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## Slavery-Like Conditions and Abuse of Positions of Vulnerability: Why the United States Should Judge Countries' Efforts to Combat Human Trafficking Based on the Palermo Protocol and Consider the Effects of Legalized Prostitution on Human Trafficking

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PALERMO PROTOCOL AND CONSIDER  
THE EFFECTS OF LEGALIZED  
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DANICA BAIRD\*

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#### INTRODUCTION

Maria<sup>1</sup> grew up in Romania. Life had its challenges, but overall, Maria felt that she had a good life. Yet, her life changed dramatically when she turned eighteen. Her boyfriend broke up with her, claiming he “was sick of her” and needed to pay him back for all the money spent on her. He knocked Maria unconscious. Later, she learned that her boyfriend had drugged her and sold her for fifty-nine euros (or about sixty-five U.S. dollars) to a criminal organization operating in that area of Romania. Shortly afterward, traffickers transported Maria to Italy, where they forced her to have sex with clients repeatedly, then later taking away the proceeds. The proceeds were allegedly for the cost of housing, food, and for transporting her from Romania to Italy—despite never agreeing or consenting to leaving Romania. Her traffickers also prohibited her from leaving her new “home.” Traffickers beat Maria every time she refused to have sex, and withheld food every time she refused to comply with their demands.

Eventually, a client offered to pay for her freedom from her traffickers. For a large price the traffickers agreed. Maria said now she only has to make one person happy, only has to have sex with one person, and does not have to handle money. But, if she refuses to have sex, she says her freedom and ability to move freely remains severely limited. Maria does not know whether she could leave the person who “bought her freedom” without suffering dire consequences. She has no legal identity or legal documents in Italy, and is uncertain how law enforcement would treat her if she fled to seek help. Maria remains unhappy with her situation, but she is afraid to leave the man who now “owns” her. She also believes she is in love with the man who “owns” her and is not sure she wants to leave him. Further, she fears if she returned to Romania that criminals might kill her and her family

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1. Name has been changed to protect the individual mentioned.

or that she will fall back into trafficking.<sup>2</sup>

Maria's situation is not unique. Kaya was fifteen when a man in her village offered to assist her in finding a job as a maid at a nearby city to help her family, who had suffered a horrible financial misfortune. Kaya agreed because she was anxious to help her family. Instead, to her surprise, the man transported Kaya to another country where she could not speak the language. In this new country, people informed her that she would never be able to return to her country. If she tried, police would arrest her and fine her parents because she lacked the right papers. Her traffickers informed her that her only option was to work in the brothel. Kaya reluctantly agreed. They sold her virginity for twenty dollars, and forced her to have sex with ten to fifteen men every night.<sup>3</sup>

In most countries in the world, Kaya and Maria would be considered victims of human trafficking.<sup>4</sup> However, under United States law, police could arrest Maria for prostitution.<sup>5</sup> Yet, Kaya is a minor, thus considered a victim of trafficking<sup>6</sup>—barring her arrest under international law and United States federal law.<sup>7</sup>

Prostitution involves exchanging sexual acts for something of value, often

2. This account comes from a personal conversation the author had with Maria in 2014 when the author lived in Italy. Maria's fear of being re-trafficked is credible. See Cherish Adams, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT'L L. REV. 201, 201-02 (2011).

3. Story slightly modified from an account compiled by The Exodus Road, an organization that fights human trafficking. See Kelly Allen, *Human Trafficking vs. Prostitution*, THE EXODUS ROAD: OUR BLOG (Sept. 9, 2012) <https://blog.theexodusroad.com/human-trafficking-prostitution-difference>.

4. See United Nations Convention Against Transnational Organized Crime and the Protocols Thereto art. 3, Nov. 15, 2000, 2225 U.N.T.S. 209.

5. Many victims of trafficking are arrested and convicted of prostitution even though this is prohibited by law. See, e.g., Danielle Augustson, *Protecting Human-Trafficking Victims from Criminal Liability—A Legislative Approach*, 17 GEO. J. GENDER & L. 625, 632 (2016); see also Alyssa M. Barnard, "The Second Chance They Deserve": *Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1481-83 (2014).

6. Sexual Exploitation & Sex Trafficking of Minors, YOUTH.GOV, <https://youth.gov/youth-topics/trafficking-of-youth/sexual-exploitation-and-sex-trafficking> (last visited Mar. 24, 2020).

7. Because Kaya is under eighteen years old and was sold for sex, she is automatically a victim of severe sex trafficking without needing to prove there was force, fraud, or coercion. See 22 U.S.C. § 7102(9) (Supp. 2018); see also United Nations Convention Against Transnational Organized Crime and the Protocols Thereto art. 3, Nov. 15, 2000, 2225 U.N.T.S. 209.

money.<sup>8</sup> In comparison, sex trafficking occurs when a person exchanges sexual acts for something of value but the trafficker induced involvement in the sexual act by fraud, force, or coercion or the person induced to commit the sexual activity is under eighteen years of age.<sup>9</sup> In essence, prostitution involves a meaningful voluntary choice to participate in the commercial sex industry, while sex trafficking involves involuntary participation in the commercial sex industry.<sup>10</sup>

While Kaya and Maria's stories occurred in other countries, international human trafficking plagues the United States because it is regarded as a destination country for human trafficking.<sup>11</sup> Traffickers transport individuals from around the world for various purposes, including the illegal commercial sex trade, forced labor, and debt bondage.<sup>12</sup> When the United States passed the Victims of Trafficking and Violence Protection Act ("TVPA") in 2000, the United States Congress indicated it believed that traffickers transported approximately 50,000 women and children into the United States each year.<sup>13</sup> However, in 2004, the State Department changed that estimate to claim that traffickers transported only 14,500–17,500 individuals per year into the United States.<sup>14</sup> Even using the State Department's most

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8. See 18 U.S.C. § 1591 (e)(3) (Supp. 2018).

9. 22 U.S.C. § 7102(11).

10. See *id.*

11. See Adams, *supra* note 2, at 222.

12. See Rebekah Kates Lemke, *7 Things You May Not Know About Human Trafficking, And 3 Ways To Help*, CATHOLIC RELIEF SERVICES (July 19, 2019), <https://www.crs.org/stories/stop-human-trafficking>.

13. See 22 U.S.C. § 7101(b)(1) (2012). This statistic does not account for all the individuals who are being trafficked within the United States. It merely accounts those who are being trafficked across international borders into the United States. The Global Slavery Index estimated that "on any given day in 2016 there were 403,000 people" being trafficked or living in conditions of modern slavery in the United States. See also *United States*, GLOBAL SLAVERY INDEX, <https://www.globallslaveryindex.org/2018/findings/country-studies/united-states/> (last visited Dec. 5, 2018).

14. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2004 23 (June 2004), <https://www.hsdl.org/?view&did=454934>; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–164., 119 Stat. 3558; see also U.N. OFFICE ON DRUGS AND CRIME, REPORT ON THE VIENNA FORUM TO FIGHT HUMAN TRAFFICKING, (Feb. 2008) (noting "statistics that report on the number of prosecutions, arrests, convictions or the number of identified victims, are necessarily only a subset of the real universe of human trafficking cases that come to the attention of the authorities"); *024 Workshop: Quantifying Human Trafficking, Its Impact and the Responses to It*, GLOBAL INITIATIVE TO FIGHT HUMAN TRAFFICKING 1–2 (2008), <https://www.unodc.org/documents/humantrafficking/2008/BP024QuantifyingHumanTrafficking.pdf>. For these reasons, these numbers are only scholars' best guesses and are estimates that vary widely

conservative estimate of 14,500, this means the United States believes that, since Congress passed the TVPA in 2000, traffickers transported at least 290,000 people into the United States.

Congress also stated, “[t]rafficking of persons is an evil requiring concerted and vigorous actions by countries of origin, transit or destination.”<sup>15</sup> Because the United States recognized human trafficking as a transnational problem, it created incentives to help countries combat human trafficking under the TVPA.<sup>16</sup> The United States’ policies have impacted how other countries approach human trafficking.<sup>17</sup> If the United States wishes to further incentivize countries to combat human trafficking, it should use the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the “Palermo Protocol”) rather than the TVPA. The United States should use the Palermo Protocol as the basis for judging how effective countries’ efforts have been in combatting human trafficking and the United States should also consider the effects of legalized prostitution on human trafficking. Specifically, the United States should: (1) use the Palermo Protocol’s definition of trafficking to more accurately represent the realities of modern-day human trafficking; (2) use the Palermo Protocol as the basis for determining whether countries have adequately assisted and protected victims of trafficking; and (3) consciously discuss the interplay between trafficking and legalized prostitution and refuse to assign a top-tier ranking to countries with legalized prostitution.

Part I briefly explains how under the TVPA the United States judges and rates other countries based on their efforts to combat human trafficking through a four-tier system that ties funding to these rankings. Part II argues that the United States should use the Palermo Protocol’s definition for trafficking, rather than the TVPA’s “minimum standards of trafficking” definition when ranking countries’ efforts to combat human trafficking. Part III argues that the United States should use the Palermo Protocol as the basis for judging countries’ efforts to protect human trafficking victims, rather than the TVPA standard because it places less attention on protecting and assisting victims of human trafficking—while allocating more resources on prosecuting traffickers. Part IV argues that the United States should not

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due to the lack of knowledge on the real scope of the problem.

