

REMOVING THE SCARLET “A” FROM VICTIMS OF  
HUMAN TRAFFICKING:  
STRATEGIES FOR AVOIDING AND ADDRESSING  
WRONGFUL CONVICTIONS

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I. INTRODUCTION

The vacant stare of her hollow eyes says it all, revealing a soul stripped bare of all dignity. The boundaries of her existence are determined by the abuse she has suffered and the rejection she is met with every time she tries to find a way to move forward. Her name does not matter. What *does* matter is that she is found nearly everywhere in our society and that she could be anyone—your childhood friend, your sister or niece, your daughter, even your wife. Her identity is defined by one thing, a figurative, yet indelible “Scarlet A”<sup>1</sup> emblazoned across her entire

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<sup>1</sup> *Hester Prynne*, CHEESE5YOU, <http://cheese5you.deviantart.com/art/Hester-Prynne-97780680> (last visited Jan. 21, 2015) (featuring an artistic rendition referencing

personhood. The fact that she has potential, and if given the opportunity, could become a productive, contributing member of society, is irrelevant. Regardless of the positive changes she tries to make, every time she attempts to pull her life on track, the “Scarlet A” on her record shows up and stops the train. Trapped in a vicious cycle of despair, there seems to be nowhere else for her to go except back to the abusive and humiliating lifestyle that got her here in the first place. Although this story may sound like a script from a B-rated film, it is, in fact, an accurate description of the daily life of the countless number of individuals in our nation who are victims of human trafficking, especially those inducted into the sex industry.<sup>2</sup> According to the Amara Legal Center in Washington, D.C.,

[i]n addition to prostitution, survivors of sex trafficking are often involved in a wide range of unlawful activity and incur hefty criminal records. Survivors are commonly convicted of crimes such as drug possession and theft, and minors are commonly convicted of truancy, running away, and violating state curfew laws. In many instances, the survivors only committed these crimes under duress from traffickers and pimps. In fact, those benefiting from sex trafficking often push survivors into these crimes intentionally, as a means of control. Survivors’ criminal records hinder them from moving forward with their lives in many ways. Many applications for public benefits require disclosure of criminal records and many programs are unavailable to those with criminal records. Specifically, a criminal record can prevent a survivor from getting a job, receiving medical care, furthering her education, receiving housing assistance, or applying for a loan.<sup>3</sup>

Many industries in the United States receive ill-gotten gains by exploiting human trafficking victims, the most notorious being the sexual slavery industry.<sup>4</sup>

Sexual exploitation has surfaced in several different forms, but the general methods of exploitation remains [sic] the same. The women are promised a better life through high-paying job offers or educational opportunities. However, once they leave their homes, they are forced into any number of commercial sex industries, including: “prostitution,

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Nathaniel Hawthorne’s *Scarlet Letter* about a young woman named Hester Prynne who was found guilty of adultery and forced to wear a conspicuous scarlet “A” on her dress as a public symbol of her private shame).

<sup>2</sup> See *Human Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview> (last visited Feb. 28, 2015). The official number of victims of human trafficking in the U.S. is unknown, but when statistics for sex trafficking victims and labor trafficking victims are combined for adults and minors, it is estimated to be in the “hundreds of thousands.” *Id.*

<sup>3</sup> Lauren Ulrich, *Vacatur Statutes for Survivors of Sex Trafficking*, AMARA LEGAL CENTER, [http://media.wix.com/ugd/da6af9\\_930bba47e2da4fc28e0a2385e48696e3.pdf](http://media.wix.com/ugd/da6af9_930bba47e2da4fc28e0a2385e48696e3.pdf) (footnotes omitted).

<sup>4</sup> Stephanie L. Mariconda, Note, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151, 155–56 (2009).

pornography, stripping, live-sex shows, mail-order brides, military prostitution and sex-tourism.” The subservience of these victims is maintained by the traffickers’ use of a number of control mechanisms. Debt bondage is commonly used; many women are forced by their captors to pay off a “never-ending cycle of debt,” which includes the cost of the trip and the everyday expenses—food, medicine, toilet paper, condoms—that they incur. Additional amounts are added to the outstanding balance for insubordination or underperformance. Moreover, the women are given little (if any) money for services rendered and are forbidden from keeping track of their debt, giving their captors increased control over their freedom. In addition to financial restrictions, the women are limited by many other control mechanisms devised by their captors. They are often subjected to intense physical and sexual violence. Their physical movement is severely restricted: they are either under constant surveillance and/or they are moved around frequently to disorient them. They are kept in isolation from the rest of society, and in extreme situations, from each other . . . . Many unsuspecting girls fall into this industry in pursuit of a better life.<sup>5</sup>

As reported by the American Bar Association, in support of ABA House of Delegates’ resolution 104G, which encouraged legislation allowing human trafficking victims to assert an affirmative defense when “charged with prostitution related offenses or other non-violent offenses that are a direct result of their being trafficked,”<sup>6</sup>

[V]ictims of human trafficking endure terrible and inhumane treatment, which results in lasting physical, emotional, and psychological scars. These victims are beaten, sexually assaulted, starved, imprisoned, threatened, and/or psychologically controlled. It is unfortunate that the nature of human trafficking either directly or indirectly results in commercial sex acts, illegal sexually explicit performances, labor violations, or other crimes being committed by victims of human trafficking. Often, victims of human trafficking are arrested and convicted for prostitution and other related offenses.<sup>7</sup>

Some legislation has been passed with the intent to protect victims of human trafficking, the most notable being the Trafficking Victims Protection Act (TVPA) of 2000<sup>8</sup> and its subsequent reauthorizations.<sup>9</sup>

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<sup>5</sup> *Id.* at 156–58 (footnotes omitted).

<sup>6</sup> A.B.A. Res. 104G, at 4 (2013), available at [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2013\\_hod\\_midyear\\_meeting\\_104g.docx](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2013_hod_midyear_meeting_104g.docx) (last visited Feb. 28, 2015).

<sup>7</sup> *Id.* at 1–2 (footnote omitted).

<sup>8</sup> Pub. L. No 106-38622, div. A, 114 Stat. 1466 (codified at 22 U.S.C. §§ 7101–13 (2000)).

<sup>9</sup> POLARIS PROJECT, *Current Federal Laws*, POLARIS (2015), <http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/current-federal-laws> (last visited March 1, 2015) [hereinafter *Current Federal Laws*].

“Through the TVPA, human trafficking victims qualify for government protections and services if they are adults who are forced, tricked, or coerced into labor or commercial sexual trafficking or they are minors who are induced to perform commercial sex acts.”<sup>10</sup> Although the TVPA affords the right of protection to both foreign victims and victims who are American citizens, serious disparities exist between the protective provisions extended to foreign victims as compared to American victims.<sup>11</sup> Specifically,

[i]f an international trafficking victim qualifies to receive services as a result of having been trafficked, the United States will provide refugee-like protections through the TVPA. These protections include housing, food, cash assistance, job training, counseling, medical care, legal assistance, and other services that are available for a period of several years. Victims who are Americans, on the other hand, must find protection elsewhere. The United States government specifically excludes its own trafficked citizens from receiving federally-funded TVPA protections. Though the United States government recognizes that there is a disparity in the services and protections offered to Americans, it has yet to provide a remedy.<sup>12</sup>

In the interest of protecting child victims of sex trafficking, some states have passed safe harbor laws, which require that “children be placed in a safe house and assessed through physical and mental examinations,” and be provided with “food, clothing, medical care, and other resources,” with the goal being the “rehabilitation and reintegration of [child victims] into society.”<sup>13</sup> Although safe harbor laws are “very beneficial to minor victims, [they] completely ignore[] victims over the age of eighteen. While a majority of sex trafficking victims appear to be minors, there are still a substantial number of sex trafficking victims who are eighteen or over.”<sup>14</sup>

Compelled by the plight of those victims who are least protected, and therefore, most vulnerable under American law—adult American citizens—the purpose of this article is to examine current practices and legislation as applicable to the wrongful convictions of those individuals, and to provide recommendations for improved legal strategies that will not merely address existing wrongful convictions, but avoid future

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<sup>10</sup> Amanda Peters, *Disparate Protections for American Human Trafficking Victims*, 61 CLEV. ST. L. REV. 1, 2 (2013).

