

# THE FALLACY OF FREE WILL IN PROSTITUTION: ENCOURAGING PROSTITUTION REFORM TO PREVENT THE REPEATED VICTIMIZATION OF VULNERABLE PERSONS

Ashleigh M. Kline<sup>1</sup>

*The crisis of human trafficking has gained increasing attention during the past decade. Sale, coercion, and exploitation of human beings still thrive in the darkest corners of the safest cities. In 2003, the United Nations passed a Trafficking in Persons Protocol (the “Palermo Protocol”) urging states to pass legislation prosecuting perpetrators of trafficking and protecting victims. While nations across the world have sought to institute new laws to fulfill the obligations created by the protocol, these efforts still fall short of controlling the worst activities. The failure to protect women and children from sexual exploitation is rooted in ineffective legislation. A lack of ability to prosecute, weak criminal sanctions, and a failure to treat victims as trafficked persons has stunted progress in trafficking control. This note addresses the specific problem of sexual exploitation of victims by analyzing the Palermo Protocol’s stipulations as it refers to sexual exploitation and prostitution and comparing and contrasting different methods of combating sexual trafficking through prostitution reform. By comparing human trafficking and prostitution, this note demonstrates that the two crimes share many of the same characteristics of abuse, lack of free will, and exploitation of vulnerable individuals. This note adapts an approach to human trafficking and prostitution that would equate the two, until a time when prostitution could reflect a process of free choice by an individual. This approach encourages a stronger victim-focused attack on human trafficking, which promotes ending the cycle of re-victimization. Finally, this note will suggest how the United States can change its laws to further the Palermo Protocol’s mission and protect victims of human*

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1. J.D. 2017, Michigan State University College of Law. Ashleigh Kline served as President of Michigan State University College of Law’s Anti-Trafficking Legal Advocacy Society and as a delegate to the Michigan Human Trafficking Task Force. She works for State Representative Tom Cochran in the Michigan House of Representatives, where she has enjoyed the opportunity to work on reforming Michigan’s human trafficking law. She would like to thank her family for supporting her, especially her fiancé, Scott Russett, for always being there. She would also like to thank her expert reader, Professor Mark Totten, for his guidance.

*trafficking. While there is no perfect solution, there are valuable methods the U.S. can apply to seek improvement of the status quo.*

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## INTRODUCTION

Society has deemed “prostitution the world’s oldest profession.”<sup>2</sup> History, on the other hand, would demonstrate that prostitution is “the world’s oldest *oppression*.”<sup>3</sup> “People in prostitution lack basic freedom: freedom over their bodies, freedom to manage their own lives, and freedom to live without fear.”<sup>4</sup> This lack of freedom is most clearly embodied in a form of modern-day slavery now known as “human trafficking”—during the course of which many victims are forced into sex slavery. While the law does not equate prostitution to human trafficking, the same negative characteristics are inherent in both crimes. Control over a vulnerable person by means of payment, threat, or any other form of coercion for the purpose of exploitation not only provides the definition for trafficking, but it also represents the inherent nature of prostitution. In learning to identify and recognize the signs of human trafficking, we can modify our existing laws on both prostitution and

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2. Heather Monasky, Note, *On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, but Not the Victim – Sweden’s Sexkopslagen in America*, 37 WM. MITCHELL L. REV. 1989, 1995 (2011).

3. *Id.* (emphasis added).

4. *Id.* at 2003.

human trafficking to prevent future victimization from occurring and provide a legal framework that protects victims rather than penalizing them.

The world has slowly recognized the crisis of human trafficking over the past decade. Between 2010 and 2012 alone, the United Nations reported over 40,000 confirmed victims of human trafficking.<sup>5</sup> At least 53% of these victims were sexually exploited,<sup>6</sup> and 82% of these victims were women and children.<sup>7</sup> These numbers are a conservative estimate of the true number of trafficked victims across the world, as the existing data is scarce and often unreliable, due to variations in data collection methods across the globe.<sup>8</sup> However, the raw data has proven to be enough to jumpstart the global community into fighting for a change in the status quo. In 2000, the United Nations (the “U.N.”) created the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “Palermo Protocol”), which was meant to supplement the United Nations Convention Against Transnational Organized Crime.<sup>9</sup> The Palermo Protocol compels states to pass legislation implementing procedures for prosecuting traffickers and protecting victims.<sup>10</sup> It also serves as a guideline for states<sup>11</sup> by setting out precise definitions, methods of prosecution, and archetypes of victimization in order to create more uniform laws and establish customary international law.<sup>12</sup>

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5. U.N. Office on Drugs and Crime, Global Report on Trafficking in Persons 17 (Nov. 2014) [hereinafter UNODC Report].

6. *Id.* at 9.

7. *Id.* at 5. As sexual human trafficking tends to affect more women than men, I have chosen to refer to victims as females throughout this paper. However, this is merely a stylistic choice, as men are also victims of this form of trafficking.

8. Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 142 (2006).

9. *See generally* United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

10. *See id.* art. 5(1).

11. In international law, countries are often referred to as “states.” As used in this paper, the term “state” refers to a country, unless otherwise specified when speaking of “the United States.”

12. *See* Palermo Protocol, *supra* note 9, arts. 3–5.

Despite the Palermo Protocol's good intentions, nations have failed to adequately fulfill their obligation of preventing, suppressing, and punishing trafficking in persons. As of 2014, an estimated two billion people are still without adequate protection against trafficking.<sup>13</sup> The protection that does exist does not provide enough deterrent to stop criminals from engaging in trafficking activities and keep vulnerable persons from repeated victimization.<sup>14</sup> Reform of the legal system is not complete. This note attempts to further this reform by analyzing the international approach to combating the issue of human trafficking and encouraging relevant legal reform within the United States. While numerous authors have discussed, analyzed, and preached the implementation of the "Nordic Model" of prostitution reform,<sup>15</sup> no state in the U.S. has implemented this form. By recognizing the failures and successes of foreign nations, the United States can take the first step in creating radical change in the status quo.

Part I of this note will describe and analyze the Palermo Protocol's provisions and obligations in regards to human trafficking and how they may relate to prostitution. Part II will describe issues in effective punishment in human trafficking cases, both at the identification level and the trial level, as well as the United States' attempts at combating trafficking. Part III will compare and contrast different methods of combating sexual trafficking through prostitution reform, namely the "Nordic Model," legalization, and prohibition, by looking at two leading European countries (Germany and Sweden). Part IV will discuss the importance of implementing the Nordic Model and will recognize the Minnesota Legislature's recent introduction of a bill to accept this model of reform. Part V will conclude the note by focusing on the importance of the societal message behind this type of reform.

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13. UNODC Report, *supra* note 5, at 12.

14. *Id.* at 14–15.

15. *See, e.g.,* Monasky, *supra* note 2, at 1994. The Nordic Model will be discussed in greater depth *infra* Section III of this paper.

I. THE UNITED NATIONS PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

The United Nations recognized that the problem of human trafficking is not only found within one country, or even several, but it is a multistep, and often international, crime that must be combatted at each stage, including “in the countries of origin, transit and destination.”<sup>16</sup> While numerous multilateral treaties combatting trafficking existed at the time the Palermo Protocol was implemented, the United Nations General Assembly felt the lack of a universal standard for combatting this issue was a substantial part of the problem.<sup>17</sup> The Palermo Protocol embodies this by stating that nations were “[c]oncerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected.”<sup>18</sup> Recognizing these issues, the U.N. General Assembly attempted to steer the Palermo Protocol into a conduit for states to play an important role in creating a lasting solution.<sup>19</sup> The passage of the Palermo Protocol was the first comprehensive step towards establishing customary international law in regards to human trafficking.<sup>20</sup>

The International Law Commission (the “I.L.C.”), the organization in charge of researching and writing opinions on customary international law for the U.N., intended this protocol to have a broad reach and a wide scope, to encompass all conceivable forms of exploitive trafficking in persons.<sup>21</sup> The traditional concept of “slavery” remained centered around the capture and detainment of foreign nationals.<sup>22</sup> The modern form of slavery, human trafficking, reflects an ideological change in the world’s

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16. Palermo Protocol, *supra* note 9, at pmb1.

17. “Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons . . . there is no universal instrument that addresses all aspects of trafficking in persons.” *Id.* (emphasis removed).

