

PROHIBITING SEX PURCHASING AND ENDING TRAFFICKING: THE SWEDISH PROSTITUTION LAW[†]

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INTRODUCTION

At the symposium on “Successes and Failures in International Human Trafficking Law” at the University of Michigan Law School in February 2011, I addressed the topic of international sex trafficking law, particularly the Swedish law that prohibits the purchase of sex while simultaneously decriminalizing the prostituted person. Being asked to address trafficking, I was surprised by the name given to my panel: “Kidnapped at Home, Sold Abroad: Sex Trafficking in the International Community.” This surprise was owing to the fact that in the most current international instrument defining trafficking, the United Nation’s so-called Palermo Protocol, nowhere is the

[†] This Essay is an edited version of a talk presented at the symposium entitled Successes and Failures in International Human Trafficking Law held at the University of Michigan Law School on February 5, 2011. All translations from Swedish are the Author’s, except where noted. Similar material by the Author is forthcoming in the journal entitled *Women’s Studies International Forum*, Volume 34. Part of the legal arguments and ideas regarding the Swedish law were previously developed with co-authors through submissions to the Swedish government. See PETITIONERS ET AL., A RESPONSE TO *Prohibition Against Purchase of Sexual Service: An Evaluation 1999–2008 (SOU 2010:49)* (officially received by the government on Feb. 2, 2011) [hereinafter PETITIONERS ET AL., A RESPONSE], available at http://www.statsvet.su.se/homepages/max_waltman.htm; PETITIONERS ET AL., SUGGESTIONS TO THE GOVERNMENT’S REVIEW OF THE SEX PURCHASE ACT (SWEDEN) (2010) (officially received by the government commissioner on Mar. 17, 2010) [hereinafter PETITIONERS ET AL., SUGGESTIONS], available at http://www.statsvet.su.se/homepages/max_waltman.htm. Jonas Tallberg and the Department of Political Science, Stockholm University, provided a foundation for further research, and the article would not have been conceived without the generous support of Catharine A. MacKinnon.

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term “kidnapping” found.¹ However, under the protocol, trafficking can be “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability . . . for the purpose of exploitation.”² Consent of the person so trafficked is irrelevant for liability purposes.³

Now, contrast the trafficking definition to kidnapping, which according to U.S. law occurs when under federal jurisdiction someone “unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person.”⁴ As opposed to this definition of kidnapping, which mostly involves physical force, trafficking can occur when someone abuses a person’s position of vulnerability for the purpose of sexual exploitation. Because most people who are in prostitution are subject to the treatment contained in the Palermo Protocol, which in reality describes pimping⁵ as commonly conducted, the U.N. Special Rapporteur on Trafficking (2004–2008) found that prostitution generally is a form of trafficking:

For the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person’s experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty. Put simply, the road to prostitution and life within “the life” is rarely one marked by empowerment or adequate options.⁶

Although some people who are trafficked for sex are kidnapped, trafficking is, as suggested below in Part I, more often a problem of social

1. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Palermo Protocol].

2. *Id.* art. 3(a).

3. *Id.* art. 3(b).

4. 18 U.S.C. § 1201(a) (2010).

5. See Palermo Protocol, *supra* note 1, art. 3(a). See also Harvey Schwartz, Jody Williams & Melissa Farley, *Pimp Subjugation of Women by Mind Control*, in PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS 49, 49–84 (Melissa Farley ed., 2007), for an illuminating account of pimping based on three different cases, where men pimped women into prostitution with different amounts and forms of coercion along a continuum—overt force on one end, exploitation of persons’ inequality and lack of equal alternatives due to racism, sexism, or social class on the other end.

6. Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, *Integration of the Human Rights of Women and a Gender Perspective*, ¶ 42, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) (by Sigma Huda) [hereinafter *U.N. 2006 Trafficking Report*].

inequality than a problem of kidnapping, and it is linked to prostitution. Further, this Essay will illuminate how the Swedish law against the purchase of sex enacted in January 1999 is based on a similar understanding of sexual exploitation and social inequality. The Swedish law criminalizes only those who buy prostituted persons, *not* those being bought: “A person who . . . obtains a casual sexual relation in return for payment, shall be sentenced for *purchase of sexual service* to a fine or imprisonment for at most one year.”⁷ From January 1999 to July 1, 2011, the maximum penalty was imprisonment for at most six months.⁸ Before this law was passed, neither the purchase of sex from adults nor being prostituted was criminalized, but procuring⁹ sex was. Tangential laws prohibiting the public performance of

7. BROTTSBALKEN [BRB] [CRIMINAL CODE] 6:11 (Swed.).

8. The raise to a one-year maximum imprisonment was made possible by an Act of Parliament. *See* LAG OM ÄNDRING I BROTTSBALKEN [AN ACT AMENDING THE CRIMINAL CODE] (Svensk författningssamling [SFS] 2011:517) (passed 282 to 1, 66 absent). For the government’s rationales for this raise, see Justitiekommitténs betänkande [Bet.] 2010/2011:JuU22 Skärpt straff för köp av sexuell tjänst [Raised Punishment for Purchase of Sexual Service] [parliamentary committee report] (Swed.) (May 12, 2011) [hereinafter Bet. 2010/2011:JuU22 Skärpt straff] (making a few additional legislative remarks and proposing that Parliament pass the executive government’s bill: Proposition [Prop.] 2010/2011:77 Skärpt straff för köp av sexuell tjänst [government bill] (Swed.) [hereinafter Prop. 2010/2011:77 Skärpt straff]). For further legislative history on this amendment, see Statens Offentliga Utredningar [SOU] 2010:49 Förbud mot köp av sexuell tjänst: En utvärdering 1999–2008 [Prohibition Against Purchase of Sexual Service: An Evaluation 1999–2008] [government report series] (Swed.) [hereinafter SOU 2010:49 Förbud mot köp].

9. Procuring laws in Sweden are used against pimps, although the two terms are not synonymous: procuring is not legally regarded as necessarily exploitative per se, while pimping is commonly perceived to involve exploitation. Normal procuring may, for example, entail either a “person who promotes” or a person who “in an improper way financially is exploiting a person who has casual sexual relations in return for payment,” with a maximum imprisonment of four years. BRB 6:12(1) (Swed.). According to existing case law no party is considered injured, except the public order, if the procuring only entailed a normal “promotion” of prostitution. Christian Diesen, *Målsägande? [Injured Party?]*, in *FESTSKRIFT TILL LARS HEUMAN* 119, 140 (Jan Kleineman, Peter Westberg & Stephan Carlsson eds., 2008). In addition to normal procuring, there is *gross procuring*, with a maximum penalty of eight years. When assessing whether the procuring is gross, “special consideration shall be given to whether the crime has concerned a large-scale activity, brought significant financial gain or involved ruthless exploitation of another person.” BRB 6:12(3) (Swed.). As is mentioned further below, *see infra* notes 44–45 and accompanying text, courts are inconsistently applying these distinctions, substituting even normal procuring for what appears to be trafficking under the Palermo Protocol. The latter is ratified and located in BRB 4:1a, with a maximum penalty of ten years imprisonment. Several members of parliament have thus repeatedly proposed instead to treat all instances of procuring, which they regard as an outmoded legal concept, as trafficking. *See* Motion till riksdagen 2008/2009:Ju379 Bekämpa den grova kriminaliteten och brottens orsaker [parliamentary motion] at 36 (Oct. 1, 2008) (Swed.) (Mona Sahlin et al.; Social Democrats) (“[I]t is time to toughen the assessment of procuring by replacing it with human trafficking for sexual purposes. The procuring offense’s foundation is that there would be voluntariness between the seller and purchaser. This voluntariness is completely false. Every purchase of someone’s body is built upon an exploitation of vulnerability.”). *See also* Motion till riksdagen 2010/2011:Ju293 Trygghet mot brott [parliamentary motion] at 6 (Oct. 25, 2010) (Swed.) (Morgan Johansson et al.; Social Democrats) (proposing to remake the

pornography, as well as regulations concerning communicable diseases, legal aliens, or the compulsory care of young or addicted persons, could at that time be used in the context of prostitution.¹⁰

This Essay considers the potential of the Swedish law against the purchase of sex, with further suggestions for improvements, as a rational response for states parties to the Palermo Protocol. It aims to sort out some of the conflicting claims and misinformation in the international debate regarding the rationales underlying the law, and will document the law's impact and some of the obstacles found in its judicial application. Part I of the Essay thus situates the legislative history of the Swedish law in the context of the knowledge of prostitution in Sweden and elsewhere before and after the law's enactment, including assessing preconditions for entry into prostitution, the situation while there, and possibilities for exit from it by prostituted persons. Part II will survey the law's impact since its introduction, including comparative assessments from neighboring countries and other relevant jurisdictions. Part III addresses some biased misinformation commonly encountered in comparative discussions. Finally, Part IV deals with current obstacles to effective implementation, particularly related to judicial interpretation and legal application. As will be further illuminated, the experience gained since the passage of the Swedish law suggests that any effective approach against sex trafficking must also reduce prostitution and the demand for it. This approach is already implied in international law, through the Palermo Protocol, which states that "States Parties shall adopt or strengthen legislative or other measures . . . to discourage the demand that

procuring offense into trafficking in order to raise the penalty and increase the protection for the person victimized); *cf.* Motion 2008/2009:Ju4 med anledning av skr. 2007/2008:167 Handlingsplan mot prostitution och människohandel för sexuella ändamål [parliamentary motion] at 3 (Sept. 23, 2008) (Swed.) (Thomas Bodström et al.; Social Democrats).

