

2019

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### Recommended Citation

Yusuf Abdulkareem, *Improving Protection and Services for Trafficking Victims in the United States: Recommendations Based on the United Kingdom's Modern Slavery Act 2015*, 39 CHILD. LEGAL RTS. J. 131 (2020).

Available at: <https://lawcommons.luc.edu/clrj/vol39/iss2/3>

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## **Improving Protection and Services for Trafficking Victims in the United States: Recommendations Based on the United Kingdom’s Modern Slavery Act 2015**

*Yusuf Abdulkareem*<sup>1</sup>

### **ABSTRACT**

Human trafficking is a form of modern slavery that occurs both internationally and within national borders. It is a multibillion-dollar criminal industry, and millions of men, women, and children have been victims of this heinous and unconscionable crime.<sup>2</sup>

Fortunately, the problem of human trafficking has finally started to receive the attention it deserves. Over the past two decades, a plethora of anti-trafficking laws have been passed at both international and domestic levels. The United States specifically has been a leader in the promulgation of anti-trafficking laws that have served as models for other nations of the world.

These federal laws, however, do not adequately address victim treatment and protection services. Minors remain particularly vulnerable. For example, minors in the United States may be prosecuted for crimes they were forced to commit by their traffickers.

Although many national anti-trafficking frameworks are based on the U.S. model, the United Kingdom has substantially different laws. The United States should look to the laws of the United Kingdom and incorporate those provisions that would provide better protection for human trafficking victims.

**KEYWORDS:** Children, Human Trafficking, Modern Slavery Act 2015, TVPA, United Kingdom, United States

### **I. INTRODUCTION**

The Trafficking Victims Protection Act (TVPA) of 2000<sup>3</sup> was the first U.S. federal law to address trafficking in persons. The TVPA established several methods for prosecuting traffickers, preventing human trafficking, and protecting survivors of trafficking.<sup>4</sup> Since the introduction of the TVPA, there has been a plethora of other federal laws that have sought to tackle the endemic problem of trafficking.

These laws, however, could be improved to provide better protection for victims. For example, these laws have not mandated the creation of a central system of victim identification and referral, nor have they provided uniform guidelines for interviewing and interacting with potential victims—a process that significantly impacts identification. Victims continue to be prosecuted for crimes they may have committed, and the definition of labor trafficking is very narrow because victims must show either force, fraud, or coercion.

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<sup>2</sup> *Human Trafficking*, POLARIS, <https://polarisproject.org/human-trafficking> (last visited May 24, 2018).

<sup>3</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1465 (codified as amended at 22 U.S.C. §§ 7101–7114 (2012)).

<sup>4</sup> Trafficking Victims Protection Act §§ 106–108.

Protection and social services for victims must play a central role in the fight against human trafficking. Victims are often traumatized after experiencing great psychological and physical abuse in the course of trafficking. Efforts must be made to assist victims to recover and successfully reintegrate into society. Victims can also serve as witnesses in the criminal justice process, and they can help prosecute their traffickers. It is therefore vital that appropriate support services and protection be offered to victims to enable them to rebuild their lives, become functioning members of society, and to provide stability during an often traumatic and stressful criminal justice process.

The next part of this paper provides a brief overview of the major federal legislation on human trafficking in the United States and highlights the most significant provisions of each law. The third part examines the national legal framework on human trafficking in the United Kingdom. Vital provisions are described that could be incorporated into U.S. law to improve protection and services for trafficking victims, with children as the main focus. Finally, the fourth part examines how these amendments might be construed, why they are necessary, and some challenges that might be encountered along the way.

## II. OVERVIEW OF U.S. FEDERAL LAWS ON HUMAN TRAFFICKING

The TVPA defined the crime of human trafficking<sup>5</sup> and provided several mechanisms to combat it. Specifically, § 104 of the TVPA amended the Foreign Assistance Act of 1961 by requiring that the U.S. State Department's annual Country Reports on Human Rights Practices (Reports) include a description of the nature and extent of severe forms of trafficking in persons (as defined in § 103 of the TVPA).<sup>6</sup> The Reports, which each focus on an individual country, must also contain an assessment of the foreign government's efforts to combat trafficking.<sup>7</sup>

Section 105 of the TVPA established an interagency task force to monitor and combat trafficking.<sup>8</sup> The TVPA itself established human trafficking and related offenses as federal crimes and attached severe penalties to them.<sup>9</sup> It also mandated that restitution be paid to victims of human trafficking adjudicated in the criminal justice process.<sup>10</sup> The TVPA further protected victims and survivors of human trafficking by establishing the T-Visa, which allows human trafficking victims and their families to become temporary U.S. residents who are eligible to become permanent residents after three years.<sup>11</sup>

The TVPA was reauthorized through the Trafficking Victims Protection Reauthorization Acts (TVPRAs) of 2003, 2005, 2008, and 2013. The reauthorizations made incremental improvements in the federal legal framework on human trafficking in the following ways:

- a) The TVPRA of 2003 established a federal civil right of action for trafficking victims to sue their traffickers.<sup>12</sup> It also added human trafficking to the list of crimes that can

<sup>5</sup> 18 U.S.C. §§ 1589-1591 (2012).

<sup>6</sup> 22 U.S.C. § 2151n (2012).

