

Charging Ahead: Prosecuting Human Trafficking Cases Without Victim Cooperation

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ABSTRACT

This Article provides brief, practical guidance and resources to practitioners prosecuting human trafficking cases. More specifically, this Article examines issues contributing to the non-cooperation of victims and protections employable to encourage victim participation. Using the victim-centered and prosecution-led approaches, this Article then provides pre-trial and trial strategies for proceeding without victim and survivor cooperation.

I. INTRODUCTION

The testimony of a human trafficking victim can be powerful evidence against a trafficker. There are, however, numerous reasons why victims often hesitate to participate in the case against their trafficker. When even best practices for victim protection are insufficient to overcome a victim's fear, trauma, or other factors that may deter their cooperation, prosecutors must learn how to successfully prosecute the case without this key evidence and assistance.

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II. WHY SOME VICTIMS ARE UNWILLING OR UNABLE TO TESTIFY OR COOPERATE¹

“[The offender] was basically pimping her out but she was completely uncooperative and she had all sorts of issues and didn’t want to come to court and when she took the stand at the testimony, it was just awful. She was clearly trying to protect him”²

Successful human trafficking prosecutions usually rely heavily on victim testimony and cooperation.³ Notably, however, these cases present unique circumstances with victim cooperation, which necessitates more attention from prosecutors for the welfare and needs of victims.⁴ Unique issues and factors that influence and prevent victims from testifying or cooperating include victims’ fear of retaliation by the traffickers, wariness of possible implications of complicity in the traffickers’ crimes, inability or unwillingness to identify themselves as victims, and lack of trust in authorities.⁵ Additionally, many victims do not understand their rights, fear deportation, or lack knowledge and understanding regarding law

¹ See HEATHER J. CLAWSON, NICOLE DUTCH & MEGAN CUMMINGS, CALIBER/ICF INT’L, LAW ENFORCEMENT RESPONSE TO HUMAN TRAFFICKING AND THE IMPLICATIONS FOR VICTIMS: CURRENT PRACTICES AND LESSONS LEARNED 37–38, 55 (2006), <https://www.ojp.gov/pdffiles1/nij/grants/216547.pdf> [hereinafter CLAWSON ET AL., PROSECUTING HUMAN TRAFFICKING CASES]; HEATHER J. CLAWSON ET AL., ICF INT’L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES v-vii (2008), <https://www.ojp.gov/pdffiles1/nij/grants/223972.pdf> [hereinafter CLAWSON ET AL., PROMISING PRAC.]; AMY FARRELL ET AL., URB. INST., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 64 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/238795.pdf>; NAT’L DIST. ATT’YS ASS’N, WOMEN PROSECUTORS SECTION, NATIONAL HUMAN TRAFFICKING PROSECUTION BEST PRACTICES GUIDE 26–27 (2020), <https://ndaa.org/wp-content/uploads/Human-Trafficking-White-Paper-Jan-2020.pdf>; Kevin Bales & Steven Lize, Trafficking in Persons in the United States: Final Report 4–6, 15, 51–53, 84, 93, 96 (NCJ No. 211980, 2005), <https://www.ojp.gov/pdffiles1/nij/grants/211980.pdf> [<https://perma.cc/LY24-6WTD>]; Michael Bradley, *Human Trafficking: Why Do So Many Victims Refuse Help?*, BBC NEWS (Oct. 17, 2013), <https://www.bbc.com/news/uk-england-24548143>; Sarah Warpinski, Know Your Victim: A Key to Prosecuting Human Trafficking Offenses 4–7 (unpublished manuscript) (2013), <https://www.law.msu.edu/king/2012-2013/Warpinski.pdf>; see also E4J University Module Series: Trafficking in Persons & Smuggling of Migrants, Module 9: Criminal Justice Responses to Trafficking in Persons, U.N. OFF. DRUGS & CRIME (2019) [hereinafter UNODC, *E4J Module 9*], <https://www.unodc.org/e4j/en/tip-and-som/module-9/key-issues/challenges-to-an-effective-criminal-justice-response.html>.