10. See SOU 1995:15 Könshandeln: Betänkande av 1993 års Prostitutionsutredning [The Sex Trade: Final Report of the 1993 Prostitution Inquiry] [government report series] at 55–70 (Swed.) [hereinafter SOU 1995:15 Könshandeln]. For instance, LAG OM VÅRD AV MISSBRUKARE I VISSA FALL [CARE OF ABUSIVE PERSONS (SPECIAL PROVISIONS) ACT] (Svensk författningssamling [SFS] 1988:870) (Swed.), could be used to force compulsory care in an institutionalized setting, among other places, on an addicted adult prostituted person, even against the person's will, if there was "an extraordinarily severe situation, where the addiction patently endangers, i.e., next to thwarting the substance abuser's possibilities to live a humanly dignified life during a long time ahead." SOU 1995:15 Könshandeln, *supra*, at 67 (citing legislative history). Similarly, the Legal Aliens Act at the time, UTLÄNNINGSLAG (Svensk författningssamling [SFS] 1989:529) (Swed.), was said, *inter alia*, to enable the state to refuse entrance to a noncitizen who is presumed to conduct a "dishonest living" (in statutory terms), or revoke the individual's residence permit after having conducted it, which according to this provision's legislative history would include "procuring" and "prostitution" (the latter, presumably, meant being prostituted). SOU 1995:15 Könshandeln, *supra*, at 67–68 (citing statute and legislative history). When this 1995 report was written, laws on legal aliens appear not to have considered prostitution as exploitation of vulnerable persons or as acts of inequality, but rather as immoral; hence the expression "dishonest living" was interpreted as a *de facto* criminalization of legal aliens who were prostituted. Such views, as will be shown, are not officially expressed in the current Swedish law prohibiting the purchase of sex.

fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”¹¹

I. PROSTITUTION AND THE SWEDISH LAW: A HISTORIC AND COMPARATIVE ANALYSIS

Before the Swedish law prohibiting the purchase of sex was introduced, some relatively obscure attempts had been made that did not bear fruit at the time to criminalize purchasers.¹² Some of these had argued along a gender-equality rationale that understood that buying women for sex was exploitative.¹³ Responses submitted to a 1981 government report, for example, effectively argued that prostitution would “disappear if there was not a demand” and that a law against purchasers would “improve equality between the sexes and prevent undue exploitation of socially deprived women.”¹⁴ The idea went no further until American lawyer Catharine A. MacKinnon in 1990, during a speech together with writer Andrea Dworkin, organized by the umbrella association Swedish Organization for Women’s and Girls’ Shelters (ROKS) under its first chair Ebon Kram, independently argued publicly that gender inequality and sexual subordination could not be fought effectively by assuming a gender symmetry that empirically does not exist.¹⁵ Thus, in an unequal world, she argued, a law against men purchasing women is called for, together with no law against the people, mainly women, being bought for sexual use and hence, “ending prostitution by ending the demand for it is what sex equality under law would look like.”¹⁶ ROKS held regular yearly meetings with

11. Palermo Protocol, *supra* note 1, art. 9(5); *see also* U.N. High Comm’r for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, ¶ 4, U.N. Doc. E/2002/68/Add.1 (May 20, 2002) (“Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.”); *U.N. 2006 Trafficking Report*, *supra* note 6, ¶¶ 29–30, 50–78 (discussing the importance of, and approaches for, reducing demand).

12. *See, e.g.*, Yvonne Svanström, *Criminalising the John: A Swedish Gender Model?*, in *THE POLITICS OF PROSTITUTION* 225, 233 (Joyce Outshoorn ed., 2004) (mentioning that from 1983 to 1993 some fifty parliamentary minorities submitted party or member bills (“motions”) that were never passed, of which approximately thirty proposed criminalizing the purchaser or both the purchaser and prostituted person).

13. *Id.* at 229–33.

14. Prop. 1981/1982:187 om vissa åtgärder mot prostitutionen [government bill] at 44–45 (Swed.) (summarizing and selectively quoting responses to a 1981 government report from considerate parties (*remissinstanser*) arguing in similar terms for criminalizing only the purchaser).

15. For MacKinnon’s speech in 1990 as it was translated then, *see* Catharine A. MacKinnon, *Pornografi och jämställdhet [Pornography and Gender Equality]*, in *PORNOGRAFI: VERKLIGHET ELLER FANTASI?* 58, 69 (Amanda Golert & Pia Laskar trans., 1991).

16. CATHARINE A. MACKINNON, *On Sex and Violence*, in *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 91, 101 (2006); *see also* MacKinnon, *Pornografi och jämställdhet*, *supra* note 15, at 69.

members of the Swedish Parliament, where the criminalization of sex purchasers was an agenda item in 1992, 1994, and 1995.¹⁷

After years of concerted effort pursuant to this theory, in 1998, the Swedish Parliament passed an omnibus bill on men's violence against women that situated prostitution and the new law in the context of sex inequality,¹⁸ rather than—as has been common around the world—among crimes against morality, decency, or the public order. The bill stated that prostitution and violence against women were “issues . . . related with each other. Men's violence against women is not consonant with the aspirations toward a gender equal society In such a society it is also unworthy and unacceptable that men obtain casual sex with women for remuneration.”¹⁹ Further, it was recognized that prostituted women often had deprived childhoods, were neglected, and early on were deprived of a sense of self-worth, as well as it was emphasized that there was a strong association between child sexual abuse and prostitution.²⁰

Compelling evidence from a broad range of countries supports the Swedish legislative conclusion that the majority of prostituted persons are sexually abused as children.²¹ Consequently, many run away from home or

17. Svanström, *supra* note 12, at 236.

18. Bet. 1997/1998:JuU13 Kvinnofrid [parliamentary committee report] (Swed.) (passed) (proposing Parliament to pass Prop. 1997/1998:55 Kvinnofrid [Women's Sanctuary] [government bill], *infra* note 19).

19. Prop. 1997/1998:55 Kvinnofrid [Women's Sanctuary] [government bill] 22 (Swed.).

20. *Id.* at 102–03.

21. See, e.g., Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS 33, 43 (Melissa Farley ed., 2003) [hereinafter Farley et al., *Nine Countries*], available at <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>. Farley and her co-authors found that 59%, or 448 responding prostituted persons, affirmed that she or he “[a]s a child, was hit or beaten by caregiver until injured or bruised.” *Id.* An additional 63%, or 508 respondents, affirmed they were “sexually abused as a child.” *Id.* See also Mimi H. Silbert & Ayala M. Pines, *Entrance into Prostitution*, 13 YOUTH & SOC'Y 471, 479 (1982) (finding 60% of 200 prostituted subjects reported childhood sexual abuse from ages three to sixteen). In-depth studies of survivors show higher frequencies of abuse. See, e.g., Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in LIVING WITH CONTRADICTIONS 120, 123 (Alison M. Jaggar ed., 1994) (referring to organization WISPER's survivor interviews in Minneapolis, where 90% reported assault and 74% sexual abuse between three to fourteen years of age); Susan Kay Hunter, *Prostitution Is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 98–99 (1993) (finding 85% of 123 prostitution survivors reported child incest, 90% physical abuse, and 98% emotional abuse). Likewise, the Mary Magdalene Project in Reseda, California, reported in 1985 that 80% of the prostituted women it worked with were sexually abused during childhood, and Genesis House in Chicago reported the same for 94%. Giobbe, *supra*, at 126 n.10 (citing The First National Workshop for Those Working with Female Prostitutes, Wayzata, Minnesota, Oct. 16–18, 1985); see also INES VANWESENBEECK, PROSTITUTES' WELL-BEING AND RISK 21–24 (1994) (summarizing studies on abuse and prostitution); Chris Bagley & Loretta Young, *Juvenile Prostitution and Child Sexual Abuse: A Controlled Study*, 6 CANADIAN J. COMMUNITY MENTAL HEALTH 5 (1987) (finding 73% of the study's prostituted persons were subjected to child sexual abuse);

become homeless,²² effectively living “on the street” and increasingly being exploited by unscrupulous purchasers. A low age of entry is common. Forty-seven percent of 751 prostituted persons in nine countries reported entering prostitution under age eighteen.²³ Among a sample of 200 juvenile and adult, current and former prostituted women in San Francisco, sixty-two percent started before age sixteen, and “a number” started “under 9, 10, 11 and 12.”²⁴ That is not an age when one has autonomy and power to choose one’s life’s further direction. Furthermore, because abuse and neglect of children may break their spirits and reduce their life chances, others will be able to abuse their vulnerability as adults in prostitution.²⁵ This was also evident among the 200 San Francisco juvenile and adult women, where seventy percent of those sexually abused as children explicitly reported that sexual abuse affected their entry into prostitution, while a greater number strongly indicated so in open-ended responses.²⁶ A 1995 Swedish government report, part of the law’s legislative history, corroborated these findings with those of clinical and outreach workers in Gothenburg.²⁷

Jennifer James & Jane Meyerding, *Early Sexual Experience as a Factor in Prostitution*, 7 ARCHIVES SEXUAL BEHAVIOR 31, 35–37 (1977).

22. See, e.g., Farley et al., *Nine Countries*, *supra* note 21, at 43 (reporting 75% of 761 prostituted persons in nine countries had been homeless, either currently or in the past); Silbert & Pines, *supra* note 21, at 485 (reporting over half of 200 juvenile and adult, current and former, prostituted women in San Francisco were runaways when entering prostitution; over two-thirds of the current prostituted women were runaways and 96% of prostituted juveniles were runaways).

23. Farley et al., *Nine Countries*, *supra* note 21, at 40. For the countries included and related information, see *infra* note 35.

24. Mimi H. Silbert & Ayala M. Pines, *Sexual Child Abuse as an Antecedent to Prostitution*, 5 CHILD ABUSE & NEGLECT 407, 410 (1981). Seventy percent of these respondents were under the age of twenty-one at the time of the interview. *Id.* at 408.

25. It is notable that in addition to home problems such as childhood abuse and neglect, Silbert & Pines’s sample of 200 juvenile and adult prostituted women reportedly had an “almost total lack of positive social supports, and . . . an extremely negative self-concept and a depressed emotional state” when entering prostitution. *Id.* at 486. The “primary picture” was thus one of vulnerable runaway juveniles being “solicited for prostitution” and exploited by pimps “because they have no other means of support due to their young age, lack of education, and lack of the necessary street sense to survive alone.” *Id.* at 489. These conditions are common for entering prostitution and also make it more difficult to leave as an adult. See also *infra* notes 54–61 and accompanying text.