<sup>7</sup> *Id.*

<sup>8</sup> Trafficking Victims Protection Act § 105.

<sup>9</sup> *Id.* § 112.

<sup>10</sup> *Id.* §§ 111-12.

<sup>11</sup> *Id.* § 107.

<sup>12</sup> Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875 (2003) (codified as amended at 22 U.S.C. § 1595 (2012)).

- be prosecuted under the Racketeer Influenced and Corrupt Organizations (RICO) statute.<sup>13</sup>
- b) The TVPRA of 2005 included a pilot program for sheltering minors who are survivors of human trafficking, as well as grant programs to assist state and local law enforcement in combating trafficking.<sup>14</sup> This law ensures that U.S. government contracts are not made with individuals or organizations that promote or engage in human trafficking.<sup>15</sup> The TVPRA of 2005 also included a penalty of forfeiture of property upon conviction of human trafficking offenses.<sup>16</sup>
  - c) The TVPRA of 2008 required that the U.S. government provide information about workers' rights to anyone applying for work- and education-based visas.<sup>17</sup> This reauthorization also enhanced criminal sanctions against traffickers and expanded definitions of various types of trafficking to make prosecution easier.<sup>18</sup> Further, the 2008 reauthorization expanded the protections available with the T-Visa<sup>19</sup> and provided additional protections for unaccompanied minors who might be trafficking victims.
  - d) The TVPRA of 2013 amended the Violence Against Women Reauthorization Act of 2013 by adding provisions to prevent child marriage and enhanced protections for children exploited abroad by U.S. citizens and permanent residents.<sup>20</sup>

Along with the TVPA and its reauthorizations, other federal laws on human trafficking have been enacted in the United States in recent years. The Preventing Sex Trafficking and Strengthening Families Act of 2014 (PSTSFA) was enacted to address the incidence of sex trafficking among youth in the foster care system. Specifically, the law requires welfare services to identify, document, and determine services for children and youth at risk of sex trafficking.<sup>21</sup> Under the PSTSFA, welfare services must also report the number of children and youth who are sex trafficking victims to law enforcement authorities and the Secretary of the U.S. Department of Health and Human Services (DHHS).<sup>22</sup> The Secretary of DHHS is required to send this report to Congress and make it available on the DHHS website.<sup>23</sup>

Additionally, the Justice for Victims of Trafficking Act of 2015 (JVTA) established a domestic trafficking victims' fund to support victim assistance grants.<sup>24</sup> It also increased restitution and compensation for trafficked victims.<sup>25</sup> Further, the JVTA amended the Runaway and

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<sup>13</sup> *Id.* § 5.

<sup>14</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, §§ 102, 119 Stat. 3569 (2005) (codified as amended at 42 U.S.C. §§ 14044a, 14044c (2012)).

<sup>15</sup> *Id.* § 203.

<sup>16</sup> *Id.* § 2428.

<sup>17</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, §§ 202–203, 122 Stat. 5044, 5055 (2008) (codified as amended at 8 U.S.C. §§ 1375b–1375c (2012)).

<sup>18</sup> *Id.* §§ 221–22.

<sup>19</sup> *Id.* § 201.

<sup>20</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 103, 1207, 127 Stat. 54, 141 (2013) (codified at 22 U.S.C. § 7104 (2013)).

<sup>21</sup> Preventing Sex Trafficking and Strengthening Families Act of 2014, Pub. L. No. 113-183, § 101, 128 Stat. 1919 (2014) (codified at 42 U.S.C. § 671 (2014)).

<sup>22</sup> *Id.* § 102.

<sup>23</sup> *Id.*

<sup>24</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 101, 129 Stat. 227, 229 (2015) (codified at 18 U.S.C. § 3014 (2015)).

<sup>25</sup> *Id.* § 105.

Homeless Youth Act of 2008 (RHYA) to provide social services to youth victims of severe forms of trafficking.<sup>26</sup>

### III. THE UNITED KINGDOM'S LEGAL FRAMEWORK ON HUMAN TRAFFICKING

The Modern Slavery Act 2015 (the 2015 Act) consolidated existing offenses of human trafficking and slavery.<sup>27</sup> The 2015 Act went into force on July 31, 2015. There are several noteworthy provisions of the 2015 Act that could be incorporated into U.S. federal law that would improve protection for trafficking victims.

#### A. *Victims are Deemed to be Automatically Intimidated and Vulnerable*

Under section 17(4) of the United Kingdom's Youth Justice and Criminal Evidence Act 1999 (YJCEA),<sup>28</sup> a trafficked victim who has been subjected to sexual exploitation is deemed to be "intimidated." Intimidated witnesses are those whose quality of evidence is likely to be diminished due to fear or distress.<sup>29</sup> A court generally considers the following factors in determining whether a victim is intimidated: (a) the nature and alleged circumstances of the offense to which the proceedings relate; and (b) the age of the witness.<sup>30</sup> A court may also consider (i) the social, cultural, and ethnic origins of the witness; (ii) the witness's domestic and employment circumstances; and (iii) the witness's religious beliefs or political opinions.<sup>31</sup> Further, where relevant, a court may consider any behavior toward the witness by the accused, members of the accused's family, associates of the accused, or any other person who is likely to be a defendant or witness in the proceedings.<sup>32</sup>

Section 46 of the 2015 Act amended the YJCEA by including victims of offenses under sections 1 and 2 of the 2015 Act; the YJCEA now includes victims of forced labor and trafficking for sexual and non-sexual exploitation.<sup>33</sup>

#### B. *Guidelines for Interviewing Victims*

A report issued by the Ministry of Justice in March 2011 provides comprehensive guidance on conducting videotaped interviews of vulnerable or intimidated witnesses, such as children.<sup>34</sup> Factors such as the emotional and mental state of the victim, as well as trauma that they have endured must be factored into the interview process. A one-size-fits-all approach cannot be taken

<sup>26</sup> *Id.* § 201; *See* 42 U.S.C. §§ 5714–23 (2015).

