

Lock Them Up and Throw Away the Key:
New Legislation Can Help Protect Child Victims of Sex
Crimes from Harsh Punishment

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**Lock Them Up and Throw Away the Key: New Legislation
Can Help Protect Child Victims of Sex Crimes from Harsh Punishment**

Trisha R. Delos Santos

I. INTRODUCTION

Child victims of sexual trafficking and sexual assault are some of the most vulnerable members of our society.¹ It is estimated that there are approximately 100,000 children in the United States who are commercially exploited each year.² What happens when these children fight back against those who abuse, exploit, and traffic them? In America, there are no special exceptions for minors who commit crimes against their abusers.³ In turn, they are prosecuted as adults and face decades in prison.⁴ In recent years, these victims' stories have come to light.

Sara Kruzan was only sixteen-years-old when she killed the man who sexually abused and trafficked her since age eleven.⁵ She was prosecuted for first-degree murder and was sentenced to life without parole.⁶ Cyntoia Brown, whose story was widely publicized recently, was also sixteen when she was sentenced to fifty-one years in prison after fatally shooting the man who was forcefully soliciting sex from her.⁷ Daniel Kovarbasich, age sixteen, faced fifteen years in prison for stabbing the man who molested him since he was twelve.⁸ Alexis Martin is currently serving a

¹ *Nevada Senate Committee on Judiciary: Hearing on A.B. 158, Exhibit D*, 80th Sess. 4 (2019).

² CHILD. ADVOC. CTR., *What is the Commercial Sexual Exploitation of Children (CSEC)* (last visited Oct. 16, 2019) <https://cacofbc.org/child-trafficking/>.

³ Olivia Exstrum, *Child Sex-Trafficking Victims Face Decades Behind Bars for Killing Their Abusers. That Could End Soon*, MOTHER JONES (May 9, 2019) <https://www.motherjones.com/crime-justice/2019/05/cyntoia-brown-sara-kruzan-sex-trafficking-abuse-legislation/>.

⁴ *Id.*

⁵ *Nevada Assembly Committee on Judiciary: Hearing on A.B. 158*, 80th Sess. 4 (2019).

⁶ Sara Kruzan, *Commentary: Legislature Will Consider Measure to Help, Not Punish, Kids Who Are Exploited*, L.V. REV. J. (Feb. 23, 2019) <https://www.reviewjournal.com/opinion/commentary-legislature-will-consider-measure-to-help-not-punish-kids-who-are-exploited-1604232/>.

⁷ Leah Carroll, *How the Justice System Failed Cyntoia Brown*, REFINERY29 (Aug. 7, 2019) <https://www.refinery29.com/en-us/2018/12/219015/cyntoia-brown-case-facts-real-story>.

⁸ *The Boy Who Killed His Molester*, OPRAH (Oct. 18, 2010) <http://www.oprah.com/oprahshow/the-16-year-old-boy-who-killed-his-molester/all>.

life sentence after pleading guilty to murder for killing the man responsible for sexually trafficking her since she was fifteen years old.⁹ Unfortunately, these are just a few of the countless stories where children are victimized not once, but twice. Once from their abuser and a second time from the criminal justice system.

In these situations, a minor is transferred to adult court due to special circumstances regarding their alleged crime. Nevada requires adult courts to handle youth offenders for “serious crimes,” such as murder, attempted murder, and sometimes sexual assault depending on the minor’s previous criminal record.¹⁰ If all the qualifications are met, then the adult court would legally treat the minor as if they were an adult.¹¹

In an attempt to remedy these issues a federal bill, H.R. 1950, was introduced to give judges more sentencing discretion in these matters.¹² H.R. 1950 is commonly referred to as “Sara’s Law,” named after Sara Kruzan.¹³ Sara’s Law would allow judges to depart from mandatory minimum sentencing guidelines for children who commit violent crimes against their abusers.¹⁴ In 2019, three states recently proposed legislation that mirror the model language of H.R. 1950: Arkansas, Nevada, and Hawaii.¹⁵

This Note will focus on Nevada’s 2019 proposed bill, A.B. 158, and the effect it could have had on child victims of sexual abuse and trafficking after they commit a crime against their abuser.

Part II provides background information on the prevalence of child victims of sexual abuse in this

⁹ Adam Ferrise, *Girl Sentenced to Life in Prison for Role in Murder at Akron Drug, Prostitution House*, CLEVELAND (Mar. 24, 2015) https://www.cleveland.com/akron/2015/03/girl_sentenced_to_life_in_pris.html.

¹⁰ NEV. REV. STAT. § 62(B).330 (2003); NEV. REV. STAT. § 62B.390 (2003); NEV. REV. STAT. § 194.010 (2015).

¹¹ *Id.*

¹² H.R. 1950, 116th Cong. (1st Sess. 2019).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Angelina Chapin, *Sex Trafficked Children Can be Locked up for Life. A New Bill Could Prevent That*, HUFFPOST (Mar. 28, 2019) https://www.huffpost.com/entry/federal-bill-would-protect-child-sex-trafficking-victims-from-spending-their-lives-in-prison_n_5c9cd7cfe4b07c8866323860.

country and Nevada specifically. It will then examine the issues presented from prosecuting these victims after they commit criminal acts against their abusers. Part II will also discuss four highly publicized cases from around the country to identify how other states have dealt with this issue. Part III will briefly describe H.R. 1950 and then will transition to an introduction of Nevada's bill, A.B. 158. Part IV of this Note will dive deeper into the logistics of A.B. 158 and discuss the impact it could have had on Nevada's children. This part will also recommend that Nevada should re-introduce A.B. 158 in future Nevada legislative sessions. Finally, Part IV will make several amendment recommendations to increase its likelihood of getting passed in Nevada, as well as in other states.

II. PROSECUTING CHILD SEXUAL ABUSE VICTIMS WHO RETALIATE

A. The Prevalence of Sex Trafficking and Abuse in the United States

Child protective services agencies estimate approximately 63,000 children in the United States are sexually abused each year.¹⁶ Unfortunately, these numbers may not accurately reflect this prevailing problem because these incidents are largely unreported.¹⁷ Evidence shows that many exploited children often view themselves as offenders because they are often directly involved in prostitution, thus they fear the repercussions of reporting their abuse to authorities.¹⁸ Additionally, sex trafficking is a billion-dollar enterprise and offenders quickly discovered that trafficking children results in high profitability with very low risk.¹⁹ In fact, police are far more likely to arrest the trafficked children than arrest those who exploit them.²⁰

¹⁶ A.B. 158, 2019 Leg., 80th Sess. (Nev. 2019).

¹⁷ Priscilla Alvarez, *When Sex Trafficking Goes Unnoticed in America*, ATLANTIC, (Feb. 23, 2016) <https://www.theatlantic.com/politics/archive/2016/02/how-sex-trafficking-goes-unnoticed-in-america/470166/>.

¹⁸ *Id.*

¹⁹ U.S. DEP'T OF JUST., THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS, 31 (Aug. 2010).

²⁰ *Id.*

Nevada specifically is subject to high rates of sexual trafficking and abuse.²¹ The FBI declared that Las Vegas is a “high intensity child prostitution area.”²² These high rates may be caused by “Nevada’s unique situation as the only U.S. state with legalized prostitution”²³ Scholars argue that legalizing a sex industry essentially markets and creates a demand for it.²⁴ In 2016, the Las Vegas Metropolitan Police Department identified 140 children who were victims of sexual trafficking.²⁵ That same year, Las Vegas ranked eleventh in the nation for the highest number of human trafficking cases.²⁶

There are also various federal and state laws that attempt to address these issues by changing the way we view this group of children. For example, many states, including Nevada, have enacted laws that actually classify minors involved in prostitution as victims, rather than criminals.²⁷ On the federal level, the Victims of Trafficking and Violence Protection Act (VTVPA) explicitly states “the victim of trafficking is a child *incapable* of giving meaningful consent.”²⁸ Therefore, if a child is involved in prostitution, law enforcement should *always* treat the child as a victim, not an offender. The problem is, not all states have these laws in place. All states should consider adopting similar laws to further protect child victims. These steps will allow law

²¹ *Id.*

²² U.S. DEP’T OF JUST. OFFICE OF INSPECTOR GEN.: AUDIT DIV., THE FEDERAL BUREAU OF INVESTIGATION’S EFFORTS TO COMBAT CRIMES AGAINST CHILDREN: AUDIT REPORT 09-08 i, 70 n. 122 (Jan. 2009).

