

SUFFERING AT THE MARGINS: APPLYING DISABILITY CRITICAL RACE STUDIES TO HUMAN TRAFFICKING IN THE UNITED STATES

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Abstract

Human trafficking is a scourge in which perpetrators victimize the most vulnerable and marginalized members of a population to sell their bodies or sell their labor for profit. This Note explores human trafficking in the United States through Disability Critical Race Studies (DisCrit). First, the Note offers background on trafficking and applicable federal law. Not only does trafficking disable people, but people with preexisting disabilities are especially at risk for trafficking. Next, the Note shows that trafficking law follows a law-and-order framework: a framework that prioritizes prosecuting traffickers and doles out penal remedies. This framework and its intimate ties with the criminal justice system is a dual-edged sword. It helps countless survivors yet retraumatizes some marginalized survivors. Finally, the Note introduces DisCrit, justifies its use for anti-trafficking advocacy, and applies the DisCrit framework. By looking at trafficking law through DisCrit, one sees that trafficking law must work with—not against—survivors to end human suffering.

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INTRODUCTION

Born with a fetal alcohol spectrum disorder, Jane¹ had faced adversity since birth.² By the young age of sixteen, Jane had been sexually exploited by nearly thirty men, after a tumultuous early childhood.³ Yet she failed to fit the public's notion of a trafficking survivor:⁴ a white woman snatched off the street by a stranger, locked in a cage, and sold in a foreign country.⁵ Jane, a Black girl living in Tennessee, was mainly trafficked by her boyfriend in Nashville.⁶ Instead of locking her in a cage, Jane's trafficker cajoled and controlled her with cocaine.⁷ He sold her to numerous men, who participated in her abuse.⁸ Like many survivors, Jane was not "rescued"

¹ "Jane" is a pseudonym.

² See MURDER TO MERCY: THE CYNTOIA BROWN STORY (Daniel H. Birman Productions 2020).

³ See ME FACING LIFE: CYNTOIA'S STORY (Daniel H. Birman Productions 2011).

⁴ Except where it directly quotes another source or cites a specific title, this Note uses the term "survivor," instead of victim, to describe people with lived experiences of trafficking. "Survivor" emphasizes the resilience and strength of people with lived trafficking experiences, and the term is preferred in survivor communities. But I recognize that "victim" reflects statutory language and is widely used in legal scholarship. For a more thorough discussion of the use of "survivor" and "victim" terminology, see Anne Johnston et al., *Framing an Emerging Issue: How U.S. Print and Broadcast News Media Covered Sex Trafficking, 2008–2012*, 1 J. HUM. TRAFFICKING 235, 242–43, 250 (2015).

⁵ See Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 606–07 (2009); Scott Alessi, *The Surprising Face of Human Trafficking*, U.S. CATH. BLOG (Aug. 19, 2011), <https://uscatholic.org/blog/the-surprising-face-of-human-trafficking/> [<https://perma.cc/7G3J-KBMY>] ("When you hear the words 'human trafficker,' what do you picture? . . . [P]robably not a . . . white male in . . . Rhode Island. But that's exactly who was sentenced to 10 years in prison this week for trafficking young women from New York to Rhode Island[.]").

⁶ MURDER TO MERCY: THE CYNTOIA BROWN STORY, *supra* note 2.

⁷ Kate Hodal, *Cyntoia Brown: Trafficked, Enslaved, Jailed for Life at 16 – and Fighting Back*, GUARDIAN (Oct. 23, 2019, 6:30 AM), <https://www.theguardian.com/global-development/2019/oct/23/cyntoia-brown-long-trafficked-enslaved-jailed-for-life-at-16-and-fighting-back> [<https://perma.cc/X8B2-CPT8>].

⁸ MURDER TO MERCY: THE CYNTOIA BROWN STORY, *supra* note 2.

by law enforcement.⁹ Rather, with support from people close to her, she rebuilt her life after escaping not only her trafficker, but also the clutches of the legal system.¹⁰

Jane's real name is Cyntoia Brown.¹¹ In 2006, at sixteen years old, she was sentenced to life in prison for killing one of the men who sexually abused her,¹² out of fear that he planned to kill her.¹³ Five years later, a PBS documentary brought her case to a national audience.¹⁴ After more than a decade behind bars, Ms. Brown walked out of prison in 2019,¹⁵ following a social media campaign to free her led by celebrities including Kim Kardashian, Rihanna, and LeBron James.¹⁶ Of her story she said, "There's nothing special about me."¹⁷

⁹ See Carrie Baker, *An Examination of Some Central Debates on Sex Trafficking in Research and Public Policy in the United States*, 1 J. HUM. TRAFFICKING 191, 199 (2015) (describing trafficking discourse's focus on a hypermasculine idea of rescue); see also Carrie Baker, *Moving Beyond "Slaves, Sinners, and Saviors": An Intersectional Feminist Analysis of US Sex-Trafficking Discourses, Law, and Policy*, 4 J. FEMINIST SCHOLARSHIP, 1, 1–23 (2013) (describing trafficking narratives' focus on female trafficking survivors' "vulnerability" and "naïvete"). Instead, "Jane" was incarcerated.

¹⁰ See Michelle Cho & Kim Cornett, *Cyntoia Brown-Long to Lester Holt on Her Release from Prison: 'There's Nothing Special About Me'*, NBC NEWS (Oct. 14, 2019, 3:19 PM), <https://www.nbcnews.com/news/us-news/cyntoia-brown-long-lester-holt-her-release-prison-there-s-n1065296> [<https://perma.cc/UDY3-8NCC>].

¹¹ This pseudonym was used to introduce Ms. Brown's story without invoking any preconceived notions that may be associated with her well-known case.

¹² Brief for Petitioner at 2–3, *Brown v. Tennessee* (Tenn. Crim. App. 2014) (No. M2013-00825-CCA-R3-PC).

¹³ Christine Hauser, *Cyntoia Brown Is Freed from Prison in Tennessee*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/cyntoia-brown-release.html> [<https://perma.cc/QP37-8GGM>].

¹⁴ ME FACING LIFE: CYNTOIA'S STORY, *supra* note 3.

¹⁵ Bobby Allyn, *Cyntoia Brown Released After 15 Years in Prison for Murder*, NPR (Aug. 7, 2019, 12:24 PM), <https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder> [<https://perma.cc/TVR9-W3M5>].

¹⁶ Donovan X. Ramsey, *Cyntoia Brown and Our Twisted System*, THE MARSHALL PROJECT (Dec. 1, 2017, 1:02 PM), <https://www.themarshallproject.org/2017/12/01/cyntoia-brown-and-our-twisted-system> [<https://perma.cc/P6AL-BH5C>].

¹⁷ Cho & Cornett, *supra* note 10.

In many ways, Cyntoia Brown is right; she is far from special. Though the media attention her case spurred was exceptional, Ms. Brown's trafficking experience up until she confronted one of her abusers is common.¹⁸ Ms. Brown's cognitive disability stemming from her fetal alcohol spectrum disorder made her a target for traffickers.¹⁹ Similarly, her Blackness saddled her with severe repercussions from trafficking, including criminalization.²⁰ Prosecutors painted Ms. Brown as a remorseless criminal, saying that she "cruelly" and "mercilessly" "executed" her trafficker.²¹ In reality, Cyntoia was a child with cognitive, behavioral, and emotional deficits, leaving her unstable, impulsive, and paranoid.²²

Out of the hundreds of thousands of individuals estimated to have been trafficked into the United States over the last two decades,²³ many people assume that

¹⁸ See generally Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1467 (2015) ("[T]he Federal Bureau of Investigation (FBI) indicate[s] that over half of minors arrested on prostitution charges in America are Black."). Note that under the federal Trafficking Victims Protection Act (inapplicable to Ms. Brown, who was convicted under state law), all minors engaging in prostitution are, by definition, "victims of a severe form of trafficking in persons" for the purposes of eligibility for federal benefits and services. 22 U.S.C. §§ 7105(b)(1)(c)(i)–(II)(i) (2000). The Act defines a minor for the purposes of a "severe form of trafficking in persons" as all people under eighteen years of age. § 7105(b)(1)(c)(II)(i) (2000). Butler thus suggests that Black minors are overrepresented in trafficking survivor populations, that law enforcement disproportionately targets Black child sex trafficking survivors, or both. See generally Butler, *supra* note 18.

¹⁹ See Susan Flynn, *Convergent Spaces: Intersectional Analysis of Ethnic Minority Status and Childhood Disability in Irish Safeguarding Work*, 25 CHILD & FAM. SOC. WORK 648, 650 (2020) (warning that children with intellectual disability are at increased risk of sex trafficking); see *infra* Section I.A.2.

²⁰ See *infra* discussion in Section II.A.

²¹ See MURDER TO MERCY: THE CYNTOIA BROWN STORY, *supra* note 2.

²² Brief for Petitioner, *supra* note 12, at 9, 12.

²³ This number represents my estimate based on the limited data available; the methodologies used to collect this information have varied significantly over time, and the covert nature of human trafficking makes establishing concrete statistics difficult. OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 4 (2009), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//43241/index.pdf [<https://perma.cc/BU3K-483Z>] (noting the lack of well-established data collection methodologies in the field of human trafficking and describing the adjustments made to official estimates over the years) ("Initial estimates cited in the TVPA suggested that approximately 50,000 individuals were trafficked into the United States each year. This estimate was subsequently reduced to 18,000–20,000 in the U.S.

disabled²⁴ survivors of color constitute a small cross-section. However, marginalization puts people at higher risk for trafficking.²⁵ For example, Kisha Roberts-Tabb, Human Trafficking, Gender Responsive, and LGBTQ Specialist at Cook County Juvenile Courts, notes that Black children and women are at higher

Department of State's 2003 *Trafficking in Persons Report*, and in its 2005 and 2006 reports, altered again to an estimate of 14,500–17,500 individuals trafficked annually into the United States.”). The U.S. Department of State has not provided an official estimate for the number of individuals trafficked into the United States in more recent years, therefore this is a rough extrapolation based on the last revised estimate. For a more thorough explanation of the barriers to establishing reliable human trafficking statistics, see Alexis A. Aronowitz, *Overcoming the Challenges to Accurately Measuring the Phenomenon of Human Trafficking*, 81 REVUE INTERNATIONALE DE DROIT PÉNAL [RIDP] 493 (2010). *But see About Human Trafficking*, U.S. DEP'T OF STATE, <https://www.state.gov/humantrafficking-about-human-trafficking> [<https://perma.cc/VW6A-C5FX>] (citing INT'L LAB. ORG., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE (Sept. 19, 2017)) (endorsing a report that estimates 24.9 million people globally were being trafficked at any given time in 2016).

²⁴ This Note uses “dis/abled,” “disabled,” and “people with disabilities” interchangeably, to represent the broad array of ways that people with lived experiences of disability (myself included) conceptualize their experiences and identity. Different communities of people with lived experiences of disability may prefer person-first language (“people with disabilities”) instead of identity-first language (“disabled person”) and vice versa. *See, e.g.*, OFF. OF DISABILITY RTS., *People First Language*, DC.GOV (July 2006), <https://odr.dc.gov/page/people-first-language> [<https://perma.cc/SH6X-VRFB>] (noting that person-first language prioritizes a person, not their disability); Molly Callahan, ‘Autistic Person’ or ‘Person with Autism’: Is There A Right Way To Identify People?, NEWS@NORTHEASTERN (July 12, 2018), <https://news.northeastern.edu/2018/07/12/unpacking-the-debate-over-person-first-vs-identity-first-language-in-the-autism-community/> [<https://perma.cc/NAD4-UWQX>] (indicating the autistic, blind, and deaf communities’ preference for identity-first language to show pride for their disability and reduce shame); *Title V of the Americans with Disabilities Act – MISCELLANEOUS PROVISIONS*, MINN. COUNCIL ON DISABILITY (July 7, 2015), <https://www.disability.state.mn.us/2015/07/07/ada-title-v/> [<https://perma.cc/5XE9-CEKW>]. Sharon Wachslar, a self-described “writer with a disability” notes that she is “fine” with either, that both representations have merit, and that “sometimes one or the other works better depending on the situation.” Sharon Wachslar, *Languageing Disability: Where Do “Ability” and “Dis/Ability” Fit In?*, BED, BODY & BEYOND BLOG (July 28, 2012), <https://sharonwachslar.blogspot.com/2012/07/languageing-disability-where-do-ability.html> [<https://perma.cc/ZXN5-P4GX>]. “Dis/abled” may emphasize the relationship and/or separation or lack thereof between disability and ability. *Id.* (cataloguing different disabled people’s uses of “dis/Ability” and “disAbled,” focusing on how people with disabilities are able—“not useless, incompetent, or inadequate”— and including a disability studies professor’s opinion that the slash indicates the inseparability of disability and ability). For a deeper dive into these discussions, as I cannot do them justice in this short work, please see Roger Collier, *Part I: Person-First Language: Noble Intent but to What Effect?*, 184 CAN. MED. ASS’N J. 1977, 1977–78 (2012).

²⁵ *See* U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 20 (2016) [hereinafter 2016 TIP REPORT]; Butler, *supra* note 18, at 1467.

risk for trafficking because of vulnerabilities from systemic racism including familial or community instability, the U.S. “school-to-prison pipeline,” homelessness, or involvement in the foster care system.²⁶ Survivors of color may also be less likely to report their trafficking experiences because of fear of facing racial bias. For example, Black and Latino male victims often fear homophobia, and are often seen as “troublemakers” or criminals instead of as victims of a crime.²⁷ Because of the vulnerability that marginalization causes, most trafficking survivors in the United States are people of color (POC).²⁸ People with disabilities are similarly

²⁶ Chamberlain University, *Up for Sale – Combatting Human Trafficking*, FACEBOOK (June 24, 2020), https://www.facebook.com/watch/live/?ref=watch_permalink&v=300765611057350 [<https://perma.cc/P8UB-WZMB>]; see Cheryl Page, *The Double Whammy of Being Female and African-American*, 22 GONZAGA J. INT’L L. 114, 114–23 (2019).

²⁷ Phillip Martin & Jenifer B. McKim, *Unseen: The Boy Victims of the Sex Trade, Part II*, GBH NEWS CTR. FOR INVESTIGATIVE REPORTING (Apr. 18, 2021), <https://www.wgbh.org/news/unseen-the-boy-victims-of-the-sex-trade-pt-2> [<https://perma.cc/87RV-L7G2>].

²⁸ CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, BUREAU OF JUST. STATS. 6 (Apr. 28, 2011), <https://www.bjs.gov/content/pub/press/cshti0810pr.cfm> [<https://perma.cc/P82R-7KFS>] (“[C]onfirmed [domestic] labor trafficking victims were more likely to be identified as Hispanic (63% of victims with known race) or Asian (17%) compared to sex trafficking victims, who were more likely to be white (26%) or black (40%).”). Data from the 2018 National Human Trafficking Hotline, which has handled over 50,000 calls since 2007, indicates that in 2018 the top three reported races and ethnicities for potential trafficking survivors were Latino, Asian, and Black. 2018 Statistics from the National Human Trafficking Hotline, HUM. TRAFFICKING HOTLINE (2018), https://humantraffickinghotline.org/sites/default/files/Polaris_National_Hotline_2018_Statistics_Fact_Sheet.pdf [<https://perma.cc/NCL5-D8JN>]; Amanda Robert, *States Help Trafficking Survivors Overcome Criminal Records*, ABA J. (Feb. 1, 2020, 1:05 AM), <https://www.abajournal.com/magazine/article/states-help-trafficking-survivors-overcome-criminal-records> [<https://perma.cc/NWH4-UAMB>]. By 2020 (the most recent year for which there is published National Human Trafficking Hotline data), the number had shifted to indicate that a majority of reported identities were Latino. Asian, then white callers followed, with Black survivors holding a close fourth-highest percentage for reported racial or ethnic identity. POLARIS PROJECT, POLARIS ANALYSIS OF 2020 DATA FROM THE NATIONAL HUMAN TRAFFICKING HOTLINE 3 (2020), <https://polarisproject.org/wp-content/uploads/2022/01/Polaris-Analysis-of-2020-Data-from-the-National-Human-Trafficking-Hotline.pdf> [<https://perma.cc/L56J-SNWE>]. “The National Trafficking Hotline provides the largest known data set on sex and labor trafficking in the United States.” Thalia Brionez, *Reported Cases of Human Trafficking on the Rise During a Pandemic*, 25 NEWS KXXV (Mar. 26, 2021, 11:27 AM), <https://www.kxxv.com/hometown/texas/reported-cases-of-human-trafficking-on-the-rise-during-a-pandemic> [<https://perma.cc/PX6L-8NF5>]. In Orange County, California, the majority of trafficking survivors identified by the county’s human trafficking task force between 2016 and 2020 were Black and Latino. Ben Brazil, *Majority of Sex and Human Trafficking Victims in Orange Country Are Black and Latino, Report Says*, L.A. TIMES (Apr. 7, 2021, 3:06 PM),

overrepresented in survivor populations.²⁹ Unfortunately, racism and ableism have long pervaded anti-trafficking movements.³⁰ And laws ignore the unique plight of disabled survivors of color, offering them few provisions.³¹ In a cruel twist, the criminal justice system sometimes even labels marginalized survivors as criminals themselves.³² This labeling revictimizes survivors.³³

Because trafficking disproportionately harms people of color and people with disabilities, it is imperative that trafficking solutions include their voices. Anti-trafficking efforts predominantly operate under a law-and-order framework.³⁴ Under this framework, anti-trafficking resources are largely directed to law enforcement to increase police monitoring, arrests, and prosecutions of traffickers.³⁵ This framework

<https://www.latimes.com/socal/daily-pilot/entertainment/story/2021-04-07/human-trafficking-victims-orange-county-black-latino> [<https://perma.cc/M6TK-GQFC>].

²⁹ Christopher Carey & Sarahfina Peterson, *Trafficking People with Disabilities: A Legal Analysis*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 471, 472 (2020).

³⁰ See Kamala Kempadoo, *The Modern-Day White (Wo)man's Burden: Trends in Anti-trafficking and Anti-slavery Campaigns*, 1 J. HUM. TRAFFICKING 8, 8–11, 13 (2015) (describing the racist history of anti-trafficking campaigns); Kara Napolitano, *Intersectionality and Human Trafficking Survivorship*, LAB'Y TO COMBAT HUM. TRAFFICKING BLOG (May 19, 2017), <https://combathumantrafficking.org/2017/05/intersectionality-human-trafficking-survivorship/> [<https://perma.cc/NFY8-HNW7>].

³¹ Tina Frundt & Cherice Hopkins, *Opinion: Girls of Color, Native Girls Have Been Sex Trafficked Since Colonization, Slavery*, JUV. JUST. INFO. EXCH. (Feb. 1, 2021), <https://jjie.org/2021/02/01/girls-of-color-native-girls-have-been-sex-trafficked-since-colonization-slavery/> [<https://perma.cc/L5XE-YFK9>] (“[T]he collateral consequences of legal system involvement can cause girls of color to experience further marginalization. This includes increased difficulty accessing protective factors such as housing, educational attainment and gainful employment — without which they can remain vulnerable to continued exploitation.”).

³² 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/XE49-8ZEU>].

³³ *Id.*

³⁴ See Abigail Swenstein & Kate Mogulescu, *Resisting the Carceral: The Need to Align Anti-Trafficking Efforts with Movements for Criminal Justice Reform*, 6 ANTI-TRAFFICKING REV. 118 (2016).

³⁵ *Id.*

leaves out marginalized voices. Instead, it often stereotypes and criminalizes survivors.³⁶ And other proposed frameworks, like Feminist Legal Theory (FLT),³⁷ Disability Legal Studies (DLS),³⁸ and Critical Race Theory (CRT),³⁹ miss many of the ways different forms of discrimination interact to oppress survivors. Although these frameworks discuss intersectionality, they primarily focus on singular identities: women, people with disabilities, and Black and Indigenous people of color.⁴⁰

Recently, Critical Race Theory offshoots like Critical Race Feminism (CRF) have started to offer a more intersectional approach.⁴¹ However, these frameworks still neglect to analyze how racism and ableism interact against trafficking survivors. Enter Disability Critical Race Studies (DisCrit). DisCrit is a framework that education scholars developed to support disabled students of color in the special

³⁶ See HANNA LOVE ET AL., URB. INST., COMPARING NARRATIVES OF JUSTICE: HOW SURVIVORS, CRIMINAL JUSTICE STAKEHOLDERS, AND SERVICE PROVIDERS PERCEIVE JUSTICE IN HUMAN TRAFFICKING CASES 2, 5 (2018), https://www.urban.org/sites/default/files/publication/97346/comparing_narratives_of_justice_0.pdf [<https://perma.cc/SAM3-7F8B>].

³⁷ E.g., Navid Pourmokhtari, *Global Human Trafficking Unmasked: A Feminist Rights-Based Approach*, 1 J. HUM. TRAFFICKING 156 (2015).

