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## When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection

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# WHEN IS A TRAFFICKING VICTIM A TRAFFICKING VICTIM? ANTI-PROSTITUTION STATUTES AND VICTIM PROTECTION

MICHELE BOGGIANI

## ABSTRACT

Victims of sex-market trafficking are often criminalized under anti-prostitution statutes rather than protected under anti-trafficking laws. As a result, trafficking victims suffer ramifications resulting from both the exploitation of their captors and the social stigma of criminalization. The combined hardships make it exponentially more difficult for victims to overcome their past and safely reintegrate into society. This Article first identifies the sources of the double-victimization problem, including the perpetuated stereotypes regarding trafficking victims and the methods of exploitation, inadequate law enforcement training, and statutes that conflate sex-market victims with prostitution. Having identified the source of the problem, the author proposes a solution for double-victimization including improved victim-identification training for law enforcement officers, an affirmative defense based on victim status, and improved application of expungement for those who are victims of the sex-market and the criminal prosecution system.

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#### I. INTRODUCTION: WHEN IS A TRAFFICKING VICTIM A TRAFFICKING VICTIM?

The United States is seriously committed to fighting human trafficking in all its forms. The main statute used to tackle this widespread phenomenon is the Victims of Trafficking and Violence Protection Act of 2000 (“TVPA”).<sup>1</sup> With the TVPA and its subsequent reenactments,<sup>2</sup> Congress has sought to enact a comprehensive strategy to fight trafficking, prosecute traffickers, and protect victims.<sup>3</sup> Following Congress’s lead, state legislatures have also passed their own anti-trafficking provisions.<sup>4</sup>

Despite this commitment, victims of trafficking are sometimes treated as criminals in the eyes of the law. This is due to the fact that trafficked individuals are, almost by definition, forced into exploitative activities, which, in many cases, also constitute criminal acts. This phenomenon is particularly dire in the “sex-market.” This Article will focus on human trafficking into this sector.

In the United States prostitution is thoroughly criminalized and the pains of the criminal law are inflicted upon pimps, clients, and sex workers alike.<sup>5</sup> However,

<sup>1</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>2</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

<sup>3</sup> See Victims of Trafficking and Violence Protection Act of 2000, § 102(a); 22 U.S.C. § 7101(a) (2000); see also Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L. J. 337, 338 (2007).

<sup>4</sup> See, e.g., MASS. GEN. LAWS ch. 265, §§ 50–51, 53 (2012).

<sup>5</sup> See, e.g., ARIZ. REV. STAT., §§ 13-3201–13-3214 (2013); IDAHO CODE §§ 18-5601–18-5614 (2014); IOWA CODE, §§ 725.1–725.4 (2014); NEB. REV. STAT., §§ 28.801–28.804.01 (2014); S.C. CODE §§ 16-15-90–16-15-110 (2014). Nevada is the only State that, in certain counties only, permits prostitution under a licensing system. See NEV. REV. STAT. ch. 201 (2014) (showing that in the counties where a licensing system is not in place, Nevada follows

many working in the sex-market are also trafficked individuals who do not deserve protection, not punishment. Unfortunately, anti-trafficking statutes and criminal provisions prohibiting prostitution function almost completely separately from one another. As a consequence, victims of trafficking suffer additional hardship by being subjected to arrest, investigation, and criminal punishment.

The Department of State, in its 2014 Trafficking in Persons Report (“2014 Report”), clearly identified the problem as the one of “victims hidden behind a crime.” The 2014 Report states:

Victims of trafficking should not be held liable for their involvement in unlawful activities that are a direct consequence of their victimization. Trafficked individuals who are forced to commit a crime are commonly mistaken for criminals—rather than being identified as victims—and therefore treated as such by law enforcement and judicial officials.<sup>6</sup>

The 2014 Report clearly identifies the causes of the problem as a lack of proper victim identification and screening.<sup>7</sup> At the same time, the 2014 Report acknowledges the efforts made by some state legislatures to address the problem by passing measures like vacating convictions statutes,<sup>8</sup> while also generally advising state legislators “to adopt victim-centered policies that prohibit prosecuting victims for crimes committed as a direct result of being trafficked.”<sup>9</sup>

The problem, however, is larger than a simple lack of coordination between two statutes. If the chief concern is that victims of trafficking into the sex market should not be treated as criminals under anti-prostitution statutes, it is not enough to provide for the vacation of a conviction for a crime committed while in trafficking, or to allow the victim to establish her status as a trafficking victim *while* being tried for prostitution. It is also necessary to improve the identification skills of law enforcement officials, which can only be done through an improved understanding of what trafficking is and who its victims are.

To this goal, Part II canvasses the complexity of trafficking, both into the sex and labor markets, as a multifaceted phenomenon which is nonetheless simplistically stereotyped. Part II also describes how a similar reduction to stereotypes involves the victims.

Subsequently, Part III introduces the other main component of this Article: anti-prostitution statutes in the United States. Part III briefly describes the history, rationale, and current status of these statutes. This Part shows how many ideas,

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the rest of the country in criminalizing prostitution); LYON CTY., NEV., CTY. CODE, §§ 5.03.01–5.03.17 (2013), [http://www.sterlingcodifiers.com/codebook/index.php?book\\_id=536](http://www.sterlingcodifiers.com/codebook/index.php?book_id=536) (last visited Oct. 13, 2014) (example of Nevada licensing provisions).

<sup>6</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2014 14 (2014), <http://www.state.gov/documents/organization/226844.pdf> [hereinafter 2014 TIP REPORT].

<sup>7</sup> Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 474 (2012) (noting how a clear overlap exists between the experiences of defendants in prostitution-related cases and victims of trafficking and how this is to be considered a serious flaw in the anti-trafficking system).

<sup>8</sup> 2014 TIP REPORT, *supra* note 6, at 14.

<sup>9</sup> *Id.* at 398.

which now permeate anti-trafficking legislation, were present a century ago when the prostitution criminalization wave swept the country.

Next, Part IV, briefly describes how trafficking, both into the sex and non-sex markets, is currently addressed in international, federal, and state law. This Part then shows the effect the debunked stereotypes identified in Part II had on all three levels of legislation.

Part V, then describes the interplay of trafficking and anti-prostitution statutes in practice from the moment a sex-market trafficking victim makes contact with law enforcement personnel and prosecutors. This Part also notes how this interplay creates a perverse system of incentives, which defeats any chance of self-rescue for trafficking victims.

Finally, Part VI proposes a few solutions. In particular, these solutions include: (1) recalibrating and enhancing law enforcement training according to the more truthful paradigm of trafficking described in Part II; (2) reflecting on rendering the status as a “victim of trafficking” as an affirmative defense against prosecution for crimes committed while in trafficking; (3) considering a vacatur or an expungement statute also predicated on the condition of “victim of trafficking” to eliminate the consequences of conviction; (4) making a limited claim to the effect of decriminalizing the conduct of the sex worker under current anti-prostitution statutes.

The scope of this Article is limited to the treatment of victims trafficked into the sex market as criminals under anti-prostitution statutes. In fact, similar problems arise with respect to trafficking into other markets and other statutes currently in effect, such as anti-immigration statutes. However, this Article approaches the problem by focusing on the sex market while keeping in mind that the inquiry is limited.

## II. THE COMPLEXITY OF TRAFFICKING: FALSE MYTHS AND HARD FACTS

### *A. Trafficking as an Activity*

Trafficking is an intricate phenomenon that by no means is limited to the sex market. In fact, throughout this analysis it is important to keep in mind that trafficking victims are often forced to perform a wide array of activities. Consequently, this section discusses human trafficking in general and focuses on trafficking in the sex market only when relevant and possible. To do otherwise would create an artificial and unnecessary separation.

The magnitude of trafficking is hard to gauge and figures are hard to trust,<sup>10</sup> but some governmental sources estimate the volume of trafficking is annually around 800,000 people worldwide.<sup>11</sup> Of these 800,000, 17,500 people are trafficked to or

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<sup>10</sup> See Janie Chuang, *The United States as a Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 481–83 (2006); Glenn Kessler, *Why You Should Be Wary of Statistics on “Modern Slavery” and “Trafficking,”* WASH. POST (Apr. 24, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/04/24/why-you-should-be-wary-of-statistics-on-modern-slavery-and-trafficking/>.

<sup>11</sup> See U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT JUNE 2005* 6 (2005) [hereinafter 2005 TIP REPORT], <http://www.state.gov/documents/organization/47255.pdf>; see also 2014 TIP REPORT, *supra* note 6, at 30 (cautioning about trafficking data in general).

within the United States.<sup>12</sup> The data on prosecution reveals that in 2013, 9,460 trafficking cases were prosecuted worldwide, leading to 5,776 convictions.<sup>13</sup> According to the same governmental source, 44,758 trafficking victims were identified in 2013.<sup>14</sup>

There are multiple variants on the trafficking theme because of the definitive trafficking action, the exploitation of a person for various activities— including sex and non-sex labor— through the use of force, fraud, or coercion, this definition is broad enough to allow many variations. However, the complexity of trafficking is better understood by exposing several stereotypes that mask the true nature of trafficking. To begin, the word “trafficking” gives the impression that a movement of some kind is involved, however, most are surprised that trafficking does not require movement at all.<sup>15</sup> Under current definitions, the core of trafficking is the recruitment, harboring, transportation, or receiving of a person obtained through direct or indirect coercive means to the purpose of exploitation of this person’s work (including “sex work”).<sup>16</sup> Even if the definition is broader, it is important to know that international conventions and domestic statutes were passed with the international movement of individuals from poorer countries to richer countries in mind.<sup>17</sup>

Second, many believe that trafficking only involves foreign individuals, usually from Asia, South and Central America, or Africa.<sup>18</sup> Contrary to the stereotype, this is not the case.<sup>19</sup> In the United States, many trafficking victims are American. According to an interview conducted with law enforcement officials of the Boston area, even in the sex market, which traditionally is thought to be populated by foreign sex workers, Americans are the vast majority.<sup>20</sup> While of course, not all of those involved in the sex market fit into this trafficking definition, this finding shakes the foundation of an otherwise uncontested stereotype. This finding should

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<sup>12</sup> See Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B. U. L. REV. 157, 162–63 (2007); see also Note, *Counteracting the Bias: The Department of Labor’s Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV. 1012, 1014 (2013).

<sup>13</sup> 2014 TIP REPORT, *supra* note 6, at 45.

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

<sup>15</sup> See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2983 (2006); see also Mogulescu, *supra* note 7, at 482–83 (noting how this misconception is present in the enforcement of New York anti-prostitution law).

<sup>16</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 § 103 (2000).

<sup>17</sup> See Srikantiah, *supra* note 12, at 162–63.

<sup>18</sup> See *id.* at 201-04.

<sup>19</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2013, at 30 (2013), <http://www.state.gov/documents/organization/210737.pdf> [hereinafter 2013 TIP REPORT].

<sup>20</sup> See Interview with Ellen Lemire, Assistant District Attorney, Suffolk Cty. Dist. Attorney’s Office (Feb. 13, 2015) (on file with author). Lemire notes how in her professional experience in the Boston area, the vast majority of victims are American. Of course, this is to be at least in part attributed to the specificity of the area.

not come as a shock given that an individual is more susceptible to exploitation based on his or her economic status rather than nationality, and this shortage of economic opportunities affects American and foreign individuals alike.<sup>21</sup> As stated in the 2014 Report:

Human trafficking can include, but does not require, movement. People may be considered trafficking victims regardless of whether they were born into a state of servitude, were transported to the exploitative situation, previously consented to work for a trafficker, or participated in a crime as a direct result of being trafficked. At the heart of this phenomenon is the traffickers' goal of exploiting and enslaving their victims and the myriad coercive and deceptive practices they use to do so.<sup>22</sup>

A third common misconception is that trafficking as a whole is equated with sex-market trafficking. This misconception existed until 2005 when the annual Department of State Trafficking in Persons Report failed to consider non-sex-market trafficking at all.<sup>23</sup> The reason for this particular mischaracterization is that public attention and political capital is easier to garner when "sex" is involved. In fact, this element captures much more attention than, say, labor exploitation.<sup>24</sup> The creators of this discursive move are prostitution neo-abolitionists.<sup>25</sup> Their ultimate goal is the eradication of prostitution through increased penalties for clients and third parties, and the way to obtain public support for this initiative is to group trafficking and prostitution together.<sup>26</sup> In fact, trafficking elicits unanimous public disapproval. If voluntary prostitution could be included within the evocative category of "trafficking," the force of public opinion would unanimously approve of the neo-abolitionist agenda.<sup>27</sup>

This stereotype is discredited because individuals are trafficked not only into the sex market, but also predominantly into non-sex markets. In fact, sixty-seven percent of victims certified for purposes of the TVPA in 2010 were victims of trafficking in industrial, domestic, and agricultural labor.<sup>28</sup> In addition, this stereotype has been

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<sup>21</sup> See Srikantiah, *supra* note 12, at 201–04.

<sup>22</sup> 2014 TIP REPORT, *supra* note 6, at 29.

<sup>23</sup> See Chacón, *supra* note 15, at 3028.

<sup>24</sup> See Haynes, *supra* note 3, at 355–56.

<sup>25</sup> See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1664 (2010) ("The neo-abolitionists believe that prostitution is exploitative and degrading to women, a form of violence against women that should be abolished.")

<sup>26</sup> See Chacón, *supra* note 15, at 3029.

<sup>27</sup> For a full analysis of the "kidnapping" of the trafficking discourse by neo-abolitionists, see generally Chuang, *supra* note 25, at 1655.

<sup>28</sup> See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2012, at 15 (2014), <https://www.justice.gov/archive/ag/annualreports/agreporthumantrafficking2012.pdf> [hereinafter ATTORNEY GENERAL'S REPORT 2012]. It should be considered, however, that the

identified by the Department of State in its 2013 and 2014 TIP Reports, which show how the federal government is laudably trying to turn the tide on this particular point, after years of semi-neglect.<sup>29</sup> According to these policy documents, during the first years of implementation of the Trafficking Protocol and the TVPA there was an excessive focus on trafficking into the sex market involving women and girls, it is now established that trafficking involves both sex- and non-sex-related exploitation, as well as male and female victims.<sup>30</sup>

An extreme version of the “sex trafficking” stereotype is the one that equates the term with prostitution. Since the 1990s, the same prostitution neo-abolitionists who promoted the conflation of trafficking and sex trafficking went a step further by proposing a definition of trafficking, which encompasses voluntary prostitution.<sup>31</sup> While during the early years of the Bush Administration, the executive branch purposely endorsed this idea,<sup>32</sup> in more recent years the Obama Administration has steered away from such conflation of different issues.<sup>33</sup> However, at the state level, where most criminal laws are actually enforced, the conflation between prostitution and trafficking remains.

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TVPA is a federal statute and thus federal authorities have more opportunities to get in contact with non-sex-market trafficking victims (since anti-prostitution enforcement is generally left to the States). At the same time, even discounting this, the 67% figure shows how trafficking into industrial, agricultural, and domestic work is, at least, not irrelevant. See Interview with Ellen Lemire, *supra* note 20.

<sup>29</sup> See 2014 TIP REPORT, *supra* note 6, at 398; see also *Counteracting the Bias: The Department of Labor’s Unique Opportunity to Combat Human Trafficking*, *supra* note 12, at 1018–19. It should be noted that until the 2005 TIP Report, non-sex-market trafficking was not considered in the document.

<sup>30</sup> 2013 TIP REPORT, *supra* note 19, at 8.

<sup>31</sup> See generally Chuang, *supra* note 25.

<sup>32</sup> This is characterized as a “structuralist” victory. This ideological field, which draws heavily from radical feminist ideas, successfully pitched its ideas to the Bush Administration, which adopted these views since it was highly palatable to its faith-based electorate. See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. L. & GENDER 335, 359–60 (2006).

<sup>33</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103(9) 114 Stat. 1464 (2000), (definition of “trafficking”); 22 U.S.C. § 7102(9)(a)–(b) (2012) (definition of “severe forms of trafficking”). Under the first provision, trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” *Id.* On the other hand, severe forms of trafficking are defined as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

*Id.*



For example, in Massachusetts, section 51 of the 2012 anti-trafficking statute describes trafficking in a way that makes it indistinguishable from prostitution.<sup>34</sup> While one can point to the fact that trafficking in industrial, agricultural, and domestic services is a solid reality, that has been unjustly ignored, debunking this myth of trafficking as equal to prostitution is an enterprise of a different kind. It requires people to develop an underlying value judgment that prostitution is never a voluntary undertaking. If one believes prostitution is always coerced, then commercial sex “swallows” the coercion element of trafficking and—voilà—the definition of trafficking encompasses prostitution.<sup>35</sup>

A final stereotype is that traffickers use physical force to keep victims exploited. To the contrary, the range of means employed by traffickers to reduce their victims in exploitation is broad and, to be sure, it does not necessarily require physical coercion.<sup>36</sup> On the one hand the Protocol defines the means as:

[T]he threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.<sup>37</sup>

On the other hand, the TVPA includes force, fraud, or coercion.<sup>38</sup> Traffickers have at their disposal a vast array of methods that do not require force and which are just as efficacious as physical force in keeping the victim in exploitation. These methods include, but are not limited to, threats of reporting to authorities (e.g., for the illegal immigration status of the victim) harming the victim’s family at home, withholding travel documents or wages, and debt bondage.<sup>39</sup>

At the same time, a survey regarding trafficking in the Boston area reveals that traffickers also put in place an inescapable system of coercion without relying

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<sup>34</sup> See, e.g., MASS. GEN. LAWS ch. 265, §§ 50–51, 53 (2012). *But see* Interview with Ellen Lemire, *supra* note 20. Lemire underscores how in actual law enforcement the anti-prostitution and trafficking statutes are considered completely distinct and used to address two very different “types” of criminals.

