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## TRAUMA, COERCION, AND THE TOOLS OF TRAFFICKING EXPLOITATION: EXAMINING THE CONSEQUENCES FOR CHILDREN AND YOUTH IN THE JUSTICE SYSTEM

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**\*721 Introduction**

Over the past couple of decades, the United States' response to child and youth sex trafficking has simultaneously seen great legislative advancements while exposing serious gaps that continue to confound and frustrate efforts to truly protect children and youth from this crime.<sup>2</sup> With the enactment of the Trafficking Victims Protection Act (TVPA) in 2000<sup>3</sup> and the subsequent enactment of state human trafficking laws across the country,<sup>4</sup> these advancements have brought increased attention to the issue of child sex trafficking in particular. Yet, child sex trafficking victims<sup>5</sup> continue to face criminalization and barriers to needed services.<sup>6</sup> The consequences of these inadequate protections for minors also have wide reaching ramifications later in life; such consequences impact youth and adults who continue to experience the cycle of trafficking victimization and criminalization but with fewer protections from the harms of that cycle.<sup>7</sup> The reality is that the legislative progress of the past decades cannot be celebrated until it is evaluated against the backdrop of how it is impacting those it was intended to protect. An examination of how trafficking laws have been implemented and enforced demonstrates a core inconsistency with the central purpose of these laws--the protection of trafficking victims.<sup>8</sup> Since the failure to protect trafficking victims largely stems from the common and widespread criminalization of sex trafficking victims, and the particularly egregious impact this has on children and youth, this Article focuses \*722 specifically on the criminalization of sex trafficked children and youth for conduct committed as a result of their trafficking victimization by examining (I) the consequences of relying on a juvenile justice response to child sex trafficking victims, (II) the failed promise of diversion programs in responding to sex trafficked children and youth, (III) how inadequate non-criminalization laws fail to protect against criminalization of children and youth, (IV) the intertwined nature of sex trafficking victimization and criminalized conduct, and (V) how a trauma-informed lens can be applied to even the most complex challenges that arise in responding to the criminalization of trafficked children and youth.

*To highlight the issues identified, this Article contains graphic quotes and examples from real cases, which may be particularly distressful and triggering for some readers.*

**I. The Consequences of Utilizing Juvenile Justice-Based Responses for Serving Child and Youth Victims of Sex Trafficking**

Following the enactment of 2008 legislation in New York state, "safe harbor" became a term widely used and revered within the anti-trafficking field to denote an alternative, victim-centered response to child sex trafficking victims.<sup>9</sup> The New York legislation and systems-level change spurred a national movement to recognize children engaged in commercial sex as victims, not perpetrators, of a crime.<sup>10</sup> New York's 2008 Safe Harbour for Exploited Children law, however, validated the continued reliance on juvenile justice to serve survivors.<sup>11</sup> In many ways, the state's "safe harbor" process exemplifies the challenge of developing a truly protective response outside of punitive systems; despite acknowledging the inherent

victimization experienced by children engaged in commercial sex, the New York response is rooted in the juvenile justice system, allowing for an untraditional-diversion-response, although one still premised on addressing delinquent behavior.

Notwithstanding research demonstrating the ineffectiveness of a justice system response to survivors of sex trafficking,<sup>12</sup> this inadequate form of a “protective” \*723 response is not uncommon. In an attempt to shift away from arresting and prosecuting commercially sexually exploited minors for prostitution and other offenses related to their exploitation, a majority of states have passed legislation requiring alternative responses to child sex trafficking victims, albeit still within a punitive justice system, including the use of permissive or mandatory diversion programs, affirmative defenses, sentencing mitigation, or Child in Need of Supervision or Services (CHINS) processes.<sup>13</sup> The common, and flawed, denominator of such responses is the inherent element of punishment and potential for additional trauma. Despite acknowledging in statute that children engaged in commercial sex are victims of sex trafficking or commercial sexual exploitation,<sup>14</sup> justice system-based alternative responses contradict the acknowledgment of victimization. Importantly, the end goal in most states has shifted away from offender accountability for child victims; however, the use of juvenile or criminal justice systems to accomplish the new goals of safety and service provision often produce the same traumatizing results for child and youth survivors.

#### *A. Harms of Punitive Response to Sex Trafficking Victimization*

Any system response that permits arrest, detention, or court-ordered conditions and services for minor victims, even if well intentioned, contradicts both the acknowledgement of victimization and promising practices.<sup>15</sup> The criminalization of survivors produces trauma, impedes healing, and perpetuates injustice; it also undermines the goals of establishing an alternative response. The development of the juvenile justice system accounted for one of the original paradigm shifts in the treatment of youth engaged in law-offending conduct.<sup>16</sup> Intended to foster rehabilitation, rather than merely punish behavior and choice, the development of juvenile court systems was a formal acknowledgment of the intrinsic differences between children and adults and, as such, the need for age-appropriate accountability measures.<sup>17</sup> Juvenile justice, however, was developed for and remains a system for offender accountability, not victim assistance.<sup>18</sup> Concerningly, the realities of the juvenile justice system as a whole today are deeply disconnected from the ideologies and principles on which they were developed in the late nineteenth century.<sup>19</sup> In fact, \*724 in pursuit of crime reduction and community safety, the very tenets of rehabilitation and access to services have become secondary in some states and jurisdictions.<sup>20</sup>

Applying a punitive response to crime victimization and trauma-induced behaviors is deeply unjust, ineffective, and uneconomical. While this is true for children and youth, generally, whose law-offending conduct often reflects historical, chronic, or acute trauma or circumstances,<sup>21</sup> it is particularly apparent for child and youth survivors of sex trafficking whose conduct does not reflect choice or autonomy. The continued unjust criminalization of child sex trafficking victims underscores narrow or vaguely defined “safe harbor” or non-criminalization protections,<sup>22</sup> deep seeded biases, misunderstandings, and cultural tendencies that tolerate the shaming of sexual and gender-based violence victims, including survivors of sex trafficking.<sup>23</sup> The phenomenon of blaming victims of sexual violence is not new, but it is increasingly documented;<sup>24</sup> occurrences of judges questioning victimization or undermining resulting harm, including suggesting that an assault did not occur because “if someone doesn't want to have sexual intercourse, the body shuts down,”<sup>25</sup> or reducing the sentence of a 67-year-old man who purchased sex and assaulted two young girls on the grounds that the thirteen and fourteen year old girls “were more an aggressor than a participant in the criminal conduct,”<sup>26</sup> highlight the challenges of identifying victimization and advancing truly protective, survivor-centered responses. The continued criminalization of survivors of sex trafficking for offenses inherent or connected to their victimization is a formal \*725 extension of victim-blaming, rooted in the misguided belief that survivors are partially responsible for their own victimization.<sup>27</sup> This ethical and systems-level failure not only delays identification and the provision of appropriate care and services, it mitigates responsibility for buyers, traffickers, and facilitators and diminishes the harm experienced by survivors.<sup>28</sup>

Beyond being unjust, utilizing the juvenile or criminal justice system to respond to child and youth survivors of sex trafficking is ineffective and conflicts with established promising practices.<sup>29</sup> Ultimately, our responses to child and youth survivors should be guided by common goals of harm prevention, healing, wellness and self-determination; relying on juvenile and criminal justice-based responses fails to contribute to or accomplish these goals. By contrast, such systems were designed to hold accountable and rehabilitate offenders, not protect and deliver services to victims.<sup>30</sup> It is unsurprising,

therefore, that depending on justice systems to serve victims results in additional trauma and relatively high rates of recidivism.<sup>31</sup>

Utilizing the juvenile justice system to secure safety and services for child and youth survivors of sex trafficking may band-aid immediate concerns and challenges but ultimately creates barriers to success and healing. Even alternative, service-oriented justice avenues, including formal diversion and CHINS programs, include punitive or coercive measures that are not only incompatible with sexual violence-induced trauma, but result in re-victimization and compounded trauma.<sup>32</sup> \*726 Arrest, court-mandated services, restrictive conditions, surveillance, and total compliance requirements are perhaps appropriate and helpful when applied to cases involving law offenders. Yet, when applied to survivors of sex trafficking, they perpetuate many of the same dynamics of exploitation and fail to account for the impact of trauma, often positioning survivors to face additional consequences or charges.<sup>33</sup>

### ***B. System Involvement and Increased Recidivism Rates***

The harmful and cyclical consequences of utilizing a punitive system to serve child victims of sex trafficking cannot be overstated.<sup>34</sup> The mechanisms employed to connect children and youth to the system, including arrest, shackling,<sup>35</sup> strip searches,<sup>36</sup> detention,<sup>37</sup> or unsupported detox,<sup>38</sup> are traumatizing experiences for any child, but particularly for survivors of sexual violence living with the effects and symptoms of trauma.<sup>39</sup> In fact, the arrest and detention process alone can have serious mental and physical health impacts on youth, often triggering post-traumatic stress responses.<sup>40</sup> Additionally, once inside the justice system, child and youth survivors are subjected to processes and conditions that often exacerbate, rather than address, trauma. Depending on the underlying charge(s) and circumstances, the child is either held in detention, which increases the risk of revictimization and additional trauma,<sup>41</sup> or is released back into the community, often accompanied by heightened symptoms \*727 of trauma.<sup>42</sup> Efforts to cope with the underlying and pre-existing trauma and newly acquired trauma often results in child and youth survivors resorting to behaviors, activities, or conduct that violate release conditions, detention policies, or the law, resulting in additional arrests and charges.<sup>43</sup> The accrual of charges and traumatic experiences further entrenches the child or youth in a punitive cycle that is ultimately punishing trauma and mental health challenges.<sup>44</sup> In fact, the most common crimes for which justice-involved girls, including survivors of sex trafficking, are arrested for are symptoms of and strategies to cope with trauma, including running from placement or home, substance use, and truancy.<sup>45</sup>

The Coalition Against Sex Trafficking (CAST) summarizes the ineffectiveness of a punitive response to survivors of sex trafficking, stating,

In a report by the Urban Institute and Streetwise and Safe, published in *The Guardian*, researchers found that “youth in the sex trades are caught in a vicious cycle of arrest and court involvement.” Frequent arrests “create instability and perpetuate youths’ need to engage in survival sex as a result of far-reaching collateral consequences.” The arrest-based approach is “part of an escalating sequence of cause and effect: instability in home and school, inability to pay fines and surcharges, active warrants, incarceration, disqualification from public benefits, deportation and consequences for future employment.” In other words, arrests breed more arrests.<sup>46</sup>

### ***C. Juvenile Justice as an Impediment to Services***

Utilizing the juvenile justice system to provide safety and services, in fact, impedes access to critical and comprehensive services and long-term psychological, physical, and emotional safety.<sup>47</sup> Rights4Girls--formerly Human Rights Project for Girls--Georgetown Law Center on Poverty and Inequality, and Ms. Foundation for Women noted this paradox in the 2015 “Sexual Abuse to Pipeline” report,

**\*728** Although some defend the practice of detaining victimized girls on the grounds that the system can provide protection or needed services, that justification cannot counterbalance the significant psychological and physical harms created by commitment. In fact, access to adequate services, if any, is severely limited; worse, the system's routine processes can serve to re-traumatize girls; and, worse still, some report they experience new incidents of abuse while inside.<sup>48</sup>

While well-intentioned criminal justice stakeholders<sup>49</sup> may encourage system involvement to secure services, juvenile justice systems and facilities not only lack resources and services that are sufficient and specific to the needs of child sex trafficking victims, but in fact, they lack the minimum mental and physical health care necessary for the general population of system-involved children and youth.<sup>50</sup> Consequently, child and youth survivors are forced into a system that is not only traumatizing in nature, but unprepared to meet the complex needs of those victimized by commercial sexual exploitation. Simultaneously, the process of forcing children and youth into justice systems can limit or preclude their engagement in community-based activities and opportunities that positively impact a child's trajectory. In fact, research demonstrates that the experience of a single arrest results in the increased likelihood of not completing high school, “not as a result of poor student engagement, but as a result of the school's reaction to the arrest.”<sup>51</sup> Barriers to educational attainment create widespread ripple effects, impacting a child's long-term physical, emotional, and psychological health outcomes.<sup>52</sup> Regardless of the underlying motivation for arrest and detention—including safety and connection to services—it is clear that the consequences are wide reaching and detrimental to the success and wellbeing of survivors.

#### ***D. Economics of a Juvenile Justice Response to Child and Youth Survivors***

Beyond being unjust and ineffective,<sup>53</sup> the utilization of juvenile and criminal justice systems to protect and provide services to child and youth survivors is **\*729** extraordinarily expensive and uneconomical.<sup>54</sup> In fact, the use of justice systems to connect or force children into services is far more expensive than the provision of services themselves.<sup>55</sup> Concerningly, an estimated \$100,000,000 is spent annually to detain and hold youth who are not awaiting juvenile or criminal proceedings, but are simply waiting for access to community mental health services.<sup>56</sup> Relatedly, in responding to alleged juvenile offenders, the juvenile justice processes themselves—often encompassing arrest, detention, investigation, adjudication, sentencing, and probation—come with an enormous price tag;<sup>57</sup> further, this does not include the cost of “lost earnings and tax revenue, additional Medicaid and Medicare [expenditures]” for system-involved youth and the treatment for additional trauma accrued due to system involvement.<sup>58</sup> Combined with high rates of recidivism and limited access to services within the system,<sup>59</sup> utilizing juvenile and criminal justice processes to secure safety and services yields a concerningly low return on the enormous investment. In addition to being a low-return investment, the expenditures associated with unnecessary and ineffective juvenile justice involvement impacts the availability of funding for vital and ongoing services, support, and care for survivors.<sup>60</sup> Contrary to a traditional juvenile justice-based response, investing in the upfront provision of high-quality, specialized services and care outside of punitive systems prevents cyclical system involvement and dependency<sup>61</sup> and effectively increases safety, wellness, and success for child and youth survivors.<sup>62</sup>

#### **\*730 II. When “Safe Harbor” Isn't Safe: The Failed Promise of Diversion Processes and Programs**

Despite the increasingly established harmful consequences of developing “safe harbor” responses within punitive systems,<sup>63</sup> the relatively recent seismic shift toward alternative responses to child and youth survivors of trafficking has resulted in the development of sex trafficking-specific diversion processes *within* the juvenile justice system.<sup>64</sup> Since the development of the first juvenile justice diversion response for child victims of sex trafficking in New York, several states have developed similar statutory mechanisms for directing child and youth survivors away from traditional delinquency processes and toward services; relatedly, other jurisdictions have created similar processes outside of legislation.<sup>65</sup> Like other “safe harbor” responses, diversion processes and requirements vary significantly; some are limited to underlying charges of prostitution,<sup>66</sup> others demand complete compliance with rigid program requirements,<sup>67</sup> including the absence of substance use despite underlying dependencies,<sup>68</sup> while others require the minor to self-identify as a child sex trafficking victim.<sup>69</sup> Consequently,

varying eligibility or compliance requirements often limit the availability to child and youth survivors who fit within the unattainable “perfect victim”<sup>70</sup> construct.

**\*731 A. Types of Diversion Processes: Formal Versus Informal Diversion**

Two diversion processes exist to direct alleged offenders away from the justice system: formal and informal diversion.<sup>71</sup> While informal diversion allows for an alternative response in the absence of an arrest or charge, formal diversion is available only after the offender, or in this case, the child or youth victim, has been arrested, detained, charged, and potentially adjudicated.<sup>72</sup> While informal diversion is increasingly regarded as a promising and effective practice,<sup>73</sup> formal diversion programs are the most commonly utilized diversion process in the context of responses to child and youth survivors.<sup>74</sup> As such, in order for a child or youth survivor to access services through such programs, they must first be arrested, charged, identified, and, in some cases, initiate the diversion process themselves.<sup>75</sup>

**B. Threshold Barrier to Relief: Requiring a Finding of Victimization**

Child sex trafficking-specific diversion processes are limited in nature, as eligibility hinges on an element that is often challenging, if not nearly impossible in some cases, to establish.<sup>76</sup> Many processes and programs designed to provide an alternative, juvenile justice-based response to commercially sexually exploited minors require a formal finding or allegation of sex trafficking victimization.<sup>77</sup> While such a requirement may appear as a simple and commonsense prerequisite to participation, it is often a problematic gatekeeper. Most stakeholders responsible for the maintenance and operation of such diversion programs have a general understanding of sex trafficking; however, many do not hold an expertise in trauma, trauma-behaviors, or child sex trafficking victimization itself, let alone the interconnectedness of all three.<sup>78</sup> Consequently, child sex trafficking victims are \*732 regularly misidentified, resulting in a denial of program eligibility and return to a traditional juvenile or criminal justice track.<sup>79</sup>

Conversely, several child sex trafficking-specific diversion processes are available to minors *suspected* of experiencing sex trafficking victimization, bypassing the requirement of a formal finding. Texas's child sex trafficking-specific diversion process, for example, is available to a minor under seventeen years of age who “is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision and *may* be a victim of conduct that constitutes [Trafficking of Persons].”<sup>80</sup> Ohio's “safe harbor” diversion process is available to a minor charged with an offense connected to the child's trafficking *victimization*, regardless of whether the court establishes a connection to the child's trafficking *offender*, recognizing that engagement in commercial sex is fundamentally connected to sex trafficking victimization.<sup>81</sup>

In addition to requiring a court's formal finding of victimization, many processes and programs require the minor themselves to self-identify and acknowledge their experience of sex trafficking victimization, a mandate that is not only challenging for many child victims to achieve but can result in re-traumatization.<sup>82</sup> In fact, it is well-established among anti-sex trafficking experts, and within the field generally, that a majority of sex trafficking victims do not self-identify, and the attempt to circumvent what should be a trauma-informed and supportive process to elicit self-identification is deeply harmful to the survivor's recovery.<sup>83</sup> In issuing guidance to state and local child welfare agencies, the federal Children's Bureau \*733 acknowledged this reality, stating that “[t]he dynamics of exploitation through sex trafficking coupled with the often experienced history of sexual abuse renders most survivors of child sex trafficking reluctant to or unable to self-identify as victims.”<sup>84</sup>

It is unsurprising that such requirements result in commercially sexually exploited minors being misidentified and, resultantly, traditional delinquency or criminal proceedings commenced. The failure to identify sex trafficking victimization, despite clear evidence to support a finding, or to discount its connection to the alleged criminal conduct,<sup>85</sup> has resulted in horrific outcomes and consequences for commercially sexually exploited minors charged with offenses related to their victimization.<sup>86</sup>

### *C. Limiting Diversion to Certain Offenses Limits Protection for Survivors*

Diversion as an alternative response is not necessarily available to all identified child sex trafficking victims as these processes and programs are commonly limited to minor victims charged with certain low-level offenses, typically prostitution or prostitution-related offenses.<sup>87</sup> This limitation not only conflates sex trafficking victimization and prostitution, confirming the unjust perception that minors can be prostitution offenders, it renders the alternative track irrelevant for a significant number of child victims. The increased understanding of sex trafficking victimization among juvenile and criminal justice stakeholders has positively resulted in a notable reduction in the number of minors who are arrested and charged with prostitution, even in states with laws *allowing* minors to be prosecuted for such offenses.<sup>88</sup> This shift, however, has not necessarily resulted in fewer child sex trafficking victims entering punitive systems; since child sex trafficking victims \*734 often enter the juvenile justice system on other charges,<sup>89</sup> diversion programs premised on prostitution charges are increasingly unavailable to a significant number of child victims. For example, in an attempt to develop “safe harbor” protections for commercially sexually exploited minors,<sup>90</sup> Louisiana enacted legislation to divert exploited minors away from a traditional juvenile response track and prevent unjust delinquency adjudications.<sup>91</sup> This process, however, is available solely to child sex trafficking victims who are charged with prostitution or prostitution-related offenses, including solicitation and prostitution by massage.<sup>92</sup>

Importantly, some states have designed responses that recognize the impact of sex trafficking victimization on other juvenile or criminal conduct, broadening eligibility requirements to minor victims who enter the system on a variety of charges.<sup>93</sup> In such processes, eligibility does not necessarily hinge on the offense or resulting charge, but on the identification of its connectivity to sex trafficking victimization. For example, in seeking an alternative, service-oriented response, Ohio created one of the first statutorily protected diversion processes for child sex trafficking victims charged with prostitution or with any offense connected to their sex trafficking victimization.<sup>94</sup>

### *D. Unrealistic Expectations: How Mandatory Program Requirements Conflict with Trauma-Informed Practices*

While diversion processes by design are intended to insulate child and youth sex trafficking victims from delinquency adjudications or criminal convictions, this protection is contingent upon the successful completion of program requirements and, ultimately, the court's satisfaction. Problematically, such requirements are often based on the discretion and determination of the court, regardless of whether the presiding judge or magistrate has a comprehensive understanding of sex trafficking victimization or trauma-informed, specialized service responses. Additionally, diversion requirements are commonly incompatible with the realities of trauma and trafficking victimization, resulting in child and youth survivors being unable to complete requirements and terms to the satisfaction of the court.

