

THE INJUSTICE OF CONVICTING SEX TRAFFICKING VICTIMS: A MODEL VACATING
CONVICTIONS LAW

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"It ought to concern every person, because it's a debasement of our common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage of human trafficking, which must be called by its true name--modern slavery."¹

INTRODUCTION

Imagine you are a twelve-year-old girl held captive by a man three times your age.² He explains the rules of the "game" to you and teaches you how to be a prostitute.³ He beats you when you speak to other men and forces you to work from sunup to sundown, ultimately taking all the money you make for himself.⁴ By the time you are fourteen, you are working for your fifth pimp and you are scared he will kill you.⁵ He forces you to have sex with him in addition to selling yourself on the streets. Often, the men who pay you for sex rape you and threaten to hurt or kill you.⁶

At this point, you are brainwashed by your pimp. You follow all of his orders, including his demand to carry a small pocketknife to protect yourself from the "johns" who pay you in exchange for sex.⁷ You are afraid to escape because you have seen your pimp beat up the other girls who have tried. At seventeen, you are arrested for ***344** prostitution for the second time.⁸ This time you are also convicted of weapons possession for the knife you carried to protect your own life.⁹ Because you are fearful of getting beat up or killed for giving away the identity of your pimp, you do not explain your situation to the police, and you are never identified as a victim of sex trafficking.

Finally, after years of abuse, your pimp is arrested and you are able to leave the sex industry to pursue a career as a social worker.¹⁰ Unfortunately, you still have a criminal record, which includes convictions for prostitution, disorderly conduct, and criminal possession of a weapon.¹¹ Consequently, you face discrimination from prospective employers, and you are denied housing, loan, and education opportunities.¹² This horrible situation is the sad reality for thousands of sex trafficking victims in the United States.

In an effort to help survivors of sex trafficking move forward in their lives, a number of states allow victims to vacate prior convictions. In 2010, New York became the first state to allow victims to vacate prostitution convictions where the defendant's participation was a result of being a sex trafficking victim.¹³ Supporters of this law indicated that “[v]ictims of sex trafficking who are forced into prostitution are frequently arrested for prostitution-related offenses and are saddled with a criminal record. They are blocked from decent jobs and other prospects for rebuilding their lives. Even after they escape from sex trafficking, the criminal record victimizes them for life.”¹⁴ At least sixteen states have since enacted laws allowing victims to vacate prior convictions where the crimes were committed while the victims were trafficked (“vacating ***345** convictions laws”).¹⁵ These laws acknowledge that victims face complex psychological and legal challenges as a consequence of trafficking. Accordingly, these laws recognize that convictions obtained by a victim during a trafficking situation should be vacated.

Although vacating convictions laws are designed to assist trafficked victims in their recovery, many of these laws fail to give victims the full relief they require to live productive lives.¹⁶ Nevertheless, combining the strengths of existing state laws with some additional language will create an effective law. This Note proposes a model state vacating convictions law that provides greater protection to sex trafficking victims, while still preserving the interests of society in preventing crime and ensuring punishment of criminals.

Part I of this Note begins with a brief overview of the prevalence of human trafficking in the United States. In particular, Part I examines sex trafficking and discusses the legal and psychological challenges victims face while recovering from sex trafficking. This section includes a discussion of federal and state anti-trafficking efforts, which have provided some relief and protection to trafficking victims. Next, Part II discusses the flaws of current state laws and proposes that further protection is needed at the state level in the form of an ideal vacating convictions statute. Finally, Part III proposes the language of a model vacating convictions law that resolves the inadequacies of existing laws.

***346 I. SEX TRAFFICKING AND ITS IMPACT ON VICTIMS**

Human trafficking is becoming a hot-button topic in the United States.¹⁷ In July 2013, the FBI arrested 159 men who had forced girls as young as thirteen into prostitution.¹⁸ The FBI noted that approximately 2,700 children have been rescued from similar anti-trafficking operations over the last decade.¹⁹ Communities, policymakers, and legislators are more aware than ever of the violence and horror faced by trafficking victims.²⁰ This awareness is apparent from the November 2012 election in California, when 81.3% of voters approved an increase in sentences and fines for those convicted of human trafficking, making it the highest passing ballot measure in the state since 1914.²¹ While this vote punishes perpetrators of human trafficking in California for their horrific acts, it does nothing for the victims who

have been charged with, or convicted of, crimes as a result of such trafficking. The following section explores human trafficking and its consequences, and provides insight into the policy rationales and practical effects of federal and state laws available to those who commit crimes while in a trafficking situation.

A. Overview of Human Trafficking in the United States

Human trafficking is the fastest growing criminal industry in the world, and is tied with arms trafficking as the second most profitable crime.²² ““Trafficking in persons,” or human trafficking, is an umbrella term for “all forms of modern slavery,” and is defined as “the recruitment, harboring, transportation, provision or obtaining of a *347 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.”²³ Twenty-seven million people in the world are victims of human trafficking.²⁴

Americans commonly misunderstand human trafficking as only occurring outside of the U.S., and many believe that only undocumented individuals or immigrants can be victims of trafficking.²⁵ In reality, human trafficking is prevalent in the U.S., and victims of trafficking include men and women of all ages, including U.S. citizens.²⁶ The U.S. is the third largest destination country for international human trafficking victims, with up to 17,500 individuals annually trafficked into the country.²⁷ A person, however, does not need to be transported from one place to another to be categorized as a victim of human trafficking.²⁸

Sex trafficking is one of multiple types of human trafficking. Under the Trafficking Victims Protection Act (“TVPA”), sex trafficking is the “recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”²⁹ A commercial sex act is “any sex act on account of which anything of value is given to or received by any person.”³⁰ This can involve forcing a victim to engage in prostitution, pornography, live stripping or sex shows, military prostitution, or sex tourism.³¹ Such commercial exploitation is often accomplished by force, fraud, or *348 coercion.³² Within U.S. borders, an estimated 100,000 children are currently subjected to sex trafficking, a shockingly high number given that the number of adult trafficking victims is not included.³³

Yet, misconceptions still exist about the presence of trafficking within U.S. borders, which complicates the success of anti-trafficking efforts³⁴ and impedes the ability of law enforcement to identify victims of human trafficking.³⁵ This often results in victims being treated as criminals through arrest, incarceration, deportation, and discrimination.³⁶ In 2009, the U.S. Department of Justice reported 71,350 arrests nationwide for prostitution and commercialized vice.³⁷ However, because of the difficulty in identifying sex trafficking victims, no accurate statistics exist depicting how many of those persons arrested for prostitution were victims of sex trafficking.³⁸

B. Legal and Psychological Consequences of Sex Trafficking

Victims may face numerous legal and emotional consequences caused by sex trafficking.³⁹ Girls frequently enter prostitution through kidnapping and “are often drugged, kept in isolation, brainwashed by a combination of mixed affection and violation, and then sold for sex over the internet, or on the ‘track,’ in hotel rooms, *349 and at sex parties.”⁴⁰ The average age of these girls at the time they enter prostitution is between twelve and fourteen years.⁴¹ As with other victims of sexual assault crimes, sex trafficking victims often experience severe negative psychological and health effects.⁴² Psychologically, victims can experience Post-Traumatic Stress Disorder (“PTSD”), depression, disconnection from feelings, self-blame, helplessness, low self-esteem, rage, guilt, and fear or hatred of men.⁴³ Victims also frequently suffer from physical injuries from sexually transmitted diseases, drug addition, drug overdose, and physical abuse.⁴⁴

Victims of sex trafficking frequently do not seek help from others or identify themselves as victims.⁴⁵ Pimps often claim ownership of their victims by giving them new identities, and once their “former identity is gone, [they] then belong to the pimp.”⁴⁶ Traffickers may confiscate a victim's documentation, instill fear in a victim regarding the victim's surroundings, and tell stories about victims who have previously disobeyed or been deported for exposing their involvement in the activity.⁴⁷ These victims may suffer from psychological paralysis, a condition making them believe they cannot escape prostitution despite opportunities to do so, thereby forcing them to accept their victimization.⁴⁸ When victims accept their victimization, they are unlikely to seek help or explain their situation to law enforcement when they are arrested.⁴⁹ By the time victims cease to be involved in trafficking, those who acquired a conviction *350record are labeled a criminal, a status that directly conflicts with their experience as a victim.⁵⁰

