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Establishing Recognition of a “Trafficked Person Syndrome”

“[Sex trafficking] is the fastest growing criminal enterprise in the country, played out in the dark alleys of every city in America.”¹ -John Walsh

Introduction

Trafficking in persons is a modern form of slavery in which men, women and children are exploited, abused, bought and sold for profit. Modern human trafficking reaches into every country in the world² and includes forced labor, domestic servitude, organ harvesting and commercial sexual exploitation. The number of people enslaved in the world today is estimated to be between 12 to 27 million³—more than in the whole of human history.⁴ Of these, approximately 12.3 million men, women and children are believed to be trafficked into sex and forced labor situations,⁵ which totals 800,000 every year⁶. The average age of entry into the sex trafficking industry is just 13 years old.⁷ It is estimated that as many as 2 million children are subjected to prostitution in the global

¹ *America's Most Wanted: Sex Trafficking Special* (Lifetime television broadcast Feb. 21, 2012).

² United States Department of State, *2011 Trafficking in Persons Report - United States of America*, 27 June 2011, available at: <http://www.unhcr.org/refworld/docid/4e12ee393c.html> [accessed 15 April 2012] [hereinafter TIP Report].

³ Due to differing definitions of “slavery” in the anti-trafficking community, the number of 27 million slaves is highly contested. *About Slavery*, FREETHESLAVES.NET, www.freetheslaves.net (last visited Apr. 15, 2012), Kevin Bales, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* (University of California Press 2009) (supporting the 27 million figure). For alternative numbers and arguments in support of the 12 million figure, see Anne Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*. VA. J. INT'L L. 789 (2009), available at

http://www.vjil.org/assets/pdfs/vol49/issue4/49_789-848.pdf

⁴ E. Benjamin Skinner, *South Africa's New Slave Trade and the Campaign to Stop It*, TIME. (Jan. 18, 2010), <http://www.time.com/time/magazine/article/0,9171,1952335,00.html>.

⁵ International Trafficking, POLARISPROJECT.ORG, www.polarisproject.org (last visited Apr. 15, 2012).

⁶ Sex Trafficking, POLARISPROJECT.ORG, www.polarisproject.org (last visited Apr. 15, 2012)

⁷ Id.

commercial sex industry,⁸ with nearly 300,000 children in America at risk of becoming victims of the commercial sex trade annually.⁹

Sex trafficking is a pervasive problem that has haunted the world for centuries, with written records of sexual slavery dating back to ancient Rome at around 4000 BCE.¹⁰ With a continuously globalizing world, the advent of modern transportation, and the explosion of the internet, it seems as though it is easier than ever to profit from the trafficking of human beings. The commercial sex trade is estimated to be a \$32 billion a year industry¹¹, totaling approximately \$87 million of profits every day.¹² This “industry” is the third most profitable in the United States, trailing only the drug trade and trafficking in arms.¹³ How can we cure this seemingly insurmountable problem that seems to be a permanent fixture of human life?

Arguably the most successful method of eradicating the problem of prostitution and sex trafficking is the comprehensive Swedish model. Implemented in 1999, Sweden’s unique combination of legislation and services designed to eliminate the country’s overwhelming prostitution problem has resulted in a dramatic decrease in the

⁸ *Supra* note 2.

⁹ *Human Trafficking Fact Sheet*, US Department of Justice Office of Justice Programs, Dec. 2011, available at http://www.ojp.usdoj.gov/newsroom/factsheets/ojpbs_humantrafficking.html.

¹⁰ Rosemary Regello, *A Short History of Sexual Slavery*, THECITYEDITION.COM. Feb. 1, 2007, <http://www.thecityedition.com/Pages/Archive/February/HistorySlavery.pdf>

¹¹ Edith M. Lederer, *UN: 2.4 Million Human Trafficking Victims*, TIME. (April 3, 2012), <http://www.time.com/time/world/article/0,8599,2111053,00.html>. See also *Sex Trafficking supra* note 6.

¹² Chuck Neubauer, *Sex trafficking in the U.S. called ‘epidemic.’* THE WASHINGTON TIMES. (Apr. 23, 2011) available at <http://www.washingtontimes.com/news/2011/apr/23/sex-trafficking-us-called-epidemic/?page=all>

¹³ *World must do better to tackle human trafficking, stresses Assembly President*. (Sept. 26, 2011). <http://www.un.org/apps/news/story.asp?NewsID=39798>. Some reports list human trafficking as the second most profitable industry of organized crime in the world, tied with drug trafficking. In these reports, human trafficking is surpassed monetarily only by weapons dealings. See *Human Trafficking Facts*, THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE. (last accessed Apr. 15, 2012) available at <http://www.ncadv.org/files/HumanTrafficking.pdf>

number of women and girls involved in prostitution in that country.¹⁴ The legislation decriminalized the sale of sex for money and criminalized its purchase throughout Sweden.¹⁵ Thus, only the johns¹⁶ could be arrested and the women and girls involved in prostitution were no longer prosecuted. Instead, they were offered social services and a way to escape “the life.”¹⁷

Before the legislation was passed, approximately 125,000 Swedish men purchased sex annually and nearly 2,500 women and girls were sold for sex every year.¹⁸ Twelve years after the implementation of law that legalized the sale of sex for money and criminalized its purchase, it was estimated that the number of women and girls involved in prostitution had been cut in half¹⁹ and that nearly 60% of women and girls involved in

¹⁴ Marie De Santis, *Why Hasn't Anyone Tried This Before?* (last accessed Apr. 15, 2012) available at http://justicewomen.com/cj_sweden.html

¹⁵ According to the Swedish Penal Code, ch. 4, §1a, criminal liability for trafficking in human beings applies to anyone who through the use of unlawful coercion or deception, by exploiting a person's vulnerability or by any other similar improper means recruits, transports, harbors, receives or takes other similar actions towards a person and thereby gains control over that person, in order for that person to be: 1. subjected to sexual offences as stated in the Penal Code, chapter 6, sections 1, 2, 3, 4, 5 or 6, casual sexual relations or other forms of exploitation for sexual purposes; 2. subjected to active service or forced labor or other similar forced conditions; 3. exploited for the removal of organs, or 4. in other ways exploited in ways that cause distress for that person.

Criminal liability also extends to anyone who, for those purposes, takes control over another person or hands control over a person to someone else as well as to anyone who commits the acts mentioned in the first section against a person who has not yet turned 18 years of age, even if no improper means have been used. Official translation available at <http://www.sweden.gov.se/content/1/c6/04/74/55/ef2d4c50.pdf>

¹⁶ The term “john” refers to an individual who buys sex in exchange for money. DICTIONARY.COM, <http://dictionary.reference.com/browse/john>

¹⁷ Individuals involved in prostitution use the term “the life” to refer to involvement in the commercial sex trade industry. See RACHEL LLOYD, *GIRLS LIKE US 23* (HarperCollins 2011).

¹⁸ Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings* JOURNAL OF VIOLENCE AGAINST WOMEN (Sage Publications 2004) available at <http://action.web.ca/home/catw/attach/Ekberg.pdf>. These statistics vary, and their reliability is questioned. See *Sweden prostitution law attracts world interest*, USA TODAY (March 16, 2008 at 4:44 AM) http://www.usatoday.com/news/world/2008-03-16-sweden-prostitution_N.htm (reporting that the number of street prostitutes dropped only 40% since the implementation of the legislation).

