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ARTICLE

THE NON-PUNISHMENT PRINCIPLE AND RESTORATIVE JUSTICE

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The non-punishment principle is a legal norm that has increasingly gained legitimacy over the past quarter-century within international, regional, and domestic law on human trafficking. At its core, this principle opposes the punishment of human trafficking victims for unlawful conduct they engage in as a consequence of their trafficking victimization. Little is known about the presence and operation of the non-punishment principle within U.S. law. This Article fills this gap as the first to comprehensively map and analyze the principle's instantiation across state and federal law.

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From this new map, three key themes emerge. First, the non-punishment principle has a distinct presence within U.S. law. This manifests predominantly through statutory immunity and affirmative defenses specifically based upon trafficking victimization, diversion to human trafficking courts, treatment programs, and social services for defendants identified as trafficking victims, and vacatur, expungement, and sealing laws providing criminal records relief for trafficking victims. Second, states often restrict non-punishment statutes and judicial initiatives to apply to only a subset of trafficking victims. Such limitations include excluding more serious offenses from eligibility, imposing age limitations, and requiring proof of a definitive nexus between the crime and trafficking victimization. Consequently, many victims are excluded from the non-punishment principle's reach and are subjected to criminal liability and punishment. Third, current approaches to the non-punishment principle largely reflect the oversimplified binary embedded within the criminal legal system that treats individuals solely as victims deserving of protection or solely as offenders deserving of punishment. This paradigm fails to appreciate the victim-offender overlap that often exists within human trafficking situations and its implications for addressing the complex harms involved.

Given the limits of current approaches, this Article advances the novel argument that restorative justice holds great promise as a non-punitive mechanism to address harm caused by trafficking victims who victimize others while avoiding violation of the non-punishment principle. Restorative justice's flexibility, focus on repair and reintegration, and appreciation of the dynamics surrounding the harm make it a valuable mechanism for addressing the complexities of the victim-offender overlap within the human trafficking context. On a broader level, this proposal supports decarceration efforts by advocating for the use of restorative justice instead of incarceration to respond to serious and violent crime committed by human trafficking victim-defendants.

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INTRODUCTION

“Yvette” wished to escape from “Red Nose,” the man who trafficked her for sex, but he brutally beat her and threatened to seriously harm her mother and brother when she tried to leave.¹ On one occasion, Yvette escaped to a friend’s house, but Red Nose managed to track her down there. Shortly thereafter, he coerced her into participating in robbing the friend who had helped her.² Yvette stole her friend’s car then lured him to her location by claiming that she would return the car to him but did not have any money for gas.³ Red Nose and another man then severely beat the friend for six hours in an attempt to extract his debit card PIN number, rendering him unconscious. They forced him into the trunk of his car while Red Nose, the other man, and Yvette attempted to use his cards to withdraw funds and purchase a flat-screen TV.⁴

While he was trafficking Yvette, Red Nose was also trafficking sixteen-year-old “Jade.”⁵ Yvette booked the motel rooms where she and Jade had sex with clients, arranged taxis to transport them between motels, and advised Jade about how to appear happy when interacting with clients.⁶ Based on these events, Yvette was charged with sex trafficking a minor and robbery.⁷ The prosecution offered her a greatly reduced sentence in exchange for her testimony against Red Nose at his trial.⁸ Yvette agreed, but she “froze up” when it came time for her to testify in court in Red Nose’s presence.⁹

¹ Morgan Smith, Edgar Walters & Neena Satija, *She Was a Sex-Trafficking Victim, but Texas Law Labeled Her a Pimp*, TEX. TRIB. (Feb. 16, 2017), <https://www.texastribune.org/2017/02/16/she-was-sex-trafficking-victim-texas-law-labeled-her-pimp> [<https://perma.cc/XZ3L-E4FS>].

² *Id.*

³ Drew Joseph, *Woman Arrested in Robbery, Beating of S.A. Man*, S.A. EXPRESS-NEWS (Sep. 19, 2014), <https://www.mysanantonio.com/news/local/article/Woman-arrested-in-beating-of-S-A-man-found-in-5766870.php> [<https://perma.cc/9JK8-KSST>].

⁴ *Id.*; Smith, Walters & Satija, *supra* note 1.

⁵ Smith, Walters & Satija, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Consequently, Yvette was convicted of both sex trafficking a minor and robbery.¹⁰ She is currently serving a twenty-three-year sentence at a prison in Gatesville, Texas.¹¹

Yvette is one of many criminalized survivors—individuals who have been victims of abuse and/or exploitation and have also been criminally charged, prosecuted, and/or punished as offenders, usually as a result of actions taken in response to their victimization.¹² Criminalized survivors occupy the complex space in which being victimized and violating the criminal law overlap, which challenges the victim–offender binary that is deeply embedded within our criminal legal system.¹³ The traditional dichotomous approach presumes that there is a cognizable binary and individuals who come into contact with the system are categorizable as either victims deserving of assistance and protection or as offenders deserving of prosecution and

¹⁰ *Id.*

¹¹ *Id.* (noting that Yvette was sentenced to fifteen years for trafficking a minor and eight years for robbery).

¹² The term “criminalized survivors” has been predominantly employed in the gender-based violence context to refer to “women, trans people, and gender-nonconforming people whose punitive encounters with the criminal legal system are directly linked to their own gender-based victimization (rape/sexual assault, intimate partner violence, or trafficking—or some combination thereof, given the co-occurrence of these forms of violence).” LEIGH GOODMARK, *IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM* 12–13 (2023); see also Deborah M. Weissman, *Gender Violence, the Carceral State, and the Politics of Solidarity*, 55 U.C. DAVIS L. REV. 801, 851–52 (2021) (noting organizations’ advocacy work in support of “criminalized survivors of gender violence” and efforts to increase recognition of the victim–offender overlap in this context); Shirley LaVarco, Note, *Reimagining the Violence Against Women Act from a Transformative Justice Perspective: Decarceration and Financial Reparations for Criminalized Survivors of Sexual and Gender-Based Violence*, 98 N.Y.U. L. REV. 912, 957–58 (2023) (arguing that the Violence Against Women Act (VAWA) should be amended to facilitate the decarceration of and fund financial reparations for criminalized survivors of sexual and gender-based violence). But the term can also be understood in a more capacious way; feminist legal scholar Leigh Goodmark observes that “[n]early every incarcerated person is a criminalized survivor in one way or another. There are very few people who are incarcerated who have not experienced trauma in some way.” Victoria Law, *Leigh Goodmark on “Imperfect Victims” and the Need for Abolition Feminism*, NATION (Feb. 2, 2023), <https://www.thenation.com/article/society/leigh-goodmark-imperfect-victims> [<https://perma.cc/462G-BG33>].

¹³ See GOODMARK, *supra* note 12, at 96 (asserting that the criminal legal system is “anchored to the victim/offender binary” and that “[i]f charging begins the process of stripping victim status from a criminalized survivor, sentencing usually cements it”); Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 BROOK. L. REV. 1319, 1319 (2022) [hereinafter Godsoe, *Victim/Offender Overlap*] (“[T]he criminal law continues to posit the victim/offender binary as rigid, mutually exclusive, and morally laden.”); Kate Mogulescu, *Foreword: The Role of the “Victim” in the Criminal Legal System*, 87 BROOK. L. REV. 1105, 1105 (2022) (“One of the most entrenched and deeply held constructs of the criminal legal system is that of victim and perpetrator—the notion that a victim and perpetrator are separate and distinct, clearly identifiable, and defined.”). The victim–offender binary is a salient example of legal scholar Kathryn Abrams’s insightful observation that “actual human lives are not confined to the dichotomous poles that they characteristically occupy in law.” Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 375 (1995).

punishment. The reality, however, is not so tidy.¹⁴ Yet, the prevalence of overlap among victimhood and offending does not stop criminal legal actors from making these categorizations, often based on whether individuals present as “ideal” victims¹⁵ and, relatedly, whether they are willing to be instrumentalized in furtherance of the state’s prosecutorial goals.¹⁶ The result is numerous criminalized survivors relegated to our nation’s prisons.¹⁷

Both the victim–offender overlap and the problematic binary approach are well-documented within the human trafficking context.¹⁸ But the tension

¹⁴ See Godsoe, *Victim/Offender Overlap*, *supra* note 13, at 1323-26 (presenting empirical research and information from direct services organizations highlighting the existence of a substantial victim–offender overlap); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 4 (2019) (“[M]any survivors of violence have complex lives, imperfect histories, and even criminal convictions.”); Christina Mancini & Justin T. Pickett, *Reaping What They Sow? Victim–Offender Overlap Perceptions and Victim Blaming Attitudes*, 12 VICTIMS & OFFENDERS 434, 438 (2017) (asserting that the victim–offender overlap is well-documented in the criminological literature and citing research demonstrating its existence within the context of many types of crimes, including murder, sex offenses, intimate partner violence, white-collar crime, and property offenses); Liz Roberts, *The Unattainable Innocent Victim Standard as Barrier to Justice for Survivors of Domestic Violence*, in VERA INST. JUST., BEYOND INNOCENCE: TOWARD A FRAMEWORK FOR SERVING ALL SURVIVORS OF CRIME 9 (2015), <https://www.vera.org/downloads/publications/beyond-innocence-blog-digest.pdf> [<https://perma.cc/TW3S-PAFM>] (noting that domestic violence survivors often “commit crimes as a result of abuse” and may also “commit crimes that are unrelated to their victimization”).

¹⁵ Criminologist Nils Christie conceptualizes the “ideal victim” as “a person or a category of individuals who—when hit by a crime—most readily are given the complete and legitimate status of being a victim.” Nils Christie, *The Ideal Victim*, in FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18 (Ezzat A. Fattah ed., 1986) (emphasis omitted). He posits that the ideal victim is weak, was engaging in respectable conduct in a location “where she could not possibly be blamed for being” at the time of the crime, and was victimized by a “big and bad” stranger. *Id.* at 19; see also SERED, *supra* note 14, at 22-23 (“[W]hen the image of an innocent white woman is invoked as the prototypical victim, [i]t . . . is also meant to conjure up a story about what justice looks like—justice in which the victim is pure and innocent, [and] in which the person who caused harm is heartless and monstrous . . .”).

¹⁶ See Rachel J. Wechsler, *Victims as Instruments*, 97 WASH. L. REV. 507, 522-25, 570-71 (2022) (discussing “the widespread state approach of treating [gender-based violence] victims essentially as instruments to further its prosecutorial goals”). Texas’s treatment of Yvette reflects this phenomenon: when she was unable to serve as a prosecutorial tool by testifying against Red Nose in his presence due to her intense fear of him, the prosecutor withdrew the offer of a greatly reduced sentence and treated Yvette solely as an offender. Smith, Walters & Satija, *supra* note 1.

¹⁷ See GOODMARK, *supra* note 12, at 11-12 (observing both that the United States incarcerates a large number of women and that “[s]tudies consistently show that anywhere from 50 percent to 95 percent of incarcerated women have been raped, sexually assaulted, or subjected to abuse by intimate partners”); LaVarco, *supra* note 12, at 931 (asserting that “countless survivors of [sexual and gender-based violence] . . . face prosecution and imprisonment for speaking out and fighting back, or for simply trying to survive”); Smith, Walters & Satija, *supra* note 1 (noting that “[p]rosecutors acknowledge it’s not unusual for sex-trafficking victims to be implicated as perpetrators” and describing several Texas cases “in which women who had been sold for sex were themselves charged as traffickers”).

¹⁸ See, e.g., Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 160-61, 187, 195-97, 211 (2007) (arguing that human

between the two takes on another layer of significance within this context because of the “non-punishment principle.” At its core, this principle opposes the punishment of human trafficking victims for unlawful conduct they engage in as a consequence of being trafficked.¹⁹ It has become increasingly

trafficking victims are “framed in contrast to traffickers” and that many are not recognized as victims because they fail to conform to stereotypes of trafficking victims as passive females who have been sexually exploited and who fully cooperate with law enforcement requests); Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 3 UTAH L. REV. 535, 548 (2016) (asserting that human trafficking victim–defendants’ “dual identity challenges long-held law enforcement notions of discrete victims and defendants”); Amy Farrell, Meredith Dank, Ieke de Vries, Matthew Kafafian, Andrea Hughes & Sarah Lockwood, *Failing Victims? Challenges of the Police Response to Human Trafficking*, 18 CRIMINOLOGY & PUB. POL’Y 649, 663–64 (2019) (concluding that individuals engaging in sex work “are often given no choice but to identify either as a trafficking victim that possesses no agency or as a prostitute/offender with full agency” even though “the reality that is not typically recognized is that human trafficking often consists of experiences somewhere between the two polar opposites,” based on qualitative interviews with police, local officials, victim services providers, and other non-law enforcement stakeholders at three sites in different U.S. regions).

¹⁹ See, e.g., THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, NON-PUNISHMENT OF VICTIMS OF TRAFFICKING 1 (2020), https://icat.un.org/sites/g/files/tmzbd1461/files/publications/19-10800_icat_issue_brief_8_ebook_final.pdf [<https://perma.cc/6E85-BP4Q>] (“Trafficked persons should not be subject to arrest, charge, detention, prosecution, or be penalized or otherwise punished for illegal conduct that they committed as a direct consequence of being trafficked.”); Siobhán Mullally (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *Implementation of the Non-Punishment Principle*, ¶ 18, U.N. Doc. A/HRC/47/34 (May 17, 2021) (serving as U.N. Special Rapporteur since 2020) (“[T]he non-punishment principle is aimed at ensuring that a victim of trafficking is not punished for unlawful acts committed as a consequence of trafficking.”); U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Protecting Victims of Trafficking: The Non-Punishment Principle 1* (2023), <https://www.state.gov/wp-content/uploads/2023/12/Protecting-Victims-of-Trafficking-The-Non-Punishment-Principle.pdf> [<https://perma.cc/N2YQ-QAZ3>] [hereinafter Dep’t of State, *Protecting Victims of Trafficking*] (“[V]ictims of trafficking should not be inappropriately penalized for unlawful acts they committed as a direct result of being trafficked.”). Relatedly, criminal and feminist legal scholar Michelle Madden Dempsey has argued against criminalizing sex trafficking victims in particular, based on U.S. obligations under the International Covenant on Civil and Political Rights and the Palermo Protocol, the United States’ encouragement of other countries to avoid criminalizing victims through its annual Trafficking in Persons Report, and insufficient blameworthiness among those who sell sex to support criminal laws prohibiting it. Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 216–23 (2015). On a broader level, feminist abolitionists have strongly advocated against punishment of survivors of multiple forms of gender-based violence. See, e.g., *Analysis & Vision*, SURVIVED & PUNISHED, <https://survivedandpunished.org/analysis> [<https://perma.cc/4E93-VDEK>] (“The Survived And Punished Project demands the immediate release of survivors of domestic and sexual violence and other forms of gender violence who are imprisoned for survival actions, including: self-defense, ‘failure to protect,’ migration, removing children from abusive people, being coerced into acting as an ‘accomplice,’ and securing resources needed to live.”); MARIAME KABA, WE DO THIS ‘TIL WE FREE US 52 (2021) (“There are thousands of Cyntoia Browns unjustly locked in cages in every state. We have to address the systemic and cultural issues that contribute to the criminalization of survival as we work to #FreeCyntoiaBrown and all of the others currently behind bars.”); Beth E. Richie, *Jail or Justice? Violence against Women in Conflict with the Law*, 6 PERSPS. CRIME & JUST. 35, 55 (2002) (“[W]e must ask what is accomplished by incarcerating battered women offenders and, instead,

enshrined in both domestic and international law over the last quarter-century.

However, little is known about the extent of the non-punishment principle's presence within U.S. law. This Article fills this gap by providing the first comprehensive survey of non-punishment statutes and judicial initiatives across the fifty states and the District of Columbia.²⁰ The data reveal that the principle has a presence in nearly every state code and at the federal level. Yet, its reach is substantially circumscribed due to the common exclusion of many criminal offenses from non-punishment statutes, age limitations, and strict requirements regarding the nexus between the crime and trafficking victimization. Consequently, many trafficking victims are currently excluded from the non-punishment principle's protections and are subjected to criminal punishment.

The current approach to the non-punishment principle also largely embodies the traditional binary model of categorizing "victims" and "offenders." For example, the non-punishment principle is commonly instantiated in state statutes that specifically provide human trafficking victims with immunity and/or an affirmative defense for certain criminal acts that they commit as a result of their trafficking victimization.²¹ Therefore, those who have caused harm to others *and* who are trafficking victims are treated *solely* as victims whose harm to others need not be addressed so long as they can prove their victimization and its nexus to the offense to the prosecutor or the factfinder, or *solely* as offenders who deserve to be criminally punished if they fail to convince the prosecutor or meet their burden. But there is an unexplored alternative to this binary approach: restorative justice.²²

Restorative justice focuses on understanding and repairing harm.²³ It embodies the flexibility and tailoring needed to effectively contextualize and

imagine what [social] justice might look like."); GOODMARK, *supra* note 12, at 186-95 (arguing for an abolition feminist approach, which "demands that we end the criminalization of survival, that we no longer arrest, prosecute, convict, or cage victims of gender-based violence").

²⁰ See *infra* Part II.

²¹ See *infra* Part II.

²² Although there is disagreement about the precise definition and the boundaries of restorative justice, Howard Zehr, a founder and leader of the modern restorative justice movement, advances the following definition: "Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible." HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 47-48 (rev. ed., 2015) [hereinafter ZEHR, *BOOK OF RESTORATIVE JUSTICE*].

²³ *Id.* at 31-33; Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 1 UTAH L. REV. 15, 15 (2003); Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 255-58 (2005); Paul McCold & Ted Wachtel, *In*

respond to situations involving individuals who have both caused harm and experienced harm—and thus do not fall neatly into just one of the traditional “victim” and “offender” categories.²⁴ Although there is ongoing debate about whether punishment can be a part of restorative justice, many scholars and practitioners in the field are “‘against punishment,’ seeing little or no connection between it and restorative justice.”²⁵ This is the position that this Article adopts.²⁶ From this perspective, restorative justice is not punitive and therefore comports with the non-punishment principle. But even those taking a different position would undoubtedly agree that restorative justice is far less punitive than incarceration.

Yet, surprisingly, restorative justice has been absent from the conversation around responses to crime committed by human trafficking victims. This Article advances the novel argument that we should harness existing human trafficking exceptionalism to implement restorative justice with human trafficking victim–defendants, beyond the limited contexts of juvenile justice and minor crimes for which restorative justice is most often accepted in the United States as a legitimate alternative to prosecution and punishment.²⁷ The non-punishment principle provides legal grounding for this proposal.

Pursuit of Paradigm: A Theory of Restorative Justice, INT’L INST. FOR RESTORATIVE PRACS. 1-3 (Aug. 12, 2003), <https://www.iirp.edu/images/pdf/paradigm.pdf> [<https://perma.cc/8YJC-N7GZ>].

²⁴ See ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, at 41 (recognizing that many who offend have also been victimized and that restorative justice must “explore the harms that those who cause harm have themselves experienced”); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 164 (2007) (emphasizing the importance of personalization, tailoring, and understanding why particular harms occurred in restorative justice); see also SERED, *supra* note 14, at 146, 197-202 (recounting the positive experience of an individual who had both caused and experienced harm with a restorative justice process and explaining the pervasiveness of victim–offender overlap among “responsible parties” in restorative justice processes responding to violent crimes (based at Common Justice, a highly successful restorative justice organization)).

²⁵ Kathleen Daly, *The Punishment Debate in Restorative Justice*, in THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 356, 356 (Jonathan Simon & Richard Sparks eds., 2013); see also Shirin Bakshay, *The Dissociative Theory of Punishment*, 111 GEO. L.J. 1251, 1307 (2023) (“Restorative justice typically is seen as something other than a criminal punishment . . . [and] is often defined not just as a different process but as a different conception of justice, one at odds with the current criminal justice system and its fixation on incarceration and incapacitation.” (footnote omitted)).

²⁶ See *infra* Section III.A. for a discussion of this issue and the reasoning underlying this Article’s position that restorative justice differs from punishment.

²⁷ See Lara Bazelon & Bruce A. Green, *Victims’ Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 298, 320 (2020) (observing that, in the United States, restorative justice is most likely to be employed in cases involving less serious crimes or juvenile defendants but that it is still underutilized in these cases); Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1152, 1163-64, 1166-67, 1171-72 (2020) (analyzing statutes, court rules, and regulations concerning restorative justice in forty-five states and the District of Columbia and finding that they exempt categories of violent crime from eligibility for restorative justice as a replacement for all or part of the criminal legal process and that there are many more restorative

On a practical level, given the social and political popularity of initiatives aimed at helping those who have experienced trafficking victimization, including criminalized trafficking survivors, efforts to employ restorative justice with this population are not just a pipe dream.²⁸ Instead, they present a politically feasible way to make inroads into addressing our mass incarceration problem, which requires the inclusion of those who have committed serious and violent crimes in decarceration efforts for meaningful progress to be achieved.²⁹

In order to maximize the benefit of this proposal and minimize the impact of the victim–offender binary on access, the eligibility criteria should not be demanding; any reasonable indication that a defendant, like Yvette, is a trafficking victim should be sufficient to merit diversion to restorative justice. This safeguard is especially important because a prerequisite to applying the non-punishment principle is the recognition of an individual as a trafficking victim, which is significantly hampered by dichotomous expectations and

justice laws applying specifically to juveniles (ninety-one laws in thirty-three jurisdictions) than to adults (forty-two laws in fifteen jurisdictions)).

²⁸ See, e.g., Combating Human Trafficking in Commercial Vehicles Act, Pub. L. No. 115-99, 131 Stat. 2242 (2018) (passing the House with a vote of 418–1 and passing the Senate unanimously); Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (passing the House with a vote of 388–25 and passing the Senate with a vote of 97–2); Trafficking Survivors Relief Act, H.R. 4323, 119th Cong. (2025) (passing the House with a two-thirds majority via voice vote); Mallory Gafas & Tina Burnside, *Cyntoia Brown Is Granted Clemency After Serving 15 Years in Prison for Killing Man Who Bought Her for Sex*, CNN (Jan. 8, 2019), <https://www.cnn.com/2019/01/07/us/tennessee-cyntoia-brown-granted-clemency/index.html> [<https://perma.cc/9WDF-KMY5>] (reporting on the commutation of a sex trafficking victim’s life sentence following a high-profile campaign for clemency); Libor Jany, *Newsom Pardons Sara Kruzan, Imprisoned as a Teen for Killing Man Who Trafficked Her*, L.A. TIMES (July 2, 2022), <https://www.latimes.com/california/story/2022-07-02/newsom-pardons-sara-kruzan-woman-sent-to-prison-for-killing-man-who-sex-trafficked-her> [<https://perma.cc/EB2N-B7D2>] (describing the commutation, and later, pardon of a sex trafficking victim who had been given a life sentence for killing her trafficker); Press Release, Off. of the Tex. Governor, Governor Abbott Establishes Customized Clemency Application for Survivors of Human Trafficking and Domestic Abuse, (Feb. 20, 2020), <https://gov.texas.gov/news/post/governor-abbott-establishes-customized-clemency-application-for-survivors-of-human-trafficking-and-domestic-abuse> [<https://perma.cc/PS76-HKNE>] (announcing a special clemency application specifically for human trafficking and domestic violence survivors to “offer[] a second chance to survivors with criminal convictions resulting from their abuse or exploitation”).

²⁹ See SERED, *supra* note 14, at 5–6 (criticizing the notion that large-scale reductions in the incarceration rate are possible by merely changing responses to non-violent offenses); KATHERINE BECKETT, ENDING MASS INCARCERATION: WHY IT PERSISTS AND HOW TO ACHIEVE MEANINGFUL REFORM 12–14, 46 (2022) (arguing that criminal legal reforms limited to reducing penalties for minor offenses cannot end mass incarceration because the majority of prisoners have been convicted of violent crime, among other reasons); Todd R. Clear & James Austin, *Mass Incarceration*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 55, 55 (Erik Luna ed., 2017) (noting the modest impact of reform strategies since 2009, which “would take nearly 75 years to return [the United States] to [its] 1985 incarceration rate of 200 per 100,000” (internal quotation marks and citation omitted)).

“genuine” victim stereotypes that fail to reflect many victims’ complex lived realities.³⁰

This Article proceeds in three parts. Part I sets forth the foundations of the non-punishment principle by discussing its development, content, and rationale. It highlights the United States’ narrower interpretation of the principle as compared to the interpretation advanced by the United Nations and other intergovernmental organizations.

Part II then provides an in-depth survey and critical analysis of the current state of the non-punishment principle in U.S. law. Very little has been written about the non-punishment principle within the U.S. context, particularly at the pre-conviction stage, and therefore this assessment makes a valuable contribution to the literature on criminal law and human trafficking. The survey reveals that most laws instantiating the principle exist at the state level and the vast majority contain limitations that only permit a relatively narrow subset of trafficking victims to benefit from their application.

Building on Part II’s demonstration of the United States’ generally tepid approach to the non-punishment principle, Part III proposes the use of restorative justice as an intervention that would vastly increase our compliance with this important legal norm. It analyzes why restorative justice is consistent with the non-punishment principle and has the ability to address harm experienced by all parties while accounting for the complexities of human trafficking dynamics. It also discusses potential ethical and practical challenges that may arise when engaging trafficking survivor–defendants, and criminalized survivors more generally, in restorative justice. These are crucial to consider given the dearth of literature on restorative justice theory and practice with this population. Part III concludes by identifying fruitful directions for future research that would build upon this Article’s contributions.

I. FOUNDATIONS OF NON-PUNISHMENT IN THE HUMAN TRAFFICKING CONTEXT

The non-punishment of human trafficking victims for crimes they commit as a consequence of being trafficked is a legal norm that has gained increasing

³⁰ See *supra* note 18; Silvia Rodríguez-López, *(De)Constructing Stereotypes: Media Representations, Social Perceptions, and Legal Responses to Human Trafficking*, 4 J. HUM. TRAFFICKING 61, 63, 66 (2018) (explaining that stereotypes of human trafficking victims as “young, innocent, and vulnerable women” who never consented to selling sex “restrict[] victim identification to a minority [of trafficking victims] who meet the strict stereotypical criteria” (citations omitted)).

presence and legitimacy over the last quarter-century.³¹ The origins of the non-punishment principle in the human trafficking context can be traced to negotiations of the United Nations Convention against Transnational Organized Crime in 1999, specifically in an informal note the U.N. High Commissioner for Human Rights submitted to the Ad Hoc Committee negotiating the treaty and its protocols.³² Since then, the non-punishment principle has been increasingly incorporated into international, regional, and domestic law.³³ Although many of the international and regional legal instruments containing the non-punishment principle are non-binding,³⁴ the

³¹ See Mullally, *supra* note 19, at ¶¶ 20-24 (highlighting the official recognition of the non-punishment principle within international and regional legal instruments and guidance, by treaty bodies, in regional and domestic case law, and in many countries' domestic legislation); Conf. of the Parties to the United Nations Convention on Transn'l Organized Crime, Working Grp. on Trafficking in Persons, *Guidance on the Issue of Appropriate Criminal Justice Responses to Victims Who Have Been Compelled to Commit Offences as a Result of Their Being Trafficked*, ¶¶ 9, 13-25, 28, U.N. Doc. CTOC/COIP/WG.4/2022/2 (Apr. 7, 2022) [hereinafter 2022 U.N. Conference Guidance] (describing the increasing adoption of the non-punishment principle in recent years through intergovernmental bodies' resolutions, recommendations, and international and regional case law); THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 2-3 (describing incorporation of the non-punishment principle into various international and regional legal instruments and guidance since the principle was first developed in 1999).

³² Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, *Informal Note by the United Nations High Commissioner for Human Rights*, ¶ 17, U.N. Doc. A/AC.254/16 (June 1, 1999) (urging that the protocol to the Convention concerning human trafficking "direct[.] . . . States Parties . . . to refrain from detaining or prosecuting trafficked persons for . . . status-related offences[.]" such as prostitution and immigration offenses). "Although the initial description of the principle was linked to status offences, other statements of the principle have expanded it to be applicable more broadly . . ." THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 3 n.15.

³³ See *supra* note 31. "Regional law" refers to law promulgated by regional intergovernmental bodies such as the African Union, the Association of Southeast Asian Nations (ASEAN), the Council of Europe, the European Union, and the Organization of American States. See Dept of State, *Protecting Victims of Trafficking*, *supra* note 19, at 1 (identifying the Council of Europe and ASEAN as regional bodies that have promulgated treaties featuring the non-punishment principle).

³⁴ See, e.g., G.A. Res. 76/7, 2021 Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons, ¶ 13 (Nov. 23, 2021) (asserting that the U.N. Member States "commit to intensify [their] efforts, subject to [their] national laws, rules and regulations, to implement the principle of non-punishment of victims of trafficking, which should apply to unlawful activity that a victim of trafficking in persons has been compelled to be involved in as a direct consequence of their trafficking situation and for all types of punishment, including criminal, civil, administrative and immigration offences"); Rep. of the U.N. High Comm'r for Human Rights to the U.N. Econ. & Soc. Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, at 3, 7, 9, 10, U.N. Doc. E/2002/68/Add.1 (May 20, 2002) [hereinafter OHCHR Recommended Principles] (articulating the non-punishment principle in Principle 7 and in Guidelines 2(5), 4(5), and 5(5)); Org. of Am. States, *Third Work Plan for a Comprehensive Response to Trafficking in Persons in the Western Hemisphere*, CP/CSH-2209/22 rev. 1 (July 21, 2023) (asserting the non-punishment principle in Principle iv and in Guidelines 59 and 91); Org. for Sec. & Co-operation in Eur., *OSCE Action Plan to Combat Trafficking in Human Beings*, ¶ 1.8, PC.DEC/557 (July 24, 2003) (recommending that participating States "[e]nsur[e] that victims

significant number of these soft law instruments combined with the substantial influence of the bodies promulgating them serves to boost their effectiveness. Moreover, the non-punishment principle is considered essential to achieving a human rights-based and victim-centered approach to human trafficking, which is widely recognized as best practice for anti-trafficking law and policy.³⁵

Binding laws instantiating the non-punishment principle with obligatory language are more common at the national level. These will be examined in the U.S. context in Part II, following a discussion of the non-punishment principle's substance and rationale in Part I.

A. Substance of the Non-Punishment Principle

The most widely adopted legally binding instrument on human trafficking at the international level is the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (the "Palermo Protocol"),³⁶ a protocol to the United Nations Convention against

of trafficking are not subject to criminal proceedings solely as a direct result of them having been trafficked").

³⁵ See ORG. FOR SEC. & CO-OPERATION IN EUR. OFF. OF THE SPECIAL REPRESENTATIVE & CO-ORDINATOR FOR COMBATING TRAFFICKING IN HUMAN BEINGS, POLICY AND LEGISLATIVE RECOMMENDATIONS TOWARDS THE EFFECTIVE IMPLEMENTATION OF THE NON-PUNISHMENT PROVISION WITH REGARD TO VICTIMS OF TRAFFICKING 9 (2013), <https://www.osce.org/files/f/documents/6/6/101002.pdf> [<https://perma.cc/JZ35-SR3M>] [hereinafter OSCE RECOMMENDATIONS] ("The non-punishment of victims of trafficking for offences they have committed as a consequence, or in the course, of being trafficked is an essential element of such a human rights approach."); *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, ¶ 32, U.N. Doc. A/70/260 (Aug. 3, 2015) ("[T]he principle of non-punishment is . . . a full guarantee that victims will not be penalized . . . as is required under a human rights-based approach to trafficking."); Dep't of State, Protecting Victims of Trafficking, *supra* note 19, at 1 (characterizing the non-punishment principle as a "central tenet" of a "victim-centered and trauma-informed approach," which "is key to successful anti-trafficking efforts"); MARIKA MCADAM, ASEAN-AUSTL. COUNTER TRAFFICKING, IMPLEMENTATION OF THE NON-PUNISHMENT PRINCIPLE FOR VICTIMS OF HUMAN TRAFFICKING IN ASEAN MEMBER STATES 16 (2022), https://www.aseanact.org/wp-content/uploads/2022/04/Non-Punishment_print_smallsize.pdf [<https://perma.cc/5KCX-7N8C>] ("The non-punishment principle is [a] core component of a human rights-based approach to trafficking . . . [and] is key to a trauma-informed and victim-centred approach.").

³⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *adopted* Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol]; *see also* Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report on the Meeting of the Working Group on Trafficking in Persons Held in Vienna on 29 and 30 June 2022*, ¶ 1, U.N. Doc. CTOC/COP/WG.4/2022/4 (July 14, 2022) [hereinafter *U.N. Working Group Report*] (stating that the Palermo Protocol has been recognized as "the principal legally binding global instrument to combat trafficking in persons"). There are other binding international instruments containing the non-punishment principle, but the United States is not a party to them. *See, e.g.*, Council of Europe Convention on Action against Trafficking in Human Beings, art. 26, May 16, 2005, C.E.T.S. No. 197

Transnational Organized Crime with 185 States Parties (including the United States).³⁷ The Working Group on Trafficking in Persons, which is part of the regular Conference of these States Parties aimed at improving implementation of the Convention, has concluded that the non-punishment principle is encompassed within Article 2(b) of the Palermo Protocol, despite not being explicitly articulated therein.³⁸ This provision states that one of the three purposes of the Protocol is “[t]o protect and assist the victims of . . . trafficking, with full respect for their human rights.”³⁹

The protection of the non-punishment principle is typically understood to extend beyond punishment imposed during sentencing, to arrest, detention, charge, and prosecution.⁴⁰ It also covers vacation of trafficking victims’ convictions and expungement of their criminal records.⁴¹

(“Each Party shall . . . provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”); ASEAN Convention against Trafficking in Persons, Especially Women and Children, art. 14(7), Nov. 21, 2015 (“Each Party shall . . . consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking.”).

³⁷ *A Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf> [<https://perma.cc/N43T-8E4S>] (last visited Nov. 21, 2025) (listing State Parties to the Protocol).

³⁸ 2022 U.N. Conference Guidance, *supra* note 31, at ¶ 4 (“Article 2 (b) of the Trafficking in Persons Protocol . . . is understood to encompass [the non-punishment] principle.”).

³⁹ Palermo Protocol, *supra* note 36, at art. 2(b).

⁴⁰ See OHCHR Recommended Principles, *supra* note 34, at add. ¶ 7 (“Trafficked persons shall not be detained, charged, or prosecuted . . .”); OSCE RECOMMENDATIONS, *supra* note 35, at 28 (“[V]ictims [must] be immune not only from punishment but also from prosecution and detention . . .”); 2022 U.N. Conference Guidance, *supra* note 31, at ¶ 11 (“The implementation of the non-punishment principle should not be limited to prosecution but should permeate all stages of the criminal justice system.”); THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 3-4 (“The non-punishment principle applies to all stages of the criminal justice system . . .”); Maria Grazia Giammarinaro (Special Rapporteur on Trafficking in Persons, Especially Women and Children), *The Importance of Implementing the Non-Punishment Provision: The Obligation to Protect Victims*, ¶ 38 (July 30, 2020) [hereinafter Giammarinaro, *Importance of Implementing*] (serving as U.N. Special Rapporteur from 2014 to 2020) (explaining that the duty of non-punishment applies to both prosecution and detention); MCADAM, *supra* note 35, at 16 (“The non-punishment principle . . . is a tool to ensure that victims of trafficking are not subject to arrest, charge, detention, prosecution, penalty or otherwise punished for illegal conduct they may have engaged in as a consequence of being trafficked.” (citations omitted)).

⁴¹ Mullally, *supra* note 19, at ¶¶ 49-50, 65; OSCE RECOMMENDATIONS, *supra* note 35, at 28-29; 2022 U.N. Conference Guidance, *supra* note 31, at ¶ 12; THE INTER-AGENCY GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 4; Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶¶ 35, 43.

Importantly, mere consideration of trafficking victimization as a mitigating factor at sentencing is insufficient to satisfy the principle.⁴²

According to the U.N. Special Rapporteur on Trafficking in Persons and other expert authorities, the non-punishment principle should be applied “[a]s soon as there are reasonable grounds to believe that a person has been trafficked or as soon as the trafficked person, or their legal representatives, raises a trafficking defence”⁴³ This is the case regardless of whether the person has been formally identified as a victim or whether an alleged trafficker has been charged.⁴⁴ In situations that give rise to a credible suspicion that the accused individual may be a trafficking victim, qualified individuals who are well-trained on the complexities of human trafficking dynamics should promptly and carefully assess whether there are reasonable grounds to believe that the individual is a victim.⁴⁵ If it is determined that reasonable grounds exist, and that the offense was sufficiently linked to the accused individual’s trafficking situation, then the non-punishment principle should be applied to drop charges, discontinue prosecution, release the individual from detention, and/or provide post-conviction relief, depending upon the stage of the process when possible trafficking victimization is detected.⁴⁶ In sum, the U.N. Special Rapporteur has concluded that

⁴² Mullally, *supra* note 19, at ¶ 25; OSCE RECOMMENDATIONS, *supra* note 35, at 28; Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶¶ 16, 37.

⁴³ Mullally, *supra* note 19, at ¶ 55(b); *see also* OSCE RECOMMENDATIONS, *supra* note 35, at 16, 31 (asserting that authorities should immediately suspend any prosecution and deportation of the accused “as soon as there is a reasonable suspicion” that she is a trafficking victim, and authorities must then carefully investigate to determine whether there are “reasonable grounds” to conclude that the accused is, in fact, a victim); Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶¶ 39-40 (emphasizing the importance of training law enforcement authorities, judges, and lawyers in trafficking victim identification because authorities are “duty bound to apply non-punishment as early as possible”); MCADAM, *supra* note 35, at 113 (“Officials should apply the non-punishment principle as soon as they have reasonable grounds to believe that a person is a victim of trafficking, irrespective of whether a victim has been formally identified or a trafficker has been indicted.”).

⁴⁴ Mullally, *supra* note 19, at ¶ 58; MCADAM, *supra* note 35, at 113.

⁴⁵ *See* OSCE RECOMMENDATIONS, *supra* note 35, at 16 (“[A]s soon as there is a reasonable suspicion that [the alleged offender] might have been trafficked, there must be a careful assessment of the circumstances”); MCADAM, *supra* note 35, at 113 (“Where circumstances give rise to a credible suspicion that a person suspected of having commit[ted] a criminal offence may have been trafficked, he or she should be promptly assessed by trained and qualified individuals, to determine whether the person has been subject to trafficking”).

⁴⁶ *See* Mullally, *supra* note 19, at ¶¶ 59, 64-65 (urging states to fully comply with the non-punishment principle by promptly releasing all presumed or identified trafficking victims from detention, discontinuing any prosecutions against them, providing relief from any sanction imposed, and expunging or sealing their criminal records); Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶¶ 33-36, 38-39 (explaining that state authorities have a duty to apply the non-punishment principle as early as possible and take the protective steps that correspond with the

non-punishment should be understood as a compulsory tool that is required to be applied by all domestic authorities and investigative, prosecutorial and judicial authorities – including the police, immigration and border officials, labour inspectorates and any other law enforcement agency or officials – when a situation triggering the application of non-punishment is first identified. As such, the application of the principle of non-punishment is intimately related to the obligation of States to identify and protect victims of trafficking⁴⁷

There is some variation in how the non-punishment principle has been articulated across jurisdictions and institutions. The formulation of the principle promulgated in 2002 by the U.N. Office of the High Commissioner for Human Rights (OHCHR) as part of its *Recommended Principles and Guidance on Human Rights and Human Trafficking* has gained widespread acceptance⁴⁸: “Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”⁴⁹ Although the OHCHR’s 2010 Commentary on its *Recommended Principles* predominantly focuses on non-punishment of trafficking victims for status-related offenses,⁵⁰ more recent commentary from U.N. Special Rapporteurs referencing the 2002 OHCHR articulation of the principle, and from regional intergovernmental bodies, asserts that the non-punishment principle is applicable to *any* offense committed by trafficked individuals as long as it is sufficiently linked to their trafficking victimization.⁵¹

stage of the legal process at which trafficking victimization is detected, such as discontinuing proceedings, releasing the victim–defendant from detention, and vacating convictions); OSCE RECOMMENDATIONS, *supra* note 35, at 31–33 (stating the same in its “Recommendations on non-punishment for legislators and prosecutors”).

⁴⁷ Mullally, *supra* note 19, at ¶ 52; accord Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 32 (“[N]on-punishment should be understood as a compulsory tool . . . when a situation triggering the application of non-punishment is first identified.”).

⁴⁸ See 2022 U.N. Conference Guidance, *supra* note 31, at ¶ 5 (describing this formulation of what the non-punishment principle entails as “generally acknowledge[d]”).

⁴⁹ OHCHR Recommended Principles, *supra* note 34, at add. ¶ 7.

⁵⁰ U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING, at 129–133, U.N. Doc. HR/PUB/10/2, U.N. Sales No. E.10.XIV.1 (2010).

⁵¹ Mullally, *supra* note 19, at ¶¶ 37, 57(b); Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 41; OSCE RECOMMENDATIONS, *supra* note 35, at 32; ASEAN, GENDER SENSITIVE GUIDELINE FOR HANDLING WOMEN VICTIMS OF TRAFFICKING IN PERSONS 20–21, (2016); GRETA, REPORT CONCERNING THE IMPLEMENTATION OF THE COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS BY GERMANY: SECOND

However, the United States articulates the non-punishment principle somewhat more narrowly. The Office to Monitor and Combat Trafficking in Persons within the U.S. State Department relied on the federal Trafficking Victims Protection Act of 2000 in its June 2023 explanation of the principle: “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.”⁵² The addition of the vague qualifier, “inappropriately,” threatens to unduly curtail the principle’s application and undermine U.S. compliance with Article 2(b) of the Palermo Protocol. It begs the question: when is the punishment of a victim of a “severe form[] of trafficking” *appropriate*?

The Director of the Human Trafficking Prosecution Unit at the U.S. Department of Justice, Hilary Axam, delivered remarks during the twelfth session of the Working Group on Trafficking in Persons in June 2022, which shed some light on the U.S. approach to this question.⁵³ She asserted that the determination of whether punishment is appropriate depends upon “the applicable laws, the available evidence, and the interests of justice in each individual case.”⁵⁴ She explained that balancing the interests of justice “requires careful consideration of all relevant circumstances, including: the gravity of the victim’s unlawful acts, relative to the severity of the victimization; harm caused by the victim’s unlawful acts, compared to harm caused by the victimization; proportionality of punishment among the victim, the trafficker, and others involved.”⁵⁵ Ms. Axam then provided the following examples:

When a victim has committed relatively minor infractions, such as narcotics possession and commercial sex solicitation, as a direct result of severe victimization, substantial punishment for those minor infractions would, presumably, be “inappropriate” once the victimization is known. Punishing the victim for such crimes would be especially inappropriate if the trafficker were not facing significantly greater punishment for the far more serious crime of exploiting and abusing the victim.

EVALUATION ROUND, 51 (2019), <https://rm.coe.int/greta-2019-07-fgr-deu-en/1680950011> [<https://perma.cc/8LR8-DDUP>].

⁵² Dep’t of State, Protecting Victims of Trafficking, *supra* note 19, at 1 (emphasis added).

⁵³ Hilary Axam, Director, U.S. Dep’t of Just. Human Trafficking Prosecution Unit, The Principle of Non-Punishment: Criminal Justice Approaches to Victims’ Criminal Conduct Related to Their Victimization, Presentation at the Twelfth Session of the Working Group on Trafficking in Persons, (June 29, 2022) (draft talking points available at https://www.unodc.org/documents/treaties/WG_TIP_2022/Presentations/H.Axam_US_Panelist_Talking_Points_on_Non-Punishment_Principle_UNTOC_2022.pdf [<https://perma.cc/2PN5-GZPS>]).

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

Balancing the interests of justice becomes more complex when a victim's conduct is more serious, particularly when it harms other victims. Victims may seek to gain favor with their traffickers by recruiting other victims, or in severe cases by physically abusing other victims. When the evidence, including statements of other victims and witnesses, directly implicates a victim in unlawful acts that inflict serious harm on other victims, the interests of justice may require imposing substantial punishment on the perpetrator of those acts, despite the severe victimization the victim–perpetrator also endured. However, any such punishment must account for the degree of coercive control the trafficker exercised over the victim, and the trafficker's greater culpability in directing and profiting from the coercive scheme.⁵⁶

This conceptualization is problematic. First, reliance on these types of harm comparisons can lead to unsound and unfair outcomes. For example, weighing the “proportionality of punishment among the victim, the trafficker, and others involved”⁵⁷ suggests that if the trafficker accepts a plea deal with a moderate sentence, the victim could be given a light sentence reflecting her comparatively lesser culpability, but if the trafficker is convicted at trial and given a severe sentence, then this proportionality factor could justify a moderate sentence for the very same victim—since it is still a significantly lower sentence than the trafficker received. It would be unjust for the victim's sentence to depend upon her trafficker's decision about whether to accept a plea deal or risk the “trial penalty.”⁵⁸ Moreover, the factor comparing the “harm caused by the victim's unlawful acts” with the “harm caused by the victimization”⁵⁹ invites prosecutors to minimize and question the harms of trafficking victimization. This poses a high risk of retraumatizing and secondarily victimizing trafficking victim–defendants, particularly against the backdrop of systemic discounts to the credibility of women who have survived violence and abuse.⁶⁰

⁵⁶ *Id.* at 3-4.

⁵⁷ *Id.* at 3.

⁵⁸ The “trial penalty” is the difference between the harsher sentences imposed on defendants who are convicted at trial and the comparatively lower sentences given to defendants who plead guilty and waive their trial rights. See Brandon L. Garrett, William E. Crozier, Kevin Dahaghi, Elizabeth J. Gifford, Catherine Grodensky, Adele Quigley-McBride & Jennifer Teitcher, *Open Prosecution*, 75 STAN. L. REV. 1365, 1382 (2023) (noting concerns that “plea bargaining has created a ‘trial penalty,’ whereby the threat of a longer sentence after trial severely penalizes the defendant's exercise of their trial rights”); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 79 (2005) (“[T]he trial penalty [means] imposing a harsher sentence on a defendant who is convicted after trial than would have been imposed had he or she pled guilty.”).

⁵⁹ Axam, *supra* note 53, at 3.

⁶⁰ See generally Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV.

Second, Ms. Axam's remarks suggest that the U.S. approach generally only views "substantial punishment"⁶¹ of trafficking victims as inappropriate in cases of "victimless" crimes such as drug possession and prostitution, which dilutes the non-punishment principle because substantial punishment for these minor crimes would likely be viewed as inappropriate regardless of the defendant's victimization status. In the case of serious crimes involving harm to other victims, Ms. Axam asserts that "the interests of justice may require imposing substantial punishment"⁶² on victim-defendants who have themselves experienced severe trafficking victimization. Although she acknowledges trafficking power dynamics by stating that "any such punishment must account for the degree of coercive control the trafficker exercised over the victim," following this statement in the very same sentence with "and the trafficker's greater culpability in directing and profiting from the coercive scheme"⁶³ suggests that accounting for coercion is predominantly used to ensure that the trafficker receives a proportionally harsher punishment than the victim-defendant, rather than as grounds for non-punishment of the latter. Ms. Axam's comments raise questions about how much work the non-punishment principle is actually doing for trafficking victims and the extent to which the U.S. approach realizes its aims, at least at the federal level.

In the discussions following Ms. Axam's remarks at the Working Group session, "some speakers stressed the importance of fully exonerating victims who had been compelled to commit crimes, [while] others mentioned the importance of giving all victims, including victims of the crime committed by the trafficked person, a sense of accountability and justice, including through the imposition of 'appropriate' punishment."⁶⁴ Thus, there is disagreement among Working Group members about whether the non-punishment principle permits punishment of trafficking victims for criminal activities they engage in under certain circumstances.⁶⁵

399 (2019) (examining systemic discounts to women's credibility in legal and social institutions through the lens of intimate partner violence); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017) (conceptualizing "credibility discounting" of sexual violence survivors as a distinct and systemic failure of justice).

⁶¹ Axam, *supra* note 53, at 3.

⁶² *Id.* at 4.

⁶³ *Id.*

⁶⁴ U.N. Working Group Report, *supra* note 36, at ¶ 10.

⁶⁵ At the end of the day, the United States prevailed in getting its position adopted in the Working Group's recommendations concerning the non-punishment principle: the first recommendation includes the "inappropriately" qualifier. *Id.* ¶ 4 ("States parties are encouraged to consider providing, in accordance with their domestic law, that victims of trafficking in persons are

However, there appears to be a failure to recognize that restorative justice would provide “a sense of accountability and justice”⁶⁶ for those harmed by trafficking victims’ criminal conduct, without the imposition of punishment. Part III of this Article explains why this is the case and why the restorative justice process is a much sounder means of discerning “the degree of coercive control the trafficker exercised over the victim”⁶⁷ than the criminal legal process. As will be demonstrated in Part III, restorative justice provides a mechanism that serves the “interests of justice in each individual case”⁶⁸ without compromising the spirit and realization of the non-punishment principle.

B. *Rationales Underlying the Non-Punishment Principle*

Several rationales have been advanced in support of the non-punishment principle. First, the principle has been justified on the basis of trafficking victims’ lack of autonomy and culpability when they engage in unlawful conduct.⁶⁹ Specifically, when victims commit crimes due to coercion from their trafficker, they are not acting as autonomous individuals who freely choose to engage in criminal conduct.⁷⁰ Thus, it would be unjust to blame them and hold them criminally responsible as if they have committed the crimes of their own free will.⁷¹

not to be inappropriately punished or prosecuted for acts that traffickers compelled them to commit or that they committed as a direct consequence of being trafficked . . .”).

⁶⁶ *Id.* ¶ 10.

⁶⁷ Axam, *supra* note 53, at 4.

⁶⁸ *Id.* at 3.

⁶⁹ See OSCE RECOMMENDATIONS, *supra* note 35, at 10 (“[T]he trafficked person acts without real autonomy . . . [and,] consequently[,] they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed.”); 2022 U.N. Conference Guidance, *supra* note 31, at ¶¶ 5, 7 (“At the core of the [non-punishment] principle is the acknowledgement that while victims of trafficking may indeed commit crimes, they lack independence and the ability to exercise free will and act without real autonomy because of their circumstances.” (footnote omitted)); Conf. of the Parties to the United Nations Convention on Transn'l Organized Crime, Working Grp. on Trafficking in Persons, *Guidance on the Issue of Appropriate Criminal Justice Responses to Victims Who Have Been Compelled to Commit Offences as a Result of Their Being Trafficked*, ¶¶ 20-21, U.N. Doc CTOC/COP/WG.4/2020/2 (June 15, 2020) [hereinafter 2020 U.N. Conference Guidance] (noting “that trafficked persons who commit crimes in connection with their trafficking are not acting freely,” thereby justifying the non-punishment principle); Ryszard Wilson Piotrowicz & Liliana Sorrentino, *Human Trafficking and the Emergence of the Non-Punishment Principle*, 16 HUM. RTS. L. REV. 669, 673-74 (2016) (“The idea that a trafficked person should not be punished for criminal acts arising out of their situation as a trafficked person is based on the appreciation that the trafficked person is not a free agent . . .”).

⁷⁰ See *supra* note 69.

⁷¹ See OSCE RECOMMENDATIONS, *supra* note 35, at 10 (explaining that since trafficked persons “have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, . . . [they] should not therefore be considered

This rationale reflects the retributive theory of punishment, under which punishment can only be justified when it is deserved and it is only deserved when an offender *freely* chooses to violate the criminal law.⁷² Retributivism bases whether and how much punishment is deserved upon an offender's level of culpability.⁷³ Furthermore, the offender's reasons for violating the criminal law are a key factor in determining the extent to which she is considered culpable.⁷⁴ In the human trafficking context, the substantial control traffickers exercise over their victims serves as a basis to negate victims' culpability when it is concluded that this control was the reason for the criminal conduct.

This autonomy–culpability rationale for the non-punishment principle has implications for how the required nexus between the criminal conduct and the trafficking situation is conceptualized. Two approaches have been identified among non-punishment laws: “duress-based” and “causation-based.”⁷⁵ The former approach requires that the trafficker compelled the victim to commit the crime in order to qualify for the non-punishment principle's application.⁷⁶ “As a general rule, however, compulsion should be understood broadly,” to encompass the range of physical and psychological methods that traffickers use to compel their victims to commit crime.⁷⁷ Traffickers commonly employ a variety of control mechanisms including debt

accountable for the unlawful act committed”); 2020 U.N. Conference Guidance, *supra* note 69, at ¶ 20 (“To punish someone in such circumstances would be a departure from a long-established criminal law principle . . . that only those who engage in criminal behaviour of their own free choice should be subject to punishment by the state.”); Piotrowicz & Sorrentino, *supra* note 69, at 674 (characterizing state punishment of trafficked persons as “a violation of their fundamental dignity” (quoting OSCE RECOMMENDATIONS, *supra* note 35, at 10)).

⁷² See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 18 (9th ed. 2022) (“Retributivists believe that punishment is justified when it is deserved. It is deserved when the wrongdoer freely chooses to violate society's rules.”).

⁷³ Larry Alexander, *Culpability*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 218, 218 (John Deigh & David Dolinko eds., 2011).

⁷⁴ See *id.* at 225–26 (explaining that the reasons capable of negating culpability can be principally categorized as justifications or excuses).

⁷⁵ 2020 U.N. Conference Guidance, *supra* note 69, at ¶ 59; THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 4; Mullally, *supra* note 19, at ¶ 45; Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 22.

⁷⁶ 2020 U.N. Conference Guidance, *supra* note 69, at ¶ 59; Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 22.

