

**VICTIMIZED BY THE STATE:  
HOW LEGISLATIVE INACTION HAS LED TO THE  
REVICITIMIZATION AND STIGMATIZATION OF  
VICTIMS OF SEX TRAFFICKING**

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*Lupus est homo homini.*<sup>1</sup>

“Man is a wolf to his fellow man.”

## I. INTRODUCTION

Internationally, human trafficking— often referred to as the “modern form of slavery”— is an estimated \$31.6 billion per year industry.<sup>2</sup> Over the course of the past two decades, the issue of human trafficking for the purpose of sexual exploitation has attracted increasing worldwide attention.<sup>3</sup> Human sex trafficking is now considered “[t]he fastest-growing business of organized crime and the third-largest criminal enterprise in the world.”<sup>4</sup>

While “sex trafficking” is a worldwide tragedy, the failure of the state legislatures to appropriately address the needs of the victims of sex trafficking is a domestic tragedy. In the United States, only fourteen states have enacted legislation that enables victims of sex trafficking to vacate their convictions for crimes committed while under the force, duress, or coercion used by a sex trafficker.<sup>5</sup> Thirty-

<sup>1</sup> TITUS MACCIUS PLAUTUS, *ASINARIA* act 2, ln. 495.

<sup>2</sup> E. BENJAMIN SKINNER, *A CRIME SO MONSTROUS: FACE TO FACE WITH MODERN DAY SLAVERY* 106-107 (2008); *see also* AMANDA WALKER-RODRIGUEZ & RODNEY HILL, DEP’T OF JUSTICE, FBI, FBI LAW ENFORCEMENT BULL. MAR. 2011, HUMAN SEX TRAFFICKING, *available at* [http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march\\_2011/human\\_sex\\_trafficking](http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march_2011/human_sex_trafficking); Patrick Belser, *Forced Labor and Human Trafficking: Estimating The Profits* 17 (International Labour Office, Working Paper No. 42, 2005) *available at* <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1016&context=forcedlabor>.

<sup>3</sup> *See, e.g.,* Helga Konrad, *The Osce and the Struggle Against Human Trafficking: The Argument for A Comprehensive, Multi-Pronged Approach*, 1 INTERCULTURAL HUM. RTS. L. REV. 79, 85 (2006); Dr. Robert David Sanborn & Dawn Lew, *Fighting Human Trafficking in Texas*, 75 TEX. B.J. 778 (2012); Charlene Porter, IIP DIGITAL, *Legislators Consider New Law to Prevent Human Trafficking* (Nov. 5, 2013), <http://iipdigital.usembassy.gov/st/english/article/2013/11/20131105285776.html?CP.rss=true#axzz2xyDcXJw3>.

<sup>4</sup> WALKER-RODRIGUEZ & HILL, *supra* note 2.

<sup>5</sup> THE POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS, VACATING CONVICTIONS FOR SEX TRAFFICKING VICTIMS (Aug. 2013) [hereinafter “2013 ANALYSIS”], *available at* <http://www.polarisproject.org/storage/documents/2013-Analysis-Category-10-Vacating-Convictions.pdf>. The Polaris Project has been an invaluable source in the research and writing of this paper. The Polaris Project is a non-profit entity that seeks to combat domestic and international human trafficking. *See National Human Trafficking Resource Center, THE POLARIS PROJECT*, <http://www.polarisproject.org/what-we-do/national-human-trafficking-hotline/the->

six states, by their failure to enact legislation permitting conviction vacation for victims of sex trafficking, have, whether intentionally or not, equated victims with vice.

Every state in America has laws in place that prohibit or regulate the commercial sex trade in some manner. “Prostitution” is often considered a “victimless crime,” at least in the sense that the circumstances may present two consenting parties.<sup>6</sup> However, under the façade of a seemingly “victimless crime” lies a horror that the majority of states have not yet recognized, a plight unheeded.

The purpose of this paper is threefold. First, to inform the reader of a matter that directly bears upon the outlawing or regulation of the commercial sex trade, a matter which directly resembles and is in fact driven by the commercial sex trade but is not, by any means, the conduct of two consenting adults— a “victimless crime” committed by a *trafficker* and carried out by a victim. Second, to draw comparisons among the pieces of legislation that have been enacted to protect the victims of sex trafficking, specifically with respect to conviction vacation, or “vacatur.” Third, to enable the reader, as well as the various states, to review and reconsider their preconceived notions as to the relationship between prostitutes and “Johns,” and the legislative infrastructure that makes victims criminals.

## II. A HISTORICAL PERSPECTIVE OF PROSTITUTION

Prostitution is colloquially referred to as the “world’s oldest profession.”<sup>7</sup> Inferential evidence suggests that the overarching institution of slavery, which further encompasses “sex slaves,” dates to the “Ubaid period in Mesopotamia, as early as 5500 BCE to 4000

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nhtrc/overview/ (last visited Mar. 15, 2014). One of The Polaris Project’s principal efforts is to collect and compile state vacatur statutes, which have been referred to and analyzed throughout this paper. The Polaris Project utilizes this information to persuade the various states to enact similar legislation or to amend their current legislation. See *Vacating Convictions*, THE POLARIS PROJECT <http://www.polarisproject.org/what-we-do/policy-advocacy/assisting-victims/vacating-convictions>

<sup>6</sup> See Micloe Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 79 (1998). See also LAURIE SHRAGE, MORAL DILEMMAS OF FEMINISM: PROSTITUTION, ADULTERY, & ABORTION (THINKING GENDER) 83 (1994).

<sup>7</sup> Jessica N. Drexler, *Governments’ Role in Turning Tricks: The World’s Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT’L L. 201 (1996).

BCE.”<sup>8</sup> Arguably, the records of sex slavery and prostitution having the most influence on Western culture were those of ancient Greece and ancient Rome.<sup>9</sup>

Alfred Kinsey defined the modern “prostitute” as “an individual who indiscriminately provides sexual relations in return for money payments.”<sup>10</sup> The advent of commercial prostitution “appears to have been a development from the institution of temple prostitution,” a predominant feature of religious life in ancient Greece.<sup>11</sup> While temple prostitution continued to be a religious exercise in ancient Greece, commercial prostitution, in its modern sense, emerged in association “with the commercial life of Athens as a metropolitan seaport.”<sup>12</sup> While prostitution was not criminal, it was highly regulated.<sup>13</sup> Prostitution was generally disdained, but was concurrently accepted due to: (1) “[the] toleration of male sexual experimentation,” (2) “[the] insistence on female virginity before marriage,” and (3) the advancement of marital fidelity.<sup>14</sup>

Prostitution, when viewed through the lens of Christianity, is often divided into two periods: (1) pre-Reformation, and (2) post-Reformation.<sup>15</sup> Each time period is represented by its own respective theologians: the pre-Reformation period is represented by St. Augustine, and the post-Reformation period is represented by Martin Luther and John Calvin.<sup>16</sup>

<sup>8</sup> Kristian Bryant Rose, *Looking for Love in all the Wrong Places: A Call to Reform State Law on Sex Trafficking*, 65 OKLA. L. REV. 303, 307 (2013) (citing DANIEL C. SNELL, SLAVERY IN THE ANCIENT NEAR EAST, in 1 THE CAMBRIDGE WORLD HISTORY OF SLAVERY 4, 7 (Keith Bradley & Paul Cartledge eds., 2011)).

<sup>9</sup> *Id.* at 310-12 (citing CARL J. RICHARD, WHY WE’RE ALL ROMANS: THE ROMAN CONTRIBUTION TO THE WESTERN WORLD xvi-xv, 10-20, 28 (2010)).

<sup>10</sup> A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 595 (1948).

<sup>11</sup> David A. J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1207 (1979) (citing WILLIAM W. SANGER, HISTORY OF PROSTITUTION: ITS EXTENT, CAUSES, AND EFFECTS THROUGHOUT THE WORLD 35-42 (1897)).

<sup>12</sup> *Id.* (citing V. BULLOUGH, THE HISTORY OF PROSTITUTION 31-44 (1964)).

