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## **Multistate Failure: Advocating for an Affirmative Defense for Sex-Trafficking Victims in Line with Feminist Legal Reasoning**

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*Sex trafficking is a national issue. The U.S. Department of State estimates there are 600,000 to 800,000 victims of sex trafficking in the United States each year. Victims are physically, emotionally, or sexually abused by their trafficker and experience indescribable trauma. This trauma has lasting biological and psychological consequences and often leads to criminal behavior. Because of the trauma and abuse, victims cannot be held morally culpable for the crimes they commit due to their victimization. However, most states punish rather than rehabilitate victims. One way to protect victims is through affirmative defense laws, yet forty-two states have improper*

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+ Thank you to my faculty advisor Professor Kimberly Holst for her support and guidance during the drafting and publication process. I am also grateful to Sean Krieg, Luke Sower, Turner Smith, and Dewey Warner for comments on earlier drafts. Thank you to Shared Hope International for opening my eyes up to progressive policymaking surrounding sex trafficking and to the Academy for Justice for their recognition and support of my work. Finally, thank you to the *Arizona State Law Journal* Staff Writers and Editors for getting my article ready for publication and to my family and friends for keeping me sane these past three years.

*affirmative defense laws. This Article proposes that those states adopt a unique affirmative defense for victims who commit a crime as a result of their sex trafficking victimization. For brevity, one of the forty-two states, Arizona, is used as a case study state to illustrate the importance of such a defense. The defense is not only victim-centered but also trauma-informed. It considers the needs and wants of the victim during the criminal justice process. It also recognizes that a victim's trauma can lead to criminal behavior, thus negating moral culpability. Finally, it is in line with feminist legal reasoning. The defense allows victims to present their story to the court, reclaim their autonomy, and integrates perspectives other than those in the dominant culture.*

### INTRODUCTION

Chrystul Kizer entered Gary, Indiana's junior high performing arts academy with a dream of becoming a violinist.<sup>1</sup> She practiced all hours of the day trying to master music by composers like Beethoven.<sup>2</sup> She was a "burgeoning artist" and defined herself by her music.<sup>3</sup> However, this dream began to unravel when her mom's boyfriend became violent.<sup>4</sup> His abuse became too much for the family and forced them to move out of town to Milwaukee.<sup>5</sup> Unable to find work or shelter, Chrystul's family stayed at a Salvation Army shelter for months.<sup>6</sup> In Milwaukee, Chrystul started dating Delane Nelson.<sup>7</sup> Unfortunately, Delane was abusive, and they spent many days fighting.<sup>8</sup> While Chrystul's mom eventually got a job at Denny's, Chrystul was still unable to pay for school supplies or food.<sup>9</sup> Her friend showed her a website where she could advertise her need for cash: Backpage.com, a classified advertising website similar to Craigslist.<sup>10</sup> Thirty-

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1. Jessica Contrera, *He Was Sexually Abusing Underage Girls. Then, Police Said, One of Them Killed Him.*, WASH. POST (Dec. 17, 2019), <https://www.washingtonpost.com/graphics/2019/local/child-sex-trafficking-murder> [https://perma.cc/SS35-DV73].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*; Christine Biederman, *Inside Backpage.com's Vicious Battle with the Feds*, WIRED (June 18, 2019, 6:00 AM), <https://www.wired.com/story/inside-backpage-vicious-battle-feds/>

three-year-old Randy Volar responded to her ad.<sup>11</sup> Volar gave her cash for those supplies and snacks, but also took her on expensive dates and let her drive his expensive cars.<sup>12</sup> Volar told Chrystul that she deserved better than Delane, that she deserved someone who would treat her like a princess, someone like him.<sup>13</sup> A year later, Chrystul was charged with his murder.<sup>14</sup> Volar was not offering these gifts freely.<sup>15</sup> In return for the gifts and the shower of compliments, Volar sexually abused Chrystul, drugged her, and forced her to have sex with other men in return for money.<sup>16</sup> Volar trafficked Chrystul.<sup>17</sup> After a year of abuse, Chrystul claims she was “tired of [him] touching her” and told him she was done meeting with him.<sup>18</sup> Chrystul claims Volar reminded her what she owed him and pinned her down.<sup>19</sup> Chrystul does not remember grabbing the gun, just the sound it made.<sup>20</sup>

The State of Wisconsin charged Chrystul with first-degree intentional homicide, which carries a mandatory life sentence.<sup>21</sup> Chrystul hopes to rely on the defense provided by Wisconsin Statute section 939.46(1m).<sup>22</sup> Under this statute, victims of trafficking have “an affirmative defense for any offense committed as a direct result of the violation of” human trafficking.<sup>23</sup> In July 2022, the Supreme Court of Wisconsin held that section 939.46(1m) was a complete defense to first-degree intentional homicide.<sup>24</sup> If Chrystul can show she was a victim of sex trafficking and that her actions against Volar were a direct result of her trafficking, she would be acquitted of the first degree homicide charge and avoid a life prison sentence.<sup>25</sup>

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[<https://perma.cc/2UT8-KW64>]. In 2011, lewd ads constituted fifteen percent of Backpage’s listings but ninety percent of its revenue. *Id.*

11. Contrera, *supra* note 1.

12. *Id.*

13. *See id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* A year before he died, Volar was the subject of a months-long investigation for sex crimes including child sexual assault. *Id.* Police discovered he had been abusing a dozen underage Black girls. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. State v. Kizer, 2022 WI 58, ¶1, 403 Wis. 2d 142, 976 N.W.2d 356.

23. WIS. STAT. § 939.46(1m) (2023).

24. Kizer, 976 N.W.2d 356, ¶2.

25. Elise Buchbinder, *Wisconsin Supreme Court Decision Allowing Chrystul Kizer To Use Trafficking Affirmative Defense Paves Way for Other Trafficking Survivors To Seek Justice*, END DOMESTIC ABUSE WIS. (July 8, 2022, 10:17 AM), <https://www.endabusewi.org/wisconsin->

However, not every victim has access to such a defense. Pieper Lewis stabbed and killed her trafficker, Zachary Brooks, and was sentenced by an Iowa court to five years of supervised probation and ordered to pay \$150,000 restitution to Brooks' family.<sup>26</sup> Iowa has an affirmative defense under Iowa Code section 710A.3 for victims of trafficking.<sup>27</sup> However, it is not available for defendants charged with first-degree murder.<sup>28</sup> Prosecutors argued that Pieper was not acting in self-defense or under duress because Brooks was asleep when she stabbed him.<sup>29</sup> Despite being trafficked, raped, and threatened, Pieper was asked by the judge to explain the "poor choices she made that led up to Brooks' stabbing."<sup>30</sup> Organizations working to end sex trafficking vehemently oppose this type of victim-blaming behavior because it is out of touch with victim-centered approaches.<sup>31</sup>

Affirmative defense laws in forty-two states and one territory do not adequately protect victims.<sup>32</sup> There are three categories of affirmative defense laws:<sup>33</sup> (1) States that do not have any kind of affirmative defense laws;<sup>34</sup> (2) States that have an affirmative defense only for prostitution and related misdemeanor offenses;<sup>35</sup> and (3) States that have an affirmative defense for

supreme-court-decision-allowing-chrystul-kizer-to-use-trafficking-affirmative-defense-paves-way-for-other-trafficking-survivors-to-seek-justice/ [https://perma.cc/6EPF-25GD].

26. Margery A. Beck, *Iowa Teen Who Killed Rapist Sentenced, Ordered To Pay \$150K*, ASSOC. PRESS (Sept. 14, 2022, 8:39 AM), <https://apnews.com/article/iowa-des-moines-human-trafficking-0b11cb8f4f0ff46d90ae17ece6bc7d15> [https://perma.cc/GBD9-X6DP].

27. See IOWA CODE § 710A.3 (2023).

28. See *id.*

29. See Beck, *supra* note 26.

30. *Id.*

31. See *Shared Hope International Releases Sex Trafficking Victim-Offender Intersectionality Report, Promoting Just Responses to Victims in the Criminal Justice System*, SHARED HOPE INT'L (Jan. 23, 2020), <https://sharedhope.org/2020/01/23/shared-hope-international-releases-sex-trafficking-victim-offender-intersectionality-report-promoting-just-responses-to-victims-in-the-criminal-justice-system/> [https://perma.cc/GP3L-PG7X].

32. See *infra* Section IV.A.

33. Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. C.R. & SOC. JUST. 177, 192–98 (2016).

34. Alaska, Florida, Hawaii, Indiana, Michigan, Mississippi, Nevada, New Mexico, Ohio, Utah, and the District of Columbia.

35. ALA. CODE § 13A-6-159 (2023); ARIZ. REV. STAT. ANN. § 13-3214(D) (2023); ARK. CODE ANN. § 5-2-210(b)–(c) (2023); CONN. GEN. STAT. § 53a-192a(b) (2023); DEL. CODE ANN. tit. 11, § 787(h) (2023); GA. CODE ANN. § 16-3-6(b)–(c) (2023); IDAHO CODE § 18-8606(2) (2023); 720 ILL. COMP. STAT. §§ 5/11-14(c-5), -14.1(c) (2023); IOWA CODE § 725.2 (2006); KAN. STAT. ANN. § 21-6419(c) (2023); LA. STAT. ANN. §§ 14:82(G), 14:46.2(F) (2023); ME. STAT. tit. 17-A, § 853(3) (2023); MD. CODE ANN., CRIM. LAW § 11-303(c)(1) (LexisNexis 2023); MASS. GEN. LAWS ch. 265, § 57 (2023); MINN. STAT. § 609.325(4) (2023); MISS. CODE ANN. § 97-3-54.1(5) (2023); MO. REV. STAT. § 566.223(2) (2023); MONT. CODE ANN. § 45-5-710 (2023); NEB.

a variety of offenses.<sup>36</sup> This Article will use a second-category state as a case study to show that it and all other second-category states, and by extension all first-category states, have inadequate affirmative defense laws.<sup>37</sup> The first two categories of affirmative defense laws not only ignore recent literature about the effects of trauma and abuse on sex trafficking victims but also disregard feminist legal frameworks.<sup>38</sup> Feminist legal frameworks are important when working with victims of sex trafficking because these frameworks prioritize the security and restoration of trafficking victims.<sup>39</sup> This Article suggests a sex-trafficking-specific affirmative defense that is trauma-informed, victim-centered, and supported by feminist theory. Specifically, it presents an affirmative defense statute for victims of sex trafficking for any offense committed as a direct result of their trafficking victimization.<sup>40</sup>

Part I explains the structure of sex trafficking, how it is defined nationally and how it is defined in the case-study state, Arizona. Part II explores the trauma of sex-trafficking, including the biological and psychological effects. It also introduces victim-offender intersectionality (“VOI”). Part III presents three theories of feminist legal reasoning that will be used to justify the affirmative defense. Part IV presents the current laws and defenses available to victims of sex trafficking in the case-study state, Arizona, almost all of which are inadequate. Part V introduces and justifies the proposed affirmative defense statute using a feminist legal framework and trauma-informed, victim-centered theories of justice. Part VI addresses potential issues with the affirmative defense, and Part VII concludes.

