

STRIPPING AGENCY FROM TOP TO BOTTOM: THE
NEED FOR A SENTENCING GUIDELINE
SAFETY VALVE FOR BOTTOMS PROSECUTED
UNDER THE FEDERAL SEX TRAFFICKING
STATUTES

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ABSTRACT—In domestic sex trafficking, the trafficker often promotes a victim to the coveted position of “lead prostitute,” or “bottom.” Once in this position, the victim engages in acts for which she can be prosecuted under federal sex trafficking statutes that carry ten- and fifteen-year mandatory minimum sentences. To recognize bottoms’ victimization and resulting lack of genuine agency, this Note proposes a Sentencing Guideline safety valve provision. Creating a safety valve would provide sentencing judges with necessary discretion to impose sentences below statutory floors in appropriate cases.

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INTRODUCTION

Keosha Jones, a twenty-one-year-old woman, held two fourteen-year-old runaways in a hotel room, capitalizing on the girls' distance from home and lack of means to support themselves in order to force them to work as prostitutes for her and her pimp, Derrick Hayes.¹ Jones purchased clothes for the girls, posted advertisements online (calling the girls “[t]wo ebony princesses that like to . . . have fun any way u want”), solicited clients for their sexual encounters, set the prices, took phone calls to set up their “dates,”² and collected all of the money that they earned.³ At one point, Jones hired a man to hurt one of the girls “real bad.”⁴

Federal prosecutors indicted Jones for these acts under federal sex trafficking statutes that carried mandatory minimum sentences of fifteen years.⁵ Jones, however, cooperated against Hayes and helped the

¹ Elaine Silvestrini, *Child Sex Trafficker Was Victim as a Teen*, Tampa Bay Times: TBO (Jan. 11, 2015), <http://www.tbo.com/news/crime/child-sex-trafficker-was-victim-as-a-teen-20150111/> [https://perma.cc/5TBX-C5KW].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ For an in-depth discussion of the federal sex trafficking statutes, see *infra* Section I.C.

government indict and convict him.⁶ Because of her cooperation, Jones spent only six months behind bars instead of fifteen years.⁷ This may seem incongruous; if Jones did so much to retain, advertise, and hurt her minor victims, then why did the government not prosecute her to the fullest extent of the law? The simple answer is because the two girls were not the only victims in this scenario. Jones was Hayes's "bottom girl" (or "bottom" or "bottom bitch"), the prostitute most loyal to him and with the most responsibility among his "stable" of prostitutes.⁸ What she did to the girls, she did at Hayes's command. Hayes also forced Jones to engage in prostitution for him, requiring her to give him both her own and the girls' earnings.⁹

As Hayes's bottom, Jones was at the top of the hierarchy of his prostitutes, but Hayes did not spare her from brutal beatings inflicted to keep her under his control.¹⁰ Hayes completely controlled Jones, and she regularly endured physical and verbal assaults.¹¹ Jones met Hayes when she was fifteen.¹² She believed he loved her.¹³ The abuse began when Jones refused to have sex with Hayes, so he beat and threatened her until she succumbed.¹⁴ Hayes soon forced Jones into having sex with strangers, and she became addicted to drugs and dropped out of school.¹⁵ Hayes beat her frequently, often choking her until she passed out.¹⁶ Jones ended up in the emergency room many times.¹⁷ When she tried to escape, Hayes would track her down, beat her, and threaten her and her family.¹⁸

Learning of the abuse that Jones endured at Hayes's hands makes her more sympathetic; clearly, it is easy to see her as a victim.¹⁹ Nonetheless, Jones, like most bottoms, committed similar trafficking offenses against

⁶ *Silvestrini, supra* note 1.

⁷ *Id.*

⁸ *Id.*; Karen Zraick, 8 *Charged in Brooklyn in Sex-Trafficking Case*, N.Y. TIMES (June 3, 2010), <http://www.nytimes.com/2010/06/03/nyregion/03sextrafficking.html> [https://perma.cc/V7PV-DLDB]. For an in-depth discussion of bottoms, see *infra* Section II.B.

⁹ *Silvestrini, supra* note 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Even Jones's sentencing judge noted that "[s]he, in a very real sense, is a victim herself." *Silvestrini, supra* note 1.

other underage victims. Does this make her a victim or a perpetrator?²⁰ No black and white answer exists: the fact that traffickers strip bottoms of their “agency”²¹ to force them to become perpetrators themselves is enveloped in shades of gray.²² Traffickers routinely employ abuse and manipulation to strip away bottoms’ agency, so that they will perform virtually any act at their trafficker’s command. Many of those acts committed by the bottoms constitute federal crimes prosecutable under various sex trafficking statutes.

To explain the often-conflicting goals of responding to victims’ needs and prosecuting human trafficking perpetrators, Part I of this Note examines the history of human trafficking legislation in the United States, specifically the Mann Act and the Trafficking Victims Protection Act (TVPA) of 2000. Part I examines the elements of both acts’ attendant sex trafficking statutes, 18 U.S.C. §§ 1591, 2422, and 2423. Finally, Part I surveys the statutes’ hefty mandatory minimums and high sentencing guidelines ranges.²³

In Part II, this Note provides background on how traffickers target vulnerable victims, and describes the deceptive, violent techniques that traffickers use to recruit, groom, and maintain their victims. In addition, Part II describes the bottom’s role within a trafficker’s commercial sex operation, including the bottoms’ roles as both victims and perpetrators who commit trafficking offenses on behalf of their traffickers.

Part III acknowledges that many prosecutors understand the complexities attendant to the offenses bottoms commit on behalf of their traffickers and therefore do not charge bottoms with statutes that carry mandatory minimums. Prosecutors do, however, often leverage the possibility of bringing these more severe charges in order to pressure the

²⁰ Throughout this Note, victims, including bottoms, are referred to with female pronouns, and traffickers with male pronouns. Certainly not every trafficking situation follows those gender norms—victims can be boys and men and traffickers can be girls and women; however, because the typical trafficking situation follows the male trafficker and female victim model, this Note uses the corresponding pronouns for simplicity.

²¹ As used throughout this Note, “agency” means the “[a]bility or capacity to act or exert power” independently. *Agency*, OXFORD ENGLISH DICTIONARY (3d ed. 2012).

²² See Transcript of Sentencing Hearing at 6, *United States v. Evans*, No. 2:09-cr-00196 (E.D. Wis. July 17, 2012) [hereinafter Transcript of Sentencing Hearing, *Evans*] (quoting the bottom’s statement during allocation that “[i]t’s bad that the law only sees things in black and white and that they feel that you always have a choice”).

²³ Although *United States v. Booker*, 543 U.S. 220 (2005), provided judges with discretion in applying the U.S. Sentencing Guidelines, it did nothing to limit the harsh effect of a mandatory minimum sentence. See, e.g., Hon. Victoria A. Roberts, *Federal Sentencing Post-Booker*, MICH. B.J., Dec. 2007, at 31 (“While expanding discretion, *Booker* did not give trial courts discretion to depart below mandatory minimums in the absence of § 3553(e) motions.”).

bottoms to cooperate and testify against their traffickers, which can be extremely traumatic for bottoms. Because charging decisions are the sole prerogative of the U.S. Attorney's Office, there is currently no mechanism in the system to counterbalance this prosecutorial power. This is the impetus behind the changes proposed in Part IV.

Specifically, in Part IV, this Note suggests adding a statutory safety valve to the U.S. Sentencing Guidelines (U.S.S.G.) for trafficking victims who perpetrate trafficking offenses. Such a safety valve would allow prosecutors and courts to address with greater specificity any factors relevant to sentencing bottoms fairly. It also would give defense attorneys an opportunity to argue that mitigating factors exist, as well as afford defense attorneys greater leverage in plea negotiations than they currently have. Additionally, it would give courts necessary discretion when sentencing bottoms, the vast majority of whom have committed trafficking crimes under duress from their traffickers. The proposed amendment would make it more feasible for the government and bottoms to work together to prosecute the most culpable perpetrators.

I. HUMAN TRAFFICKING LEGISLATION IN THE UNITED STATES

In the United States, sex trafficking is the most common form of human trafficking.²⁴ Until 2000, federal prosecutors generally charged human trafficking under statutes criminalizing involuntary servitude,²⁵ peonage,²⁶ or enticement into slavery.²⁷ However, these laws were too narrow to give adequate relief to victims, the victims themselves often were criminalized, and they could not access services to recover from being trafficked.²⁸ Further, the involuntary servitude and slavery statutes apply

²⁴ John Elrod, Note, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961, 963 (2015). The National Human Trafficking Hotline, operated by Polaris, received reports of 5,736 total cases of human trafficking as of September 30, 2016. Of those reports, 4,177 were of sex trafficking, 824 were of labor trafficking, 204 were of sex and labor trafficking, and 543 were not specified. *Hotline Statistics*, NAT'L HUMAN TRAFFICKING HOTLINE (2016), <https://humantraffickinghotline.org/states> [<https://perma.cc/P3YT-NBZ2>]. There is no official estimate of the number of human trafficking victims within the United States; however, Polaris estimates that the number is in the hundreds of thousands when adult and child victims of both sex and labor trafficking are aggregated. *The Facts*, POLARIS PROJECT (2017), <https://polarisproject.org/facts> [<https://perma.cc/G4YP-N2BY>]. The Hotline learns of an increasing number of human trafficking cases each year. *Id.*

²⁵ 18 U.S.C. § 1584 (2012); Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 451 (2012).

²⁶ § 1581; Sheldon-Sherman, *supra* note 25, at 451.

²⁷ § 1583; Sheldon-Sherman, *supra* note 25, at 451; see BRIDGETTE CARR ET AL., HUMAN TRAFFICKING LAW AND POLICY 109 (2014).

²⁸ CARR ET AL., *supra* note 27, at 109.

only to physical coercion, failing to reach subtler forms of coercion (i.e., psychological coercion),²⁹ which are common to modern trafficking.³⁰ Prosecutors had also used the Mann Act of 1910 to prosecute trafficking crimes.³¹ The Mann Act prohibited transporting individuals in interstate commerce to engage in prostitution,³² but it proved insufficient to criminalize the broad range of modern trafficking offenses.³³ To address these shortfalls, Congress enacted the TVPA, which it amended and reauthorized in 2003, 2005, 2008,³⁴ 2013,³⁵ and 2015.³⁶ Federal prosecutors use statutes created by the Mann Act and the TVPA to prosecute traffickers, and charging decisions are often dictated by the suitability of the facts to the statutes' different requirements.³⁷ Traffickers convicted of violating either the Mann Act or the TVPA face high sentencing guideline ranges and often ten- to fifteen-year mandatory minimum sentences.³⁸

A. *The Mann Act*

The Mann Act—originally known as the White Slave Traffic Act—focused on the prosecution of those who transported women or girls “for the purpose of prostitution or debauchery, or for any other immoral purpose.”³⁹ The Act did not provide protective services for prostituted women and men and, in fact, it has been used to force victims to cooperate with federal prosecutions.⁴⁰

²⁹ United States v. Kozminski, 487 U.S. 931, 944 (1988).

³⁰ Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 13 (2008). Of course, psychological coercion has always played a significant role in illicit trafficking. CARR ET AL., *supra* note 27, at 97.

³¹ §§ 2421–2424; Sheldon-Sherman, *supra* note 25, at 451.

³² Sheldon-Sherman, *supra* note 25, at 451.

³³ *Id.*

³⁴ *Id.* at 467 n.194.

³⁵ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 136.

³⁶ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 239.

³⁷ See Elrod, *supra* note 24, at 969.

³⁸ 18 U.S.C. §§ 1591, 2422(b), 2423(a) (2012).

³⁹ Pub. L. No. 61-277, § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)). The Mann Act was the product of a highly moralistic “white slavery” campaign in the 1900s that analogized prostitution to the history of the African slave trade in the United States. See Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1489–90 (2015); see also Jonathan Todres, *Prosecuting Sex Tour Operators in U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 5–11 (1999) (providing an in-depth history of the Mann Act).

⁴⁰ For a discussion regarding the way in which the government has used the Mann Act as a tool not to protect victims, but rather to force their cooperation, see *infra* Section III.A.

In 1986, Congress expanded the Mann Act to recognize that traffickers also could transport males for commercialized vice.⁴¹ The amendment also replaced the terms “debauchery” and “other immoral purpose” with “any sexual activity for which any person can be charged with a criminal offense.”⁴² Prosecutors now may use the Mann Act to prosecute persons who transport victims of any gender across state lines or in foreign commerce for prostitution or other illegal acts of commercialized unlawful sexual activity for which the victim could be prosecuted.⁴³

B. *The Trafficking Victims Protection Act*

Given the limited scope of the Mann Act, Congress decided to pass broader legislation to address human trafficking. The TVPA is the first comprehensive federal legislation to address human trafficking and to assist victims.⁴⁴ The TVPA’s purpose is “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children.”⁴⁵

As the name suggests, the heart of the TVPA addresses the victimization of trafficked persons. The current TVPA provides funding for programs aimed at assisting victims to obtain housing, psychological counseling, legal assistance, and other services.⁴⁶ The House Report notes that the Secretary of State, as part of the annual Country Reports on Human Rights Practices, should report whether governments of countries which are the “origin, transit, or destination for a significant number of victims of severe forms of trafficking . . . refrain[] from prosecuting victims of severe forms of trafficking and from other discriminatory treatment of such victims due to such victims having been trafficked.”⁴⁷ This demonstrates Congress’s recognition that victims should not be held accountable for acts they commit because of their victimization, although a similar reporting requirement does not exist for domestic prosecutions. However, given that

⁴¹ Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5, 100 Stat. 3511, 3512 (codified as amended at 18 U.S.C. § 2424 (2012)); CARR ET AL., *supra* note 27 at 109.

