

Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping

I.	INTRODUCTION	962
II.	THE LAW OF SEX TRAFFICKING	966
	A. <i>The Trafficking Victims Protection Act</i>	967
	B. <i>The TVPA's Effectiveness</i>	969
III.	UNDERSTANDING THE PROBLEM: THE RELATIONSHIP BETWEEN PROSTITUTION AND SEX TRAFFICKING	972
	A. <i>The Sex-Work Model: Separating Volitional Prostitution from Forced Sex Trafficking</i>	972
	B. <i>Why Prostitution and Sex Trafficking Are Inherently Linked</i>	973
	C. <i>The Blurred Line of Consent Between Sex Trafficking and Prostitution</i>	976
IV.	THE PROBLEM OF PIMPING	978
	A. <i>The Blurred Line Between Pimps and Sex Traffickers</i>	978
	B. <i>An Attempt at Change: H.R. 3887</i>	982
V.	A NEW APPROACH: THE CREATION OF A FEDERAL OFFENSE FOR PIMPING	984
	A. <i>The New Offense: Inducement and Enticement</i>	984
	B. <i>The Constitutional Foundation for the New Offense</i>	990
VI.	CONCLUSION	995

I. INTRODUCTION

Nearly twenty-one million men, women, and children worldwide are victims of human trafficking,¹ earning an estimated \$31.6 billion in profits for the perpetrators of these crimes.² Human trafficking is the third-largest and the fastest-growing criminal enterprise in the world.³ Of the nearly twenty-one million trafficking victims, approximately 4.5 million are victims of some form of sex trafficking.⁴ Although human trafficking primarily takes place outside of the developed world, the International Labour Organization estimates there are some 1.5 million trafficking victims in developed countries.⁵ In particular, as many as 17,500 foreign nationals are trafficked into the United States annually.⁶

However, the number of trafficking victims in the United States is not limited to those who are trafficked across borders into the country. Instead, human trafficking does not actually require transportation—much less transportation across a border.⁷ In its broadest conception, human trafficking is defined as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁸

1. SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOUR, INT'L LABOUR ORG., ILO GLOBAL ESTIMATE OF FORCED LABOUR 11, 13 (2012), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf, *archived at* <http://perma.cc/QE2V-3LKH>. As the ILO itself states, this is a conservative estimate. *Id.*

2. Patrick Belser, *Forced Labour and Human Trafficking: Estimating the Profits* 1, 17 (Int'l Labour Office, Working Paper No. 42, 2005), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081971.pdf, *archived at* <http://perma.cc/6FRV-B7ZJ>.

3. Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI L. ENFORCEMENT BULL., Mar. 2011, at 1, 2, *available at* <http://leb.fbi.gov/2011/march/leb-march-2011>, *archived at* <http://perma.cc/V7VD-49EW>.

4. Belser, *supra* note 2, at 13.

5. SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOUR, *supra* note 1, at 16. The ILO defines this group of countries as the EU, the United States, Canada, Australia, Israel, Japan, New Zealand, Iceland, Norway, and Switzerland. *Id.* at 43.

6. ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 1, 15 (2013), *available at* <http://www.fas.org/sgp/crs/row/RL34317.pdf>, *archived at* <http://perma.cc/H3UW-3PHR>.

7. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1, 29 (2013), *available at* <http://www.state.gov/documents/organization/210737.pdf>, *archived at* <http://perma.cc/8UJ3-2K5R> ("Human trafficking can include but does not require movement.").

8. U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children art. 3(a), *opened for signature* Dec. 12, 2000, 2225 U.N.T.S. 209 (emphasis added), *available at* <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/>

Accordingly, a majority of human trafficking victims never cross international borders.⁹ While the precise number of human trafficking victims in the United States is difficult to quantify,¹⁰ it is nonetheless clear that trafficking is a significant domestic issue because of both its prevalence in the United States¹¹ and its heinous nature.¹² Further, in the United States, commercial sexual exploitation is the most prevalent form of human trafficking, which underscores the particularly nefarious character of this issue.¹³

In light of the gravity and prevalence of domestic trafficking, the United States has taken significant steps, both at the federal and state

TOCebook-e.pdf, *archived at* <http://perma.cc/FG94-CHWX> [hereinafter Protocol to Prevent, Suppress and Punish Trafficking in Persons].

9. According to a Department of State study, there are six hundred thousand to eight hundred thousand victims trafficked across borders each year, while there are two million to four million total trafficking victims. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 23* (2004). There is some reason to think the methodology behind the Department of State's study on trafficking was suspect. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-825, *HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD 2* (2006). Nevertheless, the study reveals the disparity between victims trafficked across borders (six hundred thousand to eight hundred thousand annually) and total trafficking victims (two million to four million). *See* SISKIN & WYLER, *supra* note 6, at 7 n.23.

10. *See* SISKIN & WYLER, *supra* note 6, at 16 n.70 (discussing difficulties in estimating the total number of trafficking victims in the United States).

11. Although the precise scope of the problem is difficult to quantify, studies indicate that the problem is serious. *See, e.g.,* RICHARD J. ESTES & NEIL A. WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA, AND MEXICO 13* (2001) (estimating that between 244,000 and 286,000 children are at risk for sexual exploitation in the United States), *available at* <https://maggiemcneill.files.wordpress.com/2011/04/estes-weiner-2001.pdf>, *archived at* <https://perma.cc/4NKP-4CBB>.

12. In a speech in 2012, the longest speech on slavery given by a U.S. president since Lincoln's Emancipation Proclamation, President Obama said:

It ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery. . . . It is barbaric, and it is evil, and it has no place in a civilized world.

President Barack Obama, Keynote Address at the Clinton Global Initiative (Sept. 25, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>, *archived at* <http://perma.cc/59S6-UPTD>.

13. *See* LOUISE SHELLY, *HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 262* (2010) ("American trafficking is unique among Western developed democracies in having a significant problem of internal trafficking of its own citizens, particularly juveniles."); *Human Trafficking Fact Sheet*, U.S. DEP'T OF JUSTICE (Dec. 2011), *available at* http://ojp.gov/newsroom/factsheets/ojps_humantrafficking.html, *archived at* <http://perma.cc/3AR3-N4WM> (noting that sex trafficking accounted for eighty-two percent of reported human trafficking incidents in the United States between January 2008 and June 2010). While other forms of trafficking, such as forced labor, debt bondage, and organ trafficking, are all clearly problems that the United States needs to address, *see* SHELLY, *supra*, at 233–35, this Note focuses exclusively on sex trafficking.

levels, to address human trafficking within its borders.¹⁴ In 2013, Congress affirmed its commitment to battling human trafficking by reauthorizing the Trafficking Victims Protection Act (“TVPA”),¹⁵ designed to comprehensively address human trafficking.¹⁶ Moreover, all states currently have antitrafficking legislation in some form.¹⁷

In spite of these efforts, however, some questions about the effectiveness of the TVPA remain.¹⁸ The TVPA only criminalizes “severe” sex trafficking, defined as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.”¹⁹ In contrast, the TVPA broadly defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,”²⁰ which would include the acts of many “pimps”²¹ in ordinary prostitution.²² Because the TPVA

14. See, e.g., Hon. Toko Serita, *In Our Own Backyards: The Need for a Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. REV. L. & SOC. CHANGE 635, 645 (2012) (labeling the TVPA “an ambitious endeavor by Congress to combat human trafficking in the United States”); *Human Trafficking State Ratings Show Progress in 39 States*, POLARIS PROJECT (Aug. 14, 2013) (noting thirty-two states now ranked in Polaris Project’s top tier, indicating the state has passed substantial antitrafficking laws, an increase over eleven states in 2011), <http://www.polarisproject.org/media-center/news-and-press/press-releases/852-human-trafficking-state-ratings-show-progress-in-39-states>, archived at <http://perma.cc/U598-BJSQ>.

15. Valerie Jarrett, *No One Should Have to Live in Fear of Violence*, HUFFINGTON POST BLOG (Mar. 7, 2013, 3:20 PM), http://www.huffingtonpost.com/valerie-jarrett/no-one-should-have-to-liv_b_2830510.html, archived at <http://perma.cc/NL6Z-6KX7>.

16. Generally, the TVPA comprises a three-pronged approach aimed at protecting victims of trafficking, prosecuting perpetrators, and implementing general preventative measures. See SHELLY, *supra* note 13, at 259–60.

17. See *Wyoming Becomes 50th State to Outlaw Human Trafficking*, POLARIS PROJECT (Feb. 27, 2013), <http://www.polarisproject.org/media-center/news-and-press/press-releases/742-wyoming-becomes-50th-state-to-outlaw-human-trafficking>, archived at <http://perma.cc/VJ9Y-UWRN>.

18. See *infra* notes 63–79 and accompanying text.

19. 22 U.S.C. § 7102(9)(A) (2012).

20. *Id.* § 7102(10).

21. As Black’s Law Dictionary defines it, a pimp is “[a] person who solicits customers for a prostitute, [usually] in return for a share of the prostitute’s earnings.” *Pimp*, BLACK’S LAW DICTIONARY 1333 (10th ed. 2014). However, in reality, a pimp functions as far more than just an agent for a prostitute—frequently, a pimp will identify a vulnerable individual, establish a relationship with her, and gradually groom her to become a prostitute. See Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1023–29 (2013) (describing the process by which pimp recruits individuals and trains them to become prostitutes).

22. 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, U.N. Econ. & Soc. Council, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) (by Sigma Huda) (“[P]rostitution as actually practised in the world usually does satisfy the elements of trafficking.”); Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 299 (2011) (“Trafficking is

only criminalizes severe sex trafficking, it is difficult for federal prosecutors to secure convictions in all but the most incontrovertible of cases.²³ Although all states criminalize activities commonly referred to as pimping,²⁴ suggesting that individuals not engaged in severe sex trafficking should be prosecuted on the state level, state and local police have historically targeted prostitutes.²⁵ Thus, pimps and traffickers whose actions may not rise to the level of severe sex trafficking often escape both federal and state prosecution and operate with effective impunity.

While such considerations led the U.S. House of Representatives to pass a significantly more stringent version of the TVPA in 2007, the final, enacted version of the reauthorization bill significantly watered down the scope and the strength of its criminal provisions.²⁶ Opposition came from both feminist scholars, who argued against conflating all prostitution with sex trafficking,²⁷ and from federalists, who opposed the national government's intrusion into an area of the law traditionally left to the states.²⁸ In response to this tension, this Note proposes the

transportation, transfer, harboring, or receipt of a human being for purposes of sexual exploitation: it is straight-up pimping.”).

23. See, e.g., Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 451–52 (2009) (noting that “sex trafficking cases are extremely difficult to prove”); Letter from the Coal. Against Trafficking in Women to the Hon. Peter Keisler, Acting Att’y Gen. of the U.S. (Oct. 5, 2007) (“Requiring proof of force, fraud, and coercion has . . . had a detrimental effect on the prosecution of cases of domestic trafficking.”), available at <https://web.archive.org/web/20110205074321/http://www.justice.gov/olp/pdf/catw-letter.pdf>, archived at <https://perma.cc/FB6S-2XKG>.

24. See *infra* notes 169–72 and accompanying text (discussing different states’ varying forms of antipimping offenses).

25. See *infra* notes 126–28 and accompanying text (noting extremely low levels of enforcement of pimping crimes).

26. Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified as amended in scattered titles of the U.S.C.).

