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THE NON-CRIMINALISATION OF VICTIMS OF HUMAN TRAFFICKING AND MODERN SLAVERY: EXAMINING ANGLO-AMERICAN PERSPECTIVES TO ADVOCATE FOR A VICTIM-CENTRED, HUMAN RIGHTS APPROACH

Bethany Simpson

A thesis submitted in partial fulfilment of the requirements of the University of Northumbria at Newcastle for the degree of Doctor of Philosophy

2023

Abstract

This thesis addresses the research question does the current statutory framework that exists to protect victims of human trafficking and modern slavery who commit offences provide adequate protection? The author advances the literature by advocating for a victim-centred, human rights-based approach to the non-criminalisation of *all* victims of human trafficking and modern slavery. The work provides an original contribution to knowledge by affording a unique Anglo-American comparison of the law in this area and proposing novel recommendations for law reform. The thesis adopts a socio-legal, comparative methodological approach. In particular, the author compares the statutory defences in E&W with the affirmative defences of five US states: California, Kentucky, Oklahoma, Wisconsin, and Wyoming.

The current global response to addressing human trafficking and modern slavery is vested in a criminal justice-based approach which prioritises the investigation and prosecution of offenders above the protection of victims. This is consistent with the approach adopted by the early international anti-trafficking legislation. International and domestic bodies claim to prioritise a genuine human rights approach to protecting victims from punishment. This thesis, however, argues that providing victims with protection from criminalisation which adheres to a genuine human rights-based approach, one which places the victim at the centre of all anti-trafficking endeavours, has not been achieved. In particular, the statutory defence under s 45 of the Modern Slavery Act 2015 of E&W fails to afford adequate protection to adult and child victims of human trafficking and modern slavery for the purpose of criminal exploitation, as well as other forms of exploitation. This thesis proposes that a victim-centred, human rights, based approach to protecting victims who commit offences be adopted in order to protect their needs, rights and interests and prevent them from additional victimisation by the state.

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Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved.

Approval has been sought and granted by the Faculty of Business and Law Ethics Committee on 28 December 2018.

I declare that the word count of this thesis is 89,753 words.

Name: Bethany Simpson

Date: 23 May 2023

Introduction

This thesis critically examines the legislative response to victims of human trafficking and modern slavery who commit criminal offences within England and Wales (E&W). Under the leading international instrument on human trafficking, the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children supplementing United Nations Convention against Transnational Organized Crime (Trafficking Protocol),[1] one of three categories of anti-trafficking measures outlined was the protection of persons who have been trafficked – the Trafficking Protocol focuses on three general categories for tackling human trafficking: deterrence, prevention, and protection. This is guided by the central principle that trafficked persons should not be treated as criminals, but instead recognised as victims and survivors.[2]

In 2013, the UK Government pledged to put victims at the very heart of their efforts to address modern slavery and protect victims. In its current formation, however, the MSA 2015 fails to achieve this aim; the steady stream of contradictory judgments and assessments that emanate

[1] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000) 2237 UNTS 319 (Trafficking Protocol).

[2] This is a recognised legal norm that a person should not bear criminal responsibility for offences they were forced to commit whilst under the control of other, more commonly referred to as the 'non-punishment' or 'non-liability' principle. The principle exists to remedy the double victimisation of persons who suffer at the hands of their exploiters and then again at the hands of the state.

from the courts suggests the broader protective framework is also problematic.[3] The argument proposed is that the statutory response should be one centred on the victim experience following a genuine human rights-based approach founded on two key premises: firstly, that all people have human rights (we are all rights holders); and secondly, that for each right there is a corresponding duty on states to respect, protect and fulfil these rights. In this way a human rights-based approach views human rights as an ethical claim with an important role to play in governing relations between those with greater and lesser power in a democracy.[4] Such an approach would not only recognise modern slavery as a series of human rights violations, it would also recognise the particular vulnerabilities of victims and the true nature in which victims of this form of exploitation come to engage in criminal activity.

1. Research Aims, Objectives, and Goals

The central elements to this research are threefold:

(1) The extent to which protection from criminalisation is afforded to this category of victim under international and regional instruments is examined with particular focus on the existence of the non-punishment principle in the Trafficking Protocol,[5] the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (Trafficking Convention)[6] and the

---

[3] For example, following Court of Appeal decisions in *R v DS* [2020] EWCA Crim 285 and *R v A* [2020] EWCA Crim 1404 it appeared that the abuse of process protection was no longer available to victims of human trafficking and modern slavery. However, the Court in *R v AAD, AAH, and AAI* [2022] EWCA Crim 106 departed from these decisions and ruled that the abuse of process jurisdiction should be available as a legal redress, at [40].

[4] Ruth Lister, '"Power, not Pity": Poverty and Human Rights' (2013) 7(2) Ethics Soc Welf 109-123.

[5] Trafficking Protocol, Art 4.

[6] Trafficking Convention, Art 26.

2011 European Union Directive on Preventing and Combatting Trafficking in Human Beings and Protecting its Victims (Trafficking Directive).[7] This thesis finds that these instruments, despite claiming to do so, do not adopt a genuine human rights-based approach to protecting modern slavery victims from being prosecuted and convicted for crimes they were compelled to commit or as a consequence of being exploited. The current approach is vested in a criminal justice-based approach which prioritises the passing and enforcement of laws, investigation of cases, and prosecution of traffickers; the scales of justice being tipped firmly in favour of the state. This imbalance of primacies is reflective of an inadequate approach to a just response to trafficked victims who commit crimes. It permits domestic legislatures, such as E&W, to present responses which are compliant with international and regional instruments, but which fail to provide comprehensive protection from criminalisation.

(2) The second central element of this research explores the concept of victimhood. It is recognised that the identification of victims of human trafficking and modern slavery plays a vital role in creating effective frameworks for the protection of victims from criminalisation. Yet despite this a disconcerting, simplified binary exists within society between the notion of 'evil' offenders and 'innocent' victims which fails to account for the nuances that exist in situations where these binaries overlap; one such situation being when victims of modern slavery offend. This thesis draws upon the lived experiences of victims of human trafficking and modern slavery for the purpose of criminal exploitation from recent Court of Appeal cases, explored by this author in separate case notes,[8] in an effort to deconstruct the political and

[7] Trafficking Directive, Art 8.

[8] See Appendix I and II.

social preconceptions of victimhood and criminality and provide the foundations for a move towards a more victim-centred approach to non-criminalisation.

(3) A comparative analysis of the aforementioned statutory defences in E&W with the affirmative defences of five states within the United States (US): California, Kentucky, Oklahoma, Wisconsin, and Wyoming, forms the third central element of this research. The modern slavery defences, their theoretical underpinnings and practical operation are examined in their own right, focusing on each element within the provisions respectively, to expose the problematic components within their composition. Each individual element of the provision is subcategorised under five novel headings: victimisation, contemporaneity, proportionality, nexus, and exclusions. These subcategories will form the basis for the theoretical framework for comparing statutory protective provisions against the criminalisation of victims in E&W and the US in an effort to derive a novel, more inclusive framework for non-criminalisation of victims which appreciates the complexities of modern slavery victimisation and validates victims' rights as human beings.

This thesis concludes that the legislative response to victims of modern slavery who offend fails to provide sufficient protection for these victims and subsequently contradicts a genuine human rights approach to modern slavery. In its current state, the law in E&W allows for victims to be further victimised by the state. It is recommended that a victim-centred, human rights-based response be adopted and suggestions for reformation of the law are advanced.

1.1 Aims and Objectives

The overarching aim of this thesis is to challenge the current statutory framework that exists to protect victims of human trafficking and modern slavery who commit offences and advocate for a victim-centred, human rights-based approach to the non-criminalisation of these victims. This can be expanded into four core aims and objectives:

In order to address the first element outlined above, this thesis will expose the current unjust criminal justice-based approach to protecting victims of human trafficking and modern slavery that has evolved over the years from oversimplified narratives of slavery and human trafficking by exploring the historical emergence of anti-trafficking and anti-slavery frameworks that have shaped international, regional, and domestic efforts to address these forms of exploitation.

In line with the second element, this thesis will raise awareness of the extent to which victims of human trafficking and modern slavery are unjustly criminalised for their participation in criminal activity by casting a light on the lesser-known manifestation of modern slavery and its victims: criminal exploitation. This under-explored form of exploitation continues to be ignored by the Government,[9] despite accounting for the largest group of potential victims over the last three years.[10] This thesis will draw upon literature and case law to explore the lived experiences of victims of criminal exploitation.

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[9] Notably, the draft Slavery and Human Trafficking (Definition of Victim) Regulations 2022 which support the implementation of part of the Nationality and Borders Act 2022, fail to include a single reference to criminal exploitation; a point which has been contested at length in Parliamentary debates. See for example, HC Deb 29 June 2022 vol 717, cols 6-8, 19.

[10] Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, Quarter 1 2022 – January to March* (2022); Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary, 2021* (2022); Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, End of Year Summary, 2020* (18 March 2021) 5.

To address the third element, this thesis will explain how the current modern slavery legislation and policy in E&W fails to adopt a victim-centred, human rights-based approach to the protection of victims of human trafficking and modern slavery who commit offences by highlighting the parameters of the statutory defences that allow victims to continue to be unjustly criminalised.

Finally, this thesis will investigate how the statutory framework could be improved by comparing it with parallel frameworks in five jurisdictions within the US each of which afford victims varying degrees of protection by way of an affirmative defence. This thesis investigates whether each of these provide frameworks that are consistent with a victim-centred, human rights-based approach.

2. Contribution to Knowledge

This thesis provides an alternative approach to the existing research on the criminalisation of human trafficking and modern slavery victims by drawing comparisons between statutory protective frameworks in E&W and the US and advancing novel recommendations for law reform. Prior to the enactment of the MSA 2015, the research focus was largely based on the non-punishment principle and the obligations emanating from that principle at a European level. This line of research has continued since the MSA 2015 came into force, with the additional inclusion of the analysis of s 45 as a form of implementation of the non-punishment principle despite criticism that the non-punishment provisions within international and regional instruments fail to afford adequate protection to victims. Key provisions in modern slavery legislation in the UK and further afield have been reviewed by the likes of non-governmental

organisations and the US Department of State in its annual Trafficking in Persons (TIP) Report, but these reports continue to frame modern slavery legislation against arguably inadequate legal instruments and frameworks which circumscribe the potential ambit of statutory protections. This thesis secedes from this direction of research by comparing s 45 with similar provisions outside the ambit of regional constraints and proposes a novel interpretation of a victim-centred, human rights-based approach to protecting victims from criminalisation, one which respects and protects the rights of *all* victims of modern slavery.

3. Background

Slavery has existed, evolved and manifested itself in different ways throughout history. In recent years there has been an eruption of global interest in more contemporary forms which compound 'long-standing discrimination against the most vulnerable groups in society':[11] the phenomena of 'trafficking in human beings' and 'modern-day slavery'. Although international trafficking and slavery legislation was adopted in 1949 and 1926 respectively, a renewed focus on these issues began to emerge in the mid-1990s following an increased interest in transnational organised crime coupled with mounting fears over migration and the expansion of international illegal markets following the collapse of former communist regimes.[12] However, as Broad discusses, the sudden expansion of international policy focus was not paralleled alongside comprehensive research of the problem 'that would have informed a more

[11] United Nations, 'International Day for the Abolition of Slavery 2 December 2018' (2018).

[12] N Mai, 'The Psycho-Social Trajectories of Albanian and Romanian 'Traffickers' (2010) Institute for the Study of European Transformations Working Paper No.17.

robust evidence base'.[13] Ultimately, this led to myriad difficulties in approaching the phenomena as international regimes and global governance actors scrambled to develop their own agendas. Several non-legal umbrella terms comprising multiple forms of exploitation were adopted within international discourses as the shape of policy and legislation to criminalise the activities began to form. Laws at international, regional and domestic levels began to redefine contemporary trafficking and slavery and a dominant modern anti-trafficking/ anti-slavery discourse emerged. This thesis attempts to present a progressive understanding of modern slavery beyond that of the dominant discourse narrative which has thus far influenced policy and legislation.

It is noted throughout scholarly discourse that the forms of exploitation employed by traffickers/ enslavers has bourgeoned along with the definitions of 'human trafficking' and 'modern slavery', both colloquially and legally.[14] Whilst the broadening of these definitions is often commended for keeping the law at pace with reality, it is equally contested that the ever-expanding definitions further complicate an already intricate and complex area of law; with some further scrutinising the 'imperialist and racist undertones of [the] "modern slavery"' moniker itself.[15] Laws ranging from the eighteenth century to the present day have expanded on definitions of 'slavery', 'modern slavery' and 'human trafficking', but despite several positive changes, scholars continue to identify shortcomings of the language used and question

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[13] Rose Broad, 'From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK' (2019) 25(2) European Journal on Criminal Policy and Research 119.

[14] See generally, John Winterdyk and Jackie Jones (eds), *The Palgrave International Book of Human Trafficking* (Palgrave Macmillan 2020).

[15] Michael Dottridge, 'Eight reasons why we shouldn't use the term "modern slavery"' (openDemocracy, 17 October 2017) <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/eight-reasons-why-we-shouldn-t-use-term-modern-slavery/> accessed 20 May 2023.

whether contemporary definitions are working to end trafficking and slavery.[16] It is acknowledged here that 'slavery', 'modern slavery' and 'human trafficking' belong to three distinct genealogies in their own right.[17] Nonetheless, the phenomena have been and continue to be conflated, particularly by non-governmental organisations who have, since early in the new millennium, made it their mission to 'end modern slavery'.[18] Notably, early anti-trafficking and anti-slavery rhetoric in both the UK and US frequently described 'human trafficking' as 'modern slavery' and continue to synonymise the two terms to refer to the proliferating conditions of human-to-human exploitation. E&W, in particular, has now enshrined this conflation in law with the enactment of the MSA 2015. From a victim's perspective this conflation is particularly problematic as it risks 'undermining the effective application of the relevant legal regimes'[19] including the protective frameworks therein.

The early twentieth-century international response to human trafficking was dominated by themes of prostitution and sex trafficking; a dominance which would continue to define the landscape of modern anti-trafficking measures. The collapse of the Soviet Union in 1991 exposed a vast transatlantic sex trade involving young Eastern European women and girls being

[16] ibid. Unfortunately, a thorough examination of this is beyond the scope of this thesis.

[17] See J Allain, 'Genealogies of human trafficking and slavery' in R Piotrowicz, C Rijken and BH Uhl (eds), *Routledge Handbook of Human Trafficking* (Routledge 2018); Julia O'Connell Davidson, 'Editorial: The Presence of the Past: Lessons of history for anti-trafficking work' (2017) 0(9) Anti-Trafficking Review 1.

[18] For example see, 'End modern slavery: Five ways to help us on World Day against Trafficking' (Anti-Slavery International) <https://www.antislavery.org/end-modern-slavery-five-ways/> accessed 20 May 2023; Andrew Wallis and others, 'How Data Collaboration and Awareness can End Modern Slavery Forever' (Unseen, 10 May 2019) <https://www.unseenuk.org/blog/how-data-collaboration-and-awareness-can-end-modern-slavery-forever> accessed 20 September 2022.

[19] Janie Chuang, 'The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery"' (2015) 5 Anti-Trafficking Rev, 146.

trafficked by gangs of organised criminals to wealthy customers in Western Europe and North America. Pressure groups and neo-abolitionists in the US, including anti-prostitution feminists, conservatives and religious allies, who viewed this form of exploitation as 'modern-day slavery', urged the world to eradicate slavery and its practices once more.[20]

In November 2000, the UN adopted the Trafficking Protocol as part of the United Nations Convention against Transnational Organized Crime and cemented the global foundations for anti-trafficking policy. The Protocol is recognised as the first legally binding instrument with an internationally recognised definition of 'human trafficking', Under Art 3, the action of trafficking is defined as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[21]

This establishes the three elements of trafficking: the act (recruitment, transportation, etc.), the means (abduction, coercion, deception, etc.), and the purpose (for exploitation). The broad scope of activities constituting 'the act' makes it clear that 'the definition seeks to facilitate

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[20] For further discussion, see Janie A Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution reform and ant- trafficking law and policy' (2010) 158(6) U Pa L Rev 1655, 1664.

[21] The Trafficking Protocol was ratified by the UK on 9 February 2006 at which point it became obligated to criminalise human trafficking and develop anti-trafficking laws in line with the Protocol's legal provisions.

convictions',[22] and highlights the prominent criminal justice-based foundations on which the Trafficking Protocol was established. Despite the Protocol's underpinnings, the definition provides an extensive ambit under which persons exposed to an increasing array of exploitative practices can be recognised from the outset of their trafficking journey. The inclusion of the action of recruitment within the definition provides the possibility for retribution even in circumstances whereby the victim is unaware of their victimisation and has, in their view, agreed to it.[23]

By comparison, the international legal definition of slavery was introduced in the Slavery Convention 1926 and obliged signatories to eliminate slavery, the slave trade, and forced labour in their respective territories. The Convention has underpinned the modern understanding of slavery since the abolition of traditional forms of chattel slavery linked to the transatlantic slave trade. Article 1 provides the first and only definition of slavery in international treaty law as: 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[24] This is supported by a definition of the slave trade as:

> all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or

[22] Ryszard Wilson Piotrowicz and Liliana Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle' (2016) 16 HRLR 669, 671.

[23] Note, however, that under Art 3(b) of the Trafficking Protocol one cannot legally consent at any stage during the trafficking process provided that any of the prohibited means are present; UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations 2004) 13, 270.

[24] Convention to Suppress the Slave Trade and Slavery (1926) 60 LNTS 253 (the Slavery Convention), Art 1(1). The Slavery Convention was ratified by the UK on 18 June 1927.

> exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves. [25]

The 1926 Convention was commended for providing an effective tool in combatting slavery and the slave trade that presented a clear victory against slavery practices. [26] Indeed, the Convention placed an authoritative onus upon states to enact national anti-slavery legislation and enforcement mechanisms, however, a number of failings became apparent. In particular, it lacked adequate power to incite universal eradication of slavery by failing to provide the means for sufficient regulation, oversight, and detection of violations. In relation to victims, the definition of slavery lacked clarity and failed to provide guidance for its interpretation leaving victims of myriad forms of slavery susceptible to unregulated exploitation. Furthermore, the criminal-justice based approach to criminalise slavery failed to account for the violations of victims' human rights and take a truly humanitarian approach to suppressing slavery, a feat which can be paralleled with the landscape of anti-trafficking and modern slavery efforts today.

The issues began to be addressed in the years to follow with the introduction of the Universal Declaration of Human Rights in 1948, the drafting of the European Convention on Human Rights in 1949,[27] and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Article 4 of the UDHR and

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[25] ibid Art 1(2).

[26] United Nations Economic and Social Council, 'Slavery, Report prepared by Benjamin Whitaker, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, updating the Report on Slavery submitted to the Sub-Commission in 1966' (1984) UN Publication Sales No E 84 XIV 1 [122] (the Whitaker Report).

[27] The UK was the first nation to ratify the ECHR in March 1951 and came into effect on 3 September 1953.

ECHR declared freedom from slavery, servitude and forced labour as a fundamental human right and Article 1 of the 1956 Convention further defined and prohibited four additional forms of slavery: debt bondage, serfdom, forced marriage, and the trafficking and exploitation of women and children.

By the end of the twentieth century, anti-trafficking and slavery discourse appeared, at last, to be shifting towards a more victim-centric, human rights-based approach. Following trends at the time, notions of protecting victims and their human rights were echoed throughout debates, policy and international treaties.[28] In 2006, the United Nations Office on Drugs and Crime (UNODC) produced the first attempt to understand the depth, breadth and scope of trafficking in order to design policy to address it.[29] With this, the convoluted nature of trafficking victimisation became more apparent and the conflicting legal spaces occupied by victims slowly began to be directly addressed. Arguably, this can be linked to the increased understanding of victim profiles beyond the narrow understanding of trafficked women and children for sexual exploitation. Alongside being recognised as a victim of the trafficker,[30] or a victim of the failings of society in general, the duality of victim/ offender binary was also identified where it was found that offences had been committed by victims. In more recent years, international and domestic academic debates on human trafficking and modern slavery

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[28] See for example, KE Hyland, 'The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (2001) 8 Human Rights Brief 30; UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (2006); Conference of the Parties to the United Nations Convention on Transnational Organized Crime, *Report on the meeting of the Working Group on Trafficking in persons held in Vienna on 14 and 15 April 2009* (UN Doc 21 April 2009).

[29] UNODC, *Trafficking in Persons: Global Patterns* (2006) 10.

[30] Note that this was primarily for the sole purpose of providing key witness evidence against the trafficker.

have begun to shine a light on some of the lesser-known forms of exploitation, in particular types of criminal exploitation, and dual victimisation by the state.[31]

Human trafficking and modern slavery have been identified by the international community as a problem whereby law should be used, in part, to structure a solution. Detailed international laws like those referred to above, continue to be developed with regard to preventing trafficking, protecting and supporting victims/ survivors, and prosecuting perpetrators. These rules, which derive from *inter alia* international human rights law, international and transnational criminal law, and immigration/ refugee law, impose legally binding obligations upon domestic states to protect the rights and interests of all persons. Inclusive within this is the legal obligation to ensure that victims and survivors are not punished for offences they commit during the course, or as a consequence, of being trafficked. At the regional level, the Trafficking Convention and Trafficking Directive oblige states to ensure that victims of human trafficking are not punished for crimes that they have been compelled to commit as a direct result of their trafficking situation.[32] At the national level, state signatories to these instruments have sought to fulfil these obligations and implemented this principle of non-punishment by various means. In E&W this includes the common law defence of duress, prosecutorial discretion, the court's abuse of process jurisdiction, and the statutory defences under s 45 of the Modern Slavery Act 2015.

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[31] See for example, Allison L Cross, 'Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors' (2013) 44 McGeorge L Rev 395; Davor Derenčinović, 'Non-Punishment of Victims of Trafficking in Human Beings in the Context of Irregular Migrations' in Adem Sözüer (ed), *Migration. 4th International Crime and Punishment Film Festival. Academic Papers* (Istanbul Üniversitesi Hukuk Fakültesi, 2014); Carolina Villacampa and Núria Torres, 'Human trafficking for criminal exploitation: Effects suffered by victims in their passage through the criminal justice system' (2019) 25(1) Intl Rev of Victimology 3.

[32] Trafficking Convention, Art 26; Trafficking Directive, Art 8.

Section 45 of the Modern Slavery Act 2015 provides two distinct defences for victims of human trafficking and modern slavery: s 45(1) provides a defence for adult victims who are compelled to commit a criminal offence; and s 45(4) provides a defence for children who commit a criminal offence as a direct result of their trafficking exploitation. Despite the inclusion of these defences on a statutory footing, evidence suggests that victims of human trafficking and modern slavery are still at risk of being criminalised.[33] It is worth noting here that whilst this thesis adopts a victim-centred approach to victims of trafficking (VoTs) who commit offences, this does not make the (innocent) victim who has suffered as a result of actions of the VoT and their suffering any less important than that of the VoT. The exploitation of the VoT merely 'precipitates a state of "metaphorical involuntarism", operating on the actor's "free choice" capacity, thereby repudiating "fair opportunity" to conform to the requirements of the law. The conduct of the VoT is "wrongful", but the actor is not "morally responsible"'.[34] Therefore, the VoTs criminal acts are unjustified and in no way detract from the (innocent) victim's suffering, but nonetheless the acts are excusable.

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[33] Karl Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' (2016) Crim LR 395; HC Deb 26 October 2017, vol 630, col 511; ——'Child victims of human trafficking prosecuted despite CPS rules' (Guardian 17 September 2019) <https://www.theguardian.com/uk-news/2019/sep/17/child-victims-of-human-trafficking-prosecuted-despite-cps-rules> accessed 20 May 2023; Independent Anti-Slavery Commissioner, *Annual Report 2020 – 2021* (2021) 29.

[34] Nicola Wake, 'Human Trafficking and Modern Day Slavery: When Victims Kill' (2017) 9 CLR 658, 665 citing S Kadish, 'Excusing Crime' (1987) 79 Calif L Rev 257, 265; J Dressler, 'Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code' (1987– 1988) 19 RLJ 671, 701–702; MN Berman, 'Justification and Excuse, Law and Morality' (2003) 53 Duke LJ 1, 7.

4. Literature Review

This research draws on a plethora of different literature and sources that are referenced throughout each chapter. Literature from official governmental reports,[35] parliamentary debates[36] and equivalent sources[37] is examined across the jurisdictions. Several submissions to Bill consultations[38] and Hansard debates[39] are also utilised and analysed to provide valuable insight into key stakeholder concerns that present alternative views to the ones supported by governmental bodies. Since the enactment of the MSA 2015, the Home Office has commissioned two independent reviews of the Act.[40] These provide the main source of information on the application of the Act in practice, along with a report by the Independent Anti-Slavery Commissioner's Officer,[41] and aide in highlighting the gaps in existing knowledge and establishing where further developments are needed. In addition to these sources, a steady stream of case law in this area continues to emerge from the Court of Appeal

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[35] See for example, Home Office, *Modern Slavery Strategy* (HM Government 2014); Home Office, *County lines: criminal exploitation of children and vulnerable adults* (2017); Home Office, *2019 UK Annual Report on Modern Slavery* (2019); Home Office, *Modern Slavery Act 2015 – Statutory Guidance for England and Wales* (2020); US Department of State, 'Trafficking in Persons Report 2013 – Victim Identification: The First Step in Stopping Modern Slavery' (2013); US Department of State, *Trafficking in Persons Report* (2020).

[36] See for example, Modern Slavery Bill HC (2013-14); Modern Slavery Bill HL (2014-15)

[37] Uniform Law Commission, *Uniform Act on prevention of and Remedies for Human Trafficking* (2014).

[38] See for example, AIRE; Trafficking Awareness Raising Alliance; Parliament, *Joint Committee on the draft Modern Slavery Bill* (Publications, Written Evidence 2013).

[39] HL Deb 8 December 2014, vol 757, col 1658.

[40] Caroline Haughey, *Modern Slavery Act 2015 Review: One Year On* (2016); Frank Field and others, *Independent Review of the Modern Slavery Act* (2019).

[41] Jennifer Bristow and Helen Lomas, *The Modern Slavery Act 2015 Statutory Defence: A Call for Evidence* (Independent Anti-Slavery Commissioner 2020).

which continues to challenge and develop the law in place to protect victims.[42] This research also utilises case commentaries[43] and journal articles,[44] each of which provide crucial analysis of the law and surrounding context.

5. Gaps in Existing Literature

The preceding background section and literature review, which is explored in-depth throughout this thesis, exposes three fundamental gaps in current literature to which this research will address; notably, the limited research on various forms of criminal exploitation, including forced begging, theft, financial exploitation and modern slavery offences; the lack of comparative analysis of statutory non-criminalisation provisions; and the absence of academic research into the use of s 45 in practice beyond its potential application and its compliance with the non-punishment principle in regional law.

Although human trafficking and modern slavery for the purpose of criminal exploitation is by no means a new phenomenon, potential cases of this form of exploitation have been increasing

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[42] See for example, *R v O* [2008] EWCA Crim 2835; *R v L & Others* [2013] EWCA Crim 991; *R v Joseph (Verna)* [2017] EWCA Crim 36; *R v MK (Gega) [2018] EWCA Crim 667; R v DS*, *R v* A, R *v AAD, AAH, and AAI* (n 3).

[43] See for example, Riel Karmy-Jones, 'Trafficking: R v Joseph (Verna Sermanfure) (Case Comment) (2017) 10 Crim LR 817; Sean Mennim and Nicola Wake, 'Burden of Proof in Trafficking and Modern Slavery Cases: R v MK; R v Gega (Case Comment) (2018) 82(4) J Crim L 282; Suzanne O'Connell, 'R v Brecani – Modern Day Slavery Act defences s45.. is it all over?...... Well it is now?!' (2021) <https://crimeline.co.uk/wp-content/uploads/2021/07/Brecan.pdf> accessed 20 May 2023. See also Appendix I and II (case notes).

[44] Laird, 'Evaluating' (n 33); Marija Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking In Human Beings: A Quest for Rationale and Practical Guidance' (2017) 1 JTHE 41; Julia Muraszkiewicz, 'Protecting Victims of Human Trafficking from Liability: An Evaluation of Section 45 of the Modern Slavery Act' (2019) 83(5) J Crim L 394

worldwide. Adults and children are trafficked and/ or enslaved and forced to commit myriad offences at the hands of their exploiters. The increasing incidence of this form of exploitation and recognition by frontline actors has resulted in the Trafficking Directive including a wide definition of human trafficking to cover trafficking for the purpose of criminal exploitation – often referred to as 'forced criminality' or 'forced criminal activity'.[45] Despite this inclusion highlighting the need for state parties who have ratified the instrument to directly address this form of exploitation, a dearth of research and awareness persists and, as a result, victims continue to be misidentified as offenders and criminalised.

In 2014, Anti-Slavery International partnered with RACE in Europe to address this and provide a baseline assessment of the issue; their findings exposed a form of trafficking more widespread than previously reported, with victims being forced to commit an extensive variety of crimes.[46] The report noted that the UK acknowledged criminal exploitation in national statistics; the extent of this, however, was limited. Indeed, the National Crime Agency (NCA) throughout its 7 years collecting data on the National Referral Mechanism (NRM) – the framework for identifying and referring potential victims of modern slavery to appropriate support providers in the UK – has failed to recognise criminal exploitation as a stand-alone category of exploitation, instead opting to recorded potential victims of human trafficking and modern slavery as having a single primary exploitation type, either: 'labour', 'sexual', 'domestic

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[45] See, European Union Directive 2011/36 on Preventing and Combatting Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1 (Trafficking Directive).

[46] RACE, *Trafficking for Forced Criminal Activities and Begging in Europe – Exploratory Study and Good Practice* (Anti-Slavery International 2014).

servitude', 'organ harvesting' or 'unknown exploitation'.[47] Notably, 'criminal exploitation' was categorised within 'labour exploitation', masking its true nature. Here, a parallel can be drawn with the MSA 2015 itself, which fails to attach significant statutory weight to criminal exploitation by not including it within the s 3 definition of exploitation. The recognition of the increasing extent of this form of human trafficking and modern slavery and its all-inclusive nature of victimisation makes it all the more imperative that victims of criminal exploitation are afforded genuine victim-centred protection from criminalisation for these types of offences they commit. Arguably, the explicit inclusion of this form of exploitation within the Act would be a step towards creating a more victim-centred approach to protecting victims as this category of victim would be recognised in law.

Evident throughout the available literature in this area is the lack of comparative analysis of statutory non-criminalisation provisions. The Anti-Trafficking Monitoring Group provides a useful introductory comparative analysis between the non-criminalisation provisions within the three UK human trafficking and modern slavery Acts, i.e., the MSA 2015 (E&W), the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, and the Human Trafficking and Exploitation (Scotland) Act 2015, which highlights key differences and illustrates the shortcomings of the MSA 2015.[48] However, the

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[47] In stark contrast to this, the United Kingdom Human Trafficking Centre (UKHTC) recognised 'criminal exploitation' as a standalone form of trafficking in 2012 and out of the 2255 potential victims they identified, 16 per-cent (362) were victims of criminal exploitation. Cannabis cultivation and petty crimes were identified as the most common forced activities.

[48] C Beddoe and V Brotherton, 'Class Acts?: Examining modern slavery legislation across the UK' (The Anti Trafficking Monitoring Group 2016) 64-71. See also, Vicky Brotherton, 'Class Acts? A comparative analysis of modern slavery legislation across the UK' in Gary Craig and other (eds) *The Modern Slavery Agenda: Policy, Politics and Practice in the UK* (2019).

report merely provides an overview of how each of these provisions approach the principle of non-punishment/ prosecution of victims and little more is offered beyond that in terms of an in-depth analysis of each provision. While the report does prove invaluable in terms of setting out each of the non-criminalisation provisions and their respective counterparts, this research provides a more thorough, up-to date account of the statutory defence in E&W. Furthermore, beyond this domestic comparative analysis, there is a scarcity of broader in-depth comparative study that transcends national borders. Each year the US Department of State publishes its annual Trafficking in Persons Report (TIP Report) which provides the most comprehensive resource of governmental anti-trafficking efforts, however, the discussion of s 45 MSA 2015 in more recent Reports is generally more narrative than analytical and is limited to one paragraph.[49] This research addresses this gap by producing a novel Anglo-American comparative analysis of statutory protective measures against criminalisation of victims of human trafficking and modern slavery.

Previous literature on protecting victims from criminalisation has focused on high profile forms of criminal exploitation, in particular trafficking for the purpose of cannabis cultivation and, more recently, county lines. For example, Burland has written extensively on the non-punishment of Vietnamese nationals trafficked for the purpose of cannabis cultivation,[50] and there is a growing body of literature examining the trafficking of children and vulnerable

[49] See for example, US Department of State, *Trafficking in Persons Report* (2022) 572.

[50] See for example, Patrick Burland, 'Still punishing the wrong people: the criminalisation of potential trafficked cannabis growers' in Gary Craig and others (eds) *The Modern Slavery Agenda: Policy, Politics and Practice in the UK* (Bristol University Press 2019).

people across the country for the purpose of selling illegal drugs.[51] However, to date there has been no research that more widely examines the impact of the statutory defence on the responses to people exploited for other forms of criminal exploitation, such as, modern slavery offences, this thesis aims to address this gap. The available academic literature in this area emphasises that the traditional and persistent focus on sexual exploitation as the predominant form of human trafficking and modern slavery has forced other forms of exploitation to be 'largely overlooked'.[52] With regard to human trafficking for the purpose of criminal exploitation, Villacampa and Torres argue that the lack of interest in analysing this form of trafficking is in part due to Article 3 of the Trafficking Protocol and Article 4 of the Trafficking Convention not expressly including trafficking for criminal exploitation in the definition of trafficking.[53] Villacampa and Torres go on to highlight how previous studies have focused on the criminalisation of women victims of criminal exploitation, including Hale and Gelsthorpe's pre-MSA research into criminalisation of migrant women which found that out of 103 imprisoned women, 43 had been trafficked.[54] This thesis aims to address this gap in the literature by focusing on the application of s 45 MSA 2015 and exploring cases that have (un)successfully raised the defence.

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[51] See for example, Paramjit Ahluwalia, 'The Predicament of County Lines and Section 45 Modern Slavery Act 2015' (2018) 4(Win) Criminal Bar Q 21; N Stone, 'Child Criminal Exploitation: 'County Lines', Trafficking and Cuckooing' (2018) 18(3) Youth Justice 285; G Robinson, R McLean and J Densley, 'Working county lines: Child Criminal Exploitation and illicit drug dealing in Glasgow and Merseyside' (2019) 63(5) Intl J Offender Ther Comp Criminol 694.

[52] E Cockbain and H Brayley-Morris, 'Human trafficking and labour exploitation in the casual construction industry: An analysis of three major investigations in the United Kingdom involving Irish Traveller offending groups' (2018) 12(2) Policing: A Journal of Policy and Practice 129, 130.

[53] Villacampa andTorres, 'Human trafficking' (n 31) 4.

[54] Liz Hales and Loraine Gelsthorpe, *The Criminalisation of Migrant Women* (Cambridge: Institute of Criminology, University of Cambridge 2012) 2.

6. Thesis Synopsis

This thesis is split into five chapters each of which collectively challenge the current statutory framework that exists to protect human trafficking and modern slavery victims who offend and advocate for a victim-centred, human rights-based approach to the non-criminalisation of these victims. In the first chapter, the historical anti-slavery and anti-trafficking movements leading up to the development of the international anti-modern slavery agenda and the introduction of modern slavery policy and legislation in the UK and US will be analysed. Contemporary manifestations of modern slavery that have been identified in the UK will be examined, with a particular focus on trafficking for criminal exploitation as a newer, under explored manifestation of modern slavery. This chapter analyses the global measures in place to protect this category of victim/ offender to conclude that international obligations of identification and non-punishment of victims fall short of adequately protecting victims from being criminalised.

The second chapter critically investigates the concept of victimhood and the vulnerable victim discourse embedded in the anti-human trafficking and modern slavery rhetoric in the UK, US and worldwide.[55] It aims to address the intricacies between the reasons why victims offend on the one hand, and the reasons why these victims should be legally protected from punishment on the other, through thorough analysis of criminal law perspectives. Particular focus is given to the binary that exists within society between victims and offenders that often fails to

[55] See for example, Nils Christie, 'The Ideal Victim' in EA Fattah (ed) *From Crime Policy to Victim Policy* (Palgrave Macmillan 1986), cf Erin O'Brien, 'Ideal Victims in Trafficking Awareness Campaigns' in Kerry Carrington and others (eds), *Crime, Justice and Social Democracy: International Perspectives* (Palgrave 2013).

recognise the subtle distinctions that exist where these binaries overlap and victims become offenders. The effect this has on identifying victims in the first instance is also explored. This chapter examines the extent to which this dominant modern slavery discourse has hindered efforts to adopt a genuine victim-centred approach to protecting victims from being further victimised by the state.

The third chapter provides an in-depth critical examination of the s 45 modern slavery defence for adults. Through analysing the conceptualisation, application, and operation of the statutory defence available for adult victims of human trafficking and modern slavery in E&W, the focal parameters of the defence are exposed and explored. This chapter contends that these limitations of the defence correlate with socio-legal prejudices of victimhood embedded within modern slavery discourse, and broader criminal law framework, which contradict a true victim-centred, human-rights based approach to non-criminalisation and fail to provide adequate protection to victims. Through the analysis in this chapter, a novel theoretical framework for comparing the statutory defences in s 45 MSA 2015 with the affirmative defences in California, Kentucky, Oklahoma, Wisconsin and Wyoming legislation is constructed which aims to account for the complexities of human trafficking and modern slavery victimisation and justify reform of the MSA 2015.

The fourth chapter uses the framework devised in the previous chapter to explore how five states in the US: California, Kentucky, Oklahoma, Wisconsin, and Wyoming, have implemented the principle of non-punishment into their respective statute books through a comparative analysis of the adult modern slavery defence with each state's affirmative defence. Similar to the provisions in s 45 MSA 2015, each of the states listed above provide trafficking victim defences that do not limit their application to prostitution or prostitution-related

offences, or duress/ compulsion or duress-like situations. The varying elements within each affirmative defence are examined and their formulation critiqued, contrasting each with corresponding elements present in the modern slavery defence for adults in E&W. This chapter draws comparatives from each state to determine how the principle of non-punishment has been interpreted outside regional legal borders and inform a more victim-centred, human rights- based approach that could be adopted in E&W and be beneficial for other US states.

The fifth and final chapter engages in a comparative analysis of the statutory protections afforded to children in E&W and the five aforementioned US states in order to determine whether the protections in these jurisdictions provide the optimal course of redress for child human trafficking and modern slavery victims who commit offences. The distinct measures in place to protect children from criminalisation are examined, first in relation to non-criminalisation in E&W followed by the approach to non-criminalisation in the US. Case studies are provided throughout to illustrate problems that permeate from the current approaches taken by each jurisdiction. The chapter concludes that despite the child defence being formed from vastly different underpinnings to that of the adult defence, the provision, like its adult counterpart, fails to provide a truly victim centric approach to non-criminalisation in E&W. A move towards a more victim-centred solution is advanced.

7. Methodology

This research encompasses a socio-legal, comparative methodology that encompasses several methods of analysis, from a traditional doctrinal 'black-letter law' approach entailing

comparative and reform-oriented analysis[56] to historical analysis underpinning a human rights framework. 'Law', as a body of normative rules and principles,[57] is based on logical conclusions. These conclusions, however, are formed from judgment which can be derived from a wider context within which law exists, such as historical, sociological, political, moral and economic contexts. The abhorrent nature of human trafficking and modern slavery calls for an underline consideration of these factors in order to seek a greater understanding of how the law operates within a social context and the impact on its operation. As these external factors play a significant role in shaping the law, this research could be considered more interdisciplinary in nature and should be categorised as socio-legal rather than purely doctrinal in nature, although the distinction between the two is frequently blurred.[58] Medico-legal factors must also be acknowledged owing to the serious and long-term physical and psychological trauma experienced by victims (as a result of their exploitation) which may play a significant role in influencing their motivations. This research employs an inductive, qualitative methodology to determine the precise state of the law with regard to the criminalisation of victims; through engaging in interdisciplinary research via the collection and analysis of non-legal data, a broader understanding of the impact of non-legal factors is also presented.

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[56] M McConville and WH Chui, *Research Methods for Law* (2nd ed, Edinburgh University Press 2017) 3-4.

[57] S Wheeler and PA Thomas, 'Socio-Legal Studies' in D Hayton, *Law's Future(s)* (Hart Publishing 2000) 271.

[58] See P Chynoweth, 'Chapter 3 - Legal Research', in L Ruddock and A Knight, *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38 in which the author acknowledges the difficulties legal researchers have in categorising the nature of their research and attempts to describe it by reference to epistemological, methodological and cultural features; and T Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law', [2015] Erasmus Law Review 3, 130-138 and T Hutchinson and D Nigel, 'Defining and Describing What We Do: Doctrinal Legal Research' [2012] Deakin Law Review 17, 83-119 in which the shift towards more interdisciplinary legal research in the UK and Australia is explored.

The critical, qualitative analysis of legal materials adopted by this thesis to support its overall aim permits several things to take place: the systematic exposition of the rules governing a particular legal category; the analysis of the relationship between rules; the explanation of areas of difficulty; and predictions about future developments to be made.[59] In order to provide suitable reform options this research systematically analyses the legal principles and statutory provisions involved, drawing legal data from both primary and secondary sources. Legislation and case law from this jurisdiction and elsewhere forms the foundation of this thesis and is obtained electronically via legal directories and databases such as LexisNexis, Westlaw, Heinonline, BaiLII and Justia (US Law). Commentaries on the law are sourced from Northumbria University libraries and inter-library loans, the aforementioned databases including Dawsonera, and official websites.[60]

For the purposes of law reform, comparative research 'acts as a provider of a pool of models, using foreign law to modernize and improve the law at home.'[61] This analysis benefits the domestic legal system by 'offering suggestions for future developments, providing warnings of possible difficulties' and critically evaluating the domestic law.[62] The values of comparative

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[59] D Pearce, E Campbell and D Harding (the Pearce Committee), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (AGPS 1987) vol 2, 312 cited in Terry Hutchinson, *Researching and Writing in Law* (3rd ed, Thomson Reuters 2010) 7.

[60] Parliamentary and non-parliamentary publications can be accessed from a number of websites, for example: <http://www.parliament.uk>, <https://ncsl.org> <http://lawcommission.justice.gov.uk>, <https://www.gov.uk>, <http://www.nationalarchives.gov.uk/webarchive>, <https://justice.gov>, <http://www.scotlawcom.gov.uk>, <https://www.justice-ni.gov.uk>, <https://www.usa.gov> and <https://www.state.gov>.

[61] E Örücü, 'Methodology of Comparative Law' in JM Smits, *Elgar Encyclopaedia of Comparative Law* (2nd ed, Edward Elgar Publishing 2014)

[62] G Wilson, 'Comparative Legal Scholarship' in *Research Methods for Law* (2nd ed, Edinburgh University Press 2017) 87.

law received parliamentary recognition in 1965 with the enactment of the Law Commissions Act. The Act created an English and Scottish law reform commission 'whose function, *inter alia*, is to obtain information from other legal systems of other countries, as appears likely to facilitate their function of systematically developing and reforming the law of their country'.[63] With regard to modern slavery, Parliament further encouraged comparative analysis by setting up the office of Independent Anti-slavery Commissioner.[64] A general function under the position is to encourage good practice in the prevention, detection, investigation and prosecution of modern slavery offences, and identify victims of said offences, by co-operating with public authorities, voluntary organisations and other persons both in the UK and internationally.[65] The Commissioner readily looks to the work already undertaken by a number of foreign legislatures in order to combat issues surrounding modern slavery. [66]

There remains a strong urge for the UK, Australia and the US to work collectively in order to develop strong international anti-slavery strategies.[67] According to Zweigert and Kötz, within comparative research there must be 'specific comparative reflections on the problem to which the work is devoted'.[68] This is achieved by stating the essentials of the foreign law, country by

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[63] Law Commissions Act 1965, s 3(1)(f). See P de Cruz, *Comparative Law in a Changing World* (2nd ed, Cavendish Publishing Limited 1999) 17.

[64] MSA 2015, s 40.

[65] MSA 2015, s 41(1)(a)-(b) and (3)(f).

[66] See Independent Anti-Slavery Commissioner, *Annual Report 2016 – 2017* (2017) 36. In particular, Priority 5: International collaboration discusses the Commissioner's engagement with international bodies to 'secure a locally embedded response'.

[67] ibid 39. Encouragingly, on 17 September 2017, the Governments of Australia, Canada, New Zealand, the UK and the US (amongst others) endorsed a 'Call to Action to End Forced Labour, Modern Slavery and Human Trafficking', through which each committed to taking steps to eliminate slavery from their economies.

[68] K Zweigert and H Kötz, *An Introduction to Comparative Law* (Clarendon Press 1977) 5.

country, as a basis for critical comparison, concluding with suggestions about the proper policy for the law to adopt, which may require the reinterpretation of the domestic system. The socio-legal element of this research will acknowledge the historical context behind each of the relevant laws and shed light on how the political, cultural and social factors of each jurisdiction has influenced the development and implementation of current non-criminalisation provisions.

Acknowledging this, the comparative analysis undertaken in this research centres on E&W and five other jurisdictions within the US: California, Kentucky, Oklahoma, Wisconsin and Wyoming – each of which have incorporated statutory protection from criminalisation into their respective protective frameworks in one form or another. Currently within the UK, both E&W and Northern Ireland (NI) provide a statutory defence for a (VoT) who may have committed a criminal offence as a result of exploitation. Scotland provides no such statutory protection; however, the principle of non-punishment is embedded within its legislation. The US provides protection from prosecution at both federal and state level with the majority of states providing immunity to, diversion from, and affirmative defences against, criminal prosecution for actions VoTs were forced to commit. At least 27 states provide additional laws which create mechanisms to seal, vacate or expunge previous criminal convictions.[69] In contrast, whilst principles and guidelines exist, statutory laws that protect VoTs from prosecution have only recently been passed in Australia and as such it is excluded from the

[69] National Conference of State Legislatures, 'Human Trafficking State Laws' (NCSL 2018) <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx#tabs-2> accessed 20 May 2023.

ambit of this research.[70] The component of comparative analysis within this research has proven highly effective in addressing the research aims and highlighting possible avenues for reform.

Scotland and Northern Ireland enacted anti-trafficking legislation in the same year as England and Wales. Each of the Acts place strong emphasis on 'identifying, supporting and protecting victims of modern slavery, disrupting perpetrator behaviour, prosecuting perpetrators and addressing the conditions that foster trafficking'.[71] With regard to protecting victims, the Human Trafficking and Exploitation Act (Northern Ireland) 2015 provides a defence for both adult and child slavery and trafficking victims compelled to commit an offence.[72] No such defence is offered by the Human Trafficking and Exploitation Act (Scotland) 2015, however the Act does permit the Lord Advocate to prepare and publish instructions about the prosecution of a potential VoT.[73] Comparison between the non-criminalisation provisions within the three Acts highlights key differences and illustrates the shortcomings of the Modern Slavery Act 2015. The divergent approaches leave the UK at risk of producing inconsistent

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[70] See Office of the United Nations High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (OHCHR 2002). In Australia, the Joint Standing Committee on Foreign Affairs, Defence and Trade recommended that the Australian government introduce defence(s) for modern day slavery victims compelled to commit offences due to exploitation similar to, but improving upon, s 45. Modern slavery legislation is still being developed.

[71] Home Office, 'A Typology of Modern Slavery Offences in the UK' (Research Report 93, October 2017) 2.

[72] Human Trafficking and Exploitation Act (NI) 2015, s 22.

[73] Human Trafficking and Exploitation Act (Scots) 2015, s 8.

outcomes when implementing the provisions, thus emphasising the need for reform in order to create harmonisation at a national level.[74]

The US is a suitable comparator due to its position within the 'common law' parent legal family, founded on judicial decisions and the doctrine of judicial precedent or *stare decisis*.[75] In the context of comparative law, common law denotes the tradition associated with Anglo-American legal systems and research providing Anglo-American perspectives is considered common practice. US law is plural and consists of federal law, the laws of the 50 states, the District of Columbia, and the territories. This allows for a broad comparative analysis as each individual state contains their own legislatures, executives and judiciaries and thus exist as independent jurisdictions. Since the 1990's, the US has dominated the contemporary international anti-trafficking law and policy arena. In leading negotiations over the principle multilateral instrument that regulates trafficking,[76] and passing its own federal domestic anti-trafficking law, [77] the US recognised itself as one of the leading powers in tackling the issue of

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[74] C Beddoe and V Brotherton, 'Class Acts?' (n 48) 10; The Refugee Children's Consortium, 'Modern Slavery Bill
Report Stage Briefing – House of Lords Clause 45: A strengthened statutory defence' (2015) 3.

[75] de Cruz (n 63) 27. Note Louisiana being an exception as it has a civil code that is applied.

[76] The Trafficking Protocol was ratified by the UK in 2006 and aided the development of the Modern Slavery Act 2015. Although the Protocol does not specifically grant immunity from prosecution, it is acknowledged as the leading instrument in the protection of victims as it implies in various provisions that trafficked persons are to be treated as victims and not criminals; JA Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 AJIL 609, 610.

[77] Trafficking Victims Protection Act of 2000, 22 USC §§7101–7110 (hereinafter TVPA), amended by the Trafficking Victims Protection Reauthorization Act of 2003, 22 USC §§7101–7110 (Supp III 2005), Trafficking Victims Protection Reauthorization Act of 2005, 22 USC §§7101–7110 (Supp IV 2007), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 22 USC §§7101–7112 (Supp III 2010), Trafficking Victims Protection Reauthorization Act of 2013, Pub L No 113–4, 127 Stat 136. Controversially, the TVPA was passed a month prior to the Trafficking Protocol.

trafficking in human beings. Addressing the international law's lack of enforcement mechanism, the US undertook the task of policing other countries' anti-trafficking responses – notably by utilising the economic sanctions within its own legislation, the Trafficking Victims Protection Act 2000 (TVPA). The TVPA permits the President to withdraw funding from countries that fail to comply with the minimum anti-trafficking standards of the US, via its annual TIP Report.[78]

Along with the general recognition of modern slavery as a fundamental domestic and international problem, there remains a growing trend in the US towards providing adequate victim protection at various stages of identification.[79] At state level, legislators have enacted several criminal protections and civil remedies for VoTs in the judicial system. In terms of immunity and diversion from prosecution, the majority of states only offer such protection to child victims as they are considered to be the most vulnerable. Like E&W and NI, however, most states enable prosecuted VoTs to assert an affirmative statutory defence to criminal charges resulting from acts they were forced to commit by their traffickers. The main focus of comparison will be on the legislation governing each of the respective jurisdictions along with

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[78] TVPA 22 USC § 108 (West 2012). The US State Department employs a number of individuals who work full-time on investigating and preparing the TIP Report. The TIP Office partners with foreign governments, international organizations, other federal agencies, civil society, the private sector, and survivors of THB to develop and implement effective strategies to combat modern slavery. Office to Monitor and Combat Trafficking in Persons, 'About Us' (US Department of State) <https://www.state.gov/j/tip/about/index.htm> accessed 20 May 2023.

[79] TVPA, § 7101(b)(19). 'Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.'; TR Sangalis, 'Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act' (Comment, 2011) 80 Fordham L Rev 403, 418 citing *Implementation of the Trafficking Victims Protection Act: Hearing Before the H Comm on Int'l Relations*, 107th Cong 3 (2001).

relevant case law which provides an insight into how the statutory defences have been applied in practice. With regard to law reform, it is not picturesque legal traditions of faraway countries that are being sought, but innovative and practice-tested solutions from legal systems with similar operating conditions and guiding principles as one's own.[80]

Finally, it is worth noting that legal developments within human trafficking and modern slavery laws have been characterised by a number of social and economic factors and sex trafficking is now considered to be amongst the world's fastest growing criminal offence. Scholars recognise a multitude of factors that have contributed to the rise and prevalence of trafficking – namely poverty,[81] economic crisis,[82] globalisation[83] and gender inequalities.[84] Globalisation and industrialisation, in particular, have had a significant impact with the flow of trafficking being directed from the poorer countries of the East toward the richer countries of the West, such as the UK and US, in particular to those with large sex industries.[85] As modern slavery has been identified as a crime that is a gender-based phenomenon, the primary victims being women and girls, much of the literature on human trafficking, particularly in the US, adopts a

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[80] F Pakes, *Comparative Criminal Justice* (Cullompton: Willan 2004) 14-15; T Weigend, 'Criminal Law and Criminal Procedure' in JM Smits, *Elgar Encyclopaedia of Comparative Law* (2nd ed, Edward Elgar Publishing 2014).

[81] A Amiel, 'Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation' (2006) 12 BUFF HUM RTS L REV 5, 7-8.

[82] K Kim and K Hreshchyshyn, 'Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States' (2004) 16 HASTINGS WOMEN'S LJ 1, 3 and 6.

[83] Susan Tiefenbrun, 'The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000' (2002) UTAH L REV 107, 131.

[84] KE Hyland, 'Protecting Human Victims of Trafficking: An American Framework' (2001) 16 BERKELEY WOMEN'S LJ 29, 36.

[85] E Kelly, 'Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe' (International Organization for Migration 2002) 20.

feminist legal approach. Here it is acknowledged that the number of trafficked men and boys is also on the rise,[86] and so the ambit of this thesis considers this category of vulnerable offenders in its broadest sense and is not strictly limited to female VoTs.

Although the strong link between trafficking and sexual exploitation/ prostitution does emphasise the need for consideration of how the law and judiciary potentially disadvantage women,[87] this particular issue is outside the scope of this research. In terms of defence legislation, this link is primarily acknowledged by US legislators who predominantly focus on providing an affirmative defence to offences such as prostitution, loitering and solicitation. Though not the main focus in E&W, the approach proves to be invaluable when considering whether the 'compulsion' defence in the MSA 2015 ought to encompass a broader range of vulnerable victims who are compelled to commit offences, such as domestic violence victims.[88] This research is ultimately focused on providing proposals for legal reform and is undertaken with the definitive aim of making suggestions for improvements to the law that are victim-centred. This thesis has attempted to engage with the voices of victims by providing a succinct chapter on modern slavery victimisation that engages with readily available victim and survivor stories and court reports which detail evidence of the victim/ offender's background of

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[86] United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (UN Publication, Sales No E 16 IV 6) 7.

[87] ibid 8; B Kingshott and TR Jones, 'Human Trafficking: A Feminist Perspective Response' (Academy of Criminal Justice Sciences 2016 Annual Meeting, Denver Colorado, March 2016) 4.

[88] During debates on the 2021 Domestic Abuse Bill, the inclusion of a draft defence for survivors of domestic abuse who commit an offence modelled on s 45 MSA 2015 was considered, however the Government rejected the proposal. Scholars continue to advocate for the expansion of a compulsion defence similar to s 45 for domestic abuse victims/survivors, see for example Vanessa Bettinson, 'Defending the Domestic Abuse Victim/Defendant: Why the Prison Reform Trust's Campaign to Introduce Defences for Offending Driven by Domestic Abuse Is Important' (2022) 102(2) The Prison Journal 154.

exploitation. This thesis does, however, urge the Government to include the voices of victims via empirical methods in all future endeavours to address modern slavery and the protection of its victims. The chosen methodology of this thesis permits a systematic, historical, socio-legal and comparative analysis of the law which will consider both legal data and non-legal data. Collectively these research methods provide the best option for achieving the desired aim.

8. Summary of Original Contribution and Recommendations

This thesis makes an original contribution to knowledge and the current body of academic literature on human trafficking and modern slavery by providing an in-depth Anglo-American comparison of the statutory defences available to victims in E&W and the affirmative defences available to victims in the US states of California, Kentucky, Oklahoma, Wisconsin and Wyoming; and by advancing ten novel victim-centred, human rights-based recommendations for law reform outlined below:

Recommendation One: Addressing International and Regional Failings

The Trafficking Protocol, Trafficking Convention and Trafficking Directive should be amended to incorporate causation-based non-criminalisation provisions which impose positive obligations on states to provide a statutory human trafficking and modern slavery defence for adult and child victims corresponding to a true victim-centred, human rights-based interpretation of the non-criminalisation principle.

Recommendation Two: Defining Human Trafficking

The Government should amend s 2 of the MSA 2015 to mirror the Trafficking Protocol, Trafficking Convention, and Trafficking Directive in its structure and definition of 'trafficking in persons'/ 'human trafficking' and remove all explicit reference to 'travel' to ensure all victims are protected by the Act in line with the true picture of modern slavery victimhood outlined in Chapter 2.

Recommendation Three: Recognising Criminal Exploitation

The Government should amend s 3 of the MSA 2015 to include 'criminal exploitation' as a stand-alone category of exploitation.

Recommendation Four: A Retrospective Defence

The Government should amend the MSA 2015 to explicitly state that s 45 of the Act has retrospective effect.

Recommendation Five: A Subjective Defence

The Government should amend s 45(5) of the MSA 2015 to include 'background of exploitation' within the list of relevant characterises that are taken into account when applying the reasonable man test in s 45(1)(d).

Recommendation Six: A Causation-Based Defence

The Government should amend s 45(1) of the MSA 2015 to form a purely causation-based defence, as opposed to a compulsion-based defence. Section 45(2) and s 45(3) should be omitted from the Act.

Recommendation Seven: No Exclusions

The statutory defences under s 45 of the MSA 2015 should be available for all offences committed by victims of human trafficking and modern slavery. The reformulated s 45 defences should apply to all offences, except murder. Where a victim of human trafficking and modern slavery commits murder, a partial defence should be available to them that would reduce murder to manslaughter.

Recommendation Eight: Recognising the Worst Forms of Child Labour

The Government should amend the MSA 2015 to include the worst forms of child labour, as defined by International Labour Organisation (ILO) Conventions,[89] by explicitly defining modern slavery as conduct which would constitute, *inter alia*, 'the worst forms of child labour, as defined in Article 3 of the ILO Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, sone at Geneva on 17 June 1999 ([2007] ATS 38)'.[90]

Recommendation Nine: Defining Direct Consequence

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[89] ILO, Worst Forms of Child Labour Convention 1999 (No 182) Art 3.

[90] Note, this explicit wording is taken from the Australian Modern Slavery Act 2018.

The Government should amend s 45(5) of the MSA 2015 to include an explicit definition of ‘direct consequence’.

Recommendation Ten: No Objective Test for Child Victims

The Government should remove the ‘reasonable person’ test under s 45(4)(c) of the MSA 2015.

9. Terminology

As the slavery-focused holistic approach of ‘modern slavery’ moves to become the global standard terminologically, it is practical to have a common frame of reference of terms used in this area of research. Throughout each chapter, key terminology is explored and points of critiqued presented. Here a brief overview of the terminology used in this thesis is provided:

Human Trafficking and Modern Slavery: ‘human trafficking’ shall be broadly understood in accordance with Article 4 of the Trafficking Convention, as mandated through UK policy on statutory interpretation,[91] unless otherwise stipulated. ‘Modern slavery’ shall be understood in accordance with the legal definition in E&W under the MSA 2015, unless otherwise stipulated. The title of this thesis refers to both concepts individually despite the now common practice of using the terms interchangeably. This does not, however, preclude the concept of human trafficking from being included in the overarching umbrella term of modern slavery and vice versa. Human trafficking is recognised as a both a form of modern slavery and

[91] Home Office, *Modern Slavery Act 2015* (n 35) para 2.3.

inclusive of slavery as a form of trafficking. The terms are merely expressed independently in the title to reflect the distinct legal definitions of both, and the divergent legal terminology adopted by the US and E&W in their domestic legislation. Various unresolved terminological issues at international and domestic level are discussed throughout the succeeding chapters.

Non-criminalisation: the language of the overarching legal principle that pertains to the study of the protective measures afforded to victims of human trafficking and modern slavery who commit offences varies between different legal jurisdictions and human trafficking and modern slavery discourses. The concepts of 'non-punishment' and 'non-prosecution' emanate from regional instruments, the words 'non-liability' originate from UN guidance, and language such as 'non-application of penalties' and 'non-criminalisation' is adopted by scholars. It is this latter term that is relied on throughout this thesis, save where explicit reference is made to the principle as it is presented in other instruments and literature. The concept of 'non-criminalisation' is exclusively linked to criminal law, part of which this thesis sets out to address.

Victims of Human Trafficking and Modern Slavery: the persons whom the principle of 'non-criminalisation' is designed to protect are victims of human trafficking and modern slavery. The concept of 'victim' has evolved over time and embraced additional meanings to include any persons who experience injury, loss, or hardship due to any cause. Whilst there is strong support for persons who have experienced non-fatal crimes to be described as 'survivors' – particularly those who have escaped from exploitation – this thesis adopts the language used in the legislation at the centre of this research. The predominant terminology used in this thesis is 'victim of human trafficking and modern slavery' or 'victim of modern slavery' ('victim' will refer to such unless otherwise specified). When referring to a victim of

human trafficking specifically, the common abbreviation 'VoT' (victim of trafficking) will be used. When referring to a victim who has committed a criminal offence, the terms 'victim/ offender' and 'victim/ defendant' will be used interchangeably.

Criminal Exploitation: one of the lesser-known forms of human trafficking and modern slavery entails victims being trafficked/ enslaved for the purpose of forcing them to perform either activities that are considered unlawful or antisocial, such as forced begging, or those that directly constitute crimes, such as cultivating cannabis, drug dealing, acting as a drug mule, property-related offences, or financial fraud. This form of exploitation includes the recruitment, transportation, transfer, harbouring, receipt, exchange or transfer of control over a person by the characteristic means of coercion, fraud or abuse for the purpose of exploiting the person by forcing them to engage in criminal activities. Terminology including 'forced criminality', 'forced criminal activity', 'exploitation of criminal activities', 'criminal exploitation' and 'forced criminal exploitation' are often used interchangeably to describe this form of exploitation. This thesis employs the terminology of 'criminal exploitation' and 'child criminal exploitation' (CCE) as this is in current usage by the UK Government and most agencies. It is acknowledged here that overlaps between different forms of exploitation may occur as victims are often exploited in a number of ways, and victims of all forms of exploitation may be compelled to commit criminal acts during the course of their exploitation. As the analysis of each manifestation is beyond the scope of this research, priority is given to the manifestation of modern slavery that directly creates the dichotomy of victim/ offender status: 'criminal exploitation'.

Children: there are significant differences between the definition of an adult victim of human trafficking and modern slavery and a child victim of human trafficking and modern slavery.

Consequently, children are generally afforded unique protections from criminalisation. This thesis adopts the language of 'children' and 'child' to refer to any persons under the age of 18 years, except where children of the same age are explicitly referred to as 'minors' which is commonplace in the US. The term 'young person' is also utilised where reference is made to a child between 14 to 17 years of age.

Chapter 1: The Emergence of Modern Slavery and the Modern Slavery Defence(s)

1. Introduction

This chapter will provide a historical analysis of legislative anti-slavery and trafficking movements leading up to the development of the international anti-modern slavery agenda and the introduction of modern slavery policy and legislation in the UK and US. The chapter will examine the contemporary manifestations of modern slavery that have been identified in the UK, with a particular focus on human trafficking and modern slavery for criminal exploitation as a newer/ under explored manifestation of modern slavery. This will be followed by the analysis of the global measures in place to protect this category of victim via adequate identification provisions and obligations providing for the non-criminalisation of victims. The first part will chart the historical emergence of modern slavery, via the traditional abolitionist movements and anti-trafficking movements that began during the early twentieth century to contemporary anti-modern slavery agendas. The second part will outline the development of protection mechanisms in international law, notably the obligations of identification and non-criminalisation of victims. The third part will chart the political road to the application of the non-punishment/ non-prosecution principle into the MSA 2015 as a statutory defence. This chapter will expose the current unjust criminal justice-based approach to protecting victims of human trafficking and modern slavery that has evolved over the years from oversimplified narratives of slavery and human trafficking by exploring the historical emergence of anti-trafficking and anti-slavery frameworks that have shaped international, regional, and domestic efforts to address these forms of exploitation. This will support the advance of victim-centred, human rights-based reforms in the final chapter of this thesis.

2. The Historical Emergence of Modern Slavery

The abolition of slavery throughout the British Empire occurred some two centuries ago. Despite this, new subtle forms of slavery-like practices continue to manifest in modern society on a national and global scale. As the world evolves towards being a more global community, the process of globalisation both facilitates and produces these manifestations. 'Trafficking in human beings' or 'human trafficking' in particular has been driven to the forefront of international efforts to eradicate the exploitation of vulnerable people at a transnational level. Though by no means a novel phenomenon of modern times, in the last three decades human trafficking has been recognised as a form of exploitation under the 'modern-day slavery' moniker by international organisations, politicians and scholars alike.[92] Through the enactment of its own anti-modern slavery legislation, following the signature and ratification of several pieces of international law, the UK claims to remain focused on complying with international obligations directed at successfully combatting and preventing the grave injustices of modern slavery whilst simultaneously protecting its victims.

In 2015, three new pieces of modern slavery legislation passed into law in each of the UK jurisdictions: the MSA 2015 in E&W; the Human Trafficking and Exploitation (Criminal

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[92] 'Modern-day slavery' and 'modern slavery' are recognised concepts that are frequently used as (non)legal umbrella terms comprising multiple forms of exploitation, including slavery, debt bondage, serfdom, forced labour, domestic servitude, forced marriage, child soldiers, organ harvesting, severe economic exploitation of children and the process of human trafficking. See Silvia Scarpa, *Contemporary Forms of Slavery* (European Parliament 'Think Tank' 2018) which clarifies the concept of contemporary forms of slavery and provides a modern slavery policy framework for the European Union. Throughout this thesis reference will be made predominantly to the concept of 'modern slavery' to encompass contemporary forms of slavery and human trafficking in line with Government policy and legislation in E&W.

Justice and Support for Victims) Act (Northern Ireland) 2015; and the Human Trafficking and Exploitation (Scotland) Act 2015. These three Acts were widely received by leading actors involved in anti-modern slavery work for being comprehensive in scope and seemingly fit for harmonising a victim-centred, human rights-based approach with that of a criminal justice-based approach. Indeed, each of the Acts include several new criminal offences coupled with provisions for identifying, protecting and supporting adult and child victims.

In order to critically examine aspects within UK modern slavery legislation and policy it is first necessary to briefly consider its historical emergence. Over the last three centuries a mass of international legal instruments have been adopted in order to define and combat both traditional forms of slavery, including the transatlantic slave trade, and new slavery-like practices such as the white slave traffic, and trafficking in persons. Historical perspectives on traditional slavery and the legislative timeline leading to its abolition provide a valuable insight into the current approach taken by the Government to address prominent forms of slavery in contemporary times. Throughout the twentieth century slavery has persisted, 'increasingly being driven underground as an illegal activity, and morphing into new forms of enslavement',[93] and as such modern forms of slavery should not be isolated from their traditional manifestations. Modern slavery within the domestic law of E&W is broadly categorised by two substantive offences in the MSA 2015: under s 1, slavery, servitude and forced and compulsory labour; and under s 2, human trafficking. The UK legislative response to modern slavery can be attributed to three broad areas of development in international law centred around: slavery abolitionist movements, human rights movements and anti-trafficking movements. These developments,

[93] G Craig and others (ed), *The Modern Slavery Agenda: Policy, Politics and Practice in the UK* (Policy Press 2019) 6.

coupled with mounting concerns over the scale of the phenomenon at a national level, set the foundations for a criminal justice-based response to modern slavery which subsequently developed to acknowledge – albeit only to a certain extent – human rights violations and the need for a more holistic, victim-centred approach to anti-slavery and trafficking measures.[94]

2.1 (Transatlantic) Slavery, Servitude and Forced Labour

The enslavement of indigenous peoples, shipping them to imperialist countries, and trading them as property was common practice between the sixteenth and nineteenth centuries. This practice, known as the transatlantic slave trade, bore witness to over 12 million African slaves transported between Europe, Africa, and the Americas.[95] Although Britain was one of the most successful slave traders at the time, English law was far from in keeping with the practice. No statutes codifying slavery and the slave trade were ever passed and recognition of forced labour in English law was minimal.[96] When Englishmen began to bring native Africans back from colonies where they had been legally purchased as slaves, common law precedents soon began to follow. In a series of cases from the mid-1600s to the abolition of the slave trade in 1807, the courts addressed slavery and the status of slaves ruling both against the practice and, contradictorily, in favour of identifying native Africans as property. In 1677, for example, the Court of King's Bench in *Butts v Penny* ruled that as non-Christians, native Africans were essentially non-men; they were property.[97] This was despite reports from an earlier court

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[94] See Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford Scholarship Online 2008).

[95] R Segal, *The Black Diaspora: Five Centuries of the Black Experience Outside Africa* (Farrar, Straus and Giroux 1995).

[96] Feudal villeinage was the only form of forced labour recognised in English law during this period.

[97] (1677) 2 Lev 201, 3 Keb 785.

decision that 'England was too pure an Air for Slaves to breathe in'.[98] The decision in *Butts* was repeated in *Lowe v Elton*[99] and *Gelly v Cleve*[100] towards the end of the century.

In a string of subsequent cases, however, Lord Chief Justice Holt took a different approach. In *Chamberlain v Harvey*,[101] *Smith v Brown and Cooper*,[102] and *Smith v Gould*,[103] it was held that a native African slave could not amount to property as the common law did not recognise blacks as different to other people – although they could be bought and sold as chattels elsewhere, this was not the case in England: 'as soon as a negro comes into England, he becomes free, one may be a *villein* in England but not a slave'.[104] This position was followed on several occasions leading up to Lord Mansfield's famous 1772 ruling in *Somerset v Stewart* which hinted at Britain's stance on abolitionism.[105] The case, which involved the imprisonment and transportation for sale of a runaway slave, James Somerset, by his owner, Charles Stewart, sparked mass public attention towards the issue of enslavement and its macabre atrocities.[106] At the time, Lord Mansfield's decision to rule it unlawful for Somerset to be forcibly transported from England was taken to mean the emancipation of slaves; that slavery was

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[98] *In the matter of Cartwright*, 11 Elizabeth; 2 Rushworth's Coll 468 (1569).

