical Effect: It Impedes Sex Trafficking Eradication Efforts

This is a significant problem in the efforts to eradicate human trafficking. While police are now engaging in stings to arrest purchasers, the police themselves are the ones who arranged the purchase, and no actual third party trafficker exists to identify. When they do encounter a purchaser, police have been criticized for stopping there with their efforts and not continuing an investigation to find the third party traffickers.¹⁶⁶ At times, however, this can be a viable evidentiary path to the pimp. Victims of human trafficking, due to traumatic bonding with their trafficker, fear, loyalty, or the ordeal of trial, often are unwilling or unable to provide evidence against the trafficker.¹⁶⁷ Purchasers, however, have no such loyalties. Additionally, with the advent of technology being used by third party traffickers to connect purchasers to victims and third party traffickers, purchasers often have access to an electronic trail that could lead to the pimp.¹⁶⁸

Yet, police seem to not be taking advantage of this opportunity. In a narcotics transaction, police will often arrest a possessor and then work with him in order for the possessor to connect them with the dealer.¹⁶⁹ This often involves a plea of guilty to possession in exchange for a lighter sentence.¹⁷⁰ However, in human trafficking, a purchaser would likely be unwilling to plea to human trafficking, as he could face a ten- or fifteen-year mandatory

165. Beverly Ross, *Does Diversity In Legal Scholarship Make a Difference: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 802 (1999).

166. See Mary G. Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GEND. L. & POL'Y 289, 317 (2014) (citing Brief for Appellant at 3–5, *United States v. Castellan*, 382 F. App'x 326 (4th Cir. 2010) (No: 09-4910)); *United States v. Vohwinkel*, No. 2:10-cr-00085-RLH-LRL, 210 WL 3614167, at *1 (D. Nev. Aug. 27, 2010).

167. See HUMAN TRAFFICKING TASK FORCE E-GUIDE: THE VICTIM AS A WITNESS, U.S. DEP'T OF JUSTICE (2016).

168. *M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1043–44 (E.D. Mo. 2011).

169. *E.g.*, Denise Lockwood, *Caledonia Dermatologist Receives Light Sentence For Federal Drug Charges*, RACINE CTY. EYE (Dec. 12, 2015), <https://www.racinecountyeye.com/caledonia-dermatologist-receives-light-sentence-for-federal-drug-charges/>.

170. See *id.*

minimum sentence, depending upon the facts.¹⁷¹ The Sentencing Guidelines provide for a similarly significant penalty.¹⁷² In a typical scenario in which a purchaser locates the victim through an online advertisement, converses with her trafficker online, and becomes aware of the risk that she is a minor or that another is controlling her, but continues anyway with the commercial sex act—the base offense level is thirty-four, and the offender would receive an enhancement for utilizing a computer.¹⁷³ Even assuming no other aggravating circumstances, although many might apply, a purchaser is exposed to a sentence of over 151 months.¹⁷⁴ Even without force, fraud, or coercion, but with a minor over fourteen years of age, his base offense level of thirty implicates a sentence exceeding ninety-seven months.¹⁷⁵ Notwithstanding a downward departure for substantial assistance and acceptance of responsibility, a purchaser has little incentive to plead guilty and cooperate with the police.¹⁷⁶ If prosecutors want assistance from a purchaser, they have little reason to charge a suspect with a crime of such significant consequences.

Furthermore, given the possible culpability gap between purchasers as traffickers and pimps as traffickers, some prosecutors may be hesitant to utilize these charges. Thus, the effect of these progressive legal reforms to hold purchasers accountable may be producing a collateral effect of encouraging law enforcement to fail to prosecute the cases as human trafficking. Although prosecutors may circumvent the problem by charging purchasers with different charges, such as travelling to aid in racketeering,¹⁷⁷ this remains problematic. A tension exists between holding purchasers accountable for the true nature of the crime and effectively combatting human trafficking in all its forms.

It is important to hold purchasers responsible for their role in human trafficking; it is also important to hold third party traffickers responsible as well. This has been a difficult group of offenders to arrest and punish for a variety of reasons. One reason is that they often insulate themselves from liability through layers of protection. Some traffickers travel from city to

171. *See* 18 U.S.C. § 1591 (2012 & Supp. III 2015).

172. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G1.1 (U.S. SENTENCING COMM'N 2015).

173. *See id.*

174. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 5 pt. A, Sentencing Table (U.S. SENTENCING COMM'N 2015).

175. *See id.*

176. *See* *United States v. Wei Lin*, 841 F.3d 823, 825 (9th Cir. 2016).

177. *See* 18 U.S.C. § 1952 (2012 & Supp. III).

city with their group of victims.¹⁷⁸ When a victim is arrested for prostitution, the trafficker often will bail her out of jail and leave town with her, thus eluding law enforcement.¹⁷⁹ Similarly, traffickers manipulate their victims through fear, false promises, and other forms of control to not disclose their own true identity, let alone the identity of their trafficker.¹⁸⁰ Even when a trafficker is facing prosecution, it is difficult for a victim to confront him or her in a court of law due to his or her comprehensive control over the victim and the traumatic bonding that has taken place.¹⁸¹ When a purchaser is apprehended, police should not stop there. Effective law enforcement regards that as the beginning of the investigation, not the end. The preferred practice is to then utilize that as a way to access the pimp.¹⁸² However, a defendant purchaser has little incentive to cooperate if a fifteen-year mandatory minimum is definite.¹⁸³

178. See ANDREA NICHOLS, SEX TRAFFICKING IN THE UNITED STATES: THEORY, RESEARCH, POLICY, AND PRACTICE 13 (Colum. U. Press, 1st ed. 2016) (citing Andrea J. Nichols & Erin C. Heil, *Challenges to Identifying and Prosecuting Sex Trafficking Cases in the Midwest United States*, 10 FEMINIST CRIMINOLOGY 7, 17 (2015)).

179. See ILLANA R. LANE & VIRGINIA A. BACHELOR, HUMAN SEX TRAFFICKING IN THE CITY: SEEKING VICTIMS AMONG DOMESTIC GIRLS, FEMALE STUDENTS AND CULTURES OF VIOLENCE IN CITIES (2015).

180. See JILL LAURIE GOODMAN & DORCHEN A. LEIDHOLDT, N.Y. STATE JUDICIAL COMM'N ON WOMEN IN THE COURTS, LAWYER'S MANUAL ON HUMAN TRAFFICKING 33–37, 262 (2013) (citing FLA. SUPREME COURT, EXECUTIVE SUMMARY, REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 26 (1990)). See also *United States v. Valas*, 822 F.3d 228, 234 (5th Cir. 2016) (describing how a trafficker controls his victim).

181. See GOODMAN, *supra* note 180, at 256, 261; Natalie Kitroeff, *Stockholm Syndrome in the Pimp-Victim Relationship*, N.Y. TIMES (May 3, 2012), http://kristof.blogs.nytimes.com/2012/05/03/stockholm-syndrome-in-the-pimp-victim-relationship/?_r=0.

182. See, e.g., *United States v. Nyuon*, No. CR12-40017-01-KES, 2013 WL 1338192, at *1 (D. S.D. Mar. 29, 2013) (illustrating how officers use underage prostitutes to gain access to pimps); Press Release, Fed. Bureau of Investigation, Md. Couple Sentenced to Prison Terms for Running a Prostitution Operation Involving a Minor (Oct. 12, 2012), <http://www.fbi.gov/washingtondc/press-releases/2012/maryland-couple-sentenced-to-prison-terms-or-running-a-prostitution-operation-involving-a-minor> (police response to online advertisement of minor leads to discovery of comprehensive trafficking business from which police obtain cell phones linked to online advertisements, hotel keys, narcotics, and business cards).

183. See, e.g., *Valas*, 822 F.3d at 236 (illustrating a purchaser tried for sex trafficking separate from the companion case of *United States v. Copeland*, 820 F.3d 809, 2016 WL 1741616 (5th Cir. May 2, 2016) (convicting a trafficker advertising a victim online, which Valas responded to.)).

C. *The Philosophical Effect: It Undermines the Serious Nature of the Crime*

In addition to this practice's effect on cooperation, of additional concern is the need to underscore the severity of the defendant's crime. Defendants' charges and convictions should be properly labelled. This "fair labelling" principle requires criminal offenses to precisely describe both the wrongfulness and severity of his criminal action.¹⁸⁴ Purchasers of victims are human traffickers, but on the spectrum of culpability it would seem that in a typical scenario, the pimp who uses force, fraud, or coercion to control a victim of sex trafficking—subjecting her to experience over ten rapes a day—is likely more culpable than the purchaser who is with the victim for an hour. Therefore, the proper conviction and sentencing scheme should reflect the gravity of the crime-sex trafficking, but the culpability of the defendant.

