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Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking

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LEFT BEHIND: HOW THE ABSENCE OF A FEDERAL VACATUR LAW DISADVANTAGES SURVIVORS OF HUMAN TRAFFICKING

By Jessica Emerson
& Alison Aminzadeh*

INTRODUCTION

After a hamstring injury in October of 2004 forced her to surrender her athletic scholarship at St. John's University, Shamere McKenzie chose to spend her winter break working in order to save the money she needed to pay the remainder of her tuition. In January of 2005, Shamere met a man named Corey Davis, who expressed an interest in dating her. After getting to know him for several weeks, she eventually shared with him the challenges she was having earning the money she needed to continue her enrollment in college. Davis encouraged her to consider exotic dancing as a way to earn quick money, and told her he would act as her protection from the men in the clubs. Desperate to return to school and put at ease by Davis's charming and intelligent demeanor, Shamere accepted his offer.

Shamere became even more convinced of the sincerity of Davis's promises after making \$300 in less than two hours on her first night in a New Jersey strip club. Energized by the prospect of making the money she needed far more quickly than she had anticipated, Shamere accepted Davis's offer to travel from the club to a house party in Brooklyn where she could earn additional income by dancing for the men in attendance. When one of the men at the house requested a sex act from her, Shamere spoke harshly to him, which Davis overheard. Instead of protecting her as she expected he would, Davis pulled Shamere to the side and demanded she do as the man requested. When she protested, Davis told her that if she tried to leave, he'd make sure she never made it out alive. Later that night, he threatened to kill Shamere's family if she disobeyed him again, then choked her to the point of unconsciousness.

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The physical, sexual, and psychological abuse Shamere endured that first night under Davis's control would continue for the next eighteen months of her life. Fearful for her own life and for the safety of her family, Shamere complied with Davis's demands that she engage in commercial sex acts for his benefit. Eventually he began to make additional demands of her, namely that she drive the other women he controlled back and forth from New York to strip clubs in the state of Connecticut. When she first tried to protest, he put what she thought was a loaded gun in her mouth and pulled the trigger, delighting in the terror this caused her. He then beat her with the weapon in front of the other women as a show of his complete control over her life or death.¹

In January of 2007, Shamere was indicted by federal prosecutors for conspiracy to commit Mann Act violations as a result of her involvement in Davis's trafficking operation.² Shamere was considered to be Davis's "bottom girl," described in the indictment as "[his] most trusted prostitute, who facilitated transportation of the female prostitutes to various adult strip clubs, collected cash proceeds generated through the prostitution, informed them of the 'rules,' and maintained control over them when Davis was not present."³ Although Shamere cooperated fully, prosecutors refused to drop the charges against her.⁴ Eventually, Shamere pleaded guilty to the federal conspiracy charge in an attempt to keep herself out of prison, and was sentenced to five years' probation.⁵ She was also required to register as a sex offender, despite the fact that she had committed no acts of sexual violence and had, instead, been the victim of them.⁶

¹ Interviews by Alison Aminzadeh with Shamere McKenzie (Feb. 11, 2016, Feb. 22, 2016, Mar. 28, 2016, and May 11, 2016).

² Indictment at 1–2, *United States v. Corey Davis and Shamere McKenzie*, No. 3:07-CR-00011-JCH (D. Conn. Jan. 18, 2007), ECF No. 6.

³ *Id.* at 2.

⁴ *See* J. in a Criminal Case at 1, *United States v. Shamere McKenzie*, No. 3:07-CR-00011-JCH (D. Conn. May 28, 2009), ECF No. 262.

⁵ *Id.*

⁶ *See* 42 U.S.C. § 16911(3)(A) (describing conspiracy to commit Mann Act violations as a Tier II sex offense). *See also* 18 U.S.C. §§ 2421–2424 (detailing which offenses constitute violations of the Mann Act).

For advocates working with survivors of human trafficking, Shamere's story is all too common.⁷ Instead of being offered treatment and supportive services, victims of human trafficking in the United States are often arrested and prosecuted for conduct in which they are compelled to engage.⁸ The burden of a criminal record saddles trafficking victims with a number of collateral consequences, such as limitations on their ability to "seek gainful employment, secure housing, or other benefits".⁹ Criminal records are often used against victims in family court proceedings,¹⁰ while foreign-born survivors face the additional risk of deportation or the inability to attain lawful status in the United States.¹¹ The impact of having been trafficked on the psychological and physical well-being of victims combined with these limitations on access to basic needs leaves victims of trafficking convicted of criminal offenses vulnerable and without the stability they so desperately need as they work to heal from trauma and rebuild their lives.¹²

In response to this injustice, New York State became the first state in the country to pass a law designed to allow victims of

⁷ See SUZANNAH PHILLIPS ET AL., CUNY SCHOOL OF LAW, CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 15–21 (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf> (giving an overview of reasons individuals being trafficked may break additional laws, examples of those individuals, and explanations of the negative consequences).

⁸ *Id.*

⁹ *Id.* at 23.

¹⁰ *Id.* at 21; see also Andrea N. Cimino, *A Predictive Theory of Intentions to Exit Street-Level Prostitution*, 18 VIOLENCE AGAINST WOMEN 1235, 1247 (2012) (addressing the impact of prostitution on child custody issues).

¹¹ Nelson A. Vargas-Padilla, *The Immigration Consequences of Criminal Conduct*, 3 AM. U. CRIM. L. BRIEF 24, 24 (2007).

