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## How Oklahoma's Human Trafficking Victim Defense is Poised to be the Boldest Stand Against Human Trafficking in the Country

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## **HOW OKLAHOMA’S HUMAN TRAFFICKING VICTIM DEFENSE IS POISED TO BE THE BOLDEST STAND AGAINST HUMAN TRAFFICKING IN THE COUNTRY**

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## I. INTRODUCTION

American audiences likely believe that the NFL Super Bowl is the Black Friday for human traffickers.<sup>1</sup> It is also likely that their working understanding of human trafficking is from movies like *Taken*, the blockbuster starring Liam Neeson where he fights to save his daughter from being sold by human traffickers in Europe.<sup>2</sup> However, human trafficking in the United States is, unfortunately, a tricky issue—while many Americans see human trafficking portrayed on the screen, they fail to recognize human trafficking outside the theater. Most Americans do not know that human trafficking occurs in their very own neighborhoods.<sup>3</sup> Further, states vary in how they view and respond to trafficking victims, and assisting—rather than prosecuting—is a rather new concept in the realm of domestic human trafficking.<sup>4</sup>

Oklahoma has curious ties to human trafficking. Since the state is in the center of the U.S. and a gateway for the transport of goods on three interstate highways—the north-south I-35 corridor, the east-west I-40 corridor, and the diagonal I-44 corridor—human traffickers have used Oklahoma as a hub to do business.<sup>5</sup> Oklahoma criminalizes human trafficking in accord with the rest of the United States, but Oklahoma law provides a unique, largely unnoticed, and rarely used affirmative defense for human trafficking victims that applies to any crimes they committed while being trafficked.<sup>6</sup> Indeed, as this comment demonstrates, Oklahoma’s trafficking-victim defense is the broadest response to human trafficking in the country, and, because of its expansiveness, the defense is subject to varying interpretations and objections.<sup>7</sup>

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1. Sebastien Malo, *U.S. police arrest record 750 suspects in Super Bowl sex-trafficking stings*, REUTERS, Feb. 9, 2017, <https://www.reuters.com/article/us-usa-trafficking-super-bowl/u-s-police-arrest-record-750-suspects-in-super-bowl-sex-trafficking-stings-idUSKBN15O2MU>. *But see* Sebastien Malo, *Is the Super Bowl really the U.S.’s biggest sex trafficking magnet?*, REUTERS (Feb. 1, 2018), <https://www.reuters.com/article/us-football-nfl-superbowl-trafficking-an-is-the-super-bowl-really-the-u-s-s-biggest-sex-trafficking-magnet-idUSKBN1FL6A1> (noting the “media hype” surrounding this topic, which professionals call a “myth”).

2. When the topic of human trafficking comes up, the movie “Taken” is often used as an example or picture. *See* David Zoeller, *Human trafficking in Kentucky not like in movies, official says*, KENTUCKY NEW ERA (Mar. 15, 2018), [http://www.kentuckynewera.com/news/ap/article\\_9efb437e-2882-11e8-a22d-4f8feda1b8fa.html](http://www.kentuckynewera.com/news/ap/article_9efb437e-2882-11e8-a22d-4f8feda1b8fa.html); Leann Burke, *Southwest Ind. a hot spot for human trafficking*, THE HERALD, Feb. 15, 2018, <https://duboiscountyherald.com/b/southwest-ind-a-hot-spot-for-human-trafficking>; Devastasha Beaver, *Human trafficking is an often-invisible community problem*, THE STAR BEACON, March 15, 2018, [http://www.starbeacon.com/news/local\\_news/human-trafficking-is-an-often-invisible-community-problem/article\\_75ba9613-b07f-53b2-9fb2-f73289cd9d6e.html](http://www.starbeacon.com/news/local_news/human-trafficking-is-an-often-invisible-community-problem/article_75ba9613-b07f-53b2-9fb2-f73289cd9d6e.html).

3. *See* Allison L. Cross, Comment, *Slipping Through the Cracks: The Dual Victimization of Human-trafficking Survivors*, 44 MCGEORGE L. REV. 395, 400 (2013); *see also*, Julianne Siegfried, *When Sex Trafficking Victims Turn Eighteen: The Problematic Focus on Force, Fraud, and Coercion in U.S. Human Trafficking Laws*, 23 WM. & MARY J. WOMEN & L. 27 (2016) (suggesting that the idea that only foreign-born victims are trafficked “distract the public from what is actually happening here in the United States where U.S.-born women, men, and children are trafficked every day within our borders”).

4. The United States did not officially criminalize human trafficking until 2000 with the Trafficking Victims Protection Act. It was only a decade later in a reauthorization that the TVPA provided human trafficking victims protections from criminal liability. *See* Danielle Augustson, *Protecting Human-trafficking Victims from Criminal Liability—A Legislative Approach*, 17 GEO. J. GENDER & L. 625, 631 (2016).

5. OKLAHOMA COMMISSION ON THE STATUS OF WOMEN - 2014 HUMAN TRAFFICKING, [https://www.ok.gov/ocsw/\\_Summit\\_Issues/2014\\_Human\\_Trafficking\\_/index.html](https://www.ok.gov/ocsw/_Summit_Issues/2014_Human_Trafficking_/index.html) (last visited Mar. 16, 2018).

6. *See* OKLA. STAT. tit. 21 § 748.

7. One limitation on any defense, including Oklahoma’s human trafficking victim defense, is a prohibition on contrived defenses. Leo Katz, *A Theory of Loopholes*, 39 J. LEGAL STUD. 1, 4 (2010) (exploring the issue of

Oklahoma's affirmative defense afforded to victims of human trafficking may be interpreted through a plain reading of the provision, which lends the broadest interpretation, and, thus, the most extensive protection. A plain reading interpretation is supported both by the defense's surrounding legislative scheme and by an international and progressive policy initiative, which holds the non-punishment of human trafficking victims as one of its core tenets. Moreover, the existence of the various procedural safeguards and assistance measures the Oklahoma Legislature has laid out in its provision entitled "Rights of Victims of Human Trafficking" suggest the Legislature intended broad protections to victims. These safeguards, which include statutorily mandated medical care, housing, and protection from victims' traffickers, signal that the Legislature understood the unique psychological coercion victims of human trafficking face, which may prevent victims from successfully raising other criminal defenses.

Part I of this comment will provide a brief overview of human trafficking in the United States and, in particular, human trafficking in Oklahoma. Next, Part II will present Oklahoma's human trafficking statute with its affirmative defense and its companion statute that mandates victims be given certain assistance. Part III will present the plain reading of the defense, while Part IV will view the defense through the lens of duress, which provides a defense when the person commits a crime in response to a reasonable belief of imminent danger of death or serious bodily injury from another person. Part V contrasts Oklahoma's trafficking-victim defense with how other states tackle an affirmative defense for human trafficking victims. Part VI raises objections to the plain reading of the defense and proposes a remedy. Finally, Part VII explores how international public policy supports a broad interpretation of the affirmative defense.

#### *A. Human Trafficking Generally*

Human trafficking is a form of modern-day slavery in which "more than a million victims of a violent existence, who are tortured daily and forced to rot away their lives in an ugly and indecent servitude to wicked men and women."<sup>8</sup> Professionals have posited that the human trafficking industry, which encompasses both labor trafficking and commercial sex trafficking,<sup>9</sup> is growing faster than drug- and weapon-trafficking industries.<sup>10</sup> The news media often covers FBI busts of human-trafficking rings, but the day-to-day exploitation of vulnerable individuals—which occurs after a lengthy grooming process that exploits an initial hope of affection and safety in order to later coerce and control—is oftentimes not identified as human trafficking.<sup>11</sup>

Statistics are difficult to compile. First, human traffickers are skilled at keeping their

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contrivance: "the defendant obviously qualifies for a defense, but does he really remain entitled to it when he manufactured the circumstances on which it is based?"). Throughout this comment, discussion about victims raising the trafficking-victim defenses are assumed to lack any contriving intent.

8. Angela A. Jones, Note, *Post-Traumatic Stress Disorder and Victims of Human Sex Trafficking: A Perpetuation of Chronic Indignity*, 4 INTERCULTURAL HUM. RTS. L. REV. 317, 329 (2009).

9. See OKLA. STAT. tit. 21 § 748; see also 22 U.S.C. § 7101(b)(3) (stating that "[t]rafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.")

10. See Jones, *supra* note 8, at 337.

11. *Id.* at 335–36.

operations hidden.<sup>12</sup> In addition, victims often do not report for a variety of reasons. They may not realize they are being trafficked, and they may fear arrest by law enforcement or retaliation by their traffickers.<sup>13</sup> Moreover, authorities often misidentify human trafficking. Thus, human trafficking statistics are estimates, largely based upon the small number of victims that are identifiable.<sup>14</sup>

The data available from hotlines, task forces, and law enforcement are but a shadow of the human trafficking activity that actually happens every day in the United States.<sup>15</sup> The Polaris Project, an organization that runs a human trafficking hotline, reported that 10,615 human trafficking victims contacted the hotline in 2017, a thirteen percent increase over the prior year.<sup>16</sup> Those numbers are likely low: “Lack of awareness of the crime or of these resources in certain geographic regions, by particular racial or ethnic groups, and by labor trafficking survivors, can lead to significant underreporting.”<sup>17</sup> The Institute on Domestic Violence and Sexual Assault at the University of Texas at Austin School of Social Work recently estimated the current human trafficking victims in Texas to be more than 300,000.<sup>18</sup> Instead of assessing human trafficking victims from the general population of Texas, the Institute defined human trafficking narrowly by identifying human trafficking prevalence and economic impact in “community segments that are at higher-than-average risk of trafficking.”<sup>19</sup>

For local law enforcement, social workers, public defenders, and health professionals, identifying victims is perhaps the hardest issue to tackle in the battle against human trafficking.<sup>20</sup> Both society in general and those who are keenly positioned to come in contact with human trafficking victims, like local law enforcement, “readily see [them] as prostitutes” instead of who they really are: “victims of violent crimes and severe human

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12. Stephanie L. Mariconda, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151, 154 (2009); Johnny E. McGaha & Amanda Evans, *Where are the Victims? The Credibility Gap in Human Trafficking Research*, 4 INTERCULTURAL HUM. RTS. L. REV. 239, 243–44 (2009).

13. See generally, McGaha & Evans, *supra* note 12, at 244–45 (stating that “[t]rafficking victims are often in dangerous positions and may be unable, or unwilling, to jeopardize their lives to report to or seek help from the relevant authorities. Victims may live daily with emotional and physical abuse, inhumane treatment, and threats to their families. They may fear authority figures and are often told that if discovered, they would be imprisoned, deported, or tortured. Visas and other identify documents, if any exist, are often taken by their traffickers as an addition method of detaining the victims. Fostering fear of authority in victims is a common contributor to poor detection of human trafficking victims”).

