

April 2019

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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. Women & L. 555 (2019), <https://scholarship.law.wm.edu/wmjowl/vol25/iss3/4>

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THE “VICTIM-PERPETRATOR” DILEMMA: THE ROLE
OF STATE SAFE HARBOR LAWS IN CREATING A
PRESUMPTION OF COERCION FOR HUMAN
TRAFFICKING VICTIMS

MATTHEW MYATT*

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INTRODUCTION

At first glance, the roles of victim and perpetrator exist in opposition to one another. Under this assumption, there is a clear distinction between the “good” victim’s passive conduct and the “bad” perpetrator’s active conduct—which, in turn, makes the assignment of blame and criminal liability fairly straightforward. Upon a closer look, however, it becomes apparent that a troubling dichotomy between the roles of victim and perpetrator plagues victims of human trafficking.¹

This false dichotomy is brought to life when trafficking victims, themselves, engage in criminal conduct during the course of their trafficking that in some ways relates to their own victimization but also violates state or federal law.² In fact, distinguishing between varying degrees of coercion and the trafficker’s role in the criminal conduct of his victims presents one of the most challenging problems for law enforcement, prosecutors, and social services to address: the “victim-perpetrator” dilemma. Victims are not immune from liability, and in instances in which a victim’s conduct is “sufficiently harmful

1. This Comment primarily uses the term “victim” to refer to those affected by human trafficking but will often use “survivor” interchangeably because advocates typically prefer the term and it more accurately depicts their status. Additionally, this Comment uses female pronouns for trafficking survivors, but also recognizes that men are heavily exploited by human trafficking.

2. See Jeffrey H. Zeeman & Karen Stauss, *Criminal Conduct of Victims: Policy Considerations*, 65 U.S. ATT’YS BULL. 139, 140 (2017). This dichotomy presents several difficult questions, for example: what is the proper criminal justice response when a sex trafficking victim steals money from her john to meet her daily quota? Or when a labor trafficker promises a foreign citizen meaningful employment in the United States and later forces him to keep working past the expiration date of his visa? See *infra* Sections I.B.1–2, in which these questions will be addressed more fully.

to others” and “insufficiently connected to coercion,” it may be appropriate for prosecutors to consider charging a victim despite their victimization.³ However, trafficking victims are uniquely situated and suffer varying degrees of coercion that often directly contribute to their involvement in criminal conduct.⁴ This Comment does not seek to determine the line at which victims should begin to be held liable for engaging in criminal activity;⁵ it does, however, propose to protect victims to the fullest and characterize those exploited by human traffickers as victims, not criminals—at least presumptively.⁶ Traffickers are the root of the problem, and the focus should remain on prosecuting them.⁷

Before 2010, trafficking victims were regularly prosecuted for the prostitution-related crimes they were forced to commit during their trafficking.⁸ In reaction to and with pressure from activists and encouragement from federal Model Law, states began enacting safe harbor statutes.⁹ These safe harbor statutes are state-specific and ordinarily seek to shield trafficking victims from prosecution for their coerced prostitution-related offenses.¹⁰ Despite these efforts, however, victims still face unnecessary criminalization when they are coerced into criminal conduct.¹¹

3. See Zeeman & Stauss, *supra* note 2, at 144 (“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 U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-27.200-20 (2017), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.300> [<https://perma.cc/67V6-ZQTT>] (detailing the principles of federal prosecution and factors that prosecutors must balance).

4. See Sabrina Balmgamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, 94 DENV. L. REV. 1, 23 (2016). “The flip side of agency and consent is that victims cannot always be considered ‘innocent’ of unlawful conduct.” *Id.* at 26.

5. The solution of this issue lies in the facts of each case, proper investigative techniques, the use of prosecutorial discretion, and victim-centered social services. See Michele Boggiani, *When Is a Trafficking Victim a Trafficking Victim? Anti-Prostitution Statutes and Victim Protection*, 64 CLEV. ST. L. REV. 915, 923 (2016).

6. See *infra* Section IV.A.

7. See John Cotton Richmond, *The Root Cause of Human Trafficking is Traffickers*, HUM. TRAFFICKING INST. (Jan. 31, 2017), https://www.traffickinginstitute.org/wp-content/uploads/2017/06/Root-Cause-2-pager_web.pdf [hereinafter Richmond, *Root Cause*] (“Any serious effort to combat human trafficking must include striking at its root cause: the traffickers.”).

8. Cheryl Nelson Butler, *Bridge over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1283–84 (2015).

9. See *infra* Part II.

10. See *infra* Section II.A. The first “safe harbor” law, which dealt with minors, was in New York in 2007. See N.Y. SAFE HARBOR FOR EXPLOITED CHILDREN ACT LAW § 5258-C (McKinney 2007).

11. See *infra* Section I.B. For example, “[i]t is extremely difficult, if not impossible, to obtain certain types of employment, education, housing, and financial assistance as

States have sought to address the victim-perpetrator dilemma by providing several remedies to victims, but each remedy suffers drawbacks because it is either difficult to assert, contains stringent eligibility requirements, or is merely reactionary—meaning that the remedy is only offered *after* the victim exits the criminal justice system as a criminal.¹² For these reasons, this Comment proposes that a victim should be provided with a presumption of coercion for any non-violent crime committed during the course of her trafficking; a presumption that would take effect during trial and, if not rebutted, wrap in vacatur relief for arrests and charges related to the offense, so that survivors may be protected on the front end, *before* collecting an overwhelming criminal history.¹³ Because a trafficker’s coercion transcends into every area of a victim’s life,¹⁴ this Comment also posits that safe harbor statutes should be expanded beyond prostitution-related offenses and extend to all non-violent crimes survivors commit under the coercion of their trafficker.¹⁵ The effects of arrest, prosecution, conviction, and detainment cripple the recovery of survivors, as they make it nearly impossible for survivors with extensive criminal records to obtain work, financial loans, public housing, education, custody of their child, or to move past trauma.¹⁶

Part I of this Comment details the trafficker’s coercive scheme and outlines substantial problems that victims face as a result of the enduring nature of the impact of coercion.¹⁷ Part II provides relevant background information regarding the federal criminalization of human trafficking and the emergence of safe harbor statutes.¹⁸ It

a result of the criminal record that stems from one’s status as a victim of sex trafficking.” Samantha M. Meiers, *Removing Insult from Injury: Expunging State Criminal Records of Persons Trafficked in the Commercial Sex Trade*, 47 U. TOL. L. REV. 211, 217 (2015).

12. See *infra* Part III; see also Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 21 WASH. & LEE J. CIV. RTS. & SOC. JUST. 177, 186, 190 (2016) (“Given the ineffectiveness of trafficking-related vacatur statutes, legislators . . . should ask themselves why they do not provide these victims with relief *before* a conviction . . .”).

13. See *infra* Part IV.

14. See Danielle (“Elle”) Augustson, *Protecting Human-Trafficking Victims from Criminal Liability—A Legislative Approach*, 17 GEO. J. GENDER & L. 625, 634 (2016). Usual methods traffickers use may include withholding documentation, exploiting or creating strong drug and alcohol dependencies, or using debts to control victims. See Richmond, *Human Trafficking*, *infra* note 22, at 33.

15. See *infra* Part IV.

16. Stephanie Richard, *Victims of Human Trafficking Should Not Be Arrested for Crimes Their Traffickers Force Them to Commit* 1, 2 COAL. TO ABOLISH SLAVERY & TRAFFICKING (2016); see also, e.g., *People v. C.C.*, No. 51621(U), slip op. at 3 (N.Y.C. Crim. Ct. Sept. 19, 2014) (noting the victim was prevented from obtaining a cosmetology license as a result of her criminal record and its “negative impact on her opportunity to rebuild her life”).

17. See *infra* Part I.

18. See *infra* Part II.

will discuss the distinction between granting prosecutorial immunity and offering diversion programs and will briefly compare the safe harbor laws of Minnesota, Tennessee, and New York on their treatment of trafficking survivors. Part III describes the inadequacies of the existing remedies for human trafficking victims, highlighting the need for additional safeguards for victims.¹⁹ Finally, Part IV argues that states should expand safe harbor provisions to create a rebuttable presumption that victims' non-violent crimes committed during trafficking are a direct result of the victimization and therefore not susceptible to prosecution.²⁰ In doing so, states will affirm the victimhood of survivors and relieve them from the trauma associated with becoming a criminal defendant.²¹

I. THE HUMAN TRAFFICKER'S COERCIVE SCHEME

It is estimated that there are 24.9 million human trafficking victims in the world today,²² and that human trafficking generates more than \$150 billion in criminal proceeds each year.²³ In 2017 alone, there were 783 active federal human trafficking cases in the United States, including both criminal and civil cases.²⁴ The United

19. See *infra* Part III.

20. See *infra* Part IV.

21. See Ryan A. Hancock, *The Double Bind: Obstacles to Employment and Resources for Survivors of the Criminal Justice System*, 15 U. PA. J.L. & SOC. CHANGE 515, 517–20 (2012). Even in cases where the punishment imposed by the criminal justice system is less serious, "the collateral consequences of the conviction will magnify the punishment for these individuals' lifetimes, decreasing access to employment, housing, and social services." *Id.* at 519.

22. There are various global estimates of the number of trafficking victims, including estimates of "20.9 million, 27 million, 28.4 million, and 35.8 million," and each receive some level of criticism for their methodology. See John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS U. L.J. 1, 14 (2015) [hereinafter Richmond, *Human Trafficking*] ("[T]he reality that human trafficking is a hidden crime, and the difficulty of victims seeking out law enforcement make developing an accurate estimate a thorny endeavor."). Additionally, the International Labour Organization estimates that "[i]n the past five years, 89 million people experienced some form of modern slavery for periods of time ranging from a few days to the whole five years." See 8.7 ALLIANCE, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INT'L LABOUR ORG., https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf (last visited Apr. 5, 2019) [hereinafter *Forced Labour*].

23. Elizabeth G. Wright, *Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions*, 65 U.S. ATT'YS BULL. 79, 79 (2017); *Human Trafficking by the Numbers*, HUM. RTS. FIRST (Jan. 7, 2017), <https://www.humanrightsfirst.org/resource/human-trafficking-numbers> [<https://perma.cc/8LKT-5DLT>]; see also *Forced Labour*, *supra* note 22, at 34.

24. Kyleigh E. Feehs & John Cotton Richmond, *2017 Federal Human Trafficking Report*, HUM. TRAFFICKING INST., 10 (2018), <https://www.traffickingmatters.com/wp-content/uploads/2018/05/2017-Federal-Human-Trafficking-Report-WEB-Low-Res.pdf>.

Nations Office on Drugs and Crime ranked human trafficking “among the top three most lucrative criminal businesses, after drug trafficking and counterfeiting.”²⁵ Human trafficking is a lucrative, nearly hidden business that benefits from public misconceptions of what it is, how it exploits the vulnerable, and when its victims should be criminalized.²⁶

To understand the need for expanded safe harbor legislation, the powerful grip and extent of a trafficker’s coercion must first be understood. This Section outlines the standard recruitment patterns traffickers employ, their psychological manipulation and exploitative schemes, and the hierarchy of victimhood.²⁷ Human trafficking is not a “naturally occurring phenomenon”; behind each case, a trafficker makes a calculated and “wil[l]ful decision to profit,” “scheming to exploit the vulnerable and conceal the crime.”²⁸ As is often the case, the impact of this exploitation can transcend trafficking and spill into the rest of a victim’s path to recovery.²⁹

A. *The Recruitment and Exploitation of Victims by Their Trafficker*

Unlike other violent crimes or civil rights abuses, human trafficking is always motivated by money.³⁰ Not all human traffickers use the same business model to satisfy their desire for profit and many implement various means of fraud, force, and coercion.³¹ In addition

The Bureau of Justice Statistics found that in the 2015 fiscal year, a total of 1,923 criminal human trafficking cases were referred to U.S. attorneys, which is a 41% increase from those referred in 2011. Mark Motivans & Howard N. Snyder, *Federal Prosecution of Human-Trafficking Cases, 2015*, BUREAU JUST. STAT. 1, 1 (2018), <https://www.bjs.gov/content/pub/pdf/fphtc15.pdf>.

25. Wright, *supra* note 23, at 79; see UNODC, *New UNODC Campaign Highlights Transnational Organized Crime as a US \$870 Billion a Year Business* (July 16, 2012), <https://www.unodc.org/unodc/en/frontpage/2012/July/new-unodc-campaign-highlights-transnational-organized-crime-as-an-us-870-billion-a-year-business.html> [<https://perma.cc/N4XH-8LH5>].

26. Richmond, *Human Trafficking*, *supra* note 22, at 2, 41 (outlining several myths about human trafficking that “prevent individuals from identifying victims in need of help” and noting that “the reality of bringing justice to traffickers and their victims is clouded by troublesome myths and practical challenges”).

27. See *infra* Sections I.A.1–2. In its discussion regarding the coercive scheme of human trafficking, this Comment primarily focuses on sexual exploitation human trafficking cases, while acknowledging that similar types of equally powerful coercion exists in labor trafficking cases.

28. See Richmond, *Root Cause*, *supra* note 7, at 1–2.

29. See Heather J. Clawson et al., *Treating the Hidden Wounds: Trauma Treatment & Mental Health Recovery for Victims of Human Trafficking*, ISSUE BRIEF, U.S. DEPT HEALTH & HUM. SERVS., OFF. ASSISTANT SEC’Y PLAN. & EVALUATION 1, 1 (2008).

30. See Richmond, *Human Trafficking*, *supra* note 22, at 28 (“At its core, human trafficking is an economically motivated crime. It involves someone exploiting his or her power to generate and illicit economic gain by violating a victim’s human rights.”).

31. *Id.* Human trafficking is a criminal business that seeks to increase profits and take advantage of corruption, while reducing any associated costs or risk. Alexis

to sex trafficking—which may be family-directed, establishment-based, or gang-directed³²—forced labor business models also vary drastically, can occur in any industry,³³ and superficially employ “voluntary” workers.³⁴

One commonality among trafficking schemes, however, is that traffickers routinely prey on the vulnerable.³⁵ Sex traffickers, for instance, frequently target “minors with low self-worth, prior sexual experience, and at-risk youths” because they are easier to manipulate and there is less legal risk involved.³⁶ All minors are especially susceptible to sexual exploitation,³⁷ and once trapped, it is common

Aronowitz et. al., *Analysing the Business Model of Trafficking in Human Beings to Better Prevent the Crime*, UN GLOBAL INITIATIVE FIGHT HUM. TRAFFICKING, 55–57 (2010), <https://www.osce.org/cthb/69028?download=true>.

Unlike other commodities such as drugs or stolen goods, trafficked persons can be used over and over again; they can be rented out, or sold and resold. They are indebted and forced to repay sums of money far above the actual cost of their transportation, employment and housing costs. They may be exploited for years and even victims who have been rescued and repatriated can be easily re-trafficked.

Id. at 55.

32. Richmond, *Human Trafficking*, *supra* note 22, at 31 (“It is important to understand that traffickers will shift their business models over time to avoid detection. Therefore, victim advocates and investigators must always be looking for new variations on the trafficker’s coercive schemes.”).

33. Brittany Anthony, *On-Ramps, Intersections, and Exit Routes: A Roadmap for Systems and Industries to Prevent and Disrupt Human Trafficking*, POLARIS 1, 4 (2018) (exploring the ways in which human traffickers exploit legitimate business sectors for their own profit and the intersection of between industries and efforts to prevent, detect, and disrupt the trafficking scheme). “A successful trafficker, like any successful entrepreneur, begins with a business plan built on a platform of established business models and best practices.” *Id.*

34. Richmond, *Human Trafficking*, *supra* note 22, at 34. The victim identification process in labor trafficking cases is unique to sex trafficking cases because unlike sex trafficking cases, where “the unlawful nature of the underlying act of prostitution brings law enforcement into contact with potential victims and traffickers in the course of enforcing anti-prostitution laws,” in labor trafficking, “the underlying acts of braiding hair, harvesting crops, staffing nursing homes, or cleaning commercial buildings are not inherently unlawful, diminishing the encounters between law enforcement and the victims being exploited.” Hilary Axam & Jennifer Toritto Leonardo, *Human Trafficking: The Fundamentals*, 65 U.S. ATT’YS BULL. 3, 14 (2017). Moreover, forced labor is often hidden although connected “through commercial supply chains that cross our borders and end in grocery and clothing stores, high-tech corridors, car sale lots, and elsewhere.” Karen Stauss, *Forced Labor in Supply Chains: Addressing Challenges*, 65 U.S. ATT’YS BULL. 169, 169 (Nov. 2017).

35. Richmond, *Human Trafficking*, *supra* note 22, at 34.

36. See Kajal Patel, *Child Prostitutes or Sexually Exploited Minors: The Deciding Debate in Determining How Best to Respond to Those Who Commit Crimes as a Result of Their Victimhood*, 2017 U. ILL. L. REV. 1545, 1555 (2017). “While some [victims] are lured by false promises by strangers, others are emotionally coerced or physically forced by family members, neighbors, or classmates.” Butler, *supra* note 8, at 1292.