<sup>11</sup> *Id.* at 3–4.

<sup>12</sup> *Id.*

<sup>13</sup> See POLARIS PROJECT, *Human Trafficking Issue Brief: Safe Harbor* (Fall 2014), [http://www.polarisproject.org/storage/documents/policy\\_documents/Issue\\_Briefs/2014/2014\\_Safe\\_Harbor\\_Issue\\_Brief\\_Final\\_1.pdf](http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/2014/2014_Safe_Harbor_Issue_Brief_Final_1.pdf); see also Aaron Ball, Note and Comment, *The Battle Against Human Trafficking: Florida's New Expungement Law is a Step in the Right Direction*, 38 NOVA L. REV. 121, 134 (2013).

<sup>14</sup> Ball, *supra* note 13, at 134.

wrongful convictions as well. While trafficking in persons occurs in many forms, this paper will specifically focus on developing improved strategies to assist victims of sex trafficking, providing: (1) recommendations for increasing awareness of local law enforcement officers, prosecutors, defense attorneys and judges; (2) an examination of current state anti-trafficking laws regarding provisions for human trafficking as an affirmative defense, vacatur and expungement, and the need for improved state legislation that aligns with federal laws and protections for victims; and (3) recommendations for practical strategies to connect victims with the assistance that is needed to allow them to move out of their current circumstances and on to a better way of life.

## II. HISTORICAL FRAMEWORK AND EXAMINATION OF ANTI-TRAFFICKING LAWS

Human trafficking has been around for a long time, spanning many centuries, taking many forms, and hiding in the shadows of many cultures around the globe.<sup>15</sup> However, it was not until the 1990s that it gained “widespread public attention in the United States,” where the “discussion centered on international human trafficking.”<sup>16</sup> Interest in addressing the problem gained traction, with a breakthrough occurring, as if on cue, at the turn of the century on both the national and international level.<sup>17</sup>

In 2000, the United States passed what is commonly known as the Trafficking Victims Protection Act (TVPA), while the United Nations adopted a treaty known as the Palermo Protocol.<sup>18</sup> Both documents were enacted to combat human trafficking by encouraging countries to enact anti-trafficking laws and to prosecute traffickers.<sup>19</sup> Domestically, “state-level criminal justice systems treated United States citizens qualifying under the federal definition of ‘human trafficking victim’ as criminals by prosecuting them for prostitution.”<sup>20</sup> The irony that the United States was more “concerned about trafficking in other countries, but was neglecting trafficking of its own citizens” was noted by activists for sexually exploited

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<sup>15</sup> See *Timeline of Human Trafficking*, RUTGERS U. CAMPUS COALITION AGAINST TRAFFICKING (2011), <http://www.eden.rutgers.edu/~yongpatr/425/final/timeline.htm> (last visited Mar. 17, 2015); see also Kristiina Kangaspunta, *A Short History of Trafficking in Persons*, FREEDOM FROM FEAR MAG., Oct. 2008, at 38, available at [http://f3magazine.unicri.it/wp-content/uploads/F3\\_UNICRI\\_MAX-PLANCK\\_01.pdf](http://f3magazine.unicri.it/wp-content/uploads/F3_UNICRI_MAX-PLANCK_01.pdf).

<sup>16</sup> Carrie N. Baker, *Symposium: Crime & Punishment: The Modern Development of Homegrown Creative Justice: The Influence of International Human Trafficking on United States Prostitution Laws: The Case of Expungement Laws*, 62 SYRACUSE L. REV. 171, 171 (2012).

<sup>17</sup> *Id.* at 171–72.

<sup>18</sup> *Id.*

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

<sup>20</sup> *Id.*

females.<sup>21</sup> Laws and practices that were condemned in other nations, by the United States, were occurring domestically.<sup>22</sup> As an example, “federal law requires other countries to ensure that victims of trafficking are not inappropriately incarcerated for unlawful acts as a direct result of being trafficked. Yet many states lack laws ensuring that sex trafficking victims are not prosecuted for prostitution.”<sup>23</sup>

#### A. *International Level*

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, an international treaty passed by the United Nations in 2000, better known as the Palermo Protocol, defined 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, or 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.<sup>24</sup>

The Palermo Protocol defined exploitation to include “prostitution . . . or other forms of sexual exploitation” and “focused on prevention, prosecution, and protection” as it relates not only to victims of sex trafficking, but victims of labor trafficking as well.<sup>25</sup> The Protocol called “on nations to pass laws against trafficking, to prosecute traffickers, to enhance border control, and to provide services to victims of human trafficking.”<sup>26</sup>

#### B. *Federal Level*

##### 1. The Thirteenth Amendment

Suffering the grueling experience of a nation torn apart as a result of four years of civil war, the enactment of the Thirteenth Amendment to the

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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

<sup>24</sup> Convention on Transnational Organized Crime, Annex II

Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, art. 3(a), U.N. Doc. A/Res/55/25 (adopted Nov. 15, 2000; signed Jan. 8, 2001; entered into force Dec. 25, 2003), 200, T.I.A.S. 13127, 2237 U.N.T.S. 343, *available at* [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf) [hereinafter Palermo Protocol].

<sup>25</sup> Baker, *supra* note 16, at 172–73; Palermo Protocol, *supra* note 24, art. 3(a).

<sup>26</sup> Baker, *supra* note 16, at 173.

U.S. Constitution in 1865 formally abolished slavery and involuntary servitude in the United States.<sup>27</sup>

## 2. The Mann Act

Forty-five years after the passage of Thirteenth Amendment, in 1910, the Mann Act<sup>28</sup> (otherwise known as the White Slave Traffic Act) was passed, prohibiting “the knowing transport of any individual in interstate or foreign commerce with the intent that the trafficked individual will engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense.”<sup>29</sup> The Mann Act also “prohibits the knowing persuasion, inducement, or coercion of any individual to travel in interstate or foreign commerce to engage in any illegal sexual activity.”<sup>30</sup>

## 3. The Trafficking Victims Protection Act of 2000 and Reauthorizations

Fast forward ninety years from the Mann Act and right on the coattails of the Palermo Protocol, the Trafficking Victims Protection Act (TVPA) of 2000<sup>31</sup> was “the first piece of modern, comprehensive federal legislation that combats human trafficking,” specifically designed to “accomplish three main goals: prosecution of traffickers, prevention against the development of the industry, and protection of victims.”<sup>32</sup> Considered to be the “cornerstone of Federal human trafficking legislation,” it has undergone four reauthorizations.<sup>33</sup>

### a. *The Trafficking Victims Protection Reauthorization Act of 2003*

The Trafficking Victims Protection Reauthorization Act of 2003<sup>34</sup> (TVPA of 2003) “established a federal, civil right of action for trafficking victims to sue their traffickers” and “added human trafficking to the list of crimes that can be charged under the Racketeering Influenced Corrupt Organizations (RICO) statute.”<sup>35</sup> Among other things it requires the

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<sup>27</sup> U.S. CONST. amend. XIII.

<sup>28</sup> White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 825–27 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

<sup>29</sup> Mariconda, *supra* note 4, at 167.

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

<sup>31</sup> Pub. L. No 106-386, div. A, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18 U.S.C. and at 22 U.S.C. §§ 7101–13 (2000)).

