

Michigan Law Review

Volume 120 | Issue 2

2021

Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival

Alaina Richert
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Law Commons](#), [Human Rights Law Commons](#), [Law and Gender Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Alaina Richert, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 MICH. L. REV. 315 (2021).

Available at: <https://repository.law.umich.edu/mlr/vol120/iss2/4>

<https://doi.org/10.36644/mlr.120.2.failed>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

FAILED INTERVENTIONS: DOMESTIC VIOLENCE, HUMAN TRAFFICKING, AND THE CRIMINALIZATION OF SURVIVAL

*Alaina Richert**

Over the last decade, state legislators have enacted statutes acknowledging the link between criminal behavior and trauma resulting from domestic violence and human trafficking. While these interventions take a step in the right direction, they still have major shortcomings that prevent meaningful relief for survivor-defendants. Until now, there has been no systematic overview of the statutes that require courts to consider a defendant's history of trauma in the contexts of domestic violence and human trafficking. There has also been no attempt to explore how these statutes relate to each other. This Note fills those gaps. It also identifies essential elements future statutory interventions in these contexts must include in order to grant effective relief to survivor-defendants. These reforms are essential to create a legal system that does not criminalize surviving domestic violence and human trafficking.

TABLE OF CONTENTS

INTRODUCTION.....	316
I. LINKS BETWEEN DOMESTIC VIOLENCE, HUMAN TRAFFICKING, AND CRIMINAL OFFENSES	318
A. <i>Domestic Violence, Human Trafficking, and Criminal Offenses</i>	319
B. <i>IPV and Criminal Offenses</i>	322
C. <i>Childhood Domestic Violence and Criminal Offenses</i>	323
II. EXISTING STATUTORY APPROACHES	324
A. <i>Inadequate Alternatives</i>	325
B. <i>Human-Trafficking Statutes</i>	327
C. <i>Domestic-Violence Statutes</i>	330

* J.D. Candidate, May 2022, University of Michigan Law School. Thank you to Professor Kimberly Thomas for her invaluable guidance on this piece. Thank you to the *MLR* Notes Office for their feedback, with special gratitude to Brian Remlinger for his encouragement and constructive criticism throughout the entire writing process and to Ingrid Yin for her thoughtful edits. Finally, thank you to my parents, Mark and Anita, my partner Kevin, and my sibling Sabrina for all of their love and support.

1. IPV Statutes	330
2. Domestic-Violence Statutes	331
III. ENDING THE CRIMINALIZATION OF SURVIVAL	332
A. <i>Provide an Affirmative Defense</i>	333
B. <i>Allow for Resentencing</i>	335
C. <i>Fewer Limitations on Types of Crimes</i>	336
D. <i>Issues with Limitations Based on When the Abuse</i> <i>Occurred</i>	337
E. <i>Nexus Requirements</i>	339
1. A Problem with Nexus Requirements	339
2. Why a Nexus Requirement Is Desirable and How to Mitigate the Problem.....	341
CONCLUSION.....	343

INTRODUCTION

The legal system is failing criminal defendants who are survivors of domestic violence and human trafficking. In recent years, studies have revealed that there are compelling links between trauma in these contexts and criminal behavior.¹ Arresting, prosecuting, and incarcerating survivors who have committed crimes related to their abuse is itself a form of trauma. These actions treat survivors as criminals and expose them to an increased risk of experiencing physical or sexual violence.² In addition, survivor-defendants³ who are convicted of offenses linked to their abuse are subject to the negative collateral consequences that accompany criminal convictions, including barriers to securing housing, employment, public assistance, a driver's license, and financial aid.⁴

1. Deborah W. Denno, *How Courts in Criminal Cases Respond to Childhood Trauma*, 103 MARQ. L. REV. 301, 310–11 (2019).

2. Isabella Blizard, *Chapter 636: Catching Those Who Fall, an Affirmative Defense for Human Trafficking Victims*, 48 U. PAC. L. REV. 631, 646 (2017); Benjamin C. Hattem, Note, *Carceral Trauma and Disability Law*, 72 STAN. L. REV. 995, 997–98 (2020) (reporting that almost all inmates witness violence during incarceration in addition to an increased risk of personally experiencing physical or sexual violence).

3. Some use the term “victim defendant” when referring to people who experience battering and are criminally charged. This term aims to restore the empathy for a person’s experience of domestic violence and human trafficking that sometimes disappears when they are arrested. See SUE OSTHOFF & JANE SADUSKY, NAT’L CLEARINGHOUSE FOR THE DEF. OF BATTERED WOMEN, A TOOLKIT FOR SYSTEMS ADVOCACY ON BEHALF OF VICTIMS OF BATTERING CHARGED WITH CRIMES 5 (2016). But this Note uses the term “survivor-defendant” to acknowledge the resiliency shown by those who have survived domestic violence and human trafficking.

4. U.S. COMM’N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 1–3 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [perma.cc/SRE3-HML2] (explaining that

Over the course of the last decade or so, legislators have enacted statutes that acknowledge the link between trauma and criminal behavior in the context of domestic violence and human trafficking.⁵ Domestic violence is a pattern of emotional, physical, sexual, psychological, or economic abuse perpetrated by one household member against another.⁶ Intimate partner violence (IPV) is a type of domestic violence perpetrated by someone who is or wants to be in an intimate relationship with another person.⁷ Human trafficking is the use of coercion or fraud to obtain some kind of labor, including commercial sex acts.⁸ Since domestic violence, IPV, and human trafficking overlap, it is possible for someone to experience these forms of abuse simultaneously.

the negative collateral consequences of conviction are increasingly impacting women, in addition to disproportionately impacting people of color, LGBTQ+ people, people with disabilities, and immigrants).

5. While some of the arguments in this Note may apply to other kinds of trauma, this Note focuses on domestic violence and human trafficking since that is where reform is most likely to occur in the short term. Nevertheless, it is important to acknowledge that experiencing trauma is not limited to these contexts. There have been some reform efforts to make family and juvenile courts more trauma informed. Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 244 (2018); see, e.g., *Trauma-Informed Courts*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, <https://www.ncjfcj.org/child-welfare-and-juvenile-law/trauma-informed-courts> [perma.cc/Z6M2-494P]. Those reforms, however, have been limited to specific contexts and have not been extended to the criminal justice system more broadly. Gold, *supra*, at 244. Research has shown that the majority of incarcerated men have experienced some kind of trauma, much of which is quite severe. Nancy Wolff, Jessica Huening, Jing Shi & B. Christopher Frueh, *Trauma Exposure and Posttraumatic Stress Disorder Among Incarcerated Men*, 91 J. URB. HEALTH 707, 707, 713 (2014) (finding that 99% of incarcerated men have experienced some kind of trauma, including physical abuse, seeing someone seriously injured or killed, or seeing dead bodies other than at a funeral and that 64.2% have been attacked with a weapon). Further statutory interventions should apply more broadly in order to move toward prison abolition and stop the criminalization of survival.

6. See *What Is Domestic Abuse?*, UNITED NATIONS, <https://www.un.org/en/coronavirus/what-is-domestic-abuse> [perma.cc/D3BR-6XFW].

7. See FAM. VIOLENCE PREVENTION FUND, NATIONAL CONSENSUS GUIDELINES ON IDENTIFYING AND RESPONDING TO DOMESTIC VIOLENCE VICTIMIZATION IN HEALTH CARE SETTINGS 2 (2004), <https://www.futureswithoutviolence.org/userfiles/file/Consensus.pdf> [perma.cc/Q4T6-UEJF]. While much IPV research focuses on women, this Note uses gender-inclusive language wherever possible in recognition of the fact that LGBTQ+ couples experience IPV at a rate that is comparable to, or possibly higher than, heterosexual couples. E.g., Luca Rollè et al., *When Intimate Partner Violence Meets Same Sex Couples: A Review of Same Sex Intimate Partner Violence*, FRONTIERS PSYCH., Aug. 2018, at 1, 2; see also Miika Albright & DeAnn Alcantara-Thompson, *Contextualizing Domestic Violence from a LGBTQ Perspective*, INTERSECTIONS PRACTICE (Nat'l Ass'n of Soc. Workers, Washington, D.C.), no. 5, 2011, at 11, https://www.socialworkers.org/assets/secured/documents/sections/intersections/20116915434669_2011%20Intersections%20in%20Practice.pdf [perma.cc/QUU2-UF5J] (noting dearth of research on how IPV affects those identifying as transgender, bisexual, queer, or genderqueer and summarizing research showing that IPV is as common in same-sex relationships as it is in heterosexual relationships).

8. See *What Is Human Trafficking?*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/blue-campaign/what-human-trafficking> [perma.cc/M9Q7-MFCP].

New York,⁹ California,¹⁰ and Illinois¹¹ recently passed laws giving courts discretion to reduce sentences when a defendant's offense is related to being subjected to domestic violence. In addition, thirty-eight states have passed affirmative defenses for human-trafficking survivor-defendants since 2010.¹² While these laws are a step in the right direction,¹³ they do not go far enough. They often impose restrictions that deny relief to survivor-defendants, such as excluding certain types of offenses or those that occurred before a specific period.

This Note undertakes the first systematic overview of all statutes that require courts to consider a defendant's history of domestic violence or human trafficking and explores how these statutes are related. Part I explains how trauma induced by domestic violence or human trafficking may lead survivor-defendants to commit criminal offenses. Part II provides an overview of all statutes that require courts to consider a defendant's being subjected to domestic violence and human trafficking. Part III compares these statutes, identifies their shortcomings, and proposes necessary elements of future statutory interventions.

I. LINKS BETWEEN DOMESTIC VIOLENCE, HUMAN TRAFFICKING, AND CRIMINAL OFFENSES

People who experience domestic violence or human trafficking are at an increased risk of committing a criminal offense.¹⁴ For example, domestic-violence and human-trafficking survivor-defendants may commit a crime against their abuser in self-defense, be forced by their abuser or trafficker to

9. Domestic Violence Survivors Justice Act, ch. 31, § 1, 2019 N.Y. Laws 144, 145–46 (codified as amended at N.Y. PENAL LAW § 60.12(1) (McKinney Supp. 2021)).

10. Act of Sept. 30, 2012, ch. 803, 2012 Cal. Stat. 6437 (codified as amended at CAL. PENAL CODE § 1473.5 (West Supp. 2021)); Act of Sept. 30, 2012, ch. 809, 2012 Cal. Stat. 6454 (codified as amended at CAL. PENAL CODE § 4801 (West 2021)). These statutes are known as the “Sin by Silence” laws. Victoria Law, *When Abuse Victims Commit Crimes*, ATLANTIC (May 21, 2019), <https://www.theatlantic.com/politics/archive/2019/05/new-york-domestic-violence-sentencing/589507> [perma.cc/CFE8-EZDQ].