<sup>35</sup> See *infra* Part III.

<sup>36</sup> *The Victims & Traffickers*, POLARIS PROJECT, <https://polarisproject.org/victims-traffickers> (last visited Apr. 24, 2016) (“Traffickers employ a variety of control tactics, including physical and emotional abuse, sexual assault, confiscation of identification and money, isolation from friends and family, and even renaming victims. Often, traffickers identify and leverage their victims’ vulnerabilities in order to create dependency. They make promises aimed at addressing the needs of their target in order to impose control.”).

<sup>37</sup> United Nations Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children art. 3(a), *opened for signature* Dec. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003) [hereinafter Trafficking Protocol], <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOC%20book-e.pdf>.

<sup>38</sup> See 22 U.S.C. § 7102(9)(a)–(b) (2012).

<sup>39</sup> See Haynes, *supra* note 3, at 367; see also Ione Curva, *Thinking Globally, Acting Locally: How New Jersey Prostitution Law Reform Can Reduce Sex Trafficking*, 64 RUTGERS L. REV. 557, 574–76 (2012).

explicitly on physical force.<sup>40</sup> In the specific context of trafficking into the sex market, it has been reported that drugs play a fundamental role in keeping the victim under control by fueling his or her addiction.<sup>41</sup> As a result, when identifying a victim, the apparent absence of physical constraints on the victim should not be a decisive factor, because there usually is a more complex system of coercion in place<sup>42</sup> that precludes the victim from reporting his or her traffickers or fleeing.<sup>43</sup>

In conclusion, it is easy to fall prey to a trafficking stereotype. Not only in the public, but also among lawyers and law enforcement officers, trafficking is perceived as something it is not. The result is, as this false image gains credibility among law enforcement agencies, that many victims, specifically sex-market-trafficking victims, fail to fit the stereotype and do not receive protection, or, worse, are treated as criminals. In addition to these broad misconceptions, there are also some narrower misconceptions, which involve victims directly. The next section focuses on these narrow misconceptions.

### *B. Misconceptions Surrounding the Victims of Trafficking*

Along with the stereotypes surrounding human trafficking as an activity in general, there is also a specific picture of the trafficking victim as an innocent and submissive individual, incapable of self-determination, and in dire need of rescue.<sup>44</sup> At the same time, this “iconic” victim<sup>45</sup> is seen as being female, foreign, and exploited in sex work. Nonetheless, as this Article demonstrates, trafficked individuals in general, and victims of trafficking into the sex market in particular, do not necessarily fit the mold of the “iconic” victim.<sup>46</sup> This section discusses both sex-market and non-sex-market trafficking victims and specifies, when necessary, which one is being referenced.

As stated, trafficking is believed to disproportionately involve women. However, current data regarding trafficking into the agricultural and industrial markets shows that the victims are predominantly men,<sup>47</sup> while women and children make up the majority of those trafficked into the sex market.<sup>48</sup> Hopefully, the mischaracterization

<sup>40</sup> MASS. INTERAGENCY HUMAN TRAFFICKING POLICY TASK FORCE, FINDINGS AND RECOMMENDATIONS (2013).

<sup>41</sup> See Interview with Ellen Lemire, *supra* note 20.

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

<sup>43</sup> 2013 TIP REPORT, *supra* note 19, at 30.

<sup>44</sup> See Srikantiah, *supra* note 12, at 201-04.

<sup>45</sup> This accurate descriptive expression is taken from the title of Professor Srikantiah’s work. See *id.*

<sup>46</sup> See Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 107-08 (2012); see also Mogulescu, *supra* note 7, at 482-83.

<sup>47</sup> See Chacón, *supra* note 15, at 3028; see also Interview with Ellen Lemire, *supra* note 20.

<sup>48</sup> Elizabeth Bewley, *A New Form of “Ideological Capture”: Abortion Politics and the Trafficking Victims Protection Act*, 8 HARV. L. & POL’Y REV. 229, 239 (2014); see also Interview with Ellen Lemire, *supra* note 20 (noting that in her experience as a prosecutor in the Boston area, victims trafficked in commercial sex are almost exclusively women and girls).

surrounding the gender of trafficked individuals is slowly disappearing: In 2010, fifty-five percent of certified trafficking victims, for federal immigration purposes, were male, a substantial increase from a meager six percent in 2006.<sup>49</sup>

A second stereotype regarding the victims of trafficking is their lack of agency. In this context, the “iconic” victim is the one forcibly smuggled into the country of destination and exploited into the sex or non-sex labor markets.<sup>50</sup> In reality, many migrants cross borders voluntarily, just to become trafficked later in time, belies this image of the passive victim.<sup>51</sup> In this context, the perceived lack of agency of trafficking victims is intertwined with the difficulty of distinguishing trafficking (generally intended) from migration. Studies, discussed more thoroughly in Part V, seem to show that law enforcement is poorly equipped to consider these nuances and tends to emphasize “whether or not the [individuals initially] consented to their situation,” which only later takes the contours of trafficking.<sup>52</sup> The TVPA itself promotes an image of the victim as completely innocent and submissive. One of the requirements for the issuance of law enforcement certification, which is fundamental to obtain immigration relief and social services, is the victim’s cooperation in the prosecution of the victim’s traffickers.<sup>53</sup> As a consequence, this encourages law enforcement to search for victims who also make good witnesses. In turn, these “good witnesses” are the ones who are able to tell the stereotypical story of the submissive and meek person forcibly taken and enslaved.<sup>54</sup> Therefore, law enforcement is attempting to combat trafficking by seeking victims who make “good witnesses.” However, not all victims make good witnesses, nor are all victims passive participants in the trafficking process, and because of a victim’s perceived consent many victims are unable to receive protection from law enforcement.<sup>55</sup>

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<sup>49</sup> See *Counteracting the Bias: The Department of Labor’s Unique Opportunity to Combat Human Trafficking*, *supra* note 12, at 1014.

<sup>50</sup> See generally Srikantiah, *supra* note 12, 191-94.

<sup>51</sup> 2014 TIP Report, *supra* note 6, at 35 (“Victims may sign contracts and thereby initially agree to work for a certain employer, but later find that they were deceived and cannot leave the job because of threats against their families or overwhelming debts owed to the recruitment agency that arranged the employment.”); see also Chacón, *supra* note 15, at 2986.

<sup>52</sup> See SUZANNAH PHILLIPS ET AL., INT’L WOMEN’S HUMAN RIGHTS CLINIC AT THE CITY UNIV. OF N.Y. LAW SCH., CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZES TRAFFICKING VICTIMS 17 (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf>.

<sup>53</sup> See Haynes, *supra* note 3, at 359. Haynes notes how the cooperation requirement has actually been interpreted strictly. In fact, it is not enough that the victim offered his cooperation to the prosecution. What is necessary is that the prosecution *actually* used the information provided to prosecute the traffickers. *Id.* This, according to Haynes, unduly places a lot of power in the hands of prosecutors on the point of “recognizing” trafficking victims. *Id.* In fact, prosecutors, by definition, must focus on prosecuting cases and they may consequently see the issue of victim recognition as secondary. *Id.*; see also Interview with Julie Dahlstrom, Managing Attorney, Lutheran Social Services of New England and Lecturer in Law, Bos. Univ. Sch. of Law (Feb. 16, 2015) (on file with author) (noting how, in the mind of law enforcement, it is hard to separate prosecution from benefits, which they generally see as inextricably tied).

<sup>54</sup> See Srikantiah, *supra* note 12, at 195–201.

<sup>55</sup> See Haynes, *supra* note 3, at 354–55.

In conclusion, the lack of understanding regarding the complexity of trafficking leads to failure by law enforcement to identify trafficking victims generally, and, for this Article's purposes, victims trafficked into the sex market specifically.<sup>56</sup> Of course, these trafficking misperceptions are not the only factors that make identification difficult. On the one hand, law enforcement may have received inadequate training. For example, in the prostitution-related trafficking context, officers are often "unfamiliar with the reality of sex trafficking."<sup>57</sup> At the same time, scarcity of resources can lead law enforcement to spend insufficient time with victims conducting a proper screening or performing a screening at all. Also, the victim may not be able to speak out due to the trauma of trafficking.<sup>58</sup> Most importantly though:

[C]ommon misconceptions about human trafficking may result in authorities focusing solely on whether or not individuals initially consented to their situation, rather than examining whether force, fraud, or coercion was used to prevent them from exiting their work in the sex trade, thus failing to identify them as victims of trafficking.<sup>59</sup>

While the other factors mentioned all contribute to the failures in identification, the lack of understanding regarding the complexity of trafficking is the main focus, since it is addressed by "simply" changing the understanding of what trafficking really entails.

### III. THE CRIMINALIZATION OF PROSTITUTION IN THE UNITED STATES: SEX WORKERS, CLIENTS, AND THIRD PARTIES

The problem, the treatment of sex-market trafficking victims as criminals through anti-prostitution statutes, derives from the fact that prostitution is criminalized in the United States.

Before diving into the legal treatment of prostitution, it should be noted that prostitution is as complex as trafficking. The industry of commercial sex is composed of different segments. The first category is, street prostitution, which is the most visible and policed, but it is by no means the most predominant type of prostitution.<sup>60</sup> Street prostitution, while constituting roughly twenty percent of the sex market, counts for an approximate eighty-five to ninety percent of total arrests for prostitution.<sup>61</sup> The second category is, indoor prostitution, which includes massage parlors and brothels. The third category overlaps and includes, escort

<sup>56</sup> See PHILLIPS ET AL., *supra* note 52, at 17.

<sup>57</sup> *Id.* at 14–15.

<sup>58</sup> *Id.* at 17.

<sup>59</sup> *Id.* (internal quotation marks omitted).

<sup>60</sup> Susan E. Thompson, *Prostitution—A Choice Ignored*, 21 WOMEN'S RTS. L. REP. 217, 225–26 (2000). The attention tends to focus on street prostitution, presumably because this particular segment of the sex market is the most visible and the one in which its participants risk the most in terms of exploitation and physical safety.

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

agencies and call girls, which some distinguish by the fact that the latter work independently from an organization.<sup>62</sup>

As stated, prostitution in the United States is a crime, but that has not always been the case. In fact, at the beginning of the nineteenth century, the American stance on prostitution followed the classical common-law approach, meaning that commercial sex was treated chiefly as a potential public nuisance.<sup>63</sup> The main concern was not prohibiting it per se, but curbing its most public manifestations under the threat of criminal sanctions.<sup>64</sup> At the beginning of the twentieth century, the public perception of prostitution started to change. This change was mainly due to the growth of the international movement against what was called “white slavery.”<sup>65</sup> At the end of the day, the “white slavery scare” of the early twentieth century was largely exaggerated,<sup>66</sup> but these efforts had a lasting effect on the American approach to prostitution.

In 1910, the federal government took the lead by enacting the White Slave Traffic Act, also known as the Mann Act.<sup>67</sup> The statute was an integral part of a comprehensive effort to fight what was then called trafficking, but what is now known as prostitution.<sup>68</sup> At the Mann Act’s core was the prohibition of interstate transportation of women for the, “purpose of prostitution or debauchery or for any

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<sup>62</sup> Jared R. Rayborn, *Regulated Prostitution as a Component in the Fight Against Human Trafficking in Oregon*, 50 WILLAMETTE L. REV. 115, 125 (2013).

<sup>63</sup> See Michele Boggiani, *Who is Really “Paying the Price”?: La Disciplina della Prostituzione in Inghilterra e Galles*, in PROSTITUZIONE E DIRITTO PENALE: PROBLEMI E PROSPETTIVE (Alberto Cadoppi ed., 2014).

<sup>64</sup> See Rayborn, *supra* note 62, at 120 (“Prostitution and brothel owners faced prosecution for crimes, but only under vagrancy statutes and other misdemeanor charges.”).

<sup>65</sup> See Chacón, *supra* note 15, at 3012; Chuang, *supra* note 25, at 1666–67. As we have seen, the first anti-trafficking conventions were promulgated out of concern for the “white slave traffic,” which was intended as the cross-border forced movement of white women for the purpose of prostitution. The original ideological background of these efforts was a genuine belief that licensed prostitution exercised an unbearable oppressive effect on women. Soon enough, though, the movement suffered an ideological shift and took the overtone of a large-scale “moral crusade” against prostitution, while at the same time becoming an excuse to restrict immigration.

<sup>66</sup> See Chuang, *supra* note 25, at 1667.

<sup>67</sup> White Slave Traffic Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)). The key provision of The Mann Act is codified at 18 U.S.C. § 2421 and is labeled “[t]ransportation generally,” it states:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

*Id.*

<sup>68</sup> For a background on the Mann Act see Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J.L. & PUB. POL’Y 99 (1996).

other immoral purpose.”<sup>69</sup> However, up to 1919, the vast majority of states only prohibited third-party activities.<sup>70</sup> Only Indiana provided for the punishment of patrons of sex workers.<sup>71</sup> In 1919, the landscape dramatically changed<sup>72</sup> with the publication of the Standard Vice Repression Law.<sup>73</sup> The model law had monumental effects and by 1925 it was quickly adopted, either verbatim or in substance, in all states.<sup>74</sup> As a result, the current approach in America, with the partial exception of Nevada,<sup>75</sup> is total criminalization.<sup>76</sup>

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<sup>69</sup> *Id.*; see also *Caminetti v. United States*, 242 U.S. 470, 483 (1917) (affirming the conviction of two men who transported two (consenting) women in interstate commerce from Sacramento, California to Reno, Nevada, “for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine”); see also Chacón, *supra* note 15, at 3014-15. The Mann Act, in its final version, became flexible to cover both “white slavery” as well as any form of prostitution. *Id.* While this result is evident from a mere facial reading of the statute, its application confirmed it too. The Mann Act became, with time, a potent tool in the hands of law enforcement to police sexual mores and to fight prostitution by targeting men and women alike. *Id.*

<sup>70</sup> George E. Worthington, *Developments in Social Hygiene Legislation from 1917 to September 1, 1920*, 6 SOC. HYGIENE BULL. 557, 558-59 (1920).

<sup>71</sup> See RICHARD SYMANSKI, *THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES* 83 (1981).

<sup>72</sup> See Worthington, *supra* note 70, at 557-58 (stating “[t]he standards of sex conduct as expressed in legislation had already been slowly undergoing a change during the past ten years in more progressive parts of the country. After May, 1917, this movement suddenly became nation-wide and great progress was made in the approach to the single standard of morals.”).

<sup>73</sup> See *id.* at 558. The law was authored by the Law Enforcement Division of the Commission on Training Camp Activities, a War and Navy Department body charged with “stimulating the enforcement of national and local laws relating to liquor and prostitution in and about the camps and training stations.” *Id.* The body was created thanks to the body of legislation enacted in connection with the entry of the United States in World War I. This obscure but influential piece of model legislation is somewhat of a mystery. The Court of Appeals of Maryland, in *McNeil v. State*, 739 A.2d 80, 86 (Md. 1999), while seeing it cited multiple times in secondary sources, was not able to locate it and, when cited, all the citations seemed ultimately to trace back to the same source. SYMANSKI, *supra* note 71. Nonetheless, additional indirect evidence of its existence was found in the work of Worthington, which also mentions where it was originally published. According to Worthington, the law, also known as the Vice Repressive Law, was drafted, as said, by the Law Enforcement Division of the Commission on Training Camp Activities to be submitted to state legislation for approval with the goal of harmonizing state legislation on outlawing prostitution completely by targeting all the parties involved in the commercial sexual transaction.

<sup>74</sup> Gail M. Deady, *The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification with the Prostitution Industry*, 17 WASH. & LEE J. CIV. RTS. & SOC. JUST. 515, 525 (citing Charles Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 243 (2000)).

<sup>75</sup> See *supra* note 5 and accompanying text. Nevada is the only state in which prostitution is partially legalized. The activity is allowed in thirteen counties only and regulated through a licensing system. In the remaining counties, Nevada follows the other states in outlawing prostitution completely.