<sup>27</sup> *See generally*, Modern Slavery Act 2015, c. 30 (UK), <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

<sup>28</sup> Youth Justice and Criminal Evidence Act 1999, c. 23, § 17(4) (UK), <http://www.legislation.gov.uk/ukpga/1999/23/section/17>.

<sup>29</sup> *Id.* § 17.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Modern Slavery Act 2015 § 46(3).

<sup>34</sup> *See generally* MINISTRY OF JUSTICE, ACHIEVING BEST EVIDENCE IN CRIMINAL PROCEEDINGS: GUIDANCE ON INTERVIEWING VICTIMS AND WITNESSES, AND GUIDANCE ON USING SPECIAL MEASURES, 2011 (UK), <http://webarchive.nationalarchives.gov.uk/20130206070549/https://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf>.

when it comes to interviewing victims, especially if they are minors. Specialist training should be necessary for conducting interviews with victims with special needs, such as minors or traumatized victims. Where there are multiple interviewers, they should all take turns explaining their roles to the victim.<sup>35</sup> Better planning of interviews with victims who have extreme vulnerabilities is advisable, not only for the conduction of the interview, but also for purposes of presentation in court.<sup>36</sup>

### ***C. National Referral Mechanism***

The National Referral Mechanism (NRM) is a single framework centered on victim identification and referral to appropriate support.<sup>37</sup> The NRM was introduced in 2009 to meet the United Kingdom's obligations under the Council of Europe's Convention on Action against Trafficking in Human Beings.<sup>38</sup> First responders (such as police, immigration authorities, local authorities, and certain non-governmental organizations)<sup>39</sup> handle the initial referral. They may refer all suspected victims of trafficking to a competent authority for a decision on whether the individual is a victim of trafficking.<sup>40</sup> The competent authorities that decide whether an individual is a victim of trafficking are the Modern Slavery Human Trafficking Unit (MSHTU) of the National Crime Agency (NCA) and the Home Office Competent Authority (HOCA) section of the Home Office's Visas and Immigration (UKVI) unit.<sup>41</sup>

Under the NRM, a first responder initially completes a referral form<sup>42</sup> recording the encounter with a potential victim. The first responder provides adequate information on the form to enable a decision on whether the subject has "reasonable grounds" for being treated as a victim of trafficking. A reasonable grounds decision is based on "I suspect, but cannot prove"<sup>43</sup>; general indicators of a potential victim's behavior, circumstances, and responses to questions assist in the assessment.<sup>44</sup>

All referrals to the NRM from first responders must initially be sent to the MSHTU.<sup>45</sup> The MSHTU also manages the data on NRM referrals. The MSHTU has jurisdiction in cases that involve a U.K. or European Economic Area (EEA) national.<sup>46</sup> When the MSHTU receives a referral of a U.K. or EEA national who is subject to immigration control or part of an asylum case, the MSHTU will refer the case to HOCA, which makes the reasonable and conclusive grounds

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<sup>35</sup> *Id.*

<sup>36</sup> *Human Trafficking, Smuggling and Slavery*, CROWN PROSECUTION SERV., <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery> (last visited May 24, 2018).

<sup>37</sup> A full list of first responders is available at *National Referral Mechanism*, NAT'L CRIME AGENCY, NAT'L REFERRAL MECHANISM, <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism> (last visited May 24, 2018).

<sup>38</sup> CROWN PROSECUTION SERV., *supra* note 36.

<sup>39</sup> *National Referral Mechanism*, *supra* note 37.

<sup>40</sup> CROWN PROSECUTION SERV., *supra* note 36.

<sup>41</sup> *National Referral Mechanism*, *supra* note 37.

<sup>42</sup> Referral forms are available at *Modern Slavery Victims: Referral and Assessment Forms*, 16, GOV. U.K., <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms> (last updated May 22, 2018).

<sup>43</sup> CROWN PROSECUTION SERV., *supra* note 36.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

decisions. A conclusive grounds decision is whether, on the balance of probabilities, it is more likely than not that the individual is a victim of human trafficking or slavery.<sup>47</sup>

HOCA has five working days from receipt of a referral to decide whether there are reasonable grounds to believe an individual is a potential victim of human trafficking or modern slavery.<sup>48</sup> HOCA may require additional information from the first responder or from specialist NGOs or social services.<sup>49</sup> The threshold at the reasonable grounds stage is “from the information available so far, I believe but cannot prove” that the individual is a victim of trafficking or modern slavery.<sup>50</sup> If a finding of reasonable grounds is reached, suspected victims are given a place within a government-funded safe house if necessary.<sup>51</sup>

