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## Reconsidering Federal and State Obstacles to Human Trafficking and Entitlements Victim Status

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# RECONSIDERING FEDERAL AND STATE OBSTACLES TO HUMAN TRAFFICKING VICTIM STATUS AND ENTITLEMENTS

Amanda Peters\*

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*Victimhood is a cramped identity, depending on and reinforcing the faulty idea that a person can be reduced to a trait. The victim is helpless, decimated, pathetic, weak, and ignorant. Departing from this script may mean losing whatever entitlements and compassion victim status may afford.*<sup>1</sup>

## I. INTRODUCTION

Since modern-day slavery became an international criminal offense in 2000,<sup>2</sup> the federal government, all fifty states, the District of Columbia, and all U.S. territories have enacted human trafficking legislation.<sup>3</sup> Since 2000, America's

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<sup>1</sup> Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993).

<sup>2</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, UNITED NATIONS HUMAN RIGHTS (2000), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx> [<https://perma.cc/7AF3-99KP>].

<sup>3</sup> U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT JUNE 2014*, at 397, <http://www.state.gov/documents/organization/226844.pdf> [<https://perma.cc/S3N9-4CB3>] [hereinafter 2014 TIP REPORT].

primary response to trafficking concerns has been to enact more laws. Since 2012, Congress and state legislatures introduced 1,601 bills related to sex trafficking, 387 of which became law.<sup>4</sup> There are currently fifty-one human trafficking bills pending before the United States Congress.<sup>5</sup> The Senate recently enacted eleven sex trafficking laws in just one day, leaving one blogger to opine, “Either sex trafficking has suddenly reached epidemic proportions in America, or it’s become the showboat du jour for preening politicians. Most signs point to the latter.”<sup>6</sup> Despite the large number of bills being introduced and enacted, and the amount of resources the federal government pours into ending modern-day slavery,<sup>7</sup> human trafficking

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<sup>4</sup> *Protected Innocence Challenge: A Legal Framework of Protection for the Nation’s Children*, SHARED HOPE INT’L 18 (2014), <https://sharedhope.org/wp-content/uploads/2014/11/2014%20Protected%20Innocence%20Challenge%20Report.pdf> [<https://perma.cc/X6H3-TC8F>] [hereinafter *2014 Protected Innocence Challenge*] (noting 530 bills were introduced in forty-two states and the District of Columbia related to minor sex trafficking; of these, thirty-seven states enacted 123 bills); *Protected Innocence Challenge: A Legal Framework of Protection for the Nation’s Children*, SHARED HOPE INT’L 16 (2013), <http://sharedhope.org/wp-content/uploads/2014/02/2013-Protected-Innocence-Challenge-Report.pdf> [<https://perma.cc/LX8V-HFHP>] (noting forty-eight states introduced 793 bills related to prostitution and sex trafficking of minors, 186 of which were enacted); *Protected Innocence Challenge: A Legal Framework of Protection for the Nation’s Children*, SHARED HOPE INT’L 16 (2012), [http://sharedhope.org/wp-content/uploads/2012/09/Protected-Innocence-Challenge-FINAL\\_2012\\_web2.pdf](http://sharedhope.org/wp-content/uploads/2012/09/Protected-Innocence-Challenge-FINAL_2012_web2.pdf) [<https://perma.cc/5MQN-4G84>] (noting 240 state and thirty-eight federal bills on prostitution and sex trafficking were introduced, seventy-eight of which were enacted). Nations have enacted human trafficking laws quickly. See Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 438 (2006) (describing a “rapidly changing legal environment” in which “governments worldwide have hastened to pass laws and initiatives to combat” human trafficking); Angela L. Bergman, *For Their Own Good? Exploring Legislative Responses to the Commercial Sexual Exploitation of Children and the Illinois Safe Children Act*, 65 VAND. L. REV. 1361, 1367 (2012) (describing the “incredible evolution” and “hurried development” at the state level of laws related to child sexual exploitation).

<sup>5</sup> *Human Trafficking Bills*, GOVTRACK.US, [https://www.govtrack.us/congress/bills/subjects/human\\_trafficking/6210](https://www.govtrack.us/congress/bills/subjects/human_trafficking/6210) [<https://perma.cc/9ZZN-3LJ6>] (last visited April 1, 2015).

<sup>6</sup> Elizabeth Nolan Brown, *11 Human-Trafficking Bills Passed by House on Tuesday*, HIT & RUN (Jan. 28, 2015, 2:12 PM), <http://reason.com/blog/2015/01/28/house-passes-human-trafficking-bills> [<https://perma.cc/N878-KKDW>].

<sup>7</sup> See, e.g., 2014 TIP REPORT, *supra* note 3, at 398 (federal government agencies devoted to investigating and prosecuting human trafficking crimes include the Federal Bureau of Investigation, the Department of Homeland Security, U.S. Immigration and Customs Enforcement’s Homeland Security Investigations Division, the Department of State’s Diplomatic Security Service Human Trafficking Unit, the Department of Justice’s U.S. Attorney’s Offices, and their Civil Rights Division’s Human Trafficking Prosecution Unit and Child Exploitation and Obscenity Section); OFFICE FOR VICTIMS OF CRIME, FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES iii (2014), <http://www.ovc.gov/pubs/FederalHumanTrafficking>

victims face barriers to obtaining the services and benefits created for them. The rush to enact anti-trafficking laws has been saddled with an unwillingness to confer the rights and benefits traditional crime victims typically receive. The federal and state governmental response to trafficking victims begins with making them prove they are indeed victims.<sup>8</sup> This practice has gained wide acceptance in America. Unfortunately, with the practice's dominance, governments have not examined whether proof of victim status is necessary, much less whether it should be required for all human trafficking victims. The word "victim" is a term of art. Its meaning varies from jurisdiction to jurisdiction, as do the benefits and rights that come with it.

But there is more. Assuming a person earns the label "victim," it may be difficult, if not impossible, to receive financial remunerations from the trafficker or the government. Federal judges and prosecutors, particularly in sex trafficking cases, continue to demonstrate a reluctance to pursue restitution from traffickers even when mandated by law. Moreover, it is virtually impossible for trafficking victims to qualify for Crime Victims Compensation (CVC). CVC funds are remitted to victims who suffered economic loss as a result of a crime. In this way, victim status may be rendered meaningless where it is conferred.

There are legitimate and illegitimate reasons for the obstacles trafficking victims face in convincing others they are worthy of receiving restitution and compensation. Trafficking victims are often guilty of committing their own crimes, making them victims and defendants simultaneously. The concepts of culpable criminal and innocent victim coalesce in human trafficking cases, making it hard for law enforcement to parse the criminal conduct of the trafficking victim from the criminal acts of the trafficker. Furthermore, not all traffickers are pursued by law enforcement officials, nor do all victims cooperate with the investigation or prosecution of their traffickers, which may leave the traditional victim-defendant construct imbalanced. In other words, there is not always a clear-cut victim or a wholly culpable defendant, which further complicates the issue of victim identity.

This Article addresses the challenges human trafficking victims face in proving victim status and obtain entitlements traditional crime victims generally receive. Part II of this Article examines the differences between human trafficking victims and traditional crime victims. It also establishes the standard of proof required in federal and state anti-trafficking laws and who is responsible for conferring victim status in a pending case. Part III of the Article discusses the difficulties victims face in obtaining restitution in federal courts and state Crime Victim Compensation funds. Part IV analyzes whether the victim-proof requirement is justified and whether

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StrategicPlan.pdf [<https://perma.cc/2GU4-WFH3>] [hereinafter STRATEGIC ACTION PLAN] (showing that the federal government's 2013–2017 anti-trafficking strategic plan includes the Departments of Justice, Health and Human Services, Homeland Security, State, Defense, Interior, Agriculture, Labor, Transportation, Education, and the Domestic Policy Council, National Security Staff, Office of Management and Budget, Office of the Director of National Intelligence, Federal Bureau of Investigation, U.S. Agency for International Development, and U.S. Equal Employment Opportunity Commission).

<sup>8</sup> See *infra* note 40.

placing barriers before victim entitlements are warranted. In the end, this Article challenges governments to reconsider proof requirements and the obstacles placed before the protections, services, and benefits human trafficking victims are legally entitled to receive.

## II. OBSTACLE ONE: PROVING VICTIM STATUS

Victims of human trafficking are unlike traditional crime victims in that they are often first arrested and charged with a crime and only subsequently identified as victims.<sup>9</sup> This results in a dual identity. Marked simultaneously victim and defendant, the person must prove he is more victim than defendant to receive immunity and services earmarked for human trafficking victims.<sup>10</sup> This section will examine the incidence of trafficking victims' criminal activity and the challenges victims face in establishing their status.

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<sup>9</sup> 2014 TIP REPORT, *supra* note 3, at 397–98 (stating that some victims who are trafficked in America work in “illicit industries or markets, including in brothels, escort services, massage parlors, strip clubs, [and] street prostitution”); Amanda Peters, *Disparate Protections for American Human Trafficking Victims*, 61 CLEV. ST. L. REV. 1, 28 (2013) (discussing arrests of sex trafficking victims for prostitution); Dina Francesca Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77, 91 (2008) (describing the fact that some human trafficking victims have been deported or arrested and prosecuted for immigration-related offenses); Iris Yen, *Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand Through Educational Programs and Abolitionist Legislation*, 98 J. CRIM. L. & CRIMINOLOGY 653, 660 (2008) (noting that many victims in countries are jailed and detained for immigration violations); Steven Seidenberg, *Of Human Bondage: Slavery Continues to Haunt the Modern World, but Efforts to Eradicate It Are Growing*, A.B.A. J., Apr. 1, 2013, at 56 (quoting Norma Ramos, Executive Director of the Coalition Against Trafficking of Women, as saying, “We’ve been arresting the wrong people. We’ve been arresting the victims.”).

<sup>10</sup> Scholars recognize the “perceived duality” of human trafficking victims’ “status as both victim and delinquent,” particularly when it comes to juveniles who have been sexually exploited. Nikki J. Hasselbarth, *Emerging Victimhood: Moving Towards the Protection of Domestic Juveniles Involved in Prostitution*, 21 DUKE J. GENDER L. & POL’Y 401, 413–14 (2014); Katherine C. Cunningham & Lisa DeMarni Cromer, *Attitudes About Human Trafficking: Individual Differences Related to Belief and Victim Blame*, 31 J. INTERPERSONAL VIOLENCE 228, 231 (2015) (“[V]ictims of sex trafficking in the media are portrayed as very young, innocent, and vulnerable children, in contrast to seemingly hardened, promiscuous youth who are viewed as willful sex workers.”).

A. *Victim Status Under the Trafficking Victims Protection Act*

The word “victim” is legally defined in criminal law.<sup>11</sup> It refers to a person who has been harmed by criminal conduct.<sup>12</sup> Victim status in a criminal case is akin to standing in a civil case: it confers rights, services, entitlements, and audiences that ordinary citizens—even witnesses—cannot access or obtain.<sup>13</sup>

There are many reasons why a person may want to wear the victim label.<sup>14</sup> A few of the nonlegal reasons include sympathy and reverence, suffering from a sense of blameworthiness, release of shame, the ability to identify with and share in the pain of others who are similarly situated, and a person, crime, or cause to rally against.<sup>15</sup> “[V]ictimhood is attractive in the sense that it secures attention in an attention-taxed world.”<sup>16</sup> In the human trafficking context, victims receive much more than mere attention by wearing the label; they earn legal rights, services, benefits, and freedom from criminal charges. In order to obtain all of those entitlements, however, they must first prove their victim status.

The Trafficking Victims Protection Act (TVPA), the primary federal anti-trafficking law, defines “victim” as the person harmed by the trafficking scheme.<sup>17</sup> Victims of severe forms of trafficking include adult victims who were forced, defrauded, or coerced into performing labor services or sex acts and juveniles engaged in commercial sex trafficking.<sup>18</sup> Force, fraud, and coercion are considered to be “externally imposed” conditions, which induce the victim’s forced or coerced labor.<sup>19</sup>

Severe forms of trafficking include sex trafficking, involuntary servitude, peonage, debt bondage, or slavery.<sup>20</sup> Individuals who meet this definition are given the right to receive federal protections and benefits under the Act, which include immunity from prosecution and access to social services.<sup>21</sup> Foreign trafficking

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<sup>11</sup> STRATEGIC ACTION PLAN, *supra* note 7, at 8.

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

<sup>13</sup> Victim is an emotionally laden word that scholars have criticized either in use or application. *E.g.*, Minow, *supra* note 1, at 1412 (“[T]here are many dilemmas, drawbacks, and even harms, I think, in the use of victim rhetoric, especially for victims themselves.”).

<sup>14</sup> *Id.* at 1413, 1434.

<sup>15</sup> *Id.* at 1413–14.

<sup>16</sup> *Id.* at 1414.

<sup>17</sup> 18 U.S.C. § 1593(c) (2012).

<sup>18</sup> 22 U.S.C. § 7102(9) (2012).

<sup>19</sup> Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 619 (2014).

<sup>20</sup> 22 U.S.C. § 7102(8).

<sup>21</sup> 22 U.S.C. §§ 7102(9), 7105(a)(1)(B), (b)(1)(A), (c)(1)(B) (2012). Protection from arrest may be the most important benefit human trafficking victims receive. Matthew Garber, *Chapter 240: Human Trafficking—Combating the Underground Slave Industry in California*, 37 MCGEORGE L. REV. 190, 196 (2006) (“[T]rafficking legislation that exclusively criminalizes trafficking activities may effectively ignore the problem of protecting victims’ human rights.”); Cherish Adams, *Re-Trafficked Victims: How a Human Rights Approach*

victims are shielded from prosecution for immigration violations and discrimination.<sup>22</sup> They shall not be “penalized solely for unlawful acts as a direct result of being trafficked.”<sup>23</sup>

To this end, the United States Attorney General and Secretary of State are charged with promulgating regulations to ensure foreign victims are given shelter while in custody, access to legal assistance and translation services, and continued presence in our country to assist in the prosecution of their trafficker.<sup>24</sup> Other rights granted by federal law include medical care, protection from harm, threats, and retaliation, and access to information about their rights.<sup>25</sup> Finally, foreign victims are “eligible for benefits under the Crime Victims Fund without regard to their immigration status.”<sup>26</sup>

In order to receive protections, services, benefits, and immunities, many of which were created specifically for human trafficking victims, adult victims of any form of trafficking must prove they were trafficked due to coercion, force, or fraud.<sup>27</sup> Thus, unlike traditional crime victims,<sup>28</sup> all adult victims must prove their victim status in order to access victim services. Minors, defined as persons under the age of eighteen, are presumed to be trafficking victims when they engage in commercial sex acts, even absent indicia of force, fraud, or coercion.<sup>29</sup> They need not prove victim status under federal law to establish their eligibility to receive victim entitlements.<sup>30</sup>

Foreign nationals who have been trafficked in America must prove much more than citizen victims. Before they can obtain T visas, which permit trafficking victims to remain in the country and give them an opportunity to seek naturalization rather than face immediate deportation,<sup>31</sup> they must offer additional evidence according to

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*Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT’L L. REV. 201, 202 (2011) (stating that the “failure to be treated as a victim and receive support causes many victims to be re-trafficked”).

<sup>22</sup> H.R. REP. No. 106-939, at 5 (2000) (Conf. Rep.) (“Victims 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, such as using false documents, entering the country without documentation, or working without documentation.”).

<sup>23</sup> *Id.* at 18.

<sup>24</sup> *Id.* at 93.

<sup>25</sup> *Id.* at 14–15.

<sup>26</sup> *Id.* at 92.

