

VACATING CRIMINAL CONVICTIONS FOR  
VICTIMS OF HUMAN TRAFFICKING: WEIGHING  
OPPORTUNITIES FOR EXPANSION WITH A STATE  
INTEREST IN FINALITY

*Lori Waichman*<sup>†</sup>

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## INTRODUCTION

Slavery has long been illegal through both United States' domestic law<sup>1</sup> and international law.<sup>2</sup> Yet modern day slavery, most commonly known as human trafficking,<sup>3</sup> occurs throughout the world today, including within the United States. The United Nations reports that human trafficking is the third largest source of income from an organized criminal enterprise, and the fastest growing form of international crime.<sup>4</sup> The United States federal government has continued to acknowledge the existence of human trafficking by signing onto multilateral treaties<sup>5</sup> focused on the prevention of trafficking<sup>6</sup> and by publishing annual reports focused on the condition of human trafficking legislation in countries throughout the world.<sup>7</sup> Additionally, Congress acknowledged the presence of human trafficking within the United States by passing federal domestic law on the topic,<sup>8</sup> which Congress has continued to amend as more is learned about this issue.

Both international agreements and domestic law express objectives to punish traffickers, protect victims, and prevent human trafficking from continuing in the future. While it is the responsibility of the federal government to follow through with their promise to the world to work toward punishing traffickers, protecting victims, and preventing future trafficking, there is a gap in the ability of the federal government to truly protect victims of human trafficking as a result of the federalist structure of the United States. Although the federal government has the power to provide immigration reforms for victims of trafficking, which allows them to remain in the United States lawfully, that alone, is not enough to provide a life after trafficking.<sup>9</sup>

1 U.S. CONST. amend. XIII, §1.

2 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> (last visited Sept. 10, 2017).

3 *Hotline Statistics*, NATIONAL HUMAN TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/states> (last visited Feb. 22, 2017).

4 *Human Trafficking: Questions and Answers*, GLOBAL INITIATIVE TO FIGHT HUMAN TRAFFICKING, available at: [https://www.unglobalcompact.org/docs/issues\\_doc/labour/Forced\\_labour/HUMAN\\_TRAFFICKING\\_-\\_BACKGROUND\\_BRIEFING\\_NOTE\\_-\\_final.pdf](https://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_BACKGROUND_BRIEFING_NOTE_-_final.pdf) (last visited Sept. 10, 2017).

5 *Multilateral Treaty*, BLACK'S LAW DICTIONARY (1996) (Defined as a treaty "involving more than two parties").

6 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *opened for signature* Nov. 15, 2000, G.A. Res. 55/25. [hereinafter *The Protocol*].

7 U.S. DEP'T OF STATE, *Trafficking in Persons Report*, (Jun. 2016), <https://www.state.gov/documents/organization/258876.pdf>, at 30. [hereinafter *TIP Report 2016*].

8 *Trafficking Victims Protection Act of 2000 (TVPA)*, Pub. L. No. 106-386, Div. A, 22 U.S.C. §7101 (2000). [hereinafter *TVPA of 2000*].

9 N.Y. CRIM. PROC. LAW §440.10 (Consol. 2010).

In particular, one issue that thwarts victims' abilities to move beyond their time as a victim of human trafficking is the likelihood of a criminal record. Despite the fact that people are determined to have been a victim of human trafficking, and even when their past criminal acts are determined to have been a direct result of their enslavement, their records do not disappear and can continue to haunt them for the remainder of their lives. In order to truly provide victims of human trafficking with an ability to create a life after trafficking, state legislators need to provide a means for victims to vacate past convictions that were a result of their enslavement, thereby setting aside their convictions.

State legislators are generally wary to offer *vacatur* for past convictions due to the state interest in finality of criminal convictions.<sup>10</sup> This Note argues that the reasons for governmental interest in finality do not apply as prominently to cases that involve victims of human trafficking, and that the benefits of offering *vacatur* for victims of human trafficking for past convictions outweigh the necessity of finality for criminal convictions in such cases. Section I will discuss the background of human trafficking in America, and who is vulnerable to becoming a victim of human trafficking within the country. Section II will outline current international and federal legislation, significantly noting the promises made to victims and the gaps that neither the international community nor the federal government can reach. Section III will look at the current state *vacatur* laws that apply to victims of human trafficking, how they influence lives of victims for the better, and the limitations that still exist. Section IV will discuss the reasons why state legislators have not yet extended the availability of *vacatur* laws to victims of trafficking, and for those that have, how limitations prevent utilization of such laws. Section V will discuss the impact that broader laws can make, and the reasons why legislators should be actively working for broader *vacatur* laws in this context. Lastly, Section VI will discuss recommendations toward moving forward, including some legislation that is currently in process of becoming law.

## I. HUMAN TRAFFICKING: A BRIEF HISTORY

As defined by the United States' Department of State, human trafficking is "the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion."<sup>11</sup> Human trafficking

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<sup>10</sup> *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

<sup>11</sup> *TIP Report 2016*, *supra* note 7, at 30.

encompasses both sex trafficking and labor trafficking.<sup>12</sup> Federal legislation defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.” It separately defines labor trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>13</sup> According to the definition of human trafficking used by the United States government, human trafficking encompasses more than harboring people in against their will and forcing them to participate in commercial sexual activities or other forced labor.<sup>14</sup> Human trafficking additionally refers to the recruitment of persons through force, fraud or coercion as well as the transportation of the person through force, fraud or coercion.<sup>15</sup>

A victim of human trafficking does not, by definition, imply any characteristic of the person beyond the circumstances of their forced labor, sexual or other.<sup>16</sup> Victims can be female or male; they can be minors or adults; they can be foreign-born transported illegally, foreign-born with legal residency, or they can even be citizens born and raised within the country in which they were trafficked.<sup>17</sup> While there is a ubiquitous picture of a victim of human trafficking being a young woman from a poor, foreign nation,<sup>18</sup> under the definition of human trafficking provided by the Department of State, a victim can be any sex, age, socioeconomic class, and can have any citizenship status.<sup>19</sup> This is affirmed by the Department of Homeland Security, which specifies that “human trafficking victims can be any age, race, gender, or nationality” and that “[t]hey may come from any socioeconomic group.”<sup>20</sup> Despite common interpretation, a citizen of the United States who has lived in this country all of his or her life, could be a victim of

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<sup>12</sup> TVPA of 2000, *supra* note 8, at §103(8)(A).

<sup>13</sup> *Id.* at §103(8)(B).

<sup>14</sup> *TIP Report 2016*, *supra* note 7, at 9.

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

<sup>16</sup> See *The Victims and Traffickers*, POLARIS PROJECT, <https://polarisproject.org/victims-traffickers> (last visited Nov. 23, 2016).

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

<sup>18</sup> *Myths & Misconceptions*, NATIONAL HUMAN TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/what-human-trafficking/myths-misconceptions> (last visited Feb. 22, 2017).

<sup>19</sup> *TIP Report 2016*, *supra* note 7.

