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## From Criminals to Survivors: Recognizing Domestic Sex Trafficking as Violence Against Women in the District of Columbia

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# FROM CRIMINALS TO SURVIVORS: RECOGNIZING DOMESTIC SEX TRAFFICKING AS VIOLENCE AGAINST WOMEN IN THE DISTRICT OF COLUMBIA

ALICE MUTTER\*

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## INTRODUCTION

Macy came from an unstable background and met an older man who promised her love and safety.<sup>1</sup> After providing Macy with a place to stay, the man threatened to leave her if she did not engage in commercial sex.<sup>2</sup> Exposed and under the coercion of her trafficker, Macy<sup>3</sup> spent months meeting men in hotel rooms in exchange for money<sup>4</sup> trouble with her trafficker.<sup>5</sup> Ultimately, the police failed to recognize that she needed assistance and released her, notwithstanding the bruises covering her body as she sat in the police station answering questions.<sup>6</sup> Despite her entrapment in the commercial sex industry, Macy was afraid of legal consequences and of her trafficker retaliating if she asked the police for assistance.<sup>7</sup> When the police arrested Macy in another sting operation, they threatened to jail her unless she testified against her trafficker. Macy's story is not an isolated incident.

Survivors of sex trafficking,<sup>8</sup> like Macy, constantly face the risk of arrest.<sup>9</sup> While many individuals qualify as survivors of trafficking under federal law, they are not treated in such a way.<sup>10</sup> Instead, countless survivors are charged at the state or local level, where they are labeled as "prostitutes," "criminals," and/or "defendants," and face fees, jail time, and the numerous collateral

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1. Andrea Powell, *Why Do We Lock Up Survivors of Sex Trafficking?*, N.Y. TIMES (Sept. 28, 2016), [https://kristof.blogs.nytimes.com/2016/09/28/why-do-we-lock-up-survivors-of-sex-trafficking/?\\_r=0](https://kristof.blogs.nytimes.com/2016/09/28/why-do-we-lock-up-survivors-of-sex-trafficking/?_r=0) (explaining that Macy grew up in foster care before a sex trafficker targeted her).

2. *Id.*

3. *Id.* (describing how Macy was forced to have sex with men who purchased her services online).

4. *Id.*

5. *Id.*

6. *Id.* (highlighting that Macy feared the police would re-arrest her or that her trafficker would beat her if he found out).

7. Powell, *supra* note 1.

8. This author primarily uses the term "survivor" to refer to those affected by sex trafficking to reflect the language that survivors and advocates commonly prefer. However, due to the use of "victim" in the laws, "victim" is used when referring to or analyzing these laws.

9. See Alyssa M. Barnard, *The Second Chance They Deserve: Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1476 (2014) (describing how sex traffickers are often involved in drug operations and force their victims to purchase drugs, causing many victims to also face drug charges).

10. See *id.* at 1471 (explaining that defendants arrested for prostitution or related crimes qualify generally as victims of sex trafficking).

consequences of having a criminal record.<sup>11</sup>

This Comment argues that the District of Columbia's (hereinafter "D.C.") treatment of human trafficking survivors by labeling them "prostitutes" and criminalizing them, fails to afford survivors the resources that should be guaranteed to survivors of violence against women under federal law.<sup>12</sup> Part II of this Comment outlines the Violence Against Women Act, the federal laws that relate to sex-trafficking, and D.C.'s response to and criminalization of prostitution.<sup>13</sup> Part III argues that D.C.'s criminalization of survivors violates the Trafficking Victims Protection Act and that federal laws should be applied in cases where sex trafficking survivors are charged with crimes that stem from their trafficking background.<sup>14</sup> Part III further asserts that even if D.C. is not in violation of federal law, its pretrial diversion program treats survivors as criminals and fails to provide them meaningful services.<sup>15</sup> Based on this injustice, D.C. should enact a vacatur statute, allow for sex trafficking as an affirmative defense, and improve its safe harbor law.<sup>16</sup> Part IV recommends that D.C. legislature enact statutorily mandated diversion programs.<sup>17</sup> Part V concludes by reiterating that sex trafficking is a form of violence against women, and survivors of sex trafficking who are arrested for prostitution or related criminal charges in D.C. should be afforded access to vacatur laws and trauma-informed diversion programs.<sup>18</sup>

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11. *See id.* at 1472-73 (describing how criminal convictions can prevent a survivor from obtaining housing or employment, and works against them in family law or immigration proceedings).

12. *See* D.C. CODE § 22-2701 (2015) (laying out criminal charges for prostitution without addressing instances where defendants are survivors of sex trafficking or providing an affirmative defense to such crimes).

13. *See infra* Part II (explaining the terms associated with sex trafficking, vacatur statutes, and diversion programs available to those charged with certain crimes).

14. *See infra* Part III (noting that D.C. fails to apply federal approaches to violence against women to criminal defendants who are human trafficking survivors in violation of federal law).

15. *See infra* Part III (highlighting how D.C.'s diversion program unnecessarily limits admission into diversion and fails to recognize the realities of sex trafficking).

16. *See infra* Part III (comparing the various states that have vacatur statutes that permit defendants to vacate their criminal convictions where such defendants are charged with crimes as a result of being trafficked).

17. *See infra* Part IV (recommending that survivors of trafficking would be best served by policy changes that provide meaningful social services to survivors rather than criminal charges).

18. *See infra* Part V (emphasizing the need for service and support options for D.C. survivors of sex trafficking).

## I. BACKGROUND

### A. Violence Against Women and Sex Trafficking

The term “violence against women” is an umbrella term frequently used to describe various types of gender-based violence.<sup>19</sup> “Violence against women” refers to incidents or acts that manifest the systemic-inequality in power relations between men and women.<sup>20</sup> This inequality allows for power dynamics of coercion and control over women.<sup>21</sup> Incidents of violence against women can be physical in nature, such as physical or sexual assaults, or they can be verbal or psychological.<sup>22</sup> Furthermore, “violence against women” is violence that occurs in either private or public spheres.<sup>23</sup> Understood in this way, sex trafficking is a type of violence against women.<sup>24</sup>

People often think that domestic or intrastate sex trafficking does not exist because of misconceptions that trafficking requires interstate transportation.<sup>25</sup> However, to the contrary, sex trafficking does not require any movement across borders.<sup>26</sup> In the United States, an individual may be charged with sex trafficking when a person:

[K]nowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; knowing . . . that means of force, threats of force, fraud, coercion . . . will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of

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19. See Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, §§ 40001-40703, 108 Stat. 1902, 1941 (1994) [hereinafter “VAWA of 1994”] (categorizing sex crimes, sexual assault, and domestic violence as violence against women).

20. G.A. Res. 48/104, U.N. Declaration on the Elimination of Violence Against Women, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (contrasting violence against women to isolated incidents which do not constitute violence against women).

21. *Id.* (recognizing that historically unequal power relations between men and women have led to domination over and discrimination against women by men).

22. *Id.* at art. 2 (detailing that various forms of violence may occur within the family, community, or by the State).

23. *Id.* at art. 1 (noting that this includes threats of physical, sexual, or psychological harm, coercion, or deprivation of liberty).

24. *Id.* at art. 2(b) (defining “violence against women” to include forms of violence regularly faced by sex trafficking survivors).

25. Barnard, *supra* note 9, at 1465-66 (highlighting that trafficking does not require transportation between two locations).

26. 18 U.S.C. § 1591(a) (2011) (criminalizing both the transporting or harboring of individuals and causing an individual to engage in commercial sex through threat or coercion).

18 years and will be caused to engage in a commercial sex act . . .  
[.]<sup>27</sup>

Significantly, the terms “force,” “fraud,” and “coercion” are broadly defined.<sup>28</sup> The statute defines “coercion” as either “threatening to seriously harm or restrain a person,” “a scheme used to make an individual believe that failure to perform would result in serious harm or physical restraint,” or “threatening or abusing the legal system.”<sup>29</sup> Moreover, “serious harm” does not need to be physical, and includes psychological, financial, and reputational harm.<sup>30</sup>

The commercial sex industry is difficult to study and quantify given the underground nature of the operation and enjoyment of the industry.<sup>31</sup> Moreover, survivors’ fear of being prosecuted keeps them underground in an attempt to avoid arrest or confrontation with law enforcement officers, which is a narrative their traffickers reinforce as well.<sup>32</sup> Sex trafficking survivors also have other hallmarks of vulnerability that impact their likelihood to approach law enforcement for assistance.<sup>33</sup> Namely, their youth, instances of sexual assault prior to their involvement in sex trafficking, potential substance abuse, and their relative poverty are all common characteristics that deter survivors from seeking assistance.<sup>34</sup> Despite a lack of concrete statistics, one thing is evident — a large number of individuals involved in commercial sex are minors when they enter the industry and are therefore

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27. *Id.* (highlighting force, fraud, and coercion as foundational elements of sex trafficking).

