

SURVIVORS IN THE CRIMINAL JUSTICE SYSTEM

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Even though non-citizen human trafficking survivors (hereinafter “survivors”¹) interact regularly with advocates in the criminal justice system in New York City, they are not being identified as survivors, and thus remain invisible. This invisibility prevents them from accessing a plethora of services that would enable them to begin an independent and safe life in the United States. Survivors remain unidentified within the criminal justice system because they do not fit within the stereotypical and mainstream narrative of human trafficking. They enter the system under the label of a criminal and not a victim. This not only perpetuates the mainstream view of who a survivor is, but also limits advocates within the criminal justice system from viewing themselves as the new front line of individuals who can identify such survivors. The goal of this article is to (1) detail why human trafficking survivors remain unidentified, specifically in the criminal justice system, and (2) discuss why advocates working in the criminal justice system can become the new front line of individuals identifying human trafficking survivors in order to remedy this problem.

Murderer. Smuggler. Thief. Incompetent mother. Slasher. Pimp. Illegal. Liar.

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1. This paper will use the term “survivor” instead of the more common term, “victim,” for several reasons. “Victim” implies passivity, acceptance of one’s circumstances, and a casualty. The word “victim” robs individuals of their agency and their ability to fight back. “Survivor” displays the individual’s resistance, ability to take action in the face of immense obstacles, and the day-to-day work of surviving despite immense trauma. “Survivor” implies ingenuity, resourcefulness, and inner strength. “Victim” and “victimization” will only be used in reference to how front line responders may view the issue of survivor identification. Akhila Kolisetty, Why Words Matter: Victim v. Survivor, JOURNEYS TOWARDS JUSTICE BLOG (March 13, 2012), <http://akhilak.com/blog/2012/03/13/why-words-matter-victim-v-survivor/>.

These are not words or labels that one typically associates with a human trafficking survivor. They fail to connote the general sympathy that the public has for survivors, particularly those who take part in the sex trafficking industry.² However, these words are the labels assigned to individuals charged with assault, murder, shoplifting, identity theft, grand larceny, abandonment and neglect of children, and prostitution and promoting prostitution; these are the criminal charges that human trafficking survivors in the criminal justice system in New York City regularly face.

Survivors are entering the criminal justice system for three main reasons. First, survivors are more visibly engaged than their traffickers in criminal activity so that they, and not their traffickers, face criminal consequences.³ Survivors are being arrested and criminalized as a direct result of their trafficking.⁴ Second, even if survivors have been able to leave their trafficking situation, they may be committing crimes as a way to survive on their own. Survivors are generally undocumented, without any support structure, and face severe language and cultural barriers, in addition to dealing with the extreme trauma they have experienced as a result of their trafficking.⁵ All of these factors make it difficult for survivors to get help and to enter the workforce. As a result, survivors will sometimes continue the work they did while being trafficked, as a way to survive and support themselves. Third, some survivors commit crimes that are unrelated to their trafficking.⁶ Their crimes do not negate the fact that they remain survivors.

The central issue for human trafficking survivors in the criminal justice system is that criminal justice professionals,⁷ and survivors themselves, fail to see more than a “criminal” who is standing in front of them. This is because the idea of a survivor as a criminal does not

2. See Rachel Rae Curtis, *Sex Trafficking: How the Media Portrays Victims and Reflects Legislation* 33-34 (2012) (unpublished graduate thesis, Iowa State University) (on file with Digital Repository at Iowa State University), <http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=3312&context=etd>.

3. *Street-Based: Victim Vulnerabilities*, NAT'L HUMAN TRAFFICKING RESOURCE CENTER, <http://www.traffickingresourcecenter.org/sex-trafficking-venuesindustries/street-based> (last visited Nov. 6, 2015).

4. POLARIS, HUMAN TRAFFICKING ISSUE BRIEF: VACATING CONVICTIONS (2014).

5. Elizabeth K. Hopper, *Underidentification of Human Trafficking Victims in the United States*, 5 J. SOCIAL WORK RES. & EVALUATION 125, 129-30 (2004).

6. See Mitch Morrissey, *There is Nothing “Pretty” About the Illegal Sex Trade*, THE DENVER POST (Mar. 23, 2015, 5:00 PM), http://www.denverpost.com/guestcommentary/ci_27770865/guest-commentary-there-is-nothing-pretty-about-illegal?source=infinite-up.

7. For the purposes of this paper, criminal justice professionals will include public defenders, judges, and the district attorney's office.

fall squarely within the mainstream narrative of what constitutes a human trafficking survivor. Still, the consequences of failing to identify a survivor are extreme. In addition to not receiving the immigration relief and plethora of social services that survivors qualify for in New York City, it is likely that these individuals will not be able to escape their traffickers, will be forced to navigate the world with criminal convictions, and continue to be exploited. They will remain invisible despite the fact that they are standing right in front of us.

This problem is exacerbated by the lack of research specifically focusing on the experiences of survivors in the criminal justice system, which, in turn, leads to minimal efforts to educate criminal justice system advocates about how to identify survivors.⁸ Clearly, this is a vicious cycle.

The goal of this article is to fill that gap by (1) detailing why human trafficking survivors remain unidentified, specifically in the criminal justice system, and (2) discussing why professionals working in the criminal justice system can become the new front line of individuals identifying human trafficking survivors.