³⁸ E.g., Carey & Peterson, *supra* note 29, at 471.

³⁹ E.g., Butler, *supra* note 18, at 1464.

⁴⁰ Critical Race Theory does emphasize intersectionality, or how race interacts with other identities in oppression and discrimination. See, e.g., Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 463 (1993); Racquel Armstrong & Cynthia Tyson, *Say Their Name: Early Critical Race Theory Scholars and Their Place in the Debate*, DIVERSE ISSUES IN HIGHER EDUC. (Jan. 31, 2022), <https://www.diverseeducation.com/opinion/article/15287996/say-their-name-early-critical-race-theory-scholars-and-their-place-in-the-debate> [<https://perma.cc/6QS2-ZD7S>]. But by focusing primarily on racial inequity, Critical Race Theory scholars put racism at the center of their debates about oppression. See David Gillborn, *Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender, and Disability in Education*, 21(3) QUALITATIVE INQUIRY 277, 277 (2015).

⁴¹ E.g., Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 96, 101–02, 132 (2015).

education system in the United States.⁴² Its founders advocate for “removing the policing and enforcement of normality” and “dissolving barriers that actively dis/able people[.]”⁴³ The founders implore readers to listen to the “special voice” of people who have experienced discrimination.⁴⁴ The unique contribution of this Note is the application of DisCrit to human trafficking in the United States.

This Note argues that Disability Critical Race Studies can help trafficking survivors achieve justice. Part I initially provides background on trafficking in the United States. Then, it explains trafficking’s disabling effects on survivors and the vulnerabilities of people with preexisting disabilities to trafficking. Part I describes the legal landscape that disabled survivors of color must navigate, concluding with the law-and-order framework that current anti-trafficking responses follow. Part II initially delves into how this framework fails survivors by criminalizing many of them. Then, it explains how other proposed frameworks fail to tell the full, intersectional story of survivorship. Part III introduces DisCrit and Section III.A lays out its seven core tenets. Next, it justifies the application of a DisCrit framework to trafficking, domestic trafficking law, and the anti-trafficking movement in the United States. Lastly, Part III applies DisCrit’s tenets to anti-trafficking work in the United States by presenting a “real utopia”: a world that includes realizable goals for anti-trafficking advocates to move toward. Part III urges advocates to adopt a system where survivors will no longer be systematically disadvantaged by accidents of birth or chance.

I. Trafficking and the Legal Landscape in the United States

“He would explain to me that some people were born whores, and that I was one, and I was a slut, and nobody’d want me but him, and the best thing I could do was just learn to be a good whore.”

– Survivor Cyntoia Brown⁴⁵

⁴² Subini Ancy Annamma et al., *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 J. RACE, ETHNICITY, & EDUC. 1, 2, 9–11 (2013).

⁴³ *Id.* at 18.

⁴⁴ *Id.*

⁴⁵ Hodal, *supra* note 7 (describing the coercive psychological abuse she suffered by her trafficker).

This Part establishes the conceptual and legal definitions of trafficking. Then, it explains trafficking's relationship with disability: trafficking directly causes disability, and survivors with pre-existing disabilities are especially vulnerable to trafficking. This Part then sets out the laws that implicate trafficking survivors, before showing how anti-trafficking responses follow a law-and-order framework. This framework centers the criminal justice and carceral systems, instead of providing other necessary relief for survivors.

Conceptually, trafficking occurs when a person coercively, deceptively, or forcefully induces another person to provide them labor or sex.⁴⁶ Cyntoia Brown, for example, was sold as a child for sex. Her trafficker, "Kut Throat," used force, fraud, and coercion to keep her captive.⁴⁷ He beat her, lured her in with promises of romance, terrorized her with guns, and told her she was nothing but a "whore."⁴⁸ Under some definitions of trafficking, no violence, trickery, or threats were necessary for Kut Throat's actions to constitute sex trafficking of Ms. Brown; because Ms. Brown was only sixteen years old, she was legally a minor and could

⁴⁶ *Trafficking in Persons*, U.N. HUM. RTS. 1 (Sept. 2013), https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagars/Traffickingpersons_August2014.pdf [<https://perma.cc/L5PJ-738U>].

⁴⁷ See Leah Carroll, *How the Justice System Failed Cyntoia Brown*, REFINERY29 (Aug. 7, 2019, 10:40 AM), <https://www.refinery29.com/en-us/2018/12/219015/cyntoia-brown-case-facts-real-story> [<https://perma.cc/TSE3-E3YA>]; Hodal, *supra* note 7; Molli Mitchell, *Murder to Mercy: Who Is Kut Throat? What Happened to Garion McGlothen?*, EXPRESS (May 5, 2020, 03:27 PM), <https://www.express.co.uk/showbiz/tv-radio/1278149/Murder-to-Mercy-who-is-Kut-Throat-what-happened-to-Garion-McGlothen-prison-alive-killed> [<https://perma.cc/8KCZ-9J8S>]; *Cyntoia Brown Granted Clemency*, GENERATION WHY PODCAST: BLOG (Jan. 15, 2019), <https://genwhypod.com/blogs/the-generation-why-podcast-blog/cyntoia-brown-granted-clemency> [<https://perma.cc/L3NV-E9UB>].

⁴⁸ See Carroll, *supra* note 47; Hodal, *supra* note 7; Mitchell, *supra* note 47; David Alm, *Review: 'Murder to Mercy: The Cyntoia Brown Story'*, FORBES (Apr. 30, 2020, 02:47 PM), <https://www.forbes.com/sites/davidalm/2020/04/30/review-murder-to-mercy-the-cyntoia-brown-story/?sh=5e539dc4182c> [<https://perma.cc/L37B-UY9L>]; *Cyntoia Brown Granted Clemency*, *supra* note 47.

not consent to commercial sex.⁴⁹ Kut Throat need only have bought or sold her for sex to commit this crime.⁵⁰

Some sources subdivide trafficking into narrower categories, including commercial sexual exploitation, debt bondage, religious trafficking, and forced labor, to name a few.⁵¹ But what these categories all have in common is that a trafficker compels or induces another person to provide at least one of two commodities to be exploited: labor or sex.⁵²

A. Trafficking's Dark Relationship with Disability

Trafficking and disability are deeply connected. First, trafficking causes trauma that often leads to disability. Second, traffickers often target people with preexisting disabilities because of their potential vulnerabilities. Disability is more than a random additional fact of oppression in trafficking.

⁴⁹ See, e.g., Trafficking Victims Protection Act, 22 U.S.C. § 7102(11)(A) (2019) (requiring no force, fraud, or coercion for trafficking cases involving a minor, defined as someone who is not yet eighteen years old).

⁵⁰ See *id.*

⁵¹ See, e.g., *What Is Human Trafficking?*, S.F. HUM. RTS. COMM'N, <https://sf-hrc.org/what-human-trafficking> [<https://perma.cc/TAP8-ZHA8>] (conceptually separating trafficking into sex trafficking, debt bondage, and forced labor).

⁵² Even labor and sex can intersect. See *Ricchio v. McLean*, 853 F.3d 553 (1st Cir. 2017) (finding that a person can be trafficked for sexual labor or services). See also *Bistline v. Parker*, 918 F.3d 849, 872 (10th Cir. 2019) (quoting *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017), citing *United States v. Kaufman*, 546 F.3d 1242, 1261–63 (10th Cir. 2008)) (internal quotation marks omitted); (“[N]otably, “[l]abor or services in 18 U.S.C. § 1589 [the federal criminal forced labor anti-trafficking statute] is not limited to work in an economic sense and extends to forced sexual acts.”). In sexual servitude, for example, the labor the survivor provides is in the form of forced sexual services. See *United States v. Yannai*, 791 F.3d 226 (2d Cir. 2015) (convicting a trafficker of forced labor under 18 U.S.C. § 1589, for inducing sex acts, amongst other forms of labor).

1. Trafficking's Disabling Effects on Survivors

"I was only able to see [health care providers] on [a] dire emergency basis. I've had 85 broken bones that were documented, many more that were never documented because I couldn't go."

– anonymous trafficking survivor⁵³

Human trafficking causes physical and psychological trauma.⁵⁴ Sex trafficking survivors' brutal sexual encounters can cause sexually transmitted infections including HIV and AIDS, as well as pelvic inflammatory disease.⁵⁵ Poor nutrition stunts growth and development in child survivors.⁵⁶ For some survivors, dirty and crowded lodging induces the spread of communicable diseases like scabies and tuberculosis.⁵⁷ One set of survivors in Iowa, after living in dark, dank conditions in a now-condemned, boarded-up building full of cockroaches, mildew, grease, and mice droppings, developed a host of health conditions.⁵⁸ They had diabetes, high blood pressure, malnutrition, as well as "festering fungal infections" and "severe dental problems[.]"⁵⁹ Overall, trafficking survivors commonly suffer from physical disabilities.⁶⁰

⁵³ BRITTANY ANTHONY ET AL., POLARIS, ON-RAMPS, INTERSECTIONS, AND EXIT ROUTES: A ROADMAP FOR SYSTEMS AND INDUSTRIES TO PREVENT AND DISRUPT HUMAN TRAFFICKING 122 (2018), <https://polarisproject.org/resources/on-ramps-intersections-and-exit-routes-a-roadmap-for-systems-and-industries-to-prevent-and-disrupt-human-trafficking/> [https://perma.cc/EQ7L-LSJJ].

⁵⁴ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 31 (2020) [hereinafter 2020 TIP REPORT].

⁵⁵ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 15 (2004) [hereinafter 2004 TIP Report].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Yuki Noguchi, *All Things Considered: A 'Wake-Up Call' to Protect Vulnerable Workers from Abuse*, NPR (May 16, 2013, 04:29 PM), <https://www.npr.org/2013/05/16/184491463/disabled-workers-victory-exposes-risks-to-most-vulnerable/> [https://perma.cc/AEB8-XYSN].

⁵⁹ *Id.*

⁶⁰ See Benjamin Thomas Greer & Scott Davidson Dyle, *Determining the Reasonableness of Non-Compliance: Examining the "Trauma Exception" for T-Visa Applicants*, 15 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 385, 392 (2013).

Psychological trauma from trafficking can likewise take many forms.⁶¹ Deprivation and trauma can cause survivors to develop neurological and psychological disabilities.⁶² For example, after many survivors overcome their traffickers' threats, verbal and sexual abuse, and withdrawal of food, money, and sleep,⁶³ they are left suicidal and depressed.⁶⁴ They may face psychosis, exhaustion, and aggression.⁶⁵ Because of their traumatic experiences, survivors have high rates of post-traumatic stress disorder (PTSD)⁶⁶ and substance abuse.⁶⁷

In fact, many traffickers introduce or force survivors into drug use, initiating or manipulating survivors' subsequent addictions.⁶⁸ The Americans with Disabilities Act (ADA) recognizes addiction as a disability for ADA coverage, at least when people with addictions maintain sobriety.⁶⁹ But trafficking survivors with substance abuse disorders are often deep in their disorders during their trafficking

⁶¹ See Elizabeth Hopper & José Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185, 192–93 (2006) (detailing survivors' emotional helplessness, lack of personal efficacy, and sleep disturbances from the trauma of trafficking).

⁶² 2004 TIP REPORT, *supra* note 55, at 15.

⁶³ Hopper & Hidalgo, *supra* note 61, at 191–92.

⁶⁴ ANTHONY ET AL., *supra* note 53, at 132.

⁶⁵ *Human Trafficking Task Force E-Guide: Comprehensive Victim Services – Mental Health Needs*, OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/44-comprehensive-victim-services/mental-health-needs/> [<https://perma.cc/HK4N-768X>].

⁶⁶ Greer & Dyle, *supra* note 60, at 392.

⁶⁷ 2020 TIP REPORT, *supra* note 54, at 32; see also Mark Sherry, *Sex Trafficking, Activism and Disability*, in GLOBAL PERSPECTIVES ON DISABILITY ACTIVISM & ADVOCACY 161, 169 (Karen Soldatic & Kelley Johnson eds., 1st ed. 2019). (“[Pediatricians] at the Hasbro Children’s Hospital in Rhode Island reported 92 per cent of children who reported being the victims of sex trafficking also had a substance abuse disorder[.]”).

⁶⁸ See Jacquelyn C. A. Meshelemiah et al., *Use of Drug Dependency to Entrap and Control Victims of Sex Trafficking: A Call to a U.S. Federal Human Rights Response*, 3 DIGNITY: J. ON SEXUAL EXPLOITATION & VIOLENCE, no. 3, art. 8 (2018) at 2; 2020 TIP REPORT, *supra* note 54, at 32.

⁶⁹ See 42 U.S.C. § 12114(b)(1); see, e.g., *Shafer v. Preston Mem’l Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997) (holding that a current illegal drug user was not covered under the ADA).

experiences.⁷⁰ For example, at only fifteen years old, Audrey Morrissey began to “work on the streets” to earn money for the romantic future her trafficker had promised her.⁷¹ But then her trafficker introduced her to heroin.⁷² She says that her trafficker used her addiction to control her, to intimidate her, and to make her believe “that there was no way out[.]”⁷³ Likewise, survivor Shandra recounts how her traffickers “made me take drugs at gunpoint” and how the drugs may have “helped make it all bearable[.]”⁷⁴ The drugs kept her submissive, dependent, and numb.⁷⁵ They also compounded her emotional trauma.⁷⁶ The 2020 Trafficking in Persons Report warns that the mix of traumatic stress and addiction sometimes seen in survivors like Shandra is an especially thorny one, because both disorders cause “biochemical changes” to the brain.⁷⁷

Such significant and lasting physical and psychological wounds⁷⁸ can socially and functionally disable survivors. For example, substance abuse and PTSD can keep

⁷⁰ See, e.g., Phillip Martin & Jenifer B. McKim, *Unseen, Part 5: Sex Traffickers Prey on Drug-Addicted Young Men*, GBH NEWS (Dec. 13, 2021), <https://www.wgbh.org/news/national-news/2021/12/13/unseen-part-5-sex-traffickers-prey-on-drug-addicted-young-men> [<https://perma.cc/BPE6-QQSU>] (describing how one trafficker, Robert King, took vulnerable clients from group and sober houses, the street, and in one case, a psychiatric hospital, to traffic them, supplying them with a “steady stream of drugs and alcohol[.]” feeding the addictions many suffered from) (“Most of [the trafficking survivors in the King case] . . . had problems with substance abuse prior. Some had recovered, and King destroyed that[.]”). See *infra* Section II.B.1 for a discussion of the ramifications of survivors’ current addictions for ADA coverage or potential lack thereof.

⁷¹ Grace Pecci, *Victim of Human Trafficking Addresses Rotary Club*, TELEGRAPH (July 30, 2019), <https://www.nashuatelegraph.com/news/local-news/2019/07/30/victim-of-human-trafficking-addresses-rotary-club/> [<https://perma.cc/XR98-VTC3>].

⁷² ANTHONY ET AL., *supra* note 53, at 120.

⁷³ *Id.*

⁷⁴ Meshelemiah et al., *supra* note 68, at 2.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 2020 TIP REPORT, *supra* note 54, at 32.

⁷⁸ Greer & Dyle, *supra* note 60, at 392.

survivors isolated and stuck in cycles that leave them vulnerable to more victimization unless they get support.⁷⁹ Likewise, the trauma child survivors endure may spur dramatic changes in brain development that lead to impulsivity.⁸⁰ And if survivors lack appropriate resources and accommodations, lasting physical impairments can prevent survivors from engaging with their communities.⁸¹ At bottom, survivors rarely escape unscathed: if they were not already disabled before they were trafficked, they likely are by the time they escape their trafficking situation.⁸²

2. Survivors with Preexisting Disabilities

“With tears in my eyes I told him, ‘You shouldn’t go because you don’t know this man.’ But when they’re young, boys don’t always know what they’re doing[.]”

– Juana Ofelia Garcia, mother of suspected trafficking survivor Ismael Santiago Garcia⁸³

Survivors with preexisting disabilities are particularly vulnerable to trafficking.⁸⁴ Multiple factors put them at risk.⁸⁵ The U.S. Department of Justice

⁷⁹ See Hanni Stoklosa et al., *Ethics Case: Human Trafficking, Mental Illness, and Addiction: Avoiding Diagnostic Overshadowing*, 19 AM. MED. ASS’N J. ETHICS 23, 27–29 (2017).

⁸⁰ See Theresa Glennon, *The Developmental Perspective and Intersectionality*, 88 TEMP. L. REV. 929, 939 (2016).

⁸¹ See 2016 TIP REPORT, *supra* note 25, at 20.

⁸² See Sherry, *supra* note 67, at 169.

⁸³ See Mark Fineman, *Deaf Migrants’ Families Had Feared Abuse*, L.A. TIMES (July 22, 1997, 12:00 AM), [https://www.latimes.com/archives/la-xpm-1997-jul-22-mn-15006-story.html/\[https://perma.cc/FQH4-ERTE\]](https://www.latimes.com/archives/la-xpm-1997-jul-22-mn-15006-story.html/[https://perma.cc/FQH4-ERTE]). Ismael is a deaf-mute person, missing Mexican migrant, and suspected trafficking survivor. *Id.*; see *Developments in the Law: Jobs and Borders*, 118 HARV. L. REV. 2171, 2180–81 (2005). Though Ismael Santiago Garcia has not been confirmed as a trafficking survivor, he was recruited by a member of the Paoletti family, who trafficked deaf-mute Mexican migrants like Ismael in New York City. *Id.*

⁸⁴ Carey & Peterson, *supra* note 29, at 472–73.

⁸⁵ *Human Trafficking Task Force E-Guide: Comprehensive Victim Services – Victims with Physical, Cognitive, or Emotional Disabilities*, OFF. FOR VICTIMS OF CRIME,

Office for Victims of Crime indicates that people with disabilities often rely on caregivers.⁸⁶ This reliance creates an unequal power dynamic that gives caregivers an opportunity to traffic their clients.⁸⁷ Alternatively, traffickers may capitalize on the loneliness or isolation that some people with disabilities feel, to persuade them to perform sexual acts for friendship or money.⁸⁸ People with disabilities may also become desensitized to touch as a result of being handled while being cared for and from their medical procedures, and they may be unsure about whether they have the right to stop and report unwanted physical abuse.⁸⁹

Traffickers similarly target people with substance addictions, another form of disability.⁹⁰ In fact, some traffickers recruit directly from detox and treatment centers, entrapping survivors in sex trafficking and forced labor.⁹¹ The 2020 Trafficking in Persons Report notes two recent court cases involving survivors trafficked from substance abuse treatment: In the first, the owner of a chain of sober living houses was convicted of sex trafficking residents in his houses.⁹² Next, in a civil case, traffickers allegedly singled out people who had been court-ordered to spend time in substance use recovery facilities.⁹³ The traffickers made the people in recovery work in dangerous industries like chicken processing and sheet metal manufacturing.⁹⁴

<https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/45-victim-populations/victims-with-physical-cognitive-or-emotional-disabilities> [<https://perma.cc/U6XL-3TER>].

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* It is important to note that loneliness and isolation are not part and parcel with disability. Many people with disabilities are connected and engaged with their communities.

⁸⁹ *Id.*

⁹⁰ 2020 TIP REPORT, *supra* note 54, at 32.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

Traffickers exploit preexisting disabilities to keep survivors under their thumb.⁹⁵ For example, some traffickers may seek out people with disabilities who cannot speak clearly or who require communication aids or an interpreter, because the survivor cannot ask for help.⁹⁶ Or, traffickers may target people with developmental delays or mental illness, who may be easily manipulated. In the federal criminal case *U.S. v. Kaufman*, a federal court convicted Arlan and Linda Kaufman for trafficking residents at an unlicensed care facility for people with mental and cognitive disabilities.⁹⁷ The Kaufmans ran their residential care facility for approximately two decades.⁹⁸ The government presented evidence that the Kaufmans forced their residents to work naked on a farm and to film pornographic films that the Kaufmans watched.⁹⁹ The Kaufmans even claimed that the trafficking was legitimate therapy, and they billed the survivors' families for the abuse.¹⁰⁰ They were sentenced to fifteen years in federal prison.¹⁰¹

Similarly, in *EEOC v. Henry's Turkey Service*, a civil case brought by the U.S. Equal Employment Commission (EEOC) under the Americans with Disabilities Act, traffickers tricked intellectually disabled adult men into enduring inhumane conditions while working at a turkey evisceration plant, under the guise of providing

⁹⁵ *E.g.*, Press Release, EEOC, Jury Awards \$240 Million for Long-Term Abuse of Workers with Intellectual Disabilities (May 1, 2013), <https://www.eeoc.gov/newsroom/jury-awards-240-million-long-term-abuse-workers-intellectual-disabilities> [<https://perma.cc/8V2U-XPk5>] (providing an example of trafficking disabled people).

⁹⁶ OFF. FOR VICTIMS OF CRIME, *supra* note 85.

