

COMMENT

A PATH TO PROTECTION: COLLATERAL CRIME VACATUR FOR WISCONSIN'S VICTIMS OF SEX TRAFFICKING

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Sex trafficking is a form of human trafficking in which a trafficker compels a victim to engage in commercial sex acts. Traffickers often control victims using physical violence, sexual abuse, psychological abuse, isolation, and by introducing victims to illegal drugs. Throughout the course of their victimization, many victims of sex trafficking experience such distress that they turn to drugs to cope or steal to meet their basic needs. Unfortunately, the trauma of trafficking is prolonged and exacerbated when victims are prosecuted for and convicted of crimes they committed as a direct result of trafficking. In addition to prostitution convictions, many victims of trafficking accrue criminal records for “collateral” offenses such as drug possession, theft, disorderly conduct, or weapons offenses. When victims of trafficking have criminal records, they encounter barriers to housing and employment, subjecting victims to lives of poverty, which increases their risk of being re-trafficked.

Wisconsin provides victims of sex trafficking with two forms of decriminalization: (1) an affirmative defense to avoid conviction of any crime committed as a direct result of being a victim of trafficking and (2) a pathway for victims of sex trafficking to expunge or vacate prostitution convictions that were a result of being trafficked. Both pathways are insufficient remedies for victims because victim identification is poor and, more importantly, only prostitution convictions are eligible for vacatur or expungement, which leaves victims with criminal records for the collateral crimes they committed as a direct result of being a victim of sex trafficking.

Wisconsin should expand its vacatur statute for victims of trafficking to allow victims to vacate or expunge any nonviolent conviction committed as a direct result of being a victim of trafficking. Moreover, an expansion of the vacatur statute for victims of trafficking would better protect victims and help them to reintegrate into life outside of trafficking.

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INTRODUCTION

Imagine Jane Doe. Her childhood was filled with abuse and neglect.¹ When she was fourteen,² her “boyfriend” started buying her things and taking her places.³ He told her she could be a model.⁴ Then he told her she just had to sleep with one man so they could make

1. See *infra* note 41 and accompanying text.

2. In a national survey of 130 human trafficking survivors, fifty-two percent were first trafficked as minors; age fourteen to fifteen was the age group with the highest number of respondents reporting first being trafficked. NAT’L SURVIVOR NETWORK, NATIONAL SURVIVOR NETWORK MEMBERS SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING, 1–2 (2016).

3. See Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1018 (2013) (citing Transcript of Bond Hearing at 18–20, *United States v. Culp*, No. 11-20319-JPM (W.D. Tenn. Feb. 17, 2012), ECF No. 63.). While some traffickers kidnap victims and force them into the sex industry, this is rare. *Id.* Instead, most traffickers use fraud, drugs and alcohol to incapacitate, and “grooming,” the process by which traffickers use fraud and eventually violence to get compel victims into the sex industry. *Id.*

4. See *id.* at 1025–27.

money for their life together, for her career.⁵ Soon, he was trafficking her regularly.⁶ She did not have the resources to leave. She was arrested for prostitution, drug charges, and theft. Maybe she was “convicted of transporting minors across state lines because of trafficking experience—a gun was held to [her] head to force [her] to do this.”⁷ Perhaps Jane Doe was arrested for promoting prostitution and had to register as a sex offender despite her own victimization through sex trafficking.⁸ Like one Wisconsin survivor of sex trafficking, she may have been charged with prostitution but ultimately convicted of disorderly conduct instead.⁹ Eventually, Jane Doe successfully sought vacatur of the prostitution convictions. However, she was still unable to find gainful employment and housing because of her non-prostitution convictions—convictions that were a direct result of being a victim of sex trafficking.¹⁰

This Comment will use statistics to help contextualize the issue of human trafficking but with the following caveat: statistics about trafficking are notoriously untrustworthy.¹¹ The number of victims who are counted in official records (via governmental and nongovernmental identification) is much lower than the reality.¹² Like other victims of crime, many individuals who experience trafficking do not report.¹³ This Comment also uses interviews of trafficking survivors to highlight that those who have been trafficked have unique, individual perspectives on their experiences.

In 2016, there were sixty-five instances of sex trafficking reported in Wisconsin—an increase of 141 percent from the twenty-seven

5. *Id.*

6. *Id.*

7. NAT’L SURVIVOR NETWORK, *supra* note 2, at 8.

8. *Id.*

9. Telephone Interview with Michelle Kasper, Survivor and Advocate (Sept. 19, 2019).

10. NAT’L SURVIVOR NETWORK, *supra* note 2, at 8 (showing that for sixty-six respondents, their criminal records prevented them from accessing employment (approximately seventy-three percent), housing (approximately fifty-eight percent), and education (approximately seventeen percent)).

11. For instance, in 2013, the Federal Bureau of Investigation added human trafficking to its Uniform Crime Reporting program, and so statistics may improve; still, “not all states collect data, some states do not collect data every year, some only report some of their data, and some data are inaccurate due to human error or intentional omission.” Amy Farrell & Jessica Reichert, *Using U.S. Law-Enforcement Data: Promise and Limits in Measuring Human Trafficking*, 3 J. HUMAN TRAFFICKING 39, 45 (2017) (citing MICHAEL D. MALTZ, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS, BRIDGING GAPS IN POLICE CRIME DATA (1999)).

12. *Id.* at 40.

13. *Id.* at 41 (citing Andrea Lange, *Challenges of Identifying Female Human Trafficking Victims Using a National 1-800 Call Center*, 14 TRENDS IN ORGANIZED CRIME 47 (2011)).

instances reported in 2012.¹⁴ Due to the stigma associated with the sex trade and human trafficking, fear of repercussions at the hands of a trafficker, and distrust of law enforcement, many victims are reluctant to report that they have been trafficked.¹⁵ Consequently, the instances of trafficking are much higher than these statistics suggest.¹⁶ Additionally, although there were 275 Wisconsin state investigations of sex trafficking between 2014 and 2016, only ten to fifteen of those were successfully prosecuted.¹⁷ Traffickers are rarely brought to justice,¹⁸ and their victims all too often end up with convictions for prostitution and other crimes committed due to being trafficked.

Victims of sex trafficking face trauma at the hands of their perpetrators when they are forced to engage in commercial sex acts via physical and sexual abuse, coercion, and threats.¹⁹ The victimization can be prolonged, especially when these victims face criminal charges for prostitution.²⁰ According to the U.S. Institute Against Human Trafficking, ninety percent of trafficking victims are arrested for selling sex.²¹ Even after victims escape trafficking, they might face barriers to housing and employment because of prostitution convictions and convictions for other offenses they committed as a result of being trafficked.²² One survivor and advocate said that finding employment

14. Abigail Becker, "There Are People for Sale Here": Madison Authorities Struggle to Support Victims of Sex Trafficking, CAP TIMES (Dec. 6, 2017), https://madison.com/ct/news/local/crime-and-courts/there-are-people-for-sale-here-madison-authorities-struggle-to/article_a7582aed-f9c2-5007-b2ff-e79ba6efc18c.html [https://perma.cc/NBU8-974F].

15. See DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESOURCES: THE MINDSET OF A HUMAN TRAFFICKING VICTIM.

16. See *id.*

17. Becker, *supra* note 14.

18. AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 5 (2012).

19. See Parker & Skrmetti, *supra* note 3.

20. See Alyssa M. Barnard, Comment, *The Second Chance They Deserve: Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1472 (2014) (citing Kate Mogulescu, *The Defense Attorney as Anti-Trafficking Advocate, An Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 482 (2012)).

21. U.S. INSTITUTE AGAINST HUMAN TRAFFICKING (Homepage), https://usiaht.org/?gclid=Cj0KCQiAoo7gBRDuARIsANeJKUauasc3s36sXBRKEyh8dHvMnsTvNm4SdDUd8oL_cdeWfclrJSLWbHMaApKKEALw_wcB [https://perma.cc/KE5Z-R79L].

22. Barnard *supra* note 20; Whitney J. Drasin, Comment, *New York's Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering It Up?*, 28 TOURO L. REV. 489, 490 (2012) ("The stigmatizing effects of a criminal record create barriers for victims with respect to obtaining housing, jobs, and education.").

with a criminal record due to being trafficked “was incredibly difficult, [having the convictions] was an insurmountable barrier.”²³

Both state and federal laws protect victims of trafficking to a limited extent. For instance, federal law requires that victims be provided with protection and services, that victims not be detained in inappropriate facilities, and that law enforcement be trained in identifying victims.²⁴ Federal law does not provide a route to expungement or vacatur for victims of trafficking who are convicted of prostitution or collateral state crimes as a result of being trafficked because these convictions occur at the state level.²⁵ In 2010, New York passed legislation providing a mechanism for victims of trafficking to vacate their prostitution convictions, and many states have since followed suit.²⁶

Wisconsin, like most states with vacatur or expungement statutes for prostitution, does not allow for the vacatur or expungement of a trafficking victim’s “collateral convictions”²⁷ that occurred as a result of being trafficked—only the prostitution conviction itself is eligible for vacatur or expungement.²⁸ This Comment adds to a body of literature that argues for an expansion of vacatur statutes and the addition of an affirmative defense for victims of sex trafficking.²⁹ Moreover, this Comment builds on that body of literature by showing why Wisconsin, a state that already has both an affirmative defense and a vacatur statute for victims of sex trafficking, should improve its vacatur statute to better serve victims. This Comment argues that Wisconsin’s vacatur statute for victims of sex trafficking is inconsistent with Wisconsin’s

23. Telephone Interview with Anonymous, Survivor and Advocate (Sept. 21, 2019).

24. 22 U.S.C. § 7105 (2019); DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, 9, 24 (2018).

25. See DEP’T OF STATE, *supra* note, 24 at 444.

26. SUZANNAH PHILLIPS ET AL., CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 3 (2014), <https://mvslaw.org/wp-content/uploads/2017/06/Effective-Remedies-for-Criminalized-Trafficking-Victims-CUNY-2014.pdf> [<https://perma.cc/EPF5-45J5>].

27. This Comment will use the phrase “collateral convictions” to refer to non-prostitution crimes that a victim of trafficking may accrue as a direct result of being trafficked.

28. WIS. STAT. § 973.015(2m) (2017–18).

29. See, e.g., Drasin, *supra* note 22, at 489 (arguing that New York courts must interpret the vacatur statute broadly to provide relief for convictions of non-prostitution offenses); Barnard, *supra* note 20, at 1500–01 (arguing that New York should improve its vacatur statute by removing the due diligence requirement, clarifying the evidentiary requirements, and creating a trafficking victim defense); Jessica Aycock, Comment, *Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims*, 5 CRIM. L. PRAC. (forthcoming Fall 2019) (arguing for an affirmative defense for victims of trafficking, a vacatur statute, and a victims’ assistance unit).

affirmative defense and federal anti-trafficking law. It also falls short of justice for victims by failing to allow for vacatur of non-prostitution convictions and preventing victims from achieving the fresh start they deserve. Accordingly, Wisconsin's vacatur statute for victims of trafficking should be expanded to include collateral convictions for crimes committed by victims as a direct result of being trafficked.

