

ADDRESSING THE CRIMINALIZATION OF SURVIVORS OF SEX TRAFFICKING:  
RECOMMENDATIONS FOR JUDICIAL AND LEGISLATIVE IMPROVEMENTS

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Addressing the Criminalization of Survivors of Sex Trafficking: Recommendations for  
Legislative and Judicial Improvements

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## **Abstract**

Addressing the Criminalization of Survivors of Sex Trafficking:  
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### **Statement of the Problem**

Sex Trafficking in America is an issue which many have described to be “hidden in plain sight” for years. With public awareness increasing and new language being used to describe old crimes, laws have begun to change to provide protection for victims and prosecute offenders. Unfortunately, the same laws meant to protect victims may also criminalize them. For survivors of sex trafficking, crimes they may be coerced to commit while being a victim can significantly impact the trajectory of their lives after they exit the life. Inconsistencies in state and federal response for survivors of trafficking who are left with a criminal record create difficult to navigate situations for survivors to move forward with their life after the trafficking experience.

Survivors of trafficking may have the opportunity to take advantage of a diversion court which will provide them with an alternative to incarceration or “off ramp” but it may prolong the court’s presence in a victim’s life and enhance power dynamics as they are offering mandatory services at the expense of their criminalization.

Training in issue identification and dynamics of sex trafficking is necessary to make sure that victims are identified no matter how they may enter the criminal justice system. State and federal statutes need to be examined to make sure that they are providing survivors with post-

conviction relief retroactively and looking at their policies to find ways to avoid criminalizing victims.

### **Methods and Procedures**

Secondary research will be examined to determine the current effectiveness of human trafficking diversion courts. Evaluations of current human trafficking diversion courts such as the intervention courts in New York City and the Washtenaw County Human Trafficking Court in Michigan will be compared to produce a theme of common problems present in the implementation of human trafficking courts and provide recommendations to enhance the court's current approach to victims of trafficking who have been criminalized.

Secondary research on different state and federal laws will be examined to determine their effectiveness in protecting survivors of human trafficking. These laws will be examined to observe the ways in which survivors are criminalized for their own victimization and provide recommendations on a uniform form of relief for survivors who have been criminalized and ways to prevent criminalization of survivors through issue identification and an affirmative defense strategy.

### **Summary of Results**

Human Trafficking Intervention Courts are fairly new and many have been evaluated by researchers and provided with recommendations for improvement. This seminar paper has found that Human Trafficking Intervention Courts have their flaws as some advocates believe that the criminal justice system cannot use their own resources to change their system that criminalized survivors of trafficking. It has been found that when a Human Trafficking Intervention Court is recommended, that a range of services such as counseling, financial wellness, mental health

services, alcohol and other drug treatment, and other advocacy services are accessible for the defendant. The accessibility of these services assists the defendant with exiting the lifestyle.

This seminar paper has also found that *vacatur* is an ideal remedy for survivors with criminal records as a result of their victimization. *Vacatur* would allow for a more in depth relief than expungement alone. It would show that the defendant was not found to be responsible for the crime they committed and would erase the conviction. *Vacatur* does have a few drawbacks as the implementation of the laws vary. *Vacatur* laws vary by state, which makes it difficult for survivors to be given the relief they deserve especially with a highly transient crime like trafficking where offenses may be completed in different states. *Vacatur* laws also have differing temporal limitations which requires that a motion for *vacatur* needs to be made within a certain amount of time. This creates difficulty for some defendants as it may take years for them to realize the impact that these convictions have on their life or they may not know that it is an option for them early enough for the motion to be filed. Creating a broad *vacatur* law with no time limitations that covers prostitution and prostitution-related offenses would benefit survivors best.

While routing a victim to services through their own prosecution is not ideal, until there is a large shift inside of the criminal justice system, it is a temporary solution to providing “off ramps” for victims within the criminal justice system. The criminal justice system needs to seek to understand the position of victims of sex trafficking who have been coerced or forced into committing crimes with or on behalf of their trafficker and modify their system and policies to push for criminalization of the traffickers rather than the victims. Because it has been shown in research that victims of sex trafficking do not always enter the criminal justice system based on prostitution or prostitution related offenses, ongoing training on identifying potential victims of

sex trafficking needs to be provided for law enforcement, public defenders, prosecutors, and other court officials so they are able to provide survivors with options for assistance if they choose.

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## **Addressing the Criminalization of Survivors of Sex Trafficking: Recommendations for Legislative and Judicial Improvements**

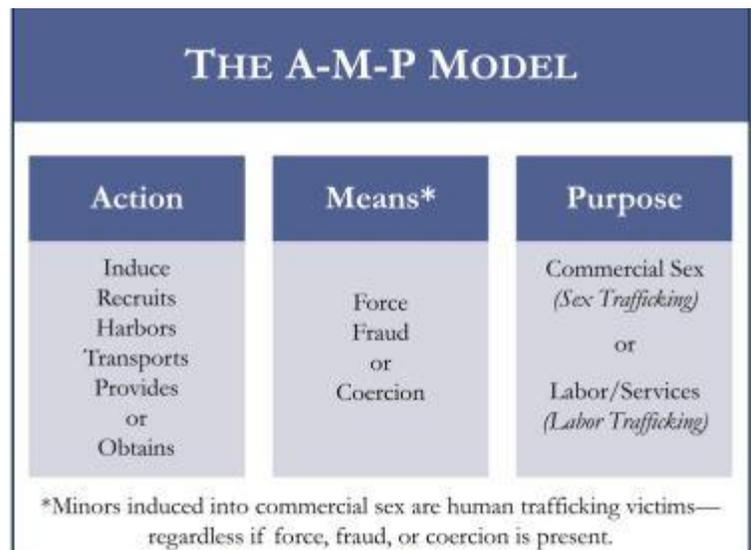
Jane is approached by a man online who expresses romantic interest in her. The two go on a few dates and after weeks, David offers to take Jane on a nice getaway out of town just a few cities over. David takes Jane up highway 94 in Milwaukee to a local strip club in Northern Wisconsin and tells her that she is pretty enough to be a dancer. David encouraged Jane to apply and Jane believes that David loves her, and she is willing to do anything to support him and their relationship. After a few nights of dancing, David tells Jane that if she conducts a few “dates” after dancing she would bring in a lot more money and they would be able to have the life that he promised her. Jane at first refuses the idea of having sex for money and is met with violence by David. Jane decides that she does not have to tolerate violence by David and tries to leave. David brutally beats Jane into submission and threatens to harm her family if she does not go on a date. Jane then complies out of fear for her family’s safety and for her own safety. David isolated Jane from her family by moving her from state to state and frequently threatened violence against her and her family. Seeing no way out, Jane was coerced into staying with David and engaging in acts of prostitution.

While Jane was involved in trafficking, she was often arrested and charged with prostitution or related crimes due to threats from David, her trafficker. Jane made it out of “the life” due to police intervention and David was criminally charged with human trafficking. Although Jane testified in the criminal case against David, she still has her own criminal record as a result of her victimization. Jane faces hardship daily finding stable employment as she is often denied for jobs after a background check. She has difficulty finding housing because her trafficker had her rent the shared apartment in her name and she now has an eviction. She feels

social stigma based on her trauma. Jane is a fictional example of one of the estimated 300,000 to 2 million people who are victims of human trafficking annually (Center for Court Innovation, 2015).

The presence of a court intervention program when Jane first had police contact for prostitution may have provided her with the off ramp and services she needed to exit that lifestyle. A model for court intervention would work to route Jane to services rather than into the criminal justice system. An intervention court may have been able to address the root causes of her what was seen to be “criminal behavior”. Depending on the state in which Jane received criminal charges, she may be eligible for expungement or *vacatur* which will erase her criminal conviction for prostitution as she was a victim of trafficking. If Jane is in a state which does not have *vacatur* or any human trafficking intervention court, she may face ongoing hardship as she has not only been criminally punished for her own victimization but now faces social stigma that impacts her ability to gain employment and housing.

Human trafficking is an umbrella term defined by the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children as, “recruitment, transportation, transfer, harboring, or receipt of persons by improper means (such as force, abduction, fraud, or coercion) for an improper purpose including forced labor or sexual exploitation” (United Nations Human Rights Office of the High Commissioner, 2000) The Action-Means-Purpose (AMP)



Model by the Polaris Project breaks down the definition of human trafficking by specific acts that need to be taken to prove the elements of the crime. Not to be confused with smuggling, human trafficking, specifically sex trafficking, does not have to be committed across borders. It is a misconception that all victims of sex trafficking have been kidnapped and brought from overseas. The difference between trafficking and smuggling is that typically individuals are consenting to be smuggled borders and that crime is transportation based rather than sex trafficking in which the crime is exploitation based (Polaris Project, 2012). Smuggling can turn into trafficking if there are elements of force, fraud, or coercion present in order to exploit that individual for labor or sex purposes (“Trafficking in Persons and Migrant Smuggling,” n.d.). Until those elements are present, cases of smuggling are typically about the transport across borders (“Trafficking in Persons and Migrant Smuggling,” n.d.).