[99] (1677) (unreported) as cited in J Baker, *An Introduction to English Legal History* (4th ed, London 2002) 475.

[100] (1694) 1 Ld Raym 147, 91 ER 994 (KB).

[101] (1697) 1 Ld Raym 146, 91 ER 994 (KB).

[102] (1702) 2 Salk 666, 91 ER 566 (KB).

[103] (1706) 2 Salk 666, Ray 1274 (KB).

[104] (1702) 2 Salk 666, 91 ER 566 (KB) (emphasis added). In the Middle Ages, a villein was a peasant who worked his lord's land and paid him duties, usually in the form of labour, in return for use of the land. A villein was held to be property fixed to the land, had limited legal protections and could not be bought and sold like chattels. In this sense, a native African enslaved elsewhere was not recognised as a slave in English law, rather they were treated as having the limited rights of a villein.

[105] [1772] 98 ER 499, 510.

[106] See, James Walvin, *The Zong: A Massacre, the Law and the End of Slavery* (Yale University Press 2011) 27.

illegal in Britain. Within the courtroom slave owner's rights were limited and the rights of slaves were expended, yet the status of slaves under English law remained ambiguous.

The early European abolitionist movements, rooted in ensuring equality and freedom for all, later began to pave the way for the universal abolition of black slavery claiming that all 'men are born and remain free and equal in rights'.[107] The crux of early British abolitionism, however, came not from straightforward humanitarian and moral concern, but rather a radical shift in political discourse requiring the protection of national interests and foreign policy. Statutory provisions illegalising slavery practices in Britain subsequently appeared in 1807 in the form of the Abolition of the Slave Trade Act and the ensuing Slavery Abolition Act of 1833 which illegalised the act itself across the British Empire.[108] The international response to abolishing slavery on the whole proved somewhat more arduous from a criminal law perspective. The practice itself, in particular the transatlantic trading of African slaves, was formally recognised as a violation of man's rights long before its criminalisation.[109] Indeed, the prohibition of slavery has long been considered a *jus cogens* principle which, arguably, provided the foundations for the present international human rights movement.[110]

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[107] French Declaration of the Rights of Man and Citizens 1789, Art 1.

[108] The 1807 Act prohibited transatlantic slave transport. Britain is often commended for paving the way for the abolitionism movement, however, Denmark in 1792 was the first country to declare the transatlantic slave trade illegal from 1803, becoming the first European colonial power to take such action. See Junius P Rodriquez, *The Historical Encyclopaedia of World Slavery*, vol 1 (ABC CLIO 1997) 9.

[109] S Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (AltaMira Press 2003) 14–15.

[110] Restatement (Third) of Foreign Relations of The United States § 702 cmts d-i § 102 cmt k (1987); Evan J Criddle and Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 Yale J of Intl L 331, 332.

The first international condemnation of slavery practices appeared in the 1815 Declaration of the Eight Courts Relative to the Universal Abolition of the Slave Trade during the Congress of Vienna 1814-1815 which addressed the Transatlantic Slave Trade as being 'repugnant to the principles of humanity and universal morality' and recognised 'the obligation and necessity of abolishing it'.[111] Whilst Britain was eager to propose a treaty that promptly outlawed the slave trade (albeit motivated by financial concerns), the other seven European powers were less forthcoming and the declaration ultimately failed to recognise it as a criminal offence. Although accredited with having introduced the abolition of the slave trade as a principle in general international law and, notwithstanding the fact that some 300 international agreements were implemented to suppress slave trading by sea,[112] the Vienna Declaration and subsequent agreements proved ineffective in fully abolishing the slave trade. Furthermore, the focus on the slave trade alone, as opposed to the institution of slavery, highlight the international reluctance to recognise the act of slavery itself as being morally unacceptable and in need of absolute condemnation.

Indeed, it took a further 104 years and the adoption of the Treaty of St-Germain-en-Laye in 1919 for the 'complete suppression of slavery in all its forms and of the slave trade by land and sea' to be internationally recognised.[113] This was promptly followed by the adoption of the Convention to Suppress the Slave Trade and Slavery 1926 (the Slavery Convention) promoted by the League of Nations which obligated states 'to prevent and suppress the slave trade' and

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[111] Declaration of the Eight Courts Relative to the Universal Abolition of the Slave Trade (1815) 63 CTS 473.

[112] R Sawyer, Slavery in the Twentieth Century (Routledge & Kegan Paul Books Ltd 1986) 217.

[113] Treaty of St-Germain-en-Laye (1919) 8 LNTS 25, Art 11.

'prevent compulsory or forced labour from developing into conditions analogous to slavery'.[114] Furthermore, the Slavery Convention provided the first and only definition of both slavery and the slave trade in international treaty law as:

> (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
> (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves. [115]

The Convention, like its predecessors, contained language that placed more weight upon the abolition of the slave trade as opposed to the institution of slavery itself and once again failed to provide an effective provision to supress slave trading beyond the sea. It did, however, serve as an effective tool in combatting slavery and the slave trade, and was commended as a clear victory against slavery practices.[116]

Following the Second World War, during which time hundreds of thousands of people were subjected to slavery-like practices and exploitation, the newly established United Nations (UN) undertook the task of 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion',[117] a feat

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[114] Slavery Convention (1926) 60 LNTS 253, Art 5. It should be noted that the Convention did permit compulsory or forced labour in exceptional circumstances for public purposes provided that the labourers received adequate payment and were not removed from their usual place of residence.

[115] Slavery Convention, Art 1.1.

[116] Whitaker Report (n 26) [122].

[117] San Francisco Charter, Art 1(3).

which some have argued indirectly supported the abolition of slavery.[118] The UN subsequently adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery in 1956 which broadened the scope of slavery-like practices to include, *inter alia* debt bondage, serfdom, forced marriage and sham adoptions, and clarified once and for all that slavery, inclusive of these practices, must be abolished 'where they still exist and whether or not they are covered by the definition of slavery contained in Art 1 of the Slavery Convention'. [119]

In addition to these laws, legislation against slavery and slavery-like practices began establishing firm foundations within international and regional human rights and international labour instruments; subsequently followed by human trafficking legislation, which began to consolidate prevention measures with victims' protection.[120] Slavery was first acknowledged in international human rights law in Art 4 of the Universal Declaration of Human Rights 1948 which expressly prohibited 'slavery and the slave trade… in all their forms' and protected all persons from being 'held in slavery or servitude'. This fundamental freedom was embedded into several universal treaties, including Art 8 of the International Covenant on Civil and Political Rights 1966 (ICCPR), Art 6 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and Art 11 of the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICMW), all of which extended the right to include protection from 'forced or compulsory labour'. In 1998, enslavement and sexual slavery were codified as crimes against humanity in the Rome Statute

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[118] Whitaker Report (n 26) [118].

[119] Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery in 1956, Art 1.

[120] Scarpa, *Trafficking* (n 94) 83.

on the International Criminal Court and slavery became universally accepted as a crime against humanity in 2001.[121]

In addition to the human rights instruments addressing slavery, a number of conventions dealing specifically with forced and exploitative labour and migrant employment were adopted by the ILO to supplement the fight against slavery and its modern-day manifestations. In particular, the 1930 Convention concerning Forced or Compulsory Labour defining 'forced or compulsory labour' as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily',[122] provided for the abolition of forced labour with certain specified exclusions.[123] Despite an omission of ownership from the definition, thus distinguishing forced labour from slavery, the imposition of restriction on an individual's freedom characterised by violent means (menace of penalty) placed forced labour on a similar par with slavery and the likely effects of such practice on victims of this form of exploitation. Much like the previous attempts to abolish slavery, however, the Convention failed to impose an absolute prohibition of forced labour instead providing for its suppression 'within the shortest possible time'.[124] It was not until the creation of the Abolition of Forced Labour Convention in 1957 that State Parties were obligated to ensure the immediate and complete eradication of forced or compulsory labour in specific circumstances.[125]

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[121] The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in September 2001 noted in its final declaration: 'We further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the trans-Atlantic slave trade.'

[122] International Labour Organization (ILO), Forced Labour Convention 1930 (No 29), Art 2(1).

[123] ibid Art 2(2).

[124] ibid Art 1(1).

[125] ILO, Abolition of Forced Labour Convention 1957 (No 105).

On a regional level, Art 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) prohibits slavery and slavery-type practices providing protection from slavery, servitude and forced or compulsory labour.[126] This right was reaffirmed by Art 5 of the Charter of Fundamental Rights of the European Union 2000, which heralded a significant achievement for the protection of fundamental rights of modern slavery victims by the explicit inclusion of the prohibition of trafficking in human beings alongside slavery and forced labour.[127] Across the pond, similar provisions to those found in the ECHR were adopted under Art 6 of the American Convention on Human Rights 1969. Notably, and of particular interest given the date in which the instrument was adopted, the American Convention explicitly prohibited 'traffic in women' as a form of slavery alongside involuntary servitude, the slave trade and forced or compulsory labour. Despite limiting the scope to that of women only, the recognition of trafficking within the ambit of freedom from slavery set a strong precedent for this new form of slavery-like practice to be addressed with the same rigour as traditional forms of slavery.

Amongst the three key international instruments enacted to combat this new form of slavery-like practice, slavery as a form of exploitation has been accepted within the definition of 'trafficking in persons' in each provision highlighting a clear legal connection between the two concepts. Although distinctions remain, insofar as modern slaves are not, in the literal sense, owned by their exploiters, the premise remains the same; individuals continue to be stripped of their freedom of choice, controlled by others for monetary and personal gain and ultimately

[126] Formally the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

[127] Charter of Fundamental Rights of the European Union 2000, Art 5(3).

exploited, often in some of the most inhumane and degrading ways possible. Whereas past forms of slavery attached considerable monetary worth to slaves whose commodity was considered a long-term investment, in modern times slavery is characterised by low purchase costs, high profits, short-term relationships between exploiters and their victims and a surplus of potential slaves in an ever expanding global population of impoverished, desperate people.[128] Despite these divergences, it can be argued that the approach taken to combat slavery in the nineteenth century runs parallel with the approach taken to combat modern slavery, in particular the phenomenon of human trafficking.

2.2 Trafficking in Human Beings

In the 1990s, following an increased international interest in organised crime, there was a specific transnational focus on one manifestation of exploitation in particular: 'trafficking in human beings'. Viewed as the modern equivalent of the nineteenth century slave trade,[129] and described by the United Nations Office on Drugs and Crime (UNODC) as a form of 'modern-day slavery',[130] the practice of human trafficking and the global understanding of the phenomenon has evolved dramatically over the last century.

By no means a novel practice, people trafficking only gained legal recognition as an international phenomenon in 1904 with the introduction of the International Agreement for the

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[128] Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press 2004) 15.

[129] See Kevin Tessier, 'The New Slave Trade: The International Crisis of Immigrant Smuggling' (1995) 3(13) Indiana J of Global Legal Studies 261, 261.

[130] UNODC, *Combating Trafficking In Persons: A Handbook for Parliamentarians* (Inter-Parliamentary Union and UNODC 2009).

Suppression of the White Slave Traffic.[131] Despite the 1904 Agreement being directed at victim protection as opposed to being purely punitive, due to limited knowledge regarding the extent of the phenomenon, the instrument was considerably restrictive. Bassiouni and others reiterate that the early trafficking treaties were 'the product of a broad-based and admittedly racist concern that white women were being sent as prostitutes to countries populated by darker skinned people.[132] Indeed this is reflective in the drafting with the agreement exclusively providing for white women and children who were moved across international borders for the purpose of prostitution, thus excluding adult males, non-white women and those trafficked for purposes beyond sexual exploitation from being recognised as victims. Trafficking in human beings was subsequently codified in 1949 with the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others entering into force in 1951. The 1949 Convention, as with the 1904 Agreement, was predominantly an anti-prostitution instrument but revealed shifts in international understandings. Notably, by referring to 'traffic in persons' the Convention acknowledged that trafficking could occur independent of age, gender and race. Furthermore, the act of trafficking was no longer restricted to transnational movement and broader forms of sexual exploitation were acknowledged,[133] albeit failing to broaden the ambit of trafficking beyond that of commercial sexual exploitation.

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[131] International Agreement for the Suppression of the White Slave Traffic 1904, 1 LNTS 83. Note the title of the agreement refers to 'white slave[s]', however the definition under Art 1 pertains solely to trafficking as opposed to slavery: 'procured, enticed, or led away'. See also, International Convention for the Suppression of the White Slave Traffic 1910, 3 LNTS 278; International Convention for the Suppression of the Traffic in Women and Children 1921, 9 LNTS 415; and International Convention for Suppression of traffic in Women of Full Age (1933) 150 LNTS 431 which were more penal in nature.

[132] C Bassiouni and others, 'Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st century' (2010) 81(3) Revue internationale de droit pénal, 417, 439.

[133] Article 1 of the 1949 Convention obligates States to criminalise all forms of procurement and exploitation for the purpose of prostitution, with or without consent of the individual involved.

The concept of trafficking in human beings within international treaties is therefore rooted in notions of prostitution and sex trafficking.

The turn of the twenty-first century brought with it a novel, broader definition of trafficking in human beings by the UN to address transnational trafficking connected to organised crime and states' security during the 1990s. Within the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplementing the 2003 UN Convention against Transnational Organized Crime (UNCTOC), 'trafficking in persons' is defined as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation...[134]

This established the three elements of trafficking as it is understood today: 'the act' (recruitment, transportation, etc.), 'the means' (by force, fraud, deception, etc.), and 'the purpose' (for exploitation). From this it is evident that the trafficking process can potentially involve several traffickers at numerous stages whereby individuals can be victimised. The broad scope of the first element of the definition, in particular, highlights the prominent criminal justice foundations on which the Trafficking Protocol was created; 'the definition seeks to facilitate convictions'[135] by ensuring that the commission of any of the stated acts constitutes trafficking in human beings. The definition not only casts a wide net for potential

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[134] Trafficking Protocol, Art 3(a).

[135] Piotrowicz and Sorrentino, 'Human Trafficking' (n 22) 671.

traffickers, including those aiding and abetting in the process of locating and moving victims, it also allows for victims to be recognised as such from the very beginning of their trafficking journey; their recruitment, even in circumstances where they are unaware of their victimisation and may, in their view, have consented to it. It must, however, be noted that under the Trafficking Protocol, one can never legally consent at any stage during the trafficking process provided that any of the prohibited means were present.[136]

The definition under the Trafficking Protocol received widespread acceptance by State Parties despite being criticised on the whole for its minimal obligations and weak protection provisions,[137] arguably due to the overall purpose of its development being to strengthen border controls and improve cooperation with organised crime authorities.[138] Indeed, Anderson and Andrijasevic reiterate that the protocol is not a human rights instrument; it was designed with the aim of facilitating cooperation between states to combat organised crime, as opposed to offering victim protection and restitution.[139] This is evident by its formation in supplement to the UNCTOC. Although void of any explicit protective framework, the protocol did encourage states to offer victim protection. Article 2(b) outlined one of its purposes as being the protection

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[136] Trafficking Protocol, Art 3(b); UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN 2004) 13, 270.

[137] B Anderson and R Andrijasevic, 'Sex, Slaves and Citizens: The Politics of Anti-Trafficking' (2008) 40 Soundings 135, 136. See also M Malloch and P Rigby, *Human Trafficking: The Complexities of Exploitation* (Edinburgh University Press 2016) 3.

[138] The United Nations Convention against Transnational Organized Crime (UNCTOC) is supplemented by three protocols which target specific areas and manifestations of organised crime that threaten national security and undermine the rule of law. The protocols are: the Trafficking Protocol; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

[139] Anderson and Andrijasevic, 'Sex, Slaves and Citizens' (n 137) 136.

of victims 'with full respect of their human rights' and the definition widened the scope of victimisation by using an age, race and gender-neutral terminology.[140] It also expressly recognised trafficking as being 'for the purpose of exploitation', leaving the ambit of 'exploitation' sufficiently wide so as to encapsulate emerging forms: '… at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.[141] Moreover, children were recognised as being particularly vulnerable and provided with additional protection under Art 3(c) and (d) which reflect the fact that the means element of trafficking need not be established where the victim involved is under 18 years of age.

In the wake of the Trafficking Protocol a number of regional trafficking instruments were adopted between 2002 and 2011,[142] notably the *2005 Council of Europe Convention on Action against Trafficking in Human Beings* (the Trafficking Convention)[143] and the *European Union Directive 2011/ 36/ EU on preventing and combating trafficking in human beings and protecting its victims* (the Trafficking Directive). On 1 February 2008 the definition of trafficking in human beings was accepted at the European level (albeit not word for word) with the commencement of the Trafficking Convention. The Council of Europe had demonstrated

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[140] The scope of its application was, however, limited to the protection of victims who had been transnationally trafficked by organised criminal groups. Therefore, the protocol failed to identify, and subsequently excluded, those who had been internally trafficked or trafficked by individuals and/or unstructured groups. This limitation was later addressed and clarified by the UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN 2004) 13, 272 -5.

[141] Trafficking Protocol, Art 3(a).

[142] The first definition appeared in the Council Framework Decision 2002/629/JHA on combating trafficking in human beings (19 July 2002), Art 1 which provided the initial anti-trafficking strategy in the EU relating to labour and sexual exploitation exclusively.

[143] Trafficking Convention (n 32).

keen opposition to the crime of trafficking in human beings and the need to protect its victims, and the Trafficking Convention quickly became regarded as 'the most complete and advanced existing international instrument dealing with trafficking in persons worldwide'.[144] Influenced by the Trafficking Protocol, Art 4 mirrored the definition of trafficking in human beings but further broadened it to include trafficking within state borders and trafficking unrelated to organised crime. Furthermore, the Article provided the first definition of a 'victim' of trafficking in human beings.[145] Throughout the drafting process, the Parliamentary Assembly of the Council of Europe predominantly advocated for a human rights approach in ensuring the effective protection of trafficking victims. Despite this, however, what came to fruition was an instrument indicative of illegal migration policy and 'the Member States' desire to protect themselves from illegal migration instead of accepting that trafficking in human beings is a crime and that its victims must be protected'.[146] Although the Parliamentary Assembly submitted over 50 amendments during the final review, only a third were adopted, thus leaving the treaty a shadow of what it was hoped to be and rendering its aim of achieving 'a proper balance between matters concerning human rights and prosecution'[147] increasingly questionable.

The conflation of trafficking and immigration policy became a recurring theme amongst regional instruments, in particular the Treaty on the Functioning of the European Union, as a result of the 2009 Lisbon Treaty, provided that the European Union 'develop a common

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[144] Scarpa, *Trafficking in Human Beings* (n 94) 163.

[145] Trafficking Convention (n 32), Art 4(e).

[146] Council of Europe (Parliamentary Assembly) 'Draft Council of Europe Convention on action against trafficking in human beings' (2005) Opinion No 253.

[147] European Trafficking Convention Explanatory Report, [29].

immigration policy aimed at ensuring… the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'.[148] Subsequently, the European Parliament adopted *Directive 2011/ 36/ EU on preventing and combating trafficking in human beings and protecting its victims* (Trafficking Directive) which entered into force on 15 April 2011. A central aim of the Trafficking Directive was the expansion of the definitional scope of trafficking in human beings. Drawing on the definitions provided in the Trafficking Protocol and the Trafficking Convention, Art 2(1) and Art 2(3) of the Directive expanded punishable acts to include 'the exchange or transfer of control' and expanded the scope of exploitation to expressly include 'begging' and 'the exploitation of criminal activities',[149] respectively. Furthermore, the Preamble expressly identified emerging forms of 'exploitation of criminal activities' including '*inter alia*, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain'.[150] Commonly referred to as criminal exploitation or forced criminality,[151] the manifestation is now recognised as a sub-category of forced labour.

The early twenty-first century witnessed the demise of the long-standing attachment to human trafficking equating to the transnational trafficking of women and children for the purpose of sexual exploitation. By 2011 the scope of international and regional anti-trafficking legislation had expanded to encompass all forms of trafficking inclusive of age, gender and race.

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[148] Treaty on the Functioning of the European Union [2012] OJ C 326/13, Art 79(1) and (2)(d).

[149] Note that the list of types of exploitation within the Trafficking Protocol, Trafficking Convention and Trafficking Directive are non-exhaustive, rather they represent a minimum, reflecting the awareness that other forms of exploitation may be identified or devised in the future. Other forms of exploitation including illegal adoption and forced marriage are further recognised in the Preamble of the Trafficking Directive.

[150] Trafficking Directive, Preamble Recital 11.

[151] Home Office, *Modern Slavery Act 2015* (n 35) para 2.37.

Furthermore, a shift in focus away from a purely criminal justice-based approach became evident with both the Trafficking Convention and the Trafficking Directive taking a predominantly more victim-centred approach to tackling trafficking in human beings than the Trafficking Protocol. Notions of respect for victims' rights and protection of victims and their human rights were echoed throughout and considered to be major objectives of each instrument.[152] Although significant questions were raised about the scope of regional anti-trafficking efforts, both instruments went beyond the encouragement of victim protection to include tangible obligations and protection provisions. Despite this, however, the nature of modern slavery was not widely understood in Britain and the propensity to drag one's feet in relation to slavery matters – as had been the case during the height of the transatlantic slave trade – had a significant impact on the Government's early 'fight against modern slavery'.

2.3 Manifestations of Modern Slavery

Notwithstanding contemporary trafficking legislation being established from the foundations of anti-trafficking treaties that were implemented to invoke comparisons to traditional forms of slavery,[153] from a legal standpoint, trafficking (and forced labour) do not equate to the *jus cogens* norm of slavery and in recognition of this, international law continues to treat the issues as separate. Neither the concept of 'modern-day slavery' nor 'modern slavery' are utilised or defined at the international level. Despite this, over the last 15 years the terms have been frequently used in discourse by global governance actors and non-governmental organisations

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[152] See, Trafficking Convention, Recital 4 and Art 1(b); Trafficking Directive, Preamble Recital 7.

[153] Trafficking was labelled as 'white slave traffic' within the titles of both the 1904 International Agreement and the 1910 International Convention.

as non-legal umbrella terms that encapsulate a variety of exploitative practices. The 'modern slavery' moniker in particular has received widespread acceptance within the UK and is gradually becoming adopted on a global scale to address the most severe forms of exploitation. These modern manifestations have been broadly categorised under five forms: slavery, practices similar to slavery, forced labour, child labour and the process of human trafficking.[154]

In 2015 the UK entrenched 'modern slavery' within national law and rhetoric with the passing of the Modern Slavery Act which extends to E&W exclusively. Being the first piece of legislation in Europe to explicitly address 'modern slavery', [155] the Act itself encapsulates two broad categories of abuse via the criminalisation of 'slavery, servitude and forced or compulsory labour' and 'human trafficking…with a view to [another person] being exploited'.[156] Since its enactment 'a new regime on modern slavery has quickly developed' building on international anti-slavery and anti-trafficking law 'sustained by active… campaigns, victim support, and rescue efforts'.[157] It is argued here that this new regime, whilst echoing sentiments of victim rescue and protection, has had a detrimental impact on the

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[154] Scarpa, *Contemporary Forms* (n 92) 9.

[155] It should be noted that despite being heralded as the first piece of legislation of its kind in Europe and one of the first in the world, both Brazil and California had legally consolidated trafficking and enslavement several years prior to the enactment of the MSA 2015 via the amendment to Art 149 of the Brazilian Penal Code in 2003 and the introduction of the Transparency in Supply Chains Act 2010, respectively. Since its enactment, however, the MSA 2015 has spurred the adoption of similar legislation amongst other jurisdiction, see Australia's Modern Slavery Act 2018. The concept is now widely used within global anti-slavery and anti-trafficking rhetoric and discourse.

[156] MSA 2015, s1-3.

[157] Agnes Simic and Brad K Blitz, 'The modern slavery regime: a critical evaluation' (2019) 7 (1) J of the British Academy 1, 2.

effectiveness of implemented protective mechanisms, particularly with regard to identification and non-criminalisation of victims.

'Modern slavery' policy and legislation in the UK now marks the beginning of a shift in global focus away from 'human trafficking' and 'forced labour' to explicitly target these types of exploitation as forms of 'slavery'. The packaging of these various phenomena under this single term and the broadening of the legal and political ambit of 'trafficking' as 'slavery' has received both positive and critical attention. In 2008, Silvia Scarpa, advanced the argument that 'under certain circumstances trafficking in persons ought rightly to be considered a part of it (the *jus cogens* principle of the prohibition of slavery)'.[158] Indeed, widening the slavery net – which had previously been reserved for the most extreme forms of exploitation, i.e. ownership of a person – to include activities which are now commonly viewed as some of the world's most vile forms of degrading, rights-violating practices, may be desirable with regard to the protection of current victims/ survivors owing to the powerful connotations and emotions evoked by the historical turmoil of traditional slavery. But concerns voiced by activists and scholars reveal that in practice the well-intended conflation of these forms of exploitation is likely to prove detrimental to certain categories of victims, none more so than those who are exploited to participate in criminal activities and those who carry out crimes as a consequence of their exploitation, i.e., victim/ offenders.

Chuang, who coined the term 'exploitation creep' to refer to the discursive and doctrinal conflation of the modern forms of exploitation, criticises exploitation creep for fuelling what she refers to as 'modern-day-slavery abolitionism' which places the source of trafficking in the

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[158] Scarpa, *Trafficking in Human Beings* (n 94) 41.

‘deviant behaviour of individuals (and corporations)… [and] prioritizes the accountability of individual perpetrators and rescue and protection of victims’.[159] Favouring aggressive criminal justice-based responses, this approach is now also endorsed by leading non-governmental organisations who advocate profusely for the prosecution of slave masters and the rescuing of the ever growing numbers of victims of modern slavery. Whilst this would appear to be a commendable response, a tendency to focus on oversimplified narratives of slavery perpetuates a form of exclusion whereby a notion of the ‘ideal’ or typical victim of modern slavery is constructed. In creating a simple moral imperative that appeals to the wider public and garners support and resources to address the problem, Chuang argues that attention has been deflected from the ‘broader structural causes of exploitation’.[160] It is further contended that by endorsing this narrative and defining these victims as being most worthy of sympathy and protection, this directly undermines efforts to protect victims. The restrictive narrative excludes a multitude of victims, in particular those who are forced into criminality, which leads to issues of misidentification and criminalisation despite protective measures in place to prevent such.

Under s 3 of the MSA 2015, the meaning of exploitation is expanded on and includes: slavery, servitude and forced/ compulsory labour; sexual exploitation; removal of organs; securing services by force, threats or deception; and securing services from children and vulnerable persons. Evidently from the wording of the provision, ‘exploitation’ is extensive and can encompass a multitude of practices. In 2017, the Home Office published a report which created a typology of modern slavery offences exposed within the UK.[161] The report, which analysed

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[159] Chuang, ‘Exploitation creep’ (n 76) 611.

[160] ibid 612.

[161] Home Office, ‘A Typology’ (n 71).

328 confirmed cases, identified 17 manifestations of modern slavery categorised under four broad groupings: labour exploitation, domestic servitude, sexual exploitation and criminal exploitation. It is acknowledged here that overlaps between different forms of exploitation may occur as victims are often exploited in a number of ways, and victims of all forms of exploitation may be compelled to commit criminal acts during the course of their exploitation. As the analysis of each manifestation is beyond the scope of this research, priority is given to the manifestation of modern slavery that directly creates the dichotomy of victim/ offender status: criminal exploitation.

Modern slavery for the purpose of criminal exploitation is now acknowledged as an increasingly significant phenomenon in both the UK and USA.[162] This newly recognised, lesser-known form of modern slavery has been highlighted as requiring particular attention and further examination.[163] In its broadest sense, 'criminal exploitation' encompasses: 'status offences', 'consequential offences', and 'liberation offences'.[164] 'Status offences' refer to criminal acts committed by victims as a result of their status in the place to or through which they have been trafficked, examples include documentation fraud,[165] and immigration- related offences. 'Consequential offences' are related to the purpose of the trafficking and refer to criminal acts committed by victims who have been forced or compelled by their traffickers to commit them; these offences are a direct consequence of a victims' situation of trafficking. Examples of consequential offences include theft, pickpocketing, petty crimes, prostitution

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[162] UNODC, *Global Report on Trafficking in Persons* (UN 2018).

[163] Klara Skrivankova, 'Forced Labour: Understanding and Identifying Labour Exploitation' in P Chandran (ed), *Human Trafficking Handbook* (LexisNexis 2011) 49.

[164] Andreas Schloenhardt and Rebekkah Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises, and Perspectives' (2016) 4 Groningen JoIL 10, 14-15.

[165] *R v O* [2008] EWCA Crim 2835 [2] [10].

related offences, drugs related offences, but can cover any criminal offences by which the victim serves as agents or instruments of their traffickers who remain the masterminds behind the acts but usually without direct involvement in them. 'Liberation offences' refer to offences that a victim may feel compelled to commit in an attempt to flee their trafficker(s) or escape their trafficking situation or improve that situation by any means necessary. These acts are usually directed against the traffickers, their associates, or their property, but may include instances where a victim, in an attempt to improve their situation, collaborates with their trafficker and becomes involved in modern slavery offences.

Manifestations of 'criminal exploitation' uncovered in the UK include the wide-scale cultivation of cannabis by Vietnamese nationals, the use adults and children by Eastern European gangs for pickpocketing, begging and shoplifting, and the grooming of children and vulnerable adults to traffic and sell drugs in 'county lines' activities. Despite its increasing global prevalence, there remains a dearth of research and awareness about this form of exploitation with limited recognition attached to official statistics and many victims misidentified as offenders.[166] In the UK, the National Crime Agency (NCA) throughout its 7 years collecting NRM data, has failed to recognise criminal exploitation as a standalone category of exploitation, instead opting to categorise it within 'labour exploitation'. Similarly, the MSA 2015 fails to attach significant statutory weight to criminal exploitation by not including it within the s 3 definition of exploitation. As such the findings from the Home Office typology report proved to be pivotal in shining a much needed spotlight on this category of exploitation. Of the four broad manifestations of modern slavery within the UK,

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[166] Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practice Examples (RACE in Europe Project, 2014)

(consequential) criminal exploitation has been found to encompass the most types. Six forms of (consequential) criminal exploitation are identified: forced gang-related criminality; forced labour in illegal activities; forced acquisitive crime; forced begging; trafficking for forced sham marriage; and financial fraud. Although (consequential) criminal exploitation only formally entered the typology of modern slavery in 2017, the evidence of these types of exploitation are long-standing. Non-governmental organisations in their reports on anti-trafficking and slavery have frequently outlined situations in which victims have become involved in criminality, either as a part of their exploitation or as a consequence of it.

3. Protecting Victims through Identification and Non-Criminalisation

> '[D]espite the fact that human trafficking straddles disciplines as diverse as law enforcement, human rights, gender rights, asylum protection, health… and social services, little has been accomplished in terms of the effective and practical protection of victims.'[167]

Before the MSA 2015 came into force, victims of trafficking/ enslavement had no statutory safeguard to protect them from criminalisation for any offences they had committed – be it as a result of coercion or owing to their trafficking situation. Instead, victims who found themselves on the wrong side of the law were reliant on domestic guidelines, policies and safeguards stemming from international treaties and obligation on the UK that were in effect at the time. Those international safeguards concerned the identification and protection of

[167] Satvinder S Juss, *The Ashgate Research Companion to Migration Law, Theory and* Policy (Routledge 2016) 282.

victims of trafficking,[168] the 'non-punishment'[169] and 'non-prosecution'[170] of people who commit criminal offences who are also victims of trafficking (including 'exploitation', slavery and forced labour), and the prohibition on slavery and forced labour. Prior to enactment of the MSA 2015, these 'safeguards' were embedded in CPS policy that was established through common law. A succinct outline of the law predating the 2015 Act was presented in *R v Joseph (Verna)* by Lord Thomas CJ who confirmed that the UK adhered to international obligations of non-punishment by means of: (i) relevant CPS guidance; (ii) the common law of duress; and (iii) the court's abuse of process jurisdiction.[171] This did not, however, provide 'blanket immunity' for victims, rather these safeguards provided for the possibility of not imposing penalties on victims.[172]

The identification and protection of victims is globally recognised as being central to creating effective anti-modern slavery measures at both a human rights level and a criminal justice level and is a key objective in transnational efforts to tackle the growing phenomenon. Early identification of victims is acknowledged as the first necessary step in granting them protection and assistance; and securing successful prosecutions for perpetrators.[173] Despite government

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[168] Trafficking Convention, Art 10; Trafficking Directive, Art 11(4).

[169] Trafficking Convention, Art 26.

[170] Trafficking Directive, Art 8.

[171] *Joseph* (n 42) [4]. See also, *R v L* [2012] EWCA Crim 189.

[172] ibid [42].

[173] CPS, 'CPS Policy for Prosecuting Cases of Human Trafficking' (May 2011) <https://www.cps.gov.uk/sites/default/files/documents/publications/policy_for_prosecuting_cases_of_human_trafficking.pdf> accessed 23 September 2022, 14; Organization for Security and Co-operation in Europe, 'Trafficking in Human Beings: Identification of Potential and Presumed Victims' (SPMU Publication Series Vol. 10, June 2011); US Department of State, 'Trafficking in Persons Report 2013 – Victim Identification: The First Step in Stopping Modern Slavery' (2013); Kevin Bales and Steven Lize, 'Investigating human trafficking: challenges, lessons learned and best practices' (2007) 76(4) FBI Law Enforcement Bulletin 24, 28.

recognition of this victim-centred approach, mistreatment of victims continues to be frequently documented. An identified form of mistreatment that occurs globally and on an alarming scale is the misidentification and subsequent criminalisation of victims. Frequently victims are arrested, detained, prosecuted and convicted for crimes they have committed in connection with their modern slavery circumstances. Since the new millennia, international, regional and domestic law has attempted to rectify this injustice. However, the criminal justice-based passive victim profile, and societies' perception of what it means to be a victim more generally, has hindered efforts to identify and protect this category of individuals. The narrow scope for identifying potential victims has a detrimental effect on genuine victims being granted official victim status and the protections it affords. This is particularly prevalent in cases concerning victims who engage in criminal activities as their criminalisation often corresponds with a related failure by officials to identify them as victims of exploitation.[174]

During the time in which a victim is being exploited they may commit numerous criminal offences on various occasions. For victims of external trafficking, being trafficked across borders may result in them gaining entry into the country illegally where immigration laws are breached. Once in the destination state they may, like many victims of internal trafficking, be forced to commit serious criminal activities such as: begging, theft, financial fraud, drugs trafficking and cannabis cultivation.[175] They may also fall foul of the law whilst attempting to flee their oppression (and/ or servitude) or otherwise endeavouring to protect or assist

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[174] Conference of the Parties to the United Nations Convention on Transnational Organized Crime, *Report on the meeting of the Working Group* (n 28) [12].

[175] Home Office, 'A Typology' (n 71) iv.

themselves,[176] for example a victim, in a quest to improve their situation, may collaborate with their exploiters taking a subordinate role in further exploitative processes.

Each of these crimes occur because either the victim was compelled to commit them within the exploitative situation or as a consequence of being exploited. Despite victims of modern slavery being described as individuals who are 'not in control of their own destiny', who 'cease to be autonomous… because they are effectively acting under the control of others',[177] too often are they viewed as criminals rather than victims and arrested, detained and charged for such offences. Even in situations where it is evident that the victim is an unwilling pawn in committing the unlawful act, criminalisation remains commonplace. Much debate has been had surrounding the detrimental impact this has on victims, along with violating fundamental rights that they are entitled to under international and human rights law because they are not formally recognised as victims.

In order to combat this, positive obligations to identify victims alongside non-criminalisation provisions[178] have been implemented into international anti-trafficking laws and recognised in several soft law instruments. To comply with international obligations the UK Government, Scottish Government and NI Assembly have each incorporated the obligation and principle into their modern slavery legislation via the inclusion of identification provisions and – in

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[176] P Carter and P Chandran, 'Protecting against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System' in P Chandran (ed), *Human Trafficking Handbook: Recognizing Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 425.

[177] Piotrowicz and Sorrentino, 'Human Trafficking' (n 22).

[178] The wording of the principle varies across different legal instruments and discourse. In addition to 'non-criminalisation', terms such as 'non-punishment', 'non-prosecution', 'non-liability', 'non-application of penalties' and 'exemption' are all used. The former is adopted in this thesis.

E&W and NI – statutory defence(s).[179] In E&W s 49 of the MSA 2015 requires the Secretary of State to issue guidance about identifying victims; s 50 requires the Secretary of State to make regulations providing for public authorities to determine victim status; and s 45 provides a '[d]efence for slavery or trafficking victims who commit an offence' including separate defences for adults and children.

The non-criminalisation of victims has been acknowledged as an 'essential element of a human rights approach'[180] which 'serves to maintain the 'interests of justice' and enhance the protection of victims'.[181] The underpinnings for the justification of non-criminalisation are thus twofold: (i) it is reflective of concepts upon which all criminal law systems are based; and (2) it seeks to protect fundamental interests of victims who have had their basic human rights violated as a result of being trafficked or enslaved. From a human rights perspective, ensuring that victims are not unjustly criminalised for offences that are consequent to their exploitation protects them from state action that would have a detrimental impact on their rights. In some cases, criminalisation may result in deportation thus denying foreign victims their rights related to participation in legal proceedings and access to remedies/ reparation.[182] Many International

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[179] Human Trafficking and Exploitation Act (NI) 2015, s 22 contains a defence for slavery and trafficking victims compelled to commit an offence; the Human Trafficking and Exploitation Act (Scots) 2015 contains no such statutory defence, however the non-punishment provision is embedded within s 8.

[180] Organization for Security and Co-operation in Europe (OSCE), *Policy and Legislative Recommendations: Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking* (OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings 2013) [26].

[181] ibid 7; Conference of the Parties to the United Nations Convention on Transnational Organized Crime, *Report on the Meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010* (UN Doc 17 February 2010) para 108; Schloenhardt and Markey-Towler, 'Non-Criminalisation' (n 164), 11.

[182] UN, *Human Rights and Human Trafficking* (2014) 17-18.

organisations and non-governmental organisations prioritise a human rights-based approach that ensures victims are fully supported and have access to a plethora of rights from the outset, independent of criminal proceedings or migration laws. Despite this, victim protection continues to be viewed through the alternative prism of criminal law. It is widely accepted by global governance actors and states that non-criminalisation is crucial in ensuring the successful investigation of modern slavery offences and its overall eradication. Providing statutory protection against criminalisation provides victims who have committed offences with the confidence to speak out against their exploiters; permitting the 'investigation and prosecution of the true modern slavery criminals', thus serving the main criminal justice interest of combatting modern slavery.[183] Arguably, this approach serves to undermine the scope of protection afforded to victims.

The MSA 2015, in particular, was commended as being the 'first legislation of its kind in Europe'[184] and considered 'world-leading'[185] in global efforts to tackle the transnational scourge of modern slavery and trafficking in human beings. Despite this, critiques of the development of modern slavery law and policy, and its applicability in practice, highlight fundamental weaknesses in the approach by the UK.[186] A central provision of the MSA 2015 which continues to expose failings and requires further scrutiny is the bespoke statutory

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[183] CPS, 'CPS Policy' (n 173) 14; OSCE, 'Trafficking in Human Beings: Identification of Potential and Presumed Victims' (SPMU Publication Series Vol 10, June 2011); US Department of State, *Trafficking in Persons Report 2013 – Victim Identification: The First Step in Stopping Modern Slavery* (2013); Bales and Lize, 'Investigating human trafficking' (n 173) 28.

[184] Theresa May, 'Defeating modern slavery: article by Theresa May' (Home Office 31 July 2016) <https://www.gov.uk/government/speeches/defeating-modern-slavery-theresa-may-article> accessed 23 September 2022.

[185] Home Office, *Modern Slavery and Supply Chains Government Response* (29 July 2015).

[186] Craig and others (eds), *The Modern Slavery Agenda* (n 93).

defence under s 45 which provides for the non-criminalisation of modern slavery victims who commit offences as a result of their exploitation. The victim-centred paradigm shift, with regard to anti-trafficking measures and treatment of 'idealised' victims, should be applied to the treatment of all categories of victims, particularly those trafficked/ enslaved for the purpose of criminal exploitation. An analysis of the political and social background during the development of the modern slavery agenda in the UK will determine why this has not been achieved despite the introduction of the s 45 defence(s). It will become apparent that competing political interests placed the anti-modern slavery agenda at odds with other policies introduced by the Conservative Government from the outset, in particular those concerning anti-immigration.

It is widely accepted by global governance actors that victim identification is crucial to the successful investigation and eradication of modern slavery. Having comprehensive identification procedures in place that target the necessary authorities and ensure early victim identification allows for the documentation and prosecution of these abhorrent crimes. Unfortunately, it is this criminal law-based approach to victim identification which provides a narrow scope for identifying potential victims. This can have a detrimental effect on victims being granted official victim status and the protections it accords. This is particularly prevalent in cases concerning victims who are exploited for the purpose of engaging in criminal activities such as, drug trafficking, cannabis cultivation, pick-pocketing, theft and fraud. Throughout their exploitation these victims may come into contact with various actors, such as law-enforcement officials, the National Crime Agency (NCA), health and social workers, and members of anti-slavery non-governmental organisations, each of which will possess their own agendas and experiences of modern slavery (or lack thereof). More often than not, however, it is those working within the criminal justice system who encounter these individuals first. How

they are perceived and treated by the law is then addressed via the rigid dichotomy that exists within the criminal justice system – as either a potential victim or, more commonly, as a ‘normal’ criminal.

3.1 Obligations under International Law

Throughout the drafting of the Trafficking Protocol efforts were made to encourage drafters to impose a positive obligation upon member states to ensure the non-criminalisation of victims for crimes they were compelled to commit, including the proposal of a provision to protect victims of trafficking from prosecution for status-related offences.[187] Unfortunately, the Ad-Hoc Committee in charge of its development rejected the submission ‘no doubt due to a fear of unwarranted use of the ‘trafficking defense’’,[188] despite opting to include an explicit non-criminalisation provision for victims of migrant smuggling within the UN Smuggling of Migrants Protocol (Smuggling Protocol).[189] This left the centrepiece of the international legal framework governing trafficking in human beings silent as to the criminal liability of victims who commit offences in the course of or as a result of their situation of exploitation. Unsurprisingly the Protocol received a myriad of criticism for this failing and the overall weakness of its protection provisions in general.

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[187] See UNODC, *Travaux Préparatoires* (n 28) 368; and Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Informal note by the United Nations High Commissioner for Human Rights* (Doc A/AC 254/16, Vienna 1999) para 17.

[188] Anne Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 HRQ 975, 991.

[189] Smuggling Protocol, Art 5.

The introduction of the Protocol was in response to the international community's political will to create a tool to combat transnational organised crime, thus a strong law enforcement approach was applied leaving the provisions considerably weak in terms of human rights protections.[190] Hyland raises the issue of the Protocol failing to protect victims who are coerced into committing criminal acts from prosecution and potentially being deported for such violations; urging State Parties to enhance victim protection when enacting domestic trafficking laws 'to better protect trafficking victims' human rights'.[191] It has been argued that the principle of non-criminalisation can be inferred from the Protocol's purpose, identified in Art 2(b): 'to protect and assist the victims of such trafficking, with full respect for their human rights'. Fedette maintains that a 'legislative link' can be inferred between the [Trafficking] Protocol and the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985[192] owing to the Protocol's presentation of trafficked persons as 'victims'.[193] However, given that an express non-criminalisation clause was included in the Smuggling Protocol and the proposal to include such a clause in the Trafficking Protocol was dismissed, it would be accurate to conclude that 'any attempt to argue that the non-criminalisation principle is incorporated into the Trafficking Protocol by inference is significantly undermined'.[194]

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[190] K Touzenis, *Trafficking in human beings: human rights and trans-national criminal law, developments in law and practices* (UNESCO Digital Library 2010) 67.

[191] Hyland, 'Protecting Human' (n 84) 31.

[192] UN General Assembly Resolution, A/RES/403/34.

[193] K Fedette, 'Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation' (2009) 17 Cardozo J of Intl and Comparative L 101, 129.

[194] Bijan Hoshi, 'The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law' (2013) 1(2) Groningen JoIL 54, 56.

The matter of non-criminalisation in relation to international trafficking efforts was eventually raised in 2009 by the Working Group on Trafficking in Persons which issued recommendations regarding the effective implementation of the Trafficking Protocol and the non-criminalisation of victims. Specifically, that states should 'establish appropriate procedures for identifying victims' and 'consider… not punishing or prosecuting trafficked persons for unlawful acts committed… as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts'.[195] This was later reaffirmed during the 2010 meeting which stressed the importance of non-criminalisation provisions being clearly stated in domestic legislation and guidance instruments. The Working Group, however, declined to elaborate on the principle and instead recommended that states consider 'establishing the principle of non-liability' through one of two already established prisms: a compulsion-based model (whereby acts were carried out under duress); and a causation-based model (whereby acts were a result of the trafficking situation).[196]

3.2 Guidance from International Quasi-Legislative Instruments

Although the Trafficking Protocol provided no legally binding obligation to protect victims from criminalisation, in the early two-thousands a series of non-binding recommendations were

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[195] Conference of the Parties to the United Nations Convention on Transnational Organized Crime, *Report on the meeting of the Working Group* (n 28) [12]. The function of the Working Group is to advise and assist the States Parties to UNCTOC in the implementation of its mandate with regard to the Trafficking Protocol. The Secretariat maintains the view that non-criminalisation is an essential element of victim protection.

[196] Conference of the Parties to the United Nations Convention on Transnational Organized Crime, 'Report' (n 182) [109]; Working Group on Trafficking in Persons, *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking* (UN Doc 17 February 2010) [4].

issued by various UN bodies strongly supporting the non-criminalisation of victims of trafficking. In particular, the UN General Assembly (UNGA) and the UN High Commissioner for Human Rights (UNHCHR) provided soft law documents which recognised the need to protect trafficking victims from being criminalised for immigration offences and trafficking-dependent crimes. The UNGA initially called on states to refrain from criminalising victims in the context of empowering women and issued narrow guidelines pertaining to the prevention of 'victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence'.[197] More recent General Assembly resolutions have expanded such calls for action, whilst simultaneously conflating non-criminalisation models, urging Governments to ensure that victims are protected from revictimisation and criminalisation for acts they have been 'compelled to commit' as a 'direct consequence' of having been trafficked.[198]

Similarly, but extending the scope of protection further than initial UNGA resolutions, the UNHCHR developed a set of Recommended Principles and Guidelines which, for the first time, placed great emphasis on the human rights of victims as being both integral to preventative efforts and protective measures. Notably, under Principle 7 it was advised that victims shall not be:

> 'detained, charged, or prosecuted for the illegality of their entry into or residence in the countries of transit and destination or for their involvement in unlawful activities to the

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[197] UN General Assembly, *Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action* (2000) A/RES/S-23/3, [70(c)]; and United Nations General Assembly, *Traffic in women and girls* (2001) 5.

[198] See, UN General Assembly, *Trafficking in women and girls* (2010) [17]; UN General Assembly, *Trafficking in women and girls* (2012) [20]; and UN General Assembly, *Trafficking in women and girls* (2014) [25].

extent that such involvement is a direct consequence of their situation as trafficked persons'.[199]

The accompanying guidelines further clarified the causation-based nature of the recommendation, accentuating the need for trafficking victims to be protected from criminalisation for activities that they were involved in as a 'direct consequence' of their trafficking situation.[200] Furthermore, the UNHCHR encouraged states to provide special measures for the protection of children including the 'rapid identification of child victims' and their exemption from being 'subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons'.[201]

In 2009, UNODC published the *Model Law against Trafficking in Persons* as a tool to promote and encourage Member States to become signatories to UNCTOC and the protocols thereto. Developed to assist states in amending their own laws to comply with obligations of the Trafficking Protocol, the *Model Law* suggests the adoption of a causation-based provision on non-criminalisation.[202] Article 10 provides:

1. 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.
2. A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law.

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[199] UN High Commissioner for Human Rights (UNHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) Principle 7.

[200] ibid Guidelines 2.5, 4.5 and 5.5.

[201] ibid Guidelines 8.2 and 8.3.

[202] UNODC, *Model Law against Trafficking in Persons* (Vienna 2009) Art 10. The provision is entitled 'Non-liability [non-punishment] [non-prosecution] of victims of trafficking in persons'.

3. The provisions of this article shall be without prejudice to general defences available at law to the victim.
4. The provisions of this article shall not apply where the crime is of a particularly serious nature as defined under national law.

The provision was explicitly referenced by the Working Group and has been commended as it 'essentially captures the three types of offences typically committed by victims [status, consequential and liberation offences]'.[203] However, although Art 10(3) appears to acknowledge that general defences will still be available to victims who commit liberation offences, the provision fails to account for the limitations of those defences, in particular the general defence of duress which requires an extremely high threshold to be met, one which often leaves trafficking victims who are forced to commit criminal offences outside the ambit of its protection. Further, the inclusion of Art 10(4) in order to ensure that the provision does not afford blanket immunity, arguable fails to account for the fact that in some circumstances victims do commit 'particularly serious offences' as a direct consequence of their trafficking and should be afforded protection.

More recently, the principle of non-criminalisation has been recognised in the context of labour trafficking and forced labour. In 2014, the ILO adopted a new Protocol to the *Forced Labour Convention* to combat all forms of forced labour and protect victims.[204] As with General Assembly resolutions from the early twenty-tens, the non-criminalisation provision under the new Protocol blurs the conceptual boundaries of compulsion and causation-based models

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[203] Schloenhardt and Markey-Towler, 'Non-Criminalisation' (n 164) 26-27. See Chapter 1, subheading 2.3 for further discussion**.**

[204] ILO, *Protocol of 2014 to the Forced Labour Convention* (ILO P029, 2014) Art 4(2).

leaving scope for ambiguous interpretations of the protective mechanism. The formulation of the non-criminalisation principle at the international level appears to have taken an unfavourable route which allows for dangerous interpretations to be made, such as non-criminalisation being purely compulsion-based, which may drastically reduce the scope of protection afforded to victims.[205] Unfortunately, the provisions under regional legal frameworks appear to parallel this predicament.

3.3 Obligations under Regional International Law

In the absence of binding international legal obligations of non-criminalisation, protective measures have since been developed and implemented at regional levels. The most progressive solution can be found in the European legal framework which explicitly recognises the fundamentality of non-criminalisation within both Council of Europe and European Union instruments. The obligation of non-criminalisation of trafficking victims has been formally recognised within the European legal framework since the Council of Europe Convention on Action against Trafficking in Human Beings (the Trafficking Convention) came into existence in 2005; later ratified by the UK on 17 December 2008. Article 26 of the Trafficking Convention provides a duress-based 'non-punishment provision' which states that:

> Each Party shall in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

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[205] ibid, the Protocol entered into force on 9 November 2016 and is currently lacking any guidance as to the interpretation of Art 4(2).

The codification of the principle pertaining to the non-criminalisation of trafficking victims has been commended for reiterating the aim of the Trafficking Convention which was to place victims at the centre of regional thinking, policies and action by adopting a human rights-based approach when drafting anti-trafficking instruments.[206] However, the drafting of the provision has been heavily scrutinised and its scope of application criticised for significantly limiting the level of protection available to victims.

A lack of travaux préparatoires for the treaty resulted in speculation as to the origin of the precise approach taken by the Council of Europe. Despite early international soft law instruments urging states not to criminalise victims for offences directly consequential to their trafficking, i.e., to establish unqualified, causation-based models, the principle of non-criminalisation presented in the Trafficking Convention was purely compulsion-based and qualified. This came much to the disappointment of non-governmental organisations who lobbied for drafters to include a clause which would avoid discrimination and offer substantial protection from criminalisation.[207] Several elements of the provision provided cause for concern, namely: the reference to the non-punishment principle being provided for 'in accordance with the basic principles of [a state's] legal system'; the obligation that states provide for the 'possibility of not imposing penalties'; and the requirement of compulsion.

Little by way of clarification was provided in The Explanatory Report to the Convention, save with regard to the latter element. It has since been accepted by scholars that the provision is

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[206] Julia Maria Muraszkiewicz, *Protecting Victims of Human Trafficking from Liability: The European Approach* (Palgrave Macmillan US 2018).

[207] Amnesty International – Anti-Slavery International, 'Council of Europe: Recommendations to Strengthen the December 2004 Draft European Convention on Action against Trafficking in Human Beings' (2005) 15-16.

non-binding and thus states can choose how they wish to apply the obligation, be it through guidance, existing defence law or the implementation of a statutory defence.[208] Consequently states may fulfil the Art 26 requirements simply by possessing an existing defence, such as duress, which provides the possibility of not imposing penalties on those victims who meet the threshold. Naturally this choice of language is undesirable as it fails to appreciate the true nature of exploitation experienced by victims of human trafficking and leaves a large proportion of them vulnerable to criminalisation and secondary victimisation. It is also problematic owing to widely acknowledged limitations of duress common law, in particular, its restrictive ambit requiring threats of death or serious harm to oneself or family set against the test of the 'person of reasonable firmness'; and its inapplicability to charges of (attempted) murder.[209]

Compulsion in this sense is taken to 'be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in Art 4',[210] arguably establishing a clear relationship between the compulsion and trafficking experience.[211] However, the Report fails to elaborate on what exactly constitutes compulsion and how it may be proved. Scarpa concludes that the ambiguity of the provision provides cause for concern and urges State Parties to 'interpret the term 'compulsion' widely, so as to comprehend both physical and

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[208] Jessica Elliott, 'Victims or Criminals: The Example of Human Trafficking in the United Kingdom' in M João Guia (ed), *The Illegal Business of Human Trafficking* (Springer International Publishing 2015) 109; Muraszkiewicz, *Protecting Victims* (n 207) 103.

[209] See *R v Howe* [1987] AC 417.

[210] Council of Europe, *Explanatory Report on the Convention on Action Against Trafficking in Human Beings* (2005) ETS 197, [273].

[211] See, V Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations* (2017).

psychological compulsion'.[212] In acknowledging the problematic nature of the framing of Art 26, it is unfortunate that the provision was not replaced with a better-formulated measure, particularly when considering that the Parliamentary Assembly of the Council of Europe proposed just that.[213]

In 2011 stricter obligations of non-criminalisation were established with the introduction of EU Directive2011/ 36/ EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims, replacing Council Framework Decision 2002/ 629/ JHA (the Trafficking Directive), ratified in the UK on 6 April 2013. Article 8 of the Trafficking Directive provides a 'non-prosecution or non-application of penalties to the victim' provision which states that:

> Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

Whilst this appears to build on the prior solution offered by the Trafficking Convention by broadening its ambit to include safeguarding against prosecution as well as penalties, the provision is compromised by both its omission and inclusion of certain language. In particular,

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[212] Scarpa, *Trafficking in Human Beings* (n 94) 156.

[213] Opinion of the Parliamentary Assembly Council of Europe, 'Draft Council of Europe Convention on action against trafficking in human beings' (2005) Opinion No 253 [14.xv]. This measure actually provides that: 'Victims of trafficking shall not be detained, charged, prosecuted or submitted to any sanction on the grounds that they have unlawfully entered or are illegally resident in countries of transit and destination, or for their involvement in unlawful activities of any kind, to the extent that such involvement is a direct consequence of their situation as victims of trafficking'.

the Article is silent on the non-detention of victims,[214] instead focusing entirely on prosecution and penalties, neither of which are defined. The inclusion of the words 'ensure' and 'entitled not to' also negates the Article from providing any direct protection to victims. As established in *P v Chief Superintendent Garda National Immigration Bureau & Others*, Art 8 does not confer an enforceable right on a victim not to be prosecuted; prosecution remains discretionary.[215] Despite this ruling, challenges are still made as to the true level of the obligation conveyed by the Directive.

The use of the word 'shall' as opposed to 'shall consider' has been taken as imposing a hard obligation upon states which denotes mandatory action and 'provide[s] for a positive obligation on states not to prosecute victims of trafficking. [Which] is not optional'.[216] Further support for this perspective comes from Piotrowicz and Sorrentino who suggest 'that any apparent discretion on the part of states… is actually with regard to how they go about not prosecuting or punishing the victims of trafficking in human beings… [and] any 'discretion' would have to be exercised so that the victim of trafficking in human beings is not punished'.[217] They reiterate this stance with reference to the Recital which uses more obligatory language, however its non-binding nature offers limited legal effect. In contrast, it is argued by most scholars that in applying a careful and strict reading of the Article one must 'deduce that the obligation is limited'.[218] As with the Trafficking Convention, the framing of the Trafficking Directive fails

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[214] Gromek-Broc, 'EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?' (2011) 20(64) Nova Et Vetera 227, 231.

[215] [2015] IEHC 22, [200] and [184].

[216] RACE in Europe, 'Trafficking for Forced Criminal Activities and Begging in Europe' (2014).

[217] Piotrowicz and Sorrentino, 'Human Trafficking' (n 22) 678.

[218] Muraszkiewicz, *Protecting Victims* (n 207) 126.

to provide for the effective safeguarding of victims and their human rights by way of avoiding further victimisation.

It is well established that the international and, in particular, the European laws addressing non-criminalisation 'remain vague and potentially inadequate to achieve the aim of safeguarding the human rights of victims and avoiding further victimisation'.[219] In order to address this issue, in 2014 human trafficking experts from around the globe put forward recommendations to the EU on two themes: victim protection and possible changes to the Trafficking Directive. In supporting the further strengthening of the Directive to assist in securing prosecutions and helping victims, one group of experts proposed two key changes in relation to updating Art 8. Firstly, the replacement of 'are entitled' with 'shall' and the deletion of 'basic principles' within the Article itself; and secondly, the inclusion of 'no secondary victimisation' clauses into other, victim-centric Articles for example Art 9(1) by replacing 'may' with 'shall'.[220] Unfortunately, neither of these recommendations were brought to fruition.

4. The Political Road to the Modern Slavery Defence(s)

This section explores the route to the inclusion of the statutory defence(s) within the MSA 2015. It examines the political ethos in the UK during the drafting of the Modern Slavery Bill and subsequent Act and considers the multitude of debates surrounding the application of the non-criminalisation principle which ultimately influenced Parliament to enact a specific

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[219] Muraszkiewicz, *Protecting Victims* (n 207) 2.

[220] Jackie Jones and John Winterdyk, 'Human Trafficking: Challenges and Opportunities for the 21st Century: Outcomes and Proposals' (2018) 8(1) Oñati Socio-legal Series 165, 168-169.

provision. The analysis places the anti-modern slavery agenda at odds with competing political interests, in particular the anti-immigration sentiments and policies introduced under the Coalition Government which directly contribute to the misidentification and criminalisation of human trafficking and modern slavery victims. Furthermore, the focus on the consolidation of trafficking and slavery-related offences, predominantly addressing longstanding forms of exploitation, i.e., sex trafficking and forced labour, during drafting diverted attention away from newer/ newly recognised forms of exploitation including forced criminality and emphasises the criminal justice-based approach to addressing human trafficking and modern slavery. This section demonstrates that each of these factors contributed to a significant lack of emphasis being afforded to victims and their circumstances which resulted in the inadequate framing of the defence(s).

4.1 Sex Trafficking, Labour Exploitation, Immigration and Modern Slavery

It is well documented that the majority of scholarly writing, policymaking and overall global rhetoric on human trafficking has been dominated by the problem of trafficking for sexual exploitation.[221] Despite the Trafficking Protocol broadening the definition of 'human trafficking' to encapsulate the exploitation of women, men and children in a wide variety of sectors, international anti-trafficking discourse has remained focused on sex trafficking. In the US in particular, the link between trafficking and prostitution remains a highly contested topic.[222] As Chuang explains, 'the trafficking field has become embroiled in broader debates

[221] J Goodey, 'Human trafficking sketchy data and policy response' (2008) 8(4) Criminology and Criminal Justice 421.
[222] Chuang, 'Rescuing Trafficking' (n 20).

over prostitution reform', divided by 'abolitionists' who favour the prohibition of all prostitution and 'activists' who view sex work as a viable livelihood, the penalisation of which denies adults their individual liberty.[223] Notably, the 'political elite' and anti-trafficking organisations within the US have been found to disproportionately focus their attention on sex trafficking as opposed to labour trafficking; reflected in media representations and public perceptions/ (mis)conceptions of human trafficking.[224]

Despite the intrinsic divergence between the myriad forms of human trafficking now recognised in modern society, the focus of anti-trafficking efforts have been geared around traditional gendered perspectives on trafficking linked to fears originating from the 'white slave trade' of European women and young girls in the early twentieth Century.[225] Quirck acknowledges that historical definitions pertaining to what constitutes slavery has contributed to the placing of different forms of exploitation within a hierarchical order of political priority.[226] Indeed, the historic propensity to conflate human trafficking with sex trafficking continued at the domestic level with the development of early human trafficking policy and legislative responses in the UK that tracked slow, incremental international developments.

Prior to contemporary developments relating to human trafficking, no specific legislation existed to adequately address the phenomenon, let alone provide protection to victims. The

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[223] Janie Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (2006) 27 Michigan J of Intl L 437, 443.

[224] Tabitha Bonilla and Cecilia Hyunjung Mo, 'The Evolution of Human Trafficking Messaging in the United States and Its Effect on Public Opinion' (2019) 39(2) J of Public Policy 201.

[225] Scarpa, *Trafficking in Human Beings* (n 94).

[226] Joel Quirck, 'Modern Slavery' in Gad Heuman and Trevor Burnard (eds), *Routledge History of Slavery* (Routledge 2011).

Sexual Offences Act (SOA) 1956 and Immigration Act 1971 covered the activities of procurement and false imprisonment for the purpose of sexual exploitation,[227] and illegal movement respectively.[228] However, the provisions provided limited recourse for the gravity of exploitation experienced by victims. Furthermore, the preliminary framing of the problem within the ambit of sexual offences and immigration law exclusively, set a damaging precedent for the future of legislation. From the mid-1990s to 2013 knowledge of the contours of human trafficking remained limited as evident from the piecemeal UK response to address these types of activities. In 2002 the first statutory offence of trafficking was introduced in the Nationality, Immigration and Asylum Act. Section 145 made it an offence for a person to arrange or facilitate the arrival in, travel within, or departure from the UK of an individual for the purpose of prostitution. The legislation was notably ill-suited to the wider ambit of the problem; the offence was largely travel-based and only covered trafficking for the purpose of prostitution and 'was foreseen as a stopgap measure before comprehensive legislation was introduced'.[229]

This was addressed in the following year with the incorporation of trafficking for sexual exploitation within the Sexual Offences Act (SOA) 2003 which repealed the SOA 1956. Sections 57, 58 and 59 of the SOA 2003 created offences relating to the trafficking of individuals for the purpose of sexual exploitation, with s 53A creating the offence of paying for sexual services of a prostitute subjected to force etc. 'Sexual exploitation' in this context was thus inclusive of the 50 offences outlined in the sexual offences' framework, ranging from

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[227] Sexual Offences Act 1956, s 22 and s 24.

[228] Immigration Act 1971, s 25 created the offence of assisting unlawful immigration to a Member State by way of facilitation.

[229] Klara Skrivankova, 'United Kingdom (UK)' in Global Alliance Against Traffic in Women (GAATW), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (Amarin Printing & Publishing Plc 2007) 205.

rape to controlling prostitution.[230] Furthermore, sections 47-51 criminalised the commercial sexual exploitation of children under 18 years of age. Regrettably, however, the sexual exploitation offences once again failed to appreciate the true extent of the nature of trafficking as defined in the Trafficking Protocol and omitted any express requirement of force, coercion or deception in the process of recruitment thus blurring the lines between those coerced into involuntary prostitution and voluntary sex worker.

The distinction between sexual and non-sexual exploitation was later acknowledged in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (AI(TC)A). Section 4(4) took a broad approach to exploitation and defined the concept in four tiers: (a) behaviour that contravenes Art 4 ECHR, relating to slavery or servitude, and forced or compulsory labour; (b) organ trafficking contrary to the Human Organs Transplant Act 1989; (c) labour trafficking; (d) abuse of a position of vulnerability deriving from physical or mental disability, youth or familial relationships. Despite both the SOA 2003 and the AI(TC)A recognising the 'act' element of trafficking as arranging or facilitating the arrival in, entry into, travel within, or out of the UK, with the latter increasing the ambit of exploitation, implementation of the legislation was significantly one sided. Skrivankova found that by the end of 2006 there had been 30 convictions in trafficking for sexual exploitation compared with no convictions in trafficking for non-sexual exploitation, although it was conceded that limited guidance on the interpretation of s 4 AI(TC)A may have contributed to its lack of application in practice.[231]

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[230] Rachel Annison, 'The Anti-Trafficking Monitoring Group: In the Dock – Examining the UK's Criminal Justice Response to Trafficking' (June 2013) 28.

[231] Skrivankova, 'United Kingdom' (n 230) 205.

The clear division of human trafficking into two distinct problems, sexual and non-sexual exploitation, with the former taking precedence, led to a separation in practical responses whereby trafficking not falling within the scope of SOA 2003 was viewed as an immigration problem to be addressed through border control.[232] This disparate legislative response to human trafficking did not go unnoticed and political pressure and campaigning from non-governmental organisations, such as Liberty and Anti-Slavery International, highlighted concerns over the innate failings of policy and legislation to address non-sexual exploitation in particular forced labour. This led to the introduction of a new offence of slavery, servitude and forced labour in s 71 of the Coroners and Justice Act 2009 which was to be understood with regard to Art 4 of the ECHR. Thus, it is evident that anti-modern slavery efforts were firmly rooted in immigration and criminal justice measures, arguably at the expense of comprehensive victim protection and identification mechanisms.

During Theresa May's October Speech to the 2013 Conservative Party Conference, in which she addressed terrorism, extremism and 'dangerous foreigners'; bolstering the Conservative's stance on immigration, she announced the Government's intention to 'make it easier to get rid of people with no right to be here' by introducing the Immigration Bill.[233] Playing on the increasing public concerns over immigration and migrant workers, the Conservative Government pledged its commitment to tackling immigration with tougher barriers to welfare creating a hostile environment for undocumented migrants. Standing in stark contrast to the undertones of the Immigration Bill, May concluded with the announcement that the

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[232] Rose Broad, 'From Human Trafficking to Modern Slavery: The Development of Anti-Trafficking Policy in the UK' (2019) 25(2) Eur J on Criminal Policy and Research 119,

[233] Theresa May, '2013 Speech to Conservative Party Conference' (October 2013).

Government would be introducing a new Modern Slavery Bill to address the appalling crime of human trafficking. The speech took a firm stance of directing anti-slavery policies and legislation to the investigation, arrest, prosecution and imprisonment of slave drivers despite essentially creating a hospitable environment for them in the same breath. In denying migrants access to support, housing and legitimate work they are pushed further into the realms of the vulnerability, exploitation and the shadow economy; prevented from seeking authoritative help or reporting crimes through fear of being reported to the Home Office. Katy Swaine Williams, senior project officer at the Prison Reform Trust expressed her concerns over the 'conflict of interest' which exists within the Government between controlling immigration and protecting victims of modern slavery, with the former being prioritised over the latter.[234]

4.2 The Modern Slavery Act 2015

Prior to the UK Government announcing its intention to stand at the forefront of the global fight against modern slavery, a number of national and international anti-modern slavery reviews recommended consolidating previous provisions criminalising human trafficking and enslavement under one single piece of legislation.[235] The vast majority of these reviews highlighted the troubling phenomenon of victims of modern slavery being prosecuted for

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[234] May Bulman, 'Female trafficking victims unlawfully held in UK jails due to "disturbing" failure to identify exploitation, finds report' (Independent 16 September 2018) <https://www.independent.co.uk/news/uk/home-news/human-trafficking-women-uk-victims-prisons-jail-modern-slavery-prison-reform-trust-hibiscus-a8534726.html> accessed 23 September 2022.

[235] It is worth noting that whilst non-governmental organisations amassed increasing support for the introduction of a single 'Modern Slavery Act'/'Anti-Trafficking Act', the Government itself considered the introduction of a bespoke 'Human Trafficking Bill' to be unavailing. See Home Office, *Report on the Internal Review of Human Trafficking Legislation* (2012).

offences they had committed as a result of being trafficked or enslaved. Many recommended the inclusion of victim protection measures, such as establishing a monitoring mechanism to review the application of the non-punishment principle;[236] improved victim identification and provisions ensuring the non-prosecution/ non-criminalisation of victims.[237] Of particular notability was a report by GRETA, the organisation responsible for monitoring state implementation of the Trafficking Convention, which in its first evaluation stated that the UK was bound to give legal effect to the non-criminalisation principle.[238] As the transposition deadline for the EU Trafficking Directive on 6 April 2013 passed and instances of human trafficking and enslavement became increasingly prevalent on both a political and social scale, the Coalition Government placed anti-modern slavery efforts firmly on its agenda.

Under increasing pressure from stakeholders, the Government initiated an urgent public debate, led by Frank Field, concerning the practical and effective ways of ending modern slavery in the UK. The resultant Modern Slavery Bill Evidence Review urged the Government to draft a Bill that acknowledged the moral imperative of protecting victims,[239] placing victims at the forefront of anti-modern slavery efforts and striking a balance between victim support/ protection and an Act that was prosecution friendly. The Field Report, published on 16 December 2013, emphasised the injustice of criminalising victims and recommended including

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[236] OSCE, *Report by OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings* (2012).

[237] Centre for Social Justice, *It Happens Here: Equipping the United Kingdom to fight modern slavery* (2013); Anti-Trafficking Monitoring Group, *In the Dock: Examining the UK's Criminal Justice Response to Trafficking* (2013).

[238] GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom – First Evaluation Round* (2012) 12.

