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

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

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¹ Martha Minow, Surviving Victim Talk, 40 UCLA L. REV. 1411, 1432 (1993).
I. Introduction

Since modern-day slavery became an international criminal offense in 2000, the federal government, all fifty states, the District of Columbia, and all U.S. territories have enacted human trafficking legislation. The legal response to human trafficking concerns in this country has been to create more laws. Since 2012, Congress and state legislatures have introduced 1,601 bills related to sex trafficking alone, 387 of which were enacted. There are currently 51 human trafficking bills pending before the United States Congress. The Senate recently enacted eleven sex-trafficking laws in just one day, leaving one blogger to opine “Either sex trafficking has suddenly reached epidemic proportions, or massive numbers of women and children are being smuggled out of the U.S.”

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proportions in America, or it's become the showboat du jour for preening politicians. Most signs point to the latter.”

Despite the large number of bills being introduced and enacted, and the amount of resources and labor the federal government has poured into ending modern-day slavery, human trafficking victims face real hurdles in obtaining the services and benefits created for them. The rush to enact anti-trafficking laws has been saddled with an unwillingness to confer the rights and benefits traditional crime victims typically receive.

This is because the federal and state governmental response to trafficking victims begins with making them prove it. This practice has gained wide acceptance in America. Unfortunately, with the practice’s dominance, governments have not examined whether proof of victim status is necessary, much less whether it should be required for all human trafficking victims.

But there is more. Assuming a person earns the label “victim,” it may be difficult, if not impossible, to receive financial remunerations from the trafficker or the government. Federal judges and prosecutors, particularly in sex trafficking cases, have demonstrated a reluctance to pursue restitution from traffickers. Moreover, it is virtually


impossible for trafficking victims to qualify for Crime Victims Compensation at the state level due to reporting, filing, cooperation, and “innocence” requirements. In this way, victim status may be rendered meaningless where it is conferred.

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

This article addresses the challenges human trafficking victims face in proving victim status and obtaining entitlements traditional crime victims generally receive. Part two of this article examines what distinguishes human trafficking victims from traditional crime victims. It also establishes the standard of proof in federal and state anti-trafficking law definitions and which criminal justice actors are responsible for conferring victim status while a case is pending. Part three of the article discusses the difficulties victims face in obtaining restitution in federal courts and state Crime Victim Compensation funds. Part four analyzes whether the victim proof requirement is justified and whether placing barriers before victim entitlements is warranted. In the end, this article challenges
governments to reconsider proof of victim status and the obstacles they have placed before the protections, services, and benefits human trafficking victims are legally entitled to receive.

II. Obstacle One: Proving Victim Status

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

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8 2014 TIP REPORT, supra note 3, at 397 (stating that some victims who are trafficked in America work in “illicit industries or markets, including in brothels, escort services, massage parlors, strip clubs, [and] street prostitution”); Amanda Peters, Disparate Protections for American Human Trafficking Victims, 61 CLEV. ST. L. REV. 1, 28 (2013) (discussing arrests of sex trafficking victims for prostitution); Dina Francesca Haynes, Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act, 6 U. ST. THOMAS L.J. 77, 91 (2008) (describing the fact that some human trafficking victims have been deported or arrested and prosecuted for immigration-related offenses); Iris Yen, Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand Through Educational Programs and Abolitionist Legislation, 98 J. CRIM. L. & CRIMINOLOGY 653, 660 (2008) (many victims in countries are jailed and detained for immigration violations); Steven Seidenberg, Of Human Bondage: Slavery Continues to Haunt the Modern World, but Efforts to Eradicate It are Growing, ABA J. 56 (April 2013) (quoting Norma Ramos, Executive Director of the Coalition Against Trafficking of Women as saying, “We’ve been arresting the wrong people. We’ve been arresting the victims.”).

9 Scholars recognize the “perceived duality” of human trafficking victims’ “status as both victim and delinquent,” particularly when it comes to juveniles who have been sexually exploited. E.g., Nikki J. Hasselbarth, Emerging Victimhood: Moving Towards the Protection of Domestic Juveniles Involved in Prostitution, 21 DUKE J. GENDER L. & POL’Y 401, 413-14 (2014); Katherine C. Cunningham & Lisa DeMarni Cromer, Attitudes about Human Trafficking: Individual Differences Related to Belief and Victim Blame, J. INTERPERSONAL VIOLENCE 4 (April 2015) (“victims of sex trafficking in the media are portrayed as very young, innocent, and vulnerable children, in contrast to seemingly hardened, promiscuous youth who are viewed as willful sex workers”).
a. *Incidence of Trafficking Victims’ Criminal Activity*

Congress recognized that traffickers frequently cause their victims to violate criminal, labor, or regulatory laws during the trafficking scheme and it is the victim who is unfairly punished for these law violations.\textsuperscript{10} According to the Department of Justice (DOJ), labor trafficking is more likely to occur in unregulated labor markets employing foreign national victims, and is detected through investigations led by federal regulatory agencies or labor rights advocates.\textsuperscript{11} Of the confirmed labor trafficking victims, 67 percent were undocumented aliens and 28 percent had qualified alien status.\textsuperscript{12} This data confirms Congress’s finding that labor trafficking victims may be violating immigration or labor laws in the course of being trafficked.\textsuperscript{13}

The DOJ reports that sex trafficking victims, on the other hand, are much more likely to be American, female, and minors or young adults.\textsuperscript{14} Suspected sex trafficking cases are nearly always investigated by state or local law enforcement officers, many of whom work within vice units investigating prostitution, massage parlors, and strip clubs.\textsuperscript{15} Prostitution was involved in 88 percent of sex trafficking cases and sexualized


\textsuperscript{11} DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2009, 1-6, 9 (April 2011) (63% of victims were Hispanic, while 17% were Asian).

\textsuperscript{12} Id. at 6.

\textsuperscript{13} Id. at 1-6.

\textsuperscript{14} Id. at 6 (of 460 identified victims, 83% were Americans, 94% were female, 248 were 17 years old or younger, while 142 were between 18 and 24 years old, and 46 were between the ages of 25 and 34).

\textsuperscript{15} Id. at 3-4.
businesses were involved in six percent of cases. Thus, in 94 percent of cases, trafficking victims engaged in the commercial sex industry during the trafficking scheme.

Human trafficking victims may commit crimes due to the forceful, fraudulent, or coercive actions of their trafficker. In these cases, two crimes have been committed: the criminal act of the trafficker and the criminal act of the trafficked person, be it immigration crime, regulatory crime, or sex crime. Nevertheless, the Trafficking Victims Protection Act (TVPA), which is the primary federal anti-trafficking law, mandates victims “shall not be detained in facilities inappropriate to their status as crime victims.” They should not be fined, jailed, or punished for criminal acts they committed at the time they were enslaved.

The criminal justice system has had difficulty dealing with an entire class of crime victims who have their own criminal histories. Federal officials and law enforcement officers have wrestled with how to regard trafficking victims. State

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16 Id. at 3.


18 E.g., Jayashri Srikantiah, Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law, 87 B.U. L. Rev. 157, 158 (2007) (without trafficking immigration exceptions, many foreign victims “would otherwise be subject to deportation after escape from exploitation”).


20 U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2012, 363, available at http://www.state.gov/j/tip/rls/tiprpt/2012/ [hereinafter 2012 TIP REPORT]; 2014 TIP REPORT, supra note 3, at 397-98 (in addition to the TVPA’s statutory mandate that victims should not be confined and jailed, there is a federal policy that “victims should not be inappropriately penalized solely for unlawful acts committed as a direct result of being trafficked”).

21 E.g., Wendi J. Adelson, Child Prostitute or Victim of Trafficking?, 6 U. ST. THOMAS L. J. 96, 119–20 (2008) (quoting one Florida official as saying that “she might consider children as young as nine or ten years old as trafficking victims, but that young women who had reached sixteen years of age were prostitutes, not victims of trafficking”); Tamar R. Birckhead, The “Youngest Profession:” Consent, Autonomy, and Prostituted Children, 88 WASH. U. L. Rev. 1055, 1065 n.41 (2011) (noting that a federal administrator in the Office of Juvenile Justice and Delinquency Prevention said that though child sexual exploitation is “rape,” it should not be legalized because teenagers need to be warned “that they are doing
officials have the same problem. For example, a Texas police officer who arrested a trafficked minor for accepting money to traffic her teenage friends described his predicament this way: “I don’t normally go from talking to a victim to all of a sudden talking with a suspect… [It’s] very rare that a person can be both like that.”

Though the district attorney’s office initially charged the minor with a crime, the office later dropped charges, stating, “We always knew that she started out as a victim.” In this case, the officer considered the minor to be both defendant and victim whereas the prosecutors implied she started off as a victim then became a defendant. Human trafficking cases thus challenge long held victim and defendant notions.

Not only have law enforcement officers and prosecutors struggled with determining whether a person is a victim or defendant in the context of human trafficking, but so too have judges. In a guide written for state court judges, the authors noted it was difficult for judges to determine whether criminal defendants may be trafficking

something that’s wrong”); Nesheba Kittling, God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution, 6 Nev. L.J. 913, 913 (2006) (“America cannot make up its mind: Are juvenile girls who have sex victims or criminals? Do they need protection or prosecution? The laws surrounding this issue reflect the country’s internal strife, as the United States takes two very distinct positions with respect to juvenile prostitution.”), See also Jonathan Todres, Maturity, 48 Hous. L. Rev. 1107, 1110 (2012) (illuminating incoherence between state laws that consider minors unable to consent to sex and the fact that many states still criminalized juvenile prostitution).

22 Michael Barajas, Teen Victim to Teen Madam, Houston Press, 12 (February 26-March 4, 2015) (Volume 27, Number 9), available at http://blogs.houstonpress.com/news/2015/02/money_mike_schoolgirl_madam.php (quoting officer David Nettles of the Webster, Texas Police Department, regarding a 17-year old girl who had been sexually assaulted by a 62-year old man named Michael McIntosh, and then paid money by McIntosh to recruit other teenage girls, some as young as 14, to have sex with him for money). See also Njeri Mathis Rutledge, Turning A Blind Eye: Perjury in Domestic Violence Cases, 39 N.M. L. Rev. 149, 165 (2009) (discussing “how the law should respond when breached” by a domestic violence victim who is beaten by her batterer but who then commits perjury).

23 Barajas, supra note 22, at 15.

victims. “A victim may initially become visible in court as a defendant charged with a crime that might normally be appropriate for a punitive sentence,” yet upon further examination, it may become evident the person is a human trafficking victim. State court judges must parse and address a victim’s criminal behavior that “might be a by-product of ... victimization.”