Survivors who acquire a criminal record during their time as a trafficking victim will often face numerous challenges in reentering society. In addition to facing the social stigma attached to a criminal record, these victims are “hindered from getting jobs, safe housing, immigration visas, loans, and continuing education.”⁵¹ Minimizing these challenges, along with the goal of “alleviat[ing] the suffering of victims and to assist them in recovery, victims need legal protection so that they are not punished for crimes they were forced to commit while being trafficked.”⁵² By vacating convictions that occurred as result of sex trafficking, survivors can take advantage of opportunities without fear of being constrained by their criminal past and are encouraged to live as productive members of society.⁵³

C. Analogizing the Criminal Accountability of Domestic Violence Victims and Juveniles to Trafficking Victims

Evidence of abuse or coercion is sometimes relevant in a criminal case before a victim is convicted of a crime. In *State v. Kelly*, the court concluded that expert testimony on battered-woman's syndrome was relevant to a homicide case where the defendant claims self-defense.⁵⁴ Although this case did not involve a trafficking

victim, a sex trafficking victim may be a battered woman, defined as one “who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without concern for her rights.”⁵⁵ Some women do not leave their abusive situations because of the cyclical nature of battery, while some women who grew up in a violent or abusive household may “perceive the battering cycle as normal.”⁵⁶ For other women, the demoralizing and degrading nature of being unable to predict or control the violence may lead to psychological *351paralysis.⁵⁷ Financial dependence or other social factors may also lead battered women to stay in abusive relationships.⁵⁸ In sum, the factors that contribute to why women remain in abusive relationships are relevant to a criminal case because they show the learned helplessness of abused victims, and thus, they help dispel the misconception of battery as an escapable danger.⁵⁹

Other areas of criminal law lessen the criminal culpability or responsibility of individuals because of coercion or immaturity. For example, at common law, the duress defense allows a defendant to escape conviction for non-homicide offenses upon showing the crime was committed under (1) an imminent threat of death or serious bodily harm; (2) a well-grounded fear or belief that the threat of harm would be followed; and (3) a reasonable belief that the commission of the crime is the only way to avoid the harm.⁶⁰ The duress defense excuses individuals of criminal responsibility if they were forced to choose the lesser of two evils, i.e., committing a criminal offense to avoid the threat of serious harm.⁶¹ Similarly, trafficking victims may commit crimes to avoid the serious consequences threatened by their traffickers.⁶² Trafficking victims may fear their trafficker's threats of harm because they have seen their trafficker harm other victims who have disobeyed.⁶³ Finally, victims may reasonably follow demands to engage in criminal activity in order to avoid further harm.

Criminal laws also limit the responsibility of juvenile defendants. Juvenile conviction records are sometimes sealed when an individual reaches a certain age in order to encourage rehabilitation by erasing the criminal label placed on a youthful *352 offender.⁶⁴ This recognition that some records of criminal acts should be destroyed to lessen the social stigma placed on the offenders is also relevant in cases of trafficking victims. Destroying victims' criminal conviction histories encourages rehabilitation and gives victims the courage to seek opportunities that were unavailable to them as a consequence of their criminal record.⁶⁵

D. Federal Anti-Trafficking Efforts

Federal anti-trafficking efforts have sought to end human trafficking both domestically and internationally, and such efforts have encouraged an increase in the protection of victims. In 2000, the U.S. acknowledged human trafficking as a form of modern-day slavery by enacting the TVPA, focusing on combating the international occurrence of trafficking in persons and protecting trafficking

victims.⁶⁶ Prior to this act, victims had little, if any, support in their post-trafficking recovery.⁶⁷ The passage of the TVPA gave relief to victims of a “severe form of trafficking” by qualifying aliens and nonimmigrants for benefits and services under federal and state programs.⁶⁸

The Act defines sex trafficking as a “severe form of trafficking” where “a commercial sex act is induced by force, fraud, or coercion, or [where] the person induced to perform such act has not attained 18 years of age.”⁶⁹ Furthermore, the TVPA encourages victims to cooperate in the prosecution of their trafficker(s) by granting “T *353 Visa” nonimmigrant status to foreign-born victims who assist in the federal investigation or prosecution of human trafficking acts.⁷⁰

In an effort to increase federally-granted relief to trafficking victims, Congress first amended the TVPA in 2003.⁷¹ Most notably this amendment gave victims of human trafficking standing to bring a tort action against their traffickers for punitive damages.⁷² Two years later, Congress sought to turn the focus of anti-trafficking legislation to combat domestic trafficking, and thus enacted the Trafficking Victims Protection Reauthorization Act of 2005.⁷³ In 2008, Congress began holding those who knowingly traffic a minor strictly liable under federal criminal law.⁷⁴

Despite the United States' victim-centered approach to confronting human trafficking and aiding victims, the majority of victim relief efforts must fall to the states that are on the “front line.”⁷⁵ Ironically, “we have created a legal dichotomy in America in which the Federal Government views prostituted children as victims, yet most states treat them as criminals.”⁷⁶ Because victims of sex trafficking are most often arrested and convicted of state crimes, such as prostitution or disorderly conduct, the states must prevent the prosecution of those who were coerced into criminal activity.⁷⁷

However, this objective is often challenging to implement.⁷⁸ In part, law enforcement frequently fails to recognize human *354trafficking.⁷⁹ This failure occurs because trafficking can involve traveling across multiple jurisdictions, and because it is “counterintuitive to the criminal justice system” to identify a perpetrator of a criminal act as a victim of crime.⁸⁰ Compounded with the reality that trafficking victims are often afraid to expose their situation, or have been threatened by violence from their traffickers if they seek help,⁸¹ victims are often incorrectly identified as criminals.⁸² This label directly conflicts with the goal of the TVPA, which mandates that “[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked.”⁸³ With inadequacies in federal law, some states have taken action to support victims in their post-trafficking recovery.

E. State Laws Available to Trafficking Victims Who Commit Crimes

Some states have responded to the problem of prosecuting trafficking victims by allowing individuals to raise their status as a sex trafficking victim as an affirmative defense to a criminal charge.⁸⁴ This defense allows the defendant to “defeat the

prosecution's claim, even if all the allegations in the complaint are true.”⁸⁵ Thus, using an affirmative defense allows a victim to avoid a conviction, even though a record of the victim's arrest may still exist.

While affirmative defense statutes recognize that victims should not be held criminally responsible for crimes they committed under the coercion of a trafficker, these statutes are flawed and the majority apply only to prostitution-related offenses.⁸⁶ Furthermore, because many victims of sex trafficking do not disclose their status until a considerable time after they are arrested, charged, or prosecuted, an affirmative defense is not always helpful in preventing their conviction.⁸⁷

***355** In response to the inadequacies of affirmative defense statutes, approximately sixteen states have enacted vacating convictions laws.⁸⁸ These laws allow a victim to vacate a prior criminal conviction upon proving he or she was a victim of sex trafficking at the time of the crime. Still, approximately thirty-four states do not offer sex trafficking victims such post-conviction relief. A model vacating convictions law would ensure that all sex trafficking victims have a method to vacate a conviction for a crime they committed as a trafficking victim.

II. POST-TRAFFICKING VICTIM SUPPORT: THE NEED FOR A MODEL VACATING CONVICTIONS LAW

This Note began with a hypothetical example based on the facts from *People v. L.G.*⁸⁹ In *L.G.*, the victim-defendant did not come forward about her sex trafficking experience until thirteen years after she was first convicted of prostitution and nine years after she had escaped from her trafficking situation.⁹⁰ At the time of her two arrests, L.G. was under the control of her pimp.⁹¹ While in police custody, L.G. did not inform the police of her situation, and the police did not identify her as a sex trafficking victim.⁹² In a state without a vacating convictions law, L.G.'s criminal record would burden her for the rest of her life. A post-conviction remedy is necessary to ensure “trafficked persons [do] not suffer ongoing punishment for acts they committed unwillingly under coercion.”⁹³

As previously mentioned, there are many psychological and social factors that may lead victims like L.G. to remain in a trafficking situation, such as psychological paralysis or the feeling of ***356** hopelessness.⁹⁴ For others, there may be no way to escape alive. Regardless of the reason victims remain in a trafficking situation, they deserve the relief that a vacating convictions law provides. When victims are coerced to commit criminal acts by their traffickers, and they are arrested and prosecuted for such crimes, the criminal justice system has failed.⁹⁵

Even if L.G.'s state had had an affirmative defense statute at the time of her arrests, that statute would not have prevented her convictions because law enforcement did not identify her as a victim and she did not voluntarily expose her trafficking situation in time to raise this defense.⁹⁶ Consequently, she was prosecuted and convicted as a criminal rather than treated as a victim.

