
US case study on the non-punishment principle

Chavi Nana *Professor from Practice, University of Michigan Law School*

Cynthia D Vreeland *Partner at WilmerHale*

Hyun-Soo Lee *Senior Associate at WilmerHale*

Jeff Habenicht *Counsel at WilmerHale*

Michael Dawson *Partner at WilmerHale*

Executive summary

Like many countries around the world, the United States faces an immense challenge combatting human trafficking crimes and protecting victims of these crimes. Federal law-makers enacted a comprehensive statute, the Trafficking Victims Protection Act (TVPA), in 2000.¹ The TVPA targets trafficking committed through force, fraud, coercion or the trafficking of minors, and provides substantial criminal and civil penalties for those who commit or financially benefit from these crimes. All 50 states have also now enacted similar laws establishing criminal and civil penalties for traffickers seeking to profit from labour or sexual servitude.

In addition to these laws targeting traffickers, the federal government and an increasing number of states have embraced underlying elements of the non-punishment principle for trafficking victims, like affirmative defences, vacatur laws and other procedural rights. The states vary considerably, however, in the extent of protections provided to victims, and these differences are significant because most of the crimes associated with trafficking are prosecuted at the state level. Nonetheless, the continuing work of state-initiated and civil society organisations dedicated to combatting human trafficking gives rise to hope that more states will follow their leading neighbours – including Nebraska, New York and Wyoming – in instituting broadly applicable affirmative defences and other protections for victims.

Overview

In 2020, the US National Human Trafficking Hotline reported 10,583 situations of human trafficking involving 16,658 individuals,² likely a small fraction of the actual incidences of this underreported and ‘largely hidden crime’.³ The National Institute of Justice has estimated, for example, that the official numbers may represent as little as 14 per cent to 18 per cent of total trafficking victims.⁴

Human trafficking in the US takes many forms.⁵ It affects nationals, non-nationals with immigration status and those wholly without immigration status,⁶ and spans sex as well as labour trafficking in illegal and legal industries alike, including ‘restaurants, massage parlors, and any type of business that can serve as a platform for this clandestine crime’.⁷ While human trafficking occurs across the full range of gender and age distributions, a large majority of identified victims are women and girls.⁸

¹ This Act was reauthorised multiple times between 2003 and 2019 as the Trafficking Victims Protection Reauthorization Act; for the purposes of this report, both statutes are referred to as ‘TVPA’.

² *Analysis of 2020 National Human Trafficking Hotline Data: Human Trafficking Trends in 2020*, POLARIS PROJECT (June 28, 2022), <https://polarisproject.org/2020-us-national-human-trafficking-hotline-statistics/>.

³ NATIONAL INSTITUTE OF JUSTICE, OVERVIEW OF HUMAN TRAFFICKING AND NIJ’S ROLE (Feb. 25, 2019) (available at <https://nij.ojp.gov/topics/articles/overview-human-trafficking-and-nijs-role>).

⁴ *Ibid*; see also *Myths, Facts, and Statistics – Human Trafficking Facts*, POLARIS PROJECT (June 28, 2022), <https://polarisproject.org/myths-facts-and-statistics/>.

⁵ *Ibid*.

⁶ *Ibid*; Alfonso Lopez de la Osa Escribano, *Addressing Human Trafficking from a Comparative Legal Perspective Mexico – United States*, 42 Hous. J. INT’L L. 521, 541 (2020); see also NATIONAL HUMAN TRAFFICKING HOTLINE, 2020 NATIONAL HOTLINE ANNUAL REPORT (Dec. 2021) (available at <https://humantraffickinghotline.org/sites/default/files/National%20Report%20For%202020.pdf>) (reporting the United States as the top-most reported country of origin for victims).

⁷ Escribano, see above note 6, at 541.

⁸ *Ibid*; Polaris Project, see above note 4. See also U.S. Department of State, 2022 Trafficking in Persons Report (available at www.state.gov/reports/2022-trafficking-in-persons-report/) [‘Traffickers often target those who experience compounding forms of discrimination (such as discrimination because of one’s racial or ethnic group, gender identity, disability, or sexual orientation), experience violence (such as intimate partner or domestic violence), or interact with government-run programs (such as the criminal justice system, runaway and homeless youth services, foster or institutional care, and the immigration enforcement system)’].

The first comprehensive federal law, the TVPA,⁹ targets trafficking committed through force, fraud, coercion or the trafficking of minors, and aims to end these abuses with the ‘3P paradigm – prosecution, protection and prevention’.¹⁰ In addition to substantial criminal and civil penalties for traffickers, Congress also included a statement, published as part of the legislation, that ‘[v]ictims of severe forms of trafficking¹¹ should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked’.¹² The TVPA does not include, however, specific statutory provisions implementing this finding.¹³ And while Congress has proposed further, more specific legal protections for victims, they have yet to be made law at a national level.¹⁴

Given that the US maintains a system of federalism, state laws are an important part of the analysis because the states have police powers (ie, the ability to make and enforce laws necessary to preserve public health, safety and general welfare, including legislation and enforcement of laws against human trafficking). Although all 50 states have passed laws targeting human trafficking, the states vary in the extent to which they recognise and apply the non-punishment principle. These differences are significant because many of the crimes associated with trafficking – including prostitution, forced prostitution, solicitation, gang activities, kidnapping, drug possession and distribution and property crimes – are typically prosecuted at the state level rather than the federal level.

Each of the sections below discusses the federal legal landscape and the law in four states selected for their efforts to protect trafficking victims: New York, the first state in the country to enact laws protecting trafficking victims; Nebraska and Wyoming, two states that have been recognised for their strong endorsement of the non-punishment principle; and Oklahoma, which has recently adopted broader affirmative defences for trafficking victims.

Part I: The legal bases for the non-punishment principle

As discussed above, while the US’ federal law recognises the non-punishment principle for trafficking victims, the TVPA offers no specific guidance on implementation of this principle, largely

⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-286 (Oct. 28, 2000); see also HUMAN TRAFFICKING INSTITUTE, 2020 FEDERAL HUMAN TRAFFICKING REPORT (June 8, 2021) (*available at* <https://traffickinginstitute.org/2020-federal-human-trafficking-report/>) (‘The TVPA was the first federal law to criminalize human trafficking and represented a monumental step in the U.S. government’s commitment to combat trafficking in person’).