For example, the Ohio Safe Harbor diversion process allows the court to “make any orders regarding placement, services, supervision, diversion actions, and conditions of abeyance ... that the court considers appropriate and in the best interest of the child.”<sup>95</sup> In such cases, “[i]f the juvenile fails to complete the diversion \*735 program to the court's satisfaction, the court will proceed on the complaint.”<sup>96</sup> In such cases, the court has the discretion to prohibit a child victim from using substances, failing to recognize that substance use is often a reflection of efforts to cope with trauma and that recovery occurs on a continuum; similarly, requirements to attend therapy, school, or work without absence may fail to account for unreliable transportation or environments that trigger a child's trauma. Other mandates, such as abstinence from “risky behaviors,” are so arbitrary or subjective in nature that the risk of unsuccessful completion is especially high for child survivors. Unsurprisingly, when program mandates are rigid and disconnected from the realities of sex trafficking victimization, outcomes are unpromising. In a recent assessment of one Ohio Safe Harbor docket, researchers concluded that “relatively few youth meet [the court's] standard, leading to a low successful graduation rate.”<sup>97</sup>

## **III. How Inadequate Non-Criminalization Laws Also Fail to Protect Child and Youth Survivors from Criminalization**

### *A. Progress and Remaining Gaps in the Development of State Non-Criminalization Laws*

Contrary to the TVPA's decree that trafficking victims not be criminalized as a result of their victimization,<sup>98</sup> survivors continue to be charged with crimes related to their trafficking. It took almost a decade after the TVPA's enactment before states began addressing the conflict between the federal sex trafficking law, which identifies all commercially sexually exploited children as *victims of trafficking*,<sup>99</sup> and state prostitution laws, almost all of which permitted these same children to be *charged with prostitution*.<sup>100</sup> While some state "safe harbor" laws attempted to *mitigate* this conflict with diversionary programs through the juvenile justice system,<sup>101</sup> other states more fully addressed the conflict by enacting \*736 "non-criminalization" laws that actually *remove* criminal liability for minors for prostitution and, in some cases, for other offenses committed pursuant to their victimization.<sup>102</sup>

In the ensuing years, states made considerable progress in shifting their laws to protect, rather than punish, children who are suspected of engaging in commercial sex.<sup>103</sup> To date, thirty-one states and the District of Columbia have enacted laws to remove criminal liability for child sex trafficking victims for prostitution.<sup>104</sup> Despite the immense importance of these legal changes, however, the degree of improvement in how some state laws have actually changed the response to exploited children and youth still lags behind the protective purpose of the legislation--and notably, only three states have extended these protections to youth over the age of eighteen.<sup>105</sup>

States have adopted varying approaches to prevent the criminalization of child sex trafficking victims, creating disparate outcomes for survivors across the nation.<sup>106</sup> The following discussion examines some of the areas where state non-criminalization laws are still failing to adequately address the needs of trafficked children and youth and protect them from the harms of criminalization.

## **i. Limiting Protections by Offense**

### ***1. Prostitution and Related Offenses***

Thirty-one states and the District of Columbia "prohibit the criminalization of child sex trafficking victims for prostitution."<sup>107</sup> This stands in stark contrast to just a decade ago when only five states provided this same protection to child trafficking victims despite every state having a statutory rape law that recognized a minor's inability to consent to sex.<sup>108</sup> This failure "to recognize minors as victims of statutory \*737 rape once the conduct [had] been commercialized," reflects a misguided and destructive belief that "the exchange of money seemingly sanitizes the underlying crime of child rape by creating the perception that these victims [were] willing participants in their own exploitation."<sup>109</sup> As another author explained,

On the state level, this drive to punish minors stems in part from an unresolved legal debate about whether minors consent to commercial sex and therefore are legally culpable for prostitution .... On the one hand, statutory rape laws have presumed that, legally, minors cannot consent to sex .... On the other hand, state prostitution laws contradict the policy underlying age-of-consent laws, namely that minors cannot legally consent. State juvenile justice laws almost always have treated minors who engage in commercial sex as criminals instead of victims.<sup>110</sup>

Over the years, increased understanding of the interplay between prostitution and consent laws has prompted wide advancements in protecting commercially sexually exploited children and youth from being charged as prostitution offenders. Limiting non-criminalization<sup>111</sup> protections to prostitution offenses, however, fails to protect victims from being charged with a wide array of offenses that child sex trafficking victims may commit as a result of their trafficking victimization.<sup>112</sup>

### ***2. Masking Charges and Status Offenses***

Although non-criminalization laws are intended to prevent commercially sexually exploited children from being criminalized, many states limit protection to victims who violate the prostitution law.<sup>113</sup> This narrow protection can lead to misidentification and misperception of victimhood when children violate other laws as a result of their trafficking victimization<sup>114</sup> and also fails to protect against the use \*738 of “masking charges.”<sup>115</sup> Typically, masking charges will be brought based on an actual or perceived “lack of viable options in removing victims from exploitive situations,” breaking the trauma-bond between victim and trafficker, or “connecting survivors to [needed] services.”<sup>116</sup> Despite the protective intent of these arrests, they reflect the underlying belief that children who engage in commercial sex require some form of coercive intervention in order to be kept safe.<sup>117</sup> This lingering misperception may be conscious or unconscious but is nevertheless grounded in the notion that the child is “on the wrong path” and needs correction to prevent commission of other offenses. This protectionist rationale often applauds the use of masking charges as being for the child’s own good, safeguarding children from real or perceived dangers as well as bad reputations.<sup>118</sup>

Status offenses--law violations that only apply to persons under a specified age, including running away, curfew violations, and truancy<sup>119</sup>--are common forms of masking charges brought against child sex trafficking victims.<sup>120</sup> Rather than defining such conduct as an offense, however, such behavior should serve as a notice that the child needs support and services as it is oftentimes reflective of underlying issues that should be addressed through protective responses, including risk and safety assessments, which consider the following:

*Why is the child running away? What are they running from?*

*Why is the child violating curfew? Do they have a safe place to go?*

*Why is the child absent from school? When in attendance, are there indicators of exploitation?*

Investing the time to ask the right questions may aid victim identification efforts and avoid unnecessary and inappropriate punitive responses including the utilization of Child in Need of Services/Supervision (CHINS) processes to service exploited children. Despite what the name purports CHINS processes are oftentimes juvenile justice responses, in that the child may be arrested, detained, and brought before a \*739 juvenile court judge for a preliminary hearing or trial.<sup>121</sup> “Ultimately, the major distinctions that delineate CHINS trials from their delinquency equivalents are the dispositional options available to the judge, but this distinction in punishment does little to overcome the overwhelming similarities in form, procedure, location, burden, due process rights, stigmatization, and emotional impact.”<sup>122</sup>

Regardless of the intended purpose behind levying masking charges, including status offenses, against commercially sexually exploited children and youth, their use ignores the re-traumatizing consequences of justice system involvement and the role of specialized service responses in connecting child sex trafficking victims with the resources necessary to promote healing and pursue justice.<sup>123</sup> Accordingly, non-criminalization laws that fail to address the use of masking charges and status offenses to continue arresting and charging trafficked children will fall short of the intended goal of shifting away from penalizing child trafficking victims for their own victimization.

### **3. Non-violent Felonies**

Commercially sexually exploited children and youth may be arrested and prosecuted for a broad range of “crimes that are seemingly unrelated to [their] exploitation but in fact are intimately tied to it,”<sup>124</sup> resulting in convictions or adjudications which have a profound and devastating impact on survivors seeking to rebuild their lives post-exploitation.<sup>125</sup> Accordingly, non-criminalization laws that limit protections to prostitution offenses nonetheless leave child sex trafficking victims highly vulnerable to punitive responses and collateral consequences. Notably, only eighteen states extend non-criminalization

protections to offenses beyond the prostitution law, and several of those states only apply to related activity such as loitering or solicitation,<sup>126</sup> meaning the majority of non-criminalization laws fail to account for the array of non-violent offenses trafficking victims may commit.

Of the eighteen states that extend non-criminalization beyond prostitution, “[t]he diversity of offenses that are included ... seems to reflect states’ varying policy positions on what can be attributed to trafficking victimization as well as the different offenses that minor victims are most susceptible to committing and, therefore, face \*740 punishment for in each particular state.”<sup>127</sup> Mississippi, for example, extends protections to child sex trafficking victims who commit promoting prostitution offenses,<sup>128</sup> while Nevada passed legislation protecting trafficking victims accused of obstructing a public officer, unlawful trespass, unlawful gaming or employment in gaming, curfew violations, jaywalking, loitering, and solicitation.<sup>129</sup> North Dakota’s non-criminalization law extends to the commission of misdemeanor forgery and theft offenses, insufficient funds or credit offenses, manufacture or possession of controlled or counterfeit substances, and drug paraphernalia offenses.<sup>130</sup> In limited cases, some states broadly prohibit the criminalization of child sex trafficking victims for all non-violent offenses.<sup>131</sup>

Broad non-criminalization laws such as these account for the fact that “[t]rafficking victimization and the resulting trauma response can uniquely impact a victim’s susceptibility to coercion, not only in the context of being coerced into commercial sex, but also in the context of being coerced to commit other crimes,”<sup>132</sup> a common practice that insulates traffickers from criminal liability, results in lower penalties and less disruption to the trafficking enterprise based on the child’s age and dispensability, and serves as a form of control over victims who, having committed a crime, are less likely to seek help for fear of being punished.<sup>133</sup> As such, “[u]nderstanding the nature and power of the coercion that traffickers exert over victims to cause them to engage in [illegal] conduct is fundamentally important ....”<sup>134</sup>

## ii. Hinging on Victim Identification Rather Than Age

Nine states restrict non-criminalization protections to those meeting the legal definition of “child sex trafficking victim,” creating identification and response issues at the state level based on varying definitions.<sup>135</sup> One of the most problematic barriers to identification is third party control, a statutory scheme requiring trafficker involvement:

This means if a buyer directly pays a minor or offers food or shelter in return for sex acts, then this child may not be identified as a victim. Alternatively, even when a trafficker is involved, if the minor does not identify the trafficker, the exploitation will not be identified as an instance of sex trafficking. This is problematic since victims often deny the extent \*741 of their own exploitation and often experience trauma-bonding making it difficult or impossible for children to disclose their trafficker. Instead of being identified and provided protections as a trafficking victim, the child could be prosecuted for prostitution in [those] jurisdictions.<sup>136</sup>

Narrowing identification in this way hinders survivors’ access to services and other remedies.<sup>137</sup> Further, hinging legal protection on a finding of victimization places an added burden on trafficked children who may be unable or unwilling to disclose intimate details about their exploitation to provide proof of victimization--if they are ready or willing to self-identify and/or testify at all.<sup>138</sup> Finally, third party control requirements are problematic in practice as well because victims may “still face arrest, detention, and a potential delinquency hearing before victimization is established.”<sup>139</sup>

Accordingly, crafting clear definitions of “child sex trafficking victim”-- absent of burdensome barriers created by third party control requirements--will ultimately allow states to address the more complex issues surrounding criminalization of offenses resulting from trafficking and avoid disparate outcomes for survivors. Therefore, to accomplish their intended protective purposes, non-criminalization protections should hinge on age, rather than a finding of victimization, to provide the greatest protections to child and youth survivors.

### *1. Breaking the Cycle of Exploitation through Trauma Informed Services*

Access to trauma-informed services is vital for breaking the cycle of exploitation;<sup>140</sup> however, critical gaps in state non-criminalization laws prevent them from accomplishing their intended purpose. As noted above, thirty-one states and the District of Columbia prevent the criminalization of child sex trafficking victims for §742 prostitution.<sup>141</sup> Yet, only sixteen non-criminalization states and the District of Columbia provide for a specialized service response,<sup>142</sup> and only eleven non-criminalization states provide for a general service response.<sup>143</sup> Four states fail to provide for service responses, referrals to child-serving agencies, or protective custody.<sup>144</sup> Problematically, even states that provide for service responses may do so through punitive avenues, which continue to burden survivors with unjust program requirements and re-traumatizing interactions with a justice system that “continues to victimize, rather than serve, them.”<sup>145</sup> Instead, non-punitive approaches allow exploited children and youth to participate in personalized service plans designed to build trust, confidence, empowerment, and healing on the survivor's terms and timeline.<sup>146</sup>

## **IV. The Intertwined Relationship of Trafficking Victimization and Criminalization and the Resulting Harm to Trafficked Children and Youth**

### *A. Criminalization of Survivors for Substance Use, Dependencies and Trauma Responses*

When criminal and juvenile justice system stakeholders have a narrow or limited understanding of the impact and manifestations of sex trafficking trauma, even the clearest of non-criminalization laws will fail to protect survivors of trafficking from facing criminal accountability for their own victimization. Survivors of commercial sexual exploitation in particular often face the double injustice paradox; traffickers and buyers exploit previously developed trauma or substance use dependency or provide illegal substances to obtain compliance, maintain control, and numb the emotional, psychological, and physical pain of exploitation, which subsequently results in the criminal justice system doling out punishment for trauma behaviors, substance use disorders, and mental health illnesses.<sup>147</sup> This pattern of criminalizing the symptoms and band-aids of trauma is regarded as the “sexual abuse to prison pipeline,”<sup>148</sup> appropriately depicting the cycle of misidentification and the resulting unjust, trajectory-altering response provided. Often, child-serving and criminal justice systems are quick to identify a §743 trauma-induced behavior rather than the traumatic experience itself, resulting in charges that criminalize the survivor's vulnerabilities, abuse, and victimization.

### *B. Existence of Substance Use and Related Dependencies*

A nuanced comprehension of the vulnerabilities that precede and exist within exploitation is critical for understanding a survivor's behaviors, choices, and obstacles. In relation to substance use and dependency, specifically, research demonstrates that survivors of exploitation are disproportionately impacted by substance use and related disorders prior to and concurrent to trafficking victimization.<sup>149</sup> Illicit substances have a significant impact on sex trafficking victimization and system responses;<sup>150</sup> pre-existing substance use or dependency can operate as a vulnerability factor to trafficking, traffickers may introduce, create, and subsequently use dependency to maintain compliance, or a victim's dependency on or use of substances may prevent accessing off-ramp opportunities or result in an unjust criminal justice response.<sup>151</sup>

### *C. The Criminalization of Substance Use and Dependencies*

Survivors of sex trafficking are regularly and unjustly criminalized for offenses that are intrinsic or related to their victimization, including the use, possession, or distribution of illicit substances. Specifically, a national survey of survivors in 2015 revealed that 40% of respondents had been arrested for drug possession while almost 20% had previously been arrested on charges related to drug distribution.<sup>152</sup> In addition to the quantitative findings, several survivor participants provided detailed accounts of harmful and punitive responses related to substance use, possession, or distribution. One survivor noted, “I was never arrested for prostitution, but I experienced the full spectrum of stigma from the cops that knew me on the street

when I was homeless and addicted, trying to cope with complex PTSD after adolescent sexual abuse/assault, and after being trafficked to Japan ...”<sup>153</sup>

Another survivor participant outlined some of the ways her trafficking victimization led to engaging in criminal activity, stating, “[w]e may not only have prostitution charges as we are also used to facilitate drug trafficking and that leads to various other charges all related. My theft charges were for food and clothing \*744 during times I ran from [my] pimp in order to survive but went to jail.”<sup>154</sup> As states shift away from penalizing victims for violating prostitution laws, it is critical for stakeholders to contemplate the consequences of criminalizing conduct or activities that reflect circumstances, not choice. Substance use, distribution, possession, or dependency should all serve as red flags or, at a minimum, risk factors for sex trafficking victimization and result in increased prevention, identification, and service delivery, not unjust arrests, convictions, and sentences.

### **i. Traffickers' Facilitation and Exploitation of Substance Use and Dependency**

Traffickers utilize illicit substances in variety of ways to support their ultimate objective: profiting from the commercial sexual exploitation of another. In identifying vulnerability factors and opportunities for exploitation, traffickers often look for and prey on individuals with pre-existing substance use habits or dependencies, recognizing the possibility to leverage a dependency to obtain and maintain control over a victim.<sup>155</sup> In fact, both anecdotal reporting and successfully prosecuted cases demonstrate occurrences of traffickers recruiting victims directly from detox or substance use dependency treatment facilities.<sup>156</sup> Additionally, traffickers may lure in potential victims with both the promise and initial distribution of substances, often before the concept or expectation of engagement in commercial sex is introduced.<sup>157</sup> In such scenarios, once traffickers have either cultivated a dependency or become the victim's sole provider of substances, the trafficker may exploit such dependency, on both the substance and trafficker, to coerce victims into commercial sex to pay off a drug debt and/or to continue receiving substances.<sup>158</sup> \*745 While pre-existing substance use and dependency is common among victims of sex trafficking, some report the absence of substance use before their victimization; in such cases, traffickers intentionally cultivated substance dependencies to develop a dependence on and attachment to the trafficker, as well as to diminish the victim's ability to resist a trafficker's demands and acts of violence.<sup>159</sup>

While commonly used to lure and groom victims, traffickers also depend on substances to both coerce or force victims into commercial sex acts and to reward or punish victims for their submission or lack thereof.<sup>160</sup> Exploiting victims' dependencies and related fears of withdrawal,<sup>161</sup> traffickers often control the use of substances throughout the course of sex trafficking victimization to facilitate compliance with demands and monetary quotes.

