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Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors

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Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors

Allison L. Cross*

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I. INTRODUCTION

Silvia Gonzalez, a Brazilian native fearing deportation from the United States, handed over her passport and immigration documents to Marisol, a

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woman who promised to help obtain a green card for Silvia.¹ However, while holding Silvia's immigration documents, Marisol demanded money and suggested that Silvia "'sleep with men in the street' in order to get her immigration documents back."² Feeling she had no other choice, Silvia worked as a prostitute for two-and-a-half years, living with her captors and giving them all the money she made.³ During that period, Silvia acquired a staggering eighty-six convictions for prostitution or loitering for the purpose of engaging in prostitution.⁴ "[S]ometimes [Sylvia] would just go up to police officers and ask them to take her in. . . . [B]eing in jail was preferable to working on the street."⁵ Though Silvia encountered law-enforcement officers⁶ on a regular basis (at least eighty-six times in a two-and-a-half year period), those officers never recognized her as a victim of human trafficking.⁷ Not only did law enforcement fail to recognize her as a victim of crime, but they further victimized her by arresting her, labeling her a criminal, and saddling her with a criminal record.⁸

It is not uncommon for law-enforcement officers to arrest and prosecute human-trafficking victims for engaging in criminal activity when that activity is a direct result of their trafficking situation.⁹ G.M., for another example, was abused and trafficked over an eleven-year period, resulting in six criminal convictions—all directly resulting from her trafficking situation.¹⁰ G.M. and her abuser were dating, and only after they married did the abuse begin—he beat and raped her,

1. New York v. Gonzalez, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. For the purpose of this Comment, "law-enforcement officer" refers to any officer or employee of a police or sheriff's department or any peace officer.

7. *Gonzalez*, 927 N.Y.S.2d at 568. Law enforcement never recognized Silvia's trafficking situation. *Id.* It was not until Silvia filed a court motion under Section 440.10(1)(i) of New York Criminal Procedure Law that the criminal-justice system recognized her situation as trafficking and vacated her convictions for prostitution and loitering for the purpose of engaging in prostitution. *Id.* at 569–70; *see also* N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005 & Supp. 2012) (allowing a sex-trafficking victim to seek vacation of prior prostitution convictions, provided the crimes were committed as a result of then-present sex trafficking); *infra* Part III.D (providing an overview and analysis of the New York law).

8. *See Gonzalez*, 927 N.Y.S.2d at 568 (Silvia had been convicted eighty-six times.).

9. *See, e.g., id.* (vacating the convictions of a trafficking victim arrested for prostitution and loitering for the purpose of prostitution); *see also* New York v. Doe, 935 N.Y.S.2d 481, 482–83 (N.Y. App. Div. 2011) (vacating the convictions of a trafficked teen arrested multiple times for loitering for the purpose of prostitution); New York v. G.M., 922 N.Y.S.2d 761, 762–63 (Crim. Ct. 2011) (vacating the convictions of a trafficking victim arrested for prostitution and loitering for the purpose of prostitution); Susan Kelleher, *Teen Missing After Testimony Against Pimp*, SEATTLE TIMES (Dec. 20, 2010), http://seattletimes.nwsources.com/html/localnews/2013719994_missing20m.html (on file with the *McGeorge Law Review*) (describing a teen arrested multiple times for prostitution and loitering for the purpose of prostitution); Barbara Goldberg, *New Yorker Expunges Prostitution Record Under Trafficking Law*, REUTERS (Sept. 21, 2011), <http://www.reuters.com/article/011/09/21/ussextrafficking-idUSTRE78K7Q320110921> (on file with the *McGeorge Law Review*) (trafficked teen arrested multiple times for prostitution and loitering for the purpose of prostitution).

10. *G.M.*, 922 N.Y.S.2d at 762–63.

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imprisoned her, watched her every move, and eventually forced her into prostitution.¹¹ G.M. complied with her husband's demands because, in addition to his history of abuse, he threatened to harm or kill her children, who remained in her native Dominican Republic.¹² She escaped to the Dominican Republic on two separate occasions, but returned to the United States each time with her abuser.¹³ After successfully escaping for good, G.M. still had a criminal record as a result of her sex-trafficking situation, and her employer of five years terminated her when they discovered her convictions.¹⁴

Minors arrested for prostitution are likewise further victimized by the criminal-justice system. For example, the Seattle Police Department first arrested Kelsey Emily Collins for prostitution when she was a sophomore in high school.¹⁵ Kelsey amassed multiple arrests and criminal charges before a police officer recognized the signs of sex trafficking.¹⁶ Similarly, Ms. Johnson was only thirteen years old when she began prostituting for her trafficker-boyfriend.¹⁷ Over a six-year period, Ms. Johnson was convicted of prostitution three times, and the arresting officers never recognized her as a trafficking victim.¹⁸

These cases indicate, first, that human-trafficking victims encounter law-enforcement officers during the officers' day-to-day duties.¹⁹ This contact creates an opportunity for law-enforcement officers to recognize the individual as a victim, interrupt the trafficking cycle, obtain social services for the victim, and prosecute the real criminal: the trafficker. Second, these cases indicate that law-enforcement officers not only fail to recognize human-trafficking victims as victims rather than criminals, but also subject victims to criminal treatment, complete with arrests, convictions, and a criminal record—what this Comment refers to as “dual victimization.”²⁰ “[T]rafficking victims should not be punished

11. *Id.*

12. *Id.*

13. *Id.* G.M. returned to the United States each time due to her abuser's coercive tactics: the first time after promising he would change, and the second time when he threatened “to harm a close family friend.” *Id.*

14. *Id.* at 763. While G.M. successfully challenged her termination, her criminal record would nonetheless pose a hurdle for future employment. *Id.* The New York Criminal Court took this burden into consideration in vacating G.M.'s record pursuant to Section 440.10(1)(i) of New York Criminal Procedure Law. *Id.*; see also *infra* Part III.D (discussing the New York law).

15. Kelleher, *supra* note 9.

16. *Id.* Oregon, which treats any minor engaging in the sex trade as a victim of crime, recognizes Kelsey's status as that of a victim, rather than a criminal guilty of prostitution. OR. REV. STAT. § 12.117(d) (2011) (classifying prostitution of a minor as child abuse).

17. Goldberg, *supra* note 9.

18. See *id.* (explaining that it was a customer who helped Ms. Johnson escape).

19. Robert Moosy, *Sex Trafficking: Identifying Cases and Victims*, 262 NAT'L INST. OF JUST. J. 2, 3 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/225759.pdf> (on file with the *McGeorge Law Review*). “Most cases prosecuted by DOJ to date have been identified by line-level police officers who encounter sex traffickers or their victims during the normal course of operations: during routine traffic stops, on domestic violence calls, while inspecting liquor licenses, and when intercepting truant children.” *Id.*

20. For the purpose of this Comment, “dual victimization” refers to when the criminal-justice system fails to recognize human-trafficking victims as victims and treats them as criminals instead. This criminal

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for crimes that are a direct result of being trafficked They should be treated as victims.”²¹ While recognizing human trafficking is difficult,²² if law-enforcement officers proactively look for it, they are more likely to recognize victims of human trafficking. In turn, law-enforcement officers will be more likely to prevent dual victimization by treating those identified victims as *victims* rather than as *criminals*.

Law-enforcement officers’ failure to recognize human trafficking does not indicate a failure to maintain high-level job performance, and this Comment does not assert any wrongdoing by these individuals. Rather, as victims are unlikely to seek help or be forthcoming to law enforcement about their situations,²³ it is imperative that law-enforcement officers proactively look for signs of human trafficking. Law-enforcement officers must also know what social services a victim will need to permanently escape his or her trafficking situation.

Misunderstanding abounds regarding human trafficking in the United States.²⁴ In jurisdictions devoid of human-trafficking training for law-enforcement officers, it is even more likely that an officer will fail to recognize the signs and treat the victim as a criminal rather than as a victim of crime.²⁵ In other words, absent trafficking training, it is more likely that a victim, who could have had meaningful contact with the law leading to freedom and prosecution of the real criminal (the trafficker), will be further victimized by the criminal-justice system. At this point, the opportunity to interrupt the trafficking cycle is lost, what this Comment refers to as “slipping through the cracks” of the criminal-justice system.²⁶

This Comment asserts the number of trafficking victims charged and prosecuted for crimes indicates a systemic failure within the criminal-justice system to recognize human trafficking and its players, and that the states should implement statutory changes, including mandatory training for law-enforcement officers.

Part II of this Comment provides a brief overview of human trafficking in the United States. In particular, Part II dispels popular misconceptions regarding

treatment—often including arrests, charges, prosecutions, and criminal records—further victimizes a human-trafficking victim: a dual victimization.

21. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 36 (2007)*, available at <http://www.state.gov/documents/organization/82902.pdf> (on file with the *McGeorge Law Review*).

22. See *infra* Part II.B (discussing the difficulties in recognizing trafficking victims).

23. See *id.*

24. See *infra* Part II.A (dispelling popular myths about trafficking).

25. Karen J. Bachar, *Combating Human Trafficking at the State and Local Levels*, 262 NAT’L INST. OF JUST. J. 8 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/225759.pdf> (citation omitted) (on file with the *McGeorge Law Review*).

26. For the purpose of this Comment, “slipping through the cracks” refers to when a human-trafficking victim comes into contact with a law-enforcement officer, and although there is an opportunity to recognize the trafficking and provide victim assistance, the officer fails to do so and the opportunity to interrupt the trafficking cycle is lost.

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human trafficking, including that which is most dangerous to trafficking victims: that modern-day slavery (human trafficking) does not exist, or, if it does, that it is an issue unique to underdeveloped nations and not present in the United States.²⁷ Part II also examines why trafficking is so difficult to recognize and why victims are unlikely to seek help from law enforcement.²⁸ Part III surveys how jurisdictions respond when a trafficking victim is charged with a crime committed due to a trafficking situation. Most jurisdictions do not provide formal relief for a criminally prosecuted human-trafficking victim.²⁹ Some states allow victims to claim human trafficking as an affirmative defense to criminal charges,³⁰ while New York allows victims to seek vacation of prior convictions on a showing of trafficking.³¹

Finally, Part IV recommends a three-part statutory response to dual victimization: (1) mandating human-trafficking training for all law-enforcement officers; (2) including human trafficking as an affirmative defense to crimes committed due to the trafficking situation; and (3) allowing vacation of prior convictions on a showing of human trafficking. While this Comment argues that all jurisdictions should enact these three recommendations, this Comment focuses primarily on *preventing* dual victimization before it occurs, and only secondarily on providing relief to trafficking victims who slip through the cracks. Therefore, Part IV focuses on requiring human-trafficking training for law-enforcement officers, using mandatory domestic-violence training as a model.³²

27. See *Myths and Misconceptions*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview/myths-and-misconceptions> (last visited July 7, 2012) (on file with the *McGeorge Law Review*) (providing an overview of commonly held human-trafficking myths).