[239] Frank Field (Chair), *Establishing Britain as a world leader in the fight against modern slavery: Report of the Modern Slavery Bill Evidence Review* (16 December 2013) 10.

a clause giving statutory effect to the non-prosecution of victims as addressed in CPS guidance at the time.[240] Prior to this, the Trafficking Convention provided the central piece of international legislation that shaped the UK response to victim identification and protection. The Convention imposed myriad obligations upon the state including the development of victim identification mechanisms and the protection from criminalisation for victims.[241]

Theresa May, the then Home Secretary, presented the draft Modern Slavery Bill to Parliament on 16 December 2013, alongside the Field Report. Despite the preface vowing to keep 'the plight of victims at the very heart of our policies and everything we do',[242] the draft was predominantly criminal justice-based and failed to provide adequate protection provisions. In terms of protecting victims who are exploited for the purpose of forced criminality, the Explanatory Notes to the Bill recognised 'exploitation' included 'forcing a person to engage in activities such as begging or shop theft',[243] however the draft Bill itself was silent on the non-criminalisation of both child and adult victims of such exploitation.[244] Fortunately, the draft formed part of a White Paper which contained a section relating to a wider package of human trafficking and modern slavery policies and actions. Amongst these was a section stating that revised guidance on prosecution of victims would be issued by the Director of Public Prosecutions (DPP) to ensure that prosecutors would not proceed with a case against a human trafficking and modern slavery victim where it was not in the public interest to do so.[245] Clearly non-criminalisation of victims featured on the Government's anti-modern slavery agenda,

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[240] ibid 39.

[241] Art 10 and Art 26, respectively.

[242] Home Office, *Draft Modern Slavery Bill* (December 2013) Cm 8770, Home Secretary Foreword.

[243] ibid 43.

[244] The non-criminalisation of children will be considered in-depth in Chapter 5.

[245] Home Office, *Draft Modern Slavery Bill* (n 243) 12.

however it was not afforded the necessary weight that international organisations, non-governmental organisations and subsequent evidence suggested it should have been.[246]

This oversight was later addressed during pre-legislative scrutiny in a report by the Joint Committee on the draft Modern Slavery Bill which acknowledged that 'avoiding abuse of victims by the state through prosecutions which are incompatible with their status as victims is key to improving victim protection' and reiterated the failings of current guidance to address the problem.[247] The Joint Committee put forward a number of recommendations on the treatment of victims that were not addressed in the initial draft Bill. In particular, it recommended 'ensuring that victims are not prosecuted for crimes they were forced to commit while enslaved' and gave statutory recognition to 'exploitation of or for criminal activities' in its revised Bill (the Committee Bill). [248] The Committee Bill further accentuated the problem by including a causation-based non-criminalisation clause available to all criminal offences (as a partial defence to murder) which clearly expressed where the burden of proof would lie should the defence be raised.[249] Article 22 of the Committee Bill provided for the:

> Non-criminalisation of victims of modern slavery:
>
> 1. Where a person charged with any offence ("the accused") is a victim of one or more offences under Part 1 of this Act, that person shall not be guilty of the offence charged if –

[246] See for example, RACE, *Trafficking for Forced Criminal Activities and Begging in Europe – Exploratory Study and Good Practice* (Anti-Slavery International 2014).

[247] Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill – Report* (April 2014) HL Paper 166/HC 1019, 56.

[248] ibid 3 and 8.

[249] ibid 20-21.

a. the offence was committed as a direct and immediate result of being a victim of the Part 1 offence; and
b. a person of the same sex and age as the accused, with a normal degree of tolerance and self-restraint and in the circumstances of the accused, might have reacted in the same or in a similar way.

2. Where the offence charged is murder, a defence under (1) shall reduce murder to manslaughter.
3. Once the defence set out in subsection (1) is raised by the accused or on his behalf, or the court of its own volition or on hearing submissions from any party decides that such a defence should be considered by the court, the burden of proving that the offence was not committed as a direct and immediate result of him being a victim as set out in subsection (1) shall lie upon the prosecution.
4. For the purpose of subsection (1) the accused is a victim of modern slavery if there is evidence that the accused is a victim of one or more of the offences in Part 1 of this Act.

The Joint Committee concluded that their proposed defence: (a) provided a clear causative link between the slavery of the victim and the offence committed; (b) provided proportionate protection; (c) considered the temporal link between slavery and the offence; and (d) made a specific provision for the reduction of murder to manslaughter.[250] The provision employed a test of 'sympathetic reasonableness'[251] more attuned to a victim-centric approach than any stance taken by the Government on the matter, even to this day.

4.3 The Application of the Non-Criminalisation Principle

Despite the best efforts of the Joint Committee to develop a proposed statutory defence, the human trafficking and modern slavery defence(s) did not reach the statute books with ease.

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[250] ibid 58-59.

[251] Public Bill Committee Deb, *Modern Slavery Bill* 11 September 2014, col 349.

The transposition of the non-criminalisation principle into a specific non-criminalisation provision opened the floor to a myriad of mixed opinions on whether creating a statutory defence for victims of human trafficking and modern slavery provided an adequate means of protection at all.[252] Those in favour of a statutory solution maintained the opinion that a codified law provided the most visible means of safeguarding the rights of victims. Providing actors within the criminal justice system with a usable single defence which solely deals with human trafficking and modern slavery victims increases visibility and provides an educational tool that improves the knowledge of those on the frontline who are most likely to come into contact with victims. In turn, victims are more likely to have confidence in authorities who are aware of their situation and approach them for help. This restricts exploiters/ traffickers from using threats of law enforcement as a means of controlling their victims.

Furthermore, discrepancies within case law highlighted the problematic nature of the pre-existing guidance and policy measures.[253] Historically, domestic safeguards were implemented through the common law defence of duress, CPS guidance on suspects in criminal cases who are potential victims of trafficking or slavery, the remedy of abuse of process, and mitigation during sentencing where the above failed.[254] Muraszkiewicz, who advocates for a victim-centred approach to anti-modern slavery measures, highlights the limitations of this framework and emphasises the importance of including 'a statutory defence that recognises the particular vulnerability of the victims and signposts that the legislator is serious about protecting them'.[255]

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[252] ibid 63.

[253] See *R v L and Others* [2013] EWCA Crim 991, [17].

[254] See David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (16th ed, OUP 2002); *Joseph* (n 42).

[255] Muraszkiewicz, *Protecting Victims* (n 207) 150-151.

However, she concedes that such a provision should be empirically researched to determine whether one would in fact provide sufficient protection in practice.

Indeed, scholars and practitioners alike, who favoured the status quo of CPS guidance, prosecutorial discretion and the abuse of process doctrine, opposed the prospect of a statutory solution arguing that such a provision would prove more problematic than beneficial in practice. During the passage of the Draft Modern Slavery Bill, several arguments were raised against the introduction of a statutory defence. Gallagher in particular noted four concerns when presenting her evidence to Parliament: (i) difficulties in defining the scope of the defence; (ii) difficulties in defining the temporal link between the commission of the offence and the enslavement of the victim and applying it in practice; (iii) a potential for unintended consequences; and (iv) that persons who are or have been victims can and do commit serious crimes, for example killing their exploiters or exploiting/ trafficking others. She concluded that: 'the state must retain the flexibility to decide whether the circumstances justify non-prosecution or non-punishment but should not be compelled, through law or policy, one way or another'.[256]

Additionally, Frank Mulholland QC, Lord Advocate for Scotland at the time, argued that such a defence would be open to abuse by perpetrators of human trafficking and modern slavery in attempts to avoid or frustrate prosecution and the focus instead should be on the improved identification of victims.[257] Although these trepidations should be afforded significant weight

[256] Anne T Gallagher, 'Submission to The Joint Committee on the Draft Modern Slavery Bill' (19 March 2014).
[257] Frank Mulholland, 'Written submission from the Rt Hon Frank Mulholland QC, Lord Advocate' (19 March 2014).

when considering the suitability of such a statutory provision, Muraszkiewicz argues that each of them could be offset by an unambiguous, well-framed defence provision.[258] As with any defence, significant weight would need to be attached to the facts in each case and the victim would still be required to meet the evidential burden when raising the defence in court.

Following the Joint Committee Report and the barrage of criticisms over the lack of protection provisions and overall failing of victims, [259] the Government accepted many of the Report's recommendations including implementing a statutory defence for victims, albeit one that was significantly different from the Art 22 defence of the Committee Bill. Responding to the Joint Committee Report the Government emphasised its commitment to protecting victims and acknowledged the need for a statutory safeguard. Although this was a crucial step in the right direction for ensuring victims of human trafficking and modern slavery would be protected from further victimisation by the state, the framing of the provision failed to appreciate the nature in which victims of this form of exploitation come to commit criminal offences.[260] In particular, the s 45 defence was entirely compulsion based, save for ambiguous language that conflated compulsion and causation; it failed to state where the burden of proof rest; and it was subject to over 130 excluded offences. Minimal consideration was also given to how the defence would be raised in practice. Unlike the Committee Bill provision, s 45 failed to

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[258] Muraszkiewicz, *Protecting Victims* (n 207) 151.

[259] Emily Dugan, 'Government's Modern Slavery Bill will "fail victims and spare criminals"' (Independent 14 December 2013) <https://www.independent.co.uk/news/uk/politics/government-s-modern-slavery-bill-will-fail-victims-and-spare-criminals-9005211.html> accessed 23 September 2022; Caroline Robinson and Claire Falconer, 'Theresa May's modern slavery bill will fail to provide protection to victims' (Guardian 20 December 2013) <https://www.theguardian.com/global-development-professionals-network/2013/dec/20/theresa-may-modern-slavery-bill> accessed 23 September 2022. Both echoing concerns raised by Anti-Slavery International Director, Aidan McQuade.

[260] See Schloenhardt and Markey-Towler, 'Non-Criminalisation' (n 164).

establish who would bear the burden of proof and to what standard, subsequently leading to arguably necessary litigation.[261] Furthermore, the limitations placed upon the defence by the excluded offences within Sch 4, such as arson, kidnapping, modern slavery, and murder, which stands to question the Government's victim-centric sentiments of protecting victims. In an attempt to 'avoid creating a legal loophole for serious criminals to escape justice',[262] the Government is arguably in breach of European obligations and has created a provision inaccessible to a large proportion of victims justified by the safety-net of prosecutorial discretion.[263]

Unfortunately this stance fails to appreciate the fact that the protection mechanisms provided by the CPS guidance, including prosecutorial discretion, have previously failed to prevent victims of human trafficking and modern slavery from being criminalised.[264] The Explanatory Notes offer some insight into why the provision presented was a mere amalgamation of several elements from legislation, common law and policy, all of which had faced scathing criticisms themselves:[265] the defence is 'intended to provide further encouragement to victims to come forward and give evidence [against their exploiters]'.[266] Thus the premise of the statutory

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[261] See *R v MK (Gega)* [2018] EWCA Crim 667; Mennim and Wake, 'Burden of Proof' (n 43).

[262] MSA 2015, Explanatory Notes [225].

[263] Laird, 'Evaluating' (n 33) 397.

[264] See for example, *R v O* [2008] EWCA Crim 2835; *L & Others* (n 42); *Joseph* (n 42); *R v MK (Gega) [2018] EWCA Crim 667; R v DS*, *R v* A, R *v AAD, AAH, and AAI* (n 3); *R v CS* [2021] EWCA Crim 134; *R v O; R v N* [2019] EWCA Crim 752.

[265] The statutory defence is recognised as being modelled upon the common law defence of duress, and to some extent necessity. Elements of the defence, such as 'relevant characteristics', 'reasonable person in the same situation' and 'no realistic alternative' mirror that of the position with regard to duress and must be considered in light of the restrictions identified in *R v Bowen* [1996] 2 Cr App Rep 157.

[266] Modern Slavery Bill: Explanatory Notes, [146].

defence came from the backdrop of criminal justice rather than focusing specifically on victim protection. This, coupled with the tensions between the anti-modern slavery agenda and other policy areas, in particular the Government's 'hostile environment' policies on immigration, significantly impeded what limited victim protection was afforded by the MSA 2015 in terms of non-criminalisation. Research suggests that since the introduction of the modern slavery defence(s), non-UK nationals who have been trafficked and/ or enslaved for forced criminality continue to be misidentified as illegal immigrants and/ or criminals and are detained, prosecuted and even deported back to the countries where their exploitation ordeal originated.[267] These problems are further compounded by severe delays in the NRM and the identification of (potential) victims. The MSA 2015 therefore represents a missed opportunity to recognise victims of human trafficking and modern slavery for criminal exploitation and provide sufficient protection to those victims of human trafficking and modern slavery who commit criminal offences during their victim experience.[268]

Although regional obligations in the late 2000s led to guidelines and policies on non-criminalisation, victims continued to be routinely prosecuted and charged with little concern given to their situation of exploitation. This is evident from the multitude of human trafficking appeal cases brought by victims in E&W over the past decade.[269] Alongside non-governmental organisation and government supported reports and academic research which exposed the

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[267] HM Inspectorate of Prisons, 'Report on the unannounced inspection of Yarl's Wood Immigration Removal Centre' (2017); Women for Refugee Women, '"From one hell to another": The detention of Chinese women who have been trafficked to the UK' (2019).

[268] Laird, 'Evaluating' (n 33) 395, 404.

[269] Over a dozen cases have been brought before the Court of Appeal (Criminal Division) since the historic case of *R v O* [2008] EWCA Crim 2835, each of which expose a multitude of failings within the criminal justice system to identify victims of human trafficking/modern slavery and correctly apply the principle of non-criminalisation.

magnitude of the situation, namely, *No Way Out* and *Still No Way Out*;[270] *The Criminalisation of Migrant Women*;[271] and *The Criminalisation of Potential Trafficked Cannabis Gardeners*.[272] Despite the introduction of the modern slavery defence under s 45 of the MSA 2015, victim/offenders are still frequently found within detention centres and prisons. Arguably, this will be even more problematic in the wake of the Nationality and Borders Act 2022 which contains a number of controversial sections which will affect the identification and treatment of victims of modern slavery.

5. The Human Rights Dimension

It has been argued that abolitionism was the first human rights movement; the Slavery Convention of 1926 being the 'first true international human rights treaty'.[273] The focus on liberation and legislation, built on core concepts of human dignity and legal rights, mirrors the human rights movement of today. Acts of modern slavery, in particular slavery and servitude, have raised important human rights issues ever since and the prohibition of slavery in all its forms has been articulated in myriad treaties from the Universal Declaration of Human Rights in 1948 to the 1998 Rome Statute which declares it as a crime against humanity. Although human trafficking is not expressly provided for in international human rights law, the intrinsic element of intentional denial of agency or freedom within the practice directly links to the protection of agency at the core of human rights theory. Furthermore, the principle of non-punishment of VoTs for crimes they commit, and its application across all anti-modern slavery

[270] Prison Reform Trust, *No Way Out* (PRT 2012); and Prison Reform Trust, *Still No Way Out* (PRT 2018).

[271] L Hales and L Geisthorpe, *The Criminalisation of Migrant Women* (Cambridge University Press 2012).

[272] Burland, 'Still punishing' (n 50) 167.

[273] Paul Sieghart, *The International Law of Human Rights* (OUP 1984).

measures, is intrinsically linked to several international and regional human rights laws and is crucial to the recognition of human trafficking as a serious human rights violation. The principle acknowledges that trafficking victims who are at greater risk of being criminalised are also those at a heightened risk of being re-trafficked. As UN General Assembly has recognised, the 'punishment of a victim marks a rupture with the commitments made by states to recognize the priority of victims' rights to assistance, protection and effective remedies'.[274] Failure by states to respect and incorporate the principle into domestic law leads to further harm and serious human rights violations, 'including detention, forced return and refoulement, arbitrary deprivation of citizenship, debt burdens arising from the imposition of fines, family separation and unfair trial'.[275]

The principle acknowledges that trafficking victims who are at greater risk of being criminalised are also those at a heightened risk of being re-trafficked. The UN General Assembly has recognised that myriad intersections, including gender, race and ethnicity, migration status and poverty are all visible in failures by domestic states to implement the principle of non-punishment or give due regard to its status and scope of application.[276] The relevance of the application of non-punishment principle to the obligations arising in international human rights law to eliminate direct, indirect and structural racial discrimination are also recognised. The OHCHR, in its 2014 report, provided that measures taken to address irregular migration or to counter terrorism, human trafficking or migrant smuggling should not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the

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[274] Siobhán Mullally, *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children* (UN General Assembly 2021) 2.
[275] ibid.
[276] ibid.

basis of prohibited grounds.[277] Human rights treaty bodies continue to call upon states to implement the non-punishment principle and protect victims from criminalisation.[278] The European Court of Human Rights (ECtHR) in the recent case of *VCL and AN v UK*[279] recognised that Art 4 ECHR incorporates the non-punishment principle within it and prosecution of victims may conflict with a state's duty to take operational measures to protect a (potential) victim 'where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked'.[280] Furthermore, the ECtHR highlighted the relevance of the non-punishment principle to the Art 6 ECHR right to a fair trial and the related rights to equality before the law and to equal protection of the law.[281].

In recent years, the ECtHR has steered the discourse on human trafficking and state responsibilities towards victims, ruling that human trafficking falls within the remit of Art 4 ECHR. In particular, the framework of positive obligations imposed by Art 4 include: the duty to take operational measures to protect (potential) victims of trafficking, as well as the procedural obligation to investigate situations of (potential) trafficking. Article 4 was recently recognised as incorporating the non-punishment principle in *VCL and AN v UK*.[282] In an attempt to create a system that is hostile to modern slavery rather than its victims, the UK Government has seemingly strived to adopt a victim-centred, human rights-based approach in

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[277] OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (OHCHR, 2014).

[278] See for example, UNOHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (E/2002/68/Add 1, 2000) principle 7.

[279] *(App no 77587/12 and 74603/12)* (2021).

[280] ibid [159].

[281] Human Rights Committee, general comment No 32 on the right to equality before courts and tribunals and to a fair trial (2007) [13].

[282] *(App no 77587/12 and 74603/12)* (2021).

combatting human trafficking and slavery. Acknowledged by Theresa May, Prime Minister at the time, as 'the great human rights issue of our time',[283] the Government continues to emphasise that it 'puts victims at the heart of everything we do'[284] and is 'committed to ensuring victims of this abhorrent crime remain at the centre of our approach'.[285] Despite this, the ECtHR in *VCL and AN* found that the failure to undertake a timely assessment of the applicants' status as victim, not only breached Art 4, it also breached the applicants' Art 6 ECHR rights to a fair trial.[286]

In order to comply with both international standards and its own 'Modern Slavery Strategy', the Government incorporated 'PART 5 Protection of victims' into the MSA 2015. Part 5 contains two crucial provisions relating to victim identification and non-criminalisation of victims. Despite this, however, several reports and reviews have found that the MSA 2015 falls significantly short on victim protection measures, favouring the prosecution of modern slavery offenders over the identification and support of victims. This in turn has led to a number of vulnerable victim offenders slipping through the net and facing dual-victimisation.

5.1 A 'Human Rights-Based' Approach

In recent years there has been an increasing amount of modern slavery literature supporting the contention that anti-modern slavery strategies, policy and legislation should be victim-centric;

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[283] May, 'Defeating modern slavery' (n 185).

[284] Karen Bradley, 'True scale of modern slavery in UK revealed as strategy to tackle it published' (GOV.UK 1 December 2014) <https://www.gov.uk/government/news/true-scale-of-modern-slavery-in-uk-revealed-as-strategy-to-tackle-it-published> accessed 23 September 2022.

[285] Home Office, *2017 UK Annual Report on Modern Slavery* (2017) 7.

[286] *VCL and AN* (n 283) [200].

placing the identification and protection of victims at the forefront of efforts to eradicate human trafficking and modern slavery. Brysk and Choi-Fitzpatrick argue that current human rights-based approaches are embedded in the UNCTOC which is shaped by a criminal justice approach which focuses on rescue, temporary support and rehabilitation and is unsuitable.[287] Thus, victims continue to be viewed and used as means of securing prosecutions. A genuine human-rights based approach seeks to develop a legislative framework that shifts the focus away from viewing trafficked individuals as objects and towards understanding them as people, each with subjective lived experiences and bearing inherent human rights. According to Jordan, a key feature of this human rights framework is that it 'dictates an empowerment approach to assisting trafficked persons in retaking control over their lives'.[288] The argument proposed is that the statutory response should be one centred on the victim experience following a genuine human rights-based approach founded on two key premises: firstly, that all people have human rights (we are all rights holders); and secondly, that for each right there is a corresponding duty on states to respect, protect and fulfil these rights. In this way a human rights-based approach views human rights as an ethical claim with an important role to play in governing relations between those with greater and lesser power in a democracy.[289]

6. Conclusion

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[287] Austin Choi-Fitzpatrick, 'From Rescue to Representation: A Human Rights Approach to the Contemporary Anti- Slavery Movement' (2015) 14 JoHR, 496; Alison Brysk and Austin Choi-Fitzpatrick, *Rethinking Trafficking and Slavery, in Human Trafficking and Human Rights: Rethinking Contemporary Slavery* (University of Pennsylvania Press 2013) 12.

[288] Ann D Jordan, 'Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings' (2002) 10 Gender and Development 28, 30.

[289] Lister, '"Power, not Pity"' (n 4).

This chapter has provided an historical analysis of legislative anti-slavery and trafficking movements through the evolution of the concept of modern slavery from its roots in the transatlantic slave trade, white slave trade, human trafficking and prostitution leading up to the development of the international anti-modern slavery agenda and the introduction of modern slavery policy and legislation in the UK. This analysis has demonstrated the true complexities that shroud the task of combatting human exploitation and protecting those ensnared in its web. Since the early abolitionist movement, opposing economic, social and policy concerns have had a profound effect on shaping the anti-slavery and anti-trafficking discourses. Neither movement has been driven by forthright humanitarian concern, but rather competing political agendas ranging from colonial expansion to transnational organised crime and anti-prostitution, and more recently divergent policies surrounding immigration. These competing interests have led to the predominant criminal justice-based focus of anti-modern slavery efforts which in turn have had a damaging impact on the rights afforded to victims, none more so than those who are arrested, detained, prosecuted and convicted for crimes they have committed in connection with their modern slavery circumstances.

It is regularly professed by international organisations, non-governmental organisations and Governments worldwide that the core of the modern anti-slavery and trafficking narrative is the protection of victims. Charting the evolution of the principle of non-criminalisation through international law, quasi-legal instruments and regional law has revealed that, despite a significant increase in research to advance the ideology of non-criminalisation and victimisation, there has been little practical development in achieving a victim-centred approach which recognises victims as rights holders and is understanding of their experiences of exploitation. Although the *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking* state that victims of trafficking equate to victims of crime and thus

should not be prosecuted for status-related offences committed during the course of their exploitation, legislation addressing the non-criminalisation of victims 'remain[s] vague and potentially inadequate to achieve the aim of safeguarding the human rights of victims and avoiding further victimisation'.[290] In particular, the language used in both the Trafficking Convention and the Trafficking Directive deny victims any direct protective provision and create copious amounts of ambiguity as to their scope. This lack of clarity and inadequate framing has had a detrimental impact on the protective framework established at the domestic level.

The transposition of the principle of non-criminalisation in E&W through guidance, policy measures and most recently the statutory defence(s) has failed to provide adequate, equal treatment to victims. Concerns raised about the scope of protection offered by s 45 shortly after the enactment of the MSA 2015 have since been confirmed and evidence continues to accumulate which suggests that victims are still not being protected from being held criminally liable for acts they were compelled to commit. Whilst it is conceded that the dual use of guidelines and a statutory non-criminalisation provision is required to provide adequate safeguarding for victims, this multi-dimensional approach must deliver a truly holistic, victim-centric framework if it is to provide the most optimal solution in practice. By analysing the anti-modern slavery agenda through the lens of victim protection this chapter has highlighted the overarching failing of the legislative response to modern slavery: the failure to acknowledge the true reality of victims' experiences. These issues will be addressed in the following chapter which critically evaluates the concept of victimhood by drawing upon recent

[290] Muraszkiewicz, *Protecting Victims* (n 207) 2.

Court of Appeal cases,[291] explored by this author in separate case notes, to extract the lived experiences of VoTs who commit offences, notably those victims who are trafficked for the purpose of criminal exploitation, in an effort to deconstruct the political and social preconceptions of victimhood and criminality, and provide the foundations for a move towards a more victim-centred approach to non-criminalisation.

[291] See Appendix I and II.

Chapter 2: Challenging the Victim/ Offender Binary

1. Introduction

Being perceived through a narrow lens – as either a perpetrator or a victim of crime – has grave consequences for victims of human trafficking and modern slavery both short and long term: in the former they face criminalisation, punishment and imprisonment and in the latter, they experience significant societal barriers as a result of their convictions. The reasons why victims offend are complex and multi-layered. So too are the reasons behind justifying the extent to which victims should be legally protected. This chapter aims to address some of these intricacies. Owing to the limited understanding and appreciation of victims' circumstances and the hidden nature of modern slavery more generally, it is not possible to convey the lived experiences of criminal exploitation abuse in its entirety. This chapter does, however, provide context and background as to the bespoke position of those individuals who are trafficked/enslaved and forced to commit criminal activities.

To do so, this chapter begins by exploring what being a victim of modern slavery constitutes; society's perception of victims, how the law defines them, and how lived experiences of victims - as explored through case law and victim stories in existent literature - compare with the above demarcations. This chapter further aims to address the reasons why these victims should be legally protected from punishment, through thorough analysis of criminal law perspectives. Particular focus is given to the binary that exists within society between victims and offenders that often fails to recognise the subtle distinctions that exist where these binaries overlap. The effect this has on identifying victims in the first instance is also explored. Finally, this chapter examines the extent to which this dominant modern slavery discourse has hindered

efforts to adopt a genuine victim-centred approach to protecting victims from being further victimised by the state.

Since the Conservative Government launched its Modern Slavery Strategy in 2014, there has been an emphasis on tackling severe exploitation and strong signalling that such forms of exploitation will not be tolerated in the UK.[292] This emphasis on severe exploitation, such as organised crime gangs, has encouraged clear distinctions between perpetrators and victims, often portraying a simplified binary of 'bad/ evil' offenders versus 'good/ innocent' victims. This simplified binary fails to recognise the complex reality that victims may present as perpetrators, with a distrust of authorities resulting in refusal to communicate their victimhood and/ or delays in revealing the victimisation they have suffered. Meanwhile, the state is depicted as the 'rescuer' of victims, despite facilitating victimisation through hostile environment policies that focus on an individual's right to be in the country, as opposed to identifying signs of exploitation. For example, the recent Nationality and Borders Act 2022 contains a number of controversial sections that will affect the identification and treatment of victims of modern slavery. The Act removes support for victims who have taken part in criminal activity, despite the continued increase in cases of exploitation for forced criminality. The criminal justice system upholds these distinctions by intrinsically polarising perpetrators and victims and, in turn, fails to account for the nuances that exist in situations where these binaries overlap.

[292] See for example, Home Office, *Modern Slavery Strategy* (n 35); Conservative Party, *Forward, Together. Our Plan for a Stronger Britain and a Prosperous Future: The Conservative and Unionist Party Manifesto 2017* (St Ives PLC 2017).

Doctrinal scholarship in the field of human trafficking and modern slavery continues to grow at an exponential rate. International, regional, and domestic anti-trafficking and anti-slavery discourse, legislation and developments are scrutinised unabatedly. The principle of non-criminalisation of trafficked/ enslaved victims,[293] and domestic compliance with it,[294] is no exception to such scrutiny. Despite this ever-increasing body of scholarship, academics highlight overarching gaps in the literature that encompass one form of trafficking in particular: trafficking for the purposes of labour exploitation (including criminal exploitation).[295] More noticeable still is the lack of criminological, victimological and socio-legal research drawing on the lived experiences of victims of human trafficking and modern slavery for this form of exploitation. As Doyle and others attest: 'The ongoing failure of policy makers and legislators to consider the crime of labour trafficking from the perspective of the victim… is thus matched by a lack of literature in this area'.[296]

Interestingly, neither the drafting of the MSA 2015, nor any of the reports reviewing its use – including the use and application of s 45 – seem to have approached and engaged with survivors of modern slavery, be it those who have been prosecuted for offences they have committed or

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[293] See, for example, Muraszkiewicz, *Protecting Victims* (n 207); Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press 2018); Marija Jovanovic, 'The Principle of Non-Punishment' (n 44)); Piotrowicz and Sorrentino, 'Human Trafficking' (n 22) 669; Schloenhardt and Markey-Towler, 'Non-Criminalisation' (n 164); Hoshi, 'The Trafficking Defence' (n 195).

[294] See, for example, Susan SM Edwards, 'Recognising the Role of the Emotion of Fear in Offences and Defences' (2019) 83(6) JCL 450; Muraszkiewicz, 'Protecting Victims' (n 44)); Ahluwalia, 'The Predicament' (n 51); Laird, 'Evaluating' (n 33).

[295] Villacampa andTorres, 'Human trafficking' (n 31).

[296] David M Doyle and others, '"I Felt Like She Owns Me": Exploitation and Uncertainty in the Lives of Labour Trafficking Victims in Ireland' (2018) 59 Br J Criminol 231, 232-233.

those with first hand lived experience of being a defendant using s 45.[297] Arguably, this is reflective of the broader crime-preventative focus of governments and lawmakers which draws attention away from the persons being exploited and ultimately results in the production of laws and policy which bears little understanding of the victim experience and fails to 'view them holistically as people with particular motivations to… improve their lives'.[298] Given this, s 45 is particularly problematic because it applies an objective standard when considering elements of compulsion and fortitude requiring VoTs to behave reasonably and seek out opportunities to resist and escape. This does not acknowledge the real-world experiences and emotions of victims in these situations which are usually outside the ambit of comprehension of those who have not been trafficked/ enslaved.[299] For example, juju and witchcraft are recognised as significant factors in trafficking cases that instil unimaginable fear in victims, arguably making it impossible to assess them against the 'artificiality of the normative construct of the reasonable person ... and the legal construct of ... a realistic alternative'.[300]

According to Berger and Luckmann, reality is a social construction: criminals, and consequently victims, are socially construed because social order is a human product which lacks ontological status:[301] the human experience of the social world is objective, it does not

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[297] Wilberforce Institute at the University for Hull, 'Evidence Review of Section 45 of the Modern Slavery Act: Background and Context' (The Modern Slavery and Human Rights Policy and Evidence Centre 2022) 10.

[298] Dina Francesca Haynes, '(Not) Found Chained to a Bed in a Brothel: Conceptual Legal, and Procedural Failures to Fulfil the Promise of the Trafficking Victim Protection Act' (2007) 21 Georgetown Immigration Law Journal 337, 347.

[299] Susan SM Edwards, 'Coercion and compulsion – re-imagining crimes and defences' (2016) Crim LR 876, 896.

[300] ibid 898.

[301] Peter L Berger and Thomas Luckmann, *The Social Construction of Reality* (Penguin Books 1966).

matter what *is* happening but rather what people *believe* is happening. Protective mechanisms in place to provide for the non-criminalisation of victims should focus on the victims themselves who are first and foremost people; they are diverse, opinionated and have a wide variety of needs and wants. To quote the 2014 review team of the NRM, 'no one size fits all'.[302] The stereotypes and narratives that depict traumatised, abject victims in the same vein as dangerous, contemptible criminals must be addressed. It is often the case that those presenting as the 'dangerous, contemptible criminals' are in fact the victims of modern slavery and herein lies with problem with s 45 which fails to acknowledge the nuances of modern slavery victimisation – that victims of modern slavery can be serious criminals – by excluding 140 offences from the ambit of the statutory defence.

What is clear is that no two victims of modern slavery share the same experience, yet they often experience intersecting inequalities that leave them vulnerable to exploitation and are exploited through common forms of entrapment. Victims of criminal exploitation, in particular, are entrapped into silent compliance by their exploiters who use threats of arrest and imprisonment,[303] ones which are all the more likely to materialise given the parameters of the s 45 defence. Although this thesis does not explicitly include the voices of victims via empirical study, the importance of their voices is echoed throughout. The lived experiences of victims are acknowledged herein through case law and extant victim stories with a view to recommending reformation of s 45 of the MSA 2015 that affords greater recognition to the reality of modern slavery victims and the bespoke position of victim/ offenders.

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[302] Home Office, *Review of the National Referral Mechanism for victims of human trafficking* (2014) 6.

[303] Laura Hoyano, 'R v N: Abuse of Process--Prosecution--Decision to Prosecute' (2012) Crim LR 958, 963.

Over the last two decades since the adoption of the Trafficking Protocol, the moniker of 'modern slavery' has gradually taken over as a global catch-all term to describe, *inter alia*, human trafficking, slavery, servitude, forced or compulsory labour, debt bondage, forced marriage, organ harvesting, and other slavery-like exploitation. Although much of this is covered in the MSA 2015, there remains separate legislation for different forms of exploitation which continues to obscure the law in this area. The Forced Marriage (Civil Protection) Act 2007 and the Anti-Social Behaviour, Crime and Policing Act 2014 were enacted to protect individuals who are being forced into marriage, as well as protecting survivors of such exploitation, however, the legislation poses further problems regarding which crime to prosecute and the nature of punishment. Whilst the term 'modern slavery' has been used by non-governmental organisations and charities – and more recently by governments – to ignite public and political outrage, some experts maintain that the conflation of these terms over-simplifies the complexities of each form of exploitation.[304] The lack of a globally agreed legal definition of 'modern slavery' not only makes it increasingly difficult to assess the extent of the problem, but leaves international, national and regional efforts to address severe forms of exploitation significantly wanting. As the term 'modern slavery' seeks to undermine victims' rights to protection and assistance, clear global definitions are imperative to ensure that a human rights-based, victim-centric approach to protective functions is achieved. If the concept of 'modern slavery' is to become the global standard – which appears to be the case – it is prudent to have a common frame of reference of terms used in the field.

The criminal justice system is built upon a framework that upholds a clear distinction between victim and perpetrator. It stands that the role of the criminal justice system is to detect, convict,

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[304] Chuang, 'Exploitation creep' (n 76) 611.

and punish offenders in order to make reparation to their victims and the wider community. Although victims were largely neglected during adversarial process in the past, at the beginning of the twenty-first century the Labour Government pledged to put victims 'at the heart of the criminal justice system'[305] in order to 'rebalance the criminal justice system in favour of the victim and the community so as to reduce crime and bring more offenders to justice'.[306] Arguably this further entrenched the concept of the two dichotomously opposed characters in crime: 'good/ innocent' victims and 'bad/ evil' offenders. Despite this polarising, black and white ideology within the criminal justice system, the categories of victim and perpetrator are far more nuanced and stretch well beyond the ambit of oversimplified narratives.

Non-governmental organisations note that women in particular are all too well aware of the harms that the victim/ offender narrative exposes them to. The UK's only employment charity solely for women with convictions, *Working Change*, suggests that the narrative manifests by forcing women who enter the criminal justice system to conceal their victimisation by not reporting trauma, violence or domestic abuse committed against them for fear of negative treatment and complications to their case: 'Women fear being scrutinised or shamed for their suffering, and not being protected even if they speak out'.[307] Being tough on criminals and equipping the criminal justice system with the means to identify, apprehend and punish (the 'offender-oriented' approach) appear to prevail over any concerns for victims, their right and protection (the 'victim-oriented' approach) where victims of human trafficking and modern

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[305] Home Office, *Justice for All* (2002, Cm 5563) [0.22].

[306] ibid [0.3]. For discussion see John D Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice?' (2003) 30(2) J Law Soc 309.

[307] Working Change, 'Dismantling the Victim/Perpetrator Binary' (Blog, 25 November 2020) <https://workingchance.org/latest/dismantling-victimperpetrator-binary/> accessed 23 September 2022.

slavery are found to have committed offences. The continued criminalisation of victims of human trafficking and modern slavery leaves one questioning whether the Government's stance on protecting victims was indeed genuine or whether the concern for victims has been a convenient cover for punitive criminal and immigration policies it wished to pursue against perpetrators.[308] The inadequate identification of victims, limited support services available to them, and the limitations of the modern slavery defence under s 45 suggest the latter.

Given the bespoke position of some persons with lived experiences of modern slavery as both victims of human trafficking and perpetrators of criminal activities, the s 45 defence is particularly problematic because it fails to adequately address the grey areas in which victims may be coerced into committing criminal offences or engage in criminal activities in the course of their exploitation. In cases where there is a lack of clarity between the criminal act being committed and its connection to the modern slavery situation, it is unclear whether the compulsion-based defence will be applicable. Similarly. the objective 'reasonable person in the same situation' requirement under s 45(1)(d) necessitates the victim to act as an autonomous moral individual would, otherwise the defence will fail. Furthermore, if a victim of modern slavery is coerced into committing a 'serious offence', for example being driven by their exploiters over time to take an active part in human trafficking and modern slavery offences,[309] they will not be able to raise the defence. By effectively requiring victims to be entirely subdued, passive individuals who are entirely blameless in all of their endeavours, in order to be able to successfully raise the s 45 defence, the law fails to acknowledge the holistic

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[308] Concerns have been raised over governments increasing emphasis on victims for this ulterior motive in the past. See generally David Garland, *The Culture of Control: Crime and Social Order* (revised ed, OUP 2001).
[309] R v O; R v N (n 265).

experiences of trafficked and enslaved persons beyond that of the 'ideal victim' of modern slavery.

2. The Rationale for a Victim/ Survivor-Centric Approach

Modern slavery as a form of extreme exploitation has been recognised as a complex social phenomenon.[310] Interdisciplinary efforts are required to coordinate cross-jurisdictional measures of prevention, investigation and protection which in turn contribute to complex undertakings within the criminal justice system. According to van der Watt and van der Westhuizen, 'human trafficking cannot be approached by using a linear or simplified lens' and should instead be viewed holistically as complex interactions between actors; alongside evolving behaviour within the criminal justice system and the modern slavery system itself.[311] They propose that human trafficking – and indeed collective forms of modern slavery – may be better addressed if viewed through a 'complex-systems lens'. Indeed, this complexity theory which investigates emergent, dynamic and self-organising systems that interact in ways that heavily influence social phenomenon,[312] allows for a broader, more nuanced understanding of the vast expanse of factors that make up the true nature of modern slavery. Such an approach is fundamental to the effective formulation and implementation of policy and legislation which adequately protects victims of modern slavery from being criminalised.

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[310] Marcel van der Watt and Amanda van der Westhuizen, '(Re)configuring the criminal justice response to human trafficking: A complex-systems perspective' (2017) 18(3) Police Pract Res 218-229; Ligia Kiss and Cathy Zimmerman, 'Human trafficking and labor exploitation: Toward identifying, implementing, and evaluating effective responses' (2019) 16(1) PLoS Med 1.

[311] ibid van der Watt and van der Westhuizen, '(Re)configuring'.

[312] I Prigogine, *The End of Certainty* (Free Press 1997) 35.

Complexity theory differentiates between complex systems and those which are merely complicated; the latter consisting of systems which can be understood in terms of individual constituent parts. Take, for example, a 'single-event' murder case. The criminal act occurs under set circumstances within a specific context: there is a crime – the murder, a victim, a perpetrator(s), witnesses and the crime scene. Evidence is then systematically pieced together to determine how the event unfolded. In comparison, complex systems harbour more intricate non-sequential interactions between each individual constituent part. The modern slavery system is acknowledged as a process – as opposed to an event – comprising six constituent parts: the 'trafficker subsystem' the 'victim subsystem', end-users and demand for services, criminal justice agencies, government departments, and civil society, alongside the context in which each subsystem operates.[313] Only by acknowledging these constituent parts and the interconnectedness between them can the complexity of modern slavery be truly comprehended. Whilst an analysis of each of these subsystems is beyond the scope of this thesis, the victim/ survivor-centric nature of the principle of non-punishment necessitates an in-depth examination of the 'victim subsystem' in particular. This is important to analyse because deconstructing the 'victim subsystem' affords a clear starting point, one rooted in vulnerability and trauma-awareness, for the move towards a more victim-centred, human rights-based legal framework of non-criminalisation.

The 'victim subsystem' consists of the victim(s) themselves and the context of their victimisation. Much like the complex system of modern slavery as a whole, the 'victim subsystem' must be recognised as a complex system in itself in order to evoke progressive responses to victim protection. Distinctive attributes of the subsystem are vast and may include

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[313] ibid 221.

a range of personal and societal factors that cause or contribute to an individual being vulnerable to trafficking or enslavement. Leading factors can include a person's familial background, their cultural circumstances and unstable conditions from which they originated, for example poverty, political instability, marginalisation, gender inequality and natural disasters.[314] In some instances victims may have pre-existing vulnerabilities, such as illiteracy, poor mental health and addictions. Each of these attributes increase the fragility of an individual and make them an easy target for a myriad of exploitative manifestations, including criminal exploitation. Further attributes within the subsystem include the victim/ exploiter relationship, methods used to recruit the victim, the length and history of exploitation, and the trauma experienced both during and post-exploitation. Given this, s 45 of the MSA 2015 is problematic because the narrow confines of the defence, in terms of excluded victims, excluded offences and its objective nature, fail to account for the vulnerability of victims. Arguably, a legal protective framework against the criminalisation of victims should reflect an understanding of the interrelations between these attributes of a lived experience of modern slavery which ultimately have an impact on the fragility of victims.

A progressive protective framework requires knowledge and understanding of victimisation beyond that of the dominant discourse narrative of modern slavery which has thus far influenced policy and legislation. Lim frames this stance in terms of 'victim deconstruction'. She argues that by deconstructing trafficked victims as 'legislated for', as 'understood by', and as 'assumed to be', a 'clearer starting point for thinking about justice and fairness in the context

[314] UNODC, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (2008).

of non-punishment in the UK' can be identified.[315] Piotrowicz notes that 'recognition of the humanity and autonomy of the person who has been trafficked lies at the core of the state's [international] obligations towards them'.[316] As the law plays a vital role in protecting victims and ensuring they are not subjected to inhuman, degrading treatment or punishment, recognition of humanity and autonomy should be at the forefront of policy and legislative responses to the non-criminalisation of victims.

3. The Modern Slavery Narrative

The 'modern slavery' discourse in the UK and more globally conflates both human trafficking and slavery, with a particularly substantial focus on the former over the latter. The entrenchment of dominant human trafficking narratives within the anti-modern slavery agenda has resulted in an oversimplified modern slavery narrative which has influenced policy and legislation. The focus on human trafficking, in particular, has directed attention to the criminal behaviour of perpetrators which requires a criminal justice response to address it, as evident by the criminality-based definition and legislation of the Trafficking Protocol under the *Convention of Transnational Organised Crime (2000)*. Furthermore, human trafficking victim stereotypes continue to affect the application and operation of protective measures in law, creating 'preclusive and victim hierarchy outcomes by dismissing categories of victims entirely or granting some victims more legitimacy over others'.[317]

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[315] Ern Huei Lim, 'Deconstructing the Victim to Avoid Dual Victimisation: A Consideration of the United Kingdom's Response to Victims of Trafficking who Commit Offences' (Thesis, Harvard Law School 2017) 1.
[316] Ryszard Piotrowicz, 'The Empowerment of Trafficked People: From Theory to Reality' (Conference Paper, 2012) 1.
[317] Lim, 'Deconstructing the Victim' (n 316) 1.

The 'master narrative' in this area of law largely comes from the Department of State's annual Trafficking in Persons (TIP) Report, which sets the standard vision and approach to the problem of human trafficking, and modern slavery more generally, and fails to appreciate the intricate intersections of identity, culture and agency at play in modern slavery situations. The TIP reports produce rankings of countries, in order to establish those who comply with the US Victims of Trafficking and Violence Protection Act (TVPA) and those who have yet to make compelling efforts to align themselves with the TVPA and thus face sanctions by the US. Notably, the US itself was only included in the rankings 9 years after the system was created. Snajdr argues that 'clearly through the TIP Report's rankings is a strategy on the part of the US Government to manage and shape the criminal justice landscapes of transitional states'.[318] The Reports continue to conflate estimates of numbers of victims, devoid of any evidential basis for them and produce limited victim stories that are short on details, use loaded emotive language, and are stereotypical of generalised myths about sex trafficking.[319]

3.1 The 'Ideal Victim'

The overarching legislative framework of human trafficking which conceptualises the phenomenon as the illegal trade in persons – now reframed as 'modern slavery' – maintains the victim/ offender binary that is commonly upheld throughout the wider criminal justice system. On one hand, perpetrators are viewed as serious organised criminals who must be

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[318] Edward Snajdr, 'Beneath the master narrative: human trafficking, myths of sexual slavery and ethnographic realities' (2013) 37 Dialectical Anthropology 229, 231.

[319] ibid.

punished and, on the other, victims are considered sufferers of crime who must be redressed and protected. This salient distinction proscribes any nuances within both categories; narratives are simplified, and the very real suffering of victim offenders is ignored. Victims of modern slavery, like victims of crime more broadly, become susceptible to the characteristics that are ascribed to the 'ideal victim'. Those who closely fit the 'ideal victim' norms are easier to identify and accept as genuine victims – the generic image of a victim being innocent, defenceless, and non-complicit.[320] By endorsing this narrative which portrays 'ideal' victims as being most worthy of sympathy and protection, victims who fail to reflect this image are directly undermined. This is particularly evident in cases concerning individuals who are exploited for criminality.

The notion of the 'ideal victim' can be found in work by the renowned Norwegian sociologist and criminologist, Nils Christie. In theorising victimhood, Christie defined the 'ideal victim' as a 'little old lady' who, on her way home from caring for her ailing sister, is hit on the head by a large male stranger who robs her in order to buy alcohol or drugs. He identified at least six characteristics present in 'ideal' victims which deem them more readily deserving of the status than others.[321] Firstly, the victim is weak or vulnerable, often old or very young and female (little old lady). Secondly, when the offence was committed, the victim was carrying out a respectable project (caring for her sick sister). Thirdly, she could not possibly be blamed for where she was (outside in the daytime). Fourthly, the offender was 'big and bad' (often male). Fifthly, the offender was unknown and had no personal relationship with the victim

[320] WG Skogan and MG Maxfield, *Coping with Crime* (Sage Publications 1981).

[321] Christie, 'The Ideal Victim' (n 55) 18-21.

(stranger). Lastly, the victim has enough influence to assert 'victim status' (Dignan posits that a combination of sympathy and power permits the label of 'victim' by society).[322]

By constructing this culturally specific 'ideal victim', Christie acknowledges the use and reification of stereotypes, noting that 'little old ladies' were not always devoid of power and social functions,[323] but in present Western culture their status has been reduced to one of vulnerability; lacking agency and generally passive in modern society. Thus, the 'unideal victim' could be described as a 'young gang member who got attacked by a rival gang'.[324] As Lim notes, the gang member's injuries may be significantly more serious than the old lady's but the label of 'victim' and the protective services that accompany it will be quickly conferred to her as opposed to him. Unsurprisingly, several of Christie's attributes are present in the generic image that society perceives as modern slavery and its victims.

3.2 The 'Ideal Modern Slavery Victim'

The notion of trafficking victims as vulnerable, passive objects who are devoid of the ability to make reasoned judgments and, subsequently, in need of rescuing is one regularly adopted by states and non-governmental organisations. In 2013, O'Brien explored how the depictions of victims of human trafficking in awareness campaigns can exclude those who do not fit such

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[322] James Dignan, *Understanding Victims and Restorative Justice* (OUP 2004) 13.

[323] Christie, 'The Ideal Victim' (n 55) 19. Christie makes light of the European Medieval witch hunts when natural healers, or 'wise women', would provide health services to their communities and were subsequently vilified as witches.

[324] Lim, 'Deconstructing the Victim' (n 316) 10. Lim goes on to outline a 2016 study by a team of phycologists at Cambridge University.

a restrictive narrative mould.[325] She identified three key themes consistent in the construction of the 'poster child' of the anti-trafficking movement – the 'typical trafficking victim': 'firstly, the victims are primarily trafficked for the purposes of sexual exploitation; secondly, trafficking victims are primarily women and girls; thirdly, trafficking victims are compulsorily vulnerable and innocent'.[326] This conforms with the 'ideal trafficked victim' identified by Hoyle and others in 2011 as a female, kidnapped from her home, imprisoned in a brothel, and forced into the sex trade.[327]

Whilst O'Brien's research predominantly focused on the issue of human trafficking exclusively, her analysis did refer to several campaigns that related to 'modern slavery' more generally. Here we begin to see a parallel 'ideal/ typical modern slavery victim' emerging that corresponds with the 'ideal/ typical trafficking victim' as defined by Hoyle and O'Brien, albeit with a reversed gender specific crux. Several campaigns originating in the UK were beginning to present narratives of victims trafficked into other forms of exploitation. Labour trafficking, in particular, became a prominent feature of campaign poster and fact sheets. It is submitted here that three attribute categories make an 'ideal' modern slavery scenario: vulnerability or weakness of the victim, deviance on the part of the exploiter, and dependency of the victim on their exploiter.

Victims of criminal exploitation and those who offend as a result of, or in the course of, their exploitation are generally neglected by the 'modern slavery' narrative. The established concept

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[325] O'Brien, 'Ideal Victims' (n 55) 315-326.

[326] ibid 316.

[327] Carolyn Hoyle, Mary Bosworth and Michelle Dempsey, 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20(3) Soc Leg 313, 314.

has created an oversimplified paradigm involving an idealistic victim, subject to an idealistic type of exploitation (most commonly sexual exploitation), who needs rescuing. Any form of exploitation or anyone who does not fit this stereotype is denied practical attention, arguably even where policy and legislation exists to the contrary. This is despite the fact that trafficked individuals are likely to be resilient risk-takers who set out by making autonomous, rational choices only to consequently become victims of trafficking.

From a feminist perspective, Faulkner draws attention to the broader construction and conceptualisation of modern slavery and 'The New Abolitionist' movement *vis-à-vis* female migration. By critiquing the 'three key actor' (victim, villain, rescuer) dominant narrative of human trafficking through a gender lens, Faulkner highlights how the narrative disproportionately disadvantages women by only allowing them to be placed in the category of victim.[328] Furthermore, this category is then over-emphasised within the framework of victim identification which ultimately deflects from the underlining structural issues that perpetuate migration and exacerbate vulnerability to exploitation Human trafficking and modern slavery are undeniably a gender-based phenomenon which disproportionately impacts women and girls. Indeed, the influence of patriarchy and gender-based factors within society have been widely acknowledged as contributing to the issue. Yet, as Kingshott and Jones suggest, the criminal justice and criminological scholarship on the topic has been largely devoid of a feminist analysis.[329] Feminist literature has instead been polarised by debates concerning victimology and victimhood; 'limited by the impasse over the victim or agent status

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[328] Elizabeth A Faulkner, 'The Victim, the Villain and the Rescuer: The Trafficking of Women and Contemporary Abolition' (2018) 21 Journal of Law, Social Justice & Global Development 1, 2.
[329] Kingshott and Jones, 'Human Trafficking' (n 87).

of trafficked women'.[330] It should be noted here for clarity that, whilst this thesis engages with feminist literature and the debate from the angle of feminism, it is recognised that human trafficking and modern slavery affect myriad persons, irrespective of sex, gender, ethnicity, race, migration status, socio-economic status, as such this thesis does not adopt a purely feminist approach in terms of its methodology in recognition of this.

3.2.1 The Victim/ Defendant Dilemma

Victims of human trafficking and modern slavery are often guilty of committing criminal offences, making them both victims and defendants simultaneously; a 'perceived duality' of status widely recognised within modern slavery literature.[331] However, when the notions of innocent victim and culpable criminal merge, it becomes difficult for the criminal justice system to differentiate the criminal conduct of victims from that of their exploiters. Routinely, victims enter the criminal justice system as ordinary criminals independent of their exploiters and are unwilling, or too afraid, to cooperate with the authorities. With no clear-cut victim, crime of human trafficking and modern slavery, or defendant, the traditional victim/ defendant dichotomy is thrown off balance; further complicating victim identification. Unlike traditional crime victims, victims of human trafficking and modern slavery are often arrested, charged, prosecuted and deported prior to being identified as victims. It is often the case that genuine victims of modern slavery will present as serious criminals and herein lies with problem with s 45 which fails to acknowledge the nuances of modern slavery victimisation: that victims of

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[330] Faulkner, 'The Victim' (n 329) 7.

[331] Amanda Peters, 'Reconsidering Federal and State Obstacles to Human Trafficking and Entitlements Victim Status' (2016) 3 Utah L Rev 535, 538.

modern slavery can be serious criminals, by excluding myriad offences from the ambit of the statutory defence under Schedule 4 of the MSA 2015.

4. The Victim of Modern Slavery - Victimology/ Human Rights Perspectives

4.1 Defining the Human Trafficking/ Modern Slavery Victim

From a human rights perspective, the anti-trafficking movement is fundamental as a means of updating the fight against modern slavery and eliminating slavery-like practices akin to the transatlantic slave trade. Taken at face value, the MSA 2015 appears to adhere to such a human rights-based approach – certainly more so than that at the international level. A human rights-based approach is based on two key premises: firstly, that all people have human rights (we are all rights holders); and secondly, that for each right there is a corresponding duty on states to respect, protect and fulfil these rights. In this way a human rights-based approach views human rights as an ethical claim with an important role to play in governing relations between those with greater and lesser power in a democracy.[332] Unlike the international legal response to combat contemporary forms of slavery, the domestic legislation explicitly establishes a new 'modern slavery' mechanism; diverging from the 'anachronistic and culturally biased' language historically focused on in the framing of international anti-trafficking instruments.[333] Despite the entrenchment of this concept within statute, however, the term 'modern slavery' remains ambiguous and ill-defined as an overarching legal concept. Subsequently, identifying

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[332] Lister, '"Power, not Pity"' (n 4).

[333] Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 Mich J Int Law 1143, 1144.

who is a 'victim of modern slavery' in the legal sense is inevitably complex, requiring an understanding of myriad forms of exploitation each containing various different elements within themselves.

4.1.1 The Western Concept of Victimhood

In the simplest sense, 'modern slavery' can be considered through two prisms: human trafficking and slavery. In the vast majority of human trafficking and slavery literature, an individual who is exploited via these means is labelled as a victim, be it of trafficking, slavery or exploitation. The term 'victim' can be traced back to late fifteenth century English and derives from the Latin *victima* translating to sacrificial object; person or animal killed as a sacrifice.[334] In all Western cultures the language used to refer to persons affected by crime carry connotations of sacrifice and/ or sacrificial objects. Contrast this with more neutral terms used on the Orient which refer to victims of crime as the 'harmed party' and it seems 'melodramatic and strangely lacking in respect to call human beings suffering from the after-effects of crimes slaughtered animals'.[335]

In the legal sense, victim status in criminal cases is akin to *locus standi* in civil proceedings in that it confers rights, services, and entitlements which are unobtainable to the ordinary population. Beyond the legal rationale for accommodating the victim label, the emotionally laden victim rhetoric grants its favourers sympathy and reverence, release of shame, relief from

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[334] E Klein, *A Comprehensive Etymological Dictionary of the English Language* (Elsevier Scientific Publishing 1971).

[335] Jan van Dijk, 'Free the Victim: A Critique of the Western Conception of Victimhood' (2009) 16 Int Rev Vict 1, 2.

a sense of blameworthiness, solidarity, and a cause to rally against.[336] Consequently, victimhood pulls on the heartstrings of humanity; it incites attention and secures a platform to push one's own, often political agenda. Yet, whilst the choice of the victim label in Western society ignites compassion for victims of crime, so too does it elicit social constructs of passivity, helplessness and forgiveness, simultaneously precluding any hope of recovery.

These stereotypes continue to be perpetuated in principal depictions of victimhood, resulting in reservations by affected individuals to define themselves as victims and accept the stereotypes that victimhood elicits.[337] Indeed, victimologist van Dijk is his article critiquing the western concept of victimhood, provides testimonies from several high-profile victims of crime each of whom publicly rejected the victim status owing to the negative connotations that shroud the label. [338] The same can be said of individuals exploited by modern slavery. Osmond, in her capacity as UN Goodwill Ambassador for the fight against human trafficking, expressed her opinion on the 'awkwardness' of victim labelling stating that '[t]here is a kind of stigma that victims feel uncomfortable with; the use of the terminology *victim* is synonymous with weakness, synonymous with shame. The people that I have met who are victims, are survivors, they are resourceful, alive and productive'.[339]

The replacement of the negative concept of 'victim' with 'survivor', as first proposed by American feminists in cases of violence against women,[340] has received almost universal

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[336] Peters, 'Reconsidering Federal' (n 332) 539; Martha Minow, 'Surviving Victim Talk' (1993) 40 UCLA L Rev 1411, 1413-14

[337] Basia Spalek, *Crime Victims: Theory, Policy and Practice* (1st ed, Palgrave Macmillan 2005) 9.

[338] van Dijk, 'Free the Victim' (n 336) 2-3.

[339] Michael Platzer, *The Forgotten Ones* (INERVICT 2006).

[340] L Kelly, *Surviving Sexual Violence* (Polity Press 1988); S Lamb (ed), *New Versions of Victims* (NYUP 1999)

acceptance. Increasingly the term survivor is being adopted by individuals exposed to serious forms of violence and harm, including individuals affected by rape, domestic violence and exploitation through forms of modern slavery themselves. The term is also readily adopted in formal government documents and reports by non-governmental organisations, often alongside concepts of victimhood which then evolve into survivor narratives following the 'rescue' of victims.[341]

This shift in language which is more considerate of individuals' agency and capacity is becoming more accepted, however, the concept of victimhood, its myths and outdated narratives, remain at the forefront of efforts to protect exploited individuals. Despite society becoming increasingly more progressive in bolstering individual strength and perseverance, victimhood, in the context of modern slavery, continues to portray innocent, passive victims as being the worthiest of sympathy and protection.[342] Consequently, this has had various implications for the treatment and protection of victims who fail to reflect this image, none more so than those who have been compelled to commit criminal offences during their situation of exploitation. This will be explored further in this chapter.

4.1.2 Victims and the Law

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[341] The Home Office's annual reports on modern slavery in the UK have referred to both victims and survivors since the first report was published in 2017. See for example, Home Office, *2019 UK Annual Report on Modern Slavery* (2019).

[342] Bethany Simpson, 'Modern Slavery for Criminal Exploitation: Challenging Victim Narratives' (Conference Paper, Unpublished 2020).

The international legal definition of a victim of crime is contained in Part A(1) of the *Declaration of Basic Principles of Justice for Victims of crime and Abuse of Power 1985* as:

> persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.[343]

Similarly, the *EU Directive 2012/ 29/ EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* (EU Victims' Directive), expanding on the standing of victims in criminal proceedings in Art 1(a) of the *Council of the European Union framework decision 2001/ 220/ JHA of 15 March 2001*, provides the international regional definition of victim as:

> a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, which was directly caused by criminal offences;
> family members of person whose death was directly caused by a criminal offence and who have suffered hard as a result if he person's death.[344]

Furthermore, both instruments stipulate that an individual may be considered a victim upon the commission of an offence regardless of whether the perpetrator is identified, arrested, prosecuted or convicted.

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[343] United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

[344] EU Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, Art 2(1)(a).

At the domestic level, the international definitions were transposed into E&W legislation with the enactment of the *Domestic Violence, Crime and Victims Act 2004* which established the *Code of Practice for Victims of Crime 2006* (Victims' Code).[345] The revised Victims' Code, as updated in 2015 to complete the formal transition of the EU Victims' Directive into national law, recognises a victim as:

> a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;
> a close relative of a person whose death was directly caused by a criminal offence.[346]

Notably, Chapter 1.8 and 1.10 of the Code expressly identifies victims of human trafficking as 'victims of the most serious crime' and 'intimidated victims', respectively, and thus accords them enhanced entitlements throughout the criminal justice process.

4.1.3 The Legal Victim of Human Trafficking/ Modern Slavery

As the above Chapters in the Victims' Code suggests, 'victims of human trafficking' are now recognised by and explicitly defined in a variety of international and domestic laws. Including twenty-year-old definitions provided by the Trafficking Protocol and TVPA in the US, and the five-year-old definitions in the MSA 2015 in E&W. This, however, was not always the case. The dominant criminal justice approach adopted in the early anti-trafficking discourse which prioritised the interception and prosecution of traffickers above the identification and protection of victims arguably provided no scope for defining victims beyond any inference drawn from the criminal offence of 'trafficking in persons' outlined in Art 3.

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[345] Domestic Violence, Crime and Victims Act 2004, s 33.

[346] Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015) [4].

With regard to the three dominant international anti-trafficking instruments, it is only the Trafficking Convention which provides a tangible definition of human trafficking victim, stating in Art 4(e) that: '[v]ictim shall mean any natural person who is subject to trafficking in human beings as defined in this Article'. Therefore, 'a state's obligations are incurred once a person is subject to trafficking, not following their being recognised as so subject'.[347] Notably, the Trafficking Protocol fails to provide an express definition of the 'trafficked victim' – perhaps owing to its principal emphasis being firmly on the interception of traffickers rather than the identification and protection of victims. Comparatively, as there is no international consensus on the definition of 'modern slavery',[348] explicitly defining a 'victim of modern slavery' remains problematic, despite an increase in the global use of the term.

Whilst acknowledged as being considerably broad, the definition provided by the Trafficking Convention, and indeed the definitions within the instruments outlined above, provide useful guidance in determining who constitutes a victim of modern slavery. With reference to the Victims' Code, it may be inferred that an individual can be considered a victim of modern slavery if they suffer some form of physical, mental or emotional harm or economic loss as a direct cause of either human trafficking (as defined in international anti-trafficking instruments) or enslavement. Additionally, they may acquire victim status by virtue of being subject to modern slavery, irrespective of how they came to be in such a situation or how they removed themselves from it. Muraszkiewicz notes the importance of this with regard to victims who commit liberation offences in a bid to escape from their situation of exploitation as such

[347] Joint Committee on Human Rights, *Human Trafficking* (2005-06, HL 245-II, HC 1127-II) 100.

[348] See Chapter 1.

crimes do not nullify their victim status, thus they are still considered victims under the law and are still entitled to protection.[349]

Although the MSA 2015 fails to provide an express definition of modern slavery victim, the Act supports the afore-mentioned inference by recognising victims of slavery and victims of human trafficking, as separate entities, via definitions pertaining to the corresponding criminal liability for each offence as outlined in Part 1 of the Act.[350] In E&W, an individual becomes a victim immediately upon suffering the crime of slavery, servitude, forced or compulsory labour, or human trafficking; therefore the scope of victimisation becomes as broad as the definitions of each of these offences, inclusive of the myriad forms of exploitation within them.

4.1.4 Common Misconceptions: Smuggling, Migration and Modern Slavery

Over the last two decades, international and domestic definitions of human trafficking and modern slavery have become enshrined in law. Common misconceptions about the crimes and their victims, however, persist amongst criminal justice actors, service providers, academics and wider society. The most common misconception, and, arguably, one of the most damaging, is that human trafficking and modern slavery, smuggling, and migration for the purposes of sex work and other forms of precarious labour are synonymous. In both the UK and US the definitions frequently become conflated. This is perhaps unsurprising considering the attempts to tackle the issue of human trafficking and modern slavery by both nations have been rooted in immigration and criminal justice measures.

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[349] Muraszkiewicz, *Protecting Victims* (n 207) 49.

[350] MSA 2015, s 56(1) and (2).

In E&W, modern slavery is by law a crime against an individual in which exploitation is prompted through arranged or facilitated travel (trafficked), or in which the individual is enslaved or required to perform forced or compulsory labour (enslaved). An individual cannot legally consent to being trafficked or enslaved and they are labelled by the Act as 'victims'.[351] By comparison, the crime of smuggling is committed against the state and constitutes an unauthorised crossing of borders, either secretly or by deception, characterised by illegal entry and international movement only. The UN Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted in 2000 defines human smuggling as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national'. With regard to consent, the individual willingly agrees to illegally enter the country and is assisted by the 'smuggler', therefore they are not a 'victim' in the legal sense.

Although smuggling and trafficking are distinct, difficulties may arise in cases where the distinctions are blurred; where a smuggling situation develops into a modern slavery situation. It can be commonplace for individuals to be proactive in their illegal movement into a country with hopes of seeking a better life with greater economic prospects, only to experience subsequent exploitation. Indeed, CPS guidance acknowledges such overlaps, but stresses the importance of prosecutors being able to understand the differences between smuggled persons

[351] MSA 2015, Part 1.

and victims of trafficking.[352] In this respect, the correct approach may only be deduced by examining the end situation when the individual is recovered.

With regard to victim identification, the continuing response to human trafficking and modern slavery as an immigration problem only exacerbates the narrow victim narrative. The Government has argued that strengthening border controls and policing prevents individuals from being trafficked and protects their human rights.[353] However, by aligning trafficking with restricting and preventing immigration, people who are trafficked within their own country run the risk of being overlooked. This is despite the fact that the MSA 2015, inclusive of the offences and defences therein, encompass the act of trafficking within the country, for example the trafficking of young individuals in and out of different areas for the purposes of county lines activities. Arguably, the Government's 'manipulat[ion] of trafficking as a moral justification for immigration controls'[354] has left genuine victims vulnerable to being misidentified and subsequently criminalised where they should instead be protected.

4.2 Barriers to Identifying Victims of Modern Slavery

It is widely accepted that modern slavery is occurring at an exponential rate worldwide, yet only a small fraction of victims are currently identified. '[I]dentifying a trafficked person is a

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[352] CPS, 'Legal Guidance: Human Trafficking, Smuggling and Slavery' (30 April 2020) <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery> accessed 23 September 2022.

[353] Home Office, *Human Trafficking: The Government's Strategy* (2010) Chapter 5.

[354] Patrick Burland, 'The Responses to Trafficked Adults in the United Kingdom: Rights, Rhetoric and Reality' (Thesis, University of West England 2015) 14.

complex and time-consuming process'[355] and persistent barriers to identification make the process problematic in practice. The UN, EU and other international and regional organisations have, however, adopted legal measures that require member states to take positive steps to protect and respect the basic rights of victims;[356] this includes actively identifying victims and referring them to corresponding agencies who can help and serve them to better protect their rights. Where there is a credible suspicion that a person is a victim of human trafficking and modern slavery, the UK has an obligation to identify and investigate under the Trafficking Convention, Trafficking Directive and Art 4 ECHR.[357] To give effect to the obligations arising under these provisions, the UK has implemented specific mechanisms and published various pieces of guidance for actors who may be involved in the identification of victims.

Identification can be categorised into 'early' and 'formal' identification: the former consisting of initial identification by frontline staff who might encounter potential victims; and the latter consisting of the official recognition of trafficking/ modern slavery status via a positive NRM decision. In the UK, the Single Competent Authority – a unit within the Serious and Organised Crime Division of The Home Office – was established under the NRM to consider referrals of potential victims of human trafficking and modern slavery. Through the NRM, potential

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[355] OSCE, *Trafficking in Human Beings: Identification of Potential and Presumed Victims: A Community Policing Approach* (2011) 18.

[356] Guofu Liu, 'National Referral Mechanisms for Victims of Human Trafficking: Deficiencies and Future Development' in M McAuliffe and M Klein Solomon (Conveners), *Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration* (International Organization for Migration 2017) 1: see footnotes 3 and 4 for a comprehensive list of the UN and EU instruments that require states to establish mechanisms for identifying and assisting victims.

[357] The UK is legally obligated to comply with Art 4 ECHR under the Human Rights Act 1998, Sch 1. The Trafficking Convention and Trafficking Directive are not directly incorporated into E&W law through any piece of legislation, however, the UK is bound to comply with the provisions through government policy.

victims are referred to the Single Competent Authority where their case is examined by an official within the unit who makes a 'reasonable grounds' decision if they suspect that a person is a victim of modern slavery. Following this decision, more evidence is gathered and the official then makes a 'conclusive grounds' decision based on the balance of probabilities. In the US, the referral mechanism for victims of human trafficking is based on the needs of the victims and works cross-departmentally to provide services to identify victims, work with other civil society organisations, and offer funds.[358] The UK established its NRM in 2009 for victims of trafficking and extended to include victims of modern slavery on 31 July 2015 following the implementation of the MSA 2015. National referral mechanisms by nature are not designed to be static and reviews are undertaken periodically to address any issues that arise.[359]

In terms of early identification of victims, this has been acknowledged as the first necessary step in granting protection and assistance – in accordance with a human rights-based approach; as well as securing successful prosecutions for perpetrators – in accordance with a criminal justice-based approach. Early identification and prompt assessment by trained and qualified individuals is also essential to ensuring the effective implementation of states' obligations of non-criminalisation.[360] A genuine human rights-based, victim-centred approach prioritises adequate formal identification measures to ensure that victims are fully supported from the outset and have access to the rights they are entitled to. Unfortunately, the prioritisation of a

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[358] Liu, 'National Referral Mechanisms' (n 357) 2.

[359] In 2017 the creation of the Single Competent Authority was announced as part of the NRM Reform Programme. The Single Competent Authority was launched in April 2019 to replace the previous 'Competent Authority' for the NRM. Guidance was published on 24 March 2020; latest update 14 June 2021: Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s 49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland* (Version 2.3, 2021).

[360] *VCL and AN* (n 283) [160].

criminal justice-based approach to address human trafficking, coupled with strong underlying links to anti-prostitution and immigration policy, has undeniably influenced the approach to identification and the identification mechanisms that are currently in place in both the UK and US for potential victims of modern slavery.

A comprehensive analysis of the formal identification mechanisms in the UK and US is beyond the scope of this thesis,[361] however, it is necessary to address the main obstacles associated with identification that have contributed to the continuing criminalisation of modern slavery victims. These can be categorised as: victim stereotypes; lack of awareness and reliable resources; and balancing political interests.

4.2.1 Victim Stereotypes and Lack of Self-identification

Although the scope for legally defining victims of human trafficking and modern slavery is particularly broad, in practice a much narrower approach if often taken by those involved in identifying victims: legitimacy is often reserved for those who fit the stereotypes of the 'ideal victim' of human trafficking/ modern slavery narrative (as discussed above).[362] As Lobasz states, with regard to the 'ideal victim of human trafficking', the problem with using this narrative as a frame of reference for identification is that it creates a hierarchy of victims.[363] The ideal trafficked/ enslaved victim is easily identifiable, but when it transpires that they have

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[361] For a succinct overview of human trafficking/modern slavery victim identification in the UK see: Philippa Southwell, Michelle Brewer and Ben Douglas-Jones QC, *Human Trafficking and Modern Slavery Law and Practice* (2nd ed, Bloomsbury 2020) Ch 2.