The examination of the anti-prostitution statutes in various state jurisdictions shows that the conduct targeted and the definitions are somewhat similar across states.<sup>77</sup> This is not at all surprising, given that most of the local provisions were adopted following the model of the Standard Vice Repression Law of 1919.<sup>78</sup> This section examines this point by looking at the anti-prostitution statute of Massachusetts, the jurisdiction that the empirical segment of the research focused on. Massachusetts relevant provisions, with respect to the sex worker and the client, provides that: “Whoever engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee”<sup>79</sup> or “[w]hoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person”<sup>80</sup> shall be guilty of the crime of “engaging in sexual conduct for a fee,” punishable with up to one year in prison for the prostitute and up to two years and a half in prison for the client.<sup>81</sup> As an alternative, or in addition, the law provides for a fine not to exceed \$500 in the first case, and between \$1,000 and \$5,000 in the second case.<sup>82</sup> At the same time, the conduct of third parties is also criminalized thoroughly. Specifically the law criminalizes: (1) “[E]nticing away a person for prostitution or sexual intercourse,”<sup>83</sup> (2) inducing or suffering a

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<sup>76</sup> For a complete and easily accessible overview of the laws of the fifty states regarding prostitution, see *U.S. Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG <http://prostitution.procon.org/view.resource.php?resourceID=000119> (last visited Jan. 15, 2015).

<sup>77</sup> See, e.g., ARIZ. REV. STAT. §§ 13-3201-13-3214 (2013); IDAHO CODE §§ 18-5601-18-5614 (2014); IOWA CODE §§ 725.1-725.4 (2014); MASS. GEN. LAWS ch. 272 § 53(A)(a)–(c) (2012); NEB. REV. STAT. §§ 28.801–28.804.01 (2014); S.C. CODE §§ 16-15-90–16-15-110 (2014).

<sup>78</sup> See generally Whitebread, *supra* note 74 (citing JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL 71 (1979)).

<sup>79</sup> *Id.* at § 53A(a) (“Whoever engages, agrees to engage or offers to engage in sexual conduct with another person in return for a fee, shall be punished by imprisonment in the house of correction for not more than 1 year or by a fine of not more than \$500, or by both such imprisonment and fine, whether such sexual conduct occurs or not.”).

<sup>80</sup> MASS. GEN. LAWS ch. 272 § 53A(b) (2012) (“Whoever pays, agrees to pay or offers to pay another person to engage in sexual conduct, or to agree to engage in sexual conduct with another person, shall be punished by imprisonment in the house of correction for not more than 2 and one-half years or by a fine of not less than \$1,000 and not more than \$5,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not.”).

<sup>81</sup> *Id.* § 53A(c) (“Whoever pays, agrees to pay or offers to pay any person with the intent to engage in sexual conduct with a child under the age of 18, or whoever is paid, agrees to pay or agrees that a third person be paid in return for aiding a person who intends to engage in sexual conduct with a child under the age of 18, shall be punished by imprisonment in the state prison for not more than 10 years, or in the house of correction for not more than 2 and one-half years and by a fine of not less than \$3,000 and not more than \$10,000, or by both such imprisonment and fine, whether such sexual conduct occurs or not; provided, however, that a prosecution commenced under this section shall not be continued without a finding or placed on file.”).

<sup>82</sup> *Id.* at § 53(A)(b).

<sup>83</sup> *Id.* at § 7 (“Whoever fraudulently and deceitfully entices or takes away a person from the house of his parent or guardian or elsewhere, for the purpose of prostitution or for the

person to resort in one's place for sexual intercourse,<sup>84</sup> (3) "support from, or sharing, earnings of prostitute,"<sup>85</sup> (4) "soliciting for prostitute,"<sup>86</sup> (5) "detaining, or drugging to detain, person in place for prostitution,"<sup>87</sup> (6) "procuring person to practice, or enter a place for, prostitution: employment office procuring person,"<sup>88</sup> and (7) "keeping house of ill fame."<sup>89</sup>

Once the conduct generally targeted was analyzed it is necessary to return to a more general outlook. This section registers a greater variance among the different states when it comes to the penalties as compared to the conduct covered.<sup>90</sup> In fact, among the three parties, pimps, clients, and sex workers, usually pimps are eligible

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purpose of unlawful sexual intercourse, and whoever aids and assists in such abduction for such purpose, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment in jail.").

<sup>84</sup> *Id.* at § 6 ("Whoever, being the owner of a place or having or assisting in the management or control thereof induces or knowingly suffers a person to resort to or be in or upon such place, for the purpose of unlawfully having sexual intercourse for money or other financial gain, shall be punished by imprisonment in the state prison for a period of five years and a five thousand dollar fine.").

<sup>85</sup> *Id.* at § 7 ("Whoever, knowing a person to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of his prostitution, from moneys loaned, advanced to or charged against him by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or shall share in such earnings, proceeds or moneys, shall be punished by imprisonment in the state prison for a period of five years and by a fine of five thousand dollars.").

<sup>86</sup> *Id.* at § 8 ("Whoever solicits or receives compensation for soliciting for a prostitute shall be punished by imprisonment in a house of correction for not more than 2 and one-half years, or by a fine of not less than \$1,000 and not more than \$5,000 or by both such imprisonment and fine.").

<sup>87</sup> *Id.* at § 13 ("Whoever, for any length of time, unlawfully detains or attempts to detain, or aids or abets in unlawfully detaining or attempting to detain, or provides or administers or aids or abets in providing or administering any drug or liquor for the purpose of detaining a person in a house of ill fame or other place where prostitution is practiced or allowed, shall be punished by imprisonment in the state prison for not more than five years or in the house of correction for not less than one nor more than two and one half years or by a fine of not less than one hundred nor more than five hundred dollars.").

<sup>88</sup> *Id.* at § 12 ("Whoever knowingly procures, entices, sends, or aids or abets in procuring, enticing or sending, a person to practice prostitution, or to enter as an inmate or a servant a house of ill fame or other place resorted to for prostitution, whether within or without the commonwealth, shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for not less than three months nor more than two years. Whoever as a proprietor or keeper of an employment agency, either personally or through an agent or employee, procures or sends a person to enter as aforesaid a house of ill fame or other place resorted to for prostitution, the character of which on reasonable inquiry could have been ascertained by him, shall be punished by a fine of not less than fifty nor more than two hundred dollars.").

<sup>89</sup> *Id.* at § 24 ("Whoever keeps a house of ill fame which is resorted to for prostitution or lewdness shall be punished by imprisonment for not more than two years.").

<sup>90</sup> See *U.S. Federal and State Prostitution Laws and Related Punishments*, *supra* note 76.



for the most severe punishment.<sup>91</sup> Clients and sex workers are usually punished equally with sentences lower than pimps.<sup>92</sup> However, there are six states that punish the three parties equally,<sup>93</sup> seven states that punish sex workers more severely than clients but more leniently than pimps,<sup>94</sup> and five states in which pimps are punished most severely, followed by consumers, and sex workers.<sup>95</sup>

After this cursory view of the typical framework employed in the United States to deal with prostitution and its origins, it can be concluded that the intent behind the legislation was, and still is, the suppression to the highest degree possible of commercial sex. Apart from punishing the exchange between sexual service and compensation, the statutes throughout the United States go much further by criminalizing, through flexible but also detailed provisions, every link in the chain of supply of the sex market.

#### IV. LEGAL FRAMEWORKS TO ADDRESS TRAFFICKING

After describing trafficking as a unitary phenomenon comprising both sex-market and non-sex-market exploitation, this Part analyzes the legal frameworks used to tackle trafficking in international, federal, and state law. In accordance with the description of trafficking as unitary, if only the final market of destination of the victim marks the difference between sex-market and non-sex-market trafficking, this section notes how the law, too, addresses the problem according to a similar distinction. Accordingly, even if the focus is sex-market trafficking, this section discusses “trafficking” without further specifications and points out when sex-market trafficking is referred to specifically.

##### *A. Trafficking in International Law*

According to current international law definitions, trafficking consists of a broad range of conduct carried out through coercive or deceitful means to the goal of exploitation.<sup>96</sup> The increased awareness of the complexity of trafficking, achieved

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<sup>91</sup> The thirty states that punish pimps more severely are: Alabama, Alaska, Arkansas, California, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming. *Id.*

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

<sup>93</sup> These six states are Illinois, Mississippi, New Hampshire, North Carolina, Oklahoma and South Carolina. *See id.*

<sup>94</sup> These states include: Arizona, Colorado, Florida, Montana, New York, Rhode Island, and West Virginia. *See id.*

<sup>95</sup> *See Curva, supra* note 39, at 565-66.

<sup>96</sup> *See* Trafficking Protocol, *supra* note 37 (“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”).

from the 1970s on, culminated in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 2000 (“Protocol”). The Protocol was signed by 117 Parties and, as of January 2015, has been ratified by 166 States.<sup>97</sup>

During the negotiations, the role of prostitution in the definition of trafficking, the first of its kind in international law, was an instantaneous object of controversy.<sup>98</sup> In the end, the Protocol of 2000 introduced a comprehensive definition, which, on the specific point of prostitution, is reflective of a compromise:<sup>99</sup>

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.<sup>100</sup>

Apart from the thorny debate on prostitution, it is evident from the definition that the array of conduct covered by the Protocol includes exploitation of prostitution as well as the macro-world of trafficking into domestic, industrial, and agricultural labor.

According to its international definition, trafficking is composed of three elements:<sup>101</sup> (1) action (“the recruitment, transportation, transfer, harbouring or receipt of persons”),<sup>102</sup> (2) means (“by means of the threat or use of force or other

<sup>97</sup> *Id.*

<sup>98</sup> See Shamir, *supra* note 46, at 89; see also ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 25 (2012).

<sup>99</sup> See Chuang, *supra* note 25, at 1676. According to Chuang, every debating party saw the adopted definition as a victory. *Id.* On the one hand, advocates for the equation of trafficking and prostitution (aptly termed neo-abolitionists) read expansive language such as “abuse of power or of a position of vulnerability” and the irrelevance of consent as implying the indivisibility of trafficking and prostitution. *Id.* On the other hand, non-abolitionists read the “means requirement” of the definition to exclude “voluntary” prostitution from the trafficking definition. *Id.* Also, the lack of a binding definition of exploitation is read as leaving the defining task to domestic implementation. *Id.*; see also GALLAGHER, *supra* note 98, at 28-29. According to Gallagher, no one won this “battle.” *Id.* Parties put aside their disagreements for the sake of an agreed-upon final definition. *Id.*

<sup>100</sup> Trafficking Protocol, *supra* note 37.

<sup>101</sup> See GALLAGHER, *supra* note 98, at 29 (describing the three elements as action, means, and purpose element. This Article uses this terminology); see also Shamir, *supra* note 46, at 85.

<sup>102</sup> Trafficking Protocol, *supra* note 37, art. 3(a).

forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”);<sup>103</sup> and (3) purpose (“for the purpose of exploitation”).<sup>104</sup>

The action element of the definition substantially enlarged the range of conduct covered under the Protocol, by expanding the list of prohibited actions, which covers trafficking from the beginning to the end.<sup>105</sup> Simultaneously, the drafters of the protocol took a clear stance in favor of an expansive view of coercion as not requiring physical force.<sup>106</sup>

The means element, on the issue of the victim’s consent, performs a clarifying, though not strictly necessary, function.<sup>107</sup> In fact, the use of force, fraud, coercion, or deception by definition excludes meaningful consent. On the one hand, force nullifies consent, while on the other hand threats, coercion, fraud, and deception elicit consent. However, it was immediately clear that the means element of trafficking could be satisfied by a wide range of behaviors other than physical force,<sup>108</sup> which ran the gamut from brutal physical coercion to subtle intimidations. In fact, the International Labour Organization noted that threats of reporting to immigration or labor authorities, withholding of wages, confiscation of passport, and false promises with respect to wages and working conditions should all satisfy the Protocol’s means element.<sup>109</sup>

The provisions for victims’ protection are also worthy of analysis. First, pursuant to article 6 of the Protocol, victims of trafficking should be supplied with physical, psychological, and social assistance.<sup>110</sup> Then, as a means of preventing trafficking rather than addressing it *ex post*, States should tackle the underlying causes of the problem, such as “poverty, underdevelopment and lack of equal opportunity.” At the same time, article 9 of the Protocol also contains language aimed at curbing the

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<sup>103</sup> *Id.* at art. 3(a) (noting further that under article 3(c) of the Trafficking Protocol, the “means” element is waived for children. Once again, the interpretative fulcrum of the provision is consent, and children are usually considered incapable of legal consent).

<sup>104</sup> *Id.* at art 3(a); *see also* Chuang, *supra* note 25, at 1674.

<sup>105</sup> *See* GALLAGHER, *supra* note 98, at 30-31. In this respect, it has been noted that the potential breadth of certain actions, such as “harboring”, has the potential to “absorb” the whole three-part framework. *Id.* In fact, no “preceding process” is needed for a conduct to amount to trafficking and every instance of forced labor is potentially covered. *Id.* Gallagher insightfully points out how an instance of forced labor, to be kept distinct from properly defined trafficking, can be deemed to be trafficking through the “harboring” language of the protocol. *Id.*

<sup>106</sup> *See* Chacón, *supra* note 15, at 2983.

<sup>107</sup> *See* GALLAGHER, *supra* note 98, at 27-28.

<sup>108</sup> *See* Trafficking Protocol, *supra* note 37. The Protocol in fact mentions fraud, deception, abuse of power or of a position of vulnerability, as well as the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. *See* Sonia Merzon, Note, *The Extraterritorial Reach of the Trafficking Victims Protection Act*, 39 GEO. WASH. INT’L L. REV. 887, 889-90 (2007).

<sup>109</sup> *See* Shamir, *supra* note 46, at 86-87.

<sup>110</sup> Trafficking Protocol, *supra* note 37, at art. 6.

“demand side” of trafficking by implementing “educational, social or cultural measures.”<sup>111</sup> In addition, article 10 of the Protocol deals directly with law enforcement agencies in charge of materially implementing the normative load of the covenant.<sup>112</sup>

Nonetheless, despite the wisdom and beauty of these provisions, they are little more than wishful thinking and describe a world that is thousands of miles away from reality. States are encouraged to implement these measures, but of course with plenty of exceptions and caveats, signaled by expressions such as, “[i]n appropriate cases and to the extent possible under its domestic law,” “shall consider implementing measures to provide,” or “[e]ach State Party shall endeavour to provide.”<sup>113</sup>

Finally, article 8(2) is a blatantly inconsistent with the goal of victim protection. Article 8(2), provides that victims of trafficking can be repatriated to the country of which they are nationals or of which they are a permanent resident.<sup>114</sup> As Part II demonstrates, repatriation is seldom the solution to a victim’s problems, since the trafficker’s reach extends to the victim’s country of origin as well. Besides, and more worryingly, article 8(2) states that repatriation is “preferably” voluntary.<sup>115</sup> The message of this provision, in short, is that victims are surely in need of protection, as long as some other country provides it, even though the country of victimization is not the best place to be for the victim.

In conclusion, the Protocol represents a substantial evolution in the development of international law on trafficking. A majority of States have since adopted the definition provided in the covenant into their domestic laws.<sup>116</sup> More laudably the definition, hotly disputed during the negotiation phase, escaped the dangers of “ideological capture” by prostitution neo-abolitionists<sup>117</sup> and ended up being comprehensive while also leaving enough room for flexible domestic implementation. Finally, the effective prevention and protection of victims is, in a way, disappointing. Articles 6, 7, 9, and 10 are drafted in aspirational, but completely non-binding language and, while stating important political goals, are less effective than the criminalization provision.<sup>118</sup> Of course, while binding Parties to pass a statute criminalizing trafficking requires a modest amount of political capital, at the present moment, many politicians do not want to be seen as “soft on crime,” obliging those same States to provide positive benefits to victims and to

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<sup>111</sup> *Id.* at art. 9.

<sup>112</sup> *Id.* at art. 10.

<sup>113</sup> *Id.* at art. 6-10.

<sup>114</sup> *Id.* at art. 8.

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

<sup>116</sup> See GALLAGHER, *supra* note 98, at 42.

<sup>117</sup> See Chuang, *supra* note 25, at 1672-77 (this Article is “borrowing” the brilliant expression used by Chuang in her article).