⁴² § 5, 100 Stat. at 3512.

⁴³ § 2421; Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247, 1251 (2011).

⁴⁴ MARY A. LENTZ, LENTZ SCHOOL SECURITY § 13:11, Westlaw (database updated 2015).

⁴⁵ 22 U.S.C. § 7101(a) (2012).

⁴⁶ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 119, 129 Stat. 227, 247 (codified as amended at 42 U.S.C. § 5611 (2012)).

⁴⁷ H.R. REP. NO. 106-487, pt. 2, at 5–6 (2000).

another aim of the TVPA is to prosecute people who commit trafficking offenses, things quickly become more complicated.⁴⁸

C. *Sex Trafficking Statutes*

The TVPA provides prosecutors with a powerful criminal provision for charging sex traffickers: 18 U.S.C. § 1591. However, as explained below, prosecutors often struggle to prove all elements of § 1591 and therefore frequently choose to prosecute traffickers under the Mann Act's more easily satisfied provisions, 18 U.S.C. §§ 2422(b) and 2423(a). The requirements of each statutory provision are detailed below.

Although the specific elements of § 1591 are difficult to prove, § 1591 is broad in scope, criminalizing any conduct related to or benefiting from domestic sex trafficking.⁴⁹ It specifically prohibits “recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], obtain[ing], or maintain[ing] by any means,” or benefiting financially or obtaining anything of value from participation in a venture that causes a person to engage in a commercial sexual act.⁵⁰ The TVPA also criminalizes attempts⁵¹ and conspiracies to engage in trafficking, making them punishable in the same way as a violation of the substantive offense.⁵²

Prosecutors must prove different elements to convict a person of trafficking an adult as opposed to trafficking a child. To be convicted of sex trafficking an adult, a trafficker must have used “force, threats of force, fraud, coercion . . . or any combination of such means” to compel the adult victim “to engage in a commercial sex act.”⁵³ There is no force, fraud, or coercion element in cases charging sex trafficking of minor children.⁵⁴ Nonetheless, in most modern sex trafficking cases, the trafficker uses at

⁴⁸ *Id.* at 6.

⁴⁹ 18 U.S.C. § 1591(a) (2012).

⁵⁰ *Id.* Because of the requirement of force, fraud, or coercion for adult victims, § 1591 does not reach the adult porn industry. *See infra* note 53 and accompanying text. However, people who benefit from causing a minor to produce child porn, which necessarily involves a sex act in the production, have been prosecuted under § 1591. *See United States v. Adams*, 789 F.3d 903, 907 (8th Cir. 2015) (upholding a mother's conviction under § 1591 where the mother knew or recklessly disregarded the fact that her daughter would be photographed nude and made to engage in a sex act in exchange for the mother's morphine pills, although the jury acquitted the mother of the charge of producing child pornography).

⁵¹ § 1594(a).

⁵² *Id.* § 1594(c). Conspiracies to violate § 1591 do not carry the same mandatory minimum, and one convicted of conspiring to violate it shall be fined, “imprisoned for any term of years or for life,” or both. *Id.* Therefore, this Note's proposed sentencing safety valve is not needed at sentencing on § 1594(c) conspiracy convictions.

⁵³ *Id.* § 1591(a)(2).

⁵⁴ *Id.*

least one of the above methods to compel adult *and* child victims to engage in commercial sex acts.⁵⁵

Courts have interpreted “force” to mean, “any form of violence, compulsion or constraint exercised upon or against a person.”⁵⁶ A trafficker may use force and coercion to create a “climate of fear” that causes a victim to obey the trafficker out of fear of provoking further violence.⁵⁷ In § 1591, “fraud” is a “deliberate act of deception, trickery, or misrepresentation.”⁵⁸ Fraud includes typical recruitment and grooming techniques, such as false promises to treat victims well, to allow them to stop prostituting themselves, to buy them expensive gifts, or to love, marry, and start a family with the victim.⁵⁹ Section 1591 defines “coercion” as

(a) threats of serious harm to or physical restraint against any person; (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (c) the abuse or threatened abuse of law or the legal process.⁶⁰

Witnessing violence against other victims can convince victims that they must obey their traffickers or face such wrath themselves.⁶¹

Although sex trafficking is prevalent in the United States, historically, it has been under-prosecuted, in large part because sex trafficking cases are difficult to prove.⁶² Proving force, fraud, or coercion often requires testimony from the victims, which can be difficult to elicit because of the

⁵⁵ See, e.g., *United States v. Alaboudi*, 786 F.3d 1136, 1139–40 (8th Cir. 2015) (trafficker beat an underage victim with nunchucks, punched her in the face, and threatened to kill her unless she did what he wanted); *Osley v. United States*, 751 F.3d 1214, 1219 (11th Cir. 2014) (trafficker beat an underage victim and put a gun in her mouth); *United States v. Lewis*, 791 F. Supp. 2d 81, 84 (D.D.C. 2011) (trafficker choked, hit, and stabbed an underage victim with a knife when she refused to obey him).

⁵⁶ *United States v. Webster*, Nos. 08-30311, 09-30182, 2011 WL 8478276, at *1 (9th Cir. Nov. 28, 2011).

⁵⁷ Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1035 (2013).

⁵⁸ *United States v. Paris*, No. 03-06-CR-64(CFD), 2007 WL 3124724, at *14 (D. Conn. Oct. 24, 2007).

⁵⁹ Parker & Skrmetti, *supra* note 57, at 1035–36; 2 Transcript of Trial Proceedings at 104, 115, 116–18, 121, 128, 139, *United States v. Sawyer (Sawyer I)*, No. 10 CR 744 (N.D. Ill. Nov. 8, 2011) [hereinafter Transcript of Trial Proceedings, *Sawyer I*].

⁶⁰ 18 U.S.C. § 1591(e)(2) (2012).

⁶¹ Brief of Appellee at 10, 12, 13, 15, 19, *United States v. Sawyer (Sawyer II)*, 733 F.3d 228 (7th Cir. 2013) (No. 12-1912) [hereinafter Brief of Appellee, *Sawyer II*] (describing how a trafficker brutally beat his victims in front of each other very often, which stuck in their minds in vivid detail and made them afraid to disobey him); Parker & Skrmetti, *supra* note 57, at 1036–37.

⁶² Elrod, *supra* note 24, at 970–71 & 971 n.70 (citing Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING* 255, 256 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011) (“Effective prosecution of sex trafficking cases is an extraordinarily challenging task.”)).

relationship between victims and their traffickers.⁶³ Traffickers groom their victims through a cycle of comfort and violence that results in traumatic bonding,⁶⁴ which makes many victims unwilling to testify against their traffickers.⁶⁵ Indeed, sometimes trafficking victims testify *for* their traffickers.⁶⁶ Other victims refuse to cooperate with law enforcement because they fear retaliation from their traffickers.⁶⁷ Even when trafficking victims testify for the prosecution, some factfinders discount their credibility due to their backgrounds, holding the view that only children who are morally blameless qualify as genuine “victims” of trafficking.⁶⁸ Compounding the prosecutors’ proof problems, law enforcement often faces difficulty securing sufficient corroborating physical and digital evidence to support the victims’ testimony.⁶⁹ This, combined with unwilling, reluctant, or untrustworthy witnesses, means that it is a significant challenge for prosecutors to meet their burden of proof as to traffickers’ use of force, fraud, or coercion.⁷⁰ Therefore, some prosecutors

⁶³ See Transcript of Sentencing Hearing, *Evans*, *supra* note 22, at 18, 20 (recognizing the possibility that the government could not have made its case without securing the bottom’s testimony); Elrod, *supra* note 24, at 971 & n.74 (citing Hersh, *supra* note 62, at 256, 262 (noting the “complexity of the victim-trafficker relationship” increases the difficulty of prosecuting trafficking cases)).

⁶⁴ U.S. DEP’T OF HEALTH & HUM. SERVS., OFFICE ON TRAFFICKING IN PERSONS, FACT SHEET: SEX TRAFFICKING (Aug. 2, 2012), <http://http://www.acf.hhs.gov/programs/endtrafficking/resource/fact-sheet-sex-trafficking-english> [<https://perma.cc/FD6Q-HH6B>]; see Megan Anitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 15 (2011). The traumatic bonding that victims experience sometimes develops into Stockholm Syndrome, causing small acts of kindness to amplify in the victim’s psyche. Elizabeth Hopper & José Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185, 199 (2006).

⁶⁵ See Krystle M. Fernandez, *Victims or Criminals? The Intricacies of Dealing with Juvenile Victims of Sex Trafficking and Why the Distinction Matters*, 45 ARIZ. ST. L.J. 859, 885 (2013) (noting the frequency with which minor victims refuse to cooperate with law enforcement).

⁶⁶ See Brief of Appellee, *Sawyer II*, *supra* note 61, at 15, 17 (noting that the victim testified as a witness for the trafficker, saying that she still loved him, she had lied to him about her age, and he had not forced her to work as a prostitute, and also noting that a second victim testified for the defendant and said that he did not know her age and that he did not traffic her by force).

⁶⁷ See AMY FARRELL ET AL., NAT’L CRIMINAL JUSTICE REFERENCE SERV., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 108–10 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf> [<https://perma.cc/MZ24-HYEF>].

⁶⁸ See Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 452 (2009).

⁶⁹ See FARRELL ET AL., *supra* note 67, at 110–13.

⁷⁰ See Elrod, *supra* note 24, at 969, 971–72; MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS DATA BRIEF: FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005, at 1 (2006), <http://www.bjs.gov/content/pub/pdf/fpht05.pdf> [<https://perma.cc/G6K7-E9F7>] (noting that from 2001 to 2005, prosecutors declined to prosecute

prosecute cases under § 1591 only if there are multiple victims, in order to increase the likelihood they will uncover credible witnesses willing to testify.⁷¹ Others choose to bring charges under the TVPA only in cases involving minor victims so that they do not have to prove force, fraud, or coercion.⁷² In cases without multiple victims or minor victims, prosecutors often eschew the TVPA and choose instead to charge traffickers under statutes with elements that are easier to prove.

Yet, these difficulties in proving the elements of § 1591 lead to the continued prosecution of traffickers under the Mann Act, 18 U.S.C. § 2422(a), even though Congress designed the TVPA to address human trafficking and to serve as the statutory basis for prosecuting trafficking in persons.⁷³ Prosecutors find the Mann Act appealing for two reasons. First, § 2422(a) does not include the elements of force, fraud, or coercion.⁷⁴ Second, in the case of adult victims, as long as the trafficker “persuades, induces, entices, or coerces” the victim to travel in interstate or foreign commerce to engage in prostitution or any other sexual activity for which a person can be charged with a criminal offense, “or attempts to do so,” the trafficker has violated § 2422(a).⁷⁵ When minor victims are involved, a prosecutor can charge a trafficker under either § 2422(b), which is identical

suspects in 222 trafficking matters, and that lack of sufficient admissible evidence was the second-leading cause for these decisions after lack of evidence of criminal intent).

⁷¹ FARRELL ET AL., *supra* note 67, at 198–99.

⁷² *Id.* at 198–99.

⁷³ See Elrod, *supra* note 24, at 969.

⁷⁴ See Jessica Neuwirth, President, Equality Now, Statement to the New York City Council (June 11, 2008), <http://www.equalitynow.org/node/10691> [<https://perma.cc/MGS3-LD2U>] (noting that the Department of Justice brings most trafficking cases not under § 1591, but rather “under the Mann Act because the Mann Act does not require proof of ‘force, fraud or coercion’”).