[362] Jennifer K Lobasz, 'Beyond Border Security: Feminist Approaches to Human Trafficking' (2009) 18 Security Studies 319, 342.

[363] ibid 341.

worked as a prostitute or entered the country illegally, common opinion is that they are' not a legitimate victim or one as deserving of protection as the ideal victim'[364]

Early typologies of trafficked victims adopted the notion of the kidnapped girl who did not agree from the outset qualifying as a 'sex slave in the truest sense'[365] – a stereotypical image of a trafficked victim that, despite being linked to cultural myths,[366] still rings true today.[367] Motifs that still persist, include: naivety, deception as to the nature of the work, gendered-power imbalances and the depiction of evil male traffickers. Lim argues that this hinders the case of sex-trafficked victims who are 'unable to prove involuntariness and provide a convincing portrayal of vulnerability'.[368] Such stereotypes also fail to acknowledge the many other causes and purposes of trafficking and the subjectivity of the overall trafficking experience. This is particularly true for victims who commit offences as they fail to conform to the notion of 'ideal victims': they are viewed only as criminals, autonomous in their choices to commit crime and undeserving of sympathy or protection.

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[364] Lim, 'Deconstructing the Victim' (n 316) 14.

[365] Willy Bruggeman, 'Illegal Immigrants and Trafficking in Human Beings Seen as a Security Problem for Europe' (European Conference on Preventing and Combating Trafficking in Human Beings, Brussels, 18-20 September 2002).

[366] Frederick K Grittner, 'White Slavery: Myth Ideology, and American Law' (Distinguished Studies in American legal and Constitutional History) (Garland 1990) 7. See also Jo Doezema, 'Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses' (2000) 18 Gender Issues 23.

[367] Maria De Angelis, 'Narratives of Human Trafficking: Ways of Seeing and Not Seeing the Real Survivors and Stories' (2017) 7(1) Narrative Works: Issues, Investigations, & Interventions 44. De Angelis presents a prototypical crime narrative found in several anti-trafficking reports, in the UK and internationally, which employs a first-person narrative depicting the story of a young girl trafficked across states for sex work, forced to traffic other women and beaten when she does not comply.

[368] Lim, 'Deconstructing the Victim' (n 316) 14.

This is further compounded by the fact that victims can be unfamiliar with the terminology of human trafficking and modern slavery,[369] or do not believe themselves to be victims of such abuses and 'struggle to define their experiences as human trafficking'.[370] It is often the case that victims do not realise that they have been exploited until they are introduced to the concept by those who are knowledgeable of modern slavery. For arrested victims this is usually a legal professional, yet even this subsequent identification may provide little recourse for some victims, especially those who are fearful of authorities. If, for example, a victim is arrested for immigration offences, enforcement action will rely on the trafficked person to disclose their victim status promptly or face detention. Where a victim is not forthcoming with their status, late disclosure is taken as a credibility issue rather than an aspect of the victim's fear, trauma or vulnerability to further exploitation. The Joint Submission to the Group of Experts on Action against Trafficking in Human Beings recently noted that lack of self-identification and lack of status disclosure is largely a result of victims being unaware that they possess rights in the UK that can afford them protection from criminalisation.[371] The lack of free legal advice available to vulnerable victim offenders further narrows the likelihood of them being identified and receiving accurate information pertaining to their rights.

4.2.2 Lack of Awareness and Reliable Resources

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[369] Jessica Elliott, *The Role of Consent in Human Trafficking* (Routledge 2014) 185.

[370] Amy Farrell and Rebecca Pfeffer, 'Policing Human Trafficking: Cultural Blinders and Organizational Barriers' (2014) 653(1) Ann Am Acad Pol Soc Sci 46, 50.

[371] Anti- Trafficking Monitoring Group, *Joint Submission to the Group of Experts on Action against Trafficking in Human Beings: Response to the Third Evaluation Round of the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings regarding the United Kingdom* (GRETA 2020) 43.

Victims are often dependent on whom they encounter and how well informed and trained those people are. In E&W, actors within the criminal justice system must remain vigilant and alert to the possibility of a suspect/ defendant being the victim of human trafficking and modern slavery. Arguably, all those involved in the criminal justice process bear responsibility for protecting victims from, *inter alia*, misidentification and criminalisation.[372] Law enforcement agencies are most likely to make initial contact with potential victims who have committed an offence; as such it is imperative that they are sufficiently trained in order to identify potential human trafficking and modern slavery scenarios and respond in an appropriate manner.[373]

Historically, the absence of a clear understanding of the term 'trafficking' created a major obstacle to identifying potential victims. More recently, the addition of the term 'modern slavery' has further compounded this issue. In 2014, a review of the NRM found that, despite many areas of good practice, awareness of human trafficking was often low with awareness of the NRM processes even lower.[374] The Review recommended developing a comprehensive awareness strategy leading to increased recognition of human trafficking by the police and professionals.[375] Additionally the review highlighted key failings with regard to child victims of trafficking and made recommendations specifically focused around improving the awareness of indicators of trafficking.

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[372] *R v N* [2019] EWCA Crim 984.

[373] In order to assess the presence of modern slavery indicators properly, full background details must be taken, as well as instructions concerning the alleged offence. In the current climate with increasing time pressures and limitations, these are difficult tasks, particularly in courts of first instance and youth courts. It is imperative that questions of modern slavery/exploitation are raised promptly in order to adequately protect victims.

[374] Home Office, *Review of the National Referral Mechanism for Victims of Human Trafficking* (2014) para 2.2.1.

[375] ibid para 2.1.5.

In 2009, the UNODC published an amalgamation of known general indicators of human trafficking. Further specific guidance is also provided with regard to children, domestic servitude, sexual exploitation, labour exploitation, begging and petty crime.[376] In the UK, a broad range of frontline service providers are offered training on how to spot potential victims of human trafficking and modern slavery and how to share information with the relevant authorities and refer cases to the NRM. Most of these indicators correspond with the indicators published by the UNODC. Non-governmental organisations, including STOPTHETRAFFIK, the Salvation Army and Hope for Justice, and the Government[377] distribute information on the indicators of modern slavery.[378] Some of the most common points, which are often widely reproduced, include: being dressed inappropriately for weather conditions; having poor English; looking particularly anxious, sleep deprivation; malnourishment; being accompanied by another and deferring to them for answers; not knowing their address; not having formal ID; physical injuries and poor dental care.

Although criminal practitioners and authorities alike are implored to familiarise themselves with these concepts and indicators,[379] evidence suggests that the identification of trafficked/ enslaved victims in practice needs improving. Research and case law highlights the lack of awareness particularly amongst legal representatives who often fail to acknowledge clients as potential victims and instead advise them to plead guilty to offences. This is despite the prosecution and defence having a duty to make proper enquiries in prosecutions involving

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[376] UNODC, 'Human Trafficking Indicators' (2009).

[377] As a requirement under the MSA 2015, s 49.

[378] Home Office, *Modern Slavery: Statutory Guidance* (n 360) 33.

[379] Southwell, Brewer and Douglas-Jones QC, *Human Trafficking* (n 362) 236.

suspects who may potentially be victims of human trafficking.[380] This has even occurred where victims have explicitly told their solicitors that they have been trafficked.[381] Additionally, the approach taken by police officers to 'rescue' victims can be counter-productive where victims are engaging in criminal activities and appear to be autonomous criminals as opposed to vulnerable persons sitting around waiting to be rescued by authorities. Undeniably, more professional training on modern slavery must occur, including awareness of indicators and victim-centred approaches that recognise victims' experiences are far more nuanced and complicated than those presented by ideal victim narratives.

4.2.3 Balancing Political Interests

The preceding issues primarily relate to early identification of victims. With regard to formal identification, the main obstacle to ensuring trafficked/ enslaved people are granted victim status in the UK is the Government's persistent approach to treating modern slavery as an immigration problem, consistent with a criminal justice-based response.[382] This is perhaps most evident by the fact that, in the UK, the Home Office has sole responsibility for identifying trafficked persons whilst simultaneously being responsible for controlling the number of people allowed into the UK and removing people from within. For trafficked/ enslaved people, the Home Office stands as the final hurdle between receiving victim status, and the protection it affords, or being classified as an illegal immigrant and being detained and/ or criminalised.[383]

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[380] *R v O* [2008] EWCA Crim 2835.

[381] Hoyle, Bosworth and Dempsey, 'Labelling the Victims' (n 328) 325.

[382] See Chapter 1, subheading 4.1.

[383] Karen E Bravo, 'Free labour! A labour liberalisation solution to modern trafficking in humans' (2009) 18(30) TLCP 103-172, 112.

In 2019, the Labour Exploitation Advisory Group published a report on human trafficking and immigration detention which found that the Home Office was systematically failing its duties towards victims.[384] The report concludes that Home Office policies and practices are not fit for purpose and consistently fail to identify and support victims of trafficking, largely due to the department's 'conflicting responsibilities: tackling modern slavery while enforcing a hostile immigration policy'.[385] More recently still, GRETA has raised concerns that the Home Office's new 'Plan for Immigration',[386] coupled with Brexit, is increasing risks to trafficked victims and must be implemented in line with the UK's broader commitments under the Trafficking Convention.[387]

Whilst efforts are continually made to supress victim stereotypes, harmful narratives, and misinformation alongside improving awareness, training, and resources/ identification tools, a recent decision by the Court of Appeal in E&W suggests that the judiciary still does not fully appreciate the extent of modern slavery. In *R v Brecani*, the Court held that, despite decision makers within the Single Competent Authority being fully trained to make both 'reasonable grounds' decisions and 'conclusive grounds' decisions (in accordance with the NRM framework), they are not considered 'experts on human trafficking or modern slavery'.[388] Thus, 'conclusive grounds' decisions made by the Single Competent Authority are not

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[384] Letícia Ishibashi, 'Detaining Victims: Human Trafficking and the UK Immigration Detention System' (Labour Exploitation Advisory Group 2019).

[385] ——'Detaining Victims: Human Trafficking and the UK Immigration System' (Bail for Immigration Detainees, 30 July 2019) <https://www.biduk.org/articles/493-detaining-victims-human-trafficking-and-the-uk-immigration-system> accessed 23 September 2022.

[386] Home Office, *New Plan for Immigration: Policy Statement* (2021).

[387] GRETA, 'Evaluation Report: United Kingdom: Third Evaluation Round' (2021) [48].

[388] *R v Brecani* [2021] EWCA Crim 731, [54].

admissible evidence in court.[389] Ultimately, what this means for some victim offenders is that courts are denied access to fundamentally relevant evidence when assessing their guilt or otherwise which could assist in providing them with a lawful defence under s 45 of the MSA 2015. Furthermore, the court can also go against such a decision as it is not legally binding even if it were to be admitted. Muraszkiewicz and Piotrowicz maintain that 'the decision of the Single Competent Authority is an important piece of the puzzle' that the court should consider alongside other evidence and expert testimony to reveal the '*actual* truth and not the apparent truth of a person's situation'.[390] Whilst the judgment in *Brecani* does not prevent a s 45 defence entirely (the CPS is still under an obligation to investigate claims of trafficking/ enslavement and it is still open to the defence to instruct a modern slavery expert and/ or psychologist), O'Connell highlights that it is still a significant low point in efforts to protect victims from criminalisation: 'it is clearly a means of derailing the substantial importance and increasing recognition that the [MSA 2015] and its referral protocol was clearly enjoying'.[391]

4.2.4 Victim Identification in the US

Just as early and formal identification presents myriad complexities in the UK, so true is that of identifying victims of trafficking in the US. The number of identified victims continues to stand in stark contrast to official estimates. Whilst several explanations have been offered,

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[389] *Brecani* overruled the earlier case of *DPP v M* [2020] EWHC 344 Admin which found Conclusive Grounds decisions to be admissible as expert evidence.

[390] Julia Muraszkiewicz and Professor Ryszard Piotrowicz, 'Whose Evidence Counts? Problems in the Identification of Victims of Trafficking' (Blog, Refugee Law Initiative 8 June 2021) <https://rli.blogs.sas.ac.uk/2021/06/08/whose-evidence-counts-problems-in-the-identification-of-victims-of-trafficking/> accessed 23 September 2022.

[391] Suzanne O'Connell, 'R v Brecani – Modern Day Slavery Act defences s45.. is it all over?...... Well it is now?!' (2021) <https://crimeline.co.uk/wp-content/uploads/2021/07/Brecan.pdf> accessed 15 September 2022.

including, *inter alia*, the use of different definitions of victimisation, underreporting, and inaccurate estimates to begin with,[392] misclassification of trafficking situations and identification issues are increasingly cited as being the main reasons for the discrepancies.[393] Much of the earlier literature on trafficking in persons in the US focuses on sex trafficking, in particular and victims of broader forms of trafficking are identified as a 'hard-to-reach' or 'hidden' population.[394] Despite this, many of the issues hindering early identification of sex trafficked victims can be applied to the wider context of all forms of human trafficking, taking into consideration the varying sensitivities of the experiences specific to different forms of exploitation. One of the main barriers to the elimination of sex trafficking in the US has been identified as flaws in the legislation and legal process making it difficult to identify victims. In 2008, the Vera Institute of Justice developed the first standardised trafficking victim screening tool as part of the National Institute of Justice-funded New York City Trafficking Assessment Project to assess the scale and character of trafficking in the US and collect and measure standardised data on victims. In their first report assessing the tool's pilot in New York, the Vera Institute acknowledged that 'knowing how to measure human trafficking in practice is the first step in understanding and, in turn, curbing and controlling it''.[395] The Report found that in order to improve victim identification attention should be afforded to, *inter alia*, using standard definitions to promote uniform victim identification; making screening tools

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[392] R Weitzer, 'New directions in research on human trafficking' (2014) 653 Ann Am Acad Pol Soc Sci 6.

[393] See Amy Farrell, Jack McDevitt and Stephanie Fahy, 'Where are all the victims? Understanding the determinants of official identification of human trafficking incidents' (2010) 9(2) Criminol 201; Amy Farrell and Jessica Reichert, 'Using U.S. Law-Enforcement Data: Promise and Limits in Measuring Human Trafficking' (2017) 3(1) J Hum Traffick 39; Claire M Renzetti, 'Does training make a difference? An evaluation of a specialized human trafficking training module for law enforcement officers' (2015) 38(3) J Crime Justice 334.

[394] Markon, Jerry, 'Human Trafficking Evokes Outrage, Little Evidence' (Washington Post, 23 September 2007).

[395] Neil A Weiner and Nicola Hala, 'Measuring Human Trafficking: Lessons from New York City' (Vera Institute of Justice 2008) viii.

accessible; identifying as many likely victims as possible, 'even if that results in the identification of some persons who are not victims, because *it is ethically preferable to provide assistance to persons who are not victims rather than to deny assistance to persons who are victims*';[396] enlisting a diverse range of service providers to administer screening tools.

In 2014, the Vera Institute of Justice found that, despite growing awareness of human trafficking and its implications, the reality of the phenomenon was still not commonly understood.[397] Similarly to the position in the UK, signs of trafficking were unrecognised, victims were concealed and living in fear, and individuals were incorrectly viewed and treated as criminals rather than individuals and deported or incarcerated.[398] To remedy this, The Vera Institute devised a revised version of the originally developed 2008 screening tool focusing on both labour trafficking and sex trafficking across diverse sub-groups, including those divided by age, gender and country of origin. Findings from the use of the revised tool revealed that: trafficking victims in the study sample were more likely than non-trafficking victims to report that they spoke 'good' or 'excellent' English and tended to have more education compared to non-trafficking victims. Females were also more likely to have been subjected to some form of sexual exploitation and isolation, while males were more likely to have experienced labour exploitation.[399] While the study findings are not generalisable to all trafficking victims in the US, the sample demographics that the Vera Institute identified afford some insights that may be useful for the wider population of trafficking victims. Of particular relevance to the non-

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[396] ibid xiv (emphasis added).

[397] Laura Simich and others, 'Improving Human Trafficking Victim Identification – Validation and Dissemination of a Screening Tool' (Vera Institute of Justice 2014).

[398] ibid 2.

[399] ibid 238-239.

criminalisation of victims, the findings suggested that several respondents were afraid of getting arrested or being deported, with some stating that they were specifically threatened with being arrested or deported.[400] This fear was also present when asked to identify why they could not leave their trafficking situation. The Report further acknowledged that certain law enforcement units mistake victims for offenders or treat them as offenders resulting in revictimisation by law enforcement and further trauma during arrest, detention, deportation or prosecution.

In terms of the law, to receive protection and avoid being criminalised, victims are tasked with the cumbersome burden of proving they are more victim than defendant.[401] Furthermore, they are only afforded the right to receive federal protections and support, including immunity from prosecution,[402] if they meet strict definitions of 'victim of severe form of trafficking'. The TVPA defines 'victim' as the individual harmed as a result of trafficking.[403] However, the TVPA contains a 'two-tiered' definition of trafficking one of which works operationally (and provides protection) and one which does not. The operational definition of 'severe forms of trafficking' includes all forms of labour exploitation and sex trafficking induced by force,

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[400] ibid 80.

[401] Note that with regard to the statutory defence for modern slavery victims under the MSA 2015 (E&W), s 45 the burden of proof on the defendant is an evidential one, not a legal one. It is enough for the defendant to adduce evidence to raise the issue of whether they were a victim of modern slavery at the time of the offence.

[402] 22 USC §§ 7102(9), 7105(a)(1)(B), (b)(1)(A), (c)(1). Protection from arrest and prosecution has been acknowledged as one of the most important benefits a victim can receive: Cherish Adams, 'Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims' (2011) 43 Geo Wash Intl L Rev 201, 202.

[403] 18 USC § 1593(c).

fraud, or coercion.[404] The non-operational definition, which was included in response to abolitionist calls to define all prostitution as trafficking, refers to 'sex trafficking' in which the 'act' elements of trafficking for the purpose of a commercial sex act are present without force, fraud, or coercion.[405] The legal definition of 'victim of trafficking' under the TVPA includes victims of both 'severe forms of trafficking' and 'sex trafficking',[406] however only victims of the former qualify for legal assistance and protection. Thus, the movement into prostitution negate of force is 'trafficking' but only in name.

Severe forms of trafficking, as the core of the law, largely reflect the definition of 'trafficking in persons' under the Trafficking Protocol, however, the elements of force, fraud, and coercion are highlighted as the core requirements of the trafficking of adults. A three-pronged definition is provided in the TVPA for 'coercion', meaning:

(A) threats of serious harm to or physical restraint against any person;
(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
(C) the abuse or threatened abuse of the legal process.[407]

4.3 Recognising the Fragility of Victims

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[404] 22 USC §§ 7102(11), (16). Note, children under the age of 18 are considered victims of severe forms of trafficking where they are found to be engaged in commercial sex trafficking, regardless of force, fraud, or coercion.

[405] 22 USC § 7102(12).

[406] 22 USC § 7102(17).

[407] 22 USC § 7102(3).

Anti-Slavery International in its Safeguarding Policy for Children, Young People and Vulnerable Adults, defined a 'vulnerable adult' as a:

> 'person aged 18 or over whose ability to protect himself or herself from violence, abuse, neglect, or exploitation, or to make informed decisions free from duress or influence are significantly impaired. This impairment could relate to the following factors: physical or mental disability; illness; old age; emotional fragility or distress; gender; ethnicity; religious beliefs or otherwise.[408]

The 'vulnerable or at-risk' state described in their definition can be temporary or indefinite and should be understood as a continuum which reflects the shifting nature of vulnerability in the context of human trafficking and modern slavery. Arguably, any adult who finds themselves in a situation of exploitation could be deemed as vulnerable or at-risk.

Physical violence or sexual violence, either towards the victim themselves or towards their families or via threats, is the most documented and recognised characteristic of modern slavery victimisation, arguably because it is the most compelling evidence that a crime has been committed. Hammond and McGlone identified 'sexual and reproductive health risks' as being amongst the most commonly reported physical health problems of VoTs in the US.[409] In reality, however, there may be situations where no physical violence is used; where the victims' movements are not restricted, and instead coercive or psychological means are used to exert control over victims, including, confiscating their passport or identity documents and keeping

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[408] Anti-Slavery International, *Anti-Slavery International Safeguarding Policy for Children, Young People and Vulnerable Adults* (Anti-Slavery 2021) 8.

[409] GC Hammond and M McGlone, 'Entry, Progression, Exit, and Service Provision for Survivors of Sex Trafficking: Implications for Effective Interventions' (Springer 2014) 165.

them in isolation. In recent years modern slavery research has expanded on the psychological as well as physical trauma endured by the victims. For people who are trafficked and enslaved, physical and psychological violence and its consequences may be inflicted upon an individual throughout the trafficking/ enslavement process (be it pre-, peri-, and post-trafficking/ enslavement). Drawing on literature on migration, domestic and sexual violence, occupational health and torture, Zimmerman and others identify the forms of violence that victims may encounter during the process of exploitation. These forms of abuse can be placed under eight broad categories: psychological abuses, physical abuses, sexual abuses, forced and coerced substance abuse, social restrictions and manipulation, economic exploitation and debt-bondage, legal insecurity, and occupational hazard and abusive working and living conditions.[410]

Whilst human trafficking and slavery-related violence is well-documented, the physical and psychological health of modern slavery victims has been recognised as a largely neglected topic. As with violence inflicted upon victims, health risks associated with modern slavery may be prevalent and persist throughout the exploitation process. Zimmerman and others establish seven event-related 'Stages of the Human Trafficking process' and chart the various risks and intervention opportunities which may arise.[411] Examples of potential psychological health consequences include, *inter alia*, post-traumatic symptoms and syndromes, depression, memory loss, aggressive behaviour, irritability and violent outbursts. Furthermore, 'psychological responses are very often correlated with many – if not, each – of the other risk

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[410] Cathy Zimmerman, Mazeda Hossain and Charlotte Watts, 'Human trafficking and health: a conceptual model to inform policy, intervention and research' (2011) 73(2) Soc Sci Med 327.

[411] ibid.

categories. For example, depression is frequently detected among those who are sexually abused, drug addicted, socially marginalized, or with insecure immigration status.'[412]

Notably, high levels of Post-Traumatic Stress Disorder have been recorded amongst victims of human trafficking, in particular female victims of sex trafficking, who display symptoms of depression, anxiety and hostility.[413] Hossain and others suggest that this can be explained by the extended period of time over which the exploitation takes place as victims are subjected to more frequent abuse which results in a more sustained sense of entrapment, alienation, humiliation, loss of control and hopelessness, all of which can be associated with mental health disorders.[414] Despite this, the MSA 2015, particularly the statutory defences, fail to acknowledge these broader circumstances of victimhood which provides a far from victim-centric approach to victim protection from criminalisation.

Increasingly, victims and survivors of human trafficking have been identified as suffering from complex trauma, a type of trauma that occurs repeatedly and cumulatively over a period of time and within specific relationships and contexts.[415] The prototype trauma stemming from child abuse sparked a change in understanding amongst researchers which expanded to include all forms of domestic violence and attachment trauma found to be present in circumstances involving familial and other intimate relationships. Further expansion of knowledge recognised complex trauma resultant from other types of damaging, catastrophic, entrapping

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[412] Hammond and McGlone, 'Entry, Progression, Exit' (n 410) 165.

[413] Madeza Hossain and others, 'The relationship of trauma to mental disorders among trafficked and sexually exploited girls and women' (2010) 100(12) AJPH 2442, 2442.

[414] ibid 2446.

[415] Christine A Courtois, 'Complex trauma, complex reactions: assessment and treatment' (2004) 41(4) Psychological Trauma: Theory, Research, Practice, and Policy 412.

traumatisation (during both childhood and/ or adulthood) commonly experienced through human trafficking and prostitution.[416]

The current protective framework in place to protect victims from criminalisation is reflective of the narrow focus by policymakers on criminal violations which occur during the exploitation process, as opposed to the health implications of modern slavery. The effects of complex trauma are likely to impact on the psychological fragility of victims of human trafficking and modern slavery, however the current mechanisms are detached and insensitive to such fragility, often permitting the exacerbation of trauma through criminalisation. From a human rights perspective, criminal actions committed by victims are a manifestation of their status as victims of human trafficking and modern slavery and thus should not result in the deprivation of dignity and liberty. As Muraszkiewicz notes, 'much dignity is eroded when trafficked persons are held liable'.[417] In this sense non-criminalisation mechanisms, including a modern slavery defence, must ensure the prevention of further victimisation.

4.4 Human Rights Perspectives

Nowak, in his foreword to Kaufman and others' expansive volume on the violation of human dignity, noted that:

> 'In my opinion, it is the experience of absolute powerlessness which creates the feeling among the victims of certain gross human rights violations to have lost their dignity

[416] See for example, PhuongThao D Le and Perry N Halkitis, 'Advancing the Science on the Biopsychosocial Effects of Human Trafficking' (2018) 44(3) Behav Med 175; and Coral J Dando and others, 'Perceptions of Psychological Coercion and Human Trafficking in the West Midlands of England: Beginning to Know the Unknown' (2016) 11(5) PLoS One 1.

[417] Muraszkiewicz, *Protecting Victims* (n 207) 61.

> and humanity. As the slave holder exercises absolute power over slaves, the torturer, the rapist, the genocidaire, the trafficker exercises absolute power over their respective victims. Many victims of torture, rape, trafficking, female genital mutilation, corporal punishment and inhuman prison conditions whom I interviewed in my function as Special Rapporteur on Torture in all world regions had reached a stage in which they regarded death as a relief compared to the suffering of being further dehumanized. That is why the right to human dignity seems to be even more important than the right to life and why "ticking bombs" and similar scenarios can never be used to balance security and saving lives of individuals against human dignity'.[418]

In 2008, the Swiss Initiative launched an Agenda for Human Rights entitled 'Protecting Dignity'.[419] Amongst other things, the Agenda recognises 'organised crime and human trafficking' as a most serious violation of human rights that constitutes an attack on human dignity.[420] As discussed in Chapter 1, the human rights-based, victim-centric spirit of the need to avoid criminalisation of victims has resulted in a rationale for the 'non-punishment principle' that is unequivocally based upon punishment being a violation of the fundamental dignity of victims. From a human rights perspective, although a victim may have committed an offence, the reality of the situation is that trafficked victims act 'without real autonomy', they have 'no, or limited, free will';[421] they are 'not a free agent' but 'the agent of the person(s) who exploit

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[418] Manfred Nowak, 'Foreword' in Paulus Kaufman and others (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer 2011) vi.

[419] ——'To Commemorate the 60th anniversary of the Universal Declaration of Human Rights – UDHR' (Agenda for Human Rights) <www.udhr60.ch> accessed 23 September 2022.

[420] Paulus Kaufman and others (eds), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer 2011) v.

[421] OSCE, *Policy and Legislative Recommendations* (n 181) [5]; Felicity Gerry, 'Human Trafficking in the Drug Trade: Lessons for Attorneys from the Mary Jane Veloso Case' in Nora M Cronin and Kimberley A Ellis (eds), Human Trafficking: Emerging Legal Issues and Applications (Lawyers & Judges Publishing Co 2017) 31.

them'.[422] Failure to respect the principle of non-punishment can lead to further serious human rights violations, hinder the possibility of recovery, and deny access to justice for trafficked persons. Thus, where there is credible evidence of victim status, states must have in place avenues to pursue non-criminalisation – or at the very least, mitigate offending. The central underpinning theory of this argument is that: 'in committing a crime, victims of human trafficking do not act voluntarily and thus the position of guilt cannot be reached'.[423] Piotrowicz and Sorrentino even go as far as to suggest that the European Court of Human Rights in *Rantsev v Cyprus and Russia*[424] likened the condition of trafficking victim to a 'radical denial of the independence of the victim'.[425]

In 2008, the UNODC published an updated toolkit to combat trafficking in human beings which indirectly attached great weight to the human rights perspective of victim protection.[426] The guidance, which provided practical assistance, aimed to enable policymakers and stakeholders to deliver best practice approaches worldwide. Chapter 6 of the toolkit included the first comprehensive international list of materials pertaining to the identification of victims, and in particular, highlighting the prerequisite for early identification as a means of ensuring the non-criminalisation of victims. Notably, the toolkit provided guidance predominantly from non-binding human rights-based guidelines which emphasised a holistic approach amongst all

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[422] Piotrowicz and Sorrentino, 'Human Trafficking' (n 22) 673.

[423] Felicity Gerry, 'Human Rights Law Conference October 2015' (Handout, 2015) <https://staging.justice.org.uk/wp-content/uploads/2015/10/Criminal-Justice-Update-Felicity-Gerry-Paper.pdf> accessed 23 September 2022, 14.

[424] (App no 25965/04) (2010) 51 EHRR 1.

[425] Piotrowicz and Sorrentino, 'Human Trafficking' (n 22) 673.

[426] UNODC, *Toolkit to Combat Trafficking in Persons* (UN 2008).

groups that may come into contact with victims.[427] The presented tools shifted the focus away from victims as sources of evidence/ usefulness within the criminal justice system and placed the focus directly on the needs of victims. In particular, *Tool 6.1 Non-criminalization of trafficking victims*, discussed the need for states to protect victims and their rights by not prosecuting or punishing victims who have committed crimes during their victimisation, regardless of factors such as, *inter alia*, the legality of prostitution, and the consent of the victim. Furthermore, the guidance explicitly called for a defence of compulsion in the absence of state laws to prevent prosecutions from occurring.[428]

5. Criminal Law Perspectives

5.1 Criminal Law Theory

In the twenty-first century, Anglo-American common law jurisdictions, capacity responsibility occupies a 'secure role among core criminal offences'.[429] Under this model of responsibility, the formation of a criminal offence constitutes two elements: firstly, conduct causing a result and secondly, with fault. In order to establish full criminal liability, a third element presents itself *vis-à-vis* the absence of any defence. Evidence of any statutory or common law defence being applicable voids liability immaterial of conduct and fault being present. The jurisprudence of criminal law, and in particular criminal defences, identifies two moral claims for the avoidance of liability: the first being the unfair punishment of the accused, despite

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[427] See discussion on the UNHCHR Recommended Principles and Guidelines in Chapter 1.3.2.

[428] UNODC, *Toolkit to Combat Trafficking in Persons* (UN 2008) 253.

[429] Nicola Lacey, *In Search of Criminal Responsibility* (2016) 147.

wrongful conduct; and the second being the acceptance of the conduct of the accused as not being wrongful owing to special circumstances. With regard to the latter, such defences are acknowledged as justifications for criminal conduct, self-defence being the prime example. The former, however, contends that although the conduct was wrongful, a deprivation of the capacity or fair opportunity to conform to the prevention of such conduct should provide an excuse for it.[430] The contention between whether certain criminal defences provide a justification or excuse for criminal behaviour is widely debated,[431] however, it is generally accepted that duress and s 45 MSA 2015 provide excusatory defences.

The principle of non-criminalisation itself, and resulting domestic statutory defence, is devised from the evolving ideology that those who have been exploited to the gravest of measures and forced to commit crimes should be guarded from prosecution and punishment. The regional international principle of non-punishment as established in the Trafficking Convention, Art 26 and the Trafficking Directive, Art 8, and indeed the statutory defence in the MSA 2015, s 45, each require evidence of compulsion, as a minimum.[432] When a victim is compelled to commit a crime, they are the subjects of someone's command. On compulsion Leiser writes: 'One who is compelled to act in a certain way has no choice, but because of some physical or psychological force over which he has no control, must behave as he does'.[433]

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[430] HLA Hart, *Punishment and Responsibility* (1968).

[431] For example, the rationale for the loss of control defence – formerly provocation – is widely debated. See for example, Vera Bergelson, 'Rationales: rejected, imagined and real – provocation, loss of control and extreme mental or emotional disturbance' (2021) 72(2) NILQ 363.

[432] With the exception of individuals under the age of 18, for the purpose of s 45(4) MSA 2015, for whom compulsion as to the commission of an offence is not a requirement.

[433] BM Leiser, 'On Coercion' in D Reidy and W Riker (eds), *Coercion and the State* (Springer 2008) 33.

Indeed, it is the presence of compulsion that rationalises why trafficked persons ought to be excused. As stated by Dubber and Hörnle: '[p]raise is indeed not bestowed, but pardon is, when one does a wrongful act under pressure which, in the words of Aristotle in *The Nicomachean Ethics*, overstrains human nature and which no one could withstand'.[434] We also must remember that 'in the criminal law of the current era, the classic exemplar of ascription of criminal responsibility is capacity, with its hallmarks of individual agency, choice and autonomy'.[435] Following the key liberal ideology of autonomy, where one lacks responsibility it would be unjust to hold them criminally liable for their actions. Persons whose actions are resultant on the actions of a third person are not responsible because they did not act on their own volition. To put it differently, there is lack of voluntariness among the trafficked persons who are compelled to commit a crime; thus, because the behaviour was involuntary the defendant should not be held to account for it.

Involuntariness in this sense does not refer to some physical intervention, such as a physically forced movement which results in the commission of a crime, rather it refers to what Fletcher expresses as 'moral or normative involuntariness'.[436] Muraszkiewicz defines this as external pressure which is intrinsically related to the victim's vulnerability, such as 'anxiety related to irregular migrating status, fear for the well-being of their family, or other weaknesses', which compels them to commit a crime whilst reducing their capacity to act lawfully. But for the external pressure significantly limiting their cognitive capacities, the victim would not have performed the act. Thus, a statutory defence which is appreciative of these factors at play,

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[434] M Dubber and T Hörnle, *Criminal Law: A Comparative Approach* (Oxford University Press 2014) 425.

[435] A Loughan, 'Asking (Different) Responsibility Questions: Responsibility and Non-Responsibility in Criminal Law' (2016) 4(1) BJCLCJ 25, 29.

[436] George Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1987) 802.

would provide a logical concession to the experiences of victims and the myriad of psychological manipulation tactics used by exploiters.

In *R v L & Others* the Court of Appeal reasoned that the justification for non-criminalisation (and essentially immunity from prosecution) is that 'the culpability of any VoT may be significantly diminished, and in some cases effectively extinguished, not merely because of age, but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals'.[437] However, whilst culpability and responsibility may be extinguished, care must be taken not to conflate these concepts with that of agency. The manipulation of their culpability and free will must be balanced with their agency. Victims are continually constructed as persons lacking free will, defined by their need to be rescued and subsequently stigmatized, as will be discussed later in this chapter with regard to dominant victim narratives.

5.2 Vulnerability, Criminal Law and Non-Criminalisation

The concepts of exploitation and vulnerability are intrinsically intertwined in the context of criminal law and in particular anti-modern slavery legislation. Exploitation, in the broadest sense of the word, constitutes an exceptional moral wrong arising from the unfair treatment of an individual for the exploiter's personal gain and/ or the victim's loss. It is generally accepted that taking advantage of another's vulnerability amounts to exploitation. In this context vulnerabilities considered relevant for exploitation should, as Logar suggests, be limited to

[437] (n 42) [13].

‘those that are more or less directly connected to our essential needs’;[438] that is beyond mere susceptibility to one’s desires.

Many of the dismissed Court of Appeal judgments offer explanations which fail to give sufficient weight to the circumstances in which the victims found themselves, for example, they may be asylum-seekers, they may be fleeing violence and persecution, or they may be escaping previous exploitation. Judges often comment on the ‘vulnerable position’ and dangers posed to victims by their situation/ exploiters. However, the precarious nature of their situation means that these individuals cannot be expected to know which authorities to seek advice from or expected to know how to access services and/or seek help. Arguably, even if they did possess this knowledge, depending on their situation it might be incredibly difficult for them to access such services without potentially endangering themselves and/ or others. Courts, as often seen in domestic violence cases, seem to inadequately take into account the impact of modern slavery and the control exerted over victims as part of their exploitation. A major issue for the courts appears to be the reasonable person threshold under s 45, it is questionable whether the reference to what could reasonably be expected of the victim defendant is sufficient to deal with concerns over victims being prosecuted for crimes they were forced to commit, that is unless the jury is provided with expert advice on the impact of modern slavery, which is generally difficult to come by.

Herring has argued for the creation of specific defences to offences which have been recognised as being used to prosecute vulnerable people despite being designed to protect those deemed

[438] T Logar, ‘Exploitation as Wrongful Use: Beyond Taking Advantage of Vulnerabilities’ (2010) 25 Acta Analytica 329.

vulnerable. Whilst his work predominantly focuses on prostitution and domestic abuse,[439] it is comparative with modern slavery in the sense that protection of vulnerable adults can result in the criminalisation of other vulnerable adults. In the context of modern slavery, there is no broadly accepted definition of the terms 'vulnerable' or 'vulnerability'. These terms are often conflated with poverty and socio-economic disadvantages as leading causes of trafficking and enslavement, despite attempts by scholars to develop the discourse of vulnerability to modern slavery beyond lack or want. A more nuanced understanding would recognise vulnerability as referring to exposure and defencelessness; the condition of a person in a specific context.[440]

In responding to vulnerability, one must acknowledge the external conditions of an individual, the negative impacts stemming from those conditions, and any coping mechanisms the individual may employ in order to protect themselves.[441] It is worth noting here that a significantly different approach is adopted in relation to voluntary association and accessorial liability; where there is a shared enterprise, each member of the group assumes responsibility for the actions of the other members of the group, even where an individual's actions are minimal, and as long as the group is acting to achieve a common purpose, the individual must be deemed to be a continuing member of that group. This is particularly relevant in the context of gangs, as county lines activities are recognised as one of the increasing forms of modern slavery exploitation in the UK. The general legal rule being that a defence of duress will fail where the defendant associates with others whom he knew or ought to have known might

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[439] Jonathan Herring, *Vulnerable Adults and the Law* (online edn, Oxford Academic 2016) Ch 7.

[440] Robert Chambers, 'Poverty and Livelihoods: Whose Reality Counts?' (1995) 7(1) Environment and Urbanization 189.

[441] Michèle A Clark, 'Vulnerability, prevention and human trafficking: the need for a new paradigm' in UNODC, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UN 2008) 68.

subject him to any compulsion through threats of violence'.[442] Arguably, an approach echoing that of Baroness Hale's dissenting judgment in *R v Hasan*, which favours a subjective approach to voluntary association assessed by reference to the circumstances as the defendant believed them to be, would be more in line with a victim-centred approach in the context of county lines and gang exploitation.

This can be linked to Fineman's 'vulnerability theory' which proposes that vulnerability is inherent to the human condition. The theory emphasises shared, universal vulnerability whereby vulnerability is posited as the characteristic that positions people in relation to each other as human beings and also suggests a relationship of responsibility between the state and the individual. This basic premise of a 'universal vulnerable subject' forms the foundation for the assertion that the state has a responsibility to implement a comprehensive and just equality regime that ensures access and opportunity for all, consistent with a realistic conception of the human subject.[443] A genuine victim-centred approach to non-criminalisation would acknowledge this inherent vulnerability. As Fouladvand and Ward note in their probe into the possible value of a form of vulnerability theory to criminal law, however, the law must also be live to acute situational vulnerability caused by a lack of social support which is all too common in cases of modern slavery.[444] Given this, s 45 is particularly problematic owing to the objective nature of the provision. In positing a move away from the reasonable person test, Fouladvand

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[442] *R v Hasan* [2005] UKHL 22.

[443] See Martha A Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale JL & Feminism 1, 9-15.

[444] Shahrzad Fouladvand and Tony Ward, 'Human Trafficking, Vulnerability and the State' (2019) JCL 39, 40.

and Ward suggest a more apposite test might be 'whether the defendant was unable, as a result of slavery or exploitation, to see any reasonable alternative to acting as they did'.[445]

More precise definitions of vulnerability exist within a legal context with regard to victims of crime in general. The definition of 'vulnerable victim' is outlined in the revised Victims' Code and based upon the criteria found in s 16 of the *Youth Justice and Criminal Evidence Act 1999*. A victim is recognised as 'vulnerable' if they are under 18 years of age, physically or mentally impaired, or otherwise significantly impaired.[446] Although victims of modern slavery are not explicitly identified as 'vulnerable victims', they may possess characteristics which meet the legal threshold of vulnerability. More specifically, the MSA 2015 recognises that, in determining whether a person is being enslaved, regard may be had to all the circumstances including *any* of the person's personal circumstance which may make them more vulnerable than others.[447] A list of particular vulnerabilities are provided in relation to age, familial relationships and mental or physical illness, however the Explanatory Notes advise that this list is non-exhaustive.

The state can be said to both create and exacerbate vulnerability of its population, with the root causes of vulnerability to trafficking and exploitation being largely systemic. Poverty, oppression, lack of opportunity, political instability and lack of social support have all been recognised as external factors which exist in the social situations of human trafficking and modern slavery victims and make them particularly vulnerable to deception, manipulation and

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[445] ibid 51-52.

[446] Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015) Ch 1 [1.10].

[447] *MSA 2015, s 1(3)-(4).*

coercion.[448] As Fouladvand and Ward contend, most victims, if not all victims, are vulnerable in both the 'ontological' sense and in the sense that 'their particular situation makes them more vulnerable than others'.[449] This situational vulnerability can then fluctuate throughout their trafficking experience and in some cases influence them to engage in criminal activities in an attempt to gain the resources they need to reduce their vulnerability or regain some form of control over their lives. Whilst situations of heightened vulnerability, such as prolonged exploitation, do not deprive victims of agency or responsibility in the strictest sense, certain opportunities may arise which present themselves as forms of resilience (i.e., unlawful activities), but their capacity for any meaningful degree of autonomy may be diminished under great levels of manipulation and coercion at the hands of their exploiters.[450]

Furthermore, anti-trafficking non-governmental organisations and scholars alike maintain that the political landscape of a state, in particular the policies and laws crafted within them, impose controlling measures upon citizens which further heightens their external situational vulnerability when they attempt to reduce their vulnerability by illicit means. Coercive measures against immigration, commercial sex work, and the drugs trade highlight how the state continues to focus on the dichotomy between those who are deemed vulnerable and in need of paternalistic state control and those who are not and therefore must be held accountable and treated punitively by the state. In the context of human trafficking and modern slavery such invidious dichotomies often overlap meaning that the approaches by the state to such societal

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[448] Angelina Stanoyoska and Blagojce Petrevsk, 'Theory of Push and Pull Factors: A New Way of Explaining the Old' (Conference Paper 2012). The paper outlines an abundance of economic, social, political, cultural and global factors that influence vulnerability to recruitment into exploitation.

[449] Fouladvand and Ward, 'Human Trafficking' (n 445) 40.

[450] ibid 52.

problems as immigration, commercial sex work, and the drugs trade, can erroneously result in vulnerable victims being treated as responsible criminals. Illegal immigrants and asylum seekers are treated as self-interested economic migrants, sexually exploited individuals are treated as prostitutes/ pimps/ madams, and county lines runners are treated as masters of an illegal trade. Consequently, in these cases where the state fails to identify such individuals as victims of human trafficking and modern slavery, and fails to afford them adequate protections as is the case with s 45, their situational vulnerability is amplified as they engage with the criminal justice system as an ordinary criminal suspect, effectively enduring further victimisation at the hands of the state.

5.2.1 Vulnerability and the Modern Slavery Act 2015

Although no definition of a victim is provided under the MSA 2015, it seems fair to suggest that vulnerability plays a crucial role in what constitutes victimisation under the Act. Under s 1(3) when considering whether a person is being held in slavery 'regard may be had to all the circumstances' which is followed by a list of circumstances which may be considered in determining whether or not a person may be a victim. The list which appears non-exhaustive, and indeed was confirmed as such by the Explanatory Notes,[451] highlights personal circumstances listing particular vulnerabilities 'such as the person being a child, the person's family relationships, and any mental or physical illness'.[452] These express personal circumstances are acknowledged as factors 'which may make the person more vulnerable than other persons'.[453] Under the theory of vulnerability, and more precisely situational

[451] MSA 2015, Explanatory Notes [20].

[452] MSA 2015, s 1(4)(a).

[453] ibid.

vulnerability, whereby some people are more vulnerable than others, the scope of vulnerability under the Act appears to be exceptionally broad, yet despite these victim-centric contentions in the Explanatory Notes, these have not been transferred to the modern slavery defences themselves which only allows due regard to be paid to a victim's age, sex and any physical or mental illness or disability.[454]

5.3 Choice Theory

Pycroft and Bartollas argue that the traditional scientific approach taken by Newton through adopting a general and mechanistic world view in order to understand the world, has fundamentally influenced the ways in which we understand human agency. Heylighen and others argue that the development of rational choice, based on the concept of utility, was one of the ways in which classical scientific principles have sought to get around the problem of determinism and free will.[455] Philosophers such as Bentham and Mill argued that people always choose an option that maximises their utility. Utility is defined as 'happiness' or 'goodness', and it is assumed that if the actor has complete knowledge of utility or options, then the actions of minds are as predictable as the laws of nature; approaches to rational choice also underpin classical jurisprudence and legal systems, with the basic premise of personal responsibility being based upon the fact that one could have done otherwise.[456]

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[454] ibid s 45(5).

[455] F Heylighen, D Cilliers, and C Gershenson, 'Philosophy and complexity' in J Bogg and R Geyer (eds) *Complexity Science and Society* (Radcliffe 2007) 117– 34.

[456] H Frankfurt, 'Alternate possibilities and moral responsibility', in D Widerker and M McKenna (eds) *Moral responsibility and alternate possibilities: essays on the importance of alternate possibilities* (Ashgate 2006) 17– 26.

6. Towards a Survivor-Centric Defence: The Importance of Survivor Narratives

As a mainly consolidating piece of legislation, the MSA 2015 simply reproduced a number of existing provisions from several statutes, including the Sexual Offences Act 2003, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and the Coroners and Justice Act 2009. As discussed in Chapter 1, none of these statutes promoted protection of victims, be it legal or otherwise, and failed to effectively address issues of extreme exploitation under the umbrella of 'modern slavery'. The driving force behind the earlier provisions was the perceived necessity by the state to control both prostitution and immigration, as opposed to any sincere desire to protect vulnerable people from exploitation. Although the 2015 Act was heralded for its commitment to protecting victims, its creation under the backdrop of criminal justice left the protection provisions within it significantly wanting. Notably, the statutory defence under s 45 merely amalgamated several elements from common law and policy which had previously failed to prevent victims from being criminalised. The defence was framed in such a way that left it entirely unappreciative of the nature in which victims come to commit criminal offences, particularly those who commit consequential offences.[457]

It is argued here that this oversight is largely due to the law and policy relating to criminal exploitation not being adequately informed by victim and survivor discourses. The narratives of survivors featured during debates were not representative of the wider scale of human trafficking and modern slavery for the purpose of criminal exploitation as the state's intentions remained firmly on prevention and prosecution, rather than victim/ survivor protection against criminalisation. The retellings of survivors who have experienced criminal exploitation and the

[457] See Chapter 1, subheading 2.3 for further discussion of the types of offences committed by VoTs.

criminal justice system are fundamental to legislative and policy considerations and should be placed at the heart of legislative and policy reformulation on non-criminalisation in E&W and beyond. It is imperative that states produce strategies, laws and guidance that are formulated to reflect victim/ survivor's lived experiences; narratives that go beyond official constructs of victimhood, beyond the dominant discourse of human trafficking and modern slavery that has created abstract law and policies which do not protect victims from being criminalised. This approach is reinforced by anti-modern slavery stakeholders and scholars in the US and E&W who strive for genuine victim/ survivor-centred measures to combat modern slavery.[458]

Through analysing victim narratives taken from recent Court of Appeal cases, explored by this author in separate case notes,[459] and existing literature, it is apparent that the lived experiences of victims tell a vastly different story to the conventional representations of passive suffering and helplessness by victims of modern slavery. Furthermore, this analysis reveals how the criminal justice system, and wider society's responses to 'victims' as a whole, can often turn from ones of compassion and sympathy into hostility and antipathy when victims flout the perceived victim role. The victims discussed throughout this chapter, the thesis as a whole, and those whose cases were explored in the case notes annexed to this thesis, endured psychological and physical abuse throughout their modern slavery experience, enduring further trauma as their cases progressed through the criminal justice system.

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[458] Maria De Angelis, *Human Trafficking: Women's Stories of Agency* (Cambridge Scholars publishing, 2016); Muraszkiewicz, *Protecting Victims* (n 207); Andrea Nicholson, 'A Survivor-Centric Approach: The Importance of Contemporary Slave Narratives to the Anti-Slavery Agenda' in Clark and Poucki (eds) *The Sage Handbook of Human Trafficking and Modern Day Slavery* (Sage 2019) 259.
[459] See Appendix I and II.

7. Conclusion

This chapter has critically investigated the concept of victimhood and the vulnerable victim discourse embedded in the anti-human trafficking and modern slavery rhetoric in the UK, US and worldwide, by drawing upon recent Court of Appeal cases, explored by this author in separate case notes,[460] and relevant literature to extract the lived experiences of VoTs who commit offences, notably those victims who are trafficked for the purpose of criminal exploitation. Support for more victim-focused and 'survivor narratives' in shaping policies and legislation is widespread. Datta and others in their assessment of the Global Slavery Index provide the historic example of the slave-turned-abolitionist, Frederick Douglas, as a prime example of how formerly enslaved people can have a profound impact on ending slavery: 'We would welcome the likes of him or her to help shape and guide the movement'.[461] The intricacies between why victims offend on the one hand, and why these victims should be legally protected from punishment on the other, has been analysed through the lens of criminal law perspectives. Focus has also been afforded to the binary that exists within society between victims and offenders; a binary that often fails to recognise the subtle distinctions that exist where victims become offenders as a result of serious forms of exploitation. The effect this has on identifying victims of human trafficking and modern slavery has also been explored and critiqued.

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[460] See Appendix I and II.

[461] Monti Narayan Datta and others, 'Assessing the Global Slavery Index' in Jennifer Bryson Clark and Steve J Shone (eds), *The SAGE Handbook of Human Trafficking and Modern Day Slavery* (SAGE 2019) 65.

It has been argued that the dominant modern slavery discourse has hindered efforts to adopt a genuine victim-centred approach to protecting victims from being further victimised by the state. In conclusion, policy, law, practice, and indeed society as a whole, should focus on efforts to deconstruct the narrow political and social preconceptions of victimhood and criminality in order to a facilitate a move towards a more victim-centred approach to non-criminalisation. Unfortunately, efforts so far have failed to achieve this, these failures will be addressed in the next chapter in light of the formation of the s 45 modern slavery defence as it pertains to adults.

Chapter 3: The Modern Slavery Defence: Adults

1. Introduction

Armed with a more nuanced perception of victimisation and victimhood, this chapter examines the conceptualisation, application and operation of the statutory defence for victims of modern slavery in E&W and highlights the focal parameters of the defence. It is argued that these parameters directly correlate with society's prejudices of victimisation, who should and should not be viewed as victims and ultimately who is deserving of protection from criminalisation and who is not. The mere fact that a person is a victim of modern slavery should not afford them a legal defence if they commit an illegal act. They should, however, have a good defence to a criminal charge where their choice to act has been constrained. Section 45 of the MSA 2015 aims to provide such a defence. The statutory defence has been modelled upon the two common law defences that currently recognise constraint by serious threats (duress) and constraint by dire consequences (necessity), albeit to a lesser extent, and even more so with regard to the latter defence. As such, it is necessary to briefly consider the established perspectives on duress and necessity and address the vexed philosophical and legal question of how constrained choice affects responsibility for one's own actions.

The 'modern slavery defence' entered the statute book on 31 July 2015 under Part 5, s 45 of the MSA 2015 to further supplement non-criminalisation protections in E&W. Prior to this, the international and regional safeguards concerning the non-punishment/ non-prosecution of victims were implemented through CPS guidance and the abuse of process doctrine.[462]

[462] See Chapter 1.

Following pressure from non-governmental organisations and activists,[463] mounting evidence in favour of a statutory defence made a practical and moral case for statutory reform. Concerned by the implications of prosecution in deterring victims of human trafficking and modern slavery from reporting instances of extreme exploitation, the Government took the unique step of giving statutory recognition to adults and children who are victims of human trafficking and modern slavery who commit certain criminal offences via sperate defences.

The statutory defence(s) are modelled upon the common law defence of duress and form part of the non-punishment policy framework already in place in E&W. Since the enactment of s 45, a steady stream of cases brought before the courts have presented the opportunity to assess the parameters of the defence(s) and clarify practical aspects of their application.[464] The defence(s) are welcomed but their effectiveness in protecting victims from criminalisation remains questionable. The 'modern slavery defence' as applicable to adults is as follows:

> **45 Defence for slavery or trafficking victims who commit an offence**
>
> (1) A person is not guilty of an offence if—
>
> (a) the person is aged 18 or over when the person does the act which constitutes the offence,
>
> (b) the person does that act because the person is compelled to do it,
>
> (c) the compulsion is attributable to slavery or to relevant exploitation, and
>
> (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
>
> (2) A person may be compelled to do something by another person or by the person's circumstances.

[463] AIRE; Trafficking Awareness Raising Alliance; Parliament, *Joint Committee on the draft Modern Slavery Bill* (Publications, Written Evidence 2013).

[464] Examples include, *Joseph* (n 42), *R v MK (Gega)* [2018] EWCA Crim 667.

(3) Compulsion is attributable to slavery or to relevant exploitation only if—

(a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or

(b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation…

(5) For the purposes of this section—

"relevant characteristics" means age, sex and any physical or mental illness or disability;

"relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.

(6) In this section references to an act include an omission.

(7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.

(8) The Secretary of State may by regulations amend Schedule 4.

In this chapter the theoretical perspectives and practical operation of the 'modern slavery defence' *vis-à-vis* adults will be examined, including *inter alia*: its connection to the common law defence of duress and the concept of involuntariness; the current test for its application; and its exclusivity to victims of human trafficking and modern slavery. The examination will analyse each individual element of the modern slavery defence exposing problematic components within its composition and exploring these issues from moral and legal perspectives. The elements of the statutory defence can be subcategorised under five headings: victimisation (i.e., victim identification), contemporaneity (i.e., time limitation), proportionality (i.e. standard of fortitude), nexus (i.e. compulsion, causation), and exclusions (i.e. crime limitations).[465] An in-depth critical analysis of each element will help determine whether or not the adult modern slavery defence: firstly, adequately protects victims from

[465] This analysis builds on the components identified by Meghan Hillborn, see Chapter 4, subheading 3.1.

criminalisation; and secondly, provides a model example of implementing the non-criminalisation principle into statute. Finally, this analysis of each element will inform the construction of a theoretical framework for comparing non-criminalisation policies in E&W and the US and help derive novel, more inclusive frameworks for non-criminalisation which appreciate the complexities of human trafficking and modern slavery victimisation and provoke reformation. This will facilitate the comparative analysis of the statutory defence in E&W and affirmative human trafficking defences in the US and support the formulation of novel reform options for the law in E&W which provides an original contribution to knowledge in the area of modern slavery and non-criminalisation.

2. Practical Operation of the Modern Slavery Defence

2.1 Scope and Application of the Defence

In the past 'trafficking' was traditionally associated with the movement of women and girls across borders into sexual exploitation; social understandings were shrouded by persistent myths that victims could only be female, non-nationals, trafficked from abroad and exploited on home soil. Under international law, however, Art 3 of the Trafficking Protocol made it clear that the definition of 'trafficking in persons' is not limited in its application; the definition is broad and open-ended enough to encapsulate new or additional exploitative purposes as and when they are identified in the future. Equally as flexible is the offence of human trafficking under the MSA 2015, s 2. One *new* form of exploitation that has been particularly problematic in terms of the application of the s 45 defence(s) is that of 'county lines' activity.

In 2018, the case of *R v Zakaria Mohammed* highlighted just how flexible the MSA 2015 was.[466] The case concerned the first conviction for human trafficking within the UK in which the victims were youths sent to different areas across the country by the defendants to sell drugs. This effectively altered the status of suspects in drug dealing cases into victims of crime who should, according to the principle of non-punishment, be protected rather than criminalised and could have a viable defence under s 45. Although O'Connell notes that such an outcome was unlikely to have been foreseen by Parliament when debating the Modern Slavery Bill,[467] evidence presented to the Joint Committee did raise concerns over the possibility of a statutory defence being available to 'drug mules', yet no drugs offences were included in the Schedule 4 exclusions. Arguably, exploitation of such a nature as county lines could have been foreseen by Parliament; indeed, the same evidence suggested no defence should be available in relation to terrorism and several offences under the Terrorism Act 2006 are explicitly excluded from the ambit of s 45.

2.1.1 The Statutory Victim of Modern Slavery

The central concept of modern slavery 'victim' is defined by s 56(1) and (2) of the MSA 2015. For the purposes of the Act:

> (1) … a person is a victim of slavery if he or she is a victim of–
> (a) conduct which constitutes an offence under section 1, or
> (b) conduct which would have constituted an offence under that section if that section had been in force when the conduct occurred.

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[466] *R v Zakaria Mohammed* (unreported).

[467] Suzanne O.Connell, 'The Modern Slavery Act 2015 Maverick or Myth?' (Tuckers Solicitors 27 March 2019) <https://www.tuckerssolicitors.com/the-modern-slavery-act-2015-maverick-or-myth/> accessed 23 September 2022.

(2) … a person is a victim of human trafficking if he or she is a victim of–

(a) conduct which constitutes an offence under section 2, or would have constituted an offence under that section if the person responsible for the conduct were a UK national, or

(b) conduct which would have been within paragraph (a) if section 2 had been in force when the conduct occurred.

The provision provides for 'a degree of express retrospection' in that for the purposes of the statute, a person is a victim of modern slavery even if they were trafficked/ enslaved prior to the offences themselves being enacted. Despite this, one issue that has been raised in the Court of Appeal on several occasions is whether s 45 is capable of having retrospective effect: can a victim who committed an offence prior to the MSA 2015 coming into force on 31 July 2015 rely on the modern slavery defence?

From a plain reading, the statute is silent on the matter. On the one hand, the wording of s 45 explicitly recognises retrospective victimisation: 'being, or *having been*, a victim of slavery [or human trafficking] …'[468] – reflective of the definition of 'victim' under s 56. Yet, on the other hand, fails to stipulate whether or not this retrospectivity extends to criminal offences committed by the victim pre-enactment of the Act. In the absence of a positive indication that Parliament intended for the defence to be retrospective or prospective, the presumption against retrospectivity has been applied unanimously. The Lord Justices in *R v Joseph (Verna)* [469] and *R v O; R v N*,[470] *in obiter*, understood s 45 to operate in line with the presumption. This

[468] MSA 2015, s 45(3)(b) and s 45(5) emphasis added.

[469] *Joseph* (n 42).

[470] [2019] EWCA Crim 752.

assumption was later confirmed in *R v CS* in which retrospectivity was directly at issue.[471] Thus the protective ambit of the modern slavery defence extends exclusively to victims who have committed offences after 31 July 2015.

The parameters of the 'statutory victim' of modern slavery, for the purpose of the s 45 defence, were established in *R v CS*. In *Joseph (Verna)*, it was stated that s 45 was not drafted to provide retrospective protection and thus excludes victim/ offenders who committed a crime prior to the MSA 2015 coming into force on 31 July 2015.[472] Thus, the parameters of the 'statutory victim' of modern slavery, for the purpose of the s 45 defence, are established and a lacuna in the law presented. Those who fall outside this scope, who claim that there was a nexus between the crime with which they are charged and their status as victims of modern slavery, must rely on the protective framework that was developed by the courts pre-MSA 2015. Up until 2020 this included the jurisdiction to stay proceedings as an abuse of process. In *R v DS*, however, the Court of Appeal ruled that the 'responsibility for deciding the facts relevant to [the defendant's victimhood] is *unquestionably* that of the jury'.[473] From a legal standpoint, formal identification may now be of little evidential value at all.[474]

The s 45 defence is not explicitly clear on where the burden of proof rests and to what standard. Believing it to be Parliament's intention, two Crown Court rulings directed juries that a reverse burden of proof applied to the defendant.[475] In each case the defendant was convicted, and both

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[471] [2021] EWCA Crim 134.

[472] *Joseph* (n 42).

[473] [2020] EWCA Crim 285, [40] (emphasis added). See also, Nadesh Karu, '*R v DS* – Modern Slavery and Abuse of Process' (Case Comment) (QEB Hollis Whiteman 2020).

[474] *R v Brecani* [2021] EWCA Crim 731.

[475] *R v Danciu (aka Kreka)* cited in Southwell, Brewer and Douglas-Jones QC, *Human Trafficking* (n 362) 126.

appealed on the basis that the trial judge had misdirected the jury. The Court of Appeal in *R v MK; R v Gega* held that the s 45 defence does not implicitly require the defendant to bear the legal or persuasive burden of proof of any element of the defence.[476] Rather, the burden on the defendant is evidential; he must raise evidence of each element of the defence and the prosecution must disprove one or more of them beyond reasonable doubt (i.e. to the criminal standard in the traditional way). Thus, in order to raise the modern slavery defence, the defendant must first raise evidence that he was a victim of modern slavery.

2.1.2 The Contemporaneity Requirement

A contemporaneity requirement within a defence refers to some form of time limit being afforded to said defence. For example, duress requires 'imminent danger of physical injury'.[477] With regard to the modern slavery defence, the wording of the statute in this respect is particularly broad. A plain reading of the section suggests that the defence has the scope to be raised by victim/ defendants who have been enslaved/ trafficked at the time the alleged offence took place as well as by victim/ defendants who have been enslaved/ trafficked (provided they have been compelled to commit the act as a direct consequence of their prior enslavement/ trafficking). This indicates a somewhat more victim-centred approach to the formation of the defence as there is the potential for the provision to encapsulate the three broad categories of offence: status, consequential and liberation offences.[478] However, this is counteracted by the overall compulsion-based nature of the defence, which has the potential to make it particularly

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[476] [2018] EWCA Crim 667. See also, Judicial College, *Crown Court Compendium* (2020) Part 1, section 18-6.

[477] *R v Quayle* [2005] 1 All ER 988.

[478] See Chapter 1, subheading 2.3 for further discussion.

difficult for those who commit liberation offences to raise the defence owing to the high threshold of the compulsion element.

2.1.3 The Proportionality Requirement

The proportionality requirement of a defence refers to the victim's action being proportional to the action taken against them, i.e., the threatened danger. The question here is how much the victim should be expected to resist the compulsion. With regard to the modern slavery defence, this standard of fortitude question is answered with reference to the inclusion of the 'reasonable person test' which requires the jury to consider the nature of the compulsion in the context of the seriousness of the offence. Under s 45(1)(d): 'a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act'. Section 45(5) provides some clarity here, defining 'relevant characteristics' as: 'age, sex and any physical or mental illness or disability'. However, these are merely a like-for-like reiteration of the characteristic taken into account for the defence of duress under *Bowen*.[479] This objective element within the provision has been described as 'ignor[ing] the fragility of human autonomy and prioritis[ing] punishment over compassion for human vulnerability'.[480] On this matter, Laird further criticised the inclusion of such a test as being 'deeply problematic given the extreme nature of [victims'] circumstances'[481] recognising the absurdity of requiring victims of extreme exploitation to show the same level of fortitude as ordinary people, and in the same vein expecting a jury comprehend a victims' situation. Laird suggests that owing to the contradictory language within the subsection, either the placing of

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[479] [1996] 2 CR App Rep 157 (CA) [166]. Note that *Bowen* included 'pregnancy' which is omitted here.
[480] Fouladvand and Ward, 'Human Trafficking' (n 445) 53.
[481] Laird, 'Evaluating' (n 33) 399.

the reasonable person in the 'same situation as the [victim]' makes the test essentially subjective, or it requires a victim to be evaluated against a standard that would be impossible for them to achieve.[482] Whilst the former would present a more victim-centred approach, Laird reiterates that such an interpretation was not intended by legislatures.

Elements of the critique of the 'reasonable man' test used, until recently, as the basis of many criminal defences are applicable here. Although the language has yielded to the more gender-neutral 'reasonable person', as in the case of s 45, the question still remains as to whether the element compressively includes the reasonable woman. Furthermore, the existing law, as it is based on the ancient common law defence of duress, to which criticisms of too high a standard of steadfastness abounds,[483] fails to appreciate the subjugated essence of victimisation to which slave drivers and traffickers prey on. The courts appear to agree with these sentiments to a certain extent. In *R v ZK*, the victim/ defendant was charged with robbery and subsequently appealed against sentence on the basis that the judge failed to consider the background of the defendant.[484] Reducing the term by one year and four months, the court held that circumstances as to the background of the defendant as a victim can provide substantial mitigation. Although the offence was committed pre-MSA 2015, and would be excluded under Schedule 4 regardless, the case highlights the readiness of the Court of Appeal to recognise the defendant's relevant characteristics beyond those prescribed by the boundaries of duress (i.e., age, sex, physical/ mental illness or disability), albeit at the level of sentencing. Arguably, the reasonable

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[482] ibid.
[483] KJM Smith, 'Duress and Steadfastness: In Pursuit of the Unintelligible' (1999) Crim LR 363, 372.
[484] [2017] EWCA Crim 347.

person requirement in s 45 should give more weight to the subjective aspect of the test in line with the general shift in the domain of criminal law towards a more subjective approach.

2.1.4 The Nexus Requirement

The modern slavery defence, like the defence of duress, is predicated on compulsion.[485] Whereas the common law provides a defence to a defendant who is compelled to commit an offence as a result of a threat of death or serious harm, the s 45 defence is available to a modern slavery victim who is compelled by conduct which is attributable to slavery or human trafficking; the victim-defendant must prove a nexus between their offending and their VoT status. This requirement for such a nexus predates the MSA 2015 and is ingrained in the CPS discretion to prosecute. CPS Guidance from 2007 onwards has encouraged prosecutors to either exercise discretion to decline to prosecute, discontinue a prosecution, or to offer no evidence against a defendant who has been recognised as a VoT. Part of this guidance requires prosecutors of such cases to consider 'whether there is a nexus between the trafficking/slavery or past trafficking/slavery and the alleged offending'; and, if so, 'whether the dominant force of compulsion from the trafficking/slavery or past trafficking/slavery acting on the suspect is sufficient to extinguish their culpability/criminality or reduce their culpability/criminality to a point where it is not in the public interest to prosecute them'.

The provision itself, however, does not expressly define 'compelled' or 'compulsion'. Rather, the Court of Appeal has, and continues to, grapple with its meaning in relation to VoT defendants. What is clear is that the 'compulsion defence', as it has been referred to, is not

[485] Laird, 'Evaluating' (n 33) 398.

limited to the circumstances in which the defence of duress applies and the thresholds for each should not become indistinguishable.In particular, and in stark contrast to duress, the modern slavery defence does not require compulsion that is borne from threats of death or serious harm. This interpretation can be drawn from the decision in *R v LM*, in which the term 'compelled' was interpreted broadly in line with a more human rights-based approach, [486] which, in essence, places the trafficked individual at the centre of countermeasures against modern slavery, inclusive of victim protection from criminalisation. This is opposed to the dominant criminal justice-based approach which places prosecution at the forefront of anti-modern slavery efforts. By not limiting 'compulsion' to the circumstances in which the common law defence of duress applies, the court demonstrated a more nuanced understanding of the trafficking experience and appreciation for victim protection in E&W. Muraszkiewicz argues that this broader language of compulsion 'is of benefit to trafficked person' because it recognises the subtle pressures that can compel victims to commit crimes.[487] Conversely, narrowly confined 'words such as coerced or forced would [risk] directly or indirectly violating victims' fundamental rights'.[488]

In *DPP for Northern Ireland v Lynch*, Lord Wilberforce asserted that:

> 'duress… is something which is superimposed on the other ingredients which by themselves would make up an offence, ie on the act and intention. Coactus volui sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime.'[489]

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[486] *R v LM* [2010] EWCA Crim 2327, 14(iii)..

[487] Muraszkiewicz, *Protecting Victims* (n 207) 130.

[488] ibid.

[489] [1975] AC 653, 680.

A similar explanation of the operation of the modern slavery defence can be proposed: the human trafficking and modern slavery victim completes the act and knows that they are doing so; but the addition of the element of compulsion (attributable to modern slavery) prevents the law from treating what they have done as a crime.

2.1.5 Excluded Offences

Schedule 4 of the MSA 2015 sets out a substantial list of offences to which the modern slavery defences under s 45 do not apply.[490] The Schedule lists over 130 offences that are excluded from the ambit of both the adult and child defences, several of which have been recognised as crimes directly linked to the criminal exploitation of victims, for example, offences under the MSA 2015 itself. In Parliamentary debates, emphasis was placed on the need to exclude 'certain serious offences' to which if a defence was allowed, unintended consequences would permeate. Concerns were raised over unscrupulous 'serious criminals' using the defence to avoid being brought to justice and fears that extending the ambit to all offences would result in the increased use of victims to commit serious crimes were presented, even though genuine victims may be compelled to commit serious crimes.[491] Arguably, the inclusion of Sch 4 in its current form is the most contested limitation of the provision for both adults and children with an abundance of criticism from Members of Parliament, practitioners in the field, NGOs, and scholars.[492] On this matter evidence was presented to both independent reviews of the Act and

[490] MSA 2015, s 45(7).

[491] Laird, 'Evaluating' (n 33) 397.

[492] See for example, OSCE, *Policy and Legislative Recommendations* (n 181) 23; Jovanovic, 'The Principle of Non-Punishment' (n 44).

the IASC's call for evidence on the statutory defence,[493] yet no changes to the Schedule have been recommended. It is argued here that the inclusion of this Schedule is not in line with a truly victim-centred approach to non-criminalisation and that the defence should have broad application to all offences, except murder.

3. Interpretation Through the Lens of Duress

The inclusion of the modern slavery defence in the MSA 2015 was intended to overcome the shortcomings of the defence of duress for human trafficking and modern slavery survivors who encountered the criminal justice system; to provide an accessible defence suitable for the circumstances of modern slavery. It would supposedly fill a lacuna in the law and thus strengthen the legal protective framework for those experiencing some of the harshest realities in modern times. Normal due process would not be limited, rather the defence would enable the courts to consider whether victims/ survivors were compelled to commit criminal offences as part of, or as a direct consequence of, their exploitation. This section will suggest that by mirroring the common law of duress, the framing of the modern slavery defence has permitted a similar interpretation to that of the common law which is too narrow.[494]

3.1 The Common Law Defence of Duress

The exculpatory common law defence of duress acts to negate any liability for crimes committed despite the dimensional elements of the offence being satisfied. Duress provides a

[493] Bristow and Lomas, 'The Modern Slavery Act' (n 41).