This Comment contains three parts. Part I provides background information about sex trafficking, trauma, why victims of trafficking commit collateral crimes, and anti-trafficking laws. Part II analyzes Wisconsin's and other states' vacatur statutes to demonstrate how Wisconsin's vacatur statute fails to align with Wisconsin's affirmative defense for victims of trafficking and fails to comply with federal anti-trafficking laws. Part III offers recommendations to repair Wisconsin's vacatur statute.

I. TRAFFICKING, TRAUMA, AND ANTI-TRAFFICKING LAWS

In a national survey of 130 trafficking survivors, ninety percent had been arrested, and the majority of these individuals attributed all of their arrests directly to being trafficked.³⁰ Among survey respondents, sixty-five percent were arrested for prostitution, forty percent were arrested for drug possession, and almost twenty percent were arrested for drug sales—indicating that human trafficking victims are compelled to commit non-prostitution-related crimes during their victimhood.³¹ Yet, Wisconsin's vacatur statute for victims of sex trafficking only allows for the vacatur of prostitution convictions, leaving many individuals with criminal records that hinder their reintegration into life outside of trafficking.³² The remainder of this Part provides a description of sex trafficking, the problem of sex trafficking in Wisconsin, and a broad picture of federal and state anti-trafficking laws.

While “survivors” is a better term for those who have been trafficked because it avoids diminishing the resiliency and agency of the individuals,³³ this Comment will typically use the term “victims” because it denotes the legal significance of “victim” status in the

30. NATIONAL SURVIVOR NETWORK, *supra* note 2, at 1, 5.

31. *Id.* at 4.

32. *See infra* notes 53–63 and accompanying text.

33. OFFICE FOR VICTIMS OF CRIMES TRAINING & TECH. ASSISTANCE CTR., HUMAN TRAFFICKING TASK FORCE E-GUIDE: STRENGTHENING COLLABORATIVE APPROACHES, 1.3 Victim-Centered Approach, <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/> [<https://perma.cc/T83L-UGN6>].

criminal justice system.³⁴ Additionally, although individuals of any gender can be victims of trafficking, this Comment will typically use feminine pronouns for trafficking victims to reflect the reality that most identified and reported sex trafficking victims are women and girls.³⁵

A. Overview of Sex Trafficking

Human trafficking is a crime that is committed against adults and children by compelling them “to work in the commercial sex industry” or the “service and labor sectors” for the financial gain of traffickers.³⁶ Sex trafficking is compelling an individual to engage in a commercial sex act.³⁷ Because this Comment focuses on sex trafficking, the term “trafficking” will be shorthand for sex trafficking throughout. The following provides an overview of how sex trafficking operates and how it affects victims, the problem in Wisconsin, and laws that combat trafficking.

1. VICTIMIZATION AND TRAUMA

Victimization occurs due to the power and control dynamic that is present in the relationship between the trafficker and the victim.³⁸ Victimization can also occur if “victims become completely dependent on their traffickers to meet their basic survival needs.”³⁹ A Wisconsin survivor of trafficking states that “[traffickers] pick on people that are vulnerable.”⁴⁰ Often individuals who are victims of trafficking are also victims of sexual and physical abuse.⁴¹ Traffickers assert control over their victims using abuse, but they also offer protection from violent

34. *Id.*

35. HUMAN RIGHTS FIRST, *Human Trafficking by the Numbers*, 1 (Jan. 7, 2017), <https://www.humanrightsfirst.org/resource/human-trafficking-numbers> [<https://perma.cc/CEB2-2KYN>] (“[Seventy-one percent] of trafficking victims around the world are women and girls and [twenty-nine percent] are men and boys.”). (Author’s note: This source does not include statistics for nonbinary people, which might be quite high. In general, statistics regarding the rates at which trans and nonbinary people experience trafficking are limited.)

36. OFFICE OF THE ATTORNEY GENERAL WISCONSIN DEPARTMENT OF JUSTICE, *HUMAN TRAFFICKING: A GUIDE FOR CRIMINAL JUSTICE PROFESSIONALS 1* (2018).

37. WIS. STAT. § 940.302 (2017–18).

38. Interview with Rachel Monaco-Wilcox, CEO and Founder, LOTUS Legal Clinic (Sept. 13, 2019).

39. OFFICE OF THE ATTORNEY GENERAL WISCONSIN DEPARTMENT OF JUSTICE, *supra* note 36, at 1.

40. Telephone Interview with Michelle Kasper, *supra* note 9.

41. Parker & Skrmetti, *supra* note 3, at 1020–21 (“[Seventy percent] of domestic sex trafficking victims were sexually abused between the ages of three and fourteen.”).

“johns,” that is, those purchasing sex,⁴² which causes some victims of trafficking to feel loyalty toward their traffickers or even results in victims being unaware of the “aberrant nature” of their relationship with the trafficker.⁴³ Perpetrators of trafficking control their victims through isolation; threats and acts of physical and sexual violence; controlling access to legal documents, important papers, and information; and psychological abuse.⁴⁴

Victims of sex trafficking experience trauma that affects their interactions with the world.⁴⁵ Trauma is the emotional and physiological response to a large, negative life event.⁴⁶ Victims of human trafficking are likely to have faced “complex trauma,” which is the repeated exposure to multiple traumatic events.⁴⁷ Complex trauma changes how a person processes events, makes developing healthy relationships or trust difficult, and even affects how memories are made and stored.⁴⁸ The effects of trauma can influence the way that victims of trafficking appear during an investigation—they may seem uncertain, uncooperative, or give contradictory statements, causing credibility issues and, for uninformed investigators, building mistrust.⁴⁹

In addition, as a result of trafficking, victims are more likely to have more negative health outcomes, such as substance abuse, sexually transmitted infections, and posttraumatic stress disorder.⁵⁰ Victims are also at a higher risk of poverty and homelessness.⁵¹ The consequences of being a victim of sex trafficking make it difficult to gain employment and housing, which is exacerbated when a victim also has a criminal record for crimes committed as a direct result of being trafficked.⁵²

42. SHARED HOPE INT’L, *Trafficking Terms*, <https://sharedhope.org/the-problem/trafficking-terms/> [https://perma.cc/J8DR-7TRK] (citing L. SMITH & C. COLOMA, *RENTING LACY: A STORY OF AMERICA’S PROSTITUTED CHILDREN* (2013)).

43. Samantha M. Meiers, Comment, *Removing Insult from Injury: Expunging Criminal Records of Persons Trafficked in the Commercial Sex Trade*, 47 U. TOL. L. REV. 211, 215 (2015).

44. OFFICE OF THE ATTORNEY GENERAL WISCONSIN DEPARTMENT OF JUSTICE, *supra* note 36, at 9–10.

45. *Id.*

46. DEP’T OF STATE, *supra* note 24, at 24.

47. *Id.*

48. *Id.*

49. *Id.*; FARRELL ET AL., *supra* note 18, at 223.

50. Lara Gerassi et al., *Disclosing Sex Trading Histories to Providers: Barriers and Facilitators to Navigation of Social Services Among Women Impacted by Commercial Sexual Exploitation*, J. INTERPERSONAL VIOLENCE 3 (2017).

51. *Id.*

52. Drasin, *supra* note 22, at 490 (“The stigmatizing effects of a criminal record create barriers for victims with respect to obtaining housing, jobs, and education.”).

2. VICTIMS AS CRIMINALS

Unfortunately, victimization of individuals who have been trafficked can be difficult to prove, and often victims are required to prove their victimhood in order to vacate prostitution convictions.⁵³ Many individuals working in the criminal justice system conflate sex work and sex trafficking.⁵⁴ In addition to minimizing the impact, trauma, and seriousness of sex trafficking, this conflation also means that victims of trafficking are treated like criminals and prosecuted under criminal laws.⁵⁵ Prosecuting victims for prostitution also fails to address the systems and strategies of traffickers who victimize these individuals.⁵⁶ Furthermore, the common conception of victims as criminals in their own right is reinforced when victims are not cooperative with investigations.⁵⁷ Law enforcement investigators and criminal justice professionals must learn and believe that victims are compelled to commit these crimes by either their traffickers directly or due to the circumstances of trauma and poverty while being trafficked.⁵⁸

Common crimes that victims of trafficking are convicted of—in addition to prostitution and prostitution-related offenses—are drug and weapon offenses.⁵⁹ Drug use and addiction often co-occur with trafficking victimhood, and victims describe being “cajole[d]” into using drugs, turning to drugs to stay awake through the night, and using drugs as a coping mechanism for dealing with the emotional distress of being trafficked.⁶⁰ Similarly, traffickers encourage drug use to promote compliance and dependence—a victim who is addicted to drugs will stick around because her trafficker is typically her drug

53. Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 2016 UTAH L. REV. 535, 537 (2016).

54. See WIS. OFFICE OF JUSTICE ASSISTANCE, WISCONSIN HUMAN TRAFFICKING PROTOCOL & RESOURCE MANUAL 30 (2012) (“A crucial distinction must be made between chosen sex-work and forced sex-trafficking. The commonalities and the shared experiences between trafficking victims and sex workers may make identifying exploitation (and therefore trafficking) difficult.”).

55. *Id.*

56. *Id.*

57. Peters, *supra* note 53.

58. *Id.* at 546.

59. Meiers, *supra* note 43, at 216.

60. MEREDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES 228 (2014), https://www.urban.org/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.urban.org%2Fsites%2Fdefault%2Ffiles%2Fpublication%2F22376%2F413047-estimating-the-size-and-structure-of-the-underground-commercial-sex-economy-in-eight-major-us-cities_0.pdf [https://perma.cc/W82G-T3TG].

dealer.⁶¹ One survivor of sex trafficking from the Milwaukee area states that her trafficker was “keeping [her] high twenty-four hours a day.”⁶² Other victims are forced to steal basic necessities like nail clippers, body wash, and toothpaste—items that their traffickers do not provide.⁶³ Traffickers even coerce victims into committing crimes, like shoplifting, and then threaten to turn in victims for these crimes.⁶⁴ Other victims may also use a fake driver’s license provided by their traffickers (sometimes to conceal that they are under the age of eighteen), resulting in convictions for using a false identification.⁶⁵

To avoid criminalizing victims, law enforcement and service providers must be trained in identifying victims.⁶⁶ Outward manifestations of being a trafficking victim include both physical hints (injuries, bruising, and malnourishment) and behavioral signs (shyness, appearing fearful of speaking, uncooperativeness, and lack of focus during interviews).⁶⁷ Of course, these indicators may be explained by any number of reasons, so it is important that law enforcement officers use trauma-informed interviewing techniques and ask potential victims about their living situation, work conditions, whether they have freedom to move, whether they feel threatened by romantic partners or employers, and whether they have been asked to do something in exchange for shelter, food, or other basic necessities.⁶⁸ The Wisconsin Human Trafficking Protocol Resource Manual recommends that victims obtain counsel prior to talking to anyone in the criminal justice system.⁶⁹ Reform is needed to identify victims and treat them with dignity and respect rather than presumptively treating them as criminals.