² FARRELL ET AL., *supra* note 1, at 178.

³ CLAWSON ET AL., PROMISING PRAC., *supra* note 1, at v-vii.

⁴ CLAWSON ET AL., PROMISING PRAC., *supra* note 1, at vi; see also Warpinski, *supra* note 1, at 7–8, 10–30.

⁵ Bradley, *supra* note 1.

enforcement's role in the process.⁶ It is imperative for law enforcement and prosecutors to recognize and understand the issues and challenges that can impede victim testimony and cooperation.⁷ It is equally important to recognize that a victim-centered approach sometimes means making the tough decision to proceed without victim testimony or cooperation because that is what is best for the victim and achieving justice in the case.

III. PRE-TRIAL STRATEGIES FOR ENCOURAGING VICTIM PARTICIPATION⁸

A. Employ Interagency Collaboration

Effective collaboration and relationship-building is integral to the success of prosecuting human trafficking cases. Federal

⁶ AMY FARRELL ET AL., INST. ON RACE & JUST., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 84 (2008), <https://www.ojp.gov/pdffiles1/nij/grants/222752.pdf>.

⁷ FARRELL ET AL., *supra* note 6, at 84.

⁸ See ANNETTE BRUNOVSKIS, BALANCING PROTECTION AND PROSECUTION IN ANTI-TRAFFICKING POLICIES: A COMPARATIVE ANALYSIS OF REFLECTION PERIODS AND RELATED TEMPORARY RESIDENCE PERMITS FOR VICTIMS OF TRAFFICKING IN THE NORDIC COUNTRIES, BELGIUM AND ITALY, NORDIC COUNCIL OF MINISTERS 65–68 (2013), <http://norden.diva-portal.org/smash/get/diva2:701729/FULLTEXT01.pdf>; CLAWSON ET AL., PROMISING PRAC., *supra* note 1, at 8–10; FRANKLIN CRUZ & TERESA M. GARVEY, ÆQUITAS, IMPROVING WITNESS SAFETY AND PREVENTING WITNESS INTIMIDATION IN THE JUSTICE SYSTEM: BENCHMARKS FOR PROGRESS 14–22 (2016), <https://aequitasresource.org/wp-content/uploads/2018/09/Benchmarks-for-Progress.pdf>; TERESA M. GARVEY, ÆQUITAS, WITNESS INTIMIDATION: MEETING THE CHALLENGE 31–42, 49–60 (2013), <https://aequitasresource.org/wp-content/uploads/2018/09/Witness-Intimidation-Meeting-the-Challenge.pdf>; KEISHA LIVERMORE ET AL., INT'L ORG. FOR MIGRATION, INVESTIGATING HUMAN TRAFFICKING CASES USING A VICTIM-CENTERED APPROACH 37–67 (2018), https://publications.iom.int/system/files/pdf/investigating_human_trafficking.pdf; JOHN WILKINSON, FRANKLIN CRUZ, HOLLY FUHRMAN & SPURGEON KENNEDY, ÆQUITAS & JUST. MGMT. INST., COMBATTING WITNESS INTIMIDATION 21 (2019), <https://aequitasresource.org/wp-content/uploads/2019/09/CWI-Final-Report-9.26.19.pdf>; Amy Farrell, Colleen Owens & Jack McDevitt, *New Laws But Few Cases: Understanding the Challenges to the Investigation and Prosecution of Human Trafficking Cases*, 61 CRIME, L. & SOC. CHANGE 139 (2013); Anne T. Gallagher & Nicole Karlebach, *Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice* (unpublished manuscript) (2011), https://www.ohchr.org/Documents/Issues/Trafficking/Geneva2011BP_GallagherAndKarlebach.pdf; Joseph M. Scaramucci, *Notes from the Field: Reducing the Need for Victim Testimony in Human Trafficking Cases*, NAT'L INST. OF JUST. (June 25, 2020), <https://nij.ojp.gov/topics/articles/reducing-need-victim-testimony-human-trafficking-cases#citation--0>; Warpinski, *supra* note 1, at 23–36. See generally ÆQUITAS, ANNOTATED BIBLIOGRAPHY WITNESS INTIMIDATION 14, 16–18 (2013) [hereinafter ÆQUITAS, ANNOTATED BIBLIOGRAPHY], <https://aequitasresource.org/wp-content/uploads/2018/09/Annotated-Bibliography-of-Witness-Intimidation-Resources.pdf>; U.N. OFF. DRUGS & CRIME,