26. Silbert & Pines, *supra* note 24, at 410; Ronald L. Simons & Les B. Whitbeck, *Sexual Abuse as Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women*, 12 J. FAM. ISSUES 361, 361 (1991) (finding, in a sample of forty adolescent runaways and ninety-five adult homeless women in Des Moines, Iowa, that “early sexual abuse increases the probability of involvement in prostitution irrespective of . . . [other] factors”).

27. SOU 1995:15 Könshandeln, *supra* note 10, 104 (citing Mimi H. Silbert & Ayala M. Pines, *Early Sexual Exploitation as an Influence in Prostitution*, 28 SOCIAL WORK 285, 286 (1983)).

The number of children being sexually exploited in Sweden is, unfortunately, still “significant” according to a 2004 government report.²⁸ Similarly, new findings among young adults prostituted in the Gothenburg area also confirm high associations to prior childhood (sexual) abuse, neglect, and homelessness,²⁹ further corroborated in nationally representative youth surveys (including LGBT populations) that add socioeconomic factors and nationality as predictors of entry to prostitution.³⁰ Additionally, as the Swedish National Council for Crime Prevention (BRÅ) recently found, poverty and discrimination are two key structural factors for recruitment into trafficking to Sweden, Finland, and Estonia.³¹ Many women and girls belong to minority groups such as the Baltic Russian-speaking minority and the Roma people in Eastern Europe, and the “majority come from the lowest social strata.”³² Many were “single mothers” and unemployed.³³ Such factors, and

28. SOU 2004:71, *Sexuell exploatering av barn i Sverige, del.1* [government report series] 15–16 (Swed.).

29. JONNA ABELSSON & ANNA HULUSJÖ, *I SEXUALITETENS GRÄNSTRAKTER: EN STUDIE AV UNGDOMAR I GÖTEBORG MED OMNEJD SOM SÄLJER OCH BYTER SEXUELLA TJÄNSTER* [AROUND THE BORDERS OF SEXUALITY: A STUDY OF YOUTH IN GOTHENBURG AND SURROUNDINGS WHO SELL OR BARTER SEXUAL SERVICES] 97–99 (2008).

30. Gisela Priebe & Carl-Göran Svedin, *Unga, sex och internet*, in SE MIG: UNGA OM SEX OCH INTERNET [SEE ME: YOUTH ON SEX AND INTERNET] 74–75, 110, 112, 135 (Ungdomsstyrelsen [Nat’l Bd. for Youth Affairs] ed., 2009); Ungdomsstyrelsen, *Erfarenheter av sexuell exponering och sex mot ersättning* [Experience of Sexual Exposure and Sex for Remuneration], in SE MIG: UNGA OM SEX OCH INTERNET, *supra*, at 156, 158, 161–69.

31. BROTTSFÖREBYGGANDE RÅDET [BRÅ] [SWEDISH NAT’L COUNCIL FOR CRIME PREVENTION], *THE ORGANISATION OF HUMAN TRAFFICKING: A STUDY OF CRIMINAL INVOLVEMENT IN SEXUAL EXPLOITATION IN SWEDEN, FINLAND AND ESTONIA* 36–43 (2008), available at <http://www.bra.se/>.

32. *Id.* at 8. Although the study had found a few “exceptions” of educated women from “better circumstances,” it is notable that the reason stated for their prostitution was a need for money (e.g., to finance their studies). *Id.* at 39. Furthermore, no information is provided to account for whether these persons had not also been subjected to childhood abuse or neglect, or were otherwise vulnerable. *Id.* at 36–43. Regarding the overrepresentation of colored women and girls in Canadian and U.S. prostitution, see, for example, 2 SPECIAL COMM. ON PORNOGRAPHY AND PROSTITUTION, PORNOGRAPHY AND PROSTITUTION IN CANADA 347 (1985) (“On the prairies . . . most of the prostitutes are young native women . . .”); Melissa Farley, Jacqueline Lynne & Ann J. Cotton, *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 *TRANS-CULTURAL PSYCHIATRY* 242, 242 (2005) (finding 52% of 100 prostituted women of First Nations descent, 1.7–7% of Vancouver’s population); Vednita Nelson, *Prostitution: Where Racism and Sexism Intersect*, 1 *MICH. J. GENDER & L.* 81, 83 (1993) (“Racism makes Black women and girls especially vulnerable to sexual exploitation and keeps them trapped in the sex industry.”); see also Aboriginal Women’s Action Network, AWAN Address to the People’s Tribunal on Commercial Sexual Exploitation (Mar. 18–20, 2011), <http://www.facebook.com/notes/aboriginal-womens-action-network/aboriginal-womens-action-network-address-to-the-peoples-tribunal-on-commercial-s/10150161363946691> (last visited Sept. 21, 2011) (stating that Aboriginal women’s overrepresentation in prostitution in Vancouver “is not simply a coincidence”).

33. BRÅ, *supra* note 31, at 56.

not being kidnapped,³⁴ explain how they entered prostitution. Hence, in most situations, coercive circumstances—including child sexual abuse, homelessness, sex discrimination, economic discrimination, and often racial discrimination—propel persons into prostitution.

Regarding traumatic experiences, a nine-country study by Melissa Farley and others found that sixty-eight percent of 840 prostituted persons met the clinical criteria for posttraumatic stress disorder (PTSD) symptoms at levels equal to or higher than the levels of symptoms found in treatment-seeking Vietnam veterans, battered women seeking shelter, or refugees fleeing from state-organized torture, regardless of whether prostitution was legalized or criminalized, and regardless of whether the prostitution took place indoors, in brothels, on the streets, or in developing as opposed to fully industrialized countries.³⁵ Professional practitioners working with trauma and recovery of women prostituted in Sweden testify that what is common with all women they encounter are “the severe posttraumatic stress reactions manifested in the forms of serious mental disorders such as severe sleep and concentration disorders, recurrent anxiety and panic attacks, grave depressions, severe anorectic reactions, self-destructive behaviors combined with extensive dissociation, problems with impulse control, and manifest or latent suicidality.”³⁶ Additionally, suggesting doubts about the position recently taken in the case *Bedford v. Canada* in Ontario that PTSD “could be caused by events unrelated to prostitution,”³⁷ a 2009 Korean study involving forty-six former indoor-prostituted persons and a control group found

34. The Council mentions that, although there have been abduction “reports” from Kosovo and Albania, in their survey of trafficking in Estonia, Finland, and Sweden only *one* woman reported being abducted. *Id.* at 50. The Council also notes that traffickers try to avoid the risks associated with such women, who will presumably try to escape; thus, traffickers avoid recruitment by kidnapping. *Id.*

35. Farley et al., *Nine Countries*, *supra* note 21, at 44–48. Researchers sampled prostituted persons (1) on streets in Canada; (2) in brothels, stripclubs, streets, or massage parlors in Mexico; (3) at clinics for STD controls in Turkey (respondents not “seeking assistance/treatment”); (4) by local newspaper advertisements, drop-in shelters for drug addicted women, and peer-referred in Germany; (5) randomly, in four different San Francisco street areas; (6) at a beauty parlor in Thailand and at a job training/nonjudgmental support agency in northern Thailand; (7) at brothels, streets, and drop-in centers for prostituted persons in Johannesburg and Capetown, South Africa; (8) at a nongovernmental organization supporting approximately 600 women a week in Lusaka, Zambia; and (9) at support agencies in Bogota, Colombia. Male and transgendered persons were included among the Thai, South African, and U.S. samples. For more information, see *id.* at 37–39.

36. Luis Ramos-Ruggiero & Brita Hännestrand, Utlåtande: Angående unga kvinnors psykiska tillstånd och reaktioner orsakad av prostitution och trafficking [Statement: Regarding Young Women’s Mental Condition and Reactions Caused by Prostitution and Trafficking] (Kris- och Traumacentrum Sverige AB [Traumacenter Sweden], 2010) (updated Oct. 12, 2010) (on file with journal).

37. *Bedford v. Canada*, 2010 ONSC 4264, [2010] O.J. No. 4057 ¶ 353 (Can. Ont. Super. Ct.) (QL).

that prostitution was strongly related to PTSD even when controlling for childhood abuse.³⁸

Not surprisingly, it is well known and well documented that pimps and purchasers commonly use threats and violence. For instance, seventy percent of the 200 prostituted females in San Francisco reported that purchasers raped or similarly victimized them “beyond the prostitution contract” on average 31.3 times;³⁹ eighty-four percent out of a group of fifty-five female prostitution survivors participating in a project in Portland, Oregon, had been subjected to aggravated assault an average of 103 times a year; seventy-eight percent were subject to rape forty-nine times a year; and fifty-three percent were sexually tortured more than once a week, often while being filmed or photographed for pornography.⁴⁰ Indeed, in the nine-country study, forty-nine percent among 749 responding persons reported being used in pornography and were diagnosed with “significantly more severe symptoms” of PTSD than were those who did not report being in pornography,⁴¹ suggesting that prostitution in pornography is particularly vicious. Independent witnesses in Swedish procuring and trafficking cases regrettably confirm the abusive image of prostitution, with their testimonies of daily beatings, gang rapes, or torture.⁴² Even an individual purchaser or pimp who does not inflict such abusive harm in every instance nonetheless contributes to the accumulated harm by exploiting a person so severely traumatized (including when the abuse primarily happened during childhood). In order to properly account for that harm, the diagnosis of PTSD symptoms provides a particularly pertinent instrument during trials and preliminary investigations. As was recently done in a number of British trafficking cases, plaintiffs’

38. Hyunjung Choi et al., *Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse*, 15 VIOLENCE AGAINST WOMEN 933, 942 (2009).

39. Mimi H. Silbert & Ayala M. Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. & BEHAV. 395, 397 (1981). Evidence suggests purchasers are generally responsible for most violence against prostituted persons. See, e.g., 2 SPECIAL COMM. ON PORNOGRAPHY AND PROSTITUTION, *supra* note 32, at 388 (stating purchasers were the “primary source of sexual violence”); Jody Raphael & Deborah L. Shapiro, *Violence in Indoor and Outdoor Prostitution Venues*, 10 VIOLENCE AGAINST WOMEN 126, 135 (2004) (noting that, in a sample of 222 women in Chicago, Illinois, purchasers were the “most frequently identified perpetrators of violence across all types of prostitution”).

