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## Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense

Francisco Zornosa

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# Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense

*Francisco Zornosa\**

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### *Introduction*

Almost every week, a news article covers a different story that underscores our government’s preference—and the preference of society, more generally—for successful human trafficking prosecutions over the recovery and rehabilitation of trafficking victims. Whether it is coverage of a large-scale prostitution sting,<sup>1</sup> or the prosecution of major sex<sup>2</sup> or labor trafficking<sup>3</sup> enterprises, our appetite for the enforcement of criminal human trafficking laws—especially sex trafficking laws—is quite satisfied. However, there is a certain group whose appetite for justice has gone unsatisfied for a long time—human trafficking victims.

Following the U.S. government’s lead, most states are beginning to recognize their historical neglect toward the interests of trafficking victims, and accordingly, many have shifted their attention—at least in part—toward

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1. See, e.g., Press Release, Polk Cnty. Sheriff’s Office, PCSO Detectives Make 92 Arrests During Four-Day-Long Undercover Prostitution Investigation (May 13, 2013), [http://www.polksheriff.org/NewsRoom/News%20Releases/Pages/05-13-2013PCSOdetectives\\_Make92ArrestsDuringFour-Day-Long.aspx](http://www.polksheriff.org/NewsRoom/News%20Releases/Pages/05-13-2013PCSOdetectives_Make92ArrestsDuringFour-Day-Long.aspx) (last visited Apr. 13, 2016) (describing the tactics used to investigate and arrest an underground prostitution ring) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

2. See, e.g., Max Kutner, Sex Slaves on the Farm, Newsweek (Feb. 5, 2015, 9:43 AM), <http://www.newsweek.com/2015/02/13/sex-slaves-farm-304354.html> (last visited Apr. 16, 2016) (describing the intimidation used against women in sex slavery) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. See, e.g., Paul Vitello, From Stand in Long Island Slavery Case, *a Snapshot of a Hidden U.S. Problem*, N.Y. TIMES (Dec. 3, 2007), <http://www.nytimes.com/2007/12/03/nyregion/03slavery.html?pagewanted=all> (last visited Apr. 16, 2016) (discussing modern-day slavery and the prosecution of involuntary servitude and peonage) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

satisfying those interests.<sup>4</sup> In practice, however, we are seeing a lot of states “talk the talk” but not “walk the walk.” That is, many of the approaches that states have adopted to help human trafficking victims are making only a small difference to a lot of victims.

This Article recognizes the need for change and urges states to adopt an overall approach that prioritizes the interests of trafficking victims to at least the same extent as it does the interests of combating human trafficking (and more specifically, combating human traffickers). As part of this overall approach, this Article proposes that states should enact affirmative defense statutes that excuse human trafficking victims for crimes that they commit as a direct result of being trafficked. In doing so, this Article frames its discussions, analyses, and arguments within the narrower context of sex trafficking, though practically, its analyses and arguments are just as convincing and applicable as applied to the context of human trafficking more generally.

The trajectory of this Article can be mapped as follows: Part I begins with a general discussion of the problem of human trafficking in the United States. This discussion lays the foundation for Part II, which summarizes the United States’ current domestic human trafficking laws, focusing particularly on human trafficking laws at the state level. Part II also includes a summary and analysis of state statutes that allow human trafficking victims to vacate prior convictions for crimes that they committed as a result of being trafficked—commonly referred to as “vacatur statutes.” Part III transitions into a discussion of affirmative defenses outside of the human trafficking context and includes a discussion of the defense of duress. Part IV lays out several arguments for why states should provide trafficking victims with an affirmative defense and addresses the claim that an affirmative defense would create a moral hazard problem. Additionally, this Part provides some useful policy considerations to keep in mind before transitioning to an overview of states’ current trafficking victim affirmative defense statutes, which this Article provides in Part V. These statutes include ones that are limited to duress-like situations, ones that excuse only prostitution and related offenses, and broader ones that extend the defense to excuse non-prostitution-related offenses. After this overview, Part VI proposes the ideal state legislative model for a trafficking victim affirmative defense. In doing so, it argues that states should not limit their affirmative defenses to prostitution and related offenses but, instead, should extend their defenses to excuse non-

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4. See *infra* notes 9–12 and accompanying text.

prostitution-related offenses. Part VI closes by qualifying this Article's proposal, urging states to adopt a collaborative approach that includes, but is not limited to, the adoption of a trafficking victim affirmative defense.

### *I. Discussion of the Domestic Human Trafficking Problem*

Human trafficking is a serious problem that exists all over the world. The United States, among others, is considered a major destination country for human traffickers, as roughly 14,500–17,500 victims are trafficked into the United States every year.<sup>5</sup> Sex trafficking in particular is a major subset of this industry—it brings in billions of dollars each year and is tied with trafficking in weapons as the second largest illegal enterprise in the United States.<sup>6</sup> Most trafficking in the United States occurs in large metropolitan areas with high immigrant populations (immigrants are especially vulnerable targets for human trafficking),<sup>7</sup> and it is most prevalent in California, Florida, New York, and Texas.<sup>8</sup>

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5. See Toko Serita, *In Our Own Backyards: The Need for a Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. REV. L. & SOC. CHANGE 635, 636 (2012) (“The United States is considered a major destination country for traffickers, into which approximately 14,500–17,500 people are trafficked every year.”); Marisa Nack, *The Next Step: The Future of New York State’s Human Trafficking Law*, 18 J.L. & POL’Y 817, 822 (2010) (describing that in New York, sex trafficking is most prevalent in industries with a demand for low-wage workers and little industry oversight).

6. See Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 409 (2011) (“Because of these exorbitant profits, the United Nations anticipates that human trafficking will surpass drug and weapon trafficking to become the world’s largest illegal business.”).

7. See *id.* at 415 (noting that, among other reasons, immigrants are generally easy targets for trafficking because (1) they are unfamiliar with the language and culture of the United States, and (2) they are often in the United States illegally, which makes them especially vulnerable to threats of deportation and fosters a general sense of distrust for law enforcement).

8. See *id.* at 410, 415 (“Scholars have cited the following causes of human trafficking: poverty, illiteracy, armed conflicts, economic crisis, globalization, gender inequalities and discrimination, low social status of women, lack of educational opportunities, restrictive immigration policies, lack of anti-trafficking laws (or lack of enforcement), and the demand of male sex buyers.”) (internal citations omitted).

## II. Discussion of Current Human Trafficking Laws

### A. Current Criminal Human Trafficking Laws

Recognizing that human trafficking—especially sex trafficking—is a major problem in the United States, all fifty states, the District of Columbia, and the federal government, respectively, have enacted some form of legislation aimed toward eliminating human sex trafficking.<sup>9</sup> As defined under federal law, sex trafficking is a form of human trafficking whereby one induces a commercial sex act through “force, threats of force, fraud, or coercion.”<sup>10</sup> States have also adopted various definitions of sex trafficking.<sup>11</sup> In addition to the general recognition of sex trafficking as a major domestic problem, there is a growing trend in the United States toward making victim recovery one of the end goals of such legislation.<sup>12</sup>

Despite this trend, however, the criminal justice system’s intersection with sex trafficking frequently favors successful prosecutions over the rights and needs of trafficking victims.<sup>13</sup> Additionally, trafficking victims are oftentimes characterized—and even targeted—as criminals because of a common practice among law enforcement personnel to place a heavy

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9. See POLARIS PROJECT, A LOOK BACK: BUILDING A HUMAN TRAFFICKING LEGAL FRAMEWORK 1–2 (2014), <https://polarisproject.org/sites/default/files/2014-Look-Back.pdf> (describing national and statewide efforts to eliminate sex trafficking).

10. 18 U.S.C. § 1591 (2012).