<sup>118</sup> See Shamir, *supra* note 46, at 98 (noting that articles 6, 7, and 9 became nonetheless the basis for “victim-centered, human rights-based framework.”) At the same time, Shamir underscores how this development is hindering efforts to tackle trafficking at its labor-connected roots by over-focusing on prosecution and the victim individually. *Id.*

change patterns of law enforcement involves a more difficult—if not impossible—diplomatic exercise.<sup>119</sup>

*B. Trafficking in U.S. Federal Law: The Trafficking Victims Protection Act of 2000*

The instrument used to address trafficking in federal law is the TVPA,<sup>120</sup> which has been reauthorized in 2003,<sup>121</sup> 2005,<sup>122</sup> 2008,<sup>123</sup> and in 2013.<sup>124</sup> The Department of Homeland Security, the Department of Justice, the Department of State, and the Department of Labor implement the TVPA's domestic provisions.<sup>125</sup> The TVPA has wide-ranging intentions. On the prosecution side, it improves existing laws and adds new provisions to offer a complete criminalization structure. On the prevention side, it builds an extensive international monitoring system, entrusted to the Department of State. On the protection side, the TVPA authorizes funding for assistance programs, provides social services and legal assistance for victims, and most importantly, opened to the possibility of immigration-related relief through the T Visa process.<sup>126</sup> This section shows that Congress's ambitious scheme falls very short of initial expectations.

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<sup>119</sup> In fact, the use of binding language in the mentioned provisions was rejected in the negotiation phase of the Trafficking Protocol. See Anne Gallagher, *Human Rights and the New UN Protocol on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 990-91 (2001).

<sup>120</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. §§ 7101-7112 (2006)).

<sup>121</sup> Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) (codified as amended at 22 U.S.C. §§ 7101-7112 (2006)).

<sup>122</sup> Trafficking Victim Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005) (codified as amended at 22 U.S.C. §§ 7101-7112 (2006)).

<sup>123</sup> William Wilberforce Trafficking Victim Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (codified as amended at 22 U.S.C. 7101-7112 (2006)).

<sup>124</sup> Trafficking Victim Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. (2013); see also Bewley, *supra* note 48, at \*245-50. Bewley notes how the means through which the Department of Health and Human Services ("HHS") distributed grants to provide trafficking victims with benefits and services became entangled with the abortion debate, thereby rendering the reauthorization of the TVPA immediately contentious. See *id.* at \*240-50. In particular, the United States Conference of Catholic Bishops ("USCCB"), the organization chosen to be in charge of administering the grants through a subcontracting system, decided not to reimburse subcontractors for abortion services. *Id.* at \*245-46. When USCCB contract expired, HHS changed its policy by granting funds to individual organizations and giving preference to the ones offering the full range of medical care, including abortion. *Id.* at \*246-47.

<sup>125</sup> See Trafficking Victim Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. (2013).

<sup>126</sup> See April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J. L. & GENDER 231, 233 (2007).

1. The Definition of Trafficking Under the TVPA: “Sex Trafficking” and “Severe Forms of Trafficking”

The TVPA does not define “trafficking,” but instead defines separately “sex trafficking” and “severe forms of trafficking.” At first, it is difficult to understand the reason for the bifurcation. Congress made the choice to create two categories which are, not as familiar, and, moreover, not mutually exclusive. In fact, “sex trafficking” is defined as: “[T]he recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>127</sup> On the other hand, severe forms of trafficking” is defined as:

- (A) [S]ex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or  
 (B) [T]he recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>128</sup>

As a consequence, “severe forms of trafficking” combines the statutory definition of “sex trafficking” and force, fraud, or coercion, and divides trafficking into sectors other than the sex market. In turn, “sex trafficking” is nothing different than a description of prostitution with the exclusion of the sex worker or trafficking victim.<sup>129</sup> Therefore, the TVPA defines “sex trafficking” as not requiring any force, fraud, or coercion, contrary to the Protocol. However, the TVPA only singles out “severe forms of trafficking” for criminal punishment.<sup>130</sup> Therefore, in general, “severe forms of trafficking” are the only forms of trafficking to which many of the TVPA’s operative provisions apply.<sup>131</sup>

There is a historical reason that explains why the definition of trafficking is split in two and why the key provisions of the TVPA are limited to “severe forms of trafficking.” In fact, the TVPA is a paramount example, as is the Protocol, of the ideological struggle to keep trafficking separate from prostitution.<sup>132</sup> Nonetheless, just like the Protocol, the final version of the TVPA reflects a compromise. While “sex trafficking” is defined as a slightly decriminalized version of an anti-

<sup>127</sup> 22 U.S.C. §7102(9)(a)-(b) (2012).

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

<sup>129</sup> This is the choice that Massachusetts also made in 2012. *See* MASS. GEN. LAWS ch. 272 § 12 (2012).

<sup>130</sup> *See* Mohamed Y. Mattar, *Interpreting Judicial Interpretation of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247, 1295 (2011).

<sup>131</sup> *See* Carrie N. Baker, *The Influence of International Human Trafficking on United States Prostitution Laws: the Case of Expungement Laws*, 62 SYRACUSE L. REV. 171, 173 (2012).

<sup>132</sup> *Id.* The legislative history of the anti-trafficking federal statute accurately reflects many of the most popular trafficking stereotypes: the victim is generally identified as a helpless young girl, forcibly abducted and, of course, exploited in the sex market. *See* Srikantiah, *supra* note 12, at 170.

prostitution statute,<sup>133</sup> the key provisions of the statute are limited to “severe forms of trafficking,” which include trafficking into “commercial sex” as well as for “labor or services” with the use of force, fraud, or coercion.<sup>134</sup>

For “severe forms of trafficking,” the TVPA relies heavily on a criminalization approach. To this end, the TVPA was an innovation, as it mainly increases sentences for existing crimes, such as peonage, enticement for slavery, and forced labor,<sup>135</sup> while also creating new offenses such as trafficking with respect to “peonage, slavery, involuntary servitude, or sex trafficking of children or by force, fraud, or coercion,” and “unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.”<sup>136</sup> At the same time, the Trafficking Victims Protection Reauthorization Act of 2005 and of 2008 adds new provisions, which create the crimes of trafficking in persons committed by persons employed by or accompanying the federal government outside the United States, benefitting from peonage, slavery, or trafficking in persons, conspiracy to an act of trafficking, as well as fraud in foreign labor contracting.<sup>137</sup> Thus, contrary to popular belief, the TVPA is not a revolution, but is “a set of incremental changes to an assortment of preexisting federal laws.”<sup>138</sup>

As stated, much of the conduct the TVPA specifically identifies as trafficking instances was already punished under other criminal statutes.<sup>139</sup> The Mann Act<sup>140</sup>

<sup>133</sup> See *infra* Part IV.C (providing an example of a state anti-prostitution statute).

<sup>134</sup> See Srikantiah, *supra* note 12, at 174; see also Chuang, *supra* note 25, at 1678-79. This limitation has brought many commentators to describe the federal statute as a symbolic victory for prostitution neo-abolitionists, but not much more. In fact, the statute’s key provisions are limited to “severe forms of trafficking,” almost entirely consistent with the international definition. Bewley, *supra* note 48, at 240. Nonetheless, neo-abolitionists obtained a much larger victory when the bigger picture is taken into consideration. First of all, according to the TVPA, federal trafficking funds can be spent not only on “severe forms of trafficking” but also on investigating and combating prostitution. 42 U.S.C. §§ 14044, 14044(c) (2012). Secondly, under the TVPA the United States can withdraw economic assistance unrelated to humanitarian and trade purposes from foreign countries, which would not comply with the TVPA’s requirements for fighting trafficking. Bewley, *supra* note 48, at 240. While this framework shows a serious commitment to fighting trafficking, with the advent of the Bush Administration in January 2001 these efforts became immediately re-directed towards anti-prostitution goals. Secondly, the discussion of the Protocol shows, anti-prostitution advocated managed to completely manipulate the trafficking discourse. *Id.*

<sup>135</sup> See Chacón, *supra* note 15, at 2992-93.

<sup>136</sup> 18 U.S.C. §§ 1589-1591 (2012). Pursuant to § 1594, all acts punished under §§ 1589-1592 are also punishable as attempts. 18 U.S.C. § 1594 (2012).

<sup>137</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 3271, 119 Stat. 3558 (2005); see also Trafficking Victims Protection Reauthorization Act of 2008, §§ 222(c)(2)(B)-(C), (d)(1), (e)(2), Pub. L. No. 110-457, 122 Stat. 5044 (2008).

<sup>138</sup> See Chacón, *supra* note 15, at 2993.

<sup>139</sup> According to Chacón, the TVPA does not mark a momentous change in anti-trafficking federal legislation, since, a part from punishing “trafficking” and “sex trafficking of children by force, fraud or coercion,” all the other conducts it criminalizes were already punished, with lower sentences, under the Mann Act. *Id.* at 3016-17; see also Rieger, *supra* note 126, at 244.

<sup>140</sup> White-Slave Traffic Act of 1910, 36 Stat. 825 (codified as amended at 18 U.S.C. §§ 2421-2424 (2006)).

being among them.<sup>141</sup> Under the Mann Act, there is no need to prove force, fraud or coercion,<sup>142</sup> which makes it useful from the law enforcement perspective,<sup>143</sup> and troubling from a theoretical perspective, since prostitution and trafficking are kept separate simply by requiring proof of force, fraud, or coercion.

It is noted that the TVPA's definition of "severe forms of trafficking" is somewhat narrower than the Protocol's definition.<sup>144</sup> In particular, in the federal statute, the "means" element of the definition lists force, fraud, or coercion only.<sup>145</sup> Whereas the Protocol, features a longer list of means, including "threat, or use of force, or other means of coercion, of abduction, of fraud, of deception, of abuse of power, or of a position of vulnerability."<sup>146</sup> Also, the TVPA does not replicate the choice of including an express provision dealing with victim's consent as the Protocol did.<sup>147</sup>

However, the TVPA is not entirely consistent with the Protocol. In particular, the TVPA's enforcement system powers the Department of State to impose sanctions (such as the cancelation of cooperative programs, the elimination of certain forms of aid, or the withdraw of United States support in international financial institutions) on countries that do not comply with the minimum standards to address "severe forms of trafficking."<sup>148</sup> The problem is that while this form of trafficking, which triggers the TVPA's operative provisions, does not include voluntary prostitution within its reach, the international enforcement mechanism of the TVPA does.<sup>149</sup> In evaluating the "serious and sustained efforts to eliminate severe forms of trafficking in persons" made by foreign countries, the State Department must consider "[w]hether the government of the country has made serious and sustained efforts to reduce the demand for (A) commercial sex acts."<sup>150</sup> While both the Protocol and the TVPA (in its "severe forms of trafficking" definition) were successfully sheltered from the ideological charge of prostitution neo-abolitionism, this same camp regrettably scored a victory in the international enforcement of the TVPA.<sup>151</sup>

## 2. The Difficult Implementation of the TVPA with Regard to Victims Protection

While legal scholarship substantially agrees on the fact that the TVPA overly relies on a criminal justice approach to the problem,<sup>152</sup> the TVPA also insufficiently

<sup>141</sup> See Mattar, *supra* note 130, at 1250-51.

<sup>142</sup> See *id.* at 1251.

<sup>143</sup> See Chacón, *supra* note 15, at 3016 (noting how, according to the DOS 2003 TIP Report, "in fiscal year 2001, 153 people were sentenced to prison under Mann Act offenses.").

<sup>144</sup> See Mattar, *supra* note 130, at 1295.

<sup>145</sup> 22 U.S.C. § 7102 (10) (2012).

<sup>146</sup> Trafficking Protocol, *supra* note 37, art. 3(a).

<sup>147</sup> See Chacón, *supra* note 15, at 2984-85.

<sup>148</sup> 22 U.S.C. § 7107 (2012).

<sup>149</sup> See generally *id.*

<sup>150</sup> *Id.* at § 7106 (12)(A) (2012).

<sup>151</sup> See Chacón, *supra* note 15, at 284, 3031-32.

<sup>152</sup> See *id.* at 2978-79.



provides for victim assistance and protection. Before the TVPA, no statute provided for specific assistance to trafficking victims.<sup>153</sup> Most federal protections extend only to victims of “severe forms of trafficking.”<sup>154</sup> For foreign trafficking victims, the TVPA provides for two types of immigration relief. First, is the T visa, a temporary visa which can lead to permanent residence, and second is “continued presence,” a status conferred on victims who cooperate in the prosecution of their traffickers.<sup>155</sup>

Apart from immigration relief, the TVPA also extends social services to victims.<sup>156</sup> The TVPA makes available “food, shelter, clothing, education, mental and physical health services, job training, and other federally-funded social service programs available to trafficking victims.”<sup>157</sup> These benefits are obtained upon certification by the Department of Health and Human Services, which certifies the individual in one of three categories:

- (1) [S]he must prove that she is a victim of ‘severe trafficking’ and is under the age of 18; (2) she has received ‘continued presence’ status from the U.S. Department of Homeland Security stating that her continued presence is necessary to prosecute traffickers; or (3) she is a victim of ‘severe trafficking,’ is willing to assist in the investigation and prosecution of her traffickers, and has made a bona fide application for a T-Visa.<sup>158</sup>

Nonetheless, the promises of the TVPA with respect to victim protection have not been fulfilled when it comes to implementation. For example, from 2001 to 2011 of the 17,500 estimated individuals trafficked in the United States each year, only 3,181 individuals were certified as eligible to receive social services by the Secretary of Health and Human Services.<sup>159</sup> At the same time, considering Congress found that “[t]raffickers primarily target women and girls” since they are “disproportionately affected by poverty, the lack of access to education, chronic unemployment,

<sup>153</sup> See Rieger, *supra* note 126, at 244.

<sup>154</sup> 22 U.S.C. § 7105(b)(1)(A) (2012).

<sup>155</sup> See Srikantiah, *supra* note 12, at 174-75.

<sup>156</sup> 22 U.S.C. § 7105(b)(1)(A)(2015) (“Notwithstanding title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, an alien who is a victim of a severe form of trafficking in persons, or an alien classified as a non-immigrant under section 1101 (a)(15)(T)(ii) of Title 8, shall be eligible for benefits and services under any Federal or State program or activity funded or administered by any official or agency described in subparagraph (B) to the same extent as an alien who is admitted to the United States as a refugee under section 1157 of Title 8.”).

<sup>157</sup> Jennifer A.L. Sheldon-Sherman, *The Missing ‘P’: Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 456 (2012); see also 22 U.S.C. § 7105(b)(1) (2012).

<sup>158</sup> See Sheldon-Sherman, *supra* note 157, at 457.

<sup>159</sup> U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2011, at 1, 4 (2011), <http://www.justice.gov/archive/ag/annualreports/agreporhumantrafficking2011.pdf>, [hereinafter AG TRAFFICKING REPORT 2011].

discrimination, and the lack of economic opportunities in countries of origin,”<sup>160</sup> however, of the 3,181 individuals certified to receive social services only 405 were minors.<sup>161</sup>

The T visa application data sharply contrasts with the estimated trafficking volume. In fact, out of an estimated flow of around 175,000 trafficking victims in a ten-year period, between 2002 and 2011, only 7,217 applications for T visas were filed and only 4,798 were granted,<sup>162</sup> even though the cap is set at 5,000 visas per year.<sup>163</sup> This disparity might be due to the fact that a T visa is exceedingly difficult to obtain, or that the data grossly overestimates the volume of trafficking, or a combination of both factors.

Finally, analyzing the data on prosecutions for human trafficking, including both minor and adult human trafficking, reveals that, between 2001 and 2011, the Department of Justice charged 1,088 individuals in 466 trafficking cases.<sup>164</sup> This number is in addition to the many trafficking cases that are also prosecuted at the state level under local trafficking statutes.

As this Article shows from a descriptive perspective, the number of applications, prosecutions, and certifications are low compared to the total estimated figure of trafficked victims claimed to suffer inside United States borders every year. Legal scholarship has tried to link these scarce figures with regulatory restrictions.<sup>165</sup> According to current regulations, the certification as a trafficking victim, issued by an appropriate law enforcement agency, is indispensable. As Part II.B shows: Certification is much more easily obtained if the victim was actually rescued by government officials, rather than self-rescued.<sup>166</sup> According to Dina Haynes, this is due to the fact that much of the anti-trafficking effort sees the United States government self-depicting itself as the rescuer:

[T]he practice of the DOJ and DHS demonstrates their belief that a victim of human trafficking somehow is more legitimately a victim (or at least more likely to be perceived as a victim by them) if she happens to have been rescued by U.S. government officials. If she never receives the benefit of being rescued, as few victims do, but rather manages to free

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<sup>160</sup> 22 U.S.C. § 7101(b)(4) (2012).

<sup>161</sup> AG TRAFFICKING REPORT 2011, *supra* note 159, at 34.

<sup>162</sup> *Id.* at 56.

<sup>163</sup> 8 U.S.C. § 1184(o)(2)-(3) (2012).

<sup>164</sup> AG TRAFFICKING REPORT 2011, *supra* note 159, at 65-66.