The suspected trafficking victim is granted a reflection period of forty-five days.<sup>52</sup> This reflection period enables a victim to recover from any immediate physical and/or psychological trauma before deciding whether to support an investigation or prosecution. The period can be extended if the victim has suffered severe trauma, or if more information that will assist HOCA in reaching a conclusive grounds decision is required.<sup>53</sup>

During the reflection period, HOCA collects further information about the potential victim from the first responders or other agencies.<sup>54</sup> This information is required to make a conclusive decision about whether the referred person is indeed a victim of human trafficking or modern slavery. A conclusive grounds decision will be made as soon as possible following the end of the recovery and reflection period.<sup>55</sup> The timescale for making a conclusive grounds decision is based on all the circumstances of the case.<sup>56</sup> The threshold for a conclusive grounds decision is that “it is more likely than not” that the individual is a victim of human trafficking or modern slavery.<sup>57</sup>

Where the victim is a child, first responders use the NRM's Guidance for Child First Responders.<sup>58</sup> Where the age of the victim has not been established, the victim is treated as a child until age is determined.<sup>59</sup> Where there is an age dispute and there is an ongoing age assessment, referral to the NRM should not be delayed if the victim is believed to be a child.<sup>60</sup> Section 51 of the 2015 Act contains a provision for the “Presumption about Age” for child victims of trafficking in England and Wales.<sup>61</sup>

Potential child victims do not need to consent to their referral.<sup>62</sup> A referral into the NRM process and subsequent decisions do not replace or supersede established child protection

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<sup>47</sup> *Id.*

<sup>48</sup> *National Referral Mechanism, supra* note 37.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> CROWN PROSECUTION SERV., *supra* note 36.

<sup>53</sup> HOME OFFICE, NATIONAL REFERRAL MECHANISM: GUIDANCE FOR CHILD FIRST RESPONDERS, *available at* <https://www.gov.uk/government/publications/national-referral-mechanism-guidance-for-child-first-responders> (last updated Mar. 23, 2016).

<sup>54</sup> *National Referral Mechanism, supra* note 37.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> HOME OFFICE, *supra* note 53, at 3.

<sup>59</sup> *Id.* at 12.

<sup>60</sup> *Id.* at 13.

<sup>61</sup> Modern Slavery Act 2015 § 51.

<sup>62</sup> CROWN PROSECUTION SERV., *supra* note 36.

processes, which should continue in tandem.<sup>63</sup> Where HOCA does not reach a reasonable grounds conclusion, but the child is able to subsequently disclose further details, or other professionals are able to provide more information, the case can be resubmitted to the first responder or support provider for reconsideration.<sup>64</sup>

Evidence collected from referrals may help to produce a national picture and can inform the decisions of policymakers and operational staff. NRM referrals and the intelligence they provide can potentially contribute directly to efforts to tackle modern slavery and may ultimately lead to a reduction in these cases seen in the United Kingdom. The NRM referrals also encourage a multiagency working approach, as well as a more comprehensive view of the collected evidence and information.<sup>65</sup>

The NRM itself was reviewed in 2014, and an interim report was published later that year.<sup>66</sup> Although not immediately implemented, the key recommendations of the report were to:

- a) strengthen the first responder role (the point when potential victims are first identified and referred) by creating new Slavery Safeguarding Leads (SSLs);
- b) streamline the referral process by removing the “reasonable grounds” decision once the successful implementation of accredited SSLs has occurred, allowing direct referral to specialist support for potential victims;
- c) establish new multidisciplinary panels headed by an independent chair with a view to cease the sole decision-making roles of the UKVI and MSHTU; and
- d) create a single case management unit within the Home Office to replace the case management units in the MSHTU and UKVI.<sup>67</sup>

In October 2017, the U.K. government’s Modern Slavery Taskforce announced three new measures to improve the way in which victims of modern slavery are identified and supported:

- a) A single expert unit will be created in the Home Office to handle all cases referred from frontline staff and to make decisions about whether someone is a victim of modern slavery. This will replace the case management units in the NCA and UKVI, which will be completely separate from the immigration system.
- b) An independent panel of experts will be introduced to review all negative decisions.
- c) A new digital system to support the NRM process will be introduced, making it easier for frontline responders to refer victims for support and enabling data to be captured and analyzed to better aid prevention and law enforcement.<sup>68</sup>

#### ***D. A Wider Definition of Labor Trafficking***

The prosecution and courts are expected to give consideration to all circumstances when determining whether a person is a victim of slavery, servitude, or forced labor.<sup>69</sup> These can include

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<sup>63</sup> HOME OFFICE, *supra* note 53, at 16.

<sup>64</sup> *Id.* at 22.

<sup>65</sup> *Id.* at 24.

<sup>66</sup> See generally HOME OFFICE, INTERIM REVIEW OF THE NATIONAL REFERRAL MECHANISM FOR VICTIMS OF HUMAN TRAFFICKING, available at <https://www.gov.uk/government/publications/interim-review-of-the-national-referral-mechanism-for-victims-of-human-trafficking> (last updated Nov. 12, 2014).

<sup>67</sup> *Id.*

<sup>68</sup> Rt. Hon. Amber Rudd, *Modern Slavery Taskforce Agrees New Measures to Support Victims*, GOV. UK (Oct. 17, 2017), <https://www.gov.uk/government/news/modern-slavery-taskforce-agrees-new-measures-to-support-victims>.