<sup>20</sup> *Myths and Misconceptions*, *supra* note 18. (Polaris Project also adds farm workers, factory workers, door-to-door salesmen, restaurant workers, construction workers, carnivals workers, and health and beauty services workers); *Labor Trafficking*, POLARIS PROJECT, <https://polarisproject.org/labor-trafficking> (last visited Nov. 3, 2016).

human trafficking if he or she is obtained “for compelled labor or commercial sex acts through the use of force, fraud, or coercion.”<sup>21</sup>

Additionally, there is not one type of job that victims of human trafficking perform. As expressed in the U.S. Department of State’s definition of human trafficking, victims can be compelled to partake in commercial sex acts as victims of sex trafficking, as well as other types of labor as victims of labor trafficking.<sup>22</sup> Again, the department of Homeland Security affirms that labor trafficking is a type of human trafficking, where victims might be found in legitimate or illegitimate businesses such as sweatshops, massage parlors, agriculture, restaurants, hotels, and domestic service.<sup>23</sup> Polaris Project, a non-governmental organization and leader in the global fight to eradicate modern slavery,<sup>24</sup> also notes that women and girls who are forced into domestic servitude are often sexually abused as well.<sup>25</sup> The United Nations Office on Drugs and Crime estimates that sexual exploitation accounts for 79% of human trafficking, although they acknowledge that the 18% of victims forced into labor trafficking is likely a misrepresentation because forced labor is less frequently detected or reported than sex trafficking.<sup>26</sup>

In the United States, human traffickers - those who partake in the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services - can be criminally charged under either federal or state criminal law, or both.<sup>27</sup> The United States, along with many other nations, has worked and is still working to create and enforce laws criminalizing the trafficking of persons and methods of dealing with identified victims.<sup>28</sup> However, the focus on criminalization of traffickers is not enough to end the hurt caused by human trafficking as another group of people are criminalized as well – the victims. While victims of human trafficking are, by definition, victims,<sup>29</sup> they are too often not treated as such. Under the control of traffickers, victims of human trafficking recurrently take part in, and are arrested for, criminal activity such as theft, using or distributing drugs, use of false identification, possession of a weapon, disorderly conduct, and some are

21 *Trafficking in Persons Report 2013 Definitions and Methodology*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/rls/tiprpt/2013/210543.htm> (last visited Nov. 3, 2016).

22 *TIP Report 2016*, *supra* note 7.

23 *Myths and Misconceptions*, *supra* note 18.

24 *About*, POLARIS PROJECT, <https://polarisproject.org/about> (last visited Feb. 22, 2017).

25 *Labor Trafficking*, *supra* note 20.

26 *UNODC report on human trafficking exposes modern form of slavery*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html> (last visited Nov. 3, 2016).

27 TVPA of 2000, *supra* note 6, at §112; *see, e.g.*, N.Y. PENAL LAW §230.34 (2007); *see also* N.Y. PENAL LAW §135.35 (2016).

28 TVPA of 2000, *supra* note 6, at §105(d)(4); The Protocol, *supra* note 5, at art 2.

29 TVPA of 2000, *supra* note 6 (defining victim of trafficking as “a person induced to perform labor or a commercial sex act through force, fraud, or coercion”).

even convicted under human trafficking laws for recruiting other victims for their traffickers.<sup>30</sup> Even more common, victims of human trafficking who are forced or coerced into commercial sex acts get arrested for prostitution or loitering.<sup>31</sup> If it is shown in court that someone arrested for prostitution or loitering is a victim of human trafficking, meaning that they had been forced into prostitution by a person generally referred to as a pimp,<sup>32</sup> a court has the discretion to not convict him or her of prostitution.<sup>33</sup> However, courts that are convicting individuals of prostitution or any other related offenses are often not aware such individuals are victims of human trafficking.<sup>34</sup>

While the ultimate goal is to find a way to prevent human trafficking from continuing, the reality is that prevention is hard when traffickers have so many tactics that they use in order to find victims and keep their victims secure. Often, traffickers get their victims by offering them jobs, and then not paying them for their work. One common method used by traffickers is referred to as debt bondage.<sup>35</sup> Debt bondage is when a trafficker pretends to help someone find a job, and in return, the employee must provide a certain amount of the wages back to the trafficker, who as that time is often believed by the victim to be a smuggler.<sup>36</sup> As employees begin to work, they rack up more debt for housing and food, which traffickers often provide in order to keep their victims controlled and under their constant supervision. These victims ultimately end up in a spiral of debt, which they may work to pay off for the rest of their lives, if they do not find a way to escape and get help.<sup>37</sup>

The easy solution is to suggest that victims should run away from

<sup>30</sup> *Post-Conviction Relief for Human Trafficking Victims Convicted of Crimes Coerced By a Trafficker*, HUMAN TRAFFICKING AND THE STATE COURT COLLABORATIVE (Aug. 2015), [http://www.htcourts.org/wp-content/uploads/150904\\_PostConviction\\_Relief\\_forHTvictims\\_v05.pdf](http://www.htcourts.org/wp-content/uploads/150904_PostConviction_Relief_forHTvictims_v05.pdf); Jessica Emerson, Jennifer Kroman, Kate Mogulescu, Lou Sartori, *Obtaining Post-Conviction Relief for Survivors of Human Trafficking*, CLEARY GOTTlieb STEEN & HAMILTON LLP (2014), [http://www.americanbar.org/content/dam/aba/directories/pro\\_bono\\_clearinghouse/ejc\\_2014\\_182.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/pro_bono_clearinghouse/ejc_2014_182.authcheckdam.pdf).

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

<sup>32</sup> *Street-Based*, NATIONAL HUMAN TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/sex-trafficking-venuesindustries/street-based> (last visited Feb. 22, 2017).

<sup>33</sup> Emerson, et al., *supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> *What is Modern Slavery?* U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/what/index.htm?goMobile=0> (last visited Nov. 3, 2016).

<sup>36</sup> *Id.* (Smuggling is defined as "Importation of people into the United States involving deliberate evasion of immigration laws. This offense includes bringing illegal aliens into the country, as well as the unlawful transportation and harboring of aliens already in the United States."); see also *Human Trafficking and Smuggling*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/factsheets/human-trafficking> (last visited Dec. 12, 2017).

<sup>37</sup> *TIP Report 2016*, *supra* note 7, at 30.

their traffickers, and that their trafficker would not come after them for the debt because they do not want to get caught for their illegal activity. It is, unfortunately, not that easy. Often, traffickers use threats of violence against victims and their families in order to keep them obedient.<sup>38</sup> One victim recounted her trafficker, a woman of her age, screaming to her, “We’re going to find you, and we’ll kill you” as she ran from the house in which she was kept.<sup>39</sup> She is not the only one to hear that threat.

The burden is typically on the victim to reach out for help, whether to law enforcement during an arrest or interrogation, or at another point to an organization providing aid to victims of trafficking. Due to immense fear from threats made by traffickers against themselves or their families,<sup>40</sup> victims often do not freely disclose their status to law enforcement, even when they are in jeopardy of receiving a criminal record.<sup>41</sup> Victims can get arrested over and over again, only to be reunited with their trafficker. After some time and multiple arrests, a victim who finally gains the courage and ability to escape from trafficking will find an agency or organization that works with victims or will sometimes go directly to law enforcement. However, even when they find the means to escape, their criminal records from their previous arrests and convictions do not disappear. With a criminal record, victims of human trafficking face extra hurdles when it comes to finding and securing employment, education, housing, and more.<sup>42</sup> Victims’ histories continue to haunt them as they try to piece their lives back together.<sup>43</sup>

## II. INTERNATIONAL AGREEMENTS AND FEDERAL LAW

In 2000, the United States took huge steps toward combatting human trafficking. First, the United States signed onto the United Nations’ Protocol to Prevent, Suppress and Punish Trafficking in

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<sup>38</sup> See *People v. G.M.*, 32 Misc. 3d 274, 275 (Crim. Ct. 2011); *People v. L.G.*, 41 Misc. 3d 428 (Crim. Ct. 2013); *UNCUT: Human trafficking victim shares her story*, MS NEWS NOW, <http://www.msnewsnow.com/Clip/7507920/uncut-human-trafficking-victim-shares-her-story> (last visited Nov. 3, 2016, at 9:24).