14. McGaha & Evans, *supra* note 12, at 243 (noting that the Department of Justice calculated its estimate of human trafficking victims through a statistical method which “replaces unknown or missing data by making use of plausible values for unknown information”). See also Noël Busch-Armendariz, et al., *Institute on Domestic Violence and Sexual Assault at The University of Texas at Austin, School of Social Work, Human Trafficking by the Numbers: The Initial Benchmark of Prevalence and Economic Impact for Texas*, 1, 13 (2016), <http://www.alliesagainstslavery.org/statewide-research>.

15. McGaha & Evans, *supra* note 12, at 245 (noting that professionals conclude human trafficking is underreported).

16. POLARIS PROJECT, GROWING AWARENESS. GROWING IMPACT. 2017 STATISTICS FROM THE NATIONAL HUMAN TRAFFICKING HOTLINE AND BEFREE TEXTLINE 1, 1, 3 (2017), <http://polarisproject.org/sites/default/files/2017NHTHStats%20%281%29.pdf>.

17. *Id.* at 1.

18. Busch-Armendariz, *supra* note 14, at 13.

19. *Id.* at 13–14.

20. See April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 245–46 (2007).

rights violations.”<sup>21</sup> To this day, most people only see human trafficking in cases that involve foreign-born citizens, movement across borders, and “chains, bars, and beatings.”<sup>22</sup> In addition, when professionals encounter a case of human trafficking, they may develop a scheme of human trafficking that they project onto future cases, leading them to discount future cases that do not conform. A prototypical human trafficking scenario does not exist,<sup>23</sup> and neither does a prototypical victim. The victim of human trafficking is rarely the “kind and demure girl who has never been in trouble with the law before.”<sup>24</sup> Because traffickers target the most vulnerable people in society, these victims commonly have pre-existing issues, including drug and alcohol addictions, criminal records, and violent, trauma-ridden pasts.<sup>25</sup>

Human trafficking is lucrative, amassing over \$30 billion every year worldwide, and traffickers are both “shrewd and resourceful” in maintaining a steady supply to meet the demand, whether this be trafficking via labor or commercial sex.<sup>26</sup> The Polaris Project reported that victims of labor trafficking reported they were groomed through offering jobs; deceiving through fraud; utilizing familial influences; smuggling; and posing as benefactors.<sup>27</sup> In addition to the recruitment tactics mentioned above, sex traffickers will also groom their victims by proposing marriage or an intimate relationship.<sup>28</sup> Indeed, traffickers “lure their victims with deception crafted precisely to offer what the potential victim wants most at that moment.”<sup>29</sup>

Once human traffickers have control over their victims, they maintain that control by employing tactics that include isolation, threats, and emotional, economic, and physical abuse.<sup>30</sup> Victims face “continual acts of intimidation and abuse” that are “likened to those used in cases of torture.”<sup>31</sup> Sex trafficking victims are subject to physical and psychological control, rape, and physical violence. One victim reported that a trafficker in the U.S. “liked to whip [her] with thin belts and urinate on [her] body. . . . Sometimes he would even invite his friends.”<sup>32</sup> Traffickers further control their victims by forcing them to participate in the abuse of other victims under the threat that, if the victims refuse, they will be abused themselves.<sup>33</sup> For example, one victim recalled that “[w]e were beaten and

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21. Jones, *supra* note 8, at 334.

22. John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS U. L.J. 1, 21–22, 24 (2015).

23. *Id.* at 28.

24. *Id.* at 34.

25. *Id.*

26. Rieger, *supra* note 20, at 235. *See also* Jones, *supra* note 8, at 337. Mariconda, *supra* note 12, at 162 (suggesting that traffickers are “simply fulfilling market demands”).

27. POLARIS PROJECT, *supra* note 16, at 4.

28. *Id.*

29. Jones, *supra* note 8, at 335.

30. *Id.*; *see also* POLARIS PROJECT, *supra* note 16, at 3 (noting that human trafficking victims reported the following methods of coercive control in order of most reported: isolation, including confinement, emotional abuse, economic abuse, threats, and physical abuse).

31. Cathy Zimmerman & Nicola Pocock, *Human Trafficking and Mental Health: My Wounds are Inside; They are not Visible*, 19 BROWN J. WORLD. AFF. 265, 266–67 (2013).

32. Rieger, *supra* note 20, at 241–42 (noting that it was not uncommon for sex trafficking victims to be forced to have sex with twenty-five men or more per day).

33. *Id.*

raped if we didn't comply . . . I had to hold down women as he raped them . . . I saw five women being raped."<sup>34</sup> Eventually, the identities of victims are eroded until they see themselves as nothing more than the trafficker's commodity or "piece of meat."<sup>35</sup> Yet, despite these atrocities, labor trafficking victims are often lured into servitude by promises of good wages, benefits, and education, all geared toward projecting the idea that the American dream awaits them.<sup>36</sup>

Federal human trafficking legislation arose as a response to a 1988 U.S. Supreme Court opinion interpreting the Thirteenth Amendment. In *United States v. Kozminski*, Mr. and Mrs. Kozminski lured two mentally-challenged men onto their dairy farm, where they were forced to work seventeen hours per day, seven days per week for no pay.<sup>37</sup> The Kozminski's subjected the two men to physical harm and psychological coercion.<sup>38</sup> Authorities charged the couple with conspiracy to violate the Thirteenth Amendment and knowingly holding someone to involuntary servitude.<sup>39</sup> The United States District Court for the Eastern District of Michigan tendered an instruction to the jury that included psychological coercion.<sup>40</sup> The jury convicted the Kozminski's.<sup>41</sup> The Sixth Circuit reversed, holding that the involuntary servitude instruction was "too broad" because it included psychological coercion.<sup>42</sup> The Supreme Court agreed, concluding that "[t]he guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion."<sup>43</sup>

In response, Congress passed the Trafficking Victims Protection Act (TVPA) in 2000.<sup>44</sup> The TVPA strikes at the heart of *Kozminski* by allowing the trafficker's coercive and threatening words to satisfy the coercion element in the statute.<sup>45</sup> The TVPA defines human trafficking for commercial sex as a "commercial sex act [that] is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."<sup>46</sup> The Act also defines human trafficking for labor as the "recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."<sup>47</sup> In an intentional contradiction to the Supreme Court's holding in *Kozminski*, Congress expressly permitted prosecution of human trafficking when the trafficker enslaves the victim by means of psychological coercion.

The TVPA provides protection for victims of human trafficking, but it is not without

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34. *Id.* at 242.

35. Zimmerman & Pockock, *supra* note 31, at 267.

36. *E.g.*, Mariconda, *supra* note 12, at 159 (noting a U.S. family luring a twelve-year-old Mexican girl to work as a housemaid in exchange for food, clothing, education, and medical care).

37. *U.S. v. Kozminski*, 487 U.S. 931, 935 (1988).

38. *Id.* at 935–36.

39. *Id.* at 934.

40. *Id.* at 937.

41. *Id.*

42. *Kozminski*, 487 U.S. at 938.

43. *Id.* at 944.

44. 22 U.S.C.A. § 7101.

45. Jones, *supra* note 8, at 326.

46. 22 U.S.C. § 7102 (9).

47. *Id.*

criticism. First, to receive assistance under the TVPA, victims must be willing to cooperate with the prosecution, which severely restricts eligibility.<sup>48</sup> This requirement will deter many victims from seeking help and protection. In addition, the TVPA provides protection for victims of human trafficking, but professionals have criticized it as favoring international victims over domestic victims.<sup>49</sup> Some have even posited that the TVPA is fully ineffective for domestic victims of human trafficking.<sup>50</sup> Although Congress has extended assistance to domestic human trafficking victims in TVPA reauthorizations, the Act's primary focus is on international victims of human trafficking.<sup>51</sup> To demonstrate, domestic human trafficking victims may only receive assistance if they fall into the category of "severe forms of trafficking," which requires a showing of "force, fraud, or coercion," while international victims of human trafficking may receive assistance if they fall in less "severe" forms of trafficking.<sup>52</sup> In addition, the main form of relief under the TVPA is a T-visa, a visa granted to undocumented immigrants subjected to human trafficking.<sup>53</sup> This form of relief does nothing for U.S.-citizen victims. The TVPA has also been criticized for drawing arbitrary lines, which creates issues "because when a group is excluded from this definition of victim entirely, it is also excluded from the resources and funds that are designated for helping victims."<sup>54</sup>

Because of the federal legislation's shortfalls in this area, the burden of assisting domestic human trafficking victims has fallen on state legislatures, and perhaps rightly so. Advocates have deemed state legislation "vital" in the fight against human trafficking.<sup>55</sup> Indeed, state and local governments are more intimately positioned to understand the rifts of human trafficking within their own communities compared to federal authorities.<sup>56</sup> Most states have responded in some shape or form. Thirty-seven states provide affirmative

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48. Rieger, *supra* note 20, at 250.

49. Amanda Peters, Comment, *Disparate Protections for American Human Trafficking Victims*, 61 CLEV. ST. L. REV. 1, 3-4 (2013); See Rieger, *supra* note 20, at 244; see also Angela D. Giampolo, Comment, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195, 206 (2006).

50. Mariconda, *supra* note 12, at 175-76. See Lindsay Strauss, Comment, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL'Y 495, 511 (2010) (noting that even in light of the most recent reauthorizations of victim assistance "the federal government generally continues to treat the domestic trafficking of adult victims as a matter primarily of state concern").

51. Siegfriedt, *supra* note 3, at 28-29. See 22 U.S.C. § 7105 (b)(1)(A) (providing domestic victims with assistance and describing eligibility as the following: "an alien who is a victim of a severe form of trafficking in persons, or an alien classified as a nonimmigrant under section 1101 (a)(15)(T)(ii) of Title 8, shall be eligible for benefits and services under any Federal or State program or activity funded or administered by any official or agency described in subparagraph (B) to the same extent as an alien who is admitted to the United States as a refugee under section 1157 of Title 8").

52. Siegfriedt, *supra* note 3, at 29-30; 22 U.S.C. § 7102 (11) (defining "severe" human trafficking as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery").