18. *Id.* (emphasis removed).

19. *See id.*

20. *See* Monasky, *supra* note 2, at 2018–19.

21. Lindsey King, *International Law and Human Trafficking*, TOPICAL RES. DIGEST: HUM. RIGHTS & HUM. TRAFFICKING 88, 88–89 (2011).

22. *See id.* at 88.

concept of humanity and basic human rights.<sup>23</sup> After many world wars over colonization, genocide, and conflicting forms of government, the international community came together and supported the passage of a number of treaties confirming the importance of free will and freedom as universal human rights.<sup>24</sup> Any infringement of these basic rights was to be deemed a form of enslavement.<sup>25</sup>

The Palermo Protocol established three basic goals. The first was to “prevent and combat trafficking in persons, paying particular attention to women and children.”<sup>26</sup> The second was to “protect and assist the victims of such trafficking, with full respect for their human rights.”<sup>27</sup> The third and final goal was to “promote cooperation among States Parties in order to meet those objectives.”<sup>28</sup> While the title of the Palermo Protocol belies the importance of preventing, suppressing, and punishing human trafficking, the statement of purpose emphasizes the additional goal of rehabilitating and protecting victims.<sup>29</sup> Its provisions were written in a manner that allowed states a great amount of freedom in creating legislation, while also setting strict standards for criminalization and goals for preventing trafficking.<sup>30</sup>

An additional requirement of the Palermo Protocol is to support rescued victims by providing counseling and medical assistance, as well as helping them find housing.<sup>31</sup> Recognizing that victims’ lives have been destroyed, the United Nations was determined to create state obligations to help restore victims.<sup>32</sup> As this could potentially create large financial burdens on state governments, the Palermo Protocol also emphasized prevention as an important measure.<sup>33</sup> By increasing law enforcement actions, states can deter both traffickers and clients, or “johns,” from participating in sex trafficking, which will lead to fewer victims and less need for victim assistance.

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23. *See id.*

24. *See id.*

25. *See id.* at 89.

26. Palermo Protocol, *supra* note 9, art. 2(a).

27. *Id.* art. 2(b).

28. *Id.* art. 2(c).

29. *See id.* art. 2(a)–(c).

30. *See id.* arts. 5, 9.

31. *Id.* arts. 6(3)(a)–(c).

32. *See, e.g.,* Palermo Protocol, *supra* note 9, at pmb1.

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

While the Palermo Protocol admirably sought substantial changes in many areas of the law, perhaps its most important assertion was the establishment of a vulnerable person's inability to provide consent.<sup>34</sup> Article Three of the Palermo Protocol declares, "[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in . . . this article shall be irrelevant where any of the means set forth in . . . [this Protocol's definition of trafficking] have been used."<sup>35</sup> This article explicitly states that a trafficker, or one who exploits a victim, cannot avoid liability on a claim that the victim consented.<sup>36</sup> This places the burden of proof on the defendant to prove he lacked the means required as an element of the Palermo Protocol, while also protecting victims who may feel too threatened to testify against their traffickers.

The definition of "[t]rafficking in persons" is extensive,<sup>37</sup> which demonstrates an intent by the drafters to codify and cover all possible forms of human trafficking. This definition can easily be broken down into two basic legal concepts of the crime: the *mens rea*<sup>38</sup> and the *actus reus*.<sup>39</sup> The *actus reus* of a trafficking in persons crime requires the defendant to have:

recruit[ed], transport[ed], transfer[ed], harbor[ed] or recei[ved] [] 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.<sup>40</sup>

The *mens rea* requirement is shorter and simpler. The trafficker must have performed the above act, "for the purpose of exploitation."<sup>41</sup> This

34. *See id.* art. 3(b).

35. *Id.*

36. *Id.*

37. *See id.* art. 3(a).

38. The "*mens rea*" is the "culpable state[] of mind which can establish criminal liability." THOMAS P. MAURIELLO, *CRIMINAL INVESTIGATION HANDBOOK: STRATEGY, LAW AND SCIENCE* ¶ 2.04 (2015).

39. "The *act element* of a crime consists of any voluntary physical activity that results in the harm or social evil the criminal law is enacted to punish or prevent." *Id.* ¶ 2.03.

40. Palermo Protocol, *supra* note 9, art. 3(a).

41. *Id.*

focus on “exploitation” becomes crucial when you take a step back and consider what it means to “exploit” another person. According to the Palermo Protocol, “[e]xploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation.”<sup>42</sup> This definition, as a minimum standard, merely sets a floor for each nation’s definition of trafficking. However, it still does not specifically define “exploitation,” nor does it truly narrow the definition of trafficking. Black’s Law Dictionary defines “exploitation” as “the act of taking unjust advantage of another for one’s own benefit or selfish ends,” and it specifically defines “sexual exploitation” as “[t]he use of a person, esp. a child, in prostitution, pornography, or other sexually manipulative activity.”<sup>43</sup> Therefore, in determining the nation’s human trafficking definition, it is necessary to recognize those activities that may be described as “sexually manipulative” and that “take unjust advantage of another for one’s own benefit or selfish ends.”<sup>44</sup>

It is also worth noting that the term “prostitute” is just as controversial in the talk of human trafficking. Michigan Assistant Attorney General Kelly Carter<sup>45</sup> states the importance of separating the term “prostitute” from a victim of human trafficking.<sup>46</sup> As a lead prosecutor for human trafficking cases, Ms. Carter attempts to identify and separate the victim from the “trick.”<sup>47</sup> The term “prostitute” is surrounded by negative connotations. Whether an individual supports “sex workers’ rights” or wishes to identify those in the sex trade as victims, both sides of the debate see the term “prostitute” as placing a negative stigma on individuals. In order to avoid confusion or insult, one who voluntarily sells their body for sex is referred to as a “sex worker,” and one who is forced into the trade is a “victim of human trafficking” or a “prostituted person” throughout this paper. The term “prostituted person” reflects the concept that one cannot consent to her own coerced exploitation.

The Palermo Protocol was a large step forward toward implementing international reform regarding human trafficking; while the topic has

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42. *Id.*

43. *Exploitation*, BLACK’S LAW DICTIONARY (10th Ed. 2014); *Sexual Exploitation*, BLACK’S LAW DICTIONARY (10th Ed. 2014).

44. *Id.*

45. Ms. Carter is a lead human trafficking prosecutor for the State of Michigan.

46. Interview with Kelly Carter, Prosecutor, State of Mich. (Sept. 14, 2016).

47. *Id.*



now received worldwide attention, experts struggle over the appropriate solution to the problem. In the case of prostitution and human trafficking, the debate is still unclear on whether prostitution automatically falls within the definition of human trafficking as exploitation of an individual, or whether it is more appropriate for states to regulate prostitution as they see fit. While considering this issue, it is necessary to consider the Palermo Protocol's specific requirements. For example, if the Palermo Protocol denies the defense of consent by a victim in a trafficking crime, can this same concept be used to explain why prostitution should be illegal? How far does "consent" go? Can one truly "consent" to the exploitation of his or her own body, or is this a "false" consent derived from external factors, such as mental and physical abuse? If the world seeks to fully carry out the provisions of the Palermo Protocol, it must recognize the humanitarian threat posed by sexual exploitation in any form.

## II. ISSUES IN EFFECTIVE PUNISHMENT AND PROTECTION IN SEX TRAFFICKING

Although fifteen years have passed since the Palermo Protocol's enactment,<sup>48</sup> most nations still lack a working, comprehensive legal scheme for combating human trafficking. Many signatories still lack any prosecutorial scheme for trafficking, and those who have implemented legislation have substantially failed in its enforcement.<sup>49</sup> These failures have many causes, but the majority of the issues lie in obstacles found in the legal field. For example, despite the substantial number of trafficked persons each year,<sup>50</sup> only 40% of nations are reporting more than ten convictions a year.<sup>51</sup> This rate of conviction is grossly disproportionate to the number of perpetrators, even if a statistically small number of people are responsible for the majority of trafficking. While there may be a

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48. Palermo Protocol, *supra* note 9.

49. UNODC Report, *supra* note 5, at 12. The United Nations Global Trafficking Report Unit estimates that over 2 billion people are not protected against human trafficking due to the failure of their nation's government to implement proper (or any) legislation as required by the Palermo Protocol. *Id.*

50. *Id.* at 17 (stating that between 2010 and 2012, there have been over 40,000 confirmed victims of trafficking).