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REV. STAT. §§ 28-801(3), -801.01(3) (2023); N.H. REV. STAT. ANN. § 645:2(IV) (2023); N.J. STAT. ANN. §§ 2C:13-8(3)(c), :34-1(e) (West 2023); N.Y. PENAL LAW § 230.01 (McKinney 2023); N.C. GEN. STAT. § 14-43.16(a) (2023); N.D. CENT. CODE §§ 12.1-41-12(1)-(3), -13 (2023); OR. REV. STAT. § 167.007 (2023) (section 163.269 could be interpreted to encompass misdemeanor and non-violent felony acts, but it is not explicitly stated); 18 PA. CONS. STAT. § 3019 (2023) (vacatur law); 11 R.I. GEN. LAWS §§ 11-67.1-15(a)-(c), -16 (2023); S.D. CODIFIED LAWS § 22-23-1.2 (2023); TENN. CODE ANN. §§ 39-13-309(f), -513 (2023); TEX. PENAL CODE ANN. § 43.02(d) (West 2023); VA. CODE ANN. § 18.2-361.1 (2023); WASH. REV. CODE ANN. § 9a.88.040 (2012).

36. CAL. PENAL CODE § 236.23 (West 2023); COLO. REV. STAT. § 18-1-713(1) (2023); KY. REV. STAT. ANN. § 529.170 (West 2023); OKLA. STAT. tit. 21, § 748(D) (2023); S.C. CODE ANN. § 16-3-2020(F) (2023); VT. STAT. ANN. tit. 13, § 2652(c)(2) (2023); WIS. STAT. § 939.46 (2023); WYO. STAT. ANN. § 6-2-708 (2023).

37. *See infra* Section II.B.

38. *See infra* Section IV.A, Part III.

39. *See infra* Parts III, V.

40. This statute is similar, but not identical, to both Wisconsin’s and Oklahoma’s affirmative defense statutes. *See infra* Part IIV; OKLA. STAT. tit. 21, § 748(D) (2023); WIS. STAT. § 939.46 (2023).

## I. THE PROBLEM OF SEX TRAFFICKING

To better understand the context in which the affirmative defense will be used, this Part gives a general overview of sex trafficking, specifically the three parties at play in a sex trafficking scheme. Part I explores this scheme in the context of two jurisdictions: the United States and Arizona. This part also defines each jurisdiction's statutory definitions of trafficking.

A. *Sex Trafficking: An Overview*

Traditionally, there are three key players within a sex trafficking scheme: the traffickers, the victims, and the buyer. Traffickers are the organizers of the trafficking ring who supply victims to buyers.<sup>41</sup> Traffickers are all genders, races, and ethnicities.<sup>42</sup> They can be total strangers, family members, or business associates.<sup>43</sup> A “trafficker” does not have to be the ring leader of a trafficking ring: any person who aids in a sex trafficking scheme could be a trafficker.<sup>44</sup> Victims themselves can help advance the sex trafficking scheme through recruitment and management of the trafficker's other victims.<sup>45</sup> However, there is disagreement in the legal community on how to classify these victim-offenders.<sup>46</sup> Some caution “inappropriately penaliz[ing] [victims] for acts committed pursuant to their victimization”<sup>47</sup> while others argue that most victim-offenders are “no less autonomous and culpable” than their traffickers.<sup>48</sup> This Article relies primarily on the former argument in its analysis, advocating for a focus on those acts committed due to their victimization.

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41. Evan Binder, *Getting Out of Traffic: Applying White Collar Investigative Tactics To Increase Detection of Sex Trafficking Cases*, 112 J. CRIM. L. & CRIMINOLOGY 631, 638–39 (2022).

42. *Understanding Human Trafficking*, POLARIS, <https://polarisproject.org/understanding-human-trafficking/> [<https://perma.cc/Z54C-RQFZ>].

43. *Id.*

44. Binder, *supra* note 41, at 639.

45. SHARED HOPE INT'L & VILLANOVA L. INST. TO ADDRESS COM. SEXUAL EXPLOITATION, RESPONDING TO SEX TRAFFICKING: VICTIM-OFFENDER INTERSECTIONALITY 49 (2020) [hereinafter SHARED HOPE VOI], [https://sharedhope.org/wp-content/uploads/2020/01/SH\\_Responding-to-Sex-Trafficking-Victim-Offender-Intersectionality2020\\_FINAL.pdf](https://sharedhope.org/wp-content/uploads/2020/01/SH_Responding-to-Sex-Trafficking-Victim-Offender-Intersectionality2020_FINAL.pdf) [<https://perma.cc/MK9M-YD2L>].

46. Compare Jeffrey H. Zeeman & Karen Stauss, *Criminal Conduct of Victims: Policy Considerations*, 65 U.S. ATT'YS' BULL. (Exec. Off. of U.S. Att'ys, Columbia, S.C.), Nov. 2017, at 139, with Alexandra F. Levy, *Innocent Traffickers, Guilty Victims: The Case for Prosecuting So-Called “Bottom Girls” in the United States*, 6 ANTI-TRAFFICKING REV. 130 (2016).

47. Zeeman & Stauss, *supra* note 46, at 140–41.

48. Levy, *supra* note 46, at 133.

Victims are those individuals subjected to sex trafficking.<sup>49</sup> Similar to traffickers, victims are not limited to one gender or race.<sup>50</sup> However, some people are more at-risk than others, specifically those who have more unmet social needs.<sup>51</sup> For example, individuals living in poverty or struggling with homelessness, people with a history of trauma or addiction, members of the LGBTQIA+ community, and people of color are all more likely to be exploited and become a victim of trafficking.<sup>52</sup> Furthermore, women and girls represent sixty-five percent of all trafficking victims.<sup>53</sup> While this includes trafficking other than sex trafficking, ninety percent of those female victims were trafficked for sexual exploitation.<sup>54</sup>

Buyers provide the demand for sex trafficking schemes.<sup>55</sup> They are connected with victims via the Internet, escort services, or through direct contact with the trafficker.<sup>56</sup> While there is no one buyer profile, a majority of buyers are male.<sup>57</sup> Most men in the United States have never paid for sex,<sup>58</sup> but the few men that do pay for sex purchase so often that they account for a “disproportionately large share” of the sex trade.<sup>59</sup> These “high-frequency buyers” are more likely to have an annual salary of \$100,000 or more.<sup>60</sup> Buyers may or may not know that the individuals they engage with are victims of sex trafficking.<sup>61</sup> While there is very little research concerning the

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49. Binder, *supra* note 41, at 639.

50. See *Understanding Human Trafficking*, *supra* note 42.

51. *Id.* Unmet social needs include things like “food insecurity, housing instability, and financial stress.” Megan B. Cole & Kevin H. Nguyen, *Unmet Social Needs Among Low-Income Adults in the United States: Associations with Health Care Access and Quality*, 55 HEALTH SERVS. RSCH. 873, 874 (2020).

52. See *Understanding Human Trafficking*, *supra* note 42.

53. U.N. Women Executive Director Sima Bahous, *Statement: Crises Drive an Increase in Human Trafficking – Here’s How We Stop It*, UN WOMEN (July 29, 2022), <https://www.unwomen.org/en/news-stories/statement/2022/07/statement-crises-drive-an-increase-in-human-trafficking-heres-how-we-stop-it> [<https://perma.cc/FT6S-787T>].

54. *Id.*

55. Binder, *supra* note 41, at 640.

56. *Id.*

57. DEMAND ABOLITION, WHO BUYS SEX?: UNDERSTANDING AND DISRUPTING ILLICIT MARKET DEMAND 6 (2018), <https://www.demandabolition.org/wp-content/uploads/2019/07/Demand-Buyer-Report-July-2019.pdf> [<https://perma.cc/GJB2-CBHF>].

58. *Id.* at 4.

59. *Id.*

60. *Id.*

61. Binder, *supra* note 41, at 640. This Article recognizes that some buyers engage with willing sex workers of consenting age.

demand side of sex trafficking,<sup>62</sup> one thing is clear: without the demand for commercial sex, sex trafficking would be obsolete.<sup>63</sup>

All three actors are important, but this Article will mainly focus on the traffickers and victims. The relationship between traffickers and victims is what motivates and informs the suggested affirmative defense, and therefore, will be scrupulously analyzed.<sup>64</sup>

### B. Sex Trafficking in the United States

In 2021, the U.S. National Human Trafficking Hotline identified 7,499 situations of sex trafficking and 400 situations of sex and labor trafficking in the United States and its territories.<sup>65</sup> However, data and methodologies for estimating the prevalence of trafficking are underdeveloped.<sup>66</sup> Statistics on the incidence of sex trafficking are limited by the “inability of law enforcement officers to identify local trafficking offenses” and “inadequate reporting of those offenses that were identified.”<sup>67</sup> Officers are not able to identify victims because they lack training and victims are reluctant to testify against their traffickers.<sup>68</sup> The U.S. State Department has estimated that there are 600,000 to 800,000 victims of trafficking each year, and seventy percent of those individuals are victims of sex trafficking.<sup>69</sup> Trafficking generates

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62. DEMAND ABOLITION, *supra* note 57, at 3.

63. Swanee Hunt, *Deconstructing Demand: The Driving Force of Sex Trafficking*, 19 BROWN J. WORLD AFFS. 225, 227 (2013).

64. *See infra* Parts II, IIV.

65. It is important to note that this data is limited to *reported* instances of trafficking rather than *actual* instances of trafficking. *National Human Trafficking Hotline Data Report*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/sites/default/files/2023-01/National%20Report%20For%202021.docx%20%283%29.pdf> [https://perma.cc/TDQ9-PKKR].