61. Meiers, *supra* note 43, at 216 (citing Louise Shelley, *The Relationship of Drug and Human Trafficking: A Global Perspective*, 18 EUR. J. CRIM. POL’Y RES. 241, 243 (2012)).

62. Telephone Interview with Michelle Kasper, *supra* note 9.

63. Bianca Bruno, *Expungement Law Helps Human Trafficking Victims Move Forward*, COURTHOUSE NEWS SERVICE (Feb. 2, 2018), <https://www.courthousenews.com/expungement-law-helps-human-trafficking-victims-move-forward/> [<https://perma.cc/3RC8-DJMD>].

64. Audio recording: Morgan Young, League of Women Voters March 2015 Forum (Mar. 4, 2015), <https://www.lwvdanecounty.org/forums/2015/3/4/human-trafficking-2015-march>.

65. Susan Coppedge, *Stop Criminalizing the Victims*, CNN (Mar. 17, 2016, 12:46 PM), <https://www.cnn.com/2016/03/17/opinions/coppedge-freedom-project-new-lives/index.html> [<https://perma.cc/2QJW-Y6WS>].

66. Drasin, *supra* note 22, at 490 (explaining that “victim identification by law enforcement is still lacking”).

67. WIS. OFFICE OF JUSTICE ASSISTANCE, *supra* note 54, at 35.

68. *Id.* at 35–38.

69. *Id.* at 47.

B. The Prevalence of Sex Trafficking in Wisconsin

Sex trafficking takes place in all of Wisconsin's seventy-two counties despite the common misconception that it is an urban crime.⁷⁰ In Wisconsin, trafficking co-occurs with many legitimate industries, such as tourism, hospitality, and agriculture, making it difficult to detect.⁷¹ Furthermore, Milwaukee is one of the top five cities in the United States for the recovery of trafficked adolescents and has gained notoriety and a national reputation as “the Harvard of Pimp School.”⁷²

C. Federal Anti-Trafficking Law

The United States did not recognize human trafficking as a federal crime until 1910.⁷³ Prior to 1910, many states implemented prostitution laws in response to the growing sex trade industry.⁷⁴ At the same time, some states instead tried to regulate and legalize prostitution. In fact, Wisconsin had a law allowing a third-party to profit from commercial sex if the individual doing sex work did not have a “previous chaste character.”⁷⁵

The most prominent federal anti-trafficking law is the Trafficking Victims Protection Act (TVPA) of 2000 and its reauthorizations.⁷⁶ The Justice for Victims of Trafficking Act (JVTA) of 2015 is another federal statute that protects victims, provides victims with services, and outlines prosecution of commercial sex purchasers.⁷⁷ The federal anti-trafficking laws show that the United States is committed to eliminating human trafficking, and this federal legislation can also provide a framework for individual states' anti-trafficking statutes and victim protection mechanisms.

70. Latoya Dennis, *Sex Trafficking Happening in Every Wisconsin County*, WUWM 89.7 MILWAUKEE'S NPR (Jan. 23, 2018), <http://www.wuwm.com/post/sex-trafficking-happening-every-wisconsin-county#stream/0> [https://perma.cc/MXE5-ZY62].

71. OFFICE OF THE ATTORNEY GENERAL WISCONSIN DEPARTMENT OF JUSTICE, *supra* note 36, at 6.

72. *Trafficking Facts*, 5-STONES, <https://5-stones.org/statistics/> [https://perma.cc/AYR3-MX2L].

73. Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 42–43 (2017).

74. *Id.* at 41.

75. *Id.* at 42 (quoting JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 10* (2014)). This law is again demonstrating that only “chaste” or innocent women are deserving of protection.

76. *Id.* at 49.

77. *Id.* at 61–62.

1. THE TRAFFICKING VICTIMS PROTECTION ACT

The Trafficking Victims Protection Act (TVPA)⁷⁸ is a federal law that operates with three goals: prevention, protection, and prosecution.⁷⁹ Under the TVPA, “sex trafficking” is the “recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”⁸⁰ The TVPA also states that “severe forms of trafficking in persons” are “induced by force, fraud, or coercion” or sex trafficking of a minor.⁸¹

The TVPA has four minimum requirements that countries must meet to show best practices and to earn a Tier 1 ranking from the Department of State.⁸² First, the government “should prohibit severe forms of trafficking in persons and punish acts of such trafficking.”⁸³ Second, for knowingly committing sex trafficking using force, fraud, or coercion, when the victim is a child, or when it includes rape or kidnapping causing death, the government “should prescribe punishment commensurate with that for grave crimes.”⁸⁴ Third, punishment for traffickers should be strong enough to deter conduct and reflect the severity of the crime.⁸⁵ Fourth, the government should make “serious and sustained efforts to eliminate severe forms of trafficking”⁸⁶ The fourth minimum standard can be shown through the government’s efforts to investigate and prosecute trafficking, protect victims and include them in investigations and prosecution of traffickers, implement public education and outreach, and collaborate with public and private sector organizations to “prevent trafficking, protect victims, and punish traffickers.”⁸⁷

The 2018 Trafficking in Persons Report, prepared by the United States Department of State, ranks national governments based on their compliance with the TVPA’s minimum standards for the treatment and

78. Trafficking Victims Protection Reauthorization Act of 2017, 22 U.S.C. §§ 7101–14 (2019).

79. *Id.*; OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, THE 3PS: PREVENTION, PROTECTION, PROSECUTION 1 (2016).

80. § 7102(12).

81. § 7102(11) (“The term ‘severe forms of trafficking in persons’ means— (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”).

82. DEP’T OF STATE, *supra* note 24, at 40, 44.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 44–45.

elimination of trafficking.⁸⁸ The Trafficking in Persons Report considers a range of measures to rank countries using four tiers, where Tier 1 indicates the highest level of compliance with the TVPA.⁸⁹ These rankings include considerations of the penalties for perpetrators of trafficking, proactive victim identification procedures, victim protection without detention, and the extent to which the government provides legal assistance with consideration of the victim's "rights, dignity, [and] psychological well-being."⁹⁰ The United States is ranked as a Tier 1 country, which is the highest rating and means that the government meets the TVPA's four minimum standards.⁹¹

Despite this Tier 1 rating, advocates point out that state authorities arrest trafficking victims for crimes committed as a direct result of being subjected to trafficking, and there is little effort on the state level to provide remedies for victims with non-prostitution convictions.⁹² And, the Trafficking in Persons Report clarifies Tier 1 rankings, explaining:

While Tier 1 is the highest ranking, *it does not mean that a country has no human trafficking problem or that it is doing enough to address the problem.* Rather, a Tier 1 ranking indicates that a government has made efforts to address the problem that meet the TVPA's minimum standards.⁹³

Importantly, human trafficking is both a federal and a state crime. Two parts of the Constitution, the Thirteenth Amendment⁹⁴ and often the Commerce Clause,⁹⁵ are used federally against human trafficking.⁹⁶ The majority of trafficking prosecutions occur at the federal level.⁹⁷ Because most trafficking prosecution takes place at the federal level, there can be barriers to successful prosecution at the state level, such as ambiguous laws, lack of awareness in prosecution agencies, and ignorance or lack of experience among prosecutors.⁹⁸ Although the

88. *Id.* at 39.

89. *Id.* at 40–41.

90. *Id.* at 39.

91. *Id.* at 53–54.

92. *Id.* at 444.

93. *Id.* at 39 (emphasis added).

94. U.S. CONST. amend XIII.

95. U.S. CONST. art. I, § 8, cl. 3.

96. Sarah Pierce, *Prosecuting Human Trafficking in the United States: State and Federal Jurisdictions*, HUMAN TRAFFICKING SEARCH (2015), <http://humantraffickingsearch.org/prosecuting-human-trafficking-in-the-united-states-state-and-federal-jurisdictions/> [https://perma.cc/MAQ4-CHVQ].

97. *Id.*

98. *Id.*

TVPA is federal legislation, individual states should also meet the TVPA's four minimum standards to accomplish its purpose of protecting victims and eliminating trafficking.⁹⁹ Wisconsin has certainly made efforts to address trafficking, as described in the TVPA's minimum standards, but Wisconsin does not fully comply with all of the minimum standards.¹⁰⁰

2. THE JUSTICE FOR VICTIMS OF TRAFFICKING ACT

The Justice for Victims of Trafficking Act (JVTA) is another piece of federal legislation that addresses some of the needs of trafficking victims.¹⁰¹ The JVTA imposes a \$5,000 special assessment against human traffickers to offset the harm they caused.¹⁰² The special assessment money funds victims' services and law enforcement investigations of human trafficking.¹⁰³ Additionally, the JVTA does more to address those purchasing commercial sex acts by requiring Department of Justice anti-human trafficking trainings to include methods for investigating and prosecuting buyers of commercial sex acts involving victims of trafficking.¹⁰⁴ By bolstering the TVPA and providing greater resources to victims of trafficking, the JVTA demonstrates a strong commitment to the well-being of victims of trafficking at the federal level.¹⁰⁵ The protections and services that the JVTA provides are not part of Wisconsin's vacatur statute in its current form.¹⁰⁶

99. See *supra* Section I.C.1.

100. See *infra* Section II.D. (explaining that Wisconsin's vacatur statute does not protect victims of sex trafficking to its full potential, and thus is not fully compliant with the fourth minimum standard of the TVPA).

101. Justice for Victims of Trafficking Act of 2015, 18 U.S.C. § 3014 (Supp. V 2012).

102. SHARED HOPE INT'L, JUSTICE FOR VICTIMS OF TRAFFICKING ACT SECTION-BY-SECTION ANALYSIS, 1–2.

103. *Id.*

104. *Id.* at 7.

105. Rachel Buchan, *JVTA One Year After Enactment*, HUMAN RIGHTS FIRST (July 12, 2016), <https://www.humanrightsfirst.org/blog/jvta-one-year-after-enactment> [<https://perma.cc/YKY7-J46E>] (describing the “[f]our key provisions of the bill” as “improving victim restitution, refining a victim-centered approach in criminal procedures, codifying training for law enforcement personnel on identifying and investigating human trafficking, and increasing reporting by law enforcement across the United States”).