<sup>32</sup> Mariconda, *supra* note 4, at 169.

<sup>33</sup> *Current Federal Laws, supra* note 9.

<sup>34</sup> Pub. L. 108-193, 117 Stat. 2875 (codified as amended at scattered sections of 8, 18, 22 U.S.C. (Supp. III 2003)).

<sup>35</sup> *Current Federal Laws, supra* note 9.

Attorney General to provide an annual report to Congress regarding federal government efforts to combat human trafficking.<sup>36</sup>

*b. The Trafficking Victims Protection Reauthorization Act of 2005*

The Trafficking Victims Protection Reauthorization Act of 2005<sup>37</sup> (TVPA of 2005) represented a notable shift in thinking. Up until that time, federal efforts to combat human trafficking had been primarily focused on the international level (*i.e.*, the problem of foreign citizens being trafficked into the U.S.), but with the passage of the TVPA of 2005, Congress acknowledged that human trafficking was not only an international problem—it was also occurring on American soil, making it a domestic problem as well.<sup>38</sup> This reauthorization included “grant programs to assist state and local law enforcement combat trafficking,” and “expanded measures to combat trafficking internationally, including provisions to fight sex tourism.”<sup>39</sup> Among other provisions, it also strengthened the “regulation over government contracts to ensure they are not made with individuals or organizations that promote or engage in human trafficking.”<sup>40</sup>

*c. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPA of 2008)<sup>41</sup> included novel prevention strategies.

The amended Act further expanded victim protections, chief among them being an expansion of trafficking penalties. The prosecution of those accused of sex trafficking minors was made easier as proof of force, fraud, or coercion would no longer be necessary . . . . However, evidence of force, fraud or coercion is still necessary for successful prosecution with regarding of trafficking of adult victims. The burden of proof was adjusted to gauging the “serious harm” suffered by the victim, as a “person of the same background and in the same circumstances” would perceive it as opposed to a reasonable person standard. As a result,

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

<sup>37</sup> Pub. L. 109-164, 119 Stat. 3558 (codified as amended at scattered sections of 18, 22, 42 U.S.C. (Supp. V 2005)).

<sup>38</sup> See Whitney J. Drasin, Comment, *New York’s Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering it Up?*, 28 TOURO L. REV. 489, 497 (2012).

<sup>39</sup> *Current Federal Laws*, *supra* note 9.

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

<sup>41</sup> Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended at scattered sections of 8 and 22 U.S.C. (2008)).



proving coercion is easier because a reasonable person who has never been trafficked and exposed to long-term physical and mental abuse by a captor may not perceive the experience the same way as a victim of sexual trafficking.<sup>42</sup>

*d. The Trafficking Victims Protection Reauthorization Act of 2013*

The Trafficking Victims Protection Reauthorization Act of 2013<sup>43</sup> (TVPA of 2013) was passed as an amendment to the Violence Against Women Act,<sup>44</sup> and contains measures to strengthen “collaboration with state and local law enforcement to ease charging and prosecuting traffickers.”<sup>45</sup> Other provisions of the reauthorization include “programs to ensure that U.S. citizens do not purchase products made by victims of human trafficking”<sup>46</sup> and establishing “emergency response provisions within the State Department to respond quickly to disaster areas and crises where people are particularly susceptible to being trafficked.”<sup>47</sup>

#### 4. Limitations of Federal Legislation

Notwithstanding the “crown jewel status” accorded to the TVPA in the war against human trafficking, federal legislation in general and the TVPA in particular have some distinct limitations and areas of weakness. First, the federal statutes are ineffective at the state and local level.<sup>48</sup> For example, the Mann Act was intended to eliminate “white-slave” trafficking, not to combat modern human trafficking.<sup>49</sup> Thus, it fails to address international human trafficking. Additionally, “it only addresses trafficking executed for sexual exploitation, and does not criminalize the trafficking of victims for domestic servitude or forced labor.”<sup>50</sup>

Second, while acknowledging the TVPA and its subsequent reauthorization’s significant progress in combatting human trafficking, shortcomings still exist. For example, the TVPA lacks an enforcement provision to ensure implementation.<sup>51</sup> Additionally, the TVPA has a reputation for being “top-heavy,” because “high ranking officials comprise

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<sup>42</sup> Drasin, *supra* note 38, at 498–99 (footnotes omitted).

<sup>43</sup> Pub. L. No. 113-4, 127 Stat. 55 (2013) (codified as amended at scattered sections of 8, 22, and 42 U.S.C. (2013)).

<sup>44</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended at 42 U.S.C. § 13701).

<sup>45</sup> *Current Federal Laws*, *supra* note 9.

<sup>46</sup> *Id.*

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

<sup>48</sup> Mariconda, *supra* note 4, at 174.

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

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

<sup>51</sup> *Id.* at 175.

the vast majority of those who understand how to identify and assist trafficking victims, and yet these individuals are the least likely to encounter such individuals.”<sup>52</sup> A “top-down approach is dangerous because . . . it permit[s] perpetrators to remain free and victims to remain in danger” and lulls us into a false sense of having solved the problem, even though it is an ineffective law.<sup>53</sup> Finally, the unfortunate reality is that the TVPA fails to provide relief to trafficking victims, as evidenced by the “stunningly low” number of victims who have received federal protection and services.<sup>54</sup>

This is not to suggest that federal anti-trafficking legislation is not needed—it is absolutely necessary—but it is not the answer in itself. In order for federal legislation to render successful results, it must be strongly supported by legislation and enforcement at the state level.

### C. State Level

Because most criminal enforcement occurs at the state and local level, it is easier for local law enforcement agencies to enforce the law.<sup>55</sup>

On the practical side, state laws engage all levels of law enforcement officers in the investigation and apprehension of traffickers. Federal law enforcement simply does not have the number of officers needed to be everywhere in the country. Local and state law enforcement are everywhere. Beat officers regularly handle solicitation, pandering, prostitution and assault cases. This is the typical way that law enforcement comes into contact with trafficking victims.<sup>56</sup>

Under the Tenth Amendment, the power to legislate and regulate issues such as public morality (as in the case of prostitution and other forms of sex trafficking) has historically been left to the states.<sup>57</sup> However, state level anti-trafficking laws are relatively new occurrences, as no state had enacted legislation on the issue prior to 2003.<sup>58</sup>

#### 1. Laws Requiring Human Trafficking Awareness Training for Law Enforcement

One of the great ironies of life is the human tendency to address problems *after* the fact, rather than taking the responsibility to enact

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Mariconda, *supra* note 4, at 174–75 (footnotes omitted).

<sup>55</sup> Melinda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 87 (2009).

<sup>56</sup> *Id.* (footnotes omitted).

<sup>57</sup> U.S. CONST. amend. X; *Jacobson v. Mass.*, 197 U.S. 11, 11 (1905) (noting “police power of a State embraces such reasonable regulations relating to matters completely within its territory”).

<sup>58</sup> Mariconda, *supra* note 4, at 182.

preventative measures that will help to avoid those problems. For example, the American legal system deals with the issue of wrongful convictions in the case of sex trafficking victims by charging the victim with the offense (instead of the real perpetrator of the crime, such as the pimp).<sup>59</sup> If the victims are lucky enough to have access to an attorney who will aggressively advocate on their behalf, they may be able to assert an affirmative defense; or if they are convicted, possibly have that conviction vacated and/or expunged from their record.<sup>60</sup> However, by that point, more harm has already occurred—the victims have endured yet more abuse (this time at the hands of the legal system) and the damage done to their record in the process is often not easily undone.<sup>61</sup> For that reason, the goal in dealing with the issue of wrongful convictions in the case of sex trafficking victims should not be to address those convictions after the fact, but to *avoid* them from occurring altogether. The first step in that direction is to ensure that law enforcement officers are trained to identify victims and to investigate those cases appropriately. Specifically, rather than charging victims, law enforcement officers should interview the victim in an effort to obtain information on the trafficker, so that the actual perpetrator of the crime can be brought to justice. In the course of interviewing victims, law enforcement officers should also be trained to help connect victims with assistance (counseling, social services and practical assistance) that can open up a path for them to break out of their abusive circumstances and move forward, instead of being forced back into the hands of their abusers due to lack of options.