These new trafficking laws challenge the traditional notion of crime victim in obvious ways. While the law confers legal victim status to human trafficking victims who commit crimes, there is no equivalent provision for traditional crime victims who do the same. In other words, a traditional crime victim who subsequently commits her own crime will, in all likelihood, be investigated, arrested, and charged with that offense irrespective of her victim status in the other case. Because of the uniqueness of the human trafficking experience – a criminal scheme that often induces victims to commit criminal acts – lawmakers have required victims to prove they were indeed human trafficking victims before they earn the right to victim status and everything it brings.

b. Victim Status under the Trafficking Victims Protection Act

The word “victim” has legal meaning within the body of criminal law. It refers to a person who has been harmed by criminal conduct. Being a victim in a criminal case

\[25\text{ Id.}\]
\[26\text{ Id. at 90-91.}\]
\[27\text{ Id. at 144.}\]
\[28\text{ STRATEGIC ACTION PLAN, supra note 7, at 8.}\]
\[29\text{ Id.}\]
is akin to standing in a civil case: it confers rights, services, entitlements, and audiences that ordinary citizens – even witnesses – cannot access or obtain.30

There are many reasons why a person may want to wear the victim label.31 A few of the non-legal reasons include sympathy and reverence, suffering with a sense of blameworthiness, release of shame, the ability to identify with and share in the pain of others who are similarly situated, and a person, crime, or cause to rally against.32 “[V]ictimhood is attractive in the sense that it secures attention in an attention-taxing world.”33 In the human trafficking context, victims get so much more than attention by wearing the label; they get services, benefits, rights, and freedom from criminal charges. In order to obtain all of those entitlements, however, they must first prove victim status.

The TVPA defines “victim” as the person harmed by the trafficking scheme.34 Victims of severe forms of trafficking include adult victims who were forced, defrauded, or coerced into performing labor services or sex acts and juveniles engaged in commercial sex trafficking.35 Force, fraud, and coercion are considered to be “externally imposed” conditions which induce the victim’s forced or coerced labor.36

30 Victim is an emotionally laden word that scholars have criticized either in use or application. E.g., Minow, supra note 1, at 1412 (“there are many dilemmas, drawbacks, and even harms, I think, in the use of victim rhetoric, especially for victims themselves”).

31 Id. at 1413 and 1434.

32 Id. at 1413-14.

33 Id. at 1414.


35 22 U.S.C. § 7102(9).

Severe forms of trafficking include sex trafficking, involuntary servitude, peonage, debt bondage, or slavery.\textsuperscript{37} Individuals who meet this definition are given the right to receive federal protections and benefits under the Act, which include immunity from prosecution and access to social services.\textsuperscript{38} When it comes to foreign victims who are trafficked into the United States from other countries, legislators wanted to shield them from prosecution for immigration violations.\textsuperscript{39} They wanted to protect victims from discrimination and ensure they would not be “penalized solely for unlawful acts as a direct result of being trafficked.”\textsuperscript{40}

To this end, the United States Attorney General and Secretary of State were charged with promulgating regulations to ensure victims were given shelter while in custody, access to legal assistance and translation services, and continued presence in our country to assist in the prosecution of their trafficker.\textsuperscript{41} Other rights granted by federal legislators included medical care, protection from harm, threats, and retaliation, and

\textsuperscript{37} 22 U.S.C. § 7102(8).


\textsuperscript{39} H.R. REP. No. 106-939, at 5 (2000) (Conf. Rep.) ("Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.").

\textsuperscript{40} Id. at 10 & 18.

\textsuperscript{41} Id. at 93.
access to information about their rights.42 Finally, the House made victims “eligible for benefits under the Crime Victims Fund without regard to their immigration status.”43

In order to receive all of these protections, services, benefits, and immunities, many of which were created specifically for human trafficking victims, adult victims of any form of trafficking must prove they were trafficked due to coercion, force, or fraud.44 Thus, unlike traditional crime victims,45 all adults must prove their victim status in order to access victim services. Minors, defined as persons under the age of 18, are presumed to be trafficking victims when they engage in commercial sex acts, even absent indicia of force, fraud, or coercion.46 In other words, they need not prove anything under federal law to establish their eligibility to receive victim entitlements.

Foreign nationals who have been trafficked in America must prove much more than citizen victims. Before they can obtain T-visas, which permit trafficking victims to remain in the country and give them an opportunity to seek naturalization,47 they must offer additional evidence according to the Code of Federal Regulations.48 First, they must establish victim status through a law enforcement agency (LEA) endorsement, which certifies they have met the severe forms human trafficking definition and are cooperating

42 Id. at 14-15.
43 Id. at 92.
45 But see Erin M. Shoudt, Identity Theft: Victims "Cry Out" for Reform, 52 Am. U. L. Rev. 339, 366 (2002) (examining the frustrations identity theft victims face in “proving their innocence to each company independently” because “the victim of identity theft is assumed guilty until proven innocent”).
46 22 U.S.C. § 7102(9)(A) (excluding victims of sexual exploitation who are younger than 18 years of age from the “force, fraud, and coercion” portion of the “severe form of human trafficking” definition).
with the criminal investigation.\textsuperscript{49} Without this LEA endorsement, victims are required to prove victim status through other credible evidence: transcripts, court-generated documents, and offense or news reports.\textsuperscript{50} International victims must then demonstrate they reported the trafficking scheme to a law enforcement agency, assisted with the investigation, and made good-faith efforts to obtain an LEA endorsement.\textsuperscript{51}

When foreign victims are not “rescued” by a law enforcement agency, they must establish they did not have an opportunity to leave the United States due to “trauma, injury, lack of resources, or travel documents that have been seized by the traffickers.”\textsuperscript{52} In other words, the government is less likely to view them as victims if they had the opportunity to leave but instead chose to stay in violation of the country’s immigration laws. The process a foreign national must go through to obtain victim status is onerous. By making the T-Visa accessible, yet difficult to obtain, the victim experiences both the “humanitarian and prosecutorial functions” of the federal government.\textsuperscript{53}

Another challenge to establishing victim status is that human trafficking victim definitions are inconsistent. Though “human trafficking victim” is clearly defined under the TVPA, other federal materials contain conflicting definitions.\textsuperscript{54} These differing definitions vary among federal agencies and federal partners, which complicate the provision of benefits and services the United States government provides this

\textsuperscript{49} 8 C.F.R. § 214.11(a) (2015). Cooperation in itself is challenging for most victims, who may come from non-rule-of-law countries with corrupt or non-existent law enforcement officials.

\textsuperscript{50} 8 C.F.R. § 214.11(f)(3).

\textsuperscript{51} 8 C.F.R. § 214.11(f), (f)(3), (g)(2), & (h)(2).

\textsuperscript{52} 8 C.F.R. § 214.11(g)(2).

\textsuperscript{53} Srikantiah, \textit{supra} note 18, at 159.

\textsuperscript{54} STRATEGIC ACTION PLAN, \textit{supra} note 7, at 15.
population. How the government and its various agencies define “victim” impacts what must be proven and the protections and services the person is entitled to receive.

c. Victim Status under State Laws

In many ways, states are more equipped than the federal government to provide services to victims of human trafficking, particularly if they are children. The federal government lacks access to state child welfare systems. Anti-trafficking laws related to children, if they define “victim” as broadly as the TVPA, are capable of directing minor victims immediately into child welfare systems that are already in place. There are many more social services available to people at the state level than exist at the federal level. In this way, these systems are superior to federal social service systems and tend to be more comprehensive and inclusive.

At the state level, human trafficking victim definitions may depart from federal law significantly. Fortunately, twenty-three states and the District of Columbia use broad definitions of “victim” in anti-trafficking legislation. Several safe harbor

55 Id.

56 E.g., Tessa L. Dysart, The Protected Innocence Initiative: Building Protective State Law Regimes for America’s Sex-Trafficked Children, 44 COLUM. HUM. RTS. L. REV. 619, 625-33 (2013) (“the federal government envisioned a role for state and local governments to prosecute sex trafficking and restore victims… because the federal government lacks the resources”).

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

58 One commentator has suggested state human trafficking laws are an “inconsistent patchwork of laws” that are “all over the map.” Seidenberg, supra note 8, at 57.

59 E.g., ALA. CODE § 13A-6-151 (2010) (victim includes “[a]ny person, including minors, subjected to labor servitude, sexual servitude, or involuntary servitude.”); ALASKA STAT. ANN. § 11.41.360 (West 2012) (deception, force, or threat of force required, which is similar to TVPA definition); ARIZ. REV. STAT. ANN. § 13-1307 & 13-1308 (2010) (“deception, coercion or force” appears in both the sexual and labor trafficking statutes); ARK. CODE ANN. § 5-18-102 (West 2013) (elements of coercion, fraud, and force
provisions – which give minors immunity from prosecution – prostitution affirmative defenses, and laws pertaining to sex or labor trafficking in these jurisdictions either reference the TVPA’s definition, mirror it, or expand upon it, granting even greater rights to victims than those conferred by federal law.  

Unfortunately, twenty-seven states approach defining the crime, the victim, or the victim proof required more narrowly than the TVPA. For instance, Connecticut, Massachusetts, Michigan, New Jersey, Ohio, Oklahoma, and Oregon, set trafficking minority ages younger than the TVPA’s below-18 standard. Minor victims in these
states lose immunity at younger ages or have to prove force, fraud, or coercion in the same way their adult counterparts do. Additionally, the legal mercy granted to minors due to their immaturity may be limited; once juveniles transgress the criminal law more than once or are trafficked a second time, legal protections vanish or work to retroactively reinstate previously expunged convictions.62 Alabama, Iowa, Mississippi, New Jersey, North Carolina, Oklahoma, and Vermont have demonstrated they have no mercy for minors who are trafficked a second time.63

Other states seem to wrestle with the concepts of force, fraud, and coercion. These words are not defined in the TVPA; the Act was intended to broaden previous anti-slavery laws by including non-physical coercion.64 The TVPA allows attorneys, courts, or juries to assign meaning to force, fraud, and coercion.65 At the international law level,

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

63 Id.

64 Chuang, supra note 36, at 643.

65 Federal legislators had a difficult time with these concepts initially as well. Srikantiah, supra note 18, at 169 (noting that initial trafficking bills defined coercion as “abuse of authority” or physical force and some sought to require evidence of mental or physical abuse or, in the case of foreign nations, fear of retribution,
stakeholders have asked for clarification of these terms, which are undefined. Thus, under the TVPA and international anti-trafficking laws, words like force, fraud, coercion, abuse, and exploitation are left open to interpretation.