¹² See PHILLIPS, *supra* note 7, at 10 (describing the extensive physical and emotional trauma victims of trafficking experiences); see also JEAN BRUGGEMAN & ELIZABETH KEYES, A.B.A., MEETING THE LEGAL NEEDS OF HUMAN TRAFFICKING VICTIMS: AN INTRODUCTION FOR DOMESTIC VIOLENCE ATTORNEYS AND ADVOCATES 7 (Amanda Kloer et al. eds., 2009), http://www.americanbar.org/content/dam/aba/migrated/2011_build/human_rights/dv_trafficking_intro.authcheckdam.pdf ("Victims are often left in poverty with few marketable skills and greatly damaged self-esteem."); CATHY ZIMMERMAN & CHARLOTTE WATTS, WHO, WHO ETHICAL AND SAFETY RECOMMENDATIONS FOR INTERVIEWING TRAFFICKED WOMEN 2–3 (2003), <http://apps.who.int/iris/bitstream/10665/42765/1/9241546255.pdf> (describing the "complex circumstances" of women who have left a trafficking situation).

trafficking to vacate, or, set aside, prostitution and related convictions resulting from their trafficking experience.¹³ Since New York enacted its law in 2010, over thirty additional states have enacted some form of post-conviction relief designed to alleviate the burden of state-based convictions for survivors of trafficking.¹⁴ While there is still much to be done to ensure that these laws more effectively assist victims, the remedy as a whole has been instrumental in helping survivors of sex trafficking achieve increased stability and self-sufficiency by eliminating the numerous barriers that accompany a criminal conviction.¹⁵

For victims like Shamere, however, who are saddled with federal convictions stemming from their trafficking experience, these state-based remedies are simply out of reach.¹⁶ As discussed below, the federal government lags behind the states in addressing the collateral consequences of federal criminal convictions for survivors of human trafficking.¹⁷ The enactment of a federal vacatur law, however—which would allow survivors to petition the courts to remove trafficking-related convictions from their records—would be the proper recourse for these survivors, who should not be prevented from moving forward with their lives because of acts they were forced to commit by their traffickers.¹⁸

¹³ N.Y. CRIM. PROC. LAW § 440.10(1)(i) (2012); Alyssa M. Barnard, Note, “*The Second Chance They Deserve*”: *Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1463–64 (2014).

¹⁴ *Survivor Reentry Project*, A.B.A. CTR. FOR HUM. RTS., http://www.americanbar.org/groups/human_rights/projects/task_force_human_trafficking/survivor-reentry-project.html (last visited Dec. 20, 2016). Additional states include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* A comprehensive map, along with links to each state law, can be found on the homepage for the American Bar Association’s Survivor Reentry Project. *Id.*

¹⁵ See Samantha Meiers, *Removing Insult from Injury: Expunging State Criminal Records of Persons Trafficked in the Commercial Sex Trade*, 47 U. TOL. L. REV. 211, 218 (2015) (explaining how unique statutory elements and the lack of consistency in the availability of relief between states has complicated the process of assisting victims).

¹⁶ See discussion *infra* Part III.

¹⁷ See discussion *infra* Part III.

¹⁸ See discussion *infra* Part IV.

Part I of this note presents a brief description of human trafficking and the federal laws designed to combat it.¹⁹ Part II details how a criminal justice approach to the crime of human trafficking frequently results in a violation of the victim's human rights and how the criminalization of trafficking victims is condemned under both federal and international law.²⁰ It also highlights how the States have responded to this injustice by enacting legislation designed to provide relief from the collateral consequences of criminal convictions.²¹ Part III highlights the federal gap in post-conviction relief for survivors, and recommends passage of legislation to assist survivors who have been criminalized at the federal level.²²

I. HUMAN TRAFFICKING DEFINED

The International Labor Organization estimates that approximately 20.9 million people around the globe are victims of forced labor at any given time.²³ Of these individuals, roughly 4.5 million people are trafficked into the sex industry, while 16.4 million are trafficked for various other forms of labor.²⁴ Human trafficking is a complex global crime affecting nearly every developed and developing country in the world.²⁵ It involves the exploitation of people for monetary or personal profit, and occurs in a range of both legal and illegal industries, including hospitality services, brothels, agriculture, street prostitution, construction, strip clubs, domestic services, manufacturing, spas, and escort services.²⁶ At its core, human

¹⁹ See *infra* Part I.

²⁰ See *infra* Part II.

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ INTERNATIONAL LABOUR ORGANIZATION, ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 13 (2012), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf.

²⁴ *Id.*

²⁵ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7–10 (June 2016), <https://www.state.gov/documents/organization/258876.pdf> [hereinafter 2016 TIP REPORT].

²⁶ *Id.* at 12, 14, 23, 28, 30, 45, 86, 92, 119, 209.

trafficking is about abuse and cruelty toward human beings, and is a gross violation of human rights.²⁷

In the United States, the Trafficking Victims Protection Act (hereinafter *TVPA*) guides federal anti-trafficking policy and establishes the legal standards by which the crime of human trafficking is defined.²⁸ The TVPA defines “severe forms of trafficking in persons” as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age,” or “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”²⁹

To guide its own efforts as well as assist foreign governments in setting standards to eliminate trafficking, the United States also established the “3P” paradigm³⁰ — prevention, protection, and prosecution.³¹ The prevention prong includes both public awareness efforts as well as strategies to address the numerous factors that make people vulnerable to the crime,³² while protection efforts are focused on the identification, recovery, rehabilitation, and reintegration of

²⁷ U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS AND HUMAN TRAFFICKING 5 (2014), http://www.ohchr.org/Documents/Publications/FS36_en.pdf (“Slavery, servitude, child sexual exploitation, forced marriage, servile forms of marriage, child marriage, enforced prostitution and the exploitation of prostitution are also trafficking-related practices that are prohibited under international human rights law”).