Sex trafficking is defined as “the recruitment, harboring, transportation, provision or, obtainment of a person for the purpose of commercial sex through the use of force, fraud, or coercion” (“Fact Sheet,” 2017.). For a situation to move from prostitution to sex trafficking, the elements of either force, fraud, or coercion must be present for those over 18. For minors, those elements do not need to be present and they are automatically assumed to be victims of sex trafficking if involved in a commercial sex act. For adults, force would include physical force (punching, slapping, hitting, choking, sexual force), fraud would include making false promises, or coercion which is defined as any scheme or plan to make someone believe that something bad will happen if they do not comply and also includes manipulation or psychological abuse to make the victim dependent upon them (Emerson et. al, 2014; Peters, 2015). The elements of force, fraud, or coercion are important to understand because victims may be so deeply coerced that they may not self-identify as victims leaving services providers, court officials, and law

enforcement with difficult tasks of understanding whether they are engaging in the sex trade<sup>1</sup> voluntarily or out of force, fraud, or coercion. If someone is initially voluntarily engaged in the sex trade but are later there via the elements of force, fraud, or coercion, legally they are still considered victims of human trafficking and their initial consent to commit a commercial sex act does not play a part in legal decisions (Larche, 2014).

Sex trafficking in the United States is an issue that impacts individuals and communities. Vulnerable populations such as youth, individuals with disabilities, the LGBTQ population, etc. are more likely to be exploited through commercial sexual exploitation (Peters, 2015). It is a widely held misconception that sex trafficking is an issue that only influences young women and girls overseas. Sex trafficking occurs in many venues outside of street-based prostitution. Individuals are commonly exploited for the purpose of commercial sex in casinos, hotels and tourism, sporting events, massage parlors, and online (Emerson, Kroman, Mogulescu, & Sartori, 2014). Some believe that only individuals who are not legal US residents are trafficked. Jude Kluger, a New York judge overseeing a Human Trafficking Intervention Court cites that “trafficking is as much an issue domestically as it is internationally. In the United States, about 80% of the victims involved in sex trafficking are citizens...Many of these victims end up in court as defendants with charges with prostitution related offenses” (as cited by Gruber et al., p. 1355, 2016).

Historically, society and the courts would refer to acts of prostitution as ones done of free will/choice and base criminal sanctions on that charge. Sex trafficking as we know it today has

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<sup>1</sup> The term sex trade is meant to include any sexual act which is exchanged for money or goods. Examples include: prostitution, escorting, camera shows, stripping.

gained much more attention within the past two decades. Godziak and Collett (2005) cite Josephine Butler as one of the nineteenth century advocates who brought the topic of forced or involuntary prostitution to the forefront. Nineteenth century feminists coined the phrase “White Slave Trade” to differentiate from the slavery of Africans. The White Slave Trade was used to describe “the abduction and transport of white women for prostitution” (Gozdziak & Collett, 2005). The social movement against the White Slave Trade was said to have grown out of the abolitionist movement against the regulation of prostitution.

In 1902, an international agreement to address fraudulent recruitment of women for prostitution in another country was signed by 16 states however this agreement did not draw a connection between white slavery and prostitution (Gozdziak & Collett, 2005). Eight years later the agreement was broadened to include the trafficking of women and girls. In 1910, the White Slave Traffic Act (later known as the Mann Act) criminalized anyone who “procured, enticed, or led away, even with consent, a woman or underage girl for an immoral purpose” (Peters, 2015). Eleven years later, the trafficking of boys was added into the agreement. In 1933, the International Convention for the Suppression of the Traffic in Women created a law against recruitment for prostitution in another country. It wasn’t until the 1980s that the topic of sex trafficking resurfaced due to the feminist movement, aids epidemic and awareness of the trafficking of children.

Following this resurfaced awareness of issues of sex work and prostitution, lawmakers attempted to create new anti-trafficking laws. Upon the creation of these anti-trafficking laws, there was much discrepancy between two different sides with opposing views on prostitution. Stolz (as cited by Peters, 2015) described these two parties as the anti-prostitution sphere and the human trafficking sphere. The anti-prostitution sphere focused on trafficking into prostitution

and the special interest groups that made up that sphere included faith-based groups, conservatives, and some radical feminists. They believed that sex trafficking was the most severe form of forced labor and they define prostitution itself as trafficking and focused to end the demand of prostitution (Peters, 2015). The human trafficking sphere featured human rights organizations, public health, labor, and migration organizations and these groups advocated for human trafficking to include movement to all areas of forced labor including involuntary prostitution (Peters, 2015). These two groups showed how difficult it was for lawmakers to come up with a uniform definition of such a large crime.

These two spheres were advocating for different definitions of human trafficking that would be present in both The Trafficking Victims Protection Act (TVPA) and the United Nations Protocol which were being formed at the same time. During the creation of these policies, there was also debate on whether the elements of force, fraud, or coercion needed to be present for the trafficking into prostitution (Peters, 2015). It was concluded that these elements are incredibly important to be featured in the definition of trafficking because these elements are what can take a case that is solely wage exploitation to trafficking or a case in which some assumed was trafficking to wage exploitation. The Clinton Administration's position was aligned with the human trafficking sphere which believed that force and fraud was necessary to distinguish between trafficking and prostitution (Peters, 2015). During testimony, Clinton described that the conditions of the work or service as opposed to the type of work or service performed would be the core of the trafficking offense (Peters, 2015).

The anti-prostitution sphere greatly disagreed and believed that all forms of recruitment and transportation for sex work, whether there is force or deception, should be considered trafficking (Peters, 2015). This was inspired by the feminist abolitionist movement which

equates all forms of prostitution with sex trafficking (Gruber, Cohen, & Mogulescu, 2016). They believed that if there was no distinction between voluntary and involuntary prostitution, then prostitution could not be consented to. This then became a large moral debate in which conservatives and Christians took a moral stance on the act of prostitution being wrong and unethical (Gruber et al., 2016). While these two spheres disagreed on what exactly constitutes as trafficking, all sides agreed that those who are engaged in commercial sex work are not criminals (Gruber et al., 2016).

Ultimately, the TVPA created a clear definition between prostitution and trafficking while the UN Protocol held in the belief that prostitution was a practice that they believed should be eliminated but still agreed that the protocol should include trafficking in which force, fraud or coercion is present and does not include any involuntary acts. The creation of the TVPA has shaped the way in which the United States responds to cases of domestic and international sex trafficking (Zornosa, 2016). The criminal justice system is now coming up to speed on how sex trafficking can present itself in their various areas thanks to advocacy groups and survivor leaders who have consistently been a part of reauthorizations of the TVPA, as well as new legislation.

Sex trafficking is a low risk, high reward crime for traffickers because often their victims are the ones who are arrested and prosecuted. When victims are prosecuted with prostitution or prostitution related crimes they are often discounted as “willing and consenting” adults rather than individuals who have been manipulated by power and control and convinced or even forced to perform sexual acts for money or goods (Larche, 2014).

In 2010, New York became the first city to pass a *vacatur* law that allowed survivors of trafficking to vacate convictions of prostitution. Since then, many other states have enacted

*vacatur* laws but there are inconsistencies on what convictions qualify of being eligible for *vacatur* (Larche, 2014). Additionally, federal *vacatur* does not exist for victims who are federally charged with trafficking related crimes (Emerson & Aminzadeh, 2017).

From February 2015 to March 2016 there were 1,413 defendants, who were also victims of trafficking, who were charged with prostitution related offenses in New York City (Dank et al., 2017). For adults who are victims of sex trafficking, their traffickers often hold them mentally captive by convincing them that no one will believe what they are experiencing; and if law enforcement or the courts become involved, they (victim) will be arrested for prostitution or any other prostitution related crimes (Emerson & Aminzadeh, 2017). The response of law enforcement and the courts support that message.

To combat the amount of victims of trafficking who are pushed through the criminal justice system, problem-solving courts such as Human Trafficking Intervention Courts (HTIC) have been developing across the nation to make sure that victims who are navigating the criminal justice system are identified and routed into probationary services instead of being charged with prostitution or prostitution related offenses (McDonough & Schlabach, 2016). Since the creation of the first statewide HTIC located in New York in 2013, little research has been done regarding the effect of human trafficking problem solving courts on recidivism. As human trafficking is gaining more public attention and attention within the courts, more human trafficking problem solving courts or diversion programs are being created therefore an analysis of current programs is beneficial.

In a 2017 research report on the repercussions of policing prostitution, Dank et al. (2017) stated that there is a strong conflict between the intentions of problem solving courts and the way that victims are routed into the court. Dank et al. (2017) argue that there is a clear problem with

criminalization being used to address the needs of the victim. While that is true, legislation is far from creating a solution that will not criminalize those who are involved in prostitution even when the elements of force, fraud, or coercion are present (Dank, Yahner, Yu, Mogulescu, & White, 2017).