⁷⁵ The government must satisfy the element that the trafficker “persuade[d], induce[d], entice[d] or coerce[d]” the victim, which—by definition—can be satisfied by proving coercion. 18 U.S.C. § 2422(a) (2012). Proving persuasion, inducement, and enticement is an easier burden than the “force, fraud, or coercion” requirement of 18 U.S.C. § 1591. See Mattar, *supra* note 43, at 1251–52 (discussing the lower burden of proof the government must meet to satisfy the elements of the Mann Act); see also *United States v. Hite*, 769 F.3d 1154, 1161 (D.C. Cir. 2014) (The “ordinary meanings of the verbs persuade, induce, entice, and coerce demonstrate that § 2422(b) is intended to prohibit acts that seek to transform or overcome the will of [the victim].”). The court looked to dictionaries to understand the meanings of the words, which, for example, define “persuade” as “[t]o induce or win over (a person) to an act or course of action; to draw the will of (another) to something, by inclining his judgement [sic] or desire to it; to prevail upon, to urge successfully, to do something,” or “to win over by an appeal to one’s reason and feelings, as into doing or believing something.” *Id.* (first citing OXFORD ENGLISH DICTIONARY (2d ed. 1989); and then citing BLACK’S LAW DICTIONARY (6th ed. 1990)). The court also noted that the inclusion of “attempt” in § 2422 is significant in making the government’s burden easier to meet. *Id.* at 1162. The court held that in the case of § 2422(b), the interaction does not even have to be with the victim, but rather can be through an adult intermediary “so long as the defendant’s interaction with the intermediary is aimed at transforming or overcoming the minor’s will in favor of engaging in illegal sexual activity.” *Id.* at 1160.

to § 2422(a) but applies to victims under eighteen, or § 2423(a), which does not contain the “persuades, induces, entices, or coerces” element, and only requires that the trafficker knowingly transport a minor victim in interstate or foreign commerce to engage in prostitution or other punishable criminal sexual activity. Similar to the prosecution of a defendant charged with trafficking a minor under § 1591 of the TVPA, the government does not need to prove force, fraud, or coercion under §§ 2422(b) or 2423(a). Prosecutors often charge defendants—traffickers and purchasers or solicitors of sex with minors—with violating 18 U.S.C. §§ 1591, 2422(b), or 2423(a), or a combination of the three.⁷⁶

D. Sentencing Persons Convicted of Trafficking Offenses

Both the TVPA and the Mann Act provide strict penalties, including lengthy mandatory minimum sentences.⁷⁷ If a defendant is convicted under the TVPA, 18 U.S.C. § 1591, for trafficking a victim under the age of fourteen, or for using “force, threats of force, fraud, or coercion” while trafficking an adult or minor victim age fourteen or above, then the defendant receives a mandatory minimum sentence of fifteen years in prison without parole, and could receive up to life in prison.⁷⁸ If the trafficker is convicted of trafficking a minor between the ages of fourteen and eighteen without force, fraud, or coercion, the mandatory minimum sentence drops to ten years without parole, but the possibility of life in prison remains.⁷⁹ Under the Mann Act, 18 U.S.C. §§ 2422(b) and 2423(a), if a trafficker is convicted of persuading, inducing, enticing, coercing, or transporting a minor to engage in prostitution or other criminal sexual activity, he receives a ten-year mandatory minimum sentence. Although a conviction of transporting an adult to engage in prostitution under § 2422(a) does not carry a mandatory minimum, it permits a sentence of up to twenty years.⁸⁰

⁷⁶ See, e.g., *United States v. Wilmer*, No. 3:12-CR-00107-BR, 2013 WL 1500698, at *1 (D. Or. Apr. 11, 2013), *aff'd*, 595 F. App'x 685, 687 (9th Cir. 2014) (noting that the pimp was charged with violating 18 U.S.C. §§ 1591, 2421, 2422(b), 2423(a), and 2423(e) for trafficking two underage girls).

⁷⁷ Even post-*Booker*, if the government does not make a U.S. Sentencing Guideline § 5K1.1 or § 3553(e) motion because the defendant provided substantial assistance, the court cannot use its discretion to impose a sentence below the statutory mandatory minimum. See Roberts, *supra* note 23, at 30, 31. See also *infra* notes 195–98 and accompanying text for an in-depth discussion of when prosecutors make § 5K1.1 motions for substantial assistance.

⁷⁸ 18 U.S.C. § 1591(b)(1) (2012).

⁷⁹ *Id.* § 1591(b)(2).

⁸⁰ *Id.* § 2422.

The U.S.S.G.⁸¹ also impose harsh sentences for sex trafficking: the statutes' base offense levels combined with the typical enhancements that accompany sex trafficking convictions⁸² often put defendants into Guidelines ranges well above the mandatory minimums.⁸³ The Guidelines calculate sentencing ranges in months.⁸⁴ Without any enhancements, a violation of the TVPA, § 1591(b)(1)—which requires the use of force, fraud, or coercion for victims over fourteen, but not for victims under fourteen—carries a base offense level of 34 (ranging from 12 years and 7 months to 27 years and 3 months), while a violation of § 1591(b)(2)—which does not require force, fraud, or coercion for minor victims between fourteen and eighteen—starts at level 30 (8 years and 1 month to 17 years and 6 months).⁸⁵ The Mann Act provisions for minor victims—§§ 2422(b), 2423(a)—have a base offense level of 28 (6 years and 6 months to 14 years and 7 months).⁸⁶ Section 2422(a), which applies to adults, carries a base offense level of 14 (1 year and 3 months to 3 years and 10 months), but increases by 4 levels if the offense involved fraud or coercion.⁸⁷ Whenever a minor victim is involved, these offenses are subject to a 2-level increase if a participant knowingly misrepresents his identity to cause or influence, or otherwise unduly influences, a victim “to engage in prohibited sexual conduct,” or in which the offense involves the use of a computer or interactive computer service to facilitate the prohibited sexual conduct.⁸⁸ Many traffickers face other enhancements, including a 3- or 4-level

⁸¹ The Sentencing Reform Act of 1984 provided for the development of guidelines to further the basic purposes of criminal punishment: “deterrence, incapacitation, just punishment, and rehabilitation.” U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A(2) (U.S. SENTENCING COMM’N 2015). After calculating the guidelines range, the court must then consider the parties’ policy statements for departure from the guidelines, and the § 3553(a) factors, such as “the nature and circumstances of the offense and the history and characteristics of the defendant” and “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.” § 3553(a).

⁸² The judge uses the sentencing guidelines to calculate incarceration terms using a base offense level for every offense, then determines whether there are certain aggravating or mitigating circumstances. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a). The base offense levels and circumstances are expressed as numbers. *Id.* Once the judge calculates the offense level of the crime, he determines the defendant’s criminal history category, then plots the numbers on a chart called the sentencing table to find the corresponding guideline range. *Id.* ch.1, pt. A(1)(4)(h). The higher the criminal history category and offense level, the higher the guidelines range. *Id.*

⁸³ See Parker & Skrmetti, *supra* note 57, at 1031.

⁸⁴ U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

⁸⁵ *Id.* § 2G1.3; *id.* ch. 5, pt. A.

⁸⁶ *Id.* § 2G1.3. The base offense level increases by 8 if the victim was less than twelve years old. *Id.* § 2G1.3(b)(5).

⁸⁷ *Id.* § 2G1.1(a); *id.* ch. 5, pt. A.

⁸⁸ *Id.* § 2G1.3(b)(2)–(3).

enhancement pursuant to U.S.S.G. § 3B1.1 for being an organizer, leader, manager, or supervisor of a criminal activity that involved five or more participants or was otherwise extensive,⁸⁹ and a 5-level enhancement pursuant to U.S.S.G. § 4B1.5(b) for engaging “in a pattern of activity involving prohibited sexual conduct.”⁹⁰ Traffickers also face a higher “criminal history category” for each prior term of imprisonment or sentence of probation.⁹¹ Therefore, the Guidelines’ sentencing ranges for sex trafficking convictions often are higher than the statutes’ mandatory minimums,⁹² often even exceeding the offense level ceiling of 43 points, which recommends a sentence of life, regardless of the defendant’s criminal history category.⁹³

II. SEX TRAFFICKING VICTIMS

Congress has determined that traffickers should receive such lengthy sentences in large part because of the severe harm they inflict on vulnerable victims.⁹⁴ Trafficking victims often share a set of qualities that makes them particularly susceptible to traffickers’ recruitment techniques, which exploit their vulnerabilities during the grooming process.⁹⁵ This victim selection and grooming process helps explain why victims stay with and work for their traffickers. Most trafficking victims are first trafficked

⁸⁹ *Id.* § 3B1.1(b).

⁹⁰ *Id.* § 4B1.5(b); see Parker & Skrmetti, *supra* note 57, at 1031.

⁹¹ U.S. SENTENCING GUIDELINES MANUAL § 4A1.1.

⁹² See Parker & Skrmetti, *supra* note 57, at 1031. For example, if a bottom was convicted of using force, fraud, or coercion to force two fourteen-year-old girls to engage in prostitution, as Keosha Jones was, see *supra* notes 1–19 and accompanying text, she would face a fifteen-year mandatory minimum. 18 U.S.C. § 1591(b)(1) (2012). However, her Guideline’s range likely would be even higher. Her base offense level would be 34 for violating § 1591(b)(1). U.S. SENTENCING GUIDELINES MANUAL § 2G1.3. If the bottom had previously been imprisoned for more than 60 days for a prior arrest involving drugs—a common occurrence for women forced to prostitute themselves—and was on parole for a drug charge or theft charge when she was arrested for her role as a bottom, her criminal history level would be 4. *Id.* § 4A1.1. Even if she did not have any other sentencing enhancements, this would make her sentencing range 15 years and 8 months to 19 years and 7 months, already higher than the mandatory minimum. *Id.* ch. 5, pt. A. The prosecutor easily could argue that the bottom played an aggravating role in the offense, because she acted as a supervisor of the two fourteen-year-old girls, and the trafficker’s stable included seven girls total, making the enterprise “otherwise extensive.” *Id.* § 3B1.1(b). The judge then would add 3 points to the base offense level of 34. *Id.* Based on her offense level of 37 and her criminal history of 4, the bottom would face a sentencing range of 21 years and 10 months to 27 years and 3 months. *Id.* ch. 5, pt. A. Although post-*Booker*, the judge is not bound to sentence the bottom within the Guideline’s range, judges often do not depart significantly downward from the Guideline’s range. See *infra* note 207 and accompanying text.

⁹³ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1.

⁹⁴ See, Parker & Skrmetti, *supra* note 57, at 1017.

⁹⁵ See *id.* at 1019–20.

before they turn eighteen,⁹⁶ and the average age of entry into prostitution is between twelve and fourteen years old.⁹⁷ Many trafficking victims already have been physically or sexually abused,⁹⁸ come from dysfunctional families,⁹⁹ and are runaways,¹⁰⁰ drug users, homeless, or transgender.¹⁰¹ Youth with such traumatic pasts often are particularly vulnerable due to lack of resources, low self-esteem, and weak family ties—particularly, a lack of a healthy relationship with an adult male—which leads traffickers to target them as easy prey.¹⁰²

Traffickers choose vulnerable victims and use grooming techniques to coerce their victims into prostituting themselves, then employ a cycle of violence to force them to continue doing so. Bottoms begin like every other trafficking victim, and the traffickers exploit their vulnerabilities to force them not only into prostituting themselves, but also into competing with each other for the coveted role of the trafficker’s bottom. Bottoms perform many duties for their traffickers, including, but not limited to, recruiting other victims, collecting money, training victims, and physically beating other victims. Bottoms’ victimization, combined with their acts against other victims, make it difficult for both the public and the law to determine whether they are victims or perpetrators.

*A. How Traffickers Choose, Groom, and Maintain Their Victims:
Including Bottoms*

A trafficker looks for a vulnerable girl—usually a minor—as his target victim, often finding her at a bus station, homeless shelter, mall, school, or

⁹⁶ Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 12 (2002).

⁹⁷ Annitto, *supra* note 64, at 9.

⁹⁸ Studies show that 70% of victims of domestic sex trafficking were sexually abused between age three and fourteen. Parker & Skrmetti, *supra* note 57, at 1020–21 (citing Suzanna L. Tiapula & Allison Turkel, *Identifying the Victims of Human Trafficking*, PROSECUTOR, Apr./May/June 2008, [https://www.gvsu.edu/cms4/asset/903124DF-BD7F-3286-FE3330AA44F994DE/identifying_victims\(2\).pdf](https://www.gvsu.edu/cms4/asset/903124DF-BD7F-3286-FE3330AA44F994DE/identifying_victims(2).pdf) [<https://perma.cc/K3N3-DXD7>]).

⁹⁹ Parker & Skrmetti, *supra* note 57, at 1021 (explaining that trafficking victims’ “family life is rife with physical abuse, verbal abuse, neglect, and family abandonment”).

¹⁰⁰ The National Center for Missing and Exploited Children estimated that one in six endangered runaways were likely sex trafficking victims in 2014. *Child Sexual Exploitation*, NAT’L CTR. FOR MISSING AND EXPLOITED CHILDREN (2015), <http://www.missingkids.com/1in6> [<https://perma.cc/E57T-5KAF>].

¹⁰¹ Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1060–61 (2011).

¹⁰² *Id.*

on the street while prowling in his car.¹⁰³ The trafficker initially flatters this young girl, taking her on dates and feigning love.¹⁰⁴ He gives her presents—usually small trinkets that mean more to a victim because she has never had a man give her anything meaningful—or drugs and alcohol, depending on what the trafficker calculates will make his target most enamored with and loyal to him.¹⁰⁵ The trafficker uses romance to gain the victim’s trust, which he then exploits.¹⁰⁶

The trafficker often exploits the fact that the victim has not had a stable family or “father figure” in her life, a role which the trafficker often fills.¹⁰⁷ He isolates his victim so that he becomes the only meaningful relationship in her life, and creates a bond with her that substitutes for a family relationship.¹⁰⁸ To limit her communication with her family or friends, the trafficker often takes away the victim’s phone or computer access.¹⁰⁹ He may give the victim a nickname to distance her from her previous identity and make her his “property.”¹¹⁰ Frequently, the trafficker has sex with the victim early in the relationship to further bond her to him and make her feel loved, and therefore less likely to leave him.¹¹¹ The trafficker only gradually introduces his victim into prostitution so that she does not immediately understand that he is victimizing her.¹¹² Often, the victim thinks that she must engage in sex acts to retain his love or to support him.¹¹³ Many different factors, including youth, prior abuse, need

¹⁰³ See Brief of Appellee, *Sawyer II*, *supra* note 61, at 3 (describing how the trafficker met victims on the street while driving and convinced them to get into his car, which he called being out “on the prowl”); Annitto, *supra* note 64, at 13.