²⁸ See POLARIS PROJECT, A LOOK BACK: BUILDING A HUMAN TRAFFICKING LEGAL FRAMEWORK 1–2 (2014), <https://polarisproject.org/sites/default/files/2014-Look-Back.pdf> (describing national and statewide efforts to eliminate sex trafficking).

²⁹ 22 U.S.C. § 7102(9) (2010).

³⁰ OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, THE 3PS: PREVENTION, PROTECTION, PROSECUTION 1 (2011) <http://www.state.gov/documents/organization/167334.pdf> [hereinafter *THE 3Ps*] (stating that in 2009, then-Secretary of State Hillary Rodham Clinton introduced the “fourth P” of partnership, which “serves as a pathway to achieve progress on the 3Ps in the effort against modern slavery.”).

³¹ *Id.* at 1–2.

³² *Id.* at 1; see also 2016 TIP REPORT, *supra* note 25, at 7 (“Without prevention, governments are left to respond to the consequences of human trafficking without coming any nearer to seeing its end.”).

victims.³³ By and large, however, the majority of the government's state and federal resources support the third prong of the "3Ps," the prosecution of traffickers.³⁴ While punishment and deterrence are an essential part of combatting this crime, the United States' focus on the prosecution of traffickers often comes at the expense of the rights of the trafficker's victims.³⁵

II. A CRIMINAL JUSTICE APPROACH TO HUMAN TRAFFICKING FREQUENTLY RESULTS IN THE VIOLATION OF VICTIMS' RIGHTS

While it is clear that victims of human trafficking have experienced a violation of their fundamental human rights, the United States' focus on a criminal justice approach to trafficking often results in prioritizing the prosecution of traffickers over the protection of victims' rights.³⁶ Law enforcement raids, long seen as the primary vehicles for identification and recovery of trafficking victims,³⁷ are more often deemed successful "by the collection of evidence....[and] witnesses who may testify in prosecution of [trafficking] crimes," than by the identification and support of victims.³⁸ Instead, victims commonly find themselves arrested or detained, either because victims are not screened for trafficking by law enforcement,³⁹ or because they

³³ THE 3P'S, *supra* note 30, at 1–2.

³⁴ PHILLIPS, *supra* note 7, at 13.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 29 (2012), <http://www.state.gov/documents/organization/192587.pdf> [hereinafter 2012 TIP REPORT] ("Anti-trafficking law enforcement actions, such as raids on suspected sites of exploitation, are often essential for the identification and liberation of trafficking victims."); see also U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 30 (2007), <http://www.state.gov/documents/organization/82902.pdf> ("Help often comes in the form of a raid by law enforcement on the place where victims are held against their will....The U.S. Government views rescues as an integral part of the law enforcement response to trafficking in persons.").

³⁸ MELISSA DITMORE, THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 36 (2009), <http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf>.

³⁹ 2016 TIP REPORT, *supra* note 25, at 26 (2016) ("Law enforcement authorities often fail to properly screen and identify victims of human trafficking when they detain or arrest criminal suspects. This can result in a second victimization when victims are punished for their engagement in the crimes their traffickers forced them to commit."); see also DITMORE, *supra* note 38, at 48 (reporting that of the nine victims

fail to identify themselves as victims.⁴⁰ For some, the threat of prosecution is used as a tool to get them to testify against their traffickers in court.⁴¹ This can result in trafficking survivors being treated as “instruments of criminal investigation, rather than as holders of rights.”⁴² Overall, these methods only serve to further traumatize victims.⁴³ Furthermore, these methods create distrust in the systems set in place to assist victims, reducing the likelihood that they will disclose their trafficking history or cooperate in a criminal case against their trafficker.⁴⁴

interviewed for the report, only one had been screened for trafficking by law enforcement).

⁴⁰ 2012 TIP REPORT, *supra* note 37, at 29 (2012) (“[S]ome trafficking victims have been arrested for prostitution several times by law enforcement authorities’ vice squads before finally being correctly identified as trafficking victims; some found the law enforcement interventions they experienced to be as distressing and confusing as their trafficking experience. Victims who have been threatened by traffickers with police action sometimes believe police action meant to protect them is actually directed against them.”); POLARIS PROJECT, DOMESTIC SEX TRAFFICKING: THE CRIMINAL OPERATIONS OF THE AMERICAN PIMP 5, <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/victims/domestic-sex-trafficking-criminal-operations-american-pimp.pdf> (last visited Dec. 20, 2016) (describing the numerous reasons victims of trafficking may not self-identify).