¹⁹ Report of Visit of Dignity Project Partners to Stockholm 14-16 September 2010. <http://www.inis.gov.ie/en/JELR/Stockholm-VisitOfDignityProjSept2010.pdf/Files/Stockholm-VisitOfDignityProjSept2010.pdf>; Sweden's Prostitution Law a Success: Report, July 3, 2010. <http://www.thelocal.se/27580/20100703/>. Criticism of the law and the statistics argue that there is

prostitution in Sweden took advantage of the comprehensive services offered and successfully escaped from “the life.”²⁰ Furthermore, traffickers now view Sweden as a “poor market”²¹ and police in Sweden believe that traffickers choose not to establish themselves in the country due to the laws now being enforced there.²²

After more than a decade of solid numbers and positive results, no other country can boast the same success Sweden has had in eliminating sex trafficking within its borders. Why does the success of this method seem to be confined to its country of origin? Why haven't other countries successfully adopted this method and why couldn't we implement it in the United States today and expect to see the same success Sweden achieved? The answer is simple, but far from easy to achieve.

The Swedes view prostitution uniquely, seeing it as a form of violence that is perpetrated by men against women, as opposed to a choice women and girls make or a mere fact of life. This view, combined with the services the country provides to victims and the implementation of game-changing legislation, has led to a dramatic decrease in the sexual trafficking of the country's women and girls, a result that remains unparalleled in the world today.²³

As it turned out, Sweden's legal and societal views of the victims of the commercial sex industry were vital to the country's successful implementation of its revolutionary method to eliminate sex trafficking within its borders. Similar views would

no way reliably to gather such statistics and that the numbers may be exaggerated. See, e.g. Laura Agustín, *Big claims, little evidence: Sweden's laws against buying sex*. *The Local – Sweden's News in English*, 23rd July 2010. <http://www.thelocal.se/27962/20100723/>

²⁰ Gunilla Ekberg, *The Swedish law that prohibits the purchase of a sexual service: Best practice for prevention of prostitution and trafficking in human beings*, *JOURNAL OF VIOLENCE AGAINST WOMEN* 15 (Sage Publications 2005).

²¹ Sweden's Prostitution Law a Success: Report, *THELOCAL.SE*, www.thelocal.se (July 3, 2010 at 9:24) available at <http://www.thelocal.se/27580/20100703/>

²² *Id.*

²³ *Infra* note 35.

be instrumental in getting successful legislation implemented in any country. Legal and societal perceptions and views of human trafficking and the victims of the commercial sex trade in the United States make the implementation of the necessary legislation in this country next to impossible. The first step is seeing these women and girls as victims and not as active participants choosing to engage in prostitution.

This paper's objective is to explore the adoption of "Trafficked Person Syndrome" in the psychological and legal communities as a way of shifting perceptions of men, women and children involved in the commercial sex industry from being seen as willing participants to victims of human trafficking. This paper will begin by explaining the need for a "Trafficked Person Syndrome" as applied to persons trafficked for sexual purposes and it will describe what the syndrome itself would look like as compared to the well-known "Battered Woman Syndrome."²⁴ Next, the paper will explore the potential societal and legal effects of adopting a "Trafficked Person Syndrome" and how the syndrome will help to change perceptions, hopefully leading to the implementation of similar legislation to Sweden's. Finally, this paper will discuss potential problems, both legal and societal, with the adoption of "Trafficked Person Syndrome."

I. Trafficked Person Syndrome: Why we need it and what it will do

"We see it as a human right to have sexual integrity, physical integrity, and not to be forced to sell your body to strange men, 10 times a day. That's human rights to us."²⁵

-Lise Tamm, Swedish Prosecutor

The recognition of a "Trafficked Person Syndrome" will help to change society's perception and the law's views of the individuals involved in the commercial sex trade.

²⁴ See the section "Will it work?" *infra*, for an explanation of Battered Woman Syndrome.

²⁵ *The battle against sex trafficking: Sweden v. Denmark*, CNN. (March 30, 2011, 1:07 PM) <http://thecnnfreedomproject.blogs.cnn.com/2011/03/30/sex-trafficking-countries-take-different-approaches-to-same-problem/>

The goal is to shift this perception away from the “choice” illusion—the idea that those involved are choosing to participate in “the life”—and towards the idea that these girls are victims of a crime and need to be helped. In order to change the laws and services supporting women and girls involved in commercial sex trafficking, the vital first step is to change society’s perception of them.

The application of “Trafficked Person Syndrome” as I set it out can be applied to men, women and children trafficked into or during their involvement in the commercial sex trade. While “Trafficked Person Syndrome” can be applied to both male and female victims, much of the research done has focused on women and girls and I will refer to women and girls as the victims of sex trafficking and commercial sexual exploitation throughout this paper. This is not to discount the fact that men and boys are also trafficked for sexual purposes, but instead refers to both the research on which I will be relying as well as the data showing that the overwhelming majority of persons trafficked for sexual purposes are female.²⁶

a) The legal problem

The first lesson we can take away from the Swedish model is that legislation is key. Once the law decriminalized the sale of sex for money, the victims of sex trafficking were no longer the ones being prosecuted—they were being helped through a variety of social services and were given a chance to escape from “the life”. Finally, the johns—the purchasers of sex for money—were being prosecuted. Within a few years of

²⁶ *Gender Imbalance in Human Trafficking*, US Department of State. June 15, 2009 <http://www.state.gov/j/tip/rls/fs/2009/126555.htm>. See also *Biennial Comprehensive Research and Statistical Review and Analysis of Severe Forms of Trafficking, Sex Trafficking and Unlawful Commercial Sex Acts in the United State*, Department of Justice (May 2005) (stating that of the alleged sex trafficking incidents reported in 2009, 99% of the victims were female.

the adoption of the legislation, Sweden began to see decrease in the numbers of both street prostitutes and in the trafficking of women and girls in general.²⁷

Women and girls trafficked commercially for sexual purposes are in a unique position among trafficked persons in the world today. While anyone trafficked into a forced labor situation certainly faces a social stigma, those being bought and sold for sex also face a legal conundrum. Because there are federal, state and local laws against the sale of sex for money, women and girls who are involved in the commercial sex industry are constantly engaging in illegal acts. Similarly, persons trafficked into domestic or farm forced labor situations run the risk of being deported if they are in the country illegally. Hopefully, with the adoption of a Trafficked Person Syndrome, perceptions of the victims will change—and the law will follow.

For example, in New Jersey, the crime of prostitution is defined as “sexual activity with another person in exchange for something of economic value, or the offer or acceptance of an offer to engage in sexual activity in exchange for something of economic value.”²⁸ The law thus applies to both the “seller” of sex as well as the “purchaser” of sex.²⁹ Offences under this section can range from disorderly persons offenses to crimes of the second degree (if the conduct involves a minor).³⁰ As a first time offender, someone charged with a disorderly persons offense, can expect to be punished with nothing more than a fine.³¹

²⁷ *Supra* note 14.

²⁸ NJSa 2C:34-1. See also *State v. Gelman*, 195 N.J. 475 (N.J. 2008) at 478.

²⁹ *Id.*

³⁰ NJSa 2C:34-1. See also *Id.* at 484.

³¹ NJSa 2C:43-3, *State v. Kennedy*, 152 N.J. 413 (N.J. 1998) at 423.