Thus, although an affirmative defense provides protection against conviction to individuals because of their status as a victim, these statutes will ultimately fail to protect trafficking victims who are afraid to tell prosecutors that they are victims. Once these victims are convicted of a crime, their only remedy is a post-conviction law that permits their prior convictions to be vacated.

A. A Model Vacating Convictions Law Will Provide the Strongest Protection to Victims

When victims escape sex trafficking, they must reenter society, typically with limited resources.⁹⁷ For victims who were convicted of crimes as a consequence of their trafficking situation, their criminal record frequently prevents them from obtaining housing, employment, and other opportunities. The TVPA grants some protection to victims, such as the “T Visa” which temporarily allows alien victims to remain in the United States in exchange for cooperation in the prosecution of their trafficker.⁹⁸

These victims who obtained a criminal record as a result of their trafficking situation can nonetheless be denied employment or housing opportunities during their stay in the U.S., so their “T-Visa” is of little use to them. Accordingly, the goal of a vacating convictions law is to provide equal protection to all sex trafficking victims by vacating convictions for crimes that the victim was forced ***357** to commit while being trafficked. This purpose is founded on the belief that these victims should not be further victimized by their criminal history during their recovery.

A model vacating convictions law would allow victims to avoid the consequences of a criminal record when they reenter society. Similar to the duress defense and the expungement of juvenile conviction records, a vacating convictions law acknowledges that certain individuals are less culpable for their conduct and are deserving of a clear criminal record to promote rehabilitation.⁹⁹ In this spirit, a vacating convictions law requires certain elements to provide the best possible relief to victims who have obtained a criminal record as a result of their trafficking situation.¹⁰⁰

An effective law would (1) allow a victim to bring a motion to vacate a prior conviction at any time; (2) vacate all nonviolent offenses committed as a result of the trafficking situation; (3) permit a victim to use any type of evidence to show he or she was a victim at the time the crime was committed; (4) require the court to vacate a victim's conviction upon finding the victim's crime was committed because of sex trafficking; and (5) allow the court to take additional action in furtherance of the policy supporting a vacating convictions law.

B. Victims Should be Able to Bring the Motion at Any Time

Victims of sex trafficking often wait many years before attempting to vacate the criminal history they acquired while they were a victim.¹⁰¹ For example, in *People v. L.G.*, the victim-defendant did not come forward to explain her trafficking situation until nine years after she had escaped from trafficking.¹⁰² It was at that point in her

life that her criminal history was hindering her employment, schooling, and even her ability to apply for guardianship *358 of her nephew.¹⁰³ Similarly, in *People v. G.M.*, the victim-defendant was not affected by her trafficking-related conviction for almost ten years, at which point her employer conducted a background check and discovered her criminal record.¹⁰⁴ After three years of contesting her employer's decision to terminate her, G.M. brought a motion to vacate her prior convictions so others would not discriminate against her in the future.¹⁰⁵ Both of these cases are examples of the length of time it can take victims to expose their trafficking situation and seek post-conviction relief. Moreover, psychological effects may contribute to the length of time it takes a victim to seek post-conviction relief.¹⁰⁶

Unfortunately, eight states limit the time in which a victim of sex trafficking may bring a motion to vacate.¹⁰⁷ Hawaii, for example, requires a victim to file a motion to vacate "within six years after the date the person ceases to be a victim ... subject to reasonable concerns."¹⁰⁸ However, as shown in *L.G.* and *G.M.*, some victims may not experience the consequences of their criminal record until many years after their convictions.¹⁰⁹ As such, they may not pursue a motion to vacate until it is too late to file under their state law. Furthermore, while Hawaii's provision allows a court to use its discretion in determining whether the motion is timely, it actually creates uncertainty for victims. Had L.G.'s motion been brought in Hawaii, it is unclear whether she would have been ineligible to have her convictions vacated due to the length of time between her convictions and her filing of a motion to vacate these convictions.¹¹⁰

Arbitrary restrictions on the timeliness of a motion to vacate run afoul of the purpose of a vacating convictions law. These laws seek to forgive victims of crimes they committed while under the force, or threat of force, from their trafficker in recognition that these *359 individuals were victims, not criminals.¹¹¹ Limiting the time in which a victim may vacate prior convictions does not further this policy. Likewise, a statute of limitations policy argument does not apply. A statute of limitations protects the person against whom a charge may be brought in order to promote the timeliness of legal claims and to prevent abuse of the legal system. This policy does not function in the same way with trafficking victims. Increasing the time a trafficking victim may bring a motion does not expose any individual to a prolonged threat of legal charges or promote abuse of the court system. Allowing a victim to bring a motion to vacate at any time does not harm society because courts can still deny frivolous motions, and because the benefits of a vacating convictions law outweigh any increase in the use of court resources.¹¹² Thus, a model vacating convictions law would operate regardless of the time that has passed since a victim was convicted or since a victim escaped a trafficking situation.

C. All Convictions for Nonviolent Offenses Should be Eligible for Vacation

An effective vacating convictions law would vacate all convictions for nonviolent offenses, rather than simply convictions for prostitution.¹¹³ Ten states currently

limit their vacating convictions laws to prostitution offenses only.¹¹⁴ Nonetheless, victims of sex trafficking are frequently arrested for crimes that are not labeled as “prostitution,” or “prostitution-related offenses,” such as crimes against nature, loitering, vagrancy, disorderly conduct, drug ***360** possession, and resisting arrest.¹¹⁵ Limiting a vacating convictions law to prostitution offenses fails to remove the criminal history from a victim's past that the policy rationale demands. Additionally, because some victims plead guilty to lower level crimes that are not prostitution-related, a model law should have the same effect on non-prostitution offenses.¹¹⁶ Likewise, the law should apply equally to an arrest because it can remain on a victim's criminal record and have the same future consequences as a conviction.¹¹⁷

To provide greater relief to trafficking victims, a model vacating convictions law would increase eligible offenses by excluding only offenses that are deemed violent. A violent offense is a crime against a person, including the intentional “use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that ... by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”¹¹⁸ Convictions for all nonviolent offenses should be vacated if the crimes were committed as a result of trafficking because the failure to destroy a victim's entire arrest and conviction record for such offenses prevents them from moving forward in their life.

Distinguishing between violent and nonviolent offenses provides greater relief to victims because it increases the types of convictions that are eligible for vacation. Furthermore, this distinction would benefit society by deterring violent criminal acts and by continuing to hold violent offenders criminally responsible. In *People v. Gonzalez*, the victim-defendant brought a motion to vacate the eighty-seven convictions she obtained during the three years she was a victim of sex trafficking because they created an obstacle to changing her immigration status.¹¹⁹ While the court found that Gonzalez's participation in the prostitution-related offenses, which accounted for all but one of her prior convictions, was caused by her trafficking situation, the court denied her request to vacate the only non-prostitution conviction for resisting arrest because it was not ***361** “prostitution-related.”¹²⁰ The court did not discuss the circumstances of Gonzalez's resisting arrest conviction.¹²¹

However, because traffickers often use fear or threats of harm to force cooperation, it is likely that a victim may resist arrest for fear of retaliation or punishment from her trafficker, regardless of whether the trafficker has directly coerced such resistance. By refusing to vacate this trafficking-related conviction, the court effectively denied Gonzalez the benefit of a clean criminal record that a vacating convictions law seeks to provide. Gonzalez's remaining conviction for resisting

arrest may continually prevent her from changing her immigration status, or obtaining housing, employment, or loans.¹²²

An effective vacating convictions law would require that any nonviolent crime committed as a result of a sex trafficking situation, either directly or indirectly coerced by a trafficker, be vacated in order to promote the victim's rehabilitation. Therefore, to achieve its purpose, a vacating convictions law must include convictions for resisting arrest if the crime is nonviolent. Critics may express concern that victims can seek vacation from an unlimited number of crimes under a broad vacating convictions law. However, distinguishing between violent and nonviolent offenses furthers the interests of recovering trafficking victims while still upholding the interests of society in deterring violent behavior. An effective vacating convictions law would relieve victims from more than just prostitution offenses because victims of sex trafficking obtain convictions for more than just prostitution-related crimes.