In contrast, many states have eliminated one or more of these words from their trafficking definition or narrowly define the words, unlike the federal law. For instance, New Hampshire and New Jersey limit “victim” by narrowly defining or restricting the force, fraud, or coercion requirements. Connecticut, Kansas, and Pennsylvania narrowly define “coercion.” Delaware, Minnesota, North Dakota, Rhode Island, Tennessee, and South Dakota eliminate coercion and fraud from the definition altogether. Iowa eliminates fraud and coercion from labor trafficking cases only whereas Indiana eliminates only coercion, emphasizing fraud and force or threat of force. This is unfortunate given the fact that the crime of human trafficking involves “a wide range of

if deported). In the end, these terms were not defined. 22 U.S.C. § 7102(9). See also Maria Ontiveros, et al., Women and Children First? New Strategies in Anti-Trafficking Initiatives, 6 GEO. J. GENDER & L. 193, 212 (2005) (psychological coercion includes “quite a number of suspect activities”).

66 Chuang, supra note 36, at 648.

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

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


70 IOWA CODE ANN. § 710A.1 (West 2012).

71 IND. CODE ANN. § 35-42-3.5-4 (West 2015).
trafficking practices involving varying types and levels of coercion, and not necessarily physical violence.”

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

In all of the aforementioned jurisdictions, human trafficking victim is defined more narrowly, and in the case of Virginia, not at all. Not only have states written laws that minimize the meaning of “victim,” but three create additional evidence that is required to prove victim status. Florida, Illinois, and Indiana require victims to demonstrate through sworn affidavits or an LEA endorsement that the trafficker was charged in a criminal case or that a professional believes the person was victimized.

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72 Chuang, supra note 36, at 634.
73 MD. CODE ANN., CRIM. PROC. § 8-302 (West 2011).
74 E.g., VA. CODE ANN. § 18.2-355 (West 2014) (statute, written in 1975, violated when defendant forces another, against her will, to enter a “bawdy house”); VA. CODE ANN. § 18.2-356 (West 2014) (outlawing forced labor or services, concubines, and prostitution, among other things); VA. CODE ANN. § 18.2-48 (West 2011) (criminalizing the abduction of minors for purposes of prostitution).
75 Id.
76 FLORIDA OFFICE OF THE ATTORNEY GENERAL, BUREAU OF VICTIM COMPENSATION, BENEFITS AVAILABLE, available at http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8CVP5T/Sfile/BVCVictimCompensationBrochure.pdf (providing relocation compensation to victims of human trafficking only upon being certified by a counselor, prosecutor, or state agency after receiving notification that the victim is cooperating in the prosecution); 725 ILL. COMP. STAT. 5/116-2.1 (2013); IND. CODE ANN. § 35-42-3.5-4 (West 2015). Some states suggest documentation creates a presumption of victim status, but is not required. E.g., LA. CHILD CODE ANN. art. 923 (2013); MISS. CODE. ANN. § 97-3-54.6 (West 2013); N.C. GEN. STAT. ANN. § 15A-1416.1(b) (West 2013); N.Y. CRIM. PROC. LAW § 440.10(h)(ii) (McKinney 2010); VT. STAT. ANN. tit. 13, §§ 2652 & 2658(b) (West 2013); WASH. REV. CODE ANN. § 9A.88.040 (West 2013); WYO. STAT. ANN. § 6-2-708 (West 2013).
Only upon having this kind of documentation will these states certify the person’s victim status and allow the victim to access victim entitlements.\textsuperscript{77}

These state anti-trafficking laws contradict the TVPA and anti-trafficking policies designed to protect victims.\textsuperscript{78} The TVPA, federal courts, and Congress have suggested the force, fraud, and coercion language “broadly and expansively cover a wide range of manipulative, threatening, and violent conduct designed to overcome the resistance of a [trafficking] victim.”\textsuperscript{79} That is the underlying act of human trafficking: that the trafficker has overborne the victim’s will by using threats, deception, coercion, theft of identification documents, lies, or physically abusive and psychologically manipulative actions. Trafficking can happen in any number of ways, both in form and in method. It is therefore problematic when states strip the definition, rendering it less encompassing, less effective. Ultimately, what that means for states is that fewer cases can be prosecuted because the crime encompasses a smaller list of prohibited conduct. It also means the state can help fewer victims; had the crime happened elsewhere or were the investigating agency federal, the person would have been a victim.


\textsuperscript{78} 2014 Protected Innocence Challenge, supra note 4, at iii (Shared Hope founder and President, Linda Smith, describing the “limitations” professionals helping trafficking victims face “on their ability to implement effective trafficking responses due to inadequate state laws”).

d. The Process of Conferring Victim Status

Victim labels qualify or disqualify individuals from receiving victim services.\textsuperscript{80} A person’s right to be called “human trafficking victim” is directly connected to the entitlements the victim receives. “Social service agencies can be severely hampered by something as simple as a lack of an appropriate category in existing forms that accurately describes the situation of a child as a human trafficking victim rather than a victim of some other form of maltreatment.”\textsuperscript{81} These labels, when withheld or misapplied, can act as a barrier to victim protections and services.\textsuperscript{82} In this way, the label does more than connote sympathy and an audience: it entitles a person to access rights and benefits he or she would otherwise not be able to obtain.

In the most recent United States Trafficking in Persons Report, the federal government expressed concern that officials occasionally misunderstand “complex legal aspects of human trafficking cases, including coercion and consent.”\textsuperscript{83} There are factual and legal aspects to the victim assessment. Whether victim status is conferred may depend on who is making the decision and how much the person or entity understands about the crime of human trafficking and its effects on the trafficked individual.

A wide variety of individuals are permitted to confer victim status to a person throughout various stages of the criminal litigation process. To illustrate who decides and

\textsuperscript{80} Bergman, supra note 4, at 1392.

\textsuperscript{81} Id.

\textsuperscript{82} Id. Some states have amended trafficking statutes to include labels that allow children and minors to get the social services they are entitled to receive. \textit{E.g.}, \texttt{VT. STAT. ANN. tit. 13, § 2652} (West 2013) (“If a person who is a victim of human trafficking is under 18 years of age at the time of the offense, the state may treat the person as the subject of a child in need of care or supervision proceeding.”)

\textsuperscript{83} 2014 TIP REPORT, supra note 3, at 401.
when the decision regarding status may be made, it is important to examine various laws designed to protect human trafficking victims.

A number of states have created new prostitution-specific laws due to sex trafficking concerns. Safe harbor laws shield minors from prosecution for prostitution; nearly 20 states have enacted them. In the case of safe harbors, law enforcement officers may confer victim status during the investigation, a prosecutor may confer it after the minor is charged, or a judge could grant victim status during the litigation process.

When a state has no safe harbor law or it does not apply to a victim charged with a criminal offense, the defendant may be able to raise a human trafficking affirmative defense. For this to apply, the victim must establish she committed the crime because she was forced, coerced, or tricked by her trafficker to commit a crime. Many states have

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

85 Id. at 20-29.

86 E.g., CONN. GEN. STAT. ANN. § 53a-82 (a) (West 2013) (girls under the age of 16 cannot be charged with prostitution); FLA. STAT. ANN. § 409.1678 (West 2013); 720 ILL. COMP. STAT. ANN. 5/11-14 (West 2013) (first law to protect all minors under the age of 18 from prostitution arrests); KAN. STAT. ANN. § 38-2232 (West 2013); KY. REV. STAT. ANN. § 529.120 (West 2013); LA. CHILD. CODE ANN. art. 725 (2013); MASS. GEN. LAWS ANN. ch. 119, § 39K-L (West 2013); MICH. COMP. LAWS ANN. § 750.448 (West 2013) (protects only individuals who are under the age of 16); MINN. STAT. ANN. § 609.325(4) (West 2013); NEB. REV. STAT. ANN. § 28-801(5) (LexisNexis 2013); N.J. STAT. ANN. §§ 2A:4A-42(h), 2A:4A-71(b)(11), & 2A:4A-74(b)(12) (West 2013); N.Y. SOC. SERV. LAW § 447-a-b, and N.Y. FAM. CT. ACT §§ 732(a)-b & 739 (McKinney 2013); OHIO REV. CODE ANN. §§ 2152.021 & 2151.358(E), (F) (West 2013); TENN. CODE ANN. § 39-13-513(d) (West 2013); VT. STAT. ANN. tit. 13, §§ 2652 & 2658(b) (West 2013) (victims of sex trafficking may not be charged with crimes of lewdness, prostitution, or obscenity); WASH. REV. CODE ANN. §§ 13.32A.030 (5) & (17) & 13.32A.270 (West 2013); WYO. STAT. ANN. § 6-2-708 (West 2013) (safeguards victims from prosecution for commercial sex acts).

87 Peters, supra note 84, at 26-29.
recently enacted prostitution-specific affirmative defenses for defendants.\textsuperscript{88} The victim assessor in these cases is the fact-finder, which may be judge or jury.

When the victim of human trafficking is convicted for a crime committed as part of the trafficking scheme, she may qualify to have her criminal records vacated or expunged after trial, which erases the crime from the defendant’s record.\textsuperscript{89} In these cases,

\textsuperscript{88} E.g., ALA. CODE § 13A-6-159 (West 2013) (affirmative defense provided to human trafficking victims engaged in prostitution); ARK. CODE ANN. § 5-70-102(c) (2013); CONN. GEN. STAT. ANN. § 53a-82 (2013); GA. CODE ANN. § 16-3-6(b) (2013) (a person charged with sex crimes is not guilty if the act “was committed under coercion while the accused was being trafficked for sexual servitude”); IOWA CODE §§ 710A.3 (2013); KAN. STAT. ANN. § 21-6419(c) (2013); LA. REV. STAT. ANN. §§ 14:46.3, 14:82(G), 14:83.3(D), 14:83.4(C), 14:89.2(D)(1) (2013) (affirmative defenses for minors built into several existing statutes addressing criminal commercial sexual acts); MASS. GEN. LAWS ANN. ch. 265, §57 (2013) (affirmative defense applying only to juveniles who establish coercion or duress); MINN. STAT. ANN. § 609.325(4) (2013) (affirmative defense available once it is established victim committed acts under compulsion or apprehension); MO. REV. STAT. § 566.223(2) (2013) (applies once coercion or threats are proven); N.H. REV. STAT. § 645:2 (2010) (defense not restricted to minors); N.J. STAT. ANN. § 2C:34-1(e) (2013) (adults can use defense if they meet specific requirements, but those under 18 do not have the same requirements); N.C. GEN. STAT. § 14-204(c) (2013); OKLA. STAT. ANN. tit. 21, § 748 (2013) (defendant need only prove that he or she meets the state’s definition of “human trafficking victim” to qualify); R.I. GEN. LAWS § 11-34.1-2(d) (2013); S.C. CODE ANN. § 16-3-2020(J) (2012); S.D. CODIFIED LAWS § 22-23-1.2 (2013) (defense applicable to all defendants charged with prostitution who committed the act of prostitution “under compulsion”); TENN. CODE ANN. § 39-13-513(e) (2013) (defense applies to all persons accused of prostitution who can establish they were a victim of human trafficking); TEX. PENAL CODE ANN. § 43.02(d) (2013); VT. STAT. ANN. tit. 13, § 2652 (West 2013); WASH. REV. CODE ANN. § 9A.88.040 (2013) (creating an affirmative defense through a presumption that the defendant is a victim of trafficking if “the actor is named as a current victim in an information or the investigative records upon which a conviction is obtained for trafficking, promoting prostitution in the first degree, or trafficking in persons”).