²³ Ben Margiott, *New Study: Nevada Has Biggest Commercial Sex Market of Any U.S. State*, NEWS4 (last visited Feb. 27, 2020) <https://mynews4.com/news/local/new-study-nevada-has-biggest-commercial-sex-market-of-any-us-state>.

²⁴ *Id.* (quoting Melissa Holland, executive director of Awaken).

²⁵ NEV. COAL. TO PREVENT THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN, ANNUAL REPORT 2017 (Oct. 2017).

²⁶ Dana Gentry, *Blaming the Victims? The Legal Quandry of Child Sex Trafficking*, NEVADACURRENT (last visited Jan. 17, 2019) <https://www.nevadacurrent.com/2019/01/31/blaming-the-victims-the-legal-quandary-of-child-sex-trafficking/>.

²⁷ Unif. Law Comm’n, *Uniform Act on Prevention of and Remedies for Human Trafficking*, COUNCIL OF ST. GOV’TS, 120, 121 (last visited Oct. 16, 2019).

²⁸ Victims of Trafficking and Violence Protection Act, 22 U.S.C. 7106 § 108(a)(2) (2000).1480 (emphasis added).

enforcement to identify and assist more child victims and hopefully receive more extensive data on this issue.

Additionally, Nevada law prohibits formal adjudication of delinquency for trafficked minors.²⁹ Nevada recognizes that at a young age, children should not be seen as offenders, but as victims. It is common practice for Clark County Family Court Judge William Voya to dismiss and amend all prostitution-related charges for minors.³⁰ However, many children in Nevada are still arrested for charges such as trespass, when, in fact, they are directly related to prostitution.³¹ If we are to address the problem of prosecuting child victims after they retaliate, we must first acknowledge that these children are *victims*. Once the general public and the law can reflect this, children may begin to see themselves as victims and feel safer to come forward *before* they turn to violence.

B. Issues That Arise from Prosecuting Child Sex Victims After They Retaliate

There are also several issues that arise from prosecuting child victims who retaliate. This section will briefly discuss three justifications for providing additional protections. First, children should not be held to the same culpability standard as adults because research shows that their brains have not fully developed yet.³² Second, the mental trauma these children have sustained from the several years of sex trafficking and abuse significantly impact their decision-making.³³ Finally, subjecting these children to decades of prison does not satisfy the established justifications of punishment.

²⁹ NEV. REV. STAT § 62C.240 (2003).

³⁰ Dana Gentry, *Blaming the Victims? The Legal Quandry of Child Sex Trafficking*, NEVADACURRENT (last visited Jan. 17, 2019) <https://www.nevadacurrent.com/2019/01/31/blaming-the-victims-the-legal-quandary-of-child-sex-trafficking/>.

³¹ *Id.*

³² Brief for the American Psychological Association, and the Missouri Psychological Association as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

³³ Carly Spatz Widom, *Victims of Childhood Sexual Abuse – Later Criminal Consequences*, 1, 2 (Mar. 1995).

i. Children Should Not Be Held to the Same Culpability Standard

The United States Supreme Court already determined that children are constitutionally different than adults for sentencing purposes.³⁴ There are two cases that when read together establish that children cannot be held at the same culpability standard as adults. First, in *Roper v. Simmons*, the Court held that sentencing minors to the death penalty was an unconstitutional violation of the Eighth and Fourteenth Amendment.³⁵ A few years later, the Supreme Court furthered that opinion in *Graham v. Florida*, holding that sentencing minors to life without parole for non-homicide offenses also violates the Eighth Amendment.³⁶ Based on these findings, the Court reasoned that several theories of punishment, such as retribution, deterrence, and incapacitation are not achieved through imposing the harshest punishments on minors,³⁷

Roper and *Graham* account for three major differences between children and adults:³⁸ First, there are several scientific and sociological studies that confirm that children lack maturity and have an undeveloped sense of responsibility,³⁹ which can usually result in “impetuous and ill-considered actions and decisions.”⁴⁰ Second, children are much more vulnerable or susceptible to negative influences, thus they have less control over their own environment.⁴¹ Lastly, personality traits of children are less fixed than adults.⁴² This means that their susceptibility to immature or irresponsible behavior is not as morally incomprehensible than in adults.⁴³

³⁴ *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

³⁵ *Id.* at 579.

³⁶ 560 U.S. 48, 82 (2009).

³⁷ *Id.* at 71–73.

³⁸ *Roper*, 543 U.S. at 569; *See* Brief for the American Psychological Association, *supra* note 32.

³⁹ *See, id.*

⁴⁰ *Roper*, 543 U.S. at 569.

⁴¹ *Id.*

⁴² *Id.* at 570.

⁴³ *Id.*

The Supreme Court held it is morally misguided to compare the failings of a minor to those of an adult.⁴⁴ The Court recognizes that children’s diminished culpability justifies applying penological justifications with lesser force than adults because children are not likely to conduct cost-benefit analysis due to their youth and immaturity.⁴⁵ Therefore, they cannot adequately appreciate severe sanctions, like lengthy sentences or life without parole.⁴⁶ Additionally, minors’ lack of maturity and “distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”⁴⁷

In *Miller v. Alabama*, the Court extended their previous holdings to establish that mandatory life-without-parole sentences for juveniles violates the Eighth Amendment’s prohibition on cruel and unusual punishment for all cases, even homicide.⁴⁸ The Court explained that an individual’s Eighth Amendment right “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’ to both the offender and the offense.”⁴⁹ A child’s diminished culpability and greater prospect for reform deem them less deserving of the most severe punishments.⁵⁰

In 2015, Nevada passed legislation that embraced and extended the rationale in these cases.⁵¹ Nevada prohibited the death penalty and life imprisonment without the possibility for parole for those who committed crimes before the age of eighteen, regardless of the underlying

⁴⁴ *Id.*

⁴⁵ *Id.* at 572.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 567 U.S. 460, 470 (2012).

⁴⁹ *Id.* at 460.

⁵⁰ *Id.* at 471. However, a juvenile may be sentenced to life *with* parole for those convicted of homicide. *Id.*

⁵¹ NEV. REV. STAT. § 176.025 (2015).

crime.⁵² Nevada demonstrated that it has the political inclination to be at the forefront of juvenile reform efforts and limited juveniles' sentencing eligibility.⁵³

ii. Mental Trauma Experienced Can Lead to Poor Decision-Making

Not only do victims of sexual assault and trafficking experience physical consequences but they are also subject to extensive mental trauma.⁵⁴ Sexually abusing a child can lead to several long-term mental health issues, such as a diagnosis for “post-traumatic stress disorder, anxiety, depression, externalizing symptoms, eating disorders, problems with relationships, sleep disorders, and suicidal and self-harm ideation and behaviours.”⁵⁵ Victims are also at higher risk of developing alcoholism or other forms of drug abuse.⁵⁶ These symptoms dramatically increase if the abuse extends over a longer period of time, or if the offender is someone the child has a close relationship with.⁵⁷

Other studies found a link between childhood sexual abuse and deviant or criminal behavior and evidence of this abuse puts its victims at a higher risk for criminal behavior.⁵⁸ The trauma and stress from these childhood victimizations combined with society's responses to the victimizations can explain the criminal effect these victims experience later in life.⁵⁹

A separate study showed that child sex assault victims were almost five times as likely as non-victims to have criminal charges.⁶⁰ Female victims are also more likely than their male

⁵² *Id.* However, if a child kills more than one person, they may be subject to a sentence of life without parole. *Id.*

⁵³ *Id.*; Miller, 567 U.S. at 471.

⁵⁴ WORLD HEALTH ORG., RESPONDING TO CHILDREN AND ADOLESCENTS WHO HAVE BEEN SEXUALLY ABUSED: WHO CLINICAL GUIDELINES, 1, 7–8 (2017).

⁵⁵ Rape, Abuse & Incest National Network, *Victims of Sexual Violence: Statistics* (last visited Oct. 20, 2019) <https://www.rainn.org/statistics/victims-sexual-violence>.

⁵⁶ THE NAT'L CTR. FOR VICTIMS OF CRIME, *Effects of Child Sexual Abuse on Victims* (last visited Oct. 20, 2019) <https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/effects-of-csa-on-the-victim>.