51. *Id.* at 53.

myriad of reasons for this statistic, the truth of these figures demonstrates that there remains a lack in prosecutorial ability, and it reiterates the fact that the current criminal justice system fails to bring justice to victims who should be protected.

According to the United Nations Office on Drugs and Crime Report, there are three main steps in the trafficking conviction process. When the authorities identify a potential trafficking case, the government initiates an investigation to determine if there is sufficient evidence to bring a case against the individual. If so, the prosecutor will file formal charges against the individual for every possible crime his actions could be categorized as, such as rape, pandering, and human trafficking.<sup>52</sup> Finally, the prosecution attempts to obtain a conviction for a trafficking offense, although often they settle for an alternative crime (which is easier to prove).<sup>53</sup> While the number of suspects identified as traffickers is conservative (assuming many are never identified or apprehended), of the ones who are charged with trafficking, only 24% are ever convicted of the crime.<sup>54</sup> Since these numbers are reported as an average, the higher conviction rates of some countries skew the perception of how well the globe is fighting trafficking, and it detracts from the appalling conviction rates of the majority of nations.<sup>55</sup> The steps seem cut and dry, but the facts prove that it is often difficult for law enforcement to commence the prosecution, let alone complete one.

The United States has taken a law enforcement approach in its attempt to combat human trafficking over the past decade.<sup>56</sup> This approach focuses on the crime committed rather than the reasoning behind it, and the government was very slow to recognize true victim status for a criminal.<sup>57</sup> The first step towards comprehensive reform began in 2000, with the Trafficking Victims Protection Act (the “TVPA”).<sup>58</sup> The TVPA established prevention measures, created programs to provide protection

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52. *See id.* at 55.

53. *Id.*

54. UNODC Report, *supra* note 5, at 55.

55. *Id.*

56. Monasky, *supra* note 2, at 2022.

57. *Id.*

58. *U.S. Laws: The Trafficking Victims Protection Act of 2000 (TVPA)*, FREEDOM NETWORK, <https://freedomnetworkusa.org/human-trafficking/> (last visited May 17, 2017).

to victims, and strengthened the punishment stage for traffickers.<sup>59</sup> In 2003, the U.S. reauthorized the TVPA and revamped it to include more legal avenues for the prosecution of traffickers and the compensation of victims by allowing victims to sue their traffickers for compensation.<sup>60</sup> The TVPA was reauthorized again with the passage of the William Wilberforce Trafficking Victims Protection Act in 2008, which served as an affirmation by Congress that “prostitution is not a legitimate, victimless enterprise.”<sup>61</sup> Most recently, the U.S. Congress made an about-face on its human trafficking stance by passing the Justice for Victims of Trafficking Act in 2015 (the “JVTA”).<sup>62</sup> The JVTA increased access to benefits for victims, created a new financial punishment for trafficking offenses, doubled the attack on sex trafficking of children, and established greater methods of inter-agency cooperation to identify victims and prosecute traffickers.<sup>63</sup>

While the United States government’s intentions were aimed at halting trafficking, its actions had an unintended consequence of punishing the very victims it was obligated to protect.<sup>64</sup> An entirely law-enforcement-based model for attacking human trafficking resulted in the criminalization of innocent victims.<sup>65</sup> United States’ law regarding prostitution and human trafficking placed an incredible burden on victims to prove every element of the crime of human trafficking.<sup>66</sup> The law treated victims with suspicion.<sup>67</sup> Trafficked persons, who already live in a world where trust is non-existent, were jailed for prostitution because they could not prove they were forced to commit certain crimes.<sup>68</sup> In fact, under United States’ law at the time, a victim could only prove trafficking in one of two ways: (1) if they were under eighteen years old (automatic trafficking consideration), or (2) if they could prove coercion (an extremely difficult task); additionally, they

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59. *Id.*

60. *See* Monasky, *supra* note 2, at 2025.

61. *Id.* at 2026.

62. CONG. RESEARCH SERV., R44315, JUSTICE FOR VICTIMS OF TRAFFICKING ACT OF 2015: CHANGES TO DOMESTIC HUMAN TRAFFICKING POLICIES 3 (2015).

63. *Id.*

64. Monasky, *supra* note 2, at 2022.

65. *Id.* at 2017.

66. *Id.* at 2022.

67. *See id.* at 2022.

68. *See id.* at 2023.

were required to cooperate fully with law enforcement and had to be a foreign national.<sup>69</sup> Due to this incredibly high hurdle, many victims did not qualify as “trafficked victims,” and were treated as criminals themselves.<sup>70</sup>

Individuals arrested for prostitution are often found to have committed numerous other petty crimes.<sup>71</sup> From drug abuse and possession to theft, most of these “criminals” are forced into a life they do not freely live.<sup>72</sup> Rather than seek assistance from the authorities, women who have been trafficked into prostitution often run from police instead of to them for help.<sup>73</sup> They do not cooperate in the investigations of their pimps (traffickers) because, in their mind, it was more likely than not they would be either thrown in jail or beat by their trafficker later for snitching.<sup>74</sup> The United States government’s plan for reducing trafficking merely resulted in little or no trust between victims and those tasked to protect and save them from the life they were forced to lead.<sup>75</sup>

The first hurdle in prosecuting traffickers is providing trust in the system. Many victims of human trafficking do not seek help because they actually trust law enforcement and legal remedies *less* than their traffickers.<sup>76</sup> Today, it is rare to find a victim of this modern form of slavery chained up in a basement.<sup>77</sup> Modern-day traffickers use psychological ploys to hold their victims in a mental grasp, which may be a more powerful form of imprisonment than physical restraints.<sup>78</sup> Victims often previously knew and trusted their trafficker or later grew

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69. *Id.*

70. *See* Monasky, *supra* note 2, at 2023.

71. *See, e.g.,* Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 16 UTAH L. REV. 535, 547–48 (2016).

72. *Id.*

73. Monasky, *supra* note 2, at 2038.

74. *Id.* A former prostitute noted, “The police were seen to us as far worse than the pimps. We were more scared of them [than] the pimps and tricks. The main reason I did not go for help sooner was because I would have been arrested or further victimized by the police.” *Id.*

75. *See, e.g., id.* at 2034.

76. *Id.*

77. *See, e.g.,* John Lazet, Dir. of Crime Victim Advocacy, Mich. Attorney Gen., Address at the MSU College of Law Anti-Trafficking Legal Advocacy Society Program: Fighting Human Trafficking Through the Law (Nov. 17, 2015), 2015).

78. *Id.*

attached to their traffickers in a twisted form of Stockholm's syndrome.<sup>79</sup> In a speech presented at a human trafficking awareness event on Michigan State University's campus, the head of the Michigan Attorney General's Crime Victim Services Unit, John Lazet, explained how many victims come to love their traffickers.<sup>80</sup> Lazet explained, in order to understand the problem, one must understand the mindset of a victim of trafficking.<sup>81</sup> If it seems shocking to believe a person would not run away or stop committing an action against their will, it is because one cannot appreciate how small the world has become in a victim's own mind.<sup>82</sup> A former prostitute once said, "I guarantee every person that has abused or hurt these women at one point said 'trust me.'"<sup>83</sup> "Trust" is a word that has lost virtually all meaning to a victim of human trafficking.<sup>84</sup>

A victim's narrow, survival-based mindset becomes their biggest obstacle to escaping the vicious cycle of trafficking. Victims constantly exhibit signs of self-deprecation, low-sense of self-worth, and a constant fear of disappointing their trafficker.<sup>85</sup> Most notably, some of these traffickers are parents, relatives, or even in a relationship with the victim.<sup>86</sup> The victim seeks only to find any sign of approval or love from their trafficker rather than make their own decisions.<sup>87</sup> This type of behavior is commonly noticed in victims of domestic violence and, similarly to domestic violence, it is often difficult and even impossible to judge or understand the relationship between an abuser and the abused from the outside.<sup>88</sup> Outsiders may see a loving relationship on the street and yet remain completely blind to the horrors that take place at home. Similarly to domestic violence, it is easy to say, "Why don't they just leave?" without taking a step back to consider what put them in a

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79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Monasky, *supra* note 2, at 2038.