\textsuperscript{89} E.g., ARIZ. REV. STAT. ANN. § 13-921 (2013) (the court may, in its discretion, set aside, dismiss, or expunge the records of juvenile victims of sex trafficking who are convicted and placed on probation, provided they successfully complete the terms of probation); COLO. REV. STAT. ANN. § 19-1-306(d)(I) (West 2013) (qualifying juveniles may have prostitution records expunged); HAW. REV. STAT. § 712-1209.6 (2013) (person convicted of prostitution may have conviction vacated upon establishing that he or she was a victim of a severe form of human trafficking); 725 ILL. COMP. STAT. 5/116-2.1 (2013) (motion to vacate conviction may be used by trafficking victims to expunge prostitution convictions); KAN. STAT. ANN. §§ 21-6419(c), 38-2312(a) (2013) (permitting minor domestic sex trafficking victims to request expungement of prostitution convictions); LA. CHILD CODE ANN. art. 918, 923(D) (2013) (expungement possible upon showing the defendant was a “victim of trafficking of children for sexual purposes” at the time of the offense); MISS. CODE ANN. § 97-3-34.6 (West 2013) (in motion to vacate, official documentation from a federal, state or local government agency as to the defendant's status as a victim at the time of the offense creates a presumption that the defendant's participation in the offense was a result of being a victim, but documentation not required in motion to vacate); MONT. CODE ANN. § 46-18-608 (2013) (court may vacate prostitution conviction if the person was a victim of human trafficking); NEV. REV. STAT. § 176.515 (2013) (if convicted, once a defendant ceases being a victim of human trafficking, as defined by the TVPA, the person may move to vacate a prostitution conviction); N.J. STAT. ANN. § 2C:34-1(e) (West 2013) (permitting the defense to be used by both minors and adults, with different burdens of proof for each category, much like the TVPA); N.Y. CRIM. PROC. LAw § 440.10(1)(i) (McKinney 2013) (expunction law may apply to both minors and adults, provided person meets definition of trafficking
the person conferring victim status is the judge overseeing the expunction hearing or motion to vacate. In the two states that permit human trafficking victim pardons – Maine and Texas – the state’s governor assesses victim status post-conviction.90

Finally, in federal cases involving foreign nationals, and even in some states, in order to be a trafficking victim worthy of receiving benefits and services, victims may have to obtain an LEA certification or declaration.91 Sometimes the LEA certification is required, sometimes it merely creates a presumption that the person was a trafficking victim.92 Regardless, in these cases, it is the law enforcement agency or another licensed professional, perhaps a counselor who certifies the victim has been traumatized, making the victim assessment.

The victim determination, therefore, may be made by any number of people: police officers, agents, prosecutors, governors, jurors, judges, or licensed counselors. The problem with having so many different categories of people making the determination is

90 ME. REV. STAT. ANN. tit. 15, §2161-B (2014), available at http://www.mainelegislature.org/legis/bills/bills_126th/billtexts/HP123801.asp (allowing victims to seek a pardon from the governor immediately after the sentence is imposed); TEX. CRIM. PROC. CODE ANN. art. 48.06 (West 2013) (authorizing the Board of Pardons and Parole to educate victims of human trafficking on the pardon process).

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

92 Id.
that there is no universal human trafficking victim assessment training available, which is troubling. “Determining whether a victim was defrauded or coerced by the trafficker … requires a complex and detailed factual examination of the victim’s state of mind and the trafficker’s actions.”\textsuperscript{93} Erroneous assessments are likely, given the factual and legal complexities of these cases.

It is also possible that each of the above persons has conflicting interests in making the assessment. A governor’s decision may be a political one, made on the basis of what serves the governor’s personal or professional interests at the time he or she is called to make the decision. For judges, on the other hand, one would hope the decision is just and that it is made from a neutral standpoint. Nevertheless, federal and state judges alike are confused about how to view someone who occupies roles of defendant and victim simultaneously and whether human trafficking victims should receive victim benefits when they look like wrongdoers.\textsuperscript{94} Juries, who likely have far less human trafficking victim identification training, may have limited information on human trafficking or whether the defendant claiming to be a victim meets the criteria.\textsuperscript{95} Even where a human trafficking defense is raised, the defendant may not have enough evidence

\textsuperscript{93} Srikantiah, supra note 18, at 192.


to establish that he or she is indeed a human trafficking victim. All of these scenarios would result in the fact-finder not conferring victim status on the individual claiming it.

In the case of law enforcement agents and prosecutors, the decision may be more practical: whether the person is aiding the investigation or prosecution of the case. The prosecutor wants to maximize the gulf between the wrongdoer’s conduct and the innocence of the victim, allowing the factfinder to place “full blame for the trafficking enterprise” on the trafficker. It benefits the prosecutor to contrast the moral corruptness of the accused and the innocence of the victim; guilty verdicts are easier to obtain that way. In cases where both victim and defendant are similarly situated, apathy may play a role in the prosecutors’ decision not to confer status or grant entitlements. In this way, the prosecutor may have an interest in conferring victim status on people who look victim like.

Law enforcement agents, on the other hand, may use victim status to entice an otherwise reluctant victim to cooperate in the investigation, thereby increasing the amount of evidence gathered. Federal officials have been known to apply incorrect

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


Even Supreme Court Justices have been known to contrast the guilt of the defendant with the innocence of the victim. Minow, supra note 1, at 1416 (quoting Scalia’s dissent in Booth v. Maryland, 482 U.S. 4966, 520 (1987), in which he contrasted the “defendant’s moral guilt” with the “harm he has caused to innocent members of society”).
standards for identifying victims. They have also hesitated to refer victims for services without approval from higher ranking officials. Regardless, every person charged with making the human trafficking victim assessment has a different outlook on how status should be granted, as well as possible self-interests in the outcome. It is possible that some of these self-interests may conflict with justice.

Traditionally, crime victims do not face life, liberty, or property deprivation. However, human trafficking victims differ from traditional victims in this regard. A factfinder’s decision to withhold victim status may result in a conviction, and in fact, has. A prosecutor’s or investigator’s decision not to certify a foreign trafficking victim means the victim must find her own credible evidence in order to qualify for immigration relief. Entitlements earmarked for trafficking victims are inaccessible for individuals who cannot prove their status to the gatekeepers of trafficking benefits, protections, and services. Therefore, there are real liberty and property interests attached to human trafficking victim status. For this reason alone, governments should consider creating a streamlined and reviewable procedure for all parties charged with conferring victim status.


99 Id.


101 Compare In re Aarica S., 168 Cal. Rptr. 3d 136, 142 (Cal Ct. App. 2014) (denying 17-year old minor’s claim that she was a human trafficking victim because no third party was exploiting her at the time she engaged in acts of prostitution) with New York v. L.G., 972 N.Y.S.2d 418, 424 (N.Y. Crim. Ct. 2013) (minor was a sex trafficking victim, according to state and federal law definitions, because she was sexually exploited and under the age of 18 when she began to work as a prostitute).
III. Obstacle Two: Qualifying for Restitution & Crime Victim Compensation

One of the rights crime victims possess is the right to be made financially whole following the crime. Our legal system has long believed that society is responsible for restoring the victim to his or her position before the crime. To this end, victims have the right to apply for government compensation and receive restitution from the defendant.

Assuming an individual has been able to establish human trafficking victim status, there are barriers to receiving financial remuneration under both federal and state laws. While many anti-trafficking laws permit victims to sue traffickers, this article’s focus is on criminal means of reimbursement: court-ordered restitution and Crime Victim

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102 STRATEGIC ACTION PLAN, supra note 7, at 8.


105 E.g., 18 U.S.C. § 1595 (2008) (TVPA provision allowing civil lawsuits to be brought against traffickers); ALA. CODE § 13A-6-157 (2010) (a civil court “may award actual damages, compensatory damages, punitive damages, injunctive relief, and any other appropriate relief” in a lawsuit against a trafficker brought by a victim); W. VA. CODE § 61-2-17(6)(f) (2013) (civil actions permitted). In the first ten years, the TVPA authorized a federal, civil cause of action, just over 40 lawsuits were filed against traffickers, only some of which were successful. Naomi Jiyoung Bang, Casting A Wide Net to Catch the Big Fish: A Comprehensive Initiative to Reduce Human Trafficking in the Global Seafood Chain, 17 U. PA. J.L. & SOC. CHANGE 221, 224 n. 22 (2014). See also Naomi Jiyoung Bang, Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases, 35 HOU. J. INT’L L. 255, 263 (2013) (discussing tried-and-failed civil corporate liabilities and possible theories of corporate civil liabilities in human trafficking cases occurring in corporate production and supply chains).

Human trafficking victims do not always realize civil judgments, even when they are awarded. E.g., Seidenberg, supra note 8, at 56-57 (discussing a $1 million verdict that has never materialized, even though it was awarded ten years ago).
Compensation funds. This section will analyze the challenges human trafficking victims face in obtaining federal restitution orders and state compensation.

a. Obtaining Federal Restitution Orders

Judge Posner once stated that restitution forces “the criminal to yield up to his victim the fruits of the crime” leaving the endeavor “worthless to the criminal.” Restitution differs from compensation in that it is penal in nature, not compensatory. Making traffickers restore the victim by paying restitution renders the trafficking endeavor profit-less, while punishing the trafficker for taking part in the criminal scheme. In this way, restitution is a powerful tool in human trafficking cases. Though a number of states offer restitution for the crime of trafficking, this section will focus on federal awards of restitution since federal courts have issued more restitution orders than their state counterparts.