¹⁰ *Ibid*; Escribano, see above note 6, at 526; *About Human Trafficking*, U.S. DEPT. OF STATE (June 15, 2022), www.state.gov/humantrafficking-about-human-trafficking/ (‘The ‘3P’ paradigm—prosecution, protection, and prevention—continues to serve as the fundamental framework used around the world to combat human trafficking. The United States also follows this approach, reflected in the United States’ Trafficking Victims Protection Act of 2000, as amended (TVPA), and in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol)’).

¹¹ 22 U.S.C. s7102(11) defines ‘severe forms of trafficking’ as (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery’.

¹² Pub. L. No. 106-286, enacted at 22 U.S.C. s7101(b)(19).

¹³ Jeffrey H. Zeeman & Karen Stauss, *Criminal Conduct of Victims: Policy Considerations*, 65 U.S. ATT’YS BULL. 139 (2017); see also 22 U.S.C. s7106(b)(2) (including as a factor in whether a country meets the minimum standards for the elimination of trafficking, ‘[w]hether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by providing 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’.) (emphasis added).

¹⁴ See, eg, Trafficking Survivors Relief Act of 2017, H.R. 459, 115th Cong. (2017) (including vacatur, expungement relief); see also 65 U.S. ATT’YS BULL. at 144 (‘Prosecutors should also keep in mind that Congress and state legislatures have been keenly focused on the enactment of vacatur and expungement laws for human trafficking victims’).

leaving the issue to the states. The states, in turn, differ significantly in the level of protection they provide to victims who face criminal charges for activities directly resulting from their trafficking and in how they incorporate the non-punishment principle, if at all. We have highlighted below four states that have adopted important protections for victims. In general, however, the majority of US states make an affirmative defence available only in narrow circumstances.¹⁵

Federal law

The TVPA strengthened the government's ability to prosecute traffickers by creating new crimes and increasing penalties,¹⁶ while also providing clearer definitions of trafficking in order to better address the legal ambiguities raised by modern day slavery.¹⁷ It also included various provisions for the protection of trafficking victims, including providing assistance to victims and establishing non-immigrant status for undocumented victims who cooperated in the prosecution of their traffickers.¹⁸

As originally passed – and still enshrined at 22 USC section 7101 – section 102 of the TVPA included, as a Congressional finding, 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 result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation'.¹⁹ Proposals to create a federal vacatur law have been introduced in Congress,²⁰ but they have not been successful.²¹

New York

New York enacted the first law in the country vacating criminal convictions for trafficking victims in 2010.²² Since then, it has continued to expand trafficking victims' rights through the introduction of the country's first specialised courts for trafficking victims, the creation of an affirmative defence to prosecutions for prostitution and further expansions of its original vacatur law.

New York Criminal Procedure Law section 440.10,²³ first enacted in 2010,²⁴ now allows state courts to vacate a conviction if the conviction 'was a result of' sex trafficking; labour trafficking; aggravated labour trafficking; compelling prostitution; or trafficking under the federal TVPA.²⁵ The original version of section 440.10 provided for vacatur of only prostitution or loitering to solicit prostitution²⁶ and was criticised for leaving many victims out of protection – but the amended

¹⁵ See POLARIS PROJECT, STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING (March 1, 2019) (available at <https://polarisproject.org/resources/state-report-cards-grading-criminal-record-relief-laws-for-survivors-of-human-trafficking/>). See also Allison L. Cross, *Slipping Through the Cracks: The Dual Victimization of Human- Trafficking Survivors*, 44 McGEORGE L. REV. 395, 407-408 (2013).

¹⁶ Pub. L. No. 106-386, s 112 Strengthening Prosecution and Punishment of Traffickers.

¹⁷ *Ibid*, s 103 Definitions.

¹⁸ *Ibid*, s 107. See also *Summary of the Trafficking Victims Protection Act (TVPA) and Reauthorizations FY 2017*, ALLIANCE TO END SLAVERY & TRAFFICKING, (June 16, 2022), <https://endslaveryandtrafficking.org/summary-trafficking-victims-protection-act-tvpa-reauthorizations-fy-2017-2/>.

¹⁹ Pub. L. No. 106-386, s 102(b)(19).

²⁰ See, eg, *Trafficking Survivors Relief Act of 2016*, S. 3441, 114th Cong. (2016).

²¹ See Jessica Emerson & Alison Aminzadeh, *Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking*, 16 U. MD. L.J. RACE RELIG. GENDER & CLASS 239, 255 (2016).

²² Cheyenne Burke, *Combating Human Trafficking: NYSBA Recommendations Become Law*, N.Y. STATE BAR ASSOC. (Dec. 2, 2021), <https://nysba.org/combating-human-trafficking-nysba-recommendations-become-law/#:~:text=In%202010%2C%20New%20York%20became,and%20other%20sex%2Drelated%20offenses.>

²³ N.Y. CRIM. PROC. LAW s 440.10 (McKinney 2022).

²⁴ Alyssa M. Barnard, *The Second Chance They Deserve: Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1463 (2014).

²⁵ N.Y. CRIM. PROC. LAW s 440.10 (McKinney 2022).

²⁶ Ralph R. Ortega, *New Law Allows Human Trafficking Survivors to Clear Their Records*, NYNMEDIA (Nov. 17, 2021), <https://nynmedia.com/content/new-law-allows-human-trafficking-survivors-clear-their-records>.

version expands section 440.10 to allow vacatur of any crimes (violent and non-violent) committed as a result of an individual being a trafficking victim.²⁷

In addition to these vacatur laws, New York Penal Law section 230.01 also provides an affirmative defence to prostitution if the defendant is a victim of sex trafficking. Section 230.01 requires that the defendant prove by a preponderance of the evidence that their participation in the offence was due to being a victim of trafficking under the New York law or the TVPA.²⁸

In addition to this legislation, the New York judiciary established the country's first system of dedicated courts, the Human Trafficking Intervention Courts, designed specifically to protect and support sex trafficking victims.²⁹ Judges, defence attorneys and prosecutors evaluate cases of victims that have been arraigned for prostitution and direct them to these courts when appropriate.³⁰ These specialised courts can then help trafficking victims gain access to needed services including, for example, drug treatment, shelter, immigration assistance, healthcare, education and job training.³¹