In addition to operating as a vulnerability factor to and driver of exploitation, substance use and related dependencies often impact accessibility of exit-ramps, stakeholder responses, and services for survivors. In fact, it is believed that traffickers facilitate or force substance use to intentionally jeopardize the credibility of victims;<sup>162</sup> survivors who use or have a history of using substances often report that disclosures of trafficking victimization are put into question or diminished as a result of their substance use or dependency.<sup>163</sup> Survivors also report obstacles in accessing services that, if available, could provide safe exit opportunities, including housing, psycho-social and emotional care, and employment.<sup>164</sup>

### **ii. Buyers' Facilitation and Exploitation of Substance Use and Dependency**

While traffickers rely on illicit substances to groom, coerce, or force victims into commercial sex and trafficking, buyers rely on substance use and related dependencies to coerce or force victims to comply with violent and degrading sex acts.<sup>165</sup> In fact, research on demand demonstrates that a significant number of buyers \*746 acknowledge the role substances play in commercial sex and sex trafficking, either as the initial driving force or as consequence to the exploitation. Further, research on buyers' attitudes and perceptions of commercial sex and those involved not only reflect an awareness of substance use and dependency among victims, but a blatant disregard for the circumstances and consequences of their exploitation. Specifically, a study on buyers in Cook County, Illinois resulted in disturbing findings that demonstrated both apathy and intentional exploitation of the dependency.<sup>166</sup> The researchers found that a portion of buyers hold an awareness of victims' circumstances,

summarizing that “[s]ome men who post on the Illinois boards of the USA Sex Guide demonstrate awareness that many women are involved in prostitution because of various types of desperate circumstances, including poverty, drug addiction, inability to support children, and homelessness.”<sup>167</sup> In fact, their findings revealed that buyers utilizing chat boards openly discussed the role of substances and dependency in commercial sex. One buyer candidly discussed these factors, stating:

I put the \$100 on the table and she told me to make myself comfortable. I assumed at that time that \$100 would be in a drug dealer's pocket 10 minutes after I walked out the door ... Call me a pussy but I have rarely (2 or 3 times in my life) done a street worker as I think it is too risky for my scenario [sic]. So to be fair, I don't see a lot of the busted out crack hoes you street mongers do. C \*\*\*\*\* was nice and did put me at ease. But to be candid, she looked like she was addicted to crack or meth. Hey, she wouldn't be fucking me if she wasn't.<sup>168</sup>

Another buyer explicitly acknowledged the use of substances to coerce a victim into sex acts that she would not normally engage in, stating, “Try L\*\*\*\*\* at [strip club]. Hot small and dirty girl ... Used to fuck her when she was ‘retired’ (temporarily). Get her drunk and she will do almost anything, in of [sic] out of the club.”<sup>169</sup>

Recent cases of sex trafficking also highlight buyers' intentional use of illicit substances to lure and entice child victims into commercial sex. In one case, a buyer was under investigation for commercial sexual exploitation and child sexual assault at the time he was killed by one of the children he had lured with substances, including acid, and repeatedly abused.<sup>170</sup> In recounting one incident of abuse and coerced substance use, the child victim stated,

\*747 I had went into the house .... We were smoking, and he asked me if I wanted to drink any liquor. And then he had gave me this drug. I don't know what it's called. And after that, we started to watch movies .... And then, the drug, it made me feel weird or whatever .... He started to touch my leg and then I had jumped and tell him that I didn't want to do that .... I tried to get up, to get away from him but I had tripped, and I fell on the floor, and he had got on top of me ...<sup>171</sup>

As these survivor accounts and posts from buyer review boards demonstrate, buyers play a significant role in facilitating and exploiting survivors' substance use and related dependencies, resulting in both immediate harm and exacerbated vulnerabilities.

### **iii. Substance Use as a Coping Mechanism**

The consequences of experiencing continuous and often unavoidable violence cannot be underestimated. In addition to forced or coerced substance use, survivors also report using substances to cope with the violence and degradation they are subjected to by traffickers and buyers alike.<sup>172</sup> Victims of sex trafficking experience extensive psychological, physical, and emotional violence at the hands of exploiters; coupled with high rates of childhood abuse and trauma,<sup>173</sup> illicit substances often become the agent for psychological survival. Numerous studies support survivors' anecdotal accounts of violence; in fact, it is estimated that anywhere from two-thirds to 100% of persons impacted by commercial sex have experienced at least one form of violence.<sup>174</sup> Such high levels of violence, compounded with the violence that is inherent to sex trafficking victimization, results in many survivors turning to coping strategies, behaviors, and habits, including substance use, to survive their circumstances.<sup>175</sup>

### **iv. Criminalization of Trauma and Trauma Behaviors**

**\*748** Trauma is both an event, or series of events, and a lasting consequence of harm experienced or witnessed. Trauma, both as an event and consequence, often results in long-term challenges and negative physiological and psychological outcomes<sup>176</sup> for those impacted, including survivors of sex trafficking. In fact, research demonstrates that trauma can impact every aspect of a person's body and mind, manifesting in psycho-social disorders, physical diseases or disorders, and emotional challenges.<sup>177</sup> For victims of sex trafficking, trauma is unavoidable; the experiences of being groomed, commodified, abused, and dehumanized are traumatic; the physical, emotional, and sexual violence that an overwhelming majority of victims experience,<sup>178</sup> in addition to the violent acts of exploitation, serve to compound the trauma. Research also demonstrates a correlation between the length of trafficking and exploitation and heightened levels of Post-Traumatic Stress Disorder (PTSD), depression, and anxiety.<sup>179</sup> The experiences and consequences of such trauma or complex trauma are thought, by some, to be comparable to the characteristics and consequences of torture.<sup>180</sup> Survivors of sex trafficking also report disproportionately higher rates of historical traumatic experiences, including childhood sexual or physical abuse, sexual violence, or dating violence.<sup>181</sup> The consequence of complex trauma--"expos[ure] to multiple traumatic events"<sup>182</sup>--results in most survivors living with its extensive physical, physiological, and psychological effects.

The impact and outcomes of complex trauma vary widely; complex trauma can manifest in acute and chronic physical health conditions, mental health disorders and illnesses, behavioral challenges, or a combination of all.<sup>183</sup> Research specific to the experiences and outcomes of survivors of sex trafficking living with complex trauma has, however, revealed several common outcomes: a majority of survivors meet the **\*749** criteria for PTSD, experience multiple, co-occurring psychological and behavioral health challenges, and use substances to cope with the toxic stress and haunting trauma.<sup>184</sup> While crime victims, generally, have a "crisis reaction" to the victimization experienced, survivors of sex trafficking tend to display "unconventional" reactions, reflecting high levels of trauma-induced behaviors and illnesses, as well as an altered state of "equilibrium."<sup>185</sup> Specifically, survivors may cope with trauma and its consequences, even post-victimization, by running from home or placement, defying safety or service plans, fighting with peers or family, or resorting to activities that were once pivotal to their survival, including home burglaries, weapons possession, drug distribution or running, substance use, or shoplifting.<sup>186</sup>

A survivor's response to unaddressed trauma can manifest in behaviors, coping mechanisms, or activities that are commonly misidentified as delinquent or criminal conduct, resulting in justice system contact or involvement. The misidentification of trauma is especially apparent among survivors of color, and Black survivors in particular,<sup>187</sup> whose very existence is already deemed threatening, aggressive, or oversexualized by justice system stakeholders, with trauma behaviors confirming discriminatory and fabricated stereotypes.<sup>188</sup> While trauma behaviors have historically been used to justify a juvenile or criminal justice response, when viewed within the context of sex trafficking victimization and the survivor's lifetime of experiences, such behaviors can serve as red flags of exploitation and shape non-punitive, trauma-informed service responses.<sup>189</sup> For example, leaving home or placement may indicate that such placement is unsafe--physically, emotionally, or psychologically--for the survivor; similarly, seeming defiance with a service or safety plan may denote the absence of built in agency, autonomy, or decision-making power for the survivor. Likewise, survivors may continue using substances as they embark on the challenging work of addressing trauma and healing; alternatively, continued substance use may reflect an underlying and unaddressed dependency. When contextualized, unconventional behaviors and activities demand a quest to uncover and address traumatizing experiences and outcomes.

A juvenile or criminal justice response to trauma behaviors is not only unjust and ineffective, but also comparable to coercive tactics employed by trafficking **\*750** offenders, causing the survivor to be tethered to their exploiter or, in this case, the system. Traffickers cement control over a victim by exploiting vulnerabilities, substance use disorders, and mental health challenges. Similarly, juvenile and criminal justice systems obtain and maintain control over victims by criminalizing substance use, substance use dependency, trauma behaviors, and survival mechanisms. Like exploitation, juvenile and criminal justice involvement, especially when hinged on the punishment of trauma, is a cycle that is all but impossible to break; survivors are charged for behaviors or activities stemming from their trauma,<sup>190</sup> and their trauma prevents them from participating in court ordered treatment and conditions, ultimately resulting in additional charges.

In addition to operating as a revolving door into a system that is all but impossible to leave without addressing the underlying causes of involvement, the phenomenon of criminalizing trauma behaviors operates as an impediment to the provision of

critically needed treatment and care. While juvenile justice systems were originally designed to “rehabilitate” a child offender, very few are equipped to address complex trauma with comprehensive services, let alone to address a child's environment or the historical root causes of sexual or gendered violence.<sup>191</sup> Criminal justice systems, conversely, operate primarily from the premise of punishment and accountability, centering the response on criminal *offenders*, not crime victims.<sup>192</sup> As such, it is unsurprising that survivors of sex trafficking who are system involved are rarely identified as such or afforded responses that are appropriate to their victimization and resulting trauma.

## V. Where to Draw the Lines in Complex Cases--Exploring Responses in the Gray Areas of Victim-Offender Intersectionality

*Not every case is the same. Not everything that you see on the news is what it is ... not every sex trafficking case has the same elements and the same story. Everything is different and when you guys are working on these cases, are involved with all of these different girls and people, take time to get to know their story. Take time to understand the reasons and \*751 the elements that they were involved in. Take time. Don't just cross them off or just think of everything as black and white because it's not ....*<sup>193</sup>

The fact that the anti-trafficking field is grappling with complex issues in responding to child and youth sex trafficking, including victim-offender intersectionality,<sup>194</sup> reflects both the progress that has been made by the field as well as the hard work that lies ahead in developing truly trauma-informed responses to this crime.<sup>195</sup> Expanding protections from criminalization for both child *and youth* victims of sex trafficking to a broader range of offenses is essential to achieve trauma-informed responses to this crime,<sup>196</sup> and yet, it is precisely when we push the line beyond prostitution offenses and push protections beyond children to also protect youth that complex issues arise. These issues require balancing victims' rights with public safety while employing a victim-centered and trauma-informed lens to identify more appropriate approaches for addressing the intersection of trafficking victimization and criminal conduct.<sup>197</sup> When this intersection involves children and youth, additional factors must also be considered, such as stages of brain development,<sup>198</sup> how past victimization is identified and considered,<sup>199</sup> and which systems are involved in responding.<sup>200</sup> Not only are children being charged with \*752 prostitution<sup>201</sup> and status offenses as a result of their victimization, but in cases across the country children are facing serious charges, such as murder, sex trafficking, and other felony offenses, arising from conduct directly related to their trafficking victimization.<sup>202</sup>

Meanwhile, an issue that receives far less media attention is the fact that youth aged eighteen to twenty-five are particularly at risk of being pulled into sex trafficking investigations as offenders, rather than victims, and often face prosecution for trafficking conduct that was coerced by their trafficker.<sup>203</sup> Despite the *legal* transformation from child to adult at the age of eighteen in most states,<sup>204</sup> youth aged eighteen to twenty-five remain especially susceptible to sex trafficking victimization as their brain development continues during a highly vulnerable phase \*753 of their lives.<sup>205</sup> This is particularly true for the most marginalized youth,<sup>206</sup> such as those aging out of foster care who lose access to critical support systems<sup>207</sup> at the same time as they reach the age of majority, which is compounded by force, fraud, or coercion requirements under the trafficking law that restrict how their exploitation is identified.

In some cases, a youth survivor might be charged as a co-conspirator alongside their trafficker while minor victims are treated as non-offending victims in the case even though the minor victims were equally or more involved in recruiting other victims than the youth victim.<sup>208</sup> Since it would be contrary to a trauma-informed approach to suggest that the minor victims should also be charged in this scenario,<sup>209</sup> this raises some important questions. Should the same force, fraud or coercion requirement that applies to prosecution of sex trafficking involving victims aged eighteen and older be applied when identifying underlying victimization? Even if evidence of force, fraud, or coercion is not present, should we consider the fact that the youth survivor was originally trafficked as a child by the same trafficker who is alleged to be their co-conspirator? While there may be strategic reasons for using charges to coerce testimony when a victim-witness is unwilling to testify against their trafficker,<sup>210</sup> the trauma this causes, and the inherent injustice of charging a victim as a co-conspirator alongside

their exploiter, must be given adequate weight in order to align the prosecution with the intent and purpose of the trafficking law being enforced.

Coercion in the trafficking context can also take many forms--including, but not limited to, infliction of severe physical violence, threats of violence against victims or their families, inducement into drug dependency, and confiscation of \*754 documentation--all of which may compel victims to engage in unlawful behavior at their trafficker's behest.<sup>211</sup> Physical violence is not always involved, however. Subtle psychological manipulation may also induce victims to engage in criminal behavior:

[P]eople who have experienced trafficking often feel trauma bonds with their traffickers wherein they develop positive, loving or loyal feelings toward the very people who are hurting and exploiting them. Especially for individuals who have had past experiences of trauma, abuse or neglect, they may view the trafficker as the only person who has cared for them and loved them. Such a relationship can lead a victim to engage in criminal behavior out of loyalty or through emotional coercion from their trafficker.<sup>212</sup>

As such, victims may perceive “no alternative but to obey,” hoping to mitigate their own exploitation by engaging in the criminal conduct as ordered.<sup>213</sup>

Recognizing the impact of trauma and the nature of control exerted by traffickers over victims demands that we closely examine these cases, set aside the traditional black and white delineation of victim *or* offender,<sup>214</sup> and develop responses that work in the gray areas. It is critically important that the complexity of these cases not become a reason for limiting non-criminalization protections for victim-offenders.<sup>215</sup> Given the importance of working through the complexity of these issues, this section considers three types of factual scenarios that raise complex challenges for responding to victim-offender intersectionality and examines how a trauma-informed lens can be applied to those scenarios to work toward a more just response.

#### ***A. Trauma-Informed Considerations for Distinguishing Between Actual and Apparent Autonomy in Sex Trafficking Cases***

In examining cases where victim-offender intersectionality is involved to determine whether a victim-offender should be excused as not culpable for their actions due to duress or coercion,<sup>216</sup> the victim's culpability as an intentional and knowing criminal actor often hinges on the degree of autonomy the victim-offender had when engaging in the criminal conduct.<sup>217</sup> This analysis of the facts, however, \*755 can be dramatically skewed by the effects of trauma<sup>218</sup> experienced by the victim-offender as well the nature of the trafficker's control over the victim-offender, which might leave the impression of autonomy where there is actually complete control over the victim-offender.<sup>219</sup> This misperception by the survivor of their own autonomy is often a reflection of the trafficker's motive to put the trafficking survivor in the position of “taking the fall” for acts that were done on behalf of, and under the control of, the trafficker. Indeed, assigning trafficking activities in order to avoid culpability is often the reason that traffickers assign status within the trafficking enterprise.<sup>220</sup>

Status in this context must not be confused with actual autonomy. In fact, status may be bestowed on those who are most submissive and is often just another exercise of control.<sup>221</sup> This false sense of autonomy is perpetuated by some of the terms commonly used to describe trafficking victims who play this role for the trafficker, such as “bottom girl,”<sup>222</sup> which focuses on the supposed status of the victim-offender in the trafficking enterprise without consideration of the trauma and victimization that lies under the surface, the same trauma and victimization that are likely the motivating factors behind the victim-offender's conduct.

Autonomy often comes into question when the victim-offender is helping to run the trafficking “business” by recruiting other victims, posting ads, driving other victims to “dates,” or setting up dates.<sup>223</sup> All of these acts potentially violate the sex \*756

trafficking law,<sup>224</sup> but they must not be viewed in isolation, apart from the victim's circumstances, history, and vulnerabilities, the impact of trauma, or the trafficker's conduct.<sup>225</sup> This includes the circumstances that led to the child or youth being trafficked and vulnerabilities that existed before they were trafficked.

For example, consider a 15-year-old who, after being thrown out of their home, experiences homelessness and begins a relationship with a trafficker; in exchange for shelter and basic necessities, the trafficker requires the child to engage in commercial sex and turn over the profits. That child may not see their trafficking experience as exploitation, but instead as survival. When that 15-year-old meets another teen experiencing homelessness and offers to introduce them to their trafficker so they can have a place to stay too, is that 15-year-old acting with the intent to exploit? Consider another child victim who, after being trafficked from a very young age, recruits another child at the direction of their trafficker. Are they acting with the intent to harm, or has their exploitation become so normalized that they do not see the recruitment as a harmful act? In yet another scenario, an 18-year-old who has been trafficked since age fifteen recruits another victim, knowing their quota will be reduced as a result that their own commercial sexual exploitation may be lessened, or that they will avoid abuse when they fail to make their quota. Does that trafficked youth really see a choice to act otherwise, or are they just operating in survival mode? While these anecdotal examples do not reflect the full range of complexity that can arise in cases where trafficking victims recruit other victims, they can help illustrate how examining the circumstances of a victim-offender's trafficking experience, relationship with the trafficker, and past history, as well as intersectional factors,<sup>226</sup> can expose the intertwined nature of trafficking victimization and offending conduct and how that impacts culpability.

### ***B. Contextualizing Violence and the Criminal Intent of Trafficking Victims Who Commit Violent Crimes***

Violent acts committed by trafficking victims raise some of the most complex issues in responding to victim-offender intersectionality. Since the circumstances of these cases can vary dramatically, it would be unjust to draw a line at non-violent \*757 offenses, even though that approach is sometimes cited as the most appropriate solution for determining when to grant relief in these cases.<sup>227</sup> A more just approach may be achieved when the diversity of circumstances is addressed through a nuanced and case-specific approach, rather than drawing a bright line that excludes protections in all cases when trafficking victims are involved in violent offenses. In general, trafficking cases involving violence perpetrated by a trafficking victim can be divided into three categories that each require unique analysis and raise different questions for assessing criminal intent and/or liability as well as appropriate defenses: (1) acts of violence committed against an exploiter (e.g., trafficker or buyer), (2) violence that was committed by the trafficker but is imputed to the victim-offender as a co-conspirator, and (3) direct acts of violence committed by a victim-offender against other victims.

#### **i. When Acts of Violence are Committed Against the Trafficking Victim's Exploiter**

Over the past few years, there have been several cases that received media attention involving child sex trafficking victims who committed acts of violence against their trafficker or buyer. Some of these cases received media attention well over a decade after the child victim-offender had been prosecuted and sentenced,<sup>228</sup> while others received media attention at the outset of the case.<sup>229</sup> While some of the \*758 older cases were prosecuted at a time when states had not enacted a trafficking law<sup>230</sup> and at a time when the crime of human trafficking was largely misunderstood and often went unrecognized,<sup>231</sup> the cases charged in recent years are strikingly similar to the cases that concluded many years ago. The most notable similarity in the recent cases has been an unwillingness to acknowledge the trafficking victimization of the minor defendant despite the clarity that now exists in the state sex trafficking law. Another notable similarity in the cases is the lack of success that child trafficking victims have had in asserting affirmative defenses based on self-defense and related intimate partner violence-related defense theories. Considering the challenges that child victims face in asserting affirmative defenses, youth are even more likely to face hurdles in presenting similar defenses since their victimization is harder to legally establish under most state trafficking laws and federal law.<sup>232</sup> Further, cases involving youth generally do not receive the same degree of media attention as cases involving minors; typically, media attention for youth has focused on victims of child sex trafficking who became adults while serving sentences for acts they committed as a minor.<sup>233</sup>

#### **ii. When an Exploiter's Violence is Imputed to a Trafficking Survivor**

Cases involving violence committed by a trafficker or exploiter that is imputed to a child sex trafficking survivor because of alleged involvement or even mere presence at the crime scene have also received media attention recently,<sup>234</sup> reflecting a potential shift in how these cases are viewed. As with the first category, these cases \*759 involve child sex trafficking victims charged many years ago who are just now receiving media attention and more recent cases that are still making their way through the justice system. Again, the child victims faced similar challenges in asserting defenses based on their trafficking victimization and consequently face severe penalties, even capital murder, despite never having pulled the trigger or being involved in the violent act itself.<sup>235</sup> In addition to having to prove their own victimization, these survivors face the uphill battle of trying to prove how duress and coercion operate in the trafficking context--which is generally very difficult to prove<sup>236</sup>--and how this form of coercion impacts or precludes their involvement in the conspiracy.<sup>237</sup> Indeed, despite evidence of trafficking victimization (and despite these cases occurring years apart), these child sex trafficking victims have been put in the position of disproving that they were a willing participant rather than starting from the understanding that someone under the control of a trafficker is not in a position to *agree* to participate in the crime.