<sup>27</sup> 22 U.S.C. §§ 7102(9)(a), 7105(a)(1)(B), (b)(1)(A), (c)(1)(B) (2012).

<sup>28</sup> *But see* Erin M. Shoudt, *Identity Theft: Victims “Cry Out” for Reform*, 52 AM. U. L. REV. 339, 366 (2002) (examining the frustrations identity theft victims face in “proving their innocence to each company independently” because “the victim of identity theft is assumed guilty until proven innocent”).

<sup>29</sup> 22 U.S.C. § 7102(8)(A) (excluding victims of sexual exploitation who are younger than eighteen years of age from the “force, fraud, or coercion” portion of the “severe forms of trafficking” definition).

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

<sup>31</sup> 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2012).

the Code of Federal Regulations.<sup>32</sup> First, they must establish victim status through a law enforcement agency (LEA) endorsement, which certifies they meet the severe forms of human trafficking definition and cooperate with the criminal investigation.<sup>33</sup> Without this LEA endorsement, victims are required to prove victim status through other credible evidence: transcripts, court-generated documents, and offense or news reports.<sup>34</sup> International victims must then demonstrate they reported the trafficking scheme to a law enforcement agency, assisted with the investigation, and made good-faith efforts to obtain an LEA endorsement.<sup>35</sup>

When foreign victims are not “rescued” by a law enforcement agency, they must establish they did not have an opportunity to leave the United States due to “trauma, injury, lack of resources, or travel documents that have been seized by the traffickers.”<sup>36</sup> In other words, the government is less likely to view them as victims if they had the opportunity to leave but instead chose to stay in violation of the country’s immigration laws. The process a foreign national must go through to obtain victim status is onerous. By making the T visa accessible yet difficult to obtain, the victim experiences both the “humanitarian and prosecutorial functions” of the federal government simultaneously.<sup>37</sup>

Another challenge to establishing victim status is that human trafficking victim definitions are inconsistent. Though “human trafficking victim” is clearly defined under the TVPA, other federal materials contain conflicting definitions.<sup>38</sup> These differing definitions vary among federal agencies and partners, which complicate the provision of benefits and services the United States government provides this population.<sup>39</sup> How the government and its various agencies define “victim” impacts what must be proven and the available protections and services.

### B. Victim Status Under State Laws

In many ways, states are more equipped than the federal government to provide services to victims of human trafficking, particularly children victims. The federal government lacks access to state child welfare systems.<sup>40</sup> Anti-trafficking laws related to children, if they define “victim” as broadly as the TVPA, are capable of

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<sup>32</sup> 8 C.F.R. § 214.11(a) (2015); H.R. REP. NO. 106-939, at 94 (2000) (Conf. Rep.).

<sup>33</sup> 8 C.F.R. § 214.11(a) (2015). Cooperation in itself is challenging for most victims, who may come from non-rule-of-law countries with corrupt law enforcement officials.

<sup>34</sup> 8 C.F.R. § 214.11(f)(3).

<sup>35</sup> 8 C.F.R. § 214.11(f)(3), (g)(2), (h)(2).

<sup>36</sup> 8 C.F.R. § 214.11(g)(2).

<sup>37</sup> Srikantiah, *infra* note 50, at 159.

<sup>38</sup> STRATEGIC ACTION PLAN, *supra* note 7, at 15.

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

<sup>40</sup> *E.g.*, Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America’s Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 629 (2013) (“[T]he federal government envisioned a role for state and local governments to prosecute sex traffickers and restore victims . . . because the federal government lacks the resources.”).



directing minor victims immediately into child welfare systems already in place.<sup>41</sup> These systems are superior to federal social service systems and tend to be more comprehensive and inclusive.<sup>42</sup>

At the state level, human trafficking victim definitions may depart from federal law significantly.<sup>43</sup> Twenty-three states and the District of Columbia broadly define “victim” in anti-trafficking legislation.<sup>44</sup> Several safe harbor provisions, which give minors immunity from prosecution, prostitution affirmative defenses, and laws pertaining to sex or labor trafficking in these jurisdictions either reference the

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<sup>41</sup> *E.g.*, N.C. GEN. STAT. ANN. § 14-204(c) (West 2013) (minors suspected of prostitution shall be referred to social services where a child abuse investigation will be conducted); WASH. REV. CODE ANN. § 13.32A.270 (West 2013) (youths are automatically diverted to social services when they are detained for suspicion of prostitution).

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

<sup>43</sup> One commentator has suggested state human trafficking laws are an “inconsistent patchwork of laws” that are “all over the map.” Seidenberg, *supra* note 9, at 57.

<sup>44</sup> *E.g.*, ALA. CODE § 13A-6-151 (LexisNexis 2014) (victim includes “[a]ny person, including minors, subjected to labor servitude, sexual servitude, or involuntary servitude”); ALASKA STAT. ANN. § 11.41.360 (West 2012) (deception, force, or threat of force required, which is similar to TVPA definition); ARIZ. REV. STAT. ANN. § 13-1307, 1308 (West 2010) (“deception, coercion or force” appears in both the sexual and labor trafficking statutes); ARK. CODE ANN. § 5-18-102 (West 2013) (elements of coercion, fraud, and force found in the involuntary servitude statute); CAL. PENAL CODE § 236.1 (West 2012) (“force, fraud, duress, or coercion, or equivalent conduct that would reasonably overbear the will of the person” found in trafficking statute); D.C. CODE §§ 22-1831, 1834 (2012) (definition consistent with the TVPA); FLA. STAT. ANN. § 409.1678 (West 2013) (definition combines the TVPA’s definition with language necessary to obtain state social services); GA. CODE ANN. § 16-3-6 (West 2011) (“sexual servitude” merely requires proof of deception or coercion); HAW. REV. STAT. ANN. § 712-1209.6 (West 2012) (references TVPA in definition of victim); IDAHO CODE § 18-8602 (2015) (tracks TVPA definition); 720 ILL. COMP. STAT. ANN. 5/11-14 (2014) (no person under eighteen can be charged with prostitution, but will instead be diverted to social services); KY. REV. STAT. ANN. § 529.120 (West 2013) (no one under eighteen may be prosecuted for prostitution); LA. STAT. ANN. § 14:46.2(C)(3) (West 2014) (does not limit and may expand the TVPA’s definition); ME. REV. STAT. tit. 5, § 4701 (2013) (defines human trafficking victim differently than TVPA but elements of force, fraud, and coercion are encompassed within the definition); MONT. CODE ANN. § 46-18-608 (2013) (references TVPA definition for victims); N.M. STAT. ANN. § 30-52-1 (2015) (force, fraud, and coercion used in both sex and labor trafficking cases); N.Y. SOC. SERV. LAW § 447-a-b (McKinney 2013) (anyone under eighteen who engages in prostitution is not criminally responsible and shall be directed to social services); TENN. CODE ANN. § 39-13-513(d)–(e) (West 2013) (references state and federal definitions); TEX. PENAL CODE ANN. § 20A.02 (West 2003) (human trafficking law reflects TVPA provisions); VT. STAT. ANN. tit. 13, §§ 2652, 2658(b) (West 2013) (tracks and references federal definition); WIS. STAT. ANN. § 940.302 (West 2015) (force, fraud, and coercion are included, but so are other means of establishing human trafficking); WYO. STAT. ANN. § 6-2-708 (2013) (tracks federal definition); *see also* OKLA. STAT. ANN. tit. 21, § 748(A)(9) (West 2014) (“victim” defined more broadly in some contexts, narrower in others).

TVPA's definition, mirror it, or expand upon it, granting even greater rights to victims than those conferred by federal law.<sup>45</sup>

Unfortunately, twenty-seven states define the crime, the victim, or the proof required to obtain victim status more narrowly than the TVPA. For instance, Connecticut, Massachusetts, Michigan, New Jersey, Ohio, Oklahoma, and Oregon set trafficking minority ages younger than the TVPA's below-eighteen standard.<sup>46</sup> Minor victims in these states lose immunity at younger ages and have to prove force, fraud, or coercion in the same way their adult counterparts do. Additionally, the legal mercy granted to minors due to their immaturity may be limited; once juveniles transgress the criminal law more than once or are trafficked a second time, legal protections vanish or retroactively reinstate previously expunged convictions.<sup>47</sup>

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<sup>45</sup> See *infra* note 46 and accompanying text.

<sup>46</sup> *E.g.*, CONN. GEN. STAT. ANN. § 53a-82(a) (West 2013) (stating girls fifteen and younger cannot be prosecuted, but girls sixteen and seventeen may be prosecuted if the state overcomes a rebuttable presumption that they were victims of trafficking); MASS. GEN. LAWS ANN. ch. 265, § 57 (West 2012) (stating juveniles may be prosecuted, but can raise an affirmative defense that “while a human trafficking victim, such person was under duress or coerced into committing the offenses for which such person is being prosecuted or against whom juvenile delinquency proceedings have commenced”); MICH. COMP. LAWS ANN. § 750.448 (West 2013) (stating minors sixteen years old and older can be charged with prostitution); N.J. STAT. ANN. § 2C:34-1(e) (West 2013) (stating all persons, regardless of age, must prove they were compelled to commit criminal act of prostitution); N.J. STAT. ANN. §§ 2A:4A-42(h), 2A:4A-71(b)(11), 2A:4A-74(b)(12) (West 2013) (stating juveniles engaged in prostitution can still be arrested, charged, and prosecuted for prostitution, but court may consider the fact that the minor is a human trafficking victim in disposing of the case); OHIO REV. CODE ANN. § 2151.358(E) (West 2012) (stating minors must prove they were human trafficking victims in order to get convictions expunged); OKLA. STAT. ANN. tit. 29, § 1029(c) (2013) (stating there is a presumption that sixteen- and seventeen-year-olds are human trafficking victims, but they can still be arrested, charged, and convicted for prostitution if the prosecutor rebuts the presumption); OR. REV. STAT. ANN. § 163.266 (West 2014) (stating minors who are fifteen years old and older have to prove force, fraud, or coercion).

<sup>47</sup> ALA. CODE § 12-15-136(e) (2014) (stating any juvenile convicted of a misdemeanor sexual offense shall have the sealed order for that offense nullified upon conviction of a second offense); IOWA CODE ANN. § 232.150(1)(a)(2) (West 2014); MISS. CODE ANN. § 99-19-71 (West 2014) (allowing for first-time minor offender expunction); N.J. STAT. ANN. § 2C:34-1(c)(4) (West 2013), N.J. STAT. ANN. § 2C:52-4.1(a)(1) (West 2010) (stating minors convicted more than once for engaging in acts of prostitution may face fourth-degree charges, which could result in loss of entitlement to an expunction); N.C. GEN. STAT. §§ 15A-145, 15A-145.4.5 (2013) (excluding anyone with felony and misdemeanor convictions from applying); OKLA. STAT. ANN. tit. 10A, § 2-6-102(D) (West 2014) (stating juvenile records are not confidential after subsequent convictions); VT. STAT. ANN. tit. 3, § 163(e)–(f) (West 2013) (stating subsequent expunction barred if applicant was convicted of a second offense, has pending proceedings, or has not been rehabilitated to the satisfaction of the court); see also Karen Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N. ILL. U. L. REV. 467, 482 (2011) (noting that protections offered to minors who are viewed as incapable of contracting “may be removed where a minor has transgressed the criminal law”).

Alabama, Iowa, Mississippi, New Jersey, North Carolina, Oklahoma, and Vermont grant no mercy for minors trafficked a second time.<sup>48</sup>

Other states wrestle with the concepts of force, fraud, and coercion. These words are not defined in the TVPA; the Act was intended to broaden previous antislavery laws by including nonphysical coercion.<sup>49</sup> The TVPA allows attorneys, courts, or juries to assign meaning to these words.<sup>50</sup> At the international law level, stakeholders have asked for clarification of these terms, which remain undefined.<sup>51</sup> Thus, under the TVPA and international anti-trafficking laws, “force,” “fraud,” “coercion,” “abuse,” and “exploitation” are left open to interpretation.

In contrast, many states have eliminated one or more of these words from their trafficking definitions or narrowly define them. For instance, New Hampshire and New Jersey limit “victim” by narrowly defining or restricting the force, fraud, or coercion requirements.<sup>52</sup> Connecticut, Kansas, and Pennsylvania narrowly define “coercion.”<sup>53</sup> Delaware, Minnesota, North Dakota, Rhode Island, Tennessee, and South Dakota eliminate “coercion” and “fraud” from the definition altogether.<sup>54</sup> Iowa eliminates “fraud” and “coercion” from labor trafficking cases only,<sup>55</sup> whereas Indiana eliminates only “coercion,” emphasizing fraud and force or threat of force.<sup>56</sup> This is unfortunate given the fact that the crime of human trafficking involves “a wide range of trafficking practices involving varying types and levels of coercion, and not necessarily physical violence.”<sup>57</sup> By narrowing the scope of the federal

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

<sup>49</sup> Chuang, *supra* note 19, at 643.

<sup>50</sup> Federal legislators had a difficult time with these concepts initially as well. See Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 169 (2007) (noting that initial trafficking bills defined coercion as “abuse of authority” or physical force and some sought to require evidence of mental or physical abuse or, in the case of foreign nations, fear of retribution, if deported). In the end, these terms were not defined. See 22 U.S.C. § 7102(9). See also Maria Ontiveros, et al., *Women and Children First? New Strategies in Anti-Trafficking Initiatives*, 6 GEO. J. GENDER & L. 193, 212 (2005) (stating that psychological coercion includes “quite a number of suspect activities”).

<sup>51</sup> Chuang, *supra* note 19, at 648.

<sup>52</sup> *E.g.*, N.H. REV. STAT. ANN. § 633:7 (West 2014) (confining a victim’s “compulsion” to a specified list of criteria); UTAH CODE ANN. § 76-5-308 (West 2013) (restricting “force, fraud, or coercion” to be proven a limited number of ways).

<sup>53</sup> CONN. GEN. STAT. ANN. § 53a-192, 53a-192a (West 2010); KAN. STAT. ANN. § 21-5426 (West 2012); 18 PA. STAT. AND CONS. STAT. ANN. §§ 3001, 3012 (West 2014) (defining narrowly “debt coercion” and “criminal coercion”).

<sup>54</sup> DEL. CODE ANN. tit. 11, § 787 (West 2010); MINN. STAT. ANN. § 609.325(4) (West 2013); N.D. CENT. CODE ANN. § 12.1-40-02 (West 2009); 11 R.I. GEN. LAWS § 11-34.1-2(c) (2014); S.D. CODIFIED LAWS § 22-23-1.2 (2013); TENN. CODE ANN. §§ 39-13-307, 39-13-309 (West 2013).

<sup>55</sup> IOWA CODE ANN. § 710A.1 (West 2012).

<sup>56</sup> IND. CODE ANN. § 35-42-3.5-4 (West 2015).

<sup>57</sup> Chuang, *supra* note 19, at 634.

definition, states chip away the breadth of this crime, ultimately punishing the victims.

Other states add additional proof requirements or appear reluctant to include human trafficking in the Penal Code. Maryland requires the victim to prove duress, making victim status akin to establishing an affirmative defense.<sup>58</sup> Virginia fails to define “human trafficking” altogether or what it means to be a victim of that crime.<sup>59</sup> Instead, the State inserts the phrase “human trafficking” into dated statutes that were never meant to encompass or describe modern-day slavery.<sup>60</sup>

In all of the aforementioned jurisdictions, “victim” is defined more narrowly, and in the case of Virginia, not at all. Not only have states written laws that minimize the meaning of “victim,” but three states create additional evidence that is required to prove victim status. Florida, Illinois, and Indiana require victims to demonstrate through sworn affidavits or an LEA endorsement that the trafficker was charged in a criminal case or that a professional validates the person’s victim status.<sup>61</sup> Only upon having this kind of documentation will these states certify status and allow the victim access to entitlements.<sup>62</sup>

These state anti-trafficking laws contradict the TVPA and anti-trafficking policies designed to protect victims.<sup>63</sup> The TVPA, federal courts, and Congress suggest the force, fraud, and coercion language “broadly and expansively cover a wide range of manipulative, threatening, and violent conduct designed to overcome

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<sup>58</sup> MD. CODE ANN., CRIM. PROC. § 8-302 (West 2011).