This policy, of course, is not meant to give victims complete freedom to commit violent offenses with the expectation that they later could have their convictions vacated “merely because [they] happened to be a victim of trafficking” at the time of the crime.¹²³ Accordingly, a serious crime such as murder is not a crime society is willing to, or should, forgive through vacation of a prior conviction.¹²⁴ Under a model law, murder would, of course, be considered a “violent” offense and therefore it would not be eligible to be vacated.

Increasing the breadth of vacating convictions laws to all nonviolent offenses does not undermine the punitive nature of the *362 criminal justice system. Victims who bring a motion to vacate their convictions would have likely already served their punishment for the crime. In *L.G.*, the victim pled guilty to her trafficking-related charges and received three years of probation.¹²⁵ Although she ultimately violated the terms of her probation, L.G. served ten days of jail time for the violation.¹²⁶ Furthermore, L.G. had already completed her court-imposed sentence when she brought the motion to vacate her convictions many years later.¹²⁷ In a circumstance such as this, failing to vacate a victim's prior criminal record is unjust when the victim has already completed the punishment and committed the crimes under coercion. The coercive nature of crimes committed as a result of sex trafficking may indicate that recovering victims will not commit further crimes once they escape a trafficking situation. Thus, society is adequately protected from future criminal acts even under a vacating convictions law that destroys all nonviolent conviction records.

D. No Official Proof of Prior Victimization or Rehabilitation Should Be Required

An effective vacating convictions law would require a low burden of proof requiring victims to show they were victims when the crime or arrest occurred.¹²⁸ In many cases, prior victimization may be difficult to prove. Under section 440.10(1)(i) of the New York Penal Code, official documentation of trafficking will create a

presumption that any crime committed during the time the victim was trafficked was committed as a result of sex trafficking, although such documentation is not required to bring a successful motion.¹²⁹ Official documentation includes letters from the Department of Health and Human Services certifying the individual is a trafficking victim, an approved “T visa” giving immigration status to a victim of human trafficking, or other documentation from federal law enforcement.¹³⁰ However, “survivors of trafficking who are citizens of the United States do not need special access to public benefits or immigrant visas, and [therefore they] are not eligible for any of these *363 documents.”¹³¹ Moreover, for the many survivors who never reported their victim status to the police, such documentation may not exist.¹³²

Lack of official evidence of one's prior victimization may be a fatal flaw in a victim's motion to vacate. To overcome this challenge, victims who do not have official documentation should be able to support their motion with any other evidence, such as “a sworn affidavit, letters from service providers, friends, or employers, or police reports,” sufficient to show past victimization.¹³³ A reviewing court is certainly capable of distinguishing between a motion that is supported by little, but credible, evidence, and a motion that is frivolously brought. Thus, allowing a low burden of proof will not result in a court granting a motion that lacks credibility. Additionally, a trafficking victim should not need to prove rehabilitation in order to successfully vacate a prior conviction. A law mandating a victim to prove rehabilitation “shifts the blame from the trafficker to the victim, which is counter to the spirit of [these] laws.”¹³⁴

E. The Court Should Be Required to Grant a Motion to Vacate Upon a Finding of Prior Victimization

Vacating convictions laws should require the court to grant a motion to vacate a prior conviction upon a showing that the crimes were committed as a result of sex trafficking.¹³⁵ A model law should express this requirement using the statutory language of “must vacate” or “shall vacate,” rather than “may vacate.” Currently, only three states explicitly require that the court “shall” grant a motion to vacate upon a finding that the offense was committed as a result of sex trafficking.¹³⁶

In order for a vacating convictions law to promote its underlying policy, the law must promise uniform relief to victims who have committed prior crimes under force or coercion. State laws that do not require the court to vacate create uncertainty for victims because *364 there is no guarantee their motion will be granted. A model law provision requiring a court to grant a motion to vacate will not only promote uniformity across states, but it will also prevent a court from using discretion to provide the least possible relief to trafficking victims.

The benefits of granting relief to trafficking victims outweigh the possible risk of frivolous motions brought by those who falsely claim to have been a victim.

In *People v. Gonzalez*, the prosecution expressed concern of “opening the flood

gates” by granting motions of those who claim they were a victim of sex trafficking but lack corroborating evidence.¹³⁷ The court responded that “even if the flood gates open by granting [the defendant's] motion, the courts can easily deny frivolous motions. The defendant's ability to continue putting her life together after [her] horrendous ordeal ... heavily outweighs any increased motion practice that may result hereafter.”¹³⁸ Moreover, a reviewing court has the capacity to review motions and determine whether they are credible. Thus, the opportunity for a trafficking victim to move forward in his or her life without a criminal record should not be hampered by the possibility that a frivolous motion will be brought.

F. The Court Should Be Allowed to Take Additional Action

A model vacating convictions law would allow the court to take additional action that is reasonable and necessary in the circumstances to fulfill the spirit of the law.¹³⁹ This spirit aims to correct the wrong that occurred when a victim was convicted of a crime while under the coercion of a trafficker. Currently, only Illinois, Nevada, and New York allow the vacating court to take such additional actions.¹⁴⁰ While each case is unique, in some situations this provision may allow the court to provide a victim with post-conviction relief from crimes that are not eligible for vacation under the state statute.¹⁴¹ In extraordinary cases, fulfilling the spirit of these laws may include***365** removing a violent offense from a victim's criminal record, even where violent offenses are not listed as eligible under the state's law. Case law supports a court's broad discretion in interpreting an “ameliorative statute,” or one that is intended to correct a previous wrong or harm.¹⁴² Furthermore, an additional action provision would allow a court to take action in furtherance of the statute's purpose, despite opposition from the prosecuting authority.¹⁴³ In some circumstances, a court may be better prepared to offer additional relief to victims to ensure that the policy of a vacating convictions law is fulfilled, and thus discretionary language is necessary.

G. Other Shortcomings of Current Vacating Convictions Laws

While the foregoing elements are necessary to create a strong vacating convictions law, current laws have other undesirable provisions that limit the protections offered to victims. Florida's law, for example, does not require the record of a vacated conviction to be destroyed.¹⁴⁴ This opposes the policy behind a vacating convictions law, because the purpose of allowing victims to vacate their prior convictions is to give them the opportunity to move forward in their lives. Even if a conviction is vacated, keeping record of the conviction can have negative impacts on a victim, such as appearing on a background check for employment.¹⁴⁵

A model vacating convictions law would require the destruction of a victim's history of nonviolent crimes committed while a trafficking victim, which would allow a victim to proceed with his or her life as if the crimes had not happened. A victim could then apply for housing or employment without discrimination and without the embarrassment of having to explain his or her criminal history.

Additionally, Washington's statute denies a victim's motion to vacate where the applicant has pending criminal charges, or where the applicant has been convicted of other crimes since the date of the trafficking-related conviction.¹⁴⁶ This provision is inconsistent with the policy behind a vacating convictions law, which aims to relieve victims of the criminal history they obtained under the coercion of a trafficking situation.

***366** Trafficking victims who commit crimes during their trafficking situation should not be further victimized by the record of their conviction, regardless of what has occurred in their life since the date of conviction. There are currently no decisions based on this provision of Washington's law, so it is unclear how the Washington courts will apply this provision. However, vacating a prior conviction dependent upon the lack of prior or subsequent criminal acts is inconsistent with the policy interests of vacating convictions laws. Vacating convictions laws aim to relieve a victim of crimes they were forced to commit, which makes other criminal acts committed by the individual irrelevant to the acts committed as a trafficking victim.

A model vacating convictions law based on the aforementioned elements will ensure that a victim is properly treated as a victim, rather than as a criminal.¹⁴⁷ By properly treating a victim as a victim, the TVPA's goal of a victim-centered approach to combat human trafficking will be met.¹⁴⁸ In addition, society will benefit by discouraging violent behavior by preventing vacation of violent offenses, and by encouraging trafficking victims to reenter their community as productive citizens.