⁵⁷ WORLD HEALTH ORG., *supra* note 54, at 8.

⁵⁸ Carly Spatz Widom, *supra* note 33, at 6.

⁵⁹ *Id.*

⁶⁰ Nina Papalia, et. al., *Child Sexual Abuse and Criminal Offending: Gender-Specific Effects and the Role of Abuse Characteristics and Other Adverse Outcomes*, 23 CHILD MALTREATMENT 399, 400 (2018).

counterparts to engage in general and violent offending.⁶¹ If this victimization occurs during the critical transition between childhood and adolescence, it can result in poorer outcomes because the abuse affects the child's hormonal and regulatory development.⁶² The victimization may also cause physiological, emotional, and behavioral issues, such as hyperarousal, poor impulse control, and aggression.⁶³ These symptoms are even intensified when combined with poor coping strategies and substance abuse.⁶⁴ Finally, this study found that girls exposed to multiple perpetrators, such as being trafficked to multiple men, showed higher rates of criminal behavior.⁶⁵

In sum, child victims of sex trafficking and sex assault experience long-lasting physical, mental, and emotional trauma at the hands of their abusers.⁶⁶ These experiences may explain why these children turn to violent, criminal behavior. The various mental, emotional, physical, and sexual consequences these children face are far beyond an average person's imagination, and their acts of violence are directly related to the abuse they endured.⁶⁷ Therefore, prosecutors need to consider these factors when prosecuting a child trafficking victim who commits violent acts against their tormentors.

iii. Long Sentences for Minors Does Not Accomplish Any Justifications of Punishment

As previously mentioned, the Supreme Court found that imposing the harshest sentences on minors does not accomplish any legitimate justification for punishment. For instance, retributive goals are not satisfied because retribution relies on the blameworthiness of the

⁶¹ *Id.* at 408.

⁶² *Id.* at 409.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See, supra* II(B)

⁶⁷ *Id.*

offender.⁶⁸ However, minors are not considered as blameworthy adults;⁶⁹ therefore, giving a child a long sentence is not equal to the offense committed.

Further, sending children to prison for decades does not align with deterrence's goals.⁷⁰ Based on the "same characteristics that render juveniles less culpable than adults," deterrence is not likely fulfilled through these sentencing practices because minors are less "susceptible to deterrence."⁷¹ Minors are not likely to consider the possible punishment of their actions, rendering this justification nullified.⁷² Especially in the cases discussed throughout this Note, these children are only committing crimes against those who have exploited them. For that reason, it is not likely that children in these circumstances would recidivate.

Additionally, incapacitation's goal is to get the offender off the street for the public's safety.⁷³ To rely on this justification would require an assumption that the juvenile offender will *forever* danger society, deeming the juvenile "incurable."⁷⁴ Mandatory minimum sentencing requires a juvenile, who was convicted of homicide and is not likely to recidivate, to spend the rest of their life locked behind bars without an opportunity to change, grow, or reform. Here, these minors are resorting to violent crime only as a direct result of the trauma and abuse their traffickers imposed upon them. Therefore, locking them away for the rest of their life is unjustified because these minors are not usually violent individuals and will not likely recidivate. Finally, lengthy sentences do nothing to reform or rehabilitate the child. Because there are no sufficient penological justifications for imposing long sentences on minors, the government

⁶⁸ *Graham v. Fla.*, 560 U.S. 48, 72 (2009).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Roper v. Simmons*, 542 U.S. 551, 571 (2005).

⁷² *Graham v. Fla.*, 560 U.S. 48, 72 (2009).

⁷³ *Id.*

⁷⁴ *Id.* (emphasis added).

should refrain from imposing these sentences to minors who commit crimes against someone who abused or trafficked them.

C. How Other States Have Dealt with This Issue

This section will discuss in further detail, the four individuals introduced at the beginning of this Note: Sara Kruzan, Cyntoia Brown, Daniel Kovarbasich, and Alexis Martin. Without controlling federal law on this issue, courts have no guidance or model on how to treat these situations; thus, the results from around the country are very inconsistent. This section will begin discussing the path that California and Tennessee took in order to remedy their previous mistakes on this matter. Then, it will follow with how Ohio came completely opposite results in two similarly situated children from different Ohio counties.

i. Sara Kruzan, California

Sara Kruzan met her pimp, George Gilbert Howard, when she was only eleven years old.⁷⁵ Howard approached Sara after school and, to gain her trust, convinced her to get into his car so they could get some ice cream.⁷⁶ From there, Sara and her pimp saw each other frequently and grew close.⁷⁷ Eventually, Howard started touching and molesting her.⁷⁸ By the time Sara was thirteen years old, Howard began to commercially traffic her and forced her to have sex with men for money every single day.⁷⁹ At age sixteen, Sara escaped Howard for one week, and subsequently agreed to kill Howard with another man.⁸⁰ She confessed upon arrest that she lured Howard to a motel and shot him the neck with a pistol and as a result was prosecuted for first-degree murder.⁸¹

⁷⁵ Amita Sharma, *After Woman Spends 18 Years in Prison for Killing Her Pimp, She Starts Anew*, KPBS (Aug. 12, 2014) <https://www.kpbs.org/news/2014/aug/12/freedom-sara-kruzan-means-cleansing-reconnecting-1/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ De Atley, Richard K., *Sara Kruzan Case: Conviction Reduced; Parole Possible*, PRESS-ENTERPRISE (Jan. 18, 2013, 12:59PM) <https://www.pe.com/2013/01/18/sara-kruzan-case-conviction-reduced-parole-possible/>.

Unfortunately, during her trial, the judge prohibited all evidence relating to her abuse and complex trauma.⁸² The jury only received one half of the story. In 1994, she was sentenced to life without parole plus four years for killing the man who constantly victimized her.⁸³ Sara was only sixteen years old when the judge in her sentencing hearing stated that she lacked “moral scruples” and ordered her to pay \$10,000 in restitution to victim services.⁸⁴

Eventually, Sara was granted clemency by California Governor Arnold Schwarzenegger.⁸⁵ Clemency is an executive action that allows a governor “to pardon a person convicted of a criminal offense or to commute the related sentence.”⁸⁶ This reduced Sara’s sentenced to twenty-five years to life, with the possibility of parole.⁸⁷ In October of 2013, Sara was paroled and released after spending nineteen years and seven months in prison.⁸⁸ Since then, Sara worked vigorously with organizations to improve policy surrounding this issue to ensure that this does not happen to another child again.⁸⁹

ii. Cyntoia Brown, Tennessee

Cyntoia Brown was only twelve years old when she met her pimp, “Kut Throat.”⁹⁰ Cyntoia was forced into prostitution while her pimp physically, mentally, and sexually abused her.⁹¹ The night Cyntoia killed Johnny Allen, Kut Throat forced Cyntoia sell herself to Allen to make him money.⁹² Allen took Cyntoia to his home where he showed her a number of guns, which made

⁸² Sara Kruzan, *supra* note 6.

⁸³ *Id.*

⁸⁴ Nevada Senate Committee on Judiciary, *supra* note 1.

⁸⁵ NAT’L CTR. FOR YOUTH LAW, *Governor Grants Clemency to Sara Kruzan*, 29 NCYL 4 (Jan. 1, 2011) <https://youthlaw.org/publication/governor-grants-clemency-to-sara-kruzan/>.

⁸⁶ *Clemency*, LAW DICTIONARY (last visited Feb 17, 2020) <https://thelawdictionary.org/clemency/>.

⁸⁷ Sara Kruzan, *supra* note 6.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Mariah Timms & Anita Wadhvani, *Cyntoia Brown, Sentenced to Life in Prison at 16, Will Walk Free Next Week*, USA TODAY (Jul. 31, 2019) <https://www.usatoday.com/story/news/nation/2019/07/31/cyntoia-brown-prison-release-august-2019/1876770001/>.

