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# A Guide for State Courts in Cases Involving Child Trafficking Victims Coerced into Criminal Behavior

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## I. Background

This guide discusses problems faced by child trafficking victims coerced into criminal behavior by a trafficker and possible options for court processing of cases involving those juveniles. Traffickers often force or coerce their child victims into the commission of a variety of crimes, and adjudications of guilt for those crimes can greatly increase the harmful effects of the victimization. Courts that deal with juveniles are thus faced with identifying when such coercion has occurred and what actions they can take to mitigate the effects of a determination of guilt for those crimes. These may be some of the most difficult types of child trafficking cases for courts to identify and process.

The guide examines:

- where juveniles coerced into criminal behavior by a trafficker might appear in the courts;
- the possible consequences of a juvenile delinquency adjudication;
- possible legal avenues of relief from the consequences of the criminal behavior for the juvenile; and
- challenges for the juvenile justice system to processing cases involving child victims of human trafficking.

The article is divided into the following sections:

- I. Background;
- II. Elements of human trafficking;
- III. Where juveniles coerced into criminal behavior by a trafficker might appear in a court;
- IV. Collateral consequences of juvenile adjudications on eligibility for employment, other state benefits, and immigration relief;
- V. Options for legal relief from criminal liability for juveniles who commit crimes coerced by a trafficker;
- VI. Court challenges for dealing with trafficking victims; and
- VII. Conclusion

## II. Elements of Human Trafficking

Under the Uniform Law Commission's suggested Uniform State Trafficking Law, a person commits the crime of human trafficking if the person intentionally, knowingly, or recklessly recruits, transports, transfers, harbors, receives, provides, obtains, isolates, maintains, or entices a person for the purposes of forced labor or servitude or commercial sex through coercion, deception, or fraud. Note that a person need not be transported from one place to another to be a trafficking victim.

Under federal law, the term "coercion" is defined as: (1) threats of serious harm to or physical restraint against any person; (2) 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 (3) the abuse or threatened abuse of the legal process.<sup>1</sup>

Generally under state law, fraud is defined as the intentional and knowing concealment or false representation of fact by words or conduct to induce another to act to his or her legal detriment. The federal crime of fraud is defined as knowingly and willfully: (1) falsifying, concealing, or covering up by any trick, scheme, or device a material fact; (2) making any materially false, fictitious, or fraudulent statement or representation; or (3) making or using any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

The following are some of the types of coercion that have been employed by traffickers to maintain control over their victims. Evidence of the use of any of these forms of coercion may indicate the presence of a trafficking issue in a juvenile case:

- threatened or actual physical or non-physical harm to the victim or the victim's family which compels the victim to perform services to avoid harm;
- use or threatened use of law to exert pressure on the victim;
- demeaning or demoralizing the victim (e.g. through verbal abuse or humiliation);
- disorienting and depriving the victim of alternatives (e.g., isolation, restricted communication, debts, monitoring);
- diminishing resistance and debilitating the victim (e.g., by denial of food, water, or medical care or by use of drugs or alcohol);
- deceiving about consequences (e.g., overstating risks of leaving or rewards of staying, feigning ties to authorities or hit men/gangs);
- threatening to report victims who are non-citizens to Immigration and Customs Enforcement (ICE) to have them deported, or
- dominating, intimidating, and controlling the victim (e.g., by abuse, an atmosphere of violence, display of weapons, rules, and punishments).<sup>2</sup>

Human trafficking victims may be coerced or pressured into committing crimes due to the direct demands of a trafficker or as a result of the physical or psychological effects associated with being a victim of human trafficking. Some of the more common crimes that a trafficking victim may be coerced into committing include the following:

- prostitution;
- drug use;
- drug sales;
- theft;
- illegal peddling;
- resisting arrest;

- using false identification;
- gang activity; and
- recruiting other victims for the trafficker.

A juvenile adjudication for a crime committed under coercion by a trafficker can greatly increase the difficulty for the victim in gaining freedom from the trafficker. The collateral consequences of a criminal conviction, moreover, can affect a person’s eligibility for employment or immigration relief, and the consequences can follow the victim into adulthood.

### III. Where Juveniles Coerced Into Criminal Behavior by a Trafficker Might Appear in a Juvenile Court

Juvenile trafficking victims may appear in court in a variety of ways. Most commonly they will appear in prostitution cases or in cases involving other crimes they were forced into committing by their traffickers. In addition, juveniles who commit status offenses, such as runaway or truancy, may be trafficking victims or at high risk of becoming trafficking victims. Table 1 summarizes the ways in which trafficking may arise in different types of cases involving juveniles.

**Table 1. Trafficking Issues in Juvenile Case Types**

Case Types	Possible Trafficking Connections
<u>Delinquency</u> <ul style="list-style-type: none"> <li>• Theft (e.g. shoplifting)</li> <li>• Criminal trespass</li> <li>• Battery</li> <li>• Assault</li> <li>• Prostitution</li> <li>• Recruiting trafficking victims</li> </ul>	<ul style="list-style-type: none"> <li>• A trafficker may coerce a victim into stealing in order to provide extra income for the trafficker.</li> <li>• Some crimes, such as assault, may involve a human trafficking offense.</li> <li>• A juvenile charged with prostitution who has solicited clients using social media may be an indication of trafficking.</li> </ul>
<u>Drug Crimes</u> <ul style="list-style-type: none"> <li>• Purchase, possession, manufacture, distribution, or sale of controlled substances or marijuana</li> <li>• Drug court</li> </ul>	<ul style="list-style-type: none"> <li>• A trafficker may require victims to engage in drug sales in addition to performing sexual services.</li> <li>• A trafficker may use drugs to control a victim.</li> </ul>
<u>Status offenses</u> <ul style="list-style-type: none"> <li>• Runaway</li> <li>• Incurable</li> <li>• Truancy</li> </ul>	<ul style="list-style-type: none"> <li>• The juveniles involved in these cases may be at risk for becoming trafficking victims.</li> </ul>
<u>Dependency</u> <ul style="list-style-type: none"> <li>• Abuse</li> <li>• Neglect</li> <li>• Abandonment</li> </ul>	<ul style="list-style-type: none"> <li>• If the person seeking to be a guardian or foster parent of a young female is a much older male, the person may be a trafficker.</li> <li>• Family members may be engaged in trafficking other family members.</li> <li>• The abuse may be a form of control by a parent or guardian.</li> </ul>
<u>Guardianship</u>	<ul style="list-style-type: none"> <li>• Traffickers have been known to seek guardianship over minor victims, so in cases where an unrelated person is seeking guardianship over a minor, the relationship between the two may suggest the existence of trafficking.</li> <li>• An extended family member of a minor may be engaged in trafficking the minor and apply for guardianship.</li> </ul>
<u>Child Placement</u>	<ul style="list-style-type: none"> <li>• In child placement decisions, evidence of the suitability of a parent for custody or the suitability of extended family members for placement of a dependent child may indicate the possibility of family trafficking.</li> </ul>