11. Act of May 25, 2015, Pub. Act 099-0384, 2015 Ill. Laws 5573 (codified at 730 ILL. COMP. STAT. 5/5-5-3.1(a)(15) and 735 ILL. COMP. STAT. 5/2-1401 (2020)).

12. See *infra* note 93.

13. Statutes explicitly making a history of IPV or human trafficking relevant to a defendant's culpability are essential because existing defenses are often ill suited to addressing the kinds of crimes survivor-defendants commit. See Lauren Danice Shuman, Comment, *Pulling the Trigger: Shooting Down Mandatory Minimum Sentencing for Victims Who Kill Their Abuser*, 56 HOW. L.J. 983, 1003–06 (2013).

14. See, e.g., Emily M. Wright, Patricia Van Voorhis, Emily J. Salisbury & Ashley Bauman, *Gender-Responsive Lessons Learned and Policy Implications for Women in Prison: A Review*, 39 CRIM. JUST. & BEHAV. 1612, 1616 (2012).

steal or commit other crimes, or turn to substance abuse to manage the emotional and physical pain caused by their abuse.¹⁵ This Part explores some of the pathways between the trauma of domestic violence and human trafficking and subsequent criminal behavior. Section I.A discusses the trauma experienced by survivor-defendants in the contexts of domestic violence and human trafficking. Section I.B explores the unique paths between IPV and criminal behavior. Section I.C highlights the connections between childhood domestic violence and criminal behavior. These links have critical implications for future statutory interventions and demonstrate how prosecuting and imprisoning survivor-defendants for their crimes effectively criminalizes survival.

A. Domestic Violence, Human Trafficking, and Criminal Offenses

The trauma of domestic violence and human trafficking affects people's subsequent behavior and mental health and can lead to criminal behavior.¹⁶ Perpetrators of domestic violence or human trafficking may force their victims¹⁷ to steal, participate in group crimes, take responsibility for their abuser's crime, or commit some other criminal offense.¹⁸ Abusers in these contexts may force their victims to commit sex-related crimes.¹⁹ For example, Judy Norman, an IPV survivor-defendant who shot her abuser, was forced by

15. Dana D. DeHart, *Pathways to Prison: Impact of Victimization in the Lives of Incarcerated Women*, 14 VIOLENCE AGAINST WOMEN 1362, 1365, 1368 (2008); Wright et al., *supra* note 14, at 1616.

16. Wright et al., *supra* note 14, at 1616; *see also* Nina Papalia, James R.P. Oglloff, Margaret Cutajar & Paul E. Mullen, *Child Sexual Abuse and Criminal Offending: Gender-Specific Effects and the Role of Abuse Characteristics and Other Adverse Outcomes*, 23 CHILD MALTREATMENT 399 (2018) (finding that people who experience sexual abuse as children are more likely to engage in criminal behavior of all kinds). According to Kathleen Daly, five pathways lead women to felony court: (1) substance-abuse and mental-health issues stemming from child abuse; (2) engaging in substance abuse, sex work, and other criminal activities after fleeing from an abusive home; (3) criminal activity directly attributable to intimate partner violence; (4) substance abuse in the context of intimate or familial relationships; and (5) other reasons. Kathleen Daly, *Women's Pathways to Felony Court: Feminist Theories of Lawbreaking and Problems of Representation*, 2 S. CAL. REV. L. & WOMEN'S STUD. 11 (1992); *see also* Angela M. Moe, *Blurring the Boundaries: Women's Criminality in the Context of Abuse*, 32 WOMEN'S STUD. Q., Fall/Winter 2004, at 116 (explaining how engaging in criminal behavior is sometimes necessary to survive IPV); Carolina Villacampa & Núria Torres, *Human Trafficking for Criminal Exploitation: Effects Suffered by Victims in Their Passage Through the Criminal Justice System*, 25 INT'L REV. VICTIMOLOGY 3 (2019) (examining criminal exploitation associated with human trafficking, including prostitution, growing drugs, and street crime).

17. In this Note, "victim" refers to a person who is experiencing ongoing illegal violence, such as domestic violence and human trafficking.

18. DeHart, *supra* note 15, at 1366.

19. *See, e.g.*, DeHart, *supra* note 15, at 1365–66 (finding that many incarcerated women were forced by caregivers to sell sex as girls, which is a form of domestic violence, or by intimate partners, which is a form of IPV); *What Is Human Trafficking?*, *supra* note 8 (stating human trafficking involves "the use of force, fraud, or coercion to obtain some type of labor or commercial sex act").

her abuser to prostitute herself.²⁰ Her abuser would beat and maim her if she refused or if he felt that she should have made more money.²¹

People who experience domestic violence or human trafficking may also respond to the abuse by using violence to protect themselves or others.²² In one case, Catina Curley was subjected to nine years of severe, relentless abuse, including punching, slapping, and strangulation, by her husband Renaldo.²³ Renaldo dislocated her shoulder, attempted to push her out of a moving car, and gave her many black eyes and other facial injuries.²⁴ During one incident, Renaldo followed Catina around the house, yelling at her, choking her, and throwing things at her in front of her daughter.²⁵ When he went downstairs, Catina called her aunt for help, armed herself with a handgun, and begged Renaldo to let her leave the house. But Renaldo walked toward her, continuing even as Catina screamed, trembled, and told him to stop. Catina fired the gun, the bullet hit Renaldo, and he died from the wound within one or two minutes. Devastated, Catina called 911, but when the police arrived, she was arrested. Catina was found guilty of second-degree murder and sentenced to life in prison.²⁶

Beyond violent crimes, domestic-violence and human-trafficking survivor-defendants may also commit crimes when they use controlled substances to manage their trauma.²⁷ People who experience domestic violence or human trafficking often use controlled substances to cope with mental-health problems or the physical and emotional pain that results from past and present

20. State v. Norman, 378 S.E.2d 8, 9–10 (N.C. 1989).

21. *Id.* at 10.

22. MELISSA E. DICHTER WITH SUE OSTHOFF, VAWNET, WOMEN'S EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION: A RESEARCH UPDATE 4 (2015), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf [perma.cc/D7WX-AK84]; see also DeHart, *supra* note 15, at 1365–66; Justine van der Leun, “No Choice but to Do It”: Why Women Go to Prison, NEW REPUBLIC (Dec. 17, 2020), <https://newrepublic.com/article/160589/women-prison-domestic-violence-survivors> [perma.cc/XZ48-RMQG] (“[A]t least 30 percent of those serving time on murder or manslaughter charges were protecting themselves or a loved one from physical or sexual violence.”).

23. State v. Curley, No. 461-907, slip op. at *1, *4 (La. Crim. Dist. Ct. Orleans Parish Mar. 1, 2019), https://www.theadvocate.com/pdf_8cefde3e-3c67-11e9-a28c-6fff990c939c.html [perma.cc/UH8J-G5AV].

24. *Id.*

25. *Id.* at *2.

26. *Id.*

27. It might be suggested that offenses fit into “direct” and “collateral” categories, where direct offenses are those compelled by an abuser, such as engaging in self-defense, and collateral offenses are those that seem more removed, such as turning to substances to cope with the physical and emotional pain of abuse. But this is not a useful framework for two reasons. First, this distinction breaks down when considered in the context of trauma resulting from domestic violence or human trafficking. It does not make sense to say some offenses are more direct than others when all the pathways are inextricably linked to abuse and the survivor-defendant’s culpability is lessened because of the abuse in all cases. Second, the two categories do not comport with existing state law. Most of the human-trafficking and domestic-violence statutes do not even cover all the “direct” results of abuse, such as being forced to steal by an abuser. See *infra* Part II.

abuse.²⁸ For example, Laura, an incarcerated survivor,²⁹ became an alcoholic when she was fifteen after using alcohol to cope with domestic violence from her stepfather.³⁰ To numb the pain of her abuse, she would drink large amounts of vodka when she saw her stepfather preparing to sexually abuse her.³¹ Relatedly, abusers sometimes pressure their victims into using drugs or alcohol as a way to control them.³² For example, abusers may force victims to use drugs or alcohol so they are less able to resist, or they may want them to become addicted so that victims are incentivized to stay with them when they promise to supply more drugs or alcohol.³³

The majority of incarcerated women have experienced these kinds of trauma.³⁴ Female prisoners report experiencing abuse before incarceration at a higher rate than male prisoners.³⁵ For example, one study found that 60% of women in prison have experienced domestic violence.³⁶ Women in jail have experienced domestic violence at similar rates: 86% of them have experienced sexual violence at some point in their lives, 77% have experienced IPV, and 60% have experienced domestic violence by a caregiver.³⁷ Multiple studies asking more comprehensive, behavior-specific questions have found that 71%–95% of incarcerated women have experienced physical violence at the hands of an intimate partner.³⁸ This is much higher than the national average of one in four women being abused by their intimate partner at some point in

28. Wright et al., *supra* note 14, at 1616. In addition to being prosecuted for their own use of controlled substances, domestic-violence and human-trafficking survivor-defendants may be disproportionately prosecuted for child abuse or endangerment for using controlled substances while pregnant, since they use controlled substances at higher rates. See CATHARINE A. MACKINNON, *SEX EQUALITY* 1479–83 (3d ed. 2016). In the context of IPV, many studies show female IPV survivors are more likely to use controlled substances than women who have not experienced IPV. ECHO A. RIVERA ET AL., NAT'L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, *THE RELATIONSHIP BETWEEN INTIMATE PARTNER VIOLENCE AND SUBSTANCE ABUSE* 3–4 (2015), <http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2014/09/IPV-SAB-Final202.29.1620NO20LOGO-1.pdf> [perma.cc/48BL-VJ6Z]. Research suggests domestic violence has similar effects. DICHTER, *supra* note 22, at 5. And according to a comprehensive study of human trafficking in the United States, 84.3% of human-trafficking survivors used controlled substances while being trafficked. Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, *ANNALS HEALTH L.*, Winter 2014, at 61, 76.

29. In this Note, “survivor” refers to someone who has survived abuse and is not a defendant.

30. DeHart, *supra* note 15, at 1368.

31. *Id.*

32. Lederer & Wetzel, *supra* note 28, at 75–76.

33. Hanni Stoklosa, Marti MacGibbon & Joseph Stoklosa, *Human Trafficking, Mental Illness, and Addiction: Avoiding Diagnostic Overshadowing*, 19 *AMA J. ETHICS* 23, 25–26 (2017).

