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## ARTICLES

### A PENUMBRA OF RIGHTS AT RISK: HUMAN TRAFFICKING VICTIMS' RIGHTS IN FEDERAL CRIMINAL CASES

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## ABSTRACT

Victims<sup>1</sup> of human trafficking can find themselves being questioned by law enforcement about their trafficking experience and may be expected to serve as victim-witnesses in federal human trafficking prosecutions. However, their rights in this process can be at risk of infringement and deserve protection, from initial questioning through, and beyond, sentencing of the trafficker.<sup>2</sup> Advocacy of victim-witness rights is critical: to ensure that victims<sup>3</sup> are not criminalized for conduct that was forced or coerced during exploitation; to preserve the rights afforded under the Crime Victims' Rights Act; and to help repair survivor distrust of the criminal justice system. This Article will explore the penumbra<sup>4</sup> of rights at risk in the unique context of this crime, provide an update on restitution and other victim remedies including federal vacatur, and demonstrate the significant impact of pro bono legal representation of victim-witnesses throughout the entire criminal process.

## INTRODUCTION

While most occurrences of human trafficking go unreported or undetected,<sup>5</sup> some are investigated and eventually prosecuted at the state or federal level.<sup>6</sup> In the twenty years following enactment of the Trafficking Victims Protection Act of 2000 (TVPA),<sup>7</sup> there have been 2,093 federal human trafficking prosecutions

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<sup>1</sup> The terms "survivor," "victim," and "victim-witness" will be used interchangeably in this Article, usually comports with the stage of investigation and prosecution. Use of one or the other does not necessarily indicate an individual who has been formally granted victim status by the federal government.

<sup>2</sup> Federal human trafficking cases can include one defendant and one victim, or one or several traffickers and one or several victims. For consistency, this Article will refer to singular victims and singular traffickers. The rights of victims deserving protection are not impacted by the number of either.

<sup>3</sup> This Article will focus mostly on the experience and implication of rights of sex-trafficking victims, although there are some themes that apply to labor trafficking victim-witnesses.

<sup>4</sup> While Merriam-Webster defines "penumbra of rights" as "a body of rights held to be guaranteed by implication in a civil constitution," in this Article it is intended to capture the implicit, related or surrounding rights deserving of protection even if not explicitly granted by statute or caselaw interpreting constitutional construction. See *Penumbra*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/penumbra> (last visited Jan. 20, 2022).

<sup>5</sup> See *Gaps in Reporting Human Trafficking Incidents Result in Significant Undercounting*, NAT'L INST. OF JUST. (Aug. 4, 2020), <https://nij.ojp.gov/topics/articles/gaps-reporting-human-trafficking-incidents-result-significant-undercounting>.

<sup>6</sup> See generally 18 U.S.C. §§ 1581–1597 (2018).

<sup>7</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18, 22, and 42 U.S.C.).

involving 4,824 victims.<sup>8</sup> Among the most significant obstacles to prosecuting this crime is the lack of victim participation.<sup>9</sup> Until human trafficking can be successfully prosecuted without the need for victim testimony, human trafficking victim-witnesses will remain the key to securing convictions.<sup>10</sup> However, the rights of vulnerable survivors, with potential criminal exposure and a lack of trust in the criminal justice system, are at great risk. This Article explains why.

In general, the Crime Victims' Rights Act<sup>11</sup> (CVRA) affords victims in federal matters:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) The reasonable right to confer with the attorney for the Government in the case.
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

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<sup>8</sup> KYLEIGH FEEHS & ALYSSA CURRIER WHEELER, HUM. TRAFFICKING INST., 2020 FEDERAL HUMAN TRAFFICKING REPORT 3 (2021), <https://www.traffickinginstitute.org/2020-federal-human-trafficking-report/>.

<sup>9</sup> See AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 201 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/238795.pdf> (listing most significant challenges to prosecuting human trafficking offenses, as identified by state and federal prosecutors).

<sup>10</sup> See Benjamin J. Hawk et al., *Chapter 77 and Beyond: Charging Strategies in Human Trafficking Cases*, 65 U.S. ATT'YS' BULL. (Exec. Off. for U.S. Att'ys, Columbia, S.C.), Nov. 2017, at 52, <https://www.justice.gov/usao/page/file/1008856/download> (discussing charging strategies that do not require victim cooperation that would be difficult to obtain due to fear, mistrust and trauma); see also Jennifer Gentile Long & Teresa Garvey, *No Victim? Don't Give Up*, STRATEGIES (AEquitas, Washington, D.C.), Nov. 2012, at 1, [https://aequitasresource.org/wp-content/uploads/2018/09/S\\_Issue\\_7\\_No\\_Victim-Dont\\_Give\\_Up.pdf](https://aequitasresource.org/wp-content/uploads/2018/09/S_Issue_7_No_Victim-Dont_Give_Up.pdf) (exploring strategies for prosecuting human traffickers when faced with lack of victim participation).

<sup>11</sup> Crime Victims' Rights Act, 18 U.S.C. § 3771(a) (2018).

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 [] and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.<sup>12</sup>

To ensure the protection of these rights, the CVRA provides, “[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a)” and “the prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).”<sup>13</sup>

The Justice for Victims of Trafficking Act of 2015 (JVTA)<sup>14</sup> reinforced the right of victims to be informed and to have access to victims' services afforded by the government.<sup>15</sup> Specifically, it added “[t]he right to be informed of the

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<sup>12</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 113(a)(1), 129 Stat. 227, 240–41 (codified as amended at 18 U.S.C. § 3771 (2021)). Section 113 of the Justice for Victims of Trafficking Act of 2015 expanded “crime victims’ rights” by establishing the right: (1) “to be informed in a timely manner of any plea bargain or deferred prosecution agreement” and (2) to be informed of rights and services described in the Victims’ Rights and Restitution Act of 1990 and contact information for the Office of the DOJ Victims’ Rights Ombudsman. *Id.* Appellate courts must apply ordinary standards of appellate review in reviewing appeals filed by crime victims. *Id.*; see generally CHARLES DOYLE, CONG. RSCH. SERV., RL33679, CRIME VICTIMS’ RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. § 3771 (2021), <https://fas.org/sgp/crs/misc/RL33679.pdf> (providing comprehensive overview of crime victims’ rights in federal matters).

<sup>13</sup> 18 U.S.C. § 3771(c) (2021). If not afforded by the government, these rights “shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus.” *Id.* § 3771(d)(3).

<sup>14</sup> Justice for Victims of Trafficking Act, §§ 101–1002, 129 Stat. 227. The JVTA mandated several important measures in support of victims, law enforcement, and victims’ service providers. See *id.* For example, the JVTA: (1) imposed on defendants convicted of human trafficking an additional \$5,000 assessment in support of the Domestic Trafficking Victims’ Fund; (2) expanded forfeiture to include property involved in the commission of the crime; (3) elevated sex buyer culpability to that of traffickers; (4) extended the statute of limitations applied to civil cases against traffickers; (5) afforded grants and services to address online child exploitation and child sex trafficking; and (6) incentivized states to have laws that allow a mother to seek court-ordered termination of the parental rights of those who caused the conception of the child through rape, and laws that allow trafficking survivors to vacate records of arrest and convictions for non-violent crimes committed as a direct result of being trafficked. See *id.* at 229, 236, 239, 247–48, 251–55, 257, 266.

<sup>15</sup> See DOYLE, *supra* note 12, at 41.

rights under this section and the services described in section 503(c) of the [JVTA] and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.”<sup>16</sup> Also related to the protection of victims' rights, the JVTA clarified that the appeal of a victim alleging that their rights were denied in federal district court is to be reviewed under the ordinary appellate standard, *i.e.*, abuse of discretion, instead of the higher standard that had been applied by some courts.<sup>17</sup> The fact that a federal statute was necessary in order to reinforce human trafficking victims' rights to information and victim services is a testament to the heightened risks that this victim demographic face.<sup>18</sup>

The rights provided to victims under the CVRA and the JVTA primarily focus on the right to: safety, dignity and privacy, notice of and inclusion in proceedings, restitution, and access to information regarding their rights and available services. For victims of most other crimes, their rights are protected at the start of criminal proceedings through federal investigative and prosecutorial procedures and by victim-witness coordinators working in United States Attorneys' Offices and federal law enforcement agencies.<sup>19</sup> However, for human trafficking survivors, safety, dignity, inclusion, and the penumbra of rights surrounding these tenets may not be guaranteed without specialized advocacy.<sup>20</sup>

## I. CRIME VICTIMS' RIGHTS

### A. *The Primary Right at Risk – The Right Against Criminalization*

The foremost right at risk for human trafficking survivors serving as victim-witnesses in federal human trafficking cases is not explicitly addressed in the

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<sup>16</sup> 18 U.S.C. § 3771(a)(10) (2021).

<sup>17</sup> See Justice for Victims of Trafficking Act § 113, 129 Stat. at 241.

<sup>18</sup> See *id.* at 240 (providing “[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement” and “[t]he right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. § 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice”).

<sup>19</sup> See DOYLE, *supra* note 12, at 9 (describing restitution statutes, which limit availability of restitution to harm caused by crime of conviction); see also NAT'L DIST. ATT'YS ASS'N, NATIONAL HUMAN TRAFFICKING PROSECUTION BEST PRACTICES GUIDE 36 (2020) [hereinafter NDAA BEST PRACTICES], <https://ndaa.org/wp-content/uploads/Human-Trafficking-White-Paper-Jan-2020.pdf>; RESOURCE GUIDE FOR SERVING U.S. CITIZENS VICTIMIZED ABROAD, U.S. DEP'T OF JUST., OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/publications/infores/ServingVictimsAbroad/workingfederal.html> (last visited Jan. 20, 2022).

<sup>20</sup> See HUMAN-TRAFFICKING TASK FORCE E-GUIDE: VICTIM-CENTERED APPROACH, U.S. DEP'T OF JUST., OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/> (last visited Jan. 20, 2022).