Wyoming

Wyoming has been widely recognised for its strong protections for trafficking victims.³² Wyoming's safe harbour law, section 6-2-708, provides two important protections.³³ First, section 6-2-708(a) provides a broad immunity from prosecution, providing that trafficking victims are not criminally liable for any 'commercial sex act' or for any other offence committed 'as a direct result of or incident to being a victim of human trafficking'.³⁴

Second, section 6-2-708(c) provides equally broad post-conviction relief for victims of human trafficking, providing that courts may vacate a victim's convictions for any offences which resulted from the victim's trafficking.³⁵ The protections for victims set forth in section 6-2-708 apply to all forms of trafficking and apply equally to adults and minors.³⁶

While Wyoming's safe harbour law has been applauded as 'one of the most effective' in the US,³⁷ critics note that the law 'fails to include any language detailing a requisite burden of proof'³⁸ which

²⁷ *Ibid*

²⁸ N.Y. PENAL LAW s 230.01 (McKinney 2021).

²⁹ Lori Waichman, *Vacating Criminal Convictions for Victims of Human Trafficking: Weighing Opportunities for Expansion with a State Interest in Finality*, 1 INT'L COMP. POL'Y & ETHICS L. REV. 473, 497 (2018). See also Press Release, NEW YORK STATE UNIFIED COURT SYS., *NY Judiciary Launches Nation's First Statewide Human Trafficking Intervention Initiative* (Sept. 25, 2013), available at http://www.nycourts.gov/press/PR13_11.pdf.

³⁰ Barnard, see above note 23, at 1478.

³¹ *Human Trafficking Intervention Courts: Overview*, NEW YORK STATE UNIFIED COURT SYSTEM, https://ww2.nycourts.gov/courts/problem_solving/htc/index.shtml (last visited June 16, 2022). See also Barnard, see above note 23, at 1479.

³² See, eg, POLARIS PROJECT, see above note 14, at 28 (ranking Wyoming second among all states for criminal record relief for trafficking survivors); NATIONAL CONFERENCE OF STATE LEGISLATURES, PROSECUTING HUMAN TRAFFICKERS: RECENT LEGISLATIVE ENACTMENTS (September 2018) (available at www.ncsl.org/research/civil-and-criminal-justice/prosecuting-human-traffickers.aspx) (highlighting recent legislative efforts in Wyoming, particularly on criminal asset forfeiture).

³³ WYO. STAT. ANN. s6-2-708 (2013).

³⁴ *Ibid*, s6-2-708(a) (2013).

³⁵ *Ibid*

³⁶ Minor Sex Traffic Victims – Liability, H.B. 210-2021, Wyo. s6-2-708 (2021). HB0210-2021 would have ensured additional protections for minor victims of human trafficking. The bill stated that a minor engaged in commercial sex acts 'should be rebuttably presumed to be a victim of human trafficking in any criminal charge as a result of engaging in the commercial sex act'. *Ibid* The bill would also have barred arrest or prosecution for minors violating the state's prostitution laws 'unless there is probable cause to believe that the minor was not subject to coercion'. *Ibid*

³⁷ Danica Baird, *Changing the Narrative: Sex Trafficking and Its Victims*, 33 BYU J. PUB. L. 321, 333 (2019).

³⁸ Christian Coward, *Breaking Secondary Trauma: Developing Conviction Relief Legislation in the United States for Sex-Trafficking Victims*, 50 U. BALT. L. REV. 465, 480 (2021).

‘may create confusion as to what exactly a victim must prove to qualify for [a] conviction vacation’.³⁹

Nebraska

Nebraska also has been a leader in protections for trafficking victims.⁴⁰ It recognises the non-punishment principle in two statutes for victims of sex trafficking: section 28-801 and section 29-3005.⁴¹ Section 28-801 provides relief at the pre-trial and trial stages for prostitution charges. Prior to trial, law enforcement officials have the discretion to ‘determine [...] that a person suspected of [prostitution] engag[ed] in those acts as a direct result of being a [sex] trafficking victim’.⁴² Such a determination provides ‘immun[ity] from prosecution for a prostitution offense’.⁴³ Section 29-3005 provides post-conviction and post-adjudication relief for prostitution-related offences and for ‘any other offense committed’ which directly resulted from or was proximately caused by a victim’s sex trafficking status.⁴⁴ This statute allows victims of sex trafficking to file, and requires judges to grant, a motion to set aside both prostitution-related offences committed while a victim was being trafficked, and ‘any other offense committed as a direct result of’ or which was ‘proximately caused by’ a movant’s sex trafficking status.⁴⁵ A separate provision of the Nebraska code also allows victims to seal criminal records of set aside convictions or juvenile adjudications which resulted from their status as a victim of sex trafficking.⁴⁶

Although these protections are a starting point for victims of sex trafficking, advocates have noted that more work is needed to ensure their implementation in practice.⁴⁷ For example, section 28-801(5) provides immunity from prostitution charges for victims of sex trafficking, but it also allows law enforcement to arrest and detain these victims.⁴⁸ As a result, ‘prostitution arrests are a frequent occurrence, because trafficking victims do not always self-identify, and a rigorous victimization screening process does not always take place’.⁴⁹ Further, Nebraska law is silent on the burden of proof required to establish victim status,⁵⁰ potentially creating inconsistencies and uncertainty in adjudication.

Oklahoma

Oklahoma is one of a number of other states starting to recognise elements of the non-punishment principle in fact, if not by name, through two new affirmative defences. Section 748, like the New York and Wyoming statutes, provides victims an affirmative defence against prosecution for any offence committed during the time that they were ‘trafficked’,⁵¹ and section 748.2 provides victims a

³⁹ *Ibid* at 481.

⁴⁰ See, eg, POLARIS PROJECT, *see above* note 14, at 28 (ranking Nebraska first among all states for criminal record relief for trafficking survivors).

⁴¹ NEB. REV. STAT. §28-801(3) (2016).

⁴² *Ibid*, §28-801(5) (2016).

⁴³ *Ibid*

⁴⁴ NEB. REV. STAT. §29-3005 (2018).

⁴⁵ *Ibid*

⁴⁶ NEB. REV. STAT. §29-3523(4) (2018).