⁴¹ See NATIONAL SURVIVOR NETWORK, NATIONAL SURVIVOR NETWORK MEMBERS SURVEY ON THE IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING 6 (2016) (responses from survivors include: “I was given a mandate that I must testify against my trafficker. I was unable, so I was charged.”; “I was sentenced to 30 months in prison because I would not testify against my trafficker”; and “I was scared they told me if I didn’t tell they would keep arresting me[sic] & keep me in jail for a very long time”); see also Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, An Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 480 (2012) (describing the “heavy-handed” approach many prosecutors use “to compel cooperation with their investigations rather than work to connect the victim to services.”); Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1083 (2011) (discussing the claim made by prosecutors that “without the threat of a criminal conviction or imprisonment, young prostitutes will fail to appear at court hearings, resulting in the dismissal of charges against pimps. Law enforcement often echoes these concerns.”).

⁴² *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, Joy N. Ezeilo, ¶ 61, Human Rights Council, U.N. Doc. A/HRC/17/35 (Apr. 13, 2011).

⁴³ 2016 TIP REPORT, *supra* note 25, at 26.

⁴⁴ *Id.* at 26–27 (2016) (“Victims of trafficking may be more likely to report their victimization if they were confident it would not lead to their arrest or prosecution. In turn, this would allow a government to better meet its obligations to provide

Some victims, like Shamere, are even charged as co-defendants alongside their traffickers based on allegations that they were or, over time, became willing participants in their trafficker's operations.⁴⁵ Referred to in industry parlance as "bottom girls", these women often occupy an integral role in a trafficker's operation.⁴⁶ Shamere's own conviction stemmed from the fact that she had responsibilities in the day-to-day management of her trafficker's exploitation scheme, such as transporting Davis's other victims to and from locations to engage in commercial sex acts, informing newly recruited victims of Davis's "rules," and collecting and delivering the money they earned to Davis.⁴⁷ As a result, bottom girls present a unique legal challenge, in that they often meet the legal definition of both trafficking victim and trafficker.⁴⁸

protection and assistance to victims, as well as to investigate and prosecute trafficking cases.""); DITMORE, *supra* note 38, at 39 (noting the perspective of service providers that "treatment during raids bears directly upon whether a person who has been detained will speak frankly about their experiences, or self-identify as having been coerced or otherwise abused"); *id.* at 49 (quoting a service provider as saying, "The majority of trafficked women recognized through this program have been arrested anywhere from two to seven times before we identify them, so they are less trusting of us and of law enforcement, and therefore less likely to want to cooperate with law enforcement or even pursue services.").

⁴⁵ Indictment, *supra* note 2, at 2.

⁴⁶ See *United States v. Pipkin*, 378 F.3d 1281, 1285 (11th Cir. 2004) (defining a "bottom girl" as a "a trusted and experienced prostitute or female associate [who] work[s] the track in his stead, run[s] interference for and collect[s] money from the pimp's other prostitutes. The bottom girl also look[s] after the pimp's affairs if the pimp [i]s out of town, incarcerated, or otherwise unavailable."); see also *United States v. Brooks*, 610 F.3d 1186, 1196 (9th Cir. 2010) (describing a bottom girl as "pimp's most senior prostitute, who often trains new prostitutes and collects their earnings until they can be trusted"); *United States v. Daniels*, 685 F.3d 1237, 1242 (11th Cir. 2012) (describing a conversation between Daniels' bottom girl and another of his victims, who "briefed her on necessary hygiene, the appropriate prices to charge for certain services, and 'just how to act with a trick.'").

⁴⁷ Indictment, *supra* note 2, at 2.

⁴⁸ Alexandra F. Levy, *Innocent Traffickers, Guilty Victims: The Case for Prosecuting So-Called "Bottom Girls" in the United States*, 6 ANTI-TRAFFICKING REV. 130, 131 (2016), http://gaatw.org/ATR/AntiTraffickingReview_issue6.pdf ("This presents a vexing legal question, one at odds with criminal law's affinity for clear boundaries between guilt and innocence: how should the law treat innocent traffickers, guilty victims?"); Shamere McKenzie, *Unavoidable Destiny | Legally a Criminal, Legally a Victim: The Plight of the Bottom*, SHARED HOPE INT'L (May 24, 2012), <http://sharedhope.org/2012/05/unavoidable-destiny-legally-a-criminal-legally-a-victim-the-plight-of-the-bottom> ("Today in America, the justice system faces a

Since escaping her trafficker, Shamere has made it a priority to shed much needed light on the plight of the bottom girl.⁴⁹ Shamere asserts that the motivation of bottom girls to comply with their trafficker's demands has nothing to do with an interest in profiting, as is the case with their traffickers.⁵⁰ Instead, their compliance is rooted in the belief that the trafficker holds their lives in his hands, a belief they develop after repeated exposure to trauma and abuse.⁵¹ Shamere states that "[the] bottom girl is the one who's the most victimized,"⁵² and that there are "extreme" consequences for those who attempt to resist a trafficker's demands.⁵³ She counters that the "independence" prosecutors claim made her a perpetrator was actually a strategic decision by her trafficker to maintain his power by making his most compliant victim bend even further to his will.⁵⁴

A. Criminalization of Victims of Human Trafficking Condemned Under Federal and International Law

The criminalization of victims of human trafficking is in direct opposition to the federal TVPA, which states that "[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct

severe challenge. Does it respond to the victimization of the bottom girl by offering services and freedom? Or does it consider the bottom girl a perpetrator and respond with jail sentences and correctional programs?").

⁴⁹ See *infra* notes 50–54 and accompanying text.

⁵⁰ McKenzie, *supra* note 48 ("The pimp is the top of the hierarchy and is the only one who profits."); *id.* ("The crimes were committed out of force and in protection of my life and the lives of my family. I never once profited.").