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106 Two additional ways to collect funds through the defendant are through asset forfeiture and fines, but these methods do not always funnel monies to victims; they typically go into state coffers, therefore they will not be analyzed in this section. E.g., 18 U.S.C. § 1594(c)-(e) (2008) (permitting fines, asset forfeiture in human trafficking cases); Polaris Project, Human Trafficking Legislative Brief: Asset Forfeiture, available at http://www.polarisproject.org/storage/documents/issue_brief_asset_forfeiture_september_2012.pdf (stating that as of 2014, 32 states and the District of Colombia had asset forfeiture laws related to human trafficking and detailing three instances where assets of traffickers were seized); Benjamin Thomas Greer, What Is the Monetary Value of Slave Labor?: Restitution Based on A Traditional Fair Market Value Valuation Basis May Not Fully Compensate Human Labor Trafficking Victims, 31 N. ILL. U. L. REV. 553, 576 (2011) (discussing California’s anti-trafficking legislation as it relates to fines collected from traffickers). But see Hasselbarth, supra note 9, at 413-14 (under federal law, assets forfeited by traffickers go directly to the trafficked person, not to federal trafficking victim compensation or restoration funds).

107 United States v. Fountain, 768 F.2d 790, 800 (7th Cir. 1985).


109 E.g., ALA. CODE §§ 13A-6-155 & 13A-6-156 (2010) (providing mandatory restitution and ordering restitution to be paid before any other disbursements from asset forfeiture funds); LA. REV. STAT. ANN. § 15:539.3 (2014) (mandatory restitution in trafficking cases).
Under the TVPA, victims are guaranteed mandatory restitution for the full amount of their losses.\(^{110}\) The statutory mandate that “the court shall order restitution” to human trafficking victims implies it is awarded in every case.\(^{111}\) It is not. Federal judges have ordered the trafficker to compensate victims in only 36\% of all human trafficking cases.\(^{112}\) This happens in part because federal prosecutors do not always request restitution\(^ {113}\) nor do judges always order it.\(^ {114}\) In only 61\% of trafficking cases did the Assistant United States Attorney request restitution; of those cases, less than one-third of the requests resulted in a judicial order of restitution.\(^ {115}\) When a restitution request was not made, restitution was rarely ordered by the court \textit{sua sponte}.\(^ {116}\)

Assessing lost wages in a human trafficking case, particularly when the wages relate to illicit work, is challenging. In human trafficking cases, federal judges must assess lost wages using the Fair Labor Standards Act or by calculating the value of the work to the human trafficker, using whichever method produces the greater restitution amount.\(^ {117}\)


\(^{113}\) Not all federal prosecutors do request restitution. Levy \textit{et al.}, \textit{supra} note 94, at 4-5 (“In 68 of the 186 total cases, the prosecutor did not make a restitution request. In 10 of the cases in which no restitution was requested, the prosecutors explicitly declined to request restitution. … In cases in which the prosecutor did not request restitution, restitution was granted in only 7 out of 68 cases”).

\(^{114}\) \textit{Id.}

\(^{115}\) \textit{Id.}

\(^{116}\) Levy \textit{et al.}, \textit{supra} note 94, at 2, 4-5.

Court-ordered restitution is more common when the case involves labor trafficking. Of the cases where restitution was ordered, labor trafficking victims were much more likely to receive lost wages than sex trafficking victims.118 In labor cases, convicted traffickers were ordered to pay restitution 93% of the time, whereas in sex trafficking cases, which greatly outnumber labor trafficking cases litigated in federal court, traffickers were ordered to pay restitution only 44% of the time. There are reasons why mandatory restitution is not truly mandatory.

Trafficking defendants’ criminal defense attorneys have argued against restitution awards, which is what zealous legal advocates should do given that restitution negatively impacts their clients financially.119 Criminal defense attorneys routinely argue that victims engaged in criminal activity should not be remunerated.120 One criminal defense attorney likened judicial restitution orders to unjust enrichment, stating trafficking victims are people “who come here illegally, commit illegal acts in our country, and now they are trying to get paid.”121

Another criminal defense attorney suggested by granting the victims restitution, the federal government “was paying them to be prostitutes.”122 These arguments appear

available at https://law.lclark.edu/live/files/16054-ncvlivensuring-full-restitution-for-trafficking (including an equation judges use to calculate restitution in human trafficking cases); Greer, supra note 106, at 555-76 (discussing federal and California computations to assess lost wages and restitution values).

118 Dawson, supra note 112.


120 Levy et al., supra note 94, at 13-16.

121 Dawson, supra note 112.

122 Levy et al., supra note 94, at 16.
to be persuasive some of the time. Researchers suggest federal courts and prosecutors are confused about when restitution is owed to sex trafficking victims.\textsuperscript{123} The illegality between the underlying criminal acts and the requirement that restitution be mandatorily ordered in human trafficking cases “provides ample fodder for defense attorneys to object to restitution.”\textsuperscript{124}

What defense attorneys, prosecutors, and judges seem to overlook is that where restitution is not ordered to the victim, it is kept by the trafficker. When the trafficker is permitted to retain forced labor profits, he faces no financial penalty for a crime with an underlying monetary purpose. This outcome conflicts with federal policy. The United States government, according to the most recent Trafficking in Persons Report, wants to “ensure that restitution is not just ordered, but in fact paid.”\textsuperscript{125} The United States Department of State, the agency that oversees trafficking policy, believes that restitution has “restorative power.”\textsuperscript{126}

Providing the victim with their traffickers’ ill-gotten gains is critical to restoring a victim’s dignity, helping them gain power back from their exploiters who took advantage of their hope for a better life. Restitution … attack[s] the greed of the trafficker and the idea of a human being as a commodity. It is a way to ensure that victims receive access to justice.”\textsuperscript{127}

\textsuperscript{123} Id. at 14.

\textsuperscript{124} Id. at 15.

\textsuperscript{125} 2014 TIP REPORT, supra note 3, at 17.


\textsuperscript{127} Id.
Another restitution barrier is lack of prosecution. Unfortunately, the number of traffickers arrested does not correlate with the number of identified trafficking victims. Restitution can only be awarded by a court with jurisdiction over the trafficker. What happens when the trafficking victim is the only person charged with a crime or the victim is not prosecuted, but neither is the trafficker? Law enforcement agencies are often the gateway to victim entitlements; they may decline to investigate suspected human trafficking activity, which means the victim has no hope of recovering restitution, much less proving she is a victim of a crime that will never be prosecuted. These scenarios happen too often in trafficking cases, which means the victim may never receive restitution, much less social services, protection, or other trafficking victim entitlements.

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

130 E.g., In the Matter of B.W., 313 S.W.3d 818, 819, 828, 835-36 (Tex. 2010) (32-year-old boyfriend of 13-year-old victim who presumably encouraged her prostitution was never arrested or charged with a crime); People v. Gonzalez, 927 N.Y.S.2d 567, 567-69 (N.Y. Crim. Ct. 2011) (Brazilian national begged police to arrest her so she would not have to sleep with men; police failed to recognize her as a trafficking victim or charge her traffickers); Marisa Silenzi Cianciarulo, Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking, 7 Nev. L.J. 826, 833-34 (2007) (stating that arrests of labor trafficking victims led them to believe law enforcement agents were not there to help them).
According to one federal study, between 2008 and 2010, there were 527 identified victims yet only 144 trafficker arrests.\footnote{Banks & Kyckelhahn, supra note 11, at 1.} While it is possible some of these arrested traffickers enslaved more than one person, it is more likely that some of the victims’ traffickers were never apprehended or convicted of the trafficking crime. Global convictions illustrate an even greater unlikelihood of restitution. Of 7,705 people who were prosecuted for trafficking crimes up to 2012, only half were ultimately convicted.\footnote{Bang, Casting a Wide Net, supra note 105, at 224 (citing the 2013 TIP REPORT).} This means that only half of all global trafficking victims have the hope of getting restitution.

Critics believe the low number of prosecutions, both in America and abroad, can be blamed on several factors: the underground, criminal nature of trafficking; limited resources to eradicate a difficult-to-eliminate crime; lack of victim cooperation; and apathy towards the victims’ politically unimportant population.\footnote{E.g., Andrea L. Johnson, A Perfect Storm: The U.S. Anti-Trafficking Regime’s Failure to Stop the Sex Trafficking of American Indian Women and Girls, 43 COLUM. HUM. RTS. L. REV. 617, 636 (2012) (Native American victims’ reluctance to testify is a barrier to successful prosecution); Seidenberg, supra note 8, at 56 (noting limited government resources to prosecute, apathy towards victims, and the underground, criminal nature of trafficking as reasons for low conviction rates).} “The victims of this crime are perceived to be society’s throwaways”\footnote{U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2010, POLICY PRIORITIES: PROSECUTION (2010), available at \url{http://www.state.gov/j/tip/rls/tiprpt/2010/142748.htm} [hereinafter 2010 TIP REPORT].} Government officials therefore do not always commit adequate resources to trafficking victims.\footnote{Seidenberg, supra note 8, at 54 (citing psychological and physical control, fear of retaliation, and beliefs that legal systems are corrupt as reasons why victims do not cooperate with investigations). See also Darryl K. Brown, The Perverse Effects of Efficiency in Criminal Process, 100 VA. L. REV. 183, 200 (2014) (“Adding new offenses to criminal codes is cheap, but their enforcement is not.”).} For all of these reasons, it is
likely that a significant number of victims, in this country and abroad, may never receive restitution from their trafficker.

_b._ Collecting State Crime Victim Compensation Funds

Every state in the nation has funds designed to compensate victims of crime.\textsuperscript{136} Generally called Crime Victim Compensation (CVC), the funds are designed to help victims and their families recover from the trauma and expense of violent crime.\textsuperscript{137} Following a criminal act, victims may need financial assistance to offset the cost of medical treatment, rehabilitation, counseling, missed wages, expenses related to participating in the criminal justice system, and emergency expenditures like housing, food, and basic necessities.\textsuperscript{138} If no other forms of reimbursement are available, say, for example, insurance, CVC can be used to reimburse paid expenses or cover anticipated costs associated with the victimization of crime.\textsuperscript{139}

Funds are managed and disbursed through state programs and boards, which are typically authorized by statute.\textsuperscript{140} Though incidents of violent crime occur less frequently today than they did twenty years ago, CVC programs report allocating more funds per victim in recent years and expanding coverage to more types of criminal acts than they


\textsuperscript{137} Id.


\textsuperscript{139} Id.

\textsuperscript{140} Id.
once did. One of those new types of crime covered is human trafficking. However, CVC programs are unlikely to disburse funds to most human trafficking victims.