27. See, e.g., Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1054 (1992) (“Anti-prostitution rules terrorize the female body Prostitution regulation also occurs through a network of cultural practices that endanger sex workers’ lives and make their work terrifying.”); Elizabeth Kaigh, Comment, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139, 172 (2009) (“Equating consensual commercial sex acts with non-consensual sex trafficking is inherently discriminatory against the women who are selling sex by choice.”).

28. See, e.g., OFFICE OF LEGAL POLICY, DEP’T OF JUSTICE, DOJ POSITION ON H.R. 3887, at 1 (on file with author) (noting that “[p]imping, pandering, and other prostitution-related offenses . . . have always been prosecuted at the state or local level”); Brian W. Walsh & Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, LEGAL MEMORANDUM, Sept. 14, 2008, at 1, 7–8, available at <http://www.heritage.org/research/reports/2008/02/human-trafficking-reauthorization-would-undermine-existing-anti-trafficking-efforts-and-constitutional-federalism>, archived at <http://>

creation of a new federal offense for pimping. The proposal attempts to address some of the challenges of prosecuting sex trafficking cases, but with a limited scope designed to avoid the pitfalls of previous attempts to alter the TVPA.

Part II of this Note discusses the TVPA and evaluates its success in combatting sex trafficking. Part III explores the relationship between sex trafficking and prostitution, recognizing that the two industries are inextricably linked. Part IV then examines the particular problem of pimping, noting that many individuals commonly thought of as pimps engage in actions that could be classified as sex trafficking. Part IV also discusses a failed attempt to pass legislation in Congress to address the problem of pimping and why the attempt failed. Finally, Part V proposes the creation of a new federal offense for activities commonly referred to as pimping. The proposal is structured to allow federal prosecutors to better target sex traffickers and pimps, while avoiding a number of the issues that prior proposed legislation encountered.

II. THE LAW OF SEX TRAFFICKING

States have traditionally used their police powers to regulate²⁹ or criminalize³⁰ prostitution and other crimes relating to public morality.³¹ In contrast, the “modern legal infrastructure” of sex trafficking—including criminal penalties for sex trafficking at both the federal and state levels—has only emerged in recent years.³² However, despite a bevy of recent sex trafficking-oriented legislation on both the state and federal levels, the overall effectiveness of current sex trafficking legislation is still questionable.³³

perma.cc/7VKE-52KB (arguing that Commerce Clause does not grant Congress authority to regulate “run-of-the-mill sex crimes” such as pimping and pandering).

29. See Nev. Rev. Stat. Ann. § 244.345 (LexisNexis 2013) (allowing counties to regulate prostitution in limited circumstances).

30. See Daniel J. Franklin, *Prostitution and Sex Workers*, 8 GEO. J. GENDER & L. 355, 356 n.5 (2007) (listing state prostitution statutes).

31. See Heiges, *supra* note 23, at 435.

32. Kelly Heinrich & Kavitha Sreeharsha, *The State of State Human Trafficking Laws*, JUDGES' J., Winter 2013, available at http://www.americanbar.org/publications/judges_journal/2013/winter/the_state_of_state_humanttrafficking_laws.html, archived at <http://perma.cc/3TRJ-NAM9>.

33. See, e.g., Marisa Silenzi Cianciarulo, *What Is Choice? Examining Sex Trafficking Legislation Through the Lenses of Rape Law and Prostitution*, 6 U. ST. THOMAS L.J. 54, 65 (2008) (“Critics, however, point out that compared to the number of trafficking victims estimated to be in the United States, the number of prosecutions has been minimal.”).

A. *The Trafficking Victims Protection Act*

Congress created the TVPA in 2000 as a comprehensive piece of legislation intended to combat human trafficking on a global level.³⁴ Specifically, the TVPA seeks to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children,”³⁵ through three primary means: prosecuting traffickers, protecting human trafficking victims, and preventing human trafficking worldwide.³⁶ Although the TVPA is an extremely broad piece of legislation with numerous elements that could be both lauded³⁷ and critiqued,³⁸ this Note limits its focus to the TVPA’s approach to prosecution of sex trafficking crimes.

One of the TVPA’s hallmarks was the creation of a new criminal offense for the “[s]ex trafficking of children or by force, fraud, or coercion.”³⁹ In short, § 1591 criminalizes, when in or affecting interstate or foreign commerce, knowingly recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining a person for the purposes of causing that person “to engage in a commercial sex act,” either by “means of force, fraud, or coercion,” or where the individual is a minor.⁴⁰ There is a fifteen-year minimum sentence for an offense

34. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. §§ 7101–7113 (2012)).

35. 22 U.S.C. § 7101.

36. See, e.g., Jennifer A.L. Sheldon-Sherman, *The Missing “P”: Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 452 (2012).

37. See, e.g., Parker & Skrmetti, *supra* note 21, at 1045 (praising the TVPA as “a powerful tool to punish and deter all sex traffickers and to protect the vulnerable people sex traffickers victimize”); Sheldon-Sherman, *supra* note 36, at 452–57 (detailing the three primary objectives of the TVPA).

38. Geneva Brown, *Women and Children Last: The Prosecution of Sex Traffickers as Sex Offenders and the Need for a Sex Trafficker Registry*, 31 B.C. THIRD WORLD L.J. 1, 25 (2011) (“[The TVPA] fails to take a gender and rights approach to the problem [of trafficking].”); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 345–46 (2007) (criticizing the TVPA as not being truly victim centric); Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation*, 101 J. CRIM. L. & CRIMINOLOGY 1337, 1349–50 (2011) (expressing concern with evidence underlying the TVPA).

39. 18 U.S.C. § 1591 (2012).

40. § 1591(a). Reprinted in full, § 1591(a) provides:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

committed by use of force, fraud, or coercion, or where the victim was a minor under fourteen years old at the time of the offense.⁴¹ Alternatively, where the victim was a minor at least fourteen years old but less than eighteen years old, the minimum sentence is ten years.⁴²

Interestingly, § 1591 does not criminalize all activities that could be defined as sex trafficking. In addition to force, fraud, or coercion, the Palermo Protocol, the definitive international agreement on human trafficking, includes “the abuse of power or of a position of vulnerability” as additional means of human trafficking.⁴³ Further, in providing general definitions for the TVPA in 22 U.S.C. § 7102, Congress broadly defined “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”⁴⁴ However, § 1591—the actual federal crime of sex trafficking—only criminalizes “severe sex trafficking,” which 22 U.S.C. § 7102 defines as trafficking through means of “force, fraud, or coercion,” or where the victim is under the age of eighteen.⁴⁵ Therefore, absent evidence of force, fraud, or coercion, the recruitment, harboring, transportation, provision, or obtaining of an individual eighteen years of age or older for commercial sexual activities is not a criminal activity under the TVPA.

Although the TVPA marked the first time the federal government recognized trafficking in persons as a specific criminal offense,⁴⁶ the Mann Act of 1910⁴⁷ can also be used to prosecute sex trafficking cases, provided that the individual was actually transported in interstate or foreign commerce.⁴⁸ The provision pertinent to sex

knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

For a more thorough analysis of the elements required under § 1591, see Parker & Skrmetti, *supra* note 21, at 1030–45.

41. § 1591(b)(1).

42. § 1591(b)(2).

43. Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 8, at art. 3(a).

44. 22 U.S.C. § 7102(10).

45. 18 U.S.C. § 1591; 22 U.S.C. § 7102(9)(A).

46. Mohammed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1250 (2011).

47. Mann Act, 18 U.S.C. §§ 2421–2424 (2012). The Mann Act is also known as the “White Slave Traffic Act.” Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3013 (2006).

48. Mattar, *supra* note 46, at 1250.

trafficking, 18 U.S.C. § 2422(a), reads, “Whoever knowingly persuades, induces, entices, or coerces any individual *to travel in interstate or foreign commerce . . . to engage in prostitution . . . or attempts to do so*, shall be fined under this title or imprisoned not more than 20 years, or both.”⁴⁹ Notably, because prosecutors are not required to prove the use of force, fraud, or coercion under the Mann Act,⁵⁰ the Department of Justice (“DOJ”) frequently brings cases under the Mann Act rather than 18 U.S.C. § 1591.⁵¹

The passage of the TVPA helped spur many states to pass legislation to combat trafficking.⁵² Currently, all fifty states have passed antitrafficking legislation in some form.⁵³ Although much of this legislation is modeled after § 1591,⁵⁴ several states have even implemented reforms that are more comprehensive than federal policies.⁵⁵ However, the implementation and effectiveness of these new laws has been lackluster thus far, as human trafficking is still rarely prosecuted on a state or local level.⁵⁶

B. The TVPA’s Effectiveness

The TVPA and similar state statutes are widely considered positive steps to combat human trafficking.⁵⁷ The TVPA helped bring public awareness to a world of crime that previously had not received the attention its heinous nature demanded.⁵⁸ Since the TVPA’s enactment, the DOJ has dedicated significant resources that have led

49. 18 U.S.C. § 2422(a) (emphasis added).

50. See Mattar, *supra* note 46, at 1251 (“Unlike the TVPA, the Mann Act does not require proof of force, fraud, or coercion.”).

51. See Jessica Neuwirth, President, Equality Now, Statement to the New York City Council (June 11, 2008), available at <http://www.equalitynow.org/node/954>, archived at <http://perma.cc/9AS5-Z6RM> (“Most of [the DOJ’s sex trafficking] cases are cases they have brought under the Mann Act because the Mann Act does not require proof of force, fraud or coercion.” (internal quotation marks omitted)).

52. See Heinrich & Sreeharsha, *supra* note 32 (discussing the “wave of state statutes enacted” since the initial passage of the TVPA).

53. *Id.*

54. 18 U.S.C. § 1591.

55. For example, the New York legislature enacted a “safe harbor” law that supports the treatment of minors arrested for prostitution as victims instead of criminals. See Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 46–53 (2011).

56. See Heinrich & Sreeharsha, *supra* note 32 (discussing numerous implementation issues that have resulted in only rare prosecution of trafficking on the state or local level).

57. See, e.g., Parker & Skrmetti, *supra* note 21, at 1045 (calling the TVPA “a powerful tool” in the fight against sex trafficking).

58. See, e.g., Chacón, *supra* note 47, at 3017 (labeling the TVPA as “instrumental in bringing to public attention the gravity of the crime of human trafficking”).

to the successful prosecution of over one thousand traffickers.⁵⁹ Indeed, in 2007, the DOJ prosecuted six times as many human trafficking cases as it prosecuted in 2001,⁶⁰ and it experienced a 581 percent increase in convictions and guilty pleas of traffickers for fiscal years 2001 to 2008 compared to the previous eight-year period.⁶¹

Despite the steps taken at both the federal and state levels to increase prosecution of traffickers,⁶² there are still reasons to question whether the TVPA's criminal provisions are aggressive enough.⁶³ While the DOJ has pointed to that 581 percent increase in the number of convictions in human trafficking cases,⁶⁴ because the overall number of DOJ prosecutions and convictions before the TVPA was so low (seventy-six over the course of eight years), the comparative increase in prosecutions and convictions is not indicative of the overall effectiveness of the TVPA's criminal provisions.⁶⁵ To use an analogy to help illustrate this point, if I had \$3 yesterday, and \$18 today, while it is correct to state that I am six times richer today than I was yesterday, that does not mean that I am actually rich today.⁶⁶ Accordingly, although the DOJ did technically experience a 581 percent increase in convictions of traffickers from 2001 to 2008 compared to the previous eight-year period,⁶⁷ the meager seventy-six human trafficking-related convictions over that previous eight-year period⁶⁸ makes the 581 percent increase seem far less impressive.