Survivors are unidentified in the criminal justice system due to three key factors: (1) they bear the burden of proving their victimization because they deviate significantly from the mainstream narrative of survivor identification, in the sense that they enter the system as a criminal offender; (2) the coercion under which they committed the crimes exists in degrees; and (3) a criminal justice professional may hesitate to concede a survivor's victimization in a legal context due to the conflation of human trafficking with terrorism and national security issues. Moreover, criminal justice professionals should become the new front line for survivor identification because they interact regularly with the same survivors on a frequent basis for a prolonged period of time and can identify survivors through their unique access to their criminal history.

I. DEFINING HUMAN TRAFFICKING

There are multiple ways to define and approach the overarching concept of human trafficking. "Trafficking is not a single phenomenon but consists of many different forms, in different locations, affecting different kinds of people, making it virtually impossible to cover in a comprehensive way."⁹ It can be viewed as a problem relating to "pros-

8. ANNUSKA DERKS ET AL., REVIEW OF A DECADE OF RESEARCH ON TRAFFICKING IN PERSONS, CAMBODIA 19 (2006), <https://asiafoundation.org/resources/pdfs/CBTIPreview.pdf>.

9. *Id.*

titution, to children, to the rising levels of migration, to labor supply and demand, to criminality, and/or to human rights.”¹⁰ Most existing definitions are based on the Palermo Protocols, which was adopted by the UN General Assembly in 2000.¹¹ On a national level, the Trafficking Victims Protection Act of 2000¹² (“VTVPA”) is the cornerstone of federal human trafficking legislation in the United States. The VTVPA has established several methods of prosecuting traffickers, preventing human trafficking, and protecting victims and survivors of trafficking.¹³ The act establishes human trafficking and related offenses as federal crimes, and attaches severe penalties to them.¹⁴ It also mandates that restitution be paid to victims of human trafficking.¹⁵ At the heart of all of these definitions are three essential elements that encompass human trafficking: the act (what is done); the means (how it is done); and the purpose (why it is done), which is generally exploitation.¹⁶

II. THE DIFFICULTY IN IDENTIFYING HUMAN TRAFFICKING SURVIVORS

A. *The Numbers: How Many Survivors are Being Identified?*

Identifying survivors has always been an issue. Prior to the passage of the VTVPA in 2000, there was limited awareness of this human trafficking problem. The U.S. government did not monitor trafficking rates until 1994.¹⁷ After the passage of the VTVPA in 2000, the Department of State estimated that as many as 50,000 new victims

10. *Id.*

11. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational organized Crime, G.A. Res. 55/25, U.N. Doc A/55/283 (Nov. 15, 2000); “The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.” *What is Human Trafficking?*, EXODUS CRY, <http://exoduscry.com/about/human-trafficking/> (last visited Nov. 6, 2015).

12. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000)) [hereinafter “VTVPA”].

13. *Id.* §102.

14. *Id.* §104.

15. *Id.* §112.

16. *Human Trafficking*, United Nations Office on Drugs and Crime, <https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last visited Nov. 6, 2015).

17. Elizabeth K. Hopper, *supra* note 5, at 126.

are trafficked into the U.S. each year.¹⁸ From 2001 to 2005, only 1,000 victims had been assisted.¹⁹

The most updated statistics reflect that, in the 2013 fiscal year, Immigration and Customs Enforcement opened 1,025 investigations, the FBI formally opened 220 human trafficking investigations, and there were 161 federal human trafficking prosecutions, resulting in 252 defendants being charged.²⁰ However, in the 2013 fiscal year, only 857 survivors were granted immigration relief based on their trafficking experiences.²¹ Although this article fully acknowledges that not all survivors are non-citizens and do not need immigration relief (making the number of survivors identified more than 857), these statistics still raise the essential question: if human trafficking occurs on such an enormous scale in the United States, then why are so few survivors being identified?

B. The General Factors: What Makes it so Hard to Identify Human Trafficking Survivors?

Factors that account for the difficulty in identifying survivors can be grouped into two categories: Self-identification and identification from others.

Self-Identification

The following factors account for why survivors face extreme difficulty in identifying themselves as survivors and telling their stories to others.

(1) Strangers in a Strange Land

Non-citizen survivors in the United States are essentially trying to navigate a completely new world around them without any assistance or guidance. They generally do not speak English, or, if they are lucky, have a very low level of English proficiency that is generally linked to their trafficking work.²² They cannot call for help if they cannot articulate the help that they need in a language they do not know. Moreover, survivors are moved from city to city, maintaining a lack of

18. VTPA §102.

19. DEPARTMENT OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005, at 9 (2006).

20. U.S. DEP'T. OF STATE, TRAFFICKING IN PERSONS REPORT 398 (2014).

21. *Id.* at 400.

22. Elizabeth K. Hopper, *supra* note 5, at 129.

familiarity with their environment.²³ Additionally, navigating transportation is a problem, especially in large cities like New York City.²⁴ Even if a survivor is permitted by his or her trafficker to use the subway or bus system, their movements are still monitored by the trafficker.²⁵ Moreover, in smaller communities, there is often limited or no public transportation, meaning that a trafficker would have more control over monitoring victims' movements. Most importantly, survivors are not familiar with the norms of U.S. law.²⁶ A 911 call is a foreign concept. Survivors are generally from developing countries, where laws penalizing violence against women are rarely enacted, and even more, rarely enforced.²⁷ As a result, some survivors have grown up believing that gender-based violence is common, and is a part of everyday life like it was in their home country. Finally, these cultural barriers would prevent survivors from knowing that their experiences qualify them as human trafficking survivors under the VTVPA, or even under international law. Most non-citizen survivors do not know that what is happening to them is a crime.