Instead of jail time . . . victims should receive medical attention, protection from traffickers and “sensitive” treatment intended to gain their trust and cooperation for future investigations . . . . Without professional treatment from police and social service providers, victims remain vulnerable to being re-trafficked, or becoming traffickers themselves after years of conditioning in the trade. Finally, because victim testimony is essential to prosecuting traffickers, victim-centered enforcement practices are a crucial component of U.S. anti-trafficking policy.<sup>62</sup>

Due to the novelty of trafficking laws, the majority of local law enforcement agencies have not adopted anti-trafficking policies requiring

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<sup>59</sup> POLARIS PROJECT, *Human Trafficking Issue Brief: Vacating Convictions*, POLARIS (Fall 2014), [http://www.polarisproject.org/storage/documents/policy\\_documents/Issue\\_Briefs/2014/2014\\_Vacating\\_Convictions\\_Issue\\_Brief\\_Final.pdf](http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/2014/2014_Vacating_Convictions_Issue_Brief_Final.pdf).

<sup>60</sup> *Id.*

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

<sup>62</sup> Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 439–40 (2009).

officers to question potential victims about their living and working conditions, or to watch for subtle signs of trafficking.<sup>63</sup>

Legislation including provisions related to training of law enforcement is in place at the federal level in the form of the TVPA, which:

directs the Department of Justice (DOJ) and Department of State (DOS) to develop internal programs to train appropriate personnel in identifying victims of severe forms of trafficking and providing for the protection of such victims. The DOJ (through the Bureau of Justice Assistance) has developed programs for federal, state, and local law enforcement, courts, health service providers, and crime prevention personnel. Similar programs have been developed by the Department of Homeland Security and the DOS.<sup>64</sup>

However, much work remains to be accomplished in this area at the state level, for the reality is that states can pass laws to cover every aspect of human trafficking imaginable, but until law enforcement officers are trained to implement those laws effectively, the legislation will be “all bark and no bite.”<sup>65</sup> According to the most recent analysis of state human trafficking laws performed by the Polaris Project, slightly more than half of all states have laws mandating or encouraging human trafficking-related training for law enforcement personnel.<sup>66</sup>

Twelve states—Arkansas, California, Georgia, Indiana, Kentucky, Minnesota, Nebraska, Nevada, New Jersey, New York, Ohio, and Wyoming—have enacted statutes: (i) requiring that a state agency or task force train law enforcement personnel with respect to human trafficking-related matters and (ii) specifying topics to be covered in the course of such training.

Typical of this approach is Indiana’s statute, which requires that law enforcement personnel receive training with respect to: (i) human and sexual trafficking laws; (ii) identification of human and sexual trafficking[;] (iii) communicating with traumatized persons; (iv) therapeutically appropriate investigative techniques; (v) collaboration with federal law enforcement officials; rights of and protections afforded to victims; (vi) the provision of documentation satisfying federal legal requirements; and (vii) community resources available to assist human and sexual trafficking victims. Arkansas, California, Georgia, Nebraska, and Ohio have adopted similar approaches.

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<sup>63</sup> *Id.* at 450.

<sup>64</sup> POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 23 (2013), available at [http://www.polarisproject.org/storage/2013\\_State\\_Ratings\\_Analysis\\_Full\\_Report.pdf](http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf).

<sup>65</sup> Allison L. Cross, *Comment: Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, 44 MCGEORGE L. REV. 395, 397–98 (2013).

<sup>66</sup> POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS, *supra* note 64, at 23

Minnesota also has established a detailed curriculum for training about trafficking-related matters, but goes further in two important respects. First, Minnesota requires state officials to develop training curricula in light of human trafficking data collected in the state. Second, such data must be used to inform not only *law enforcement* training, but also a public awareness campaign (*i.e.*, “training” for the general public).

New Jersey and Kentucky are slightly less inclusive as their statutes limit training requirements to police and attorneys, respectively. However, New Jersey does define the topics to be covered to include items such as response procedures and best practices when conducting investigations.<sup>67</sup>

Other states “have enacted statutes that require a state agency or task force to train law enforcement personnel with respect to human trafficking-related matters, but that do not identify specific topics to be covered.”<sup>68</sup> Although one benefit of this approach is that individual states may tailor their training requirements to the needs peculiar to their respective region, a better approach may be to require inclusion of certain elemental topics (such as those covered by the states that do specify topics) and then add in other state-specific topics as needed.<sup>69</sup> Since such decisions are almost always budget-driven, perhaps the financial hurdle can be addressed by exercising discretion regarding the level of detail included for each topic covered in the curriculum.

Still other states, Virginia being among them, “have enacted laws permitting, but not requiring, a state agency or task force to train law enforcement personnel with respect to human trafficking-related matters.”<sup>70</sup> Such statutes have no teeth, wherein it can only be assumed that state legislators were merely going through the motions, paying lip service to further political agendas.

Lastly, some states, as well as the District of Columbia, have not enacted any legislation at all regarding human trafficking awareness training for law enforcement.<sup>71</sup> The fact that our nation’s capital shows up in this category is a sad commentary in itself.

The need for human trafficking awareness training for local law enforcement personnel cannot be over-emphasized because these are the individuals on the front lines, who are initially entrusted with making the right call when it comes to protecting victims. But in order to do that, they must know how to identify a victim in the first place. Training in human

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<sup>67</sup> *Id.* at 24.

<sup>68</sup> *Id.* at 24.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 25.

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

trafficking awareness should also be a mandatory requirement for prosecutors, defense attorneys and judges.<sup>72</sup>

## 2. Laws Allowing Human Trafficking as an Affirmative Defense

Even assuming the optimal implementation of widespread human trafficking awareness training, some victims will inevitably slip through the cracks without being properly identified and end up facing charges that will, if left unchecked (since the default mode for those arrested for prostitution is criminalization<sup>73</sup>), lead to an experience of dual victimization. Once the arrest process starts it is hard to stop, and very difficult to reverse the resulting harm.<sup>74</sup> Therefore, in order to avoid wrongful convictions, “an affirmative defense of human trafficking must be established and the arrest and prosecution policies must be reevaluated.”<sup>75</sup> An affirmative defense defeats the charges even if the victim actually committed them.<sup>76</sup> As such, the defendant is not challenging the crime or its elements, but instead attempts to justify, excuse, or mitigate the crime.<sup>77</sup> “Unlike a simple defense, the defendant bears the burden of proof to establish the specific facts to mitigate the charges.”<sup>78</sup>

However, once a victim raises an affirmative defense (except insanity), the evidentiary burden shifts to the State, requiring the defense to be disproven beyond a reasonable doubt.<sup>79</sup>

Currently there are thirteen states that have some form of affirmative defense for human trafficking victims; these states include Alabama, Connecticut, Indiana, Iowa, Minnesota, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, Texas, Vermont, and Wisconsin. In Alabama, the Human Trafficking statute states “[i]n a prosecution for prostitution, or a sexually explicit performance defined in this article, of a human trafficking victim for the victim’s illegal acts engaged in or performed as a result of labor servitude or sexual servitude, it shall be an affirmative defense that the person was a victim of human trafficking.” In Minnesota, legislation states that “[i]t is an

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<sup>72</sup> Drasin, *supra* note 38, at 517 (“The need for increased awareness through education and training regarding victim identification is vital if existing legislation is going to be useful.”).