Nationally, “the vast majority of those arrested for prostitution are women, with only about 10% of arrests consisting of clients.”³² In the United States, law enforcement and prosecutorial authorities clearly focus almost exclusively on the “seller” aspect of the sex trade—the women and girls—while the purchasers of sex—the johns—are arrested at significantly lower rates. This method of dealing with prostitution has not led to any significant decrease in the commercial sex industry in the United States; the Bureau of Justice Statistics reports that national prostitution arrest rates remain at close to 100,000 per year.³³

The U.S. arrest statistics and prostitution rates show that the method of punishing the women and not the johns does not work and does nothing to curb either the “supply” or demand for commercially available sex. The Swedish model’s method of decriminalizing the sale of sex and criminalizing the purchase of sex, in combination with progressive views of women a number of social services provided to former prostitutes, has seen unparalleled results and this ground-breaking legislation would be an instrumental first step in eliminating the problem of sex trafficking in any country.

b) The (mis)perception problem

i) Sweden

So why can’t other countries copy this success by simply enacting identical legislation? It is clear that merely implementing the same or similar laws in other countries does not have the same success of reducing street prostitution that Sweden has

³² Dr. Martin A. Monto, *Focusing on the Clients of Street Prostitutes: A Creative Approach to Reducing Violence Against Women – Summary Report*. (Oct. 1999) available at <https://www.ncjrs.gov/pdffiles1/nij/grants/182859.pdf>

³³ *Focusing on the Clients of Street Prostitutes: A Creative Approach to Reducing Violence Against Women*, SUMMARY REPORT FOR NATIONAL INSTITUTE OF JUSTICE. This number is collected nationally from across the states and is an estimate. The FBI’s own Uniform Crime Report for 2007 points out that there can be a difference in both the incidence of prostitution by state and also in policing tactics across the states, which can result in different arrest rates.

had.³⁴ Other countries including Finland, Iceland, and Norway have adopted legislation that incorporates at least parts of the Swedish legislation.³⁵ The results have been far from successful. In Finland, there is currently a call to revise the legislation.³⁶ The law is described as being “disliked by many,”³⁷ due to both inefficiency of the law to prosecute traffickers and purchasers of sex as well as the fact that many in Finland do not view the purchase of sex as a crime.³⁸ Interestingly, the reasons these countries gave for enacting the legislation was to combat human trafficking,³⁹ not an attempt to further gender equality, as in Sweden.

Of course, none of these factors alone led to the failure of laws criminalizing the purchase of sex in these countries. During the initial enactment of the law, Sweden had its own naysayers.⁴⁰ Now, support for the law is high and the decrease in street prostitution speaks for itself. The success of the Swedish method begs the question: why Sweden? And why not anywhere else?

³⁴ *Infra* note 35.

³⁵ *Prostitution laws around the world: Canada in “about the middle of” other G8 countries*, NATIONAL POST (March 26, 2012, 8:29 PM) available at <http://news.nationalpost.com/2012/03/26/prostitution-laws-around-the-world-canada-in-about-the-middle-of-g8-countries/>. Other countries that have enacted legislation similar to Sweden’s include Finland, Iceland and Norway. However, Sweden is the only country that has reported such positive results in the reduction of street prostitution (as opposed to “hidden prostitution,” or the online commercial sex industry). I believe this is due to Sweden’s combination of an aggressive implementation of the legislation, the services it provides to women leaving the commercial sex trade industry and its views on women’s rights. Also, the other countries following in Sweden’s legislative footsteps have done so relatively recently. As Sweden’s own history shows, the success of its own model took years to have any impact on the country’s problem of street prostitution. For example, Finnish law has criminalized the purchase of sex from victims of human trafficking only since 2006. See Max Koch et. al. *DIVERSITY, STANDARDIZATION AND SOCIAL TRANSFORMATION: GENDER, ETHNICITY AND INEQUALITY IN EUROPE*. (Ashgate Publishing, Ltd., 2011)

³⁶ *Finnish Legislation on the purchase of sexual services expected to be revised*, NORDIC PROSTITUTION POLICY REFORM. (July 11, 2011) available at <http://nppr.se/2011/11/07/finnish-legislation-on-the-purchase-of-sexual-services-expected-to-be-revised/>

³⁷ *Id.*

³⁸ *Id.* See also *Sex ban puts us at greater risk*, THE GUARDIAN. (May 27, 2009). <http://www.guardian.co.uk/society/2009/may/27/prostitution-norway>

³⁹ Koch *supra* note 35.

⁴⁰ *Supra* note 14.

Simply put, the Swedish method seems to work because it is exactly that—a method. It is not just one measure that Sweden took—it is a combination of strategies that made the method successful, something the countries trying to emulate the method have not yet achieved. The implementation of social services for former prostitutes, the re-training of the law enforcement officials, and the legislation itself, can all be traced back to the fact that Sweden has one vital thing that the U.S. doesn't: a progressive perception of the women and girls being trafficked in the commercial sex trade. Sweden is a country with a great degree of equality between women and men. For example, women and men are represented in nearly equal numbers in Parliament, while county councils and municipal governments are at 48 and 41 percent, respectively.⁴¹

In Sweden, “prostitution is regarded as an aspect of male violence against women and children.”⁴² Furthermore, the right not to be forced to sell your body is viewed as a basic human right, one that everyone deserves equally.⁴³ From a Swedish legal point of view, *any* woman selling sex has been forced to do so, either by circumstance or coercion.⁴⁴ These progressive views helped the legislature attack the problem of prostitution in a novel way. Seeing those involved in prostitution as victims rather than as women and girls making a choice to work and remain in “the life” led the Swedish Parliament to the natural conclusion that these victims should be protected and given services, and those exploiting them—the johns, pimps and traffickers—should be prosecuted.

⁴¹ *Fact Sheet on Violence Against Women*, PROSTITUTION RESEARCH AND EDUCATION. (last accessed April 15, 2012). <http://www.prostitutionresearch.com/laws/000024.html>

⁴² *Supra* note 14.

⁴³ *Supra* note 25.

⁴⁴ *Id.*

Notably, Sweden is a country that has led the way in modern women's rights for decades.⁴⁵ During the enactment of the groundbreaking legislation in 1999, the Swedish government—which has the highest proportion of women at all levels of government of any country—included a Parliament that was comprised of nearly equal numbers of men and women. Furthermore, an overwhelming 80% of Sweden's population now supports the country's novel approach to prostitution.⁴⁶

As previously discussed, Sweden's laws worked—they resulted in a dramatic decrease in prostitution and sex trafficking within the country. Sweden's National Criminal Police state that “it is clear that the ban against the purchase of sexual services acts as a barrier to human traffickers and procurers considering establishing themselves in Sweden.”⁴⁷ Sweden has embraced the view that prostitution is violence perpetrated against women as opposed to a choice women and girls make or a mere fact of life. No other country has done so on both a societal and legislative scale. This view, combined with the services Sweden provides to victims, and its unique legislation led to a dramatic decrease in prostitution and sex trafficking, a result which remains unparalleled in the world today.

ii) The U.S.

Sweden's views on victims of human trafficking are a far cry from the U.S.'s perceptions of the commercial sex industry. The overwhelming perception in the United States today is that women and girls involved in prostitution are just that—prostitutes.

⁴⁵ *Supra* note 41.