In addition, although Congress may not have intended for § 1591 to be overly burdensome for prosecutors,⁶⁹ sex trafficking cases remain

59. See, e.g., Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 16 (2008) (noting significant increases in the number of investigations, prosecutions, and convictions of traffickers since the TVPA was enacted); OFFICE OF LEGAL POLICY, *supra* note 28, at 1 (discussing the DOJ's "successful anti-trafficking strategy").

60. OFFICE OF LEGAL POLICY, *supra* note 28, at 1.

61. Kappelhoff, *supra* note 59, at 16.

62. See *supra* Part II.A (discussing implementation of antitrafficking legislation).

63. See, e.g., Cianciarulo, *supra* note 33, at 65 (noting that the number of prosecutions under TVPA has been extremely low).

64. OFFICE OF LEGAL POLICY, *supra* note 28, at 1.

65. Compare Kappelhoff, *supra* note 59, at 16 (noting that in fiscal years 1993–2000, there were only ninety-five prosecutions for trafficking-related offenses and only seventy-six convictions), with SISKIN & WYLER, *supra* note 6, at 30 (noting that in fiscal year 2010, federal law enforcement prosecuted 181 individuals for trafficking and obtained 141 convictions).

66. My thanks to Matt Gornick for this analogy.

67. Kappelhoff, *supra* note 59, at 16.

68. *Id.*

69. See Parker & Skrmetti, *supra* note 21, at 1040 ("Congress intended the force, fraud, and coercion element to broadly and expansively cover a wide range of manipulative, threatening, and violent conduct . . .").

difficult to prove.⁷⁰ Because of the rigorous requirement to prove force, fraud, or coercion, some federal prosecutors are only willing to prosecute “slam-dunk” cases.⁷¹ In fact, because the force, fraud, or coercion requirement does not apply when the victim is a minor, one U.S. Attorney went so far as to say that “[my office] only took cases in which there was a child involved, although it’s a federal crime to take an adult.”⁷² One difficulty in proving force, fraud, or coercion could be the unusual relationships between the victims and those who engage in trafficking.⁷³ Because traffickers and pimps often recruit their victims under the guise of romantic relationships, a victim may be unwilling to testify against a trafficker even after being trafficked.⁷⁴ Further, a victim may often fear retribution for testifying against her trafficker.⁷⁵

Moreover, prosecutors often do not have other evidence necessary to prove the elements of force, fraud, or coercion.⁷⁶ Because federal prosecutors often receive human trafficking cases from local law enforcement officials after the local officials have already conducted an

70. See Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, in LAWYER’S MANUAL ON HUMAN TRAFFICKING 255, 256 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011) (“Effective prosecution of sex trafficking cases is an extraordinarily challenging task.”); Heiges, *supra* note 23, at 451–52 (citing multiple reports indicating trafficking cases are difficult to prove); see also Norma Ramos, *Addressing Domestic Human Trafficking*, 6 U. ST. THOMAS L.J. 21, 23 (2008) (noting that the force, fraud, or coercion requirement has made § 1591 “an ineffective prosecutorial instrument”).

71. See AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 197–98 (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf>, archived at <http://perma.cc/66L7-U8XB>.

72. *Id.* at 199.

73. See, e.g., Hersh, *supra* note 70, at 256 (noting the “complexity of the victim-trafficker relationship” makes trafficking cases more difficult to prosecute).

74. See *id.* at 262 (“Breaking the pimp’s control over the victim is one of the greatest challenges that prosecutors face.”); Parker & Skrmetti, *supra* note 21, at 1025–29 (describing process used by pimps and traffickers to make victims fall in love with them).

75. See SISKIN & WYLER, *supra* note 6, at 30 (“[T]he successful prosecution of trafficking cases relies on the availability of witnesses who may refuse to testify because of fear of retribution against themselves or their families.”); Hersh, *supra* note 70, at 256 (“[V]ictims are likely to be too frail, too frightened, or too traumatized to provide much help in building cases or to testify before grand juries or in open court.”). This can be exacerbated by the fact that victims are typically predisposed to distrust the police, both because they may have been engaged in criminal activity other than the sale of sex and because police often treat victims leaving the commercial sex trade like criminals, because their status as trafficking victims often only becomes clear after their arrests for prostitution. See *id.* at 261 (“Arresting a victim also confirms what many traffickers tell victims: that law enforcement will never believe her and will ‘lock her up.’”).

76. See AMY FARRELL ET AL., *supra* note 71, at 200; MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005, at 1 (2006) (noting that from 2001 to 2005, federal prosecutors declined to prosecute suspects in 222 trafficking matters, and that lack of sufficient admissible evidence was the second-leading cause for these decisions after lack of evidence of criminal intent).

investigation and made an arrest,⁷⁷ the prosecutors are not able to gather the evidence necessary to convict under § 1591.⁷⁸ This stands in stark contrast to prosecutors' ability "to control a large part of the investigative process" in most other types of federal cases. As a result, the prosecutors are often left with evidence that is either insufficient or irrelevant to proving a human trafficking case.⁷⁹ Thus, despite limited success since Congress passed the TVPA in 2000, significant obstacles still prevent the effective prosecution of sex traffickers.

III. UNDERSTANDING THE PROBLEM: THE RELATIONSHIP BETWEEN PROSTITUTION AND SEX TRAFFICKING

Before considering how the legislature might more effectively combat sex trafficking, it is important to understand the relationship between sex trafficking and the prostitution industry as a whole. To fully consider the issue of this relationship, Section A discusses the position of commercial sex-work advocates, who believe that prostitution generally is a legitimate form of work that is completely distinguishable from sex trafficking and that it should at least be decriminalized, if not legally regulated.⁸⁰ Refuting that position, Section B examines the inherent link between the prostitution industry and the sex trafficking industry. Finally, Section C explores the real-world difficulties in differentiating between individuals who have chosen to engage in prostitution of their own volition and those who have been wrongfully enticed to enter the industry due to their vulnerabilities.

A. The Sex-Work Model: Separating Volitional Prostitution from Forced Sex Trafficking

Sex-work advocates generally consider the prohibition on the commercial sale of sex to infringe upon an individual's right to choice or agency.⁸¹ According to the sex-work model, those engaged in the commercial sex industry, including prostitutes, are exercising their

77. See AMY FARRELL ET AL., *supra* note 71, at 199–200 (noting that "a majority of human trafficking cases are identified and initially investigated by local law enforcement" and are referred to federal prosecutors only after an arrest has taken place).

78. *Id.*

79. See *id.* at 200 (noting that a common complaint of federal prosecutors is that they often receive referrals with either "little evidence" or "weak evidence").

80. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1699–1702 (2010) (arguing against the conflation of prostitution with sex trafficking); MacKinnon, *supra* note 22, at 272–74.

81. MacKinnon, *supra* note 22, at 272–73.

agency as individuals to determine their own paths.⁸² Supporters of this sex-work model view the legalization or decriminalization of prostitution as, at worst, providing women with agency, even if in undesirable situations.⁸³

Just as those in favor of the sex-work model oppose the criminalization of prostitution, they also oppose the conflation of the commercial sex industry generally, including prostitution, with sex trafficking.⁸⁴ On the broadest level, many sex-work advocates view sex trafficking and prostitution as two separate, unconnected industries. In this conceptualization of the industries, all those who engage in prostitution do so of their own volition. In contrast, a victim of sex trafficking has not made a choice to participate in the industry—this victim is there fully against his or her will.

Supporting their view of separate sex trafficking and prostitution industries, sex-work advocates assert that equating prostitution with sex trafficking fails to recognize the possibility of a woman's choice to engage in commercial sex work.⁸⁵ Further, given that far more females engage in prostitution than males, commercial sex-work advocates posit that equating prostitution and sex trafficking reinforces gender-based stereotypes of females as weak, vulnerable individuals with no agency to choose their own paths.⁸⁶

B. Why Prostitution and Sex Trafficking Are Inherently Linked

Commercial sex-work advocates certainly express some valid concerns. But even if these advocates properly view prostitution and sex trafficking as distinct industries, there is still a definite link between

82. *Id.*

83. See Chuang, *supra* note 80, at 1702 (noting that while the commodification of sex might be undesirable in an ideal world, it is better to recognize reality and legitimize a woman's choice "between selling sex and letting [herself] or [her] children go hungry"). In a best-case scenario, the sex-work model provides gender equality by liberating women from gender stereotypes. *Id.* at 1670. As Catharine MacKinnon describes it, "[t]he agentic actors, sex workers, most of them women, control the sexual interaction, are compensated for what is usually expected from women for free, and have independent lives and anonymous sex with many partners—behaviors usually monopolized by men, hence liberating for women." MacKinnon, *supra* note 22, at 273.

84. See, e.g., Chuang, *supra* note 80, at 1699–702 (discussing the "discursive and practical perils" of equating sex work generally with sex trafficking).

85. See *id.* at 1699 (arguing that equating prostitutes and sex trafficking victims "sweeps any exercise of agency by the putative victim under a totalizing narrative of victimization that refuses to engage in any marking of relative control or freedom").

86. See *id.* at 1699–700, 1710–11.

the two industries. As several “abolitionists”⁸⁷ have pointed out,⁸⁸ on both a theoretical and a practical level, as the commercial sex industry goes, so goes the sex trafficking industry.⁸⁹

On the theoretical side, a series of causal chains provides the link between prostitution and sex trafficking.⁹⁰ First, any form of commercial transaction for sex leads to an increase in market demand for sexual services.⁹¹ This demand for sexual services creates a “profit motive” that encourages individuals, including traffickers, to provide commercial sexual services.⁹² Finally, given the nature of the industry and established practices, traffickers often resort to exploitive tactics in order to find sex partners to meet this demand.⁹³ Thus, as the prostitution industry as a whole goes, so goes sex trafficking.⁹⁴

While this supply-and-demand theory is susceptible to some criticisms,⁹⁵ evidence supporting this model shows that sex trafficking

87. Note that the term “abolitionists” is often used in scholarship to define those individuals who seek to combat sex trafficking by eliminating the commercial sex industry as a whole. *See, e.g., id.* at 1664–69; Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1730–31 (2010).

88. While abolitionists come in a wide range of forms and have different motivating concerns, they generally share a desire to abolish both sex trafficking and prostitution. *See* Dempsey, *supra* note 87, at 1740–45 (providing thorough discussion of various motivations of abolitionists).

89. *See, e.g., id.* at 1752–53 (detailing the theoretical link between the purchase of sex and sex trafficking); *see also* Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 136–37 (2006) (noting that the legalization of prostitution in Australia has worsened conditions for many prostitutes and increased sex trafficking); MacKinnon, *supra* note 22, at 304 (noting that where prostitution has been legalized, trafficking has increased dramatically).

90. *See* Dempsey, *supra* note 87, at 1752–53.

91. *Id.* at 1752.

92. *Id.* at 1753.

93. *Id.*

94. *See id.* (“[B]y purchasing sex, one encourages conduct by traffickers and pimps that is often harmful to prostituted people.”)