34. OSTHOFF & SADUSKY, *supra* note 3, at 19–20.

35. Wright et al., *supra* note 14, at 1616.

36. *Id.*

37. ELIZABETH SWAVOLA, KRISTINE RILEY & RAM SUBRAMANIAN, *VERA INST. OF JUST., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM* 11 (2016).

38. OSTHOFF & SADUSKY, *supra* note 3, at 20.

their lives.³⁹ The trauma associated with domestic violence often goes undetected and unaddressed during a survivor's entire period of incarceration.⁴⁰

B. IPV and Criminal Offenses

There are also many unique ways that IPV causes victims to be criminally charged, such as abusers' manipulation of the criminal justice system, unjust enforcement of kidnapping laws, failure to protect laws, and economic abuse. For example, abusers often falsely accuse their victims of criminal activity as retaliation for victims reporting their abuse to the police.⁴¹ In other IPV cases, abusers have convinced the police that the victim was the primary aggressor in the relationship, thus creating bias in the criminal justice system against the victim.⁴²

IPV survivor-defendants may also be convicted of kidnapping for taking their children with them when fleeing an abusive relationship.⁴³ Mothers leaving with their children are more likely to be fleeing abuse than fathers who leave with children, and fathers are more likely to demonstrate controlling behavior over mothers.⁴⁴ Yet while fathers kidnap their children at a higher rate than mothers, mothers are convicted of parental kidnapping more often than fathers.⁴⁵

IPV survivor-defendants are also often criminalized for failing to protect their children from harm at the hands of their abuser.⁴⁶ A severe gender disparity exists in this context as well: almost all defendants who are convicted of failure to protect children are female.⁴⁷ For example, survivor-defendant Shantonio Hunter was sentenced to twenty-eight years in prison on a failure-

39. SHARON G. SMITH ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 7 (2018).

40. SWAVOLA ET AL., *supra* note 37, at 11.

41. DICHTER, *supra* note 22, at 5.

42. *Id.*

43. Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259, 260.

44. *Id.* at 262.

45. *Id.* at 261–62.

46. Amanda Mahoney, Note, *How Failure to Protect Laws Punish the Vulnerable*, 29 HEALTH MATRIX 429, 431 (2019). See generally DEBRA WHITCOMB, CHILDREN AND DOMESTIC VIOLENCE: THE PROSECUTOR'S RESPONSE (2004), <https://www.ncjrs.gov/pdffiles1/nij/199721.pdf> [perma.cc/LVP4-DLYZ] (finding that 78% of prosecutors in states with failure-to-protect laws would prosecute a mother for failing to protect her child from abuse by a perpetrator who was abusing both the mother and the child).

47. Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 274 (2001).

to-protect theory when her abusive boyfriend killed her three-year-old son.⁴⁸ In this way, Shantonio was convicted for the actions of her abusive partner.

Economic control is often part of IPV since it provides abusers with more power over their victims.⁴⁹ Abusers may restrict the ability of their victims to work, forcing survivor-defendants to turn to criminal behavior to gain economic resources and financial independence.⁵⁰ For example, a study of incarcerated survivors found that some had been fired from their jobs after being stalked or harassed by their abuser at the workplace and that others were forced to leave their jobs by controlling partners.⁵¹

C. Childhood Domestic Violence and Criminal Offenses

There are clear connections between experiencing domestic violence as a child and criminality.⁵² Experiencing DV does not necessarily mean a child will become a delinquent or adult offender, but it increases the risk.⁵³ Victims of childhood trauma, including domestic violence, are more likely to commit a criminal offense in the future.⁵⁴ Children who experience trauma see the

48. See Victoria Law, *Convicted as a Teenager, Abuse Survivor Cyntoia Brown May Have the Chance to Leave Prison (Updated)*, REWIRE NEWS GRP. (May 23, 2018, 12:23 PM), <https://rewirenewsgroup.com/article/2018/05/23/convicted-as-a-teenager-abuse-survivor-cyntoia-brown-may-have-the-chance-to-leave-prison> [perma.cc/S7ZC-3GQN].

49. Shamita Das Dasgupta, *Just Like Men? A Critical View of Violence by Women*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND 195, 200 (Melanie F. Shepard & Ellen L. Pence eds., 1999).

50. DICHTER, *supra* note 22, at 5–6.

51. DeHart, *supra* note 15, at 1373.

52. Mirko Bagaric, Gabrielle Wolf & Peter Isham, *Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse*, 30 STAN. L. & POL'Y REV. 1, 33 (2019). So far, only the New York domestic-violence law has the potential to address childhood domestic violence. See *infra* Section II.C. But the far-reaching implications of experiencing domestic violence as a child have important ramifications for future statutory interventions. Specifically, they imply that the relief should not be limited based on when the abuse occurred. See *infra* Section III.D.

53. Joanne Belknap & Kristi Holsinger, *An Overview of Delinquent Girls: How Theory and Practice Have Failed and the Need for Innovative Changes*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 3, 8 (Ruth T. Zaplin ed., 2d ed. 2008) (discussing many recent studies finding that 40%–73% of delinquent girls have experienced sexual or physical abuse); see also Tina Maschi, *Unraveling the Link Between Trauma and Male Delinquency: The Cumulative Versus Differential Risk Perspectives*, 51 SOC. WORK 59, 66–67 (2006) (reporting that experiencing trauma increases the likelihood that boys will become delinquents); *Pathways Between Child Maltreatment and Adult Criminal Involvement*, NAT'L INST. OF JUST. (Oct. 11, 2017) <https://nij.ojp.gov/topics/articles/pathways-between-child-maltreatment-and-adult-criminal-involvement> [perma.cc/LE5J-EZT6] (reporting that experiencing childhood trauma increases the likelihood that boys will engage in criminal behavior as adults).

54. See, e.g., Denno, *supra* note 1, at 311; see also Margaret F. Brinig & Marsha Garrison, *The Invisible Prison: Pathways and Prevention*, 95 NOTRE DAME L. REV. 1439, 1481 (2020) (noting that childhood trauma is prevalent among incarcerated men, with over 25% of them being abandoned in childhood or adolescence, 42% having witnessed someone being killed, and over 50% experiencing physical trauma).

world as a place of danger and are overloaded by stress hormones.⁵⁵ When coupled with a lack of trust in adults, the harms associated with trauma can cause children to fall behind in school and inhibit them from developing healthy relationships with peers or teachers.⁵⁶ Children who run away from home to escape abuse may be criminalized for their survival strategies of delinquency, substance abuse, theft, or prostitution.⁵⁷ Arrest, prosecution, and incarceration are themselves traumatizing, compounding the problem instead of solving it.⁵⁸

The harmful effects of domestic violence create a pathway from childhood trauma to criminal behavior.⁵⁹ For example, in Oregon's juvenile justice system alone, 93% of girls have been sexually or physically abused.⁶⁰ Research shows high rates in other states as well.⁶¹ Of all the women currently serving life sentences for crimes committed as juveniles, 80% are survivors of physical abuse and 77% are survivors of sexual abuse.⁶² Routing abused girls into the justice system retraumatizes them and compounds the original harm.⁶³ Girls of color are disproportionately affected: Black girls comprise 33.2% of detained and committed girls, despite making up only 14% of the population of girls in the United States.⁶⁴ LGBTQ+ girls are also disproportionately affected, comprising 13%–15% of youth involved with the juvenile justice system but just 5%–7% of the general population.⁶⁵

II. EXISTING STATUTORY APPROACHES

This Part begins by examining self-defense and duress, the two affirmative defenses traditionally available in criminal trials, and argues that they are inadequate to prevent the unjust criminalization of survivor-defendants. It then looks to statutes that have been passed in the last decade to address trauma from domestic violence and human trafficking. This exercise serves to

55. Susan Ayres, *Trauma-Informed Advocacy: Learning to Empathize with Unspeakable Horrors*, 26 WM. & MARY J. RACE GENDER & SOC. JUST. 225, 230 (2020).

56. *Id.*

57. Belknap & Holsinger, *supra* note 53, at 7–8.

58. Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 16–17 (2018); *see also* LA. CHILD. CODE ANN. art. 725 (2014) (“[A]rresting, prosecuting, and incarcerating victimized children serves to re-traumatize them and to increase their feelings of low self-esteem, which only makes the process of recovery more difficult.”).

59. Some have called this the “girls’ sexual abuse to prison pipeline.” *E.g.*, MALIKA SAADA SAAR, REBECCA EPSTEIN, LINDSAY ROSENTHAL & YASMIN VAFA, GEO. CTR. ON POVERTY & INEQ., *THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS’ STORY* 5 (2015).

60. *Id.* at 7.

61. *Id.* at 7, 9.

62. The Sent’g Project, *Women and Life Imprisonment Webinar*, YOUTUBE (July 11, 2019), <https://youtu.be/m9qpocC4qlo>.

63. *See* SAAR ET AL., *supra* note 59, at 12.

64. *Id.* at 7.

65. *Id.*

catalogue all current existing legislative approaches to trauma in these contexts and sets up the comparative analysis in Part III.

A. *Inadequate Alternatives*

As discussed in Part I, survivor-defendants often commit crimes to defend themselves from further abuse or because they are being controlled and manipulated by their abuser.⁶⁶ Therefore, many attempt to raise an affirmative defense (i.e., argue that a special circumstance negates their culpability) at trial.⁶⁷ Self-defense and duress are two of the most relevant affirmative defenses.⁶⁸ A self-defense claim asserts that one's use of force was necessary and proportional to protect oneself against unlawful force by another.⁶⁹ The duress defense asserts that one's criminal conduct was the result of coercion by the use or threat of unlawful force by another.⁷⁰

But it is difficult for domestic-violence and human-trafficking survivor-defendants to successfully assert self-defense or duress defenses in court because both defenses require defendants to prove they had a reasonable belief that they were in "imminent" danger of death or serious bodily harm when they committed the crime of which they were accused.⁷¹ People subjected to domestic violence and human trafficking do not often kill their abusers in situations that reflect standard notions of imminent physical danger.⁷² Survivor-defendants are thus unlikely to successfully assert self-defense, even if they lived with the threat of imminent danger of great bodily harm—or even death—every day for years.⁷³ For example, in *State v. Norman*, the survivor-defendant's husband beat and tortured her for approximately twenty years.⁷⁴ He also forced her to sell sex.⁷⁵ She attempted to escape several times but was caught and brutally beaten each time.⁷⁶ He made many threats to kill her if she ever tried to go to the police or leave him.⁷⁷ After twenty years of continuous

66. See *supra* Part I.

67. See, e.g., *United States v. Lopez*, 913 F.3d 807, 811 (9th Cir. 2019) (asserting duress against charge of buying a gun for an abusive ex-boyfriend); *State v. Norman*, 378 S.E.2d 8, 9–10 (N.C. 1989) (asserting self-defense against charge of murdering an abusive husband).