Until there is a clear paradigm shift in the approach to prostitution as a result of trafficking, problem-solving courts are a viable option to route victims into services while causing the least harm possible. Furthermore, surveys conducted by the Urban Institute (2017) suggest that programming that the courts find valuable and the programming that the participants find valuable can be at odds, leaving the program seeming more like a mandatory service instead of one that may benefit them long term (Dank et al., 2017). Additionally, legislation regarding human trafficking places an emphasis on punishing traffickers. In some cases, victim needs are not a priority over the prosecution of a trafficker (Dempsey, 2015). The criminal justice system should work to have more training on issue identification so that victims do not have to interact with the criminal justice system for lengths of time before they are found to be a victim of trafficking. Victims should be protected and have the opportunity to receive benefits such as *vacatur* or expungement at the least to ensure that they are able to live a life outside of their trauma experience and all of the labels that come with it.

### **Trafficking Victims Protection Act of 2000**

In November of 1999, the Trafficking Victims Protection Act (TVPA) was introduced. This bill created a broader view of trafficking to not only include the sexual trafficking of women and girls but boys and men as well. Even broader, it included “non sexual forms of compelled service” which included labor trafficking (Peters, 2015). The Trafficking Victims Protection Act was the first comprehensive federal legislation to address human trafficking and

assist victims. The purpose of the TVPA is to combat trafficking in persons which the act describes as a “contemporary manifestation of slavery whose victims are primarily women and children” (Peters, 2015). The TVPA formatted the Three P anti-trafficking strategy – prevention, protection, and prosecution (Peters, 2015). Additionally, TVPA provides funding for programs that assist victims with housing, psychiatric needs, and legal assistance.

Prior to the TVPA, the statutes used to prosecute traffickers were prosecution focused and did not consider the needs of the victims. At the time, this severely impacted individuals who were trafficked for either labor or sex but did not have legal documents (Peters, 2015). As a result of their victimization, they were at risk of being deported (Payne, 2006). The TVPA provided options for victims without legal documentation to remain safe and obtain visas that are specifically for individuals who have been trafficked. The protective measures as illustrated by the TVPA are as follows: to provide preventative measures against the trafficking of individuals across the US borders, provide prosecution for those who traffic individuals, they offer protection and assistance for victims already in the US and they provide monitoring of other countries activities that contribute to trafficking by collecting data from the Trafficking In Persons (TIP) Report (“Trafficking In Persons Report”, as cited by Payne, 2006). The TVPA requires that countries that receive financial or security aid from the United States submit an annual report assessing their efforts to combat trafficking. If they fail to meet those standards they are at risk of losing economic or security funding (Payne, 2006).

Until 2000, federal prosecutors charged human trafficking under statutes that criminalized involuntary servitude, peonage, or enticement into slavery (Crocker, 2017). There was no federal law in place for cases of human trafficking. Involuntary servitude and slavery statutes apply only to physical coercion and excludes psychological coercion which is seen in

many trafficking cases (Crocker, 2017; Payne, 2006). The TVPA was enacted in 2000 and reauthorized in 2003, 2005, 2008, 2013, and 2015 (Peters, 2015). The TVPA states that victims of a “severe form of trafficking” are eligible for the protections of the act. The TVPA defined a “severe form of trafficking” as:

Sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform the act is under 18 years of age, or 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 subsection to involuntary servitude, peonage, debt bondage, or slavery.

The TVPA requires that the elements of force, fraud, or coercion be present in order for it to be considered either sex or labor trafficking. According to Crocker (2017), force means any form of violence, compulsion or constraint exercised upon or against a person. Fraud is defined as a “deliberate act of deception, trickery or misrepresentation” (Crocker, 2017). Coercion is defined as “threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of law or the legal process” (Crocker, 2017).

While the TVPA created a new approach to sex trafficking, it enhanced the already existing US Code regarding labor trafficking or involuntary servitude/debt bondage. Crocker (2017) explores Section 1598 of Title 18 of United States Code which describes trafficking as:

(a) Whoever knowingly— (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age

of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

The elements of the 18 U.S.C. §1591 can be difficult to prove which is why some prosecutors may opt to charge with the Mann Act under 18 U.S.C. §2422 (a) or (b) (Crocker, 2017). The Mann Act focused on the prosecution of those who transported women or girls for the purpose of prostitution or debauchery or any immoral purpose (Crocker, 2017). In 1986 the Mann act expanded to recognize men could be transported for vice. Now, prosecutors use the Mann Act to prosecute people who transport victims of any gender across state lines or in foreign commerce for prostitution or other illegal acts of commercialized unlawful sexual activity for which the victim could be prosecuted (Crocker, 2017). The code states that:

**(a)** Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

**(b)** Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

The Mann Act of 1910 has been used as an option instead of the trafficking statute because it does not have the force, fraud, or coercion elements present in the trafficking statute which may make some cases difficult to prove (Crocker, 2017). With adults, if one persuades, induces, entices, or coerces the victim to travel interstate or foreign commerce to engage in prostitution or any sex act for which a person can be charged with a criminal offense or if they attempt to do so, they are in violation of the Mann Act. The Mann Act however has been described as “insufficient to prove modern forms of trafficking” (Crocker, 2017).

The TVPA also criminalized any attempt or conspiracy to engage in trafficking which is punishable in the same way as the actual trafficking offense (Carr, Milgram, Kim, & Warnath, 2014).

Difficulties in proving the force, fraud, and coercion aspect which are the elements in the federal trafficking statute, lead traffickers to be prosecuted under the Mann Act (Crocker, 2017). Cases of sex trafficking are typically difficult to prove since the proving of the elements typically involves victim testimony. The Mann Act only focused on prosecution and has been used in the past to coerce victims into cooperating with federal prosecution (Crocker, 2017). Symptoms of trauma bonding, which is the result of the ongoing cycle of violence where there is a system of punishment and reward, are seen in many trafficking relationships which makes victims reluctant to testify on their abuser and feel a sense of attachment or dependence towards their abuser despite the abuse they have experienced. Difficulties with reluctance of victims to participate in court trials create difficulties with prosecutors charging under the TVPA or the Mann Act (Crocker, 2017). The TVPA was designed to provide a statutory basis for prosecuting cases of trafficking yet prosecutors may defer to the Mann Act for when they know a crime occurred but do not have the elements to charge it under trafficking codes because the Mann Act does not include the elements of force, fraud or coercion and has a broader scope in the trafficker's responsibility in the crime (Crocker, 2017).

### **Criminalization of Survivors of Trafficking**

For many victims of sex trafficking, their first interaction with the criminal justice system will likely be as a perceived criminal rather than a victim (Byrne, 2017). The TVPA shows that victims should not be held accountable for acts they commit, yet victims of sex trafficking are often criminalized for engagement in trafficking or crimes they commit as a direct result of being

trafficked (Emerson et al., 2014). Criminalization of survivors can result in recidivism, further exploitation, or the instability that occurs from inability to heal from trauma (Emerson et al., 2014).

Traffickers groom victims through a cycle of comfort and violence (Crocker, 2017). They target vulnerability and exploit those vulnerabilities to coerce individuals to commit sexual acts for money. Usually, traffickers use romance to begin the grooming stage in order to gain the victim's trust and then begins to exploit them. Crocker (2017) described the methods of power and control with traffickers to being similar to tactics found within domestic violence relationships. With domestic violence there is a cycle of violence which includes the tension building phase, explosive or violent event, and honeymoon phase. This cycle which slows during the honeymoon phase can be emotionally taxing for victims and create emotional turmoil as the honeymoon phase is meant for them to forgive the abuser until the next incident happens again. In relationships where sex trafficking is present, there is a similar cycle (Gruber, Cohen, & Mogulescu, 2016).

Crocker (2017) describes that the cycle may look a little different with sex trafficking as the trafficker may promise the victim marriage, children, jewelry, or tattoos. One of the largest "incentives" is to become the traffickers bottom. Bottoms or enforcers enter the life like any other trafficking victim but their role changes as the trafficker begins to have them take on more roles. Common duties for bottoms and enforcers include recruiting other victims, training victims. And beating other victims (Crocker, 2017). Bottoms may still have to engage in commercial sex acts for the trafficker, but they may have a lesser amount for a quota or have to go on less dates than other women involved with the same trafficker. For some, they may no longer have to but now work with the trafficker to take on some of his duties.

Many of the duties the bottom commits on behalf of the trafficker are punishable by either 18 U.S.C. §2422 which is the Mann Act or 18 U.S.C. §1591 which has the elements of force, fraud, or coercion present in the TVPA (Crocker, 2017). Bottoms are not the only ones who are forced to recruit victims. Other victims may be required to as well. Having a unique role as being seen as a party to a crime of trafficking or a victim who was forced into engaging in the same acts as their trafficker makes it difficult when it comes to the prosecution of those victims or bottom when there is a federal case. Crocker (2017) suggests an amendment to U.S.C §1591 which would be a safety valve which would allow for judicial discretion when sentencing bottoms. Factors that they would be able to weigh the bottom's lack of agency include: whether violence was used, prior criminal history, coercion, and whether they are involved with the investigation of other parties involved in the same trafficking scheme and are cooperating with law enforcement and the courts (Crocker, 2017).