prosecutors surveyed stated that successful cases generally depend on testimony of victims, properly trained investigators, multi-agency collaboration, and trusting relationships with victims.⁹ Additionally, evidence demonstrates a higher likelihood of identification, prosecution, and services provided to victims where agencies participate in task forces.¹⁰ Prosecutors should therefore collaborate with victims, law enforcement, and other service providers; focus on investigations and evidence gathering; and use available pre-trial protections to facilitate victim cooperation and successful prosecutions.

Collaboration with other law enforcement agencies and other community service providers produces better outcomes.¹¹ Consequently, lack of coordination and collaboration between agencies may diminish victim's confidence in the system and their willingness to participate in the prosecution process.¹² All too often, however, prosecutors and investigators are not trained specifically on dealing with the unique issues and challenges presented in human trafficking cases. This lack of training leads to continuing difficulties with victim and witness cooperation and creates additional obstacles to successful prosecution.

B. Implement a Victim-Centered Approach

Focused on a victim-centered response,¹³ the federal government funded numerous multi-agency task forces designed to help local law enforcement agencies partner with victim's services agencies and United States Attorney's Offices.¹⁴ Top federal law enforcement officials say that local law enforcement agencies are likely best positioned for identifying human trafficking in their

TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 173–243, 253–56, 289–97 (2008) [hereinafter UNODC, TOOLKIT], [https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook\[1\].pdf](https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook[1].pdf); *Anti-Human Trafficking Manual for Criminal Justice Practitioners*, U.N. OFF. DRUGS & CRIME (2009), <https://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>; UNODC, *E4J Module 9*, *supra* note 1.

⁹ CLAWSON ET AL., PROMISING PRAC., *supra* note 1, at vi.

¹⁰ FARRELL ET AL., *supra* note 6, at 10.

¹¹ FARRELL ET AL., *supra* note 2, at 64.

¹² WILKINSON ET AL., *supra* note 8, at 6.

¹³ Off. for Victims of Crime Training & Tech. Assistance Ctr., *Victim-Centered Approach*, in HUMAN TRAFFICKING TASK FORCE E-GUIDE, OVCTAC.gov (n.d.) [hereinafter OCVTAC E-GUIDE], <https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/13-victim-centered-approach/> (defining the victim-center approach as “the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner”).

¹⁴ FARRELL ET AL., *supra* note 6, at 8–10.

community.¹⁵ Therefore, in human trafficking cases, the federal government has focused on establishing and utilizing task forces, comprised of law enforcement, service providers, and community agencies.¹⁶

1. Be a Proactive Practitioner

Prosecutors should be proactive and take the lead in investigating and coordinating necessary support in human trafficking cases. While some state prosecutors are adequately prepared to handle human trafficking cases presented to them, many states, smaller cities, and rural areas lack access to task forces, training, and resources. Consequently, many state prosecutors are forced to wait for local police to bring cases to them.¹⁷ Additionally, police investigators and prosecutors are not usually most suited for these highly sensitive interactions with victims, as they often lack the necessary training and time to establish rapport and trust with the victims.¹⁸ Consequently, once cases are initiated, victims should be immediately referred to victim-witness coordinators or non-governmental organizations that can help advocate and assist the victim in finding appropriate resources.