One day, my partner came home drunk and angry when we were still living in Colombia. Like always, he started to punch me everywhere and call me all the bad names you can think of. He then grabbed a knife and cut me across my arm. I was in the kitchen and saw a police car go by. I called out to them to stop. I thought in that moment he would kill me. I had never contacted the police about him before, and if they hadn't driven by I would never have thought of it. I told them what happened and showed them the blood from the knife cut (the knife that was still in his hand). They took him away, and for a second I felt some relief. The car all of a sudden stopped, turned around, and he was dropped off at the house again. He had paid the officers to let him go. He then grabbed a gun from the cabinet and shot me in the leg. After that, he made me go with him to the United States, where he forced me to steal purses, and would always bring up the shooting incident as a reminder of what would happen if I disobeyed him. I never thought about talking to the police, even when they arrested me. They didn't help me in Colombia, why would they help me here?²⁸

23. *Id.*

24. *See id.*

25. PROTECTION PROJECT, A HUMAN RIGHTS REPORT ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN: UNITED STATES OF AMERICA (2014).

26. Elizabeth K. Hopper, *supra* note 5, at 129.

27. *See id.* at 127.

28. All of the stories in block quotations are based on client interviews with non-citizen survivors of human trafficking and shall remain anonymous for safety reasons. Interview with Anonymous Client A (May 2014) (on file with author).

(2) Trauma Related Symptoms:

Survivors have gone through extreme forms of victimization, both in their own country and in the United States. The horrific abuse that occurs in the typical human trafficking experience has been well documented, and these traumatic experiences are repeated over time. The average trafficking experience can last approximately 2 to 5 years, and that does not include experiences of victimization before and/or after.²⁹ The psychological impact of these experiences can result in depression, PTSD, complex PTSD, and more.³⁰ Furthermore, “aspects of each of these disorders may impact victims’ help-seeking behavior.”³¹ For example, depression has cognitive and psychological components that can make a survivor have feelings of worthlessness or excessive guilt, problems with concentration or decision-making, hopelessness, suicidal thoughts, psychomotor agitation or retardation, or fatigue or less energy, among other symptoms.³² A survivor experiencing these symptoms is unlikely to mobilize the resources needed to escape a trafficking situation. In addition, “self-blame, uncontrollability and learned helplessness are characteristics commonly associated with depression.”³³ The internalization of this blame impacts survivors’ ability to leave abusive situations.³⁴

Furthermore, trauma victims experience difficulty in relaying a coherent story of victimization.³⁵ This includes symptoms such as “emotional numbing, detachment from others, and avoidance of thoughts or feelings about the traumatic experience.”³⁶ These “avoidance symptoms” actually run counter to actively dealing with trauma.³⁷ They discourage survivors from thinking about trauma and its impacts.³⁸ Each of these symptoms may decrease the likelihood of trafficked persons seeking help.³⁹

I couldn’t tell [the Assistant District Attorney] what he needed to hear. I didn’t know my trafficker’s address, even though I lived in

29. Elizabeth K. Hopper, *supra* note 5, at 130.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 130-31.

36. *Id.* at 131.

37. *Id.*

38. HEATHER J. CLAWSON & NICOLE DUTCH, U.S. DEP’T OF HEALTH & HUMAN SERV., IDENTIFYING VICTIMS OF HUMAN TRAFFICKING: INHERENT CHALLENGES AND PROMISING STRATEGIES FROM THE FIELD 6 (2008), <http://aspe.hhs.gov/sites/default/files/pdf/75321/ib.pdf>.

39. *Id.* at 2.

that basement for a year. I didn't know what kind of car he drove or the color of the car, even though he drove me to work everyday. It was hard for me to tell [the Assistant District Attorney] why I couldn't remember. I lived in terror for that year; I just tried to put one foot in front of the other. I know that if I looked up, or [looked at my trafficker] in a way he didn't like, he would hurt me. I just couldn't remember these things. I felt lost. All I could do was put one foot in the front of the other, and sometimes he didn't even let me do that.⁴⁰

(3) Control by the Trafficker

Traffickers exert complete control over every facet of a survivor's life. A trafficker will know everywhere they go, everything they eat, and every person they talk to, if they are even permitted to do these things outside the purveyance of the trafficker.⁴¹ The secret nature of trafficking only empowers traffickers by maintaining this control.⁴² Survivors are brought into the country illegally, and their passports and documentation are typically confiscated, which prohibits them from trying to escape or return to their home country.⁴³ This is exacerbated by the aforementioned language and cultural barriers survivors must overcome in order to seek help. Traffickers also threaten survivors in a variety of ways to keep them within their control. The most common threat is of extreme physical or sexual violence as a form of retaliation for disobeying a trafficker in any way.⁴⁴ Another common threat is against the survivor's family; the trafficker threatens that the family will face dire consequences in lieu of the survivor suffering.⁴⁵ Furthermore, survivors are regularly coached by traffickers about what to say if they encounter authorities.⁴⁶

It was the first and only time I told her I didn't want to do it. Honestly, I was just too tired. I couldn't continue. She didn't really react for a while, but then her eyes got really big. She got one of the other boys and brought him into the same room as me. She broke his

40. Interview with Anonymous Client B (on file with author).

41. See Dorchen A. Leidholdt, *Human Trafficking and Domestic Violence: A Primer for Judges*, 52 JUDGES J. 16, 18 (2013).