⁴⁷ In addition to these legislative actions, the Nebraska Governor’s office also has expressed its commitment to ‘supporting survivors’ who have experienced human trafficking.

⁴⁸ NEB. REV. STAT. §28-801(5) (2016).

⁴⁹ *Representing Victims/Survivors of Sex Trafficking in Nebraska: A Guide for Legal Practitioners* at 11, WOMEN’S FUND OF OMAHA, <https://omahawomensfund.org/wp-content/uploads/Nebraska-Trafficking-Legal-Guide.pdf> (last visited Oct. 4, 2022) [hereinafter *Nebraska Guide for Legal Practitioners*].

⁵⁰ See POLARIS PROJECT, CRIMINAL RECORD RELIEF FOR TRAFFICKING SURVIVORS: NEBRASKA (October 2019) (*available at* <https://polarisproject.org/wp-content/uploads/2019/10/2019-CriminalRecordRelief-Nebraska.pdf>).

⁵¹ CRIMES AND PUNISHMENTS, 2022 Okla. Sess. Law Serv. Ch. 20 (H.B. 4224) (formerly OKLA. STAT. ANN. tit. 21, § 748 (West)).

set of procedural rights.⁵² Together, sections 748 and 748.2 establish important protections for trafficking victims.⁵³

In addition to these affirmative defences, Oklahoma Criminal Procedure section 22-19c also provides for vacatur of past convictions. Specifically, '[t]he court, upon its own motion or upon petition by the defendant and for good cause shown, may enter an order for expungement of law enforcement and court records relating to a charge or conviction for a prostitution-related offense committed as a result of the defendant having been a victim of human trafficking'.⁵⁴ By covering only prostitution-related offences, the law provides only a narrow group of victims protection against prosecution. Further, Oklahoma requires the victim to appear in person at all proceedings, including to raise an affirmative defence, which has been criticised to be 'unnecessarily difficult and could cause additional trauma'.⁵⁵

Part II: The non-punishment principle in practice

While the executive branch of the federal government clearly endorses the TVPA's non-punishment principle, the lack of an enforcement provision in the TVPA has caused some concerns about its effectiveness and resulted in varied implementation. Given the relatively recent introduction of the affirmative defence, vacatur laws or other procedural protections in most states, there is a dearth of case law and statistics that illustrate how effectively these laws are protecting victims on the ground.⁵⁶ Because a number of non-legislative factors – including the law enforcement officers' relative familiarity with the law – affects the availability of the protection in many circumstances, as highlighted in Part III, commentators have thus emphasised the critical importance of educating victims, law enforcement and the judiciary that trafficking victims should be supported and not treated as criminals.

Federal law

As noted above, the TVPA recognises the non-punishment principle for victims of 'severe forms' of both sex and labour trafficking.⁵⁷

The Department of Justice (DoJ) has issued a bulletin with a 'framework' for applying the TVPA's language using prosecutorial discretion in a manner that does not inappropriately punish victims of human trafficking.⁵⁸

⁵² *Ibid* (formerly OKLA. STAT. ANN. tit. 21, s 748.2 (West)).

⁵³ *Ibid*

⁵⁴ OKLA. STAT. tit. 22-19c (2019).

⁵⁵ See POLARIS PROJECT, CRIMINAL RECORD RELIEF FOR TRAFFICKING SURVIVORS: OKLAHOMA (October 2019) (available at <https://polarisproject.org/wp-content/uploads/2019/10/2019-CriminalRecordRelief-Oklahoma.pdf>).

⁵⁶ Literature suggests that these laws in general have significantly improved the legal landscape for victims' protection. See, eg, Amara Legal Center, *Vacatur Statutes for Survivors of Sex Trafficking* (June 2016), www.amaralegal.org/wp-content/uploads/2016/06/Vacatur-Statutes-for-Survivors-of-Sex-Trafficking.pdf ('[Vacatur] statutes significantly help survivors move past their experiences with sex trafficking and rebuild their lives'); *State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking*, POLARIS PROJECT (Mar. 2019), available at <https://polarisproject.org/wp-content/uploads/2019/03/Grading-Criminal-Record-Relief-Laws-for-Survivors-of-Human-Trafficking.pdf> ('contemporaneous reform efforts in the criminal legal system have made significant progress in reducing mass incarceration more broadly').

⁵⁷ 22 U.S.C. s 7101; 22 U.S.C. s 7102(11)

⁵⁸ Zeeman & Stauss, see above note 12, at 139. For 'minor or non-violent' crimes that were 'directly caused by or otherwise inseparable from the trafficking offense', the non-prosecution principle almost always applies; however, for 'violent crimes or other significant offenses victimizing third parties that were directly caused by or otherwise inseparable from the trafficking offense, [...] protection of the victim potentially conflicts with protection of third parties harmed by the victim's conduct'. *Ibid* at 140-141. These circumstances 'require a nuanced, fact-specific analysis' of multiple factors, such as the degree of harm to third parties, age and capacity of the victim, the 'nature and extent of compulsion', prior history of abuse, and duration of victimisation. *Ibid* at 145. See also U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTORNEY

The US Attorney-General 'Guidelines for Victim and Witness Assistance' ('AG Guidelines') also highlight the importance of prosecutorial discretion. While persons engaged in prostitution as part of trafficking crime 'should not be disqualified from being considered a victim if the person otherwise fits the definition of victim and is not culpable for the trafficking offense',⁵⁹ the AG Guidelines also emphasise that 'it is extremely difficult to anticipate and provide direction for the myriad of situations [...] DOJ employees are consequently expected to use their sound judgment and discretion in deciding how best to accord victims and witnesses the rights and services required under Federal law and these AG Guidelines'.⁶⁰

New York

While New York has specialised courts aimed at helping victims as mentioned above, it also relies on discretion of prosecutors and judges to recognise victims of human trafficking.