⁷⁷ 2020 U.N. Conference Guidance, *supra* note 69, at ¶ 60; see also Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶¶ 24–25, 30 (“[T]he compulsion required by the non-punishment duress model needs to be interpreted broadly . . .” (emphasis omitted)).

bondage,⁷⁸ financial dependence,⁷⁹ isolation,⁸⁰ confiscation of identity and travel documents,⁸¹ threats to effectuate victims' incarceration and/or

⁷⁸ Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 30 (identifying debt bondage as a type of coercion which States much account for in their implementation of the non-punishment principle); Marcel van der Watt & Beatri Kruger, *Breaking Bondages: Control Methods, "Juju," and Human Trafficking*, in THE PALGRAVE INTERNATIONAL HANDBOOK OF HUMAN TRAFFICKING 935, 940-41 (John Winterdyk & Jackie Jones eds., 2020) (explaining that debt bondage keeps victims under traffickers' control through a "never-ending cycle of debt" that often involves fines for "transgressions," exorbitant interest rates, and inflated travel, accommodation, food, and documentation charges); COLLEEN OWENS, MEREDITH DANK, JUSTIN BREAUX, ISELA BAÑELOS, AMY FARRELL, REBECCA PFEFFER, KATIE BRIGHT, RYAN HEITSMITH & JACK MCDEVITT, URB. INST. & NE. UNIV., UNDERSTANDING THE ORGANIZATION, OPERATION, AND VICTIMIZATION PROCESS OF LABOR TRAFFICKING IN THE UNITED STATES ix, 81, 83, 200-01 (2014), <https://www.urban.org/sites/default/files/publication/33821/413249-Understanding-the-Organization-Operation-and-Victimization-Process-of-Labor-Trafficking-in-the-United-States.PDF> [<https://perma.cc/GC7N-V78C>] [hereinafter UNDERSTANDING LABOR TRAFFICKING] (finding that labor traffickers use manipulation of debts as a form of coercion based on data from 122 labor trafficking victim records from service providers and eighty-six interviews with labor trafficking victims, service providers, legal advocates, and law enforcement); Maria Ioannou & Miriam S.D. Oostinga, *An Empirical Framework of Control Methods of Victims of Human Trafficking for Sexual Exploitation*, 16 GLOB. CRIME 34, 39 (2015) (finding that "outstanding debt with a member of the criminal group" was employed as a control method against nearly 20% of a sample of 137 sex trafficking victims in the Netherlands); Joan A. Reid, *Entrapment and Enmeshment Schemes Used by Sex Traffickers*, 28 SEXUAL ABUSE 491, 491, 500 (2016) (identifying debt bondage as a method that traffickers use to entrap youth in sex trafficking, based on a review of forty-three case files for sex trafficked female youth and ten semi-structured interviews with social services providers).

⁷⁹ Ioannou & Oostinga, *supra* note 78, at 39 (finding that many of the 137 sex trafficking victims in the sample "were financially dependent on their trafficker as either their earnings were taken (34.3%) or they had an outstanding debt with a member of the criminal group (18.2%)"); UNDERSTANDING LABOR TRAFFICKING, *supra* note 78, at 81 ("Victims did not have enough money to escape. Traffickers exploited this by further reducing their options (by taking away their food and threatening to take away their housing)."); Reid, *supra* note 78, at 502-03 (finding that sex traffickers kept all or most of the earnings for many victims in the sample and the traffickers often controlled victims' possessions).

⁸⁰ van der Watt & Kruger, *supra* note 78, at 942-43 (reviewing research finding that traffickers often use social isolation, including cutting off support systems and limiting access to telecommunication devices, to increase victims' dependency upon them, maintain control over victims, and prevent them from seeking help); UNDERSTANDING LABOR TRAFFICKING, *supra* note 78, at 81, 83, 94, 101-03 (concluding that traffickers often use geographic isolation, monitoring, language barriers, and restricted telecommunication access to control labor trafficking victims); Ioannou & Oostinga, *supra* note 78, at 39 (finding that traffickers used isolation to control victims by limiting social contacts and exploiting language barriers); Reid, *supra* note 78, at 498, 500, 502-03 (finding that sex traffickers' recruitment and control tactics often include isolating victims by taking them to other cities and states, restricting their access to cell phones, and monitoring and controlling their social media accounts); Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 422 (2011) ("Certain methods of nonphysical coercion, such as cultural and linguistic isolation, could be just as powerful, if not more powerful, than physical or legal coercion" (citing *U.S. v. Mussry*, 726 F.2d 1448, 1553 (9th Cir. 1984))).

⁸¹ van der Watt & Kruger, *supra* note 78, at 943 ("[P]sychological confinement can be created through the trafficker's control of victims' passports, visas, and identification documents." (citation omitted)); Ioannou & Oostinga, *supra* note 78, at 39 (finding that nearly 32% of the sample of 137 sex trafficking victims "had their travel documents confiscated"); UNDERSTANDING LABOR

deportation,⁸² grooming and “love bombing,”⁸³ and humiliation and degradation.⁸⁴ The recognition of these methods as a basis for compulsion distinguishes the duress-based approach to the non-punishment principle from the traditional duress defense, which is “exceptionally narrow” and requires the defendant to prove that a coercer unlawfully threatened to imminently kill or grievously injure her or a family member if she did not commit the crime.⁸⁵ The imminency requirement for a general duress defense typically limits its application to situations in which the coercer’s threat was likely to be carried out so quickly that the defendant would not have had a reasonable opportunity to escape from the situation without complying with the coercer’s demands.⁸⁶ U.N. actors have concluded that the duress-based defense pursuant to the non-punishment principle does not contain this restriction as it would render the duress defense redundant and “fail to reflect the realities faced by victims . . . [given] the specific means employed by traffickers to cause them to commit crimes.”⁸⁷

TRAFFICKING, *supra* note 78, at 70-71, 88-89, 92 (noting that “[c]oercion was particularly acute when traffickers seized and held the documents of their victims,” which happened to 64% of the 122 labor trafficking victims whose records were part of the study).

⁸² See Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 30 (identifying “threats of denunciation to the authorities” as a type of coercion which states much account for in their implementation of the non-punishment principle); UNDERSTANDING LABOR TRAFFICKING, *supra* note 78, at 82, 89 (“One tactic [labor] traffickers commonly used regardless of industry was the threat of law enforcement involvement and deportation.”); van der Watt & Kruger, *supra* note 78, at 940 (“Victims are . . . made to believe that reporting to police is of no use, since police are complicit in the syndicate’s activity and will arrest the victim.” (citation omitted)).

⁸³ van der Watt & Kruger, *supra* note 78, at 942; Ioannou & Oostinga, *supra* note 78, at 42, 44; Reid, *supra* note 78, at 497-500, 504. “Love bombing” involves showering the victim or prospective victim with affection (often involving gifts) as a means of gaining her trust, devotion, and feelings of indebtedness in order to manipulate and control her. MICHEL DORAIS & PATRICE CORRIVEAU, GANGS AND GIRLS: UNDERSTANDING JUVENILE PROSTITUTION 35-36, 38-39, 42 (Peter Feldstein trans., McGill-Queens University Press 2008) (2006).

⁸⁴ van der Watt & Kruger, *supra* note 78, at 941 (drawing on studies finding that traffickers maintain psychological control over their victims by treating them as mere commodities, subjecting them to degrading punishments and public abuse, insulting them, and denying them privacy and dignity); UNDERSTANDING LABOR TRAFFICKING, *supra* note 78, at 81 (providing concrete examples of labor traffickers subjecting their victims to demeaning insults, public verbal abuse, and squalid living conditions); Reid, *supra* note 78, at 501-02 (finding that sex traffickers often demean and humiliate their victims by posting sexually explicit photos of them online without their consent, watching them have sex with clients on camera, and communicating that no one else will ever want to hire them for a job outside of the sex industry or have a relationship with them now that they have sold sex).

⁸⁵ Joshua Dressler, *Duress*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 269, 270 (John Deigh & David Dolinko eds., 2011).

⁸⁶ *Id.* at 271; DRESSLER, *supra* note 72, at 294.

⁸⁷ THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 4 n.17; see also 2020 U.N. Conference Guidance, *supra* note 69, at ¶ 60 (asserting similarly that the duress-based approach to the non-punishment principle should not have the same

The causation-based approach to the non-punishment principle is also justified with the autonomy–culpability rationale, but the connection is more implicit. This approach has been conceptualized as requiring the defendant to have committed the crime as “a direct consequence” of her trafficking victimization or that the crime be “directly related” to it for the non-punishment principle to apply.⁸⁸ Another articulation is that the defendant committed the offense “in the process of being trafficked.”⁸⁹ The U.N. Special Rapporteur has recognized the autonomy–culpability rationale embedded within the causation-based approach, asserting that this formulation recognizes that an “offence committed by a trafficked person may arise as a result of their lack of independence or ability to exercise free will.”⁹⁰ In other words, this approach responds to the coercive power dynamics existing within trafficking situations and implicitly recognizes their broad impact upon victims’ behavior. Given that the causation-based approach does not require a victim–defendant to specifically prove that her trafficker compelled her to engage in the alleged criminal conduct, a non-punishment principle defense employing the causation-based approach is likely easier to prove and applicable to a broader swath of trafficking victim–defendants than a defense utilizing the duress-based formulation. For example, a victim who steals a car to escape from her trafficker would be eligible for an affirmative defense that required the crime to be a direct result of being trafficked, but she would not be eligible for an affirmative defense that required her trafficker to have coerced her to commit car theft. This distinction has led human rights actors to endorse the causation-based approach over the duress-based approach.⁹¹

Second, reducing disincentives for trafficking victims to report their victimization to authorities is another rationale underlying the non-

evidentiary requirements as the general duress defense because that would render the non-punishment principle “redundant and fail to provide additional protection to victims”).

⁸⁸ Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 22 (internal quotation marks omitted).

⁸⁹ OSCE RECOMMENDATIONS, *supra* note 35, at 22.

⁹⁰ Mullally, *supra* note 19, at ¶ 46; *accord* Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 23 (explaining that the causation-based approach recognizes the defendant’s “lack of complete autonomy or independence, such as in the ‘run away’ cases where trafficking victims use false documents or illegally cross a border to escape from their trafficker or trafficking situation”).

⁹¹ *See, e.g.*, Mullally, *supra* note 19, at ¶ 52 (recommending that states adopt a non-punishment provision in their domestic legislation that employs a causation nexus rather than a duress nexus); Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 42 (“States are called upon to adopt a causation model based on a direct consequentiality between the trafficking and the offence, which is both easier to prove and responds well to the specific dynamics of trafficking.”); LA STRADA INT’L, *THE NON-PUNISHMENT PRINCIPLE 6* (2023), [https://documentation.lastradainternational.org/lsidocs/3512-LSI%20-%20Explanatory%20Brief%20on%20the%20Non-Punishment%20Principle%20\(Nov%202023\).pdf](https://documentation.lastradainternational.org/lsidocs/3512-LSI%20-%20Explanatory%20Brief%20on%20the%20Non-Punishment%20Principle%20(Nov%202023).pdf) [<https://perma.cc/YC2R-T9MF>] (observing that “[t]he causation model is the preferred model based on a human rights-based approach” to human trafficking).

punishment principle.⁹² This justification is based on the notion that victims who have engaged in criminal activity will not come forward if doing so places them at risk of being punished. And if they do not come forward, they are much less likely to obtain access to assistance and protection services⁹³ and participate in the investigation and prosecution of their trafficker.⁹⁴ The strength of this rationale is, of course, impacted by whether trafficking victims who have committed crimes are actually aware of the non-punishment principle and its protection in their jurisdiction. If they are unaware or if their trafficker convinces them that they would be punished regardless, then the principle's aim of encouraging victims to report their trafficking to authorities would be thwarted.

Third, the non-punishment principle has been justified on humanitarian grounds. This rationale emphasizes the trauma associated with trafficking victimization and seeks to avoid retraumatizing victims through the imposition of state punishment.⁹⁵ It encompasses not only the substantial trauma caused by incarceration,⁹⁶ but also the oft-overlooked trauma associated with other forms of punishment, such as sex offender registration

92 THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 1; 2022 U.N. Conference Guidance, *supra* note 31, at ¶ 7; Dep't of State, Protecting Victims of Trafficking, *supra* note 19, at 1; U.N. OFF. ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2020, at 19, U.N. Sales No. E.20.IV.3 (2021), https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf [<https://perma.cc/LWZ7-L5Q2>] [hereinafter U.N. OFF. ON DRUGS & CRIME].

93 THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 1; Dep't of State, Protecting Victims of Trafficking, *supra* note 19, at 1; Mullally, *supra* note 19, at ¶ 18.

94 THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 1; OSCE RECOMMENDATIONS, *supra* note 35, at 10; U.N. OFF. ON DRUGS & CRIME, *supra* note 92, at 19.

95 THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 1; Dep't of State, Protecting Victims of Trafficking, *supra* note 19, at 1; OSCE RECOMMENDATIONS, *supra* note 35, at 10.

96 OSCE RECOMMENDATIONS, *supra* note 35, at 18 (“[M]edical research on the consequences of the trafficking experience on victims indicates that detention and imprisonment contribute to exacerbating their trauma and vulnerability, and can lead to cumulative trauma, suicidal behaviour and post-traumatic stress disease.”); Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 38 (“Not only does detention jeopardise the victims’ physical, psychological and social recovery, it may also result in accumulative trauma, suicidal behaviour and post-traumatic stress disorder, as well as lead to a secondary victimisation.” (footnote omitted)); GOODMARK, *supra* note 12, at 93 (“[V]ictims of gender-based violence frequently find themselves incarcerated and subjected to other forms of punishment that not only fail to acknowledge their experiences of victimization but often exacerbate their trauma.”). It is important to note that the traumatic impact of incarceration is certainly not limited to trafficking survivors. *See, e.g.*, Mika’il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 257 (2013) (“The experience of being locked in a cage has a psychological effect upon everyone made to endure it. No one leaves unscarred.”).

requirements.⁹⁷ Criminalized survivors, like Yvette, are often required to register as sex offenders following their release due to convictions for sex trafficking offenses they committed while they themselves were being trafficked.⁹⁸

The collateral consequences of criminal punishment—including the way criminal records often “interfere with a person’s ability to access education, employment, accommodation, loans, immigration and protection visas, social security, licenses, and even custody of their children”—also underlie the humanitarian justification for the non-punishment principle and support its application to criminalized trafficking survivors at the post-conviction stage.⁹⁹ Furthermore, given the harms of arrest, charge, and prosecution,¹⁰⁰ the humanitarian rationale bolsters the predominant interpretation of the non-punishment principle as also encompassing criminal legal actions against trafficking victims prior to the imposition of punishment at sentencing.¹⁰¹

II. MAPPING NON-PUNISHMENT IN THE UNITED STATES

Part II provides an in-depth picture of the current state of the non-punishment principle within U.S. law. First, it examines non-punishment laws and initiatives at the state level—specifically, trafficking victimization-based immunity and affirmative defense statutes, diversion statutes and

⁹⁷ See GOODMARK, *supra* note 12, at 129-36 (cataloging the wide-reaching harms of being required to register as a sex offender, including barriers to securing housing, social stigma and marginalization, lack of privacy, and vulnerability to abuse and exploitation); 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> [<https://perma.cc/ME5L-UZUC>] (highlighting the “crushing impact sex offender registration has on survivors’ ability to transition home after serving prison sentences”); Justine A. Hill & Kelsey J. Mullins, *A Threat to Healing and a Barrier to Recovery: An Assessment of Health Impacts of Criminalization through the Stages of Domestic Sex Trafficking* 13 (UNESCO Chair on Gender, Wellbeing, and a Culture of Peace & 4W Initiative, Univ. of Wis.-Madison, Working Paper No. 005-06-2022, 2022), <https://minds.wisconsin.edu/bitstream/handle/1793/83657/005%20Criminalization%20on%20Survivor%20Health.pdf?sequence=1&isAllowed=y> [<https://perma.cc/Q7QU-9HW5>] (describing a trafficking survivor’s suicidal ideation, which she attributed in large part to feeling overwhelmed by her placement on the sex offender registry).

⁹⁸ Yvette’s conviction for sex trafficking Jade is a reportable offense under Texas law and she will be required to register as a sex offender upon her release from prison. TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(K) (West 2025) (listing human trafficking as a reportable offense); *id.* art. 62.051(a) (stating that a person who has a “reportable conviction or adjudication” is required to register as a sex offender).

⁹⁹ MCADAM, *supra* note 35, at 132; Dep’t of State, Protecting Victims of Trafficking, *supra* note 19, at 1 (describing how the “negative effects” of punishment for offenses committed as a direct result of trafficking victimization impact survivors’ “daily lives”).

¹⁰⁰ GOODMARK, *supra* note 12, at 54-63, 71-72, 171 (explaining the significant harms of arrest, charge, and prosecution for survivors of gender-based violence); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 778 (2012) (“Every arrest harms an individual, and perhaps a community, no matter how lawful.”).

¹⁰¹ See *supra* note 40 and accompanying text.

“problem-solving” courts, and vacatur, expungement, and sealing statutes. Second, this Part explores the non-punishment principle’s presence within federal law. The extensive mapping of these laws illuminates the reach of, and the limitations placed on, the non-punishment principle across the country.¹⁰² The serious implications of substantially restricting the principle’s reach, as many jurisdictions do, are laid bare through discussion of the recent cases of several criminalized trafficking survivors.

A. State Law

1. Immunity and Affirmative Defenses

Nearly all U.S. jurisdictions have laws providing immunity from prosecution and/or an affirmative defense based on trafficking victimization.¹⁰³ However, the vast majority of these laws strictly limit their application to a modest subset of trafficking victims based on their age, the type of crime they committed, and/or the nexus between the crime and their trafficking victimization.

Twenty-five states have immunity and/or affirmative defense statutes or statutory provisions that apply specifically to juvenile trafficking victims.¹⁰⁴

¹⁰² Statutes are interpreted and categorized based on their text and existing case law. It is possible that courts may interpret statutes differently than I have here, especially given the current dearth of case law interpreting non-punishment statutes in many jurisdictions. I thank my Research Assistants for their tremendous efforts to find and categorize non-punishment laws across the country, without whom a project of this scope would not have been possible.

¹⁰³ See Figures 1–2. Only the District of Columbia, Florida, Hawai’i, and Ohio lack any statute providing immunity or an affirmative defense based on trafficking victimization. Ohio has a diversion statute for juvenile trafficking victims, which is discussed in subsection II.A.2.

¹⁰⁴ ARK. CODE ANN. § 5-2-210(d) (2025); CAL. PENAL CODE § 236.23(f) (West 2025); COLO. REV. STAT. § 18-1-713(1) (2025); COLO. REV. STAT. § 18-7-209 (2025); CONN. GEN. STAT. § 53a-192a(b) (2025); GA. CODE ANN. § 16-3-6(b)(1), (c) (2025) (sex trafficking victims only); IDAHO CODE § 18-5613(4) (2025); IDAHO CODE § 18-8606(2) (2025); IOWA CODE § 725.2(3) (2025) (providing an affirmative defense for individuals under the age of twenty-one for acts that occurred while the individual was under the age of eighteen); KAN. STAT. ANN. § 21-5426(e) (2025); KY. REV. STAT. ANN. § 630.125 (West 2025); LA. STAT. ANN. § 14:82(G)(1) (2025) (sex trafficking victims only); LA. STAT. ANN. § 14:46.3(E) (2025) (sex trafficking victims only); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.13(4) (West 2025); MD. CODE ANN., CRIM. LAW § 1-402(b) (West 2025); MICH. COMP. LAWS § 750.451(6) (2025) (providing a rebuttable presumption that a juvenile defendant was coerced into committing prostitution offense(s) by the trafficker); MISS. CODE ANN. § 97-29-51(3) (2025); MONT. CODE ANN. § 45-5-709(1)–(2) (2025); NEB. REV. STAT. § 28-801(5) (2025); NEV. REV. STAT. § 201.303 (2025) (providing a rebuttable presumption that a juvenile sex trafficking victim being prosecuted as an adult for pandering, sex trafficking, or facilitating sex trafficking committed the offense(s) under duress); NEV. REV. STAT. § 62C.015 (2025) (sex trafficking victims only); N.H. REV. STAT. ANN. § 633:7(VII) (2025); N.J. STAT. ANN. § 2C:13-9(b)(2) (West 2025) (establishing a rebuttable presumption that juveniles are trafficking victims for purposes of a trafficking victimization-based affirmative defense, but not providing a separate affirmative defense for juvenile victims); N.D. CENT. CODE § 12.1-41-12(1)–(3) (2025); OKLA. STAT. tit. 21, § 1029(C) (2025); OKLA. STAT. tit. 21, § 748.2(E)(2) (2025); 18 PA. CONS. STAT. § 3065(a)(1)

Eleven of these states provide juvenile trafficking victims with immunity or an affirmative defense to a greater number of crimes than they do for adult victims.¹⁰⁵ In addition, twenty-eight jurisdictions have enacted statutes that protect minors from prostitution-related charges or convictions regardless of trafficking victim status.¹⁰⁶ Two jurisdictions with juvenile-specific statutes—Michigan and West Virginia—lack statutes providing immunity or an affirmative defense for adult trafficking victims.

Regarding laws not limited to juvenile trafficking victims, twenty-one states restrict affirmative defenses based on trafficking victimization to prostitution and related offenses.¹⁰⁷ Texas was one of these jurisdictions when

(2025) (sex trafficking victims only); 11 R.I. GEN. LAWS § 11-67.1-15(a)–(b) (2025); S.C. CODE ANN. § 16-3-2020(G) (2025); TENN. CODE ANN. § 39-13-309(e)–(f) (2025); W. VA. CODE § 61-14-8(a) (2025); W. VA. CODE § 61-8-5(b) (2025).

¹⁰⁵ See Figure 2; see also ARK. CODE ANN. § 5-2-210(d) (2025); COLO. REV. STAT. § 18-1-713(1) (2025); COLO. REV. STAT. § 18-7-209 (2025); CONN. GEN. STAT. Ann. § 53a-192a(b) (2025); KAN. STAT. ANN. § 21-5426(e) (2025); LA. STAT. ANN. § 14:82(G)(1) (2025) (sex trafficking victims only); LA. CHILD. CODE ANN. art. 725 (2025); LA. STAT. ANN. § 14:46.3(E) (2025) (sex trafficking victims only); MICH. COMP. LAWS § 750.451(6) (2025) (providing a rebuttable presumption that a juvenile defendant was coerced into committing prostitution offense(s) by the trafficker); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.13(4) (West 2025); MD. CODE ANN., CRIM. LAW § 1-402(b) (West 2025); NEV. REV. STAT. § 201.303 (2025) (sex trafficking victims only); NEV. REV. STAT. § 62C.015 (2025) (sex trafficking victims only); S.C. CODE ANN. § 16-3-2020(G) (2025); TENN. CODE ANN. § 39-13-309 (e)–(f) (2025); W. VA. CODE § 61-14-8(a) (2025); W. VA. CODE § 61-8-5(b) (2025).

¹⁰⁶ CAL. PENAL CODE § 647(b)(5) (West 2025); CONN. GEN. STAT. § 53a-82(a) (2025); D.C. CODE § 22-2701(d)(1) (2025); FLA. STAT. § 796.07(2)(e) (2025); GA. CODE ANN. § 16-6-9 (2025); IDAHO CODE ANN. § 18-5613(4) (2025); 720 ILL. COMP. STAT. 5/11-14(d) (2025); 720 ILL. COMP. STAT. 5/11-14.1(c) (2025); IND. CODE § 35-45-4-2(a) (2025); KY. REV. STAT. ANN. § 529.120(1) (West 2025); An Act to Reduce Commercial Sexual Exploitation, L.D. 1435, 131st Leg., 1st Spec. Sess. (Me. 2023) (repealing the criminal statute that prohibited engaging in prostitution for both juveniles and adults); MICH. COMP. LAWS § 750.448 (2025) (juveniles under sixteen only); MICH. COMP. LAWS § 750.449 (2025) (juveniles under sixteen only); MICH. COMP. LAWS § 750.450 (2025) (juveniles under sixteen only); MINN. STAT. § 260B.007(6)(c) (2025); MISS. CODE ANN. § 97-29-49(1) (2025); MO. REV. STAT. § 567.020.5 (2025); MONT. CODE ANN. § 45-5-709(2) (2025); NEB. REV. STAT. § 28-801(5) (2025); NEV. REV. STAT. § 62C.015(1) (2025); N.H. REV. STAT. ANN. § 645:2(V) (2025); N.M. STAT. ANN. § 32A-2-3.A. (2025) (excluding prostitution from the definition of “delinquent act”); N.C. GEN. STAT. § 14-204(c) (2025), N.C. GEN. STAT. § 14-205.1(b) (2025); N.D. CENT. CODE § 12.1-41-12.1.a (2025); 11 R.I. GEN. LAWS § 11-67.1-15(a)–(b) (2025); S.D. CODIFIED LAWS § 22-23-1 (2025); TENN. CODE ANN. § 39-13-513(d) (2025); *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010) (holding that prostitution charges cannot be brought against minors under the age of fourteen); UTAH CODE ANN. § 76-5d-106 (West 2025); VT. STAT. ANN. tit. 13, § 2652(c)(1)(B) (2025); WASH. REV. CODE § 9A.88.030(1) (2025). New York is not included in this list because it only has a presumption that a juvenile arrested for prostitution is a trafficking victim and the court is permitted to adjudicate the juvenile as a delinquent if she has previously been adjudicated as such for a prostitution offense or if she “expresses a current unwillingness to cooperate with specialized services for sexually exploited youth.” N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2025).

¹⁰⁷ ALA. CODE § 13A-6-159 (2025); ALASKA STAT. § 11.66.100(a), (c)(1)(W)–(Z) (2025) (providing immunity to sex trafficking victims in the context of reporting to law enforcement); ARIZ. REV. STAT. ANN. § 13-3214 (2025) (sex trafficking victims only); CONN. GEN. STAT. § 53a-

Yvette was prosecuted,¹⁰⁸ which is why a trafficking victimization-based affirmative defense was unavailable to her. An additional three states limit their immunity and/or affirmative defenses for trafficking victims to one or more non-violent crimes, in addition to prostitution and related offenses.¹⁰⁹ Although it is not uncommon for victims to be charged with trafficking other victims (or threatened with these charges),¹¹⁰ just fourteen states permit an affirmative defense or immunity based on trafficking victim status to be raised in prosecutions for human trafficking crimes.¹¹¹ Only four states—Oklahoma, South Carolina, Wisconsin, and Wyoming—permit trafficking victimization to serve as the basis for a defense to any crime for victim-defendants of any age.¹¹² One additional state—Louisiana—provides immunity to juvenile sex trafficking victims for any unlawful act.¹¹³

82 (2025); DEL. CODE ANN. tit. 11, § 787(h) (2025); GA. CODE ANN. § 16-3-6(b)–(c) (2025) (sex trafficking victims only); 720 ILL. COMP. STAT. 5/11-14(c-5) (2025); IND. CODE § 35-45-4-2(b) (2025); LA. STAT. ANN. § 14:46.2(F) (2025) (sex trafficking victims only); MD. CODE ANN., CRIM. LAW § 11-303(c)(1) (West 2025); MD. CODE ANN., CRIM. LAW § 11-306(c)(1) (West 2025); MD. CODE ANN., CRIM. LAW § 11-307(c)(1) (West 2025); MASS. GEN. LAWS ch. 265, § 57 (2025); MINN. STAT. § 609.325(4) (2025); MO. REV. STAT. § 566.223(2) (2025); NEV. REV. STAT. § 201.353(4) (2025) (sex trafficking victims only); 18 PA. CONS. STAT. § 3019(b) (2025); 11 R.I. GEN. LAWS § 11-34.1-2(c) (2025) (sex trafficking victims only); 11 R.I. GEN. LAWS § 11-67.1-16 (2025); S.D. CODIFIED LAWS § 22-23-1.2 (2025); TENN. CODE ANN. § 39-13-513(e) (2025); UTAH CODE ANN. § 76-5d-202(4)(e) (West 2025); VA. CODE ANN. § 18.2-361.1(B) (2025) (sex trafficking victims only); WASH. REV. CODE § 9A.88.040 (2025).