Human trafficking cases are unique and require an approach that is distinct from other types of criminal cases. Nonetheless, the lack of resources or limited ability to collaborate with law enforcement on human trafficking investigations should not hinder prosecutors from pursuing human trafficking cases.¹⁹ Prosecutors should be proactive in their interactions with law enforcement investigators and work to implement prosecution-led or -guided investigations in human trafficking cases.²⁰ They should help organize trainings, identify human trafficking cases, and coordinate with appropriate agencies for investigating cases and assisting victims. Finally, prosecutors should also seek to leverage other laws and resources at their disposal, and hone other effective skills and tactics in pursuit of successful prosecution of human trafficking cases.

¹⁵ FARRELL ET AL., *supra* note 6, at 26.

¹⁶ FARRELL ET AL., *supra* note 6, at 84, 233–46. For more information on the victim-centered approach or starting a task force, see OCVTAC E-GUIDE, *supra* note 13.

¹⁷ Farrell et al., *supra* note 8, at 155.

¹⁸ Warpinski, *supra* note 1, at 35.

¹⁹ Farrell et al., *supra* note 8, at 155.

²⁰ LINDSEY ROBERSON & ALYSSA CURRIER, BEST PRACTICES FOR PROSECUTION-LED TRAFFICKING IN PERSONS INVESTIGATIONS IN UGANDA, HUM. TRAFFICKING INST. 3–6, 11–21 (2020), <https://www.traffickinginstitute.org/wp-content/uploads/2020/06/HTI-Best-Practices-Manual-WEB-High-Res-1.pdf>.

2. Use Protective Orders

Pre-trial protective orders should be used to help protect victim's privacy and safety. Rule 16 of the Federal Rules of Criminal Procedure provides courts broad authority to order protections during the discovery phase. Under this rule, courts have the authority to permit or deny pre-trial protections and relief.²¹ Prosecutors may request protections such as victim name redaction, restricting the defendant's access to certain documents and pictures, and in camera review of evidence, among others. To support successful prosecution of human trafficking cases, prosecutors should seek these and other necessary pre-trial precautions to reassure victims of their privacy and safety, and to help encourage victim cooperation and testimony.

IV. PRE-TRIAL STRATEGIES FOR MOVING FORWARD WITH LIMITED OR NO VICTIM PARTICIPATION²²

When proceeding through the pre-trial stage with limited or no victim participation, practitioners should look to other resources and forms of evidence to aid the veracity of their case. This requires shifting the focus from relying mainly on the victim's testimony to exploring other avenues and strengthening other evidentiary sources.

A. Reduce Reliance on Victim Testimony and Focus on Enhancing Other Evidence

For understandable reasons, human trafficking prosecutions are highly reliant on victim testimony for successful prosecution. However, investigators and prosecutors should seek to reduce this reliance whenever possible by deploying similar investigative

²¹ FED. R. CRIM. P. 16(d)(1) ("The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party's statement under seal.")

²² See FARRELL ET AL., *supra* note 1, at 132–42; GARVEY, *supra* note 8, at 20–24, 32–42, 53–60; KEISHA LIVERMORE ET AL., *supra* note 8, at 68–70 (2018); WILKINSON ET AL. *supra* note 8, at 21; Bales & Lize, *supra* note 1, at 90–92, 94–107; Louise Ellison, *Prosecuting Domestic Violence Without Victim Participation*, 65 MOD. L. REV. 834, 840–42 (2002); Farrell et al., *supra* note 8, at 161–65; Kristin Grossman, *What Will it Take? Examining the Use of Preliminary Hearing Testimony Where Victims are Unavailable Due to Mental Illness Stemming from Domestic Violence and Sexual Assault*, 39 N. ILL. U.L. REV. 140, 150–56 (2018); Bobby Naudé, *The Uncooperative Victim and the Admissibility of Evidence: Some Pointers from the USA*, 39 COMP. & INT'L L.J. S. AFR. 450, 454–59 (2006); Scaramucci, *supra* note 8; Rachel Louise Snyder, *We Prosecute Murder Without the Victim's Help. Why Not Domestic Violence?*, N.Y. TIMES (May 4, 2019), <https://www.nytimes.com/2019/05/04/opinion/sunday/domestic-violence-recanting-crawford.html>; UNODC, TOOLKIT, *supra* note 8, at 176–99, 206–16; UNODC, *E4J Module 9*, *supra* note 1.