40. Hunter, *supra* note 21, at 93–94.

41. Melissa Farley, *Renting an Organ for Ten Minutes*, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 144, 146, 422 n.298 (David E. Guinn & Julie DiCaro eds., 2007) (Pearson $r = 126$, $p = .001$, $n = 749$). For the nine-country study, see Farley et al., *Nine Countries*, *supra* note 21.

42. See, e.g., Helsingborgs tingsrätt (TR) [Helsingborg Dist. Ct.] 2005-09-25, B 1230-05 *passim* (Swed.), *sentences modified by* Hovrätten över Skåne och Blekinge [Scania & Blekinge Ct. App.] 2006-01-11, B 2429-05 (Swed.); see also Stockholms tingsrätt (TR) [Stockholm Dist. Ct.] 2003-03-21, B 4205-02, at 13 *et seq.* (Swed.) (several testimonies of daily beatings, gang rapes, and torture, by Nadja, Julia, Renata, and Olesia), *sentence modified by* Svea hovrätt [Svea Ct. App.] 2003-06-23, B 2831-03, at 15 *et seq.* (Swed.) (additional testimonies).

attorneys should submit a diagnosis of the PTSD symptoms of the prostituted persons, followed by additional inquiries about their suffering and situation to assess their damages.⁴³ Using this documentation provides persuasive evidence that purchasers and pimps have contributed to harm, and thus should pay damages.

Unfortunately, many Swedish cases involving pimps never result in formal charges or convictions under trafficking,⁴⁴ rape, assault, or unlawful deprivation of liberty laws, even where such crimes have been committed de facto; rather, these crimes are pursued under the less stringent procuring provisions, suggesting that prostituted persons are unequal under the law.⁴⁵ However, the 1995 Swedish government report had already noted that violence, abuse, and coercion were frequent in prostitution:

It is common that women in the sex trade are subjected to various forms of violations such as physical abuse and rape. Some purchasers conceive the situation such as that they, since they're paying, have a right to treat the woman as they wish. The purchaser thinks that he has . . . also paid for the woman's right to a human and dignified treatment.⁴⁶

Consistent with these remarks, more recent studies also show that many purchasers perceive it as their right to demand whatever acts they are paying for,⁴⁷ which documented harm and trauma in commercial sexual exploitation

43. See, e.g., *AT v. Dulghieru*, [2009] EWHC (QB) 225, [et passim] (Eng.) (citing, inter alia, a report from Dr. Monica Thompson, a single joint expert).

44. See, for example, FANNY HOLM, BROTTSOFFERMYNDIGHETEN [SWEDISH CRIME VICTIM COMPENSATION AND SUPPORT AUTHORITY], UTBETALNING AV BROTTSSKADEERSÄTTNING TILL OFFER FÖR MÄNNISKOHANDEL [PAYMENTS OF CRIMINAL DAMAGE REIMBURSEMENTS TO VICTIMS OF HUMAN TRAFFICKING] 14 (2010), available at <http://www.brottsoffermyndigheten.se/default.asp?id=3850>, where a review was reported of all human trafficking cases since July 2002 and “some seventy judgments” since March 1999 on “accounts of the criminal acts of procuring or gross procuring, despite that in the description of the acts is accounted for a sequence of events that exhibit very large similarities to, or are completely identical with, those that could give rise to liability for human trafficking for sexual purposes.” Holm notes that “[t]his may have the consequence that the victim, rather than as injured party, is considered as a witness and therefore is not given the opportunity to assist the prosecution, claim reimbursement in the scope of the criminal proceeding, or to receive an injured party’s legal counsel.” *Id.* at 15.

45. For examples and analysis, see PETITIONERS ET AL., SUGGESTIONS, *supra* note † at 22–29.

46. SOU 1995:15 Könshandeln, *supra* note 10, at 142.

47. Of 103 male sex purchasers interviewed in London, 27% openly explained that once having paid “the customer is entitled to engage in any act he chooses”; 47% openly expressed to a greater or lesser degree that “women did not always have certain rights during prostitution.” MELISSA FARLEY, JULIE BINDEL, & JACQUELINE M. GOLDING, MEN WHO BUY SEX 4, 13 (2009), [hereinafter FARLEY ET AL., MEN WHO BUY SEX] available at http://www.eaves4women.co.uk/Documents/Recent_Reports/MenWhoBuySex.pdf; see also RACHEL DURCHSLAG & SAMIR GOSWAMI, DECONSTRUCTING THE DEMAND FOR PROSTITUTION 7, 18 (2008), available at <http://www.caase.org/pdf/resources/17-deconstructing-the-demand-for-prostitution.pdf> (finding 43% of 113 sex purchaser-interviewees in Chicago stated the

evidences also. Such treatment is possible because prostitution usually entails a massive power imbalance against the prostituted person, often simply because of the desperate position that causes her entry into prostitution and keeps her from leaving it. The 1995 Swedish government report described one such instance where a “club” that sold pornographic movies had produced its own videos in its basement, in which any male guest could perform with the women for approximately ten dollars.⁴⁸ One twenty-year-old woman in great need of money was put through two “seasoning” sessions where more men were introduced each time. The girl was expected to perform for less than \$100. After the first two sessions, she finally found herself having to serve over ten men from a large crowd with vaginal and oral intercourse, and a completely unprepared anal intercourse.⁴⁹ Police investigated several similar reports and testimonies at the time according to the 1995 Swedish government report, which additionally stated that she “had been very ill because of what had happened,” and also that she did not get the full pay promised.⁵⁰

Similarly, legalization cannot address the power imbalance between the purchaser and the prostituted woman and, among other things, his demand for unsafe or high-risk sex.⁵¹ In the state of Victoria, Australia, legalization appears rather to lead to competition and increasing demands that women perform unsafe or high-risk practices and accept unwanted purchasers.⁵² Correspondingly, during three years of research interviews in Nevada (where prostitution is legal in several counties), Melissa Farley received a number of accounts in which women were fired from legal brothels upon receiving a positive HIV test, while brothels appeared uninterested in the women’s lives and health.⁵³ This is to be expected, considering the fact that purchasers’ money—and not the women or their choices—drives the business. That is what inequality looks like. Some scholars and most courts, as well as the existing structure of laws in most jurisdictions, do not adequately perceive this inequality. The *Bedford v. Canada* ruling appears to have failed in this regard, invalidating a provision against “living on the avails” of pros-

woman “should do anything he asks” when paid); Melissa Farley et al., *Attitudes and Social Characteristics of Men Who Buy Sex in Scotland*, PSYCHOL. TRAUMA: THEORY RES. PRAC. & POL’Y 3, 7 (Advance online publication Mar. 28, 2011), available at [http://www.prostitutionresearch.com/pdfs/Farley,Macleod et al 2011 Men Who Buy Sex In Scotland.pdf](http://www.prostitutionresearch.com/pdfs/Farley,Macleod%20et%20al%202011%20Men%20Who%20Buy%20Sex%20in%20Scotland.pdf) (reporting that 22% of 110 Scotland purchasers said that the paying customer is “entitled to do whatever he wants to the woman”); Farley, *supra* note 41, at 149–51 (quoting from interviews).

48. SOU 1995:15 Könshandeln, *supra* note 10, at 96.

49. *Id.* at 96–97.

50. *Id.* at 97.

51. See, e.g., MARY LUCILLE SULLIVAN, MAKING SEX WORK 106, 264–65 (2007).

52. See, e.g., MARY LUCILLE SULLIVAN, WHAT HAPPENS WHEN PROSTITUTION BECOMES WORK? AN UPDATE ON LEGALISATION OF PROSTITUTION IN AUSTRALIA 7 (2005), available at http://action.web.ca/home/catw/attach/Sullivan_proof_01.pdf.

53. See Melissa Farley, *Legal Brothel Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA, *supra* note 5, at 18, 21, 39–45.

titution that had been used against pimping and traffickers.⁵⁴ The outcome is that third-party involvement, without more, is principally regarded as beneficial for prostituted persons' security,⁵⁵ rather than being the exploitation, and indeed the pimping/trafficking that it is.

Even prostituted women not exploited by pimps often face economic hardships coercing them to stay put, thus keeping them exploited. A woman interviewed for the 1995 Swedish government report stated that she had been prostituted for twenty-five years and claimed that she could choose her customers carefully; nonetheless, she said that, above all else, she wanted to escape prostitution but could not:

The problem is that I cannot enter schools, courses, or work-places. I have no papers and I cannot account for what I have done during all these years. I get anxious for the future. It is too late for me now to change my life. Nonetheless, I am afraid to get stuck in prostitution. I cannot imagine going around here until age 50–60. For me, it is now burdensome and difficult to walk the streets. It is onerous to stand here.⁵⁶

Thus, if purchasers can buy persons and pimps can sell them for sex, but the persons themselves want to escape and cannot, (as explicitly reported by eighty-nine percent of 785 persons in nine countries⁵⁷) then according to the Slavery Convention, these persons appear to be in a "status or condition . . . over whom any or all of the powers attaching to the right of ownership are exercised."⁵⁸ Undoubtedly, all of these prostituted persons are in a position of vulnerability that the interpretive notes to the Palermo Protocol define as "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved."⁵⁹ The exploitation of the persons' lack of alternatives is a reason why, in response to demands to criminalize prostituted persons, the 1998 Swedish legislature concluded that it is "not reasonable also to criminalize the one who, at least in most cases, is the weaker party whom is exploited by others who want to

54. Bedford v. Canada, 2010 ONSC 4264, [2010] O.J. No. 4057 ¶¶ 259–72, 379 (Can. Ont. Super. Ct.) (QL).

55. See, e.g., *id.* ¶¶ 429–31.

56. SOU 1995:15 *Könshandeln*, *supra* note 10, at 75.

57. Farley et al., *Nine Countries*, *supra* note 21, at 51, 56.

58. Convention to Suppress the Slave Trade and Slavery, art. 1(1), Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927).