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

<sup>40</sup> *Myths and Misconceptions*, DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/myths-and-misconceptions> (last visited Jan. 26, 2017).

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

<sup>42</sup> Emerson, *supra* note 30.

<sup>43</sup> Cynthia Soohoo, *Criminalization of Trafficking Victims*, Submission to the United Nations Universal Periodic Review of United States of America, <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Criminalization-of-Trafficking-Victims.pdf>.

Persons.<sup>44</sup> This Protocol is one of three supplements to the United Nations Convention Against Transnational Organized Crime.<sup>45</sup> A total of one hundred and seventeen nations, including the United States, have signed The Protocol to Prevent, Suppress and Punish Trafficking in Persons, which seeks to take “effective action to prevent and combat trafficking in persons” through an international approach in which the countries of origin, transit, and destination work collectively.<sup>46</sup> Of the one hundred and seventeen signatures, ninety-one have ratified, including the United States.<sup>47</sup> The United States, having ratified the Protocol in 2005, has thus expressed its consent to be bound to the Protocol, consequently accepting responsibility to punish those who have trafficked persons into America and to protect their victims “with full respect for their human rights.”<sup>48</sup> Article Two of the Protocol states the purpose of the Protocol, “to prevent and combat trafficking, to protect and assist victims, and to promote cooperation among state parties.”<sup>49</sup>

The years between the passage of the protocol and the United States’ ratification may indicate that the United States was wary of the protocol in its entirety in the beginning. However, although the United States did not ratify the protocol in 2000, it did implement similar comprehensive domestic law in the same year.<sup>50</sup> In 2000, Congress passed the Victims of Trafficking and Violence Protection Act, later reauthorized as the Trafficking Victims Prevention Act (TVPA).<sup>51</sup> By creating the TVPA the American government set a goal “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>52</sup> In the

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<sup>44</sup> *Chapter XVIII Penal Matters*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en#EndDec) (last visited 11-01-2016, 12:43 PM).

<sup>45</sup> *See Signatories to the United Nations Convention against Transnational Crime and its Protocols*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> (last visited Feb. 22, 2017) (along with the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition).

<sup>46</sup> *The Protocol*, *supra* note 6, at art. 41.

<sup>47</sup> *Signatories to the United Nations Convention against Transnational Crime and its Protocols*, *supra* note 45.

<sup>48</sup> *United Nations Convention Against Transnational Organized Crime And The Protocols Thereto*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>, at 41-42 (last visited Feb. 22, 2017).

<sup>49</sup> *Id.* at 42.

<sup>50</sup> TVPA of 2000, *supra* note 8.

<sup>51</sup> *U.S. Laws on Trafficking in Persons*, U.S. DEP’T OF STATE, <https://www.state.gov/j/tip/laws/> (last visited Oct. 26, 2016).

<sup>52</sup> TVPA of 2000, *supra* note 8, at §102(a).



simplest form, the TVPA set out to do three things: prevent human trafficking into and within its own borders, protect victims of trafficking, and prosecute traffickers.<sup>53</sup>

One of the most impactful changes to domestic laws with respect human trafficking as a result of the TVPA was the creation of T visas, which created a process for victims of trafficking to obtain official nonimmigrant status.<sup>54</sup> With nonimmigrant status, victims became able to lawfully remain in the United States, temporarily.<sup>55</sup> However, despite the promise to the world that the United States would protect victims of trafficking, the intent of Congress providing victims of trafficking with a temporary legal status was not for the victims. Instead, Congress provided victims of trafficking with an opportunity for legal status “to strengthen the ability of law enforcement agencies to investigate and prosecute serious crimes and trafficking in persons, while offering protections to victims of such crimes without the immediate risk of being removed from the country.”<sup>56</sup> Congress realized that in order to prosecute traffickers, it would likely need to rely on testimony from victims who were illegally in the country, and that getting such testimony would be very hard if victims had either been deported or else were trying to avoid law enforcement while remaining in the United States illegally. As the Department of Homeland Security put it, Congress created the T visa program “out of recognition that human trafficking victims without legal status may otherwise be reluctant to help in the investigation or prosecution of this type of criminal activity.”<sup>57</sup>

To be eligible for benefits provided by the TVPA, trafficking victims must prove that they have suffered “a severe form of trafficking.”<sup>58</sup> In doing so, the victim must prove that he or she was recruited through force, fraud or coercion.<sup>59</sup> The United States has continued to rework human trafficking legislation, creating the Trafficking Victims Protection Reauthorization Acts (TVPRA) of 2003, 2005, 2008, 2013 and most recently, 2015.<sup>60</sup> Based on new findings by

53 *3Ps: Prosecution, Protection, and Prevention*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/3p/index.htm> (last visited Nov. 23, 2016).

54 Trafficking Victims Protection Reauthorization Act of 2013, 113 H.R. 898, 113th Cong. (2013). [hereinafter, “TVPA of 2013”].

55 *U and T Visa Law Enforcement Resource Guide*, HOMELAND SECURITY, [https://www.dhs.gov/sites/default/files/publications/PM\\_15-4344%20U%20and%20T%20Visa%20Law%20Enforcement%20Resource%20Guide%2011.pdf](https://www.dhs.gov/sites/default/files/publications/PM_15-4344%20U%20and%20T%20Visa%20Law%20Enforcement%20Resource%20Guide%2011.pdf), at 9 (last visited Nov. 23, 2016).

56 *Id.*

57 *Id.*

58 *Definitions*, DEP’T OF STATE ARCHIVE, <https://2001-2009.state.gov/g/tip/c16507.htm> (last visited Nov. 23, 2016).

59 *Id.*

60 *TIP Report 2016*, *supra* note 7.

Congress, the changes made to each Reauthorization Act have served to implement additional procedures in order to protect, prosecute and prevent trafficking. The most dramatic change to the Act was during the reauthorization in 2013, when instead of being a stand-alone Act, as it had always been, it instead served as Title XII of the Violence Against Women Act (VAWA) of 2013.<sup>61</sup> While the Act in and of itself did not change much, its new home inside of the VAWA served as a reminder to the world that the United States saw human trafficking as a women's issue,<sup>62</sup> not a general human rights issue, as it had previously appeared.

Both the international and federal laws share an important commonality: they discuss all steps of trafficking, from the recruiter to the employer, whether a pimp or a business owner, and under such acts, all parties involved are liable.<sup>63</sup> Both international law and domestic law are interested in preventing human trafficking, in the first place, but with the understanding that traffickers still find a way to conduct their illegal activities, both bodies of law show an interest in holding traffickers accountable as well as providing support to victims. Despite the victim-centered approach, neither body of law discusses the legal consequences faced by victims. This matter is important given the frequency of victims' arrests during their enslavement.<sup>64</sup> Even if federal legislators wanted to expand the TVPA to respond to the need for *vacatur*, they would be substantially stuck since criminal law is typically left to the states. Federal *vacatur* statutes could only reach crimes that are federally punishable, of which there are some.<sup>65</sup> For example, under the TVPA, human trafficking itself is a federally punishable offense,<sup>66</sup> so federal legislators would be able to provide *vacatur* to victims who have previous trafficking convictions. Therefore, federal laws should serve as an indicator to the states that providing protections for victims of human trafficking is important, and given the convictions under state law, it is only state legislators that can provide relief for victims.

