

The Illinois Predator Accountability Act:

A Sleeping Giant

By Christopher P. Keleher

The Illinois Predator Accountability Act of 2006 has lain dormant – surprisingly, the author argues, because it could spell the demise of the sex trade by allowing sexually exploited persons to sue pimps, brothels, and customers. Here’s a look at the law’s potential and pitfalls.



Laws are most effective when they prevent the exploitation of people. The sex trade is exploitation in its rawest form. Occupational hazards include drugs, disease, and violence. Reflecting their shunned societal status, prostitutes are often kept at the margins of legal discourse.

In the face of such realities, the Illinois Predator Accountability Act¹ represents an upheaval. No state has moved so invasively against those who profit off sex trade workers.

The rationale of the Illinois General Assembly is simple. The legal system’s approach to sexual exploitation and trafficking is outmoded. Worse, it is toothless. Money moves pimps and traffickers, and endangering their wealth may drive them out.

Prostitution is a controversial issue. But even its most ardent defenders would agree that no one should be forced into the profession. The Illinois

General Assembly has concluded that giving sexually exploited persons a private cause of action will reduce exploitation and trafficking. This article considers whether the Illinois Predator Accountability Act can do so.

The essentials of the Illinois Predator Accountability Act

The Act came into effect in July of 2006. Ground-breaking, its enactment was accompanied by signifi-

1. 740 ILCS 128/1 Illinois Predator Accountability Act.

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cant fanfare. But expectations have since waned. It appears no lawsuit has ever been brought under the Act. No court has interpreted, applied, or discussed the Act. Even legal commentary has been minimal. This void notwithstanding, the law warrants attention.

The language of the Act is straightforward. It “allow[s] persons who have been or who are subjected to the sex trade to seek civil damages.”² “Sex trade” is defined clinically: “any act, which if proven beyond a reasonable doubt could sup-

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port a conviction for a violation or attempted violation of” soliciting a prostitute, pandering, keeping a place of prostitution, pimping, obscenity, or trafficking of persons.³ The definition thus encompasses street level prostitution, pornography, escort services, and massage parlors.

Plaintiffs under the Act include persons sexually exploited, sexually trafficked, or solicited to act as prostitutes.⁴ Those appearing in obscene materials, including child pornography, can also sue.⁵

Plaintiffs must prove the defendant caused long-term physical or emotional harm due to trafficking, pimping, or abusing them in any form while keeping them in the sex trade.⁶ They must also detail their injuries.⁷ A pattern of incidents need not be shown, once is enough.⁸ Plaintiffs can recover compensatory damages, punitive damages, and attorney’s fees.⁹ The statute of limitations is generous – 10 years from the last act involving the sex trade.¹⁰

The Act targets those who exploit persons in the sex trade.¹¹ A cause of action exists “against a person or entity who recruits, profits from, or maintains the victim in any sex trade act.”¹² The pool of potential defendants is diverse, ranging from the street level pimp to the escort agency to the buyer. Other defendants include those that knowingly advertise or publish advertisements recruit-

ing women into the sex trade.¹³

Beyond these obvious targets, the Act goes one step further. The sex trade is a multifaceted industry with legitimate businesses such as taxi services and hotels occasionally playing peripheral roles. Such a business can be liable under the Act if it “knowingly receives a higher level of compensation...than it generally receives from customers.”¹⁴

An integral part of the Act is the defenses that cannot be invoked. Indeed, to be called a “defendant” under the Act is a misnomer; those sued are rendered virtually defenseless. The Act eliminates plaintiff’s consent or payment for the service as defenses.¹⁵ That the plaintiff remained with the pimp is not a defense.¹⁶ Marital, sexual, or familial relations between the parties are immaterial.¹⁷ Finally, plaintiff’s criminal conduct is not a defense.¹⁸ Thus, plaintiffs’ lopsided balance of power

in the courts resembles what defendants enjoy in the streets.

Dulling the lures of the sex trade: The benefits of the Act

The sex trade is often viewed in an unrealistically sanguine light. The Illinois General Assembly looked at the dark realities. The U.S. Department of Justice estimates that up to three million children are ensnared in the global sex trade.¹⁹ Many are trekked through Chicago.²⁰

Through the fortuity of geography, Chicago is ground zero for the American sex industry. In Chicago alone, upwards of 25,000 women are involved in prostitution each year.²¹ The number of youth prostituted yearly in Illinois approaches 7,000.²²

The Illinois General Assembly concluded that the sex trade thrives on coercion. While some may dispute that assessment, it is well established that many individuals are forced into the trade.²³

Some are enticed by lies of legitimate work in a foreign land.²⁴ Others may enter desperate for money. However one enters the trade, most find the exit sealed by drug addiction, illegal status, language barriers, and physical abuse. Exploited and trafficked persons thus have little recourse to fight their oppressors. The Act changes that dynamic.