Victims may also be criminally punished based on prostitution related offenses. According to Gruber et al. (2016), in the 80s and 90s a shift in moral views on engagement in prostitution and the impact on communities began to rise. This was reflected in the police's new strategy of "broken windows policing". The belief behind broken windows policing was that "visible disorder had a strong causal link to violent crime" (Kelling & Wilson, as cited by Gruber et al., 2016). The policing strategy then believed that they could reduce or prevent crime by focusing on crimes that created "community decay" (Kelling & Wilson, as cited by Gruber et al., 2016). One of the crimes that indicated community decay was prostitution. Street police began to heavily police prostitution. This resulted in an increasing amount of misdemeanor charges and lengthy criminal records. Through broken windows policing, they believed that visible crime had a strong link to violent crime which resulted in the police targeting crimes that create the look of

a decaying neighborhood. They described this as a public order paradigm (Gruber et al., 2016). This created for the courts “mass misdemeanors” which left defendants with long records of arrests and convictions but doesn’t necessarily mean that they were in jail for a long sentence. These cases were treated as disposable because individuals who were charged with prostitution typically resolved cases quickly by either taking a plea or serving a quick jail sentence and not returning to court (Gruber et al., 2016).

Law enforcement and prosecutors spend much time targeting those who are victims rather than those who drive the demand or those who profit from others being victimized in the commercial sex industry. No states have completely decriminalized adult victims of sex trafficking (Gruber et al., 2016). Many defendants charged with prostitution don’t consider themselves to be trafficked or label themselves as trafficking victims. Based on that, they typically choose not to disclose evidence of trafficking even when encouraged to do so for their own legal interest (Gruber et al., 2016).

Up until 2015, it was found that only 29 states required or encouraged training to assist officers in identifying potential trafficking cases (Dempsey, 2015). According to Dempsey (2015), when law enforcement fails to screen prostitution cases for trafficking, they miss the opportunity to gain information and possibly prosecute their trafficker. The lack of issue identification results in the prosecution of victims.

According to the Palermo Protocol which the United States ratified, sex trafficking does not only include cases in which force, fraud, or coercion are present but also includes cases in which there is an abuse of power or a position of vulnerability (Carr et al., 2014; Dempsey, 2015). Some believe that the United States’ current definition of trafficking is too narrow. Critics of the current definition argue that commercial sex cases in which there is an abuse of power or

position of vulnerability should also be categorized as trafficking and victims should be eligible for all benefits and services available for those who are considered to be victims of a “severe form of trafficking” as described by the TVPA (Dempsey, 2015). The Palermo Protocol defines power and vulnerability to include power disparities based on gender, race, ethnicity and poverty (Dempsey, 2015). Dempsey (2015) argues that the narrow definition of a trafficking victim under federal and state law does not allow for the protection of victims who are in the sex trade due to abuse of power or abuse of a position of vulnerability and those victims continue to be treated as criminals even though international law recognizes that their experience is in line with their definition of sex trafficking.

Historically, prostitution has been seen as a victimless crime that people opposed due to the view of it being immoral. Dempsey (2015) offers a solution of using criminal law to target those who engage in the victimization while decriminalizing victims. While decriminalization does not address the root cause of sex trafficking, giving victims the options of services and non-law enforcement related advocacy may assist victims with exiting the life in a safe way.

Dempsey (2015) argues that full decriminalization is the best way to protect victims of trafficking. She argues that relying on law enforcement and prosecutors to screen and identify potential victims of trafficking allows for the parties to use too much of their discretion. There is concern that even with training, there is still a risk that law enforcement may miss. An example of a scenario in which law enforcement may miss a potential victim of trafficking is if they are being trafficked by a boyfriend or girlfriend. With proper training on the dynamics of trafficking, law enforcement may have potential to see some warning signs outside of the normal “pimp” and have the tools to identify traffickers who are intimate partners. This could be beneficial for states in which there is mandatory domestic violence reporting because law

enforcement may be able to screen for trafficking at the time of the incident. Heightened awareness of trafficking in intimate relationships may help identify victims before they have any kind of police involvement as a potential defendant. Again, distrust of law enforcement and the lack of self-identification may not allow for a victim to provide enough information to law enforcement to be seen as potential victims of trafficking but it is important that law enforcement be able to see red flags and indicators of potential trafficking.

### **Legislative Remedies**

Although there is a federal framework in place to guide how state legislature should respond to trafficking, nationwide there are inconsistencies within the state's response. According to Barnard (2014), federal laws initially had no impact on state law since they did not allow prosecutors to prosecute traffickers or prevent states from prosecuting victims. Initially, anti-trafficking laws protected victims from being prosecuted at the federal level, but victims involved in street-based prostitution still faced arrest and prosecution at the state level (Barnard, 2014). New York has spearheaded much of the trafficking legislation at the state level. While Texas and Washington were the first states to enact legislation specifically for trafficking, in 2006, New York was the first state that enacted a law which specifically criminalized sex trafficking (Barnard, 2014).

State legislation is meant to complement federal laws and cover any shortcomings that federal law may have that is particular to their individual state (Payne, 2006). State courts are more at the forefront of sex trafficking cases than federal courts which is why it is important that they have a strong legislative response without loopholes for traffickers all while protecting victims. Following the reauthorization of the TVPA in 2003, the Civil Rights Division and Office of Legal Policy drafted the Model State Anti-Trafficking Statute in 2004. This statute is based on

the TVPA and experience in prosecuting federal cases. The model offers various sentencing enhancers for other crimes that may have gone along with the trafficking such as kidnapping, aggravated sexual abuse, attempts to kill, bodily injury, periods of service for greater than 180 days, cases that involve more than 10 people, and made restitution mandatory (US Department of Justice, 2007). The authors of this statute believed that this would provide states with guidance on creating their own similar version of the statute that prosecutions of trafficking would increase. Payne (2006), however, finds that this ideal model statute falls short as it only mentions protection of the victim as it encourages the attorney general's office and the state department of health and social services to compile reports on how existing laws and social services agencies can assist trafficking victims which doesn't necessarily impact victims who are still being victimized nor those who are at risk of being recruited.

Currently, thirty-six states have *vacatur* laws for criminal convictions of prostitution or prostitution related crimes. There is a current disparity in the style and range of human trafficking provisions nationwide. In 2014, forty-eight states had legislation for sex trafficking specifically, 36 states and Washington D.C. had asset forfeiture against traffickers, 18 states had Safe Harbor laws which prevent minors under the age of 18 from being charged with acts of prostitution, and 14 states had *vacatur* laws (Larche, 2014). *Vacatur* laws were created to provide post-conviction relief to victims who have been charged as criminals as a result of their trafficking experience (Barnard, 2014). The criminal record that comes along with their victimization may inhibit their ability to find quality and affordable housing, employment, ability to receive loans, and reintegration to society without stigma (Dank et al., 2017).

The scope of state level *vacatur* laws range between narrow, intermediate, and broad. The narrow category allows for *vacatur* of prostitution charges exclusively, the intermediate category

allows for *vacatur* of prostitution charges as well as prostitution related charges and what qualifies as a prostitution related charge varies by state, and the broad category allows for the *vacatur* of convictions received while a victim of trafficking. For the broad scope, Florida and Wyoming are the only 2 states who have a broad scope of *vacatur*. Florida statute states that “a person who is a victim of human trafficking may petition for the expunction of any conviction for an offense committed while he or she was a victim of human trafficking (Larche, 2014, p. 300). Wyoming statute states that “at any time after the entry of a conviction, the court in which it was entered may vacate the conviction if the defendant’s participation in the offense is found to have been the result of having been a victim” (Larche, 2014, p. 300).

Narrow	Intermediate	Broad
Connecticut, Illinois, Maryland, Mississippi, Montana, and Washington	Hawaii, Nevada, New Jersey, New York, North Carolina, and Vermont	Florida and Wyoming

Some *vacatur* statutes have temporal limitations. Of the states which allow *vacatur*, Montana and Maryland allow for a motion at a “reasonable time after his or her conviction or after he or she ceases to be involved in trafficking” (Larche, 2014, p. 300). Hawaii has a strict time limit which is within 6 years after the date that an individual ceases to be a victim (Larche, 2014). *Vacatur* can be denied in some states. For Washington D.C. an applications motion is denied if there are additional criminal charges pending against the victim in any state or federal court, the applicant has been convicted of another crime in any state or federal court since the date of the conviction seeking to be vacated, or the applicant has had the record of another prostitution conviction vacated (Larche, 2014).