⁹⁷ HUM. TRAFFICKING LEGAL CTR., FACT SHEET: TRAFFICKING OF PERSONS WITH DISABILITIES IN THE UNITED STATES 2 n.10, <https://www.htlegalcenter.org/wp-content/uploads/Trafficking-of-Persons-with-Disabilities-in-the-United-States-Fact-Sheet.pdf> [<https://perma.cc/2HKZ-6EPB>] (citing *United States v. Kaufman*, 546 F.3d 1242 (10th. Cir. 2008)).

⁹⁸ ANTHONY ET AL., *supra* note 53, at 113.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Kaufman Sentenced to 15 Years in Prison in 'Nude Therapy' Case*, KANSAN (Nov. 24, 2009, 03:52 PM), https://www.themaplist.org/wp-content/uploads/2019/01/Arlan-Kaufman-_Kaufman-sentenced-to-15-years-in-prison-in-%E2%80%98nude-therapy%E2%80%99-case_-Newton-Kansan-Nov.-24-2009.pdf [<https://perma.cc/WQ2W-5XZU>].

them with services and a community.¹⁰² Because of their impairments and isolation from family, the men failed to understand their rights “as workers and human beings.”¹⁰³ Susan Seehase, director of the support center that took in most of the men after their ordeal, says the abuse went “on and on” because the men “knew nothing better”¹⁰⁴ A jury issued a \$240 million judgement against Henry’s Turkey Service in connection with the abuse.¹⁰⁵

Ismael Santiago Garcia’s narrative highlights the plight of survivors of color with preexisting disabilities. Barely in his twenties, Ismael, who is deaf-mute, abandoned his life as a traveling salesman in Mexico and embarked to America after a man he knew as “Señor Paoletti” offered him a job.¹⁰⁶ In Mexico, young members of the deaf-mute population are either put into regular classes with non deaf-mute children or stop schooling after junior high.¹⁰⁷ Often their own kin shun them.¹⁰⁸ Ismael suffered from this strong stigma against deaf-mute people and made mere pennies for his work, so he was swayed by the promise of a better life.¹⁰⁹

Unfortunately, life in the United States was likely no better for Ismael. Investigations later revealed that the Paolettis had trafficked dozens of deaf-mute Mexicans to whom they had promised job opportunities in the United States.¹¹⁰ Discovered by police in Queens, New York, the survivors had been forced to peddle

¹⁰² ANTHONY ET AL., *supra* note 53, at 21–22, 112–113; HUM. TRAFFICKING LEGAL CTR., *supra* note 97, at 2.

¹⁰³ ANTHONY ET AL., *supra* note 53, at 113.

¹⁰⁴ Noguchi, *supra* note 58.

¹⁰⁵ Press Release, EEOC, *supra* note 95.

¹⁰⁶ *Developments in the Law – Jobs and Borders*, *supra* note 83, at 2180.

¹⁰⁷ *Id.* at 2181 (“[Deaf-mute people in Mexico] are denied special education after junior high school.”).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

trinkets in subway cars for “eighteen hours a day, seven days a week.”¹¹¹ The survivors stayed because they had “nowhere else to go,” as many had been smuggled, undocumented, across the border.¹¹² Even worse, the Paolettis had confiscated the workers’ government documents before subjecting the workers to unfathomable physical, mental, and sexual abuse.¹¹³ Here, the survivors’ deafness and muteness, undocumented immigration status, and Latina/o ethnicity intersected to make them especially vulnerable to the Paoletti family’s trafficking scheme.

B. Trafficking in United States Law

Sections I.B.1 and I.B.2 provide an overview of some of the United States statutes that marginalized trafficking survivors may encounter. While by no means exhaustive, these Sections show what sort of relief trafficking survivors can expect. Then, Section I.B.3 explains that trafficking is largely considered a problem for the criminal justice system.

1. The Americans with Disabilities Act

This Section provides a brief background in federal disability law and its relation to trafficking survivors. The Americans with Disabilities Act (ADA) defines “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of [the] individual.”¹¹⁴ Survivors’ social and functional disabilities are legally recognizable when they substantially limit the survivors’ abilities to live their lives.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See id.*

¹¹⁴ Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2008).

The ADA prohibits discrimination against people with disabilities,¹¹⁵ as well as disability-based harassment.¹¹⁶ Titles I and V often apply in trafficking cases.¹¹⁷ The EEOC notes that Title I forbids discrimination based on disability in employment and wages.¹¹⁸ Title V similarly forbids coercion, threats, and intimidation in work.¹¹⁹ The ADA also provides for civil penalties and remedies to trafficking survivors.¹²⁰

The 2013 landmark disability discrimination case *EEOC v. Henry's Turkey Service* showcases how the ADA can protect trafficking survivors. Brought by the EEOC under the ADA, this civil case starkly illuminates the abuse and discrimination that disabled survivors can suffer based on their disabilities.¹²¹ Decades earlier, Henry's Turkey Service transported dozens of intellectually disabled men from Texas to Iowa under the promise of employment opportunities.¹²² To make the opportunities fair, Henry's should have paid the workers approximately \$1,800 per month, based on a forty-hour work week, which was the average non-overtime wage typically earned by workers without intellectual disabilities who performed the same or similar work.¹²³ When the disabled men arrived at Henry's turkey processing plant, however, the owners and staffers paid the men about \$65 a month, or less than 4% of what they should have earned.¹²⁴ Henry's refused to pay

¹¹⁵ Off. of Disability Emp. Pol'y, *Employment Laws: Disability & Discrimination*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/odep/publications/fact-sheets/employment-laws-disability-and-discrimination> [<https://perma.cc/2H3S-PV34>].

¹¹⁶ Press Release, EEOC, *supra* note 95.

¹¹⁷ See Carey & Peterson, *supra* note 29, at 477.

¹¹⁸ Press Release, EEOC, *supra* note 95.

¹¹⁹ Carey & Peterson, *supra* note 29, at 477.

¹²⁰ See *id.*

¹²¹ See ANTHONY ET AL., *supra* note 53, at 112.

¹²² *Id.*

¹²³ See Press Release, EEOC, *supra* note 95 (revealing that Henry's should have paid the workers \$11 to \$12 per hour).

¹²⁴ See ANTHONY ET AL., *supra* note 53, at 112–13.

the disabled men for working overtime, even when they worked excessive hours.¹²⁵ Harassing the men for their disabilities, the traffickers called them “retarded[.]” “dumb ass[es][.]” and “stupid.”¹²⁶ Many of the men suffered in silence under these conditions for most of their adult lives.¹²⁷

Though the EEOC could not make up for lost time, the federal agency sought to compensate the men with money damages. The EEOC filed two lawsuits against Henry’s Turkey Service on behalf of the abused workers: the first for wage discrimination, and the second for disability-based harassment and discrimination.¹²⁸ In 2012, the workers were awarded \$1.37 million in lost wages.¹²⁹ These damages pale in comparison to the \$240 million jury verdict awarded two years later in favor of the workers, for “disability discrimination and severe abuse.”¹³⁰ This was the largest award in the federal agency’s history.¹³¹ The damages highlight the magnitude of abuse that trafficking survivors with disabilities may suffer. It also shows the importance of laws that provide proportional relief.

Despite enabling victories for some survivors, the ADA fails others, including those in “active” addiction before recovery. Addiction is federally recognized as a disability under the ADA, but only when people with addictions maintain sobriety.¹³² The ADA can protect former drug addicts because in some circumstances addictions

¹²⁵ *See id.*

¹²⁶ Press Release, EEOC, *supra* note 95.

¹²⁷ ANTHONY ET AL., *supra* note 53, at 113.

¹²⁸ Press Release, EEOC, *supra* note 95.

¹²⁹ HUM. SMUGGLING & TRAFFICKING CTR., FACT SHEET: HUMAN TRAFFICKING V. HUMAN SMUGGLING 3 (2013), <https://2009-2017.state.gov/documents/organization/226276.pdf> [<https://perma.cc/F8AM-LV88>].

¹³⁰ Press Release, EEOC, *supra* note 95.

¹³¹ *Id.*

¹³² *See, e.g.,* Shafer v. Preston Mem’l Hosp. Corp., 107 F.3d 274 (4th Cir. 1997) (holding that a current illegal drug user was not covered under the ADA); 42 U.S.C. § 12114(b).

are considered a “substantially limiting impairment.”¹³³ Qualified individuals under the ADA include former addicts who have been successfully rehabilitated, for example, through successful completion of a supervised drug rehabilitation program with maintenance of sobriety.¹³⁴ The ADA also protects those who are currently participating in a supervised rehabilitation program and are no longer engaged in drug use.¹³⁵

Like in *EEOC v. Henry's Turkey Service*, the EEOC can bring disability discrimination cases on behalf of disabled trafficking survivors, but the ADA's definition of disability excludes *presently*-addicted labor trafficking survivors trapped at the will of a controlling employer. If an employer forces survivor workers into addiction or perpetuates their addictions, survivors are unlikely to be “successfully rehabilitated”—and thus disabled under the ADA—during their trafficking experiences. Only after their trafficking experiences are long over are these survivors likely to recover. Moreover, disability discrimination only occurs when an employer treats an employee unfavorably because that employee has a disability or a history of a disability at the time of employment.¹³⁶ Under this standard, a trafficking survivor who is only considered disabled under the ADA *after* they leave their trafficking situation (here, their employment) will not qualify for relief for the discriminatory actions of their trafficker *during* employment.¹³⁷

¹³³ MICHAEL L. FOREMAN ET AL., COMM'N ON CIV. RTS., SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? 55–66 (U.S. Comm'n on C. R., 2000), <https://files.eric.ed.gov/fulltext/ED457626.pdf> [<https://perma.cc/JE53-KJ3S>] (citing EEOC Technical Assistance Manual on the ADA 8.5; *Hartman v. City of Petaluma*, 841 F. Supp. 946, 949 (N.D. Cal. 1994) (concluding that there must be “some indicia of dependence” to be considered substantially limiting a major life activity)).

¹³⁴ 42 U.S.C. § 12114(b)(1).

¹³⁵ § 12114(b)(2).

¹³⁶ *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/disability-discrimination> [<https://perma.cc/5TEB-ZS4M>].

¹³⁷ See generally Samantha A. Hill, *The ADA's Failure to Protect Drug Addicted Employees Who Want to Seek Help and Rehabilitation*, 9 U. PA. J. BUS. L. 973 (2007) (describing how the ADA fails to protect currently-using drug addicts who want to seek help and rehabilitation). I could not find examples of failed claims for disability discrimination on the basis of labor trafficking survivors' addictions. This suggests that survivors, or the EEOC on their behalf, are not bringing these claims.

Consider a hypothetical situation in which Sam at Housecleaners Inc. hires Sue, a woman of color seeking a second job to support her family. Housecleaners is a small business, employing two other housecleaners besides Sue: Sam's two sons. Sam treats his other two housecleaners, his sons, well. Sam realizes he can coerce Sue to work for little to no pay—much less than agreed upon—by threatening her with violence. To keep Sue compliant Sam plies Sue with drugs, and Sue becomes addicted. Sam then uses Sue's addiction against her. He threatens to tell the police that Sue uses illegal drugs when Sue tries to leave Housecleaners. In addition, Sam gives Sue drugs for free, then withholds them when Sue is in withdrawal to make Sue feel dependent on him but also fear him.

Under the ADA's current definition of addiction as a disability, Sue would likely not qualify for relief in a federal disability discrimination case if she were to seek help through civil litigation to try to save herself from her situation. This is because Sue was actively addicted to drugs when Happy Housecleaners discriminated against her. She was not rehabilitated nor continuously sober during her trafficking, and rehabilitation and maintained sobriety are required for relief under the ADA. The ADA's lack of protection is an especially egregious failure here, as Sue needs help the most during her period of active addiction, when her trafficker controls her. This is an unthinkable reality that some survivors could face given traffickers' propensity to exploit survivors suffering from addiction.

2. Federal Anti-Trafficking Statutes

Trafficking survivors may receive civil, criminal, and immigration relief under federal law.¹³⁸ State penalties vary widely, and therefore are outside the scope of this Note.¹³⁹ The Trafficking Victims Protection Act of 2000 (TVPA), a bipartisan act

¹³⁸ See NOEL BRIDGET BUSCH-ARMENDARIZ ET AL., HUMAN TRAFFICKING APPLYING RESEARCH, THEORY, AND CASE STUDIES 1, 14 (2018) (discussing the TVPA, which provides a civil remedy, promotes criminal prosecution of traffickers, and protects survivors from removal or deportation in immigration proceedings).

¹³⁹ All fifty states have criminal anti-trafficking statutes. *Human Trafficking State Laws*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx> [<https://perma.cc/T79R-3CQL>]. State penalties vary widely: Alaska, for example, penalizes anyone who benefits from trafficking as being guilty of second-degree trafficking, while Alabama, Georgia, and Mississippi allow, if certain requirements are met, businesses to be found guilty of trafficking offenses. *Id.* Given the variety of state law approaches to trafficking, this section centers discussion around federal statutes to provide a nationwide snapshot of laws especially relevant to trafficking survivors.

signed into law by then-President Bill Clinton, marked the moment that the United States committed to fighting trafficking alongside numerous other countries.¹⁴⁰ The TVPA's scope is broad.¹⁴¹ It is the "cornerstone" for the U.S. counter-trafficking effort, containing most of the authorizations for U.S. anti-trafficking policies and programs.¹⁴² The TVPA's purpose is to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."¹⁴³ To do so, the TVPA expanded survivor protections, anti-trafficking programs, and criminal statutes against trafficking.¹⁴⁴ This strategy is known as the three P's: prevention, protection, and prosecution.¹⁴⁵ The TVPA is now in its seventh iteration after six reauthorizations by Congress.¹⁴⁶

¹⁴⁰ See *Summary of the Trafficking Victims Protection Act (TVPA) and Reauthorizations FY 2017*, ALL. TO END SLAVERY & TRAFFICKING (Jan. 11, 2017, 08:40 AM), <https://endslaveryandtrafficking.org/summary-trafficking-victims-protection-act-tvpa-reauthorizations-fy-2017-2/> [<https://perma.cc/6LAJ-MG9Y>]; *Victims of Trafficking and Violence Protection Act of 2000 (TVPA)*, Pub. L. No. 106-386, 106th Cong. (Oct. 28, 2000); *Federal Law, NAT'L HUM. TRAFFICKING HOTLINE*, <https://humantraffickinghotline.org/what-human-trafficking/federal-law> [<https://perma.cc/JGA2-FUHS>] (indicating the TVPA is "the first comprehensive federal law to address trafficking in persons").

¹⁴¹ See *Recommendations to Congress for Reauthorization of the Trafficking Victims Protection Act*, ALL. TO END SLAVERY & TRAFFICKING (June 14, 2021, 10:10 AM), <https://endslaveryandtrafficking.org/2947-2/> [<https://perma.cc/6G7V-RGTB>].

¹⁴² *Id.*

¹⁴³ 22 U.S.C. § 7101(a). The TVPA's provisions for children sometimes differ depending on whether the child is under eighteen years old (*see, e.g.*, 18 U.S.C. § 1591(a)(2)), under fourteen years old (18 U.S.C. § 1591(b)(1)), or between fourteen and eighteen years old (18 U.S.C. § 1591(b)(2)). Depending on the provision, these different ages may warrant harsher or lesser punishments. *See* § 1591. For the purposes of this Note, the exact age of minor survivors is not relevant, though it is worth noting that the younger the survivor, the more vulnerable they may be.

¹⁴⁴ PRESIDENT'S INTERAGENCY TASK FORCE TO MONITOR & COMBAT TRAFFICKING IN PERSS., *FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013-2017*, at 5 (2014).

¹⁴⁵ *Id.* Secretary of State Hillary Clinton introduced a fourth P in the tenth edition of the *Trafficking in Persons Report* in 2010: "partnership." U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 2* (2010). This "p" "serve[d] as a pathway to progress in the effort against modern-day slavery." ALL. TO END SLAVERY & TRAFFICKING, *supra* note 140.

¹⁴⁶ The Act has been reauthorized in 2003, 2005, 2008, 2013, 2017, and 2019. *See* CHELSEA CAPLINGER, *HUM. TRAFFICKING SEARCH, TRAFFICKING VICTIM PROTECTION REAUTHORIZATION ACT: A BRIEF*

The TVPA defines “severe forms of trafficking in persons” as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁴⁷

SUMMARY OF THE TVPA AND EACH REAUTHORIZATION 2000–2019 (2021), <https://humantraffickingsearch.org/wp-content/uploads/2021/08/TVPA-Summary-HTS-2021.pdf> (explaining each reauthorization and the legislative quirk that led to the 2017 reauthorization being nested within the 2019 reauthorization) [<https://perma.cc/2L2Y-3EXH>]. Though a 2021 reauthorization has been introduced in Congress, it has not yet become law. *See* H.R. 5150, 117th Cong. (2021).

¹⁴⁷ Trafficking Victims Protection Act, 22 U.S.C. § 7102(11) (2000) (amended 2021). Other relevant definitions include a “commercial sex act,” meaning “any sex act on account of which anything of value is given to or received by any person[.]” and “sex trafficking” which means “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” §§ 7102(4), 7102(12). Additionally, “coercion” means:

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of the legal process.

§ 7102(3).

“[D]ebt bondage” means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

§ 7102(7).

“[I]nvoluntary servitude” includes a condition of servitude induced by means of—

The Office on Trafficking in Persons in the Department of Health and Human Services (HHS) explains that force may involve physical violence like beatings.¹⁴⁸ Fraud may include false promises regarding love, marriage, or a better life.¹⁴⁹ Coercion may consist of psychological manipulation or threats of serious harm.¹⁵⁰

Survivors have multiple remedies under the TVPA and its subsequent reauthorizations.¹⁵¹ First, survivors have criminal remedies intended to strengthen prosecution and punishment of traffickers.¹⁵² For its criminal remedies, the TVPA amended and added several existing criminal statutes that penalize traffickers.¹⁵³

(A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or

(B) the abuse or threatened abuse of the legal process.

§ 7102(8).

¹⁴⁸ OFF. ON TRAFFICKING IN PERSS., ADMIN. FOR CHILD. & FAMS., DEP'T OF HEALTH & HUM. SERVS., FACT SHEET: HUMAN TRAFFICKING, DOC. NO. OTIP-FS-18-01 (2017), https://www.acf.hhs.gov/sites/default/files/documents/otip/fact_sheet_human_trafficking_fy18.pdf [<https://perma.cc/52J9-32WG>].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ For a comprehensive analysis of the TVPA's reauthorizations, see ALL. TO END SLAVERY & TRAFFICKING, *supra* note 140 (cataloguing the new provisions in each TVPRA—Trafficking Victims Protection Reauthorization Act—prior to the 2019 reauthorization).

¹⁵² 22 U.S.C. § 7109 (2018).

¹⁵³ 22 U.S.C. § 7109(a) (2000) (amending 18 U.S.C. §§ 1581(a), 1583, and 1584, and adding 1589 (“forced labor”), 1590 (“[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor”), 1591 (“[s]ex trafficking of children or by force, fraud or coercion”), 1592 (“[u]nlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor”), 1593 (“[m]andatory restitution”), and 1594 (“[g]eneral provisions” including amendments to the federal Sentencing Guidelines to account for the “heinous nature” of trafficking offenses)).

These criminal statutes penalize traffickers for a variety of offenses.¹⁵⁴ To avoid an exhaustive list, this Note will provide a brief overview instead.

Federal criminal statutes that address trafficking include those in 18 U.S.C. Chapter 77, covering “peonage, slavery, and trafficking in persons[.]”¹⁵⁵ These statutes include trafficking children, forcing people into servitude, enticing someone into slavery, and sex trafficking a person across state lines.¹⁵⁶ Federal immigration offenses like fraud and misuse of visas may implicate traffickers when they traffic foreign-born survivors.¹⁵⁷ Such statutes and others provide harsh penalties to traffickers. Under some of these provisions, traffickers may even face life in prison.¹⁵⁸

Notably, adult “mentally incompetent” or psychologically-coerced survivors with disabilities are currently protected under these criminal statutes like their non-disabled counterparts. The statutes override the Supreme Court’s earlier decision in *United States v. Kozminski*, in which the Court had held that the Thirteenth Amendment did not cover psychological coercion in a case involving intellectually disabled farmers held in servitude.¹⁵⁹ Now, prosecutors can use the statutes to punish traffickers who use psychological coercion against survivors. The recent impact of these federal criminal statutes is that in Fiscal Year 2020, the Department of Justice (DOJ) opened 663 federal human trafficking investigations, initiated 210 federal human trafficking prosecutions, and secured convictions against 309 traffickers.¹⁶⁰

¹⁵⁴ *Id.*

¹⁵⁵ See 18 U.S.C. §§ 1581–1597.

¹⁵⁶ See, e.g., 18 U.S.C. §§ 2422–23, 1581, 1583–84, 1589–92.

¹⁵⁷ See, e.g., 8 U.S.C. §§ 1324, 1325, 1328; 18 U.S.C. §§ 2424, 1546.

¹⁵⁸ Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 322–23 (2005).