<sup>165</sup> See Srikantiah, *supra* note 12, at 179-84. Srikantiah nonetheless is cautious in drawing definitive conclusions on the point. In fact, with particular reference to T visa applications, these procedures are confidential and consequently it is not possible to assess the percentage of successful applications in which a law-enforcement certification was issued. *Id.*

<sup>166</sup> See Haynes, *supra* note 3, at 347; see also Interview with Julie Dahlstrom, *supra* note 53. According to Dahlstrom, law enforcement simply feel a sense of “ownership” of the case if they are directly involved in the rescue of the victim. *Id.* On the opposite, it is harder to convince them to certify a case if the referral comes from a lawyer assisting the victim. *Id.*

herself and then seek assistance, she is more likely to be perceived by law enforcement as not a victim and not ‘certifiable.’<sup>167</sup>

The issuance of certification requires the victim to cooperate with the prosecution of his or her traffickers.<sup>168</sup> The decision to cooperate with law enforcement is not easy to make. For one, the decision inevitably means that the victim will have to allocate a substantial amount of time, money, and energy to the cooperation.

However, for a trafficking victim, the effects of the combination of coercion and threats through which he or she was exploited may still linger and may weigh in favor or non-cooperation.<sup>169</sup> In addition, among the psychological devices used by traffickers to keep control over their victims, there is the intentional creation of distrust towards law enforcement. This device deters voluntary escapes prior to victim identification by law enforcement and increases the chance of non-cooperation assuming victim identification is made.<sup>170</sup>

Apart from this, even an adamant resolution to cooperate on the part of the victim may not be enough to satisfy the “cooperation requirement” to obtain certification. In fact, it appears that, in practice, what is necessary is not a serious offer to aid in the prosecution of one’s traffickers, but rather the decision, which lies entirely in the broad discretion of the prosecutor, to use the information provided to prosecute those individuals. If the prosecution does not pursue charges no protections are given to the victim.<sup>171</sup> In sum, the fact that certification is conditioned upon the victim’s availability for assisting in the actual prosecution of his or her traffickers underlines the TVPA’s overreliance on a prosecutorial approach to trafficking to the inevitable detriment of victim protection.

Another problem with the implementation of the TVPA is its excessive focus on trafficking in the sex market and prostitution. Federal agencies, especially in the early years of the TVPA during the Bush Administration, overly relied on the “sex trafficking” stereotypes.<sup>172</sup> As a result, these agencies neglected a large portion of

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<sup>167</sup> See Haynes, *supra* note 3, at 350.

<sup>168</sup> *Id.* at 359.

<sup>169</sup> See 2013 TIP REPORT, *supra* note 19, at 24 (“Trauma may impair their ability to process information and make choices. The threats traffickers used to maintain control may be foremost in their minds. These difficulties often persist through the first few hours, days—even weeks, months, and years—after being freed or escaping, as victims adjust to being outside of their traffickers’ control and reintegrate into society.”); see also Srikantiah, *supra* note 12, at 179-84. Another possible factor in favor of non-cooperation can be traumatic events the victim may have suffered, which in turn lead to emotional numbness and dissociation. See Chacón, *supra* note 15, at 3026; see also Interview with Julie Dahlstrom, *supra* note 53.

<sup>170</sup> See Curva, *supra* note 39, at 574-76.

<sup>171</sup> See Haynes, *supra* note 3, at 360. Haynes also underscores how additional burdens are placed in the path of victimhood recognition under federal law. *Id.* at 354-55. In fact, the burden of proving the intent of the trafficker lies entirely with the victim. At the same time, this burden is set at “conclusive proof,” which, according to Professor Haynes, can only be obtained if the victim is actually rescued by law enforcement officers. *Id.* at 361; see also Interview with Julie Dahlstrom, *supra* note 53 (noting that, if the case is not prosecuted, it becomes more difficult to obtain certification).

<sup>172</sup> See *supra* Part II.A.

victims, which did not appear on the federal “radar” at all.<sup>173</sup> Nonetheless, according to recent government data, federal agencies are becoming more aware of the importance of trafficking in non-sex work. First, of all the 564 victims certified to receive social services in 2011, seventy-five percent of them were trafficked in agricultural, industrial, and domestic work, while only nineteen percent were trafficked in the sex market.<sup>174</sup> Prosecution has also shifted, even if less pronounced. Focusing on adult trafficking cases, in 2011, the forty-two cases prosecuted were equally divided between cases of trafficking in the sex market and cases of trafficking in agricultural, domestic, and industrial work.<sup>175</sup> However, considering trafficking cases involving minors, only three labor-related cases were prosecuted versus eighty sex-related cases.<sup>176</sup>

In conclusion, it is clear that the TVPA does not do enough for victims of trafficking. The figures relating to the first fifteen years of implementation of the anti-trafficking federal statute are disappointing. Both the number of people receiving social services and immigration relief are below reasonable estimates of the volume of trafficking. As stated, the reason for the scarce relief the TVPA provides is manifold. The inadequate relief is often traced to shortcomings of the law itself, such as the requirement of necessary cooperation, which grossly overlooks the reality of trauma of many trafficking victims. While a full analysis of the shortcomings of the federal anti-trafficking statute and possible solutions to them is beyond the scope of this Article, it is indisputable that much more should be expected from a statute like the TVPA, whose stated goals are not even close to being reached.

### *C. Trafficking in State Law: The Massachusetts Anti-Trafficking Statute*

Massachusetts was among the last states to pass legislation directly targeting trafficking.<sup>177</sup> Washington was the first to pass an anti-trafficking statute in 2003.<sup>178</sup> Massachusetts followed in 2011 with the passage of H.B. 3808, “An Act Relative to the Commercial Exploitation of People” (the “Bill”).<sup>179</sup>

For this Article’s present purpose, it is of particular interest to focus on the criminal provisions introduced by the Bill. The legislature decided to target three forms of trafficking: (1) “trafficking of persons for sexual servitude,”<sup>180</sup> (2)

<sup>173</sup> See Srikantiah, *supra* note 12, at 184-87 (providing a complete analysis of the overreliance of federal agencies on the sex-trafficking stereotype).

<sup>174</sup> AG TRAFFICKING REPORT 2011, *supra* note 159, at 33-34.

<sup>175</sup> *Id.* at 64-65.

<sup>176</sup> *Id.* at 65.

<sup>177</sup> See MASS. GEN. LAWS ch. 265 § 49-51, 53 (2012); see also Melissa Dess, *Walking the Freedom Trail: an Analysis of the Massachusetts Human Trafficking Statute and its Potential to Combat Child Sex Trafficking*, 33 B.C. J. L. & SOC. JUST. 147, 155-56 (2013); Interview with Ellen Lemire, *supra* note 20.

<sup>178</sup> See *Human Trafficking*, OFF. ATT’Y GEN. WASH. ST., <http://www.atg.wa.gov/human-trafficking> (last visited Apr. 22, 2016).

<sup>179</sup> H.B. 3808, 187th GEN. COURT, ANN. SESS. (Mass. 2012).

<sup>180</sup> MASS. GEN. LAWS ch. 265, § 50 (2012).

“trafficking of persons for forced service,”<sup>181</sup> and (3) “organ trafficking.”<sup>182</sup> In general, the “trafficking of persons for forced service” provision is of interest, because it seems to follow the general framework of both the federal and state level. In fact, this provision punishes with substantial penalties whomever subjects a person to forced service, as well as any other individual who plays any role in a victim’s exploitation.<sup>183</sup> Also, section 51(b) enhances the penalty if the victim is a minor.<sup>184</sup> In turn, “forced services” are defined in section 49 as services extracted by the exploiter through the actual performance or threat of serious harm, financial harm, physical restraint, confiscation of identification documents, abuse of the legal process, or extortion.<sup>185</sup>

As for organ trafficking, section 53 defines the criminal conduct as: The recruitment, enticement, harboring, transportation, delivering or obtainment by any

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<sup>181</sup> *Id.* at § 51.

<sup>182</sup> *Id.* at § 53.

<sup>183</sup> *Id.* at § 51(a) (“Whoever knowingly: (i) subjects, or attempts to subject, another person to forced services, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person, intending or knowing that such person will be subjected to forced services; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause . . . .”).

<sup>184</sup> *See id.* at § 51.

(b) Whoever commits the crime of trafficking of persons for forced services upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for forced labor services shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of person for forced labor or services shall be civilly liable for an offense under this section.

*Id.*

<sup>185</sup> *See id.* at § 49.

As used in sections 50 to 51, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings . . . . ‘Forced services,’ services performed or provided by a person that are obtained or maintained by another person who: (i) causes or threatens to cause serious harm to any person; (ii) physically restrains or threatens to physically restrain another person; (iii) abuses or threatens to abuse the law or legal process; (iv) knowingly destroys, conceals, removes, confiscates or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person; (v) engages in extortion under section 25; or (vi) causes or threatens to cause financial harm to any person.

*Id.*

means of another person or the knowingly receipt of anything of value for the removal or the sale, against her will, of an organ, tissue, or body part, performed knowing or intending that the victim will be subject to such removal.<sup>186</sup> The legislative choice to single out organ trafficking for specific prohibition can be understood if the desire to capture the uniqueness of such conduct is considered, which does not belong in the traditional domain of trafficking for forced labor. At the same time, the provision identifies conduct that is negatively qualified by a particular heinous and direct form of exploitation, where what is misused is not the services of the victim but her body directly.

The most interesting provision is section 50 that defines “trafficking for sexual servitude.”<sup>187</sup> The norm found in this section perfectly embodies the ideological anti-prostitution stance, which was discussed in Part II as the cause of one of the die-hard stereotypes on trafficking (i.e., the equation of trafficking with sex trafficking, intended in turn as including voluntary prostitution).<sup>188</sup> The Bill states:

Whoever knowingly . . . obtains by any means . . . another person to engage in commercial sexual activity, a sexually-explicit performance . . . shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than five years but not more than twenty years and by a fine of not more than \$25,000.<sup>189</sup>

The norm appears, in theory, as a slightly decriminalized version of the current Massachusetts’ anti-prostitution provisions.<sup>190</sup> The conduct punishable by these provisions<sup>191</sup> is summarized as subjecting, recruiting, enticing, harboring,

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<sup>186</sup> *See id.* at § 53.

(a) Whoever: (i) recruits, entices, harbors, transports, delivers or obtains by any means, another person, intending or knowing that an organ, tissue or other body part of such person will be removed for sale, against such person’s will; or (ii) knowingly receives anything of value, directly or indirectly as a result of a violation of clause (i) shall be guilty of organ trafficking and punished by imprisonment in the state prison for not more than 15 years or by a fine of not more than \$50,000, or both.

(b) Whoever commits the crime of organ trafficking upon a person under 18 years of age shall be punished by imprisonment in the state prison for 5 years. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from such sentence for good conduct until having served 5 years of such sentence.

*Id.*

<sup>187</sup> *Id.* at § 50(a).

<sup>188</sup> *See* Stephanie M. Berger, *No End in Sight: Why the “End Demand” Movement is the Wrong Focus For Efforts to Eliminate Human Trafficking*, 35 *HARV. J. L. & GENDER* 524, 562-64 (2012). The analyses of the statements by the then-Attorney General reported by Berger do not leave much doubt.

<sup>189</sup> MASS. GEN. LAWS ch. 265 § 50(a).

<sup>190</sup> *See id.* ch. 272 §§ 2, 6-9, 12, 13, 24, 31, 53, 53A (2012).

<sup>191</sup> *See id.* ch. 265 § 50.

transporting, providing, or obtaining a person for a *non-coerced* commercial sexual activity, thereby obviating for the need to prove any force, fraud, or coercion.<sup>192</sup> Apart from the “prostitution” and “trafficking” labels, the real difference between the two provisions, when applied to clients, is the penalty: “[N]ot more than 2 and one-half years or by a fine of not less than \$1,000 and not more than \$5,000, or by both such imprisonment and fine” in the case of prostitution; as opposed to “imprisonment in the state prison for not less than 5 years but not more than twenty years and by a fine of not more than \$25,000” in the case of trafficking.<sup>193</sup>

The Bill, in that respect, made the choice of equating prostitution with sex trafficking and, according to a plain reading of the statute, clients who engage with a prostitute without any force, fraud, coercion, or other illegal means might be found guilty of trafficking and subjected to a minimum five-year sentence.<sup>194</sup> The connection between trafficking and prostitution was undoubtedly on the mind of the Massachusetts legislature. In fact, chapter 272, section 53A was modified to increase

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(a) Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of chapter 272, or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography in violation of said chapter 272; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude and shall be punished by imprisonment in the state prison for not less than 5 years but not more than 20 years and by a fine of not more than \$25,000. Such sentence shall not be reduced to less than 5 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence. No prosecution commenced under this section shall be continued without a finding or placed on file.

(b) Whoever commits the crime of trafficking of persons for sexual servitude upon a person under 18 years of age shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 5 years. No person convicted under this subsection shall be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 5 years of such sentence.

(c) A business entity that commits trafficking of persons for sexual servitude shall be punished by a fine of not more than \$1,000,000.

(d) A victim of subsection (a) may bring an action in tort in the superior court in any county wherein a violation of subsection (a) occurred, where the plaintiff resides or where the defendant resides or has a place of business. Any business entity that knowingly aids or is a joint venturer in trafficking of persons for sexual servitude shall be civilly liable for an offense under this section.

*Id.*

<sup>192</sup> See *id.* at § 49 (2012) (defining “commercial sexual activity” as, “any sexual act on account of which anything of value is given, promised to or received by any person”).

<sup>193</sup> Compare *id.* at § 50, with *id.* at ch. 272, § 53A.

<sup>194</sup> *Id.* at § 50(a).

the punishment for the clients from one year imprisonment and/or a \$500 fine to two and one-half years and/or a fine between \$1,000 and \$5,000.<sup>195</sup>

However, there is some evidence that this expansion of the scope of section 50 is cabined by prosecutorial discretion. In fact, the presence of the provision in the Bill does not mean that prosecutors view clients as “traffickers.” In fact, empirical evidence shows that unless a more egregious act is attributable to the client, such as “real” trafficking, presumably intended as involving coercion, prosecutors will simply charge a client under chapter 272 section 53A.<sup>196</sup>

At the same time, the broad definition of trafficking adopted by the Bill could encompass other people in addition to “real” traffickers and clients, such as sex workers themselves. In fact, it is noted that “sex workers who encourage friends to join the sex trade or recommend a friend to a client” may be guilty of enticing and recruiting for a commercial sexual activity.<sup>197</sup> However, it is plausible that prosecutorial discretion would work in the sense of excluding these individuals from the reach of section 50.

Massachusetts also laudably introduced an affirmative defense for “charges of engaging in common night walking or common streetwalking,” as well as engaging in sexual conduct for a fee for defendants who at the time of the conduct were trafficking victims.<sup>198</sup> This provision is a step forward in assuring protection for trafficking victims and avoiding double victimization. Unfortunately, a plain reading of the provision seems to dramatically reduce the innovative potential of the provision, thus putting those hopes into perspective. In fact, the statute states that: “In any prosecution . . . of a person who is a human trafficking victim . . . it shall be an affirmative defense to charges of [prostitution] that, while a human trafficking victim, such person was under duress or coerced into committing the offenses for which such person is being prosecuted . . . .”<sup>199</sup> Consequently it seems a human trafficking victim’s status only occasions the application of the affirmative defense, for which it is necessary to additionally prove either duress or coercion.<sup>200</sup>

As shown, the Bill is problematic because it conflates trafficking with prostitution. The problem with this conflation is that it dilutes trafficking by including voluntary prostitution within its purview. Most importantly, it perpetuates a stereotype that renders victim identification less efficient and consequently exacerbates the problem of double victimization.<sup>201</sup>

The Massachusetts framework addressing trafficking, however, suffers from additional problems. In fact, upon the passing of the Bill, commonwealth authorities justified the law as a conscious effort to focus on an enhanced protection of

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<sup>195</sup> *Id.* at ch. 272 § 53A(b).

<sup>196</sup> *Id.* Also, it seems in certain instances the Bill allows prosecutors to have additional leverage against defendant-clients thanks to the strikingly different magnitudes of the penalties. See Interview with Ellen Lemire, *supra* note 20.

<sup>197</sup> See Berger, *supra* note 189, at 562.

<sup>198</sup> MASS. GEN. LAWS ch. 265, §57 (2012).

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

<sup>200</sup> *Id.*

<sup>201</sup> See *supra*, Part II.B.



victims.<sup>202</sup> Those statements regrettably forgot that, pursuant to chapter 272 section 53A, selling sex is a crime and those same victims which the Bill pledges to protect might still be labeled as criminals under the Bill.<sup>203</sup> The inconsistency is not attributable to a simple lack of coordination between statutes, but to a deliberate choice. As noted above, the Bill replaced the old section 53A with an integrally new version that fully confirmed the criminality of selling sexual services.