⁹¹ *Id.*

⁹² *Id.*

Cyntoia fear him.⁹³ Then, Allen aggressively and forcefully tried to solicit sex from Cyntoia.⁹⁴ As Allen reached under the bed, Cyntoia believed he was reaching for a gun and she shot him in self-defense.⁹⁵ She was prosecuted for first-degree murder based on the prosecutor's theory that sixteen-year-old Cyntoia actually intended a robbery-murder and did not act in self-defense.⁹⁶ She was sentenced to fifty-one years in prison with parole.⁹⁷

In recent years, Cyntoia's story was widely publicized due to the support of many celebrities, including Rihanna and Kim Kardashian.⁹⁸ In response, Tennessee Governor Bill Haslam commuted her sentence.⁹⁹ After spending fifteen years in prison, nearly half of her life, Cyntoia was released on August 7th, 2019.¹⁰⁰

What occurred in both Sara's and Cyntoia's case was the result of pressure from human right advocates fighting for their freedom.¹⁰¹ California and Tennessee decided to commute their sentences to remedy the injustice they suffered.¹⁰² However, relieving these women of their life sentences does not change the fact that they spent the back half of their teen years and early adulthood locked behind bars. Unfortunately, Sara and Cyntoia's stories are not unique; there are many children who face similar problems who have not received comparable remedies.

To date, there are no states with laws resembling A.B. 158 to protect children in these horrible situations.¹⁰³ The closest thing that a state has involves allowing courts to use this

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* Sara Kruzan, *supra* note 6.

¹⁰³ *Nevada Assembly Committee on Judiciary, supra* note 5, at 7.

information as a mitigating factor during sentencing.¹⁰⁴ Nevada’s proposed law would have taken that a step further by giving judges more discretion to depart from any mandatory sentencing guidelines or suspend any portion of the sentence.¹⁰⁵

iii. Daniel Kovarbasich, Ohio – Lorain County

Daniel Kovarbasich received more generous treatment than any of the other cases previously discussed. The judge utilized his discretion in sentencing Daniel to probation, rather than imposing prison time.¹⁰⁶

Daniel was twelve years old when he met his abuser, Duane Hurley.¹⁰⁷ Hurley approached Daniel outside of his elementary school and charmed Daniel with his dog. A few days later, Hurley paid Daniel thirty dollars to keep an eye on the dog; this began Hurley’s “grooming process.”¹⁰⁸ Grooming occurs when an offender draws a victim, usually a young and impressionable individual, into a sexual secret relationship.¹⁰⁹ As the grooming intensifies, the sex offender manipulates its victim by causing separation between his victim and their family and peers.¹¹⁰ The offender controls his victims and makes them believe that the offender is the only one who truly loves them and their relationship is normal.¹¹¹

There are six stages involved in the grooming process: (1) targeting the victim, (2) gaining the victim’s trust, (3) filling a need, (4) isolating the child, (5) sexualizing the relationship, and (6) maintaining control.¹¹² This is what Hurley, and many other traffickers and abusers do to transform

¹⁰⁴ *Id.*

¹⁰⁵ A.B. 158, *supra* note 16.

¹⁰⁶ *The Boy Who Killed His Molester*, *supra* note 8.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Dr. Michael Welner, *Child Sexual Abuse: 6 Stages of Grooming*, OPRAH (Oct. 18, 2019) <http://www.oprah.com/oprahshow/child-sexual-abuse-6-stages-of-grooming/all>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

their victims into willing and silent prey.¹¹³ Not only did Hurley groom Daniel, but he groomed Daniel's parents as well.¹¹⁴ He gained Daniel's parents' trust, which allowed Hurley to get closer to Daniel and abuse him right under their nose.¹¹⁵ After gaining Daniel's parents' trust, Hurley would spend more time alone with Daniel and eventually began sexualizing their relationship.¹¹⁶

Over the years, Daniel received gifts and money from Hurley in exchange for sexual acts.¹¹⁷ While many may question why Daniel would subject himself to this type of treatment, his actions were clearly the product of the skillful grooming he endured since age twelve. This was all Daniel knew. When Daniel was asked why he kept returning to Hurley after the abuse, he responded, "I felt like I *had* to. Like I couldn't get away from him,"¹¹⁸ and continued, "If I didn't [go over to Duane's house], he'd come find me."¹¹⁹

After enduring years of this treatment, Daniel retaliated against Hurley. Daniel went over to Hurley's residence to ask for money for his upcoming anniversary with his girlfriend.¹²⁰ Hurley responded, "You know this stuff isn't free right?"¹²¹ In that moment, Daniel snapped, which resulted in Daniel hitting Hurley in the head with a pickle jar and proceeding to stab Hurley fifty-five times.¹²² In that moment, Daniel felt he had no other way out, which unfortunately led to a violent act resulting in Hurley's death.¹²³ Daniel was in such a state of rage that he did not even realize that he stabbed Hurley so many times.¹²⁴

¹¹³ *Id.*

¹¹⁴ *The Boy Who Killed His Molester, supra* note 8.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

The District Attorney originally sought a murder charge, but later reduced the charges to voluntary manslaughter and aggravated assault.¹²⁵ At trial, Daniel was found guilty of both charges; however, the judge sentenced Daniel to a five-year on probation, despite the district attorney's recommendation of the maximum sentence: ten years in prison.¹²⁶

In this case, the judge exercised extreme discretion and empathy for Daniel. Luckily for him, this particular judge likely saw a rehabilitative approach would better serve Daniel than incapacitation. This brings us back to the point that was made earlier: long sentences imposed on children have little to no penological justifications.¹²⁷ Daniel was twelve years old when the abuse started and it is impossible to know how the abuse truly affected him physically and/or mentally. Due to his age, he is considered to have less blameworthiness than an adult. Studies showed how the parts of Daniel's brain that are responsible for impulse control and decision making are not fully developed at his age.¹²⁸ Further, deterrence would not likely serve any purpose because Daniel's only violent act was against his abuser and he was probably unable to appreciate the consequences of his actions. Finally, incapacitation would not give him any opportunity to reform.

iv. Alexis Martin, Ohio – Summit County

Strangely, a different district in Ohio treated another child completely different than Daniel. Alexis Martin was serving a life sentence after pleading guilty to the murder of her pimp and trafficker, Angelo Kearney.¹²⁹ The odd thing about Alexis' case is that she did not pull the trigger, nor was she even in the same room when the fatal shot occurred.¹³⁰ Kearney's brother was raping Alexis in the other room when a rival gang entered Kearney's home to rob and murder

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See supra* Part II(B)(iii).

¹²⁸ Nina Papalia, et. al., *supra* note 60.

¹²⁹ Adam Ferrise, *Girl Sentenced to Life in Prison for Role in Murder at Akron Drug, Prostitution House*, CLEVELAND (Mar. 24, 2015) https://www.cleveland.com/akron/2015/03/girl_sentenced_to_life_in_pris.html.

¹³⁰ *Id.*

him.¹³¹ However, the prosecutor’s theory of the case was Alexis conspired with the robber to stage the killing.¹³² Subsequently, Alexis was charged with murder and pled guilty to murder and felonious assault.¹³³ Consistent with her plea deal, Alexis was sentenced to a minimum life in prison with possibility of parole.¹³⁴ This sentence is was far below what was imposed against Daniel, who also resided and committed the crime in Ohio. In this case, if Alexis had not taken the plea deal, she could have faced an even longer sentence.

Following the announcement of Cyntoia Brown’s clemency, Alexis’ attorneys were hopeful for similar treatment.¹³⁵ Former Ohio Governor John Kasich was given an opportunity to grant clemency to Alexis Martin;¹³⁶ unfortunately, the Governor denied this request.¹³⁷ Additionally, Alexis’ attorneys filed an appeal to the Ohio Supreme Court but they upheld Alexis’ conviction, citing there was no evidence that Alexis was acting in a way to “free herself,” nor was there any evidence that she was compelled or coerced in committing the murder.¹³⁸ Justice Terrence O’Donnell wrote a dissent noting that Martin was forced to perform exotic dances, sell drugs, and recruit other prostitutes for her pimp by the time she was fifteen.¹³⁹ He opined the murder of her pimp was related to her victimization because the pimp controlled her and Alexis had a “slavish relationship” with him.¹⁴⁰

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Melissa Gira Grant, *If Cyntoia Brown Can Be Released from Prison, Why Not Trafficking Survivor Alexis Martin?*, APPEAL (Jan. 11, 2019) <https://theappeal.org/if-cyntoia-brown-can-be-released-from-prison-why-not-trafficking-survivor-alexis-martin/>.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Adam Ferrise, *supra* note 129.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

As recent as April 2020, Ohio has finally, after several attempts, granted clemency for Alexis Martin.¹⁴¹ Ohio Governor Mike DeWine granted clemency because Alexis' first attorney did not pursue protections under the Safe Harbor law.¹⁴² Governor DeWine acknowledged Alexis as a "child sex trafficking survivor" and the failure to apply the Safe Harbor law prevented Alexis from properly being tried as a juvenile, rather than an adult.¹⁴³

It is clear from these four examples that there is not a uniform procedure on how to deal with these issues when they arise. Even children whose actions occurred in the same state were treated differently. It is important that we acknowledge this problem and implement remedies so children in similar predicaments receive better, similar treatment.