37. Butler, *supra* note 8, at 1289. “[T]he comparative immaturity and irresponsibility of juveniles’ makes them less culpable than adults who commit crimes.” *Id.* at 1290 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). “[T]he Court recognized the importance of

for victims to develop relationships with their traffickers.³⁸ While violent threats and other forms of abuse may occur during the recruitment process, a trafficker's relationship with a new recruit often begins friendly or romantically, and many victims voluntarily move in with their soon-to-be trafficker.³⁹ These types of gradual relationships later help the trafficker manipulate the victim into believing her victimhood is voluntary and stabilize his control over her.⁴⁰

Traffickers often recruit runaways who are fleeing abuse or searching for protection, shelter, and/or companionship.⁴¹ It is estimated that 450,000 children run away from their homes each year and within the first forty-eight hours of running away, one out of three minors are recruited into commercial sex.⁴² On a particularly jarring note, some traffickers prefer to pursue what they call "throw-aways" because, unlike runaways, no one is looking for them.⁴³ Sexually exploited minors fall victim to coercive techniques very early.⁴⁴ In fact, it is estimated that the average age of children who are forced into human trafficking is twelve⁴⁵—"well below the age at which the law recognizes a person as mature enough to enter into a contract, to choose to work, or to consent to sex."⁴⁶

new adolescent brain research that posits that minors have a limited ability to avoid negative influences and that the criminal justice system must consider this evidence." *Id.* (citing *Graham v. Florida*, 560 U.S. 48, 68–69 (2010)).

38. *Id.* at 1291–92. Although the archetypal human trafficking victim is typically portrayed as a female, the epidemic is prevalent among male victims as well, who are often neglected in the publicity of human trafficking. See Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1143–44 (2010).

39. See Patel, *supra* note 36, at 1564.

40. *Id.* Many traffickers develop a system to secure the victim called "finesse," by which he "first courts the victim with gifts and flattery and then turns the tables to take advantage of the victim's hope and devotion for the pimp's own personal gain." See Meiers, *supra* note 11, at 215.

41. *Domestic Minor Sex Trafficking: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. 2 (2010) (statement of Robert C. "Bobby" Scott, Chairman, Subcomm. on Crime, Terrorism, and Homeland Security), <https://www.govinfo.gov/content/pkg/CHRG-111hhr58250/pdf/CHRG-111hhr58250.pdf>.

42. *Id.*

43. See Elliott C. McLaughlin, *Expert: Child Traffickers Target Runaways, "Throw-aways"*, CNN (Nov. 18, 2009, 1:48 PM), <http://www.cnn.com/2009/CRIME/11/18/domestic.child.trafficking/index.html> [<https://perma.cc/QHZ5-9LXA>]. In these instances, "[t]he child, typically homeless and in need of food and shelter, can be manipulated into 'survival sex.'" *Id.*

44. See Patel, *supra* note 36, at 1547.

45. *Id.* However, Polaris, a non-profit in D.C. which addresses human trafficking issues, conducted its own study in 2015 and found that "44% of these survivors estimated that they were 17 or younger" when they first engaged in commercial sex, and the "average age of entry was 19 years old." See Polaris Project, *The Average Age of Entry Myth*, POLARIS (Jan. 5, 2016), <https://polarisproject.org/blog/2016/01/05/average-age-entry-myth> [<https://perma.cc/PWS8-8ZZB>].

46. Butler, *supra* note 8, at 1290. Depending on the state's age of consent, child

1. *Psychological Manipulation and Coercion*

After a calculated grooming process, during which the trafficker wins over a victim’s affection and trust through attention, shelter, food, and commodities, the trafficker begins the exploitation process of abuse and manipulation.⁴⁷ Generally, traffickers will use the least amount of “force, fraud, [or] coercion necessary to compel their victims.”⁴⁸ Traffickers often turn to psychological manipulation and threaten the victim or her family for this very reason, as these techniques alleviate the need for the trafficker to “invest in elaborate surveillance systems or pay for guards.”⁴⁹ The repeated use of these psychological pressures, when paired with physical abuse and/or various forced behavior, ultimately tear down the victim’s self-worth and leave her dependent and fearful of her trafficker.⁵⁰ Soon thereafter, the trafficker encourages and solicits the victim to perform sexual acts for the benefit of the trafficker and the cycle of survival sex ensues.⁵¹ Sadly, it is not uncommon for victims to have several

victims may be entitled to prosecutorial immunity if the state has enacted a robust safe harbor law. *See* Patel, *supra* note 36, at 1571 (“While states have not uniformly adopted one law determining whether a minor can consent to sex, they have adopted different laws, namely statutory rape laws, through which states have definitively established circumstances where minors are unable to consent to sex.”); *cf. In re B.W.*, 313 S.W.3d 818, 822 (Tex. 2010) (overturning a 13-year-old’s prostitution misdemeanor “[b]ecause a thirteen-year-old child cannot consent to sex as a matter of law . . . [the minor] cannot be prosecuted as a prostitute”).

47. Patel, *supra* note 36, at 1555, 1565. This process is often jarring for victims because “[a] victim who has become accustomed to situations of excessive violence or violence mixed with love may not be aware of the aberrant nature of the relationship.” *See* Meiers, *supra* note 11, at 215.

48. Richmond, *Human Trafficking*, *supra* note 22, at 25. The trafficker’s grooming process and abuse can also mirror that of a domestic abuser. *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, 770 (2017).

49. Richmond, *Human Trafficking*, *supra* note 22, at 25 (“Subtle forms of coercion can also be more powerful. A chain-cutter can free a victim held by mere chains. A key can open a locked door and allow a detained victim to walk free. Yet, if a trafficker renders a victim fearful of what will happen to the victim’s family or traps the victim with some other form of nonviolent coercion, the victim can become so helpless that even the dream of escape begins to die.”).

50. *See* Patel, *supra* note 36, at 1564.

Though most trafficking narratives emphasize the fear and psychological manipulation that connects victims and offenders, there is a wide range of experiences among trafficked individuals, and the reality is that some individuals may feel emotional connection, familial obligation, and other complex—and potentially competing—emotions to those implicated in their trafficking situations.

Balmgamwalla, *supra* note 4, at 30.

51. *See* Patel, *supra* note 36, at 1555; *see also* Butler, *supra* note 8, at 1291 (“For these youth, prostitution is ‘survival sex’—they are not freely consenting to sell their bodies; rather, they are coerced into ‘trading sexual relations for basic needs, including shelter, food, and water.’”).

children with their trafficker—a tactic of oppression that is especially unsettling, as the children are often used as further means of securing the victim to the trafficker’s will.⁵²

Once incorporated into “the Life,” victims slowly begin to believe they are criminals.⁵³ They are taught to distrust law enforcement officers and are persistently reminded of the lie that they are just as culpable as their trafficker.⁵⁴ The use of psychological abuse against already vulnerable individuals often results in trauma bonding between the victim and her trafficker, in which the victim fails to identify herself as a victim of sexual exploitation and may defend her trafficker.⁵⁵ Even after victims are freed from their captors, they remain vulnerable at the hands of law enforcement,⁵⁶

52. See generally, e.g., WENDY BARNES, AND LIFE CONTINUES: SEX TRAFFICKING AND MY JOURNEY TO FREEDOM (2015) (describing her years as a trafficking victim under the control of a violent pimp, who was later sentenced to life in prison, and with whom she had three children).

53. See Shared Hope International, *Trafficking Terms*, <https://sharedhope.org/the-problem/trafficking-terms> [<https://perma.cc/W3JA-VJUT>]; see also Rosemary Killian & Loretta M. Young, *Human Trafficking: A Primer*, 34 DEL. LAW. 9 (2016) (“[U]nfortunately, for some victims, ‘the life’ may be their first experience of ‘family’ and belonging.”).

54. See Patel, *supra* note 36, at 1564 (“When law enforcement officers reinforce this notion by refusing to recognize prostituted minors solely as victims, they echo the self-perception of victims, who view their plight as a continuation of the abuse they suffered for years in the child-welfare system.”); see also FREE THE SLAVES & THE HUMAN RIGHTS CENTER AT THE UNIVERSITY OF CALIFORNIA AT BERKELEY, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 36 (2004), <https://www.freetheslaves.net/wp-content/uploads/2015/03/Hidden-Slaves.pdf>. A victim’s fear increases through “inconsistent and unpredictable outbursts of violence and by capricious enforcement of petty rules. The ultimate effect of these techniques is to convince the victim that the perpetrator is omnipotent, that resistance is futile, and that her life depends upon winning his indulgence through absolute compliance.” Catherine McCall, *Jaycee Dugard, Elizabeth Smart, and Other Children in Captivity*, PSYCHOL. TODAY (July 16, 2011), <https://www.psychologytoday.com/us/blog/overcoming-child-abuse/201107/jaycee-dugard-elizabeth-smart-and-other-children-in-captivity> [<https://perma.cc/K5K7-2ZD6>].

55. See Patel, *supra* note 36, at 1565–66. A condition called “trauma bonding” instills the victim with feelings of love and loyalty to the trafficker. See Meiers, *supra* note 11, at 215. The effects of trauma sustained over a period of time leaves victims to “lose not only a sense of control over their ‘self,’ but also lose a sense of ‘self’ altogether.” Zeeman & Stauss, *supra* note 2, at 143. Additionally, traffickers take advantage of previously existing mental disabilities, especially in forced labor cases. See Nirav K. Desai & Sean Tepfer, *Proactive Case Identification Strategies and the Challenges of Initiating Labor Trafficking Cases*, 65 U.S. ATT’YS BULL. 25, 29 (2017) (“People living with a physical or cognitive disability inherently have a dependency on others in their life in some way. . . . Unfortunately, others see this type of relationship as an opportunity to control another person for their own financial benefit.”); see, e.g., United States v. Kozminski, 487 U.S. 931 (1988) (ruling on a historic forced labor case in which the traffickers took advantage of and physically abused men with previously existing mental disabilities).

56. Patel, *supra* note 36, at 1562. The frequency of police misconduct, in the form of forced sexual misconduct through threat of prosecution, after a victim is “rescued” can further perpetuate her abuse. See Juhu Thukral & Melissa Ditmore, *Revolving Door: An Analysis of Street-Based Prostitution in New York City*, URB. JUST. CTR. (2003), <http://>

and the strength of a trafficker’s coercion can even linger into the courtroom.⁵⁷

Judge Camacho relates a story of a pimp punching a victim out in the middle of the courtroom in front of everyone. He did it “to send a message—I own you and no one can protect you from me—not the police, not the prosecutor, and certainly not the person in the black robe sitting under the sign that reads In God We Trust.”⁵⁸

The victim’s plight becomes more intricate as traffickers establish a culture of mistreatment and a hierarchy of distrust among victims.⁵⁹ When traffickers target more than one victim and manage a ring of sexually exploited victims, the psychological pressures can be more pronounced.⁶⁰ A hierarchy quickly unfolds as victims learn to compete with one other to gain the trafficker’s approval, to demonstrate their loyalty, or to escape punishment.⁶¹ Isolated from one another, victims may depend solely on their trafficker and fail to create meaningful relationships with other victims.⁶² This tactic is beneficial for the trafficker because it prevents dissension among the sexually exploited.⁶³ Additionally, the culture and hierarchy of

sexworkersproject.org/downloads/RevolvingDoor.pdf [hereinafter *Revolving Door*]; see also Patel, *supra* note 36, at 1562 n.154 (conducting a study on police misconduct against sex workers and reporting that violence “included grabbing and kicking prostitutes, along with beating and raping them[,] . . . fondling them and offering them cigarettes or agreeing not to arrest them in exchange for sex”).

57. Darian Etienne, *Victims, Not Criminals: Exempting and Immunizing Children Subjected to Sex Trafficking from Prosecution for Prostitution*, 16 WHITTIER J. CHILD & FAM. ADVOC. 44, 55 (2017).

58. *Id.* (footnote omitted).

59. See Elizabeth Hopper & Jose Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185, 196–97 (2006). “For instance, in some large trafficking rings, traffickers create a hierarchy within the group so that victims can *rise in the ranks* through compliance. In this case, some victims assert control over others who are lower in the hierarchy, acting as enforcers for the traffickers.” *Id.*

60. Patel, *supra* note 36, at 1566. “Traffickers employ a variety of control tactics, including physical and emotional abuse, sexual assault, confiscation of identification and money, isolation from friends and family, and even renaming victims.” See Polaris Project, *The Victims & Traffickers*, POLARIS, <https://polarisproject.org/victims-traffickers> [<https://perma.cc/3XRQ-NPCN>].

61. See Hopper & Hidalgo, *supra* note 59, at 196–97; Patel, *supra* note 36, at 1566. Some victims also refer to their experience in sex trafficking as “the game,” because the subculture is “complete with rules, a hierarchy of authority, and language.” See Shared Hope International, *supra* note 53.

62. Patel, *supra* note 36, at 1566. “Traffickers work to create an isolated community with its own rules and pressures to conform. This helps them utilize group dynamics to ensure that victims remain destabilized.” See Hopper & Hidalgo, *supra* note 59, at 196.

63. See Hopper & Hidalgo, *supra* note 59, at 196 (“Traffickers may show favoritism, pitting victims against each other and creating infighting. This ensures that there will not be power in the group for resistance.”). The neurobiological effects of trauma as a

human trafficking later create problems for law enforcement because victims have difficulty narrating their abuse or identifying their trafficker.⁶⁴

Traffickers further induce loyalty and strip victims of their individuality by renaming them, preventing them from contacting their family members, withholding documents, constantly monitoring their activity, and tattooing their bodies.⁶⁵ Tattooing, for example, demonstrates allegiance to the trafficker and can, again, become a competition among the victims.⁶⁶ In some cases, a victim's perception is so distorted that her tattoos are seen as "badges" instead of as harmful branding.⁶⁷ Implicitly, these tattoos mark victims as property and mentally chain the women to their trafficker and his criminality.⁶⁸

result of trafficking can alter the way the brain stores memories, which can make a victim be viewed as "deceptive, dishonest, or unreliable by those who are unaware of the effects of trauma on the brain." Zeeman & Stauss, *supra* note 2, at 142.

These hormones play some positive roles in reducing physical and psychological pain experienced in the moment, and activating the body for a fight, flight, or freeze response—all of which are possible responses in different situations, supporting the most fundamental need to preserve the physical body in the face of an attack that the brain may perceive as threatening to life.

Id.

64. Patel, *supra* note 36, at 1566 ("According to some experts, this resistance could be characterized as a dissociative disorder, which acts as a defense mechanism where a victim puts up a barrier in his/her memory 'in order to cope with the sexually-invasive acts performed on her multiple times each day for weeks, months, or even years.'") (quoting Leslie Klaassen, *Breaking the Victimization Cycle: Domestic Minor Trafficking in Kansas*, 52 WASHBURN L.J. 581, 588 (2013)). For a more detailed discussion on the difficulty of victims to self-identify and the effects of trauma in trafficking victims, see generally Elizabeth K. Hopper, *Polyvictimization and Developmental Trauma Adaptations in Sex Trafficked Youth*, 10 J. CHILD & ADOLESCENT TRAUMA 161, 161 (2017).

65. Butler, *supra* note 8, at 1294.

66. See *United States v. Campbell*, 770 F.3d 556, 559 (7th Cir. 2014) (convicting defendant who recruited young females into the United States illegally, and upon gaining their trust, "required the women to break their ties with their relatives and friends, . . . confiscated their identification, immigration documents and money," and "renamed them, branded them with tattoos, abused them, and forced them to engage in prostitution for his benefit"). See generally Shared Hope International, *supra* note 53 (defining common terminology in sex trafficking and explaining that "branding" occurs when a trafficker makes tattoos or carvings on a victim to indicate ownership).

67. See generally Sara Sidner, *Branded: The Shocking Life of a Sex-Trafficked Girl*, CNN (Sept. 10, 2015, 9:24 AM), <https://www.cnn.com/2015/09/09/us/freedom-project-branding/index.html> [<https://perma.cc/AQ3M-ADTT>] (describing the dehumanizing nature of branding and the prevalence of tattoos such as "old-fashioned money-bags," "diamonds," "a trafficker's name across the forehead," "an ATM etched on the skin near [the victim's] groin," and even "a barcode put on a girl's wrist, like an item in a grocery store").

68. See *Campbell*, 770 F.3d at 565 (describing how the trafficker forced his victim to be "part of the Family" against her will and drove her to a tattoo parlor along with another victim to receive "a tattoo on her neck modelled after [the other victim's] neck," and later required each victim to "receive[] a tattoo covering 70 percent of her back which depicted a scroll containing a manifesto drafted by [defendant] asserting that each woman 'live[s] for' [defendant] 'till death'").

2. *The Use of Intoxicants in the Coercive Scheme*

Intoxicants can be manipulated by traffickers and turned into powerful means for coercion. There are three pertinent uses of intoxicants in human trafficking schemes: incentives, tethers, and anesthetics.⁶⁹ These tactics can be used to manipulate a victim’s pre-existing dependency or can actively be used to create a new addiction or dependency.⁷⁰ It is very common for victims to be under the influence of drugs or alcohol when law enforcement identifies them.⁷¹ This dependency frequently originates from the beginning of the victim’s relationship with her trafficker,⁷² and some refer to this process as “breaking in.”⁷³

“Breaking in” involves a series of emotional, physical, and psychological abuses such as rape, torture, threats, degradation, and the forced consumption of drugs and alcohol. This happens mercilessly during the acquirement period to break the spirit of trafficked victims. Survivors have also said that shortly after arrival they witnessed the murder of other victims. This causes victims to go into a self-preserving state of compliance.⁷⁴

First, traffickers distribute drugs and alcohol to control their victims by using it as an incentive.⁷⁵ In this regard, intoxicants are provided to the victim in exchange for engaging in some act.⁷⁶ In some cases, traffickers will also withhold intoxicants as a form of punishment when victims refuse to listen or participate.⁷⁷ Second,

69. Richmond, *Human Trafficking*, *supra* note 22, at 35–36.

70. Feehs & Richmond, *supra* note 24, at 17.

71. Richmond, *Human Trafficking*, *supra* note 22, at 35; *see, e.g.*, United States v. Alaboudi, 786 F.3d 1136, 1139 (8th Cir. 2015) (noting that the traffickers provided alcohol, drugs, and cigarettes to a fourteen-year-old victim after she was expelled from school).