<sup>73</sup> See ABA Res. 104G, *supra* note 6, at 7.

<sup>74</sup> *Id.* at 2.

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

<sup>76</sup> Cross, *supra* note 65, at 406.

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

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

<sup>79</sup> *Human Trafficking Victims as Criminal Defendants*, HUMAN TRAFFICKING AND THE STATE COURTS COLLABORATIVE (Nov. 2013), [http://www.htcourts.org/wp-content/uploads/HT\\_Victims\\_asCriminalDefendants\\_v01.pdf?InformationCard=HT-Victims-as-Criminal-Defendants](http://www.htcourts.org/wp-content/uploads/HT_Victims_asCriminalDefendants_v01.pdf?InformationCard=HT-Victims-as-Criminal-Defendants).

affirmative defense to a charge under section 609.324 if the defendant proves by a preponderance of the evidence that the defendant is a labor trafficking victim . . . or a sex trafficking victim . . . and that the defendant committed the act only under compulsion by another who by explicit or implicit threats created a reasonable apprehension in the mind of the defendant that if the defendant did not commit the act, the person would inflict bodily harm upon the defendant.” In Oklahoma, the Penal Code provides “[i]t is an affirmative defense to prosecution for a criminal offense that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking.”<sup>80</sup>

As stated by the Criminal Justice Section of the American Bar Association,

Enacting legislation that creates the affirmative defense of human trafficking would obligate criminal justice professionals to investigate prostitution-related cases to determine if trafficking exists and would require instituting policies on how to appropriately and effectively identify victims of human trafficking. Legislation establishing the affirmative defense of human trafficking could lead to two significant results. First, victims of human trafficking facing criminal prosecutions can avoid unjust convictions and gain access to social services and benefits to alleviate their plight. Second, identifying victims of human trafficking and obtaining their cooperation can lead law enforcement to their traffickers and possibly result in trafficking rings being shut down.<sup>81</sup>

However, an affirmative defense statute that is drafted too narrowly will provide only limited relief to many human trafficking victims, still leaving them vulnerable to wrongful conviction.<sup>82</sup> Of those states providing an affirmative defense for human trafficking, the majority “allow an affirmative defense to criminal charges if the defendant was a trafficking victim when the crime was committed, and the crime was a direct result of the defendant’s trafficking situation.”<sup>83</sup> However, some states such as “Iowa and Minnesota more narrowly require not only that

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<sup>80</sup> ABA Res. 104G, *supra* note 6, at 2 (footnotes omitted).

<sup>81</sup> *Id.* at 3 (footnote omitted).

<sup>82</sup> Steven Seidenberg, *New Legislative Strategy is Tougher on Human Trafficking and More Supportive of Victims*, A.B.A. J. (Dec. 1, 2013, 8:00 AM), [http://www.abajournal.com/mobile/mag\\_article/new\\_approach\\_is\\_tougher\\_on\\_human\\_trafficking\\_and\\_more\\_supportive\\_of\\_victims](http://www.abajournal.com/mobile/mag_article/new_approach_is_tougher_on_human_trafficking_and_more_supportive_of_victims). The following excerpt from the ABA Journal, along with the rest of the article, demonstrates how narrowly drafted defense statutes will limit relief to trafficking victims: “The uniform act does not, for instance, address the plight of ‘bottom girls,’ those who are ‘put out on the streets to manage other girls, and they are the fall guys if authorities intervene,’ Vardaman says. ‘They are a buffer protecting the traffickers from being arrested. And when these bottom girls are charged with human trafficking offenses, they can’t raise an affirmative defense that they were themselves victims of trafficking.’” *Id.*

<sup>83</sup> Cross, *supra* note 65, at 407.

the defendant committed the charged crime or crimes during a trafficking situation, but also did so under force or threat of force.”<sup>84</sup> Also, the majority of those states providing an affirmative defense restrict application of “the defense to prostitution and prostitution-related offenses, thereby providing a remedy to *sex*-trafficking victims only.”<sup>85</sup> Only a small minority of states “provide an affirmative defense for crimes committed as a direct result of a then-present *human*-trafficking situation.”<sup>86</sup>

By limiting the crimes to which the affirmative defense applies to prostitution and loitering for the purpose of prostitution, the majority of the jurisdictions providing this relief effectively limit its availability to *sex*-trafficking victims, rather than to the broader classification of *human*-trafficking victims. Furthermore, even if this relief is available to a *sex*-trafficking victim for prostitution or loitering for the purpose of prostitution, the defendant may have other charges to which the affirmative defense does not apply, even if the defendant proves a then-present *sex*-trafficking situation.<sup>87</sup>

Some state statutes are even more limited, requiring that the defendant not only “committed the crime or crimes during a trafficking situation, but also under force or threat of force, thereby imposing another obstacle to successfully raising an affirmative defense.”<sup>88</sup> However, as pointed out by Professor Mohamed Y. Mattar, “every victim of trafficking is a vulnerable victim who has no choice but to submit; every case of trafficking entails the abuse of a position of vulnerability . . . . Illegal means must therefore be broadly defined; force should not be required for proof of such means.”<sup>89</sup>

A recommended course of action would be for states to:

enact an affirmative defense that a criminal defendant may raise when the crime committed was a direct result of a then-present human trafficking situation. The trafficking victim need not show any force or threat of force to prevail on such a defense. Furthermore, the affirmative defense . . . must apply to crimes other than prostitution and loitering for the purpose of prostitution . . . . [T]here are certain crimes to which an affirmative defense should not apply. However, these limits must not be so austere as to limit applicability of the affirmative defense to only one category of human-trafficking victims. The proposed affirmative defense will be neither too broad nor too

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<sup>84</sup> *Id.*

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

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

<sup>87</sup> *Id.* at 408.

<sup>88</sup> *Id.*

<sup>89</sup> Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT’L & COMP. L. 357, 371 (2006).



narrow, and will provide relief to human-trafficking victims who slip through the cracks of the criminal-justice system.<sup>90</sup>

However, while human trafficking as an affirmative defense is a valuable weapon in the war against dual victimization, it is far from a perfect solution, because “by the time this relief is available to a trafficking victim, the criminal-justice system [has] already arrested, charged, and prosecuted the defendant as a criminal rather than recognizing him or her as a victim of a crime.”<sup>91</sup>

### 3. Laws Providing the Opportunity to Vacate and/or Expunge Wrongful Convictions

Victims of sex trafficking frequently are forced to work as prostitutes and to commit other crimes; however, they “are not always identified as victims when they are arrested, detained, prosecuted, convicted, and/or plead guilty to these crimes.”<sup>92</sup> These victims face an inability to move forward with their lives because their criminal records prevent them from obtaining particular jobs or loans, or going to school due to the stigma of having to report a prostitution conviction.<sup>93</sup>

Several states have enacted vacatur statutes, which permit survivors of sex trafficking to vacate the records of their conviction for prostitution and other criminal activities that they committed as a result of their involvement in sex trafficking. These statutes significantly help survivors move past their experiences with sex trafficking and rebuild their lives.<sup>94</sup>

A vacating convictions statute allows a survivor of human trafficking to file a motion with a court to have convictions removed. When a conviction is vacated, the court acknowledges that an error has been made and the conviction is reversed. In order to be successful, the applicant must present evidence that the conviction was the result of being trafficked. The types of evidence that constitute acceptable proof vary by state, but official documentation from a government entity is not required.<sup>95</sup>

Connecticut, Florida, Hawaii, Illinois, Maryland, Mississippi, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Vermont, Washington and Wyoming allow wrongful convictions of victims

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<sup>90</sup> Cross, *supra* note 65, at 419–20 (footnotes omitted).