84. Further, victims of human trafficking have often lost trust in law enforcement personnel, which makes them more susceptible to abuse in the criminal justice system. See Lazet, *supra* note 77.

85. *Id.*

86. *Id.*

87. *Id.*

88. ELAINE WEISS, SURVIVING DOMESTIC VIOLENCE: VOICES OF WOMEN WHO BROKE FREE 17 (2004).

situation of exploitation in the first place.<sup>89</sup> In fact, society has traditionally looked to questions of domestic violence in terms of the victim's actions; it is only in recent years that the shift towards a perpetrator-focused consideration has developed.<sup>90</sup>

Experts in the field of domestic violence advocacy state one must begin with a "victim-defined approach" and work on "understanding each victim's perspective."<sup>91</sup> This approach requires two very important components: (1) analyzing the victim's "risk analysis and life circumstances" and (2) "working with the victim to build a partnership."<sup>92</sup> Recognizing the similar components between human trafficking and domestic violence, it is only natural to apply many of the same analyses to assisting and protecting victims of human trafficking and affirm victim advocacy and trust in law enforcement and the judicial system are indivisible concepts of anti-trafficking legislation. Similarly to domestic violence, the Palermo Protocol affirmed the necessity of a victim-focused approach to human trafficking reform by extensively defining what makes a "victim," in order to define what makes a "perpetrator."<sup>93</sup> This victim-focus emphasizes the Palermo Protocol's goal of ending a crime that is abhorrent to human nature, even if it means constraining the abilities of those who freely choose to pursue a career in the sex trade.

In order to come to terms with the reality of the lack of free will in human trafficking, and to some extent in prostitution, it is also necessary to look at who the rescued women are and where they come from. Not all women found in the practice of prostitution choose to be "brave" or "confident" by engaging in this line of work – in reality, these women are often a product of years of abuse and self-deprivation.<sup>94</sup> Early Swedish studies found that "prostituted women often had deprived childhoods, were neglected, and early on were deprived of a sense of

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89. *Id.*

90. JILL M. DAVIES & ELEANOR LYON, DOMESTIC VIOLENCE ADVOCACY: COMPLEX LIVES/DIFFICULT CHOICES xiii (2d ed. 2014).

91. *Id.* at 3.

92. *Id.*

93. See Palermo Protocol, *supra* note 9, art. 3(a).

94. See, e.g., Monasky, *supra* note 2, at 2003–07.

self-worth.”<sup>95</sup> These studies also found “a strong association between child sexual abuse and prostitution.”<sup>96</sup> Sweden is not alone in finding a direct correlation between an unhealthy upbringing and prostitution. In a study of nine countries, forty-seven percent of those in the sex trade began prostitution as minors, as a common result of homelessness and dependency on “unscrupulous purchasers.”<sup>97</sup>

The practice of the majority of prostitution today is not a product of free will, and until the day that it reflects a truly free choice, it should be seen as a form of human trafficking. A crime of human trafficking has been committed when an individual exerts force, fraud, or coercion in order to abuse the vulnerability of another for the purpose of exploitation. In most instances of prostitution, the same elements are present. Many prostitutes find their way into the profession either by an individual directly forcing them or by some form of physical and mental abuse used to exploit their vulnerabilities.<sup>98</sup> Expanding the definition of trafficking to include prostitution *per se* protects victims and discourages unscrupulous purchasers from exploiting vulnerable individuals. This outlook supports the focus of a victim-centered approach to human trafficking reform, and it is vital to efforts seeking to end repeated victimization.

### III. THE DEBATE OVER REGULATION

There remains an undeniable connection between human trafficking and prostitution,<sup>99</sup> but the international community lacks consensus on the appropriate method of combating this crime. The competing paradigms of regulation have important implications for victims of sex trafficking, who are impacted by market demands for sex work and who may be initially profiled by law enforcement as sex workers. Three

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95. Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT’L L. 133, 138 (2011).

96. *Id.*

97. *Id.* at 138–39. On a more appalling note, sixty-two percent of polled prostitutes in San Francisco reported selling themselves before the age of sixteen, and some reported beginning between the ages of nine and twelve. *Id.* at 139.

98. See, e.g., Waltman, *supra* note 95, at 139–43.

99. Lehti & Aromaa, *supra* note 8, at 133 (“[T]here exists a general consensus that a majority of female victims of trafficking are trafficked for prostitution.”).

competing methods of prostitution regulation are prevalent throughout Western nations: “prohibition, legalization, and decriminalization.”<sup>100</sup>

Prohibition is the most traditional concept, and it encompasses legal regimes ranging from an outright ban on the sale of sexual favors to a ban on “prostitution” alone (containing the “exploitation” element).<sup>101</sup> Other countries around the world have engaged in the legalization of prostitution with the belief that strict regulation imposing “licensing, registration, and health checks” will solve exploitation problems.<sup>102</sup> The most modern form of prostitution reform is decriminalization, in which “prostitution and other forms of sex work are officially considered comparable to other lines of business and are subject to general regulation by civil employment law.”<sup>103</sup> This reform is often referred to as the “sex workers’ rights movement.”<sup>104</sup> Each model differs substantially in its ideological basis. In determining which form has the most amount of efficacy, it is almost impossible to avoid philosophical debates on the true meaning of freedom and basic human rights. The essential question boils down to whether it is better to legalize and regulate prostitution or continue to criminalize and stigmatize it as a “profession.”

The debate over prostitution reform can be split into two main poles: those who believe prostitution is inherently exploitative and a moral wrong (the “sexual moralist”) and those who believe prostitution should be treated the same as any other profession (the “libertarian”).<sup>105</sup> The sexual moralist sees prostitution as a human rights issue, where it is “immoral or violative of gender or human rights.”<sup>106</sup> Some feminists view “prostitution as a form of slavery, an expression of structural inequalities of modern patriarchal society, and a form of exploitation of women.”<sup>107</sup> Under this ideological pole, there is no free will or choice in prostitution, and a “prostitute is always an object and a victim.”<sup>108</sup> The

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100. *Id.* at 134.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 135.

105. Lehti & Aromaa, *supra* note 8, at 135.

106. *Id.*

107. *Id.*

108. *Id.* at 136.



major criticism with this ideology is that it ignores male prostitution almost entirely, and it refuses to acknowledge that there may be individuals who enjoy selling and freely choose to sell their services.<sup>109</sup> At the opposite end of the spectrum, some feminists claim prostitutes are no different than any other employed citizen.<sup>110</sup> The sex worker's rights movement aims at eliminating the stigmatization of prostitution and preaching libertarian principles of independence and free will.<sup>111</sup> Proponents of this view seek to protect sex workers by making available benefits other professions enjoy.<sup>112</sup> However, this form is often criticized due to its apparent ignorance of dominance issues, social and economic coercion, and forced prostitution.<sup>113</sup>

There remains a substantial link between prostitution, human trafficking, and organized crime, which feeds both ideological poles simultaneously.<sup>114</sup> Drug trafficking is often effortlessly connected to human trafficking, as trafficking in persons remains a low risk enterprise.<sup>115</sup> “[P]andering<sup>116</sup> is an alluring side business,” and many traffickers force prostitutes to become drug mules or dealers.<sup>117</sup> The introduction of drugs into the human trafficking equation can also benefit the trafficker in two additional ways: (1) it provides another reason for the prostituted person to fear the authorities (i.e. a substantial likelihood they will obtain a drug charge), and (2) forcing or ‘encouraging’ prostitutes to use drugs makes them more susceptible to control and abuse.<sup>118</sup> This organized crime component can influence the prostitution reform advocated for in one of two ways.<sup>119</sup> The government can either push for decriminalization, with the hope that affording sex workers’ legal status will pull them out of organized criminal networks, or it can

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109. *Id.* at 135.

110. *Id.* at 136.

111. Lehti & Aromaa, *supra* note 8, at 136.

112. *Id.* at 134–35.

113. *Id.* at 135–36.

114. *Id.* at 138.