28. Moosy, *supra* note 19, at 3–6.

29. As this Comment goes to press, nine states had provided some form of recourse for a criminally prosecuted trafficking victim. See ALA. CODE § 13A-6-159 (LexisNexis 2012) (providing an affirmative defense); IOWA CODE ANN. § 710A.3 (West Supp. 2011) (providing an affirmative defense); MINN. STAT. ANN. § 609.325(4) (West 2009) (providing an affirmative defense); N.H. REV. STAT. ANN. § 645:2(IV) (LexisNexis 2012) (providing an affirmative defense); N.J. STAT. ANN. § 2C:34-1(e) (West 2005) (providing an affirmative defense); N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005 & Supp. 2012) (allowing a victim to seek vacation of judgment); OKLA. STAT. ANN. tit. 21, § 748(D) (West Supp. 2012) (providing an affirmative defense); TEX. PENAL CODE ANN. § 43.02(d) (West 2011) (providing an affirmative defense to an actor who was “the victim of conduct that constitutes an offense under” section 20A.02 of the Texas Penal Code, which lists the elements of trafficking of persons); WIS. STAT. ANN. § 939.46(1m) (West Supp. 2011) (providing an affirmative defense “for any offense committed as a direct result of the violation of [section 940.302(2) of the Wisconsin Criminal Code],” which describes human trafficking).

30. ALA. CODE § 13A-6-159; IOWA CODE ANN. § 710A.3; MINN. STAT. ANN. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); N.J. STAT. ANN. § 2C:34-1(e); OKLA. STAT. ANN. tit. 21, § 748(D); TEX. PENAL CODE ANN. § 43.02(d); WIS. STAT. ANN. § 939.46(1m).

31. N.Y. CRIM. PROC. LAW § 440.10(1)(i).

32. See, e.g., CAL. PENAL CODE § 13519 (West 2012) (requiring police officers receive training in the “nature and extent of domestic violence,” how to recognize domestic violence, and issues commonly related to a domestic-violence situation).

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II. HUMAN TRAFFICKING IN THE UNITED STATES

As a “hot button topic,”³³ people are more aware that human trafficking exists and that it exists in the United States.³⁴ However, common-held beliefs about human trafficking are often mere myths, which are problematic for combating dual victimization.³⁵ Furthermore, even the most well-informed law-enforcement officer is still encumbered by the inherent difficulties in recognizing human trafficking.³⁶

A. *Overview of Human Trafficking*

Human trafficking is “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.”³⁷ Human trafficking is an umbrella term for “when one person obtains or holds another person in compelled service,” including, but not limited to, forced labor,³⁸ sex trafficking,³⁹ and bonded labor.⁴⁰ This Comment uses the umbrella term “human trafficking” to include any number of trafficking classifications.⁴¹

Despite its status as a “hot button topic,”⁴² misunderstanding about human trafficking in the United States abounds.⁴³ These misunderstandings are

33. Allison Navarro, *Human Trafficking: A Hot-Button Topic*, UNITED NATIONS ASS’N OF SAN DIEGO (United Nations Ass’n and the Business Council of the United Nations, San Diego Chapter, San Diego, CA) Summer 2009, at 9 (on file with the *McGeorge Law Review*).

34. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 372 (2011), available at <http://www.state.gov/g/tip/rls/tiprpt/2011/> [hereinafter TRAFFICKING IN PERSONS REPORT 2011] (on file with the *McGeorge Law Review*) (“The United States is a source, transit, and destination country for men, women, and children subjected to forced labor, debt bondage, document servitude, and sex trafficking.”).

35. See POLARIS PROJECT, *supra* note 27 (“To effectively combat human trafficking, each of us needs to have a clear ‘lens’ that helps us understand what human trafficking is. When this lens is clouded or biased by certain persistent misconceptions about the definition of trafficking, our ability to respond to the crime is reduced.”).

36. See *infra* Part II.B (discussing the difficulties in recognizing human trafficking).

37. TRAFFICKING IN PERSONS REPORT 2011, *supra* note 34, at 8.

38. *Id.* at 7. Forced labor or involuntary servitude “may result when unscrupulous employers exploit workers made more vulnerable by high rates of unemployment, poverty, crime, discrimination, corruption, political conflict, or cultural acceptance of the practice.” *Id.*

39. *Id.* Sex trafficking occurs “[w]hen an adult is coerced, forced, or deceived into prostitution—or maintained in prostitution through coercion . . .” *Id.*

40. *Id.* at 7–8. Bonded labor or debt bondage occurs when “traffickers or recruiters unlawfully exploit an initial debt the worker assumed as part of the terms of employment.” *Id.*

41. This Comment disproportionately focuses on sex trafficking, even though the proposed statutory changes are to combat dual victimization for *all* human-trafficking victims. This is because certain statutes described herein apply only to sex-trafficking victims. See, e.g., N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005 & Supp. 2012) (permitting vacation of judgment for prostitution or loitering for the purpose of prostitution only, effectively precludes many *human*-trafficking victims from seeking this relief).

42. Navarro, *supra* note 33.

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especially problematic if held by a law-enforcement officer. For example, human trafficking does not require “physical restraint, physical force, or physical bondage.”⁴⁴ A law-enforcement officer under the mistaken assumption that trafficking requires physical restraint will undoubtedly fail to recognize a trafficking victim walking freely about. Another commonly held misunderstanding is that victims of crime generally seek assistance from law enforcement.⁴⁵ However, due to distrust, fear, or the fact that a trafficking victim may engage in criminal activity as part of his or her trafficking situation, trafficking victims often do not seek help.⁴⁶ Perpetuation of these misunderstandings exacerbates the already tremendous difficulty in recognizing human trafficking and its players.⁴⁷ Therefore, it is imperative that law-enforcement officers proactively look for signs indicative of human trafficking.

B. The Difficulty in Recognizing Human Trafficking

Human trafficking is difficult to recognize for many reasons. Human trafficking is often “a hidden crime,” and sex trafficking is even more so, often “perpetuated in alleys, brothels and illicit massage parlors.”⁴⁸ Also, victims may travel between jurisdictions, leaving little time for law enforcement to recognize the crime and its players and to prosecute accordingly.⁴⁹ Furthermore, recognizing an individual engaging in criminal activity as a victim of crime rather than as a perpetrator of crime is counterintuitive to the criminal-justice system. This Comment acknowledges the difficulty for a law-enforcement officer to simultaneously view a trafficked person as both a criminal committing an offense and a victim compelled by a human-trafficking situation to commit that offense.

In addition to being difficult to recognize, human-trafficking victims do not often seek help and may even hide the reality of their situation.⁵⁰ It is not uncommon for trafficking victims to protect their traffickers, at least initially.⁵¹

43. See generally POLARIS PROJECT, *supra* note 27 (providing an overview of commonly held misconceptions about human trafficking in the United States).

44. *Id.*

45. *Id.*

46. *Id.*

47. See *infra* Part II.B (discussing the difficulties in recognizing human trafficking).

48. Moosy, *supra* note 19, at 3.

49. E.g., TRAFFICKING IN PERSONS REPORT 2011, *supra* note 34, at 37. *But see id.* at 8 (“A victim need not be physically transported from one location to another in order for the crime to fall within these definitions.”).

50. See POLARIS PROJECT, *supra* note 27 (“Victims of human trafficking often do not immediately seek help or self-identify as victims of crime due to a variety of factors, including lack of trust, self-blame, or specific instructions by the traffickers regarding how to behave when talking to law enforcement or social services.”).

51. See Moosy, *supra* note 19, at 5 (noting that a victim may have an emotional attachment to or love

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Trafficking “victims are often highly traumatized, having lived through months or even years of brutality In some instances, victims develop survival or coping mechanisms that manifest as distrust, deceptiveness and an unwillingness to accept assistance.”⁵² Through force and humiliation, traffickers control their victims to convince them that “the police will not help them and will be interested only in arresting the victims for [crimes committed] or for being undocumented.”⁵³ A victim may fear deportation if undocumented,⁵⁴ may have an emotional connection to the trafficker,⁵⁵ or may fear retaliation from the trafficker.⁵⁶ Furthermore, as a trafficking victim’s previous encounter with law enforcement may have involved an arrest, a trafficking victim may distrust law enforcement.⁵⁷

III. FAILING TO RECOGNIZE TRAFFICKING VICTIMS: A MULTIJURISDICTIONAL COMPARATIVE ANALYSIS

While human trafficking is a crime under federal law,⁵⁸ failing to recognize the crime and its players may lead to prosecuting the victim rather than the trafficker.⁵⁹ When a human-trafficking victim commits a crime due to a then-present trafficking situation, there is a vast discrepancy in jurisdictional responses.⁶⁰ Ideally, the law-enforcement officer who encounters a trafficking victim would recognize the situation and treat the individual as a victim rather than as a criminal.⁶¹ A law-enforcement officer is more likely to recognize human trafficking—thereby more likely to interrupt the trafficking cycle—if he or she has had human-trafficking training.⁶² However, if an officer fails to recognize a

for his or her trafficker, or may fear retaliation if the victim seeks help from the police).

52. *Id.*

53. *Id.* at 6–7.

54. *Id.* at 5. For example, fearing deportation, Silvia Gonzalez voluntarily handed over her identifying documents to her trafficker, relying on the trafficker’s promise to obtain a green card for her. *New York v. Gonzalez*, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011).

55. Moosy, *supra* note 19, at 5; *see also, e.g.*, *New York v. G.M.*, 922 N.Y.S.2d 761, 762–63 (Crim. Ct. 2011) (G.M.’s husband trafficked her.); Kelleher, *supra* note 9 (Kelsey Collins’ boyfriend trafficked her.); Goldberg, *supra* note 9 (Ms. Johnson’s boyfriend trafficked her.).

56. Moosy, *supra* note 19, at 6. Victims may fear retaliation because the “[t]rafficker may have threatened to harm them or their families if they are truthful.” *Id.*

57. *See id.* at 4–5 (providing an example of a sex-trafficking victim fearing arrest for prostitution if he or she seeks help).

58. 18 U.S.C. §§ 1581–96 (2006).

59. *See, e.g., Gonzalez*, 927 N.Y.S.2d 567; *G.M.*, 922 N.Y.S.2d 761; Kelleher, *supra* note 9; Goldberg, *supra* note 9 (Silvia, G.M., Kelsey Collins, and Ms. Johnson were all prosecuted for crimes committed due to their status as human-trafficking victims.).

60. *See, e.g., ALA. CODE* § 13A-6-159 (LexisNexis 2012) (providing an affirmative defense for a trafficking victim charged with a crime); *N.Y. CRIM. PROC. LAW* § 440.10(1)(i) (McKinney 2005 & Supp. 2012) (allowing vacation of judgment for certain crimes committed by a trafficking victim).