11. See, e.g., N.Y. PENAL LAW § 230.34 (McKinney 2015) (defining sex trafficking broadly as advancing or profiting from prostitution by providing drugs to impair a victim’s judgment; making false or misleading statements to induce a victim to engage in prostitution; confiscating, withholding, or destroying a victim’s passport or other important identity documents; keeping a victim in debt bondage; or using force, threats, and humiliation to make a victim engage in prostitution).

12. See, e.g., Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7104, 7105, 7109 (2012) (comprising the TVPA’s three-pronged approach to combat trafficking: (1) *prevention* of the crime of trafficking; (2) *protection* of trafficking survivors; and (3) *prosecution* of traffickers); *id.* § 7101(b)(19) (“Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.”); Sangalis, *supra* note 6, at 418 (“[Congress] took a decidedly victim-centered approach to the [TVPA].” (citing *Implementation of the Trafficking Victims Protection Act: Hearing Before the H. Comm. on Int’l Relations*, 107th Cong. 3 (2001))).

13. See, e.g., MELISSA DITMORE, SEX WORKERS PROJECT, URBAN JUSTICE CTR., THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 36 (“From the perspective of law enforcement personnel, whether a raid is successful is determined by the collection of evidence rather than by positive outcomes for the people affected by the raid.”).

emphasis on arrests for low-level misdemeanors, including prostitution.<sup>14</sup> This results in a large number of trafficking victims who are arrested for incidental offenses, which severely undermines the goals of facilitating trafficking victim recovery.

### B. Current Vacatur Statutes

States are beginning to recognize the status quo's neglect toward victim recovery and are taking legislative action. Leading the way in 2010, New York passed a law that allows victims of trafficking to file motions to vacate prostitution and related convictions that were direct results of having been trafficked.<sup>15</sup> Since then, twenty-three states have followed suit by enacting laws that similarly allow trafficking victims to vacate or expunge certain convictions.<sup>16</sup>

"Despite early praise for these laws, however, very few victims have exercised the new legal rights these laws created."<sup>17</sup> The shortage of relief provided pursuant to these vacatur statutes is largely the result of their ineffective and impractical structures. The following subpart analyzes New York's vacatur statute and uses its flaws to demonstrate why similar statutes, in and of themselves, fall short of their stated purposes (i.e., assisting trafficking victims).

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14. See SUZANNAH PHILLIPS ET AL., INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 14 (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf> ("In addition to raids, common policing strategies, driven by the broken windows theory that unchecked minor crimes will lead to an increase in overall criminal activity, place a heavy emphasis on arrests for low-level misdemeanors, including prostitution.").

15. See PHILLIPS ET AL., *supra* note 14; see also N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney Supp. 2014) (providing that a defendant can file a motion for relief from judgment where the crime was the result of sex trafficking).

16. See POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: VACATING CONVICTIONS 1 (2015), <https://polarisproject.org/sites/default/files/2015%20Vacating%20Convictions%20Issue%20Brief.pdf>; see also PHILLIPS ET AL., *supra* note 14, at 3 (discussing the state of human trafficking vacatur remedies); see also Annie Sweeney, *Cook County Court Clears Sex Trafficking Victim of Prostitution Record*, CHI. TRIB. (Aug. 23, 2013), [http://articles.chicagotribune.com/2013-08-23/news/ct-met-prostitution-trafficking-adoption-20130823\\_1\\_dreamcatcher-foundation-abusive-pimps-brenda-myers-powell](http://articles.chicagotribune.com/2013-08-23/news/ct-met-prostitution-trafficking-adoption-20130823_1_dreamcatcher-foundation-abusive-pimps-brenda-myers-powell) (last visited Apr. 13, 2016) ("[P]eople who can show proof they were sexually trafficked, including those forced to work in prostitution, may petition to have related convictions cleared from their record.") (on file with Washington and Lee Journal of Civil Rights and Social Justice).

17. Alyssa M. Barnard, Note, "*The Second Chance They Deserve*": *Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1464 (2014).

### *1. New York's Vacatur Statute*

New York enacted section 440.10(1)(i) of the New York Criminal Procedure Law on August 13, 2010, to provide a post-conviction remedy for sex trafficking victims.<sup>18</sup> Section 440.10(1)(i) allows courts, after the entry of a judgment for prostitution or loitering for the purpose of engaging in a prostitution offense, to vacate such judgment if “the defendant’s participation in the offense was the result of having been a victim of sex trafficking” under either New York or federal law.<sup>19</sup> The primary purpose of the law was to relieve trafficking victims of punishment for acts committed at the coercive direction of their traffickers and, in doing so, to provide such victims with the “second chance they deserve.”<sup>20</sup> Additionally, section 440.10(1)(i) applies retroactively to convictions that were imposed before its enactment.<sup>21</sup>

### *2. Flaws with New York's Vacatur Statute*

Despite the statute’s benevolent goals and provisions—and its role as an important step in the movement to empower trafficking survivors<sup>22</sup>—its utilization as a method of relief for trafficking victims has been marginal in relation to the number of people who are eligible for relief.<sup>23</sup> One

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18. Act of Aug. 13, 2010, ch. 332, 2010 N.Y. Sess. Laws 1083 (McKinney).

19. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney Supp. 2014).

20. See Barnard, *supra* note 17, at 1463 (citing Letter from Richard N. Gottfried, Chair, N.Y. Assembly Comm. on Health, to Peter Kiernan, Counsel to the Governor (July 20, 2010)).

21. See *id.* (citing Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws, at 1906–07).

22. PHILLIPS ET AL., *supra* note 14, at 26.

23. See Barnard, *supra* note 17, at 1483–84 (noting that as of March 2014, only thirty-eight sex trafficking victims in New York had successfully utilized section 440.10(1)(i) to vacate prior convictions); see also Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 477–78 (2012) (noting that in 2011, more than 2800 people were arrested and prosecuted in New York City for engaging in prostitution-related activity and that the overwhelming majority of those arrested meet all of the legal criteria for sex trafficking under either New York or federal law). The number of cases in which convictions have been vacated in other states is even smaller. See Barnard, *supra* note 17, at 1484 (noting only two people in Illinois who had successfully vacated their trafficking-related convictions since the enactment of Illinois’ vacatur statute in 2011 and only one person in Maryland). Barnard added that with respect to the other states with vacatur provisions for trafficking victims, she found “no evidence that anyone [in those states] has ever vacated a trafficking-related conviction.” *Id.*

explanation for the statute's limited application is that it imposes certain procedural hurdles, making it impractical or otherwise difficult for trafficking victims to utilize as a method for relief.

For example, Section 440.10(1)(i) has a due-diligence requirement, which provides that a victim's motion must be filed in a timely fashion.<sup>24</sup> Ordinarily, when a defendant moves to vacate a criminal conviction, she argues that she did not, as a factual matter, commit the offense for which she was convicted.<sup>25</sup> The primary reason behind imposing due-diligence requirements for vacatur provisions is to balance justice with both the integrity of the trial process and the finality of the jury's judgment<sup>26</sup>—i.e., after a certain amount of time, we have to accept factual findings as fact to avoid endless challenges that would otherwise excessively clog the criminal justice system. This reason, however, does not justify a due-diligence requirement for the sex trafficking vacatur statute to the same extent as it does, say, for the newly discovered evidence vacatur statute. The former does not involve a factual challenge as to whether or not the defendant actually committed the offense at issue; instead, a sex trafficking victim who brings a motion to vacate does so on the grounds that she is not culpable for the conduct that formed the basis of the offense at issue.<sup>27</sup> Thus, motions to vacate sex trafficking victims' convictions do not threaten

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24. N.Y. CRIM. PROC. LAW § 440.30(1)(b)(ii) (2012) (providing that a motion to vacate filed under 440.10 shall be denied if filed more than five years after the conviction). This is the case unless the party filing the motion shows:

(A) that he or she has been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion; (B) that the facts upon which the motion is predicated were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of the statute of limitations; or (C) considering all circumstances of the case including but not limited to evidence of the defendant's guilt, the impact of granting or denying such motion upon public confidence in the criminal justice system, or upon the safety or welfare of the community, and the defendant's diligence in seeking to obtain the requested property or related relief, the interests of justice would be served by considering the motion.