53. See 22 U.S.C. § 7105 (b)(E).

54. Siegfriedt, *supra* note 3, at 30.

55. Mariconda, *supra* note 12, at 174.

56. Jones, *supra* note 8, at 343 (calling state and local agencies "best able to identify victims and understand the unique way human trafficking impacts an individual community").



defenses for human trafficking victims.<sup>57</sup> In addition, many states allow human trafficking victims to vacate or expunge their criminal records that pertain to human trafficking.<sup>58</sup>

### B. Human Trafficking in Oklahoma

Oklahoma's major cities have become epicenters of human trafficking. The Oklahoma Commission on the Status of Women suggests three reasons why Oklahoma is a hotbed of trafficking. First, Oklahoma has the highest rates of incarcerated women in the U.S., leaving vulnerable children to be groomed by traffickers.<sup>59</sup> Second, Oklahoma has high rates of teen pregnancy and homeless children, providing what the Commission called a "stable" of children for traffickers to exploit.<sup>60</sup> And third, truck drivers who travel on I-35, I-44, and I-40 utilize Oklahoma as a central hub to engage in the sexual exploitation of human trafficking victims.<sup>61</sup>

In 2016, the National Human Trafficking Hotline (NHTH) found Oklahoma had 235 "high indicators," which measure how much human trafficking activity exists within a state based upon the number and nature of calls, emails, and webforms the hotline receives from victims and civilians who suspect human trafficking.<sup>62</sup> A "high indicator" is characterized by evidence of force, fraud, and coercion, while a "moderate indicator" shows signs of human trafficking but lacks coercive qualities.<sup>63</sup> Oklahoma has significantly more high indicators than its neighbors: Arkansas had ninety-three high indicators, and Kansas had fifty-three.<sup>64</sup> The NHTH reported that in Oklahoma in 2016 more than seventy-nine percent of cases that were reported to the hotline involved sex trafficking.<sup>65</sup> Almost eighty-five percent of victims were female.<sup>66</sup>

Oklahoma's courts have little experience with the trafficking-victim defense because it appears to rarely be raised. For this reason, throughout this comment, two accounts of human trafficking in the United States will be used as aids in understanding how the trafficking-victim defense may be utilized.<sup>67</sup> The first human trafficking account is one of

57. ALA. CODE § 13A-6-159; ARIZ. REV. STAT. ANN. § 13-3214; ARK. CODE ANN. § 5-70-102; CAL. PENAL CODE § 236.23; COLO. REV. STAT. § 18-3-504; CONN. GEN. STAT. § 53a-82; DEL. CODE ANN. tit. 11, § 787; GA. CODE ANN. § 16-3-6; 720 ILL. COMP. STAT. 5 / 11-14; IOWA CODE § 710A.3; KAN. STAT. ANN. § 21-6419; KY. REV. STAT. ANN. § 529.170; LA. STAT. ANN. § 14:46.2; ME. STAT. tit. 17-A, § 853-A; MD. CODE ANN., CRIM. LAW § 11-306; MASS. GEN. LAWS ch. 265, § 57; MINN. STAT. § 609.325; MISS. CODE ANN. § 97-3-54.1; MO. REV. STAT. § 566.223; MONT. CODE ANN. § 45-5-710; NEB. REV. STAT. § 28-801; NEB. REV. STAT. § 28-801.01; N.H. REV. STAT. ANN. § 645:2; N.J. STAT. ANN. § 2C:13-8; N.Y. PENAL LAW § 230.01; N.D. CENT. CODE § 12.1-41-13; OKLA. STAT. tit. 21, § 748; OR. REV. STAT. § 163.269; 18 P.A. CONS. STAT. § 3019; 11 R.I. GEN. LAWS § 11-67.1-16; S.C. CODE ANN. § 16-3-2020; S.D. CODIFIED LAWS § 22-23-1.2; TENN. CODE ANN. § 39-13-513; TEX. PENAL CODE ANN. § 43.02; VT. STAT. ANN. tit. 13, § 2652; WASH. REV. CODE § 9A.88.040; WIS. STAT. § 939.46; WYO. STAT. ANN. § 6-2-708 [hereinafter "STATE AFFIRMATIVE DEFENSES"].

58. Augustson, *supra* note 4, at 639.

59. OKLAHOMA COMMISSION ON THE STATUS OF WOMEN - 2014 HUMAN TRAFFICKING, *supra* note 5.

60. *Id.*

61. *Id.*

62. NATIONAL HUMAN TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/state/oklahoma> (last visited Mar 15, 2018).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Both accounts are derived from human trafficking survivors' experiences that were reported to the Polaris

sex trafficking. The victim, whom we will call Jane, was in a committed relationship with her boyfriend, Doug. When money was tight, he forced her into commercial sex. Calling her a whore, Doug physically abused Jane, and he threatened worse punishment if she did not comply with his orders to sell her body and return with cash. The second human trafficking account is one of labor trafficking. John came to the United States looking for a stable job with a good wage. Upon arrival, John presented his identification and work documents to begin working. His employer kept them and threatened to call immigration enforcement officials if John did not comply with the excessive hours without pay. In addition, John's employer threatened and abused him if he did not adhere to the work conditions. These common accounts present simple examples of human trafficking, allowing us to explore the various ways of interpreting Oklahoma's trafficking-victim defense and their consequences.

## II. OKLAHOMA'S HUMAN TRAFFICKING STATUTE

### A. Oklahoma's Definition of Human Trafficking

Oklahoma's human-trafficking statute defines human trafficking as "modern-day slavery," which includes the "extreme exploitation and the denial of freedom or liberty of an individual for purposes of deriving benefit from that individual's commercial sex act or labor."<sup>68</sup> The definition encompasses exploitation via labor or commercial sex.<sup>69</sup> The contents of the statute, and the affirmative defense it provides, apply in both criminal and civil contexts.<sup>70</sup> The statute simply defines a victim as anyone against whom a trafficker has violated this provision.<sup>71</sup>

The statute prohibits a person from knowingly "recruiting, enticing, harboring, maintaining, transporting, providing or obtaining, by any means," another person "through deception, force, fraud, threat or coercion or for purposes of engaging the person" in labor or a commercial sex act.<sup>72</sup> In addition, a person is prohibited from "benefiting, financially or by receiving anything of value, from participation in a venture that has engaged in an act of trafficking" for labor or commercial sex.<sup>73</sup> A trafficker may also commit human trafficking against a minor by "recruiting, enticing, harboring, maintaining, transporting, providing, purchasing or obtaining, by any means, a minor for purposes of engaging the minor in a commercial sex act."<sup>74</sup> Commercial sex is specifically defined as "any form of commercial sexual activity such as sexually explicit performances, prostitution, participation in the production of pornography, performance in a strip club, or exotic

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Project. Survivor Story: Boyfriend Turned Trafficker, POLARIS PROJECT (Apr. 14, 2015), <https://polarisproject.org/blog/2015/04/14/survivor-story-boyfriend-turned-trafficker>. Survivor Story: He Dreamed of Working in the United States, POLARIS PROJECT (Nov. 8, 2014), <https://polarisproject.org/blog/2014/11/08/survivor-story-he-dreamed-working-united-states>.

68. OKLA. STAT. tit. 21, § 748(A)(4).

69. *Id.*

70. § 748(A)(7).

71. § 748(A)(9).

72. §§ 748(A)(5)(a), (A)(6)(a).

73. §§ 748(A)(5)(b), (A)(6)(c).

74. § 748(A)(6)(b).

dancing or display.”<sup>75</sup>

The statute defines coercion broadly:

The trafficker coerces the victim when the trafficker:

- (i) blackmails the victim;
- (ii) chooses the location of the labor or commercial sex;
- (iii) controls the victim’s access to drugs;
- (iv) threatens the victim;
- (v) physically restrains the victim; or
- (vi) performs “any act, scheme, plan, or pattern intended to cause a person to believe that performing, or failing to perform, an act would result in serious physical, financial, or emotional harm or distress to or physical restraint against any person.”<sup>76</sup>

Notably, coercion includes choosing where the labor or commercial sex is conducted and controlling the victim’s access to drugs—two acts that are not commonly thought of as constituting coercion.

The Oklahoma Legislature clearly wanted to limit the defenses traffickers could raise at trial and ensure they remained in prison. First, in an effort to further restrict any mistake-of-fact defense by the trafficker defendant, the Oklahoma Legislature amended the statute to provide that consent of the victim *shall not* be a defense to an allegation of human trafficking.<sup>77</sup> Additionally, the alleged trafficker may not raise the defense that he believed the minor to be an adult.<sup>78</sup> Moreover, human trafficking is a felony that carries a minimum five-year sentence upon conviction in a case involving an adult victim.<sup>79</sup> If the victim is a minor, the minimum sentence increases to fifteen years.<sup>80</sup> In addition, human trafficking is an eighty-five percent crime, which means the convicted trafficker may not be eligible for parole or any earned credits until he has served eighty-five percent of his sentence.<sup>81</sup>

With an understanding of Oklahoma’s definition of human trafficking, the actions of both Jane’s boyfriend, Doug, and John’s employer easily fall within Oklahoma’s definition of human trafficking. Jane’s boyfriend trafficked her for commercial sex by “obtaining” her cooperation in engaging in commercial sex by means of “threat. . . for purposes of engaging the person in a commercial sex act.”<sup>82</sup> Even if Jane’s boyfriend forced her to engage in a commercial sex act *once*, his actions constitute human trafficking. In addition, the commercial sex act could be anything from Jane producing pornography to prostitution.<sup>83</sup> In addition, the statute does not require Jane’s boyfriend to be engaged in a “human trafficking ring” for his actions to amount to human trafficking, although the

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75. § 748(A)(2).

76. § 748(A)(1).

77. § 748(E); 2014 Okla. Sess. Laws p. 764.

78. § 748(F).

79. § 748(C).

80. *Id.*

81. *Id.*

82. § 748 (A)(6)(a).

83. § 748 (A)(2).

statute does account for those engaged in a human trafficking “venture.”<sup>84</sup>

Turning to John’s scenario, it is also clear that the employer engaged in human trafficking as defined in Oklahoma. John’s employer was “maintaining . . . providing or obtaining” John by means of threat “for purposes of engaging the person in labor.”<sup>85</sup> This would constitute human trafficking even if John was only forced to work under these conditions for a single day, as there is no requirement that the trafficking occur for a certain period of time or under a multitude of incidents. Further, like in the sex trafficking context, a systematic group of human traffickers is not required, but the statute provides for a theory of human trafficking by way of “participation in a venture that has engaged in an act of trafficking for labor.”<sup>86</sup>

Without knowing any further details about Jane and John’s trafficking incidents, it is clear that the statute encompasses a wide variety of actions and places few limitations on actions that can be characterized as human trafficking. With the expansive definition of coercion and the many avenues by which one could exploit a person under § 748, Oklahoma’s human trafficking statute casts a wide net in order to prosecute human traffickers, and, through its affirmative defense for victims, attempts to protect victims from prosecution of crimes that stemmed from the trafficking.