<sup>59</sup> *E.g.*, VA. CODE ANN. § 18.2-355 (West 2014) (noting that the statute, written in 1975, was violated when a defendant forced another, against her will, to enter a “bawdy house”); VA. CODE ANN. § 18.2-356 (West 2014) (outlawing forced labor or services, concubines, and prostitution, among other things); VA. CODE ANN. § 18.2-48 (West 2011) (criminalizing the abduction of minors for purposes of prostitution).

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

<sup>61</sup> BUREAU OF VICTIM COMP., FLA. OFFICE OF THE ATTORNEY GEN., BENEFITS AVAILABLE, [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/\\$file/BVCVictimCompensationBrochure.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/$file/BVCVictimCompensationBrochure.pdf) [<https://perma.cc/Q6QV-Q8DD>] (last visited Mar. 24, 2016) [hereinafter BENEFITS AVAILABLE] (providing relocation compensation to victims of human trafficking only upon being certified by a counselor, prosecutor, or state agency after receiving notification that the victim is cooperating in the prosecution); 725 ILL. COMP. STAT. 5/116-2.1 (2013); IND. CODE ANN. § 35-42-3.5-4 (West 2015). Some states suggest documentation creates a presumption of victim status, but is not required. *E.g.*, LA. CHILD CODE ANN. art. 923 (2013); MISS. CODE ANN. § 97-3-54.6 (West 2013); N.C. GEN. STAT. ANN. § 15A-1416.1(b) (West 2013); N.Y. CRIM. PROC. LAW § 440.10(1)(h)(ii) (McKinney 2010); VT. STAT. ANN. tit. 13, §§ 2652 & 2658(b) (West 2013); WASH. REV. CODE ANN. § 9A.88.040 (West 2013); WYO. STAT. ANN. § 6-2-708 (West 2013).

<sup>62</sup> BENEFITS AVAILABLE, *supra* note 61; 725 ILL. COMP. STAT. 5/116-2.1 (2013); IND. CODE ANN. § 35-42-3.5-4 (West 2015).

<sup>63</sup> 2014 *Protected Innocence Challenge*, *supra* note 4, at 1 (pointing out that Shared Hope founder and President Linda Smith described the “limitations” professionals helping trafficking victims face “on their ability to implement effective trafficking responses due to inadequate state laws”).

the resistance of a [trafficking] victim.”<sup>64</sup> That is the underlying act of human trafficking: that the trafficker has overborne the victim’s will by using threats, deception, coercion, theft of identification documents, lies, or physically abusive and psychologically manipulative actions. Trafficking can happen in any number of ways, both in form and in method. Therefore, it is problematic when states restrict the definition, rendering it less effective. Ultimately, what that means for victims in states with narrow definitions is that fewer cases can be prosecuted because the crime encompasses a smaller list of prohibited conduct. It also means the state can help fewer victims; had the crime happened elsewhere or were the investigating agency federal, the person would have been legally recognized as a crime victim.

### C. Incidence of Trafficking Victims’ Criminal Activity

Congress recognized that traffickers frequently cause their victims to violate criminal, labor, or regulatory laws during the trafficking scheme and often, the victim is punished for these law violations by governments.<sup>65</sup> According to the Department of Justice (DOJ), labor trafficking is more likely to occur in unregulated labor markets employing foreign national victims and is detected through investigations led by federal regulatory agencies or labor rights advocates.<sup>66</sup> Of the confirmed labor trafficking victims, 67% are undocumented aliens and 28% have qualified alien status.<sup>67</sup> Congress suggests that labor trafficking victims are likely to violate immigration or labor laws in the course of being trafficked.<sup>68</sup>

The DOJ reports that sex trafficking victims, on the other hand, are much more likely to be American, female, and minors or young adults.<sup>69</sup> Suspected sex trafficking cases are nearly always investigated by state or local law enforcement officers, many of whom work within vice units investigating prostitution, massage parlors, and strip clubs.<sup>70</sup> Prostitution was involved in 88% of sex trafficking cases, whereas sexualized businesses were involved in 6% of cases.<sup>71</sup> Thus, in 94% of

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<sup>64</sup> Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1040 (2013) (citing the language of the Act, congressional intent, and federal court opinions interpreting the “force, fraud, and coercion” element of trafficking).

<sup>65</sup> Trafficking Victims Protections Act, 22 U.S.C. § 7101(b)(6), (10), (17) (2013).

<sup>66</sup> DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 1–6, 9 (2011) (showing that 63% of victims were Hispanic, while 17% were Asian).

<sup>67</sup> *Id.* at 6.

<sup>68</sup> *Id.* at 1–6.

<sup>69</sup> *Id.* at 6 (noting that of 460 identified victims, 83% were Americans, 94% were female, 248 were seventeen years old or younger, while 142 were between eighteen and twenty-four years old, and forty-six were between the ages of twenty-five and thirty-four).

<sup>70</sup> *Id.* at 3–4.

<sup>71</sup> *Id.* at 3.

cases, trafficking victims engaged in the commercial sex industry during the trafficking scheme.

Human trafficking victims may commit crimes due to the traffickers' forceful, fraudulent, or coercive actions.<sup>72</sup> In these cases, two crimes have been committed: the criminal act of human trafficking and the criminal act of the trafficked person, be it an immigration crime, regulatory crime, or sex crime.<sup>73</sup> Nevertheless, the TVPA mandates victims "shall not be detained in facilities inappropriate to their status as crime victims."<sup>74</sup> They should not be fined, jailed, or punished for criminal acts they committed at the time they were enslaved.<sup>75</sup>

The criminal justice system has had difficulty dealing with an entire class of crime victims who have their own criminal histories. Federal officials and law enforcement officers have wrestled with how to regard trafficking victims.<sup>76</sup> State officials have the same problem. For example, a Texas police officer who arrested a trafficked minor for accepting money from an older man to traffic her teenage friends, described his predicament this way: "I don't normally go from talking to a victim to all of a sudden talking with a suspect . . . [It's] very rare that a person can be both like that."<sup>77</sup> Though the district attorney's office initially charged the minor

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<sup>72</sup> See 22 U.S.C. § 7102(8) (explaining severe sex trafficking as including "force, fraud, or coercion").

<sup>73</sup> E.g., Srikantiah, *supra* note 50, at 158 (arguing that without trafficking immigration exceptions, many foreign victims "would otherwise be subject to deportation after escape from exploitation").

<sup>74</sup> 22 U.S.C. § 7105(c)(1)(A).

<sup>75</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2012, at 362 (2012), <http://www.state.gov/j/tip/rls/tiprpt/2012/> [<https://perma.cc/EUE9-XM9B>] [hereinafter 2012 TIP REPORT]; 2014 TIP REPORT, *supra* note 3, at 397–98 (stating that in addition to the TVPA's statutory mandate, victims should not be confined and jailed, there is a federal policy that "victims should not be inappropriately penalized solely for unlawful acts committed as a direct result of being trafficked").

<sup>76</sup> E.g., Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 119–20 (2008) (quoting one Florida official as saying that "she might consider children as young as nine or ten years old as trafficking victims, but that young women who had reached sixteen years of age were prostitutes, not victims of trafficking"); Tamar R. Birkhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1065 n.41 (2011) (noting that a federal administrator in the Office of Juvenile Justice and Delinquency Prevention said that though child sexual exploitation is "rape," it should not be legalized because teenagers need to be warned "that they are doing something that's wrong"); Nesheba Kittling, *God Bless the Child: The United States' Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 913 (2006) ("America cannot make up its mind: Are juvenile girls who have sex victims or criminals? Do they need protection or prosecution? The laws surrounding this issue reflect the country's internal strife, as the United States takes two very distinct positions with respect to juvenile prostitution."). See also Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1110 (2012) (illustrating incoherence between state laws that consider minors unable to consent to sex and the fact that many states still criminalized juvenile prostitution).

<sup>77</sup> Michael Barajas, *Teen Victim to Teen Madam: Among All the Kids Money Mike Handed \$100 Bills for Sex, One Was Charged with a Felony*, HOUSTON PRESS (Feb. 24,

with a crime, the office later dropped charges, stating, “We always knew that she started out as a victim.”<sup>78</sup> In this case, the officer considered the minor to be defendant and victim simultaneously whereas the prosecuting agency implied she was initially a victim, but subsequently became something else. This dual identity challenges long-held law enforcement notions of discrete victims and defendants.

Not only have law enforcement officers and prosecutors struggled with determining whether a person is a victim or defendant in the context of human trafficking, but judges have too.<sup>79</sup> In a guide written for state court judges, the authors noted it was difficult for judges to determine whether criminal defendants may be trafficking victims.<sup>80</sup> “A victim may initially become visible in court as a defendant charged with a crime that might normally be appropriate for a punitive sentence,” yet upon further examination, it may become evident the person is a human trafficking victim.<sup>81</sup> For this reason, the manual advises state court judges to parse out and address a victim’s criminal behavior that “might be a by-product of . . . victimization.”<sup>82</sup>

While the law confers legal victim status to human trafficking victims who commit crimes, there is no equivalent provision for traditional crime victims who do the same. In other words, a traditional crime victim who subsequently commits her own crime will, in all likelihood, be investigated, arrested, and charged with that offense irrespective of her victim status in the other case. Because of the uniqueness of the human trafficking experience—a criminal scheme that often induces victims to commit criminal acts—lawmakers require survivors to prove they are human trafficking victims before they can access victim status benefits.

#### D. *The Process of Conferring Victim Status*

Victim labels qualify or disqualify individuals from receiving victim services.<sup>83</sup> A person’s right to be called a “human trafficking victim” is directly connected to the entitlements the victim receives. “Social service agencies can be severely

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2015), [http://blogs.houstonpress.com/news/2015/02/money\\_mike\\_schoolgirl\\_madam.php](http://blogs.houstonpress.com/news/2015/02/money_mike_schoolgirl_madam.php) [<https://perma.cc/CMC6-DHTH>] (quoting officer David Nettles of the Webster, Texas Police Department, regarding a seventeen-year-old girl who had been sexually assaulted by a sixty-two-year-old man named Michael McIntosh, and then paid money by McIntosh to recruit other teenage girls, some as young as fourteen, to have sex with him for money). See also Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 165 (2009) (discussing “how the law should respond when breached” by a domestic violence victim who is beaten by her batterer, but who then commits perjury).

<sup>78</sup> Barajas, *supra* note 77.

<sup>79</sup> STATE JUSTICE INST., A GUIDE TO HUMAN TRAFFICKING FOR STATE COURTS 144 (2014), [http://www.htcourts.org/wp-content/uploads/00\\_EntireGuide\\_140726\\_v02.pdf](http://www.htcourts.org/wp-content/uploads/00_EntireGuide_140726_v02.pdf) [<https://perma.cc/PEN3-DK4C>] [hereinafter STATE JUSTICE INSTITUTE].

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 90–91.

<sup>82</sup> *Id.* at 144.

<sup>83</sup> Bergman, *supra* note 4, at 1392.

hampered by something as simple as a lack of an appropriate category in existing forms that accurately describe the situation of a child as a human trafficking victim rather than a victim of some other form of maltreatment.”<sup>84</sup> These labels, when withheld or misapplied, can act as a barrier to victim protections and services.<sup>85</sup> In this way, the label does more than connote sympathy and an audience: it entitles a person to access rights and benefits she would otherwise be unable to obtain.

In the most recent United States Trafficking in Persons (TIP) Report, the federal government expressed concern that officials occasionally misunderstand “complex legal aspects of human trafficking cases, including coercion and consent.”<sup>86</sup> There are factual and legal aspects of the victim assessment. Whether victim status is conferred may depend on who is making the decision and how much the person or entity understands about the crime of human trafficking and its effects on the victim.

A wide variety of individuals are permitted to confer victim status to a person throughout various stages of the criminal litigation process. To illustrate who decides and when the decision regarding status may be made, it is important to examine various laws designed to protect human trafficking victims and the criminal justice actors involved. A number of states have created new prostitution-specific laws due to sex trafficking concerns.<sup>87</sup> Safe harbor laws shield minors from prosecution for prostitution;<sup>88</sup> nearly twenty states have enacted them.<sup>89</sup> In the case of safe harbors, law enforcement officers may confer victim status during the investigation, a prosecutor may confer it after the minor is charged, or a judge may grant victim status during the litigation process.<sup>90</sup>

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

<sup>85</sup> *Id.* Some states have amended trafficking statutes to include labels that allow children and minors to get the social services they are entitled to receive. *E.g.*, VT. STAT. ANN. tit. 13, § 2652(e) (West 2013) (“If a person who is a victim of human trafficking is under 18 years of age at the time of the offense, the state may treat the person as the subject of a child in need of care or supervision proceeding.”).

<sup>86</sup> 2014 TIP REPORT, *supra* note 3, at 401.

<sup>87</sup> See generally Amanda Peters, *Modern Prostitution Legal Reform and the Return of Volitional Consent*, 3 VA. J. CRIM. L. 1, 20–44 (2015) (describing prostitution-specific safe harbors, affirmative defenses, and expunctions and what they have done to return the consent element to the crime of prostitution).

<sup>88</sup> See generally *id.* at 20–29 (discussing prostitution-specific safe harbor laws for minors).

<sup>89</sup> See *id.* at 23 n.71.

<sup>90</sup> *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010) (“In the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution . . . we hold that a child under the age of fourteen may not be charged with [prostitution].”); Peters, *supra* note 87, at 22 (“[Safe harbor statutes] direct government officials to view the child as a victim in need of services rather than a criminal defendant in need of punishment.”); Staff of the Michigan Department of Attorney General, *Eroding Freedom’s Foundation: Human Trafficking and the Threat to American Principle*, 30 T.M. COOLEY L. REV. 13, 20 (2013) (explaining that states may bar the prosecution of victims or may choose to permit the prosecutor to rebut evidence of safe harbor qualification).



Where a victim is not protected by a safe harbor, she may be able to raise a human trafficking affirmative defense. In this case, the victim must establish she committed the crime because she was forced, coerced, or tricked by her trafficker to commit a crime.<sup>91</sup> Many states have recently enacted prostitution-specific affirmative defenses for defendants.<sup>92</sup> The victim assessor in these cases is the fact finder, which may be the judge or jury.

When the victim of human trafficking is convicted for a crime committed as part of the trafficking scheme, she may qualify to have her criminal records vacated or expunged after trial, which erases the crime from the defendant's record.<sup>93</sup> In

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<sup>91</sup> See Peters, *supra* note 87, at 29–36.