42. See *id.*

43. HEATHER J. CLAWSON & NICOLE DUTCH, U.S. DEP'T OF HEALTH & HUMAN SERV., ADDRESSING THE NEEDS OF VICTIMS OF HUMAN TRAFFICKING: CHALLENGING, BARRIERS, AND PROMISING PRACTICES 3 (2008), <http://aspe.hhs.gov/sites/default/files/pdf/75471/ib.pdf>.

44. Leidholdt, *supra* note 41, at 18.

45. CLAWSON & DUTCH, *supra* note 38.

46. DONNA M. HUGHES, HIDING IN PLAIN SIGHT: A PRACTICAL GUIDE TO IDENTIFYING VICTIMS OF TRAFFICKING IN THE U.S. 7 (2003), http://www.uri.edu/artsci/wms/hughes/hiding_in_plain_sight.pdf.

finger and he started screaming. She then told me to never say that again and walked away. . . every time I thought about running away or doing anything she didn't want me to [do], I remembered this moment. She could do anything to anyone.⁴⁷

These abusive dynamics are only worsened when the trafficker is also a romantic partner of the survivor. Trafficking is often an extreme form of intimate-partner violence in which traffickers are pimps and batterers, combined into one.⁴⁸ Once called Stockholm Syndrome, “traumatic bonding” is the name mental health professionals use to describe the condition of psychological enslavement, not uncommon in cases of victims of intimate-partner sex trafficking, where the dynamics of the relationship compel survivors to view their tormentors as their protectors.⁴⁹

The modus operandi of intimate-partner traffickers is usually a mixture of rewards and punishments—gifts and protestations of love followed by verbal slurs and beatings. These traffickers convince their victims' that they are outside the law and can never seek protection from the police. They reinforce their victims' sense of exclusion from society by remaking their identities, often giving them new names and provocative attire and sometimes branding them with tattoos to demonstrate their status as chattel. Isolated from their families and communities, subjected to psychological and physical coercion by men they love and depend on, victims are gradually stripped of their sense of self and seasoned into new identities.⁵⁰

I met him when I was 14. I had run away from home because my Mom was beating me and yelling all the time. We met at a corner store. He was so cute. He knew all of these cool things about music. He seemed like the coolest person to me. He took me to his house after that because I had nowhere to go. For the first time in a long time I felt safe and happy. After that we became intimate, and I thought we were going to be together forever. We had a baby together. He started to make me go with other guys too for money. He said that this was the easiest way we could support ourselves, and I would do it if I loved him. That's how it started, and then it just got worse and worse after that.⁵¹

47. Interview with Anonymous Client C (June 2012) (on file with author).

48. Leidholdt, *supra* note 41, at 17.

49. HEATHER J. CLAWSON ET AL., U.S. DEP'T OF HEALTH & HUMAN SERV., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 14 (2009), <http://lastradainternational.org/lisidocs/index.pdf>.

50. Leidholdt, *supra* note 41, at 17.

51. Interview with Anonymous Client D (Apr. 2014) (on file with author).

Identification from Others

The two underlying issues in survivor identification by those other than survivors are: (1) who is being trained in survivor identification and (2) who do these professionals view as a survivor?

(1) Who is being trained in survivor identification?

Parties dubbed “front line responders” are generally law enforcement and service providers such as health clinic workers.⁵² Other referral sources include domestic violence and sexual assault shelters, crisis hotlines, social workers, community organizations and faith-based organizations, religious and community leaders, “good Samaritans,” school personnel (e.g., vice principals, guidance counselors, teachers), business owners (e.g., markets, beauty salons), postal workers, and housing or employment-related inspectors (e.g., wage and hour, housing, liquor licenses).⁵³ These individuals are considered front line responders because they represent those on the front line of encountering victims. Front line responders trained by the Department of Justice are generally given the survivor identification toolkit created by the Vera Institute.⁵⁴ The Vera Institute survivor identification toolkit details the ideas of coercion, deception, fraud and force in the context of labor or sex trafficking.⁵⁵ However, there is little verification that the screening toolkits are actually used in day-to-day interactions with survivors.

For example, the City of New York has a campaign called “Let’s End Human Trafficking.” This campaign defines a survivor as “a victim of human trafficking when they are forced, tricked, or coerced into performing commercial sex acts or working in exploitive jobs.”⁵⁶ It identifies front line responders as individuals, communities, and professionals.⁵⁷ Professionals are categorized as hospitality and travel professionals, anti-sex trafficking organizations, hospitals, lawyers,

52. CLAWSON & DUTCH, *supra* note 38, at 4.

53. *Id.*

54. *See generally* LAURA SIMICH ET AL., VERA INST. OF JUSTICE, IMPROVING HUMAN TRAFFICKING VICTIM IDENTIFICATION-VALIDATION AND DISSEMINATION OF A SCREENING TOOL (2014); *see also* VERA INST. OF JUSTICE, SCREENING FOR HUMAN TRAFFICKING: GUIDELINES FOR ADMINISTERING THE TRAFFICKING VICTIM IDENTIFICATION TOOL (TVIT) (2014).