72. Hannah Spruce, *Methods of Human Trafficking and Recruitment*, HUB (Feb. 15, 2017), <https://www.highspeedtraining.co.uk/hub/methods-of-human-trafficking> [<https://perma.cc/5NQ9-D55F>].

73. *Id.* Others refer to this process as indoctrination, a process in which “[t]raffickers utilize their authoritarian status to retain control over their victims.” *See* Hopper & Hidalgo, *supra* note 59, at 196 (“Once victims have been initiated into the culture of trafficking, there is an indoctrination phase where traffickers deepen their control over victims.”).

74. Spruce, *supra* note 72. Some victims will learn to mask the pain of coercion and “self-medicate with drugs to treat mental health issues and any pain inflicted by the trafficker or johns.” *See* Meiers, *supra* note 11, at 216.

75. Richmond, *Human Trafficking*, *supra* note 22, at 35; *see, e.g.*, Alaboudi, 786 F.3d at 1139 (discussing how the victim “had no money or place to stay and was looking for drugs” and her trafficker gave her a place to stay while incentivizing her with drugs and alcohol).

76. *See, e.g.*, Alaboudi, 786 F.3d at 1140 (describing how the trafficker “hosted lots of parties, used drugs, and provided drugs in exchange for sex with many of the women who came to his apartment”).

77. *Id.*; *see, e.g.*, United States v. Webster, No. 08-30311, 2011 U.S. App. LEXIS 26438,

traffickers use drugs and alcohol as a tether.⁷⁸ This occurs when the trafficker becomes the “exclusive supplier of drugs.”⁷⁹ The chemical tether allows the trafficker to control the victim through biological mechanisms and addiction without expending too many resources or too much time.⁸⁰ The trafficker knows the victim will later return when they need more drugs or alcohol, allowing the victim to remain in the community “freely.”⁸¹ Ultimately, a chemical tether makes victims all the more difficult to identify because victims are not “locked up” or “in chains,” as sometimes portrayed in the media.⁸²

Third, traffickers use drugs and alcohol as anesthesia.⁸³ In this cruel tactic, the trafficker attempts to impair the victim’s perceptions and abilities, leaving the victim only acutely aware of the events that are taking place and diminishing her free will.⁸⁴ This tactic similarly makes the prosecution of traffickers more difficult because victims often have distorted or insufficient memory of their forced commercial sex acts.⁸⁵ Ultimately, the intersection between intoxicants and

at *1 (9th Cir. Nov. 28, 2011) (where the trafficker distributed cocaine to his victims and then withheld it when the victims refused to perform commercial sex acts).

78. Richmond, *Human Trafficking*, *supra* note 22, at 36.

79. *Id.* “When traffickers and pimps find that they can exploit an addiction to produce profit through commercial sex acts, the challenge for service providers, law enforcement, and the entire legal system is increased exponentially.” See Lindsey N. Roberson, *She Leads a Lonely Life: When Sex Trafficking and Drug Addiction Collide*, 52 WAKE FOREST L. REV. 359, 361 (2017).

80. Richmond, *Human Trafficking*, *supra* note 22, at 36. The complexities that arise with chemical tethers allows a trafficker to maintain control. Traffickers exploit the depth of a victim’s addiction and “drugs play a fundamental role in keeping the victim under control by fueling his or her addiction.” See Boggiani, *supra* note 5, at 923.

81. Richmond, *Human Trafficking*, *supra* note 22, at 36; see, e.g., United States v. Fields, No. 8:13-cr-198-T-30TGW, 2013 U.S. Dist. LEXIS 135763, at *1 (M.D. Fla. Sept. 18, 2013), *aff’d*, 2015 U.S. App. LEXIS 15679 (11th Cir. 2015) (describing how the trafficker used a powerful prescription drug to compel his victims to perform commercial sex acts).

82. Richmond, *Human Trafficking*, *supra* note 22, at 22, 36. Certain drugs are particularly addictive, such as opioids, and trafficking victims are more susceptible to addiction. See Roberson, *supra* note 79, at 370. As a result of the incorporation of intoxicants into a trafficker’s coercive scheme, “the need for cross-sectional training for law enforcement, service providers, and those likely to come into contact with those at risk for exploitation, is paramount to achieving the goal not only of recognizing potential victims, but is also the only pathway to a successful prosecution of the offenders.” *Id.*

83. Richmond, *Human Trafficking*, *supra* note 22, at 36.

84. *Id.*; see, e.g., United States v. Rivera, 799 F.3d 180, 183 (2d Cir. 2015) (describing where the trafficker operating out of a bar required his waitresses to consume large amounts of alcohol before selling their bodies to customers).

85. Richmond, *Human Trafficking*, *supra* note 22, at 36. The effects of trauma on the brain can lead to victims displaying “belligerence, coldness, evasiveness, or nonchalance,” which in turn highlights the importance of the victim’s first encounter with law enforcement, especially in the interest of “effective crime detection and punishment.” Zeeman & Stauss, *supra* note 2, at 142; see Hopper & Hidalgo, *supra* note 59, at 203–04 (explaining the neurobiological response to “uncontrollable stress” as a “release of endogenous opioids, or endorphins, which has an analgesic effect” and “protects the victim physically by numbing physical pain and psychically creating a diminished awareness of surroundings and

exploitative tactics in a trafficker’s coercive scheme underscores the powerful grip a trafficker can maintain over a victim.⁸⁶

B. *The Effects of Coercion*

Now that the trafficker’s coercive scheme has been explored in depth, the lingering effects of systematic coercion on a survivor’s life no longer at the mercy of a trafficker can finally be understood. While several safe harbor laws commendably deal with prosecutorial immunity for certain crimes and specialized services, the scope of state legislative action has remained narrow and continues to unsuccessfully account for the collateral consequences of coercion.⁸⁷ Specifically, the states’ main limitation is their failure to protect victims from prosecution for the wide variety of crimes the victims are compelled to commit.⁸⁸ Human trafficking, by definition, is a crime of coercion, and victims are forced to commit a diverse assortment of non-violent (and violent) crimes.⁸⁹ A trafficker’s coercion is not limited to prostitution; it is equally strong, regardless if the victim is forced to perform sexual acts or whether she is forced to steal from a customer to meet her trafficker’s daily quota,⁹⁰ commit tax evasion,⁹¹ or violate immigration law.⁹²

emotional numbness”); *see also* Rebecca Campbell, *Transcript “The Neurobiology of Sexual Assault,”* NIJ (Dec. 3, 2012), <https://www.nij.gov/multimedia/presenter/presenter-campbell/Pages/presenter-campbell-transcript.aspx> [<https://perma.cc/J2CB-MVSW>].

86. *See infra* Section I.B.

87. *See infra* Section II.B. While many states have enacted expungement and vacatur laws to vindicate survivors from the consequences of retaining a criminal record for the crimes they committed as a direct result of their trafficking, these remedies remain inadequate for reasons that will be discussed *infra* Part III.

88. *See* Adelson, *infra* note 99, at 96–98, 101; Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 403 (2015).

89. *See* Richard, *supra* note 16, at 5–7. Victims can also commit violent crimes as a result of their trafficking, but the legislative approach and the level of prosecutorial discretion in those cases—while at the heart of the victim-perpetrator dilemma—are much more clouded and obscure. *See* Zeeman & Stauss, *supra* note 2, at 139–40; *see, e.g.*, *Brown v. State*, No. M2013-00825-CCA-R3-PC, 2014 Tenn. Crim. App. LEXIS 1014, at *1–4 (Tenn. Crim. App. Nov. 6, 2014) (holding that a sixteen-year-old human trafficking victim was sentenced to life in prison for shooting and killing a “john” after she believed he was reaching for a gun underneath the bed).

90. Richmond, *Human Trafficking*, *supra* note 22, at 7, 25.

91. *See, e.g.*, National Survivor Network, *Trafficking Survivor Cases: Trafficking Survivors Relief Act of 2017 (S.104/H.R.459)*, <https://nationalsurvivornetwork.org/policy-advocacy> [hereinafter *Trafficking Survivor Cases*] (detailing a survivor’s conviction for conspiracy to commit tax evasion and her 13-month sentence in federal prison, because her “trafficker began demanding that [she] allow him to put the deeds for homes and cars he had purchased in [her] name so that he could evade the attention from law enforcement”).

92. *Id.* (detailing a survivor’s conviction for violating federal immigration law for financial gain because her trafficker ordered her to hide “the identification documents from two of his victims, both of whom were in the United States illegally”).

The impact of not extending safe harbor provisions beyond prostitution-related crimes is inconsistent with the notion of decriminalization.⁹³ Not only do survivors face expensive court appearances, probation, and time in prison, but their criminal record later inhibits them from receiving steady jobs, decreases their eligibility for loans and other educational opportunities, and severely hinders their ability to secure permanent housing.⁹⁴ Aside from subtle recognition by the TVPA and Department of State Trafficking In Persons Reports,⁹⁵ the legal basis for immunizing the criminal conduct of trafficking victims is accepted by scholars like Dr. Mohamed Mattar from Johns Hopkins University's Protection Project⁹⁶:

Recognition of the trafficked person as a victim requires the application of the principle of noncriminalization. That is, the law must excuse the victim from criminal liability for the acts committed as a result of being trafficked. Victims of trafficking should be immune from such liability every time they commit an illegal act as long as those acts are related to their trafficking, whether this act is illegal entry, falsification of travel documents, or prostitution.⁹⁷

Only a few states have adopted robust immunity provisions, the majority of which are limited to solely protecting minors.⁹⁸ Given the importance of providing holistic, rehabilitative services to trafficking victims, states must understand the need to create a presumption of coercion to protect victims from prosecution for the non-violent crimes they were forced to commit.⁹⁹ To understand the scope of coercion's effect, this Comment will next discuss the challenges that arise when victims engage in criminal conduct at the direction of their trafficker, the frequency of victims arrested during their trafficking, and several of the debilitating obstacles of a criminal record.

93. Augustson, *supra* note 14, at 638.

94. *See infra* Section I.B.3.

95. *See infra* notes 160–63 and accompanying text.

96. Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL'Y 255, 279 (2014).

97. Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357, 380–81 (2006).

98. Dysart, *supra* note 96, at 279.

99. Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 101 (2008) (“The Congressional debates make clear that the TVPA sought to separate victim from offender to ensure that the law protects the victim and the culpable receive punishment.”).

1. *When Victims Engage in Criminal Conduct*

When investigators and prosecutors encounter trafficking victims who have engaged in criminal conduct during the course of their trafficking, a unique challenge arises. On one hand, the 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”¹⁰⁰ On the other, law enforcement must balance the circumstances underlying the criminal offense and the harm inflicted to others that could have reasonably been avoided.¹⁰¹ While victims are certainly not exempt from liability, there are several instances in which a trafficker coerces victims into committing crimes¹⁰² and “then threaten[s] to report it if the victim does not continue to ‘work’ for [him].”¹⁰³ Unfortunately, these cases are overlooked and only corrected—typically through expungement or vacatur petitions—after a victim has been labeled a criminal by the justice system.

In a sex trafficking case, it is common for a victim to have engaged in prostitution-related offenses, such as solicitation, loitering, or criminal trespass during the course of her trafficking.¹⁰⁴ The stigma behind being involved with morally charged criminal conduct (i.e., prostitution-related activity) adds another layer to the harms of double victimization.¹⁰⁵ It is less obvious, however, that trafficking victims also commit a wide variety of non-prostitution-related offenses, such as drug-related crimes,¹⁰⁶ weapon-possession violations,¹⁰⁷

100. Zeeman & Stauss, *supra* note 2, at 140, 146 (quoting 22 U.S.C. § 7101(b)(19) (2012)).

101. *Id.* at 144, 146.

102. *Id.* at 146. The proper implementation of this balancing test, of course, assumes that law enforcement acknowledges the importance of an initial screening and are aware of potential indicators of victimization. *Id.* at 140. The initial screening “can be extremely difficult because trafficking victims do not usually self-identify as such due to the effect of complex trauma, . . . fear or distrust of law enforcement, lack of information about their rights, and (perceived or actual) ongoing threats from their traffickers.” *Id.*

103. See Sarah Dohoney Byrne, *Meeting the Legal Needs of Human-Trafficking Survivors*, 52 WAKE FOREST L. REV. 379, 381 (2017).

104. See Meiers, *supra* note 11, at 216.

105. See Boggiani, *supra* note 5, at 951 (describing the harms of double victimization and the need to protect victims from the “‘hidden punishments’ deriving from the very nature of being involved in the criminal justice system”).

106. Zeeman & Stauss, *supra* note 2, at 140. This is common for many victims who suffer from addiction “[b]ecause traffickers control many sex trafficking victims via a narcotics dependency.” *Id.*; see also Meiers, *supra* note 11, at 216 (“Drug use is often encouraged by traffickers to lower a victim’s inhibitions in the early stages of trafficking. Traffickers also use drugs as a means of control—a victim who is addicted to drugs is dependent upon her drug dealer, who often is also her trafficker.”).

107. See, e.g., *People v. L.G.*, 972 N.Y.S.2d 418, 424–25 (Crim. Ct. 2013) (vacating a

theft,¹⁰⁸ and immigration or visa fraud violations,¹⁰⁹ among many others. In *People v. G.M.*, the victim was forced to engage in prostitution as well as purchase illegal drugs on behalf of her trafficker so that he could avoid arrest.¹¹⁰ According to a study conducted by National Survivor Network (NSN) in 2015,

When asked what crimes [sex trafficking victims] were arrested for, 65.3% respondents indicated they had been arrested for prostitution, 42.7% for solicitation, and 25.3% for inten[t] to solicit. Interestingly, 40% of respondents also reported being arrested for drug possession, and 18.7% for drug sales. 60% reported being arrested for other crimes.¹¹¹

Other times a trafficking victim may commit more serious offenses as a result of her own victimization and become involved in the recruitment and management of other victims.¹¹² In a sex trafficking scheme, the trafficker can solicit the help of a “Bottom, . . . the girl or woman who has the longest history with the pimp or who is favored by him,” to enforce the trafficker’s policies.¹¹³ Traffickers use Bottoms because they are a “force multiplier,” less conspicuous, inexpensive, and allow the trafficker to remain out of sight.¹¹⁴ Significantly, it is common for Bottoms to remain fearful of their trafficker and suffer from some degree of coercion even though they have now received a more active role in the trafficking scheme; but a case-by-case fact analysis, alongside a balance of the subsequent victim’s interest, is required for prosecutors to determine whether the Bottom should be held criminally liable and the best course for her recovery.¹¹⁵ Bottoms can also make it difficult for prosecutors to

weapon possession conviction against a trafficking survivor “because her participation in that offense was undeniably connected to the coerced trafficking activity”). At the direction of a trafficker, many victims carry weapons on the streets to protect themselves. *Id.* at 421.

108. See Meiers, *supra* note 11, at 216.

109. See Zeeman & Stauss, *supra* note 2, at 140.

110. *People v. G.M.*, 922 N.Y.S.2d 761, 762–63 (Crim. Ct. 2011) (vacating the human trafficking survivor’s convictions for prostitution-related offenses because her trafficker coerced her into committing the crimes).

111. See *National Survivor Network Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking*, NAT’L SURVIVOR NETWORK (Aug. 2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf> [hereinafter *NSN Members Survey*]. From these numbers, NSN recognized their limited resources and concluded that these statistics are not a coincidence and that “traffickers force their victims to participate in other crimes beyond prostitution, especially drug sales and possession.” *Id.*

112. See Crocker, *supra* note 48, at 767.

113. Butler, *supra* note 8, at 1294.

114. *Id.*

115. See Zeeman & Stauss, *supra* note 2, at 146. Some advocates argue that a Bottom

obtain evidence against the trafficker, as victims are often able to provide more evidence of a Bottom’s manipulative activity—which typically manifests itself through recruiting others, delivering beatings, spreading lies, and collecting the money from each victim—rather than the actual trafficker’s acts of force, fraud, or coercion.¹¹⁶

Given the unique situation of trafficking survivors, there should be a careful consideration of “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.”¹¹⁷ For this reason, states should adopt solutions that recognize the power of a trafficker’s coercion and provide remedies for all non-violent convictions committed as a direct result of being trafficked, rather than only for prostitution offenses.¹¹⁸

2. The Frequency of Arrests for Crimes While Acting Under the Coercion of a Trafficker

It is especially common for a trafficking victim to be repeatedly arrested during the course of her trafficking. The Coalition to Abolish Slavery & Trafficking (CAST) collected data regarding arrest frequency for human trafficking victims.¹¹⁹ The results of the study indicate that “human trafficking victims are arrested seven times more frequently for activity directly related to their trafficking than for non-trafficked activity.”¹²⁰ Under the coercion of a trafficker,

is purely a victim and lacks the requisite level of criminal intent to be considered a perpetrator, while others recognize the gray area, where a victim is both a victim and criminally responsible for her own conduct. *Id.* Still, some believe there are instances where a Bottom may “not [be] subject to any force or coercion and is purely a perpetrator.” *Id.*

116. Butler, *supra* note 8, at 1294.

117. See Zeeman & Stauss, *supra* note 2, at 140. As a guide for prosecutors, it may be helpful to divide the crimes committed by trafficking victims into three categories:

offenses wholly unrelated to the underlying trafficking offenses (i.e., which were not committed “as a direct result of being trafficked”); relatively minor or non-violent offenses—such as prostitution or working without documentation—that are directly caused by or otherwise inseparable from the trafficking offense and for which penalizing the victim would be “inappropriate”; and violent crimes or other significant offenses victimizing third parties that were directly caused by or otherwise inseparable from the trafficking offense.