<sup>92</sup> *E.g.*, ALA. CODE § 13A-6-159 (2013) (affirmative defense provided to human trafficking victims engaged in prostitution); ARK. CODE ANN. § 5-70-102(c) (2013); CONN. GEN. STAT. ANN. § 53a-82(b)-(d) (2013); GA. CODE ANN. § 16-3-6(b) (West 2013) (a person charged with sex crimes is not guilty if the act “was committed under coercion or deception while the accused was being trafficked for sexual servitude”); IOWA CODE § 710A.3 (2013); KAN. STAT. ANN. § 21-6419(c) (2013); LA. REV. STAT. ANN. §§ 14:46.3, 14.82(G), 14:83.3(D), 14:83.4(C), 14:89.2(D)(1) (2013) (affirmative defenses for minors built into several existing statutes addressing criminal commercial sexual acts); MASS. GEN. LAWS ANN. ch. 265, § 57 (2013) (affirmative defense applying only to juveniles who establish coercion or duress); MINN. STAT. ANN. § 609.325(4) (West 2013) (affirmative defense available once it is established victim committed acts under compulsion or apprehension); MO. REV. STAT. § 566.223(2) (2013) (applies once coercion or threats are proven); N.H. REV. STAT. § 645:2 (2010) (defense not restricted to minors); N.J. STAT. ANN. § 2C:34-1(e) (West 2013) (adults can use defense if they meet specific requirements, but those under eighteen do not have the same requirements); N.C. GEN. STAT. § 14-204(c) (2013); OKLA. STAT. ANN. tit. 21, § 748 (2013) (defendant need only prove that he or she meets the state’s definition of “human trafficking victim” to qualify); R.I. GEN. LAWS § 11-34.1-2(c) (2013); S.C. CODE ANN. § 16-3-2020(J) (2012); S.D. CODIFIED LAWS § 22-23-1.2 (2013) (defense applicable to all defendants charged with prostitution who committed the act of prostitution “under compulsion”); TENN. CODE ANN. § 39-13-513(e) (West 2013) (defense applies to all persons accused of prostitution who can establish they were a victim of human trafficking); TEX. PENAL CODE ANN. § 43.02(d) (2013); VT. STAT. ANN. tit. 13, § 2652 (West 2013); WASH. REV. CODE ANN. § 9A.88.040 (2013) (creating an affirmative defense through a presumption that the defendant is a victim of trafficking if “the actor is named as a current victim in an information or the investigative records upon which a conviction is obtained for trafficking, promoting prostitution in the first degree, or trafficking in persons”).

<sup>93</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 13-921 (2013) (the court may, in its discretion, set aside, dismiss, or expunge the records of juvenile victims of sex trafficking who are convicted and placed on probation, provided they successfully complete the terms of probation); COLO. REV. STAT. ANN. § 19-1-306(d)(I) (West 2013) (qualifying juveniles may have prostitution records expunged); HAW. REV. STAT. § 712-1209.6 (2013) (person convicted of prostitution may have conviction vacated upon establishing that he or she was a victim of a severe form of human trafficking); 725 ILL. COMP. STAT. 5/116-2.1 (2013) (motion to vacate conviction may be used by trafficking victims to expunge prostitution convictions); KAN. STAT. ANN. §§ 21-6419(c), 38-2312(a) (West 2013) (permitting minor domestic sex trafficking victims to request expungement of prostitution convictions); LA. CHILD CODE ANN. art. 918, 923(D) (West 2013) (expungement possible upon showing the

these cases, the person conferring victim status is the judge overseeing the expunction hearing or motion to vacate. In the two states that permit human trafficking victim pardons—Maine and Texas—the state’s governor assesses victim status post-conviction.<sup>94</sup>

Finally, in federal cases involving foreign nationals, and even in some states, in order to be deemed worthy of receiving benefits and services, victims may be required to obtain an LEA certification or declaration.<sup>95</sup> Sometimes the LEA certification is required, sometimes it merely creates a presumption that the person

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defendant was a “victim of trafficking of children for sexual purposes” at the time of the offense); MISS. CODE ANN. § 97-3-54.6 (West 2013) (in motion to vacate, official documentation from a federal, state or local government agency as to the defendant’s status as a victim at the time of the offense creates a presumption that the defendant’s participation in the offense was a result of being a victim, but documentation not required in motion to vacate); MONT. CODE ANN. § 46-18-608 (2013) (court may vacate prostitution conviction if the person was a victim of human trafficking); NEV. REV. STAT. § 176.515 (2013) (if convicted, once a defendant ceases being a victim of human trafficking, as defined by the TVPA, the person may move to vacate a prostitution conviction); N.J. STAT. ANN. § 2C:34-1(e) (West 2013) (permitting the defense to be used by both minors and adults, with different burdens of proof for each category, much like the TVPA); N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2013) (expunction law may apply to both minors and adults, provided person meets definition of trafficking victim); N.C. GEN. STAT. § 15A-1416.1 (2013) (court permitted to grant a motion to vacate if the defendant committed the offense of prostitution while a victim of human trafficking); OHIO REV. CODE ANN. § 2151.358(E) (West 2013) (expunction applies to child victim of human trafficking); R.I. GEN. LAWS ANN. § 11-34.1-5(a) (West 2013) (“any person” found guilty of prostitution, at the court’s discretion, can seek to have the record expunged after one year); WASH. REV. CODE ANN. § 9.96.060(3) (West 2013) (permitting victims to vacate criminal records of prostitution); W. VA. CODE § 61-2-17(6)(f) (2013) (human trafficking victims may seek expungement of prostitution convictions); WYO. STAT. ANN. § 6-2-708 (West 2013) (permits victims to vacate prostitution convictions and be safe from prosecution for commercial sex acts).

<sup>94</sup> ME. REV. STAT. ANN. tit. 15, § 2161-B (2014), [http://www.mainelegislature.org/legis/bills/bills\\_126th/billtexts/HP123801.asp](http://www.mainelegislature.org/legis/bills/bills_126th/billtexts/HP123801.asp) [<https://perma.cc/ZPZ8-K5NH>] (allowing victims to seek a pardon from the governor immediately after the sentence is imposed); TEX. CRIM. PROC. CODE ANN. art. 48.06 (West 2013) (authorizing the Board of Pardons and Parole to educate victims of human trafficking on the pardon process).

<sup>95</sup> *E.g.*, 8 C.F.R. § 214.11 (2015); 725 ILL. COMP. STAT. 5/116-2.1 (2013); IND. CODE ANN. § 35-42-3.5-4 (West 2015); LA. CHILD CODE ANN. art. 923 (West 2013) (documentation creates a presumption); MISS. CODE ANN. § 97-3-54.6 (West 2013) (same); N.C. GEN. STAT. ANN. § 15A-1416.1(b) (West 2013) (same); N.Y. CRIM. PROC. LAW § 440.10(h)(ii) (McKinney 2010) (same); VT. STAT. ANN. tit. 13, §§ 2652, 2658(b) (West 2013) (same); WASH. REV. CODE ANN. § 9A.88.040 (West 2013) (same); WYO. STAT. ANN. § 6-2-708 (West 2013) (same).

was a trafficking victim.<sup>96</sup> Regardless, in these cases, it is the law enforcement agency or another licensed professional who makes the assessment.<sup>97</sup>

The victim determination, therefore, may be made by any number of people: police officers, agents, prosecutors, governors, jurors, judges, or licensed counselors. The problem with having so many different people make the determination is that there is no universal human trafficking victim assessment training available. “Determining whether a victim was defrauded or coerced by the trafficker . . . requires a complex and detailed factual examination of the victim’s state of mind and the trafficker’s actions.”<sup>98</sup> Erroneous assessments are likely, given the nuances involved in these cases.

It is also possible that the individual making the victim determination has conflicting interests in making the assessment. A governor’s decision may be political, made on the basis of personal or professional interests at the time he or she is called to make the decision. For judges, on the other hand, one would hope the decision is just and made from a neutral standpoint. Nevertheless, federal and state judges alike are confused about how to view someone who occupies roles of defendant and victim simultaneously. For instance, federal judges are reluctant to compensate sex trafficking victims, whereas state judges often view the victim as someone worthy of punishment.<sup>99</sup> Juries likely have far less human trafficking victim identification training and may be working with limited information on whether the defendant meets the victim definition.<sup>100</sup> Even where a human trafficking defense is raised, the defendant may not have enough evidence to

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<sup>96</sup> *E.g.*, 8 C.F.R. § 214.11 (2015); 725 ILL. COMP. STAT. 5/116-2.1 (2013); IND. CODE ANN. § 35-42-3.5-4 (West 2015); LA. CHILD CODE ANN. art. 923 (2013) (documentation creates a presumption); MISS. CODE ANN. § 97-3-54.6 (West 2013) (same); N.C. GEN. STAT. ANN. § 15A-1416.1(b) (West 2013) (same); N.Y. CRIM. PROC. LAW § 440.10(h)(ii) (McKinney 2010) (same); VT. STAT. ANN. tit. 13, §§ 2652, 2658(b) (West 2013) (same); WASH. REV. CODE ANN. § 9A.88.040 (West 2013) (same); WYO. STAT. ANN. § 6-2-708 (West 2013) (same).

<sup>97</sup> *See, e.g.*, VERA INSTITUTE OF JUSTICE, SCREENING FOR HUMAN TRAFFICKING: GUIDELINES FOR ADMINISTERING THE TRAFFICKING VICTIM IDENTIFICATION TOOL (TVIT) 3, 7 (2014), <http://www.vera.org/sites/default/files/resources/downloads/human-trafficking-identification-tool-and-user-guidelines.pdf> [<https://perma.cc/A76C-9CGT>] (explaining how “victim service agency staff or other social service providers” in addition to law enforcement officers can identify victims of human trafficking in order to get victims the services they need).

<sup>98</sup> Srikantiah, *supra* note 50, at 192.

<sup>99</sup> *E.g.*, Alexandra F. Levy et al., *When “Mandatory” Does Not Mean Mandatory: Failure to Obtain Criminal Restitution in Federal Prosecution of Human Trafficking Cases in the United States* 14–16 (2014), <http://www.htprobono.org/wp-content/uploads/2014/09/HTProBono-Trafficking-Restitution-Report.pdf> [<https://perma.cc/9MRE-VQTQ>]; STATE JUSTICE INSTITUTE, *supra* note 79, at 90–91, 144.

<sup>100</sup> *E.g.*, *California v. Zeng*, No. A138970, 2015 WL 300470, at \*4–5 (Cal. Ct. App. Jan. 22, 2015) (holding that when defendant attempted to raise a human trafficking defense, though court allowed an expert to briefly testify about the phenomenon of human trafficking, defendant was not permitted a jury instruction on the human trafficking affirmative defense).

establish that he or she is indeed a human trafficking victim.<sup>101</sup> All of these scenarios result in the fact finder not conferring victim status on the requesting individual.

In the case of law enforcement agents and prosecutors' decisions to confer victim status, the decision assesses whether the person is aiding the investigation or prosecution of the case. The prosecutor wants to maximize the gulf between the wrongdoer's conduct and the innocence of the victim, allowing the fact finder to place "full blame for the trafficking enterprise" on the trafficker.<sup>102</sup> It benefits the prosecutor to contrast the moral corruptness of the accused and the innocence of the victim; guilty verdicts are easier to obtain that way. In cases where both victim and defendant are similarly situated, apathy may play a role in the prosecutors' decision not to confer status or grant entitlements. Prosecutors may thus be biased in conferring victim status on people who appear victim-like.

Law enforcement agents, on the other hand, may use victim status to entice an otherwise reluctant victim to cooperate in the investigation, thereby increasing the amount of evidence gathered. Federal officials have been known to incorrectly screen trafficked persons, which has resulted in their detention, arrest, and prosecution.<sup>103</sup> Furthermore, anti-trafficking policies created at the executive level of government are not always applied to the trafficking victim in the lower levels of government.<sup>104</sup> Every person charged with making the human trafficking victim assessment may view victim status differently. Some of these perceptions may conflict with notions of justice or the greater anti-trafficking goal.

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<sup>101</sup> *Id.*; *In re M.D.*, 181 Cal. Rptr. 3d 761, 767–68 (Cal. Ct. App. 2014) (discussing that minor may have been victim of human trafficking, but she did not prove it as a matter of law given that older woman arrested as pandering prostitutes was not necessarily this minor's panderer); *In re Aarica S.*, 168 Cal. Rptr. 3d 136, 141 (Cal. Ct. App. 2014) (ruling that minor was not a human trafficking victim because she was acting on her own as a prostitute, not under the control of another, thus she did not meet the force, fraud, or coercion requirement).

<sup>102</sup> Srikantiah, *supra* note 50, at 195–96; *see also* Maxine D. Kersh, *The Empowerment of the Crime Victim: A Comparative Study of Victim Compensation Schemes in the United States and Australia*, 24 CAL. W. INT'L L.J. 345, 348 (1994) (describing the crime victim as "simply a prosecutor's tool"); Christa Obold-Eshleman, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 589 (2004) (stating that the traditional crime victim "model stresses 'the innocence of victims and the guilt of offenders,' and denies any overlap between the two categories"). Even Supreme Court justices have been known to contrast the guilt of the defendant with the innocence of the victim. Minow, *supra* note 1, at 1416 (quoting Justice Scalia's dissent in *Booth v. Maryland*, 482 U.S. 496, 520 (1987), in which he contrasted the "defendant's moral guilt" with the "harm he has caused to innocent members of society").

<sup>103</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2013, at 385, <http://www.state.gov/j/tip/rls/tiprpt/2013/> [<https://perma.cc/B8HM-98GX>] [hereinafter 2013 TIP REPORT].

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

Traditionally, crime victims do not face liberty or property deprivation.<sup>105</sup> However, human trafficking victims differ from traditional victims in this regard. A fact finder's decision to withhold victim status may result in a conviction, thereby resulting in loss of liberty.<sup>106</sup> Entitlements earmarked for trafficking victims are inaccessible for individuals who cannot prove their status to the gatekeepers of trafficking benefits, protections, and services. There are real liberty and property interests attached to human trafficking victim status. For this reason alone, governments should consider creating a streamlined and reviewable procedure for all parties charged with conferring victim status.

### III. OBSTACLE TWO: QUALIFYING FOR RESTITUTION & CRIME VICTIM COMPENSATION

One of the rights crime victims possess is the right to be made financially whole following the crime.<sup>107</sup> Our legal system has long believed that society is responsible for restoring the victim to her pre-crime position.<sup>108</sup> To this end, victims have the right to apply for government compensation and receive restitution from the trafficker.<sup>109</sup>

Assuming an individual is able to establish human trafficking victim status, there are barriers to receiving financial remuneration under both federal and state laws. While many anti-trafficking laws permit victims to sue traffickers,<sup>110</sup> this

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<sup>105</sup> Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 439 (2008).

<sup>106</sup> *Compare In re Aarica S.*, 168 Cal. Rptr. 3d 136, 142 (Cal Ct. App. 2014) (denying seventeen-year-old minor's claim that she was a human trafficking victim because no third party was exploiting her at the time she engaged in acts of prostitution), *with* *New York v. L.G.*, 972 N.Y.S.2d 418, 424 (N.Y. Crim. Ct. 2013) (holding that minor was a sex trafficking victim, according to state and federal law definitions, because she was sexually exploited and under the age of 18 when she began to work as a prostitute).

<sup>107</sup> STRATEGIC ACTION PLAN, *supra* note 7, at 8.

<sup>108</sup> Linda F. Frank, *The Collection of Restitution: An Often Overlooked Service to Crime Victims*, 8 J. C.R. & ECON. DEV. 107, 115 (1992) (asserting that society has a moral obligation to restore crime victims).

<sup>109</sup> *Victims' Rights*, NAT'L CTR. FOR VICTIMS OF CRIME (2012), <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims'-rights#rights> [<https://perma.cc/32CW-G9XQ>].