### iii. When Trafficking Victims Commit Acts of Violence Against Other Victims

The third and most challenging category is violence committed against other victims, particularly when this violence is perpetrated in the context of furthering or assisting in the sex trafficking of other victims.<sup>238</sup> This category raises the most difficult questions in determining an appropriate response because it requires a careful balancing of the non-offending victims' rights, public safety, and a trauma-informed understanding of the victim-offender's actions.<sup>239</sup> There also needs to be a close examination of the context in which the violent act occurred and what \*760 motivated the violent act. When a violent act occurs within the trafficking situation, this raises the threshold question of whether the violent act was coerced. Coercion, however, should be evaluated from the perspective of the individual, not a reasonable person standard.<sup>240</sup> This means that the violent act must be understood through a broader understanding of the victim-offender's circumstances, including the presence (or lack) of immediate control to past victimization and past trauma and other historical circumstances that could have impacted the victim-offender's susceptibility to coercion and whether the victim-offender actually perceived a choice under the circumstances in which the violent act occurred.<sup>241</sup> This highly individualized assessment is also necessary to understand when there is a nexus between the trafficking victimization and the coercion to commit the violent act.<sup>242</sup>

The nexus between the violent act and coercion resulting from trafficking victimization is also an important consideration for determining investigative and prosecutorial approaches that balance the victim-offender's rights as a crime victim with the rights of the non-offending victim. For example, if the violent act was not motivated by the trafficker's coercion, but instead by other external factors, such as interpersonal conflict, accountability for that act may be appropriate but should not be the basis for charging a victim-offender alongside their trafficker as a co-conspirator. Instead, the violent act can be redressed in a separate proceeding if it is appropriate for the victim-offender to be held accountable for a violent act they committed outside the trafficking context or without coercion.<sup>243</sup>

Due to these competing interests, affirmative defenses can be one appropriate avenue for seeking justice:

Just as traditional affirmative defenses allow criminal defendants to demonstrate that they lacked criminal intent to commit the crime, trafficking victims need an opportunity to demonstrate the nexus between criminal conduct and their trafficking victimization .... If successful, a sex-trafficking-specific affirmative defense would allow sex trafficking victims accused of engaging in criminal conduct as a result of their victimization to avoid unjust criminalization for acts they were coerced to \*761 commit. Importantly, a sex-trafficking specific affirmative defense can account for the actual dynamics of trafficking, the nature and extent of control exerted by sex traffickers, and the influence of trauma on the decision-making process and behavior of sex trafficking survivors.<sup>244</sup>

An affirmative defense that converts to a presumption of coercion once trafficking victimization is established provides greater protection to the survivor who has been charged with criminal conduct and reflects the immense barriers that trafficking victims face in asserting and establishing an affirmative defense. The rebuttable presumption still allows the

prosecution to make a meaningful inquiry into the nexus between the trafficking victimization and the unlawful act,<sup>245</sup> thereby ensuring both the victim of the offense and the trafficking victim-offender have access to justice.<sup>246</sup>

The availability of affirmative defenses may be all the more important in cases where trafficked children and youth are certified to stand trial as adults.<sup>247</sup> Under automatic certification statutes, children alleged to have committed certain offenses, including violent felonies such as murder, are statutorily precluded from facing delinquency proceedings and are, instead, automatically transferred into the criminal justice system.<sup>248</sup> Because child sex trafficking victims may commit violent felonies as a result of their victimization, affirmative defenses are particularly important to ensure their victimization is considered during the trial process.

Equally important is ensuring trafficked children and youth have access to both an affirmative defense *and* vacatur--and that assertion of one does not bar assertion of the other.<sup>249</sup> While an affirmative defense can provide relief at the commencement of the criminal justice process, this remedy must be utilized when a survivor has only recently been removed from their trafficking situation and most likely has not had trauma treatment. Without trauma treatment, survivors are more likely to view **\*762** themselves as willing participants despite having been coerced by their trafficker<sup>250</sup> Additionally, even if a survivor identifies as a victim of trafficking and is willing to cooperate in the criminal justice process, trauma can interfere with a survivor's ability to accurately recall and recount the circumstances of their victimization and/or involvement in criminal conduct.<sup>251</sup> Consequently, trafficking survivors may struggle to meet the threshold burden of demonstrating their trafficking victimization and may, nonetheless, face prosecution and conviction for offenses related to their trafficking victimization. Accordingly, survivors need both remedies: if they are unsuccessful in avoiding prosecution under an affirmative defense, they must retain the opportunity to seek relief under vacatur laws following their conviction.

### *1. The Coercive Role of Imputed Liability in Sex Trafficking Victim-Offender Cases*

Conspiracy laws and felony murder laws, which both impute criminal liability on the basis of a defendant's potential to anticipate the scope of harms that could have resulted from their conduct,<sup>252</sup> play a central and problematic role in the criminalization of children and youth for sex trafficking offenses.<sup>253</sup> The use of conspiracy laws can also be particularly harmful for youth victims who are more likely to be pulled into the sex trafficking prosecution as offenders<sup>254</sup> because they are past the age of majority and their exploitation must involve force, fraud, or coercion in order to constitute sex trafficking under most state trafficking laws and the federal criminal sex trafficking statute.<sup>255</sup> The predominant problem with the use of these laws to charge sex trafficking victims with serious offenses, or alongside **\*763** their traffickers as co-conspirators, is that this practice is deeply discordant with a trauma-informed approach that acknowledges the role of trauma and the nature of control exerted over victims by their trafficker--the same control that must be alleged and proven beyond a reasonable doubt when the trafficker is prosecuted.<sup>256</sup> In the context of children and youth, imputing liability in this manner also ignores the role of brain development in the ability to foresee the full scope of consequences of particular conduct.<sup>257</sup>

Indeed, the same youth who are charged as co-conspirators alongside their trafficker may also be called to testify against their trafficker, and that testimony could be central to the successful prosecution of the trafficker.<sup>258</sup> The centrality of victim-offenders' testimony in these cases is likely a motivating factor for bringing charges in many of these cases among other considerations related to trial strategy<sup>259</sup> and perhaps simply the efficiency of prosecuting defendants together. The need to weigh these considerations against the harm to victim-offenders and the injustice of coercive charging tactics, however, has prompted some states to enact non-criminalization protections to protect against criminalization of victim-offenders in these cases. For example, New Mexico's human trafficking law prohibits human trafficking victims from being charged as an accomplice to trafficking,<sup>260</sup> while Mississippi, South Carolina, and Wyoming all prohibit human trafficking victims from being charged with trafficking if the offending conduct arose from their trafficking victimization.<sup>261</sup>

Few other states, however, have remedies for victim-offenders facing trafficking charges or other serious charges related to their trafficking victimization. While many states have enacted laws that allow human trafficking victims to assert an **\*764** affirmative defense to charges related to their trafficking victimization,<sup>262</sup> the majority of these laws are limited to prostitution

offenses and do not allow a victim-offender charged as a co-conspirator to assert a defense.<sup>263</sup> Additionally, common law defenses of duress and coercion are rarely applicable in sex trafficking conspiracy prosecutions because they are generally structured narrowly and fail to reach the conduct of trafficking victims or the nature of control exerted by traffickers.<sup>264</sup> In addition to the lack of options available to victim-offenders to challenge the prosecution in these cases, their options for post-conviction relief are equally limited in most states<sup>265</sup> and remain unavailable under federal law as well.<sup>266</sup> Conspiracy laws may also be misapplied to victim-offenders in other types of prosecutions. Two common scenarios where victim-offenders may be charged alongside their trafficker as co-conspirators for offenses that do not necessarily involve trafficking charges are “trick rolls”<sup>267</sup> and drug-related offenses,<sup>268</sup> both of which involve the trafficker utilizing the victim-offender as a shield to detection. In all of these cases, the coercion and control exercised by the trafficker should preclude any finding of an underlying agreement necessary for establishing a conspiracy between a trafficking victim and their trafficker.

Additionally, given the potential for conspiracy laws to be used coercively, as well as the inherent harm in charging sex trafficking victims alongside their trafficker, barring the use of these charges in the trafficking law further clarifies the incongruence of these concepts as New Mexico has done in its human trafficking law. Additionally, training is needed for law enforcement and prosecutors on \*765 pursuing victim-centered investigations and prosecutions that do not rely on coercive tactics to gain witness testimony.

## VI. Conclusion

Survivor's access to holistic safety<sup>269</sup> and specialized services is essential to breaking the cycle of exploitation and opening pathways to sustainable healing and wellbeing.<sup>270</sup> This cannot be accomplished, however, without reconstructing the systems-level response provided to trafficked children and youth, shifting from rehabilitative, juvenile justice-based practices to protective, healing-oriented responses. While all systems must be prepared to identify and serve trafficked children and youth, practice and policy-based solutions centered on access to services through non-punitive systems are the best solution for preventing the criminalization and re-victimization of child and youth survivors. In addition to committing needed resources and funding to ensure the availability of trauma-informed services,<sup>271</sup> ensuring access to specialized services can be achieved through: (1) increasing prompt identification of victimization and connection with trauma-informed services regardless of system involvement, (2) permitting identification of *possible* victimization to serve as a sufficient basis to trigger access to trauma-informed services, (3) strengthening proactive efforts by all criminal or juvenile justice stakeholders to identify potential victimization throughout the justice process, and (4) expanding funded, accredited, and mandatory training for criminal and juvenile justice stakeholders on identification of, and responses to, victims of sex trafficking who commit criminal acts as a result of, or in relation to, their trafficking victimization

Equally important is the development of a range of specialized legal protections to provide bright lines for protection where appropriate (e.g., removing criminal penalties for children and youth for prostitution) and to provide more flexibility for cases that involve complex balancing and highly individualized factual assessments (e.g., violent felonies). In addition to legal protections that prevent juvenile and criminal justice system involvement at the outset, it is important to ensure remedies that mitigate the harms of justice system involvement at the sentencing stage and through post-conviction relief are available.

Truly protective responses for addressing the needs of trafficked children and youth cannot be achieved through a single policy, practice, or legislative change. \*766 Effective responses for addressing the needs of impacted children and youth requires transformative culture and systems change centered on, and aspiring for, the long-term wellbeing of survivors. Identifying avenues to safety, services, and meaningful opportunities void of collateral roadblocks and obstacles is key for anti-trafficking stakeholders seeking to support sustainable success. As such, states can improve outcomes for survivors *and* systems by reimagining, redesigning, and reinvesting in non-punitive avenues that deliver both comprehensive safety and services.

## Footnotes

- <sup>a1</sup> Sarah Bendtsen Diedhiou is the Director of State Legislative Advocacy at Shared Hope International. Sarah Roberts is the Director of Policy Research at Shared Hope International. Christine Raino is the Senior Director of Public Policy at Shared Hope International. The authors would like to extend their gratitude to the following individuals who assisted with research for this article: Susannah Ayers, Meredith Behrens, Maria Hodge, Amanda Lopez, Savannah McElroy, Valentina Perdomo Lopez, Sarah Stefaniak, Emily Tegley and Shaina Daquiaoag.
- <sup>2</sup> Shared Hope Int'l, Report Cards on Child & Youth Sex Trafficking 1 (2020) [hereinafter SHI Report Cards], [https://sharedhope.org/wp-content/uploads/2020/11/SHI\\_2020\\_Advanced-Legislative-Framework-Report\\_FINAL.pdf](https://sharedhope.org/wp-content/uploads/2020/11/SHI_2020_Advanced-Legislative-Framework-Report_FINAL.pdf) [<https://perma.cc/9SGA-C667>] (describing successes and challenges of developing state laws to address child sex trafficking).
- <sup>3</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 20, 22, 28, and 42 U.S.C.).
- <sup>4</sup> SHI Report Cards, *supra* note 2, at 1 (describing long term impacts of arrests resulting from trafficking victimization).
- <sup>5</sup> This article uses victim and survivor interchangeably to provide consistency with statutory language and cross-agency terminology. The authors recognize that individuals who have experienced trafficking are survivors at all stages of their abuse and recovery and are not defined by their victimization.
- <sup>6</sup> Fed. Bureau of Investigation, Uniform Crime Reports for the United States--2019, tbl.32 (2020), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-32> [<https://perma.cc/UW23-P2BA>] (revealing that while the number of children arrested for prostitution has declined, states continue to report data reflecting that children are arrested for prostitution, despite safe harbor laws); *see also* Brynn N.H. Jacobson, *Addressing the Tension Between the Dual Identities of the American Prostitute: Criminal and Victim; How Problem-Solving Courts Can Help*, 37 Seattle U. L. Rev. 1023, 1030 (2014) (describing the lack of access to services for child sex trafficking victims).
- <sup>7</sup> *See National Survivor Network Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking*, Nat'l Survivor Network (Aug. 2016) [hereinafter *Impact of Criminal Arrest*], <https://nationalsurvivornetwork.org/wp-content/uploads/2019/08/NSNVacate-Survey-2018.pdf> [<https://perma.cc/T299-MH6F>] (describing long term impacts of arrests resulting from trafficking victimization).
- <sup>8</sup> 22 U.S.C. § 7101(b)(24) (“Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and *protecting rather than punishing the victims of such offenses.*” (emphasis added)); *see also* Christine Raino, *When Difficult News is the Most Important News*, Shared Hope Int'l (Dec. 20, 2019), <https://sharedhope.org/2019/12/20/when-difficult-news-is-the-most-important-news/> [<https://perma.cc/2AMB-8G3E>] (noting that victims are sometimes charged with trafficking as co-conspirators).
- <sup>9</sup> Karen Wigle Weiss, *End Child Prostitution and Trafficking USA, A Review of the New York State Safe Harbor Law 1* (2013), <https://d2jug8yyubo3yl.cloudfront.net/26999B2F-7C10-4962-918CE964709E745D/8d5cfab4-a75e-4dd6-97c8-2f9752d16b5d.pdf> [<https://perma.cc/7CJ5-2N7M>].
- <sup>10</sup> Katherine Mullen & Rachel Lloyd, *The Passage of the Safe Harbor Act and the Voices of Sexually Exploited Youth*, in *Lawyer's Manual on Human Trafficking: Pursuing Justice For Victims* 129, 135 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., Supreme Court of the State of New York, Appellate Division, First Department New York State Judicial Committee on Women in the Courts, 2013).
- <sup>11</sup> *See S. & Assemb. 5258-C, 2007-2008 Reg. Sess. (N.Y. 2007)*; Weiss, *supra* note 9, at 2 (noting that New York law continues to allow prosecution of trafficked children).

- <sup>12</sup> Misty Luminais & Rachel Lovell, Begun Ctr. for Violence Prevention and Educ., Process and Outcome Evaluation of Cuyahoga County's Safe Harbor Project 5-6 (2018), <https://case.edu/socialwork/begun/sites/case.edu.begun/files/2018-09/Safe-Harbor-Report-Final-5-22-18-FINAL.pdf> [<https://perma.cc/W3ZP-4R33>].
- <sup>13</sup> See generally Stephen Gies, Amanda Bobnis, Marcia Cohen & Matthew Malamud, Dev. Servs. Grp., Inc., Safe Harbor Laws: Changing the Legal Response to Minors Involved in Commercial Sex (2018), <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/253146.pdf> [<https://perma.cc/2TFA-LS9V>] (explaining the history and evolution of “safe harbor” laws in the United States).
- <sup>14</sup> 22 U.S.C. § 7102(11)(A) (defining inducing or causing individuals under the age of 18 to engage in commercial sex acts as a severe form of trafficking in persons).
- <sup>15</sup> See *JuST Response Council: Protective Response Model*, Shared Hope Int'l (Nov. 2016), [http://sharedhope.org/wp-content/uploads/2014/04/JRC\\_ResponseModel\\_Spreads\\_web.pdf](http://sharedhope.org/wp-content/uploads/2014/04/JRC_ResponseModel_Spreads_web.pdf) [<https://perma.cc/PXD4-6LH9>].
- <sup>16</sup> Christopher A. Mallett & Miyuki Fukushima Tedor, *Juvenile Delinquency: Pathways and Prevention* 27-41 (2018).
- <sup>17</sup> Nat'l Rsch. Council & Inst. of Med., *Juvenile Crime, Juvenile Justice* 154 (2001).
- <sup>18</sup> See generally Kristin C. Thompson & Richard J. Morris, *Juvenile Delinquency and Disability* 55-72 (2016), [https://www.researchgate.net/publication/301321024\\_History\\_of\\_the\\_Juvenile\\_Justice\\_System](https://www.researchgate.net/publication/301321024_History_of_the_Juvenile_Justice_System) [<https://perma.cc/LJ8F-MGAG>] (discussing the history and evolution of the juvenile justice system).
- <sup>19</sup> Nat'l Rsch Council & Inst. of Med., *supra* note 17, at 155; Mallet & Tedor, *supra* note 16, at 28-30.
- <sup>20</sup> *Youth in the Justice System: An Overview*, Juv. L. Ctr., <https://jlc.org/youth-justice-system-overview> [<https://perma.cc/UYL7-LQBR>].
- <sup>21</sup> Yael Cannon & Andrew Hsi, *Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 *Fordham Urb. L.J.* 425, 426 (2016).
- <sup>22</sup> See Shared Hope Int'l, *Seeking Justice: Legal Approaches to Eliminate Criminal Liability for Juvenile Sex Trafficking Victims* 18 (2018) [hereinafter *Seeking Justice*], [https://sharedhope.org/wp-content/uploads/2018/07/ANALYSIS-OF-STATUTORY-APPROACHES\\_ver4.pdf](https://sharedhope.org/wp-content/uploads/2018/07/ANALYSIS-OF-STATUTORY-APPROACHES_ver4.pdf) [<https://perma.cc/A6GR-HSAV>] (analyzing a national move toward non-criminalization statutes for victims of trafficking).
- <sup>23</sup> Hanna Cody, *End Stigma, End Trafficking*, Unicef USA (Jan. 11, 2018), <https://www.unicefusa.org/stories/end-stigma-end-trafficking/33865> [<https://perma.cc/E22D-J766>] (“In many cultures, any association with the sex industry--whether by force or by choice--is highly stigmatized .... Families may disown trafficked girls and women, blaming them and not their traffickers for their ordeal. In the U.S., a majority of states [] treat child sex trafficking victims as criminals.”); see also Dave Collins, *Case reveals shame, trauma of male sex trafficking victims*, WAFB9 (Nov. 15, 2018, 2:18 AM), <https://www.wafb.com/2018/11/15/case-reveals-shame-trauma-male-sex-trafficking-victims/> [<https://perma.cc/8KQN-47W6>] (describing the shame experienced by male sex trafficking victims and their difficulties with finding counseling and other services).
- <sup>24</sup> Julia Churchill Schoellkopf, *Victim-Blaming: A New Term for an Old Trend*, Lesbian Gay Bisexual Transgender Queer Ctr., 2012, at 1, 2, <https://digitalcommons.uri.edu/glbtc/> [<https://perma.cc/5ENF-QJZX>]; see Sarah Friedmann, *9 Horrifying Things Judges Have Said To Sexual Assault Victims*, *Bustle* (May 1, 2017), <https://www.bustle.com/p/9-infuriating-things-judges-have-said-when-ruling-on-sexual-assault-cases-54674> [<https://perma.cc/4LP8-7PSV>].
- <sup>25</sup> Jessica Phelan, *Judge Derek Johnson reprimanded for claiming body can ‘shut down’ rape*, *World* (Dec. 14, 2012,

5:30 PM), <https://www.pri.org/stories/2012-12-14/judge-derek-johnson-reprimanded-claiming-body-can-shut-down-rape> [<https://perma.cc/5AR4-P7VV>].