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

CVC programs also base fund disbursements on reporting deadlines and investigation cooperation. For example, they typically require that victims report the crime to police within a few days of its occurrence and file a claim within a specified

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141 OVERVIEW, supra note 136.

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


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

146 E.g., MASS. GEN. LAWS ANN. ch. 258C, § 2 (West 2010) (victim must report crime within five days of its occurrence unless delay for good cause has been shown); OKLA. STAT. ANN. tit. 21, § 142.10(a)(4) (West 2007) (crime must be reported within 72 hours unless there was good cause for delay).
amount of time after the crime’s commission.\textsuperscript{147} They also tie compensation to victim cooperation with law enforcement officers and prosecutors.\textsuperscript{148}

It is unlikely that trafficking victims would meet these reporting or cooperation requirements. First, many trafficking victims do not identify as such; they view themselves as criminals and are thus fearful of contacting law enforcement agencies, even when they are abused or mistreated by their trafficker.\textsuperscript{149} “Human trafficking is an extremely unusual category of major crime in which the victims will not report to law enforcement what is being perpetrated against them,” which makes identifying victims difficult.\textsuperscript{150} Many victims are simply unaware or unable to report the trafficking scheme to authorities, much less meet statutorily defined deadlines.\textsuperscript{151}

\textsuperscript{147} E.g., ATTORNEY GENERAL, STATE OF DELAWARE, VICTIMS’ COMPENSATION ASSISTANCE PROGRAM (2013), \url{http://attorneygeneral.delaware.gov/vcap/files/VCAP_2013_Annual_Report.pdf} (one year filing limitation); IOWA CODE ANN. § 915.84 (West 1999) (two year filing limitation).

\textsuperscript{148} E.g., ARIZONA CRIMINAL JUSTICE COMMISSION, VICTIM COMPENSATION: ELIGIBILITY, \url{http://azcjc.gov/ACJC.Web/victim/VictComp.aspx#2} (last visited March 19, 2015) (victims who want compensation must cooperate with law enforcement); STATE OF IDAHO, CRIME VICTIMS COMPENSATION: WHAT ARE THE CONDITIONS FOR ELIGIBILITY?, \url{http://crimevictimcomp.idaho.gov/faqs.html#conditions} (victims must fully cooperate with investigation and prosecution in order to qualify for benefits); OHIO REV. CODE ANN. § 2743.60(C) (West 2014) (fund awards may be reduced or rejected if a victim has not fully cooperated with law enforcement).


\textsuperscript{149} Peters, supra note 8, at 25-26.


\textsuperscript{151} E.g., Benjamin T. Greer & Scott D. Dyle, \textit{Determining the Reasonableness of Non-Compliance: Examining the “Trauma Exception” for T-Visa Applicants}, 15 ST. MARY’S L. REV. & SOC. JUST. 385, 409-10 (2013) (“Victims may also be mentally traumatized to the extent they are rendered unable to retell their story, thereby causing them to be unable to adequately inform law enforcement of the underlying crime.”).
There are several legitimate reasons why victims are not cooperative. They are conditioned to protect their trafficker or face life-threatening consequences;\(^{152}\) they generally do not trust law enforcement officers; they are distressed about the possibility of their deportation if they are here illegally; they experience mental and physical trauma that sometimes makes cooperation difficult; and they fear retaliation against themselves and their loved ones.\(^{153}\) For all of these reasons, states should consider exempting human trafficking victims from these requirements.

Another problem area for human trafficking victims is the “clean hands” qualification that most CVC programs require. CVC statutes typically disqualify victims from compensation if they engaged in criminal conduct at the time the victimizing crime was committed.\(^{154}\) Kentucky, Nebraska, and Utah require fund applicants be “innocent

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\(^{152}\) E.g., id. at 411 (non-citizen victims are reluctant to cooperate with federal officials because the agency charged with investigating the crime, Immigration and Customs Enforcement, is also the agency responsible for deporting them; traffickers exploit this fact to maintain loyalty); Dysart, supra note 56, at 638 (juvenile sex trafficking victims may consider their trafficker their boyfriend); Parker & Skrmetti, supra note 79, at 1028-29, 1035 (traffickers “create a climate of fear that compels the victim to obey the sex trafficker for fear of additional violence”).

\(^{153}\) E.g., Jennifer S. Nam, The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims, 107 COLUM. L. REV. 1655, 1683 (2007) (the trauma of enduring the trafficker's trial, the inability traumatized victims have in assisting investigators, and the complexity of the victim certification process are all barriers to victim cooperation with law enforcement); Marisa Silenzi Cianciarulo, The Trafficking and Exploitation Victims Assistance Program: A Proposed Early Response Plan for Victims of International Human Trafficking in the United States, 38 N.M.L. REV. 373, 374 (2008) (detailing a sex-trafficking case in which most foreign nationals were deported for failure to cooperate with law enforcement officials); Martina Pomeroy, Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement, 16 MICH. J. GENDER & L. 453, 458 (2010); Adams, supra note 38, at 229 (“many victims are unwilling or unable to assist in a prosecution because they are afraid of retribution from their traffickers, are afraid of the police, are afraid of sensitive and personal information becoming public, or are too severely traumatized by the trafficking experience”).

\(^{154}\) E.g., CONN. GEN. STAT. ANN. § 54-208(c) (West 2002) (behavior not contributory); NEW HAMPSHIRE DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, VICTIMS COMPENSATION PROGRAM: WHAT MUST I DO TO GET HELP?, http://doj.nh.gov/grants-management/victims-compensation-program/faq.htm (eligible victims “must not have been assisting in or committing a criminal act causing [their] injuries”); NORTH DAKOTA DEP’T OF CORRECTIONS & REHABILITATION, NORTH DAKOTA CRIME VICTIMS COMPENSATION: ELIGIBILITY CRITERIA, http://www.nd.gov/docr/programs/victims/viccomp.html (restricting funds to victims who were not engaged in criminal activity at the time they were injured); S.C. CODE ANN. § 16-3-1510(1) (1998) (eligibility criteria exclude people who were “engaged in an illegal act
victims” whereas Georgia excludes victims who consented “to the events that led up to the crime.” In Montana, CVC funds can be reduced for contributory misconduct.

Alabama’s CVC statute maintains that funds will not be granted to “a claimant who was the offender, or an accomplice to the offender, or who encouraged or in any way participated in the criminally injurious conduct.” The message is clear: states prefer compensating blameless victims.

States may even take this “clean hands” requirement one step further. Victims may be disqualified from receiving funds if they have a criminal history, even if it is unrelated to the crime for which they are seeking compensation. In Ohio, for example,

at the time of the offense”); Utah Office for Victims of Crime, Crime Victim Reparations Program, available at http://www.crimevictim.utah.gov/Documents/Crime%20Victim%20Information/CrimeVictimBrochure_2011.pdf (last visited on March 11, 2015) (victims whose own misconduct contributed to the crime or who engaged in illegal conduct at the time of the crime are excluded from receiving compensation); Virginia Criminal Injuries Compensation Fund, Eligibility Benefits: Who Cannot Receive Assistance, http://www.cicf.state.va.us/benefits.shtml#assistance (victims “who participated in or were involved in the events leading to the crime” are excluded from receiving compensation).


See also Njeri Mathis Rutledge, Looking A Gift Horse in the Mouth-The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims, 19 Duke J. Gender L. & Pol’y 223, 238 (2011) (discussing the preference to award CVC funds to “innocent” domestic violence victims versus “victims [who] contributed to their own victimization”); Giannini, supra note 100, at 440 (discussing the “not-entirely-realistic dichotomy of the ‘good victim’ and the ‘bad defendant’” in criminal law).

E.g., Kan. Admin. Regs. § 20-2-8 (2014) (“contributory misconduct,” which may diminish or disqualify a victim from receiving compensation includes drug or alcohol intoxication); In re Application of Barnes, 34 Ill. Ct. 424, 425-26 (Ill. Ct. Cl. 1980) (claimant denied compensation, in part because he was
all human trafficking victims, except sex-trafficked minors, must possess clean criminal histories for ten years before filing their claims, must not have contributed to the victimizing crime’s commission, and must not have been under the influence of drugs or alcohol when the crime was committed. These criteria make compensation highly unlikely. This is unfortunate given the fact that trafficking victims’ “unique injuries and criminal backgrounds [should] be recognized as indicators of their exploitation rather than barriers” to compensation.

Few states have exempted trafficking victims from CVC conditions. Only twenty states and the District of Columbia have specifically included human trafficking as a compensable crime in the CVC statute or program. The remaining states make no


162 Mathis Rutledge, supra note 159, at 240-43 (“Issues with addiction, or a past criminal record, should not automatically disqualify victims from receiving compensation because those issues do not negate the victimization experienced.”).

163 2014 Protected Innocence Challenge, supra note 4, at 87.

mention of trafficking victims nor consider it a crime worth compensating. Of the twenty states that specifically mention trafficking victims, two CVC programs apply only to minor victims while one applies to sex trafficking victims solely. Thus, even where states have recognized a distinction between human trafficking victims and traditional crime victims, they impose limitations upon who is relieved from meeting the program or statute’s requirements.

Only a handful of states recognize trafficking victims will not be able to meet CVC conditions. California exempts trafficking victims from meeting the police report requirement whereas Iowa does not require victims to be residents or even U.S. citizens in order to access CVC funds. In Florida, Georgia, and North Carolina, CVC

eligibility requirements, not any other forms of trafficking); PENNSYLVANIA OFFICE OF HUMAN SERVICES, HUMAN TRAFFICKING (“Victims of human trafficking may be eligible for … financial assistance with relocation, counseling, and replacement of some identification documents” through the State’s Victim’s Compensation Assistance Program), http://pcv.pccd.pa.gov/empowering-the-victim/Pages/Human-Trafficking.aspx#.VQtp59LF-Sq; SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES, HUMAN TRAFFICKING INFORMATION, https://dss.sd.gov/keyresources/victimservices/humantrafficking.aspx; TEX. CRIM. PROC. CODE ANN. art. 56.01(3), 56.32(14), & 56.42(d) (West 2013) (permitting both labor and sexual trafficking victims to be compensated); WASH. REV. CODE ANN. § 7.68.060(6)(b) (West 2011) (child victims of commercial sexual exploitation can receive compensation funds); WIS. STAT. ANN. § 949.03(1)(b) (West 2014) (referencing §940.302, the human trafficking statute, in the list of crimes that qualify victims for compensation).

It is not clear whether Tennessee offers compensation funds to trafficking victims. TENN. CODE ANN. § 71-1-135(b)(4) (West 2013) (devising a plan to coordinate compensation funds for trafficking victims at a future date uncertain).