115. *Id.*

116. The act of engaging in the prostituting of persons. Also referred to as “pimping.”

117. Lehti & Aromaa, *supra* note 8, at 138.

118. *Id.*

119. *Id.*

call for more prohibitive polices, which will potentially cut off a major financing arm of criminal organizations.<sup>120</sup>

Since the passage of the Palermo Protocol in 2000,<sup>121</sup> Europe has experienced a substantial increase in demand for sexual services.<sup>122</sup> This increase in demand is directly correlated with an increase in the amount of international trafficking.<sup>123</sup> This phenomenon has been labeled “sex tourism,” as traffickers come from all over the world to sell their victims in Europe due to the increased demand for such services.<sup>124</sup> The nations of Europe have provided an interesting case study for prostitution reform, as many nations are split between reform approaches.<sup>125</sup> Most notably, Germany and Sweden wholeheartedly adopted two polar opposite approaches to prostitution, which has yielded some interesting results.<sup>126</sup> Germany elected a more libertarian approach with a complete legalization of sex work and brothels, whereas Sweden has adopted a human rights approach that attaches to the concept of all prostitutes as victims.<sup>127</sup>

#### A. LEGALIZED PROSTITUTION IN GERMANY

Germany legalized prostitution in 2002 in an attempt to provide sex workers with legal status as well as economic and social benefits.<sup>128</sup> The sex workers’ rights movement, which preaches the independence and equality of sex work with other civil enterprises, was the main motivation behind the legislative change.<sup>129</sup> In an attempt to combat possible abuse of the system and pandering, compensation for sexual acts must be agreed upon prior to their consummation and the proceeds must

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120. *Id.* at 138–39.

121. Palermo Protocol, *supra* note 9, at iii.

122. Lehti & Aromaa, *supra* note 8, at 140.

123. *Id.* See also Nisha Lilia Diu, *Welcome to Paradise: Inside the World of Legalised Prostitution*, THE TELEGRAPH (2013), <http://s.telegraph.co.uk/graphics/projects/welcome-to-paradise/> [hereinafter *Welcome to Paradise*] (stating “at least 70 per cent of trafficking in Europe is into forced prostitution.”).

124. Lehti & Aromaa, *supra* note 8, at 140.

125. *Id.*

126. *Id.* at 140–41.

127. *Id.*

128. *Id.* at 140.

129. *See id.*

be given directly to the worker.<sup>130</sup> Under this system, it is illegal to transfer compensation to another individual, which eliminates the “shared profits” aspect of pandering.<sup>131</sup> Additionally, the German government is consistently revamping their criminal code to protect against “prostitution-related trafficking, buying sexual services from minors, and profiting from forced or underage prostitution.”<sup>132</sup>

Germany has 400,000 sex workers employed in the nation, representing the greatest number of sex workers (per capita) in any European country.<sup>133</sup> On average, 1.2 million men visit brothels in Germany *every day*.<sup>134</sup> Sale of sexual services is an extremely lucrative business in Germany and is thought to be worth fifteen billion euros.<sup>135</sup> The sex work realm is heavily regulated (and heavily taxed), with the goal of affording sex workers the ability to “enter into employment contracts, sue for payment and register for health insurance, pension plans and other benefits.”<sup>136</sup> Contrary to the government’s intentions, only forty-four prostitutes (in the entire country) have registered for benefits, and not a single individual has received an employment contract or sued for payment.<sup>137</sup>

Despite the argument over the appropriateness of legalization, Germany has worked hard to implement legislation addressing the issue of human trafficking. The German Criminal Code sets out the elements of the crime of sexual human trafficking as follows:

First, [there must be] exploitation of another person’s predicament or helplessness. Second, this predicament or helplessness must be connected with that person’s residence in a foreign state. Third, the exploitation must lead to that person being engaged . . . in one or more

130. Lehti & Aromaa, *supra* note 8, at 140–41.

131. *Id.* at 141.

132. *Id.*

133. *Welcome to Paradise*, *supra* note 123.

134. *Id.*

135. *Id.* Despite the high value of the market, not all prostitutes are making a living wage. German prostitutes have reported fees as low as 10 euros at the “sex boxes” on the streets, and one prostitute stated, “One woman here will even do it for a Big Mac.” *Id.*

136. *Id.*

137. *Id.* In fact, health insurance is so costly for prostitutes, due to the “risk” inherent in their business, that those who would elect to receive insurance would have to pay a 500 euro a month premium. *Id.*

of these acts: (a) prostitution; (b) exploitative sexual activity with or in the presence of the perpetrator or a third person; (c) suffering sexual acts which are performed on him/her by the perpetrator or a third person.<sup>138</sup>

There are three interesting facets of this crime to note. First, the German Code reflects the vulnerability present in a victim of human trafficking by acknowledging the presence of helplessness or a vulnerable predicament. This is important to consider in relation to its fulfillment of the Palermo Protocol's provisions.<sup>139</sup> Second, the Code requires the victim to be helpless in connection "with that person's residence in a foreign state."<sup>140</sup> This leaves a potential substantial gap in the law, which could leave many victims of prostitution uncovered by German law. Many victims of trafficking may be trafficked within their home state and yet be unable to seek protection under this statute. Most importantly, Germany uses the term "prostitution" as connected to an exploitative action.<sup>141</sup> By Germany's stance, the term "prostitution" is directly tied to the state of vulnerability and hopelessness, thus agreeing that there is an inherent risk of taking advantage of another individual in the sex trade.

The decision to legalize sex work comes at a steep price, which hinders the protection of sex trafficking victims in its effects.<sup>142</sup> The first noticeable effect legalized prostitution has on a city is the change in its atmosphere. For example, the German city of Saarbrücken has been tarnished by the 100 brothels located within its borders.<sup>143</sup> Saarbrücken's mayor complains of "men being approached by prostitutes in supermarket car parks and even, once, at a funeral," as well as "used condoms littering bus stops their children use to go to school."<sup>144</sup> A major cause for this problem is the complete lack of restrictions on

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138. Konstantinos Magliveras, *Human Trafficking for the Purpose of Prostitution and German Criminal Law*, 26 INT'L ENF'T L. REP. 363 (2010).

139. See Palermo Protocol, *supra* note 9, art. 3(a) (noting the presence of "vulnerability" in a victim of human trafficking).

140. Magliveras, *supra* note 138, at 363.

141. See *Welcome to Paradise*, *supra* note 123.

142. Michelle Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 226 (2015).

143. *Welcome to Paradise*, *supra* note 123.

144. *Id.*

brothels.<sup>145</sup> Brothels function as an odd hotel-like scheme for sexual services.<sup>146</sup> As it is illegal for the proceeds of sex work to transfer from the sex worker to another (an attempt to avoid pandering),<sup>147</sup> the brothels instead rent a room to the sex workers for their use.<sup>148</sup> The brothels also charge an entrance fee to johns regardless of whether they purchase sex.<sup>149</sup> A second-rate brothel in Germany may charge a sex worker 175 euros for 24-hours of use, which means they may need to sleep with at least four men before they can simply pay the brothel back for the use of their room.<sup>150</sup> The effect of this economic scheme is simply a roundabout method of pandering with no additional benefits or protections offered to sex workers.

Additionally, the normalization of purchasing sexual favors actually causes an increase in sex trafficking within that area by increasing the market demand.<sup>151</sup> This fact was glaringly present during the 2006 World Cup in Germany.<sup>152</sup> As sex work is legal in Germany, many fans expressed a desire to visit the brothels during their time in the country “simply because it was legal in Germany.”<sup>153</sup> International media released an original estimate of 40,000 trafficked victims to be brought to the country just for the World Cup.<sup>154</sup> This number reflected merely a ten percent increase in the number of prostitutes currently “employed” in Germany at the time (400,000).<sup>155</sup> Thankfully, due to extraordinary prevention efforts of the German government and non-governmental organizations, the substantial increase was not realized during that

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145. *Id.* “[W]hile premises serving food need special licenses there are no restrictions on brothels.” *Id.*

146. *See id.*

147. Lehti & Aromaa, *supra* note 8, at 141.

148. *See Welcome to Paradise, supra* note 123.

149. *Id.* They often supply them with various other amenities, such as a buffet, “peep” shows, and dance performances. *Id.*

150. *Id.*

151. Dempsey, *supra* note 142, at 226. A 2012 study of 150 countries revealed “countries where prostitution is legal experience a larger reported incidence of human trafficking flows.” *Id.* (quoting Seo-Young et al., *Does Legalized Prostitution Increase Human Trafficking?*, 41 *WORLD DEV.* 67, 71 (2012)).

152. Victoria Hayes, *Human Trafficking for Sexual Exploitation at World Sporting Events*, 85 *CHI.-KENT L. REV.* 1105, 1126 (2010).