Id.

118. See Suzannah Phillips et al., *Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims*, CUNY SCH. L. 1, 15 (2014), <https://ncjtc-static.fvtc.edu/Resources/RS00002861.pdf> (explaining that victims are “at risk of arrest for vagrancy, trespass, disorderly conduct, crimes against nature, larceny, and drug and immigration offenses”).

119. Richard, *supra* note 16, at 1. “The Coalition to Abolish Slavery & Trafficking (CAST), a not-for-profit organization established in 1988, provides comprehensive long-term services to human trafficking victims.” *Id.* at 2.

120. *Id.* at 1. Additionally, the NSN survey expanded upon this number and revealed that 90.8% of trafficking survivors had criminal convictions, over 23% had been arrested

victims are forced into criminal activity and are arrested up to thirty or forty times in only a few years for solely trafficking-related offenses.¹²¹ Although the victim-perpetrator dilemma blurs the line between “victim” and “perpetrator,” this sobering data emphasizes the need to protect trafficking victims from unnecessary prosecution.¹²²

CAST assembled a customized database to “learn about and address the complexities of human trafficking cases, evaluate and improve the long-term services that victims need in order to rebuild their lives, and assess survivors’ progress in reaching service goals.”¹²³ The database contains information regarding 926 adult and minor victims from both sex and labor trafficking.¹²⁴ The statistics reveal that victims face high numbers of arrests and convictions during their trafficking as a result of a trafficker’s coercion.¹²⁵

According to the research, 69% of the victims studied had arrest records, and of those with arrest records, 67% had at least one arrest directly related to their trafficking.¹²⁶ Among this subset, 54% “only ha[d] arrest records directly related to their trafficking.”¹²⁷ In fact, the victims who were arrested only for crimes directly related to their trafficking “were arrested between one and 42 times, with an average of 14.86 arrests.”¹²⁸ Conversely, victims who were arrested only for crimes *unrelated* to their trafficking were arrested an average of

more than 10 times, and over 6% had been arrested more than 30 times. *See NSN Members Survey, supra* note 111.

121. Richard, *supra* note 16, at 7. The NSN survey also indicated that “over half of all [victim] respondents believed that 100% of their arrests/charges/convictions were directly related to their trafficking experience.” *See NSN Members Survey, supra* note 111.

122. Richard, *supra* note 16, at 1. The data also emphasizes the need to reform the justice systems treatment of trafficked persons and to view these individuals as victims, not as perpetrators, of a crime. *Id.*

123. *Id.* at 3.

124. *Id.* at 4 (“Although CAST attempts to include complete information for each individual in its database, some fields were unknown and were thus excluded from the results . . .”).

125. *Id.* at 3. The criminal records of a subset of 61 recent trafficking victims were reviewed for purposes of this analysis. *Id.* at 5. Specifically, “each arrest was categorized as either ‘directly related’ or ‘unrelated’ to the trafficking. Arrests that occurred during the trafficking time period were considered to be directly related to the trafficking. Arrests that occurred either before or after the trafficking time period were considered unrelated to the trafficking.” Richard, *supra* note 16, at 5. Notably, CAST recognizes that its sample size is not large enough to fully illustrate the association between arrests and trafficking with undisputable statistical analysis. *Id.* However, the data provides a clear starting point and reveals the need for “government and private agencies [to] share data . . . to conduct a large-scale statistical analysis.” *Id.*

126. *Id.* at 6.

127. *Id.*

128. *Id.* For example, “Penny (not her real name) was forced into commercial sex at age 12. Before she turned 14, she had been arrested *seven times* for prostitution, *false ID*, and *theft*. . . Penny was arrested *42 times* during her nine years of being trafficked.” *Id.* at 8 (emphasis added).

two times.¹²⁹ Therefore, trafficking victims “arrested *only* in relation to their trafficking are arrested [*seven times*] more often than those arrested only for activity unrelated to their trafficking.”¹³⁰ Even among the victims arrested for *both* directly related and unrelated crimes, “the vast majority of the arrests are directly related” to the victim’s trafficking.¹³¹

These statistics underscore the fact that human trafficking victims are frequently arrested in the course of their coercion.¹³² Moreover, the results are noteworthy because they demonstrate that victims are arrested significantly less when they are no longer being trafficked.¹³³ Most importantly, though, these statistics dismantle the assumption that trafficking victims have high numbers of arrests simply because the victims involved are generally prone to criminal activity.¹³⁴ While it is true that victims voluntarily commit crimes and routinely fall back into trafficking—usually as a result of some combination of ineffective victim services, the general difficulty of overcoming trauma, and lack of familial support—the assumption that trafficking victims are inherently “criminal” is harmful and untrue, as evidenced by the CAST database.¹³⁵

3. *The Obstacles of a Criminal Record*

There are overwhelming consequences of not providing human trafficking victims with a rebuttable presumption that any non-violent

129. See Richard, *supra* note 16, at 6.

130. *Id.* (emphasis omitted).

131. *Id.*

132. See *id.* at 7.

133. See *id.* The study discusses which arrests were not “in relation to” a victim’s trafficking and, therefore, it is also possible that the data could reasonably suggest that any arrest not “in relation to” a victim’s trafficking could be for an offense committed *while still being trafficked*, but entirely unrelated to the trafficking coercion. *Id.* at 6. However, as mentioned, the fact-by-fact analysis can make it difficult to ascertain which offenses were entirely divorced from a trafficker’s coercion. See, e.g., Richard, *supra* note 16, at 6.

134. See Rachel Austin & Amy Farrell, *Human Trafficking and the Media in the United States*, OXFORD RES. ENCYCLOPEDIA CRIMINOLOGY 1, 10 (Apr. 2017), <http://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-290?print=pdf>.

135. 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, 257 (2016) (recognizing that criminalizing victims “results in recidivism, continued exploitation, or the chronic instability that comes with an inability to heal from trauma.”); Cherish Adams, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT’L. REV. 201, 202 (2011) (stating that the “failure to be treated as a victim and receive support causes many victims to be re-trafficked”). “For instance, research on victim identification suggests that when judges, prosecutors, and police officers are faced with a ‘bad victim’ who does not resemble the constructed ideal victim of human trafficking, they are reluctant to treat these individuals as victims at all.” Austin & Farrell, *supra* note 134, at 10.

crime committed during the course of their trafficking is a result thereof and thereby not prosecutable.¹³⁶ The long-term effects of arrest, conviction, detention, and/or fines severely hinder the successful recovery of victims and extend well beyond the obvious punishment of prison and probation.¹³⁷ Additionally, prosecution-focused tactics may leave trafficking victims scarred with criminal records that unduly burden their educational opportunities, psychological well-being, employment prospects, financial stability, and eligibility for federal funding.¹³⁸ One survivor describes her struggle to overcome an arrest record as “the invisible bars even though I am free.”¹³⁹

According to the American Bar Association, there are approximately 40,309 federal, state, and local collateral consequences individuals with a criminal record face.¹⁴⁰ Of which, three primary consequences will be addressed here. First, employment opportunities severely diminish when victims retain a criminal history of arrests and convictions.¹⁴¹ This is because an estimated 80% or more United

136. See Richard, *supra* note 16, at 7; see also Patel, *supra* note 36, at 1561 (“[T]he trauma associated with trafficking and its psychological effects can be devastating and, if left unaddressed, can undermine victims’ recovery and potentially contribute to their vulnerability to re-victimization.”).

137. See Kessler, *supra* note 88, at 405.

Failing to recognize a person as a potential victim of trafficking may . . . hamper opportunities to deal with trafficking in persons offenders through interdiction, investigation and prosecution. The problems are compounded if such a person is treated as a criminal. Building trust is essential to gaining the cooperation of a victim. An arrest and detention will cause a serious setback or destroy any chance of building that trust.

Anti-human Trafficking Manual for Criminal Justice Practitioners, Module 11, UNITED NATIONS OFF. DRUGS & CRIME 2–3 (2009), http://www.unodc.org/documents/human-trafficking/TIP_module11_Ebook.pdf.

138. Richard, *supra* note 16, at 1; see Amanda Geller et al., *The Effects of Incarceration on Employment and Wages: An Analysis of the Fragile Families Survey* 1, 24 (Ctr. for Res. on Child Wellbeing, Working Paper No. 2006-01-FF, 2006), <https://pdfs.semanticscholar.org/a748/257cf094a1868ba70514c09098462f2c5dde.pdf>.

139. Richard, *supra* note 16, at 10. The “elusive nature” of a criminal record’s collateral consequences “can prove even more detrimental than a period of confinement” because “[t]hey are not specifically ordered by a sentencing judge but rather exist as a function of our system of retributive laws, inhibiting and discouraging productive engagement in society.” See Kessler, *supra* note 88, at 406–07.

140. American Bar Association, *National Inventory of the Collateral Consequences of Conviction*, https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type&duration_category=&page_number=1 [<https://perma.cc/RML9-3QBZ>]. This number is a count of the effects of different state and local regulations of the same types. *Id.* In the NSN study, discussed above, 72.7% of survivors surveyed reported that the long-term effects of arrest and convictions had created an employment barrier, and over 57.6% reported it a housing barrier. See *NSN Members Survey*, *supra* note 111.

141. See Richard, *supra* note 16, at 10. “The Supreme Court has held that an arrested individual has no right to privacy in his arrest information. The fact of an arrest may not be used directly to bar employment by itself. However, arrest information is available to, and can be considered by, potential employers.” *Id.* at 11.

States employers use criminal background checks during the hiring process.¹⁴² Moreover, the mass digitization and dissemination of criminal history in the modern world further exacerbate this issue.¹⁴³ Even when a victim’s criminal record has been expunged or sealed, private companies often still have these details in their database.¹⁴⁴

Second, there are lasting psychological impacts of detention and arrest.¹⁴⁵ Research shows that “being arrested, often handcuffed, taken to a police station, booked, and held overnight causes serious psychological distress.”¹⁴⁶ Criminal arrests are traumatic experiences and once in the custody of law enforcement, victims may be subject to more stressful situations.¹⁴⁷ Any skepticism or manipulation by law enforcement, added to such tactics having been used by the victim’s trafficker, will often aggravate the victim’s trauma.¹⁴⁸ A survivor’s reintegration into normalcy becomes even more challenging if they have spent a significant amount of time in “the Life.”¹⁴⁹

142. See *id.* at 11; see also Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 329 (2009).

143. See Kessler, *supra* note 88, at 403 (“[T]he modern information age has created an uphill battle for any efforts to obtain criminal history privacy.”). Further, the common law right of public access to criminal history information and judicial records—established in 1970 by the Supreme Court—makes effective expungement and vacatur laws difficult to implement. See *id.* at 409–10; see also *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

144. See Richard, *supra* note 16, at 12; see also Joe Palazzolo & Gary Fields, *Fight Grows to Stop Expunged Criminal Records Living On in Background Checks*, WALL STREET J. (May 7, 2015, 4:33 PM), <https://www.wsj.com/articles/fight-grows-to-stop-expunged-criminal-records-living-on-in-background-checks-1430991002> [<https://perma.cc/5XWN-F2VC>].

145. Richard, *supra* note 16, at 15. Specifically, with sexually exploited minors, the harmful process of arrest and detention can re-traumatize victims and ultimately “strengthen trauma bonds with traffickers who have warned victims that they would be arrested and blamed if they were to seek help from law enforcement or were ‘found out.’” Rachel Harper, *Shifting Towards Justice: Non-Criminalization of Child Sex Trafficking Victims*, SHARED HOPE INT’L (Apr. 5, 2016), <https://sharedhope.org/2016/04/shifting-towards-justice-non-criminalization-child-sex-trafficking-victims> [<https://perma.cc/XE4X-VLQK>].

146. Richard, *supra* note 16, at 15.

147. See, *cf.*, Cynthia Soohoo, *Criminalization of Trafficking Victims*, UNITED NATIONS UNIVERSAL PERIODIC REV. U.S. AM. (May 2015), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Criminalization-of-Trafficking-Victims.pdf>. For example, “[i]n New York City [victims] can be held up to 24 hours in the ‘squalid’ and ‘chronically overcrowded’ central booking facility. They may be forced to remain unclothed for long periods of time and are often subjected to inappropriate conduct and harassment while in custody.” *Id.* at 3.

148. Richard, *supra* note 16, at 15. Trafficking survivors are vulnerable to being manipulated by law enforcement into testifying against their trafficker or chastised for refusing to do so. See Emerson & Aminzadeh, *supra* note 135, at 246 (“For some, the threat of prosecution is used as a tool to get them to testify against their traffickers in court. This can result in trafficking survivors being treated as ‘instruments of criminal investigation, rather than as holders of rights.’”).

149. Lori Basheda, *Sex Trafficking Victim: “Just Because I Was Beaten or Raped . . . That’s not All that I Am,”* BEHIND BADGE (Jan. 20, 2016), <http://behindthebadgeoc.com/?p=12178> [<https://perma.cc/6524-VA8D>]. According to one sex trafficking survivor, Oree Freeman, a survivor’s perception of “normal” becomes warped because “[n]ormal is [now] scary. Love and support is not normal. Quiet is not normal.” *Id.*

Third, criminal records can lead to short-term and long-term housing, education, and financial problems.¹⁵⁰ Victims are often sent to emergency shelters for domestic violence victims because shelter options are limited.¹⁵¹ The long-term hurdles created by a victim's criminal record may disqualify her from "access [to] long-term, affordable, safe and stable housing."¹⁵² Further, a victim's credit may be affected, leaving her with little access to federal lending assistance and more susceptible to lending discrimination.¹⁵³ In reality, a victim's educational opportunities are also adversely affected because "[f]ederal law suspends eligibility for education grants, loans, and work assistance for students convicted of offenses involving the possession or sale of controlled substances while receiving student aid."¹⁵⁴ Acknowledging that these are only a few categories of the ways in which a criminal record can constrain a survivor's recovery, states must address the survivor's need for a clean criminal history if they want to see her successfully reintegrate into society without unnecessary scars of her trafficking.¹⁵⁵

II. CURRENT STATE OF ANTI-HUMAN TRAFFICKING LAW

Fortunately, states are beginning to recognize the need to provide holistic protection to human trafficking victims.¹⁵⁶ For states, safe

150. See David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 6 (2008).

151. See *id.* at 17; see also Amanda Peters, *Disparate Protections for American Human Trafficking Victims*, 61 CLEV. ST. L. REV. 1, 33–34 (2013) (Many homeless shelters and runaway homes have "[e]xclusion criteria"—including "drug addictions, violent behavior, or mental health conditions, all of which are common for victims of human trafficking to experience"—which effectively disqualify trafficking survivors from obtaining emergency housing). Other shelters do not categorize a survivor as a "real" domestic violence victim, while others "are unable to house individuals of different ages, genders, and sexual orientation." *Id.* at 34.

152. Richard, *supra* note 16, at 19. "Federal Housing laws currently permit providers of public, Section 8, and other federally assisted housing to perform criminal background checks on individuals applying for public housing." *Id.* Additionally, some states have broad interpretation of a victim's "criminal activity," leaving room for "even arrests without conviction [to] bar access to affordable and stable housing." *Id.* at 20.

153. Taja-Nia Y. Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237, 1243 (2005).

154. Richard, *supra* note 16, at 20. "Of course, once an individual has acquired criminal history record information, even if by court error, it is now his or her legal and financial burden to correct the inaccuracies that may be keeping him or her from employment, education, and housing opportunities." See Hancock, *supra* note 21, at 523.

155. See *id.* at 521 ("Overcharging not only unfairly extracts plea agreements, but it also leads to unnecessary incarceration in other ways as well.").

156. *Id.* at 528. In addition to New York, other States "have worked toward creating legislation to protect trafficking victims from criminal liability." Augustson, *supra* note 14, at 642. For example, "[i]n the first regular session of 2015, the Arizona House of

harbor laws must be based on the recognition that "[e]ven after [victims] escape . . . [human] trafficking, the criminal record victimizes them for life."¹⁵⁷ To give victims a deserved, second chance, however, states must go further and create a presumption of coercion that shields victims from unnecessary prosecution for the criminal offenses they were forced to commit as a direct result of their trafficking.¹⁵⁸ Perhaps a new federal Model Law, as discussed below, is needed to provide state legislatures with the support they need to draft consistent and effective safe harbor legislation with a rebuttable presumption provision regarding coercion.¹⁵⁹

A. Federal Criminalization of Human Trafficking: Trafficking and Violence Protection Act of 2000

In 2000, Congress recognized the human trafficking problem by passing the Trafficking Victims Protection Act (TVPA).¹⁶⁰ Partly as a result of pressure from human rights activists and non-profit organizations, the TVPA criminalized human trafficking by making it a federal felony and adopted a federal policy to focus on prosecution, protection, and prevention.¹⁶¹ The Department of Justice then prepared the Model State Anti-Trafficking Criminal Statute (Model Law) in 2004, with the hope that state anti-trafficking laws could effectively and consistently address the crime.¹⁶² Although the Model Law is not ratified legislation, it served as a practical guideline for state legislatures.¹⁶³ The Model Law acknowledges that current federal

Representatives also put forth an amendment that would allow human-trafficking victims to vacate prostitution or *non-dangerous offenses* that were committed as a direct result of being a human-trafficking victim." *Id.* (emphasis added).

157. *Id.*

158. *See infra* Sections II.B, IV.A.