III. PROPOSED MODEL VACATING CONVICTIONS LAW

A model vacating convictions law is necessary to support victims and encourage them in their post-trafficking recovery. In light of the flaws in existing state laws discussed above, this Note proposes a model vacating convictions law, which will provide victims of sex trafficking with effective protection without negatively impacting society.

A. Model Law

(1) "A victim of human trafficking is not criminally liable for any commercial sex act or other [nonviolent] criminal acts committed as a direct result of, or incident to, being a victim of human trafficking."¹⁴⁹

(2) A victim of human trafficking may bring a motion to vacate a prior conviction or arrest committed "as a direct result of, or incident to, being a victim of human trafficking." The motion "may ***367** be filed at any time following" a guilty plea, the entry of a verdict, or a finding of guilty.¹⁵⁰

(3) Convictions or arrests for violent offenses are disqualified for vacation under this statute, unless addressed by the court under subsection (7). A violent offense is a crime against a person, including the intentional "use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that ... by its nature, involves a substantial risk that physical force

against the person or property of another may be used in the course of committing the offense.”¹⁵¹ Convictions or arrests for nonviolent offenses are eligible for vacation subject to subdivision

(4). “Violent offenses” include, but are not limited to:

(a) Murder, including felony murder;

(b) Manslaughter;

(c) Vehicular assault or homicide;

(d) Kidnapping;

(e) Arson;

(f) Assault;

(g) Battery;

(h) Robbery; and

(i) Any offense that includes the attempted completion of the abovementioned offenses.¹⁵²

(4) The court must “vacate a [nonviolent] conviction pursuant to this section if it finds, by a preponderance of the evidence, that the person was a victim of human trafficking,” as defined under state law or under subsection (14) of [22 U.S.C. § 7102](#), “at the time of the offense, and that the violation was a result of the person having been a victim of human trafficking.”¹⁵³ The court shall vacate eligible convictions under this section regardless of:

***368** (a) Whether the applicant has other prior or subsequent convictions or pending charges for non-trafficking offenses;¹⁵⁴ and

(b) The amount of time that has lapsed from the date the offense was committed.¹⁵⁵

(5) “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” is not required to grant a motion under this section.¹⁵⁶ Such documentation, however, “will create a presumption the person’s participation in the offense was a result of being a victim.”¹⁵⁷ “[T]he court may consider such other evidence as it deems of sufficient credibility ... in determining whether the defendant is a trafficking victim.”¹⁵⁸

(6) A criminal record which is vacated under this section shall be destroyed and “shall not be disclosed to any person or entity,”¹⁵⁹ for any purpose, “including, but not limited to, a criminal records check.”¹⁶⁰ The record “shall be considered not to have occurred.”¹⁶¹ “The applicant may, and the court shall, reply that no record exists with respect to the applicant upon inquiry into the matter.”¹⁶² (7) “The court may take such additional action as is appropriate in the circumstances,”¹⁶³ to further the purpose of this law.

****369 B. The Proposed Model Law Provides More Effective Protections Than Current Vacating Convictions Laws***

The language of this model law overcomes the shortcomings of current vacating convictions laws. First, it directly states the policy reasoning behind this law: an individual should not be criminally liable for nonviolent crimes he or she committed

as a victim of human trafficking.¹⁶⁴ Stating this policy also ensures the court will use its discretion in section (7) to take additional action when it is necessary to fulfill this purpose.

Second, this model law allows the victim to bring the motion to vacate at any time.¹⁶⁵ The length of time it takes victims to experience the consequences of their criminal record can vary; thus, this provision acknowledges that coerced criminal activity should be vacated regardless of the time that has passed since the conviction.¹⁶⁶

Third, this model law distinguishes between violent and nonviolent offenses, and only mandates the court to vacate convictions for nonviolent crimes.¹⁶⁷ Disqualifying violent offenses is consistent with public policy against allowing an individual who has caused severe injury or harm to another to escape the repercussions of a violent act. Furthermore, this distinction is consistent with the policy behind a vacating convictions law, which aims to relieve victims of more than prostitution convictions where the crimes were committed while they were trafficked.¹⁶⁸

Fourth, this model law limits the courts' discretion in granting a victim's motion to ensure the furtherance of the policy behind vacating convictions laws.¹⁶⁹ This provision ensures uniformity in its application, in addition to providing certainty to a moving victim by requiring the court to vacate upon finding the victim committed the crime as a result of sex trafficking.¹⁷⁰ Victims are further supported by requiring the court to grant the motion regardless of the elements set forth in (4)(a-i). The policy behind a model vacating convictions law is not furthered by restricting a victim's eligibility for vacation based on extrinsic factors, such as criminal history independent from ***370** the crimes committed while a trafficking victim. To further this policy, this model law does not limit a victim's eligibility based on any other acts committed, so long as the convictions in question are related to the victim's trafficking situation.

Fifth, this law does not require the victim to prove rehabilitation or use official documentation to prove their prior victimization.¹⁷¹ This provides strong protection to victims who may not have official evidence of their trafficking situation. So long as a court is able to conclude that the victim committed the convicted crime while the victim was trafficked, the court should be allowed to grant the motion.

Sixth, this is an effective law because it requires the court to destroy the victim's criminal record and it prohibits the record from being used in any manner in the future.¹⁷² Destruction is the strongest possible remedy available to a victim, and allows the victim to move forward in his or her life regardless of any criminal activity that occurred while in a trafficking situation.¹⁷³

Finally, this law allows the court to take additional action beyond the language of the statute.¹⁷⁴ While this law is written in response to the shortcomings of current laws and is based on suggestions from victim advocates, each case may require a

court to address facts that are unique to a particular situation.¹⁷⁵ Because of the uniqueness of each case, it is impossible to determine every situation for which a court may use this additional discretion; however, giving the court the discretion to make decisions beyond what is enumerated in the law will more effectively ensure the law's purpose is satisfied.¹⁷⁶ Therefore, this proposed model law addresses the shortcomings of current vacating convictions laws while furthering the goal of the TVPA.¹⁷⁷

***371 CONCLUSION**

Victims who were convicted of crimes as a result of their trafficking situation are further victimized by their criminal record when they search for housing, employment, education, or when they seek to change their immigration status. These victims need support in their post-trafficking recovery through a vacating convictions law. Vacating prior nonviolent convictions where the crimes were committed as a result of sex trafficking allows victims to reenter society without discrimination based on their past, and recognizes that society is not benefitted by continuing to label victims as criminals when they committed crimes while being trafficked.

The sixteen states that currently have vacating convictions laws do not provide victims with sufficient protections or relieve them of all nonviolent crimes they were forced to commit in a trafficking situation. While further exploration into the types of convictions eligible for vacation under vacating convictions laws is warranted, the model law proposed in this Note addresses many of the shortcomings in current laws. Failing to support victims in their post-trafficking recovery through a vacating convictions law incorrectly labels victims as criminals and does not encourage victims to reenter their communities as productive members of society.

Footnotes

[a1](#)

J.D. Candidate, Thomas Jefferson School of Law, 2015; B.A., Psychology, University of California, Santa Cruz, 2011. I would like to thank to Professor Julie Greenberg for her invaluable guidance and critique during my writing process. Thank you to my editors, Tom Wiseman, Kathy Aranda, Julie Flickner, and Ranessa Santos, as well as Chief Notes Editor Cristina Kinsella, for their meaningful contributions and dedication to my work. A special thank you to my family and amazing husband Chris for their continuing love and encouragement throughout all my endeavors. And finally, thank you to those who dedicate their life to helping victims of sex crimes.

[1](#)

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Barack Obama from a September 2012 speech “reaffirming the commitment of the United States to fight modern slavery, known as trafficking in persons”).

2

Hypothetical is based largely on facts from [People v. L.G., 972 N.Y.S.2d 418, 420 \(2013\)](#).

3

Id.

4

Id.

5

Id. at 421.

6

Id.

7

Id.

8

Id.

9

Id.

10

Id. at 422.

11

Id. at 423.