The following are some of the indicators that may appear in a delinquency or dependency case that may give rise to a concern that a juvenile is a victim or may be at risk of becoming a victim of human trafficking. The indicators often involve a disruptive home or school environment that leaves the juvenile vulnerable with no safe or stable place to go:

- absence of supervision at home;
- parents who are or have been in prison;
- a history of involvement with child welfare;
- multiple foster care placements or schools attended;
- a family history of domestic violence;

- frequent runaway or truancy, particularly three or more runaways in a 12-month period or a runaway at age 12 years or younger;
- a history of alcohol or drug abuse;
- behavioral problems at school; and
- behind in grade level.<sup>3</sup>

Table 2 summarizes the decision points in case processing involving children where evidence may arise that human trafficking may be involved.

**Table 2. Decision Points Where Evidence of Trafficking May Appear**

Decision Point	Possible Trafficking Connections
<u>Delinquency</u> : plea colloquy	The judge may uncover possible trafficking issues in assuring that a crime was committed and the juvenile knowingly and willingly entered the plea.
<u>Delinquency</u> : disposition and determination of mitigating factors	With regard to possible victim-defendants, evidence of mitigating factors may reveal that the defendant engaged in the criminal activity due to the coercion of a trafficker or the effects of victimization.
<u>Delinquency</u> : juvenile diversion decision	The decision to place a juvenile into a diversion program may be based on trafficking-involved factors.
<u>Delinquency</u> : juvenile detention decision	The decision whether or not to place a juvenile into detention may be based on trafficking-involved factors, particularly if there is a need to separate the juvenile from a trafficker or evidence that delinquent acts may have been coerced by a trafficker.
<u>Delinquency</u> : determining sanctions for probation violations	If the juvenile is a human trafficking victim, the behavior may be an expected result of the effects of victimization.
<u>Status Offense</u> : determination of need for secure detention or return home	Evidence of the suitability of a parent for return home or the suitability of extended family members for placement may reveal risks to the juvenile of becoming a trafficking victim.  The decision whether or not to place a juvenile into detention may be based on trafficking-involved factors.
<u>Dependency</u> : determination of dependency jurisdiction	Evidence of the ways in which a child has been abused, neglected, or abandoned may provide an indication of trafficking.
<u>Dependency</u> : removal of child from a home	Evidence regarding the conditions in the home may provide an indication of trafficking.
<u>Guardianship</u> : determination of suitability of guardian	Evidence of the suitability of a proposed guardian may reveal the possibility of trafficking.
<u>Child placement</u> : determination of suitability of a child placement	Evidence of the suitability of a parent for custody or the suitability of extended family members for placement of a dependent child may reveal the possibility of family trafficking

The following discussion describes in detail the trafficking issues that can arise in each case type listed in Table 1. Evidence of trafficking issues can come to light at each decision point in the case process listed in Table 2, so the issues raised in the discussion below can arise throughout the case process.

## Delinquency

Judges should be alert to signs of victimization by traffickers, especially by juvenile gangs, which can in turn get them involved in a variety of delinquent activities, such as prostitution, theft, drug use, and drug sales. This susceptibility to victimization may be a consideration for a juvenile court judge in dealing with delinquency matters.

A juvenile's judgment can affect competence to plead guilty. A juvenile may be more likely to focus on the short term benefits of pleading guilty, such as immediate release, rather than long term consequences such as the implications of a delinquency conviction on the juvenile's record.<sup>4</sup> Further, for juveniles who are not U.S. citizens, the ramifications of a guilty plea in a delinquency proceeding for the juvenile's immigration rights and status are complex, and an immigrant juvenile is unlikely to be able to comprehend them without the assistance of a defense attorney who is familiar with Federal immigration law.<sup>5</sup>

Identifying juvenile trafficking victims in the context of a delinquency case can be difficult. Juveniles may be easy prey for human traffickers who deal in prostitution, and traffickers may also force the victims into committing other crimes, such as selling drugs for the trafficker, stealing, or even assisting the trafficker in recruiting other victims, thus turning the trafficking victim into a trafficker as well. This makes it difficult to recognize juvenile criminal behavior that is the result of victimization rather than criminal intent.

Trafficking victims may not view themselves as victims, but rather believe that, despite repeated abuse, the trafficker is a loving boyfriend, protector, or parent. They also often have a history of anti-social behavior and may be uncooperative and distrustful of people in authority, so they may not meet our expectations of what a victim should look or act like. As a result, they may make unsympathetic witnesses, complicating the difficulties in identifying them as victims.

Determining which cases involve trafficking can be particularly difficult where gangs are involved.

- With shoplifting gangs, it is hard to sort out whether the gang members are doing it voluntarily or working for a trafficker.
- Gang members may use false names and identify a person as a parent who is in fact not their parent, so the judge cannot be sure that the child is being released to a real parent.
- Coercion by fraud is hard to sort out.

- With gangs, the trafficker may also be a juvenile.
- A girl may come in as a runaway where the mother is asking the court to keep her away from the gang.

## Status Offenses

Runaways and truants are at high risk of becoming trafficking victims, as their living situations are often precarious. The trafficker may provide the juveniles with the semblance of security that is missing from their lives.

Some state statutes limit what a judge can do with runaways and other status offenders. The following are some of the problems that those statutes may create.