Jane and John would both be classified as human trafficking victims merely by the fact that Jane’s boyfriend and John’s employer violated § 748. The statute does not require Jane’s boyfriend and John’s employer to be convicted under § 748, nor does it require a pending prosecution for a victim to qualify for protection. The term “violate” simply connotes a “break” or “disregard” for § 748.<sup>87</sup>

### *B. Oklahoma’s Affirmative Defense for Human Trafficking Victims*

Although the effect of Oklahoma’s affirmative defense for human trafficking victims is incredibly broad, the text of the provision itself contains few words: “It is 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>88</sup>

Oklahoma’s human trafficking provisions pertaining to victims are contained in two statutes: § 748 and § 748.2. The above-mentioned provisions are all included in § 748, which is the main provision criminalizing human trafficking and stating the defense. The first line of § 748 begins with “[a]s used in Sections 748 and 748.2 of this title,” pairing these provisions together as sister statutes.<sup>89</sup> As § 748’s sister statute, § 748.2 contains certain layers of assistance to human trafficking victims.<sup>90</sup> First, victims are given statutory

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84. § 748 (A)(6)(c).

85. § 748 (A)(5)(a).

86. § 748 (A)(5)(b).

87. § 748 (A)(9) (defining victim as “a person against whom a *violation* of any provision of this section has been committed”) (emphasis added); *Violate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/violate>; (last visited Mar. 15, 2018) (defining violate as “break, disregard” or “to do harm to the person or especially the chastity of”); *Violate*, BALLENTINE’S LAW DICTIONARY (3d ed. 2010) (defining violate as “to break; to infringe; to disobey: as, to violate a statute. To force; to ravish”).

88. § 748(D).

89. §§ 748.2, 748(A).

90. § 748.2(B).

authority to bring a civil cause of action against the human trafficker.<sup>91</sup> Victims may bring civil actions against their traffickers regardless of whether the traffickers have been prosecuted for or convicted of trafficking, which also supports the assertion that one may be defined as a victim of human trafficking without the trafficker carrying a human trafficking conviction or being imminently prosecuted for human trafficking.<sup>92</sup>

In addition, § 748.2 provides that human trafficking victims *shall*:

- (1) Be housed in an appropriate shelter as soon as practicable;
- (2) Not be detained in facilities inappropriate to their status as crime victims;
- (3) Not be jailed, fined, or otherwise penalized due to having been trafficked;
- (4) Receive prompt medical care, mental health care, food, and other assistance, as necessary;
- (5) Have access to legal assistance, information about their rights, and translation services, as necessary; and
- (6) Be provided protection if the safety of the victim is at risk or if there is a danger of additional harm by recapture of the victim by a trafficker, including:
  - (a) taking measures to protect trafficked persons and their family members from intimidation and threats of reprisals, and
  - (b) ensuring that the names and identifying information of trafficked persons and their family members are not disclosed to the public.<sup>93</sup>

Thus, not only are victims able to assert the affirmative defense to crimes they committed while being trafficked, but they are statutorily mandated to be provided the above, including, of particular interest, the right not to be jailed for their alleged offenses.<sup>94</sup> Because the trafficking-victim defense and the different forms of assistance outlined above have been used little, if at all, it is unclear whether victims are actually receiving the “shelter,” “protection,” and “medical care, mental health care, [and] food” as required. Who is responsible for connecting victims to the services? Who provides the services? Who pays for the services? One shelter in Oklahoma City notes that its human trafficking victim shelter will be “certified by the Oklahoma Office of the Attorney General and will be the only certified human sex trafficking shelter in Oklahoma City.”<sup>95</sup> Still, questions remain whether the assistance will be given to those trafficking victims who are released from jail upon identification and who establish their right to the services in § 748.2.

The effectiveness of affirmative defense and the statutorily-mandated layers of assistance are predicated upon the often-incorrect assumption that a human trafficking victim will be immediately identified and given care.<sup>96</sup> However, victims are not

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91. *Id.* This provision also allows the human trafficking victim to recover, in addition to actual damages, both punitive damages and attorney’s fees.

92. *Id.*

93. § 748.2(A)(1)–(6).

94. § 748.2(2), (3).

95. The Dragonfly Home Residential Program, THE DRAGONFLY HOME, <http://www.thedragonflyhome.org/services/human-trafficking-shelter> (last visited Mar 16, 2018).

96. Francisco Zornosa, Note, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 177, 202 (2016) (suggesting that “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

commonly identified as victims, and instead, they are arrested and charged with crimes like prostitution, drug trafficking, drug possession, theft, and fraud.<sup>97</sup> This is what professionals call the “dual victimization” of human trafficking victims: the victims are abused first by being trafficked, and second by being subjected to unjust criminal penalties.<sup>98</sup> In fact, victims often face a third victimization: their resulting criminal records severely restrict them from truly moving out of the life.

Oklahoma provides two distinct remedies to prevent compounded victimization: the affirmative defense and expungement of criminal records.<sup>99</sup> To prevent the dual victim from the third victimization, “[t]he court, upon its own motion or upon petition by the defendant and for good cause shown” may expunge a victim’s criminal record for prostitution-related offenses that result from being trafficked.<sup>100</sup> Still, these remedies are “far from perfect” and are given only after the human trafficking victims have “encountered the criminal justice system as criminals,” even though the layers of assistance, which include the right not to be jailed, aim for the trafficked women and men to be treated not as criminals but as victims in need of aid.<sup>101</sup>

### III. A PLAIN READING OF THE AFFIRMATIVE DEFENSE

There are several “cogs” that come together to encompass a moveable criminal defense. Indeed, all criminal defenses have at least some elements of the following cogs: a time limitation, otherwise known as a contemporaneous requirement; proportionality, a requirement that the victim’s allegedly justified action be proportional to the action taken against her; a nexus requirement, or whether the victim’s action was somehow caused or connected to the crime committed against her; and a crime limitation, which limits the defense’s application to certain crimes.<sup>102</sup> Several cogs, including a crime limitation and proportionality requirement, are completely absent in the Oklahoma human-trafficking victim defense. Other cogs like the time limitation, are ambiguously stated. Because of the ambiguities, there are two reasonable readings of the trafficking-victim defense, the first being a plain reading.

#### A. Defining the Victim of Human Trafficking

The statute defines a human trafficking victim as anyone against whom a trafficker

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otherwise”).

97. Isabella Blizard, Note, *Chapter 636: Catching Those Who Fall, An Affirmative Defense for Human Trafficking Victims*, 48 U. PAC. L. REV. 631, 633 (2017).

98. Allison L. Cross, *supra* note 3, at 403; Blizard, *supra* note 97, at 633 (noting that the “legal system simultaneously exposes them to dual victimization—making them victims of both the charged crime and victims of human trafficking”).

99. OKLA. STAT. tit. 21, § 748(D); OKLA. STAT. tit. 22, § 19c.

100. OKLA. STAT. tit. 22, § 19c.

101. Blizard, *supra* note 97, at 638–39; OKLA. STAT. tit. 21, § 748.2(A)(3).

102. For example, a necessary element of a defense of self-defense that may justify use of deadly force is that it occur in the face of “imminent danger of death or great bodily harm,” which requires the self-defense to be both contemporaneous to the danger and caused by the danger that is imminently approaching. Vernon’s Okla. Forms 2d, OUII-CR 8-46. A person’s use of deadly force is not justified, however, in the face of merely “imminent danger of bodily harm,” which institutes a requirement that the action taken is proportional to the threatened danger. Vernon’s Okla. Forms 2d, OUII-CR 8-48.

has exploited for commercial sex or labor by the means set forth in § 748.<sup>103</sup> Victim status under § 748 does not require the victim to name the trafficker or for the trafficker to be charged or prosecuted, although it does not expressly indicate it is not required.<sup>104</sup> Ambiguities arise as to when exactly an actual victim becomes a statutory victim, and for how long that status remains under the statute. Human trafficking is pervasive and enduring, and the psychological coercion and manipulation traffickers use on victims can follow them for the rest of their lives, well beyond the period when they were initially trafficked.<sup>105</sup> There is a legally-significant difference between a victim who will be victimized for the rest of her life even after the trafficking has ended, and the “victim” who is being imminently trafficked. The affirmative defense hints at this distinction by adding a contemporaneity requirement: to raise the affirmative defense, the human trafficking victim must have been trafficked at the time of the alleged offense.<sup>106</sup>

Clearly, a victim qualifies for protection under this statute while being sold for commercial sex or being exploited for labor.<sup>107</sup> The question remains, however, whether the victim—whom research shows will be a victim for the rest of his or her life due to the physical, mental, and health battles that will inevitably linger long after the trafficking ends—will be categorized as a statutory victim when the person falls somewhere between the preceding two scenarios, one who is no longer being imminently trafficked, but who is still close in time to the trafficking. For example, is Jane a “victim” when she is not being trafficked for sex on the street, but is out buying groceries? Is John a “victim” when he gets a break from his seventeen-hour, wageless work day? The psychological coercion, which the statute clearly provides as a means by which the trafficker violates the human trafficking statute, will persist in these moments although the victim is not immediately being trafficked. Thus, the Oklahoma Legislature likely intended these victims to be statutory victims even while not being imminently exploited.

The Oklahoma Legislature’s extension of statutory victimhood past the actual events of trafficking (*e.g.*, having sex with a customer) and into the period of time where the victim is less obviously connected to the trafficking (*e.g.*, washing the dishes) corroborates a traditional maxim of criminal law: punishment should only be given to those who are morally culpable and who have the requisite culpable mental state. Human trafficking victims lack this moral culpability precisely because their actions are coerced by their traffickers. A victim is just as coerced when she is forced to give her body to customers as she is where she is washing her clothes in preparation for the next night. For this reason, the broader classification of statutory victims is appropriate, and the contemporaneous requirement sufficiently narrows the defense’s availability by necessitating that it be used against a crime committed while the victim was being trafficked.<sup>108</sup>

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103. § 748(A)(9).

104. § 748(A)(9). *See, e.g.*, DEL. CODE. tit. 11, § 787 (defining a victim as a “person who is subjected to [human trafficking] or to conduct that would have constituted [human trafficking]. . . regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted”).

105. Zimmerman & Pockock, *supra* note 31, at 266.

106. OKLA. STAT. tit. 21, § 748(D).

107. § 748.

108. § 748(D).

### *B. Inherent Contemporaneousness Requirement*

A plain reading of the statute reveals that victims may only raise the affirmative defense if they were victims of human trafficking when the crimes occurred.<sup>109</sup> The statute is clear on this requirement that “during the time of the alleged commission of the offense, the defendant was a victim of human trafficking.”<sup>110</sup> For example, a victim of human trafficking may raise this defense if, while being trafficked for commercial sex, she stole a vehicle, she had drugs in her possession, or she assaulted her john. In contrast, the defense would not be available to a victim who escaped “the life” and subsequently committed a crime.

### *C. Lack of Implicit Proportionality Requirement*

In addition, Oklahoma's affirmative-defense provision does not expressly designate a proportionality requirement. In other words, there are no requirement that that “the bad effects of such an act not be excessive in relation to the good.”<sup>111</sup> Under a plain reading, the affirmative defense would extend to a human trafficking victim who, while being trafficked, murders her customer while he is using her for commercial sex. Reasonable minds could argue in fact-specific cases whether this would be proportional. Even beyond that, the defense would be available to a human trafficking victim who murdered a random person on the street if she was being trafficked at that time, which is clearly not proportional. Without a proportionality requirement, the victim could assert this affirmative defense even to what are considered the most heinous crimes in cases where those crimes are clearly not proportional.