61. A dual victimization.

62. *See POLARIS PROJECT*, *supra* note 27 (“To effectively combat human trafficking, [law-enforcement

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trafficking situation and arrests the victim, a majority of jurisdictions do not provide any remedy to the victim.⁶³ Some states allow victims to raise human trafficking as an affirmative defense.⁶⁴ New York takes a unique approach and allows victims to seek vacation of a prior conviction on a showing of then-present trafficking.⁶⁵

While providing an affirmative defense or the option to seek vacation of a prior conviction are important statutory steps, either form of relief is too narrow to apply to all trafficking victims.⁶⁶ Furthermore, neither form of relief *prevents* dual victimization; both an affirmative defense and vacation of prior convictions provide relief after the dual victimization has already occurred.⁶⁷

A. *Federal Anti-Trafficking Efforts*

This Comment focuses on the systemic failure to recognize human trafficking at the state level. However, federal measures provide a baseline in combating human trafficking in the United States; therefore, it would be remiss to exclude them. Federal law criminalizes human trafficking.⁶⁸ The Trafficking Victims Protection Act of 2000, reauthorized in 2008, creates victim support programs and task forces to combat human trafficking.⁶⁹ The Department of Justice (DOJ) established trafficking task forces in forty-two jurisdictions.⁷⁰ As the DOJ task forces investigate trafficking cases to provide victim support, task forces are a means of combating trafficking generally,⁷¹ thereby rescuing victims

officers need] to have a clear ‘lens’ that helps [them] understand what human trafficking is.”) It is unlikely law-enforcement agencies will train officers on human trafficking, as very few jurisdictions require it. *See infra* Part IV.A (discussing the statutes mandating human-trafficking training for law-enforcement officers).

63. As this Comment goes to press, nine states provided some form of recourse for a criminally prosecuted trafficking victim. *See* ALA. CODE § 13A-6-159 (providing an affirmative defense); IOWA CODE ANN. § 710A.3 (West Supp. 2011) (providing an affirmative defense); MINN. STAT. ANN. § 609.325(4) (West 2009) (providing an affirmative defense); N.H. REV. STAT. ANN. § 645:2(IV) (LexisNexis 2012) (providing an affirmative defense); N.J. STAT. ANN. § 2C:34-1(e) (West 2005) (providing an affirmative defense); N.Y. CRIM. PROC. LAW § 440.10(1)(i) (allowing a victim to seek vacation of judgment); OKLA. STAT. ANN. tit. 21, § 748(D) (West Supp. 2012) (providing an affirmative defense); TEX. PENAL CODE ANN. § 43.02(d) (West 2011) (providing an affirmative defense); WIS. STAT. ANN. § 939.46(1m) (West Supp. 2011) (providing an affirmative defense).

64. ALA. CODE § 13A-6-159; IOWA CODE ANN. § 710A.3; MINN. STAT. ANN. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); N.J. STAT. ANN. § 2C:34-1(e); OKLA. STAT. ANN. tit. 21, § 748(D); TEX. PENAL CODE ANN. § 43.02(d); WIS. STAT. ANN. § 939.46(1m).

65. N.Y. CRIM. PROC. LAW § 440.10(1)(i).

66. *See infra* Part III.C (discussing affirmative defense to charges); Part III.D (discussing vacation of prior convictions).

67. *See infra* Part III.E (discussing how either response fails to combat dual victimization, but provides an important form of relief for human-trafficking victims).

68. 18 U.S.C. §§ 1581–96 (2006).

69. 22 U.S.C. §§ 7101–12 (2006 & Supp. IV 2011).

70. Moosy, *supra* note 19, at 5.

71. *See id.* (stating that DOJ task forces combine local, state, and federal law enforcement to proactively

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before they are further victimized by the criminal-justice system. While many states provide additional measures to combat trafficking, victims still slip through the cracks.⁷²

B. Mandatory Human-Trafficking Training for Law-Enforcement Officers

A recent study revealed that, generally, law-enforcement officers could not identify different types of human trafficking or its elements, and “could not . . . [d]istinguish trafficking from smuggling.”⁷³ This indicates a failure to adequately train law-enforcement officers to recognize trafficking victims they may encounter during their careers. In contrast, law-enforcement agencies that have a human trafficking task force⁷⁴ “are more likely to perceive human trafficking as a problem in their communities and to have training, protocols and specialized units of personnel devoted to investigating these cases.”⁷⁵

Human-trafficking victims typically encounter law-enforcement officers during the officers’ day-to-day duties.⁷⁶ Therefore, officers’ mere presence provides a crucial opportunity to interrupt the trafficking cycle by recognizing trafficking victims, facilitating victim rescue, potentially finding other trafficking victims,⁷⁷ and prosecuting the real criminal: the trafficker. With sex trafficking specifically, “the trafficker must obtain a stream of paying clients . . . and provide an array of new victims. Both these activities require traffickers to become more ‘public,’ providing opportunities for law enforcement to intervene.”⁷⁸ As the number of law-enforcement officers on the street at any given time is limited, having officers who do not know how to recognize trafficking wastes this precious resource.

It is imperative that law-enforcement officers are trained to recognize the signs of human trafficking, know what to do when they encounter a suspected trafficking victim or trafficker, and proactively look for trafficking in their community. Failure to recognize the problem—which is more likely when the law-enforcement officers have not received trafficking training⁷⁹—allows trafficking victims to slip through the cracks. Silvia was convicted eighty-six

investigate cases and identify victims, which would effectively interrupt the trafficking cycle).

72. See *supra* Part I (providing several examples of human-trafficking victims prosecuted for crimes committed due to a then-present trafficking situation).

73. Bachar, *supra* note 25.

74. See *supra* notes 70–71 and accompanying text.

75. Bachar, *supra* note 25.

76. Moossy, *supra* note 19, at 3.

77. *Id.* at 7.

78. *Id.* at 3.

79. Bachar, *supra* note 25. This Comment does not allege any wrongdoing on behalf of law-enforcement officers. Rather, this Comment seeks to expose a systemic failure to recognize trafficking victims as victims rather than as criminals, and propose ways to combat this dual victimization.

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times without law enforcement recognizing her as a victim of crime;⁸⁰ G.M. was arrested six times;⁸¹ Kelsey Collins⁸² and Ms. Johnson⁸³ were each arrested several times without being recognized as victims, even though they were minors at the time of their arrests.

As this Comment goes to press, only seven states⁸⁴ require human-trafficking training for law-enforcement officers.⁸⁵ Of these states, some impose broad, non-descriptive obligations requiring merely that law-enforcement agencies provide a training.⁸⁶ 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.⁸⁷ As human trafficking involves complex issues,⁸⁸ this Comment argues that human-trafficking training must cover those issues in detail, and that the mandatory-training statute must reflect the necessity of such detail by itemizing a list of topics to be covered during this training.⁸⁹ A descriptive statute will protect against holding a superficial and uninformative training merely to meet the minimum requirement of the statute. Furthermore, the mobile nature of human trafficking also cautions against states enacting a non-descriptive statutes to ensure that law-enforcement officers respond to human trafficking similarly regardless of jurisdiction.

80. *New York v. Gonzalez*, 927 N.Y.S.2d 567, 568–69 (Crim. Ct. 2011). Gonzalez was so desperate to get off of the street, “sometimes she would just go up to police officers and ask them to take her in.” *Id.*

81. *New York v. G.M.*, 922 N.Y.S.2d 761, 762 (Crim. Ct. 2011). As a result of her trafficker's abuse, G.M. visited the hospital for medical care. *Id.* That the hospital staff also failed to recognize G.M. as a trafficking victim indicates a need for mandatory human-trafficking training for individuals in the medical field and social services. However, this exceeds the scope of this Comment.

82. Kelleher, *supra* note 9. Unlike Gonzalez, G.M., and Ms. Johnson, a police officer eventually recognized Kelsey Collins as a trafficking victim; however, she had multiple arrests prior to her meaningful contact with law enforcement, leading to escape, albeit temporarily, from her trafficking situation. *Id.*

83. Goldberg, *supra* note 9.

84. California, Indiana, Iowa, Missouri, New Mexico, Texas, and Virginia.

85. CAL. PENAL CODE § 13519.14 (West 2012); IND. CODE ANN. § 5-2-1-9(a)(10) (West 2008); IOWA CODE ANN. § 80B.11(2)(e) (West 2009); MO. ANN. STAT. § 566.223 (West Supp. 2011); N.M. STAT. ANN. § 30-52-3 (LexisNexis 2012); TEX. OCC. CODE ANN. § 1701.258 (West 2012); VA. CODE ANN. § 9.1-102(55) (West 2012).

86. *See, e.g.*, TEX. OCC. CODE ANN. § 1701.258 (requiring law-enforcement officers to take a four-hour training “including a review of the substance of” penal code sections defining human trafficking); *see also* VA. CODE ANN. § 9.1-102(55) (requiring a training “regarding the identification, investigation, and prosecution of human trafficking offenses . . .”).

87. *See, e.g.*, IND. CODE ANN. § 5-2-1-9(a)(10) (requiring law-enforcement officers undergo training examining “the human and sexual trafficking laws”; “[i]dentification of human and sexual trafficking”; “[c]ommunicating with traumatized persons”; “[t]herapeutically appropriate investigative techniques”; “[c]ollaboration with federal law enforcement officials”; “[r]ights of and protections afforded to victims”; and “[t]he availability of community resources to assist human and sexual trafficking victims”).

88. Complex issues such as recognizing a trafficking situation, victims' distrust of the criminal-justice system, and what social services a victim will likely need to successfully escape the trafficking situation and maintain freedom.

89. *See supra* note 87 (listing topics to be covered under Indiana's human-trafficking training statute).

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Statutory training requirements set the minimum requirements, not the maximum.⁹⁰ Therefore, law-enforcement officers may undergo human-trafficking training, through continuing education or an informal training, even though not required by a majority of jurisdictions.⁹¹ As human trafficking is and has been a “hot button topic,”⁹² it is likely that many law-enforcement officers receive human-trafficking training while not statutorily mandated to do so. However, as most law-enforcement officers cannot recognize the difference between the types of human trafficking or the difference between smuggling and human trafficking,⁹³ this informal training is clearly insufficient.

Mandatory training will give law-enforcement officers the tools they need to recognize trafficking victims, thereby preventing dual victimization. However, no amount of training will provide adequate relief to those trafficking victims who will inevitably slip through the cracks.⁹⁴ Therefore, it is imperative that in addition to mandating human-trafficking training for law-enforcement officers, jurisdictions also provide relief to those victims who slip through the cracks.⁹⁵

C. *Affirmative Defense to Criminal Charges*

The Center for Women Policy Studies recommends all jurisdictions make human trafficking an affirmative defense to criminal charges.⁹⁶ An affirmative defense defeats the “prosecution’s claim, even if all the allegations in the complaint are true.”⁹⁷ Therefore, the defendant does not challenge committing the crime or its elements, but rather “seeks to justify, excuse, or mitigate it.”⁹⁸ Unlike a simple defense, the defendant bears the burden of proof to establish the specific facts to mitigate the charges.⁹⁹ Common affirmative defenses to criminal charges include insanity and self-defense.¹⁰⁰

90. *See, e.g.*, UTAH CODE ANN. § 53-6-207 (West 2007) (“The minimum standards in this part concerning peace officer qualifications and training do not preclude counties, cities, or towns from establishing standards higher than the minimum standards contained in this part.”).