*Id.*

25. *See* Barnard, *supra* note 17, at 1486 (citing N.Y. CRIM. PROC. LAW § 440.10(1)(g) (allowing a motion to vacate if newly discovered evidence that was unavailable at trial "is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant")).

26. *See* Barnard, *supra* note 17, at 1486 (explaining the delicate balance between justice and integrity in trial procedure).

27. *See id.* (explaining that vacatur is based on culpability rather than whether or not the law was broken).

the criminal justice system with the possibility of endless factual challenges, and as a result, their due-diligence requirements unnecessarily infringe on trafficking victims' abilities to obtain relief.<sup>28</sup>

Additionally, New York's sex trafficking vacatur statute provides sex trafficking victims with little guidance as to what types of evidence are acceptable ways of proving that they were, in fact, sex trafficking victims.<sup>29</sup> "Without clear standards to guide judges on the evidence probative in trafficking vacatur cases, there is a danger that judges will use improper means to evaluate credibility, and that those credibility determinations would be difficult to overturn upon [appellate] review."<sup>30</sup>

Another critique of the statute claim that its limitation to arrests for prostitution and related offenses denies relief to individuals who are forced by their traffickers to commit other, non-prostitution-related offenses. For example, sex traffickers often maintain control over their victims by making them dependent on illegal drugs and sometimes force them to purchase the illegal drugs.<sup>31</sup> Under New York's vacatur statute, the criticism follows, a trafficking victim who purchases illegal drugs as a result of being trafficked would have no relief for any arrests or convictions that stem from the illegal drug transaction. Considering that trafficking victims in such scenarios commit illegal acts at the coercive direction of their traffickers, it is illogical—keeping in mind the justification behind the vacatur statutes—to preclude these victims from relief of punishment for the acts.

A critique of vacatur statutes, generally, is that most of them condition—either explicitly<sup>32</sup> or implicitly<sup>33</sup>—the ability to obtain relief on

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28. See generally PHILLIPS ET AL., *supra* note 14, at 35 (noting that requiring trafficking victims to file their vacatur motions within a certain period of time ignores the fact that after a victim has escaped a trafficking situation, it may be some time before she is ready to seek services or pursue relief).

29. Barnard, *supra* note 17, at 1488–89; see also § 440.10(1)(i)(ii) (providing that "official documentation of the defendant's status as a victim of sex trafficking . . . shall create a presumption that the defendant's participation in the offense was a result of having been a victim of sex trafficking."); see also PHILLIPS ET AL., *supra* note 14, at 34 ("Although vacatur statutes do not require that survivors present corroborating evidence to prove they were trafficking victims, there is a danger that prosecutors and courts may implicitly require corroborating evidence."). See, e.g., FLA. STAT. § 943.0583(6)(a) (2015), and MD. CODE ANN., CRIM. PROC. § 8-302(b)(4) (West 2015) (showing that other states' statutes similarly provide sex trafficking victims with little guidance).

30. Barnard, *supra* note 17, at 1490.

31. See *id.* at 1476.

32. See, e.g., generally, HAW. REV. STAT. § 712-1209.6(2)(e) (2015); MD. CODE ANN., CRIM. PROC. § 8-302(b)(2); WASH. REV. CODE § 9.96.060(3)(a)–(c) (2015).

either a victim's cooperation with law enforcement, prosecutor approval, or the lack of other criminal charges or convictions.<sup>34</sup> Many trafficking victims have strong and legitimate reasons for not wanting to cooperate with law enforcement;<sup>35</sup> and thus, conditioning relief on victim cooperation frequently undermines vacatur statutes' goals of furthering the fundamental principles of justice.<sup>36</sup>

Given the ineffectiveness of trafficking-related vacatur statutes, legislators in states like New York—and in states that do not provide trafficking victims with any relief for crimes that they committed as a result of having been trafficked, for that matter—should ask themselves why they do not provide these victims with relief *before* a conviction in the form of an affirmative defense. To answer this question, it is helpful to understand how affirmative defenses work and why they exist. The following Part analyzes the justifications for affirmative defenses, generally, and discusses affirmative defenses in contexts outside of sex trafficking.

### *III. Discussion of Affirmative Defenses in Other Contexts*

This Part provides useful background on affirmative defenses, generally, in the criminal law context. It then discusses the affirmative defense of duress and its underlying justification.

#### *A. Affirmative Defenses, Generally*

The term defense in the criminal law context refers to identifiable conditions or circumstances that may *prevent* conviction for an offense.<sup>37</sup> There are three types of “general” defenses that apply to offenses despite the existence of all required elements of an offense and independently of

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33. *See, e.g.*, PHILLIPS ET AL., *supra* note 14, at 34 (noting that although New York's vacatur statute does not require victims to cooperate with law enforcement, “New York District Attorneys' offices often implicitly require such cooperation before they will consent to motions to vacate”).

34. *Id.*

35. *See id.* (explaining that trafficking victims' reasons for declining to cooperate in investigations stems from fear and mistrust of law enforcement—resulting from prior experiences with the police and from the fact that traffickers instill a fear of law enforcement into their victims to prevent them from seeking help—and fear that their traffickers might seek retribution against them or their families).

36. *Id.* at 35.

37. PAUL H. ROBINSON, 1 CRIMINAL LAW DEFENSES § 21 (2014).

the criminalization decision of a particular offense: (1) justifications, (2) excuses, and (3) nonexculpatory defenses.<sup>38</sup>

The conduct of a justified actor is not culpable because its benefits outweigh the harm or evil of the offense itself; an excused actor admits the harm or evil but nonetheless claims an absence of personal culpability; and an actor exempt under a nonexculpatory defense admits the harm or evil and his culpability but relies upon an important public policy interest, apart from blamelessness, that is furthered by foregoing the defendant's conviction.<sup>39</sup>

Particularly relevant to the context of trafficking victims who commit crimes at the direction of their traffickers is the "excuse" defense, because such a defense is deemed appropriate based on the defendant's lack of responsibility.

In criminal law, an excuse defense generally has the following internal structure: a "*disability* causing an *excusing condition*."<sup>40</sup> A disability is a condition with observable manifestations that are separate from the conduct constituting the offense and "may be permanent (subnormality) or temporary (intoxication), internal (insanity) or external (duress)."<sup>41</sup> Having the disability at the time of the offense is not enough, as the disability is not the underlying reason for excusing the actor; instead, an actor's disability must have caused a particular result.<sup>42</sup> Society is generally willing to excuse an actor "when the actor perceives the conduct accurately and fully, understands its physical consequences, and knows its wrongfulness or criminality, but lacks the ability to control his conduct . . . to such an extent that it is not proper to hold him accountable for it."<sup>43</sup> Thus, the rationale underlying the establishment of an excuse defense for human trafficking victims is that the victims lack personal culpability for crimes that their traffickers cause them to commit.

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38. *Id.*

39. *Id.*

40. *Id.* § 25.

41. *Id.*; WAYNE R. LAFAYE, 2 SUBSTANTIVE CRIMINAL LAW § 9.1 (2d ed. 2014).