New York's vacatur law allows the victim to make a post-trial motion to vacate a conviction at any time after the judgment.⁶¹ The victim bears the burden of proving that the defendant was a victim of sex trafficking by a preponderance of the evidence.⁶² Section 440.10 does not provide specific guidance on what evidence is acceptable to prove that the defendant was a trafficking victim and scholars have characterised it as vague – the statute only states that official documentation of the defendant's status as a trafficking victim creates a presumption that their participation was a result of being a victim, but such documentation is not necessary.⁶³

Even before the amendments passed, New York courts construed the provision liberally, applying it to cover crimes beyond prostitution.⁶⁴ For the conviction to be vacated, the defendant must show that (1) they were a trafficking victim at the time of arrest, and (2) that the conduct leading to the arrest resulted from the defendant being trafficked.⁶⁵ In one case, a judge noted that 'specific corroborating facts or other evidence' were not necessary – section 440.10 does not require 'bright-line rules and formulaic determinations' to grant relief.⁶⁶ In fact, failure of a governmental organisation to determine that the defendant was a victim of trafficking would not be a bar to relief.⁶⁷ Thus, it is ultimately within the judge's discretion to determine whether vacatur is granted.⁶⁸

GENERAL, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 2000 (January 31, 2000) at 22 (*available at https://popcenter.asu.edu/sites/default/files/problems/witness_intimidation/PDFs/USDOJ_OAG_2000.pdf*) ('[T]he interests of justice must be weighed carefully before pursuing prosecutions of victims for criminal conduct, including considerations of whether the victim had the requisite *mens rea*. When weighing the interests of justice, prosecutors should consider the trauma endured by the victim, the role and relative responsibility of other perpetrators, and the impact of the victim's conduct on other victims').

⁵⁹ U.S. DEPT. OF JUSTICE, *see above* note 57.

⁶⁰ *Ibid*

⁶¹ Claudia Trupp, *Collateral State Proceedings Under C.P.L. ss 440.10 and 440.20*, NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES (May 17, 2019), www.ils.ny.gov/files/440%20Motions%20Outline.pdf.

⁶² *See, eg, People v. P.V.*, 100 N.Y.S.3d 496, 501 (N.Y. Crim. Ct. 2019). *See also People v. Gonzalez*, 927 N.Y.S.2d 567, 570 (N.Y. Crim. Ct. 2011) ('By avoiding bright-line rules and formulaic determinations, the legislature squarely gave the Courts the discretion to grant relief pursuant to CPL s 440.10(1)(i) when a defendant could show by a preponderance of the evidence that he or she was a sex trafficking victim').

⁶³ N.Y. CRIM. PROC. LAW s 440.10 (McKinney 2022).

⁶⁴ *See, eg, People v. G.M.*, 922 N.Y.S.2d 761 (N.Y. Crim. Ct. 2011) (vacating criminal trespass and drug possession convictions with prosecutorial consent); *People v. L.G.*, 972 N.Y.S.2d 418 (N.Y. Crim. Ct. 2013) (vacating non-prostitution charges incurred as a result of victim's being forced into prostitution); *People v. P.V.*, 100 N.Y.S.3d 496, 504 (N.Y. Crim. Ct. 2019) (same).

⁶⁵ *People v. L.G.*, 972 N.Y.S.2d 418, 423 (N.Y. Crim. Ct. 2013).

⁶⁶ *People v. Gonzalez*, 927 N.Y.S.2d 567, 570 (N.Y. Crim. Ct. 2011).

⁶⁷ *Ibid*

⁶⁸ *People v. L.G.*, 972 N.Y.S.2d at 426.

If the judge denies the motion, the denial can be appealed.⁶⁹ The appellate court has reviewed denials of section 440.10 motions under other subsections for abuse of discretion.⁷⁰

Wyoming

Wyoming's affirmative defence and vacatur statutes can be applied pre-trial, during trial, or post-trial, by a number of different actors. At the earliest stage, a law enforcement officer may use their discretion not to execute an arrest or bring a case against a person for prostitution if they suspect that the offence resulted from the individual's status as a trafficking victim.⁷¹ If the prosecutor does pursue the case, the victim may raise their trafficking experience as an affirmative defence at trial.⁷² The decision to vacate a victim's prior conviction(s), however, is at the sole discretion of the judge before whom the motion is brought.⁷³ There is no time limit as to when post-conviction relief is available.

Judicial discretion to provide relief to victims also changes from the trial stage to the post-conviction stage. At the trial stage, a victim 'is not criminally liable' for offences resulting from their trafficking status.⁷⁴ At the post-conviction relief stage, however, judges 'may' vacate a victim's conviction for an offence which resulted from their trafficking status.⁷⁵ However, the state's statutes do not speak to whether the judicial review at the post-conviction stage is available in either circumstance, and there are currently no cases available on the issue.

Nebraska

Sex trafficking victims charged with prostitution in Nebraska have three possible avenues for relief. The first depends on law enforcement's knowledge of the non-punishment principle and related laws. If a law enforcement officer determines 'after a reasonable detention for investigative purposes' that a person suspected of engaging in prostitution did so 'as a direct result of being a [sex] trafficking victim', the detained individual is immune from prosecution for prostitution.⁷⁶ If a law enforcement officer does not use their discretion to release a victim at this stage, the victim may raise their victim status at trial as an affirmative defence to the prostitution charge.⁷⁷ In these cases, the judge or jury ultimately deciding the criminal case would make the decision on whether the defence is warranted. The defence is available to both minors and adults who are victims of sex trafficking. In addition to these provisions, if, a sex trafficking victim is convicted of prostitution despite his or her victim status, the court must, upon motion, set aside the conviction for any prostitution-related offences committed while the movant was a victim of sex-trafficking.⁷⁸ The same laws apply for juvenile adjudications.⁷⁹

Sex trafficking victims convicted of offences other than prostitution may move to set aside convictions or adjudications which were 'a direct result of' or 'proximately caused by' the movant's trafficking status.⁸⁰

⁶⁹ Trupp, *see above* note 60 (noting that it is best to bring a s 440.10 motion prior to appeal so that if the motion is denied, appeal of the denial can be consolidated with the direct appeal).

⁷⁰ *See People v. Jones*, 26 N.E.3d 754, 758 (N.Y. 2014).

⁷¹ WYO. STAT. ANN. s6-2-708(a) (2013).

⁷² *Ibid*

⁷³ WYO. STAT. ANN. s6-2-708(c) (2013).

⁷⁴ WYO. STAT. ANN. s6-2-708(a) (2013).

⁷⁵ *Ibid* s6-2-708(c) (2013).

⁷⁶ NEB. REV. STAT. s28-801(5) (2016).

⁷⁷ *Ibid* s28-801(3) (2016).