55. VERA INST. OF JUSTICE, SCREENING FOR HUMAN TRAFFICKING: GUIDELINES FOR ADMINISTERING THE TRAFFICKING VICTIM IDENTIFICATION TOOL (TVIT) 35 (2014).

56. *About Let’s End Human Trafficking*, NYC LET’S END HUMAN TRAFFICKING, <http://www.nyc.gov/html/endht/html/how/how.shtml> (last visited Nov. 6, 2015).

57. *How to Help*, NYC LET’S END HUMAN TRAFFICKING, <http://www.nyc.gov/html/endht/html/how/how.shtml> (last visited Nov. 6, 2015).

teachers, businesses, and criminal justice professionals.⁵⁸ It should be noted that the training listed under criminal justice professionals is only for investigating and prosecuting trafficking, not regarding survivor identification.⁵⁹ However, there are no trainings that are directly offered by the city administration. The campaign lists organizations that can provide such training, if the front line responder chooses to have a training at all.⁶⁰ The end result is that even if an organization is a front line responder, it will only receive training if it actively pursues this for the organization, on top of its current workload. And if it does not have a formal training on at least the general factors of survivor identification, then it is likely that the organization will base its survivor identification on who it stereotypically views as a survivor. These assumptions are likely influenced by the mainstream narrative of who constitutes trafficking survivors.

(2) Who do front line responders view as survivors?

“Innocent Young Girls in Prostitution” as the Mainstream Narrative

While several forms of trafficking are recognized in the VTVPA, human trafficking is most commonly associated with sex trafficking. In media portrayals of human rights issues in general, it has been argued that there is an inordinate focus on abuses that contain an element of sex, sexuality, and gender, because sex sells.⁶¹ We hear mostly about sex slavery, forced marriage, child porn, and female genital mutilation.⁶² For example, the 2014 Trafficking In Persons Report states that “[m]edia reports indicate an increase in the number of prosecutions. . . . While there was a heavy emphasis on sex trafficking cases, especially of children, cases range from sex trafficking—including in illicit massage parlors and of individuals with intellectual disabilities—to cases of exploitation for forced labor, including domestic servitude and of children in sale crews.”⁶³

Current stereotypes depict the victim of human trafficking as innocent young girls from foreign countries who are manipulated, lied to, and often kidnapped and forced into prostitution.⁶⁴ This is re-

58. *Id.*

59. *Professionals*, NYC LET’S END HUMAN TRAFFICKING, <http://www.nyc.gov/html/endht/html/how/professionals.shtml> (last visited Nov. 6, 2015).

60. *Id.*

61. See SIMICH ET AL., *supra* note 54, at 223-29.

62. See UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 6 (2009).

63. U.S. DEP’T OF STATE, *supra* note 20, at 399.

64. CLAWSON & DUTCH, *supra* note 38, at 1.

flected in academic research as well, where in literature reviews on human trafficking about two thirds of the studies focus solely on trafficking for the purposes of prostitution.⁶⁵ The problem with this is that when the public is led to believe that only one aspect of trafficking is recognizable or relevant, we miss the opportunity to recognize and assist other types of trafficking victims.

“Chained to a Bed”⁶⁶

Another view promoted by the mainstream media is that young innocent female survivors are “chained to a bed” and are only recognized when they are “rescued” by law enforcement. “Most victims of human trafficking are not ‘rescued’ by anyone. They are not found by law enforcement, chained to a bed in a brothel.”⁶⁷ They are not rescued in law enforcement raids of restaurants and shops. “Many victims of trafficking find their way out of their situation after much psychological, emotional, physical, or sexual abuse, and some eventually make their way to a shelter, a hospital, an advocate, or a victim’s service provider.”⁶⁸ The false assumption that real victims are those who are rescued by anyone, let alone by a federal agent, and the converse assumption that those who rescue themselves are not or are less likely to be real victims, distorts the ability to understand the true nature of the identification problem.⁶⁹

My uncle helped me cross the border when I was twenty-three years old. I thought I was going to be able to support my family back home. But when I got here, my uncle started to make me do terrible things. The first time I was drugged and I woke up with another man. And then he started to make me rob stores with guns. He would tell me that he would make sure I was deported and everyone would know about how I had laid with men back home. Everyone would think I was a freak. I worked as a dishwasher at a restaurant, and the feds got tipped off that a bunch of illegal Mexicans worked there. All of these men came in once with uniforms and guns and we ended up in immigration jail. I felt hopeless and I kept telling them I couldn’t go back to Mexico. Eventually I broke

65. DERKS ET AL., *supra* note 7, at 15.

66. Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 337 (2007).

67. *Id.* at 351.

68. *Id.*

69. *Id.* at 346.

down and told him about everything. The man in the uniform said, “It’s not my problem that you’re a fag.”⁷⁰

The “Means” is Clear

The ambiguity of real life situations calls into question the dichotomies between voluntariness and force, and between choice and coercion.⁷¹ These principles define the “means” prong of the VTVPA trafficking definition and are meant to help draw out the complicated and nuanced power dynamics between trafficker and survivor.