<sup>13</sup> *Id.* at 1208-09 (citing OTTO KEIFER, SEXUAL LIFE IN ANCIENT ROME 53-63 (1934)); SANGER, *supra* note 11, at 64-68.

<sup>14</sup> Richards, *supra* note 11 at 1209 (citing S. POMEROY, GODDESSES, WHORES, WIVES AND SLAVES 88-92 (1975)).

<sup>15</sup> *Id.* at 1209.

<sup>16</sup> *Id.* at 1210.

The Augustinian view perceived sexual intercourse to be moral only when exercised pursuant to a “marital intention to procreate.”<sup>17</sup> However, St. Augustine was tolerant of prostitution on the premise that it served to protect the “marital procreation unit.”<sup>18</sup> Under the Augustinian view, should prostitution be permitted, unmarried males “incapable of celibacy” would be less likely to seduce either married woman or “virgins destined to be married.”<sup>19</sup> Further, married men incapable of absolute fidelity would also be less likely to seduce either of the above groups or “to form more permanent liaisons [which] would threaten . . . the pro-creational unit.”<sup>20</sup>

In contrast to the Augustinian view, the Lutheran view perceived prostitution as an offense against celibacy as well as the “companionate marriage.”<sup>21</sup> Both Lutheran and Calvinist thought regarded prostitution as immoral and urged its comprehensive prohibition.<sup>22</sup> Calvinism, by way of the sub-theology Puritanism, vastly influenced the views on prostitution in England and in the United States.<sup>23</sup>

Prostitution in the United States during the nineteenth century was, as was true in ancient Athens, an “urban phenomenon.”<sup>24</sup> This was largely due to the onset of the Industrial Revolution.<sup>25</sup> Following the American Civil War, numerous cities attempted to informally regulate prostitution, primarily by geographically confining its activities to so-called “red-light districts” and mandating the registration of prostitutes.<sup>26</sup> Today, every state in America has enacted laws that criminalize prostitution.<sup>27</sup> Only the State of Nevada

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1211 (*citing* AUGUSTINE, DE ORDINE, II.4 (12)).

<sup>19</sup> *Id.* at 1199.

<sup>20</sup> Richards, *supra* note 11, at 1199.

<sup>21</sup> *Id.* at 1211 (*citing* MARTIN LUTHER, THE NATURAL PLACE OF WOMEN, IN SEXUAL LOVE AND WESTERN MORALITY 134-143 (D. Verene ed., 1972)).

<sup>22</sup> *Id.* at 1212 (*citing* LUTHER, *supra* note 21, at 141-142).

<sup>23</sup> *Id.*

<sup>24</sup> Susan E. Thompson, *Prostitution— A Choice Ignored*, 21 WOMEN’S RTS. L. REP. 217, 222 (2000).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 224-25 (*citing* V. BULLOUGH & B. BULLOUGH, WOMEN AND PROSTITUTION: A SOCIAL HISTORY 1, 224-25 (1987)).

<sup>27</sup> *Id.* (*citing* PRISCILLA ALEXANDER, PROSTITUTION: A DIFFICULT ISSUE FOR FEMINISTS, SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY 184, 195 (Frederique

authorizes the regulation of prostitution, but only in those counties that choose to permit its practice.<sup>28</sup>

While prostitution is deemed illegal in the vast majority of jurisdictions in the United States, commercial sex “remains easily accessible for many who desire its services.”<sup>29</sup> Current estimates with respect to the number of *female* prostitutes in the United States range from 250,000 to 1,300,000.<sup>30</sup> The estimated number of consumers, or “Johns,” are approximated at 1,500,000 per week.<sup>31</sup> Estimates on the gross revenue gained from prostitution vary from seven to nine billion dollars per annum.<sup>32</sup> The Federal Bureau of Investigation reported an estimated 57,345 arrests for prostitution and commercial vice in the United States during 2011.<sup>33</sup>

### III. SEX TRAFFICKING

Prior to delving into the definition, statistics, and issues of sex trafficking, the following 2011 case will provide a conceptual illustration of overarching significance that will be referred to throughout this section. In *People v. G.M.*, the Criminal Court of Queens County in New York issued a judgment with respect to G.M.’s motion for vacatur.<sup>34</sup> The disposition of this case will be examined in the subsequent section regarding conviction vacation. For now, only the facts are of particular relevance.

G.M., the defendant and a native of the Dominican Republic,

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Delacoste & Priscilla Alexander eds. 1987)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Thompson, *supra* note 24, at 225. The vast discrepancy is seemingly attributed to the research method employed, whether it be Decker’s method of analyzing a small Midwestern city and thereafter extrapolating data nationwide, employing data collected from outreach services organizations, or approximating by reference to yearly arrest statistics. In addition, statistics may vary depending on whether the statistician assessed participation in prostitution based on either a part-time or a full-time basis. See Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 527 n. 16 (2000).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> FEDERAL BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERVS. DIVISION, ESTIMATED NUMBER OF ARRESTS, UNITED STATES 2011, tbl. 29 (2011) *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29>.

<sup>34</sup> 922 N.Y.S.2d 761 (Crim. Ct. 2011).

met a man while visiting the United States on a tourist visa.<sup>35</sup> G.M. decided to remain in the United States in order to earn money for her two children still living in the Dominican Republic, who were seemingly unable to join their mother.<sup>36</sup> The couple subsequently married, and, shortly thereafter, the relationship became violent.<sup>37</sup> The abuse that G.M. suffered at the hands of her new husband had never occurred prior to their marriage.<sup>38</sup> G.M. decided to leave her husband and return to the Dominican Republic.<sup>39</sup> G.M.'s husband traveled to the Dominican Republic and begged her to return, promising her a lucrative job and assistance with her immigration status.<sup>40</sup> Upon returning to the United States, G.M. discovered that her husband was addicted to crack cocaine, and the abuse continued more severely than before.<sup>41</sup> Because of his addiction, G.M.'s husband would often compel her to purchase crack cocaine on his behalf for fear of being arrested.<sup>42</sup> G.M. was imprisoned by her husband for days at a time, her income from various part-time jobs was confiscated, and she was continuously beaten and raped.<sup>43</sup> G.M., now scarred and disfigured, was, by the threat of physical harm, sold to numerous "Johns" for sexual services.<sup>44</sup> Her husband would drive her to inner-city brothels and wait inside his car while she sold her body.<sup>45</sup> If G.M. did not earn enough money on any one particular visit, her husband would become angry and abuse her.<sup>46</sup> G.M. once more escaped to the Dominican Republic and rejoined her family, whom she had not seen in more than eight years.<sup>47</sup> G.M.'s husband tracked her down, threatened her family, and forced G.M. to return to the United States.<sup>48</sup> The abuse continued for some time until, one day, G.M.'s

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<sup>35</sup> *Id.* at 762.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *G.M.*, 922 N.Y.S.2d at 762.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 762-63.

<sup>43</sup> *Id.* at 762.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 763.

<sup>46</sup> *G.M.*, 922 N.Y.S.2d at 763.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



husband left and never returned.<sup>49</sup>

During G.M.'s nightmare ordeal, she had been arrested six times: twice for prostitution, twice for trespass, and twice for criminal possession of a controlled substance.<sup>50</sup> G.M. was ultimately convicted of two counts of disorderly conduct—a non-criminal violation—and four Class B misdemeanors: two for prostitution and two for possession of narcotics.<sup>51</sup> G.M.'s vacatur proceeding will be revisited in the subsequent section regarding conviction vacation.