28. *Id.* § 1591(e)(2).

29. *Id.*

30. *Id.* (e)(4) (recognizing that there are numerous types of harm faced by survivors).

31. See *2016 Hotline Statistics*, POLARIS (Jan. 2017), <https://polarisproject.org/resources/2016-hotline-statistics> (describing the difficulty in obtaining data on trafficking because of lack of awareness and subsequent underreporting).

32. See Priscilla Alvarez, *When Sex Trafficking Goes Unnoticed in America*, THE ATLANTIC (Feb. 23, 2016), <http://www.theatlantic.com/politics/archive/2016/02/how-sex-trafficking-goes-unnoticed-in-america/470166/> (discussing how survivors believe they are offenders and are simultaneously silenced by their traffickers and a fear of the law).

33. Jo-Anne Madeleine Stoltz et al., *Associations Between Childhood Maltreatment and Sex Work in a Cohort of Drug-Using Youth*, NATIONAL INSTITUTE OF HEALTH 1, 2, 7 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2254224/> (finding that history of various forms of abuse at a young age is a common factor among trafficking survivors).

34. *Id.* at 5 (noting the high prevalence of drug use, childhood abuse, and maltreatment among youth involved in commercial sex).

survivors of sex trafficking under federal law.<sup>35</sup> Even if age is disregarded, entry into commercial sex is frequently coupled with the elements of force and coercion as described under federal law.<sup>36</sup> Traffickers, commonly referred to as pimps, use exploitive techniques to prey on vulnerable individuals with unstable home lives, financial issues, or a history of abuse.<sup>37</sup>

When an individual exchanges sexual acts for money or goods, the law defines her as a “prostitute.”<sup>38</sup> Many women enter such commercial sex work industries willingly and are therefore not considered survivors of sex trafficking.<sup>39</sup> However, the prevalence of child sex trafficking and coercion tactics means that a large percentage of these criminally-defined “prostitutes” are survivors of trafficking.<sup>40</sup> In summation, while not all prostitutes are sex trafficking survivors, the data strongly suggests that *many* are.

### B. *The Violence Against Women Act and Federal Laws on Sex Trafficking*

In 1994, Congress passed the Violence Against Women Act (hereinafter “VAWA”) as a national response to gender-based violence; this response provides services to survivors and holds perpetrators of such violence accountable through the criminal justice system.<sup>41</sup> VAWA created positive

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35. See 18 U.S.C. § 1591(a) (2011) (describing how minors under the age of eighteen are unable to consent, and that their involvement in commercial sex is therefore *per se* sex trafficking); Barnard, *supra* note 9, at 1466-67 (highlighting the large number of sex workers who began as minors).

36. See *Domestic Sex Trafficking: The Criminal Operations of the American Pimp*, POLARIS PROJECT, <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/victims/domestic-sex-trafficking-criminal-operations-american-pimp.pdf> (last visited Feb. 2, 2017) (explaining that traffickers exert control and domination over their victims and induce commercial sex acts).

37. See Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1023-24 (2013) (highlighting how traffickers seek girls who need support, come from bad homes, have run away, or are “desperate”).

38. See D.C. CODE § 22-2701 (2015) (criminalizing prostitution and solicitation for prostitution).

39. See 18 U.S.C. § 1591(a) (emphasizing that sex trafficking involves commercial sex under force or threat).

40. See Barnard, *supra* note 9, at 1471 (noting that most individuals arrested for prostitution qualify as survivors of sex trafficking); Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1061 (2011) (explaining that the majority of individuals in the commercial sex industry were minors when they began, thereby qualifying them as sex trafficking survivors).

41. See generally VAWA of 1994 §§ 40151-40155, 40241-40261, 40302 (creating programs to address issues such as rape, sexual assault, and domestic violence).

change by both preventing violence against women and supporting survivors through services like telephone hotlines, protection orders, and temporary housing.<sup>42</sup> Furthermore, in 2013 Congress reauthorized VAWA.<sup>43</sup> The VAWA Reauthorization Act of 2013 notably included a provision on combating trafficking in the United States.<sup>44</sup>

In addition to general violence against women initiatives, in 2000, Congress passed a crucial piece of anti-trafficking legislation.<sup>45</sup> Known as the Victims of Trafficking and Violence Protection Act of 2000, Congress recognized sex trafficking as “a contemporary manifestation of slavery” that disproportionately affects women.<sup>46</sup> Most recently, the Justice for Victims of Trafficking Act of 2015 created more programing and funding that was specifically geared at assisting survivors of trafficking.<sup>47</sup> Beyond the relief and services available through VAWA and other federal acts, vacatur statutes are a crucial resource for survivors of sex trafficking as they afford survivors the opportunity to clear their criminal record.<sup>48</sup>

### C. *Vacatur Statutes and Diversion Programs*

Vacatur statutes enable survivors to clear their criminal records.<sup>49</sup> As of January 2017, sixteen states had enacted vacatur statutes: Connecticut, Florida, Hawaii, Illinois, Maryland, Mississippi, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Vermont, Washington,

42. *See id.* (highlighting how VAWA provides extensive services to women who have experienced violence).

43. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 47 (2013) [hereinafter “VAWA Reauthorization Act of 2013”] (reauthorizing and amending VAWA of 1994).

44. *See generally id.* §§ 1211-1264 (creating initiatives to increase penalties for traffickers and improve state efforts to combat trafficking).

45. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (establishing new findings and initiatives regarding trafficking).

46. 22 U.S.C. § 7101(a) (2012) (emphasizing that the purpose of the Act is to combat sex trafficking).

47. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015) (establishing numerous programs for survivors, including a monetary fund, increased reporting and data, and enhanced law enforcement and task force responses).

48. *Human Trafficking Issue Brief: Vacating Convictions*, POLARIS, <https://polarisproject.org/sites/default/files/2015%20Vacating%20Convictions%20Issue%20Brief.pdf> (last visited Feb. 2, 2017) (noting that vacatur statutes provide necessary relief to survivors).

49. *See id.* (stating that vacatur statutes allow survivors to file motions with the court to have convictions removed).



and Wyoming.<sup>50</sup> Trafficking survivors often find themselves involved in an array of criminal activity, under the pressure of their traffickers, which ultimately causes them to accumulate long criminal records.<sup>51</sup> These records can prevent survivors from obtaining crucial services like admission into diversion programs, public benefits, educational grants, housing assistance, and loans.<sup>52</sup> Restrictions on services such as public benefits, housing, and other key resources can either inhibit survivors' ability to leave the commercial sex industry and threaten their success in instances where victims have been able to leave.<sup>53</sup> In contrast to vacatur statutes, diversion programs are pretrial agreements that enable individuals who fulfill certain requirements to have their charges subsequently dismissed.<sup>54</sup> Court systems may have multiple diversion programs targeted at different types of courts, for example drug court, mental health court, or human trafficking diversion programs.<sup>55</sup>

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50. See Barnard, *supra* note 9, at 1480 (listing states with vacatur statutes); see also CONN. GEN. STAT. ANN. § 54-95c (West 2016); MD. CODE ANN., CRIM. PROC. § 8-302 (West 2011).

51. See Barnard, *supra* note 9, at 1476 (stating that many survivors face drug charges because of traffickers' high involvement in drug sales); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (emphasizing that survivors of trafficking face both prostitution and other criminal charges).

52. See Lauren Ulrich, *Vacatur Statutes for Survivors of Sex Trafficking*, AMARA LEGAL CENTER, <http://www.amaralegal.org/wp-content/uploads/2016/06/Vacatur-Statutes-for-Survivors-of-Sex-Trafficking.pdf> (last visited Jan. 22, 2017) (listing the effects of a criminal record on survivors' access to services); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (explaining how criminal records can inhibit access to jobs, loans, immigration visas, and education).

53. See *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (highlighting how criminal convictions create barriers for survivors rebuilding their lives and, consequently, re-victimizes them).

54. See *Diversion Opportunities*, PRETRIAL SERVS. AGENCY OF D.C., [https://www.psa.gov/?q=programs/diversion\\_opportunities](https://www.psa.gov/?q=programs/diversion_opportunities) (last visited Jan. 22, 2017) (describing pretrial diversion opportunities in D.C.); see also *Irby v. United States*, 464 A.2d 136, 141 (D.C. 1983) (noting that there is no right to diversion); *United States v. Smith*, 354 A.2d 510, 512 (D.C. 1976) (stating that diversion is based on prosecutorial discretion).

55. See PRETRIAL SERVS. AGENCY OF D.C., *supra* note 54 (emphasizing that pretrial services, through Drug Court and Mental Health Court, have diversion components that provide survivors with support they need); see also COLO. REV. STAT. § 13-3-115 (2013) (establishing Colorado's diversion program); LA. REV. STAT. § 13:587.4 (2017) (statutorily creating a human trafficking diversion court); *State ex rel. M.J.* (La. App. 4 Cir. 2/4/15) 160 So.3d 1040, 1045-46 (highlighting flaws in diversion statute enforcement).