tactics used in other types of cases. Domestic violence and murder cases are often prosecuted without the victim's testimony or cooperation and it is reasonable to work toward similar goals in human trafficking cases when feasible.²³

Yet, unlike murder and domestic violence cases, human trafficking cases are unique because they often lack physical evidence. The lack of physical evidence in human trafficking cases necessitates specialized training for investigators and prosecutors. Those handling human trafficking cases should have thorough knowledge of the particular and unique elements of human trafficking laws and comprehensively understand how to prove these elements.²⁴ Law enforcement should expand the scope of available evidence in the case through evidence gathering techniques that are not solely focused on the victim's testimony. Prosecutors should look to sources outside of victim testimony, such as victim cell phone contents, hotel receipts, and surveillance recordings to augment investigations.²⁵ Specifically, evidence related to components such as advertising, renting of real estate, transportation methods and documents, communication methods, and financial transactions should be sought after and gathered.²⁶

B. Consider Other Charging Options Based on Available Evidence

After assessing what evidence is available, consideration should be given to what, if any, other charges may be proven with the evidence obtained.²⁷ While it is often best practices to charge traffickers under anti-trafficking laws, in certain situations, it might be better strategy to file charges in addition to or beyond the anti-trafficking statutes to ensure successful prosecution. Consequently, in trafficking cases, investigators and prosecutors must be knowledgeable in all relevant or applicable laws and have the capacity to think more broadly or creatively.

²³ Snyder, *supra* note 22.

²⁴ LIVERMORE ET AL., *supra* note 22, at 62.

²⁵ FARRELL ET AL., *supra* note 1, at 223.

²⁶ LIVERMORE ET AL., *supra* note 22, at 63.

²⁷ NAT'L DIST. ATT'YS ASS'N, *supra* note 1, at 41. For a broader discussion of evidentiary issues in human trafficking cases, see U.N. OFF. DRUGS & CRIME, EVIDENTIAL ISSUES IN TRAFFICKING IN PERSONS CASES (2017), https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf.

V. HOW TO PROCEED WITH THE TRIAL STAGE IF THE VICTIM REMAINS UNCOOPERATIVE OR ABSENT²⁸

Even with the above practices, some victims remain unwilling or unable to testify. When this occurs, prosecutors should examine whether strategies developed in other contexts, such as domestic violence, assault, sexual assault, and child abuse cases are appropriate. The following Section presents strategies for proceeding without victim cooperation and testimony at trial.

A. Use Protections for Victims Who are Compelled to Testify

Sometimes reluctant or fearful victims are compelled to testify against their trafficker in court, which may cause more trepidation. The best practice is to avoid compelling victims to testify, and victim-centered prosecutions should place concern for the victim as the ultimate guide for how to proceed at trial. In employing victim-centered practices, practitioners ought to recognize the victim's apprehension and the possibility of re-traumatization that often occurs when victims are compelled to testify. This possibility for greater harm should trigger efforts on alternative avenues for proceeding without a victims' testimony.

In rare situations however, such as when the victim is the sole witness or the sole source of evidence, it may be necessary to legally compel a victim to testify. After carefully assessing and confirming the necessity of this testimony, practitioners should request other protections to help alleviate victims' fears (in addition to those available under Federal Rule of Criminal Procedure 16, previously mentioned) such as in camera proceedings, closed