<sup>110</sup> *E.g.*, 18 U.S.C. § 1595 (2008) (TVPA provision allowing civil lawsuits to be brought against traffickers); ALA. CODE § 13A-6-157 (2010) (a civil court "may award actual damages, compensatory damages, punitive damages, injunctive relief, and any other appropriate relief" in a lawsuit against a trafficker brought by a victim); W. VA. CODE § 61-2-17(6)(f) (2013) (civil actions permitted). In the first ten years after the TVPA authorized a federal, civil cause of action, just over 40 lawsuits were filed against traffickers, only some of which were successful. Naomi Jiyoun Bang, *Casting A Wide Net to Catch the Big Fish: A Comprehensive Initiative to Reduce Human Trafficking in the Global Seafood Chain*, 17 U. PA. J.L. & SOC. CHANGE 221, 224 n.22 (2014); *see also* Naomi Jiyoun Bang, *Unmasking*

Article's focus is on criminal means of reimbursement: court-ordered restitution and Crime Victim Compensation funds.<sup>111</sup> This Part will analyze the challenges human trafficking victims face in obtaining federal restitution orders and state compensation.

#### *A. Obtaining Federal Restitution Orders*

Restitution differs from compensation in that it is penal in nature, not compensatory.<sup>112</sup>

Providing the victim with their traffickers' ill-gotten gains is critical to restoring a victim's dignity, helping them gain power back from their exploiters who took advantage of their hope for a better life. Restitution . . . attack[s] the greed of the trafficker and the idea of a human being as a commodity. It is a way to ensure that victims receive access to justice.<sup>113</sup>

Judge Posner once stated that restitution forces "the criminal to yield up to his victim the fruits of the crime" leaving the endeavor "worthless to the criminal."<sup>114</sup> Making

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*the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUSTON J. INT'L L. 255, 263 (2013) (discussing tried-and-failed civil corporate liabilities and possible theories of corporate civil liabilities in human trafficking cases occurring in corporate production and supply chains). Human trafficking victims do not always realize civil judgments, even when they are awarded. *E.g.*, Seidenberg, *supra* note 9, at 56–57 (discussing a \$1 million verdict that has never materialized, even though it was awarded ten years ago).

<sup>111</sup> Two additional ways to collect funds from the defendant are through asset forfeiture and fines, but these methods do not always funnel monies to victims; they typically go into state coffers, therefore they will not be analyzed in this section. *E.g.*, 18 U.S.C. § 1594(c)–(e) (2008) (permitting fines, asset forfeiture in human trafficking cases); Polaris Project, *Human Trafficking Legislative Brief: Asset Forfeiture*, [http://polaris.nonprofitsoapbox.com/storage/documents/policy\\_documents/Issue\\_Briefs/issue\\_brief\\_asset\\_forfeiture\\_september\\_2012.pdf](http://polaris.nonprofitsoapbox.com/storage/documents/policy_documents/Issue_Briefs/issue_brief_asset_forfeiture_september_2012.pdf) [<https://perma.cc/XGH3-AATQ>] (stating that as of 2014, thirty-two states and the District of Columbia had asset forfeiture laws related to human trafficking and detailing three instances where assets of traffickers were seized); Benjamin Thomas Greer, *What Is the Monetary Value of Slave Labor?: Restitution Based on a Traditional Fair Market Value Valuation Basis May Not Fully Compensate Human Labor Trafficking Victims*, 31 N. ILL. U. L. REV. 553, 576 (2011) (discussing California's anti-trafficking legislation as it relates to fines collected from traffickers). *But see* Hasselbarth, *supra* note 10, at 413–14 (noting under federal law, assets forfeited by traffickers go directly to the trafficked person, not to federal trafficking victim compensation or restoration funds).

<sup>112</sup> See *Kelly v. Robinson*, 479 U.S. 36, 52–53 (1986).

<sup>113</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2009, TOPICS OF SPECIAL INTEREST: RESTITUTION 18, <http://www.state.gov/j/tip/rls/tiprpt/2009/123128.htm> [<https://perma.cc/5WMK-YKL6>] [hereinafter 2009 TIP Report].

<sup>114</sup> *United States v. Fountain*, 768 F.2d 790, 800 (7th Cir. 1985).

traffickers restore the victim by paying restitution renders the trafficking endeavor profitless, while punishing the trafficker for taking part in the criminal scheme. Restitution is a powerful tool for a greed crime like trafficking. Though a number of states offer victims restitution,<sup>115</sup> this section will focus on federal awards of restitution since federal courts have issued more restitution orders than their state counterparts.

Under the TVPA, victims are guaranteed mandatory restitution for the full amount of their losses.<sup>116</sup> The statutory mandate that “the court shall order restitution” to human trafficking victims implies it is awarded in every case.<sup>117</sup> It is not. Federal judges have ordered the trafficker to compensate victims in only 36% of all human trafficking cases.<sup>118</sup> Federal prosecutors do not always request restitution<sup>119</sup> nor do judges consistently grant it.<sup>120</sup> In only 61% of trafficking cases did the Assistant United States Attorney request restitution; of those cases, fewer than one-third of the requests resulted in a judicial order of restitution.<sup>121</sup> When a restitution request was not made, restitution was rarely ordered by the court *sua sponte*.<sup>122</sup>

Assessing lost wages in a human trafficking case, particularly when the wages relate to illicit work, is challenging. In human trafficking cases, federal judges must assess lost wages using the Fair Labor Standards Act or by calculating the value of the work to the human trafficker, using whichever method produces the greater restitution amount.<sup>123</sup>

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<sup>115</sup> See, e.g., ALA. CODE §§ 13A-6-155, 13A-6-156 (LexisNexis 2014) (providing mandatory restitution and ordering restitution to be paid before any other disbursements from asset forfeiture funds); LA. STAT. ANN. § 15:539.3 (2016) (stating the mandatory restitution in trafficking cases).

<sup>116</sup> 18 U.S.C. §1593 (2012).

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

<sup>118</sup> Stella Dawson, *U.S. Courts Deny Trafficking Victims Lost Wages: Study*, REUTERS (Oct 1, 2014), <http://www.reuters.com/article/2014/10/01/us-foundation-trafficking-wages-idUSKCN0HP0KP20141001> [<https://perma.cc/3ZD7-ZDJE>].

<sup>119</sup> Not all federal prosecutors request restitution. Levy et al., *supra* note 99, at 4–5 (“In 68 of the 186 total cases, the prosecutor did not make a restitution request. In 10 of the cases in which no restitution was requested, the prosecutors explicitly declined to request restitution . . . . In cases in which the prosecutor did not request restitution, restitution was granted in only 7 out of 68 cases.”).

<sup>120</sup> See *id.* at 5 (showing how often courts grant restitution when the prosecutor requests restitution compared with when the prosecutor does not request restitution).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2, 4–5.

<sup>123</sup> 18 U.S.C. §1593(b)(3) (2012); Levy et al., *supra* note 99, at 2; NAT’L CRIME VICTIM L. INST., *Ensuring Full Restitution for Trafficking Victims: An Overview of Mandatory Restitution Awards Under the Trafficking Victims Protection Act* (Nov. 2013), <https://law.lclark.edu/live/files/16054-ncvlivlensuring-full-restitution-for-trafficking> [<https://perma.cc/TSN7-WY69>] (including an equation judges use to calculate restitution in human trafficking cases); Greer, *supra* note 111, at 555–76 (discussing federal and California computations to assess lost wages and restitution values).

Court-ordered restitution is more common when the case involves labor trafficking. Of the cases where restitution was ordered, labor trafficking victims were much more likely to receive lost wages than sex trafficking victims.<sup>124</sup> In labor cases, convicted traffickers were ordered to pay restitution 93% of the time, whereas in sex trafficking cases, which are more likely to be litigated in federal court, traffickers were ordered to pay restitution only 44% of the time.<sup>125</sup>

Trafficking defendants' criminal defense attorneys argue against restitution awards, which is what zealous legal advocates should do given that restitution negatively impacts their clients financially.<sup>126</sup> Criminal defense attorneys routinely argue that victims engaged in criminal activity should not be compensated.<sup>127</sup> One criminal defense attorney likened judicial restitution orders to unjust enrichment, stating trafficking victims are people "who come here illegally, commit illegal acts in our country, and now they are trying to get paid."<sup>128</sup>

Another criminal defense attorney suggested by granting the victims restitution, the federal government "was paying them to be prostitutes."<sup>129</sup> These arguments appear to be persuasive. Federal judges and prosecutors seem to be confused about when restitution should be granted to sex trafficking victims.<sup>130</sup> The illegality of the underlying criminal acts and the requirement that restitution be mandatorily ordered in human trafficking cases "provides ample fodder for defense attorneys to object to restitution."<sup>131</sup>

What defense attorneys, prosecutors, and judges overlook is that where restitution is not ordered to the victim, the ill-gotten profits are retained by the trafficker. In these instances, the trafficker faces no financial penalty for a crime with an underlying financial objective. This outcome conflicts with federal anti-trafficking policy. The United States government, according to the most recent TIP Report, wants to "ensure that restitution is not just ordered, but in fact paid."<sup>132</sup> The United States Department of State, the agency that oversees trafficking policy, believes that restitution has "restorative power."<sup>133</sup>

Another restitution barrier is a lack of prosecution. Unfortunately, the number of traffickers arrested does not correlate with the number of identified trafficking

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<sup>124</sup> Dawson, *supra* note 118.

<sup>125</sup> Levy et al., *supra* note 99, at 9.

<sup>126</sup> Criminal defense attorneys frequently put the victim on trial in an attempt to exonerate or mitigate their client's punishment. *E.g.*, Stephen D. Easton, *Whose Life Is It Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims*, 49 S.C. L. REV. 1, 30 n.140 (1997) (noting the "victim blaming" phenomenon).

<sup>127</sup> Levy et al., *supra* note 99, at 15–16.

<sup>128</sup> *Id.* at 16.

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

<sup>130</sup> *Id.* at 14.

<sup>131</sup> *Id.* at 15.

<sup>132</sup> 2014 TIP REPORT, *supra* note 3, at 17.

<sup>133</sup> 2009 TIP REPORT, *supra* note 113, at 3–4.



victims.<sup>134</sup> Restitution can only be awarded by a court with jurisdiction over the trafficker. What happens when the trafficking victim is the only person charged with a crime?<sup>135</sup> What if the victim is not prosecuted, but neither is the trafficker? Law enforcement agencies are the gateway to victim entitlements; they may decline to investigate suspected human trafficking activity, which means the victim has no hope of recovering restitution, much less proving she is a victim of a crime that will never be prosecuted. In these real-life scenarios, the victim never receives restitution, much less social services, legal protections, or other victim entitlements.<sup>136</sup>

According to one federal study, between 2008 and 2010, there were 527 identified victims yet only 144 trafficker arrests.<sup>137</sup> While it is possible some of these arrested traffickers enslaved more than one person, it is more likely that some of the victims' traffickers were never apprehended or convicted of the trafficking crime. Global convictions illustrate an even greater unlikelihood of restitution. Of 7,705 people who were prosecuted for trafficking crimes up to 2012, only half were ultimately convicted.<sup>138</sup> This means that one of two global trafficking victims have the *hope* of getting restitution.

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<sup>134</sup> There is evidence that there are far fewer prosecutions and convictions than there should be. For example, according to the Texas Human Trafficking Prevention Task Force, between 2007 and 2014, a total of 171 people had been convicted of human trafficking or compelling prostitution, yet Backpage.com ran 25,950 commercial sex ads in the Houston area over a twelve-week period in Houston alone in 2014. TEX. OFF. OF THE ATTN'Y GEN., THE TEXAS HUMAN TRAFFICKING PREVENTION TASK FORCE REPORT 2014, at 7 (Dec. 2014), [https://www.texasattorneygeneral.gov/files/agency/20142312\\_htr\\_fin.pdf](https://www.texasattorneygeneral.gov/files/agency/20142312_htr_fin.pdf) [<https://perma.cc/Y5YY-2BJM>]. Between 2001 and 2012, more than 352 people had been imprisoned for felony prostitution. Mike Ward, *Texas Rethinks Law Making Repeat Prostitution a Felony*, AUSTIN AMERICAN-STATESMAN (Aug. 26, 2012, 8:09 PM) <http://www.statesman.com/news/news/state-regional-govt-politics/texas-rethinks-law-making-repeat-prostitution-a-fe/nRNmt/> [<https://perma.cc/RQ5Y-6SZ4>]. These numbers reflect there are likely far more trafficking victims than trafficking convictions. See, e.g., Elizabeth M. Johnson, *Buyers Without Remorse: Ending the Discriminatory Enforcement of Prostitution Laws*, 92 TEX. L. REV. 717, 725–29 (2014) (detailing the discriminatory enforcement of anti-prostitution laws with two-thirds of all prostitution-related arrests affected upon female prostitutes and only one-third of arrests affected upon johns).

<sup>135</sup> The federal government recognizes there is a need for better data, particularly at the state level, regarding prosecution outcomes for both victims and traffickers. STRATEGIC ACTION PLAN, *supra* note 7, at 19.

<sup>136</sup> E.g., *In re B.W.*, 313 S.W.3d 818, 819, 828, 835–36 (Tex. 2010) (thirty-two-year-old boyfriend of thirteen-year-old victim who presumably encouraged her prostitution was never arrested or charged with a crime); *People v. Gonzalez*, 927 N.Y.S.2d 567, 567–69 (N.Y. Crim. Ct. 2011) (Brazilian national begged police to arrest her so she would not have to sleep with men; police failed to recognize her as a trafficking victim or charge her traffickers); Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L.J. 826, 833–34 (2007) (explaining that the arrests of labor trafficking victims led them to believe law enforcement agents were not there to help them).

<sup>137</sup> Banks & Kyckelhahn, *supra* note 66, at 1.

<sup>138</sup> Bang, *supra* note 110, at 224 (citing the 2013 TIP REPORT).

Critics believe the low number of prosecutions, both in America and abroad, can be blamed on several factors: the underground, criminal nature of trafficking; limited resources to eradicate a difficult-to-eliminate crime; lack of victim cooperation; and apathy towards the victims' politically uninfluential population.<sup>139</sup> "The victims of this crime are perceived to be society's throwaways."<sup>140</sup> Government officials therefore do not always commit adequate resources to trafficking victims.<sup>141</sup> For all of these reasons, it is likely that a significant number of trafficked persons, in this country and abroad, may never receive victim status, much less restitution from their trafficker.

### B. Collecting State Crime Victim Compensation Funds

Every state in the nation has funds designed to compensate victims of crime.<sup>142</sup> Generally called Crime Victim Compensation (CVC), these monies are designed to help victims and their families recover from the trauma and expense of violent crime.<sup>143</sup> Following a criminal act, victims may need financial assistance to offset the cost of medical treatment, rehabilitation, counseling, missed wages, expenses related to participating in the criminal justice system, and emergency expenditures including housing, food, and basic necessities.<sup>144</sup> If no other forms of reimbursement are available, such as insurance, CVC can be used to reimburse paid expenses or cover anticipated costs associated with the victimization of crime.<sup>145</sup>

Funds are managed and disbursed through state programs and boards, which are typically authorized by statute.<sup>146</sup> Though incidents of violent crime occur less

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<sup>139</sup> E.g., Andrea L. Johnson, *A Perfect Storm: The U.S. Anti-Trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 636 (2012) (Native American victims' reluctance to testify is a barrier to successful prosecution); Seidenberg, *supra* note 9, at 56 (noting limited government resources to prosecute, apathy toward victims, and the underground, criminal nature of trafficking as reasons for low conviction rates).

<sup>140</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2010, POLICY PRIORITIES: PROSECUTION (2010), <http://www.state.gov/j/tip/rls/tiprpt/2010/142748.htm> [<https://perma.cc/T72P-4F9C>] [hereinafter 2010 TIP REPORT].