66. HEATHER J. CLAWSON ET AL., OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 4, 5 (2009), <https://aspe.hhs.gov/reports/human-trafficking-within-united-states-review-literature-0> [https://perma.cc/RK7Z-LEPU].

67. *Gaps in Reporting Human Trafficking Incidents Result in Significant Undercounting*, NAT'L INST. OF JUST. (Aug. 4, 2020), <https://nij.ojp.gov/topics/articles/gaps-reporting-human-trafficking-incidents-result-significant-undercounting> [https://perma.cc/YXG2-XJX2].

68. *Id.*

69. CLAWSON ET AL., *supra* note 66, at 4. The top types of sex trafficking, by a large margin, were escort services, pornography, illicit massages, and residential-based commercial sex. *National Human Trafficking Hotline Data Report*, *supra* note 65.



large profits and, with low rates of arrest and prosecution of traffickers, trafficking in the United States and elsewhere is booming.<sup>70</sup>

According to the U.S. Department of State, sex trafficking involves a trafficker compelling another person through force, fraud, or coercion to engage in a commercial sex act or causing a child to engage in a commercial sex act.<sup>71</sup> Another way to understand sex trafficking is through the “acts,” “means,” and “purpose” framework.<sup>72</sup> All three elements must be met to bring a sex trafficking charge.<sup>73</sup> “Acts” is met when a trafficker “recruits, harbors, transports, provides, obtains, patronizes, or solicits another person to engage in commercial sex.”<sup>74</sup> “Means” is met where the trafficker uses force, fraud, or coercion, including threats, debt manipulation, or physical, psychological, or reputational harm.<sup>75</sup> Initial consent is not relevant if the trafficker later uses force, fraud, or coercion to cause the victim to continue such acts.<sup>76</sup> “Means” is not required for child sex trafficking as a child can never legally consent to commercial sex.<sup>77</sup> “Purpose” is met where there is a commercial sex act.<sup>78</sup> A commercial sex act can include “prostitution, pornography, or sexual performance done in exchange for any item of value.”<sup>79</sup> The act can occur in any location, including on the Internet.<sup>80</sup>

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70. See INST. FOR WOMEN’S POL’Y RSCH., THE ECONOMIC DRIVERS AND CONSEQUENCES OF SEX TRAFFICKING IN THE UNITED STATES 1 (2017), [https://iwpr.org/wp-content/uploads/2020/09/B369\\_Economic-Impacts-of-Sex-Trafficking-BP-3.pdf](https://iwpr.org/wp-content/uploads/2020/09/B369_Economic-Impacts-of-Sex-Trafficking-BP-3.pdf) [<https://perma.cc/B95Y-2TUN>].

71. *About Human Trafficking*, U.S. DEP’T OF STATE, <https://www.state.gov/humantrafficking-about-human-trafficking> [<https://perma.cc/R4MT-8ZLL>]. This language is also used in the Trafficking Victims Protection Act (“TVPA”). See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 7101, 114 Stat. 1464, 1466.

72. *About Human Trafficking*, *supra* note 71.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *What Is Sex Trafficking?*, SHARED HOPE INT’L., <https://sharedhope.org/the-problem/what-is-sex-trafficking/> [<https://perma.cc/KQ92-Z5UE>].

80. *Traffickers Abusing Online Technology*, UN Crime Prevention Agency Warns, UN NEWS (Oct. 30, 2021), <https://news.un.org/en/story/2021/10/1104392> [<https://perma.cc/WPJ8-8DMU>].

### C. Sex Trafficking in Arizona

In 2021, Arizona ranked thirteenth in the country for reported instances of trafficking.<sup>81</sup> Despite the prevalence of trafficking, Arizona received an “F” from Shared Hope International’s 2022 Report Cards on Child & Youth Sex Trafficking.<sup>82</sup> Shared Hope provides an “in-depth analysis of current laws” for each state based on six core issues: (1) Criminal Provisions; (2) Identification of and Response to Victims; (3) Continuum of Care; (4) Access to Justice for Trafficking Survivors; (5) Tools for a Victim-Centered Criminal Justice Response; and (6) Prevention and Training.<sup>83</sup> Arizona’s laws were particularly lacking for the issues of “Identification of and Response to Victims” and “Tools for a Victim-Centered Criminal Justice Response,” both intimately connected with this Article’s suggested affirmative defense statute.<sup>84</sup>

In Arizona,

it is unlawful for a person to knowingly traffic another person who is eighteen years of age or older with either of the following: (1) The intent to cause the other person to engage in any prostitution or sexually explicit performance by deception, force or coercion and/or (2) the knowledge that the other person will engage in any prostitution or sexually explicit performance by deception, coercion or force.<sup>85</sup>

Any person under the age of eighteen who is caused to engage in prostitution is a sex trafficking victim.<sup>86</sup> While deception is not defined in the Arizona Revised Statutes (“A.R.S.”), § 13-1307 defines “coercion” as:

- (a) Abusing or threatening to abuse the law or legal system.
- (b) Knowingly destroying, concealing, removing, confiscating, possessing or withholding another person’s actual or purported

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81. NAT’L HUMAN TRAFFICKING HOTLINE, *supra* note 65, at 2–4.

82. SHARED HOPE INT’L INST. FOR JUST. & ADVOC., ARIZONA 2022 REPORT CARD ON CHILD & YOUTH SEX TRAFFICKING (2022) [hereinafter ARIZONA REPORT CARD], <https://reportcards.sharedhope.org/wp-content/uploads/2022/10/2022-State-Report-Card-AZ.pdf> [<https://perma.cc/333M-9G6T>]. Shared Hope International is a non-profit organization whose main mission is to prevent sex trafficking and bring justice to those victimized through sex trafficking. *See* SHARED HOPE INT’L, <https://sharedhope.org/> [<https://perma.cc/CRC3-FBAS>].

83. ARIZONA REPORT CARD, *supra* note 82.

84. *Id.*

85. ARIZ. REV. STAT. ANN. § 13-1307(A) (2024).

86. § 13-1307(A); § 13-3212 (explicitly criminalizing child sex trafficking).

passport or other immigration document, government issued identification document, government record or personal property.

(c) Extortion.

(d) Causing or threatening to cause financial harm to any person.

(e) Facilitating or controlling another person's access to a controlled substance.<sup>87</sup>

“Force” is defined as “causing or threatening to cause serious harm to another person or physically restraining or threatening to physically restrain another person.”<sup>88</sup>

## II. THE TRAUMA OF SEX TRAFFICKING VICTIMS

This Part discusses the physical and mental side effects of being trafficked. These are key to understanding the justifications behind an affirmative defense and a victim's lack of moral culpability. Furthermore, this Part explores victim-offender intersectionality, the phenomenon where victims are also criminal offenders.

### A. *The Victim's Experience*

Victims are rarely physically confined.<sup>89</sup> Instead, traffickers use physical, sexual, and psychological abuse to subjugate their victims.<sup>90</sup> Comparable to cult leaders and dictators, traffickers use coercion and manipulation to control victims.<sup>91</sup> Coercion tactics were first described by Albert Biderman in 1957 in the context of confinement.<sup>92</sup> He outlined eight methods used to establish compliance: isolation, monopolization of perception, induced debility or exhaustion, threats, occasional indulgences, demonstration of omnipotence, degradation, and enforcing trivial demands.<sup>93</sup>

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87. § 13-1307(C)(1).

88. § 13-1307(C)(2).

89. Susie B. Baldwin et al., *Psychological Coercion in Human Trafficking: An Application of Biderman's Framework*, 25 *QUALITATIVE HEALTH RSCH.* 1171, 1171 (2014).

90. *Id.*

91. HEATHER EVANS, UNDERSTANDING COMPLEX TRAUMA AND POST-TRAUMATIC GROWTH IN SURVIVORS OF SEX TRAFFICKING: FOREGROUNDING WOMEN'S VOICES FOR EFFECTIVE CARE AND PREVENTION 39 (2022).

92. Baldwin et al., *supra* note 89, at 1171.

93. *Id.*

Traffickers often begin with gifts and promises of a better life.<sup>94</sup> Ironically, many victims describe an initial sense of power and control at the beginning of their trafficking.<sup>95</sup> They claim that they had some manner of choice and were free to leave at any time.<sup>96</sup> The trafficker oftentimes fakes a romantic relationship with the victim creating a “trauma bond” where victims have intense feelings of attachment to their trafficker.<sup>97</sup> The trauma bond is strengthened by alternating moments of violence and moments of kindness.<sup>98</sup> Victims fear repercussions while simultaneously yearning for emotional support or a material reward from their trafficker.<sup>99</sup>

A study in Los Angeles found that trafficking victims and survivors “universally experienced” the conditions described in Biderman’s framework.<sup>100</sup> The following is a summary of each coercion tactic in the sex trafficking context.

**Isolation:** Traffickers keep victims away from any form of social support, “exacerbat[ing] the power imbalance between the [victims] and their traffickers, making victims more dependent.”<sup>101</sup>

**Monopolization of Perception:** The victims’ understanding of the world is completely determined by their traffickers.<sup>102</sup> Traffickers also monopolize the victims’ attention by constantly calling and punishing those who do not answer the phone.<sup>103</sup> Victims feel continuously watched by their traffickers, creating intense anxiety about leaving the house and a “sense of futility” about exploring the outside world.<sup>104</sup>

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94. OFF. OF ARIZ. ATT’Y GEN., HUMAN TRAFFICKING: ARIZONA’S NOT BUYING IT. 20 [https://www.azag.gov/sites/default/files/publications/2018-06/Human\\_Trafficking\\_Not\\_For\\_Sale.pdf](https://www.azag.gov/sites/default/files/publications/2018-06/Human_Trafficking_Not_For_Sale.pdf) [<https://perma.cc/FE27-3UB8>].

95. EVANS, *supra* note 91, at 45. For those that do not report this initial “perception of power,” their trafficking victimization most likely started in childhood. *Id.*

96. *Id.*

97. *Id.* at 39.

98. Kyla Baird & Jennifer Connolly, *Recruitment and Entrapment Pathways of Minors into Sex Trafficking in Canada and the United States: A Systematic Review*, 24 TRAUMA, VIOLENCE, & ABUSE 189, 196 (2021).

99. Baldwin et al., *supra* note 89, at 1176.

100. *Id.* at 1172.

101. *Id.* at 1173. A survivor said she could not speak, look at, or be near any man that was not buying sex from her. EVANS, *supra* note 91, at 46.