<sup>69</sup> CROWN PROSECUTION SERV., *supra* note 36.



age, family relationships, and any mental or physical illness that may make the person more vulnerable.<sup>70</sup> The victim's consent (without force, fraud, or coercion), whether adult or child, does not preclude a finding that the person is being held in slavery or forced labor.<sup>71</sup> If the victim is a child, it is not necessary for any of the following to be present: threats; use of force; fraud and deception; inducement; abuse of power or of a position of vulnerability; or use of debt bondage.<sup>72</sup>

### ***E. Slavery and Trafficking Prevention Orders and Slavery and Trafficking Risk Orders***

Sections 14 and 15 of the 2015 Act introduced the Slavery and Trafficking Prevention Orders (STPOs). An STPO can only be issued in three instances: if a defendant has been convicted of a trafficking or slavery offense, the court is satisfied that there is a risk the defendant may commit further offenses, and it is necessary to protect others from harm.<sup>73</sup>

Slavery and Trafficking Risk Orders (STROs) were introduced under section 23 of the 2015 Act.<sup>74</sup> An STRO can be granted if a defendant has not been convicted of a trafficking or slavery offense, but is nevertheless thought to pose a risk of harm, and it is necessary to protect others.<sup>75</sup> The court must be satisfied that the defendant has acted in a way that suggests there is a risk of a trafficking or slavery offense being committed.<sup>76</sup> An order can be issued by a magistrates' court and can prohibit the defendant from doing anything described in the order that is necessary to protect others from harm likely to occur.<sup>77</sup> Breach of an STRO may be punishable by up to five years imprisonment.<sup>78</sup>

### ***F. A Statutory Defense for Offenses Committed by Victims***

Section 45 of the 2015 Act introduced a defense for victims who are compelled to commit criminal offenses.<sup>79</sup> The defense cannot be used for certain (violent) crimes.<sup>80</sup> This section applies concurrently with the Crown Prosecution Service (CPS) guidance to suspects who may be victims of trafficking.<sup>81</sup>

The CPS guidance applies:

- a) after prosecutors have already considered and rejected the statutory defense under section 45 of the 2015 Act;
- b) where the criminal offense is excluded from the defense in Schedule 4 of the 2015 Act (e.g., common law offenses, such as false imprisonment, manslaughter, murder, kidnapping, or violent crimes generally); and

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<sup>70</sup> *Id.*

<sup>71</sup> Modern Slavery Act 2015 § 1.

<sup>72</sup> CROWN PROSECUTION SERV., *supra* note 36.

<sup>73</sup> *Id.*

<sup>74</sup> Modern Slavery Act 2015 § 23.

<sup>75</sup> *Id.* § 23(2).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* § 30(3).

<sup>79</sup> Modern Slavery Act 2015 § 45.

<sup>80</sup> *Id.* §§ 4, 45. The criminal offenses excluded from this defense are listed in Schedule 4 and include, kidnapping, false imprisonment, manslaughter, murder, and piracy.

<sup>81</sup> *Id.*

- c) where criminal offenses have been committed by a victim of trafficking or slavery before the date on which the statutory defense came into force (July 31, 2015).<sup>82</sup>

The CPS guidance lays out the following framework to determine whether to prosecute: Is there a reason to believe that the person is a victim of trafficking or slavery? If so, if there is clear evidence of a credible common law defense of duress, the case should be discontinued on evidential grounds. However, even where there is no clear evidence of duress, but the offense may have been committed as a result of compulsion arising from the person's trafficking or slavery situation, prosecutors should consider whether the public interest lies in proceeding with prosecution.<sup>83</sup>

The obligation for prosecutors to apply this framework is imposed by Article 26 of the Council of Europe Anti-Trafficking Convention, which requires that the law “provides for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so.”<sup>84</sup> U.K. courts have interpreted this article to mean that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim, and the crime has been committed when the defendant was in some manner compelled (in the broad sense) to commit it.<sup>85</sup>

The obligation imposed by Article 26, and the third question in the CPS guidance on the decision to prosecute, does not preclude the prosecution of a victim of human trafficking, even for violent crimes. However, it is possible for a prosecutor to decide, after examining the circumstances of the case and the interests of public policy, not to prosecute a victim of trafficking for violent crimes. Additional requirements are applied when the victim is a child. When considering whether to prosecute a child victim of trafficking/slavery, prosecutors will only need to consider whether the offense was committed as a direct consequence of, or in the course of, trafficking/slavery.<sup>86</sup>

Section 45 of the 2015 Act is similar to the safe harbor laws in the United States. A safe harbor law prevents minors (any child under 18) from being prosecuted for prostitution and directs juvenile sex trafficking victims to non-punitive specialized services.<sup>87</sup>

Most U.S. states have limited safe harbor laws that apply to children who have engaged in commercial sex. The laws vary across states but generally fall into two broad categories: 1) states that direct juvenile sex trafficking victims to specialized services and 2) states that protect minors from criminalization for prostitution.<sup>88</sup> More U.S. states began passing safe harbor laws because of the Uniform Act on Prevention of and Remedies for Human Trafficking (UAPRHT), drafted and promoted by the Uniform Law Commission (ULC) and the American Bar Association (ABA).<sup>89</sup> Section 45 of the 2015 Act, the CPS guidance, and the Council of Europe Convention

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<sup>82</sup> CROWN PROSECUTION SERV., *supra* note 36.