CVRA; that is, the right against criminalization of victimhood.<sup>21</sup> Human trafficking is perhaps the only federal offense for which it is common practice to target victims of the crime as perpetrators or co-conspirators, alongside the primary perpetrator.<sup>22</sup> For many reasons, mostly related to the complicated trafficker-victim dynamic and the impact of trauma, the behavior of human trafficking victims often causes them to be identified as offenders themselves.<sup>23</sup>

Most human trafficking survivors have experienced immense trauma while being trafficked.<sup>24</sup> An understanding of trauma—and *complex* trauma—can explain why victims engage in behavior that appears to facilitate human trafficking or advance other criminal conduct.<sup>25</sup> This Article does not purport to comprehensively address the psychology of trauma, but a high-level summary is essential to understanding how victimhood becomes criminalized. Traumatic experiences, such as child abuse or sexual assault, can acutely impact judgment, impulse control, and recollection of events.<sup>26</sup> Trauma can result in periods of anger, disassociation, depression, and substance abuse.<sup>27</sup> Trauma can cause

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<sup>21</sup> 22 U.S.C. § 7101(b)(19) (2019) (“Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked . . .”).

<sup>22</sup> See SHARED HOPE INT’L & VILLANOVA LAW INST. TO ADDRESS COM. SEXUAL EXPLOITATION, RESPONDING TO SEX TRAFFICKING: VICTIM-OFFENDER INTERSECTIONALITY 48–53 (2020) [hereinafter VICTIM-OFFENDER INTERSECTIONALITY], [https://sharedhope.org/wp-content/uploads/2020/01/SH\\_Responding-to-Sex-Trafficking-Victim-Offender-Intersectionality2020\\_FINAL.pdf](https://sharedhope.org/wp-content/uploads/2020/01/SH_Responding-to-Sex-Trafficking-Victim-Offender-Intersectionality2020_FINAL.pdf).

<sup>23</sup> *Id.* at 7 (defining the term “victim-offender intersectionality” as “the phenomenon of sex trafficking victims alleged to have engaged in conduct that violates the federal definition of sex trafficking under 22 U.S.C. [§] 7102”); see generally AM. BAR ASS’N, POST-CONVICTION ADVOCACY FOR SURVIVORS OF HUMAN TRAFFICKING: A GUIDE FOR ATTORNEYS (2016), [https://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/SRP/practice-guide.pdf](https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/SRP/practice-guide.pdf) (listing reasons as failures in investigative process, victim nondisclosure, and connection to other criminal conduct engaged in by victims).

<sup>24</sup> See U.N. OFF. ON DRUGS & CRIME, ANTI-HUMAN TRAFFICKING MANUAL FOR CRIMINAL JUSTICE PRACTITIONERS 2–6 (2009), [https://www.unodc.org/documents/human-trafficking/TIP\\_module3\\_Ebook.pdf](https://www.unodc.org/documents/human-trafficking/TIP_module3_Ebook.pdf); VICTIM-OFFENDER INTERSECTIONALITY, *supra* note 22, at iv (“Trafficking victimization and the resulting trauma can uniquely impact a victim’s susceptibility to coercion, not only in the context of being coerced into commercial sex, but also in the context of being coerced to commit other crimes.”); Jeffrey H. Zeeman & Karen Strauss, *Criminal Conduct of Victims: Policy Considerations*, 65 U.S. ATT’YS’ BULL. (Exec. Off. of U.S. Att’y, Columbia, SC), Nov. 2017, at 146, <https://www.justice.gov/usao/page/file/1008856/download> (“[A] history of prior psychological, sexual, or physical abuse may have contributed to making the victim vulnerable to trafficking in the first instance, as well as complicating the analysis of whether her involvement in perpetrating criminal acts resulted from the trafficking-related trauma or previously existing trauma.”).

<sup>25</sup> VICTIM-OFFENDER INTERSECTIONALITY, *supra* note 22, at 9–10.

<sup>26</sup> See *id.*

<sup>27</sup> *Id.* at 8–10.

“crisis reactions,” including aggression and risk-taking behavior.<sup>28</sup> For a trafficking survivor, this can manifest in the form of harmful behavior such as recruiting other victims or committing violence against other victims.<sup>29</sup>

Reactive or criminal behavior can also result from historical sexual abuse.<sup>30</sup> There are clear connections between child sexual abuse and subsequent vulnerability to sex-trafficking.<sup>31</sup> Victims of trafficking are highly likely to be subject to criminal penalties for prostitution or other offenses—despite the fact that this apparently criminal conduct is more consistent with an experience of victimization than one of voluntary perpetration.<sup>32</sup>

For these complicated yet understandable reasons, a victim who has experienced trauma, either by being trafficked or otherwise, is often reluctant to self-report or cooperate with law enforcement.<sup>33</sup> Psychologists, advocates, and scholars now commonly refer to this phenomena as “victim-defendant duality”<sup>34</sup> or “victim-offender intersectionality.”<sup>35</sup> This general concept presents in two forms: (1) a victim may be perceived to have facilitated the trafficking, and may even be criminally charged for such activity; or, (2) a victim is being held accountable for criminal conduct ancillary to the trafficking, despite being characterized as a victim in the overall trafficking scheme.<sup>36</sup> Specifically, most sex trafficking schemes involve victims who are forced or coerced into criminal activity, either by carrying out the primary criminal enterprise (*e.g.*, commercial sex) or a related crime (*e.g.*, carrying a concealed firearm or theft), or as an

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<sup>28</sup> *Id.*; Zeeman & Strauss, *supra* note 24, at 142 (finding that behaviors including belligerence or noncooperation “may be the result of fear or trauma and, in some cases, of the victim’s “traumatic bonding” or “trauma-coerced attachment” to the trafficker”).

<sup>29</sup> VICTIM-OFFENDER INTERSECTIONALITY, *supra* note 22, at 8–10.

<sup>30</sup> MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS’ STORY 7–12 (2015), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/02/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls%E2%80%99-Story.pdf> (demonstrating causal connection between childhood sexual violence and female juvenile detention numbers).

<sup>31</sup> VICTIM-OFFENDER INTERSECTIONALITY, *supra* note 22, at iv.

<sup>32</sup> SAADA SAAR ET AL., *supra* note 30, at 19–20.

<sup>33</sup> Zeeman & Strauss, *supra* note 24, at 140 (explaining that “trafficking victims do not usually self-identify as such due to the effect of complex trauma”).

<sup>34</sup> See generally CTR. FOR CT. INNOVATION, IDENTIFYING AND RESPONDING TO SEX TRAFFICKING: A GUIDE FOR THE COURTS (2014), <https://www.courtinnovation.org/publications/identifying-and-responding-sex-trafficking-guide-courts>.

<sup>35</sup> VICTIM-OFFENDER INTERSECTIONALITY, *supra* note 22, at 7 (defining “victim-offender intersectionality” (VOI), and confining definition to when victim is criminalized for human-trafficking-related offense).

<sup>36</sup> Zeeman & Strauss, *supra* note 24, at 140 (listing three forms: (1) offenses entirely unrelated to victimization; (2) minor offenses connected to the victimization including prostitution; and (3) violent crimes that are intertwined with the victimization). This Article condenses (2) and (3) and contends that the violent or non-violent nature of a crime that is forced or coerced remains immaterial when considering criminal culpability.

ancillary tactic by traffickers to instill fear of criminalization (*e.g.*, forcing a trafficking victim to sell narcotics and then threatening to report those narcotics sales to the authorities). Some victims are also forced or coerced into facilitating the trafficking scheme by recruiting other victims, posting commercial sex advertisements, or punishing other “noncompliant” victims with violence.<sup>37</sup>

Due to this unique intersection of victimization and criminality, most trafficking victims do not readily cooperate with law enforcement for fear that they themselves will become a target of the same or a separate investigation—and for many victims, this fear is warranted.<sup>38</sup> Some feel forced to cooperate and testify against their trafficker, despite their reluctance to do so, to avoid criminal penalties. Because the risk of criminalization is very real and the fear among survivors palpable,<sup>39</sup> victims must continue to be characterized as victims.<sup>40</sup>

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<sup>37</sup> Michael J. Frank & G. Zachary Terwilliger, *Gang-Controlled Sex Trafficking*, 3 VA. J. CRIM. L. 342, 399 n.210 (explaining promotion of certain victims to “bottom” status or engagement in business operations as method of protection); Zeeman & Strauss, *supra* note 24, at 140 (“Sex trafficking victims may also engage in more serious offenses intertwined with their own victimization, including recruitment of other victims into a trafficking enterprise.”).

<sup>38</sup> See Zeeman & Strauss, *supra* note 24, at 139 (“Fear of arrest and prosecution can compound victims’ distrust of authorities and impede their willingness to cooperate with law enforcement in bringing traffickers to justice.”); see also Kate Hodal, *Cyntoia Brown: Trafficked, Enslaved, Jailed for Life at 16 – and Fighting Back*, THE GUARDIAN (Oct. 23, 2019, 6:30 AM), <https://www.theguardian.com/global-development/2019/oct/23/cyntoia-brown-long-trafficked-enslaved-jailed-for-life-at-16-and-fighting-back> (explaining that Cyntoia Brown was convicted of murder for killing sex buyer and her sentence later received gubernatorial commutation); Samantha Raphelson, *Cyntoia Brown Case Highlights How Child Sex Trafficking Victims Are Prosecuted*, NPR (Dec. 1, 2017, 3:51 PM), <https://www.npr.org/2017/12/01/567789605/cyntoia-brown-case-highlights-how-child-sex-trafficking-victims-are-prosecuted> (highlighting growing attention to minor victims of child exploitation who are criminalized because of Cyntoia Brown case); Jessica Contrera, *Chrystul Kizer, Sex Trafficking Victim Accused of Killing Alleged Abuser, Wins Appeal in Wisconsin*, WASH. POST (June 3, 2021, 2:41 PM), <https://www.washingtonpost.com/dc-md-va/2021/06/03/chrystul-kizer-sex-trafficking-appeal/> (reporting on Chrystul Kizer case); Byrhonda Lyons, *Victims Behind Bars: Trafficking Survivors Still Struggle Despite State Laws*, CAL MATTERS (Oct. 11, 2021), <https://calmatters.org/justice/2021/01/sex-trafficking-victims-prison-california/> (reporting on Sarah Kruzan’s experience of being convicted of murdering her abuser and later receiving clemency, and how state laws need improvement to protect victims of abuse from prosecution).