¹⁵⁹ Carey & Peterson, *supra* note 29, at 474–75; see *United States v. Kozminski*, 487 U.S. 931, 931–32 (1988).

¹⁶⁰ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 585–86 (2021) [hereinafter 2021 TIP Report].

In addition to criminal remedies, survivors have immigration and civil remedies. For example, in 2000, the TVPA established trafficking visas (T-visas), with which some immigrant survivors can stay in the United States if they satisfy certain requirements.¹⁶¹ Three years later, in its first reauthorization, the TVPA (now, the TVPRA 2003) created a civil right of action under which survivors could sue their traffickers in federal district court.¹⁶² Under this remedy, survivors may now recover damages and reasonable attorney's fees.¹⁶³

The TVPRA 2005 provided grant money to state and local law enforcement to aid in the prosecution of traffickers.¹⁶⁴ The 2005 reauthorization also expanded services for survivors, creating rehabilitation and "comprehensive service facilities[.]"¹⁶⁵ The TVPRA 2008 expanded the crime of forced labor, established new crimes imposing penalties on people who obstruct trafficking investigations, and created a penalty for people who benefit from trafficking, among other efforts.¹⁶⁶ The TVPRA 2013 expanded holistic services for survivors, added a criminal penalty for confiscation of identity documents (a form of coercion traffickers use on victims), and extended jurisdiction for law enforcement in prosecuting child sex tourism cases.¹⁶⁷ The TVPRA 2017 "contains the Frederick Douglass Trafficking Prevention Act of 2017, which authorizes grant funding to train School Resource Officers to recognize and respond to signs of human trafficking"¹⁶⁸

¹⁶¹ Tiefenbrun, *supra* note 158, at 331; see *infra* Section I.B.3 for more discussion on survivors and T-visas.

¹⁶² Carey & Peterson, *supra* note 29, at 475; ALL. TO END SLAVERY & TRAFFICKING, *supra* note 140.

¹⁶³ 18 U.S.C. § 1595(a).

¹⁶⁴ ALL. TO END SLAVERY & TRAFFICKING, *supra* note 140.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Press Release, Off. on Trafficking in Perss., President Signs the Trafficking Victims Protection Act of 2017 (S. 1312) (Dec. 21, 2018), <https://www.acf.hhs.gov/otip/news/s-1312> [<https://perma.cc/YWR7-ETNA>].

The most recent 2019 reauthorization extended grant programs for survivors and recommended trainings for federal law enforcement officers and prosecutors.¹⁶⁹ On its face, the TVPA offers varied provisions to fight trafficking.¹⁷⁰ In 2020, a total of nearly \$85 million was awarded in federal civil trafficking cases.¹⁷¹ More survivors are filing more federal civil cases in more jurisdictions.¹⁷² Survivors are now seeking relief under diverse statutory TVPRA provisions.¹⁷³

3. Trafficking Is Considered a Law-and-Order Problem

In the pursuit of prevention, protection, and prosecution, anti-trafficking responses are dominated by a law-and-order framework.¹⁷⁴ A law-and-order framework at times prioritizes crime control and public safety—or prosecution—over survivors' rights.¹⁷⁵ The current law-and-order approach cuts both ways: it punishes criminals for human trafficking, and it sometimes punishes survivors for crimes they were forced to commit while being trafficked.

In 2004, the U.N. Special Rapporteur on trafficking in persons emphasized that the international community still saw trafficking as a law-and-order problem,

¹⁶⁹ KRISTEN WELLS, POLARIS PROJECT, THE 2019 TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT: A TOPICAL SUMMARY AND ANALYSIS OF FOUR BILLS 7, 20 (2019), <https://polarisproject.org/wp-content/uploads/2020/01/Polaris-TVVRA-2019-Analysis.pdf> [<https://perma.cc/7PLW-VK4U>].

¹⁷⁰ See *infra* Section I.B.3 for a discussion on how prosecution dominates anti-trafficking responses and how the criminal justice system pervades the anti-trafficking conversation.

¹⁷¹ REBEKAH R. CAREY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 2020 DATA UPDATE 21 (Martina E. Vandenberg & Alexandra Levy Yelderman eds., 2021).

¹⁷² *Id.* at 19.

¹⁷³ *Id.*

¹⁷⁴ See Swenstein & Mogulescu, *supra* note 34, at 118; HANNA LOVE ET AL., JUSTICE IN THEIR OWN WORDS: PERCEPTIONS AND EXPERIENCES OF (IN)JUSTICE AMONG HUMAN TRAFFICKING SURVIVORS 1, 2 (2018). Much of the scholarship around trafficking still focuses on prosecutions and criminal cases. *E.g.*, Carey & Peterson, *supra* note 29, at 471–97.

¹⁷⁵ See Iveta Cherneva, *Human Trafficking for Begging*, 17 BUFFALO HUM. RTS. L. REV. 25, 53 (2011) (indicating that international efforts to fight trafficking focus on crime control and punishment of traffickers, over the human rights of survivors).

without regard for international human rights.¹⁷⁶ As of 2018, prioritization of prosecution had not lessened in the past seventeen years: a study that year of eighty trafficking survivors and one hundred human trafficking stakeholders across the country found that “the criminal justice system remains the primary mechanism for identifying, classifying, and responding to human trafficking in the [United States].”¹⁷⁷ This past year, in 2021, federal government investigations increased, though convictions decreased because of “pandemic-related court closures” and the suspension of grand jury proceedings due to the COVID-19 pandemic.¹⁷⁸ Federal prosecutions decreased for the third year in a row, though it is unclear whether the pandemic also contributed to the decrease in 2020 and 2021.¹⁷⁹

There are few, if any, plans to reduce the role of the criminal justice system in trafficking. So far, in 2021, the DOJ, in coordination with the Department of Homeland Security and the Department of Labor, have continued to support large-scale human trafficking investigations and prosecutions.¹⁸⁰ This is a great development to the extent that the justice system apprehends more human traffickers and deters potential traffickers. In its 2019 reauthorization, the TVPA augmented criminal penalties for trafficking and mandated that domestic airlines report suspected trafficking to a national trafficking hotline or to law enforcement.¹⁸¹ However, the system needs to stop punishing the survivors of trafficking. Only this past year, in the introduction to the 2021 Trafficking in Persons Report (“TIP Report”) disseminated during the editing of this Note, has the federal government explicitly recognized the systemic discrimination and racism that trafficking survivors face in the criminal justice system.¹⁸² The government indicated that

¹⁷⁶ *Id.*

¹⁷⁷ LOVE ET AL., *supra* note 36, at 1–2.

¹⁷⁸ 2021 TIP Report, *supra* note 160, at 585.

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ Carey & Peterson, *supra* note 29, at 477.

¹⁸² *See* 2021 TIP Report, *supra* note 160, at iii. I read the introductory messages of all published TIP reports, from their inception in 2001 through present day, and found no mentions of racism as explicit as in the 2021 TIP Report’s introductory remarks. See *infra* Section II.A for an expanded discussion of marginalized survivors’ relationship with the criminal justice system.

advocates have called for more trainings across all criminal justice sectors, including “law enforcement, prosecutors, and judges,” to correct misconceptions about the elements of a human trafficking crime.¹⁸³

It remains to be seen whether this governmental recognition of how the criminal justice system penalizes survivors will expand to recognizing how the system penalizes even more vulnerable survivors, like disabled survivors of color. It also remains to be seen whether the government will call for reduced prosecutions of survivors who commit crimes during their trafficking experiences in the wake of this new recognition.

Trafficking law’s focus on law-and-order is evident in the TVPA’s provision of T-visas, where immigrant survivors of a “severe form of trafficking in persons” who lack residency but wish to stay in the United States must cooperate with law enforcement to investigate or prosecute their perpetrators.¹⁸⁴ Survivors may be eligible for T nonimmigrant status, or in other words, receive a T-visa, if they:

- Are or were a victim of a severe form of trafficking in persons as defined above [defined in the same way as in the TVPA;]
- Are physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry due to trafficking;
- Have complied with any reasonable request from a law enforcement agency for assistance in the investigation or prosecution of human trafficking (unless [the survivor] w[as] under the age of 18 at the time [that] at least one of the acts of trafficking occurred or [the survivor] [is] unable to cooperate due to physical or psychological trauma; if either case applies, [the survivor] may not need to show that [the survivor] complied with reasonable requests from law enforcement);

¹⁸³ 2021 TIP Report, *supra* note 160, at 587.

¹⁸⁴ See Cherneva, *supra* note 175, at 62. The standard requires survivors to comply with “any reasonable request in investigations.” *Id.*

- Demonstrate that [the survivor] would suffer extreme hardship involving unusual and severe harm if [the survivor] w[as] removed from the United States; and
- Are admissible to the United States (If [the survivor] [is] not admissible, [the survivor] may be eligible for a waiver of certain grounds of inadmissibility. . . .)¹⁸⁵

If law enforcement requests help in investigating or prosecuting a trafficker and the survivors refuse to cooperate with law enforcement, the survivors will not receive immigration relief under a T-visa, unless they fit one of the listed exceptions.¹⁸⁶ If the survivors cooperate, they are permitted to stay in the United States “at least through the duration of their captors’ prosecution”¹⁸⁷ But they are not guaranteed a longer stay.¹⁸⁸

For example, in the *Matter of T-B-B-*, an Applicant was denied a T-visa because the Applicant “had not demonstrated that she had complied with any reasonable requests for assistance in the investigation or prosecution of acts of severe forms of trafficking in persons.”¹⁸⁹ After an agency recruited her for a job teaching math in the United States, the Applicant found herself living in an overcrowded house with

¹⁸⁵ *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 20, 2021), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status> [<https://perma.cc/H8BN-YGZM>].

¹⁸⁶ Tiefenbrun, *supra* note 158, at 331–33. The TVPA does provide for a few exceptions to its requirement for law enforcement cooperation, notably, for minors and for physical or psychological trauma. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 185. Certain eligible family members may also apply. *Id.* (“Regardless of your age, you may apply for the following family members if they are in present danger of retaliation as a result of your escape from trafficking or cooperation with law enforcement: Your parents; [y]our unmarried siblings under 18 years of age; and [t]he children of any age or marital status of your qualifying family members who have been granted derivative T nonimmigrant status.”) (noting additionally that those whose family members are not in present danger of retaliation may apply for their spouses and unmarried children under the age of twenty-one, and applicants under the age of twenty-one may additionally apply for their parents and unmarried siblings under the age of eighteen).

¹⁸⁷ Tiefenbrun, *supra* note 158, at 331–33.

¹⁸⁸ *See id.*

¹⁸⁹ *Matter of T-B-B-*, ID# 488216 (AAO Oct. 23, 2017), at 1.

ten other teachers.¹⁹⁰ She was “intimidated and scared[,]” and the agency pressured her into paying the agency over 10% of her pay after her first year of teaching.¹⁹¹ She thought that the agency could fire her from the teaching position or, worse, deport her.¹⁹² Though she and over three hundred other Filipino teachers recruited by the same agency finally banded together and filed complaints against the agency, her participation in the class action failed to satisfy the T-visa law enforcement cooperation requirement.¹⁹³ The T-visa thus shows how domestic trafficking law centers around criminal justice, often at the expense of survivors.

Even responses that aim to divert trafficking survivors away from the legal system often end up operating within a law-and-order framework. New York State, for example, created Human Trafficking Intervention Courts, in which courts mandate services for people charged with prostitution offenses, some of whom are trafficking survivors.¹⁹⁴ In return, courts dismiss their charges and seal their criminal records.¹⁹⁵ The courts “handle all cases involving prostitution-related offenses that continue past arraignment,” according to then-Chief Judge Lippman of the New York Court of Appeals, New York’s highest state court.¹⁹⁶ In each court, the judge, defense lawyer, and prosecutor will all evaluate the case.¹⁹⁷ If they agree, the court will connect defendants with services like “drug treatment, shelter, immigration

¹⁹⁰ *Id.* at 2–3.

¹⁹¹ *Id.* at 3.

¹⁹² *Id.*

¹⁹³ *Id.* at 4.

¹⁹⁴ Christina Goldbaum, *Charged with Prostitution, She Went to a Special Court. Did It Help?*, N.Y. TIMES (Jan. 6, 2020), <https://www.nytimes.com/2020/01/06/nyregion/ny-prostitution-courts.html> [<https://perma.cc/B7G8-6VGC>]; see Mekeila C. Cook et al., *A Longitudinal Study of Justice Characteristics Among Girls Participating in a Sex Trafficking Court Program*, 9 HEALTH & JUST. J. 1 (2021).

¹⁹⁵ Goldbaum, *supra* note 194.

¹⁹⁶ William K. Rashbaum, *With Special Courts, State Aims to Steer Women Away from Sex Trade*, N.Y. TIMES (Sept. 25, 2013), <https://www.nytimes.com/2013/09/26/nyregion/special-courts-for-human-trafficking-and-prostitution-cases-are-planned-in-new-york.html> [<https://perma.cc/9Z6R-JHBY>].

¹⁹⁷ *Id.*

assistance and health care, as well as education and job training,” to try to keep them from returning to prostitution.¹⁹⁸ But if defendants cannot or decide not to comply with the mandates, their arrests may stand and they may be subject to criminal prosecution and conviction.¹⁹⁹ For trafficking survivors arrested on prostitution charges, a court that forces treatment at threat of criminal conviction may seem to use coercion similar to other problematic law-and-order mechanisms, like T-visas.²⁰⁰

What about all the responses to trafficking outside of the legal system, like the efforts of non-governmental organizations? Non-governmental organizations that respond to trafficking outside of the criminal justice system certainly exist.²⁰¹ Many focus on providing survivors with relief and helping them to gain the skills and resources they need to succeed outside of a life of trafficking.²⁰² Less directly, movements that respond to addiction, poverty, mass incarceration, and other issues with public health or social work remedies make trafficking less likely, as they help

¹⁹⁸ *Id.*

¹⁹⁹ See Melissa Gira Grant, *Human Trafficking Courts Are Not a Criminal Justice “Innovation”*, NEW REPUBLIC: SOLD/SHORT (Jan. 7, 2020), <https://newrepublic.com/article/156135/human-trafficking-courts-not-criminal-justice-innovation> [<https://perma.cc/9HUZ-3VQ6>] (“The courts can reinforce the coercion they are supposed to interrupt by making help contingent on pleading guilty and by using the threat of arrest or jail time as a tool for compliance.”).

²⁰⁰ Becca Kendis, *Human Trafficking and Prostitution Courts: Problem Solving or Problematic?*, 69 CASE W. RESV. L. REV. 805, 828–29 (2019); see *infra* Section I.B.3 for discussion of the T-visa status’s coercion of survivors to aid law enforcement efforts, and their lack of support for survivors if survivors fail to cooperate with and/or aid law enforcement in prosecution of their trafficker(s).

²⁰¹ See, e.g., *STOP-IT Initiative Against Human Trafficking*, THE SALVATION ARMY, <https://centralusa.salvationarmy.org/stopit/> [<https://perma.cc/7KUY-92VL>] (Salvation Army’s STOP-IT anti-trafficking program, which includes a drop-in center); *What We Do*, ON EAGLES’ WINGS, <https://www.oewhope.org/what> [<https://perma.cc/ZX67-LTJ7>] (Fields of Hope and Hope House, which reintegrate and provide care for minor female trafficking survivors); *Human Trafficking*, COVENANT HOUSE, <https://www.covenanthouse.org/homeless-issues/human-trafficking> [<https://perma.cc/M3HG-T5TJ>] (Covenant House, which provides direct services to housing-insecure trafficking survivors).

²⁰² See, e.g., THE SALVATION ARMY, *supra* note 201; *Stop-It*, FACEBOOK, <https://www.facebook.com/SAStopIt/> [<https://perma.cc/H86C-83ZA>] (offering food, temporary shelter, and clothing to survivors); ON EAGLES’ WINGS, *supra* note 201 (providing survivors with mandatory weekly therapy); COVENANT HOUSE, *supra* note 201 (giving personal care kits, trauma-informed care, and mental health care to survivors).

to reduce vulnerabilities of individuals and communities to trafficking.²⁰³ However, the scale of these efforts pales in comparison to law-and-order measures.²⁰⁴ And these efforts are largely *in response* to the damage that the law-and-order approach to trafficking leaves in its wake. They help survivors free themselves from criminal records obtained from their trafficking experiences.²⁰⁵ They support survivors in securing housing and employment.²⁰⁶ That way, such survivors do not have to navigate the system alone. They help survivors file civil claims against their traffickers so survivors may feel some semblance of justice.²⁰⁷ They help survivors process their trauma from trafficking, trauma that the criminal justice system often compounds, rather than mitigates.²⁰⁸

II. Current and Proposed Frameworks Fail Survivors

“Katya from the Ukraine [is] seen as a real victim and provided with services and support, but Keshia from the Bronx [is] seen as a ‘willing participant,’ someone who’s out there because she ‘likes it’ and who is criminalized and thrown in detention or jail.”

– survivor-leader Rachel Lloyd²⁰⁹

²⁰³ *Preventing Child Trafficking at the School Level*, NAT’L CTR. ON SAFE SUPPORTING LEARNING ENV’TS, <https://safesupportivelearning.ed.gov/human-trafficking-americas-schools/preventing-child-trafficking-at-school-level> [<https://perma.cc/BG7M-5HDL>] (“By identifying and addressing the “upstream” determinants of human trafficking, such as domestic violence, substance use, and poverty, communities can help reduce the number of students who will face it.”).

²⁰⁴ See Swenstein & Mogulescu, *supra* note 34.

²⁰⁵ See, e.g., *Our Programs*, FREE TO THRIVE (2020), <https://www.freetothrive.org/our-programs> [<https://perma.cc/GLS5-FPX9>].

²⁰⁶ See, e.g., *What We Do*, RESTORE, <https://restorenyc.org/our-work/what-we-do/> [<https://perma.cc/U4QF-J8AE>].

²⁰⁷ See FREE TO THRIVE, *supra* note 205.

²⁰⁸ See, e.g., *Restoring Choice to Survivors and Victims*, SALVATION ARMY, <https://centralusa.salvationarmy.org/stopit/> [<https://perma.cc/JJ46-EBPY>] (providing survivors with counseling by social workers, and with other direct services).

²⁰⁹ *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Hum. Rts. and the L. of the S. Comm. on the Judiciary*, 111th Cong. 15 (2010)

The law-and-order framework's focus on *criminal* justice ignores *survivors'* justice. Section II.A describes how the law-and-order framework retraumatizes and ignores marginalized survivors. Then, Section II.B identifies how other proposed frameworks for trafficking law fall short of analyzing the many ways survivors' intersecting identities affect their experiences amid active exploitation and during survivors' recovery afterwards.

A. The Law-and-Order Framework Criminalizes Marginalized Survivors

Though the law-and-order framework that underpins anti-trafficking responses has led to more arrests and convictions of traffickers,²¹⁰ the framework also criminalizes marginalized survivors and fails to connect them with resources like education, employment, or support groups.²¹¹

Trafficking laws distinguish between “deserving” and “undeserving” survivors,²¹² or “perfect” and “imperfect” ones, incarcerating and discounting the human rights of the latter groups.²¹³ Prosecutors perpetuate this injustice by using stereotypes about “appropriate” survivor responses to their situations to decide whether a survivor's account of their trafficking experience is credible.²¹⁴ And

(statement of Rachel Lloyd, Executive Director, Founder, Girls Education and Mentoring Services) (noting how society deems trafficking survivors “acceptable” or “unacceptable”).

²¹⁰ See Tiefenbrun, *supra* note 158, at 324.

²¹¹ See Sabrina Balgamwalla, *Trafficking Rescue Initiatives as State Violence*, 122 PENN STATE L. REV. 171 (2017) (finding that the criminal justice system often treats trafficking survivors as “victim-offenders’ who may be punished rather than protected”); The Human Trafficking Legal Center, *Racism & the Anti-Trafficking Movement*, YOUTUBE (June 15, 2021), <https://www.youtube.com/watch?v=bNrEoUfay-8> [<https://perma.cc/Y9B3-ZAMQ>] (presenting survivor responses to a survey on racism in the anti-trafficking movement) (raw study data on file with author); Swenstein & Mogulescu, *supra* note 34, at 118 (saying that criminal justice responses to trafficking do not help trafficking survivors get access to needed resources and services).

²¹² Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 IMMIGR. & NAT’Y L. REV. 741, 741–98 (2007).

²¹³ See LOVE ET AL., *supra* note 36, at 4–5, 7–8.