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<sup>61</sup> TVPA of 2013, *supra* note 54.

<sup>62</sup> This distinction is important because it categorizes trafficking victims in a way that is not true to the makeup of real victims.

<sup>63</sup> See The Protocol, *supra* note 6; see also Justice for Victims of Trafficking Act of 2015, Public Law No. 114-22 (May 29, 2015).

<sup>64</sup> Malika Saada Saa, *U.S. should stop criminalizing sex trafficking victims*, CNN (Feb. 7, 2011, 12:52 PM), <http://www.cnn.com/2011/OPINION/02/05/saar.ending.girl.slavery/>.

<sup>65</sup> *Criminal Law*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law) (last visited Feb 23, 2017).

<sup>66</sup> TVPA of 2000, *supra* note 8.

### III. STATE VACATUR LAWS WITH RESPECT TO TRAFFICKING VICTIMS

Given the wide array of crimes for which trafficked persons get arrested,<sup>67</sup> it is necessary to look at how states have reacted in the pursuit of offering opportunities to vacate convictions, since these arrests are commonly state law violations. In order for victims to vacate any convictions under state law, the state must have a law to provide a right to vacate, and a process of doing so. While each of the fifty states has a law providing circumstances under which a criminal defendant can vacate convictions, there is no federal requirement imposed on the states to provide vacatur to victims of trafficking, as shown by the fact that only twenty-four states have a reference to victims of trafficking in their vacatur statutes.<sup>68</sup> The pioneer of human trafficking vacatur laws is New York State, which in 2010, saw a need to treat human trafficking victims as victims, and give them a change to rebuild their lives.<sup>69</sup> In 2010, an amendment was made to Criminal Procedure Law §440.10 (“NY CPL §440.10”)<sup>70</sup> to include victims of human trafficking to the list of defendants who have the opportunity to get their convictions vacated.

Under NY CPL §440.10, those who have been convicted of prostitution or loitering for the purpose of engaging in prostitution as a result of having been a victim of sex trafficking or labor trafficking are able to vacate their convictions.<sup>71</sup> Though this is a big step toward providing victims with a life after trafficking, it is imperative to recognize the limitations of the law. The first limitation has to do with the types of convictions that can be vacated. The only convictions that can be vacated, under this statute, are those related to prostitution – either the crime of prostitution itself or loitering for the purpose of engaging in prostitution.<sup>72</sup> Additionally, there are procedural limitations by which a victim must prove that she was a victim under the state penal code.<sup>73</sup>

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<sup>67</sup> *Post-Conviction Relief for Human Trafficking Victims*, *supra* note 30.

<sup>68</sup> *Human Trafficking Issues Brief: Vacating Convictions*, POLARIS, <https://polarisproject.org/sites/default/files/2015%20Vacating%20Convictions%20Issue%20Brief.pdf> (last visited Dec. 12, 2017).

<sup>69</sup> New York State Assembly Memo for Bill, State Assemb. B., Reg. Sess. (N.Y. 2010), [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A07670&term=2009&Summary=Y&Actions=Y&Memo=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A07670&term=2009&Summary=Y&Actions=Y&Memo=Y&Text=Y).

<sup>70</sup> This law lists the different circumstances under which a criminal defendant can file a motion to vacate their conviction.

<sup>71</sup> N.Y. CRIM. PROC. LAW §440.10 (Consol. 2010).

<sup>72</sup> *See Id.* at §(i). (Note the exception for loitering to promote prostitution or patronizing a person for prostitution. Therefore, those who are convicted of either promoting the prostitution of someone else, or of patronizing a prostitute are unable to vacate such convictions.)

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

Since New York's expansion of its *vacatur* law, twenty-three other states have similarly expanded their *vacatur* laws to include the opportunity to vacate convictions for victims of human trafficking or created new laws to provide a process for *vacatur* specifically for victims of human trafficking. Some states have followed New York's method, opting to have one law that covers all of the grounds under which a convicted defendant can move to vacate.<sup>74</sup> Other states, such as New Jersey, have statutes that entirely focus on providing victims of human trafficking with the opportunity to move for vacation of a conviction,<sup>75</sup> although the name of the law sounds general, like that of New York.<sup>76</sup> Some states, like Montana and North Carolina, for example, have specific names to match the specific reach of their *vacatur* statutes.<sup>77</sup> As any law, the choices made by the state legislatures affect the way in which their state *vacatur* laws work for victims of trafficking.

One of the prominent distinctions between the states' statutes is the difference in the convictions that they reach with respect to victims of trafficking, and therefore what types of convictions can be vacated in each state.<sup>78</sup> While New York's statute, as well as Montana's and North Carolina's, specifically reference prostitution convictions, some state statutes such as Florida and New Jersey's are broader.<sup>79</sup> New Jersey's statute refers to "prostitution and related offenses".<sup>80</sup> Florida's statute is even broader, covering "any conviction for an offense committed while he or she was a victim of human trafficking."<sup>81</sup> The question remains regarding how these statutes are applied and what impact the wording of the statutes have on the ability for victims to use them for prostitution and for other offenses.

Other issues that face victims who are trying to vacate convictions are statutes of limitations, burdens and standards of proof, and prosecutorial consent.<sup>82</sup> *Vacatur* statutes in Maryland, Hawaii, Montana,

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

<sup>75</sup> NJ REV. STAT. §2C:44-1.1 (2013) (New Jersey *vacatur* statute is called "Criminal convictions vacated, expunged.").

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

<sup>77</sup> See N.C. GEN. STAT. §15A-1416.1 (2013). (North Carolina *vacatur* statute is called "Motion by the defendant to vacate prostitution conviction for sex trafficking victim"); see also MONT. CODE ANN. §46-18-608 (2013) (Montana *vacatur* statute is called "Motion to vacate conviction - human trafficking victims.").

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

<sup>79</sup> See NJ REV. STAT. §2C:44-1.1 (2013); see also FLA. STAT. § 943.0583 (2014).

<sup>80</sup> FLA. STAT. § 943.0583 (2014).

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

<sup>82</sup> *Post-Conviction Relief for Human Trafficking Victims Convicted of Crimes Coerced By a Trafficker*, HUMAN TRAFFICKING AND THE STATE COURT COLLABORATIVE (Aug. 2015), [http://www.htcourts.org/wp-content/uploads/150904\\_PostConviction\\_Relief\\_forHTvictims\\_v05.pdf](http://www.htcourts.org/wp-content/uploads/150904_PostConviction_Relief_forHTvictims_v05.pdf).

and New Jersey require that a motion to vacate convictions related to human trafficking must be filed “within a reasonable period of time after the conviction.”<sup>83</sup> The question to ask then becomes, what is a “reasonable” time? Have different states defined “reasonable” differently? Additionally, different statutes have different burdens and standards of proof placed on a victim who has motion for *vacatur*. Some states do not require official documentation of trafficking, but such documentation, when available, serves to create a presumption that the criminal act was a result of human trafficking. This is true for statutes in Mississippi, Montana, New Jersey and Wyoming.<sup>84</sup> Some statutes, however, do require documentary evidence showing that the criminal action was a result of human trafficking, such as the statutes in Vermont and Maryland.<sup>85</sup>

A selection of states explicitly places the burden of proof on the victim, such as Connecticut, Hawaii, Maryland, and Washington State.<sup>86</sup> In doing so, these states have expressed that without proof of trafficking and additional proof that the criminal act was a part of the coercion or force from the trafficking, a victim cannot get her convictions vacated. Is this standard too cumbersome? Do most victims who do not have the burden still, in practice, need to show proof of victimhood in order to get their convictions vacated? Lastly, some states, namely Maryland and Hawaii, require consent of prosecution prior to filling out a motion to vacate.<sup>87</sup> How, in practice, does this affect the ability to vacate convictions?