¹⁰⁸ TEX. PENAL CODE ANN. § 43.02(d) (West 2025) (effective Sep. 1, 2009). Texas now provides a trafficking victimization-based affirmative defense to all but the most serious crimes (unless “charged only as a party to that offense,” in which case, all offenses are eligible), which came into effect on December 4, 2025. TEX. PENAL CODE ANN. § 8.09(b)(4) (West 2025).

¹⁰⁹ ARK. CODE ANN. § 5-2-210(b)–(c) (2025); ARK. CODE ANN. 5-70-102(c) (2025); ARK. CODE ANN. 5-70-103(c) (2025); N.H. REV. STAT. ANN. § 633:7(VI) (2025); N.H. REV. STAT. ANN. § 645:2(IV) (2025); N.D. CENT. CODE § 12.1-41-13 (2025).

¹¹⁰ See Sarah Crocker, Note, *Stripping Agency from Top to Bottom: The Need for a Sentencing Guideline Safety Valve for Bottoms Prosecuted under the Federal Sex Trafficking Statutes*, 111 NW. U. L. REV. 753, 777–80 (2017) (discussing the prosecutorial tactic of leveraging trafficking charges against sex trafficking victims involved in the trafficking of other victims to secure their testimony against their traffickers); see also Silvia Rodríguez-López, *Telling Victims from Criminals: Human Trafficking for the Purposes of Criminal Exploitation*, in THE PALGRAVE INTERNATIONAL HANDBOOK OF HUMAN TRAFFICKING 303, 310 (John Winterdyk & Jackie Jones eds., 2020) (identifying human trafficking as a type of crime trafficked individuals often commit, leading to convictions for trafficking offenses among this population).

¹¹¹ COLO. REV. STAT. § 18-3-503(3) (2025) (victims of human trafficking for involuntary servitude only); COLO. REV. STAT. § 18-3-504(2.5) (2024) (sex trafficking victims only); IDAHO CODE § 18-8606(2) (2025); IOWA CODE § 710A.3 (2025); ME. STAT. tit. 17-A, § 853(3)–(4) (2025); MISS. CODE ANN. § 97-3-54.1(5) (2025); NEB. REV. STAT. § 28-831(3) (2025); N.M. STAT. ANN. § 30-52-1(E) (2025); MONT. CODE ANN. § 45-5-710 (2025); N.J. STAT. ANN. § 2C:13-8(c) (West 2025); N.J. STAT. ANN. § 2C:13-9(b)(1) (West 2025); N.C. GEN. STAT. § 14-43.16(a) (2025); OKLA. STAT. tit. 21, § 748(D) (2025); S.C. CODE ANN. § 16-3-2020(F) (2025); WIS. STAT. § 939.46(1m) (2025); WYO. STAT. ANN. § 6-2-708(a) (2025).

¹¹² OKLA. STAT. tit. 21, § 748(D) (2025); S.C. CODE ANN. § 16-3-2020(F) (2025); WIS. STAT. § 939.46(1m) (2025); WYO. STAT. ANN. § 6-2-708(a) (2025).

¹¹³ LA. STAT. ANN. § 14:46.3(E) (2025).

Figure 1.

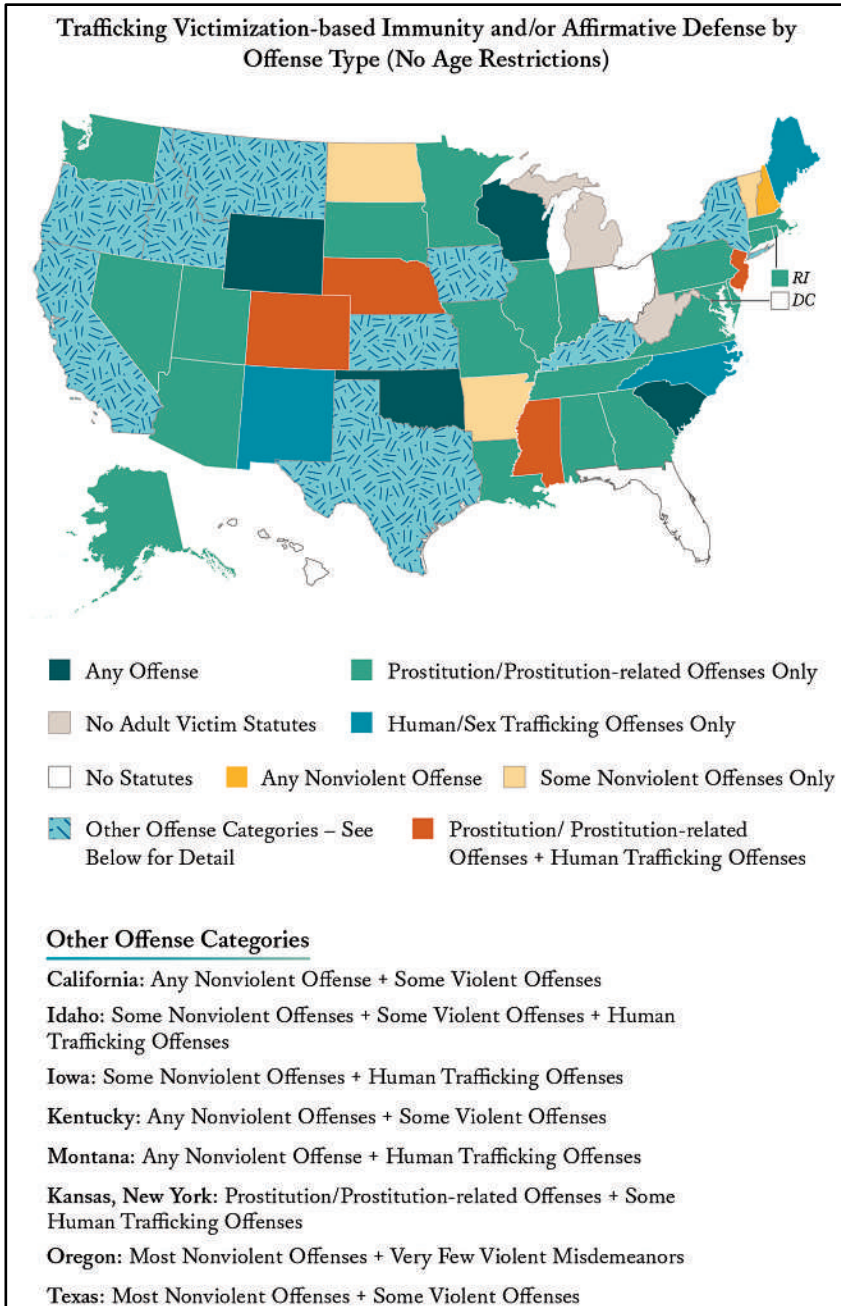
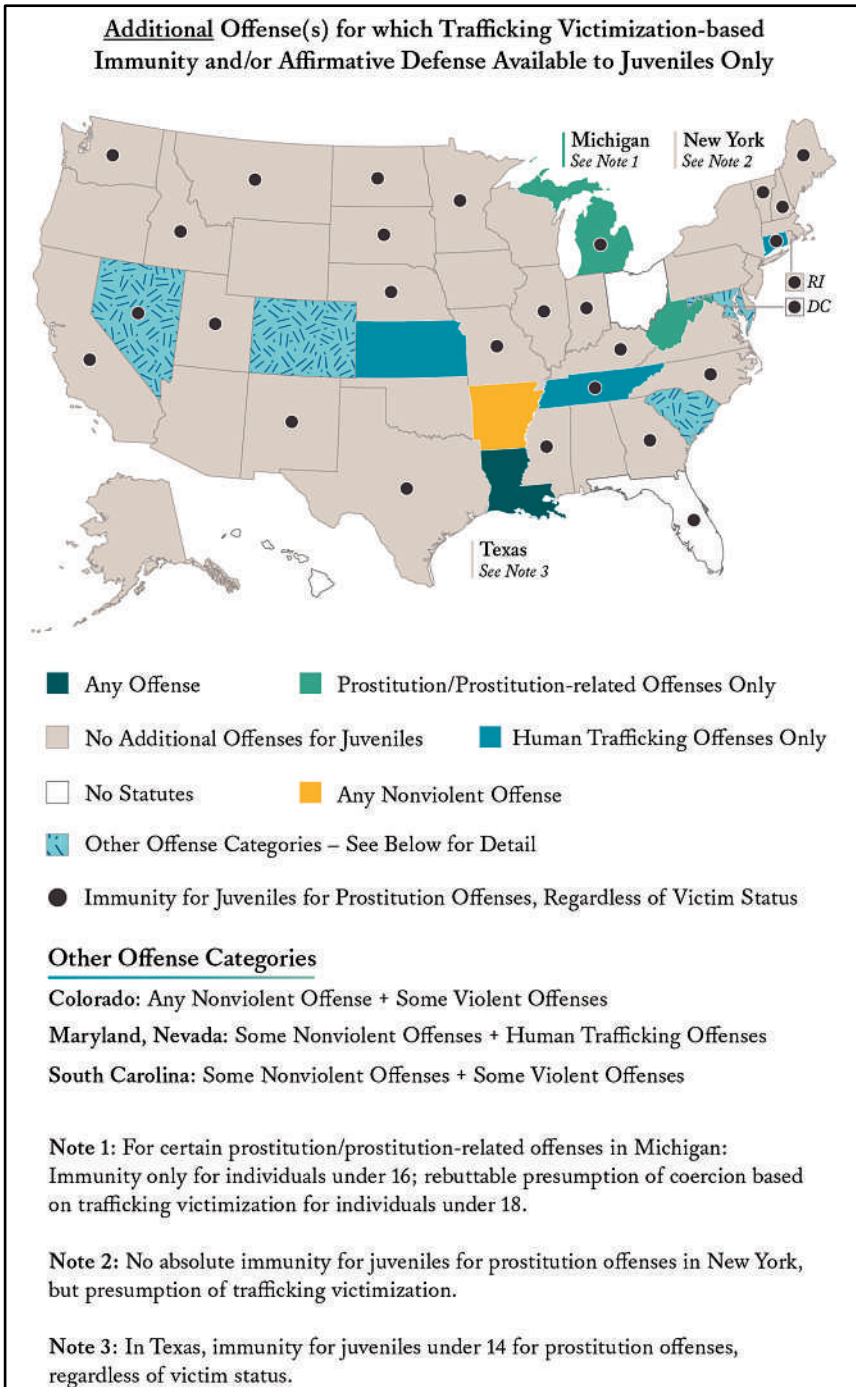


Figure 2.



But when the relevant statute says “any crime,” does it really mean *any* crime? This issue came before the Wisconsin Supreme Court in 2022 in *State v. Kizer*.¹¹⁴ In this case, Chrystul Kizer sought to raise an affirmative defense to first-degree intentional homicide and several other felonies based on her sex trafficking victimization by the decedent, Randall P. Volar III, since she was sixteen years old.¹¹⁵ Based on the absence of explicit statutory language indicating only mitigation to a lesser offense and the rule of lenity, the court agreed with Kizer that the statute provides a complete defense to first-degree intentional homicide.¹¹⁶

Despite winning this statutory interpretation battle, Kizer accepted a plea deal in which she pleaded guilty to second-degree reckless homicide in May 2024¹¹⁷ instead of proceeding to trial a month later.¹¹⁸ This development is not entirely surprising, as going to trial would have been an enormous risk for Kizer because first-degree intentional homicide carries a mandatory life sentence in Wisconsin¹¹⁹ and her success on the affirmative defense was certainly not guaranteed. For the affirmative defense, Kizer would have needed to prove that she had “committed [the offenses] as a direct result” of her trafficking victimization.¹²⁰ The Wisconsin Supreme Court defined this statutory language to mean that “there is a logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking violation.”¹²¹ The court added that “the offense need not be a foreseeable result of the trafficking violation and need not proceed ‘relatively immediately’ from the trafficking violation.”¹²²

¹¹⁴ 976 N.W.2d 356, 358 (Wis. 2022).

¹¹⁵ *Id.*; Jessica Contrera, *Wisconsin Supreme Court Will Hear Case of Chrystul Kizer, Sex Trafficking Victim Accused of Killing Abuser*, WASH. POST (Sep. 20, 2021), <https://www.washingtonpost.com/dc-md-va/2021/09/20/chrystul-kizer-wisconsin-supreme-court-trafficking-murder> [<https://perma.cc/EgZ8-DMK5>] [hereinafter Contrera, *Wisconsin Supreme Court*].

¹¹⁶ *Kizer*, 976 N.W.2d at 367. The text of the trafficking victim affirmative defense statute reads as follows: “A victim of a violation of [the statute prohibiting human trafficking] or [the statute prohibiting child sex trafficking] has an affirmative defense for any offense committed as a direct result of the violation of [these statutes] without regard to whether anyone was prosecuted or convicted for the violation of [the human trafficking or child sex trafficking statute].” WIS. STAT. § 939.46(1m) (2025).

¹¹⁷ Amended Plea Agreement at 2, *State v. Kizer*, No. 201818CF000643 (Kenosha Cnty. Cir. Ct. May 9, 2024).

¹¹⁸ Joe Kelly, *Kenosha Trafficking Victim Pleads Guilty to Reckless Murder of Her Trafficker*, COURTHOUSE NEWS SERV. (May 2024), <https://www.courthousenews.com/kenosha-trafficking-victim-pleads-guilty-to-reckless-murder-of-her-trafficker> [<https://perma.cc/J7BH-27J6>].

¹¹⁹ See WIS. STAT. § 940.01(1)(a) (2025) (classifying first-degree intentional homicide as a Class A felony); WIS. STAT. § 939.50(3)(a) (2025) (providing a life imprisonment penalty for Class A felonies).

¹²⁰ See WIS. STAT. § 939.46(1m) (2025).

¹²¹ *Kizer*, 976 N.W.2d at 362.

¹²² *Id.*

According to the criminal complaint, Kizer admitted to going to Volar's house with a gun, shooting him in the head, setting his house on fire with him still inside, and driving away in his BMW.¹²³ She allegedly told the police detective interviewing her and separately, her boyfriend, that she shot him because she was "tired of Mr. Volar touching her."¹²⁴ But the Kenosha County District Attorney had repeatedly asserted his belief that Kizer's true motive was to steal Volar's BMW.¹²⁵ His court filings referenced a Facebook message Kizer sent to a friend a few days before the crimes stating, "I'm finna get a bmw[.]" and her reply when her friend asked when, which was "[s]oon."¹²⁶ Thus, the jury may have concluded that Kizer did not meet the direct causal nexus requirement for the affirmative defense—a result that would have yielded a life sentence.¹²⁷ Instead, she was sentenced to eleven years in Wisconsin state prison plus five years of extended supervision on August 19, 2024, after pleading guilty to second-degree reckless homicide.¹²⁸

The Wisconsin statute at issue in Kizer's case contains the most common type of required nexus between the crime and the defendant's victimization among trafficking-based affirmative defense and immunity statutes: an explicit causal link.¹²⁹ Twenty-eight states have at least one statute that takes

¹²³ Criminal Complaint at 5-6, *State v. Kizer*, No. 2018CF000643 (Kenosha Cnty. Cir. Ct. June 13, 2018).

¹²⁴ *Id.*

¹²⁵ Contrera, *Wisconsin Supreme Court*, *supra* note 115.

¹²⁶ Jessica Contrera, *He Was Sexually Abusing Underage Girls. Then, Police Said, One of Them Killed Him.*, WASH. POST (Dec. 17, 2019), <https://www.washingtonpost.com/graphics/2019/local/child-sex-trafficking-murder> [<https://perma.cc/75AW-4489>] [hereinafter Contrera, *Underage Girls*].

¹²⁷ See *supra* note 119 and accompanying text.

¹²⁸ Kim Bellware & Jessica Contrera, *Sex-Trafficking Victim Chrystul Kizer Gets 11 Years for Killing Her Abuser*, WASH. POST (Aug. 19, 2024), <https://www.washingtonpost.com/nation/2024/08/19/chrystul-kizer-sentence-wisconsin-sex-trafficking> [<https://perma.cc/97N7-P3QB>].

¹²⁹ See WIS. STAT. § 939.46(1m) (2025); Figures 3-4. Wisconsin's statute only contains a single nexus in its statutory language—"a direct result"—which makes it easy to categorize. *Id.* However, a minority of jurisdictions' non-punishment statutes contain two (or very rarely, three) relevant nexuses. The approach this Article takes to categorizing these multiple-nexus statutes considers whether (1) one nexus is broader and fully encompasses the other(s) and (2) whether the victim-defendant must satisfy only one or must satisfy all of the nexuses. For example, Wyoming's trafficking victimization-based defense statute requires the crime to have been committed "as a direct result of, or incident to, being a victim of human trafficking." WYO. STAT. ANN. § 6-2-708(a) (2025). Since only one of the two nexuses must be satisfied (because "or" rather than "and" is used) and every situation in which the offense is "a direct result of" trafficking victimization, the offense would also be "incident to" trafficking victimization, but not vice versa, this statute is categorized only in terms of the broader nexus category: "incident to." But if the statute had used "and" rather than "or" between the two nexuses, then the statute would have been categorized in accordance with the narrower nexus category: "a direct result of." This is because a situation where the crime is incident to, but not a direct result of, trafficking victimization would be insufficient if the statute had required both nexuses to be satisfied. Furthermore, where statutes contain multiple nexuses that are not fully encompassed within one another, they are categorized as falling into multiple nexus categories. For instance, Arkansas's affirmative defense statute requires that the defendant was (1) a trafficking

this approach.¹³⁰ Among these, seventeen states have statutes requiring the causal link to be “direct,” including Wisconsin,¹³¹ which is a narrower standard

victim “at the time [she] engaged in the [criminal] conduct” and (2) committed the offense as “a direct result of” human trafficking. ARK. CODE ANN. § 5-2-210(b) (2025). These categories comprise a Venn diagram rather than concentric circles. A situation in which a victim–defendant’s trafficker coerced her into consuming illegal drugs with the aim of getting her addicted so he could more easily control her would satisfy both (1) and (2) if the victim was prosecuted for drug possession while she was still being exploited by her trafficker. However, if months after escaping her trafficker she was arrested and prosecuted for drug possession, then she could only satisfy (2) but not (1). Conversely, if during the time she was under her trafficker’s control she saw someone on the street who she had considered her arch enemy since long before she had become a trafficking victim, and then she assaulted this person solely because of what had transpired between them long before, then she could satisfy (1) but not (2). Thus, it is necessary to include this statute in both nexus categories.

¹³⁰ ALA. CODE § 13A-6-159 (2025); ARIZ. REV. STAT. ANN. § 13-3214(D) (2025); ARK. CODE ANN. § 5-2-210(b) (2025) (requiring also that the victim–defendant committed the offense “at the time” she was a trafficking victim); ARK. CODE ANN. § 5-70-103(c) (2025); CAL. PENAL CODE § 236.23(a), (f) (West 2025) (juveniles only in subsection (f)); *In re D.C.*, 275 Cal. Rptr. 3d 191, 194 (Cal. Ct. App. 2021) (holding that “section 236.23 does not require a showing that the accused was coerced directly by the trafficker to commit the specific crime” and that “the accused’s reasonable fear of suffering harm as a result of the trafficker’s scheme, plan, or pattern establishes the required showing of coercion to commit the offense as a direct result of being a human trafficking victim”); COLO. REV. STAT. § 18-7-201.3 (2025); CONN. GEN. STAT. § 53a-192a(b) (2025) (juveniles only); DEL. CODE ANN. tit. 11, § 787(h) (2025); IDAHO CODE § 18-8606(2) (2025); 720 ILL. COMP. STAT. 5/11-14(c-5) (2025); IOWA CODE § 710A.3 (2025); KAN. STAT. ANN. § 21-6419(c) (2025); KAN. STAT. ANN. § 21-6424(d) (2025); LA. STAT. ANN. § 14:46.2(F)(1) (2025); LA. STAT. ANN. § 14:46.3(E) (2025) (juveniles only); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.13(4) (West 2025) (juveniles only); MD. CODE ANN., CRIM. LAW § 1-402(b) (West 2025) (juveniles only); MD. CODE ANN., CRIM. LAW § 11-303(c)(1) (West 2025); MD. CODE ANN., CRIM. LAW § 11-306(c)(1) (West 2025); MD. CODE ANN., CRIM. LAW § 11-307(c)(1) (West 2025); MINN. STAT. § 609.325(4) (2025); MISS. CODE ANN. § 97-29-49(4) (2025); MONT. CODE ANN. § 45-5-710 (2025); MONT. CODE ANN. § 45-5-709(1) (2025) (juveniles only); NEB. REV. STAT. § 28-801(5)(a) (2025); N.H. REV. STAT. ANN. § 633:7(VI) (2025); N.H. REV. STAT. ANN. § 633:7(VII) (2025) (juveniles only); N.Y. PENAL LAW § 230.01 (McKinney 2025); N.D. CENT. CODE § 12.1-41-12(1)–(2) (2025) (juveniles only); N.D. CENT. CODE § 12.1-41-13 (2025); OKLA. STAT. tit. 21, § 748.2(E)(2) (2025) (juveniles only and unlikely to be employed because Oklahoma’s age-unrestricted trafficking victimization-based affirmative defense likely only requires proof of victim status and applies to any crime); OKLA. STAT. tit. 21, § 1029(C) (2025) (juveniles only and unlikely to be employed because Oklahoma’s age-unrestricted trafficking victimization-based affirmative defense likely only requires proof of victim status and applies to any crime); OR. REV. STAT. § 163.269(2) (2025) (requiring also that the offense was committed “at the time” the defendant was a trafficking victim); 11 R.I. GEN. LAWS § 11-67.1-15(a) (2025) (juveniles only); 11 R.I. GEN. LAWS § 11-67.1-16 (2025); TENN. CODE ANN. § 39-13-309(f) (2025) (juveniles only); TENN. CODE ANN. § 39-13-513(e) (2025); TEX. PENAL CODE ANN. § 8.09 (West 2025); TEX. PENAL CODE ANN. § 43.02(d) (West 2025); VT. STAT. ANN. tit. 13, § 2652(c)(2) (2025); VT. STAT. ANN. tit. 13, § 2638 (2025) (requiring that the trafficking victim report their victimization to law enforcement in good faith and in a timely manner to be eligible for immunity for prostitution and drug-related offenses); WASH. REV. CODE § 9A.88.040 (2025); WIS. STAT. § 939.46(1m) (2025).

¹³¹ ARIZ. REV. STAT. ANN. § 13-3214(D) (2025) (sex trafficking victims only); ARK. CODE ANN. § 5-2-210(b) (2025); CAL. PENAL CODE § 236.23(a), (f) (West 2025) (juveniles only in subsection (f)); *In re D.C.*, 275 Cal. Rptr. 3d at 194 (holding that “the accused’s reasonable fear of suffering harm as a result of the trafficker’s scheme, plan, or pattern establishes the required showing

than one only requiring the offense to be a result or consequence of the defendant's trafficking victimization.

Eleven states have statutes requiring the defendant to have committed the offense(s) during the course of or in the process of being trafficked,¹³² while four states have statutes specifying that the commission of the offense must have been related or directly related to the defendant's trafficking victimization.¹³³ Intergovernmental organizations interpreting the non-

of coercion to commit the offense as a direct result of being a human trafficking victim"); COLO. REV. STAT. § 18-7-201.3(1) (2025); DEL. CODE ANN. tit. 11, § 787(h) (2025); IDAHO CODE § 18-8606(2) (2025); IOWA CODE § 710A.3 (2025); LA. STAT. ANN. § 14:46.2(F)(1) (2025); LA. STAT. ANN. § 14:46.3(E) (2025) (juveniles and sex trafficking victims only); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-17.13(b)(4)(ii) (West 2025) (juveniles only); MD. CODE ANN., CRIM. LAW § 1-402(b) (West 2025) (juveniles only); MISS. CODE ANN. § 97-29-49(4) (2025); MONT. CODE ANN. § 45-5-710 (2025); MONT. CODE ANN. § 45-5-709(1) (2025) (juveniles only); NEB. REV. STAT. § 28-801(5)(a) (2025); N.H. REV. STAT. ANN. § 633:7(VI) (2025); N.H. REV. STAT. ANN. § 633:7(VII) (2025) (juveniles only); N.D. CENT. CODE § 12.1-41-12(1)-(2) (2025) (juveniles only); N.D. CENT. CODE § 12.1-41-13 (2025); 11 R.I. GEN. LAWS § 11-67.1-15(a) (2025) (juveniles only); 11 R.I. GEN. LAWS § 11-67.1-16 (2025); TEX. PENAL CODE ANN. § 8.09 (West 2025); WIS. STAT. § 939.46 (1m) (2025).

¹³² ARK. CODE ANN. § 5-2-210(b) (2025) (requiring also that the victim-defendant "[e]ngaged in the offense as a direct result of" human trafficking); ARK. CODE ANN. § 5-70-102(c) (2025); COLO. REV. STAT. § 18-7-209 (2025) (juveniles only); GA. CODE ANN. § 16-3-6(b)(1), (c) (2025) (juvenile sex trafficking victims only); IDAHO CODE § 18-5613(3) (2025) (sex trafficking victims only); IND. CODE § 35-45-4-2(b) (2025); KAN. STAT. ANN. § 21-5426(e) (2025) (juveniles only); LA. STAT. ANN. § 14:82(G)(1) (2025) (juvenile sex trafficking victims only); LA. STAT. ANN. § 14:82(G)(2) (2025); N.J. STAT. ANN. § 2C:13-8(3)(c) (West 2025); N.J. STAT. ANN. § 2C:13-9(b)(1) (West 2025); N.J. STAT. ANN. § 2C:34-1(e) (West 2025); OR. REV. STAT. § 163.269(2) (2025) (requiring that the offense was also committed "due to" the defendant's trafficking victimization); OR. REV. STAT. § 167.007(3) (2025) (sex trafficking victims only); UTAH CODE ANN. § 76-5d-202(4)(e) (West 2025) (requiring that the trafficking victim report her victimization to law enforcement in "good faith" and requiring that she committed the prostitution offense "at or near the time" of her victimization); VT. STAT. ANN. tit. 13, § 2652(c)(1)(A) (2025) (sex trafficking victims only). Although OKLA. STAT. tit. 21, § 748(D) states that the accused must have been a human trafficking victim "during the time of the alleged commission of the offense" for the affirmative defense, the accused would likely still qualify for the defense even if she committed the crime after exiting the trafficking situation because Oklahoma's model criminal jury instructions define "victim" within the human trafficking context as "[a] person against whom human trafficking has been committed." OKLA. CT. CRIM. APP., OKLAHOMA UNIFORM JURY INSTRUCTIONS 4-113D (2014). Therefore, this statute is categorized as not requiring a nexus between the defendant's trafficking victimization and the offense. See Stephen R. Galoob & Erin Sheley, *Reconceiving Coercion-Based Criminal Defenses*, 112 J. CRIM. L. & CRIMINOLOGY 265, 287 n.124 (2022) (concluding that Oklahoma's trafficking victimization-based affirmative defense likely does not have a nexus requirement but acknowledging that "it is possible that Oklahoma courts do not actually adopt the interpretation of the Oklahoma human trafficking affirmative defense offered here"); Meghan Hilborn, Note, *How Oklahoma's Human Trafficking Victim Is Poised to Be the Boldest Stand against Human Trafficking in the Country*, 54 TULSA L. REV. 457, 471 (2019) (asserting that Oklahoma's age-unrestricted affirmative defense based on trafficking victimization lacks a nexus requirement).