⁵¹ *Id.* ("Her basic ability to determine right from wrong has become corrupted by thoughts and actions instilled by her pimp through fear. The 'bottom girl' develops compliant behavior after constant threats and real severe beatings and rapes, and witnessing the cruelty done to other girls.").

⁵² Marquette University Law School, *Human Trafficking – Part 8 – What Was Learned Today*, MARQUETTE UNIVERSITY LAW SCHOOL (Mar. 20, 2015), <https://law-media.marquette.edu/Mediasite/Play/9da2e13c4b4c481da48c89c3e31e98151d>.

⁵³ Anna Bisaro, *Legal Debate Focuses on Prosecution of "Bottoms" in Sex Trafficking of Minors*, NEW HAVEN REGISTER (May 7, 2016, 8:24 PM), <http://www.nhregister.com/general-news/20160507/legal-debate-focuses-on-prosecution-of-bottoms-in-sex-trafficking-of-minors>.

⁵⁴ McKenzie, *supra* note 48.

result of being trafficked[.]”⁵⁵ Furthermore, the TVPA requires that the Department of State take into account the criminalization of victims as part of its assessment of foreign governments’ action on combatting human trafficking, which is published every year in the United States’ *Trafficking in Persons Report*.⁵⁶ Specifically, the TVPA states that foreign governments should:

ensure[] that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, [and should provide] training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims.⁵⁷

The criminalization of victims of human trafficking is also condemned as a violation of fundamental human rights under international law.⁵⁸ The Office of the High Commissioner on Human Rights recommends that “[t]rafficked persons [] not be detained, charged or prosecuted for . . . their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”⁵⁹ The U.N. Special Rapporteur on Trafficking has repeatedly emphasized that governments have an obligation to ensure that victims are not inappropriately criminalized, as “criminalization and/or detention of victims of trafficking is incompatible with a rights-based approach to trafficking because it

⁵⁵ 22 U.S.C. § 7101(b)(19); *see also* THE 3PS, *supra* note 30, at 2 (“[G]overnments should make the rights and needs of victims a priority to ensure that protection efforts restore a survivor’s dignity and provide an opportunity for a safe and productive life.”).

⁵⁶ *Trafficking Victims Protection Act: Minimum Standards for the Elimination of Trafficking in Persons 2016*, Office to Monitor and Combat Trafficking in Persons, U.S. Dep’t of State, <http://www.state.gov/j/tip/rls/tiprpt/2016/258695.htm> (last visited Dec. 20, 2016). Since 2001, the United States has published the Trafficking in Persons Report, where countries are placed into one of three “tiers” based on their governments’ compliance with the “minimum standards for the elimination of trafficking” found in 22 U.S.C. § 7106. *Id.*

⁵⁷ 22 U.S.C. § 7106(b) (2012).

⁵⁸ *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, ¶ 7, U.N. Office of the High Commissioner for Human Rights, U.N. Doc. E/2002/68/Add.1 (May 20, 2002).

⁵⁹ *Id.*

inevitably compounds the harm already experienced by trafficked persons and denies them the rights to which they are entitled.”⁶⁰ In 2009, the Working Group on Trafficking in Persons, advisor to the Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, recommended that State parties “[c]onsider . . . not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts[.]”⁶¹ Most recently, a report was issued by the United Nations in March of 2014 condemning the criminalization of trafficking victims as a violation of the International Covenant on Civil and Political Rights, of which the United States is a party.⁶²

B. The States Respond

Recognizing the special burden placed on victims of trafficking who are swept into the criminal justice system and charged with crimes they were forced to commit by their traffickers, New York State enacted the country’s first “vacatur law,” allowing survivors of sex trafficking to vacate state-based prostitution and loitering for prostitution convictions that were directly related to their trafficking experience.⁶³ In passing the law, legislators in New York State recognized that “[e]ven after they escape from sex trafficking, the criminal record victimizes them for life. This bill would give victims

⁶⁰ *Special Rapporteur, supra* note 42, at ¶ 25.

⁶¹ *Report on the Meeting of the Working Group on Trafficking in Persons Held in Vienna on 14 and 15 April 2009*, ¶ 12, Conference of the Parties to the U.N. Convention against Transnational Organized Crime (CTOC), U.N. Doc. COP/WG.4/2009/2 (Apr. 21, 2009).

⁶² *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 14, Human Rights Committee, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23 2014); *see also* Letter from Cynthia Soohoo, Director, Int’l Women’s Human Rights Clinic, CUNY Sch. of Law et al., to the Human Rights Committee Secretariat, Office of the U.N. High Commissioner for Human Rights (Aug. 23, 2013) (on file with author) (“The abusive and degrading nature of these arrests, coupled with the lasting harms of criminal records, violates the rights of trafficking survivors to be free from cruel, inhuman or degrading treatment and exposes them to additional risks of exploitation by traffickers in contravention of the U.S.’s obligations under . . . the ICCPR.”).