<sup>91</sup> *Id.* at 409.

<sup>92</sup> POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS, *supra* note 64, at 51.

<sup>93</sup> *Id.*

<sup>94</sup> Ulrich, *supra* note 3.

<sup>95</sup> *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 59.

to be vacated.<sup>96</sup> Once again, our nation's capital, the District of Columbia, is conspicuously absent from that list.<sup>97</sup>

The effect of a vacated conviction varies from state to state, and it is important to know how a vacated conviction will be reflected on a survivor's criminal record or other official documents. In some states, vacating a conviction must be paired with an order of expungement, which, in most states, will remove the charge from criminal record, but the conviction will remain. The effect of expungement alone on a survivor will depend on the state.<sup>98</sup>

New York bears the distinction of leading the pack in this area, being the first state to enact a vacating convictions statute in 2010.<sup>99</sup> The New York statute

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." Victims are thereby "blocked from decent jobs" and are limited in their "prospects for rebuilding their lives." "Even after [victims] escape from sex trafficking, [their] criminal record victimizes them for life." As such [the New York vacatur statute] would provide sex trafficking victims in New York State the "desperately needed second chance they deserve."<sup>100</sup>

Some state vacatur statutes are written broadly while others are written narrowly.<sup>101</sup> Under narrow vacatur statutes, "the plain meaning of such statutes allows vacatur exclusively for the charge of prostitution."<sup>102</sup> Based on that standard, the vacatur statutes enacted by Connecticut,<sup>103</sup> Illinois,<sup>104</sup> Maryland,<sup>105</sup> Mississippi,<sup>106</sup> Montana,<sup>107</sup> Vermont<sup>108</sup> and Washington<sup>109</sup> would be considered to fit into the narrow category.<sup>110</sup>

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<sup>96</sup> See Ulrich, *supra* note 3.

<sup>97</sup> See *id.*

<sup>98</sup> *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 59.

<sup>99</sup> *Id.*; N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2012).

<sup>100</sup> Nicholas R. Larche, *Victimized by the State: How Legislative Inaction Has Led to the Revictimization and Stigmatization of Victims of Sex Trafficking*, 38 SETON HALL LEGIS. J. 281, 297 (2014) (citations omitted).

<sup>101</sup> *Id.* at 299, 301.

<sup>102</sup> *Id.* at 299.

<sup>103</sup> 2013 Conn. Acts 13-166 (Reg. Sess.).

<sup>104</sup> 725 ILL. COMP. STAT. 5/116-2.1 (2013).

<sup>105</sup> MD. CODE ANN., CRIM. PROC. § 8-302 (West 2011).

<sup>106</sup> MISS. CODE ANN. § 97-3-54.6 (West 2013).

<sup>107</sup> MONT. CODE ANN. § 46-18-608 (West 2013).

<sup>108</sup> VT. STAT. ANN. tit. 13, § 2658 (West 2012).

<sup>109</sup> WASH. REV. CODE ANN. § 9.96.060 (West 2012).

<sup>110</sup> See Larche, *supra* note 100, at 299.

“Intermediate category statutes permit vacatur for prostitution *as well as* prostitution-related offenses.”<sup>111</sup> Based on that standard, the vacatur statutes enacted by Hawaii,<sup>112</sup> Nevada,<sup>113</sup> New Jersey,<sup>114</sup> New York,<sup>115</sup> North Carolina<sup>116</sup> and Vermont<sup>117</sup> would be considered to fit into the intermediate category.<sup>118</sup>

The vacatur statutes enacted by Florida<sup>119</sup> and Wyoming<sup>120</sup> are more broad.<sup>121</sup> Under the Florida statute “[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>122</sup> The Wyoming statute is similarly broad in that “any time after the entry of a conviction, the court 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>123</sup>

#### a. Time Limits

Some statutes require that a motion to vacate be made within specific time limits, whereas other statutes do not prescribe a time limit.<sup>124</sup> Though fourteen states permit vacatur, only four states prescribe any temporal limitations.<sup>125</sup> Maryland and Montana require the movant to make his or her “motion within a reasonable period of time after . . . conviction or after . . . ceas[ing] to be involved in sex trafficking.”<sup>126</sup> “Nevada, setting perhaps 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>127</sup> Hawaii prescribes an exact temporal limitation requiring that the motion be submitted no later than six years after the movant

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<sup>111</sup> *Id.* at 300.

<sup>112</sup> HAW. REV. STAT. § 712-1209.6 (2012).

<sup>113</sup> NEV. REV. STAT. § 176.515 (2013).

<sup>114</sup> N.J. STAT. ANN. § 2C:44-1.1 (West 2013).

<sup>115</sup> N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2012).

<sup>116</sup> N.C. GEN. STAT. ANN. § 15A-1416.1 (West 2013).

<sup>117</sup> VT. STAT. ANN. tit. 13, § 2658 (West 2012).

<sup>118</sup> *See* Larche, *supra* note 100, at 300.

<sup>119</sup> FLA. STAT. ANN. § 943.0583 (West 2014).

<sup>120</sup> WYO. STAT. ANN. § 6-2-708 (West 2013).

<sup>121</sup> Larche, *supra* note 100, at 300.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 300–01.

<sup>124</sup> *Id.* at 301.

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

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

<sup>127</sup> *Id.* at 301–02 (citations omitted).

ceases to be a sex trafficking victim.<sup>128</sup> Florida, Washington, and Vermont fail to specify any temporal limitations. The respective vacatur statutes for Connecticut, Illinois, Mississippi, New Jersey, New York, North Carolina, and Wyoming allow the movant to make any time following a conviction for the prescribed offenses.<sup>129</sup>

b. Burden of Proof and Standard of Proof

There is some variation among vacatur statutes with regard to the burden of proof and the standard of proof. For example, although the burden of proof is generally placed on the victim seeking to vacate his or her conviction, the Washington statute takes it a step further,

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 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>130</sup>

The standard of proof required by some statutes may also pose a challenge for certain victims.

Vermont and Maryland, for example, require that a victim's motion to vacate a conviction describe supporting evidence with particularity, and provide documentary evidence showing that the victim is entitled to relief. Some victims will not have access to such information. Moreover, these statutes require victims to disclose sensitive information that may be painful or embarrassing for them. However, other states have created a rebuttable presumption that should be useful to victims of human trafficking attempting to prove their cases. For example, Mississippi, Montana, New Jersey, and Wyoming provide that official documentation from a federal, state, or local government agency as to the person's status as a victim at the time of the offense creates a presumption that his or her participation in the offense was a result of being a victim.<sup>131</sup>

c. Distinguishing Between Vacatur and Expungement

Some statutes provide for vacatur while others provide merely for expungement and yet others provide for both vacatur and expungement.<sup>132</sup>

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<sup>128</sup> *Id.* at 302.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 302–03.

<sup>131</sup> POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS, *supra* note 64, at 53.

<sup>132</sup> *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 59.

Although the concepts may initially appear to be similar in nature, they are distinctly different in both content and effect.

“A defendant who moves to expunge her conviction does not seek to vacate or set aside her conviction.” To “expunge” is “to erase;” to “vacate” is “to nullify or to cancel.” “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.” In sharp contrast, to seek expungement is to seek “the judicial editing of history.” . . . 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>133</sup>

Roughly fifty-seven percent of existing vacatur statutes (those enacted by Connecticut, Hawaii, Maryland, Mississippi, Montana, New York, Washington and Wyoming) “do not expressly or impliedly provide for expungement . . . . 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>134</sup> A small minority (only about fourteen percent) of existing vacatur statutes (those enacted by Florida and Vermont) provide for the combined remedies of both vacatur and expungement.<sup>135</sup>

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.” 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>136</sup>

The remaining twenty-nine percent of vacatur statutes (those enacted by Illinois, Nevada, New Jersey and North Carolina) “expressly provide for the remedy of vacatur and seemingly open the door for the possibility of the remedy of [expungement].”<sup>137</sup>

#### d. Limitations of Vacatur and Expungement

The opportunities and rules for vacatur and expungement vary from state to state.<sup>138</sup> Even though they are valuable tools in potentially lifting some of the burden off of a victim of human trafficking, depending on how and in what circumstances they are applied, the form of relief they offer

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<sup>133</sup> Larche, *supra* note 100, at 303 (footnotes omitted)..