- Often a first offender may just be sent home. It may be possible to put the child who is sent home into counseling or wrap-around services and require the child to attend school if the family is willing to cooperate.
- Families may be reluctant to file runaway petitions, if all the courts are going to do is send the child home. They may just give up on chronically unruly kids, especially adopted kids. As a result, the courts may rarely see those cases.
- The court may not be able to hold a child in secure detention without a concurrent delinquency charge.
- The court may be able to send a child to a family member in another state as part of the conditions of release for a status offense.
- The court may be able to appoint a guardian *ad litem* (GAL) in a status offense case.
- There are ethical issues in status offense cases: (1) the judge may have no option other than to send a child home knowing that the child will run away again; and (2) the judge may find himself or herself acting as prosecutor where the family filed the petition and no prosecutor is involved.

## Dependency

The juvenile court judge in a dependency case may need to be alert to signs of victimization. Possible indicators of human trafficking that might appear in a dependency case from an assessment of the signs of child abuse and neglect include a variety of behaviors or attitudes that reveal a mindset of fear, distrust, denial, and conflicting loyalties. For example, trafficking victims may:

- develop general feelings of helplessness, shame, guilt, self-blame, and humiliation;
- suffer from shock and denial, or display symptoms of phobias, panic attacks, anxiety, and depression;
- suffer from sleep or eating disorders;
- become addicted to drugs and alcohol as a way to cope with or "escape" their situation, or as a method of control used by their traffickers;

- become emotionally numb, detached, and disassociated and display “flat affect;” or
- believe that, despite repeated abuse, the trafficker is a loving guardian or parent.<sup>6</sup>

## Guardianships

Human traffickers have been known to apply for guardianship over their juvenile victims. The court may deny a guardianship petition if there is evidence that the proposed guardian may be a trafficker.

## Child Placement

In child placement decisions, evidence of the suitability of a parent for custody or the suitability of extended family members for placement of a dependent child may indicate the possibility of family trafficking. One source of evidence may be evidence presented where a parent files for a restraining order against a family member or an unrelated person for alleged trafficking of his or her child.

## IV. Collateral Consequences of Delinquency Adjudications Involving Trafficking Victims

Juvenile trafficking victims who are convicted of criminal activity coerced by a trafficker may face serious collateral consequences that greatly increase the effects of their victimization. These collateral consequences may make it more difficult for the victim to get free from the control of the trafficker.<sup>7</sup>

### Eligibility for Employment

Juvenile offenses may affect an individual’s eligibility for employment either as a juvenile or later when applying for employment as an adult. While juvenile adjudications are not criminal convictions for the purposes of eligibility for employment, some convictions for juvenile offenses can affect eligibility for certain types of employment and can also affect access to other privileges that may be a requirement for certain jobs, such as driving or possessing a firearm. Further, employers may take into account any criminal or juvenile conviction that reasonably relates to the fitness of an individual for a particular job. Note that the laws with regard to eligibility for employment vary considerably by state.

Prospective employers may request a job applicant to provide records pertaining to juvenile offenses as a precondition to an offer of employment, if an offense might affect the person’s suitability for a certain job. Even if juvenile records are not public records under state law, an applicant may feel it necessary to disclose juvenile adjudications in the interest of honesty. Further, prospective employers may

have other ways to find out if a person has a juvenile record. For example, arrest records may still be available from law enforcement web sites, and other public sources of information not affected by expungement orders, such as archived newspapers, may be available. In addition, some states make records of serious juvenile offenses public records.

The types of delinquency adjudications that can affect eligibility for employment vary greatly from state to state, but certain criminal offenses will nearly always affect an offender’s employment involving work with children or the elderly. Delinquency adjudications for sex offenses are likely to bar juveniles from working with young children in schools, summer camps and swimming programs. Delinquency adjudications for aggravated assault may bar juveniles from working with the elderly. The ability to work in a variety of human service occupations may also be affected. Applications for those types of employment may trigger a background check by the prospective employer.

A delinquency adjudication may affect an application for military service as follows:

- A delinquency adjudication is considered a conviction for a criminal offense under Army regulations.<sup>8</sup>
- The Air Force, Navy and Marines examine delinquency adjudications on a case-by-case basis.<sup>9</sup>

### Eligibility for Other State or Federal Benefits

A juvenile delinquency conviction, or in some cases even an arrest for certain offenses, can affect the juvenile’s eligibility for other state or federal benefits. The following is a summary of those benefits, with the caveat that laws differ from state to state, so that juvenile judges need to be aware of their own specific state laws.

#### Driving Privileges

A variety of juvenile offenses, particularly offenses involving possession of drugs or alcohol, DUI, and other driving offenses, may result in the suspension of driving privileges for a statutorily defined length of time. Lack of driving privileges may seriously limit the juvenile’s ability to engage in certain types of employment.

#### Possession of a Firearm

Some serious juvenile offenses may prohibit an individual from obtaining a license to possess or use a firearm for a specified period of time. This would prevent the person from entering any profession requiring the carrying of a firearm, such as law enforcement, park ranger, etc.

## School Attendance

Conviction or even arrest for certain offenses, particularly offenses involving a crime of violence or a weapon, may result in suspension or expulsion from school. In some places a school administrator may have the authority to assess the suspension or expulsion even if the juvenile is not adjudicated delinquent.

## Public Assistance and Public Housing

Certain delinquency adjudications can make the juvenile ineligible for public or subsidized housing or food stamps and lead to eviction from public housing.<sup>10</sup>

## **Effects of Delinquency Adjudications on Eligibility for Immigration Relief for Immigrant Juvenile Trafficking Victims**

For juvenile human trafficking victims who are immigrants, a juvenile delinquency disposition or admissions made in a delinquency hearing can affect the individual's immigration status and eligibility for many forms of immigration relief.

## Deportability

With regard to deportability, while juvenile adjudications are not considered adult convictions of crimes for immigration purposes, some juvenile behavior that may arise in a delinquency case may make a person deportable without a criminal conviction, including the following:

- being known or reasonably believed to have engaged in drug trafficking;
- being a drug addict;
- having engaged in prostitution;
- violating a protection order;
- using false documents; or
- having a mental condition that is a threat to others.