Studies confirm that free will is at a

nadir in the sex trade. This reflects what common sense suggests – few people choose to be degraded. Of women in the sex trade:

- 62 percent are prostituted before the age of 18;
- 86 percent are victims of domestic violence;
- 75 percent are victims of sexual assault;
- 66 percent are victims of incest;
- 50 percent experience homelessness;
- 45 percent give money to a pimp, and 65 percent of those women would face physical harm if they did not.²⁵

These figures explain why many work in the sex trade; the psyche of a sexually abused person is fertile ground for further exploitation.

The hurdles facing law enforcement also highlight the Act’s utility. Human trafficking is a \$50 billion business transcending continents.²⁶ Law enforcement is often stymied by the transnational nature of trafficking and prostitution rings.

Additionally, it is difficult identifying

2. 740 ILCS 128/5.

3. 740 ILCS 128/10.

4. Id.

5. Id.

6. 740 ILCS 128/20.

7. Id.

8. 740 ILCS 128/25(a)(7).

9. 740 ILCS 128/20.

10. 735 ILCS 5/13-225(b).

11. 740 ILCS 128/5.

12. 740 ILCS 128/15(b).

13. 740 ILCS 128/15(b)(3).

14. 740 ILCS 128/15(c)(2).

15. 740 ILCS 128/25(a)(3) & (6).

16. Id at (a)(5).

17. Id at (a)(1) & (2).

18. Id at (b).

19. Trafficking in Persons 2009 located at <http://www.state.gov/g/tip/rls/tiprpt/2009/>.

20. Peter Landesman, *The Girls Next Door*, NY Times Mag, January 25, 2004 at 34, available at <http://www.nytimes.com/2004/01/25/magazine/the-girls-next-door.html>.

21. Chicago Coalition for the Homeless–The Predator Accountability Act, located at <http://www.sapromise.org/pdfs/PABFactSheet.pdf>.

22. Id.

23. Katherine Kaufka, *T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner’s Guide*, 09-06 Immigr Briefings 1 (Oct 2006) (“Victims of trafficking are subjected to both physical violence such as detention, beatings, or rape; and psychological coercion and intimidation, such as threats of retribution or physical force, debt bondage, threats of deportation, and withholding of identity documents.”).

24. Press Release, US Dept of Justice, *Rockford Man Found Guilty on Federal Charges Involving Prostitution at Royal Health Spa 2* (May 11, 2006), available at http://www.justice.gov/usao/iln/pr/rockford/2006/pr0511_01.pdf.

25. Chicago Coalition for the Homeless–The Predator Accountability Bill, located at <http://www.sapromise.org/pdfs/PABFactSheet.pdf>.

26. Trafficking in Persons 2009 located at <http://www.state.gov/g/tip/rls/tiprpt/2009/>.

trafficked persons and infiltrating trafficking organizations. Many trafficked persons shun assistance because they are engaged in criminal behavior, in the country illegally, or at physical risk. Private causes of action against pimps and traffickers may bridge the gaps law enforcement cannot.

Agencies in Illinois that target traffickers and pimps include the sex crimes division of the state's attorney's office, the Illinois Department of Public Health, and the Illinois Department of Human Services.²⁷ Such entities face an uphill battle as street corner prostitution and red light districts fade into folklore.

The sex trade has gone virtual, enveloping an already enigmatic industry in another layer of secrecy. Worse, websites like Craigslist and Backpage have enabled prostitute and customer to transact in an efficient, effective, and discreet manner. Such developments have enabled prostitution to proliferate.

The Act does what the criminal justice system cannot – allow sex trade victims to take the offensive. Private actors are less encumbered by logistical, budgetary, and political obstacles.

The Act also makes exploitation cost prohibitive. Punitive damages and attorney's fees are not abstractions. Recognizing the Sisyphean task law enforcement faces in stemming the tide of trafficking and exploitation, the Act opens a new front in the battle against pimps, traffickers, and associated businesses.

Does the Act go too far?