Additionally, through these examples we saw that three of the four stories discussed ended with clemency that commuted Sara, Cyntoia, and Alexis' sentences; these were executive remedies. What A.B. 158 proposes is a judicial remedy and in this context, judicial remedies have far better outcomes than executive remedies. Granting clemency is an executive function that acts as a reactive remedy,¹⁴⁴ while attacking this problem at sentencing and from a judicial standpoint is more proactive. There is a lot of uncertainty if the defendant has to wait for the very slight chance that their governor will eventually commute their sentence. Additionally, many states, such as Nevada, have little to no supervision or guidelines as to who or why a person's sentence is commuted.¹⁴⁵ This leaves a lot of room for arbitrary decisions that are not subject to a second review.

¹⁴¹ Max Londberg, *Sex Trafficking Survivor Alexis Martin Will Be Released from Prison by Ohio's Governor*, CINCINNATI ENQUIRER (Apr. 17, 2020) <https://www.cincinnati.com/story/news/2020/04/17/sex-trafficking-survivor-alexis-martin-being-released-ohio-prison/5154816002/>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Clemency*, LAW DICTIONARY (last visited Feb 17, 2020) <https://thelawdictionary.org/clemency/>.

¹⁴⁵ CRIM. JUST. POL'Y FOUND., *State Clemency: Nevada* (last visited Feb. 27, 2020) <https://www.cjpf.org/clemency-nv> (describing Nevada Board of Pardon's lack of exclusive set of factors for determining whether or not to grant clemency). Nevada's case-by-case review reinforces the inconsistency of executive remedies.

There are a few reasons why addressing this issue at sentencing is better than waiting years for a possible clemency. For example, sentencing discretion is more effective than clemency because it gives a defendant a clear and more consistent idea of what their sentence is at the forefront. A judicial remedy is far easier to direct and guide because judges are often required to follow rules and guidelines in their decision-making and are supposed to explain the reasons behind their decisions.¹⁴⁶ Additionally, judicial decisions are subject to appellate review;¹⁴⁷ thus, there is another set of eyes ensuring that abuse was not exercised. Pushing for more judicial remedies, rather than relying on executive remedies will create a more uniform and just system.

III. PROPOSED LEGISLATION TO REMEDY THIS ISSUE

Both federal and state legislators acknowledged this prevailing problem and proposed legislation to attack this issue. This section will briefly discuss the federal bill, H.R. 1950, which contains the model language for these bills. This Note specifically address Nevada’s bill, A.B. 158, therefore this section will describe dive deep into the background, components, and effect this bill carries.

A. Federal Bill “H.R. 1950” or “Sara’s Law”

Human Rights for Kids, an international nonprofit organization, teamed up with Arkansas House Representative Bruce Westerman and Sara Kruzan to draft the model language for H.R. 1950, or “Sara’s Law.”¹⁴⁸ In March 2019, Congressman Westerman proposed this joint-partisan

¹⁴⁶ See U.S. COURTS., *Code of Conduct for United States Judges: Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary* (last visited Feb 27, 2020) <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> (describing that “Although judges should be independent, they must comply with the law . . . maintain public confidence in the impartiality of the judiciary.) This code provides guidance to judges on how to ethically maintain their office. *Id.*

¹⁴⁷ LAW LIBRARY OF CONG., *Researching Judicial Decisions: Introduction* (last visited Feb 27, 2020) <https://www.loc.gov/law/help/judicial-decisions.php>.

¹⁴⁸ Human Rights for Kids, *Accomplishments: HRFK Leading National efforts to End Human Rights Abuses Against Children* (last visited Feb. 17, 2020) <https://humanrightsforkids.org/accomplishments/>.

federal bill.¹⁴⁹ Sara’s Law would provide more expansive protections for abused children who commit crimes against their abusers.¹⁵⁰ Sara’s Law grants judges more discretion in their sentencing decisions.¹⁵¹ If H.R. 1950 passed, it would have granted federal judges the power to impose a sentence that is below the mandatory minimum or suspend any portion of the sentence.¹⁵² Under this bill, judges may consider the effect of the trauma the child-defendant experienced.¹⁵³

H.R. 1950 also specifically outlines who this law would apply to. This law is only applicable to “youthful victim offender” under the age of eighteen.¹⁵⁴ The court must also find by clear and convincing evidence that the crime was committed against a person who sexually trafficked or abused the youthful victim offender within one year of the child’s retaliation.¹⁵⁵ It is important to note that the passing of this law would not force judges to impose lesser sentences, but simply permits more discretion to do so based on individual circumstances.¹⁵⁶ After the bill’s introduction, it was referred to the Crime, Terrorism, and Homeland Security sub-committee on May 3, 2019, which was the last major action on this bill.¹⁵⁷

Although the passing of H.R. 1950 would have been a great accomplishment, this victory would have only carried a miniscule effect. Most violent crimes are prosecuted at the state level; thus, this law would not affect state judges, where a majority of these cases are tried. That is why

¹⁴⁹ CONGRESS, *H.R. 1950 – Sara’s Law*, 116th sess. (last visited Mar. 1, 2020) <https://www.congress.gov/bill/116th-congress/house-bill/1950>.

¹⁵⁰ H.R. 1950, *supra* note 12.

¹⁵¹ *Id.*

¹⁵² *Id.* at § 2(h).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at § 2(h)(3)(A).

¹⁵⁵ *Id.* at § 2(h)(3)(B).

¹⁵⁶ *Nevada Assembly Committee on Judiciary, supra* note 5, at 23.

¹⁵⁷ *Id.*

it is important for states to adopt the model language contained in H.R. 1950 and implement it in their respective states.

B. Nevada’s Bill, “A.B 158”

i. Background

Assemblyman John Hambrick introduced Nevada’s bill, A.B. 158 in February 2019 during Nevada’s eightieth legislative session.¹⁵⁸ It was then referred to the Judiciary Committee.¹⁵⁹ The language of A.B. 158 mirrors H.R. 1950’s language very closely. However, A.B. 158 originally contained an additional third option available for judges: if the person is less than twenty-one years old, a judge may deem them to have committed a delinquent act and transfer the case to the juvenile court.¹⁶⁰ During the initial hearing in front of the Assembly’s Judiciary Committee, some voiced concerns over the procedural logistics of that provision.¹⁶¹ In response, the Assembly amended A.B. 158 by removing that provision in April 2019.¹⁶² Following that amendment, the Nevada Assembly passed the bill to the Senate.¹⁶³ The Senate Judiciary Committee heard the bill, but no further action was taken.¹⁶⁴ Therefore, the bill “died” in the Nevada Senate.¹⁶⁵

This was not Nevada’s first attempt to pass a bill relating to this subject matter. In the 2017 legislative session, Assemblyman Hambrick proposed a broader version of A.B. 158.¹⁶⁶ The bill Assemblyman Hambrick proposed in 2017 was A.B. 216. A.B. 216 intended to presume

¹⁵⁸ NELIS, *Overview of A.B. 158*, 80th sess. (last visited Feb. 17, 2020) <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6244/Overview..>

¹⁵⁹ *Id.*

¹⁶⁰ A.B. 158, 2019 Leg., 80th Sess. (Nev. 2017).

¹⁶¹ *Nevada Assembly Committee on Judiciary*, *supra* note 5, at 9–10.

¹⁶² A.B. 158: Amendment No. 73, 2019 Leg., 80th Sess. (Nev. 2019).