[494] See Laird, 'Evaluating' (n 33).

defence whereby external threats manifest under two circumstances: human agency or circumstances. The former is commonly referred to as 'duress by threats' and the latter 'duress of circumstances'. Both operate as substantive defences to absolve the defendant from any responsibility for what would otherwise be a criminal infraction. The defendant is generally not exempt from being a 'reasonable agent', nor incapable of forming the requisite *mens rea*, and commits the crime 'voluntarily' (i.e., D consciously chooses to act) and 'intentionally' (i.e., D deliberately acts). Instead, it is accepted that under circumstances of extreme pressure the defendant did what was 'reasonably necessary' to deflect a threat of immediate harm to themselves or another onto an innocent third party, and thus may be exculpated on grounds of excuse. In this sense, duress provides an excusatory defence as a concession to human frailty.[495]

It is worth noting that over the course of the development of duress, varying accounts and characterisations of the defence have been submitted by the courts. The majority of these accounts coming from the Court of Appeal have characterised the nature of duressed activity as synonymous with 'break[ing] the will' of the defendant.[496] However, as Fairall and Yeo observe, references to the defendant's acts being not voluntary and that the defendant is merely an instrument of the duressor is 'unhelpful' and 'an actor who chooses to break the law is not a mere passive instrument of crime, but someone motivated by the rational desire to minimise

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[495] *R v Graham* [1982] 1 WLR 294, 299 (citing *Smith & Hogan, Criminal Law* (4th ed 1978) 205; *R v L* [2012] EWCA Crim 189; *Hasan* (n 443) [18].

[496] ibid 300. See also *Attorney-General v Whelan* [1934] Ir R 518, 526 ('overbear the ordinary power of human resistance'); *R v Steane* [1947] 1 KB 997, 1001 ('overbear a man's will [so that] it is not his will at all') and 1007 ('negating the intent'); *R v Bourne* (1952) 36 Cr App R 125, 129 ('will was overborne by threats', i.e. no *mens rea*); *R v Kray* (1969) 63 Cr App R 125, 578 ('ceased to be an independent actor'); *R v Hudson and Taylor* [1971] 2 QB 203, 207 ('sufficient to destroy [the defendant's] will'); *R v Emery* (1993) 14 Cr App R (S) 394, 398 ('the defendant] had her will crushed').

personal exposure to harm. The wrongfulness of the threats provides the basis for the exoneration in limited circumstances'.[497] It is argued here that this observation is correct, both for defendants claiming duress and for victims of human trafficking and modern slavery for whom victims are not passive in the strictest sense, and do make an active choice to commit the offence, however, for the latter this is due to the situation of exploitation in which they find themselves as opposed to the wrongfulness of the threats.

The common law defence of duress (by threats and of circumstances) is recognised as a protective element within the non-criminalisation protective framework in E&W in its own right. The defence affords protection for victims of human trafficking and modern slavery who commit certain offences within its ambit.

3.1.1 Duress by Threats

Duress *per minas* (by threats)[498] observes the basic rationale that, 'As punishments are…only inflicted for the abuse of…free will…it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion'.[499] Strictly speaking, those who commit a criminal act may plead duress if they were unlawfully threatened and acted out of a well-founded fear of imminent death or serious injury. However, the defence is not without its limitations and the courts remain committed to reading the defence

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[497] P Fairall and S Yeo, *Criminal Defences in Australia* (2005) 137.

[498] The term 'duress' is henceforth used to describe 'duress by threats', as distinguished from 'duress of circumstance', which is discussed below.

[499] Peter Rosenthal, 'Duress in the Criminal Law' (1990) 32 Crim LQ 199, 200-201 citing Blackstone, *Commentaries on the Laws of England* (vol IV, 1765) 107-108.

restrictively. Early in the 21st century, the House of Lords reviewed duress by threats in *Hasan* and ultimately confined its application for public policy reasons.[500] Lord Bingham decreed that it is 'unsurprising that the law in this and other jurisdictions should have been developed so as to confine the defence of duress within narrowly defined limits'.[501] Despite the Lords' resistance to any liberalisation of the test for duress, the scope of the defence continues to face heavy criticism.

Duress has antiquated roots with reference being made in both the law of ancient Hebrews[502] and medieval English law[503] where the defence was available for perpetrators who had been forced, against their will, to commit the most heinous of crimes (treason). It has since undergone considerable development but remains dependent on compulsion and generally concerns instances of personal crises. Whilst there remains a controversial debate surrounding the theoretical underpinnings as to duress operating as a justificatory defence or an excusatory defence, it is widely categorised as the latter; operating to excuse the perpetrator from criminal liability where they have committed an offence as a result of fear induced by the threat of physical harm to themselves or another, should they refuse to comply.[504] The threshold is considerably high but, when raised successfully, it is a complete defence and results in the full acquittal of the perpetrator. In essence, the excusatory defence shows that, although the conduct was wrongful, the perpetrator is blameless.

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[500] [2005] UKHL 22 sub nom *R v Z* [2005] 2 AC 467.

[501] ibid *Hasan* [21].

[502] Peter Rosenthal, 'Duress in the Criminal Law' (1989) 32 Crim LQ 199, 200.

[503] The defence of duress in England was first enunciated in the 1331 case of *John de Culewen*, Close Roll 7 Ewd 3, memb 15 (1333), cited in MS Hale, *Historia Placitorum Coronae* (1736) 167-168. See also 'Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases' (1956) 56(5) Columbia L Rev 709, 719.

[504] The Law Commission, *Criminal Law Report on Defences of General Application* (HM Stationary Office 1977).

The two most common underpinning theories of excuse find expression in the common law defence of duress, of which the new modern slavery defence is modelled upon. The current test for the defence of duress is comprised of several elements which must be established by the defendant. The defendant bears an evidential burden and must adduce evidence of each element. The four elements of the defence, as set out in *Hasan*,[505] are:

i) reasonable belief that there was threats of death or serious injury made against the defendant, a member of their immediate family, or someone for whom they might reasonably feel responsible – this belief must be genuinely held;[506]
ii) reasonable belief that the threats would be carried out (almost) immediately with no reasonable avenue of escape;
iii) the defendant's criminal conduct was directly caused by the threat or belief in the threat (i.e., the defendant had a good cause to fear death or serious injury would result if they did not comply);[507] and
iv) a sober person of reasonable firmness, having the same characteristics as the defendant (age, sex, pregnancy, physical and mental disabilities),[508] would have responded in the same way.[509]

In short, the defence of duress can be said to arise where the freedom of choice of the perpetrator is compromised and where the perpetrator's criminal conduct does not represent an expression of criminal character. Similarly, the principle of non-criminalisation has been

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[505] *Hasan* (n 443) [21(2)].

[506] ibid [23].

[507] The threat must be the direct cause of the defendant committing the defence; however it need not be the sole cause, see *R v Ortiz* (1968) 83 Cr App R 173.

[508] *R v Bowen* [1996] 2 CR App Rep 157, CA [166].

[509] *Graham* (n 497) 295; approved in *Howe* (n 205) [65]-[66].

described as being ‘based on the premise that even if a VoT deliberately commits an offence, they cannot be charged and prosecuted for that offence if they lacked true autonomy or agency at that time’.[510] Indeed, the same can be argued of the modern slavery defence; notwithstanding the problematic ambiguities that arise when analysing non-criminalisation through the lens of criminal responsibility(supra). One might consider how autonomous a choice truly is when the option is between starvation and destitution and the decision to act is skewed by a history of abuse and exploitation.

Although duress serves to excuse some victims for crimes committed under particular circumstances, the defence is rarely used in the context of human trafficking and modern slavery for three main reasons. Firstly, the emphasis on threats of death or serious injury fails to recognise the myriad forms of compulsion and abuse that victims are subjected to. Secondly, duress requires imminent threats. Thirdly, for the defence to succeed, victims of human trafficking and modern slavery must show the same level of fortitude as non-victims. Ultimately, the defence of duress is problematic because it ignores the complexities of human trafficking and modern slavery and the situations in which vulnerable individuals find themselves.

Notwithstanding the fact that satisfying each of these elements has proven significantly problematic in practice (for victims and non-victims alike), additional restrictions further preclude a defence of duress from succeeding. In particular, several offences are excluded from its ambit and duress is unavailable where the defendant ‘voluntarily’ associates with others engaged in criminal activity in circumstances where he knows or ought reasonably to know the

[510] Schloenhardt and Markey-Towler, ‘Non-Criminalisation’ (n 164) 19.

risk of being subject to violent compulsion.[511] When considering the incremental methods of coercion used by traffickers, each of these facets highlight why duress is ill-fitting in the prism of human trafficking and modern slavery. It is thus concerning that the s 45 defence is reliant upon the framework of the common law test as the new modern slavery defence now incorporates several of the deficiencies of duress.

3.1.2 Duress of Circumstances (Necessity)

Alongside duress, necessity is often cited as providing a legitimate exemption from being punished which helps states fulfil their obligations under the Trafficking Convention, Art 26. In E&W, however, a general defence of 'pure necessity'[512] has never been expressly recognised in court.[513] In theory, necessity in its 'purest' form provides a defence in situations where an actor commits a crime to avoid the greater evil to themselves or another which would ensue from the objective dangers arising from the dangerous circumstances in which they or that other is placed; it is effectively a choice between two evils.[514] The unlawfulness of the action

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[511] *Hasan* (n 443); *R v Ali* [2008] EWCA Crim 716.

[512] Richard Card, *Card, Cross & Jones Criminal Law* (21st ed, OUP 2014) 708. Card refers to 'pure necessity' in order to differentiate from circumstances of self-defence, duress by threats, and duress of circumstances, on the one hand, and another situation where D is not compelled to act as he does but chooses to act as he does in order to avert greater evil, i.e. pure necessity.

[513] Alan Reed and Ben Fitzpatrick, *Criminal Law* (4th ed, Sweet & Maxwell 2009) 265. See also, Clare Barsby and DC Omerod, 'Criminal Damage: Defendants Damaging Property at Operational Military Airbase' (2005) Crim LR 122, 125. It is worth noting, however, that, despite several modern cases casting doubt on the existence of 'pure necessity' as a common law defence (see *R v Martin (Colin)* [1989] 1 All ER 652; *R v Pommell* [1995] 2 Cr App R 607; and *R v Quayle* [2005] All ER 988), there is strong authority for a justification of pure necessity in cases involving medical treatment. See, for example, *Re F (Adult Patient: Jurisdiction)* [2000] Lloyd's Law Reports 381; *R v Bournewood Community and Mental Health NHS Trust* [1998] 2 WLR 764 (CA) [1999] 1 AC 458 (HL); and, most notably, *Re A (Children) (Conjoined Twins: Surgical Separation*) [2000] 4 All ER 961.

[514] 4 Bl Comm (1768) 30.

is negated by the necessity of it, i.e. necessity operates as a justification rendering the conduct lawful. In this sense, necessity is a matter of balancing harms so that the defence would be available if the harm committed is less than the harm the accused feared would otherwise occur. Indeed, allowing such a defence would inevitably open the floodgates to myriad criminal activities as Lord Denning aptly highlighted with his examples of hunger being permitted as an excuse for stealing and homelessness a defence to trespass.[515]

In practice, the justificatory underpinnings of necessity, and its propensity to provide 'an excuse for all sorts of wrongdoing',[516] have evoked judicial reluctance to recognise it as a defence. As a result, a limited form of necessity as an excuse has developed through common law: 'duress of circumstances'.[517] The test is as follows:

> 'the defendant committed the offence in response to a genuine belief in an imminent threat of death or serious injury and that a sober person of reasonable firmness [sharing the] characteristics of the accused would have reacted in the same way…'.[518]

Thus, where an actor commits an offence (*mens rea* and *actus reus* proved) but acted both reasonably and proportionately in order to avert dire consequences, it can be said that they were acting under duress.

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[515] *London Borough of Southwark v Williams* [1971] 2 All ER 175, 179.

[516] ibid.

[517] The distinction between 'necessity' and 'duress of circumstances' is not clear-cut. In E&W, the terms are used interchangeably and conterminously by the courts. Both terms are treated by common law as one and the same; although it has been submitted that 'duress of circumstances is more conveniently dealt with under the heading of 'necessity' as the use of the word 'duress' in this context is misleading. See also *R v Shayler* [2001] EWCA Crim 1977 [55].

[518] A James, 'Divisional Court: Duress: Objective Test' (2007) 71 JCL 193, 193. The test is one of objectivity, albeit with a proportionality requirement.

The differences between necessity and duress of circumstances were observed in *Re A (Children)*. Brook LJ opined that:

> '[necessity and duress of circumstances] do not…cover the same ground. In cases of pure necessity the actor's mind is not irresistibly overborne by external pressures. The claim is that his or her conduct was not harmful because on a choice of two evils the choice of avoiding the greater harm was justified'.[519]

The duress terminology is permitted here because the test is exactly the same as for duress by threats with the exception of the source from which the threat emanates;[520] either from a human or from the circumstances of the case, for example, a natural disaster or wild animal. Indeed, the defence was previously confined to driving cases.[521] To that effect, there is also no requirement that the threatening circumstances accompany an instruction, for example, 'supply drugs or else'.[522] Thus, where pure necessity is unlikely to provide a defence (or justification) to most defendants,[523] duress of circumstances may provide an excuse.

The close affinity between the two types of duress means that duress of circumstances is 'subject to the same limitations [as duress by threats], namely that the harm sought to be avoided must be death or serious injury' (i.e. there must be sufficient nexus between the threat

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[519] [2000] 4 All ER 961, 1047-1048.

[520] Michael J Allen, *Textbook on Criminal Law* (13th ed, OUP 2015) 194.

[521] *R v Conway* [1988] 3 All ER 1025; *R v Martin* [1989] 1 All ER 652.

[522] Supra at Chapter 3.3.1.1, the defence of duress by threats (seemingly unnecessarily) requires that the offence charged is 'the very offence' nominated by the person making the threat; 'unless D commits the offence charged, harm will be done to D or a third person'. See Richard Card, *Card, Cross & Jones Criminal Law* (21st ed, OUP 2014) 683.

[523] Beyond the exception of those carrying out medical treatment.

and the crime).[524] Additionally, duress of circumstances cannot be raised to murder or attempted murder, unlike necessity which can provide a defence.[525] Consequently, similar objections as to duress by threats have been raised: namely, the test requires performance to an unjust, immoral and unattainable heroic standard;[526] and the defendant's emotional state (i.e. fear, anger) is ignored owing to the objective nature of the test in determining their reaction to the danger.[527] As Williams notes, the rationale for the defence fails to resonate with the prevailing psychological condition of a person claiming duress: fear – a characteristic not ascribed to the 'reasonable person' who is more often measured as being courageous.[528] Williams proposes that 'the duress of circumstances test is wrong, because it excludes fear and expects courage. And proposes that 'Characteristics ascribed to the reasonable man…should include the fear felt by the defendant in the circumstances in which he or she finds him/ herself'.[529]

It is submitted here that necessity, in its purest form, fails to offer any substantial protection for human trafficking and modern slavery victims – if not most defendants – from criminalisation and that the limited version of the duress of circumstances offers little

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[524] *R v Conway* [1988] 3 All ER 1025. See also *Howe* (n 210) [39] and *R v Martin* [1989] 1 All ER 652, 653; *R v Shayler* [2001] EWCA Crim 1977.

[525] *Re A (conjoined twins: surgical separation)* [2000] 4 All ER 961, 1048.

[526] A Noti, 'The Uplifted Knife: Morality, Justification and the Choice-Of-Evils Doctrine' (2003) 78 New York University Law Review 1859, 1886.

[527] Glenys Williams, 'Necessity: Duress of Circumstances or Moral Involuntariness?' (2014) 43(1) Common Law World Review 1, 4.

[528] Glenys Williams, 'Necessity: Duress of Circumstances or Moral Involuntariness?' (2014) 43(1) Common Law World Review 1, 4. See also SMH Yeo, 'Necessity under the Griffith Code and the Common Law' (1991) 15 Crim LJ 17, 36.

[529] Glenys Williams, 'Necessity: Duress of Circumstances or Moral Involuntariness?' (2014) 43(1) Common Law World Review 1, 21.

consolation. The defence of necessity offers a justification for actors who make a reasoned and reasonable decision. There is no question of excusing human frailty in such cases as the actor is 'free to choose which course to take, whether to obey the letter of the law and do nothing and risk damage to all interests involved in the weighing exercise, or damage one and thus protect the other';[530] in that sense, no implicit moral involuntariness on the part of the actor is present. Arguably, the capacity of human trafficking and modern slavery victims to make such decisions may be marred by their history of exploitation. As such, it appears more rational to speak of a victim's will as being overborne when they are compelled to commit an offence in which case an excusatory defence is more appropriate.

3.2 The Scope of Duress

3.2.1 Compulsion

In order to raise the defence of duress, the defendant must have been unlawfully threatened by another person and that threat (of immediate death or serious personal violence) was 'so great as to overbear the ordinary human resistance'.[531] This provides the compulsion basis for the defence. In *R v Brandford*, the court confirmed that pressure unaccompanied by a threat of death or really serious injury is insufficient to form the basis of a defence of duress.[532] Smith suggests that marking the limits of compulsion to a minimum level of threats of death or serious

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[530] Michael Bohlander, 'Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes – Taking Human Life and the Defence of Necessity' (2006) 70(2) JCL 147, 150-151. See also *R v Shayler* [2001] EWCA Crim 1977 [54].

[531] *Attorney-General v Whelan* (n 498).

[532] [2016] EWCA Crim 1794, [2017] 4 WLR 17 [40].

injury implies an objective standard as it fails to allow a person's characteristics to be considered where the required level of threat is not achieved. Smith criticises this objective standard by presenting an example where the defendant is an elderly infirm widow,[533] however, his argument appears equally as compelling when substituted with the victim of modern slavery: if V is a victim of human trafficking and modern slavery threatened by D with less than 'serious harm' unless V facilitates the production of a controlled drug by cultivating cannabis, V would have no defence to a criminal charge.

In *R v Dao & Ors*[534] the Court of Appeal was asked to consider the extent of the duress defence and whether it extended to false imprisonment; that is, whether being locked in a premises with no means of escape could satisfy the compulsion test for duress. In the case, three appellants were convicted of cultivating cannabis and possessing criminal property, all three claimed they had been duped into attending the premises and wanted to leave but were threatened to the extent that they had been overcome. The jury was asked to apply the duress test for compulsion: had the appellants been threatened by someone with death or serious injury if they did not cultivate the cannabis? To which the answer was held to be in the negative. On appeal the Court held that the convictions were safe and expressed the provisional view that it would not be appropriate to accept that a threat of false imprisonment suffices for the defence of duress, without an accompanying threat of death or serious injury. Following *R v Abdul-Hussain*[535] and *R v LM,*[536]in which the Court reasserted the parameters of the duress defence and acknowledged its limitations for VoTs, no encouragement was leant to the widening of the

[533] Smith, 'Duress and Steadfastness' (n 484) 369-370.

[534] [2012] EWCA Crim 1717.

[535] [1998] EWCA Crim 3528.

[536] [2010] EWCA Crim 2327.

defence of duress, albeit the judge in the former stressed that this was purely a provisional view. Furthermore, the Trafficking Convention provided no assistance with ascertaining the scope of duress as a defence for VoTs.

3.2.2 Contemporaneity

Duress requires the threat to be one that the defendant 'reasonably expects to follow *immediately* or *almost immediately*';[537] there must be '*imminent* danger of physical injury'.[538] In *R v Brandford*, the Court of Appeal accepted that indirect threats could in theory be capable of supporting a duress defence.[539] Nonetheless, the Court has made clear that the focus should not be on how the threat was conveyed, rather the focus should be on the potency, imminence and immediacy of the threat.[540] In practice, however, the more remote threats are, the greater the likelihood is that the judge will withdraw the defence from the jury.

Additionally, the availability of a reasonable escape from the threat will undermine the requirement of immediacy. Thus, the defence will fail if there was an opportunity to take some evasive action that the defendant could reasonably have been expected to take in order to avoid the threat without committing the offence.[541] Examples of evasive action have included calling the police and/ or escaping from the threat.[542] Where the threat is unlikely to follow '(almost)

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[537] *Hasan* (n 443) [28]; reaffirmed in *R v Brandford* [2016] EWCA Crim 1794, [2017] 4 WLR 17 [33] (emphasis added).

[538] *R v Quayle* [2005] 1 All ER 988 (emphasis added).

[539] Cf *R v LM* [2010] EWCA Crim 2372, [2011] Cr App R 135 [8].

[540] *Brandford* [2016] EWCA Crim 1794, [2017] 4 WLR 17 [39(v)].

[541] *Hasan* (n 443) [28].

[542] *R v Pommell* [1995] 2 CR App Rep 607; *R v Brandford* [2016] EWCA Crim 1794, [2017] 4 WLR 17.

immediately', a failed opportunity to take evasive action will be more readily disproved by the prosecution.

The requirement of immediacy of violence highlights why duress is ill-fitting for human trafficking and modern slavery; the narrow confines of duress make for a defence that is widely unavailable to human trafficking and modern slavery victims, for whom more subtle forms of control and coercion suffice as compulsion.

3.2.3 Proportionality and Reasonableness

There is no explicit proportionality requirement within the defence of duress. Rather, two choices were presented to the courts when deciding what level of harm would suffice: either one requiring proportionality or a fixed level. Opting for the latter, a set level requiring threat of death or serious harm became the common law. Indeed, an approach which would allow the defence wherever the harm avoided was greater than the harm inflicted (a 'balancing of harms approach') has been repeatedly rejected.[543]

Compulsion operates in the sense that, from the defendant's point of view and the predicament he is in, his coerced choice may be 'reasonably regarded as the lesser of two evils'.[544] A

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[543] Smith, 'Duress and Steadfastness' (n 484) 373-374; William Wilson, *Central Issues in Criminal Theory* (Hart Publishing 2002) 302. See *R v Hudson and Taylor* [1971] 2 QB 203; *Graham* (n 497) 300; *DPP for Northern Ireland v Lynch* [1975] AC 653, 680. See also Law Commission, *Defences of General Application* (Working Paper No 55, 1974) paras 16-17. Cf The Model Penal Code, § 2.09(1); Wayne R LaFave and Austin W Scott, *Criminal Law* (West 1978); Wayne R LaFave, *Substantive Criminal Law* (2nd ed, Thomson/West 2003) section 1.5.

[544] *Howe* (n 210) [13].

proportionality element of duress can thus be construed from the basis of reasonableness in that the defendant's claim to an excuse stems from a person of reasonable firmness acting similarly under the same circumstances.[545] Authority had previously alluded to such an objective standard,[546] and Lord Lane's duress-provocation analogy in *Graham* sought to establish the requirement as precedent:

> 'Provocation and duress are analogous. In provocation the words or actions of one break the self-control of another. In duress the words or actions of one person break the will of another. The law requires a defendant to have the self control reasonably to be expected of the ordinary citizen in his situation. It should likewise require him to have the steadfastness reasonably to be expected of the ordinary citizen in his situation'.[547]

The objective question in *Graham*, and subsequently *Hasan*, was described by Smith as 'superfluous in situations where the threat is credible, and the defendant has no means of escape'. Arguably, the initial requirement of a minimum level of threat which impels the defendant to act, is enough to justify acts that would otherwise be criminal.[548]

The problematic nature of the reasonable person test is also evident *vis-à-vis* defendants who have suffered from domestic abuse. In *R v YS*,[549] the defendant had been driving erratically and was stopped and arrested by police. YS told officers that she had been dragged from her home by her partner who was in the passenger seat. He had forced her to drive, threatening to kill her

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[545] *Graham* (n 497); *Hasan* (n 443) [21(6)].

[546] *Attorney-General v Whelan* (n 498). In *Whelan*, the Irish Court of Appeal observed (*obiter*) that the test for duress was whether the threats were 'so great as to overbear the ordinary power of human resistance'. The word 'ordinary' suggested an objective test based on whether the 'reasonable person' would have done the same in that situation. This dictum ultimately persuaded the devising of the test in *Graham*.

[547] *Graham* (n 497) 300.

[548] Smith, 'Duress and Steadfastness' (n 484) 370-371.

[549] [2017] EWHC 2839. See also, Domestic Abuse Bill Deb 17 June 2020, cols 469-470.

if she refused, punching her in the ribs and grabbing the steering wheel. Prosecution of YS was deemed to be in the public interest. Although the court agreed that she believed that if she did not drive, her partner might kill or seriously injury her, she was convicted. Based on the objective test, it was found that a reasonable person of YS's age, in her situation, with her beliefs and history of domestic violence, would not have done what she did. Indeed, the Divisional Court upheld her conviction, opining that the test had in fact been applied too leniently; the apparent subjective spin afforded by the magistrates provided YS no recourse, regardless.

The deficiency of duress by way of the objective element is that protection is only afforded to victims who can be pathologized with outdated, often misogynistic, concepts such as 'learned helplessness' and, particularly with regard to victims of domestic abuse, 'battered woman syndrome'. As Ahluwalia contends,

> 'The real reason a victim of domestic abuse offends is the abuse. And the syndrome we seek to scientifically ascribe as being the justification for the offending directly results from the abuse. Yet we are left with syndromization [sic] being the key to acquittals for duress.'[550]

The same can be argued of victims of human trafficking and modern slavery. In order to prove learned helplessness (and indeed 'battered woman syndrome'), expert medical opinion on the condition must be produced as evidence, which is oftentimes impractical in cases of low-level offending and raises issues of access to justice. Skinazi argues that no logical basis exists for

[550] Paramjit Ahluwalia, 'The forgotten victims of domestic abuse' (Counsel Magazine 2020) <https://www.counselmagazine.co.uk/articles/the-forgotten-victims-of-domestic-abuse> accessed 23 September 2022.

applying different standards of reasonableness to the doctrines of self-defence and duress, therefore duress should adopt a hybrid objective/ subjective approach to reasonableness that resembles self-defence. Such a modification could accommodate a defendant who had reasonable perception of coercion/ compulsion, but one that could only be understood given their experience of prior exploitation (the 'totality of the circumstances').[551] The objective component –the 'sober person of reasonable firmness' test – leaves much to the discretion of the court and is particularly burdensome on trial judges who must ensure that their directions to juries are clear. One notable difficulty is that a 'sober person of reasonable firmness' is deemed not to share the defendant's vulnerability to pressure, timidity, emotional instability, or addiction. The standard of fortitude here is arguably at odds with vulnerability theory as previously discussed.[552]

3.2.4 Excluded Offences

Duress, in either form, cannot be raised in defence to murder,[553] attempted murder,[554] and treason involving death of the sovereign.[555] With regard to murder, this exclusion has applied for centuries. The House of Lords in *Lynch* provided some leniency by extending the availability of the defence to a person charged with murder as an accessory,[556] but this was short lived. Following a somewhat scathing criticism of their predecessors, their Lordships in

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[551] Heater R Skinazi, 'Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect"' (1997) 85(4) Cali L Rev 993.

[552] See Chapter 2, subheading 5.2 for discussion of vulnerability theory.

[553] *Howe* (n 210); *R v Wilson* [2007] EWCA Crim 1251.

[554] *R v Gotts* [1992] 2 AC 412.

[555] *Hasan* (n 443) [21(1)]. See also, Ormerod and Laird, *Smith, Hogan* (n 255) 363.

[556] *DPP for Northern Ireland v Lynch* [1975] AC 653.

Howe reversed the decision in *Lynch,* and it is now definitive law that duress can never be a defence to murder.[557] There is, however, much criticism on this point. As Smith argues, their Lordships in *Howe* errored in their premise for which they held duress can never be a defence unless it justified the action of the defendant: had they instead 'considered that the question was whether the defendant deserved to be punished, or ought to be excused, they might have reached a different result'.[558] The Law Commission is also in favour of duress being available to a charge of murder (albeit whilst being cautious of opening the floodgates to spurious and unmeritorious defences being run) and has, in its recommendations, proposed that the burden of proof be reversed so as to place the onus on the accused to prove on the balance of probabilities that the elements of the defence were made out.[559]

3.2.5 Excluded Defendants

The CPS guidance on modern slavery, in its interpretation of the non-punishment principle, states that where they may be consideration of charge and prosecution of vulnerable persons (involved in drug offences), 'prosecutors should consider applying the statutory defence or CPS policy on the non-prosecution of suspects who may be victims of trafficking'.[560] Yet the subsequent paragraph in the guidance stipulates that:

> 'prosecutors should also be alive to the fact that, if a person, by joining an illegal organisation or similar group of people with criminal objectives and coercive methods, voluntarily exposes and submits himself to illegal compulsion, he cannot rely on the

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[557] *Howe* (n 210) 430; see also, *R v Wilson* [2007] EWCA Crim 1251.

[558] JC Smith, *Justification and Excuse in the Criminal Law* (Sweet & Maxwell 1989) 12-13.

[559] Law Commission 304, para 6.115.

[560] CPS, 'Human Trafficking, Smuggling and Slavery' (2020) <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery> accessed 23 September 2022.

> duress to which he has voluntarily exposed himself as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress which calls in aid: *R v Fitzpatrick* [1977] NILR 20'.[561]

The paragraph is lifted verbatim from the CPS guidance on duress and necessity under the heading 'Voluntary Exposure to Risk of Duress'[562] and has been criticised by GRETA who are increasingly concerned that the inclusion of this guidance 'may significantly reduce the scope of the application of the non-punishment provision'.[563] In E&W, and indeed many other jurisdictions, the criminal law has adopted a strict exclusionary approach to individuals who 'voluntarily' associate with criminal gangs. For those who do engage with others involved in criminal activity and commit an offence, the defence of duress is generally not available.[564] This is referred to as the 'voluntary exposure' exception or the 'gang exception';[565] due to the defendant's prior fault in associating with the gang, they are excepted from availing themselves of the defence. It is worth noting, however, that the defence will still be available to defendants who join non-violent criminal gangs.[566] Whilst it is noted that distinguishing between genuine and ostensible gang membership is a difficult task, the increase in county lines activity and its recognition as a form of criminal exploitation highlights that coerced gang activity is a live issue in E&W that falls into the realm of modern slavery.

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[561] ibid.

[562] CPS, 'Legal Guidance: Defences - Duress and Necessity' (2018) <https://www.cps.gov.uk/legal-guidance/defences-duress-and-necessity> accessed 23 September 2022.

[563] GRETA, 'Evaluation Report' (n 388) [168].

[564] *Hasan* (n 443); *Ali* (n 513).

[565] See A P Simester and others, *Simester & Sullivan's Criminal Law: Theory and Doctrine* (4th ed, Hart Publishing 2010) 732; and Southwell, Brewer and Douglas-Jones QC, *Human Trafficking* (n 362) 121, respectively.

[566] *R v Shepherd* (1988) 86 Cr App Rep 47.

The exception was considered in depth by the Court of Criminal Appeal in NI in *R v Fitzpatrick*.[567] The appellant had been denied the defence of duress to a charge of robbery because he had voluntarily joined the IRA. Fitzpatrick claimed that he had tried to leave the terrorist organisation, but threats had forced him to stay and, as such, duress should have been left to the jury. The Court of Criminal Appeal in NI rejected this argument; the fact that he had voluntarily exposed himself to illegal compulsion was enough to deny him the defence.[568] However, as cases involving criminal activity and gangs of a more routine nature, for example, burglary and gangs of robbers/ shoplifters,[569] began to present themselves, the Court of Appeal began to develop the boundaries of the qualification. In *Sharp*,[570] the CoA, in referring to other common law jurisdictions, established that for duress to be denied, D must have knowledge of the nature of the gang; his knowledge would be judged subjectively. This decision was upheld in *Shepherd* where the CoA quashed a conviction for burglary because 'a gang of shoplifters is very different from a paramilitary organisation or gang of armed robbers'; if a reasonable man would have failed to appreciate the risk of violence when joining the gang then the defence should not be automatically denied.[571] As such, duress should have been left for the jury who should have been invited to consider whether D could be said to have taken the risk of violence simply by joining a gang of shoplifters whose activities were not overtly violent.

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[567] [1977] NILR 20 (CCA).

[568] [1977] NILR 20 (CCA) [33].

[569] *R v Sharp* [1987] QB 853; *R v Shepherd* (1988) 86 Cr App Rep 47; *Hasan* (n 443); *Ali* (n 513).

[570] ibid *Sharp*.

[571] *R v Shepherd* (1988) 86 Cr App Rep 47.

The question of voluntary exposure was considered further in the context of drug dealers. In *R v Baker & Ward*,[572] the defendants claimed that they had been specifically instructed to rob a particular store for which they were convicted of robbing. Despite not voluntarily joining a criminal organisation, they had associated with drug suppliers to whom they became indebted to. The trial judge directed the jury that duress would be unavailable if D was aware that the gang might require him to *commit offences*.[573] The CoA held this to be a misdirection and opined that duress will not be available to a defendant if: (a) he is aware of a risk of threats; and (b) he foresees pressure to commit the *offence of the type for which he was convicted*.[574] This two-pronged requirement significantly restricted the scope of the voluntary exposure exception and, despite being favoured by the Law Commission, [575] was later judged to be an erroneous piece of law in *Hasan*.[576]

A similar set of facts arose in *Heath* in which the defendant too had become indebted to a drug dealer.[577] Despite claiming that he had been compelled by threats of physical violence to collect a package of drugs, his defence of duress failed at trial. The CoA, distinguishing *Baker & Ward*, upheld the decision; the fact that D had put himself in a situation where he was likely to

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[572] [1999] 2 Cr App R.

[573] ibid 341.

[574] ibid 346.

[575] Law Commission, *Report on Defences of General Application* (Law Com No 83, 1977); Law Commission, *Report to the Law Commission on the Codification of the Criminal Law* (Law Com No 143, 1985); and Law Commission, *Legislating the Criminal Code. Offences against the Person and General Principles* (Law Com No 218, 1993).

[576] By restricting the scope of voluntary exposure, duress became more readily available to defendants who voluntarily associated with criminal groups who perhaps foresaw pressure to commit offences, but not necessarily those offences with which they were ultimately pressured into committing. Thus, Lord Bingham in *Hasan* stated that *Baker & Ward* mis-stated the law at [37].

[577] [2000] Crim LR 109.

be subjected to threats was enough to deny him the defence. This decision was followed in *Harmer* which concerned similar facts.[578] The departure from the stance in *Baker & Ward* suggests a judicial policy decision to restrict the availability of duress being used by drug users who become indebted to their suppliers. The scope of the exception doctrine was ultimately bolstered by the House of Lords in *Hasan* and it became binding precedent that the excusatory defence of duress (by threats) does not apply if the defendant has voluntary put himself in a position in which he foresaw or ought reasonably to have foreseen the risk of being subjected to *any compulsion* by threats of violence.[579] Whereas the pre-*Hasan* doctrine established a subjective criterion for the voluntary exposure exception which required anticipated coercion to commit *crimes*,[580] the House overruled these precedents by preferring an objective version which ultimately denies D a defence of duress when he voluntarily associates himself with generally violent and coercive people.[581] In other words, if the fact of association is proven and D ought reasonably have known that the associate might subject him to compulsion, he will be denied access to the defence.

Their Lordships stance on the voluntary exposure exception demonstrates a clear intention to restrict the growing use and availability of duress, none more so than to victims of human trafficking and modern slavery. Lord Bingham's rationale for his decision in *Hasan* was profoundly influenced by policy: 'The policy of the law must be to discourage association with

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[578] [2002] Crim LR 401.

[579] [2005] UKHL 22 [38]-[39] emphasis added; *Ali* (n 513) [12].

[580] Or crimes of the type ultimately committed.

[581] Although Lord Bingham favoured an objective test for judging the defendant's foresight, in keeping with the other elements of duress, it has been argued that the inclusion of such criterion is not settled. See David Ormerod, 'R v Dao: Duress – Extent of Duress' (case note) [2013] Crim LR 234, 143; and David Ibbetson, 'Duress Revisited' (2005) 64 CLJ 530, 530-531.

known criminals, and it should be slow to excuse…those who do so'.[582] By all means, those who choose a career within an illegal economy, whereby it is predictable that their employer would use harsh means of enforcement, should be denied a defence of duress. The problem is that cases of ostensible gang membership do occur, particularly in the context of human trafficking and modern slavery, and that 'focusing on the gang membership, in the absence of appropriate consideration of the abuse[/exploitation] has the potential to lead to unjust convictions/ sentences'.[583]

The new authority, undoubtedly motivated by the perception that those who choose to harm innocent victims should not be readily exonerated, understandably sides with the innocent victims. However, the decision simultaneously fails to recognise the possibility that the defendant may themselves be a victim. Indeed, Baroness Hale herself was of the impression that this law was too tough. In her dissent she said:

> 'It is one thing to deny the defence to people who choose to become members of illegal organisations, join criminal gangs, or engage with others in drug-related criminality. It is another thing to deny it to someone who has a quite different reason for becoming associated with the duressor and then finds it difficult to escape'.[584]

The doctrine was described by Baroness Hale as providing the best counterargument to the main criticism of duress: that it is readily raised by the least deserving of people whilst being too onerous for the prosecution to disprove.[585] Hale expressed fear that women in relationships

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[582] [2005] UKHL 22 [38].

[583] Nicola Wake, 'Submission on the "NZ Law Commission Issues Paper, *Victims of family violence who commit homicide* (NZ Law Com IP No 39, 2015)"' (2016) 7.

[584] [2005] UKHL 22 [78].

[585] ibid [73]-[74].

with criminal men might be denied the defence merely on the basis that they should have foreseen that he might be violent to them in the course of the relationship. She preferred that D should have foreseen that he would coerce her into committing a *crime*, a condition which she considered would have been fulfilled on the facts of *Hasan*. The majority, however, disavowed that limitation, confirming the decision in *Heath* and *Harmer*. Ultimately, the restriction on the use of the duress defence was justified under the rationale of it being a salutary principle which acts to restrict unwarranted claims, thus protecting its ambit from abuse by 'unworthy defendant[s]',[586] yet academicians maintain the view that the restriction is 'unduly harsh'.[587]

Arguably, the doctrine is unduly harsh *vis-à-vis* a broad spectrum of circumstances, none more so than situations of modern slavery. Under the voluntary exposure principle, the defendant should not lose the defence if he was forced to join a gang by threats of imminent violence which continued thereafter.[588] In some county lines cases, such threats may be imposed on victims, but it is more often the case that victims are enticed into joining these types of gangs before they become involved in drug trafficking (be it by compulsion for adults or as a direct result of exploitation for children). Following the judgment in *Hasan*, these individuals would be excluded from a duress defence, a decision which seems somewhat illogical when we consider the lengths that traffickers/ exploiters will go to recruit victims, often preying on the most vulnerable people in society.[589] With regard to the defence of duress alone, the result of

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[586] R Ryan, 'Resolving the Duress Dilemma: Guidance from House of Lords' (2005) 56 NILQ 421, 430.

[587] David Omerod, 'Duress: Foreseeability of Risk of Being Subjected to Compulsion by Threats of Violence' [2006] Crim LR 142, 145.

[588] A P Simester and others, *Simester & Sullivan's Criminal Law: Theory and Doctrine* (4th ed, Hart Publishing 2010) 732.

[589] See discussion in Chapter 2.

this restriction obviates the defence from operating as a true concession to human frailty. The modern slavery defence does not apply such a restriction, and there is support for not denying victims the defence on the grounds of voluntary association with a person from whom some form of compulsion was foreseeable, yet the CPS guidance explicitly referencing *Fitzpatrick* has the potential to raise arguments to the contrary.[590]

4. Compulsion vs Causation

There is currently no binding, hard-law international legal model for the non-criminalisation of modern slavery victims.[591] In response to the absence of a unified concept of non-criminalisation, regional legal frameworks began to develop their own principle. In Europe the 'Non-punishment provision' became enshrined in the Trafficking Convention, Art 26. Five years later, the UN Working Group on Trafficking in Persons identified two legislative models that, if adopted, would meet the obligations imposed by Art 26: the compulsion (duress) model; and the causation model. Member States were encouraged to consider establishing the principle of non-punishment for criminal acts committed by victims either through 'duress'-based provisions, whereby a trafficked person is compelled to commit the offence, or through a 'causation'-based provision, whereby the offence committed is directly connected or related to the trafficking.[592]

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[590] [1977] NILR 20 (CCA).

[591] See discussion in Chapter 1, 3.

[592] UN Working Group on Trafficking in Persons, 'Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking' (CTOC/COP/WG.4/2010/4, 17 February 2010) [4]. See also Conference of the Parties to the United Nations Convention on Transnational Organized Crime, Report (n 182) 18.

In practice, however, the differences between the two models/ approaches are not always straightforward. As Hoshi outlines in his examination of the existing international and regional anti-trafficking legal frameworks, at the European level it is difficult to ascertain whether the Trafficking Directive in particular imposes a compulsion-based or causation-based approach. This analysis can be extended to the (adult) modern slavery defence itself which incorporates elements of both causation and compulsion: the modern slavery victim must have been 'compelled' to commit an offence as 'a direct consequence' of them being, or having been, a victim. The modern slavery defence adopts the compulsion-based approach with an additional nexus test as included in regional models of the non-punishment principle and is therefore bound by the scope of duress and its theoretical underpinnings, and subject to the same criticisms afforded to Art 26 of the Trafficking Convention and Art 8 of the Trafficking Directive.[593] This section will analyse both models and establish that a causation-based approach would more desirable as it would ensure that all victims are captured within the ambit of the statutory protective framework and provide much needed clarity in this area of law.

4.1 A Compulsion-based Approach

Derenčinović notes that overlaps can exist between the two; 'while elements of the duress model may prevail in a given country, it does not exclude at least some elements pertaining to the causation model and *vice versa*'.[594] He goes on to suggest that states should be categorised by whether their relevant provision(s) mostly rely on substantive (prevailing) elements of

[593] See discussion in Chapter 1, 3.3.

[594] Davor Derenčinović, 'Comparative Perspectives on Non-Punishment of Victims of Trafficking in Human Beings' (2014) 63 Annales XLV 3, 13.

compulsion or causation model, rather than drawing a sharp edge dividing line between the two. This thesis disagrees with this approach on the basis that the theoretical underpinnings of the protective framework against criminalisation has been too narrowly formulated under the confines of a criminal law lens. Whilst victims of modern slavery may indeed be compelled to commit offences, similar to duress-type situations, in reality the crimes committed by victims extend far beyond this. By focusing on compulsion, the protective framework excludes a proportion of victims who commit crimes either in the process of their exploitation or in an effort to escape whereby the basis for them committing the crime stems from their innate victimisation as opposed to coercion exerted by their exploiters.

E&W adopts substantive elements of the compulsion model. The modern slavery defence, as it pertains to adults, constitutes a 'duress'-based provision. Compulsion plays a vital role in the framing of the defence which has been coined the 'compulsion defence'.[595] It has been suggested that the nature of the compulsion in the context of the seriousness of the offence, offers a helpful way of analysing individual cases; in theory, the greater the dominant force of compulsion, the more likely the higher criminality threshold involved in serious offences will be extinguished.[596] The language of compulsion, and indeed coercion, is ubiquitous in Anglo-American legal literature on the topic of duress, and with the passing of the MSA 2015 and the Serious Crime Act 2015,[597] the concepts finally gained statutory recognition in E&W.

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[595] Edwards, 'Coercion and compulsion' (n 300) 888.

[596] Southwell, Brewer and Douglas-Jones QC, *Human Trafficking* (n 362) 119.

[597] Serious Crime Act 2015, s 76. The provision creates a stand-alone offence of coercion which is (limitedly) recognised within an intimate of familial relationship.

One reason for the adoption of a compulsion-based approach may be because of its already well-established roots in criminal law. As Lodge notes, 'one of the most challenging aspects of [excusatory] defences is their ability to undermine the rights of innocent people by permitting legally protected interests to be infringed without the defendant incurring any criminal responsibility'.[598] Indeed, due to the ever increasing significance of individual autonomy and protection of human rights, the circumstances under which the criminal law tolerates rights infringements require cautious and transparent definitions. Although impinging on the human rights of innocent autonomous people is discouraged, the criminal law already permits their rights to be outweighed by other considerations in circumstances of compulsion. As the anti-modern slavery discourse in E&W was formed on the backbone of a criminal justice approach to addressing the issue, it is unsurprising that a compulsion-based approach underpinned by the common law defence of duress was deemed an appropriate means of implementing the non-punishment principle by legislators when structuring the modern slavery defence. It is, however, unfortunate that greater attention was not afforded to the reality of the situation under which victims come to commit offences which extends beyond that of consequential offences directly linked to the purpose for their trafficking/ enslavement, criminal exploitation.

4.2 A Causation-based Approach

As mentioned above, a 'causation'-based approach to non-criminalisation refers to affording protection to victims of modern slavery who commit offences that are directly connected or

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[598] Anne Lodge, 'Criminal responsibility for intrusions on the rights of innocent persons: the limits of self-defence, necessity and duress' (PhD thesis, Durham University 2009) 4.

related to their exploitation (i.e., slavery or trafficking). The language associated with causation-based models in law is expressed in terms of 'direct consequence' and acknowledges a clear causal link between the criminal act committed and the accused's situation as a trafficked person. The current literature on the non-criminalisation principle offers conflicting views on whether such an approach offers adequate protection from criminalisation for victims, it will be contested here that it does.

Interpretation of the non-criminalisation principle through the prism of causation has its roots in international soft-law instruments. Indeed, as Hoshi notes, ' the normative standard of protection required by international law is causation-based'.[599] The omission of an express non-criminalisation provision in the Trafficking Protocol was discussed in Chapter 1and so will not be repeated here.[600] It was, however, observed in that chapter that guidance from the UN Working Group on Trafficking in Persons, in particular, suggests an implied principle of non-criminalisation within the Trafficking Protocol and explicitly supports a causation-based interpretation of the principle with reference to 'as a direct consequence of their situation as trafficked persons'.[601]

In addition to the aforementioned recommendation, both the UN Office of the High Commissioner for Human Rights (UNOHCHR) and the UNODC recommended states adopt

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[599] Hoshi, 'The Trafficking Defence' (n 195) 56.

[600] See discussion in Chapter 1, 3.1

[601] Conference of the Parties to the United Nations Convention on Transnational Organized Crime, 'Report on the meeting of the Working Group on Trafficking in Persons' (CTOC/COP/WG.4/2009/2, 21 April 2009) 3. It is worth noting that the recommendation directly acknowledges a disparity between trafficked persons who commit unlawful acts as a direct consequence of their trafficking situation and where they are compelled to commit such acts, yet recognises the need to avoid criminalising victims under both circumstances.

causation-based non-punishment provisions.[602] Recommended Principle 7, Recommended Guideline 2.5 and 4.5 from the UNOHCHR each expressly reference not detaining, charging, punishing or prosecuting (i.e. non-criminalisation) trafficked persons for status related offences 'or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons'.[603] Similarly, the UNODC developed the Model Law against Trafficking in Persons (Model Law) in 2009 with an explicit causation-based non-criminalisation provision presented under Art 10.

The Model Law is distinguishable from the UNOHCHR recommendations in that the provision set more definitive parameters for the causation-based approach by suggesting that 'crimes of a particularly serious nature' be excluded from its ambit.[604] Despite this, the commentary provided alongside the provision suggests that 'as a direct result of the crime of trafficking in persons' should be interpreted broadly; the example set of guidelines for prosecutors in legal systems that have prosecutorial discretion demonstrates this:

> 'A victim of trafficking should not be detained, imprisoned or held liable for criminal prosecution or administrative sanctions for offences committed by him or her as a direct result of the crime of trafficking in persons, including:
>
> (a) The person's illegal entry into, exit out of or stay in [state];
> (b) The person's procurement of possession of any fraudulent travel or identity documents that he or she obtained, or with which he or she was supplied, for the purpose of entering or leaving the country in connection with the act of trafficking in persons;

[602] See discussion in Chapter 1, 3.2

[603] UNOHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (E/2002/68/Add 1, 2000) 1, 5-6.

[604] UNODC, Model Law against Trafficking in Persons 2009, Art 10(4).

(c) The person's involvement in unlawful activities to the extent that he or she was compelled to do so'.[605]

Hoshi suggests that it is this broader interpretation of the term 'direct consequence' that affords the adequate amount of legal protection to victims of modern slavery; this author agrees. The rationale for this is that a broadly construed form of 'direct consequence' allows for the inclusion of protection from criminalisation for the three main typologies of offences committed by victims of modern slavery: status offences; consequential offences; and liberation offences.[606] In other words, where the compulsion-based model fails to recognise that trafficking victims may be left with no reasonable alternative but to commit a crime, even in the absence of any force or pressure, the causation-based model recognises that 'but for' the trafficking situation the victim would not have committed the crime.

4.3 Responsibility, Autonomy and Excuses

The dominant narrative of human trafficking and modern slavery explored in the preceding chapter of this thesis instils a prescriptive understanding of a gendered construct which conceptualises modern slavery victims as helpless, naïve and powerless to exploitation from traffickers; they seemingly lack agency and autonomy. Yet this is at odds with the experiences of most victims. [607] Individuals who find themselves in precarious situations, be it due to

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[605] UNODC, Model Law against Trafficking in Persons 2009, 33.

[606] See Chapter 1 subheading 2.3 for further discussion. See also, Hoshi, 'The Trafficking Defence' (n 195) 55 citing P Carter and P Chandran, 'Protecting against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System' in P Chandran (ed), *Human Traffickign Handbook: Recognizing Trafficking and Modern-Day Slavery in the UK* (LexisNexis 2011) 425.

[607] See Chapter 2 for discussion.

poverty, ostracization, political instability or various other reasons, are at an increased risk of harm and are particularly susceptible to exploitation. They may turn to organised crime and criminal enterprises in order to exert some form of resilience over their adversity which, in turn, may result in them being exploited.[608] In doing so they outwardly display a certain degree of agency, they exercise free-will in their choice to migrate for example, which runs counter to the notion of the 'perfect' victim who is kidnapped and forced to cross borders. Their agency and free-will, however, is ultimately constrained by the influence of their traffickers and the forms of compulsion exerted over them which make it ever more difficult for them to resist the demands and pressures of their traffickers. In this sense, it can be said that there is a lack of voluntariness in their actions even despite them exhibiting agency, although the meaningfulness of such agency is questionable.[609] Ultimately, the line between exploitative and non-exploitative practices has become increasingly fine where individuals exercise agency in seeking to ultimately better their lives but do so in a space where their options can be severely constrained by their relative lack of power. Parallels can be drawn here with young victims of trafficking who are lured in by their abusers using the 'lover boy' method: a form of grooming whereby traffickers create a romantic relationship with a vulnerable girl or woman, manipulating her into thinking the abuser is her 'boyfriend' to gain her trust before forcing her into sexual exploitation.

Wake, in her critique of duress and s 45 and their availability to modern slavery victims who kill, conceptualises the theoretical underpinnings of non-criminalisation in these types of cases as such:

[608] Fouladvand and Ward, 'Human Trafficking' (n 445) 54.
[609] ibid 41.

> 'the exploitation precipitates a state of "metaphorical involuntarism", operating on the actor's "free choice" capacity, thereby repudiating "fair opportunity" to conform to the requirements of the law. The conduct is "wrongful", but the actor is not "morally responsible"'.[610]

In that sense, an offence, albeit an unjust one, committed by a victim of modern slavery should be permitted to be considered an excusable one based on the grounds of compassion. Whilst Wake makes it clear that a full defence to murder 'where an actor's "hard choice" response to emotional pressures was "understandable" or… "socially comprehensible"' ought not be a given, she emphasises that it is wrong to ignore the victim/ offender status entirely,[611] as is currently the case with murder and the various other offences excluded from the ambit of s 45. Considering Wake's views here apply to the modern slavery victim who commits murder – the most serious of crimes – it would be nonsensical not to apply this logic to a victim who commits one of the other 130-or-so 'serious crimes' listed in Schedule 4. Providing a full defence to those and a partial defence to murder would, arguably, ensure a more compassionate defence.

When a victim is compelled to commit a crime, they are the subjects of another person's command. According to Leiser, 'one who is compelled to act in a certain way has no choice, but because of some physical or psychological force over which he has no control, must behave as he does'.[612] The presence of compulsion rationalises why trafficked persons ought to be excused. We must remember that 'in the criminal law of the current era, the classic exemplar of ascription of criminal responsibility is capacity, with its hallmarks of individual agency,

[610] Wake, 'Human Trafficking' (n 34) 665.

[611] ibid 666.

[612] BM Leiser, 'On Coercion' in D Reidy and W Riker (eds), *Coercion and the State* (Springer 2008) 33.

choice and autonomy'.[613] Following the key liberal ideology of autonomy, where one lacks responsibility it would be unjust to hold them criminally liable for their actions. Individuals whose actions are resultant on the actions of a third person are not responsible because they did not act on their own volition. In other words, there is lack of voluntariness among the trafficked persons who are compelled to commit a crime; thus, because the behaviour was involuntary the defendant should not be held to account for it.

The theoretical underpinnings of the modern slavery defence, as with the principle of non-criminalisation itself, serve to balance the interests of justice with the protection of victims by recognising that in some circumstances, individuals who would otherwise be criminally responsible/ accountable for their actions should be excused from criminal liability because they are victims of modern slavery. Neither serve to refute the fact that the conduct is wrongful, but rather recognise the lack of moral responsibility of the actor. The victim/ offender's criminal acts remain unjustified, and this should in no way detract from any suffering caused to an (innocent) victim, but nonetheless the acts should be excusable. The foundations of the modern slavery defence are based on duress and thus abide by the same reasonings of compulsion and excuse.[614] The following sections discuss the general concepts of responsibility, agency and autonomy, and criminal liability associated with compulsion via two predominant contemporary models of responsibility: choice theory; and character theory.

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[613] Loughan, 'Asking (Different)' (n 436).

[614] This thesis follows the predominant, plausible rationale of duress as an excusatory defence rather than one of justification. The wrongfulness of the actor's conduct is accepted but blame cannot be attributed to the actor owing to the fact that the serious and compelling threats encountered by them left minimal opportunity to resist complying with the threat.

4.3.1 Choice Theory

Both choice and character models reflect the presumption that liability requires proof of fault, especially for serious offences. Choice theory holds that 'criminal liability is unjust if the one who is liable was not able to choose effectively to act in a way that would avoid criminal liability, and because of that he violated the law.[615] There are two main interpretations of choice theory: the 'orthodox' version; and the 'capacity' version. The former holds that an offender should only be punished for what he/ she chooses to do,[616] whereas the latter maintains that the offender should not be punished if he/ she could not have chosen to act otherwise, owing to lack of capacity or opportunity.[617] The orthodox interpretation relies on the existence of (voluntary) choice. All individuals are free to adhere to or break the law, but they must take responsibility for the consequences of their free choice to do so. The choice may indeed be limited, constrained, unnatural or created as a result of existing circumstances, but a choice, albeit one forced upon the offender, is still a choice.

Excusatory defences intercede to ensure that those who lack capacity, because of coercion for example, do not face punishment or full punishment under the law where a partial defence exists. In a similar vein, the non-punishment principle for victims of modern slavery recognises that victims may have had limited agency and choice in their actions, as a result of their victimisation, and prioritises their protection support over punitive responses. In some of the more extreme cases of modern slavery that tend to align with dominant human trafficking

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[615] H Gross, *A Theory of Criminal Justice* (OUP 1979) 137

[616] Michael S Moore, 'Choice, Character and Excuse' (1990) 7 Soc Phil Pol 29, 40; Jonathan Herring, *Criminal Law: Text, Cases and Materials* (5th ed, OUP 2012) 727.

[617] ibid Moore, 29; A Duffy, 'Choice, Character, and Criminal Liability' (1993) 12 L Phil 345, 354.

discourses, victims may be completely denied agency, for example where they are kidnapped and enslaved for the purposes of sexual exploitation. In other situations, victims may display some levels of agency throughout their trafficking experience, for example they may have initially decided to travel abroad and knowingly carry out specified work only to end up in a situation far different from that they were promised. Here, the victim's agency can ultimately become constrained by the influence of their exploiters. This is not to say that they lack agency and choice to act completely, however, their actions are not entirely voluntarily carried out either. This can make it particularly difficult for the early identification of victims as they may present as either smuggled migrants, or as willing participants in the work they are carrying out, depending on when and where they are initially intercepted by the authorities. Arguably, efforts to address human trafficking and modern slavery should focus on providing support and assistance to victims, regardless of their initial appearance of cooperation.

4.3.2 Character Theory

The second most favourable rationale for excuse defences focuses less on choice and agency and instead argues that an excuse provides the context under which the accused acted, contrary to their established character. Tadros frames this as people being responsible for their actions only insofar as their actions reflect their character.[618] The theory permits that where an actor commits wrongful conduct that is not reflective of a 'vicious character', it can be said that they were not acting as their 'true self' and thus it would be unjust to inflict any punishment.[619]

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[618] Victor Tadros, *Criminal Responsibility* (OUP 2010) 45. See also Nicola Lacey, *State Punishment* (Routledge 1988) 65-68; Norvin Richards, 'Acting Under Duress' (1987) 37 Philosophical Q 21.

[619] George P Fletcher, 'The Individualisation of Excusing Conditions' (1974) 47 S Cal L Rev 1269, 1271. See also, Michael D Bayles, 'Character, Purpose and Criminal Responsibility' (1982) 1 L Phil 1.

Under this model, responsibility is lacking where actions are not a true reflection of the individual's (good) character. According to Duff, the law condemns criminal character traits and pursues this by punishing those whose conduct is seen to reflect these 'bad' traits.[620] Therefore, where a person acts under extreme pressure, be it under duress or in self-defence, they should not be punished because 'an inference from criminal act… to character-trait is… blocked'.[621]

Although assessment of character traits finds expression in the objective elements of reasonableness in law, this theoretical approach to excuse defences is not without its criticisms. In particular, Horder contests the notion that 'the law punishes wrongful acts simply because the defendant has bad character' as not being consistent with liberal views underpinning the harm principle.[622] Rather certain character traits should count towards mitigation of punishment as opposed to negating conviction entirely. Furthermore, the theory is based on the presumption that the actor has a 'settled character' for an accurate evaluation of whether the actor has in fact behaved 'out of character'. The conceivably young legal age of criminal responsibility in E&W prompts Horder to suggest that character theory 'is simply not defensible'.[623] Clearly, the character theory does not provide an adequate basis for certain excusatory defences, inclusive of duress, yet where the theory fails to provide a rationale for

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[620] Anthony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 363. See also John Gardner, 'Justification and Reasons' in *Offences and Defences – Selected Essays in the Philosophy of Criminal Law* (first published 1996, OUP 2007).

[621] Anthony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007) 363.

[622] Jeremy Horder, *Excusing Crime* (OUP 2004) 118-119.

[623] Jeremy Horder, *Excusing Crime* (OUP 2004)122-123.

duress, it may arguably provide a more appropriate foundation for a more victim-centric defence for victims of human trafficking and modern slavery.

5. Victims of Abuse: A Lacuna in the Law

The MSA 2015, s 45 currently provides the only form of statutory legal protection where compulsion and pressure arising from a certain type of relationship can be sufficient to form the basis of the defence. Lord Bingham in *Hasan* favoured 'tightening rather than relaxing the conditions to be met [for duress]' where policy choices were to be made.[624] Indeed, this stance has been echoed by the courts in more recent cases, including those concerning victims of human trafficking and modern slavery. In *R v van Dao*, [625] two defendants appealed against convictions of cultivating cannabis and possession of criminal property. They claimed to have been duped into working in a cannabis factory under duress after attending the unit believing they were there to clean. They were locked in the premises with no means of escape and threatened with continuing false imprisonment if they did not comply with instructions. The Court of Appeal was invited to extend duress to a threat of false imprisonment in order to better ensure domestic compliance with the Trafficking Convention, Art 26.[626] Dismissing the appeals, Lord Justice Gross concluded that duress should not be extended to the threat of imprisonment in the absence of an accompanying threat of death or serious injury, thereby upholding the high threshold of duress.[627]

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[624] *Hasan* (n 443).

[625] [2012] EWCA Crim 1717.

[626] ibid [24(iv)].

[627] ibid [33].

The decision in *van Dao* clarified that no modifications should be made to the defence of duress in the context of victims of human trafficking. Rather, when considering prosecution of victims, '[t]he logical conclusion of such elision would be to create a new form of immunity (albeit under a different name) or to extend the defence of duress by removing the limitation inherent in it. Whatever form of trafficking is under consideration, that approach to these problems… would be fallacious'.[628] The introduction of the MSA 2015 more aptly corresponds with the former. More recently, this conclusion was reiterated in *Joseph (Verna)* in which the Court of Appeal declined to reassess the parameters of duress to bring it into line with s 45 MSA 2015.[629] The court dismissed written submissions produced by Anti-Slavery International arguing for such, finding 'no reason to develop the law of duress in the way suggested'.[630] Both *van Dao* and *Joseph (Verna)* evidence how the defence of duress fails to appreciate the situations in which human trafficking and modern slavery victims find themselves.

The nature, and level, of threat required for a successful plea of duress is often simply too high a threshold for victims of human trafficking and modern slavery to meet. The intricate nature of exploitation and the manner in which exploiters exert compulsion over their victims is often far more nuanced than brazen threats to kill or injure. The forms of compulsion used by exploiters are vast and continually developing; they are the very core of modern slavery offences. As Muraszkiewicz argues, 'the defence of duress does not recognise the means through which victims are controlled',[631] and ultimately fails to protect the vast number of

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[628] ibid [54] citing Lord Judge CJ in *R v N; R v L* [2012] EWCA Crim 189 [12].

[629] *Joseph* (n 42) [7].

[630] ibid [24] and [28].

[631] Muraszkiewicz, *Protecting Victims* (n 207) 161.

victims of forced criminality from criminalisation. The common policy arguments against relaxing the strictness of duress that have been expressed over past decades were reiterated in *van Dao*: duress results in a total acquittal; it is an easy plea to make and a difficult one to rebut; there is insufficient clarity as to whether the other elements of the defence would suffice in safeguarding against its misuse were the level to necessary threat to be widened; justice can be done by mitigation of sentence.[632] Victims may be threatened with death or harm to themselves and/ or their families, but judges are entitled to withdrawn the defence where reliance upon it is 'fanciful' – if the court concludes that the jury would have inevitably found the element of immediacy absent, they may withdraw the defence from the jury. As Laird notes, 'judges should be wary of usurping the function of the jury and should only withdraw the defence if it is beyond doubt that the jury would find one of the elements of the defence absent'[633]

6. Conclusion

This chapter has provided an in-depth critical examination of the s 45 modern slavery defence for adults. The modern slavery defence for adults, its theoretical underpinnings and practical operation was examined, focusing on each element within the provision, to expose the problematic components within the section's composition. Through analysing the conceptualisation, application, and operation of the statutory defence available for adult victims of human trafficking and modern slavery in E&W, the focal parameters of the defence were exposed and explored. It has been argued that these limitations of the defence correlate

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[632] ibid [46]-[48].

[633] Karl Laird, 'Duress: *R v Brandford (Olivia)*' (case note) [2017] 7 Crim LR 505, 556.

with the socio-legal prejudices of victimhood embedded within modern slavery discourse, and broader criminal law frameworks, which contradict a true victim-centred, human-rights based approach to non-criminalisation and fail to provide adequate protection to victims who commit offences resulting in their unjust criminalisation. In this chapter, a novel theoretical framework for comparative analysis was formulated. Each individual element of the s 45 provision was subcategorised under five novel headings: victimisation, contemporaneity, proportionality, nexus, and exclusions. These subcategories form the basis for the theoretical framework for comparing statutory protective provisions against the criminalisation of victims in E&W and the US in an effort to derive a novel, more inclusive framework for non-criminalisation of victims which appreciates the complexities of modern slavery victimisation and validates victims' rights as human beings. This framework will be applied in the succeeding chapters to compare the statutory defences in s 45 MSA 2015 with the affirmative defences in California, Kentucky, Oklahoma, Wisconsin and Wyoming in an effort to derive a novel, more inclusive framework for non-criminalisation of victims which appreciates the complexities of modern slavery victimisation and validates victims' rights as human beings.

Chapter 4: An Anglo-American Analogy

1. Introduction

This chapter will begin by analysing the emergence of human trafficking and modern slavery in the US and examining a handful of pertinent issues that are present within the human trafficking and modern slavery agenda in order to provide context for the move towards protecting victims and introducing statutory protective measures for victims who commit crimes. A comparative analysis of the affirmative defence statutes in California, Oklahoma, Kentucky, Wisconsin and Wyoming will then be provided by examining how the varying elements within each defence have been formulated in different criminal codes. This will then be contrasted with the corresponding element present in the modern slavery defence for adults in E&W, as were discussed in Chapter 3, in order to identify similarities and differences in the scope and application of the law in these different jurisdictions. This comparison will highlight that similar common law jurisdictions have successfully developed protective legal frameworks, in particular specific trafficking defences, that adopt holistic victim-centred and human rights-based approaches to non-punishment and adequately protect victims from criminalisation. This will provide support for the conclusion that more victim-centric reform is needed and the scope of the modern slavery defence for adults in E&W should be broadened.

This chapter will focus on how the implementation of the non-punishment principle by way of a statutory defence for victims of human trafficking and modern slavery – officially referred to

as an affirmative defence – has been developed in the common law jurisdiction of the US,[634] specifically the states of California, Kentucky, Oklahoma, Wisconsin and Wyoming. Comparisons will be drawn between each of these states in order to inform how the protective framework for victims who commit criminal offences should be developed in E&W. The attention of this thesis has been focused on these five states as they each provide trafficking-victim defences that do not limit application to prostitution or prostitution-related offences and thus are comparable with the broader definition of human trafficking and modern slavery victim in the MSA 2015 to which s 45 applies. Of the thirty-seven US states that currently offer affirmative defences to human trafficking and modern slavery victims, twenty-seven states limit their coverage to prostitution and related offenses. In Minnesota, for example, protection from criminalisation is only afforded to victims charged with prostitution in a public place and/ or general prostitution crimes.[635] Several other states, including Iowa,[636] Missouri,[637] and South Carolina,[638] limit the defences they provide to duress/ compulsion or duress-like situations which is already available as a stand-alone defence in these states. The chosen affirmative defences are directly comparable with the statutory defence(s) available in E&W and are useful in examining how variations of defences operate in similar common law systems. Although affirmative defences make up only one part of the wider non-punishment

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[634] Thirty-seven states currently provide human trafficking specific affirmative defences for victims: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, Wisconsin, and Wyoming.

[635] Minn Stat § 609.325 (2015).

[636] Iowa Code Ann § 710A.3 (2020).

[637] MO Rev Stat § 566.223 (2019).

[638] SC Code Ann § 16-3-2020(F) (2018).

framework in the US, they are still a crucial part of protecting victims and warrant in-depth analysis.

The recently enacted affirmative defence in California has been chosen as it provides a snapshot of the narrower statutes adopted by the majority of US states. The states of Kentucky, Oklahoma, Wisconsin and Wyoming have also been selected as they offer affirmative defences with the broadest scope of protection in comparison to most states which limit affirmative defences to prostitution and prostitution-related offences. For example, Kentucky restricts the availability of an affirmative defence to prostitution and non-violent crimes only, whereas Wisconsin and Wyoming allow an affirmative defence for any offence. Although there are complexities involved when analysing different domestic legal systems that contain common law, codified law and federal law, a comparison between these systems allows a wide range of different perspectives and models to be examined in order to determine how the protective framework in E&W can be developed to provide better protection for victims of forced criminality.

1.1 A Note on Language

Legislation in E&Ws adopts the moniker 'modern slavery' as the favoured umbrella term for 'slavery, servitude and forced or compulsory labour' and 'human trafficking' (encompassing myriad forms of exploitation).[639] By comparison, the US favours the reference to 'trafficking in persons' under the Trafficking Protocol; the US Department of State has acknowledged the term as being synonymous with 'human trafficking' and 'modern slavery'. Thus, 'trafficking

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[639] MSA 2015, s 1–3.

in persons' and 'human trafficking' are often used as an umbrella term in US federal law and state law to encompass, *inter alia* 'sexual exploitation', 'forced labour', 'slavery', and 'servitude'. The language used in this chapter will be in keeping with the language used throughout this thesis, i.e., 'human trafficking' and 'modern slavery' (human trafficking and modern slavery) will be regarded as synonymous and used interchangeably unless otherwise stipulated. In the US, in particular, many academics and contributors frame their discussions within the narrower context of sex trafficking in direct correlation to the US Government's own historical framing of human trafficking. It should be noted that where this is the case, there is a practical argument for such literatures to be just as convincing and applicable as applied to the context of modern slavery more generally.[640]

1.2 A Note on Legal Culture

When comparatively analysing separate jurisdictions, it is also necessary to be mindful of the differences between the legal cultures being examined. In particular, consideration should also be given to the practice of plea bargaining in the US, which is commonplace in each of the five comparative states under scrutiny in this thesis, as it is in most US jurisdictions.[641] Plea bargaining involves negotiations between the prosecutor and the defendant's lawyer, whereby the defendant agrees to plead guilty to a lesser charge or accept a reduced sentence in exchange for a guilty plea. The practice is often used in criminal cases as a way to avoid a trial and to ensure that the defendant receives a lesser sentence than they would if they were found guilty

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[640] Francisco Zornosa, 'Protecting Human Trafficking Victims for Punishment and Promoting their Rehabilitation: The Need for an Affirmative Defense' (2016) 22(1) Wash & Lee J Civ Rts & Soc Just 177, 179.