### *D. Lack of Nexus Requirement*

Oklahoma's trafficking-victim defense also lacks a nexus requirement—an element of the defense that would connect the victim's alleged criminal act to the human trafficking. In other words, the fact the victim is being trafficked must be the cause of the victim's criminal response.<sup>112</sup> Other states with similar trafficking-victim defenses carry language that requires the crime to be a “direct result” of the trafficking.<sup>113</sup> Interestingly, Oklahoma's minor trafficking-victim defense carries such language, but only recently. In an amendment effective Nov. 1, 2018, the affirmative defense for minor human trafficking victims mandates “an affirmative defense to delinquency or criminal prosecution for any misdemeanor or felony offense that the offense was committed during the time of and as

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109. *Id.*

110. *Id.*

111. Jeff McMahan, *Proportionate Defense*, 23 J. TRANSNAT'L L. & POL'Y 1, 1 (2013).

112. See Anders Kaye, *Resurrecting the Causal Theory of the Excuses*, 83 Neb. L. Rev. 1116, 1120 (2005) (advocating for the causal theory of criminal law and explaining that criminal law excuse defenses adhere to a “causal account” of a certain class of acts—that is, an account according to which those acts are caused by forces beyond the actor's control” while at the same time providing “the ‘control principle’—that is, that it excuses the acts it excuses precisely because they are caused by forces beyond the actor's control”).

113. See WYO. STAT. ANN. § 6-2-708(a).



the *direct result* of the minor being the victim of human trafficking.”<sup>114</sup> Prior to this amendment, there was no such affirmative defense for minor human trafficking victims<sup>115</sup>; therefore, this amendment is the first time the minor trafficking-victim defense has graced the statute books. In comparison, the adult trafficking-victim defense continues in its original form since its enactment in 2008 without any nexus requirement.

#### *E. Lack of Crime Limitation*

In conjunction with the lack of causation and proportionality, Oklahoma’s statute lacks express exclusion of any particular criminal offenses. The statute simply states that it can be asserted to defend against a “criminal offense.”<sup>116</sup> Thus, the affirmative defense could apply to misdemeanors, non-violent felonies, and even violent felonies, like murder. Other state statutes are explicit in identifying the crimes the affirmative defense applies.<sup>117</sup> In North Dakota, for example, the trafficking-victim defense applies to prostitution, felony or misdemeanor forgery; felony or misdemeanor theft; insufficient funds or credit offenses; felony drug distribution; manufacture or possession of a counterfeit substance offense; and drug paraphernalia offenses.<sup>118</sup> Returning to the earlier example, as long as Jane was being trafficked, she could raise this trafficking-victim defense against *any* crime, whether it be misdemeanor drug possession or first-degree murder.

The Oklahoma Court of Criminal Appeals has somewhat approved of this plain reading interpretation by signing off on the trafficking-defense uniform jury instruction. The Oklahoma Uniform Jury Instructions (OUJI) states the trafficking-victim defense as follows:

The defendant has raised the defense that he/she was a victim of human trafficking during the time of the alleged offense. It is the burden of the State to prove beyond a reasonable doubt that the defendant was not a victim of human trafficking during the time of the alleged offense. If you find that the State has failed to satisfy its burden of proof beyond a reasonable doubt, then the defendant must be found not guilty.<sup>119</sup>

By accepting the OUJI Committee’s formulation, the Oklahoma Court of Criminal Appeals endorsed it, indicating a plain reading of the human trafficking victim defense is certainly a plausible way to read the affirmative defense.

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114. 2018 Okla. Sess. Law Serv. Ch. 167 (S.B. 1005) (emphasis added).

115. 2014 Okla. Sess. Law Serv. Ch. 309 (S.B. 1538) (utilizing dismissal, rather than an affirmative defense, as a remedy for minor human trafficking victims charged with crimes: “If criminal charges were filed against the minor and the investigation shows, at the show-cause hearing, that it is more likely than not that the child minor is a victim of human trafficking or sexual abuse, then the criminal charges against the minor shall be dismissed and the Department of Human Services case and services shall proceed”).

116. § 748(D).

117. See N.D. CENT. CODE § 12.1-41-13; LA. STAT. ANN. § 14:46.2 (listing prostitution; prostitution by massage; crime against nature; crime against nature by solicitation); MASS. GEN. LAWS CH. 265, § 57 (listing common night walking, common streetwalking, and engaging in sexual conduct for a fee).

118. N.D. CENT. CODE § 12.1-41-13.

119. Vernon’s Okla. Forms 2d, OUJI-CR 8-61.

IV. INTERPRETING THE HUMAN TRAFFICKING VICTIM DEFENSE THROUGH THE LENS OF  
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The trafficking-victim defense is similar to a duress defense. In fact, the human trafficking victim defense may be best understood as a more particularized duress defense.<sup>120</sup> Indeed, a few states have enacted statutory provisions that merely state that human trafficking victims may raise the defense of duress to crimes they are charged with.<sup>121</sup> Other states provide affirmative defenses to human trafficking victims and reference the duress and coercion as the underlying theory of their defense.<sup>122</sup> Although the trafficking-victim defense is broad in scope and will apply in almost any situation where a human trafficking victim is charged with a criminal offense, the duress defense is more narrow.<sup>123</sup> Because of this, a comparison of the defenses provides guidance on how to treat the trafficking-victim defense; however, the trafficking defense should not be given the exact treatment as a duress defense.

In Oklahoma, a person may raise the duress defense if he or she committed a crime due to a reasonable belief of imminent danger of death or serious bodily injury from another person.<sup>124</sup> Like the trafficking-victim defense, the duress defense is an excuse defense; it says that the conduct committed was criminal, but that the actor is excused because the conduct was committed “without possessing any of the motivations that judgments of blame presuppose.”<sup>125</sup> Thus, the actor is “blameless because he substantially lacked the capacity for free choice.”<sup>126</sup> Though the Oklahoma Legislature did not confirm its reasoning, this is most likely the rationale behind providing an affirmative defense for the human trafficking victim: the human trafficking victim who has been coerced into committing a crime is blameless.

In addition, the duress defense covers crimes committed under threats that are “purposefully coercive,” where the person commanding the action dictates the “exclusive avenues of escape”—*e.g.*, you will not be killed as long as you transport these drugs across state lines.<sup>127</sup> Similarly, the trafficking-victim defense recognizes the coercion traffickers

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120. Compare OKLA. STAT. tit. 21, § 748(D), with OKLA. STAT. tit. 21, § 156.

121. MD. CODE ANN., CRIM. LAW § 11-306 (expressly stating its human trafficking victim affirmative defense is “an affirmative defense of duress”).

122. See CONN. GEN. STAT. § 53a-82 (providing that “[n]othing in this section shall limit a person’s right to assert the defense of duress pursuant to section 53a-14 in any prosecution for an offense under this section”); IOWA CODE § 710A.3 (stating duress’ implicit limitations in its affirmative defense and allowing the defense “provided that the defendant reasonably believed that such injury was imminent”).

123. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1375 (1989) (stating that “common law jurists” have an “extremely narrow conception of duress”); see also Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 673 (1995) (viewing duress in light of a battered woman and noting that “[g]iven the objective nature of duress, as well as the principles of personal accountability and free choice that underlie our criminal justice system, the battered woman defense, as employed in practice today, cannot fit within the narrow confines of duress as an exception to the general rule of culpability for crimes knowingly and voluntarily committed”) (emphasis added).

124. Instruction No. 8-20, OUJI-CR(2d).

125. Peter Western & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—and Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 865 (2003).

126. Dressler, *supra* note 123, at 1357.

127. Western & Mangiafico, *supra* note 125, at 847.

utilize to command their victims. With their commands, the traffickers outline the victims' exclusive avenues of survival—*e.g.*, you will not be physically abused as long as you have sex with this customer and return with a profit.

To demonstrate an analogous scenario to when a victim raises the trafficking-victim defense, consider when a battered woman raises the duress defense after she is coerced by her husband or intimate partner to commit a crime. This woman's situation is factually analogous to that of a trafficking victim who raises the trafficking-victim defense after she is coerced by her trafficker into committing a crime. In neither case does the victim have a "gun to her head" compelling her to commit the crime. Rather, each victim's act is based on the trafficker or batterer's "'uncoerced' suggestion that she engage in illegal activity or out of some generalized, albeit well-founded, fear of future abuse unless she obtains money to support her family or placate her abuser."<sup>128</sup>

Moreover, the duress defense can cover situations involving three parties: the person who commanded the action, the actor coerced to act, and the innocent bystander.<sup>129</sup> Although the trafficking-victim defense may apply to situations where the only party is the victim (*e.g.* the victim commits a crime while buying groceries) and to situations where there are two parties (the victim and the trafficker), it also may apply to situations involving three parties: the trafficker who commanded the action, the victim coerced to act, and the innocent bystander.

The trafficking-victim defense's explicit contemporaneousness requirement is akin to the implicit contemporaneousness requirement in the duress defense, though the former is more ambiguous, while the latter is more specific, given its time-based requirement of imminence.<sup>130</sup> Under the common law rule of duress, the availability of a reasonable escape from the danger of death or serious bodily injury undermines imminence and causes the defense to fail.<sup>131</sup> The trafficking-victim defense's contemporaneous requirement may be interpreted through the lens of duress by attaching an imminence requirement, and, thus, a requirement that there was no reasonable escape available to the victim. Therefore, if the trafficking-victim defense is read to imply duress' imminence requirement, the human-trafficking victim may only assert the defense if the crime was committed while the trafficking was occurring.

Though the two defenses' contemporaneousness requirements may be interpreted similarly, the defenses differ significantly regarding proportionality and crime limitations. Under a lesser-of-two-evils rationale, the duress defense at common law required the action taken under duress to be proportional; duress was "disallowed when the social harm caused by the commission of the offense is extremely disproportional to the harm averted."<sup>132</sup> In addition, jurisdictions will not extend duress to an intentional killing.<sup>133</sup> It would not be reasonable to interpret the trafficking-victim defense as having an implicit

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128. Dore, *supra* note 123, at 670.

129. Western & Mangiafico, *supra* note 125, at 843.

130. § 748(D); Vernon's Okla. Forms 2d, OUJI-CR 8-61.

131. Vernon's Okla. Forms 2d, OUJI-CR 8-61.

132. Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT'L L. 741, 755 (2008).