159. *See, e.g.,* Richard, *supra* note 16, at 15; *see also* Patel, *supra* note 36, at 1563 ("[W]hen [victims] are released, they gain nothing more than a criminal record and usually more trauma from the experience than what they had faced earlier.").

160. *See* Trafficking Victims Protection Act of 2000, 22 U.S.C.A. § 7101 (West) (2000).

161. 22 U.S.C.A. § 7101(b)(24); U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 5 (2006), <http://www.state.gov/documents/organization/66086.pdf>.

162. Model State Anti-Trafficking Criminal Statute, U.S. DEP'T OF JUSTICE (2004), https://web.archive.org/web/20091201110112/http://www.justice.gov/crt/crim/model_state_law.pdf [hereinafter Model Law]. Given that the Model Law is now fourteen years old, there are other models states look to that are more comprehensive, such as the ULC's Uniform Act to combat trafficking. *See* Butler, *supra* note 8, at 1316; NAT'L CONF. COMM'RS UNIFORM ST. LAWS, ULC Unif. Act on Prevention of and Remedies for Human Trafficking 1, 2 (2013).

163. Additionally, the U.S. Senate encouraged states to follow the Model Law and even passed a resolution endorsing the statute. Model Law, *supra* note 162, at 6; *see* S. Res. 414, 108th Cong. (2004) ("[E]nactment of comprehensive State laws criminalizing human trafficking . . . may be necessary to ensure that Federal efforts are accompanied by robust efforts at the State and local levels.").

law must also be supported by robust state anti-trafficking laws to collectively address the crime.¹⁶⁴ As an incentive, states may receive grants under the TVPA to “develop, expand, or strengthen victim service programs for victims of trafficking, including programs that provide housing to victims of trafficking.”¹⁶⁵

The TVPA has undergone several reauthorizations since 2000 and now provides funding for victims, resources and training for law enforcement’s anti-trafficking efforts, and collects global data to determine best practices for anti-trafficking legislation.¹⁶⁶ In line with the recommendations of this Comment, the TVPA also acknowledges the need to protect survivors from being “inappropriately” punished for acts committed “as a direct result of being trafficked.”¹⁶⁷ Moreover, in its 2014 Trafficking In Persons Report, the United States Department of State explained that trafficking victims,

should not be held liable for their involvement in unlawful activities that are a direct consequence of their victimization. Trafficked individuals who are forced to commit a crime are commonly mistaken for criminals—rather than being identified as victims—and therefore treated as such by law enforcement and judicial officials.¹⁶⁸

Nevertheless, federal anti-trafficking efforts fail to adequately resolve the victim-perpetrator dilemma.¹⁶⁹ Despite this shortcoming,

164. John Tanagho, Comment, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with Its Federal and State Counterparts*, 38 LOY. U. CHI. L.J. 895, 918 (2007) (“State laws will result in increased prosecutions and a potential added deterrent to traffickers. Furthermore, state anti-trafficking legislation is needed because . . . state and local authorities are usually first to discover trafficking victims.”).

165. Trafficking Victims Protection Act of 2000, 22 U.S.C.A. § 7105(b)(2)(A) (West) (2000). Under the TVPA, coercion is defined as:

(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process.

Id. § 7102(3).

166. *See, e.g.*, Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919, 1920–21, 1933, 1946 (2014).

167. 22 U.S.C.A. § 7101(b)(19) (West) (2012). The United Nations Office of the High Commissioner for Human Rights contains similar language: “[t]rafficked persons shall not be detained, charged or prosecuted for . . . their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.” *See* OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *Recommended Principals and Guidelines on Human Rights and Human Trafficking* 1, 1 (May 20, 2002), <https://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.

168. U.S. DEPT’ OF STATE, *TRAFFICKING IN PERSONS REPORT 14* (June 14, 2014), <http://www.state.gov/documents/organization/226844.pdf>.

169. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127

the TVPA has successfully sought to combat human trafficking in the United States and continues to encourage states to enact victim-centered anti-human trafficking legislation.¹⁷⁰

B. Emergence of State Safe Harbor Laws

To date, every state and U.S. territory has some form of an anti-trafficking criminal statute.¹⁷¹ Many states have gone further in terms of victim-centered legislation and enacted safe harbor statutes that protect sexually exploited minors by not convicting them of prostitution—or, in some states, a prostitution-related crime that was committed as a result of trafficking.¹⁷² Safe harbor statutes “seek[] to offer and engage victims in rehabilitative services in lieu of charging them with a crime.”¹⁷³ The two goals that underlie safe harbor laws are: “(1) to provide legal protection to those forced, compelled, or induced to commit a crime, and (2) to provide ready access to necessary services such as psychological and medical treatment, housing, and rehabilitation services.”¹⁷⁴

As of June 2018, thirty-four states had enacted safe harbor provisions.¹⁷⁵ However, most safe harbor legislation limits the scope of protection to “children that have been . . . sexually exploited,” and the typical “legal protections offered [only] apply to prostitution and prostitution-related crimes.”¹⁷⁶ Effective safe harbor laws, in contrast, must be based on an understanding of the complexities of victim

Stat. 54, 144 (2013); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

170. See generally Peters, *supra* note 151.

171. See 2018 U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 444 (2018), <https://www.state.gov/documents/organization/282798.pdf> [hereinafter TIP REPORT 2018].

172. See Rich Williams, *Safe Harbor: State Efforts to Combat Child Trafficking*, NAT'L CONF. ST. LEG. 1, 1 (Apr. 2017) (describing the current status of state safe harbor legislation in detail).

173. Sarah Wasch et al., *An Analysis of Safe Harbor Laws for Minor Victims of Commercial Sexual Exploitation: Implications for Pennsylvania and Other States*, U. PA. FIELD CTR. 1, 1 (2016). “By the end of 2015, a full two-thirds of states had passed some version of ‘Safe Harbor’ legislation.” *Id.*

174. Patel, *supra* note 36, at 1561. States are beginning to recognize that “[p]rosecution and detainment of victimized children repeat[] the cycle of trauma and control that they have already experienced during their trafficking, and leaves youth with a criminal record for crimes that were perpetrated against them.” Wasch et al., *supra* note 173, at 5. However, some scholars argue that “when victims are not detained, they will not cooperate with prosecution of traffickers and/or purchasers of illegal commercial sex.” *Id.* at 7.

175. TIP REPORT 2018, *supra* note 171, at 444; see also Wasch et al., *supra* note 173, at 2.

176. *Human Trafficking Issue Brief: Safe Harbor*, POLARIS PROJECT (2015), <https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf>.

identification and the needs of human trafficking victims.¹⁷⁷ Limiting safe harbor protection to only prostitution-related offenses adversely impacts the recovery of victims and severely discredits our understanding of the depth of a trafficker's coercion.¹⁷⁸ While states recognize the importance of decriminalization, prosecutorial discretion, and diversion programming, safe harbor laws remain wholly inadequate because the scope of their protection is limited and states remain inconsistent in their approaches.¹⁷⁹

1. Immunity from Prosecution and Diversion Programs

There are two main categories that safe harbor provisions can fall under: decriminalization and diversion.¹⁸⁰ The distinction between the two is at the heart of effective safe harbor statutes and robust rehabilitation for survivors.¹⁸¹ First, decriminalization of trafficked youth occurs when states grant youth immunity for the prostitution-related crimes committed while being trafficked.¹⁸² Such immunity protects child victims from facing certain legal consequences for acting under the coercion of their trafficker,¹⁸³ and twenty states and the District of Columbia provide trafficked youth with criminal immunity for prostitution or prostitution-related offenses.¹⁸⁴

Second, diversion programs are meant to “provide[] officials with the ability to divert trafficked youth away from the justice system to programs and services that address their underlying needs.”¹⁸⁵ States

177. Wasch et al., *supra* note 173, at 2. Further, the 2018 TIP Report's United States country narrative notes that even in states with safe harbor laws that aim to “protect” trafficked youth, children still faced arrest. See TIP REPORT 2018, *supra* note 171, at 444.

178. See *supra* Section I.B.

179. See Joseph A. Colquitt, *Attacking Human Trafficking Through Legislative Change*, 52 WAKE FOREST L. REV. 457, 475 (2017) (explaining the need for state “uniformity because human trafficking is a complex process that occurs over a continuum and potentially crosses state lines”); Williams, *supra* note 172, at 1 (noting that the recent trend is to treat “trafficked youth as survivors of trauma . . . rather than as perpetrators of crimes they were forced to commit”).

180. Williams, *supra* note 172, at 4.

181. *Id.* (“Proponents of [prosecutorial] immunity and diversion [to survivor services] contend that they keep youth from continued trauma in the justice system and prevent them from compiling criminal records that can make it difficult to pursue future housing, employment and education opportunities.”).

182. *Id.*; see also Vanessa Bouche et al., *Identifying Effective Counter-Trafficking Programs and Practices in the U.S.: Legislative, Legal, and Public Opinion Strategies that Work*, NAT'L CRIM. JUST. REFERENCE CTR. 1, 12 (2016) (noting that the prosecution of traffickers has increased since minors have been granted prosecutorial immunity because minors are now more likely to cooperate in the investigations).

183. Wasch et al., *supra* note 173, at 5.

184. Williams, *supra* note 172, at 4.

185. *Id.* at 5.

that have chosen not to provide immunity have instead “created a diversion to social services program for minors [who] are arrested or charged.”¹⁸⁶ Twenty-nine states and the District of Columbia offer diversion programs for trafficked youth.¹⁸⁷ The most protective state provisions grant both immunity and offer diversion programming with specialized services.¹⁸⁸ Fortunately, eighteen states and the District of Columbia have done so.¹⁸⁹

2. Safe Harbor Laws of Minnesota, Tennessee, and New York

Safe harbor statutes vary from state to state, and some are more effective than others.¹⁹⁰ Minnesota, Tennessee, and New York have had varying degrees of success, and an analysis of each will provide insight into the common limitations and procedural hurdles of safe harbor legislation.¹⁹¹ In 2010, New York became the first state to enact safe harbor legislation.¹⁹² Shortly after, in 2011, Minnesota passed safe harbor legislation.¹⁹³ Minnesota is considered model legislation and was the first state to conduct a “*First Year Evaluation Overview*” of its safe harbor laws, where it found a dramatic “increase in cooperation with law enforcement” and a higher number of “convictions against traffickers since passing Safe Harbor legislation.”¹⁹⁴

186. Wasch et al., *supra* note 173, at 2.

187. Williams, *supra* note 172, at 4.

188. Wasch et al., *supra* note 173, at 2 (“Effective Safe Harbor statutes must address not only the issue of whether to charge a youth or provide immunity from prosecution (decriminalization), but also whether or how to obtain appropriate referrals to service providers regardless of legal outcomes.”).

189. Williams, *supra* note 172, at 5.

190. See *supra* notes 171–89 and accompanying text; *infra* notes 191–95 and accompanying text.

191. See *2017 State Report Cards—Protected Innocence Challenge*, SHAREDHOPEINTL, <https://sharedhope.org/what-we-do/bring-justice/reportcards/2017-reportcards> [https://perma.cc/PX25-EA4T] (ranking states on their response to the domestic sex trafficking of minors). In its 2017 Report, Shared Hope gave Minnesota a “B” (with a raw score of 89%), Tennessee an “A” (with a raw score of 96.5%), and New York a “D” (with a raw score of 66%). *Id.* at 23–25. Tennessee received the highest score of all U.S. states. *Id.*

192. Karen W. Weiss, *Steps to Safety: A Guide to Drafting Safe Harbor Legislation to Protect Sex-Trafficked Children*, 15 ECPAT USA 1, 39 (2015); see New York Safe Harbor for Exploited Youth Act, 2008 N.Y. Sess. Laws Ch. 569 (A. 5258-C) (McKinney). New York’s safe harbor provision provided the backbone for non-profits and victim-advocates to implement safe harbor laws in various states. See Marisa Nack, Note, *The Next Step: The Future of New York State’s Human Trafficking Law*, 18 J.L. & POL’Y 817, 821 (2010) (“At the time of enactment, commentators praised the legislation as one of the nation’s strongest and most comprehensive anti-trafficking laws.”).

193. Williams, *supra* note 172, at 7; see Safe Harbor for Sexually Exploited Youth Act, MINN. STAT. ANN. § 145.4716 (West 2013).

194. Wasch et al., *supra* note 173, at 1, 8. Of the 163 referrals that were made during

Finally, Tennessee passed its safe harbor legislation in 2012, which provides victims with both immunity from prosecution for prostitution and diversion opportunities.¹⁹⁵

Concerning the way these states treat the commercial sexual exploitation of children (CSEC) in the criminal justice system, both Minnesota and Tennessee provide trafficked minors immunity for engaging in commercial sex.¹⁹⁶ However, each state has a different age requirement for a victim to be categorized as a “minor.”¹⁹⁷ Minnesota’s safe harbor provision is known as “No Wrong Door” and includes “a mandatory diversion for the first offense of prostitution or prostitution-related charges for 16 and 17 year olds.”¹⁹⁸ In contrast, “youth [in Minnesota] under 16 years old are deemed *not* delinquent and are immune from prosecution for sex crimes.”¹⁹⁹ Therefore, victims in Minnesota between the ages of sixteen and eighteen are caught in a “gray area” in which they are no longer protected by prosecutorial immunity but may still receive benefits from specialized diversion programs if it is their first arrest.²⁰⁰ Tennessee law is similar to Minnesota with respect to its approach to decriminalization, but protects a larger population of victims because it prohibits anyone under the age of eighteen to be charged with a crime of prostitution.²⁰¹

Taking a different approach, New York categorizes trafficked youth as “abused children” but does not decriminalize children engaged in commercial sex, meaning that child victims of trafficking in New York may be arrested and charged.²⁰² However, New York’s safe harbor laws do allow for diversion to services upon the request

the study, 129 victims voluntarily accepted and participated in services because “there were no pending criminal charges or detainment.” *Id.* at 6.

195. Williams, *supra* note 172, at 4; *see also* Dysart, *supra* note 96, at 285; J. Ryan Dalton, *Modern-Day Slavery: Lawyers Help Fight Human Trafficking in Tennessee*, TENN. B.J. 12, 16 (2013).

196. Weiss, *supra* note 192, at 15.

197. *See infra* notes 198–200.

198. Wasch et al., *supra* note 173, at 2. The No Wrong Door initiative “also established additional services focusing on trauma-informed care and culturally specific services and housing.” Williams, *supra* note 172, at 7.

199. Wasch et al., *supra* note 173, at 2 (emphasis added).

200. Melissa Golke, *The Age of Consent: How Minnesota’s Safe Harbor for Sexually Exploited Youth Act of 2011 Falls Short of Fully Addressing Domestic Child Sex Trafficking*, 33 HAMLIN J. PUB. L. & POL’Y 201, 220 (2011). However, in 2016 under No Wrong Door, the age of eligibility for services in Minnesota was raised from eighteen to twenty-four. 2016 Minn. Sess. Law Serv. Ch. 189, Sec. 2, Subd. 3 (West).

201. TENN. CODE ANN. § 39-13-513(d) (2015); *see also* Dalton, *supra* note 195, at 12, 17. *But cf.* CONN. GEN. STAT. § 53a-82(a) (2016) (where only a “person eighteen years of age or older” may be “guilty of prostitution”).

202. N.Y. FAM. CT. ACT § 1012(e)(iii) (McKinney 2018). Additionally, New York’s definition of an abused child includes children who have been trafficked by a “person legally responsible,” which can also mean a relative. § 1012(e).

and consent of the child defendant.²⁰³ New York also allows for commercially exploited children and young adults to be certified as “Persons In Need of Supervision” (PINS), rather than juvenile delinquents.²⁰⁴ Once certified, a child may no longer be detained and will instead receive services through the Department of Social Services.²⁰⁵ About one-third of states currently do not have safe harbor statutes and offer neither immunity nor diversion for victims of human trafficking.²⁰⁶ Without consistent safeguards across all states, victims will continue to receive unequal treatment and endure preventable hardship.

Effective victim-centered services for commercially exploited children are difficult to provide because trafficking victims have diverse needs, including emergency shelter, food, transportation, sexual assault care, mental health treatment, counseling, and even case management services.²⁰⁷ Nevertheless, services are crucial for the rehabilitative process of victims and their healing process.²⁰⁸ In Tennessee, although no services are statutorily defined, “[e]nforcement [officers] must provide sexually exploited child[ren] with the telephone number for the National Human Trafficking Resource Center hotline and must release the minor to [her] parents.”²⁰⁹ Tennessee’s lack of statutorily defined services and the state’s failure to include provisions for funding may both be detrimental to the state’s ability to provide consistent rehabilitation for trafficked youth.²¹⁰

203. See Weiss, *supra* note 192, at 16; see also N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2010). Other states allow diversion opportunities at the discretion of judge, prosecutor, or both. See Weiss, *supra* note 192, at 16.

204. See N.Y. FAM. CT. ACT § 712(a) (McKinney 2014). Although not mandated, the “[c]onversion from juvenile delinquency complaint (if under 16) or Criminal Court complaint (if between 16 and 18) to Family Court person-in-need-of-services petition” is permitted. Weiss, *supra* note 192, at 16.

205. Williams, *supra* note 172, at 5. If, for whatever reason, the commercially exploited minor does not qualify for PINS certification, then she does not receive the services or benefits of its protection. See *infra* Part III.

206. See Williams, *supra* note 172, at 4–5. Many states have been reluctant to pass safe harbor laws for reasons that will be addressed more fully *infra* Section IV.D.