15. See 22 U.S.C. § 7101(b)(21) (2012).

16. See 22 U.S.C. § 7107 (2012); see also 22 U.S.C. §2152(d) (2012).

17. See *infra* Part I(B) for a discussion of how United States’ laws have impacted countries’ efforts to combat human trafficking.

award any country with legalized prostitution a top-tier rating for efforts to combat human trafficking because: (1) legalized prostitution violates the Palermo Protocol by allowing traffickers and pimps to engage in practices similar to slavery and to exploit persons in positions of vulnerability;<sup>18</sup> and, (2) legalizing prostitution has increased trafficking, especially child trafficking, in every country that has embraced legalization.<sup>19</sup>

#### I. THE UNITED STATES' FOUR-TIER SYSTEM FOR RATING OTHER COUNTRIES' EFFORTS TO COMBAT HUMAN TRAFFICKING

While the TVPA mostly contains mandated procedures for handling human trafficking cases domestically,<sup>20</sup> the TVPA also requires the United States to rank other countries based on their efforts to combat human trafficking.<sup>21</sup> The TVPA authorizes the United States to give assistance (including monetary assistance) to foreign countries and non-governmental and multilateral organizations that meet “minimum standards” for eliminating trafficking within their country.<sup>22</sup> These minimum standards form the basis for deciding each country’s rank and focus on the following factors: (1) whether the country has enacted laws prohibiting and punishing severe forms of trafficking as defined under the TVPA;<sup>23</sup> (2) whether the country vigorously prosecutes traffickers; (3) whether the country proactively identifies and protects victims; and (4) governmental efforts to prevent human trafficking.<sup>24</sup>

Additionally, the United States’ policy under the TVPA is to withhold non-humanitarian, non-trade related assistance (including monetary assistance) to any government that does not comply and fails to make

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18. See United Nations Convention Against Transnational Organized Crime and the Protocols Thereto art. 3, Nov. 15, 2000, 2225 U.N.T.S. 209.

19. *Does Legalized Prostitution Increase Human Trafficking?*, HARVARD LAW AND INTERNATIONAL DEVELOPMENT SOCIETY, June 12, 2014, <https://orgs.law.harvard.edu/lids/2014/06/12/does-legalized-prostitution-increase-human-trafficking/> (providing analysis of legalized prostitution’s effect on human trafficking).

20. See 22 U.S.C. § 7101 (2012), *et. seq.*

21. See 22 U.S.C. §§ 7106–7107 (2012); 22 U.S.C. § 2152(d) (2012).

22. See *id.*

23. See *infra* note 59–64 and accompanying text for a more comprehensive definition of severe forms of trafficking. However, severe forms of trafficking include “commercial sex acts induced by force, fraud, or coercion” or involve an individual who is younger than 18 years of age or use “force, fraud, or coercion” to force people into labor trafficking. 22 U.S.C. § 7102(4) (Supp. 2018).

24. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2018 44 (June 2018), <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf>; 22 U.S.C. §§ 7106–7107.



significant efforts to comply with these minimum standards.<sup>25</sup> The TVPA requires the State Department to place each country into one of four tiers; placement is based on whether the country meets the TVPA minimum standards to combat human trafficking.<sup>26</sup> This analysis does not factor in compliance with the Palermo Protocol or any other international treaty. Rather, each year, the State Department analyzes each country and assigns one of the four tier rankings to each country based on its efforts to meet minimum standards on combatting trafficking.<sup>27</sup> The State Department publishes these rankings in an annual report titled the Trafficking in Persons Report (“TIP Report”).<sup>28</sup> The first TIP Report was published in 2001, but it was not until 2010 that the United States began analyzing its own efforts to combat human trafficking in the TIP Report.<sup>29</sup>

#### A. The Four-Tier Placement System

The United States can assign each country one of the following four tiers: Tier 1, Tier 2, Tier 2 Watch List, or Tier 3.<sup>30</sup> Countries labeled Tier 2 Watch List are at risk of losing funding, and countries ranked Tier 3 are ineligible to receive funding.<sup>31</sup>

Tier 1 countries consists of governments that have “[m]ade efforts to address the problem that meet the TVPA’s minimum standards . . . . Tier 1 represents a responsibility rather than a reprieve.”<sup>32</sup> Currently, thirty-three countries are Tier 1 countries.<sup>33</sup> The State Department assigns Tier 2 to “[g]overnments of countries that do not fully meet the TVPA’s minimum standards, but are making significant efforts to bring themselves into

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25. See *id.*; see also *infra* Part II(A) for a discussion of the TVPA’s definition of trafficking; see *infra* Part III for a discussion of how the United States judges whether countries proactively identify and protect victims.

26. See 22 U.S.C. §§ 7106–7107.

27. See *id.*

28. See *id.*

29. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2010 5 (June 2010), <https://www.state.gov/documents/organization/142979.pdf>.

30. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2018: TIER PLACEMENT AND REGIONAL MAPS 40–41 (June 2018), <https://www.state.gov/j/tip/rls/tiprpt/2018/282584.htm>.

31. See *id.*

32. See *id.*; see also U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2019 48 (June 2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>. In 2018, thirty-nine countries were ranked as a Tier 1 country..

33. See TRAFFICKING IN PERSONS REPORT 2018: TIER PLACEMENT AND REGIONAL MAPS, *supra* note 30, at 42.

compliance with those standards.”<sup>34</sup> Ninety-three countries fall into Tier 2.<sup>35</sup> The State Department assigns Tier 2 Watch List to countries who do not fully meet the minimum standards and are making only minor efforts to adhere to the standards.<sup>36</sup> Thirty-eight countries fall in the Tier 2 Watchlist.<sup>37</sup> Tier 3 countries are those “[t]hat do not fully meet the TVPA minimum standards and are not making significant efforts to do so.”<sup>38</sup> Currently, twenty-one countries fall in Tier 3.<sup>39</sup>

*B. Understanding the Impact of the TIP Reports and the  
TVPA on State Parties*

Many countries either value their eligibility to receive foreign aid funding from the United States or care about how the United States perceives them.<sup>40</sup> Therefore, these countries care how the United States rates them in the annual TIP Report.<sup>41</sup> While some critics argue that political gamesmanship affects the TIP Report,<sup>42</sup> three examples help demonstrate how the TIP Report has positively impacted countries’ efforts to combat human

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34. See TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 40.

35. See TRAFFICKING IN PERSONS REPORT 2019: TIER PLACEMENT AND REGIONAL MAPS, *supra* note 32, at 48. In 2018, eighty countries were ranked as Tier 2 countries. See TRAFFICKING IN PERSONS REPORT 2018: TIER PLACEMENT AND REGIONAL MAPS, *supra* note 30, at 42.

36. See TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 40–41.

37. See TRAFFICKING IN PERSONS REPORT 2019: TIER PLACEMENT AND REGIONAL MAPS, *supra* note 32, at 48. In 2018, forty-two countries were ranked as Tier 2 Watchlist. See TRAFFICKING IN PERSONS REPORT 2018: TIER PLACEMENT AND REGIONAL MAPS, *supra* note 30, at 30.

38. See TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 41.

39. See TRAFFICKING IN PERSONS REPORT 2019: TIER PLACEMENT AND REGIONAL MAPS, *supra* note 32, at 48. In 2018, twenty-two countries were ranked as Tier 3. See TRAFFICKING IN PERSONS REPORT 2018: TIER PLACEMENT AND REGIONAL MAPS, *supra* note 30, at 30.

40. See Shawn Langlois, *Here’s where all that U.S. foreign aid is going and why, in one chart*, MARKET WATCH (Jan. 15, 2019), <https://www.marketwatch.com/story/us-foreign-aid-where-all-that-money-is-going-and-why-in-one-chart-2019-01-15>.

41. See *infra* Part I(B) (explaining several situations in which countries have changed behaviors as a result of TIP Reports).

42. See Judith Kelley, *The State Department Just Released its Human Trafficking Report. Here’s Why it Matters*, THE WASHINGTON POST (July 3, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/03/the-state-department-just-released-its-trafficking-in-persons-report-heres-why-that-matters/> (stating some claim the TIP reports “are often ideologically loaded and based on dubious statistics” and that “countries try to game the rankings rather than making genuine improvements.”).

trafficking.

First, the Republic of the Marshall Islands was a Tier 3 country in 2016,<sup>43</sup> a Tier 2 Watch List country in 2017,<sup>44</sup> and a Tier 2 country in 2018.<sup>45</sup> In the 2016 TIP Report, the State Department criticized the Marshall Islands for failing to enact laws that: punish trafficking, prosecute any case of trafficking in the last five years, and proactively identify victims.<sup>46</sup> In 2017, the State Department determined that the Marshall Islands introduced new drafts of trafficking laws, began implementing a national plan to combat human trafficking, engaged in two investigations on labor trafficking, and made “modest efforts to identify trafficking victims.”<sup>47</sup> The criticism from the 2016 TIP Report directly aligned with these changes.<sup>48</sup> In 2018, the government passed and enacted additional trafficking laws in response to State Department criticisms.<sup>49</sup> This consistent implementation of new policies demonstrates the TIP report’s influence on the Marshall Islands’ desire to comply with the TVPA and receive funding.

Second, the Government of the Central African Republic was a Tier 3 country in 2017.<sup>50</sup> The State Department justified this rating due to the harassment of non-governmental organizations and general corruption.<sup>51</sup> The State Department also claimed that the government failed to undertake any efforts to prevent child trafficking, especially trafficking for child soldiers.<sup>52</sup> In 2018, the State Department upgraded the Central African Republic to the Tier 2 Watch List because the government established an organization to combat trafficking, and because the government partnered with a program that identified 3,000 child soldiers and helped reintegrate these children into civilian society.<sup>53</sup> Again, these changes show that the Government of the Central African Republic responded to the TIP Report’s recommended changes and criticism.

Third, Cambodia was a Tier 3 country one year because the government

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43. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2016 56 (June 2016), <https://www.state.gov/documents/organization/258876.pdf>.

44. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2017 44 (June 2017), <https://www.state.gov/documents/organization/271339.pdf>.