<sup>83</sup> *Id.*

<sup>84</sup> Council of Europe Convention on Action Against Trafficking in Human Beings, Art. 26, May 16, 2005, C.E.T.S No. 197, available at <https://rm.coe.int/168008371d>.

<sup>85</sup> See LM & Ors. v. R. [2010] EWCA (Crim) 2327 (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Crim/2010/2327.html>.

<sup>86</sup> CROWN PROSECUTION SERV., *supra* note 36.

<sup>87</sup> *Fact Sheet: Safe Harbor Laws*, NATIONAL COUNCIL OF JEWISH WOMEN (Sept. 2016), [https://www.ncjw.org/wp-content/uploads/2017/07/Fact-Sheet\\_Safe-Harbor\\_Updated-2016.pdf](https://www.ncjw.org/wp-content/uploads/2017/07/Fact-Sheet_Safe-Harbor_Updated-2016.pdf).

<sup>88</sup> *Id.*

<sup>89</sup> See NAT'L CONF. OF COMM'RS OF UNIF. ST. L., UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUM. TRAFFICKING, §§ 14-17 (2013), available at [http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013\\_UPRHT\\_Final%20Act.pdf](http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013_UPRHT_Final%20Act.pdf).

collectively provide a more robust defense and better protection for victims than the United States' safe harbor laws.

#### IV. RECOMMENDATIONS FOR IMPROVING U.S. ANTI-TRAFFICKING LAWS AND THE POTENTIAL CHALLENGES OF IMPLEMENTING THEM

Some of the aforementioned provisions of the United Kingdom's 2015 Act could be incorporated into the United States' anti-trafficking framework through another reauthorization of the TVPA. For example, a suggested amendment could take the form of a statutory defense for victims of trafficking. The defense would not be limited to non-violent crimes; it would encompass violent crimes in certain circumstances, especially where the victims are children and there is a clear nexus between the crime and the victim's status as a trafficked person. An instance of this would be where a child victim of trafficking is forced to commit violent crimes because refusal would have resulted in deportation, personal harm, and/or harm to members of his or her family.

For example, international gangs such as MS-13 have been known to target children. Some of these children are fleeing gang violence in their own home countries. The gangs forcefully try to recruit young boys and offer them two options: join or die.<sup>90</sup> Rances Ulices Amaya, a member of MS-13, was sentenced to fifty years for preying on teenage girls and forcing them into prostitution.<sup>91</sup> Court testimony indicated Amaya raped the girls, threatened them, and gave them drugs to keep them compliant.<sup>92</sup> Yimmy Anthony Pineda Penado, a member of MS-13 in Maryland, forced a teen girl to have sex with more than twenty clients over a two-week period.<sup>93</sup> MS-13 members provided the juvenile with alcohol and drugs to make her more compliant and receptive to being prostituted.<sup>94</sup>

Indeed, targeted children are forced to commit an array of different crimes for gangs. For example, Timothy Sini, the police commissioner for Suffolk County, New York, said unaccompanied minors constituted the majority of thirty gang members his department tracked in 2016 as part of a special program to reduce gang violence.<sup>95</sup> Another example is Danny Centeno-Miranda, a 16-year-old who fled El Salvador to escape the influence of MS-13. He was caught at the U.S. border and sent to live with an uncle in a Virginia suburb.<sup>96</sup> He enrolled in a high school where he met gang members and was drawn into tensions between MS-13 and a rival gang.<sup>97</sup> On orders from gang leaders in El Salvador, Danny was shot to death on his way to school one morning.<sup>98</sup> The slaying was payback for Danny's fleeing from MS-13 in El Salvador.<sup>99</sup> His killer,

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<sup>90</sup> Justin Jouvenal et al., *MS-13 Gains Recruits and Power in U.S. as Teens Surge Across Border*, WASH. POST (June 17, 2017) [https://www.washingtonpost.com/local/public-safety/ms-13-gains-recruits-and-power-in-us-as-teens-surge-across-border/2017/06/16/aacea62a-3989-11e7-a058-dbb23c75d82\\_story.html?utm\\_term=.20b7a594d81d](https://www.washingtonpost.com/local/public-safety/ms-13-gains-recruits-and-power-in-us-as-teens-surge-across-border/2017/06/16/aacea62a-3989-11e7-a058-dbb23c75d82_story.html?utm_term=.20b7a594d81d).

<sup>91</sup> *MS-13 Leader Gets 50 Years for Sex Trafficking*, NBC WASH. (last updated June 2, 2012, 2:23 PM), <https://www.nbcwashington.com/news/local/MS-13-Leader-Gets-50-Years-For-Sex-Trafficking-156709955.html>.

<sup>92</sup> *Id.*

<sup>93</sup> Truman Lewis, *MS-13 Leader Pleads Guilty in Juvenile Prostitution Case*, FAIRFAX NEWS (Sept. 11, 2012), <https://fairfaxnews.com/2012/09/ms-13-leader-pleads-guilty-in-juvenile-prostitution-case/>.