<sup>39</sup> NDAA BEST PRACTICES, *supra* note 19, at 34.

<sup>40</sup> See Zeeman & Strauss, *supra* note 24, at 143 (“Prosecutors must consider whether it is in the interest of justice to prosecute a person for conduct that was a normal human response to abusive control over time, rather than an independently developed desire or intent to do harm.”). This source provides a framework for analyzing criminal accountability for the more violent conduct that may be committed during a victim’s trafficking experience. See *id.* at



B. *The Right to Dignity Includes Non-Detention*

Victim-witnesses can often appear unsympathetic and uncooperative.<sup>41</sup> As explained in the previous section, this can stem from trauma, distrust of the criminal justice system, or concern regarding past criminal conduct or records.<sup>42</sup> Despite a posture of noncooperation, human trafficking survivors serving as victim-witnesses are entitled to “[t]he right to be treated with fairness and with respect for [their] dignity and privacy.”<sup>43</sup> The primary tenet that guarantees this right is noncoercive participation. Federal courts do have the authority to require victim-witness testimony, and the Sixth Amendment’s Confrontation Clause grants defendants the right to confront their accusers.<sup>44</sup> However, for a population that has endured as severe a deprivation of autonomy as human trafficking victims have, compulsory engagement in the criminal proceedings against the trafficker is as far from a victim-centered approach as possible.<sup>45</sup> Regrettably, “[i]t is not uncommon for courts to issue [material witness] warrants in human trafficking prosecutions, particularly in sex trafficking cases, where the material witnesses are sometimes the defendant’s victims.”<sup>46</sup> The uniqueness of this crime and victim experience requires sensitivity when it comes to prosecutorial decisions to charge and detain victims in human trafficking cases. While the materiality of certain testimony remains the

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144–46 (listing factors including degree of harm caused, victim-offender’s age and capacity, and extent of psychological control trafficker had over victim-offender). The Article understands the government’s motivation to establish a balancing test weighing the interests of criminal accountability and victim protection, but maintains that forced or coerced conduct should not lead to criminal culpability.

<sup>41</sup> *The Victim as a Witness*, U.S. DEP’T OF JUST., OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/54-landing-a-successful-prosecution/the-victim-as-a-witness/> (last visited Jan. 20, 2022).

<sup>42</sup> See Zeeman & Strauss, *supra* note 24, at 140 (listing trauma, combined with “fear or distrust of law enforcement, lack of information about their rights, and (perceived or actual) ongoing threats from their traffickers” as reasons why victims of trafficking do not self-identify to law enforcement); *id.* at 143 (stating that a non-trauma informed interview which treats the victim like a perpetrator “will likely provoke fear, distrust, and anxiety over an implicit or explicit threat of prosecution”).

<sup>43</sup> Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(8) (2021).

<sup>44</sup> See U.S. CONST. amend. VI (establishing constitutional right for a defendant “to be confronted with the witnesses against him”); 18 U.S.C. § 3144 (2012) (authorizing reasonable detention of material witness).

<sup>45</sup> See HENRY WU & ALEXANDRA YELDERMAN, HUM. TRAFFICKING LEGAL CTR., PROSECUTION AT ANY COST? THE IMPACT OF MATERIAL WITNESS WARRANTS IN FEDERAL HUMAN TRAFFICKING CASES 2 (Martina E. Vandenberg ed., 2020), [https://www.htlegalcenter.org/wp-content/uploads/Material-Witness-Report-FINAL-FOR-PUBLICATION\\_April-2020.pdf](https://www.htlegalcenter.org/wp-content/uploads/Material-Witness-Report-FINAL-FOR-PUBLICATION_April-2020.pdf).

<sup>46</sup> *Id.* at 1 (summarizing results of study of federal human trafficking cases prosecuted from 2009-2020 and finding forty-nine separate instances of human trafficking victims held by material witness detention).

standard for issuing such warrants, careful thought ought to be given to other means of deriving comparable evidence to establish the elements, the necessity of such testimony, and the psychological impact of detention on a victim of this crime.<sup>47</sup>

C. *The Right to be Cast as Victim, Not Villain*

For the reasons previously explained in this Article, survivors of human trafficking may have lengthy criminal records, which can impair a prosecutor's efforts to cast the witness as a "pure victim" and reliable source of truth. A defense attorney representing an accused trafficker may elicit testimony and other evidence that casts a victim-witness as someone who voluntarily engaged in commercial sex in order to demonstrate that the government has not proved force, fraud or coercion. Ensuring the dignity afforded under the CVRA means reframing the victim-witnesses' experiences to reflect the role of abuse, coercion, and trauma.<sup>48</sup>

Human trafficking victims may also be impeachable witnesses if their memory of events changes over time or if they recant a prior statement—both common occurrences in human trafficking cases resulting from trauma or substance abuse.<sup>49</sup> Trafficking victims may recant statements out of fear of, or loyalty to, their trafficker.<sup>50</sup> These circumstances, together with victim-offender intersectionality, can lead a jury to disbelieve a victim-witness and their testimony. Without proper explanation through expert testimony about the vulnerabilities that give rise to trafficking, the impact of trauma, trafficker tactics, and the complicated relationship between trafficker and victim, victim-witness testimony may only serve to hurt the government's case and the victim's recovery.<sup>51</sup>

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<sup>47</sup> See *id.* at 7.

<sup>48</sup> *Present Human Trafficking Experts*, U.S. DEP'T OF JUST., OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/55-strategies-for-prosecutors-law-enforcement/present-human-trafficking-experts/> (last visited Jan. 20, 2022).

<sup>49</sup> See *The Victim as a Witness*, *supra* note 41; Zeeman & Strauss, *supra* note 24, at 142 ("[V]ictims may provide statements that are incoherent, internally inconsistent, or evolving over time."); see also NDAA BEST PRACTICES, *supra* note 19, at 44; Erin Williamson et al., *Evidence-Based Mental Health Treatment for Victims of Human Trafficking*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION (Apr. 14, 2010), <https://aspe.hhs.gov/reports/evidence-based-mental-health-treatment-victims-human-trafficking-0>; see generally Lindsey N. Roberson, *She Leads a Lonely Life: When Sex Trafficking and Drug Addiction Collide*, 52 WAKE FOREST L. REV. 359 (2017) (addressing connections between sex trafficking, substance abuse and exploitation of dependency as a means of coercion).

<sup>50</sup> NDAA BEST PRACTICES, *supra* note 19, at 44.

<sup>51</sup> See *id.*

D. *The Right to Presence of Counsel at Investigative and Prosecutorial Meetings*

Like any third-party witness who participates in a legal proceeding, survivors of human trafficking can be of great assistance in the investigation, discovery, pleading, or trial phase of a federal matter. In fact, testimony of a human trafficking victim is often hard to obtain but imperative to a successful prosecution.<sup>52</sup> A fundamental right of victim-witnesses in the federal criminal justice system is the right to have one's attorney present when questioned about the crime.<sup>53</sup> As discussed previously in this Article, fear of retaliation by the perpetrator or criminalization by the government are the primary reasons for victims' reluctance to participate in the process.<sup>54</sup> And for these very reasons, when victims are willing to participate in the criminal process, they are entitled to the presence of counsel at every stage.

Presence of counsel at every stage necessarily includes investigative interviews and trial preparation sessions. The right to counsel outweighs any risk that counsel may be called to testify at trial about inconsistencies in witness statements, for impeachment purposes. First, case law establishes that courts are reluctant to allow counsel to be called to testify at trial.<sup>55</sup> Further, in order to subpoena a third party for the purpose of soliciting impeachment material, defense counsel would have to show that the impeachment material could not be obtained elsewhere.<sup>56</sup> In the context of human trafficking witness meetings, a law enforcement agent is usually in attendance and already likely to be called to the stand to testify. Testimony about a witness inconsistency could more easily be derived from that agent than the victim-witness' own lawyer. Even if the

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<sup>52</sup> See Hawk et al., *supra* note 10, at 52 (discussing charging strategies that do not require victim cooperation that would be difficult to obtain due to fear, mistrust and trauma); see also HUMAN-TRAFFICKING TASK FORCE E-GUIDE: VICTIM-CENTERED INVESTIGATIONS, U.S. DEP'T OF JUST., OFF. FOR VICTIMS OF CRIME [hereinafter VICTIM-CENTERED INVESTIGATIONS], <https://www.ovcttac.gov/taskforceguide/eguide/5-building-strong-cases/51-victim-centered-investigations/> ("In many human trafficking cases, only the victim can explain the coercion and control that is a basic element of the crime of human trafficking.").

<sup>53</sup> See 18 U.S.C. § 3771 (2021); see also *Crime Victims Have the Right to Retained Counsel's Presence During Investigative Interviews*, VICTIM L. POSITION PAPER (Nat'l Crime Victim L. Inst., Portland, OR), Aug. 2014, at 1–3.

<sup>54</sup> See *The Victim as a Witness*, *supra* note 41; Robert Moossy, *Sex Trafficking: Identifying Cases and Victims*, NAT'L INST. OF JUST. (Mar. 8, 2009), <https://nij.ojp.gov/topics/articles/sex-trafficking-identifying-cases-and-victims>; Kevin Bales & Steven Lize, *Investigating Human Trafficking: Challenges, Lessons Learned and Best Practices*, in TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 187, 188 (2008), [https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296\\_tool\\_5-1.pdf](https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_5-1.pdf).

<sup>55</sup> See *United States v. Regan*, 103 F.3d 1072, 1083 (2d Cir. 1997) (holding that defense counsel would have to show "compelling and legitimate reason" for summoning counsel to the stand).