59. Rep. of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions, Addendum, Interpretative Notes for the Official Records (*Travaux Préparatoires*) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, ¶ 63, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000) [hereinafter *Travaux Préparatoires* to the Palermo Protocol].

satisfy their own sexual drive.”⁶⁰ By recognizing the clear link between prostitution and trafficking—that the reality of prostitution “usually does satisfy the elements of trafficking”⁶¹—it becomes evident that in order for trafficking to end, prostitution must end as well. The question, then, is how successful has the Swedish law been?

II. IMPACT OF THE SWEDISH LEGISLATION

In 1995, the government estimated that there were approximately 2500 to 3000 prostituted women in Sweden, of whom 650 were on the streets.⁶² In contrast, a study published in 2008 estimated that approximately 300 women were prostituted on the streets, while 300 women and fifty men were found in prostitution being advertised online.⁶³ Comparable methods of approximation have been used in Denmark, where sex purchase is legal. Even though Denmark only has a population of 5.6 million⁶⁴ while Sweden has 9.4 million,⁶⁵ Sweden’s prostituted population is approximately one-tenth of Denmark’s. Approximations suggest that at least 5567 persons are visibly in prostitution in Denmark, among whom 1415 were on the streets.⁶⁶ A Danish nongovernmental organization (NGO) claimed street numbers were exaggerated, but even without street numbers, the difference in prostitution between Sweden and Denmark is staggering.⁶⁷ Using similar methods of

60. Prop. 1997/1998:55 Kvinnofrid [government bill] 104 (Swed.); see also Bet. 1997/1998:JuU13 Kvinnofrid [parliamentary committee report] (Swed.) (dismissing minority motions proposing criminalizing both parties).

61. U.N. 2006 *Trafficking Report*, *supra* note 6, ¶ 42.

62. SOU 1995:15 *Könshandeln*, *supra* note 10, at 10, 99.

63. Charlotta Holmström, *Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduktion [Prostitution and Trafficking for Sexual Purposes in Sweden: Extent, Occurrence, and Knowledge Production]*, in PROSTITUTION I NORDEN: FORSKNINGSRAPPORT [PROSTITUTION IN THE NORDIC: RESEARCH REPORT] 303, 314 (Charlotta Holmström & May-Len Skilbrei eds., 2008).

64. Statistics Denmark, Quarterly Population, 2011Q2 (Feb. 9, 2011), http://www.dst.dk/HomeUK/Statistics/Key_indicators/Population/pop_quarterly.aspx.

65. Press Release, Statistiska Centralbyrån [SCB] [Statistics Sweden], Trend Break for Increased Births (Aug. 15, 2011), http://www.scb.se/Pages/PressRelease____318978.aspx.

66. Charlotta Holmström & May-Len Skilbrei, *Nordiska prostitutionmarknader i förändring [Nordic Markets for Prostitution Under Change]*, in PROSTITUTION I NORDEN, *supra* note 63, at 9, 14.

67. A so-called sex workers’ organization in Denmark claimed that street prostitution in Copenhagen had been overestimated by 1000 persons, attributing these numbers to an NGO called Reden that works with prostituted women in outreach programs. See Pressemeldelse [Press Release], Sexarbejdernes Interesse Organisation (SIO), Svensk rapport bygger på forkerte tal for Danmark; Nu må Reden sige sandheden (July 4, 2010), <http://s-i-o.dk/wordpress/?p=58>. However, the researchers’ numbers on indoor prostitution, particularly “clinic prostitution,” which on their own were estimated to include 3278 persons, see Holmström & Skilbrei, *supra* note 66, at 14, were based primarily on advertising—and not on any information from Reden. See Jeanett Bjonness, *Holdninger til prostitution i Danmark*, in PROSTITUTION I NORDEN, *supra* note 63, at 101, 107.

approximation in Norway (population 4.9 million),⁶⁸ there were 2654 prostituted women, of whom 1157 were on the street in 2007 when purchasing sex was still legal,⁶⁹ which is well over eight times more per capita than in Sweden. Although the Nordic numbers are not exact, as comparative approximations they are more than sufficient.

According to both NGOs and government agencies in Stockholm, Gothenburg, and Malmö, briefly after the law's enactment "the sex trade virtually disappeared from the street," although it did later return, "albeit to a lesser extent."⁷⁰ In Stockholm, the number of purchasers was reported by police to have decreased by almost eighty percent in 2001.⁷¹ As reported in 2007, social workers in Stockholm encountered only fifteen to twenty prostituted persons per night, whereas they encountered up to sixty per night prior to the law.⁷² In Malmö, social workers encountered 200 women a year prior to the law, but a year after the law, they encountered 130, and in 2006, only sixty-six.⁷³ In Gothenburg, data indicate that street prostitution declined from one hundred to thirty persons a year between 2003 and 2006.⁷⁴

Despite the misinformation (discussed further below) spreading what is sometimes simply rumors of how, after the law's enactment, there was a stronger move from street prostitution to internet or other indoor, allegedly "hidden" prostitution venues in Sweden as compared to elsewhere, no information, empirical evidence, or other research suggests that this has actually occurred.⁷⁵ Concurring with these observations, the National Criminal Investigation Department states that its telephone interceptions show that international traffickers and pimps have been disappointed with the prostitution market in Sweden.⁷⁶ Consequently, the latter's clandestine

68. *Focus on Population*, STATISTICS NORWAY, http://www.ssb.no/english/subjects/02/befolkning_en/ (last visited Sept. 21, 2011).

69. Marianne Tveit & May-Len Skilbrei, *Kunnskap om prostitusjon og menneskehandel i Norge [Knowledge of Prostitution and Human Trafficking in Norway]*, in *PROSTITUTION I NORDEN*, *supra* note 63, at 213, 220–21 (noting that among those not on the street in Norway, the numbers were based on those who sought support from social agencies or whose advertisement was found on the internet or in a newspaper); *see also* Holmström & Skilbrei, *supra* note 66, at 13.

70. SOCIALSTYRELSEN [SoS] [NAT'L BD. OF HEALTH AND WELFARE], *PROSTITUTION IN SWEDEN 2007*, at 33 (2008), *available at* http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/8806/2008-126-65_200812665.pdf.

71. Caspar Opitz, *Gatans sexhandel minskar [The Street's Sex Trade Decreases]*, DAGENS NYHETER [DAILY NEWS], June 29, 2001, at 7.

72. SoS, *supra* note 70, at 33.

73. *Id.*

74. *Id.* at 34.

75. SOU 2010:49 Förbud mot köp, *supra* note 8, at 118, 152.

76. RIKSPOLISSTYRELSEN [NAT'L CRIMINAL INVESTIGATION DEP'T, SWED.], LÄSGESRAPPORT 10: MÄNNISKOHANDEL FÖR SEXUELLA OCH ANDRA ÄNDAMÅL 2007–2008 [SITUATION REPORT NO. 10: TRAFFICKING FOR SEXUAL AND OTHER PURPOSES 2007–2008] 10 (2009); *cf.* NCID, TRAFFICKING IN WOMEN: SITUATION REPORT NO. 5, at 34 (2003) [hereinafter NCID REPORT NO. 5] (noting reduced demand after 1999).

brothels in Sweden are fairly small enterprises, with police operations rarely finding more than three or four prostituted women at one time,⁷⁷ compared to the twenty to sixty women commonly included in certain criminal activities in the rest of Europe.⁷⁸ These international traffickers and pimps avoid conducting prostitution for too long in any one apartment or location in order to calm customers' fears of getting caught.⁷⁹ This "necessity" for "several premises" has been corroborated in telephone interceptions, testimonies from prostituted women, police reports in the Baltic states, and in almost all preliminary investigations of procuring or trafficking charges.⁸⁰

Moreover, the passing of the law, in and of itself, seems to have changed public sentiment. In 1996, only forty-five percent of women and twenty percent of men in Sweden were in favor of criminalizing male sex purchasers.⁸¹ In 1999, eighty-one percent of women and seventy percent of men were in favor of criminalizing the purchase of sex; in 2002, eighty-three percent of women and sixty-nine percent of men were in favor; and, in 2008, seventy-nine percent of women and sixty percent of men favored the law.⁸² Furthermore, the number of men who reported, in the national population samples, having purchased sex seems to have dropped from 12.7% in 1996⁸³ (before the law took effect) to 7.6% in 2008.⁸⁴ The method used for approximation, self-reported anonymous crime surveys, has repeatedly been proven reliable in a number of scientific reviews.⁸⁵ Asked about the law's effects on their own purchase of sex in 2008, respondents stated they had

77. *Id.*

78. SOU 2010:49 Förbud mot köp, *supra* note 8, at 122.

79. NCID, REPORT NO. 5, *supra* note 76, at 34.

80. *Id.* The use of several premises may be observed by reading individual case-opinions from Swedish courts.

81. Sven-Axel Månsson, *Commercial Sexuality*, in *SEX IN SWEDEN: ON THE SWEDISH SEXUAL LIFE 1996*, at 235, 249 (Nat'l Inst. of Pub. Health & Bo Lewin eds., 2000).

82. Jari Kuosmanen, *Tio år med lagen [Ten Years with the Law]*, in *PROSTITUTION I NORDEN*, *supra* note 63, at 357, 361–62. While the drop-out rate was considerably high in the 2008 survey, which had been sent to 2500 persons, with only 43% of men and 57% of women responding ($n = 1134$), its results nonetheless are consistent with other surveys conducted in 1999 and 2002, and with a study done in 1996 before the law took effect. *Id.* at 359–60.