106. See *infra* notes 144–49 and accompanying text. While Wisconsin provides rights to victims and witnesses of crimes, these rights do not automatically extend to those motioning for vacatur because individuals motioning for vacatur must first prove that they were victims. WIS. STAT. § 950 (2017–18).

D. Wisconsin's Human Trafficking Statute

Wisconsin's anti-trafficking statute prohibits labor trafficking and trafficking for the purposes of a commercial sex act.¹⁰⁷ A commercial sex act includes sexual contact, sexual intercourse, sexually explicit performance, or conduct done for the purpose of sexual humiliation, degradation, arousal, or gratification “for which anything of value is given to, promised, or received directly or indirectly, by any person[.]”¹⁰⁸ A person who “knowingly engages in trafficking” for the purpose of commercial sex acts is guilty of a Class D felony.¹⁰⁹ According to the statute, “[t]rafficking’ means recruiting, enticing, harboring, transporting, providing, or obtaining, or attempting to recruit, entice, harbor, transport, provide, or obtain, an individual.”¹¹⁰ Importantly, trafficking does not require moving or transporting victims, a common misconception.¹¹¹ Trafficking is done by any of the following:

- (a) Causing or threatening to cause bodily harm to any individual.
- (b) Causing or threatening to cause financial harm to any individual.
- (c) Restraining or threatening to restrain any individual.
- (d) Violating or threatening to violate a law.
- (e) Destroying, concealing, removing, confiscating, or possessing, or threatening to destroy, conceal, remove, confiscate, or possess, any actual or purported passport or any other actual or purported official identification document of any individual.
- (f) Extortion.
- (g) Fraud or deception.
- (h) Debt bondage.
- (i) Controlling or threatening to control any individual's access to an addictive controlled substance.
- (j) Using any scheme, pattern, or other means to directly or indirectly coerce, threaten, or intimidate any individual.
- (k) Using or threatening to use force or violence on any individual.

107. WIS. STAT. § 940.302 (2017–18).

108. § 940.302(1)(a).

109. § 940.302(2)(a).

110. § 940.302(1)(d).

111. *See id.*

- (l) Causing or threatening to cause any individual to do any act against the individual's will or without the individual's consent.¹¹²

Wisconsin's anti-trafficking statute broadly encompasses the many types of force, fraud, and coercion utilized by traffickers, including grooming, isolation, and control via drugs.¹¹³ The statute's broadness is helpful for proving victimhood because it enables advocates to point to multiple ways in which the trafficker exerted control over the victim. It is critical for anti-trafficking statutes to be broad and to recognize the dynamics of trafficking so that victims are able to demonstrate victimhood when seeking relief via vacatur statutes.

II. WISCONSIN'S PROTECTION OF TRAFFICKING VICTIMS

In addition to the human trafficking statute, Wisconsin also provides two forms of recourse to victims of trafficking charged with prostitution offenses: an affirmative defense based on being the victim of human trafficking,¹¹⁴ and a pathway to vacatur or expungement.¹¹⁵ However, Wisconsin's prostitution vacatur statute fails to meet the legislative intent of reintegrating victims of sex trafficking into life outside of trafficking because it is cumbersome and penalizes victims of trafficking for other crimes they were compelled to commit as a direct result of their victimization.¹¹⁶ Moreover, Wisconsin's vacatur statute does not meet the minimum standards of the TVPA.¹¹⁷ Remediating Wisconsin's vacatur statute would result in better consistency with both the affirmative defense for victims of trafficking and federal victim protections. Accordingly, Wisconsin should expand its prostitution vacatur statute to allow for vacatur of collateral convictions that an individual accrued as a direct result of being a victim of trafficking.

A. Wisconsin's Pathway to Vacatur

Anti-trafficking laws protect victims, but when victims are criminalized for offenses committed as a result of being a victim of trafficking, they face further challenges because their convictions make securing employment, housing, public benefits, and financial aid for

112. § 940.302(2)(a)(2).

113. See, e.g., Parker & Skrmetti, *supra* note 3, at 1018.

114. WIS. STAT. § 939.46(1m) (2017–18); see also *infra* note 157 and accompanying text.

115. See *infra* Section II.A.

116. See *infra* Section II.A.

117. See *infra* Section II.D.

higher education difficult, even after escaping trafficking.¹¹⁸ Victims who have been criminalized need further protection: they need a vacatur or expungement statute. The purpose of state expungement or vacatur laws is to protect victims and reintegrate victims of trafficking into life outside of trafficking by clearing their criminal records.¹¹⁹

Similar to forty-three other states, Wisconsin has a law to vacate or expunge sex trafficking victims' prostitution convictions.¹²⁰ Wisconsin Statute Section 973.015(2m)¹²¹ provides an avenue to vacate or expunge prostitution convictions if the person was a victim of trafficking "for the purposes of a commercial sex act" and committed the prostitution violation "as a result of being a victim of trafficking."¹²² The statute states:

At any time after a person has been convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect for a violation of s. 944.30 [the prostitution statute], a court may, upon the motion of the person, vacate the conviction, adjudication, or finding, or may order that the record of the violation of s. 944.30 be expunged, if all of the following apply¹²³

Thus, a court has the discretion to vacate *or* expunge a conviction. This difference is not merely semantic. Expungement "means to strike from the record or obliterate from the record" ¹²⁴ In contrast, "[V]acatur is the formal recognition of 'factual innocence.'" ¹²⁵ Thus, vacatur is the favored method of relief for victims of trafficking in Wisconsin because it stops victims from being viewed as criminals and it "increases a survivor's ability to find work, reducing their economic

118. See *supra* note 22 and accompanying text; DEP'T OF STATE, *supra* note 24, at 446.

119. See, e.g., Drasin, *supra* note 22.

120. ERIN MARSH ET AL., STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING 10 (2019) ("Today, all but six remaining states (Alaska, Iowa, Maine, Minnesota, South Dakota, and Virginia) and the federal government offer some form of criminal record relief specific for survivors of trafficking."); SHARED HOPE INTERNATIONAL, NATIONAL STATE LAW SURVEY: EXPUNGEMENT AND VACATUR LAWS (2017), https://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Expungement-and-Vacatur-Laws.pdf [<https://perma.cc/5ET6-FSZ5>].

121. WIS. STAT. § 973.015(2m) (2017–18).

122. *Id.*

123. *Id.*

124. § 973.015 (history).

125. See DEP'T OF STATE, Protecting Victims from Wrongful Prosecution and Further Victimization, in TRAFFICKING IN PERSONS REPORT 27 (2016).

vulnerabilities and the risk of being re-trafficked.”¹²⁶ However, a victim of trafficking will only be granted vacatur or expungement if the seven statutory elements are met:¹²⁷

- (a) The person was a victim of trafficking for the purposes of a commercial sex act¹²⁸
- (b) The person committed the violation of s. 944.30 [the prostitution statute] as a result of being a victim of trafficking for the purposes of a commercial sex act.
- (c) The person submitted a motion that complies with s. 971.30, that contains a statement of facts and, if applicable, the reason the person did not previously raise an affirmative defense under s. 939.46 or allege that the violation was committed as a result of being a victim of trafficking for the purposes of a commercial sex act, and that may include any of the following:
 1. Certified records of federal or state court proceedings.
 2. Certified records of approval notices, law enforcement certifications, or similar documents generated from federal immigration proceedings.
 3. Official documentation from a federal, state, or local government agency.
 4. Other relevant and probative evidence of sufficient credibility in support of the motion.
- (d) The person made the motion with due diligence subject to reasonable concern for the safety of himself or herself, family members, or other victims of trafficking for the purposes of a commercial sex act or subject to other reasons consistent with the safety of persons.
- (e) A copy of the motion has been served on the office of the district attorney that prosecuted the case that resulted in the conviction, adjudication, or finding except that failure to serve a copy does not deprive the court of jurisdiction and is not grounds for dismissal of the motion.
- (f) The court in which the motion was made notified the appropriate district attorney’s office of the motion and has given the district attorney’s office an opportunity to respond to the motion.

126. *See id.*

127. § 973.015(2m)(a)–(g).

128. Critically, Wisconsin’s vacatur statute may not encompass victims who were trafficked for labor purposes. An improvement to protecting victims of labor trafficking would be a separate statute to vacate crimes that these victims commit due to being a victim of trafficking.

(g) The court determines that the person will benefit and society will not be harmed by a disposition.¹²⁹

A breakdown of the statute's seven elements is confusing because several of them seem ambiguous or provide judges with a great deal of discretion. It is also difficult to interpret the statutory elements because there is no case law in the area—Wisconsin's prostitution vacatur and expungement cases for victims of trafficking are typically filed under seal to protect victims.¹³⁰

B. Deficits in Wisconsin's Pathway to Vacatur

State vacatur and expungement laws have been lauded for “empowering survivors,” decreasing “shame and stigma,” and helping reintegrate victims into life outside of trafficking.¹³¹ A Milwaukee-based advocate and survivor of trafficking explained that, for her, vacatur “recognized there had been an injustice and that it was being reconciled as much as possible.”¹³² However, Wisconsin's prostitution vacatur statute only applies to prostitution convictions.¹³³ For many victims, this is not enough because they also have convictions of collateral crimes such as theft and drug possession.¹³⁴ Victims commit these collateral crimes to meet their daily needs and cope with the abuse they endure.¹³⁵ Victims with criminal records are at an increased risk of revictimization, so these collateral crime convictions are a barrier to victims seeking to improve their quality of life.¹³⁶ Under Wisconsin's vacatur statute, an individual who no longer has prostitution convictions on her record might be stuck with convictions for theft or drug possession that also occurred *because* the individual was a victim of

129. § 973.015(2m)(a)–(g) (paraphrased for concision only).

130. Advocates file a motion to have the vacatur documents filed under seal based upon victims' rights to “fairness, dignity, and respect for his or her privacy” WIS. STAT. § 950.04(1v)(ag) (2017–18). And filing under seal is also allowed in Wisconsin when not doing so could “destroy the basic cause of action.” *State ex rel. Bilder v. Delavan*, 334 N.W.2d 252, 261 (Wis. 1983).

131. Jessica Emerson & Alison Aminzadeh, *Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 239, 251 (2016).

132. Telephone Interview with Anonymous, *supra* note 23.

133. § 973.015(2m).

134. Drasin, *supra* note 22, at 490 (“[C]ourts must understand that prostitution and prostitution related convictions might not be the only convictions a victim has on their record as a result of being trafficked.”); DEP'T OF STATE, *supra* note 24, at 446.

135. See Parker & Skrmetti, *supra* note 3, at 1022 (explaining that many victims “abuse drugs to self-medicate and dull the pain from their past”).