¹³³ KY. REV. STAT. ANN. § 630.125 (West 2025) (juveniles only); NEV. REV. STAT. § 62C.015(3) (2025) (juveniles only); S.C. CODE ANN. § 16-3-2020(F) (2025); S.C. CODE ANN. § 16-3-2020(G) (2025) (juveniles only); WYO. STAT. ANN. § 6-2-708(a) (2025).

punishment principle have also classified these two nexus formulations as reflective of the causation-based approach, despite not explicitly employing the language of causation.¹³⁴

In contrast, fourteen states have adopted the stricter “duress-based” nexus approach in one or more of their trafficking-specific immunity and/or affirmative defense statutes.¹³⁵ These statutes require the defendant to demonstrate that her trafficker compelled or forced her to commit the crime(s) for which she is charged, within the context of the trafficking. This is the narrowest and most demanding type of statutory nexus requirement.

At the other end of the spectrum sit twelve states’ statutes that do not include a nexus requirement—defendants must only prove their trafficking victim status.¹³⁶ These statutes simply refer to the defendant “being” a victim or use similar language. However, it is unclear whether a defendant is not actually required to demonstrate *any* link between her trafficking victimization and the offense in practice due to the dearth of case law interpreting these statutes, and it is possible that courts would find an implicit nexus requirement.

¹³⁴ See, e.g., Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 22 (categorizing the nexus formulation as “when the offense is ‘directly related’ to” the defendant’s trafficking victimization, as a “causation link” in the U.N. Special Rapporteur’s paper on the non-punishment principle (footnote omitted)); OSCE RECOMMENDATIONS, *supra* note 35, at 22 (classifying offenses “committed in the process of being trafficked” as “causation-based offenses”).

¹³⁵ COLO. REV. STAT. § 18-1-713 (2025) (juveniles only); COLO. REV. STAT. § 18-3-503(3) (2025) (labor trafficking victims only); COLO. REV. STAT. § 18-3-504(2.5) (2025) (sex trafficking victims only); GA. CODE ANN. § 16-3-6(b)(2)–(c) (2025) (sex trafficking victims only); IOWA CODE § 725.2(3) (2025) (juveniles only); ME. STAT. tit. 17-A, § 853(3) (2025) (sex trafficking victims only); MASS. GEN. LAWS ch. 265, § 57 (2025); MICH. COMP. LAWS § 750.451(6) (2025) (providing a rebuttable presumption that a juvenile defendant was coerced into committing prostitution offense(s) by a trafficker); MISS. CODE ANN. § 97-3-54.1(5) (2025); MO. REV. STAT. § 566.223(2) (2025); N.C. GEN. STAT. § 14-43.16(a) (2025); OR. REV. STAT. § 163.269(1) (2025); 18 PA. CONS. STAT. § 3019(b) (2025); 11 R.I. GEN. LAWS § 11-34.1-2(c) (2025) (sex trafficking victims only but note that 11 R.I. GEN. LAWS § 11-67.1-16 provides the same defense with a causation-based nexus); VA. CODE ANN. § 18.2-361.1(B) (2025) (sex trafficking victims only); W. VA. CODE § 61-14-8(b) (2025) (juvenile sex trafficking victims only).

¹³⁶ ALASKA STAT. § 11.66.100(c) (2025); CONN. GEN. STAT. § 53a-82(b) (2025); KY. REV. STAT. ANN. § 529.170 (West 2025); MISS. CODE ANN. § 97-29-51(3) (2025) (juveniles only); NEB. REV. STAT. § 28-801(3) (2025); NEB. REV. STAT. § 28-801.01(3) (2025); NEV. REV. STAT. § 201.353(4) (2025); N.M. STAT. ANN. § 30-52-1(E) (2025); OKLA. STAT. tit. 21, § 748(D) (2025); Stephen R. Galoob & Erin Sheley, *Reconceiving Coercion-Based Criminal Defenses*, 112 J. CRIM. L. & CRIMINOLOGY 265, 287 n.124 (2022) (explaining that Oklahoma should be categorized as Only Victim Status Required in light of Oklahoma Uniform Jury Instructions—Criminal 4-113D, which defines “victim” broadly enough to allow the defense even after trafficking has ceased); 18 PA. CONS. STAT. § 3065(a)(1) (2025) (juvenile sex trafficking victims only); S.D. CODIFIED LAWS § 22-23-1.2 (2025); TENN. CODE ANN. § 39-13-309(e) (2025) (juvenile sex trafficking victims only); W. VA. CODE § 61-8-5(b) (2025) (juveniles only); W. VA. CODE § 61-14-8(a) (2025) (juvenile sex trafficking victims only).

As the figures and citations indicate, a state may have multiple trafficking-specific immunity and/or affirmative defense statutes that apply to different populations (e.g., juveniles, individuals of any age) or to different types of crimes (e.g., prostitution-related offenses, non-violent offenses), for which the legislature has adopted differing nexus requirements.¹³⁷ The overall trends demonstrate that, helpfully, most jurisdictions have adopted a causation-based rather than duress-based approach to the nexus that defendants must establish between their victimization and the offense.¹³⁸ However, even if trafficking victim-defendants are able to satisfy the required nexus, the fact that many jurisdictions limit eligibility for trafficking victimization-based immunity or affirmative defenses to less serious crimes,¹³⁹ despite the justifications for the non-punishment principle applying with equal force to more serious crimes, leaves many trafficked individuals unprotected from criminal liability and punishment.

¹³⁷ See Figures 1–4. The figures in this Article categorize each jurisdiction in accordance with the cumulative impact of all relevant statutes within that jurisdiction.

¹³⁸ See Figures 3–4.

¹³⁹ See Figures 1–2.

Figure 3.

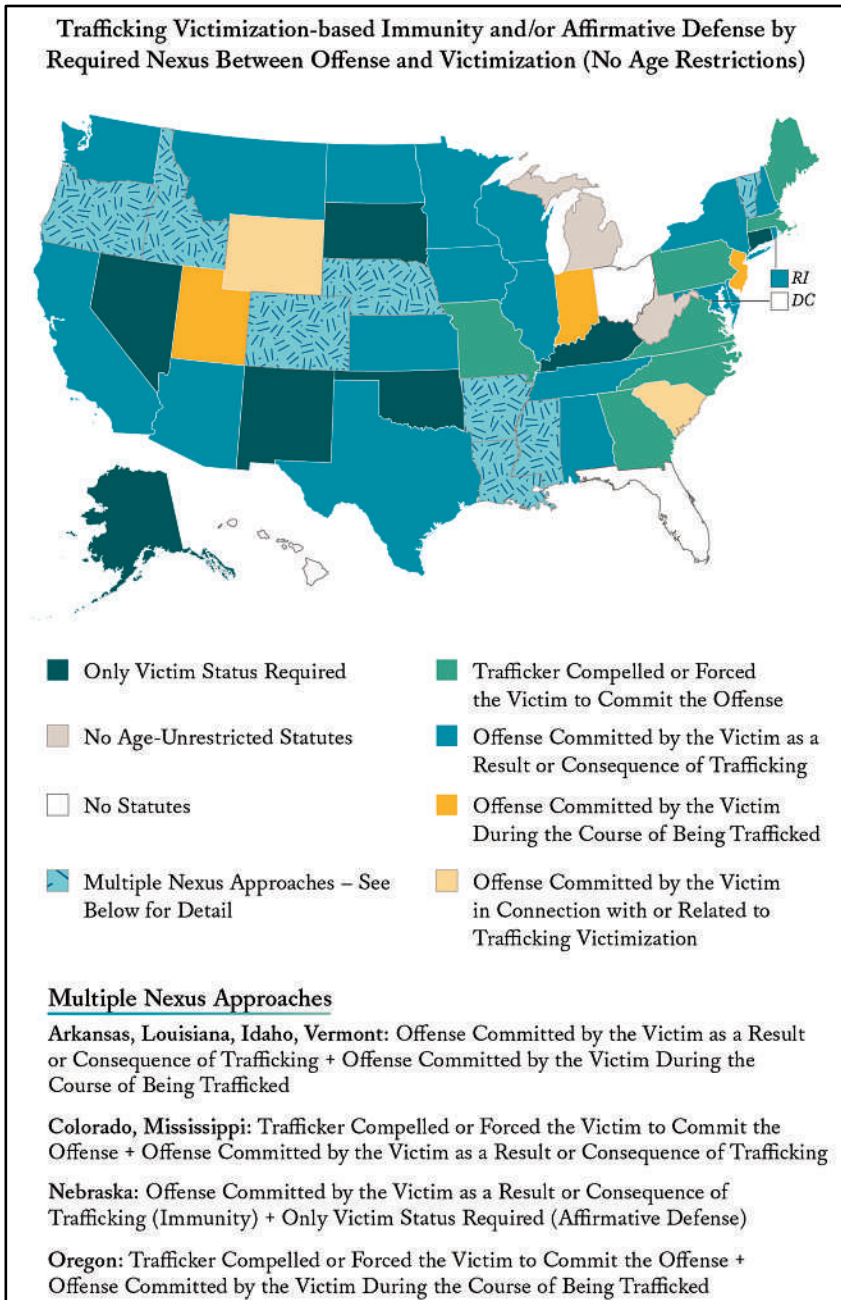
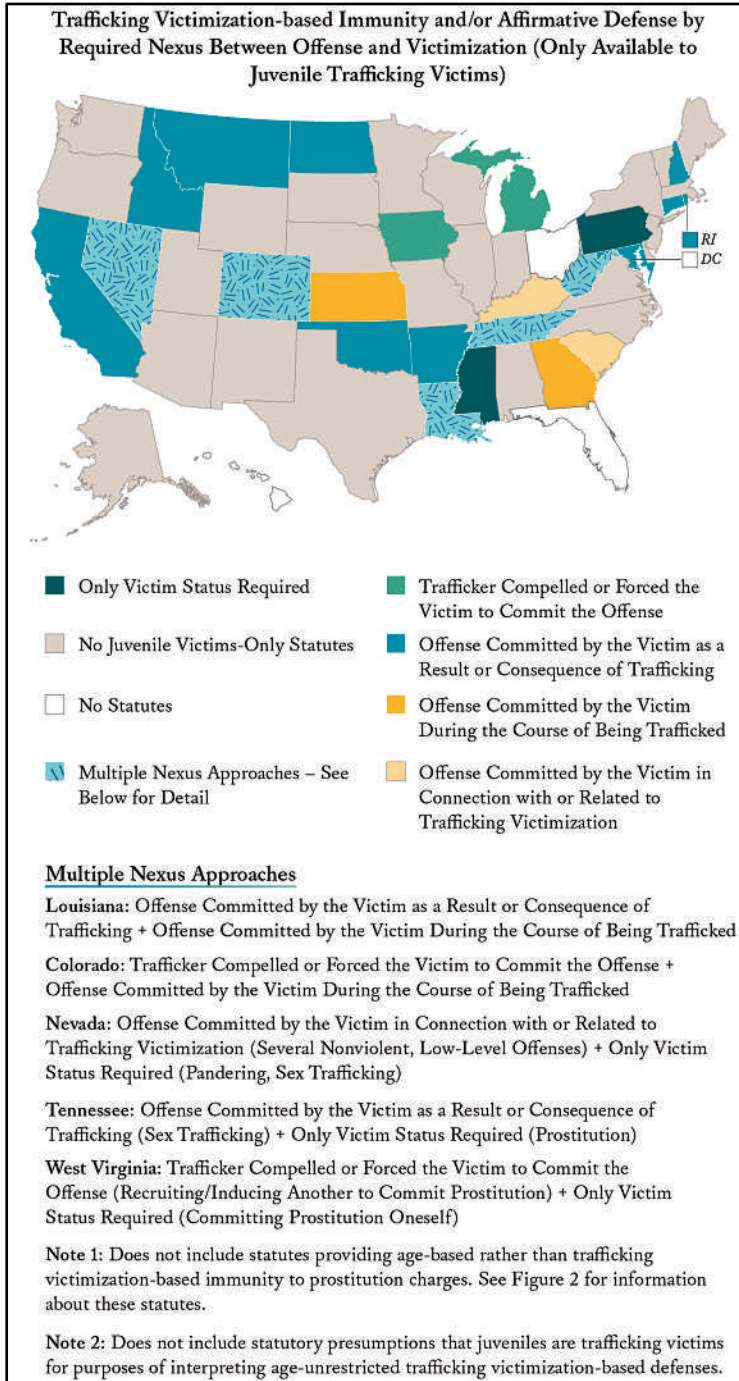


Figure 4.



2. Diversion to Human Trafficking Courts, Treatment Programs, and Social Services

Diversion from the mainstream criminal legal process to human trafficking intervention courts, treatment programs, and/or social services reflects efforts to avoid subjecting trafficking victims to criminal punishment. Only six states have codified trafficking victimization-based diversion—Idaho¹⁴⁰ and Ohio¹⁴¹ for juvenile victims, and Louisiana,¹⁴² Michigan,¹⁴³ New York,¹⁴⁴ and Pennsylvania¹⁴⁵ for victims of any age. However, at least fourteen jurisdictions have one or more human trafficking courts to which juvenile and/or adult victims charged with crimes can be diverted.¹⁴⁶ These specialized

¹⁴⁰ IDAHO CODE § 18-8606(1) (2025) (excluding juvenile trafficking victims charged with serious offenses from diversion eligibility and requiring that the juvenile committed the offense “as a direct and immediate result” of being a trafficking victim to be eligible).

¹⁴¹ OHIO REV. CODE ANN. § 2152.021(F) (West 2025) (requiring the court to appoint a guardian ad litem and permitting the juvenile, her attorney, or the guardian ad litem to petition the court to hold the complaint in abeyance if “the court has reason to believe” that the alleged offense would be a prostitution offense if the juvenile were an adult or that the juvenile is charged with an offense that is “related to” the juvenile’s trafficking victimization). In *State v. Martin*, the Ohio Supreme Court held that there are no limits on the type of offense charged for this statute to apply; the court only needs “reason to believe that the juvenile is a human-trafficking victim and that the charged offenses are related to the victimization.” 116 N.E.3d 127, 132 (Ohio 2018).

¹⁴² LA. STAT. ANN. § 13:587.4(C) (2025) (specifying that all cases involving prostitution-related, human trafficking, incest, child molestation, or molestation of a person with a disability charges shall be transferred to the human trafficking division of the court (if one has been designated), that judges may mandate support services for human trafficking victim–defendants, and that upon completion of the mandated services and consent from the prosecution, victim–defendants shall be considered for a non-criminal disposition or case dismissal).

¹⁴³ MICH. COMP. LAWS § 750.451c (2025) (limiting eligibility to those pleading guilty to or convicted of prostitution-related offenses that were committed “as a direct result” of being a trafficking victim).

¹⁴⁴ N.Y. CRIM. PROC. LAW § 170.15(5)(a) (McKinney 2025) (authorizing courts to order a misdemeanor case to be transferred to a human trafficking court upon a defendant’s motion and after giving the prosecution an opportunity to be heard); N.Y. CRIM. PROC. LAW § 180.20(4)(a) (McKinney 2025) (authorizing the same but for felony cases). Although not all of New York’s Human Trafficking Intervention Courts (HTICs) are still active, at least several are, including HTICs in Erie County (Buffalo), Monroe County (Rochester), Nassau County (Hempstead), Oneida County (Utica), and Onondaga County (Syracuse). Telephone Interview by Rachel Wechsler with Amanda Ciccarella, Clerk, Buffalo City Ct. (Nov. 24, 2025); Telephone Interview by Christy Hoffmann with Andrea Sevene, Program Coordinator, Rochester SAFE Ct. (Aug. 8, 2025); Telephone Interview by Christy Hoffmann with Robert Cramer, Clerk, Nassau Dist. Ct., (Oct. 31, 2025); Telephone Interview by Christy Hoffmann with anonymous, Case Manager, Utica City Ct. (Oct. 31, 2025); Telephone Interview by Christy Hoffmann with Queen Lane, Clerk, Syracuse City Ct. (Aug. 7, 2025).

¹⁴⁵ 18 PA. CONS. STAT. § 3019(c) (2025) (requiring courts to give “first consideration for a pretrial diversionary program” for human trafficking victims charged with “violating a trespassing, loitering, obstruction of highway, disorderly conduct or simple possession of a controlled substance statute as a direct result of” their victimization and as a first offense).

¹⁴⁶ See *STRENGTH Court*, SUPERIOR CT. OF ARIZ. IN MARICOPA CNTY., <https://superiorcourt.maricopa.gov/departments/superior-court/juvenile/strength-court>

[<https://perma.cc/7VXD-849R>] (last visited Nov. 10, 2025) (juveniles only) (“Youth survivors of sex trafficking . . . have the option to choose whether they want their case to be permanently moved to STRENGTH Court”); *Collaborative Courts*, SUPERIOR CT. OF CAL. CNTY. OF SACRAMENTO, <https://www.saccourt.ca.gov/criminal/collaborative-courts.aspx> [<https://perma.cc/5ZZ5-X999>] (last visited Jan. 22, 2025) (describing eligibility for a court program for adult females charged with prostitution or related offenses); *Girls’ Courts/CSEC Courts Overview*, JUD. CTS. OF CAL., <https://courts.ca.gov/programs-initiatives/collaborative-justice-courts/juvenile-collaborative-courts/girls-courtssec> [<https://perma.cc/98VR-SBCA>] (last visited Jan. 22, 2025) (juveniles only) (providing a unique court for juvenile girls that responds to gender-specific risk of trauma and exploitation); *Human Trafficking Diversion Program*, 4TH JUD. DIST. ATT’Y, <https://www.4thjudicialda.com/HumanTrafficking.html> [<https://perma.cc/L2VK-zQP5>] (last visited Jan. 22, 2025) (describing a Colorado diversion program aimed at “victims of human trafficking and [the] sex trade”); *G.R.A.C.E. Court*, ELEVENTH JUD. CIR. OF FLA., <https://www.jud11.flcourts.org/GRACE-Court> [<https://perma.cc/BL7Y-F8NA>] (last visited Jan. 22, 2025) (juveniles only) (“G.R.A.C.E. Court is . . . [a] specialized court in the nation devoted to the needs of children who have been identified as victims of commercial sexual exploitation . . .”); *HOPE Program in DC Superior Court Takes a Different Approach*, D.C. CTS. NEWSROOM (Apr. 26, 2019), <https://newsroom.dccourts.gov/news-stories/hope-program-in-dc-superior-court-takes-a-different-approach> [<https://perma.cc/8LPP-NW7W>] (juveniles only) (“HOPE Court . . . [is] designed to recognize and treat juvenile victims of commercial sexual exploitation rather than to prosecute them for underlying offenses.”); General Administrative Order 2015-04 (Cir. Ct. Cook Co., Ill., June 1, 2015); *S.T.A.R. COURT*, CADDO PARISH JUV. CT., <https://www.caddoclerk.com/juvenile/StarCourt.html> [<https://perma.cc/MHX2-REG6>] (last visited Jan. 22, 2025) (juveniles only) (describing an approach to prevent human trafficking, including the S.T.A.R. court, the first trafficking-specific court in Louisiana); *Phoenix Court*, INGHAM CNTY., https://cc.ingham.org/courts_and_sheriff/circuit_court/phoenix_court.php [<https://perma.cc/29HB-ST8E>] (last visited Jan. 22, 2025) (juveniles only) (describing a specialty court in Michigan that serves youth victims of sexual trauma and/or exploitation); Washtenaw Cnty., Off. of the Prosecuting Att’y, Policy Directive 2021-14: Protocols Regarding Potential Survivors of Human Trafficking (Apr. 21, 2021), <https://content.civicplus.com/api/assets/88e23a25-18e9-4835-91c0-005cf63b1b5c> [<https://perma.cc/Y2ST-A66Z>] (requiring assistant prosecuting attorneys to refer trafficking victims to the University of Michigan Human Trafficking Law Clinic “immediately upon becoming aware” of their victimization); *All Things Judicial Podcast Focuses on Human Trafficking Diversion Court*, N.C. JUD. BRANCH, (Jan. 19, 2022), <https://www.nccourts.gov/news/tag/press-release/all-things-judicial-podcast-focuses-on-human-trafficking-diversion-court> [<https://perma.cc/7ACQ-N2YR>] (juveniles only) (“WORTH Court [is] a Cumberland County specialized court designed to help human trafficking survivors with supportive care and intervention services.”); *Human Trafficking Intervention Courts*, N.Y. CTS., https://ww2.nycourts.gov/courts/problem_solving/htc/courts.shtml [<https://perma.cc/VRF2-BJLA>] (last visited Jan. 22, 2025) (listing locations for human trafficking-specific courts); *CATCH Court*, FRANKLIN CNTY. MUN. CT., <https://www.franklincountymunicourt.org/Departments-Services/Specialized-Dockets/CATCH-Court> [<https://perma.cc/NM7K-F7ZU>] (last visited Jan. 22, 2025) (setting out the goals of the CATCH court in Ohio to recognize that women accused of prostitution are victims in need of support); *Tennessee Treatment Court Contacts*, TENN. DEP’T OF MENTAL HEALTH & SUBSTANCE ABUSE SERVS., https://www.tn.gov/content/dam/tn/mentalhealth/documents/Recovery_Court_Contact_List.pdf [<https://perma.cc/5JN7-QP46>] (last visited Jan. 22, 2025) (providing contacts for recovery courts in Tennessee); *Specialty Courts in Texas*, TEX. JUD. BRANCH, <https://www.txcourts.gov/about-texas-courts/specialty-courts> [<https://perma.cc/PNQ3-CPVM>] (last visited Nov. 10, 2025) (providing an overview of specialty courts in Texas, including one for commercially or sexually exploited persons); *THRIVE Court Eligibility Criteria*, KITSAP CNTY., WASH., https://www.kitsap.gov/pros/Pages/THRIVE_Court_Eligibility_Criteria.aspx [<https://perma.cc/8SGS-E8YX>] (last visited Jan. 22, 2025) (“The Kitsap THRIVE Court is an optional diversion program for survivors of trafficking, exploitation, and/or abuse.”).

“problem-solving” courts typically operate on the local level and aim to provide social services and/or treatment to trafficking victims instead of incarceration.¹⁴⁷ Relatedly, ten states have codified diversion for defendants charged with prostitution, regardless of trafficking victim status,¹⁴⁸ and at least seven have prostitution diversion courts or programs.¹⁴⁹ In reality, a great deal of overlap exists among “human trafficking” and “prostitution” courts, since at least some human trafficking courts do not require proof of a defendant’s trafficking victimization for eligibility¹⁵⁰ and prostitution

¹⁴⁷ See, e.g., *supra* note 146; *Announcement of New York’s Human Trafficking Intervention Initiative*, CTR. FOR JUST. INNOVATION (Oct. 4, 2013), <https://www.innovatingjustice.org/updates/announcement-of-new-yorks-human-trafficking-intervention-initiative> [<https://perma.cc/3KZG-DPS3>] (explaining that New York’s human trafficking intervention courts “connect those arrested for prostitution to counseling and social services in lieu of jail-time”).

¹⁴⁸ ALA. CODE § 13A-6-181(c)–(e) (2025); CAL. PENAL CODE § 1001.87(b)(6) (West 2025); COLO. REV. STAT. § 13-10-126 (2025); FLA. STAT. § 796.07(5)(b) (2025); N.C. GEN. STAT. § 14-204 (2025); NEV. REV. STAT. § 201.353 (2025); N.Y. CRIM. PROC. LAW § 170.80 (McKinney 2025); TEX. GOV’T CODE ANN. § 126.001 (West 2025); WASH. REV. CODE § 13.40.213(1)–(2) (2025); WASH. REV. CODE § 13.40.070(7)(a) (2025) (juveniles only); WIS. STAT. § 944.30(2m) (2025) (juveniles only).

¹⁴⁹ *The Office of the Phoenix City Prosecutor*, CITY OF PHX., <https://www.phoenix.gov/administration/departments/law/prosecutor> [<https://perma.cc/J5ZL-P44C>] (last visited Jan. 30, 2025) (describing specialty courts and programs for prostitution and solicitation diversion); *Diversion Programs*, OFF. OF MIA.-DADE STATE ATT’Y GEN., <https://miamisao.com/our-work/signature-programs/diversion-programs> [<https://perma.cc/YK9J-9TAE>] (last visited Jan. 30, 2025) (“Miami SAO offers a diversion program for non-violent first-time offenders facing misdemeanor prostitution charges.”); *Solicitation/Prostitution*, KANE CNTY., IL STATE’S ATT’Y’S OFF., <https://sao.kanecountyil.gov/Pages/Deferred-Prosecution.aspx> [<https://perma.cc/TW63-NXZX>] (last visited Jan. 30, 2025) (describing a special program as an alternative to court proceeding for “prostitution- or solicitation-related offenders”); *Sex Industry Diversion*, CADDO PARISH DIST. ATT’Y, <https://www.caddoda.com/blank-19> [<https://perma.cc/936Q-8GYD>] (last visited Jan. 30, 2025) (outlining a diversion program in Louisiana that results in dismissal of charges upon its successful completion); *Hamilton County CHANGE Court*, HAMILTON CNTY., OHIO CTS., <https://hamiltoncountycourts.org/index.php/change-court-2> [<https://perma.cc/E83M-T2WA>] (last visited Jan. 27, 2025) (“[CHANGE is a] specialized Court serving the needs of those charged with Prostitution and Related Offenses and victims of Sex Trafficking.”); PHILA. DIST. ATT’Y’S OFF., PRE-TRIAL DIVERSION PROGRAMS 20 (2016), <https://phlcouncil.com/wp-content/uploads/2016/04/Pre-Trial-Diversion.Philadelphia.pdf> [<https://perma.cc/4EHR-P77C>] (last visited Jan. 27, 2025) (“Project Dawn seeks to connect non-violent repeat prostitution offenders with therapeutic and reentry services . . .”); *Restorative Justice*, DALL. CNTY., TEX., <https://www.dallascounty.org/government/district-attorney/restorative-justice> [<https://perma.cc/YM2V-3QBW>] (last visited Feb. 4, 2025) (“The Misdemeanor Prostitution Pre-Trial Intervention Program offers services to individuals charged with prostitution.”).

¹⁵⁰ See, e.g., *Announcement of New York’s Human Trafficking Intervention Initiative*, *supra* note 147 (“All cases involving prostitution-related offenses will be identified at arraignment and, if not resolved there, be transferred to the local Human Trafficking Intervention Court.”); Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEXAS L. REV. 915, 973-74 (2017) (explaining that defendants with prostitution and prostitution-related charges are not required to present evidence of trafficking victimization in New York City’s human trafficking intervention courts); *Human Trafficking Diversion Program*, *supra* note 146 (explaining that defendants

diversion courts cover sex trafficking victims charged with prostitution offenses.