#### A. *What is Sex Trafficking?*

"Trafficking in persons," often referred to as "human trafficking," is an "umbrella term" encompassing those activities that are "involved when one person obtains or holds another person in compelled service."<sup>52</sup> Unlike "human smuggling," human trafficking "does not require any movement whatsoever and can occur without victims ever leaving home."<sup>53</sup> "Sex trafficking," specifically, occurs "when an adult is coerced, forced, or deceived into prostitution— or maintained in prostitution through coercion."<sup>54</sup> Only when a victim is "recruit[ed], harbor[ed], transport[ed], provid[ed], or obtain[ed] . . . for the purpose of a commercial sex act" does human trafficking become sex trafficking.<sup>55</sup> Parties' "initial consent to participate in prostitution is not legally determinative: if they are thereafter held in service through psychological manipulation or physical force, they are trafficking victims."<sup>56</sup>

#### B. *Who are the Victims of Sex Trafficking?*

It is often assumed that the "average trafficking victim is . . . from

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<sup>49</sup> *Id.* at 763.

<sup>50</sup> *Id.* at 762.

<sup>51</sup> *Id.*

<sup>52</sup> U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT JUNE 2011*, 7 (2011) available at <http://www.state.gov/documents/organization/164452.pdf> [hereinafter *Trafficking Report*].

<sup>53</sup> Rose, *supra* note 8, at 308 (citing JIM FINCKENAUER & MIN LIU, *STATE LAW & HUMAN TRAFFICKING, MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSE TO HUMAN TRAFFICKING* 4, 4-6 (Dessi Dimitrova ed., 2007)).

<sup>54</sup> *Trafficking Report*, *supra* note 52, at 7.

<sup>55</sup> Rose, *supra* note 8, at 316 (quoting 22 U.S.C. § 7102(8)-(9) (2006)).

<sup>56</sup> *Trafficking Report*, *supra* note 52, at 7.

the poorest, most isolated communities.”<sup>57</sup> However, trafficking studies have revealed “that the incidence of trafficking is highest among those who have become empowered enough to aspire to a better life but have few good options for fulfilling those aspirations.”<sup>58</sup> Traffickers, acknowledging these aspirations, “[exploit] the information gap,” promising a lucrative opportunity and a better life.<sup>59</sup>

In a study conducted by the United States Bureau of Justice Statistics on domestic sex trafficking between January 2008 and June 2010, 94 percent of victims were female, 62 percent of victims were twenty-five years of age or older, and 83 percent of victims were either a U.S. citizen or a permanent U.S. resident.<sup>60</sup> With respect to race and origin, 26 percent of victims were White/Caucasian, 40 percent were Black/African American, 63 percent were Hispanic/Latino, 17 percent were Asian, and 18.7 percent were either classified as “Other” or “Unknown.”<sup>61</sup>

#### C. *Who are the Perpetrators of Sex Trafficking?*

According to the same study presented above, 76.6 percent of suspect traffickers were male, 60.9 percent were between the ages of 18 and 34, and 66.1 percent were either a U.S. citizen or a permanent U.S. resident.<sup>62</sup>

#### D. *Where Can Sex Trafficking Happen?*

Although it may be assumed that sex trafficking is predominant in urban areas, this is not always the case. “Human trafficking cases happen all over the United States . . . Sex trafficking can happen anywhere, however unlikely.”<sup>63</sup> To illustrate this point, consider the case of Theresa Flores.

In 1980, Theresa Flores was a high school sophomore in

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<sup>57</sup> *Id.* at 24.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> DUREN BANKS & TRACY KYCKELHAHN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010 6 (2011), *available at* <http://www.BJS.gov/content/pub/pdf/cshti0810.pdf>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> WALKER-RODRIGUEZ & HILL, *supra* note 2, at 6-7.

Birmingham, Michigan, an affluent and predominantly white suburb northwest of Detroit.<sup>64</sup> Theresa was a “white, upper-middle class teenager,” a “budding track star,” and a perfectly normal, American Catholic girl.<sup>65</sup> Theresa’s parents had professional occupations.<sup>66</sup> She had loving siblings, was never abused, and by all accounts had “a good life.”<sup>67</sup> Theresa was accustomed to moving and starting anew because of her father’s occupation, but this move was different because Theresa became romantically involved with a boy from her school.<sup>68</sup> “What began one day as a kiss at his house became a grave miscalculation Theresa would inestimably regret.”<sup>69</sup> Despite Theresa’s attempt to stop him, her high school crush raped her.<sup>70</sup> Unbeknownst to Theresa, the boy’s cousins photographed the entire sexual encounter.<sup>71</sup> The boys later blackmailed Theresa, threatening to release the photographs to her parents, her friends, and the entire school if she refused to follow their demands.<sup>72</sup> Over the course of the school year, the boys waited until Theresa’s parents were asleep and then transported her to various parts of the city, unremittingly selling and reselling Theresa for sex.<sup>73</sup> From her parents’ perspective, Theresa was an average high school student, returning to home and to school as an average teenage student would. No one but Theresa and her traffickers knew otherwise.

*E. How Prevalent is Sex Trafficking in the United States?*

In a thirty-month span between January 2008 and June 2010,

<sup>64</sup> Rose, *supra* note 8, at 303. The writer is extremely grateful to Kristian Bryant Rose for her scholarship on the topic of sex trafficking. While the primary focus of this paper is state vacatur statutes that benefit the victims of sex trafficking, Ms. Rose’s work has proved indispensable, particularly in providing the reader with background knowledge of sex trafficking as well as illustrative examples of the horrors which befalls the victims thereof. The remainder of Section II, entitled “Sex Trafficking,” provides a synthesis of Ms. Rose’s scholarship.

<sup>65</sup> THERESA L. FLORES, *THE SACRED BATH: AN AMERICAN TEEN’S STORY OF MODERN DAY SLAVERY* xi (2007).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Rose, *supra* note 8, at 303.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 304.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

“[f]ederally funded human trafficking task forces opened 2,515 suspected incidents of human trafficking.”<sup>74</sup> Approximately 82.1 percent of those incidents were identified as sex trafficking.<sup>75</sup> Of the 2,515 suspected incidents, nearly half (48 percent) involved “allegations of adult prostitution.”<sup>76</sup> An estimated 6 percent of all cases involved “[e]lements of sexualized labor, including exotic dancing and unlicensed massage parlors.”<sup>77</sup> Approximately 7 percent of all incidents were classified as “Unknown,” or temporarily incapable of determining whether the incident involved sex trafficking— thus having the potential to raise the percentage of sex trafficking incidents reported.<sup>78</sup>

*F. What Agencies Identify Incidents of Sex Trafficking?*

Among suspected sex trafficking incidents between January 2008 and June 2010, 98.1 percent of incidents were identified and investigated by a law enforcement agency; 1.5 percent were identified by a victim advocacy agency.<sup>79</sup> Of the 98.1 percent of incidents led by a law enforcement agency, 91.6 percent of investigations were handled at the state or local level; only 6.9 percent were led by federal agencies.<sup>80</sup> In fact, “federal agencies were more likely to lead labor trafficking investigations (29 percent), compared to sex trafficking investigations (7 percent).”<sup>81</sup> Based on the statistics alone, state and local governments can most appropriately be deemed the “front line personnel,” the ones most apt to identify and prosecute domestic sex traffickers.

*G. The Economics of Human Trafficking*

The International Labour Organization estimates human trafficking to constitute a \$31.6 billion per year industry.<sup>82</sup> “Individually, the average enslavement in the United States lasts four

<sup>74</sup> BANKS & KYCKELHAHN, *supra* note 60, at 1.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 3.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 4.

<sup>80</sup> BANKS & KYCKELHAHN, *supra* note 60, at 4.

<sup>81</sup> *Id.*

<sup>82</sup> Belser, *supra* note 2, at 17.

to five years.”<sup>83</sup> To place human trafficking in a historical context, the “average field laborer” in the American South in 1850 “sold for \$1,000 to \$1,800.”<sup>84</sup> “This was three to six times the average [annual] wage of an American worker at the time, a cost equivalent to around \$40,000 to \$80,000 today.”<sup>85</sup> Despite their relatively high cost, the average annual return on a slave in 1850 was approximately 5 percent.<sup>86</sup> Today, purchasing a trafficking victim for purposes of “economic exploitation” can cost as little as “a few hundred dollars.”<sup>87</sup> Thus, while slavery in 1850 had a substantial cost and nominal financial returns, today’s trafficking victim is comparatively inexpensive and has a tendency to produce a substantial profit for his or her trafficker.