V. THE EFFECTS ON THE GROUND OF THE CRIMINALIZATION OF PROSTITUTION: THE INTERPLAY OF ANTI-PROSTITUTION AND ANTI-TRAFFICKING STATUTES

For the sake of clarity, a brief restatement of the above discussion is helpful. The problem addressed is the fact that victims of sex-market trafficking, who are, or, rather, should be, protected under anti-trafficking laws, are often the same people criminalized under anti-prostitution statutes.

As a preliminary step, this Article analyzed trafficking in general, both into the sex and non-sex markets. Up to this point, this Article studied trafficking in this wider sense by trying to render, in comprehensible terms, its undeniable complexity. This is only a natural consequence of the vast array of conduct covered by international and domestic anti-trafficking laws.<sup>204</sup> When it came to state provisions, this Article focused on the Massachusetts anti-trafficking provisions, both because the interviews focused on Massachusetts professional figures and because the state's human trafficking provisions encompass voluntary prostitution.

Notwithstanding its complexity, trafficking is sometimes reduced to a cluster of stereotypes, which, for various reasons, oversimplify trafficking. Among them, trafficking is wrongly equated with trafficking into the sex market or to voluntary prostitution. Also, trafficking is wrongly imagined to necessarily involve the transnational movement of people and the use of physical force to exploit victims. Finally, the victims of this criminal activity are reduced to stereotyped narratives: They are believed to be women or girls, foreign, and devoid of any agency.

The main ramification of this misguided imaginative effort is that it partially distorts what law enforcement agencies consider as "trafficking" and whom law enforcement considers as "trafficking victims." For many sex-market trafficking victims that do not fit into the stereotype, this means that victims may not only be left unidentified, but may also be criminalized under anti-prostitution statutes. The reason is, once again, that wrong trafficking stereotypes in general deprive specific victims (i.e., those exploited in the realm of commercial sex) of the first "filter" against double victimization through law enforcement identification.

This Article then considered anti-prostitution statutes. Part III demonstrates that prostitution in the United States is completely criminalized. Consequently, this Article must consider the effects of the criminalization of prostitution on sex-market trafficking victims in the interplay between the trafficking and anti-prostitution legal structure. To this goal, this Article presents the results of two interviews conducted with professionals directly working with trafficking victims in Massachusetts.<sup>205</sup> One

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<sup>202</sup> See Berger, *supra* note 189, at 562.

<sup>203</sup> *Id.*

<sup>204</sup> See *supra* Part IV.A-C.

<sup>205</sup> This author selected one prosecutor and one attorney who worked on sex-market trafficking cases by picking their names from the Interagency Human Trafficking Task Force

prosecutor and one attorney working on sex-market trafficking cases were selected by choosing their names from the Interagency Human Trafficking Task Force of that state. They were asked to explain their day-to-day experience with trafficking victims and their perception of the on-the-ground operation of the legal framework used to address trafficking. Then, the interview focused on the issues identified in this Article's theoretical inquiry, such as the already-mentioned inconsistencies between anti-trafficking and anti-prostitution statutes. Simultaneously, this new research was supplemented with similar studies whose results were already published and reported in law review articles or available online.

*A. The Encounter Between the Victim of Sex-Market Trafficking and the Police*

In general, law enforcement officers are usually the first to engage in contact with potential victims at the moment of arrest or referral. This "first contact" is an important moment. At the initial contact, the harm of victimization at the hand of the traffickers already occurred, but the additional harm of *double* victimization through criminalization under anti-prostitution statutes has not yet happened. The U.N. Special Rapporteur on trafficking in persons, especially women and children has noted, with regard to human trafficking victims in general:

Trafficked persons are often arrested, detained, charged and even prosecuted for such unlawful activities as entering illegally, working illegally or engaging in prostitution. The vulnerability of trafficked persons to such treatment is often directly linked to their situation: . . . the exploitative activities in which they are or have been engaged, such as prostitution, soliciting or begging, may be illegal in the State of destination . . . . In many cases, criminalization is tied to a failure of the State to identify the victim correctly . . . . The Special Rapporteur notes that efforts to identify trafficked persons as victims deserving of protections are often complicated by the problem of "imperfect" victims. Some victims may have committed crimes, whether willingly or as a result of force, fraud or coercion, prior to becoming or in conjunction with becoming a trafficking victim, thereby making it hard to distinguish victims from perpetrators.<sup>206</sup>

More specific studies seem to confirm what the U.N. Special Rapporteur wrote. According to a recent study carried out in the New York area,<sup>207</sup> it appears that officers in charge of making arrests for loitering and prostitution do not receive

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of that State. First, they were asked to explain their day-to-day experience with trafficking victims and their perception of the on-the-ground operation of the legal framework used to address trafficking. Then, the interview focused on the issues that identified in the theoretical inquiry, such as, the already-mentioned inconsistencies between anti-trafficking and anti-prostitution statutes. Simultaneously, this new research was supplemented with similar studies whose results were already published and reported in law review articles or available online.

<sup>206</sup> Joy Ngozi Ezeilo (Special Rapporteur on trafficking in persons, especially women and children), U.N. Doc. A/HRC/20/18 (June 6, 2012).

<sup>207</sup> See PHILLIPS ET AL., *supra* note 52, at 14-15 (citing *Oversight: Combating Sex Trafficking in NYC: Examining Law Enf't Efforts—Prevention and Prosecution: Testimony Before the City of New York Comm. on Women's Issues and the Comm. on Pub. Safety* (2011) (statement of Kate Mogulescu & Katherine Mullen)).

adequate training in trafficking screening procedures.<sup>208</sup> At the same time, claims have been made that the very policing strategies employed by law enforcement might hinder proper identification.<sup>209</sup> For example, in the case of New York, while public statements from the NYPD set trafficking high in its enforcement priorities, the concurrent policy of heavy enforcement of minor offenses, “works against any efforts to meaningfully investigate and arrest sex traffickers.”<sup>210</sup> To shore up these two claims, an advocacy and legal defense institution, which represents sex workers arrested for prostitution-related offenses, disclosed that about one third of its clients actually claim to have been trafficked into the sex market.<sup>211</sup>

A different study, conducted in various areas of the United States, focused on the use of law enforcement raids in the trafficking-into-sex-market context and interviewed nine sex workers who were arrested for prostitution during federal and state police raids. Of those interviewed, only one was asked at the moment of her arrest if she was coerced into prostitution, despite the fact that seven of the nine immediately self-identified as trafficked.<sup>212</sup> The study also focused on the perspective of law enforcement personnel. In that respect the study found, regarding the screening process, that:

Identification of trafficked persons during the interview procedure appears to be largely driven by subjective determinations by individual law enforcement officers based on their perceptions and assumptions about how people who are trafficked are expected to appear and behave . . . . Such subjective and discretionary determinations are almost guaranteed to let some individuals who have been trafficked slip through the cracks.<sup>213</sup>

A third study, that took place in Oregon, concluded that the lack of proper victim identification was one substantial gap in its approach to victim protection,<sup>214</sup> due to the lack of training of local police forces on trafficking.<sup>215</sup> Once again, it was particularly difficult for police officers to “see” the arrested sex worker as a potential trafficking victim. In fact, this would have required, as a prerequisite, specific training on trafficking and, once aware of the problem, a screening procedure to differentiate sex workers from trafficking victims.<sup>216</sup> The problem of identification is

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<sup>208</sup> *Id.*

<sup>209</sup> *See* Mogulescu, *supra* note 7, at 486.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 478 (citing LEGAL AID SOC’Y, TRAFFICKING VICTIMS LEGAL DEFENSE AND ADVOCACY PROJECT REPORT TO THE NOVO FOUNDATION (2013)).

<sup>212</sup> MELISSA DITMORE, KICKING DOWN THE DOOR: THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 7, 24 (2009), <http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf>.

<sup>213</sup> *Id.* at 37.

<sup>214</sup> INT’L HUMAN RIGHTS CLINIC AT WILLAMETTE UNIV. COLL. OF LAW, MODERN SLAVERY IN OUR MIDST: A HUMAN RIGHTS REPORT ON ENDING HUMAN TRAFFICKING IN OREGON 58 (2010).

<sup>215</sup> *See* Rayborn, *supra* note 62, at 145-46.

<sup>216</sup> *See* PHILLIPS, *supra* note 52, at 58.

particularly acute in the case of adult sex workers, as minors are usually not found on the criminal side of an anti-prostitution statute.<sup>217</sup>

In conclusion, the victim identification process in the enforcement of anti-prostitution statutes appears to be inaccurate and in need of improvement. The main cause of this inaccuracy is the absence of proper training of police forces coupled with a lack of resources. Moreover, this lack of awareness of the realities of trafficking seems to extend beyond police forces to other actors in the criminal justice system, such as attorneys,<sup>218</sup> prosecutors, and judges.<sup>219</sup> Taking this information into account, the encounter between victims trafficked into the sex market and the police might result in further victimization, rather than relief.

*B. The Encounter Between the Victim of Sex-Market Trafficking and the Prosecutor*

Further down the road, prosecutors play a big role. Their contribution can impact the process in different ways. For one, in the exercise of their discretion, prosecutors can leverage victim cooperation in the prosecution of their traffickers. Anti-prostitution statutes are the “stick” in the process in the sense that if the victim does not cooperate, the office will seek incarceration for violations of the statute. The problem with this approach is that it may sacrifice the reality of the trauma that trafficking victims suffer for the goal of operational efficiency within the law enforcement process.<sup>220</sup> In fact, trauma and fear might lead an otherwise cooperative victim to be unwilling to help law enforcement. Indeed, fear of retaliation from traffickers and distrust of law enforcement make cooperation less likely.<sup>221</sup>

Cooperation, as highlighted above in the implementation of the TVPA, is necessary to obtain certification as a trafficking victim, which in turn is necessary to open the doors to immigration and social services relief.<sup>222</sup> As one advocate points out, the process is currently left in the hands of prosecutors who, quite comprehensibly, see the situation in light of prosecution-related goals rather than victim protection.<sup>223</sup> The two goals are competing since effective prosecutions routinely follow a specific timeline, which is incompatible with the duration of victims’ recovery time from the traumatic experiences involved with trafficking.<sup>224</sup>

In certain jurisdictions, in fact, it seems that the threat of incarceration is used to encourage trafficked sex workers to cooperate with law enforcement.<sup>225</sup> In

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<sup>217</sup> See Rayborn, *supra* note 62, at 146.

<sup>218</sup> See Interview with Julie Dahlstrom, *supra* note 53 (underscoring how an underlying problem she faces in her professional activity is the lack of an in-depth understanding of trafficking by others professional figures, such as law enforcement officials and attorneys).

<sup>219</sup> See PHILLIPS, *supra* note 52, at 17.

<sup>220</sup> See Mogulescu, *supra* note 7, at 480-81.

<sup>221</sup> See *id.*

<sup>222</sup> See Interview with Julie Dahlstrom, *supra* note 53 (noting how a T visa can also be obtained without certification, even though, when required, cooperation represents a major obstacle in obtaining certification).

<sup>223</sup> See Mogulescu, *supra* note 7, at 481-82.

<sup>224</sup> See *id.*

<sup>225</sup> See *id.* at 480-81.

Massachusetts, this seems not to be the case. The research shows, the assistant district attorney claimed that, on the contrary, sex workers are routinely not charged with a violation of chapter 272, section 53A, which is commonly referred to as “sex for a fee,” since the District Attorney’s office does not “see” them as criminals, but rather as victims exploited by their pimps who, along with clients, are the main focus of these types of investigations.<sup>226</sup> Then, even though some sex workers do not have pimps and might self-identify as escorts, they still are not normally charged with a violation of section 53A, because escort activities, contrary to street prostitution, are mostly hidden from public view.<sup>227</sup> However, if an escort started collaborating with the pimp by acting as the middleperson in managing the prostitution ring, the prosecutor could charge the accused escort either under section 53A, or with a violation of chapter 265 section 50, human trafficking statute, in order to encourage cooperation with prosecuting the “bigger fish” that the trafficker or pimp represents.<sup>228</sup>

Part II discussed that coercion of victims to engage in prostitution by traffickers is at the core of the sex-market. In fact, the percentage of people working in the sex market, which are trafficked, is not trivial. In New York City, the people arrested for prostitution seem to satisfy, in most cases, the definition of trafficking victims under federal and New York state law.<sup>229</sup>

Prosecution of sex-market and non-sex-market trafficking victims under either anti-prostitution or immigration statutes have the effect of double victimization on the victims: first by traffickers, and second by the criminal justice system. However, the novelty is that the criminalization of prostitution specifically adds another layer to the problem of double victimization of victims indicted for violations of anti-prostitution statutes which non-sex-market trafficked individuals do not face. This layer is the gender-biased enforcement of prostitution laws. According to a 2009 article, the trend<sup>230</sup> was “to focus on targeting sex workers for arrest and prosecution, while ‘police, prosecutors, and courts have typically viewed pimps and purchasers as trivial or derivative offenders.’”<sup>231</sup> The FBI data seems to support the general validity of the claim that in 2013 in the United States, 24,438 women and 11,124 men were arrested for crimes categorized as “Prostitution and Commercialized

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<sup>226</sup> See Interview with Ellen Lemire, *supra* note 20.

<sup>227</sup> See *id.* (noting how the old common-law approach, which treated prostitution mainly as a public nuisance, seems to be still lingering in the background).

<sup>228</sup> See *id.*

<sup>229</sup> See Mogulescu, *supra* note 7, at 477-78.

<sup>230</sup> See generally Curva, *supra* note 39, at 574.

<sup>231</sup> See *id.* (quoting Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 438 (2009)). For evidence of a different type of gender-specific enforcement, see Interview with Ellen Lemire, *supra* note 20. In the Suffolk County District Attorney’s Office, the trend is quite the opposite, since sex workers are, absent other additional grounds, generally not charged with violations of the Massachusetts “sex for a fee” statute, while clients and above all pimps absorb most of the investigative effort in the enforcement of prostitution laws. *Id.* Sex workers are routinely charged only if they do “something more” than simple prostitution, such as helping the pimp in running the prostitution ring. *Id.*

Vice,” which means that 68.7% of the total were women and 31.3% were men. The trend is well established, since, in the ten-year window that the source considers, these percentages remained stable (69.1% v. 30.9%).<sup>232</sup>

These numbers might be due to the fact that prostitution has traditionally been viewed as a crime against “sexual morality.”<sup>233</sup> As intended at the time the United States steered toward a criminalization approach to prostitution,<sup>234</sup> traditional sexual mores commanded that “women [were] not supposed to enjoy sex or engage in sexual conduct outside of marriage, whereas men [were] viewed as sexual creatures that often cannot control their sexual impulses.”<sup>235</sup> This outdated contraposition of sex-driven men and necessarily chaste women is likely today to make law enforcement see clients in a more benign light and sex workers, including trafficking victims, in a much harsher light. It then becomes somewhat more difficult to “convince” law enforcement that the person they see as the one sure culprit in the prostitution ring is indeed a victim, and not a criminal.<sup>236</sup>

### *C. The Harms of Double Victimization*

What does double victimization at the hand of the criminal justice system entail? In general, the effects of the criminal law on individuals are well documented. Apart from the punishment itself, there are “hidden punishments” deriving from the very nature of being involved in the criminal justice system. Beginning with arrest, the sufferings one endures are apparent. For example, in New York, a study found that upon apprehension, those arrested are “transferred to a central booking facility,” with horrific conditions.<sup>237</sup> Those arrested are reported to be usually “poorly clothed, tired, hungry, and [to have] endured miserable conditions overnight.”<sup>238</sup>

In addition, the moral stigma of a criminal conviction, which is particularly strong in morally-charged crimes, like prostitution, adds another dimension of the harm to misidentified trafficked sex workers convicted as prostitutes.<sup>239</sup> The criminal law has the power to blame the perpetrator, this effort is misguided when the victim is not culpable.

Finally, and possibly most importantly, a stained criminal record forecloses any meaningful job opportunities to survivors of trafficking, which are fundamental to rebuild a life after trafficking,<sup>240</sup> and exposes them to “barriers to obtaining housing

<sup>232</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS T. 33 (2013), [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-33/table\\_33\\_ten\\_year\\_arrest\\_trends\\_by\\_sex\\_2013.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-33/table_33_ten_year_arrest_trends_by_sex_2013.xls) (last visited Jan. 22, 2015).

<sup>233</sup> See Curva, *supra* note 39, at 564-67.

<sup>234</sup> See *supra* Part III.

<sup>235</sup> See Curva, *supra* note 39, at 566-67.

<sup>236</sup> *Id.*

<sup>237</sup> See *e.g.*, SUZANNAH PHILLIPS ET AL., CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZES TRAFFICKING VICTIMS (2012).

<sup>238</sup> *Id.* at 18.

<sup>239</sup> *Id.* at 16-18.