The stop demand movement correctly reflects the dignity of the victims as worthy of protection. This is a progressive development of the law and should not be undermined.

V. A SOLUTION: A GRADUATED MENS REA SENTENCING APPROACH

Given this tension between holding purchasers responsible as sex traffickers and the desire to hold the arguably more culpable pimps responsible for their violent acts, the sentencing regime should be reviewed. Indeed, the progress in stigmatizing purchasers as traffickers is an important step forward and consistent with the fair labeling principle. Thus, this change in the criminal law is needed and should not in any way be reversed. Alternatively, however, it is entirely appropriate to recognize that within the myriad of sex traffickers, there are many different levels of culpability.¹⁸⁵ Distinguishing among them is also necessary and proper. Therefore, the solution to this problem lies in sentencing. It is here that the law can keep the social stigma and label of sex trafficker for the purchaser while at the same time mete out punishments commensurate with culpability.

There are three possible solutions to this problem. The first is to leave the legal regime as it is. This solution would encourage prosecutors to charge crimes different from sex trafficking to avoid a mandatory minimum

184. See Dennis J. Baker, *Complicity, Proportionality, and the Serious Crime Act*, 14 NEW CRIM. L. REV. 403, 405 (2011).

185. See Gregario, *supra* note 25, at 638–39 (warning of the watering down of trafficking laws).

penalty¹⁸⁶ or to defer to state level solicitation offenses. This solution has two flaws. First, it is inapposite to the very purpose of the TVPA as outlined by Congress in 2000 and reiterated in 2015: purchasers of trafficked people are sex traffickers and should be regarded as such. Secondly, it is inaccurate. Criminal charges should be precise and complete and criminal convictions should reflect the gravity of the offense committed; negotiating a plea agreement in which the defendant is in actuality guilty of significantly more than the charged conduct does not accurately reflect the culpability or dangerousness of a suspect. Both of these outcomes unacceptably mislead the public, lessen the stigma and condemnation of the offender, and fail to serve an adequate sentencing theory.

The second solution is borrowed from the penalty scheme of child sexual abuse images (a.k.a. child pornography). This has a tiered approach in which a possessor of child abuse images faces no mandatory minimum term of incarceration, but one who is charged with receipt of child abuse images faces a five-year mandatory minimum.¹⁸⁷ While there is a nuanced distinction between the two charges, it has been criticized by the judiciary. This regime suffers from two flaws as well. First, it effectively places in the hands of the prosecutors the defendant's sentence. If a prosecutor wants to ensure the defendant serve at least five years' incarceration, he can charge him with receipt of child abuse images. Thus, sentencing is usurped from the bench by the prosecutor.¹⁸⁸ Secondly, the advisory nature of the guidelines combined with the judiciary reluctance to sentence possessors to the mandatory minimum has allowed judges to take advantage of the lack of a mandatory minimum for possession and sentence far below what the guidelines suggest.

There is a valid reason for concern that courts will also abuse a lack of mandatory minimum in the sex trafficking context. The judiciary has a history of doing just that in this similarly tiered child pornography system which has a similar demographic of defendants. As discussed, a defendant convicted of receipt of child pornography faces a mandatory minimum sentence of five years' incarceration. Additional application of the

186. *See, e.g.*, 18 U.S.C. § 1952 (2012 & Supp. III 2015) (criminalizing interstate travel in aid of racketeering); 18 U.S.C. § 2421 (2012 & Supp. III 2015) (transporting an individual with the intent that the individual engages in prostitution); 18 U.S.C. § 2422(a) (2012) (enticing an individual to travel to engage in prostitution); 18 U.S.C. § 2423(b) (2012) (travelling in interstate commerce to engage in illicit sexual conduct not with a minor).

187. *See* 18 U.S.C. § 2252 (2012).

188. *See* Gregario, *supra* note 25, at 639 (discussing the wide range of tools prosecutors have to alter sentences); *see also* United States v. Norris, 159 F.3d 926, 930 n.4 (5th Cir. 1998).