The vast potential of this “illegitimate market . . . threatens to thwart centuries-long jurisprudential and legislative attempts to abolish slavery.”<sup>88</sup> Due to the “disparity between capital costs and profit potential,” it is foreseeable that “opportunists” would “view human exploitation as an attractive commercial concept.”<sup>89</sup>

#### IV. ADDRESSING SEX TRAFFICKING

As with any issue of national and international concern, first, the problem needs to be identified; second, resolutions need to be advanced; and third, formal enactments need to be contemporary.

##### A. Issue Identification

For resolutions to be advanced by federal and state legislatures, there first needs to be a catalyst to convince organized governments to act. For instance, a July 29, 2013 Gallup poll reported that 52 percent of Americans favor legalizing gay marriage.<sup>90</sup> Today,

<sup>83</sup> Rose, *supra* note 8, at 305.

<sup>84</sup> KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 16 (1999).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Rose, *supra* note 8, at 306.

<sup>88</sup> *Id.* at 306-07.

<sup>89</sup> *Id.*

<sup>90</sup> Lydia Saad, *In U.S., 52% Back Law to Legalize Gay Marriage in 50 States*, GALLUP POLITICS (July 29, 2013), <http://www.gallup.com/poll/163730/back-law-legalize-gay-marriage-states.aspx>.

“[t]hirteen states and the District of Columbia allow gay couples to marry.”<sup>91</sup> Raising public awareness is pertinent in motivating legislative representatives to act for their constituency. Unsurprisingly, the rate of human trafficking is “considerably lower in regions where the awareness . . . of human trafficking is high.”<sup>92</sup>

The public awareness with respect to human trafficking has proliferated in recent years. In the forty years between 1950 and 1990, “newspapers ran fewer than one hundred stories covering human trafficking.”<sup>93</sup> In the years between 1991 and 2000, newspapers published nearly 400 stories.<sup>94</sup> Of temporal importance, the federal government enacted the Victims of Trafficking and Violence Protection Act (“TVPA”) in the year 2000.<sup>95</sup> Over the next two years, newspapers published approximately 1,000 articles regarding human trafficking, “essentially doubling in [only] two years the issue’s exposure from the previous fifty.”<sup>96</sup>

### B. *The Response of Federal and State Legislatures*

The passage of the TVPA “signaled a transition from post-[C]ivil [W]ar conceptions of involuntary servitude . . . to a modern, victim-centered approach.”<sup>97</sup> The purpose of the TVPA is “to combat trafficking in persons,” recognizing such conduct to amount to “a

<sup>91</sup> Kate Zernike & Marc Santora, *Judge Orders New Jersey to Allow Gay Marriage*, N.Y. TIMES, (Sept. 27, 2013), [http://www.nytimes.com/2013/09/28/nyregion/new-jersey-judge-rules-state-must-allow-gay-marriage.html?\\_r=0](http://www.nytimes.com/2013/09/28/nyregion/new-jersey-judge-rules-state-must-allow-gay-marriage.html?_r=0).

<sup>92</sup> Rose, *supra* note 8, at 309 (quoting Toman Omar Mahmoud & Christopher Trebsch, *The Economic Drivers of Human Trafficking: Micro-Evidence From Five Eastern European Countries* 5 (Kiel Inst. for the World Econ., Working Paper No. 1480, 2009), available at <http://www.ifw-members.ifw-kiel.de/publications/the-economic-drivers-of-human-trafficking-micro-evidence-from-five-eastern-european-countries/kap1480.pdf>).

<sup>93</sup> *Id.* (citing DANIEL TICHENOR, *THE POLITICS OF MODERN SLAVERY IN AMERICA: ADVOCACY GROUPS AND HUMAN TRAFFICKING REFORM, MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING* 35, 38-39 (Dessi Dimitrova ed., 2007)).

<sup>94</sup> *Id.*

<sup>95</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8 and 22 U.S.C.), available at <http://www.state.gov/documents/organization/10492.pdf>.

<sup>96</sup> Rose, *supra* note 8, at 309.

<sup>97</sup> Rose, *supra* note 8, at 316 (quoting Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 12 (2008)).

contemporary manifestation of slavery;” “to ensure just and effective punishment of traffickers;” and “to protect” victims of trafficking.<sup>98</sup> In carrying out the aforementioned purposes, the TVPA prescribes criminal sanctions ranging from economic penalties to life in prison, provides grant funding to “[s]tates, Indian tribes, units of local government, and nonprofit, nongovernmental victim’s service organizations to develop, expand, or strengthen victim service programs,” and extends “benefits and services to victims . . . without regard to the immigration status of such victims.”<sup>99</sup> As state and local governments are generally the first to identify and prosecute domestic sex traffickers, and as the federal prosecution of such cases typically commences at the state level, the various states are in a unique position to shoulder a purpose similar to that of the federal government’s, as outlined in the TVPA, to circumvent openings in that legislation’s coverage, and to ensure the proper execution of a matter of national and international interest.<sup>100</sup>

Today, every state in America has enacted, in one form or another, legislation to combat human trafficking.<sup>101</sup> However, there is a vast disparity in the manner and extent of such trafficking provisions. For instance, only forty-eight states have enacted legislation specifically combatting sex trafficking, only thirty-six states and the District of Columbia provide for asset forfeiture, and only eighteen states have enacted so-called “safe harbor” provisions, which presumptively treat exploited minors as victims and thereby exempt such individuals from criminal prosecution for crimes such as prostitution.<sup>102</sup>

With respect to the interstate disparity in sex trafficking legislation, as well as the regulation of the commercial sex industry, it should be noted that only fourteen states have enacted legislation permitting victims of sex trafficking to vacate convictions for “crimes”

<sup>98</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 14 Stat. 1466, § 102(a) (codified at 22 U.S.C. § 7101).

<sup>99</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 14 Stat. 1466, § 107(b) (codified as amended at 22 U.S.C. § 7105).

<sup>100</sup> BANKS & KYCKELHAHN, *supra* note 60, at 4; Rose, *supra* note 8, at 339 (citing Terry Coonan, *Anatomy of a Sex Trafficking Case*, 5 INTERCULTURAL HUMAN RIGHTS L. REV. 313, 325 (2010)).

<sup>101</sup> See 2013 ANALYSIS, *supra* note 5.

<sup>102</sup> *Id.* at 7, 16, & 34.

committed whilst being trafficked and sexually exploited.<sup>103</sup>

## V. CONVICTION VACATION FOR VICTIMS OF SEX TRAFFICKING

“A sophisticated understanding of the realities of [sex trafficking] is necessary to ensure that . . . victims are not wrongly discounted as consenting adults.”<sup>104</sup> “Victim protection must be a critical component of any government’s anti-trafficking efforts.”<sup>105</sup> Victim protection efforts must be forward-thinking. That is, such efforts must not only meet the immediate needs of sex trafficking victims, they must also ensure a healthy and viable reintegration back into society.<sup>106</sup>

### A. *People v. G.M*

*People v. G.M.* detailed one woman’s nearly decade-long experience with sex trafficking.<sup>107</sup> Despite being a victim of sex trafficking, G.M.’s criminal convictions not only stigmatized her as a prostitute, but also had the effect of creating a severe financial hardship for her.<sup>108</sup> G.M., a “home healthcare attendant,” was suspended and later terminated from her job due to the Department of Health’s discovery of her prior convictions.<sup>109</sup> It took nearly three years and the assistance of a number of non-profit victim advocacy agencies to appeal the Department of Health’s findings and restore G.M. to her prior position of employment.<sup>110</sup> During these efforts, G.M. was granted a “T Visa” from the federal government after providing sufficient evidence to prove that she was, in fact, a victim of human trafficking.<sup>111</sup> In seeking vacatur, G.M. asserted that should her request be denied, she would remain “vulnerable to having her [criminal record] exposed to future employers, creating further

<sup>103</sup> *Id.* at 51.