¹⁰⁴ See Michael J. Frank & G. Zachary Terwilliger, *Gang-Controlled Sex Trafficking*, 3 VA. J. CRIM. L. 342, 376 (2015) (describing the techniques of “Romeo” or “finesse pimps,” only one type of pimp in gangs that engage in sex trafficking); Parker & Skrmetti, *supra* note 57, at 1025.

¹⁰⁵ Frank & Terwilliger, *supra* note 104, at 377; see, e.g., *United States v. Alaboudi*, 786 F.3d 1136, 1139 (8th Cir. 2015) (noting that traffickers provided alcohol, drugs, and cigarettes to fourteen-year-old victim).

¹⁰⁶ Frank & Terwilliger, *supra* note 104, at 377.

¹⁰⁷ *Id.* at 369 (noting that it is not mere happenstance that “traditional” pimps require their victims to call them “daddy”).

¹⁰⁸ *Id.* at 370.

¹⁰⁹ Parker & Skrmetti, *supra* note 57, at 1025.

¹¹⁰ *Id.*; Frank & Terwilliger, *supra* note 104, at 416–17; see also Brief of Appellee, *Sawyer II*, *supra* note 61, at 3, 9–12, 14 (noting that the trafficker gave each of his victims new names starting with the letter “P,” such as Precious, Paradise, Pooh, and Peaches, because his nickname was “P-Child”).

¹¹¹ See, e.g., *United States v. Lewis*, 791 F. Supp. 2d 81, 83 (D.D.C. 2011) (noting the underage victim’s first sexual partner was her trafficker, beginning on the second day they met); Silvestrini, *supra* note 1 (describing a fifteen-year-old victim who lost her virginity to a trafficker only after he beat and threatened her).

¹¹² See Annitto, *supra* note 64, at 13–14.

¹¹³ See *United States v. Roy*, 781 F.3d 416, 418 (8th Cir. 2015) (noting that although the trafficker—whom the victim considered her “boyfriend”—“initially treated [the victim] well,” he

for attention, and lack of knowledge and experience, contribute to a victim's obliviousness that the trafficker is victimizing and exploiting her.¹¹⁴

Once the trafficker has the victim under his thumb, he can begin to exercise his power over her in increasingly degrading, violent ways. In addition to giving his victim a new name, a trafficker often refers to her with derogatory terms, such as “ho,” “bitch,”¹¹⁵ or “beast,”¹¹⁶ signaling to the victim that she has no value—except as the pimp's property and moneymaker.¹¹⁷ A trafficker also imposes a variety of rules on his victim, such as requiring her to look down when addressing him, walking behind him, obeying his orders, and having sex with him whenever he desires.¹¹⁸ These rules demonstrate that he owns her; she is merely his chattel.

Most commonly, a trafficker employs violence or the threat of violence to prevent victims from violating his rules or punish them for doing so. Traffickers have beaten their victims with fists, belts, hammers, pipes,¹¹⁹ shoes,¹²⁰ and other objects;¹²¹ choked them unconscious; and kicked, slapped, and thrown them down stairs.¹²² Traffickers use rape as a way to control their victims.¹²³ Traffickers subject their victims to strip

“eventually told her that if she loved him, she would go make money for him,” then beat her repeatedly and threatened to kill her); Parker & Skrmetti, *supra* note 57, at 1026.

¹¹⁴ See Anitto, *supra* note 64, at 14 (citing FRANCES GRAGG ET AL., N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN: FINAL REPORT 44 (2007), <http://www.ocfs.state.ny.us/main/reports/csec-2007.pdf> [<https://perma.cc/W8DC-HBV6>]).

¹¹⁵ See Frank & Terwilliger, *supra* note 104, at 381.

¹¹⁶ Brief of Appellee, *Sawyer II*, *supra* note 61, at 10 (noting the trafficker called one of his victims his “beast” because she made so much money for him).

¹¹⁷ See Sara Sidner, *Branded: The Shocking Life of a Sex-Trafficked Girl*, CNN (Sept. 10, 2015, 9:24 AM), <http://www.cnn.com/2015/09/09/us/freedom-project-branding/> [<https://perma.cc/74LL-AWUX>] (discussing ways in which traffickers demonstrate their ownership over victims, including tattoos of barcodes).

¹¹⁸ See Brief of Appellee, *Sawyer II*, *supra* note 61, at 4 (stating that the pimp did not allow his victims to look at or talk to other men, since that would disrespect the pimp, and “the other man might be a pimp who could ‘steal’ the victim away from [him]”); Frank & Terwilliger, *supra* note 104, at 381–82.

¹¹⁹ Brief of Appellee, *Sawyer II*, *supra* note 61, at 5.

¹²⁰ *United States v. McIntyre*, 612 F. App'x 77, 79 n.3 (3d Cir. 2015).

¹²¹ See, e.g., Government Sentencing Memorandum at 13, *Sawyer I*, No. 10-CR-744 (N.D. Ill. Mar. 27, 2012) (describing instance in which the trafficker's victim, who was about six months pregnant with his child at the time, tried to leave after a fight, at which point the trafficker “slammed [the victim's] arm in the door and threw a glass ash tray at her head, forcing her to go to the hospital, where staples were put in her head”).

¹²² Brief of Appellee, *Sawyer II*, *supra* note 61, at 5, 13.

¹²³ Transcript of Trial Proceedings, *Sawyer I*, *supra* note 59, at 124; *United States v. Alaboudi*, 786 F.3d 1136, 1139 (8th Cir. 2015).

searches when suspicious that they are hiding money.¹²⁴ Traffickers may harm or threaten to harm victims' family members or children if they step out of line.¹²⁵ Almost as effective as physical violence against victims is making them witness violent abuse directed at other victims.¹²⁶ Traffickers often beat victims in the presence of fellow victims to demonstrate power and instill fear.¹²⁷

The grooming process and subsequent abuse mirrors that of a domestic batterer and his victim.¹²⁸ A batterer employs a cycle of violence, which includes a tension-building phase, physical violence, and a honeymoon phase in which the batterer promises to end the violence, which often causes a victim to forgive him and stay.¹²⁹ Like battered women who stay with their abusers, sex trafficking victims often stay with their traffickers, caught in a similar cycle of violence.¹³⁰ Like a domestic batterer in the "honeymoon phase," a trafficker motivates his victims to work more to make him more money by promising incentives such as tattoos¹³¹ or marriage,¹³² or that they can have his babies.¹³³ He also may promise that if a victim makes enough money, she can supervise other

¹²⁴ Brief of Appellee, *Sawyer II*, *supra* note 61, at 5.

¹²⁵ Evelina Giobbe, *An Analysis of Individual, Institutional, and Cultural Pimping*, 1 MICH. J. GENDER & L. 33, 48 (1993); SIDDHARTH KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY 192 (2009) (describing traffickers who routinely threatened children they had fathered with their victims when the victims resisted engaging in sex acts).

¹²⁶ See Frank & Terwilliger, *supra* note 104, at 381.

¹²⁷ See *id.*; see also Brief of Appellee, *Sawyer II*, *supra* note 61, at 10 (describing when the victim witnessed the pimp beat many other victims and witnessed him threaten to shoot and kill another victim and explaining she never said no to him because she was too terrified of what he would do to her); Transcript of Sentencing Hearing, *Evans*, *supra* note 22, at 6 (stating trafficker would "beat the daylight" out of his bottom as an example to other victims).

¹²⁸ See Annitto, *supra* note 64, at 14; Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 125 (2006) ("The traumatic bonds established between women in prostitution and their pimp/captors is identical to those between battered women and their batterers."); Giobbe, *supra* note 125, at 45–46.

¹²⁹ Kelly Grace Monacella, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 TEMP. L. REV. 699, 705 (1997).

¹³⁰ Transcript of Trial Proceedings, *Sawyer I*, *supra* note 59, at 145; Annitto, *supra* note 64, at 15.

¹³¹ Brief of Appellee, *Sawyer II*, *supra* note 61, at 4 (explaining that the trafficker would tattoo his victims with his name after they proved themselves to him by making him enough money, using the tattoo as an incentive to prostitute themselves more and also as a branding mechanism); Sidner, *supra* note 117 (detailing thirteen-year-old victim's feeling of pride after having trafficker's nickname tattooed on her chest, thinking it meant a "new family").

¹³² Brief of Appellee, *Sawyer II*, *supra* note 61, at 14 (noting that the trafficker called victim his wife and gave her an engagement ring for her seventeenth birthday, promising that if she made enough money, she eventually could be his "bottom bitch" and stop working).

¹³³ *Id.* at 10 (noting that the trafficker told his victim that he loved her and that she could have his baby).

victims and eventually stop working as a prostitute, becoming the trafficker's bottom.¹³⁴

B. Bottoms' Role in Sex Trafficking

Bottoms are trafficked in the same way as every other trafficking victim: they display the same vulnerabilities and are recruited and groomed in the same manner, with promises of love and a better life, quickly followed by severe abuse and degradation.¹³⁵ Just as the traffickers exploit victims' vulnerabilities when recruiting them, they also prey upon those vulnerabilities to motivate victims to compete with each other to become the trafficker's bottom.¹³⁶ Traffickers often use the status of bottom to force the girls to compete against each other for the trafficker's affection.¹³⁷ To keep his victims psychologically dependent on him, a trafficker may demote and promote different girls to punish or reward them.¹³⁸

Traffickers dangle the possibility of being the bottom like a carrot, often with additional promises that once a victim becomes the bottom, she

¹³⁴ *Id.* at 7–8.

¹³⁵ See RIC CURTIS ET AL., NAT'L INSTITUTE OF JUSTICE, 1 COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY: THE CSEC POPULATION IN NEW YORK CITY: SIZE, CHARACTERISTICS, AND NEEDS 48 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225083.pdf> [<https://perma.cc/8G2N-M2B5>] (footnote omitted). One seventeen-year-old victim recounted, "I fell in love with this guy and thought he was *the one* . . . and he called himself a pimp. But he always tell me I'm his *Bottom Bitch* and whatever. He put me on the stroll, out there with black eyes and broken noses. I was out there messed up." *Id.* It is important to note the distinction between female traffickers or pimps and bottoms. Although bottoms engage in all of the elements of 18 U.S.C. §§ 1591, 2422(b), or 2423(a), they do not traffic girls of their own volition. Bottoms themselves are trafficked simultaneously while committing trafficking offenses; their traffickers' abuse and power over them causes them to commit the offenses. Conversely, some female pimps have their own domestic sex trafficking careers. In a DePaul College of Law study of twenty-five former pimps in Chicago, over 25% of the pimps interviewed were women. Most of them engaged in commercial sex before trafficking others, and some even began their trafficking careers as trafficking victims; however, these women no longer were trafficked by someone else, even if some still engaged in commercial sex themselves. They therefore are not bottoms and could not benefit from this Note's proposed defenses or statutory safety valve. JODY RAPHAEL & BRENDA MYERS-POWELL, SCHILLER DUCANTO & FLECK FAMILY LAW CTR. OF DEPAUL UNIV. COLL. OF LAW, FROM VICTIMS TO VICTIMIZERS: INTERVIEWS WITH 25 EX-PIMPS IN CHICAGO 1 (2010), http://www.turnofftheredlight.ie/wp-content/uploads/2011/02/PIMPING-FAMILY_LAW_CENTER_REPORT-final.pdf [<https://perma.cc/D32Y-Y5GZ>].

¹³⁶ See Parker & Skrmetti, *supra* note 57, at 1028.

¹³⁷ *Id.*; Press Release, U.S. Dep't of Justice, Glen Burnie Man Indicted for Sex Trafficking of a Minor (Sept. 21, 2010), <https://www.justice.gov/archive/usao/md/news/archive/GlenBurnieManIndictedforSexTraffickingofaMinor.html> [<https://perma.cc/Z3N3-7CPB>] (noting trafficker enticed girls to work for him by promising they could be his bottom).

¹³⁸ See Parker & Skrmetti, *supra* note 57, at 1028. Susan Karaskiewicz, a defense attorney in Milwaukee, Wisconsin who has represented multiple bottom girls, noted that the bottom changes often in a typical trafficking situation, making it a game of chance for which girl will be considered the bottom when the government arrests the actors in the sex trafficking ring. Interview with Susan Karaskiewicz, Criminal Def. Attorney, in Milwaukee, Wis. (Mar. 11, 2016).

can stop working as a prostitute.¹³⁹ This promise rarely comes true. Due to such promises, and a desire to please their pimps with whom they are in love,¹⁴⁰ victims covet being the bottom. The bottom is the pimp's most trusted prostitute, who may have achieved her status by earning the most money¹⁴¹ or working for the pimp the longest.¹⁴² While a bottom's duties vary depending on her trafficker, many of the common duties are punishable under §§ 1591, 2422(b), or 2423(a): recruiting more victims, collecting money from other victims, creating and posting internet advertisements, training new victims, transporting victims (often across state lines), supervising other victims, and occasionally punishing other victims.¹⁴³

Many bottoms participate in recruiting other victims for their traffickers. Despite their promises to the contrary, most traffickers still require bottoms to engage in commercial sex themselves. Because many traffickers set quotas for their victims as a collective,¹⁴⁴ it is logical but naïve for victims, including bottoms, to seek more victims for their stable in the hope that the trafficker will allow each victim to engage in fewer sex acts.