*D. D.C.'s Prostitution Laws*

Despite advances in legislation on violence against women and the increased availability of various services for survivors of domestic sex trafficking in D.C., the nation's capital continues to treat survivors as criminals.<sup>56</sup> Under D.C.'s prostitution and solicitation laws, arrested individuals face fees as well as jail time, with punishments increasing for each offense.<sup>57</sup> Although the statute provides immunity for minors, it includes no references to whether a sex worker is in the field voluntarily.<sup>58</sup> Moreover, while many states have laws vacating convictions for survivors of sex trafficking, D.C. is not one of them.<sup>59</sup> D.C.'s human trafficking laws are so minimal that it is the tenth worst jurisdiction in the country for human trafficking laws.<sup>60</sup> D.C.'s low ranking can be attributed to its lack of human trafficking laws regarding law enforcement training, a human trafficking task force, a hotline, a safe harbor law, or a vacatur law.<sup>61</sup> Since the latest state ratings, D.C. passed a law that importantly established immunity for minors, a training program for law enforcement, and hotline information postings.<sup>62</sup> Despite these advancements, gaps in D.C.'s laws persist that prevent survivors from accessing the services they need to build a life outside of the commercial sex industry.<sup>63</sup> Survivors' extensive criminal records create an

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56. Compare The Office of Planning, Policy, and Program Support, *Human Trafficking Resource Guide*, D.C. CHILD & FAMILY SERVS. AGENCY, <http://cfsa.dc.gov/publication/human-trafficking-resource-guide> (last visited Jan. 22, 2017) (listing resources available for survivors of trafficking), with D.C. CODE § 22-2701 (2015) (criminalizing prostitution without recognizing the possibility that defendants may be survivors of sex trafficking).

57. See D.C. CODE § 22-2701 (outlining that first-time offenders may be jailed up to ninety days, but the jail time jumps up to 180 days for a second offense and two years for a third-time offense).

58. Sex Trafficking of Children Prevention Amendment Act of 2014, 62 D.C. Reg. 479 (Jan. 16, 2015) (highlighting that D.C.'s immunity for minors, known as a "Safe Harbor" law, was only recently enacted and went into effect in 2015).

59. See Ulrich, *supra* note 52 (stating that despite the importance of vacatur statutes for survivors, D.C. does not have any).

60. *2014 State Ratings on Human Trafficking Laws*, POLARIS (2014), <https://polarisproject.org/sites/default/files/2014-State-Ratings.pdf> (providing that Polaris' most recently available report analyzes all states plus D.C. and assigning D.C. a point value in relation to other jurisdictions).

61. *Id.* (establishing which states have various categories of statutes, and categorizing D.C. as Tier 2).

62. Sex Trafficking of Children Prevention Amendment Act of 2014, 62 D.C. Reg. at 479 (creating new provisions for preventing sex trafficking of minors).

63. See *2014 State Ratings on Human Trafficking Laws*, *supra* note 60 (noting that D.C. lacks law establishing training programs or a vacatur statute).

obstacle to obtaining public benefits, education, and numerous other services.<sup>64</sup> As such, their criminalization actively prevents survivors from obtaining the financial, emotional, and educational tools they need to escape from the commercial sex industry.<sup>65</sup>

## II. ANALYSIS

### A. D.C.'s Criminalization of Trafficking Survivors Violates the Trafficking Victims Protection Act

In both definition and practice, federal law recognizes the complexity of sex trafficking.<sup>66</sup> Federal laws contend that the industry is both widespread and difficult to detect and prosecute.<sup>67</sup> Despite federal recognition of these challenges and the need to address sex trafficking and to provide support services for survivors, D.C. lacks the appropriate training programs needed for detection, survivor services, and judicial options for survivors who face criminal charges.<sup>68</sup>

VAWA lays out numerous programs and initiatives for combating violence against women.<sup>69</sup> Furthermore, VAWA specifically targets systems of violence that survivors of sex trafficking face regularly, including sexual assault, rape, domestic violence, and domestic sex trafficking.<sup>70</sup> Despite numerous versions and amendments, VAWA, as it currently stands, applies

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64. *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48.

65. *Id.*

66. See 22 U.S.C. § 7101 (2012) (emphasizing how traffickers lure individuals and use force and threats against them to exert control over them); 18 U.S.C. § 1590 (2010) (stating that sex trafficking involves elements of coercion and threats).

67. See 22 U.S.C. § 7101 (noting that at least 700,000 people are trafficked within or across international borders each year); see also Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227, §§ 203, 231 (2015) (creating additional grants for training programs for judicial officers, law enforcement officials, and first responders regarding sex trafficking identification and investigation).

68. See D.C. CODE § 22-2701 (2016) (describing the crime of prostitution without referencing D.C.'s sex trafficking law).

69. See VAWA of 1994 §§ 40151-40155, 40241-40261 (1994) (outlining training and education programs in sexual assault and domestic violence).

70. VAWA Reauthorization Act of 2013 §§ 1211-1243 (emphasizing new efforts to combat trafficking, including increased penalties for traffickers, additional reporting requirements, and enhanced state efforts); see generally 34 U.S.C. § 12291 et seq. (2013) (federally funding efforts against sexual assault, rape, domestic violence, and sex trafficking).

to survivors of trafficking through various initiatives.<sup>71</sup> Under VAWA, survivors should benefit under a federally-funded program aimed at combating stalking and domestic violence.<sup>72</sup> This resource relates to trafficking due to the relationships that survivors frequently have with their traffickers.<sup>73</sup> Similarly, innumerable survivors fall under the intended protected class in VAWA's initiatives on rape and sexual assault due to the large number of survivors who endure criminal acts at the hands of their traffickers and customers.<sup>74</sup> Furthermore, the federal Trafficking Victims Protection Act mandates that survivors of trafficking not be unduly criminalized.<sup>75</sup>

By criminalizing survivors of sex trafficking through its prostitution laws and limited recourse for survivors in criminal cases, D.C. is in violation of the Trafficking Victims Protection Act (hereinafter "the Act").<sup>76</sup> The Act states that, "[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked[.]"<sup>77</sup>

Under this provision, the term "severe forms of trafficking" mirrors other federal definitions of sex trafficking, defining it as a commercial sex act that is induced by force, fraud, or coercion, or where the person induced to perform such an act is under eighteen years old.<sup>78</sup> As such, "severe forms of trafficking" include all forms of sex trafficking.<sup>79</sup> Furthermore, a "victim of

71. See generally 34 U.S.C. § 12291 et seq. (providing funding to combat various forms of violence against women faced by survivors of sex trafficking).

72. *Id.* § 12291(b) (establishing funding for improved data and reporting on stalking and domestic violence issues to enhance anti-stalking and anti-violence programs and legislation).

73. See 22 U.S.C. § 7101 (2012) (highlighting how traffickers use coercion and threats to control their victims).

74. See *id.* (describing how trafficking survivors are commonly subjected to rape and sexual abuse).

75. *Id.* (b)(19) (stating that survivors should not be criminalized for acts committed as a result of their trafficking).

76. See *id.* (providing protections for survivors of sex trafficking); D.C. CODE § 22-2701 (2016) (violating the Act by criminalizing survivors through prostitution charges).

77. 22 U.S.C. § 7101(b)(19) (2012) (describing Congress' findings on sex trafficking that serve as a basis for the Act).

78. Compare 18 U.S.C. § 1591(a) (2011) (explaining that the crime of sex trafficking involves causing an individual to engage in commercial sex under force, threat, fraud, or coercion), with 22 U.S.C. § 7102(9) (defining "severe forms of trafficking" the same as accompanying federal legislation that contains definitions of sex trafficking).

79. See 22 U.S.C. § 7102(9) (2012) (noting that sex trafficking is a severe form of human trafficking).

severe forms of trafficking” simply means any individual subjected to a severe form of trafficking, particularly sex trafficking.<sup>80</sup>

For victims of severe forms of trafficking, the Act’s requirement that the victim not be “inappropriately incarcerated, fined, or otherwise penalized” includes criminal convictions for crimes like prostitution.<sup>81</sup> This policy of not penalizing survivors extends to any unlawful act committed as a result of being trafficked, and therefore involves not prosecuting survivors for criminal charges that are a direct result of an individual’s trafficking.<sup>82</sup> The Act gives minimal instructions on what this includes, listing just three examples.<sup>83</sup> Nonetheless, the vague nature of the language strongly suggests that it is intended to broadly cover any criminal acts committed because of trafficking, including prostitution or even trespassing or drug-related charges.<sup>84</sup> Notably, the Act describes how traffickers use elements of force, coercion, psychological abuse, and legal threats to compel their victims to participate in sexual acts.<sup>85</sup> This focus on the methods used by traffickers supports the interpretation that in addition to sexual acts committed as a result of such force, other illegal activity coerced by traffickers, such as unlawful labor or drug-trafficking, also fall under “unlawful acts committed as a direct result of being trafficked.”<sup>86</sup>

Such inappropriate penalization for these broadly defined “unlawful acts” should be interpreted to include prosecution for crimes committed because of a survivor’s trafficking, forced testimony against a survivor’s trafficker, and other punitive measures such as supervision.<sup>87</sup> The Act does not include an exhaustive list of what the inappropriate penalties include, but the intent

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80. *See id.* § 7102(14) (clarifying the use of “victim of severe forms of trafficking” in the Act).