207. See VIRGINIA DEPT OF CRIMINAL JUSTICE SERVS. RESEARCH CTR., *Report on the Human Trafficking Services Needs Assessment Survey 1, 2* (Sept. 2012), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/victims/human-trafficking-services-needs-assessment-survey.pdf>. Unfortunately, a 2012 study conducted by Virginia Department of Criminal Justice Services Research Center found that over 80% of the agencies and organizations responsible for meeting these needs responded that they were unable to adequately do so. *Id.* at 2, 16.

208. See Peters, *supra* note 151, at 36. In addition to immediate housing opportunities, “victims need clothing, food, financial assistance, medical treatment, mental health treatment, legal assistance, substance abuse treatment, transportation, life skills training, education, work skills training, employment, and where appropriate, reunification with loving, supportive family members.” *Id.*

209. Weiss, *supra* note 192, at 16; see H.B. 0035, 107th Gen. Assemb. § 1 (Tenn. 2011).

210. Weiss, *supra* note 192, at 44.

In contrast, Minnesota and New York both have statutorily defined specialized services for commercially exploited children.²¹¹ In Minnesota, it is mandated that sexually exploited youth receive housing and that grants be awarded to service providers through the Commissioner of Human Services and the Homeless Youth Act Fund.²¹² Minnesota provides child victims who are in immediate danger the option of emergency detention, during which they may be “held in secure placement for up to 72 hours upon court order,” and holds mandatory training programs for law enforcement, social services, and medical professionals.²¹³ More comprehensively, though, the Family Court in New York can order services, such as “housing in specialized short- and long-term safe houses,” and local social services are required to provide for an exploited child’s “welfare needs,” such as “housing, food, clothing, [and] counseling.”²¹⁴ New York implements this approach through a presumption that commercially exploited children are victims of human trafficking and a diversion to specialized services.²¹⁵ New York’s diversion programming could be coupled with prosecutorial immunity, like Minnesota and Tennessee, to become more effective.²¹⁶

III. EXISTING REMEDIES FOR VICTIMS ARE INADEQUATE

Many states have listened to the call of anti-trafficking organizations and safe harbor advocates and created several remedies for victims of human trafficking.²¹⁷ While each state’s remedies vary quite drastically, there are currently several limitations and procedural hurdles that, in effect, render each inadequate. Even those that exclusively seek to remedy a victim’s undeserved criminal history fail to holistically protect victims. As the 2018 Trafficking In Persons Report stated, “NGOs . . . noted a lack of sustained state and local

211. *See id.* at 36, 40.

212. MINN. STAT. ANN. § 256K.45 (West 2015).

213. Weiss, *supra* note 192, at 17; *see* MINN. STAT. ANN. 260C.177 (West 2012).

214. Weiss, *supra* note 192, at 17; *see* N.Y. FAM. CT. ACT § 739(a) (McKinney 2010).

215. Weiss, *supra* note 192, at 40; *see* N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2010).

This presumption means that

a minor under the age of sixteen who is arrested for prostitution is a victim of a severe form of trafficking in persons under federal law and that the minor will be treated as a child in need of services. However, if the minor is a repeat offender or fails to cooperate with services provided, the minor can still be prosecuted.

Dysart, *supra* note 96, at 277.

216. *See* Williams, *supra* note 172, at 9 (explaining the importance for states to have both prosecutorial immunity and diversion programming for human trafficking victims).

217. *See supra* notes 211–16 and accompanying text; *see also infra* notes 219–49 and accompanying text.

government efforts to provide remedies for sex trafficking survivors who had criminal records as a result of their exploitation.”²¹⁸

A. Pretrial Diversion Programs

Generally, pretrial diversion programs are subject to the fulfillment of certain conditions that make it difficult for victims to receive immunity or services.²¹⁹ In states that have adopted this tactic, victims may still be charged with a crime before being diverted to a separate proceeding at the discretion of the judge or prosecutor.²²⁰ Some diversion programs require the admission of guilt or a conditional plea, while others have enumerated several conditions, like cooperation with law enforcement or first-time-offender requirements, that must be met.²²¹ If these requirements are not met and diversion efforts fail, charges can be reinstated, and the victim may also be disqualified from receiving the residual benefits of diversion, which can include “safe housing, drug-rehabilitation services, therapy, and employment training.”²²² Moreover, pretrial diversion programs often lack funding, leaving victims with no real alternative other than relying on the services provided through the criminal justice system.²²³

New York’s safe harbor law, for example, has four procedural hurdles that a victim under the age of eighteen must overcome before she can receive any benefits.²²⁴ There are four explicit reasons why PINS certification can be denied to a trafficking victim over eighteen: if she (1) is not a victim of “severe forms” of trafficking, (2) has a prior conviction of prostitution, (3) had previously received PINS, or (4) expressed unwillingness to cooperate with services.²²⁵ These

218. TIP REPORT 2018, *supra* note 171, at 444.

219. Patel, *supra* note 36, at 1558.

220. *Id.* at 1557.

221. *Id.*; *see also* Williams, *supra* note 172, at 5 (“[D]iversion contingent upon an admission of guilt, harms youth by treating them as an offender in the justice system rather than as a survivor of trauma.”); NCSL, *Human Trafficking State Laws*, NAT’L CONF. ST. LEG. (Dec. 5, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx> [<https://perma.cc/F6SJ-W6B4>].

222. Patel, *supra* note 36, at 1557. “For instance, in Massachusetts, should the minor fail to comply with the state-sanctioned diversion programs, the charges against him/her can be reinstated.” *Id.* at 1574.

223. *Id.* at 1559 (“Yet not all states that have enacted a pre-trial diversion program mandate funding for the rehabilitative programs they provide . . .”).

224. *See* Karen Wigle Weiss, *A Review of the New York State Safe Harbor Law*, ECPAT 1, 3–4 (2013). State statutes in general, but human trafficking safe harbor statutes in specific, contain several ambiguities and leave room for procedural hurdles. For a comprehensive outline of the procedural hurdles of state expungement and vacatur laws, *see* Alice Mutter, *From Criminals to Survivors: Recognizing Domestic Sex Trafficking As Violence Against Women in the District of Columbia*, 26 AM. U. J. GENDER, SOC. POLY & L. 593, 615 (2017).

225. Weiss, *supra* note 192, at 40; *see also* Krystle M. Fernandez, *Victims or Criminals?*

restrictions severely inhibit the rehabilitation of victims in New York because victims are often arrested by police for prostitution before they are identified as trafficking victims.²²⁶ Consequently, victims are often barred from receiving PINS certification, and obtaining the benefits that follow, long before law enforcement realizes the person is a victim and that certification as such is necessary.²²⁷ Further, victims may lose certification because they fail to cooperate with authority, a characteristic common among trafficking survivors.²²⁸ Any one of these reasons leaves a victim without the benefit of services, or at a minimum, with less opportunity to receive services, which ultimately makes it more likely she will return to trafficking.²²⁹ Relying solely on conditional pretrial diversion programs is insufficient.²³⁰

B. Affirmative Defenses and the Existing Rebuttable Presumption

Next, some states provide trafficking victims with an affirmative defense of coercion against a criminal charge, while others have created a rebuttable presumption of human trafficking victim in limited circumstances, but both are meant to, in a sense, protect survivors from further victimization.²³¹ Unfortunately, the very nature

The Intricacies of Dealing with Juvenile Victims of Sex Trafficking and Why the Distinction Matters, 45 ARIZ. ST. L.J. 859, 873 (2013).

226. Patel, *supra* note 36, at 1568 (“Usually, when victims are finally identified it is not the first time they have been charged with prostitution. For example, in Colorado, the 2014 Colorado Legislative Report on Human Trafficking found that 20% of trafficked victims represented repeat victims and 40% of juveniles were rescued again as adults.”).

227. *See generally* Patel, *supra* note 36, at 1558.

228. *See supra* note 205 and accompanying text.

229. Patel, *supra* note 36, at 1570 (“Though the frequency of recidivism may seem peculiar to those who recognize these victims as victims of a crime, most of them have been thoroughly pressured into a system that becomes familiar to them by the time they are rescued.”).

230. *See* Mutter, *supra* note 224, at 595 (explaining that state legislatures which fail to enact statutorily mandated diversion programs without unnecessary qualifications, like D.C., “treats survivors as criminals and fails to provide them meaningful services”). “Where law enforcement, lawyers, or judges fail to properly identify defendants as survivors, such survivors are not offered diversion services. Consequently, such statutes, while necessary, require additional initiatives, such as improved training programs, to be properly accessible to survivors.” *Id.* at 609.

231. *See* Dysart, *supra* note 96, at 276 (providing the text of the relevant state statutes dealing with affirmative defenses and explaining the differences between each); *see, e.g.*, ALA. CODE § 13A-6-159 (2010); ARK. CODE ANN. §§ 5-70-102(c), 103(c) (2013); GA. CODE ANN. § 16-3-6(c) (2015); IOWA CODE. § 710A.3 (2006); KAN. STAT. ANN. § 21-6419(c) (2013); LA. STAT. ANN. § 14:82(G)(1) (2017); MASS. ANN. LAWS ch. 265, § 57 (LexisNexis 2012); MO. REV. STAT. § 566.223 (2011); N.H. REV. STAT. ANN. § 645:2 (LexisNexis 2018); OR. REV. STAT. § 163.269 (2007); 11 R.I. GEN. LAWS § 11-34.1-2(c) (2014); S.C. CODE ANN. § 16-3-2020(F) (2015); S.D. CODIFIED LAWS § 22-23-1.2 (2012); TEX. PENAL CODE ANN. § 43.02(d) (West 2017); WASH. REV. CODE ANN. § 9A.88.040 (LexisNexis 2012); *see also* Boggiani,

of trafficking victims frequently renders these safe harbor provisions difficult to assert or qualify for.²³² Roughly thirty states allow trafficking victims to be arrested, charged, and prosecuted, but offer victims an affirmative defense to the charge of prostitution.²³³ These affirmative defenses are predictably difficult for victims to assert and require “a set of facts that defeat[] or negate[] the legal consequences of the defendant’s otherwise unlawful conduct of criminal liability.”²³⁴ Moreover, for a victim to benefit from an affirmative defense, she is required to assert the defense, and the case must reach the trial phase of prosecution.²³⁵ This is problematic because victims do not typically self-identify, are placed with the burden of proof, and often agree to plea deals soon after being charged.²³⁶ Some victims are in relationships with their traffickers—making it “unlikely that victims will intentionally incriminate the trafficker” or assert the defense.²³⁷ Because victims typically come from vulnerable populations, language or trauma barriers can be particularly challenging to overcome and can, ultimately, make the victims less likely to cooperate with law enforcement or their legal counsel.²³⁸ Thus, the affirmative defense does not adequately protect victims.

supra note 5, at 953–60 (outlining the advantages and disadvantages of providing victims with an affirmative defense and expungement and/or vacatur laws).

232. See Isabella Blizard, *Chapter 636: Catching Those Who Fall, an Affirmative Defense for Human Trafficking Victims*, 48 U. PAC. L. REV. 631, 644 (2017). Because the survivor has recently left her traumatizing situation, deep psychological and emotional issues may surface that could render her unable to explain the depth of her exploitation, which could ultimately present “some difficulties in convincing the jury that she is a trafficking victim.” See Boggiani, *supra* note 5, at 956.

233. Blizard, *supra* note 232, at 633; Wasch et al., *supra* note 173, at 2. For example, New York allows survivors to use their victim status as an affirmative defense to a prostitution charge. See N.Y. PENAL LAW § 230.01 (McKinney 2018). In contrast, D.C. does not provide victims with an affirmative defense at all. See D.C. Code Ann. § 22-2701(a) (West 2016).

234. Wasch et al., *supra* note 173, at 2; see Boggiani, *supra* note 5, at 957 (“[A] recently traumatized victim may not be able to express her sufferings in open court, or that the affirmative defense is unlikely to be asserted given that the case is unlikely to be brought to trial at all.”).

235. Boggiani, *supra* note 5, at 957. Reaching the trial phase of prosecution allows victims to enter the justice system as criminals and is also highly unlikely considering the frequency of plea bargains in obtaining convictions. See generally Lindsey Devers, *Research Summary: Plea and Charge Bargaining*, BUREAU JUST. ASSISTANCE 1, 1 (2011) (“While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.”).

236. Blizard, *supra* note 232, at 644 (“Victims of trafficking are unlike victims of other crimes—they don’t actively seek to involve law enforcement due to their unique type of trauma.”).

237. *Id.*

238. *Id.* at 634. Trafficking victims typically come from low socioeconomic backgrounds, are uprooted from familiar locations, and have little education and low self-confidence from years of abuse. *Id.* at 634–35.

Some states also offer trafficking victims a rebuttable presumption within the state's affirmative defense provisions.²³⁹ In Connecticut, for instance—unlike other states who provide complete immunity for sexually exploited youth—children charged with prostitution are presumed to be victims of sex trafficking, but this of course may be rebutted with facts to the contrary.²⁴⁰ Current rebuttable presumptions can be highly beneficial in the context of an affirmative defense for those who qualify, but for the same reasons why general affirmative defense provisions do not effectively redress a victim's criminalization, they too unsuccessfully protect victims. Moreover, states have limited the scope of these provisions so that only minors engaging in prostitution can benefit from the presumption.²⁴¹ For these reasons, current rebuttable presumptions do not account for the adult trafficking victim who participates in a wide variety of criminal conduct.

Even so, the shortcomings of the affirmative defense and current rebuttable presumptions should not prevent states from providing victims with these tools; they should, however, urge states to search for better, more definitive solutions. There is an obvious advantage of early intervention when it comes to affirmative defenses as compared to reactionary remedies, such as expungement or vacatur laws.²⁴²

C. *Expungement and Vacatur Laws*

Until now, states which sought to address the victim-perpetrator dilemma and recognize non-criminalization of victims focused their efforts on enacting expungement and vacatur laws.²⁴³ However, these

239. See CONN. GEN. STAT. ANN. § 53a-82(b) (West 2016); N.Y. FAM. CT. LAW § 311.4 (McKinney 2010); OKLA. STAT. ANN. tit. 21, § 1029 (West 2013).

240. See CONN. GEN. STAT. ANN. § 53a-82 (West 2016); Etienne, *supra* note 57, at 51. For example, to rebut the presumption of victim, a prosecutor in Connecticut may provide evidence that there was no third-party profiting (i.e., a pimp) from the child's conduct, or that the john bought directly from the child. See CONN. GEN. STA. ANN. § 53a-82 (West 2016). New York also has a rebuttable presumption, which is again limited to minors under the age of sixteen. See N.Y. FAM. CT. LAW § 311.4 (McKinney 2010). Additionally, Oklahoma provides sixteen to seventeen-year-old victims who are being prosecuted for prostitution the presumption that "the actor was coerced into committing such offense by another person in violation of the human trafficking provisions . . ." See OKLA. STAT. ANN. tit. 21, § 1029 (West 2013).

241. See CONN. GEN. STAT. ANN. § 53a-82 (West 2016); N.Y. FAM. CT. LAW § 311.4 (McKinney 2010); OKLA. STAT. ANN. tit. 21, § 1029 (West 2013).

242. Emerson & Aminzadeh, *supra* note 135, at 257 (discussing the subsequent damage victims bear after conviction).

243. See, e.g., Trafficking Survivors Relief Act of 2017, S. 104, 115th Cong. (2017); H.R. 459, 115th Cong. (2017).

The terms "expungement" and "vacatur" may seem interchangeable, but in practice, the terms provide two very different types of relief. While expungement means "to erase," vacatur means "to null or cancel." Vacatur is effective in certain contexts as it removes the legal consequences of conviction, but

laws have hidden procedural hurdles and do not safeguard victims from initially being criminalized.²⁴⁴ Currently, “39 states ha[ve] vacatur laws allowing survivors to seek a court order vacating or expunging criminal convictions entered against them that resulted from their trafficking situation.”²⁴⁵ The rationale for enacting expungement laws is the same as that for adopting a rebuttable presumption of coercion: to protect trafficking victims from the long-term obstacles of a criminal history for crimes with which they should not have been charged or convicted.²⁴⁶ Expungement opportunities afford victims a much-needed avenue for clearing their criminal history *after* they endure the criminal justice system as a perpetrator.²⁴⁷ Rebuttable presumptions, on the other hand, address the victim-perpetrator dilemma at an earlier stage *before* a victim faces the psychological and criminal consequences of being convicted.

It is necessary that victims retain the ability to file motions to expunge or vacate their prior convictions and arrests but relying on these mechanisms comes too late.²⁴⁸ Expungement provisions in their

the record of the charge still exists. Expungement, on the contrary, requires “the physical destruction of information.” In other words, a vacated conviction will still appear on a criminal record as vacated, but an expunged conviction will not appear on a criminal record at all.

Meiers, *supra* note 11, at 219–20.

244. See Augustson, *supra* note 14, at 639; Mutter, *supra* note 224, at 599–600 (discussing vacatur statutes and their effectiveness in clearing victims’ criminal records). Although there is currently no federal expungement or vacatur laws, Congress—through the Justice for Victims of Trafficking Act of 2015—has incentivized states “to pass laws that allow trafficking victims to petition courts to expunge arrest and conviction records for non-violent offenses committed as a direct result of being trafficked.” Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 64 (2017); see also Justice for Victims of Trafficking Act, S. 178, 114th Cong. § 1002 (2015); Emerson & Aminzadeh, *supra* note 135, at 252.

245. TIP REPORT 2018, *supra* note 171, at 444; see Survivor Reentry Project, *Post-Conviction Advocacy for Survivors of Human Trafficking: A Guide for Attorneys*, AM. B. ASS’N (Apr. 2018), https://www.americanbar.org/groups/domestic_violence/survivor-reentry-project [<https://perma.cc/6V4L-LJ39>].