133. Dressler, *supra* note 123, at 1342–43.

proportionality or crime limitation. First, § 748 is devoid of any hint to limit the criminal offenses committed to a certain subsection of crimes. In addition, the statute lacks any indication of a proportionality requirement. The Legislature most likely understood that human trafficking victims may commit heinous crimes given the pervasive torture they face on a daily basis. In addition, while the duress defense is available to any criminal defendant who was coerced, this trafficking-victim defense applies to a particular person: one who has been trafficked. While it may be appropriate to limit the duress defense through the requirements of imminence, proportionality, and a crime limitation to prohibit abuse, the trafficking-victim defense's purpose was for it to be used by all victims who are blameless for the crimes charged against. Limiting the trafficking-victim defense's use with an implicit proportionality and crime limitation would fly in the face of this purpose.

The trafficking-victim defense should not be treated the same as the duress defense regarding the implicit proportionality requirement and the crime limitation because while the duress defense is appropriate for some crimes, the trafficking-victim defense is appropriate for others. While both defenses cover some common ground, that common ground is small. As previously mentioned, the battered woman who raises the duress defense is factually analogous to the human-trafficking victim who raises this defense. However, the battered woman is almost always unsuccessful because she fails the narrow requirements of duress.<sup>134</sup> However, with the trafficking-victim defense, the human trafficking victim would succeed in these areas, precisely because the defense does not carry these limitations. The human trafficking victim defense is broader, providing protection in many more cases involving crimes committed by human-trafficking victims than does the duress defense; thus, although it may be appropriate to lend the trafficking-victim defense a duress interpretation, for the reasons stated above, the trafficking-victim defense should not be read to include an implicit proportionality requirement and crime limitation like duress. Although properly viewed as a particularized duress defense, the trafficking-victim defense should not be given duress limitations because the defense is broad in order to encompass as many trafficking victims as possible, who have been deemed to lack blameworthiness. This encompassment of many victims may be best understood against the backdrop of other state's affirmative defenses for human trafficking victims.

#### V. HOW OKLAHOMA'S HUMAN-TRAFFICKING VICTIM DEFENSE COMPARES WITH OTHER STATES' HUMAN TRAFFICKING STATUTES

One avenue to truly perceive the expanse of Oklahoma's affirmative defense for human-trafficking victims is to compare the statute to other states' legislative attempts to combat human trafficking. Thirty-seven states have enacted trafficking-victim defenses, which range from covering only prostitution to allowing the defense to be raised against crimes that directly result from the human trafficking.<sup>135</sup> Based on a survey of states' human-trafficking statutes, Oklahoma's is the most expansive in the nation Oklahoma is

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134. Dore, *supra* note 123, at 673.

135. See STATE AFFIRMATIVE DEFENSES, *supra* note 57.

the *only* state that lacks both a crime limitation and a nexus requirement.<sup>136</sup>

Out of the thirty-seven states that afford victims an affirmative defense, over seventy percent only allow a victim to raise the defense to a charge of prostitution or prostitution-related offenses.<sup>137</sup> Comparatively, Colorado, Mississippi, and New Jersey only allow the affirmative defense to a charge of human trafficking, presumably protecting the “bottom girl.”<sup>138</sup> Only five states, around thirteen percent, lack a crime limitation in its affirmative defense.<sup>139</sup> States who may that lack one element of the moveable defense make up for it with a tight-knit crime limitation or nexus requirement, unlike Oklahoma which cannot pass this balancing act: every element of its defense is wide open. For example, South Dakota lacks a nexus requirement, but has a crime limitation that only allows the affirmative defense to be raised to prostitution.<sup>140</sup> New Jersey also lacks a nexus requirement, but is has a tight crime limitation and contemporaneous requirement.<sup>141</sup> Connecticut, Kentucky, and Nebraska also lack a nexus requirement, but their statutes limit application to prostitution or prostitution-related charges.<sup>142</sup> Although one aspect of the moveable defense is lacking, the affirmative defense fills the gap elsewhere; however, Oklahoma’s gaps are too large to fill, which creates the questions and ambiguities as discussed above.

Furthermore, some states have allowed their affirmative defenses to be broad, and, yet, Oklahoma still leaps ahead for providing the most expansive defense. Although these states’ affirmative defenses are broad, their defenses are sufficiently tightened by two words: “direct result.”<sup>143</sup> Nearly half of the thirty-seven states with affirmative defenses create a tight nexus between the victim’s conduct and the fact the victim was trafficked by utilizing language “as a result of” or “as a direct result of.”<sup>144</sup> For example, Wyoming’s and Wisconsin’s trafficking-victim defenses are also broad, yet still narrower than Oklahoma’s. Wyoming’s states 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>145</sup> Wisconsin’s is similar: “A victim of a violation of [human trafficking] has an affirmative defense for any offense committed as a direct result of the violation of [human trafficking] without regard to whether anyone was prosecuted or convicted for the violation of [human trafficking].”<sup>146</sup> Upon a plain reading, Wyoming’s and Wisconsin’s trafficking-victim defenses lack a specific crime limitation, much like Oklahoma’s. However, the two defenses require a strict nexus requirement between the crime committed and the trafficking. These are explicit

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136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. S.D. CODIFIED LAWS § 22-23-1.2.

141. N.J. REV. STAT. § 2C:13-8.

142. CONN. GEN. STAT. § 53a-82; KY. REV. STAT. ANN. § 529.170; NEB. REV. STAT. § 28-801; NEB. REV. STAT. § 28-801.01.

143. *See infra* Appendix A – A PLAIN READING OF STATES’ AFFIRMATIVE DEFENSES.

144. *See* STATE AFFIRMATIVE DEFENSES, *supra* note 57.

145. WYO. STAT. ANN. § 6-2-708(a).

146. WIS. STAT. § 939.46(1m).

limitations that Oklahoma's defense does not have.

Wyoming's and Wisconsin's defenses both require causation between the trafficking and the victim's criminal offense. Although Oklahoma's trafficking-victim defense has a contemporaneous requirement—that the crime be committed while the victim is being trafficked—it fails to require the strict nexus found in Wyoming and Wisconsin. Oklahoma's trafficking-victim defense is silent on whether the crime committed needs to be the “direct result” of the victim's trafficking. Thus, Oklahoma's defense lacks any requirement of causation, which allows the defense to be raised by victims who commit crimes that have no relation to the trafficking. In turn, Oklahoma's trafficking-victim defense would protect a victim who murders a stranger on the street. Wyoming's and Wisconsin's defenses would not stretch to protect this victim, because the victim's murder of a stranger would fail to meet the expressed nexus requirement.

Compared with even the broadest trafficking-victim defenses in the United States, Oklahoma's trafficking-victim defense is much more expansive due to its lack of a nexus requirement. Oklahoma's lack of crime limitation is similar to Wyoming's and Wisconsin's lack of crime limitations. In addition, Wisconsin, Wyoming, and Oklahoma do not require proportionality. However, Oklahoma is an anomaly compared to other state's human-trafficking victim defenses, because, where other states require a nexus between the victim's criminal action and the trafficking and/or impose a crime limitation, Oklahoma does not. Thus, the Oklahoma human-trafficking victim may raise the defense to criminal offenses that had nothing to do with the trafficking. This is one of many potential objections to a plain reading of the defense.

## VI. OBJECTIONS TO OKLAHOMA'S HUMAN-TRAFFICKING DEFENSE

### A. Procedural Implications

One looming question regarding Oklahoma's trafficking-victim defense is when is this defense actually raised? The intricacies of this defense with the layers of assistance provided in § 748.2 may raise some anxiety for judges, prosecutors, public defenders, and criminal defense attorneys.<sup>147</sup> Affirmative defenses are raised at trial.<sup>148</sup> However, the special procedures laid out in the defense's sister statute, § 748.2, suggest that this defense should be raised much earlier.<sup>149</sup> Section 748.2 provides that the human-trafficking victim shall “[n]ot be jailed, fined, or otherwise penalized due to having been trafficked . . . .”<sup>150</sup> The statute does not identify when this procedure should commence, but the most reasonable interpretation would be that it launches *immediately* when the person is

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147. See American Bar Association Task Force on Human Trafficking, *Voices for Victims: Lawyers Against Human Trafficking Tool Kit for Bar Associations*, [https://www.americanbar.org/content/dam/aba/multimedia/trafficking\\_task\\_force/resources/TFHT\\_Toolkit/HumanTrafficking\\_Bar.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/multimedia/trafficking_task_force/resources/TFHT_Toolkit/HumanTrafficking_Bar.authcheckdam.pdf) (last visited Mar. 16, 2018) (providing a tool kit for local bar associations to help educate local attorneys about human trafficking).

148. The defense's jury instruction seems to expect the defense to be raised at trial and not before. Vernon's Okla. Forms 2d, OUI-CR 8-61 (advising “[t]his instruction should be given where the evidence presented at trial sufficiently raises the defense that the defendant was a victim of human trafficking at the time of the alleged offense”).

149. See OKLA. STAT. tit. 21, § 748.2(B).

150. § 748.2 (A)(3).

identified as a victim of human trafficking.<sup>151</sup> Thus, when that identification takes place, the victim shall not be jailed or fined. If this identification takes place before trial, the prohibition on detaining the victim should also take place before trial. California recognizes this issue, and it provides the following procedure for raising the defense:

The affirmative defense may be asserted at any time before the entry of a plea of guilty or nolo contendere or admission to the truth of the charges and before the conclusion of any trial for the offense. If asserted before the preliminary hearing held in a case, the affirmative defense, shall, upon request by the defendant, be determined at the preliminary hearing.<sup>152</sup>

Louisiana's statute requires written notice forty-five days before trial when using the affirmative defense.<sup>153</sup> Thus, the special nature of Oklahoma's affirmative defense and the procedures that accompany it, transform this defense into a matter that should be determined at the outset of the case.

For example, imagine that Jane, who is out on the street being trafficked for commercial sex, is arrested and booked into the county jail for prostitution. In addition, assume that Jane's lawyer detects that she is a victim of human trafficking. Jane's lawyer should *immediately* identify her as a victim of human trafficking to the court and present the statutory authority which prohibits her detainment in jail. The looming question surrounding the timing of this defense being raised is valid: neither § 748 or § 748.2 provide any procedures to guide a criminal defense attorney or public defender. To make matters worse, the defense has yet to be used in Oklahoma, leaving the efficacy of the procedures provided in § 748.2 untested.

#### *B. The Defense Is Too Broad Without a Crime Limitation*

Another potential objection to Oklahoma's trafficking-victim defense involves the absence of any explicit crime limitation. For example, a human-trafficking victim could raise this affirmative defense to a charge of murder as long as the murder took place in the course of being trafficked—which, as indicated in the above discussion of defining the victim, is an ambiguous and unhelpful identifier. In addition, a victim of human trafficking can raise this defense to a charge of human trafficking. The lack of a crime limitation is perhaps the strongest objection to this expansive defense; however, this objection is overcome, in part, by analyzing fact-specific scenarios that are common in cases involving human-trafficking victims and by providing a fix.