<sup>56</sup> See *United States v. Watson*, 952 F.2d 982, 983, 986 (8th Cir. 1991) (holding that calling prosecutor to show contradictory statements by witness was not vital evidence).

“compelling and legitimate” and “not otherwise available” standards were met, protecting a victim-witness’ rights under the CVRA and against self-incrimination bears more weight than the risk of providing the defense with impeachment evidence. Notably, even if the risk of providing impeachment evidence is realized, that harm falls to the government’s case; not the victim. To acquiesce to the exclusion serves the interest of the government, and not that of the lawyer’s own client, the crime victim.<sup>57</sup>

E. *The Right to the Full Amount of the Victim’s Losses*

“[R]estitution awards can provide life-changing resources for a trafficking survivor.”<sup>58</sup> Compensation for the wages deprived by, or the ill-gotten gains inured to, the trafficker, together with payment for other personal losses caused by the exploitation, are at the heart of restorative justice for human trafficking survivors.<sup>59</sup> Both the CVRA<sup>60</sup> and the TVPA<sup>61</sup> require remedy for human trafficking victims through criminal restitution. Specifically, United States Code, Title 18, Section 1593, provides that the court “shall order restitution for . . . the full amount of the victim’s losses” which is defined by “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (FLSA).”<sup>62</sup> Generally, in sex trafficking cases, this calculation is based on the gross income derived by the trafficker from the forced or coerced commercial sex.<sup>63</sup> Practically, this means multiplying the rates for the victim’s commercial sex services by the time

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<sup>57</sup> Notably, this practice does not appear to exist for attorneys who represent third-party witnesses in white collar criminal investigations, regulatory investigations, or civil matters. If the distinction lies in the pro bono nature of services provided to human trafficking and sexual assault victim-witnesses, that is without basis. If it is because victims or witnesses of other types of crimes do not tend to be represented by counsel—rendering their presence in this context uncustomary—that too is unsupported. The rights of this type of victim are even more at stake—which means their right to presence of counsel, at every stage of the process, is even more vital.

<sup>58</sup> See William E. Nolan, *Mandatory Restitution: Complying with the Trafficking Victims Protection Act*, 65 U.S. ATT’YS’ BULL. (Exec. Off. of U.S. Att’ys, Columbia, S.C.), Nov. 2017, at 103, <https://www.justice.gov/usao/page/file/1008856/download>.

<sup>59</sup> See *id.* at 96–97.

<sup>60</sup> 18 U.S.C. § 3771(a) (2021) (affording crime victims “[t]he right to full and timely restitution as provided in law”).

<sup>61</sup> *Id.* § 1593 (explaining mandatory restitution).

<sup>62</sup> *Id.* §§ 1593(a), (b)(3). Under 18 U.S.C. § 1593, defendants are directed to pay the victim “the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. [§] 201 et seq.)” *Id.* § 1593(b).

<sup>63</sup> See *id.* § 1593.

periods worked.<sup>64</sup> For labor trafficking cases, restitution is generally calculated by the hourly rate for the labor performed including overtime, as determined by the Fair Labor Standards Act.<sup>65</sup> Section 1593 also requires that the restitution include:

[T]he “full amount” of the victim’s losses, as defined as “(A) medical services related to physical, psychiatric, or psychological care; (B) physical an occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) reasonable attorneys’ fees, as well as other cost incurred; and (F) any other relevant losses incurred by the victim.”<sup>66</sup>

The breadth of losses to be calculated, both historical and prospective, does not come close to making a victim of this crime whole, but it can help provide financial security which may be the best prevention against re-victimization.<sup>67</sup>

The good news regarding criminal restitution for human trafficking survivors is that many of the early unsettled issues that directly impacted victim recovery have since been resolved. These important areas of now well-settled law include

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<sup>64</sup> CASSONDR A JO MURPHY, HUM. TRAFFICKING INST., HUMAN TRAFFICKING RESTITUTION RESOURCE GUIDE FOR JUDGES 3 (2019), [https://www.traffickinginstitute.org/wp-content/uploads/2019/02/Restitution-Article\\_Updated-2019-05-WEB.pdf](https://www.traffickinginstitute.org/wp-content/uploads/2019/02/Restitution-Article_Updated-2019-05-WEB.pdf).

<sup>65</sup> 29 U.S.C. § 216(b) (2021) (“Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages.” (citation omitted)); *see generally* Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2021). FLSA states that victims are entitled to unpaid minimum wage, plus overtime and liquidated damages. *Id.* § 216(b).

<sup>66</sup> 18 U.S.C. § 2259(c)(2) (2012). Section 1593(b)(3) incorporates by reference the definition of “full amount of the victim’s losses” contained in § 2259(c)(2). *Id.* § 1593(b)(3) (“[T]he term ‘full amount of the victim’s losses’ has the same meaning as provided in section 2259(c)(2) and shall in addition include the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act.” (citation omitted)).

<sup>67</sup> *See* U.N. UNIV. CTR. FOR POL’Y RSCH., UNLOCKING POTENTIAL: A BLUEPRINT FOR MOBILIZING FINANCE AGAINST SLAVERY AND TRAFFICKING 13 (2019), <https://www.fastinitiative.org/wp-content/uploads/Blueprint-DIGITAL-3.pdf>. “All victims of modern slavery and human trafficking are entitled under international law to an effective remedy, including to compensation.” *Id.* “Yet in reality access to an effective remedy is the exception, not the rule, for victims of trafficking and modern slavery.” *Id.* “They often lack access to effective remedial mechanisms, and even where they do have such access these processes rarely lead to compensation, restoration or other forms of effective remedy.” *Id.* “This remedy gap prolongs trauma and heightens risk of re-victimization.” *Id.* The *Finance Against Slavery and Trafficking* Blueprint, designed to guide the financial sector in combatting modern slavery, identifies as a primary goal “[p]roviding and enabling [an] effective remedy for modern slavery and human trafficking harms.” *Id.* at 103–05 (discussing role of financial sector to assist in investigations that yield restitution and compensation for victims).

that: restitution calculations under 18 U.S.C. § 1593 necessarily involve approximation;<sup>68</sup> the forced or coerced work was illegal is immaterial;<sup>69</sup> courts are not to consider the defendant's ability to pay;<sup>70</sup> restitution awards are tax free to the victim;<sup>71</sup> restitution is available to victims who did not participate in the criminal process;<sup>72</sup> criminal restitution includes personal losses;<sup>73</sup> and liquidated damages are mandatory, and compensatory in nature, for restitution calculated under the FLSA.<sup>74</sup>

The bad news is that there is a continued downward trend of courts ordering this mandatory relief for survivors.<sup>75</sup> The rates of criminal restitution orders in federal courts are still in decline, as illustrated by a 2018 study and report conducted by the Human Trafficking Legal Center that found that restitution

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<sup>68</sup> See *In re Sealed Case*, 702 F.3d 59, 66 (D.C. Cir. 2012) (“Nor must the amount of restitution be proven with exactitude.”). The court must estimate the victims' losses based on the record. *Id.*

<sup>69</sup> See *United States v. Mammedov*, 304 F. App'x 922, 927 (2d Cir. 2008).

<sup>70</sup> 18 U.S.C. § 3664(f)(1)(A) (2021) (“In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.”).

<sup>71</sup> I.R.S. Notice 2012-12, 2012-6 IRB 365 (Feb. 6, 2012) (“Mandatory restitution payments awarded under 18 U.S.C. § 1593 are excluded from [a trafficking victim's] gross income for federal income tax purposes.”).

<sup>72</sup> Nor do victims have to participate in the proceedings related to restitution for the benefit of the victims. See 18 U.S.C. § 3664(g)(1) (2021) (“No victim shall be required to participate in any phase of a restitution order.”).

<sup>73</sup> See 18 U.S.C. §§ 1593, 3664(f)(1)(A) (2021).

<sup>74</sup> 29 U.S.C. § 260 (2021) (mandating liquidated damages under the FLSA unless the employer demonstrates that it acted in good faith); see also *United States v. Edward*, 995 F.3d 342, 345–47 (4th Cir. 2021) (concluding that the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the FLSA includes liquidated damages); *Republic Franklin Ins. Co. v. Albemarle Cty. Sch. Bd.*, 670 F.3d 563, 568–69 (4th Cir. 2012) (describing as well-settled law the notion of liquidated damages as compensatory in FLSA violations); *United States v. Sabhnani*, 599 F.3d 215, 259–60 (2d Cir. 2010) (upholding award of liquidated damages in conviction including forced labor and characterizing it as compensatory, not punitive, under the FLSA).

<sup>75</sup> ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., UNITED STATES FEDERAL COURTS' CONTINUING FAILURE TO ORDER MANDATORY CRIMINAL RESTITUTION FOR HUMAN TRAFFICKING VICTIMS 1 (Martina E. Vandenberg et al. eds., 2018) [hereinafter FEDERAL COURTS' CONTINUING FAILURE], <https://www.htlegalcenter.org/wp-content/uploads/2018-Mandatory-Restitution-Report.pdf>. The Human Trafficking Legal Center 2018 report follows its previous study of restitution orders from federal cases decided from 2009 to 2012. ALEXANDRA F. LEVY ET AL., HUM. TRAFFICKING LEGAL CTR., WHEN “MANDATORY” DOES NOT MEAN MANDATORY: FAILURE TO OBTAIN CRIMINAL RESTITUTION IN FEDERAL PROSECUTION OF HUMAN TRAFFICKING CASES IN THE UNITED STATES 1–3 (Michelle D. Miller et al. eds., n.d.) [hereinafter FAILURE TO OBTAIN CRIMINAL RESTITUTION], <https://www.htlegalcenter.org/wp-content/uploads/mandatory.pdf> (finding restitution ordered in 36% of cases decided during the analyzed period).

was only ordered 27% of the time during the analyzed period.<sup>76</sup> The government's failure to order mandatory restitution in all cases is inexcusable but some asserted explanations demonstrate prosecutorial misunderstanding that the burden is on the victim to participate in and even request restitution, or that restitution is somehow not mandatory if the defendant is without assets or means to pay it.<sup>77</sup> The silver lining, however, is the existence of Assistant United States Attorneys and federal courts that do understand the mechanics of criminal restitution in human trafficking cases.<sup>78</sup> For those who consider increased prosecutions of human traffickers as the most effective response to human trafficking, prioritizing restitution as part of that process may be the only way to prevent recidivism of victimization.<sup>79</sup> In other words, the federal criminal justice system is uniquely positioned to combat human trafficking both through punishing offenders and decreasing vulnerabilities to future victimization.<sup>80</sup> Pursuing<sup>81</sup> and enforcing mandatory restitution on behalf of victims in the

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

<sup>77</sup> See Alexandra F. Levy & Martina E. Vandenberg, *Breaking the Law: The Failure to Award Mandatory Criminal Restitution to Victims in Sex Trafficking Cases*, 60 ST. LOUIS U. L.J. 43, 62 (2015). Restitution is mandatory regardless of defendant's ability to pay or victim's participation in the proceedings. See 18 U.S.C. § 3664 (2021).