⁴⁶ *Supra* note 14.

⁴⁷ *Sweden: Why we Criminalized Purchase of Sexual Services*, CNN. (March 31, 2011) available at <http://thecnnfreedomproject.blogs.cnn.com/2011/03/31/sweden-why-we-criminalized-purchase-of-sexual-services/>

An Albuquerque police officer is filmed as he drives around the hot, urban city in New Mexico. He spots a girl getting into a man's car and immediately sets out to follow the pair. Within moments, Officer Lee Brown and a few of his fellow officers are questioning both the man and the woman. But just moments after that, both are released. "She's not a human trafficking victim," Officer Brown says. "She's working, making money."⁴⁸ Describing his department's methods of investigating potential cases of human trafficking, Officer Brown explains, "We don't want to put someone in jail who's a victim."⁴⁹ In other words, there are some women who choose to be in "the life," who are not deserving of care and services or the title of "victim."

This line of thinking is a prime example of the view that many Americans have regarding individuals involved in the commercial sex trade. Too often, trafficking victims are wrongly discounted as consenting adults. For most people—certainly for Officer Brown—the term "human trafficking" conjures up images of women and girls locked in closets, hidden from sight and physically subdued. It seems to be a foreign concept that a woman found on the streets alone, seemingly of her own free will and with the ability to walk away at any time, could also be a victim in need of social services as opposed to a criminal to be prosecuted.

While the use of violence against girls and women in cases of sex trafficking is common, the U.S. State Department's 2011 Trafficking In Persons Report (TIP Report) points out that "there are other more subtle forms of fraud and coercion that also prevent a person from escaping compelled servitude."⁵⁰ The TIP Report explains that whether a girl or woman was kidnapped or coerced into selling her body for money, believes that

⁴⁸ *Supra* note 1.

⁴⁹ *Id.*

⁵⁰ *Supra* note 2.

she has a romantic relationship with her trafficker, or may have consented to entering into the commercial sex trade initially, “none of these factors, taken alone or in sum, means that she or he is not a victim of a severe form of trafficking.”⁵¹ In fact, in Sweden, “any woman selling sex has been forced to do so, either by circumstance or coercion.”⁵² Training people to understand this concept is “an important step in shifting attitudes about commercial sex.”⁵³

This misperception—that domestically trafficked girls and women are making a choice to enter or remain in the life—is a huge roadblock in the way of the passing of key legislation that would hopefully mimic Sweden’s success. Rachel Lloyd, founder of Girls Educational and Mentoring Services (GEMS) for women and girls who have been trafficked, says, “When it comes to girls who are commercially sexually exploited, or trafficked, we keep saying, ‘Well, why doesn’t she just leave?’ Society doesn’t have a lot of empathy for girls who have been in the life.”⁵⁴

Lloyd further explains: “When we talk about girls and young women as prostitutes...[that word] has so much stigma attached to it...whereas when you talk about a young person being trafficked or exploited...the “ed” on the end makes it something that happened to them. It’s not who they are.”⁵⁵ Something as simple as changing the vernacular used to describe women and girls in the commercial sex industry can change not only how these women view themselves but also how they are viewed by society as a whole.

⁵¹ *Id.*

⁵² *Supra* note 25.

⁵³ *Supra* note 2.

⁵⁴ *Supra* note 1.

⁵⁵ *Id.*

The intent of the adoption of a Trafficked Person Syndrome is to shift cultural and societal views away from a blaming, “choosing” or “acceptance” perception and towards the view that sex trafficking is something that happened to a person, a crime that was perpetrated by a pimp or trafficker against someone. The adoption of this syndrome will hopefully also lead to an eventual shift in legislation as well.

Changing the society’s perception of persons involved in the commercial sex trade is the first step in changing the laws. If we do not view these people as victims of anything, why would we enact legislation to stop prosecution and start helping them? As Rachel Lloyd writes in her book *Girls Like Us*, “The sex industry isn’t about choice, it’s about lack of choices.”⁵⁶

c) Will it work?

The results of the adoption of the Swedish model show that society’s perceptions of victims of the commercial sex trade can be changed. Before the implementation of the Sweden's National Rapporteur on Human Trafficking, Kaisa Wahlberg, explained in an interview with CNN that “Sweden was ridiculed for its approach...I was told ‘you can’t do that. It’s impossible.’ People could not even get it into their minds that it would have any effect on trafficking.”⁵⁷ In the early years after the laws were changed, many felt that because there was no immediate positive effect, the legislation was a failure and would never have the intended effect of eliminating prostitution in Sweden.⁵⁸ Now, after more than a decade of steadily decreasing numbers of girls and women involved in sex

⁵⁶ *Supra* note 17 at 219.

⁵⁷ *Supra* note 25.

⁵⁸ *Supra* note 14.

trafficking and prostitution, approximately 80% of Swedish citizens approve of the legislation.⁵⁹

Furthermore, according to one Swedish prosecutor, a person who buys sex is colloquially referred to as a bottom-feeder⁶⁰ in Sweden. “They’re called a ‘cod,’ a fish...it’s the same word as a loser, or [someone who] gets called by the police, or runs out of gas in his car. You’re a loser if you buy sex in Sweden.”⁶¹

The adoption of “Trafficked Person Syndrome” will hopefully do what Battered Woman Syndrome did in the 1980’s—bring attention to a national problem, shedding light on the unfairness and impracticality of certain laws and methods of law enforcement. Created and promulgated by Dr. Lenore E. Walker in the 1980’s, Battered Woman Syndrome (BWS) is a syndrome identified by empirical data and research based on Dr. Walker’s extensive surveys of women in battering relationships. BWS helps to explain the behavior of domestic violence survivors that outsiders may not understand—behaviors such as returning to an abuser, refusing to press charges or leave the abuser, or why a woman who may have killed her abuser should be viewed as having acted in self-defense rather than with premeditation.⁶²

This was a difficult concept for many jurors since the woman often killed her abuser at a time where—to an outsider—an attack was not occurring or even imminent. As BWS explains, women who suffer from this syndrome experience symptoms of Post-Traumatic Stress Disorder (PTSD) which causes them to believe that even in situations

⁵⁹ Id.

⁶⁰ Clare Tremblay, *Going Dutch*, OTTOWACITIZEN.COM, December 3, 2011 <http://www.ottawacitizen.com/news/Going+Dutch/5805904/story.html>

⁶¹ *Supra* note 25.

⁶² *See* Lenore E. Walker, *THE BATTERED WOMAN SYNDROME* (Sheri W. Sussman ed. 3rd ed. 2009). *See also* Mary Ann Dutto, *Update of the “Battered Woman Syndrome” Critique*, 3 (August 2009) available at http://www.vawnet.org/Assoc_Files_VAWnet/AR_BWSCritique.pdf

where there may not be a present physical attack or threat, they are in immediate physical danger such that the use of deadly force is both necessary and justified. In these cases, Battered Woman Syndrome is intended to assist survivors of domestic violence in an effective self-defense theory that—with the adoption of the syndrome—could now be bolstered through expert testimony.⁶³ Furthermore, courts have continued to expand use and acceptance of BWS despite a relatively recent call in legal evidentiary doctrine which requires “more stringent, methodological review, rigor and acceptance” when it come to admitting expert testimony.⁶⁴ Although Battered Woman Syndrome is not a complete and recognized legal defense in and of itself,⁶⁵ the incorporation of BWS into the legal world certainly assisted the assertion of claims of self-defense for domestic violence survivors who had killed their abusers in non-imminent situations.⁶⁶

BWS has also been employed as an “educational tool” used to raise public awareness of the repercussions and effects that domestic violence can have on women.⁶⁷ There was initially a need for a mitigating defense because of both a lack of police response to protect victims of domestic violence and gender inequality generally in the criminal justice system.⁶⁸ A husband’s violence against his wife was long tolerated by society and the law⁶⁹ and by the mid-19th century, the women’s movement and women’s rights were only beginning to gain momentum. Women were often without legal remedies and services, and support for women living in situations of domestic violence was low. In fact, despite the prevalence of domestic violence and the fact that wife-

⁶³ Brenda Russell, BATTERED WOMAN SYNDROME AS A LEGAL DEFENSE, HISTORY, EFFECTIVENESS AND IMPLICATIONS, 30-33 (McFarland 2010).