²⁸ See FARRELL ET AL., *supra* note 1, at 162; GARVEY, *supra* note 8, at 37; NAT'L DIST. ATT'YS ASS'N, *supra* note 1, at 39–45; UNODC, TOOLKIT, *supra* note 8, at 233–42; Bales & Lize, *supra* note 1, at 108–11; Ellison, *supra* note 22, at 842–48; Farrell et al., *supra* note 8, at 161–65; Teresa Garvey, *Legal Jiu-Jitsu for Prosecutors in Intimate Partner Violence Cases: Forfeiture by Wrongdoing*, 17 STRATEGIES (Æquitas, Washington, DC), Dec. 2018, at 4–9, <https://aequitasresource.org/wp-content/uploads/2018/12/Legal-Jiu-Jitsu-for-Prosecutors-in-IPV-Cases-Forfeiture-by-Wrongdoing-2.pdf>; Warpinski, *supra* note 1, at 30–36; Jennifer Gentile Long & Teresa Garvey, *No Victim? Don't Give Up*, 7 STRATEGIES (Æquitas, Washington, DC), Nov. 2012, at 1, https://aequitasresource.org/wp-content/uploads/2018/09/S_Issue_7_No_Victim-Dont_Give_Up.pdf; Grossman, *supra* note 22, at 157–66; Snyder, *supra* note 22. See generally ÆQUITAS, ANNOTATED BIBLIOGRAPHY, *supra* note 8, at 16–17; ÆQUITAS, FORFEITURE BY WRONGDOING, THE PROSECUTORS' RESOURCE 3–7 (2012) [hereinafter ÆQUITAS, FORFEITURE BY WRONGDOING], https://aequitasresource.org/wp-content/uploads/2018/09/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf.

courtrooms, and closed-circuit or video testimony.²⁹ These provisions are most often used in cases with child victims, or victims who may be adults at trial but were underage during the crime.³⁰ However, courts may permit wider use of these protections in human trafficking cases, especially if prosecutors sufficiently establish the victim's need for these provisions.³¹

B. Educate the Court and Jury by Introducing Expert Witness Testimony

When trafficking victims are unwilling or unable to testify at trial, prosecutors should present expert witness testimony to inform and educate the court and jury on the psychology of why victims might be unwilling to cooperate and testify.³² Prosecutors should find an expert to communicate the effects of coercion and abuse, specifically in trafficking cases, and how that contributes to the victim's fear and behaviors.³³ The expert should be someone who can effectively explain that public and individual perceptions of how a victim *should* respond to abuse and trauma often conflict with a victim's actual response.³⁴ Experts may also testify generally about other issues in trafficking cases including, but not limited to, that victims may: (1) not see themselves as victims; (2) have relied on the trafficker for food, housing, and other basic needs; (3) have been threatened or had their family threatened; or (4) think they are "in love" with their trafficker.³⁵

²⁹ See Child Victims' and Child Witnesses Rights Act, Pub. L. 101-647, title II, §225(a), 104 Stat. 4798 (1990) (codified as amended at 18 U.S.C. § 3509); see also THOMSON REUTERS FOUND. & RIGHTS4GIRLS, SURVIVOR PROTECTION: REDUCING THE RISK OF TRAUMA TO CHILD SEX TRAFFICKING VICTIMS 17–27 (2018) [hereinafter SURVIVOR PROTECTION], <https://rights4girls.org/wp/wp-content/uploads/r4g/2018/01/Survivor-Protection.pdf> (discussing CCTV, videotaped depositions, and videotaped testimony, along with other alternatives to direct testimony).

³⁰ SURVIVOR PROTECTION, *supra* note 29, at 17–27.

³¹ *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995) (applying the *Craig* analysis and determining that the trial court's decision to limit the pro se defendant's ability to personally cross-examine the victim-witnesses did not violate his constitutional rights, finding the government's interest "sufficiently important to outweigh" the defendant's rights).

³² Long & Garvey, *supra* note 28, at 5–6.

³³ Long & Garvey, *supra* note 28, at 5–6; see also ÆEQUITAS, JUST. MGMT. INST. & URB. INST., 1 MODEL RESPONSE TO SEXUAL VIOLENCE FOR PROSECUTORS 71 (2017) [hereinafter RSVP MODEL], <https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Vol.-I-1.8.20.pdf>.

³⁴ RSVP MODEL, *supra* note 33, at 74; see generally Eric Werner, *Avoiding the Second Assault: A Guidebook for Trauma-Informed Prosecutors*, 25 LEWIS & CLARK L. REV. 573 (2021).