95. For instance, one might argue that individuals willfully choosing to engage in prostitution would rise to meet this increased demand and could do so at a lower cost to the consumer given the smaller risk premium compared to that faced by traffickers and pimps coercing individuals into prostitution. However, even this criticism is susceptible to critique. First, the cost of sex with a willful prostitute can often be higher than with a coerced prostitute, and most johns seeking sex are willing to overlook any possibility of coercion in exchange for a lower price. *See, e.g.,* GARY A. HAUGEN & VICTOR BOUTROS, *THE LOCUST EFFECT: WHY THE END OF POVERTY REQUIRES THE END OF VIOLENCE* 58 (2014) (“The vast majority of customers just want the sex, and they are very willing to ignore and deny the coercion that makes it possible for them to purchase the cheap sex”); Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 331–32 (2007) (noting that “john schools,” intended to educate men about the negative effects of prostitution on women, often do not succeed in stopping men from purchasing sex). Second, while pimping and trafficking almost always carry greater sentences, far more prostitutes are arrested than any of the individuals in the commercial sex industry’s support structure, such as johns,

increases substantially in jurisdictions that legally regulate or decriminalize prostitution-related activities.⁹⁶ Specifically, an increase in sex trafficking has unequivocally accompanied the legalization of prostitution in the Netherlands, Germany, and Victoria, a state in Australia.⁹⁷ For instance, from 1996 to 2003, as the entire prostitution industry in the Netherlands grew, the number of children in prostitution increased by eleven thousand.⁹⁸ This contradicts the sex-work model's conception of sex trafficking and prostitution as two unconnected industries. Rather, the theoretical and practical evidence that supply and demand provides suggests that, at the very least, the two industries are linked. Thus, even if each person who engages in prostitution does so completely of his or her own free will and each victim of sex trafficking had no choice whatsoever in entering the industry, the growth or decline of the sex trafficking industry is linked to the growth or decline of the prostitution industry as a whole.

In contrast to the complete decriminalization of prostitution discussed above, in 1999, Sweden took a different approach to decriminalization that did not trigger increases in sex trafficking.⁹⁹ The new Swedish laws made it legal for a prostitute to sell sexual services, but the laws continued to prohibit the purchase of sexual services, traditional pimping, and sex trafficking.¹⁰⁰ Although this change in the law has received some criticisms,¹⁰¹ it has served as an effective restriction to sex trafficking in Sweden, where trafficking is “substantially smaller in scale than in other comparable countries.”¹⁰²

pimps, and traffickers. See, e.g., DONNA M. HUGHES, FACT SHEET, DOMESTIC SEX TRAFFICKING AND PROSTITUTION IN THE UNITED STATES 3–4 (2005) (citing several studies showing extreme disparities between arrests of johns and arrests of prostitutes).

96. MacKinnon, *supra* note 22, at 304. This is different from the Swedish model, discussed *infra* notes 99–102 and accompanying text, because here not only is the act of prostitution legal, but so are acts of purchasing sex and general pandering (without force, fraud, or coercion, of course). See *id.* at 301–04 (comparing Swedish model with legalization models in other countries).

97. *Id.* at 304.

98. JULIE BINDEL & LIZ KELLY, A CRITICAL EXAMINATION OF RESPONSES TO PROSTITUTION IN FOUR COUNTRIES: VICTORIA, AUSTRALIA; IRELAND; THE NETHERLANDS; AND SWEDEN 15 (2003).

99. See Heather Monasky, Note, *On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, but Not the Victim—Sweden's Sexköpslagen in America*, 37 WM. MITCHELL L. REV. 1989, 2012–17 (2011).

100. *Id.* at 2012–13.

101. See *id.* at 2030–33.

102. Statens Offentliga Utredningar [SOU] 2010:49 Förbud mot köp av sexuell tjänst. En utvärdering 1999-2008 [Prohibition of the Purchase of Sexual Services] [government report series] (Swed.), at 37, available at <http://www.regeringen.se/content/1/c6/14/91/42/ed1c91ad.pdf>, archived at <http://perma.cc/B4BR-PPXT>. Additionally, the shift in the focus of enforcement from prostitutes to johns, pimps, and traffickers has reportedly resulted in a decrease in demand for sexual services, as potential johns are more concerned with the increased risk of criminal punishment. See *id.* at 38.

Thus, even if one accepts sex-work advocates' proposition that prostitution and sex trafficking are two fully distinguishable industries, the differences between the Swedish model's effects on sex trafficking and those of more generalized legalization of prostitution further underscore that the industries are unquestionably linked.

*C. The Blurred Line of Consent Between Sex Trafficking
and Prostitution*

In addition to this link between sex trafficking and prostitution, the distinction between individuals in prostitution and sex trafficking victims is, at best, blurred. Studies of prostitution grounded in the practical reality of a prostitute's daily life suggest that, rather than being a completely distinct industry from sex trafficking, prostitution may often involve coercive elements.¹⁰³ Evidence indicates that the majority of prostitutes do not enter the prostitution industry of their own free will¹⁰⁴ but instead become prostitutes due to a variety of vulnerabilities that both pimps and traffickers exploit.¹⁰⁵ It appears that prostitutes and sex trafficking victims do not make up two distinct categories, as sex-work advocates suggest, but rather, most individuals involved in the commercial sale of sex exist along a continuum, with varying levels of consent.

Poverty and economic vulnerability are the most prevalent reasons individuals find themselves in prostitution.¹⁰⁶ But in addition to the sheer need for money caused by his or her financial situation, an individual's impoverished status can lead to more questions about whether he or she has truly consented to engaging in prostitution.¹⁰⁷

103. See, e.g., JODY RAPHAEL & DEBORAH L. SHAPIRO, SISTERS SPEAK OUT: THE LIVES AND NEEDS OF PROSTITUTED WOMEN IN CHICAGO 5 (2002) (noting at least seventy-five percent of prostitutes who gave some share of their profits to a pimp feared they would be harmed if they stopped giving that share); JANICE G. RAYMOND & DONNA M. HUGHES, COAL. AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES 63–64 (2001), available at http://www.uri.edu/artsci/wms/hughes/sex_traff_us.pdf, archived at <http://perma.cc/QXM3-JL65> (noting that eighty percent of prostitutes surveyed experienced sexual assault by their pimps, eighty-five percent experienced psychological abuse by their pimps, and ninety percent reported verbal threats by pimps); Melissa Farley, *Prostitution Is Sexual Violence*, PSYCHIATRIC TIMES, Oct. 1, 2004, available at <http://www.psychiatristimes.com/prostitution-sexual-violence>, archived at <http://perma.cc/U2X2-T8XR> (“Instead of the question, ‘Did she voluntarily consent to prostitution?’ the more relevant question would be, ‘Did she have real alternatives to prostitution for survival?’”).

104. See Farley, *supra* note 89, at 118.

105. See Parker & Skrmetti, *supra* note 21, at 1023–25.

106. See MacKinnon, *supra* note 22, at 276 (“Urgent financial need is the most frequent reason mentioned by people in prostitution for being in the sex trade.”).

107. See HAUGEN & BOUTROS, *supra* note 95, at 61 (“The poor are especially susceptible to these schemes of deception because the desperation of their economic situation makes

Indeed, those recruiting individuals into the commercial sex industry often take advantage of the fact that “poverty frequently also means [potential recruits] are more likely to be less educated, more naïve, less sophisticated, deferential to people of higher status, and less accustomed to asserting themselves.”¹⁰⁸ Accordingly, these characteristics may indicate that the individual did not truly understand the industry he or she was entering, that the individual never affirmatively manifested consent, or that other undue persuasion may have played a role in the individual’s entrance into the industry.

In addition to poverty, the average age of individuals entering prostitution creates doubt about whether an individual had the capacity to truly consent to entering prostitution.¹⁰⁹ Given that many prostitutes enter the industry as minors,¹¹⁰ that minors cannot legally consent to sexual acts,¹¹¹ and that it is extremely difficult for an individual to leave prostitution once involved,¹¹² most adults who entered prostitution as minors are likely not in the industry truly of their own volition.¹¹³

Because these vulnerabilities contribute to an individual’s lack of full consent in entering prostitution, the distinction between consensual prostitution and sex trafficking is unclear.¹¹⁴ Ultimately, while there are legitimate concerns regarding fully equating all prostitution with sex trafficking, the demonstrable connection between the two industries suggests that any effective sex trafficking legislation may also implicate prostitution.

them . . . more willing to suspend their disbelief, set aside their suspicions, and take greater risks.”).

108. *Id.*

109. *See* MacKinnon, *supra* note 22, at 278.

110. *See, e.g.,* RAPHAEL & SHAPIRO, *supra* note 103, at 4 (noting that, of 222 prostitutes surveyed in Chicago, sixty-two percent began before the age of eighteen); MIMI H. SILBERT & AYALA M. PINES, *Entrance into Prostitution*, 13 *YOUTH & SOC’Y* 471, 483 (1982) (noting that, of two hundred prostitutes surveyed in San Francisco, sixty-two percent began before the age of sixteen and seventy-eight percent began before the age of eighteen).

111. *See, e.g.,* Annitto, *supra* note 55, at 31 (noting that “statutory rape laws preclude legal consent to sexual activity” for minors).

112. *See* MacKinnon, *supra* note 22, at 306 (“Most adult women in prostitution are first prostituted as girls and are just never able to escape.”); *see also* RAPHAEL & SHAPIRO, *supra* note 103, at 5 (noting at least seventy-five percent of prostitutes who gave a cut of their profits to a pimp felt they would be harmed if they stopped giving that cut).

113. MacKinnon, *supra* note 22, at 278–79.

114. Indeed, this blurring is highlighted by the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, which defines trafficking as including “the abuse of power or of a position of vulnerability.” Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 8, at art. 3(a). Given the vulnerabilities that contribute to many individuals’ “choices” to enter prostitution, the distinction between the reasons for entering the two industries becomes less clear.

IV. THE PROBLEM OF PIMPING

A. The Blurred Line Between Pimps and Sex Traffickers

When dealing with an issue as complex as sex trafficking, there is not a singular “quick fix.”¹¹⁵ Although Sweden’s method of criminalizing the acts of pimps and johns while decriminalizing the actual sale of sex offers an intriguing possibility to fight sex trafficking,¹¹⁶ federalism concerns and the politically controversial nature of such a law make it highly unlikely that the U.S. government would be able to implement Sweden’s model. Scholars have made various other suggestions for improvements, including more training for law enforcement officials,¹¹⁷ the establishment of a safe harbor for minor victims,¹¹⁸ and better coordination between federal and state law enforcement.¹¹⁹ However, rather than broadly considering a variety of possible issues and solutions, this Note seeks to mitigate the difficulty of successfully prosecuting sex trafficking cases under 18 U.S.C. § 1591¹²⁰ by addressing one particular type of actor in the commercial sex industry—the pimp.

According to Black’s Law Dictionary, a pimp is “[a] person who solicits customers for a prostitute, [usually] in return for a share of the prostitute’s earnings.”¹²¹ In reality, however, a pimp functions as far more than just an agent for a prostitute—frequently, a pimp will also establish relationships with vulnerable individuals and work to recruit them into prostitution.¹²²

The similar methods that pimps and sex traffickers use indicate that the prostitution and sex trafficking industries are not as different as some believe. Recall that many sex-work advocates view consent or lack of consent by individuals entering the commercial sex business as mutually exclusive pathways into the industry—an individual either

115. See HAUGEN & BOUTROS, *supra* note 95, at 60 (noting that sex trafficking is an extremely complex issue and that relatively little is actually known about traffickers).

116. See, e.g., Bindel & Kelly, *supra* note 98, at 77 (noting that Sweden is now less attractive to traffickers and that only “between 200 and 500 women are trafficked into Sweden in recent years,” compared with an estimated ten thousand to fifteen thousand into Finland); Statens Offentliga Utredningar [SOU], *supra* note 102, at 37.

117. See, e.g., Chacón, *supra* note 47, at 3038 (noting the general failure of the TVPA to encourage adequate training of local law enforcement officers).