102. Baldwin et al., *supra* note 89, at 1173–74. In another systematic review of recruitment and entrapment pathways of minors in sex trafficking, researchers in Canada and the U.S. found that “[t]raffickers will disorient youth by moving them around from place to place, assuming control of their cell phones, [and] limiting access to the internet.” Baird & Connolly, *supra* note 98, at 196.

103. Baldwin et al., *supra* note 89, at 1174.

104. *Id.*

**Induced Debility and Exhaustion:** Traffickers deprive their victims of basic human needs like food, medicine, and sleep.<sup>105</sup> Victims often report sneaking food or eating food meant for the pets of the house.<sup>106</sup> In other instances, victims are forced to use alcohol or illicit drugs or are deprived of real medical attention when they become sick.<sup>107</sup>

**Threats:** Traffickers often threaten the victims and their family members with assault, death, deportation, or arrest.<sup>108</sup>

**Occasional Indulgences:** These include things as little as basic medical needs<sup>109</sup> to ostentatious gifts of cash, clothes, food, or drugs.<sup>110</sup> This tactic is intimately tied to the trauma bond.<sup>111</sup>

**Demonstration of Omnipotence:** Traffickers often claim to be well-connected to law enforcement or immigration officials so that “resistance seem[s] futile.”<sup>112</sup> Some traffickers even claim they are connected to a deity.<sup>113</sup>

**Degradation:** Victims are “insulted and humiliated, denied privacy and dignity,” and treated overall like animals.<sup>114</sup> Degradation also includes physical and sexual abuse.<sup>115</sup>

**Enforcing Trivial Demands:** Enforcing trivial demands develops “habits of compliance” among the victims and “instill[s] a need for perfection.”<sup>116</sup> This is particularly debilitating because small tasks are already difficult without sleep, food, or any emotional or physical support.<sup>117</sup>

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105. *Id.*

106. *Id.*

107. *Id.* at 1175. Some victims’ previous drug use was exploited by their trafficker while others were first introduced to drugs by their trafficker. EVANS, *supra* note 91, at 47. Both groups relied on their trafficker because they often could not function without the drug. *Id.*

108. Baldwin et al., *supra* note 89, at 1175. These threats could also include threats of outing the victim’s illicit activities to their family. Baird & Connolly, *supra* note 98, at 196. For example, a trafficker could “stage a gang rape, photograph the event, and threaten to expose the pictures” if the victim does not begin to sell sex for the trafficker. *Id.*

109. Baldwin et al., *supra* note 89, at 1176.

110. Neha A. Deshpande & Nawal M. Nour, *Sex Trafficking of Women and Girls*, 6 REVS. OBSTETRICS & GYNECOLOGY e22, e24 (2013).

111. See Baird & Connolly, *supra* note 98.

112. Baldwin et al., *supra* note 89, at 1176.

113. *Id.* In a national cross-sectional sample of sex traffickers in the U.S., physical violence was used in 32.9% of cases while sexual violence was used in 36.3% of cases. Dominique Roe-Sepowitz, *A Six-Year Analysis of Sex Traffickers of Minors: Exploring Characteristics and Sex Trafficking Patterns*, 29 J. HUM. BEHAV. SOC. ENV’T 608, 617 (2019).

114. Baldwin et al., *supra* note 89, at 1176.

115. *Id.*

116. *Id.* at 1177.

117. *Id.*

The Biderman framework helps explain how coercion “perpetuates the submission” of victims in absence of true physical confinement.<sup>118</sup> It provides a nuanced answer to a question so often asked of victims: “Why didn’t you just escape?”<sup>119</sup> This intermingling of fear, trust, and authority creates an environment where victims see no way out.<sup>120</sup> Some victims do not even realize they have lost their autonomy until after their victimization ends.<sup>121</sup> Victims who try to set boundaries or to defend themselves are seriously disciplined.<sup>122</sup>

### *B. The Biological and Psychological Effects of Trauma*

A victim’s experience is full of “adverse conditions” that can harm their physical and mental health.<sup>123</sup> Victims are exposed to sexually transmitted infections, sustain physical injuries, and experience malnutrition from food deprivation.<sup>124</sup> Unwanted pregnancy and menstrual complications are issues as well.<sup>125</sup> Victims may also experience long-term effects from psychological trauma.<sup>126</sup> According to the American Psychological Association, trauma is “an emotional response to a terrible event.”<sup>127</sup> However, trauma does not have to be one singular event but rather can be “chronic events.”<sup>128</sup> The trauma either overwhelms the victim’s ability to integrate emotions and/or the victim experiences a threat to “life, bodily integrity, or sanity.”<sup>129</sup>

Stress from trauma disrupts the body’s ability to maintain biological stability, also known as homeostasis.<sup>130</sup> Disrupting homeostasis significantly affects the brain, the sympathetic nervous system, and the immune, cardiac,

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118. *Id.* at 1178.

119. *See id.*

120. EVANS, *supra* note 91, at 46, 49.

121. *Id.* at 54.

122. A victim details that after she stood up for herself and other girls, her trafficker slammed her head into a wall, causing her to lose a tooth and rip open her lip. *Id.* at 50.

123. Deshpande & Nour, *supra* note 110, at e25. Health providers can be essential in intervention. *Id.*

124. *Id.*

125. *Id.*

126. *See* EVANS, *supra* note 91, at 62.

127. Trauma, AM. PSYCH. ASS’N, <https://www.apa.org/topics/trauma> [https://perma.cc/3GYL-RY7U].

128. SHARED HOPE VOI, *supra* note 45, at 8.

129. *Id.*

130. Eldra P. Solomon & Kathleen M. Heide, *The Biology of Trauma: Implications for Treatment*, 20 J. INTERPERSONAL VIOLENCE 51, 52 (2005); George E. Billman, *Homeostasis: The Underappreciated and Far Too Often Ignored Central Organizing Principle of Physiology*, 11 FRONTIERS PHYSIOLOGY 1, 2 (2020).

and endocrine systems.<sup>131</sup> Repeated heightened stress responses also increase the output of epinephrine and norepinephrine, the hormones that control a person's fight-or-flight response.<sup>132</sup> Abnormal concentrations of these hormones contribute to hyperarousal which can include an exaggerated startle response or hypervigilance.<sup>133</sup> Hyperarousal makes it incredibly difficult to respond appropriately to emotional signals.<sup>134</sup> Remarkably, studies have shown that individuals who experience trauma have smaller amygdalae which can result in hypersensitivity and affect judgement and impulse control.<sup>135</sup>

Psychologically, victims often experience mood and anxiety disorders and struggle with substance abuse and addiction.<sup>136</sup> Most victims express feelings of long-lasting and debilitating fear that's reinforced by past and future threats from their trafficker.<sup>137</sup> Overall, victims of sex trafficking may be "restless, angry, reactive, or defensive," because they "live on a level of survival."<sup>138</sup> Their feelings of shame, humiliation, distrust, self-hatred, suicidal ideation, and confusion warp them into a completely different person; they lose their identity.<sup>139</sup> Given all of these psychological issues, it is common to see victims in their early thirties who are "psychologically and emotionally disabled."<sup>140</sup>

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131. Solomon & Heide, *supra* note 130, at 52–53 (discussing the effects on the brain and the nervous, immune, and endocrine systems); Takuya Kishi, *Heart Failure as a Disruption of Dynamic Circulatory Homeostasis Mediated by the Brain*, 57 INT'L HEART J. 145, 145 (2016) (discussing the effects on the brain, the nervous system, and the cardiac system).

132. Solomon & Heide, *supra* note 130, at 52–53. The fight-or-flight response enables people to react quickly in dangerous situations by helping them either fight the threat or flee to safety. *Understanding the Stress Response*, HARVARD HEALTH PUBL'G (July 6, 2020), <https://www.health.harvard.edu/staying-healthy/understanding-the-stress-response> [<https://perma.cc/BL72-PLX7>]. If neither response is available, the person freezes. Solomon & Heide, *supra* note 130, at 53.

133. Solomon & Heide, *supra* note 130, at 53.

134. *Id.*

135. See RONALD T. POTTER-EFRON, HANDBOOK OF ANGER MANAGEMENT: INDIVIDUAL, COUPLE, FAMILY, AND GROUP APPROACHES 229 (2005); Rajendra A. Morey et al., *Amygdala Volume Changes with Posttraumatic Stress Disorder in Large Case-Controlled Veteran Group*, 69 ARCHIVES GEN. PSYCHIATRY 1169, 1176 (2012).

136. Deshpande & Nour, *supra* note 110, at e25.

137. See EVANS, *supra* note 91, at 64–65.

138. *Id.* at 63.

139. Deshpande & Nour, *supra* note 110, at e25; EVANS, *supra* note 91, at 70.

140. Deshpande & Nour, *supra* note 110, at e25.

C. *A Potential Effect of Trauma: Victim-Offender Intersectionality (“VOI”)*

The physical and mental effects of trauma can lead a victim to offend.<sup>141</sup> Usually, when authorities refer to a sex trafficking victim-offender, they mean a sex trafficking victim who commits the criminal act of sex trafficking.<sup>142</sup> Social scientists believe the “victim-offender overlap” can be explained by two criminological theories: the “cycle of violence theory” and the “routine activities theory.”<sup>143</sup> Both theories concern social learning but have similarities with how biological and psychological trauma are described in the trafficking context.<sup>144</sup>

The cycle of violence theory holds that “violence breeds violence.”<sup>145</sup> While the cycle of violence theory normally applies to familial relationships, it can be applied to victim-trafficker relationships as well.<sup>146</sup> The trafficker abuses the victim and the victim eventually abuses other victims.<sup>147</sup> Routine activities theory “focuses on the circumstances in which crime is committed rather than the characteristics of those who commit it.”<sup>148</sup> Based on this theory, the circumstances of a victim-offender are distinguishable from those of a trafficker.<sup>149</sup> A trafficker “never loses autonomy and is responsible for creating an environment of control and coercion.”<sup>150</sup> A victim-offender is *subject* to that physical and psychological abuse and coercion, and that subjugation is *why* they offend.<sup>151</sup>

Studies on Intimate Partner Violence (“IPV”) are informative given the similar relationship dynamics.<sup>152</sup> Both involve violence between two individuals who are in a relationship and who interact with each other on a routine basis.<sup>153</sup> Violence itself can increase future likelihood of violence in

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141. See SHARED HOPE VOI, *supra* note 45, at 51.

142. *Id.* at 48.