136. See DEP'T OF STATE, *Protecting Victims from Wrongful Prosecution and Further Victimization*, *supra* note 126 (“Vacatur . . . reduce[s] the risk of being re-trafficked.”).

trafficking.¹³⁷ For some, the narrow reach of Wisconsin’s vacatur statute indicates a lack of understanding of sex trafficking—for victims of trafficking, convictions do not always fit in a neat box of only prostitution convictions.¹³⁸ By prohibiting victims from vacating or expunging those collateral convictions, the insufficient Wisconsin vacatur statute prevents victims from having a chance to start anew.¹³⁹

Additionally, in Polaris’s 2019 State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking, Wisconsin receives a grade of F and makes the “Hall of Shame” for requiring victims to be “on trial” to prove victimization and defend why they did not use an affirmative defense when they were convicted.¹⁴⁰ Wisconsin scores just forty-four points out of a possible one hundred points, and the largest area for improvement is “offenses covered,” where Wisconsin scores just five out of a possible thirty points.¹⁴¹

1. “GATEKEEPER” ELEMENTS

The first element of the vacatur statute requires that an individual must have been “a victim of trafficking for the purposes of a commercial sex act”¹⁴² to have her prostitution convictions vacated.¹⁴³ Looking elsewhere in the statutes, a person is a victim if she is “[a] person against whom a crime has been committed.”¹⁴⁴ A court can determine victimhood based upon the definition of trafficking found in the human trafficking statute,¹⁴⁵ but this definition describes the trafficker’s actions rather than the victim’s experiences. A victim must have been trafficked¹⁴⁶ through one of the forms of compulsion included in the human trafficking statute.¹⁴⁷ The prostitution vacatur statute does

137. See WIS. STAT. § 973.015(2m) (2017–18).

138. Telephone Interview with Anonymous, *supra* note 23.

139. See Drasin, *supra* note 22, at 490.

140. MARSH ET AL., *supra* note 120, at 28–29.

141. POLARIS PROJECT, CRIMINAL RECORD RELIEF FOR TRAFFICKING SURVIVORS 1–2 (2019), <https://polarisproject.org/sites/default/files/2019-CriminalRecordRelief-Wisconsin.pdf> [<https://perma.cc/2FDR-J3V5>].

142. § 973.015(2m)(a).

143. *Id.* (“The person was a victim of trafficking for the purposes of a commercial sex act, as defined in s. 940.302 (1) (a), under s. 940.302 or 948.051 or under 22 USC 7101 to 7112.”).

144. WIS. STAT. § 950.02 (4)(a) (2017–18).

145. WIS. STAT. § 940.302 (2017–18).

146. § 940.302(1)(d) (“‘Trafficking’ means recruiting, enticing, harboring, transporting, providing, or obtaining, or attempting to recruit, entice, harbor, transport, provide, or obtain, an individual.”).

147. § 940.302(2)(a)(2).

not require a trafficker to be convicted to find an individual was a victim, but the victim must demonstrate her victimhood.¹⁴⁸

The second element requires the individual to have committed the violation (i.e., the prostitution offense) “as a result of being a victim of trafficking.”¹⁴⁹ This element could be interpreted two ways, making it ambiguous.¹⁵⁰ First, it may mean that the victim must prove victimhood (element one) and prove that she indeed engaged in prostitution (element two). This interpretation appears to make the second element superfluous because an individual pursuing prostitution vacatur obviously has a prostitution conviction—proving she committed the prostitution offense would be redundant. The second interpretation suggests an individual can prove victimhood (element one) but that she can still be guilty of prostitution and thus must prove the prostitution was *due to* the trafficking. The notion that an individual was trafficked for commercial sex but simultaneously chose to engage in other instances of commercial sex work is not only counterintuitive but also fails to recognize the dynamics of sex trafficking.¹⁵¹

Another “gatekeeping” element of the vacatur statute requires that the individual seeking relief made the motion with concern for herself, family members, and/or other victims of trafficking.¹⁵² Once again, this element is ambiguous. One interpretation of this element is that prostitution vacatur is viewed as more justified when it protects more people than *merely* the victim herself. The implication is that vacatur is only valuable when it protects innocent people (in contrast to the victim who is still seen as culpable and perhaps morally tarnished). Another interpretation of the element is to protect other victims and individuals who have been threatened by the movant’s trafficker. For example, if a trafficker has threatened to hurt other victims, a motion containing those victims’ names, the movant’s name, or the trafficker’s name could cause serious harm. To protect the victimized parties, advocates representing movants move the court to file under seal.¹⁵³ As a result, there are no opinions, published or unpublished, from which to glean judicial interpretations of the prostitution vacatur statute. With no

148. WIS. STAT. § 973.015(2m)(c) (2017–18).

149. § 973.015(2m)(b) (“The person committed the violation of s. 944.30 as a result of being a victim of trafficking for the purposes of a commercial sex act.”).

150. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 681 N.W.2d 110, 124 (Wis. 2004) (explaining that a statute is ambiguous if it can be understood by reasonably well-informed people in two or more ways).

151. *See supra* Section I.A.1.

152. § 973.015(2m)(d) (“The person made the motion with due diligence subject to reasonable concern for the safety of himself or herself, family members, or other victims of trafficking for the purposes of a commercial sex act or subject to other reasons consistent with the safety of persons.”).

153. *See supra* note 130 and accompanying text.

precedent, the elements are left further open to each individual judge's discretion.

The final element of the statute requires that the court find that the individual will benefit and society will not be harmed by the vacatur.¹⁵⁴ This element is likely another “gatekeeper” to prevent those who are voluntarily participating in the sex work industry from seeking vacatur of their prostitution convictions. Additionally, the element could be related to the presence of non-prostitution convictions—if an individual is seeking vacatur of her prostitution conviction and she also has drug possession convictions, she is seen as less sympathetic. The element implies that vacating a prostitution conviction for a “criminal” would harm society. If the court truly saw the individual seeking relief as a victim of trafficking (as required in the first element of the prostitution vacatur statute), then this final element would be presupposed.

2. PROCEDURAL ELEMENTS

Wisconsin's prostitution vacatur statute requires that the individual seeking expungement or vacatur must submit a motion, in compliance with Section 971.30,¹⁵⁵ that contains a statement of facts, includes the reason the person did not raise an affirmative defense of coercion,¹⁵⁶ and explains why the person did not allege that the violation was the direct result of being a victim of trafficking, another available affirmative defense.¹⁵⁷

Many victims of trafficking who are charged with prostitution report that their defense attorneys “did not explain the long-term consequences of pleading guilty to prostitution charges,” and instead, their defense attorneys advised, “if they wanted to go home that day . . . they should plead guilty.”¹⁵⁸ Additionally, an affirmative defense is

154. § 973.015(2m)(g) (“The court determines that the person will benefit and society will not be harmed by a disposition.”).

155. WIS. STAT. § 971.30 (2017–18) (“(1) ‘Motion’ means an application for an order. (2) Unless otherwise provided or ordered by the court, all motions shall meet the following criteria: (a) Be in writing. (b) Contain a caption setting forth the name of the court, the venue, the title of the action, the file number, a denomination of the party seeking the order or relief and a brief description of the type of order or relief sought. (c) State with particularity the grounds for the motion and the order or relief sought.”).

156. WIS. STAT. § 939.46(1) (2017–18) (“(1) A threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act is a defense to a prosecution for any crime based on that act . . .”).

157. § 939.46(1m).

158. MEREDITH DANK ET AL., CONSEQUENCES OF POLICING PROSTITUTION: AN ANALYSIS OF INDIVIDUALS ARRESTED AND PROSECUTED FOR COMMERCIAL SEX IN NEW

only useful to a victim if her defense attorney knows that it is an option.¹⁵⁹ There are a plethora of reasons that a defense attorney would not realize his or her client was a victim of trafficking. For instance, victims do not always realize that a crime is being committed against them.¹⁶⁰ Perhaps even more frequently, professionals in the legal system do not want to see alleged prostitutes as victims.¹⁶¹ Further, in many instances, there is not enough time for defense attorneys to adequately learn the facts and circumstances associated with these cases. By way of example, one Wisconsin survivor of sex trafficking did not meet her defense attorney until the morning of her hearing, when he “helped” her by getting her prostitution charge lowered to disorderly conduct—without realizing her context, he turned her conviction from one that was eligible for vacatur into one that was not.¹⁶²

Two more procedural requirements of the prostitution vacatur statute are proper service and notice. First, the motion must be served on the prosecuting district attorney’s office.¹⁶³ Second, the court receiving the motion must notify the appropriate district attorney’s office and provide an opportunity for a response.¹⁶⁴ Unfortunately for victims of trafficking, the prosecuting district attorney may have reason (such as a victim’s collateral convictions) to oppose the motion.¹⁶⁵ Additionally, it can be difficult for an individual to change others’ perceptions of her if she has appeared in the same court multiple times (for example, if she has multiple prostitution convictions), potentially making this element another hurdle.

YORK CITY 32 (2017) [hereinafter DANK ET AL., CONSEQUENCES OF POLICING PROSTITUTION]; Drasin, *supra* note 22, at 506.

159. Rachel Monaco-Wilcox & Daria Mueller, *Human Trafficking in Wisconsin*, 90 WIS. LAW. (2017), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=9&ArticleID=25914> [<https://perma.cc/29G8-R2Y6>].

160. Nancy Derringer, *Human Trafficking Fight Plagued by Bad Data, As Well As Bad Guys*, M LIVE (June 9, 2016), https://www.mlive.com/news/index.ssf/2016/06/human_trafficking_fight_plague.html [<https://perma.cc/NA5U-WERF>].

161. See DANK ET AL., CONSEQUENCES OF POLICING PROSTITUTION, *supra* note 158, at 27.

162. Telephone Interview with Michelle Kasper, *supra* note 9.

163. WIS. STAT. § 973.015(2m)(e) (2017–18) (“A copy of the motion has been served on the office of the district attorney that prosecuted the case that resulted in the conviction, adjudication, or finding except that failure to serve a copy does not deprive the court of jurisdiction and is not grounds for dismissal of the motion.”).

164. § 973.015(2m)(f) (“The court in which the motion was made notified the appropriate district attorney’s office of the motion and has given the district attorney’s office an opportunity to respond to the motion.”).

165. Moreover, District Attorneys may be reluctant to “admit” that they made a mistake in front of a judge they will continue to appear before.

C. Ready for a Remedy: Wisconsin's Environment for Reform

Wisconsin is particularly ripe for an expansion of the vacatur statute because Wisconsin law already provides an affirmative defense for any crime committed as a direct result of being a victim of human trafficking. Cohesion between the affirmative defense and vacatur statute will provide more holistic protection to victims.¹⁶⁶ Remediating the vacatur statute will acknowledge the realities of victim misidentification and provide a post-conviction path to relief.