118. See, e.g., Annitto, *supra* note 55, at 58, 62.

119. See Heiges, *supra* note 23, at 438–39 (arguing for greater federal law enforcement involvement to address discrepancies between state and federal enforcement models).

120. See, e.g., Chacón, *supra* note 47, at 3019–20.

121. BLACK’S LAW DICTIONARY, *supra* note 21, at 1333.

122. See, e.g., Parker & Skrmetti, *supra* note 21, at 1023–29.

fully consents to entering the commercial sex industry as a prostitute or does not consent at all and is forced into the industry as a sex trafficking victim. Likewise, many view the statuses of third-party actors (i.e., pimps and sex traffickers) involved in the commercial sex industry as mutually exclusive as well: either these individuals are sex traffickers, reviled by the public for their abhorrent crimes, or they are common pimps, whose actions are technically crimes but go unpunished on every level of the criminal justice system.¹²³

Section 1591 embodies such a view of third-party actors involved in the commercial sex industry. Individuals who cause another person “to engage in a commercial sex act” by means of “force, fraud, or coercion” or where the person is a minor are considered sex traffickers, deserving a minimum sentence of either ten or fifteen years.¹²⁴ In contrast, individuals who cause an adult individual to engage in a commercial sex act by means less than force, fraud, or coercion, including by exploiting any of the many vulnerabilities often found in prostitutes, are considered common pimps, left to be dealt with at the discretion of state or local law enforcement.¹²⁵

However, laws against pimping are underenforced. Although all states criminalize pimping,¹²⁶ studies in Boston and Chicago reported that less than one percent of prostitution-related arrests were for pimping.¹²⁷ These studies, though providing only a limited sample, support the scholarly perception that local law enforcement agencies generally spend very little time addressing the problem of pimping when enforcing prostitution laws.¹²⁸ Accordingly, the conception of pimps and sex traffickers as mutually exclusive groups leads to substantially different treatment by law enforcement when the two groups’ behavior is not substantially different. This asymmetry leaves condemnable behavior unpunished.

In contrast to this dichotomous view of third-party actors in the commercial sex industry, this Note proposes that the reprehensibility (and thus culpability) of the third-party actors’ conduct falls along a

123. For more discussion of the underenforcement of pimping laws, see *infra* notes 126–28 and accompanying text.

124. 18 U.S.C. § 1591 (2012).

125. See, e.g., OFFICE OF LEGAL POLICY, *supra* note 28, at 2.

126. See generally *US Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000119>, archived at <http://perma.cc/AZM6-K354> (last updated Mar. 15, 2010) (summarizing criminal punishments for pimping in each state).

127. DONNA M. HUGHES, *THE DEMAND FOR VICTIMS OF SEX TRAFFICKING* 38–39 (2005), available at http://www.uri.edu/artsci/wms/hughes/demand_for_victims.pdf, archived at <http://perma.cc/WWB4-LAZY>.

128. See, e.g., Heiges, *supra* note 23, at 442–43.

continuum based on the degree of coercive and exploitative conduct used. On one end of this spectrum are the actions of a “benevolent” pimp—someone who acts as an agent for a prostitute by scheduling appointments with clients, ensuring clients pay the promised price, and protecting the prostitute from the various dangers encountered in the course of prostitution, in exchange for a fair portion of the prostitute’s profits.¹²⁹ At the other end of the spectrum is the general public’s image of a sex trafficker—a sensationalized criminal who abducts or kidnaps victims and chains them up to be sold for sexual services.¹³⁰

However, third-party actors in the commercial sex industry typically do not engage in actions at one end of the continuum or the other but rather in actions with a degree of reprehensibility between these two extremes. In fact, in the U.S. commercial sex industry, many individuals who have been convicted as “sex traffickers” are actually pimps whose actions rose beyond a certain level of exploitation, supporting this Note’s view that, despite the traditional taxonomy, these actors cannot be neatly divided into two distinct categories.¹³¹

Pimps exploit their victims in a variety of ways. First, pimps recruiting prostitutes often seek out individuals who are vulnerable in any of the ways discussed in Part III.C.¹³² As one pimp explained, “[i]t doesn’t matter to a pimp what hoes’ weaknesses are, so long as they have them. Then he uses those to his advantage. Weakness is the best trait a person can find in someone they want to control.”¹³³

Pimps typically recruit these vulnerable individuals through use of persuasive tactics that do not rise to the level of the force, fraud, or coercion required by § 1591.¹³⁴ In describing the role of force in pimping,

129. This accords with the historical conceptualization of pimps. See Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1 MICH. J. GENDER & L. 33, 33–38 (1993) (citing BEN L. REITMAN, *THE SECOND OLDEST PROFESSION* (1931)).

130. See, e.g., TAKEN (EuropaCorp. 2008).

131. See, e.g., *United States v. Campbell*, 770 F.3d 556, 563, 575 (7th Cir. 2014) (affirming conviction of self-labeled pimp for sex trafficking); *United States v. Pringler*, 765 F.3d 445, 448, 456 (5th Cir. 2014) (same); *United States v. Mozie*, 752 F.3d 1271, 1278, 1291 (11th Cir. 2014) (same).

132. See *supra* notes 105–14 and accompanying text.

133. PIMPIN’ KEN & KAREN HUNTER, *PIMPOLOGY: THE 48 LAWS OF THE GAME* 22 (2008).

134. See *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 77 (2007) (statement of Dorchon A. Leidholdt, Director, Sanctuary for Families’ Center for Battered Women’s Legal Services), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg38640/html/CHRG-110hhrg38640.htm>, archived at <http://perma.cc/NAK8-2LG2> (discussing the difficulties of prosecuting under the force, fraud, or coercion standard because sex traffickers “need not resort to [such means] because their victims are so vulnerable, terrified, or traumatized that such conduct isn’t necessary to obtain their victims’ submission”); see also Hersh, *supra* note 70, at 262 (noting that “most victims do not self-identify as ‘trafficking victims’”).

one former pimp said, “If your thing is to physically intimidate bitches into trickin [sic] for you then you’re not a pimp, you’re a thug or a gangster.”¹³⁵ Instead, pimps often use tactics that, on the surface, seem to fall short of criminal behavior. One former pimp described pimping as a “mind game,” labeling a “true pimp” as “someone who gets a bitch to love her pimp [and] need her pimp,” such that “she can leave at any time if she wanted to but she won’t cause [sic] life without her pimp is the darkest place in the world for a bitch.”¹³⁶ Another pimp explained that “[u]nless [the prostitute] feels love for you, a ho’s not going to give you her money for eight- and ten-year stretches.”¹³⁷ These pimps exploit the desire for loving relationships to recruit individuals to enter prostitution. As one prostitute explained:

Most hoes are lost little girls who have been neglected growing up, now living in a woman’s body. Hoes don’t do this because they enjoy turning tricks, most hoes don’t even like sex. They believe a pimp will give them the love and care they didn’t have growing up. . . . In her mind a pimp is a ho’s man . . .¹³⁸

Accordingly, pimps’ use of seduction tactics to recruit individuals into the commercial sex industry is a prime example of the type of behavior that falls into this grey area of criminal culpability. While not using means that would constitute force, fraud, or coercion, the pimp is intentionally exploiting the individual’s vulnerabilities, leading that individual to enter the industry without true volition. Interestingly, such exploitation could potentially satisfy the Palermo Protocol’s definition of “trafficking in persons,” which prohibits the “*abuse of power or of a position of vulnerability* . . . for the purpose of exploitation.”¹³⁹

Even where a pimp engages in more direct tactics to gain and maintain control over a prostitute, these tactics often fall short of what the law considers force, fraud, or coercion. For example, one common practice is for pimps to manage all financial matters for their prostitutes.¹⁴⁰ The prostitute will give the pimp all of her earnings, and the pimp will play the role of provider by paying bills (including rent), buying clothes, and providing food.¹⁴¹ In doing so, the pimp ensures that

135. *How to Be a Pimp: Learn & Understand Pimping 2.0*, PIMPFEET.COM, <http://www.pimpfeet.com>, archived at <http://perma.cc/W7TF-TH4S> (last visited Jan. 17, 2015).

136. *Id.*

137. PIMPIN’ KEN & HUNTER, *supra* note 133, at 77.

138. *Id.* at 77–78.

139. Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 8, at art. 3(a) (emphasis added).

140. PIMPIN’ KEN & HUNTER, *supra* note 133, at 19–20.

141. *Id.*

he always controls all of the prostitute's earnings.¹⁴² Thus, even if the prostitute wanted to leave the pimp, she would have to do so with only the clothes on her back—penniless, homeless, and likely jobless.¹⁴³

Another tactic pimps use to maintain control is moving their prostitutes around to different cities.¹⁴⁴ By constantly moving a prostitute, the pimp is able to keep the prostitute off-balance and dependent on the pimp.¹⁴⁵ Rather than becoming comfortable with a location and thinking she can function without the pimp, the prostitute has to depend on the pimp for information on where to find clients and who can be trusted.¹⁴⁶ As one pimp explained, “[w]ithout strong ties to a place, family, or loved ones, [people] can be easily manipulated and controlled. If you can keep a person off-balance, they’ll be too busy trying to regain stability to try to unbalance you.”¹⁴⁷

Ultimately, as this discussion shows, most pimps do not engage in conduct at either end of the reprehensibility continuum. Rather, most of their conduct falls somewhere in the grey area between “benevolent” pimping and forced sexual slavery. Such actions could be classified as sex trafficking under the general definitions that the TVPA¹⁴⁸ and the Palermo Protocol provide.¹⁴⁹ However, the dichotomous view of the TVPA’s criminal prohibition on sex trafficking and the lack of significant enforcement of pimping laws at the state level allow pimps to operate with effective impunity.

B. An Attempt at Change: H.R. 3887

Responding to the prosecutorial difficulties with the force, fraud, or coercion standard—and attempting to address the problem of pimping in the commercial sex industry discussed above—the House of Representatives passed H.R. 3887 in 2007 to increase prosecutors’ ability to target both pimps and sex traffickers who might otherwise go unpunished.¹⁵⁰ Although the bill ultimately failed in the Senate, consideration of what the bill proposed and the criticisms it faced

142. *Id.*

143. *Id.*

144. *Id.* at 83–85.

145. *Id.*

146. *Id.*

147. *Id.* at 85.

148. See 22 U.S.C. § 7102(10) (2012) (defining “sex trafficking”).

149. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, *supra* note 8, at art. 3(a) (defining “[t]rafficking in persons”).

150. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (2007), available at <https://www.congress.gov/bill/110th-congress/house-bill/3887>, archived at <http://perma.cc/9YEF-HXP8>.

informs what type of legislation might be implemented in the future to deal with the problem of pimping.

While the bill contained many provisions aimed at eliminating human trafficking generally,¹⁵¹ § 221(f) of the bill created a new offense of “Sex Trafficking,” which read:

Whoever knowingly, in or affecting interstate or foreign commerce . . . persuades, induces, or entices any individual to engage in prostitution for which any person can be charged with an offense or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.¹⁵²

Most notably, conviction under this new offense did not require that traffickers of adult victims had used force, fraud, or coercion, unlike conviction under § 1591.¹⁵³ The bill also retitled § 1591 as a new offense of “Aggravated Sex Trafficking” and shifted it from Chapter 77 of Title 18 (Peonage, Slavery, and Trafficking in Persons) to Chapter 117 of Title 18 (Transportation for Illegal Sexual Activity and Related Crimes), which contained the Mann Act and the new offense of “Sex Trafficking.”¹⁵⁴

However, after the House passed H.R. 3887, a number of third parties, including the DOJ and sex-work advocates, voiced opposition to the bill.¹⁵⁵ First, and perhaps most importantly, many opponents of H.R. 3887 viewed the new offense for “Sex Trafficking”¹⁵⁶ as an unconstitutional intrusion into the states’ police power, believing that neither the Thirteenth Amendment nor the Commerce Clause supported such federal regulation.¹⁵⁷ Second, the DOJ opposed the bill as an unnecessary alteration to its “successful anti-trafficking strategy.”¹⁵⁸ The DOJ claimed that such legislation would “detract from the investigation and prosecution of existing federal [human

151. See Lindsay Strauss, Note, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL’Y 495, 523–25 (2010).

152. H.R. 3887 § 221(f) (as referred in Senate, Dec. 5, 2007).

153. 18 U.S.C. § 1591.