Although avoiding the imposition of carceral sentences and criminal dispositions—as human trafficking and prostitution courts often do—is in line with the goal of the non-punishment principle, these diversion mechanisms only serve a narrow subset of trafficking victims: mainly sex trafficking victims facing low-level prostitution charges. Furthermore, some human trafficking and prostitution courts do occasionally employ incarceration.¹⁵¹ They have also been criticized as “net-widening,” coercive, paternalistic, and misguided in their practice of connecting social services with the criminal legal system.¹⁵² Despite these issues, at least some defendants view the services they received through diversion to these courts as beneficial.¹⁵³

Like immunity and affirmative defense statutes, nexus requirements can restrict eligibility for trafficking victimization-based diversion. For example, the Ohio Supreme Court in 2018 held that a diversion statute did not apply to a juvenile trafficking victim because, according to the majority, the charged offenses were not sufficiently “related to” her victimization.¹⁵⁴ The defendant in this case, Alexis Martin, was fifteen years old when she and three adults planned to rob her trafficker, Angelo Kerney, at his home.¹⁵⁵ Kerney had been trafficking Martin for exotic dancing, drug dealing, and assisting him with trafficking other girls for sex.¹⁵⁶ On the day of the planned robbery, Martin and one of the adults distracted Kerney and another man at Kerney’s house

are given the information and the opportunity to participate in the Human Trafficking Diversion Program during their first court appearance following a prostitution arrest and summons).

¹⁵¹ See, e.g., Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1336, 1357-60, 1375-76 (2016) (describing two cases in which a Human Trafficking Intervention Court judge remanded defendants to jail—one because of a missed court date and another prostitution arrest, and the other to prevent her from returning to her abusive ex-boyfriend while she awaited a residential drug treatment program placement).

¹⁵² *Id.* at 1336-38, 1381, 1393-95, 1402; Cohen, *supra* note 150, at 980-81, 986; Yale Glob. Health Just. P’ship, *Diversion from Justice: A Rights-Based Analysis of Local “Prostitution Diversion Programs” and Their Impacts on People in the Sex Sector in the United States* 18-20, 46-49, 60 (Sep. 2018) (unpublished working paper) [hereinafter *Diversion from Justice*], https://law.yale.edu/sites/default/files/area/center/ghjp/documents/diversion_from_justice_pdp_report_ghjp_2018rev.pdf [<https://perma.cc/49WQ-WDH5>].

¹⁵³ Gruber, Cohen & Mogulescu, *supra* note 151, at 1381, 1393; Yale Glob. Health Just. P’ship, *supra* note 152, at 19, 45, 48-49, 57-58; YALE GLOB. HEALTH JUST. P’SHP, UN-MEETABLE PROMISES: RHETORIC AND REALITY IN NEW YORK CITY’S HUMAN TRAFFICKING INTERVENTION COURTS 61-62 (2018), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/un-meetable_promises_htic_report_ghjp_2018rev.pdf [<https://perma.cc/8JWD-V8W5>].

¹⁵⁴ *State v. Martin*, 116 N.E.3d 127, 134 (Ohio 2018).

¹⁵⁵ *Id.* at 128-129.

¹⁵⁶ *Id.* at 129.

with dancing and sex.¹⁵⁷ The other two adults entered the home and shot the men in the head, killing Kerney and seriously injuring the other man.¹⁵⁸ Martin and the adults then cleaned the scene before leaving the house.¹⁵⁹ Martin was charged with aggravated murder, attempted murder, felonious assault, aggravated robbery, aggravated burglary, and evidence tampering.¹⁶⁰

The statute at issue in this case requires the court in a juvenile delinquency proceeding to appoint a guardian ad litem for the child when the court “has reason to believe that . . . [t]he child is a victim” of human trafficking and “the act charged in the complaint is related to the child’s victimization.”¹⁶¹ It grants the court discretion to hold a hearing on whether to hold the complaint in abeyance pending the child’s completion of court-approved diversion actions, including trauma-based behavioral health treatment or educational activities.¹⁶²

The Ohio Supreme Court rejected Martin’s claim that the juvenile court had committed plain error in failing to appoint a guardian ad litem for her and failing to exercise discretion regarding whether to divert her from the juvenile court system pursuant to the statute.¹⁶³ The court did so based on its conclusion that Martin’s offenses were not “related to” her trafficking victimization.¹⁶⁴ Since the Ohio legislature does not define “related to,” the court employed the dictionary definition of “related” to guide its analysis: “connected by reason of an established or discoverable relation.”¹⁶⁵ The court then suggested limited circumstances that would meet this definition and emphasized that none existed in Martin’s case: “There is no evidence that Martin was compelled or coerced into committing the offenses[,]” that she “committed similar offenses against others at the behest of Kerney” or the other man, that she “planned the offenses to free herself from Kerney[,]” or that she “was trafficked by any of

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ OHIO REV. CODE ANN. § 2152.021(F)(1)–(2) (West 2025).

¹⁶² *Id.* § 2152.021(F)(1), (4).

¹⁶³ *Martin*, 116 N.E.3d at 133–34.

¹⁶⁴ *Id.* at 134.

¹⁶⁵ *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1916 (2002)).

her accomplices.”¹⁶⁶ Consequently, the court upheld her sentence of twenty-one years to life.¹⁶⁷

The dissent defined “related to” similarly but interpreted it more broadly.¹⁶⁸ It asserted that Martin satisfied this nexus requirement because the intended victim of her criminal conduct was the person who was trafficking her at that time.¹⁶⁹ Furthermore, the dissent pointed out that the robbery was related to Martin’s victimization because she collected money from Kerney’s other victims at his direction, and as a result, Martin knew that there would be money in Kerney’s house when she participated in the robbery planning.¹⁷⁰ In the dissent’s view, the crimes were clearly “related to” Martin’s victimization and the juvenile court committed plain error when it failed to appoint a guardian ad litem to present recommendations about which dispositional action would be in Martin’s best interest, such as diversion to treatment instead of criminal punishment.¹⁷¹

3. Vacatur, Expungement, and Sealing Laws

Criminal records relief for trafficking victims in the form of vacatur, expungement, and sealing laws is widely recognized as an important part of implementing the non-punishment principle.¹⁷² Although often applied after

¹⁶⁶ *Id.* By referring to the three adults as “her accomplices,” the court classifies Martin, the one juvenile involved, as the principal. In April 2020, Ohio Governor Mike DeWine commuted her sentence and she was released from prison. Jessica Contrera, *Alexis Martin, Sex Trafficking Survivor and Activist, Is Back in Prison*, WASH. POST (Apr. 6, 2022), <https://www.washingtonpost.com/dc-md-va/2022/04/06/alexis-martin-prison-sex-trafficking-kardashian> [<https://perma.cc/3VEZ-9MAS>]. In 2022, however, Martin’s original sentence was reinstated after a parole violation, when officers found cocaine, marijuana, and two firearms in her apartment—items Martin claims belonged to her newly moved-in boyfriend and of which she was unaware. *Id.*

¹⁶⁷ *Martin*, 116 N.E.3d at 130.

¹⁶⁸ *Id.* at 137.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 137-38.

¹⁷¹ *Id.*

¹⁷² See Mullally, *supra* note 19, at ¶¶ 49-50, 65 (noting that the burden of vacating a guilty plea or initiating a judicial review rests with the state, not with the trafficking victim, since the state is obligated “to ensure the effective application of the non-punishment principle”); OSCE RECOMMENDATIONS, *supra* note 35, at 28-29 (“Where it is concluded that a person has been trafficked, their criminal file should be cleared so that that person has no criminal record with regard to offences committed in the course, or as a result, of having been trafficked.”); 2022 U.N. Conference Guidance, *supra* note 31, at ¶ 12; THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 4, 6 (“States should extend the non-punishment principle to enable criminal records to be vacated or expunged for individuals who were convicted of crimes committed as a direct result of trafficking.”); Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶ 35 (explaining that the due diligence principle obliges states to provide a mechanism to overturn a trafficking victim’s conviction when the non-punishment principle should have been applied at an earlier stage); Axam, *supra* note 53, at 5 (noting that at least

the imposition of criminal punishment, these laws can mitigate the serious collateral consequences of a criminal record for trafficking victims.¹⁷³ Vacatur laws permit trafficking survivors to petition a court to vacate their convictions related to their victimization, which erases these convictions from their record.¹⁷⁴ Criminal law scholar Jenny Roberts observes that “[t]here is no one definition of sealing or expungement” but explains that they are generally mechanisms to “limit public access to and use of specified types of records” and are usually achieved through court order.¹⁷⁵ An expungement or sealing order can apply to convictions, prosecutions, and arrests and cover records maintained by courts, law enforcement agencies, and other institutions.¹⁷⁶ Trafficking victimization-based expungement, sealing, and vacatur laws provide an important means for many survivors to avoid the negative effects of a criminal record upon their ability to fully participate in political, economic, and social life.¹⁷⁷

Like trafficking victimization-based immunity, affirmative defenses, and diversion, however, state statutes providing for criminal records relief for trafficking victims typically contain strict limits related to age, offense type, and the nexus between the crime and the victimization that operate to exclude many victims from eligibility.¹⁷⁸ Only three states permit relief for any type of crime when committed at any age,¹⁷⁹ and one additional state does so for crimes committed by juvenile victims.¹⁸⁰ On the other end of the spectrum,

thirty-two U.S. jurisdictions provide vacatur or expungement remedies for trafficking victims and that the absence of these remedies increases the risk of re-victimization).

¹⁷³ See Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 319, 319 n.21, 320 (2019) (observing that the collateral consequences of a criminal record include the loss of housing, voting, employment, financial, and parental rights and “collectively amount to a form of civil death” (internal quotation marks omitted)); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 327–30 (2015) (noting that the widespread impact of collateral consequences is compounded by technological advances that make criminal records easily accessible through publicly available online databases).

¹⁷⁴ Patricia C. Rodda & Heather Smith-Cannoy, *The Human Rights of Sex Trafficking Survivors: Trends and Challenges in American Vacatur Laws*, 14 SOCIETIES 1, 1 (2024).

¹⁷⁵ Roberts, *supra* note 173, at 323–24.

¹⁷⁶ *Id.* at 324.

¹⁷⁷ See *supra* notes 99, 173, and accompanying text.

¹⁷⁸ See Figures 5–6.

¹⁷⁹ NEB. REV. STAT. § 29-3005(3)(a)–(b) (2025); NEB. REV. STAT. § 29-3523(4) (2025); N.Y. CRIM. PROC. LAW. § 440.10(1)(i) (McKinney 2025); WYO. STAT. ANN. § 6-2-708 (2025). At the time of this writing, Maine’s sex trafficking victimization-based criminal records relief bill, which was passed by the Maine legislature in June 2025, is being held by the governor. An Act to Permit Sealing Criminal History Record Information of Victims of Sex Trafficking or Sexual Exploitation, L.D. 1871, 132d Leg., 1st Spec. Sess. (Me. 2025). If the governor does not veto the bill at the beginning of the next legislative session, it will become law and enable the sealing of criminal history record information for any offense committed as “a substantial result of sex trafficking or sexual exploitation.” *Id.* § 8.

¹⁸⁰ S.D. CODIFIED LAWS § 26-7A-115.1 (2025).

three states lack trafficking victimization-based criminal records relief laws and twelve states limit relief to just prostitution and prostitution-related offenses.¹⁸¹ The remainder fall somewhere in between.¹⁸²

At times, trafficking survivors have attempted to challenge limits on the types of offenses eligible for criminal records relief. For example, in 2018, M.G. argued that records related to her nolle prossed kidnapping charge should be eligible for trafficking victimization-based expunction.¹⁸³ Her trafficker, Alexander Valdes, had forced her to persuade a woman he had just met, K.D., to work for him as a prostitute as well.¹⁸⁴ M.G. had complied with his demand because he had previously beaten her when she had broken any of his “rules”—which included prohibitions on looking other men in the eye, keeping any of her earnings from forced prostitution, and failing to make at least \$1,000 per day from clients.¹⁸⁵ Valdes had also regularly forced M.G. to take drugs to more easily control her.¹⁸⁶ After about a month of engaging in prostitution for Valdes, K.D. escaped and told her father that Valdes and M.G. had kidnapped and trafficked her for sex.¹⁸⁷ Pursuant to a plea agreement, M.G. pleaded guilty to sex trafficking and related charges, agreed

181 The three states without any trafficking victimization-based criminal records relief statutes are Alaska, Iowa, and Minnesota. It should be noted that Minnesota has a general expungement statute with a provision specifying that if a court deciding an expungement petition determines that there exists a nexus between the criminal record and the petitioner’s status as a crime victim, and it grants the petition, then the effect of the court order must be “to restore the person, in the contemplation of the law, to the status the person occupied before the arrest, indictment, or information.” MINN. STAT. § 609A.03(6a) (2025). Arizona, Arkansas, Hawai’i, Illinois, Kansas, Louisiana, Michigan, Missouri, Oklahoma, Oregon, Rhode Island, and West Virginia limit relief to prostitution and prostitution-related offenses. ARIZ. REV. STAT. ANN. § 13-909(A) (2025) (sex trafficking victims only); ARK. CODE ANN. § 16-90-1412(c)(1) (2025); HAW. REV. STAT. § 712-1209.6 (2025); 725 ILL. COMP. STAT. 5/116-2.1(a) (2025); KAN. STAT. ANN. 12-4516(c)(2) (2025) (using the term, “coercion,” instead of “trafficking,” but the preamble of the bill enacting this provision explicitly refers to “human trafficking” (citing S. Substitute for H.B. 2034, 2013-2014 Leg. Sess. (Kan. 2013))); LA. CHILD. CODE ANN. art. 923 (2025) (juvenile convictions only); MICH. COMP. LAWS § 780.621(3) (2025); MO. REV. STAT. § 610.131(1) (2025) (juvenile convictions only); OKLA. STAT. tit., 22 § 19c (2025); OR. REV. STAT. § 137.221 (2025) (sex trafficking victims); 11 R.I. GEN. LAWS § 11-67.1-17 (2025); W. VA. CODE ANN. § 61-14-9 (2025). Hawai’i expanded eligibility for vacatur of prostitution convictions from trafficking victims to any persons in 2019 because “sex trafficking victims are often misidentified and criminalized by law enforcement . . . [, and] may face significant challenges in disclosing and proving victimization.” HAW. CONF. COMM. REP. NO. 30-53, A BILL FOR AN ACT RELATING TO PROSTITUTION (2019). Hawai’i’s statute is included in the data because it is specifically aimed at trafficking victims, despite the removal of references to trafficking from the statutory text.

182 See Figure 5.

183 M.G. v. State, 260 So. 3d 1094, 1094-95, 1098-99 (Fla. Dist. Ct. App. 2018).

184 *Id.* at 1096.

185 *Id.*

186 *Id.*

187 *Id.*

to testify against Valdes, and the State nolle prossed her kidnapping charge.¹⁸⁸ After M.G.'s felony record prevented her from enrolling in culinary school, she petitioned for trafficking victimization-based expungement.¹⁸⁹ However, the trial court denied her petition with respect to her kidnapping charge and the appeals court affirmed the denial because Florida's trafficking victimization-based expunction statute explicitly excludes kidnapping from eligibility for relief.¹⁹⁰

Similarly, a New York court denied a sex trafficking survivor's motion to vacate her disorderly conduct conviction in 2019 because, at the time, New York's statute only applied to convictions following from prostitution-based arresting charges, and the disorderly conduct conviction stemmed from third-degree assault and second-degree harassment charges.¹⁹¹ In denying the petition, the court lamented the fact that it was constrained by the "limiting statutory language which deprives identified victims of sex trafficking of the relief they deserve."¹⁹² But unlike Florida, New York later amended its statute to address this issue—making vacatur available for any conviction "where the defendant's participation in the offense was a result of having been a victim of sex [or labor] trafficking."¹⁹³

It is encouraging that only four states have adopted the demanding duress-based nexus requirement for one or more offenses,¹⁹⁴ which is significantly fewer than the fourteen states that have done so for immunity and affirmative defenses based on trafficking victimization.¹⁹⁵ However, fifteen jurisdictions taking the causation-based approach to the nexus required for trafficking survivors to obtain vacatur, expungement, or sealing narrow eligibility by requiring that the causal link be "direct."¹⁹⁶ A few states

¹⁸⁸ *Id.* at 1095.

¹⁸⁹ *Id.* at 1096.

¹⁹⁰ *Id.* at 1097-99.

¹⁹¹ *People v. P.V.*, 100 N.Y.S. 496, 502-06 (N.Y. Crim. Ct. 2019).

¹⁹² *Id.* at 505.

¹⁹³ N.Y. CRIM. PROC. LAW. § 440.10(1)(i) (McKinney 2025).

¹⁹⁴ IDAHO CODE § 67-3014(1)-(2), (10) (2025); IND. CODE § 35-38-10-2 (2025); N.M. STAT. ANN. § 30-52-1.2 (2025); N.C. GEN. STAT. § 15A-145.9(b) (2025).

¹⁹⁵ *See supra* note 135.

¹⁹⁶ ARIZ. REV. STAT. ANN. § 13-909(A) (2025); CAL. PENAL CODE § 236.14 (West 2025); COLO. REV. STAT. § 24-72-707(1.5) (2025); DEL. CODE ANN. tit. 11, § 787(j) (2025); D.C. CODE § 22-1844(a)-(b) (2025); GA. CODE ANN. § 17-10-21(a)(1) (2025); KY. REV. STAT. ANN. § 529.160(1) (West 2025); MD. CODE ANN., CRIM. PROC. § 8-302(b) (West 2025); MICH. COMP. LAWS § 780.621(3) (2025); MONT. CODE ANN. § 46-18-608(1) (2025); N.D. CENT. CODE § 12.1-41-14(1) (2025); N.H. REV. STAT. ANN. § 633:7(VIII) (2025); 18 PA. CONS. STAT. ANN. § 3019(d)(1) (2025); 11 R.I. GEN. LAWS § 11-67.1-17(a) (2025); W. VA. CODE § 61-14-9(a) (2025). Similarly, Maine's bill requires the causal link be "substantial." An Act to Permit Sealing Criminal History Record Information of Victims of Sex Trafficking or Sexual Exploitation, L.D. 1871, 132d Leg., 1st Spec. Sess. (Me. 2025). N.C. GEN. STAT. § 15A-145.9(b) is not included in the "direct" causation-based category because the narrower "coerced or deceived into committing the offense" language

require victims to prove an implicit causal connection between the crime and their victimization, such that they committed the crime during the course of being trafficked¹⁹⁷ or that the crime is interrelated to trafficking.¹⁹⁸

Some jurisdictions' statutes contain additional requirements that can delay criminal records relief or deny certain criminalized trafficking survivors the ability to access it altogether. For example, a few states require survivors to seek relief within a certain time frame after a conviction.¹⁹⁹ Conversely, others require a particular amount of time to have passed before survivors are eligible to apply.²⁰⁰ In five states, only survivors who are no longer in their trafficking situations or who have sought trafficking victim services are eligible for criminal records relief.²⁰¹ And uniquely, in order to be eligible for relief in Texas, survivors must have cooperated with authorities' requests for assistance with the investigation or prosecution of their trafficker or have only

subsumes the former category. *See supra* note 129 for an explanation of this Article's approach to categorizing multiple-nexus statutes.

¹⁹⁷ CONN. GEN. STAT. § 54-95c(d) (2025) (using this nexus for prostitution misdemeanors but requiring an explicit causal link in subsection (a) for other crimes); FLA. STAT. § 943.0583(3) (2025) (requiring that the "offense was committed or reported to have been committed as part of the human trafficking scheme of which the person was a victim or at the direction of an operator of the scheme" as well); OR. REV. STAT. § 137.221(4) (West 2025) (sex trafficking victims only).

¹⁹⁸ S.C. CODE ANN. § 16-3-2020(F) (2025).

¹⁹⁹ IDAHO CODE § 67-3014(4) (2025) (requiring parties to file "within a reasonable time" and applying to any conviction that is the subject of the action except for a petition to expunge an arrest that did not result in a prosecution); MD. CODE ANN., CRIM. PROC. § 8-302(c)(2) (West 2025) (requiring parties to file "within a reasonable period of time after the conviction"); N.D. CENT. CODE § 29-32.1-01(2) (2025) (setting forth procedure for N.D. CENT. CODE § 12.1-41-14 and requiring that an application for relief be filed within two years of the date the conviction becomes final).

²⁰⁰ HAW. REV. STAT. § 712-1209.6(1) (2025) (requiring petitioners to not have had any subsequent convictions under the Hawai'i Penal Code within three years after the date of the original conviction and requiring the court to hold a hearing on a motion filed under this section to review the petitioner's record "over the three years after the date of the original conviction"); IDAHO CODE § 67-3014(4) (2025) (applying a two-year waiting period for a petition to expunge an arrest that did not result in prosecution); KY. REV. STAT. ANN. § 529.160(2) (West 2025) (requiring petitioners to wait sixty days following the date the final judgment was entered before filing); OR. REV. STAT. § 137.221(2)(a) (2025) (requiring petitioners to wait twenty-one days after the judgment of conviction is entered to file the motion and applying to sex trafficking victims but not applying to victims of other types of human trafficking); 11 R.I. GEN. LAWS § 11-67.1-17(c) (2025) (specifying that motions filed under the section and relief granted shall be conducted in accordance with the provisions of chapter 1.3 of title 12, which, under 12 R.I. GEN. LAWS § 12-1.3-2 provides that "a person may file a motion for the expungement of records relating to a misdemeanor conviction after five (5) years from the date of the completion of his or her sentence[; and] . . . a person may file a motion for the expungement of records relating to a felony conviction after ten years from the date of the completion of his or her sentence"); TENN. CODE ANN. § 40-32-105(b)(1) (2025) (requiring petitioners to wait to file until at least one year has elapsed since the completion of the sentence imposed for the petitioner's most recent criminal offense).

²⁰¹ CAL. PENAL CODE § 236.14(l) (West 2025); FLA. STAT. § 943.0583(4) (2025); 725 ILL. COMP. STAT. § 5/116-2.1(a) (2025); MONT. CODE ANN. § 46-18-608(2)(a) (2025); NEV. REV. STAT. § 62E.275(3)(c) (2025).

failed to cooperate due to their age or a mental or physical disability resulting from their trafficking victimization.²⁰² This requirement is likely to be highly restrictive for two reasons. First, the statutory exception to the assistance requirement fails to cover survivors who cannot comply with authorities' requests due to their mental or physical disability that did not result from their trafficking victimization, such as congenital disability or mental illness unrelated to trafficking. Second, it does not account for the many other reasons why survivors may not wish to cooperate with law enforcement and prosecutors, including dissatisfaction with the criminal legal system, distrust of criminal legal actors based on prior experiences or stories they have heard from others, financial dependency upon their trafficker, and a desire to avoid recounting distressing and sensitive details about their victimization to strangers and potentially in open court.²⁰³

²⁰² TEX. GOV'T CODE ANN. § 411.0728(a)(2) (West 2025).

²⁰³ Wechsler, *supra* note 16, at 534-36, 538, 559.

Figure 5.

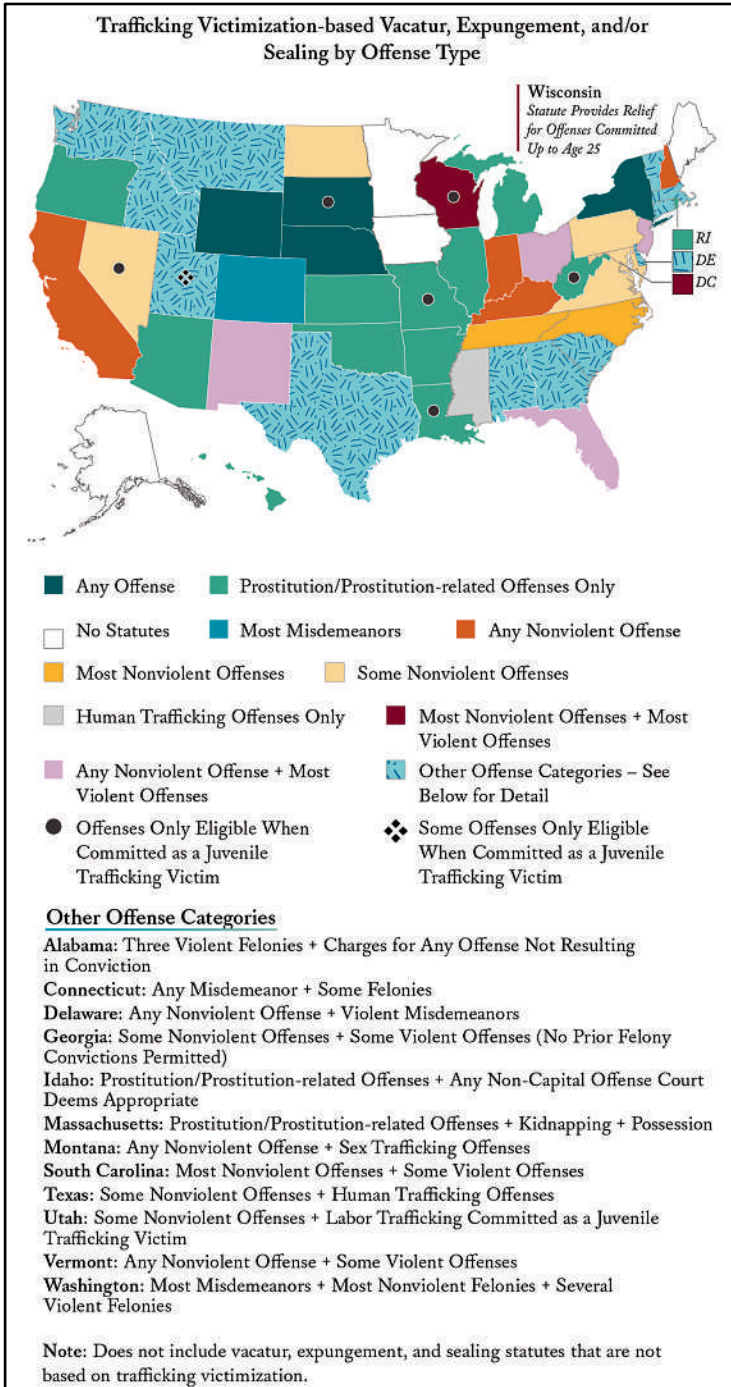
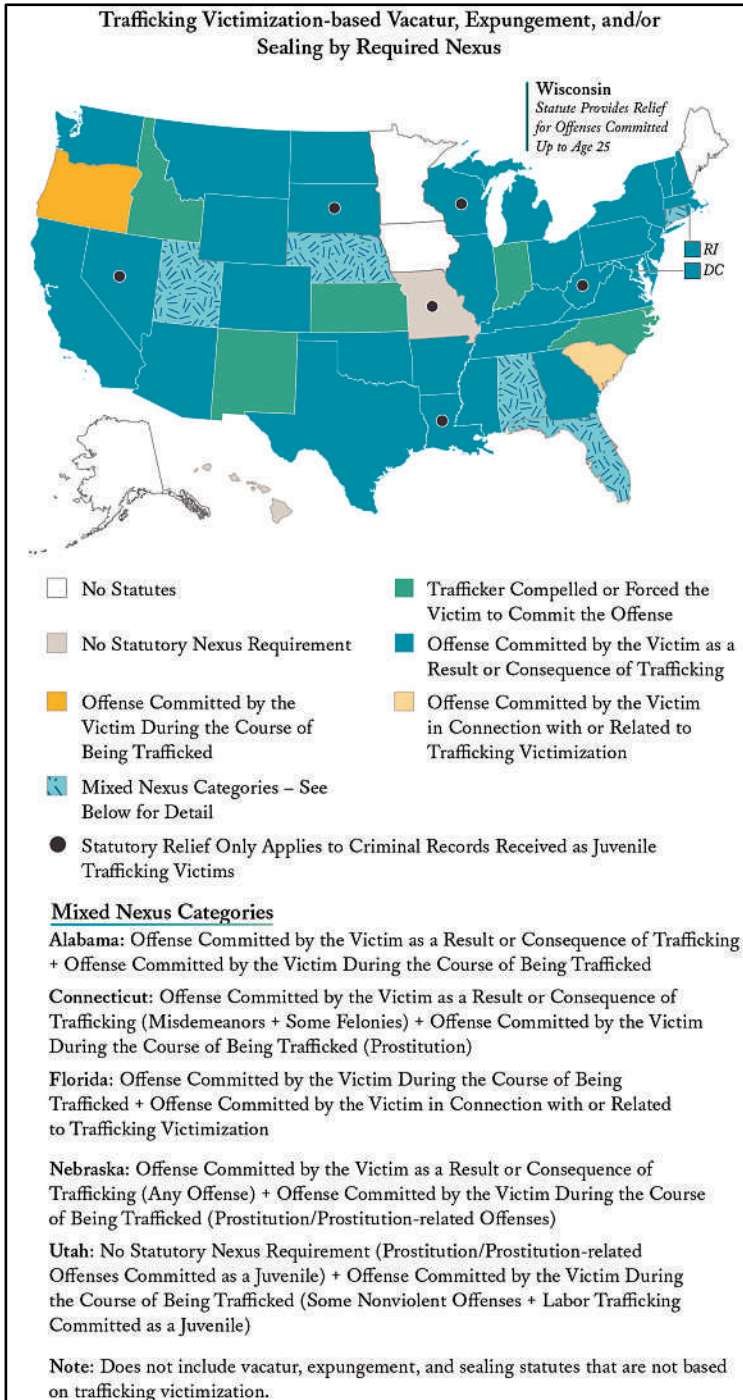


Figure 6.