²¹⁴ Amy Farrell et al., *New Laws but Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases*, 61 CRIME, L. & SOC. CHANGE 139, 144 (2013).

because prosecutors “focus on securing successful convictions, prosecutors . . . evaluate evidence based on how they believe information will be received by judges and juries regardless of their personal opinions about the facts of the case.”²¹⁵ Because of this “downstream orientation” prosecutors may refrain from taking cases in which survivors engage in behavior perceived as “risky” or in which survivors engage in illegal acts like unlawful border crossings or prostitution.²¹⁶ In doing so, prosecutors send the following message to survivors who did what they had to in order to survive: *You are not deserving or worthy of protection.*

Young women who fail to fit the “perfect victim” narrative, like ones who engage in risky behavior such as consuming drugs or engaging in other criminal activities, are framed as traffickers themselves or harshly punished for self-defense.²¹⁷ Sex trafficking survivors are sometimes charged with prostitution “in the hope that they would receive the help needed to disclose their victimization.”²¹⁸ One survivor arrested for prostitution says, “There was . . . a lot of pressure for me to talk. The D.A. was there and they were asking me questions and [told me] if you give us information, then the D.A. is more likely to give you a good deal and you’ll get out”²¹⁹ According to one report, arrest was the *main mechanism* police used to compel sex trafficking survivors to disclose information for their cases in the South.²²⁰ In a cruel twist, after being charged with prostitution to compel their

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See Mariame Kaba & Brit Schulte, *Not a Cardboard Cutout: Cyntoia Brown and the Framing of a Victim*, THE APPEAL (Dec. 6, 2017), <https://theappeal.org/not-a-cardboard-cut-out-cyntoia-brown-and-the-framing-of-a-victim-aa61f80f9cbb/> [<https://perma.cc/JP4A-KUXM>].

²¹⁸ Andrea Cipriano, *Police Are ‘Failing’ Human Trafficking Survivors: Study*, THE CRIME REP. (Aug. 1, 2019), <https://thecrimereport.org/2019/08/01/police-are-failing-human-trafficking-survivors-study/> [<https://perma.cc/JS4N-5ZVS>].

²¹⁹ LILLY YU ET AL., ALTERNATIVE FORMS OF JUSTICE FOR HUMAN TRAFFICKING SURVIVORS 7 (2018), https://www.urban.org/sites/default/files/publication/97341/alternative_forms_of_justice_for_human_trafficking_survivors.pdf [<https://perma.cc/6SG3-2SX8>].

²²⁰ Cipriano, *supra* note 218.

testimony, survivors might have to register as sex offenders for the rest of their lives, compounding their difficulties.²²¹

Trafficking victims of color are vulnerable to discrimination throughout the entire process, from the legal system itself, through to the police forces.²²² U.S. Secretary of State Antony Blinken acknowledged this discrimination when he introduced the 2021 U.S. Trafficking in Persons Report, explaining that “deeply held racial biases and stereotypes” influence outcomes for trafficking victims in the criminal justice system because they “lead to racially disparate assumptions about who is identified as a trafficker and who is identified as a victim . . . a somber, unacceptable reality.”²²³ The TIP Report further noted that “marginalized communities” were overrepresented in the data available on trafficking victims.²²⁴

When survivors try to achieve justice, they face a burdensome process.²²⁵ At best, according to Heather Clawson and Nicole Dutch in a study of U.S. Health and Human Services programs serving survivors of human trafficking, survivors often have complex legal needs that can be challenging to meet.²²⁶ At worst, police, prosecutors, and courts may retraumatize survivors, especially marginalized survivors.²²⁷ For example, though some police departments proceed without survivor

²²¹ Kate Mogulescu & Leih Goodmark, *Surveillance and Entanglement: How Mandatory Sex Offender Registration Impacts Criminalised Survivors of Human Trafficking*, 14 ANTI-TRAFFICKING REV. 125, 125–30 (2020) (explaining that survivors convicted of prostitution must sometimes register as sex offenders, further marginalizing them).

²²² See Cheryl Page, *The Double Whammy of Being Female and African-American*, 22 GONZAGA J. INT'L L. 114, 119–23 (2019).

²²³ 2021 TIP Report, *supra* note 160, at iii.

²²⁴ *Id.* at 584.

²²⁵ Sarah Warpinski, Know Your Victim: A Key to Prosecuting Human Trafficking Offenses 21–23 (Spring 2013) (King Scholar Program, Michigan State University College of Law), <https://www.law.msu.edu/king/2012-2013/Warpinski.pdf> [<https://perma.cc/YQD3-L4G5>].

²²⁶ HEATHER J. CLAWSON ET AL., OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, STUDY OF HHS PROGRAMS SERVING HUMAN TRAFFICKING VICTIMS, (Dec. 14, 2009), <https://aspe.hhs.gov/reports/study-hhs-programs-serving-human-trafficking-victims> [<https://perma.cc/8BDH-HEGS>].

²²⁷ See Matthew Leviates, *Holding Trafficking Victims to Testify Makes Lives Worse: U.S. Group*, REUTERS (Apr. 16, 2020, 1:35 AM), <https://www.reuters.com/article/us-usa-trafficking-victims->

testimony,²²⁸ some courts still use material witness warrants to force survivors to identify themselves as survivors and to testify against their traffickers in court.²²⁹ Arresting these survivors to compel their testimony replicates the trauma they have already experienced: the trauma of “being locked up and being forced to do things they didn’t want to do[.]”²³⁰ And marginalized survivors are at risk of the most harm: they may lose custody of their children, jobs, or access to “services they need for recovery[.]”²³¹ Survivors who are more privileged, on the other hand, are more likely to be able to afford childcare while they are detained or to support themselves if they lose their job.

Some survivors of human trafficking, especially those of color, already distrust the police and may be loath to reach out for help. They often have personal experience with abuse or coercion by police.²³² One survivor of color interviewed describes how a police officer used his authority to manipulate her into revealing her genitals.²³³ Survivors of color may also fear stereotyping.²³⁴ Lali, a Hispanic survivor, describes how police willfully ignore missing Black and Brown survivors who are addicted to drugs, justifying their inaction by saying that these survivors “like to party” and “[will] be back in a few days.”²³⁵ Survivors may expect to be met

trfn/holding-trafficking-victims-to-testify-makes-lives-worse-u-s-group-idUSKCN21Y0HB
[<https://perma.cc/LWK6-NM95>].

²²⁸ Joseph M. Scaramucci, *Reducing the Need for Victim Testimony in Human Trafficking Cases*, NAT’L INST. OF JUST. (June 25, 2020), <https://nij.ojp.gov/topics/articles/reducing-need-victim-testimony-human-trafficking-cases> [<https://perma.cc/VV8S-NHR5>].

²²⁹ *Leviates*, *supra* note 227.

²³⁰ *Id.*

²³¹ *See id.*

²³² *Interview with Lali*, ECPAT-USA: SURVIVOR PERSPECTIVES (July 27, 2020), <https://www.ecpatusa.org/blog/category/Survivor+Perspectives> [<https://perma.cc/T6XC-WWXF>].

²³³ *Interview with “Warrior Angel,”* ECPAT-USA: SURVIVOR PERSPECTIVES (July 29, 2020), <https://www.ecpatusa.org/blog/category/Survivor+Perspectives> [<https://perma.cc/T6XC-WWXF>].

²³⁴ ECPAT-USA: SURVIVOR PERSPECTIVES, *supra* note 232.

²³⁵ *Id.*

with bias.²³⁶ Black survivor-leader Lyresh Magee says she only realized the extent of racial injustice against Black survivors, especially those with criminal records, when she decided to escape her own trafficker.²³⁷

Here is a closer look at why one survivor did not ask the police for help: Emma, a young woman of color with a crippling drug addiction, feared discrimination by the police based on negative experiences with law enforcement that her friends had shared with her.²³⁸ Instead, she attempted to recover from her drug addiction, leave her trafficker, and improve her situation, all without help from the police. Emma's trafficker continued to cajole her with drugs to have sex with other men for money. He controlled how much cash she could keep and even how often Emma talked to her family. Left with mental health issues from her trafficker's abuse, she believed she had no one to turn to for help.

Sadly, trafficking survivors' fears and suspicions are largely justified. The U.S. State Department identified multiple ways that systemic racism and bias pervade anti-trafficking efforts.²³⁹ For example, racial stereotypes can impact the specific

²³⁶ Lyresh McGee, *Op Ed: Who Holds Space for Black Survivors?*, CAST (Nov. 12, 2020), <https://www.castla.org/op-ed-who-holds-space-for-black-survivors/> [<https://perma.cc/V4HX-P5DY>].

²³⁷ *Id.*

²³⁸ I met "Emma" (name changed to protect anonymity) in Texas while mentoring survivors of abuse. See Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS NEWS HOUR (June 5, 2020, 12:00 PM), <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do> [perma.cc/99MR-S3NW] ("Nearly half of black Americans have very little or no confidence that police officers in their community treat people with different skin colors the same . . . [b]ut overall, only 18 percent of Americans take that view — an illustration in itself that people of different races are living different realities in the United States.").

²³⁹ OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSS., *Acknowledging Historical and Ongoing Harm: The Connections Between Systemic Racism and Human Trafficking*, U.S. DEP'T OF STATE (July 1, 2021), <https://www.state.gov/acknowledging-historical-and-ongoing-harm-the-connections-between-systemic-racism-and-human-trafficking/> [<https://perma.cc/H26D-7TH2>]; see Daphne Psaledakis & Jonathan Landay, *In a First, U.S. Warns of Dangers of Systemic Racism in Human Trafficking Report*, REUTERS (July 1, 2021, 2:46 PM), <https://www.reuters.com/world/first-us-warns-dangers-systemic-racism-human-trafficking-report-2021-07-01/> [<https://perma.cc/4JFV-49WV>]; Butler, *supra* note 18, at 1464.

communities police focus on for anti-trafficking operations.²⁴⁰ Next, prosecutors are more likely to charge marginalized child trafficking survivors as adults.²⁴¹ While white youths commit crimes at the same rate as Black youths, prosecutors are more likely to charge similarly-situated white girls as minors and Black girls as adults.²⁴² Even when all the factors prosecutors take into consideration in charging—including “educational and familial background, economic status, type and severity of the crime, any past criminal history, [and] likelihood to re-offend”—are similar, significant disparities in charging white girls versus Black girls remain.²⁴³ Laura Cohen, Director of the Criminal and Youth Justice Clinic at Rutgers Law School, says that these disparities can only be explained by race.²⁴⁴ Finally, these predetermined biases can impact the credibility of survivor-witnesses when they testify before a judge or jury.²⁴⁵

According to survivor-leader Fainess Lipenga, the criminal justice system’s weaknesses are exposed in the instances where trafficking survivors are arrested and prosecuted for their trafficker’s crimes.²⁴⁶ Bridgette Carr, founding director of the University of Michigan Law School’s Human Trafficking Clinic, explains: “We know that Black victims . . . are pushed more into being criminals and not being offered services[.]”²⁴⁷ For example, in the 2021 U.S. Trafficking in Persons Report, one non-governmental organization revealed that 89% of its current trafficking survivor clients who reported an arrest or conviction of a crime were

²⁴⁰ OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSS., *supra* note 239.

²⁴¹ Page, *supra* note 222, at 114–20.

²⁴² *Id.* at 120–21.

²⁴³ *Id.* at 121–22.

²⁴⁴ *Id.* at 114, 122, 122 n.56.

²⁴⁵ OFF. TO MONITOR & COMBAT TRAFFICKING IN PERSS., *supra* note 239.

²⁴⁶ 2021 TIP Report, *supra* note 160, at 39.

²⁴⁷ Christine Murray, *Victims and Villains: Anti-Trafficking Movement Urged to Tackle Racial Bias*, REUTERS (June 25, 2020, 2:04 PM), <https://www.reuters.com/article/us-usa-race-trafficking-trfn/victims-and-villains-anti-trafficking-movement-urged-to-tackle-racial-bias-idUSKBN23W30S> [perma.cc/JX52-W4VW].

“Black, [I]ndigenous, or people of color.”²⁴⁸ That organization indicated that survivors of color were more likely to be charged for crimes their traffickers forced them to commit and more likely to be coerced through threats by police into cooperation.²⁴⁹

A similar fate befell survivor Keosha Jones in *United States v. Jones*, a federal criminal case in which prosecutors charged Ms. Jones for a crime she committed while being trafficked herself.²⁵⁰ Ms. Jones pled guilty along with her co-conspirator Derrick Hayes to trafficking two fourteen-year-old girls.²⁵¹ But Mr. Hayes had forced Ms. Jones into commercial sex when she was only fifteen years old, beating and drugging her to gain her compliance.²⁵² Prosecutors appeared to ignore Ms. Jones’s own history of victimization when they decided to charge her with trafficking despite her trauma.²⁵³ The judge, however, noted Ms. Jones’s history of victimization, and while Ms. Jones received supervised release, Mr. Hayes received a thirty-year sentence.²⁵⁴

Ms. Jones was a “bottom girl,” or a trafficker’s right hand woman.²⁵⁵ Survivor Shamere McKenzie, a former “bottom girl” herself, has called for prosecutors to understand the victimization a “bottom girl” faces.²⁵⁶ She explains that survivors who face “constant threats[,]” witness “cruelty done to other girls[,]” and suffer

²⁴⁸ 2021 TIP Report, *supra* note 160, at 586.

²⁴⁹ *Id.*

²⁵⁰ See Alexandra F. Levy, *Innocent Traffickers, Guilty Victims: The Case for Prosecuting So-Called ‘Bottom Girls’ in the United States*, 6 ANTI-TRAFFICKING REV. 130 (2016).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *U.S. v. Pipkins*, 378 F.3d 1281 (11th Cir. 2004) (describing a “bottom girl’s” duties as managing her “pimp’s [in other words, her trafficker’s] affairs” when needed).

²⁵⁶ Levy, *supra* note 250, at 132.

“severe beatings and rapes” become compliant with their traffickers.²⁵⁷ She says that traffickers manipulate these girls through trauma bonds and fear, corrupting their free will.²⁵⁸

Lack of access to services and opportunities is another harm that survivors identify.²⁵⁹ In one 2021 survivor-leader-led survey, respondents noted that victims of color needed more support finding job opportunities and more support groups geared to women of color.²⁶⁰ The data also points to policies that prevent migrant victims from accessing services at all.²⁶¹ Scholars Abigail Swenstein and Kate Mogulescu explain that lack of employment, education, and affordable housing lead to survivors struggling, even survivors participating in prosecutions.²⁶² For example, when one survivor’s trafficker petitioned for custody of the child they had together, she sought help from the police.²⁶³ Despite her trafficker’s arrest, she still struggles without a high school education and without much family support.²⁶⁴ She has limited time and resources to heal or to raise her child, keeping her from achieving greater stability.²⁶⁵

Black survivors, who do not fit the idea of a “perfect victim,” are especially at risk of arrest.²⁶⁶ Black survivor Chrystul Kizer knows first-hand what happens when

²⁵⁷ Shamere McKenzie, *Unavoidable Destiny: Legally a Criminal, Legally a Victim: The Plight of the Bottom*, SHARED HOPE INT’L (May 24, 2012), <https://sharedhope.org/2012/05/24/unavoidable-destiny-legally-a-criminal-legally-a-victim-the-plight-of-the-bottom/> [<https://perma.cc/4NHD-2FQU>].

²⁵⁸ *Id.*

²⁵⁹ The Human Trafficking Legal Center, *supra* note 211 (raw survey data on file with author).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Swenstein & Mogulescu, *supra* note 34, at 118.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Murray, *supra* note 247.

survivors defend themselves against their traffickers.²⁶⁷ In 2018, when she was only seventeen years old, Ms. Kizer killed the man who allegedly purchased sex from her when she was a child—the man who allegedly sex trafficked her.²⁶⁸ Like Cyntoia Brown, instead of receiving support, Ms. Kizer was charged with murder.²⁶⁹ The prosecutors charged her even though Chrystul’s alleged trafficker was already under police investigation for sex crimes at the time of his death.²⁷⁰ Both prosecutors and police had evidence that the man, who is white, abused Ms. Kizer and other Black girls.²⁷¹ In the summer of 2020, Ms. Kizer was finally released from a Wisconsin jail on bail, but only after activists banded together to pay the \$400,000 sum.²⁷² Though she is out on bond, she is still fighting her case in court and may face life in prison.²⁷³ When courts and prosecutors punish trafficking survivors, they replicate the power that traffickers lord over survivors. The replication of a punitive relationship “compounds and prolongs victims’ experience of ongoing trauma and abuse.”²⁷⁴

²⁶⁷ See Ryan Brooks, *Chrystul Kizer, a 19-Year-Old Sex Trafficking Victim Who Killed Her Abuser, Has Been Released from Jail*, BUZZFEED NEWS (June 23, 2020, 6:31 PM), <https://www.buzzfeednews.com/article/ryancbrooks/chrystul-kizer-released-bail> [<https://perma.cc/C53C-7X5B>].

²⁶⁸ Jacey Fortin, *Chrystul Kizer, Teen Charged with Killing Sexual Abuser, Is Released on Bond*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/us/chrystul-kizer-free-bond.html> [<https://perma.cc/MD9K-MR3L>].

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Char Adams, *After Rittenhouse Verdict, Advocates Demand Justice for Chrystyl Kizer*, NBC NEWS (Nov. 29, 2021, 11:37 AM), <https://www.nbcnews.com/news/nbcblk/rittenhouse-verdict-advocates-demand-justice-chrystul-kizer-rcna6352> [perma.cc/LF57-CG57].

²⁷² Jessica Contrera, *Chrystul Kizer, Sex Trafficking Victim Accused of Killing Alleged Abuser, Wins Appeal in Wisconsin*, WASH. POST (June 3, 2021, 02:41 PM), <https://www.washingtonpost.com/dc-md-va/2021/06/03/chrystul-kizer-sex-trafficking-appeal/> [perma.cc/LQF7-8MSQ].

²⁷³ Rebecca Klar, *Black Teen Facing Life in Prison for Killing Her Alleged Sex Trafficker Released After Protest Fundraisers Cover Bail*, HILL (June 22, 2020, 9:58 PM), <https://thehill.com/homenews/state-watch/504007-black-teen-facing-life-in-prison-for-killing-her-alleged-sex-trafficker> [perma.cc/6JGB-98SD]; Contrera, *supra* note 272.

²⁷⁴ Kaba & Schulte, *supra* note 217.

And even when police do not arrest survivors, the legal system still ignores survivors' stated goals. As one survivor explained, "Nobody asks [survivors] what their dreams are."²⁷⁵ Survivors sometimes want restorative, instead of punitive justice, or reparations. As another survivor said, "I think that restitution the perpetrator has to pay should also be paying for therapy. Because part of human sex trafficking is a . . . lot of verbal, mental, and physical abuse. We need help with that."²⁷⁶ Procedural justice is equally important.²⁷⁷ The outcome of a case may matter less to a survivor than "neutrality, lack of bias, honesty, efforts to be fair, politeness, and respect for citizens' rights."²⁷⁸

Even legal interventions like New York's Human Trafficking Intervention Courts, meant to help survivors, sometimes also criminalize them. Because the Human Trafficking Courts rely on police bringing in people charged with prostitution, the potential human trafficking survivors who appear before the courts reflect police and the courts' gender bias and racial prejudice.²⁷⁹ In the Brooklyn Human Trafficking Court, for example, Black defendants "accounted for 69 percent of all of the charges brought forth in the court[.]"²⁸⁰ Black women faced a horrific 94% of all "loitering for the purpose of engaging in prostitution" criminal charges.²⁸¹ When aggressive programs, including human trafficking intervention courts, threaten survivors with prosecution if they do not cooperate with law enforcement, these programs prioritize criminal justice goals over making sure that survivors

²⁷⁵ Anna Shen, *Human Trafficking Survivor Harold D'Souza: "The Perpetrators Are More Aggressive Than Ever"*, INTER PRESS SERV. (Oct. 21, 2020), <https://www.ipsnews.net/2020/10/qa-human-trafficking-survivor-harold-dsouza-perpetrators-aggressive-ever/> [perma.cc/4KNW-D5JA].

²⁷⁶ YU ET AL., *supra* note 219, at 10.

²⁷⁷ *See id.* at 2.

²⁷⁸ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 7 (1990).

²⁷⁹ *Sex Trafficking and the Carceral State*, END SLAVERY NOW (Mar. 12, 2015), <https://www.endslaverynow.org/blog/articles/sex-trafficking-and-the-carceral-state> [perma.cc/S6JZ-HWRX].

²⁸⁰ *Id.*

²⁸¹ *Id.*

receive the support they need and deserve.²⁸² The first independent assessment of the Human Trafficking Intervention Courts Program by the Yale Global Health Justice Partnership bolstered those critiques.²⁸³ The study found that when the courts mandated social services, defendants before the court saw the courts “as an extension of law enforcement[.]”²⁸⁴ These people had often been introduced to police through “frightening arrests.”²⁸⁵ In conclusion, consideration of all survivors—especially marginalized survivors—and their conceptions of justice is imperative. Otherwise, programs meant to help survivors of trafficking risk punishing them by recreating traumatic experiences.