154. H.R. 3887 § 221.

155. See Strauss, *supra* note 151, at 523.

156. H.R. 3887 § 221(f).

157. See, e.g., OFFICE OF LEGAL POLICY, *supra* note 28, at 2 (noting that pimping and pandering “have always been prosecuted at the state or local level”); Walsh & Grossman, *supra* note 28, at 5, 7–9 (arguing that authority for the bill could not be based on either the Thirteenth Amendment or the Commerce Clause); Letter from Brian A. Benczkowski, Principle Deputy Assistant Att’y Gen., to The Honorable John Conyers, Jr., Chairman of House Comm. on the Judiciary (Nov. 9, 2007) (on file with author) (“[P]andering, pimping, and prostitution-related offenses have historically been prosecuted at the state or local level.”). However, as discussed below, these objections were likely unfounded. See *infra* Part V.B (analyzing Commerce Clause justification of a similar statute).

158. OFFICE OF LEGAL POLICY, *supra* note 28, at 1.

trafficking] crimes” by draining resources from existing task forces while stepping into an area of law enforcement traditionally left to the states—the enforcement of prostitution laws.¹⁵⁹ Finally, sex-work advocates criticized the bill both as improperly equating all prostitution with sex trafficking¹⁶⁰ and as assuming that no individual could choose to engage in prostitution of his or her own will.¹⁶¹ For all of these reasons, the bill that was ultimately enacted, the Trafficking Victims Protection Reauthorization Act (“TVPRA”) of 2008, excluded many of the most significant changes that H.R. 3887 had included. Most significantly for the purposes of this Note, it eliminated the creation of the new criminal offense for “Sex Trafficking,”¹⁶² leaving 18 U.S.C. § 1591 as the only sex trafficking–specific offense.¹⁶³

V. A NEW APPROACH: THE CREATION OF A FEDERAL OFFENSE FOR PIMPING

Despite H.R. 3887’s death in the Senate, this Note proposes a solution to address the same challenges of dealing with pimps that the House attempted to remedy in the bill’s initial passage. In doing so, though, this solution also incorporates lessons that can be learned from the criticisms H.R. 3887 faced, thus creating a refined criminal offense that better addresses the problem of pimping and the difficulties federal prosecutors face in trying sex trafficking cases under § 1591.

This Note proposes that Congress should create a new federal offense for pimping by amending a part of the Mann Act—18 U.S.C. § 2422(a). Section A presents the new provision and explains why the new offense is not subject to much of the criticism that was directed at H.R. 3887. Section B then explains in depth the constitutional foundation for such legislation.

A. *The New Offense: Inducement and Enticement*

A number of changes could improve the usefulness of federal sex trafficking legislation. However, concerns such as federalism¹⁶⁴ and

159. *Id.* at 1–2.

160. See Letter from Alexandria House et. al. to Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary et al. (Jan. 23, 2008), available at http://napawf.org/wp-content/uploads/2009/working/pdfs/TVPRA_letter%20_1-23-08.pdf, archived at <http://perma.cc/FZ9F-AZZD>.

161. See Kaigh, *supra* note 27, at 157–58.

162. See Strauss, *supra* note 151, at 526–27.

163. See Heiges, *supra* note 23, at 446–47.

164. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

resource limitations,¹⁶⁵ discussed in Part IV.B, limit the steps that Congress can take. Despite these limitations, Congress should create a new federal offense to address pimping while retaining the offense for sex trafficking in 18 U.S.C. § 1591. The purposes of the federal sex trafficking legal regime would best be served by Congress amending 18 U.S.C. § 2422(a) of the Mann Act.¹⁶⁶ The amended statute should be retitled “Inducement and Enticement” and should read:

Whoever knowingly, in or affecting interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or in any territory or possession of the United States, persuades, induces, or entices an individual to engage in a commercial sex act with a third party, or attempts to do so, shall be fined under this title or imprisoned for not more than 10 years, or both.¹⁶⁷

This Note proposes such specific language to ensure that the statute fills the current gap in the sex trafficking legal regime by addressing the problem of pimping. First, by using the phrase “in or affecting interstate or foreign commerce” instead of requiring travel in interstate or foreign commerce, the new federal offense will provide prosecutors with an additional tool to use against those pimps and traffickers of adults who neither transport individuals across state lines nor employ the force, fraud, or coercion that 18 U.S.C. § 1591 requires.¹⁶⁸ Further, instead of terms such as “procuring,”¹⁶⁹ “pandering,”¹⁷⁰ “promoting prostitution,”¹⁷¹ or “profiting from a prostitute’s earnings”¹⁷² that are used in state antipimping laws, keeping the original Mann Act’s “persuades, induces, [or] entices” language best serves the goals of the new federal offense.¹⁷³ The “persuades, induces, [or] entices” language avoids the potentially unduly narrow interpretation of a term such as “procuring.”¹⁷⁴ Instead,

165. See Letter from Brian A. Benczkowski, *supra* note 157 (opposing passage of H.R. 3887 because of lack of resources).

166. 18 U.S.C. § 2422 (2012).

167. For comparison, as it currently stands, 18 U.S.C. § 2422(a) reads:

Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce . . . to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

168. 18 U.S.C. § 1591.

169. *E.g.*, IDAHO CODE ANN. § 18-5602 (2014).

170. *E.g.*, WIS. STAT. ANN. § 944.33 (West 2014).

171. *E.g.*, N.Y. PENAL LAW § 230.15 (McKinney 2014).

172. *E.g.*, CAL. PENAL CODE § 266h(a) (West 2014).

173. 18 U.S.C. § 2422(a).

174. See, *e.g.*, MODEL STATE PROVISIONS ON PIMPING, PANDERING, AND PROSTITUTION (2014), available at <http://www.justice.gov/olp/model-state-criminal-provisions.html>, archived at <http://perma.cc/PWY2-YV6J> (including offense of “procuring” that makes it unlawful “to receive any

the Mann Act language provides prosecutors with a more flexible offense that can supplement existing sex trafficking legislation. In addition, the amended statute does not use the term “coercion,” which appears in the original Mann Act, to help distinguish the new offense of “Inducement and Enticement” from the offense of sex trafficking in § 1591.¹⁷⁵

Although this provision is similar to H.R. 3887, several key differences help alleviate concerns that were raised about the proposed “Sex Trafficking” offense found in § 221(f) of the bill. First, the new statute’s title addresses the concern that H.R. 3887 equated all prostitution-related crime with sex trafficking.¹⁷⁶ The new offense would no longer be titled “Sex Trafficking,”¹⁷⁷ thereby dispelling any possible conflation of sex trafficking with prostitution based upon the title of the statute. Additionally, the amended statute clarifies that the offense is only intended to punish a third party—a pimp who causes an individual to engage in prostitution—thus further delineating the difference between those engaging in prostitution and those engaging in pimping.¹⁷⁸

Of course, the proposed amendment is still susceptible to some critiques from sex-work advocates. For example, clearly the amendment does not decriminalize prostitution. However, the amendment does not change the status quo of the legality of prostitution, allowing states and localities to retain their individual laws. Furthermore, it could encourage local law enforcement agencies to shift their primary targets under prostitution laws from prostitutes to pimps, as discussed further later in this Section.

Additionally, although sex-work advocates could argue that such legislation harms prostitutes because some pimps actually act in a way that benefits prostitutes—the so-called benevolent pimp discussed previously¹⁷⁹—two other considerations outweigh these concerns. First,

money or other thing of value for or on account of arranging for or causing any individual to engage in prostitution”).

175. See 18 U.S.C. § 1591 (criminalizing use of coercion in sex trafficking).

176. See, e.g., Kaigh, *supra* note 27, at 169 (“The equation of prostitution and sex trafficking . . . would be unacceptable.”); Letter from Alexandria House et. al., *supra* note 160 (contesting equation of prostitution with sex trafficking).

177. See H.R. 3887, 110th Cong. § 221 (1st Sess. 2007) (creating new offense of “Sex Trafficking”).

178. Many state statutes use the phrase “to become a prostitute” where this proposed statute uses “to engage in an act of prostitution.” *E.g.*, N.Y. PENAL LAW § 230.15 (McKinney 2014). This Note thoughtfully and deliberately rejects the state language because criminalizing only behavior that causes an individual to become a prostitute places undue focus on the initial decision to work in the sex industry, rather than on each act of prostitution.

179. See *supra* note 129 and accompanying text.

because many pimps are not of this benevolent nature, but rather seek to exploit prostitutes for the pimps' own gain, it seems unlikely that the net impact on all prostitutes would be negative.¹⁸⁰ Second, even if one were to believe that all pimps act benevolently to their prostitutes, the linkage between the prostitution and sex trafficking industries suggests that measures seeking to limit the prostitution industry broadly may be legitimately necessary to combat sex trafficking.¹⁸¹

Finally, one particular concern raised by opponents of H.R. 3887 should be addressed: resource diversion. One of the DOJ's primary arguments against H.R. 3887 was that it would force federal law enforcement to become a vice squad, needlessly diverting the limited federal resources devoted to combating sex trafficking to the enforcement of common prostitution laws. However, the proposed offense of "Inducement and Enticement" likely would not be detrimental to federal sex trafficking enforcement but would instead aid in the fight against sex trafficking.

First, the proposed offense of "Inducement and Enticement" is narrower in scope than H.R. 3887's proposed offense for "Sex Trafficking." Although one critique of the "Sex Trafficking" offense was that it could have been interpreted in a way that criminalized the actions of not just pimps, but also prostitutes and johns,¹⁸² the language of this Note's proposal is tailored to preclude such an interpretation. H.R. 3887's proposed "Sex Trafficking" offense made it a crime for an individual to "persuade[], induce[], or entice[] any individual to engage in prostitution."¹⁸³ While it is unclear whether the House intended for this statute to make the actual sale or purchase of sexual services a federal crime, statements that the DOJ's Office of Legal Policy released in response to the bill indicated that they believed it to include such offenses.¹⁸⁴ Such an interpretation would have made the DOJ responsible for enforcing a broad law covering all prostitution-related

180. See *supra* notes 132–47 and accompanying text.

181. See *supra* Part III.B.

182. See OFFICE OF LEGAL POLICY, *supra* note 28 (noting that the bill would make the DOJ responsible "for coordinating and prosecuting all prostitution cases within the United States"); Letter from Alexandria House et. al., *supra* note 160 (expressing concern that the DOJ would be able to prosecute almost any prostitution-related offense, including for the actual sale of sex).