81. *See id.* § 7101(b)(19) (emphasizing that survivors of trafficking should not be prosecuted for crimes related to their trafficking).

82. *See, e.g., id.* (describing a wide range of acts that survivors should not be penalized for).

83. *See id.* (noting the types of criminal charges that sex trafficking survivors may face including false documents and entering the country or working without documentation).

84. *See id.* (broadly describing the types of acts that trafficking survivors should be protected from criminal liability for committing).

85. *See* 22 U.S.C. § 7101(b)(6)-(8) (2012) (highlighting the control that traffickers exert over their victims and the criminal enterprises behind many traffickers).

86. *See id.* (19) (providing protection for unlawful acts committed by survivors of sex trafficking as a direct result of their history).

87. *See id.* (16)-(19) (noting that the United States should provide greater protections for survivors).

and purpose of the Act provide insight into its interpretation.<sup>88</sup> In both the Act's stated purpose and in numerous legislative documents, it is clear that Congress intended for the Act to be a legal protection for survivors of trafficking.<sup>89</sup> Consequently, punitive measures that harm rather than support survivors are in direct conflict with the intent of the Act.<sup>90</sup>

While the Act is contained under the United States Code's "Foreign Relations and Intercourse" title, it nonetheless applies to both international *and* domestic survivors of sex trafficking.<sup>91</sup> First, the Act itself explicitly outlines protections for domestic survivors.<sup>92</sup> Additionally, the intended subject class—"victim of trafficking"—has no national origin or alien status requirement in its definition.<sup>93</sup> Instead, the protected class of victims of trafficking is defined as people who are subject to a certain act or practice described in the Act's definitions of "sex trafficking" and "severe forms of trafficking."<sup>94</sup> Furthermore, the Victims of Trafficking and Violence Protection Act of 2000, which contains the Act, is organized into three separate divisions: (1) the Act, (2) the 2000 reauthorization of VAWA, and (3) miscellaneous provisions, which includes a section on state management of individuals convicted of murder, rape, or a dangerous sexual offense.<sup>95</sup> The Act's connection with VAWA and domestic sex crimes places the Act

88. *See id.* (a) (emphasizing the intent to provide protections to survivors of trafficking).

89. *See id.* (outlining the purposes of the Act); 146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Gilman), 146 Cong. Rec. H2675-01, at \*H2682, 2000 WL 561118 (highlighting how the Act will provide necessary protections and services to survivors); 146 CONG. REC. H9865-02 (daily ed. Oct. 12, 2000), 146 Cong. Rec. H9865-02, at \*H9865, 2000 WL 1514963 (noting that the Act is intended to combat trafficking, prosecute traffickers, and protect and assist survivors).

90. *See* 22 U.S.C. § 7101(a), (b)(19) (creating legislation to support and protect survivors, including not inappropriately penalizing survivors).

91. *See* 22 U.S.C. § 7105 (2012) (emphasizing trafficking as both an international and domestic issue).

92. *See id.* (b)(i) ("[f]ederal agencies shall expand benefits and services to victims of severe forms of trafficking in persons in the United States").

93. *Id.* § 7102(15) (defining victim of trafficking by the unlawful act an individual is subjected to without additional qualifiers).

94. *Id.* (9)-(10) (describing trafficking without any requirement of crossing international borders or being an alien).

95. Victims of Trafficking & Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (enacting the Act and also re-enacting the domestic-focused VAWA); *see also* VAWA Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 47 (2013) (simultaneously amending and reauthorizing both VAWA and the Trafficking Victims Protection Act in a unified effort to further support survivors of trafficking and violence).

in the context of legislative efforts to combat violence and trafficking of *all* women.<sup>96</sup> Moreover, even if this domestic intent is interpreted as ambiguous in the Act's initial 2000 enactment, its reauthorization in 2005 clearly recognizes the issue of domestic sex trafficking when it explicitly clarifies that "[t]rafficking in persons also occurs within the borders of a country, including the United States."<sup>97</sup>

Despite federal recognition of the challenges of sex trafficking and the need to address the issue and provide support services to survivors, D.C. continues to criminalize survivors in violation of the Act.<sup>98</sup> D.C. can ensure its compliance with the Act by working to support survivors of sex trafficking, instead of criminalizing them, through adopting the prevention and assistance focused approach taken by federal laws.<sup>99</sup> D.C. can best serve its survivors by actively working to prevent punishment or criminalization of survivors.<sup>100</sup>

*B. Even if D.C. is Not Failing to Abide by Federal Law, Its Pretrial Options Treat Survivors as Criminals and Fail to Provide Meaningful Services*

Even if D.C. is not in violation of federal law, it nonetheless lacks the appropriate training programs for detection, survivor services, and judicial options for survivors who face criminal charges.<sup>101</sup> Unlike statutorily defined programs in Colorado, Louisiana, and New York, D.C.'s pretrial diversion program highly criminalizes survivors through its ill-defined

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96. See generally VAWA Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 47 (2013) (revealing a trend towards continuously increasing protections for survivors); Victims of Trafficking & Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (increasing funding and legislation for supporting survivors of trafficking and violence).

97. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat 3558 (2005) (clarifying that "trafficking" under the Act includes domestic forms).

98. See D.C. CODE § 22-2701 (2016) (criminalizing survivors for prostitution without recognition of human trafficking).

99. See generally VAWA Reauthorization Act of 2013 §§ 1201-1264 (amending protections for victims of sex trafficking and approaches to combatting sex trafficking); VAWA of 1994, Pub. L. No. 103-322, tit. IV, §§ 40001-40703, 108 Stat. 1902, 1941-42 (1994) (establishing funding for education, prevention, and assistance programs for sexual assault and domestic violence).

100. See 22 U.S.C. § 7101(b)(19) (2012) (urging that survivors not be inappropriately incarcerated, fined, or punished for acts committed because of their trafficking).

101. See *United States v. Smith*, 354 A.2d 510, 512 (D.C. 1976) (allowing pretrial diversion services only at the discretion of the prosecution).

admission standards and program requirements that lack services for trafficked individuals.<sup>102</sup> Although not explicitly articulated in statutory law, the motivation behind the D.C. diversion programs are evident.<sup>103</sup> D.C.'s pretrial diversion program exists to reduce the court docket, conserve resources for more serious offenses, and create rehabilitative "regimens" that may be better suited than prison time.<sup>104</sup> While such diversion programs are statutorily defined in some jurisdictions, D.C.'s program is based solely on prosecutorial discretion.<sup>105</sup> If defendants believe that the prosecution denied involvement in a diversion program based on discrimination, they must meet a heavy burden.<sup>106</sup> Under this burden, defendants must prove that the prosecutor's denial of enrollment was based on invidious or otherwise impermissible discrimination, was arbitrary, or was capricious.<sup>107</sup> Because of this high standard, D.C. criminal defendants have little recourse if a prosecutor does not offer them enrollment in a diversion program.<sup>108</sup>

Statutorily defined diversion programs better enable survivors to gain admission into pre-trial programs that are more appropriate based on their history of sex trafficking.<sup>109</sup> Unlike D.C., other states have either statutorily defined, or even statutorily mandated, diversion programs.<sup>110</sup> While D.C.'s

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102. *See id.*

103. *See id.* (explaining that the purpose and function of diversion programs is to provide a tool for the prosecutor's office to lighten the court docket, conserve resources, and create rehabilitative programs).

104. *See id.* at 512 (explaining the purpose behind the "first offender" program, one of several pretrial diversion programs); *see also* *Irby v. United States*, 464 A.2d 136, 141 (D.C. 1983) (holding that a defendant has no right to diversion).

105. *Compare* COLO. REV. STAT. §§ 13-10-126, 13-5-144 (2013) (requiring clear judicial procedure and regular review of its diversion program), *and* LA. STAT. ANN. § 13:587.4 (2014) (establishing a diversion program for survivors of sex trafficking), *and* N.Y. CRIM. PROC. LAW § 216.05 (McKinney 2016) (articulating the factors relevant to diversion), *with* *Smith*, 354 A.2d at 512 (noting that diversion in D.C. "owes its existence and operation solely to prosecutorial discretion").

106. *See Smith*, 354 A.2d at 512-13 (highlighting the defendant's heavy burden for a defense of discriminatory prosecution).