26 Nicole Chavez & Amanda Watts, *Kansas judge calls teen victims in sex abuse case the 'aggressor'*, ABC 13 News (Feb. 10, 2019), <https://wlos.com/news/nation-world/kansas-judge-calls-teen-victims-in-sex-abuse-case-the-aggressor> [<https://perma.cc/34D3-XNZ8>].

27 *See e.g.*, Vanessa Bouché, *Tarrant County can do better than punishment for sex-trafficking victim in Tay-K 47 case*, Fort Worth Star-TelegramM (July 23, 2019, 12:23 PM), <https://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article233014092.html> [<https://perma.cc/9PLJ-WL62>] (“But the broader implication of misunderstanding sex trafficking victimization is that victim blaming and rape myth ideologies are perpetuated even among elected officials. Consider Kim, who told the girl in court: ‘I believe you went more or less willing along with the opportunity that the traffickers provided for you. They provided a certain sense of excitement or lifestyle that you weren't entirely opposed to.’”).

28 *See* Marinella Marmo & Nerida Chazal, *The Trafficked Woman: Ideal or Blameworthy Victim?*, 7 Adv. Sociol. Res. 125, 135-36 (Jared Jaworski ed., 2010) (“As a result of being an un-ideal victim, the trafficked woman is often considered either partly or fully responsible for her victimization ... The outcome is that trafficked women, who are not ideal victims, and are consequently blamed for their victimization, are given less recognition, fewer rights, and considerably less support and assistance .... The victim blaming mindset can also significantly affect the outcome of trafficking trials ... [and the] successful prosecutions of offenders ....”).

29 *See* Nat'l Advisory Comm. on the Sex Trafficking of Child. & Youth in the U.S., Best Practices and Recommendations for States 47-48, 50 (2020), [https://www.acf.hhs.gov/sites/default/files/documents/otip/nac\\_report\\_2020.pdf](https://www.acf.hhs.gov/sites/default/files/documents/otip/nac_report_2020.pdf) [<https://perma.cc/LX86-GP2B>].

30 *See generally* Thompson & Morris, *supra* note 18, at 55-72 (discussing the history and evolution of the juvenile justice system).

31 Christopher Edward Branson, Carly Lyn Baetz, Sarah McCue Horwitz & Kimberly Eaton Hoagwood, *Trauma-Informed Juvenile Justice Systems: A Systematic Review of Definitions and Core Components*, 9 Psych. Trauma: Theory, Rsch., Prac., & Pol'y 635, 636 (2017) (“A small retrospective study of young adults (ages 18-20) that had been discharged from a juvenile justice facility in the past year found that exposure to abuse and/or harsh punishments (i.e., seclusion) while incarcerated was positively associated with post-release criminal behavior and PTSD symptoms. Thus, the justice system may impede the efforts of trauma survivors to rehabilitate and desist from crime.” (citations omitted)).

32 Luminais & Lovell, *supra* note 12, at 5; Malika Saada Saar, Rebecca Epstein, Lindsay Rosenthal & Yasmin Vafa, Hum. Rts. Project for Girls, Georgetown L. Ctr. on Poverty and Inequality & Ms. Found. for Women, *The Sexual Abuse to Prison Pipeline: The Girls' Story* 5 (2015) [hereinafter *Pipeline*], <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls'-Story.pdf> [<https://perma.cc/UW6D-RUAZ>] (“More harmful still is the significant risk that the punitive environment will re-trigger girls' trauma and even subject them to new incidents of sexual victimization, which can exponentially compound the profound harms inflicted by the original abuse.”).

33 *See Pipeline, supra* note 32, at 13.

34 *See id.* at 12-15.

35 Kim Gilhuly, Megan Gaydos & Holly Avey, Hum. Impact Partners, *Reducing Youth Arrests Keeps Kids Healthy and Successful: A Health Analysis of Youth Arrest in Michigan* 11 (2017), [https://humanimpact.org/wp-content/uploads/2018/10/HIP\\_MichYouthArrests\\_2017.06.pdf](https://humanimpact.org/wp-content/uploads/2018/10/HIP_MichYouthArrests_2017.06.pdf) [<https://perma.cc/NJ92-5QHT>] (“Once youth have been detained, they are sometimes placed in shackles during transport to the court. For children who have

experienced physical or sexual abuse ... the use of shackles can cause ‘serious mental and emotional harm, and undermine the court's very objectives in preventing delinquency or rehabilitating a child.’”).

36 Erica L. Green, *Juveniles in Maryland's justice system are routinely strip-searched and shackled*, Balt. Sun (Mar. 13, 2016, 12:17 PM), <https://www.baltimoresun.com/news/investigations/bs-md-strip-and-shackle-20160129-story.html> [<https://perma.cc/4SZB-29Y6>] (last visited Apr. 24, 2021).

37 Gilhuly et al., *supra* note 35, at 10-11 (“[T]here is evidence in the research literature to illustrate that youth detention—even for short periods of time—can negatively impact a youth's mental and physical health.”).

38 Trevor Boyer, *Rikers: Island of Harm Reduction in State of ‘Forced Detox’*, Juv. Just. Info. Exch. (Oct. 10, 2019), <https://jjie.org/2019/10/10/rikers-island-of-harm-reduction-in-state-of-forced-detox/> [<https://perma.cc/UFL6-JZKF>].

39 Gilhuly et al., *supra* note 35, at 9 (“[T]he act of processing during and after arrest can be traumatizing and may trigger stress responses and depressive symptoms [in those who have already experienced trauma] ....”).

40 *Id.* at 11 (“Even if detained for short periods of time, youth in detention facilities may be exposed to verbal, physical, or sexual aggression (from other youth and from staff), loss of privacy, isolation, or confinement. These exposures can exacerbate mental illness, PTSD, and fear, particularly among previously victimized youth.”).

41 *Id.* (“Youth who have experienced sexual assault are particularly at risk for victimization and further trauma if they are detained.”).

42 Pipeline, *supra* note 32, at 13.

43 *Id.* at 9 (“[A] recent study has shown that sexual abuse is one of the strongest predictors of whether a girl will be charged again after release; in fact, it appears to have a greater impact on girls' re-entry into the system than other risk factors like behavioral problems and prior justice involvement.”); See Sue Burrell, *Trauma and the Environment of Care in Juvenile Institutions*, The Nat'l Child Traumatic Stress Network 1 (Aug. 2013), [https://www.nctsn.org/sites/default/files/resources/trauma\\_and\\_environment\\_of\\_care\\_in\\_juvenile\\_institutions.pdf](https://www.nctsn.org/sites/default/files/resources/trauma_and_environment_of_care_in_juvenile_institutions.pdf) [<https://perma.cc/LRL2-7X86>] (“We now understand that youth who have experienced trauma at home or in their communities may resort to self-help methods in an effort to feel safe—carrying weapons, engaging in physical conflict in situations they perceive as calling for ‘self-defense,’ joining gangs, and self-medication with drugs or alcohol.”).

44 Pipeline, *supra* note 32, at 12.

45 *Id.* at 9.

46 Stephanie Richard, Coal. to Abolish Slavery & Trafficking, *Victims of Human Trafficking Should Not Be Arrested for Crimes Their Traffickers Force Them to Commit* 9-10 (2016) (footnotes omitted).

47 See *Seeking Justice 2019 Update*, Shared Hope Int'l (2019), [https://sharedhope.org/wp-content/uploads/2019/11/Seeking-Justice\\_2019-Update.pdf](https://sharedhope.org/wp-content/uploads/2019/11/Seeking-Justice_2019-Update.pdf) [<https://perma.cc/5G4K-VYQS>].

48 Pipeline, *supra* note 32, at 12 (footnote omitted).

49 See Jennifer Musto, *Domestic Minor Sex Trafficking and the Detention-to-Protection Pipeline*, 37 *Dialectical Anthropology* 257, 267-68 (2013) (“Whether the result of a lack of services or instead the outcome of historic precedent of detaining youth for their involvement in prostitution, some front-line police officers and NGO advocates have come to a general consensus that due to the lack of options for youth, arresting them remains the best way to assist them.”).

- 50 Minority Staff Special Investigations Div., U.S. House of Representatives Comm. on Gov't Reform, *Incarceration of Youth Who Are Waiting for Community Mental Health Services in the United States* (2004) [hereinafter House Report], <https://www.hsgac.senate.gov/imo/media/doc/040707juvenilereport.pdf> [<https://perma.cc/ZE4P-ATEW>].
- 51 Gilhuly et al., *supra* note 35, at 16.
- 52 *Id.* at 14.
- 53 See Derek Cohen, *Kids Doing Time for What's Not a Crime: The Over-Incarceration of Status Offenders*, Right on Crime (Mar. 1 2014), <http://rightoncrime.com/2014/03/kids-doing-time-for-whats-not-a-crime-the-over-incarceration-of-status-offenders/> [<https://perma.cc/JQX6-9HS2>] (describing the use of incarceration and traditional punitive systems to address low-level offenses, including status offenses, “have proven to be costlier than alternatives, are largely ineffective (and, in some cases, counterproductive) at reducing public safety, and are detrimental to the youth's development.”).
- 54 See *id.* (“Many in-home interventions, which cost a fraction of confinement, such as multisystemic therapy (MST) and functional family therapy (FFT), have been proven to strengthen a family's capacity to care for ... their child, including, for example, helping them set appropriate rules, boundaries, and consequences.”).
- 55 See generally Nat'l Conf. of State Legislatures, *Cost-Benefit Analysis of Juvenile Justice Programs*, <https://www.ncsl.org/documents/cj/jjguidebook-costbenefit.pdf> [<https://perma.cc/2475-U325>] (discussing a cost-benefit analysis of wraparound, community-based care, services, and coordination, in lieu of traditional juvenile justice responses and incarceration, and how it has consistently yielded significant savings for states and taxpayers).
- 56 House Report, *supra* note 50, at 11.
- 57 See Gilhuly et al., *supra* note 35, at 28-29.
- 58 Richard, *supra* note 46, at 21-22.
- 59 See *supra* Section I(B)-(C) (discussing recidivism and barriers to services within the juvenile justice system).
- 60 See Lauren Martin, Richard Lotspeich, and Lauren Stark, *Early Intervention to Avoid Sex Trading and Trafficking of Minnesota's Female Youth: A Benefit-Cost Analysis* (2012), <https://mnhttf.org/wp-content/uploads/2013/10/Benefit-Cost-Study-Full.pdf> [<https://perma.cc/5ZNZ-8QQ8>] (discussing the impact of limited resources and funding for services).
- 61 See Gilhuly et al., *supra* note 35, at 24, 26 (“[L]ow-risk youth participating in pre-arrest diversion programs were almost 2.5 times (2.44) less likely to re-offend, while low-risk youth in post-arrest diversion programs were 1.5 times (1.49) less likely than traditionally processed youth to re-offend ... In general, the less contact a youth has with the juvenile system, the less they are re-arrested and re-convicted.”).
- 62 See *id.* at 26 (“[M]eta-analysis of service delivery for youth found that therapeutic interventions delivered in community settings are more effective than those delivered in juvenile institutional settings.”).
- 63 See *supra* Section I.
- 64 Gies et al., *supra* note 13, at 25.
- 65 *Id.* at 19.
- 66 *E.g.*, La. Child. Code Ann. art. 839 (2013).

- <sup>67</sup> See, e.g., Chrysanthi S. Leon & Corey S. Shdaimah, *JUSTifying Scrutiny: State Power in Prostitution Diversion Programs*, 16 J. Poverty 250, 258 (2012) (“During their tenure in the program, participants are required to meet weekly with their assigned social worker and to call or visit weekly with the pretrial staff. Participants are also referred to various other programs, such as addiction treatment or behavioral health interventions, and must comply with any requirements that these additional programs stipulate. These can include curfews, drug testing, attendance at individual and group therapy sessions, or classes. Although the 90 days is often shorter than the probation that they might otherwise be assigned, the forms of supervision and the required level of disclosure are far greater than the often rote reporting that participants face in ‘regular probation.’”); Summit Cnty. Juv. Ct.: Pol’y No. 10.7, Gen. Provisions, Hum. Trafficking--Identification, Assessment, & Response to Victims (2014), [https://humantrafficking.ohio.gov/links/SCJCHumanTraffickingPolicy10\\_2014.pdf](https://humantrafficking.ohio.gov/links/SCJCHumanTraffickingPolicy10_2014.pdf) [<https://perma.cc/HU6B-UWA4>].
- <sup>68</sup> See Leon & Shdaimah, *supra* note 67, at 258 (“During their tenure in the program, participants were required to ... comply with any requirements that [] additional programs stipulate. These can include ... drug testing ....”).
- <sup>69</sup> See Child Welfare Capacity Building Collaborative, *Identifying Minors and Young People Exploited Through Sex Trafficking: A Resource for Child Welfare Agencies*, Child’s Bureau 2 (2016) [hereinafter Child Welfare], <https://capacity.childwelfare.gov/pubPDFs/cbc/identifying-exploited-trafficking-cp-00053.pdf> [<https://perma.cc/GNE4-J2TC>] (“To further complicate matters, survivors of sex trafficking often do not self-identify as victims for a number of reasons, including, but not limited to, pimp control, manipulation, shame, stigmatization, fear, and/or trauma bonds with their abuser.”); Seeking Justice, *supra* note 22, at 11 (“[R]equiring a finding of victimization may necessitate that the minor identify him or herself as a victim of sex trafficking ....”).
- <sup>70</sup> Katie Vloet, *Debunking Myths About Human Trafficking*, Univ. of Mich., Mich. L. (Oct. 23, 2015), [https://www.law.umich.edu/newsandinfo/features/Pages/trafficking\\_myths\\_102315.aspx](https://www.law.umich.edu/newsandinfo/features/Pages/trafficking_myths_102315.aspx) [<https://perma.cc/JKS9-MVVG>].
- <sup>71</sup> *Diversion Programs*, Off. of Just. Programs, Off. of Juv. Just. & Delinq. Prevention, <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/mpg-iguides/topics/diversion-programs/index.html> [<https://perma.cc/4RJS-A6WH>].
- <sup>72</sup> *Id.*; *Seeking Justice 2019 Update*, *supra* note 47.
- <sup>73</sup> See Gilhuly et al., *supra* note 35, at 23-24.
- <sup>74</sup> Shared Hope International, *JuST Response State System Mapping Report: A Review of Current Statutes, Systems, and Services Responses to Juvenile Sex Trafficking 76-77* (2015), <https://sharedhope.org/wp-content/uploads/2015/09/JuST-Response-Mapping-Report-Final-web.pdf> [<https://perma.cc/WSH4-RJAH>].
- <sup>75</sup> See e.g., N.Y. Fam. Ct. Act §§ 311.4(3), 732(a)-(b) (McKinney 2021).
- <sup>76</sup> See Heather J. Clawson, Nicole M. Dutch, Amy Salomon & Lisa Goldblatt Grace, U.S. Dept. of Health & Hum. Servs., *Study of HHS Programs Serving Human Trafficking Victims 33-35* (2009), <https://aspe.hhs.gov/report/study-hhs-programs-serving-human-trafficking-victims/what-are-challenges-identifying-victims> [<https://perma.cc/DT3W-DV8B>].
- <sup>77</sup> See Leon & Shdaimah, *supra* note 67, at 253 (“Defendants are often required to plead guilty to participate in problem-solving courts and to gain access the much-needed resources; this therefore raises concerns about coercion of defendants as well as the diversion of community resources into the criminal justice system.”).
- <sup>78</sup> *Trauma-informed Courts*, Nat’l Council of Juv. & Fam. Ct. Judges, <https://www.ncjfcj.org/child-welfare-and-juvenile-law/trauma-informed-courts/> [<https://perma.cc/5GEN-WZ2V>] (“Despite the growing attention to the needs of children exposed to violence, progress toward ameliorating adverse childhood experiences is slow, particularly in

the juvenile and family court systems. Courts often lack a complete understanding of the effects of trauma on the populations before them and may not have the capacity to modify environments, policies, and practices to keep from compounding the trauma experienced.”); Nat’l Council of Juv. & Fam. Ct. Judges, Research Report--National Judicial Institute on Domestic Child Sex Trafficking Evaluation--Asheville, North Carolina 1 (2018), [https://www.ncjfcj.org/wp-content/uploads/2019/01/2018-Asheville-DCST-Insitute-Evaluation-Report\\_FINAL.pdf](https://www.ncjfcj.org/wp-content/uploads/2019/01/2018-Asheville-DCST-Insitute-Evaluation-Report_FINAL.pdf) [<https://perma.cc/Q5F7-4H68>] (“It is estimated that thousands of children are at risk of being exploited; many are already being trafficked. These child victims are often child welfare involved. They are frequently seen as offenders. Juvenile and family court judges are in a unique position to assist these youth to ensure they receive the necessary services to heal and recover from the trauma associated with [Domestic Child Sex Trafficking].”).

79 Clawson et al., *supra* note 76, at 21 (“If these reactions were not understood in the context of trauma and exposure to violence/control, respondents indicated that the likelihood of misinterpretation and resulting misidentification were likely, and the victim was therefore seen as a willing participant in the crime and not a victim. The resulting arrest and treatment of the victim by law enforcement reinforced the fear and mistrust of other victims and reinforced stereotypes among those in a position to identify victims.”).

80 Tex. Fam. Code Ann. § 54.0326 (West 2021) (emphasis added).

81 Ohio Rev. Code Ann. § 2152.021(F)(1)(b) (West 2021).

82 Letitia Browne-James, Stacey Diane A. Litam & Lamerial McRae, *Child Sex Trafficking: Strategies for Identification, Counseling, and Advocacy*, Int’l J. for Advancement Counselling (Jan. 6, 2021), <https://doi.org/10.1007/s10447-020-09420-y> [<https://perma.cc/WQP5-5UHQ>] (“School counselors must also recognize how children and adolescents may be reluctant to disclose details about DMST due to feelings of shame, fear of their trafficker, or their inability to recognize themselves as victims.”); Seeking Justice, *supra* note 22, at 11 (“[R]equiring a finding of victimization may necessitate that the minor identify him or herself as a victim of sex trafficking ....”); Pipeline, *supra* note 32, at 5 (“More harmful still is the significant risk that the punitive environment will re-trigger girls’ trauma and even subject them to new incidents of sexual victimization, which can exponentially compound the profound harms inflicted by the original abuse.”).

83 See Seeking Justice, *supra* note 22.

84 Child Welfare, *supra* note 69, at 3.

85 E.g., State v. Martin, 116 N.E.3d 127, 133-34 (Ohio 2018); see also Max Londberg, *Sex trafficking survivor Alexis Martin will be released from prison by Ohio’s governor*, Cincinnati.com, Enquirer (Apr. 17, 2020, 4:26 PM), <https://www.cincinnati.com/story/news/2020/04/17/sex-trafficking-survivor-alexis-martin-being-released-ohio-prison/5154816002/> [<https://perma.cc/BN5S-9Z66>] (At 15 years old, Alexis Martin was arrested and charged in juvenile court for the murder of her trafficker by a robber. Despite acknowledging on the record that Martin was a victim of child sex trafficking at the time of the incident, the presiding judge failed to hold a Safe Harbor hearing to determine if Martin was eligible for the state’s Safe Harbor diversion program. Consequently, Martin’s case was transferred to the adult criminal system, where she subsequently pled guilty to one count of aggravated murder with a firearm and was sentenced to 21 years to life in prison. In 2020, after serving five years, Governor DeWine granted her clemency, acknowledging her underlying victimization and unjust criminalization.).