¹⁶³ NELIS, *supra* note 156.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ A.B. 216, 2017 Leg., 79th Sess. (Nev. 2017).

self-defense if the child-offender committed a crime against someone who sexually abused, trafficked, or “otherwise physically abused” them.¹⁶⁷ This bill was heard in front of the Assembly Judiciary Committee in 2017 but no further action was taken.¹⁶⁸

Assemblyman Hambrick likely narrowed the scope of A.B. 158 due to the little to no support he received in the 2017 session. Fortunately, the narrower scope allowed the bill to pass through the Assembly’s Judiciary Committee and through the General Assembly – showing major traction in comparison to the previous session’s bill.¹⁶⁹ Legislators should propose a narrower version of A.B. 158 in Nevada’s future legislative sessions and hopefully will become law in the near future.

Assemblyman Hambrick actually has a reputation for introducing juvenile criminal justice reform bills. The 2019 legislative session was Assemblyman Hambrick’s final session and many people came forward at the A.B. 158 hearings to graciously thank him for his work in juvenile criminal justice reform in Nevada. Without Assemblyman Hambrick in the future legislative sessions, another Assemblyman- or woman would have to become the primary sponsor and introduce the bill, or else this bill will never become Nevada law.

ii. Components of A.B. 158

There are several requirements that must be present to trigger A.B. 158’s protections. It reads:

“. . . if a person is **convicted as an adult** for an offense that the person committed when he or she was **less than 18 years of age** and the court finds by **clear and convincing evidence** that, at any time during the **1-year period immediately preceding the commission of the offense**, the person against whom the offense was committed **trafficked the person who committed the**

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ NELIS, *Overview of A.B. 216*, 79th session (last visited Feb 17, 2020) <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6244/Overview>.

offense . . .or sexually assaulted the person who committed the offense . . .”¹⁷⁰

Once all of the above requirements are met, then a judge would have three options available during sentencing, A.B. 158 explicitly outlines two of those options:

“the court *may*, in *its discretion*, take either or both of the following actions:

1. **Depart from any mandatory minimum sentence or mandatory additional penalty; or**
2. **Suspend any portion of an otherwise applicable sentence”¹⁷¹**

The third option, which is not explicit in the bill, is for judges to impose the mandatory minimum sentence for the convicted crime. This reinforces the idea that this bill would not force a judge to impose lesser sentences for these crimes, but at least gives them an option to do so if they are convinced the surrounding mitigating circumstances justifies a lesser punishment.

iii. Support for A.B. 158

A.B. 158 appeared to have strong support from the community based on the open support of many groups, such as the Nevadans for the Common Good Coalition for Public Life, the ACLU of Nevada, the Washoe’s Public Defender’s Office, and Nevada’s Attorneys for Criminal Justice.¹⁷²

The groups above made several points as to why A.B. 158 should have passed.¹⁷³ First, multiple groups acknowledge that this bill directly impacts the need to help and protect child victims of sexual assault and trafficking.¹⁷⁴ Children in these situations have endured years of traumatic abuse and the law should not further traumatize or criminalize them.¹⁷⁵ These groups

¹⁷⁰ A.B. 158, 2019 Leg., 80th Sess. (Nev. 2019) (emphasis added).

¹⁷¹ *Id.*

¹⁷² *Nevada Assembly Committee on Judiciary, supra* note 5, at 10–12.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 11 (testimony of Marta Schmitt, Campaign Manager, Nevadans for the Common Good Coalition for Public Life).

found it refreshing for the law to take a victim-centered approach, rather than a perpetrator-centered approach.¹⁷⁶

While these children have committed serious crimes, it is essential to recognize that the children’s violence is directly correlated to the “extensive mental, emotional, physical, and sexual exploitation.”¹⁷⁷ Not only do these victims have diminished culpability due to their brains not reaching full development, but these children are subject to sex trafficking and abuse which also diminishes their culpability.

Additionally, John Piro of the Clark County Public Defender’s Office, pointed out that the abuse must be proven by clear and convincing evidence before a judge may use sentencing discretion.¹⁷⁸ Piro states that this a high standard that is not easily met.¹⁷⁹ The arguments concerned with this bill inviting vigilantism is countered with this high standard requirement.

iv. Opposition to A.B. 158

Conversely, there were groups who testified in opposition to A.B. 158, including the Nevada District Attorney’s Association and the Clark County District Attorney’s Office.¹⁸⁰ The critics of this bill argued district attorneys and defense attorneys already take these victims’ mitigating factors into account during negotiations.¹⁸¹ Jennifer Noble of the Nevada District Attorney’s Association argued that the goals of A.B. 158 were already accomplished the previous legislative session with A.B. 218.¹⁸² A.B. 218 gave judges discretionary power to depart from the mandatory minimum sentence by up to thirty-five percent.¹⁸³

¹⁷⁶ *Id.* at 11–12 (testimony of Kendra Bertschy, Deputy Public Defender, Washoe County Public Defender’s Office).

¹⁷⁷ *Id.* at 10–12.

¹⁷⁸ *Id.* at 12 (testimony of John Piro, Deputy Public Defender, Clark County Public Defender’s Office).

¹⁷⁹ *Id.* (testimony of John Piro, Deputy Public Defender, Clark County Public Defender’s Office).

¹⁸⁰ *Id.* at 17–18.

¹⁸¹ *Id.* at 16.

¹⁸² *Id.* at 16 (testimony of Jennifer Noble, Legislative Liaison, Washoe County District Attorney’s Office).

¹⁸³ A.B. 218, 2017 Leg., 79th Sess. (Nev. 2017).

A.B. 218, which was also proposed by Assemblyman Hambrick, only attacks our current problem in a broad sense. The language of A.B. 218 reads “. . . the court shall consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth.”¹⁸⁴ Noble argued that the negotiations of the charges between the district attorney and the defense attorney coupled with A.B. 218 equal a sufficient remedy to our current problem.¹⁸⁵

Noble’s argument falls flat on the notion that the current remedy is sufficient. First, A.B. 218 is extremely broad to address the problem with prosecuting child victims. A.B. 218 gives judges more sentencing discretion for *any* crime a person commits if they are under age eighteen and convicted as an adult. A.B. 158 specifically attacks this problem at issue because it narrows the scope to those who commit crimes against someone who abused them. A bill that is narrowly tailored to accomplish a specific goal is likely better suited to remedy the particular issue. Noble’s proposition is not sufficient to justify lengthy prison sentences for children who commit crimes against their abusers.

Additionally, district attorneys have exclusive power in deciding what charges to file against these children. Giving judges more sentencing discretion shifts some of the power to punish back into the hands of an impartial party.

v. Why did A.B. 158 die in the Senate?

Although there is no direct evidence as to why the Senate did not take any action on this bill, there are minutes from the Senate hearing that can give insight. When this bill was presented in front of the Senate, many similar individuals and groups present at the Assembly judiciary

¹⁸⁴ *Id.*

¹⁸⁵ *Nevada Assembly Committee on Judiciary, supra* note 5, at 16 (testimony of Jennifer Noble, Legislative Liaison, Washoe County District Attorney’s Office).

hearing also attended the Senate judiciary hearing to express their opinions regarding A.B.

158.¹⁸⁶ For example, Jennifer Noble testified again at the Senate judiciary hearing to oppose A.B.

158.¹⁸⁷ In this hearing, Noble adds that even with the amendment, this bill was still not narrow enough to accomplish its goal.¹⁸⁸ She argues there was not a strong enough “nexus between the abuse and the violent acts subsequently committed by the juvenile.”¹⁸⁹

This point arises from the requirement that the child was abused within one year of the retaliation.¹⁹⁰ The Nevada District Attorney’s Association were concerned with the opportunity for vigilantism.¹⁹¹ Noble uses an example of an abused child somehow escaping the clutches of their abuser but using this law to justify their killing.¹⁹² “This child is able to get away from that person to a place of safety for some time. This bill would allow the child to return to the abuser and potentially murder them; the court would have an unlimited departure.”¹⁹³

Noble makes a valid point here. There are already well-established policies in place that allow self-defense claims for those in imminent danger.¹⁹⁴ So why is it necessary to implement a new law allowing a lesser sentence for a child, who commits a violent crime against an individual who has potentially not harmed them in 364 days? The time limit of one year does appear long; therefore, the future drafters consider narrowing the scope to increase its likelihood of getting passed. On the other hand, Noble’s vigilante argument assumes that a trafficked or

¹⁸⁶ *Id.* at 16–23; *Nevada Senate Committee on Judiciary*, *supra* note 1, at 15–17.

¹⁸⁷ *Nevada Senate Committee on Judiciary*, *supra* note 1, at 15–16.