107. *See id.* (citing to *Oyler v. Boles*, 368 U.S. 448 (1962)) (emphasizing the high standard for appealing prosecutorial discretion).

108. *Id.*

109. *See, e.g.*, COLO. REV. STAT. § 13-3-115 (2013) (requiring statutorily enumerated diversion program requirements instead of leaving diversion program admission solely up to prosecutors); LA. STAT. ANN. § 13:587.4 (2014) (providing specific diversion protocol for trafficking victims).

110. *Compare* COLO. REV. STAT. §§ 13-10-126, 13-5-144 (outlining clear requirements and parameters of its diversion program), *with* LA. STAT. ANN. § 13:587.4 (2014) (explaining the diversion procedure for defendants who are identified as victims).



diversion program is largely designed for judicial ease and as a tool of prosecutorial discretion, states such as Colorado, Louisiana, and New York all have statutorily established diversion programs with the intent of providing services and supports for their participants.<sup>111</sup> For example, in Colorado, state statute creates and defines a diversion funding committee.<sup>112</sup> Under the statute, Colorado explicitly tasks the diversion funding committee with establishing the parameters of the diversion program, the application process, tracking information on participants, and setting clear outcomes and performance measures for participants.<sup>113</sup> Colorado's diversion program is therefore required to be concretely defined, tracked, and reviewed; it cannot be arbitrarily offered or denied as it is in D.C.<sup>114</sup> In other words, Colorado, unlike D.C., puts its money where its mouth is and values outcomes.<sup>115</sup>

D.C.'s discretion-based program unnecessarily blocks diversion participation, forcing survivors to undergo trial and to face prison time or fees.<sup>116</sup> Conversely, under a statutorily defined program, such as Colorado's, survivors are not prevented from entering a diversion program based on the decision of a single prosecutor.<sup>117</sup> Instead, whether an individual may enroll in a diversion program depends upon a set of clearly laid out criteria.<sup>118</sup> Even where a statutorily defined program allows for a degree of prosecutorial discretion, such as in Louisiana, the parameters laid out in the law provide

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in need of services), and N.Y. CRIM. PROC. LAW § 216.05 (McKinney 2016) (stating the judicial procedures for diversion enrollment and establishing the relevant factors for judges to consider in making determinations).

111. Compare United States v. Smith, 354 A.2d 510, 512 (D.C. 1976) (describing diversion in D.C. as a tool of judicial economy and leverage through prosecutorial discretion), with COLO. REV. STAT. § 13-3-115 (designating resources towards diversion program outcomes and improvements), and LA. STAT. ANN. § 13:587.4 (designating a specific human trafficking court with specially trained judges).

112. COLO. REV. STAT. § 13-3-115.

113. *Id.* (explaining that the diversion funding committee oversees developing an application that prescribes the diversion process, while having a district attorney provide program reports).

114. Compare Smith, 354 A.2d at 512 (providing no detailed requirements for participating in diversion), with COLO. REV. STAT. § 13-3-115 (enumerating the requirements and expectations of entry into its diversion program.)

115. See COLO. REV. STAT. § 13-3-115 (valuing hard data on outcomes and performance measures of its diversion program).

116. See Smith, 354 A.2d at 512 (permitting prosecutors to arbitrarily deny criminal defendants entry into diversion).

117. *Contra id.* (emphasizing that defendants are not statutorily entitled to a diversion program because D.C.'s program is solely up to the prosecutor).

118. COLO. REV. STAT. § 13-3-115(2)(b) (2013) (noting that a clear list of eligibility criteria determines diversion program admission).

clear guidance on providing survivors access to such programs.<sup>119</sup> Alternatively, statutes that automatically permit diversion enrollment best support survivors because involvement is not conditioned on the discretion of judges or prosecutors.<sup>120</sup> Of note is the dependence on identifying survivors when enforcing any form of diversion, particularly where the statutorily listed criteria requires being a victim of trafficking.<sup>121</sup> Where law enforcement, lawyers, or judges fail to properly identify defendants as survivors, such survivors are not offered diversion services.<sup>122</sup> Consequently, such statutes, while necessary, require additional initiatives, such as improved training programs, to be properly accessible to survivors.<sup>123</sup>

In addition to statutorily defined programs, legislatures emphasize that survivors should have access to services, not jail time, where laws specifically reference human trafficking, sex trafficking, or specialized human trafficking.<sup>124</sup> However, D.C. fails to recognize that a criminal defendant may be a survivor of sex trafficking.<sup>125</sup> In comparison, Louisiana references the possibility that a criminal defendant may have a background in sex trafficking.<sup>126</sup> In Louisiana, survivors are recognized through the automatic transfer of individuals charged or indicted pursuant to a prostitution-related crime to a human trafficking division of the court.<sup>127</sup>

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119. See LA. STAT. ANN. § 13:587.4 (2014) (describing the process that survivor defendants are entitled to and the specific services that they may receive).

120. See *id.* (allowing, but not requiring, admission into diversion programs).

121. See *id.* (permitting human trafficking diversion opportunities only where a survivor is identified as a survivor of trafficking).

122. See *State ex rel. M.J.* (La. App. 4 Cir. 2/4/15) 160 So.3d 1040, 1045-46 (describing how a judge failed to find the defendant a survivor of trafficking, thereby denying the defendant the legislative protections offered to survivors).

123. See LA. STAT. ANN. § 13:587.4 (requiring judges to undergo special training, but failing to elaborate and report on the parameters and effectiveness of such training measures).

124. See *id.* (emphasizing that victims of sex trafficking should have access to services).

125. See D.C. CODE § 22-2701 (2016) (failing to cross reference D.C.'s human trafficking laws and definitions by strictly criminalizing prostitution).

126. See LA. STAT. ANN. § 13:587.4 (2014) (describing the procedure and services available to survivors); N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2016) (acknowledging that a defendant may participate in criminal activities because they are trafficked).

127. LA. STAT. ANN. § 13:587.4(C)(2) (noting that charges for crimes including prostitution, solicitation, and massages with sexual conduct shall be referred to the human trafficking court).

Moreover, Louisiana law, unlike D.C., provides additional alternatives to criminalization through establishing diversion as an option for survivors.<sup>128</sup> These laws recognize that a defendant with a background in sex trafficking should have their involvement in criminal activities handled differently than traditional defendants.<sup>129</sup> The provisions established under Louisiana law exist to support survivors through trained judges and services, not to criminalize them in D.C.<sup>130</sup>

Jurisdictions such as Louisiana signal that they have a starting point of assuming that a survivor of sex trafficking is in need of assistance and rehabilitation.<sup>131</sup> In keeping with the recognition that individuals arrested for prostitution are overwhelmingly the “victim,” Colorado, Louisiana, and New York have vacatur statutes that permit survivors to clear their records.<sup>132</sup> Comparatively, in D.C., there is no such statute.<sup>133</sup> While Louisiana’s law, for example, effectively recognizes that individuals arrested for prostitution and other related crimes are recurrently “victims” rather than criminals, the D.C. prostitution law is never referenced in conjunction with human trafficking judicial procedure.<sup>134</sup> D.C.’s human trafficking laws maintain complete separation from its prostitution offenses.<sup>135</sup> D.C. has human trafficking crimes and definitions, yet these laws are located in an entirely different chapter of the D.C. Code’s criminal offenses without mention of human trafficking in the prostitution statute and vice versa.<sup>136</sup> This literal

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128. *Id.* (C)(3) (providing a diversion process for survivors to obtain services and avoid criminal charges).

129. *Id.* (2)-(3) (highlighting that identification of a defendant as a survivor is a basis for special support services and processes).

130. *Compare id.* (C) (recognizing that a survivor of human trafficking may need services and support instead of jail time or fees) with D.C. CODE § 22-2701 (including no provisions to adequately support survivors charged with prostitution or other crimes).

131. *See* LA. STAT. ANN. § 13:587.4(C) (recommending victims of trafficking to diversion programs).

132. *See* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2016) (establishing an option for survivors of trafficking to file a motion to vacate convictions that were a result of their trafficking).

133. *See* Ulrich, *supra* note 52 (highlighting that D.C. does not have a vacatur statute).

134. *Compare* LA. STAT. ANN. § 13:587.4 (2014) (recognizing that sex trafficking survivors may need services, not a criminal charge) with D.C. CODE § 22-2701 (2016) (failing to provide statutorily based services to survivors arrested for prostitution).

135. *See* D.C. CODE § 22-2701 (explaining the criminal offense of prostitution without any reference to human trafficking).