68. See Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J.C.R. & SOC. JUST. 177, 188–89 (2016); Sharon Angella Allard, Essay, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991).

69. See, e.g., MODEL PENAL CODE § 3.04 (AM. L. INST. 1962).

70. See *id.*

71. Zornosa, *supra* note 68, at 188; see Allard, *supra* note 68, at 193.

72. See Allard, *supra* note 68, at 193.

73. MACKINNON, *supra* note 28, at 838–39.

74. See 378 S.E.2d 8, 10 (N.C. 1989).

75. *Norman*, 378 S.E.2d at 10.

76. *Id.* at 11.

77. *Id.* at 10.

abuse, the survivor-defendant shot her abuser while he slept.⁷⁸ The court rejected her self-defense claim because it did not think the imminence prong was met, despite the evidence that she had tried to leave numerous times.⁷⁹

Another reason survivor-defendants often fail to successfully prove self-defense is because anyone classified as an “aggressor,” or someone who instigated the actions immediately leading to the violence in question, cannot claim self-defense.⁸⁰ This limitation prevents consideration of domestic violence or human trafficking as a mitigating factor when a survivor-defendant who has been repeatedly abused eventually takes action against their abuser. It is particularly difficult for Black women to convince a court that they acted in self-defense because of stereotypes that portray Black women as angry, strong, and assertive.⁸¹

Lastly, courts have typically required survivor-defendants pleading self-defense to show that they retreated before using force, even if they committed a crime because of IPV in their own home.⁸² But this requirement ignores the reality that many IPV victims cannot escape without risking great violence or death.⁸³ Women are seventy times more likely to be killed by their abusers within two weeks of leaving the relationship than at any other time in the relationship.⁸⁴ This statistic demonstrates that many victims of IPV are unable to safely retreat from abuse, which means courts are forcing IPV victims to choose between risking their life to retreat and being able to plead self-defense for any crimes committed in the course of protecting themselves.

In addition, many victims of IPV suffer over time from a psychological phenomenon called “learned helplessness,” where victims may stop seeking to escape since doing so seems futile.⁸⁵ Learned helplessness makes it less likely that a survivor-defendant will retreat from ongoing violence, which makes asserting self-defense more difficult. Self-defense assumes that people in danger will be able to remove themselves from violent situations, which is not the case for many IPV victims. This leaves IPV survivor-defendants without a defense if they commit any offense while protecting themselves.

78. *Id.* at 9.

79. *Id.*

80. *See, e.g.*, LA. STAT. ANN. § 14:21 (2016).

81. *See* Allard, *supra* note 68, at 195–98.

82. Cristina Georgiana Messerschmidt, Comment, *A Victim of Abuse Should Still Have a Castle: The Applicability of the Castle Doctrine to Instances of Domestic Violence*, 106 J. CRIM. L. & CRIMINOLOGY 593, 598, 610, 617 (2016) (explaining that this is currently hotly debated and that eight states even specify that victims of IPV must retreat before using deadly force).

83. Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 253–54 (2008).

84. Messerschmidt, *supra* note 82, at 620.

85. Suk, *supra* note 83, at 257. Regardless of whether one believes in battered woman syndrome, which highlights the psychological implications of cycles of abuse, or survivor theory, which emphasizes the agency and conscious choices of those who experience IPV, both theories make it clear that abused women do not believe they can successfully leave abusive relationships. Messerschmidt, *supra* note 82, at 598, 620–24.

Duress defenses often fail for similar reasons. Again, duress requires a showing of “imminent” physical harm that is difficult for survivor-defendants to meet. Duress does not apply to survivor-defendants who commit crimes due to threats of nonphysical harm, fear of past patterns of violence reoccurring, or an extremely imbalanced power dynamic between the survivor-defendant and the abuser.⁸⁶ For example, in the case of human trafficking, abusers “groom” victims to commit criminal offenses through extensive sexual and physical abuse, facilitating dependency on drugs, confiscating documents, threatening to call the police and report past forced criminal behavior, and similar techniques.⁸⁷ In the case of undocumented victims, traffickers also use threats of nonphysical harm like deportation.⁸⁸ Survivor-defendants who experience these forms of coercion cannot raise a duress defense because they do not pose a threat of imminent physical harm.⁸⁹

B. Human-Trafficking Statutes

Since 2010, state legislatures have become increasingly aware of the links between domestic violence, human trafficking, and criminal behavior. In response, thirty-eight states have passed laws providing affirmative defenses to human-trafficking survivor-defendants. This Section provides a brief overview of the various human-trafficking statutes, highlighting the differing approaches legislatures have taken to address the impact of trauma in these contexts.

Statutes providing relief to human-trafficking survivor-defendants are much more numerous than domestic-violence statutes.⁹⁰ Human-trafficking statutes also have a slightly longer history; the first human-trafficking statute appeared in 2005,⁹¹ whereas the first domestic-violence statute did not appear until 2012.⁹² Unlike domestic-violence statutes, human-trafficking statutes provide survivor-defendants with an affirmative defense. Currently, thirty-eight states have affirmative defenses for human-trafficking survivor-defendants.⁹³ All these laws include one or more of the following restrictions on when

86. See Zornosa, *supra* note 68, at 188.

87. *Id.*

88. *Id.* at 188–89.

89. *Id.*

90. See *infra* notes 93, 107–123 and accompanying text.

91. Act of Apr. 26, 2005, ch. 77, § 1, 2005 N.J. Laws 318, 319 (codified at N.J. STAT. ANN. § 2C:13-8(c) (West 2015)).

92. Governor Signs Both Sin by Silence Bills, THE SIN BY SILENCE BILLS (Oct. 2, 2012) [hereinafter *Sin by Silence Bills*], <https://legislation.sinbysilence.com/lastest-news-updates/governor-signs-both-sin-by-silence-bills> [perma.cc/3WYM-Y96X]; see also *infra* Section II.C.

93. ALA. CODE § 13A-6-159 (LexisNexis 2015); ARIZ. REV. STAT. ANN. § 13-3214(D) (2018); ARK. CODE ANN. § 5-70-102 (Lexis through 2021 Reg. Sess.); CAL. PENAL CODE § 236.23 (West Supp. 2021); COLO. REV. STAT. § 18-3-504(2.5) (2020); CONN. GEN. STAT. § 53a-82(b) (2020); DEL. CODE ANN. tit. 11, § 787(h) (2021); GA. CODE ANN. § 16-3-6(b) (2019); 720 ILL. COMP. STAT. 5/11-14(c-5) (2020); IOWA CODE § 710A.3 (2021); KAN. STAT. ANN. § 21-6419(c)

the defense can be invoked: (1) restrictions based on the offense committed, (2) a nexus requirement, (3) a coercion requirement, and (4) a temporal requirement.

The most common limitation is based on the type of offense the survivor-defendant committed. Twenty-seven states limit the defense to charges of prostitution or sex-related crimes.⁹⁴ Although the eleven other states have broader affirmative-defense statutes that apply beyond sex-related crimes, six of them still limit the kinds of offenses that are eligible.⁹⁵ Of those six, two states limit the defense to situations in which the survivor-defendant is charged with human trafficking.⁹⁶ The four others only apply to nonviolent felonies, which are sometimes specified in the statute.⁹⁷

The eleven states that apply the human-trafficking defense in cases other than prostitution and sex-related crimes also limit the defense in other ways

(Supp. 2019); KY. REV. STAT. ANN. § 529.170 (LexisNexis 2014); LA. STAT. ANN. § 14:46.2(F) (Supp. 2021); ME. REV. STAT. ANN. tit. 17-A, §§ 853(3), 853-A(4) (Supp. 2020); MD. CODE ANN., CRIM. LAW § 11-306(c) (LexisNexis 2021); MASS. GEN. LAWS ch. 265, § 57 (2020); MINN. STAT. § 609.325(4) (2020); MISS. CODE ANN. § 97-3-54.1(5) (2020); MO. REV. STAT. § 566.223 (2016); MONT. CODE ANN. § 45-5-710 (2019); NEB. REV. STAT. §§ 28-801(3), -831(3) (2016 & Supp. 2020); N.H. REV. STAT. ANN. § 645:2(IV) (Supp. 2020); N.J. STAT. ANN. § 2C:13-8(c) (West 2015); N.Y. PENAL LAW § 230.01 (McKinney Supp. 2021); N.C. GEN. STAT. § 14-43.16 (2019); N.D. CENT. CODE § 12.1-41-13 (Supp. 2017); OKLA. STAT. tit. 21, § 748(D) (Supp. 2020); OR. REV. STAT. § 163.269 (2019); 18 PA. STAT. AND CONS. STAT. ANN. § 3019(b) (West 2015); 11 R.I. GEN. LAWS § 11-67.1-16 (Supp. 2020); S.C. CODE ANN. § 16-3-2020 (Supp. 2020); S.D. CODIFIED LAWS § 22-23-1.2 (2017); TENN. CODE ANN. § 39-13-513(e) (2018); TEX. PENAL CODE ANN. § 43.02 (West Supp. 2020); VT. STAT. ANN. tit. 13, § 2652(c) (2018); WASH. REV. CODE § 9A.88.040 (2020); WIS. STAT. § 939.46(1m) (2019–2020); WYO. STAT. ANN. § 6-2-708 (2021).

94. ALA. CODE § 13A-6-159; ARIZ. REV. STAT. ANN. § 13-3214(D); ARK. CODE ANN. § 5-70-102; COLO. REV. STAT. § 18-3-504(2.5); CONN. GEN. STAT. § 53a-82; DEL. CODE ANN. tit. 11, § 787; GA. CODE ANN. § 16-3-6(b); 720 ILL. COMP. STAT. 5/11-14(c-5); KAN. STAT. ANN. § 21-6419(c); LA. STAT. ANN. § 14:46.2(F); ME. REV. STAT. ANN. tit. 17-A, §§ 853(3), 853-A(4); MD. CODE ANN., CRIM. LAW § 11-306(c); MASS. GEN. LAWS ch. 265, § 57; MINN. STAT. § 609.325(4); MISS. CODE ANN. § 97-3-54.1(5); MO. REV. STAT. § 566.223; NEB. REV. STAT. §§ 28-801(3), -831(3); N.H. REV. STAT. ANN. § 645:2(IV); N.J. STAT. ANN. § 2C:13-8(c); N.Y. PENAL LAW § 230.01; 18 PA. STAT. AND CONS. STAT. ANN. § 3019(b); 11 R.I. GEN. LAWS § 11-67.1-16; S.D. CODIFIED LAWS § 22-23-1.2; TENN. CODE ANN. § 39-13-513(e); TEX. PENAL CODE ANN. § 43.02; VT. STAT. ANN. tit. 13, § 2652(c); WASH. REV. CODE § 9A.88.040.