<sup>104</sup> *Trafficking Report*, *supra* note 52, at 25.

<sup>105</sup> *Id.* at 40.

<sup>106</sup> *Id.*

<sup>107</sup> *G.M.*, 922 N.Y.S.2d at 761.

<sup>108</sup> *Id.* at 763. Recall that G.M. was ultimately convicted of two counts of disorderly conduct, two counts for prostitution, and two counts for possession of narcotics. *Id.* at 762.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 763.



embarrassment, humiliation, and financial hardship.”<sup>112</sup>

In 2010, during the pendency of *People v. G.M.*, the New York State Legislature amended New York Criminal Procedure § 440.10, allowing courts, for the first time in the United States, “to vacate the convictions of those arrested for prostitution-related offenses if they were sex trafficking victims at the time of arrest.”<sup>113</sup> Specifically, § 440.10(1)(i) “allows for the vacatur of convictions where the underlying charge was for prostitution or loitering for the purpose of engaging in a prostitution offense.”<sup>114</sup> With respect to the status of sex trafficking victims, § 440.10 applies to victims of sex trafficking under either state or federal law.<sup>115</sup>

New York’s conviction vacation legislation was premised on the notion that “victims of sex trafficking who are forced into prostitution are frequently arrested for prostitution-related offenses and are saddled with the criminal record.”<sup>116</sup> Victims are thereby “blocked from decent jobs” and are limited in their “prospects for rebuilding their lives.”<sup>117</sup> “Even after [victims] escape from sex trafficking, [their] criminal record victimizes them for life.”<sup>118</sup> As such, New York Criminal Procedure § 440.10 would provide sex trafficking victims in New York State the “desperately needed second chance they deserve.”<sup>119</sup>

Given the opportunity to interpret and apply § 440.10, the Queens County Criminal Court determined that G.M. was, in fact, a victim of human trafficking.<sup>120</sup> The court stated that “[w]hile ‘official documentation of the defendant’s status’ from a federal agency is not required for granting a motion to vacate under CPL § 440.10(1)(i), it nevertheless ‘creates a presumption that the defendant’s participation in the offense was a result of having been a victim of sex

<sup>112</sup> *Id.*

<sup>113</sup> *G.M.*, 922 N.Y.S.2d at 764. See N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2012).

<sup>114</sup> *Id.* N.Y. CRIM. PROC. LAW § 440.10(1)(i).

<sup>115</sup> See N.Y. CRIM. PROC. LAW § 440.10(1)(i); N.Y. PENAL LAW § 230.34 (McKinney 2007); Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>116</sup> *G.M.*, 922 N.Y.S.2d at 764.

<sup>117</sup> *Id.* at 764-65.

<sup>118</sup> *Id.* at 765.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

trafficking.”<sup>121</sup> Further, the court determined that G.M. had provided a “compelling narrative” demonstrating “years of brutal physical, psychological and sexual violence by her husband.”<sup>122</sup>

Recall that New York Criminal Procedure § 440.10 provided for the vacation of “prostitution-related offenses,” and that G.M. had six criminal convictions, only two of which were within the plain meaning of the statute.<sup>123</sup> The Queens County Criminal Court nevertheless vacated all six convictions because the Queens District Attorney’s Office consented to G.M.’s motion in its entirety.<sup>124</sup> Assistant District Attorney Kimberly Affronti, crediting G.M. for her truthfulness, explained that the People were simply “exercising discretion,” and did not wish to expand the statute.<sup>125</sup> She believed that “this [was] not a case to refer to in future [§] 440 motions.”<sup>126</sup> Thus, while the court recognized that the two counts of disorderly conduct and the two counts of possession narcotics were outside the scope of the statute, the court nevertheless applied the statute broadly.

#### *B. Purpose of Vacatur*

As was demonstrated in *People v. G.M.*, victims of sex trafficking are not always identified as victims before they are arrested, prosecuted, and convicted. “The resulting criminal records inhibit the ability of these victims to move forward with their lives.”<sup>127</sup> Not only can their criminal records affect employment prospects, but they can also impact victims’ ability to obtain loans, immigration visas, housing, voting rights, and their ability to reintegrate into society. States are in a unique position to assist victims in “rebuild[ing] their lives by enacting statutes that permit courts to vacate convictions for . . . crimes that victims of human trafficking were forced to commit.”<sup>128</sup>

Since New York’s 2010 amendment of § 440.10, only thirteen other states have enacted similar legislation; these states are

<sup>121</sup> *Id.* (quoting N.Y. CRIM. PROC. LAW §§ 440.10(1)(i)-(ii)).

<sup>122</sup> *G.M.*, 922 N.Y.S.2d at 765.

<sup>123</sup> N.Y. CRIM. PROC. LAW § 440.10.

<sup>124</sup> *G.M.*, 922 N.Y.S.2d at 766.

<sup>125</sup> *Id.* at 764.

<sup>126</sup> *Id.* at 764.

<sup>127</sup> 2013 ANALYSIS, *supra* note 5, at 1.

<sup>128</sup> *Id.*

Connecticut, Florida, Hawaii, Illinois, Maryland, Mississippi, Montana, Nevada, New Jersey, North Carolina, Vermont, Washington, and Wyoming.<sup>129</sup> However, the majority of the state statutes regarding conviction vacatur have yet to be interpreted or applied.

### C. *Scope of Conviction Vacatur*

As was demonstrated in *People v. G.M.*, a state court may ultimately decide to broadly apply a vacatur statute.<sup>130</sup> The majority of states that have enacted vacatur statutes for the benefit of victims of sex trafficking have yet to interpret or apply them; this section will examine the potential application of the statutes' plain language meaning. In examining the plain language of the vacatur statutes, the statutes may be viewed as falling along a continuum, each being characterized as belonging to one of three categories: (1) narrow, (2) intermediate, or (3) broad.

In the narrow category, the plain meaning of such statutes allows vacatur exclusively for the charge of prostitution. The states that can be appropriately classified as narrow, include: Connecticut, Illinois, Maryland, Mississippi, Montana, Vermont, and Washington. For instance, the Illinois vacatur statute exclusively references "the entry of a verdict or finding of guilty where the conviction was under Section 11-14 . . . of the Criminal Code of 1961."<sup>131</sup> Section 11-14 is the statute governing prostitution, which prescribes that a person commits an act of prostitution where one "knowingly performs, offers or agrees to perform any act of sexual penetration . . . or any touching or fondling of the sex organs of one person by another person, for anything of value."<sup>132</sup>

<sup>129</sup> See H. 5666, 2013 Gen. Assemb., Reg. Sess. (Conn. 2013); H. 1325, 115th Leg., Reg. Sess. (Fla. 2013); FLA. STAT. ANN. § 943.0583 (West 2014); HAW. REV. STAT. § 712-1209.6 (2012); 725 ILL. COMP. STAT. 5/116-2.1 (2013); MD CODE ANN., CRIM. PROC. § 8-302 (West 2011); MISS. CODE ANN. § 97-3-54.6 (West 2013); S.259, 63rd Leg., Reg. Sess. (Mont. 2013); NEV. REV. STAT. § 176.515 (2011); N.J. STAT. ANN. § 2C:44-1.1 (West 2013); 2013 N.C. Sess. Laws 368; N.C. GEN. STAT. ANN. § 15A-1416.1 (West 2013); VT. STAT. ANN. tit. 13, § 2658 (West 2012); WASH. REV. CODE ANN. § 9.96.060 (West 2012); WYO. STAT. ANN. § 6-2-708 (West 2013).

<sup>130</sup> See *G.M.*, 922 N.Y.S.2d 761.

<sup>131</sup> 725 ILL. COMP. STAT. 5/116-2.1 (2013).

<sup>132</sup> 720 ILL. COMP. STAT. 5/11-14 (amended by 2013 Ill. Legis. Serv. P.A. 98-538 (S.B. 1872)).