143. *Id.* at 50.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Mark Farmer et al., *Sex Offending and Situational Motivation: Findings from a Qualitative Analysis of Desistance from Sexual Offending*, 60 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1756, 1758 (2016) (citing R. Wortley & S. W. Smallbone, *Applying Situational Principles to Sexual Offenses Against Children*, in SITUATIONAL PREVENTION OF CHILD SEXUAL ABUSE 7 (R. K. Wortley & S. W. Smallbone eds., 2006)).

149. SHARED HOPE VOI, *supra* note 45, at 50.

150. *Id.*

151. *Id.* at 50–51.

152. *Id.* at 51.

153. *Id.*



both relationships.<sup>154</sup> In other words, “[t]he intimate crime event . . . has the potential to create motivation and opportunity for subsequent violence, either during the same incident or in future fights.”<sup>155</sup> Other similarities include “substance abuse, negative temperament . . . and feeling isolated.”<sup>156</sup> In IPV, the violence is strictly between partners.<sup>157</sup> However, a sex trafficking victim-offender can commit offenses against other victims.<sup>158</sup> These “unconventional reactions” to their victimization are best explained by the trauma bond.<sup>159</sup> Shared Hope provides a detailed description of the trauma bond:

Upon promoting a victim to the top of the hierarchy, a trafficker may promise the victim, among other things, that they will no longer have to engage in commercial sex. In return, the victim must supervise the others and commit acts that violate the sex trafficking law. Accordingly, the sex trafficking victim-offender often does not commit such acts because they genuinely want to hurt those individuals; instead, the sex trafficking victim-offender may perceive no choice but to engage in such behavior. In other words, the acts committed against other victims may be done out of self-defense to avoid abuse by the trafficker or to escape their own sexual exploitation.<sup>160</sup>

While most of the discussions surrounding victim-offender intersectionality (“VOI”) deal only with the crime of sex trafficking other victims, the theories behind VOI support the argument that victims are not morally culpable for their actions post-victimization. Therefore, an affirmative defense should protect victim-offenders from criminal punishment.

### III. FEMINIST LEGAL FRAMEWORK

This Part introduces feminist legal theory, a framework that often incorporates social science and lived experiences, like the trauma of a sex

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154. *Id.* Perhaps explained by the cycle of violence theory.

155. *Id.* (citing Marie Skubak Tillyer & Emily M. Wright, *Intimate Partner Violence and the Victim-Offender Overlap*, 51 J. RSCH. CRIME & DELINQ. 29, 36 (2014)).

156. *Id.* (citing Tillyer & Wright, *supra* note 155, at 45)

157. *Id.*

158. *Id.*

159. *Id.* (citing Marinella Marmo & Nerida Chazal, *The Trafficked Woman: Ideal or Blameworthy Victim?*, in 7 ADVANCES SOCIO. RSCH. 125, 133 (Jaworski, J. ed., 2010) (citations omitted)); *see supra* Section II.A.

160. SHARED HOPE VOI, *supra* note 45, at 51.

trafficking victim, in its legal decisions.<sup>161</sup> *Feminist Judgments: Rewritten Opinions of the United States* is a project that brought together various scholars to rewrite select U.S. Supreme Court opinions using feminist methods and perspectives.<sup>162</sup> In the introduction of the project, the authors lay out the main feminist methods and theories used by the scholars in their rewritten opinions.<sup>163</sup> There are three overarching theories that are relevant to this Article: feminist practical reasoning, narrative feminist method, and agency and autonomy.

### A. *Feminist Practical Reasoning*

Feminist practical reasoning recognizes that problems and their solutions depend on the totality of the circumstances and each specific factual context.<sup>164</sup> It's meant to make legal decision-making "more sensitive to the features of a case not already reflected in legal doctrine."<sup>165</sup> Feminist practical reasoning is a twist on the Aristotelian model of practical reasoning.<sup>166</sup> Aristotelian practical reasoning calls for an integration of "perspectives, contradictions, and inconsistencies" and does not advocate for bright line rules.<sup>167</sup> In other words, a judge using practical reasoning would not only apply facts to the law, but also would integrate the new facts into the law.<sup>168</sup> However, practical reasoning differs from feminist practical reasoning in that it "takes for granted the legitimacy of the community whose norms it expresses," namely male dominated communities.<sup>169</sup> Feminist practical reasoning believes there is not a single community to look to for reason.<sup>170</sup> Looking to one community for reasoning promotes existing power structures.<sup>171</sup> Reinforcing existing power structures "protects the status quo over the interests of those seeking recognition of new rights" and ensures

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161. See Kathryn M. Stanchi et al., *Introduction* to FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 15–16 (Kathryn M. Stanchi et al. eds., 2016).

162. *Id.* at 1. The editors did not define feminism for their contributors but did include a summary in the introduction of each of the methods and theories used by the authors. *Id.* at 4, 15–22.

163. *Id.* at 15–22.

164. *Id.* at 15–16.

165. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836–37 (1990).

166. *Id.* at 850.

167. *Id.* at 851.

168. *Id.*

169. *Id.* at 855.

170. *Id.*

171. *Id.*

issues that sprout from power inequalities remain.<sup>172</sup> No one community can speak for all others; therefore, feminist reasoners tend to look for perspectives “not represented in the dominant culture from which reason should proceed.”<sup>173</sup>

An example of feminist practical reasoning would be considering that a marital rape exemption completely subordinates the interest of the woman and strengthens “gender-based structures of power.”<sup>174</sup> It would also look at the role societal pressure plays in conditioning men to expect or demand sex, helping to identify the “real problems society has to face in rape reform.”<sup>175</sup> Feminist practical reasoning expands the lens of what is “legally relevant” to include those perspectives that are missing from traditional legal decision-making.<sup>176</sup>

### B. Narrative Feminist Method

Narrative feminist method is related to feminist practical reasoning in that it tries to uncover and oppose the “bias and power dynamics inherent in the law’s purported neutrality” by including facts that are important to those “outside the mainstream account in law.”<sup>177</sup> However, “while feminist practical reasoning may address both the individual story of the case and the broader context in which the law is applied, narrative feminist method focuses on presenting the facts of the particular case as a story.”<sup>178</sup> It fully fleshes out all of the details that are usually minimized or simply avoided, like sexuality, racism, or gruesome and violent details.<sup>179</sup> When the law refuses to acknowledge these facts, it makes them invisible and allows them to “proliferate.”<sup>180</sup> The feminist narrative method attempts to humanize the law by focusing on the real people in the case rather than on “abstract rules and ideals.”<sup>181</sup>

In the marital rape exemption example, a writer using the narrative feminist method would write from the perspective of the wife, giving intimate details of the rape. While it could appeal to emotion, and often does, emotion

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172. *Id.* at 845, 855.

173. *Id.* at 855.

174. *Id.* at 861.

175. *Id.* at 861–62.

176. *See id.* at 863.

177. Stanchi et al., *supra* note 161, at 16.

178. *Id.* at 15.

179. *Id.* at 16.

180. *Id.*

181. *Id.*

is not a weakness in the narrative feminist method.<sup>182</sup> The point is to show how heinous the acts occurring to the wife are and how unethical it would be to provide an exemption for any partner to rape their significant other.<sup>183</sup>

### C. Feminist Autonomy

Feminist autonomy and agency involves individuals striving against “patriarchal constraints to express and refashion their deepest commitments and senses of self.”<sup>184</sup> Feminists seek to clarify responsibility by clearly identifying “perpetrators of violence, abuse, exploitation, and harassment” and give voices to those “who have been wrongly blamed for the harms inflicted on them.”<sup>185</sup> Victims are encouraged to take responsibility for their feelings, beliefs, actions, perceptions, and desires and by doing so, take responsibility “for their own interpretations of their experiences and activities.”<sup>186</sup> In the context of the marital rape exemption, individuals who have been abused need the ability to choose what they will do post-abuse, whether that be pursuing criminal charges or leaving the abuser—they should never be forced to endure a mandatory intervention.<sup>187</sup>

## IV. CURRENT AFFIRMATIVE DEFENSE LAWS

This Part introduces the three categories of affirmative defense laws available to victims of sex trafficking in the United States. Current criminal protections for victims of sex trafficking in the case study state, Arizona, are abysmal.<sup>188</sup>

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182. See Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 428–29 (2002).

183. See *id.* at 432–33.

184. Marilyn Friedman, *Autonomy, Social Disruption, and Women*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 35, 37 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

185. Paul Benson, *Feeling Crazy: Self-Worth and the Social Character of Responsibility*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 72, 72–73 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

186. *Id.* at 73.

187. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 29–32 (2009).

188. See *supra* Section I.C.

*A. Three Categories of State Affirmative Defense Laws*

There are three categories of affirmative defense laws available to victims of trafficking:<sup>189</sup> (1) States that do not have any kind of affirmative defense laws;<sup>190</sup> (2) States that have an affirmative defense only for prostitution and related misdemeanor offenses;<sup>191</sup> and (3) States that have an affirmative defense for a variety of offenses.<sup>192</sup> A majority of states are in the second category, including Arizona.<sup>193</sup> States in the second category usually have causation requirements that limit the defense for crimes committed as a “direct result” of being trafficked.<sup>194</sup> For example, sex trafficking victims who flee from their trafficker, move to a completely different city, and assault a random individual, would not be entitled to relief.<sup>195</sup> There are only eight states—California, Colorado, Oklahoma, Kentucky, South Carolina, Vermont, Wisconsin, and Wyoming—in the third category, offering an affirmative defense for a variety of offenses.<sup>196</sup> California, South Carolina,

189. Zornosa, *supra* note 33, at 192–98.

190. Alaska, Florida, Hawaii, Indiana, Michigan, Mississippi, Nevada, New Mexico, Ohio, Utah, and the District of Columbia.