[641] Thea Johnson, *2023 Plea Bargain Task Force Report* (American Bar Association's Criminal Justice Section 2023) 6.

at trial. As a means to ensure the quick resolution of a case in criminal justice systems that are under time and financial constraints, plea bargains present some benefits to lengthy trials. Where defences are inadequate to address the circumstances of victims who offend, plea bargaining also provides the means to avoid engaging with the trial procedure which in turn may reduce the risk of re-traumatisation and the possibility of a failed defence and harsher punishment.[642]

In the context of human trafficking, however, plea bargaining is largely inappropriate as it can lead to victim-defendants pleading guilty to crimes they may have a viable affirmative defence to. Some commentators have argued that prosecutors are encouraging defendants by offering incentives that are inherently psychologically coercive.[643] Whilst a plea deal may allow the victim to avoid a lengthy trial and the trauma of reliving their experience in court and receive a reduced sentence and/or a lesser charge, the tool will ultimately result in the punishment of the victim for crimes they were forced to commit. Ultimately, these individuals should be afforded full protection by the law and be diverted away from the criminal justice system so that they can be fully supported and protected from further victimisation and re-trafficking.

The practice of plea bargaining permits the victim's exploitation to be overlooked and turns the focus squarely towards securing a conviction rather than identifying and addressing the underlying issues of trafficking and exploitation. Arguably, plea bargaining seeks to further undermine and exploit already vulnerable victims who may not be in a position to fully

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[642] ibid. See also The Survivor Reentry Project, *Post-Conviction Advocacy for Survivors of Human Trafficking: A Guide for Attorneys* (American Bar Association Commission on Domestic & Sexual Violence 2016) 5.

[643] Rebecca K Helm, 'Cognitive Theory and Plea-Bargaining' (2018) 5(2) Policy Insights from the Behavioural and Brain Sciences 195.

understand their legal rights or the implications of such a deal.[644] This vulnerability may be further exacerbated by a lack of resources and the ability to instruct competent legal advocates who will help them make informed decisions about their legal options and avoid accepting plea deals that are not in their best interest. Although the impact of plea bargaining in terms of protecting victims from criminalisation is largely negative, it is highly probable that the tool is still being utilised in these types of cases and could provide reason in part for the lack of reported cases involving the affirmative defences in some US states, including the five being analysed here.

Just as there is very limited academic research into the use of s 45 in E&W, with no quantitative data on its use currently in circulation, data on the use of the affirmative defences in each of the five states is not forthcoming. As is the case in E&W, this makes it increasingly difficult to assess how the statutory protections are working in practice. Anecdotal evidence, case studies and research[645] suggests that victims of human trafficking who commit offences continue to take plea deals in the US.[646] Chrystul Kizer, a victim of child sexual exploitation from Wisconsin, was offered a plea deal where, if she pleaded guilty to her trafficker's death, she would be charged with felony murder and armed robbery and sentenced to 43 years in prison. She refused the deal and maintained that she acted out of self-defence.[647] In a case study

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[644] For discussion of the use of impermissibly coercive incentives or incentives that overbear the will of the defendant see Johnson, *2023 Plea Bargain* (n 643), 15.

[645] Jessica A Pingleton, 'Finding Safe Harbor: Eliminating the Gap in Colorado's Human Trafficking Laws' (2016) 87 University of Colorado Law Review 257, 293.

[646] See also subheading 3.4 for further discussion.

[647] Chrystul Kizer's case is discussed below in subheading 3.5. See also Asia Ewart, 'Chrystul Kizer Was Freed on Bail Thanks to the Chicago Community Bond Fund' (Refinery29, 23 June 2020) <https://www.refinery29.com/en-us/2020/06/9877014/chrystul-kizer-out-bail-chicago-community-bond-fund> accessed 17 March 2023.

provided by San Francisco Public Defender's Office, a survivor of human trafficking was lured into prostitution at the age of 17 after being promised safety, security and a fancy lifestyle by a man 20 years older than her. She was in and out of trouble with the law for misdemeanour prostitution offences where she would be repeatedly arrested, booked, charged, and then take a plea deal.[648] The true scale of this issue is currently unknown and warrants further research beyond the scope of this thesis.

2. Modern Slavery in the United States

The *Victims of Trafficking and Violence Protection Act of 2000* (TVPA)[649] was the first comprehensive federal law to address trafficking in persons in the US, with a particular focus on the international dimension of the phenomenon. Reinforcing the Trafficking Protocol, the bipartisan law established a three-pronged approach to combat human trafficking, the '3P' paradigm: Prosecution. Protection. Prevention. The TVPA was the first piece of legislation to officially criminalise human trafficking in the US. Since its initial passage, the Act has been reauthorized several times through the Trafficking Victims Protection Reauthorization Act (TVPRA): in 2003, 2005, 2008, 2013 and 2017/ 18 with the next scheduled for 2021. The TVPA primarily focused on international human trafficking, whereas the TVPRAs that followed offered greater protections for US citizens. Furthermore, the reauthorizations enacted new human trafficking crimes, enhanced victim support and services, and strengthened the role of the Trafficking in Persons Office within the State Department.

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[648] See Minouche Kandel, Kyoko Peterson and Racheal Chambers, *San Francisco Mayor's Task Force on Anti-human Trafficking: Human Trafficking in San Francisco: 2017 Data* (City and County of San Francisco Department on the Status of Women 2019) 81.

[649] Often referred to as the Trafficking Victims Protection Act (TVPA).

In the US, the general and permanent laws of the country are consolidated in the United States Code; the provisions in the TVPA and subsequent TVPRAs are contained therein. Title 18 of the Code, *Crimes and Criminal Procedure,* comprises the prohibitions on human trafficking and slavery. *Chapter 77 – Peonage, Slavery, and Trafficking in Persons*, as amended to include contemporary forms of modern slavery via the TVPRAs, addresses the prosecution of traffickers/ exploiters. It does so by encompassing myriad offences including, *inter alia*, 'debt servitude' or peonage; involuntary servitude; forced labour; labour trafficking; sex trafficking of children; and sex trafficking by force, fraud or coercion.[650] Additionally, *Chapter 78 – Trafficking Victims Protection* of Title 22 of the Code provides for government agencies, funding, and assistance and procedures intended to protect victims and prevent trafficking.

Additional legislation, including the *Preventing Sex Trafficking and Strengthening Families Act of 2014* and the *Justice for Victims of Trafficking Act of 2015* (JVTA)*,* was also passed in order to improve the US response to human trafficking. The JVTA, in particular, contains several key amendments that strengthen victim services, including establishing criminal liability for buyers of commercial sex from victims of trafficking. Although both pieces of law focus heavily on anti-sex trafficking measures. As discussed in previous chapters, the early drafting stages of the international anti-trafficking law were undeniably devoid of the perspectives of victims and victim advocates alike. This too was the case with the US law enacted in the same year. As a result, the TVPA failed to adequately address specific issues faced by human trafficking victims. In particular, the US law, like the Trafficking Protocol, neglected to appreciate the risk of criminalisation faced by victims. Indeed, assisting victims

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[650] 18 USC § 1581 – § 1591 (2000).

as opposed to prosecuting them is acknowledged as a 'rather new concept in the realm of domestic human trafficking [in the US]'.[651] Although federal law fails to protect victims from legal consequences, the emerging international norm on non-punishment has slowly begun to be incorporated into law by state legislatures.

2.1 The Emergence of Human Trafficking

In line with the wider international community, inclusive of E&W and the wider UK,[652] human trafficking and modern-day slavery began to emerge as a social problem in the US in the mid-1990s. The trafficking of citizens and migrants existed long before this, however, predominantly throughout the period of the trans-Atlantic slave trade and post-emancipation efforts to secure labour in times of hardship, for example during the World Wars.[653] In the US, in particular, need for workers during the First World War caused a heavy influx of Mexican nationals into the country, many of whom became stranded and penniless following the Great

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[651] Meghan Hillborn, 'How Oklahoma's' Human Trafficking Victim Defense Is Poised to Be the Boldest Stand against Human Trafficking in the Country' (2019) 54 TLR 457, 458.

[652] The four countries within the UK expressed mounting concerns about human trafficking and modern slavery towards the end of the twentieth century leading into the twenty-first. Britain, in particular, during the New Labour years of 1990 to 2008 saw great economic success underpinned by a more flexible job market than in other EU states. However, research suggested that this newfound prosperity was formed on the exploitation of a largely international migrant-based workforce on the ground. Fears of significant amounts of human trafficking and forms of contemporary slavery were rife; see Michael Parsons, 'Exploitation and human trafficking in the UK today: political debate, fictional representation and documentaries' (2012) XVII-2 Revue Française de Civilisation Britannique 181. In addition to this, the Home Office funded the first major study on human trafficking for the purposes of sexual exploitation in the UK, published in 2000, in response to the emergence of trafficking as an international policy concern; see Liz Kelly and Linda Regan, 'Stopping Traffic: Exploring the Extent of, and responses to, Trafficking in Women for Sexual Exploitation in the UK' in Carole F Willis (ed), Police Research Series Paper 125 (Home Office 2000).

[653] See discussion in Chapter 1.

Depression; this required Mexico to spend millions repatriating its people. Subsequently, when the Second World War brought a new demand for workers, Mexico and its nationals were reluctant to assist. This resulted in the introduction of the first guestworker programme, the agricultural-based Bracero Program, which allowed Mexican nationals temporary residence and employment in the US. Although the Bracero Program benefitted over 200,000 workers and offered a partial solution to the problem of illegal entry at the US-Mexico border, abuse of the programme was widespread often violating workers' rights and leaving them vulnerable to exploitation.[654] Similar problems persisted with subsequent guestworker programmes which encouraged early anti-trafficking responses and, following pressure from the international community, the US began to address policies that created vulnerabilities to exploitation.

As with worldwide difficulties to measure the global prevalence of modern slavery phenomena, regional and state-specific estimates have been obscure. Like the UK, the US faces similar challenges defining and estimating the prevalence of different forms of modern slavery; this is compounded by the fact that cases often appear as domestic abuse or other crimes and are recorded as such. Despite this, the Walk Free Foundation's most recent 2018 Global Slavery Index suggests that approximately 403,000 people live in modern slavery in the US.[655] This estimation includes individuals in forced labour, those who have been trafficked (including trafficking for labour exploitation, sexual exploitation, and slavery), and those in slavery and slavery-like practices (including forced marriage). The figure, whilst inclusive of victims who

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[654] See James F Creagan, 'Public Law 78: A Tangle of Domestic and International Relations' (2018) 7 Journal of Inter-American Studies 541. The article discusses the formalisation of the 'Bracero Program' which brought millions of Mexican workers to the US and has been reconsidered during recent US immigration policy debates.

[655] Walk Free Foundation, 'The Global Slavery Index 2018' (The Minderoo Foundation 2018) 78.

may not have been ‘trafficked’ under US law, highlights an extensive problem with human trafficking in the country which is equally as difficult to depict.

In 2009, a comprehensive review of the literature on human trafficking *into* and *within* the US highlighted the challenges in producing reliable estimates and painted a harrowing picture of confusion and discrepancies surrounding human trafficking in the US.[656] The US Central Intelligence Agency reported in 1999 that approximately 45,000 to 50,000 women and children were trafficked *into* the US annually.[657] This estimation was reduced considerably following the passage of the TVPA to approximately 18,000 to 20,000 individuals trafficked *into* the US each year,[658] which was dropped further to between 14,500 and 17,500 in 2004.[659] Concerningly, these estimations failed to account for the number of US citizens exposed to human trafficking within the country itself and highlighted the pertinacity by the US to focus on trafficking as both a problem of prostitution and immigration. Indeed, human trafficking was frequently cited as being most prevalent in large metropolitan areas with high immigrant populations.[660] The latter estimations were widely cited by the US Department of State up until 2006 when the US Government Accountability Office questioned the methodological validity of the statistics.[661] Although the Department of State now acknowledges the difficulty in

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[656] Heather J Clawson and others, ‘Human Trafficking Within and Into The United States: A Review of the Literature’ (ASPE 2009) (emphasis added).

[657] US Central Intelligence Agency, ‘Global Trafficking in Women and Children: Assessing the Magnitude’ (1999); Amy O’Neill Richard, ‘International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime’ (Centre for the Study of Intelligence 1999) iii.

[658] US Department of State, *Trafficking in Persons Report* (2003) (emphasis added).

[659] US Department of State, *Trafficking in Persons Report* (2004) 23.

[660] Sangalis, ‘Elusive Empowerment’ (n 79) 409.

[661] US Government Accountability Office, *Human Trafficking: Better Data, Strategy, and Reporting Needed to Enhance US Antitrafficking Efforts Abroad* (2006) 12-14.

sourcing reliable statistics that reflect the true nature and scope of the problem, the 'ubiquitous victim statistics continue to provide a basis for the traditional narrative [that human trafficking is predominantly about men enslaving females for sex]'. [662]

In the US, the main source of human trafficking data comes from the National Human Trafficking Hotline (NHTH). Operated by Polaris, the NHTH receives tips about potential suspicions of human trafficking and modern slavery and connects victims/ survivors with protective services and support. Although the hotline statistics fail to represent the full scope of trafficking in the US,[663] the collated data produced by the non-government entity sheds some much-needed light on the situation in each state. Since 2007, the NHTH has identified 63,380 potential cases of trafficking,[664] the majority of which have been recorded as 'sex trafficking'. In 2019, the NHTH identified 22,326 trafficked individuals, but acknowledged that this figure is only a fraction of the actual problem.[665]

Despite the challenges in producing reliable estimates, traditional sources of criminal justice data also continue to be utilised, finding that the majority of cases of human trafficking involve sex trafficking, a problem which is most prevalent within domestic trafficking. Owens and others suggest that this reflects the prioritisation of sex trafficking by law enforcement and the

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[662] Samuel Vincent Jones, The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking' (2010) 4 Utah L Rev 1143, 1165.[663] The data is a record of reports made to the National Human Trafficking (NHTH), but it is acknowledged that many cases remain unreported.

[663] The data is a record of reports made to the National Human Trafficking (NHTH), but it is acknowledged that many cases remain unreported.

[664] The NHTH uses the word 'case' to represent distinct situations of human trafficking reported to the hotline. A case may involve one or more potential victims and can be reported through several mediums. The use of the word 'case' does not indicate law enforcement involvement in the situation.

[665] NHTH, *2019 Data Report: The U.S. National Human Trafficking Hotline* (Polaris 2019) 1.

under identification of labour trafficking.[666] Furthermore, distinguishing cases of sex trafficking from that of prostitution can prove particularly problematic for police officers in the US without evidence of force, fraud or coercion.[667] The hidden nature of human trafficking and the reluctance by victims to seek help or report their victimisation to the authorities additionally compounds these identification and monitoring challenges.

2.2 The Nature of Human Trafficking

Human trafficking in the US, as with all countries, is characteristic of unique cultural and structural factors that create specific vulnerabilities to exploitation. Sharing boundaries with two other countries in North America: Canada and Mexico, makes cross-border migration a further factor as illicit migration and smuggling practices increase vulnerability to trafficking. The NHTH has reported that recent migration/ relocation is the main risk factor for human trafficking.[668] The US is classified by the TIP as a source, transit and destination country for sex and labour trafficking. Citizens are victimised within domestic borders and oftentimes their own communities, non-citizens are victimised as they seek work and greater opportunities, and migrants are victimised as they are transported through the country. Forms of trafficking that are recognised by the NHTH include: sex trafficking, labour trafficking, and unspecified or both, with the former making up the majority of cases year in, year-out.

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[666] C Owens and others, 'Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States' (Department of Justice, National Institute of Justice 2014).

[667] A Farrell and S Cronin, 'Policing Prostitution in an era of Human Trafficking Enforcement' (2015) 64(4) CL&SC 211.

[668] NHTH, *2018 Statistics from the National Human Trafficking Hotline* (Polaris 2018).

Reported sex trafficking cases have occurred across a myriad of venues, including commercial-front businesses such as spas, massage parlours, bars and strip clubs, hotels/ motels, and residential brothels. Sex trafficking also has links to the pornography and online advertisement industry, with both featuring in the NHTH top reported known industries for incidents of sex trafficking in 2019.[669] The TIP report has annually reported on the populations that are particularly vulnerable to sex trafficking in the US, identifying, amongst others, the homeless, migrant labourers, those with disabilities, and members of the LGBTQ+ community.

Disadvantaged youths including runaways, those in child welfare and foster systems, and those involved in the juvenile justice system are also at increased risk of being exposed to sexual exploitation.[670] Poverty, substance abuse, isolation, mental health, and a history of sexual abuse have been identified as risk factors.[671] Despite a growing awareness of young people at-risk of sexual exploitation, particularly domestic sex trafficking, little is known about the extent of its prevalence in the US.[672] Whilst much of what is known about victims stems from the population identified by service providers and authorities, and therefore is by no way generalisable of the wider population of victims/ survivors who remain unidentified, research suggests that those most vulnerable to sex trafficking in the US are women and young girls.[673] Indeed, the notion that human (sex) trafficking is a gendered phenomenon whose victims are

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[669] NHTH, *2019 Data Report: The U.S. National Human Trafficking Hotline* (Polaris 2019) 4.

[670] US Department of State, *Trafficking in Persons Report* (2016).

[671] N McLain and S Garrity, 'Sex Trafficking and the Exploitation of Adolescents' (2011) 40 JOGNN 243.

[672] Robin M Hartinger-Saunders, Alex R Trouteaud and Jodien Matos Johnson, 'Mandated reporters' perceptions of and encounters with domestic minor sex trafficking of adolescent females in the United States' (2017) 87(3) Am J Orthopsychiatry 195, 195-196.

[673] NHTH, *2019 Data Report: The U.S. National Human Trafficking Hotline* (Polaris 2019).

predominantly women is widely accepted.[674] NHTH statistics do, however, indicate growing numbers of males, 'gender minorities' and 'minors' being identified as victims of sex trafficking.[675]

As with sex trafficking, labour trafficking occurs across a range of industries including domestic work, agriculture, hospitality, and construction. Notably, 'illicit activities' such as peddling and begging, drug smuggling and distribution, and human trafficking were also reported as being one of the top three identified sex and labour trafficking types in the 2019 NHTH statistics.[676] Although labour exploitation remains prevalent in the US, the prioritisation of sex trafficking over labour trafficking is reflected in much of the human trafficking literature coming from the US, which has a propensity to focus on sexual exploitation of females. In that respect research and data on labour trafficking, including forced criminality beyond prostitution, in the US is significantly restricted.

2.3 The Evolution of Anti-Human Trafficking Policy

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[674] See Tsachi Keren-Paz, *Sex Trafficking: A Private Law Response* (Routledge 2013) 12; ICAT, 'The Gender Dimensions of Human Trafficking' (Issue Brief No 4, 2017).

[675] NHTH, 'Sex Trafficing' <https://humantraffickinghotline.org/type-trafficking/sex-trafficking> accessed 23 September 2022. Between 2015 and 2019, the number of male victims/survivors of sex trafficking increased from 167 to 527 cases. Within the same period, the number of 'gender minorities' identified as victims/survivors of sex trafficking rose from 37 to 82 cases. The number of 'minors' identified as victims/survivors increased from 1,419 to 2,154 cases. It is worth noting that 'cases' may involve multiple victims.

[676] The NHTH does not explicitly define 'illicit activities', however the given examples have been used to illustrate the trafficking profile of the US in the 2020 TIP Report. See US Department of State, *Trafficking in Persons Report* (2020) 523.

Human trafficking challenges the very core of the historic collective identity of the US, described by Morehouse as ‘a mix of the pioneering fight for freedom and the idea that immigrants form the fabric of US society’.[677] As such, anti-human trafficking policy is of high priority on the political agenda and is discussed as both an immigration issue and a moral issue against prostitution: ‘there is a puritan, moral anti-prostitution signature to the US Government’s approach’.[678] The prioritisation of freedom is evident throughout anti-trafficking discourse and ‘securing freedom for all’ is still frequently expressed as being at the heart of anti-trafficking policy in the US.[679] The historical background of anti-trafficking policy and its close links to the principles of freedom and equality are therefore extremely relevant.

The main piece of anti-trafficking legislation in the US, the TVPA, directly references the country’s founding policy framework, the Declaration of Independence, in its text and strengthens the key principles of right to life, liberty, and the pursuit of happiness.[680] Furthermore, the TVPA reiterates the constitutional stance on institutional slavery, pursuant to the Thirteenth Amendment of the US Constitution, which abolished slavery and involuntary servitude.[681] The relevance to combating human trafficking is expressed in terms of the similar abhorrence between ‘current practices of sexual slavery and trafficking of women and children’

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[677] Christal Morehouse, ‘Combatting Human Trafficking: Policy Gaps and Hidden Political Agendas in the USA and Germany’ (VS Research 2009) 19.

[678] ibid.

[679] John Cotton Richmond, ‘Prevalence Reduction Innovation Forum’ (Webinar 2020). See also Bill Wolf quoting Donald J Trump during the same Webinar (attended by this author).

[680] Victims of Trafficking and Violence Protection Act of 2000 (US) Sec 102(22). Quoting US Congress, Declaration of Independence of the Thirteen Colonies (4 July 1776) para 2.

[681] United States Constitution 1865, 13th Amendment.

and the 'principles upon which the United States was founded'.[682] However, despite establishing minimum standards of human rights and providing greater protection from slavery, in reality the Declaration and Third Amendment failed to address the main barriers to freedom – ethnic and gender discrimination.

This failure to create civil equality and the gaps that have persisted throughout the US is reflected in the country's anti-trafficking policy. As Morehouse explains: '[t]he long lasting struggle for ethnic-independent and gender-independent equality is an issue closely tied to combating human trafficking and a struggle which has still to be fully won in the United States'.[683] The US Government has dedicated generous amounts of political investment, resources and exposure to tackling human trafficking at a domestic and global level since the start of the twenty-first century. Yet this comes as a stark contrast to the relatively low number of identified cases of human trafficking, particularly sex trafficking, in the US. The 2004 TIP Report estimated that 14,500 to 17,500 people are trafficked *into* the US each year.[684] Utilising these figures, between 2007 and 2019 the total number of people trafficked into the US would have been between 188,500 and 227,500. Notwithstanding the fact that these figures fail to account for individuals trafficked *within* US borders, the total number of victims identified within this period, inclusive of those trafficked into and within the US, stands at 134,332.[685] Compare this with estimates of 100,000 to 150,000 children and adults trafficked within the

[682] Victims of Trafficking and Violence Protection Act of 2000 (US) Sec 102(22).
[683] Christal Morehouse, 'Combatting Human Trafficking' (n 679) 106.
[684] US Department of State, *Trafficking in Persons Report, 2004* (2004) 23.
[685] Polaris, 'Hotline Statistics' (2019) <https://humantraffickinghotline.org/states> accessed 23 September 2022.

US every year[686] and the numbers are strikingly low. Arguably, the country's anti-human trafficking framework exists under the guise of hidden agendas and as such is littered with policy gaps. Consequently, the anti-trafficking discourse set by the US stands in strong opposition to the lived reality of victims of human trafficking. This is particularly evident in the context of (non)criminalisation of victims.

A brief overview of international human trafficking developments offers a reference point for US policy in this arena. At the international level, *inter alia*, forced labour, sexual exploitation, removal of organs, criminal activities, forced marriage and illicit adoption have been identified as forms of exploitation encompassed by human trafficking treaties.[687] However, the evolution of the definition of human trafficking was not a straightforward one. Whilst the link between human trafficking and prostitution developed in a linear fashion, with the dominance of preventing prostitution being a key feature in designing anti-trafficking policy and legislation, recognition of wider forms of exploitation was less forthcoming. Until the twenty-first century, human trafficking treaties were limited to prostitution and preventing women from leading immoral lives:[688] the 1921, 1933, and 1949 Human Trafficking Conventions were all prostitution-specific.[689] In 2000, this trajectory changed with the introduction of the Trafficking Protocol which expanded the scope of human trafficking to include 'the

[686] EJ Schauer and EM Wheaton, 'Sex Trafficking into the United States: A Literature Review' (2006) 31(1) Crim Justice Rev 1; A Siskin and LS Wyler, 'Trafficking in Persons: U.S. Policy and Issues for Congress' (Congressional Research Service 2013).
[687] Trafficking Protocol (n 1), Art 3(a).
[688] Statues at Large, 'International Agreement for the Suppression of the "White Slave Traffic"' (1904); Treaties and International Agreements Registered with the Secretariat of the United Nations, Art 2.
[689] See discussion in Chapter 1.

exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs'.[690]

The theoretical concepts of human trafficking are closely linked to its international definition and exploitation parameters. In human trafficking literature, the theory is dominated by three typologies: (i) a by-product of forced labour; (ii) a symptom of migration facilitated by organised crime; and (iii) a result of prostitution.[691] The persistent nexus between human trafficking and wider political agendas, encompassing prostitution, (im)migration, and border control, has resulted in several debilitating preoccupations under the trafficking lens. The US in particular has developed its anti-trafficking policy in close proximity to related policy concerning anti-prostitution and immigration. By conceptualising human trafficking as a subset of these related issues, a cross-section of victims have been exposed to gaps in the anti-trafficking policy. Notably, those trafficked and forced to engage in commercial sex work and undocumented migrants victimised by human trafficking who are criminalised for prostitution and illegal entry, respectively.

2.4 The Anti-Prostitution Agenda

The link between human trafficking and prostitution has amassed widespread Anglo-American support; the transposition of the anti-prostitution agenda into the anti-human trafficking movement is evident throughout legislation and policy. Following historical precedent, as previously discussed, the focal point of human trafficking has been sexual exploitation, often

[690] Trafficking Protocol (n 1), Art 3(a).

[691] Morehouse, Combatting Human Trafficking' (n 679) 75.

referred to as 'sexual slavery' or 'forced prostitution'. This stems from the early political issue of 'white slavery' in the 1800s, defined by criminal law as the forced transfer of women across (inter)national borders for the purposes of prostitution which intrinsically linked it to prostitution. As Outshoorn notes, this basic definition went on to characterise modern international trafficking conventions and treaties, culminating in the 1949 UN International Convention for the Suppression of the Traffic in Women.[692] The modern anti-trafficking campaign is demarcated by ideological lines on views of prostitution that revolve around the notion of 'consent'.[693] On one side is those who define prostitution as sexual domination, the essence of gendered oppression and inequality, whereby prostitution is sexual slavery and all forms of recruitment and transportation for prostitution constitutes 'trafficking' ,[694] thus the abolition of prostitution provides a strong defence against trafficking. On the other side is those who maintain that prostitution is work that can be voluntarily executed, that not all sex workers migrating are victims of forced prostitution,[695] and only those who are coerced should be defined as 'trafficked'. In this sense, only by decriminalising, regulating and normalising sex work and tackling trafficking as a separate issue can sex workers and victims of trafficking be fully recognised and protected as rights-bearing individuals.

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[692] Joyce Outshoorn (ed), *The Politics of Prostitution* (CUP 2009) 9.

[693] See generally, Doezema, 'Loose Women' (n 367).

[694] See for example, Kathleen Barry, *Female Sexual Slavery* (New York University Press 1979); Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart Publishing 2008); and Michelle Madden Dempsey, 'Sex, Trafficking and Criminalization: In Defense of Feminist Abolitionism' (2010) 158 U Pa L Rev 1729.

[695] See for example, Shannon Bell, *Reading, Writing and Rewriting the Prostitute Body* (Indiana University Press 1994); and Wendy Chapkis, *Live sex Acts: Performing Erotic Labor* (Routledge 1997).

The longstanding social issue of prostitution continues to divide opinion and 'inevitably impinges upon broader preoccupations with age, sex, gender, and the status of prostitution more generally'.[696] For Quirk, this has made human trafficking a 'powerful lodestone' for a myriad of interests, orientations and agendas across the globe.[697] More specifically, the US views human trafficking as closely linked with prostitution. The Government's firm anti-prostitution stance and outlook on human trafficking was substantiated in its 2002 National Security Presidential Directive in which it denied the issuance of government funding to foreign organisations that support the legalisation of prostitution.[698] The rationale being that legalised prostitution results in an increase in demand for women and children into sexual slavery.[699] A view which parallels that of Kathleen Barry and other feminist writers of the anti-prostitution/ neo-abolitionist movement.[700] Indeed, sexual exploitation by way of forced prostitution is estimated to be the most prevalent form of human trafficking in the US, with 72 per-cent of cases uncovered by the NHTH being classed as sex trafficking (and more as sex and labour trafficking).[701] It should be noted here, however, that the concept of trafficking itself, and in particular the classification of sex trafficking has been heavily criticised for failing to acknowledge that prostitution is sex work. Instead, sex trafficking should be regarded as

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[696] Joel Quirk, 'Trafficked into Slavery' (2007) 6 J Hum Rights 181, 181.

[697] ibid.

[698] US Department of State, *The Link Between Prostitution and Sex Trafficking* (2002) 1.

[699] Research has shown that 'on average, countries where prostitution is legal experience larger reported human trafficking inflows', see Seo-Young Cho and Eric Neumayer, 'Does Legalized Prostitution Increase Human Trafficking?' (2013) 41 World Development 67,

[700] See Kathleen Barry, *Female Sexual Slavery* (New York University Press 1979); J Raymond and D Hughes, *Sex Trafficking of Women in the United States* (US Department of Justice 2001); M Farley, 'Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized' (2004) 10 Violence Against Women 1087.

[701] Polaris, '2019 Data Report' (2019) <https://humantraffickinghotline.org/sites/default/files/Polaris-2019-US-National-Human-Trafficking-Hotline-Data-Report.pdf> accessed 23 September 2022.

forced labour, addressed as such and disconnected from prostitution so as to de-gender the practice and avoid conflation.[702] Whilst human trafficking and prostitution may comprise related issues, adversaries continue to rival the firm anti-prostitution/ anti-trafficking rationale.

Recent empirical research suggests that trafficking for the purpose of sexual exploitation constitutes only a small portion of human trafficking worldwide.[703] Differentiating between forced sex work and voluntary sex work, Steinfatt notes that the vast majority of sex work in modern industrialised societies is regarded as being the latter. Following theories proposed by liberal feminists that some women autonomously choose sex work, support is provided for the removal of legal and social burdens on that choice. Despite this, the current anti-prostitution/ anti-trafficking movement both in the US and the UK focuses primarily on instances of abuse and violence against women. Heavily influenced by radical feminist thinking, the idea that free choice is possible is precluded and all activities within the commercial sex industry are shoehorned into the category of broader systemic sexual exploitation of women by men.[704] Terms such as *prostitution*, *sex work*, *commercial sex*, and *sex trafficking* are used interchangeably, muddying the boundaries of voluntary actions and coercive exploitation. When one considers the problematic nature of 'consent' and 'choice', however, the concept of 'coerced consent' – the notion that one can be subtly and/ or violently manipulated into engaging in sexual activity which may, on the face of it, appear to be undertaken voluntarily

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[702] Jo Doezma, 'Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy', in Kamala Kemoadoo and Jo Doezma (eds), *Global Sex Workers: Rights, Resistance, and Redefinition* (Routledge 1998) 34.

[703] Thomas M Steinfatt, 'Empirical Research on Sex Work and Human Trafficking in SE Asia and a Critique of the Methodologies for Obtaining Estimates of Human Trafficking Numbers' in Jennifer Bryson Clark and Steve J Shone (eds), *The SAGE Handbook of Human Trafficking and Modern Day Slavery* (SAGE 2019) 59.

[704] Dorothy McBride Stetson, 'The invisible issue: prostitution and trafficking of women and girls in the United States' in Joyce Outshoorn (ed) *The Politics of Prostitution* (CUP 2009) 245.

and with consent – further blurs the binary between voluntary actions and coercive exploitation.[705]

Those who support the anti-prostitution movement contend that sex work leads to violence against women, yet simultaneously fail to appreciate the implications of ignoring evidence that opposes their agenda. However, as Doezema argues, cherry-picking cases of abuse of women in sex work provides no clear evidence that violence against sex workers is more recurrent than, for example, domestic abuse or any other form of abuse against women outside of sex work.[706] Furthermore, a lack of evidence of the proportion of sex workers who are mistreated, against those not mistreated, affords no opportunity for comparison. For these reasons, Steinfatt maintains that '[anti-prostitution supporters'] contentions that sex work leads to violence against women are simply unsupported assertions'.[707]

Sex work in the US, regardless of whether it is forced or voluntary, is stigmatised as an immoral, ungodly profession in which violence is rife and sex-workers are denied any form of legal rights. The country is renowned for its firm stance on prostitution, employing a prohibitionist model which criminalises all aspects of sex work, despite proliferating arguments for treating sex work as a legitimate profession.[708] Arguably, by linking human trafficking to prostitution the US Government has further stigmatised and vilified voluntary sex-workers in a bid to pursue its prohibitionist, anti-prostitution agenda. This in turn has allowed for the

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[705] Jenny Pearce, 'A Social Model of Abused Consent' in M Melrose and J Pearce (eds), *Critical Perspectives on Child Sexual Exploitation and Related Trafficking* Palgrave Macmillan 2013) 52–68.

[706] Doezema, 'Loose Women' (n 367).

[707] Steinfatt, 'Empirical Research' (n 705) 65.

[708] See for example, Jo Doezma, 'Forced to Choose' (n 704); Susan E Thomson, 'Prostitution – A Choice Ignored (2000) 21 Women's Rts L Rep 217.

creation of anti-human trafficking policy within an anti-prostitution framework which fails to recognise the true complexity of human trafficking and exposes victims to further victimisation at the hands of the state. Although a growing number of academics have challenged the anti-prostitution paradigm, their criticisms have failed to gain traction with American legislators and the current prohibitionist model employed by the US continues to unjustly criminalise both consenting voluntary sex workers and victims of sex trafficking. Although, as mentioned above, consent can be problematised when considering whether the consent has been coerced; and factoring in the relevance of socio-economic factors, one might postulate whether is it really a voluntary choice if the only other option is destitution.

2.5 Irregular Immigration and Organised Crime

In the early 2000s, the high number of detected human trafficking victims characterised as undocumented immigrants resulted in the international categorisation of human trafficking as a subset of irregular migration policy. Organised crime networks were understood to be facilitating a proportion of irregular/ undocumented arrivals into states, some of which could be defined as victims of human trafficking.[709] The US, in particular, chose to focus exclusively on this subset, developing its anti-trafficking framework around international victims who were victimised during, or shortly after, the immigration process. Notably, the country's early estimates of human trafficking focused solely on international victims – of which immigrant victims were categorised – whilst neglecting those who had been trafficked within its own borders. Subsequently, early funding was only issued to service-providers who focused on

[709] Europol, *Crime Assessment: Trafficking of human beings into the European Union* (2001) 45.

international victims, who were often misidentified as irregular or undocumented migrants and criminalised for such.

The link between human trafficking and international migration cannot be disputed. Migrants are often led down various paths, varying in their degrees of legality, in pursuit of a better life for themselves or their family. The opportunity to exploit these individuals is great and debt bondage serves as a strong premise for perpetrators to exploit migrants through forced labour and sexual exploitation. Immigrants often lack knowledge of foreign policy, are unfamiliar with the language of their destination country and are fearful of authorities, thus less likely to contact law enforcement and seek help, making them prime targets for exploiters. However, by focusing on the link between human trafficking and organised crime networks (i.e., smugglers), the US anti-trafficking framework began to significantly blur the lines between the two.

Human Trafficking has been referred to as a transnational criminal enterprise controlled by organised crime at both an international and domestic level. Indeed, the UNODC, US State Department and the UK Government recognise human trafficking as the third most profitable business of organised crime which involves the enslavement of tens of millions of people, generates multibillion-dollar profits, and provides a serious threat to national and global security.[710] Whilst the role of profit associated with organised crime is only briefly acknowledged by the UN,[711] the commercial nature of human trafficking plays a significant

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[710] US Department of State, *Trafficking in Persons* (2003); Francis T Miko, 'Trafficking in Women and Children: The U.S. and international response' (CRS Report for Congress, 24 June 2005) 2.

[711] See the Trafficking Protocol (n 1).

role in the anti-trafficking frameworks of the US. Notably, the commercial nature of the crime features prominently in defining human trafficking under the TVPA 2000.[712] Although this primarily relates to sex trafficking, the commercial nature of exploitation has been a deciding factor when distinguishing between smuggling and trafficking.

In the US, 'safe houses' are often established to harbour smuggled migrants along a smuggling route before they reach their destination. Human smuggling has been found to transform into cases of human trafficking within these safe houses. Determining whether human trafficking has occurred is dependent on US authorities' judgment of several factors including the commercial nature of what was 'extracted' from the smuggled persons during their time at the safe houses.[713] In *United States v Soto-Huarto (Texas)* smugglers brought newly-arrived illegal migrants across the US-Mexico border to trailer 'safe houses' where women were kept and forced to cook, clean, and submit to rapes at the hands of the smugglers. The women were held against their will until their 'debt' to the organisation, incurred from their smuggling fees, was repaid either by them or their families.[714] Ultimately, the commercial nature of the crimes that took place in the safe houses helped identify the case as one in which smuggling became trafficking. Seven defendants received sentences ranging from four months to over 23 years of incarceration, the longest sentence ever received under the TVPA at the time.

Although transnational organised crime has been described as 'a related issue that lies at the core of human trafficking' – a view which is widespread – numerous scholars criticise this

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[712] Victims of Trafficking and Violence Protection Act of 2000 (US) Sec 103.

[713] Morehouse, 'Combatting Human Trafficking' (n 679) 172.

[714] No 03-341 (SD Texas 2004).

perception. Finckenauer, in his analysis of the link between human trafficking, slavery and organised crime, concludes that 'the issue of organized crime involvement in human trafficking has been blown out of proportion, oversimplified, and under-researched'.[715] In particular, the focus by the US on *transnational* organised crime fails to acknowledge victims of domestic trafficking who do not fit this profile as well as victims who have been exploited by individuals or small groups with no, or limited, links to criminal networks. Importantly, irregular migrants form only part of the spectrum of those victimised by human trafficking. In recent years the US has acknowledged that legal immigrants, as well as its own nationals can also become victims of human trafficking. Despite this new progressive approach, migrant smuggling and human trafficking remain conflated concepts.

2.5.1 Migration, Smuggling and Trafficking

The inextricably linked nature of migration, smuggling and trafficking is well documented in modern slavery literature. Restrictive immigration policies and legislation, often a result of xenophobia, racism, and nationalism, render migrants vulnerable to mistreatment and exploitation whilst simultaneously driving the profits of smugglers and traffickers alike.[716] Government-imposed guest worker programs and tied visa systems further perpetuate smuggling and trafficking by subjecting migrants to manipulative and controlling behaviour at

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[715] James O Finckenauer, 'Human Trafficking, Modern Day Slavery and Organized Crime' in Jennifer Bryson Clark and Steve J Shone (eds), *The SAGE Handbook of Human Trafficking and Modern Day Slavery* (SAGE 2019) 229. See also Meredith Dank and others, *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities* (NCJRS 2014) 3; Chenda Keo and others, 'Human Trafficking and Moral Panic in Cambodia' (2014) 653(1) Ann Am Acad Pol Soc Sci 202, 204.

[716] Clark and Shone (2019) xxiv.

the hands of recruiters and employers who routinely abuse the systems. The US is notorious for imposing both and creating precarious environments for migrants.

Immigration is the touchstone of the US political debate and the US Government, particularly under Donald J. Trump, and is well known for pledging to take extraordinary steps to curb immigration. However, controversial border plans, such as the deportation of millions of migrants, temporary ban of Muslims, and the building of a border wall with Mexico, regularly dismiss humanitarian concerns entirely. These restrictive immigration policies leave migrants in countries and states where they are systematically exposed to, and vulnerable to, modern slavery and exploitation. The US-Mexico border restrictions, in particular, highlight this. Clark and Shone suggest that by building a wall and coercing Mexico to close the Mexico-Guatemala via the *Programa Frontera Sur* (Southern Border Plan), migrants were thrust into the palms of smugglers and traffickers, 'exposing them to kidnapping, extortion, ransom, and compelled labor for criminal activity'.[717]

Furthermore, the current H-2 visa system in the US which provides temporary labour across a range of industries, has been rigorously criticised for facilitating labour trafficking and bonded forms of labour. H-2 workers are often linked to a single employer and denied the power to change employers if mistreated. The system additionally fails to permit workers any pathway to permanent residency or citizenship leaving them vulnerable to exploitation. As Freedom Network USA highlights, this imbalance of power between worker and employer has resulted

[717] ibid xxv.

in numerous cases of forced labour and trafficking of guest workers.[718] Notable cases include, *Casilao et al v Hotelmacher LLC et al*[719] and *Chellen v John Pickle Co Inc*[720] in Oklahoma, and *Tanedo v E Baton Rouge Parich Sch Bd*[721] and *Doe v Penzato* in California.[722]

Although documented cases of human trafficking have exposed a close relation between trafficking and smuggling, the clear legal distinctions between the two are often not as straightforward in practice. As Quirk articulates, '(t)here is not one path for migrants and one path for victims of trafficking, but many overlapping paths with many overlapping destinations'.[723] In practice, the close proximity of anti-trafficking policy to that of immigration means that differentiating between the two is still not clear cut. The fact that human smuggling can still form part of the trafficking process, and the strong stance on immigration in the US means that victims are still frequently misidentified and criminalised. Voluntary migration, albeit on the basis of false pretences and/ or promises, raises challenging dilemmas *vis-à-vis* consent and the link between individual choices and adverse outcomes. Most victims of cross-border trafficking do not hold valid immigration papers. With an increasing number of states now penalising asylum seekers for irregular migration into a country of refuge, it is of little surprise that many victims of trafficking face punishment for being illegal immigrants.

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[718] Freedom Network USA, 'Human Trafficking and H-2 Temporary Workers' (2018) <https://freedomnetworkusa.org/app/uploads/2018/05/Temporary-Workers-H2-May2018.pdf> accessed 23 September 2022.

[719] 5:17-CV-00800 (WD Okla 2017).

[720] 446 F Supp 2d 1247 (ND Okla 2006).

[721] LA CV10-01172JAK, 2011 WL 7095434 (CD Cal 2011).

[722] C-10-05154 MEJ (ND Cal 2010).

[723] Quirk, 'Trafficked into Slavery' (n 698) 182.

3. Decriminalising Victims: Affirmative Defences

The UK Government's emphasis on criminal justice-based approaches to modern slavery and successful human trafficking and modern slavery prosecutions over the protection and recovery of victims is mirrored in the US. Both the UK and US Government's preference – and that of wider society – is reflected in large-scale sting operations and prosecutions of major trafficking enterprises.[724] In recent years, the US Government has begun to recognise the historical neglect of victims, their needs, rights and interests, with states following suit and shifting their attention, in part, towards providing justice for human trafficking victims. Despite this growing trend toward a more victim-centred approach to human trafficking and modern slavery, the intersection between the criminal justice system, sex trafficking and labour trafficking, frequently results in the characterisation and targeting of victims as criminals. Law enforcement officials place a great emphasis on arrests for low-level crimes, including immigration related offences, prostitution, and prostitution-related offences,[725] many of which are incidental offences committed by victims. It is well documented that despite wider

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[724] Sting operations in the UK: Ellena Cruse, 'County lines gangs: More than 700 arrested and £400k of drugs seized in UK-wide sting' (Evening Standard 18 October 2019) <https://www.standard.co.uk/news/uk/county-lines-operation-more-than-700-arrested-and-400k-of-drugs-seized-in-ukwide-sting-a4264661.html> accessed 23 September 2022. Sting operations in the US: Celine Castronuovo, '179 arrested in Ohio anti-human trafficking sting "Operation Autumn Hop"' (The Hill 27 October 2020) <https://thehill.com/homenews/state-watch/522941-179-arrested-in-ohio-anti-human-trafficking-sting-operation-autumn-hope> accessed 23 September 2022. Trafficking prosecutions in the UK: 'CPS secures convictions in largest ever modern slavery prosecution' (CPS 5 July 2019) <https://www.cps.gov.uk/west-midlands/news/secures-convictions-largest-ever-modern-slavery-prosecution> accessed 23 September 2022. Trafficking prosecutions in the US: 'Leader of sex ring gets more than 33 years in prison for trafficking minors' (US Department of Justice 10 November 2020) <https://www.justice.gov/usao-sdtx/pr/leader-sex-ring-gets-more-33-years-prison-trafficking-minors> accessed 23 September 2022.

[725] Suzannah Phillips and others, 'Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims' (University of New York School of Law, International Women's Human Rights Clinic 2014) 1-2.

awareness of the significance of victim protection, US states continue to rank and privilege some types of victims over others.[726] In particular, and paralleling the approach in E&W, the perceived 'ideal' victims often take precedent over 'real' victims, with the former being viewed as 'innocent' as opposed to 'irresponsible', 'culpable' and 'guilty.[727] Indeed, state judges often view (sex trafficking) victims as being worthy of punishment.[728]

In 2000, whilst heading negotiations over the new anti-trafficking strategy under the Trafficking Protocol, the US simultaneously enacted its own comprehensive domestic anti-trafficking legislation, the Victims of Trafficking Protection Act 2000 (TVPA).[729] During this period victim-rights advocates endeavoured to ensure that strong protective provisions were included in the Protocol and the TVPA. Both the Human Rights Caucus, a grouping of non-governmental organisations working in the fields of human rights, anti-trafficking and pro-sex workers' rights, and a second bloc of non-governmental organisations who viewed prostitution as akin to slavery, namely the Coalition Against Trafficking in Persons (CATW) and the Internationalist Abolition Federation (IAF), fought for the inclusion of an express provision protecting trafficking victims from prosecution for 'offenses committed as a result of their having been trafficked – for example, illegal immigration and prostitution'.[730] Notwithstanding

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[726] Widney Brown, 'A Human Rights Approach to the Rehabilitation and Reintegration into Society of Trafficked Victims' (21st Century Slavery: The Human Rights Dimension to Trafficking in Human Beings Conference, Rome 2002) <https://www.hrw.org/news/2002/05/13/human-rights-approach-rehabilitation-and-reintegration-society-trafficked-victims> accessed 23 September 2022.

[727] See Chapter 2 for discussion.

[728] Peters, 'Reconsidering Federal' (n 332) 552; State Justice Institute, 'A Guide to Human Trafficking for State Courts' (2014) 90-91, 144.

[729] 22 USC 78, §§ 7101–12 (2006).

[730] Chuang, 'Rescuing Trafficking' (n 20) 1677. See also Melissa Ditmore and Marjan Wijers, 'The Negotiations on the UN Protocol on Trafficking in Persons' (2003) 4 NEMESIS 79, 80.

these efforts, both pieces of legislation failed to provide hard obligations for the non-criminalisation of trafficking victims. Instead, the Protocol advised State Parties to consider protective measures 'in appropriate cases and to the extent possible under… domestic law'.[731]

Similarly the TVPA omitted to engage with the criminal liability of victim offenders despite acknowledging that victims are routinely 'punished more harshly than the traffickers' and 'should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked'.[732] The Act does, however, mandate that '[v]ictims of severe forms of trafficking, while in the custody of Federal Government… shall not be detained in facilities inappropriate to their status as crime victims',[733] a provision which to some suggests adherence to the principle of non-criminalisation.[734] It is contested here that this section merely stipulates that victims should be housed in secure, non-prison-like facilities separate from 'normal' criminal detainees pending their imminent prosecution and, as such, offers no obligation upon states not to criminalise victims. In 2006, however, the Organization of American States highlighted the obligation of its Member States to ensure that trafficking victims were not prosecuted for participating in illegal activities if they were the direct results of their having been a victim of such trafficking.[735] The Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Trafficking in

[731] Trafficking Protocol, Art 6(1).

[732] 22 USC 78, § 7101(b)(17) and (19)

[733] 22 USC 78, § 7105(c)(1)(A).

[734] Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor* (2007) 36 Denv J Intl L & Poly 9, 22; Amanda Peters, 'Disparate Protections for American Human Trafficking Victims' (2013) 61 Clev St L Rev 1, 27; Peters, 'Reconsidering Federal' (n 332) 569.

[735] Organization of American States, 'Conclusions and Recommendations of the First Meeting of National Authorities on Trafficking in Persons' (26 April 2006) Topic IV, para 7.

Persons further provide that states have an obligation to protect and assist migrants who are victims of trafficking, taking into account the gender perspective, the best interests of the child and the non-criminalisation of migrants who are victims of trafficking in persons.[736] The non-punishment principle falls within the protections afforded to trafficked persons in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,[737] the American Convention on Human Rights[738] and the American Declaration of the Rights and Duties of Man.[739]

On 9 January 2019, President Donald J Trump affixed his signature to the final Bill in a legislative package which represented the most recent reauthorisation of the TVPA. The TVPRA of 2017 encompasses four Bills, including the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, the Abolish Human Trafficking Act of 2017, the Trafficking Victims Protection Act of 2017, and the Trafficking Victims Protection Reauthorization Act of 2017. It is within this penultimate Act that the law discourages law enforcement officials from 'arresting, charging, or prosecuting [victims of sex or labor trafficking] for any offence that is the direct result of their victimization'.[740] In particular, the Act 'Implement[s] a victim-centred approach to human trafficking' by prioritising awarding grants to law enforcement operations who aim to use the grant to 'take affirmative measures to

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[736] Inter-American Commission on Human Rights resolution 4/19 of 7 December 2019, principle 20.

[737] Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994; entered into force 3 February 1995) Arts 2, 3 and 7(g).

[738] Organization of American States, American Convention on Human Rights (adopted 22 November 1969; entered into force 18 July 1978) Art 6.

[739] Organization of American States, American Declaration of the Rights and Duties of Man (adopted 2 May 1948) Art 1.

[740] TVPA 2017, s 302(2)(D)(i)(III), s 501(b)(1)(C)(i), s 502(1)(C)(iv)(II) and s 502(2)(f)(2)(B).

avoid arresting, charging, or prosecuting victims'.[741] Additionally, the Act 'Encourag[es] a victim-centred approach to training' by ordering the Attorney General and Secretary of Homeland Security to develop an advanced training curriculum that provides guidance about victim identification and explains that victims often engage in criminal activities and that affirmative measures should be taken to avoid criminalising such individuals.[742]

Evidently federal law acknowledges the need for a victim-centred approach to human trafficking but its consistent failure to incorporate direct protections from criminalisation into statute, has left it up to domestic legislatures to fill the gaps. In theory, many US states incorporate all-encompassing, victim-centric protective frameworks for victims of human trafficking inclusive of three components: affirmative defences, safe harbour laws, and vacatur statutes. Scholars believe that incorporating these measures into anti-human trafficking frameworks will 'create a holistic approach to human trafficking, which will help states alleviate the problem'.[743] It has, however, been argued that in practice 'a lot of states "talk the talk" but [do] not "walk the walk"'.[744] The following analysis looks specifically at one limb of the protective framework – the affirmative defence – within five states. The affirmative defences have been chosen as the point of focus here as the overarching theme of this thesis is non-criminalisation of modern slavery victims. Vacature statutes can only offer support to victims subsequent to their criminalisation and, although safe harbour laws grant immunity from prosecution to some victims, this protection from criminalisation is extremely limited in

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[741] TVPA 2017, s 302(2)(D)(i)(III).

[742] TVPA 2017, s 501(b)(1)(C)(i).

[743] Jessica Aycock, 'Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims' [2019] 5(1) Crim L Practitioner 5, 7.

[744] Zornosa, 'Protecting Human' (n 642) 179.

nature. Additionally, the framing of the state affirmative defences can be comparatively analysed with the framing of the MSA 2015, s 45, whereas no comparative safe harbour or vacature statutes exist in E&W law.

3.1 Theoretical Underpinnings

As Derham stipulates, US states have taken several differing approaches when creating affirmative defences: '(1) states that limit the defense to situations involving duress; (2) states which restrict the defense to prostitution or related offenses; and, (3) states that extend the defense broadly'.[745] The first approach is understandable given the underlying rationale of the non-punishment principle, its close proximity to coercion, force and deception, and its universal alignment with the long-standing common law defence. Indeed, US academics have likened the trafficking affirmative defences to 'a more particularized duress defence'.[746] Whilst some US states explicitly curtail their non-punishment statutes to only allow victims to raise the defence of duress to crimes they are charged with, others provide relief that simply rests on the underlying theory of duress and coercion inclusive of the implicit limitations inherent within. There is a breadth of Anglo-American scholarship that critiques the narrow confines of duress which stand at odds with the notion of the defence being a concession to human frailty.[747]

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[745] Rachael Derham, 'Justice for Victims of Sex Trafficking: Why Current Illinois Efforts Aren't Enough' (2018) 51 J Marshall L Rev 715, 739.

[746] Hillborn, 'How Oklahoma's' (n 653) 473.

[747] See, for example, Alan Reed, 'The Need for a New Anglo-American Approach to Duress' (1997) 61(2) JCL 209; Luis E Chiesa, 'Duress, Demanding Heroism, and Proportionality' (2008) 41 Vand J Transnatl L 752; and

Under US law, several components must come together to encompass a practical affirmative criminal defence. Hillborn identifies four components, which she refers to as 'cogs', including: contemporaneity (i.e. a 'time limitation'); proportionality; nexus; and exclusions (i.e. 'crime limitations'), and states that 'all criminal defenses have at least some elements of [these] cogs'.[748] Many of the affirmative human trafficking defences in the US consist of each of these elements, although, it will become apparent that several components are completely absent in some state defences. Together with the four components outlined, affirmative trafficking defences require one additional unique element: the victimisation requirement. Unlike the modern slavery defences in E&W which are explicitly available to victims of 'slavery' and 'trafficking', US states limit the availability of their affirmative defences to statutory defined victims of human trafficking. Ambiguously stated provisions often result in discrepancies in the interpretation of affirmative defence provisions.

3.2 California's Affirmative Defence

Since the emergence of human trafficking and modern slavery as a social problem in the US, California has been continuously cited as having the highest prevalence of human

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Russell Shankland, 'Duress and the Underlying Felony' (2009) 99(4) JCLC 1227. Cf Dressler's accounts of the defence of duress: Joshua Dressler,' Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code' (1988) 19 Rutgers L J 671; Joshua Dressler, 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits' (1989) 62 S Cal L Rev 1331; Joshua Dressler, 'Some Very Modest Reflections on Excusing Criminal Wrongdoers' (2009) 42 Tex Tech L Rev 247.

[748] Hillborn, 'How Oklahoma's' (n 653) 469.

trafficking.[749] The NHTH has ranked California as the number one state for reported human trafficking cases since 2014. In 2019, there was a total of 1,507 potential cases reported from which 3,021 victims were identified.[750] The California-Mexico border has been acknowledged as presenting specific challenges in combatting human trafficking as both forced labour operations and sexual exploitation tend to thrive in transit routes for international travellers.[751] Los Angeles County, San Diego County and Alameda County, in particular, are documented as being high-intensity commercial sexual exploitation areas for both adults and children, many of whom are arrested, charged and deported when discovered by law enforcement officers.

The frequent criminalisation of trafficked victims for status, consequential and liberation offences in California is well documented.[752] In 2016, following national trends in providing victims with protection from criminalisation, the California Legislature passed legislation creating an affirmative defence for human trafficking victims involved in criminal activities.[753] Assembly Bill 1761 (Chapter 636) permits victims to raise the defence when arrested for committing non-serious, non-violent, and non-trafficking offences that they were coerced to commit as a direct result of their trafficking. Chapter 8 of the California Penal Code contains the offence of human trafficking and defines the act not dissimilar from that of ‘a severe form

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[749] Sangalis, ‘Elusive Empowerment’ (n 79) 410-15; National Human Trafficking Hotline, *2015 U.S. National Human Trafficking Hotline* Statistics (Polaris 2015).

[750] NHTH, *California Spotlight:2019 National Human Trafficking Hotline Statistics* (Polaris 2019)

[751] Free the Slaves and Human Rights Centre, *Hidden Slaves: Forced Labor in the United States* (September 2004) 1.

[752] Shirley N Weber, ‘AB 1761 Human Trafficking Victims Affirmative Defense’ (8 July 2016); Isabella Blizard, ‘Chapter 636: Catching Those Who Fall, An Affirmative Defense for Human Trafficking Victims’ (2017) 48(3) UOP 631, 633. See Chapter 1 subheading 2.3 for further discussion of these types of offences.

[753] California Penal Code § 236.23 (2019) (enacted by Chapter 636). Approximately twenty-nine other states provided similar affirmative defences at the time. ibid Blizard, 633.

of trafficking' as found in the US Code.[754] California's affirmative defence (the 'California Defence'), which became effective on 1 January 2017, can be found in s 236.23 of Chapter 8 and provides that:

> 'In addition to any other affirmative defense, it is a defense to a charge of a crime that the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm. This defense does not apply to a serious felony, as defined in subdivision (c) of s 1192.7, or a violent felony, as defined in subdivision (c) of s 667.5, or a violation of s 236.1.'[755]

The passage of the California Defence, much like the passage of the modern slavery defence in E&W, was not without extensive debate. Despite a third of labour trafficking victims being undocumented immigrants,[756] and mounting evidence of sex trafficking victims being arrested and deported,[757] the Senate deliberated extensively over the inclusion of a new defence within statute. Notably, critics argued it was unnecessary owing to the small number of potential criminal defendants and the availability of duress.[758] The arguments from those who opposed the Bill remain prevalent across the US in relation to the passage of these types of affirmative defences, with such protection still absent in over a dozen states.

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[754] 22 USC § 7102(11):

> 'The term "severe form of trafficking in persons" means–
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> (A) 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
>
> (B) The recruitment, harbouring, 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'.

[755] California Penal Code § 236.23(a) (2019) (enacted by Chapter 636).

[756] Sheldon X Zhang, 'Looking for a Hidden Population: Trafficking of Migrant Laborers in San Diego County' (Research Report, San Diego State University 2012).

[757] Human Rights Center, 'Freedom Denied: Forced Labor in California' (2005) 5.

[758] Mary Kennedy, *Third Reading* (Senate Rules Committee 3 August 2016) 7.

Ultimately, California opted to take proactive steps to protect victims from being convicted of crimes they were forced to commit by introducing an affirmative defence, similar to the proposed provision in the Uniform Act on Prevention of and Remedies for Human Trafficking (the 'Uniform Act'). However, although the criminal justice reforms under Chapter 636 aimed to address the unique plight of human trafficking victims, the California Defence is particularly narrow.

One significant limitation in the application of the California Defense is that it does not apply to: a serious felony; a violent felony; or human trafficking. A 'serious felony' is any one of 42 offenses listed in subdivision (c) of s 1192.7 of the Penal Code, including *inter alia*: (attempted) murder or voluntary manslaughter; mayhem; several sexual offenses; various assault offenses; weapons/ destructive device offenses; arson; burglary; robbery; kidnapping; carjacking; and some drug offenses. Subdivision (c) of s 667.5 of the Penal Code identifies 23 'violent felony' offenses in total. The majority of the violent felonies listed overlap with those classified as serious felonies. The difference between the two charges concerns the circumstances surrounding the specific crime(s) committed, the circumstances of the particular case, and the defendant's criminal history. A serious or violent felony constitutes a 'strike' under California's Three Strikes Law whereby repeat felony offenders receive longer, harsher prison sentences. Under s 236.1 of the Penal Code, a person who deprives or violates the personal liberty of another with the intent to: obtain forced labor or services; or (cause, induce, or persuade a minor to) commit various prostitution/ sexual acts (with children) is guilty of human trafficking and may not invoke the California Defense. Lack of victim identification training

is also an issue that has been raised with regard to juries. In *California v Zeng*,[759] the defendant, a victim of human trafficking, attempted to raise a defence of necessity. An expert was permitted to briefly testify about the phenomenon of human trafficking, but the defendant was refused a jury instruction on the necessity defence.

3.3 Kentucky's Affirmative Defence

Since 2014, Kentucky has provided an affirmative defence to victims of human trafficking. Under Chapter 529 – Prostitution Offences of the Kentucky Revised Statutes (KRS), s 529.170 provides that:

> **Being victim of human trafficking is affirmative defense to violation of chapter.**
> A person charged under this chapter, or charged with an offense which is not a violent crime as defined in KRS 17.165, may assert being a victim of human trafficking as an affirmative defense to the charge.[760]

KRS 17.165(3) defines 'violent crime' as: 'a conviction of or a plea of guilty to the commission of a capital offense, Class A felony, or Class B felony involving the death of the victim, or rape in the first degree or sodomy in the first degree of the victim or serious physical injury to a victim'. A plain reading of the affirmative defence suggest that it specifically lacks any nexus requirement, it is simply enough that the defendant can assert that they are a victim of human trafficking, however, the application of the statute is limited by only being available to victims

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[759] No A138970, 2015 WL 300470 (Cal Ct App 2015).
[760] Ky Rev Stat § 529.170 (2019).

who have committed prostitution or prostitution-related offences. In this sense, the Kentucky affirmative defence is particularly constrained and arguably provides the least amount of protection to victims of human trafficking who have been forced to commit offences beyond prostitution. The provision could provide a more victim-centred provision by expanding its scope beyond the current narrow ambit and incorporating a nexus requirement in line with a causation-based approach.

3.4 Oklahoma's Affirmative Defence

Oklahoma is described as a 'business hub' for human traffickers.[761] The central US state provides a crossroads for the transport of goods across three interstate highways, which some sources argue increases the potential for exploitation.[762] Between 2012 and 2019, the NHTH identified an increase from 473 to 799 'high' level cases of human trafficking in Oklahoma, with even greater numbers recorded at 'moderate' level.[763] With reported cases of potential human trafficking on the rise, the prevalence of the phenomenon and its effects on victims are becoming points of increased social concern. Indeed, McNiell and McLeod note the increase in social media posts describing individuals who have been 'almost' abducted from retail

[761] Hillborn, 'How Oklahoma's' (n 653) 458.

[762] Oklahoma's Commission on the Status of Women, *Human Trafficking* (2017).

[763] Cases categorised as 'high' contain a high level of indicators of human trafficking; 'moderate' cases contain several indicators of human trafficking, or resemble common trafficking scenarios, but lack core details. See Madison McNiell and David A McLeod, 'Sex Trafficking in Oklahoma: A look into Demand and the Online Networks of Commercial Sex Purchases' (The University of Oklahoma 2019) 5; and National Human Trafficking Hotline, 'Oklahoma' (2019) <https://www.humantraffickinghotline.org/state/oklahoma> accessed 23 September 2022.

parking lots, which have sparked fears throughout local communities of human trafficking attempts.[764]

Oklahoma, like all other US states, has legislation in place that criminalises human trafficking in accordance with federal law. Title 21, s 748 of the 2019 Oklahoma Statutes contains the offence of human trafficking and defines the act as 'modern-day slavery that includes, but is not limited to, 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'.[765] The definitions of human trafficking for both labour and commercial sex correspond with the international definition of human trafficking requiring the 'act', 'means' and 'purpose' elements be present.[766] Additionally, the statute prohibits 'benefiting, financially or by receiving anything of value, from participation in a venture that has engaged in an act of trafficking' for labour or commercial sex.[767] The term coercion, as relevant for the 'means' element of trafficking, is also broadly defined.[768]

The breadth of the offences within the statute indicates the firm stance taken by the Oklahoma Legislature against the perpetrators of human trafficking. Indeed the Legislature went on to ensure that defences open to traffickers were limited; the statute was amended to provide that consent of a victim to any activity prohibited therein does not constitute a defence,[769] nor does

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[764] ibid 2.
[765] Okla Stat § 21-748(A)(4) (2019).
[766] Okla Stat § 21-748(A)(5)-(6) (2019).
[767] Okla Stat § 21-748(A)(5)(b) and (6)(c) (2019).
[768] Okla Stat § 21-748(A)(1) (2019).
[769] Okla Stat § 21-748(E) (2019).

lack of knowledge of the age of the victim with respect to human trafficking of a minor.[770] Furthermore, anyone found guilty of human trafficking in Oklahoma faces a minimum five-years imprisonment with the minimum sentence being increased to fifteen years where the victim was a minor. Eligibility for parole requirements are also strict.[771]

Whilst the Oklahoma trafficking statute casts a wide net in order to prosecute those who engage in exploitative practices, it casts an equally wide net in its attempt to protect victims from criminalisation for crimes resultant of that exploitation. Unlike other states, Oklahoma provides a 'unique, largely unnoticed, and rarely used affirmative defense for human trafficking victims'.[772] Comparatively, Oklahoma's affirmative defence (the Oklahoma Defence), enacted in 2008, is the broadest in the country; for example, where California excludes offences that are not a serious or violent felony from the ambit of its defence, Oklahoma extends the ambit of its defence to all criminal offences. The Oklahoma Defence provides that:

> '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.'[773]

In addition to this affirmative defence, s 21-748.2 provides guidelines for the treatment of victims which mandates that, *inter alia*, human trafficking victims shall not be detained in

[770] Okla Stat § 21-748(F) (2019).

[771] Okla Stat § 21-748(C) (2019).

[772] Hillborn, 'How Oklahoma's' (n 653) 458.

[773] Okla Stat § 21-748(D) (2019).

facilities inappropriate to their status as crime victims,[774] nor shall they be jailed, fined, or otherwise penalised due to having been trafficked.[775]

It should be noted that there is no record of the Oklahoma Defence having been utilised yet, thus its application and effectiveness in practice remains difficult to ascertain. The legal culture in the US, particularly the use of plea bargaining, could provide one possibility for the apparent lack of cases involving the use of the affirmative defence in Oklahoma. It is estimated that only 2 to 3 per cent of state and federal felony prosecutions proceed to trial; plea offers primarily being made for the remainder.[776] The desire to ensure quick resolution of cases in a criminal justice system under pressure from mounting cases and limited resources largely outweighing issues of fairness and due process. According to practicing lawyer Michael Diver, Oklahoman prosecutors have utilised several coercive tools to pressure defendants into taking inadvisable plea deals including pre-trial detention, punitive bonds, and hiding potentially favourable evidence during negotiations.[777] Considering the experiences of coercion and exploitation that VoTs will have already faced it is arguably inevitable that further coercive tactics used against them in the criminal justice system are likely to see them further victimised and not at liberty to raise the affirmative defence that could excuse their criminal liability.[778]

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[774] Okla Stat § 21-748.2(2) (2019).

[775] Okla Stat § 21-748.2(3) (2019).

[776] John Gramlich, 'Only 2% of federal criminal defendants go to trial, and most who do are found guilty' (Pew Research Centre, 11 Jun 2019) <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> accessed 17 March 2023.

[777] Michael Diver, 'Plea Bargaining Power: A One-Way Road' (Diver Law Firm, 17 Jan 2020) <https://www.diverlawfirm.com/blog/plea-bargaining-power> accessed 17 March 2023.

[778] For discussion of the use of impermissibly coercive incentives or incentives that overbear the will of the defendant see Johnson, *2023 Plea Bargain* (n 640), 15.

Hillborn notes that the effectiveness of affirmative defence statutes is habitually 'predicated upon the often-incorrect assumption that a human trafficking victim will be immediately identified',[779] suggesting that the limited use of the Oklahoma Defence may also be due to the common (mis)identification of victims as mere criminals as opposed to their dual victim/ offender status. Despite this, however, varying interpretations of the statute suggest how the defence could operate in practice and provide an insight into how broader affirmative defences could be transposed into statute.

A plain reading of the Oklahoma Defence provides the broadest interpretation of the provision which lends the most extensive protection to victims of human trafficking. As discussed in the afore analysis of the theoretical underpinnings of state specific affirmative defences, the common elements of an affirmative human trafficking defence include five requirements: victimisation; contemporaneity; proportionality; nexus; and exclusions. Interestingly, a plain reading of the statute reveals that several of these requirements are either completely absent or ambiguously stated in the Oklahoma Defence.

Under the Oklahoma statute, a victim is defined broadly as anyone 'against whom a violation of [section 21-748] has been committed'.[780] The act is silent on whether statutory victim status requires the perpetrator be identified or pursued criminally, however the surrounding legislative scheme and the Legislature's clear understanding of trafficking victimisation,

[779] Hillborn, 'How Oklahoma's' (n 653) 468.

[780] Okla Stat § 21-748(A)(9) (2019).

suggests that this is not a requirement.[781] Hillborn emphasises how the broadness of the definition creates ambiguities with regard to when exactly an 'actual victim' becomes a 'statutory victim' and for how long that status remains.[782] Naturally, statutory victim status confers rights, services, entitlements, and protections that should be available throughout the trafficking experience, even when it has ended. Indeed, the consequences of victimisation, such as physical, psychological and health problems, persist long after the initial trafficking ends,[783] which arguably warrants the extension of statutory victimhood past the actual events of trafficking, i.e., past the act and purpose elements.

The Oklahoma Legislature appears to agree. A plain reading of the definition suggests that, by not qualifying statutory victim status to those being imminently trafficked, the Legislature likely intended those who are still close in time to the trafficking experience to be statutory victims.[784] Hillborn demonstrates this by suggesting that the statute permits a victim of commercial sex trafficking to be categorised as a statutory victim even when she is doing menial activities, such as 'washing the dishes', which occur in 'period[s] of time where the victim is less obviously connected to the trafficking'.[785] It is submitted here that a plain reading suggests that the statute goes further than this and extends statutory victimhood beyond these periods of time to after the trafficking has ended, for example, where the victim has escaped.

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[781] For comparison, the Wisconsin Defence expressly provides that 'A victim…has an affirmative defense…*without regard to whether anyone was prosecuted or convicted for the…violation*', Wisconsin Statutes § 939.46(1m) (2018) emphasis added.

[782] Hillborn, 'How Oklahoma's' (n 653) 470.

[783] Kajal Patel, 'Child Prostitutes or Sexually Exploited Minors: The Deciding Debate in Determining How Best to Respond to Those Who Commit Crimes as a Result of Their Victimhood (2017) Univ Ill L Rev 1545, 1561.

[784] Hillborn, 'How Oklahoma's' (n 653) 470.

[785] ibid 470.

Further ambiguity arises with regard to the contemporaneity requirement present in the Oklahoma Defence. Although Hillborn opines that the affirmative defence hints at a legally significant distinction between an imminently trafficked victim and one whose initial trafficking situation has ended 'by adding a contemporaneousness requirement',[786] it remains to be seen whether this requirement does in fact sufficiently narrow the defence's availability.