C. Complications of Bottoms Being Victims and Perpetrators

The understanding that most women who have engaged in prostitution as a result of having been trafficked are victims, which was explicitly recognized in the TVPA, is gaining traction in state governments and with the public.¹⁴⁵ After Congress enacted the TVPA in 2000, several states

¹³⁹ See Brief of Appellee, *Sawyer II*, *supra* note 61, at 10, 14 (detailing how the defendant told one fifteen-year-old victim that he loved her, she would be his “bottom bitch” and could have his baby, and how he told another seventeen-year-old prostitute that if she made him enough money, she could become his “bottom bitch” and stop working).

¹⁴⁰ Transcript of Trial Proceedings, *Sawyer I*, *supra* note 59, at 109, 122–23; Silvestrini, *supra* note 1 (recounting that a bottom told her trafficker she loved him).

¹⁴¹ *United States v. Daniels*, 685 F.3d 1237, 1241 (11th Cir. 2012).

¹⁴² *United States v. Brooks*, 610 F.3d 1186, 1196 (9th Cir. 2010); *United States v. Pipkins*, 378 F.3d 1281, 1285 (11th Cir. 2004).

¹⁴³ See Frank & Terwilliger, *supra* note 104, at 399 n.210.

¹⁴⁴ See *United States v. Hornbuckle*, 784 F.3d 549, 551 (9th Cir. 2015) (noting that traffickers imposed daily quotas on their victims); *United States v. Maes*, No. 1:05-CR-443-2, 2009 WL 5064621, at *1 (M.D. Pa. Dec. 23, 2009) (noting that traffickers beat victims if they did not meet their quota for the night); see also Cheryl Nelson Butler, *Bridge over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1294 (2015) (discussing quotas traffickers impose on their victims).

¹⁴⁵ See, e.g., Eleanor Goldberg, *Sex Trafficking Victims Usually Can't Escape Prostitution Charges. This Lawyer's Working to Change That*, HUFFINGTON POST (May 20, 2015), http://www.huffingtonpost.com/2015/05/18/sex-trafficking-prostitution-charges_n_7119474.html [https://perma.cc/6SXE-UHYE]; Batya Ungar-Sargon, *Sex Trafficking Victims, Not 'Prostitutes,'*

passed laws that allow trafficking survivors to vacate prior convictions for prostitution if the acts were committed as a result of trafficking.¹⁴⁶ State legislatures enacted these laws because they recognized that trafficking victims were presumably not criminally responsible for their actions.¹⁴⁷ Nonetheless, the presumption that a trafficking victim is not criminally responsible disappears when that victim performs acts that traffic other victims.¹⁴⁸ On one hand, this makes sense; a bottom who furthers the trafficking of another person hurts another vulnerable youth. When one examines in isolation the acts of recruitment, management, and violence that a bottom commits against other victims, it may be easy to advocate prosecuting her to the fullest extent of the law.¹⁴⁹ On the other hand, it is imperative that law enforcement and the courts not view bottoms' offenses in isolation. Bottoms are victims of their traffickers; their traffickers used the same recruitment and grooming techniques on the bottoms as on their other victims.

Traffickers almost always continue to force bottoms to engage in prostitution, and continue to physically and verbally assault them.¹⁵⁰ The traffickers' physical abuse and complete domination strip away the bottoms' agency: although bottoms commit offenses against other victims, they do so either at the command of or for the sake of the man trafficking the bottom and the other victims. A trafficker often forces his victims to

Finally Getting Help (and a New Name) in Court, DAILY BEAST (Jan. 12, 2015, 4:50 AM), <http://www.thedailybeast.com/articles/2015/01/12/sex-trafficking-victims-not-prostitutes-finally-getting-help-and-a-new-name-in-court.html> [<https://perma.cc/Q7N7-H366>]; Jacob Wheeler, *Are Prostitutes Lawbreakers or Trafficking Victims?*, BRIDGE MAG. (June 9, 2016), <http://bridgemi.com/2016/06/are-prostitutes-lawbreakers-or-trafficking-victims/> [<https://perma.cc/6HW9-VRSU>].

¹⁴⁶ New York was the first state to create such a mechanism; the New York legislature sought to “remove a blot on the character of such victims so as to help those presumably not criminally responsible for the offense to gain useful employment and rebuild their lives.” Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 476 (2012). Subsequently, other states have followed suit with similar statutes. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/116-2.1 (2016); MD. CODE ANN. CRIM. PROC. § 8-302 (West 2011); NEV. REV. STAT. § 176.515 (2015).

¹⁴⁷ *See* Mogulescu, *supra* note 146, at 476.

¹⁴⁸ *See* Transcript of Sentencing Hearing, *Evans*, *supra* note 22, at 6–7 (government acknowledging that bottom was the “chief victim” although it had prosecuted her under § 1591).

¹⁴⁹ *See supra* Section II.B.

¹⁵⁰ *See* United States v. McIntyre, 612 F. App'x 77, 79 (3d Cir. 2015); Brief of Appellee, *Sawyer II*, *supra* note 61, at 10, 14–15.

compete with each other¹⁵¹ or beat each other, which provokes animosity and contributes to the culture of fear.¹⁵²

The Ninth Circuit has held that an expert's testimony about the role of a bottom may have "helped the jury evaluate [the bottom's] testimony that she was acting at [her trafficker's] direction, not on her own accord."¹⁵³ In other cases, experts have testified that traffickers exert "total control" over their victims and can force them to victimize other victims at their behest.¹⁵⁴ When subject to such total control, trafficking victims, including bottoms, are not exercising agency to freely decide to engage in trafficking offenses against other victims, but are acting out of a need to protect themselves and please their trafficker.

Public perception has begun to shift from condemnation to compassion and is beginning to consider prostitutes—in particular underage prostitutes—as victims rather than criminals.¹⁵⁵ Many scholarly articles have proposed legal solutions for dealing with prostitutes and trafficking victims,¹⁵⁶ nevertheless, most have ignored the problem raised when a victim—still victimized and controlled by her trafficker—perpetrates trafficking offenses against other trafficking victims.¹⁵⁷

Although bottoms perform different roles for different traffickers, many participate in the recruitment of new victims¹⁵⁸ and management of other prostitutes¹⁵⁹—thereby meeting § 1591(a)(1)'s element of recruiting

¹⁵¹ See *People v. McFarland*, No. B171999, 2005 WL 713815, at *8 (Cal. Ct. App. Mar. 30, 2005).

¹⁵² See *Parker & Skrmetti*, *supra* note 57, at 1028, 1035; Transcript of Trial Proceedings, *Sawyer I*, *supra* note 59, at 136 (noting that when a trafficker forces one victim to beat up another, all victims develop a sense of distrust of each other, and therefore are less likely to conspire to escape together).

¹⁵³ *United States v. Brooks*, 610 F.3d 1186, 1196 (9th Cir. 2010).

¹⁵⁴ Transcript of Trial Proceedings, *Sawyer I*, *supra* note 59, at 135–36.

¹⁵⁵ See *supra* note 145.

¹⁵⁶ See, e.g., Annitto, *supra* note 64, at 59, 62, 65 (advocating for increased judicial understanding about exploited youth, statutory provisions preventing the prosecution of underage prostitutes, and increased funding for therapeutic services for victims); Alyssa M. Barnard, Note, "The Second Chance They Deserve": Vacating Convictions of Sex Trafficking Victims, 114 COLUM. L. REV. 1463, 1493–1500 (2014) (proposing amendments to state vacatur statutes to make it easier for victims to avoid criminal convictions and vacate existing ones); Carly Elizabeth Souther, *Victims Not Vixens: Prostituted Children and the Case for Preemption*, 21 GEO. J. ON POVERTY L. & POL'Y 381, 384 (2014) (arguing for federal preemption of state laws that criminalize underage prostitutes).

¹⁵⁷ Fernandez, *supra* note 65 (addressing the possibility of the necessity for bringing criminal charges against an underage "bottom" who recruits other trafficking victims and advocating for prosecutorial discretion and a need for recognition of the fact that the bottom is also a victim). However, the author does not give specific solutions to the problem.

¹⁵⁸ Brief of Appellee at 21, *United States v. McIntyre*, 612 F. App'x 77 (3d Cir. 2015) (No. 14-3691); *Silvestrini*, *supra* note 1.

¹⁵⁹ *United States v. Fuertes*, 435 F. App'x 802, 805 (11th Cir. 2011); *United States v. Lewis*, 791 F. Supp. 2d 81, 83 (D.D.C. 2011); Report and Recommendation, *United States v. Wilson*, No. 10-cr-60102, 2010 WL 2609429, at *2 (S.D. Fla. June 5, 2010), *adopted*, No. 10-cr-60102, 2010 WL

or maintaining a person. Because the majority of victims are minors, the government would not need to prove that the bottom did so using force, fraud, or coercion.¹⁶⁰ Ironically, the element rarely at issue when prosecuting a trafficker could be difficult for the government to prove against his bottom: that she benefitted financially or received something of value from causing another person to engage in a commercial sex act.¹⁶¹ However, even if the trafficker does not allow a bottom to keep her own proceeds or those of the victims that she helps recruit or maintain, courts have held a “thing of value” to include sex acts and items such as photographs and videos.¹⁶² Any additional benefits a bottom receives from her trafficker as a result of her duties as a bottom, such as additional nail appointments or jewelry, also could be considered a “thing of value” for purposes of § 1591. Many bottoms, in their recruitment or managerial duties, also participate in enticing victims to travel or transporting victims across state lines—thereby satisfying those elements of §§ 2422 and 2423.¹⁶³ Therefore, most bottoms satisfy the elements of the federal sex trafficking statutes; however, bottoms perpetrate these offenses not of their own volition, but because of their own victimization. The question of their criminal responsibility becomes fraught, as bottoms take on the role of both victim and perpetrator.

III. PROSECUTION OF BOTTOMS WHO VIOLATE THE SEX TRAFFICKING STATUTES

As the law stands today, prosecutors may use their discretion to charge bottoms with violating §§ 1591, 2422(b), and 2423(a), which has the dual effect of granting prosecutors tremendous leverage to make

2612341 (S.D. Fla. June 25, 2010) (noting that each bottom controlled the day-to-day activities of the prostitutes that worked for each pimp).

¹⁶⁰ 18 U.S.C. § 1591(a) (2012); DUREN BANKS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 8 (2011), <http://www.bjs.gov/content/pub/pdf/cshti0810.pdf> [<https://perma.cc/H2SV-UAFG>] (stating that 64% of confirmed sex trafficking cases involved allegations of prostitution or sexual exploitation of a child).

¹⁶¹ § 1591(a)(2); *see, e.g.*, Brief of Appellee at 21–22, *McIntyre*, 612 F. App’x 77 (No. 14-3691) (describing how the bottom was required to give all proceeds from a victim she had recruited to her trafficker, as well as her own profits, and was beat with a shoe when she did not).

¹⁶² *See, e.g.*, *United States v. Cook*, 782 F.3d 983, 990 (8th Cir. 2015) (holding that sexual acts, photographs, and videos constitute “things of value,” and that acquiring those items through participation in a commercial sex trafficking venture could result in criminal culpability).

¹⁶³ *See, e.g.*, Indictment at 2–3, *United States v. Wiggins*, No. 3:11-cr-02420 (W.D. Tex. Oct. 5, 2011) (charging bottoms with violating § 2422(a)); *United States v. Scott*, 529 F.3d 1290, 1303 (10th Cir. 2008) (holding that because the bottom assisted in convincing the underage victim to get into a vehicle, she was “criminally responsible” for the same offense as the pimp and could have been convicted under § 2423(a)).

bottoms cooperate in exchange for a lesser sentence and cabining the judge's sentencing discretion for bottoms who do go to trial, due to the mandatory minimum sentences.¹⁶⁴ Not many published cases exist in which a bottom has appealed; this is most likely because either bottoms cannot be identified¹⁶⁵ or, more often, because they pleaded guilty to lesser charges and testified for the government as part of the plea deal.¹⁶⁶

Some federal prosecutors view all victims of trafficking—including bottoms—as victims. These prosecutors can exercise their discretion to not charge bottoms with any crimes, or to charge bottoms who commit trafficking offenses under less harsh statutes, such as § 1591(c), that do not carry mandatory minimums.¹⁶⁷

However, as demonstrated below, not every prosecutor in every district declines to charge bottoms or opts to charge them with lesser offenses without mandatory minimums.¹⁶⁸ This inconsistency suggests the need for a statutory mechanism that recognizes bottoms' role as victims within the victim–perpetrator spectrum and codifies it in the law.¹⁶⁹ This

¹⁶⁴ Interview with Joseph Bugni, Supervisory Assoc. Fed. Def., Fed. Def. Servs. of Wis., Inc. (Mar. 16, 2016).

¹⁶⁵ See, e.g., Scott, 529 F.3d at 1294 n.1 (noting that law enforcement could not identify the bottom).