⁶³ N.Y. CRIM. PROC. LAW § 440.10(1)(i) (2012).

of human trafficking a desperately needed second chance they deserve.”⁶⁴

Since New York enacted its law in 2010, more than thirty additional states, including Maryland, have enacted similar laws,⁶⁵ with efforts made to enact this legislation in numerous others.⁶⁶ The availability of this remedy has been instrumental in empowering survivors,⁶⁷ addressing issues of shame and stigma,⁶⁸ and aiding their reintegration into society.⁶⁹ Even more importantly, it signals a growing understanding that victims of trafficking should not be criminalized for actions they were forced to commit.⁷⁰

III. THE FEDERAL GAP IN RELIEF

For survivors like Shamere, however, who have been charged and convicted of federal crimes stemming from their victimization, the availability of relief is far less concrete.⁷¹ While Congress has provided for the destruction of criminal records through a process called expungement, the few statutes that exist are incredibly narrow⁷²

⁶⁴ N.Y. STATE ASSEMBLY, MEMORANDUM IN SUPPORT OF LEGISLATION, B. A7670, 2009–2010 Regular Sess. (Apr. 20, 2009), http://assembly.state.ny.us/leg/?default_fld=&bn=A07670&term=2009&Memo=Y&Text=Y.

⁶⁵ See *supra* note 14 and accompanying text.

⁶⁶ See, e.g., H.B. 4354, 189th Leg. (Mass. 2016).

⁶⁷ PHILLIPS, *supra* note 7, at 27 (quoting a survivor of trafficking who recalled how she felt after being granted vacatur: “Walking out with my lawyer and the [Assistant District Attorney], I felt like I was a new person. I felt like I was like them.”).

⁶⁸ 2012 TIP REPORT, *supra* note 37, at 25 (“I always felt like a criminal. I never felt like a victim at all. Victims don’t do time in jail, they work on the healing process. I was a criminal because I spent time in jail.”).

⁶⁹ PHILLIPS, *supra* note 7, at 26–27 (citing a survivor of trafficking who discusses the impact being granted vacatur has had on her life: “I worked very hard for my home health care attendant certification, and I would very much...like to start working to support myself. Most importantly, I want my children to grow up in a happy and healthy home.”).

⁷⁰ See *id.* at 27 (“[T]he vacatur process restores a sense of faith in the criminal justice system that was lost when they were treated like criminals”).

⁷¹ See *infra* notes 77–100 and accompanying text.

⁷² 18 U.S.C. § 3607(c) (2015) (entitling defendants who were under the age of twenty-one at the time they were charged with a single “personal use” drug possession offense under the Controlled Substances Act, and who successfully completed pre-judgment probation, to expungement of the record); 42 U.S.C. § 14132(d) (2015) (allowing for the expungement of FBI DNA records when a

and therefore unhelpful to survivors who are primarily charged with trafficking-related offenses like violations of the Mann Act⁷³ and conspiracy to commit sex trafficking.⁷⁴

Absent any express expungement authorization from Congress, victims like Shamere would have to rely on submitting motions to expunge based on equitable grounds, such as evidence of rehabilitation or the inability to obtain stable employment because of their conviction.⁷⁵ However, these forms of relief are far from accessible.⁷⁶

Although jurisdiction of federal courts is limited to that which is “authorized by Constitution and statute,”⁷⁷ federal courts have authorized the expungement of records subject to a court’s ancillary jurisdiction, which allows federal courts “to adjudicate claims and proceedings *related to* a claim that is properly before the court.”⁷⁸

The Supreme Court decision in *Kokkonen v. Guardian Life Ins. Co. of Am.*, however, curtailed the reach of the courts’ ancillary jurisdiction.⁷⁹ In *Kokkonen*, the petitioner moved in the United States District Court for the Eastern District of California to enforce a settlement agreement it had approved a month prior.⁸⁰ The District Court issued an order enforcing the agreement under its “inherent supervisory power” over matters relating to the original order.⁸¹ When *Guardian Life* appealed, the petitioner, in its response, relied on the

conviction is overturned in certain cases); 10 U.S.C. § 1565(e) (requiring expungement of DNA records when a court overturns a military conviction); 38 U.S.C. § 7462(d)(1) (2015) (authorizing the expungement of records in certain disciplinary matters involving Veterans Health Administration employees).

⁷³ 18 U.S.C. §§ 2421–2428 (2015).

⁷⁴ 18 U.S.C. § 1594(c) (2015).

⁷⁵ See *infra* notes 78–101 and accompanying text.

⁷⁶ *Id.*

⁷⁷ See, e.g., *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

⁷⁸ *Jurisdiction, Ancillary Jurisdiction*, BLACK’S LAW DICTIONARY (10th ed. 2014) (emphasis added); see also 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3523.2 (3d ed. 2008) (defining ancillary jurisdiction as “jurisdiction over related proceedings that are technically separate from the initial case[.]”).

⁷⁹ 511 U.S. 375 (1994).

⁸⁰ *Id.* at 376–77.

⁸¹ *Id.* at 377.

doctrine of ancillary jurisdiction, citing dicta within the 1904 Supreme Court case *Julian v. Central Trust Co.*⁸² that stated:

A bill filed to continue a former litigation in the same court...to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties...or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court...is an ancillary suit.⁸³

The Supreme Court, in a 9-0 decision, stated that the purposes of ancillary jurisdiction are to “(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, and (2) to enable a court to function successfully [through its ability] to manage its proceedings, vindicate its authority, and effectuate its decrees.”⁸⁴ In rejecting the petitioner’s reliance on the dicta in *Julian* as overbroad, Justice Scalia stated that while “ancillary jurisdiction can hardly be criticized for being overly rigid or precise, [] we think it does not stretch so far as that statement suggests.”⁸⁵ Since that time, the First, Third, Sixth, Eighth, and Ninth Circuits have used *Kokkonen* to reject jurisdiction over motions for equitable expungement, stating that the expungement of records does not serve either of the purposes laid out in the decision.⁸⁶ Despite a circuit split, the Supreme Court has twice passed on the opportunity to resolve the inconsistency.⁸⁷

⁸² 193 U.S. 93 (1904).