The statute states that 'during the time of the alleged commission of the offense, the defendant was a victim of human trafficking'.[787] Hillborn suggests that 'the defense would not be available to a victim who escaped "the life" and subsequently committed a crime'.[788] However, a plain reading suggests that such a victim is in fact a statutory victim. Furthermore, this interpretation corresponds with internationally recognised rationales for non-punishment which suggest that victims lack 'real autonomy…have no, or limited, free will…consequently they are not responsible…and should not therefore be considered accountable' for unlawful acts committed, extending to situations 'where the victim has escaped…and the crime…arises as a direct consequence of their trafficked status'.[789] For example, a victim may source fraudulent documents in order to flee from their traffickers, and succeed, only to be arrested for status offences later down the line, as in the case of *R v O* in E&W.[790]

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786 Hillborn, 'How Oklahoma's' (n 653) 470.

787 Okla Stat § 21-748(D) (2019).

788 Hillborn, 'How Oklahoma's' (n 653) 471.

789 OSCE, *Policy and Legislative Recommendations* (n 181) 10.

790 [2008] EWCA Crim 2835 [2] and [10].

Where the Oklahoma Defence differs from the international stance on non-punishment is the idea that victims should not be granted blanket immunity. In order to avoid misuse, defence provisions may either be cast narrowly or include an express proportionality requirement which ensures that the harm done by the victim is not disproportionate to the harm done to them; a feature that is absent in the Oklahoma Defence. A proportionality requirement is paramount in order to strike a balance between offences committed *against* the victim and offences committed *by* the victim and 'maintain the "interests of justice" and enhance the protection of victims of trafficking'.[791] However, under a plain reading, a victim could assert the defence to some of the most serious offences in circumstances that are clearly disproportionate and unreasonable.[792]

Evidently, an implicit proportionality test is a desirable feature of a human trafficking affirmative defence: 'Reasonable minds could argue in fact-specific cases whether this would be proportional'.[793] Indeed in *Joseph (Verna)* in E&W, [794] the prosecution suggested that a greater dominant force of compulsion would be needed to extinguish the higher criminality involved in serious offences; an implied proportionality test that offers a helpful way of

[791] Schloenhardt and Markey-Towler, 'Non-Criminalisation' (n 164) 11. See also, OSCE, *Policy and Legislative Recommendations* (n 181) 7; Conference of the Parties to the United Nations Convention on Transnational Organized Crime, *Report* (n 182) para 108.

[792] For example, if a victim is forced to sell drugs while being trafficked and, upon being discovered by law enforcement, shoots and kills a police officer, the harm done to the officer is clearly disproportionate.

[793] Hillborn, 'How Oklahoma's' (n 653) 471. Referring to the affirmative defence extending to a victim of commercial sex trafficking who murders her customer.

[794] *Joseph* (n 42).

analysing individual cases.[795] An expressly termed proportionality requirement may not, however, be fundamental. As Hillborn observes,

> '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'. [796]

Other states, including Wisconsin and Wyoming, appear to rectify this disproportionality gap by including confined causation-based requirements. Both states employ language that requires the crimes to be 'as a direct result of' trafficking;[797] unlike Oklahoma which omits any nexus requirement. Unsurprisingly, this is the main source of criticism of the Oklahoma Defence,[798] fuelled by the fact that unequivocal nexus language is, paradoxically, incorporated into Oklahoma's defence for child trafficking victims.[799]

Kentucky, like Oklahoma, also lacks a nexus requirement but the Kentucky Defence implicitly limits its application to charges of prostitution or offences which are not violent crimes.[800] Thus, the gaps created by the lack of causation requirement are filled by narrowing the defence's application to specific crimes.[801] The omission of both of these requirements in the

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[795] Southwell, Brewer and Douglas-Jones QC, *Human Trafficking* (n 362) 119: 'For the purpose of the MSA 2015, S 45, when considering whether a reasonable person would have acted as the defendant acted the jury will have to consider the nature of the compulsion in the context of the seriousness of the offence'. This suggests an implied requirement of proportionality under the MSA, s 45(1)(d).

[796] Hillborn, 'How Oklahoma's' (n 653) 475.

[797] Wisconsin Statutes § 939.46(1m) (2018); Wyo Stat Ann § 6-2-708(a) (2020).

[798] Allison L Cross, 'Slipping Through the Cracks' (n 31) 419; Zornosa, 'Protecting Human' (n 642) 199-198.

[799] Okla Stat § 21-748.2(E) (2019).

[800] K Rev Stat Ann § 529.170.

[801] This is problematic in itself, however, as discussed above.

Oklahoma Defence means that, if taken to its logical extreme, a trafficking victim in Oklahoma could successfully apply the defence and be excused for murder regardless of whether the crime was committed as a consequence of being trafficked. Zornosa concludes that such a case would be 'especially absurd' as it 'gives trafficking victims carte blanch to break the law however they want, which is particularly frightening because the vast majority of trafficking victims are essentially puppets who do whatever their masters (i.e., their traffickers) command'.[802] To this extent, it could be argued that interpretation through the lens of duress, albeit not to the exact letter of duress' limitations, is more appropriate.

Owing to the extensive breadth of protection afforded by a plain reading of the statute, the Oklahoma Defence 'may be best understood as a more particularized duress defense'.[803] Notably, both the trafficking defence and Oklahoma's codified duress statute are broader than most states, although the latter does retain some of the limitations present in the common law rule of duress. In particular the explicit requirement of contemporaneity manifests in the requirement of 'a reasonable belief that there was imminent danger of death or great bodily harm',[804] undermined by the opportunity to escape from the situation.[805] Interpreting the Oklahoma Defence through this lens would require attaching strict rules of contemporaneity which seem far beyond that which the Legislature intended.

Oklahoma's duress statute implies an excuse rationale, yet despite this, the majority of court rulings base their decisions on a justification rationale. Under the latter, action taken whilst

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[802] Zornosa, 'Protecting Human' (n 642) 200.

[803] Hillborn, 'How Oklahoma's' (n 653) 473.

[804] Okla Stat § 21-748(D) (2019); Okla Stat § 21-156 (2019).

[805] *Spunaugle v State* 946 P 2d 246, 250 (1997 Okla Crim App 47) (US).

under duress must be proportional, i.e., the social harm caused by the offence must not be disproportionate to the harm averted.[806] Additionally, the statute provides no exclusion as to what crimes the defence can be used for. This is in sharp contrast to the 'hostile' common law defence of duress, especially in E&W and several US states. Nonetheless, specific limitations, including the general implacability of the defence to murder, have been acknowledged by the Oklahoma Court of Criminal Appeals (the OCCA) in *dicta*.[807]

In *Tully v State*, the OCCA opined that the common law rule barring the defence to murder only governs 'the intentional taking of an innocent life' but not unintended killing.[808] Thus, although Oklahoma generally denies duress for malice murder and assault with intent to kill, the defence may be permitted for the special case of felony murder. [809] Notably, *Tully* focused solely on the 'choice of evils' (or 'justification') rationale of the duress defence which requires that the act committed under duress be proportionate to the harm threatened; thus, duress does not extend to murder as the resulting harm will be at least as great as the harm threatened

[806] Hillborn, 'How Oklahoma's' (n 653) 473 citing Luis E Chiesa, 'Duress, Demanding Heroism, and Proportionality (2008) 41 V and J Transnatl L 741, 755.

[807] *Methvin v State* 60 Okl Cr 1, 60 P 2d 1062 (1936). See also, Oklahoma Court of Criminal Appeals (OCCA), OUJI-CR 8-61.

[808] 730 P 2d 1206, 1210 (Okla Crim App 1986) (US). See also, Russell Shankland, 'Duress and the Underlying Felony' (2009) 99(4) Journal of Criminal Law & Criminology 1227, 1242-1243.

[809] *Tully v State* 730 P 2d 1206,1208 (Okla Crim App 1986) (US).

murder can never be the lesser evil.[810] This follows the sanctity of human life principle, as promoted by Hale, that the defendant ought to die himself rather than kill an innocent victim.[811]

The OCCA now treats *Tully* as binding precedent on this matter.[812] It is worth noting, however, that this conclusion was not reached without opposition. In *Spunaugle v State*, the OCCA opined that under a plain reading of the provision, the defence of duress in Oklahoma is based on the legal theory of excuse and thus the 'choice of evils' rationale of justification does not apply.[813] Therefore, the reasoning set forth in *Tully* for denial of duress to intentional killing has no application; 'We find the defense of duress is available in Oklahoma to a defendant charged with the crime of first degree malice murder'.[814] The OCCA opined that the unambiguous nature of the statute and the inherent limitations therein rightly determined the extent and limit of the defence which did not exclude any offences from its ambit.

In *Long v State*, the majority overruled *Spunaugle* to find that duress is not a defence to malice murder. Dissenters have criticised the decision as 'ignor[ing] the letter and spirit of the statutes…display[ing] a contempt for our precedent and the legislative process'[815] and

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[810] *Howe* (n 210) (E&W), the killing of an innocent person was deemed something of which their Lordships could never approve, therefore duress could never be a defence to murder, no matter how grave the threats involved. See also, *United States v LaFleur* 971 F 2d 200 (1991) (US); *State v Rocheville* 425 SE 2d 32 310 SC 20 (1993) (US); *Commonwealth v Vasquez* SJC 10140 (20212) (US).

[811] MS Hale, *Historia Placitorum Coronae, 1736* (Classical English Law Texts 1971) 51. See also, G Williams, 'Criminal Law: Tully v. State of Oklahoma: Oklahoma Recognizes Duress as a Defense to Felony-Murder' (1988) 41 Okla L Rev 5151, 525.

[812] *Long v State* 74 P 3d 105 (2003 Ok Cr 14) (US); *Bever v State* 2020 Ok Cr 13 (Okla Crim App 2020) (US).

[813] 946 P 2d 246, 250 (1997 Okla Crim App 47) (US).

[814] ibid.

[815] 74 P 3d 105, 109-110 (2003 Ok Cr 14) (Judge Chapel dissenting).

‘unnecessarily changing Oklahoma law in order to impose a particular view of the law’.[816] Strikingly, the recent majority verdicts by the OCCA in this area of law appear to be driven, on the whole, by moral principles as opposed to principles of legal interpretation.[817]

3.5 Wisconsin’s Affirmative Defence

Chapter 940 of the Wisconsin Statutes Criminal Code contains the offense of human trafficking and prohibits trafficking for the purpose of labour or services and trafficking for the purpose of a commercial sex act.[818] ‘Trafficking of a child’ also constitutes an offense under Chapter 940 whereby the defendant traffics a person who has not attained the age of 18 years for the purpose of commercial sex acts or sexually explicit performance.[819] A ‘commercial sex act’ is defined as ‘sexual contact for which anything of value is given to, promised, or received, directly or indirectly, by any person’.[820]

Under the statute, both the ‘act’ and ‘means’ elements of human trafficking are all-encompassing; the statute goes beyond the definition provided in the Trafficking Protocol to further include: ‘enticing… providing, or obtaining… an individual without consent of the individual’[821] and lists several means by which trafficking may be carried out emphasising the

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[816] *Easlick v State* 90 P 3d 556, 563 (2004 Ok Cr 21) (JJ Strubhar dissenting).

[817] *Long v State* 74 P 3d 105, 110 (2003 Ok Cr 14) (Judge Chapel dissenting). See also *Spunaugle v State* 946 P 2d 246, Note [3] (1997 Okla Crim App 47) (US) (Judge Lane) remarking that Judge Lumpkin’ dissent ‘might pass as a sermon’.

[818] Wisconsin Statutes § 940.302 (2018).

[819] Wisconsin Statutes § 948.051 (2018).

[820] Wisconsin Statutes § 940.302(1)(a) (2018).

[821] Wisconsin Statutes § 940.302(1)(d) (2018); the definition also includes attempting such ‘acts’ of trafficking.

myriad ways in which control can be exerted over victims.[822] The broad scope of Wisconsin's anti-trafficking statute, in particular, has been praised for its recognition of the dynamics of trafficking and its ability to enable victims to demonstrate their victimhood when seeking statutory relief and protection.[823]

Wisconsin's affirmative defence (the 'Wisconsin Defence'), enacted in 2008, can be found in Chapter 939, Subchapter III under the coercion defence and provides that:

> 'A victim of [human trafficking] or [child trafficking] has an affirmative defense for any offense committed as a direct result of [being trafficked] without regard to whether anyone was prosecuted or convicted for the [human trafficking or child trafficking] violation.'[824]

The same practical and procedural dilemmas that exist when invoking the modern slavery defence in E&W are evident in the US. As Monaco-Wilcox and Mueller note in their article examining human trafficking in Wisconsin, criminal defence lawyers are most likely to see individuals who are actively being trafficked due to status offenses and criminal charges for prostitution and/ or drug possession.[825] When considering how legal services are delivered for trafficking victims in Wisconsin, they found that 'Systemic barriers abound for providing

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[822] Wisconsin Statutes § 940.302(2)(a)(2) (2018).

[823] Kelsey Mullins, 'A Path to Protection: Collateral Crime Vacatur for Wisconsin's Victims of Sex Trafficking' (2019) 6 Wis L Rev 1551, 1566. See also, Stephen C Parker and Jonathan T Skrmetti, 'Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking' (2013) 43 U Mem L Rev 1013, 1018.

[824] Wisconsin Statutes § 939.46(1m) (2018).

[825] Rachel Monaco-Wilcox and Daria Mueller, 'Under the Radar: Human Trafficking in Wisconsin' (Article, 2017) 90(9) Wisconsin Lawyer <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=90&Issue=9&ArticleID=25914> accessed 23 September 2022.

appropriate legal protections and services. The primary barriers are lack of financial resources, training, personnel, and data'.[826]

Indeed, in an increasingly inundated court system with added pressure on attorneys, the avoidance of additional court dates is paramount, thus the quick disposal of cases by entering a guilty plea is often engaged. As Drasin discovered, with regard to sex trafficking in New York, most 'prostitution and prostitution-related offenses are usually pled out at arraignment or first appearance in court'.[827] Parallels can be drawn with county lines cases and drug offences in the UK, victims of human trafficking and modern slavery are often misidentified by the criminal justice system and encouraged to plead guilty without being warned of the consequences.[828]

For the victims whose defence attorney lacks sufficient knowledge of human trafficking and victim protection, and fails to identify them as victims, the affirmative defence provides little protection. Practitioners who lack awareness, or simply do not want to see alleged criminals as victims, and are presented with a seemingly dishonest, manipulative client who appears resistant to help, will advise them to plead guilty. The victim will remain silent and plead guilty in order to return to their exploiters, often through fear of repercussions. They may have been coached by their traffickers, given fake identities to outmanoeuvre the system and be released

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[826] ibid.

[827] Whitney J Drasin, 'New York's Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering It Up?' (2012) 28 Touro L Rev 489, 506.

[828] Aamna Mohdin, '"I thought I was guilty": how the law can fail county lines victims' (Guardian 17 September 2019) <https://www.theguardian.com/uk-news/2019/sep/17/law-county-lines-victims> accessed 23 September 2022.

as soon as possible in order to perpetuate their continuing victimisation.[829] Drasin identifies a combination of three factors that lead to a trafficked persons treatment as criminals in the court system: distrust for the legal system; fear of retaliation; and the failure of law enforcement officials to identify victims.[830]

The Wisconsin Defence, like most human trafficking affirmative defence laws, has never been used in a murder or any other violent crime case. Whilst the law has been used by lawyers seeking plea deals for their clients charged with prostitution, the defence has not been raised in court.[831] However, in 2019 a judge hearing the case of Chrystul Kizer was presented with the question of whether or not the Wisconsin Defence could be used in a homicide case. In 2016, Kizer a 16-year-old black girl, met Randy Volar, a 33-year-old white male. She alleged that Volar was her sex trafficker and had sexually abused her multiple times. Volar was arrested in February 2018 on charges including child sexual assault but was released without bail. He remained free until June of that year when Kizer, then 17-years-old, went to his house and allegedly shot and killed him. Judge David P. Wilk announced that the court was 'satisfied that a blanket affirmative defense to all acts leads to an absurd result'. Consequently, neither Kizer nor any other trafficking victims charged with violent crimes would have access to the Wisconsin Defense.

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[829] Drasin, 'New York's Law' (n 830) 506.

[830] ibid 507.

[831] Jessica Contrera 'He was sexually abusing underage girls. Then, police said, one of them killed him' (The Washington Post 17 December 2019) <https://www.washingtonpost.com/graphics/2019/local/child-sex-trafficking-murder/> accessed 23 September 2022.

3.6 Wyoming's Affirmative Defence

In 2013, Wyoming became the last state in the US to outlaw human trafficking with the enactment of the Human Trafficking Act.[832] The statute divides human trafficking,[833] forced labour or servitude,[834] and sexual servitude[835] into three distinct offences and provides a wholly separate offence for the sexual servitude of a child.[836] Praised as 'one of the few [laws] in the country to provide strong legal protections and support for survivors of human trafficking',[837] Wyoming law not only defines trafficking offences, but also provides an affirmative defence against prosecution for victims of trafficking.[838] Under s 6-2-708(a) of the Wyoming Statutes,

> '[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.'

As with the previously discussed affirmative defences, and indeed the modern slavery defence itself, application of the Wyoming provision depends first and foremost on the premise that the defendant is a victim of human trafficking. In addition to this, and with regard to the general elements that come together to encompass a workable criminal defence, a plain reading of the Wyoming affirmative defence suggests that only one element is definitively stated, albeit at the

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[832] Wyo Stat Ann § 6-2-700 (2020).

[833] Wyo Stat Ann § 6-2-702 and 703 (2020). Human trafficking is further divided into two distinct offences in the first degree and in the second degree where fault is required intentionally and recklessly, respectively.

[834] Wyo Stat Ann § 6-2-704 (2020).

[835] Wyo Stat Ann § 6-2-705 (2020).

[836] Wyo Stat Ann § 6-2-706 (2020).

[837] Polaris, 'Wyoming Becomes 50th State to Outlaw Human Trafficking' (Polaris Project 27 February 2013) <https://polarisproject.org/press-releases/wyoming-becomes-50th-state-to-outlaw-human-trafficking/> accessed 23 September 2022.

[838] Wyo Stat Ann § 6-2-708(a) (2020).

risk of being ambiguously interpreted: the nexus requirement. The victim's action must have been a 'direct cause' of, or 'incident to', the trafficking. Several general elements, including some form of contemporaneity and proportionality requirement are completely absent in the Wyoming defence and other elements, like crime limitation, are somewhat abstruse.

Wyoming Statutes explicitly defines a 'victim' in s 701((a)(xv) as 'the person alleged to have been subject to human trafficking'. Human trafficking under the provision constitutes 'intentionally or knowingly [or recklessly] recruits, transports, transfers, harbors, receives, provides, obtains, isolates, maintains or entices an individual for the purpose of (i) Forced labor or servitude… (ii) Sexual servitude… or (iii) Sexual servitude of a minor…'.[839] A victim of forced labour is implicitly defined as an individual who is compelled through 'coercion, deception or fraud… to provide forced services';[840] 'services' encompass activities resulting from a relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor, including commercial sexual services.[841] The definitions section of the statute expands further on the nature of 'force' required to constitute 'forced services', including *inter alia*, infliction or threats of serious harm and/ or physical restraint and/ or financial harm; destruction, concealment, removal or confiscations of identification documentation; and blackmail.[842] An adult victim of sexual servitude is an individual who is compelled through the use of 'coercion, deception or fraud… to engage in commercial sexual services'.[843] 'Commercial sexual services' are defined as 'any sexual act

839 Wyo Stat Ann § 6-2-702(a) and 703(a) (2020).

840 Wyo Stat Ann § 6-2-704(a) (2020).

841 Wyo Stat Ann § 6-2-701(a)(xiv) (2020).

842 Wyo Stat Ann § 6-2-701(a)(vi) (2020).

843 Wyo Stat Ann § 6-2-705(a) (2020).

for which anything of value is given to, promised to, or received by a person in exchange for the sexual act'.[844]

Under the affirmative defence, 'being a victim of human trafficking' is defined broadly and extends to each activity/ purpose outlined above, in addition to 'patronizing a victim of sexual servitude'.[845] Nowhere in the act, however, does it indicate when an 'alleged victim' becomes a statutory victim, or for how long victim status remains under the statute. As human trafficking is widely recognised as 'a pervasive and enduring' form of exploitation with psychological and physical consequences that can follow victims well beyond the initial trafficking period,[846] qualification for statutory protection from criminalisation should not be curbed to those being imminently trafficked, but rather should be continuous in order to encompass those still proximate to the exploitation. Hillborn supports this broader classification of statutory victim owing to the fact that 'psychological coercion… will persist in these moments', but offsets its appropriateness with the requirement of a contemporaneous element within affirmative defence statute,[847] a requirement which is not explicit in the Wyoming defence.

A literal reading of the provision suggests that the affirmative defence covers a wide range of criminal conduct that extends beyond prostitution-related offences. Accompanying Oklahoma, Wisconsin and, to some extent, Kentucky statute in this respect, Wyoming similarly affords expansive protection to victims of trafficking. Furthermore, the plain language of the statute

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[844] Wyo Stat Ann § 6-2-701(a)(iii) (2020).

[845] Wyo Stat Ann § 6-2-707 (2020).

[846] Cathy Zimmerman and Nicola Pocock, 'Human Trafficking and Mental Health: My Wounds are Inside: They are not Visible' (2013) 19 Brown J World Aff 265, 266.

[847] Hillborn, 'How Oklahoma's' (n 653) 470.

indicates that, like Wisconsin, a victim of human trafficking in Wyoming can assert an affirmative defence for *any* criminal offence, provided the offence is committed as a 'direct result' of being trafficked. A trafficking victim in both states could conceivably be excused for murdering another person, provided that the victim satisfies the additional statutory criteria. Arguably the causation requirement present in the statute, a fact-specific inquiry that should lie with the jury, offsets any unscrupulous use of the defence. Due caution should, however, be given to the issues raised with regard to application of the affirmative defence to serious crimes as previously discussed *vis-à-vis* Wisconsin's affirmative defence.[848]

Zornosa argues that, whilst the evidence of frequent commission of non-prostitution-related offences by trafficking victims warrants more generalised affirmative defences, 'by extending the defense to any crime, [Oklahoma, Wisconsin, and Wyoming] provide too much relief under their respective statutes'.[849] The rational for this viewpoint comes from the very fine line between ensuring that trafficked victims receive an adequate amount of relief from criminalisation and protecting general interests in combating crime, especially those involving violence. It is argued here that, whilst this rationale is justified, limiting the scope of statutory/ affirmative defences to certain criminal activities does not provide a victim-centred, human rights-based approach to non-criminalisation of human trafficking and modern slavery victims as there will be victims who have been compelled to commit offences and acted without due agency who will be excluded through no fault of their own.

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[848] Cf section 3.5 above.

[849] Zornosa, 'Protecting Human' (n 642) 199.

4. Conclusion

This chapter used the novel framework devised in the preceding chapter to produce an in-depth comparative analysis of how the US states of California, Kentucky, Oklahoma, Wisconsin, and Wyoming have implemented the principle of non-punishment into their respective statute books, via affirmative defences, against the approach adopted by E&W under the s45 modern slavery defence for adults. This has provided an insight into the operation of protective non-criminalisation frameworks in alternative common law systems that is largely absent from the current literature in this area. In particular, this chapter found that the US affirmative defences contained equally ambiguous language regarding the underpinnings of the defences that mirrored that of regional non-punishment provisions and the language used in s 45 MSA 2015. Overall, the thesis found that, similar to the provisions in s 45 MSA 2015, each of the states listed above provide trafficking victim defences that do not limit their application to prostitution or prostitution-related offences, or duress/ compulsion or duress-like situations. However, the same limitations of the s 45 MSA 2015 defence are generally present within the US provisions, save for Oklahoma which provides the most expansive defence from all the comparable states. The varying elements within each affirmative defence were examined and their formulation critiqued, contrasting each with corresponding elements present in the modern slavery defence for adults in E&W. This chapter drew comparatives from each state to determine how the principle of non-punishment has been interpreted outside regional legal borders and to inform a more victim-centred, human rights-based approach that could be adopted in E&W and be beneficial for other US states. In the next chapter, a similar comparative analysis will take place in relation to child victims of human trafficking and modern slavery who commit offence.

Chapter 5: The Modern Slavery Defence: Children

1. Introduction

The exploitation of children and young people is prevalent in the UK and the number of identified potential child victims continues to rise.[850] Drug offences, including 'county lines' drug dealing, are recognised typologies of exploitation which involve drug gangs relying on the exploitation of children and vulnerable people in order to distribute narcotics from urban cities into rural towns and regions. In the past five years, following the case of *R v Karemera*,[851] there has been a particular focus on 'county lines' offending as an 'increasingly prevalent' form of child criminal exploitation.[852] In part, this focus has increased awareness and understanding of the exploitation of children for drug offences and the possibility that those carrying out such offences may in fact be victims of modern slavery who can avail from the s 45 defences in the MSA 2015. From this, critiques of the potentially narrow ambit of the s 45 defence for children have ensued.

More recently, however, and on the back of a surge in these types of cases, an opposing view has begun to take centre stage: the possibility that the statutory defence is counterproductive

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[850] Meghan Elkin, 'Child victims of modern slavery in the UK: March 2022' (Office for National Statistic 29 March 2022) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/childvictimsofmodernslaveryintheuk/march2022> accessed 25 April 2023.

[851] [2018] EWCA Crim 1432.

[852] See (n 51).

and ‘may increase the risk of exploitation’.[853] This chapter engages with both of these perspectives, and the broader political climate in which the law is being applied, and suggests that the argument that the defence can be used against the fight to prevent modern slavery, and is therefore counter-productive, fails to appreciate the theoretical underpinnings of the principle of non-punishment. There is currently too much scope for child victims to continue being criminalised for offences they commit as a consequence of their exploitation.

The Trafficking Protocol, Trafficking Convention, and Trafficking Directive are not age-specific – in that they do not apply specific restrictions on victims of human trafficking based on age. However, the international and regional definitions of ‘trafficking in persons, and ‘trafficking in human beings’ distinguish between adult and child victims considering the particular vulnerabilities of children to crimes of human trafficking and modern slavery.[854] Scholars recognise that age, in particular, has played varying roles concerning rights of children and young persons who have been trafficked compared with those of adult victims.[855] The differences between trafficking in adults and children were acknowledged during early stages of the development of the international legal definition of ‘trafficking’. Consequently, the

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[853] HMICFRS, ‘Both sides of the coin: The police and National Crime Agency’s response to vulnerable people in “county lines” drug offending’ (2020) 5. See also Field and others, *Independent Review* (n 40); Bristow and Lomas, ‘The Modern Slavery Act’ (n 41).

[854] See Chapter 1 for a general discussion of the international and regional anti-trafficking laws.

[855] Morehouse, Combatting Human Trafficking’ (n 679) 29.

Trafficking Protocol,[856] Trafficking Convention,[857] and Trafficking Directive[858] explicitly define children as those under the age of eighteen years old and the latter treaties devise comprehensive measures to protect them which are distinct from the protection afforded to adults. In congruence with international law, s 56(3) of the MSA 2015 defines 'child' as a person under the age of eighteen and the Act offers children a stand-alone modern slavery defence courtesy of s 45(4) that can be distinguished from the adult defence under s 45(1).[859]

This chapter engages in a comparative analysis of the statutory protection afforded to children in E&W and five US states, namely California, Kentucky, Oklahoma, Wisconsin and Wyoming in order to determine whether the protections in these jurisdictions provide the optimal course of redress for child human trafficking and modern slavery victims who commit offences. The distinct statutory measures in place to protect children from criminalisation are examined, first in relation to non-criminalisation in E&W under s 45(4) of the MSA 2015 followed by the approach to non-criminalisation in the aforementioned US states. Case studies are provided to illustrate problems that permeate from the current approaches taken by each jurisdiction and the limitations within the respective legislation. It is argued that, although the s 45(4) defences

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[856] Trafficking Protocol, Art 3(d).

[857] Trafficking Convention, Art 4(d). The Trafficking Convention provides myriad additional protection and assistance measures exclusive to child victims, including *inter alia*: special measures of protection pending age verification (Art 10(3)); appointing a representative for unaccompanied children (Art 10(4)(a)); requiring States Parties to establish the child's identity and nationality (Art 10(4)(b)) and locate their family (Art 10(4)(c)); and providing child victims with access to education (Art 12(1)(f)).

[858] Trafficking Directive, Art 2(6). The Trafficking Directive, in particular, refers at length to the special status of child victims, particularly where they are 'separated children': Preamble [8], [12], [19], [22]-[25] and Arts 2, 13-16.

[859] See Chapter 3 for discussion of the adult defence.

appear to be causation-based, the ambiguous language within the provision suggests that a more narrow compulsion-based approach could be applied by the courts.

In theory, the child defence provides a broader remit for its use than for an adult in recognition that children are inherently vulnerable and thus more in need of greater protection. A child victim's action must be a direct consequence of their exploitation and it must be established that a reasonable person in the same circumstances and with the same characteristics would do the act. It has, however, been argued that in practice, this 'reasonable person' test indirectly introduces a compulsion element which should not have to be established in the case of children.[860] The chapter concludes that despite the child defence being formed from vastly different underpinnings to that of the adult defence, the provision, like its adult counterpart, fails to provide a truly victim centric approach to non-criminalisation in E&W. A move towards a more victim-centred solution that ensures vulnerable children are not at risk of being criminalised for committing offences as a result of their trafficking and/ or exploitation is advanced.

2. Non-Criminalisation in E&W

In E&W, the statutory defence(s) for human trafficking and modern slavery victims are modelled upon the common law defence of duress and form part of the pre-established non-punishment policy framework outlined in the current CPS Guidance. As with the modern slavery defence for adults under s 45(1) of the MSA 2015, discussed in Chapter 3, several cases

[860] GRETA, 'Evaluation Report' (n 388) [162].

have been brought before the courts which have presented the opportunity to assess the parameters of the defence for children under s 45(4) and clarify practical aspects of its application.[861] Although the defence for children presents an alternative approach to the overtly compulsion-based approach found in the adult defence, the elements of the provision are not without their limitations. The modern slavery defence as applicable to children is as follows:

> **45 Defence for slavery or trafficking victims who commit an offence**
>
> (4) A person is not guilty of an offence if—
>
> (e) the person is under the age of 18 when the person does the act which constitutes the offence,
>
> (f) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and
>
> (g) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.
>
> (5) For the purposes of this section—
>
> *"relevant characteristics"* means age, sex and any physical or mental illness or disability;
>
> *"relevant exploitation"* is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.
>
> (6) In this section references to an act include an omission.
>
> (7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.
>
> (8) The Secretary of State may by regulations amend Schedule 4.

For the purposes of s 45(4) of the MSA 2015, a child does not have to raise evidence of compulsion in order to satisfy the elements of the statutory defence. The child must, however,

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[861] Examples include *R v N; R v L* [2012] EWCA Crim 189; *R v L and Others* [2013] EWCA Crim 991, [2014] 1 All ER 113; *Joseph* (n 42); and *R v DS* [2020] EWCA Crim 285.

prove on the balance of probabilities that a reasonable person in the same situation and with the same characteristics as them would do the act: this element of the defence is limited by the definition of 'relevant characteristics' which includes age, sex, and any physical or mental illness or disability.[862] GRETA submits that the 'reasonable person' test indirectly introduces an element of compulsion into children's cases that should not need to be proven. Noting that the Human Trafficking and Exploitation Act (Northern Ireland) 2015 does not include the 'reasonable person test' for children, which provides clearer protection for children who are forced to commit crimes, GRETA recommends that the MSA 2015 should remove the requirement to apply the 'reasonable person' test in the statutory defence for child victims.[863]

The latest version of the CPS guidance on *Human Trafficking, Smuggling and Slavery* provides that, with regard to prosecuting 'vulnerable children':

> '…prosecutors should consider applying the statutory defence or CPS policy on the non-prosecution of suspects who may be victims of trafficking…who: In the case of a child under 18, has done the act as a direct consequence of being a victim of slavery or exploitation.'[864]

Despite compulsion being irrelevant insofar as satisfying the global and domestic definitions of child trafficking, and indeed the elements of the modern slavery defence for children, the CPS Guidance indicates that 'compulsion will be a relevant consideration when considering whether the public interest in prosecuting a child is satisfied'.[865] Thus, if an offence committed

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[862] MSA 2015, s 45(5).

[863] GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom* (2016) 71, 73, 87.

[864] CPS, 'Legal Guidance: Human Trafficking' (n 353).

[865] ibid.

by a child victim falls outside the ambit of the statutory defence, some level of compulsion may still be necessary before a prosecutor considers it not to be in the public interest to prosecute. For those who maintain the view that children should not have to be compelled to commit an offence in order to benefit from the protective non-criminalisation framework, this Guidance is particularly problematic.[866]

Arguably, by failing to define 'direct consequence' in s 45, this may permit a narrower interpretation of the concept in line with the CPS Guidance whereby compulsion and causation are intertwined as with the adult defence. In order to avoid such a prescriptive approach, 'direct consequence' should be explicitly defined in the Act in line with a purely causation-based approach that affords protection to victims who commit offences that are directly connected or related to their exploitation.[867] This stance on sufficient nexus between the act committed and the exploitation with regard to non-criminalisation has been reaffirmed by the Court of Appeal both pre- and post- the enactment of the MSA 2015.[868] It is argued here that 'direct consequence' should be defined broadly to encompass each category of offence committed by victims including, status offences, consequential offences, and liberation offences.[869]

2.1 Child Victims of Modern Slavery

2.1.1 Child Criminal Exploitation and Criminalisation

[866] See Southwell, Brewer and Douglas-Jones QC, *Human Trafficking* (n 362) 120.

[867] See Chapter 3, subheading 4.2 for discussion of a causation-based approach.

[868] See *L & Others* (n 42) [33] and *Joseph* (n 42) [20].

[869] Schloenhardt and Markey-Towler, 'Non-Criminalisation' (n 164) 13. See Chapter 1 subheading 2.3 for further discussion of these types of offences.

The MSA 2015 in its current form fails to acknowledge the true nature of victimisation of trafficked children in E&W. As with 'criminal exploitation' *in toto*, there is currently no statutory definition of CCE, despite NRM Referral Statistics indicating that criminal exploitation is the most common for child potential victims (51 percent; 2,544 individuals), of which 93 percent were males.[870] In addition to this failing, there is also no mention of child labour exploitation within the Act itself. This is in contradiction of ILO Conventions to which the UK became signatory to in 2017 and agreed to ratify and implement. Amongst other things, the UK agreed to develop and accelerate implementation of domestic legislation to ensure that forced labour, human trafficking, modern slavery, and the 'worst forms' of child labour are never tolerated.[871] By not providing legislation that ensures the protection of child victims from enslavement, separation from family, exposure to serious hazards and illnesses, and abandonment, a true victim-centred, human rights-based approach is not being adopted.

In the absence of a statutory definition of CCE, the Home Office has defined this form of exploitation as:

> 'Child Criminal Exploitation… occurs where an individual or group takes advantage of an imbalance of power to coerce, control, manipulate or deceive a child or young person under the age of 18. The victim may have been criminally exploited even if the activity appears consensual. Child Criminal Exploitation does not always involve physical contact; it can also occur through the use of technology'. [872]

[870] Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify Statistics* (2021) 5.

[871] Department for International Development, 'A Call to Action to End Forced Labour, Modern Slavery and Human Trafficking' (2017).

[872] Home Office, *Criminal Exploitation of children and vulnerable adults: County Lines guidance* (2018) 3.

The definition highlights that children who are criminally exploited may have appeared to voluntarily engage in this conduct and consequently are first and foremost victims. The scope of this 2018 definition is vast and encompasses myriad forms of exploitation that intersect with child trafficking and modern slavery. Although not stated explicitly within guidance, CCE involves the manipulation and coercion of children and young people into committing crimes which is a subcategory of forced labour.[873] Alternatively, where a person provides services for another, this is also covered by the definition of exploitation in the MSA 2015. Consequently, these forms of exploitation fall within the ambit of the MSA 2015, s 1 and s 2, yet the explicit inclusion of both criminal exploitation and child labour exploitation within the Act fails to appreciate the true extent of child trafficking and afford significant weight to these forms of exploitation. The remainder of this section will consider the Home Office 'modern slavery typologies' under the categorisation of 'criminal exploitation'[874] that list victims as 'predominantly children',[875] 'majority… children'[876] and 'often children'[877]. Attention is also drawn to the emerging trend of CCE for forced acquisitive crime, namely shoplifting, as identified by the National Crime Agency.[878]

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[873] MSA 2015, s 3.

[874] Home Office, 'A Typology' (n 71) iv.

[875] ibid 35.

[876] ibid 37.

[877] ibid 41.

[878] National Crime Agency, 'NCA Guidance for Councils on How to Identify and Support Victims of Criminal Exploitation'(15 Nov 2018) <https://nationalcrimeagency.gov.uk/who-we-are/publications/241-guidance-for-councils-on-how-to-identify-and-support-victims-of-criminal-exploitation/file> accessed 23 September 2022, 2. The guidance was reproduced, almost verbatim, on 15 March 2019: see National Crime Agency, 'NCA Guidance for non-governmental organisations on How to Identify and Support Victims of Criminal Exploitation' (15 Mar 2019) <https://www.nationalcrimeagency.gov.uk/who-we-are/publications/254-guidance-for-ngos-on-how-to-identify-and-support-victims-of-criminal-exploitation/file> accessed 23 September 2022, 2.

Forced gang-related criminality – a significant area of criminal exploitation that has been problematic for legal practitioners acting on behalf of criminalised (child) victims is that of 'violent gangs' using young individuals to transport drugs across the UK. While the use of drug couriers, colloquially known as 'drug mules', to smuggle drugs into the UK became prominent in the early 1990s, a recent surge in drugs trafficking within the UK has seen a sharp focus by the government on tackling County Lines offending. Increased awareness of the issue is welcomed but with this comes the increased risk of exploited children being arrested and prosecuted for their involvement in related activities.

The majority of gang-related criminal activities relate to organised criminal enterprises, including knives, firearms, and drug networks. The typology of modern slavery offences created by the Home Office identifies children as the main target for this type of exploitation; with gangs forcing them to transport drugs and money to and from urban areas to suburban areas, market and coastal towns using dedicated mobile telephone lines.[879] This type of activity, colloquially referred to as 'county lines' exploitation, involves the grooming, coercion and/ or deception of young people and vulnerable adults. In the cases identified by the Home Office, some victims were paid monetarily or with expensive gifts, whilst others were not; violence, threats, blackmail and emotional control were used to exert power over victims; some victims were known to the local authority and/ or the police; and the victims were subject to multiple forms of trafficking, including sexual exploitation.[880] It has been reported that the majority of

[879] Home Office, 'A Typology' (n 71) iv, 35.
[880] Ibid 35.

young people caught with heroin and cocaine are ‘selling to middle-class users who consume it just as they would have a glass of wine on a Friday night’.[881]

Forced labour in illegal activities – the most common example of victims being forced to work for offenders in illicit activities is cannabis cultivation in urban private residences. The Home Office identifies the majority of victims of this form of exploitation as being children.[882] Research by the Independent Anti-Slavery Commissioner found that in some instances of child criminal exploitation for cannabis cultivation, indicators of slavery/ exploitation were present and should have triggered an automatic trafficking investigation, yet children were still not being identified as victims.[883] These recent findings confirm several reports from over the last decade. In 2011 the Child Exploitation and Online Protection Centre (CEOP), as part of the National Crime Agency (NCA), published a report which found that some Vietnamese boys trafficked for cannabis cultivation were ‘identified during police raids… [and] subject to criminal proceedings’.[884] In the following year, GRETA acknowledged the ongoing punishment of victims for trafficking-dependant crimes including the criminalisation of child victims for cannabis cultivation.[885] Although the CEOP report failed to elaborate on the

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[881] Nadine White, ‘”Your Dealer Is Nearby” – How Drugs Are Delivered To Your Doorstep’ (HuffPost 1 March 2021) <https://www.huffingtonpost.co.uk/entry/county-lines-drug-dealer-prices-street-value_uk_6033cc5ec5b66dfc10205933> accessed 23 September 2022. Quoting the founder of grassroots North London charity Minority Matters, Sadia Ali.

[882] Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify Statistics* (2021) 6.

[883] Bristow and Lomas, ‘The Modern Slavery Act’ (n 41) 44.

[884] Child Exploitation and Online Protection Centre, ‘Child Trafficking Update’ (2011) <https://www.islingtonscb.org.uk/SiteCollectionDocuments/CEOP_child_trafficking_update_2011.pdf> accessed 23 September 2022, 10.

[885] GRETA, ‘Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom. First Evaluation Round’ (Strasbourg, Council of Europe, 2012) 75.

punishment of victims, GRETA took a firm stance against it and 'urge[d] the British authorities to step up their efforts to adopt a victim-centred approach when implementing Art 26 of the [Trafficking] Convention'.[886]

Non-governmental organisations, including leading children's rights organisation, Every Child Protected Against Trafficking UK, have long campaigned for increased awareness of the continued criminalisation of children in cannabis cultivation and there has been increased scholarly focus on the area in particular in recent years.[887]

Forced acquisitive crime – both the Home Office and National Crime Agency (NCA) identify '[forced] shoplifting' as an acquisitive crime covered by the umbrella term, criminal exploitation.[888] This form of exploitation involves Organised Crime Groups (OCGs) sourcing victims in their home countries and playing on vulnerabilities, such as homelessness and unemployment, with the offer of work and opportunities to earn money abroad. Victims are then transported to the UK, absorbed into the OCGs and forced to steal from stores. The shoplifting operation is meticulously coordinated by the OCGs who pre-select items to be stolen and provide a rehearsed narrative for victims should they be stopped. A resultant arrest

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[886] Ibid 76.

[887] Chloe Setter, 'ECPAT UK Discusses Plight of Trafficked Vietnamese Children in UK Cannabis Cultivation' (ECPAT UK 2015) <https://www.ecpat.org.uk/news/ecpat-uk-discusses-plight-of-trafficked-vietnamese-children-in-uk-cannabis-cultivation> accessed 23 September 2022. See also, Daniel Silverstone and Stephen Savage, 'Farmers, Factories and Funds: Organised Crime and Illicit Drugs Cultivation within the British Vietnamese Community' (2010) 11 Global Crime 16; and Burland, 'Still Punishing' (n 50).

[888] See Home Office, 'A Typology' (n 71) 39; and National Crime Agency, 'NCA Guidance for Councils' (n 887) 2.

of a victim will lead to their abandonment by the gang, referred to as 'burn out', and subsequent deportation which leaves them vulnerable to revictimisation.[889]

Although typical victims are described as 'usually in their 20s, both male and female', the NCA acknowledges that there is an emerging trend of criminal exploitation in migrant children operating under the supervision of adults.[890] Exploiting children allows the OCGs to maximise profits as operating in a family unit reduces the risk of identification and arrest. In 2017, the Home Office found two child victims of this type, both female migrants; in both cases, 'the exploitation was discovered when the victims were arrested by the police'.[891]

Aside from the typologies of offences discussed above, smaller numbers of children have also been identified as victims of CCE for offences including, *inter alia*, pickpocketing[892], forced begging[893] and financial fraud.[894] In a criminal exploitation case study outlined by the Home

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[889] ——'Data exposes U.K.'s revictimization of confirmed trafficking survivors' (Freedom United 4 January 2022) <https://www.freedomunited.org/news/data-exposes-uk-revictimizing-survivors/?category=2657> accessed 23 September 2022.

[890] National Crime Agency, 'NCA Guidance for NGOs' (n 887) 2.

[891] Home Office, 'A Typology' (n 71) 39-40. It is worth noting that the Home Office compounds shoplifting and pickpocketing under the typology 'forced acquisitive crime' and fails to stipulate which offence(s) the young girls were forced to commit.

[892] Ibid 39.

[893] Ibid 41.

[894] Tom de Castella, 'Child Criminal Exploitation – Tackling Criminal Exploitation' (Children & Young People Now 28 July 2020) <http://www.cypnow.co.uk/features/article/child-criminal-exploitation-tackling-criminal-exploitation> accessed 23 September 2022. Financial fraud includes 'using children's bank accounts to transfer money'.

Office,[895] a thirteen-year-old Romanian girl was trafficked to the UK, via Spain, to undertake forced begging. Her father had paid an organised crime group 200 euros for the journey. The victim was accompanied by a male trafficker and used her own Romanian identity card to travel, but her flights were paid for by the gang using a stolen US credit card. Once in the UK, the victim was placed with a male and female in Slough; she was instructed to call them 'aunt' and 'uncle'. Five days a week the victim was driven to another town 40 miles away where she was forced to sell outdated copies of the charity magazine, Big Issue. She would do this for over 7 hours a day and would be beaten and searched at the end of each day. All the proceeds she made were retained by the gang. Members of the public observed that the victim was dishevelled and malnourished.

Following a large-scale investigation by the police into the trafficking of Romanian nationals to the UK by organised crime groups for the purposes of forced criminality, the victim was identified during a raid and placed into social services. The victim was later returned to her mother in Romania; she gave evidence against her father and three other offenders, who were convicted for trafficking a child into the UK for forced criminal exploitation.[896] Despite her father being sentenced to four years imprisonment, he subsequently returned to his family (including the victim) in Romania after serving two years. As is often the case, the young girl

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[895] Home Office, 'A Typology' (n 71) 42; Home Office, *Modern Slavery Awareness and Victim Identification Guidance* (2017) 5. See also CARE, 'EU Directive on Human Trafficking: Why the UK Government Should Opt-in' (2011) <http://www.care.org.uk/wp-content/uploads/2011/02/EU-Directive-on-Human-Trafficking-Why-the-UK-should-opt-in-7-Feb-2011.pdf> accessed 23 September 2022; and ——'Children removed in Ilford People-trafficking raids' (BBC News 14 October 2010) <http://www.bbc.co.uk/news/uk-england-london-11524732> accessed 23 September 2022.

[896] The case predated the MSA 2015 and as such the offenders would have been convicted under the pre-existing legal framework which criminalised human trafficking. See Chapter 1, subheading 4.3 for discussion of the application of the non-punishment principle pre-2015.

faced multiple forms of exploitation: she was also exploited for domestic servitude by the gang members and forced to look after their children. Child victims can find it particularly difficult to disclose information. They are often coached by their exploiters to relay fabricated stories or warned to avoid authorities. Additionally, 'they may relate their experience in an inconsistent way or with obvious error';[897] their early accounts can be affected by the impact of trauma which can result in delayed disclosure, difficulty recalling facts, or symptoms of PTSD.[898]

During the initial Covid-19 lockdown period, it was reported that children were still being exploited by 'county lines' gangs; runners and victims of exploitation continued to be identified by the British Transport Police, despite restrictions on many forms of public transport.[899] However, as it became easier to spot drug dealers in the community, criminal gangs began 'dressing young drug mules as nurses and Deliveroo workers to deliver cocaine, heroin and illegally acquired prescription drugs' as a means of escaping detection.[900] Interpol issued an alert warning authorities of the tactic, concerns of which had previously been raised by The Children's Society over fears that children and young adults were being forced to steal jackets and bags from fast-food delivery couriers to conceal drugs. In the past, branded courier bags have been found inside dealers' properties during police raids and drug searches. Whilst the

[897] Home Office, *Modern Slavery Act* 2015 (n 35) para 10.9.

[898] ibid Appendix D.

[899] Jamie Grierson and Amy Walker, 'Gangs still forcing children into "county lines" drug trafficking' (Guardian 13 April 2020) <https://www.theguardian.com/uk-news/2020/apr/13/gangs-still-forcing-children-into-county-lines-drug-trafficking-police-covid-19-lockdown> accessed 23 September 2022.

[900] Helen Pidd, 'County lines gangs disguised drug couriers as key workers during coronavirus lockdown' (Guardian 5 July 2020) <https://www.theguardian.com/uk-news/2020/jul/05/county-lines-gangs-drug-couriers-key-workers-coronavirus-lockdown-cocaine-heroin> accessed 23 September 2022.

tactic of posing as food couriers to deliver drugs has been recorded as early as 2019, the pandemic saw the problem become more widespread. The demand for home delivered food and the increased prevalence of delivery drivers on otherwise deserted streets provided the perfect 'front' for dealing drugs. Reports suggest that the tactic is still being used.[901]

2.1.2 Victim or Criminal?

Since 2018, there has been a particular focus on 'county lines' offending as one of the more 'increasingly prevalent' forms of child criminal exploitation. Although this focus has increased awareness and understanding of the exploitation of children for criminality, children continue to be arrested, charged and convicted of crimes committed as a direct result of them being trafficked/ exploited. The possibility that those carrying out such offences may in fact be victims of modern slavery is becoming more widely acknowledged and accepted, yet practitioners still face frustrations and struggle to identify children who are being criminally exploited. Furthermore, there is still reluctance by police officers to identify victims because of a mistaken belief that in doing so the suspect will be given automatic immunity from prosecution.[902]

Failure to identify exploited children as victims has the potential to see them held criminally responsible – an outcome that is entirely inappropriate. As with adult victim offenders, the factors that contribute to the criminalisation of trafficked children centre around a broader lack

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[901] Thomas Kingsley, 'Suspected drug dealer arrested while posing as Just Eat delivery driver' (Independent 13 September 2021) <https://www.independent.co.uk/news/uk/crime/suspected-drug-dealer-arrested-just-eat-delivery-driver-b1918924.html> accessed 23 September 2022.

[902] Bristow and Lomas, 'The Modern Slavery Act' (n 41) 31.

of knowledge and awareness of human trafficking and modern slavery, specifically the typology of offences,[903] and the guidance and procedures associated with identifying and protecting victims.[904] Victims of trafficking/ exploitation continue to be misidentified as autonomous criminals; are denied referral to the NRM; and, in circumstances where referrals are made, they face lengthy delays pending the decision regarding their victim status.[905] This could be a reflection of the approach to youth offending in E&W being much more criminally justice focused than most other countries, including Scotland, as exemplified by the comparatively low age of criminal responsibility, comparatively higher rates of custody and the reduced opportunities to divert children from the criminal justice system.[906] Arguably this strong stance has had an indirect effect on the criminalisation of vulnerable young victims of human trafficking and modern slavery as under such a response they are seen first and foremost as criminals rather than the victims of exploitation that they are. Such an approach is in direct conflict with the victim-centred provision that the MSA 2015 claims to provide and as a result a genuine victim-focused approach – one which recognises the broader nuances of victimisation – is not being maintained. The adoption of the guiding principle of 'child-first' by the youth criminal justice system is a welcome policy shift towards a system more amenable to recognising exploitation but is not without challenges.[907]

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[903] Hestia, 'Underground Lives: Criminal Exploitation of Adult Victims' (July 2020).

[904] Samantha Currie and Johanna Bezzano, 'An Uphill Struggle: Securing Legal Status for Victims and Survivors of Trafficking' (Research Report, February 2021) 22.

[905] Youth Justice Legal Centre, 'Statutory Defence for Child Slavery – Section 45 *Modern Slavery Act 2015*' (25 November 2016).

[906] See Nicola Wake and others, 'Legislating Approaches to Recognising the Vulnerability of Young People and Preventing their Criminalisation' (2021) Public Law 145.

[907] Anne-Marie Day, 'It's a Hard Balance to Find': The Perspectives of Youth Justice Practitioners in England on the Place of "Risk" in an Emerging "Child-First" World (2023) 23(1) Youth Justice 58.

This strong criminal justice-based response is particularly evident in a report by HMICFRS which explores the police and NCA's response to vulnerable people in 'county lines' drug offending and the IASC's finalised independent review of the s 45 defence. Both were published in 2020 and take the view that the statutory defence is counterproductive as it is open to abuse and can be used against the fight to prevent modern slavery. According to HMICFRS, relying on anecdotal evidence from a survivor of country lines exploitation and police investigators and CPS lawyers respectively, there are two main reasons for this: firstly, the availability of the defence may increase the risk of exploitation because some offenders coach their recruits (vulnerable or otherwise) to say they have been trafficked if they are arrested; and secondly, there are practical difficulties disproving the defence even when it is false.[908] The Report concluded that, 'the section 45(1) defence may be too open to abuse' and recommended that the HO commission a detailed review of cases involving the defence under s 45(1) in order to establish whether there is sufficient justification to amend the law.[909] Similarly, the IASC's Review suggested high numbers of use of the defence in drug trafficking cases which raised concerns; concluding that the defence's operation was neither adequately protecting victims of trafficking nor adequately protecting the public.[910] According to the IASC, the main reason for this appears to be the continuing lack of awareness and understanding of the function of the defence (and its relationship with NRM decisions) by police and CPS practitioners and a lack of rigour in terms of analysis, testing and weighing of evidence.[911] Of particular concern were

[908] HMICFRS, 'Both sides of the coin' (n 856) 32.

[909] ibid 33.

[910] Bristow and Lomas, 'The Modern Slavery Act' (n 41) 7.

[911] ibid 8.

incidents where the defence was raised by a victim/ offender who had committed a serious offence and the case was subsequently 'discontinued based on a brief SCA decision letter'.[912]

The IASC, in referring to her 2019-2021 Strategic Plan, acknowledged cases where victims had not been able to use the defence and had been imprisoned (or sentenced to custody in the case of children) alongside claims there had been cases where 'criminals' had attempted to abuse the defence. Work by Hibiscus Initiatives, an article in the Guardian, and verbal accounts from Lancashire police force were referenced for the former, however no examples of the defence being exploited were provided and it is unclear what evidence was being relied on here. Unlike the HMICFRS Report, the IASC's concerns over the defence being exploited do not appear to lie with the unscrupulous use of the defence by an 'opportunistic defendant', but rather with a genuine victim of modern slavery who commits a 'serious offence'. Whilst this is in line with the current framing of the statutory defence, which exempts several serious offences from its ambit, it is argued here that the basis for this approach is fundamentally flawed. A victim ultimately has no choice in the levels of exploitation and compulsion exerted over them nor the types of activities that they are forced to commit. What makes a victim, trafficked hundreds of miles from their home, beaten and forced to traffic drugs, less blameworthy than one who endures the same treatment but is forced to traffic humans? That one should be allowed to raise a statutory defence and be protected from criminalisation whilst the other should face the full extent of the law seems entirely unjust. Arguably it is unrealistic to expect a victim who has endured indisputable levels of exploitation and abuse to refuse to follow a direction to commit any offence when forced to do so either expressly or as a direct

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[912] ibid.

consequence of their exploitation. The law should provide an excuse to those who engage in criminal behaviour because they had no other reasonable choice.

What is striking about the two aforementioned reports is that the conclusions reached by both take a particularly harsh stance against the statutory defence in its current form to that of the 2019 Independent Review of the MSA 2015 conducted by Frank Field despite no new quantitative data being collected on its use. In that review, the statutory defence was found to strike the correct balance between protecting genuine victims and preventing misuse from opportunistic criminals.[913] It is argued here that the Review was significantly limited by the lack of available data on the application of s 45 and how often it was being used. Ultimately, the conclusion drawn by the Review lacks sufficient rigour and caution should be exercised when assessing the veracity of its claims. This is also true of the subsequent reports. Furthermore, the Independent Review itself was critical of the lack of genuine independence of the IASC, suggesting that the role is 'too heavily influenced and constricted by Government, particularly the Home Office'.[914] This lack of genuine independence of the IASC, and the current government's reluctance to appoint a new commissioner, continues to present a risk to the protection of victims and should be addressed immediately.

2.2 Protecting Child Victims from Criminalisation

The principle of non-punishment provided for by Art 26 of the Trafficking Convention, and subsequently Art 8 of the Trafficking Directive, require states to, in accordance with the basic

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[913] Field and others, *Independent Review* (n 40) 18.

[914] Final Report, [12].

principles of their legal system, 'provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'. Art 4 defines trafficking as including 'forced labour or services, slavery or practices similar to slavery, servitude' and s 3 of the MSA 2015 extends this further to include providing services to another, which is especially intended to protect individuals who are 'prone to making poor choices'.[915]

In order to give further effect to obligations under Art 26 Trafficking Convention and Art 8 Trafficking Directive, s 45(4) of the MSA 2015 introduced a bespoke defence for victims of human trafficking and modern slavery under the age of 18 (and over the minimum age of criminal responsibility: ten-years-old) who commit certain offences as a direct consequence of being, or having been, a victim of slavery or exploitation (human trafficking), where a person in the same situation as the young person and having that young person's relevant characteristics would do that act.[916] Exploitation is broadly defined in the Act itself and clarified further by frequently updated CPS guidance.[917] Notably, 'criminal activity', a form of exploitation not expressly recognised in the MSA 2015, is identified in the CPS guidance as an illustrative typology of activities including, *inter alia*, 'cannabis cultivation, petty street crime, illegal street trade, etc.'.[918] The expansive ambit of the defence *vis-à-vis* victimisation provides the possibility of statutory protection from criminalisation for the three broad categories of offending: status offences, consequential offences and liberation offences. Despite this, however, the defence is marred by several limitations which make it inaccessible to many

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[915] *Karemera* (n 854) [23].

[916] MSA 2015, s 45(4). See exact wording above.

[917] MSA 2015, s 3; CPS, 'Legal Guidance: Human trafficking' (n 353).

[918] ibid CPS.

victims, in particular, the defence does not apply retrospectively,[919] it requires the standard of 'reasonable person' to be met and it is subject to over 130 arbitrary offences contained in Sch 4 of the MSA 2015, including *inter alia*, arson, theft, modern slavery and murder.

The defence does, however, recognise that children are particularly vulnerable to being influenced into committing crimes by not explicitly requiring compulsion to be present, nor is there a requirement for a child victim to have a realistic alternative to committing the offence, as is the case with adult victims under s 45(1)(d). Furthermore, the burden of proof is lower, only placing an evidential burden on the child or young person whereby they only have to adduce sufficient evidence to allow the defence to be considered by a jury. The provision has been largely well received, despite its limitations, as representing a significant development in explicitly recognising children's 'inability, or reduced capacity, to assess alternatives' taking into account factors which are likely to make children more impulsive and engage in risky behaviour 'while lacking the capacity to consider longer term consequences of their actions'.[920] It is argued here, however, that the statutory defence does not go far enough in providing a victim-focused defence that provides adequate protection to *all* child victims who commit criminal offences owing to the aforementioned limitations which seek to exclude certain categories of victims on an *ad hoc* basis.

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[919] It is worth noting that although section 45 recognises retrospective victimisation (i.e. 'being, or having been, a victim of slavery…') reflective of the definition of 'victim' under section 56, the defence is not retrospectively applicable in that it does not apply to criminal acts committed prior to its enactment on 31 July 2015: *R v CS* (n 265). See also *Joseph* (n 42) [4]; and *R v O and N* [2019] EWCA Crim 752.

[920] Wake and others, 'Legislating Approaches' (n 919).

2.2.1 A Causation-Based Approach – Recognising Vulnerability

The innate vulnerability of children is a recognised and reoccurring feature throughout regional and global anti-trafficking discourse. Leading international anti-trafficking law and policy acknowledge the greater risk of children being victimised by traffickers compared to adults owing to them being 'more vulnerable'.[921] Similarly, the UNODC as part of the United Nations Global Initiative to Fight Human Trafficking (UNGIFT) advance that 'While subject to the same harmful treatment as adults, child victims are especially vulnerable to trafficking because of their age, immaturity and lack of experience, to abusive practices… and to continued victimization as a result of attachment, developmental and social difficulties'.[922]

Situational vulnerability alone does not provide the theoretical underpinning for the separate modern slavery defences, otherwise a collective defence would apply to all trafficked/ exploited victims.[923] In the context of trafficking and modern slavery it is generally accepted that children should not be treated the same as adults; their unique vulnerability differs from the vulnerability of adults – this could be explained by the divergence between innate vulnerability and situational vulnerability. In general terms devised by the UNODC, children 'are vulnerable to the demands and expectations of those in authority, including their parents, extended family and teachers. Physically, they are not able to protect themselves. They are usually unaware of laws that may exist to protect them, and they are unable to negotiate fair treatment for themselves… they are not always able to articulate the nature of their experiences

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[921] Trafficking Directive.

[922] UNODC, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action' (UN 2008) 9.

[923] Wake and others, 'Legislating Approaches' (n 919) 150.

in a way that corresponds to protocols used to identify adult victims of trafficking. They are also physically vulnerable in harsh environmental conditions'.[924]

The s 45(4) defence, by comparison to the s 45(1) defence for adults which requires 'compulsion' and the need for 'no realistic alternative' to committing the offence,[925] operates under a much lower threshold test for young 'victim offenders'. The element of 'compulsion' is altogether absent from the child defence; the mere fact that the child's conduct in committing the offence is a direct consequence of them being or having been a victim of slavery or exploitation will suffice. This position aligns with the causation-based approach to non-punishment of victims of human trafficking and modern slavery, discussed in Chapter 3.4.2, and is favoured for being easier to establish, broadly applicable,[926] and unequivocal in nature.[927]

The exact scope of the child defence was considered extensively by Parliament when passing the Modern Slavery Bill culminating in the stance that it would be 'simply wrong to put such an onus on a victim who has been turned into a potential defendant by the situation'.[928] The express inclusion of 'compulsion' within the statute was deemed to contradict the irrefutable nature of anti-trafficking laws. The recognition that the innate vulnerabilities of children, and

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[924] UNODC, 'An Introduction to Human Trafficking: Vulnerability, Impact and Action' (UNODC 2008) 71-72.
[925] MSA 2015, s 45(1).
[926] ICAT, 'Issue Brief: Non-Punishment of Victims of Trafficking' (ICAT 2020) 4.
[927] ——'Section 45 Modern Slavery Act: Direct Consequence' (UK Human Trafficking Law blog, 4 August 2017) <https://ukhumantraffickinglaw.wordpress.com/2017/08/04/section-45-modern-slavery-act-direct-consequence/> accessed 28 September 2022.
[928] Public Bill Committee Deb, *Modern Slavery Bill* 11 September 2014, col 379.

in particular their inability to resist compulsion thus rendering it irrelevant to the assessment of whether a child has been trafficked.

By removing the element of compulsion, the s 45(4) defence appears to provide statutory recognition of the innate vulnerabilities of children; grounded on the explicit recognition of the situational vulnerability of children who have been trafficked. As Wake and others contend, 'It is the innate vulnerability, the age of the child, and what that means in terms of neurodevelopmental capacities that arguably drives an alternative threshold level for these vulnerable offenders in terms of the s 45 defence'.[929] However, despite the defence for children being void of any explicit mention of 'compulsion', concern has been raised as to the possibility of the compulsion requirement 'manifest[ing] itself under a different guise'.[930] Where an overly strict application of the causative requirement is adopted, the efficacy of the defence teeters on the cusp of causation and compulsion, arguably crossing over into the latter whereby founding the modern slavery defence is markedly more difficult.

In *R v A* the Court of Appeal, in its concluding remarks, reiterated the position of the judiciary *vis-à-vis* vulnerability that, notwithstanding statutory recognition of young people's innate and situational vulnerability: 'Parliament's decision to legislate… to limit the scope of the s 45 defence… reflects the balance struck by Parliament between preventing perpetrators of serious criminal offences from evading justice and protecting genuine victims of trafficking from prosecution'.[931] It is disappointing then that despite Smiler LJ affirming that the applicant

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[929] Nicola Wake and others, 'Legislating Approaches' (n 919) 150.

[930] ibid 149, citing ——'Section 45 Modern Slavery Act: Direct Consequence' (UK Human Trafficking Law blog, 4 August 2017).

[931] [2020] EWCA Crim 1408, [62].

'undoubtedly… experienced terrible tragedy and trauma… was a child victim of trafficking, and was recruited for criminal activities as a child… [and] was historically a victim of trafficking and was both vulnerable and traumatised',[932] A is not considered a 'genuine victim of trafficking'.

On a more general note, the criminal justice system in E&W recognises the vulnerability of certain categories of individuals involved in criminal procedures. Notably, vulnerable witnesses can be accommodated for during court hearings by allowing them to testify by video, behind a screen, or with the public removed from court. In theory, victims of human trafficking and modern slavery could be accommodated for in this manner during court hearings against their traffickers. This same level of treatment, however, is not paralleled when that same victim has committed an offence as a direct consequent of their trafficking experience. Arguably, the broader more general brutality of the youth justice system, inclusive of this contradictory failure to extend protective accommodations to vulnerable defendants, has a particularly negative affect on young victims of human trafficking and modern slavery and presents a further argument against the victim-centred approach to protecting victims that the Government claims to place at the heart of anti-trafficking endeavours.

2.2.2 Limiting Protection and Exacerbating Vulnerability

Although the ostensibly causation-based approach of the defence for children provides statutory recognition of the vulnerabilities of trafficked/ exploited young people, the defence has been criticised for potentially having the 'unintentional effect of dangerously exacerbating

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[932] ibid [67] – [68].

the vulnerabilities of those who are already enslaved or trafficked'.[933] Just as the s 45(1) defence for adults is subject to a somewhat arbitrary list of over 130 excluded offences in Schedule 4, so too is the s 45(4) defence. During parliamentary debates, questions were raised as to the possibility of the list helping the trafficker; inferably increasing victims' vulnerability to forced criminality and hindering their protection from criminalisation. Citing Chandran, Baroness Kennedy of Cradley described Schedule 4 as 'an escape strategy… a traffickers' charter' that provides a catalogue of crimes which astute traffickers could compel victims to carry out, knowing that the state will prosecute for those crimes.[934]

Furthermore, it was questioned whether the inclusion of such a list would lead actors within the criminal justice system to 'stop looking for signs of slavery and trafficking for these offences'[935]. Irrefutable evidence highlights the abundant criminalisation of victims for crimes that are directly consequential to their trafficking/ exploitation, despite guidance that explicitly stipulates that individuals in these circumstances should be referred to the NRM and safeguarded. Instead, they are wrongly imprisoned and face a lengthy process to absolve their conviction, if they are lucky. Although Baroness Kennedy framed this concern from the perspective of prosecuting perpetrators: 'traffickers get clean away',[936] it can also be argued that little or no investigation into the trafficked/ exploited situation of a victim further exacerbates their vulnerability and leaves them exposed to both criminalisation, and the stigma and repercussions attached to it, as well as re-victimisation by traffickers/ exploiters.

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[933] HL Deb 8 December 2014, vol 757, col 1658.

[934] HL Deb 8 December 2014, vol 757, col 1658. Note that Schedule 4 was, at the time, listed as 'Schedule 3' and references are made to such in the debate.

[935] HL Deb 8 December 2014, vol 757, col 1658.

[936] ibid.

Not only does the inclusion of a list in itself provide ramifications for victims, the contents of such a schedule have proved particularly problematic also. Notably, and with regard to child victims in particular, one of the excluded offences listed in Schedule 4 – assault with intent to resist arrest[937] – was explicitly raised as a concern: 'We know that children especially… are suspicious of authority, because the traffickers have made them that way; they are scared and do not understand the language.'[938] As of yet, there have been no reported cases where a VoT under the age of 18 has been prosecuted for an offence where s 45(4) is not available pursuant to Schedule 4, but the risk of such still remains.

The concept of vulnerability is central to the exploitation of children and young people, yet its recognition and use in policy and law is infrequent. Wake and others recognised that a number of factors can enhance a child's vulnerability, placing such factors into two categories: innate vulnerability and situational vulnerability. The former includes factors such as age, gender and neurodevelopmental immaturity; whereas the latter includes factors such as dysfunctional and traumatic backgrounds involving some combination of poor parenting, physical or sexual abuse, substance misuse and/ or mental health problems.[939] In its own guidance the Home Office concedes that 'it is important for professionals to understand the specific vulnerability of victims of modern slavery and utilise practical, trauma-informed methods of working which are based upon fundamental principles of dignity, compassion and respect'.[940] Yet in the same

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[937] Offences Against the Person Act 1861, s 38.

[938] HL Deb 8 December 2014, vol 757, col 1659.

[939] Wake and others, 'Legislating Approaches' (n 919) 150.

[940] Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland* (Version 3.1, 2023) 6.

vein, the Conservative Government continues to resist calls to make improvements to domestic protection efforts. Whilst this comes as no surprise considering several amendments to the Modern Slavery Bill to expand the scope of victim support were not adopted,[941] it is concerning that the government is now making it increasingly more difficult for victims to access support and protection.

The prioritisation of immigration policy above that of protecting victims is most evident in the recently enacted Nationality and Borders Act 2022 (NBA 2022) and the new Illegal Migration Bill introduced in March 2023 both of which conflate modern slavery with immigration/ human smuggling with human trafficking and permit the government to remove people from the UK even where there are reasonable grounds to believe they have been trafficked.[942] Clearly, the sentiments in the government's own guidance are entirely contradictory to the broader political landscape of the UK today which favours punishing victims above their traffickers.

For unaccompanied children caught up in this hostile environment created by the government, even if they are allowed to remain in the UK whilst they are a child, they will be subject to removal upon turning 18. This will only seek to exacerbate their vulnerability by forcing many to go underground placing them at serious risk of exploitation and harm.[943] For unaccompanied

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[941] Maria Moodie, *Determinants of Anti-Trafficking Efforts* (British Institute of International and Comparative Law 2022) 14.

[942] David Burrows, 'As it stands, the Government's new Migration Bill will only help the people traffickers – and damage our mission to wipe out modern slavery' (Conservative Home, 23 March 2023) <https://conservativehome.com/2023/03/23/david-burrowes-as-it-stand-the-governments-new-migration-bill-will-only-help-the-people-traffickers-and-damage-our-mission-to-wipe-out-modern-slavery/> accessed 17 March 2023.

[943] Joint Committee on Human Rights, *Human Rights of Unaccompanied Migrant Children* (June 2013) HL Paper 9/HC 196.

child victims of modern slavery who engage in criminal activities as part of their exploitation, the NBA 2022 risks categorising them as 'unworthy' of support or recognition as a victim under s 63 of the Act. Under this section, an individual is exempt from recognition as a victim of modern slavery via the NRM if they are a 'threat to public order' or made a claim in 'bad faith'.[944] The Human Trafficking Foundation has argued that 'the definition of a threat to public order [which includes anyone who has been convicted of any of the offences listed in Schedule 4 of the MSA 2015] casts far too wide a net, and, despite being immigration legislation, will also impact British victims… who currently make up the majority of victims protected in the UK'.[945] Effectively, the Act seeks to disqualify undocumented victims of modern slavery from being identified as such because they have been convicted of certain crimes, regardless of whether or not they were committed as part of their exploitation, and provides traffickers with additional tactics to continue exploiting young people.