153. *Id.* at 1125.

154. *Id.* at 1124.

155. *Id.*

time.<sup>156</sup> However, the fear of such a number did spark an international call to Germany to cease its legalization of sex work.<sup>157</sup>

Germany may be heading away from legalization in the near future, as reports of its failure begin to circulate. The Netherlands, which legalized prostitution two years before Germany, has already begun the process of reversing this reform, calling it a “national mistake.”<sup>158</sup> The deputy mayor of Amsterdam has reportedly begun “buying back window brothels, turning them into shops and restaurants in an effort to rid the city of the gangs that had moved in.”<sup>159</sup> Even Denmark, a country with half the population of Sweden, but who decriminalized prostitution in 1999, has reported four times as many instances of trafficking than Sweden.<sup>160</sup> These countries have taken on the belief that the legalization of the sex trade is a mistake, and it is now time to take on a proven, positive approach to reform.

#### B. THE “NORDIC METHOD” OF SWEDEN

Sweden has traditionally remained an “abolitionist” nation, which follows the “sexual moralist” ideals regarding prostitution.<sup>161</sup> Prostitution has long been illegal in Sweden, but the prohibition on the purchase of *any* sexual service has been in place since 1999.<sup>162</sup> The unique concept Sweden has incorporated into its prostitution laws is the legal safe-haven provided for prostituted persons.<sup>163</sup> Under Sweden’s model,<sup>164</sup> the *sale* of sexual services is legal, even though the purchase of those services is

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156. *Id.* at 1126–27.

157. *See id.* at 1125–26. The United States specifically requested that Germany criminalize prostitution. *Id.*

158. *Welcome to Paradise*, *supra* note 123 (quoting The Deputy Prime Minister, Lodewijk Asscher).

159. *Id.*

160. *Id.*

161. Lehti & Aromaa, *supra* note 8, at 141.

162. *See id.*

163. *See id.*

164. While we refer to Sweden’s reform as the “Nordic” model, it is known as “Sexköpslagen” in Sweden. Monasky, *supra* note 2, at 2013.

illegal.<sup>165</sup> This model focuses on the belief that all forms of sex work are sexual exploitation and all prostitutes are victims.<sup>166</sup>

Unlike Germany, Sweden believes the legalization of sex work may actually have contributed to the high volume of sex trafficking in Europe by de-stigmatizing the buying of sex.<sup>167</sup> This belief is predicated on the idea that even if the john does not directly harm the victim, his act of purchasing sex increases the demand for sex work.<sup>168</sup> An increased demand in prostitutes will lead to a need to increase the supply, which means the business of prostitution becomes more lucrative for criminals.<sup>169</sup> By making the purchase of sex illegal, this model seeks to stigmatize the practice of purchasing prostitutes, thereby reducing demand.<sup>170</sup> Additionally, this model demonstrates the government's distaste for punishing victims for crimes for which they should not be held responsible. Sweden also holds strongly to the belief that the mere purchasing of sex causes harm to society and human nature by exploiting a vulnerable individual.<sup>171</sup> Sweden has conducted numerous studies on the effect of prostitution since the 1970's.<sup>172</sup> These studies have led Sweden to implement its current system of prostitution reform after realizing the immense damage prostitution has on all women, especially those forced into selling their bodies, and to the community as a whole.<sup>173</sup>

In implementing its reform, the Swedish government has taken a stance that explicitly excludes the sale of one's body for sexual favors

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165. See Lehti & Aromaa, *supra* note 8, at 141.

166. *Id.*

167. See Monasky, *supra* note 2, at 2011–12.

168. *Id.* at 2012.

169. See Waltman, *supra* note 95, at 137. A Swedish report “argued that prostitution would ‘disappear if there was not a demand’ and that a law against purchasers would ‘improve equality between the sexes and prevent undue exploitation of socially deprived women.’” *Id.*

170. *Id.*

171. Monasky, *supra* note 2, at 2012.

172. *Id.* at 2013.

173. See *id.* at 2013–14. See also Waltman, *supra* note 95, at 138 (quoting a Swedish report which found “[m]en’s violence against women is not consonant with the aspirations toward a gender equal society” and that “it is . . . unworthy and unacceptable that men obtain casual sex with women for remuneration”).

from recognition as a legitimate business.<sup>174</sup> Considering the morally inhumane nature of sexual exploitation, Sweden has stated,

[T]he female body cannot be looked upon as merchandise which can be bought or sold . . . . All trade is based on the fact that there are customers and demand. If there were no customers looking upon women's bodies as objects, there would be no market where the victims for this trade could be offered and exploited.<sup>175</sup>

Additionally, “safe” legalized sex work is far from a reality when the entire concept revolves around purchasing the use of another human body.<sup>176</sup> Studies show “purchasers perceive it as their right to demand whatever acts they are paying for,”<sup>177</sup> which leads to workers being raped or victimized “beyond the prostitution contract.”<sup>178</sup>

Years after implementing Sexkopslagen (Sweden's form of prostitution reform), the Swedish government released a study describing the method's successes and failures.<sup>179</sup> According to the 2010 report, Sweden has seen substantially “less prostitution and trafficking than its neighboring countries.”<sup>180</sup> However, the main criticism of the law is its failure to provide an adequate punishment for the purchasing of sex.<sup>181</sup> In fact, the punishment for buying sex is equivalent to that of shoplifting in Sweden.<sup>182</sup> At first, this minimal level of punishment led to law

174. *Id.* at 2017 (quoting Yvonne Svanstrom, *Prostitution in Sweden: Debates and Policies 1980-2004*, in INTERNATIONAL APPROACHES TO PROSTITUTION: LAW AND POLICY IN EUROPE AND ASIA 67, 67 (Geetanjali Gangoli & Nicole Westmarland, eds., 2006)).

175. *Id.*

176. *See* Waltman, *supra* note 95, at 143.

177. *Id.*

178. *Id.* at 142. Waltman further states: “For instance, seventy percent of the 200 prostituted females in San Francisco reported that purchasers raped or similarly victimized them ‘beyond the prostitution contract’ on average 31.3 times; eighty-four percent out of a group of fifty-five female prostitution survivors . . . in Portland, Oregon, had been subject to aggravated assault an average of 103 times a year; seventy-eight percent were subject to rape forty-nine times a year; and fifty-three percent were sexually tortured more than once a week, often while being filmed or photographed for pornography.” *Id.* (citations omitted).

179. Monasky, *supra* note 2, at 2028.

180. *Id.* at 2029.

181. *Id.*

182. *Id.* at 2016.



enforcement disregarding enforcement of the crime as a low-priority offense.<sup>183</sup> Shortly, however, law enforcement realized the major benefit to arresting a john was using him as a witness in a case against the original trafficker.<sup>184</sup> As an additional criticism, police have mentioned the decline in demand has left only the most foul-minded johns on the streets, with despairing sex workers submitting themselves to worse treatment in desperate need of money.<sup>185</sup>

In an impressive show of praise for Sweden's model, Norway and Iceland have also adapted their prostitution legislation to "criminalize the purchase, but not the sale, of sex."<sup>186</sup> After these countries followed suit, Sweden's model became referred to as the "Nordic Model," in recognition of the regional trend.<sup>187</sup> In 2014, the European Parliament officially endorsed the Nordic Model as the recommended prostitution reform for all European countries.<sup>188</sup>

#### IV. IMPLEMENTING THE NORDIC MODEL

The United States has come a long way since the passage of the Palermo Protocol. Legislative efforts have focused on "protection, prevention, and prosecution."<sup>189</sup> However, there is almost always room for improvement, especially when the exploitation of human life is at stake. As the United States has, generally, taken a prosecution-focused approach to combating traffickers, it has failed to protect many victims of sex trafficking by failing to legally view these persons as victims.<sup>190</sup> In 2007, the U.S. House of Representatives attempted to broaden the definition of sex trafficking to accommodate for the true nature of sexual

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183. *Id.* at 2029–30.

184. *Id.* at 2030.

185. Monasky, *supra* note 2, at 2031.

186. *Id.* at 2033. Norway and Iceland passed this reform in 2009. *See id.*

187. *Id.* at 1998, n. 45.