The ends sought by the Act are worthwhile. But the law is not a panacea. Permitting prostitutes to sue those who pimped or hired them is novel.

One problem with the Act is that sex trade workers are engaging in criminal behavior. As such, the "victim" label bestowed by the Act raises questions. While the plight of many in the sex trade is tragic, should it be the basis to sue another person for engaging in what is at its core, a sale of services?

One newspaper editorial criticized the Act along these lines. "It is a bad idea to begin using the overtaxed civil legal system to allow criminals or former criminals to fight each other over the take."²⁸

Such criticism has appeal. Like the pimp or customer, a prostitute's conduct is criminal. But this line of reasoning assumes sex trade workers are no different than other participants.

Reality suggests otherwise. Customers often live a comfortable existence, their periodic forays into the underworld chosen. Sex trade workers by contrast often operate in coerced conditions, the threat of arrest or physical danger implicit in each knock at the door. Pimps and traffickers also exert control via physical abuse.

These realities aside, the Act eliminates the prostitute's conduct from the equation. "Any illegality of the sex trade activity on the part of the victim of the sex trade shall not be an affirmative defense...."²⁹ Thus, even if defendants wanted to make the case a referendum on plaintiff's criminality, they could not.

The above criticism also oversimplifies the Act. The law is not merely a mechanism to redistribute ill-gotten gains. The Act's *raison d'être* is curbing sexual exploitation. And the general assembly surmised this can be achieved by targeting the entities behind the bodies of the sex trade.

Additionally, the Act may clash with the doctrine of *in pari delicto*. Under *in pari delicto*, parties to an illegal contract (such as hiring a prostitute) cannot hold one another liable if those parties are equally guilty.³⁰ The defense of *in pari delicto* prohibits a party from recovering damages arising from misconduct for which the party bears responsibility.³¹

To apply *in pari delicto*, the illegal transaction must have been entered voluntarily and the fault apportioned equally.³² The coercive nature of the sex trade may render this theory inapt. *In pari delicto* would not apply if the plaintiff showed she was acting under the defendant's compulsion.³³ Indeed, where the party seeking relief consented to an illegal transaction because of duress, menace, or undue influence, that party is not *in pari delicto*.³⁴ Thus, a plaintiff under the Act could likely circumvent *in pari delicto*.

Constitutional considerations

In its zeal to combat exploitation and trafficking, the general assembly may have overreached. A constitutional challenge might be a defendant's most promising line of attack given the affirmative defenses unavailable. However, no guid-

ance on this question exists because the Act has never been cited in an opinion, let alone discussed.

At first blush, the Act encroaches on protected conduct, raising overbreadth concerns. A statute is overly broad if, in proscribing unprotected conduct, it also proscribes protected conduct.³⁵

But the Act may inoculate itself from an overbreadth challenge because liabil-

The *Balas* case from Florida demonstrates a court's receptiveness to the policy underlying the Illinois Predator Accountability Act.

ity only exists if one has engaged in criminal (unprotected) conduct. One provision that may not fit that description is the section targeting businesses with a tangential relationship to the sex trade.³⁶ This is not an academic question, for legitimate businesses would be the most attractive defendants. That a hotel or taxi service knowingly receives a kickback may simply reflect market forces.

While such arrangements indirectly contribute to the exploitation of sex trade workers, whether they justify punitive damages and attorney's fees is a stretch. A court might find different treatment for a preferred customer too tenuous for the Act's onerous liability.

The Act may court constitutional scrutiny in another respect – its target of sex trade publications. Plaintiffs can sue mediums that carry or sell sex trade advertisements. However, such businesses are liable only if they knowingly publish

27. See Vanessa B. M. Vergara, *Looking Beneath the Surface: Illinois' Response to Human Trafficking and Modern-Day Slavery*, 38 U Tol L Rev 991 (2007).

28. Editorial, *Chicago Sun Times*, March 14, 2005.

29. 740 ILCS 128/25(b).

30. *In re Verestar, Inc.*, 343 BR 444, 478-79 (Bankr SDNY 2006).

31. *Id.*

32. *In re Grumman Olson Industries, Inc.*, 329 BR 411, 425 (Bankr SDNY 2005).

33. Restatement (Second) of Contracts § 198(b).

34. *Smith v Smith*, 72 Ohio App 203, 215, 50 NE2d 889, 895 (1943).

35. *Broadrick v Oklahoma*, 413 US 601, 612-13 (1973).