95. CAL. PENAL CODE § 236.23; KY. REV. STAT. ANN. § 529.170; MONT. CODE ANN. § 45-5-710; N.D. CENT. CODE § 12.1-41-13; OR. REV. STAT. § 163.269; S.C. CODE ANN. § 16-3-2020.

96. N.C. GEN. STAT. § 14-43.16; OR. REV. STAT. § 163.269.

97. CAL. PENAL CODE § 236.23 (stating the defense does not apply to survivor-defendants who are charged with violent and serious felonies, as defined elsewhere, or human trafficking); KY. REV. STAT. ANN. § 529.170 (excluding capital offenses, Class A felonies, and Class B felonies involving the death, rape or sodomy, or serious physical injury of the victim); MONT. CODE ANN. § 45-5-710 (stating that only nonviolent offenses are covered, which are not defined); N.D. CENT. CODE § 12.1-41-13 (enumerating a list of offenses that are eligible for the affirmative defense, none of which are violent). *See generally* Zornosa, *supra* note 68, at 200 (pointing out that Kentucky's statute protects more human-trafficking survivor-defendants who are forced to commit crimes by their abusers since it is not limited to sex-related crimes).

besides limiting the kinds of offenses that are eligible.⁹⁸ One common limitation is a nexus requirement, under which the defendant must show a direct relationship between the trafficking and the crime. Statutes vary in their exact wording, but all require the survivor-defendant to show that their criminal offense was a “direct result” of their status as a then-victim of human trafficking.⁹⁹ For example, the Wyoming affirmative defense specifies that “[a] victim of human trafficking is not criminally liable for any commercial sex act or other criminal acts committed as a direct result of, or incident to, being a victim of human trafficking”¹⁰⁰

A few of the eleven broader state statutes also have a coercion requirement.¹⁰¹ For example, the California statute provides an affirmative defense when “the person was coerced to commit the offense as a direct result of being a human trafficking victim . . . and had a reasonable fear of harm.”¹⁰² The similarly worded Iowa statute also requires that the compulsion include a threat of serious injury.¹⁰³

Two of the eleven broader statutes require that the offense have been committed while the survivor-defendant was a victim of human trafficking.¹⁰⁴ The temporal requirement is the only limit in the Oklahoma statute, which is otherwise written very broadly.¹⁰⁵ It applies to human-trafficking survivor-defendants charged with any offense and does not contain a nexus or coercion requirement.¹⁰⁶

98. CAL. PENAL CODE § 236.23; IOWA CODE § 710A.3; KY. REV. STAT. ANN. § 529.170; MONT. CODE ANN. § 45-5-710; N.C. GEN. STAT. § 14-43.16; N.D. CENT. CODE § 12.1-41-13; OKLA. STAT. tit. 21, § 748(D); OR. REV. STAT. § 163.269; S.C. CODE ANN. § 16-3-2020; WIS. STAT. § 939.46(1m); WYO. STAT. ANN. § 6-2-708.

99. See CAL. PENAL CODE § 236.23; IOWA CODE § 710A.3; MONT. CODE ANN. § 45-5-710; N.D. CENT. CODE § 12.1-41-13; S.C. CODE ANN. § 16-3-2020; WIS. STAT. § 939.46(1m); WYO. STAT. ANN. § 6-2-708.

100. WYO. STAT. ANN. § 6-2-708(a).

101. CAL. PENAL CODE § 236.23; IOWA CODE § 710A.3.

102. CAL. PENAL CODE § 236.23(a); see also Jessica Aycock, *Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims*, CRIM. L. PRAC., Fall 2019, at 5, 10–11.

103. IOWA CODE § 710A.3 (“It shall be an affirmative defense . . . to a prosecution for a criminal violation directly related to the defendant’s status as a victim of [human trafficking], that the defendant committed the violation under compulsion by another’s threat of serious injury, provided that the defendant reasonably believed that such injury was imminent.”); see also Allison L. Cross, Comment, *Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, 44 MCGEORGE L. REV. 395, 407 (2013) (arguing that the Iowa statute can only be applied in a narrow range of circumstances since it contains a nexus requirement and requires that the offense be committed under coercion).

104. CAL. PENAL CODE § 236.23; OKLA. STAT. tit. 21, § 748(D) (Supp. 2020).

105. OKLA. STAT. tit. 21, § 748(D); see also Meghan Hilborn, Note, *How Oklahoma’s Human Trafficking Victim Defense Is Poised to Be the Boldest Stand Against Human Trafficking in the Country*, 54 TULSA L. REV. 457, 458 (2019) (“Oklahoma’s trafficking-victim defense is the broadest response to human trafficking in the country . . .”).

106. OKLA. STAT. tit. 21, § 748(D).

Altogether, the offense-based limitations, the nexus requirement, the coercion requirement, and the temporal requirement restrict survivor-defendants' ability to use these statutory affirmative defenses, leaving many of them at risk of conviction and retraumatization by the criminal justice system.

C. Domestic-Violence Statutes

While most states have adopted human-trafficking affirmative-defense statutes, only California, Illinois, and New York have passed laws explicitly acknowledging the link between criminal offenses and domestic violence. One critical difference between domestic-violence and human-trafficking statutes is that the latter provide affirmative defenses while the domestic-violence statutes do not. The domestic-violence statutes apply only at the sentencing stage or afterwards, and most of them provide only for state post-conviction review.

The domestic-violence statutes differ not only from human-trafficking statutes but also among themselves. For example, the statutes provide eligibility for different crimes and provide different types of relief to survivor-defendants. And while some apply to all forms of domestic violence, others apply only to IPV. Since IPV is a specific kind of domestic violence, statutes about domestic violence apply to IPV survivor-defendants, but statutes about IPV do not apply to all domestic-violence survivor-defendants. This Section outlines the California, Illinois, and New York statutes and provides comparisons between them.

1. IPV Statutes

In 2012, the California legislature passed the "Sin by Silence" bills,¹⁰⁷ named after a documentary film that drew attention to the injustice that IPV survivor-defendants face in the criminal justice system.¹⁰⁸ Section 1473.5 of the California Penal Code now permits IPV survivor-defendants to file for a writ of habeas corpus if they show that competent and substantial expert testimony about IPV would have affected the outcome of their trial but was not presented to the finder of fact.¹⁰⁹ And section 4801 requires parole boards to give "great weight" to any evidence that the prisoner experienced IPV and to consider the effects of the abuse on the prisoner at the time of the offense.¹¹⁰ It also prohibits parole boards from denying parole based on a finding that the prisoner "lacks insight" into their crime when the board is presented with evidence of IPV.¹¹¹ The two laws were intended to provide greater justice to IPV

107. Act of Sept. 30, 2012, ch. 803, 2012 Cal. Stat. 6437 (codified as amended at CAL. PENAL CODE § 1473.5 (West Supp. 2021)); Act of Sept. 30, 2012, ch. 809, 2012 Cal. Stat. 6454 (codified as amended at CAL. PENAL CODE § 4801 (West 2021)).

108. *Sin by Silence Bills*, *supra* note 92.

109. CAL. PENAL CODE § 1473.5(a) (West Supp. 2021).

110. *Id.* § 4801(b)(1) (West 2021).

111. *Id.* § 4801(b)(3).

survivor-defendants by giving them the opportunity to tell courts and parole boards about the abuse they experienced.¹¹²

In 2015, the Illinois legislature passed Public Act 099-0384, which allows for resentencing of some IPV survivors currently serving jail or prison sentences.¹¹³ To qualify for resentencing, the survivor must satisfy several factors: (1) the survivor was convicted of a forcible felony related to having been a victim of domestic violence perpetrated by an intimate partner (a nexus requirement),¹¹⁴ (2) no evidence of IPV was presented at the sentencing hearing, (3) the survivor was unaware of the mitigating nature of evidence of IPV at the time of sentencing, and (4) the new evidence must be likely to change the original sentence.¹¹⁵ Thus, both the California and the Illinois statutes apply only to IPV survivor-defendants after conviction, but the requirements survivor-defendants must satisfy to be considered for relief differ.

2. Domestic-Violence Statutes

Illinois Public Act 099-0384 also gives domestic-violence survivor-defendants the opportunity to present their past abuse as a mitigating factor during sentencing.¹¹⁶ The statute provides that if the defendant was or had been a victim of domestic violence and if the effects of that abuse tended to excuse or justify the defendant's criminal conduct, then the survivor-defendant's experiences should weigh in favor of withholding or minimizing a sentence.¹¹⁷ Public Act 099-0384 also includes a temporal limitation: the defendant must have been a victim of domestic violence at the time of the offense.¹¹⁸

In 2019, the New York legislature passed the Domestic Violence Survivors Justice Act (DVSJA), which gives courts discretion to give lower sentences, reduce the sentences of some currently incarcerated survivor-defendants, and

112. *Sin by Silence Bills*, *supra* note 92.

113. Act of May 25, 2015, Pub. Act 099-0384, § 10, 2015 Ill. Laws 5573, 5574–75 (codified at 735 ILL. COMP. STAT. 5/2-1401 (2020)).

114. Although this statute uses the term domestic violence, it is really talking about IPV since the abuse must be perpetrated by an intimate partner. The statute defines intimate partner as “a spouse or former spouse, persons who have or allegedly have had a child in common, or persons who have or have had a dating or engagement relationship.” 735 ILL. COMP. STAT. 5/2-1401(b-5) (2020).

115. *Id.*

116. Act of May 25, 2015, Pub. Act 099-0384, § 5, 2015 Ill. Laws 5573 (codified at 730 ILL. COMP. STAT. 5/5-5-3.1(a)(15) (2020)).