B. Proposed Frameworks That Reimagine Trafficking Law Fall Short

Even proposed frameworks that recognize the human rights of trafficking survivors miss many of the ways that different forms of discrimination combine to hurt survivors. Leading scholar Kimberlé Crenshaw, who developed the theory of intersectionality, explains that intersectionality—or looking at how dimensions of people’s identities intersect²⁸⁶—is critical, because the oppressions that many people face are often shaped by “other dimensions of their identities[.]”²⁸⁷ Because people with intersectional identities, like women of color, undocumented immigrants of color, and disabled people in poverty, are already at increased risk for trafficking,²⁸⁸ a successful framework will tell their stories.

²⁸² Kaba & Schulte, *supra* note 217; e.g., Cheryl Nelson Butler, *Bridge over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1287 (2015).

²⁸³ Goldbaum, *supra* note 194. The Yale Global Health Justice Partnership is a Yale University research initiative. *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241, 1242 (1991).

²⁸⁷ *Id.*

²⁸⁸ See Todres, *supra* note 5, at 621 (“[There are a] number of factors [that] increase an individual’s risk of exploitation. These include, but are not limited to: poverty, race, ethnicity, sex, immigration status, class, caste, and age.”).

Proposed frameworks for anti-trafficking law, like International Human Rights,²⁸⁹ Feminist Legal Theory,²⁹⁰ Disability Legal Studies,²⁹¹ and Critical Race Theory²⁹² fail to revise and reimagine trafficking law in a way that supports all survivors. For example, an International Human Rights Framework, which views trafficking as a “human rights abuse” and not a problem of “[organized] crime, migration, and/or prostitution,”²⁹³ proposes affording immigrant survivors the same rights as refugees.²⁹⁴ This would be a positive first step, but the Office of Refugee Resettlement within in the Department of Health and Human Services (HHS) already treats certified survivors of human trafficking as refugees.²⁹⁵ Moreover, theoretically

²⁸⁹ E.g., Ann D. Jordan, *Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings*, GENDER & DEV., Mar. 2002, at 28; Cherneva, *supra* note 175, at 62 (“Traditional asylum law might be an alternative to the T-visa, and also according to international asylum law when a human rights framework is applied to it.”).

²⁹⁰ E.g., Pourmokhtari, *supra* note 37; Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83 (2009) (advocating for a feminist, gender-specific approach to trafficking).

²⁹¹ E.g., Carey & Peterson, *supra* note 29, at 471.

²⁹² E.g., Butler, *supra* note 18, at 1464.

²⁹³ Jordan, *supra* note 289, at 29.

²⁹⁴ Cherneva, *supra* note 175, at 62.

²⁹⁵ *Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 8, 2018), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/benefits-and-responsibilities-of-asylees> [<https://perma.cc/BX7M-HEEN>]; Off. of Refugee Resettlement, *Anti-Trafficking in Persons Programs*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Apr. 23, 2019), <https://www.acf.hhs.gov/orr/programs/anti-trafficking/about> [<https://perma.cc/SBD5-G87N>]. As noted in its description of anti-trafficking programs in 2019,

HHS is the sole Federal agency authorized to certify adult foreign victims of human trafficking. Similarly, it is the sole Federal agency authorized to provide Eligibility Letters to minor foreign victims of human trafficking. The Office of Refugee Resettlement (ORR) within HHS issues all Certifications and Eligibility Letters. Certification grants adult foreign victims of human trafficking access to Federal benefits and services to the same extent as refugees. Likewise, Eligibility Letters grant minor foreign victims of trafficking access to Federal benefits and services to the same extent as refugees, including placement in the Unaccompanied Refugee Minors program, which provides specialized, culturally appropriate foster care or other licensed care settings, according to children’s individual needs. Trafficking

granting survivors access to federal benefits does not help survivors navigate the complex system to first become certified and then to receive benefits.²⁹⁶

First, we must ask: How easy is it for survivors to become certified under the current system?²⁹⁷ HHS requires adult trafficking survivors to be a “victim of a severe form of trafficking in persons” under federal law and be willing to assist law enforcement in “every reasonable way” in investigating and prosecuting severe forms of trafficking unless they meet an exception for physical or psychological trauma.²⁹⁸ The U.S. Department of Homeland Security must also have granted the survivors Continued Presence to assist in prosecuting traffickers, or the survivors must have applied for a T-visa without denial of that application.²⁹⁹ Any one of those steps may prove difficult for survivors. Second, even if survivors successfully become certified, they may find the process of applying for benefits to be confusing and burdensome, especially if survivor-facing government workers do not come from or understand the survivors’ native cultures, customs, or languages.³⁰⁰

victims who are U.S. citizens or Lawful Permanent Residents (LPR) do not need Certification or Letters of Eligibility to be eligible for similar benefits and services.

Id.

²⁹⁶ See generally, *Lifting Barriers to Citizenship*, IMMIGR. POL’Y LAB (2019), <https://immigrationlab.org/project/lifting-barriers-to-citizenship/> [https://perma.cc/PPP3-72TL] (describing barriers immigrants face in the immigration system); Samantha Balaban et al., *Without a Lawyer, Asylum-Seekers Struggle With Confusing Legal Processes*, NPR (Feb. 25, 2018, 2:10 PM) <https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes> [https://perma.cc/TSW3-FXEG] (describing how asylees, who share some similar characteristics with trafficking survivors, experience the asylum process as “extremely complex and confusing” to navigate, especially without a lawyer, and describing how immigrants must privately get a lawyer or rely on charities to succeed in the asylum process).

²⁹⁷ See OFF. ON TRAFFICKING IN PERSS., ADMIN. FOR CHILD. & FAMS., U.S. DEP’T. OF HEALTH AND HUM. SERVS., DOC. NO. OTIP-FS-16-01, FACT SHEET: CERTIFICATION FOR ADULT VICTIMS OF HUMAN TRAFFICKING (2016), https://www.acf.hhs.gov/sites/default/files/documents/otip/otip_fact_sheet_certification.pdf [https://perma.cc/NFS5-R3F2] (explaining the steps for certification).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ See Balaban, *supra* note 296.

Latina/o Critical Race Theory (LatCrit)³⁰¹ honors immigrant survivors' homelands by analyzing the intersection of colonialism, immigration status, and Latina/o identity. A LatCrit analysis would likely take a closer look at deaf-mute Mexican survivor Ismael and study how his undocumented immigration status made him especially vulnerable to trafficking. However, Latina/o Critical Race Theory might miss the intersection of Ismael's ethnicity and his disability status: namely, how deaf-mute people are maligned in Mexico.³⁰²

Similarly, Disability Legal Studies³⁰³ and Feminist Legal Theory view human trafficking narrowly, through a disability or gender lens.³⁰⁴ Exploitation of a survivor may be shaped by more than the survivor's gender or disability: race, class, and other identities may impact the survivor's experience.³⁰⁵ For example, without accounting for intersectionality, a white female trafficking survivor receives the same support and services as a Black female survivor. But though both likely share gendered trauma, white female survivors do not have to cope with the individual and systemic ramifications of racism when exiting their trafficking situations. They are more likely to be confident that law enforcement will view their trafficking situation sympathetically and help them escape, unlike their Black counterparts. Black female survivors could benefit from racially sensitive care, a need that Feminist Legal Theory has historically ignored.³⁰⁶

Critical Race Feminism and Critical Race Theory look at how race and racism connect to other risk factors for trafficking,³⁰⁷ but both still let down disabled survivors. Disability scholars have pointed to a tendency in the field of Critical Race

³⁰¹ E.g., Marisa Silenzi Cianciarulo, *Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking*, 7 NEV. L.J. 826, 826–40 (2007).

³⁰² *Developments in the Law: Jobs and Borders*, *supra* note 83, at 2180.

³⁰³ Arlene Kanter, *The Law: What's Disability Studies Got to Do with It or an Introduction to Disability Legal Studies*, 42 COLUM. HUM. RTS. L. REV. 403, 477 (2011).

³⁰⁴ E.g., Carey & Peterson, *supra* note 29, at 471; Pourmokhtari, *supra* note 37, at 159–60.

³⁰⁵ Crenshaw, *supra* note 286, at 1242.

³⁰⁶ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

³⁰⁷ BUSCH-ARMENDARIZ ET AL., *supra* note 138, at 103–04; Butler, *supra* note 18, at 1464, 1467.

Theory to classify race as social and political, while classifying disability “as an immutable and pathological abnormality rooted in the ‘medical language of symptoms and diagnostic categories[.]’”³⁰⁸ So, trafficking survivors are doomed to be “abnormal,” and they are not given the chance to overcome or celebrate their disabilities if they wish to do so.

Thus, though the issues and experiences of survivors with multiple identities do not often occur on “mutually exclusive terrains[.]”³⁰⁹ proposed frameworks still treat survivors’ experiences independently. In providing “either/or” propositions, these frameworks hide the stories of disabled survivors of color.³¹⁰ Part III of this Note offers an opportunity to bring these stories to light.

III. Towards a Real Utopia: Disability Critical Race Studies Strengthens Anti-Trafficking Efforts

To center marginalized survivors’ stories, Part III presents a “real utopia,” an ideal yet realizable set of goals for anti-trafficking advocacy to move toward providing survivors with a better world.³¹¹ A “real utopia,” first coined by sociologist Erik Olin Wright, is a “proposal for social transformation” that provides a “clear-headed, rigorous, and viable alternative[] to existing social institutions . . .”³¹² Real utopias must embody people’s “deepest aspirations for human flourishing” yet “take seriously the problem of practical design.”³¹³ They are simplified dreams, but they “remain attentive to what it takes to bring those aspirations to life.”³¹⁴ They include strategizing how to develop “empirically and theoretically sound arguments” about

³⁰⁸ Nirmala Erelles & Andrea Minear, *Unspeakable Offenses: Untangling Race and Disability Discourses of Intersectionality*, 4 J. LITERARY & CULTURAL STUD. 127, 132 (2010) (quoting SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* (New York University Press 1998)).

³⁰⁹ See Crenshaw, *supra* note 286, at 1242.

³¹⁰ See *id.*

³¹¹ See Erik Olin Wright, *Real Utopias*, 10 CONTEXTS 36, 37 (2011).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

what is possible.³¹⁵ In a real utopia, disabled survivors of color could more easily access affirming resources, investigators and prosecutors would avoid criminalizing survivors when possible, and courts would help connect trafficking survivors with services. The sections that follow introduce, justify, and apply DisCrit to move the needle closer to this goal.

A. Disability Critical Race Studies (DisCrit)

This Note contends that Disability Critical Race Studies, or DisCrit, is a useful framework through which to analyze trafficking and trafficking law in the United States. DisCrit is the combination of Disability Studies and Critical Race Theory.³¹⁶ The brainchild of special education scholars Subini Ancy Annamma, David Connor, and Beth Ferri, DisCrit studies the intersection of race and dis/ability, and racism and ableism, to support disabled students of color in special education in the United States.³¹⁷

Annamma, Connor, and Ferri propose seven tenets for DisCrit:

- (1) DisCrit focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy.
- (2) DisCrit values multidimensional identities and troubles singular notions of identity such as race *or* dis/ability *or* class *or* gender *or* sexuality, and so on.
- (3) DisCrit emphasizes the social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms.
- (4) DisCrit privileges voices of marginalized populations, traditionally not acknowledged within research.

³¹⁵ *Id.*

³¹⁶ Annamma et al., *supra* note 42, at 1.

³¹⁷ *See id.* at 2, 9–11.

- (5) DisCrit considers legal and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens.
- (6) DisCrit recognizes whiteness and Ability as Property and that gains for people labeled with dis/abilities have largely been made as the result of interest convergence of white, middle-class citizens.
- (7) DisCrit requires activism and supports all forms of resistance.³¹⁸

Though these seven tenets were developed in the context of special education, DisCrit's creators intend and hope for the framework's interdisciplinary use.³¹⁹ They endeavor to use DisCrit to study how society constructs ability and disability both "in and out" of schools.³²⁰ DisCrit's tenets have already been applied far and wide to topics spanning from welfare management³²¹ to mass incarceration.³²² To honor Annamma, Connor, and Ferri's wish that DisCrit be used to "partake in related difficult discussions linking race and dis/ability to . . . laws, civil rights, [and] human rights, in the quest for a more socially just society[.]"³²³ Section III.B justifies the use of DisCrit in the anti-trafficking field.

³¹⁸ *Id.* at 11.

³¹⁹ Subini Ancy Annamma et al., *Disability Critical Race Theory: Exploring the Intersectional Lineage, Emergence, and Potential Futures of DisCrit in Education*, 42 REV. RSCH. EDUC. 46, 47 (2018).

³²⁰ Annamma et al., *supra* note 42, at 23.

³²¹ *E.g.*, Shelley Bielefeld & Fleur Beaupert, *Income Management and Intersectionality: Analysing Compulsory Income Management Through the Lenses of Critical Race Theory and Disability Studies ('DisCrit')*, 41 SYDNEY L. REV. 327 (2019).

³²² Annamma et al., *supra* note 319, at 54.

³²³ Annamma et al., *supra* note 42, at 23.

B. Justification of DisCrit

Reducing discrimination is critical to end trafficking.³²⁴ DisCrit fights discrimination by paying attention to survivors' intersecting lived experiences, identities, and oppressions so that communities can respond accordingly. DisCrit helps elucidate the experience of trafficking and the anti-trafficking movement, and the racism and ableism that pervades them. Accurately identifying problems in the anti-trafficking movement is the first step to mitigating these problems and removing the barriers between survivors and their own success.

DisCrit encourages society to “become more encompassing of [all] diversity and perceived difference.”³²⁵ It also calls for critical study beyond disability and race, asking people to “question the very norms that create difference.”³²⁶ Annamma, Connor, and Ferri advocate for “removing the policing and enforcement of normality” and “dissolving barriers that actively dis/able people[.]”³²⁷ They implore readers to listen to the “special voice” of people who have experienced discrimination.³²⁸ DisCrit thus provides an anti-trafficking approach that listens to the voices of marginalized survivors.

Next, while DisCrit elevates all intersectional identities, DisCrit also offers specific provisions to support disabled survivors of color. In doing so, DisCrit amplifies the voices of these vulnerable survivors who are typically singled out and stigmatized by trafficking law's law-and-order framework. For example, DisCrit illuminates how “racism and ableism, intersecting with additional oppressions, often have serious and sometimes deadly implications.”³²⁹ DisCrit scholars tell the story of Bresha Meadows, a fourteen-year-old disabled Black girl who killed her father

³²⁴ Mark Ensalaco, *Ensuring Decent Work for Domestic Workers: An Integral Approach to the Prevention of Labor Trafficking*, 7 INTERCULTURAL HUM. RTS. L. REV. 45, 73 (2012).

³²⁵ Annamma et al., *supra* note 42, at 18.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Annamma et al., *supra* note 319, at 47.

after enduring years of his physical abuse against her and her entire family.³³⁰ Though the average pretrial length of detention is twenty-two days, Bresha was incarcerated for over thirteen times that amount: almost three hundred days.³³¹ She had PTSD, depression, and anxiety, and had a history of self-harm.³³² DisCrit shows how Bresha was treated like a dangerous criminal, instead of given the compassion she was due for being a “marginalized disabled Black girl in distress.”³³³ And in this story alone, DisCrit includes many topics “inconsistently” or “only recently recognized” in disability scholarship, like mood disorders, domestic violence, and brutality by the criminal justice system, providing a truly intersectional approach.³³⁴

One could argue that DisCrit is yet another framework in a field already saturated with critical analysis. That may be so. This Note’s response is two-fold: First, contributions to legal scholarship need not be revolutionary. DisCrit supports efforts in the anti-trafficking sphere—similar to the ways in which LatCrit, AsianCrit, and TribalCrit have added to discourse in the educational leadership field³³⁵ or how Critical Race Feminism has provided helpful insights into the plight of Black female sex trafficking survivors.³³⁶ Second, DisCrit is distinguishable from other frameworks by its focus on a group that needs special attention from anti-trafficking law on account of trafficking’s disabling effects: disabled survivors. And by studying disabled survivors of color and the systems that oppress them, DisCrit ensures that the goals for the anti-trafficking movement align with what will help the most

³³⁰ *Id.* at 46.

³³¹ Melissa Jeltsen, *Bresha Meadows Thought You’d Understand*, HUFFPOST (Mar. 29, 2021), https://www.huffpost.com/entry/bresha-meadows-thought-you-understand_n_5da48081e4b087efd9bb23973 [<https://perma.cc/GNG8-VL9J>] (indicating 299 days of incarceration until a plea deal was secured).

³³² Annamma et al., *supra* note 319, at 46–47.

³³³ *Id.* at 47.

³³⁴ See Julie Avril Minich, *Enabling Whom? Critical Disability Studies Now*, 5 EMERGENT CRITICAL ANALYTICS FOR ALT. HUMANS. 1 (2016).

³³⁵ See Colleen Capper, *LatCrit, Tribal Crit, and Asian Crit Theories*, in ORGANIZATION THEORY FOR DIVERSITY AND EQUITY (1st ed. 2018).

³³⁶ Butler, *supra* note 41, at 132.

marginalized survivors. Therefore, DisCrit is necessary, or at the very least, helpful, because it supports survivors suffering at the margins.

C. Applying DisCrit to Protect Marginalized Survivors of Trafficking

To move toward strengths-based and affirming care for survivors, DisCrit can be applied to trafficking and the movements, systems, and laws that respond to trafficking in the United States.³³⁷

1. “DisCrit focuses on ways that the forces of racism and ableism circulate interdependently, often in neutralized and invisible ways, to uphold notions of normalcy.”³³⁸

Racism and ableism interact to harm survivors.³³⁹ In education, Black students are more likely to be placed in special education, removed from school on “grounds of dangerousness[,]” and more likely to be arrested in school.³⁴⁰ This is their “normal”: one of unfair “adultification” and criminalization.³⁴¹ Both Black disabled students and disabled survivors of color are segregated and criminalized instead of helped. Disabled survivors of color who act out because of their trauma are

³³⁷ Because this Note has already used the tenets of DisCrit throughout the text, this application is a short summary.

³³⁸ Annamma et al., *supra* note 42, at 11.

³³⁹ See *supra* Sections I.A, I.B.3, II.A.

³⁴⁰ Annamma et al., *supra* note 42, at 7.

³⁴¹ See GEO. L. CTR. ON POVERTY & INEQ., *Adultification Bias*, <https://genderjusticeandopportunity.georgetown.edu/adultification-bias/> [https://perma.cc/EQL6-SSXF]; *Research Confirms That Black Girls Feel the Sting of Adultification Bias Identified in Earlier Georgetown Law Study*, GEO. L. (May 15, 2019), <https://www.law.georgetown.edu/news/research-confirms-that-black-girls-feel-the-sting-of-adultification-bias-identified-in-earlier-georgetown-law-study/> [https://perma.cc/Z6SH-A2ZR] (finding that Black girls routinely face “adultification,” that adultification is linked to “developmentally inappropriate” treatment of Black girls by educators and other authorities, and that adults are less empathetic toward Black girls than their white counterparts).

categorized as criminals and dangerous,³⁴² unlike white, able-bodied survivors portrayed as “perfect victims.”³⁴³

What can DisCrit do about this injustice? Initially, law enforcement officers can attend trainings to recognize the signs of human trafficking so they do not mistake coercion for consent, a common mistake officers make when learning about survivors’ situations.³⁴⁴ That way, police will stop assuming that Black and Brown survivors addicted to drugs are willingly disappearing “to party” and will soon return.³⁴⁵ Survivors addicted to drugs, another example of “imperfect” survivors, are just as worthy of receiving care and help from the legal system as the fictionalized ideal of a “perfect victim.”

Following these trainings, when police encounter potential survivors who appear to be engaging in prostitution, they may look more closely for signs of human trafficking. Correctly identifying human trafficking can mean the difference between a human trafficking survivor being labeled a criminal and handed a jail sentence for prostitution or being validated as a survivor and connected with restorative resources. Correct identification also ensures that law enforcement will be able to locate the real perpetrators: the traffickers.

Similarly, prosecutors may use their judgment when choosing whether to charge a human trafficking survivor with a crime that the survivor was forced to commit during their trafficking experience. Cyntoia Brown and Chrystul Kizer’s cases come to mind as instances where prosecutors may have been able to exercise more discretion in their charging decisions and where racism and ableism may have influenced both survivors’ experiences in the legal system. For example, in Cyntoia

³⁴² See OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUST., *THE IMPACT OF INCARCERATION AND MANDATORY MINIMUMS ON SURVIVORS: EXPLORING THE IMPACT OF CRIMINALIZING POLICIES ON AFRICAN AMERICAN WOMEN AND GIRLS* 5 (2017) (finding rates of incarceration to be twice as high for Black women as compared to white women; many of the prisoners are also survivors of interpersonal violence, and some of trafficking).

³⁴³ See *supra* Section II.A.

³⁴⁴ See LOVE ET AL., *supra* note 36, at 10 (“Law enforcement officers . . . often . . . felt that survivors could voluntarily leave their situations.”).

³⁴⁵ ECPAT-USA: SURVIVOR PERSPECTIVES, <https://www.ecpatusa.org/blog/category/Survivor+Perspectives> [<https://perma.cc/UBZ8-2JFA>].