183. H.R. 3887, 110th Cong. § 221 (1st Sess. 2007).

184. OFFICE OF LEGAL POLICY, *supra* note 28. Such a position is further supported by the Office of Legal Policy in its Model State Provisions on Pimping, Pandering, and Prostitution, which defines "prostitution" as "a sexual act or contact with another person in return for giving or receiving a fee or a thing of value." MODEL STATE PROVISIONS ON PIMPING, PANDERING, AND PROSTITUTION, *supra* note 174. Accordingly, criminalizing persuading, inducing, or enticing an individual to engage in prostitution, as defined by the Model State Provisions, could include prostitutes who talked johns into the purchase of sexual services.

acts. In contrast, this Note's proposed offense of "Inducement and Enticement" only criminalizes persuading, inducing, or enticing "an individual to engage in a commercial sex act with a third party." The use of "a third party" in this manner thus only criminalizes the actions of individuals acting as pimps—either by persuading an individual to engage in the commercial sale of sexual services or by persuading customers to bring their business to the pimp's prostitutes. Accordingly, because the new offense would only apply to pimps and not to either prostitutes or customers, the DOJ would bear far less responsibility under the new offense than it would have under H.R. 3887.

Second, the mere creation of a new offense does not necessarily mean that federal law enforcement officials must prosecute all violations of the law. Numerous federal criminal provisions exist that the federal government does not have the resources to stringently enforce.¹⁸⁵ However, by exercising prosecutorial discretion, federal prosecutors still effectively apply laws that are broad in scope to target the worst offenders. For example, consider the Child Support Recovery Act ("CSRA"), which effectively federalizes the crime of failing to pay child support.¹⁸⁶ The CSRA has often been criticized as an overly broad piece of legislation that intrudes into areas typically left to state regulation.¹⁸⁷ However, because prosecutors have exercised a great deal of prosecutorial discretion to only prosecute the most grievous violations that were not dealt with at the state level, the implementation of the CSRA has actually been effective and has allowed federal prosecutors to fill a gap left by the states' enforcement regimes.¹⁸⁸

Third, even if the new offense did not lead to the prosecution of any individuals that could not have been prosecuted under § 1591, it could provide federal prosecutors who are less experienced in prosecuting trafficking cases with an additional tool to use in

185. One prime example of this is enforcement of federal drug crimes. Although federal drug law is full of examples of crimes that are not enforced against all offenders, this is particularly true of marijuana laws. As more and more states legalize marijuana for medicinal or recreational use and dispensaries operate openly, federal prosecutors only bring cases against select individuals. For a more complete discussion of these issues, see generally, Melanie Reid, *The Quagmire That Nobody in the Federal Government Wants to Talk About: Marijuana*, 44 N.M. L. REV. 169 (2014).

186. 18 U.S.C. § 228 (2012).

187. See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 899–900 (2012) ("The CSRA is frequently cited as a prime example of the kind of rampant and unprincipled federalization that threatens the character and quality of the federal courts and unnecessarily infringes on the prerogatives of the states.").

188. *Id.* at 949–56.

prosecuting sex traffickers. Rather than only taking slam-dunk cases or ones in which the victims were minors,¹⁸⁹ the new offense could allow prosecutors to more easily bring cases against sex traffickers who victimize adults but are more skilled at hiding their own involvement. Even if prosecutors find a “hook” to argue force, fraud, or coercion for pimps’ actions in the grey area discussed in Part IV.A,¹⁹⁰ many federal prosecutors still feel the force, fraud, or coercion standard is difficult to prove.¹⁹¹ Accordingly, providing prosecutors with an additional chargeable offense might make the average federal prosecutor more willing to try these cases. Additionally, providing this related, lesser offense could allow prosecutors to settle more cases against traffickers through plea bargaining, thus allowing more cases to be brought and increasing the number of convictions.

Finally, even if creating this new offense were to have no impact on federal prosecutors’ ability to fight sex trafficking, the federal government merely passing this law could lead to a shift in how states enforce prostitution laws. Although regulation of prostitution-related crimes traditionally has been left to the states,¹⁹² previous action by the federal government has led states to change their regulation of the prostitution industry.¹⁹³ Historically, there was no consensus among the states about criminalizing prostitution.¹⁹⁴ Instead, the states’ coalescence in the criminalization of prostitution only occurred after Congress passed the Mann Act of 1910,¹⁹⁵ which was one of the earliest federal criminal provisions related to prostitution.¹⁹⁶ Within fifteen years of the Mann Act’s passage, every state had passed some type of prostitution law.¹⁹⁷ Similarly, all fifty states enacted antitrafficking legislation within thirteen years of Congress’s initial passage of the TVPA in 2000.¹⁹⁸ Clearly, the present situation does not fully parallel

189. See AMY FARRELL ET AL., *supra* note 71, at 197–99 (noting that a number of prosecutors are willing to pursue only what are effectively “slam-dunk” cases with “smoking gun” evidence or in which the victim was a minor).

190. See *supra* Part IV.A.

191. See *supra* notes 70–79 and accompanying text.

192. See OFFICE OF LEGAL POLICY, *supra* note 28, at 2.

193. See Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 241–43 (2000).

194. See *id.* at 241–42.

195. See *supra* notes 47–51 and accompanying text.

196. See Whitebread, *supra* note 193, at 241–43.

197. *Id.* at 243.

198. See CHILDREN AT RISK, THE STATE OF HUMAN TRAFFICKING IN TEXAS (Robert Sanborn et al. eds., 2013), available at http://childrenatrisk.org/wp-content/uploads/2013/05/02_The-State-of-Human-Trafficking-in-Texas.pdf, archived at <http://perma.cc/DGR7-LVCJ> (noting that Texas was the first state to criminalize human trafficking in 2003); *Wyoming Becomes 50th State to Outlaw Human Trafficking*, *supra* note 17.

these instances, as all states have already criminalized pimping in some manner.¹⁹⁹ However, in light of this precedent, Congress's mere passage of a law criminalizing acts of pimping could encourage states to regulate pimping more stringently. Ultimately, rather than forcing the DOJ to superfluously invest resources in vice squads that duplicate the efforts of state law enforcement officers—a result the DOJ worried H.R. 3887 would produce²⁰⁰—the new offense would strengthen the DOJ's ability to prosecute sex traffickers and could encourage states to take more aggressive action to combat sex trafficking.

B. The Constitutional Foundation for the New Offense

Finally, from a legal standpoint, the most significant criticism of H.R. 3887's new federal offense for sex trafficking was that it was unconstitutional. Critics claimed that the federal offense extended beyond the scope of its most instinctive supporting sources, the Thirteenth Amendment²⁰¹ and the Commerce Clause.²⁰² However, this constitutional concern is ill-founded: the Commerce Clause amply supports properly designed federal offenses for sex trafficking and pimping.

Although it would seem natural that the Thirteenth Amendment would enable legislation relating to human trafficking, there are three reasons to believe that Congress actually designed a number of the TVPA's sex trafficking provisions, as well as H.R. 3887's proposed offense of "Sex Trafficking," under the authority of the Commerce Clause. First, specific statutory language suggests Congress viewed its enactment of sex trafficking-related offenses, particularly 18 U.S.C. § 1591, as an exercise of its Commerce Clause powers. Comparing § 1591 with another provision of the TVPA, 18 U.S.C. § 1589 (an offense created to criminalize "Forced Labor") reveals congressional intent to

199. See *US Federal and State Prostitution Laws and Related Punishments*, *supra* note 126.

200. See, e.g., OFFICE OF LEGAL POLICY, *supra* note 28, at 1–2; Kaigh, *supra* note 27, at 156–57.

201. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

202. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); see, e.g., OFFICE OF LEGAL POLICY, *supra* note 28, at 1 (opposing new offenses as being beyond the scope of the Thirteenth Amendment); Walsh & Grossman, *supra* note 28, at 5, 7–8 (arguing that authority for the bill could be based on neither the Thirteenth Amendment nor the Commerce Clause); Letter from Brian A. Benczkowski, *supra* note 157, at 8 (opposing § 221(f) as being beyond the scope of the Thirteenth Amendment).

exercise commerce authority over sex trafficking.²⁰³ Congress's use of "in or affecting interstate or foreign commerce" as the jurisdictional element of § 1591—in contrast to § 1589, which contains no such reference to commerce—clearly points to its intention that the antitrafficking statute be tied to its powers to regulate commerce.²⁰⁴ Second, when providing its findings that supported enacting the TVPA, Congress stated that "[t]rafficking in persons substantially affects interstate and foreign commerce," suggesting that Congress passed a number of the TVPA's provisions, including § 1591, using its Commerce Clause powers.²⁰⁵ Finally, the courts of appeals have consistently analyzed § 1591's constitutionality under the Commerce Clause, indicating that the judiciary also views § 1591 as an exercise of Congress's Commerce Clause powers.²⁰⁶

Given that § 1591 is rooted in the Commerce Clause, opponents of H.R. 3887's proposed offense of "Sex Trafficking" contended that such legislation would not be a valid exercise of the Commerce Clause.²⁰⁷ However, while only a limited number of courts have considered arguments that § 1591 and the TVPA generally exceed Commerce Clause authority, these challenges have been consistently rejected.²⁰⁸

203. See *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1003 (S.D. Ind. 2007) (comparing § 1591 with § 1589). Compare 18 U.S.C. § 1591 (2012) (requiring that the act of sex trafficking be "in or affecting interstate or foreign commerce"), with 18 U.S.C. § 1589 (excluding requirement of "in or affecting interstate or foreign commerce" as an element of the crime).

204. 18 U.S.C. § 1591. The *Roe* court highlighted the contrast, comparing § 1591's inclusion of, and § 1589's exclusion of, the "in or affecting interstate or foreign commerce" language to determine that, while § 1591 was enacted under Congress's Commerce Clause powers, § 1589 was enacted under the Thirteenth Amendment. *Roe*, 492 F. Supp. 2d at 1003.

205. 22 U.S.C. § 7101(b)(12).

206. See, e.g., *Ditullio v. Boehm*, 662 F.3d 1091, 1097 n.4 (9th Cir. 2011) ("Congress enacted [§ 1591] under its Commerce Clause powers."); *United States v. Chang Da Liu*, 538 F.3d 1078, 1084 (9th Cir. 2008) (holding "the commerce clause provides a constitutional basis" for Congress's enactment of § 1591.); *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) (holding § 1591 constitutional under the Commerce Clause). See generally Mattar, *supra* note 46, at 1277–80 (reviewing a number of constitutional challenges to the TVPA under the Commerce Clause since the TVPA's inception).

207. See, e.g., *Evans*, 476 F.3d at 1178 (challenging a charge under § 1591 as an invalid exercise of Commerce Clause power because defendant's acts were purely intrastate); Walsh & Grossman, *supra* note 28, at 7–8 (arguing that the Commerce Clause does not grant Congress authority to regulate "run-of-the-mill sex crimes" such as pimping and pandering); Jennifer Nguyen, Note, *The Three Ps of the Trafficking Victims Protection Act: Unaccompanied Undocumented Minors and the Forgotten P in the William Wilberforce Trafficking Prevention Reauthorization Act*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 187, 214 (2010) (noting challenges made to H.R. 3887 on grounds it exceeded the scope of the Commerce Clause).

208. See, e.g., *Evans*, 476 F.3d at 1178–81 (rejecting constitutional challenges to the authority of Congress to enact the TVPA); *supra* note 206 and accompanying text (citing judicial responses to arguments that the TVPA is beyond the scope of the Commerce Clause).