191. ALA. CODE § 13A-6-159 (2023); ARIZ. REV. STAT. ANN. § 13-3214(D) (2023); ARK. CODE ANN. § 5-2-210(b) to -210(c) (2023); CONN. GEN. STAT. § 53a-192a(b) (2023); DEL. CODE ANN. tit. 11, § 787(h) (2023); GA. CODE ANN. § 16-3-6(b) to -6(c) (2023); IDAHO CODE § 18-8606(2) (2023); 720 ILL. COMP. STAT. §§ 5/11-14(c-5), -14.1(c) (2023); IOWA CODE § 725.2 (2006); KAN. STAT. ANN. § 21-6419(c) (2023); LA. STAT. ANN. §§ 14:82(G), 14:46.2(F) (2023); ME. STAT. tit. 17-A, § 853(3) (2023); MD. CODE ANN., CRIM. LAW § 11-303(c)(1) (LexisNexis 2023); MASS. GEN. LAWS ch. 265, § 57 (2023); MINN. STAT. § 609.325(4) (2023); MISS. CODE ANN. § 97-3-54.1(5) (2023); MO. REV. STAT. § 566.223(2) (2023); MONT. CODE ANN. § 45-5-710 (2023); NEB. REV. STAT. §§ 28-801(3), -801.01(3) (2023); N.H. REV. STAT. ANN. § 645:2(IV) (2023); N.J. STAT. ANN. §§ 2C:13-8(3)(c), :34-1(e) (West 2023); N.Y. PENAL LAW § 230.01 (McKinney 2023); N.C. GEN. STAT. § 14-43.16(a) (2023); N.D. CENT. CODE §§ 12.1-41-12(1) to -12(3), -13 (2023); OR. REV. STAT. § 167.007 (2023) (section 163.269 could be interpreted to encompass misdemeanor and non-violent felony acts but it is not explicitly stated); 18 PA. CONS. STAT. § 3019 (2023) (vacatur law); 11 R.I. GEN. LAWS §§ 11-67.1-15(a) to -15(c), -16 (2023); S.D. CODIFIED LAWS § 22-23-1.2 (2023); TENN. CODE ANN. §§ 39-13-309(f), -513 (2023); TEX. PENAL CODE ANN. § 43.02(d) (West 2023); VA. CODE ANN. § 18.2-361.1 (2023); WASH. REV. CODE ANN. § 9a.88.040 (2012).

192. CAL. PENAL CODE § 236.23 (West 2023); COLO. REV. STAT. § 18-1-713(1) (2023); KY. REV. STAT. ANN. § 529.170 (West 2023); OKLA. STAT. tit. 21, § 748(D) (2023); S.C. CODE ANN. § 16-3-2020(F) (2023); VT. STAT. ANN. tit. 13, § 2652(c)(2) (2023); WIS. STAT. § 939.46 (2023); WYO. STAT. ANN. § 6-2-708 (2023).

193. Zornosa, *supra* note 33, at 195.

194. *Id.* at 196.

195. *Id.*

196. CAL. PENAL CODE § 236.23 (West 2023); COLO. REV. STAT. § 18-1-713(1) (2023); KY. REV. STAT. ANN. § 529.170 (West 2023); OKLA. STAT. tit. 21, § 748(D) (2023); S.C. CODE ANN. § 16-3-2020(F) (2023); VT. STAT. ANN. tit. 13, § 2652(c)(2) (2023); WIS. STAT. § 939.46 (2023); WYO. STAT. ANN. § 6-2-708 (2023).

Vermont, Wisconsin, and Wyoming all have causation requirements while Kentucky and California limit their defense to nonviolent crimes.<sup>197</sup> Oklahoma stands above all the rest.

Under Oklahoma Statute title 21, § 748(D), “it is an affirmative defense to prosecution for a criminal, youthful offender, or delinquent offense that, during the time of the alleged commission of the offense, the defendant or alleged youthful offender or delinquent was a victim of human trafficking.”<sup>198</sup> A plain reading of the statute indicates that a human trafficking victim has a complete defense to any offense they commit during their victimization.<sup>199</sup> Oklahoma has the most expansive defense available to victims because it lacks a crime limitation, a nexus requirement, and an implicit proportionality requirement.<sup>200</sup> The Oklahoma legislature most likely reasoned that a trafficking victim lacks the capacity for free choice and is blameless.<sup>201</sup>

### B. Arizona’s Laws

There are two statutes currently available to victims of sex trafficking in Arizona. First, there is a vacatur statute for a prostitution charge: A.R.S. section 13-909(A). A victim can vacate a prostitution charge committed before July 24, 2014, if the court finds by clear and convincing evidence that it was a direct result of being a victim of sex trafficking.<sup>202</sup> The other statute is an affirmative defense for a prostitution charge: A.R.S. section 13-3214(D). If the prostitution charge is from after July 24, 2014, the victim must prove by a preponderance of the evidence that it was a direct result of his/her trafficking at the time of conviction.<sup>203</sup>

Two other options that are potentially available to sex trafficking victims include self-defense and duress. Arizona’s self-defense statute, A.R.S.

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197. CAL. PENAL CODE § 236.23 (West 2023); COLO. REV. STAT. § 18-1-713(1) (2023); KY. REV. STAT. ANN. § 529.170 (West 2023); OKLA. STAT. tit. 21, § 748(D) (2023); S.C. CODE ANN. § 16-3-2020(F) (2023); VT. STAT. ANN. tit. 13, § 2652(c)(2) (2023); WIS. STAT. § 939.46 (2023); WYO. STAT. ANN. § 6-2-708 (2023).

198. OKLA. STAT. tit. 21, § 748(D) (2023).

199. Meghan Hilborn, *How Oklahoma’s Human Trafficking Victim Defense Is Poised To Be the Boldest Stand Against Human Trafficking in the Country*, 54 TULSA L. REV. 457, 467–69 (2019).

200. *Id.* at 471–72.

201. *See id.* at 473.

202. ARIZ. REV. STAT. ANN. § 13-909(A) (2023). Section 13-3214 is the statute that criminalizes prostitution while section 13-909 includes the procedural requirements for vacating a conviction.

203. § 13-3214(D). In Arizona, defendants must prove affirmative defenses raised by a preponderance of the evidence. § 13-205(A).

section 13-404(a), provides that “a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force.”<sup>204</sup>

Arizona’s duress statute provides:

A. Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

B. The defense provided by subsection A is unavailable if the person intentionally, knowingly or recklessly placed himself in a situation in which it was probable that he would be subjected to duress.

C. The defense provided by subsection A is unavailable for offenses involving homicide or serious physical injury.<sup>205</sup>

These options are insufficient because they ignore the effects of trauma on victims and their lack of moral culpability for offenses committed because of their victimization. A.R.S. section 13-909(A) only protects victims from charges of prostitution and completely ignores all other offenses that victims could commit because of their victimization.<sup>206</sup> Both self-defense and duress require an immediate threat of violence.<sup>207</sup> This completely ignores that trauma can lead to a constant fear of being abused or being put dangerous situations.<sup>208</sup> Duress also does not cover any offenses involving “homicide or serious physical injury,”<sup>209</sup> again ignoring the offenses that have the most severe criminal punishments. Arizona does not offer an adequate affirmative defense for victims of sex trafficking. The following part introduces an affirmative defense that is trauma-informed, victim-centered, and in line with feminist legal reasoning.

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204. § 13-404(A).

205. § 13-412.

206. §§ 13-909(A), -3214(D).

207. §§ 13-404(A), -412(A).

208. *See supra* Section III.B.

209. § 13-412(C).

## V. THE PROPOSED AFFIRMATIVE DEFENSE STATUTE

The Affirmative Defense,<sup>210</sup> unlike current affirmative defense laws, is victim-centered, trauma-informed, and supported by relevant feminist legal theories. This Part concludes by comparing the Affirmative Defense to Battered Women Syndrome (“BWS”) evidence, a semi-successful defense used in intimate partner violence cases. While the underlying justifications for BWS evidence are like those supporting the Affirmative Defense, there are some limitations to BWS evidence that the Affirmative Defense avoids.

### A. Statutory Text

Arizona and other first and second category states need to enact a trafficking-specific affirmative defense statute to adequately provide victims with pathways to justice. For clarity, the Affirmative Defense should be listed with the classification and definition of sex trafficking. For Arizona, the Affirmative Defense would be in A.R.S. section 13-1307. As an example for all states, the Affirmative Defense is reprinted and bolded within A.R.S. section 13-307 below.

13-1307. Sex trafficking; classification; definitions

A. It is unlawful for a person to knowingly traffic another person who is eighteen years of age or older with either of the following:

1. The intent to cause the other person to engage in any prostitution or sexually explicit performance by deception, force or coercion.
2. The knowledge that the other person will engage in any prostitution or sexually explicit performance by deception, coercion or force.

B. A person who violates this section is guilty of a class 2 felony and the person is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by section 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.

**C. A victim of a violation of A.R.S. § 13-1307 or 13-3212<sup>211</sup> has an affirmative defense for any offense committed as a result of the violation of § 13-1307 or 13-3212 without regard to whether any person was prosecuted or convicted for the violation of**

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210. Hereinafter, the suggested affirmative defense will be referred to as the Affirmative Defense.

211. A.R.S. section 13-3212 criminalizes child sex trafficking.



**§ 13-1307 or 13-3212. If the victim commits aggravated assault, sexual assault, or murder against an individual who is neither a trafficker nor buyer nor any individual complicit in the sex trafficking scheme, and the victim uses the affirmative defense, the victim must stay at a sex-trafficking-victim rehabilitation center for a minimum of two years and complete at least 500 hours of community service at the rehabilitation center within the first year after their release. For all other offenses, victims must stay at a sex-trafficking-victim rehabilitation center for a minimum of six months. Victims of sex trafficking are not individuals complicit in the sex trafficking scheme.**

*B. Victim-Centered: Bringing the True Criminals to Justice*

This Affirmative Defense provides victim-centered justice for victims of sex trafficking. A victim-centered approach is the “systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a nonjudgmental manner.”<sup>212</sup> Taking a victim-centered approach potentially “minimize[s] retraumatization associated with the criminal justice process” by empowering survivors and providing them an opportunity to bring their traffickers to justice.<sup>213</sup> The true criminals are the traffickers and buyers. While perhaps not equally culpable, both are at least complicit in the victimization of the innocent.<sup>214</sup>

Bringing those who perpetuate the sex trafficking scheme to justice should be the top priority. The State has a stronger interest in preventing coerced sex work than it does in punishing victims. Without traffickers, there are no victims. Arresting victims is a way for law enforcement to poorly mask a symptom of a much deadlier disease. If the State wants to stop sex trafficking, it needs to ferret out the traffickers and punish the buyers, but this is a very difficult task compared to arresting victims.<sup>215</sup> However, it is common for police leadership to implicitly or explicitly direct officers to meet an arrest

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212. Off. of Cmty. Oriented Policing Servs. & Inst. for Intergovernmental Rsch., *Implementing a Victim-Centered, Trauma-Informed Approach To Address Labor Trafficking for Law Enforcement Executives*, U.S. DEP’T OF JUST. (2020), <https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-w0920-pub.pdf> [<https://perma.cc/AXN5-F8TJ>].