42. ROBINSON, *supra* note 37, at § 25.

43. *Id.*

### B. Duress

An affirmative defense for trafficking victims would be similar to the defense of duress, though duress is defined narrowly and thus would not encompass a substantial amount of crimes that trafficking victims commit at the direction of their traffickers. The defense of duress in the criminal law context is generally defined as the following:

A person's unlawful threat (1) which causes the defendant reasonably to believe that the *only way to avoid imminent death or serious bodily injury to himself or to another* is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress (sometimes called compulsion or coercion) to the crime in question unless that crime consists of intentionally killing an innocent third person.<sup>44</sup>

Given the manner in which sex traffickers often compel their victims to break the law—for example, by “grooming” victims through extensive psychological torment; physical, verbal, and sexual abuse; facilitating dependency on drugs; brainwashing; document confiscation; and techniques used to erase the victim's former identity, like renaming the victim or burning personal items<sup>45</sup>—the duress defense falls short for the many sex trafficking victims who do not face imminent death or serious bodily injury. Perhaps more importantly, duress falls short for the many sex trafficking victims who would not be able to prove in court that their criminal behavior was the result of some imminent threat of death or serious bodily injury. In fact, instead of using threats of imminent physical violence to compel their victims to prostitute themselves, sex traffickers oftentimes threaten to call the police and have their victims arrested if they

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44. LAFAVE, *supra* note 41, at § 9.7. “The rationale of the defense of duress is that the defendant ought to be excused when he ‘is a victim of a threat that a person of reasonable moral strength could not fairly be expected to resist . . .’” (quoting Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1350 (1989)).

45. See PHILLIPS ET AL., *supra* note 14, at 9 (“Physical violence can be used to instill submission, to punish victims if they challenge their traffickers’ authority, and as a reminder that the victim is entirely at the whims of the trafficker.”); see Barnard, *supra* note 17, at 1469 (“Slowly, the trafficker will ‘groom’ his victim through a combination of physical and emotional abuse.”); see also Marihug Cedeño, *Pimps, Johns, and Juvenile Prostitutes: Is New York Doing Enough to Combat the Commercial Sexual Exploitation of Children?*, 22 CORNELL J.L. & PUB. POL’Y 153, 160 (2012) (describing grooming as a “brutal process [that] involves breaking the girls down in order to gain complete control over their identity or individuality”).

do not submit to the trafficker's demands<sup>46</sup>—a threat that relies on the fact that these victims face criminal liability and that, presumably, would not be possible if these victims were excused from such criminal behavior via an affirmative defense.

Considering the rationale for excuse defenses like duress—that is, lack of personal culpability—as well as the fact that many trafficking victims who commit incidental crimes lack personal culpability, it seems intuitive that trafficking victims should be excused from criminal liability even when they do not directly face death or some imminent, physical injury. This position is supported by the fact that states are increasingly enacting vacatur and affirmative defense statutes for trafficking victims. So, if society is beginning to acknowledge that trafficking victims do not deserve criminal convictions for certain crimes, why are more states not taking remedial action through the use of affirmative defense statutes? The following Parts consider answers to this question and argue that more states should consider adopting their own affirmative defense statutes for trafficking victims.

#### *IV. The Establishment of an Affirmative Defense for Victims of Human Trafficking*

This Part considers arguments for and against the creation of an affirmative defense at the state level for victims of human trafficking. In doing so, it compares the effectiveness of an affirmative defense to that of vacatur statutes.

##### *A. Arguments in Favor of an Affirmative Defense*

First, creating an affirmative defense for trafficking victims who commit incidental crimes—specifically, prostitution—as a result of being trafficked would allow victims to avoid convictions for crimes that they are not culpable of committing. Like a person who is excused for committing a crime under duress, a human trafficking victim who commits a criminal offense as a result of being trafficked oftentimes is subject to the complete

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46. See generally PHILLIPS ET AL., *supra* note 14, at 9; see also Mogulescu, *supra* note 23, at 483 (“Traffickers use victims’ criminal histories as grounds for bringing proceedings against them in Family Court, and as a consistent threat for clients who are undocumented immigrants . . . Traffickers take advantage of their victims’ isolation, and deceive them into thinking that they lack any legal protections and that reporting will result in arrest, deportation, and even abuse by authorities.”).

volition of the trafficker. For example, when a sex trafficking victim prostitutes herself at the direction of her pimp, she is acting under her pimp's orders, subject to her pimp's physical and/or psychological torment, and for her pimp's financial gain. Even if the sex trafficking victim in this scenario does not qualify for a duress defense—say, because she did not face an imminent threat of physical injury—she seems just as deserving of an excuse for her criminal act as someone who does qualify for a duress defense. From a sheer culpability standpoint, society should allocate all of the blame to the trafficker and none to the victim.

Second, an affirmative defense offers a procedural advantage that is not available under some states' current post-conviction remedial approaches—namely, it is easier to prove that someone is a trafficking victim early in the process as opposed to months or years later.<sup>47</sup> A human trafficking victim would certainly be able to furnish more evidence of her status as a trafficked person soon after an arrest than if she had to prove this fact months or years later as she would likely have to do for a motion to vacate.<sup>48</sup>

During the time it takes to convict the trafficking victim and then file a motion to vacate, her trafficker could relocate or cover up any evidence that the victim would need to prove that she was a trafficking victim at the time of the offense. Moving this burden of proof earlier in the process (i.e., establishing an affirmative defense) simply allows for less manipulation—natural or artificial—of crucial evidence.<sup>49</sup>

Third, an affirmative defense for sex trafficking victims would give those victims an alternative that does not brand them as criminals, allowing them to focus solely on rehabilitation. In holding people criminally accountable for certain acts, the criminal justice system has several end goals, only one of which is rehabilitating the defendant.<sup>50</sup> An affirmative defense would allow victims to bypass the criminal justice system, thus allowing them to utilize—and allowing government and non-governmental actors to

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47. See Barnard, *supra* note 17, at 1500 (suggesting that by letting victims of trafficking present a defense earlier in the legal process, it would be easier to prove and may also encourage the victims to leave their traffickers earlier).

48. See *id.* (noting that it makes more sense from an evidentiary perspective to be able to raise the defense sooner).

49. *Id.*

50. See *Kelly v. Robinson*, 479 U.S. 36, 52 (1986) (stating that the criminal justice system operates primarily for the benefit of society, which includes both punishing the offender and rehabilitating him); see also Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1444 (2004) (“[P]hilosophers of punishment traditionally offer four justifications for punishment: deterrence of future wrongful actions by either the offender or the general population, incapacitation, rehabilitation, and retribution.”).

provide—options that focus solely on rehabilitation and that are entirely separate from the penal goals of the criminal justice system.

Fourth, an affirmative defense for sex trafficking victims would encourage such victims to seek help and to cooperate with law enforcement. With an available affirmative defense, victims who would otherwise fear criminal prosecution would be more likely to view law enforcement—and the government, more generally—as avenues of solace, as opposed to adversaries. This would help align trafficking victims with the government and would allow them to distance victims from their traffickers, which is particularly important because traffickers oftentimes make this very difficult by establishing systematic and psychological ties of dependence and loyalty with their victims.<sup>51</sup>

### *B. Addressing the Moral Hazard Counterargument*

The first counterargument to a trafficking victim affirmative defense that comes to mind is the moral hazard<sup>52</sup> argument. Excusing trafficking victims of their crimes, the argument follows, would make them more likely to commit crimes or, depending on how you view the issue, it would make them less likely to avoid committing crimes. This argument assumes that trafficking victims are rational, autonomous decision-makers who consider how their conduct might benefit or harm them before acting. However, most human trafficking victims are not autonomous decision-makers but, rather, act solely based on the decisions that their traffickers make for them.<sup>53</sup> In fact, the primary justification for establishing a trafficking victim affirmative

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51. See PHILLIPS ET AL., *supra* note 14, at 9–10 (telling the story of a trafficked sex worker who did not want to cooperate with law enforcement because she both loved her pimp and was afraid of him); Serita, *supra* note 5, at 643 (noting that the complicated relationship between pimp and prostitute—oftentimes involving a sexual relationship and shared children between the two parties—is similar to that of domestic batterer and intimate partner, and explaining that it is usually difficult for prostitutes to leave their pimps because “they ‘often express feelings of love and admiration for the pimp, have their freedom and finances controlled, and may feel they somehow deserve the violence they are dealt’” (quoting Celia Williamson & Terry Cluse-Tolar, *Pimp-Controlled Prostitution: Still an Integral Part of Street Life*, 8 VIOLENCE AGAINST WOMEN 1074, 1089 (2002))).