⁷⁸ *Ibid* s29-3005(3) (2018).

⁷⁹ *Ibid*

⁸⁰ *Ibid* s29-3005(2) (2018). Once a court has granted a motion to set aside a conviction or an adjudication under s29-3005 for prostitution or other offense, the victim may file a motion to have their criminal record(s) of the conviction(s) or adjudication(s) at issue sealed, which will automatically be granted. *Ibid* s29-3523(4) (2018).

Oklahoma

As referenced above, section 748 provides an affirmative defence to prosecution when ‘during the time of the alleged commission of the offense, the defendant or alleged youthful offender or delinquent was a victim of human trafficking’.⁸¹ Though the defendant must affirmatively raise this defence, the burden then shifts to ‘the State to prove beyond a reasonable doubt that the defendant was not a victim of human trafficking during the time of the alleged offense’.⁸²

While affirmative defences are typically raised at trial, the inclusion of ex ante procedural rights in section 748.2 suggests that the non-punishment principle must be honoured as soon as the victim⁸³ is identified.⁸⁴ For example, section 748.2 requires that victims not be jailed or fined. If, however, a victim is charged with a crime, the affirmative defence of section 748 may ultimately shield them from liability.

The scope of this affirmative defence remains largely untested, but its wording is broad. Unlike other state laws, section 748 only imposes an express temporal limitation (the offence must have been committed during the time that the victim was trafficked). Section 748 does not impose an express crime limitation or age limitation.⁸⁵ Under a plain reading, the affirmative defence could therefore be raised by any person for any criminal, youthful offender or delinquent offence – even a violent felony like murder.⁸⁶ Finally, section 748 lacks an express nexus requirement, or language that requires the offence to be the ‘result’ of the trafficking.⁸⁷ Accordingly, a victim is spared the burden of establishing a causal connection between their alleged offence and the fact that they were trafficked.

In addition to an affirmative defence, Oklahoma law provides victims with a set of robust procedural rights, including mandatory access to shelter, food, medical care and certain legal services, as well as a prohibition on inappropriate detention, jailing or fines.⁸⁸ As explained above, the inclusion of

⁸¹ CRIMES AND PUNISHMENTS, 2022 Okla. Sess. Law Serv. Ch. 20 (H.B. 4224) (formerly OKLA. STAT. ANN. tit. 21, s 748 (West)).

⁸² Vernon's Okla. Forms 2d, OUJI-CR 8-61.

⁸³ Section 748.2 provides even stronger protections for minors who are victims of human trafficking. Minors ‘shall not be subject to juvenile delinquency proceedings or child-in-need-of-supervision proceedings for prostitution offenses or misdemeanor or nonviolent felony offenses committed as a result of being a victim of human trafficking’. CRIMES AND PUNISHMENTS, 2022 Okla. Sess. Law Serv. Ch. 20 (H.B. 4224) (formerly OKLA. STAT. ANN. tit. 21, s 748 (West)). While Section 748 provides an affirmative defense against prosecution, this provision appears to prohibit prosecution of minors in the first instance. Unlike Section 748’s affirmative defense, this blanket prohibition against prosecution is tempered by both a crime limitation and nexus requirement – historically, a related provision also established a presumption that minors engaged in prostitution were victims of human trafficking, OKLA. STAT. ANN. tit. 21, s 1029(C) (West), but recent amendments removed this presumption. CRIMES AND PUNISHMENTS, 2022 Okla. Sess. Law Serv. Ch. 20 (H.B. 4224). Therefore, minors engaged in prostitution will not be protected under Section 748 unless it is established that they are victims of human trafficking. Minors are only immune from prosecution for prostitution, misdemeanor, or nonviolent felony offenses. Furthermore, the offense must be the ‘result’ of the victim’s human trafficking.

⁸⁴ See, eg, OKLA. STAT. TIT. 21, s 748.2 (‘Human trafficking victims shall: 1. Be housed in an appropriate shelter as soon as practicable; 2. Not be detained in facilities inappropriate to their status as crime victims; 3. Not be failed, fined, or otherwise penalized due to having been trafficked; 4. Receive prompt medical care, mental health care, food, and other assistance as necessary...’).

⁸⁵ See, eg, WYO. STAT. ANN. s 6-2-708 (West) (imposing crime limitation); N.D. CENT. CODE ANN. s 12.1-41-13 (West) (same); MASS. GEN. LAWS ANN. ch. 265, s 57 (West) (same).

⁸⁶ Meghan Hilborn, *How Oklahoma’s Human Trafficking Victim Defense Is Poised to Be the Boldest Stand Against Human Trafficking in the Country*, 54 TULSA L. REV. 457, 472 (2019).

⁸⁷ See, eg, WYO. STAT. ANN. s 6-2-708 (West) (requiring crime to be a ‘direct result’ of the trafficking).

⁸⁸ Under Section 748.2, human trafficking victims may neither be ‘detained in facilities inappropriate to their status as crime victims’, nor ‘be jailed, fined, or otherwise penalized due to having been trafficked’. CRIMES AND PUNISHMENTS, 2022 Okla. Sess. Law Serv. Ch. 20 (H.B. 4224). Furthermore, victims must be provided ‘appropriate shelter’ and ‘food’, ‘medical’ and ‘mental health care’, ‘legal assistance’, ‘translation services’, and ‘protection if the safety of the victim is at risk[.]’ *Ibid*

these ex ante procedural rights suggests that the non-punishment principle applies as soon as a victim is identified, long before it is raised as an affirmative defence before a court.

Part III: Ongoing awareness and training efforts regarding the non-punishment principle

Federal and state governments have increased their efforts to protect victims through non-legislative avenues as well. Given the significant use of discretion envisioned in existing legislation, many of these efforts focus on awareness raising and training, to ensure that victims are aware of their rights and that law enforcement does not penalise or prosecute victims in ignorance of legally available protections. These efforts are replicated and amplified by the civil rights and victim support organisations actively advocating for the non-punishment principle in their respective states.