Intermediate category statutes permit vacatur for prostitution *as well* as prostitution-related offenses. The states that can be appropriately classified as “intermediate,” include: Hawaii, Nevada, New Jersey, New York, North Carolina, and Vermont. For instance, returning to New York’s vacatur statute, New York Criminal Procedure § 440.10 references convictions “under section 240.37 . . . or 230.00 . . . of the penal law.”<sup>133</sup> Section 240.37 of New York’s Penal Law governs loitering for the purpose of engaging in a prostitution offense.<sup>134</sup> Section 230.00 of New York’s Penal Law governs prostitution.<sup>135</sup>

Continuing with the intermediate category, Nevada provides for vacatur of convictions under Nevada Revised Statute § 201.354, “for engaging in prostitution or solicitation for prostitution.”<sup>136</sup> New Jersey provides for vacatur of convictions under N.J.S.A. § 2C:34-1.1, which governs loitering for the purpose of engaging in prostitution, or of convictions under N.J.S.A. § 2C:34-1, which governs “[p]rostitution and related offenses”— including “engag[ing] in prostitution,” “promot[ing] prostitution,” and “compell[ing] another to engage in or promote prostitution.”<sup>137</sup> North Carolina provides for vacatur of convictions under [General Statute §] 14-204, which governs prostitution and various acts abetting prostitution.<sup>138</sup> Finally, Hawaii provides for vacatur of convictions of “prostitution,” “loitering for the purpose of engaging in or advancing prostitution,” “street solicitation of prostitution,” or of any “lesser offense when originally charged with a violation” of any of the aforementioned offenses.<sup>139</sup>

The states that can be appropriately classified as broad are Florida and Wyoming. The Florida vacatur statute provides that “[a] person who is a victim of human trafficking may petition for the expunction of *any* conviction for an offense committed while he or she was a victim of human trafficking.”<sup>140</sup> Similarly broad, Wyoming provides that “[a]t any time after the entry of a conviction, the court

<sup>133</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(i).

<sup>134</sup> N.Y. PENAL § 240.37 (McKinney 2014).

<sup>135</sup> N.Y. PENAL § 230.00 (McKinney 1969).

<sup>136</sup> NEV. REV. STAT. § 176.515(5)(a) (2013).

<sup>137</sup> N.J. STAT. ANN. § 2C:34-1 (West 2013).

<sup>138</sup> N.C. GEN. STAT. §§ 15A-1416.1(a), 14-204 (2013).

<sup>139</sup> HAW. REV. STAT. § 712-1209.6(1) (2012).

<sup>140</sup> FLA. STAT. ANN. § 943.0583(3) (2014) (emphasis added).

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in which it was entered may vacate the conviction if the defendant's participation in the offense is found to have been the result of having been a victim."<sup>141</sup>

<i>Narrow</i>	<i>Intermediate</i>	<i>Broad</i>
Connecticut, Illinois, Maryland, Mississippi, Montana, Vermont, & Washington	Hawaii, Nevada, New Jersey, New York, & North Carolina	Florida & Wyoming

Table 1 - Vacatur Statute Continuum

*D. Statutory Limitations on Vacatur Requests*

The statutory limitations placed on motions for vacatur varies among the states herein concerned. The limitations prescribed may be categorized as: (1) temporal limitations, and (2) other statutory limitations.

## 1. Temporal Limitations

The time by which one may seek vacatur varies among the states herein concerned. With respect to temporal limitations, the vacatur statutes may be classified as belonging to one of three categories: statutes that (1) prescribe a time limit, (2) do not contain a time limit, or (3) allow for a motion "at any time."

Of the fourteen states permitting vacatur, only four states prescribe some variation of temporal limitation. Montana and Maryland require one seeking vacatur to make such a motion within a reasonable period of time after his or her conviction or after he or she ceases to be involved in sex trafficking.<sup>142</sup> Nevada, setting perhaps

<sup>141</sup> WYO. STAT. ANN. § 6-2-708(c) (2013) (emphasis added).

<sup>142</sup> See MD CRIM. PROC. § 8-302 (2011) (requiring a vacatur motion to be made "within a reasonable period of time after the conviction."); S.259, 63rd Leg. Reg. Sess. (Mont. 2013) (requiring a vacatur motion be made "within a reasonable time after the person ceased to be involved in trafficking for commercial sexual activity or sought services for trafficking victims, subject to reasonable concerns for the safety of

a more strict limitation, requires a movant to make his or her motion “with due diligence after the [movant] has ceased being a victim of trafficking” or “has sought services for victims of such trafficking.”<sup>143</sup> Hawaii is the only state that prescribes a precise time limitation, requiring the motion for vacatur to be submitted “within six years after the date that the person ceases to be a victim.”<sup>144</sup>

Three of the fourteen states— Florida, Washington, and Vermont— fail to address any temporal limitation a motion for conviction vacatur.<sup>145</sup> The remaining seven states— Connecticut, Illinois, Mississippi, New Jersey, New York, North Carolina, and Wyoming— allow for a motion for vacatur to be made “at any time” following a conviction for the offenses prescribed in their respective vacatur statute.<sup>146</sup>

<i>Time Limit</i>	<i>Does Not Address</i>	<i>“At Any Time”</i>
Hawaii, Maryland, Montana, & Nevada	Florida, Washington, & Vermont	Connecticut, Illinois, Mississippi, New Jersey, New York, North Carolina, & Wyoming

Table 2 - Temporal Limitations

## 2. Other Statutory Limitations

Besides the general rule that the burden of proof belongs to the party making the motion, only the State of Washington is unique in requiring an applicant’s motion be denied if any one of the following conditions are present: (1) at the time the motion is made, there are criminal charges pending against the applicant in any state or federal

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the person, family members of the person, or other victims of trafficking who could be jeopardized by filing a motion under this section”).

<sup>143</sup> NEV. REV. STAT. § 176.515(5)(c) (2013).

<sup>144</sup> HAW. REV. STAT. § 712-1209.6(2)(c) (2012).

<sup>145</sup> See FLA. STAT. ANN. § 943.0583 (West 2014); WASH. REV. CODE ANN. § 9.96.060 (West 2012); VT. STAT. ANN. tit. 13, § 2658 (West 2012).

<sup>146</sup> See H. 5666, 2013 Gen. Assemb., Reg. Sess. (Conn. 2013); 725 ILL. COMP. STAT. 5/116-2.1 (2013); MISS. CODE ANN. § 97-3-54.6 (West 2013); N.J. STAT. ANN. § 2C:44-1.1 (West 2013); N.Y. CRIM. PROC. LAW § 440.10; N.C. GEN. STAT. ANN. § 15A-1416.1 (West 2013); WYO. STAT. ANN. § 6-2-708 (West 2013).

court, (2) the applicant had been convicted of “another crime” in any state or federal court since the date of the conviction seeking to be vacated, or (3) the applicant has had “the record of another prostitution conviction vacated.”<sup>147</sup>

#### *E. Vacatur & Expungement*

There is a material difference between the concepts of expungement and vacatur.<sup>148</sup> “A defendant who moves to expunge her conviction does not seek to vacate or set aside her conviction.”<sup>149</sup> To “expunge” is “to erase;” to “vacate” is “to nullify or to cancel.”<sup>150</sup> “When a court vacates a conviction, [the court] sets aside or nullifies the conviction and its attendant legal disabilities; the court does not necessarily attempt to *erase* the fact of the conviction.”<sup>151</sup> In sharp contrast, to seek expungement is to seek “the judicial editing of history.”<sup>152</sup> That is to say, when a defendant seeks an expunction, he or she requests that “the court destroy or seal the records of the fact of the defendant’s conviction.”<sup>153</sup> Thus, expungement, without the additional utility of vacatur, generally “does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty.”<sup>154</sup>

In examining the plain language of the vacatur statutes, the statutes herein concerned, with respect to the judicial remedies permitted, may be classified as belonging to one of three categories: (1) those permitting the exclusive remedy of vacatur, (2) those permitting both vacatur and expungement, and (3) those expressly permitting vacatur while opening the door for the possibility of expungement.