52. See Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383, 1463 n.257 (2009) (defining moral hazard as the phenomenon by which injury and activity rates increase as a response to a decrease in the expected costs of injury).

53. See Cedeño, *supra* note 45, at 160 (“After gaining their trust and affection, pimps begin to ‘groom’ or ‘season’ the girls . . . [which] involves breaking the girls down in order to gain complete control over their identity or individuality.”).

defense is that the victims lack culpability because they effectively have no say in their conduct. As such, it is unlikely that an affirmative defense would motivate trafficking victims to act a certain way at all, much less break the law.

### *V. States' Current Trafficking Victim Affirmative Defense Statutes*

This Part describes the current state of the law regarding states' trafficking victim affirmative defense statutes and considers the different approaches that states have adopted in their respective efforts to provide trafficking victims with affirmative defenses. In doing so, it discusses trafficking victim affirmative defense statutes that: (1) are limited to duress or duress-like situations, (2) are limited to prostitution and related offenses; and (3) extend beyond prostitution offenses and apply to other incidental crimes.

#### *A. Current State of the Law Regarding States' Trafficking Victim Affirmative Defense Statutes*

Eighteen states—Alabama,<sup>54</sup> Arizona,<sup>55</sup> Arkansas,<sup>56</sup> Connecticut,<sup>57</sup> Delaware,<sup>58</sup> Georgia,<sup>59</sup> Kansas,<sup>60</sup>

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54. See ALA. CODE § 13A-6-159 (2015) (providing victims of human trafficking an affirmative defense to prosecution for prostitution or sexually explicit performances).

55. See ARIZ. REV. STAT. ANN. § 13-3214(D) (2015) (providing an affirmative defense to prosecutions under this section if a defendant commits the acts constituting prostitution as a direct result of being a victim of sex trafficking).

56. See ARK. CODE ANN. §§ 5-70-102(c)–103(c) (West 2015) (providing an affirmative defense to prosecutions if a person engaged in an act of prostitution as a result of being a victim of human trafficking).

57. See CONN. GEN. STAT. § 53a-82(b) (2015) (providing immunity for minors under the age of sixteen with respect to prosecution for prostitution, giving all trafficking victims an affirmative defense to prosecution for prostitution, and stating that for prostitution prosecutions involving minors aged sixteen and seventeen, there is “a presumption that the actor was a victim of conduct by another person that constitutes” a violation of the state or federal anti-trafficking laws).

58. See DEL. CODE ANN. tit. 11, § 787(h) (2015) (establishing that patronizing a victim of sexual servitude is a Class D felony, or a Class C felony if the victim is a minor).

59. See GA. CODE ANN. § 16-3-6(b)–(c) (West 2015) (providing an affirmative defense to prosecutions under this section if a defendant commits the acts constituting prostitution as a direct result of being a victim of sex trafficking).

60. See KAN. STAT. ANN. § 21-6419(c) (2015) (providing an affirmative defense to prosecutions if a person engaged in an act of prostitution as a result of being a victim of trafficking of persons).

Kentucky,<sup>61</sup> Louisiana,<sup>62</sup> Nebraska,<sup>63</sup> New Hampshire,<sup>64</sup> New Jersey,<sup>65</sup> Oklahoma,<sup>66</sup> South Dakota,<sup>67</sup> Vermont,<sup>68</sup> Washington,<sup>69</sup> Wisconsin,<sup>70</sup> and Wyoming<sup>71</sup>—currently provide affirmative defenses for human trafficking victims who commit certain criminal acts as a result of being trafficked. Some of these statutes are limited to prostitution and related offenses, and others cover a wider range of criminal conduct. In every other state, however, human trafficking victims who are arrested for criminal offenses

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61. See KY. REV. STAT. ANN. § 529.170 (West 2015) (establishing that a person charged under this chapter, or charged with an offense that is not a violent crime, may assert being a victim of human trafficking as an affirmative defense to the charge).

62. See LA. REV. STAT. ANN. § 14.46.2(F)(1) (2014) (providing an affirmative defense to prosecutions under this section if a defendant commits the acts constituting prostitution as a direct result of being a victim of sex trafficking).

63. See NEB. REV. STAT. § 28-801(3) (2014) (providing an affirmative defense to prosecutions under this section for persons who were trafficking victims).

64. See N.H. REV. STAT. ANN. § 645:2(IV) (2015) (limiting the applicability of the affirmative defense to prostitution and loitering for the purpose of prostitution charges).

65. See N.J. STAT. ANN. § 2C:34-1(e) (West 2015) (providing an affirmative defense to prosecution for a violation of this section if, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking or compelled by another to engage in sexual activity, regardless of the defendant's age).

66. See OKLA. STAT. ANN. tit. 21, § 748(D) (West 2015) (providing an affirmative defense to prosecution for a criminal offense if, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking).

67. See S.D. CODIFIED LAWS § 22-23-1.2 (2014) (providing an affirmative defense to a charge of prostitution if the defendant proves by a preponderance of the evidence that the defendant is a victim of human trafficking or that the defendant committed the act only under compulsion by another person who, by implicit or explicit threat, created a reasonable apprehension in the mind of the defendant that if the defendant did not commit the act, the person would inflict bodily harm upon the defendant).

68. See VT. STAT. ANN. tit. 13, § 2652(c) (West 2015) (providing that a person who is a victim of sex trafficking shall not be found in violation of or be the subject of a delinquency petition (lewdness and prostitution) or (obscenity) of this title for any conduct committed as a victim of sex trafficking).

69. See WASH. REV. CODE § 9A.88.040 (2015) (providing that trafficking in persons shall create a presumption that the person's participation in prostitution was a result of having been a victim of trafficking).

70. See WIS. STAT. ANN. § 939.46(1m) (West 2015) (providing victims human trafficking or child trafficking with an affirmative defense for any offense committed as a direct result of the violation of human trafficking or child trafficking without regard to whether anyone was prosecuted or convicted for the violation of human trafficking or child trafficking).

71. See WYO. STAT. ANN. § 6-2-708(a) (West 2015) (stating that a "victim of human trafficking is not criminally liable for any commercial sex act or other criminal acts as a direct result of, or incident to, being a victim of human trafficking").

that they commit as a result of being trafficked can only claim successful affirmative defenses if they establish duress (or something similar).<sup>72</sup>

### 1. Limiting the Affirmative Defense to Duress or Duress-Like Situations

Five states—Iowa,<sup>73</sup> Massachusetts,<sup>74</sup> Minnesota,<sup>75</sup> Pennsylvania,<sup>76</sup> and South Carolina<sup>77</sup>—provide affirmative defenses to trafficking victims who commit certain criminal acts under duress or duress-like situations. Although these five states formally provide trafficking victims with codified affirmative defenses, the extent of their coverage is essentially the same as that of a duress defense—the latter of which is already available to any person, victim or not. As such, this Article distinguishes these five states from the eighteen states listed in the preceding paragraph and equates the former to states that do not designate any type of affirmative defense for trafficking victims.<sup>78</sup>

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72. See LAFAYE, *supra* note 41, at § 9.7 (noting that “a great majority of the modern criminal codes provide for a duress defense[.]” and that a common law duress defense is available in the absence of a statutory defense).