136. *Compare* D.C. CODE § 22-1831 et. al. (2016) (defining and criminalizing human trafficking) with D.C. CODE § 22-2701 (criminalizing individuals who commit prostitution regardless of their status as victims under D.C. CODE § 22-1831).

separation is carried over into pretrial services, where survivors arrested for prostitution are dealt with solely as criminals without consideration of, or screening for, backgrounds in sex trafficking, unlike in other states.<sup>137</sup>

Furthermore, D.C.'s prostitution statute has no *mens rea* requirement that the criminal act be willful and free from coercion or threat—making it a strict liability crime—which is significantly different when compared to other jurisdictions.<sup>138</sup> When an individual commits the act of prostitution in D.C., defined simply as having a sexual act or contact with another person in return for anything of value, that individual is criminally liable.<sup>139</sup> Consequently, D.C.'s prostitution law fails to contend with the reality of trafficking; as Louisiana's law reflects, survivors of trafficking are very frequently victims of crime, not criminals.<sup>140</sup> Despite the newness of its laws on diversion for survivors and its continuing prioritization of the issue of sex trafficking, Louisiana bridges the criminal language of prostitution-related offenses with the survivor-centered, supportive approach seen in federal law.<sup>141</sup>

In addition to referencing human trafficking in prostitution law, allowing proof of sex trafficking as an affirmative defense to prostitution highlights the freedom from coercion necessary for criminal liability.<sup>142</sup> Similarly to Colorado and Louisiana, New York has a vacatur statute that permits survivors to clear their record.<sup>143</sup> However, New York further permits survivors to use the fact that they are survivors of sex trafficking as an

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137. See *United States v. Smith*, 354 A.2d 510, 512 (D.C. 1976) (explaining that enrollment in diversion programs is solely up to prosecutorial discretion).

138. See D.C. CODE § 22-2701 (holding offenders strictly liable for prostitution offenses without any requirement of a willful and deliberate *mens rea*).

139. See D.C. CODE § 22-2701 (holding offenders strictly liable for prostitution offenses); D.C. CODE § 22-2701.01 (2015) (defining the crime of prostitution based on the physical act itself without mention of the intent or motivation).

140. Compare D.C. CODE § 22-2701 (2015) (criminalizing prostitution without any mention of or reference to sex trafficking) with LA. STAT. ANN. § 13:587.4 (2014) (transferring survivors charged with prostitution and related offenses to a specialized human trafficking court where the presiding judge is trained in human trafficking and survivor support services).

141. Compare LA. STAT. ANN. § 13:587.4 (offering diversion and support services to sex trafficking survivors) with Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (creating programs to address sex trafficking, for instance survivor assistance and support services).

142. See N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2016) (acknowledging that a survivor of trafficking should not be criminally charged).

143. See *id.* (establishing an option for survivors of trafficking to file a motion to vacate convictions that were a result of sex trafficking).

affirmative defense to prostitution charges.<sup>144</sup> D.C., in contrast, provides no method of defense for survivors who engage in the crime of prostitution to avoid penalties altogether.<sup>145</sup> Under New York's affirmative defense, defendants charged with certain prostitution charges are afforded a legal defense when participation in the offense resulted from being a survivor of sex trafficking or compulsion.<sup>146</sup> Moreover, the affirmative defense directly references New York's definition of sex trafficking.<sup>147</sup>

Recognizing sex trafficking as an affirmative defense is noteworthy, since it helps survivors prevent convictions rather than merely permitting vacatur at a later point.<sup>148</sup> Furthermore, affirmative defenses, such as New York's, play an important role in recognizing that individuals arrested for prostitution related crimes are not simply "criminals," but survivors of a form of violence against women.<sup>149</sup> In contrast, D.C.'s prostitution laws fail to recognize that the defendants involved are so often survivors of sex trafficking.<sup>150</sup> While an increasing number of states reconcile this through providing opportunities for survivors to later clear their record, D.C. lacks any such provisions, ultimately providing no recognition of a survivor's history of sex trafficking in the pre-trial, trial, or post-conviction stage.<sup>151</sup> The only pre-trial relief available in D.C. is an extremely limited safe harbor law designed to protect minor survivors from prostitution charges.<sup>152</sup>

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144. N.Y. PENAL LAW § 230.01 (McKinney 2016) (permitting an affirmative defense where defendant's participation in the offense is a result of compulsion into prostitution or sex trafficking).

145. D.C. CODE § 22-2701 (2016) (providing no affirmative defense for trafficking survivors).

146. N.Y. PENAL LAW § 230.01 (citing to criminal prosecution charging and explaining the affirmative defense of being a victim of sex trafficking).

147. *Id.* (explaining that defendants who committed prostitution crimes because of being trafficked may use such trafficking as an affirmative defense).

148. *Compare id.* (allowing sex trafficking as an affirmative defense), with CONN. GEN. STAT. ANN. § 54-95c (West 2016) (providing the opportunity for survivors of trafficking to vacate convictions after a judgment has been entered).

149. *See* N.Y. PENAL LAW § 230.01 (offering a defense for sex trafficking survivors to prevent criminal prostitution convictions in instances where the defendant is a survivor).

150. *See* D.C. CODE § 22-2701 (2016) (criminalizing prostitution without any defense options for survivors of sex trafficking).

151. *See* Ulrich, *supra* note 52 (highlighting that many states have enacted vacatur statutes that allow sex trafficking survivors to clear their criminal record, yet D.C. does not have one).

152. *See* Sex Trafficking of Children Prevention Amendment Act of 2014, 62 D.C. Reg. 479 (Jan. 16, 2015) (attempting to assist minor survivors of sex trafficking through new screening methods, services, and limited criminal immunity).

D.C.'s safe harbor law represents an important first step in ending the criminalization of minor survivors of sex trafficking.<sup>153</sup> Under D.C.'s safe harbor law, the D.C. City Council intended to provide protections and services to minors who are trafficked.<sup>154</sup> However, despite these intentions, minor survivors continue to face criminalization because of the limited scope of D.C.'s safe harbor immunity.<sup>155</sup> Restrictions on the age of an individual at the time of the crime and the type of crime for which minors are immune fail to properly protect survivors trafficked as children.<sup>156</sup> The statute's first flaw is how it limits immunity to only prostitution offenses.<sup>157</sup> Where minor survivors face an array of criminal charges as a direct result of their sex trafficking, a safe harbor law that provides limited immunity, such as D.C.'s, fails to effectively prevent criminalization of minor survivors.<sup>158</sup> Because sex trafficking survivors are frequently involved in other forms of criminal activity beyond prostitution, they are immunized for prostitution offenses but are nonetheless criminalized through the prosecution of their other criminal involvements.<sup>159</sup> Similar to the expansive range of certain vacatur statutes, D.C.'s safe harbor law should encompass a wide breadth of crimes to best reflect the reality of trafficking.<sup>160</sup>

In addition to the limited charges that the safe harbor law provides immunity for, D.C. law only grants protections for minor survivors while they are still legally children.<sup>161</sup> This cutoff for relief prevents individuals who were trafficked as minors from receiving immunity as soon as they turn eighteen years old.<sup>162</sup> For example, an individual may have been trafficked

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153. See D.C. CODE § 22-2701(d) (providing immunity from prostitution charges for children).

154. See 62 D.C. Reg. at 479 (creating new laws and procedures intending to assist at risk children).

155. See D.C. CODE § 22-2701(d) (2015) (limiting immunity to only prostitution charges).

156. See *id.* (establishing minimal protections to child trafficking survivors).

157. See *id.* (providing no protections to child survivors for non-prostitution offenses).

158. See *id.*

159. See Ulrich, *supra* note 52 (highlighting how survivors are frequently involved in multiple forms of criminal activity); see also *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (explaining that traffickers often coerce survivors into additional forms of criminal activity).

160. Compare D.C. CODE § 22-2701(d) (2016) (restricting immunity for minors to prostitution charges), with CONN. GEN. STAT. ANN. § 54-95c (West 2016) (permitting vacatur for an array of crimes).

161. See D.C. CODE § 22-2701(d) (providing immunity only for individuals currently under the age of eighteen).

162. See *id.* (only protecting individuals who were trafficked as minors and are still

at age seventeen and, at the time of her trafficking, qualified for immunity under D.C. law.<sup>163</sup> However, the survivor may continue providing commercial sex services when she is legally an adult at ages eighteen or nineteen, a trend that is common given the coercion and power that traffickers exert over their victims for extended periods of time.<sup>164</sup> Despite this, as an adult, the same act of prostitution that is a continuation of her trafficking as a minor, is suddenly a criminal act.<sup>165</sup> Protections and services for survivors of child sex trafficking that end as soon as the survivor is an adult result in the unnecessary criminalization of survivors who were coerced and trafficked as children and continue to be affected by such trafficking in adulthood.<sup>166</sup> Similar to D.C.'s safe harbor law, various state vacatur statutes contain gaps that fail to adequately provide relief to survivors of sex trafficking.<sup>167</sup> In order to provide survivors with a fresh start, D.C. should enact a vacatur statute that addresses the realities of sex trafficking.<sup>168</sup>

*C. Vacatur Statutes That Include Non-Prostitution Crimes, Have No Time Limit, and Do Not Require Documentation Best Reflect the Realities of Sex Trafficking and Provide Opportunities for Survivors to Start Fresh*

D.C. currently lacks a vacatur statute, which prevents survivors with prostitution or other convictions in D.C. from vacating criminal records.<sup>169</sup> Of the existing state vacatur statutes, there are variations on the types of convictions that defendants may vacate, how long after a defendant can vacate, and documentation requirements for proving that a defendant has left

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under the age of majority at the time of their arrest).