The difference between *vacatur* and expungement is that when a conviction is vacated, it is then nulled and cancelled and meaning that they are innocent of the charge (Emerson et al.,

2014). With expungement, they seal and destroy the records of conviction but the person has still been convicted of the crime. The ideal method would be to expunge and then vacate (Dank et al., 2017). While expungement alone is partially beneficial to survivors, it does not show that they were innocent and imply their criminality was a result of a trafficking experience. *Vacatur* will show their innocence.

States also vary on the category of *vacatur*. Some states may permit the exclusive remedy of *vacatur*, some may permit both *vacatur* and expungement, and some may permit *vacatur* while opening the door for the possibility of expungement (Larche, 2014). According to Larche (2014) an ideal state level *vacatur* statute would permit *vacatur* for an array of criminal offenses, not necessarily limited to prostitution or prostitution related offenses, allow for an indefinite period of time in which the motion of *vacatur* may be made, and would provide both the remedy of *vacatur* and expungement. This ideal statute is present in Florida but has not been applied yet. Prosecutorial discretion may be in the way of support for *vacatur* statutes (Larche, 2014). Prosecutors may argue that there is no need for that ideal statute or *vacatur* statutes because they do not charge victims there is no but there is no research that proves that (Larche, 2014). Research instead indicates that victims pay plead guilty. Problems in issue identification may also prove that prosecutors may charge victims because they do not know they are victims and perceive them as a willing adult. It has been proven that victims of sex trafficking have distrust of law enforcement and the courts, issue identification on the courts and law enforcements behalf may only increase that lack of trust (Larche, 2014). Additionally, research has shown that plea bargaining is at a high rate for sex trafficking victims (Larche, 2014). This can be credited to the belief that prostitution charges or prostitution related charges are viewed easily disposable and there is a lot of pressure on defense attorneys and prosecutors to quickly move these cases

through the court system with a plea to avoid having additional court dates (Drasin, 2012).

Defense attorneys play a large role in issue identification as they would need to know the difference and relationship between prostitution and sex trafficking (Drasin, 2012).

Drasin (2012) has suggested that some *vacatur* laws are simultaneously over and under inclusive. In some *vacatur* statutes, a survivor is only eligible for *vacatur* when the arresting charge is prostitution. As consistent with the literature, sometimes victims are arrested on other charges. Due to the language in some *vacatur* statutes they would not be eligible for *vacatur* even if they were coerced into committing other crimes while involved in trafficking. Drasin (2012) suggests that future *vacatur* statutes should be drafted narrowly but interpreted broadly so that they are able to provide victims with relief in situations where their arresting charge was not a prostitution or prostitution related offense.

*Vacatur* laws are important due to difficulties that law enforcement has with identifying them as victims at time of arrest (Drasin, 2012). Law enforcement has a unique task of distinguishing between individuals who are engaged in sex work voluntarily but may experience sexual violence or exploitation and those who are forced or tricked into sex work (van der Watt and van der Westhuizen, 2017). Victims many times do not self-identify as victims of trafficking and in the rare change that they do, they are still reluctant to disclose to law enforcement due to fear of retaliation by their trafficker, distrust of the police, and fear of not being believed. Convictions which appear on a survivor's record can prevent them from obtaining employment, furthering education, receiving housing assistance, applying for a loan, or obtaining immigration relief.

New York passed the first *vacatur* law in 2010. New York's *vacatur* law (Criminal Procedure Law 440.10(1)(i)) allows for a *vacatur* for the following judgements: when the

judgment is a conviction where the arresting charge was under the statute that covers loitering for the purpose of engaging in a prostitution offense or prostitution and the defendant's participation in the offense was a result of having been a victim of sex trafficking as defined in New York penal law or trafficking in persons under the TVPA (Emerson et al., 2017). New York's *vacatur* law does not require that the survivor prove that they have left the sex trade. The benefits of New York's *vacatur* is that it allows for the court to pursue *vacatur* of additional charges outside of the sole prostitution charge (Emerson et al., 2017). The *vacatur* statute is also retroactive which allows for survivors who have received criminal convictions prior to 2010 to take advantage of this opportunity.

Emerson et al. (2017) describes nine components of an effective *vacatur* law. The nine components are as follows: inclusion of prostitution and other offenses, no official documentation of trafficking requirement, no rehabilitation requirement ( doesn't require survivors to prove they've left the sex trade), guarantees confidentiality, offers the strongest remedy possible which is *vacatur*, no judicial discretion if all elements are met, allows for the court to take additional action, ensure retroactive application, and attach funding provisions for legal representation for survivors. An effective *vacatur* law must be one which has the previously mentioned components. Many states have a few components, but no state has a *vacatur* law in which all of the recommendations as cited by Emerson et al. (2017) are met.

An example of a piece of state legislation which provides services for criminalized survivors of trafficking is the Trafficking Survivors Relief Act (Emerson & Aminzadeh, 2017.). New York State Senator Kristen Gillibrand introduced the Trafficking Survivors Relief Act of 2016 (TSRA) which would allow survivors of trafficking convicted of non-violent offenses that are a direct result of their trafficking experience to vacate the record of their conviction. Victims

who were arrested but never charged may petition the court for expungement of those records. The TSRA requires that the motion be in writing and the petitioner provide any supporting evidence of sufficient credibility and probative value that documents the petitioners trafficking experience (Emerson & Aminzadeh, 2017). For those who don't have supportive evidence, the affidavit or sworn testimony may be considered to vacate the conviction. To grant this motion, the court has to consider by clear and convincing evidence that the petitioner participation in the offense was a result of having been trafficked (Emerson & Aminzadeh, 2017).

Federal law typically lags behind state law and due to that, there is no federal *vacatur* law in place meant to protect victims from hardship following their victimization. In Emerson & Aminzadeh's (2017) article, they cited a case study in which a college student was recruited and encouraged to dance for money. Later, she was forced to have sex for money and when she initially denied the request she was beat up. While involved in trafficking she ended up recruiting more victims for her trafficker. Upon the trafficker's federal case, she was also charged due to her involvement as a bottom and now has to register as a sex offender due to the recruitment of minors.

Federal *vacatur* law would allow survivors to petition the court to remove trafficking related convictions from their records. While the 3P Paradigm of the TVPA focuses on prevention, protection, and prosecution, the prosecution of the trafficker may come at the expense of victim's rights. There has been seen to be prioritization over the prosecution of the traffickers over the protection of victim's rights. Victims are often arrested because either they don't identify as victims of sex trafficking or law enforcement doesn't identify them as victims of sex trafficking. Emerson & Aminzadeh (2017) suggest that survivors are used as instruments of criminal investigation which creates distrust in the system and reduces the likelihood that they

will disclose the full trafficking history or disclose their trafficking or cooperate in a criminal case. Victims may also be charged as co-defendants. Victims have a unique position and legal challenge because they meet both definitions of a trafficker and a trafficking victim. Emerson & Aminzadeh (2017) argue that criminalization of trafficking victims is in direct opposition to the federal TVPA and point out that it is also a violation of international law. International law states that “trafficked persons not be detained, charged, or prosecuted for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons” (as cited by Emerson & Aminzadeh, 2017). Federal expungement is an option but there is no federal *vacatur* law. Presidential pardon is the most accessible form of relief and does not remove the conviction from their record. The pardon will appear alongside the conviction. The authors recommend that federal law replicate state efforts to provide victims of sex trafficking (Emerson & Aminzadeh, 2017).

### **Judicial Remedies**

Human trafficking diversion courts have developed across the nation as the criminal justice system has begun to realize that not everyone involved in the sex trade are there by choice. Literature in which an anti-trafficking program or diversion court is evaluated is slim. Much literature focuses on legislative work being done to create policies such as Safe Harbor laws which target juveniles and route them to services rather than juvenile detention when they are arrested for prostitution related charges or on the conception of human trafficking courts.

As it relates to sex trafficking, much of the literature focuses on minors as there is a lot of attention on youth being coerced into the sex trade. Once an individual is over 18 it is commonly seen as acts of prostitution rather than possible sex trafficking. Roe-Sepowitz et al. (2014) conducted a study for an alternative to arrest program for adults who have been involved in the

sex trade whether by trafficking or prostitution. Their study compared a control group of women who have been identified as committing a prostitution related from and women who have been arrested and charged with prostitution. Researchers found that there were no differences between recidivism and program completion of the program between the two groups. Researchers found the benefits of this diversion program to include a change in the community perspective regarding individuals who engage in sex work, the program was cost effective, and it allowed for greater intelligence gathering for program staff.

Gruber, Cohen, and Mogulescu (2016) described the state intervention in getting victims into social services as “penal welfare”. They use the term to describe the practice of using criminal courts to provide social services and benefits. This view raises the question of why human trafficking intervention courts are praised when they involve the arrest, prosecution, and possible incarceration of survivors. This study believes that the courts may stunt the development of other types of assistance and may reinforce stigmas of trafficking victims (Gruber et al., 2016). When a client participates in a HTIC has the potential to have their case dismissed. It is suggested that the format of this intervention court clashes with the objectives of criminal court which is to punish and deter crime and also clashes with the court processes for repeat offenders and violation of court requirements (Gruber et al., 2016).