In a situation where the human-trafficking victim murdered her trafficker or murdered the person abusing or raping her, the victim may have other criminal law defenses to use, like self-defense. A situation where a victim murders to protect herself is less objectionable than a situation where a victim murders or commits a violent felony against a stranger. But because the trafficking-victim defense lacks a crime limitation, it allows either victim to evade criminal responsibility as long as she can show she was trafficked when the crime was committed.

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151. See CAL. PENAL CODE § 236.23(d) (providing that when the defense is “asserted before the preliminary hearing held in a case, the affirmative defense shall, upon request by the defendant, be determined at the preliminary hearing”).

152. CAL. PENAL CODE § 236.23(d).

153. LA. STAT. ANN. § 14:46.2(F)(2).

Jane's human trafficking experience may add further explanation on this issue. Suppose Jane, who is being trafficked for commercial sex by Doug, is out on the street to pick up customers. At this moment, Jane is being trafficked, and there is no question that she is presently a statutory victim. Jane picks up a customer, but, while they have sex, the customer becomes violent, and Jane fears for her life. Jane stabs the customer, killing him. Arguably, Jane was acting in self-defense, and a lack of crime limitation may not raise too many red flags when she raises the trafficking-victim defense. However, if Jane is on the street and stabs a passerby, red flags abound. Where Jane's former killing was clearly connected to the trafficking, the latter was not. Fewer questions abound in regard to Jane's blameworthiness when she stabbed the violent customer, but issues arise as to Jane's blameworthiness when she killed a passerby.

Interestingly, the lack of a crime limitation helps a particular human-trafficking victim: the "bottom girl." The bottom girl is a sort of right-hand to the human trafficker.<sup>154</sup> As the trafficker's most compliant victim, the bottom girl is a ringleader of the other victims and becomes another arm of the trafficker, which furthers the solidification of his control over his victims.<sup>155</sup> Because of her position as bottom girl and her actions as an extension of the trafficker, she is a less sympathetic victim. But she is, nonetheless, a victim—even as she is also a perpetrator. Like the victim who is charged with a crime of drug possession or prostitution, the bottom girl's actions are more a survival tactic as a victim than culpable conduct.<sup>156</sup> This presents an interesting legal question, which has arisen with respect to other states' human trafficking defenses.<sup>157</sup>

For example, California's affirmative defense for human-trafficking victims has received criticism for its crime limitation that expressly excludes the bottom girl.<sup>158</sup> The defense protects a human-trafficking victim who was "coerced to commit the offense as a direct result of being a human-trafficking victim at the time of the offense and had reasonable fear of harm."<sup>159</sup> It expressly prohibits application to a serious or violent crime, or to a charge of human trafficking.<sup>160</sup> It therefore ignores the bottom girl and an important sector of human-trafficking victims: those who are involved in the human trafficking as well as being trafficked themselves. Oklahoma's trafficking-victim defense does not exempt the bottom girl. Without a crime limitation, a bottom girl may utilize Oklahoma's trafficking-victim defense, which is appropriate because not only does the bottom girl fit the statutory definition of "victim," but by her designation as the bottom girl, she may have been abused and coerced more than any of the other victims.<sup>161</sup> Oklahoma's defense appropriately recognizes her plight. In fact, other states have as well, extending the affirmative defense *only* to a charge of human trafficking, which points straight to the

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154. Jessica Emerson & Alison Aminzadeh, *Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking*, 16 U. MD. L.J. RACE RELIG. GENDER & CLASS 239, 247 (2016).

155. *Id.* at 248.

156. *Id.*

157. *Id.* at 247.

158. Blizard, *supra* note 97, at 639.

159. CAL. PENAL CODE § 236.23.

160. *Id.*

161. Emerson & Aminzadeh, *supra* note 154, at 248.



bottom girl.<sup>162</sup>

Although objectionable in a situation where the human-trafficking victim raises this defense to a charge of murder and other violent felonies, the lack of a crime limitation is appropriate in other instances, especially in the case of the bottom girl. The lack of crime limitation is perhaps the most persuasive argument against a plain reading of the affirmative defense. Because the definition of victim is broad, and the contemporaneous requirement is expansive, the lack of any crime limitation transforms this defense into a device where every criminal defense attorney hopes their client can be identified as a victim of human trafficking after being charged with a crime, whether the charge be prostitution or murder. The statute clearly states that “[i]t is an affirmative defense to prosecution for a criminal offense.”<sup>163</sup> If the Oklahoma Legislature truly wanted to limit this defense to trafficking-related crimes, as most states do in their trafficking-victim defenses, it could have. History shows it knows how to: the Legislature limited the scope of record expungement for human-trafficking victims to *only* “prostitution-related offense[s] committed as a result of the defendant having been a victim of human trafficking.”<sup>164</sup> Once again, the simple remedy would be to add a nexus requirement to Oklahoma’s trafficking-victim defense. Without jeopardizing the bottom girl or the victim who is less blameworthy when she murders a violent customer, the nexus requirement would put this objection to rest.

### *C. Human-Trafficking Victims Should Raise a Duress Defense*

Other anticipated objections to Oklahoma’s trafficking-victim defense include the fact that the defense is superfluous. If a human-trafficking victim is being coerced—as the evidence shows such victims often are<sup>165</sup>—that victim should raise a duress or coercion defense. However, for the reasons stated below, although the human-trafficking victim is subjected to harsh coercion, a duress defense will not provide the victim relief.

A human-trafficking victim can face a vast array of physical harm from her trafficker, including abuse that leaves bruises, scars, broken bones, or concussions.<sup>166</sup> Victims are forced daily to remain submissive to and fearful of their traffickers: “On a typical day, a [t]rafficker will rape, beat, and isolate a victim to wipe out any trace of resistance.”<sup>167</sup> The trafficker utilizes psychological manipulation, which “‘causes a victim to believe’ that a negative consequence will result from non-compliance.”<sup>168</sup> Often, a victim cannot make rational decisions due to the perpetual abuse she faces: “clear decision making, rational perception and the ability to focus on long term outcomes is markedly diminished.”<sup>169</sup> In other words, a victim’s mind is in perpetual psychological

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162. COLO. REV. STAT. § 18-3-504; MISS. CODE ANN. § 97-3-54.1; N.J. REV. STAT. § 2C:13-8.

163. OKLA. STAT. tit. 21, § 748.

164. OKLA. STAT. tit. 22, § 19c.

165. Jones, *supra* note 8, at 344.

166. Mariconda, *supra* note 12, at 165.

167. Jones, *supra* note 8, at 336.

168. Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 967 (2007).

169. Jones, *supra* note 8, at 340.

“enslavement.”<sup>170</sup> Even with this enslavement, however, a human-trafficking victim’s reactions to the abuse and trafficking “fall somewhere between consent and coercion.”<sup>171</sup> The horrifying truth that contributes to this particular type of psychological coercion and necessitates unique specialized assistance for a human-trafficking victim is that “[s]he may be so deeply under the [t]rafficker’s thumb that she herself may fail to realize she did not consent.”<sup>172</sup>

Although human-trafficking victims may be considered to be under “psychological coercion,” the legal parameters defining that concept are lacking.<sup>173</sup> In response to *Kozminski*, Congress clearly recognized psychological coercion as a tactic traffickers use against their victims.<sup>174</sup> But while Congress provided for psychological coercion as a theory of abuse traffickers utilized to manipulate their victims, it did not define psychological coercion or hint at any standards to use to determine what constitutes psychological coercion.<sup>175</sup>

Oklahoma’s human-trafficking statute defines coercion very broadly to satisfy an element in a human-trafficking prosecution; however, a defense based on coercion continues to be rigid. Because the duress and coercion defenses fail to defer to the “subjective experience and context-specific circumstances of the trafficked individual,” and the heart of trafficking is psychological coercion, these defenses fall short for the average human-trafficking victim.<sup>176</sup> In Oklahoma, the average human-trafficking victim raising a duress defense will most likely receive the same treatment as a battered woman, who likely lacks imminence and has an opportunity to escape.

#### VII. PUBLIC POLICY SUPPORTS A PLAIN READING OF OKLAHOMA’S HUMAN-TRAFFICKING VICTIM DEFENSE

As the state with the broadest affirmative defense, Oklahoma affords the most protections to those victims charged with crimes. Oklahoma’s affirmative defense is in direct alignment with the international community’s shift towards non-punishment of victims of human trafficking.<sup>177</sup> Indeed, scholars have extended this non-punishment principle to effectuate a positive obligation on the State to ensure human-trafficking victims go unpunished, which may become State-sanctioned persecution if left unfulfilled:

The criminalization of trafficked victims may be tantamount to persecution of victims by the State: not only does fail to take into account the serious crimes

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170. *Id.* at 342.

171. Kim, *supra* note 168, at 967.

172. Jones, *supra* note 8, at 344.

173. Kim, *supra* note 168, at 944.

174. *Id.* at 966.

175. *Id.* (noting that “Congress characterized coercion as unequivocally broad, encompassing ‘threats of serious harm’ that are both physical and non-physical. Yet, the term serious harm lacks specificity . . . . Rather than provide a more detailed definition of non-physical harm, the TVPA vaguely refers to it as all forms of harm in the absence of physical force”).

176. *Id.* at 972.

177. Ryszard Wilson Piotrowicz, *Human Trafficking and the Emergence of the Non-Punishment Principle*, HUM. RTS. L. REV. 1 (2016).

committed against the victim by the traffickers, which should be investigated, it fails to recognize trafficked persons as victims and witnesses of those serious crimes and exacerbates their victimization and/or trauma by imposing on such persons State-imposed, unjust punishment.<sup>178</sup>

Oklahoma's trafficking-victim defense fully embraces the non-punishment principle. In fact, Oklahoma's defense may be broader than the United Nations Office on Drugs and Crime's Model Law against Trafficking in Persons, which provides that "[a] victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons."<sup>179</sup> In a later provision, the Model Law limits this command to crimes of a non-serious nature.<sup>180</sup> Without a specific crime limitation or a nexus requirement, Oklahoma goes one step further than the United Nation's Model Law to assist human-trafficking victims.

Apart from international public policy towards non-punishment of human-trafficking victims, whether intentionally or unknowingly, Oklahoma has placed itself in a position to lead the non-punishment movement in the United States. Oklahoma's defense appropriately views victims as they truly are: people who have "effectively become the agent of the person(s) who exploit them because they are powerless to do anything other than the will of their exploiters."<sup>181</sup>

Many professionals criticize state legislatures' efforts as "expressive legislation"—action that seeks to relay the message that human trafficking is bad and that the legislature is the hero by prosecuting traffickers and saving victims.<sup>182</sup> Such legislation lacks teeth and fails to effect true assistance. Rather, in reality, a human-trafficking victim "face[s] what amounts to an un rebuttable presumption that, because she is a prostitute, the violent sexual attack she suffered was the result of a prior financial arrangement and not a forced rape."<sup>183</sup> A plain reading of the trafficking-victim defense would protect Oklahoma's human-trafficking victims and "[obligate] professionals to investigate cases and determine if a person being charged with a crime is in fact a victim," which would "[create] a positive ripple effect within the justice system."<sup>184</sup>

#### VIII. CONCLUSION

Oklahoma's affirmative defense provided to human-trafficking victims in § 748 should be interpreted by its plain meaning, because at any time when victims are being trafficked, victims "are not in control of their own destiny. They cease to be autonomous

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178. *Id.* at 4.