Brown's case, prosecutors elected to charge Ms. Brown as an adult.³⁴⁶ How different could Ms. Brown's experience in the legal system have been if prosecutors had chosen instead to charge her as a child, like they often do with white children?³⁴⁷

Granted, if a prosecutor believes that all elements of a crime are met, they are more likely to charge a survivor-defendant (a survivor who is alleged to have committed a crime or crimes during or because of their trafficking experience) for their crimes. Similarly, a prosecutor may feel compelled to charge a survivor who protected themselves against their trafficker using violence, depending on the seriousness of the offense and the prospective success of affirmative defenses, such as duress or self-defense. However, prosecutors who are trained to recognize the signs of human trafficking may notice a potential missed case, and may be able to bring additional charges against the survivor's trafficker to keep a criminal from walking free. Both police and prosecutors can provide a bulwark against unjust outcomes; training these public servants to recognize the signs of trafficking can help them better protect the public.

2. “DisCrit values multidimensional identities and troubles singular notions of identity such as race or dis/ability or class or gender or sexuality, and so on.”³⁴⁸

A disabled survivor of color is not “just” disabled nor “just” a person of color. The narratives of Cyntoia Brown, Audrey Morrissey, and Ismael Santiago Garcia, among others, show how intersecting identities impact marginalized survivors.³⁴⁹ In a real utopia, systems will value survivors' multi-faceted identities to provide them affirming, sensitive care. For example, intersectional social worker practices recognize the importance of cultural competency and humility but also its limits.³⁵⁰ “Anti-oppressive practice” is the “reflective and critical process [in social work] of

³⁴⁶ Page, *supra* note 222, at 123.

³⁴⁷ *Id.* at 120–21.

³⁴⁸ Annamma et al., *supra* note 42, at 11.

³⁴⁹ *See supra* Section II.B.

³⁵⁰ Lara B. Gerassi & Andrea J Nichols, *Social Work Education That Addresses Trafficking for Sexual Exploitation: An Intersectional, Anti-Oppressive Practice Framework*, 17 ANTI-TRAFFICKING REV. 20, 28–30 (2021).

actively challenging domination at an interpersonal and structural level.”³⁵¹ Social workers are people like everyone else, and they can both help and hurt their clients. Anti-oppressive practice helps ensure that social workers acknowledge their own power and roles in perpetuating oppression.³⁵² Social workers may also emphasize a person-centered approach with clients in trafficking risk assessments, case management, and therapy.³⁵³ In such an approach, social workers will address the survivor’s intersectional identities and experiences.³⁵⁴

3. “DisCrit emphasizes the social constructions of race and ability and yet recognizes the material and psychological impacts of being labeled as raced or dis/abled, which sets one outside of the western cultural norms.”³⁵⁵

Disability and race are, in part, socially constructed.³⁵⁶ Part of what it means to be a person of color or a disabled person depends on individual people’s experiences interacting with their environments.³⁵⁷ Fixed definitions of race or disability fail to account for this nuance.³⁵⁸ These social constructions impact disabled survivors of color in multiple ways. For example, though trafficking disables survivors through physical and psychological harm, stereotypes about survivors, perpetuated by the legal system, further keep survivors from healing. Initially, disability triggers

³⁵¹ *Id.* at 30.

³⁵² *Id.* at 31.

³⁵³ *Id.* at 33.

³⁵⁴ *Id.*

³⁵⁵ Annamma et al., *supra* note 42, at 11.

³⁵⁶ Susan R. Jones, *Toward Inclusive Theory: Disability as Social Construction*, 33 NAT’L ASS’N STUDENT PERSON. ADM’RS J. 347, 348 (1996); *Race Is a Social Construct*, CTR. FOR HEALTH PROGRESS, <https://centerforhealthprogress.org/blog/race-social-construct> [<https://perma.cc/4VRW-VH62>].

³⁵⁷ Jones, *supra* note 356; CTR. FOR HEALTH PROGRESS, *supra* note 356.

³⁵⁸ Ta-Nehisi Coates, *What We Mean When We Say ‘Race Is a Social Construct’*, ATLANTIC (May 15, 2013), <https://www.theatlantic.com/national/archive/2013/05/what-we-mean-when-we-say-race-is-a-social-construct/275872/> [<https://perma.cc/HM7U-RDPR>].

stereotypical associations with “weaknesses[.]”³⁵⁹ Disabled people are seen as unhealthy and unable to compete,³⁶⁰ and immigrant survivors may be seen as outsiders, both “imperfect” survivors.

The criminal justice system sometimes labels survivors as criminals, socially disabling them by isolating them from the free and “moral” public. Furthermore, mental health conditions and substance abuse may make a survivor seem unreliable in court if the survivor testifies against their trafficker. The very traumas trafficking causes thus make it harder for survivors to access legal remedies. And all survivors, especially survivors who are isolated, may be unaware of their rights or resources, which could prevent them from accessing helpful legal remedies, like restitution³⁶¹ or state vacatur.³⁶² These remedies attempt to rectify undue criminalization.³⁶³ In addition, the legal system punishes disabled survivors who lack the energy or ability to navigate what is often a complex and exhausting process—if a survivor is unable to show up for court, they may lose their claim against their trafficker. Even legal diversion programs may disable survivors because these programs hold the threat of

³⁵⁹ Gerassi & Nichols, *supra* note 350, at 20–37.

³⁶⁰ *Id.*

³⁶¹ Martina E. Vandenberg, *Palermo’s Promise: Victims’ Rights and Human Trafficking*, 6 ANTI-TRAFFICKING REV. 138, 138–39 (2016) (describing some of the ways restitution can benefit survivors, including restoring dignity to a survivor who wants to support her family, providing funds for housing or education, or removing the need for civil litigation).

³⁶² *How to Obtain Vacatur for Survivors of Human Trafficking*, SUPPORTHTSURVIVORS.ORG, <https://www.supporthtsurvivors.org/vacatur> [<https://perma.cc/8D53-FVLP>] (defining vacatur as the vacating of convictions resulting from a survivor’s trafficking experience, explaining the process for obtaining vacatur, elucidating the remedies that can accompany it, and providing additional resources on rights restoration and criminal record relief). See *infra* Section III.C.5 for a discussion of the lack of a federal vacatur law. *Survivors’ Rights*, THE HUM. TRAFFICKING LEGAL CTR., <https://htlegalcenter.org/our-work/survivors-rights/> [<https://perma.cc/S352-TTRJ>] (showing that in most federal criminal human trafficking cases that end in conviction, courts fail to order restitution even though ordering it is mandatory, and that prosecutors often fail to collect restitution even when a court orders it). When victims are less isolated and know their rights and the remedies that they are entitled to, they have a chance at advocating for themselves and for their rights.

³⁶³ Vandenberg, *supra* note 361.

a criminal charge over survivors' heads to force them to get help, risking re-traumatization.³⁶⁴

What, then, is the future of labeling in a real utopia under DisCrit? There is no simple answer. But the legal system should account for marginalized survivors' identities and vulnerabilities in ways that help, not hurt, these survivors. At a bare minimum, immigration services and law enforcement should provide survivors of color whose first language is not English with culturally competent care.³⁶⁵ This care should include interviews by police and immigration officials who speak the survivor's first language, so that survivors' descriptions of their trafficking experiences are not lost upon unknowing officials.³⁶⁶ Moreover, survivors with disabilities should be afforded appropriate accommodations to communicate their situation and their needs.

Additionally, the creation of human trafficking intervention courts that suggest, instead of mandate social services, could account for survivors' marginalization without the looming threat of incarceration. The very vulnerabilities that led survivors to trafficking situations or kept them there may make compliance with social service mandates difficult.³⁶⁷ Survivors living in poverty may juggle work

³⁶⁴ See Melissa Gira Grant, *Human Trafficking Courts Are Not a Criminal Justice "Innovation,"* NEW REPUBLIC (Jan. 7, 2020), <https://newrepublic.com/article/156135/human-trafficking-courts-not-criminal-justice-innovation> [<https://perma.cc/U3JC-CAAZ>]; Goldbaum, *supra* note 194.

³⁶⁵ See FAM. VIOLENCE PREVENTION FUND, COLLABORATING TO HELP TRAFFICKING SURVIVORS: EMERGING ISSUES AND PRACTICE POINTERS 6 (2007) <https://www.futureswithoutviolence.org/userfiles/file/ImmigrantWomen/Collaborating%20to%20Help%20Trafficking%20Survivors%20Final.pdf> [<https://perma.cc/9SW4-PYPK>]; John A. Martin, *Addressing the Complexities of Language and Culture in Human Trafficking-Involved Cases*, in HUM. TRAFFICKING AND THE STATE CTS. COLLABORATIVE, A GUIDE TO HUMAN TRAFFICKING FOR STATE COURTS 141, 150–54.

³⁶⁶ See Maura Nsonwu, *Human Trafficking of Immigrants and Refugees in North Carolina*, 8 N.C. MED. J. 101, 103 (2019) (noting the need for culturally relevant approaches for foreign-born trafficking survivors, including "skilled interpretation and translation services," and an understanding of cultural barriers).

³⁶⁷ See GLOB. HEALTH JUST. P'SHIP OF THE YALE L. SCH. ET AL., UN-MEETABLE PROMISES: RHETORIC AND REALITY IN NEW YORK CITY'S HUMAN TRAFFICKING INTERVENTION COURTS 54 (2018) https://law.yale.edu/sites/default/files/area/center/ghjp/documents/un-meetable_promises_htic_report_ghjp_2018rev.pdf [<https://perma.cc/6KDS-S7P8>] ("Several service providers describe defendants as not being 'ready' for services, or highlighted that defendants had

hours with counseling groups and may need to skip groups to make enough money to support themselves and their families.³⁶⁸ Survivors with addictions or mental disabilities may have trouble with treatment compliance due to the nature of their illnesses. Survivors with racial trauma may balk at the revictimization that mandatory diversion programs can cause.

A successful model may suggest treatment instead of mandating it. Survivors who do not participate in treatment will have to cope with an increased risk of returning to their trafficking situations or other situations involving victimization. But these survivors would not face potential jail time for refusing treatment.

4. “DisCrit privileges voices of marginalized populations, traditionally not acknowledged within research.”³⁶⁹

To privilege voices of marginalized populations, scholarly works can incorporate their narratives, including those of disabled survivors of color.³⁷⁰ These counter-narratives challenge master narratives about trafficking that people without lived experiences of trafficking have disseminated. By incorporating survivor narratives directly, scholarship can avoid speaking for survivors, or about them. Marginalized survivors do not need scholars to “give [them] voice,” but rather, to help their voices reach a broader audience.³⁷¹

A response to trafficking that centers survivor voices is one that promotes coalition-building with survivor-led organizations that have disabled survivors of color at the helm. Survivors see themselves as “self-sufficient, self-responsible, and

difficulty accessing and receiving services due to the various barriers they may be facing in their lives.”).

³⁶⁸ *Id.* at 54 (“One service provider acknowledged that some defendants simply ‘don’t have the time or space [to attend mandated sessions[.]’”).

³⁶⁹ Annamma et al., *supra* note 42, at 11.

³⁷⁰ This Note includes direct quotes from marginalized survivors whenever possible, to minimize the alteration of their experiences.

³⁷¹ Annamma et al., *supra* note 42, at 14.

self-enterprising[.]”³⁷² Promoting survivor leadership reframes marginalization from a “subordinate position” to a “positive marker of identity and something to be “claimed[.]”³⁷³ For example, My Life My Choice, a survivor-led program based in Boston, connects survivor-mentors with survivor-mentees.³⁷⁴ Survivors can share their stories to empower the youth they mentor.³⁷⁵

Similarly, nonprofit Survivor Alliance provides survivors with leadership opportunities, skills trainings, and chances to connect with other survivor-leaders.³⁷⁶ Survivor Alliance’s “Membership Manifesto” outlines how the coalition supports survivor-leaders: through intersectional, trauma-informed approaches; recognition of survivors’ individual unique experiences; a collective voice to pressure lawmakers and pool resources when Alliance members agree on particular issues; and a professional and peaceful approach to conflict resolution that avoids “call[ing] out” members.³⁷⁷

³⁷² Sealing Cheng & Eunjung Kim, *The Paradoxes of Neoliberalism: Migrant Korean Sex Workers in the United States and “Sex Trafficking”*, 21 SOC. POLS. 355, 355 (2014).

³⁷³ Annamma et al., *supra* note 42, at 8.

³⁷⁴ *Survivor Empowerment*, MY LIFE MY CHOICE, <https://www.mylifemychoice.org/survivor-empowerment> [<https://perma.cc/B56V-6PCE>].

³⁷⁵ Varun Goyal, *Support Needed for Sex Trafficking Survivors*, HUNTINGTON NEWS (Mar. 19, 2015), <https://huntnewsnu.com/37960/city-pulse/support-needed-for-sex-trafficking-survivors/> [<https://perma.cc/L9XS-M8RY>]. My Life, My Choice is a Boston-based NGO that fights against child commercial sexual exploitation. *Id.*

³⁷⁶ *Survivor Alliance Membership*, SURVIVOR ALLIANCE, <https://www.survivoralliance.org/membership> [<https://perma.cc/GBC9-4H2P>].

³⁷⁷ *Id.*

5. “DisCrit considers legal and historical aspects of dis/ability and race and how both have been used separately and together to deny the rights of some citizens.”³⁷⁸

Anti-trafficking law and historical rhetoric have long been intertwined with racism and ableism.³⁷⁹ Passed in 1910, the Mann Act³⁸⁰ banned the transportation of people across state lines for criminal sex activities.³⁸¹ Legislators intended it to prevent consensual interracial relationships.³⁸² To do so, the Act framed trafficking survivors as white women and traffickers as people of color.³⁸³ Police often used the Act to arrest immigrants and Black men.³⁸⁴ More recently, anti-trafficking campaigns across the country, like the White Slavery Campaign, have focused only on the trafficking of white women, while others have used imagery of African slavery to provoke public outrage toward trafficking.³⁸⁵

How can the law be used to help disabled survivors of color? Nongovernmental organizations continue to call for using vacatur to erase survivors’ criminal records

³⁷⁸ Annamma et al., *supra* note 42, at 11.

³⁷⁹ See Sarah L. Steele, ‘Combating the Scourge’: Constructing the Masculine ‘Other’ Through U.S. Government Anti-Trafficking Campaigns, 9 J. HATE STUD. 33, 34 (2011) (“The trafficker . . . in the press and in the government-issued materials . . . repeatedly is described as ‘evil.’ . . . [H]e is diseased, ‘ill,’ and a ‘scourge’ on society. Coupled with images of traffickers that show these men as foreign, the effect is to problematize the ethnic man As a result, trafficking relegates both trafficked men and traffickers to the status of “Others” who are risky. . . . Current anti-trafficking regimes embody and restate xenophobic reactions directed against illegal migrant men, while often disguising the role domestic actors have in trafficking.”) (citations omitted).

³⁸⁰ BUSCH-ARMENDARIZ ET AL., *supra* note 138, at 14.

³⁸¹ 18 U.S.C. § 2421.

³⁸² JESSICA R. PLILEY, POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI 101–02 (2014).

³⁸³ See *id.*

³⁸⁴ Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3016 (2006).

³⁸⁵ Butler, *supra* note 18, at 1464, 1468; Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 216, 247 (2007).

associated with their trafficking experiences.³⁸⁶ While nearly all states have codified criminal record relief for trafficking survivors, there is no federal vacatur law.³⁸⁷ Congress can reintroduce and pass the Trafficking Survivors Relief Act, bipartisan legislation introduced by U.S. Senators Rob Portman (R-OH) and Kirsten Gillibrand (D-NY), which would clear the federal criminal records of survivors.³⁸⁸ The bill previously died without a vote.³⁸⁹ Advocates should continue to lobby for a federal vacatur law to ensure that marginalized survivors facing some of the harshest penalties, like time in federal prison, stop paying for their traffickers' crimes.³⁹⁰

While this remedy will not stop bias against trafficking survivors before it begins, vacatur will help prevent marginalized survivors from continuing to suffer compounded racial traumas. Vacatur can also help survivors who have criminal records more easily access housing, education, and employment, areas in which they may otherwise struggle.³⁹¹ And a federal vacatur law fits within a real utopia: Though some anti-trafficking advocates call for deprioritization of the carceral system,

³⁸⁶ See Alyssa M. Barnard, *"The Second Chance They Deserve": Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463 (analyzing a state vacatur law, Section 440.10(1)(i) of the New York Criminal Procedure Law, and similar statutes); 2021 TIP REPORT, *supra* note 160, at 586.

³⁸⁷ See ERIN MARSH, ET AL., STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING (2019), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2081&context=all_fac [<https://perma.cc/P4PU-666C>] (“[As of 2019,] all but six remaining states (Alaska, Iowa, Maine, Minnesota, South Dakota, and Virginia) and the federal government offer some form of criminal record relief specific for survivors of trafficking.”) (emphasis removed).

³⁸⁸ Trafficking Survivors Relief Act of 2020, S. 3240, 116th Cong. § 2 (2020).

³⁸⁹ *Id.*

³⁹⁰ See 2021 TIP REPORT, *supra* note 160, at 586; Press Release, Rob Portman, Portman, Gillibrand Announce Bipartisan Legislation to Clear Federal Criminal Records of Human Trafficking Victims, ROB PORTMAN: U.S. SENATOR FOR OHIO (Feb. 4, 2020), <https://www.portman.senate.gov/newsroom/press-releases/portman-gillibrand-announce-bipartisan-legislation-clear-federal-criminal-0> [<https://perma.cc/LK83-TPGS>].

³⁹¹ See Shawntel Williams, *The Disconnect in Vacatur Laws, Human Trafficking, and Race*, 27 MICH. J. RACE & L. (2021), <https://mjrl.org/2021/11/30/the-disconnect-in-vacatur-laws-human-trafficking-and-race/> [<https://perma.cc/N78V-8T3M>].

Congress is far more likely to pass a federal vacatur law for survivors than to dismantle prisons.³⁹²

Additionally, Congress may consider amending the ADA to include *current* addiction as a “substantially limiting” impairment in addition to *prior* addiction, at least in situations of suspected labor exploitation.³⁹³ This would ensure labor trafficking survivors whose employers exploit their addictions are more likely to qualify for federal disability discrimination relief under the ADA. This amendment has the potential to fix the current gap in coverage that trafficker-employers may already knowingly exploit. All survivors with addictions, not just those who have recovered, deserve relief from unequal treatment by opportunistic trafficker employers. Federal civil protections like those provided by the ADA provide an avenue for holding traffickers accountable without subjecting survivors to the traumatizing effects of the criminal justice system. This protects marginalized survivors, like disabled survivors of color, who often lose out in the criminal justice system.

6. “DisCrit recognizes whiteness and Ability as Property and that gains for people labeled with dis/abilities have largely been made as the result of interest convergence of white, middle-class citizens.”³⁹⁴

The interest convergence of white, middle-class citizens³⁹⁵ against trafficking raises interesting questions about the power that privileged advocates can wield in

³⁹² See, e.g., Swenstein & Mogulescu, *supra* note 34 (arguing for de-prioritization of the carceral system in trafficking) (“Trying to arrest our way out of a multi-faceted problem has failed before. Even where trafficking efforts may be understood as well-meaning, we will lose the ‘war’ on trafficking if we continue to fight it the same way we fought the war on drugs. Both wars have overwhelmingly relied on the arrests of low-level offenders rather than perpetrators of more serious offences. As with the war against drugs, the collateral damage of anti-trafficking efforts that prioritise prosecution comes in the form of scores of arrests.”); END SLAVERY NOW, *supra* note 279.

³⁹³ Cf. Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2008).

³⁹⁴ Annamma et al., *supra* note 42, at 11.

³⁹⁵ As a white, middle-class scholar, I must explicitly recognize how this very Note exemplifies DisCrit’s sixth tenet. My race and class privilege have afforded me the ability to dedicate the necessary time and energy to write this Note. These axes of privilege insulate me from many effects of exploitation and ableism. Many disabled survivors of color, on the other hand, are busy fighting against the effects of racism and ableism in their trafficking situations as well as in the anti-trafficking community at large.

law and how that power impacts disabled survivors of color. Many legislators have championed the causes of human trafficking and child sexual abuse. Their efforts have been well-intentioned, but in some cases have backfired, harming survivors. For example, in 2017 and 2018, members of Congress used the specter of trafficking to campaign against open online markets like Backpage.³⁹⁶ Advocates who work directly with survivors and sex workers have condemned the campaign against sites advertising sexual services.³⁹⁷ They warn that a lack of online forums robs law enforcement and advocates of an important investigative tool.³⁹⁸ Now, exploitation can leave little trace, making it difficult to track survivors in need of support.³⁹⁹

Powerful people within the legal system can use their professional capital to help survivors. Law enforcement and prosecutors, utilizing knowledge from trainings, can exercise their discretion when presented with trafficking survivors long before a case comes before a judge.