Likewise, the proposed offense would fall well within the bounds of Congress's Commerce Clause authority. According to the Supreme Court, as long as Congress has the authority to regulate under the Commerce Clause, whether the underlying "motive and purpose" of the legislation is to regulate commerce is irrelevant.²⁰⁹ Specifically, as the Court observed in *Gonzales v. Raich*, Congress has the power to prohibit illicit economic activity, regardless of its rationale for doing so, as long as it has the "hook" of the Commerce Clause.²¹⁰ It is well established that the Commerce Clause allows for congressional regulation of activities that have a "substantial effect" on interstate commerce.²¹¹

Of particular importance for the new offense, the substantial-effect threshold does not have to be met by any single actor alone.²¹² Instead, under *Wickard v. Filburn* and *Raich*, Congress can regulate a purely intrastate activity if it determines that an individual's activity, when aggregated with all other individuals' similar activities, would have a substantial effect on interstate commerce.²¹³ Additionally, a court need not determine whether the aggregated activities would in fact have a substantial effect on interstate commerce.²¹⁴ Rather, the court need only consider whether Congress had a rational basis for concluding that the aggregated activities would have a substantial effect on interstate commerce.²¹⁵

In analyzing the new offense proposed by this Note, several factors support a rational basis for concluding that aggregated acts of pimping have a substantial effect on interstate commerce. First, the prostitution industry as a whole, including the actions of pimps, is

209. See, e.g., *United States v. Darby*, 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.").

210. See *Gonzales v. Raich*, 545 U.S. 1, 12–13 (2005) (noting congressional goals of the Controlled Substance Act, the statute at issue in *Raich*, were "to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances"); *id.* at 22 (holding that Congress acted well within its power under the Commerce Clause "when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity").

211. E.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012); see also *Darby*, 312 U.S. at 119–20 ("[T]he power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.").

212. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where . . . his contribution, taken together with that of many others similarly situated, is far from trivial.").

213. E.g., *id.*; *Raich*, 545 U.S. at 18.

214. *Raich*, 545 U.S. at 22.

215. *Id.* For a discussion of factors a court should consider in determining whether Congress had a rational basis to believe that an activity, when aggregated, would have a substantial effect on commerce, see *infra* note 232 and accompanying text.

inextricably linked to sex trafficking and thus to interstate and foreign commerce. As discussed more fully in Part III.B,²¹⁶ the volume of the prostitution industry as a whole is directly proportional to the volume of sex trafficking.²¹⁷ As long as the demand for and general facilitation of prostitution are allowed to go unchecked, traffickers and abusive pimps will continue to provide the requisite supply to meet this demand.²¹⁸ Second, the sheer magnitude of the prostitution industry²¹⁹ suggests that even purely intrastate acts, when aggregated, can have a substantial effect on commerce.²²⁰ Finally, pimps often use either instrumentalities of or items in interstate commerce to conduct their business, which further indicates that the act of pimping affects interstate commerce.²²¹

Even though Congress would have a rational basis to believe that acts of pimping, when aggregated, would have a substantial effect on interstate commerce, some critics would likely argue that such federal regulation of purely intrastate activities is still unconstitutional²²² under *United States v. Morrison*²²³ and *United States v. Lopez*.²²⁴ Although both decisions broadly stand for the principle that federal power under the Commerce Clause is not

216. *Supra* Part III.B.

217. Farley, *supra* note 89, at 142.

218. *See id.* at 143 (arguing that full prevention of harms such as sex trafficking and abusive pimps requires elimination of the prostitution industry itself).

219. Margaret A. Baldwin, *Pornography and the Traffic in Women: Brief on Behalf of Trudee Able-Peterson, et. al., Amici Curiae in Support of Defendant and Intervenor-Defendants*, Village Books v. City of Bellingham, 1 YALE J.L. & FEMINISM 111, 122 (1989) (noting that over \$14 billion is spent each year in the prostitution industry (citing CAROLE PATEMAN, THE SEXUAL CONTRACT 190 (1988))).

220. *See Raich*, 545 U.S. at 33 (noting the magnitude of the market for marijuana in support of finding a rational basis for proper exercise of Commerce Clause powers).

221. *See, e.g.*, *United States v. Evans*, 476 F.3d 1176, 1179–80 (11th Cir. 2007) (noting that defendant's use of hotels for interstate travelers and of condoms manufactured out-of-state helped satisfy the interstate commerce requirement of 18 U.S.C. § 1591); *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004) (noting pimps' use of landline phones, cellular phones, the internet, and condoms manufactured out-of-state to counter defendants' argument that the RICO statute was beyond the scope of the Commerce Clause); *United States v. Paris*, No. 03:06–CR–64(CFD), 2007 WL 3124724, at *8 (D. Conn. Oct. 24, 2007) (relying on use of cellular phones, credit cards, hotels catering to out-of-state guests, and condoms manufactured out-of-state to support finding that actions affected interstate commerce). It should be noted that use of such items would help satisfy the jurisdictional element of the proposed offense, just as it did in *Evans*, *Pipkins*, and *Paris*.

222. *See, e.g.*, Walsh & Grossman, *supra* note 28, at 7–8 (discussing examples of the Supreme Court limiting Congress's attempts to federalize common crimes).

223. 529 U.S. 598 (2000).

224. 514 U.S. 549 (1995).

limitless,²²⁵ each decision distinguishes commercial or economic activities, which can be aggregated, from noneconomic activities, which cannot be aggregated.²²⁶ Subsequent jurisprudence has called this distinction into question, suggesting that the Court may now allow aggregation of noneconomic activities.²²⁷ But even if this is still the absolute test for whether activities' effects can be aggregated, the prostitution industry is, by its very nature, commercial—it revolves around the sale and purchase of sex.²²⁸ Thus, the new offense for pimping is far more similar to the statute that was upheld in *Raich*²²⁹ than the statutes at issue in *Morrison* and *Lopez*.²³⁰

Finally, analyzing the proposed statute under the *Morrison* framework shows that a federal offense for pimping would be well within the limits of Congress's Commerce Clause powers.²³¹ As the Tenth Circuit explained in applying *Morrison*, courts should consider four factors to determine whether Congress had a rational basis for believing that an activity, when aggregated, would have a substantial effect on interstate commerce: (1) whether the activity at issue is "commercial or economic in nature"; (2) any jurisdictional element the statute contains limiting the law to activities in or affecting interstate commerce; (3) whether Congress has made express findings about the effect of the activity on interstate commerce; and (4) the degree of attenuation in the link between the activity and interstate commerce.²³²

225. See *Morrison*, 529 U.S. at 617–18 ("The Constitution requires a distinction between what is truly national and what is truly local."); *Lopez*, 514 U.S. at 566 ("[Commerce Clause] authority, though broad, does not include the authority to regulate each and every aspect of local schools.").

226. *Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."); *Lopez*, 514 U.S. at 561 (noting that the statute at issue had "nothing to do with 'commerce' or any sort of economic enterprise").

227. See, e.g., *Alderman v. United States*, 131 S. Ct. 700, 700 (2011) (Thomas, J., dissenting from denial of certiorari) (noting that Court's denial of certiorari "tacitly accepts the nullification" of *Morrison* and *Lopez*'s limitations on the Commerce Clause).

228. See Mattar, *supra* note 46, at 1277.

229. 545 U.S. 1 (2005).

230. See *id.* at 25 ("Unlike those at issue in *Lopez* and *Morrison*, the activities regulated [here] are quintessentially economic.").

231. See, e.g., *United States v. Patton*, 451 F.3d 615, 623 (10th Cir. 2006) (noting factors for determining whether "the regulated activity, taken in the aggregate, would substantially affect interstate commerce"); *United States v. Gregg*, 226 F.3d 253, 262 (3d Cir. 2000) (noting four relevant considerations from *Morrison*); Mattar, *supra* note 46, at 1277 (outlining four factors used in the substantial-effect analysis).

232. E.g., *United States v. Grimmer*, 439 F.3d 1263, 1272 (10th Cir. 2006) (citing *United States v. Morrison*, 529 U.S. 598 (2000), *United States v. Lopez*, 514 U.S. 549 (1995)). The Court in *Morrison* considered these same factors but in the specific context of distinguishing its decision from *Lopez*'s limitation on the Commerce Clause, rather than as factors to be applied generally. See *Morrison*, 529 U.S. at 609–12.

The new offense for pimping would satisfy each of these four factors. First commercial sex acts are, by their very nature, commercial.²³³ Second, the proposed offense includes a jurisdictional element limiting application of the law to acts “in or affecting interstate or foreign commerce.”²³⁴ Third, though congressional hearings would produce even more evidence of the effect of the prostitution industry on interstate commerce, when Congress passed the TVPA, it indicated that the sex industry as a whole affects interstate commerce.²³⁵ Finally, as discussed in Part III.B, there is a clear link between pimping and interstate commerce.²³⁶ Accordingly, although the states have traditionally regulated the sex industry, creating a federal offense for pimping would be well within Congress’s authority under the Commerce Clause.

Finally, opponents might challenge the proposed amendment on Equal Protection grounds. They could characterize the law as unconstitutionally discriminatory—it only criminalizes what has typically been the male-dominated sector of the sex industry, while offering victim-relief services to the predominantly female prostitutes.²³⁷ However, the Supreme Court has established that even when a law contains express gender classifications and not just a disparate effect, discrimination is allowed where the classification serves “important governmental objectives” and “the discriminatory means employed are substantially related to the achievement of those objectives.”²³⁸ Thus, while not wholly eliminating this criticism, pimping’s substantial relation to the important government interests in combating sex trafficking and exploitation suggests that the proposed amendment would be constitutional.

VI. CONCLUSION

While the United States has had limited success in combating the abomination that is sex trafficking, the current structure of

233. *E.g.*, Mattar, *supra* note 46, at 1277.

234. *Supra* note 168 and accompanying text.

235. *See* 22 U.S.C. § 7101(b)(2), (12) (2012) (noting link between trafficking and the sex industry as a whole and that trafficking affects interstate and foreign commerce).

236. *See supra* Part III.B (discussing ways that pimps’ activities affect interstate commerce because of the increase in level of sex trafficking where pimps are active); *see also* United States v. Paris, No. 03:06–CR–64(CFD), 2007 WL 3124724, at *8 (D. Conn. Oct. 24, 2007) (noting “clear nexus” between defendant’s recruitment of women to engage in commercial sex acts and interstate commerce).

237. *See generally* Kaigh, *supra* note 27, at 158–62 (discussing problems of gender discrimination in prostitution laws generally).

238. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1984).

antitrafficking laws leaves undesirable gaps in its coverage. Specifically, it fails to recognize that the line between sex trafficking and the pimping of a prostitute is blurred. The current federal offense for sex trafficking, 18 U.S.C. § 1591, only criminalizes sex trafficking of adults by means of force, fraud, or coercion or of minors using any means. However, both because the elements of force, fraud, or coercion are extremely difficult to prove and because traffickers and pimps often need not resort to force, fraud, or coercion due to their victims' vulnerabilities, it is challenging for prosecutors to secure convictions in all but the most incontrovertible of sex trafficking cases. These prosecutorial difficulties, combined with the underenforcement of state antipimping laws, allow many traffickers and pimps to operate with effective impunity.

To address these issues, this Note proposes creating a new federal offense to combat pimping. The new offense would be structured to avoid many criticisms levied at past attempts to reform the TVPA. Most importantly, the new offense would be well within Congress's constitutional powers under the Commerce Clause because Congress would have a rational basis to believe that, when aggregated, even the intrastate actions of pimps and sex traffickers would have a substantial effect on interstate commerce. While this new offense for pimping would certainly not singlehandedly eliminate sex trafficking in the United States, it would provide prosecutors with a significant tool that would allow greater flexibility in prosecuting sex traffickers and pimps.

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