<sup>94</sup> *Id.*

<sup>95</sup> Jouvenal et al., *supra* note 90.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

Jose Espinosa de Dios, was also an unaccompanied minor who was smuggled into the United States from Mexico and then recruited into MS-13.<sup>100</sup>

Research has shown that children are increasingly trafficked for criminal activities.<sup>101</sup> These children are often classified as perpetrators instead of victims. Arrest frequency data from the Coalition to Abolish Slavery and Trafficking (CAST) indicates that human trafficking victims are arrested seven times more frequently for activity directly related to their trafficking than for non-trafficked activity.<sup>102</sup> A recent CAST study indicated that, in a sample of sixty-one victims from 2005 to 2015, forty-two individuals (69%) had arrest records.<sup>103</sup> Of those forty-two victims, twenty-eight (67%) had at least one arrest directly related to their trafficking.<sup>104</sup> Among the twenty-eight victims with at least one directly related arrest, fifteen (54%) of those victims only had arrest records directly related to their trafficking.<sup>105</sup> Most of these victims were minors when their trafficking began.<sup>106</sup>

Children should not be convicted of crimes they were forced to commit while they were victims of trafficking. Apart from the immediate punishment of jail terms, the convictions remain on the victims' records for the rest of their lives. A criminal record can make it much more difficult for a child to shake off the hardships he or she has experienced and grow into a responsible and successful member of society. It is unjust to saddle victimized children with a criminal record, especially when the crime was not of the victim's volition.

Another suggested statutory amendment to U.S. anti-trafficking laws, based on the United Kingdom's 2015 Act, is to expand the definition of labor trafficking. Under current U.S. law, victims of labor trafficking, including children, must show evidence of fraud, force, or coercion to prove that they are actual victims.<sup>107</sup> There is no such requirement in the United Kingdom; forced labor is not specifically defined in the 2015 Act. This flexibility makes it significantly easier to prosecute labor trafficking offenses, especially in cases without demonstrated force or coercion.

The boundaries of forced labor and labor trafficking are not always easy to define. There are a very small number of egregious cases worldwide where perpetrators have been successfully prosecuted and have received heavy convictions.<sup>108</sup> When subtle forms of coercion are difficult to prove in court, there has been a tendency in national legislatures and judiciaries to focus on the objective conditions of exploitation, rather than on the coercive or deceptive means by which people ended up in those conditions.<sup>109</sup>

U.S. courts have recognized as far back as 1880 that a child's age is important when determining whether he or she is a victim of involuntary servitude. In *United States v. Ancarola*, a

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<sup>100</sup> *Id.*

<sup>101</sup> TRAFFICKING FOR FORCED CRIMINAL ACTIVITIES AND BEGGING IN EUROPE: EXPLORATORY STUDY AND GOOD PRACTICE EXAMPLES 5 (Sept. 2014), [http://www.antislavery.org/wp-content/uploads/2017/01/trafficking\\_for\\_forced\\_criminal\\_activities\\_and\\_begging\\_in\\_europe.pdf](http://www.antislavery.org/wp-content/uploads/2017/01/trafficking_for_forced_criminal_activities_and_begging_in_europe.pdf).

<sup>102</sup> STEPHANIE RICHARD, VICTIMS OF HUMAN TRAFFICKING SHOULD NOT BE ARRESTED FOR CRIMES THEIR TRAFFICKERS FORCE THEM TO COMMIT: A STUDY OF DATA FROM THE COALITION TO ABOLISH SLAVERY & TRAFFICKING (CAST) 1 (Jan. 2016), available at [http://castla.org/assets/files/arrest\\_is\\_not\\_the\\_answer.pdf](http://castla.org/assets/files/arrest_is_not_the_answer.pdf).

<sup>103</sup> *Id.* at 5.

<sup>104</sup> *Id.* at 6.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 18 U.S.C. § 1589(a)(1)-(4) (2012).

<sup>108</sup> See Roger Plant, *Forced Labour, Slavery and Human Trafficking: When Do Definitions Matter?*, in ANTI-TRAFFICKING REVIEW 153, 155 (Rebecca Napier-Moore et al., eds., 2015).

<sup>109</sup> *Id.*

U.S. district court opined, “[i]n regard to some things, a child of such tender years is incapable of consent.”<sup>110</sup> The court also stated that, while the child may have consented to the terms of employment, “such intended employment was one injurious to its morals and inconsistent with its proper care and education.”<sup>111</sup>

Several studies have concluded that adolescent brains are not as fully developed as those of adults. Evidence shows that the brain does not stop maturing until the early twenties in those areas that govern impulsivity, judgment, planning, the foresight of consequences, and other characteristics that make people morally culpable.<sup>112</sup> The U.S. justice system distinguishes between adults and children.<sup>113</sup> However, U.S. law does not make this distinction in the context of labor trafficking. “A 12-year-old child must submit evidence and prove eligibility for protection in the same manner as a 30-year-old adult.”<sup>114</sup>

It is unreasonable to place the burden of proving force, fraud, or coercion on children. Children are vulnerable and, in many cases, will do whatever an adult asks of them. A child, for example, can be coached to deny any foul play. In some cases, a child may not even know he or she has been a victim of trafficking until after being released from the custody of traffickers.<sup>115</sup>

A broader and more flexible definition of labor trafficking that distinguishes children from adults would make it easier to identify child victims of trafficking. Identifying cases of labor trafficking is hard enough because of its clandestine nature; placing the burden of proof on a child makes it even more onerous. A broader definition of labor trafficking would also eliminate a child’s burden of proving fraud, force, or coercion since, in most instances, children cannot prove those factors by themselves.