91. *Id.*; *supra* note 85 and accompanying text.

92. Navarro, *supra* note 33.

93. Bachar, *supra* note 25.

94. As human trafficking is inherently difficult to recognize, even the finest trained individuals may fail to recognize a trafficking situation. *See supra* Part II.B (discussing the difficulties in recognizing human trafficking).

95. *See infra* Part III.C (describing human trafficking as an affirmative defense to criminal charges); Part III.D (describing vacation of prior judgment based on then-present human trafficking).

96. NAT’L INST. ON STATE POLICY ON TRAFFICKING OF WOMEN & GIRLS, RESOURCE GUIDE FOR STATE LEGISLATORS: MODEL PROVISIONS FOR STATE ANTI-TRAFFICKING LAWS 4 (2005), available at <http://www.centerwomenpolicy.org/pdfs/TraffickingResourceGuide.pdf> [hereinafter MODEL PROVISIONS] (on file with the *McGeorge Law Review*).

97. BLACK’S LAW DICTIONARY 190 (3d Pocket ed. 2006).

98. 21 AM. JUR. 2D *Criminal Law* § 182 (2008) (citations omitted).

99. *Id.*

100. BLACK’S LAW DICTIONARY, *supra* note 97.

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As this Comment goes to press, eight states¹⁰¹ have some type of affirmative defense for crimes committed by a trafficking victim.¹⁰² Of these eight states, Alabama, Iowa, Minnesota, New Hampshire, Texas, and Wisconsin allow an affirmative defense to criminal charges if the defendant was a trafficking victim when the crime was committed, and the crime was a direct result of the defendant's trafficking situation.¹⁰³ Of those six states, Iowa and Minnesota more narrowly require not only that the defendant committed the charged crime or crimes during a trafficking situation, but also did so under force or threat of force.¹⁰⁴ New Jersey and Oklahoma are broader, requiring neither direct relation between the crime committed and the trafficking situation, nor a force or threat of force requirement.¹⁰⁵ Rather, these two states merely require that the defendant was a human-trafficking victim when he or she committed the crime.¹⁰⁶

Additionally, of these eight states providing an affirmative defense, the majority only apply the defense to prostitution and prostitution-related offenses,¹⁰⁷ thereby providing a remedy to *sex*-trafficking victims only. In contrast, only Iowa, Oklahoma, and Wisconsin provide an affirmative defense for crimes committed as a direct result of a then-present *human*-trafficking situation.¹⁰⁸

A jurisdiction providing an affirmative defense as a form of relief for a human-trafficking victim facing criminal charges may implement a broad or narrow defense, depending on its statutory drafting.¹⁰⁹ For example, the Center for Women Policy Studies proposes language that would include any crime

101. Alabama, Iowa, Minnesota, New Hampshire, New Jersey, Oklahoma, Texas, and Wisconsin.

102. ALA. CODE § 13A-6-159 (LexisNexis 2012); IOWA CODE ANN. § 710A.3 (West Supp. 2011); MINN. STAT. ANN. § 609.325(4) (West 2009); N.H. REV. STAT. ANN. § 645:2(IV) (LexisNexis 2012); N.J. STAT. ANN. § 2C:34-1(e) (West 2005); OKLA. STAT. ANN. tit. 21, § 748(D) (West Supp. 2012); TEX. PENAL CODE ANN. § 43.02(d) (West 2011); WIS. STAT. ANN. § 939.46(1m) (West Supp. 2011).

103. ALA. CODE § 13A-6-159; IOWA CODE ANN. § 710A.3; MINN. STAT. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); TEX. PENAL CODE ANN. § 43.02(d); WIS. STAT. ANN. § 939.46(1m).

104. IOWA CODE ANN. § 710A.3; MINN. STAT. § 609.325(4).

105. N.J. STAT. ANN. § 2C:34-1(e); OKLA. STAT. ANN. tit. 21, § 748(D).

106. *Id.*

107. ALA. CODE § 13A-6-159; MINN. STAT. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); N.J. STAT. ANN. § 2C:34-1(e); TEX. PENAL CODE ANN. § 43.02(d).

108. IOWA CODE ANN. § 710A.3; OKLA. STAT. ANN. tit. 21, § 748(D); WIS. STAT. ANN. § 939.46(1m). Therefore, had Silvia Gonzales been in one of these three states, she would have also had an affirmative defense to her conviction for resisting arrest, in addition to her prostitution-related offenses. *See* New York v. Gonzalez, 927 N.Y.S.2d 567, 569 (Crim. Ct. 2011) (stating that, under New York law, Gonzalez had no redress for her resisting arrest conviction).

109. *Compare* N.J. STAT. ANN. § 2C:34-1(e), *and* OKLA. STAT. ANN. tit. 21, § 748(D) (providing that a defendant must show he or she was a trafficking victim when the crime was committed to successfully raise an affirmative defense), *with* IOWA CODE ANN. § 710A.3, *and* MINN. STAT. ANN. § 609.325(4) (requiring a defendant show three elements to successfully raise an affirmative defense: (1) the defendant was a trafficking victim when he or she committed the crime; (2) the crime was directly related to that trafficking situation; and (3) the defendant acted under force or threat of force).

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committed while “the defendant was a victim of human trafficking,”¹¹⁰ thereby encompassing all crimes committed during a trafficking situation—even if those crimes did not stem directly from that trafficking situation.¹¹¹ However, such statutes may be drafted narrowly as well, such as Iowa Code section 710A.3, requiring that the defendant’s crime stem directly from the human-trafficking situation and that the defendant commit the crime under force or threat of force in order for the affirmative defense to apply.¹¹²

While an affirmative defense certainly provides judicial relief for criminally prosecuted trafficking victims, this form of relief is far from perfect.¹¹³ By limiting the crimes to which the affirmative defense applies to prostitution and loitering for the purpose of prostitution, the majority of the jurisdictions providing this relief effectively limit its availability to *sex*-trafficking victims, rather than to the broader classification of *human*-trafficking victims.¹¹⁴ Furthermore, even if this relief is available to a sex-trafficking victim for prostitution or loitering for the purpose of prostitution, the defendant may have other charges to which the affirmative defense does not apply, even if the defendant proves a then-present sex-trafficking situation.¹¹⁵ Additionally, the Iowa and Minnesota statutes are even more limited; not only do they require that the defendant committed the crime or crimes during a trafficking situation, but also under force or threat of force, thereby imposing another obstacle to successfully raising an affirmative defense.¹¹⁶

Some of the barriers to recognizing human-trafficking victims generally and sex-trafficking victims in particular also present a barrier to a victim claiming the defense.¹¹⁷ For example, trafficking victims may have feelings for, be in a

110. MODEL PROVISIONS, *supra* note 96, at 4. Proposed language: “It is an affirmative defense to prosecution for a criminal violation that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking.” *Id.*

111. *Id.*

112. IOWA CODE ANN. § 710A.3.

113. *See infra* notes 114–25 and accompanying text (discussing the limitations of an affirmative defense for crimes directly related to a trafficking situation).

114. Compare ALA. CODE § 13A-6-159 (LexisNexis 2012), and MINN. STAT. ANN. § 609.325(4), and N.H. REV. STAT. ANN. § 645:2(IV) (LexisNexis 2012), and N.J. STAT. ANN. § 2C:34-1(e), and TEX. PENAL CODE ANN. § 43.02(d) (West 2011) (limiting the applicability of the affirmative defense to prostitution and loitering for the purpose of prostitution charges), with IOWA CODE ANN. § 710A.3, and OKLA. STAT. ANN. tit. 21, § 748(D), and WIS. STAT. ANN. § 939.46(1m) (West Supp. 2011) (containing no limit on what types of crimes the affirmative defense applies to, provided the defendant was a human-trafficking victim at the crime’s commission).

115. *See* ALA. CODE § 13A-6-159; MINN. STAT. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); N.J. STAT. ANN. § 2C:34-1(e); TEX. PENAL CODE ANN. § 43.02(d) (limiting the applicability of the affirmative defense to prostitution and loitering for the purpose of prostitution charges). For example, a victim like Sylvia Gonzalez would be unable to raise an affirmative defense for resisting arrest, which was a direct result of her then-present sex-trafficking situation, where the affirmative defense is limited to prostitution-related offenses. *New York v. Gonzalez*, 927 N.Y.S.2d 567, 569 (Crim. Ct. 2011).

116. IOWA CODE ANN. § 710A.3; MINN. STAT. ANN. § 609.325(4).

117. *See supra* Part II.B (indicating the inherent difficulties in recognizing trafficking victims).

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relationship with, or even be in love with their traffickers.¹¹⁸ In this case, claiming the affirmative defense would force the defendant to incriminate the person they love—the trafficker.¹¹⁹ Even if the trafficking victim has no feeling of intimacy towards the trafficker, due to the coercion and fear the trafficker uses to control trafficking victims, a trafficked person is not likely to be forthcoming and implicate the trafficker as a criminal.¹²⁰ Trafficking victims may also fear retaliation from their traffickers if they were to claim trafficking as an affirmative defense in court.¹²¹ Additionally, language barriers or misunderstandings about individual rights may prevent a victim from claiming trafficking as an affirmative defense.¹²²

More importantly, this form of relief does not combat dual victimization.¹²³ Rather, by the time this relief is available to a trafficking victim, the criminal-justice system already arrested, charged, and prosecuted the defendant as a criminal rather than recognizing him or her as a victim of crime.¹²⁴ Therefore, while providing an affirmative defense for crimes committed while the defendant was a trafficking victim is an important form of relief for when trafficking victims slip through the cracks, it does not combat dual victimization.¹²⁵

D. Vacate Judgment upon a Showing of Trafficking

If a criminal defendant is unable or unwilling to raise an affirmative defense for crimes committed due to a then-present human-trafficking situation,¹²⁶ the

118. Moosy, *supra* note 19, at 5; TRAFFICKING IN PERSONS REPORT 2011, *supra* note 34, at 25; *see also* New York v. G.M., 922 N.Y.S.2d 761, 762–63 (Crim. Ct. 2011) (G.M.’s husband trafficked her.); Kelleher, *supra* note 9 (Kelsey Collins’ boyfriend trafficked her.); Goldberg, *supra* note 9 (Ms. Johnson’s boyfriend trafficked her.).

119. Moosy, *supra* note 19, at 5; TRAFFICKING IN PERSONS REPORT 2011, *supra* note 34, at 25; *see also* G.M., 922 N.Y.S.2d at 762–63; Kelleher, *supra* note 9; Goldberg, *supra* note 9.