83. Månsson, *supra* note 81, at 238.

84. Kuosmanen, *supra* note 82, at 368.

85. See, e.g., David Huizinga & Delbert S. Elliot, *Reassessing the Reliability and Validity of Self-Report Delinquency Measures*, 2 J. QUANTITATIVE CRIMINOLOGY 293, 294, 324 (1986) (stating that "these measures have acceptable levels of reliability and validity as judged by conventional social-science standards;" *id.* at 294 (multiple citations omitted), and that "self-report measures are among the most promising of our measures of criminal behavior and are, perhaps, the only measures capable of meeting the needs of both descriptive and etiological research," *id.* at 324); Josine Junger-Tas & Ineke Haen Marshall, *The Self-Report Methodology in Crime Research*, 25 CRIME & JUST. 291, 354 (1999); Terence P. Thornberry & Marvin D. Krohn, *The Self-Report Method for Measuring Delinquency and Crime*, 4 MEASUREMENT & ANALYSIS CRIME & JUST. 33, 72 (2000).

not increased their purchase of sex, had not started purchasing sex outside of Sweden, and had not begun purchasing sex in “non-physical” forms.⁸⁶

The changed circumstances in Sweden after the law’s enactment, especially compared to its neighbors, highlight the strong deterrent effect of the law, even if conviction rates have not been staggering. Convictions went from 10 in 1999 to 29 in 2000, 38 in 2001, 37 in 2002, 72 in 2003, 48 in 2004, 105 in 2005, 114 in 2006, 85 in 2007, 69 in 2008, 107 in 2009, and 326 in 2010.⁸⁷ However, in 2010 there was a dramatic increase in crimes reported to the police, the customs authority, and the prosecution service—1251 reported sex purchases—compared with the previous highest annual number of 460, reported in 2005.⁸⁸ In 2010, there were also 231 reported “purchases of a sexual act from a child” (under age eighteen), a crime for which the maximum penalty is two years.⁸⁹ The reasons for this increase in 2010 appear to be due to particular funds allotted by the Government’s Action Plan against “prostitution and trafficking” and one large, local case of organized pimping in Jämtland in northern Sweden.⁹⁰

From the perspectives of international jurisdictions, the Swedish law’s effects are notable. Studies suggest that with legalization comes an increased demand for more prostituted persons.⁹¹ Indeed, legalization appears to be associated with a culture in which prostitution and sexual coercion are more normalized.⁹² Moreover, to meet the increased demand for prostitution, there

86. Kuosmanen, *supra* note 82, at 372–73.

87. BRÅ [Swedish Nat’l Council for Crime Prevention], Statistics, National Criminal Statistics Database, Sweden, [hereinafter National Criminal Statistics Database] available at <http://www.bra.se> (under “Statistik,” follow “Personer lagförda (dömda m m) för brott,” then select year prior to 2004 under “Samtliga lagföringsbeslut. Årsvis: Lagföringsbeslut efter huvudbrott och huvudpåföljd,” and from 2004 under “Samtliga lagförda brott”). In both cases, numbers include orders for summary penalty and district court sentences, but not appeals and not persons simultaneously convicted for offenses with a higher penalty (i.e., the “primary crime” (*huvudbrott*)). See SCB [Statistics Sweden], Beskrivning av statistiken [Description of the Statistics], http://www.scb.se/Pages/ProductDocumentations___19175.aspx (select year, then read under heading “B. Kvalitetsdeklaration”). Note also that, before April 1, 2005, the Sex Purchase Law was not inserted into the criminal code but was cited as a special law: LAG OM FÖRBUD MOT KÖP AV SEXUELLA TJÄNSTER (Svensk författningssamling [SFS] 1998:408) (Swed.), available at <http://62.95.69.3/SFSdoc/98/980408.PDF>, superseded by statute, BRB 6:11. There were some differences in wordings between the two.

88. National Criminal Statistics Database, *supra* note 87. Reports may, or may not, result in convictions.

89. See BRB 6:9. For number statistics, see the National Criminal Statistics Database, *supra* note 87.

90. See Anna Helmersson, *Anmälda sexköp har fördubblats* [Reported Sex Purchases Doubled], DAGENS NYHETER [DAILY NEWS], July 27, 2010, <http://www.dn.se/nyheter/sverige/anmalda-sexkop-har-fordubblats>.

91. See generally SULLIVAN, *supra* note 51; SULLIVAN, *supra* note 52; Farley, *supra* note 53.

92. See, e.g., Melissa Farley, Mary Stewart & Kyle Smith, *Attitudes Toward Prostitution and Sexually Coercive Behaviors of Young Men at the University of Nevada at Reno*, in PROSTITUTION AND TRAFFICKING IN NEVADA, *supra* note 5, at 173–80 (surveys comparing

is often a corresponding increase in cross jurisdictional trafficking.⁹³ In Sweden in 2008, though, there were no such reported large groups of foreign women being prostituted visibly as there were in Norway, Denmark, and Finland.⁹⁴ This is notable also compared to the Netherlands, where, in 1999, half of all prostituted persons were estimated to be foreign born.⁹⁵ Previously, in 1994 and 1995, the Amsterdam police had also estimated that approximately seventy-five percent of all prostituted persons “behind windows in the Red Light district, De Wallen, were foreigners and that 80 percent of all foreign prostitutes [*sic*] are in the country illegally.”⁹⁶ In 2008, the *New York Times* reported that, after legalization reforms in 2000, the situation had deteriorated further.⁹⁷ In contrast, other countries—including Norway,⁹⁸ Iceland,⁹⁹ and, to some extent, South Korea¹⁰⁰ and the United

undergraduate men in California, Iowa, Oregon, and Texas (n = 783) with similar men in Nevada (n = 131), finding that the latter, to a significantly higher extent, normalized sexual exploitation, prostitution, and sexual violence such as rape myths). Cf. Melissa Farley, *Adverse Effects of a Prostitution Culture on Nonprostituting Women*, in PROSTITUTION AND TRAFFICKING IN NEVADA, *supra* note 5, at 181–86.

93. There are findings in Victoria, Australia, and similar indications in Nevada as well suggesting, for instance, that prostituted women and minors are regularly moved between legal and illegal venues by pimps for reasons which appear to include money laundering, changed demand, and avoiding law enforcement scrutiny. SULLIVAN, *supra* note 51, at 202–03, 206, 225–26, 243; Melissa Farley, *Trafficking for Legal and Illegal Prostitution in Nevada*, in PROSTITUTION AND TRAFFICKING IN NEVADA, *supra* note 5, at 103–05, 118–21; Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 21, at 315, 320. Regarding interstate trafficking, among a sample of forty-five women in legal Nevada brothels, thirty-two had moved there from another state in the United States, and 58% had been in prostitution in other states. Farley, *supra*, at 104. Not surprisingly, the president of the Nevada Brothel Owners Association in 1994 said that 90% of prostituted persons in the legal brothels in Storey, Nye, and Lyon counties were not Nevada residents. See LENORE KUO, PROSTITUTION POLICY 80 (2005).

94. Holmström & Skilbrei, *supra* note 66, at 16–17.

95. SOU 2010:49 Förbud mot köp, *supra* note 8, at 163.

96. Gerben J.N. Bruinsma & Guus Meershoek, *Organized Crime and Trafficking in Women from Eastern Europe in the Netherlands*, in ILLEGAL IMMIGRATION AND COMMERCIAL SEX: THE NEW SLAVE TRADE 105, 107 (Phil Williams ed., 1999).

97. See Marlise Simons, *Amsterdam Tries Upscale Fix for Red-Light District Crime*, N.Y. TIMES, Feb. 24, 2008, at A10 (citing reports suggesting over 75% of Amsterdam’s 8000 to 11,000 prostituted persons are from Eastern Europe, Africa, and Asia, as well as statements by Amsterdam’s mayor that reforms did not give more transparency or protection to women, but, rather, just the opposite).

98. ALMINDELIG BORGERLIG STRAFFELOV (STRAFFELOVEN) [CRIMINAL CODE] Ch. 19, § 202a (Nor.), available at <http://www.lovdato.no/cgi-wift/ldles?doc=/all/nl-19020522-010.html>.

99. See Comm. on the Elimination of All Forms of Discrimination Against Women, *Response to the Recommendations Contained in the Concluding Observations of the Committee Following the Examination of the Fifth and Sixth Periodic Reports of the State Party on 8 July 2008* (Iceland), U.N. Doc. CEDAW/C/ICE/CO/6/Add.1 (May 27, 2011).

Kingdom¹⁰¹—are starting to adopt aspects of the Swedish model. A similar law was also proposed by the Government of India.¹⁰²

III. MISINFORMATION ABOUT SWEDEN'S LAW

Unfounded rumors have circulated internationally about Sweden's law, surprisingly often attributed to one Swedish prostitution commentator, Petra Östergren, and an old unpublished English-language piece of hers.¹⁰³ For instance, the Sex Worker Education and Advocacy Taskforce (SWEAT) promulgated her claims to the South African Law Reform Commission (SALRC) in 2009, but never referred to any published research from Sweden.¹⁰⁴ Östergren argues, *inter alia*, that “[a]ll of the authorities say that there is no evidence that prostitution was lower overall” and that “hidden prostitution had probably increased.”¹⁰⁵ However, none of the reports Östergren cites were published more than two years after the law took effect. Data before and after the law took effect, as well as comparative data from other Nordic countries, undoubtedly show Östergren's claims are not correct.¹⁰⁶ Moreover, Östergren claims that women in street prostitution faced a tougher “time” after the law's enactment with, *inter alia*, more demands for unsafe sex and more violent purchasers.¹⁰⁷ Not surprisingly, the National Board of Health and Welfare's 2000 report that Östergren cites is, according to the Board's own homepage, “not valid anymore.”¹⁰⁸ Already in 2003, the Board expressed doubts about such claims:

While *some* informants speak of a more risk-filled situation, few are of the opinion that there has been an increase in actual violence. Police who have conducted a special investigation into the amount

100. Statutes of S. Korea, Act No. 7196: Act on the Punishment of Procuring Prostitution and Associated Acts (Mar. 22, 2004); Statutes of S. Korea, Act No. 7212: Act on the Prevention of Prostitution and Protection of Victims Thereof (Mar. 22, 2004).