In federal sentencing proceedings, trial judges have a great deal of discretion when sentencing trafficking survivor-defendants.⁴⁰⁰ The late Judge Jack B. Weinstein, who presided over cases in the Eastern District of New York, called sentencing “perhaps the most difficult task of a trial court judge.”⁴⁰¹ When

Leslie Jo Shelton, “*Who Belongs*”: *A Critical Race Theory and Latino Critical Theory Analysis of the United States Immigration Climate for Undocumented Latinx College Students*, 7 J. CRITICAL THOUGHT & PRAXIS 123, 135 (2018) (describing the phenomenon of interest convergence regarding undocumented Latinx college students).

³⁹⁶ See Melissa Gira Grant, *Proposed Federal Trafficking Legislation Has Surprising Opponents: Advocates Who Work with Trafficking Victims*, THE APPEAL (Jan. 26, 2018), <https://theappeal.org/proposed-federal-trafficking-legislation-has-surprising-opponents-advocates-who-work-with-bf418c73d5b4/> [<https://perma.cc/TF7B-BSLU>].

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ See *U.S. v. Booker*, 543 U.S. 220, 222 (2005).

⁴⁰¹ Jack B. Weinstein, *Does Religion Have a Role in Criminal Sentencing?*, 23 TOURO L. REV. 539, 539 (2007) (“Sentencing, that is to say punishment, is perhaps the most difficult task of a trial court judge.”); see also CHIEF JUSTICE JOHN G. ROBERTS JR., 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2016) (“Most district judges agree that sentencing is their most difficult duty.”).

sentencing, a judge must impose a sentence that is “sufficient, but not greater than necessary,” and consider the need for a sentence in light of the goals of the criminal justice system: broadly, incapacitation, deterrence, rehabilitation, and retribution.⁴⁰² A sentence ought to protect the public, “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”⁴⁰³ A judge must consider whether or how much the sentence will deter the specific defendant from committing future crimes, and potential criminals from committing the same crime.⁴⁰⁴ The court must also consider whether the sentence imposed will “provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]”⁴⁰⁵

Judges are tasked with interpreting and applying the law, not making law.⁴⁰⁶ Judicial activism is frowned upon by many as an impermissible overstep of judicial power into the legislative branch.⁴⁰⁷ While a carceral system still stands, a judge cannot simply dismiss a survivor-defendant’s case, no matter how sympathetic the survivor-defendant may be. Though federal trial judges do not have unlimited sentencing discretion, they are no longer bound to follow federal sentencing

⁴⁰² DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE I (2001), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-2.pdf> [<https://perma.cc/28C2-ZAF8>]; see 18 U.S.C. § 3553 (a)(2) (describing the factors that point to the need for the imposition of specific sentence).

⁴⁰³ 18 U.S.C. §§ 3553 (a)(2)(A), (C).

⁴⁰⁴ § 3553 (a)(2)(B).

⁴⁰⁵ § 3553 (a)(2)(D).

⁴⁰⁶ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1776) (influencing legal scholars and judges in the U.S. legal system throughout the ages, and positing law as a thing to be discovered through logical deduction by judges rather than created by judges).

⁴⁰⁷ See William J. Haun, *The Virtues of Judicial Self-Restraint*, NAT’L AFFS. (Fall 2018), <https://www.nationalaffairs.com/publications/detail/the-virtues-of-judicial-self-restraint> [<https://perma.cc/K7U3-GSKV>]; see also Clint Bolick, *The Proper Role of “Judicial Activism”*, 42 HARV. J.L. & PUB. POL’Y 1, 6 (2019) (arguing in favor of judicial activism to “police[] constitutional boundaries” and to “avoid[] artificial, court-made obstacles to the vindication of individual rights,” yet warning that “judge[s] should never . . . exercise legislative or executive powers[.]”).

guidelines.⁴⁰⁸ In *United States v. Booker*, the Supreme Court held that the U.S. Sentencing Commission's Federal Sentencing Guidelines, which had previously been mandatory, were now advisory.⁴⁰⁹ Today, pursuant to *Booker*, federal district court judges must initially consider the Guidelines when sentencing, but they are ultimately free to sentence above or below the sentencing ranges that the Guidelines provide.⁴¹⁰ Their mandatory consideration of the Guidelines, instead, is now the first part of a multi-factor process.⁴¹¹ After calculating the recommended sentencing range, judges must then consider multiple factors, set forth in 18 U.S.C. § 3553(a), to make "an individualized assessment based on the facts presented."⁴¹²

This Note does not go so far to suggest that trial judges should sentence trafficking survivor-defendants to sentences below the Guidelines range in all circumstances, though judges can do so and must never presume that a sentence within the Guidelines range is reasonable.⁴¹³ Instead, trainings for judges can play a crucial role in educating judges about the nature of trafficking, including the

⁴⁰⁸ *U.S. v. Booker*, 543 U.S. 220, 245 (2005) (holding that the U.S. Sentencing Commission's mandatory Federal Sentencing Guidelines, as they had been applied since their inception in 1987, violated the Sixth Amendment right to trial by jury).

⁴⁰⁹ *Id.*

⁴¹⁰ *Kimbrough v. United States*, 552 U.S. 85, 90 (2007) (citing *Booker*, 543 U.S. at 244). "[D]istrict courts are required to properly calculate and consider the [G]uidelines when sentencing, even in an advisory guideline system." U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, § 2 (U.S. SENT'G COMM'N 2021).

⁴¹¹ *Gall v. United States*, 552 U.S. 38, 50 (2007) (noting that the Guidelines' sentencing ranges are "the starting point and the initial benchmark" in sentencing); see also *Kimbrough*, 552 U.S. at 90–91.

⁴¹² *Gall*, 552 U.S. at 50; 18 U.S.C. § 3553(a); see *infra* Section III.C.

⁴¹³ See *Nelson v. United States*, 555 U.S. 350, 352 (2009). If a judge were to sentence outside the Guidelines range, they would still be subject to the deferential appellate review standard of abuse of discretion. *Gall*, 552 U.S. at 594–98. Judges will review an outside-the-Guidelines sentencing for abuse of discretion, "whether . . . just outside, or significantly outside the Guidelines range[.]" *United States v. Cunningham*, 669 F.3d 723, 728 (6th Cir. 2012). But "a major departure should be supported by a more significant justification than a minor one." *Gall*, 552 U.S. at 597. In the spirit of advocating for a real utopia, this Note must at least note the discretion of judges to sentence outside of the Sentencing Guidelines, if judges have correctly calculated the Guidelines sentencing ranges, considered that range, and considered the requisite additional sentencing factors. To only propose the narrowest solutions would not be in the spirit of imagining the "possible." See *Wright*, *supra* note 311, at 37.

powerful control tactics that traffickers use to keep survivors compliant. That way, when judges must sentence survivor-defendants, they may accurately account for a survivor-defendant's situation when weighing the § 3553(a) sentencing factors.

The first § 3553(a) factor is the “nature and circumstances of the offense and the history and characteristics of the defendant[.]”⁴¹⁴ To be able to understand the nature and circumstances of the offense, a judge must understand the effect of the trafficker's coercion on the survivor, and specifically how it motivated and likely forced the survivor-defendant to commit the crime in question. It can be difficult to understand someone else's experiences without having lived them oneself, and it can be especially difficult if those experiences are vastly different from one's own. Therefore, one should not assume that judges understand the complex dynamics of trafficking.⁴¹⁵ Judge Pamela J. Brown, a district administrative judge, advises other judges to be mindful of individual implicit biases, to refrain from categorizing survivors as “good” or “bad[.]” and to understand that though survivors may “often appear nonchalant, nonresponsive, and even disrespectful[.]” they are still survivors.⁴¹⁶

Those in the anti-trafficking movement should instead mirror the anti-domestic violence movement's effort to educate judges about domestic violence by mobilizing to educate federal trial judges about human trafficking.⁴¹⁷ For example, the National Judicial Institute on Domestic Violence, a non-governmental organization supported by a federal grant from the DOJ's Office on Violence Against Women, educates judges and judicial officers in state, local, and tribal courts about domestic violence.⁴¹⁸ Though there is a National Judicial Institute on Domestic Child Sex

⁴¹⁴ 18 U.S.C. § 3553(a)(1).

⁴¹⁵ Pamela J. Brown, *Disparate Impact Considerations in Human Trafficking Cases*, 60 JUDGES' J. 8, 8–9, 36 (2021), reprinted in Pamela J. Brown, *Disparate Impact Considerations in Human Trafficking Cases*, AM. BAR ASS'N (Aug. 24, 2021), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2021/august-2021/disparate-impact-considerations-human-trafficking-cases/ [<https://perma.cc/HH2R-R5K5>].

⁴¹⁶ *Id.*

⁴¹⁷ See *Course Offerings*, NAT'L JUD. INST. ON DOMESTIC VIOLENCE, <https://njudv.org/course-offerings> [<https://perma.cc/8GXX-JJ7K>].

⁴¹⁸ *Id.*

Trafficking, the institute educates juvenile and family court judges.⁴¹⁹ There appears to be no training institute that centers around teaching human trafficking topics to federal judges.⁴²⁰ A training institute for federal judges could teach judges some of the same topics as the National Judicial Institute on Domestic Child Sex Trafficking teaches: who is at risk of trafficking, how to identify survivors, and effective intervention techniques, among other topics.⁴²¹

Similarly, trainings on trafficking could affect judges' consideration of the second sentencing factor: the need for the sentence imposed. For example, if more judges were aware of a survivor-defendant's motivation to survive in committing their crimes the judges may reconsider how likely a survivor-defendant is to become a repeat offender, or how necessary it is to "protect the public" from a survivor-defendant.⁴²² And if more judges understand the depth of physical and psychological trauma that survivor-defendants face, they may think differently about how capable the criminal justice system will be in "provid[ing] the defendant with needed

⁴¹⁹ *National Judicial Institute on Domestic Child Sex Trafficking*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, <https://www.ncjfcj.org/child-welfare-and-juvenile-law/domestic-child-sex-trafficking/national-judicial-institute-on-domestic-child-sex-trafficking/> [https://perma.cc/N5ZL-NB8C].

⁴²⁰ See generally, BUREAU OF JUST. ASSISTANCE, *Funding & Awards: "Human Trafficking Training for State Judges and Prosecutors"*, OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST. (Sept. 9, 2010), <https://bja.ojp.gov/funding/awards/2010-vt-bx-k002> [https://perma.cc/73GF-99TQ] (describing a human trafficking training program for state judges and prosecutors); *Human Trafficking – Resources: Training & Technical Assistance*, U.S. DEP'T OF JUST. (Nov. 26, 2021), <https://www.justice.gov/humantrafficking/resources/training-technical-assistance> [https://perma.cc/7VX6-JA5h] (mentioning the Human Trafficking for State Judges online program); THE NAT'L JUD. COLL., *HUMAN TRAFFICKING: WHAT JUDGES NEED TO KNOW* (2014), <http://www.htcourts.org/wp-content/uploads/HT-Instructor-Guide.pdf> [https://perma.cc/FZD9-DWUH] ("The National Judicial College drafted this curriculum for state trial judges who will confront these cases as task forces and law enforcement attack the problem."). The National Judicial College held an online training on September 1, 2021, on "What Judges Need to Know: Human Trafficking on US Roads and Highways" that focused on federal laws, including the 'No Human Trafficking on Our Roads Act' [S. 1532, 115th Cong. (2018)] and the Trafficking Victims Protection Act of 2000 [*supra* note 140]. *What Judges Need to Know: Human Trafficking on US Roads and Highways*, NAT'L JUD. COLL. (Sept. 1, 2021), <https://www.judges.org/courses/what-judges-need-to-know-human-trafficking-on-us-roads-and-highways/> [https://perma.cc/29GU-R7LG]. But this is one training, not an entire institute dedicated to teaching federal judges about human trafficking.

⁴²¹ NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, *supra* note 419.

⁴²² 18 U.S.C. §§ 3553 (a)(2)(B)–(C).

educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]”⁴²³ Granted, in cases involving serious violence, judges will likely heavily weigh the seriousness of the offense and the need to provide just punishment over other factors. But educating judges about trafficking is an important first step in ensuring that judges have the requisite information to make informed, pragmatic decisions when sentencing federal survivor-defendants.

Alternately, judges should take care to explain in their opinions what they believe appropriate treatment of a survivor-defendant would be, even if after considering aggravating and mitigating factors, a judge must sentence a survivor-defendant to a high sentence.⁴²⁴ Judges could explain a survivor-defendant’s situation extensively in their opinions and note their policy disagreements with unfair sentences. For example, in *U.S. v. Dossie* and *U.S. v. Diaz*, Judge Gleeson of the Eastern District of New York described the unfair treatment of low-level drug trafficking offenders under mandatory minimum sentencing and the calculation of drug trafficking sentences based on drug weight.⁴²⁵ By using their sentencing memos and opinions as vehicles to voice policy disagreements, judges can help ensure

⁴²³ § 3553 (a)(2)(D).

⁴²⁴ See, for example, this statement of reasons from Judge Gleeson of the Eastern District of New York:

If [the government] hadn’t [chosen to cite the mandatory minimum provision in the indictment], I would have been permitted, indeed obligated, to consider, among others, the facts that (1) Dossie had a very minor role in the offense; (2) the drugs he helped to sell weren’t his, and he got hardly any money for his involvement; (3) Dossie got off to a very rocky start in life – there’s no surer sign of a dysfunctional childhood than a family court judge ordering a 16-year-old out of his home and into a residential drug treatment program; (4) Dossie’s criminal record and unsuccessful drug treatment suggest strongly that his legal problems all arose from a drug problem he developed as a child; (5) Dossie is from a very supportive family – his family made all of his court appearances – which could very well have provided the support he needs to get and remain drugfree; and (6) Dossie is genuinely remorseful. I would have considered all of these factors in sentencing Dossie, and there is no way I would have sentenced him to a prison term within the severe advisory range. I might even have given him the chance to enter our Court’s Pretrial Opportunity Program, which would have given Dossie the chance to both conquer his substance abuse problem and avoid prison altogether.

Statement of Reasons, *U.S. v. Dossie*, 851 F. Supp. 2d 478, 483–84 (E.D.N.Y. 2012).

⁴²⁵ See *id.*; *U.S. v. Diaz*, No. 11-CR-00821-2 JG, 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013).

trafficking survivor-defendants feel heard, even if they sentence survivor-defendants to Guidelines sentences. This would be consistent with how judges have voiced or affirmed policy disagreements with the sentences for other federal crimes.⁴²⁶

Similarly, a trial judge sentencing a survivor-defendant forced by their trafficker to traffic other survivors in order to survive may weigh all the sentencing factors and find that a high sentence is still warranted by the law. But they may indicate the unfairness of the revictimization of the survivor, the fear and control a trafficker instills in a survivor, and other considerations relevant to the survivor's individual sentencing proceeding.

7. “DisCrit requires activism and supports all forms of resistance.”⁴²⁷

A real utopia is what trafficking law would look like if the fruits of activism and resistance are realized. A real utopia welcomes political advocacy, community organization, and legal responsiveness. So, petitioning for federal funding, building coalitions between advocates and between disabled survivor-leaders of color, and encouraging trainings for law enforcement and prosecutors, are all welcome efforts.

On the street, law enforcement needs to make more effort to work directly with at-risk groups and communities plagued by trafficking.⁴²⁸ For example, police can collaborate with a neighborhood watch, engage in community meetings, and practice restorative justice when applicable.⁴²⁹ By listening to community voices and building positive relations, police officers can increase accurate detection of

⁴²⁶ See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 85–87 (2007) (crack cocaine distribution); *United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010) (child pornography); *United States v. Cavera*, 550 F.3d 180, 191, 194–96 (2d Cir. 2008) (en banc) (firearms trafficking). Under *Kimrough*, judges need not follow a Guidelines sentence if they have a policy disagreement with it. 552 U.S. at 85, 85–87. Note that in the above cases, the courts did elect to depart from the Guidelines. See also *United States v. Dorvee: Second Circuit Holds Within-Guidelines Child Pornography Sentence Procedurally and Substantively Unreasonable*, 124 HARV. L. REV. 1082, 1082 (2011).

⁴²⁷ Annamma et al., *supra* note 42, at 11.

⁴²⁸ Stephany Powell, *Sex Trafficking and Vice: Addressing Quality-of-Life Issues Through Police Reform in the African American Community*, POLICE CHIEF ONLINE (Oct. 28, 2020), <https://www.policechiefmagazine.org/sex-trafficking-and-vice/> [<https://perma.cc/88WV-S7M8>].

⁴²⁹ *Id.*

trafficking. Communities may be more likely to trust and cooperate with police forces they have created positive coalitions with, by coming to see them as allies in the fight. For example, one 2019 study indicated that after New Haven police initiated positive nonenforcement interactions with neighborhood residents, there were significant improvements in how the residents perceived the officers, especially among Black residents.⁴³⁰ Communities of color are burdened by complex, long-standing traumas from the criminal justice system, and community-building exercises will not erase this trauma. However, community-building efforts can help start to rebuild communities' trust, which may lead to more positive and inclusive responses to all crime.⁴³¹

In the criminal justice system, training for law enforcement is a good place to start to tackle racial bias. Law enforcement officers are the first point of contact between some trafficking survivors and the criminal justice system.⁴³² As a result, officers have an early opportunity to help trafficking survivors have a more restorative experience in the criminal justice system. Increased trainings on topics like implicit bias, trauma-informed care, and cultural sensitivity are viable options.⁴³³ Additionally, through local partnerships, the Federal Law Enforcement

⁴³⁰ Kyle Peyton et al., *A Field Experiment on Community Policing and Police Legitimacy*, 116 PROC. NAT'L ACAD. SCI. U.S. 19894, 19894 (2019).

⁴³¹ Terrence M. Cunningham, *How Police and Communities Can Move Forward Together*, AM. BAR ASS'N: HUM. RTS. MAG. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-police-and-communities-can-move-forward-together/ [<https://perma.cc/Y4ZS-BVG3>].

⁴³² Laura Castellanos, *Responding to Human Trafficking: Developing a Program to Help Victims*, AM. ORG. FOR NURSING LEADERSHIP (Mar. 2020), <https://www.aha.org/system/files/media/file/2020/03/aonl-voices-nursing-leadership-question-answers-responding-human-trafficking-developing-program-to-help-victims.pdf> [<https://perma.cc/P78Z-YGTP>].

⁴³³ See Nat'l Hum. Trafficking Training & Tech. Assistance Ctr., *Barriers that Prevent Identification*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://nhctac.acf.hhs.gov/soar/eguide/observe/Barriers_to_Screening_and_Responding [<https://perma.cc/9QK2-JF4J>] (explaining that implicit bias is one barrier that prevents law enforcement from identifying trafficking victims and responding to trafficking); 2021 TIP REPORT, *supra* note 160, at 32, 585. The 2021 Trafficking in Persons Report states:

Advocates called for increased training across all criminal justice sectors, including law enforcement, prosecutors, and judges, to correct misconceptions about what

Training Centers currently provide a Human Trafficking Awareness Program to raise officer awareness of trafficking and applicable state and federal law nationwide.⁴³⁴ The program's curriculum currently includes three sections: the "definition of human trafficking," "indicators of human trafficking," and "human trafficking report protocols."⁴³⁵ Including a main section on the issue of racial bias and trafficking victims may educate law enforcement on systemic racism. These types of training programs should be standard procedure and reinforced regularly with refreshers or supplementary training on an ongoing basis.

CONCLUSION

By the time Cyntoia Brown was released from her wrongful incarceration, she had two degrees, a husband, and an opportunity for a free, meaningful life.⁴³⁶ But she says that countless more survivors like her remain incarcerated, some facing more than half a century in prison, without hope.⁴³⁷ When scholars fail to educate lawyers, judges, and legislators on the unique ways ableism and racism intersect to prevent trafficking survivors from achieving justice, society misses the opportunity to end other forms of violence and discrimination. It is time for academics and advocates to ensure that the legal system supports the most vulnerable survivors of these horrific crimes.

constitutes a human trafficking crime. One NGO called for more training on trauma-informed care during the criminal justice process to avoid retraumatizing victims who choose to testify against their traffickers and called for training on the effect on victims of prosecuting victims for unlawful acts their traffickers compelled them to commit. Advocates called on the government to ensure that law enforcement trainings, including on labor trafficking investigations and cultural sensitivity, are developed in consultation with survivor leaders. Advocates called for training and technical assistance for law enforcement and judges to recognize when individuals with cognitive disabilities are targeted by traffickers.

Id. at 586–87.

⁴³⁴ *Human Trafficking Awareness Training*, FED. L. ENF'T TRAINING CTRS., <https://www.fletc.gov/training-program/human-trafficking-awareness-training> [<https://perma.cc/7YBH-LETA>].

⁴³⁵ *Id.*

⁴³⁶ Cho & Cornett, *supra* note 10.

⁴³⁷ *Id.*