120. *See* Moosy, *supra* note 19, at 5 (“[V]ictims develop survival or coping mechanisms that manifest as distrust, deceptiveness and an unwillingness to accept assistance.”).

121. *See id.* at 6 (“[T]he trafficker may have threatened to harm them or their families if they are truthful. This may lead victims to deceive law enforcement, especially early in the process.”).

122. *See id.* at 6–7 (providing that traffickers may tell their victims that if they try to go to the police for help, the police will arrest them for prostitution or for being in the country illegally).

123. Of course, if a defendant successfully raises the affirmative defense, then the trafficking victim will not be saddled with a criminal record. However, this Comment argues that even without a resulting criminal record, being arrested as a criminal rather than recognized as a victim is sufficient to constitute dual victimization.

124. *See* 21 AM. JUR. 2D *Criminal Law* § 182 (2008) (citations omitted) (stating that affirmative defenses, like simple defenses, are raised during trial).

125. *See id.* (As a human trafficking victim raises an affirmative defense, if at all, during trial, dual victimization has already occurred.).

126. It is unlikely a defendant could raise such an affirmative defense, because only a few jurisdictions provide one. ALA. CODE § 13A-6-159 (LexisNexis 2012); IOWA CODE ANN. § 710A.3 (West Supp. 2011); MINN. STAT. ANN. § 609.325(4) (West 2009); N.H. REV. STAT. ANN. § 645:2(IV) (LexisNexis 2012); N.J. STAT. ANN. § 2C:34-1(e) (West 2005); OKLA. STAT. ANN. tit. 21, § 748(D) (West Supp. 2012); TEX. PENAL CODE ANN. § 43.02(d) (West 2011); WIS. STAT. ANN. § 939.46(1m) (West Supp. 2011). Additionally, it is

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criminal-justice system saddles that trafficking victim with a criminal record in all but one jurisdiction.¹²⁷ In 2010, New York passed landmark legislation allowing a sex-trafficking victim to seek vacation of prior convictions, provided “the defendant’s participation in the offense was a result of having been a victim of sex trafficking,”¹²⁸ which the defendant must prove by a preponderance of the evidence.¹²⁹ Additionally, New York recognizes any minor engaging in prostitution or loitering for the purpose of prostitution as a trafficking victim.¹³⁰

To vacate a prior conviction is to invalidate the conviction.¹³¹ Therefore, the timing for a vacation of judgment differs from an affirmative defense. An affirmative defense is raised, if at all, during a defendant’s trial, and therefore, before a conviction.¹³² Vacation of prior conviction proceedings occur after a court enters a formal judgment against a criminal defendant.¹³³

For the purpose of the New York statute, sex trafficking is defined under either New York state law¹³⁴ or the federal Trafficking Victims Protection Act.¹³⁵ This statute is limited to *sex* trafficking and does not extend to the broader category of *human* trafficking.¹³⁶ To move for a vacation of a prior conviction, the

likely a defendant would be unwilling to raise such a defense because of the emotional intricacies and distrust of the legal system involved in a human trafficking situation. *See supra* Part III.C (discussing why an affirmative defense, even in a jurisdiction providing one, is not an ideal form of relief for a human-trafficking victim).

127. *See* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005 & Supp. 2012) (allowing sex-trafficking victims to seek a vacation of prior conviction); Press Release, Urban Justice Center’s Sex Workers Project, Governor Paterson Signs First in the Nation Bill Allowing Survivors of Sex Trafficking to Clear Prostitution Convictions (Aug. 16, 2010), *available at* http://assembly.state.ny.us/member_files/075/20100816/statement.pdf (on file with the *McGeorge Law Review*).

128. N.Y. CRIM. PROC. LAW § 440.10(1)(i). Providing official documentation showing a then-existing sex-trafficking situation creates a presumption that the defendant’s crime stems from the trafficking situation. *Id.* § 440.10(1)(i)(ii). Such documentation, however, is not required for a motion to vacate under section 440.10(1)(i). *Id.*

129. *New York v. Gonzalez*, 927 N.Y.S.2d 567, 570 (Crim. Ct. 2011).

130. *See New York v. Doe*, 935 N.Y.S.2d 481, 483 (N.Y. App. Div. 2011) (providing the trend in this area of law indicates “a strong expression that those engaging in prostitution, or commercial sex, under the age of eighteen are to be viewed as victims of trafficking, rather than perpetrators of crime.”). Treating minors engaging in prostitution as victims rather than criminals is a growing trend in other jurisdictions. *See, e.g.*, OR. REV. STAT. § 12.117(d) (2011) (classifying prostitution by a minor as child abuse).

131. *See* BLACK’S LAW DICTIONARY, *supra* note 97, at 753 (“To nullify or cancel; make void; invalidate.”).

132. *See* 21 AM. JUR. 2D *Criminal Law* § 182 (2008) (citations omitted) (Affirmative defenses are raised to “justify, mitigate, or excuse” a crime.).

133. 47 AM. JUR. 2D *Judgments* § 655 (2006).

134. N.Y. PENAL LAW § 230.34 (McKinney 2008) (defining sex trafficking categorically as: intentionally profiting from prostitution by (1) unlawfully providing drugs to a trafficked individual; (2) “making material false statements, misstatements, or omissions to induce [the trafficked person] to engage in . . . prostitution”; (3) withholding a trafficked person’s identification documents to “impair said person’s freedom of movement”; (4) requiring the trafficked person to engage in prostitution for debt repayment; and (5) using fear or force to induce the trafficked person to engage in prostitution).

135. 22 U.S.C. § 7102(9) (2006) (defining sex trafficking broadly as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act”).

136. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005 & Supp. 2012).

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statute requires due diligence, which is satisfied if the movant is no longer a victim of sex trafficking and it is safe to make such a motion.¹³⁷ Provided the defendant satisfies the due diligence requirement, even if the criminal case against him or her is still appealable, the defendant may nevertheless file a motion to vacate at any time after sentencing.¹³⁸ This statute does not require a showing of any particular facts, which allows broad judicial discretion to determine whether the movant has shown “he or she was a sex-trafficking victim.”¹³⁹

Despite broad judicial discretion, the New York law is nevertheless limited, as it only applies to prostitution or loitering for the purpose of engaging in prostitution convictions stemming from the sex-trafficking situation.¹⁴⁰ Therefore, a trafficking victim who commits an offense other than these two crimes has no parallel relief—under even New York’s landmark legislation.¹⁴¹ Similarly, in Silvia Gonzalez’s case,¹⁴² the court denied her motion to vacate her prior conviction for resisting arrest, because resisting arrest was “not a prostitution related offense.”¹⁴³ This is the state of the law even though Gonzalez successfully demonstrated that she was a sex-trafficking victim at the time of that offense.¹⁴⁴ However, as the *G.M.* court¹⁴⁵ noted, “a valid issue remains as to whether the statute can be applied to non-prostitution offenses where the defendant was a demonstrated sex-trafficking victim during their commission. [New York Penal Law section] 440.10(6) allows the court to ‘take such additional action as is

137. *Id.* § 440.10(1)(i)(i).

138. *See id.* § 440.10(2)(b) (Where appellate review is possible, the court must deny a motion to vacate prior convictions. However, this section explicitly does not apply to trafficking victims.); *see also id.* § 440.10(3)(a) (granting judicial discretion to deny a motion where the record prior to sentencing does not include facts supportive of vacation of prior convictions. This section does not apply to trafficking victims.).

139. *New York v. Gonzalez*, 927 N.Y.S.2d 567, 570 (Crim. Ct. 2011). “[T]he legislature did not require any specific corroborating facts or other evidence which would to [sic] support a defendant’s application By avoiding bright-line rules and formulaic determinations, the legislature squarely gave the Courts the discretion to grant relief pursuant to [New York Criminal Procedure Law section] 440.10(1)(i)” *Id.*

140. *See* N.Y. CRIM. PROC. LAW § 440.10(1)(i) (allowing vacation of judgment “where the arresting charge was under [New York Penal Law] section 240.37 (loitering for the purpose of engaging in a prostitution offense . . .) or [New York Penal Law] 230.00 (prostitution) . . . and the defendant’s participation in the offense was result of having been a victim of sex trafficking . . .”). *But cf.* WIS. STAT. ANN. § 939.46(1m) (West Supp. 2011) (providing a defendant with “an affirmative defense for *any offense committed* as a direct result” of then-existing human trafficking) (emphasis added).

141. *See* N.Y. CRIM. PROC. LAW § 440.10(1)(i) (applying only to prostitution or loitering for the purpose of prostitution).

142. *See supra* notes 1–7 and accompanying text.

143. *Gonzalez*, 927 N.Y.S.2d at 569.

144. *Id.* The court did, however, vacate eighty-six prior convictions for either prostitution or loitering for the purpose of engaging in a prostitution offense. *Id.* at 568, 571. *But cf.* *New York v. G.M.*, 922 N.Y.S.2d 761, 766 (Crim. Ct. 2011) (vacating all six of G.M.’s prior convictions, including trespass and drug possession, even though her two prostitution convictions were the only ones covered by the statute; this is more of a procedural decision rather than statutory interpretation, because the prosecution consented to the vacation of these convictions in addition to the prostitution convictions).

145. *See supra* notes 10–14 and accompanying text (describing *G.M.*, 922 N.Y.S.2d 761).

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appropriate in the circumstances[.]”¹⁴⁶ As this Comment goes to press, no New York court had extended Criminal Procedure Law section 440.10(6) to a non-prostitution offense.¹⁴⁷

Enacting New York Criminal Procedure Law section 440.10(1)(i) allows for an increase in motions to vacate prior convictions.¹⁴⁸ One may argue this will “‘open the flood gates’ of prior prostitution convictions insofar as those defendants can just come into court and claim that they were the victims of sex trafficking . . . and have their convictions vacated.”¹⁴⁹ However, the New York City Criminal Court found this argument “dogmatic and unpersuasive.”¹⁵⁰ Furthermore, “even if the floodgates open by granting [vacations of prior convictions under New York Criminal Procedure Law section 440.10(1)(i)], the Courts can easily deny frivolous motions”¹⁵¹ Additionally, the court emphasized the importance of providing relief for a trafficking victim outweighs the concern for any administrative burden the law may impose on the judicial system.¹⁵²

On the one hand, New York Criminal Procedure Law section 440.10(1)(i) is very limited.¹⁵³ The vacation statute only applies to sex trafficking, rather than all instances of human trafficking;¹⁵⁴ it only vacates convictions for prostitution and loitering for the purpose of engaging in prostitution, rather than for other crimes stemming from a sex-trafficking situation.¹⁵⁵ Furthermore, as trafficking victims are likely to be wary of the court system that criminally prosecuted them, they are not likely to pursue judicial relief.¹⁵⁶ Even more important to this Comment, the New York statute provides relief to a sex-trafficking victim only *after* the victim has been arrested, charged, and criminally prosecuted.¹⁵⁷ In other words, when the criminal-justice system fails to recognize a trafficking victim as a

146. *G.M.*, 922 N.Y.S.2d at 766 n.7 (citing N.Y. PENAL LAW § 440.10(6)).