45. See TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 295.

46. See TRAFFICKING IN PERSONS REPORT 2016, *supra* note 43, at 262.

47. See TRAFFICKING IN PERSONS REPORT 2017, *supra* note 44, at 273.

48. See *id.*

49. See TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 295.

50. See TRAFFICKING IN PERSONS REPORT 2017, *supra* note 44, at 120–21.

51. See *id.* at 121.

52. See *id.*

53. See TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 133.

failed to combat severe trafficking by failing to convict traffickers, and because of public official involvement in human trafficking.<sup>54</sup> The next year, Cambodia increased its efforts to uncover, arrest, charge, prosecute, and ultimately convict traffickers.<sup>55</sup> The Cambodian government also made efforts to arrest police officers engaged in trafficking.<sup>56</sup> Consequently, “[t]hrough Cambodia is still plagued by ‘corruption at all levels of government and an ineffectual judicial system,’ placement in Tier 3 seems to have motivated the country to increase its efforts to combat sex trafficking.”<sup>57</sup> These examples demonstrate how the United States’ TVPA and mandated TIP Reports influence countries to improve their efforts to combat human trafficking. However, with some simple changes to its approach, the United States could dramatically increase its positive impact.<sup>58</sup>

## II. THE UNITED STATES SHOULD USE THE PALERMO PROTOCOL’S DEFINITION OF TRAFFICKING INSTEAD OF THE TVPA’S WHEN ASSIGNING A RANK TO EACH COUNTRY

The United States should use the Palermo Protocol’s definition of human trafficking instead of the TVPA’s definition of human trafficking when analyzing foreign countries’ efforts to combat human trafficking. The State Department currently judges countries according to the “minimum standards” required for combating severe forms of human trafficking.<sup>59</sup> Since the TVPA took effect in 2000, eighty-eight percent of countries in the world have signed onto the Palermo Protocol,<sup>60</sup> which imposes higher standards than the TPVA. Most countries, other than the United States, have adopted the Palermo Protocol’s definition of human trafficking in their own domestic laws.<sup>61</sup> However, an overwhelming majority of countries have

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54. See Melissa Holman, *The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking Protection Act in Order to Combat International Sex Trafficking More Effectively*, 44 TEX. INT’L. L.J. 99, 114 (2009).

55. *See id.*

56. *See id.*

57. *See id.*

58. *See infra* Part II (describing how the United States could increase their ability to positively impact other countries’ efforts to combat human trafficking and place more attention on protecting victims); *see also infra* Part IV (explaining why no country with legalized prostitution should receive a Tier 1 ranking).

59. *See* 22 U.S.C. §§ 7106–7107 (2000).

60. *See* U.N. Office on Drugs and Crime, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2016, U.N. Sales No. E.16.IV.6 at 48 (2016).

61. *See* Mohamed Y. Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 VAND. J. TRANSNAT’L L. 1355, 1380 (2008).

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failed to comply with the Palermo Protocol.<sup>62</sup> Thus, it is time to judge countries according to their efforts to comply with the definition of human trafficking that the Palermo Protocol uses, rather than the narrow definition the United States employs.

*A. Comparing the Palermo Protocol and TVPA Definitions of Human Trafficking*

The Palermo Protocol employs a broad definition of human trafficking in Article 3, especially when compared to the TVPA. The Palermo Protocol defines human trafficking as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>63</sup>

This broad language aims to encompass a wide range of possible victims and forms of trafficking. In comparison, the United States adopted a narrow approach to trafficking. The TVPA employs a restrictive definition that only covers severe forms of trafficking, which serves as the basis for measuring countries' efforts to combat human trafficking.<sup>64</sup> The TVPA defines severe forms of trafficking as:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>65</sup>

Additionally, the TVPA defines sex trafficking as “the recruitment, harboring, transportation, provision or obtaining of a person for the purpose

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62. *See id.*; GLOBAL REPORT ON TRAFFICKING IN PERSONS 2016, *supra* note 60, at 48.

63. United Nations Convention Against Transnational Organized Crime and Protocols Thereto, *supra* note 4, at 42.

64. 22 U.S.C. §7101 (2000).

65. 22 U.S.C. §7102(11) (Supp. 2018).

of a commercial sex act.”<sup>66</sup> The TVPA defines “commercial sex act” as “any sex act on account of which anything of value is given to or received by any person.”<sup>67</sup>

The TVPA’s definitions are problematic because it ignores several means of trafficking, and fails to consider various types of trafficking; by definition, it limits victims of trafficking to those willing to aid in the investigation and prosecution of traffickers.<sup>68</sup>

*1. The TVPA limits several means of trafficking and thus by definition limits what acts constitute trafficking.*

The analysis of trafficking falls into three parts: the act, the means, and the purpose.<sup>69</sup> The *act* or the crime of trafficking under the Palermo Protocol and the TVPA are essentially identical.<sup>70</sup>

However, the TVPA ignores several *means* and *purposes* of trafficking listed in the Palermo Protocol. Under the Palermo Protocol, trafficking can occur:

[b]y means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, *of 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.<sup>71</sup>

Exploitation encompasses any sexual exploitation, including prostitution, forced labor, removal of organs, or any practice like slavery.<sup>72</sup>

In contrast, the United States limits the means of trafficking a person to “force, fraud, or coercion.”<sup>73</sup> Moreover, the burden of proof to satisfy the elements of “force, fraud, or coercion” under the TVPA is difficult to meet. Many prosecutors have stated that traffickers are often charged under lesser requirements found elsewhere in the law to avoid having to meet this high standard, and to avoid having to explain to juries the complexities of

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66. 22 U.S.C. §7102(12).

67. 22 U.S.C. §7102(4).

68. *See Adams, supra* note 2, at 223.

69. The National Institute of Justice, *Overview of Human Trafficking and NIJ’s Role* (Feb. 25, 2019), <https://www.nij.gov/topics/crime/human-trafficking/pages/welcome.aspx>.

70. *See* United Nations Convention Against Transnational Organized Crime and Protocols Thereto, *supra* note 4, at 42; *see also* 22 U.S.C. §7102(12).

71. *See* United Nations Convention Against Transnational Organized Crime and Protocols Thereto, *supra* note 4, at 42. (emphasis added).

72. *Id.*

73. 22 U.S.C. §7102(11).

trafficking law.<sup>74</sup> This has two consequences: (1) the law does not always classify victims of trafficking as victims of human trafficking and are unable to receive services available to victims of trafficking;<sup>75</sup> and, (2) consequently, the law does not prosecute traffickers as traffickers due to the unrealistic and difficult standard for proving trafficking. Limiting the standard to force, fraud, and coercion does not reflect the messy realities of trafficking, which often include abuse of power and psychological brainwashing.<sup>76</sup> The narrow standard of the TVPA, which does not include for “the purpose of exploitation,” also pushes the debate away from people living in exploitative and slavery-like conditions to a laser-like focus on whether individuals consented to live in those conditions, even if he or she had no safe alternative.<sup>77</sup>

## 2. *The TVPA limits what types of trafficking are punishable.*

The TVPA predominantly recognizes two forms of trafficking—sex trafficking and labor trafficking—with a greater emphasis on sex trafficking.<sup>78</sup> While these two forms of trafficking are most common,<sup>79</sup> they are far from the only types of human trafficking. The TVPA’s definition excludes several common forms of trafficking, such as: illicit international adoption, practices similar to slavery, trafficking for the purpose of marriage or forced sham marriages, victims forced into pornography production, victims compelled to work as beggars, and trafficking in human organs.<sup>80</sup> This is a significant oversight, as these are thriving forms of human trafficking. This definition also “[b]ecomes increasingly restrictive as it only protects those victims who cooperate with law enforcement.”<sup>81</sup> In Contrast, the Palermo Protocol does not limit itself to focusing on sex trafficking and labor trafficking alone, but aims to include all forms of trafficking.

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74. Alyssa Nielsen, *Utah Attorney General Sean Reyes Shares Utah Cases of Human Trafficking*, THE DAILY UNIVERSE (Jan. 9, 2016), <https://universe.byu.edu/2016/01/09/utah-attorney-general-addresses-byu-about-human-trafficking/>.

75. See Adams, *supra* note 2, at 223–24.

76. See *infra* Part III(A)(1) (explaining how traffickers use these means to traffic individuals who come from positions of vulnerability).

77. See *supra* note 1–2 (describing the story of Maria and Kaya).

78. See 22 U.S.C. §§ 7102–7106 (2012).

79. GLOBAL REPORT ON TRAFFICKING IN PERSONS 2016, *supra* note 60, at 27.

80. See *id.*

81. Alese C. Wooditch, et al., *Traffick Jam: A Policy Review of the United States’ Trafficking Victims Protection Act of 2000*, TRENDS IN ORGANIZED CRIME, at 245 (June 30, 2009).

3. *Case Studies demonstrating why the United States should judge countries based on compliance with the Palermo Protocol's definition and not the TVPA's.*

Maria's current arrangement demonstrates why the definition of human trafficking matters. Use of the TVPA or Palermo Protocol's definition varies the outcome of Maria's dilemma. Maria's liberty and freedom are contingent upon her doing what her new owner requires, and she is punished if she does not comply. She also fears punishment or falling prey to re-trafficking if she ever tried to leave.

Under the Palermo Protocol, her current "arrangement" would fall into the category of "abuse of power or of a position of vulnerability," and she likely could prove she is a victim of sexual exploitation and thus considered a victim of trafficking.<sup>82</sup> However, she would find it difficult to prove that her new owner used force, fraud, or coercion under the TVPA. Furthermore, it would be more difficult to prove both that this new "arrangement" meets the definition of sex trafficking and that she is engaging in a commercial sex act because of this force, fraud, or coercion.<sup>83</sup> Rather, the government could argue she consented to the arrangement and may even benefit from it, which satisfies the requirement of engaging in an unlawful commercial sex act.<sup>84</sup>

III. THE UNITED STATES SHOULD PLACE MORE WEIGHT ON COUNTRIES' EFFORTS TO PROTECT VICTIMS BY USING THE PALERMO PROTOCOL'S MANDATED ASSISTANCE PROVISIONS WHEN ASSIGNING COUNTRIES A TIER RANKING.