Federal law

The TVPA and its subsequent reauthorisations have emphasised the importance of awareness and training.⁸⁹

In December 2021, the Biden administration published 'The National Plan to Combat Human Trafficking' ('National Plan'), making education and training a central part of its plan for addressing human trafficking.⁹⁰ The National Plan is organised around prevention, protection and prosecution and a key 'protection' principle is to '[s]afeguard victims of human trafficking from being inappropriately incarcerated, fined, or otherwise penalized for unlawful acts committed as a direct result of being trafficked'.⁹¹ In order to implement this principle, the National Plan includes various priority actions related to ongoing training and education.⁹² This emphasis on training as a means to avoid inappropriate arrest and prosecution is similarly adopted by the DoJ's 2022 National Strategy to Combat Human Trafficking, which calls for additional research and development of training and policies on the topic.⁹³

The DoJ Office for Victims of Crime (OVC) plays a central role in managing federal funding dedicated to victim services and training and maintains the OVC Training and Technical Assistance Center, which offers education and tools for those in the victim services field, including prosecutors and law enforcement professionals.⁹⁴ The DoJ Office of Justice Programs, Bureau of

⁸⁹ Section 107 of the TVPA directed the Attorney General to 'make grants to States, Indian tribes, units of local government, and nonprofit, nongovernmental victims' service organizations to develop, expand, or strengthen victim service programs for victims of trafficking', a portion of which was required to be set aside for 'training and technical assistance'. Pub. L. No. 106-386, s 107(b)(2); see 22 U.S.C. s 7105(b)(2). Section 107 also required that '[a]ppropriate personnel of the Department of State and the Department of Justice shall be trained in identifying victims of severe forms of trafficking and providing for the protection of such victims'. Pub. L. No. 106-386, s 107(c)(4); see 22 U.S.C. s 7105(c)(4).

⁹⁰ THE NATIONAL ACTION PLAN TO COMBAT HUMAN TRAFFICKING 31-33 (December 2021) (available at www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf)

⁹¹ *Ibid* at 31.

⁹² For example, the National Plan directs that '[f]ederal training and policies should be reviewed with consideration for the principle that victims should not be inappropriately penalized or prosecuted for the unlawful acts their trafficker compelled them to commit', and '[f]ederal law enforcement agencies will provide information to state, local, tribal and territorial governments on policies that would prevent the inappropriate arrest of human trafficking victims for unlawful conduct resulting directly from victimization and offer victim services instead'. *Ibid*

⁹³ U.S. DEPT. OF JUSTICE, *supra* note 57, at 22-24.

⁹⁴ *Human Trafficking Training and Technical Assistance*, U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, (June 28, 2022), <https://ovc.ojp.gov/program/human-trafficking/training-and-technical-assistance>; *Human Trafficking*, OFFICE FOR VICTIMS OF CRIME TRAINING & TECHNICAL ASSISTANCE CENTER, (June 28, 2022) www.ovcttac.gov/views/HowWeCanHelp/dspHumanTrafficking.cfm?nm=sfa&ns=ht.

Justice Assistance also provides no-cost, online and classroom, human trafficking training for law enforcement, prosecutors, tribal leaders and law enforcement.⁹⁵

New York

There are many organisations in New York that have advocated for the rights of trafficking victims and supported the amendments introduced by the Survivors of Trafficking Attaining Relief Together Act (the START Act).⁹⁶ Organisations such as the Safe Horizon, International Institute of Buffalo, Empowerment Collaborative of Long Island, Urban Justice Center Sex Workers Project, Brooklyn Defenders, Legal Aid Society, SOAR Institute, New York Civil Liberties Union and Sanctuary for Families all provide resources to aid victims of trafficking.⁹⁷ Many of these organisations also provide education to the greater public about human trafficking.⁹⁸

Organisations such as these continue to advocate for further improvements in the law, highlighting that not all weaknesses of an older version of section 440.10 have been addressed by the START Act amendments.⁹⁹ While the scope of the START Act was expanded beyond prostitution-related convictions and an unnecessary due diligence requirement was removed in the amended legislation,¹⁰⁰ section 440.10 delays the timing of relief to until after a victim has already been convicted, rather than providing an earlier avenue through an affirmative defence.¹⁰¹ Victims also may not know that vacatur relief is available to them, or may be unable to find a lawyer who can help them receive such relief.¹⁰² Overall, rights for trafficking victims are increasing in New York, notwithstanding that more work could be done.

Wyoming

Although Wyoming has been a leader in legislation protecting trafficking victims, it does not currently mandate human trafficking or non-punishment principle training for any state employees or elected officials.¹⁰³ A few non-profit organisations do offer trainings to raise awareness of human trafficking in Wyoming.

To date, the reach of local organisations has been limited. In 2020, however, a new victim advocacy organisation set out to raise awareness about human trafficking in Wyoming.¹⁰⁴ In the two years since its founding, Uprising has trained more than 550 professionals and over 700 parents and caregivers in an effort to aid trafficking victims.¹⁰⁵ Advocates hope that Uprising's

⁹⁵ *Ibid*

⁹⁶ Members of the judiciary have also called for legal reform that recognises the harm of criminalisation to victims of human trafficking. See, eg, Toko Serita, *In Our Own Backyards: The Need For A Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. REV. L. & SOC. CH. 635, 656 ('There needs to be holistic reform of the criminal justice system's treatment and criminalization of prostitutes and consideration of the consequences of its failure to identify trafficking victims among this population'); Fernando Camacho, *Sexually Exploited Youth: A View from the Bench*, 31 TOURO L. REV. 377, ('the justice system's treatment of [minor victims of sexual trafficking accused of prostitution] needs to change. Let's not punish them, let's get them help').

⁹⁷ Dana Willbanks, *New York State Becomes a National Leader in Providing Survivors of Trafficking Real Justice*, CITIZEN ACTION OF NEW YORK (Nov. 16, 2021), <https://citizenactionny.org/2021/11/16/new-york-state-becomes-a-national-leader-in-providing-survivors-of-trafficking-real-justice/>.

⁹⁸ See, eg, SANCTUARY FOR FAMILIES, <https://sanctuaryforfamilies.org/> (last visited Oct. 4, 2022); SOAR INSTITUTE, www.soarinstitute.org/ (last visited Oct. 4, 2022); *Sex Workers Project*, URBAN JUSTICE CENTER, <https://swp.urbanjustice.org/> (last visited Oct. 4, 2022).

⁹⁹ See, eg, Barnard, *see above* note 23, at 1493-1500; Waichman, *see above* note 28, at 486-90.