163. *See id.* (safeguarding victims of trafficking under the age of eighteen from prosecution).

164. 22 U.S.C. § 7101(b)(4)-(8) (2012) (describing how traffickers target young girls and continue to use coercion and threats past the age of minority).

165. *See* D.C. CODE § 22-2701 (charging survivors who were trafficked as minors with criminal prostitution charges once they turn eighteen years old).

166. *See* Sex Trafficking of Children Prevention Amendment Act of 2014, 62 D.C. Reg. 479 (Jan. 16, 2015) (limiting services and protections for survivors of child sex trafficking to survivors who are still minors at the time of arrest).

167. *See* Ulrich, *supra* note 52 (comparing the strengths and weaknesses of different state vacatur statutes).

168. *See id.* (recommending that D.C. enact a vacatur statute that provides appropriate levels of relief to survivors); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (recognizing that vacatur statutes with certain elements are more effective at removing barriers faced by survivors).

169. *See* Ulrich, *supra* note 52 (noting that D.C.'s lack of a vacatur statute prevents survivors from receiving public benefits and moving past the trauma of their trafficking).

the commercial sex industry.<sup>170</sup> The limits that some states place on the type of convictions that defendants may vacate and the time span where defendants may file a motion for vacatur often prevent survivors of sex trafficking from cleaning their record.<sup>171</sup>

Where state statutes allow vacatur for only prostitution charges, survivors cannot clear other charges that similarly result from their trafficking background.<sup>172</sup> While some states do allow survivors to clear prostitution charges from their records, survivors frequently have criminal records beyond prostitution charges.<sup>173</sup> Under a vacatur statute like Maryland's, these survivors are unable to clear non-prostitution charges that result from their trafficking, including non-violent charges of trespass and drug possession.<sup>174</sup> Because of this limitation, survivors who are only able to clear prostitution charges continue living with both stigma and barriers to services.<sup>175</sup> Therefore, failing to provide vacatur opportunities for a myriad of crimes serves to continue criminalizing survivors.<sup>176</sup> Conversely, where states permit vacatur of multiple types of crimes, survivors have access to

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170. See *id.* (describing the different provisions of state vacatur statutes); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (presenting a model vacatur statute that includes crimes beyond prostitution and does not include documentation as proof of past involvement in sex trafficking); see also CONN. GEN. STAT. ANN. § 54-95c (West 2016) (allowing vacatur on the basis of being a survivor of trafficking); MD. CODE, CRIM. PROC. § 8-302 (2011) (establishing vacatur as an option for prostitution convictions).

171. See MD. CODE, CRIM. PROC. § 8-302 (allowing only vacatur based on being trafficked for prostitution convictions).

172. See *id.* (noting that prostitution under duress is a basis for vacating only prostitution claims).

173. See Ulrich, *supra* note 52 (emphasizing that survivors are often involved in multiple forms of illegal activity and incur extensive criminal records); see also *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (describing how survivors of sex trafficking are often forced to commit other crimes outside of prostitution offenses).

174. MD. CODE, CRIM. PROC. § 8-302 (2011) (permitting sex trafficking as a basis for vacatur only with prostitution convictions); see *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (recommending vacatur opportunities for survivors of non-violent criminal offenses).

175. See Ulrich, *supra* note 52 (noting that survivors face barriers to services, educational opportunities, and jobs because of their criminal records).

176. See MD. CODE, CRIM. PROC. § 8-302 (2011) (criminalizing survivors by not permitting vacatur of their non-prostitution crimes); Sponsor's Mem., 2010 N.Y. Assemb. Bill A7670 (noting the long-term effects of criminal records on survivors and how they are consequently prevented from rebuilding their lives); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (highlighting how survivor's non-prostitution convictions can lead to lifelong stigma and challenges).



the relief they need to restart their lives.<sup>177</sup> Moreover, despite the small number of such wide-ranging vacatur statutes, these statutes best encompass the initiatives and findings of several national legal organizations.<sup>178</sup> Compared to D.C.'s lack of reference to sex trafficking in its prostitution law or the limited scope of Maryland's vacatur statute, the Connecticut vacatur statute's language acknowledges that criminal convictions for crimes other than prostitution may be related to a defendant's background in sex trafficking.<sup>179</sup> Connecticut's approach mirrors federal law enforcement's views on sex trafficking by providing a means for survivors to avoid arduous fines or punishment.<sup>180</sup>

In addition to limiting types of convictions that survivors may vacate, many states, like Maryland, put restrictions on how long after a conviction a defendant may file a motion for vacatur or are vague as to the time requirement.<sup>181</sup> Vacatur statutes with time restraints unnecessarily hinder a survivor's ability to vacate their convictions.<sup>182</sup> Furthermore, such restrictions are in conflict with federal findings on the complexity of sex trafficking and the long term effects of trafficking on survivors.<sup>183</sup> For survivors who are not ready to face the realities of their trafficking or who do not have knowledge about vacatur statutes within the permissible time frames, time restrictions prevent them from vacating their convictions when

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177. See Ulrich, *supra* note 52 (describing how vacatur of criminal convictions allows survivors to rebuild their lives); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (emphasizing that vacatur allows survivors to overcome barriers created by their trafficking history).

178. See *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (noting that the American Bar Association and Uniform Law Commission both released publications calling on states to expand vacatur opportunities to better support survivors of sex trafficking).

179. See CONN. GEN. STAT. ANN. § 54-95c (West 2016) (permitting vacatur of any criminal charges that a defendant participated in due to being a survivor of sex trafficking).

180. 22 U.S.C. § 7101(b)(19) (2012) (finding that survivors should not be inappropriately incarcerated, fined, or penalized for unlawful acts committed as a direct result of being trafficked).

181. MD. CODE, CRIM. PROC. § 8-302 (requiring that vacatur motions be filed within a reasonable amount of time from the conviction).

182. See *id.* (preventing survivors from vacating convictions if the motion is not filed in a reasonable amount of time); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (noting that a vacatur statute without time restraints best provides relief to survivors).

183. See 22 U.S.C. § 7101(a) (recognizing sex trafficking as a form of modern slavery).

they are ready to file a motion.<sup>184</sup>

For example, Maryland's time requirement vaguely requires that a defendant file a motion to vacate a judgment within a reasonable amount of time.<sup>185</sup> With no specific time restraint, a judge could determine that anywhere from a month, a year, or even ten years after a conviction qualifies as a "reasonable amount of time". This undefined time restraint provides a means for judges to deny a motion where they make a subjective determination that a defendant waited too long to file.<sup>186</sup> These provisions are at odds with federally recognized findings on sex trafficking, which state that survivors of trafficking should not be unnecessarily criminalized.<sup>187</sup> Unlike Maryland, Connecticut's vacatur statute better coincides with federal approaches to sex trafficking and violence against women because it does not place time limits on vacatur motions.<sup>188</sup> Additionally, the Connecticut vacatur statute's non-requirement of documentation further aligns with federal law's policy against criminalizing survivors of sex trafficking.<sup>189</sup>

In addition to permitting survivors to clear an array of charges and to do so at any time, an effective vacatur statute should not require any documentation to prove that the survivor was involved in and left the commercial sex industry.<sup>190</sup> Because of the illicit and criminal nature of commercial sex, documentation that an individual left the industry is an unrealistic requirement.<sup>191</sup> Unlike traditional industries, sex workers have

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184. Ulrich, *supra* note 52 (highlighting the lack of time limits as effective provisions for vacatur statutes to assist survivors).

185. MD. CODE, CRIM. PROC. § 8-302 (2011) (setting a vague, undefined time limit on when survivors may vacate a prostitution conviction).

186. *Id.* (specifying that a defendant may file, but ultimately leaving vacatur or modification of a conviction in the court's discretion).

187. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015) (preferring state laws that allow vacatur of any crimes committed as a result of trafficking and that have no time limit or documentation requirement); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (emphasizing that survivors of trafficking should not be inappropriately penalized for unlawful acts committed as a result of being trafficked).

188. See CONN. GEN. STAT. ANN. § 54-95c (West 2016) (allowing a survivor of trafficking to vacate a criminal conviction without a requirement of timely filing).

189. See *id.* (permitting survivors of sex trafficking to file for vacatur of criminal charges without documented proof that they have left or were involved in the industry); 22 U.S.C. § 7101(b)(19) (stating that survivors of trafficking should not be criminalized).

190. See CONN. GEN. STAT. ANN. § 54-95c (serving survivors by having no documentation requirement for expungement); Ulrich, *supra* note 52 (stating that effective vacatur statutes do not require documentation as proof that a defendant has left the commercial sex industry).