117. *Id.* This statute applies to domestic violence more broadly, not just IPV. It defines domestic violence to “include spouses, former spouses, parents, children, stepchildren and other persons related by blood or by present or prior marriage, persons who share or formerly shared a common dwelling, persons who have or allegedly have a child in common, persons who share or allegedly share a blood relationship through a child, persons who have or have had a dating or engagement relationship, persons with disabilities and their personal assistants, and caregivers.” 750 ILL. COMP. STAT. 60/103 (2020).

118. 730 ILL. COMP. STAT. 5/5-5-3.1 (2020).

resentence survivor-defendants to community-based alternatives.¹¹⁹ To be eligible for a reduced sentence under the DVSJA, a survivor-defendant must meet three requirements. First, the survivor-defendant must have been a victim of domestic violence¹²⁰ at the time of the offense. Second, the abuse must have been a significant factor in producing the defendant's offense.¹²¹ Third, the defendant's previously imposed sentence must have been "unduly harsh."¹²² To be eligible for resentencing, a survivor-defendant must meet these three requirements and be serving a sentence with a minimum or determinate term of eight years or more.¹²³

Although the statutes discussed in Section II.B recognize the impact of trauma resulting from domestic violence and human trafficking, they do not do nearly enough to end the criminalization of survival. Part III examines these shortcomings through a comparison of the current approaches to domestic violence and human trafficking. It then uses those observations to suggest several much-needed statutory interventions.

III. ENDING THE CRIMINALIZATION OF SURVIVAL

What would a meaningful consideration of trauma look like in the context of domestic violence and human trafficking? The domestic-violence and human-trafficking statutes discussed in Part II bring the law more in line with the current social-science research about trauma in these contexts.¹²⁴ They also recognize that survivor-defendants' offenses are driven by the abuse they experienced.¹²⁵ By granting affirmative defenses, resentencing, habeas petitions, and parole consideration to survivor-defendants, the statutes recognize that survivor-defendants need rehabilitation, not prolonged separation from their families and communities through incarceration.¹²⁶

Nonetheless, most of these reform efforts have major shortcomings that prevent meaningful relief. This Part explores those shortcomings through a

119. Domestic Violence Survivors Justice Act, ch. 31, 2019 N.Y. Laws 144 (codified as amended at N.Y. CRIM. PROC. LAW § 440.47 and N.Y. PENAL LAW §§ 60.12, 70.45 (McKinney Supp. 2021)); Cynthia Feathers, *Domestic Violence Survivor-Defendants: New Hope for Humane and Just Outcomes*, N.Y. STATE BAR ASS'N J., Mar. 2020, at 15, 16.

120. The DVSJA applies to domestic violence broadly, not just to IPV. N.Y. PENAL LAW § 60.12(1) (McKinney Supp. 2021) (defining a victim of domestic violence as someone subjected to "substantial physical, sexual or psychological abuse" by a member of their family or household). "Family" and "household" are defined as people related by blood or affinity, currently or formerly married partners, people with a child in common, and people not related by blood or affinity who are or have been in an intimate relationship. N.Y. CRIM. PROC. LAW § 530.11(1) (McKinney Supp. 2021).

121. N.Y. PENAL LAW § 60.12(1).

122. *Id.*

123. N.Y. CRIM. PROC. LAW § 440.47.

124. See Feathers, *supra* note 119, at 15, 16.

125. *Id.*

126. *Id.*

comparative analysis of the domestic-violence and human-trafficking statutes. Using statutes and case studies, this Part explains how the criminal justice system fails domestic-violence and human-trafficking survivor-defendants. It examines issues with current statutes, including their failures to provide an affirmative defense at trial, failures to provide for resentencing, limitations to certain offenses, limitations to crimes committed during the abuse or trafficking, and nexus requirements. It then argues that including only a modified nexus requirement as a limitation in future statutes is the optimal and politically attainable way to stop the criminalization of survival.¹²⁷

A. Provide an Affirmative Defense

While many states have adopted an affirmative human-trafficking defense, no such defense exists in the context of domestic violence. Thus far, the laws that increase consideration of domestic violence apply only after a conviction.¹²⁸ But the criminal justice system must consider trauma resulting from domestic violence before the sentencing stage. Specifically, future statutes should provide an affirmative defense to survivor-defendants as the human-trafficking statutes do.¹²⁹ This would enable domestic-violence survivor-defendants to avoid the negative consequences of a criminal conviction, including the retraumatizing effects of incarceration.

The California and Illinois domestic-violence laws apply only after the survivor-defendant has already been convicted and incarcerated for a period of time.¹³⁰ Although none of the three laws granting broad relief to domestic-violence survivor-defendants create affirmative defenses, several state statutes already provide an affirmative defense to specific categories of criminal charges for domestic-violence survivor-defendants. For instance, seventeen states

127. This intervention is intended as a stepping stone toward the abolition of the prison-industrial complex.

128. CAL. PENAL CODE § 1473.5(b) (West Supp. 2021) (“This section is limited to violent felonies . . . that resulted in judgments of conviction or sentence after a plea or trial as to which expert testimony . . . may be probative on the issue of culpability.”); *id.* § 4801(a) (West 2021) (“The Board of Parole Hearings may report to the Governor, from time to time, the names of any and all persons imprisoned in any state prison who, in its judgment, ought to have a commutation of sentence or be pardoned and set at liberty on account of good conduct, or unusual term of sentence, or any other cause, including evidence of intimate partner battering and its effects.”); 730 ILL. COMP. STAT. 5/5-5-3.1(a)(15) (2020); 735 ILL. COMP. STAT. 5/2-1401(a) (2020) (“Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section.”); N.Y. PENAL LAW § 60.12(1) (McKinney Supp. 2021) (“Notwithstanding any other provision of law, where a court is imposing sentence upon a person . . . the court . . . may instead impose a sentence in accordance with this section.”).

129. See *supra* Section II.B.

130. CAL. PENAL CODE §§ 1473.5, § 4801; 730 ILL. COMP. STAT. 5/5-5-3.1(a)(15); 735 ILL. COMP. STAT. 5/2-1401.

provide an affirmative defense for parental kidnapping when the alleged kidnapper was fleeing IPV.¹³¹ In addition, several states have created an affirmative defense to child endangerment if the defendant was a victim of IPV.¹³² Furthermore, the human-trafficking statutes provide survivor-defendants with an affirmative defense. Domestic violence statutes do not provide affirmative defenses despite the fact these statutes are driven by knowledge that trauma from domestic violence and human trafficking reduces the culpability of survivor-defendants.¹³³

The current discrepancy between human-trafficking and domestic-violence statutes lacks justification. Domestic violence and human trafficking are similar kinds of abuse.¹³⁴ This abuse includes sex trafficking, forced participation in group crimes, forced commission of theft or other criminal offenses, economic abuse, restrictions on travel or work, and forced use of drugs or alcohol.¹³⁵ Thus, domestic-violence and human-trafficking survivor-defendants often experience the same kinds of coercive violence over the course of multiple or prolonged traumatic events. Similarly, survivor-defendants of domestic violence and human trafficking may turn to substance abuse as a way of coping with physical and emotional pain.¹³⁶ Given the parallels in their traumatic experiences and the impact of those experiences, the difference in legal responses is unjustified.

To be sure, even an affirmative defense does not fully avoid dual victimization since survivor-defendants are treated as criminals before they can raise the affirmative defense at trial.¹³⁷ But it is a start. An affirmative defense would spare domestic-violence survivor-defendants the negative consequences of

131. Cross, *supra* note 43, at 282. In Arizona, for example, a defendant has an affirmative defense to a charge under the parental-kidnapping statute if “[t]he defendant has begun the process to obtain an order of protection or files a petition for custody . . . and the order of protection or petition states the defendant’s belief that the child was at risk if left with the other parent,” the defendant has the right of custody and is the child’s parent, and the defendant “[h]as a good faith and reasonable belief that the taking, enticing or withholding is necessary to protect the child from immediate danger” or “[i]s a victim of domestic violence by the other parent and has a good faith and reasonable belief that the child will be in immediate danger if the child is left with the other parent.” ARIZ. REV. STAT. § 13-1302(C) (2020).

132. Cross, *supra* note 43, at 272–73, 272 n.80; *see also, e.g.*, MICH. COMP. LAWS ANN. § 750.136b(10) (West Supp. 2020) (“It is an affirmative defense to a prosecution under this section that the defendant’s conduct involving the child was a reasonable response to an act of domestic violence in light of all the facts and circumstances known to the defendant at that time.”).

133. *Cf. NYS Bill and Veto Jackets: 2019, Chapter 31*, N.Y. STATE ARCHIVES 6, <https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/85269> [perma.cc/8BMT-BPYW] (saying the purpose of the Domestic Violence Survivors Justice Act is to remedy “the unjust ways in which the criminal justice system responds to and punishes domestic violence survivors who act to protect themselves from an abuser’s violence”).

134. *See supra* Section I.A.

135. *See supra* Section I.A.

136. *See supra* Section I.A.

137. Blizard, *supra* note 2, at 646.

unjust incarceration and the collateral consequences of conviction.¹³⁸ Since domestic-violence statutes do not provide affirmative defenses, survivor-defendants are convicted and may spend years in prison for crimes inextricably linked to their own abuse before they can challenge the injustice of their conviction.¹³⁹ These survivor-defendants are also burdened with the negative collateral consequences accompanying their criminal convictions, such as barriers to securing housing, employment, public assistance, a driver's license, and financial aid.¹⁴⁰

Spending time in prison denies people suffering from these kinds of trauma the care they need and oftentimes retraumatizes them. Between 32% and 66% of inmates experience physical victimization while in prison.¹⁴¹ Inmates also experience sexual assault at extremely high rates.¹⁴² Creating an affirmative defense that forces courts to consider a defendant's trauma resulting from domestic violence before the sentencing stage would help prevent this further harm. Like human-trafficking survivor-defendants, domestic-violence survivor-defendants have reduced culpability due to the connection between their crimes and their abuse and thus do not deserve to bear the negative consequences that come with a criminal conviction.