The United States should place more emphasis on countries' efforts to protect and proactively identify victims of human trafficking. The United States should also analyze countries' efforts to protect victims and provide them assistance based on the provisions in the Palermo Protocol and not the TVPA. The United States undoubtedly has been effective domestically in prosecuting traffickers, or at least consistently has improved efforts to increase prosecutions of traffickers.<sup>85</sup> Likewise, the United States has also been exceptional at encouraging countries to increase their efforts to prosecute and punish traffickers.<sup>86</sup> Punishing traffickers is essential and one

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82. United Nations Convention Against Transnational Organized Crime and Protocols Thereto, *supra* note 4, at 42.

83. *See* 22 U.S.C. § 7102 (11) (2012).

84. *See* 22 U.S.C. § 7102(4).

85. *See* Justice Department, *Human Trafficking Prosecution Unit*, (last updated Nov. 12, 2019), <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu>.

86. *See* TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 199 (emphasizing



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of the *three p's* scholars consistently identify to stop human trafficking.<sup>87</sup> However, both domestically and internationally, the United States has failed to emphasize another one of the *p's* necessary to eradicate human trafficking: protecting victims, which is essential in preventing the re-trafficking of individuals or wrongful arrests for actions committed as victims of trafficking.<sup>88</sup>

*A. The United States Has Failed to Properly Weigh Protection of Victims of Human Trafficking in Efforts to Combat Human Trafficking*

The TVPA and TIP Reports demonstrate that the United States has placed more attention on prosecution than the protection of victims. Prosecutorial efforts are important and many countries—like Nigeria and Russia— have a flourishing trade of trafficking due to lack of prosecutorial efforts.<sup>89</sup> However, without focusing on foreign country efforts to protect victims, human trafficking will continue to flourish, thus perpetuating the threat of re- trafficking of victims.<sup>90</sup>

*1. The United States has failed to place adequate attention on protecting victims of human trafficking in the TVPA.*

The United States' efforts to protect victims of trafficking lags behind that of international laws. For example, the Palermo Protocol uses vague language in Article 6(3) to account for protections that should be offered to victims, including: appropriate housing, counseling, legal advice as to personal rights, medical and psychological assistance, employment, educational, and training opportunities.<sup>91</sup> Despite critics arguing that the Palermo Protocol offers vague protections, many countries and international

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the efforts of various countries like Ghana to prosecute trafficking crimes, which increased from zero convictions to nearly a dozen convictions after pressure from the United States).

87. See Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 445 (2012); see also Anke Sembacher, *The Council of Europe Convention on Action Against Trafficking in Human Beings*, 14 TUL. J. INT'L & COMP. L. 435, 436 (2006) (explaining that the other two P's are prosecution and prevention).

88. See Augustson, *supra* note 5, at 632; see also Barnard, *supra* note 5, at 1483.

89. See Adams, *supra* note 2, at 217 (discussing failures of prosecutorial efforts); see also Holman, *supra* note 54, at 103 (discussing similar failures).

90. See Adams, *supra* note 2, at 202.

91. Jonina Einarsdottir, *The Palermo Protocol Takes It All*, STJORNMAL & STJORNYSLA, 10 ICELANDIC REV. OF POL. & ADMIN. 385, 388 (2014).

bodies codified the Palermo Protocol's recommendations into law.<sup>92</sup> Yet, the TVPA fails to address any of these protections. Namely, the TVPA fails to address the provision of healthcare, housing, education, medical and psychological assistance, employment, or educational opportunities to victims.<sup>93</sup> Additionally, it also ties all protection and assistance for victims of trafficking to those who agree to help with prosecutorial efforts,<sup>94</sup> further limiting efforts to protect victims.

Maria and Kaya's stories help to illustrate why it is so vital to provide services to assist victims of trafficking. Other than living with their traffickers, neither Maria nor Kaya had any housing options; both suffered extreme abuse and rape. Both also may have post-traumatic stress disorder (PTSD), other mental health issues, and/or sexually transmitted diseases (STDs). Prior to their trafficking, neither Kaya nor Maria received employment, educational, or training opportunities that would enable them to support themselves or taught them important life skills such as budgeting, cooking, or seeking employment. These factors make it likely that Maria or Kaya would fall prey to re-trafficking.<sup>95</sup> This cycle of re-trafficking, especially with the absence of these resources, enables the trafficking trade to flourish.<sup>96</sup>

These examples illustrate how determining both, (1) who is a victim of trafficking and (2) what services to provide to victims, can make a dramatic difference in their lives. There are an estimated 27 to 40 million victims of trafficking worldwide,<sup>97</sup> with 4.8 million victims forced into horrific sexual exploitation, making the above referenced range of services immensely important.<sup>98</sup> Thus, the United States' failure to protect victims and provide them with resources signals to other countries that providing

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92. *Id.* (explaining that while the Palermo Protocol's mandate is softened through discretionary language, such as "shall consider implementing," other countries and international bodies, such as the United Kingdom and the European Union, have adopted these principles from the Palermo Protocol in almost identical form and have expanded even further the protections that must be provided to victims).

93. *See* 22 U.S.C. § 7105(f)(1–3) (2012).

94. *See Adams, supra* note 2, at 223.

95. *See id.*

96. *See id.* at 202.

97. KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 3 (2009); *see also The Facts*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking/facts> (last visited Nov. 6, 2019).

98. *See Forced Labour, Modern Slavery and Human Trafficking*, INT'L LAB. ORG., <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> (last visited Jan. 22, 2020).

resources is optional but not required to be in good standing with the United States.

*2. The United States has also failed to properly weigh countries' efforts to protect victims when assigning a country's tier ranking.*

Countries repeatedly have received Tier 1 rankings despite severe failures to protect victims of trafficking or provide them any assistance. For example, Spain currently is and has consistently been ranked a Tier 1 country.<sup>99</sup> Yet, Spain did not offer victims who testified against traffickers basic witness protection, undisclosed housing, or provisions for other basic needs.<sup>100</sup> Spain also ultimately relied primarily on non-profit organizations and non-governmental organizations (NGOs) to protect victims of human trafficking and offer any services.<sup>101</sup> While the TIP Report states that no Tier 1 country is perfect,<sup>102</sup> Spain, which offered, at best, minimal protection for victims, should not have received a Tier 1 ranking.

Another example is the country of Guyana, which received a Tier 1 ranking in 2018<sup>103</sup> that it currently maintains.<sup>104</sup> Authorities have cited the government of Guyana's failure to provide shelter to victims, particularly male and child victims.<sup>105</sup> While Guyana has made progress each year since 2016, the United States should not have ranked Guyana as a Tier 1 country when it has offered such little support to victims of trafficking. Likewise, Italy, known as a destination country for victims from Nigeria, also has done little to protect victims for years.<sup>106</sup> Yet, it was only in 2019 that the State Department rebuked Italy for its failure to protect victims.<sup>107</sup>

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99. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2019, *supra* note 32, at 48; TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 393.

100. Viviana Waisman, *Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard*, 33 HASTINGS INT'L & COMP. L. REV. 385, 398 (2010).

101. *Id.*

102. TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 39.

103. *Id.* at 54.

104. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2019, *supra* note 32, at 48;

105. *Guyana Maintains Tier 1 Status in Human Trafficking Fight Despite Fewer Prosecutions, Convictions*, STABOREK NEWS (June 30, 2018), <https://www.stabroeknews.com/2018/news/guyana/06/30/guyana-maintains-tier-1-status-in-human-trafficking-fight-despite-fewer-prosecutions-convictions/>.

106. See Adams, *supra* note 2, at 219.

107. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2019, *supra* note 32, at 257. While in 2019 the United States seemingly placed more emphasis on the importance of protecting victims in its TIP Report, it is too premature to know if this

While holding countries to standards of perfection is unreasonable, the State Department should strongly emphasize the protection of victims and not merely the prosecution of traffickers. When the State Department repeatedly gives countries like Spain, Guyana, and Italy Tier 1 rankings, despite such inadequacies in protecting victims, it sends the dangerous message that the United States cares more about prosecuting traffickers than about protecting victims. Sending this message proves ineffective in combatting trafficking.<sup>108</sup> Thus, the State Department must place increased weight on countries' efforts to protect victims of trafficking. Using the standards from the Palermo Protocol, especially those in Article 6(3), provides a clear blueprint that the United States could follow to ensure that it places adequate weight on the broad range of assistance victims of trafficking need.

#### IV. NO COUNTRY THAT HAS LEGALIZED PROSTITUTION SHOULD RECEIVE A TIER 1 RANKING.<sup>109</sup>

The United States should not assign a Tier 1 ranking to any country that has legalized prostitution because it has led to “slavery-like conditions” and increased trafficking in every country that embraces legalization.<sup>110</sup> Yet, the United States has chosen to ignore the effects of legalized prostitution when assigning rankings to countries in its TIP Reports.<sup>111</sup> While scholars claim that “[t]he connection of trafficking and prostitution, together with strict state

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changes a pattern that has been in place for the previous eighteen reports. Additionally, and more importantly, the United States still failed to stress the importance of providing robust resources to victims (e.g. healthcare, housing, education, medical and psychological assistance, employment or educational opportunities to victims). This oversight still needs rectifying. *See id.*

108. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2019, *supra* note 32, at 48.

109. It is important to note that criticizing legalizing prostitution is not the same as criticizing the individuals who are involved in the commercial sex industry. This paper's purpose is not to stigmatize prostituted individuals or villainize them. Rather, this paper focuses on how legalizing prostitution causes trafficking to flourish and preys on and exploits the vulnerable in order to satisfy the international demand for the commercial sex industry or at least currently has done so everywhere it has been legalized.

110. *See What is Modern Slavery?*, U.S. DEP'T OF STATE, <https://www.state.gov/what-is-modern-slavery/> (last visited Mar. 24, 2020); *see also Does Legalized Prostitution Increase Human Trafficking?*, HARVARD LAW AND INTERNATIONAL DEVELOPMENT SOCIETY, June 12, 2014, <https://orgs.law.harvard.edu/lids/2014/06/12/does-legalized-prostitution-increase-human-trafficking/> (providing analysis of legalized prostitution's effect on human trafficking).