147. *See id.* at 762–63; *see also* *New York v. Doe*, 935 N.Y.S.2d 481, 482–83 (N.Y. App. Div. 2011); *Gonzalez*, 927 N.Y.S.2d at 570 (vacating prior convictions for prostitution and loitering for the purpose of prostitution).

148. *See Gonzalez*, 927 N.Y.S.2d at 570 (referring to the prosecution’s unsuccessful argument).

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.* (“[T]he defendant’s ability to continue putting her life back together after [her sex trafficking situation] heavily outweighs any increased motion practice that may result hereafter.”).

153. *See supra* notes 140–47 and accompanying text (describing the novel law’s limitations).

154. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005 & Supp. 2012).

155. *Id.*

156. *See Gonzalez*, 927 N.Y.S.2d at 570 (providing that “victims of human trafficking are often too wary of authorities or too traumatized by their experiences to be able or willing to timely report their victimization”); *supra* Part II.B (discussing why victims often do not seek help and why they may distrust the criminal-justice system generally).

157. *See* N.Y. CRIM. PROC. LAW § 440.10(1)(i) (allowing a sex trafficking victim to bring a motion to vacate prior convictions, as opposed to allowing a victim to bring an affirmative defense).

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victim, the victim slips through the cracks, and the opportunity to interrupt the trafficking cycle is lost.¹⁵⁸

Despite the limited applicability of New York's vacation statute and its failure to combat dual victimization, the statute gives "'victims of human trafficking the fresh start they deserve' by vacating criminal records that can serve as barriers to employment, housing and citizenship applications."¹⁵⁹

E. Too Little, Too Late

As this Comment goes to press, no jurisdiction has a combination of all three of the above statutory responses to when a trafficking victim commits a crime due to a then-present trafficking situation.¹⁶⁰ Standing alone, any one of these forms of relief is insufficient. While providing an affirmative defense and vacating judgment on a showing of trafficking are important statutory changes for all jurisdictions to adopt, they come too little, too late. By the time a case goes to trial, the criminal-justice system already failed to recognize a human-trafficking victim and instead prosecuted the victim as a criminal perpetrator. Therefore, while these retroactive measures are important to catch victims who slip through the cracks, these initiatives are of secondary importance to those combating dual victimization before it occurs—primarily, requiring human-trafficking training for law-enforcement officers.¹⁶¹

Mandatory-trafficking training for law-enforcement officers—a critical means of combating dual victimization—is not widely implemented.¹⁶² As human-trafficking victims encounter law-enforcement officers during the officers' day-to-day duties,¹⁶³ training officers how to recognize human trafficking is the best strategy to combat dual victimization.

Of the forms of relief available to trafficking victims prosecuted for crimes committed due to their trafficking situations, only a combination of all three initiatives will combat dual victimization before it occurs and provide relief for

158. A dual victimization.

159. Noleen G. Walder, *City Bar Urges Passage of Law for Sex-Trafficking Victims*, N.Y.L.J., Apr. 12, 2010 (quoting N.Y.C. BAR COMM. ON SEX & LAW, REPORT ON A.7670/S.4429, at 4 (Mar. 2010)).

160. See N.Y.C. BAR COMM. ON SEX & LAW, REPORT ON A.7670/S.4429, at 4 (Mar. 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071848-CommentonLegislationreVictimsofSexTrafficking.pdf> (on file with the *McGeorge Law Review*) (providing that the New York legislation is the first of its kind in the country). As New York (the only jurisdiction with a vacation of prior judgment statute) does not have an affirmative defense for trafficking, no jurisdiction has all three.

161. See *supra* Part III.B (discussing the important of human-trafficking training for law-enforcement officers).

162. As this Comment goes to press, only seven states required human-trafficking training for law-enforcement officers: California, Indiana, Iowa, Missouri, New Mexico, Texas, and Virginia. CAL. PENAL CODE § 13519.14 (West 2012); IND. CODE ANN. § 5-2-1-9(a)(10) (West 2008); IOWA CODE ANN. § 80B.11(1)(e) (West 2009); MO. ANN. STAT. § 566.223 (West Supp. 2011); N.M. STAT. ANN. § 30-52-3 (West 2012); TEX. OCC. CODE ANN. § 1701.258 (West 2012); VA. CODE ANN. § 9.1-102(55) (West 2012).

163. Moosy, *supra* note 19, at 3.

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those victims who will inevitably slip through the cracks. Therefore, this Comment recommends a three-part statutory response to dual victimization: (1) mandating human-trafficking training for law-enforcement officers; (2) providing human trafficking as an affirmative defense to crimes committed as a direct result of a then-present human-trafficking situation; and (3) allowing vacation of judgment upon a showing of human trafficking.¹⁶⁴

IV. COMBATING DUAL VICTIMIZATION: A PROPOSAL

This Comment argues the number of human-trafficking victims charged and prosecuted for crimes related to their trafficking situations indicates a systemic failure within the criminal-justice system to recognize human trafficking and its players and prosecute accordingly. When a human-trafficking victim is arrested and charged for crimes committed as a result of a then-present trafficking situation, a dual victimization occurs. This dual victimization is best prevented when law-enforcement officers know the signs of human trafficking, proactively look for it during their day-to-day duties, and know what services the victim will need to escape and maintain freedom from his or her trafficking situation.¹⁶⁵ Despite even the best training for law-enforcement officers, trafficking victims will inevitably slip through the cracks. Therefore, it is imperative that each jurisdiction also implement after-the-fact relief: providing human-trafficking victims the options of raising an affirmative defense during trial or vacating a prior judgment for crimes committed as a direct result of a then-present trafficking situation.

A. *Preventing Dual Victimization: Mandatory Human-Trafficking Training for Law-Enforcement Officers*

“In most communities police officers may be the only meaningful contact citizens have with ‘the law.’”¹⁶⁶ A substantial number of trafficking victims are identified by police officers engaged in their day-to-day duties.¹⁶⁷ Therefore, law-enforcement officers are generally in the best position to interrupt the trafficking

164. As a statutory response, each individual state would have to enact such legislation. While this may seem untenable, a similar federal law would be an inappropriate exertion of control over the states, and would therefore be unconstitutional. *See, e.g.,* *Printz v. United States*, 521 U.S. 898, 926 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)) (internal quotation marks omitted) (“The Federal Government . . . may not compel the States to enact or administer a federal regulatory program.”)

165. *See* Bachar, *supra* note 25 (“[T]he difficulty of uncovering and investigating human trafficking cases is often caused by a lack of training, the need for enhanced communication between local law enforcement and victim service agencies, and the hidden nature of this crime.”).

166. *See* Joan Zorza, *Symposium on Domestic Violence: Criminal Law: The Criminal Law of Misdemeanor Domestic Violence 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) (discussing the importance of domestic-violence training for police officers).

167. Moosy, *supra* note 19, at 3.

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cycle,¹⁶⁸ and it is essential that officers know how to recognize human trafficking. If it were mandatory for law-enforcement officers to receive human-trafficking training, it is likely that an officer would have recognized Silvia Gonzalez,¹⁶⁹ G.M.,¹⁷⁰ Kelsey Collins,¹⁷¹ and Ms. Johnson¹⁷² as victims.

In 2007, the California Attorney General's Office recommended a mandatory human-trafficking training for law-enforcement officers.¹⁷³ However, trafficking training is far from universally required, as only seven states require all law-enforcement officers undergo human-trafficking training.¹⁷⁴ That so few jurisdictions mandate human-trafficking training for law-enforcement officers is troubling for many reasons. First, law-enforcement officers are in the best position to recognize trafficking and interrupt its cycle.¹⁷⁵ Failure to train officers to recognize situations they will likely encounter during the course of their duties is a waste of precious resources. Second, law-enforcement training absent any statutory mandate may result in the officers receiving insufficient information on the subject.¹⁷⁶ In addition to ensuring law-enforcement officers are well informed and prepared to recognize trafficking and provide victim assistance, the mobile nature of human trafficking renders it particularly important that all law-enforcement officers receive uniform training.¹⁷⁷

While imposing mandatory law-enforcement training is an integral step in preventing dual victimization, this Comment recognizes it is unwieldy to

168. *Id.*

169. *See* *New York v. Gonzalez*, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011) (Sylvia Gonzalez had acquired eighty-six convictions for prostitution or loitering for the purpose of prostitution over a two-and-a-half year period, and law enforcement never recognized her as a human-trafficking victim.).

170. *See* *New York v. G.M.*, 922 N.Y.S.2d 761 (Crim. Ct. 2011) (G.M. had acquired six convictions.).

171. *See* Kelleher, *supra* note 9 (noting that law-enforcement officers arrested Kelsey Collins multiple times before an officer in another state recognized her as a human-trafficking victim).

172. *See* Goldberg, *supra* note 9 (noting that Ms. Johnson acquired three convictions for prostitution and, despite her status as a minor, law enforcement never recognized her as a trafficking victim).

173. CAL. ALLIANCE TO COMBAT TRAFFICKING & SLAVERY TASK FORCE, HUMAN TRAFFICKING IN CAL.: FINAL REPORT 5 (2007), available at http://ag.ca.gov/publications/Human_Trafficking_Final_Report.pdf (on file with the *McGeorge Law Review*). The Attorney General's Office recommended mandatory trafficking training for other individuals likely to encounter human-trafficking victims during the course of their employment (health professionals, service providers, and other first responders). *Id.*

174. CAL. PENAL CODE § 13519.14 (West 2012); IND. CODE ANN. § 5-2-1-9(a)(10) (West 2008); IOWA CODE ANN. § 80B.11 (West 2009); MO. ANN. STAT. § 566.223 (West Supp. 2011); N.M. STAT. ANN. § 30-52-3 (LexisNexis 2012); TEX. OCC. CODE ANN. § 1701.258 (West 2012); VA. CODE ANN. § 9.1-102(55) (West 2012).

175. Moosy, *supra* note 19, at 3. "Most cases prosecuted by DOJ to date have been identified by line-level police officers who encounter sex traffickers or their victims during the normal course of operations: during routine traffic stops, on domestic violence calls, while inspecting liquor licenses, and when intercepting truant children." *Id.*

176. *See supra* notes 88–93 and accompanying text (examining the shortfalls of informal human-trafficking training); Bachar, *supra* note 25 (evidencing the insufficiencies of informal human-trafficking training).

177. *See* Moosy, *supra* note 19, at 4 ("Sex traffickers often operate in multijurisdictional networks, transporting their victims to various brothels, motels, communities and towns.").