## Eligibility for Immigration Relief

There are a variety of forms of immigration relief that may be available to people without lawful status who are victims of abuse or certain crimes, on application to the United States Citizenship and Immigration Services (USCIS). Those forms of relief are temporary (i.e. time-limited) unless converted to a grant of lawful permanent resident (LPR) status pursuant to an application to USCIS within a statutorily defined time.

To be granted LPR status, the applicant must be admissible to the United States, so the grounds for inadmissibility under federal immigration law apply. Some juvenile offenses may make the defendant inadmissible and thus ineligible for

adjustment to LPR status. While many of the offenses can be waived by USCIS, violent offenses, sex offenses, drug trafficking or addiction, and gang activity are unlikely to be waived and can lead to denial of any form of immigration relief. As a result, where traffickers force the victims into committing crimes, that criminal behavior, if admitted to in a delinquency hearing, could also make the victim ineligible for adjustment to LPR status.

In circumstances where the delinquency offense might affect eligibility for the requested relief, the burden of establishing eligibility for the immigration relief is on the applicant. United States Citizenship and Immigration Services (USCIS) may request the applicant to provide records of a juvenile proceeding as a condition of meeting that burden. If the juvenile court records are sealed, the juvenile may have to request that the records be unsealed in order to provide them to USCIS. In some rare circumstances, USCIS may deny the benefit if the juvenile does not provide the records.

The eligibility requirements for adjustment to LPR status can become especially problematical for a juvenile in circumstances where the state court is unable to send a juvenile to a treatment program unless the court has a delinquency adjudication on which to base a court order. For example, there may be no secure housing available for a juvenile victim of sex trafficking unless the juvenile is adjudicated for prostitution and sentenced to a juvenile detention facility.

The primary forms of immigration relief available to juvenile trafficking victims and the effects of juvenile delinquency adjudications on the victim's eligibility for relief are discussed below.

## Special Immigrant Juvenile Status (SIJS)

Special Immigrant Juvenile Status (SIJS) is a form of temporary immigration relief that provides an abused, neglected, or abandoned juvenile who meets certain requirements with some important rights, including the right to work. A trafficked juvenile who is also an undocumented immigrant may be eligible to apply for SIJS under certain conditions specified by Federal immigration law. The juvenile must file an application with the United States Citizenship and Immigration Services (USCIS) for the grant of SIJS, and the granting of status is discretionary with USCIS. Then in order to remain permanently in the U.S., the juvenile must also file a separate application for adjustment to lawful permanent resident (LPR) status.

## T Visas

The T visa is a non-immigrant (temporary) visa available for individuals who have been the victims of human trafficking and meet the following requirements. The person:

- is or has been the victim of severe trafficking, as defined in federal law;
- is physically present in the United States or its territories as a result of the trafficking;
- if 18 years of age or above, is complying with any reasonable request for assistance in the investigation or prosecution of traffickers; and
- would suffer extreme hardship involving unusual and severe harm upon removal.

Under the Trafficking Victims Protection Act, a person under the age of 18 years who is induced to perform a commercial sex act is considered a victim of severe trafficking. The holder of a T visa is eligible to apply for LPR status after he or she has been continuously in the U.S. in T visa status for three years and meets the requirements of admissibility. Federal immigration law permits USCIS to waive most of the requirements of admissibility, and in particular requirements based on criminal convictions rendering the person inadmissible that were caused by or related to victimization as a result of the trafficking.

## U Visas

A victim of human trafficking may qualify for U non-immigrant status, also referred to as a U visa, in some circumstances, on application to USCIS. The U visa is a non-immigrant (temporary) visa available to undocumented individuals who meet the following requirements:

- the individual has suffered severe physical or mental abuse as a result of being a victim of certain enumerated criminal activity;
- the individual has information about the criminal activity and has been, is being, or is likely to be of help to a federal, state, or local investigation or prosecution of the criminal activity; and
- the individual has certification from a federal, state, or local judge, prosecutor, law enforcement officer, or other justice system official involved in investigating or prosecuting the criminal activity that he or she has been, is being, or is likely to be of help to the investigation or prosecution of the criminal activity. State court judges are among the justice system officials who are authorized to provide the certification, if they possess information to justify the certification.

The holder of a U visa is eligible to apply for LPR status after three years of continuous residence in U visa status. Federal immigration law permits USCIS to waive most of the requirements of admissibility in determining eligibility for the U visa, and the waiver is not limited to convictions for crimes related to victimization from human trafficking.<sup>12</sup>

## Access to Juvenile Court Records

Access to juvenile court records is an important component for all of the above collateral consequences of delinquency adjudications. The rules of access to juvenile court records differ from state to state on a variety of dimensions, including the age at which an offense was committed, the crime committed, other criminal convictions of the juvenile, the age of the offender at the time that access to the juvenile court records is being sought, the person or agency requesting the records, the relationship of the requesting entity to the juvenile, the reasons for the request, whether records are sealed automatically or require a motion on behalf of the individual to seal the record, and whether a court order is required to unseal a record.

In most states, juvenile court records of individuals who have not yet attained the age of 18 years are not public records, although all states provide that juvenile court records may still be available to specified justice system officials. As an example, in Hawaii all juvenile court records are considered confidential, even if the juvenile is not eligible to have the adjudication expunged.<sup>13</sup> In New Hampshire, juvenile court records are not open to the public and can be accessed only by certain justice system agencies and individuals entrusted with the care of the child, and all juvenile court records for an individual are automatically sealed when the person reaches 21 years of age.<sup>14</sup>

Some states, however, make juvenile court records open to the public except in very limited circumstances. Michigan, for example, provides that juvenile court records are open to the public unless the court hearing was closed to the public by the judge as provided by Michigan law.<sup>15</sup> Washington makes all juvenile court records public, although the court may seal a juvenile court record on motion by the offender after the offender reaches the age of 18.<sup>16</sup> Further, some states make records public for serious offenses such as murder or rape. If a juvenile court record is open to the public, it makes the juvenile record available to potential employers making a background check.