12

Vacating Convictions, POLARIS PROJECT, <http://www.polarisproject.org/whatwedo/policy-advocacy/assisting-victims/vacating-convictions> (last visited Mar. 23, 2014) (“As a result [of trafficking-related convictions], these victims are hindered from getting jobs, safe housing, immigration visas, loans, and continuing education On many job, loan, and educational applications, a person is required to disclose any prior convictions. Having these convictions removed from a victim's record would ensure that the victim does not miss out on opportunities as a result of having been victimized.”).

13

Id. See [N.Y. CRIM. PROC. LAW § 440.10\(1\)\(i\)](#) (Consol. 2013).

14

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15

[FLA. STAT. § 943.0583 \(2013\)](#); [HAW. REV. STAT. § 712-1209.6 \(2013\)](#); 725 ILL. COMP. STAT. 5 / 116-2.1 (2013); [MD. CODE ANN., CRIM. PROC. § 8-302 \(LexisNexis](#)

[2013](#)); [MISS. CODE ANN. § 97-3-54.6\(5\) \(2013\)](#); [MONT. CODE ANN. § 46-18-608 \(2013\)](#); [NEV. REV. STAT. § 176.515\(5\) \(2013\)](#); [N.J. STAT. ANN. § 2C:44-1.1 \(West 2013\)](#); [N.Y. CRIM. PROC. LAW § 440.10\(1\)\(i\) \(Consol. 2013\)](#); [N.C. GEN. STAT. § 15A-1416.1 \(2013\)](#); [OHIO REV. CODE ANN. § 2953.38 \(LexisNexis 2013\)](#); [OKLA. STAT. tit. 22, § 19\(c\) \(2013\)](#); [VT. STAT. ANN. tit. 13, § 2658 \(2013\)](#); [WASH. REV. CODE § 9.96.060 \(2013\)](#); [W. VA. CODE § 61-2-17\(f\) \(2013\)](#); [WYO. STAT. ANN. § 6-2-708 \(2013\)](#); Melissa Broudo & Sienna Baskin, *Vacating Criminal Convictions for Trafficked Persons*, SEX WORKERS PROJECT (Urban Justice Center, New York, N.Y.), Aug. 2012, <http://sexworkersproject.org/downloads/2012/20120422-memo-vacatingconvictions.pdf> (defining “vacating convictions law”).

[16](#)

See Allison L. Cross, Comment, *Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, [44 MCGEORGE L. REV. 395, 397 \(2013\)](#) (“[T]he number of trafficking victims charged and prosecuted for crimes indicates a systematic failure within the criminal justice system to recognize human trafficking and its players”).

[17](#)

Allison Navarro, *Human Trafficking: A Hot-Button Topic*, UNASD UPDATE (UNITED NATIONS ASS'N OF THE U.S. AND THE BUS. COUNS. OF THE UNITED NATIONS, San Diego, C.A.), Summer 2009, at 9, available at http://www.superfooddrive.org/wp-content/uploads/2013/04/6_2009_UNASD.pdf.

[18](#)

Michael S. Schmidt, *F.B.I. Charges 159 Men with Forcing Teenage Girls into Prostitution*, N.Y. TIMES, July 30, 2013, at A11.

[19](#)

Id.

[20](#)

See Symposium, *Sex For Sale: The Commercial Sexual Exploitation of Women and Girls: A Survivor Service Provider's Perspective*, [18 YALE J.L. & FEMINISM 181, 187-88 \(2006\)](#).

[21](#)

Approval Percentages of Initiatives Voted into Law, CAL. SEC'Y OF STATE ELECTIONS DIVISION, <http://www.sos.ca.gov/elections/ballot-measures/pdf/approval-percentages-initiatives.pdf>; see generally DEBRA BOWEN, CAL. SEC'Y OF STATE ELECTIONS DIVISION, *Cal. General Election Voter Guide: Proposition 35, 42-47*, <http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf>.

[22](#)

Kamala D. Harris, *Human Trafficking*, STATE OF CAL. DEP'T OF JUST., OFF. OF THE ATT'Y GEN., <http://oag.ca.gov/human-trafficking> (last visited Mar. 23, 2014).

[23](#)

U.S. DEP'T OF STATE, TRAFFICKING IN PERSON REP. 2012, 8-9 (2012), <http://www.state.gov/documents/organization/192587.pdf>.

[24](#)

U.S. DEP'T OF STATE, TRAFFICKING IN PERSON REP. 2013, *supra* note 1, at 7.

[25](#)

Myths and Misconceptions, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview/myths-and-misconceptions> (last visited Mar. 23, 2014).

[26](#)

Human Trafficking, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview> (last visited Mar. 23, 2014); *see also In our own backyard: Child Prostitution and Sex Trafficking in the United States: Hearing before the Subcomm. on H.R. and the Law, 111th Cong. 74, 2 (2010)* (statement of Hon. Richard J. Durbin, U.S. Senator, IL) (“Americans tend to think of forced prostitution as the plight of women from other countries locked up in brothels Equally scandalous is the violence involving America's teenage girls.”).

[27](#)

Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, [12 WM. & MARY J. WOMEN & L. 403, 407 \(2006\)](#).

[28](#)

U.S. DEP'T OF STATE, TRAFFICKING IN PERSON REP. 2012, *supra* note 23, at 8.

[29](#)

[22 U.S.C. § 7102\(10\) \(2012\)](#).

[30](#)

[22 U.S.C. § 7102\(4\)](#).

[31](#)

Fact Sheet: Sex Trafficking, OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T. OF HEALTH AND HUM. SERV. (Aug. 2, 2012), <http://www.acf.hhs.gov/programs/orr/resource/fact-sheet-sex-trafficking-english> (last visited Mar. 23, 2014).

[32](#)

[22 U.S.C. § 7101 \(2012\)](#).

[33](#)

Human Trafficking, *supra* note 26; *see infra* text accompanying notes 79-82 for a discussion on the difficulty in identifying victims.

[34](#)

Myths and Misconceptions, *supra* note 25. (“[E]ach of us needs to have a clear ‘lens’ that helps us understand what human trafficking is. When this lens is clouded or biased by certain persistent misconceptions about the definition of trafficking, our ability to respond to the crime is reduced.”).

[35](#)

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[36](#)

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[37](#)

Howard N. Snyder, *Arrests in the United States, 1980-2009*, U.S. DEP'T OF JUSTICE (Sept. 2, 2011), <http://www.bjs.gov/content/pub/pdf/aus8009.pdf>.

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[40](#)

Serita, *supra* note 39, at 641 (defining “track” as a “term for streets known for high prostitution activity outdoors”).

[41](#)

Id.

[42](#)

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[43](#)

Id.; see also Rita Chi-Ying Chung, *Human Trafficking for Sexual Exploitation: Psychological & Cultural Impacts*, 2 GEO. MASON GLOBAL STUDIES REV. 3 (2006).

[44](#)

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[45](#)

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[46](#)

Symposium, *Sex For Sale*, *supra* note 20, at 186.

[47](#)

MaryAnne McReynolds, *The Trafficking Victims Protection Act: Has the Legislation Fallen Short of its Goals?*, 15 GEO. WASH. J. PUB. POL'Y. & PUB. ADMIN. 33, 35-36 (2008).

[48](#)

Symposium, *Sex For Sale*, *supra* note 20, at 186 (citing Mimi H. Silbert & Ayala M. Pines, *Victimization of Street Prostitution*, 7 VICTIMOLOGY: INT'L J. 122, 129-32 (1982)).

[49](#)

See id.

[50](#)

See Drasin, *supra* note 38, at 507.

[51](#)

Vacating Convictions, *supra* note 12.

[52](#)

Victim Assistance, POLARIS PROJECT, [http:// www.polarisproject.org/what-wedo/policy-advocacy/assisting-victims/victim-assistance](http://www.polarisproject.org/what-wedo/policy-advocacy/assisting-victims/victim-assistance) (last visited Mar. 23, 2014).

[53](#)

Vacating Convictions, *supra* note 12.

[54](#)

[State v. Kelly, 97 N.J. 178, 187 \(1984\).](#)

[55](#)

Id. at 193 (citing Dr. Lenore Walker, *THE BATTERED WOMAN* (1979)).

[56](#)

Id. at 194.

[57](#)

Id. (describing psychological paralysis as a state where the woman becomes incapable of taking action to escape from her situation); *see supra* text accompanying note 48.

[58](#)

[Kelly, 97 N.J. at 195.](#)

[59](#)

Id. at 205.