These dichotomies are not necessarily consistent with the diversity of views and experiences among survivors. For example, there are sex workers who are not “chained to their beds” and have other jobs as nannies, waitresses, receptionists, janitors, and other ordinary occupations.⁷² They have regular interactions with the outside world. There are labor trafficking survivors who after initially being coerced into performing the work, choose to stay out of fear of deportation.⁷³ A variety of survivors may continue to perform whatever work they are asked, after repaying the debt they owe.⁷⁴ The variations and nuances of coercion, force, choice, and voluntariness at various points in the survivors’ experience are truly endless.

The underlying problem with front line responders’ limited training (if they are trained at all) is that these responders perpetuate the mainstream narrative of what constitutes a survivor. And that narrative does not view an “innocent young girl” as a criminal. However, in order to understand why survivor identification is minimal (at best) in the criminal justice system, it is necessary to understand how survivors generally interact with the criminal justice system itself.

III. HOW SURVIVORS INTERACT WITH THE CRIMINAL JUSTICE SYSTEM

(1) The Interaction

If a survivor interacts with the criminal justice system, it typically occurs in five stages as illustrated in the following chart. It should be noted that at all of these stages, a survivor could still potentially be within the control of the trafficker. This chart also does not include a

70. Interview with Anonymous Client E (Aug. 2011) (on file with author).

71. DERKS ET AL., *supra* note 7, at 16.

72. *General Information*, HUMANTRAFFICKING.ORG, http://www.humantrafficking.org/combat_trafficking (last visited Nov. 6, 2015).

73. See Haynes, *supra* note 66, at 378.

74. See *id.* at 380.

survivor's interaction with family court (which is in the civil system), but does include Criminal Courts and Integrated Domestic Violence Courts.⁷⁵

Arrest/Arraignment: A survivor's first interaction with the criminal justice system begins when he or she is arrested.⁷⁶ The arrest typically does not fall within the purveyance of the VTPA (with the exception of prostitution or loitering for the purposes of prostitution), but rather for other criminal offense such as shoplifting, robbery, assault, open warrants, possession of a forged instrument, and identity theft. After he or she is arrested and arraigned, some of the scenarios experienced include being released on one's own recognizance, posting bail, being put on probation, or being sent to one of Rikers Island's Detention Facilities as a detainee to await sentencing. At this stage, the survivor always interacts with law enforcement personnel, and sometimes with a magistrate judge or public defender during an arraignment. The survivor can also potentially interact with a probation officer if given probation.

Detention in Rikers: If a survivor is not released on either his or her own recognizance or put on probation, he or she may be sent to one of Rikers Island's detention facilities.⁷⁷ The survivor can remain at Rikers from anywhere between one month to more than five years, depending upon interactions between the public defender and district attorney's office.⁷⁸ During this time, survivors interact regularly with the staff at Rikers jail.

Court Proceedings: While survivors are detained at Rikers, they will also go through court proceedings determining their guilt in committing the crime, the level of the charge, and sentencing.⁷⁹ The survivors will interact at various frequencies with the criminal court judge, public defenders, and the New York District Attorney's Office attorneys. If the survivors are determined to be non-citizens, they may or

75. See also *Integrated Domestic Violence Courts*, N.Y. ST. UNIFIED CT. SYSTEM, https://www.nycourts.gov/courts/problem_solving/idv/home.shtml (last visited Oct. 31, 2015) (Integrated Domestic Violence ("IDV") courts use a "one family-one judge" model to bring before a single judge the multiple criminal, family (civil) and matrimonial (divorce) disputes for families where domestic violence is an underlying issue).

76. KIMYETTA R. ROBINSON & ILONA A. LEWYCKYJ, *THE FUND FOR MODERN COURTS, FROM ARREST TO APPEAL: A GUIDE TO CRIMINAL CASES IN THE NEW YORK STATE COURTS* 11 (2005).

77. See *Facilities Overview*, CITY OF N.Y. DEP'T OF CORRECTIONS, <http://www.nyc.gov/html/doc/html/about/facilities-overview.shtml> (last visited Nov. 6, 2015).

78. See ROBINSON & LEWYCKYJ, *supra* note 76, at 5.

79. See *generally id.* at 11-23.

may not obtain an immigration attorney.⁸⁰ This is dependent on whether the public defender refers a survivor to an immigration attorney.⁸¹

The End (Stay in Rikers, Upstate Prison, Removal Proceedings or Re-Entry): Depending upon a survivor's criminal sentencing, three options exist. First, the survivor will remain in Rikers if he or she is sentenced to less than 1 year imprisonment, and can possibly enter removal proceedings (which determine whether or not he or she can stay in the United States) while in New York City.⁸² Second, if the survivor is sentenced to more than 1 year imprisonment, he or she will be sent to prison in upstate New York, where he or she will enter removal proceedings.⁸³ Third, if the survivor is released from Rikers, he or she will go through the re-entry process.⁸⁴ Re-entry is a term used to describe the time period when an individual, who was previously incarcerated, is released from a detention facility and "re-enters" society as a civilian.⁸⁵ There are re-entry organizations in New York City that a survivor may be referred to in order to obtain much-needed services.

I think they saw me about four or five times over about a year. I was forty-six and [I] was a prostitute before they caught me. My friend's Uncle (so he says) got me tickets to come to the U.S. from Jamaica. My ex-boyfriend was really bad, he beat me all the time, and I decided to come here to escape him. But I came to something even more horrible. I didn't want to do what I did, but where would I go? My friend's uncle made me give him most of the money, but he let me stay in his house and cook for him. I didn't know where to go. I had to get into the car of one of the customers, and after we had sex, he started to beat and choke me. I found a pen in the car and stuck it in his arm. He called the cops and they found me running away from the car. It was really hard for me to talk about. The judge, the man on the other side [Assistant District Attorney], and the Public Defender didn't ask me too many questions about what happened.