Sealing a record will make it non-public, but it does not erase the record, so it may be accessed for certain purposes. For example, Michigan provides for setting aside a juvenile conviction in certain circumstances.<sup>17</sup> The law provides that on application to the court by the offender the record can be made non-public, but it can still be accessed by a court, a justice system agency, a law enforcement agency, a prosecutor, the attorney general, or the governor for certain

specified purposes, including consideration for licensing and consideration for employment in a law enforcement agency. Kentucky makes juvenile court records available to school officials, including the juvenile's counselor and teacher.<sup>18</sup>

The scope of what records are covered by an order sealing a juvenile's record varies by state. In some states sealing applies just to the records of the juvenile court, while other states extend the sealed records to include other justice system records. For example, New Jersey applies the sealing of juvenile records to just the record of the juvenile court and not the records of any other governmental agency.<sup>19</sup> On the other hand, New York provides that when a juvenile record is sealed, "all official records and papers, including judgments and orders of the court, but not including public court decisions or opinions or records and briefs on appeal, relating to the arrest, the prosecution and the probation service proceedings, including all duplicates or copies thereof, on file with the court, police agency, probation service and presentment agency shall be sealed and not made available to any person or public or private agency."<sup>20</sup>

## V. Options for Legal Relief From Criminal Liability for Juveniles Who Commit Crimes Coerced by a Trafficker

As noted above, the collateral consequences of a delinquency adjudication for crimes committed under coercion by a trafficker can greatly increase the difficulty for the victim in gaining freedom from the trafficker. In this section we discuss ways in which juveniles charged with criminal activity coerced by a trafficker may be relieved of criminal liability for the crimes committed.

Coercion by a trafficker may have the following legal consequences for a victim-defendant's criminal liability for his or her acts.

- The juvenile may be classified as a victim rather than an offender.
- The coercion may negate the requisite criminal intent, so an essential element of the crime is missing and the offender cannot be convicted.
- The coercion may provide grounds for expunging or vacating the conviction at a later date.
- Public access to the juvenile's records may be limited.

## Classifying Juvenile Trafficking Victims as Children in Need of Services or Youthful Offenders

Some states provide options for classifying cases involving children who engaged in prostitution as a result of trafficking as dependency cases rather than delinquency cases. The difference could be critical to the juvenile victim by avoiding the collateral consequences of a conviction. Examples of alternative ways to classify cases involving children who have been forced into prostitution or the commission of other crimes by a trafficker are described below in Section VI, Court Challenges for Dealing With Trafficking Victims.

## Coercion as Negating Criminal Intent

The United States Supreme Court has made it clear in a number of opinions that the burden of proof regarding the consequences of coercion on criminal liability depends on whether the coercion affects the presence of an essential element of the crime as defined by state law.

- **Coercion Affecting Criminal Intent.** The prosecution has the burden of proving beyond a reasonable doubt every element of the crime charged. If the coercion is such that it negates the requisite criminal intent for a crime, once the issue of coercion has been raised, the burden of disproving coercion is placed on the prosecution. This is the case even if state law labels the defense an "affirmative defense." The only burden placed on the defendant is the burden of producing some evidence in order to create a factual issue as to the lack of criminal intent due to coercion. Once this is done, the state then has the burden of proving beyond a reasonable doubt the absence of coercion.<sup>21</sup>
- **Coercion as a Mitigating Factor.** If the coercion does not rise to the level of negating criminal intent, so that the offender has committed all the elements of the offense but is raising coercion as an affirmative defense in order to avoid the legal consequences of the offense, the burden of proving this defense is on the defendant. The required burden of proof of this affirmative defense may be proof by clear and convincing evidence or by a preponderance of the evidence, depending on state law, but not proof beyond a reasonable doubt.<sup>22</sup>

## Expunging a Juvenile Record

Once a former juvenile offender attains the age of 18 years, it may be possible for the person to have the juvenile court record expunged. The offender typically must apply to the court for expungement, although in some states juvenile records are expunged automatically once the offender reaches a defined age and has not committed any disqualifying offenses as provided under state law. Expunging the conviction physically seals all official records pertaining to the case and treats the proceeding as not having occurred. The rules vary from state to state as to which types of offenses can be expunged or vacated, who may be eligible or ineligible, and the process for having a conviction expunged, including whether a court order is required. For example, many states bar expungement of any crime committed by a juvenile offender that would have been a felony if committed by an adult. The subsequent criminal record of the person, both as a juvenile and as an adult, can also be considered by the court in deciding whether to grant a request for expungement.

Some of the juvenile crimes that states have made ineligible for expungement may have been committed as a result of trafficking victimization. Barring the expungement of those crimes may serve to increase the negative effects of the victimization. For example, Colorado makes crimes involving unlawful sexual behavior ineligible for expungement.<sup>23</sup> Included in the definition of unlawful sexual behavior are a variety of offenses that may be committed by a juvenile trafficking victim who is coerced into recruiting other juvenile victims, such as procuring a child for prostitution, inducing child prostitution, and human trafficking of a minor for sexual servitude.<sup>24</sup> Florida makes juveniles whose record includes procuring a person under the age of 18 for prostitution ineligible for expungement.<sup>25</sup> Alabama makes juveniles ineligible for expungement if the juvenile is adjudicated delinquent of a “felony or misdemeanor involving a sexual offense, drugs, weapons, or violence, or threats of violence”.<sup>26</sup> Some of those crimes could have been committed due to the coercion of a trafficker.

Some states will not consider a motion to expunge or vacate a conviction if there are any criminal charges pending against the applicant in any court. For example, the District of Columbia Code provides that expungement of a juvenile delinquency adjudication is not available if the juvenile offender is later adjudicated delinquent for another offense.<sup>27</sup> As trafficking victims are often coerced into a variety of criminal activities by a trafficker and may continue to engage in such activities if they remain under the control of the trafficker after the conviction for which expungement is being sought, this restriction may prove to be a significant burden.

## VI. Court Challenges For Dealing With Trafficking Victims

### Juvenile Court Dockets

There are four basic types of court dockets in which cases involving trafficking victims may appear: dependency dockets, regular delinquency dockets, combined dependency/delinquency dockets, and designated human trafficking dockets.

#### Dependency Docket

Some states have provisions for child sex trafficking victims to be designated as sexually-exploited children rather than delinquents, so they can be treated in the courts as children in need of protection or services rather than delinquents. For example, recent legislation in California specifies that a child who is a victim of sex trafficking, a child engaged in survival sex, or a child paid to perform a sexual act can now fall within the jurisdiction of the dependency court.<sup>28</sup> In essence, this allows dependency courts to provide specialized counseling and related services to trafficking victims or individuals at risk of becoming victims. Since the juvenile court does not have jurisdiction over parents in delinquency cases, treating the case as a dependency gives the court control over the parents as well.