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recommend a state-by-state statutory change. However, as it would be unconstitutional to impose a similar federal mandate,¹⁷⁸ a state-by-state statutory change is the only remaining option. Furthermore, as unwieldy as it may be, mandatory domestic-violence training for law-enforcement officers progressed through a similar state-by-state enactment; currently, twenty-five states impose mandatory domestic-violence training for law-enforcement officers.¹⁷⁹ Therefore, as cumbersome as it may be, this multijurisdictional legislative progression is not unprecedented, and domestic-violence training provides legislators with a model.¹⁸⁰

1. *Mandatory Domestic-Violence Training: A Model*

Mandatory domestic-violence training provides a model for mandatory human-trafficking training. While only seven states mandate human-trafficking training for law-enforcement officers,¹⁸¹ twenty-five states¹⁸² mandate domestic-violence training for all law-enforcement officers.¹⁸³ State statutes requiring domestic-violence training for law-enforcement officers vary in the breadth and depth of information covered. Some statutes impose a detailed list of issues arising around domestic violence to be covered in a required training.¹⁸⁴ In

178. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 926 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)) (internal quotations omitted) (“The Federal Government . . . may not compel the States to enact or administer a federal regulatory program.”).

179. *See infra* note 183 (Alaska, California, Connecticut, Florida, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin).

180. *See infra* Part IV.A.1 (discussing the progression of mandatory domestic-violence training enacted state-by-state).

181. CAL. PENAL CODE § 13519.14 (West 2012); IND. CODE ANN. § 5-2-1-9(a)(10) (West 2008); IOWA CODE ANN. § 80B.11 (West 2009); MO. ANN. STAT. § 566.223 (West Supp. 2011); N.M. STAT. ANN. § 30-52-3 (LexisNexis 2012); TEX. OCC. CODE ANN. § 1701.258 (West 2012); VA. CODE ANN. § 9.1-102 (LexisNexis 2012).

182. Alaska, California, Connecticut, Florida, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, and Wisconsin.

183. ALASKA STAT. ANN. § 18.65.510 (2010); CAL. PENAL CODE § 13519; CONN. GEN. STAT. ANN. § 7-294g (West 2008); FLA. STAT. ANN. § 943.1701 (West 2006); IDAHO CODE ANN. § 39-6316 (2011); 50 ILL. COMP. STAT. ANN. 705/7 (West 2005); IOWA CODE ANN. § 80B.11(1)(a)–(b); KY. REV. STAT. ANN. § 15.334(1)(b) (West Supp. 2011); ME. REV. STAT. ANN. tit. 25, § 2803-B(1)(D) (West Supp. 2011); MASS. GEN. LAWS ANN. ch. 6, § 116A (West Supp. 2012); MICH. COMP. LAWS ANN. § 776.22 (West 2006); MO. ANN. STAT. § 590.040 (West 2011); NEB. REV. STAT. ANN. § 42-927 (West 2008); N.J. STAT. ANN. § 2C:25-20 (West 2005); N.Y. EXEC. LAW § 214-b (McKinney 2010); N.D. CENT. CODE § 14-07.1-14 (2004); OHIO REV. CODE ANN. § 109.73 (LexisNexis 2007); OKLA. STAT. ANN. tit. 70, § 3311.5(G) (West Supp. 2011); R.I. GEN. LAWS ANN. § 12-29-6 (2002); S.D. ADMIN. R. 2:01:08:04(5) (2011); TENN. CODE ANN. § 38-8-112(37) (2003); VT. STAT. ANN. tit. 20, § 2365 (West 2012); VA. CODE ANN. § 9.1-102; WASH. REV. CODE ANN. § 10.99.030 (West 2012); WIS. STAT. ANN. § 165.85(b)(1d)(a) (West Supp. 2011).

184. *See, e.g.*, CAL. PENAL CODE § 13519(c) (requiring law-enforcement officers to undergo a domestic-violence training covering the “nature and extent of domestic violence,” “signs of domestic violence,” “legal rights of, and remedies to, victims of domestic violence,” “impact on children of law enforcement intervention

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contrast, some of the statutes are non-descriptive and merely require that law-enforcement officers attend a domestic-violence training.¹⁸⁵ Inherent in non-descriptive mandatory-training statutes is the danger of under-informative or inconsistent trainings.

While only twenty-five states have mandatory domestic-violence training, this state-by-state enactment provides a model for a similar state-by-state mandate for human-trafficking training.

2. *Mandatory Human-Trafficking Training for All Law-Enforcement Officers*

Using domestic-violence training as a model, this Comment argues that every jurisdiction should mandate human-trafficking training for its law-enforcement officers. Furthermore, due to the need for consistency across jurisdictions and the breadth of issues arising around human trafficking,¹⁸⁶ this Comment proposes a statutory amendment imposing detailed obligations and topics to be covered, more like the existing Indiana statute,¹⁸⁷ as opposed to the vague Texas statute.¹⁸⁸

Of course, there are certain drawbacks to implementing mandatory human-trafficking training for all law-enforcement officers. First, mandating training will have a substantial fiscal impact on each state. In addition to the initial expense in enacting a new statute, the training itself will require initial funding and continued maintenance. However, as many jurisdictions already require continuing education for law-enforcement officers, requiring human-trafficking training does not “result in *increased* costs” because this existing funding may support human-trafficking training.¹⁸⁹ Additionally, if law-enforcement officers are trained to recognize the signs of trafficking, it is reasonable to assume that more traffickers will be criminally prosecuted, thereby increasing pressure on the

in domestic violence,” “services and facilities available to victims and batterers,” among other topics).

185. See, e.g., N.D. CENT. CODE § 14-07.1-14 (requiring law-enforcement officers undergo “an education and training program . . . concerning the handling of crimes involving domestic violence,” stressing “the enforcement of criminal laws in domestic violence cases and the use of community resources”).

186. See Moosy, *supra* note 19, at 4 (“Because traffickers are mobile and cross jurisdictional lines, victim identification training must be implemented not just in one jurisdiction, but in neighboring jurisdictions as well.”).

187. IND. CODE ANN. § 5-2-1-9(a)(10) (West 2008) (requiring law-enforcement officers undergo training examining “the human and sexual trafficking laws”; “[i]dentification of human and sexual trafficking”; “[c]ommunicating with traumatized persons”; “[t]herapeutically appropriate investigative techniques”; “[c]ollaboration with federal law enforcement officials”; “[r]ights of and protections afforded to victims”; and “[t]he availability of community resources to assist human and sexual trafficking victims”).

188. See TEX. OCC. CODE ANN. § 1701.258 (West 2012) (requiring law-enforcement officers to take a four-hour training “includ[ing] a review of the substance of” penal code sections defining human trafficking).

189. See *County of Los Angeles v. Comm’n on State Mandates*, 2 Cal. Rptr. 3d 419, 429 (Ct. App. 2003) (addressing similar fiscal concerns for implementing mandatory domestic violence training, and holding that requiring domestic violence training will not increase costs for law enforcement training as the state can use the existing continuing education fund for law-enforcement officers).

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prison system. While the financial impact of implementing mandatory training is a substantial burden, a cost-benefit analysis dictates that individual freedom and justice must outweigh the fiscal impact.

Another concern with implementing mandatory human-trafficking training for law enforcement is that there is no way to ensure consistency across state lines. However, the same is true of mandatory domestic-violence training, yet twenty-five states imposed mandatory domestic-violence training.¹⁹⁰

Perhaps the best criticism of this proposal is the argument that it is only necessary to implement such a training program in highly trafficked-to areas. However, due to the mobility of human trafficking¹⁹¹ and the issues of underreporting and inaccurate statistics, limiting such training to only certain states creates an unworkable line-drawing issue.¹⁹²

Therefore, despite these valid criticisms of a multi-state statutory scheme to mandate human-trafficking training for all law-enforcement officers, the importance of recognizing a victim of a crime and treating him or her as such rather than as a criminal outweighs any other state interest. Mandatory human-trafficking training for law-enforcement officers is the best way to provide law enforcement with the tools they need to recognize trafficking and interrupt the trafficking cycle, thereby preventing dual victimization.

B. After-the-Fact Relief

Because human trafficking is so difficult to recognize, human-trafficking victims will inevitably slip through the cracks, even with the best law-enforcement training in place.¹⁹³ Therefore, it is imperative that states provide remedies for those human-trafficking survivors who slipped through the cracks of the criminal-justice system, in addition to preventative measures.¹⁹⁴ This Comment urges states to provide both an affirmative defense to criminal charges and vacation of judgment on a showing of then-present human trafficking.¹⁹⁵

190. See *supra* Part IV.A.1 (discussing existing domestic violence training for law-enforcement officers).

191. See Moosy, *supra* note 19, at 4 (“Sex traffickers often operate in multijurisdictional networks, transporting their victims to various brothels, motels, communities and towns.”).

192. Should mandatory training be required only in the highest trafficked-to states? The highest trafficked-to and neighboring states? Will such a line-drawing scheme be reviewed in the future to see if “highly trafficked-to” states have changed?

193. See *supra* Part II.B (discussing the difficulties in recognizing human trafficking).

194. See *infra* Part IV.B.1. This Comment urges each state to enact an affirmative defense that a criminal defendant may raise when the crime committed was a direct result of a then-present human-trafficking situation. The trafficking victim need not show any force or threat of force to prevail on such a defense.

195. See *infra* Part IV.B.2 (explaining why both forms of relief, while important, are insufficient when taken alone).

*McGeorge Law Review / Vol. 44**1. Affirmative Defense to Criminal Charges*

Providing an affirmative defense for defendants to raise during trial is an imperative form of relief for those human-trafficking victims who slip through the cracks. Currently, only eight states provide any affirmative defense,¹⁹⁶ and this Comment argues the majority of these statutes are too limited to provide effective relief for human-trafficking victims.¹⁹⁷ Conversely, a few of the existing statutes are too broad and would apply to too many crimes.¹⁹⁸

In light of the existing and flawed affirmative defense statutes,¹⁹⁹ this Comment urges each state to enact an affirmative defense that a criminal defendant may raise when the crime committed was a direct result of a then-present human-trafficking situation.²⁰⁰ The trafficking victim need not show any force or threat of force to prevail on such a defense.²⁰¹ Furthermore, the affirmative defense must be available to more human-trafficking victims than the majority of the existing statutes currently allow for. Specifically, the affirmative defense must apply to crimes other than prostitution and loitering for the purpose of prostitution.²⁰² This Comment recognizes that there are certain crimes to which

196. ALA. CODE § 13A-6-159 (LexisNexis 2012); IOWA CODE ANN. § 710A.3 (West Supp. 2011); MINN. STAT. ANN. § 609.325(4) (West 2009); N.H. REV. STAT. ANN. § 645:2(IV) (LexisNexis 2012); N.J. STAT. ANN. § 2C:34-1(e) (West 2005); OKLA. STAT. ANN. tit. 21, § 748(D) (West Supp. 2012); TEX. PENAL CODE ANN. § 43.02(d) (West 2011); WIS. STAT. ANN. § 939.46(1m) (West Supp. 2011).