B. Allow for Resentencing

Domestic-violence and human-trafficking laws should also explicitly allow for the resentencing of defendants who were unable to bring up their abuse at trial. As the California "Sin by Silence" laws recognized, evidence of IPV should be heard in all cases in which it might apply, even if the defendant has already been convicted and incarcerated for several years.¹⁴³ Resentencing provisions are necessary because although the criminal justice system still often does not understand domestic violence and human trafficking or their implications, it considered these issues even less in the past.¹⁴⁴ In some cases, evidence of domestic violence was even excluded from the courtroom.¹⁴⁵ As

138. See U.S. COMM'N ON C.R., *supra* note 4, at 1–3.

139. See *supra* Section II.C.

140. See U.S. COMM'N ON C.R., *supra* note 4, at 1–2.

141. Hattem, *supra* note 2, at 998.

142. See *id.* (reporting that 43% of Black male prisoners overheard a sexual assault during incarceration and 16% witnessed a fellow inmate being sexually assaulted); see also PA. COAL. AGAINST RAPE, FACTS ABOUT SEXUAL ASSAULT IN PRISON 1 (2013), https://pcar.org/sites/default/files/resource-pdfs/prea_facts_about_sexual_assault_in_prison.pdf [perma.cc/Y55F-F7TP] (“One in 10 former state prisoners reported one or more incidences of sexual victimization . . .”).

143. *Sin by Silence Bills*, *supra* note 92.

144. Debra Pogrud Stark & Jessica Choplin, *Seeing the Wrecking Ball in Motion: Ex Parte Protection Orders and the Realities of Domestic Violence*, 32 WIS. J.L. GENDER & SOC'Y 13, 63 (2017).

145. See, e.g., LA. STAT. ANN. § 15:482 (repealed 1988) (barring courts from even considering domestic violence in cases where there was no violent act toward the defendant at the time of the crime). Louisiana's Code of Evidence now permits evidence about the effects of prior abuse if a survivor-defendant pleads self-defense and there is a history of abuse. LA. CODE EVID. ANN. art. 404(A)(2)(a), (B)(2) (2017).

discussed earlier, laws recognizing the pathways between human trafficking and criminal behavior also did not exist until 2005, leading to many unjust incarcerations of human-trafficking survivor-defendants.¹⁴⁶

C. Fewer Limitations on Types of Crimes

An examination of domestic-violence and human-trafficking laws shows that limiting trauma defenses to only defendants who are charged with certain crimes ignores the reality of trauma in these contexts and criminalizes survival. Currently, two of the three domestic-violence statutes, and the vast majority of the human-trafficking statutes, are limited to a small range of eligible crimes. For example, the Illinois IPV law is limited to survivor-defendants who are convicted of a “forcible felony.”¹⁴⁷ The California law similarly limits petitions for habeas corpus to those convicted of “violent felonies.”¹⁴⁸ In contrast, New York’s DVSJA is not limited to the self-defense context, which means that it has the potential to provide more just sentences to domestic-violence survivor-defendants who are forced to commit crimes by their abusers or who turn to substances as a way of coping with abuse.¹⁴⁹ The California and Illinois laws do not apply to those kinds of offenses.¹⁵⁰

There is also a great deal of disparity between human-trafficking statutes as to which offenses are eligible for an affirmative defense. All but eleven states limit the defense to prostitution and other sex-related crimes.¹⁵¹ Of the eleven that apply more broadly, six of those are also limited to certain offenses.¹⁵²

Limiting consideration of trauma to certain criminal offenses ignores domestic violence and human trafficking’s effects. For example, human traffickers trap and control their victims through threats, assaults, debt, shaming, isolation, and false promises.¹⁵³ This atmosphere of control and abuse can lead victims of domestic violence and human trafficking to engage in criminal behavior in many ways, including forced commission of nonsexual crimes; using violence to protect themselves or others, or to escape their trafficker; and substance abuse.¹⁵⁴ In the context of IPV, survivor-defendants may be falsely accused of kidnapping children when fleeing an abuser or convicted for failing to protect their children from their abuser.¹⁵⁵ Limiting those who are eligible for relief to only those charged with violent crimes does not account for the

146. See *supra* text accompanying note 91.

147. 735 ILL. COMP. STAT. 5/2-1401(b-5) (2020).

148. CAL. PENAL CODE § 1473.5(b) (West Supp. 2021).

149. Feathers, *supra* note 119, at 15, 16–17.

150. See *supra* Part II.

151. See *supra* text accompanying note 94.

152. See *supra* text accompanying note 95.

153. *Sex Trafficking*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 28, 2021), <https://www.cdc.gov/violenceprevention/sexualviolence/trafficking.html> [perma.cc/W347-ZHWW].

154. See *supra* Section I.A.

155. See *supra* Section I.B.

many ways that domestic violence and human trafficking can lead to nonviolent criminal behavior.

In the context of human trafficking specifically, limiting the defense to only sex-related crimes ignores the plight of “bottom girls,” a term used to refer to the victim who has been with the trafficker for the longest amount of time and is therefore higher in the hierarchy of human-trafficking victims.¹⁵⁶ While bottom girls are sometimes the most abused of a trafficker’s victims, they are also used by their traffickers to commit trafficking crimes and shield the trafficker from liability.¹⁵⁷ Several human-trafficking statutes recognize this dynamic by explicitly granting an affirmative defense to defendants who are charged with human trafficking but are also victims of human trafficking.¹⁵⁸ New statutes should not limit the range of eligible crimes in order to avoid criminalizing survival.

D. *Issues with Limitations Based on When the Abuse Occurred*

Trauma caused by domestic violence and human trafficking can have long-lasting effects that continue even after the abuse ends. For this reason, domestic-violence and human-trafficking statutes must apply to any crime related to a survivor-defendant’s abuse, regardless of whether the survivor-defendant was experiencing abuse at the time of the crime or had experienced abuse in the distant past. Due to the potentially long-lasting effects of trauma in these contexts, no survivor-defendant should be prevented from invoking an affirmative defense because their offense did not occur while they were experiencing abuse. Thus, future statutes should impose a nexus requirement instead of a temporal limitation.¹⁵⁹

Many of the current laws attempting to account for trauma in the context of domestic violence and human trafficking include rigid temporal requirements. For example, New York’s DVSJA only applies to survivor-defendants who experienced domestic violence “at the time of the instant offense.”¹⁶⁰ The practical implications of this requirement are still unclear. One court has held that while the defendant does not have to be enduring abuse at the moment they commit the offense, abuse that occurred years earlier should not be given much weight.¹⁶¹ The California IPV laws and the Illinois domestic-violence

156. See Blizard, *supra* note 2, at 639–40.

157. *Id.*

158. N.C. GEN. STAT. § 14-43.16 (2019); OR. REV. STAT. § 163.269 (2019); S.C. CODE ANN. § 16-3-2020 (Supp. 2020).

159. See *infra* Section III.E.

160. N.Y. PENAL LAW § 60.12(1) (McKinney Supp. 2021).

161. *People v. Addimando*, 120 N.Y.S.3d 596, 619 (Dutchess Cnty. Ct. 2020) (stating that “alleged events that occurred years earlier may be given more limited weight” when determining whether the DVSJA’s temporal requirement is met); see also N.Y. PENAL LAW § 60.12(1) (“[A]t the time of the instant offense, the defendant [must be] a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant . . .”).

law are similarly limited to survivor-defendants who were subject to domestic violence at the time of the offense.¹⁶² Human-trafficking laws are more forgiving. While some are also limited to offenses that occurred when the defendant was a victim of human trafficking,¹⁶³ others have no time limitation at all.¹⁶⁴

Future statutes must extend past the time of active abuse in order to account for the long-lasting effects of trauma that might cause criminal activity.¹⁶⁵ For instance, abusers may force or pressure their domestic-violence or human-trafficking victims into using drugs or alcohol in order to gain more control over them.¹⁶⁶ This can result in addiction, which can have lasting effects even after the abuse ends.¹⁶⁷ In addition, domestic-violence and human-trafficking survivors often use substances to cope with physical pain, mental-health problems, and emotional pain incurred from past abuse.¹⁶⁸ In other words, both domestic violence and human trafficking can lead to substance-related crimes that last after the abuse has ended.

Moreover, the economic effects of domestic violence and human trafficking can last well after the abuse is over. Since between 24% and 52% of survivors lose at least one job due to IPV¹⁶⁹ and human-trafficking victims are not paid for their labor, survivors of these two kinds of violence can be economically disadvantaged past the time of the abuse. Thus, survivors may turn to criminal behavior out of economic necessity, even after the abuse is over.¹⁷⁰ Domestic-violence and human-trafficking statutes must account for these long-lasting effects by not limiting coverage to offenses that happen during the period of abuse, as long as the offenses are related to the abuse.

In the context of IPV, there are additional reasons to allow survivor-defendants who committed an offense after leaving their abusive relationship to invoke an affirmative defense. Refusing to do so fails to account for the realities of IPV. Research has shown that the most dangerous time for someone

162. CAL. PENAL CODE § 4801(b)(1) (West 2021) (“The board, in reviewing a prisoner’s suitability for parole . . . shall give great weight to any information or evidence that, at the time of the commission of the crime, the prisoner had experienced intimate partner battering . . .”); 730 ILL. COMP. STAT. 5/5-5-3.1 (2020) (favoring reduction of a sentence if “[a]t the time of the offense, the defendant is or had been the victim of domestic violence”).

163. See, e.g., OKLA. STAT. tit. 21, § 748(D) (Supp. 2020) (“It is an affirmative defense to prosecution for a criminal offense that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking.”).

164. See, e.g., WYO. STAT. ANN. § 6-2-708(a) (2021) (“A victim of human trafficking is not criminally liable for any commercial sex act or other criminal acts committed as a direct result of, or incident to, being a victim of human trafficking . . .”).

165. See *supra* Section I.C.

166. See DeHart, *supra* note 15, at 1368.

167. See Stoklosa et al., *supra* note 33, at 25–26.

168. Wright et al., *supra* note 14, at 1616.

169. Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 677 (2008).

170. DICHTER WITH OSTHOFF, *supra* note 22, at 6.

experiencing IPV is after they leave their abuser.¹⁷¹ In fact, 77% of homicides related to IPV occur after the relationship ends,¹⁷² and the risk that the survivor will be killed by the abuser increases dramatically in the two-week period immediately after the survivor leaves the relationship.¹⁷³ This risk of violence remains elevated for at least two years.¹⁷⁴ Since there is an increased risk of violence after the relationship ends, there is a corresponding increased risk of the need to engage in self-defense. Statutes addressing trauma should account for this elevated risk by providing IPV survivor-defendants with an affirmative defense, so long as their offense was related to their abuse.

E. Nexus Requirements

1. A Problem with Nexus Requirements

Many domestic-violence and human-trafficking statutes currently impose a nexus requirement under which a survivor-defendant must show a relationship between their experience of abuse and the crime that they committed. For example, the DVSJA says that the abuse must be “a significant contributing factor to the defendant’s criminal behavior,”¹⁷⁵ and many human-trafficking statutes are limited to scenarios when the offense is a “direct result” of being trafficked.¹⁷⁶ But the meaning of “direct” is unclear. This leaves determining who is eligible for relief to judicial discretion, which is problematic since judges have different levels of understanding about domestic violence and human trafficking. Thus, nexus requirements enable judges who are unaware of, or who simply ignore, the links between trauma and criminal offenses to refuse to grant statutory relief.