Finally, once a victim has proven victimhood to the standard expressed by the applicable state statute, different states award a different level of discretion to courts. New York, for example, says that a court *may* vacate the conviction,<sup>88</sup> while other statutes like Connecticut’s say that a court *shall* vacate the conviction.<sup>89</sup> The effects of these differences have potential to change the lives of victims who have come forward for help since statutes that require courts to vacate convictions have the ability to create an expectation of a motion to vacate being granted, while statutes that give court discretion might not offer the same reliance. Another source of law, which impacts the

<sup>83</sup> NJ REV. STAT. §2C:44-1.1 (2013).

<sup>84</sup> *Id.*; WYO. STAT. ANN. §6-2-708 (2013); MONT. CODE ANN. §46-18-608 (2013); MISS. CODE ANN. §97-3-54.6 (2013).

<sup>85</sup> VT. STAT. ANN. TIT. 13, §2658 (2011); MD. CODE ANN., CRIM. PROC. §8-302 (LexisNexis 2011).

<sup>86</sup> MD. CODE ANN., CRIM. PROC. §8-302 (LexisNexis 2011); CONN. GEN. STAT. §52-418 (2012); HAW. REV. STAT. §712-1209.6 (LexisNexis 2013); WASH. REV. CODE. §9.96.060 (2012).

<sup>87</sup> MD. CODE ANN., CRIM. PROC. §8-302 (LexisNexis 2011); HAW. REV. STAT. §712-1209.6 (LexisNexis 2013).

<sup>88</sup> N.Y. CRIM. PROC. LAW §440.10 (Consol. 2010).

<sup>89</sup> CONN. GEN. STAT. §52-418 (2012).

direction that courts may take when faced with a victim of human trafficking motioning for *vacatur* is federal law and international law.

#### IV. WHAT IS MISSING IN STATE VACATUR LAWS, AND WHY?

Given the background of the current state *vacatur* laws as well federal laws and international agreements regarding human trafficking, the inquiry that must be discussed is determining what is missing from the state statutes and why those elements are missing. The remainder of this note will discuss the holes in the statutes that do exist and the reasons for the holes. This note assumes that over time, more states will continue to follow the trend of creating opportunities for *vacatur* for victims of human trafficking, either by expanding existing laws or by creating specific statutes for trafficking victims who have been convicted of crimes.<sup>90</sup>

##### A. *The Focus on Prostitution*

Notably, a commonality shared among many state *vacatur* statutes that reference specific convictions that can be vacated, is that prostitution and loitering for purposes of prostitution are in a league of their own. For example, as previously explained, New York, Montana and North Carolina's statutes specify that only prostitution and loitering convictions can be vacated.<sup>91</sup> There are various possibilities as to why states have focused their *vacatur* legislation for victims of human trafficking on prostitution and loitering, to the extent that states have such statutes to begin with. The possibilities for this preference, generally, are focused on frequency of convictions, level of danger to victims most likely to commit such offenses, and the victims of the victims.

First, there is reason to believe that the focus on prostitution and related charges is based on the fact that the most common reason that victims of human trafficking get arrested is, in fact, prostitution.<sup>92</sup> That is to say, of the victims that actually come forward and tell law enforcement of their trafficking, the most common reason for arrest is prostitution.<sup>93</sup> With this knowledge, it is not unreasonable for law

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<sup>90</sup> This assumption is based on the fact that no state has abolished a *vacatur* law as applied to human trafficking victims.

<sup>91</sup> N.Y. CRIM. PROC. LAW §440.10 (Consol. 2010); N.C. GEN. STAT. §15A-1416.1 (2013).

<sup>92</sup> Soohoo, *supra* note 43.

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

makers to want to focus on what they believe will make the biggest impact while still starting small. Particularly regarding the New York Statute, it is conceivable that the state legislature simply wanted to take a smaller step to increase the likelihood of passage.<sup>94</sup> While there are data to support the assertion that prostitution is the most commonly common charge for trafficking victims, this theory does not preclude expansion of such laws as the New York law has now been in place for six years and the number of states with similar statutes is consistently increasing.<sup>95</sup>

Furthermore, there is a need for expansion in order to protect victims who are arrested for prostitution, themselves. This is because, as earlier described, many victims who are arrested for prostitution are also arrested for other crimes.<sup>96</sup> If the same victim is arrested for multiple crimes, and only a portion may be vacated, the victim still maintains the criminal record that the *vacatur* statutes intend to fix. Therefore, even if the law is intended to protect victims arrested for prostitution only, this formulation, which only allows that conviction to be vacated, does not actually protect such victims in the way that it is intended to.

A second theory is based on the different attention given to victims of sex trafficking versus those finding themselves victim to labor trafficking. This theory relies on the conflation between “human trafficking” and “sex trafficking,”<sup>97</sup> suggesting that more attention is given to sex trafficking, generally, and therefore victims of sex trafficking are also the focus of legislation intended to protect victims. As the Polaris Project explains in its document on common myths and misconceptions about human trafficking in the United States, many people believe that sex trafficking is the only kind of human trafficking.<sup>98</sup> The idea is that victims of sex trafficking are universally understood to be victims of human trafficking who are in danger and need protection, while those stuck in the lesser known labor trafficking doing forced housework or work outside of the house do not need as much protection since it is not their physical bodies being used.

This conflation goes all the way up through government, as even

<sup>94</sup> *How a Bill becomes a Law in New York State*, THE BUSINESS COUNCIL, <http://www.bcny.org/inside/sb/billlaw.htm> (last visited Nov. 26, 2016).

<sup>95</sup> Kate Mogulescu, *Clearing Prostitution Convictions from your Criminal Record*, THE LEGAL AID SOCIETY, [http://c.yimcdn.com/sites/www.lawyersclubsandiego.com/resource/resmgr/MCLE\\_Documents/Mogulescu\\_-\\_Vacating\\_Convict.pdf](http://c.yimcdn.com/sites/www.lawyersclubsandiego.com/resource/resmgr/MCLE_Documents/Mogulescu_-_Vacating_Convict.pdf) (last visited Feb 22, 2017).

<sup>96</sup> *Human Trafficking as Criminal Defendants*, HUMAN TRAFFICKING AND THE STATE COURT COLLABORATIVE, [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) (last visited Nov. 23, 2016).

<sup>97</sup> *Common Myths and Misconceptions about Human Trafficking in the U.S.*, POLARIS PROJECT, <http://www.nova.edu/create/projectheat/forms/section1.pdf> (last visited Nov. 23, 2016).