179. United Nations Office on Drugs and Crime, *Model Law against Trafficking in Persons*, 1, 34, U.N. Doc. V.09-81990 (E) (Aug. 5, 2009).

180. *Id.*

181. Piotrowicz, *supra* note 177, at 3.

182. Peters, *supra* note 49, at 32.

183. Jones, *supra* note 8, at 344.

184. Blizard, *supra* note 97, at 640.

individuals because they are effectively acting under the control of others.”<sup>185</sup> The strongest objection to the defense’s plain reading is that it lacks a crime limitation or a nexus requirement which connects the status of the human-trafficking victim to the crime they allegedly committed. However, this objection may be defeated by an amendment to the statute adding the “direct result” language, effectuating a connection between the status of the trafficking victim and the crime the victim allegedly committed. Such an amendment would then mirror Oklahoma’s recent minor trafficking-victim defense.

Oklahoma’s affirmative defense does more than stand out as the broadest and most progressive defense for human-trafficking victims: it has the ability to cause significant change to Oklahoma’s criminal justice system. Oklahoma has one of the highest rates of incarcerated women in the nation.<sup>186</sup> This affirmative defense provides an avenue where victims may break free of criminal charges and begin to receive the assistance they dearly need.<sup>187</sup> Once systematically implemented to assist human-trafficking victims, Oklahoma’s affirmative defense is poised to be the country’s boldest policy of placing human-trafficking victims at the center of anti-human-trafficking initiatives where law enforcement, judges, prosecutors, public defenders, politicians, policy analysts, and pedestrians shift their focus away from the criminal and towards the victim in need of assistance and healing.

—*Meghan Hilborn*

#### IX. APPENDIX A – A PLAIN READING OF STATE AFFIRMATIVE DEFENSES

<i>State</i>	<i>Crime Limitation</i>	<i>Contemporaneous Requirement</i>	<i>Nexus Requirement</i>	<i>Citation</i>
<b>AL</b>	Yes; “prostitution or sexually explicit performance”	N/A	Yes; direct result	ALA. CODE § 13A-6-159 (2010)
<b>AK</b>	No Defense			
<b>AZ</b>	Yes; prostitution	N/A	Yes; direct result	ARIZ. REV. STAT. ANN. § 13-3214 (2014)

185. Piotrowicz, *supra* note 177, at 1.

186. E. Ann Carson, U.S. Department of Justice, Prisoners in 2016, (Updated Aug. 7, 2018) [https://www.bjs.gov/content/pub/pdf/p16.pdf?ed2f26df2d9c416fbddddd2330a778c6=erbannumm-ewauebthe&utm\\_campaign=p16&utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.bjs.gov/content/pub/pdf/p16.pdf?ed2f26df2d9c416fbddddd2330a778c6=erbannumm-ewauebthe&utm_campaign=p16&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=).

187. OKLA. STAT. tit. 21, § 748.2 (including mental health services and medical care).

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<b>AR</b>	Yes; prostitution	N/A	Yes; direct result	ARK. CODE ANN. § 5-70-102 (West 2013)
<b>CA</b>	Yes; does not apply to serious or violent felonies	Yes; "at the time of the offense"	Yes; direct result	CAL. PENAL CODE § 236.23 (West 2017)
<b>CO</b>	Yes; human trafficking of a minor	Yes; "at the time of the offense"	Yes; "forced or coerced into engaging in the human trafficking of minors"	COLO. REV. STAT. ANN. § 18-3-504 (West 2017)
<b>CT</b>	Yes; prostitution	N/A	N/A	CONN. GEN. STAT. § 53a-82 (West 2016)
<b>DE</b>	Yes; prostitution or loitering	N/A	Yes; direct result	DEL. CODE ANN. TIT. 11, § 787 (West 2018)
<b>FL</b>	No Defense			
<b>GA</b>	Yes; sexual crime	Yes; "while the accused was being trafficked"	Yes; "acting under coercion or deception"	GA. CODE ANN. § 16-3-6 (West 2015)
<b>HI</b>	No Defense			
<b>ID</b>	No Defense			
<b>IL</b>	Yes; prostitution	N/A	Yes; direct result	720 ILL. COMP. STAT. ANN. 5 / 11-14 (West 2015)
<b>IN</b>	No Defense			

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<b>IA</b>	No; criminal violation	No; criminal violation related to the person's status as a human-trafficking victim	Yes; directly related	IOWA CODE ANN. § 710A.3 (West 2006)
<b>KS</b>	Yes; selling sexual relations	N/A	Yes; "because such defendant was subjected to human trafficking"	KAN. STAT. ANN. § 21-6419 (West 2011)
<b>KY</b>	Yes; prostitution offenses or nonviolent offenses	N/A	N/A	KY. REV. STAT. ANN. § 529.170 (West 2014)
<b>LA</b>	Yes; prostitution; prostitution by massage; crime against nature; crime against nature by solicitation	N/A	Yes; direct result	LA. STAT. ANN. § 14:46.2 (2017)
<b>ME</b>	Yes; engaging in prostitution	N/A	Yes; "because the person was compelled to do so"	ME. STAT. TIT. 17-A, § 853-A (2014)
<b>MD</b>	Yes; prostitution	N/A	Yes; direct result	MD. CODE ANN., CRIM. LAW § 11-306 (West 2015)
<b>MA</b>	Yes; common night walking, common streetwalking, and engaging in sexual conduct for a fee	Yes; "while a human trafficking victim"	Yes; "such person was under duress or coerced into committing the offenses"	MASS. GEN. LAWS ANN. CH. 265, § 57 (West 2012)
<b>MI</b>	No Defense			

<b>MN</b>	Yes; prostitution	N/A	Yes; direct result	MINN. STAT. ANN. § 609.325 (West 2015)
<b>MS</b>	Yes; human trafficking	Yes; “committed the offense under a reasonable apprehension”	Yes; “reasonable apprehension created by a person that, if the defendant did not commit the act, the person would inflict serious harm on the defendant, a member of the defendant’s family, or a close associate”	MISS. CODE ANN. § 97-3-54.1 (West 2013)
<b>MO</b>	Yes; prostitution	N/A	Yes; “because he or she was coerced to do so by the use of, or threatened us of, unlawful physical force”	MO. ANN. STAT. § 566.223 (West 2011)
<b>MT</b>	Yes; prostitution, promoting prostitution, or another nonviolent offense	N/A	Yes; direct result	MONT. CODE ANN. § 45-5-710 (West 2015)
<b>NE</b>	Yes; prostitution, or solicitation of prostitution	N/A	N/A	NEB. REV. STAT. ANN. § 28-801 (West 2013); NEB. REV. STAT. ANN. § 28-801.01 (West 2013)

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## HUMAN TRAFFICKING

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<b>NV</b>	No Defense			
<b>NH</b>	Yes; solicits, agrees to perform, or engages in sexual contact or sexual penetration in return for consideration	N/A	Yes; "because he or she was the victim of trafficking in persons"	N.H. REV. STAT. ANN. § 645:2 (West 2018)
<b>NJ</b>	Yes; human trafficking	Yes; "during the time of the alleged commission of the offense of human trafficking"	N/A	N.J. STAT. ANN. § 2C:13-8 (West 2013)
<b>NM</b>	No Defense			
<b>NY</b>	Yes; prostitution; prostitution in a school zone; loitering for the purpose of engaging in a prostitution offense	N/A	Yes; direct result	N.Y. PENAL LAW § 230.01 (McKinney 2016)
<b>NC</b>	No Defense			
<b>ND</b>	Yes; prostitution, felony or misdemeanor forgery, felony or misdemeanor theft, insufficient funds or credit offenses; felony drug distribution; manufacture or possession of a counterfeit substance	N/A	Yes; direct result	N.D. CENT. CODE ANN. § 12.1-41-13 (West 2015)



	offense; drug paraphernalia offenses			
<b>OH</b>	No Defense			
<b>OK</b>	No; “criminal offense”	Yes; “during the time of the alleged commission of the offense”	No	OKLA. STAT. ANN. TIT. 21, § 748 (West 2008)
<b>OR</b>	Yes; “services” or “activities performed by one person under the supervision or for the benefit of another person”	N/A	Yes; “that the person was caused to provide”	OR. REV. STAT. ANN. § 163.269 (West 2007)
<b>PA</b>	Yes; prostitution and related offenses	N/A	Yes; “because he was compelled to do so by coercion or the use of or threat to use unlawful force against his person or the person of another”	18 PA. STAT. AND CONS. STAT. ANN. § 3019 (West 2014)
<b>RI</b>	Yes; prostitution or solicitation to commit a sexual act	N/A	Yes; direct result	11 R.I. GEN. LAWS § 11-67.1-16 (West 2017)
<b>SC</b>	N/A	N/A	Yes; “as a direct result of, or incidental or related to, trafficking”	S.C. CODE ANN. § 16-3-2020 (2015)
<b>SD</b>	Yes; prostitution	N/A	N/A	S.D. CODIFIED LAWS § 22-

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				23-1.2 (2012)
<b>TN</b>	Yes; prostitution	Yes; "charged for conduct that occurred because the person was a victim"	Yes; "because the person was a victim"	TENN. CODE ANN. § 39-13-513 (West 2015)
<b>TX</b>	Yes; prostitution	N/A	Yes; "because the actor was the victim"	TEX. PENAL CODE ANN. § 43.02 (West 2017)
<b>UT</b>	No Defense			
<b>VT</b>	Yes; "any offense or is the subject of any delinquency petition other than a violation of lewdness and prostitution or obscenity"	Yes; "which arises out of the sex trafficking or benefits the sex trafficker"	Yes; "as a result of force, fraud, or coercion, by the sex trafficker"	VT. STAT. ANN. TIT. 13, § 2652 (West 2011)
<b>VA</b>	No Defense			
<b>WA</b>	Yes; prostitution	N/A	Yes; direct result	WASH. REV. CODE ANN. § 9A.88.040 (West 2012)
<b>WV</b>	No Defense			
<b>WI</b>	No; "any offense"	N/A	Yes; direct result	WIS. STAT. ANN. § 939.46 (West 2008)
<b>WY</b>	No; "commercial sex act or other criminal acts"	N/A	Yes; "as a direct result of, or incident to, being a victim"	WYO. STAT. ANN. § 6-2-708 (West 2013)