¹⁰⁰ N.Y. CRIM. PROC. LAW s 440.10 (McKinney 2022).

¹⁰¹ Barnard, *see above* note 23, at 1490-93.

¹⁰² *Ibid* at 1484-85.

¹⁰³ *National State Law Survey: Law Enforcement Officer Training on Human Trafficking*, SHARED HOPE INTERNATIONAL 2 (2017), http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Law-Enforcement-Officer-Human-Trafficking-Training.pdf.

¹⁰⁴ See *Awareness*, UPRISING, <https://uprisingwyo.org/awareness/> (last visited Oct. 4, 2022).

¹⁰⁵ See *Education*, UPRISING, <https://uprisingwyo.org/education/> (last visited Oct. 4, 2022).

trainings will have an impact in the state of Wyoming as the organisation continues to grow. In the meantime, Wyoming could improve the application of its own non-punishment principle values by mandating human trafficking and non-punishment principle training for the state's law enforcement officers, prosecutors and judges.¹⁰⁶

Nebraska

Nebraska has implemented mandatory training regarding issues of human trafficking for law enforcement agencies, prosecutors, public defenders, judges, juvenile detention staff and other relevant officials.¹⁰⁷ In 2017, the task force expanded training access to service providers and to the Lincoln Public Schools, one of the state's largest school systems.¹⁰⁸ More recently, the Nebraska legislature also signed a bill into law that requires training on recognising human trafficking for foster parents.¹⁰⁹

Other groups, such as the Women's Fund of Omaha, are working to raise awareness of non-punishment principle laws in Nebraska by educating attorneys.¹¹⁰ In their 'Nebraska Trafficking Legal Guide', the Women's Fund of Omaha explains that most of Nebraska's sex trafficking laws are new, and that, as such, it is critical for lawyers to 'educate the court about sex trafficking' and about how victims' cases should be handled, especially as it pertains to immunities and set asides.¹¹¹

Oklahoma

In addition to enacting new legislation protecting victims, Oklahoma also has made substantial efforts outside of lawmaking. In its most recent report, the Oklahoma Commission on the Status of Women published a list of recommendations to improve the state's response to its human trafficking crisis. Educational opportunities for the general public – as well as the business, industrial, educational and professional sectors – to better 'identify and assist' victims of human trafficking¹¹² topped the list, with the Commission specifying that educational programs should increase understanding of 'force, fraud, and coercion', as many 'survivors of human trafficking do not self-identify when seeking services' and many people have 'preconceived ideas' of what constitutes trafficking.¹¹³

In accordance with the Commission's recommendations, the Oklahoma District Attorneys Council has programmed professional trainings for prosecutors.¹¹⁴ A recent training programme outlined prosecutors' 'wide powers of discretion' and unique role in 'guid[ing] policies and practices, including how victims and survivors are treated when they interact with the criminal justice

¹⁰⁶ For instance, a local organisation in Wyoming recently held their first immersive training conference to provide training to local law enforcement, advocates, service providers, and medical responders. See Uprising, Greater Rockies Immersive Training on Exploitation and Trafficking (GRIT), available at <https://uprisingwyo.org/grit/#aboutgrit>.

¹⁰⁷ *Ibid*

¹⁰⁸ Nebraska Attorney General's Office, *Task Force Review 2019: Combating Human Trafficking in Nebraska*, NEBRASKA HUMAN TRAFFICKING TASK FORCE 5 (2019), https://ago.nebraska.gov/sites/ago.nebraska.gov/files/doc/Task%20Force%20Review%202019%20FINAL_1.pdf.

¹⁰⁹ NEB. REV. STAT. §43-4707 (2017).

¹¹⁰ *Representing Victims/Survivors of Sex Trafficking in Nebraska: A Guide for Legal Practitioners*, WOMEN'S FUND OF OMAHA, <https://omahawomensfund.org/wp-content/uploads/Nebraska-Trafficking-Legal-Guide.pdf> (last visited July 13, 2022) [hereinafter Nebraska Guide for Legal Practitioners].

¹¹¹ *Ibid* at 7.

¹¹² *Growing Epidemic of Human Trafficking in Oklahoma*, OKLA. COMM'N ON THE STATUS OF WOMEN (2021), at 6, www.ok.gov/ocsw/documents/HT%20White%20Paper%2002132021.pdf (last visited Oct. 4, 2022).

¹¹³ *Ibid* at 4, 6.

¹¹⁴ See *Training Schedule*, OKLA. DIST. ATT'YS COUNCIL, www.ok.gov/dac/Training/Victims_Assistance_and_Allied_Professional_Training/index.html (last visited Oct. 4, 2022).

system'.¹¹⁵ The presentation emphasised prosecutors' 'duty to achieve justice over convictions and to proactively remedy wrongful convictions'.¹¹⁶ Advocates are hopeful that these educational efforts may help to increase the number of victims who are afforded Oklahoma's statutory enactments of the non-punishment principle.

Conclusion

Notwithstanding meaningful progress following the passage of the TVPA and similar state statutes, the US has much work to do in ensuring that victims of human trafficking are shielded from prosecution for crimes arising as a result of their trafficking. Although the federal government and many states have recognized the importance of the principle that victims of human trafficking should not be penalised, efforts to create a federal vacatur law have been unsuccessful, and existing state laws vary widely. Some states have taken the lead on legislating the non-punishment principle in the form of immunities from prosecution, affirmative defences, vacatur laws and other procedural rights. In certain states, victims can avoid convictions in the first place, or alternatively, set aside certain trafficking-related convictions and adjudications, although the time at which the remedy is available varies, along with the requisite burden of proof. Moreover, many of these protections rely in large part on the discretion of law enforcement and adjudicators, who require training and education to ensure they identify and respond to victims appropriately.

Advocates, including these authors, hope that efforts that led to the legislation in leading states will also translate to success in other states that have fallen behind in creating broad protections for trafficking victims against prosecution, and that prosecutors and judges will exercise their discretion to support, rather than punish, victims of human trafficking.

¹¹⁵ *Maximizing Justice, Minimizing Harm: The Prosecutors' Role in Achieving Survivor-Centered Justice in Human Trafficking Cases*, OKLA. DIST. ATT'YS COUNCIL.

¹¹⁶ *Ibid*