<sup>240</sup> See DENISE BRENNAN, LIFE INTERRUPTED: TRAFFICKING INTO FORCED LABOR IN THE UNITED STATES (2014).

and loans and pursuing educational and employment goals” as well as “consequences for immigration and child custody.”<sup>241</sup>

As stated, law enforcement’s misidentification of trafficking victims in the sex market is also problematic. Unfortunately, the persistent criminalization of prostitution, which the victim may have been forced to undertake, also takes away almost all incentives to self-rescuing, through which the victim of trafficking autonomously comes forward and identifies herself as trafficked.<sup>242</sup> It is counterintuitive to expect victims, who by definition are exploited, threatened, and diminished in their personality, to denounce their traffickers<sup>243</sup> because in doing so, victims risk prosecution if law enforcement officials do not believe victims’ claims of exploitation. If law enforcement rescues were as efficient as they claim to be, this problem would be of minor concern. Current laws discourage victims from exposing the source of their exploitation and hinder what is arguably the best chance for law enforcement to help these victimized individuals.<sup>244</sup>

In addition, it is important to note the interplay between anti-prostitution statutes and the anti-trafficking framework, which creates an additional layer to the negative synergy against self-rescuing. Law enforcement is often times pressured to “prefer” non-self-rescued victims. In fact, in accessing social and immigration benefits, law enforcement certification is very important to victims.<sup>245</sup> For prosecutors, victims are of great importance in the criminal case mounted against traffickers<sup>246</sup> and a victim’s willingness to cooperate is a requirement to obtain that certification.<sup>247</sup> Consequently, law enforcement agencies are pushed to prefer a rescued victim, who officials think will be more reliable in subsequent prosecutions since officials will

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<sup>241</sup> See PHILLIPS ET AL., *supra* note 52, at 21.

<sup>242</sup> See Interview with Julie Dahlstrom, *supra* note 53. With particular reference to T visa proceeding, one of the most delicate parts of the task of assisting victims consists in realistically prospecting to the trafficked person the consequences he may face if put in contact with law enforcement. *Id.* In fact, on the one hand, law enforcement may grant certification but, given the persistent criminal status of illegal migration, the victim runs the risk of being prosecuted and deported by the same agency he contacted, if his case is not seen as “deserving.” *Id.*

<sup>243</sup> See Haynes, *supra* note 3, at 366. Haynes notes how certain characteristics of the crime make it less identifiable. These features include “linguistic and social isolation, fear or threat of exposure and shame, threat of reprisals against loved ones, and the special set of circumstances that ensure that immigrant victims in particular ‘remain in the shadows of our communities.’” *Id.* (quoting CIVIL RIGHTS DIV., U.S. DEPT. OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005 (2006)); see also Curva, *supra* note 39, at 574-76.

<sup>244</sup> See PHILLIPS ET AL., *supra* note 52, at 13.

<sup>245</sup> See Interview with Julie Dahlstrom, *supra* note 53.

<sup>246</sup> Tanya Mir, Note, *Trick or Treat: Why Minors Engaged in Prostitution Should Be Treated as Victims, Not Criminals*, 51 FAM. CT. REV. 163, 166 (2013).

<sup>247</sup> The willingness to cooperate is translated, in practice, as the prosecutor actually prosecuted the traffickers using the information provided by the victim. See Haynes, *supra* note 3, at 359.

have had time, throughout the rescuing process, to form an impression of a victim's value as a witness.<sup>248</sup>

This particular type of "structural entrapment" is not unique to trafficking victims. For example, co-conspirators who are offered leniency in exchange for cooperation can be similarly entrapped. Nonetheless, trafficking victims face other problems due to their particularly vulnerable position. In general, however, anti-prostitution statutes have per se a more general "trapping" effect on sex workers. The trapping device works in two steps. First, the system creates a vicious cycle of arrests for prostitution and return to prostitution to pay the fines.<sup>249</sup> Second, the stain of a criminal record forecloses any employment in the legal market for those convicted of prostitution.<sup>250</sup> The reality of this "structural entrapment" is affirmed by the fact that traffickers reassert their power over their victims by reminding them of the legal consequences of seeking help from the police.<sup>251</sup>

## VI. PROPOSED SOLUTIONS

So far, this Article shows the basic inconsistency that lies underneath the struggle against sex-market trafficking in the United States. In particular, those categorized as victims of this type of trafficking under federal and state law are threatened by the concurrent existence of anti-prostitution statutes, which criminalize exactly the conduct in which traffickers force these victims to engage. These individuals are treated as criminals by the same government that solemnly pledged to protect them. Consequently, in the final section of this Article analyzes the possible solutions to this problem.

### *A. Changing the Paradigm of Trafficking to Improve Law Enforcement Training*

One possible solution to the problem of trafficking victims treated as criminals under anti-prostitution statutes is to correct the perception surrounding trafficking that is applied by law enforcement in its day-to-day operation as a way of allowing its officers to recognize sex-market trafficking victims as victims.

Part II shows there is a widespread misconception surrounding both sex-market and non-sex-market trafficking. In a quick summary, trafficking can be a purely domestic activity and, in many cases, may not involve sex. Additionally, victims themselves sometimes participate in the first stages of their own exploitation. For example, a victim might voluntarily immigrate to the country in which he or she later becomes exploited, or might already be an American who is being exploited.

<sup>248</sup> See *supra* Part II and accompanying footnotes.

<sup>249</sup> See Dedy, *supra* note 74, at 536-38.

<sup>250</sup> See *id.* (noting how the current approach also destroys any incentive for non-trafficked sex workers to report any trafficking activity they may encounter in their activity). For the more general effect that a conviction has on future employment opportunities, see DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007).

<sup>251</sup> See *Counteracting the Bias: The Department of Labor's Unique Opportunity to Combat Human Trafficking*, *supra* note 12, at 1014-15. It is noted how, in the context of trafficking into industrial, agricultural, and domestic labor, the undocumented status of these workers makes them unlikely to complain, allowing in turn the traffickers to exploit this weakness to achieve a deeper level of exploitation. See *Curva*, *supra* note 39, at 574-76; see also *Mogulescu*, *supra* note 7, at 482-83.



Voluntary immigration and residential status create a false perception that a victim has contributed to his or her eventual exploitation. Also, a victim's exploitation may not involve physical restraints from a trafficker, but a more subtle mix of threats, intimidation, and degradation.<sup>252</sup> Moreover, while the stereotypical victim is a woman, or girl, many trafficked individuals, especially in non-sex markets, are men.<sup>253</sup> Finally, law enforcement officials generally expect the victim to be incapable of self-rescuing, while in most cases it is the trafficked individual that comes forward to denounce her exploiters.<sup>254</sup>

If enforcement of anti-trafficking statutes in the sex market, both at the federal and state level, is pursued according to these stereotypes, a large portion of victims are left unidentified, unprotected, and at risk of being re-victimized as criminals under anti-prostitution statutes. Our myth-busting list, indeed, constitutes the "correct" paradigm of trafficking which law enforcement should use when pursuing traffickers and helping victims.<sup>255</sup> Victims include sex workers who are also Americans, victims who somehow participated at the beginning of their process of exploitation, male victims, or victims trafficked into forced labor.

Once a more accurate paradigm of trafficking is described, the best way to implement it is through law enforcement training. The importance of specialized training in fighting trafficking cannot be overstated, for the simple fact that most of the time the first to encounter trafficking victims is a police officer.<sup>256</sup> Nonetheless, it is well documented that police officers are not routinely trained to handle the complexities of trafficking.<sup>257</sup> This deficiency in training exists even though official statements made at every governmental level purport that trafficking is at the top of enforcement priorities.<sup>258</sup> As of 2013, one author noted that: "[O]nly seven states require human-trafficking training for law-enforcement officers. Of these states, some impose broad, non-descriptive obligations requiring merely that law-enforcement agencies provide training. In contrast, other states impose a descriptive list of topics that must be covered during a mandatory human-trafficking training, such as Indiana's mandatory-training statute."<sup>259</sup>

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<sup>252</sup> See *supra* Part II and accompanying footnotes.

<sup>253</sup> See *supra* Part II and accompanying footnotes.

<sup>254</sup> See *supra* Part II and accompanying footnotes.

<sup>255</sup> See *supra* Part II and accompanying footnotes.

<sup>256</sup> Allison L. Cross, *Slipping Through the Cracks: The Dual Victimization of Human Trafficking Survivors*, 44 MCGEORGE L. REV. 395, 405 (2013).

<sup>257</sup> See Mogulescu, *supra* note 7, at 488 (reporting a telling story of a ten-year veteran of NYPD, with 250 prostitution arrests under his belt, who testified about never receiving any trafficking training from his employer); see also Cross, *supra* note 256, at 415.

<sup>258</sup> See 2014 TIP REPORT, *supra* note 6; see also Mogulescu, *supra* note 7, at 488.

<sup>259</sup> See CAL. PENAL CODE § 13519.14 (2012); IND. CODE ANN. § 5-2-1-9(a)(10) (2008); IOWA CODE ANN. § 80B.11(c)(2)(e) (2009); MO. ANN. STAT. § 566.223 (2011); N.M. STAT. ANN. § 30-52-3 (2012); TEX. OCC. CODE ANN. § 1701.258 (2012); VA. CODE ANN. § 9.1-102(55) (2012); see also Cross, *supra* note 256, at 405.

In the same timeframe, twenty-nine states mandated or encouraged law-enforcement training in trafficking.<sup>260</sup> Accordingly, only seven states mandate law-enforcement trafficking training and twenty-two states merely encourage such training. More worrisome, however, is that even when training is in place it is often misdirected to match the stereotypes of trafficking victims rather than actual trafficking victims.<sup>261</sup>

In conclusion, one proposal is to redirect, potentiate or, where completely lacking, implement law enforcement training, especially in areas with trafficking-intensive criminal activity, with a mandatory unit on trafficking. If training is already in place, steps should be taken to ensure that training is not based on the false image of trafficking stereotypes, but on a more realistic and up-to-date understanding of the realities of trafficking.

Admittedly, this suggestion is at once obvious, fundamental, and difficult to implement. It is obvious because the best way to foster correct victim identification, thereby avoiding double victimization at its root, is to supplement the officers most likely to encounter victims with the training to recognize victims. It is fundamental because without implemented training, even an experienced agent may not be able to identify trafficking victims simply because the search may be skewed by outdated trafficking stereotypes. Finally, it is difficult to implement because resources are scarce and because it is exceedingly challenging to change deep-seated law enforcement patterns. Nonetheless, proper training is necessary to win the fight against human trafficking.

#### *B. Trafficking Victim Status as an Affirmative Defense*

Another solution to the problem is establishing an affirmative defense to sex crimes based on the status of trafficking victims. This defense would spare the victim the stigmatizing effect of a criminal conviction and instead leave the victim with an unstained criminal record.<sup>262</sup>

This solution, however, is only a partial one because the victim would still suffer the hardships that follow an arrest. A victim would not be spared from all the possible negative consequences which follow from the time of arrest for prostitution to the time a jury is satisfied that the victim established the defense of victimization.<sup>263</sup> Additionally, the very fact that this defense must be proven in court means a trial has to take place, which is an unlikely occurrence, given that a huge share of criminal cases are disposed of without a trial through guilty pleas.<sup>264</sup>

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<sup>260</sup> This figure is now at thirty-one states. For the most current data, see *2014 State Ratings on Human Trafficking Laws*, POLARIS PROJECT, <https://polarisproject.org/sites/default/files/2014-State-Ratings.pdf> (last visited Apr. 24, 2016). For the 2013 data, see *2013 State Ratings on Human Trafficking Laws*, POLARIS PROJECT, <https://polarisproject.org/sites/default/files/2013-State-Ratings.pdf> (last visited May 6, 2015).

<sup>261</sup> See *supra* Part II.B.

<sup>262</sup> Cross, *supra* note 256, at 406.

<sup>263</sup> *Id.*

<sup>264</sup> LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011) (“While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.”).

Moreover, there is the distinct risk that the defense would arise too early in the process. In fact, at that stage, the victim has just abandoned her exploitative situation and may still show deep emotional scars from her time in trafficking. As a result, she may suffer from the range of problems already discussed throughout this Article, such as the inability to tell her story for fear of retaliation, or simply because of excessive trauma. It follows that this hypothetical victim, in the unlikely event that the case is brought to trial, will face some difficulties in convincing the jury that she is a trafficking victim. Even so, the affirmative defense's possible shortcomings should not prevent its adoption, but encourage the search for more definitive solutions.

Currently, similar provisions have already been implemented in a number of states including: Alabama, Arkansas, Georgia, Iowa, Kansas, Louisiana, Massachusetts (with the caveat made above in Part IV), Missouri, New Hampshire, New Jersey, Oregon, Rhode Island, South Carolina, South Dakota, Texas, and Washington.<sup>265</sup> These provisions have some common elements, such as being generally limited to prosecutions for prostitution and connected offenses.

Iowa and New Jersey are exceptional states. First, according to Iowa's statute, any crime committed in direct relation "to the defendant's status as a trafficking victim" seems to be covered by the affirmative defense.<sup>266</sup> At the same time, though, the offense must be committed "under compulsion by another's threat of serious injury, provided that the defendant reasonably believed that such injury was imminent."<sup>267</sup> Secondly, pursuant to New Jersey's statute,<sup>268</sup> the affirmative defense works as a shield against prosecutions *for* human trafficking. The statute states it is an affirmative defense "to prosecution for [human trafficking] that . . . the defendant was a victim of human trafficking."<sup>269</sup> The type of situations the drafters had in mind is probably the one in which a trafficking victim becomes a "trafficker," by helping his or her captor recruit or harbor other victims. This situation is far from being only

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<sup>265</sup> See ALA. CODE § 13A-6-159 (2016); ARK. CODE §§ 5-70-102(c), 103(c) (2013); GA. CODE § 16-3-6(c) (2015); IOWA CODE § 710A.3 (2006); KAN. STAT. § 21-6419(c) (2013); LA. STAT. § 14:82(g) (2014); MASS. GEN. LAWS ch. 265, § 57 (2012); MO. ANN. STAT. § 566.223 (2011); N.H. REV. STAT. § 645:2 (2014); OR. REV. STAT. § 163.269 (2007); 11 R.I. GEN. LAWS § 11-34.1-2(c) (2014); S.C. CODE § 16-3-2020(J) (2015); S.D. CODIFIED LAWS § 22-23-1.2 (2015); TEX. PENAL CODE ANN. § 43.02(d) (2015); WASH. REV. CODE § 9A.88.040 (2012). For the text of the relevant statutes, see Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL'Y 255, 276 (2014).

<sup>266</sup> IOWA CODE § 710A.3 ("It shall be an affirmative defense, in addition to any other affirmative defenses for which the victim might be eligible, to a prosecution for a criminal violation directly related to the defendant's status as a victim of a crime that is a violation of section 710A.2, that the defendant committed the violation under compulsion by another's threat of serious injury, provided that the defendant reasonably believed that such injury was imminent.").

<sup>267</sup> *Id.*

<sup>268</sup> N.J. STAT. § 2C:13-8(c) (2012) ("It is an affirmative defense to prosecution for a violation of this section that, during the time of the alleged commission of the offense of human trafficking created by this section, the defendant was a victim of human trafficking.").

<sup>269</sup> See Dysart, *supra* note 265, at 276.

a hypothetical, this can indeed be the case of the trafficked sex worker who supervises and directs other sex workers at the instruction of the original captor.<sup>270</sup>

Another relevant distinction among provisions establishing an affirmative defense for trafficking victims is between states that only require the victim to be a victim, and states that require some additional element. In this second category is, Georgia, Iowa, Massachusetts, Missouri, Oregon, Rhode Island, and South Carolina. Additional requirements such as “duress,” “unlawful physical force,” or “threats of abuse of law or legal process” restrict the potential application of the provision and render the defense closer to normally applicable affirmative defenses.<sup>271</sup>

The scope of any potential affirmative defense for trafficking victims should be as broad as possible, to the point of including every offense committed as a result of having been trafficked, with particular reference to prostitution and drug offenses. In any case, the causal link between the status and the offense committed will always be an element of the defense.

In conclusion, an affirmative defense would have the obvious advantage of intervening early in the double victimization process, compared to, for example, a vacating conviction statute.<sup>272</sup> This Article is conscious of its many disadvantages, such as the fact that a recently traumatized victim may not be able to express her sufferings in open court, or that the affirmative defense is unlikely to be asserted given that the case is unlikely to be brought to trial at all.

Nonetheless, the defense also presents some distinct advantages, such as the timing of its impact, which precedes a potential trial, the finalization of the conviction, the possible incarceration or fine, as well as the subsequent filing a vacating conviction motion.<sup>273</sup> Generally, the possibility of raising a successful affirmative defense based on the status of trafficking victim could save the victim precious time which he or she would otherwise spend healing the scars of a criminal conviction before rebuilding his or her life after trafficking.