Wisconsin's prostitution statute falls within Chapter 944, for "crimes against sexual morality."¹⁶⁷ The legislative intent of Chapter 944 is to "encourage high moral standards" and to discourage "any form of sexual conduct outside the institution of marriage."¹⁶⁸ Prostitution is a Class A misdemeanor,¹⁶⁹ which is punishable by "a fine not to exceed \$10,000 or imprisonment not to exceed 9 months, or both."¹⁷⁰ A person is guilty of prostitution if he or she intentionally has, offers to have, or requests to have a multitude of types of sexual contact¹⁷¹ or sexual intercourse¹⁷² in exchange for "anything of value."¹⁷³ Wisconsin's prostitution statute presents prostitution as a

166. See WIS. STAT. § 939.46 (1m) (2017–18). Notably, the affirmative defense applies for individuals who were victims of labor trafficking and individuals who were victims of sex trafficking.

167. WIS. STAT. § 944 (2017–18).

168. § 944.01 ("The state recognizes that it has a duty to encourage high moral standards. Although the state does not regulate the private sexual activity of consenting adults, the state does not condone or encourage any form of sexual conduct outside the institution of marriage. Marriage is the foundation of family and society. Its stability is basic to morality and civilization, and of vital interest to society and this state.").

169. § 944.30(1m).

170. § 939.51(3)(a).

171. § 939.22(34) ("'Sexual contact' means any of the following if done for the purpose of sexual humiliation, degradation, arousal, or gratification: (a) The intentional touching by the defendant or, upon the defendant's instruction, by a third person of the clothed or unclothed intimate parts of another person with any part of the body, clothed or unclothed, or with any object or device. (b) The intentional touching by the defendant or, upon the defendant's instruction, by a third person of any part of the body, clothed or unclothed, of another person with the intimate parts of the body, clothed or unclothed. (c) The intentional penile ejaculation of ejaculate or the intentional emission of urine or feces by the defendant or, upon the defendant's instruction, by a third person upon any part of the body, clothed or unclothed, of another person. (d) Intentionally causing another person to ejaculate or emit urine or feces on any part of the actor's body, whether clothed or unclothed.").

172. § 939.22(36) ("'Sexual intercourse' requires only vulvar penetration and does not require emission.").

173. WIS. STAT. § 944.30(1m) ("Any person who intentionally does any of the following is guilty of a Class A misdemeanor: (a) Has or offers to have or requests to have nonmarital sexual intercourse for anything of value. (b) Commits or offers to

moral issue, and an act that threatens marriage—the statute states that marriage is “the foundation of family and society” and “[i]ts stability is basic to morality and civilization, and of vital interest to society and this state.”¹⁷⁴ Due to the moralization of the issue of prostitution, those who engage in sex work are vilified.¹⁷⁵ Because law enforcement officers are not adept at distinguishing trafficking victims from willing participants in the sex work industry, victims fall through the cracks and many victims are prosecuted as prostitutes.¹⁷⁶

Vacatur and expungement laws are intended to remedy the misidentification of victims as criminals. The legislative intent behind the prostitution vacatur statute reflects the pathos of this issue—legislators, like society, want to protect people from sex trafficking and the consequences of trauma and barriers to a successful life. Moreover, Wisconsin’s vacatur statute demonstrates that people want to allow a reprieve for the moral condemnation of sex work and the consequences of criminalization if the individual was a victim of trafficking. However, many people hold a sensational image of trafficking, which can actually be detrimental to victims seeking relief when they do not match the stereotypical image of a victim.¹⁷⁷ For instance, many people expect that those who have been trafficked are in “shackles and chains,” and do not understand the power of coercion.¹⁷⁸ Low-income people, people of color, and people with criminal records are seen as

commit or requests to commit an act of sexual gratification, in public or in private, involving the sex organ of one person and the mouth or anus of another for anything of value. (c) Is an inmate of a place of prostitution. (d) Masturbates a person or offers to masturbate a person or requests to be masturbated by a person for anything of value. (e) Commits or offers to commit or requests to commit an act of sexual contact for anything of value.”).

174. § 944.01.

175. See Barnard, *supra* note 20, at 1470 (explaining that prostitution is a “quality of life” offense that demoralizes communities); Dank et al., CONSEQUENCES OF POLICING PROSTITUTION, *supra* note 158, at 27 (“[A]lmost none claimed to be treated as a victim by the police or the courts. It was made clear to them, whether explicitly or implicitly, that they were criminals breaking the law.”).

176. See DANK ET AL., CONSEQUENCES OF POLICING PROSTITUTION, *supra* note 158, at 10 (thirty-five percent (N = 1,413) of Exploitation Intervention Project clients (individuals who had been prosecuted for violating state prostitution laws) reported having been trafficked); U.S. INSTITUTE AGAINST HUMAN TRAFFICKING, *supra* note 21 (stating ninety percent of sex trafficking victims are prosecuted for prostitution).

177. Derringer, *supra* note 160 (explaining that the movie *Taken* put human trafficking “into the public eye” but also “postulated that young women are routinely ID’d at airport taxi stands or shopping malls, kidnapped, shot full of drugs and then peddled to rich men who pay high prices for them”).

178. Telephone Interview with Anonymous, *supra* note 23.

prostitutes, whereas white women are seen as victims.¹⁷⁹ Similarly, it is still controversial to see an adult as a victim of sex trafficking instead of as a prostitute, whereas it is less controversial to understand children as victims.¹⁸⁰

Yet, despite some of the negative perceptions of victims of trafficking, Wisconsin has a longstanding (but wavering) history as a legislative leader in victim protection.¹⁸¹ For instance, Wisconsin is one of fewer than half of states in the United States that provide an affirmative defense to victims of trafficking.¹⁸² Wisconsin's affirmative defense statute states:

A victim of a violation of s. 940.302(2) [the human trafficking statute] or 948.051 [the trafficking of a child statute] has an affirmative defense for any offense committed as a direct result of the violation of s. 940.302 (2) or 948.051 without regard to whether anyone was prosecuted or convicted for the violation of s. 940.302 (2) or 948.051.¹⁸³

Importantly, Wisconsin leads other states by extending the trafficking affirmative defense to non-prostitution offenses, demonstrating the legislative purpose to provide victims with relief from criminal convictions, even if the crime is not prostitution.¹⁸⁴

D. Wisconsin's Victim Protection Should Better Align with the TVPA

Wisconsin's anti-trafficking statute and prostitution vacatur statute do not fully comply with the TVPA victim protections. Wisconsin's anti-trafficking statute requires some type of compulsion and provides a

179. Derringer, *supra* note 160 (Author's note: For male, nonbinary, or transgender victims of trafficking, there may be greater or different stigma and barriers to receiving help.).

180. *Id.* However, children can still be viewed as criminals. See SHARED HOPE INT'L, NATIONAL STATE LAW SURVEY: NON-CRIMINALIZATION OF CHILD SEX TRAFFICKING VICTIMS (2017), http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Non-Criminalization-of-Juvenile-Sex-Trafficking-Victims.pdf [https://perma.cc/3CM9-RLST] [hereinafter SHARED HOPE INT'L, NATIONAL STATE LAW SURVEY] (showing that only twenty-three states and the District of Columbia prohibit the criminalization of minors for prostitution).

181. See, e.g., WIS. CONST. art I, § 9; WIS. STAT. ch. 950 (2017–18).

182. Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 177, 192–93 (2016) (explaining that, in 2016, Wisconsin was one of just four states with a trafficking affirmative defense that applied to non-prostitution offenses).

183. WIS. STAT. § 939.46(1m) (2017–18).

184. Zornosa, *supra* note 182, at 196–97.

very long list of ways in which this compulsion can occur, which is helpful for attorneys seeking to prove their client's victim status.¹⁸⁵ The TVPA recognizes "sex trafficking"¹⁸⁶ and then also defines "severe forms" of trafficking that involve "force, fraud, or coercion . . ."¹⁸⁷ The TVPA requires victim protections to work toward the elimination of human trafficking.¹⁸⁸ The TVPA sets four minimum standards for governments to meet in working toward the elimination of trafficking,¹⁸⁹ and, under a strict reading of the TVPA, Wisconsin only meets one of those standards. While judges in Wisconsin may not be persuaded to use their discretion to best comply with the TVPA in vacatur cases, the Wisconsin legislature should be persuaded to amend the vacatur statute to more fully comply with the federal TVPA.

Wisconsin's statute meets the first minimum standard of the TVPA, which states that the government "should prohibit severe forms of trafficking in persons and punish acts of such trafficking."¹⁹⁰ The standard is met through Wisconsin's human trafficking statute, which makes human trafficking a felony crime.¹⁹¹ But that is as good as it gets; Wisconsin does not meet the remaining three minimum standards.

Wisconsin does not meet the second minimum standard because it fails to mandate "punishment commensurate with that for grave crimes, such as forcible sexual assault" for trafficking that uses force, fraud, coercion, or when the victim is a child, or when it includes rape or kidnapping causing death.¹⁹² In Wisconsin, even if a trafficker engages in trafficking by causing bodily harm to the victim, the crime is a Class D felony¹⁹³ unless the victim is a child.¹⁹⁴ Victims of trafficking are

185. See WIS. STAT. § 940.302(2)(a)(2) (2017-18).

186. 22 U.S.C. § 7102(12) (2019) ("The term 'sex trafficking' means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.").

187. § 7102(11) ("The term 'severe forms of trafficking in persons' means— (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained [eighteen] years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.").

188. See *supra* Section I.C.1.

189. See *supra* Section I.C.1.

190. § 7106(a)(1).

191. DEP'T OF STATE, *supra* note 24, at 44 (discussing the second minimum standard of the TVPA).

192. § 7106(a)(2) ("For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.").

193. WIS. STAT. § 940.302(2)(a)(2)(a) (2017-18).

compelled to engage in sex acts, essentially forcible sexual assault,¹⁹⁵ many times over the course of their victimization. Yet, traffickers face a lower penalty felony than perpetrators of second-degree sexual assault.¹⁹⁶ Second-degree sexual assault, an example of forcible sexual assault, as provided by the TVPA, is a more serious Class C felony.¹⁹⁷ The incongruence between the felony classifications of second-degree sexual assault and human trafficking—a Class C felony carries a penalty of up to forty years imprisonment whereas a Class D felony carries a penalty of up to twenty-five years imprisonment¹⁹⁸—demonstrates that Wisconsin is not compliant with the TVPA requirement of treating trafficking as commensurate with other grave crimes. Even if one *does* interpret the penalties as commensurate, the practice in Wisconsin fails to live up to the law. Advocates in the area of human trafficking report that in many counties, prosecutors are reluctant to prosecute perpetrators of sex trafficking under the human trafficking statute, instead opting to use more familiar statutes, such as false imprisonment and sexual assault.¹⁹⁹ While these substitute crimes do constitute “grave crimes,”²⁰⁰ using these crimes instead of the actual crime of human trafficking hides the magnitude of the issue.