<sup>78</sup> See, e.g., United States v. Jennings, No. 5:18-CR-318-FL-1, 2019 U.S. Dist. LEXIS 50075, at \*1 (E.D.N.C. Mar. 25, 2019) (sentencing trafficker to life in prison and ordering payment of \$1,880,648.25 in restitution to victims); United States v. Luong, No. 3:20-CR-00079-KDB-DCK, 2020 U.S. Dist. LEXIS 151424, at \*1 (W.D.N.C. Mar. 3, 2020) (sentencing including restitution order pending); Press Release, Dep't of Just., U.S. Att'ys Off. for E. Dist. of N.C., Smithfield Man Sentenced to Three Life Sentences for Human Trafficking (Aug. 4, 2021), <https://www.justice.gov/usao-ednc/pr/smithfield-man-sentenced-three-life-sentences-human-trafficking> (\$418,000 ordered in EDNC); Judgment & Am. Prelim. Order Forfeiture, United States v. Miller, No. 4:14-CR-409-RBH (D.S.C. Oct. 28, 2015), ECF No. 103 (defendant pleaded guilty to fraud in forced labor, visa fraud and failure to pay minimum wage, and was ordered to pay \$75,000); Am. Judgment, United States v. Streeter, No. 8:20-cr-00304-VMC-CPT-1 (M.D. Fla. Apr. 1, 2021), ECF No. 64 (\$70,000 awarded); Judgment, United States v. Wahid, No. 3:20-cr-00098-PGS-1 (D.N.J. July 8, 2021), ECF No. 104 (\$100,000 ordered).

<sup>79</sup> See Amy Rahe, *How to Ensure Survivors of Modern Slavery Stay Free*, STAN. SOC. INNOVATION REV. (Jan. 26, 2021), [https://ssir.org/articles/entry/how\\_to\\_ensure\\_survivors\\_of\\_modern\\_slavery\\_stay\\_free](https://ssir.org/articles/entry/how_to_ensure_survivors_of_modern_slavery_stay_free) (echoing findings of study that showed that "economic empowerment is a key imperative for survivors" and acknowledging "the ever-present risk of survivors falling back into conditions of exploitation").

<sup>80</sup> See Nolan, *supra* note 58 ("The mandatory nature of the TVPA's restitution provision highlights the significance of restitution, both as a means of stabilizing and empowering the victim and as a means of deterring the trafficking conduct.").

<sup>81</sup> While this Article does not specifically address seizure and forfeiture, it is critical that assets involved in the trafficking scheme be brought into government custody at the very beginning, before indictment, to prevent that which could be applied to victim restitution from being spent or hidden. See generally Elizabeth G. Wright, *Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions*, 65 U.S. ATT'YS' BULL. (Exec.

criminal process is critical because of the challenges with seeking civil remedy and the importance of financial support for survivors emerging from exploitation.<sup>82</sup>

F. *The Right to be Heard or Not Heard at Sentencing*

It is the prerogative of a human trafficking victim-witness whether to attend and participate in the sentencing of the trafficker(s).<sup>83</sup> If a victim-witness desires to exercise their “right to be reasonably heard at any public proceeding in the district court involving [] sentencing,” they may, in written and/or oral form, describe the impact of the defendant’s crime on them, their family, and the community, and they may make recommendations to the court about the length of the sentence.<sup>84</sup> While the spirit of the CVRA is to give a voice to victim-witnesses in this important stage of the criminal process, it is important to understand that the *right to not be heard* is as worthy of protection. In fact, respecting a victim-witness’s decision to not be heard serves the rights to “dignity and privacy” and “to be reasonably protected from the accused” as similarly afforded under the CVRA.<sup>85</sup> For reasons described in this Article, fear of criminalization, or of the trafficker or their associates, or in order to minimize the risk of retraumatization, human trafficking survivors may decline to provide any form of a victim impact statement.<sup>86</sup> Nonetheless, exercising the right to not be heard at sentencing does not impair the rights to timely notice of the results of that proceeding, or the right to “full and timely restitution” as described previously in this Article.<sup>87</sup>

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Off. of U.S. Att’ys, Columbia, S.C.), Nov. 2017, at 79, <https://www.htlegalcenter.org/wp-content/uploads/Follow-the-Money-Financial-Crimes-and-Forfeiture-in-Human-Trafficking-Prosecutions.pdf>.

<sup>82</sup> See Rahe, *supra* note 79 (identifying financial security as most critical in sustaining freedom for survivors); U.S. DEP’T OF STATE, OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, THE ROLE OF THE FINANCIAL SECTOR: PROMISING PRACTICES IN THE ERADICATION OF TRAFFICKING IN PERSONS 2 (2021), <https://www.state.gov/the-role-of-the-financial-sector-promising-practices-in-the-eradication-of-trafficking-in-persons/> (“Survivors of human trafficking often discover that human traffickers have taken control of their financial identity or banking products and limited or prevented their access to the financial system, spoiling their credit record and hindering their financial reintegration.”).

<sup>83</sup> 18 U.S.C. § 3771(a)(4) (2021). Section 3771(a)(4) also affords victim-witnesses the right to be heard at release, plea, and parole if they so choose. *Id.*

<sup>84</sup> See DOYLE, *supra* note 12, at 27.

<sup>85</sup> 18 U.S.C. § 3771(a)(8) (2021).

<sup>86</sup> See DOYLE, *supra* note 12, at 37 (acknowledging that some victims want to put the victim-witness experience behind them and end the hardship that serving as a victim-witness includes as soon as possible); see also *id.* at 38 (citing congressional record discussing stress and hardship that comes from victims having to anticipate criminal proceedings).

<sup>87</sup> 18 U.S.C. § 3771(a)(6) (2021).



### G. Rights Related to Plea Agreements

“Negotiated guilty pleas account for well over 95% of the criminal convictions obtained.”<sup>88</sup> In federal human trafficking cases specifically, 80% of the 183 federal defendants charged in 2020 pleaded guilty.<sup>89</sup> The CVRA explicitly includes a crime-victim’s “right to be informed in a timely manner of any plea bargain.”<sup>90</sup> Practically, this means that *this* right in particular may be the one that is most commonly invoked or at risk for human trafficking victim-witnesses. “For the victim, a plea bargain may come as an unpleasant surprise, one that may jeopardize the victim’s prospects for restitution; one that may result in a sentence the victim finds insufficient; and/or one that changes the legal playing field so that the victim has become the principal target of prosecution.”<sup>91</sup> Therefore, a victim’s right to be heard at this stage is crucial.

The right to be heard at the pleading stage does not include a role in plea negotiations or in making the final decision; that authority is vested only with the government.<sup>92</sup> However, broadly interpreting the right to be informed of a potential plea agreement to include meaningful input from the victim as to the specific terms facilitates another explicit victim right—“the reasonable right to confer with the attorney for the Government in the case.”<sup>93</sup> The government’s responsibility to use best efforts to ensure the protection of all victim rights, includes an affirmative obligation on behalf of the government to initiate such conference.<sup>94</sup> This right is only meaningful if extended to the period before an agreement has been reached so as to reflect the victim’s sense of safety and justice.<sup>95</sup>

Just as the pleading stage must include protection of the right to notice and the right to confer with the government, it also must advance the victim’s “right to full and timely restitution.”<sup>96</sup> Recovery of restitution through plea agreements is particularly important because victims may feel deprived of the justice otherwise afforded through prosecution of the originally indicted charges which would have resulted in a more significant sentence. Therefore, it is vital that the full amount of the victims’ losses be calculated and contemplated as part of

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<sup>88</sup> See DOYLE, *supra* note 12, at 30.

<sup>89</sup> FEEHS & WHEELER, *supra* note 8, at 89.

<sup>90</sup> 18 U.S.C. § 3771(a)(9) (2021).

<sup>91</sup> DOYLE, *supra* note 12, at 30.

<sup>92</sup> See *id.* at 30–31.

<sup>93</sup> 18 U.S.C. § 3771(a)(5) (2021).

<sup>94</sup> *Id.*; see DOYLE, *supra* note 12, at 33; see also *United States v. Stevens*, 239 F. Supp. 3d 417, 421–22 (D. Conn. 2017) (describing government’s obligation to include giving “victims a meaningful voice in the prosecution process”).

<sup>95</sup> See DOYLE, *supra* note 12, at 40 (noting that the Justice for Victims of Trafficking Act addressed any confusion about when the right attaches).