<sup>98</sup> *Id.*

President George W. Bush seemed to ignore an entire section of trafficking victims in his 2003 Address to the United Nations General Assembly when he said that human trafficking was “a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of sex trade see little of life before they see the very worst of life.”<sup>99</sup> It is true that victims of the sex trade typically have few opportunities in life before they become victims, however this is equally true for victims of labor trafficking. Members of both groups find themselves in trafficking situations as a result of seeing “little of life,” as President Bush put it. The idea further follows that *vacatur* statutes focus on prostitution in order to use resources on the most vulnerable population. The federal government has taken similar action by reallocation of anti-trafficking funds to anti-prostitution groups and away from organizations focused on forced labor and exploitation of migrant workers.<sup>100</sup> Even if this method is given credence, it has been established that victims of sex trafficking commonly have convictions for crimes other than prostitution related crimes.<sup>101</sup> Therefore, even if the focus is placed on victims of sex trafficking over those falling victim to labor trafficking, *vacatur* statutes need to apply to more types of convictions in order to provide a future for victims.

Finally, the third reason that state *vacatur* statutes focus only on prostitution and loitering, and omit any other convictions, is due to the fact that prostitution and loitering are seen as the only ‘victimless’ crimes. Victimless crimes are important to *vacatur* statutes because while the point is to provide victims of trafficking with a second chance, it is not to be done at the expense of someone else that is truly a victim.<sup>102</sup> As an example of the discussions had by state legislatures prior to passing *vacatur* provisions for human trafficking victims, Colorado’s state legislature debated whether to extend their statute to prostitution, “victimless crimes,” or all other offenses.<sup>103</sup> Ultimately, the Colorado legislature determined that it was, at the time, too difficult to agree on the definition of a “victimless crime,” and therefore postponed the discussion until future research could be conducted.<sup>104</sup>

Unlike the first two theories, this theory precludes certain offenses where there are victims, such as theft or more notably, recruitment of

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<sup>99</sup> President George W. Bush, Address to the United Nations General Assembly, The United Nations: New York, NY, (Sept. 23, 2003), in UN WEBCAST, <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm>.

<sup>100</sup> “Counteracting The Bias: <sup>117</sup>The Department Of Labor’s Unique Opportunity To Combat Human Trafficking”, 126 HARV. L. REV. 1012, 1017 (2013).

<sup>101</sup> Soohoo, *supra* note 43.

<sup>102</sup> COLORADO HUMAN TRAFFICKING COUNCIL, ANNUAL REPORT 2015, at 37, [http://cdpsdocs.state.co.us/safeschools/Resources/CHTC\\_2015\\_Rpt\\_12\\_23\\_15.pdf](http://cdpsdocs.state.co.us/safeschools/Resources/CHTC_2015_Rpt_12_23_15.pdf).

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

<sup>104</sup> *Id.*



trafficking victims. However, some of the crimes that the Colorado Human Rights Counsel thought might, eventually, make it into *vacatur* statutes as victimless crimes were forced drug sales, begging, immigration offenses, and surprisingly, stealing and larceny.<sup>105</sup> The question therefore remains, what exactly does “victimless crime” mean, and what crimes does it encompass? Even if all states were to pass an identical statute that includes the opportunity to vacate victimless crimes, there is still room for inconsistency among application by courts of law. Additional research can be done to determine whether laws can hold traffickers, instead of victims of trafficking, responsible for the crimes that took place.

### B. *Sanctity of Court Judgments*

There is a reasonable goal in finality for criminal convictions in order to maintain assurance in the legal system.<sup>106</sup> However, while finality is a realistic and reasonable state interest, there are multiple characteristics of relevant laws that put these convictions in a different arena. First and foremost, courts dealing with motions to vacate convictions are not re-fact finding, which can be a concern among court systems.<sup>107</sup> It is an important American judicial principle that appellate courts to not redo the fact-finding process that the trial court considered. That is the job for the trial court, exclusively, as appellate courts look primarily at legal processes used by the trial court and the effects of such processes on the parties. Similarly, there is a fear that vacating convictions as a result of new facts can be problematic with regard to the sanctity of judicial decisions.

Instead of new facts that have to be considered, there is simply new information that changes the relationship between the actor and the act, which under the statute changes the relationship as a matter of law as opposed to a matter of fact which would have an effect on the ability to review a verdict. Although there are new facts that come into the determination of a declaration of victimhood, this has no effect on the crime committed. The fact that a court, whether in front of a jury or judge, found that a crime was committed is not in question. Instead, the status of the defendant has changed from criminal to victim of human trafficking. Once a victim is determined to be a victim of sex trafficking or labor trafficking under the relevant part of the state’s penal law, the victim is given the opportunity to move to vacate prior convictions, as a

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

<sup>106</sup> *Duncan v. Walker*, 533 U.S. 167, 178 (2001).

<sup>107</sup> Alyssa M. Barnard, Note, “*The Second Chance They Deserve*”: *Vacating Convictions Of Sex Trafficking Victims*”, 114 *COLUM. L. REV.* 1463, 1494 (2014).

result of the trafficking.

## V. THE IMPACT BROADER LAWS CAN MAKE

There are no published statistics on the number of victims of trafficking who have moved to vacate prior convictions, nor are there statistics regarding the number of victims who have done so successfully. The reason for this, at least in part, is that vacated convictions disappear off of the record of the defendant. That means that after a successful vacation, there are no statistics to gather.<sup>108</sup> Although there are no general statistics, information can be gathered through individual stories of victims. Since the New York statute has been around the longest, there are stories available from New York that showcase how victims have been impacted by the ability to get their convictions vacated. The following stories show the impact that criminal convictions can have on victims of human trafficking, and the importance of getting such convictions vacated. For the safety of the victims, their initials are used in the case titles in place of full names.

### A. *The Story of GM*

The story of GM is one of the clearest examples of victimhood of human trafficking. Her story is not all that unique, and yet her case is one of only a few to make it to court. Picture a woman from the Dominican Republic. She traveled to the United States on a tourist visa and decided to stay with a man who she met who let her live with him while she made money to send home to her two children.<sup>109</sup> She remained in America and after a few years, they married. So far, GM thought she was lucky, but it did not take long until her husband began to physically abuse her.<sup>110</sup> As a result, she decided to return to the Dominican Republic.<sup>111</sup> Her husband followed her and begged her to move back with him, promising “to find her a good job and to help her with her immigration status.”<sup>112</sup> He did not keep his promise.

Instead of getting help to find a job and with her immigration status, GM endured increasing physical abuse, leading to her hospitalization on multiple occasions.<sup>113</sup> In addition to the physical

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<sup>108</sup> The only published information is that three victims had their convictions vacated within the first year of New York’s statute. All three were victims of sex trafficking.

<sup>109</sup> *People v. G.M.*, 32 Misc. 3d 274, 275 (Crim. Ct. 2011).

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

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

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

<sup>113</sup> *Id.*

abuse, overtime he began isolating her from her outside world, exercising complete control over her physically and psychologically.<sup>114</sup> She was not allowed to leave a room or the apartment without him coming with her. He drove her to and from work each day, waiting outside in the car to ensure that she did not go somewhere else without his consent and supervision.<sup>115</sup> At times, he even forced her to engage in prostitution, threatening her with physical harm and sometimes actually acting violently, if she did not comply. Just as he supervised her time at work, he would drive her to brothels and wait inside his car until she returned.<sup>116</sup> He would take all of her money, never allowing her to keep the money she earned.<sup>117</sup> He even forced her to purchase crack cocaine for him because he did not want to get arrested. GM complied, out of fear for her life and of her children's lives, as he would continue to threaten her with violence and with threats against her children.<sup>118</sup> Accordingly, she did as she was told. In the short time between September 1997 and January 1998, she was arrested six times – twice for prostitution, twice for trespass, and twice for criminal possession of a controlled substance, all under the New York State Penal Code.<sup>119</sup>

The story of GM is troubling, but is a common illustration of the experience of a victim of trafficking. In 2011 when GM's case made it to trial, New York State already had in place a *vacatur* law which included prostitution as a count that could be vacated, under certain circumstances.<sup>120</sup> In an unprecedented ruling, the court held that all six counts would be vacated since the state *vacatur* law “allow[ed] the court to ‘take such additional action as is appropriate in the circumstances.’”<sup>121</sup> As Polaris Project says, “[t]his decision exemplifies why it is beneficial to afford judges broad discretion to vacate convictions not just for prostitution but also for other criminal acts committed as a result of human trafficking.”<sup>122</sup>

### B. *The Story of LG*

The story of LG is as alarming as it gets. Until she was eight

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 276.