73. See IOWA CODE ANN. § 710A.3 (West 2015) (limiting the affirmative defense to situations in which the trafficking victim “committed the violation under compulsion by another’s threat of serious injury, provided that the defendant reasonably believed that such injury was imminent”).

74. See MASS. GEN. LAWS ANN. ch. 265, § 57 (West 2015) (limiting the affirmative defense to situations in which the trafficking victim committed the violation “under duress or [was] coerced into committing the offenses”).

75. See MINN. STAT. ANN. § 609.325(4) (West 2015) (limiting the affirmative defense to situations in which the trafficking victim “committed the act only under compulsion by another who . . . created a reasonable apprehension in the . . . defendant that if the defendant did not commit the act, the person would inflict bodily harm upon the defendant”).

76. See 18 PA. CONS. STAT. § 3019(b) (2014) (limiting the affirmative defense to situations in which a person charged with prostitution or related offenses committed the act(s) “because he was compelled to do so by coercion or the use of or a threat to use unlawful force against his person or the person of another”).

77. See S.C. CODE ANN. § 16-3-2020(J) (2015) (limiting the affirmative defense to situations in which the trafficking victim committed the violation “under duress or [was] coerced into committing the offenses”).

78. The other states that do not designate any type of affirmative defense to trafficking victims are: Alaska, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, and West Virginia. Westlaw, Lexis, and Google searches for human trafficking victim affirmative defenses returned no results for the states listed in the preceding sentence. Searches were run for each state individually with the terms “human traffic! affirmative defense!” in each database.

## 2. Limiting the Affirmative Defense to Prostitution and Related Offenses

A majority of the states that provide affirmative defenses for human trafficking victims limit their coverage to prostitution and related offenses.<sup>79</sup> Delaware's affirmative defense statute, for example, only applies to trafficking victims who are charged with prostitution or loitering.<sup>80</sup> Georgia's

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79. See, e.g., ALA. CODE § 13A-6-159 (2015) (stating explicitly that the affirmative defense applies to those involved “[i]n a prosecution for prostitution, or a sexually explicit performance defined in this article, of a human trafficking victim for the victim’s illegal acts engaged in or performed as a result of labor servitude or sexual servitude”); ARIZ. REV. STAT. ANN. § 13-3214(D) (2015) (indicating that in a prosecution regarding prostitution “[i]t is an affirmative defense . . . that the defendant committed the acts constituting prostitution as a direct result of being a victim of sex trafficking”); ARK. CODE ANN. §§ 5-70-102(c)–103(c) (West 2015) (finding “an affirmative defense” for both prostitution and sexual solicitation charges “as a result of being a victim of trafficking”); CONN. GEN. STAT. § 53a-82(b) (2015) (stating that “[i]n any prosecution for an offense under this section, it shall be an affirmative defense that the actor was a victim of conduct by another person”); DEL. CODE. ANN. tit. 11, § 787(h) (2015) (indicating that “[a]n individual charged with prostitution or loitering committed as a direct result of being a victim of human trafficking may assert as an affirmative defense that the individual is a victim of human trafficking”); GA. CODE ANN. § 16-3-6(b)–(c) (West 2015) (indicating that a defense under this provision constitutes an affirmative defense, and one is not guilty of a “sexual crime if [the] accused . . . was . . . [a]cting under coercion or deception while the accused was being trafficked for sexual servitude”); KAN. STAT. ANN. § 21-6419(c) (2015) (finding that it is “an affirmative defense to any prosecution under this section that the defendant committed the violation of this section because such defendant was subject to human trafficking or aggravated human trafficking”); LA. REV. STAT. ANN. § 14:46.2(F)(1) (2014) (stating that “[a] victim of trafficking . . . shall have an affirmative defense to prosecution for any of the following[:] . . . prostitution, prostitution by massage, massage (sexual conduct prohibited), crime against nature, [and] crime against nature by solicitation”); NEB. REV. STAT. § 28-801.01(3) (2015) (indicating that “[i]t is an affirmative defense to prosecution under this section that such person was a trafficking victim”); N.H. REV. STAT. ANN. § 645:2(IV) (2015) (indicating that it is an affirmative defense in the event an individual is charged under “subparagraph l(a) that the defendant engaged in the conduct because he or she was the victim of trafficking in persons”); N.J. STAT. ANN. § 2C:34-1(e) (West 2015) (stating that “it is an affirmative defense to prosecution of . . . [prostitution and related offenses] during the time of the alleged commission of the offense, [if] the defendant was a victim of human trafficking . . . or [was] compelled by another to engage in sexual activity”); S.D. CODIFIED LAWS § 22-23-1.2 (2014) (providing that human trafficking is “an affirmative defense to a charge of prostitution if the defendant proves by a preponderance of the evidence that the defendant is a victim of human trafficking . . . or that the defendant committed the act only under compulsion by another”); VT. STAT. ANN. tit. 13, § 2652(c) (West 2015) (indicating that a victim of sex trafficking “shall not be found in violation of or be the subject of a delinquency petition [for lewdness and prostitution and obscenity],” and that an individual may raise this as an affirmative defense for delinquency petitions in violation of other chapters); WASH. REV. CODE § 9A.88.040 (2015) (regarding prosecutions for prostitution charges “it is an affirmative defense that the actor committed the offense as a result of being a victim of trafficking”).

80. See, e.g., DEL. CODE. ANN. tit. 11, § 787(h) (indicating that “[a]n individual

statute, on the other hand, has a slightly broader reach and excuses trafficking victims who are charged with “sexual crimes.”<sup>81</sup> Louisiana’s statute excuses trafficking victims who are charged with prostitution, prostitution by massage, crime against nature, or crime against nature by solicitation.<sup>82</sup>

In addition to their substantive limitations, these statutes generally contain causation requirements that limit their availability to crimes that are committed as direct results of being trafficked.<sup>83</sup> In other words, they would not excuse a sex trafficking victim who commits one of the enumerated offenses but who does so on her own time, so to speak. For example, consider a sex trafficking victim who is prostituting herself in Baton Rouge, Louisiana at the direction of her pimp (i.e., she is committing the crime of prostitution as a direct result of being trafficked). If she flees her trafficker, relocates to New Orleans, and prostitutes herself on her own (i.e., without a pimp); then she would not be entitled to relief under statute’s with causation requirements, even though she was previously a sex trafficking victim.

### 3. Extending the Affirmative Defense to Non-Prostitution-Related Offenses

There are currently four states—Kentucky,<sup>84</sup> Oklahoma,<sup>85</sup> Wisconsin,<sup>86</sup> and Wyoming<sup>87</sup>—that provide an affirmative defense for human trafficking

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charged with prostitution or loitering committed as a direct result of being a victim of human trafficking may assert as an affirmative defense”).

81. See GA. CODE ANN. § 16-3-6(a)(3) (defining sexual crime as “prostitution, sodomy, solicitation of sodomy, or masturbation”).