Of the fourteen vacatur statutes herein concerned, eight provide for the exclusive remedy of vacatur. These states, by their plain language, do not expressly or impliedly provide for expungement.

<sup>147</sup> WASH. REV. CODE ANN. § 9.96.060(3) (West 2012).

<sup>148</sup> See *United States v. Crowell*, 374 F.3d 790, 792 (9th Cir. 2004).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (emphasis added) (citing *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 114-22 (1983)).

<sup>152</sup> *Id.* (internal quotation marks omitted).

<sup>153</sup> *Id.*

<sup>154</sup> *Crowell*, 374 F.3d at 792 (citing *Dickerson*, 460 U.S. at 104).

The eight states that fall into this category are: Connecticut, Hawaii, Maryland, Mississippi, Montana, New York, Washington, and Wyoming. For instance, Connecticut merely provides that should the defendant satisfy the burden required under the vacatur statute “the court shall vacate the judgment of conviction and dismiss any charges related to the offense.”<sup>155</sup>

Of the fourteen vacatur statutes, only two provide for *both* the remedy of vacatur *and* the remedy of expunction. The two states that fall into this category are Florida and Vermont. Vermont’s vacatur statute expressly states that, “[i]f the motion [to vacate] is granted, the court shall vacate the conviction, strike the adjudication of guilt, and expunge the record of the criminal proceedings.”<sup>156</sup> To a similar effect, Florida provides that, “[a] conviction expunged under this section is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings.”<sup>157</sup>

Finally, of the fourteen vacatur statutes herein concerned, four statutes, by a reading of their plain language, expressly provide for the remedy of vacatur and seemingly open the door for the possibility of the remedy of expunction. The four states that fall into this category are: Illinois, Nevada, New Jersey, and North Carolina. Illinois provides that, “[i]f the court grants a motion [to vacate a prostitution conviction] under this Section, it must vacate the conviction and *may* take such additional action as is appropriate in the circumstances.”<sup>158</sup> Both Nevada and North Carolina track Illinois’ statutory language.<sup>159</sup> In a minor departure from the aforementioned language, New Jersey’s vacatur statute provides that, in addition to a defendant’s motion for vacatur, “[w]hen the [defendant’s]

<sup>155</sup> CONN. GEN. STAT. § 54-95c (2013).

<sup>156</sup> VT. STAT. ANN. tit. 13 § 2658(d)(2) (2012).

<sup>157</sup> FLA. STAT. ANN. § 943.0583(3) (2014). Of particular importance, no Florida court has yet applied this statute for the purpose of conviction vacatur. Thus, it remains to be seen whether such courts will apply the statute in accordance with its plain language, thereby providing for both the remedy of vacatur and of expunction.

<sup>158</sup> 725 ILL. COMP. STAT. 5/116-2.1(c) (2013) (emphasis added).

<sup>159</sup> See NEV. REV. STAT. ANN. § 176.515(7)(b) (2011) (providing “[i]f the court grants a motion made pursuant to subsection 5, the court . . . (b) may take any additional action that the court deems appropriate under the circumstances); *see also* N.C. GEN. STAT. § 15A-1416.1(c) (2013) (providing “[i]f the court grants a motion under this section, the court must vacate the conviction and may take such additional action as is appropriate in the circumstances”).



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application also seeks an order for expungement, the court order shall require that any court, law enforcement and correctional agencies, and other noticed parties . . . expunge all references to the person's arrest, conviction, and related proceedings."<sup>160</sup>

<i>Exclusively Vacatur</i>	<i>Vacatur &amp; Expunction</i>	<i>Vacatur &amp; Possible Expunction</i>
Connecticut, Hawaii, Maryland, Mississippi, Montana, New York, Washington, & Wyoming	Florida & Vermont	Illinois, Nevada, New Jersey, & North Carolina

Table 3 - Remedies Available at Law

F. *The Optimal Model Statute*

While the scope, limitations, and effect of the vacatur statutes herein concerned vary from jurisdiction to jurisdiction, a vacatur statute that would be of the greatest benefit to victims of sex trafficking is one which (1) permits vacatur for an array of criminal offenses, not necessarily limited to prostitution or such related offenses; (2) allows for an indefinite period of time in which the motion for vacatur may be made; and (3) provides for both the remedy of vacatur as well as the remedy of expunction.

The only statute that adheres to all three of the aforesaid criteria is that of Florida. While the merits of Florida's vacatur statute are laudable, it is to be noted that the statute has only recently come into effect—effective January 1, 2014—and that no court in the State of Florida has applied it as of yet.<sup>161</sup> As a result, how courts in Florida will interpret the new law is unknown. As was demonstrated in *People v. G.M.*, conviction vacatur statutes for the benefit of victims of sex trafficking are a rather novel, social, and legal phenomena, arguably subject to unpredictable interpretations.<sup>162</sup>

<sup>160</sup> N.J. STAT. ANN. § 2C:44-1.1 (2013).

<sup>161</sup> 2013 Fla. House Bill No. 1325; FLA. STAT. ANN. § 943.0583 (effective Jan. 1, 2014).

<sup>162</sup> *G.M.*, 922 N.Y.S.2d at 764.

## VI. A NOTE ON PROSECUTORIAL DISCRETION

While victims of sex trafficking being charged with criminal offenses is of grave concern, it is important to note the role of prosecutorial discretion may, to an indeterminable degree, undercut the argument in support of conviction vacatur statutes.

The decision to charge a person with a criminal offense is largely subject to prosecutorial discretion.<sup>163</sup> A prosecutor may initially exercise his or her broad discretion in determining “that the interests of the [S]tate are served by *not* seeking more serious charges.”<sup>164</sup> However, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”<sup>165</sup>

A prosecutor’s broad discretion with respect to charging or not charging a criminal offense is largely unreviewable by the courts.<sup>166</sup> While “prosecutorial discretion is broad, it is not ‘unfettered.’”<sup>167</sup> “Selectivity in the enforcement of [the criminal law] is . . . subject to constitutional constraints.”<sup>168</sup> That is, “the decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’”<sup>169</sup>

With respect to criminal charges against victims of sex trafficking, one may argue that the vacatur statutes described above are unnecessary legislation because a prosecutor may simply decide not to charge said victim with a criminal offense, which would be subject to vacatur or expunction in other states. However, there has been no comprehensive research determining whether victims of sex trafficking are being treated as victims in such initial stages. In fact, in 2002, 95 percent of state convictions for felony offenses were the result of guilty pleas.<sup>170</sup>

<sup>163</sup> See *United States v. Goodwin*, 457 U.S. 368 (1982).

<sup>164</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 367 (1978) (dissenting opinion) (*quoting* *Hayes v. Cowan*, 547 F.2d 42, 44 (6th Cir. 1976) (emphasis added)).

<sup>165</sup> *Wayte v. United States*, 470 U.S. 598, 607 (1985) (*quoting* *Bordenkircher*, 434 U.S. at 364).

<sup>166</sup> *Wayte*, 470 U.S. at 607-08.

<sup>167</sup> *Id.* (*quoting* *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* (*quoting* *Bordenkircher*, 434 U.S. at 364).

<sup>170</sup> MATTHEW R. DUROSE & PATRICK A. LANGAN, DEP’T OF JUSTICE, U.S. BUREAU OF

Nearly 20 percent of those convicted in the United States that have been later exonerated had originally “confessed to the crimes with which they were charged and convicted.”<sup>171</sup> Troublingly, this figure represents only those persons who had proceeded to trial.<sup>172</sup> There is “no way of knowing how many [people] merely entered guilty pleas through bargains and never appealed.”<sup>173</sup> It is even more troubling when the high rate of plea bargaining is considered in tandem with the culture of sex trafficking victims. “Distrust of law enforcement, law enforcement’s failure to identify victims, and fear of retaliation from pimps all contribute to trafficking victims’ reluctance to come forward and seek help.”<sup>174</sup> As a result, this culture may very well perpetuate the underlying notion that innocent people do, in fact, plead guilty.