111. *See infra* Part III(B)(1) for a robust discussion on how the United States has ignored legalized prostitution in the TIP Reports.

immigration policies have stalled international legal and political counter-trafficking efforts,”<sup>112</sup> this does not excuse the United States from failing to consider the effects and implications of legalized prostitution when assigning tier ranking to countries. Countries that have legalized prostitution should instead receive a Tier 2, Tier 2 Watch List, or Tier 3 ranking, depending on how severely legalized prostitution increases trafficking and based on other factors that the United States already considers.<sup>113</sup> Also, while refusing to assign Tier 1 rankings to countries may not encourage all countries to refrain from legalizing prostitution, discussing how legalized prostitution interplays with human trafficking worldwide would honor the connection between the two—likely influencing some countries that otherwise legalize prostitution.

While proponents claim that legalized prostitution is not always bad or harmful, and that some women even seemingly consent and enjoy this work,<sup>114</sup> this section asserts that the United States should not assign a Tier 1 ranking to countries with legalized prostitution because it leads to conditions violating the Palermo Protocol and increases trafficking.<sup>115</sup> Parts A and B of this section will demonstrate that the focus should fall on the overwhelming majority of victims who suffer from dreadful, exploitative situations,<sup>116</sup> especially since partial decriminalization of trafficking has proven to be the most successful in the world.<sup>117</sup> Additionally, Parts A and B of this section will assert that the United States should not assign a Tier 1 ranking to any country that has legalized prostitution. Legalized prostitution increases trafficking, especially child trafficking, in countries where prostitution is legal.<sup>118</sup>

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112. Anna Gekht, *Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings*, 37 DENV. J. INT’L. & POL’Y, 29, 29 (2008).

113. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2018 *supra* note 20 and accompanying text for a discussion of the factors that the United States currently uses when assigning rankings.

114. See Lauren Hersh, *Prostitution Is Not Just Another Job*, HUFFINGTON POST (Mar. 29, 2016), [https://www.huffpost.com/entry/prostitution-is-not-just-\\_b\\_9557032](https://www.huffpost.com/entry/prostitution-is-not-just-_b_9557032).

115. See *infra* Part IV(A–B).

116. See *id.* (providing more detail into these exploitative situations prostituted individuals experience).

117. See Holman, *supra* note 54, at 120; see also THE ADVOCATES FOR HUMAN RIGHTS, SEX TRAFFICKING AND PROSTITUTION: AN OVERVIEW OF FOUR LEGAL RESPONSE MODELS (2015), [https://www.theadvocatesforhumanrights.org/uploads/sextrafficking\\_and\\_prostitution\\_10\\_15.pdf](https://www.theadvocatesforhumanrights.org/uploads/sextrafficking_and_prostitution_10_15.pdf).

118. See *infra* Part IV(A–B).

*A. Legalized Prostitution Leads to Conditions that Violate the Palermo Protocol and Thus No Country with Legalized Prostitution Should Receive a Tier 1 Ranking.*

As explained in prior sections, to combat severe forms of trafficking, the United States should judge countries based on the Palermo Protocol's definition of trafficking and not the TVPA's minimum standards.<sup>119</sup> If the United States judged countries against the Palermo Protocol's standard, no country with legalized prostitution would receive a Tier 1 ranking, because every country with legalized prostitution helps create situations that violate the Palermo Protocol.<sup>120</sup> Legalizing prostitution violates the Palermo Protocol by definition because pimps either (1) abuse power to exploit persons in positions of vulnerability, inducing them into the commercial sex industry or (2) induces these individuals into practices akin to slavery.<sup>121</sup>

1. *Legalizing prostitution violates the Palermo Protocol because it allows pimps and traffickers to abuse positions of power and to exploit people in positions of vulnerability to induce persons into the commercial sex industry.*

Proponents of the legalization of prostitution frame prostitution as an empowered choice made by consenting individuals to make money in a career, rather than as an often unavoidable action resulting from a position of extreme vulnerability or abusive exploitation.<sup>122</sup> However, the debate as to whether an individual consents to prostitution “[s]hifts the focus away from the discussion of the slavery-like conditions under which prostitution may occur.”<sup>123</sup> The debate also shifts the focus away from the exploitive nature of prostitution that frequently involves abuse of power or vulnerability to a focus on consent. “It is generally agreed that ‘[a] person cannot consent to enslavement, to forced labor of any kind, including sex work, or to debt bondage.’”<sup>124</sup> As another scholar stated:

Limiting relief only to those who are innocently coerced into

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119. See *supra* Part II (discussing what meets minimum standards to combat trafficking under the TVPA).

120. Einarsdottir, *supra* note 91, at 34 (emphasizing that while not all forms of prostitution violate this definition, most do).

121. United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, *supra* note 4, at 42–43.

122. See Hersh, *supra* note 114.

123. Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN'S L.J. 77, 94 (2002). See also Maria's story, *supra* notes 1–3 and accompanying text.

124. See *id.*

prostitution . . . ignor[es] the experience of many victims of modern day slavery who may be viewed by governmental officials as complicit or guilty. Still, while these individuals may have ‘voluntarily’ agreed to commercial sex, they likely did not agree to be subjected to slave-like working conditions.<sup>125</sup>

Pimps and traffickers abuse power and exploit people in positions of vulnerability because prostituted individuals<sup>126</sup> often come from disadvantaged backgrounds, experience crushing poverty, and have severely limited options—all conditions enabling traffickers or pimps to induce vulnerable populations into prostitution.<sup>127</sup> The commercial sex industry preys on vulnerable and poverty-stricken people who, due to their situation, cannot truly consent to the trade of prostitution.<sup>128</sup> Proponents of legalizing prostitution frequently use examples of typically white females who work as escorts to pay for an Ivy League college education, or advanced degree to justify their assertion that prostitution is not exploitive or coercive and does not involve degrading conditions.<sup>129</sup> However, this image of the glamorous, privileged life of an escort does not adequately represent the harsh reality of those involved in the commercial sex industry, especially those working in brothels or on the streets, where trafficking and exploitative conditions are more common.<sup>130</sup> Proponents usually depict a woman who exercises complete control of her schedule and lives a glamorous lifestyle of earning large profits for work that she claims to enjoy.<sup>131</sup> These stories do exist, but are the exception—not the norm—in the legalized commercial sex industry. As Part B will demonstrate, the focus should rest on the vast majority of individuals who have stated that they wish to leave the industry, rather than the minority who claim to enjoy the work.<sup>132</sup>

Neither international law nor the Palermo Protocol defines what it means

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125. See, e.g., Sheldon-Sherman, *supra* note 87, at 461.

126. This paper uses the adjective “prostituted” rather than the noun “prostitutes” out of respect for those individuals who are being prostituted. Also, please note the adjective “prostituted” is used throughout this paper to refer to all those who are engaged in the commercial sex industry whether their involvement is voluntary or coerced.

127. See Hersh, *supra* note 114; see also *Myth v. Fact*, ELIJAH RISING, <https://www.elijahrising.org/resources/myth/> (last visited Dec. 5, 2018); see also Adams *supra* note 2; Allen, *supra* note 3 (Maria and Kaya’s stories fit this criteria).

128. See *id.* Hersh, *supra* note 114; RISING, *supra* note 127; see also Adams *supra* note 2; Allen, *supra* note 3 (Maria and Kaya’s stories fit this criteria).

129. See Hersh, *supra* note 114.

130. *Id.*

131. *Id.*

132. See *infra* Part IV(B) (detailing the experiences of the vast majority of women).

to abuse a position of vulnerability.<sup>133</sup> However, the drafting history of the Palermo Protocol confirms that “abuse of a position of vulnerability” refers “to any situation in which the person involved has no real acceptable alternative but to submit to the abuse involved.”<sup>134</sup> This definition has been criticized for being circular.<sup>135</sup> However, unofficial guidance has shown that vulnerability factors include those that are both intrinsic and extrinsic to the victim.<sup>136</sup> For example, intrinsic factors can include age, illness, gender, and poverty.<sup>137</sup> Extrinsic factors include isolation, dependency, irregular legal status, or other vulnerabilities.<sup>138</sup>

Many victims exhibit these vulnerabilities that traffickers exploit. Most victims are women or girls of color who lack education and economic opportunities and turn to prostitution as a last resort to counter crushing poverty.<sup>139</sup> Additionally, women involved in prostitution often come from backgrounds of sexual and physical abuse in childhood, being a runaway youth, and/or homelessness and neglect.<sup>140</sup> Economic analysis demonstrates that for most women, prostitution is a route into increased poverty, not wealth and prosperity.<sup>141</sup> The same factors that push somebody into prostitution, helps ensure that person remains in prostitution. For example, women in legal brothels report having to pay exorbitant sums for rent and food.<sup>142</sup> Many also have to repay the brothel owner transportation fees upon arriving at the brothel, often under dubious circumstances that can be coercive or even forceful.<sup>143</sup> Additionally, the women often endure severe

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133. See United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, *supra* note 4, at 42–43.

134. *Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons*, UNITED NATIONS OFFICE ON DRUG CRIMES (Apr. 2013), at 3, [https://www.unodc.org/documents/humantrafficking/2012/UNODC\\_2012\\_Issue\\_Paper\\_-\\_Abuse\\_of\\_a\\_Position\\_of\\_Vulnerability.pdf](https://www.unodc.org/documents/humantrafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. See Hersh, *supra* note 114; RISING, *supra* note 127; see also Adams *supra* note 2; Allen, *supra* note 3 (Maria and Kaya’s stories fit this criteria).

140. See Hersh, *supra* note 114; RISING, *supra* note 127; see also Adams *supra* note 2; Allen, *supra* note 3 (Maria and Kaya’s stories fit this criteria).