<sup>96</sup> 18 U.S.C. § 3771(a)(6) (2021).

every plea agreement for human trafficking-related offenses.<sup>97</sup> Section 3664 sets out the process that the government is to follow to request restitution in cases that are resolved by trial or by plea agreement.<sup>98</sup> In order to fulfill a victim's right to full restitution, plea agreements originating from indictments of human trafficking offenses but including other offenses are to include restitution as calculated under 18 U.S.C. § 1593.<sup>99</sup> As noted, the vast majority of federal criminal cases, including those that begin as human trafficking charges, result in a plea agreement. Therefore, vigilant inclusion of carefully and inclusively calculated restitution for all losses in plea agreements best supports victims' rights.<sup>100</sup>

#### H. *Immigration-Related Rights for Human Trafficking Survivors*

This Article does not endeavor to specifically address the important immigration rights afforded to survivors in human trafficking investigations and prosecutions. However, survivors, their advocates and lawyers, victim-witness coordinators, law enforcement, and courts and prosecutors ought to be informed about the various immigration-related protections available to human trafficking survivors. The TVPA and subsequent reauthorizations provide for several humanitarian immigration remedies for foreign-born survivors who meet certain

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<sup>97</sup> See Nolan, *supra* note 58, at 102; see also FAILURE TO OBTAIN CRIMINAL RESTITUTION, *supra* note 75, at 7. "In plea bargains, prosecutors have a unique opportunity to secure restitution for the victims. *Id.* Following a conviction, a court calculating restitution may only consider the restitution provision corresponding to the crime charged. *Id.* But a court may accept a plea agreement that stipulates to restitution. *Id.* In addition, parties may stipulate to the calculation of restitution under another statute."

<sup>98</sup> Section 3664(d)(1) provides that the prosecutor, "not later than 60 days prior to the date initially set for sentencing," consult with the victim and "promptly provide the probation officer with a listing of the amounts subject to restitution." 18 U.S.C. § 3664(d)(1) (2021). Section 3664(d)(5) provides that: "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." *Id.* "If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order." *Id.* "Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief." *Id.*

<sup>99</sup> See 18 U.S.C. § 3663(a)(3) ("The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement."); see also Judgment, United States v. Edwards, No. DKC-8-11-CR-0316-001 (D. Md. May 8, 2013), ECF Nos. 89 & 91 (ordering restitution under 18 U.S.C. § 1593 after pleading guilty to alien harboring); Judgment & Restitution J., United States v. Bakilana, No. 1:10-CR-00093-LMB (E.D. Va. July 2, 2010), ECF Nos. 20 & 21 (awarding restitution of back wages after pleading guilty to lying to the FBI).

<sup>100</sup> See United States v. Edwards, 995 F.3d 342, 345–46 (4th Cir. 2021) (noting that breadth of "full amount of victim's losses" includes compensation for any delay in payment of wages).

eligibility standards.<sup>101</sup> These forms of relief were established with the dual intentions of protecting victims while assisting law enforcement in their investigations and prosecutions of human trafficking crimes<sup>102</sup> These protections permit survivors to remain in the United States temporarily and some provide a pathway for lawful permanent residence and citizenship. Specifically, T Nonimmigrant Status, also known as a T Visa,<sup>103</sup> is available to applicants who are: (1) victims of a severe form of trafficking; (2) physically present in the United States or its territories due to being trafficked; (3) who comply with any reasonable request for assistance from investigators or prosecutors (unless they are under the age of 18, or are unable to cooperate due to psychological or physical trauma); and (4) would suffer extreme hardship upon removal.<sup>104</sup> T Visas provide for work authorization, access to public benefits, and access to other supportive services such as case management.<sup>105</sup> They also provide potential eligibility for lawful permanent residence at the conclusion of a pending criminal investigation or prosecution, or after the recipient has resided in the U.S. continuously for three years while in T nonimmigrant status.<sup>106</sup>

Continued Presence (CP)<sup>107</sup> provides temporary status to victims of severe forms of human trafficking identified by law enforcement. CP allows the recipient to remain in the U.S. temporarily during an ongoing investigation and provides work authorization and access to public benefits during the validity period.<sup>108</sup> CP is initially authorized for two years and may be renewed by law enforcement.<sup>109</sup> Importantly, application for CP early in an investigation is

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<sup>101</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18, 22, and 42 U.S.C.); *see generally* Steven Weller & Angie Junck, *Human Trafficking and Immigrant Victims: What Can State Courts Do?*, in A GUIDE TO HUMAN TRAFFICKING FOR STATE COURTS (John A. Martin ed., 2014), [http://www.htcourts.org/wp-content/uploads/Ch-3\\_140725\\_NACM\\_Guide\\_OnlineVersion\\_v04.pdf](http://www.htcourts.org/wp-content/uploads/Ch-3_140725_NACM_Guide_OnlineVersion_v04.pdf).

<sup>102</sup> *See* U.S. DEP'T OF HOMELAND SEC., *Immigration Relief for Victims of Human Trafficking and Other Crimes*, <https://www.dhs.gov/xlibrary/assets/blue-campaign/ht-information-for-law-enforcement-officials-immigration-relief-for-victims-of-human-trafficking.pdf>.

<sup>103</sup> *See* 8 U.S.C. § 1101(a)(15)(T) (2021).

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

<sup>105</sup> *Id.*; *see also* U.S. DEP'T OF HOMELAND SEC., T VISA LAW ENFORCEMENT RESOURCE GUIDE iii (2021), <https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf>.

<sup>106</sup> *See* 8 U.S.C. § 1101(a)(15)(T) (2021); T VISA LAW ENFORCEMENT RESOURCE GUIDE, *supra* note 105, at 2.

<sup>107</sup> *See* 28 C.F.R. § 1100.35 (2021).

<sup>108</sup> *Id.*; T VISA LAW ENFORCEMENT RESOURCE GUIDE, *supra* note 105, at 11.

<sup>109</sup> *See* 28 C.F.R. § 1100.35 (2021); T VISA LAW ENFORCEMENT RESOURCE GUIDE, *supra* note 105, at 11.

encouraged.<sup>110</sup> A best practice is for law enforcement to request CP for every identified victim who lacks immigration status and may be a potential witness.<sup>111</sup> CP does not require that charges be filed or that an indictment be pending.<sup>112</sup>

U Nonimmigrant Status, also known as a U Visa or crime victim visa, is available to applicants who: (1) have suffered severe physical or mental abuse, (2) as a result of being a victim of certain qualifying crimes including human trafficking that occurred in the United States, (3) have information about the crime, and (4) who were, are being, or are likely to be, helpful to law enforcement in the investigation or prosecution of this crime.<sup>113</sup> Applicants for U nonimmigrant status must receive certification from a law enforcement agency confirming they are the victim of a qualifying crime and have been helpful in the investigation or prosecution of this crime.<sup>114</sup>

Also provided for in the TVPA is Special Immigrant Juvenile Status (SIJS)<sup>115</sup> for unmarried persons under the age of 21 with a pathway to lawful permanent residence where reunification with one or both parents is not safe due to abuse, neglect, or abandonment, and it would not be in the applicant's best interest to return to their country of nationality or last residence.

Finally, the Violence Against Women Act (VAWA) includes immigration remedy for survivors through a VAWA Self-Petition which allows spouses, children, or parents of an abusive United States citizen or lawful permanent resident who meet the statutory eligibility requirements to file their own immigrant visa petitions without the assistance of their abusive spouse, parent, or child.<sup>116</sup>

These humanitarian remedies provide critical stability and protection for foreign-born survivors of human trafficking and other crimes. Survivors who are approved for one of these remedies may receive lawful status, the possibility for employment authorization, a pathway to lawful permanent residence in the future and they may also be protected from removal and the threat of harm or retaliation in their home countries.

## II. THE RIGHT TO REPRESENTATION – THE ARMOR THAT BEST GUARDS ALL VICTIM-WITNESS RIGHTS

The federal government is obliged to use “best efforts” to protect victims’ rights, and most federal prosecutors and court personnel take that responsibility

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<sup>110</sup> See U.S. DEP’T OF HOMELAND SEC., CONTINUED PRESENCE: TEMPORARY IMMIGRATION DESIGNATION FOR VICTIMS OF HUMAN TRAFFICKING (2021), [https://www.dhs.gov/sites/default/files/publications/continued\\_presence\\_pamphlet\\_ccht\\_final.pdf](https://www.dhs.gov/sites/default/files/publications/continued_presence_pamphlet_ccht_final.pdf).

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> See 8 U.S.C. § 1101(a)(15)(U) (2021).

<sup>114</sup> See *id.*

<sup>115</sup> See *id.* § 1101(a)(27)(J).

<sup>116</sup> See *id.* §§ 1101(a)(51), 1154(a).

seriously.<sup>117</sup> However, federal prosecutors' primary duty is to protect and advance the interests of the public, which is not necessarily consistent with the interests of crime victims.<sup>118</sup> These best efforts, together with progressive law enforcement approaches, are often characterized as a "victim-centered" model, but this is a misnomer.<sup>119</sup> In strict ethical terms, victim interests are not the polestar of prosecutorial duty. Indeed, it is likely that the drafters of the CVRA forecasted the emergence of conflicts among the various obligations borne by prosecutors when they decreed, "[t]he prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a)."<sup>120</sup> It is also clear that the drafters contemplated the role of an unconflicted representative capable of asserting victims' rights to representation by including "or the crime victim's lawful representative" into the statute.<sup>121</sup>

Prejudicial harm to victim-witness rights in the context of human trafficking may range from, on one end, untimely notice of proceedings, to, on the other end, criminalization of victimhood. The only certain method to ensure the protection of victim rights throughout all proceedings is through consistent advocacy,<sup>122</sup> which is best achieved through pro bono legal representation.

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<sup>117</sup> 18 U.S.C. § 3771 (2021); *see* DOYLE, *supra* note 12 ("[Section 3771] directs the federal courts and law enforcement officials to see to it that the rights it creates are honored."); *see also id.* at 41–42 (distinguishing between trial court's duty to "ensure" victims' rights and lesser "best efforts" obligation imposed upon other federal officials).

<sup>118</sup> *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION at Standard 3-1.3 (2017) ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim."). "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." *Id.* at Standard 3-1.2. "The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances." *Id.* "The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants." *Id.*; *see also id.* at Standard 3-3.4 (listing various responsibilities vis-à-vis protection and support of victims in criminal proceedings).

<sup>119</sup> VICTIM-CENTERED INVESTIGATIONS, *supra* note 52 ("A victim-centered investigation respects the dignity of the victim and adapts, wherever possible, to meet the needs and wishes of the victim.").