[60](#)

Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, [56 OHIO ST. L.J. 665, 697-99 \(1995\)](#).

[61](#)

Id. (citing Wayne R. Lafave & Austin W. Scott, Jr., *Criminal Law*, section 5.7(d), at 433 (2d ed. 1986)).

[62](#)

See Broudo & Baskin, *supra* note 15, at 4 (explaining that, while trafficking victims may commit crimes under the coercion of a trafficker, “the defense of duress is too narrow to be effectively used by most trafficking victims,” and thus a model law is needed).

[63](#)

See [L.G., 972 N.Y.S.2d at 421](#) (explaining that the defendant did not leave her trafficker because she had witnessed him beat other victims for disobeying).

[64](#)

T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, [29 U. MICH. J.L. REFORM 885, 890-92 \(1996\)](#).

[65](#)

Vacating Convictions, *supra* note 12.

[66](#)

[22 U.S.C. § 7101 \(2013\)](#).

[67](#)

Rieger, *supra* note 38, at 243-44. (“Prior to the enactment of the TVPA, when government officials discovered a sex trafficking victim, they typically labeled her an illegal alien, perhaps jailed her for prostitution, sent her to a detention center ... and then deported her back to her home country.”).

[68](#)

[22 U.S.C. § 7105\(b\)\(1\)\(A\)](#) (establishing the “T visa,” which grants temporary U.S. residence to those who can show (1) they are a victim of a severe form of trafficking; (2) they are present in the U.S.; (3) they have complied with the human trafficking investigation or prosecution; and (4) they would suffer hardship if they are removed from the country); *see also* [8 U.S.C. § 1101\(a\)\(15\)\(T\)\(i\) \(2013\)](#).

[69](#)

[22 U.S.C. § 7102\(9\)](#) (defining “severe forms of trafficking in persons” also 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.”).

[70](#)

McReynolds, *supra* note 47, at 38. (“Issuance of a T visa allows a trafficking victim to remain in the U.S. for three years, during which time he or she has legal work authorization and access to benefits and services.”).

[71](#)

Trafficking Victims Protection Reauthorization Act of 2003, [Pub. L. No. 108-193, 117 Stat. 2875 \(2003\)](#).

[72](#)

Id.

[73](#)

Trafficking Victims Protection Reauthorization Act of 2005, [Pub. L. No. 109-164, 119 Stat. 3558 \(2006\)](#). (“Trafficking in persons also occurs within the borders of a country, including the United States.”).

[74](#)

[18 U.S.C. § 1591\(a\) \(2012\)](#); see William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 222(b)(5), [Pub. L. No. 110-457, 122 Stat. 5044 \(2008\)](#).

[75](#)

In our own backyard: Child Prostitution and Sex Trafficking in the United States, *supra* note 26, at 3 (statement of Hon. Richard J. Durbin, U.S. Senator, IL).

[76](#)

Id. at 2.

[77](#)

See Cross, *supra* note 16, at 414-22 (discussing the identification of victims, training of law enforcement, and “after-the-fact” relief, such as vacating convictions laws, as a state-level approach to helping victims of trafficking).

[78](#)

See generally Amanda Peters, *Disparate Protections for American Human Trafficking Victims*, [61 CLEV. ST. L. REV. 1, 25-33 \(2013\)](#) (discussing the difficulty in identifying trafficking victims and the mandate of the TVPA that victims are not inappropriately treated as criminals).

[79](#)

Cross, *supra* note 16, at 401.

[80](#)

Id.

[81](#)

Id.

[82](#)

Vacating Convictions, *supra* note 12.

[83](#)

[22 U.S.C. § 7101\(b\)\(19\) \(2012\)](#).

[84](#)

See Cross, *supra* note 16, at 406-07 (including Alabama, Iowa, Minnesota, New Hampshire, New Jersey, Oklahoma, Texas, and Wisconsin).

[85](#)

BLACK'S LAW DICTIONARY 212-13 (4th Pocket ed. 2011) (“Examples of affirmative defenses are ... insanity and self-defense.”).

[86](#)

See Cross, *supra* note 16, at 408.

[87](#)

Id. at 410.

[88](#)

[FLA. STAT. § 943.0583 \(2013\)](#); [HAW. REV. STAT. § 712-1209.6 \(2013\)](#); 725 ILL. COMP. STAT. 5 / 116-2.1 (2013); [MD. CODE ANN., CRIM. PROC. § 8-302 \(LexisNexis 2013\)](#); [MISS. CODE ANN. § 97-3-54.6\(5\) \(2013\)](#); [MONT. CODE ANN. § 46-18-](#)

[608](#) (2013); [NEV. REV. STAT. § 176.515\(5\)](#) (2013); [N.J. STAT. ANN. § 2C:44-1.1](#) (West 2013); [N.Y. CRIM. PROC. LAW § 440.10\(1\)\(i\)](#) (Consol. 2013); [N.C. GEN. STAT. § 15A-1416.1](#) (2013); [OHIO REV. CODE ANN. § 2953.38](#) (LexisNexis 2013); [OKLA. STAT. tit. 22, § 19\(c\)](#) (2013); [VT. STAT. ANN. tit. 13, § 2658](#) (2013); [WASH. REV. CODE § 9.96.060](#) (2013); [W. VA. CODE ANN. § 61-2-17\(f\)](#) (2013); [WYO. STAT. ANN. § 6-2-708](#) (2013).

[89](#)

See *supra* text accompanying notes 2-11.

[90](#)

[People v. L.G., 972 N.Y.S.2d 418, 421-22](#) (2013).

[91](#)

Id. at 421-22.

[92](#)

Id.

[93](#)

Id. at 425.

[94](#)

See *supra* text accompanying notes 42-50.

[95](#)

Cross, *supra* note 16, at 397-98.

[96](#)

See *supra* text accompanying notes 79-82.

[97](#)

Rieger, *supra* note 38, at 253.

[98](#)

McReynolds, *supra* note 47, at 38.

[99](#)

See *supra* text accompanying notes 60-65.

[100](#)

See Broudo & Baskin, *supra* note 15, at 3; 2013 Analysis of State Human Trafficking Laws, *Category 10: Vacating Convictions for Sex Trafficking Victims*, 51, POLARIS PROJECT (August 2013), http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf.

[101](#)

See [People v. L.G., 972 N.Y.S.2d 418, 422](#) (2013) (bringing motion to vacate approximately ten years after most recent trafficking-related conviction); see also [People v. G.M., 922 N.Y.S.2d 761](#) (N.Y. Crim Ct. 2011) (bringing motion to vacate approximately twelve years after most recent trafficking-related conviction).

[102](#)

See *supra* text accompanying note 90.

[103](#)

[L.G., 972 N.Y.S.2d at 422.](#)

[104](#)

[G.M., 922 N.Y.S.2d at 761-63.](#)

[105](#)

Id.

[106](#)

See *supra* text accompanying notes 42-50.

[107](#)

[FLA. STAT. § 943.0583\(4\) \(2013\)](#); [HAW. REV. STAT. § 712-1209.6\(2\)\(c\) \(2013\)](#); [725 ILL. COMP. STAT. 5 / 116-2.1\(1\) \(2013\)](#); [MD. CODE ANN., CRIM. PROC. § 8-302\(b\)\(3\) \(LexisNexis 2013\)](#); [MONT. CODE ANN. § 46-18-608 \(2013\)](#); [NEV. REV. STAT. § 176.515\(5\)\(c\) \(2013\)](#); [N.J. ANN. STAT. § 2C:44-1.1\(b\)\(2\) \(West 2013\)](#); [OKLA. STAT. tit. 22, § 19\(c\) \(2013\)](#).

[108](#)

[HAW. REV. STAT. § 712-1209.6\(2\)\(c\) \(2013\)](#).

[109](#)

[People v. L.G., 972 N.Y.S.2d 418, 421 \(2013\)](#); [G.M., 922 N.Y.S.2d at 761-63.](#)

[110](#)

[L.G., 972 N.Y.S.2d at 422.](#)

[111](#)

Vacating Convictions, supra note 12.

[112](#)

[People v. Gonzalez, 927 N.Y.S.2d 567, 570 \(N.Y. Crim. Ct. 2011\)](#).