101. Policing and Crime Act (2009) Chap. 26 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2009/26>.

102. *See Anti-Prostitution Laws in for Drastic Revamp*, TIMES OF INDIA, Oct. 1, 2005, *available at* http://articles.timesofindia.indiatimes.com/2005-10-01/delhi/27864103_1_prostitution-laws-immoral-trafficking-prevention-act.

103. Petra Östergren, *Sexworkers Critique of Swedish Prostitution Policy*, PETRAOSTER-
GREN.COM, http://www.petraostergren.com/pages.aspx?r_id=40716 (last visited Sept. 21, 2011).

104. *See* ERIC HARPER, DIANNE MASSAWE & VIVIENNE MENTOR-LALU, SEX WORKER EDUCATION AND ADVOCACY TASKFORCE [SWEAT], SUBMISSION TO THE SOUTH AFRICAN LAW REFORM COMMISSION: PROJECT 107 SEXUAL OFFENCES ADULT PROSTITUTION 41–42 (2009).

105. Östergren, *supra* note 103.

106. *See supra* notes 62–97 and accompanying text.

107. Östergren, *supra* note 103.

108. SoS [NAT'L BD. OF HEALTH AND WELFARE], KÄNNENDOM OM PROSTITUTION 1998–1999 (2000), <http://www.socialstyrelsen.se/publikationer2000/2000-3-5>.

of violence have not found any evidence of an increase. Other research and the responses of our informants both indicate a close connection between prostitution and violence, regardless of what laws may be in effect.¹⁰⁹

Additionally, in a 2007 report, the Board noted that opinions vary among prostituted women, with some still preferring the street over restaurants, nightclubs, and the Web. One woman likened “making contact online” to “buying a pig in a poke” while another said it makes dismissing an unwanted purchaser harder.¹¹⁰ Although Östergren may have been correct that some purchasers stopped testifying against traffickers once they were criminalized,¹¹¹ the Gothenburg Police report having “received anonymous tips from clients who suspect human trafficking.”¹¹²

Furthermore, few people outside of Sweden appear to know how Östergren selected her sample of twenty prostituted women-interviewees to whom she refers frequently. Clues are given in a book published by her in Swedish in 2006, in which Östergren explicitly says she did not attempt to contact or hold interviews with “sellers of sex” who had “primarily bad experiences of prostitution,”¹¹³ but, rather, intentionally sought women with “completely different experiences” since the former were claimed to be “the only ones heard in Sweden.”¹¹⁴ Similarly, her 2003 graduate thesis refers to interviews with fifteen female “sellers of sex” of whom “most . . . have a positive view of what they do.”¹¹⁵ Thus, when mentioning “informal talks and correspondence with approximately 20 sex workers since 1996”¹¹⁶ in her English-language piece, she apparently refers to persons selected because they had positive views of prostitution. Evidently, she should have informed readers that critics were excluded. Scholars like Jane Scoular have referred to “Östergren’s interviews with women, who reported experiencing greater stress and danger on the streets” after the 1998 law took effect, without noting this selection bias.¹¹⁷ In 2009, Ronald Weitzer cited Scoular in

109. SoS [NAT’L BD. OF HEALTH AND WELFARE], PROSTITUTION IN SWEDEN 2003, at 34 (2004) (emphasis added), *available at* http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/10488/2004-131-28_200413128.pdf.

110. SoS, *supra* note 70, at 28.

111. Östergren, *supra* note 103.

112. SoS, *supra* note 70, at 48.

113. PETRA ÖSTERGREN, PORR, HOROR OCH FEMINISTER [PORN, WHORES, AND FEMINISTS] 168 (2006).

114. *Id.* at 169.

115. Petra Östergren, *Synden Ideologiserad* 17 (Spring 2003) (unpublished *magisteruppsats* [master’s thesis], Stockholm University), *available at* <http://www.petraostergren.com/upl/files/8914.pdf>.

116. Östergren, *supra* note 103.

117. Jane Scoular, *What’s Law Got to Do with It? How and Why Law Matters in the Regulation of Sex Work*, 37 J.L. & SOC’Y 12, 20 (2010); *see also* Jane Scoular, *Criminalizing ‘Punters’: Evaluating the Swedish Position on Prostitution*, 26 J. SOC. WELFARE & FAM. L.

order to support the claim that Sweden's law has not been effective.¹¹⁸ Janet Halley and others have also cited Östergren's unpublished piece to support the claim that the law has made prostitution more hidden and dangerous.¹¹⁹ The Swedish government's latest inquiry report, of course, establishes that these claims are baseless.¹²⁰

Naturally, there is still room for improvement, and the law could—consistent with its intent—be further strengthened. Until those victimized are empowered to leave prostitution, the situation will not be fully addressed.

IV. OBSTACLES TO EFFECTIVE IMPLEMENTATION

Contrary to the Palermo Protocol, where *consent* is explicitly stated as irrelevant,¹²¹ the Swedish Supreme Court in 2001, in a cursory opinion consisting of merely four sentences, affirmed rulings by lower courts where, *inter alia*, an interpretation was made that, under Sweden's prohibition against the purchase of sex, the prostituted person's so-called "consent" was relevant, suggesting that the offense was primarily a crime against the public order and not primarily against her as a person, and failing to recognize damages for the prostituted person.¹²² In the District Court, it was argued that crimes primarily directed against the public order entail a lower punishment *per se* than crimes primarily directed against persons.¹²³ Although penalties were slightly raised in the Court of Appeals in this case, the purchaser was nonetheless only fined.¹²⁴ Many law enforcement officers and prosecutors have subsequently awarded the Sex Purchase Law little priority when assigning resources to enforce it, explicitly blaming the penalty level as determining their priorities.¹²⁵ Although some courts lately, beginning in

195, 200 (2004) [hereinafter Scoular, *Evaluating the Swedish Position*] (citing Östergren's interviews to support a critique of the 1998 Swedish law).

118. Ronald Weitzer, *Legalizing Prostitution: Morality Politics in Western Australia*, 49 BRIT. J. CRIMINOLOGY 88, 100 (2009) (citing Scoular, *Evaluating the Swedish Position*, *supra* note 117).

119. Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, Sex Trafficking*, 29 HARV. J.L. & GENDER 335, 396 nn.206–07 (2006).

120. SOU 2010:49 Förbud mot köp, *supra* note 8, at 127–30.

121. Palermo Protocol, *supra* note 1, art. 3(b).

122. Nytt Juridiskt Arkiv [NJA] [Scania & Blekinge Ct. App.] 2001-07-09 pp. 527, 532, *aff'd id.* p. 533 [Supreme Court] (Swed.).

123. NJA [Malmö Dist. Ct.] 2001-07-09 p. 529 (Swed.).

124. NJA [Scania & Blekinge Ct. App.] 2001-07-09 p. 532, *aff'd id.* p. 533 [Supreme Court] (Swed.).

125. *See, e.g.*, SOU 2010:49 Förbud mot köp, *supra* note 8, at 217 (reporting that police say they could bring "many times more" legal cases against purchasers if prioritized higher and that prosecutors agree, in part, but blame the low penalty level); Ann Johansson & Per Nygren, *Polisen tar tuffare tag mot sexköparna runt Rosenlund* [*Police Being Tougher Against Sex Purchasers Around Rosenlund*], GÖTEBORGS-POSTEN [GOTHENBURG POST], Apr. 11, 2010,

December 2007, switched direction and recognized some circumstances during the purchase of sex as coercive, thereby justifying a higher level of sanctions such as conditional sentences for purchasers in those cases, courts nonetheless have awarded no damages merited by such victimization.¹²⁶

However, none of the conditions or observations of prostitution recognized in the legislative findings, or in contemporary research, document the condition of freedom that is required for the “consent” on which the above courts relied to be meaningful. Exploiting the deprived conditions or abusive situations leading persons to enter prostitution in order to purchase them for sex is not a situation to which these persons can legitimately consent.¹²⁷ Based on the legislative history and evidence accounted for above, sex purchase appears primarily to be a crime against the purchased person’s humanity, equality, and dignity, one which is “objectively damaging to the person in the social empirical sense.”¹²⁸

Several studies strongly suggest purchasers understand that prostituted persons do not enjoy the sex, are economically strapped, are subjected to violence and grave hardships, and are often pimped or trafficked, but nonetheless, they proceed to purchase sex.¹²⁹ In the words of the omnibus bill on

sec. 1, at 9 (noting that police traditionally define success in terms of total jail time and number of convictions).

126. See, e.g., Hovrätten för västra Sverige [Ct. App. for Western Sweden] 2007-12-18, B 3065-07, at 9-10, Rättsfall från hovrätterna [RH] [Ct. of App. Case Reporter] 2008:59 (Swed.) (sentencing purchasers to conditional sentences and to pay fines—but *not* to pay damages—because, after the completed sexual act, one defendant introduced the other, an acquaintance, to the situation when the prostituted person had “been in such a subordinate position against the two men that it must have appeared as a near-impossibility for her to refuse the other man intercourse, or to otherwise affect the situation. This [the defendants] have understood and exploited.”). The prostituted person was, according to the court, effectively understood to be in a situation in which genuine consent was not possible. This is common in prostitution.

127. Just as consent to prostitution appears to not be genuinely valid, it would be equally wrong to say that prostituted people are contributing to their own exploitation when being subjected to the coercive circumstances overwhelmingly documented as preconditions for entry into prostitution. See *supra* notes 19-38, 56-60, and accompanying text. Doing so is to incorrectly blame the persons victimized, as is arguing that prostituted people generally are liable to gross negligence under the Swedish Tort Liability Act, which, according to this theory, would diminish their entitlement to damages. SKADESTÅNDSLÄG [SKL] [TORT LIABILITY ACT] 6:1(1) (Swed.) (“Damage awards due to personal harm may be adjusted, if the injured person themselves intentionally or by gross negligence have contributed to the harm.”).