86 E.g., Rebecca Lopez, *Zephi Trevino didn’t pull the trigger, but this teen girl is charged with capital murder*, WFAA (July 30, 2020, 8:31 PM), <https://www.wfaa.com/article/news/local/zephi-trevino-teen-jail-charged-capital-murder-attorney/287-edad30ed-f2a4-4f50-8f2b-f6c023cda2b2> [<https://perma.cc/825U-TZEF>]; Angelina Chapin, *She Says Her Best Friend Sold Her To a Pimp. The Court Says She’s a Criminal*, HuffPost (Dec. 21, 2019, 6:00 AM), [https://www.huffpost.com/entry/youth-sex-trafficking-violent-crimes-legal-system\\_n\\_5df7f060e4b0ae01a1e59701](https://www.huffpost.com/entry/youth-sex-trafficking-violent-crimes-legal-system_n_5df7f060e4b0ae01a1e59701) [<https://perma.cc/XDH8-CWBN>].

- 87 See, e.g., La. Child. Code Ann. art. 839 (2021); N.Y. Crim. Proc. Law § 170.80 (McKinney 2021); N.Y. Fam. Ct. Act § 720, 732, 739, 756 (McKinney 2021); N.Y. Soc. Serv. Law § 483-cc (McKinney 2021).
- 88 See Seeking Justice, *supra* note 22.
- 89 *Impact of Criminal Arrest*, *supra* note 7 (“Interestingly, 40% of respondents also reported being arrested for drug possession, and 18.7% for drug sales. 60% reported being arrested for other crimes. We can conclude from this information that traffickers force their victims to participate in other crimes beyond prostitution, especially drug sales and possession.”).
- 90 La. Child. Code Ann. art. 725 (2021).
- 91 La. Stat. Ann. §§ 46:2161-63 (2021).
- 92 La. Child. Code Ann. art. 839(D) (2021).
- 93 See, e.g., Ohio Rev. Code Ann. § 2152.021(F) (West 2021).
- 94 *Id.* § 2152.021(F)(1)(b).
- 95 *Id.* § (F)(4).
- 96 Summit Cnty. Juv. Ct.: Pol’y No. 10.7, Gen. Provisions, Hum. Trafficking--Identification, Assessment, & Response to Victims (2014), [https://humantrafficking.ohio.gov/links/SCJCHumanTraffickingPolicy10\\_2014.pdf](https://humantrafficking.ohio.gov/links/SCJCHumanTraffickingPolicy10_2014.pdf) [<https://perma.cc/HU6B-UWA4>].
- 97 Luminais & Lovell, *supra* note 12, at 4.
- 98 22 U.S.C. § 7101(b)(19); see also Jeffrey H. Zeeman & Karen Stauss, *Criminal Conduct of Victims: Policy Considerations*, U.S. Att’ys Bull., Nov. 2017, at 139, 140. (“Prosecutors should carefully consider the circumstances underlying any crime committed by a trafficking victim prior to bringing charges against such victim in order to ensure that the victim is not ‘inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked ....’” (citing 22 U.S.C. § 7101(b)(19))).
- 99 22 U.S.C. § 7102(17) (2000) (“The term ‘victim of trafficking’ means a person subjected to an act or practice described in paragraph (9) or (10).”); Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 109, 129 Stat. 239 (“[S]ection 108 of this title amends section 1591 of title 18, United States Code, to add the words ‘solicits or patronizes’ to the sex trafficking statute making absolutely clear for judges, juries, prosecutors, and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.”).
- 100 SHI Report Cards, *supra* note 2, at 13.
- 101 In 2008, New York laid the groundwork for “safe harbor” legislation through the enactment of the Safe Harbour for Exploited Children Act, which attempted to address the conflict between the federal trafficking laws and state prostitution laws by *mitigating* the criminal consequences for some trafficked children--although it failed to prevent them from being charged with prostitution. Shared Hope Int’l, Protected Innocence Challenge Toolkit 2019: 2019 Analysis and Recommendations: New York 31-38 (2019), [http://sharedhope.org/PICframe9/analysis/PIC\\_AR\\_2019\\_NY.pdf](http://sharedhope.org/PICframe9/analysis/PIC_AR_2019_NY.pdf) [<https://perma.cc/XBM2-QJMX>]; see also N.Y. Soc. Serv. Law § 447-b (McKinney 2021) (discussing New York’s Safe Harbour process which requires trafficked children to be arrested and directed into the juvenile justice system to receive discretionary referral to specialized

diversion and services).

<sup>102</sup> In 2010, Connecticut became the first state to enact a law *removing* criminal liability for prostitution for minors under 16 years of age. *E.g.*, Substitute S. 153, 2010 Gen. Assemb., Reg. Sess. (Conn. 2010).

<sup>103</sup> *See Seeking Justice, supra* note 22, at 1-2 (showing the timeline of state non-criminalization laws).

<sup>104</sup> *Seeking Justice 2019 Update, supra* note 47; *e.g.*, Act of Apr. 3, 2020, ch. 331, 2020 Wash. Sess. Laws 2533 (making Washington the newest state to enact non-criminalization protections for commercially sexually exploited children).

<sup>105</sup> *See generally Seeking Justice 2019 Update, supra* note 47 (discussing legal approaches to non-criminalization to youths); *see also Seeking Justice, supra* note 22, at 45, 47.

<sup>106</sup> *See Seeking Justice, supra* note 22, at 18.

<sup>107</sup> *Seeking Justice 2019 Update, supra* note 47; *e.g.*, Act of Apr. 3, 2020, ch. 331, 2020 Wash. Sess. Laws 2533 (making Washington the newest state to add non-criminalization protections for commercially sexually exploited youth).

<sup>108</sup> SHI Report Cards, *supra* note 2, at 13. *See generally* Eugene Volokh, *Statutory rape laws and ages of consent in the U.S.*, Wash. Post: Volokh Conspiracy (May 1, 2015, 11:17 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/> [<https://perma.cc/5PPF-S5JM>] (discussing the ages of consent in a variety of jurisdictions).

<sup>109</sup> *Seeking Justice, supra* note 22, at 9; *see also* Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. Rev. 1281, 1289 (2015) (“Furthermore, law enforcement and other first responders often perceive and identify prostituted minors-- particularly American minors--as criminals or delinquents, instead of victims. Consequently, these minors have traditionally been placed in the juvenile justice or criminal justice system as punishment and have been denied victim services.”).

<sup>110</sup> Butler, *supra* note 109, at 1307.

<sup>111</sup> *Seeking Justice, supra* note 22, at 4 (“The term ‘non-criminalization’ encapsulates this idea most accurately because it reflects the concept that charging a child with a crime related to their own rape is not properly enshrined in the criminal code. Related terms such as ‘decriminalization’ and ‘immunity’ also reflect the concept of protecting children from criminal consequences for their own victimization, but those terms do not as clearly reflect the idea that a child charged with the crime of prostitution is, in fact, legally untenable.”).

<sup>112</sup> *See id.* at 19-22; Erin Marsh, *Relief Not Arrests: Strengthening Laws for Survivors of Human Trafficking*, Thomson Reuters Inst. (Apr. 3, 2019), <https://www.legalexecutiveinstitute.com/polaris-arrests-human-trafficking/> [<https://perma.cc/J2F9-CQ7Z>] (“Sex trafficking victims are commonly arrested on prostitution charges, or for other crimes such as possession of weapons, drugs, or identity theft--all of which may well have been orchestrated in some way by their trafficker .... Children who are trafficked for both sex or labor are often charged with status offenses like truancy and running away.”).

<sup>113</sup> *Seeking Justice 2019 Update, supra* note 47.

<sup>114</sup> *Seeking Justice, supra* note 22, at 53 (“Without reforming the lens in which youth survivors are viewed, even states that have enacted non-criminalization laws risk funneling minor victims through the juvenile justice system on other charges, commonly referred to as ‘masking charges.’”).

<sup>115</sup> *Id.* (explaining that a “masking charge” refers to the situation in which minors, while they cannot be charged with prostitution, are charged with other crimes as a result of their time experiencing trafficking); *see also* Angela L. Bergman, Note, *For Their Own Good? Exploring Legislative Responses to the Commercial Sexual Exploitation of*

*Children and the Illinois Safe Children Act*, 65 Vand. L. Rev. 1361, 1380 (2012) (“[T]here is anecdotal evidence that police may use what are called ‘masking crimes’ for juveniles suspected of prostitution-related offenses instead of directly charging them with solicitation. Police may use status offenses such as being a runaway, being out past curfew, or even different criminal offenses such as drug possession to prevent labeling the child as a prostitute.” (footnotes omitted)).

116 Seeking Justice, *supra* note 22, at 53, 55.

117 See Musto, *supra* note 49, at 267-68.

118 Cynthia Godsoe, *Punishment as Protection*, 52 Hous. L. Rev. 1313, 1319 (2015).

119 Naomi Smoot, Coal. for Juv. Just., Status Offenses: A National Survey 5-6 (2014), <https://www.juvjustice.org/sites/default/files/resource-files/Status%20Offenses%20-%20A%20National%20Survey%20WEB.pdf> [<https://perma.cc/9743-6NGL>]; Brendan M. Conner, *In Loco Aequitatis: The Dangers of “Safe Harbor” Laws for Youth in the Sex Trades*, 12 Stan. J. C.R. & C.L. 43, 46-47 (2016).

120 See Pipeline, *supra* note 32, at 22.

121 David Aaron Michel, Note, *The CHINS Don't Stand a Chance: The Dubious Achievements of Child in Need of Services (“CHINS”) Jurisdiction in Massachusetts & a New Approach to Juvenile Status Offenses*, 20 B.U. Pub. Int. L.J. 321, 331 (2010).

122 *Id.* at 332.

123 Seeking Justice, *supra* note 22, at 16.

124 *Id.* at 17.

125 *The Importance of Criminal Record Relief for Human Trafficking Survivors*, Polaris (Mar. 20, 2019), <https://polarisproject.org/blog/2019/03/the-importance-of-criminal-record-relief-for-human-trafficking-survivors/> [<https://perma.cc/P7F6-7YZZ>], (“A criminal record has a profound impact on the ability of any individual to obtain future gainful employment, find affordable and safe housing, be able to begin or continue their education at college, obtain financial aid for tuition, retain custody of their children, and can affect an individual's access to crucial government benefits.”).

126 *Seeking Justice 2019 Update*, *supra* note 47.

127 Seeking Justice, *supra* note 22, at 17.

128 Miss. Code Ann. § 97-29-49(4) (2021); Miss. Code Ann. § 97-29-51(3) (2021).

129 Nev. Rev. Stat. § 62C.015 (2021); Nev. Rev. Stat. § 201.303 (2021).

130 N.D. Cent. Code §§ 12.1-29-03, 12.1-41-12 (2021).

131 *E.g.*, Mont. Code Ann. § 45-5-709 (2021); Wyo. Stat. Ann. § 6-2-708 (2021).

132 Shared Hope Int'l & Vill. L. Inst. to Address Com. Sexual Exploitation, *Responding to Sex Trafficking: Victim-Offender Intersectionality: A Guide For Criminal Justice Stakeholders* iv (2020) [hereinafter VOI Report],



- 148 Pipeline, *supra* note 32, at 9-12.
- 149 Hanni Stoklosa, Marti MacGibbon & Joseph Stoklosa, Commentary, *Human Trafficking, Mental Illness, and Addiction: Avoiding Diagnostic Overshadowing*, 19 AMA J. Ethics 23, 25-26 (2017) (84.3% of trafficking victims reported substance use during exploitation).
- 150 *See generally* Roberson, *supra* note 147 (discussing the overlapping nature of opioid use and trafficking); Meshelemiah & Lynch, *supra* note 147, at 127-42 (discussing the various ways in which drugs are used against trafficking victims).
- 151 Roberson, *supra* note 147, at 369-71; *Substance Abuse Needs*, Off. for Victims of Crime Training & Tech. Assistance Ctr., <https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/44-comprehensive-victim-services/mental-health-needs/substance-abuse-needs/> [<https://perma.cc/2E5Z-TDX2>].
- 152 *Impact of Criminal Arrest*, *supra* note 7.
- 153 *Id.*
- 154 *Id.*
- 155 *See* Tammy J. Toney-Butler, William Gossman & Olivia Mittel, *Human Trafficking*, Nat'l Ctr. for Biotech. Info. (Jan. 25, 2021), <https://www.ncbi.nlm.nih.gov/books/NBK430910/> [<https://perma.cc/7EJN-53SV>]; *United States v. Ford*, No. 17-20183, 2019 U.S. Dist. LEXIS 210735, at \*2 (E.D. Mich. 2019) (“One customer admitted that ... ‘lots’ of ‘girls’ work as prostitutes there to support their drug habits.”).
- 156 Office to Monitor and Combat Trafficking in Persons, *The Intersection of Human Trafficking and Addiction*, U.S. Dep’t of State (June 2020), [https://2017-2021.state.gov/wp-content/uploads/2020/10/TIP\\_Factsheet-The-Intersection-of-Human-Trafficking-and-Addiction-1-508.pdf](https://2017-2021.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-The-Intersection-of-Human-Trafficking-and-Addiction-1-508.pdf) [<https://perma.cc/UP37-SQFB>]; Stoklosa et al., *supra* note 149, at 26 (“Opioids in particular are an effective coercion tool for traffickers because they numb both emotional and physical pain; clinicians have noted clear links between the current US opioid epidemic and trafficking. Some traffickers recruit directly from substance use disorder treatment facilities.” (footnotes omitted)); *Human Trafficking and the Opioid Crisis*, Polaris, <https://polarisproject.org/wp-content/uploads/2019/10/Human-Trafficking-and-the-Opioid-Crisis.pdf> [<https://perma.cc/NK5M-HVSJ>] (“Polaris recorded 926 potential victims of human trafficking who had a substance abuse issue prior to the potential trafficking, many of whom had this vulnerability exploited by their traffickers. Twenty-six of those were recruited into their trafficking situation directly from drug rehabilitation centers.”); *Drug Abuse and Human Trafficking: Exploring the Connection*, The Recovery Vill. (Nov. 4, 2020), <https://www.therecoveryvillage.com/drug-addiction/related-topics/human-trafficking-exploring-connection/> [<https://perma.cc/7YBP-ZLCJ>] (“A perpetrator may stake out the local methadone clinic for potential victims, and some are even sold into the trade by addicted family members.”); Collins, *supra* note 23 (“One of the defendants, Robert King, found some of his victims at drug rehab centers. He would allegedly give them drugs, including heroin and cocaine, and bring them to other men for sex acts so they could earn money to pay him back for the drugs, according to arrest warrants.”).
- 157 *E.g.*, VOI Report, *supra* note 132, at 38.
- 158 *See id.* (discussing case study involving coercion of trafficking victims by exploiting substance dependency and drug debt).
- 159 Meshelemiah & Lynch, *supra* note 147, at 127-42.
- 160 *See id.*

- <sup>161</sup> *E.g.*, Press Release 13-1189, Off. of Pub. Affs., Dep't of Just., Lutz, Fla., Man Convicted on Drug Distribution and Sex Trafficking Charges (Nov. 6, 2013), <https://www.justice.gov/opa/pr/lutz-fla-man-convicted-drug-distribution-and-sex-trafficking-charges> [<https://perma.cc/NC3U-4TQY>].
- <sup>162</sup> Meshelemiah & Lynch, *supra* note 147, at 129-30.
- <sup>163</sup> *See id.* (“If apprehended by law enforcement while under the influence or in possession, drug using victims may lose their credibility and presumed innocence. The trafficker knows that her arrest will distract from her victimization.”).
- <sup>164</sup> *See* Meghan McCann, Nat'l Conf. of State Legislatures, Human Trafficking: An Overview of Services and Funding for Survivors 2 (2018), [https://www.ncsl.org/documents/cj/Human\\_Trafficking\\_FINAL\\_32391.pdf](https://www.ncsl.org/documents/cj/Human_Trafficking_FINAL_32391.pdf) [<https://perma.cc/CF5E-JM6V>] (describing the types of services that states can provide, including health care, legal services and housing, and how funding is primary barrier for all services).
- <sup>165</sup> *E.g.*, Lara Janson, Chi. All. Against Sexual Exploitation in Partnership with thorn, Our Great Hobby: An Analysis of Online Networks for Buyers of Sex in Illinois 74 (2013), <https://www.caase.org/wp-content/uploads/2020/06/OurGreatHobby.pdf> [<https://perma.cc/G38A-UV2P>] (quoting a buyer who'd use alcohol to coerce his victim to “do almost anything.”); *see also* Roberson, *supra* note 147, at 371 (noting the “existence of many situations in which opioid abuse exacerbates the already horrific experience of commercial sexual exploitation ...”).
- <sup>166</sup> *See* Janson, *supra* note 165, at 74.
- <sup>167</sup> *Id.* at 55.
- <sup>168</sup> *Id.* at 74.
- <sup>169</sup> *Id.*
- <sup>170</sup> Jessica Contrera, *He was sexually abusing underage girls. Then, police said, one of them killed him.*, Wash. Post (Dec. 17, 2019), <https://www.washingtonpost.com/graphics/2019/local/child-sex-trafficking-murder/> [<https://perma.cc/9FS4-58M9>].
- <sup>171</sup> *Id.*
- <sup>172</sup> Pa. Coal. Against Rape, *The Intersection Between Prostitution and Sexual Violence* 7 (2013), [https://pcar.org/sites/default/files/pages-pdf/the\\_intersection\\_between\\_prostitution\\_and\\_sexual\\_violence.pdf](https://pcar.org/sites/default/files/pages-pdf/the_intersection_between_prostitution_and_sexual_violence.pdf) [<https://perma.cc/U3Z3-HGDV>].
- <sup>173</sup> *See id.* at 5-8.
- <sup>174</sup> Serena Maszak, *Violence in Prostitution* 6 (May 17, 2018) (M.A. thesis, City University of New York), [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1068&context=jj\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1068&context=jj_etds) [<https://perma.cc/Q3VA-ZQ7V>] (referencing independent studies that revealed 93.8% of victims had been sexually assaulted, 82% had been physically assaulted, 75% had been raped, etc.); *see also* Lisa Fedina, Celia Williamson & Tasha Perdue, *Risk Factors for Domestic Child Sex Trafficking in the United States*, 34 J. Interpersonal Violence 2653, 2656 (2019), (“Women engaged in pimp-controlled and street-based prostitution often experience high rates of physical violence, sexual violence, and harassment and are at increased risk of HIV/AIDS, sexually transmitted infections (STIs), Hepatitis, and other infectious diseases.”); Alexandra (Sandi) Pierce, Minn. Indian Women's Res. Ctr., *Shattered Hearts: The Commercial Sexual Exploitation of American Indian Women and Girls in Minnesota* 14-15 (2009), <https://www.niwrc.org/sites/default/files/images/resource/Shattered-Hearts-Full.pdf> [<https://perma.cc/95PN-YVWA>] (noting that “at least 84% of the woman interviewed were victims of aggravated assault ...” and that there were a prevalence of murder attempts against the women).

175 Stoklosa et al., *supra* note 149, at 25-26.

176 See Harvard Women's Health Watch, *Past trauma may haunt your future health*, Harv. Health Publ'g (Feb. 2019), <https://www.health.harvard.edu/diseases-and-conditions/past-trauma-may-haunt-your-future-health> [<https://perma.cc/GM43-NTM6>].