Similarly, although Wisconsin is working toward deterrence of future sex trafficking, it does not fully comply with the TVPA’s third minimum standard. The third minimum standard of the TVPA is that the punishment should “deter” trafficking.²⁰¹ Sex trafficking is a lucrative business, “[t]he average annual profits generated by each woman in forced sexual servitude” is \$100,000,²⁰² and many traffickers are prone to recidivism.²⁰³ Moreover, purchasers of commercial sex

194. § 940.302(2)(a) (“Except as provided in s. 948.051 [the child trafficking statute], whoever knowingly engages in trafficking is guilty of a Class D felony . . .”).

195. WIS. STAT. § 940.225(2) (2017–18) (second degree sexual assault).

196. *Id.*

197. *Id.* (“Whoever does any of the following is guilty of a Class C felony: (a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.”).

198. WIS. STAT. § 939.50 (2017–18).

199. Interview with Morgan Young, Victim Services Training Officer, Wis. Dep’t of Justice (Feb. 13, 2019).

200. 22 U.S.C. § 7106(a)(2) (2019) (Severe forms of trafficking should be punished “commensurate with that for grave crimes, such as forcible sexual assault.”).

201. § 7106(a)(3) (“For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.”).

202. HUMAN RIGHTS FIRST, *supra* note 35.

203. U.S. DEP’T OF JUSTICE, NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING 4 (2017).

acts are prosecuted at low rates, so there is little reason for traffickers to stop—there is constant demand for commercial sex.²⁰⁴ Thus, Wisconsin’s human trafficking statute does not adequately deter sex trafficking.

Finally, Wisconsin does not comply with the fourth and final minimum standard of the TVPA, that the government “should make serious and sustained efforts to eliminate severe forms of trafficking in persons.”²⁰⁵ Some indicia of “serious and sustained efforts” include: protecting victims, educating the public, partnering with community organizations, and making efforts to reduce the demand for commercial sex.²⁰⁶ The fourth minimum standard is the hardest to measure because it requires the involvement of law enforcement, the legal system, community organizations, and community educators.²⁰⁷ However, one way in which Wisconsin falls short is the criminalization of victims via prostitution and collateral crime convictions for offenses victims committed as a direct result of being a victim of trafficking.²⁰⁸

Victims of sex trafficking who have criminal records are at greater risk for re-victimization. In the National Survivor Network survey, seventy-three percent of respondents lost or did not receive employment due to criminal records they had as a result of being a trafficking victim.²⁰⁹ Similarly, fifty-eight percent of respondents struggled to find housing due to convictions that resulted from being a victim of trafficking.²¹⁰ Victims who live in poverty are more vulnerable to being trafficked again.²¹¹ Wisconsin should improve its compliance with the TVPA by including collateral crimes in its vacatur statute and making the statute more accessible to victims. By preventing victims of trafficking from vacating all of their criminal convictions due to being victimized, Wisconsin is falling short in protecting victims, and thus falling short in eliminating severe forms of trafficking in compliance with the TVPA’s fourth minimum standard.

204. Wagner & Wagley McCann, *supra* note 73, at 89–92, 96 (2017).

205. § 7106(a)(4).

206. § 7106(b).

207. *See id.*

208. *See supra* Section I.A.2.

209. NAT’L SURVIVOR NETWORK, *supra* note 2, at 7.

210. *Id.*

211. *See* DEP’T OF STATE, *Protecting Victims from Wrongful Prosecution and Further Victimization*, *supra* note 126.

E. Other States' Vacatur Statutes

There is no consensus across states for how to approach criminal convictions as a result of trafficking victimization.²¹² New York was the first state with a pathway to relief for victims of sex trafficking convicted of prostitution, but its vacatur law, like Wisconsin's, does not allow for setting aside non-prostitution related convictions for violations victims committed due to being trafficked.²¹³

In contrast, California's vacatur and expungement statute is one of the broadest in its protection of victims because it includes all nonviolent offenses.²¹⁴ Including all nonviolent offenses recognizes the experiences of victims and helps them to obtain relief, and it also protects public safety by expanding only so far as nonviolent offenses.²¹⁵ In California, if an individual is arrested for or convicted of any nonviolent offense while a victim of trafficking, the person may petition the court for vacatur if she can demonstrate by "clear and convincing evidence" that the offense was "the direct result of being a victim of human trafficking."²¹⁶ Then, if the prosecution does not file opposition to the petition, the petition is "deemed unopposed," and the court "may" grant the petition without holding a hearing.²¹⁷ Finally, victims in California can file one petition covering all offenses "even if they occurred in different counties" if the prosecutorial agencies agree.²¹⁸ California's vacatur statute does not have the same procedural barriers as Wisconsin's, instead, it allows for an expedited pathway to relief if the prosecuting attorney does not oppose the petition for vacatur.²¹⁹ Expediting the process of vacatur is a critical step toward meeting the goal of reintegrating victims of trafficking into life outside of trafficking. Not only would this meet Wisconsin's legislative intent, but it would also demonstrate efforts to protect victims of trafficking,

212. See SHARED HOPE INT'L, NATIONAL STATE LAW SURVEY, *supra* note 180.

213. PHILLIPS ET AL., *supra* note 26, at 15–21; Emerson & Aminzadeh, *supra* note 131, at 241–42; Barnard, *supra* note 20, at 1463–64.

214. CAL. PENAL CODE § 236.14 (Deering 2018).

215. *Id.*

216. § 236.14(a).

217. § 236.14(d).

218. SAN DIEGO COUNTY, *Human Trafficking Victim Conviction Relief FAQ*, OFF. PUBLIC DEFENDER, https://www.sandiegocounty.gov/content/sdc/public_defender/human_trafficking.html [https://perma.cc/K7WX-S7XK] ("The law allows, if you want and all the different prosecutorial agencies agree, to have one petition and one hearing cover all your cases even if they occurred in different counties.").

219. *Id.*

an indication of efforts to stop trafficking in accordance with the TVPA.²²⁰

III. A PATH FORWARD: REMEDIES FOR WISCONSIN'S VACATUR STATUTE

Wisconsin should work toward full compliance with the minimum standards of the TVPA through changes to both the human trafficking statute itself and the prostitution vacatur statute. For example, Wisconsin should increase the penalty for human trafficking to a Class C felony (and similarly increase the penalty for child trafficking).²²¹ Wisconsin should also make efforts to prosecute more buyers of commercial sex in order to decrease demand and thus decrease the instances of trafficking.²²² Changes to the vacatur statute for victims of trafficking are the focus of this Part.

Amending the prostitution vacatur statute will move Wisconsin closer to compliance with the TVPA's fourth minimum standard, which requires serious and sustained efforts to eliminate severe trafficking.²²³ Expanding the prostitution vacatur statute will better protect victims of trafficking,²²⁴ which is one indication of efforts to eliminate trafficking.²²⁵ Expanding Wisconsin's vacatur statute is highly unlikely to cause an abuse of the statute because victims will still need to provide evidence of being trafficked.²²⁶ Waiting for federal legislation to better support victims would be a failure to victims because the state

220. See *supra* note 87 and accompanying text (explaining the fourth minimum standard of the TVPA).

221. See *supra* text accompanying notes 192–99 (explaining that Wisconsin's penalty for human trafficking is lower than the penalty for second degree sexual assault, in discordance with the TVPA).

222. Mary Spicuzza & Ashley Luthern, *Wisconsin Sex Trafficking Bills Target Repeat Patrons of Prostitutes*, J. SENTINEL (May 28, 2017), <https://www.jsonline.com/story/news/crime/2017/05/28/wisconsin-sex-trafficking-bills-target-repeat-patrons-prostitutes/349214001/> [<https://perma.cc/3YB4-NHL7>] (“[P]art of the drive for pimps to push prostitution is the demand, so reducing that demand will help combat trafficking.”).

223. See *supra* text accompanying notes 86–87 and accompanying text.

224. DEP'T OF STATE, *Protecting Victims from Wrongful Prosecution and Further Victimization*, *supra* note 126 (“States should also ensure these laws cover convictions that encompass the wide variety of nonviolent crimes that victims are forced to commit.”).

225. See *supra* text accompanying notes 86–87 and accompanying text (explaining the TVPA's fourth minimum standard and how it can be measured).

226. See, e.g., WIS. STAT. § 973.015(2m)(c) (2017–18). For instance, in California, if a victim was arrested or convicted of a nonviolent crime, she can petition to vacate the arrests or convictions if she shows by clear and convincing evidence that the arrest or conviction was the direct result of being a victim of trafficking. CAL. PENAL CODE § 236.14(a) (2018) (Deering).

has jurisdiction for prostitution cases and has greater accessibility to victim advocacy agencies and community organizations.²²⁷

A. Prioritize Substance Over Form

With seven elements, Wisconsin's vacatur statute is cumbersome.²²⁸ Other states' prostitution vacatur statutes are underutilized, and that is likely true of Wisconsin's. For instance, Alyssa Barnard reasons that of New York City's 2,391 individuals convicted of a prostitution-related offense in 2011, seventy-five percent could be attributed to trafficking and eligible for vacatur.²²⁹ Yet, in the first four years of New York's vacatur law, only thirty-eight individuals vacated their convictions; similarly, in the first three years of Illinois's vacatur law, only two people obtained relief.²³⁰ To make vacatur more accessible to victims of trafficking, some of the elements should be collapsed or deleted, and some of the procedural elements should be changed to allow for *pro se* use of the vacatur statute.²³¹

1. AVOID REDUNDANCY

Several of Wisconsin's prostitution vacatur statute elements would be better executed if they were collapsed. For instance, rather than requiring (1) the person be a victim of trafficking²³² and (2) the person committed the violation "as a result of being a victim of trafficking,"²³³ the statute would be clearer and fairer to victims by deleting the first element and just using the second element.²³⁴ If the person committed the violation as a result of being trafficked, then she must also have been trafficked.²³⁵ Similarly, the last element of the statute requires that the vacatur benefit the victim and not harm society.²³⁶ Since the statute should aim to reintegrate trafficking victims into life outside of trafficking and reduce trafficking by protecting survivors so that more individuals will come forward, the final element is unnecessary and

227. It is unclear how a federal vacatur statute would apply and whether it could apply to state convictions without a constitutional problem.

228. See § 973.015(2m)(a)–(g).

229. Barnard, *supra* note 20, at 1483.

230. *Id.* at 1484.

231. See *id.* at 1484–85 (discussing obstacles to achieving vacatur including lack of information, lack of legal services, and structural deficits in vacatur statutes).

232. § 973.015(2m).

233. *Id.*

234. See *supra* text accompanying notes 149–50 (arguing that element one should prove element two).

235. *Id.*

236. *Id.*

presents another hurdle for victims to overcome. For judges who are unsympathetic to a movant, this element could act as a barrier for victims. Unsympathetic judges may balance the victim's other criminal convictions—even those committed as a direct result of being trafficked, because those are not covered by the statute—against the benefit to society, and decide that the victim poses a danger to society. Instead, the purpose—to benefit the victim and society—should be worked into the statute outside of its elements.