82. LA. REV. STAT. ANN. § 14:46.2(F)(1)(a)–(e).

83. See, e.g., ARK. CODE ANN. § 5-70-102(c) (“It is an affirmative defense to prosecution that the person engaged in an act of prostitution *as a result of* being a victim of trafficking of persons.” (emphasis added)); DEL. CODE. ANN. tit. 11, § 787(h) (“An individual charged with prostitution or loitering committed *as a direct result of* being a victim of human trafficking may assert as an affirmative defense that the individual is a victim of human trafficking.” (emphasis added)); LA. REV. STAT. ANN. § 14:46.2(F)(1) (“A victim of trafficking . . . shall have an affirmative defense to prosecution for any of the following offenses which were committed *as a direct result of* being trafficked.” (emphasis added)); cf. CONN. GEN. STAT. § 53a-82(b) (providing an affirmative defense in any prosecution for prostitution if the actor was a victim of human trafficking and not limiting coverage to crimes that are committed as a direct result of being trafficked).

84. *Infra* notes 88, 94 and accompanying text; KY. REV. STAT. ANN. § 529.170 (West 2015).

85. *Infra* notes 89, 93 and accompanying text; OKLA. STAT. ANN. tit. 21, § 748(D) (West 2015).

86. *Infra* note 90 and accompanying text; WIS. STAT. ANN. § 939.46(1m) (West 2015).

87. *Infra* note 91 and accompanying text; WYO. STAT. ANN. § 6-2-708(a) (West 2015).

victims who commit non-prostitution-related offenses. Kentucky's statute provides that "[a] person charged [with prostitution], or charged with an offense which is not a violent crime . . . may assert being a victim of human trafficking as an affirmative defense to the charge."<sup>88</sup> Oklahoma's statute provides "an affirmative defense to prosecution for a criminal offense that, during the time of the alleged commission of the offense, the defendant was a victim of human trafficking."<sup>89</sup> Wisconsin's statute provides an affirmative defense to a human trafficking victim "for any offense committed as a direct result of [being trafficked] without regard to whether anyone was prosecuted or convicted" for the human trafficking violation.<sup>90</sup> Finally, Wyoming's statute provides that "[a] victim of human trafficking is not criminally liable for any commercial sex act or other criminal acts committed as a direct result of, or incident to, being a victim of human trafficking . . . ."<sup>91</sup>

Under a plain reading of Wisconsin's and Wyoming's statutes, a human trafficking victim in either of those states can assert an affirmative defense for any offense, so long as the offense is committed as a direct result of being trafficked.<sup>92</sup> Oklahoma's statute goes even further and applies to any offense that a human trafficking victim commits while she is a victim, regardless of whether the offense is committed as a direct result of being trafficked.<sup>93</sup> Of these statutes, Kentucky's has the narrowest scope, as it only applies to prostitution and non-violent crimes.<sup>94</sup>

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88. KY. REV. STAT. ANN. § 529.170; *see also id.* § 17.165(3) (defining "violent crime" as "a capital offense, Class A felony, or Class B felony involving the death of the victim, or rape in the first degree or sodomy in the first degree of the victim or serious physical injury to a victim").

89. OKLA. STAT. ANN. tit. 21, § 748(D).

90. WIS. STAT. ANN. § 939.46(1m).

91. WYO. STAT. ANN. § 6-2-708(a).

92. *See* WIS. STAT. ANN. § 939.46(1m); WYO. STAT. ANN. § 6-2-708(a) (noting the reach of the affirmative defense, extending to offenses directly resulting from conduct of an individual that is a victim of human trafficking).

93. OKLA. STAT. ANN. tit. 21, § 748(D) (West 2015). This plain-meaning interpretation of Oklahoma's trafficking victim affirmative defense statute is based on the statute's general applicability to "prosecution for a criminal offense" and its omission of a causation requirement.

94. Though it is worth noting that, like Oklahoma's statute, Kentucky's trafficking victim affirmative defense statute does not contain a causal provision; and presumably, it would excuse a trafficking victim from prosecution for prostitution or a non-violent crime, regardless of whether the offense is committed as a direct result of being trafficked.

*VI. Proposed State Legislative Model for the Adoption of a Trafficking  
Victim Affirmative Defense*

This Part considers what legislative model states should adopt to adequately further the goals of assisting human trafficking victims while maintaining their respective interests in combating human trafficking and other crimes. In doing so, it demonstrates why states should create general trafficking victim affirmative defenses, as opposed to limiting their respective trafficking victim affirmative defenses to prostitution and related offenses. Finally, it discusses why state legislatures should adopt multi-faceted, collaborative approaches that include trafficking victim affirmative defenses as well as other victim-oriented solutions.

*A. Why States Should Not Limit Their Affirmative Defenses to Prostitution  
and Related Offenses*

A majority of the states with trafficking victim affirmative defense statutes have limited the substantive reach of those statutes to excuse charges for prostitution and related offenses.<sup>95</sup> As discussed earlier in this Article, trafficking victims are frequently compelled to commit non-prostitution-related crimes<sup>96</sup> or are arrested for “lesser” offenses such as vagrancy, trespass, or disorderly conduct.<sup>97</sup> Despite committing such offenses, however, these trafficking victims (1) lack culpability to the same extent as those who are entitled to relief from committing prostitution-related crimes, and (2) need non-criminal outlets to have any viable chance of rehabilitation and/or rescue from their traffickers. Thus, by limiting their affirmative defenses to prostitution-related offenses, states do not adequately provide relief to trafficking victims who deserve and need it just as much as those who are entitled to relief.<sup>98</sup> As the next subpart demonstrates, states that have not already done so should create trafficking

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95. See generally *supra* Part V.A.2.

96. See, e.g., PHILLIPS ET AL., *supra* note 14, at 16 (“Due to risks of violence and rape from clients, individuals trafficked into the sex trade may also be compelled to carry a weapon for self-defense.”).

97. *Id.* at 15.

98. Cf. *People v. L.G.*, 972 N.Y.S.2d 418, 425–28 (Crim. Ct. 2013) (finding that a trafficking victim who was convicted for criminal weapons possession was entitled to vacatur relief, even though New York’s vacatur statute was limited to prostitution-related offenses, on the grounds that the conviction was clearly the result of her having been trafficked, thus allowing the criminal charge to be considered a prostitution-related offense).

victim affirmative defense statutes that extend to non-prostitution-related offenses; but in doing so, they should not extend the coverage of those statutes too broadly, lest they excessively diminish their respective interests in combating crime.

*B. Why States Should Extend Their Affirmative Defenses to Incidental (Non-Prostitution-Related) Offenses*

As mentioned in the previous subpart, human trafficking victims frequently commit non-prostitution-related offenses at the direction of their respective traffickers (e.g., vagrancy, trespass, disorderly conduct, crimes against nature, larceny, drug offenses, and immigration offenses),<sup>99</sup> and as a result, they need the option to assert more generalized affirmative defenses. Four states recognized this problem and responded by enacting their own non-prostitution-related affirmative defense statutes.<sup>100</sup> However, by extending the defense to any crime,<sup>101</sup> three of these states provide too much relief under their respective statutes.

While ensuring that trafficking victims are entitled to an adequate amount of relief should be an important goal for every state legislature, states must also consider their general interests in combating crime—especially crimes involving violence. In the three states that extend their affirmative defenses to include any crime—Oklahoma, Wisconsin, and Wyoming—a trafficking victim could conceivably be excused of murdering another person, so long as the trafficking victim satisfies the other statutory criteria.<sup>102</sup> This hypothetical, in which a trafficking victim is excused of murder, seems especially absurd under the Oklahoma statute. Oklahoma’s statute does not contain a causation requirement, so a trafficking victim could conceivably be excused of murdering another person, regardless of

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99. See, e.g., PHILLIPS ET AL., *supra* note 14, at 15–16 (discussing common instances of criminal conduct carried out by human trafficking victims as incidents of having been trafficked).

100. See KY. REV. STAT. ANN. § 529.170 (West 2015) (allowing a person to assert being a victim of human trafficking as an affirmative defense to certain non-prostitution-related charges); OKLA. STAT. ANN. tit. 21, § 748(D) (West 2015) (same); WIS. STAT. ANN. § 939.46(1m) (West 2015) (same); WYO. STAT. ANN. § 6-2-708(a) (West 2015) (same).