Sentencing Guidelines to typical cases places many defendants at the higher end of the guidelines. No mandatory minimum exists for possession of child pornography, although the guidelines do apply enhancements. Many members of the judiciary have voiced disagreement with the guidelines.¹⁸⁹ Some have very valid concerns, one concern shared by the Department of Justice¹⁹⁰ is that the guidelines are outdated and should be amended to reflect current versions of child pornography offenses. However, others have done so based on a belief that it is a victimless crime.¹⁹¹ When prosecutors attempt to be responsive to concerns and charge a defendant only with possession, judges depart from the guidelines at a rate far exceeding that of other crimes.¹⁹² Such an approach leads to disparate sentences.¹⁹³

While some of the conflict is certainly based upon the judge's specific disagreement with the guidelines in a specific case, another potential reason for the variation cannot be ignored: demographics. This crime, which the judiciary departs more frequently than almost every other crime, is also for a group of defendants different than most others. They are "99% male [and] 88.7 % white," educated, employed, professional, with minimal prior records.¹⁹⁴ This represents a demographic more closely resembling the bench, and this group receives nearly the most departures from the guidelines.¹⁹⁵ Furthermore, the intent of Congress is effectively thwarted when courts are allowed to sentence defendant in accordance with their own

189. U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES Tbl. 1 (2010).

190. Letter from the U.S. Dep't of Justice, to the Honorable Patti B. Saris (Mar. 5, 2013), http://www.jstor.org/stable/10.1525/fsr.2013.25.5.345?seq=1#page_scan_tab_contents; 2012 REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, at 10–15 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

191. Niquita M. Vinyard, *Extralegal Factors and the Imposition of Lifetime Supervised Release for Child Pornography Offenders*, 80 FED. PROBATION 45, 47 (2016) (citing Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity of Political Rhetoric*, 22 STAN. L. & POL'Y REV. 545, 555) (discussing the ability of federal judges to depart from the Sentencing Guidelines for policy reasons).

192. Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 L. & CONTEMP. PROBS. 27, 37, 41 (2013) ("defections").

193. See Vinyard, *supra* note 191, at 45.

194. Deborah Akers et al, *Prevention of Human Trafficking: A Review of the Literature*, PORTLAND STATE UNIV. 3 (2011), http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1009&context=ccj_capstone.

195. Holly H. Krohel, *Dangerous Discretion: Protecting Children by Amending Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Non-Custodial Sentences*, 48 SAN DIEGO L. REV. 623, 649 (2011). See also Vinyard, *supra* note 191, at 48 (citing Hamilton, *supra* note 191).

sentencing philosophies which are not reflective of the Congress and the Sentencing Guidelines.

Child pornography possessors and purchasers of trafficked people share the same demographic. Therefore, a concern exists that allowing any discretion for the same demographic of defendant will result in the same routine departure for these traffickers. Consequently, a more structured approach that retains mandatory minimum sentences, although less when the mens rea is less, but also allows more discretion through the guidelines is needed. Such an approach allows the proper amount of culpability to be considered, without thwarting the intent of Congress.

An already present distinction exists within the crime of sex trafficking. This distinction is linked to the mens rea. When applied to purchasers of sex, it provides a path to resolve the distinctions between third party traffickers and purchasers in a manner that keeps purchasers properly labeled as traffickers, but acknowledges different types of traffickers. Such an amendment would require a change in the mandatory minimum term of incarceration for some human traffickers, and then a tiered approach within the guidelines.

Currently, all traffickers face the same mandatory minimum terms of incarceration, regardless of whether they are pimps, purchasers, or beneficiaries of human trafficking.¹⁹⁶ A defendant faces a fifteen-year mandatory minimum if the victim is less than fourteen years of age or his offense was effected by force, fraud, or coercion.¹⁹⁷ If the offense was not committed by such means and the victim is older than fourteen years of age but less than eighteen, the defendant faces a mandatory minimum sentence of ten years' incarceration.¹⁹⁸ Among these three types of offenders, there are often different levels of culpability. Although it is a social harm to purchase another person for sex, it arguably is more of a social harm to force that victim to be a commodity for hundreds of different purchasers. In the current hierarchy of federal law, the most culpable offenders are those who use force or purchase a minor under fourteen years of age.¹⁹⁹ This should remain a fifteen-year mandatory minimum sentence. Although a purchaser, this method of committing human trafficking is a particularly disturbing method of committing an already disturbing crime. Furthermore, the loss of the cooperation of such a defendant is more acceptable because he himself is a dangerous offender. However, arguably the purchaser who does not know his victim is a minor or who purchased the victim without knowledge of her

196. *See* 18 U.S.C. § 1591 (2012 & Supp. III 2015).