128. See PETITIONERS ET AL., A RESPONSE, *supra* note †, at 3.

129. See, e.g., DURCHSLAG & GOSWAMI, *supra* note 47, at 20, 22 (finding that, of the 113 men interviewed, 66% responded that “economic necessity” is the cause of female prostitution; 27% responded that the majority are “homeless”; 57% believed the majority had “experienced some type of childhood sexual abuse”; 32% believed the majority’s age of entry to be below eighteen; and 42% believed that “prostitution causes both psychological and physical damage”); FARLEY ET AL., MEN WHO BUY SEX, *supra* note 47, at 14 (“34% of the [103 London male] interviewees estimated that between 30-40% of all women in prostitution were [abused as children], and 35% thought that 50-90% were.”); *id.* at 16 (“Of the men interviewed, 55% believed that a majority of women in prostitution were lured, tricked or trafficked.”); JAN MACLEOD ET AL., CHALLENGING MEN’S DEMAND FOR PROSTITUTION,

men's violence against women passed by Sweden's Parliament in 1998, these "ordinary men' who are often married or cohabiting, are involved in an activity which they should be aware of is destructive . . . particularly for the women they are buying sexual services from."¹³⁰ The purchaser has, in other words, abused the prostituted person's conditions of deprivation or abuse, thus harming the person and should therefore compensate her or him. Imposing damages on the purchaser creates both an economic opportunity—that the state does not have to pay for—to facilitate the prostituted person's escape, as well as an incentive for the prostituted person to testify against sex purchasers, an incentive that is currently lacking.

The courts' decisions have now been clarified, however, by the government's latest inquiry. Consistent with the argument raised here, the government inquiry concludes that the "*purchase of sexual service* . . . is more of a crime against a person than a crime against the public order, even if its background has elements of both."¹³¹ Furthermore, the report states that "anyone who has been exploited by someone who has purchased a sexual service occupies a special position compared with others who felt violated by the crime. Nor is the offence of such misdemeanor character that could support the conclusion that there is no injured party."¹³² This inquiry report strongly emphasized that, even where a crime's protected interest might "primarily" be public-interest related, for example, to promote gender equality and fight exploitation, this need *not* mean the interest is exclusively public.¹³³ Indeed, no court has held that the interest cannot, at the same time, be regarded as a crime against the person purchased. Hence, Parliament has followed the preceding government report and proposals and acknowledged that prostituted persons may be recognized as the "injured party" under the Code of Judicial Procedure, which can entail entitlement to damage awards from the purchasers, though Parliament has also stated that an individual assessment of whether the prostituted person is an "injured party" has to be made in each and every case.¹³⁴ It is notable that the Parliamentary Committee on Justice, in

TUTION IN SCOTLAND: A RESEARCH REPORT BASED ON INTERVIEWS WITH 110 MEN WHO BOUGHT WOMEN IN PROSTITUTION 20–21 (2008), *available at* <http://www.prostitutionresearch.com/ChallengingDemandScotland.pdf> (finding that, of the 110 men interviewed, 85% stated prostituted women do not like the sex of prostitution, while 73% said women are prostituted only because of "economic necessity"); Andrea Di Nicola & Paolo Ruspini, *Learning from Clients*, in PROSTITUTION AND HUMAN TRAFFICKING: FOCUS ON CLIENTS 231–32 (Andrea Di Nicola et al. eds., 2009) ("[S]triking is the shared . . . awareness [among purchasers] of exploitation and the related neutralization techniques."); Martin A. Monto, *Female Prostitution, Customers, and Violence*, 10 VIOLENCE AGAINST WOMEN 160, 177 (2004) ("[M]any [purchasers] are aware that prostitutes are victimized in the course of their activities.").

130. Prop. 1997/1998:55 *Kvinnofrid* [government bill] 22 (Swed.).

131. SOU 2010:49 *Förbud mot köp*, *supra* note 8, at 81.

132. *Id.* at 250 (citation omitted).

133. *Id.* at 250–51.

134. Bet. 2010/2011:JuU22 *Skärpt straff*, *supra* note 8, at 11–12; *see also* Prop. 2010/2011:77 *Skärpt straff*, *supra* note 8, at 14–15; RÄTTEGÅNGSBALKEN [RB] [CODE OF

conjunction with passing these amendments in May 2011, found itself having to remark in writing that existing law *already* provides opportunities for witnesses and other persons affected by the offense who are not technically recognized as injured parties to claim certain damages.¹³⁵ The statement might imply that many legislators are disappointed with how the judicial system is asserting prostituted persons' rights to damage awards.

There are problems with this secondary venue for claiming damages though. For instance, prosecutors and public victims' legal counsels are only obliged to represent claims of a recognized injured party.¹³⁶ The fact that no prostituted person has ever received damage awards under the Sex Purchase Law since its enactment suggests that existing law might need further improvements for any civil venues to be effectively used.¹³⁷ Nevertheless, by emphasizing these dormant venues, the legislature's intent arguably is for them to be used. In the future, these statements might be seen as the tipping point that enabled more damage awards for prostituted persons.

Furthermore, nothing stops states from extending their application of the Palermo Protocol to charge purchasers with human trafficking when they receive persons who are effectively pimped by a third party, even if the Protocol's *travaux préparatoires* do not specifically mention purchasers.¹³⁸ Just as pimps abuse prostituted persons' vulnerabilities, purchasers do so when

JUDICIAL PROCEDURE] 20:8(4) (Swed.), *unofficial translation available at* <http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf> (as amended 1999) ("The injured party is the party against whom the offence was committed or who was affronted or harmed by it."); SOU 2010:49 Förbud mot köp, *supra* note 8, at 250 (noting that the one who, according to RB 20:8(4), was harmed by the crime is entitled to damages).

135. Bet. 2010/2011:JuU22 Skärpt straff, *supra* note 8, at 11–12.

136. See RB [CODE OF JUDICIAL PROCEDURE] 22:2 (Swed.), for this particular regulation of the prosecutor's obligation. In addition to the prosecutor, for offenses falling under the criminal code's Chapter 6 on Sexual Offenses and some other chapters, a victim's legal counsel (*målsägandebitråde*) is appointed by the public on behalf of injured parties. 1 § LAG OM MÅLSÄGANDEBITRÅDE (Svensk Författningssamling [SFS] 1988:609) (Swed.). For a critical commentary on the problems with the procedural status associated with technically non-injured parties who nonetheless have a right to claim damages, see, for example, Diesen, *supra* note 9, at 122–24. There appear to be more legal demands for scrutiny in assessing whether a defendant caused damages to the plaintiff where the latter is not regarded as an injured party. See *id.* at 123 n.13 (citing SKADESTÅNDSLÄG [SKL] [TORT LIABILITY ACT] 2:3 (Swed.) while noting that torts specifically relating to offenses against the "person, liberty, peace, or reputation" are unavailable for persons not regarded as an injured party).

137. See Carina Hägg et al., *Stärk prostituerade personers möjlighet att kräva skadestånd* [Strengthen Prostituted Persons' Possibilities to Demand Damages], GÖTEBORGS-POSTEN [GOTHENBURG POST], May 10, 2011 (online ed.), <http://www.gp.se/nyheter/debatt/1.622968>; see also Motion 2010/2011:Ju10 med anledning av prop. 2010/2011:77 Skärpt straff för köp av sexuell tjänst [parliamentary motion] (Mar. 22, 2011) (Swed.) (Social Democrats) (suggesting a further government inquiry that returns to Parliament with a proposal for creating better conditions for the prostituted person to receive damages); Motion 2010/2011:Ju11 med anledning av prop. 2010/2011:77 Skärpt straff för köp av sexuell tjänst [parliamentary motion] (Swed., Mar. 22, 2011) (Left Party) (proposing additional inquiry along the lines of Motion 2010/2011:Ju10, *supra*).

138. See *Travaux Préparatoires* to the Palermo Protocol, *supra* note 59, ¶¶ 62–86.

buying them from a third party. In any case, a purchaser could already be liable as “an accomplice” under the Protocol.¹³⁹ Additionally, as opposed to a purchaser of consumer goods, the sex purchaser is distinctly part of the trafficking chain by “virtue of his receipt of the trafficked person.”¹⁴⁰

CONCLUSION

Despite its present shortcomings, the Swedish law has been very successful in reducing trafficking, particularly so when compared to Sweden’s neighbors. In light of the evidence presented above, and considering that prostitution generally “does satisfy the elements of trafficking”¹⁴¹ and that the legalization of third-party profiteering and the purchase of sex promotes the demand for both domestic and cross jurisdictional trafficking, jurisdictions where third parties and sex purchasers may act legally—such as Denmark, Germany, the Netherlands, New Zealand, Nevada, and Victoria, Australia—arguably violate international law. As stated by the U.N. Trafficking Rapporteur in 2006: “State parties with legalized prostitution industries have a heavy responsibility to ensure that . . . [they] are not simply perpetuating widespread and systematic trafficking. As current conditions throughout the world attest, States parties that maintain legalized prostitution are far from satisfying this obligation.”¹⁴² Policy makers, such as the U.S. Department of State, who assess countries globally on the basis of their commitment to fight trafficking should not rank jurisdictions that legalize prostitution, and so *promote* trafficking, in the same “tier one” as countries that criminalize purchasers and decriminalize prostituted persons, and so *deter* trafficking.¹⁴³ Many citizens of the United States and elsewhere now surely ask their governments what they are doing to address the clear link between trafficking and prostitution, as Sweden is doing in criminalizing buyers, which has proven so effective in eliminating so much trafficking from our country.¹⁴⁴

139. Palermo Protocol, *supra* note 1, art. 5(2)(b).

140. U.N. 2006 Trafficking Report, *supra* note 6, ¶ 63.

141. *Id.* ¶ 42.

142. *Id.* ¶ 43.

143. See, e.g., OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERS., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 47–48 (10th ed. 2010) (ranking several countries with legalized prostitution industries in the same top tier as countries that do not legalize the purchase of sex, submitting the rationale that the former are in full compliance with U.S. domestic trafficking law).

144. Immediately following delivery of this paper, the chair of the panel at which it was presented invited Mr. Luis CdeBaca, Ambassador-at-Large of the U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, to address the question posed at the end of this paper. He did not do so then, stating he had to leave for an interview, nor later.