⁶⁴ *Id.* at 6. *See also infra* note 133.

⁶⁵ *Supra* note 63.

⁶⁶ *Id.*

⁶⁷ *Supra* note 63 at 3.

⁶⁸ *Id.*

⁶⁹ *See Mangum infra* note 73 at 596-597.

beating had been categorized as an assault crime in most states for decades,⁷⁰ the first battered women's shelter in the United States did not appear until 1974.⁷¹

Like survivors of sex trafficking, domestic violence survivors are viewed as choosing to remain in their situation and therefore as willingly participating in an abusive relationship or having some amount of ownership in the abuse they suffer. Despite the fact that an abused woman is at the highest level of risk from her abusive partner when she leaves or tries to leave the relationship, Lenore E. Walker points out that when it comes to survivors of domestic violence, "the most frequently asked question continues to remain, 'Why doesn't she leave?'"⁷²

With the women's movement of the 1960's and 70's and the promulgation of BWS in the 1980's, important legal and societal changes also began to occur. Importantly, one scholar notes that "as the Battered Woman Syndrome developed in social science literature and within the general public, legislative changes followed."⁷³ Despite centuries of gender inequality in the justice system and in society in general,⁷⁴ social and legal notions about survivors of domestic violence began to shift. Juries were given a concrete way to look beyond their outsider point of view of women and their abusers and survivors of domestic violence who killed their abusers were no longer caught in a situation of legal inequality.

The women's movement and the adoption of Battered Woman Syndrome led to a major shift in legal and societal views of survivors of domestic violence. The lifting of

⁷⁰ *Supra* note 63 at 6.

⁷¹ *Id.*

⁷² *Supra* note 62 at 23. *See also infra* note 110.

⁷³ *Supra* note 63 at 5. *See also* Finley Mangum, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution of Expert Testimony on Battering*, 19 B.C. Third World L. J. 593, 594-95 (1999) (noting the shift in prosecutorial response to domestic violence with the emergence of battered woman syndrome advocacy and evidence).

⁷⁴ *See supra* note 63.

domestic violence and its survivors out from under societal taboos led not only to open discussion and thought about the topic but also to the demand for more to be done, including vital services and even altering legal defenses to support survivors of domestic violence. The adoption of Trafficked Person Syndrome would hopefully mirror the change that BWS helped to bring about. Now there are numerous services and organizations dedicated to helping survivors of domestic violence. Our society should begin devoting similar services and resources to victims of the commercial sex trade.

With the adoption of a “Trafficked Person Syndrome,” we can stop viewing these women and girls as people choosing to participate in the sex trade and start viewing them as survivors of sex trafficking in need of social services and understanding. With a change in the way society perceives survivors of sex trafficking would hopefully come a change in the country’s prostitution laws. This would ideally include the decriminalization of the sale of sex for money by a “prostitute” while outlawing the purchase of sex for money. This change in legislation would mimic the laws passed in Sweden, giving the women are given access to services that can give them a way out of the life, while punishing the johns and pimps.

The world of sex trafficking is not a situation where we can affect demand simply by reducing supply, as seen in the unsuccessful attempts in the United States to arrest the women and not the johns. The numbers show that this method simply does not work⁷⁵—there is and will always be a cheap supply of women and girls for traffickers to exploit. This is a situation where we must affect the supply by erasing the demand; by making the purchase of sex an effectively prosecuted offense and offering the women and girls caught up in the commercial sex trade help instead of doing them harm.

⁷⁵ See *supra* note 32.

II. Trafficked persons and battered women: the similarities and the differences

With many similarities in the situations of survivors of both sex trafficking and domestic violence, Battered Women Syndrome is a good starting point for the development of Trafficked Person Syndrome. Domestic violence and sex trafficking share many likenesses: domestic violence often includes instances of sexual violence⁷⁶ and survivors of sex trafficking almost across-the-board experience physical violence at the hands of their pimp, trafficker or johns.⁷⁷ While the two situations are similar, there are also important differences that make Battered Woman Syndrome a less than perfect fit for survivors of sex trafficking. I will now explore the similarities and differences of the two syndromes.

a) The Background

**“The important thing to remember when you’re thinking about human trafficking is that the victims are just like us. They could be anyone.”⁷⁸
-Luis CdeBaca, Ambassador-US State Department**

“There is not one consistent face of trafficking victim.”⁷⁹ He or she can belong to any socio-economic group, be of any race, and come from anywhere in the world.⁸⁰ In his book, Kevin Bales explains that “pimps are equal opportunity exploiters: age, color, gender, and ethnicity are irrelevant,”⁸¹ and therefore the backgrounds of sex trafficking victims are diverse and not easily categorized.

There are, however, certain groups that are particularly vulnerable to traffickers’ recruitment tactics. One such group is youth (namely, young girls) who have run away

⁷⁶ See *supra* note 62.

⁷⁷ *Trafficking and Sexual Violence*, PENNSYLVANIA COALITION AGAINST RAPE. (last accessed April 15, 2012) available at <http://www.pcar.org/trafficking-and-sexual-violence>.

⁷⁸ *Supra* note 1.

⁷⁹ Human Trafficking, POLARISPROJECT.ORG, www.polarisproject.org (last visited Apr. 15, 2012)

⁸⁰ See *supra* note 3.

⁸¹ *Id.* at 90.

from home or who are living in homelessness.⁸² It is estimated that 1.6 million youth experience homelessness in a given year, and this estimate only includes data on youths between 12-17.⁸³ Of these, 52% are female.⁸⁴ Nationally, approximately 450,000 children run away from home per year and “one out of every three teens on the street will be lured toward prostitution within 48 hours of leaving home.”⁸⁵ A 2001 study on “runaway/throwaway youth” and exploitation revealed that approximately 162,000 homeless youth were estimated to be victims of commercial sexual exploitation in the United States.⁸⁶

Research has also identified some commonalities among the backgrounds of commercially sexually exploited girls. One pervasive characteristic or risk factor for commercially sexually exploited girls is a history of sexual abuse in childhood.⁸⁷ Studies of adult women who have been commercially sexually exploited show that childhood sexual abuse increases the risk of commercial sexual exploitation later in life.⁸⁸

Similarly, while many battered women come from abusive homes, there is no one defining background factor that can predict a woman’s potential involvement in an abusive relationship. The battered woman “is all ages, all ethnicities, from all

⁸² *Supra* note 79.