³⁵ RSVP MODEL, *supra* note 33, at 71–75.

C. Use Hearsay Exceptions to Admit Evidence instead of Victim Testimony

Prosecutors should examine whether the use of a hearsay exception is an appropriate method for introducing evidence where live victim testimony is unavailable. Such exceptions include use of a victim's prior statements (including spontaneous utterances and state of mind statements), forfeiture by wrongdoing, or introducing the prior bad acts of the defendant.³⁶ The admissibility of statements offered under these exceptions have often been unfairly questioned or incorrectly thought of as an inadequate replacement for victim testimony at trial.

When a victim is unavailable to testify at trial because of the defendant's actions, prosecutors may be able to use the forfeiture by wrongdoing exception.³⁷ This exception allows the admission of a victim's out-of-court statements if they are unavailable during trial due to the defendant's actions.³⁸ Wrongdoing, as classified under this exception, may involve direct or explicit intimidation, such as aggressive behavior, threats, and assault.³⁹ And, "declarations of love, or promises to marry or to change, when they are intended as inducements for the victim not to testify" may also be included.⁴⁰ The inclusion of these promises or inducements is significant because they are common methods of coercion in human trafficking cases.⁴¹ This exception is especially important in human trafficking cases where the trafficker's intimidation is similar to the dynamics of domestic violence cases, as traffickers often threaten retaliation against the victim or their family and "victims may be too fearful to testify or may go into hiding to escape, not trusting in the ability of law-enforcement to protect them."⁴²

Of interest to practitioners prosecuting human trafficking cases is the emerging theory of "Forfeiture by Exploitation."⁴³ Under this theory, scholars argue for the expansion of forfeiture by wrongdoing "to include 'forfeiture by exploitation,' or the admission of testimonial hearsay when a 'defendant exploited a child's vulnerabilities such that he could reasonably anticipate that the child would be

³⁶ Ellison, *supra* note 22, at 846–48.

³⁷ SURVIVOR PROTECTION, *supra* note 29, at 17–20; Naudé, *supra* note 22, at 459–66.

³⁸ ÆQUITAS, FORFEITURE BY WRONGDOING, *supra* note 28, at 1–8.

³⁹ ÆQUITAS, FORFEITURE BY WRONGDOING, *supra* note 28, at 1–8.

⁴⁰ ÆQUITAS, FORFEITURE BY WRONGDOING, *supra* note 28, at 1.

⁴¹ KYLEIGH FEEHS & ALYSSA CURRIER, HUM. TRAFFICKING INST., 2019 FEDERAL HUMAN TRAFFICKING REPORT 26–27 (2020), https://www.traffickinginstitute.org/wp-content/uploads/2020/05/2019-Federal-Human-Trafficking-Report_Low-Res.pdf.

⁴² FEEHS & ALYSSA CURRIER, *supra* note 41, at 1–2.

⁴³ SURVIVOR PROTECTION, *supra* note 29, at 21.

unavailable to testify.”⁴⁴ Arguably, the baseline assumptions and arguments would not apply only to trafficking cases involving children, but also should be inclusive of all trafficking cases where exploitation is found. Thus, practitioners should follow the development of this theory, and perhaps work to incorporate all trafficking victims under its umbrella.

VI. CONCLUSION

Victim and witness cooperation and testimony provide arguably the most powerful evidence in human trafficking cases. Yet, for a multitude of reasons, victims often hesitate to provide testimony or cooperate with investigations. Accordingly, it is important for prosecutors and investigators to understand and adapt to the unique complexities presented in human trafficking cases. To this end, strategies that practitioners have developed in other contexts—such as domestic violence, assault, sexual assault, and child abuse cases—may be helpful. Moreover, investigators and prosecutors should focus on interagency collaboration, using protective measures, and employing appropriate evidence rules. If these measures are broadly adopted and incorporated, practitioners are likely to see improved victim cooperation and increased success in human trafficking prosecutions.

⁴⁴ SURVIVOR PROTECTION, *supra* note 29, at 21.