101. OKLA. STAT. ANN. tit. 21, § 748(D); WIS. STAT. ANN. § 939.46(1m); WYO. STAT. ANN. § 6-2-708(a).

102. See *supra* Part V.A.3 (discussing the plain-meaning interpretation of Oklahoma’s, Wisconsin’s, and Wyoming’s affirmative defense statutes).

whether the homicide was committed as a result of being trafficked. Taking the statute to its logical extreme, if a sex trafficking victim in Tulsa, Oklahoma were to go into a convenience store to commit an armed robbery, only to kill the store clerk afterward to cover her tracks, then that trafficking victim could argue that she is entitled to a defense under Oklahoma's trafficking victim affirmative defense statute simply because she was, in fact, a trafficking victim during the commission of the offense. This interpretation of the statute seemingly gives trafficking victims carte blanche to break the law however they want, which is particularly frightening because the vast majority of trafficking victims are essentially puppets who do whatever their masters (i.e., their traffickers) command.

On the other hand, under Kentucky's approach—which is limited to non-violent crimes<sup>103</sup>—traffickers would not be able to use their trafficking victims as proxies to commit violent, ancillary crimes without consequence. In this vein, states would be able to maintain their interests in preventing violent crime and, relatedly, in maintaining a safe and orderly society. The normative concern that society ought to weigh the prevention of violent crime more heavily than the vindication of non-culpable actors is supported by the fact that even duress generally does not excuse murder.<sup>104</sup> It is important to note, however, that Kentucky's statute lacks a causation requirement and extends the defense to cover crimes that trafficking victims commit without any influence from their traffickers. An ideal approach would contain a causation requirement to limit the defense to only those crimes for which trafficking victims truly lack personal culpability. Under this modified Kentucky approach, trafficking victims would be entitled to relief for many of the non-prostitution-related offenses that they commit as a result of being trafficked—offenses for which they lack personal culpability. They would also be able to obtain necessary relief through an ideal, non-criminal outlet. As such and for the reasons discussed above, a trafficking victim affirmative defense statute that resembles Kentucky's framework but that adds a causation requirement is the ideal approach.

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103. See KY. REV. STAT. ANN. § 529.170 (allowing a person “charged with an offense that is not a violent crime” to assert an affirmative defense as a victim of human trafficking).

104. See LAFAVE, *supra* note 41, at § 9.7(b) (noting that, under the common law and most modern penal codes, duress cannot excuse murder).

*C. Adopting a Multi-Faceted, Collaborative Approach*

It is important to point out that the solutions proposed in this Article, if adopted by states, would not be dispositive of the criminal justice system's inadequacies with respect to identifying and protecting trafficking victims. In considering how to adequately address the problem of identifying and protecting trafficking victims, legislatures should consider adopting several approaches to operate concurrently with, not in lieu of, a trafficking victim affirmative defense.<sup>105</sup>

For example, the Honorable Toko Serita<sup>106</sup> argues that "law enforcement and prosecutors should make it a priority to identify potential victims of trafficking" by learning about the realities and complex dynamics of sex trafficking.<sup>107</sup> She also argues that states should "develop a coordinated judicial response to the problem" that would require judges to understand: (1) human trafficking and how the courts intersect with potential victims of trafficking; (2) that prostitutes must be viewed as potential sex trafficking victims; (3) that identification of trafficking victims is extremely difficult, but is not impossible; and (4) that, once

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105. Despite the fact that states seem to be increasingly proactive in their respective approaches to protect and rehabilitate human trafficking victims, their approaches, for the most part, remain binary and thus are not sufficiently "multi-faceted" to combat the complexities involved in protecting and rehabilitating trafficking victims. For example, although sixteen states have enacted vacatur statutes and eighteen states have enacted affirmative defense statutes, there are only six states that have adopted both forms of relief for trafficking victims. *See supra* Parts II.B, V.A (identifying Connecticut, New Jersey, Oklahoma, Vermont, Washington, and Wyoming as the six dual-option states). This is puzzling, because common sense tells us that both forms of relief would work well in conjunction (e.g., an affirmative defense statute could excuse trafficking victims on the front end while a vacatur statute could operate on the back end by providing relief to trafficking victims who were convicted before the availability of an affirmative defense) and thus would only improve states' abilities to protect and rehabilitate human trafficking victims. Abandoning this "one or the other" mentality among states is the focus of this Part.

106. Judge Serita is a New York City Criminal Court Judge and is currently the presiding judge of the Human Trafficking Intervention Court. *See Serita, supra* note 5, at 635 n.\* (introducing the author of the article, Judge Serita, and discussing her credentials). She issued the first opinion on New York's sex trafficking vacatur statute and was the first judge to consider whether the substantive reach of New York's section 440.10(1)(i) includes non-prostitution offenses. *See N.Y. CRIM. PROC. LAW* § 440.10(1)(i) (Consol. 2015) (establishing vacatur relief for sex trafficking victims); *People v. G.M.*, 922 N.Y.S.2d 761, 765–66 (Crim. Ct. 2011) (granting a defendant's motion to vacate convictions for prostitution and other offenses because the defendant was presumptively entitled to an affirmative defense under § 440.10(1)(i)); *see also People v. L.G.*, 972 N.Y.S.2d 418, 427 (Crim. Ct. 2013) (holding that section 440.10(1)(i) allows courts to vacate non-prostitution convictions).

107. Serita, *supra* note 5, at 657.

identified, trafficking victims should be provided with the necessary services to adequately address their situation.<sup>108</sup>

The approaches for which Judge Serita advocates would complement the affirmative defense approach and would help to alleviate some of the problems that might otherwise undermine the effectiveness of the affirmative defense approach. For example, two obstacles that prevent trafficking victims from bringing post-conviction motions under vacatur statutes are (1) lack of knowledge about the availability of vacatur relief, and (2) lack of access to counsel.<sup>109</sup> Presumably, these obstacles would similarly prevent trafficking victims from utilizing an affirmative defense, all things being equal, because they surface after arrest and before conviction. However, if a state were to enact an affirmative defense while also teaching law enforcement, prosecutors, and judges how to identify victims and appropriately foster their rehabilitation, then these obstacles certainly would not hinder trafficking victims' abilities to exercise an affirmative defense to the extent that they would otherwise. A more thorough consideration of the effectiveness of the approaches that Judge Serita and others advance, however, is beyond the scope of this Article.

### *Conclusion*

Although states are increasingly taking measures to more adequately account for the interests of human trafficking victims, few of them have adopted solutions with enough teeth to make a noticeable difference. It is my hope, however, to shed some light on these shortcomings and to provide states with part of a framework that places enough emphasis on the proper rehabilitation and recovery of human trafficking victims.

In this Article, I discussed the policy justification for affirmative defenses—that is, a lack of personal culpability—in an effort to demonstrate how a significant number of human trafficking victims fall within that justification and thus deserve their own affirmative defense. Additionally, I summarized states' current trafficking victim affirmative defense statutes and analyzed their respective pros and cons in an effort to demonstrate which framework would be ideal for other states to adopt. Ultimately, this analysis indicated that Kentucky's statute—with the addition of a causation requirement—would provide the ideal framework

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108. *Id.* at 658.

109. Barnard, *supra* note 17, at 1480.

because it would necessarily extend coverage to non-prostitution-related offenses while also considering states' important interests in preventing violent crime. Lastly, I want to stress again that the solution proposed in this Article is only part of a more expansive framework, one that states should adopt in their efforts to adequately provide trafficking victims with enough opportunities and resources to recover and, eventually, to live the normal lives that they deserve.