<sup>141</sup> Seidenberg, *supra* note 9, at 54 (citing psychological and physical control, fear of retaliation, and beliefs that legal systems are corrupt as reasons why victims do not cooperate with investigations); see also Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 200 (2014) ("Adding new offenses to criminal codes is cheap, but funding their enforcement is not.").

<sup>142</sup> CRIME VICTIM COMPENSATION: AN OVERVIEW, NAT'L ASS'N CRIME VICTIM COMP. BD., <http://www.nacvcb.org/index.asp?bid=14> [<https://perma.cc/7FTS-3C94>] (last visited Mar. 12, 2016) [hereinafter OVERVIEW].

<sup>143</sup> *Id.*

<sup>144</sup> RESTITUTION, NAT'L CTR. FOR VICTIMS OF CRIME (2004), <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution> [<https://perma.cc/8542-5VNG>].

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

frequently today than twenty years ago, CVC programs report allocating more funds per victim in recent years and expanding coverage to more types of criminal acts than they once did.<sup>147</sup> One of the new types of crime covered is human trafficking.<sup>148</sup>

CVC programs are fairly uniform when it comes to fund stipulations. Programs consistently “mandate modest awards and restrictive eligibility requirements,” which have the effect of limiting allotments.<sup>149</sup> Most CVC programs compensate violent crime that results in physical and psychological injuries or death, not property crimes.<sup>150</sup> States often require residency in order to qualify for compensation.<sup>151</sup> Trafficking victims would likely meet these CVC program requirements.

CVC programs base fund disbursements on reporting deadlines and investigation cooperation. For example, they typically require that victims report the crime to police within a few days of its occurrence<sup>152</sup> and file a claim within a specified amount of time after the crime’s commission.<sup>153</sup> They also tie compensation to victim cooperation with law enforcement officers and prosecutors.<sup>154</sup>

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<sup>147</sup> OVERVIEW, *supra* note 142.

<sup>148</sup> *Id.* (stating that violent crime has decreased one-third since 1993 and currently, CVC funds disburse nearly “\$500 million annually to more than 200,000 victims”).

<sup>149</sup> Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167, 189–90 (2004).

<sup>150</sup> *E.g.*, UTAH OFFICE FOR VICTIMS OF CRIME, CRIME VICTIM REPARATIONS PROGRAM (2011), [http://www.crimevictim.utah.gov/Documents/Crime%20Victim%20Information/CrimeVictimBrochure\\_2011.pdf](http://www.crimevictim.utah.gov/Documents/Crime%20Victim%20Information/CrimeVictimBrochure_2011.pdf) [<https://perma.cc/GH8Z-6S75>].

<sup>151</sup> *E.g.*, ME. REV. STAT. ANN. tit. 5, § 3360-B (2009) (crime has to have been committed against a resident, within the state, or, if the criminal act occurred outside of the state, it has to have been committed against a state resident who was not eligible for that jurisdiction’s compensation); MISS. CODE ANN. § 99-41-5(d) (West 2012) (same); N.M. STAT. ANN. § 31-22-3(I) (West 2001) (same).

<sup>152</sup> *E.g.*, MASS. GEN. LAWS ANN. ch. 258C, § 2 (West 2010) (victim must report crime within five days of its occurrence unless delay for good cause has been shown); OKLA. STAT. ANN. tit. 21, § 142.10(a)(4) (West 2007) (crime must be reported within seventy-two hours unless there was good cause for delay).

<sup>153</sup> *E.g.*, ATTORNEY GENERAL, STATE OF DELAWARE, VICTIMS’ COMPENSATION ASSISTANCE PROGRAM 1, 5 (2013), [http://attorneygeneral.delaware.gov/vcap/files/VCAP\\_2013\\_Annual\\_Report.pdf](http://attorneygeneral.delaware.gov/vcap/files/VCAP_2013_Annual_Report.pdf) [<https://perma.cc/5WZT-3P84>] (requiring victim to file within one year to be eligible for compensation unless that requirement is waived); IOWA CODE ANN. § 915.84 (West 1999) (one-year filing limitation).

<sup>154</sup> *E.g.*, ARIZONA CRIMINAL JUSTICE COMMISSION, VICTIM COMPENSATION: ELIGIBILITY, <http://azcjc.gov/ACJC.Web/victim/VictComp.aspx#2> [<https://perma.cc/8DCN-XRK5>] (last visited Mar. 19, 2016) (victims who want compensation must cooperate with law enforcement); STATE OF IDAHO, CRIME VICTIMS COMPENSATION: WHAT ARE THE CONDITIONS FOR ELIGIBILITY?, <http://crimevictimcomp.idaho.gov/faqs.html#conditions> [<https://perma.cc/8GVQ-AYE3>] (victims must fully cooperate with investigation and prosecution in order to qualify for benefits); OHIO REV. CODE ANN. § 2743.60(C) (West 2014) (fund awards may be reduced or rejected if a victim has not fully cooperated with law

It is unlikely that trafficking victims would meet these reporting or cooperation requirements. First, many trafficking victims do not identify as such; they view themselves as criminals and are thus fearful of contacting law enforcement agencies, even when they are abused or mistreated by traffickers.<sup>155</sup> “Human trafficking is an extremely unusual category of major crime in which the victims will not report to law enforcement what is being perpetrated against them,” which makes identifying victims difficult.<sup>156</sup> Many victims are simply unaware or unable to report the trafficking scheme to authorities, much less meet statutorily defined deadlines.<sup>157</sup>

There are several legitimate reasons why victims are not cooperative. Victims are conditioned to protect their trafficker or face life-threatening consequences;<sup>158</sup> they generally do not trust law enforcement officers; they are distressed about the possibility of their deportation if they are here illegally; they experience mental and physical trauma that sometimes makes cooperation difficult; and they fear retaliation against themselves and their loved ones.<sup>159</sup> For all of these reasons, states must consider exempting human trafficking victims from these CVC fund requirements.

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enforcement). Whereas international efforts to eradicate human trafficking center on human rights law, the United States uses a law enforcement legal model, which ties law enforcement cooperation to receiving victim services and benefits. Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 646–49 (2009). However, the TVPA exempts some minors and persons who have severe psychological trauma from the cooperation requirement. 22 U.S.C. § 7105(b) (2013); 8 U.S.C. § 1101(a)(15)(T) (2012). America’s cooperation requirement has been described by critics as a “you help us and we will help you” approach. Valerie S. Payne, *On the Road to Victory in America’s War on Human Trafficking: Landmarks, Landmines, and the Need for Centralized Strategy*, 21 REGENT U. L. REV. 435, 448–49 (2009).

<sup>155</sup> Peters, *supra* note 9, at 25–26.

<sup>156</sup> IAN KITTERMAN ET AL., THE RENEWAL FORUM, AN EXAMINATION OF STATE LAWS ON HUMAN TRAFFICKING 1, 4 (Jan. 27, 2012), <http://renewalforum.org/wp-content/uploads/2012/01/State-Law-Analysis.pdf> [https://perma.cc/PQK6-4W7F].

<sup>157</sup> E.g., Benjamin Thomas Greer & Scott Davidson Dyle, *Determining the Reasonableness of Non-Compliance: Examining the “Trauma Exception” for T-Visa Applicants*, 15 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 385, 409–10 (2013) (“Victims may also be mentally traumatized to the extent they are rendered unable to retell their story, thereby causing them to be unable to adequately inform law enforcement of the underlying crime.”).

<sup>158</sup> E.g., *id.* at 410–11 (discussing the ideas that noncitizen victims are reluctant to cooperate with federal officials because the agency charged with investigating the crime, Immigration and Customs Enforcement, is also the agency responsible for deporting them, and that traffickers exploit this fact to maintain loyalty); Dysart, *supra* note 40, at 638 (stating that juvenile sex trafficking victims may consider their trafficker to be their boyfriend); Parker & Skrmetti, *supra* note 64, at 1035 (noting that traffickers “create a climate of fear that compels the victim to obey the sex trafficker for fear of additional violence”).

<sup>159</sup> E.g., Adams, *supra* note 21, at 229 (“[M]any victims are unwilling or unable to assist in a prosecution because they are afraid of retribution from their traffickers, are afraid of the police, are afraid of sensitive and personal information becoming public, or are too severely traumatized by the trafficking experience.”); Marisa Silenzi Cianciarulo, *The Trafficking and Exploitation Victims Assistance Program: A Proposed Early Response Plan for Victims of*

Another problem area for human trafficking victims is the “clean hands” requirement.<sup>160</sup> CVC statutes typically disqualify victims from compensation if they engaged in criminal conduct at the time the victimizing crime was committed.<sup>161</sup> Kentucky, Nebraska, and Utah only provide funds to “innocent victims”<sup>162</sup> whereas Georgia excludes victims who consented to “the events leading to the crime.”<sup>163</sup> In

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*International Human Trafficking in the United States*, 38 N.M. L. REV. 373, 373–74 (2008) (detailing a sex trafficking case in which most foreign nationals were deported for failure to cooperate with law enforcement officials); Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1684 (2007) (noting that the trauma of enduring the trafficker’s trial, the inability traumatized victims have in assisting investigators, and the complexity of the victim certification process are all barriers to victim cooperation with law enforcement); Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention’s “Nexus” Requirement*, 16 MICH. J. GENDER & L. 453, 458 (2010) (“[A] victim may legitimately fear that she could be putting herself, or her family, in danger of retaliation by her traffickers.”).

<sup>160</sup> E.g., Jeffrey A. Parness et al., *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819, 847–48 (2010) (detailing the “clean hands” requirement that most states impose upon crime victims who seek CVC funds).

<sup>161</sup> E.g., CONN. GEN. STAT. ANN. § 54-208(c) (West 2015) (behavior not contributory); S.C. CODE ANN. § 16-3-1510(1) (1998) (listing eligibility criteria that excludes people who were “engaged in an illegal act at the time of the offense”); *Victims’ Compensation Program FAQ*, STATE OF N.H., <http://doj.nh.gov/grants-management/victims-compensation-program/faq.htm> [<https://perma.cc/YZ4W-UKZ4>] (last visited Mar. 12, 2016) (eligible victims “must not have been assisting in or committing a criminal act causing [their] injuries”); *Victim Services: North Dakota Crime Victims Compensation*, THE STATE OF N.D., <http://www.nd.gov/doctr/programs/victims/viccomp.html> [<https://perma.cc/PZ7U-CAFT>] (last visited Mar. 12, 2016) (restricting funds to victims who were not engaged in criminal activity at the time they were injured); UTAH OFFICE FOR VICTIMS OF CRIME, ARE YOU A VICTIM OF A CRIME . . . , [http://www.crimevictim.utah.gov/Documents/Crime%20Victim%20Information/CrimeVictimBrochure\\_2011.pdf](http://www.crimevictim.utah.gov/Documents/Crime%20Victim%20Information/CrimeVictimBrochure_2011.pdf) [<https://perma.cc/ES4K-K3MX>] (last visited on Mar. 12, 2016) (noting that victims whose own misconduct contributed to the crime or who engaged in illegal conduct at the time of the crime are excluded from receiving compensation); *Eligibility Benefits*, CRIMINAL INJURIES COMP. FUND, <http://www.cicf.state.va.us/benefits.shtml#assistance> [<https://perma.cc/G7ZM-DMBR>] (last visited Mar. 12, 2016) (stating that victims “who participated in or were involved in the events leading to the crime” are excluded from receiving compensation).

<sup>162</sup> CRIME VICTIMS COMP. BD., FINANCIAL ASSISTANCE FOR INNOCENT VICTIMS OF VIOLENT CRIME: CRIME VICTIMS’ COMPENSATION 2 (2013), <http://cvcb.ky.gov/Documents/Crime%20Victims%20Compensation%20Brochure%20in%20English%20Revised%202013.pdf> [<https://perma.cc/S5WT-H365>]; NEB. CRIME COMM’N, NEBRASKA’S CRIME VICTIM’S REPARATIONS PROGRAM 2, [https://ncc.nebraska.gov/sites/ncc.nebraska.gov/files/pdf/others/crime\\_victims\\_reparations/cvr\\_presentation.pdf](https://ncc.nebraska.gov/sites/ncc.nebraska.gov/files/pdf/others/crime_victims_reparations/cvr_presentation.pdf) [<https://perma.cc/UX6G-S8PS>] (last visited Mar. 12, 2016).

<sup>163</sup> *Victims Compensation*, CRIMINAL JUSTICE COORDINATING COUNCIL, <http://cjcc.georgia.gov/victims-compensation> [<https://perma.cc/9GTS-YNJY>] (last visited Mar. 12, 2016).

Montana, CVC funds can be reduced for contributory misconduct.<sup>164</sup> Alabama's CVC statute maintains that funds will not be granted to "a claimant who was the offender, or an accomplice to the offender, or who encouraged or in any way participated in the criminally injurious conduct."<sup>165</sup> States may even take this "clean hands" requirement one step further. Victims may be disqualified from receiving funds if they have a criminal history, even if it is unrelated to the crime for which they are seeking compensation.<sup>166</sup> In Ohio, for example, all human trafficking victims, except sex trafficked minors, must possess clean criminal histories for ten years before filing their claims, must not have contributed to the victimizing crime's commission, and must not have been under the influence of drugs or alcohol when the crime was committed.<sup>167</sup> The message is clear: states prefer compensating legally innocent victims.<sup>168</sup> These criteria make compensation for most sex trafficked victims highly unlikely.<sup>169</sup> This is unfortunate given the fact that trafficking victims' "unique injuries and criminal backgrounds [should] be recognized as indicators of their exploitation rather than barriers" to compensation.<sup>170</sup>

Few states have exempted trafficking victims from CVC conditions. Only twenty-one states and the District of Columbia have specifically included human trafficking as a compensable crime in the CVC statute or program.<sup>171</sup> The remaining

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<sup>164</sup> *Crime Victim Compensation*, MONT. DEP'T OF JUSTICE, <https://dojmt.gov/victims/crime-victim-compensation/> [<https://perma.cc/X6V7-BMEA>] (last visited Mar. 12, 2016).

<sup>165</sup> ALA. CODE § 15-23-12(a)(2) (2015).

<sup>166</sup> *E.g.*, *Sims-Hearn v. Office of Med. Exam'r, Cook*, 834 N.E.2d 505, 508 (Ill. App. Ct. 2005) (denying the mother of a deceased man compensation because the deceased had drugs in his system at the time of his death); *In re Barnes*, 34 Ill. Ct. Cl. 424, 425–26 (1980) (denying the claimant compensation, in part because he was intoxicated by alcohol and drugs when the crime was committed); KAN. ADMIN. REGS. § 20-2-8 (2016) (stating that "contributory misconduct," which may diminish or disqualify a victim from receiving compensation, includes drug or alcohol intoxication).

<sup>167</sup> OHIO REV. CODE ANN. § 2743.60 (West 2015); Marilyn Tobocman & Diane Citrino, *Human Trafficking in Our Backyard: What Can Lawyers Do?*, 61 FED. LAW. 16, 17 (2014); STRATEGIC ACTION PLAN, *supra* note 7, at 6.

<sup>168</sup> *See* Giannini, *supra* note 105, at 440 (discussing the "not-entirely-realistic dichotomy of the 'good victim' and the 'bad defendant'" in criminal law); Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 238 (2011) (discussing the preference to award CVC funds to "innocent" domestic violence victims versus "victims [who] contributed to their own victimization").

<sup>169</sup> *See* Rutledge, *supra* note 168, at 240–43 ("Issues with addiction, or a past criminal record, should not automatically disqualify victims from receiving compensation because those issues do not negate the victimization experienced.").

<sup>170</sup> 2014 *Protected Innocence Challenge*, *supra* note 4, at 87.