141. See RISING, *supra* note 127.

142. See also Jon Lockett, *Horror of Women in the Windows*, THE SUN (Feb. 11, 2018), <https://www.thesun.co.uk/uncategorized/5551825/amsterdam-red-light-district-is-a-front-for-human-trafficking-rape-drug-addiction-and-brutal-beatings/>.

143. See RISING, *supra* note 127; see also Adams *supra* note 2 (Maria’s story which supports this claim).



restrictions limiting their ability to leave the brothel when they wish.<sup>144</sup>

Additionally, as a report cited by the State Department indicates, eighty-nine percent of women in prostitution want to escape the profession immediately.<sup>145</sup> Carol Leigh, a leader of an organization that advocates for legalization of prostitution, acknowledged that ninety-five percent of her friends want out of prostitution.<sup>146</sup> Most of these prostituted women, like Maria and Kaya, feel they are unable to leave their current situations and feel unable to consent to the arrangement. If the overwhelming majority of prostituted individuals want to leave but feel unable to do so, then for many, prostitution is not a freely made choice and amounts to abuse of positions of vulnerability. This abuse is also coercive and employs methods of force that violate the Palermo Protocol and falls within its definition of trafficking. Thus, countries with legalized prostitution should not receive Tier 1 rankings. Furthermore, the focus should reside on this eighty-nine to ninety-five percent who claim they want to leave the industry and not the five to ten percent that allegedly consent to and enjoy their work, especially because, as explained in Part B, partial decriminalization is the most successful approach to the commercial sex industry.

*2. Legalized prostitution exposes individuals to slavery-like conditions because it further perpetuates harms such as assault, rape, physical violence, negative health implications, and death at higher rates than for non-prostituted individuals and because it allows pimps and traffickers to control or possess ownership of other individuals.*

Legalizing prostitution results in slavery-like conditions that violate the Palermo Protocol because: (1) legalizing prostitution further exposes individuals to high levels of assault, rape, physical violence, negative health implications, higher mortality rates, and leads to further abuse of vulnerable populations even in places where prostituted individuals are part of a regulated industry; and (2) it legitimizes these slavery-like conditions in which individuals possess ownership or control over other individuals.

The Palermo Protocol does not define the term “practices similar to slavery.”<sup>147</sup> However, slavery has been defined as “the status or condition of

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144. See RISING, *supra* note 127.

145. U.S. DEP’T. OF STATE, THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION (2004), <https://2001-2009.state.gov/r/pa/ei/rls/38790.htm#6>.

146. Melissa Farley, *Myths and Facts about Trafficking for Legal and Illegal Prostitution* (Mar. 2009), <http://www.prostitutionresearch.com/Myths%20&%20Facts%20Legal%20&%20Illegal%20ProstitutionMelissaFarley3-09.pdf>.

147. See United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, *supra* note 4, at 42–43.

a person over whom any or all of the powers attaching to the right of ownership are exercised.”<sup>148</sup> Practices similar to slavery include debt bondage, serfdom, servile forms of marriage, and the exploitation of children and adolescents—i.e. all forced labor or forced sexual acts of children.<sup>149</sup> Many prominent scholars state that the Palermo Protocol’s definition merged “slavery and sexual exploitation into the term trafficking”<sup>150</sup> and thus expanded the definition of “acts similar to slavery.” However, the United Nations also stated that practices similar to slavery could include: “the economic exploitation of another person on the basis of an actual relationship of dependency or coercion, in combination with a serious and far-reaching deprivation of fundamental civil rights.”<sup>151</sup>

*a. Legalizing prostitution creates exploitative conditions akin to practices of slavery.*

Proponents of legalized prostitution claim that its only harm is the stigmatization associated with prostitution and that legalizing prostitution will erase this stigma, allowing women to receive more protection, better healthcare, and increased access to unions.<sup>152</sup> However, while Germany and the Netherlands have granted access to unions, prostituted women have not joined them.<sup>153</sup> For example, in Germany, out of an estimated 400,000 sex workers, only one-hundred have joined the union.<sup>154</sup> Furthermore, statistics show that the real harm of legalized prostitution involves higher rates of assault, rape, physical violence, negative health impacts, and death than for non-prostituted individuals, thus demonstrating the slavery-like conditions.<sup>155</sup>

For example, the State Department’s published report cited research in nine countries revealing that sixty to seventy-five percent of prostituted women were raped, seventy to ninety-five percent were physically assaulted,

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148. Einarsdottir, *supra* note 91, at 390.

149. *See id.*

150. *See, e.g., id.* at 391.

151. *See Analysis of Key Concepts of the Trafficking in Persons Protocol*, U.N. CONVENTION AGAINST TRANSACTIONAL ORGANIZED CRIME, at 7, CTOC/COP/WG.4/2010/2 (Dec. 2009) .

152. Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 3-4 J. TRAUMA PRACTICE 315, 321-28 (2004); Holman, *supra* note 54, at 117–18.

153. *See* RISING, *supra* note 127.

154. *See id.*

155. THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145; Holman, *supra* note 54, at 117–18.

and sixty-eight percent satisfied the psychological criteria for PTSD—to the same extent as military veterans.<sup>156</sup> In Germany, fifty-nine percent of respondents said that legalization of prostitution did not make them feel any safer from the possibility of being raped or physically assaulted.<sup>157</sup> In the Netherlands, forty-percent of prostituted women reported experiences of sexual abuse or prostitution.<sup>158</sup> Eighty-six percent of prostituted persons in Nevada reported that customers had been physically violent.<sup>159</sup> In Canada, where enforcement of prostitution laws is rare, prostituted women and children suffer a mortality rate forty times higher than the national average.<sup>160</sup> In general, women involved in street prostitution worldwide are sixty to one-hundred times more susceptible to homicide than non-prostituted individuals.<sup>161</sup> Yet, all the aforementioned countries with legalized prostitution currently enjoy a Tier-1 status.<sup>162</sup>

From a public health standpoint, it is impossible to ignore the risks of serious and fatal diseases, including HIV and AIDS.<sup>163</sup> The State Department has cited a report stating that studies have proven “the burden of physical injuries and illnesses that women in the sex industry sustain from the violence inflicted on them, or from their significantly higher rates of hepatitis B, higher risks of cervical cancer, fertility complications, and psychological trauma” has a significant effect on prostituted individuals.<sup>164</sup> In an international study that interviewed 186 prostituted women, the women “consistently stated that prostitution establishments did little to help them, regardless of whether the brothels were legal or illegal.”<sup>165</sup> And, as one woman stated, “The only time [the brothel owners] protect anyone is to protect the customers.”<sup>166</sup> Thus, “states that practice legalized prostitution are condoning violence against women, because even women in highly

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156. THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145

157. Holman, *supra* note 54, at 118.

158. *See id.* at 117.

159. *See id.*

160. *See id.*

161. *See* Hersh, *supra* note 114 (citing C. Gabrielle Salfati, Alison R. James, & Lynn Ferguson, *Prostitute Homicides: A Descriptive Study*, 23 J. OF INTERPERSONAL VIOLENCE 4, 505, 543 (2008)).

162. *See* TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 39; TRAFFICKING IN PERSONS REPORT 2017, *supra* note 44, at 25; TRAFFICKING IN PERSONS REPORT 2016, *supra* note 43, at 36.

163. *See* THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145.

164. *See id.*

165. *See* Holman, *supra* note 54, at 118.

166. *See id.*

regulated prostitution systems still suffer rape, violence, mental abuse, and emotional trauma”<sup>167</sup> and often results in prostituted individuals living in conditions akin to slavery. “[D]ignifying prostitution as work doesn’t dignify the women; it simply dignifies the sex industry.”<sup>168</sup> And, “no amount of regulation can keep an industry safe that is predicated on power, violence, and gender inequality.”<sup>169</sup> Because trafficking and prostitution flourish together and the conditions in this industry are so deplorable, legalized prostitution perpetuates an abuse of power that exploits individuals’ vulnerability, creating slavery-like conditions that violate the Palermo Protocol. Thus, no country that has legalized prostitution should receive a Tier 1 ranking.

*b. Legalized prostitution grants ownership over individuals to pimps and traffickers, creating slavery-like conditions.*

In addition to the high rates of physical violence, sexual assault, and death that result in slavery-like conditions, pimps and traffickers often have control or rights of ownership over other individuals.<sup>170</sup> Other people often control prostituted individuals by limiting their ability to move freely, using force and rape, and employing practices that resemble forced labor.<sup>171</sup> For example, in 2018, a woman reported her sale to work in an alleged legal Amsterdam brothel, where the owner of the brothel informed her that she owed him €27,000 (or approximately \$29,243) for transport fees. The owner also expected her to work non-stop until she had repaid the balance.<sup>172</sup> While prostituted individuals in Amsterdam earn about €350 (approximately \$379) per day, she received merely €9 (approximately \$9.75) each day to buy food and supplies. To make things worse, her boss regularly raped her.<sup>173</sup> While not all forms of legalized prostitution result in this sort of imprisoned life, studies indicate that the majority of prostituted individuals worldwide experience similar conditions.<sup>174</sup> Consequently, many forms of legalized prostitution violate the Palermo Protocol’s definition of trafficking, and thus demonstrate why the United States should not assign Tier 1 classification to

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167. *See id.* at 100.

168. *See Raymond, supra* note 152, at 316.

169. *See Hersh, supra* note 114.

170. *See THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, supra* note 145.

171. *See id.*; Lockett, *supra* note 142; *see also Adams supra* note 2 (describing how Maria’s story supports this claim).

172. *See Lockett, supra* note 142.

173. *See id.*

174. *See THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, supra* note 145; Holman, *supra* note 54, at 117-18; Hersh, *supra* note 114.

countries that have legalized prostitution.