⁸³ *Id.* at 113–14.

⁸⁴ 511 U.S. at 379–80 (citations omitted).

⁸⁵ *Id.* at 379.

⁸⁶ See, e.g., *United States v. Coloian*, 480 F.3d 47 (1st Cir. 2007), *cert. denied*, 552 U.S. 948 (2007) (holding that the petitioner’s expungement claims were separate and distinct from his original claims, and that the power the petitioner requested the court assert is not *required* for the court’s functioning).

⁸⁷ *Rowlands v. United States*, 451 F.3d 173 (3d Cir. 2006), *cert. denied*, 549 U.S. 1032 (2006); *United States v. Coloian*, 480 F.3d 47 (1st Cir. 2007), *cert. denied*, 552 U.S. 948 (2007).

Even among the courts that have upheld such jurisdiction,⁸⁸ there is a split as to whether this jurisdiction extends to expungement of a valid *conviction* on equitable grounds, or just to the expungement of records of dismissed charges.⁸⁹ Most notably, the Second Circuit, which would have jurisdiction over a motion to expunge Shamere's conviction, recently held that the District Court for the Eastern District of New York lacked the jurisdiction to consider a motion for expungement of a valid conviction.⁹⁰

The most accessible relief available for addressing federal convictions is a presidential pardon.⁹¹ Under Article II, Section 2, Clause 1 of the United States Constitution, the President is authorized "to grant Reprieves and Pardons for Offenses against the United States[.]"⁹² A pardon serves as "an expression of the President's forgiveness" for the commission of a federal crime,⁹³ and allows the offender to regain the civil liberties/privileges that were revoked by the conviction, such as the right to vote and to own a firearm.⁹⁴

Although a presidential pardon is, essentially, the only option for federally criminalized survivors, it is both an ill-fitted and imperfect avenue for recourse.⁹⁵ At base, the process requires that

⁸⁸ The Second, Fourth, Fifth, Seventh, Tenth, and District of Columbia Circuits have all upheld such jurisdiction. *United States v. Schnitzer*, 567 F.2d 536, 539–40 (2d Cir. 1977); *Allen v. Webster*, 742 F.2d 153, 154–55 (4th Cir. 1984); *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697–98 (5th Cir. 1997), *cert. denied*, 523 U.S. 1077 (1998); *United States v. Flowers*, 389 F.3d 737, 739 (7th Cir. 2004); *Camfield v. Oklahoma City*, 248 F.3d 1214, 1218 (10th Cir. 2001); *Livingston v. U.S. Dep't of Justice*, 759 F.2d 74, 78 (D.C. Cir. 1985).

⁸⁹ *See, e.g., United States v. Harris*, 847 F. Supp. 2d 828, 835 (D. Md. 2012) ("In the absence of acquittal...I find that this Court is not empowered to grant the expungement relief sought.").

⁹⁰ *Doe v. United States*, No. 15-1967-cr, 2016 WL 4245425, at *11–12 (2d Cir. Aug. 11, 2016) ("We therefore conclude that *Schnitzer* is confined to the expungement of arrest records following a district court's order of dismissal and as such does not resolve whether the District Court had ancillary jurisdiction to expunge records of a valid conviction in this case.").

⁹¹ *See infra* notes 92–94 and accompanying text.

⁹² U.S. CONST. art. II, § 2, cl. 1.

⁹³ *Frequently Asked Questions Concerning Clemency*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/pardon/frequently-asked-questions-concerning-executive-clemency#1> (last visited Dec. 20, 2016) [hereinafter *Clemency FAQ's*].

⁹⁴ *Id.*

⁹⁵ *See infra* notes 96–100 and accompanying text.

victims of trafficking ask forgiveness for crimes they were forced to commit by their traffickers, despite the abundance of guidance that exists suggesting they never should have been charged to begin with.⁹⁶ Additionally, a pardon does not remove the conviction from the survivor's record; instead, the pardon is noted alongside the conviction.⁹⁷ Considering the stigmatizing nature of convictions related to the crime of human trafficking, that the conviction remains makes this remedy especially incomplete.⁹⁸ In addition to the more theoretical challenges this form of relief presents, the process of petitioning for a pardon is lengthy,⁹⁹ and the petitions are rarely granted.¹⁰⁰

IV. RECOMMENDATIONS

The proper recourse would be to replicate the efforts the States have made by enacting a federal vacatur law, which would provide a process for survivors to clear their records of federal trafficking-related convictions.¹⁰¹ New York State Senator Kirsten Gillibrand has championed this effort, and, on September 28th, 2016, the *Trafficking Survivors Relief Act of 2016* (hereinafter *TSRA*) was introduced.¹⁰² The *TSRA* would allow survivors of trafficking convicted of non-violent offenses¹⁰³ that are a direct result of their trafficking experience to petition the court to vacate the record of their conviction.¹⁰⁴ Survivors who have been arrested but never charged, or charged but not

⁹⁶ See *supra* Part II.

⁹⁷ *Clemency FAQ's*, *supra* note 93.