¹⁸⁸ *Id.* at 16 (testimony of Jennifer Noble, Legislative Liaison, Washoe County District Attorney’s Office).

¹⁸⁹ *Id.*

¹⁹⁰ A.B. 158, *supra* note 16.

¹⁹¹ *Nevada Senate Committee on Judiciary*, *supra* note 1, at 16 (testimony of Jennifer Noble, Legislative Liaison, Washoe County District Attorney’s Office).

¹⁹² *Id.*

¹⁹³ *Id.* (Jennifer Noble using an example involving a child who could use this bill).

¹⁹⁴ NEV. REV. STAT. § 200.275 (2017).

abused child would be aware of A.B 158's protections and strategically use it to get away with murder; that is extremely unlikely.

It is important to restate that all this bill would do is give judges the tools they need to make more just and informed sentencing decisions. Judges are completely welcome to impose the mandatory minimum, but at least with A.B. 158, they would have more discretion based on individualized circumstances.

Additionally, some Senators did not think that A.B. 158 would effectively remedy its intended problem.¹⁹⁵ For example, Senator Dondero Loop expressed concerns that imposing a lesser sentence or suspending a sentence will do nothing more than throw these children on the streets with no rehabilitative services.¹⁹⁶ She also points out that there must be a funding model and a more proactive remedy than mitigating at the sentencing level.¹⁹⁷ Senate Majority Leader and Chair of Judiciary Committee, Nicole Cannizzaro, also mentioned that A.B. 158 is very similar to A.B. 216 and questions how these issues are not already addressed by that bill.¹⁹⁸ Senator Cannizzaro also critiqued the bill for its absence of procedure on how and when these evidentiary hearings would occur to satisfy the clear and convincing evidence standard.¹⁹⁹

Although we will never truly know why this bill failed to pass in the Senate, it appears that the arbitrary one-year time limit, failure to narrowly address the problem, and absence of procedure were all valid reasons why A.B. 158 did not pass. These concerns and critiques discussed in the Senate hearing are important if the Assembly wants to propose a similar bill in

¹⁹⁵ *Nevada Senate Committee on Judiciary*, *supra* note 1, at 9–10.

¹⁹⁶ *Id.* (statement of Marilyn Dondero Loop, Nevada Senator).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 11–12 (statement of Nicole Cannizzaro, Chair of Judiciary).

¹⁹⁹ *Id.*

future legislative sessions. If the drafters of A.B. 158 can address these concerns, it could likely lead to a victory in the near future.

IV. RECOMMENDATIONS FOR FUTURE NEVADA LEGISLATIVE SESSIONS

A. A Version of A.B. 158 Needs to be Proposed in future legislative sessions

There are several factors that contribute to the likelihood that Nevada will pass a version of A.B. 158 in future legislative sessions. The most significant factor is obviously whether or not this bill will even be introduced in future legislative sessions at all. As previously stated, the juvenile criminal justice reform activist, Assemblyman Hambrick, maxed out his eligible terms at the eightieth session in 2019.²⁰⁰ In Nevada, an Assemblyman- or woman is only eligible to act as a member of the Assembly for six two-year terms, for a total of twelve years.²⁰¹ The end of the eightieth legislative session marked Assemblyman Hambrick's twelfth year in the Assembly.²⁰²

Assemblyman Hambrick was the primary sponsor for A.B. 158, as well as the 2017 version proposed at the seventy-ninth legislative session.²⁰³ Without his participation in future legislative sessions, another Assemblyman- or woman will have to pick up where he left off in order to revive this bill. Additionally, in Nevada, each Assembly member is only allowed to propose a limited amount of bills in each legislative session.²⁰⁴ Therefore, another obstacle would involve convincing another Assembly member to use one of their limited amount of bills for this proposal.

These are only minor hurdles, which are easily resolved by another legislator carrying on Assemblyman Hambrick's work. The best way to accomplish this is for supporters of this bill to reach out to legislators that signed onto this bill with Assemblyman Hambrick as a primary or

²⁰⁰ Nevada Legislature, *Assembly, Legislator Information: Assemblyman John Hambrick* (last visited Feb. 17, 2020) <https://www.leg.state.nv.us/App/Legislator/A/Assembly/Current/2>.

²⁰¹ Nevada Legislature, *Facts About the Nevada Legislature* (last visited Feb. 17, 2020) https://www.leg.state.nv.us/General/AboutLeg/General_Short.html.

²⁰² Nevada Legislature, *supra* note 197.

²⁰³ NELIS, *Overview of A.B. 216*, *supra* note 166; NELIS, *Overview of A.B. 158*, *supra* note 156.

²⁰⁴ NEV. REV. STAT § 218D.150(1) (2019).

secondary sponsor. For those individuals already know the background relating to this bill and cared enough about it to sign on as a sponsor.

B. Recommended Amendments

If A.B. 158 is re-introduced in future legislative sessions, there are a few amendments that the sponsor should consider when drafting this bill. These amendments are based on the opposition testimony received in the Assembly judiciary and Senate judiciary hearings, as well as some alternative options.

i. Narrow the Time Frame

First, and most importantly, the new drafter should strongly consider altering the time frame listed in the bill. Currently, the bill allows the judge to depart from mandatory minimum sentencing guidelines when the child-defendant commits the crime against their abuser within *one year* of abuse or trafficking.²⁰⁵ Many critiqued this time frame as arbitrary and too long.²⁰⁶ Narrowing the time frame allotted will address these concern. The problem is that any time frame that the drafter comes up with will be criticized as arbitrary. A better solution is to develop a methodology that will determine an appropriate number so that if asked during a hearing, the drafters may explain how that number was determined. Opposed to what is in place now, which has no rhyme or reason for choosing the one-year time frame.

ii. Add a Procedural Clause

In addition to that, to address concerns made by Senator Cannizzaro,²⁰⁷ drafters should add language relating to the procedural process of this bill. Also, drafters should add this

²⁰⁵ A.B. 158, *supra* note 16.

²⁰⁶ *Nevada Senate Committee on Judiciary*, *supra* note 1, at 16 (testimony of Jennifer Noble, Legislative Liaison, Washoe County District Attorney's Office).

²⁰⁷ *See* note 184 and accompanying text.

recommendation only if they decide to alter the time frame and maintain most of the original language.

In this procedural clause, the drafters would need to include when this evidentiary hearing would occur to determine, by clear and convincing evidence, whether the defendant was trafficked or abused resulting in the violent offense against their abuser. This would clearly be post-conviction; therefore, the drafters should articulate how long after conviction must a party make a motion to initiate the evidentiary hearing. Additionally, it should include who has the duty to raise this issue and if there are any waivers after a set amount of time. A.B. 158 already states that the defendant has the burden to prove by clear and convincing evidence that the child was abused²⁰⁸ and this language is sufficient and should remain.

iii. Alternatively, Broaden the Applicability of Self-Defense Claims

Another amendment the drafters should consider would require a fundamental change to current bill's language. If the time frame cannot be reasonably narrowed, then the bill should attempt to create broaden the use of self-defense claims. This modification will create a larger impact on the target population because it will excuse child-defendant entirely if they can meet their burden of proof.

There are three approaches the drafters may use in developing this new defense: 1) include subjective test language, 2) adopt language from Nevada's current "battered woman's syndrome" statute, or 3) create a battered child's syndrome defense. Drafters may use these approaches separately, but they are more effective if blended together.

²⁰⁸ A.B. 158, *supra* note 16.

a. Include Subjective Test Language

Another option drafters should consider in future legislative sessions is outlining a subjective test that the court could use to determine whether or not the child-defendant's actions were justifiable. A subjective test looks more into the viewpoint of a person in the actor's situation under the circumstances that the actor believed to exist.²⁰⁹ This language will help create a new defense for child-defendants who retaliate against their abusers. Drafters should include language such as:

“evidence based on the history of abuse or trafficking between the defendant and the victim, as the defendant perceives them, is admissible to show that the defendant honestly believed he/she would be unable to permanently extract themselves from the abuse without their own intervention.”

Under this subjective test, the child-defendant would bear the burden to prove beyond a reasonable doubt that their abuse was so significant and traumatizing that the only way to permanently escape their abuser was through violence. The trier of fact is obligated to determine whether or not the child-defendant's actions against their abuser were justified based on the circumstances as the child perceived them.