[113](#)

Broudo & Baskin, *supra* note 15, at 3 (arguing for an increase in types of eligible offenses without distinguishing between violent and nonviolent offenses). Increasing the type of eligible convictions under a vacating convictions law to all nonviolent offenses is only the first step in improving current laws. Society may want to consider a further increase to include violent convictions. However, vacating violent offenses raises additional issues, including the amount of evidence of past victimization required to vacate a crime such as murder, particularly because society justifiably wants to hold accountable those who have killed another. Such a discussion is beyond the scope of this Note.

[114](#)

[HAW. REV. STAT. § 712-1209.6 \(2013\)](#); [725 ILL. COMP. STAT. 5 / 116-2.1 \(2013\)](#); [MD. CODE ANN., CRIM. PROC. § 8-302 \(LexisNexis 2013\)](#); [MONT. CODE ANN. § 46-18-608 \(2013\)](#); [NEV. REV. STAT. § 176.515\(5\) \(2013\)](#); [N.J. STAT. ANN. § 2C:44-1.1 \(West 2013\)](#); [N.C. GEN. STAT. § 15A-1416.1 \(2013\)](#); [OHIO REV. CODE ANN. § 2953.38 \(LexisNexis 2013\)](#); [OKLA. STAT. tit. 22, § 19\(c\) \(2013\)](#); [W. VA. CODE § 61-2-17\(f\) \(2013\)](#).

[115](#)

Broudo & Baskin, *supra* note 15, at 3.

[116](#)

Id.

[117](#)

Id.

[118](#)

[18 U.S.C. § 16 \(2012\)](#).

[119](#)

[People v. Gonzalez, 927 N.Y.S.2d 567, 569 \(N.Y. Crim. Ct. 2011\)](#).

[120](#)

Id.

[121](#)

Id.

[122](#)

Vacating Convictions, supra note 12.

[123](#)

[People v. L.G., 972 N.Y.S.2d 418, 426 \(2013\)](#).

[124](#)

See Broudo & Baskin, *supra* note 15, at 3.

[125](#)

[L.G., 972 N.Y.S.2d at 422](#).

[126](#)

Id.

[127](#)

Id.

[128](#)

Broudo & Baskin, *supra* note 15, at 4.

[129](#)

[N.Y. CRIM. PROC. LAW § 440.10\(1\)\(i\), \(iii\) \(Consol. 2013\)](#).

[130](#)

Broudo & Baskin, *supra* note 15, at 4.

[131](#)

Id.

[132](#)

Id.

[133](#)

Id.

[134](#)

Id. at 5 (“This burden [of proving rehabilitation] would also exclude those who have escaped human trafficking, have been unable to secure employment because of their

criminal records, and found themselves turning to prostitution again out of dire need Unfortunately, these situations are not uncommon.”).

[135](#)

Id. at 7.

[136](#)

E.g., [HAW. REV. STAT. § 712-1209.6\(4\)](#) (2013); [OHIO REV. CODE ANN. § 2953.38\(f\)](#) (LexisNexis 2013); [VT. STAT. ANN. tit. 13, § 2658\(d\)](#) (2013).

[137](#)

[People v. Gonzalez, 927 N.Y.S.2d 567, 570 \(N.Y. Crim. Ct. 2011\).](#)

[138](#)

Id.

[139](#)

Broudo & Baskin, *supra* note 15, at 7.

[140](#)

[725 ILL. COMP. STAT. 5 / 116-2.1\(2\)\(c\)](#) (2013); [NEV. REV. STAT. § 176.515\(7\)\(b\)](#) (2013); [N.Y. CRIM. PROC. LAW § 440.10\(6\)](#) (Consol. 2013).

[141](#)

See [People v. L.G., 972 N.Y.S.2d 418, 426 \(2013\)](#) (arguing for judicial discretion in interpreting eligible convictions under New York’s vacating convictions law); [People v. G.M., 922 N.Y.S.2d 761 \(N.Y. Crim Ct. 2011\).](#)

[142](#)

Broudo & Baskin, *supra* note 15, at 8; see [L.G., 972 N.Y.S.2d at 426-27.](#)

[143](#)

Broudo & Baskin, *supra* note 15, at 8.

[144](#)

[FLA. STAT. § 943.0583\(10\)\(a\)](#) (2013).

[145](#)

Vacating Convictions, *supra* note 12.

[146](#)

[WASH. REV. CODE § 9.96.060\(3\)](#) (2013).

[147](#)

See *supra* text accompanying note 111.

[148](#)

U.S. DEP’T OF STATE, *supra* note 23, at 19.

[149](#)

[WYO. STAT. ANN. § 6-2-708\(a\)](#) (2013).

[150](#)

[WYO. STAT. ANN. § 6-2-708\(a\)](#) (2012); [725 ILL. COMP. STAT. 5 / 116-2.1](#) (2013).

[151](#)

[18 U.S.C. § 16](#) (2012).

[152](#)

This language comes from [WASH. REV. CODE §§ 9.96.060\(2\)\(b\), 9.94A.030\(54\)\(a\)](#) (2013). This subsection solves the issue of which crimes a victim can have vacated under a vacating convictions law. By limiting the crimes that cannot be vacated to only violent offenses, this provision balances the maximum amount of crimes a victim will be able to vacate with social policy against vacating offenses that pose bodily harm or injury to another.

[153](#)

[N.J. STAT. ANN. § 2C:44-1.1\(c\)\(1\)](#) (West 2013). This language will prevent a court from using its discretion in determining which crimes should be vacated. By requiring a court to vacate a nonviolent conviction of a victim who can establish that they were a victim at the time the crime was committed, this law will provide uniform protection to victims and ensure that all victims can vacate prior crimes that resulted from a trafficking situation.

[154](#)

Contra [WASH. REV. CODE § 9.96.060\(2\)\(g\)](#) (2013). Consistent with the policy of a vacating convictions law, this provision will prevent a court from holding prior or subsequent crimes against a victim when determining whether to vacate crimes that were committed while they were a victim of trafficking.

[155](#)

Contra [HAW. REV. STAT. § 712-1209.6\(2\)\(c\)](#) (2013); [MD. CODE ANN., CRIM. PROC. § 8-302\(b\)\(3\)](#) (LexisNexis 2013). This relates to Model Law (2). *See supra* text accompanying note 151.

[156](#)

[MISS. CODE ANN. § 97-3-54.6\(5\)](#) (2013). *See also* [NEV. REV. STAT. § 176.515\(7\)\(b\)](#) (2013).

[157](#)

[MISS. CODE ANN. § 97-3-54.6\(5\)](#). *See also* [NEV. REV. STAT. § 176.515\(7\)\(b\)](#).

[158](#)

[N.C. GEN. STAT. § 15A-1416.1\(b\)](#).

[159](#)

[FLA. STAT. § 943.0583\(10\)\(a\)](#) (2013).

[160](#)

[OHIO REV. CODE ANN. §2953.38\(G\)\(2\)](#) (LexisNexis 2013).

[161](#)

Id.

[162](#)

Id. This provision is consistent with the policy of a vacating convictions law as it allows a victim to completely move forward in their life as if the crimes they committed under the force of a trafficker did not occur.

[163](#)

[NEV. REV. STAT. § 176.515\(7\)\(b\)](#) (2013).

[164](#)

See supra text accompanying note 149.

[165](#)

See supra text accompanying note 150.

[166](#)

See supra Part II.B.

[167](#)

See supra text accompanying note 151.

[168](#)

See supra Part II.C.

[169](#)

See supra text accompanying note 153.

[170](#)

Id.

[171](#)

See supra text accompanying notes 156-58.

[172](#)

See supra text accompanying notes 159-62.

[173](#)

See generally Broudo & Baskin, *supra* note 15 (discussing the difference between vacating, expunging, and sealing criminal convictions, and arguing for the strongest possible remedy).

[174](#)

See supra text accompanying note 163.

[175](#)

[People v. L.G., 972 N.Y.S.2d 418, 427 \(2013\)](#) (“[I]n order for the court to exercise its discretion to consider vacatur of each of defendant's judgments of conviction, the court must examine the unique factual circumstances pertaining to each conviction.”).

[176](#)

See supra Part II.F.

[177](#)

[22 U.S.C. § 7101\(b\)\(19\) \(2012\)](#). *See supra* text accompanying note 83.