Gruber, Cohen, and Mogulescu (2016) also cite the law reform around domestic violence as shaping the intervention court model. In the 1990s, specialized domestic violence dockets were created in state courts across the nation which featured judges trained in domestic violence, prosecutors, and policies to protect victims. Specialized domestic violence courts and the recidivism of offenders created a shift in sentencing policies in which judges made sure to sentence individuals to a term that included opportunities for rehabilitation which is seen as

anger management or batterers intervention programs. These domestic violence courts saw many problems initially as they believed that it would be easy to draw a clear distinction between victim and defendant and that victims would likely cooperate with prosecutors in the case. They later found that victims of domestic violence were unwilling to participate in prosecuting their abuser whether it was due to fear of retaliation, prior past experiences with the court system, or other personal reasons. To combat the unwillingness of victims wanting to participate in the court process against their abuser, prosecutors began to use the term “coercive control” to state that the victim’s decision to not participate in the court process was influenced by the abuser (Gruber et al., 2016). The prosecution’s tool of “coercive control” to explain why the victim was not cooperating is cited as the beginning of being able to implement a legal structure in which prosecutors pressure reluctant victims to participate or proceed to trial without victim testimony (Gruber et al., 2016).

The Minneapolis Domestic Violence Experiment was conducted to find what strategy best reduces recidivism for abusive partners. The result of this experiment was that warnings and temporary separation did not reduce recidivism; what reduced it was arrest (Gruber et al., 2016). From this finding, courts began to reform their policies to enforce pro-prosecution policies, policies that encourage separation like no contact orders, and mandatory arrest laws began to be adopted. After these laws and policies, specialized domestic violence courts began to spread. Before human trafficking intervention courts, prostitution offenses were typically resolved at arraignment or distributed to misdemeanor courts then they were typically plea bargained out. (Zornosa, 2016) described that prostitution cases operate is that individuals are arrested and prosecuted and then receive credit for time served without any services recommended or provided. Defendants were also eligible to receive an “adjournment in contemplation of

dismissal” (ACD) which allows for the judge to set a length of time to continue the case and add conditions and if the defendant does not have any new offenses and completed conditions, if there were any, the case would be dismissed and sealed (Zornosa, 2016). This was a benefit because once they were sealed, they would not appear on a background check. Although this was beneficial for the time, it was a rarely sought after resolution for prostitution charges. Prior to HTICs there was no single way to handle prostitution charges. Services offered were inconsistent, short sentences were still being given as a result of plea bargaining, and variability in judging styles.

Human Trafficking Intervention Courts (HTIC) are criminal diversion courts where defendants are prosecuted for prostitution related offenses but offered mandatory services in place of criminal conviction or jail. At face value, many would believe that there are no negative impacts that the presence of a HTIC would have because it routes victims to services to exit the lifestyle. Gruber et. al (2016) suggest that the formation of these court may negatively impact survivors in three ways: (1) they may sustain arrest and prosecutions of victims, (2) stunt the development of other forms of assistance and resources, and (3) reinforce stigmatizing ideologies (Gruber et al., p. 1333. 2016). Gruber et al., (2016) cite that the philosophy of the HTIC which views defendant’s charged with prostitution as victims who were coerced and not necessarily responsible for recidivism clashed with the structure of the criminal system which views recidivism as a factor which outweighs most other factors when determining pre-trial conditions, plea deals, and sentences.

## **Diversion Court Models**

### **Delaware**

In Delaware between January 2012 and April 2016 there were 419 arrests for prostitution, 145 for solicitation of a prostitute, and 27 arrests for promoting prostitution (McDonough & Schlabach, 2016). Their treatment court was started in 2012 and only serves one county but has had 101 participants between 2012 and 2016. Initially their court model operated post adjudication but they have learned that a successful diversion program would function pre-plea rather than after they are charged and sentenced. During an evaluation of their program, they also found that after a string of massage stings, they have seen women who do not speak English. The prosecutors in Delaware have agreed to offer diversion which will avoid a criminal conviction for the victims because they could be deported if they are charged with a prostitution related crime.

### **Michigan**

The Human Trafficking Diversion Court in Washtenaw County, Michigan is one of few diversion court created specifically for sex trafficking. Prostitution diversion courts have been utilized but may miss the hidden signs of trafficking as it only focuses on the act of prostitution. The aim of Washtenaw County's Human Trafficking Court is to provide an alternative to jail by offering a program through probation that focuses on sex trafficking. Michigan does have prostitution courts, but it has been found that prostitution courts do not address unique concerns that arise when commercial sexual exploitation is involved (Campbell, 2015).

The Human Trafficking Court in Washtenaw County's main goal is to provide identify victims of sex trafficking and divert them from jail and into services via probation. The conception of this court was developed by the Human Trafficking Clinic at the University of

Michigan Law School who provides legal service and representation to individuals who identify as human trafficking survivors (both labor and sex trafficking) (Campbell, 2015). Initially, the Human Trafficking Clinic had no set approach on how to deal with individuals who were being criminalized for their victimization. One client who they were working with was being charged and transporting a person for prostitution which carried a 20-year felony sentence. The individual took a plea deal as she did not want to risk serving a 20-year sentence and then called the National Human Trafficking Hotline which directed her to the Human Trafficking Clinic at the University of Michigan Law School (Campbell, 2015). Representatives from the clinic were able to work with the probation and prosecutor's office to allow her a delayed sentence if she complies with 1 year of probation. This case was the trigger for a diversion court specifically for victims of sex trafficking (Campbell, 2015).

During initial interviews with key stakeholders during the formation of the court, the stakeholders identified that the state of Michigan as well as Washtenaw County has a history for creating problem solving courts (Campbell, 2015). A proposal was submitted for a problem-solving court that would divert from jail adult victims of sex trafficking, reduce recidivism, and launch a paradigm shift to change the view that everyone involved in commercial sex are there by personal choice. The Washtenaw County Human Trafficking Court began operating in 2014 with its mission being to “reduce the incidence of human trafficking, identify victims and vulnerable individuals engaged in commercial sex, and provide victims with holistic, trauma-informed services” (Campbell, 2015, p. 105).

The court's main priority is to know how to identify potential victims of trafficking. Trafficking victims can be charged with multiple different crimes and it's a misconception to believe that they only come in as prostitution charges. According to Campbell (2015), other

charges could include accosting and soliciting, pandering, disorderly conduct, public indecency, possession of drug paraphernalia. One does not have to be arrested for prostitution directly to be eligible for the court (Campbell, 2015). Any of the above listed or other prostitution related charges would make one eligible for the court in addition to anyone simply arrested for a prostitution or prostitution related charge are eligible for the court.

Once someone is identified as a potential victim of trafficking, they are referred to the coordinator of the court by the arresting officer, probation agent, judge, defense attorney, or a service provider. The coordinator then meets with the victim within 48 hours and discuss the requirements of their probation. At this meeting the coordinator also does a formal assessment created by the Human Trafficking Clinic to identify whether the victim has experienced trafficking (Campbell, 2015). The assessment was created by the Human Trafficking Clinic specifically for this court program. The professionals at the Human Trafficking Clinic recognized that victims of trafficking may not disclose the elements of force, fraud, or coercion at the time of the assessment due to trauma and safety concerns so they have created this assessment to be ongoing instead of a one time assessment (Campbell, 2015). Although it is recognized that an individual may not disclose right away, it is important to gain information on if their criminal offense was due to their involvement in trafficking quickly especially if the individual has not been convicted yet (Campbell, 2015). The staff at the Human Trafficking Clinic will need to speak with the victim's defense attorney to discuss the probationary program, meet with the victim to gain a sense of their goals, and receive the victim's permission to disclose to the court their experience with trafficking and their goals to request that they be routed to the Human Trafficking Court instead of jail (Campbell, 2015).

Defendants with felony charges are not eligible for the Court. Campbell (2015) noted that if the prosecutor is willing to drop a felony charge down to a misdemeanor then the individual would then be eligible to participate in this program. Individuals with violent crimes are also not eligible for the program (Campbell, 2015). If an individual has received a battery charge and was later found to be a victim of trafficking they would be ineligible. If an individual has received a retail theft charge and was later identified to be a victim of trafficking, they would be eligible. Individuals with severe mental health are also ineligible for Human Trafficking Court but Washtenaw County has a mental health court which the program coordinator can refer them to (Campbell, 2015).