177 *Id.*

178 Jody Raphael & Katie Feifer with Jayne Bigelsen, Michelle Dempsey & Shea Rhodes, *World Without Exploitation, What We Know About Sex Trafficking, Prostitution, and Sexual Exploitation in the U.S.* 24, 29, 37 (2017), [https://endsexualexploitation.org/wp-content/uploads/Research-Summary\\_What-we-know-about-trafficking-prostitution-and-exploitation-in-US-.pdf](https://endsexualexploitation.org/wp-content/uploads/Research-Summary_What-we-know-about-trafficking-prostitution-and-exploitation-in-US-.pdf) [<https://perma.cc/8S6R-FYLM>] (discussing prevalence of physical and sexual violence and noting studies that showed the use of psychological coercion by traffickers through emotional isolation and exhaustion).

179 Mazedra Hossain, Cathy Zimmerman, Melanie Abas, Miriam Light & Charlotte Watts, *The Relationship of Trauma to Mental Disorders Among Trafficked and Sexually Exploited Girls and Women*, 100 Am. J. Pub. Health 2442, 2442 (2010).

180 *Id.*

181 Joan A. Reid, Michael T. Baglivio, Alex R. Piquero, Mark A. Greenwald & Nathan Epps, *Human Trafficking of Minors and Childhood Adversity in Florida*, 107 Am. J. of Pub. Health, 306, 306 (2017) (“ACE composite scores were higher and 6 ACEs indicative of child maltreatment were more prevalent among youths who had human trafficking abuse reports.”); see also Melissa Farley, Nicole Matthews, Sarah Deer, Guadalupe Lopez, Christine Stark & Eileen Hudon, Minn. Indian Women's Sexual Assault Coal. & Prostitution Rsch. & Educ., *Garden of Truth: The Prostitution and Trafficking of Native Women in Minnesota* 28 (2011), <https://www.niwr.org/sites/default/files/images/resource/Garden-of-Truth.pdf> [<https://perma.cc/TNF4-7JAJ>] (Table 4. Violence in Prostitution of Native American Women and in a Study of Prostitution in 9 Countries).

182 VOI Report, *supra* note 132, at 9.

183 *Id.* at 8-9.

184 Hossain et al., *supra* note 179, at 2446; *Addiction as a Coping Mechanism and Healthy Alternatives*, Am. Addiction Ctrs. (June 13, 2019), <https://americanaddictioncenters.org/sobriety-guide/coping-mechanism> [<https://perma.cc/6E76-EAMG>].

185 VOI Report, *supra* note 132, at 9.

186 Hannah Green, *Criminalizing trauma*, Soc'y for Child & Fam. Pol'y & Prac. (Aug. 2020), <https://www.apadivisions.org/division-37/publications/newsletters/maltreatment/2020/08/criminalizing-trauma> [<https://perma.cc/2EEP-NGFM>].

187 Teresa Stafford, *The Criminalization of Black Survivors of Commercial Sex Trafficking*, Shared Hope Int'l (Oct. 21, 2020), <https://webinars.sharedhope.org/product/issuearea5-a/> [<https://perma.cc/822W-QWKA>].

188 See Kimberlé Williams Crenshaw with Priscilla Ocen & Jyoti Nanda, *Afr. Am. Pol'y F. & Ctr. for Intersectionality & Soc. Pol'y Stud.*, *Black Girls Matter: Pushed Out, Overpoliced and Underprotected* 34-35 (2015); Gilhuly et al., *supra* note 35, at 3.

189 Green, *supra* note 186.

- <sup>190</sup> See Gilhuly et al., *supra* note 35, at 4.
- <sup>191</sup> Charisa Smith, *No Quick Fix: The Failure of Criminal Law and Promise of Civil Law Remedies for Domestic Child Sex Trafficking*, 71 U. Mia. L. Rev. 1, 20-21 (2016) (“The juvenile and criminal justice system are also particularly ineffective in reforming youth behavior and are highly criminogenic. A growing literature demonstrates that the most punitive approaches to youth crimes such as prostitution are developmentally inappropriate and cause youth to develop psychological damage, poor coping skills, negative peer associations, and a higher propensity to avoid seeking future intervention .... punitive approaches overwhelmingly fail to re-direct or rehabilitate. Instead, adolescents require a particular and often fluid balance of guidance, support, opportunity, and empowerment.” (footnotes omitted)).
- <sup>192</sup> Anne Seymour, *Dynamics of the Criminal Justice System*, in Off. for Victims of Crimes, 1999 National Victim Assistance Academy (Grace Coleman, Mario Galbourn, Morna Murray & Anne Seymour eds., 1999), [https://www.ncjrs.gov/ovc\\_archives/nvaa99/chap2-2.htm](https://www.ncjrs.gov/ovc_archives/nvaa99/chap2-2.htm) [<https://perma.cc/CF72-RGDK>] (“Victims of crime have historically been treated less than adequately within the criminal justice system. The vestiges of a victim-oriented or victim-driven system, with private prosecution or so called ‘vigilante’ justice, have given way over the last decades to an offender-based criminal justice system”); see Anne M. Morgan, *Criminal Law--Victim Rights: Remembering the “Forgotten Person” in the Criminal Justice System*, 70 Marq. L. Rev. 572, 572 n.1 (1987) (Hearings and studies have repeatedly shown that too often the victim has been the ‘forgotten person’ in the criminal justice system. It has been noted that with few exceptions, victims and witnesses are either ignored by the system or simply used to identify offenders.”).
- <sup>193</sup> Emancipation Nation Podcast, *Episode 61: Is this an Example of Overzealous Advocacy or Good Anti-Trafficking Law? You Decide. Part II of Breyonna Jones*, Celia (Sept. 8, 2020), <https://celiawilliamson.com/episodes/episode-61-is-this-an-example-of-overzealous-advocacy-or-good-anti-trafficking-law-you-decide-part-ii-of-breyonna-jones> [<https://perma.cc/8J9E-TTFT>] (Breyonna Jones speaking).
- <sup>194</sup> VOI Report, *supra* note 132, at 7 (“[T]he phenomenon of sex trafficking victims alleged to have engaged in conduct that violates the federal definition of sex trafficking under 22 U.S.C. 7102 [sic] (Definitions). Under this definition, the trafficking violation could involve a broad range of conduct, including recruitment, transportation, advertising and harboring, and could involve trafficking of adults by means of force, fraud or coercion or children without regard to whether force, fraud or coercion was involved.” (footnote omitted)). For purposes of this article, the term “victim-offender intersectionality” will be used to describe sex trafficking victims who engage in criminal acts as a result of their trafficking victimization.
- <sup>195</sup> See SHI Report Cards, *supra* note 2, at 1 (“Comprehensive and accessible victim protections are, undoubtedly, the most crucial components of a strong response to child sex trafficking and, yet, as a nation we continue to fall behind.”).
- <sup>196</sup> See Musto, *supra* note 49, at 273 (“Moving forward, scholars and activists ought to cultivate new models of justice that do not rely on a detention-to-protection paradigm and which do not require sex trade-involved individuals to gain protection and obtain services by interfacing with the state and its allies in its most punitive form”).
- <sup>197</sup> See Zeeman & Stauss, *supra* note 98, at 144 (“In some circumstances, prosecutors must consider potentially charging victims, despite their victimization, if their conduct is sufficiently harmful to others and insufficiently connected to coercion. Prosecutors represent the government and, by extension, society. While the victim-perpetrator may be the member of society that has the biggest stake in a case at hand, law enforcement must balance the interests of this victim against the interests of other victims, of potential future crime victims, and of the community in being safe from harmful conduct.”); see also VOI Report, *supra* note 132, at 2 (advocating for a “just, trauma-informed and victim-centered response” when encountering the intersection of crimes committed by victims of sex trafficking).
- <sup>198</sup> See Grace Icenogle et al., *Adolescents' Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample*, 43 L. Hum. Behav. 69 (2019)

(discussing the cognitive capacity and psychosocial maturity of children, adolescence, and young adults); *Id.* at 72 (“[F]acets of hot cognition, including sensation seeking (or lack thereof), impulse control, future orientation, and resistance to peer influence, follow a protracted development into adulthood.”).

199 *See* Raino, *supra* note 136.

200 *E.g.* *Responding to Human Trafficking*, Child Welfare Info. Gateway, <https://www.childwelfare.gov/topics/systemwide/trafficking/responding/> [<https://perma.cc/8FSH-EH5H>].

201 *Estimated number of arrests by offense and age group, 2019*, Off. Juv. Just. Delinq. Prevention (Nov. 16, 2020), [https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table\\_in=1](https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1) [<https://perma.cc/84DL-EQZQ>] (showing “Prostitution and commercialized vice” arrests of children and youth in 2019 for ages 10 to 17 (290), 0 to 14 (40), 15 to 17 (250), 18 to 20 (2,900), 21 to 24 (4,660)).

202 *E.g.*, Tessa Duvall, *Adults, agencies failed Alyssa Beck*, Fla. Times-Union (July 30, 2016, 10:25 PM), <https://www.jacksonville.com/news/2016-07-30/story/adults-agencies-failed-alyssa-beck> [<https://perma.cc/N9W8-9AFV>]; Morgan Smith, Edgar Walters & Neena Satija, *She was a sex-trafficking victim, but Texas law labeled her a pimp*, Tex. Trib. (Feb. 16, 2017, 12:00 AM), <https://www.texastribune.org/2017/02/16/she-was-sex-trafficking-victim-texas-law-labeled-her-pimp/> [<https://perma.cc/9WTP-WDZ3>]; Chapin, *supra* note 86; Anita Chabria, *This sex trafficking victim is behind bars, suicidal. She seeks Newsom's clemency*, L.A. Times (Sep. 7, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-09-07/sex-trafficking-victim-suicidal-newsom-clemency> [<https://perma.cc/9TXT-DUEK>]; Ken Kalthoff, *Families Debate Claims of Sex Trafficking and Murder by Teens*, NBC DFW (Aug. 28, 2020, 7:16 PM), <https://www.nbcdfw.com/news/local/families-debate-claims-of-sex-trafficking-and-murder-by-teens/2434844/> [<https://perma.cc/3DW7-5YU6>]; Jacey Fortin, *Chrystul Kizer, Teen Charged with Killing Sexual Abuser, Is Released on Bond*, N.Y. Times (June 23, 2020), <https://www.nytimes.com/2020/06/23/us/chrystul-kizer-free-bond.html> [<https://perma.cc/SM3B-8275>]; Janelle Griffith, *Child sex trafficking survivor supported by Kim Kardashian West freed from jail*, NBC News (Apr. 22, 2020, 2:57 PM), <https://www.nbcnews.com/news/us-news/child-sex-trafficking-survivor-supported-kim-kardashian-west-freed-jail-n1189536> [<https://perma.cc/4S8A-4FMM>]; Peggy Lowe & Sherman Smith, *Kansas Made This Sex Trafficking Survivor A Criminal--She Wants Another Chance*, KCUR (Oct. 14, 2019, 5:30 AM), <https://www.kcur.org/news/2019-10-14/kansas-made-this-sex-trafficking-survivor-a-criminal-she-wants-anotherchance#stream/0> [<https://perma.cc/AY43-P4DZ>]; Leah Carroll, *How the Justice System Failed Cyntoia Brown*, Refinery 29 (Aug. 7, 2019, 10:40 AM), <https://www.refinery29.com/en-us/2018/12/219015/cyntoia-brown-case-facts-real-story> [<https://perma.cc/DX4K-JGY3>]; Alex Halverson, *Seattle teen killer sentenced to 19 years in prison for 'cold-blooded' murder*, Seattle P-I (Sept. 17, 2020), <https://www.seattlepi.com/local/crime/article/Woman-sentenced-19-years-shooting-Seattle-man-13706912.php> [<https://perma.cc/3YC9-826H>]; Ashley Rowe, *Judge grants Patrice Smith freedom after serving 21 Years for murder, thanks to new law*, WKBW (Sept. 17, 2020, 11:23 AM), <https://www.wkbw.com/news/local-news/judge-grants-patrice-smith-freedom-after-serving-21-years-for-murder-thanks-to-new-law> [<https://perma.cc/GR6N-FDU2>]; Crimesider Staff, *Sarah Kruzan Update: Calif. woman who killed pimp as teen released from prison under new juvenile--offender law*, CBS News (Oct. 31, 2013, 5:25 PM), <https://www.cbsnews.com/news/sara-kruzan-update-calif-woman-who-killed-pimp-as-teen-released-from-prison-under-new-juvenile-offender-law/> [<https://perma.cc/E7YH-VVMT>]; Nichole Manna, *At 14, she was a victim of sex trafficking. Should that excuse her murder conviction?*, Fort Worth Star--Telegram (July 31, 2019, 12:06 PM), <https://www.star-telegram.com/article232843707.html> [<https://perma.cc/F6WJ-XVN9>].

203 *E.g.*, VOI Report, *supra* note 132, at 36 (discussing “Brittany” case study in which, “[d]espite being charged with conspiracy to commit sex trafficking in a superseding indictment, the indictment cites no overt acts by Brittany in furtherance of the sex trafficking charge, such as allegations that Brittany recruited other victims or managed any aspects of her trafficker's trafficking enterprise .... Additionally, the sentencing memorandum in her trafficker's case includes Brittany among his minor victims. However, unlike the other victims discussed in the sentencing memorandum, Brittany was no longer a minor when her trafficker was arrested.”).

- 204 See *State Legal Ages Laws*, FindLaw, <https://statelaws.findlaw.com/family-laws/legal-ages.html> [<https://perma.cc/7QKV-MP8E>] (listing age of majority for each state).
- 205 *Best Practices for Rescuing Trafficking Victims: Briefing Before the Comm'n on Sec. and Coop. in Eur.*, 114th Cong. 39 (2015) (prepared statement of Dr. Jordan Greenbaum) (“Arguably, all adolescents are at risk for human trafficking simply by virtue of their age and developmental status. This is a period of risk-taking and impulsive behavior, when the part of the brain responsible for thoughtful consideration of risks and benefits, of delaying gratification, of comparing current possible outcomes with past consequences is still relatively immature.”).
- 206 See Duren Banks & Tracey Kyckelhahn, U.S. Dep’t of Just., *Characteristics of Suspected Human Trafficking Incidents, 2008-2010* at 6 (2011), <https://www.bjs.gov/content/pub/pdf/cshti0810.pdf> [<https://perma.cc/TH2F-GE67>] (discussing victim characteristics of sex trafficking victims from 2008-2010, including age, gender and race).
- 207 Sarah Bendtsen, *Bridge to Success--National Foster Care Month*, Shared Hope Int’l (May 29, 2020), <https://sharedhope.org/2020/05/29/bridge-to-success-national-foster-care-month/> [<https://perma.cc/75WP-SBJM>].
- 208 See VOI Report, *supra* note 132, at 36-37.
- 209 See Roya Ijadi-Maghsoodi, Mekeila Cook, Elizabeth S. Barnert, Shushanik Gaboian & Eraka Bath, *Understanding and Responding to the Needs of Commercially Sexually Exploited Youth*, 25 Child & Adolescent Psychiatric Clinics of N. Am. 107 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4725731/> [<https://perma.cc/W2HJ-6QAT>] (“A trauma-informed approach recognizes the symptoms of trauma, understands the impact of past trauma on an individual’s life and coping, and incorporates this understanding into practices to empower and avoid retraumatizing the individual. Implementing a trauma-informed model of care can improve identification, diminish harm, and enhance care of youth who have been sexually exploited and victimized.”).
- 210 See *United States v. Brooks*, 610 F.3d 1186, 1192 (9th Cir. 2010) (victim-offender “pleaded guilty and received a reduced sentence in exchange for her testimony against [her traffickers]”); *United States v. Campbell*, 770 F.3d 556, 559-60 (7th Cir. 2014) (victim-offender withdrew a previous plea of “not guilty” and prosecution dropped trafficking charges).
- 211 Butler, *supra* note 109, at 1292-94.
- 212 VOI Report, *supra* note 132, at 10.
- 213 *Exploited and Prosecuted: When Victims of Human Trafficking Commit Crimes*, United Nations Off. on Drugs & Crime (Dec. 16, 2020), [https://www.unodc.org/unodc/frontpage/2020/December/exploited-and-prosecuted\\_-when-victims-of-human-trafficking-commit-crimes.html](https://www.unodc.org/unodc/frontpage/2020/December/exploited-and-prosecuted_-when-victims-of-human-trafficking-commit-crimes.html) [<https://perma.cc/35KU-CJG5>].
- 214 Zeeman & Stauss, *supra* note 98, at 140-42.
- 215 See generally VOI Report, *supra* note 132, at 46 (discussing recommendations for next steps and continuing the dialogue about this issue).
- 216 See generally Jessica Aycock, *Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims*, 5 Crim. L. Prac. 10 (2019) (discussing the use of affirmative defenses by victim-offenders to avoid culpability).
- 217 Matthew Myatt, *The “Victim-Perpetrator” Dilemma: The Role of State Safe Harbor Laws in Creating a Presumption of Coercion for Human Trafficking Victims*, 25 Wm. & Mary J. Race, Gender, & Soc. Just. 555, 571 (2019) (“[T]he interest of justice calls for law enforcement to consider the degree of psychological coercion, the victim’s level of intent and autonomy, and the need to protect victims from being ‘inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked ....’” (footnote omitted)).

- 218 Claudia Peña, *Trauma Abounds: A Case for Trauma-Informed Lawyering*, 26.1 UCLA Women's L.J. 7, 8-9 (2019) (“Trauma can lead to varying effects such as hopelessness, inability to recall, loss of sleep, distrustfulness, disassociation, difficulty concentrating, exaggerated startle response, hyper- or hypoarousal, irritability, outbursts of anger, hypervigilance, or efforts to avoid any reminders of the traumatic event.”).
- 219 VOI Report, *supra* note 132, at 21 (“Questions related to a VO's [victim-offender's] apparent and actual autonomy are important because, even when conduct on the part of the VO may appear autonomous, the VO may not perceive that they had a choice due to their underlying trauma or their trafficker's control.”).
- 220 *See Winn v. Sec'y of Corr.*, No. CV 17-9144-DOC (AFM), 2018 U.S. Dist. LEXIS 152322, at \*20 (C.D. Cal. July 19, 2018) *report and recommendation adopted*, No. CV17-09144 DOC (AFM), 2018 U.S. Dist. LEXIS 152304 (C.D. Cal. Sept. 6, 2018) (discussing how victim-offender insulates the pimp from law enforcement, because “[s]he's taking all the risk and he is reaping all of the reward.”).
- 221 *See Sarah Crocker, Stripping Agency from Top to Bottom: The Need for a Sentencing Guideline Safety Valve for Bottoms Prosecuted Under the Federal Sex Trafficking Statutes*, 111 Nw. U. L. Rev. 753, 756, 771-72 (2017) (“Traffickers routinely employ abuse and manipulation to strip away bottoms' agency, so that they will perform virtually any act at their trafficker's command.”).
- 222 A “bottom” is “a trusted and experienced prostitute” whose place is “[a]t the top of the pimp's organization.” *United States v. Pipkins*, 378 F.3d 1281, 1285 (11th Cir. 2004) *superseded by statute* U.S.S.G. § 2G1.3 (2021), *as recognized in United States v. Madison*, 477 F.3d 1312 (11th Cir. 2007); *see also United States v. Brooks*, 610 F.3d 1186, 1196 (9th Cir. 2010) (describing the role of “bottom girl” as the “pimp's most senior prostitute, who often trains new prostitutes and collects their earnings until they can be trusted ...”).
- 223 VOI Report, *supra* note 132, at 33-45 (discussing case studies with varying levels of victim-offender involvement in helping to run their respective trafficking enterprises).
- 224 18 U.S.C. § 1591 (listing proscribed acts under child sex trafficking law, including anyone who knowingly “recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person”).
- 225 VOI Report, *supra* note 132, at 53; *see also Exploited and Prosecuted: When Victims of Human Trafficking Commit Crimes*, *supra* note 213 (explaining that very few victim-offenders engage in acts of trafficking for economic gain or for hierarchical reasons).
- 226 Elspeth Drayton, (Re)Racialising the Domestic Minor Sex Trafficking Discourse (2018) (MSc Dissertation, University of London), <https://soas-uk.academia.edu/ElspethDrayton> [<https://perma.cc/2Q5G-ED66>]; *see also* Laura T. Murphy, Loy. Univ. New Orleans Modern Slavery Rsch. Project, Labor and Sex Trafficking Among Homeless Youth: A Ten-City Study Executive Summary 5-6, <https://www.covenanthouse.org/sites/default/files/inline-files/Loyola%20Multi-City%20Executive%20Summary%20FINAL.pdf> [<https://perma.cc/EGS4-DKVC>] (explaining that 29% of LGBTQ youth were identified as human trafficking survivors, compared to 16% of all young men surveyed, and 50% of LGBTQ youth had engaged in any form of commercial sex, compared to 24% of cisgender men).
- 227 Myatt, *supra* note 217, at 594 (arguing for drawing line at non-violent offenses because of the difficulty with balancing public safety and other considerations when violence is involved); *see* 22 U.S.C. §§ 7101-7114 (providing a non-criminalization provision for trafficking victims, but recommends drawing a line at non-violent offenses).
- 228 Bobby Allyn, *Cyntoia Brown Released After 15 Years In Prison For Murder*, NPR (Aug. 7, 2019, 12:24 PM), <https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder> [<https://perma.cc/AZ5F-ZELS>] (discussing Cyntoia Brown's grant of clemency in 2019, after serving 15 years of a life sentence in prison, following her conviction in 2006); Anita Chabria, *Sex trafficked and imprisoned, California woman wins freedom after long fight*, L.A. Times (Nov. 6, 2020, 2:05 PM),

<https://www.latimes.com/california/story/2020-11-06/sex-trafficked-and-imprisoned-california-woman-wins-freedom> [<https://perma.cc/D6PB-C3AZ>] (discussing Keiana Aldrich's release from prison after being trafficked as a minor and spending almost a decade behind bars); Emma Beavins, *Patrice Smith Case: What To Know*, Dressember (July 14, 2020), <https://www.dressember.org/blog/patrice-smith-case> [<https://perma.cc/CUV3-2HB8>] (discussing Patrice Smith, whose case is now being reconsidered after serving 21 years in prison for killing her abuser); Tony Inglis, *Sara Kruzan, imprisoned for killing her sex trafficker, is free and fighting back*, ST. Roots (June 21, 2019), <https://www.streetroots.org/news/2019/06/21/sara-kruzan-imprisoned-killing-her-sex-trafficker-free-and-fighting-back> [<https://perma.cc/TQD3-EDT2>] (discussing Sara Kruzan, who was only recently freed from prison after being sentenced to life without parole when she was 17 for killing her sex trafficker).