B. Federal Law

There is no federal immunity or affirmative defense statute based on trafficking victimization, no federal human trafficking diversion statute or court, and no federal vacatur, expungement, or sealing law for trafficking victims with criminal records—yet. But on December 1, 2025, the Trafficking Survivors Relief Act (TSRA) passed by voice vote in the House of Representatives and, as of this writing, is pending in the Senate.²⁰⁴ This bipartisan bill has the potential to significantly increase the realization of the non-punishment principle on the federal level. Originally introduced in 2022 but never making it out of committee,²⁰⁵ this bill would establish key non-punishment mechanisms already available in most states—trafficking victimization-based vacatur, expungement, and an affirmative defense.²⁰⁶ But also like most states, the TSRA would make these non-punishment protections available to only a subset of trafficking victim–defendants.

First, the TSRA would limit vacatur eligibility to convictions for nonviolent offenses that were “committed as a direct result of” the survivor’s trafficking victimization.²⁰⁷ Second, it would exclude violent offenses from eligibility for arrest record expungement unless the survivor had been acquitted, the government had dropped the charges, or the charges had been reduced to nonviolent offense(s) and the reduced charges had been dropped or any conviction resulting from them had been vacated.²⁰⁸ Furthermore, even if these requirements are met, arrests for violent crimes against juveniles are not eligible for expungement.²⁰⁹ The survivor seeking expungement would also need to prove by a preponderance of the evidence that the alleged conduct resulting in the arrest was “directly related” to her trafficking victimization.²¹⁰ Third, it would prohibit a victim–defendant from raising a “human trafficking defense” in a prosecution for a violent offense against a juvenile.²¹¹ Thus, if a trafficking victim–defendant used force or threats of

²⁰⁴ Trafficking Survivors Relief Act, H.R. 4323, 119th Cong. (2025); 171 CONG. REC. H4923 (daily ed. Dec. 1, 2025).

²⁰⁵ Trafficking Survivors Relief Act of 2022, H.R. 8672, 117th Cong. (2022).

²⁰⁶ Trafficking Survivors Relief Act, H.R. 4323.

²⁰⁷ *Id.* § 2 (limiting eligibility for vacatur to convictions for level A offenses, which are defined as “[f]ederal offense[s] that [are] not . . . violent crime[s]”).

²⁰⁸ *Id.* (permitting expungement of arrest records for level A and level B offenses if certain conditions are met).

²⁰⁹ *Id.* (defining a level B offense as “a [f]ederal offense that is a violent crime; and . . . does not include a [f]ederal offense that is a violent crime of which a child was a victim”).

²¹⁰ *Id.*

²¹¹ *Id.* § 6 (“In a prosecution for a covered Federal offense [(a level A or level B offense)], a defendant who establishes by clear and convincing evidence that the defendant was a victim of trafficking at the time at which the defendant committed the offense shall create a rebuttable presumption that the offense was induced by duress.”).

force to traffic a juvenile for sex because she knew that her trafficker would seriously harm her or her family if she refused his demands, she would presumably be barred from raising the “human trafficking defense” under the TSRA. Despite these limitations, however, enacting the TSRA would meaningfully improve the non-punishment principle’s implementation for trafficking survivors facing federal prosecutions and for those with federal criminal records.

But even if the TSRA is not enacted, the non-punishment principle still has a presence at the federal level. First, as discussed in Part I, the federal government recognizes the legitimacy of the non-punishment principle but interprets it narrowly.²¹² The Department of Justice and the State Department only view the principle as protecting trafficking victims from “inappropriate” punishment for offenses they commit as a direct result of their trafficking victimization.²¹³ This approach is based on the federal Trafficking Victims Protection Act of 2000’s finding that “[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.”²¹⁴

Second, the non-punishment principle is clearly reflected in federal statutes requiring Department of Justice and Department of Homeland Security law enforcement training to explain that:

[V]ictims of sex or labor trafficking often engage in criminal acts as a direct result of severe trafficking in persons and such individuals are victims of a crime and affirmative measures should be taken to avoid arresting, charging, or prosecuting such individuals for any offense that is a direct result of their victimization.²¹⁵

This broad formulation of the non-punishment principle aligns with interpretations of the principle advanced by intergovernmental organizations

²¹² See *supra* Section I.A.

²¹³ Dep’t of State, Protecting Victims of Trafficking, *supra* note 19, at 1; Axam, *supra* note 53, at 2-4.

²¹⁴ Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(19).

²¹⁵ Abolish Human Trafficking Act of 2017, 6 U.S.C. § 645 (requiring a directive including instructions on the non-punishment principle as stated above to be issued to DHS officers and other DHS personnel who may be involved in human trafficking investigations); Trafficking Victims Protection Act of 2017, 34 U.S.C. § 20713(b)(1) (requiring the development of an advanced training curriculum for DOJ and DHS investigative personnel explaining the non-punishment principle as stated above (but with different punctuation)); Combat Human Trafficking Act of 2015, 34 U.S.C. § 20709(c)(1)(A) (requiring the inclusion of technical training on the non-punishment principle, as stated above (but employing different punctuation and formatting), in every DOJ anti-human trafficking program, including every anti-human trafficking training program for federal, state, or local law enforcement officers).

to the extent that it applies to “criminal acts” generally and criminal legal actions that occur prior to the imposition of post-conviction punishment.²¹⁶ However, upon signing the legislation during his first term, President Donald Trump issued a statement specifying that his administration will interpret this non-punishment provision “consistent with the prosecutorial discretion of the executive branch and the President’s constitutional responsibility to faithfully execute the laws of the United States.”²¹⁷ This qualification undoubtedly limits the non-punishment provision’s application in practice and does not bode well for trafficking victims who commit offenses as a direct result of their victimization during President Trump’s second term.²¹⁸

III. BEYOND THE BINARY: RESTORATIVE JUSTICE FOR HUMAN TRAFFICKING VICTIM–DEFENDANTS

As Part II demonstrates, there are considerable limits on the non-punishment principle within state and federal law. Consequently, many human trafficking victim–defendants are currently excluded from the principle’s reach. To significantly improve U.S. compliance with the non-punishment principle, I propose offering restorative justice to trafficking victim–defendants as an alternative to the criminal legal process and punishment. Restorative justice provides a non-punitive means of addressing both the harms experienced by trafficking victim–defendants and by victims of their offenses. Moreover, it is particularly well-suited for appreciating the complex dynamics involved in human trafficking situations and the victim–offender overlap.

Part III first delves into the debate concerning whether restorative justice should be considered punishment, arguing that it should not be. It then discusses the promise of restorative justice for situations involving trafficking victims who have harmed others through criminal conduct. Lastly, it explores potential challenges that may arise in conducting restorative justice with human trafficking victim–defendants and other criminalized survivors.

²¹⁶ See OHCHR Recommended Principles, *supra* note 34, at add. ¶ 7; OSCE RECOMMENDATIONS, *supra* note 35, at 23, 31-32; 2022 U.N. Conference Guidance, *supra* note 31, at ¶¶ 11, 16; THE INTER-AGENCY COORDINATION GROUP AGAINST TRAFFICKING IN PERSONS, *supra* note 19, at 3-4; Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶¶ 16, 33-36, 38, 41; MCADAM, *supra* note 35, at 16, 120, 122.

²¹⁷ Statement on Signing the Abolish Human Trafficking Act of 2017, 2018 DAILY COMP. PRES. DOC. 863 (Dec. 21, 2018); Statement on Signing the Trafficking Victims Protection Act of 2017, 2018 DAILY COMP. PRES. DOC. 864 (Dec. 21, 2018).

²¹⁸ *Id.*

A. Restorative Justice as Non-Punishment?

Although its precise definition is contested, restorative justice is generally understood as a mechanism that brings together stakeholders in a specific offense or set of related offenses—victims, offenders, their “support people,” and community members—to collaboratively recognize, understand, and identify ways to repair harm.²¹⁹ While restorative justice processes can assume different forms,²²⁰ they are all animated by a set of core principles and values. Among these are the importance of understanding the harms involved and their causes, focusing on the needs of those who experienced harm, recognizing repair obligations of those who caused harm, utilizing inclusive, collaborative processes, promoting accountability, healing, and reintegration, and ensuring respect of all individuals involved in the restorative justice process.²²¹

Many legal scholars, criminologists, restorative justice practitioners, and members of the public view restorative justice as an alternative to punishment

²¹⁹ See ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, at 47-48 (“Restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offense or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible.”); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743-44 (1999) (“Restorative justice is a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime.”); SERED, *supra* note 14, at 135-40 (asserting that “restorative justice’s primary concern [is] with harm rather than with broken rules” and explaining that most restorative justice approaches involve “a dialogue process . . . that includes the responsible party, the harmed party, and support people”). A trained facilitator typically guides the process and engages in extensive preparation with stakeholders separately, prior to bringing them together for a dialogue process (often referred to as a “circle” process). *Id.* at 135-36; Miriam Krinsky & Taylor Phares, *Accountability and Repair: The Prosecutor’s Case for Restorative Justice*, 64 N.Y.L. SCH. L. REV. 31, 38, 41 (2020).

²²⁰ ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, 55-66 (noting the diversity of existing restorative justice models, observing that models are often blended in practice, and explaining the key aspects of “victim offender conferences, family group conferences, and circles processes”); Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 268-70 (2005) (discussing four types of restorative justice dialogue processes); SUJATHA BALIGA, SIA HENRY & GEORGIA VALENTINE, IMPACT JUST., RESTORATIVE COMMUNITY CONFERCING: A STUDY OF COMMUNITY WORKS WEST’S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 3 (2017), https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf [<https://perma.cc/V8VD-DNT2>] (explaining that there are a variety of restorative justice models and programs, including Restorative Community Conferencing, “victim-offender dialogues, circles of support and accountability, and peacemaking circles”).

²²¹ ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, at 28-52; Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, in RESTORATIVE JUSTICE 73, 77-81 (Declan Roche ed., 2004); Menkel-Meadow, *supra* note 24, at 164.

rather than as a type of punishment.²²² However, others disagree.²²³ There are also more incremental positions. For example, leading restorative justice scholars John Braithwaite and Howard Zehr do not draw a bright line between restorative justice and punishment, but argue that punishment should be strictly limited within a restorative approach.²²⁴ Criminal legal scholar

²²² See, e.g., Bakhshay, *supra* note 25, at 1307 (“Restorative justice typically is seen as something other than a criminal punishment . . . [and] is often defined not just as a different process but as a different conception of justice, one at odds with the current criminal justice system and its fixation on incarceration and incapacitation.” (footnote omitted)); Lode Walgrave, *Restorative Justice, Punishment, and the Law*, in THE PALGRAVE HANDBOOK ON THE PHILOSOPHY OF PUNISHMENT 613, 623 (Matthew C. Altman ed., 2023) (arguing that restorative justice does not include punishment because obligations to repair harm do not intentionally inflict pain on the obligor and restoration is an end, whereas punishment is a means to express disapproval and potentially to enforce compliance, rather than an end); Paul McCold, *Toward a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model*, 3 CONTEMP. JUST. REV. 357, 372 (2000) (asserting that a purist model of restorative justice conceptualizes it as “an alternative to punishment, not an alternative punishment”); BALIGA, HENRY & VALENTINE, *supra* note 220, at 16 (“[T]he [Restorative Community Conferencing] process focuses on healing harms and repairing broken relationships as opposed to punishment.”); Thom Brooks, *Restorative Justice and Punitive Restoration*, in THE ETHICS OF POLICING AND IMPRISONMENT 129, 134 (Molly Gardner & Michael Weber eds., 2018) (asserting that “restorative justice is not ‘punishment’ where this is conceived of as some form of hard treatment” and characterizing restorative justice as a “non-punitive alternative”); Jennifer J. Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework 70-71* (1999) (prepared for the Law Commission of Canada) (contending that “punishment has no place in a restorative justice system” because punishment “causes intentional harm or suffering[,]” which is distinct from unintentional pain or suffering that may accompany restorative justice agreements to repair harm).

²²³ See, e.g., R.A. Duff, *Alternatives to Punishment—Or Alternative Punishments?*, in RETRIBUTIVISM AND ITS CRITICS 43, 48-51 (Wesley Cragg ed., 1992) (arguing that restorative justice is a form of punishment because it can be painful for an offender to have a discussion with the victims of his offense (often involving condemnation of the offense), reparative work can be burdensome, and the pain and burden are imposed on him because he committed the offense); Kathleen Daly, *Revisiting the Relationship Between Retributive and Restorative Justice*, in RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE 33, 39 (Heather Strang & John Braithwaite eds., 2000) (contending that punishment should be defined in an “inclusive” way, as “anything that is unpleasant, a burden, or an imposition of some sort on an offender[,]” and under this definition “it would be impossible to eliminate the idea of punishment from a restorative response to crime”); Richard Young & Carolyn Hoyle, *Restorative Justice and Punishment*, in THE USE OF PUNISHMENT 199, 223 (Seán McConville ed., 2003) (asserting that restorative justice is punishment because “it is the intentional and authoritative imposition of a burden (viewed objectively) on the offender as a response to the wrong represented by the breach of a criminal-law norm that qualifies a process as punitive” regardless of whether the burden is intended to be painful or whether it is experienced as painful); Bakhshay, *supra* note 25, at 1309-11 (arguing that restorative justice should be reframed as a form of punishment to increase its mainstream appeal and highlighting aspects of restorative justice that comport with “the dominant sociopsychological understanding of punishment”).

²²⁴ Braithwaite, *supra* note 219, at 1743 (“One value of restorative justice is that we should be reluctant to resort to punishment.”); HOWARD ZEHR, CHANGING LENSES: RESTORATIVE JUSTICE FOR OUR TIMES 210 (25th anniversary ed., 2015) (“Perhaps punishment cannot be eliminated entirely from a restorative approach, but it should not be normative, and its uses and purposes should be carefully prescribed.”).

Stephen Garvey also adopts a nuanced perspective.²²⁵ In his view, whether restorative justice is punishment depends upon the victim's intent in agreeing to actions the person who harmed her will take in an effort to repair the harm.²²⁶ If the actions are burdensome to the person who caused harm (PWCH)²²⁷ and the intent of the person harmed (PH) in agreeing to participate in restorative justice processes is to condemn the PWCH, then the burden constitutes punishment.²²⁸ But if the PH's intent is instead to provide a way for the PWCH to compensate her for material harm she suffered from the crime and/or for the PWCH to expiate his guilt or express repentance, Garvey classifies the restorative justice process as an alternative to punishment.²²⁹

Whether restorative justice constitutes punishment necessarily depends upon how punishment—a long-contested concept—is defined. Cultural anthropologist Christian Gade developed a useful framework featuring nine dimensions for capturing different conceptualizations of punishment.²³⁰ One dimension, for example, concerns whether treatment of an individual is intended to inflict pain or unpleasantness; for some definitions of punishment, this intent is required, but for others, the intent behind the treatment does not impact whether it constitutes punishment.²³¹ Another dimension captures whether experiencing treatment as painful is material to whether the treatment can be characterized as punishment.²³² Gade concludes that under some conceptualizations of punishment across the nine dimensions, restorative justice fulfills the necessary conditions of punishment, but under others, it does not.²³³

I take the view that restorative justice should not be characterized as punishment. I agree with scholars such as Lode Walgrave, Jennifer Llewellyn, and Robert Howse that punishment intentionally inflicts suffering upon an individual in response to wrongdoing.²³⁴ In my view, an aim of imposing punishment is to inflict pain and suffering upon the PWCH. Restorative

²²⁵ Stephen P. Garvey, *Alternatives to Punishment*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* 493, 509-13 (John Deigh & David Dolinko eds., 2011).

²²⁶ *Id.* at 511-13.

²²⁷ Restorative justice practitioners and scholars often employ the terms, "person who caused harm" (PWCH) and "person harmed" (PH), instead of "offender" and "victim," respectively. See, e.g., Alicia Virani, *The Co-Optation of Restorative Justice and Its Consequences for an Abolitionist Future*, 30 *WM. & MARY J. RACE, GENDER & SOC. JUST.* 101, 108 (2023).

²²⁸ Garvey, *supra* note 225, at 511-12.

²²⁹ *Id.*

²³⁰ Christian B.N. Gade, *Is Restorative Justice Punishment?*, 38 *CONFLICT RESOL. Q.* 127, 132-42 (2021).

²³¹ *Id.* at 141-42.

²³² *Id.* at 139.

²³³ *Id.* at 149-50.

²³⁴ See Walgrave, *supra* note 222, at 622-23; Llewellyn & Howse, *supra* note 222, at 70-71.

justice does not have this goal. Importantly, restorative justice “processes don’t allow agreements that are harmful or degrading to the responsible party.”²³⁵ This stands in sharp contrast to incarceration, a primary form of criminal punishment in the United States,²³⁶ which subjects individuals to harmful and degrading conditions.²³⁷ When restorative justice processes or commitments aimed at repair are emotionally painful for the PWCH, such as hearing about how the crime affected the life of the PH or giving part of a hard-earned paycheck to the PH as compensation for injuries, the other stakeholders are present to help the PWCH carry and ease his pain. Pain is not the point; while it is often part of the wide range of emotions that stakeholders experience during restorative justice processes, the intention is that working through it together will lead to healing and more positive emotions in the longer term.²³⁸ In this way, restorative justice is beneficial rather than harmful, despite at times involving painful emotions.

What are the implications of the punishment and restorative justice debate for the non-punishment principle? It depends on how the principle is defined. Under the narrow U.S. approach, the principle permits trafficking victims who commit unlawful acts as a direct result of their victimization to be punished for these acts as long as punishment is not “inappropriate.”²³⁹ Thus, even if restorative justice were considered punishment, its application would comply with the non-punishment principle in any case where punishment of a human trafficking victim who committed an offense is deemed appropriate.

Under the more capacious interpretation of the non-punishment principle advanced by the U.N. Office of the High Commissioner for Human Rights

²³⁵ SERED, *supra* note 14, at 116; *see also* Llewellyn & Howse, *supra* note 222, at 70 (“[T]he agreement in a restorative justice process must aim to restore the relationship[, and] . . . vengeance is not restorative This clearly means that punishment has no place in a restorative justice system.”).

²³⁶ JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 31 (9th ed. 2022) (“In the United States today, the word ‘punishment’ typically evokes the thought of imprisonment.”).

²³⁷ *See* Bakhshay, *supra* note 25, at 1272 (observing that “harsh and degrading treatment . . . [is] typical of the prison system”); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 *HARV. L. REV.* 515, 525 (2021) (“[P]risons are degrading spaces, where numbers replace names and humans live in barren cells.”); James Forman, Jr., *Why Care about Mass Incarceration?*, 108 *MICH. L. REV.* 993, 1008 (2010) (book review) (“[P]risoner advocates object to degrading practices by pointing out how they harm prisoners; conversely, prisons’ defenders say that prison is supposed to be tough.”).

²³⁸ *See* SERED, *supra* note 14, at 102, 106-08, 113, 252.

²³⁹ Dep’t of State, *Protecting Victims of Trafficking*, *supra* note 19, at 1; Axam, *supra* note 53, at 2-4.

and U.N. Special Rapporteurs,²⁴⁰ among others,²⁴¹ restorative justice fully complies with the non-punishment principle only if it is not considered punishment. But as a matter of *degree*, those who view restorative justice as a form of punishment would undoubtedly consider it more closely aligned with the spirit of the non-punishment principle than incarceration, which is far more punitive.

This Article contends that restorative justice should not be considered punishment and, as such, it comports with the non-punishment principle under both interpretations. Restorative justice is a non-punitive means of addressing harm resulting from crime and should be offered as an alternative to trafficking survivors who are ensnared in the criminal legal system. It is especially important that it be offered to those who are excluded from trafficking victimization-based immunity, affirmative defenses, and diversion opportunities due to statutory or discretionary limits related to the type of crime, its nexus to their victimization, their age, or another basis.²⁴² But it should also be offered to those who are eligible for relief under current non-punishment laws, since “legal proceedings can often be intensive, traumatic, and time-consuming” for defendants, victims, their loved ones, and their communities.²⁴³ Trafficking victim–defendants who are eligible for an affirmative defense, for example, may prefer participating in restorative justice over having to appear in court multiple times, present evidence of their trafficking victimization in open court, and experience the uncertainty of waiting to learn whether they have successfully met the burden of proof for the defense. These victim–defendants may also view restorative justice as a meaningful opportunity for healing, reintegration, and repairing their relationships with those they may have harmed—one that they wish to pursue, particularly when compared with the conventional criminal legal process.

B. *The Promise of Restorative Justice*

Restorative justice has a number of features that make it especially well-suited for addressing harms related to the victim–offender overlap in human

²⁴⁰ OHCHR Recommended Principles, *supra* note 34, at add. ¶ 7; Giammarinaro, *Importance of Implementing*, *supra* note 40, at ¶¶ 2, 16, 28–32, 41; Mullally, *supra* note 19, at ¶¶ 20, 32, 37, 57.

²⁴¹ See, e.g., OSCE RECOMMENDATIONS, *supra* note 35, at 23, 31–32 (asserting that the non-punishment principle should prevent trafficking victims from being punished for any offense sufficiently linked to their trafficking victimization); MCADAM, *supra* note 35, at 16, 120–23 (“The non-punishment principle applies to all victims on the basis of non-discrimination, and regardless of the type of trafficking they have been subject to, or the type of offence they have committed as a consequence of it.”).

²⁴² See *supra* subsections II.A.1–2.

²⁴³ BALIGA, HENRY & VALENTINE, *supra* note 220, at 2.

trafficking situations. One of these key features is its emphasis on the necessity of understanding the causes of harm.²⁴⁴ Importantly, this includes harm experienced by the person who committed the crime.²⁴⁵ The significant victim–offender overlap that criminological studies have revealed,²⁴⁶ which necessarily exists for trafficking victims who have committed crimes, underscores the particular importance of addressing the harms that victim–offenders have suffered and the role these harms played in the harm they ultimately caused to others. This is a meaningful advantage of restorative justice over the conventional criminal legal system, where there is often little examination of and significance accorded to harms suffered by the defendant. For Yvette, a restorative justice process would facilitate a deep understanding of the severe physical and psychological abuse and sexual exploitation she suffered at the hands of Red Nose, of which the jurors in her trial were never made aware.²⁴⁷ It would also promote understanding of the sexual abuse and instability she endured as a child.²⁴⁸ This context is essential to understanding why Yvette participated in the robbery of her friend and in Jade’s trafficking. It is also essential to discerning a path forward for healing and repairing the harms Yvette, the robbery victim, and Jade suffered.

Restorative justice does not limit its concern to the individual-level factors that led to the harm; it also facilitates appreciation of structural community- and society-level causes of crime.²⁴⁹ These can include factors such as poverty, unemployment, inadequate housing, racial discrimination, and a lack of access to mental healthcare.²⁵⁰ For example, Alexis Martin’s

²⁴⁴ ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, at 40–42; Menkel-Meadow, *supra* note 24, at 163–64.

²⁴⁵ ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, at 33, 41–42 (explaining that studies show that many individuals who engage in criminal conduct have experienced significant trauma and victimization themselves, and that it is necessary to understand and attend to these harms “[i]f we are to truly address harms and causes” of crime).

²⁴⁶ See *supra* notes 14 & 18.

²⁴⁷ Smith, Walters & Satija, *supra* note 1.

²⁴⁸ *Id.*

²⁴⁹ ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, at 40; SERED, *supra* note 14, at 119–20.

²⁵⁰ Getinet Ayano et al., *Risk and Protective Factors of Youth Crime: An Umbrella Review of Systematic Reviews and Meta-Analyses*, 113 CLINICAL PSYCH. REV. 1, 6 (2024) (finding statistically significant positive correlations between youth crime and eight social-level factors, including economic inequality, homelessness, and discrimination); Alison Evans Cuellar, Sara Markowitz & Anne M. Libby, *Mental Health and Substance Abuse Treatment and Juvenile Crime*, 7 J. MENTAL HEALTH POL’Y & ECONS. 59, 61, 65 (2004) (finding that teenagers in foster care who receive mental health or substance abuse treatment are significantly less likely to be detained for any offense than foster youth who do not receive treatment, and that foster youth living in areas with greater treatment availability are also less likely to be detained, through a longitudinal study involving over 6,000 youths); Callie Harbin Burt, Ronald L. Simons & Frederick X. Gibbons, *Racial Discrimination, Ethnic-Racial Socialization, and Crime: A Micro-Sociological Model of Risk and Resilience*, 77 AM. SOCIO. REV. 648, 649, 657, 662–63 (2012) (“replicating the finding [from previous studies] that

mother reported that she had sought mental health treatment for Alexis but was turned away by multiple public programs.²⁵¹ She lamented, “[t]he system was not there for her or for us The system failed.”²⁵²

The system also failed Chrystul Kizer. Her lack of funds for even small expenses like “snacks and school notebooks” led her to post an advertisement for herself on Backpage.com when she was sixteen years old, which is how she met her trafficker, Randall Volar.²⁵³ He bought her a phone and gave her “cash she could share with her sisters, sometimes \$500 at a time.”²⁵⁴ Her family’s precarious financial situation and the lack of a societal safety net to help contributed to Chrystul’s vulnerability to trafficking.²⁵⁵ Moreover, police possessed overwhelming evidence that Volar was sexually abusing about a dozen underage Black girls and had arrested him on charges of child enticement, using a computer to facilitate a child sex crime, and second-degree sexual assault of a child more than three months before Chrystul fatally shot him.²⁵⁶ Police had released him on the day of his arrest without any measures in place to stop him from continuing his abuse of Chrystul and other girls.²⁵⁷ Restorative justice processes would examine these systemic failures and account for their contribution to the various harms experienced by Chrystul, her family, Volar, his family, his other victims, and the Kenosha and Milwaukee communities. These processes would also enable the identification of societal obligations to repair, resulting from society’s contributory role in bringing about the harm.²⁵⁸ Here, this could mean an

interpersonal racial discrimination increases offending among African American males” through a multisite longitudinal study with a sample of more than 700 families participating throughout the study period); Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & ECONs. 259, 264, 270-71, 273-74 (2001) (finding a strong positive correlation between unemployment and property crime rates and between unemployment and robbery rates when state-specific linear and quadratic time trends are included in the statistical model, based on crime and unemployment rate data from 1971–1997 for all fifty states).