Another important recommendation is the creation of a central system of information gathering and data collection for victims of trafficking in the United States. A UCLA study conducted in 2016 indicated that there was no comprehensive, representative sample of the status of sex trafficking in the United States.<sup>116</sup> The study also found “weak methodologies in empirical evidence and small data sets that urge readers to not republish as a national representative.”<sup>117</sup> It concluded that a lack of uniform data-collection policies across states and communities is a problem.<sup>118</sup>

In general, a central system of identification and referral is important to ensure victims receive appropriate services when needed. A central database can help form a clearer picture of a country’s trafficking problem and it can provide guidance on how to respond appropriately. The database can profile traffickers, as well as victims, and it can be used to track anyone who is processed within the system. The system can also serve as a means of central record keeping on trafficking.

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<sup>110</sup> *United States v. Ancarola*, 1 F. 676, 682 (C.C.S.D.N.Y. 1880).

<sup>111</sup> *Id.*

<sup>112</sup> Elizabeth Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8819 (2001).

<sup>113</sup> *Roper v. Simmons*, 543 U.S. 551 (2005); *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>114</sup> Katherine Kaufka Walts, *Child Labor Trafficking in the United States: A Hidden Crime*, 5 SOC. INCLUSION 59, 65 (2017).

<sup>115</sup> *Id.*

<sup>116</sup> SARAH GODOY ET AL., *SHEDDING LIGHT ON SEX TRAFFICKING: RESEARCH, DATA, AND TECHNOLOGIES WITH THE GREATEST IMPACT* 6 (May 2016), <http://innovation.luskin.ucla.edu/sites/default/files/Luskin%20HT%20Report.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Victims are prone to re-victimization in the absence of a coordinated effort to provide them with services—such as housing, medical and dental care, and substance abuse treatment—and track their progress and whereabouts. Children are even more vulnerable because of their age. They are much more likely to return to the criminals who trafficked them in the first place, or they may fall into the hands of another trafficker.<sup>119</sup> Identifying a trafficking victim and referring him or her to services does not necessarily mean that he or she was rescued and that services were provided.<sup>120</sup> A more centralized and coordinated national system of victim referral and service provision could reduce the gap between anti-trafficking policy and action.

The U.S. DHHS could play a role similar to that of the NRM in the United Kingdom. The DHHS could serve as the national center for identification and referral; every suspected case of human trafficking in the United States could be referred to that agency. Like the United Kingdom, there should be a system in the United States for a first responder who identifies a victim for referral to the DHHS. The DHHS could then coordinate with state and local officials to provide services to victims. Admittedly, the United States' size and population would make a central system of referral more difficult to administer than in a smaller country, like the United Kingdom. It will require a lot more resources and coordination amongst what will likely be numerous government agencies. However, that does not mean it could not be done.

A statutory provision that recognizes victims as vulnerable and intimidated would also be beneficial. The treatment of a trafficking victim mostly depends on the sensitivity and knowledge of the law enforcement officers with whom the victim interacts. A law that places an obligation on law enforcement officials to view victims of trafficking as intimidated would require training for those officers on how to interact with vulnerable victims. At the very least, members of law enforcement would receive guidance or standard operating procedures to follow when interacting with vulnerable victims.

There is also a need in the United States for uniform guidelines on interviewing trafficking victims. Different interested parties, ranging from law enforcement agents to social service providers, usually subject a victim of trafficking to a barrage of interviews. It is essential that these interviews be well coordinated and conducted in a way that does not aggravate a victim's trauma, especially when the victim is a child. Uniform guidelines at the national level would be helpful because they would require optimal interviewing practices across the country.

## V. CONCLUSION

Trafficking victims may continue to suffer the consequences of the crime long after the trafficking has ended. Victims must be given adequate and timely services to help them rebuild their lives and recover from the traumatic effects of being trafficked. As such, trafficking victim protection and services, especially for children, must play a central role in any legislation or legal frameworks on human trafficking.

The United States' TVPA 2000 was a landmark law on human trafficking that has been reauthorized and updated over the years. Other federal legislation, such as the PSTSFA and JVTA have been enacted to ensure that the United States has a robust anti-trafficking legal framework. This framework has served as a template and model for anti-trafficking laws worldwide.

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<sup>119</sup> Kimberly Mehlman-Orozco, *What Happens After a Human Trafficking Victim is 'Rescued'?*, THE HILL (July 29, 2016, 4:28 PM), <http://thehill.com/blogs/congress-blog/judicial/289709-what-happens-after-a-human-trafficking-victim-is-rescued>.

<sup>120</sup> *Id.*

Despite the existence of the TVPA and its progeny, there are still gaps in the United States' anti-trafficking laws—especially where victim protection and services are concerned. While many nations have legal models based on the TVPA framework, the anti-trafficking laws in the United Kingdom are noticeably more victim-centered. Admittedly, the United Kingdom is still struggling to effectively implement its robust laws on trafficking but, if successful, it provides better safeguards for the victims. Many provisions from the United Kingdom's anti-trafficking laws could successfully be incorporated into U.S. federal law such that protection and support services for trafficking victims would be considerably enhanced.