165 E.g., CONN. GEN. STAT. ANN. § 54-234 (West 2002) (though “human trafficking” is mentioned within the compensation statute, it is unclear whether funds compensate human trafficking victims); HAW. REV. STAT. § 351-32 (West 1998) (crime of human trafficking not on list of compensable crimes); KAN. STAT. ANN. § 74-7305 (West 2011) (same); MO. ANN. STAT. § 595.010(1)(5) (West 2009) (same); R.I. GEN. LAWS ANN. § 12-25-20 (West 1999) (same).

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

167 CAL. GOV’T CODE § 13956(b)(3) (West 2014).

168 IOWA CODE ANN. § 915.51 (West 2006).
statutes excuse trafficking victims from the innocence standard.\textsuperscript{169} The Texas Attorney General has suggested the State modify its CVC criteria so trafficking victims with criminal histories could access funds, which it recognizes are inaccessible given the conditions the State currently requires victims meet.\textsuperscript{170}

It is important to note that even though the above states have recognized the challenges victims face and have taken measures to exempt victims from a single requirement, it is still unlikely human trafficking victims would be able to meet the other CVC conditions. Thus, there is currently not a single state where all types of human trafficking victims could access CVC funds without meeting all or most of the conditions, which makes the likelihood of such compensation doubtful.

The federal government recognizes that CVC funds are a necessary component of victim benefits in that they decrease the likelihood of re-trafficking and reimburse the victim when restitution is not available.\textsuperscript{171} To this end, the United States government is attempting to work with states to streamline victim services. The Department of Justice’s Office for Victims of Crime is currently attempting to “create partnerships that provide comprehensive legal services to crime victims”\textsuperscript{172} which includes increasing access to CVC funds in trafficking cases.\textsuperscript{173} As one anti-trafficking nonprofit organization stated,

\begin{quote}
169 FLA. STAT. ANN. § 960.065(2)(a)-(c) & (5) (West 2014) (exempting sex trafficking victims from the innocent victim requirement of the compensation statute); GA. CODE ANN. § 17-15-7(e) (West 2014); N.C. GEN. STAT. ANN. § 15B-2(2)(e) (West 2013).


172 STRATEGIC ACTION PLAN, supra note 7, at 42.

173 Id. at 43, 67.
\end{quote}
At the societal level, awarding compensation acknowledges that trafficking is a crime. At the individual level, compensation acknowledges victims’ pain and suffering. At the practical level, compensation can assist victims in rebuilding their lives. Statutory exceptions for victims of … trafficking … are necessary to ensure access to these funds.174

Legislators must recognize that trafficked persons do not lose victim status by engaging in forced or coerced criminal acts. All states need to be diligent about revising criteria in CVC statutes and programs, some of which have not been updated since trafficking became a crime in 2000.175 Programs and statutes must encompass all types of human trafficking victims. And program directors and lawmakers must understand that without more exemptions, there is no hope a trafficking victim will ever meet CVC fund criteria.

IV. Heightened Victim Requirements: Justifications & Dilemmas

Governments must focus on redrafting and reimagining anti-trafficking laws so that they better serve human trafficking victims. While the federal government has made a victim-centered aim its priority,176 it must ensure that federal and state governments are focusing on improving the quality of legislation, not just enacting more laws.

It would be wise for governments to re-examine whether fifteen years later, the definition legislators thought might apply to human trafficking victims is workable given the fact that the actual victim population does not match the imagined victim population.

174 2014 Protected Innocence Challenge, supra note 4, at 103.

175 E.g., HAW. REV. STAT. § 351-32 (West 1998); R.I. GEN. LAWS ANN. § 12-25-20 (West 1999).

176 STRATEGIC ACTION PLAN, supra note 7, at vi (the strategic plan of 2013-2017 is focused on “strengthening coordination, collaboration, and capacity across governmental and nongovernmental entities dedicated to providing support to the victims of human trafficking”).
Legislators must recognize the TVPA trafficking victim definition – or some variation thereof – has become the standard of proof required for access to victim entitlements and determine whether this is sound. They should understand the distinctions between human trafficking victims and traditional crime victims when it comes to accessing services. And they may want to consider categorizing trafficking entitlements into traditional and trafficking-specific classes. By doing so, governments may better justify the obstacles victims must overcome to access extraordinary victim services. This section will highlight each of these considerations in greater detail.

a. Re-evaluating the Definitional Standard of Proof

The human trafficking victim definition can be traced to legislative uncertainty and fear, mostly due to ignorance. At first, federal legislators reacted with feelings of “surprise, incredulity or indifference” when they discovered the prevalence of human trafficking on American soil. But skepticism eventually gave way to discussion. In the legislative history of the TVPA, Senators focused on the international brand of trafficking, most often sex trafficking, and its effects on America. Senator Sam Brownback stated, “victims are routinely forced against their will into the sex trade, transported across international borders, and left defenseless in a foreign country.” When he introduced the Act, Senator Paul Wellstone stated that trafficking victims were “brought into the

United States” by force, that some of these individuals came from collapsed political
deges in the former Soviet Union, and that corrupt officials overseas were complicit in
the international trafficking problem.\textsuperscript{180}

These statements indicate that Congress imagined victims were primarily Eastern
European or Russian women, who were forcibly trafficked into the United States by
organized criminal syndicates, to work in forced sexual servitude.\textsuperscript{181} Few remarks
suggest legislators recognized that victims could be Americans\textsuperscript{182} or undocumented aliens
resembling the non-enslaved, undocumented immigrant population currently living and
working in the United States.\textsuperscript{183}

International human trafficking was the primary concern in the drafting of the
TVPA as well.\textsuperscript{184} Congress focused on the idea that foreign women were kidnapped and
trafficked across international borders to be sexual slaves.\textsuperscript{185} In the first few subsections
of the TVPA, which detail the Act’s purpose and Congressional findings, phrases like
“throughout the world,” “international sex trade,” and “transnational crime” appear,

\textsuperscript{180} 146 CONG. REC. S2414 (daily ed. April 12, 2000) (statement of Sen. Wellstone).

\textsuperscript{181} 22 U.S.C. § 7101(b)(8) (“Trafficking in persons is increasingly perpetrated by organized, sophisticated
criminal enterprises.”)

\textsuperscript{182} Birckhead, supra note 21, at 1079 (highlighting two comments made – one by New York Representative
Christopher Smith and the other by Minnesota Congressman Paul Wellstone – about domestic trafficking victims).

\textsuperscript{183} See also Chuang, supra note 36, at 640 (“trafficking abuses typically occur in the context of individuals
seeking a livelihood – often as migrants, sometimes undocumented, sometimes utilizing state-created or
sanctioned mechanisms or third-party actors that offer opportunities laced with potentially exploitative
constraints”).

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

\textsuperscript{185} DESTEFANO, supra note 178, at 38.
demonstrating that Congress was attempting to protect the foreign-born, sex slave.\textsuperscript{186} Federal law enforcement agencies were concerned about foreigners who would take advantage of the T-Visa.\textsuperscript{187} Federal agencies “were preoccupied with avoiding claims from undocumented migrants falsely claiming to be trafficking victims.”\textsuperscript{188} In the end, legislators wavered between a desire to protect these victims and a duty to assess their credibility and motives before offering them crime victim entitlements.

The fact that victim status was something that had to be earned originated out of a concern that these victims were not citizens, they were engaged in organized crime, and it was possible they may not be victims after all. Legislators were skeptical and reluctant to offer entitlements carte blanche. The TVPA definition reflects a compromise on behalf of human rights activists, governments, labor organizations, and advocacy groups.\textsuperscript{189} It was not designed to be a burden of proof used to establish victim entitlements. Yet, that is what it has become.

Fifteen years after the TVPA’s passage and several years into the enactment of state trafficking laws, governments need to be candid about who trafficking victims are, what they need, and what the government can do to provide them with victim services. According to the DOJ statistics on trafficking victims in America, the majority of sex trafficking victims are young, female Americans whereas most labor trafficking victims

\textsuperscript{186} 22 U.S.C. § 7101(a)-(3).

\textsuperscript{187} Srikantiah, \textit{supra} note 18, at 191 n.194.

\textsuperscript{188} \textit{Id}.

\textsuperscript{189} Chuang, \textit{supra} note 36, at 613-28 (describing the formation of the “severe form” definition and how various stakeholders and Presidential administrations have re-interpreted it).
are undocumented or qualified aliens, mostly of Hispanic or Latino origin. These are not the victims Congress imagined when it drafted the TVPA.

Lawmakers in this country should no longer operate under the mythical notions that human trafficking victims are Eastern-European or Russian women, abducted against their will, rescued and saved by law enforcement officers. Nor should they blame victims who do not fit this image for the crimes they committed pursuant to the trafficking scheme. These myths and practices “denigrate the victim, excuse the perpetrator, and obfuscate human trafficking.”

By requiring the human trafficking victim to prove his or her status, governments enter into the provision of services with skepticism and blame. This is how the relationship between government and human trafficking victim begins: with a “prove-you-have-been-injured” approach. Governments need to openly assess their trafficking victim definition, whether there should even be a standard of proof victims must meet, and whether the practice of making victims prove their status violates the TVPA and its mandate to refrain from treating trafficking victims like criminal defendants.

a. Distinguishing Crime Victim Characteristics

Most human trafficking victims do not resemble traditional crime victims. It is uncommon for traditional crime victims to engage in criminal activity at the time of their

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190 See infra text accompanying notes 11-16.

191 Srikantiah, supra note 18, at 160, 170-72 (discussing the iconic trafficking victim as “meek, passive objects of sexual exploitation … exercising no free will during their illegal entry” and suggesting this rhetoric has become a myth to lawmakers and law enforcement agents).

192 Cunningham & Cromer, supra note 9, at 10.
victimization. Yet, according to the TVPA, trafficking victims who have committed criminal acts during the trafficking scheme are not to be treated as criminal defendants. This justification principle is called non-criminalization; it has long applied to trafficking victims, even before the TVPA’s enactment. The basis for non-criminalization in human trafficking cases is simply that

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

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

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193 But see Mathis Rutledge, supra note 22, at 165 (discussing “how the law should respond when breached” by a domestic violence victim who later commits perjury in the process of her batterer’s trial).

194 22 U.S.C. § 7105(c)(1)(A); 2014 TIP REPORT, supra note 3, at 397-98 (in addition to the TVPA’s statutory mandate that victims should not be confined and jailed, there is a federal policy that “victims should not be inappropriately penalized solely for unlawful acts committed as a direct result of being trafficked”).