A subjective test should be successful because subjective tests are already used in criminal law defenses, such as entrapment. In *Hampton v. United States*, the Supreme Court declared that the entrapment defense focuses on the intent of the particular defendant to commit the crime.²¹⁰ Specifically, entrapment arises “only when the government's deception actually implants the criminal design *in the mind of the defendant*.”²¹¹

This is preferable to an objective test because it allows the trier of fact to analyze all the circumstances between the abused child endured and whether or not it was reasonable for that

²⁰⁹ MODEL PENAL CODE § 210.3 cmt 5(a), at 62–63 (1980)/

²¹⁰ 425 U.S. 484, 488 (1976).

²¹¹ *Id.* at 488–89.

child to lash out. Using an objective test would minimize the abuse and psychological impact the child experienced and could not accurately determine the reasonableness of the child's actions.

b. Adopt Language from Nevada's Current "Battered Women's Syndrome" Statute

This defense should mirror battered women's syndrome defenses that are in place around the country. Even though Nevada does not currently recognize a separate battered women's defense, they do allow evidence of domestic abuse to prove self-defense claims or state of mind.²¹² This is reflected in NRS 48.061, which states:

“ . . . [E]vidence of domestic violence and expert testimony concerning the effect of domestic violence, including, without limitation, the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence that is offered by the prosecution or defense is admissible in a criminal proceeding for any relevant purpose, including, without limitation, when determining: . . .

(b) Whether a defendant in accordance with NRS 200.200 has killed another in self-defense, toward the establishment of the legal defense.”²¹³

NRS 48.061 allows a party to introduce evidence of domestic abuse to support that the defendant acted in self-defense, even if there was no imminent danger.²¹⁴ In a bill proposing a new defense, drafters should mirror the language used in the above statute. The following is an example of the language that could be used:

“Evidence of sexual trafficking or sexual abuse and expert testimony concerning the effect of sexual trafficking and abuse, including, without limitation, the effect of physical, emotional, or mental abuse, on the beliefs, behaviors and perception of the alleged victim of the sexual trafficking or abuse that is offered by the prosecution or defense is admissible in a criminal proceeding for any relevant purpose, including, without limitation, when determining:

(a) Whether a defendant in accordance with NRS 200.200 has killed another in self-defense, toward the establishment of the legal defense.”

²¹² See *Boykins v. Nev.*, 995 P.2d 474, 478 (2000).

²¹³ NEV. REV. STAT. § 48.061 (2010).

²¹⁴ NEV. REV. STAT. § 48.061 (2010); NEV. REV. STAT. 200.275 (2017).

This language would be effective because it directly mirrors language that Nevada currently has in place for a similar issue. While these children are also not in imminent danger during the commission of the crime, they are subject to such extensive abuse that causes them to resort to violence as their only way out. This bill should still limit its eligibility to juveniles who experience sexual abuse or trafficking. Since evidence of domestic violence is admissible to support a theory of self-defense, so should evidence of sexual trafficking and sexual abuse.

c. Create a Battered Children's Syndrome Defense

Finally, drafters should consider creating an entirely new defense that focuses on “battered children.” This would include any child who was subject to long-term physical or sexual abuse, which impacted their mental health, including diminished decision-making abilities. The term “battered child syndrome” was coined in Dr. Henry Kempe’s 1962 study.²¹⁵ He defined this condition as “a clinical condition in young children who have received serious physical abuse.”²¹⁶

Jamie Heather Sacks argues that battered children are subject to hypervigilance, which means they are constantly on alert for signs of danger because of the history of abusive encounters with their batterer.²¹⁷ This hyper-monitoring behavior makes these children more sensitive to signals which suggest danger is imminent. Sacks explains that acknowledging hypervigilance is important in aiding the jury understand the violent response of these

²¹⁵ Jamie Heather Sacks, *A New Age of Understanding: Allowing Self-Defense Claims for Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL’Y 349, 354 (1994).

²¹⁶ *Id.* at n. 35.2. This condition is generally attributed to children who are abused by their parents or caretakers, but this term should include children who experience long-term physical and sexual abuse generally, despite the identity of the abuser.

²¹⁷ *Id.* at 356.

children.²¹⁸ Hypervigilance explains the child’s fear of imminent danger that an outsider would not detect.²¹⁹

Children in these situations often assert self-defense claims, but courts often reject these claims because the child’s violent actions are usually conducted when the abuser is in a vulnerable state, like sleeping. Therefore, the facts usually cannot conform to the “classic self-defense” theory.²²⁰

A new battered children’s defense would require the admissibility of expert testimony to help the jury in examining the reasonableness of the child’s belief of imminent danger. An average juror cannot reasonably come to this conclusion without the expert testimony because they cannot understand the physical and mental impact involved between the batterer and the child.²²¹ Children in these situations are often unable to perceive any other alternative to escape from the abuse.

Acknowledging a battered child’s syndrome defense would broaden the eligibility for self-defense claims for these abused and trafficked children. Current self-defense claims are insufficient because it is only successful if one reasonably believes a serious enough threat was posed and if one honestly and reasonably believes that the use of force is necessary to prevent that threat.²²² In Nevada, a defendant asserting a self-defense claim must prove beyond a reasonable doubt that an aggressor poses an *immediate* threat, and the defendant inflicted no more force than necessary to resist the aggressor’s threat.²²³

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 350.

²²¹ *Id.*

²²² Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 52–53 (2008).

²²³ NEV. REV. STAT. § 200.200 (2019) (emphasis added).

Prohibiting use of expert testimony to show that the child-defendant's abuse and trauma were linked to violent act would bar children in these situations from successfully asserting a self-defense claim. Allowing the use of battered children's syndrome evidence to explain why the child reasonably believed the threat was imminent will broaden the use of self-defense claims for only the group of vulnerable children who experience the extensive trauma.

C. Summary of Recommendations

Shifting to a new defense requires a much higher burden than the clear and convincing standard outlined in A.B. 158. If a new defense is created, it would shift the burden onto the child-defendant to prove beyond a reasonable doubt that their criminal act was justified.

Creating a new defense or incorporating the child-offender's previous abuse will likely be criticized by those who already have reservations regarding this bill. It might be too radical to receive enough support to actually pass in both the Assembly and Senate. Although this new defense would be innovative and allow for more protections for these child victims, the legislators will probably have a higher rate of success by simply narrowing the time frame rather than creating a whole new defense. If Assembly members want a higher chance at passing A.B. 158, narrowing the time frame is likely a better route.

Incorporating these recommendations addresses the criticisms concerns that were brought during the 2019 legislative session and would increase the likelihood of this bill getting passed in future legislative sessions. A.B. 158 is an important juvenile justice reform bill and should become Nevada law.

V. CONCLUSION

Child victims of sexual trafficking and sexual abuse are some of the most vulnerable members of our society,²²⁴ and Nevada specifically has one of the highest rates for sex trafficking.²²⁵ A.B. 158 was a bill proposed in the 2019 Nevada legislative session, but unfortunately died in the Senate.²²⁶ Under this bill, judges would have power to depart from mandatory minimum sentencing guidelines for child victims of sexual trafficking or abuse who retaliate and commit violent crimes against their abuser.²²⁷

This bill would have provided additional protections for Nevada’s child victims of sexual assault and trafficking. Unfortunately, during the 2019 Nevada legislative session, Nevada failed to pass A.B. 158. Nevada missed their opportunity to be the first state to pass a law relating to this specific issue. Additionally, Nevada’s acknowledgment and solution to the problem would have set a national standard and hopefully influenced states to follow suit. However, it is not too late and this fight is not over. Nevada residents should encourage their legislators to push this movement forward to help these vulnerable children. Nevada legislators should adopt the recommendations set forth in this Note to increase the likelihood that it is passed in future legislative sessions. In the words of James Dold, “Pass A.B. 158, and send an unmistakable message to child victims everywhere: we *see* you, we *hear* you, we will *protect* you, and we *love* you.”²²⁸

²²⁴ *Nevada Senate Committee on Judiciary, supra* note 1.

²²⁵ NEV. COAL. TO PREVENT THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN, *supra* note 25.

²²⁶ A.B. 158, *supra* note 16.

²²⁷ *Id.*

²²⁸ *Nevada Assembly Committee on Judiciary, supra* note 5, at 7 (emphasis added).