*B. Countries That Have Legalized Prostitution Should Not Receive a Tier 1 Ranking Because Legalized Prostitution Is Inexorably Linked with Human Trafficking.*

Regardless of which definition of trafficking the United States applies, the United States should not assign any country with legalized prostitution a Tier 1 ranking. The United States has recognized the link between human trafficking and the legalized commercial sex industry. For example, a report published by the State Department on November 24, 2004, titled “The Link Between Prostitution and Sex Trafficking,” acknowledged: “Where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.”<sup>175</sup> The report concluded boldly: “[a]s a result of the prostitution-trafficking link, the United States government concluded that *no United States grant funds should be awarded* to foreign non-governmental organizations that *support legal state-regulated prostitution*. Prostitution is not the oldest profession, but the oldest form of oppression.”<sup>176</sup> However, the United States continues to provide funding to countries who have legalized prostitution, continues to give these countries Tier 1 rankings, and has largely ignored the link between legalized prostitution and human trafficking in its analysis of each country in TIP Reports.

While Amnesty International<sup>177</sup> and proponents of the legalization of prostitution claim that legalizing prostitution is an effective way to empower women, regulate trafficking, and provide public health benefits,<sup>178</sup> legalization of prostitution fails for three reasons. First, legalizing prostitution is a failed model that has not eradicated trafficking, but has contributed to it.<sup>179</sup> Second, legalizing prostitution does not result in increased regulation of the commercial sex trade, but instead results in increased trafficking—especially child trafficking.<sup>180</sup> And third, legalizing the commercial sex industry helps human trafficking flourish in part because

175. See THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145.

176. See *id.* (emphasis added).

177. See *Amnesty International Publishes Policy and Research on Protection of Sex Workers’ Rights*, AMNESTY INT’L (May 26, 2016), <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>.

178. See, e.g., Holman, *supra* note 54, at 116–18.

179. See *infra* Part IV(B)(1).

180. See *infra* Part IV(B)(2).

it lends a sense of legitimacy to traffickers and creates a legal safe haven in which they can operate freely.<sup>181</sup>

*1. Legalizing prostitution is a failed model that has not eradicated trafficking and is less effective than partial decriminalization.*

Countries have approached the problem of the commercial sex industry primarily by adopting one of three models: (1) complete legalization, which Germany, the Czech Republic, parts of Australia, and the state of Nevada have employed unsuccessfully;<sup>182</sup> (2) partial decriminalization (more commonly known as the Nordic Model) that Sweden has successfully employed;<sup>183</sup> and (3) complete criminalization that most states in the United States employ with mixed success.<sup>184</sup> Statistics have shown repeatedly that countries who employ the Nordic Model have experienced greater success in combatting trafficking, while complete legalization has failed as an experiment.<sup>185</sup>

Under complete legalization, neither the buyer nor supplier of sex (the prostituted individual) engages in any illegal activity.<sup>186</sup> Under the Nordic Model, the prostituted individual or supplier of sex does not engage in illegal activity, but the buyer and the trafficker, brothel manager, pimp, madam, and those involved engages in illegal activity and exposes them to prosecution.<sup>187</sup> Under complete criminalization, the commercial sex industry is illegal on all fronts, and those involved in the industry engage in illegal activity.<sup>188</sup> Complete criminalization has led to a focus on prosecution and a lack of attention on protecting victims,<sup>189</sup> inadequate protection of victims of human trafficking, and inadvertent arrests and convictions of victims of trafficking.<sup>190</sup> Consequently, complete criminalization or decriminalization

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181. See *infra* Part IV(B)(3).

182. See THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145.

183. See Holman, *supra* note 54, at 119-21; THE ADVOCATES FOR HUMAN RIGHTS, *supra* note 117.

184. See Lauren M. Davis, *Prostitution*, 7 *Geo. J. Gender & L.* 835, 835 (2006).

185. See THE ADVOCATES FOR HUMAN RIGHTS, *supra* note 117.

186. See *id.*

187. See *id.*

188. See *id.*

189. See *supra* Part III(A)(1) for a discussion of how the United States has failed to place adequate attention on protecting victims.

190. See Augustson, *supra* note 5, at 625 (A twelve-year-old girl was convicted of prostitution in New York); Barnard, *supra* note 5, at 1463 (Sheriff's office arrested a fifteen-year-old-girl and a sixteen-year-old-girl for prostitution even though this is in violation of United States federal law).

are less effective models than the Nordic Model. Where prostitution is legal, trafficking affects a significant proportion of prostituted individuals.<sup>191</sup> The Swedish Government has said “International trafficking in human beings could not flourish but for the existence of local prostitution markets where men are willing and able to buy and sell women and children for sexual exploitation.”<sup>192</sup>

Sweden experiences the least sex trafficking of any European Country because it employs a Nordic Model.<sup>193</sup> The case of Sweden illustrates that countries that “diligently enforce anti-prostitution laws can be incredibly effective at reducing illegal sex trafficking.”<sup>194</sup> Two years after enacting the Nordic Model, Sweden enjoyed a fifty percent decrease in prostituted women and a seventy-five percent decrease in men buying sex.<sup>195</sup> While even one trafficked individual is still too many, Sweden only has an estimated 400–600 trafficked individuals that are brought into the country each year for prostitution.<sup>196</sup> In contrast “Finland, a country half the size of Sweden,” has legalized prostitution and has an estimated “10,000–15,000 women trafficked into the country each year.”<sup>197</sup> Yet, Finland remains a Tier 1 country.<sup>198</sup>

Likewise, in the Netherlands, where prostitution is legal, eighty percent of prostituted women reportedly experience trafficking.<sup>199</sup> The Netherlands is also currently ranked as a Tier 1 Country.<sup>200</sup> Likewise, in Greece, the State Department estimated that out of 21,000 prostituted women, fewer than 1,000 were legally employed as prostituted individuals; the rest, ninety-five percent, were likely affected trafficking victims.<sup>201</sup> Currently, Greece is

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191. See Augustson, *supra* note 5, at 631–32; *Does Legalized Prostitution Increase Human Trafficking*, HAR. LAW & INT’L DEV. SOC. (Jun. 12, 2014), <https://orgs.law.harvard.edu/lids/2014/06/12/does-legalized-prostitution-increase-human-trafficking/>.

192. See Holman, *supra* note 54, at 115.

193. See *id.* at 120–21; Andre Anwar, *Criminalizing the Customers: Prostitution Ban Huge Success in Sweden*, SPIEGEL ONLINE (Nov. 8, 2007), <http://www.spiegel.de/international/europe/0,1518,druck-516030,00.html>.

194. See Holman, *supra* note 54, at 121.

195. See *id.* at 120.

196. See *id.* at 121.

197. TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 54.

198. See TRAFFICKING IN PERSONS REPORT 2019: TIER PLACEMENT AND REGIONAL MAPS, *supra* note 32, at 48.

199. See Farley, *supra* note 146, at 8.

200. TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 54.

201. U.S. DEP’T OF STATE, 2008 COUNTRY REPORTS ON HUMAN RIGHTS: GREECE

ranked a Tier 2 country, but the current TIP Report failed to mention the effect of legalized prostitution as a rationale for this ranking.<sup>202</sup> These examples demonstrate that despite proponents' claims that legalizing prostitution will eradicate trafficking, statistics prove that countries with legalized trafficking still experience a flourishing human trafficking trade.

*2. Legalizing prostitution does not result in increased regulation of the commercial sex trade. Rather, it increases trafficking, especially child trafficking.*

While proponents have argued that legalizing prostitution will result in less trafficking because the government can regulate the legal commercial sex trade,<sup>203</sup> countries with legalized trafficking have experienced an increase in trafficking, especially child trafficking. For example, in 1984, Victoria, Australia legalized prostitution with the aim of reducing criminal organizations' involvement in the commercial sex industry and limiting the expansion of the industry.<sup>204</sup> However, the opposite has occurred. In a twelve-month period, the number of unlicensed brothels tripled to more than one-hundred.<sup>205</sup> According to one study, brothels in Victoria earn as much as \$1 million a week from *illegal* sex trafficking.<sup>206</sup> Yet, Australia is a Tier 1 country,<sup>207</sup> with no mention in the TIP Report of this legalized prostitution or its impact on increasing human trafficking.<sup>208</sup>

Likewise, in the Netherlands, (also a Tier 1 country)<sup>209</sup> the Red Light District has become a multimillion-dollar business, making over €83 million (just shy of \$92.5 million) a year.<sup>210</sup> Prostitution became so lucrative that law enforcement was unable to control or regulate the industry.<sup>211</sup> In 2008, the consequences of legalization forced the Dutch government to close

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(2009), <https://www.state.gov/j/drl/rls/hrrpt/2008/eur/119082.htm>.

202. TRAFFICKING IN PERSONS REPORT 2019, *supra* note 32, at 211–213. Nor was it mentioned as a rationale for being ranked as Tier 2 in 2018; *see* TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24 at 54.

203. *See* Holman, *supra* note 54, at 115.

204. *See id.* at 119–20.

205. *See id.* at 120.

206. *See id.*

207. TRAFFICKING IN PERSONS REPORT 2019, *supra* note 32, at 48. Nor was it mentioned in the 2018 TIP Report. TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 54.

208. *See id.*

209. TRAFFICKING IN PERSONS REPORT 2019, *supra* note 32, at 48.

210. IAN YEOMAN, 2050 – TOMORROW'S TOURISM 109 (2012).

211. *Id.*



approximately half of the brothels in Amsterdam because it was unable to control traffickers and other organized crime groups who had infiltrated the industry.<sup>212</sup> A year later, it shut down two-thirds of the legal brothels in Amsterdam because of the inability to control the industry.<sup>213</sup> The Dutch reported that legalizing prostitution had instead created “[a]n environment that was so attractive to organized crime that the Dutch could not control the traffickers and pimps”<sup>214</sup> and that “[i]nternational organized criminals began to take over the city.”<sup>215</sup> A report to the Amsterdam City Council estimated that seventy-five percent of Amsterdam’s 8,000–11,000 prostituted women were foreigners from Eastern Europe, Africa, and Asia, and were likely trafficked individuals.<sup>216</sup> The Council estimates criminals trafficked approximately 6,000–8,250 individuals into the city of Amsterdam alone, a city that legalized prostitution under the belief that it would eradicate trafficking.<sup>217</sup> Furthermore, several studies demonstrate that criminals coerced approximately forty percent of prostituted women in countries with legalized prostitution into the trade.<sup>218</sup> These examples demonstrate that countries with legalized prostitution create an environment that fosters the illegal trade of human trafficking.