Individuals who are eligible for the program are sentenced to probation during their court proceedings via a plea or being found guilty by a jury. After they are sentenced, an intake and individualized service plan is completed by a service provider which covers their trauma history, mental health, and drug or alcohol dependency (Campbell, 2015). All participants in the program are offered individual therapy and support group which covers one of their probation requirements. The Human Trafficking Court funds those services but Medicaid and community resources are also utilized to keep costs to a minimum (Campbell, 2015). Individuals who participate in the court are required to meet regularly with the coordinator, attend review hearings with the judge of the Human Trafficking Court, enroll in school or secure employment, involvement in a recovery community, and AODA testing (Campbell, 2015). Participants are provided with case management by the coordinator which includes services such as applying for public benefits, securing safe and affordable housing, gaining identification, applying for employment or educational opportunities, and participants are provided with three-month supply

of free public transportation to eliminate the transportation barrier that may cause them to miss meetings or not take full advantage of case management services (Campbell, 2015).

The court has three phases and with each phase there is less oversight. Throughout each phase participants are required to go over their individualized plan with a therapist. Individuals are sanctioned when they do not comply with a probation requirement and rewarded and recognized when they continue to comply with requirements (Campbell, 2015). Successful completion of the program takes between 18 and 24 months. When a participant graduates, they are released from probation and must have paid any fines that were mandatory and were not waived, and have been sober and without any sanctions for 90 days prior to their graduation date (Campbell, 2015). According to Campbell (2015), Michigan has a deferred judgement law which allows a court to erase the initial conviction after an individual completes probation. In 2015, human trafficking was added to the statute which makes victims of trafficking eligible to have that conviction erased from their records after they successfully complete the program.

### **New York**

In 1993 the Center for Court Innovation created the Midtown Community Court which focus was to target “quality of life offenses” which included prostitution (Gruber et al., 2016). The Midtown Community Court was different than the normal procedure through the courts because it gave defendants the option to pay back through community services. It combined punishment with corrective community services. It was described as an accountability model (Gruber et al., 2016). When the MCC was faced with defendants who engaged in sex work, they would deliberately frame their sentencing to where it made it difficult for defendants to engage in sex work by scheduling some community services at night, so they were unable to engage in sex work. The results of the MCC were that prostitution arrests were reduced. However, the results

did not indicate whether prostitution arrests were down because people were committing less acts of prostitution in general or if they have just chosen another area out of MCC's jurisdiction to continue sex work (Gruber et al., 2016). The role of the MCC was to reduce the signs of community decay as outlined in the goals of broken windows policing, not to have an impact on sex trafficking (Gruber et al., 2016).

In 2013, the Chief Judge in New York created specialized courts in various boroughs to address sex trafficking and prostitution in New York City. These courts received criticism because participants must first be arrested and charged in order to participate in the court. Outside referrals without a criminal charge are not accepted for this program. According to Barnard (2014), the evaluation of the pilot programs for the courts in Manhattan and Queens found their methods to be counterproductive as participants must have a guilty plea to enter the program therefore leaving them with criminal charges on their record either way.

New York's HTIC have been evaluated to determine their effectiveness and recommendations have also been provided to improve the court's functioning. Gruber et al., (2016) find that merging of prostitution related cases in front of a trained judge is a key feature of New York's HTIC. The centralization of key actors in this process was important to the courts. The ability for judges, prosecutors, defense attorneys, and services providers to all communicate in one place created a space for all actors to develop relationships and the presence of service providers allowed judges to make sure defendants are connected with an appropriate service.

There is variability on a defendant's eligibility to have their case routed to a HTIC. In New York, various boroughs have different qualifications. Some will not accept defendants with extensive criminal records while others accept repeat offenders (Gruber et al., 2016). For those with long criminal records, some courts in a different borough may not accept them into the

HTIC program due to their status as a repeat offender. Defendants with prostitution in addition to drug charges have been a problem for New York HTIC. In some trafficking situations, drugs are used to control victims and are also used by victims as a coping mechanism. Whether defendants with drug charges were also eligible for HTIC varied by borough in New York. For some defendants, their prostitution charge would be eligible for HTIC but would still have to interact with criminal court for the drug related charges. According to a Brooklyn HTIC judge, “we are not going to incarcerate ourselves out of a drug, prostitution or trafficking problem”(Gruber et al., 2016). They cited services as being one mechanism to getting to the root cause of their behavior and preventing recidivism.

In some cases, prosecutors and judges may grant adjournment in contemplation of dismissal (ACD) to defendants who have non-violent misdemeanor charges unrelated to prostitution (Gruber et al., 2016). Again, the possibility of an ACD for these charges vary from court to court. HTICs so far have reduced convictions and jail sentences for prostitution defendants and are seen as a last diversion technique than having a conviction on a record.

Gruber et al. (2016) finds a unique problem with the nature of New York’s HTIC which is spectacle and shaming of victims. One defense attorney described that the centralization of services also has its drawbacks (Gruber et al., 2016). They described that sometimes pimps will show up to court, detectives, other court officers, and other people observing the case (Gruber et al., 2016). The presence of different individuals in and out of the court room to watch the case may enhance the shame and stigma that some defendants may feel due to being labeled in the type of court they are in. It would be beneficial for the HTICs to be a closed court in which the public and others are not allowed to observe the case.

HTIC's are part of the alternatives to incarceration movement or 'decarceration' movement (Gruber et al., 2016). Some participants still prefer short jail sentences rather than ACDs that have conditions because they know they will not be able to successfully complete services or they do not want services in the first place. While routing to services is beneficial, it also prolongs the court monitoring of someone's progress which in turns keeps a case open for longer and continues court involvement and monitoring. It requires multiple court appearances and increases the length of time to resolve the case rather than the five sessions it would take to complete the services (Dank, Yahner, Yu, Mogulescu, & White, 2017; Zornosa, 2016). Gruber et al. (2016) found that defendants prefer dismissal without mandatory services and defense attorneys still try to bargain down dismissal with services as an option.

The HTIC model conflicts with the objective of criminal court which is to punish and the procedures that give different treatment to repeat offenders, violate court mandates, and fail to appear (Zornosa, 2016). Potential victim's participation is mandatory under prosecution; if they don't comply, conviction and jail are still possibilities. Those who comply, and complete services have the opportunity to receive non-criminal dispositions or dismissal (Zornosa, 2016). Typically, when victims are willing to disclose details of their trafficking experience, prosecutors are willing to dismiss. Defendants worry that disclosure may put them in danger and law enforcement may use their statement against them to get them to participate in criminal case (Gruber et al., 2016; Zornosa, 2016). Incarceration has also been used to mandate safety in situations where there is a concern about the defendant's ability to make safe decision for their well-being. Gruber et al. (2016) gave an example of a defendant/victim who was a participant in both drug treatment court and human trafficking intervention court who disclosed trafficking by her intimate partner. The judge had concerns about this defendant going back to her abusive

partner and instead chose to incarcerate her for her own safety rather than risk her going back to her abusive partner. Gruber et al. (2016) cite that prior to her incarceration, she had not committed any additional crimes and made it to all of her court proceedings. After this defendant was release from custody, she never returned to court although she had hearing. This example shows an inconsistency with the court's victim-centered strategy. The court encourages victims to disclose but also may incarcerate them based on their disclosure for what the courts perceive as the defendant's safety.

Clawson et al. (2009) identified that getting survivors of trafficking involved in mental health and substance abuse treatment is one of the largest barriers but also one the services that is needed most. Multidisciplinary services that involve government agencies, non-profit agencies, advocacy groups and survivor leaders can be an effective strategy to address the issue of getting services to survivors of sex trafficking (Miller & Stewart, 1998, as cited by Clawson et al., 2009). Critics of HTIC find that court mandated therapy are forms of judicial coercion and control. It is suggested that judges may use their authority on the threat of incarceration to pressure defendants who do not want to engage in services into a treatment-based sentence (Zornosa, 2016). Defense attorneys have been known to attempt to defend their client's agency that they experience from again being mandated, even coerced, into participating in services that they may not want. Courts need to understand that the physical and emotional coercion that victims face makes it difficult for them to leave the life and creates a high likelihood of recidivism.

Zornosa (2016) suggests that HTICs are not completely necessary to have an impact of on the criminalization of survivors of trafficking. Public defenders typically already have the connections to various social services to assist their clients with services that exist without them

behind mandated (Zornosa, 2016). HTICs are not a necessary part to reach his population. Gruber et al. (2016) fear that if further court reform takes place to where more HTICs occur, the criminal court will become its own entity with keeping all services internal and funding will then only go to social services who cooperate with the courts. This may be a disservice for victims who need connected to culturally specific services who do not choose to cooperate with the courts and do not receive funding from the courts. While evaluating the overall functioning of HTICs it is important to remember the unintended consequences that consistent court monitoring may place on a defendant even if the intentions are good.

### **Further Recommendations**

#### **Affirmative Defense**

Identifying victims of sex trafficking as early as their criminal justice system interaction begins should be a goal of law enforcement and court officials. Zornosa (2016) suggests that relief should be provided to trafficking victims before a conviction by an affirmative defense. Zornosa (2016) argues that an affirmative defense for trafficking victims would be similar to the defense of duress which is commonly used in courts. The duress defense is described as follows

A person's unlawful threat (1) which causes the defendant to reasonably believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in the conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress (sometimes called compulsion or coercion) to the crime in question unless that crime consists of intentionally killing and innocent person.