213. *Id.*

214. *See supra* Section II.A (discussing the roles of the trafficker and the buyer).

215. *Federally Backed Human Trafficking Task Force Model Yields Progress, and Opportunities for Continued Growth*, NAT’L INST. OF JUST. (Jan. 6, 2022), <https://nij.ojp.gov/topics/articles/federally-backed-human-trafficking-task-force-model-yields-progress> [<https://perma.cc/H32A-J4SP>].

quota.<sup>216</sup> Incentivizing officers to meet an arrest quota may lead officers to prioritize easier arrests, like prostitution.<sup>217</sup> While the Affirmative Defense does not solve this specific issue of police quotas, it may discourage officers from needlessly arresting a victim if they know the victim will be immune to any charges arising from their victimization. Instead, the officers could bring in victims for treatment and care rather than for punishment within the penal system.

In addition, officials will have more productive interviews when a survivor is treated with respect and feels safe and supported.<sup>218</sup> Therefore, providing victims with a defense for crimes committed due to their trafficking legitimizes the criminal justice process and emphasizes rather than negates a survivor's victimization. When victims are more willing to testify about their traffickers and buyers, the State is more likely to arrest those truly responsible for perpetrating the sex trafficking scheme. The State can pursue its interest in investigating a crime, meet law enforcement goals, and support victims in a way that helps them "reclaim their lives and . . . move toward self-sufficiency and independence."<sup>219</sup>

### *C. Trauma-Informed: Lack of Moral Culpability as a Victim-Offender*

Sex trafficking victims lack the moral culpability necessary for punishment. Victims' experiences are traumatic and alter them both biologically and psychologically.<sup>220</sup> Biologically, they have a heightened startle response and cannot react to external stimuli with the appropriate emotional response.<sup>221</sup> Psychologically, they are anxious and indefinitely fearful.<sup>222</sup>

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216. See Jackie Fielding, *Outlawing Police Quotas*, BRENNAN CTR. FOR JUST. (July 13, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/outlawing-police-quotas> [https://perma.cc/5T4Q-Q6NN].

217. *Id.* (noting a study that found "officers with arrest and citation quotas have a lower clearance rate for violent crimes" and may even "resort to malfeasance to meet their quotas").

218. *Supporting Victims*, OFF. FOR VICTIMS OF CRIME TRAINING & TECH. ASSISTANCE CTR. (Feb. 27, 2024), <https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/> [https://perma.cc/ZF5N-9UM4].

219. *Human Trafficking: Anti-Trafficking Professionals*, OFF. FOR VICTIMS OF CRIME (July 20, 2023), <https://ovc.ojp.gov/program/human-trafficking/anti-trafficking-professionals> [https://perma.cc/T2BF-M22U].

220. See *supra* Section III.B (explaining the biological and psychological effects of trauma on sex trafficking victims).

221. See *id.*

222. See *id.*

The following hypothetical exemplifies how trauma can lead sex trafficking victims to commit criminal acts against their traffickers. Tina is a victim of sex trafficking whose trafficker employs coercive tactics to ensure her obedience. He physically and sexually abuses her and has irregular emotional outbursts because Tina sometimes fails to comply with his arbitrary rules. Tina is on edge most of the time, uncertain about when her next “punishment” will come and so experiences hyperarousal and intense panic attacks after loud noises. One afternoon, her trafficker comes home upset and slams the front door. Tina’s fight-or-flight response is triggered, and because of the high concentrations of epinephrine and norepinephrine, she has an inappropriate emotional response and stabs her trafficker.<sup>223</sup> This is a situation where a victim, through no fault of her own, responded to an external stimulus in accordance with her current biological and psychological dispositions.

Usually, victims commit crimes as a result of their victimization for two reasons:<sup>224</sup> (1) they are forced by their trafficker to commit crimes,<sup>225</sup> or (2) they are trying to avoid imminent abuse or escape their own victimization.<sup>226</sup> The Affirmative Defense gives the victim an opportunity to “demonstrate the nexus between criminal conduct and their trafficking victimization.”<sup>227</sup> In contrast with a general affirmative defense, a sex-trafficking specific one accounts for the nuances of sex trafficking, including the influence of “trauma on the decision-making process” and the coercive environment in which the victim commits the crimes.<sup>228</sup> In addition to accounting for weaknesses of a general affirmative defense, this nexus requirement actually prevents overinclusion by requiring a connection between the crime and the victim’s own victimization.<sup>229</sup> This approach also recognizes the victim’s autonomy and self-determination in criminal proceedings by giving victims an opportunity to fight the charges against them.<sup>230</sup> Recognizing their *lack of*

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223. Biological and psychological processes are inherently complex, but for the sake of a clear example, these processes are simplified.

224. SHARED HOPE INT’L, IDENTIFICATION OF AND RESPONSE TO VICTIMS: ISSUE BRIEF 2.8, at 1 (2022), <https://reportcards.sharedhope.org/wp-content/uploads/2022/10/2022-Issue-Briefs-2.8.pdf> [<https://perma.cc/4YGG-9GGG>].

225. *Id.* A trafficker may make a victim complicit in crime for extortion purposes. *See Baird & Connolly, supra* note 98. They could also do so because, if the victim is a minor, the punishment will most likely be lower. SHARED HOPE INT’L, *supra* note 224.

226. SHARED HOPE INT’L, *supra* note 224, at 1.

227. *Id.*

228. *Id.*

229. *See id.*

230. *See* Off. of Cmty. Oriented Policing Servs. & Inst. for Intergovernmental Rsch., *supra* note 212.

autonomy in their sex trafficking situation is equally important. The Affirmative Defense recognizes victims are not autonomous during their victimization; therefore, they cannot be held legally responsible for criminal acts resulting from their victimization.

*D. Alignment with the Feminist Legal Framework*

The Affirmative Defense is informed by feminist practical reasoning. It looks at the context in which sex trafficking occurs and the specific facts of each victim's experiences to inform whether the victim is morally culpable for the offense. The Affirmative Defense is also influenced by the science behind trauma and the resulting effects that may lead to an individual becoming a victim-offender. The "dominant" culture represented in current Arizona statutes clearly focuses on criminalizing those found to be engaged in prostitution and punishing victims for committing offenses that are a result of their own victimization. It is not a victim's fault for being a victim, and if that victim becomes a victim-offender, it would be against feminist practical reasoning to punish those victim-offenders who have endured unspeakable trauma.

If feminist reasoning is supportive of victims, what about potential victims of victim-offenders? Unlike Oklahoma or any of the third category states, the Affirmative Defense provides a form of restorative justice for three violent crimes committed against innocent third parties by requiring the victim to be admitted into a sex-trafficking-victim rehabilitation center and complete community service hours at the same center. Using restorative justice ensures victims recognize the severity of their actions while protecting them from further victimization. Serving prison time or being fined puts victims in a position to be easily re-victimized.<sup>231</sup> It does not serve society to throw victims in prison only for them to become victims again upon release, especially where they offend because of their victimization. If society's goals are to end sex trafficking and reduce overall crime, it must hold traffickers

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231. *See generally* Section I.A. Those who serve prison time just once experience homelessness at a rate seven times higher than the general public. Lucius Couloute, *Nowhere To Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html> [<https://perma.cc/LEX4-RNJ3>]. In addition, those who are incarcerated have a much harder time attaining economic stability. David J. Harding et al., *Making Ends Meet After Prison*, 33 J. POL'Y ANALYSIS & MGMT. 440, 441 (2014). Both factors, homelessness and poverty, increase the likelihood a victim of sex trafficking will become a victim again. *See* Section I.A.

responsible for victims' offenses and aim to reintegrate victims back into society.

In addition, the Affirmative Defense allows a victim to present their story through a feminist narrative method to show their lack of moral culpability. Victims must show by a preponderance of the evidence that the commission of their offense was a direct result of their victimization. To do this, victims are allowed to provide as much detail as they can to show that their victimization is an issue that the justice system can no longer dismiss as irrelevant to the findings of law. Because their victimization is directly related to the offense committed, it should dissuade criminal punishment and encourage legal protection. The Affirmative Defense forces a court to face the issue of sex trafficking head-on and to focus on the real people rather than "abstract rules and ideals."<sup>232</sup>

Most importantly, the Affirmative Defense is not forced upon victims. It respects a victim's autonomy. It is an option that any victim of sex trafficking is allowed to use during their interactions with the criminal justice system. For those that wish to assert the Affirmative Defense, it can give them a sense of autonomy in legal proceedings. Instead of feeling like the law is happening *to* a victim, a victim can feel like they are an active participant. The Affirmative Defense gives victims the opportunity to "take responsibility" for their feelings of trauma and clearly identify the true perpetrators of crime: the traffickers. So often, trafficking victims are charged with offenses committed during their victimization while their trafficker remains untouched by the law.<sup>233</sup> This Affirmative Defense can be a clear path to restoration of a victim's autonomy and agency.

### *E. Comparison to Battered Women Syndrome*

This Article has reiterated that trauma and threat of abuse may constitute evidence that absolves a victim of any moral culpability, justifying an affirmative defense. This argument is not as "unique" as it may seem. A similar legal theory is Battered Women Syndrome ("BWS"). BWS is a pattern of cyclical violence against a woman that leads to psychological

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232. Stanchi et al., *supra* note 161, at 16.

233. See *Exploited and Prosecuted: When Victims of Human Trafficking Commit Crimes*, UN OFF. ON DRUGS & CRIME (Dec. 16, 2020), [https://www.unodc.org/unodc/en/frontpage/2020/December/exploited-and-prosecuted\\_-when-victims-of-human-trafficking-commit-crimes.html](https://www.unodc.org/unodc/en/frontpage/2020/December/exploited-and-prosecuted_-when-victims-of-human-trafficking-commit-crimes.html) [<https://perma.cc/EF7X-LED2>].

changes, “collectively referred to as a sense of ‘learned helplessness.’”<sup>234</sup> According to BWS theory, a victim becomes incapable of imagining or plotting an escape from their abusive environment.<sup>235</sup> The stress from BWS also makes a victim more sensitive to “imminent threats” from their abuser even if, at that very moment, a threat is not present.<sup>236</sup> This exact phenomena is seen in victims of sex trafficking as well.<sup>237</sup>

BWS has been used in self-defense cases to show the objective reasonableness of the defendant’s perception of danger and to help interpret the immediacy of perceived threats.<sup>238</sup> A justification for the Affirmative Defense is similar—the defense is appropriate because it takes into account that the victim has an extreme sensitivity to imminent danger after enduring a traumatic experience.<sup>239</sup> However, BWS is not equally accepted in courts across the United States.<sup>240</sup> BWS is more likely to succeed with a duress defense, particularly for victims who can demonstrate a close proximity of violence and its influence on their alleged crimes.<sup>241</sup> The Affirmative Defense’s nexus requirement is similar in this regard.<sup>242</sup> The Ninth Circuit has held that expert testimony on BWS can be relevant to a duress defense.<sup>243</sup>

While the comparison to BWS can be helpful, it is important to recognize the limitations of the comparison. BWS is often limited by needing a “good”

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234. Michaela Dunn, Note, *Subjective Vulnerabilities or Individualized Realities: The Merits of Including Evidence of Past Abuse To Support a Duress Defense*, 54 SUFFOLK U. L. REV. 347, 348 (2021).