<sup>120</sup> 18 U.S.C. § 3771(c)(2) (2021).

<sup>121</sup> *See id.* § 3771(d)(1) ("The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a)."); *see also* DOYLE, *supra* note 12, at 43–44 (discussing how "victims' attorneys and those standing in the stead of a legally unavailable victim" ultimately control these rights, despite the grant of power to prosecutors to also enforce them).

<sup>122</sup> *See* OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., THE CRIME VICTIM'S RIGHT TO BE PRESENT 4 (Nov. 2001), [https://www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin3/ncj189187.pdf](https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin3/ncj189187.pdf) ("The supportive presence of a trusted advocate or family member

Although the legislative history of the JVTAs reveals some discussion of whether certain language could be construed as mandating court appointment of legal counsel for victims, Congress ultimately concluded it could not.<sup>123</sup> In the American criminal justice system, victim-witnesses generally are not entitled to legal representation, save a few limited exceptions.<sup>124</sup> Neither the CVRA nor the JVTAs expanded crime victim rights to include a right to court-appointed counsel. Thus, until such a right is recognized, guaranteed protection and advocacy for victims is dependent on the benevolence and volunteerism of pro bono attorneys.<sup>125</sup>

Currently, all across the United States, there remain persistent “legal deserts,” *i.e.*, areas where legal services are unavailable or inaccessible to trafficking victims.<sup>126</sup> Most trafficking survivors do not have access to free legal representation by a competent lawyer who is informed about the trauma of exploitation.<sup>127</sup> While we have yet to measure the frequency of victims being represented in their role as witnesses by pro bono counsel, experts believe it to be rare, at least in sex-trafficking cases.<sup>128</sup> And yet, access to counsel has a tremendous impact on some of the most life-changing aspects of a victim’s experience.<sup>129</sup>

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often enables a crime victim to exercise his or her right to be present during proceedings.” “[I]t is critically important during the investigation, at trial, and in plea agreements to develop evidence that can support a reasonably certain estimation of the amount of the victim’s loss.” Nolan, *supra* note 58, at 99. “However, eliciting this evidence can be challenging, particularly when trauma symptoms or substance abuse issues complicate victims’ ability to recount chronology or when traffickers keep victims unaware of how much customers are charged.” *Id.*

<sup>123</sup> See DOYLE, *supra* note 12, at 47 (explaining legislative history that bans cause of action for failure to honor rights).

<sup>124</sup> Victims facing material witness charges receive court-appointed counsel. 18 U.S.C. § 3509(a)(1)(A) (2021). Section 3509(h) provides for the appointment of a guardian ad litem for minor victims. *Id.* § 3509(h).

<sup>125</sup> See NAT’L CRIME VICTIM L. INST., RIGHTS ENFORCEMENT TOOLKIT [hereinafter RIGHTS ENFORCEMENT TOOLKIT], [https://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/projects/violence\\_against\\_women/toolkit\\_resource.php](https://law.lclark.edu/centers/national_crime_victim_law_institute/projects/violence_against_women/toolkit_resource.php) (last visited Jan. 20, 2022) (“Victims’ rights are rights personally held by the victim that can be legally asserted during the criminal case. Independent legal representation is absolutely critical to making these rights meaningful.”).

<sup>126</sup> See generally HANNAH SWEENEY, THE AVERY CTR., LEGAL DESERTS REPORT 2 (2021), <https://theaverycenter.org/wp-content/uploads/2021/07/The-Avery-Center-Legal-Deserts.pdf>.

<sup>127</sup> *Id.* at 3.

<sup>128</sup> See Levy & Vandenberg, *supra* note 77, at 64 (noting immeasurability of instances of victim-witness representation).

<sup>129</sup> See *id.* (predicting positive impact of competent representation on victims’ receipt of restitution); see also Letter from Jean Bruggeman, Exec. Dir., Freedom Network USA, to Dr. Kari Johnstone, Acting Dir., U.S. Dep’t of State 5 (Feb. 5, 2021), <https://freedomnetworkusa.org/app/uploads/2021/02/FNUSA2021TIPReportInput.pdf>

Pro bono lawyers may be able to protect a victim-witness from becoming a target of an investigation and help seek compensation for all losses incurred through the victimization. Prosecutors often find that victim-witnesses cease participation at some point before case conclusion, which can make a prosecutor's preparation for restitution and sentencing more challenging.<sup>130</sup> Legal representation during the restitution stage, whether in preparation for a plea agreement or a sentencing hearing, surely increases the likelihood that victims receive due restitution.<sup>131</sup> Pro bono lawyers can advocate for victim compensation by providing the government with legal authority to support granting a restitution order that includes all losses, and can work with their client to provide accurate estimates for lost wages, ill-gotten gains, and other medical and psychological expenses resulting from their exploitation.<sup>132</sup>

Pro bono representation ought to continue through the sentencing stage and beyond. This includes ensuring notice of release or change in detention status to protect victims' right to "timely notice . . . of any release or escape of the accused" and "[t]he right to be reasonably protected from the accused."<sup>133</sup> Post-sentence priorities also include ensuring enforcement and collection of restitution not paid in accordance with court-ordered restitution.<sup>134</sup> Representation throughout the entire process undoubtedly increases participation of victim-witnesses from the commencement of investigation, through pleading, trial, and sentencing, and best ensures continuity of services for survivors.

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(advocating that federal government "provide trafficking victims with victim-witness counsel to advocate for restitution and other victims' rights issues before federal courts."). "Additionally, when a victim becomes uncommunicative after the conviction, it is still necessary to seek restitution, to the extent possible, based on the evidence in the record because the court is nevertheless mandated to order restitution." Nolan, *supra* note 58, at 101. "In such cases, it may be that the record does not contain enough information to calculate losses under § 2259(b)(3) or an 'unjust enrichment' estimate, but in most cases there is enough evidence to at least put forth an 'opportunity loss' estimate." *Id.* "While it may be difficult to deliver any recovered funds to a victim who has ceased contact with the government, the court is still required to order mandatory restitution, and the government must make reasonable efforts to contact the victim and provide the restitution recovered." *Id.*

<sup>130</sup> See Nolan, *supra* note 58, at 101.

<sup>131</sup> See *id.* at 99–100 (describing the challenges with obtaining information from victims to calculate restitution).

<sup>132</sup> See *id.* at 100.

<sup>133</sup> 18 U.S.C. §§ 3771(a)(1)–(2) (2021); see also *Victim Notification Program*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-vns> (last visited Jan. 20, 2022) (summarizing electronic system to register to receive notices of change in detention status).

<sup>134</sup> See *Restitution*, U.S. ATT'Y OFF. DIST. OF ALASKA, U.S. DEP'T OF JUST., <https://www.justice.gov/usao-ak/restitution> (last visited Jan. 20, 2022) (explaining that survivors and advocates are instructed to alert the Department of Justice agency charged with enforcing restitution to known assets or sources of income of the defendant to assist in collection efforts).

## III. FEDERAL POST-CONVICTION RELIEF – THE RIGHT OF THE FUTURE

As previously explained in this Article, federal authorities, at times, pressure human trafficking victims to assist in the prosecution of their trafficker.<sup>135</sup> Often, human trafficking victims—even those who choose to cooperate with authorities—are portrayed as complicit in their trafficker’s enterprise and targeted as co-defendants.<sup>136</sup> Despite increased understanding about coercion, victims are still unjustly penalized for their forced or coerced participation in recruiting and training other victims and advertising commercial sex.<sup>137</sup> As a result, many victims end up being convicted of, or pleading guilty to, charges that can range from property and drug crimes to conspiracy and serious sex offenses.<sup>138</sup>

For human trafficking survivors who are left with a criminal record and, in some cases, are required to register as sex offenders, this status can be a source of secondary trauma, as the collateral consequences of a criminal conviction are swift and severe.<sup>139</sup> Preventing trafficking survivors from seeking gainful employment, accessing secure housing, or receiving government benefits could even cause them to become “vulnerable to either further coercion or returning to sex work or other illegal or unauthorized work in order to subsist.”<sup>140</sup>

In most states, upon proof in state court that a convicted individual engaged in a crime only as a direct result of being trafficked—meaning that they could not have possessed the requisite criminal intent because they were forced or coerced into engaging in the crime—records relating to that crime can be

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<sup>135</sup> A 2017 survey conducted by the National Survivor Network (NSN) found that, of 130 respondents, 30.5% felt pressure to testify by law enforcement, and 22.2% of respondents reported that they felt like they had to testify against their trafficker in order to get access to help or services. NAT’L SURVIVOR NETWORK, NATIONAL SURVIVOR NETWORK MEMBERS SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING 0, 5 (2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf>.

<sup>136</sup> VICTIM-OFFENDER INTERSECTIONALITY, *supra* note 22, at 12.

<sup>137</sup> *Id.* at 2.

<sup>138</sup> See NAT’L SURVIVOR NETWORK, *supra* note 135, at 2–4.

<sup>139</sup> See Kate Mogulescu & Leigh Goodmark, *Clemency for War Criminals but Not Survivors of Trafficking and Violence?*, GENDER POL’Y REP. (May 30, 2019), <https://genderpolicyreport.umn.edu/clemency-for-war-criminals-but-not-survivors-of-trafficking-and-violence/>.