<sup>134</sup> *Id.* at 303–04.

<sup>135</sup> *Id.* at 304.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 59.

may be merely cosmetic in nature. Expungement does not always mean that the victim's record is destroyed, or that it is even necessarily sealed.<sup>139</sup> For that reason, rather than being a magic wand that can be waved over the victim's criminal record to make it vanish into thin air, expungement is more like a broom that can be used to "sweep the dirt under the rug" so that it remains unseen for the most part, but in certain cases, permission may be granted for prying eyes to peel back the proverbial "rug," revealing the victim's past record. Applicants who seek employment in any area that requires professional licensing or increased security (especially in the case of national security), are subject to a detailed and intense background check regarding their character and fitness, wherein an applicant who does not reveal the details of their past record up front will be denied a security clearance.<sup>140</sup> Another example where the "rug" can be pulled back is in the case of a non-U.S. citizen victim who has immigration issues.<sup>141</sup> According to United States Citizenship and Immigration Services (USCIS),

A record of conviction that has been expunged does not remove the underlying conviction. For example, an expunged record of conviction for a controlled substance violation or any crime involving [m]oral turpitude (CIMT) does not relieve the applicant from the conviction in the immigration context . . . . The Board of Immigration Appeals (BIA) has held that a state court action to "expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute" has no effect on removing the underlying conviction for immigration purposes. The officer may require the applicant to submit evidence of a conviction regardless of whether the record of the conviction has been expunged. It remains the applicant's responsibility to obtain his or her records regardless of whether they have been expunged or sealed by the court. USCIS may file a motion with the court to obtain a copy of the record in states where the applicant is unable to obtain the record.<sup>142</sup>

However, the position of USCIS on convictions that have been vacated (not merely expunged) is that

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<sup>139</sup> *Id.*

<sup>140</sup> See generally *United States Secret Service Standard Form 86 Questionnaire for National Security Positions* 86, [https://www.secretservice.gov/forms/security\\_clearance\\_forms.pdf](https://www.secretservice.gov/forms/security_clearance_forms.pdf) (requiring the applicant to "report information regardless of whether the record . . . has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed").

<sup>141</sup> See generally Department of Homeland Security, *Chapter 2 – Adjudicative Factors*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) POLICY MANUAL (Oct. 28, 2014), <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter2.html#S-C-8>.

<sup>142</sup> *Id.* (footnotes omitted).

[i]f a judgment is vacated for cause due to Constitutional defects, statutory defects, or pre-conviction errors affecting guilt, it is not considered a conviction for immigration purposes. The judgment is considered a conviction for immigration purposes if it was dismissed for any other reason, such as completion of a rehabilitative period (rather than on its merits) or to avoid adverse immigration consequences. A conviction vacated where a criminal court failed to advise a defendant of the immigration consequences of a plea, which resulted from a defect in the underlying criminal proceeding, is not a conviction for immigration purposes.<sup>143</sup>

As previously mentioned with regard to affirmative defense, vacatur and expungement, are valuable tools having only limited benefit to trafficking victims due to the fact that “by the time [the] relief is available . . . the criminal-justice system [has] already arrested, charged, and prosecuted the defendant as a criminal rather than recognizing him or her as a victim of crime.”<sup>144</sup> No remedy, regardless of how brilliantly constructed, can substitute the need to accurately identify trafficking victims at the very beginning of the process. All other efforts are really just a costly exercise in damage control as measured by the subsequent effect(s) on the victim’s present and future.

### III. RECOMMENDATIONS FOR IMPROVED STRATEGIES TO AVOID AND ADDRESS WRONGFUL CONVICTIONS OF HUMAN TRAFFICKING VICTIMS

The following five recommendations are offered for consideration regarding improved strategies for avoiding and, where necessary, addressing wrongful convictions of trafficking victims.

#### A. *Recommendation 1: Use the TVPA as a Bare Minimum Standard for State Legislation*

The results of the wisdom of the Founding Fathers in reserving those powers not granted to the federal government “by the Constitution, nor prohibited by it” to the states are a double-edged sword, capable of producing both a blessing *and* a curse, depending upon circumstance and perspective.<sup>145</sup> One such power granted to the states is the regulation of issues related to public morality, where, given the nature of many human trafficking cases (*e.g.*, involving prostitution, etc.), most trafficking victims become subject to law enforcement at the state and local level.<sup>146</sup> However, the variations existing across the fifty states regarding state legislation and the enforcement thereof are literally all over the map—

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<sup>143</sup> *Id.* (footnotes omitted).

<sup>144</sup> Cross, *supra* note 65, at 409.

<sup>145</sup> U.S. CONST. amend. X.

<sup>146</sup> *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 59.

ranging from extreme to nonexistent and everywhere in between.<sup>147</sup> Similarities exist between the laws and practices of some states, but there is no required standard for consistency between the states, nor for regional areas in general—which is important, because human trafficking issues tend to follow regional trends, rather than actual state boundaries.<sup>148</sup> A genuine source of frustration is that if one state enacts and strictly enforces an anti-trafficking law, but neighboring states do not follow suit, then the traffickers who previously operated in the state that adopted more strict measures will simply pack up, move over the state line, and resume their activities in that new territory.. Rather than discouraging human trafficking, it appears that the current hodge-podge of state statutes (or lack thereof) has produced an overall environment that is actually conducive to those activities. The fact that most human trafficking issues are discovered at the local level due to the presence of local law enforcement would make it unreasonable to argue for federalization of these matters; however, there is clearly a need for some standardization of legislation and approach to enforcement that would provide a level of consistency across the fifty states. The TVPA admittedly has its imperfections.<sup>149</sup> However, a step in the right direction may be to pass a federal law requiring states to enact and enforce legislation that, at bare minimum, aligns with federal requirements (in this case, the TVPA), with the goal being to form some initial basis of consistency across the fifty states.

*B. Recommendation 2: Use Federal Funds to Encourage Incorporation of the Uniform Prevention of and Remedies for Human Trafficking Act Provisions into State Legislation*

Another recommendation that would facilitate consistency would be for the federal government to encourage states to draft and/or revise existing state anti-trafficking legislation to incorporate the provisions of the Uniform Prevention of and Remedies for Human Trafficking Act, as promulgated by the National Conference of Commissioners on Uniform State Laws in 2013 (hereinafter referred to as “the Uniform Act”) and

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<sup>147</sup> See *supra* notes 74–120.

<sup>148</sup> See generally POLARIS PROJECT, *2014 State Ratings on Human Trafficking Laws*, POLARIS (2014), available at <http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/state-ratings-on-human-trafficking-laws> (generally indicating the regional trend in state laws and ratings).