197. *See id.* § 1591(b)(1).

198. *See id.* § 1591(b)(2).

199. *See id.* § 1591(b)(1).

status as a trafficking victim arguably should not be punished with the same level of mandatory sentence as a pimp. Therefore, the mandatory minimum sentence should arguably be lowered for a purchaser of a victim of sex trafficking. If purchasers face a mandatory term of incarceration starting at less years (the proper amount perhaps being five years) for a victim over sixteen, such a punishment scheme would arguably reflect a distinction between purchasers and pimps, while still conveying the gravity of the offense of human trafficking.

That alone is insufficient. Among purchasers there are distinctions between the preferential sex offender who purposefully seeks to purchase a minor or a victim of sex trafficking and one who is indifferent to the status of the person purchased. Arguably, an offender who seeks a minor or an exploited person may do so because the victims are more easily abused, can be forced into more dangerous behaviors, or are exceptionally vulnerable. As such, these individual should face an upward enhancement in their sentence. Whereas a defendant who has a reckless disregard for the status of the victim, as opposed to willful indifference, that offender should have a lesser enhancement. Finally, the offender who has a reasonable opportunity to observe the victim, but the government may have no way of proving indifference, should face the least amount of enhancement.²⁰⁰

For example, a purchaser with no prior record in a typical scenario of responding to an online advertisement for commercial sex could begin with a base offense level of five. If he recklessly purchases a minor who is over the age of fourteen, the base offense level increases four levels, effectively a five-year mandatory minimum. Similarly, if the offender purchased a minor, as proven through § 1591(c), he faces a higher increase. This level remains the same and makes sense. An offender who knowingly seeks out trafficked minors for sex, commits rape. As such, it is difficult to understand how he would be treated differently than a trafficker.

Such a system continues the advancement of the TVPA by seriously punishing purchasers of trafficked people as sex traffickers. It does not dilute sex trafficking legislation by bluntly treating purchasers of less (although condemnable) culpability the same as pimps. It distinguishes between purchasers and pimps where appropriate. Thus, it also allows prosecutors to obtain convictions of purchasers as sex traffickers, while still

200. The research is mixed as to purchasers' recklessness regarding whether a victim is trafficked. See MICHAEL SHIVELY ET AL., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS 4 (2012) (stating that the distinction between a trafficked seller of sex and an independent one is "usually invisible to" purchasers); THE SHAPIRO GROUP, *supra* note 107, at 16 (reporting that a majority of purchasers believe their victims were lured, tricked, or trafficked).

affording such defendants some incentive to negotiate a plea agreement in which they cooperate against traffickers who are pimps. Finally, it structures judicial and prosecutorial discretion so as to insulate it from prosecutor unwillingness to seek trafficking convictions and judicial bias minimizing the role of purchasers in marketplace creation and sustainability.

VI. CONCLUSION

Sex trafficking is a very serious crime committed by many different actors. These actors include the people who purchase trafficked people for sex. Attacking demand is an essential component of a global effort to end sex trafficking. It is an important step forward for the criminal law to recognize this form of victimization and to accurately label these offenders as sex traffickers. To be most effective, such a provision must be utilized by law enforcement and prosecutors. Therefore, it must reflect the culpability of the sex trafficker and also retain the appropriate label of the offender as such a trafficker. Current law and sentencing practice equates all traffickers. A more effective structure would include mandatory minimum sentences, but tier them to more accurately reflect the role of the trafficker in the criminal act. As such, potential purchasers who would be sex traffickers will continue to be deterred. However, those who are not deterred will be charged with sex trafficking and may be available to cooperate in targeting more culpable offenders, while at the same time be held accountable for their own criminal activity. Judges would also have more discretion in sentencing, but it would be structured discretion where mandatory minimum sentences prevent implicit bias.