¹⁶⁶ The practice of charge bargaining occurs often in sex trafficking cases. Interview with Joseph Bugni, *supra* note 164. In charge bargaining, the prosecution and defense agree that the defendant will plead guilty to a lesser charge than what the evidence supports. *Id.*; see, e.g., Criminal Complaint at 2, United States v. Saxton, No. 2:13-cr-00037 (E.D. Wis. Sept. 7, 2012) (charging bottom with two counts of sex trafficking of a child and one count of conspiracy to commit sex trafficking of a child); Plea Agreement, United States v. Saxton, No. 2:13-cr-00037 (E.D. Wis. Mar. 7, 2013) (documenting that the bottom pleaded guilty to one count of interstate travel in aid of a prostitution enterprise); see also Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1855 (1995).

¹⁶⁷ See, e.g., United States v. Lewis, 791 F. Supp. 2d 81, 82–83 (D.D.C. 2011) (considering the trafficker's underage bottom to be one of his victims and noting that she was not charged with anything, even though she explained rules and collected money from other girls); Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, FBI L. ENFORCEMENT BULL. (March 2011), <https://leb.fbi.gov/2011/march/human-sex-trafficking> [<https://perma.cc/7QCT-HXAK>] (noting that a bottom is a “victim herself”). Although some may worry that not charging bottoms for the crimes they commit against other victims is contrary to the principles of criminal punishment, such as just retribution, incapacitation, or deterrence, it should be noted that bottoms are punished during their experience as a trafficking victim far worse than the criminal justice system could punish them—experiencing verbal abuse, severe physical abuse, and being compelled to participate in sex work. U.S. SENTENCING GUIDELINES MANUAL 1 (U.S. SENTENCING COMM'N 2015).

¹⁶⁸ See *infra* Section III.B for examples of cases in which prosecutors charged bottoms with violating 18 U.S.C. § 1591.

¹⁶⁹ Depending on the district in which a bottom is charged, she may face lesser charges and receive a minimal prison sentence or probation. See, e.g., Indictment, United States v. Campbell, No. 1:10-cr-00026 (N.D. Ill. Apr. 15, 2010); Judgment in a Criminal Case, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. May 11, 2012) (charging the bottom with two counts of harboring illegal aliens for commercial advantage, who pleaded guilty to both counts and received a sentence of three years' probation). In

Part outlines the government's practice of leveraging charges carrying mandatory minimums in exchange for bottoms' cooperation and the resulting coercion that further strips bottoms' agency. It then examines courts' lack of discretion in sentencing bottoms due to the ten- and fifteen-year mandatory minimums, sentencing guidelines, and sentencing enhancements.

*A. Mandatory Minimums as Leverage to
Compel Pleas and Cooperation*

Justice Kennedy noted in *Missouri v. Frye* that the United States has “for the most part a system of pleas, not a system of trials.”¹⁷⁰ More than 97% of federal convictions are the result of guilty pleas.¹⁷¹ The enactment of the federal Sentencing Guidelines and mandatory minimum sentences caused a precipitous decline in criminal trials.¹⁷² Critics claim that prosecutors use mandatory minimum sentences to “pressure defendants, who otherwise might test the state’s evidence, into accepting guilty pleas.”¹⁷³ In the majority of reported cases, bottoms fit this mold: they commit crimes for which they could be prosecuted under §§ 1591, 2422(b), or 2423(a), all of which carry mandatory minimums, but they accept plea deals in which they plead guilty (often to lesser charges), testify for the government, and receive lower sentences.¹⁷⁴ Because victim testimony is

other districts, a bottom may be prosecuted to the fullest extent of the law and face the substantial mandatory minimums. *See, e.g.*, Criminal Complaint at 2, *Saxton*, No. 2:13-cr-00037 (charging the bottom with two counts of 18 U.S.C. § 1591). This is the type of inconsistent treatment that Congress sought to address through the enactment of the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpt. 1.

¹⁷⁰ 132 S.Ct. 1399, 1407 (2012) (quoting *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012)).

¹⁷¹ MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2011 STATISTICAL TABLES, tpls.4.2 & 5.22.2009 (2015), <https://www.bjs.gov/content/pub/pdf/fjs11st.pdf> [<https://perma.cc/4DCP-5RAH>].

¹⁷² *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1453–54 (2008) (citing Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005)). Before Congress adopted the guidelines, more than 12% of federal criminal offenders were convicted at trial, but by 1996, that number had dropped to approximately 8%, and since 2000 has remained below 5%. *Id.*

¹⁷³ Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 78 (1993); *see also* Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 137 (1995) (arguing that the guidelines give prosecutors “greater leverage to virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences”).

¹⁷⁴ *See, e.g.*, Criminal Complaint at 2, *Saxton*, No. 2:13-cr-00037 (E.D. Wis. Sept. 7, 2012); Plea Agreement at 1, 7, *Saxton*, No. 2:13-cr-00037 (E.D. Wis. Mar. 7, 2013) (documenting that the bottom was charged with 18 U.S.C. § 1591 and pleaded guilty to a lesser charge on the condition she would testify for the government if necessary); *United States v. Daniels*, 653 F.3d 399, 404–05 (6th Cir. 2011); Plea Agreement at 1, *United States v. Daniels*, No. 2:08-cr-20213 (E.D. Mich. July 10, 2008)

essential to proving the elements of trafficking offenses under § 1591,¹⁷⁵ prosecutors may use whatever leverage they have over victims to make them testify against their traffickers¹⁷⁶—in the case of bottoms, by threatening them with charges that carry mandatory minimums.

Although using this leverage may result in convicting more traffickers, it also squeezes bottoms between a rock and a hard place: either they cooperate with the government and testify or face the same charges as the men who trafficked them—charges that carry ten- or fifteen-year mandatory minimums. This is not a genuine choice, so the government could be viewed as having replaced the bottom’s trafficker in coercing her to engage in potentially traumatic activity.¹⁷⁷ When looking at the big picture of who should be behind bars and the easiest way to put them there, it is understandable that the government would use this leverage to pressure bottoms to testify against their traffickers.

For instance, in *United States v. Campbell*,¹⁷⁸ the government charged the trafficker’s bottom, Danielle John, as a codefendant with her trafficker. John originally pleaded not guilty; however, she withdrew that plea pursuant to a plea agreement and testified for the government.¹⁷⁹ The jury heard negative things about John’s role in the sex trafficking operation, including her forcing noncitizen victims to continue working as sex workers in the “spa” by confiscating their identification documents so that the trafficker could threaten them with deportation.¹⁸⁰ She also trained other

(describing a bottom who acted in concert with the trafficker to transport a minor victim for the purposes of prostitution who was charged with eight counts of child pornography and adult and child prostitution, leading to her pleading guilty to distribution of child pornography, testifying against the trafficker and receiving a sentence of ten years in prison); *United States v. Brooks*, 610 F.3d 1186, 1192 (9th Cir. 2010) (noting the bottom was charged with § 1591(a) before pleading guilty, testifying on behalf of the government, and receiving a reduced sentence).

¹⁷⁵ See *supra* notes 63–70 and accompanying text.

¹⁷⁶ See Barnard, *supra* note 156, at 1471 (noting the possibility that some women are prosecuted for the sole crime of being a trafficking victim, in order to convince them to provide information about their trafficker in exchange for reduced or dropped charges).

¹⁷⁷ See Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471, 501 (2008) (detailing the secondary victimization trafficking victims endure when coerced into cooperation).

¹⁷⁸ 770 F.3d 556, 560 (7th Cir. 2014).

¹⁷⁹ Minute Entry, *United States v. Campbell*, No. 1:10-cr-00026 (N.D. Ill. May 6, 2010) (pleading not guilty); Minute Entry, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. Nov. 29, 2010) (pleading guilty); Annie Sweeney, *Convicted Pimp Sentenced to Life in Prison*, CHI. TRIB. (Nov. 26, 2012), http://articles.chicagotribune.com/2012-11-26/news/ct-met-human-trafficking-sentence-20121127_1_message-parlors-life-sentence-illegal-immigrants [<https://perma.cc/2B65-JG8B>].

¹⁸⁰ *Campbell*, 770 F.3d at 562, 565. Every act John committed against the other victims, she committed at her trafficker’s direction; John’s trafficker would beat her severely if she did not obey his orders. Government Sentencing Memorandum at 5–6, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. May 8, 2012).

victims, enforced the trafficker's rules, collected the victims' money, beat the other victims or restrained them so the trafficker could beat them, and helped the trafficker frighten the victims into thinking he had killed a victim who complained to the police by lining a basement with plastic so he could "dismember a dead body."¹⁸¹ But the jury also heard evidence of the trafficker's abuse of John—he beat her when she broke his rules, tattooed her with a large scroll bearing his "manifesto," which asserted that she "live[s] for" the trafficker "till death."¹⁸² Despite her substantial role in the sex trafficking operation, as part of her plea agreement, John pleaded guilty to harboring undocumented immigrants for commercial advantage,¹⁸³ and the government recommended that she receive probation; the government reasoned that John did not deserve further punishment through incarceration given her trafficker's treatment of her and given her cooperation in the case.¹⁸⁴

The competing interests between forcing bottoms to testify to ensure that their trafficker is convicted, and trying to preserve what little agency bottoms have left after being trafficked create a tension that cannot be easily reconciled. Leveraging the threat of charges that carry mandatory minimums may be an effective way to secure bottoms' testimony, and in some cases, such as John's, will result in conviction of the trafficker and a better life for the bottom.¹⁸⁵ However, when prosecutors are able to use this potent threat over bottoms in exchange for their testimony, they are

¹⁸¹ Brief of Appellee at 14, *Campbell*, 770 F.3d 556 (No. 12-3724); *Campbell*, 770 F.3d at 564–65.

¹⁸² Brief of Appellee at 14, *Campbell*, 770 F.3d 556 (No. 12-3724); *Campbell*, 770 F.3d at 565.

¹⁸³ 8 U.S.C. § 1324(a)(1)(A)(v)(II) (2012); Judgment in a Criminal Case, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. May 11, 2012). John was never formally charged with a trafficking-related offense; although she was arrested pursuant to a criminal complaint that charged her with conspiracy to commit extortion pursuant to 18 U.S.C. §§ 1591, 1592. The indictment charged her with harboring offenses pursuant to 8 U.S.C. §§ 1324(a)(1)(A)(iii), 1324(a)(1)(A)(v)(II), and 1324(a)(1)(B)(i). Criminal Complaint at 1, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. Jan. 12, 2010); Indictment at 4, 6, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. Apr. 15, 2010).

¹⁸⁴ Diane MacArthur, Assistant U.S. Att'y, N. Dist. of Ill., Presentation to Human Trafficking Class at Northwestern University Pritzker School of Law (Oct. 29, 2015); Government Sentencing Memorandum at 6, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. May 8, 2012) (noting that "John began to cooperate with the government shortly after her January 2010 arrest"); Judgment in a Criminal Case, *Campbell*, No. 1:10-cr-00026 (N.D. Ill. May 11, 2012). John was recently finishing her college degree and created an organization called "The Next Step ND" to help others coming out of the life of trafficking. Kevin Wallevand, *Sex Trafficking Survivor, Unveils New Organization to Help Those Coming Out of the Life, Speaking at NDSU Tuesday*, ABC WDAY 6 (Jan. 25, 2016), <http://www.wday.com/news/3932742-sex-trafficking-survivor-unveils-new-organization-help-those-coming-out-life-speaking> [<https://perma.cc/MH8C-E69V>].

¹⁸⁵ Silvestrini, *supra* note 1 (describing a case in which a bottom who pleaded guilty, cooperated with the government against her trafficker, got a job, began working toward obtaining her GED, and then, after sentencing, thanked the prosecutor and hugged the FBI agent who arrested her, telling him, "[y]ou're the lifesaver").

exerting pressure that is, in the eyes of the bottom, not so different than that exerted by her trafficker. Testifying in open court against their traffickers may be extremely traumatic for bottoms, inhibiting their recovery or causing them to fear for the lives of their families.¹⁸⁶ The government further strips the bottoms' agency by threatening to charge them with statutes that carry high mandatory minimums; as a practical matter, this practice forces bottoms into pleading guilty to lesser charges and testifying for the government.¹⁸⁷

B. Prosecutorial Discretion Replaces Judicial Discretion When Charging Bottoms with Statutes Carrying Mandatory Minimums

Sometimes the mere threat of charging a bottom with violating the substantive sex trafficking statutes fails to compel the bottom's cooperation: there are many cases in which the government charged bottoms with violating § 1591 and the bottoms do not plead guilty immediately or, in rare cases, ever.¹⁸⁸ In *United States v. Wilson*, the government charged two traffickers and their respective bottoms with violating § 1591.¹⁸⁹ The court noted that the bottoms controlled the victims' everyday activity, but did not give further details about their activities.¹⁹⁰ However, there are recordings of conversations between one of the incarcerated traffickers and his bottom, during which he was "giving directives" to her, including directions to post prostitution advertisements

¹⁸⁶ See ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 30 (Feb. 19, 2013), <http://www.fas.org/sgp/crs/row/RL34317.pdf> [<https://perma.cc/WE7D-4JNE>] (noting that victims "may refuse to testify because of fear of retribution against themselves or their families"); Zraick, *supra* note 8 (noting that "[v]ictims, particularly minors, are often fearful of speaking out against their pimps," needing services and counseling to recover and to overcome the fear).

¹⁸⁷ Because of the strong interest in prosecuting and convicting bottoms' traffickers, this Note does not advocate making bottoms immune from cooperating with the government, but rather proposes a solution to mitigate the government's power to force bottoms into testifying at trial. See *infra* Section IV.A.