#### Regular Delinquency Docket

Child trafficking victims may commit a variety of offenses as a result of their victimization that could result in a delinquency conviction. It is common for victims to engage in runaway or truant behaviors, and conviction of those offenses makes the child a status offender. Further, victims may commit a variety of crimes that stem from their exploitation, including prostitution, theft, drug use, assault, providing false identification to an arresting officer, resisting arrest, loitering, and disturbing the peace. They may also commit probation violations, become involved in gang activity, and recruit other trafficking victims for their traffickers. The result of such a conviction is a delinquency record.

#### Combined Dependency/Delinquency Docket

Some states allow the court to keep both dependency and delinquency options open for trafficking victims. For example, California statutes create a “dual status” option for child sex trafficking victims. The county probation department and child welfare services department must agree to designate the county as a dual status county and jointly create a written protocol covering the methods for designating the child as a dual status child. This status allows the court to keep both dependency and delinquency options open as long as the child is designated a dual status juvenile.<sup>29</sup>

In a similar vein, New Jersey classifies "... an act which if committed by an adult would constitute prostitution in violation of N.J.S.2C:34-1 or any offense which the juvenile alleges is related to the juvenile being a victim of human trafficking" as a "juvenile-family crisis." The court is then required to refer the complaint to court intake services for review and recommendation "as to whether the complaint should be dismissed, diverted, or referred for court action." The jurisdiction of the court in those cases extends to the juvenile and the juvenile's parents or guardian. The stated goal of the law in those cases is, "... to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefor an adequate program of supervision, care and rehabilitation, and a range of sanctions designed to promote accountability and protect the public."<sup>30</sup>

For another approach, New York has a youthful offender statute that allows the court to classify a youth who has not committed certain designated serious offenses and is not a repeat offender as a youthful offender. The law then provides: "A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority but shall be deemed a conviction only for the purposes of transfer of supervision and custody ..."<sup>31</sup>

### Designated Juvenile Human Trafficking Docket

A number of courts around the country have formed designated juvenile human trafficking dockets, either as a separate docket within the court or as a juvenile human trafficking specialty court. These specialized dockets or courts typically have a designated judge and a dedicated prosecutor and defense attorney who handled most of the cases. They also typically have special child sex trafficking teams, that could include the prosecutor, defense attorney, probation officer, and service providers, to review the cases on the docket prior to the court hearing and try to reach a consensus on the desired outcome of the hearing.<sup>32</sup>

Victimization can affect the following aspects of a court case involving a child human trafficking victim:

- the victim-defendant's culpability for criminal acts if the acts are forced on the victim by a trafficker,
- the demeanor of the victim in court, which may make the judge or prosecutor doubt that the victim is willing to cooperate with the judge or probation;
- the willingness or ability of the victim to cooperate with the judge due to fear of reprisal or further victimization by a trafficker;
- the ability of the victim to participate meaningfully in her defense, including refusing to identify her trafficker and not recognizing that she is a victim;

- the ability of the victim to meet conditions of probation in light of the fact that victimization can have recurring effects, so behavioral change may not be linear and challenges can be expected;
- the possibility that a victim may try to return to the trafficker if s/he has been threatened or fears for her/his safety, possibly making some placements challenging or unsuitable for trafficking victims; and
- the victim's needs for specialized services that may not be available.

The following are some of the ways in which it might be desirable to adapt the court process to deal with child trafficking victims.

- Prosecutors and defense attorneys may need to become more collaborative.
- With juvenile trafficking victims, the public defender may also have to take on the role of guardian *ad litem* (GAL), representing the best interests of the child, as well as adversary counsel.
- Prosecutor and defense may need to focus more on assisting the victim.
- Concepts of guilt and culpability may need to take victimization into account.
- Victim safety must be a focus of the judge in the court. The trafficker may be in the courtroom. The counsel for the defendant may have been hired by the trafficker.
- Probation conditions and dealing with violations need to be oriented to the special needs of trafficking victims.
- Expectations of behavior (e.g. with regard to AWOLs) may need to change (e.g., in licensing shelters).

All the participants in court cases involving child trafficking victims, including the judges, district attorneys, public defenders, probation officers, child welfare workers, and service providers need to take the effects of victimization into consideration in handling those cases and may need to adapt their handling of child trafficking cases to account for the effects of victimization. The following are some of the ways in which the courts may need to adapt their processes and expectations. All of the strategies below apply regardless of the model the court is using for handling child trafficking cases, including special trafficking dockets, dual status dockets, regular delinquency dockets, or dependency dockets.

Case Initiation. The first responder in a delinquency case is typically a law enforcement officer. An initial investigation will then be conducted by some combination of law enforcement, probation, and child welfare, at which a determination of diversion, initial placement or detention, and case filing is made. This is also the step in the process where the first opportunity for identification of possible child trafficking occurs.

Regardless of the calendaring model used, the success of the system depends heavily on having all the key actors in a case, the judge, district attorney, public defender, probation officer, and child welfare worker, collaborating toward the same goal.

Some of the child trafficking-related issues that may arise at this point in the process include the following.

- Law Enforcement may have options for differential treatment of child trafficking victims at the point of initial contact. Law enforcement officers must be sensitive to the possibility of the presence of trafficking.
- While prostitution is the offense most clearly related to trafficking, child trafficking victims may be in court for a variety of other offenses, such as resisting arrest, providing false identification, disorderly conduct, theft, drug use, and assault. Identifying who might be a trafficking victim can be difficult.
- Probation and Child Welfare may have to collaborate and share information to identify the trafficking victim, and this may require finding solutions to confidentiality restrictions. Probation normally will not have access to Child Welfare reports, so the probation officer may not know much of the child's background and may not have information that might alert the officer to possible victimization of the child. Further, the Child Welfare reports may just have the filing and outcome, but not the details of the abuse or neglect.
- For dependency cases involving child trafficking victims, Child Welfare may have to expand its investigative capabilities. State laws typically do not authorize Child Welfare agencies to file against a parent who is raising an issue of inability to control a child. Child Welfare will thus have to investigate the relationship between the child and a third party, the trafficker, and this is likely to require additional infrastructure and experienced staff. Even identifying the trafficker may be difficult, especially if the victim refuses to cooperate with Child Welfare.