⁸³ NATIONAL NETWORK FOR YOUTH, (last accessed April 15, 2012) <http://www.nn4youth.org/our-work>.

⁸⁴ *Id.*

⁸⁵ *Who is there to Help Us? How the System Fails Sexually Exploited Girls in the United States: Examples from Four American Cities*, END CHILD PROSTITUTION, CHILD PORNOGRAPHY AND TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES. (last accessed April 15, 2012) <http://ecpatusa.org/wp-content/uploads/2010/11/Who-Is-There-to-Help-Us.3.pdf>

⁸⁶ *See Fast Facts*, NATIONAL NETWORK FOR YOUTH available at http://www.nn4youth.org/system/files/FactSheet_Unaccompanied_Youth_0.pdf. *See also* Heather J. Clawson, Nicole Dutch, Amy Solomon and Lisa Goldblatt-Grace, *Human Trafficking into and Within the United States: A Review of the Literature* (2009) available at <http://aspe.hhs.gov/hsp/07/humantrafficking/litrev/#Other>

⁸⁷ *See* Clawson *supra* note 86.

⁸⁸ *Id.* (citing Raphael, J., LISTENING TO OLIVIA: VIOLENCE, POVERTY, AND PROSTITUTION (Northeastern University Press 2004).

socioeconomic groups.”⁸⁹ Like the backgrounds of survivors of human trafficking, research on the backgrounds of battered women has found commonalities among survivors of domestic violence.

b) The Relationship

Many trafficked girls begin by having a relationship with their future pimps. They are wined and dined, told they are loved, etc. Then the isolation, threats, beatings, control over money, etc. comes into play. They have the added problem that their pimps will often also get them hooked on physical dependency on drugs.⁹⁰ Eventually, pimps use force, fraud and coercion to control the women they traffic. They use beatings, gang rape, torture, and feigned love and affection.⁹¹ They use economic control by withholding money. They “create an atmosphere of terror.”⁹² They create drug dependency in their victims, then “use that addiction to control them.”⁹³

In *The Slave Next Door: Human Trafficking and Slavery in America Today*, Kevin Bales and Ron Soodalter describe the “pimp’s process.”⁹⁴ First, he dates the girl, and the two engage in a real relationship. Bales and Soodalter explain that this initial stage in the pimp’s process is called “copping.”⁹⁵ The woman believes she is in a “‘normal’ man-woman relationship” and is usually unaware that the man is a pimp or is involved in prostitution at all⁹⁶. Once the pimp has earned the girl’s trust and affection, the second phase begins in which the pimp turns on the girl or woman he has been

⁸⁹ Donna Moore et al., *BATTERED WOMEN 20* (SAGE Publications 1979)

⁹⁰ See Bales *supra* note 3.

⁹¹ See Bales and Lloyd, generally.

⁹² Bales *supra* note 3 at 90.

⁹³ *Id.*

⁹⁴ *Id.* at 84.

⁹⁵ *Id.* at 90.

⁹⁶ *Id.*

“dating.”⁹⁷ He uses physical violence as well as threats against her family and forces her into prostitution. This is the “turning-out” phase.⁹⁸ The third phase “involves both the physical and psychological manipulation of the woman” which the pimp uses to keep her trapped in “the life.”⁹⁹

Battering relationships have a similarly identifiable pattern to the relationship, which also includes manipulation and threats by the abusive partner towards the battered partner. This is known as the cycle theory of violence, promulgated by Lenore E. Walker in her studies of women in battering relationships.¹⁰⁰ This theory describes the typical pattern or cycle that battering relationships exhibit: 1) tension building, 2) acute battering, and 3) loving contrition.¹⁰¹ The first phase of the cycle involves a growing hostility on the part of the batterer and an attempt by the battered partner to placate him.¹⁰² Any small success the battered partner has here reinforces her belief that she has control and influence over the abusive situation.¹⁰³ The second “acute battering” stage involves the verbal and/or physical abuse, manifesting as a battering event that is the result of the tension-building phase. In the “loving contrition” phase, the abusive partner shows the battered partner kindness, promises, and remorse. This provides “positive reinforcement for remaining in the relationship for the woman.”¹⁰⁴ The cycle then repeats over the course of the relationship.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Supra* note 61.

¹⁰¹ *Id.* See also Leti Volpp, (Mis)Identifying Culture: Asian Women and the “Cultural Defense,” 17 *Harv. Women's L.J.* 57, 101 note 150.

¹⁰² *Supra* note 62 at 91.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 94.

These cycles are not omnipresent, however, and reports on the number of battering relationships that actually consistently exhibit certain phases vary.¹⁰⁵ Similarly, the patterns described above regarding the relationships of traffickers and their victims are not present in all situations of human trafficking. Many girls and women are not enticed through the promises of a trafficker, but are simply kidnapped and thus forced into “the life.”¹⁰⁶

c) The Staying

As Ambassador Luis CdeBaca of the U.S. State Department explains, “The traffickers are very good at exploiting not just fear on the part of their victims, but hope. What do they do? They tell the girl that they love them. They tell the woman that they’re going to have a better life and a better opportunity. That’s how they start. How they end, though, is through force, through violence, through coercion, to make sure that once in the trap, the woman or the girl can never leave.”¹⁰⁷

It takes a lot for a victim of human trafficking to get up the courage to leave. After experiencing coercion, violence, threats to her person and family, the typical human trafficking victim is unlikely to run. One girl who attended the GEMS program stayed away from her pimp for 18 months while he was in jail. Within three hours of his release, she had not only met with him, she was working back on the streets at his demand.¹⁰⁸ Furthermore, as CdeBaca notes, the psychological element that the traffickers

¹⁰⁵ Id. at 95. *See also supra* note 96. According to Walker, 65% of cases showed evidence of the tension-building phase prior to the battering event. 58% of cases showed evidence of a loving contrition phase. Walker points out that even cases without any “observable loving-contrition behavior” can still include positive reinforcement for the woman remaining in the relationship.

¹⁰⁶ *See Lloyd supra* note 17 (discussing accounts of girls and women both seduced by pimps into “the life” as well as girls physically forced and held in prostitution). *See also Bales supra* note 3.

¹⁰⁷ *Supra* note 1.

¹⁰⁸ *Supra* note 17 at 192.

use against the girls they traffic keeps them convinced that if they did run, they would have nowhere to go.¹⁰⁹

The fact that many women and girls trafficked for sex can be seen walking the streets at night—seemingly alone—getting into cars or meeting johns at a location, and presumably engage “willingly” in sex for money is a point of confusion and only distorts the fact that this is anything but unwilling coercion at best, physical intimidation and force at worst.

As the cycle theory of violence demonstrates, many women in battering relationships remain in those relationships, seeming to return to the abuse. One view on women who stay in such situations was (and is) centered on the idea that these women are free to leave and should. As Susan Schechter points out, this line of thinking ignores the fact that many women in such situations have no real alternative, often with no money or no place to go.¹¹⁰

d) The Differences

In the typical case where BWS is invoked in support of a claim of self-defense, the battered woman commits one illegal act at one time—usually, killing her abuser. The woman is charged with murder and she invokes BWS in support of a self-defense claim. Despite this difference, survivors of domestic violence still faced a stigma of public misperception about their relationships and the fact that they seem to choose to stay in abusive relationships.