<sup>149</sup> SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT AND THE NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 69–70 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011) (pointing out three significant flaws in the TVPA’s definitions of trafficking).



endorsed by the American Bar Association.<sup>150</sup> Allocation of federal funds for state roads and highways is often used by the federal government as a means to “encourage” states to adopt certain measures, and may render successful results in this instance, as well. States enacting legislation incorporating the provisions of the Uniform Act could be “rewarded” with highway funds (assuming they also present evidence of programs to facilitate appropriate enforcement of those statutes), whereas states failing to take such action would simply not receive those coveted financial resources. In this era of shrinking budgets, it is reasonable to assume that there may be a revived interest in anti-trafficking laws amongst the states (even by those states that have, by their lack of legislation, shown little interest until this time) if the federal government adopted this initiative. Also, states participating as beneficiaries of this initiative should not be allowed to cherry-pick which provisions of the Uniform Act they will incorporate into their respective legislation. Since the ideal goal would be to provide a standard of consistency across the fifty states, then in order for a state to qualify to receive such funds, *all* of the provisions of the Uniform Act should be incorporated into that state’s legislation (otherwise, states will inevitably find loopholes that will allow the current hodge-podge effect to continue).

*C. Recommendation 3: Expand Safe Harbor Laws to Include Provisions for Adult Victims*

Yet another recommendation is that Safe Harbor laws be revised to include provisions for adult victims as well as minors. Most Safe Harbor Acts provide important benefits to minor victims, but completely exclude victims over eighteen years of age.

While a majority of sex trafficking victims appear to be minors, there are still a substantial number of sex trafficking victims who are eighteen or over. Victims need to be able to find a safe place to stay while they go through the rehabilitation process. Group homes and halfway homes are potential safe houses for adult victims; however, those places are, often times, targets for sex traffickers to recruit more victims. The likelihood of being pulled back into sex trafficking is much higher if victims do not have a place to stay and be protected. The best possible solution is to amend the Safe Harbor Act[s] to be non-discriminatory. Victims of all ages need physical and mental medical

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<sup>150</sup> See generally UNI. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (2013), available at [http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM\\_UPRHT\\_As%20approved.pdf](http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved.pdf).

attention, food, shelter, and legal assistance to effectively seek legal remedies.<sup>151</sup>

*D. Recommendation 4: Implement Human Trafficking Awareness Training as the Cornerstone to Success*

Without a doubt, the most important recommendation is for law enforcement to receive the training that will allow them to accurately identify and appropriately interact with trafficking victims. Rather than arresting and charging sex trafficking victims with prostitution, law enforcement personnel should be trained to interview those individuals in detail for the purpose of obtaining information on the “real” perpetrator of the crime (the trafficker/pimp, etc., so that the “real criminal” can be brought to justice) and to connect the victim with appropriate assistance whereby they can discover a safe and practical means of escape from their current circumstances. However, law enforcement personnel are not the only players who should receive training—prosecutors, defense attorneys and judges should also be trained to accurately identify and appropriately interact with trafficking victims. That way, if, for whatever reason, law enforcement personnel fail to accurately identify a victim, such that the victim ends up being arrested and charged with a criminal offense, then perhaps the prosecutor (as the next player) who comes in contact with the victim, will be able to accurately identify the defendant as a victim. Similarly, the defense attorney should be able to do the same—and be skilled in the area of raising human trafficking as an affirmative defense. Prosecutors and defense attorneys, having both received training in this area, should then be able to work together in a manner that protects the victim, rather than causing that individual to experience even more abuse at the hands of the legal system. Lastly, but just as importantly, judges should be well trained in the same skills, for judges are the “last stop on the train”—the last player in the process, and the one who just so happens to be fully empowered in every aspect to stop the effect of dual victimization.

It is vital that state legislation include broad provisions for the use of human trafficking as an affirmative defense, as well as vacating and expunging wrongful convictions, but if the system is working correctly in terms of accurate identification of trafficking victims at the forefront, then the need for relief in the form of affirmative defense, vacatur and expungement should be the exception, rather than the norm.

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<sup>151</sup> Ball, *supra* note 13, at 134–35 (footnotes omitted).

*E. Recommendation 5: Step Up to the Plate and Find Your Place of Relevance*

There is a well-known maxim among Jewish people that “all Jews are responsible for one another.”<sup>152</sup> I would suggest extending that principle to *all* people who are responsible for one another, at least to the extent where we have the ability to extend a hand to help another in distress. Many trafficking victims have endured a level of abuse that most individuals who have not been in that position cannot even begin to fathom. As such, those victims often have needs that require professional help, but they will mostly likely have practical needs that go unmet if they are unable to qualify for public assistance. Budgets in our federal, state and local systems are strained far beyond their resources at this time, and there is little reason to believe that they will increase in the near future, so it is unreasonable (and perhaps even irresponsible) to stand by and expect the government to cover all of the needs of those victims. That is why it is time for new champions—individuals and especially faith-based entities (synagogues, churches, mosques, temples, bible study groups, prayer circles)—to arise, open up their eyes, and extend a hand to those victims with whom they come into contact.

In a Gallup poll conducted in 2013, participants were asked if they thought that religion as a whole is increasing or losing its influence on American life.<sup>153</sup> Seventy-six percent of respondents indicated that they believed religion is losing its influence.<sup>154</sup> Many conclusions may be drawn as to the cause of that effect, but this author would submit that the main reason religion appears to be losing ground in American life is that it is no longer viewed as being relevant to the world around us. Relevance is a powerful measuring rod, separating that which is essential from that which is viewed as less important and possibly negotiable. What does it mean for something to be “relevant”? Merriam-Webster defines it as “having significant and demonstrable bearing on the matter at hand” and also “having social relevance.”<sup>155</sup> Note that one of the qualifying adjectives in that definition is “demonstrable,” meaning “able to be proven or shown.”<sup>156</sup>

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<sup>152</sup> Jeffrey R. Solomon, *Reinventing North American Jewish Communal Structures*, J. OF JEWISH COMMUNAL SERVICE, Spring/Summer 2001, at 147, 153.

<sup>153</sup> *Religion*, GALLUP, *available* at <http://www.gallup.com/poll/1690/religion.aspx?version=print> (last visited Apr. 5, 2015).

<sup>154</sup> *Id.*

<sup>155</sup> *Relevant*, MERRIAM-WEBSTER ONLINE DICTIONARY (2015), <http://www.merriam-webster.com/dictionary/relevant>.

<sup>156</sup> *Demonstrable*, MERRIAM-WEBSTER ONLINE DICTIONARY (2015), <http://www.merriam-webster.com/dictionary/demonstrable>.

What is a primary means of being able to prove or show that something has bearing on the matter at hand? The ability to bring a positive change to existing circumstances is the appropriate measuring rod for use in making that determination. For example, in the case of religion, is it truly making a desirable change in the world around us? More specifically, is religion really changing lives in ways that are demonstrating a sustained positive impact on individuals and as a result, on society as a whole? Often it seems that religious entities start out full of good intent to change the world for the better, but eventually become sidetracked with other matters that cause them to fall far short of that goal, with the frequent result being that they lose the very key of what should have been their success—relevance to the world around them. The good news is that this trend can be reversed. The opportunity to reach out and help those who have been trapped in the hellish circumstances of human trafficking is a golden invitation for any faith-based institution, movement or ministry to step into the fullness of its calling. What will be required for that kind of investment? In the practical sense, some financial and/or material resources for temporary assistance will be necessary, as will human resources for counseling and mentoring. However, the most important requirement will be discarding the religious mindset that has previously rejected those who have been caught up in human trafficking—viewing them as being somehow less valuable and therefore, less worthy of human compassion and practical assistance. If faith-based entities will accept the challenge of supporting this type of investment with the same level of dedication and enthusiasm normally associated with a building program, then the influence of religion in American life will increase dramatically as a direct result, because the faith behind those actions will become relevant to the needs in our society. In the end, what “building program” could possibly be more relevant to the world around us than rebuilding lives that are currently broken, but can be made whole through spiritual wisdom, human compassion and practical assistance? For those faith-based entities and individuals who may be ordinary in circumstance, but long to make an *extraordinary* difference in the world around them, this can be their finest hour.