Zornosa (2016) describes that the duress defense isn't applicable for some trafficking victims who have not faced imminent death or serious bodily injury. He states that it may be difficult for victims to prove in court that their criminal offense was a result of some imminent threat of death or serious bodily injury. The affirmative defense for trafficking victims who've

committed crimes as a result of being trafficked would allow them to avoid those criminal convictions. Zornosa (2016) finds that an affirmative defense for trafficking victims would be much easier than relying on post-conviction relief since it is much easier to prove that someone is a victim of trafficking early on rather than months or years later. By the time that a trafficking victim is convicted and their motion is filed to vacate, their trafficker could have relocated or destroyed any evidence that would corroborate the victim's experience of being trafficked and coerced into committing a crime (Zornosa, 2016). Zornosa (2016) argues that if this burden of proof is moved from the back end of the process to the front, it would allow for less manipulation and more positive outcomes for the victim. Another benefit of an affirmative defense for trafficking victims is that it does not brand them as criminals and allows them to focus on bettering themselves. The affirmative defense would allow them to interact less with the criminal justice system and allow them to fully utilize social services to recover from their trauma and rebuild their life (Zornosa, 2016).

Critics of an affirmative defense for trafficking victims have stated that having an affirmative defense for trafficking victims would make them more likely to commit more crimes because they know they will not be punished for them. To this critique of the defense, Zornosa (2016) finds that this view assumes that the trafficking victims are rational actors who are making choices to commit these crimes all while weighing the harm and benefits. From what much research has shown, trafficking victims who commit crimes are likely to be committing these crimes under the influence of their trafficker rather than of their own compulsion (Zornosa, 2016).

Eighteen states currently have affirmative defense statutes: Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Kansas, Kentucky, Louisiana, Nebraska, New Hampshire, New Jersey, Oklahoma, South Dakota, Vermont, Washington, Wisconsin, and Wyoming. The range of

what they are able to provide an affirmative defense for varies. Iowa, Massachusetts, Minnesota, Pennsylvania, and South Carolina have what is called a ‘codified affirmative defense’ in which the affirmative defense is available for victims who commit crimes in duress or duress like situations (Zornosa, 2016). Some states affirmative defense statutes are limited to prostitution and prostituted related offenses while others have a broader scope to trafficking victims who commit a non-prostitution related offense if they are a direct result of being trafficked. Zornosa (2016) suggests that since trafficking victims are often arrested for crimes such as trespassing, disorderly conduct, or other non-prostitution related offenses, the ideal affirmative defense statute would include non-prostitution related charges as eligible for an affirmative defense. He suggests the need to find a balance to where too much relief isn’t being provided. An ideal affirmative defense would match Kentucky’s affirmative defense which is limited to non-violent crimes but have a ‘causation requirement’ that restricts the defense for only crimes in which “trafficking victims truly lack personal culpability” (Zornosa, p. 200, 2013) whereas Kentucky’s affirmative defense is a bit too broad in language and could be used to cover crimes that trafficking victims commit without influence of their traffickers

### **Municipal Courts**

Another area that survivors of sex trafficking are criminalized are within the municipal court system. Instead of being arrested, sometimes individuals engaged in sex work receive municipal citations which could potentially turn into warrants. City prosecutors may treat these cases as disposable as they may never be resolved (Gruber et al., 2016). Out of fear of arrest, some victims may never report to court regarding the prostitution citation once they do not pay the fine (Dank et al., 2017).

In some states municipal court records are closed to the public. In Milwaukee, Wisconsin municipal court and criminal court records are open public records. This would allow for potential landlords or employers to simply type someone's name into the search bar for the public record and be able to see any criminal convictions, civil lawsuits, or municipal citations they have received. For victims, criminal convictions of prostitution-based offenses may prohibit them from getting a job, housing, or employment but under the right conditions they have the possibility to be vacated or expunged. There is no *vacatur* or expungement available for municipal court cases. If a victim of trafficking frequently received citations for loitering-prostitution and they paid their fines and later exited the life, those citations will still be listed and still will be public record. It could potentially be off putting for potential employers to be able to search an applicant's name and see that they have received 12 municipal citations for loitering-prostitution.

While there is acknowledgement and support for the movement to end the demand of trafficking by arresting Johns, some language in city ordinances may require the criminalization of individuals engaged in sex work to give the john a penalty. For example, the City of Milwaukee's ordinance 106-35. Loitering- Soliciting Prostitutes states the following:

Any person who loiters or drives in any public place in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to commit an act of prostitution shall forfeit not less than \$500 nor more than \$5,000 or upon default of payment be imprisoned for not more than 80 days. Among the circumstances which may be considered in determining whether such purpose is manifested are the following: that the person frequents, either on foot or in a motor vehicle, a known area of prostitution; repeatedly beckons to stop or attempts to stop, or engages known prostitutes in conversation; or stops the motor vehicle the person is the operator of and picks up or attempts to pick up a known prostitute. The violator's conduct must be such as to demonstrate a specific intent to induce, entice, solicit or procure another to commit an act of prostitution.

There are a few points in the language of this ordinance that implies the criminalization of a potential victim in order to target a john. This ordinance defines a known area of prostitution as “a public place where within 3 years previous to the date of arrest for violation of this section, and within the knowledge of the arresting officer, a person had been arrested for a violation which led to a conviction in Milwaukee municipal court or Milwaukee County circuit court of an offense involving prostitution” (Milwaukee Ordinance, p. 627, 2016). This ordinance defines a known prostitute as a “person who, within 3 years previous to the date of arrest for violation of this section, had within the knowledge of the arresting officer been convicted in Milwaukee (Common Council, p. 627, 2016) municipal court or Milwaukee County circuit court of an offense involving prostitution” (Common Council, p. 627, 2016). Breaking down this ordinance, it implies that for a john to receive a citation for solicitation, it would require that he is seeking someone engaged in sex work who has been criminalized in the past 3 years. For some victims of sex trafficking who are being forced into commercial sex and have been lucky enough to not receive citations, this would not allow for the protection of them. Especially when one takes into account violent johns, citations that may prevent them from re-offending would not apply if the potential victim has not been criminalized in the past.

### **Conclusion.**

As sex trafficking has begun to catch much public and political attention, it is important to recognize and re-evaluate current laws and systems that victims/survivors may interact with. Srikantiah (2007) believes that the TVPA was created with a certain type of victim in mind. He states that model victim has the following characteristics: the victim is a woman who is trafficked for sex, law enforcement believes she will be a good witness, she cooperates fully with law enforcement investigation, and she is rescued instead of escaping from the trafficking

situation. He coins this as the “iconic victim” (Srikantiah, 2007). This view clashes with the fact that in many cases, victims choose not to cooperate with law enforcement or the courts whether it be due to fear of retaliation from the trafficker, distrust of law enforcement, fear that they may also be arrested for crimes committed while being trafficked, or because of previous negative interactions with the criminal justice system.

Some anti-trafficking efforts are based on a limited concept of victimhood, which only reflects the experience of some trafficking victims and may not protect those who have also been charged with crimes based on their exploitation (Srikantiah, 2007). Only focusing on the “iconic victim” does a disservice to survivors of trafficking. The reality of the issue is that sometimes, victims commit crimes by force or being tricked into it by their trafficker. Viewing them as simply a defendant who chose to commit a crime will not address the underlying motivators for the criminal act. Taking time to listen for indicators of trafficking and routing them to services rather than incarceration would fall more in line with the criminal justice system’s value of rehabilitation.

Training for all law enforcement and court officials on how to identify trafficking victims and how their victim status may have played into their criminality needs to be made a priority. Due to the belief that prostitution charges or prostitution related charges are easily disposable, there is a lot of pressure on defense attorneys and prosecutors to quickly move these cases through the court system with a plea to avoid having additional court dates (Drasin, 2012). Defense attorneys play a large role in issue identification as they would need to know the difference and relationship between prostitution and sex trafficking. Additional training for court staff on the use of the affirmative defense for trafficking as well as issue identification would be

useful. Further training for court officials on *vacatur* will also be beneficial for survivors whose past criminal records as a result of trafficking have hindered them in moving forward.

Human Trafficking Intervention Court models have their flaws, but with ongoing evaluation and input from survivors they may be an option for victims/defendants who have committed crimes that they are found to have been responsible for. If a victim is unlucky enough to interact with a court system who does not recognize the dynamics of trafficking and the coercion and pressure that are present in those relationships, they still may be criminally charged. In the event that they are, routing to short term probationary services which will allow for connections to housing, education, employment, and counseling would be beneficial.

While these recommendations are not perfect, they reflect where we are now and are a step in the right direction into finding solutions in which survivors of trafficking are not further criminalized by the system and laws put in place to protect them. They should not be prosecuted for the same laws that were meant to protect them. While the idea of having the criminal courts or municipal courts step in to route survivors to social services may not be ideal, it is indicative of where we are right now.

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