¹⁸⁸ See, e.g., *United States v. Brooks*, 610 F.3d 1186, 1192 (9th Cir. 2010); Criminal Complaint at 1, *United States v. Jones*, No. 8:13-cr-00442 (M.D. Fla. July 15, 2013); Criminal Complaint at 2–3, *United States v. Moore*, No. 2:13-mj-00462 (E.D. Wis. Apr. 23, 2013); Plea Agreement for Defendant Kimberly Alberti, *United States v. Bell*, No. 5:12-cr-00057 (C.D. Cal. Jan. 25, 2013); Criminal Complaint at 2, *United States v. Saxton*, No. 2:13-cr-00037 (E.D. Wis. Sept. 7, 2012); Criminal Complaint, *United States v. Rodriguez*, No. 8:11-mj-01469 (M.D. Fla. Sept. 19, 2011); Indictment at 1–2, *United States v. Avery*, No. 2:09-cr-196 (E.D. Wis. Aug. 25, 2009); Plea Agreement, *United States v. Gates*, No. 1:04-cr-00205 (D.D.C. May 14, 2004).

¹⁸⁹ Report and Recommendation at 2–4, *United States v. Wilson*, No. 10-cr-60102, 2010 WL 2609429 (S.D. Fla. June 5, 2010), *adopted*, No. 10-cr-60102, 2010 WL 2612341 (S.D. Fla. June 25, 2010).

¹⁹⁰ *Id.* at 3–4.

and an order to collect money from the other victims.¹⁹¹ This conversation may be interpreted as further proof that the bottom caused other victims to engage in commercial sex acts and financially benefitted from those acts while not under the direct control of her trafficker, thus warranting a charge of § 1591. Nonetheless, psychologists note that even though a bottom's trafficker may not be physically present, his influence and control over her remains just as strong,¹⁹² causing the bottom to act on his behalf and under his directive, a phenomenon likely attributable to her conditioning and trauma bonding.¹⁹³

It is possible that even with an understanding of the bottom–trafficker relationship, a jury or judge would still conclude that the bottom acted with agency and satisfied the elements of § 1591, and therefore should be held fully or partially accountable for her actions. Even if a judge determines during sentencing that the bottom's offenses do not warrant a term of fifteen years in prison, the judge would be powerless to consider the bottom's lack of agency and depart from the statute's mandatory minimum if the jury convicts her.¹⁹⁴

One avenue currently exists for judges to depart from the mandatory minimums. Under § 3553(e), if the government makes a motion, “the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.”¹⁹⁵ But this exception is only of use to bottoms if they plead guilty and cooperate with the government.¹⁹⁶ As noted above, most prosecutors offer bottoms plea deals that require them to testify against their traffickers in exchange for a lesser charge without a

¹⁹¹ *Id.* at 5–6.

¹⁹² Transcript of Trial Proceedings, *Sawyer I*, *supra* note 59, at 129 (discussing the fear traffickers condition victims to feel, which causes them to remain with their traffickers and follow their directions).

¹⁹³ See also Transcript of Sentencing Hearing, *Evans*, *supra* note 22, at 13–16. The defense attorney stated that the government targeted the bottom because she failed to appear for the grand jury, which she could not do because her trafficker would not allow it. *Id.* The bottom told the court that the only choice she felt she had was either to leave her children behind, putting them in danger, or “roll with the punches” and continue working for her trafficker. *Id.*

¹⁹⁴ Keep in mind that while the Sentencing Guidelines are merely advisory, statutory minimum sentences are mandatory.

¹⁹⁵ The corresponding Sentencing Guideline is § 5K1.1. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2015). However, even when a defendant provides substantial assistance, the government has “a power, not a duty, to file a [substantial assistance] motion.” *Wade v. United States*, 504 U.S. 181, 185 (1992).

¹⁹⁶ See, e.g., Plea Agreement at 1, *United States v. Jones*, No. 8:13-cr-00442 (M.D. Fla. Sept. 11, 2013). The bottom was charged under 18 U.S.C. § 1591 but pleaded guilty to a count of conspiracy set forth in the information filed on September 10, 2013. *Id.* The prosecutor filed a U.S.S.G. § 5K1.1 motion for substantial assistance before sentencing. *Id.*

mandatory minimum.¹⁹⁷ Bottoms who choose not to charge bargain and instead go to trial may do so for various reasons: continued loyalty to their traffickers and resulting unwillingness to turn and testify against them; fear of their traffickers and resulting unwillingness to testify against them; ingrained mistrust of law enforcement and unwillingness to make a deal; or hope that weak evidence and a favorable jury will result in an acquittal. Thus, bottoms who choose to fight their charges almost certainly are not providing substantial assistance to the government. If they had provided such assistance, then they likely would not be defendants at trial, as the government either would have dropped the charges against them, or worked out a plea deal with lesser charges.¹⁹⁸ Therefore, it is highly unlikely that the government would make a motion under U.S.S.G. § 5K1.1 for the judge to depart downward from the mandatory minimum sentence if a bottom goes to trial and is convicted of violating 18 U.S.C. §§ 1591, 2422(b), or 2423(a).

Beyond simply facing mandatory minimum sentences, if a bottom is convicted under §§ 1591, 2422(b), or 2423(a), the prosecutor likely will argue that the judge should apply the sentencing enhancement under U.S.S.G. § 3B1.1 for her aggravating role as an organizer, leader, manager, or supervisor or the criminal activity. As noted above, traffickers are often subject to many sentencing enhancements.¹⁹⁹ Bottoms also likely have a high criminal history category due to serving time in prison on multiple occasions or for committing the instant offense while on probation.²⁰⁰ Many women engaging in prostitution are in and out of jail, as they are the target of police attention and often not recognized as trafficking victims.²⁰¹ Because traffickers force bottoms to engage in commercial sex acts themselves, bottoms face considerable risk of having a high criminal history score resulting from *each* prior term of imprisonment due to

¹⁹⁷ See *supra* Section III.A.

¹⁹⁸ See, e.g., Criminal Complaint at 2, *United States v. Saxton*, No. 2:13-cr-00037 (E.D. Wis. Mar. 7, 2013) (charging the bottom with two counts of violating 18 U.S.C. § 1591); Plea Agreement at 1, 7, *Saxton*, No. 2:13-cr-00037 (the bottom pleaded guilty to a lesser charge and agreed to cooperate with the government); Judgment in a Criminal Case, *United States v. Campbell*, No. 1:10-cr-00026 (N.D. Ill. May 11, 2012) (documenting that the bottom pleaded guilty to a lesser charge and received a sentence of probation, with prosecutors' recommendation).

¹⁹⁹ See *supra* Section I.D for a discussion of common sentencing enhancements.

²⁰⁰ U.S. SENTENCING GUIDELINES MANUAL § 4A1. Prostitution is only counted if "the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days" or if "the prior offense was similar to an instant offense." § 4A1.2(c)(1). Although it is possible that bottoms may not have been imprisoned for thirty days or had a probation sentence of over one year, the government likely could argue that the prior prostitution offense was "similar to [the] instant offense" of forcing or coercing another into engaging in prostitution. *Id.*

²⁰¹ See Barnard, *supra* note 156, at 1471 (discussing the frequency of prostitutes' convictions).

prostitution or related activity,²⁰² as well as at risk of receiving the 5-level enhancement from U.S.S.G. § 4B1.5(b) because of their “prohibited sexual conduct.”

Although many states have created a safety valve for prostitution offenses committed as a result of trafficking,²⁰³ those are state safety valves that a federal court may not consider when imposing a sentence on a bottom who has been found guilty of trafficking. U.S. Department of Justice policy directs prosecutors to file sentence enhancements whenever possible, unless they would be inappropriate for prosecutorial management;²⁰⁴ such enhancements would lead to a higher Guidelines sentencing range due to the nature of a bottom’s profession and likely history with law enforcement.²⁰⁵

Despite judges’ discretion to accept or reject Guidelines sentences post-*Booker*,²⁰⁶ when multiple enhancements have been added to a sentence that carries a mandatory minimum, the judge is unlikely to depart significantly downward from the Guidelines recommendation to the mandatory minimum for multiple reasons, including judges’ respect for the separation of powers and Congress’s role in creating the U.S. Sentencing Commission; the desire to avoid judicial activism; the goal of maintaining uniformity among judges; social pressure to conform among judges; and a reluctance to be overturned on appeal.²⁰⁷ Therefore, Congress should create a statutory amendment to allow judges to consider the totality of the

²⁰² *Id.*

²⁰³ See Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 223–24 (2015) (discussing the shortcomings of current safe harbor laws); Mogulescu, *supra* note 146.

²⁰⁴ Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & C.R. L. REV. 377, 385 n.52 (2010) (citing U. S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-27.300 (1997), <https://www.justice.gov/usam/united-states-attorneys-manual> [<https://perma.cc/NPB2-BJV3>] (“Such a reason [for not filing an enhancement] might include, for example, that the United States Attorney’s office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.”)).

²⁰⁵ See *supra* Section I.D.

²⁰⁶ *United States v. Booker*, 543 U.S. 220, 258 (2005) (striking part of Federal Sentencing Act that made the Guidelines mandatory).

²⁰⁷ U.S. SENTENCING GUIDELINES MANUAL ch.1 pt. A(1)(4)(b) (U.S. SENTENCING COMM’N 2015) (noting that downward departures should be applied only to “atypical” cases that fall outside the “heartland” of cases). The Guidelines warn that appellate courts are likely to find sentences outside the Guidelines’ ranges “unreasonable.” *Id.* The Guidelines send a mixed message, however, also stating that departures “perform an integral function in the sentencing guideline system” because “it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.” *Id.* § 5K2.0 cmt. background; see also Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 37 (2010) (discussing reasons judges sentence within the Guidelines post-*Booker*).

circumstances to provide a fair and just sentence for bottoms convicted of trafficking offenses at trial.²⁰⁸

IV. STATUTORY SAFETY VALVE FOR BOTTOMS PROSECUTED UNDER
18 U.S.C. §§ 1591, 2422(B), AND 2423(A)

Congress has stated that the purpose of mandatory minimum sentences is to provide a strong deterrent, just punishment, and uniformity for perpetrators of certain crimes.²⁰⁹ However, because bottoms commit offenses as a result of force, fraud, or coercion exerted upon them by their traffickers and not as a result of their own agency, forcing judges to impose mandatory minimums on them is not “just punishment.” To impose a just sentence on bottoms who commit trafficking offenses, judges must be able to consider the circumstances, including the traffickers’ power over the bottoms’ actions, to “impose a sentence sufficient, but not greater than necessary” under § 3553(a). Therefore, sentencing judges need an avenue by which they may consider all of the § 3553(a) factors and apply them without being bound by the high mandatory minimums. The only avenue presently available, the U.S.S.G. § 5K1.1, is limited to considering cooperation with the government and must be initiated by the government, therefore leaving significant discretion to the federal prosecutors yet again.

This is inadequate.

The problem with mandatory minimum sentences in trafficking cases mirrors the problem with mandatory minimums in certain drug cases; Congress found mandatory minimums under drug statutes problematic when they applied equally to low-level offenders and drug kingpins.²¹⁰ To remedy this incongruity, Congress created 18 U.S.C. § 3553(f), a safety valve provision to exclude certain drug offenders from mandatory minimums, allowing courts to use the Sentencing Guidelines to determine an offender’s status.²¹¹ To be eligible, the defendant must: (1) have no more than one criminal history point, (2) have been unarmed and nonviolent, (3) not have caused death or serious injury to any person, (4) not have been a leader of others or engaged in a continuing criminal enterprise, and (5) have provided the government with all of the information that he or she had relating to the offense.²¹²

²⁰⁸ 18 U.S.C. § 3553(a) (2012) requires that judges consider a list of factors when sentencing in order to “impose a sentence sufficient, but not greater than necessary.”

²⁰⁹ H.R. REP. NO. 1030 (1984).

²¹⁰ 132 CONG. REC. S14,301 (daily ed. Sept. 30, 1986) (statement of Sen. Byrd).

²¹¹ Oliss, *supra* note 166, at 1884.

²¹² § 3553(f); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2.

Congress should create a similar safety valve for bottoms charged with violating the federal sex trafficking statutes to recognize their lack of agency and criminal responsibility. Due to the more serious—and often more violent—nature of the crime, the safety valve eligibility criteria for bottoms would necessarily be different than those for the drug offense statutes, as discussed in the following Section.²¹³

A. Proposed Safety Valve

This Note proposes a statutory amendment similar to the first-time drug offender safety valve, U.S.S.G. § 5C1.2,²¹⁴ to create a safety valve for bottoms charged with violating 18 U.S.C. §§ 1591, 2422(b), or 2423(a). If adopted, the safety valve would allow judges to employ their discretion and expertise in weighing sentencing factors, including a bottom’s lack of agency in committing the offense, to sentence bottoms below the mandatory minimums. The proposed safety valve includes the following requirements:

- (1) the defendant does not have more than five criminal history points resulting from non-violent crimes, not including points from prostitution or other offenses committed as a result of having been trafficked before application of U.S.S.G. § 4A1.3(b) (Departures Based on Inadequacy of Criminal History Category);
- (2) the defendant did not use violence unless coerced or forced by her trafficker,²¹⁵ and did not possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense—except when coerced by her trafficker as part of her duties as lead prostitute—as determined under the sentencing guidelines, U.S.S.G. § 3B1.1,²¹⁶ and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
- (5) the defendant “has complied with any reasonable request [by the government] for assistance in the investigation or prosecution of acts of severe forms of trafficking in persons,” including testifying against other

²¹³ See *infra* Section IV.B for a more in-depth discussion of the burden of proof for each condition of the proposed safety valve.