188. Dempsey, *supra* note 142, at 227 (citing Resolution of 26 February 2014 on Sexual Exploitation and Prostitution and Its Impact on Gender Equality, EUR. PARL. DOC. P7\_TA(2014)0162 (2014), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2014-0162+0+DOC+PDF+V0//EN>).

189. Monasky, *supra* note 2, at 2022.

190. *Id.*

exploitation.<sup>191</sup> House Resolution 3887 suggested changing the sex trafficking “means” definition from merely “force, fraud, or coercion” to include “persuades, induces, or entices.”<sup>192</sup> This change would have made prostitution a crime of human trafficking *per se*, because by giving money to achieve “consent,” the “john” would be inducing the prostitute to engage in self-exploitation.<sup>193</sup> While some states chose to adopt this methodology,<sup>194</sup> the U.S. Congress ultimately denied the request.<sup>195</sup>

The push to decriminalize victims of sex trafficking has met many roadblocks in its path to fruition, mostly due to the confusion surrounding the “commercial sex trade” and sex trafficking realities.<sup>196</sup> However, advocates for sex trafficking reform continue to push for an alteration to the definition of sex trafficking to include “cases involving merely an ‘abuse of power or a position of vulnerability.’”<sup>197</sup> Recall the definition of human trafficking as defined by the Palermo Protocol.<sup>198</sup> The United Nations explicitly and unambiguously defined trafficking as “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of *the abuse of power or of a position of vulnerability . . .* for the purpose of exploitation.”<sup>199</sup> The former United Nations Special Rapporteur on Trafficking in Persons even stated, “[p]ut simply, the road to prostitution and life within ‘the life’ is rarely one

191. See William Wilberforce Trafficking Victims Protection Act of 2007, H.R. 3887, 110th Cong. § 214 (2007).

192. Monasky, *supra* note 2, at 2026 (citing William Wilberforce Trafficking Victims Protection Act of 2007).

193. *Id.*

194. *Id.* (citing Marisa Nack, Note, *The Next Step: The Future of New York State’s Human Trafficking Law*, 18 J.L. & POL’Y 817, 850 (2010)). *But see* Dempsey, *supra* note 142, at 209 (“[T]hirty-two states within the U.S. continue to treat child victims as criminals, and no states have comprehensively decriminalized adult victims of sex trafficking.”).

195. Monasky, *supra* note 2, at 2026–27.

196. See Dempsey, *supra* note 142, at 212–13.

197. *Id.*

198. 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.” Palermo Protocol, *supra* note 9, art. 3(a) (emphasis added).

199. *Id.*

marked by empowerment or adequate options.”<sup>200</sup> As a majority of prostituted persons have faced some form of exploitation or coercion in their “decision,” the law should reflect a tendency to treat these women as victims, rather than criminals themselves. This victim-focused approach will only be accomplished by the decriminalization of the sale of sex, and it cannot be artificially created through legalization of the sex trade. Partial-decriminalization over legalization sends an important message: regardless of instances of “voluntary” sexual exploitation, the protection of victims through the criminalization of the purchase of sexual services *must* be a higher priority than the freedom of sex workers to sell their sexual services.<sup>201</sup>

Minnesota has played a leading role in prostitution reform in the United States. The state has modeled Sweden’s recognition of prostitution as an “inherently harmful” act that constitutes a “human rights abuse.”<sup>202</sup> This was in recognition of the unlikelihood of an individual to “willingly” participate in sex work.<sup>203</sup> Currently, Minnesota is one of the only states in the nation to recognize any presence of a “facilitator”<sup>204</sup> in prostitution as constituting a crime of sex trafficking.<sup>205</sup> It has also implemented a comprehensive “Safe Harbor Law” for

200. Dempsey, *supra* note 142, at 214 (quoting Sigma Huda (Special Rapporteur on the Human Rights Aspects of Victims of Trafficking in Persons Especially Women and Children), *Integration of the Human Rights of Women and a Gender Perspective*, Rep. of the Comm. on Human Rights on Its Sixty-Second Session, ¶ 42, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006).

201. Monasky, *supra* note 2, at 2011. “This system weighs the costs and decides that the human right to live free from violence and fear trumps the privilege of choosing one’s occupation.” *Id.*

202. The Advocates for Human Rights, *Sex Trafficking and Prostitution: An Overview of Four Legal Responses*, [http://www.theadvocatesforhumanrights.org/uploads/sextrafficking\\_and\\_prostitution\\_10\\_15.pdf](http://www.theadvocatesforhumanrights.org/uploads/sextrafficking_and_prostitution_10_15.pdf) (last visited May 17, 2017) [hereinafter Advocates for Human Rights].

203. *Id.* “Poverty, race, lack of resources, and violence consistently play a coercive role in prostitution.” *Id.*

204. “[P]erson who is a pimp, trafficker, brothel owner, madam, promoter of prostitution.” *Id.*

205. “Specifically, Minnesota’s law defines sex trafficking as ‘receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual or receiving profit or anything of value, knowing or having reason to know it is derived from sex trafficking.’” *Id.* (quoting MINN. STAT. § 609.321(7)(a) (2009)).

minors.<sup>206</sup> Due to this law, a minor engaged in prostitution is *per se* a crime victim protected from personal criminal liability.<sup>207</sup> Minnesota's legislation is centered on the same three P's of the Palermo Protocol: "Prosecution of traffickers; Punishment with appropriate sanctions; Protection of trafficked persons from prosecution."<sup>208</sup> This model reiterates the most important concept of human trafficking reform, which is ensuring a "victim-centered response."<sup>209</sup>

Minnesota has recently made the United States' first approach at implementing the Nordic Model of prostitution reform into its penal code. In May of 2015, the Minnesota House of Representatives introduced HF 2355, which created the Safe Harbor Act (mentioned above) and repealed penalties for prostitution.<sup>210</sup> This Act would repeal Minnesota Statutes § 609.324(6) and (7) (general crime and penalties for prostitutes) as well as § 609.325(4) (affirmative defense of victimization by trafficking).<sup>211</sup> As a prosecuting attorney in Minnesota for over fifteen years, Minnesota State Representative John Lesch knows the intricacies of prostitution and its connection to human trafficking.<sup>212</sup> Representative Lesch is optimistic about the bill's prospect of passage stating it will not "cut down partisan lines," but rather it will come down to the "psychology of individual members."<sup>213</sup>

206. *Id.*

207. *Id.*

208. Advocates for Human Rights, *supra* note 202. See Palermo Protocol, *supra* note 9, at pmbl.

209. Advocates for Human Rights, *supra* note 202. "This approach is defined as the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner." *Id.* (quoting OFFICE FOR VICTIMS OF CRIME TRAINING AND TECHNICAL ASSISTANCE CENTER, [ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/](http://ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/) (last visited Feb. 9, 2017)).

210. Journal of the House, State of Minn. 89th Sess., 63rd Day, 4733 (May 16, 2015) <http://www.house.leg.state.mn.us/cc/journals/2015-16/J0516063.pdf>.

211. *Id.*

212. Mike Mosedale, *Lesch Takes the Leap Into Criminal Defense*, MINN. LAWYER (Jan. 21, 2016), <http://minnlawyer.com/2016/01/21/lesch-takes-the-leap-into-criminal-defense/#ixzz3y5ipSOU0>. Lesch stated about the prostitutes he prosecuted, "They were all sad cases. Of all the women I prosecuted, I can't think of a single one where I thought, 'Wow, she really deserves this sentence.' They were all sad cases." *Id.*

213. *Id.*

Safe-harbor provisions for minors are a significant step in the right direction. While it may seem innate to recognize that children are incapable of choosing a life of prostitution, the criminal justice system has a dark past of determining minors “are exhibiting their own independent agency and are choosing to do so of their own accord.”<sup>214</sup> Thankfully, state governments across the United States have begun to implement new legislation that would extend protection to prostituted minors “under statutory age of consent laws.”<sup>215</sup> Studies show that many victims of prostitution were sexually abused as children.<sup>216</sup> By providing minors safe-haven from prostitution laws, the government is recognizing “the fallacy of free will in prostitution” for minors. Unfortunately, this does nothing to address or acknowledge the reality of trafficking victims who pass into a “legal” age during their lifetime of repeated victimization. These laws create a legal fiction of mental maturity by assuming one can simply “learn better” by the time they reach a majority age, rather than realizing this behavior may have been present for many years and remained unaddressed.