### At the Trial

Once a case has been filed, the first issue for the court is whether the juvenile should be assigned to a specialized trafficking docket, if the court has one. Some courts may also have access to multi-disciplinary teams, which could include the district attorney, public defender, probation, and possibly child welfare and service providers, to review the circumstances of the child and make recommendations to the court regarding services and placement options. Some of the effects of trafficking victimization at this stage of the process include the following.

- Helping trafficking victims to develop enough trust to participate in the justice system and work with service providers is critical. All court actors, including the judge, the district attorney, and the public defender, need to develop rapport with the victim and maintain continuity throughout the victim's contacts with the court. Having

the same judge, district attorney, and public defender throughout a case is an important part of this continuity.

- Defense attorneys may have to take on the role of guardian ad litem (GAL) as well as adversary counsel, as the victim's decision-making may be negatively affected by the coercive control of a trafficker and other effects of victimization. For example, a public defender may agree to the use of secure detention against the wishes of the child, if secure detention appears to be in the best interest of the child. This may raise concerns about the ethical obligations of counsel to represent the wishes of the juvenile.
- District attorneys may have to seek solutions for the best interest of the child rather than adopting a pure prosecutorial role in a criminal proceeding. Prosecutors may have informal options available through diversion programs to work with a juvenile before involving the juvenile in the formal justice system.
- The prosecutor and public defender may need to put aside their adversarial roles and work together as a team to reach agreement on an outcome that is in the best interest of the child in a case involving a trafficking victim.
- Judges need to schedule review hearings frequently enough to track the progress of a juvenile, since the support, oversight, and consistency provided by the court and stakeholders can provide incentives for a child to engage with services. For dependency cases involving trafficking victims, this may mean more frequent review hearings than the standard six-month reviews, possibly as often as every 30-90 days.
- Judges may have to set probation conditions that take into account the effects of trafficking victimization, and probation may have to rethink what constitutes a probation violation and how to deal with violations. It may be important to start by setting short-term goals and being flexible about minor violations. The definition of success may have to be defined differently for each child.

### Disposition

Issues at disposition include placement, the use of secure detention, probation conditions, and family reunification conditions, if appropriate. In most cases, the goal of the disposition will be emancipation of the victim to gain his/her freedom and independence from the trafficker in the context of assuring his/her safety. Some of the effects of victimization include the following.

- In making decisions about the use of secure detention for child trafficking victims, judges need to balance public safety and the safety of the children with the need to treat victims with compassion. There may be times where placing a trafficking victim in secure detention is the only way to prevent further victimization by a trafficker, particularly if the victim has no viable family to return to.
- There may be a concern about having group homes that

mix juveniles from the delinquency system, and especially trafficking victims, with juveniles from the dependency system, due to the possibility that trafficked juveniles will use group homes to recruit new victims for their traffickers. At the same time, foster parents may not be fully informed about the trafficking experiences that a child has gone through, and in addition may not be trained to deal with a child affected by victimization. There may be a need for foster parents who are specially trained to deal with child trafficking victims.

- The options available to the judge in a delinquency case are different from those available in a dependency case. The judge can monitor Child Welfare in a dependency case but not in a delinquency case.
- For child trafficking cases where the family has other children that are also dependents of the court, judges may need to have strategies for dealing with the interactions between the trafficking victims and their siblings in the context of the dependency proceedings.

### Bifurcated Adjudication and Disposition of Delinquency Cases

For delinquency cases, if the crime takes place in a county other than the juvenile's home county, the case will be adjudicated in the county where the crime took place, and the disposition will be handled by the juvenile court in the county where the child lives. Status offense cases are also typically handled in the child's home county, so a court handling a delinquency charge may not know that the child has a concurrent status offense case in another county. In addition, there may be a prostitution case in one court and a runaway warrant in another, and the first court may be unaware of the case in the other court.

In a delinquency case involving a child trafficking victim where the adjudication hearing (typically a plea hearing) is held in one county and the case is then transferred to another jurisdiction for disposition, an important ethical issue for both judges is when it is appropriate for the first judge to discuss the case with the judge who is handling the disposition hearing.<sup>33</sup> For example, where the victim/delinquent is charged with petty theft charges but the first judge suspects her to be a human trafficking victim who was coerced into criminal behavior by the trafficker, it is a question whether it is appropriate for that judge to communicate with the judge who is going to determine her "disposition" and suggest that specialized probation services are more appropriate for this trafficking victim than custody time.

In some juvenile courts, judges commonly talk to other judges about cases where venue is changed, either by writing notes to the file or, occasionally, by telephone. Such communication may be inappropriate, however, if the first judge conveys information that the judge received from a third party that would be prejudicial to one of the parties in

the case. If the judge shares that information, or even appears to, it could compromise the receiving judge. On the other hand, the adjudicating judge should be allowed to discuss his or her concerns with the disposition judge as long as the information exchanged is based on evidence that arose in the juvenile court adjudication process.

If the evidence of possible trafficking does not appear until the disposition hearing, another problem arises. The judge at the disposition hearing may believe that the guilty plea accepted by the judge at the adjudication hearing should be vacated. Judges should check their state laws covering the options available in that situation.

### System Resources

The ability to deal with child trafficking victims raises a variety of resource issues for the juvenile justice system, including the following.

- The behavioral requirements of group homes and foster parents may have to be adjusted for trafficking victims to account for AWOLs and other common problems associated with trafficking victims. County licensing boards need to be cognizant of what constitutes reasonable expectations for a provider that houses trafficking victims.
- There is a need for specialized services for trafficking victims. Judges may play a role in helping develop services, as long as the judge does not violate ethical boundaries by appearing to promote specific services or service providers.
- Child trafficking victims who are LGBTQ (lesbian, gay, bisexual, transsexual, or questioning) may need specialized services and placement options that are supportive of their needs.
- Coordination between courts will be an issue with delinquency cases where a case is adjudicated in one county and then transferred to another county for disposition. Judges may wish to develop a means for communicating with neighboring counties to maintain continuity when a disposition involving a child trafficking victim is transferred to their county.
- There may be an issue of maintaining continuity of approach when one or more of the key actors change, such as the judge, district attorney, public defender, probation officers, or child welfare workers, and continuity of funding for service programs that are dependent on soft money for their existence. Continuing training will be needed as people move to new assignments and others replace them.