235. *Id.*

236. *Id.*

237. *See supra* Part I.

238. *See* Jessica R. Holliday et al., *The Use of Battered Woman Syndrome in U.S. Criminal Courts*, 50 J. AM. ACAD. PSYCHIATRY & L. 373, 375 (2022). The Kansas Supreme Court held that a jury could consider evidence of prior abuse to determine if there was a reasonable use of self-defense by the defendant. *State v. Hundley*, 693 P.2d 475, 478 (Kan. 1985). A Maryland appellate court held that BWS could be used as a defense for a defendant who killed her abusive husband despite not assaulting her at that very moment. *State v. Peterson*, 857 A.2d 1132, 1152 (Md. Ct. Spec. App. 2004). The Court acknowledged “heightened sensitivity” explains why conduct perceived as threatening by the abused may appear non-threatening to those who have not experienced trauma. *Id.* at 1149–50.

239. *See supra* Section VI.C.

240. Holliday et al., *supra* note 238, at 376.

241. *Id.* BWS evidence was admissible where the defendant sought to establish the defense of duress by showing that she was “rendered entirely submissive” to her partner through his physical and emotional abuse. *United States v. Marengi*, 893 F. Supp. 85, 97 (D. Me. 1995).

242. *See supra* Part V.

243. Specifically, the Ninth Circuit held BWS is not “categorically incompatible” with the duress defense. *United States v. Lopez*, 913 F.3d 807, 819 (9th Cir. 2019). BWS evidence explains why a reasonable person can be trapped and controlled by another even if the threat of violence is not overt at that moment. *Id.* at 820.

battered woman.<sup>244</sup> Walker's model, which came from a racially homogeneous group of women, has become an "unrealistic, culturally limited construct that risked convicting women not because their actions failed to support self-defense," but because they did not fit in the BWS mold.<sup>245</sup>

In a re-written opinion of *State v. Norman*,<sup>246</sup> Professor Martha Mahoney, writing as Justice Mahoney, adopts many of the feminist methodologies used to justify the Affirmative Defense.<sup>247</sup> The re-written opinion encapsulates the legal reasoning and policy justifications behind the Affirmative Defense.<sup>248</sup> Justice Mahoney uses the feminist narrative method by presenting and engaging with the complete trial record.<sup>249</sup> She reveals the horrifying abuse that Judy Norman endured that the majority failed to include in its decision.<sup>250</sup> The ultimate question was: "What does the history and her belief in the danger of death mean in weighing the elements of self-defense?"<sup>251</sup> Justice Mahoney emphasized that the court did not need to use BWS evidence and instead could have used the court-appointed psychologist's testimony about coercive-control framework, a framework that mirrors this Article's previous discussion about the trauma bond and the coercive methods adopted by traffickers.<sup>252</sup> The evidence irrefutably showed that Judy perceived deadly

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244. See Joan H. Krause, *Commentary on State v. Norman*, in *FEMINIST JUDGMENTS: REWRITTEN CRIMINAL LAW OPINIONS* 230, 232 (Bridget J. Crawford et al. eds., 2023).

245. *Id.* Furthermore, women are not the only victims of intimate partner violence. One in three women and one in four men experience intimate partner violence. *Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/STATISTICS> [<https://perma.cc/R5NR-7JF2>]. The gap between women and men is not as large as society assumes. However, this statistic also completely ignores those who do not identify within the gender binary. In a 2022 study, fifty-seven percent of 3,462 transgender adults reported experiencing intimate partner violence in their lifetime. Jennifer Hillman, *Lifetime Prevalence of Intimate Partner Violence and Health-Related Outcomes Among Transgender Adults Aged 50 and Older*, 62 *GERONTOLOGIST* 212, 219 (2022). In a 2015 study, fifty-four percent of transgender and non-binary respondents testified that they were a victim of IPV. Elliot Kozuch, *HRC Report Shows that LGBTQ People Are More Likely To Be Victims of Interpersonal Violence*, HUM. RTS. CAMPAIGN (June 25, 2020), <https://www.hrc.org/news/hrc-report-shows-lgbtq-people-are-more-likely-to-be-victims-of-interpe> [<https://perma.cc/PW4Y-VQG>].

246. *State v. Norman*, 378 S.E.2d 8 (N.C. 1989). The North Carolina Supreme Court upheld Judy Norman's voluntary manslaughter conviction for killing her abusive husband using the BWS framework. *Id.* at 14.

247. Martha Mahoney, *Judgment of State v. Norman*, in *FEMINIST JUDGMENTS: REWRITTEN CRIMINAL LAW OPINIONS* 236, 236–52 (Bridget J. Crawford et al. eds., 2023).

248. See *id.* at 237. The author highly recommends reading the full re-written opinion to see how a court could justify the use of the Affirmative Defense.

249. Krause, *supra* note 244, at 234.

250. *Id.*

251. *Id.*

252. *Id.* at 234–35; see *supra* Part I.

threats every day and there was no legal protection available to her, similar to current victims of sex trafficking.<sup>253</sup> The legal system failed Judy Norman, but the Affirmative Defense would prevent a case like *State v. Norman* from ever happening again.

## VI. POTENTIAL ISSUES WITH THE AFFIRMATIVE DEFENSE

While the justifications for the Affirmative Defense are persuasive, this Part introduces three potential critiques of the Affirmative Defense and provides explanations as to why those critiques are unfounded.

### A. Voluntary Sex Workers Will Abuse the Affirmative Defense

Concerns of the Affirmative Defense being abused by willing sex workers are unfounded. This concern is nullified by the language of the statute. The defendant utilizing the Affirmative Defense must be a *victim* of sex trafficking.<sup>254</sup> A victim of sex trafficking in Arizona is either a minor who is caused to engage in prostitution or a person who is eighteen years of age or older who is caused to engage in prostitution through deception, force, or coercion.<sup>255</sup> The definitions of force and coercion are specific and the Affirmative Defense requires the defendant to prove by a preponderance of the evidence that their offense was committed as a result of the trafficking victimization.<sup>256</sup>

### B. Prevention Is More Important

Legislatures might argue preventative measures would be more successful and less risky than the Affirmative Defense. It's true that States could also use an upgrade to legislation pertaining to prevention.<sup>257</sup> However, just focusing on prevention ignores current victims and survivors. This author obviously advocates for preventative measures but sees a need for more conversation on affirmative defenses and the criminal justice response to

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253. Krause, *supra* note 244, at 235.

254. *See supra* Part IIV.

255. ARIZ. REV. STAT. ANN. §§ 13-1307, 13-3212.

256. § 13-205(A); *see supra* Part IIV.

257. For example, one of Arizona's lowest scores was in Prevention and Training. ARIZONA REPORT CARD, *supra* note 82. Shared Hope International reported gaps remained in "all areas" including training for justice agencies and prevention education for schools. *Id.*



trafficking victims. Both preventative measures and criminal justice responses can be improved simultaneously.

### *C. The Affirmative Defense Is Overinclusive*

It could be argued this statute includes victims who do not experience years of trauma and abuse, therefore lacking a key element of why these victims lack moral culpability. However, this argument misunderstands the development of trauma. While this Article does focus on the effects of prolonged trauma, it does not take years to traumatize someone or to put someone in a situation where they see only one way out.<sup>258</sup> This same logic would excuse kidnapping victims for murdering their kidnappers after they were held captive for two years but simultaneously would not excuse victims who murder their kidnapper that were only held for two weeks. Traumatic experiences do not have a required duration and the consequences of those experiences are severe regardless of how many times one experiences them.<sup>259</sup>

One could also argue that the nexus requirement is not sufficiently defined and would provide a blanket defense against any crime committed by a victim of sex trafficking. However, this largely ignores the “as a result” language in the statute. There must be a connection between their victimization and the offense. An overbroad application of the defense is mitigated by thoroughly engaging with the record presented by the victim. Once a court evaluates the facts surrounding the trafficking victimization and the offense, it becomes clear what is “a result” of someone’s victimization. The purpose of the Affirmative Defense is to acknowledge that trafficking victims are not morally culpable for crimes caused by their victimization. To the author, it seems clear that a justice system’s focus should be on removing a victim from the trafficking scheme and rehabilitating them so they can re-enter society rather than focusing on racking up charges to keep them in prison.

## VII. CONCLUSION

Victim-centered criminal justice responses are key to protecting victims of sex trafficking from revictimization. This will allow States to focus on the true perpetrators: the traffickers and buyers. When taking into consideration the effects of trauma and abuse on these victims, they are clearly not morally

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258. *See supra* Section I.B.

259. *See supra* Part II.

culpable for offenses committed as result of their trafficking, especially against the very actors victimizing them. The Affirmative Defense, in line with feminist theories, protects individuals who are no longer autonomous beings and are “rendered entirely submissive”<sup>260</sup> to their trafficker and their altered stress response. It allows the court to engage with a detailed record of their victimization and truly understand the narrative of their trauma. The Affirmative Defense is sufficiently limited through its nexus requirement and specific statutory language. Furthermore, enacting the Affirmative Defense will not detract from efforts to install preventative measures if States choose to do so. States in the second and third affirmative defense categories will continue to fail sex trafficking victims without a proper affirmative defense. Notwithstanding the abject horrors that victims experience daily, perhaps a third year receiving very public failing grades from Shared Hope International will motivate legislatures to act.

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260. *United States v. Marengi*, 893 F. Supp. 85, 97 (D. Me. 1995) (citing to the specific phrase used to describe the effects of abuse on a defendant).