<sup>171</sup> *E.g.*, ALASKA STAT. ANN. § 18.67.101 (West Supp. 2013) (including "any degree" of human trafficking); *Who's Eligible*, CAL. VICTIM COMP. PROGRAM, <http://www.vcpcb.ca.gov/victims/eligibility.aspx> [<https://perma.cc/9GTX-2373>] (last visited Mar. 15, 2016) (human trafficking listed under qualifying crimes); CAL. GOV'T CODE

states make no mention of trafficking victims nor consider trafficking a crime worth compensating.<sup>172</sup> Of the twenty-one states that specifically mention trafficking victims, two CVC programs apply only to minor victims while one applies solely to

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§ 13956(b)(3) (West 2014) (exempts trafficking victims from making a police report); COLO. REV. STAT. ANN. § 24-4.1-302(1)(ii) (West 2014) (trafficking of adults or children included); D.C. CODE § 4-501(6) (2010) (including as crimes, among other things, “benefitting financially from human trafficking,” “trafficking in labor or commercial sex acts,” and “sex trafficking of children”); FLA. STAT. ANN. § 960.065(2)(b) (West 2014) (exempting sex trafficking victims from the innocent-victim requirement of the CVC statute); GA. CODE ANN. § 17-15-2(3)(A)(iv) (West 2014) (referencing the state’s criminal human trafficking section); 720 ILL. COMP. STAT. ANN. 5/10-9 (West 2014) (human trafficking included); 740 ILL. COMP. STAT. ANN. 45/2(c), (m) (West 2014) (human trafficking-related tattoos in the CVC statute); IOWA CODE ANN. § 915.51 (West 2006) (trafficking victims can apply for CVC funds “regardless of their immigration status”); KAN. STAT. ANN. § 74-7305 (West 2015) (including human trafficking as compensable); LA. REV. STAT. ANN. §§ 46:1802(13)(a), 46:1805(A) & (B)(3), & 46:1809(B)(3)(a)(iv), (4)(a) (2015) (including and providing exemptions for human trafficking victims); ME. REV. STAT. tit. 5, § 3360(3)(J) (2014) (including aggravated sex trafficking and sex trafficking only); MINN. STAT. ANN. § 299A.795 (West 2006) (permitting victims compensation in human trafficking cases); N.J. ADMIN. CODE § 13:75-2.1(b)(16) (2012); *Compensation FAQ*, N.M. CRIME VICTIMS REPARATIONS COMM’N, [http://www.cvrc.state.nm.us/frequently-asked-questions/\[https://perma.cc/2YX8-66SP\]](http://www.cvrc.state.nm.us/frequently-asked-questions/[https://perma.cc/2YX8-66SP]) (last visited Mar. 15, 2016) (listing victims of human trafficking under qualifying victims); N.C. GEN. STAT. ANN. § 15B-2(2)(e) (West 2013) (allowing compensation claims for victims of trafficking); OR. REV. STAT. § 147.015 (2013) (only child sexual exploitation is exempted from eligibility requirements, not any other forms of trafficking); *Human Trafficking*, PA. OFFICE OF VICTIM SERVS., <http://pcv.pccd.pa.gov/empowering-the-victim/Pages/Human-Trafficking.aspx#.VQtp59LF-Sq> [https://perma.cc/U9RS-UWC5] (last visited Mar. 15, 2016) (“Victims of human trafficking may be eligible for . . . financial assistance with relocation, counseling, and replacement of some identification documents” through the state’s Victims Compensation Assistance Program); *Human Trafficking Information*, S.D. DEP’T OF SOC. SERVS., <https://dss.sd.gov/keyresources/victimservices/humantrafficking.aspx> [https://perma.cc/LC99-BU46] (last visited Mar. 15, 2016) (listing services and resources for victims of human trafficking); TEX. CODE CRIM. PROC. ANN. art. 56.01(3), 56.32(a)(14), 56.42(d) (West 2013) (permitting both labor and sexual trafficking victims to be compensated); WASH. REV. CODE ANN. § 7.68.060(6)(b) (West 2011) (child victims of commercial sexual exploitation can receive compensation funds); WIS. STAT. ANN. § 949.03(1)(b) (West 2014 & Supp. 2015) (referencing §940.302, the human trafficking statute, in the list of crimes that qualify victims for compensation). It is not clear whether Tennessee offers compensation funds to trafficking victims. TENN. CODE ANN. § 71-1-135(b)(4) (West 2015 Supp.) (devising a plan to coordinate compensation funds for trafficking victims at a future date uncertain).

<sup>172</sup> *E.g.*, CONN. GEN. STAT. ANN. § 54-234 (West 2009) (though “trafficking in persons” is mentioned within the compensation statute, it is unclear whether funds compensate human trafficking victims); HAW. REV. STAT. § 351-32 (West 1998) (crime of human trafficking not on list of compensable crimes); MO. ANN. STAT. § 595.010(1)(5) (West 2011) (same); 12 R.I. GEN. LAWS ANN. § 12-25-20 (West 2006) (same).

sex trafficking victims.<sup>173</sup> Thus, even where states have recognized a distinction between human trafficking victims and traditional crime victims, they impose limitations upon who is relieved from meeting the program or statute's requirements.

Only a handful of states recognize trafficking victims will not be able to meet CVC conditions, but even then the criteria are inconsistent. California exempts trafficking victims from meeting the police report requirement,<sup>174</sup> whereas Iowa does not require victims to be residents or even American citizens in order to access CVC funds.<sup>175</sup> In Florida, Georgia, and North Carolina, CVC statutes excuse trafficking victims from the innocence standard.<sup>176</sup> The Texas Attorney General has suggested the State modify its CVC criteria so trafficking victims with criminal histories can access funds, which it recognizes are inaccessible given the criteria the State currently requires victims to meet.<sup>177</sup>

It is important to note that even though these states recognize the challenges victims face and exempt victims from certain requirements, it is still unlikely human trafficking victims can meet the other CVC conditions. There is currently not a single state where all types of human trafficking victims can access CVC funds without meeting all or most of the conditions, which makes recovery improbable.

The federal government recognizes that CVC funds are a necessary component of victim benefits in that they decrease the likelihood of re-trafficking and reimburse the victim when restitution is not available.<sup>178</sup> To this end, the United States government is attempting to work with states to streamline victim services. The Department of Justice's Office for Victims of Crime is currently attempting to "create partnerships that provide comprehensive legal services to crime victims,"<sup>179</sup> which includes increasing access to CVC funds in trafficking cases.<sup>180</sup> As one anti-trafficking nonprofit organization stated,

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<sup>173</sup> ME. REV. STAT. tit. 5, § 3360(3)(J) (2014) (including aggravated sex trafficking and sex trafficking only); OR. REV. STAT. ANN. § 147.015 (West 2013) (only child sexual exploitation is exempted from eligibility requirements, not any other forms of trafficking); WASH. REV. CODE ANN. § 7.68.060(6)(b) (West 2011) (child victims of commercial sexual exploitation can receive compensation funds).

<sup>174</sup> CAL. GOV'T CODE § 13956(b)(3) (West 2014).

<sup>175</sup> IOWA CODE ANN. § 915.51 (West 2006) (trafficking victims can apply for CVC funds "regardless of their immigration status").

<sup>176</sup> FLA. STAT. ANN. § 960.065(2)(a)–(c), (5) (West 2014); GA. CODE ANN. § 17-15-7(e) (West 2014); N.C. GEN. STAT. ANN. § 15B-2(2)(e) (West 2013).

<sup>177</sup> TEXAS OFFICE OF THE ATTORNEY GENERAL, TEXAS HUMAN TRAFFICKING PREVENTION TASK FORCE REPORT 21 (2014), [https://www.texasattorneygeneral.gov/files/agency/20142312\\_htr\\_fin.pdf](https://www.texasattorneygeneral.gov/files/agency/20142312_htr_fin.pdf) [<https://perma.cc/JRS8-7XQT>].

<sup>178</sup> 2014 TIP REPORT, *supra* note 3, at 17; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2009, TOPICS OF SPECIAL INTEREST: RESTITUTION, <http://www.state.gov/j/tip/rls/tiprpt/2009/123128.htm> [<https://perma.cc/HKU7-YXEH>].

<sup>179</sup> STRATEGIC ACTION PLAN, *supra* note 7, at 42.

<sup>180</sup> *Id.* at 43, 67.



At the societal level, awarding compensation acknowledges that trafficking is a crime. At the individual level, compensation acknowledges victims' pain and suffering. At the practical level, compensation can assist victims in rebuilding their lives. . . . Statutory exceptions for victims of . . . trafficking . . . are necessary to ensure access to these funds.<sup>181</sup>

Legislators must recognize that trafficked persons do not lose victim status by engaging in forced or coerced criminal acts. All states need to diligently revise criteria in CVC statutes and programs, some of which have not been updated since trafficking became a crime in 2000.<sup>182</sup> Programs and statutes must encompass all types of human trafficking victims. CVC program directors and lawmakers must understand that without more exemptions, there is little hope trafficking victims will meet CVC fund conditions.

#### IV. HEIGHTENED VICTIM REQUIREMENTS: JUSTIFICATIONS & DILEMMAS

Governments must focus on redrafting and reimagining anti-trafficking laws so that they better serve human trafficking victims. While the federal government is attempting to create more victim-centered laws and policies,<sup>183</sup> it must ensure that state and federal legislators are focusing on improving the quality of legislation, not just enacting more laws.

It would be wise for governments to reexamine whether fifteen years later, the TVPA and state trafficking definitions are workable given the fact that the actual and imagined victim populations differ. Legislators must recognize the trafficking victim definition is the standard of proof required to access victim entitlements and determine whether the current definition is sensible. They must understand the distinctions between human trafficking victims and traditional crime victims when it comes to accessing services. And they should consider sorting trafficking entitlements into traditional and trafficking-specific categories. By doing so, governments may better justify the obstacles victims must overcome to access extraordinary victim services. This section will detail each of these considerations.

##### *A. Re-evaluating the Definitional Standard of Proof*

The human trafficking victim definition was never meant to establish the standard of proof in human trafficking cases. International human trafficking was

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<sup>181</sup> 2014 *Protected Innocence Challenge*, *supra* note 4, at 103.

<sup>182</sup> *E.g.*, HAW. REV. STAT. ANN. § 351-32 (West 1998); R.I. GEN. LAWS ANN. § 12-25-20 (West 1999).

<sup>183</sup> STRATEGIC ACTION PLAN, *supra* note 7, at vi (noting that the strategic plan of 2013–2017 is focused on “strengthening coordination, collaboration, and capacity across governmental and nongovernmental entities dedicated to providing support to the victims of human trafficking”).

the primary concern in the drafting of the TVPA.<sup>184</sup> Congress focused on the idea that foreign women were kidnapped and trafficked across international borders to be sexual slaves.<sup>185</sup> In the first subsections of the TVPA, which detail the Act's purpose and congressional findings, phrases like "throughout the world," "international sex trade," and "transnational crime" appear, demonstrating that Congress was attempting to protect the foreign-born sex slave.<sup>186</sup> Federal law enforcement agencies were concerned about foreigners who would take advantage of the T visa.<sup>187</sup> Federal agencies "were preoccupied with avoiding claims from undocumented migrants falsely claiming to be trafficking victims."<sup>188</sup> In the end, legislators wavered between a desire to protect these victims and a duty to assess their credibility and motives before offering crime victim entitlements.

During the first human trafficking federal hearings, legislators reacted with feelings of "surprise, incredulity or indifference" when they discovered the prevalence of human trafficking on American soil.<sup>189</sup> Skepticism eventually gave way to discussion. In the legislative history of the TVPA, senators focused on the international brand of trafficking, most often sex trafficking, and its effects on America.<sup>190</sup> Senator Sam Brownback stated, "victims are routinely forced against their will into the sex trade, transported across international borders, and left defenseless in a foreign country."<sup>191</sup> When he introduced the Act, Senator Paul Wellstone stated that trafficking victims were "brought into the United States" by force, that some of these individuals came from collapsed political regimes in the former Soviet Union, and that corrupt officials overseas were complicit in the international trafficking problem.<sup>192</sup>

These statements indicate that Congress imagined victims were primarily Eastern European or Russian women, who were forcibly trafficked into the United

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<sup>184</sup> See, e.g., 22 U.S.C. § 7101(b)(1) (2012) (emphasizing human trafficking as a global phenomenon crossing international borders that results in approximately 50,000 people being trafficked into the United States annually); § 7101(b)(5) (stating that traffickers often transport victims from their home countries to foreign countries); § 7101(b)(20) (stating that "victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked").

<sup>185</sup> ANTHONY M. DEStEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED* 38 (2007).

<sup>186</sup> § 7101(b)(1)–(3).

<sup>187</sup> Srikantiah, *supra* note 50, at 191 n.194.

<sup>188</sup> *Id.*

<sup>189</sup> 157 CONG. REC. E2112 (daily ed. Nov. 22, 2011) (statement of Rep. Smith).

<sup>190</sup> See, e.g., Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3029–30 nn. 311–12 (2006) (recounting some of the many characterizations of sex trafficking scenarios on the Senate floor). See generally DEStEFANO, *supra* note 185, at 32–41 (2007) (noting that Congress was concerned about people being trafficked into the United States).

<sup>191</sup> 146 CONG. REC. S10137 (daily ed. October 10, 2000) (statement of Sen. Brownback).

<sup>192</sup> 146 CONG. REC. S2414 (daily ed. April 12, 2000) (statement of Sen. Wellstone).

States by organized criminal syndicates, to work in forced sexual servitude.<sup>193</sup> Few remarks suggest legislators recognized that victims could be Americans<sup>194</sup> or individuals resembling the non-enslaved, immigrant population currently living and working in the United States.<sup>195</sup> The fact that victim status was something that had to be earned originated out of a concern that these people were not citizens, they were engaged in organized crime, and it was possible they may not be victims after all. Legislators were skeptical and reluctant to offer entitlements *carte blanche*. The TVPA definition reflects a compromise on behalf of human rights activists, governments, labor organizations, and advocacy groups.<sup>196</sup> This definition was not designed to be a burden of proof used to establish victim entitlements. Yet, that is what it has become.

Fifteen years after the TVPA's passage and several years into the enactment of state trafficking laws, governments need to be candid about who trafficking victims are, what they need, and what services the government is willing to provide. According to the DOJ, the majority of sex trafficking victims are young, female Americans whereas most labor trafficking victims are undocumented or qualified aliens, mostly of Hispanic or Latino origin.<sup>197</sup> These are not the victims Congress imagined when it drafted the TVPA.

Lawmakers in this country should no longer operate under the dated notions that human trafficking victims are Eastern European or Russian women, abducted against their will, chained in locked and guarded rooms, rescued, and ultimately saved by law enforcement officer heroes.<sup>198</sup> Nor should they blame victims who do not fit this image for the crimes they committed pursuant to the trafficking scheme. These myths and practices “denigrate the victim, excuse the perpetrator, and obfuscate human trafficking.”<sup>199</sup>

By requiring the human trafficking victim to prove her status, governments enter into the provision of services with skepticism and blame. This is how the relationship between government and human trafficking victim begins: with a prove-

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<sup>193</sup> 22 U.S.C. § 7101(b)(8) (2012) (“Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises.”).

<sup>194</sup> Birckhead, *supra* note 76, at 1079 (highlighting two comments made—one by New York Representative Christopher Smith and the other by Minnesota Congressman Paul Wellstone—about domestic trafficking victims).

<sup>195</sup> See also Chuang, *Exploitation*, *supra* note 19, at 640 (noting that “trafficking abuses typically occur in the context of individuals seeking a livelihood—often as migrants, sometimes undocumented, sometimes utilizing state-created or sanctioned mechanisms or third-party actors that offer opportunities laced with potentially exploitative constraints”).