<sup>140</sup> SUZANNAH PHILIPS ET AL., INT’L WOMEN’S HUM. RTS. CLINIC, CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 23 (2014), <https://mvlslaw.org/wp-content/uploads/2017/06/Effective-Remedies-for-Criminalized-Trafficking-Victims-CUNY-2014.pdf>; see also NAT’L SURVIVOR NETWORK, *supra* note 135, at 6 (finding that, of the sixty-six survey responses received on the issue of whether a respondent’s criminal record had had any long-term impacts, 72.7% reported that their criminal record had created a barrier when seeking employment, and 57.8% reported it as a barrier to housing).



expunged, vacated, or sealed.<sup>141</sup> In the decade since New York became the first state to enact legislation creating a procedural means for survivors of human trafficking to seek vacatur of prior state criminal convictions for prostitution-related offenses,<sup>142</sup> forty-three other states have enacted some form of post-conviction criminal record relief for adult defendants, and three more states have enacted mechanisms for expungement of juvenile delinquency records related to human trafficking or sexual exploitation.<sup>143</sup> Although an increasing number of states are expanding their laws to better reflect the victim experience,<sup>144</sup> many

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<sup>141</sup> The extent of relief provided by expunction, vacatur and sealing statutes, and the use of terminology vary by state. See ERIN MARSH ET AL., POLARIS PROJECT, STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING 7 (2019), <https://polarisproject.org/wp-content/uploads/2019/03/Grading-Criminal-Record-Relief-Laws-for-Survivors-of-Human-Trafficking.pdf>. The call for federal “vacatur” in this Article is intended to provide full exoneration, meaning the conviction is nonexistent as a matter of law and any record is entirely erased. See Ashleigh Pelto, *Criminal Record Relief for Human Trafficking Survivors: Analysis of Current Statutes and the Need for a Federal Model Statute*, 27 MICH. J. GENDER & L. 473, 478 (2021). Discussion of state statutory frameworks in this Article does not address “safe harbor” laws, which protect children from being prosecuted for commercial sex acts, or affirmative defense laws, which provide that if a defendant meets the burden of showing their criminal conduct was the direct result of being trafficked, the prosecutor’s claim is defeated even if all facts alleged in the complaint are true. See Jessica Aycock, *Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims*, 5 CRIM. L. PRAC. 5, 7–8 (2019). These two types of laws are essential features of any human trafficking statutory framework to prevent wrongful conviction but are temporally distinct from expunction and vacatur laws which provide post-conviction relief—the focus of this discussion.

<sup>142</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2021); 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 237, 242 (2016).

<sup>143</sup> *Survivor Reentry Project*, FREEDOM NETWORK USA, <https://freedomnetworkusa.org/advocacy/survivor-reentry-project/> (last visited Jan. 20, 2022). Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming have enacted some form of post-conviction criminal record relief for adult defendants. Louisiana, Missouri, and South Dakota have enacted mechanisms for expungement of juvenile delinquency records related to human trafficking or sexual exploitation. *Id.*

<sup>144</sup> See N.C. GEN. STAT. § 15A-145.9 (2020) (expunctions of certain offenses committed by human trafficking victims). In 2019, North Carolina expanded eligible offenses from just prostitution-related offenses to any non-violent offense, opening up relief to the many survivors whose records were previously ineligible. See Amanda Robert, *States Help Trafficking Survivors Overcome Criminal Records*, ABA J. (Feb. 1, 2020, 1:05 AM), <https://www.abajournal.com/magazine/article/states-help-trafficking-survivors-overcome->

trafficking survivors still find that some state vacatur and expunction remedies are inaccessible and do not provide adequate relief.<sup>145</sup>

Many state vacatur and expungement statutes narrowly circumscribe the categories of victims deemed worthy to avail themselves of conviction relief. For example, despite the clear weight of evidence demonstrating that trafficking victims are at an increased likelihood of having repeated encounters with the criminal justice system throughout their trafficking experience,<sup>146</sup> it is not uncommon for a state's vacatur statute to tie eligibility for relief to a defendant's lack of other criminal convictions.<sup>147</sup> In addition, they can "fail to cover a realistic range of offenses, require a strict nexus between the trafficking and the crime of conviction, and require a higher burden of proof."<sup>148</sup>

State vacatur statutes only apply to state-level criminal convictions and only within the jurisdiction in which they were enacted. For survivors who were federally prosecuted for coerced participation in a trafficking scheme or other criminal activity, there remains no viable avenue for full relief.<sup>149</sup> Unless and

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criminal-records; *Survivor Reentry Project*, *supra* note 143 (50 state survey of post-conviction relief statutes); *see also* JESSICA KITSON & KATE MOGULESCU, SURVIVOR REENTRY PROJECT, WORKABLE SOLUTIONS FOR CRIMINAL RECORD RELIEF: RECOMMENDATIONS FOR PROSECUTORS SERVING VICTIMS OF HUMAN TRAFFICKING 8 (2019), <https://freedomnetworkusa.org/app/uploads/2020/06/SRP-Workable-Solutions-November-2019.pdf> (offering recommendations for most effective state post-conviction relief statutory frameworks).

<sup>145</sup> NAT'L SURVIVOR NETWORK, *supra* note 135, at 8 (finding that 75.4% of respondents reported that they had been unable to vacate their convictions, with many indicating that the process was too expensive or they did not know how).

<sup>146</sup> *See id.* at 2–3. 90.8% of respondents reported having been arrested. *See id.* When asked what specific crimes they were arrested for, 65.3% of the seventy-five survey responses indicated an arrest for prostitution, 42.7% for solicitation, and 25.3% for intent to solicit. *See id.* Also, many respondents reported having been forced by their trafficker to participate in crimes beyond mere prostitution, with 40% of respondents reported having been arrested for drug possession, 18.7% for drug sales, and 60% for other crimes. *See id.*

<sup>147</sup> *See* HAW. REV. STAT. § 712-1209.6(1) (2021) ("A person convicted of committing the offense of prostitution . . . may file a motion to vacate the conviction if the defendant is not subsequently convicted of any offense under the Hawaii Penal Code within three years after the date of the original conviction."); *see also* NAT'L SURVIVOR NETWORK, *supra* note 135, at 2 (finding that over 39% of respondents reported being arrested four times or less, and over 40% reported being arrested over nine times or more).

<sup>148</sup> Christian Coward, *Breaking Secondary Trauma: Developing Conviction Relief Legislation in the United States of Sex-Trafficking Victims*, 50 U. BALT. L. REV. 465, 468 (2021) (explaining that, in many states, the forms of conviction relief that are available to survivors of human trafficking are inadequate because they fail to cover a realistic range of offenses).

<sup>149</sup> Traditionally, there has been a split of authority on the issues of whether federal courts have the power to expunge criminal records on equitable grounds through the exercise of ancillary jurisdiction. *Compare* *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977) ("No federal statute provide[d] for the expungement of an arrest record. Instead, expungement

until trafficking survivors with criminal records that were unjustly incurred can seek post-conviction relief for all such records, they will meet unnecessary barriers to full participation in society.<sup>150</sup> This begs the question: is this the type of hardship that we, as a society, want to subject an already-vulnerable population to?

Though not perfect, state-level statutory relief is more advanced in this victim right than the federal system. Many human rights scholars and advocates posit that the enactment of a federal vacatur law is a crucial step toward addressing the current limitations in overall relief from criminalization of survivors.

If Congress decides to craft a comprehensive federal vacatur measure to catch up to the progress at the state level, it must reflect the modern understanding of human trafficking crimes, coercion, and the victim experience. Coward states:

The factors relevant in creating the ideal model for conviction relief are: (1) having a broad range of full records relief; (2) providing arrest and adjudicatory relief; (3) allowing vacatur of a plethora of offenses including violent offenses; (4) having broad judicial discretion to take any remedial action to grant full relief; (5) a broad and inclusive standard to establish nexus to trafficking; (6) the absence of time limits and wait times; (7) a reasonable hearing requirement; (8) a “preponderance of the evidence” burden of proof requirement; (9) official documentation; and (10) victim confidentiality.<sup>151</sup>

Other recommended features of a federal vacatur bill for human trafficking survivors include an affirmative defense, indication that relief under the statute includes eligibility for benefits provided by the by the Trafficking Victims Protection Act and a grant of rights to the return of any fines, fees, costs and restitution paid as a result of the vacated judgment. Importantly, a process to ensure relief from any sex offender registry requirements resulting from a vacated conviction is a necessary part of any framework for post-conviction relief of sex offenses.

Unless Congress acts, human trafficking survivors—who all too often carry the weight of federal criminal convictions for conduct that was forced or

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lies within the equitable discretion of the court . . .”), with *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001) (“[I]n the absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record . . .”). However, in the wake of the Supreme Court’s holding in *Kokkonen v. Guardian Live Insurance Corporation of America*, the disagreement has become even more profound. 511 U.S. 375 (1994). See generally Brandon Salky, *Ancillary Enforcement Jurisdiction: The Misinterpretation of Kokkonen and Expungement Petitions*, 69 EMORY L.J. 1255 (2020) (highlighting the trend of federal circuits holding that they do not retain ancillary jurisdiction over equitable expungement motions after *Kokkonen* but arguing that *Kokkonen* does not warrant such a restrictive interpretation).

<sup>150</sup> See generally Emerson & Aminzadeh, *supra* note 142.

<sup>151</sup> Coward, *supra* note 148, at 483.

coerced—have no path to remedy or opportunity to restore their rights to not be criminalized for victimhood.<sup>152</sup>

#### CONCLUSION

In the context of most crimes, when the justice system endeavors to protect victims' rights, it focuses on the finite period between investigation and disposition of the criminal matter. Further, the rights to be protected are those explicitly provided under the CVRA, including notice and participation in proceedings, safety from the accused, and treatment with dignity during the process. The rights requiring protection for human trafficking survivors are necessarily broader in scope and are acutely at risk for a protracted period of time beyond that of other crime victims. A trafficking victim's rights are first vulnerable to violation at the moment of law enforcement interface, whether voluntary or not, and remain at risk all the way through to post-conviction relief of unjustly incurred criminal records. This could extend indefinitely if no such relief exists. The criminal justice system is not designed to put victims' rights first and foremost in the execution of duties. A clear understanding of these rights by all stakeholders in the justice system, survivors, advocates and lawyers is the only protection. The very essence of being trafficked is a deprivation of rights, which makes advocacy for the penumbra of rights the key to restorative justice for human trafficking survivors.

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<sup>152</sup> See Emerson & Aminzadeh, *supra* note 142, at 254–55 (acknowledging that a presidential pardon is out of reach for most survivors and does not provide full relief required by justice).