80. AM. CIVIL LIBERTIES UNION, KNOW YOUR RIGHTS WHEN ENCOUNTERING LAW ENFORCEMENT 13, https://www.aclu.org/files/kyt/kyr_english.pdf.

81. See generally ROBINSON & LEWYCKYJ, *supra* note 76, at 9-10.

82. See generally BRYAN LONEGAN, THE LEGAL AID SOC'Y, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 10 (2006).

83. See generally *id.*

84. See Cynthia Caporizzo, *Prisoner Reentry Programs: Ensuring a Safe and Successful Return to the Community*, THE WHITE HOUSE (Nov. 30, 2011, 1:09 PM), www.whitehouse.gov/blog/2011/11/30/prisoner-reentry-programs-ensuring-safe-and-successful-return-community (providing more information on prison re-entry programs).

85. *Id.*

They sentenced me and I had to go upstate to a prison. I'm now in immigration court and I think I have to go back to Jamaica.⁸⁶

(2) The Unique Position of Criminal Justice Professionals in Identifying Survivors

There are two general points of significance pertaining to survivor identification when looking at this chart. First, survivors interact with the same parties on a frequent basis over a prolonged period of time. They appear with the same Public Defender or immigration attorney, against the same Assistant District Attorney, in front of the same judge, meeting with the same probation officer, and interacting on a daily basis with the same staff at Rikers or in an upstate prison. This is very different from the typical one-off interaction a survivor has with a law enforcement officer, nurse, or other traditional front line responders. Second, these parties can potentially deduce if the criminal standing in front of them is a survivor because they have unique tools to analyze a survivor's criminal history that the typical front line trafficking responder does not have. For example, a RAP sheet can indicate the kinds of crimes a survivor has been charged with. An FBI criminal check will state if the survivor has been arrested in other states and if they are a non-citizen. The types of crimes a survivor is arrested for (particularly low level misdemeanor crimes such as shoplifting, prostitution, identity theft, etc.), whether or not they have changed states, and if they have been arrested for similar crimes in those states are all patterns indicative of human trafficking. This can be determined without questioning the survivor in any capacity.

This again begs the question: if survivors are interacting over a prolonged period of time with the same parties who have unique tools to identify survivors, then why are survivors not being properly identified?

IV. WHY ARE SURVIVORS REMAINING UNIDENTIFIED IN THE CRIMINAL JUSTICE SYSTEM?

The simple answer to this question is that we do not bother looking past the criminal standing in front of us to understand the human story. We, as a society, do not bother to look past the crime or ask questions about victimization. Society is premised on notions of bad versus good, and the underlying premise of the criminal justice system

86. Interview with Anonymous Client F (June 2013) (on file with author).

is that “justice” must be served, and that the person who commits a crime must be punished for it. The lack of individualization and humanity in the criminal justice system (especially in New York City) can be seen with all defendants, including survivors.

The problem is that “[t]hese myths about the nature of victims and criminals, and the assumptions that being a criminal precludes being a victim, obscure the true nature of the crime, its victims, and the ways in which the victims are exploited.”⁸⁷

(1) Self-Identification

Proving that Survivors are Victims

Essentially, once they have been arrested and arraigned, survivors bear the burden of telling their story.

[T]hey . . . have to prove that they are really victims, worthy of time and attention of law enforcement. They also have to overcome the presumption . . . that they are not criminals themselves—after all, they are likely to be in the country without status, are likely to have engaged in unlawful employment or activities, and are likely to be in possession of false documents supplied to them by their traffickers. Then, they must further convince law enforcement that even if they did engage in illegal activity, they might also be victims of trafficking. In truth, the criminal activity in which they engaged might itself be proof of their victimization.⁸⁸

Moreover, survivors must face all of this while overcoming the language and cultural barriers, fear of deportation, and fear that the trafficker will retaliate against them or their families.

(2) Identification by Others

Conflation of Human Trafficking with Terrorism and National Security Issues

Human trafficking was formally introduced as an international women’s rights issue in the Palermo Protocols.⁸⁹ However, as national fears of terrorism and immigration grew, the problem of human trafficking was “redefined to address national security threats.”⁹⁰ The change in national priorities resulted in a shift from victim assistance to the prosecution of criminals, in order to “[disrupt] criminal net-

87. Haynes, *supra* note 66, at 355.

88. *Id.* at 352.

89. Amy Farrell & Stephanie Fahy, *The Problem of Human Trafficking in the U.S.: Public Frames and Policy Responses*, 37 J. CRIM. JUST. 617, 621 (2009).