2. STREAMLINE THE PROCEDURAL REQUIREMENTS

Another hurdle facing trafficking victims seeking vacatur is the lack of documentary evidence to prove their victimhood. In fact, traffickers often take identification and important documents from their victims.²³⁷ A lack of documentation should not be a barrier to expungement. Instead, like in California, an individual should be required to demonstrate by “clear and convincing evidence”²³⁸ that she committed the violation as a result of being a victim of sex trafficking. This evidentiary standard can be accomplished with an affidavit or testimony.²³⁹ Moreover, so long as the person can demonstrate that her conviction was the result of being a victim of sex trafficking, she should not have to explain why she did not use an affirmative defense at the time she was charged with prostitution.²⁴⁰

Finally, the service and notice requirements should be streamlined. Wisconsin's vacatur statute requires a victim to serve the motion on the district attorney that prosecuted the case²⁴¹ and requires the court in which the motion was made to notify the appropriate district attorney's office to provide an opportunity for response.²⁴² Instead, to make vacatur accessible to more people and, perhaps, to *pro se* individuals, the statute should merely require an individual to file her motion with the court.²⁴³ The law should also allow victims, with the agreement of

237. WIS. STAT. § 940.302(2)(a)(2)(e) (2017–18) (defining one method of compelling someone in trafficking as destroying, concealing, removing, confiscating, or possessing the individual's identification or threatening to do so). When traffickers have this level of control over their victims and their victims' movement, victims rarely have specific documentation of their victimhood.

238. See CAL. PENAL CODE § 236.14(a) (Deering 2018).

239. See WIS. STAT. § 906.01–02 (2017–18) (“Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.”).

240. *Supra* notes 155–60 and accompanying text (explaining why victims of trafficking may not utilize (or may not know to utilize) an affirmative defense).

241. WIS. STAT. § 973.015(2m)(e) (2017–18).

242. § 973.015(2m)(f).

243. Currently, it would likely be very difficult for a victim to complete the vacatur process *pro se*. The importance of victims' counsel cannot be understated—

the prosecutorial agencies, to file one consolidated motion covering offenses in any Wisconsin county.²⁴⁴ After a victim of trafficking completes a vacatur motion, the court could take responsibility for serving the prosecuting district attorney and the appropriate district attorney's office. Furthermore, like in California, the district attorney should have a set time limit in which they must respond to a motion, and failure to respond marks the motion as "unopposed," at which point the court may grant the motion without a hearing.²⁴⁵

B. Expand the Scope

Wisconsin's vacatur statute for trafficking victims should include the vacatur of all nonviolent crimes committed as a direct result of being a victim of trafficking, not just prostitution. The current vacatur statute states:

At any time after a person has been convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect for a violation of s. 944.30 [the prostitution statute], a court may, upon the motion of the person, vacate the conviction, adjudication, or finding, or may order that the record of the violation of s. 944.30 be expunged. . . .²⁴⁶

Many victims of trafficking who seek vacatur have convictions collateral to their prostitution convictions.²⁴⁷ Wisconsin's vacatur statute

these attorneys help to guide victims through the legal system and attempt to avoid re-traumatization. However, victims of other crimes do have the opportunity to obtain forms and complete their processes *pro se*. For instance, individuals seeking petitions for domestic violence and harassment temporary restraining orders are able to obtain fill-in-the-blank forms for free from county courthouses, where they are able to file the document, and take the document to a sheriff to serve the respondent. WIS. DEP'T OF JUSTICE, *Restraining Orders*, <https://www.doj.state.wi.us/ocvs/victim-rights/restraining-orders> [<https://perma.cc/WKZ6-M8JC>]; Dane County Clerk of Courts, *Petitioner's Instructions: Procedures for Filing Harassment Restraining Orders*, https://danedocs.countyofdane.com/pdf/court/tro_harrassment_civil.pdf [<https://perma.cc/X9Z8-S8YU>]; DANE COUNTY DISTRICT ATTORNEY'S OFFICE, *Restraining Orders*, https://da.countyofdane.com/restraining_order.aspx [<https://perma.cc/KDN3-9564>]. Eventually, as key players in the legal system gain knowledge of trafficking and vacatur, the process could become more accessible even for *pro se* victims.

244. SAN DIEGO COUNTY, *supra* note 218 (explaining consolidation of multi-county convictions into one vacatur motion is permissible).

245. *See* CAL. PENAL CODE § 236.14(d) (Deering 2018).

246. § 973.015(2m).

247. *See* DANK ET AL., CONSEQUENCES OF POLICING PROSTITUTION, *supra* note 158, at 22 (explaining that twenty-five percent (N = 51) of clients seeking vacatur were also convicted of a non-prostitution charge).

should be altered to use language from the trafficking affirmative defense, which victims of sex trafficking may utilize for “any offense committed as a direct result of the violation of [the human trafficking statute].”²⁴⁸ Wisconsin’s affirmative defense statute has a stricter nexus requirement than Wisconsin’s vacatur statute because it requires that the individual’s conviction to be “a direct result” of the individual’s status as a trafficking victim.²⁴⁹ The stricter nexus could be borrowed for the vacatur statute in addition to expanding the scope of the vacatur statute.

By making incremental changes in keeping with the affirmative defense for victims of sex trafficking, Wisconsin’s vacatur statute would help victims to more completely clear their records.²⁵⁰ The improved and revised language should include the purpose of the statute and the clearer procedural requirements. The improved statute could read:

The intent of this statute is to protect victims of sex trafficking and support them in their reintegration into life outside of trafficking. This statute provides victims of sex trafficking a pathway to clear convictions of crimes their traffickers and trafficking circumstances compelled them to commit.

At any time after a person has been convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect of *any nonviolent offense that the person committed as a direct result of a violation of s. 940.30* [the human trafficking statute] *or s. 948.051* [the child trafficking statute], a court may, upon the motion of the person, vacate the conviction, adjudication, or finding, or may order that the record of the violation be vacated or expunged if all of the following apply:

- (a) The individual files, under seal, a motion with the court;
- (b) The individual demonstrates by clear and convincing evidence that he or she committed the violation(s) as a direct result of being the victim of human trafficking under s. 940.302 [the human trafficking statute] or s. 948.051 [the child trafficking statute];

248. WIS. STAT. § 939.46(1m) (2017–18).

249. *Id.*

250. *See, e.g.,* Drasin, *supra* note 22 (arguing that New York courts must interpret the vacatur statute broadly to provide relief for convictions of non-prostitution offenses); *see also* Aycok, *supra* note 29 (arguing for an affirmative defense for victims of trafficking, a vacatur statute, and a victims assistance unit).

- (c) The court serves the motion upon the appropriate district attorney office; and
- (d) If the district attorney does not respond within 45 days, the court may grant the motion as unopposed.²⁵¹

This much shorter statute still requires that an individual demonstrate she was a victim of sex trafficking. This revised statute also reduces procedural work because it allows for, essentially, the administrative granting of vacatur motions.²⁵² Additionally, the court still has the discretion to call a hearing even if the district attorney does not oppose a motion for vacatur.²⁵³

C. Promote a “Wrap-Around” Approach

One recommendation from the TVPA is for criminal justice agencies to partner with social service organizations to better identify and serve victims.²⁵⁴ Wisconsin currently has a victim accompaniment statute that provides victims of crimes such as sexual assault and human trafficking with the right to an advocate at law enforcement interviews and court proceedings.²⁵⁵ Providing advocates for those charged with prostitution would help identify victims of trafficking, and advocates could help victims of trafficking create safety plans to leave their situations. In a study of individuals in New York seeking vacatur for prostitution convictions, respondents reported that they did not have resources to leave their trafficking situation.²⁵⁶ Because all of these clients had convictions, they “spent years, if not decades, cycling in and out of the criminal legal system, with few opportunities provided

251. See CAL. PENAL CODE § 236.14(d) (Deering 2018).

252. See *id.*

253. See *id.*

254. DEP’T OF STATE, *supra* note 24, at 3.

255. WIS. STAT. § 950.045(1)(a) (2017–18) (“(1) Right to accompaniment at law enforcement interviews; exceptions. (a) In addition to all rights afforded to victims under s. 950.04, an individual who is a victim of a violation of s. 940.22, 940.225, 940.302, 948.02, 948.025, or 948.05 to 948.11 has the right to be accompanied by a victim advocate at law enforcement interviews, subject to par. (b) or (c) and except as provided in par. (c) or (d).”); § 950.045(2)(a) (“(2) Right to accompaniment at proceedings. (a) In addition to all rights afforded to victims under s. 950.04, an individual who is a victim of a violation of s. 940.22, 940.225, 940.302, 948.02, 948.025, or 948.05 to 948.11 has a right to be accompanied by a victim advocate at interviews and proceedings at which he or she is requested or allowed to attend that are related to the crime committed against him or her, including prosecution interviews, department of corrections proceedings, court proceedings, and postconviction proceedings, except as provided in s. 950.045 (1) (c) and (d).”).

256. See DANK ET AL., CONSEQUENCES OF POLICING PROSTITUTION, *supra* note 158, at 34.

for intervention and assistance.”²⁵⁷ Fewer individuals would need vacatur and more traffickers would be brought to justice if victim identification were formalized in the criminal justice system.²⁵⁸ Service providers who specialize in working with victims of trafficking should be part of law enforcement and defense attorney interviews with individuals arrested for and charged with prostitution to screen for victims of trafficking.²⁵⁹

CONCLUSION

To help victims of sex trafficking reintegrate into life outside of trafficking, Wisconsin must recognize that victims are compelled to commit non-prostitution crimes and Wisconsin must offer a pathway to vacatur for those collateral crimes. Although Wisconsin leads other states by offering trafficking victims an affirmative defense for collateral crimes, Wisconsin’s vacatur statute for victims of trafficking falls short. By expanding the scope of the vacatur statute, the statute will be more compliant with the minimum standards of the TVPA, more consistent with Wisconsin’s affirmative defense for trafficking victims, and better aligned with the legislative goal of reintegrating victims of trafficking into life outside of trafficking. Under Wisconsin’s current vacatur statute for victims of trafficking, Jane Doe may struggle to find housing and employment, and may experience shame due to a criminal record of collateral crimes she did not want to commit, even if she successfully vacates her prostitution convictions. Wisconsin’s vacatur statute for victims of trafficking should provide victims with a pathway to vacate all nonviolent crimes that the individual committed as a direct result of being a victim of sex trafficking.

257. *Id.*

258. *Id.* at 55–57.

259. *See id.* at 35 (interview of a sex trafficking victim who would have disclosed her circumstances had there even been a female officer present).