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

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

<sup>120</sup> N.Y. CRIM. PROC. LAW §440.10 (Consol. 2010). Further details about the NY statute as well as other states' statutes are explained in Section III of this Note.

<sup>121</sup> 2013 Analysis of State Human Trafficking Laws, POLARIS PROJECT, , at 2, <http://www.themainewire.com/wp-content/uploads/2013/10/2013-Analysis-Category-10-Vacating-Convictions1.pdf> (last visited Feb. 22, 2016)

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

years old, LG lived in Brooklyn with her grandmother, where she was being sexually abused by an uncle.<sup>123</sup> Her grandmother passed away when she was eight and for the next four years, she “bounced around different foster homes.”<sup>124</sup> When she was 12 years old, while living in a foster home in Brownsville, a man in his thirties approached her. He was very nice at first and let her come back with him to his house, where six other girls were also living. He said that if she stayed with him, she would not have to go back to the foster home. “[A]lthough she didn’t understand it at the time, [he] was preparing her to become a prostitute.”<sup>125</sup> At 12 years old, LG was prostituted by this man. Witnessing him beat the other girls just for speaking to other men, LG was scared to leave, fearing that if she was caught, he would beat her, too.<sup>126</sup> While it may seem extreme for a victim to be under the power of multiple traffickers, this experience is common, and often occurs with human trafficking.<sup>127</sup>

Eventually, LG was able to leave her pimp when another man offered to help her leave.<sup>128</sup> To LG, this man seemed safer, but one day later, he also made her go out and prostitute herself. Just like her first pimp, he threatened her with violence if she did not listen to what he told her to do, or if she ever tried to leave. Within a year, she began working for a third pimp who sent her out of New York City to Atlantic City, Washington D.C., and Miami to prostitute herself.<sup>129</sup> While in Miami, she reached out to a family member who helped her escape “the life,” and she was able to return to New York, where she moved in with another foster family. However, her new family did not support her in her process of healing.<sup>130</sup> In order to find support, she turned to friends. A new friend introduced her to another man, another pimp, although she did not know it at the time.<sup>131</sup>

She was with the fourth pimp for over three years, at one point beaten to the point that her pimp would not let her leave the house for two weeks because he was scared she would attract attention from police. She was ultimately arrested at age fourteen for prostitution.<sup>132</sup> In accordance with her pimp’s instructions, she provided a fake name and

123 *People v. L.G.*, 41 Misc. 3d 428, 428 (Crim. Ct. 2013).

124 *Id.*

125 *Id.* at 431.

126 *Id.*

127 *Sex Slavery/Trafficking: Frequently Asked Questions*, SOROPTOMIST, <https://www.soroptimist.org/trafficking/faq.html> (last visited Dec. 12, 2017).

128 *L.G.*, *supra* note 123, at 431.

129 *Id.*

130 *Id.* at 432.

131 *Id.*

132 *Id.*

birthdate to police.<sup>133</sup> She was arrested again three years later for prostitution, disorderly conduct, and criminal possession of a weapon in the fourth degree for allegedly carrying a pocketknife.<sup>134</sup> She pled guilty to the weapons charge and was given three years of probation, which she eventually violated. There was a warrant out for her arrest, although she did not know it at the time. She only found out about the warrant three years later, after she had left her pimp and was in the process of applying for a job as a home health aide.<sup>135</sup> Instead of protecting the victim, as is the goal of international and domestic laws on human trafficking, she was sentenced to ten days in jail for not responding to the arrest warrant.<sup>136</sup>

It has been a long ride for LG. Four years after getting out of jail, she received her GED and certificate as a medical assistant. She petitioned for custody of her nephew, but was questioned because of her convictions. After all LG lived through, all she wants is to “vacate [her] convictions so that [she] can move forward with [her] life and career without being held back in [the] past.”<sup>137</sup> She is a victim. The court knows it, but that does not make her history disappear, and her history of criminal activity is not a speaking point at a custody hearing.

### C. *Impacts of Personal Stories*

These stories share the hardships faced by victims of human trafficking, in being forced to commit crimes and the resulting problems, such as opportunities for housing and employment, faced by having a criminal record even after being declared a victim. Despite the fact that twenty-three states other than New York have amended existing *vacatur* laws to include victims of human trafficking or have passed *vacatur* laws specifically for victims or human trafficking, there are few stories of victims successfully using such statutes. Although it is hard to gain information due to the personal nature and the fact that *vacatur* means the records disappear, this really shows that these laws are a step in the right direction, but still need more attention. States that do not provide a method for *vacatur* for victims of trafficking can look at existing laws as inspiration for instituting laws, but those that do exist can continue to expand in order to embrace the victim-centered approach.

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 434.

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

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

## VI. MOVING FORWARD: A VIEW TOWARD CHANGE

In any policy matter, change comes as a result of legislators knowing that an issue exists and understanding the finding the best solution to fix the problem. Of course, it has long been established that pressure from constituents also plays a role in the reactions of legislators in choosing what issues to focus on.<sup>138</sup> The first step is that if the underlying issue preventing the states from expanding their *vacatur* laws to all victims' crimes is that lawmakers are not educated on the issues, then steps must be taken to educate and the focus should be placed on enabling non-governmental organizations to develop their work further. While education may be the easiest fix for such a situation, the numerous organizations that devote their entire existence to educating the community and lawmakers lead to the presumption that that any diligent lawmaker would be aware of the third most profitable illegal activity in the world.<sup>139</sup> Furthermore, with the numerous Polaris reports<sup>140</sup> and annual publications by U.S. government officials that have been published since 2001,<sup>141</sup> it is probable that government officials have access to and are aware of this issue, in general, and more specifically about the commonality of criminal action by victims. There have even been recent continuing legal education sessions focused on this exact topic,<sup>142</sup> further supporting the likelihood that lawmakers are aware of the criminalization of victims of trafficking.

In September of 2016, Senator Kristin Gillibrand of New York along with senators from Ohio, Connecticut, Missouri, Hawaii, and Florida, introduced legislation that would clear criminal records of victims of human trafficking.<sup>143</sup> The act will allow victims of trafficking to move to vacate non-violent convictions.<sup>144</sup> This standard is different from the victimless crime standard that many states have expressed, as there are various crimes that are not violent, but that are also not

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<sup>138</sup> Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990).

<sup>139</sup> *Human Trafficking/ Involuntary Servitude*, *supra* note 3.

<sup>140</sup> *State Laws & Issue Briefs*, POLARIS REPORT, <https://polarisproject.org/state-laws-issue-briefs> (last visited Feb. 22, 2017).

<sup>141</sup> *Trafficking in Persons Report*, *supra* note 7.