#### VII. A COMPARATIVE APPROACH TO DOMESTIC SEX TRAFFICKING LEGISLATION

While the approach of the United States, with respect to combatting sex trafficking, has been to prosecute traffickers, and to provide services and recourse to victims, Sweden has led the world in another direction by attempting to solve the problem of sex trafficking by way of pure economics.<sup>175</sup> On January 1, 1999, “Sweden became the first country in the world to introduce legislation criminalizing the purchase, but not the sale of sexual services.”<sup>176</sup> This

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JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURT, 2002 8 (2004) *available at* <http://www.bjs.gov/content/pub/pdf/fssc02.pdf>.

<sup>171</sup> Hon. H. Lee Sarokin, *Why Do Innocent People Plead Guilty?*, HUFFINGTON POST (May 29, 2012), [http://www.huffingtonpost.com/judge-h-lee-sarokin/innocent-people-guilty-pleas\\_b\\_1553239.html](http://www.huffingtonpost.com/judge-h-lee-sarokin/innocent-people-guilty-pleas_b_1553239.html).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Ione Curva, *Thinking Globally, Acting Locally: How New Jersey Prostitution Law Reform Can Reduce Sex Trafficking*, 64 RUTGERS L. REV. 557, 576-77 (2012) (quoting Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3012 (2006)).

<sup>175</sup> A special thanks to Kristian Bryant Rose, *supra* note 8, at 322 for bringing the writer’s attention to the legislation of Sweden as per this segment entitled “A Comparative Approach to Domestic Sex Trafficking Legislation.”

<sup>176</sup> Statens Offentliga Utredningar [SOU] 2010:49 Prohibition of the Purchase of Sexual Services: An Evaluation 1999-2008[government report series](Swed.) *available at* <http://www.government.se/content/1/c6/15/14/88/6dfbbdbd.pdf> [hereinafter *Sweden Report*].

prohibition can be “found in Chapter 6, Section 11 of the [Swedish] Penal Code.”<sup>177</sup>

*A. Harm Reduction vs. Economic Strategy*

Sweden’s approach advanced a theory unlike that of its international counterparts; instead of focusing on “harm reduction,” Sweden set its target on combatting prostitution by targeting demand and deterring prospective “Johns,” or purchasers.<sup>178</sup> The theory underlying this approach was, “if there was no demand[,] there would be no prostitution.”<sup>179</sup>

*B. Penalties & Implications*

Under Sweden’s statutory scheme, “the scale of penalties for the purchase of sexual services is a fine or imprisonment for at most six months.”<sup>180</sup> Recognizing “a clear link between the existence of prostitution and human trafficking for sexual purposes,” Sweden viewed the aforementioned deterrent as equally instrumental “to prevent and combat trafficking in human beings and to protect those people who are, or are [at] risk [of] becoming, involved in prostitution and other forms of sexual exploitation.”<sup>181</sup>

*C. Results*

The Government of Sweden, in evaluating the impact of the controversial legislation, has advised that there is “reason to interpret the results with caution.”<sup>182</sup> The precaution was stressed primarily due to the nature of sexual services, being “multifaceted social phenomena which partly occur in secret,” and due to increased internationalization as well as the internet serving as a “new arena for prostitution.”<sup>183</sup> With that precaution in mind, the Government of Sweden declared via its representative and Chancellor of Justice Anna

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 33.

<sup>179</sup> *Id.* at 30.

<sup>180</sup> *Id.* at 32 (emphasis added).

<sup>181</sup> *Id.*

<sup>182</sup> *Sweden Report*, *supra* note 176, at 34.

<sup>183</sup> *Id.* (indicating that the prevalence of prostitution is difficult to assess as the result of the clandestine nature of sexual services as well as such services being offered in evolving mediums.).

Skarhed, that “street prostitution in Sweden” has been reduced by fifty percent since the prohibition’s enactment.<sup>184</sup> As a comparison, the Government of Sweden reported that the “prevalence of street prostitution” in Stockholm, Sweden’s capital city, was substantially similar to that of the capital cities of neighboring Norway and Denmark prior to the legislation in question.<sup>185</sup> However, in 2008, nine years following the legislative prohibition, the prevalence of street prostitution in Norway and Denmark has increased to nearly three times that of Sweden.<sup>186</sup>

While theoreticians may attribute the reduction in visible street prostitution in Sweden to having transitioned to more clandestine mediums, Sweden reported no overall increase in prostitution subsequent to the ban, and only a moderate increase in internet-based prostitution when contrasted to other comparable Nordic countries.<sup>187</sup>

The Government of Sweden recognizes that sex trafficking is “a growing form of serious economic crime in large parts of the world.”<sup>188</sup> However, the statistics available have led Sweden to conclude that sex trafficking is “substantially smaller in scale [in Sweden] than in other comparable countries.”<sup>189</sup> According to Sweden’s National Criminal Police, “it is clear that the ban on the purchase of sexual services acts as a barrier to human traffickers and procurers considering establishing themselves in Sweden.”<sup>190</sup> This approach has since been adopted by both Iceland and Norway, and is often referred to as the “Nordic Model.”<sup>191</sup>

#### *D. Can it Work Here?*

Whether the Nordic Model could be adopted by the United

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 35.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 35-36.

<sup>188</sup> *Sweden Report*, *supra* note 176, at 37.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Norma Ramos, *Such Oppression Can Never Be Safe*, N.Y. TIMES (Apr. 19, 2010), <http://www.nytimes.com/roomfordebate/2012/04/19/is-legalized-prostitution-safer/legal-prostitution-can-never-be-safe>.

States is a fervently contested issue.<sup>192</sup> Employing the mantra, “no demand, no supply,” advocacy groups and a number of legislators have sought to follow the Nordic Model, and “eradicate all prostitution” by increasing criminal penalties against “Johns”— “a [strategy] they believe will upend the market that fuels prostitution and sex trafficking.”<sup>193</sup> However, critics suggest that translating the Nordic Model into an American context would present a plethora of social and institutional problems.<sup>194</sup>

Critics of the potential American adoption of the Nordic Model suggest that America “lacks the extensive services of [the Nordic] social welfare state,” which are considered imperative to those individuals exiting the commercial sex trade.<sup>195</sup> Critics further suggest that the adoption would fail due to the dynamics of American politics and the desire of American politicians to not be viewed as “soft on crime or morally lax.”<sup>196</sup> Finally, some theoreticians suggest that adopting such an approach would “drive the trade underground” and make the commercial sex trade more dangerous.<sup>197</sup>

Interestingly enough, some theoreticians suggest that “any uptick” in actions taken by law enforcement to pursue “Johns,” as would be necessary to implement the Nordic Model, would “inevitably result” in the “increased criminalization of those selling sex.”<sup>198</sup> As a result, these theoreticians postulate that the supposed “victim-centered” approach that is the Nordic Model would, in all probability, “disproportionately hurt” those it was intended to help, leaving victims “more vulnerable to trafficking and exploitation” due to their criminal records —the exact vulnerability of which thirty-six states in America fail to address.<sup>199</sup>

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<sup>192</sup> See Noy Thrupkaew, *A Misguided Moral Crusade*, N.Y. TIMES (Sept. 22, 2012), <http://www.nytimes.com/2012/09/23/opinion/sunday/ending-demand-wont-stop-prostitution.html?adxnnl=1&pagewanted=all&adxnnlx=1382120908-m81ibJxPveRc28rMZfhiBw>.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Thrupkaew, *supra* note 192, at 3.

<sup>199</sup> *Id.*

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**VIII. CONCLUSION**

Sex trafficking is a worldwide tragedy. The failure or deferment of state legislatures to appropriately address the needs of victims of sex trafficking is a domestic tragedy. The individual states, being the governmental units most uniquely positioned to address this industry and its horrific implications, have the duty and ability to constrain, restrict, and expulse this “modern day form of slavery” from within their borders.<sup>200</sup> States also have the similar responsibility to emancipate the victims of trafficking by enacting conviction vacation legislation.

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<sup>200</sup> WALKER-RODRIGUEZ & HILL. *supra* note 2.