191. See 22 U.S.C. § 7101 (2012) (describing the criminal nature of sex trafficking

no pay stubs or work records that could be used as evidence of their work history.<sup>192</sup> Due to significant underreporting, lack of screening processes, and the psychological trauma that survivors face, documentation from any local, state, or federal government is an unrealistic requirement that would consequently prevent an immeasurable number of survivors from clearing their records.<sup>193</sup>

### III. POLICY RECOMMENDATION

D.C. should enact a statutorily defined diversion program that provides meaningful social services with collaboration through local non-profits, develop an affirmative defense for charges incurred as a direct result of an individual's sex trafficking, and enact a vacatur statute.<sup>194</sup> Where survivors of sex trafficking willingly participate in unlawful activity, survivor-focused diversion programs permit them to move through the judicial system with as little re-traumatization as possible.<sup>195</sup> Furthermore, where survivors continue to struggle with their history of sex trafficking, such programs can link individuals with support services, like social workers and local non-profits that work with survivors to ensure normality and rehabilitation.<sup>196</sup> Participation in such services should be clearly defined in statutory law with explicit enumerations regarding options available to defendants identified as survivors, to increase their accessibility to such diversion programs.<sup>197</sup>

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and the extensive criminal backgrounds of many traffickers); D.C. CODE § 22-2701 (2016) (classifying prostitution as a criminal activity).

192. See D.C. CODE § 22-2701 (preventing sex workers from working in the formal sector of the economy by criminalizing prostitution).

193. See Ulrich, *supra* note 52 (arguing that documentation should not be a requirement for vacatur); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (suggesting that no documentation requirement provides the greatest relief to survivors).

194. See, e.g., 22 U.S.C. § 7101(b)(19) (emphasizing that survivors of trafficking should not be criminalized); COLO. REV. STAT. § 13-3-115 (2013) (creating a statutorily defined diversion program with clear enrollment requirements and program goals that increases access to such programs); LA. STAT. ANN. § 13:587.4 (2014) (focusing on using diversion to provide crucial services to survivors of human trafficking); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (highlighting the importance of inclusive vacatur statutes for supporting survivors).

195. See LA. STAT. ANN. § 13:587.4 (utilizing a trauma-informed approach through specially training judges and prosecutors in Louisiana's human trafficking courts).

196. See *id.* (highlighting that survivors can benefit from services more than criminal charges).

197. See COLO. REV. STAT. § 13-3-115 (requiring clear diversion enrollment procedures and program components); LA. STAT. ANN. § 13:587.4 (statutorily defining the diversion procedure as it relates to survivors).

In addition to a statutorily defined diversion program, D.C. should enact a human trafficking affirmative defense for criminal charges where participation in crimes is a direct result of an individual's trafficking.<sup>198</sup> Having such an affirmative defense, for not only prostitution charges but other unlawful acts directly linked to a survivor's trafficking background, enables survivors to avoid criminal charges altogether.<sup>199</sup> Moreover, such a policy importantly recognizes the relationship between sex trafficking and coerced criminal activity in a manner reflective of federal law.<sup>200</sup>

Finally, D.C. should enact a vacatur statute that permits survivors to clear criminal acts from their record at any point in time, and without proof that they have left the sex industry.<sup>201</sup> During the publication of this Comment, D.C. City Council introduced a vacatur bill known as the "Trafficking Survivors Relief Amendment Act of 2017."<sup>202</sup> D.C. City Council should pass the bill and Congress should in turn allow the legislation to pass without a joint resolution of disapproval so that survivors may have the necessary legal foundation to restart their lives.<sup>203</sup> These policy recommendations are neither exhaustive nor an automatic fix for the persistent struggles and criminalization faced by survivors of sex trafficking.<sup>204</sup> Nonetheless, these policies would act as a crucial spring board away from criminalization and toward support for survivors.<sup>205</sup>

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198. See N.Y. PENAL LAW § 230.1 (McKinney 2016) (creating an alternative to criminalization for survivors with a sex trafficking affirmative defense).

199. See *id.* (recognizing that survivor defendants are often the victims in a case, not the criminals).

200. See 22 U.S.C. § 7101(b)(19) (2012) (highlighting how unlawful acts committed by survivors may be a direct result of their sex trafficking and should therefore not be penalized).

201. See *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (noting that vacatur statutes with these aspects provide the best opportunity for survivors to move past their history of trafficking).

202. B22-0329, Trafficking Survivors Relief Amendment Act of 2017 (under Council review as of Nov. 26, 2017).

203. See *id.* (recommending that D.C. enact a vacatur law for sex trafficking survivors).

204. See, e.g., Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, §§ 101-113, 114 Stat. 1464, 1466-91 (2000) (highlighting the vast scale and perpetuation of human trafficking).

205. See, e.g., *id.* (emphasizing the need for support services and protections for survivors of trafficking).

#### IV. CONCLUSION

Domestic sex trafficking is a serious form of violence against women.<sup>206</sup> Federal law recognizes this and attempts to address the issue through legislation such as the Violence Against Women Act and the Trafficking Victims Protection Act.<sup>207</sup> However, D.C. fails to properly treat survivors of sex trafficking as survivors of a form of violence against women.<sup>208</sup> The extent to which D.C. criminalizes domestic survivors of sex trafficking is in clear violation of the Trafficking Victims Protection Act.<sup>209</sup> The Act crucially emphasizes that survivors of sex trafficking should not be prosecuted or penalized for criminal actions committed as a direct result of their trafficking.<sup>210</sup>

Even if D.C. is not in violation of the Trafficking Victim's Protection Act, it nonetheless fails to properly support survivors of sex trafficking.<sup>211</sup> D.C.'s current pretrial diversion program treats survivors as criminals since the program was established primarily for judicial ease.<sup>212</sup> Furthermore, unlike programs in other jurisdictions, enrollment in diversion is not statutorily defined or mandated.<sup>213</sup> Instead, D.C.'s program is based on prosecutorial discretion.<sup>214</sup> Because of this, survivors face criminal convictions rather than

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206. See generally VAWA Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 47 (2013) (classifying sex trafficking as a form of violence against women).

207. See generally Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015) (establishing federal services and programs to combat violence against women); VAWA Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 47 (2013); Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, §§ 101-113, 114 Stat. 1464, 1466-91 (2000); VAWA of 1994, Pub. L. No. 103-322, tit. IV, §§ 40001-40703, 108 Stat. 1902, 1941-42 (1994).

208. See D.C. CODE § 22-2701 (2015) (describing the crime of prostitution without accounting for instances where such acts are a result of sex trafficking).

209. See generally Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, §§ 101-113, 114 Stat. 1464, 1466-91 (2000) (highlighting the need to protect and provide services to survivors of trafficking).

210. See 22 U.S.C. § 7101(b)(16) (2012) (noting that criminalization of survivors fails to recognize the realities of trafficking).

211. See generally D.C. CODE § 22-2701 (creating a basis for the criminalization of sex trafficking survivors).

212. *United States v. Smith*, 354 A.2d 510, 512 (D.C. 1976) (emphasizing that diversion helps ease the court docket).

213. Compare *Smith*, 354 A.2d at 512-13 (describing diversion in D.C. as a tool of judicial economy and leverage through prosecutorial discretion), with COLO. REV. STAT. § 13-3-115 (2013) (designating resources towards diversion program outcomes and improvements), and LA. STAT. ANN. § 13:587.4 (2014) (implementing a specific human trafficking court with specially trained judges).

214. See *Smith*, 354 A.2d at 512-13 (highlighting that diversion is solely within the

receiving meaningful services through the court system.<sup>215</sup> In addition, D.C. should enact a vacatur statute that permits vacatur of an array of crimes are committed as a result of sex trafficking, has no restraints on when a defendant may file, and does not require documentation demonstrating a defendant is no longer engaged in commercial sex.<sup>216</sup> D.C. should also create a statutorily mandated diversion program that provides meaningful social services.<sup>217</sup> In doing so, legislators should also integrate federal legislation and affirmative defense laws into D.C.'s criminal laws against prostitution.<sup>218</sup> Through these measures, domestic trafficking survivors may finally be treated as survivors of violence, rather than criminals.

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prosecutor's discretion).

215. See D.C. CODE § 22-2701 (2016) (penalizing survivors with criminal charges rather than providing any support services).

216. *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 48 (noting that an ideal vacatur statute provides vacatur of crimes beyond prostitution, does not require documentation, and has no time limits).

217. See COLO. REV. STAT. § 13-3-115 (acknowledging the need for diversion services in cases of human trafficking); LA. STAT. ANN. § 13:587.4 (emphasizing services over penalties for survivors).

218. See 34 U.S.C.S. § 20701 (LexisNexis 2017)(creating programs to combat sex trafficking); D.C. CODE § 22-1834 (2017) (providing immunity for minors convicted of prostitution).