246. See generally Emerson & Aminzadeh, *supra* note 135, at 257 (“Once criminalized, victims then bear the additional burden of the stigma and collateral harms that come with a criminal record. Frequently, this results in recidivism, continued exploitation, or the chronic instability that comes with an inability to heal from trauma.”).

247. See Boggiani, *supra* note 5, at 960.

248. See Bouche et al., *supra* note 182, at 5. For example, during the course of her trafficking, a victim

picked up 12 convictions on her record. . . . Since this incident, CAST has helped to get 11 out of 12 of her cases dismissed, yet still has one more conviction that a courthouse refuses to dismiss because of unpaid court fees. Ava also has a wage garnishment attached to each paycheck she receives because of unpaid court fees. These lingering reminders of her past make it painstakingly difficult for Ava to get a higher-than-minimum-wage job, to provide for her son, and to move on.

Richard, *supra* note 16, at 13.

very nature serve as “last-resort legal safety net[s] to trafficking victims trapped in the double victimization cycle.”²⁴⁹ With this in mind, states must tackle the criminalization of victims at its origin, focusing their efforts on victim identification and informed prosecutorial discretion. That way, victims may avoid criminal charges altogether for crimes committed as a direct result of their victimization.²⁵⁰ Withholding the remedy for clearing a victim’s offenses committed as a result of her trafficking until *after* she collects a lengthy criminal history can create prolonged psychological consequences and barriers to recovery.²⁵¹ For example, it may be difficult for a victim to ensure that all her convictions are cleared because, depending on the state, only certain types of offenses may qualify for expungement or there may be a timeliness requirement, a burdensome documentation requirement, or a requirement that a victim demonstrate that she has made efforts toward rehabilitation.²⁵²

Because trafficking victims often commit crimes in multiple jurisdictions, it also becomes burdensome for victims to spend the money and time to go to each jurisdiction and petition each conviction—this is true even when we assume the victim has enough resources to secure a lawyer on her behalf.²⁵³ The reality is that “[a]n individual must file a separate petition for each arrest and the individual must pay an additional filing fee for each petition filed.”²⁵⁴ It is also common for discrepancies to exist between documents meant to track an

249. See Boggiani, *supra* note 5, at 960.

250. See 22 U.S.C.S. § 7101(b)(24) (2012). “Indeed, it is undeniable that being trafficked, coerced into prostitution, arrested, and convicted are terrible experiences and [expungement statutes] would only serve the limited purpose of erasing the legal consequences of the last and least meaningful part of the [trafficking experience].” Boggiani, *supra* note 5, at 960.

251. See Boggiani, *supra* note 5, at 960.

252. See Bouche et al., *supra* note 182, at 12–13, 19. “Of the existing state vacatur statutes, there are variations on the types of convictions that defendants may vacate, how long after a defendant can vacate, and documentation requirements for proving that a defendant has left the commercial sex industry.” Mutter, *supra* note 224, at 614–15. “Many states also include additional stipulations regarding burden of proof, demonstration of rehabilitation, . . . [s]till other statutes have completely unique requirements . . .” Meiers, *supra* note 11, at 218–19.

253. See Bouche et al., *supra* note 182, at 12–13, 19. A victim may also need to secure multiple lawyers, as the lawyer may have to be licensed in the relevant state. Often times, the costs associated with petitioning a court for expungement is well outside a victim’s means, in terms of both money and time. See, e.g., Hancock, *supra* note 21, at 528 (explaining that “[e]xpungement costs between \$450 and \$2,000 in Philadelphia, including \$15.00 per petition for expungement and \$12.50 per petition for redaction,” and noting that “[b]eyond the costs associated with expungement, the process can take up to a year.”). Moreover, “[t]he limits that some states place on the type of convictions that defendants may vacate and the time span where defendants may file a motion for vacatur often prevent survivors of sex trafficking from cleaning their record.” Mutter, *supra* note 224, at 615.

254. See Hancock, *supra* note 21, at 528.

individual’s criminal history, such as FBI Live Scans, a particular state’s Department of Justice rap sheet, and the lower court’s minute orders from the county in which the offense took place.²⁵⁵ Discrepancies among these documents can consume a lawyer’s time and ultimately burden the preliminary step of simply compiling a survivor’s criminal history. Finally, expungement laws are inadequate because a portion of victims are left unaware that they may qualify for beneficial remedies.²⁵⁶

While expungement and vacatur laws may not be the ideal instruments for preventing revictimization, similar to affirmative defenses and existing rebuttable presumptions, they do serve valuable functions by relieving victims of obstacles to rehabilitation.²⁵⁷ Clearing a victim’s criminal history will never erase the trauma of a victim’s past; but it will, to some degree, ensure that a victim’s wrongful prosecution will no longer inhibit the journey forward on her road to recovery.

IV. CREATING A REBUTTABLE PRESUMPTION OF COERCION FOR VICTIMS

With the guidance of a revised federal Model Law, states should adopt broad safe harbor provisions that seek to protect victims of human trafficking from the lingering effects of their coercion.²⁵⁸ This Part will address the necessity for expanded safe harbor statutes. Section A outlines the call for a rebuttable presumption that extends to all non-violent crimes—encompassing non-prostitution-related offenses—and explains the contours and policy considerations of such a provision.²⁵⁹ Section B discusses the need for consistent and comprehensive state action,²⁶⁰ and lastly, Section C raises the arguments against protecting victims from prosecution and rebuts the most common misconceptions.²⁶¹

255. Interview with Tanya Cooper, Associate Professor, Pepperdine University School of Law, in Malibu, Cal. (Oct. 12, 2018). Tanya Cooper teaches Pepperdine’s Restoration and Justice clinic, which, among other legal services, assists human trafficking survivors compile their criminal history and file vacatur petitions in California courts to relieve the burden of a criminal history.

256. See Kessler, *supra* note 88, at 429. “Expungement is generally inaccessible due to strict statutes, limited inherent judicial authority, and record holders’ lack of knowledge regarding access to and eligibility for expungement.” *Id.*

257. *Id.* at 408.

258. See *supra* Section II.B.

259. See *infra* Section IV.A.

260. See *infra* Section IV.B.

261. See *infra* Section IV.C.

A. The Rebuttable Presumption That Any Non-violent Offense Committed by a Victim During Trafficking Is a Result Thereof

The creation of a rebuttable presumption of coercion for trafficking victims will inevitably affect the victim-identification process; a process that is extremely fact-sensitive, where reasonable, well-informed minds may disagree, and one that requires patience.²⁶² It is truly difficult for law enforcement officers to identify which crimes were committed as a result of coercion and which individuals are victims in unclear situations. Therefore, states should heavily consider the advantages of enacting a provision into their existing safe harbor laws, detailing that *any non-violent criminal offense committed by a victim of human trafficking during the course of his or her trafficking is presumptively a product of coercion and therefore non-prosecutable.*²⁶³

This provision goes beyond the presumption of innocence because it would characterize victims as more than simply innocent.²⁶⁴ It would presumptively label those exploited by human traffickers as victims and confer a presumption of coercion, even when the prosecutor is able to prove that a victim knowingly engaged in criminal conduct.²⁶⁵ Of course, a prosecutor can attempt to rebut this

262. See Zeeman & Stauss, *supra* note 2, at 147 (recognizing that “even experienced agents and prosecutors who are alert to trauma responses and are deeply committed to pursuing justice on behalf of vulnerable victims may reach differing conclusions in analyzing and balancing the multiple complex considerations relevant to assessing a victim-perpetrator’s criminal liability”).

263. See *id.* at 140 (“[V]ictims should rarely, if ever, be charged with non-violent, victimless offenses that are entirely a product of the trafficking, such as prostitution offenses committed at the trafficker’s direction. Prosecuting such offenses serves no deterrent purpose and only amplifies the severe harm suffered from the initial victimization. This type of prosecution will only further alienate the victim, increasing her risk of re-victimization. Similarly, it would not serve the interest of justice to prosecute a labor trafficking victim for an immigration-related offense that the trafficker facilitated in furtherance of the coerced labor scheme.”).

264. A rebuttable presumption, by definition, is

[a] legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.

Presumption, BLACK’S LAW DICTIONARY (10th ed. 2014).

265. Human trafficking victims are in unique positions, because in “other criminal contexts, previous trauma and victimizations may be considered mitigating factors, but typically would not foreclose federal prosecution in itself, as is the case when a child pornography perpetrator has previously been sexually abused.” See Zeeman & Stauss, *supra* note 2, at 146.

presumption with evidence that the conduct was not the result of coercion.²⁶⁶ It is important to note that "not all crimes committed by trafficking victims are [a] result of trauma, force, or coercion."²⁶⁷ But because trafficking victims have suffered extreme trauma, often fail to self-identify, tell incoherent stories, can refuse to testify, and have troubling pasts, placing the initial burden on them to prove coercion as a defense adds another problematic hurdle for victims to overcome before receiving services.²⁶⁸ The fact that the presumption of coercion need not be asserted allows the victim to immediately benefit from its effect upon being identified.²⁶⁹

Some may argue that the creation of a new rebuttable presumption will be too strenuous for prosecutors to overcome. This argument, however, fails to acknowledge that our criminal justice system, through varying levels of burdens of proof and the existing presumption of innocence, already recognizes the importance of protecting victims from being wrongfully convicted and weighs that interest above that of the prosecutor. While the role of prosecutors must be considered, it should not outweigh the liberty interest of victims. In fact, the victim's well-being should be of the utmost importance.

Other anti-trafficking advocates argue that providing absolute immunity to victims for crimes that were committed as a direct result of trafficking is the proper avenue to protect victims from further criminalization. If there were clear distinctions between "victim" and "perpetrator," this would be an excellent remedy. However, as discussed earlier, the line between victim and perpetrator is often indistinguishable, and completely foreclosing the possibility of holding victims criminally liable for engaging in criminal conduct when it was in no way a product of coercion would not serve the interest of justice. Ultimately, with the increased enactment of state expungement and vacatur laws, states have obviously begun to understand the need to protect victims from unnecessary criminalization. The

266. Interestingly, the presumption of coercion may require the victim to admit to engaging in the criminal conduct in question. In other words, if a victim introduces evidence that the charged conduct occurred while she was a victim of trafficking, she will inherently admit to the act. Therefore, while the prosecutor must still overcome a difficult causation issue (i.e., whether the conduct was a direct result of trafficking), the prosecutor no longer has to prove the victim-defendant engaged in the criminal conduct.

267. *Id.* at 145 ("[I]mmigration-related crimes or violations may precede the onset of coercion and abusive control. Sex trafficking victims may initially consent to engage in commercial sex, in violation of state laws, and may have committed drug-related crimes before the abuse and control began.").

268. *See* Boggiani, *supra* note 5, at 916.

269. *See* Peters, *supra* note 151, at 25 (recognizing that "citizen victims must be viewed as crime victims worthy of receiving protection," and that "[b]efore a person can qualify as a victim of human trafficking, he or she must be identified as one").

rationale for these laws also supports the creation of a new presumption of coercion: to protect trafficking victims from the long-term obstacles of a criminal history for crimes of which they should not have been convicted.²⁷⁰

The “non-violent” portion of the rebuttable presumption provision is crucial. First, it ensures that states balance the level of potential harm the victim posed to a third party while committing her criminal offense; and second, it recognizes the wide variety of crimes that a victim can commit during the course of her trafficking. When victims engage in violent criminal conduct, the analysis becomes even more convoluted because the interests of a third party must also be considered.²⁷¹ With this in mind, providing an immediate rebuttable presumption to victims who commit violent crimes would not serve in the interest of justice and prosecutorial discretion becomes the key, not legislative solutions. Understandably, victims *can* commit violent crimes under the coercion of their trafficker, but these crimes do not warrant the presumption of coercion due to their violent nature. For instance, in situations where a victim becomes a Bottom and engages in violent activity similar to trafficking, rather than providing her a presumption of coercion, survivor-based diversion programming may “permit [her] to move through the judicial system with as little re-traumatization as possible.”²⁷²

The “non-violent” portion is also consistent with most anti-trafficking scholars, who support that “a broad statute, offering relief for offenses other than prostitution, would best serve the victim.”²⁷³ Given the variations in traffickers’ coercive schemes, it is important to understand that human trafficking is more than prostitution-related crimes and more than sex trafficking.²⁷⁴ This fact is underscored by the CAST study on the arrest frequency of victims during their trafficking and the diversity of those crimes. For this reason, it is vital that the rebuttable presumption extend to all non-violent

270. See Boggiani, *supra* note 5, at 916.

271. See Zeeman & Stauss, *supra* note 2, at 145 (“Deciding whether the interest of justice favors holding an individual accountable for severe criminal conduct arising from her own victimization requires a nuanced, case-by-case, fact-specific analysis involving consideration of the totality of the trafficking victim’s actions, intent and personal circumstances, as well as the impact of her conduct on others.”).

272. Mutter, *supra* note 224, at 618.

273. Meiers, *supra* note 11, at 229. “The distinction between non-violent and violent offenses, however, can limit the relief available to the victim because it is possible for a violent crime to result from victimization.” *Id.* at 229–30. In fact, the scope of what crimes fall within the term “non-violent” has been the subject of debate among federal courts in the realm of sentencing law. See Shelby Burns, *The Johnson & Johnson Problem: The Supreme Court Limited the Armed Career Criminal Act’s “Violent Felony” Provision—And Our Children Are Paying*, 45 PEPP. L. REV. 785, 809 (2018).

274. See Richard, *supra* note 16, at 7–8.

crimes a victim commits as a result of her trafficking, not just prostitution or prostitution-related offenses.²⁷⁵

Technically, rebuttable presumptions do not generally shield victims from prosecution, and a prosecutor can still go forward with evidence of the offense or of how the criminal conduct was not a result of trafficking.²⁷⁶ Thus, the rebuttable presumption of coercion will not, on its face, protect victims from prosecution; it will, however, make victims less likely of being *convicted inappropriately*—and also effectively make victims less likely to be *prosecuted* in cases where prosecutors are less confident they can overcome the presumption of coercion. Therefore, while it may not overtly prohibit prosecution, the presumption of coercion will likely have the practical effect of shielding victims from unnecessary prosecution.

Because the presumption of coercion attaches during the trial phase of prosecution—therefore, inherently allowing victims to still be arrested and charged—it is imperative that states which enact this proposed provision also include language which allows for vacatur relief of the arrests and charges at issue in the litigation if the presumption of coercion is not rebutted. That way, victims will no longer be burdened by the weight of an unnecessary criminal history. Statutory language of this kind (i.e., that allow for arrests and charges to be cleared upon identifying a victim of human trafficking) are not novel because current vacatur and expungement laws provide similar relief.

In California, for example, upon filing a petition with the court alleging that the non-violent offense occurred during the course of a victim’s trafficking and was the product of coercion, the arrests, charges, and convictions relating to the offenses may be wiped clean.²⁷⁷ A similar mechanism within the presumption of coercion is not only easily integrated, but it is crucial for this proposed solution to holistically deal with a survivor’s victimization. Moreover, allowing the judge to immediately vacate or expunge the arrests and charges for the crimes at issue in the case is efficient and will save judicial resources. If allowed, a victim’s rehabilitation efforts may begin all

275. See Meiers, *supra* note 11, at 230 (“To be successful, the statute must be as inclusive as possible to encompass the wide variety of offenses victims are compelled to commit as a result of their victimization.”).

276. In situations where a prosecutor is able to rebut the presumption of coercion and offer evidence that the victim had the requisite criminal intent to commit the crime, the victim in that instance should still be able to file a vacatur petition following the trial. This is because victims should not be barred from the benefits of vacatur and expungements laws by the addition of a new remedy. This would provide survivors with an equitable amount of latitude to bring their case.

277. CAL. PENAL CODE § 236.14 (West 2017).

at once, instead of her having to retain another attorney and begin the vacatur process for the arrests and charges for a crime that has already been presumptively deemed a product of coercion.

It is true that even with a rebuttable presumption on the front end of a victim's encounter with the criminal justice system, some victims will fail to be identified as victims, and as a result will continue to be punished for crimes they were forced to commit. Therefore, this single solution will not in itself cure the victim-perpetrator dilemma, nor will it alone successfully end human trafficking. But it will provide identified victims with a helpful mechanism that sends victims through rehabilitative services rather than through prosecution. It is necessary that our justice system views a victim through a lens that presumptively recognizes both her victimhood and the extent of the coercion she likely endured.

B. Why Consistent and Comprehensive State Action Is Necessary

Creating a rebuttable presumption for victims through state-level safe harbor laws is the most effective avenue to address the narrow scope of current safe harbor laws.²⁷⁸ This is true despite the plausibility of also creating the presumption at the federal level, which would arguably discourage states from prosecuting human trafficking victims without first addressing the victim-perpetrator dilemma.²⁷⁹ While the Thirteenth Amendment certainly empowers the federal government to combat human trafficking, "it is inconceivable to think that the federal government is best situated to eradicate trafficking in the United States."²⁸⁰ Federal prosecutors are limited in their resources and as a result are not equipped to deal with the growing number of human trafficking cases.²⁸¹ State and local governments are better situated to prosecute traffickers and protect victims because they encounter victims more often than federal officers.²⁸² Therefore, state-regulated safe harbor laws which grant

278. Dysart, *supra* note 96, at 273. The U.S. Department of State recognizes this notion, as the 2018 TIP Report affirms that "[s]tate laws form the basis of most criminal actions in the United States." TIP REPORT 2018, *supra* note 171, at 444.