## VII. Conclusion

Court officials should be alert to human trafficking issues in the investigation and prosecution of child protection and juvenile delinquency cases. Traffickers are often prosecuted under lesser charges that are easier to prove and carry similar penalties. This may make it difficult to identify the victim of the crime as a human trafficking victim, as nobody in the justice system may be looking for a trafficking victim in those cases.

Trafficking victims are most likely to appear in court as criminal offenders, either in prostitution cases or in other criminal cases coerced by a trafficker, such as theft, assault, drug sales, illegal peddling, and the like. Judges need to be aware of the signs that the offender is in fact a trafficking

victim at every decision point throughout the processing of all types of cases involving juveniles.

The burden of identifying human trafficking victims falls on officials from across the entire justice system, including law enforcement officers, human service providers, prosecutors, defense attorneys representing possible trafficking victims who are charged as criminals, judges, and probation officers. Still, trafficking victims are difficult to identify, so victims may pass through the justice system without being identified as victims. In those cases, the court may be the last recourse for a trafficking victim to get help if other parts of the justice system have missed the signs of victimization.

<sup>1</sup> 22 U.S.C 7102(3).

<sup>2</sup> Farrell, A., McDevitt, J., Pfeffer, R., Fahy, S., Owens, C., Dank, M, and Adams, W. (2012). Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases. (Washington, D.C.; National Institute of Justice).

<sup>3</sup> Goodman, M. and Laurence, J. (2014). "Child Trafficking Victims and the State Courts." in A Guide to Human Trafficking for State Courts. (Denver, CO: Center for Public Policy Studies/National Association for Court Management).

<sup>4</sup> Weller, S. (2002). "The Importance of Understanding Juvenile Judgment and Cognition in Determining Competence and Culpability," in Weller, S. and Wosje, R., Editors, A Judge's Guide to Juvenile Offenders in Adult Criminal Court. (Reno, NV: National Judicial College).

<sup>4</sup> Weller, S., and Junck, A. (2014). "Human Trafficking and Immigrant Victims: What Can State Courts do?" A Guide to Human Trafficking for State Courts. (Denver, CO: Center for Public Policy Studies/National Association for Court Management). <http://www.htcourts.org/guide-chapter3.htm>.

<sup>6</sup> Martin, J. (2014). "Addressing Human Trafficking in the State Courts: Background and Approach." A Guide to Human Trafficking for State Courts. (Denver, CO: Center for Public Policy Studies/National Association for Court Management).

<sup>7</sup> For links to summaries of laws relating to collateral consequences of juvenile adjudications for individual states, see <http://www.modelsforchange.net/publications/listing.html?tags=collateral+consequences>.

<sup>8</sup> Army Regulation 601-210, Chapter 4, available at [http://www.apd.army.mil/pdffiles/r601\\_210.pdf](http://www.apd.army.mil/pdffiles/r601_210.pdf).

<sup>9</sup> Air Force Instruction 36-2002, at 31 attachment 4 (1999), available at <http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2911.pdf>; Navy Recruiting Manual-Enlisted 2-95-2-98 (2002), available at <http://usmilitary.about.com/library/pdf/navrecruit.pdf>; 2 Military Personnel Procurement Manual, MCO P1100, 72C 3-95-3-105 (2004), available <http://www.marines.mil/news/publications/Documents/MCO%20P1100.72C%20W%20ERRATUM.pdf>.

<sup>10</sup> See for example 42 U.S.C 1437d(l)(6)).

<sup>11</sup> 8 U.S.C. § 1182(d)(13).

<sup>12</sup> 8 U.S.C. § 1182(d)(14).

<sup>13</sup> Hawaii Statutes 571-84.

<sup>14</sup> RSA 169-B:35.

<sup>15</sup> Mich. Comp. Laws § 712A.28.

<sup>16</sup> RCW 13.50.050, RCW 13.50.260.

<sup>17</sup> Michigan Comp. Laws Ann. Section 712A.18e.

<sup>18</sup> Ky. Rev. Stat. 610.340(5).

<sup>19</sup> New Jersey Court Rule 1:38

<sup>20</sup> New York Family Law, Section 375.2.

<sup>21</sup> Sandstrom v. Montana, 442 U.S. 510 (1979).

<sup>22</sup> Patterson v. New York, 432 U.S. 197 (1977) and Dixon v. United States, 548 U.S. 1 (2006).

<sup>23</sup> C.R.S. 19-1-306.

<sup>24</sup> C.R.S. 16-22-102(9).

<sup>25</sup> Florida Code 943.059.

<sup>26</sup> Code of Alabama Section 12-15-136 and 137.

<sup>27</sup> D.C. Code 16-2335.

<sup>28</sup> SB 855, signed June 20, 2014.

<sup>29</sup> California Welfare and Institutions Code Section 241.1.

<sup>30</sup> P.L. 2011, c. 195, Approved January 17, 2012.

<sup>31</sup> New York Criminal Procedure Law Section 720.35 Youthful offender adjudication; effect thereof; records.

<sup>32</sup> For example, see [http://www.courts.ca.gov/documents/LosAngeles-STARCourt-ProgramOutline\\_ikc.pdf](http://www.courts.ca.gov/documents/LosAngeles-STARCourt-ProgramOutline_ikc.pdf) for a description of the Los Angeles STAR Court program.

<sup>33</sup> For a detailed discussion of ethical issues for judges in human trafficking cases, see Weller, S., Lee, E., and Marks, D. (2014). "Ethical Issues for Judges and Court Practitioners in Human Trafficking-Involved Cases." in A Guide to Human Trafficking for State Courts. (Denver, CO: Center for Public Policy Studies/National Association for Court Management). <http://www.htcourts.org/guide-chapter6.htm>



**HUMAN TRAFFICKING**  
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