### *C. Introducing a Vacating Conviction Statute or an Expungement Law*

For any person, a criminal conviction represents a huge obstacle to a better future. For example, the search for housing and employment are heavily encumbered or rendered almost impossible by the presence of a previous criminal conviction on one’s record.<sup>274</sup> With particular regard to employment, which is of fundamental importance in rebuilding life after a conviction or, as in our case, after trafficking, a recent study shows how a previous conviction impacts the chances of being hired. According to the study, the chances two otherwise identical applicants of receiving a

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<sup>270</sup> See Interview with Ellen Lemire, *supra* note 20 (noting how in this case the sex worker could be charged with human trafficking).

<sup>271</sup> See Dysart, *supra* note 265, at 276-77 n.156.

<sup>272</sup> See *infra* Part IV.C.

<sup>273</sup> See Aaron Ball, Note, *The Battle Against Human Trafficking: Florida’s New Expungement Law is a Step in the Right Direction*, 38 NOVA L. REV. 121, 140-41 (2013).

<sup>274</sup> See Nicholas R. Larche, *Victimized by the State: How Legislative Inaction Has Led to the Revictimization and Stigmatization of Victims of Sex Trafficking*, 38 SETON HALL LEGIS. J. 281, 297 (2014); Mogulescu, *supra* note 7, at 479; see also PAGER, *supra* note 250.

callback after an interview for jobs dramatically changed if a conviction (in this case, a one-year sentence for a drug-related conviction) was present on record.<sup>275</sup>

Some states recognize the necessity of introducing a vacating conviction statute, which provides for the nullification of a previous conviction, or an expungement law.<sup>276</sup> Although the conviction remains as a historical fact, expungement erases one or more criminal convictions from the defendant's record. Those laws are usually applicable for certain type of offenses only, provided that they were committed as a result of being trafficked. To date, eighteen states have passed similar statutes,<sup>277</sup> while the first jurisdiction to implement this innovative, although delayed, solution to the problem was New York in 2010.<sup>278</sup>

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<sup>275</sup> See PAGER, *supra* note 250. Pager, using one set of African-American and one set of white applicants, also found that a criminal conviction impacted the first set much more than the second, probably due to the fact that the conviction confirmed, in the eye of some employers, a heinous stereotype associating African-Americans with criminality. *Id.* at 101-02.

<sup>276</sup> See, e.g., Ball, *supra* note 273.

<sup>277</sup> See 2014 State Ratings on Human Trafficking Laws, *supra* note 260. The organization also published a "model" vacating conviction statute. POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: VACATING CONVICTIONS, <https://polarisproject.org/sites/default/files/2015%20Vacating%20Convictions%20Issue%20Brief.pdf> ("Section 17. Motion to Vacate Conviction (a) An individual convicted of [prostitution] or [insert other non-violent offenses] committed as a direct result of being a victim of human trafficking may apply to [insert name of appropriate court] to vacate the applicant's record of conviction for the offense. A court may grant such motion on a finding that the defendant's participation in the offense was a direct result of being a victim of human trafficking. (b) No official determination or documentation is required to grant a motion under this section, but official documentation from a federal, state, local, or tribal government agency indicating that the defendant was a victim at the time of the offense creates a presumption that the defendant's participation in the offenses was a direct result of being a victim. (c) A motion filed under subsection (a), any hearing conducted on the motion, and any relief granted, are governed by [insert the appropriate state code section governing post-conviction relief procedures].").

<sup>278</sup> See N.Y. CRIM. PROC. LAW §440.10(1)(i) (McKinney 2012) (amended 2016) ("(i) The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or 230.00 (prostitution) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law or trafficking in persons under the Trafficking Victims Protection Act (United States Code, title 22, chapter 78); provided that (i) a motion under this paragraph shall be made with due diligence, after the defendant has ceased to be a victim of such trafficking or has sought services for victims of such trafficking, subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of such trafficking that may be jeopardize by the bringing of such motion, or for other reasons consistent with the purpose of this paragraph; and (ii) official documentation of the defendant's status as a victim of sex trafficking or trafficking in persons at the time of the offense from a federal, state or local government agency shall create presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking or trafficking in persons, but shall not be required for granting a motion under this paragraph.").

As an example, the New York version of the defense allows the defendant to have his or her convictions vacated if the victim can demonstrate that the offense was committed as a result of being trafficked and the *arresting charge* was either for loitering for the purpose of engaging in prostitution or prostitution itself.<sup>279</sup> First of all, on the point of certification, it should be noted that certification is issued by either a federal or state agency and it creates a presumption that the offense was committed as a result of that status.<sup>280</sup> At the same time, however, the New York statute makes clear that official documentation is not required for granting the motion.<sup>281</sup> Nonetheless, in the case of the Florida Expungement Law, modeled after the New York statute, the presence of “official documentation” issued by a federal, state, or local agency lowers the standard of proof from clear and convincing evidence to preponderance of the evidence.<sup>282</sup>

The most challenging criticism to the New York statute is in 2011, 1,793 convictions for prostitution were attributable to trafficking,<sup>283</sup> but up to March 2014, only thirty-eight individuals benefited from the statute.<sup>284</sup> The substantial underuse of the remedy could be attributed to its relative novelty, as well as the difficulty of obtaining legal aid for trafficking victims. If the view is broadened beyond New York, a complete systematic analysis of vacating conviction statutes and expungement laws has put them into three categories with respect to the offenses covered and in three categories with respect to time limitations to file the motion.<sup>285</sup> According to this analysis, seven states covered only prostitution offenses, six states also covered “prostitution-related offenses,”<sup>286</sup> and two states included every conviction resulting from being a trafficking victim.<sup>287</sup> When it comes to the time limit to file the motion, five states provide a time limit, “due diligence,” reasonable time, or “six years” after the ceasing of the trafficking conduct,<sup>288</sup> three states do not address the problem,<sup>289</sup> and six states make the filing possible with no limitation.<sup>290</sup>

<sup>279</sup> See Alyssa M. Barnard, Note, “*The Second Chance They Deserve:*” *Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1474-75 (2014) (emphasis added).

<sup>280</sup> See N.Y. CRIM. PROC. LAW §440.10(1)(i).

<sup>281</sup> See *id.* at 1474-78.

<sup>282</sup> FLA. STAT. § 943.0583 (3)-(5) (2012); see also Ball, *supra* note 273, at 136-37.

<sup>283</sup> See Barnard, *supra* note 279, at 1481-83 (stating the complete statistical process leading to the estimated figure).

<sup>284</sup> *Id.*

<sup>285</sup> See Larche, *supra* note 274, at 299-303. Since the time the article was published, Delaware, New Hampshire, and Pennsylvania also passed similar provisions.

<sup>286</sup> *Id.* at 300 (these states include: Hawaii, Nevada, New Jersey, New York, North Carolina, and Vermont).

<sup>287</sup> *Id.* at 299-300.

<sup>288</sup> *Id.* at 301-02. “Nevada, setting perhaps a more strict limitation, requires a movant to make his or her motion ‘with due diligence after the [movant] has ceased being a victim of trafficking’ or ‘has sought services for victims of such trafficking.’” *Id.* (quoting NEV. REV. STAT. § 176.515(5)(c) (2013)). “Montana and Maryland require one seeking vacatur to make such a motion within a reasonable period of time after his or her conviction or after he or she ceases to be involved in sex trafficking.” *Id.* Hawaii . . . require[s] the motion for vacatur to be

In conclusion, aside from its underutilization, which may be partially due to the novelty of the instrument, a vacating conviction statute should be implemented in every jurisdiction along with a victim-of-trafficking affirmative defense, discussed in the preceding paragraph. Both types of provisions should extend to every offence committed while in trafficking, provided that a causal link between trafficking and the offence committed exists. Also, there should be no time limit on the filing of the motion.

A provision, like the one proposed, provides a last-resort legal safety net to trafficking victims trapped in the double victimization cycle. Nonetheless, it should be clear that this remedy only helps victims after the harm that follows re-victimization has already been inflicted. Indeed, it is undeniable that being trafficked, coerced into prostitution, arrested, and convicted are terrible experiences and such a statute would only serve the limited purpose of erasing the legal consequences of the last and least meaningful part of the process. However, even this limited benefit should not be adopted, since a conviction on record is likely to foreclose a substantial share of life-rebuilding opportunities.

Laudably, a major breakthrough in favor of this solution happened with the signing into law, on May 29, 2015, of the Justice for Victims of Trafficking Act of 2015.<sup>291</sup> Title X of the Act introduces a substantial encouragement to States to pass laws similar to the ones this Article analyzes here. According to the summary prepared by Congress, Title X: Amends the Omnibus Crime Control and Safe Streets Act of 1968 to provide for preferential consideration of grant applications under the public safety and community-oriented policing grant program to applicants from states that have in effect a law that: (1) “[P]rovides a process by which a human trafficking survivor can move to vacate any arrest or conviction records for a non-violent offense committed as a direct result of human trafficking, including prostitution or lewdness;<sup>292</sup> (2) “establishes a rebuttable presumption that any arrest or conviction of an individual for a human trafficking offense is a result of being trafficked if such individual . . .” has been granted nonimmigrant status as a victim of a severe form of trafficking in persons, is certified by HHS as a victim of a severe form of trafficking in persons under the Trafficking Victims Protection Act of 2000, or has other similar documentation of trafficking;<sup>293</sup> (3) protects the identity of individuals who are human trafficking survivors in public and court records;<sup>294</sup> and

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submitted ‘within six years after the date that the person ceases to be a victim.’” *Id.* at 302 (quoting HAW. REV. STAT. § 712-1209.6(2)(c) (2012)). Larche originally listed only four States in the “time limit” category, even though New York (put in the “no limit” category) provides for a “due diligence” requirement. *Id.* I thereby move it to this first category.

<sup>289</sup> *Id.* (these states are: Florida, Washington, and Vermont).

<sup>290</sup> *Id.* at 302 (there states include: Connecticut, Illinois, Mississippi, New Jersey, North Carolina, and Wyoming. Noting also that New York has been to the first category).

<sup>291</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, tit. 10 sec. 1002, 129 Stat. 227 § 1002 (2015).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

(4) does not require an individual who is a human trafficking survivor to provide official documentation in order to receive protection under the law.<sup>295</sup>

Of course, the effects of this very recent amendment cannot be evaluated at the present stage. However, it definitely promises to be a substantial step towards a nation-wide adoption of these much-needed provisions.

#### *D. Decriminalizing the Conduct of the Sex Worker and Beyond*

The treatment of victims of sex-market trafficking as criminals obviously would not exist if selling sex was not completely criminalized as it currently is. To be sure, the trafficking paradigm should still be free from stereotypes and law enforcement should still receive better trafficking training, since this would lead to more immigration relief and social services for trafficking victims. However, we already discussed the strikingly positive effects of these changes. Instead, this section aims to discuss the decriminalization of prostitution in a very limited and non-contentious sense. To this goal, this Article makes a very limited claim and argues for the decriminalization of the conduct of the sex worker only.

In general, a wholesale decriminalization or legalization of prostitution is an extremely contentious topic, especially from the angle of feminist legal theory.<sup>296</sup> However, the contention arises only with respect to certain parts of a full-scale decriminalization claim, intended as the repeal of current criminal statutes with respect to not only sex workers, but also clients and pimps. In particular, there is an almost irreconcilable disagreement on the treatment to be reserved to clients. One camp argues for the decriminalization of their conduct, on the ground that they are just the other side in an agreement, which the two parties freely entered as autonomous individuals. The other camp argues for the criminal punishment of the client, on the ground that prostitution is per se exploitative of women and cannot be freely entered. The clients are consequently exploiters and should be punished accordingly.

However, neither side of the debate seriously believes that the conduct of the sex worker should be criminalized. In fact, at worst, the sex worker suffers from a “false consciousness” problem, which causes her to believe she is engaging in commercial sex voluntarily. At best, she is making a conscious or, better, intentional choice of use of her body as a means of empowerment. As a consequence, the wounds of blameless individuals should be soothed immediately with the balm of decriminalization.

The strong suit of this position is that it takes no position on the most contentious issue of the treatment to be reserved to the clients and pimps, since for this Article's purposes a position does not need to be taken. As a consequence, this Article strongly suggests decriminalizing the conduct of the sex worker. Moreover, even in this limited non-contentious sense, it is undeniable that decriminalizing the conduct of the sex worker would be a neat solution to the problem of double victimization.<sup>297</sup> In fact, it is evident that if the prostitute, or trafficking victim's, conduct were decriminalized; the specific problem of double victimization would simply not arise.

<sup>295</sup> *Id.*

<sup>296</sup> See generally MAGGIE O'NEILL, *PROSTITUTION AND FEMINISM: TOWARDS A POLITICS OF FEELING* (2001).

<sup>297</sup> See Deady, *supra* note 74, at 555; see also Dess, *supra* note 177, at 177-78 (arguing for the decriminalization of the conduct of minors engaged in prostitution).



Besides, the decriminalization of the conduct of the trafficking victim would provide a much larger incentive to self-rescuing.<sup>298</sup> As noted, relying on law-enforcement rescuing is not wise, since resources are scarce, stereotypes render victim identification difficult, and trafficking remains a “hidden crime.”<sup>299</sup> In the current framework, trafficking victims rarely come forward at all, because they are kept under dire conditions and risk being criminalized for prostitution if they contact law enforcement.<sup>300</sup> This “structural trapping” makes an even more compelling case for giving any possible incentive to trafficking victims to come forward and denounce their traffickers.<sup>301</sup> Also, law enforcement resources could be redirected towards investigating and punishing the conduct of traffickers, instead of engaging in the difficult exercise of sorting victims from criminals.<sup>302</sup> Finally, decriminalization gives an incentive to other sex workers to report trafficking situations they may encounter in their own activities.<sup>303</sup>

However, this is by no means a definitive solution to the larger problem of abuse in the sex sector, nor to the paucity of relief given to trafficking victims. To the first point, the sex market would remain completely illegal, with only partial exception just described. The sector is indisputably dominated by criminal rings, which usually deal in trafficking, guns, and drugs.<sup>304</sup> Plus, the very illegality of the activity renders it a haven of violence largely beyond the reach of the law. Finally, all these factors inevitably attract the attention of law enforcement, which is not necessarily beneficial, for the complex reasons this Article analyzes above, for trafficked individuals. To the second point, Part IV shows why an improved understanding of trafficking is necessary to supplement law enforcement training. Many trafficking victims are currently ignored by law enforcement and thereby denied relief. The problem however, as momentous as it can be, is beyond the scope of the present work. Ultimately, to end the double victimization of sex-sector trafficking victims perpetrated through anti-prostitution statutes and enhance the likelihood that victims will autonomously reach out to law enforcement and rescue themselves; the conduct of the victimized sex worker should be decriminalized.

#### CONCLUSION

The solemn pledge to protect trafficking victims embodied in treaties and statutes is going unfulfilled, since those trafficked in the sex market are routinely treated as criminals. The trouble arises when one realizes that double victimization happens

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<sup>298</sup> See Curva, *supra* note 39, at 584.

<sup>299</sup> See PHILLIPS ET AL., *supra* note 52, at 16.

<sup>300</sup> See Deady, *supra* note 74, at 538.

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

<sup>302</sup> See Curva, *supra* note 39, at 574.

<sup>303</sup> See Deady, *supra* note 74, at 536-38, 554-55 (noting “[t]he example off . . . New Zealand has dispelled warnings that decriminalization will lead to an increase in both the prostitution industry and sex trafficking victims.”).

<sup>304</sup> See Interview with Ellen Lemire, *supra* note 20 (reporting that in the Boston area, guns and drugs almost always follow prostitution, and the connection with drugs is particularly clear, since they are used to make trafficked victims addicted and, thus, easily kept under control).

precisely because the activities, such as prostitution, in which victims are forced to engage, are also classified as criminal conduct under international, federal, and state laws. Double victimization at the hand of the criminal justice system through anti-prostitution statutes not only plagues already traumatized individuals but it also forecloses any meaningful opportunity to successfully emerge from trafficking victimization. The cause of this mismatch is attributable to the fact that many trafficking victims, legitimately included in the legal definition, are not perceived as deserving due to many stereotypes that create a false mirror image of trafficking. Law enforcement officials act on the basis of this false image and, as a result, do not “recognize” victims and instead blindly enforce anti-prostitution statutes.

As serious as the problem is, there are possible solutions. First, trafficking should be re-pictured as it really is and law enforcement should be trained according to a more accurate understanding of sex-worker victims. Second, the status of trafficking victims should be rendered an affirmative defense in case the victim is accused of a crime including, but not limited to, prostitution offenses. Third, once a conviction is finalized, the victim should be given the possibility to vacate or expunge the conviction from his or her record. Fourth, prostitution should simply be decriminalized with respect to the sex worker. The first three solutions would leave the “hot potato” of prostitution untouched, but would provide an incremental and partial relief to the problem of double victimization. The fourth solution, in turn, is a better and more definitive solution, but it is also more contentious and requires more political capital. In any case, the problem is real and pressing and deserves attention.