36. 740 ILCS 128/15(c)(2).

advertisements intended to recruit individuals into prostitution.³⁷

This appears permissible. While commercial speech is protected, speech that aids or abets criminal activity is not.³⁸ Thus, there is no constitutional interest in publishing ads soliciting prostitution.³⁹

Most sex trade advertisements do not trumpet the sale of sex. Instead, euphemisms such as “massage” and “escort” are de rigeur. Whether such ads are protected speech is a question not definitively answered. The Supreme Court has noted that some businesses “apparently are not protected by the First Amendment – e.g., escort agencies and sexual encounter centers....”⁴⁰ The ninth circuit held an escort service could not invoke the First Amendment because “escort services are primarily commercial enterprises, and their activities are not predominately of the type protected by the First Amendment.”⁴¹ The court further observed the relationship between the client and her paid companion is “the antithesis of the highly personal bonds protected by the fourteenth amendment.”⁴²

Prostitution and its diplomatically phrased permutations are typically not afforded much, if any, constitutional protection. However, for a defendant under the Act, this may be the best route.

Interpretations of similar provisions

Examining other jurisdictions offers few clues how the Act would weather a constitutional challenge. Florida, Hawaii, and Minnesota provide civil actions for individuals coerced into the sex trade.⁴³ However, none replicate the Act’s reach.

Only Illinois targets sex trade advertisers and businesses with a peripheral connection to the trade. Additionally, Illinois eliminates more defenses and provides a longer statute of limitations.

Under Hawaii law, an individual can sue a person who coerced her into prostitution.⁴⁴ She can also sue those who hire her for sex acts when a reasonable person would believe she was coerced into prostitution.⁴⁵

Minnesota provides the same.⁴⁶ Under those laws, coercion constitutes blackmail, promise of marriage, or physical isolation.⁴⁷ No case law addresses the Hawaii or Minnesota statute.

Florida provides for punitive damages against individuals who coerce another into prostitution.⁴⁸ Coercion is any form of inducement, including promise of legal benefit or promise of greater financial rewards.⁴⁹

A Florida court examined the law in *Balas v Ruzzo*.⁵⁰ The dispositive issue was the statute’s limitation on discovery. The defendant challenged his inability to inquire about the plaintiff’s work in the sex trade.⁵¹

The *Balas* court rejected the defendant’s contentions because the law was designed to encourage prostitutes to sue their pimps.⁵² For that reason, “discovery may be constricted so that prostitutes will not be embarrassed, harassed or hindered in their actions.”⁵³ The court was sensitive to the policy underlying the law: “to lessen the incentive to traffic in human flesh by giving the prostitute access to the judicial system without first having to be arrested.”⁵⁴

Balas found a prostitute’s private cause

of action against her pimp permissible. While *Balas* is isolated, it demonstrates a court’s receptiveness to the policy underlying the Illinois Predator Accountability Act. Illinois courts might also be inclined to respect the Act’s legislative aims and policy concerns.

Conclusion

The Illinois Predator Accountability Act is designed not to cull the weeds of the sex trade but to sever its roots. Human trafficking is the fastest growing criminal industry.⁵⁵ Trafficking a woman into the United States can net \$250,000.⁵⁶

Until the civil legal system follows the money, trafficking and sexual exploitation will continue to proliferate. Whether the Act is the answer to this problem remains to be seen. ■

37. Id at (b)(3).

38. *Giboney v Empire Storage & Ice Co*, 336 US 490, 498 (1949).

39. *Braun v Soldier of Fortune Magazine, Inc*, 968 F2d 1110, 1117 (11th Cir 1990).

40. *FW/PBS, Inc v Dallas*, 493 US 215, 224 (1990).

41. *IDK, Inc v Clark County*, 836 F2d 1185, 1195 (9th Cir 1988).

42. Id at 1193.

43. Haw Rev Stat Ann § 663J-3, Minn Stat Ann § 611A.81, Fla Stat Ann § 796.09(1).

44. Haw Rev Stat Ann § 663J-3.

45. Id.

46. Minn Stat Ann § 611A.81.

47. Minn Stat Ann § 611A.80; Haw Rev Stat Ann § 663J-4.

48. Fla Stat Ann § 796.09(1).

49. Id at § 796.09(3).

50. 703 So2d 1076 (Fla D Ct App 1997).

51. Id at 1077.

52. Id at 1079.

53. Id.

54. Id.

55. Traffickfree.org, Human Trafficking in Illinois Fact Sheet.

56. Id.

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