Additionally, these laws do not often adequately address the multitude of other crimes that may come along as a package with a prostituted person. In addition to prostitution, “[t]raffickers often compel victims to engage in criminal activities such as . . . pick-pocketing, or drug trafficking and cultivation.”<sup>217</sup> While the U.S. government acknowledges these individuals should not be held accountable for crimes committed as a “direct consequence of their victimization,”<sup>218</sup> law enforcement personnel and prosecutors often fail to identify and protect these individuals from punishment, which results in a “second victimization.”<sup>219</sup> Avoiding this second victimization by the government has come to the forefront of Europe’s anti-trafficking measures. The

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214. Alyssa Daniels, Note, *Limping Toward Decriminalization: The Case Act, De Facto Decriminalization of Domestic Minor Sex Trafficking Victims, and 2-Way CCTV*, 88 S. CAL. L. REV. 1421, 1439 (2015).

215. *Id.* at 1439.

216. *Id.* at 1431.

217. OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEPT. OF STATE, PROTECTING VICTIMS FROM WRONGFUL PROSECUTION AND FURTHER VICTIMIZATION 26 (2016).

218. *Id.*

219. *Id.*

European Union Directive on preventing and combatting trafficking in persons provides:

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that the competent authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts . . . referred to in [the Palermo Protocol].<sup>220</sup>

Therefore, affording the opportunity to escape punishment for crimes committed against one's will is essential to rehabilitating rescued victims as well as encouraging current victims to trust the criminal justice system and seek help.

Other notable members of the Minnesota community have also spoken out in their support of Minnesota implementing the Nordic Model. Evelina Giobbe, a retired United Way executive director, stated, "current laws are ill suited to fully address the problem."<sup>221</sup> Giobbe emphasized that prostitution is an economic-centered problem, as it is a "demand-driven market."<sup>222</sup> While she acknowledges the good faith effort by the Legislature and law enforcement, Giobbe feels the main problem lies in the law's tendency to view prostitutes as women who are "exercising their free right to engage in criminal activity," rather than as trafficked women.<sup>223</sup> Local Minnesota attorney Daniel McIntosh stated that some jurisdictions have chosen to "unofficially" implement the Nordic Model in Minnesota by refusing to prosecute women engaged in prostitution at all.<sup>224</sup> McIntosh reiterates the most important method of halting sex trafficking, which is "to make the subjects of human trafficking more confident and more supportive in coming out of that life and shutting down that operation."<sup>225</sup>

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220. *Id.*

221. William Morris, *Prostitution, Trafficking a Tough Target for Law Enforcement*, OWATONNA.COM (May 2, 2015), [http://www.southernminn.com/owatonna\\_peoples\\_press/news/article\\_360fe433-2e6e-503a-a0c5-70a6555c623c.html](http://www.southernminn.com/owatonna_peoples_press/news/article_360fe433-2e6e-503a-a0c5-70a6555c623c.html).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

Minnesota's impressive drive for combatting human trafficking through prostitution reform demonstrates a movement in the right direction. International experiments have given the U.S. the statistics it needs to prove that legalization does more harm than good and complete criminalization has the unintended impact of hurting the exact people it is meant to protect. Time will tell if Minnesota is effective in passing the Nordic Model of partial decriminalization in prostitution reform, but if the current support of the legislative, law enforcement, and public service communities continues, Minnesota appears likely to pass this humanitarian reform soon.

## V. CONCLUSION AND LOOKING FORWARD

Obtaining effective conviction rates and identifying victims remain crucial problems in halting human trafficking. In order to effect necessary change, the U.S. government must increase its training programs for law enforcement, as well as other social services providers (including education and medical professionals), to not only identify trafficking and rescue victims, but also to facilitate a relationship of trust with vulnerable persons they have contact with. This will serve a two-fold purpose: encouraging those who feel threatened by someone to come forward and seek help (thus avoiding a trafficking situation) and preventing those with low self-determination from spiraling into a situation where they could become exploited.

While Sweden's current law imposes too weak of a punishment to effectuate true deterrence of purchasing sex,<sup>226</sup> its methodology of prostitution reform speaks of a much more important message that other states should take notice of. By criminalizing the buying of sex and legalizing its sale, Sweden is sending a "societal message" that prostitution is inherently wrong while also confirming the victimization of prostitutes.<sup>227</sup> The "Nordic Model" affirms a humanitarian approach to prostitution reform by acknowledging this simple fact: "prostitution [is] a

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226. Monasky, *supra* note 2, at 2016 (Sweden's current law "punishes the purchase of sex to the same extent as it punishes shoplifting.").

227. *Id.* "It is not reasonable to punish the person who sells a sexual service. In the majority of cases at least, this person is a weaker partner who is exploited by those who want only to satisfy their sexual drives." *Id.*

form of violence against women.”<sup>228</sup> According to a study of prostituted persons in nine countries, a majority of prostitutes were diagnosed with posttraumatic stress disorder that equaled (or surpassed) levels found in “Vietnam veterans, battered women seeking shelter, or refugees fleeing from state-organized torture, regardless of whether prostitution was legalized or criminalized, and regardless of [where] the prostitution took place.”<sup>229</sup> Furthermore, even German trauma experts have collected studies and opinions to urge Germany, and other countries, to change its policy on prostitution for humanitarian reasons.<sup>230</sup> In the “Manifesto,” these German experts argue “prostitution is a humiliating, that it is degrading, that it is an act of violence and a continuation of violence in these women’s life histories.”<sup>231</sup>

Human trafficking is not a secluded crime; the undisputable truth is that human trafficking, prostitution, and organized crime are all linked.<sup>232</sup> Prostitution and human trafficking are both “lucrative enterprises” for organized criminal syndicates because they have “relatively high profits and low risks.”<sup>233</sup> By impeding the low risk factor of prostitution for traffickers, human trafficking could be greatly reduced. If prostitutes felt they could turn to police for help, and may even be rewarded for doing

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228. *Id.*

229. Waltman, *supra* note 95, at 141.

230. Taina Blen-Aime, *Germany Wins the Title of ‘Bordello of Europe’: Why Doesn’t Angela Merkel Care?*, HUFFINGTON POST (May 27, 2016, 3:50 PM), [http://www.huffingtonpost.com/taina-bienaime/germany-wins-the-title-of\\_b\\_7446636.html](http://www.huffingtonpost.com/taina-bienaime/germany-wins-the-title-of_b_7446636.html) (referring to the Psychotraumatologists’ *Manifesto Against Prostitution* by Ingeborg Kraus). Dr. Kraus recanted her own personal experience with victims of human trafficking: “With rape, women are not only deeply traumatized, they are dishonored by their communities and as a consequence often rejected by their own families and by society. This destroys the core social structures of a community. . . . When I returned to Germany, I also counseled women who were in or had left the sex trade. Learning about their life journeys, it became clear that prostitution was, in all cases, a continuation of violent experiences in their biographies. It surprised me that even in peaceful Germany, approximately half of the female patients I treated had experienced sexual violence as children. Also, the psychological effects of sexual violence on women, whether in war or in prostitution are clinically similar.” *Id.*

231. Ingeborg Kraus, *Prostitution is Incompatible for Equality Between Men and Women*, TRAUMA AND PROSTITUTION (Oct. 15, 2015), <http://www.trauma-and-prostitution.eu/en/2016/01/08/prostitution-is-incompatible-with-equality-between-men-and-women/>.

232. Lehti & Aromaa, *supra* note 8, at 138.

233. *Id.*



so, traffickers may be less likely to engage in sex trafficking and pandering.

Fighting prostitution is essential to the fight against human trafficking because the two share common characteristics of the exploitation of vulnerable individuals. Making an effective change in how the judicial system treats prostitution offenses should be a priority for the United States. The conversation on sex in this country should be one of free choice, and until prostitution reflects a system of freedom, it must be viewed as a form of human trafficking to prevent victimization. While partially decriminalizing prostitution may be unsatisfactory to those claiming “sex workers’ rights,” this form is preferable to the alternative (legalization) as it puts the rights and protection of victims before those who claim to be engaged in “voluntary” self-sexual exploitation. Until the horrendous presence of sex trafficking is no longer a reality, the government must take steps to ensure the effective punishment of traffickers, and those who purchase their goods, while keeping victims from falling under the hammer.