²⁵¹ Adam Ferrise, *Girl Sentenced to Life in Prison for Role in Murder at Akron Drug, Prostitution House*, CLEVELAND.COM (Mar. 24, 2015), https://www.cleveland.com/akron/2015/03/girl_sentenced_to_life_in_pris.html [<https://perma.cc/NF9W-2LCR>].

²⁵² *Id.*

²⁵³ Contrera, *Underage Girls*, *supra* note 126.

²⁵⁴ *Id.*

²⁵⁵ *See id.* (describing how a lack of financial resources led Chrystul to the situation where she met her trafficker). Poverty has been identified as a significant risk factor for child sex trafficking. Hannabeth Franchino-Olsen, *Vulnerabilities Relevant for Commercial Sexual Exploitation of Children/Domestic Minor Sex Trafficking: A Systematic Review of Risk Factors*, 22 TRAUMA, VIOLENCE, & ABUSE 99, 106 (2021); Jessica J. Laird, Bianca Klettke, Kate Hall, Elizabeth Clancy & David Hallford, *Demographic and Psychosocial Factors Associated with Child Sexual Exploitation: A Systematic Review and Meta-Analysis*, 3 JAMA NETWORK OPEN 1, 7, 9 (2020).

²⁵⁶ Contrera, *Underage Girls*, *supra* note 126.

²⁵⁷ *Id.*

²⁵⁸ *See* ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, at 33-34, 40, 43 (explaining that “[s]ocial injustices and other conditions that cause crime” give rise to repair obligations for

apology from the police for allowing Volar to continue to abuse girls after discovering video evidence the abuse, reforming police procedures and increasing training to prevent similar situations from happening in the future, paying restitution to the Kizers and the Volars, investing in programs to provide material assistance to low-income families so children will not resort to sex work to afford “snacks and school notebooks,”²⁵⁹ and providing access to robust mental health treatment for individuals who are at risk of committing sex crimes.

Another significant advantage of restorative justice is that it is highly tailored to the particular individuals and situation involved.²⁶⁰ In contrast, incarceration is a “blunt instrument”; as a response to criminal offending, it only involves tailoring to individual situations through sentence length and institution security level.²⁶¹ It offers the same conditions of confinement for individuals who engaged in different types of criminal conduct under different circumstances and for different reasons. It provides this one-size-fits-all approach to individuals who experience and respond to the same carceral environment differently. There is very little tailoring to individual needs, vulnerabilities, and circumstances.

The tailoring that restorative justice offers is especially significant in the context of crime committed by human trafficking victims. This feature makes it particularly capable of appreciating complex power dynamics present within human trafficking situations and victims’ diminished culpability for their harmful actions. In the words of renowned restorative justice practitioner Danielle Sered, “restorative justice is capable of acknowledging and holding people’s multiple roles as at once harmed and responsible, at once owed and in debt.”²⁶² Her insight is based on many years of restorative justice facilitation and underscores the ability of restorative justice to go beyond the myopic binary approach of the criminal legal system, to one that appreciates the nuance and complexity often involved in criminal offending and victimization.

communities and the larger society); SERED, *supra* note 14, at 119-20 (asserting that structural factors contributing to violence, such as economic and housing instability, “demand the fulfillment not only of the person’s promises, but of our larger societal responsibility to create the conditions that make violence less likely”).

²⁵⁹ Contrera, *Underage Girls*, *supra* note 126.

²⁶⁰ Menkel-Meadow, *supra* note 24, at 163-65; Virani, *supra* note 227, at 113-14; Steve Kirkwood, *A Practice Framework for Restorative Justice*, 63 *AGGRESSION & VIOLENT BEHAV.* 1, 4-5 (2022).

²⁶¹ TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 20 (2007); *see also* Virani, *supra* note 227, at 112-14 (contrasting the lack of individual tailoring in the current criminal punishment system with the highly tailored responses to harm that are a hallmark of restorative justice).

²⁶² SERED, *supra* note 14, at 142.

Opponents of an expansive interpretation of the non-punishment principle, like the United States and various other States Parties at the 2022 session of the U.N. Working Group on Trafficking in Persons, often justify their position on the grounds of giving “victims of the crime committed by the trafficked person . . . a sense of accountability and justice, including through the imposition of an ‘appropriate’ punishment.”²⁶³ But Sered powerfully argues that restorative justice is much better at serving the interests of accountability and justice for crime victims than punishment through incarceration.²⁶⁴ She identifies five core elements of accountability: “(1) acknowledging responsibility for one’s actions; (2) acknowledging the impact of one’s actions on others; (3) expressing genuine remorse; (4) taking actions to repair the harm to the degree possible, and guided when feasible by the people harmed . . . ; and (5) no longer committing similar harm.”²⁶⁵ The only element that incarceration is poised to achieve is “no longer committing similar harm,”²⁶⁶ which may only be accomplished during the period of incapacitation, since prison fails to address the underlying causes of an individual’s criminal behavior and criminological research suggests that prison also fails to effectively prevent recidivism following release.²⁶⁷

Sered argues that being punished is passive and does not require the PWCH to do the work of accountability.²⁶⁸ “All one has to do to be punished is not to escape,” Sered writes.²⁶⁹ “[P]rison lets people off the hook” because it “insulates people from the human impact of what they have done.”²⁷⁰ Incarceration does not require the PWCH to come face-to-face with the

²⁶³ *U.N. Working Group Report*, *supra* note 36, at ¶ 10.

²⁶⁴ See generally SERED, *supra* note 14, at 91-128.

²⁶⁵ *Id.* at 96.

²⁶⁶ *Id.*

²⁶⁷ See Charles E. Loeffler & Daniel S. Nagin, *The Impact of Incarceration on Recidivism*, 5 ANN. REV. CRIMINOLOGY 133, 143, 147, 149 (2022) (finding that postconviction incarceration has “a predominantly minimal effect . . . on criminal recidivism” and the weight of the evidence on pretrial incarceration indicates that it “exacerbates postrelease recidivism,” based on a literature review focusing on methodologically rigorous studies that account for potential selection bias); Lynne M. Vieraitis, Tomislav V. Kovandzic & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, 6 CRIMINOLOGY & PUB. POL’Y 589, 589-93, 606, 610, 614-16 (2007) (concluding that there is strong support for the hypothesis that imprisonment is criminogenic based on quantitative analysis of longitudinal state panel data for forty-six states that controlled for changes in prison population levels, and discussing prior theoretical and empirical research concerning reasons for the phenomenon); Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 50S-58S (2011) (recognizing that while incarceration has “some incapacitation effect” that prevents a certain amount of crime from occurring in the community, “prisons do not reduce recidivism more than noncustodial sanctions,” according to the best available criminological research, which still has certain limitations).

²⁶⁸ SERED, *supra* note 14, at 91-94.

²⁶⁹ *Id.* at 91.

²⁷⁰ *Id.* at 91, 93.

person he has harmed, listen to how the harm has affected her and her loved ones, answer her questions, and learn about the depth of her pain.²⁷¹ In contrast, restorative justice requires the PWCH to be active and engage in affirmative steps to face, understand, and repair the harm, as well as to address the causes of the harm to prevent the PWCH from committing similar harm in the future.²⁷² This is the work of real accountability.

Restorative justice, instead of incarceration, would have enabled Yvette, Chrystul, and Alexis to face, understand, and take steps to address their own pain and the pain of those harmed by their actions. Randall Volar's father shared the following about his son's death on behalf of his family: "We all miss . . . [my son] dearly and would do anything to turn back the hands of time so we could be with him. What happened is a tragedy for both families[,] the Kizers and the Volars."²⁷³ Notably, he recognizes both his own family's pain and that of Chrystul's family. Similarly, Angelo Kerney's mother expressed both deep pain about her son's death and compassion for Alexis Martin: "My heart goes out to her, but my son would still be alive if she didn't take those boys there . . . I hope she does change and I pray for her, but nothing can bring my son back."²⁷⁴ If it had been made an option, restorative justice could have provided a means to address important needs and goals of Volar and Kerney's families much more effectively than incarcerating Chrystul and Alexis. Specifically, it would have brought together the Kizers and the Volars to engage in mutual support, process their pain, better understand why the harm occurred, and begin to heal from their collective tragedy, with the assistance of a trained facilitator. Restorative justice would also have provided Alexis with the tools and ongoing support needed for her to "change" in a positive direction, which is one of Kerney's mother's wishes.²⁷⁵ Unlike incarceration, which does not require the PWCH to engage with the human impacts of the harm and the needs of those experiencing it, restorative justice centers the harm and resulting needs with the aim of promoting healing, repair, and, ultimately, greater well-being for the PH, the PWCH, and the community.²⁷⁶

²⁷¹ *Id.*

²⁷² *See id.* at 96-128 (summarizing the elements of accountability and explaining how restorative justice can satisfy each element); *see also* Krinsky & Phares, *supra* note 219, at 39 (asserting that restorative justice has the "ability to encourage true accountability" and "shows promise in better addressing the root causes of crime and reducing recidivism than our traditional system").

²⁷³ Contrera, *Underage Girls*, *supra* note 126.

²⁷⁴ Ferrise, *supra* note 251 (internal quotation marks omitted).

²⁷⁵ *Id.*

²⁷⁶ *See* SERED, *supra* note 14, at 93-94, 97-106, 117-28 (explaining how incarceration shields people from having to confront the true impact of the harms they have caused to other human beings and how restorative justice facilitates repair and transformation for the PHs, PWCHs, and their communities by grappling head-on with these harms and their human impacts); ZEHR, BOOK OF

Restorative justice holds much promise for greatly expanding access to the non-punishment principle in the United States and for promoting healing, repair, and reintegration for trafficking victim–defendants and those who have been harmed by their criminal acts. It also holds promise as a politically feasible way to advance decarceration efforts because trafficking victims are a sympathetic population that legislators and governors have a track record of singling out for mercy.²⁷⁷ Importantly, it provides a substantive response to those who commit violent crime, who elected officials are unlikely to be willing to fully excuse (at least prior to any criminal punishment). Even if they find the circumstances of trafficking victims who commit violent offenses compelling, elected officials tend to perpetually fear appearing “soft on crime.”²⁷⁸ Restorative justice’s emphasis on meaningful accountability is likely to ease their concerns, at least to a certain extent. Thus, lobbying efforts to implement restorative justice with trafficking victim–defendants in place of criminal prosecution and punishment, including for those who have committed violent and serious crimes, are a worthwhile endeavor.

C. Challenges of Applying Restorative Justice with Criminalized Survivors

There are several challenges associated with conducting restorative justice with human trafficking victim–defendants, and with criminalized survivors more broadly, that merit discussion. First, restorative justice’s emphasis on accountability for the PWCH raises the risk that a criminalized survivor may feel pressure to assume greater responsibility for the harm her crime caused to the PH than is appropriate in light of her trafficker’s role in causing the harm. Traffickers utilize coercion to control their victims, a tactic that is recognized by the autonomy–culpability rationale for the non-punishment principle.²⁷⁹ The extent of this control and the trafficker’s responsibility for the harm must be recognized in a restorative justice process. To mitigate the risk of over-accountability, a restorative justice process concerning crime committed by a trafficking victim should involve a facilitator who has in-depth knowledge of human trafficking dynamics. I also recommend analogous

RESTORATIVE JUSTICE, *supra* note 22, at 42 (“[R]estorative justice must start with those who have been victimized and their needs . . . [but] restorative justice is ultimately concerned about the restoration and reintegration of those who have been harmed, those who have caused harm, and the well-being of the entire community.” (emphasis omitted)).

²⁷⁷ See *supra* note 28 & Part II.

²⁷⁸ RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 111 (2019); see also Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 993–94 (2019) (“[T]he ‘soft on crime’ label is so toxic that interest groups seeking to advance non-criminal law interests have targeted state judges who are opposed to those interests in their reelection campaigns by running ads about their defense-friendly rulings.”).

²⁷⁹ See *supra* notes 69–91 and accompanying text.

measures for restorative justice processes with criminalized survivors of other forms of gender-based violence that commonly involve coercive control.

Second, identification of trafficking victims is an ongoing challenge, particularly in light of the persistence of the victim–offender binary within our system and stereotypes of “real” trafficking victims as passive, innocent, and fully cooperative with criminal legal actors.²⁸⁰ Consequently, the bar to trafficking victimization-based diversion to restorative justice should be low—establishing eligibility in cases where there exist reasonable grounds to believe that the defendant is a trafficking victim. This standard should not require that victimization be proven by a preponderance of the evidence or clear and convincing evidence, as is often required for an affirmative defense.²⁸¹ It is much better to err on the side of over- rather than under-inclusiveness, given the stakes for unidentified victims and the fact that restorative justice is still a meaningful response to crime committed by individuals who are not trafficking victims.

Third, there are likely to be concerns about “net-widening” within the criminal legal system, as are often expressed about diversion initiatives.²⁸² “Net-widening” refers to “an increase in the number of people having contact with the criminal justice system as the unintentional result of a new practice[,]” and also encompasses an increase in the duration or severity of state surveillance and control over individuals in its criminal legal “net.”²⁸³ To be clear, I am not arguing that trafficking victims who are not subject to

²⁸⁰ See *supra* notes 13–16, 18 and accompanying text.

²⁸¹ E.g., CAL. PENAL CODE § 236.23(b) (2025) (preponderance of the evidence); COLO. REV. STAT. § 18-7-201.3(1) (2025) (preponderance of the evidence); MINN. STAT. § 609.325(4) (2025) (preponderance of the evidence); NEV. REV. STAT. § 62C.015(3) (2025) (clear and convincing evidence); S.C. CODE ANN. § 16-3-2020(F) (2025) (preponderance of the evidence); S.D. CODIFIED LAWS § 22-23-1.2 (2025) (preponderance of the evidence); see also ALICE RISTROPH, CRIMINAL LAW: AN INTEGRATED APPROACH 424 (2d. ed. 2024) (“[T]he defendant often bears the burden of proving an affirmative defense[, and] . . . the standard of proof is typically lower than ‘beyond a reasonable doubt’—for example, a defendant may have to prove the elements of duress by a preponderance of the evidence, or the elements of insanity by clear and convincing evidence.”).

²⁸² See Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 201-03 (2022) [hereinafter Godsoe, *Abolitionist Praxis*] (explaining that diversion programs can be net-widening because the state often diverts defendants accused of low-level crimes who would otherwise not have been charged or whose charges would have been quickly dismissed, and surveillance through these programs can ultimately lead to greater sanctions for participants); Allison Morris, *Critiquing the Critics: A Brief Response to Critics of Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 596, 602 (2002) (observing that the claim “that restorative justice processes widen the net of social control” has been made about numerous diversionary programs).

²⁸³ Jeremy Prichard, *Net-Widening and the Diversion of Young People from Court: A Longitudinal Analysis with Implications for Restorative Justice*, 43 AUSTRALIAN & N.Z. J. CRIMINOLOGY 112, 113 (2010); see also Godsoe, *Abolitionist Praxis*, *supra* note 282, at 201-03 (explaining how “net-widening increases the footprint of the criminal system” by surveilling and controlling many defendants who would not have faced charges or whose charges would have been quickly dismissed absent diversionary programs).

criminal prosecution be diverted to restorative justice. My proposal is not aimed at those whom prosecutors decline to charge or whose charges are dropped or dismissed, and I certainly do not contend that these individuals should remain involved in the criminal legal system in any way. However, I recognize the risk of criminal legal actors diverting trafficking victims to restorative justice when they would have otherwise declined to charge them or would have dismissed the charges against them if diversion had not been an option.²⁸⁴

Restorative justice scholars and practitioners have identified concrete measures aimed at mitigating the risk of net-widening related to diversion. Cynthia Godsoe explains that “[t]o effectively address overincarceration and overcriminalization, [diversion] programs must include those accused of serious crimes, which few do, and must always incorporate ongoing assessment of whether a diversion program is enlarging the state surveillance and control footprint.”²⁸⁵ Donna Coker goes further by arguing that diversion to restorative justice “must avoid net-widening by requiring that only cases involving potentially serious charges are referred.”²⁸⁶ Reflecting on challenges in the development and implementation of new restorative justice interventions dependent upon system actors for referrals, Gordon Bazemore and Mark Umbreit caution that “[i]f new models are to avoid net-widening, marginalization, and irrelevance, community advocates should begin to work with sympathetic justice professionals who are also committed to community-driven systemic reform.”²⁸⁷ Thus, steps calibrated to prevent net-widening should be incorporated from the outset of a restorative justice diversion program’s development and assessment of their effectiveness should be ongoing.

When conceptualizing the scope of restorative justice diversion for trafficking victim–defendants, serious crimes must be included both to mitigate the risk of net-widening and to comply with the non-punishment principle. But I do not believe that less serious crimes not involving violence

²⁸⁴ See Godsoe, *Abolitionist Praxis*, *supra* note 282, at 201-03 (“Diversion programs in particular have been cited as increasing surveillance over those who would never have been charged otherwise, and violations of the terms of diversion sometimes result in more jail time than would have been served under a conviction for the underlying crime.”); Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 CRIM. L.F. 251, 272 (1993) (discussing the concern that diversion programs focused on minor offenses may result in the referral of cases that would have otherwise been dismissed, and these defendants could then face incarceration if they fail to fully comply with the program terms).

²⁸⁵ Godsoe, *Abolitionist Praxis*, *supra* note 282, at 202.

²⁸⁶ See Donna Coker, *Restorative Approaches to Intimate Partner Violence and Sexual Harm*, 36 OHIO ST. J. DISP. RESOL. 591, 624 (2021).

²⁸⁷ Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 17.

should be ineligible. For example, crimes such as theft and property damage cause harm that restorative justice can meaningfully address.²⁸⁸ But what about so-called “victimless” crimes? Restorative justice is thought to be most helpful when a crime harms an identifiable person or persons.²⁸⁹ And diversion options for minor victimless crimes such as prostitution and drug possession create the most risk of widening the criminal legal “net.”²⁹⁰ Rather than removing restorative justice as an option for trafficking victims arrested for these offenses who would prefer it over the conventional criminal legal process, I propose keeping the restorative justice option open and available to them at any time—including after they attempt to get charges dismissed and raise an affirmative defense. This approach would disincentivize prosecutors from diverting cases that they would otherwise decline to charge or that they believe would be quickly dismissed, as they would likely have to devote resources to defending the charges and negotiating with opposing counsel before a defendant would agree to diversion.

Fourth, there may also be concerns about co-optation of restorative justice by criminal legal actors and institutions. Restorative justice scholar and practitioner Alicia Virani expresses deep concern over this trend, which she explains has led to many state-controlled programs that are framed as restorative justice but which fail to adhere to core restorative justice principles.²⁹¹ She identifies examples of these programs that only address the harm at a superficial level, fail to involve a collaborative process incorporating the PWCH and the PH (or an appropriate surrogate), require court approval of repair and accountability agreements, and/or incorporate punitive elements.²⁹² She also highlights state statutes that restrict eligibility for restorative justice programs and prescribe certain procedures and outcomes that conflict with the restorative justice principles of broad accessibility, centering the PH, opposing hierarchies, voluntary participation, and tailoring the process and outcomes to the particular situation and stakeholders involved.²⁹³ I agree with Virani that the better approach is for states to provide grants and control to community-based, nonprofit restorative justice organizations that take core restorative justice principles and values seriously,

²⁸⁸ BALIGA, HENRY & VALENTINE, *supra* note 220, at 8 (“With respect to less serious offenses, the [restorative justice] program has worked with cases involving vandalism, fighting in class / school assaults, hate crimes, and theft of purses and credit cards.” (footnote omitted)).

²⁸⁹ *Id.* at 2 (asserting that Restorative Community Conferencing “is most effective with serious crimes in which there is an identifiable victim”).

²⁹⁰ See Godsoe, *Abolitionist Praxis*, *supra* note 282, at 203 (“[R]ather than having their charges entirely dismissed, people convicted of more minor offenses find themselves under state surveillance through diversion programs.”).

²⁹¹ Virani, *supra* note 227, at 116-32.

²⁹² *Id.* at 119-25, 136-38.

²⁹³ *Id.* at 125-32.

rather than to develop programs within criminal legal institutions that stray far from these principles and values.²⁹⁴

Fifth, and relatedly, the issue of voluntariness is a thorny one, particularly with respect to the PWCH. Voluntary participation of all who are involved in restorative justice processes is an important value.²⁹⁵ Although the PWCH technically agrees to diversion to restorative justice, the highly coercive conditions under which he agrees—while facing criminal charges, prosecution, and the risk of punishment—raise serious questions about whether his participation in restorative justice can be viewed as voluntary.²⁹⁶ Many well-respected restorative justice programs, including Danielle Sered’s Common Justice, Alicia Virani’s California Conference for Equality and Justice Restorative Community Conferencing (RCC) Program, and sujatha baliga’s Community Works West RCC Program, work with those whose diversion from the criminal legal system is contingent upon their completion of the restorative justice process.²⁹⁷ If a PWCH fails to attend or fails to complete the actions agreed upon during the collaborative restorative justice process, his case is returned to the regular criminal legal process.²⁹⁸ Thankfully, however, “many RJ programs do everything within their power to support individuals struggling to complete the RJ process, rather than sending their case back to the system.”²⁹⁹ But, of course, this is not a guarantee of success.

My proposal would operate similarly and would therefore be subject to the same critique regarding voluntary participation. While wholly voluntary

²⁹⁴ See *id.* at 131, 141 (noting that several states mitigate concerns about state control of restorative justice programs by statutorily requiring that state grants for these programs be awarded exclusively to community-based organizations or nonprofits and arguing that advocacy for greater use of restorative justice should include “a clear vision for community-based RJ that remains outside of the state and its carceral functions”).

²⁹⁵ Van Ness, *supra* note 284, at 275 (“Restorative justice . . . places a premium on *voluntary* involvement. For offenders, this demonstrates willingness to assume responsibility for their actions. For victims, it reduces the likelihood that they will be victimized a second time by the formal or informal responses to crime.”); Menkel-Meadow, *supra* note 24, at 168 (“Restorative justice programs are intended, in ideology, to be purely voluntary . . .”).

²⁹⁶ Virani, *supra* note 227, at 122, 128-29.

²⁹⁷ See SERED, *supra* note 14, at 117 (noting that a PWCH risked being removed from Common Justice’s restorative justice program and sentenced to prison if she violated the terms of the restorative justice agreement); Virani, *supra* note 227, at 101, 101 n.1, 104, 139 (explaining that the California Conference for Equality and Justice RCC Program and other restorative justice programs that accept referrals from state actors typically involve the threat of prosecution if the PWCH fails to complete the restorative justice process, which amounts to “some level of coercion”); BALIGA, HENRY & VALENTINE, *supra* note 220, at 3 (“If the [Community Works West] RCC participants are unable to come to agreement on the plan or the youth fails to complete the plan, the case is returned to the referring agency (e.g., police, probation, or the court).”).

²⁹⁸ See *supra* note 297.

²⁹⁹ Virani, *supra* note 227, at 130.

participation is certainly ideal, many restorative justice scholars and practitioners recognize real-world limitations on the full realization of this value when it comes to the PWCH. Howard Zehr, for example, recognizes that although “[e]fforts are made to maximize the offending person’s voluntary participation[,] . . . [i]n reality, however, there is often some pressure on the offending person to choose between lesser evils [because it often] . . . is difficult and frightening to face the ones they have harmed.”³⁰⁰ Along these lines, Danielle Sered powerfully explains:

Very few . . . responsible parties . . . go into their [restorative justice] circles with great enthusiasm. Most go in trembling or dragging themselves along. Many of our harmed parties, while always there voluntarily, go in with similar ambivalence and fear. It never quite seems like a good idea right before it begins. And then—every single time—it turns out to have been the right thing to do. People typically get the things they hoped for going in—closure, recognition, answers, connection, clarity, a path to repair. But people almost always get something more There is a way of being in the world and with what happened that becomes clear only on the other side of reckoning. It is more—bigger, better, more complete—than we knew to ask for. And it is almost always there.³⁰¹

The sixth and final challenge I will identify concerns language. The restorative justice terms, PWCH and PH, while less stigmatizing than “offender” and “victim” and commendable for employing “person-first” language,³⁰² still manifest an oversimplified binary that fails to capture the complex realities of criminalized survivors. This population has both caused *and* experienced harm. Therefore, it would be beneficial to employ language that reflects this duality within restorative justice processes. Instead of the somewhat cumbersome “person who caused and experienced harm” (PWCAEH), I propose using “person with bidirectional harm” (PWBH) or “person with multidirectional harm” (PWMH). This measure would more

300 ZEHR, BOOK OF RESTORATIVE JUSTICE, *supra* note 22, at 58.

301 SERED, *supra* note 14, at 252-53.

302 Advocates, scholars, practitioners, professional associations, and governmental agencies have criticized the term, “offender,” as stigmatizing and dehumanizing, and have called for the use of “person-first” or “person-centered” language instead, such as “incarcerated person.” Lynn S. Branham, *Eradicating the Label “Offender” from the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53, 54-65 (2019); Alexandra Cox, *The Language of Incarceration*, 1 INCARCERATION 1, 3-7 (2020). The term “victim” has likewise been criticized as connoting negative attributes, including passivity, weakness, helplessness, and shame. Jan van Dijk, *In the Shadow of Christ? On the Use “Victim” for Those Affected by Crime*, 27 CRIM. JUST. ETHICS 13, 21 (2008); LIZ KELLY, SURVIVING SEXUAL VIOLENCE 159-60, 163 (1988). The person-first language often employed in restorative justice processes avoids the “offender” and “victim” labels and underscores the humanity of the PWCH and the PH.

authentically represent criminalized survivors' lived experiences and serve as a helpful reminder to remain sensitive to the risk of over-accountability.

Future scholarship should aim to address the foregoing challenges in greater depth. Another important direction for future research is developing best practices for conducting restorative justice with criminalized survivors. This research should include empirical examination of first-person stakeholder perspectives, including those of criminalized survivors themselves.

CONCLUSION

The non-punishment principle certainly has a presence within U.S. law, particularly at the state level. However, this presence is substantially limited because a significant number of trafficking victims are excluded from its protection. This Article's in-depth mapping of non-punishment laws and judicial initiatives across the country reveals that the United States still has a long way to go toward meaningful realization of the non-punishment principle.

Restorative justice holds great promise as a means of bringing us significantly closer to this goal. It enables appreciation of complex dynamics and the victim-offender overlap within the human trafficking context in a way that the reductive criminal legal system is currently incapable of doing. Restorative justice is particularly well-equipped to address harm experienced *and* harm caused by the same individual in a constructive and meaningful way. Implementing this Article's proposal for restorative justice with human trafficking victims who have committed crimes will also contribute to the legitimation of restorative justice responses to serious crime. Importantly, this will bolster efforts to address our country's deep-seated issues of mass incarceration and hyper-punitive responses to social problems.