⁹⁸ 2016 TIP REPORT, *supra* note 25, at 26.

⁹⁹ Families Against Mandatory Minimums, *Frequently Asked Questions About Commutations and Pardons* 3 (Apr. 13, 2012), <http://famm.org/wp-content/uploads/2013/08/FAQ-Commutations-4.13.pdf> (“[T]he application process will often take at least 18 months to two years...to complete.”).

¹⁰⁰ Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1193 (2010) (noting that the approval of pardons has slowed to almost a complete halt since 1980, when the issue of crime control became the primary focus of American politics).

¹⁰¹ See *supra* Part II.B.

¹⁰² S. 3441, 114th Cong. (2016).

¹⁰³ The term “violent crime” has the meaning given in 42 U.S.C. § 5603(27) (the Juvenile Justice and Delinquency Prevention Act), and includes murder, non-negligent manslaughter, rape, robbery, and aggravated assault with a firearm.

¹⁰⁴ S. 3441(c)(2).

convicted, may also petition the court for expungement of those records.¹⁰⁵

The procedure set out in the TSRA requires that the motion be in writing and that the petitioner provide any supporting evidence “of sufficient credibility and probative value” that documents the petitioner’s trafficking experience.¹⁰⁶ For petitioners who are unable to furnish supportive evidence,¹⁰⁷ the affidavit or sworn testimony of the petitioner may be considered sufficient evidence upon which to vacate the conviction.¹⁰⁸ Upon the filing of a motion to vacate, the Government is given the opportunity to respond; if the Government files a motion in opposition, a mandatory hearing is held.¹⁰⁹ If the Government does not oppose the motion, the court may hold a discretionary hearing.¹¹⁰

In deciding whether to grant the motion, the court must consider whether, by clear and convincing evidence, the petitioner’s participation in the offense was as a result of having being trafficked.¹¹¹ The legislation also contains a rebuttable presumption of victimization if the petitioner can provide any official documentation of their trafficking experience from a Federal or State proceeding, or through the affidavit or sworn testimony of a service provider from whom the petitioner has sought assistance in recovering from their trafficking experience.¹¹² If the motion to vacate is granted, the court must vacate the conviction, enter a judgment of acquittal, and enter an

¹⁰⁵ S. 3441(b)(1)(B); *see also* 2016 TIP REPORT, *supra* note 25, at 26 (“Even if a trafficking victim never faces charges, or if charges are dropped, arrest records and stigma remain, affecting where victims live, their employment opportunities, and how others perceive them.”).

¹⁰⁶ S. 3441(b)(2)(A)–(D), (5)(B).

¹⁰⁷ *See* *People v. Gonzalez*, 927 N.Y.S.2d 567 (N.Y. Crim. Ct. July 11, 2011). In *Gonzalez*, the petitioner successfully vacated over eighty prostitution convictions, despite being unable to provide independent corroboration of her story. *Id.* at 570. The judge presiding over the matter notes that there are numerous reasons trafficking victims may be unable to corroborate their stories, including not knowing their trafficker’s full name, unfamiliarity with the resources available in the area, and/or limited English proficiency. *Id.*

¹⁰⁸ S. 3441(b)(5)(B)(ii).

¹⁰⁹ S. 3441(b)(3)(A)(i)–(ii).

¹¹⁰ S. 3441(b)(3)(B).

¹¹¹ S. 3441(b)(3).

¹¹² S. 3441(b)(5)(A)(i)–(ii).

order to expunge the records of the offense.¹¹³ If the motion is denied, the legislation provides processes for curing deficiencies in the motion¹¹⁴ and to appeal the denial.¹¹⁵

CONCLUSION

The prioritization of a criminal justice approach to combatting trafficking has had devastating consequences for victims of human trafficking in the United States.¹¹⁶ Despite having already suffered severe abuses of their fundamental human rights, they are frequently revictimized through the process of arrest and prosecution for crimes they were forced to commit by their traffickers.¹¹⁷ Once criminalized, victims then bear the additional burden of the stigma and collateral harms that come with a criminal record.¹¹⁸ Frequently, this results in recidivism, continued exploitation, or the chronic instability that comes with an inability to heal from trauma.¹¹⁹

Although over thirty states now provide some form of access to legal relief for survivors criminalized under state-based criminal laws, the federal government lags far behind the states in these efforts.¹²⁰ Survivors with federal convictions resulting from their trafficking experience deserve the same opportunity to petition the courts to vacate their convictions. Senator Gillibrand's proposed legislation would provide this much needed recourse, but, until the TSRA is passed, survivors like Shamere are left without an appropriate remedy.¹²¹ By their failure to provide this crucial avenue of relief, the federal government is depriving survivors of human trafficking both the opportunity to heal and the ability to significantly improve the quality of their lives.¹²² If proper legislation is not passed, the federal government will continue to be a key player in the revictimization of survivors of this horrific crime.

¹¹³ S. 3441(c)(1).

¹¹⁴ S. 3441(b)(7)(C).

¹¹⁵ S. 3441(b)(8).

¹¹⁶ See *supra* Part II.

¹¹⁷ See *supra* Part II.

¹¹⁸ 2016 TIP REPORT, *supra* note 25, at 26.

¹¹⁹ See *supra* Part II.

¹²⁰ See *supra* Part III.

¹²¹ See *supra* Part IV.

¹²² See *supra* Part III.