196 Id. at 380-81.

recognized that trafficking victims frequently commit prostitution and immigration crimes and are inappropriately punished for these crimes.\textsuperscript{198} It sought to shield victims from being punished for these crimes.\textsuperscript{199} In this way, the law reiterates the trafficked person is always a victim, never a defendant.

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

Making the victim “work off” his or her case by cooperating with the government in proving the trafficker’s criminal violation parallels the way law enforcement agents regard confidential informants. Whether the victim is likened to a criminal defendant with an affirmative defense, a confidential informant working towards immunity, or held to the same list of elements the prosecutor must prove, the victim in all of these instances resembles a criminal defendant. This is precisely what the federal law prohibits governments from doing: treating the victim like a defendant.

In all of the above ways, human trafficking victims differ from traditional crime victims. Trafficking victims are blamed more often.\textsuperscript{200} As discussed earlier, when a trafficking victim violates the law, actors within the criminal justice system appear

\textsuperscript{198} 22 U.S.C. § 7101(6), (10), & (17).

\textsuperscript{199} Id.

\textsuperscript{200} E.g., Cunningham & Cromer, supra note 9, at 6-8 (36 percent of study participants blamed the underage sexually trafficked minor for what happened even though, under the majority of state laws and under the TVPA, she would be deemed a trafficking victim).
confused about how to handle the victim and the legal transgression. “It may be possible for the public to view a trafficked person as a victim and yet still believe he or she should be punished, because his or her behavior (regardless of locus of control) is illegal.”

Human trafficking cases require a nuanced and complex analysis of exploitation. “A victim may act within a larger environment of psychological and physical coercion but still exercise some limited will nonetheless… the survivor may be both victim and individual actor.” Governments must carefully evaluate these nuances, recognize the complexity of these cases, and contemplate whether trafficking victims should be regarded differently than traditional crime victims, and if so, justify the differences in treatment.

b. Parsing Traditional and Extraordinary Victim Entitlements

Governments would benefit from determining whether the entitlements trafficking victims desire to access are available to traditional victims of crime. There is little justification for making traditional victim benefits less accessible to human trafficking victims. However, where protections like immunity from prosecution or a path to citizenship are concerned, governments may determine that such entitlements warrant screening before victims can receive them.

Traditional crime victims have many rights. For example, the right to access restitution, the right to share feelings on punishment with the prosecutor, and the right to be made aware of the defendant’s release from custody are freely offered to victims of

\[201\] Id. at 11.

\[202\] Chuang, supra note 36, at 648.

\[203\] Srikantiah, supra note 18, at 197.
violent crime.\textsuperscript{204} Because these rights are generally accessible to crime victims, there is little justification for making a human trafficking victim prove his or her status as a prerequisite to accessing these rights. Traditional crime victims, however, are typically not entitled to criminal immunity or citizenship. These extraordinary rights and benefits go beyond those offered to traditional crime victims, which may warrant making them harder to obtain.

Governments must recognize the challenges trafficking victims face in accessing traditional crime victim rights and services as well as extraordinary protections and benefits. For instance, restitution is not awarded in every case, as the mandatory restitution section of the TVPA implies.\textsuperscript{205} Judges and prosecutors have legitimate concerns about making restitution awards in sex trafficking cases where the victim’s labor was, by definition, criminal. On the one hand, allowing the trafficker to retain the financial rewards from the victim’s forced or coerced labor during the scheme defeats one of the primary reasons for his punishment.

On the other hand, courts have always been concerned about awarding restitution where the victim was involved in illicit partnerships. For example, a party may not recover prospective profits from an illegal scheme.\textsuperscript{206} In 1851, the United States Supreme Court held that “the law will not aid either of two parties who are \textit{in pari delicto} in the violation of a statute.”\textsuperscript{207} Thus, courts will not facilitate an illegal agreement between two parties. Prosecutors and judges are uncertain about whether sex trafficking victims should

\textsuperscript{204} E.g., \textsc{Fla. Stat. Ann.} § 960.0021 (West 2002).

\textsuperscript{205} See infra text accompanying notes 107-35.


\textsuperscript{207} \textsc{Harris v. Runnels}, 53 U.S. 79, 86 (1851).
be reimbursed or whether criminal sex acts are even compensable. The hesitation they face in awarding restitution to a trafficking victim who violated criminal laws is understandable. The federal government should recognize the legal conundrum human trafficking cases raise and create restitution guidelines for federal judges and prosecutors.

When it comes to CVC statutes and programs, states must consider modernizing them. Their language has not kept pace with the advent of anti-trafficking statutes. While some CVC programs have been amended by state boards, statutes lag behind. Some states have not changed the language of the statute since the 1990s, which predates human trafficking as a crime. Other states, like Virginia, merely paste the word “human trafficking” into antiquated criminal statutes. State legislatures must recognize that human trafficking crimes and their unique victim concepts warrant new legislation. It is unclear whether state reluctance to grant benefits is due to a failure to modernize statutes or whether states are afraid that by offering services freely to human trafficking victims, they will exhaust finite victim resources.

Depletion concerns are not warranted. Despite questionable estimates that tens of thousands of people are trafficked in the United States annually, the number of

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208 Levy et al., supra note 94, at 16.


210 E.g., HAW. REV. STAT. § 351-32 (West 1998); R.I. GEN. LAWS ANN. § 12-25-20 (West 1999).

211 E.g., VA. CODE ANN. § 18.2-355 (West 2014) (statute, written in 1975, is violated when defendant forces another, against her will, to enter a “bawdy house”); VA. CODE ANN. § 18.2-356 (West 2014) (outlawing forced labor or services, concubines, and prostitution, among other things).

212 See e.g., Susan W. Tiefenbrun, Sex Slavery in the United States and the Law Enacted to Stop it Here and Abroad, 11 WM. & MARY J. WOMEN & L. 317, 318-19 (2005) (“statistics about trafficking are notoriously
human trafficking federal convictions has, at most, reached 174 in any given fiscal year.\textsuperscript{214} The federal government is attempting to obtain more reliable state human trafficking data.\textsuperscript{215} However, in 2013, there were approximately 100 convictions for human trafficking offenses at the state level.\textsuperscript{216} The number of prosecutions does not necessarily correlate to the number of trafficking crimes that occur in the United States. Nonetheless, these numbers are far lower than early government estimates. It is therefore unlikely that human trafficking victims will ever deplete CVC funds or exhaust resources apportioned to traditional crime victims.

If governments regard extraordinary victim benefits – criminal immunity and immigration relief – which are atypical from the entitlements traditionally offered to crime victims, they may choose to limit their availability. Safe harbors, affirmative

\begin{itemize}
\item \textsuperscript{213} E.g., Samuel Vincent Jones, \textit{Human Trafficking Victim Identification: Should Consent Matter?}, 45 IND. L. REV. 483, 485 (2012) (stating that while some human trafficking scholars simply state that the number of victims is unknown, others estimate between 14,500 and 100,000 victims are trafficked in America annually); Ankita Patel, \textit{Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking}, 9 SEATTLE J. FOR SOC. JUST. 813, 822 n. 41 (2011) (arriving at 175,000 victims in America by multiplying the number of known victims by ten due to the underground nature of human trafficking).
\item \textsuperscript{214} 2010 TIP REPORT, supra note 134, at 339 (47 convictions for federal human trafficking crimes in 2009); 2012 TIP REPORT, supra note 20, at 361 (141 convictions for federal human trafficking crimes in 2010 and 151 convictions for federal human trafficking crimes in 2011 along with “several dozen” convictions for state human trafficking crimes); 2014 TIP REPORT, supra note 3, at 398 (in fiscal year 2012, there were 138 federal human trafficking criminal convictions, whereas in 2013, 174 people were convicted for federal human trafficking criminal violations).
\item \textsuperscript{215} STRATEGIC ACTION PLAN, supra note 7, at 21-22 (the federal government hopes to implement new data collection procedures and encourage sharing of data between inter-governmental agencies).
\item \textsuperscript{216} 2014 TIP REPORT, supra note 3, at 398 (in fiscal year 2013, media reports indicated about 100 people had been convicted for human trafficking crimes under state laws). \textit{See also} Heather J. Clawson, et al., U.S. Dep’t of Health and Human Services, \textit{Human Trafficking into and within the United States: A Review of the Literature}, 5, available at \url{http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/index.shtml} (warning that “there are huge gaps between estimates of ‘prevalence’ or populations ‘at risk’ and individuals actually identified as trafficking victims or enrolled in government programs”).
\end{itemize}
defenses, expunctions, pardons, and the right to remain in the country may justify barriers or require proof. In those cases, the proof required may be similar to the evidence necessary for similarly situated individuals who are seeking comparable immunity or citizenship entitlements. However, law and policy makers should carefully consider what should be required of human trafficking victims, given their rights and the federal mandate that they be treated like victims, not criminal defendants.

V. Conclusion

The crime of human trafficking has received much political and media attention in recent years. Yet, lawmakers and actors within the criminal justice system have yet to fully grasp the challenges human trafficking victims face in securing the rights, benefits, services, and protections reserved for this group. One of the qualities of the American criminal justice system is its ability to adapt to new challenges. Law and policy makers must understand why human trafficking victims differ from victims of traditional crime and how entitlements for both groups overlap in some ways and vary in others. Until they grasp and ponder the distinctions, trafficking victims will continue to find entitlements unobtainable.

The government’s assessment about who victims are, what they must prove to establish their victim-ness, and whether this practice actually places them more in the role of criminal defendant than criminal victim, which violates the non-criminalization principle, must be examined more closely. Governments are sending mixed messages about culpability in human trafficking cases. The federal government has pledged to

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217 Brown, supra note 135, at 205.
encourage officials “to adopt victim-centered policies that prohibit prosecuting victims for crimes committed as a direct result of being trafficked.”

Though this goal is admirable, refraining from prosecution does not go far enough.

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

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

“When pursued in a victim-centered, rights-protective manner, criminal justice interventions unquestionably offer much-needed accountability and restitution for egregious wrongs.”

Human trafficking is an egregious wrong that the nation has committed to eradicate using criminal and civil remedies. Despite the enactment of literally hundreds of pieces of anti-trafficking legislation in the last three years alone, new

218 2014 TIP REPORT, supra note 3, at 398.

219 Chuang, supra note 36, at 641.
laws must address the barriers the federal government, legislatures, judges, attorneys, and law enforcement agents have placed before victim entitlements. Until that happens, most of the new legislation will continue to include hollow assurances of rehabilitation, restitution, and restorative justice. Human trafficking victims deserve and need so much more.