- 229 WCPO Staff, *Alexis Martin: Trafficking survivor convicted of pimp's murder freed from Ohio prison amid COVID-19*, News5 Cleveland (Apr. 20, 2020, 9:58 AM), <https://www.news5cleveland.com/news/national/coronavirus/alexis-martin-trafficking-survivor-convicted-of-pimps-murder-freed-from-ohio-prison-amid-covid-19> [<https://perma.cc/98ML-XMPW>] (discussing Alexis Martin, who was granted clemency after being sentenced to 21 years in prison for planning the murder of her sex trafficker when she was 15); Fortin, *supra* note 202 (discussing Chrystul Kizer, who was released on bond after being charged with killing her sexual abuser); Greg Hanlon, *Texas Teen Is Accused of Murder--But Advocates Say She's a Sex Trafficking Victim, Not a Killer*, People (Dec. 17, 2020, 11:24 AM), <https://people.com/crime/zephaniah-trevino-case-texas-teen-accused-murder-says-she-was-sex-trafficking-victim/> [<https://perma.cc/3V4Y-TGYQ>] (discussing Zephaniah Trevino, who was accused of murdering a man as a result of a robbery initiated by a man who was allegedly sex trafficking her).
- 230 *Compare* Act of Mar. 23, 2012, ch. 613, 2012 Tenn. Pub. Acts 1939 (enacting Tennessee's sex trafficking law in 2012), with Allyn, *supra* note 228 (discussing Cyntoia Brown's grant of clemency in 2019, after serving 15 years of a life sentence in prison, following her conviction in 2006).
- 231 Linda A. Smith, Samantha Healy Vardaman & Melissa A. Snow, Shared Hope Int'l, *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children* 7 (2009), [https://sharedhope.org/wp-content/uploads/2012/09/SHI\\_National\\_Report\\_on\\_DMST\\_2009.pdf](https://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf) [<https://perma.cc/MXU3-46MD>].
- 232 *See Citizen's Guide to U.S. Federal Law on Child Sex Trafficking*, U.S. Dept. of Just. (May 28, 2020), <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-sex-trafficking> [<https://perma.cc/P7FS-LE27>] (examining the lower threshold for identification as a trafficking victim when the victim is a child since proof of force, fraud, or coercion is not a required element of the offense and noting that only minor victims are excused from these showings).
- 233 At age seventeen, Sara Kruzan was convicted of killing the man who abused and trafficked her. She was sentenced to life in prison without parole. *Sex trafficking victim who killed her abuser hopes to change laws*, WAVY (Apr. 12, 2019, 9:48 PM), <https://www.wavy.com/news/sex-trafficking-victim-who-killed-her-abuser-hopes-to-change-laws/> [<https://perma.cc/EBZ2-GML8>]. Cyntoia Brown, age sixteen at the time of the crime, was convicted of murder and robbery for killing the man she alleged was soliciting her for sex. Mallory Gafas & Tina Burnside, *Cyntoia Brown is granted clemency after serving 15 years in prison for killing man who bought her for sex*, CNN (Jan. 8, 2019, 5:31 AM), <https://www.cnn.com/2019/01/07/us/tennessee-cyntoia-brown-granted-clemency/index.html> [<https://perma.cc/Y4LT-XVEY>]. See also Maggy Krell & Maheen Kaleem, Opinion, *How California is failing vulnerable victims of systemic racism*, Wash. Post (Oct. 28, 2020, 8:00 AM), <https://www.washingtonpost.com/opinions/2020/10/28/how-california-is-failing-vulnerable-victims-systemic-racism/> [<https://perma.cc/7HFL-HLEX>] (discussing Keiana Aldrich, who was prosecuted as an adult and sentenced to nearly 10 years in prison for crimes committed against her alleged sex buyers).
- 234 Lopez, *supra* note 86 (discussing Zephi Trevino, who was charged with felony murder for the shooting of a man who intended to purchase her for sex by her alleged sex trafficker).
- 235 *E.g.*, Nichole Manna, *Family says Texas teen facing capital murder charge was being sold for sex by gunman*, Fort Worth Star-Telegram (Aug. 5, 2020, 4:06 PM),

<https://www.startelegram.com/news/local/crime/article244709977.html> [<https://perma.cc/V2QM-CZ6P>] (describing the challenges involved with Zephi's ongoing case).

- <sup>236</sup> See Erin Marsh, Brittany Anthony, Jessica Emerson & Kate Mogulescu, Polaris, Am. Bar Ass'n Comm'n on Domestic & Sexual Violence, Brooklyn L. Sch., Univ. of Balt. Sch. of L., State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking 17 (2019), <https://polarisproject.org/wp-content/uploads/2019/03/Grading-Criminal-Record-Relief-Laws-for-Survivors-of-Human-Trafficking.pdf> [<https://perma.cc/M3UK-8EGN>] (“This is commonly understood to apply only to criminal acts committed in response to an immediate threat of death or serious physical harm.”). But duress only properly describes a small subset of trafficking circumstances, as most are instead more subtle forms of chronic manipulation, rather than acute/discrete instances of immediate threat. See, e.g., Lindsey Roberson & Shan Patel, *Prosecuting Sex Trafficking Cases Using a Drug-Based Theory of Coercion*, U.S. Att'ys' Bull., Nov. 2017, at 175, 178-81 (detailing the manipulation of victims' drug addictions in instances of trafficking).
- <sup>237</sup> See Christian Lee González Rivera, *The Plight of “Unreasonable” Trafficking Victims: Replacing the Trafficking Victims Protection Act's Reasonable Person Standard for Coercion with a Genuine Belief Standard*, 40 Women's Rts. L. Rep. 272, 281-83 (2019) (discussing the problems with having to prove coercion and using the reasonable person standard for sex trafficking survivors).
- <sup>238</sup> See Zeeman & Stauss, *supra* note 98, at 140-41 (identifying three categories of crimes committed by trafficking victims and describing the third category which involves “harms inflicted on others through conduct that is related to the underlying victimization” as “especially challenging to evaluate because protection of the victim potentially conflicts with protection of third parties harmed by the victim's conduct.”).
- <sup>239</sup> *Id.* at 144.
- <sup>240</sup> Rivera, *supra* note 237, at 283-86 (discussing the problems with using the reasonable person standard for sex trafficking survivors).
- <sup>241</sup> VOI Report, *supra* note 132, at 12-15 (presenting the criminal justice stakeholder tool, section addressing violence).
- <sup>242</sup> Zeeman & Stauss, *supra* note 98, at 140 (“[The TVPA's] non-prosecution policy would not apply to a victim who engaged in the first category of offenses, as those crimes were not caused--either directly or indirectly--by victimization. An example might be a sex trafficking victim having committed credit card fraud against a customer that was in no way directed by, or for the benefit of, her trafficker. Prosecutors should, however, carefully consider whether an offense that may seem facially unrelated to human trafficking may have been coerced or directed by a trafficker in ways that are not immediately apparent.” (footnote omitted)).
- <sup>243</sup> See *People v. Cross*, No. G054153, 2019 Cal. App. Unpub. LEXIS 1966, at \*17-19 (Cal. Ct. App. Mar. 22, 2019) (detailing a magistrate's finding that the victim-offender not culpable for offenses carried out under duress, and while effectively acting under their trafficker's control, but found culpability for a violent act the victim-offender carried out against another victim in anger because the victim-offender “stepped above and beyond any kind of relationship with the ... male pimp ....”).
- <sup>244</sup> SHI Report Cards, *supra* note 2, at 43.
- <sup>245</sup> *Id.*
- <sup>246</sup> Importantly, recognition of trafficking victimization, the subtleties of coercion, and the availability of an affirmative defense could make a significant difference in the outcome of several recently publicized court cases. See, e.g., Dana Branham, *Family says North Texas teen murder suspect is sex-trafficking victim; co-defendants' attorneys call it a false narrative*, Dall. Morning News (Dec. 20, 2020, 10:05 PM),

<https://www.dallasnews.com/news/courts/2020/12/20/family-says-north-texas-teen-murder-suspect-is-sex-trafficking-victim-co-defendants-attorneys-call-it-a-false-narrative/> [<https://perma.cc/YH8C-6AB5>] (discussing Zephi Trevino, charged with capital murder for her role in a robbery that ended with her trafficker killing one man and injuring another); Fortin, *supra* note 202 (discussing Chrystal Kizer, charged with premeditated murder after the killing of her abuser despite acting in self-defense); Lowe & Smith, *supra* note 202 (discussing Hope Zeferjohn, charged with sex trafficking, a role she assumed during the course of her own exploitation and abuse).

247 See Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 Minn. L. Rev. 965, 970-71 (1995).

248 See Paula R. Brummel, *Doing Adult Time for Juvenile Crime: When the Charge, Not the Conviction, Spells Prison for Kids*, 16 L. & Ineq. 541, 541-42 (1998).

249 Compare Ariz. Rev. Stat. Ann. § 13-909(A) (2021) (Arizona vacatur law is an example of what to avoid as it only allows convictions occurring before July 24, 2014--when the state's affirmative defense for prostitution went into effect-- to be vacated), with HOPE for Victims of Human Trafficking Act, H. R. 5080, 116th Cong. § 28(a) (2019) (would have established an affirmative defense for victims of sex trafficking to use that did not prohibit future post-conviction relief if the defense was unsuccessful or not asserted at trial).

250 Rachael Derham, Comment, *Justice for Victims of Sex Trafficking: Why Current Illinois Efforts Aren't Enough*, 51 J. Marshall L. Rev. 715, 740 (2018) (“The first is that it may not be practical because victims tend to distrust law enforcement and the criminal justice system, and therefore may not be willing to assert the defense. Additionally, many victims do not self-identify as victims. Victims may also still be under the control of their trafficker. These factors make it unlikely that victims of sex trafficking will actually assert an affirmative defense even if it is available to them.”).

251 Browne-James et al., *supra* note 82.

252 See *Vicarious Liability*, Legal Information Institute, [https://www.law.cornell.edu/wex/vicarious\\_liability](https://www.law.cornell.edu/wex/vicarious_liability) [<https://perma.cc/FN62-GUR9>] (In its definition of vicarious liability, the Legal Information Institute states, “Under common law, a member of a conspiracy can be held vicariously liable for the crimes of his co-conspirators if the crimes committed by the co-conspirators were foreseeable and if they were committed with the intent of furthering the objective of the conspiracy.”); *Felony Murder Rule*, Legal Information Institute, [https://www.law.cornell.edu/wex/felony\\_murder\\_rule](https://www.law.cornell.edu/wex/felony_murder_rule) [<https://perma.cc/8W4C-KAE7>] (Defining the Felony Murder Rule as, “The unlawful killing of another human being while engaged in the commission of or attempted commission of one of several felonies specified according to the laws of a particular jurisdiction.”).

253 See, e.g., Branham, *supra* note 246 (discussing Zephi Trevino, who was charged with the murder of an individual killed by her trafficker); Chabria, *supra* note 228 (discussing Keiana Aldrich, who was charged with kidnapping and robbery when she was 17-years-old); Londberg, *supra* note 85 (discussing Alexis Martin, who, at age 17, was charged in the murder of her trafficker); John Holt & Lisa McCormick, *Hope for Hope: Kansas sex trafficking victim put behind bars for sex trafficking*, Fox4 (Feb. 26, 2020, 4:01 PM), <https://fox4kc.com/news/hope-for-hope-kansas-sex-trafficking-victim-put-behind-bars-for-sex-trafficking/> [<https://perma.cc/Z5Z7-3CGZ>] (discussing Hope Zeferjohn, who was sentenced to six years in prison for ten felony and two misdemeanor charges when she was a minor, despite arguing that she had no choice).

254 VOI Report, *supra* note 132, at 36-37 (noting case studies, including “Brittany” who had just turned eighteen when her trafficker was arrested).

255 18 U.S.C. § 1591.

256 See *id.*

257 See e.g., Raychel Teasdale, Accounting for Adolescents' Twice Diminished Culpability in California's Felony Murder Rule, 53 Loy. L.A. L. Rev. 307 (2019); Katherine Dobscha, Note, *Considering a Juvenile Exception to the Felony Murder Rule*, 70 Case W. Rsv. L. Rev. 141 (2019).

258 VOI Report, *supra* note 132, at 38-45 (noting three case studies in which victims testified their traffickers); Musto, *supra* note 49, at 257, 269-70 (discussing prosecutors' motivations to work with advocates because they can help ensure the victim will be able to testify).

259 Evidence of a victim-offender's participation in trafficking conduct may be the basis for a sentencing enhancement even if the victim-offender was coerced into such activity by the trafficker. See U.S. Sent'g Guidelines Manual § 2G1.1(3) (U.S. Sent'g Comm'n 2018) ("For the purposes of § 3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim."). See *United States v. Britton*, 567 F. App'x 158, 159, 161 (3d Cir. 2014) (finding that the victim-offender qualified as a "participant" because "she assisted in promoting prohibited sexual conduct with respect to other victims." As a result of her role as a victim-offender, she pled guilty to conspiracy to engage in interstate prostitution. As a coconspirator, the victim-offender qualified as a participant because she was "criminally responsible for the commission of the offense ..." (quoting U.S.S.G. § 3B1.1 app. n. 1.)); *But cf.* U.S. Sent'g Guidelines Manual § 3B1.1(1) (U.S. Sent'g Comm'n 2018) ("A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted."); see also *United States v. Scott*, 529 F.3d 1290, 1303 (10th Cir. 2008) (finding that, although the victim-offender was not located or charged, her involvement still served as the basis for a four-level sentencing enhancement for the trafficker).

260 N.M. Stat. Ann. § 30-52-1(E) (West 2021) ("In a prosecution pursuant to this section, a human trafficking victim shall not be charged with accessory to the crime of human trafficking.").

261 Seeking Justice, *supra* note 22, at 17.

262 Amanda Peters, *Modern Prostitution Legal Reform & the Return of Volitional Consent*, 3 Va. J. Crim. L. 1, 31 (2015) (noting that, at the time of publication, 22 states have recently enacted affirmative defense laws in relation to sex trafficking victims).

263 *Id.* at 31 n. 93.

264 Marsh et al., *supra* note 236, at 17 ("This is commonly understood to apply only to criminal acts committed in response to an immediate threat of death or serious physical harm."). But duress only properly describes a small subset of trafficking circumstances, as most are instead more subtle forms of chronic manipulation, rather than acute/discrete instances of immediate threat. Myatt, *supra* note 217, at 563-66.

265 See generally Alyssa M. Barnard, Note, "*The Second Chance They Deserve*": *Vacating Convictions of Sex Trafficking Victims*, 114 Colum. L. Rev. 1463 (2014) (discussing the limitations of state vacatur laws); *New Analysis Grades States on Criminal Record Relief for Survivors of Human Trafficking*, Polaris (Mar. 14, 2019), <https://polarisproject.org/press-releases/new-analysis-grades-states-on-criminal-record-relief-for-survivors-of-human-trafficking/> [<https://perma.cc/XY67-JHP5>].

266 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, Religion, Gender & Class 239, 252 (2016). See also Trafficking Survivors Relief Act of 2019, H.R. 3627, S. 3240, 116th Cong. (2019). Both bills were referred to the committee, but both bills died when Congress adjourned on January 1st. *H.R.3627--Trafficking Survivors Relief Act of 2019*, Congress.gov, <https://www.congress.gov/bill/116th-congress/house-bill/3627/text?r=98&s=1> [<https://perma.cc/8F7B-PJ6W>]; *S. 3240--Trafficking Survivors Relief Act of 2020*, Congress.gov, <https://www.congress.gov/bill/116th-congress/senate-bill/3240> [<https://perma.cc/X5ZL-KC7C>].

- <sup>267</sup> Dominique Roe-Sepowitz, Elynne Greene, Kristine Buist, Stephanie Dirks, James Walters, James Gallagher, Kristen Bracy, Kimberly Hogan, Bandak Lul, Jiwon Byun & Veronica Duffield, ASU Off. Sex Trafficking Intervention Rsch., Trick Roll Study: Forced Criminality in Sex Trafficking Situations 3-4 (2020).
- <sup>268</sup> VOI Report, *supra* note 132, at 36 (detailing the case study of “Brittany,” who was charged with conspiracy to distribute cocaine).
- <sup>269</sup> See Burrell, *supra* note 43, at 1-2 (“Our system has lost touch with its well-intentioned origin as a means to care for young people. In the ‘get tough’ era of juvenile justice toward the end of the last century, we built and began to operate juvenile facilities that are indistinguishable from adult jails and prisons--heavy on hardware, custody, and control .... We have been slow to recognize that subjecting children to detention in such facilities is inherently traumatic, and counterproductive to producing good outcomes.”).
- <sup>270</sup> VOI Report, *supra* note 132, at 24 (“A criminal response can often impede access to these needed services and compound the trauma. For this reason, as soon as trafficking victimization is suspected and/or confirmed, a VO should be connected with a victim advocate or specialist who can connect them with needed support and services.”).
- <sup>271</sup> SHI Report Cards, *supra* note 2, at 64-65.

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