For example, Nicole Addimando was convicted of intentional murder after killing one of her traffickers.¹⁷⁷ Nicole presented compelling evidence, including eyewitnesses and photographs, documenting years of severe, sadistic

171. *Why Do Victims Stay?*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/why-do-victims-stay> [perma.cc/FS6T-V3TH]; see also Jana Kasperkevic, *Private Violence: Up to 75% of Abused Women Who Are Murdered Are Killed After They Leave Their Partners*, GUARDIAN (Oct. 20, 2014, 4:00 PM), <https://www.theguardian.com/money/us-money-blog/2014/oct/20/domestic-private-violence-women-men-abuse-hbo-ray-rice> [perma.cc/3GJL-GZNY] (reporting that 50%–75% of IPV homicides happen after the survivor has left the abuser).

172. *Eighteen Months After Leaving Domestic Violence Is Still the Most Dangerous Time*, BATTERED WOMEN’S SUPPORT SERVS. (June 11, 2020), <https://www.bwss.org/eighteen-months-after-leaving-domestic-violence-is-still-the-most-dangerous-time> [perma.cc/MNM2-2TAF].

173. See *supra* note 82 and accompanying text.

174. *Eighteen Months After Leaving Domestic Violence Is Still the Most Dangerous Time*, *supra* note 172.

175. N.Y. PENAL LAW § 60.12(1) (McKinney Supp. 2021). Similarly, the Illinois law is limited to crimes where “the movant’s participation in the offense was related to him or her previously having been a victim of domestic violence as perpetrated by an intimate partner.” 735 ILL. COMP. STAT. 5/2-1401(b-5) (2020).

176. See, e.g., WIS. STAT. § 939.46(1m) (2019–2020).

177. *People v. Addimando*, 120 N.Y.S.3d 596, 598 (Dutchess Cnty. Ct. 2020).

sexual and physical abuse by multiple people.¹⁷⁸ This included evidence that the man she killed subjected her to horrific abuse, including burning her vagina multiple times with a spoon heated on a stove, raping her with a bottle, whipping her, beating her, and telling her twice on the night of his death that he was going to kill her.¹⁷⁹

Nicole tried to invoke the DVSJA,¹⁸⁰ but the judge refused to apply the statute to Nicole's case, citing Nicole's failure to provide enough evidence to prove that the abuse was a significant contributing factor to the crime.¹⁸¹ The judge highlighted that Nicole had shot her abuser while he was sleeping instead of using that opportunity to escape.¹⁸² The judge's decision ignored the reality that many people who experience IPV do not believe that they are able to successfully leave the relationship.¹⁸³ This belief is justified: research has confirmed that personal danger significantly increases for those experiencing IPV after they try to leave the relationship.¹⁸⁴

Taylor Partlow's case provides another example of a judge using the nexus requirement to unjustly deem a survivor-defendant unworthy of relief. Taylor was convicted of first-degree manslaughter and sentenced to eight years in prison after stabbing her abuser.¹⁸⁵ Numerous witnesses confirmed that Taylor was subjected to severe abuse at the hands of her boyfriend, including being dragged across the floor by her hair and beaten, choked in a car, verbally abused, and forced to accompany her abuser to his job so that he could see her.¹⁸⁶ Immediately after the stabbing, Taylor was found naked and with a black eye, corroborating her self-defense claim.¹⁸⁷ Nevertheless, the judge found that the abuse was not a significant contributing factor to the offense and declined to apply the DVSJA, calling the relationship "mutually abusive" and noting that Taylor had used cocaine prior to the stabbing.¹⁸⁸ Not only does the judge's reasoning fail to take the abuse that Taylor was subjected to seriously, it also fails to account for the links between IPV and substance

178. *Id.* at 618.

179. *Id.* at 602–03.

180. N.Y. PENAL LAW § 60.12(1).

181. *Addimando*, 120 N.Y.S.3d at 619–20; see also Christopher L. Hamilton, "Alive but Still Not Free": Nikki Addimando and Judicial Failure to Apply the Domestic Violence Survivors Justice Act, 100 B.U. L. REV. ONLINE 174, 175 (2020) (arguing that Nicole was an ideal candidate for relief at sentencing under the DVSJA).

182. *Addimando*, 120 N.Y.S.3d at 619.

183. Messerschmidt, *supra* note 82, at 620–24.

184. See *supra* notes 173–176 and accompanying text.

185. Patrick Lakamp, 'Epitome of a Domestic Violence Victim' or Not, She's Still Going to Prison, BUFFALO NEWS (July 9, 2020), https://buffalonews.com/news/local/epitome-of-a-domestic-violence-victim-or-not-shes-still-going-to-prison/article_53129e5d-5ae5-5845-a58b-d1325352982f.html [perma.cc/KMK7-MZ36].

186. *Id.*

187. *Id.*

188. *Id.*

abuse.¹⁸⁹ Taylor's case illustrates the way in which nexus requirements allow judges to inconsistently and inappropriately determine who is "worthy" of a defense.

The decisions in both these cases are also representative of the gender bias in the judicial system as a whole. As of 1996, thirty-one states had published studies finding that gender bias in the courts was an issue.¹⁹⁰ Judges have been shown to generally view women as less credible and more likely to exaggerate than men.¹⁹¹ Judges are also influenced by myths about domestic violence, may not understand why people often do not leave their abusive relationships, and tend to doubt domestic violence survivor-defendants' testimony.¹⁹² This shows that judges may not be able to appropriately apply a nexus requirement and may instead use it to deny relief to survivor-defendants based on their own implicit biases.

2. Why a Nexus Requirement Is Desirable and How to Mitigate the Problem

Part III has identified a number of common shortcomings in laws aimed at addressing the link between domestic violence, human trafficking, and criminal behavior. For reasons explained above, future domestic-violence and human-trafficking statutes should provide survivor-defendants with an affirmative defense and allow for resentencing. As shown, there are problems with the limitations existing statutes impose, but some kind of limiting principle is necessary in order to ensure that these statutes benefit only the intended population: survivor-defendants whose culpability is lessened because their crime is connected to their abuse. A single limitation is sufficient to achieve this goal since, as seen, multiple limitations deny relief to a larger number of survivors whom the statutes were intended to benefit.

Although it also has problems, a nexus requirement is the most preferable limitation. As previously explained, both temporal limitations and restrictions to certain kinds of crimes exclude some survivor-defendants whose abuse is related to their offense. On the other hand, a nexus requirement ensures that all survivor-defendants who commit offenses related to their abuse will have an affirmative defense, at least in theory. Whether a survivor-defendant's abuse is related to their offense is highly fact-dependent. Although it would be ideal if this inquiry could be conducted by the courts, the cases of Nicole Addimando and Taylor Partow suggest that courts are sometimes unable to

189. See *supra* Section I.A.

190. Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 3 (1996).

191. Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 176-77 (2009).

192. *Id.* at 177-78.

meaningfully address the impact of trauma related to domestic violence and human trafficking in their sentencing decisions.¹⁹³

In order to mitigate the potential harm of a nexus requirement, it is essential for any new statute with a nexus requirement to also mandate judicial education. Because these statutes substantially expand judicial discretion, training is necessary to combat the apparent judicial bias against granting relief to survivor-defendants.¹⁹⁴ There must also be a mechanism for ensuring that judges are actually trained. After many jurisdiction-specific task forces found gender bias in the courts, some recommended judicial education as a way to ameliorate the problem.¹⁹⁵ But even where education task forces were created, educational programs were not always implemented.¹⁹⁶ New legislation granting survivor-defendants an affirmative defense could avoid this problem by specifying how and when judicial education will take place as part of the same piece of legislation.

It is also essential for the nexus requirement to be carefully worded so that courts apply the affirmative defense broadly. For example, the Wyoming human-trafficking statute says that “[a] victim of human trafficking is not criminally liable for any commercial sex act or other criminal acts committed as a direct result of, or incident to, being a victim of human trafficking”¹⁹⁷ Including “or incident to” makes it clear that stealing due to an abuser’s economic control or committing an offense related to controlled substances should be covered as long as it is related to the abuse experienced by the survivor-defendant. As discussed above, it does not make sense to exclude offenses that some may deem to be less “directly” connected to abuse than others.¹⁹⁸ The pathways discussed in Part I are inextricably linked to abuse and thus lessen the survivor’s culpability.¹⁹⁹ Finally, human-trafficking statutes that already use this “or incident to” language show that this kind of nexus requirement is politically feasible and does not lead to widespread inappropriate application of the defense.²⁰⁰

Including a nexus requirement will also make future domestic-violence and human-trafficking statutes more politically attainable. Existing statutes in these contexts limit eligibility to only certain kinds of crimes or impose temporal or nexus requirements. This trend shows that some limiting principle is politically necessary in statutes granting relief to survivor-defendants.

193. See *supra* Section III.E.1.

194. Shuman, *supra* note 13, at 1013 (arguing the New York DVSJA must be accompanied by judicial education about domestic violence for survivor-defendants to be able to successfully invoke it).

195. Swent, *supra* note 190, at 72.

196. *Id.* (finding one such group appointed to carry out judicial education was unable to do so because the group received no staff or funding).

197. WYO. STAT. ANN. § 6-2-708(a) (2021).

198. See *supra* note 27.

199. See *supra* Part I.

200. See S.C. CODE ANN. § 16-3-2020 (Supp. 2020); WYO. STAT. ANN. § 6-2-708(a).

CONCLUSION

The wave of domestic-violence and human-trafficking statutes enacted over the past decade are a step toward creating a criminal justice system that accounts for the relationship between trauma in these contexts and culpability. But current approaches suffer from critical shortcomings that deny survivor-defendants meaningful relief. Comparing statutes from different states and different contexts reveals that future statutes addressing domestic violence or human trafficking must provide an affirmative defense at trial and allow for resentencing to meaningfully account for the effects of trauma on survivor-defendants. These statutes should also not limit the defense to a narrow list of eligible crimes or impose temporal limitations. Although there are issues with nexus requirements, future statutes should include a broadly worded nexus requirement accompanied by a judicial-education mandate. Otherwise, the criminal justice system will continue to unjustly incarcerate survivor-defendants, compounding their existing trauma instead of redressing it.