Legalized prostitution also increases child trafficking. The report the State Department published in 2004 on human trafficking cited a study proving that despite the so-called regulation of the commercial sex industry, children were stuck in prostitution.<sup>219</sup> In the United Kingdom, where prostitution is legal, approximately fifty percent of prostituted women reported they began prostituting before they reached the age of eighteen, falling under the child sex trafficking definition.<sup>220</sup> Yet, the United Kingdom is still a Tier 1

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*; see Peter Cluskey, *Abuse, Misery and Criminality Behind the Legal Sex Trade*, THE IRISH TIMES (Mar. 17, 2002), <https://www.irishtimes.com/news/abuse-misery-and-criminality-behind-the-legal-sex-trade-1.483366> (providing that victims of sex trafficking are often women from foreign countries who were smuggled into Amsterdam and forced into sexual-slavery).

217. See YEOMAN, *supra* note 210, at 111; see also RISING, *supra* note 127 (proving that “75% of Amsterdam’s 8,000 to 11,000 women in prostitution” were from foreign countries).

218. Hersh, *supra* note 114.

219. THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145.

220. HOME AFFAIRS COMMITTEE, PROSTITUTION, 2016–17, HC 26-III, at 10 (UK).

country.<sup>221</sup> Additionally, in Amsterdam, proponents of legalized prostitution argued it would decrease child prostitution.<sup>222</sup> However, in the decade following legalization, an Amsterdam-based organization, ChildRight, estimated that the number of prostituted children *increased by more than 300 percent*, from 4,000 children to an estimated 15,000 children.<sup>223</sup> Furthermore, Victoria, Australia, the only state in Australia with legalized prostitution, also has the highest reports of child prostitution in all of Australia.<sup>224</sup> Countries with legalized prostitution continue to show an increase in trafficked individuals, especially child victims, which should prevent these countries from receiving a Tier 1 ranking. For these reasons, the issue of consent or the apparent five to ten percent of prostituted individuals who choose to work voluntarily is immaterial.<sup>225</sup> Furthermore, as the next section will show, legalized prostitution not only has failed to eradicate trafficking, it has helped legitimize trafficking.

*3. Legalizing the commercial sex industry increases trafficking in part because it lends a sense of legitimacy to traffickers and creates a legal safe haven that makes it harder for law enforcement to regulate.*

While proponents of legalizing the commercial sex industry argue that legalizing prostitution will result in increased tax revenue,<sup>226</sup> legalizing prostitution has only made the illegal industry of trafficking more profitable.<sup>227</sup> Legalizing prostitution has also legitimized traffickers and created a safe haven for traffickers, making it harder for law enforcement to regulate the industry.<sup>228</sup> The State Department noted “[t]he Swedish Government has found that much of the vast profit that the global prostitution industry generates goes into the pockets of human traffickers.”<sup>229</sup> Janice Raymond, a prominent scholar on trafficking, stated that proponents of legalizing prostitution have failed to realize they are “[l]egalizing pimps as

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221. TRAFFICKING IN PERSONS REPORT 2019, *supra* note 32, at 48. It was also a Tier 1 country in 2018. TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 54.

222. RISING, *supra* note 127.

223. *Id.*

224. See Holman, *supra* note 54, at 120. By definition, under both the TVPA §1702 and the Palermo Protocol Article 3 this constitutes illegal human trafficking.

225. See *supra* Part IV for a discussion of the horrible conditions prostituted individuals face.

226. RISING, *supra* note 127; THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145.

227. See Holman, *supra* note 54, at 118; RISING, *supra* note 127.

228. *Id.*

229. THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145.

legitimate sex entrepreneurs or third party businessmen” and making “men who buy women for sexual activity . . . accepted as legitimate consumers of sex.”<sup>230</sup> Legalizing prostitution allows traffickers to more easily avoid detection and masquerade as legitimate business owners.<sup>231</sup>

Since the legalization of prostitution in New Zealand and its legal status, scholars have indicated that law enforcement now have a harder time both regulating and entering legalized brothels to check age identification of those involved in the industry.<sup>232</sup> Lending an air of legitimacy to traffickers as business owners is a side effect of legalized prostitution and is partially responsible for why trafficking increases when prostitution is legal. Thus, countries with legalized prostitution should not receive a Tier 1 ranking.

#### CONCLUSION

The United States has chosen to place itself at the forefront of international policy on human trafficking when it started annually assigning tier rankings to countries that receive aid from the United States.<sup>233</sup> Countries care about the tier rankings and have made changes to laws and policies to better comply with the United States’ recommendations.<sup>234</sup> The United States is minimizing its influence in international policy and falling short of the goals of the TVPA by defining trafficking narrowly, placing subordinate attention on protecting victims through resources, and by turning a blind eye to the effects of legalized prostitution on trafficking.<sup>235</sup>

First, the United States should use the definition of trafficking articulated in the Palermo Protocol when analyzing countries’ efforts to combat human trafficking because it accurately captures the realities of trafficking. Maria, and many other victims, cannot neatly show they are in the commercial sex industry as a result of “force, fraud, or coercion” as required by United States law, but that does not mean they are not victims. Rather, they have been deceived. There has been an abuse of power or an exploitation of a position of vulnerability. The definition of a victim that countries adopt determines who is a victim and whether they are protected under the law. The United States should expand its definition and judge other

230. Raymond, *supra* note 152, at 316.

231. *Id.*; Holman, *supra* note 54, at 116.

232. RISING, *supra* note 127.

233. See TRAFFICKING IN PERSONS REPORT 2018, *supra* note 24, at 40 <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf>; see 22 U.S.C. §§ 7106–7107.

234. See *supra* Part III for a discussion of how countries have changed human trafficking laws to receive higher Tier rankings.

235. See 22 U.S.C. § 7101 *et seq.*

countries of an expanded definition in hopes it will encourage other countries to do the same.

Second, the United States should analyze a countries' protection and resources provided to victims and stop assigning Tier I rankings to countries who have failed on this front. Instead, the United States has relegated its power by signaling to countries that failure to provide services or offer adequate protection to victims will not result in a demoted status in the tier rankings. While prosecuting trafficking is important, failing to provide adequate protection and resources to victims contributes to the growth of human trafficking.<sup>236</sup> Instead, if the United States were to place a heavier emphasis on providing services to victims when assigning Tier rankings, it could encourage countries to follow Article 6(3) of the Palermo Protocol, a treaty that eighty-eight percent of countries in the world have signed.<sup>237</sup> It should also encourage countries to offer victims appropriate housing, counseling, legal advice as to personal rights, medical and psychological assistance, employment, educational, and training opportunities.<sup>238</sup> Maria and Kaya demonstrate why these resources are so necessary to the victims.<sup>239</sup>

Lastly, the United States should not award Tier I status to countries where prostitution is legal and should instead discuss the effects of legalized prostitution on trafficking. While the State Department has explicitly stated that “*no United States grant funds should be awarded to foreign non-governmental organizations that support legal state-regulated prostitution*” because it recognized the link between trafficking and prostitution,<sup>240</sup> it continues to award funding and Tier I statuses to countries who have legalized prostitution.<sup>241</sup> The United States has greatly impeded efforts to combat human trafficking by willfully turning a blind eye to the effect legalized prostitution has on human trafficking.

The overwhelming majority of people in trafficking are experiencing

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236. See Adams, *supra* note 2, at 202.

237. See GLOBAL REPORT ON TRAFFICKING IN PERSONS 2016, *supra* 60, at 48.

238. See Einarsdottir, *supra* note 91, at 388 (explaining that while the Palermo Protocol's mandate is softened through discretionary language, such as “shall consider implementing,” other countries and international bodies, such as the United Kingdom and the European Union, have adopted these principles from the Palermo Protocol in almost identical form and have expanded even further the protections that must be provided to victims).

239. See *id.* at 202.

240. See *id.* (emphasis added).

241. See *supra* Part IV for a discussion of which countries have continued to receive a Tier I status despite evidence that legalization of prostitution has increased human trafficking.

conditions that violate the Palermo Protocol and state that they want to immediately leave the commercial sex industry.<sup>242</sup> The abuse prostituted individuals endure, even in areas with regulated and legalized prostitution, violates the Palermo Protocol and creates slavery-like conditions. Legalized prostitution is a failed model that has only resulted in increased demand, increased trafficking, and increased child trafficking. It legitimizes and provides traffickers with a lucrative career. In short, legalizing prostitution is a failed method that should penalize countries in the TIP Reports.

Maria and Kaya's stories, their struggles to find resources, and how different countries would treat them represent the stories of 27 to 40 million people currently trafficked.<sup>243</sup> This paper's discussions on how the United States' policy influences countries are not abstract. The United States has real influence over whether these millions of people will be considered victims, what resources and protections they receive, and how the systems—such as legalized prostitution—create conditions that fuel trafficking worldwide. If the United States used the definition of trafficking articulated in the Palermo Protocol, considered whether countries placed adequate attention on protecting victims, and refused to assign Tier I to countries who have legalized prostitution, the United States' TIP Reports would finally live up to the stated purpose in the TVPA—eradicating human trafficking worldwide. It is about time it decided to do so.

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242. THE LINK BETWEEN SEX TRAFFICKING AND PROSTITUTION, *supra* note 145; See Farley, *supra* note 146, at 8.

243. BALES, *supra* note 97.