<sup>142</sup> *Vacatur and Expungement Relief for Human Trafficking Victims*, Webinar, Jan. 31, 2017, <http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=267244921>.

<sup>143</sup> Senators Gillibrand, Portman And Blumenthal And U.S. Representatives Wagner, Gabbard, And Jolly Announce Bipartisan Legislation To Clear Criminal Records Of Human Trafficking Victims (Sept. 28, 2016), <https://www.gillibrand.senate.gov/news/press/release/senators-gillibrand-portman-and-blumenthal-and-us-representatives-wagner-gabbard-and-jolly-announce-bipartisan-legislation-to-clear-criminal-records-of-human-trafficking-victims>.

<sup>144</sup> *Id.*

victimless. For example, the Federal Bureau of Investigations considers larceny-theft a property crime, not a violent crime.<sup>145</sup> Larceny-theft, however, is not a victimless crime as it, by definition, means that property is unlawfully being taken from someone else, who is the victim of the larceny.<sup>146</sup>

The broader coverage provided by this potential federal statute does not mean that all state law will now have to be read in accordance with the broader coverage. For reasons most likely to do with federalism and the constitutional reach of federal statutes over actions of the state, this bill specifically indicates that it will only apply to federal convictions.<sup>147</sup> It is, however, an important step toward expanding all *vacatur* statutes. The support for this law is remarkable as Polaris, Rights4Girls, FAIR Girls, Sanctuary for Families, The Urban Justice Center’s Sex Workers Project, The Family Focused Treatment Association, The Coalition to Abolish Slavery & Trafficking, The National Survivor Network, and The New York State Anti-Trafficking Coalition all support the bill.<sup>148</sup> As a federal act, this statute would only pertain to federal prosecutions, which is not a tremendous portion of convictions. However, this legislation is extremely important, if for no other reason that it would set an example for states. While not binding on states, the ability of the federal government to provide this opportunity for victims is a step in the right direction. If it passes, it will be interesting to see the effects that it has on state statutes, if any.

In addition to looking to the federal government to statutorily change the way that victims of human trafficking are treated, the courts themselves can be an effective means to moving toward a broader application of *vacatur* laws. One practical way to expand *vacatur* statutes for victims of human trafficking is through the newly created Human Trafficking Intervention Court. Started by the Center for Court Innovation in 2013 in New York City, Human Trafficking Intervention Courts served the mission to “stop the pattern of shuffling trafficking victims through our criminal courtrooms without addressing the underlying reasons why they are there in the first place.”<sup>149</sup> As

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<sup>145</sup> *Violent Crimes*, U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime> (last visited Feb. 22, 2017).

<sup>146</sup> *Larceny-theft*, U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/property-crime/larcenytheftmain> (last visited Feb. 22, 2017).

<sup>147</sup> Trafficking Survivors Relief Act of 2016, H. R. 6292, 114th Cong. §2(c)(2) (2016).

<sup>148</sup> *Trafficking Survivors Relief Act of 2016 (S.3441)*, COALITION TO ABOLISH SLAVERY & TRAFFICKING, <http://www.castla.org/templates/files/trafficking-survivors-relief-act-of-2016-one-pager.pdf> (last visited Feb. 22, 2017).

<sup>149</sup> Hon. Jonathan Lippman, Address at Citizens Crime Commission (Sept. 25, 2013), in *Announcement of New York’s Human Trafficking Intervention Initiative*, CENTER FOR COURT INNOVATION (Oct. 4, 2013), <https://www.courtinnovation.org/articles/announcement-new-yorks->

expressed in the mission statement, the New York Court Authority realized that these victims were not being treated like victims and instead were being treated like criminals because no single court had the ability to connect the pieces and get to the real issue of human trafficking.<sup>150</sup> When one single victim is picked up on a theft charge, he or she is brought to a court that deals with theft. The same victim, when charged with prostitution is brought to a different court, as is true for drug charges, and so on. Instead of being treated like a victim by getting to the root of the problem and offering assistance, these victims are criminalized by multiple judges and multiple prosecutors.

Currently, victims enter the Human Trafficking Intervention Court only when they are arrested for prostitution. As Honorable Jonathan Lippman explains, "prostitution-related offenses will be identified at arraignment and, if not resolved there, be transferred to the local Human Trafficking Intervention Court."<sup>151</sup> In the Trafficking Court, cases will be evaluated by the judge, the defense attorney and the prosecutor and, if there is consensus that the case involves a victim in need of services, appropriate connections will be made."<sup>152</sup> Connections, as he explains, are to attend mandated services with domestic violence and sexual assault service providers, substance abuse, and/ or mental health treatment providers, which will offer an opportunity to heal and to receive non-criminal dispositions and a dismissal of cases.<sup>153</sup>

The work of these intervention courts is extremely important and might be the exact tool that lawmakers can look toward in order to expand *vacatur* for more than just prostitution charges. Currently, just like *vacatur* statutes, the work of the Human Trafficking Intervention Courts focuses on prostitution, which is clear through the fact that they get all their cases sent from prostitution cases currently in the trial courts. However, Human Trafficking Intervention Courts are uniquely situated to work toward this goal of vacating convictions. They understand that prostitution is rarely the only criminal activity that one takes part in.<sup>154</sup>

## VII. CONCLUSION

Victims of human trafficking, though victims, are frequently prosecuted for crimes committed whilst under the power of a

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human-trafficking-intervention-initiative.

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

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 3.

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

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



trafficker.<sup>155</sup> Often, victims are convicted and rearrested for the same crime multiple times before coming forward to non-profit organizations or law enforcement that they are victims of human trafficking. Whether out of their own fear of law enforcement, threats made by the trafficker against the victim's family at home, or numerous other reasons, victims of human trafficking do not always come forward to get help the first time they are arrested or at any point during their various encounters with the justice system. It often takes an independent organization, members of law enforcement who know and are trained to detect trafficking, or a glimmer of hope among victims to lead them to safety. When victims finally come forward to receive the help they so desperately need to avoid their trafficker and protect their loved ones, they are faced with more challenges that hinder their ability to create a new life for themselves. Notably, many victims of human trafficking are tarnished with a criminal record that follows them around throughout the rest of their lives, even after being declared a victim, hindering their ability to get housing, employment, and more.

This note argues that although the state legislators have an interest in finality in criminal proceedings, the elements of that interest do not apply to victims of human trafficking, and are outweighed by the need for relief for victims. In order to make that argument, it discusses the holes in international and federal laws that can only be achieved through state legislation, the pattern that much of the existing legislation focuses on vacating only crimes relating to prostitution, the arguments for offering *vacatur* and for relinquishing finality among criminal convictions, and recommendations toward the future. Useful future research to broaden the understanding of this issue could focus on what is considered a "victimless crime." Understanding this is vital if it is true that state legislators keep the reach of *vacatur* laws narrow because they do not want to provide relief for crimes with victims. In order to move forward, this term needs to be defined to create an idea of what can be expanded without offending this standard. Finally, a deep comparison between state laws and the usage of such laws is imperative in order to determine the most effective way to frame a law providing a process for *vacatur* to victims of human trafficking. Victims of human trafficking deserve protection, not punishment, and it is well within the powers and ability of the states to provide such protection. Therefore, all states should continue to work toward ensuring that victims of human trafficking are provided the ability to seek freedom from crimes that were committed during enslavement by enabling them to vacate convictions of such crimes.

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<sup>155</sup> *Human Trafficking Issues Brief: Vacating Convictions*, *supra* note 68.