Trafficked women and girls, on the other hand, are routinely committing the offense they are arrested for—prostitution. The repetition of the illegal act perpetuates

¹⁰⁹ *Supra* note 105.

¹¹⁰ Susan Schechter, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLE OF THE BATTERED WOMEN'S MOVEMENT* (South End Press 1983).

the misperception that there is some element of choice. Also, the fact that girls and women are arrested for prostitution not only feeds perceptions that the girls are the ones doing something wrong and should be punished, but also reinforces what the traffickers and pimps are trying to convince the girls: that they cannot and should not seek help because the police will only put them in jail for prostitution.¹¹¹

III. Trafficked Person Syndrome

a) What would it look like?

Battered Woman Syndrome is identified by six sets of criteria.¹¹² The first three symptoms mirror Post-Traumatic Stress Disorder while the remaining factors are present in what is called “intimate partner victims.”¹¹³ The factors that BWS shares with PTSD are: 1) Intrusive recollections of the trauma event, 2) Hyperarousal and high levels of anxiety, and 3) Avoidance behavior and emotional numbing which typically manifest as depression, dissociation, minimization, repression and denial.¹¹⁴ These symptoms are unsurprisingly also found in degrees of prevalence in survivors of sex trafficking.

i) Intrusive recollections of the trauma event

Intrusive recollections are pervasive, unwelcome memories that are pervasive and inescapable, sometimes resulting in a PTSD flashback, during which the individual actually relives the event.¹¹⁵ The traumatic event is described as “having a life of its own.”¹¹⁶ In a 2006 survey on the mental health of survivors of sex trafficking, 75%

¹¹¹ See Lloyd *supra* note 17.

¹¹² *Supra* note 63 at 42. See also Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*. 11 Yale J.L. & Feminism 3, 41 (1999).

¹¹³ *Supra* note 63.

¹¹⁴ *Supra* note 112.

¹¹⁵ FRONTLINE interview of Dr. Matthew Friedman, PBS. available at <http://www.pbs.org/wgbh/pages/frontline/shows/heart/themes/ptsd.html> (Dr. Matthew Friedman is the Executive Director of the VA National Center for PTSD).

¹¹⁶ *Id.*

reported severe recurrent thoughts or memories of terrifying events, 52% reported severe symptoms of feeling as though the event is happening again, and 54% reported severe recurrent nightmares.¹¹⁷ Similarly, in a 1994 survey of women in battering relationships, “intrusive recollections” was the most common symptom appearing in battered women, with a prevalence rate of 90%.¹¹⁸

ii) Hyperarousal and high levels of anxiety

The second criteria include in both Battered Women Syndrome and PTSD is the symptom of hyperarousal and a high level of anxiety.

In the survey of battered women, 75% of the women reported experiencing this symptom.¹¹⁹ These symptoms have also been observed in survivors of sex trafficking. One study found that 91% of survivors surveyed experienced nervousness or shakiness inside, 61% reported terror or panic spells, and 85% were observed to exhibit fearfulness.¹²⁰ 67% reported severe symptoms of being jumpy or easily startled.¹²¹

iii) Avoidance behavior and emotional numbing

In the same survey of survivors of sex trafficking, 60% reported feeling severely detached or withdrawn and 44% reported a severe inability to feel emotion.¹²² Furthermore, 61% marked as “severe” the avoidance of activities that remind them of the traumatic or hurtful event and 58% reported severe symptoms of avoiding thoughts or

¹¹⁷ Erin Williamson, Nicole M. Dutch, and Heather J. Clawson, *Evidence-Based Mental Health Treatment for Victims of Human Trafficking*, US DEPARTMENT OF HEALTH AND HUMAN SERVICES. <http://aspe.hhs.gov/hsp/07/humantrafficking/MentalHealth/index.shtml> (citing Zimmerman et. al, 2006)

¹¹⁸ Saunders, D. G., *Posttraumatic stress symptom profiles of battered women: A comparison of survivors in two settings*, VIOLENCE AND VICTIMS 2004, 9 (1), 31-44 available at http://digital.library.unt.edu/ark:/67531/metadc2209/m1/1/high_res_d/thesis.pdf

¹¹⁹ Id.

¹²⁰ *Supra* note 117.

¹²¹ Id.

¹²² Id.

feelings associated with the traumatic events.¹²³ The study of battered women revealed that 75% of women surveyed reported hyperarousal.¹²⁴

iv) Other symptoms

Battered Woman Syndrome has three more sets of criteria that are not criteria for a diagnosis of PTSD but are found in “intimate partner victims¹²⁵.” These additional symptoms were added by Lenore E. Walker in 2006¹²⁶ and include 1) a disruption to interpersonal relationships due to the batterer’s power and control measures, 2) distorted body image and/or somatic or physical ailments, and 3) issues with sexual intimacy.¹²⁷

While it is likely that many—if not most—survivors of human trafficking could potentially exhibit the same symptoms that are in fact criteria of Battered Woman Syndrome itself, it is important to have a separate Trafficked Person Syndrome for several reasons. First, not all survivors of human trafficking had a relationship with their trafficker and therefore could not properly be said to have been in an abusive relationship or suffer from “intimate partner” abuse. Also, because the goal of Trafficked Person Syndrome is to raise awareness about sex trafficking and change perception about and legal responses to survivors, it would be counter-productive in this regard to lump survivors of sex trafficking in with survivors of domestic violence.

Other symptoms that could be included in the definition of “Trafficked Person Syndrome” are trouble sleeping or feeling as if she didn’t have a future.¹²⁸ Both of these symptoms were reported in high numbers among survivors of sex trafficking.¹²⁹ Another

¹²³ *Id.*

¹²⁴ *Supra* note 118.

¹²⁵ *Supra* note 62 at 42.

¹²⁶ *Supra* note 63.

¹²⁷ *Supra* note 62 at 42.

¹²⁸ *Supra* note 117.

¹²⁹ *Id.*

possibility is the symptom of experiencing sudden emotional or physical reaction when reminded of the most hurtful or traumatic events, reported in 65% of the survivors surveyed.¹³⁰

Also, survivors of sex trafficking have often “experienced, witnessed, or [been] confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others” and their response to these events frequently involves “intense fear, helplessness, or horror.”¹³¹ More research done on survivors of human trafficking will result in better and more comprehensive data and will assist in the creation of a complete and accurate Trafficked Person Syndrome.

b) What would it do?

As previously discussed, the goal of the adoption of a “Trafficked Person Syndrome” is twofold. The first goal is that it will be a concrete basis for a change in society’s views on girls and women who have been trafficked for sex, highlighting that trafficking was something that happened to them. This will hopefully help to dispel the misperception that any amount of choice is involved in the lives of trafficked persons.

Legally, the adoption of “Trafficked Person Syndrome” is intended to make two changes; one short-term, the other long-term. In the immediate future, it will make an affirmative defense to the crime of prostitution (and potentially to human trafficking itself) easier and hopefully encourage more states to adopt affirmative defenses to prostitution laws. In the long-term, the intent is that “Trafficked Person Syndrome” will lead to a change in the legislation, giving Congress a push to follow in Sweden’s

¹³⁰ Id.

¹³¹ Id.

footsteps by decriminalizing the sale of sex and heightening the criminal penalties for the purchase of sex.