279. See Dysart, *supra* note 96, at 273 ("The Supreme Court recognized in *Keller v. United States* that "[j]urisdiction over [the offense of keeping a house of ill-fame] comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress."); see also *Keller v. United States*, 213 U.S. 138, 144 (1909).

280. Dysart, *supra* note 96, at 273.

281. *Id.* at 274.

282. *Id.*; see also Tanagho, *supra* note 164, at 918–19 ("[F]ederal resources alone are inadequate[,] . . . federal prosecutors are unlikely to take smaller cases, and state laws can address the local population's unique needs."). For this reason, many non-profits and

victims a presumption of coercion should be the avenue state legislators and advocates focus on.²⁸³

More importantly, the victim-perpetrator dilemma must be addressed through the enactment of positive law, not through judicially created provisions.²⁸⁴ While prosecutorial discretion and successful victim identification efforts play a vital role in the prosecution of human trafficking, state legislatures can better support victims by also adding an explicit rebuttable presumption provision.

In addition to calling on states legislatures, this Comment proposes that the United States Department of Justice can also play a role in guiding states in the proper direction. To support the expansion of well-drafted safe harbor statutes, federal, state, and local governments must work together to address this issue.²⁸⁵ Ultimately, safe harbor laws can be effectively drafted by state legislatures with the help of an updated federal Model Law; one that encourages states to enact new rebuttable presumption of coercion provisions. Currently, federal Model Law is silent on the issue of prosecutorial immunity for crimes other than prostitution and has no rebuttable presumption provision.²⁸⁶

The use of financial incentives to create state task forces and “combat sex trafficking of minors” under the reauthorizations of the TVPA and guidance from the Model Law, along with other sources of influence, have proven effective; they encouraged states to enact general safe harbor provisions and states listened by enacting these provisions.²⁸⁷ For example, a “recent reauthorization of the TVPA contained a section amending a grant program in the TVPRA 2005 to provide grants to state or local governments to ‘combat sex trafficking of minors.’”²⁸⁸ Therefore, providing explicit presumption of coercion provisions in federal Model Law would be an effective avenue for helping state legislatures draft similar provisions.

advocacy organizations push for legislation at the state level, rather than through federal legislation. *See* Dysart, *supra* note 96, at 274.

283. Dysart, *supra* note 96, at 274.

284. *Id.* at 286. A judicially created provision would be one the court creates that is not explicitly stated in a particular statute, but derived from the statute’s purpose and language. *Id.* (“One of the benefits of a positive-law immunity provision, as opposed to a judicially created provision, is that the legislature can better consider the legal and policy issues on both sides of the argument and craft a solution that best balances the countervailing concerns.”).

285. *Id.* at 273 (“In fact, the federal government in the TVPA and its reauthorizations ‘envisioned a role for state and local governments to prosecute sex traffickers and restore victims.’”).

286. *See generally* Model Law, *supra* note 162.

287. Dysart, *supra* note 96, at 273.

288. *Id.*; *see also* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 149–53 (2013).

Because federal Model Law is not enacted legislation, including a presumption of coercion within it would have no legal consequences and would come at little expense to the federal government. It would only serve the purpose of providing best practices for safe harbor statutes at the state level.²⁸⁹ States need a Model Law to look to for guidance to draft effective provisions that are consistent with the congressional intent of protecting human trafficking victims from inappropriate incarceration.²⁹⁰ If updated, the Model Law could help create a much-needed consistency among each state's safe harbor laws, ensuring that victims of human trafficking are protected equally among the states.²⁹¹

C. Arguments Against Safe Harbor Statutes That Excuse a Victim's Criminal Liability

There are several arguments against implementing a safe harbor provision that grants victims a rebuttable presumption of coercion.²⁹² Admittedly, the idea of not prosecuting individuals for the "crimes" they commit is fairly controversial when viewed through an isolated lens.²⁹³ In this Section, this Comment will explain the likely arguments against creating a rebuttable presumption of coercion.²⁹⁴ These objections, however, ultimately lack merit and fail to recognize the policy implications behind protecting victims from coercion and unnecessary criminalization.

1. Misconception: Arresting Victims Is the Only Effective Way to Get Them Off the Street and into Services

One of the most common misconceptions regarding human trafficking is the argument that the best avenue to get victims into services is to increase prosecution efforts and arrest them.²⁹⁵ It is

289. See *supra* notes 9–10 and accompanying text.

290. See generally *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347–48 (11th Cir. 2011) (outlining congressional intent of the TVPA).

291. See *Tanagho*, *supra* note 164, at 939; see also *Wagner & McCann*, *supra* note 244, at 93 ("States play a central role in combating trafficking. Many sex trafficking victims are identified locally, often by police patrol officers . . .").

292. See *Dysart*, *supra* note 96, at 279.

293. See *Etienne*, *supra* note 57, at 76.

294. See *supra* notes 262–83 and accompanying text.

295. *Etienne*, *supra* note 57, at 76; see also *Emerson & Aminzadeh*, *supra* note 135, at 245–46 ("Law enforcement raids, long seen as the primary vehicles for identification and recovery of trafficking victims, are more often deemed successful 'by the collection of evidence . . . [and] witnesses who may testify in prosecution of [trafficking] crimes,' than by the identification and support of victims. Instead, victims commonly find themselves arrested or detained, either because victims are not screened for trafficking by law enforcement, or because they fail to identify themselves as victims.").

believed that once a victim is arrested, she can finally be placed into social services and while under the control of the government, will get the support she needs.²⁹⁶ Especially for trafficked youth, this rationale often comes from law enforcement, prosecutors, and juvenile judges who argue that, “‘because strategies of persuasion and common sense have failed with these youth, it is necessary to place them in secure custody for their own protection,’ both to keep them from running back to their pimps and to ensure that they receive the services they need.”²⁹⁷

Unfortunately, however, this well-intentioned rationale criminalizes victims of human trafficking.²⁹⁸ It provides a disservice to victims because law enforcement officers end up treating victims similar to how they treat the victims’ trafficker.²⁹⁹ This treatment can confirm the lies that traffickers frequently tell their victims about their own culpability and increase a victim’s distrust for law enforcement³⁰⁰—perpetuating the cycle of trafficking victims returning to “the Life.” Moreover, the need for victims to receive access to social services does not justify criminalizing them.³⁰¹ The focus must shift away from the arrest and prosecution of victims and concentrate on less traumatic victim-identification techniques and creating a presumption of coercion.³⁰²

2. Misconception: Law Enforcement Need the Threat of Prosecution for Victims to Cooperate

Others believe that if victims are granted immunity for the crimes they commit and “do not face the threat of prosecution and imprisonment,” then victims will not “cooperate with the prosecution of their

296. See Dysart, *supra* note 96, at 281.

297. *Id.*

298. See *id.*

299. See Tamar R. Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1085–86 (2011) (“Yet, the justification of detention in the name of protection is less compelling when the penalty includes such negative consequences as a permanent criminal record or imprisonment with adult offenders . . .”). According to the Sex Workers Project at the Urban Justice Center, 27% of sex workers have been subjected to violent behavior from law enforcement officers. See *Revolving Door*, *supra* note 56. Further, a Washington, D.C. study estimated that “50% of sex workers who turned to law enforcement officials for assistance were ignored or experienced abuse at the hands of police officers.” See Patel, *supra* note 36, at 1562.

300. See Balmgamwalla, *supra* note 4, at 35 (“The policy of arresting individuals in the interest of their own welfare also suggests that benefits cannot be given outside the criminal justice system, although there are a number of programs that seek to deliver their services independently of criminal justice proceedings.”).

301. Dysart, *supra* note 96, at 281.

302. *Id.* at 282 (“[A]s the Texas Supreme Court pointed out in *In re B.W.*, the juvenile justice system is not the ‘only portal’ for prostituted children to receive needed social services.”); see generally *In re B.W.*, 313 S.W.3d 818 (Tex. 2010).

[traffickers] by testifying against them.”³⁰³ This misconception is premised on the idea that “[b]ecause [a victim’s] testimony is often necessary to successfully prosecute those who exploit them, . . . the mere threat of prosecution and the subsequent ability to detain [victims] is the most effective way to obtain their important testimony.”³⁰⁴

While it is known that victims are unlikely to cooperate with law enforcement—often a direct result of trauma, including trauma-bonding with their trafficker, inability to self-identify as a victim, or apprehension of authority—this argument is misplaced.³⁰⁵ Using the threat of prosecution is uncomfortably similar to the coercion that victims have already experienced under their trafficker. A trafficking survivor’s status as a victim should not depend on her initial hesitation, or ultimate refusal, to cooperate with law enforcement.³⁰⁶ Moreover, “[c]onditioning treatment and services upon requirements only exacerbate[s] victims’ trauma and tendency to be uncooperative. Thus, the *victims’ behavior*, not the perpetrators’, dictates whether the victims receive immunity for actions they were coerced into committing.”³⁰⁷ Prosecutors do not need to threaten survivors into cooperating.³⁰⁸ In reality, trafficking victims may be more likely to cooperate with law enforcement if they are first relieved of the fear of prosecution and met with a presumption of coercion.³⁰⁹

303. Dysart, *supra* note 96, at 280.

304. Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POLYREV. 1, 27–28 (2010).

305. Dysart, *supra* note 96, at 280–81.

306. See *NSN Members Survey*, *supra* note 111, at 6 (detailing survivors’ responses to the survey, which include: “I was given a mandate that I must testify against my trafficker. I was unable, so I was charged”; “I was sentenced to 30 months in prison because I would not testify against my trafficker”; and “I was scared they told me if I didn’t tell they would keep arresting me[sic] & keep me in jail for a very long time”). In the end, very few survivors testify against their trafficker in court and they are ordinarily not ideal witnesses due to their troubled past. See Balmgamwalla, *supra* note 4, at 27 (“As witnesses, trafficking victims may refer to choices such as travelling abroad, knowingly accepting sex work, keeping false passports, and deciding to make money, all of which might undermine their credibility in court.”). Additionally, many of the cases against the trafficker are dismissed “when witnesses fail to testify, mainly as a result of witness intimidation.” Kessler, *supra* note 88, at 442.

307. Patel, *supra* note 36, at 1574 (emphasis added). “Unfortunately, state safe-harbor statutes do offer referrals to service providers or actual rehabilitative services but condition it upon cooperation with law enforcement officers who they have been taught to fear or other such requirements.” *Id.*

308. See Dysart, *supra* note 96, at 280; see also Annitto, *supra* note 304, at 28 (“[I]t is easier for law enforcement personnel to build a relationship of trust with children when they are not at risk of prosecution.”).

309. See Dysart, *supra* note 96, at 280. However, in the event that victims are unwilling or unable to testify against their trafficker in court, prosecutors may have sufficient evidence to prove each element. See Alessandra P. Serano, *Evidence Considerations in Proving Sex Trafficking Cases Without a Testifying Victim*, 65 U.S. ATTYS BULL. 115, 116–21 (2017).

3. *Misconception: The Victim Freely Entered Prostitution and Should Be Punished, Not Excused from Liability*

Another argument against creating a rebuttable presumption of coercion is that some victims are not victims at all because they freely enter prostitution and should be punished as a result.³¹⁰ This Comment does not argue for the decriminalization of prostitution, but it is important to note that a victim’s sexual history may seem relevant and that some individuals freely enter prostitution.³¹¹ In fact, the history of sex trafficking victims often brings to light previous instances of voluntary prostitution or engagement in commercial sex acts.³¹² These facts alone, however, do not mean that the victim has foregone her ability to deny consent to engaging in prostitution in the future.³¹³ Thus, if she is trafficked, she should also benefit from the presumption of coercion.³¹⁴

This misconception is based on an erroneous analysis and seriously “underestimate[s] the reality of coercion in this industry.”³¹⁵ For example, “[i]t is not assumed that because someone voluntarily worked on a farm, picking tomatoes last year that they cannot be coerced to work on a different farm this year.”³¹⁶ Thus, a victim’s prior employment in the sex industry should not lead to an immediate abandonment of a case; it should lead to better identification techniques.³¹⁷ There must be a focus on victim identification and law enforcement training, not on the previous sexual history of potential victims.³¹⁸ Otherwise, the line between criminal and victim will continue to remain blurry, or worse, non-existent.³¹⁹ As John Cotton

310. See Dysart, *supra* note 96, at 286.

311. *Id.* at 287.

312. See Richmond, *Root Cause*, *supra* note 7, at 2.

313. *Id.* at 1, 2; see, e.g., United States v. Cephus, 684 F.3d 703, 708 (7th Cir. 2012) (“[E]ven if [the victim] knew going in, from her prior experience, that [the trafficker] probably would beat her, it was still a crime for him to do so. And finally[,] the fact that [the victim had] been a prostitute before does not suggest that he didn’t beat and threaten her—that was his *modus operandi* . . .”).

314. Dysart, *supra* note 96, at 287. Although some sex trafficking victims may initially “consent” to being prostituted—sometimes “out of misplaced loyalty to an organization or a desire to be part of the family structure[.]”—when victims desire to stop, “gangs usually increase their use of fraud, threats, and coercion to keep victims submitting to commercial sex acts.” See G. Zachary Terwilliger et al., *Human Trafficking and Organized Crime: Combating Trafficking Perpetrated by Gangs, Enterprises, and Criminal Organizations*, 65 U.S. ATT’YS BULL. 123, 129 (2017).

315. Dysart, *supra* note 96, at 287.

316. Richmond, *Human Trafficking*, *supra* note 22, at 36.

317. See Heather J. Clawson & Nicole Dutch, *Identifying Victims of Human Trafficking: Inherent Challenges and Promising Strategies from the Field*, U.S. DEPT HEALTH & HUM. SERVS. 1, 2–3 (2008), <https://aspe.hhs.gov/system/files/pdf/75321/ib.pdf>.

318. See *id.*

319. See *id.*

Richmond, a former federal prosecutor in the United States Department of Justice's Human Trafficking Prosecution Unit and the current U.S. Department of State's Ambassador for Trafficking in Persons, stated: "Self-inflicted problems and messy lives are attractive to traffickers when they are recruiting their victims; these conditions should not also be barriers to the rescue and restoration of victims."³²⁰

In sum, each misconception fails to account for the need to protect trafficking victims from coercion and unnecessary criminalization, and therefore should not deter states from creating a rebuttable presumption of coercion.

CONCLUSION

When states fail to prioritize efforts to understand the victim-perpetrator dilemma, human trafficking survivors suffer devastating consequences.³²¹ Despite having already endured severe trauma and exploitation, survivors are frequently criminalized for crimes they were forced to commit by their trafficker.³²² The extent of states' response has led to several reactionary remedies that are difficult to assert, contain numerous burdensome eligibility requirements, and are only available once a victim has been convicted of a crime.³²³

A new rebuttable presumption of coercion is desperately needed.³²⁴ The Department of Justice should draft a new Model Law with an expanded safe harbor provision that encourages the creation of a presumption of coercion to protect victims from conviction for the wide variety of crimes they were forced to commit.³²⁵ This will give states a clearer guideline for anti-human trafficking statutes and empower states to not only criminalize human trafficking but decriminalize the victims.³²⁶ For safe harbor laws to fully address the needs of survivors, there must be state consistency in prevention and punishment.³²⁷ Unfortunately, our collective decriminalization efforts fail when we do not protect victims from the full extent of a trafficker's coercion.³²⁸ The longer the effects of this coercion linger,

320. Richmond, *Human Trafficking*, *supra* note 22, at 37.

321. See Emerson & Aminzadeh, *supra* note 135, at 245–46.

322. See *supra* Section I.B.2.

323. See *supra* Part III.

324. See *supra* Part IV.

325. See Tanagho, *supra* note 164, at 899.

326. See *supra* Section IV.B.

327. See Tanagho, *supra* note 164, at 919. Otherwise, "[i]nconsistent anti-trafficking statutes in a region result in human trafficking routes *shifting* as opposed to human trafficking activity *lessening*." *Id.* at 939 (emphasis added).

328. See Dysart, *supra* note 96, at 267 ("According to the United States Department of State, the 'protection' prong [of the TVPA] 'is key to the victim-centered approach the

the harder it will be for victims to recover and the easier it will be for the public to implicitly justify their criminalization.³²⁹

Although the victim-perpetrator dilemma can best be addressed through the creation of a rebuttable presumption of coercion, this single curative measure will not solve our nation’s human trafficking problem.³³⁰ The presumption of coercion will, however, prevent the creation of new sources of stress and trauma and ease the collateral consequences of a criminal record, while still leaving room for prosecutors to effectively curb crime in the interests of justice.³³¹ Though survivors have experienced a tremendous amount of abuse, many are resilient and so much more than their trafficking story; they “are leaders, experts, advocates, caseworkers, lawyers, speakers, consultants, program managers, and executive directors.”³³² Survivors are worthy of our effort, and in the pursuit of justice, states must take preventative steps to better protect them—even those who at first glance look like perpetrators.

United States and the international community pursues in efforts to combat modern slavery.’”).

329. The moral stigma associated with the sexual promiscuity of prostitution is often imputed to human trafficking victims. *See, e.g., Trafficking Survivor Cases, supra* note 91.

330. *See supra* Section IV.A.

331. *Id.*

332. *See* Nat’l Survivor Network, *Voices of the National Survival Network*, <https://freedomnetworkusa.org/app/uploads/2018/04/Voices-of-the-NSN-Report.pdf>; *see also* Martina E. Vandenberg, *Innovations in the Fight Against Human Trafficking: Listening to Trafficking Survivors, Fighting for Justice*, 60 N.Y.L. SCH. L. REV. 631, 632 (2015) (describing the significant role of trafficking survivors in the anti-trafficking movement and how the anti-trafficking community is shifting to become more survivor-led).