<sup>196</sup> *Id.* at 617–28 (describing the formation of the “severe form” definition and how various stakeholders and presidential administrations have reinterpreted it).

<sup>197</sup> See *supra* text accompanying notes 66–71.

<sup>198</sup> Srikantiah, *supra* note 50, at 160, 170–72 (discussing the iconic trafficking victim as “meek, passive objects of sexual exploitation . . . exercising no free will during their illegal entry” and suggesting this rhetoric has become a myth to lawmakers and law enforcement agents).

<sup>199</sup> Cunningham & Cromer, *supra* note 10, at 237.

it approach. Governments need to openly assess their trafficking victim definition, whether it is good policy to even have a standard of proof victims must meet, and whether the practice of making victims prove their status violates the TVPA and its mandate to refrain from treating trafficking victims like criminal defendants.

*B. Distinguishing Crime Victim Characteristics*

Most human trafficking victims do not resemble traditional crime victims. It is unusual for traditional crime victims to engage in criminal activity at the time of their victimization.<sup>200</sup> Regardless, federal law mandates trafficking victims who have committed criminal acts during the trafficking scheme are not to be treated as criminal defendants.<sup>201</sup> Known as the principle of non-criminalization, it has long applied to trafficking victims, even before the TVPA's enactment.<sup>202</sup> The basis for non-criminalization in human trafficking cases is simply that

[T]he law must excuse the victim from criminal liability for the acts committed as a result of being trafficked. Victims of trafficking should be immune from such liability every time they commit an illegal act as long as those acts are related to their trafficking, whether this act is illegal entry, falsification of travel documents, or prostitution.<sup>203</sup>

Making victims prove their victim status is akin to making a criminal defendant prove justification through an affirmative defense. A justified crime committed in self-defense, under duress, or due to necessity may be excused but it is still committed by a criminal defendant.<sup>204</sup> The fact that the criminal act was justified does not transform the defendant into a victim. This is not true for a crime committed by a trafficking victim pursuant to the trafficking scheme. Those crimes are not only justifiable, but the TVPA mandates that trafficking victims shall not be treated like criminal defendants even when they engage in criminal activity "as a direct result of being trafficked."<sup>205</sup> Congress recognized that trafficking victims frequently commit prostitution and immigration crimes and are inappropriately punished for these

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<sup>200</sup> *But see* Mathis Rutledge, *supra* note 77, at 165 (discussing "how the law should respond when breached" by a domestic violence victim who later commits perjury in the process of her batterer's trial).

<sup>201</sup> 22 U.S.C. § 7105(c)(1)(A) (2012); 2014 TIP REPORT, *supra* note 3, at 397–98 (detailing that in addition to the TVPA's statutory mandate that victims should not be confined and jailed, there is a federal policy that "victims should not be inappropriately penalized solely for unlawful acts committed as a direct result of being trafficked").

<sup>202</sup> Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357, 380–82 (2006).

<sup>203</sup> *Id.* at 380–81.

<sup>204</sup> See L. I. Reiser, Annotation, *Coercion, Compulsion, or Duress as Defense to Criminal Prosecution*, 40 A.L.R.2d 908 (1955).

<sup>205</sup> 22 U.S.C. § 7101(b)(19).

crimes.<sup>206</sup> It sought to shield victims from being punished for these crimes.<sup>207</sup> In this way, the law reiterates the trafficked person is always a victim, never a defendant.

When governments require the individual to prove victim status by establishing the elements of the trafficking crime, they hold the victim to a higher burden of proof than they do the trafficker, who, as a criminal defendant, is not obligated to prove anything. In a criminal case, it is the prosecutor who must prove guilt. The defendant is not required to prove innocence. Yet, governments require that trafficking victims prove their innocence before offering entitlements, protections, or services. This is unjust.

Making the victim work off her case by cooperating with the government to prove the trafficker's criminal violation parallels the way law enforcement agents regard confidential informants. Whether the victim is likened to a criminal defendant with an affirmative defense, a confidential informant working toward immunity, or held to the same list of elements the prosecutor must prove, the victim in all of these instances resembles a criminal defendant more than she does a victim of crime. Federal law prohibits such treatment.

In all of the above ways, human trafficking victims differ from traditional crime victims. Trafficking victims are blamed more often.<sup>208</sup> As discussed earlier, when a trafficking victim violates the law, actors within the criminal justice system appear confused about how to handle the victim and the legal transgression. "It may be possible for the public to view a trafficked person as a victim and yet still believe he or she should be punished, because her behavior (regardless of locus of control) is illegal . . . ."<sup>209</sup>

Human trafficking cases require a multifaceted analysis of exploitation.<sup>210</sup> "A victim may act within a larger environment of psychological and physical coercion but still exercise some limited will nonetheless. . . . [T]he survivor may be both victim and individual actor."<sup>211</sup> Governments must carefully evaluate these nuances, recognize the complexity of these cases, and contemplate whether trafficking victims should be regarded differently than traditional crime victims, and if so, justify the differences in treatment.

### *C. Parsing Traditional and Extraordinary Victim Entitlements*

Governments would benefit from determining whether the entitlements trafficking victims desire to access are available to traditional victims of crime. There is little justification in making traditional victim benefits less accessible to

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<sup>206</sup> 22 U.S.C. § 7101(b)(6), (10) & (17).

<sup>207</sup> *Id.*

<sup>208</sup> *E.g.*, Cunningham & Cromer, *supra* note 10, at 234–35 (explaining 36.5% of study participants blamed the underage sexually trafficked minor for what happened even though, under the majority of state laws and under the TVPA, she would be deemed a trafficking victim).

<sup>209</sup> *Id.* at 238.

<sup>210</sup> Chuang, *supra* note 19, at 648.

<sup>211</sup> Srikantiah, *supra* note 50, at 197–98.

human trafficking victims. However, where protections like immunity from prosecution or a path to citizenship are concerned, governments may determine that such entitlements warrant screening before victims can access them.

Traditional crime victims have many rights: the right to access restitution, the right to share feelings on punishment with the prosecutor, and the right to be made aware of the defendant's release from custody, to name a few.<sup>212</sup> Because these rights are generally accessible to all crime victims, there is little justification for making a human trafficking victim prove her status as a prerequisite to accessing these rights. Traditional crime victims, however, are typically not entitled to criminal immunity or citizenship. These extraordinary rights and benefits go beyond those offered to traditional crime victims, which may warrant making them more difficult to obtain.

Governments must recognize the challenges trafficking victims face in accessing traditional crime victim rights and services as well as extraordinary protections and benefits. For instance, restitution is not awarded in every case, as the mandatory restitution section of the TVPA implies.<sup>213</sup> Judges and prosecutors have legitimate concerns about making restitution awards in sex trafficking cases where the victim's labor was, by law, criminal. On the one hand, allowing the trafficker to retain the financial rewards from the victim's forced or coerced labor during the scheme defeats one of the primary reasons for his punishment. On the other hand, courts have always been concerned about awarding restitution where the victim was involved in illicit partnerships. For example, it is well established that a party may not recover prospective profits from an illegal scheme.<sup>214</sup> In 1851, the United States Supreme Court held that "the law will not aid either of two parties who are *in pari delicto* in the violation of a statute."<sup>215</sup> Thus, courts will not immerse themselves in an illegal agreement between two parties. For this reason, prosecutors and judges are uncertain about whether criminal sex acts are even compensable.<sup>216</sup> Their hesitation is understandable. The federal government should recognize the legal conundrum human trafficking cases raise and create restitution guidelines for federal judges and prosecutors who are confronted with this dilemma.

States must consider modernizing CVC statutes and programs. Their language has not kept pace with the advent of anti-trafficking statutes. While some CVC programs have been amended by state boards, statutes lag behind.<sup>217</sup> Some states have not changed the language of the statute since the 1990s, which predates human

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<sup>212</sup> *E.g.*, FLA. STAT. ANN. § 960.0021 (West 2002).

<sup>213</sup> *See supra* text accompanying notes 106–194.

<sup>214</sup> *E.g.*, *Victor Talking Mach. Co. v. Kemeny*, 271 F. 810, 819 (3d Cir. 1921).

<sup>215</sup> *Harris v. Runnels*, 53 U.S. 79, 86 (1851).

<sup>216</sup> Levy et al., *supra* note 99, at 16.

<sup>217</sup> *Compare* FLORIDA OFFICE OF THE ATTORNEY GENERAL, BUREAU OF VICTIM COMPENSATION, BENEFITS AVAILABLE, [http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/\\$file/BVCVictimCompensationBrochure.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/$file/BVCVictimCompensationBrochure.pdf) [<https://perma.cc/N62C-5ZCE>] (providing relocation compensation to victims of human trafficking), *with* FLA. STAT. ANN. § 960.03 (West 2012) (referencing online solicitation of a minor and child pornography, not a trafficking offense).

trafficking as a criminal act.<sup>218</sup> Other states, like Virginia, merely paste the word “human trafficking” into antiquated criminal statutes.<sup>219</sup> State legislatures must recognize that human trafficking crimes and their unique victim concepts warrant new legislation. It is unclear whether state reluctance to grant benefits is due to a failure to modernize statutes or whether states are afraid that by offering services freely to human trafficking victims, they will exhaust finite victim resources.

Depletion concerns are not warranted. Despite questionable estimates<sup>220</sup> that tens of thousands of people are trafficked in the United States annually,<sup>221</sup> the number of human trafficking federal convictions has, at most, reached 174 in any given fiscal year.<sup>222</sup> The federal government is attempting to obtain more reliable state human trafficking data.<sup>223</sup> However, in 2013, there were approximately one hundred convictions for human trafficking offenses at the state level.<sup>224</sup> The number

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<sup>218</sup> *E.g.*, HAW. REV. STAT. § 351-32 (West 1998); R.I. GEN. LAWS ANN. § 12-25-20 (West 1999).

<sup>219</sup> *E.g.*, VA. CODE ANN. § 18.2-355 (West 2014) (stating that a statute, written in 1975, was violated when a defendant forced another, against her will, to enter a “bawdy house”); VA. CODE ANN. § 18.2-356 (West 2014) (outlawing forced labor or services, concubines, and prostitution, among other things).

<sup>220</sup> *See, e.g.*, Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 318–19 (2005) (“[S]tatistics about trafficking are notoriously unreliable. . . .”); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1707 (2010) (“[U]nsubstantiated figures [are] often recycled and accepted as true, as if sheer repetition guarantees veracity.”).

<sup>221</sup> *E.g.*, Samuel Vincent Jones, *Human Trafficking Victim Identification: Should Consent Matter?*, 45 IND. L. REV. 483, 485 (2012) (stating that while some human trafficking scholars simply state that the number of victims is unknown, others estimate between 14,500 and 100,000 victims are trafficked in America annually); Ankita Patel, *Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking*, 9 SEATTLE J. FOR SOC. JUST. 813, 822 n.41 (2011) (arriving at 175,000 victims in America by multiplying the number of known victims by ten due to the underground nature of human trafficking).

<sup>222</sup> 2010 TIP REPORT, *supra* note 140, at 339 (noting forty-seven convictions for federal human trafficking crimes in 2009); 2012 TIP REPORT, *supra* note 75, at 361 (stating there were 141 convictions for federal human trafficking crimes in 2010 and 151 convictions for federal human trafficking crimes in 2011, along with “several dozen” convictions for state human trafficking crimes); 2014 TIP REPORT, *supra* note 3, at 398 (explaining that in fiscal year 2012, there were 138 federal human trafficking criminal convictions, whereas in 2013, 174 people were convicted for federal human trafficking criminal violations).

<sup>223</sup> STRATEGIC ACTION PLAN, *supra* note 7, at 21–22 (noting the federal government hopes to implement new data collection procedures and encourage sharing of data between intergovernmental agencies).

<sup>224</sup> 2014 TIP REPORT, *supra* note 3, at 398 (explaining that in fiscal year 2013, media reports indicated about one hundred people had been convicted for human trafficking crimes under state laws). *See also* HEATHER J. CLAWSON, ET AL., U.S. DEP’T OF HEALTH AND HUMAN SERVICES, HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 15 (2009), <http://lastradainternational.org/lisidocs/index.pdf> [<https://perma.cc/GZH7-RVTK>] (warning that “there are huge gaps between estimates of

of prosecutions does not necessarily correlate to the number of trafficking crimes that occur in the United States. Nonetheless, these numbers are far lower than early government estimates. It is therefore unlikely that human trafficking victims will ever deplete CVC funds or exhaust resources apportioned to traditional crime victims.

If governments regard criminal immunity and immigration relief as extraordinary victim benefits, they may choose to limit their availability. Safe harbors, affirmative defenses, expunctions, pardons, and the right to remain in the country may justify barriers or require proof. In those cases, the proof mandated may be similar to the evidence necessary for similarly situated individuals who are seeking comparable immunity or citizenship entitlements. However, lawmakers must carefully consider what should be required of human trafficking victims, given the federal mandate that they must be treated as victims, not criminal defendants.

## V. CONCLUSION

The crime of human trafficking has received much political and media attention in recent years. Lawmakers and actors within the criminal justice system have yet to fully grasp the challenges human trafficking victims face in securing the rights, benefits, services, and protections reserved for this group. One of the qualities of the American criminal justice system is its ability to adapt to new challenges.<sup>225</sup> Law and policy makers must understand whether and why human trafficking victims differ from victims of traditional crime and how entitlements for both groups overlap, yet differ. Without pondering the distinctions, trafficking victims will continue to find entitlements unobtainable.

The government's assessment about who victims are, what they must prove to establish their victim status, and whether this practice actually places them more in the role of criminal defendant than criminal victim, which violates the non-criminalization principle, must be examined more closely. Governments are sending mixed messages about culpability in human trafficking cases. The federal government has pledged to encourage officials "to adopt victim-centered policies that prohibit prosecuting victims for crimes committed as a direct result of being trafficked."<sup>226</sup> Though this goal is admirable, refraining from prosecution does not go far enough.

Governments conflate victim benefits with the process of proving victim status; the two are now intertwined for better or worse. Some states have tied the definition of human trafficking victim and elements of the trafficking crime together. What is terribly wrong with this practice is that while the trafficker has no obligation to prove anything in a criminal case—because the burden of proof rests with the prosecutor—

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'prevalence' or populations 'at risk' and individuals actually identified as trafficking victims or enrolled in government programs").

<sup>225</sup> Brown, *supra* note 141, at 205.

<sup>226</sup> 2014 TIP REPORT, *supra* note 3, at 398.



the trafficking victim does. Consequently, the victim must prove more than her trafficker.

The federal government's push to encourage states to adopt victim-centered policies and laws must address whether proof of victim status and its connection to trafficking victim entitlements is justified. There may be valid reasons to create barriers for extraordinary protections like criminal immunity or pathways to citizenship. However, where the victim has committed no crime or traditional victim rights are concerned, governments must remove impediments.

"[W]hen pursued in a victim-centered, rights-protective manner, criminal justice interventions unquestionably offer much-needed accountability and restitution for egregious wrongs."<sup>227</sup> Human trafficking is an egregious wrong; law and policy makers are attempting to eradicate it through criminal and civil remedies. Despite the enactment of hundreds of pieces of anti-trafficking legislation in the last three years alone, new laws must address the barriers the federal government, legislatures, judges, attorneys, and law enforcement agents have placed before victim entitlements. Until that happens, most of the new legislation will continue to include hollow assurances of rehabilitation, restitution, and restorative justice. Human trafficking victims deserve and need so much more.

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<sup>227</sup> Chuang, *supra* note 19, at 641.