197. See ALA. CODE § 13A-6-159; MINN. STAT. ANN. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); N.J. STAT. ANN. § 2C:34-1(e); TEX. PENAL CODE ANN. § 43.02(d) (limiting the affirmative defense to charges for prostitution and loitering for the purpose of prostitution, thereby effectively limiting the defense to sex-trafficking victims rather than the broader category of human-trafficking victims); see also IOWA CODE ANN. § 710A.3; MINN. STAT. ANN. § 609.325(4) (requiring not only the direct relation between the crime committed and the trafficking situation, but also a showing of force or threat of force); *supra* Part III.C (discussing the limitations of most of the affirmative defense statutes currently available to human-trafficking victims during a criminal trial).

198. See N.J. STAT. ANN. § 2C:34-1(e); OKLA. STAT. ANN. tit. 21, § 748(D) (Neither New Jersey nor Oklahoma require the crime committed be directly related to the trafficking situation. Rather, these statutes require only that the defendant was a human-trafficking victim at the time the crime was committed.); see also MODEL PROVISIONS, *supra* note 96 (recommending states enact an affirmative defense that does not have a direct-relation requirement).

199. ALA. CODE § 13A-6-159; IOWA CODE ANN. § 710A.3; MINN. STAT. ANN. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); N.J. STAT. ANN. § 2C:34-1(e); OKLA. STAT. ANN. tit. 21, § 748(D); TEX. PENAL CODE ANN. § 43.02(d); WIS. STAT. ANN. § 939.46(1m).

200. This statutory scheme would maintain the direct-result requirement, like Alabama, Iowa, Minnesota, New Hampshire, Texas, and Wisconsin. ALA. CODE § 13A-6-159; IOWA CODE ANN. § 710A.3; MINN. STAT. ANN. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); TEX. PENAL CODE ANN. § 43.02(d); WIS. STAT. ANN. § 939.46(1m).

201. This Comment rejects the force or threat of force requirement that Iowa and Minnesota impose on a trafficking victim attempting to raise an affirmative defense. IOWA CODE ANN. § 710A.3; MINN. STAT. § 609.325(4).

202. See ALA. CODE § 13A-6-159; MINN. STAT. ANN. § 609.325(4); N.H. REV. STAT. ANN. § 645:2(IV); N.J. STAT. ANN. § 2C:34-1(e); TEX. PENAL CODE ANN. § 43.02(d) (limiting the affirmative defense to prostitution and loitering for the purpose of prostitution, thereby effectively limiting the defense only to victims of sex-trafficking rather than human-trafficking victims).

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an affirmative defense should not apply.²⁰³ However, these limits must not be so austere as to limit applicability of the affirmative defense to only one category of human-trafficking victims.²⁰⁴ The proposed affirmative defense will be neither too broad nor too narrow,²⁰⁵ and will provide relief to human-trafficking victims who slip through the cracks of the criminal-justice system.

2. *Vacation of Judgment on a Showing of Human Trafficking*

While an affirmative defense is a necessary form of relief for a trafficking victim charged of a crime, a trafficking victim may be unwilling at the time of trial to take advantage of this relief by raising an affirmative defense.²⁰⁶ Therefore, it is imperative—even in jurisdictions that provide an affirmative defense²⁰⁷—that states also enact a statute allowing victims to vacate a criminal judgment upon a showing of a then-present trafficking situation.

As this Comment goes to press, only New York has a vacation-of-judgment statute.²⁰⁸ The first of its kind, the statute allows broad judicial discretion, as it does not require a showing of particular facts.²⁰⁹ Despite this broad judicial discretion, New York's statute is nevertheless too narrow, as it applies only to prostitution or loitering for the purpose of engaging in prostitution.²¹⁰ Therefore, a human-trafficking victim who commits any crime other than these two offenses as a direct result of a then-present trafficking situation would be left without any form of relief, even in New York.²¹¹ For example, in Silvia Gonzalez's case,²¹² the court denied her motion to vacate her prior conviction for resisting arrest,

203. Prohibiting the defense for homicide or other violent crimes, for example, would be a permissible limitation.

204. The affirmative defense is limited to sex trafficking in the majority of jurisdictions currently providing such a defense. ALA. CODE § 13A-6-159; MINN. STAT. ANN. § 609.325(4); N.H. REV. STAT. ANN. § 645:2; N.J. STAT. ANN. § 2C:34-1(e); TEX. PENAL CODE ANN. § 43.02(d).

205. As the proposed affirmative defense statute maintains the direct-result requirement, it is not overbroad. *See supra* note 198 and accompanying text. Furthermore, the proposed affirmative defense statute is not too limited, as it does not include a force or threat of force requirement, and it is not restricted to only prostitution or loitering for the purpose of prostitution. *See supra* note 197 and accompanying text.

206. *See supra* Part II.B (discussing barriers human-trafficking victims encounter with the judicial system more generally); Part III.C (discussing the potential difficulties in claiming a then-present trafficking situation as an affirmative defense).

207. *See supra* Part IV.A (analyzing mandatory human-trafficking training for law-enforcement officers); Part IV.B.1 (considering the affirmative defense against criminal charges).

208. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005 & Supp. 2012); *see also supra* Part III.D (analyzing New York's unique vacation statute).

209. *New York v. Gonzalez*, 927 N.Y.S.2d 567, 570 (Crim. Ct. 2011). “[T]he legislature did not require any specific corroborating facts or other evidence which would [sic] to support a defendant’s application By avoiding bright-line rules and formulaic determinations, the legislature squarely gave the Courts the discretion to grant relief pursuant to [New York Criminal Procedure Law section] 440.10(1)(i)” *Id.*

210. N.Y. CRIM. PROC. LAW § 440.10(1)(i).

211. *See id.* (applying only to prostitution or loitering for the purpose of prostitution).

212. *See supra* notes 1–8 and accompanying text.

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because resisting arrest was “not a prostitution related offense.”²¹³ Therefore, even though this crime was a direct result of a then-present trafficking situation, this unique form of relief remained out of Silvia’s reach.²¹⁴ Furthermore, by limiting the statute’s applicability so narrowly to these two crimes, the statute effectually only applies to *sex* trafficking, rather than *human* trafficking.²¹⁵

In light of these considerations, this Comment urges states to enact a vacation-of-judgment statute that requires the movant show (1) the crime committed was a direct result of (2) a then-present human-trafficking situation. Like the New York statute, this proposed statute would not require a showing of particular facts, thereby allowing broad judicial discretion.²¹⁶ However, unlike the New York statute, the proposed statute must not be limited solely to prostitution or loitering for the purpose of prostitution, thereby limiting applicability to sex-trafficking victims.²¹⁷ Nonetheless, this Comment recognizes that there are certain crimes to which such relief should not apply, provided those limits do not effectively restrict the relief’s applicability to one category of trafficking victims.²¹⁸ In this way, the proposed vacation-of-judgment statute would apply to a human-trafficking victim who committed a crime due to a then-present trafficking situation, and would allow enough judicial discretion to provide effective after-the-fact relief to a trafficking victim who slips through the cracks.

V. CONCLUSION

The number of human-trafficking victims charged and prosecuted for crimes²¹⁹ indicates a systemic failure within the criminal-justice system to recognize the crime and its players, and requires statutory changes. These changes must focus on both preventing dual victimization before it occurs²²⁰ and

213. *Gonzalez*, 927 N.Y.S.2d at 569.

214. *Id.*

215. See N.Y. CRIM. PROC. LAW § 440.10(1)(i) (applying only to prostitution or loitering for the purpose of prostitution).

216. *Gonzalez*, 927 N.Y.S.2d at 570. “[T]he legislature did not require any specific corroborating facts or other evidence which would to [sic] support a defendant’s application. . . . By avoiding bright-line rules and formulaic determinations, the legislature squarely gave the Courts the discretion to grant relief pursuant to [New York Criminal Procedure Law section] 440.10(1)(i) . . .” *Id.*

217. Cf. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (limiting the vacation of prior convictions statute to prostitution or loitering for the purpose of prostitution).

218. See *supra* notes 202–04 and accompanying text.

219. See, e.g., *Gonzalez*, 927 N.Y.S.2d at 568 (Sylvia Gonzalez had acquired eighty-six convictions for prostitution or loitering for the purpose of prostitution over a two-and-a-half year period, and law enforcement never recognized her as a human-trafficking victim.); *New York v. G.M.*, 922 N.Y.S.2d 761 (Crim. Ct. 2011) (G.M. had acquired six convictions.); Kelleher, *supra* note 9 (noting that law-enforcement officers arrested Kelsey Collins multiple times before an officer in another state recognized her as a human-trafficking victim); Goldberg, *supra* note 9 (noting that Ms. Johnson acquired three convictions for prostitution and, despite her status as a minor, law enforcement never recognized her as a trafficking victim).

220. Mandatory human-trafficking training seeks to prevent dual victimization before it occurs. See

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providing relief for those human-trafficking victims who will inevitably slip through the cracks.²²¹ This Comment urges states to enact a three-part statutory response to dual victimization: (1) mandatory human-trafficking training for all law-enforcement officers;²²² (2) an affirmative defense for crimes committed as a direct result of a then-present human-trafficking situation;²²³ and (3) vacation of prior convictions on a showing that the crime committed was a direct result of a then-present human-trafficking situation.²²⁴ Of these statutory changes, only imposing mandatory law-enforcement training *prevents* dual victimization;²²⁵ however, it is imperative that jurisdictions adopt both an affirmative defense and a vacation of prior conviction statute to provide relief for those victims who will inevitably slip through the cracks, even with the best human-trafficking training in place.

supra Part IV.A (advocating each state provide mandatory human-trafficking training for law-enforcement officers).

221. An affirmative defense and a vacation of prior convictions statute are important forms of relief for victims who slip through the cracks. *See supra* Part IV.B (advocating each state provide an affirmative defense for human-trafficking victims and provide a vacation of prior convictions statute).

222. Mandatory human-trafficking training for all law-enforcement officers prevents dual victimization. *See supra* Part IV.A (advocating each state mandate human-trafficking training for all law-enforcement officers, and that this statute detail specific topics to be covered during this training).

223. To provide relief for human-trafficking victims who slip through the cracks, jurisdictions should have an affirmative defense that human-trafficking victims may raise during trial on a showing that the crime committed was a direct result of a then-present human-trafficking situation. *See supra* Part IV.B.1 (advocating each state provide an affirmative defense for human-trafficking victims).

224. As human-trafficking victims may be unable or unwilling to raise an affirmative defense during trial, jurisdictions should further provide a vacation of prior convictions statute, on which an individual may prevail on a showing that the convicted crime was a direct result of a then-present trafficking situation. *See supra* Part IV.B.2 (advocating each state provide a vacation of prior convictions statute).

225. The primary issue this Comment seeks to address.