²¹⁴ The safety valve for bottoms would include several necessary amendments from the first-time drug offender safety valve.

²¹⁵ Parts (2) and (4) of the safety valve would employ § 1591’s definition of coercion, “threats of serious harm to or physical restraint against any person [or] any scheme, plan, or pattern intended to believe that failure to perform an act would result in serious harm to or physical restraint against any person.” § 1591.

²¹⁶ U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (U.S. SENTENCING COMM’N 2015).

perpetrators of severe forms of trafficking in persons on behalf of the government, unless unable to do so due to physical or psychological trauma.²¹⁷

With respect to Part (5), the reasonableness of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to:

(i) General law enforcement and prosecutorial practices; (ii) The nature of the victimization [of the lead prostitute]; (iii) The specific circumstances of the [lead prostitute]; (iv) Severity of trauma suffered (both mental and physical) or whether the request would cause further trauma; (v) Access to support services; (vi) The safety of the [lead prostitute] or the [lead prostitute's] family; (vii) Compliance with previous requests and the extent of such compliance; (viii) Whether the request would yield essential information; (ix) Whether the information could be obtained without the [lead prostitute's] compliance; (x) Whether an interpreter or attorney was present to help the [lead prostitute] understand the request; (xi) Cultural, religious, or moral objections to the request; (xii) The time the [lead prostitute] had to comply with the request; and (xiii) The age and maturity of the [lead prostitute].²¹⁸

Part (1) of the safety valve allows for up to five criminal history points. As discussed above,²¹⁹ traffickers specifically target vulnerable victims, including drug addicts or homeless youth who may have committed burglaries or other crimes.²²⁰ The Sentencing Guidelines require adding 2 points for each prior sentence of imprisonment lasting at least sixty days, and 1 point for every other sentence of imprisonment, meaning that many victims likely acquire multiple criminal history points before being trafficked.²²¹ Further, Part (1) would exclude from the 5-point calculation criminal history points from prostitution and other crimes resulting from having been trafficked, including drug charges following drug use that began while the bottom was being trafficked. As noted in Section III.B, bottoms likely have been incarcerated multiple times for prostitution prior to and while being trafficked. Although states may have their own safety valves for such offenses resulting from having been trafficked, it is necessary to create such an exception in the federal

²¹⁷ Alien Victims of Severe Forms of Trafficking in Persons, 8 C.F.R. § 214.11(b)(3)(ii), (h)(2) (2017).

²¹⁸ *Id.*

²¹⁹ *See supra* Part II.

²²⁰ *See, e.g.*, *United States v. Mack*, 808 F.3d 1074, 1078 (6th Cir. 2015) (detailing that the trafficker gave drugs to a victim for sex and forced her to prostitute herself to pay for more drugs); *United States v. Todd*, 627 F.3d 329, 332 (9th Cir. 2010) (noting that the trafficker picked up a teenage runaway who had been using drugs and prostituting herself).

²²¹ U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(b)–(c) (U.S. SENTENCING COMM'N 2015).

Sentencing Guidelines. Codifying this exception in the Guidelines would permit bottoms with convictions resulting from the force, fraud, or coercion exercised upon them by their trafficker to invoke the safety valve to §§ 1591, 2422(b), or 2423(a).

Further, because traffickers often force bottoms to punish other victims, Part (2) of the proposed safety valve would include an exception for using violence against other victims when the bottom was under force or threat of force to do so by her trafficker. This limited exception would prevent bottoms who might use violence against other victims for their own pleasure or benefit from being eligible for the safety valve. The exception is further limited by Part (3), which would require that the offense not result in death or serious bodily harm. Because bottoms, as a matter of definition, act as “leader[s], manager[s], or supervisor[s]” of others,²²² Part (4) requires a qualification: bottoms acting in those roles when required to do so by their traffickers remain eligible for the safety valve.

Some may argue that sex trafficking offenses committed by bottoms are much more serious and harmful than offenses committed by nonviolent, first-time drug offenders eligible for the safety valve on which the proposed safety valve is modeled; therefore bottoms should not be given a similar safety valve.²²³ However, the proposed safety valve would be available only to a bottom who acted under force, fraud, or coercion exercised upon her by her trafficker, thereby making her a victim of “[s]evere forms of trafficking in persons” as defined by the TVPA.²²⁴ If she had not been under the control or climate of fear of her trafficker, then the bottom would not have committed the trafficking offenses against other victims.²²⁵

Part (5) of the proposed safety valve mirrors the language of the TVPA’s requirements for foreign victims’ assistance to law enforcement to be eligible for immigration relief and a “T-Visa,” including the definition of “reasonableness,” which considers characteristics of the victims, such as severe mental and physical traumatization.²²⁶ A “reasonable request” may include interviews with law enforcement, testifying before a grand jury, or, as specifically enumerated in the proposed amendment, testifying against other perpetrators at trial, unless the bottom is unable to do so due to

²²² *Id.* § 3B1.1 cmt. 2.

²²³ *See* United States v. Nagel, 559 F.3d 756, 761 (7th Cir. 2009) (holding that although drug offenses are serious, first-time drug offenders present differing degrees of risk to the community, while traffickers “who violate § 2422(b) always present a serious danger to children”).

²²⁴ Trafficking Victims Protection Act, 22 U.S.C.A. § 7102(9)(A) (West 2015).

²²⁵ Many of the terms of the safety valve are subjective, so an evidentiary hearing would be required for the court to determine whether the bottom qualifies.

²²⁶ 8 C.F.R. § 214.11 (2012).

physical or psychological trauma.²²⁷ This requirement would mitigate potential criticism from the government that the safety valve has removed the government's leverage to make bottoms testify against their traffickers. However, the qualification that bottoms be exempted from the requirement due to physical or psychological trauma would alleviate concerns about retraumatization.²²⁸ Because the bottoms' eligibility for the safety valve would be judicially determined at a sentencing hearing, the reasonableness of the government's requests for assistance likewise would be reviewable, unlike a U.S.S.G. § 5K1.1 reduction.²²⁹

B. Proving Eligibility for the Safety Valve

Although defendants often clearly meet the conditions of the first-time drug offender safety valve,²³⁰ Parts (2), (4), and particularly (5) of the proposed safety valve for bottoms contain subjective conditions that the government may contest, largely because of the strong need for bottoms' testimony at trial.²³¹ During the presentence investigation, the U.S. Probation Office would ask both parties where they stand on the issue and document their positions in the presentence report submitted to the court.²³² The defendant would bear the burden of establishing all five criteria by a preponderance of the evidence.²³³ However, if the government believes that the bottom does not meet all five criteria, then the government would have the opportunity to file a brief and provide information at sentencing stating why the bottom does not qualify for the safety valve.²³⁴ The defendant would be allowed to reply.²³⁵ Because of the particularly subjective nature of Part (5) of the proposed safety valve, the court would likely conduct an evidentiary hearing regarding the bottom's compliance with government requests, the reasonableness of the request, and whether physical or psychological trauma prevented compliance.

²²⁷ *Id.*

²²⁸ Zraick, *supra* note 8.

²²⁹ Judicial review of the government's request would mitigate criticism about the arbitrariness of such requests for noncitizen victims seeking T-Visas. Benjamin Thomas Greer & Scott Davidson Dyle, *Determining the Reasonableness of Non-Compliance: Examining the "Trauma Exception" for T-Visa Applicants*, 15 SCHOLAR: ST. MARY'S L. REV. RACE & SOC. JUST. 385, 430–31 (2013).

²³⁰ E-mail from Lori C. Baker, Parole Officer, W.D. Wis. Parole Office (Mar. 18, 2016) (on file with author).

²³¹ See *supra* notes 63–70 and accompanying text.

²³² E-mail from Lori C. Baker, *supra* note 230.

²³³ *Id.* Often the defendant could prove she satisfied Part (5) by submitting a law enforcement agency declaration to the court. See Greer & Dyle *supra* note 229, at 394.

²³⁴ *Id.*

²³⁵ *Id.*

When the government disputes the bottom's eligibility for the safety valve based on the bottom's insufficient compliance with government request for assistance, the burden would shift and the government would bear the burden of proof to show that the bottom was noncompliant and that the request was reasonable. If the government succeeded in meeting its burden, the bottom then would need to prove that her noncompliance resulted from trauma. To determine whether the bottom has satisfied the Part (5)—and potentially Parts (1)–(4)—the court likely would hold an evidentiary hearing.²³⁶ To prove the reasonableness of the government request—which “depends on the totality of the circumstances” and the bottom's physical or psychological trauma preventing compliance²³⁷—both parties might call expert witnesses. The government often calls experts to testify in sex trafficking cases: experts typically testify about the common dynamics present in sex trafficking operations, including the means traffickers use to maintain control over their victims and victims' resulting mental health issues, including post-traumatic stress disorder.²³⁸ Both the government and defense could rely upon such experts at a sentencing hearing to testify about the bottom's specific physical or psychological symptoms, whether the government's requests for compliance were reasonable in light of such symptoms, and whether those symptoms prevented the bottom from complying with the government's request, even if it was reasonable. The court would make the final determination regarding the bottom's compliance with all five parts of the test.

Therefore, creating a safety valve would give a bottom the opportunity to benefit from the court's sentencing discretion in addition to the prosecutor's charging and U.S.S.G. § 5K1.1 discretion. It would give her defense attorney an opportunity to argue that mitigating factors exist that the judge could consider. It also would allow the bottom to regain some of her agency by making a real choice between entering into a plea deal and fighting the charges at trial without the threat of an automatic ten- or fifteen-year mandatory minimum sentence if convicted.²³⁹ The safety valve

²³⁶ *Id.* (discussing the typical process for determining defendants' eligibility for the drug offender safety valve).

²³⁷ See 8 C.F.R. § 214.11 (2016).

²³⁸ See, e.g., *United States v. Brooks*, 610 F.3d 1186, 1196 (9th Cir. 2010); *United States v. Anderson*, 560 F.3d 275, 281–82 (5th Cir. 2009); *United States v. Sutherland*, 191 F. App'x 737, 741 (10th Cir. 2006); *United States v. Shamsud-Din*, No. 10 CR 927, 2012 WL 280702, at *2–3, 9 (N.D. Ill. Jan. 31, 2012).

²³⁹ See *supra* Section III.A. The first-time drug offender safety valve affected the number of guilty pleas defendants made: a study found that “the effect of guilty pleas and other guidelines departures on the length of actual imprisonment critically depended upon whether the defendant had qualified for the safety-valve provision.” Natasha Bronn, Note “*Unlucky Enough to Be Innocent*”: *Burden-Shifting and*

additionally may provide defense attorneys with greater leverage during plea negotiations to work out the best deal for their clients. Although Part (5) of the proposed safety valve still would require bottoms to comply with the government's "reasonable request[s]," including testifying at trial, the court could review the exemption for physical or psychological trauma, thereby mitigating much of the potential coercion resulting from government pressure to cooperate. Although a judge could consider a bottom's cooperation as part of her overall determination of a fair and just sentence, she also would be able to consider many other mitigating factors, including the bottom's age, vulnerabilities, and status as a trafficking victim, to impose a fair and just sentence.²⁴⁰

CONCLUSION

Although many people prosecuted for committing federal offenses have troubled backgrounds, a bottom who commits sex trafficking offenses constantly fears being subjected to severe violence and has lost her agency because her trafficker has made her his property. At the same time, a bottom should be punished appropriately for the crimes that she has committed against other victims. Nonetheless, appropriate punishment must consider the bottom's lack of agency in committing those offenses, in recognition that she too is a victim, acting due to force, fraud, or coercion exercised upon her by her trafficker. A judge experienced in weighing sentencing factors, including a victim's agency in committing offenses, should have available a Sentencing Guidelines safety valve that allows her to consider such factors when imposing a sentence. Leaving a bottom—a victim of trafficking herself—subject to only a prosecutor's review of the facts of her case in determining whether she deserves to be subject to a ten- or fifteen-year minimum sentence is neither just nor fair. Therefore, Congress should amend 18 U.S.C. § 3553 to include a safety valve provision for victims of trafficking who commit sex trafficking offenses. This provision would allow prosecutors and judges to incorporate their discretion, conscience, experience, and sense of justice into the sentencing procedure.

Although reported cases demonstrate appropriate prosecutorial discretion when charging bottoms who commit trafficking crimes under the thumb of their traffickers, the societal—and prosecutorial—understanding of bottoms' lack of agency in committing the offenses should be codified.

the Fate of the Modern Drug Mule Under the 18 U.S.C. § 3553(f) Statutory Safety Valve, 46 COLUM. J.L. & SOC. PROBS. 469, 483 (2013).

²⁴⁰ 18 U.S.C. § 3553(a) (2012).

Such codification would cause the federal criminal justice system to recognize bottoms' status as victims who lacked agency when committing offenses. Beyond that, recognizing bottoms' victimization in law, similar to the TVPA's recognition of trafficking victims as *victims* and not people willingly selling sex, makes a statement not only to the legal system, but also to the American public and foreign governments.