90. *Id.* at 618.

works and [to safeguard] U.S. borders.”⁹¹ The emphasis on the prosecution of criminals assumes that there is a clear distinction between victims, offenders, and traffickers. The problem with this shifting viewpoint is that it perpetuates the assumption that a victim could not have engaged in criminal behavior.⁹² This problem is compounded by the issue that a trafficking survivor must be certified as such by the government.⁹³ “Conflation of trafficking with other political agendas has . . . confused those who are in the best position to ‘certify’ a trafficking victim or has made them [scared] of erroneously certifying someone who might not really be a victim of trafficking—someone who might be a terrorist, a ‘simple’ illegal migrant. . . or another criminal.”⁹⁴

In addition to overcoming the label of being a criminal, survivors also have to overcome the label of being undocumented. Traditionally, survivors have been treated as illegal aliens who have committed crimes (rendering them inadmissible to the United States under immigration laws) and face removal proceedings for deportation after their criminal cases are resolved.⁹⁵ Even if a survivor can vocalize their victimization, a common story is that officials continue to view them as “illegal immigrants trying to concoct a tall tale to secure immigration benefits, a prostitute, for instance, and therefore worthy of deportation.”⁹⁶ This issue is only exacerbated by trauma related symptoms and fears of certifying a “criminal” discussed above.

91. *Id.*

92. It should be noted that New York City is unique in that it was the first state to implement a vacatur law specific to human trafficking survivors, where if someone is found to be a human trafficking survivor, the convictions that stem from their trafficking experience is erased from their record. However, the fact that survivors are still going unidentified highlights the significance of this problem. JESSICA EMERSON ET AL., THE LEGAL AID SOC’Y, OBTAINING POST-CONVICTION RELIEF FOR SURVIVORS OF HUMAN TRAFFICKING 7 (2014), http://www.americanbar.org/content/dam/aba/directories/pro_bono_clearinghouse/ejc_2014_182.auth_checkdam.pdf; N.Y. C.P.L.R. § 5015.

93. Haynes, *supra* note 66, at 346.

94. *Id.* at 340.

95. DEP’T OF HEALTH & HUMAN RES., THE MINDSET OF A HUMAN TRAFFICKING VICTIM, http://www.acf.hhs.gov/sites/default/files/orr/understanding_the_mindset_of_a_trafficking_victim_1.pdf.

96. Haynes, *supra* note 66, at 350.

The “Means” in the Criminal Context

In the criminal context, the ideas of “involuntary, forced, or coerced” directly relate to the level of *mens rea*⁹⁷ in criminal law. But the idea of a survivor being explicitly forced into committing a crime completely against his or her will is complicated for several reasons. First, the force and coercion that compel a survivor to undertake criminal activity exists in degrees. Most survivors do not have a literal “gun to their heads” when they shoplift. Instead, traffickers rely upon the existing power dynamics and threaten the survivor with further physical and sexual violence, or threats to their family if they do not follow through with the crime. Traffickers may not verbally threaten survivors at all, but survivors know through past personal experience or the experiences of other survivors that if they disobey them, then they will face severe consequences. Second, the crimes committed by a survivor may not be directly related to the trafficking experience itself. If a survivor is able to leave the trafficking situation, they may continue to commit similar crimes (most commonly shoplifting or prostitution) as a way to survive. As undocumented individuals who are essentially on the run or in hiding from their trafficker, their opportunities to enter the workforce are severely limited.⁹⁸ To survive, survivors have to earn a living the only way they know how—what they did while being trafficked. Third, a survivor may also have committed the crime for survival purposes in addition to being coerced to commit it by the trafficker. Fourth, all of these issues are exacerbated by the aforementioned factors of being a “stranger in a strange land,” which makes them vulnerable to trafficking in the first place.

I thought I was free of him. I thought maybe it was all over, that I escaped. I moved four times in the past six years to escape him. But he found us— me and my son. He told me that I still had to repay him my debt for coming over to the U.S. He told me if I didn't, he knew where my son lived and where he went to school. When he found out I was a nanny, he told me I had to give him all my money. But after paying my rent and buying food, I only had \$100 to give him. He laughed and threw it back in my face. He said I needed to give him at least \$2,000 the next month or else. He said, “Don't you care about your son?” I didn't know what to do. Another nanny

97. *Mens rea* is a fundamental principle of criminal law and compromises the mental (and not physical) component. It is a person's awareness of the fact that his or her conduct is criminal. See BLACK'S LAW DICTIONARY 1134 (10th ed. 2014).

98. *Lessons Learned in the Fight to End Human Trafficking*, SAFE HORIZON, <http://www.safehorizon.org/page/lessons-learned-in-the-fight-to-end-human-trafficking-65.html> (last visited Oct. 19, 2015).

friend of mine told me that she had stolen checkbooks from her employer's house and written checks to make extra money. I hated this idea, but I had to protect my son. I started to steal checks from the families I worked for, the very families I loved, and would take out money. I would keep some of the money for myself to pay for my rent and food otherwise we would be out on the streets, and the rest to him. What else could I do?⁹⁹

CONCLUSION

Human trafficking is a problem that is all around us. It is happening in our local grocery store, in our schools, on our block, and in our homes. It is an intricate global phenomenon that is right in front of us—but we lack the tools to see it. This is especially true in the context of the criminal justice system, where survivors remain invisible despite their regular appearances in front of professionals who have connections to pertinent survivor-centric services. A survivor in the criminal justice system not only has to confront the general identification issues that survivors face, but he or she also bears the burden of proving victimization despite immigration status and criminal activity. In order to tackle this problem, criminal justice professionals must be trained about survivor identification issues specific to the criminal justice system. And we, as a society, must be open to the idea of seeing defendants in the criminal justice system as more than merely a perpetrator of a crime, but a person with a human story of survival.

99. Interview with Anonymous Client F (Nov. 2014) (on file with author).