Some states have adopted different versions of an affirmative defense for victims of trafficking who are charged with prostitution. For example, New Jersey's prostitution statute allows for an affirmative defense for prostitution if the person being charged was a victim of human trafficking at the time of the offense.¹³² However, such laws require that the victim first prove that he or she was a victim of trafficking. Proving this sufficiently to qualify for the affirmative defense can be problematic for a variety of reasons. New Jersey's law also requires that the individual charged be a victim of human trafficking at the time of the offense. This completely disregards the fact that a person may have been trafficked into the commercial sex industry, but may have been unable to escape from the situation. It also reinforces the idea that a person can be involved in prostitution but not be a victim, as well as the misperception that such individuals really have the ability to leave all along. If accepted, Trafficked Person Syndrome can assist in an individual's affirmative defense against prostitution charges in states with statutes that provide for such defenses. Hopefully, it will also encourage more states to allow for similar defenses and support the long-term, comprehensive solution of adopting the Swedish method in the United States in the near future.

¹³² *Supra* note 28.

c) What it would not do: The Daubert standard and admissibility of scientific evidence relating to syndromes

The Daubert standard governs the admissibility of scientific evidence in court.¹³³ In Daubert v. Merrell Dow Pharmaceuticals, the Supreme Court of the United States decided that trial court judges would be the gatekeepers of scientific evidence presented to juries by expert witnesses.¹³⁴ Judges are responsible for “determining the admissibility of scientific expert testimony by determining that the evidence supporting that opinion is valid.”¹³⁵ The goal is to ensure that only reliable scientific evidence is presented to juries when expert witnesses are needed in court. As a result of the Court’s determination in the Daubert case, the courts have created a set of typical standards for determining the admissibility of scientific evidence. These standards include (i) falsifiability of the information or research used or presented by the expert, (ii) the “known or potential error rate” associated with applications of a theory, (iii) whether the findings have been subjected to peer review and publication; and (iv) the “general acceptance” of the science being offered.¹³⁶ While the Court in Daubert emphasized that there it was not creating an exhaustive, rigid list of factors but instead a flexible and open-ended list,¹³⁷ factors such as those listed above are generally what courts consider in deciding the admissibility of scientific evidence presented.

Expert testimony presenting research on syndromes—including Battered Woman Syndrome—has been heavily criticized as inadmissible due to unreliable methodology

¹³³ See Daubert v. Merrell Dow Pharms., 509 U.S. 579 (U.S. 1993). See also David L. Faigman et al., *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY*, Vol. 1 (Thompson Reuters/West 2010) generally.

¹³⁴ *Id.*

¹³⁵ Faigman at 21.

¹³⁶ *Infra* note 140.

¹³⁷ *Id.* at 594-95.

under the Daubert guidelines. Expert testimony on a diagnosis of a syndrome is scientific evidence and therefore an expert's methods for making that diagnosis have to meet the Daubert standard to be admissible in court. Though evidence of Battered Woman Syndrome and PTSD have gained wide acceptance in courts, there are instances where expert testimony and methodology supporting a diagnosis of these syndromes do not withstand the Daubert guidelines.¹³⁸ One criticism of such methodology is that the very nature of social and behavioral science theories which underlie expert testimony on syndromes may be "inherently inconsistent" with Daubert's requirements regarding falsifiability and potential error rates.¹³⁹ Another criticism is that judges do not have a firm enough understanding of scientific principles and methodology in general to evaluate those principles and methods accurately and in a manner that is helpful to the gatekeeper function.

Clearly, expert testimony regarding a diagnosis of Trafficked Person Syndrome would have the same difficulties regarding evidentiary support that testimony on Battered Women Syndrome has had. Also, just as Battered Women Syndrome did not create a complete defense to murder, TPS in and of itself will likely not become a legal defense to either prostitution or human trafficking. With its novelty and relatively little scientific, medical or psychological development and research, it is an example of a syndrome that simply has not been sufficiently developed as a theory to allow for proper application of the guidelines offered by Daubert. With proper methodology and acceptance in the legal

¹³⁸ Stephen P. Sonnenberg and Maria A. Audero, *Post-Traumatic Stress Disorder*, N.Y. L.J. 2 (2010), available at <http://www.paulhastings.com/assets/publications/1562.pdf> (giving examples of expert testimony methodology regarding PTSD diagnoses that did and did not meet Daubert standards in certain litigation). See also James T. Richardson, Gerald P. Ginsburg, Sophia Gatowski, and Shirley Dobbin, *The problems of applying Daubert to psychological syndrome evidence*, 11 at n. 3 *Judicature* 79, no. 1 (July-Aug 1995) (discussing problems with expert testimony and methodology regarding syndromes in general and its application in courts).

¹³⁹ *Id.*

and medical communities, expert testimony on Trafficked Person Syndrome certainly has the potential to be admitted in court. Its evidentiary support issues notwithstanding, TPS will still hopefully help to spur legislative changes in the United States regarding victims of the commercial sex industry.

IV. Potential Problems

a) More harm than good?

Some criticisms of BWS include that the terminology and adoption of a “syndrome” was hurting as much as it was helping. Now, many expert witnesses and advocates prefer the term “battering and its effects.”

It would be a disservice to survivors of human trafficking to label or identify them negatively through the recognition of a “Trafficked Person Syndrome.” One suggestion proposed is that it may be more productive to use the term “trafficking and its effects,” modeling the shift in terminology that Battered Woman Syndrome has undergone in recent years. The term “trafficking and its effects” focuses more on the act of trafficking and the crime the traffickers (and pimps and johns) have committed that is wrong and detrimental, as opposed to focusing on something that is perceived as “wrong with” survivors of sex trafficking who can be said to suffer from “Trafficked Person Syndrome.”

However, its inadmissibility as evidence in court notwithstanding, TPS does have useful applications that are worth exploring. Ian Freckleton, an authority on the law regarding admissibility of expert evidence,¹⁴⁰ states that while battered woman syndrome and rape trauma syndrome do not meet the Daubert guidelines, they are “useful as

¹⁴⁰ *Id.* at 12.

therapeutic tools.”¹⁴¹ The goal of Trafficked Person Syndrome is to be a similar tool, potentially valuable as both a therapeutic tool and a catalyst, changing societal perceptions of survivors of human trafficking and encouraging a change in state prostitution laws.

V. Conclusion

While expert testimony of not admissible in court as scientific evidence (at least not yet), Trafficked Person Syndrome has a number of important uses. First, it will help to acknowledge survivors of human trafficking—and hopefully, anyone in the commercial sex industry at all—as victims of force, fraud, coercion, or circumstance. A shift in societal perception of those involved in the commercial sex trade from people “choosing” sex work to individuals who are victims of something is an important step in changing the legislation of the states. Once these women and girls are viewed as victims of a crime, an incentive will arise to help them through social services instead of punish them through the criminal justice system.

Hopefully, the recognition of a Trafficked Person Syndrome will also encourage states to create legislation that punishes the purchasers of sex, emulating the vastly successful Swedish model. Where other countries have tried and failed to implement successfully the Swedish method, the US can succeed by adopting the comprehensive Swedish method as opposed to just the legislation. With the combination of progressive views of victims, vital social services for survivors, retraining of police to enforce effectively the instrumental legislation, and the reformed law itself, the US will be on the road to achieving the same success the Swedish model has had in eradicating prostitution

¹⁴¹ Id. at 13.

(and hopefully sex trafficking in general) within its borders and leaving the commercial sex industry in the past for good.