To permit the categorisation of victims as 'unworthy' of modern slavery victim status because they have been a perpetrator of an offence, particularly one contained within a list of offences which has faced unequivocable criticism and arguably should be removed, represents a significant backwards step in the fight against modern slavery. It is concerning that objections and amendments to the inclusion of the section throughout the Bill's passage through Parliament were not adhered to despite clear evidence being raised of its potential to exclude numerous victims.[946] The government must adhere to its own guidance and recognise that

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[944] Nationality and Borders Act 2022, s 63(1).

[945] Human Trafficking Foundation, 'Human Trafficking Foundation Evidence Nationality & Borders Bill1 Committee September 2021' (2021) <Human+Trafficking+Foundation+-+Evidence+to+the+NB+Bill+Committee+Sept+2021+.pdf (squarespace.com)> accessed 17 March 2023.

[946] HL Deb 10 February 2022, vol 818, col 1870.

victims of modern slavery, particularly children, are vulnerable to being forced to commit serious crimes or may commit serious offences in the course of their exploitation. Reformation of the laws that challenge such and deny victims protection, including the MSA 2015 and NBA 2023, must ensue.

3. Non-Criminalisation in the US

3.1 Child Victims of Human Trafficking

In most US states, children under eighteen years of age who are victims of human trafficking are provided with specialised legal protection from prosecution charges and services which preclude adult victims. The demographics within the US population which have been identified as amongst the most vulnerable to human trafficking include children, and in particular, 'street-children', 'runaways' or 'thrown away children' who may have been victimised, abandoned or left home.[947] Runaway and homeless children are often those most at risk for being trafficked into sexual exploitation.[948] The common trend amongst victims in the US is vulnerability, it is very rare that victims are politically connected, financially well-off, or independent.[949] A further demographic that encapsulates victims who are trafficked across international borders are unaccompanied immigrants and refugee children who, in general, have a history of faring

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[947] Florida State University, 'Florida Responds to Human Trafficking' (Centre for Advancement of Human Rights 2003) 18.

[948] SA Friedman, 'Who is there to help us? How the system fails sexually exploited girls in the United States: Examples from Four American Cities' (2005) 54.

[949] Kevin Bales, 'Disposable people: New slavery in the global economy' (University of California Press 1999).

poorly in the US immigration system, a fate which is only exacerbated when they a victimised by human traffickers.

Trafficked children face myriad problems and issues; none more so than in the context of immigration. Thorough reports carried out by the non-governmental organisation community identified that 'unaccompanied immigrant and refugee children have fared poorly in the US immigration system' with those that are also victims of human trafficking and modern slavery facing even greater obstacles.[950] They have distinctive medical, psychological and legal needs which are compounded by their extreme vulnerability and inability to seek support on their own. These vulnerable children are then faced with the complexities of the US legal system completely alone and, as removal proceedings are civil matters, undocumented children do not possess many of the rights afforded to criminal defendants. As Florida States University's Centre for the Advancement of Human Rights highlighted in its report, *Florida Responds to Human Trafficking*, 'Very few children have representation in legal proceedings against them and are severely disadvantaged when facing the U.S. immigration law and benefits system'.[951]

US federal law expressly aims to prohibit and punish any attempts to involve children in exploitation, particularly sexual exploitation.[952] The US Code defines 'victim' as the person harmed by the trafficking scheme.[953] Under the TVPA, victims are re-classified as either 'victims of a severe form of trafficking'[954] or 'victims of trafficking'.[955] The former

[950] ibid 77.

[951] ibid 3.

[952] 18 USC § 1519(a)(2) (2018).

[953] 18 USC § 1593 (c) (2018).

[954] 22 USC § 7102(16) (2019).

[955] 22 USC § 7102(17) (2019).

encompasses adult victims who were forced, defrauded or coerced into performing labour services or sexual acts *and* minors engaged in commercial sex trafficking.[956] The latter includes victims of severe forms of trafficking and victims of 'sex trafficking', defined as 'the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act'.[957]

Under the TVPA, a child victim of human trafficking is defined as any child (under the age of 18) engaged in a commercial sex act (i.e. sex trafficking) or labour exploitation by force, fraud or coercion (i.e. labour trafficking).[958] A commercial sex act is defined as 'any sex act on account of which anything of value is given to or received by any person', [959] for example as survival sex, drugs, transportation, food or clothing. Notably, force, fraud or coercion need not be present for a child under the age of 18 involved in any commercial sex act because children cannot consent to a sexual act with an adult. There is uniform consensus among academicians, advocates and general observers that a zero-tolerance stance should be taken to the trafficking of children for the sex trade.[960] Indeed, the TVPA acknowledges that children are easier to exploit, manipulate and compel, thus increasing their vulnerability to human trafficking, and broadly defines sex trafficking accordingly.

Despite this protection, Martinez de Vedia notes that the predominant focus of the TVPA – to intercept and disrupt criminal activity that exclusively relates to commercial sex and sexual

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[956] 22 USC § 7102(11) (2019) (emphasis added).

[957] 22 USC § 7102(12) (2019).

[958] 22 USC § 7105(11)(A) and (B).

[959] 22 USC § 7102(4) (2018).

[960] Loring Jones and Others, 'Globalization and Human Trafficking' (2007) 34(2) J Sociol Soc Welf 107, 112.

exploitation – creates a blind spot in the US response to human trafficking whereby victims of labour trafficking are overlooked. He further observes that this blind spot 'only widens in consideration of new transnational trends, such as the recent increase in entry to the US of unaccompanied minors from Central America, which have left new generations of immigrants more vulnerable to these types of crime…'.[961] Conservative estimates suggest that 293,000 children in the US are at risk of commercial sexual exploitation, with an estimated 100,000 children victimised each year. Although sexual exploitation dominates much of the current focus, both in the general media and political sphere, experts and academicians maintain that labour trafficking is likely to be more widespread on a global level. Over the last two decades they have strived for the expansion of collective data gathering, improved preventative measure, and overall knowledge of this widespread form of trafficking. Examples of child trafficking and forced exploitation are widespread.

3.1.1 United States v Paoletti

In 1997, law enforcement agencies uncovered a large Mexican trafficking ring that had been trafficking deaf children from Mexico to California and onto several cities along the east coast.[962] The Paoletti case involved an estimated 74 – 1000 victims who were locked in cramped apartments at night and forced to beg and sell trinkets on the streets during the day.[963] As the traffickers believed the children were incapable of soliciting help, due to their hearing

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[961] Gonzalo Martinez de Vedia, 'Labor Trafficking: The *Garcia* Case and Beyond' in Nora M Cronin and Kimberley A Ellis (eds), *Human Trafficking: Emerging Legal Issues and Applications* (Lawyers & Judges Publishing Co 2017) 5.

[962] United States v Paoletti No 97-768 (EDNY 1997).

[963] Kevin Bales and Steven Lize, 'Trafficking in Persons in the United States' (Croft Institute for International Studies 2005) 20.

impairments, they were allowed to roam freely during the day to sell their goods. The child-slaves were eventually discovered by a deaf American citizen who informed the police. The FBI raided a number of sites where the children were being held; on one occasion more than 40 people were found inside a squalid house with only one bathroom, piled high mattresses and infants on the floor.[964] A total of eighteen members of the trafficking ring were convicted.[965]

None of the victims in the Paoletti case were arrested or imprisoned, however they were initially held in secure immigration detention facilities and had to fight their own detention to win the right to remain in the country.[966] Although these facilities were non-incarcerating, the guards supplied by the Immigration and Naturalization Service (INS) were from a detention and deportation centre, armed and fully dressed in immigration uniforms. Consequently, the INS agents' lack of knowledge and sensitivity to the needs of the victims resulted in some inappropriate behaviour and ultimately their dismissal. Bales and Lize attempt to justify the conduct of the Paoletti case with regard to it being one of the first cases that the US Department of Justice handled – the case was discovered three years before the passage of the TVPA.

Indeed, the contention that 'The Department has since learned to address more appropriately and sensitively the shelter and security needs of trafficking victims'[967] is not without merit – the TVPA and Reauthorisation Acts have increasingly worked toward more victim-centred

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[964] ibid 42, citing CNN and Associated Press, 'New York police rescue Mexican held captive' (19 July 1997).
[965] Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2008) 195.
[966] Jennifer M Chacon, 'Misery and Mypoia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking' (2006) 74(6) Fordham L Rev 2977, 2989.
[967] Bales and Lize, 'Trafficking in Persons' (n 976) 70.

approaches to protecting victims from criminalisation and further harm. However, considering the number of victims, including children and young adults, who find themselves criminalised for acts committed as a result of their trafficking experience, the inadequacy of protective efforts is still prevalent today.

3.1.2 United States v Cadena

In the same year, 'one of the most high profile - and egregious - instances of human trafficking in modern America' came to the attention of law enforcement authorities.[968] Upon receiving tips from concerned locals, FBI and US Border Patrol agents raided six Florida brothels and discovered an organised forced prostitution ring operating inside the premises'.[969] The Cadena case involved trafficked Mexican women and girls – some as young as fourteen – being regularly rotated between eleven Florida cities from 1996-1998 for prostitution.[970] Young, educated women from poor backgrounds were approached by Cadena recruiters in discos, restaurants and cafés and offered jobs as landscapers and waitresses where they could earn $200-$300 on tips. The traffickers used female recruiters in order to convince the girls and offered to buy them new clothes and pay their transportation/ smuggling fees to help them get started on their journey to a better life. Once convinced, the girls agreed to cross into the US illegally only to be told that they would be working at a brothel as a prostitute in order to pay off their smuggling debt – ranging from $2000 to $3000.[971]

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[968] Florida State University, 'Florida Responds' (n 960) 38.

[969] *United States v Cadena* 207 F 3d 663 (11th Circuit 2000). See also ibid Florida State University, 37-38; Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (Columbia University Press 2008) 188.

[970] Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* (Center for the Study of Intelligence 1999)

[971] Bales and Lize, 'Trafficking in Persons' (n 976) 38.

The trafficked victims were subjected to violent, degrading and dehumanising conditions designed to break down their resistance and deter them from attempting to escape. In some cases, the younger girls who were virgins were 'taught' to have sex by being raped by their Cadena handlers.[972] The women and girls were held at gunpoint and forced to work twelve-hour days for six days a week – servicing up to thirty-five men per day[973] – for fifteen days before being relocated to another brothel where the cycle would repeat. This was used as a tactic by the traffickers for several reasons: to keep the victims unsure of their location, to ensure no lasting relationships could be established with clients, and to provide the 'johns' with 'fresh women'.[974] If the victims refused to service clients or resisted, they would be beaten and raped by their traffickers. Victims who became pregnant were forced to have abortions; costs from the procedures were added to their smuggling debts.

In addition to physical forms of discipline, the traffickers would utilise psychological methods of coercion, including creating social isolation; exacerbated by language barriers, repetitive routines and sleep restriction, and threatening members of the victims' families with death if they tried to escape. In some cases, relationships evolved between victims and their traffickers – akin to 'Stockholm Syndrome' in hostage situations – resulting in the victims benefiting from small 'privileges' and in extreme cases, becoming willing participants in the criminal enterprise.[975] In other cases, clients who became aware of the victims' situation were sympathetic towards them and attempted to facilitate escapes, albeit unsuccessfully. A victim

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[972] Florida State University, 'Florida Responds' (n 960) 40.

[973] Bales and Lize, 'Trafficking in Persons' (n 976) 31.

[974] Florida State University, 'Florida Responds' (n 960) 40.

[975] ibid 42.

who was seventeen at the time of her exploitation, recalled declining an offer to assist with her escape due to the overwhelming sense of fear she had of her traffickers.[976] The notoriety of the Cadena case led to the passage of the TVPA in 2000.

3.1.3 Criminal Conduct and Criminalisation

As Miller-Perrin and Wurtele acknowledge, 'minors are deemed victims even when engaged in activities defined as illegal or when entering certain arrangements seemingly voluntarily (e.g., prostitution)'.[977] However, state laws that criminalise adults who have sex with children under statutory rape laws are not consistently applied in cases where the adult purchased the sex. In such cases, children who are recognised at both federal and state level as being victims of crime, are often arrested and convicted under prostitution laws. Despite being victims of commercial sexual exploitation and sex trafficking, they are identified as 'child prostitutes'[978]: arrested, detained, adjudicated or convicted, committed or imprisoned, and besmirched with permanent records as offenders. Evidence of this taking place in the American justice system is ubiquitous. Girls as young as 10-years-old are brought before family court judges, in-and-out of detention for prostitution, forced to sell themselves by adult men who abuse and threaten to kill them.[979] Domestic Minor Sex Trafficking (DMST), as it is now more accurately defined,

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[976] ibid 45.

[977] Cindy Miller-Perrin and Sandy K Wurtele, 'Sex Trafficking and the Commercial Sexual Exploitation of Children' (2017) 40(1-2) Women & Therapy 123, 125.

[978] WJ Adelson, 'Child prostitute or victim of trafficking' (2008) 6 University of St Thomas L J 96.

[979] Jane O Hansen, 'Selling Atlanta's Children: Runaway Girls Lured into the Sex Trade are being Jailed for Crimes while their Adult Pimps go Free' (The Atlanta Journal-Constitution, J Jan 2001) 1A. See also, Darren Geist, 'Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors' (2012) 4(2) Legislation & Policy Brief 67, 68.

has been identified as 'one of the most hidden forms of abuse and exploitation of children within the United States today'.[980]

3.2 Protecting Children from Criminal Liability

Under US federal law, a child under the age of 18 that is induced into providing commercial sex is a VoT and must be treated as such. The TVPA treats children engaged in commercial sexual activity as victims of sex trafficking, regardless of the means element present in the definition of 'trafficking', i.e., force, fraud, or coercion,[981] allowing them access to a wide range of services. However, as Geist notes, 'most minors are handled by the state justice system', several of which have yet to follow the lead of the TVPA.[982] Due to these statutory inconsistencies, child sex trafficking victims who have not yet reached the legal age to consent to sex – ranging from sixteen to eighteen on a state-by-state basis – can be charged with prostitution and prosecuted. In 2019, a total of 214 individuals under the age of eighteen/ children were arrested for 'prostitution and commercialized vice', thirty of whom were under the age of fifteen.[983]

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[980] Karen Countryman-Roswurm and Brien L Bolin, 'Domestic Minor Sex Trafficking: Assessing and Reducing Risk' (2014) 31 Child Adolesc Soc Work J 521, 522. See also, Linda A Smith, Samantha Healy Vardman and Melissa A Snow, *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children* (Shared Hope International 2009); and US Department of Justice, *Trafficking in Persons Symposium Final Report* (OJJDP, OJP, DOJ 2012).

[981] 18 USC § 1591(a)(2) (2018); 22 USC § 7102(11)(A) (2019).

[982] Geist, 'Finding Safe Harbor' (n 992) 71.

[983] FBI, '2019 Crime in the United States' (US Department of Justice, 2019) <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-38> accessed 23 September 2022.

When young victims of trafficking are convicted of offences they have been forced to commit, the control that has been exerted over them by their trafficker(s) is often transferred over to the criminal justice system. In order to protect these inherently vulnerable victims from secondary victimisation, it is necessary to have policy and legal measures in place to protect children from continued trauma via unjust criminalisation. Such measures should prevent child victims/ survivors from entering the justice system and from compiling criminal records that may hinder future efforts to pursue housing, education, and employment opportunities. The main issue at play here, both in E&W and the US appears to be the youth justice system which is unnecessarily tough on young people on the one hand, and the resultant problems for young victims of human trafficking and modern slavery on the other. In this sense, states can be more equipped than federal government to provide protection and services to child victims.

3.2.1 State Safe Harbour Laws

In 2013, thirteen years post-introduction of the Trafficking Protocol and TVPA, the Institute of Medicine and National Research Council called for a paradigm shift within the American criminal justice system towards treating children involved in commercial sexual exploitation and sex trafficking as victims/ survivors of child abuse rather than criminals.[984] In order to address the inconsistent treatment of sexually exploited children, a growing number of states began to enact laws designed to redirect young victims away from criminal justice systems and into more supportive services and child welfare systems. Rather than treating prostituted

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[984] Ellen Wright Clayton, Richard D Krugman and Patti Simon (eds), *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States* (The National Academies Press 2013). See also, Stephen V Gies and others, 'Safe Harbor Laws: Changing the Legal Response to Minors Involved in Commercial Sex, Phase 1 The Legal Review' (National Criminal Justice Reference Service 2019).

children as ‘delinquents’, these ‘safe harbor’ laws treat them as victims of exploitation and offer them protection as opposed to punishment.[985] Safe harbour laws provide a safety net for child victims. Ensuring states have such laws in place was viewed by many non-governmental organisations and grassroots organisations as ‘a great first step’ for state anti-trafficking advocacy.[986]

Polaris identifies safe harbour policies as having two fundamental components that reduce trauma and provide a path to recovery: legal protection and provision of services.[987] A complete safe harbour law decriminalises prostitution for any child under the age of eighteen, diverts them out of the criminal justice system and into non-punitive specialised service programmes where their charges will be dropped upon completion. These services include, *inter alia*, medical and psychological treatment, emergency safe housing, remedial education assistance and counselling. Practitioners further attest that safe harbour laws act to reclassify ‘prostituted minors’ as ‘victims or sexually exploited children’.[988] Evidently, the fundamental principle underlying these laws is that children and adolescents who endure sexual exploitation and trafficking must be treated as victims and not criminals.[989]

There are several methods which permit safe harbour laws to redirect children away from the justice system: immunity, diversion, mandatory referral, or a combination of these three

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[985] Geist, ‘Finding Safe Harbor’ (n 992) 71.

[986] Jody Rabhan, ‘Fact Sheet: Safe Harbor Laws’ (National Council of Jewish Women 2016).

[987] Polaris, *Human Trafficking Issue Brief: Safe Harbor* (2015) 1.

[988] Kimberly Mehlman-Orozco, ‘Safe Harbor Policies for Juvenile Victims of Sex Trafficking: A Myopic View of Improvements in Practice’ (2015) 3(1) Social Inclusion 52, 53. See also, Geist, ‘Finding Safe Harbor’ (n 992) 86.

[989] See also, Gies and others, ‘Safe Harbor Laws’ (n 997) 8.

elements/ raising the age of criminal responsibility. From 2009 to 2017, thirty-five states enacted some variation of safe harbour laws suggesting a fundamental shift in the treatment of prostituted children at a national level;[990] this brings the majority of state laws into line with the TVPA. Although the composition of safe harbour laws varies greatly from state to state, most states implement such laws through immunity with mandatory referral. This effectively means that prostituted children are granted immunity from arrest and prosecution because they are unable to consent to sex/ may not have actually consented in any sense, and under mandatory referral are treated as children in need of services, removed from the justice system and placed in a youth-serving agency.[991] Similarly, through diversion victims are treated as children in need of services, however, unlike immunity and mandatory referral, diverted victims who have been charged with a crime remain under the authority of the court and charges may only be dropped upon completion of 'therapeutic treatment'.[992]

With regard to the comparative states included in this thesis, California, Kentucky, Oklahoma and Wyoming each provide prosecutorial immunity for certain crimes as well as opportunities for diversion to specialised survivor services. Wisconsin provides diversion opportunities for trafficked children but does not provide prosecutorial immunity. Both Kentucky and Oklahoma require proof that a child is trafficked before they can benefit from criminal and/ or juvenile court immunity. [993] Kentucky provides immunity to child trafficking victims for status offences, such as truancy and underage drinking, if the act was committed as a result of being

[990] ibid 7.

[991] ibid 8.

[992] ibid.

[993] Rich Williams, *Safe Harbor: State Efforts to Combat Child Trafficking* (NCSL 2017) 4.

trafficked.[994] Oklahoma provides sixteen to seventeen-year-old victims who are being prosecuted for prostitution the presumption that 'the actor was coerced into committing such offense by another person in violation of the human trafficking provisions…'.[995] Although this provision allows for the presumption of human trafficking victimisation, the victim may nonetheless be charged with prostitution. Oklahoma further requires that any criminal charges filed against a child be dropped if, at preliminary hearing, it is found to be more likely than not that the child is a victim of human trafficking or sexual abuse

Since the beginning of the twenty-first century, the US federal government has achieved moderate success with the introduction of its anti-trafficking policies,[996] none more so than in respect of sex trafficked children. Indeed, the TVPA of 2000 formulated the most used taxonomy of human trafficking to date which placed child victims of sex trafficking into one of three main categories of victims, alongside victims of labour trafficking and adult victims of sex trafficking.[997] Reauthorisations of the TVPA (TVPRAs) provided further protection and support for these young victims. Almost five years later, Congress formally acknowledged the irrefutable state of domestic trafficking within the US and with that the TVPRA 2005 provided funding to shelters for domestic child sex victims.[998] Similarly, the TVPRA 2008 placed a particular emphasis on protecting 'minors' and block grants were authorised by the TVPRA 2013 to combat domestic child sex trafficking and create shelters.

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[994] ibid.

[995] Okla Stat Ann § 21-1029(C) (2019).

[996] Stephanie Richard, 'State Legislation and Human Trafficking: Helpful or Harmful?' (2006) 38 U Mich JL Reform 447, 477; Andrew Hall, 'The Uniform Act on Prevention of and Remedies for Human Trafficking' (2015) 56(3) Arizona L Rev 853, 856 and 862-863.

[997] 22 USC § 7102(8) (2000); 22 USC § 7102(11) (2019).

[998] 42 USC § 14044b (2012).

Unfortunately, despite Congress' best efforts to fight modern slavery and protect those most vulnerable to exploitation, state policy was lagging far behind. As Hall notes, 'Inconsistent and inadequate state anti-trafficking laws… resulted in patchwork problems, underenforcement, and backward policing policies, leaving the large majority of trafficking victims in the [US] to suffer in the shadows.'[999] This was particularly true of child trafficking victims who were coming into contact with the criminal justice system during the course of their trafficking experience. Consequently, the 2013 TVPRA further advocated that states: 'facilitate the promulgation of a model statute that – … (2) protects children exploited through prostitution by including safe harbor provisions that –

(A) treat an individual under 18 years of age who has been arrested for engaging in, or attempting to engage in, a sexual act with another person in exchange for monetary compensation as a victim of a severe form of trafficking in persons;
(B) prohibit the charging or prosecution of an individual described in subparagraph (A) for a prostitution offense;
(C) require the referral of an individual described in subparagraph (A) to appropriate service providers, including comprehensive service or community-based programs that provide assistance to child victims of commercial sexual exploitation; and
(D) provide that an individual described in subparagraph (A) shall not be required to prove fraud, force, or coercion in order to receive the protections described under this paragraph.'[1000]

In addition to this, and in the same year, the Uniform Law Commission ('UCL', also known as the National Conference of Commissioners on Uniform State Laws) provided states with comprehensive guidance directed against human trafficking. In recognition of the fact that anti-

[999] Hall, 'The Uniform Act' (n 1009) 856-857.

[1000] Violence Against Women Reauthorization Act of 2013 § 1243, 127 Stat 54, 154 (2013-2014).

human trafficking legislation, inclusive of safe harbour laws, is complex to draft, the novel uniform state law – the Uniform Act on Prevention of and Remedies for Human Trafficking 2013 ("UAPRHT") – provides language drafted by lawyers that serves as a basis for state legislation and establishes three components necessary for ending human trafficking: criminal penalties; victim protections; and public awareness and prevention methods. With regard to victim protections, the UAPRHT provides states with model legislation to facilitate the enactment of safe harbour laws as well as providing an affirmative defence to prostitution charges or other non-violent offences and the possibility to vacate such convictions.

The UAPRHT 'clearly and unequivocally recommends the immunity model for child victims of trafficking'.[1001] Under s 15, entitled 'Immunity of a Minor', the act provides that:

> '(a) An individual who was a minor at the time of the offense is not criminally liable or subject to [juvenile delinquency proceeding] for [prostitution] and [insert other non-violent offenses] committed as a direct result of being a victim of human trafficking.'

Notably, the Act also broadens the scope of safe harbour provisions to protect children who have been commercially sexually exploited as well as child victims of labour trafficking. This is encouraging as victims of labour trafficking who have been forced to commit crimes during the course of their exploitation have been overlooked in the past due to the early predominant human trafficking narrative which focused on sexual exploitation. Comparable protections for minor victims of labour trafficking remain few and far between. Indeed, an over-focus on

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[1001] Polaris, *Human Trafficking Issue Brief: Safe Harbor* (2015) 2.

punishment over protection and (domestic minor) sex trafficking over labour trafficking plagues the anti-human trafficking framework in the US.[1002]

In the latest TIP Report, released in June 2020, the US State Department ranked its own response to human trafficking and forced labour for the tenth year running. Following stricter procedures mandated by Congress to rank countries based on substantive results and progress, as outlined in the 2018 TVPRA, the US government ranked itself in the highest tier – Tier 1. The ranking was heavily criticised by the Alliance to End Slavery and Trafficking (ATEST) who argued that the Report failed to meet the new minimum standards established by Congress to merit Tier 1 status. Indeed, the TIP Report itself indicates that the US falls short in two of the three main areas of ranking evaluation: prosecution and protection. Of particular concern is the acknowledgment that the US government 'has decreased protection efforts' for victims/ survivors. ATEST goes as far as to argue that this undermines the overall credibility of the TIP Report and the 'nation's credibility as a leader in the anti-trafficking movement at large'.[1003]

3.2.2 Lower Burden of Proof

The TVPA, as amended, states that the sex trafficking of a victim aged eighteen years or younger is 'a severe form of trafficking in persons'.[1004] Furthermore, the same provision provides a significant distinction between adult victims of sex trafficking and child victims by

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[1002] See Chapter 4, subheading 2 for discussion of human trafficking and modern slavery policy and legislation in the US.

[1003] Terry FitzPatrick, 'ATEST Challenges Tier 1 Ranking for U.S. in 2020 TIP Report' (ATEST 29 June 2020) <https://endslaveryandtrafficking.org/atest-challenges-tier-1-ranking-for-u-s-in-2020-tip-report/> accessed 23 September 2022.

[1004] 22 USC § 7102(11)(A) (2019).

retracting the coercive means element of the offence for the latter. In other words, when a case against a trafficker is made, the prosecution need not establish that the trafficker compelled the victim to participate through any means. According to the federal definition, the notion that children are unable to consent to sexual activity is reason enough to consider any commercial sexual activity involving a child as being coerced. The child's age alone negates capacity to consent and thus the presence of force, fraud or coercion is immaterial when securing a conviction against a trafficker; under federal law, any child in commercial sex is a victim of sex trafficking regardless of whether coercion is demonstrable.

By eliminating the requirement to prove the means element of trafficking in cases involving sex trafficking, it is easier to successfully prosecute sex traffickers at the federal level, thus protecting (potential) victims from further harm. The TVPA does not, however, apply this approach consistently to all child victims of human trafficking. In cases concerning victims of labour trafficking, for example, no distinction is made between child and adult and the prosecution must prove that the child was forced to work under threat of serious harm or physical restraint, or threatened with such.[1005] By restricting this protection to victims of sex trafficking only, the TVPA disproportionately affects children who are victims of other forms of human trafficking.

Similarly, the majority of US states and the District of Columbia have enacted anti-trafficking statutes that provide for this lower burden of proof in cases of child sex trafficking. Each of the states analysed in this thesis: California, Kentucky, Oklahoma, Wisconsin and Wyoming, criminalise the trafficking of a child with intent to cause the child to engage in a commercial

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[1005] 22 USC § 7102(11)(B) (2019).

sexual act without the need to prove coercion. Several states provide further protection with statutes that explicitly provide that the prosecution need not establish actual knowledge, on the part of the trafficker, of a child's age in order to be convicted of sex trafficking. In such states, lack of knowledge of a victim's age does not provide an affirmative defence to a perpetrator,[1006] nor does a reasonable mistake in estimating the age of a victim.[1007]

3.2.3 Affirmative Defence Statutes

California,[1008] Kentucky,[1009] and Wyoming[1010] each prohibit the arrest of minors for prostitution whereas Oklahoma[1011] and Wisconsin[1012] continue to allow the prosecution of minors for sex. Oklahoma's law includes a passage stating that it is presumed that persons aged sixteen or seventeen were coerced into prostitution, but the law considers children sold into sex trafficking as child prostitutes, not victims.[1013] Oklahoman does, however, provide an affirmative defence for minor victims of human trafficking in addition to the affirmative defence for adults. The minor trafficking victim defence, as amended on 1 November 2018, affords 'an affirmative defense to delinquency or criminal prosecution for any misdemeanor or

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[1006] Missouri.

[1007] Alabama.

[1008] California's prostitution law does not apply to children under the age of eighteen. Cal Penal Code § 647(5).

[1009] Kentucky state law exempts minors under the age of eighteen from prosecution for prostitution Ky Rev Stat §529.120(1).

[1010] Wyoming law states that human trafficking victims may have their charges vacated if their offense is deemed to have been a 'result of having been a victim'. Wyo Stat §§ 6-2-708 (2013). Wyoming further deems minor human trafficking victims as 'child[ren] in need', and 'neglected' pursuant to the Child in Need of Supervision Act and the Child Protection Act.

[1011] Okla Stat 21 § 1029(C) (2016).

[1012] Wis Stat § 944.30(2m) (2013).

[1013] Okla Stat §1029(A).

felony offense that the offense was committed during the time of and as the direct result of the minor being the victim of human trafficking.[1014] It is argued here that the statutory laws in the comparative US states do not go far enough to ensure a victim-centred approach to non-criminalisation of child victims. All states should prohibit the criminalisation of children for prostitution and prostitution related offences and provide broad causation-based affirmative defences for child victims, similar to the recommendations for E&W in the succeeding chapter.

4. Towards a Victim-Centric Solution

The Anti-Trafficking Monitoring Group note that a key voice missing from domestic anti-trafficking work is that of those who have themselves been trafficked or are vulnerable to such exploitation.[1015] Indeed, knowledge from children directly was all but absent as the landscape of anti-child trafficking strategy, policy and practice began to take shape in the UK; notably child victims were not consulted in the process leading up to the government's 2011 human trafficking strategy, which explicitly includes a section on children.[1016] Those with lived experience of raising the statutory defence, including children, have also not been consulted as part of the evidence gathering for any of the recent reviews into the defence. Gearon argues that trafficked children's participation in developing, implementing and evaluating anti-trafficking strategies would provide valuable first-hand experience to inform policies.[1017]

[1014] Okla Stat § 21-748.2(E) (2019).

[1015] Anti-Trafficking Monitoring Group, 'All Change: Preventing Trafficking in the UK' (Anti-Slavery International 2012) 69.

[1016] ibid.

[1017] Alinka Gearon, 'Child Trafficking: Young People's Experiences of Front-Line Services in England' (2019) 59 Brit J Criminol 481, 481.

5. Conclusion

This chapter has provided a critical examination of the s 45 modern slavery defence for children, its theoretical underpinnings and practical operation, and engaged in a comparative analysis of the statutory protections afforded to children in E&W and the US states of California, Kentucky, Oklahoma, Wisconsin and Wyoming. It was argued that the protections in these jurisdictions fail to provide the optimal course of redress for child human trafficking and modern slavery victims who commit offences. The distinct measures in place to protect children from criminalisation were examined, first in relation to non-criminalisation in E&W followed by the approach to non-criminalisation in the US.

It was found that problematic components within the composition of the defence are abundant, in particular the problematic language used within the Act, the inclusion of the 'reasonable person' test, the failure to define 'direct consequence', and the overall lack of victim input when producing policy and legislation. Case studies were provided throughout which illustrated the myriad problems which permeate from the current approaches taken by each jurisdiction. It was further argued that, despite the s 45 MSA 2015 child defence being formed from vastly different underpinnings to that of the adult defence, the provision, like its adult counterpart, fails to provide a truly victim centric approach to non-criminalisation in E&W. Two opposing views were acknowledged: that the statutory defence is counterproductive, as well as the view that the defence strikes the correct balance between protecting victims and preventing misuse of the defence. It was, however, argued that the reports proposing such conclusions were significantly limited in their methodologies and thus the veracity of their claims are questionable. Quantitative and qualitative data on the use of the statutory defence must be obtained in order to fully assess the extent to which it is indeed being exploited. Until

then, the well-documented convictions of (potential) victims of modern slavery provide a compelling reason to ensure the s 45 defence is fit for purpose. Ultimately, this chapter proposed that, in its current form, the black-letter law of the s 45(4) defence fails to afford sufficient protection to child victims on modern slavery and is not fit for purpose. In the following chapter, a move towards a more victim-centred solution is advanced and optimal recommendations are made.

Conclusions And Recommendations for Reform

> 'To allow a defence to crime is not to express approval of the action of the accused but only to declare that it does not merit condemnation and punishment'.[1018]

The statutory defences under s 45(1) and s 45(4) provide a crucial layer of protection to adult and child victims of human trafficking and modern slavery, respectively, accused of committing criminal offences and is a key piece of legislation, and one of the central statutory vehicles, by which the UK implements the non-criminalisation principle. In theory, the provision is a positive development in the protective framework afforded to victims in E&W that outlines how criminal justice actors, and the courts should proceed when trafficking victims commit crimes. As this research has shown, however, in practice, the application of both the defence for adults and the defence for children is significantly flawed and does not prioritise the needs and rights of victims. The MSA 2015 represents a missed opportunity to fully appreciate the innate vulnerability of victims and provide a more humanising defence that adopts a truly victim-centred, human rights approach to non-criminalisation. This concluding chapter succinctly summarises the findings from each of the chapters in this thesis that support this statement and the move towards a more victim-centric approach to non-criminalisation of human trafficking and modern slavery victims. This thesis provides an original contribution to knowledge and existing literature in an ever-expanding area of law and social policy, specifically by presenting a unique Anglo-American comparison of the law in this area and proposing novel recommendations for law reform.

[1018] *DPP for Northern Ireland v Lynch* [1975] AC 643, 716 (Lord Edmund-Davies) citing JC Smith, 'A Note on Duress' [1974] Crim LR 349, 352.

The overarching aim of this thesis was to challenge the current statutory framework that exists to protect victims of human trafficking and modern slavery who commit offences and advocate for a victim-centred, human rights-based approach to the non-criminalisation of victims by comparatively analysing statutory modern slavery defences in E&W and the US. The political movements leading up to the development of the international anti-modern slavery agenda were examined and the international and regional obligations vis-à-vis protecting victims from criminalisation were critiqued. It was suggested that the dominant criminal justice-based focus of international policy laid the foundations for the introduction of legislation in the UK and US which hindered the progression of a victim-centred approach to non-criminalisation. The concept of modern slavery victimhood was explored alongside the victim/ offender dichotomy which prevents the prioritisation of victims' needs, rights and lived experiences in protection efforts. The scope of the modern slavery defences for adults and children were exposed and explored by analysing the conceptualisation, application, and operation of each with reference to literature and case law. It was suggested that the limitations within the defences directly correlate with socio-legal prejudices of victimhood that are embedded within the modern slavery discourse and prevent a true victim-centred approach from being adopted which ultimately leads to the inappropriate criminalisation of victims. The elements within the statutory defences in both E&W and the US were compared via a novel theoretical framework which highlighted how the limitations within s 45 of the MSA 2015 have been addressed by other state legislatures via different interpretations of the non-criminalisation principle. To address the limitations present within s 45, reforms were proposed and are extrapolated in each section below to strengthen the current legislation by plugging current gaps in the formation of s 45 and provisions affecting its scope which ultimately lead to victims facing unjust criminalisation.

1. International, Regional and National Failings

Chapter 1 provided an historical analysis of legislative anti-trafficking and slavery movements that established the foundations for conducting an in-depth Anglo-American comparison of the statutory defences available to victims of modern slavery who commit offences in E&W and the US. It was argued that the International anti-trafficking instruments should be amended to incorporate causation-based non-criminalisation provisions which impose positive obligations on states to provide statutory human trafficking and modern slavery defences corresponding to a true victim-centred, human rights-based interpretation of the non-criminalisation principle.[1019] By analysing the anti-modern slavery agenda through the lens of victim protection, this chapter highlighted the overarching failing of the legislative response to modern slavery: the failure to acknowledge the true reality of the lived experiences of victims. Only by doing this can a truly victim-centred approach be adopted. The evolution of the concept of 'modern slavery' was explored; its roots in the transatlantic slave trade, white slave trade, human trafficking and prostitution considered; and the development of the international anti-modern slavery agenda and introduction of modern slavery strategies in the UK were examined. The chapter demonstrated the true complexities of combatting human exploitation and the challenges that presented themselves when developing victim identification frameworks and protective provisions for victims. From this it can be concluded that the early abolitionist movement had a profound effect on the anti-trafficking and slavery discourses of the present day; neither of which has been driven by honest humanitarian concern, but rather by competing political agendas, despite states claiming otherwise. These competing interests

[1019] Similar to the model proposed by Hoshi to be incorporated into the Trafficking Protocol: Hoshi, 'The Trafficking Defence' (n 195) 71.

that manifest today in the spheres of transnational organised crime, anti-prostitution, and anti-immigration frameworks have led to the predominant criminal justice-based focus of anti-modern slavery efforts which consequently has had a damaging impact on the rights afforded to victims. This is especially apparent for those victims who are arrested, detained, prosecuted and convicted for crimes they have committed in connection with their modern slavery circumstances.

The Trafficking Protocol, in particular, was constructed with its central emphasis being on the interception and punishment of traffickers as opposed to the identification and protection of victims in line with a victim-centred approach. Indeed, the Protocol is silent on victim identification and imposes no obligations on states to identify victims nor set up any mechanism to identify victims. The instrument is primarily criminal justice-based, adopting a law enforcement approach that focuses on trafficking as a form of transnational organised crime that must be addressed in order to protect state borders. As this thesis has highlighted, this approach has since been imbedded into subsequent anti-trafficking instruments and domestic anti-modern slavery legislation and frameworks, which reduces victim identification and protection to being peripheral issues, despite claims to the contrary. This is evident by the weak language used within the Trafficking Convention and Directive pertaining to state obligations to identify victims. This thesis argued that the weak language within the instruments did not provide a truly victim-centred, human rights based approach to protecting victims, via identification.

Although both the Convention and Directive explicitly recognise the importance of identifying trafficked victims, neither impose hard obligations on states to do so, contradictory to a victim-centred approach. Rather they encourage cooperation between public and competent

authorities, encourage states to create frameworks to train people to identify victims, and encourage states to establish early identification mechanisms.[1020] With early victim identification considered to be the first necessary step in granting protection to victims, it is therefore unfortunate that hard obligations were not imposed on states to establish more proactive victim-centred procedures for identifying victims. Although the ECtHR has since held that identification of (potential) victims is a positive obligation flowing from Article 4 ECHR,[1021] whereby consequences of failure to identify can result in violation of both Articles 4 and 6 ECHR,[1022] explicitly including victim identification as a positive obligation would serve to bolster the victim-centred approach these regional instruments claim to adopt.

In the same spirit of victim identification, the Trafficking Protocol, Trafficking Convention, and Trafficking Directive each claim to protect the human rights of victims of trafficking, stating the protection of victims as being a 'paramount objective',[1023] yet none of the instruments provide truly victim-centred protections from criminalisation. The former implies states comply with the principle of non-criminalisation and the latter two instruments explicitly provide for the 'non-punishment' and 'non-prosecution or non-application of penalties to the victim' respectively. Despite being distinguished for their seemingly victim-centred approach to human trafficking, it is concluded from this research that the non-criminalisation provisions in these instruments contradict each of their aforementioned claims. Neither the implicit

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[1020] Trafficking Convention, Art 10; Trafficking Directive, Art 11(4).

[1021] *Rantsev*. See also, inter alia, L.E. v. Greece, App. No. 71545/12 (ECtHR, 21 January 2016); Chowdury and Others v. Greece, App. No. 21884/15 (ECtHR, 30 March 2017); S.M. v. Croatia, App. No. 60561/14 (ECtHR [GC], 25 June 2020); and V.C.L. and A.N. v. United Kingdom, Apps. No. 74603/12 and No. 77587/12 (ECtHR, 16 February 2021).

[1022] *VCL and AN* (n 283) [163]-[183], [194]-[210].

[1023] Trafficking Protocol, Art 2(b); Trafficking Convention, Art 1(b).

reference to non-criminalisation, nor the explicit reference to the principle provides a truly victim-centred, human rights-based approach that affords paramount concern to victim protection. Each instrument permits responses in E&W which are compliant with the rights to protection from criminalisation it obliges, but which fail to provide comprehensive protection to victims.

Neither the Trafficking Protocol, Convention nor Directive impose any hard obligations on states to provide for the non-criminalisation of trafficking victims. Both the Trafficking Convention and Directive appear to endorse a human rights approach, focusing on victim vulnerability and the fact that they may be forced to commit crimes or become involuntarily involved in criminal activity, but they are innately weak for several reasons. Firstly, the provisions are silent on the need to protect victims from detention.[1024] Secondly, neither provide clarity on what exactly constitutes compulsion in the sense that one must be 'compelled' to commit unlawful activities.[1025] Thirdly, both impose a limited obligation on Member States making the non-prosecution provision elective in nature.[1026] On this final matter, and despite some arguments to the contrary,[1027] the language in each is inherently weak. Arguably, although this serves a constructive purpose in not encroaching on states' penal

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[1024] Gromek-Broc, 'EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?' (2011) 20(64) Nova Et Vetera 227, 231.

[1025] Scarpa, *Trafficking* (n 94) 156.

[1026] *P v Chief Superintendent Garda National Immigration Bureau & Others* [2015] IEHC 22, [200] and [184]; Muraszkiewicz, *Protecting* (n 207) 126.

[1027] See for example, RACE in Europe, 'Trafficking for Forced Criminal Activities and Begging in Europe' (2014); Piotrowicz and Sorrentino, 'Human Trafficking' (n 22) 678. Cf *VCL and AN v UK* (n 283) [157] in which the ECtHR has since confirmed that no general prohibition on the prosecution of victims of trafficking can be construed from the-Trafficking Convention, Art 26 or any other international instrument, even where the victim was a child.

systems, the lack of clarity and absence of any binding international and regional legal obligations on non-criminalisation has had a detrimental impact on achieving a desirable victim-centred approach to protecting victims at the domestic level. This thesis argued that the Trafficking Protocol, Convention and Directive should be amended to incorporate causation-based non-criminalisation provisions which impose positive obligations on states to provide statutory human trafficking and modern slavery defences corresponding to a true victim-centred, human rights-based interpretation of the non-criminalisation principle.

2. Towards a Victim-Centred Approach

In Chapter 2, awareness was raised as to the extent of which victims of human trafficking and modern slavery are unjustly criminalised for their participation in criminal activities. Attention was drawn to the lesser-known manifestation of modern slavery, namely 'criminal exploitation'. The thesis highlighted that, despite accounting for the largest group of victims,[1028] criminal exploitation is largely overlooked by the Government. [1029] Literature and

[1028] Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, Quarter 1 2022 – January to March* 12 May 2022) <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-1-2022-january-to-march/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-1-2022-january-to-march> accessed 27 September 2022; Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary, 2021* (3 March 2022) <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2021/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2021> accessed 27 September 2022; Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, End of Year Summary, 2020* (18 March 2021) 5.

[1029] Notably, the draft Slavery and Human Trafficking (Definition of Victim) Regulations 2022 which support the implementation of part of the Nationality and Borders Act 2022, fail to include a single reference to criminal exploitation; a point which has been contested at length in Parliamentary debates. See for example, HC Deb 29 June 2022 vol 717, cols 6-8, 19.

case law was used to draw upon the lived experiences of victims of criminal exploitation which established the rationale for a truly victim-centred approach to anti-modern slavery efforts and the non-criminalisation of victims. A victim-centred approach to the non-criminalisation of human trafficking and modern slavery victims places the priorities, needs and rights of victims and survivors at the centre of all policy, legislative and practical responses to the protection of victims from arrest, detainment, prosecution, and conviction for crimes committed in connection with their exploitation. Parallels can be drawn here with the human rights-based approach which follows the theory that all people are human rights holders and states should be under a duty to respect, protect, and fulfil corresponding rights, something which the current identification and protective frameworks in the UK has been found to be in breach of.[1030] This thesis adopted a 'complex-systems lens' which deconstructed the victim subsystem in order to analyse the concept of victimisation beyond that of the dominant discourse narrative of modern slavery which has previously influenced policy and legislation. The research found that a genuine victim-centred approach to non-criminalisation, incorporating a progressive protective framework, requires a trauma-informed, victim/ survivor informed, and culturally competent approach that necessitates adequate protection be afforded to *all* victims, for *all* criminal activities they commit.[1031] It was argued that humanity, vulnerability, and autonomy must be placed at the core of policy and legislative responses to the non-criminalisation of victims.

The analysis of victim narratives from recent Court of Appeal cases, explored by this author in case notes,[1032] presented a true picture of victimhood in the context of modern slavery for

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[1030] *VCL vand AN v UK* (n 283) [200].

[1031] UNODC, *Model Legislative Provisions Against Trafficking in Persons* (UN 2020) 45.

[1032] See Appendix I and II.

criminal exploitation, one which is vastly different from that of conventional representations of helpless victims and passive suffering. This highlighted the fundamental need for the experiences of survivors of criminal exploitation who have engaged with the criminal justice service to be present in policy and legislative considerations and for victim/ survivor voices to be central to the reformation of laws on non-criminalisation. It is crucial that states formulate strategies, laws and guidance that reflect the lived experience of victim and survivors. Legislation and protective frameworks must go beyond official constructs of victimhood; beyond dominant human trafficking and modern slavery discourse; beyond abstract law and policies which favour one type of victim over another, in order to adequately protect all victims from being criminalised. This approach is reinforced by anti-modern slavery stakeholders and scholars in E&W and the US who strive for genuine victim/ survivor-centred measures to combat this form of exploitation.

The subsequent sections of this conclusion address the main parameters of s 45 of the MSA 2015, inclusive of the narrow statutory definition of 'human trafficking (victims)' to which s 45 is applicable, the limited scope and clarity of the adult modern slavery defence, and the limited composition of the modern slavery defence for children, and offer suitable reforms. The table below provides an overview of the proposed changes to the MSA 2015 followed by a brief explanation for each of the re-drafts which are explored in more detail in the succeeding sections.

Provision	Current Wording	Proposed Re-draft
Section 1	Slavery, servitude and forced or compulsory labour (1) A person commits an offence if— (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or (b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour. (2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention. (3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances. … (5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.	Slavery, servitude, ~~and~~ forced or compulsory labour **and child labour** (1) A person commits an offence if— (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or (b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour~~.~~ **or** **(c) the person subjects a child to child labour, including all of the worst forms of child labour, and the circumstances are such that the person knows or ought to know that the child is being required to perform child labour.** (2) In subsection (1)— **(a)** the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention. **(b) the references to subjecting a child to the worst forms of child labour are to be construed in accordance with Article 3 of the ILO Convention (No182).** (3) In determining whether a person is being held in slavery or servitude or required to

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<tr><td></td><td></td><td>perform forced or compulsory labour or child labour, regard may be had to all the circumstances.

…

(5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, or child labour does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour or child labour.</td></tr>
<tr><td colspan="3">Explanation

The proposed re-draft above differs in that the language of ‘child labour’ and ‘worst forms of child labour’ is now included in the provision in line with Article 3 of the ILO Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. Currently, there is no reference to child labour, or child exploitation generally, within the 2015 Act despite it being internationally recognised that this form of exploitation is vastly different from that of ‘forced labour’. Though they are distinct concepts, both lie at the extreme end of the spectrum of labour exploitation and represent some of the most egregious labour rights violations. While not all child labour is forced, children often do not have a voice, are especially vulnerable to exploitation, and face significant immediate and long-term consequences from child labour. The 2015 Act fails to appreciate the magnitude of this type of exploitation. By explicitly recognising the distinct legal definitions of these terms in domestic law, the proposed re-draft ensures that all children engaged in the worst forms of child labour are covered by the Act, affording appropriate statutory weight to the prevention of these crimes and protection of its victims.</td></tr>
<tr><td>Section 2</td><td>Human trafficking

(1) A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.

(2) It is irrelevant whether V consents to the travel (whether V is an adult or a child).</td><td>Human trafficking

(1) A person commits an offence if the person arranges or facilitates the ~~travel of~~ recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control over another person (“V”) with a view to V being exploited.</td></tr>
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<tr>
<td></td>
<td>(3) A person may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.

(4) A person arranges or facilitates V's travel with a view to V being exploited only if—
(a) the person intends to exploit V (in any part of the world) during or after the travel, or
(b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.

(5) "Travel" means—
(a) arriving in, or entering, any country,
(b) departing from any country,
(c) travelling within any country.

(6) A person who is a UK national commits an offence under this section regardless of—.
(a) where the arranging or facilitating takes place, or
(b) where the travel takes place.

(7) A person who is not a UK national commits an offence under this section if—
(a) any part of the arranging or facilitating takes place in the United Kingdom, or
(b) the travel consists of arrival in or entry into, departure from, or travel within, the United Kingdom.</td>
<td>(2) It is irrelevant whether V consents to the ~~travel~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control** (whether V is an adult or a child).

~~(3) A person may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.~~

~~(4)~~(3) A person arranges or facilitates ~~V's travel~~ **the recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control over V** with a view to V being exploited only if—
(a) the person intends to exploit V (in any part of the world) during or after the ~~travel~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control**, or
(b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the ~~travel~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control**.

~~(5) "Travel" means—~~
~~(a) arriving in, or entering, any country,~~
~~(b) departing from any country,~~
~~(c) travelling within any country.~~</td>
</tr>
</table>

<table>
<tr><td></td><td></td><td>~~(6)~~(4) A person who is a UK national commits an offence under this section regardless of—
(a) where the arranging or facilitating takes place, or
(b) where the ~~travel~~ <u>**recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control**</u> takes place.

~~(7)~~(5) A person who is not a UK national commits an offence under this section if—
(a) any part of the arranging or facilitating takes place in the United Kingdom, or
(b) the ~~travel~~ <u>**recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control**</u> consists of arrival in or entry into, departure from, or travel within, the United Kingdom.</td></tr>
<tr><td colspan="3">**Explanation**

The proposed re-draft above differs in that the language of ‘travel’ has been omitted as the overarching requirement of the provision and replaced with the language used in the international definitions of human trafficking: ‘recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control’. The current version of the provision is not optimal as it remains narrowly focused on the facilitation of ‘travel’ as a precursor to the action of trafficking thereby permitting a restricted interpretation which has the potential to leave some potential victims outside the ambit of the Act’s definition of trafficking and corresponding protections. The new provision permits a reading that is more aligned with the international understanding of the act of trafficking and will avoid any risk of future challenges being made to the interpretation of ‘travel’.</td></tr>
<tr><td>Section 3</td><td>Meaning of exploitation[*]</td><td>Meaning of exploitation
…</td></tr>
</table>

[*] No explicit reference is made to ‘criminal exploitation’ as a form of exploitation in the MSA 2015.

		Criminal exploitation **(7) The person is subjected to force, threats, coercion or deception designed to induce him or her to commit a criminal offence under the law in England and Wales.**
Explanation The proposed re-draft above differs in that 'criminal exploitation' is now explicitly included within the provision as a stand-alone form of exploitation. Currently, the Act includes five forms of exploitation, but is silent as to the concept of 'criminal exploitation'. Instead, exploitation of this type is shoehorned into the broader, less loaded concept of 'securing services' under s 3(5) of the Act. This is a significant omission which fails to afford appropriate statutory recognition to victims of this form of modern slavery. The language of the proposed re-draft is in line with the international and regional anti-trafficking instruments and acknowledges the recognised 'means' employed by exploiters to ensure compliance by victims in their exploitation. Including criminal exploitation as an independent form of exploitation, which includes explicit language of being forced to commit criminal acts, provides greater awareness and ensures that victims of this form of exploitation are recognised as equally deserving of statutory protection.		
Section 45	Defence for slavery or trafficking victims who commit an offence (1) A person is not guilty of an offence if— (a) the person is aged 18 or over when the person does the act which constitutes the offence, (b) the person does that act because the person is compelled to do it, (c) the compulsion is attributable to slavery or to relevant exploitation, and (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act. (2) A person may be compelled to do something by another person or by the person's circumstances.	Defence for slavery or trafficking victims who commit an offence (1) A person is not guilty of an offence if— (a) the person is aged 18 or over when the person does the act which constitutes the offence, (b) the person does that act ~~because the person is compelled to do it,~~ **as a direct consequence of slavery or relevant exploitation, and** ~~(c) the compulsion is attributable to slavery or to relevant exploitation, and~~ ~~(d)~~(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.

	(3) Compulsion is attributable to slavery or to relevant exploitation only if— (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation. (4) A person is not guilty of an offence if— (a) the person is under the age of 18 when the person does the act which constitutes the offence, (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and (c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act. (5) For the purposes of this section— "relevant characteristics" means age, sex, and any physical or mental illness or disability; "relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking. (6) In this section references to an act include an omission. (7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.	~~(2) A person may be compelled to do something by another person or by the person's circumstances.~~ ~~(3) Compulsion is attributable to slavery or to relevant exploitation only if—~~ ~~(a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or~~ ~~(b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.~~ ~~(4)~~ (2) A person is not guilty of an offence if— (a) the person is under the age of 18 when the person does the act which constitutes the offence, (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation~~, and~~ ~~(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.~~ ~~(5)~~ (3) For the purposes of this section— "relevant characteristics" means age, sex, ~~and~~ any physical or mental illness or disability, **and background of exploitation;** "relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking;

	(8) The Secretary of State may by regulations amend Schedule 4.	**“direct consequence” means in connection with, or in relation to, or as a result of.** ~~(6)~~ (4) In this section references to an act include an omission. ~~(7)~~ (5) ~~Subsections (1) and (4) do not apply to an offence listed in Schedule 4.~~ **A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.** ~~(8) The Secretary of State may by regulations amend Schedule 4.~~ (6) This section extends to offences that were committed wholly or partly before the commencement of this provision.

Explanation

The proposed re-draft above differs in regard to four main areas:

A retrospective provision

An explicit clause has been introduced in the new s 45(6) to give retrospective effect to the provision. Currently, the Act is silent on this matter and, as a consequence, has been interpreted by the Court of Appeal as not having retrospective effect. It is submitted here that this conclusion is flawed and not in line with the statutory definition of a ‘modern slavery victim’ under s 56(1) and (2) of the Act. The current interpretation excludes genuine victims from the ambit of the modern slavery defence, particularly those seeking to appeal their convictions who, had they been forced to commit the offence before 31 July 2015 – something entirely out of their control, would otherwise be able to raise the defence. The new re-draft seeks to prevent this injustice.

The reasonable victim of modern slavery

The reasonable person test remains in the adult defence under s 45(1)(d) which becomes s 45(1)(c) in the re-draft. However, the definition of ‘relevant characteristics’ under s 45(5), which becomes s 45(3) in the re-

draft, is amended to include 'background of exploitation'. Currently, the provision employs a standard of fortitude which requires an objective test that is not fully representative of a victim-centric approach to protecting victims from being criminalised. The standard to which victims are held does not fully capture the experiences of modern slavery victims, their unique circumstances, and the power dynamics at play over the course of their exploitation. By including 'background of exploitation' as a relevant characteristic that can be taken into account when establishing whether a realistic alternative to doing the act was available, this permits individual vulnerabilities to be considered and prevents victims from being held to an unrealistic standard of behaviour and convicted for actions committed as a result of their exploitation.

The reasonable person test is removed entirely from the child defence under s 45(4) which becomes s 45(2) in the re-draft.

As a direct consequence

The overall compulsion-based nature of the defence for adults is too narrow and fails to afford all victims adequate protection from criminalisation. The black-letter law in its current formationhas the potential to make it particularly difficult for victims who commit liberation offences to raise the defence owing to the high threshold of the compulsion element. The current wording of s 45(1)(b) conflates both a compulsion-based approach and a causation-based approach whereby the former takes precedent and seeks to further exckude victims who commit crimes in the process of their explitation wherevy the basis for them committing the crime is a result of their innate victimisation as opposed to direct coercion exerted by their exploiters. The language of compulsion in s 45(2) and (3) and 'direct consequence' is defined in the new s 45 (3).

Excluded offences

The inclusion of Schedule 4 in its current form is the most contested limitation of the provision for both adults and children. It is not in line with a truly victim-centred approach to non-criminalisation which would permit the broad application of the modern slavery defence to all offences, except murder. The reference to Schedule 4 under s 45(7) is amended under s 45(5) of the re-draft to only exclude the offence of murder and instead, a partial defence is created which would result in a conviction for manslaughter in cases where a victim commits murder. S 45(8) as it pertains to Schedule 4 is removed. Schedule 4 itself would also be removed from the MSA 2015 in the re-draft.

2.1 An All-encompassing Provision

A major shortcoming of the MSA 2015 lies at the very heart of the Act with its definition of 'human trafficking'.[1033] Rather than transposing the definitions of human trafficking from the corresponding international and regional instruments, the Act simply consolidates existing offences into a single piece of legislation. Unsurprisingly then, flaws in those offences that made the legislation ill-suited to the wider scope of the problem of human trafficking, as outlined in Chapter 1, are still present in the MSA 2015. Crucially, the definition of human trafficking in English and Welsh law today remains narrowly focused on the facilitation of 'travel' as a precursor to the action of trafficking. This has the potential to allow for victims who may not need to leave their own homes, or those who arrange their own travel, to fall outside the ambit of the definition of trafficking and the protections afforded to those who suffer these crimes and become victims. Although the CPS reportedly take a broad interpretation of the word 'travel', the language in the Act is not as clear as it should be, and risks being challenged in future where a narrower approach may be taken to what constitutes 'travel'. This thesis urges the Government to amend s 2 MSA 2015 to mirror the Trafficking Protocol, Convention, and Directive in its structure and remove all explicit reference to 'travel' to ensure all victims are protected by the Act in line with the true picture of modern slavery victimhood outlined in Chapter 2.

To ensure that all adult and child victims of human trafficking and modern slavery are protected from criminalisation, the law should first and foremost include a definition of 'human trafficking' that is broad in its ambit and aligns with the international and regional definitions of trafficking to encompass a wide range of exploitative practices. This definition should be reviewed annually by the Secretary of State and updated in line with evolving international

[1033] Modern Slavery Act 2015, s 2.

anti-human trafficking and modern slavery law. ‘Movement’, particularly ‘travel’, should not be an essential aspect of the definition of human trafficking. Section 2 of the Modern Slavery Act 2015 should be amended as follows:

Human trafficking

(1) A person commits an offence if the person arranges or facilitates the ~~travel of~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control over** another person (“V”) with a view to V being exploited.

(2) It is irrelevant whether V consents to the ~~travel~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control** (whether V is an adult or a child).

~~(3)A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.~~

~~(4)~~ (3) A person arranges or facilitates ~~V’s travel~~ **the recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control over V** with a view to V being exploited only if—

(a) the person intends to exploit V (in any part of the world) during or after the ~~travel~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control**, or

(b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the ~~travel~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control**.

~~(5)“Travel” means—~~

~~(a)arriving in, or entering, any country,~~

~~(b)departing from any country,~~

~~(c)travelling within any country.~~

~~(6)~~ (4) A person who is a UK national commits an offence under this section regardless of—

(a) where the arranging or facilitating takes place, or

(b) where the ~~travel~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control** takes place.

~~(7)~~ (5) A person who is not a UK national commits an offence under this section if—
(a) any part of the arranging or facilitating takes place in the United Kingdom, or
(b) the ~~travel~~ **recruiting, transporting, transferring, harbouring or receiving, or transferring or exchanging of control** consists of arrival in or entry into, departure from, or travel within, the United Kingdom.

In a similar vein, this research has found that the failure by the Government to attach significant statutory weight to 'criminal exploitation' as a form of modern slavery has had a detrimental impact on victim identification and protection from criminalisation. Currently, the MSA 2015 is silent on the concept of criminal exploitation with legislatures opting to omit this form of exploitation from the statute books. This is despite explicit recognition in the Trafficking Directive which expresses the need to encompass a broader concept of human trafficking in light of recent developments in this area, and the fact that suspected criminal exploitation accounts for the largest group of (potential) victims identified in the UK. Consequently, criminal exploitation falls under the radar of the Act, albeit not entirely owing to several subsections within s 3 which outlines the statutory meaning of exploitation, referencing the less-loaded concept of 'securing services'.[1034] Arguably, however, this does not go far enough to ensure that this category of victim receives the appropriate recognition they deserve.

[1034] MSA 2015, s 3(5) and (6).

Criminal exploitation continues to be conflated with other forms of exploitation which ultimately masks the true nature and extent of the problem. The explicit inclusion of 'criminal exploitation' as a form of exploitation within the Act would provide a further step towards creating a more victim-centred approach to protecting victims as this category of victim would be recognised in law. The Modern Slavery Act 2015 should include 'criminal exploitation' as a stand-alone category of exploitation, section 3 of the Act should incorporate the following subsection:

Criminal exploitation

(7) The person is subjected to force, threats, coercion or deception designed to induce him or her to commit a criminal offence under the law in England and Wales.

The above reforms should be adopted into the MSA 2015 to ensure that the domestic definition of human trafficking and modern slavery victim and exploitation is consistent with international and regional instruments, the latter of which provide broader, more victim-centred definitions, which permit the identification and therefore access to statutory protections from criminalisation within the Act. This would be a vital step towards providing a more victim-centred approach to supporting victims as the Act would encompass all victims within the statutory definition of 'slavery or trafficking victim' to which s 45 applies. A truly victim-centred approach to protecting victims from criminalisation, however, must also ensure that *all* victims have access to the statutory defence(s). In their current formation, the statutory defences do not provide adequate protection to victims in line with a victim-centred approach owing to myriad limitations that have been addressed in this thesis. Each will be dealt with in turn as they relate to adult and child victims and reforms are proposed.

2.2 Protecting Adult Victims from Criminalisation

In Chapter 3, it was argued that the s 45 modern slavery defence as it pertains to adults should be amended to incorporate a causation-based provision corresponding to a true victim-centred, human rights-based interpretation of the non-criminalisation principle. The formation and application of s 45 statutory defence for adults was critiqued and the limitations of the defence were outlined. The scope and theoretical underpinnings of the defence were explored, paying particular attention to its connection to the defence of duress and the concept of involuntariness; the current (convoluted) test for its application; and its exclusivity to victims of human trafficking and modern slavery. Each individual element of the provision was subcategorised under five novel headings: victimisation, contemporaneity, proportionality, nexus, and exclusions. These subcategories formed the basis for the theoretical framework for the comparative analysis of the selected jurisdictions in Chapter 4. Following the analysis of each subcategory, four fundamental flaws within s 45 (as it pertains to adults) were identified as creating gaps in the statutory limb of the protective framework whereby vulnerable adult victims remain at risk of criminalisation. First, relates to the lack of clarity as to the effect of the defence, be it retrospective in nature or entirely prospective. Although this point of contention had since been clarified by the Court of Appeal in *CS*, this thesis argued that the decision in that case was wrong as a matter of construct. Second, relates to the inclusion of a (conflicting) reasonable person test. Third, relates to the compulsion-based nature of the defence. Fourth, relates to the extensive list of excluded offences under Sch 4 of the Act. It was asserted that each of these flaws have prevented the MSA 2015 from providing a genuine victim-centred approach to protecting victims from being criminalised as each create gaps in the framework whereby certain categories of victims fall outside the ambit of the defence and are unjustly prosecuted.

This thesis argued that a ‘victim of modern slavery’ should be defined in line with a victim-centred approach. The statutory definition of ‘modern slavery victim’ can be interpreted from s 56(1) and (2) of the MSA 2015. A ‘victim of slavery’ and a ‘victim of human trafficking’ are defined, respectively, and provide for an interpretation of explicit retrospectivity in the sense that, for the purposes of the MSA 2015, a person is a victim even if they were enslaved or trafficked prior to the offences being enacted, i.e. victim status can be applied in retrospect in recognition that these forms of exploitation were indeed taking place before the concepts were enshrined in statute. Despite this observation, the s 45 provision itself is silent with regard to whether the defence can afford protection to a victim who committed an offence prior to the MSA 2015 coming into force. This permitted the principle of the presumption against retrospectivity to be applied, *obiter*, by the courts, subsequently being confirmed in the case of *R v CS*.[1035] Consequently, the parameters of the statutory ‘modern slavery victim’, for the purposes of s 45, have been set and thus victims who have committed crimes prior to 31 July 2015 are excluded from the ambit of the modern slavery defence. This thesis argued that this decision is wrong as a matter of construction, the effect of s 45 should run in line with the intentions of Parliament in s 56(1) and (2) whereby the statutory definition of a victims of modern slavery is retrospective, in order to provide a substantive all-encompassing protective provision. The Government should amend the MSA 2015 to explicitly state that s 45 of the Act has retrospective effect. This should only apply specifically to the defence(s) and not the offences within s 1 and s 2 of the MSA 2015 in recognition of the notion that ‘if we do something today, we feel that the law applying to it should be the law in force today, not tomorrow’s backward adjustment of it’.[1036]

[1035] *R v CS* (n 265).

[1036] Oliver Jones, *Bennion on Statutory Interpretation* (6th ed, Butterworths Law 2013).

This thesis argued that the 'reasonable person' test in s 45(1)(d) is not representative of a victim-centred approach to the non-criminalisation of victims of human trafficking and modern slavery. The threshold of the 'reasonable person' test has caused issues for the courts.[1037] This proportionality requirement within the defence arguably applies a standard of fortitude which requires an objective test beyond that envisaged by a true victim-centred approach to non-criminalisation. It is questionable whether the reference to what could reasonably be expected of the victim/ defendant is sufficient to deal with concerns over victims being prosecuted for crimes they were forced to commit; that is unless the jury is provided with expert advice on the impact of modern slavery and specifically criminal exploitation. Ultimately, the standard to which victims are held is too high for what is understood to be an excusatory defence. This thesis examined the conflicting nature of the test in its current form which engages with both an objective and subjective approach and argued that the requirement in s 45 should afford more weight to the subjective aspect of the test keeping in line with the general shift in the realm of criminal law toward more subjective approaches. This would allow for the ambit of s 45 to encompass all circumstances under which offences are committed by victims as a consequence of their exploitation, providing a genuine victim-centred approach. The Government should amend s 45(5) to include 'background of exploitation' within the list of relevant characterises that are taken into account when applying the reasonable man test in s 45(1)(d).

This thesis additionally argued that the purely compulsion-based approach adopted by E&W in the s 45 modern slavery defence for adults is unfit for purpose and not characteristic of a

[1037] See *R v N* (n 373); and Appendix II (case note).

victim-centred, human rights-based approach to non-criminalisation. The s 45 defence is modelled on the duress defence and is therefore largely bound by the scope and theoretical underpinnings of ancient common law. By following this approach, the current formulation of the modern slavery defence for adults provides insufficient protection of victims from criminalisation where they have committed status offences and liberation offences. Furthermore, under s 45(3), the compulsion must result from either conduct that constitutes an offence of slavery, servitude or forced labour under s 1 MSA 2015 or conduct that constitutes 'relevant exploitation' which results from an act of human trafficking as defined in s 3 of the Act. Evidently, a literal reading of s 45 in its current form suggests that a victim has already been subject to exploitation, that is the defence cannot be raised by a victim who has been trafficked (satisfying the act of trafficking) but not yet exploited (satisfying the purpose of trafficking). This seeks to exclude a large portion of individuals who would be considered to have trafficking status, provided they were trafficked for the purpose of exploitation, under the international definition of trafficking, a clear oversight by legislatures especially considering a plain reading of the s 45 heading explicitly states that the defence is for 'slavery and trafficking victim' not simply 'exploited victim'. As the courts have been reluctant to adopt a more causation-based approach on the unsatisfactory basis that 'compulsion' as defined in *Joseph (Verna)* is not too narrow,[1038] the Government should step in to ensure that the modern slavery defence applies to *all* victims who may commit offences as a result of their situation of trafficking, slavery *and* exploitation beyond the confines of being 'compelled' to commit the act. Section 45(2) and (3) should be omitted from the Act and s 45(1) and (5) should be amended as follows:

[1038] *Joseph* (n 42).

Defence for slavery or trafficking victims who commit an offence

(1) A person is not guilty of an offence if—

(a) the person is aged 18 or over when the person does the act which constitutes the offence,

(b) the person does that act ~~because the person is compelled to do it,~~ **as a direct consequence of slavery or relevant exploitation. and**

~~(c) the compulsion is attributable to slavery or to relevant exploitation, and~~

~~(d)~~ (c) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.

~~(2) A person may be compelled to do something by another person or by the person's circumstances.~~

~~(3) Compulsion is attributable to slavery or to relevant exploitation only if—~~

~~(a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or~~

~~(b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.~~

…

~~(5)~~ (3) For the purposes of this section—

"relevant characteristics" means age, sex, ~~and~~ any physical or mental illness or disability, **and background of exploitation**;

"relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking;

"direct consequence" means in connection with, or in relation to, or as a result of.

The resultant defence will provide a final layer of protection to all victims, regardless of whether or not they have yet been exploited and regardless of the category of offence they have committed, unless it can be established that their offending is unrelated to their situation of trafficking/slavery/exploitation and a reasonable person having their relevant characteristics

would have had no realistic alternative but to commit the act. This provides a more victim-centred recourse by making a concession for status-related offences, those committed as a consequence of criminal exploitation, and offences committed where the victim is not under the control of the trafficker, in the strictest sense, for example when trying to escape from their trafficking situation. Assessing the credibility of the victim/ defendant would still be vested entirely in the court and the reasonable person caveat, albeit one which adopts a broader subjective limb of the test whereby the full extent of the nature of modern slavery is permitted to be considered by the court, would provide a safeguard against the unscrupulous use of the defence. This amended provision, however, would only present a truly victim-centred, human rights-based defence were its ambit not proscribed by excluded offences to which the formation of s 45 currently is.

This thesis further argued that the limitation of s 45 by way of excluded offences were not representative of a victim-centred approach to non-criminalisation of victims. Under s 45(7) MSA 2015, the statutory defences do not apply to offences listed in Sch 4. The Schedule lists over 130 offences that are excluded from the ambit of both the adult and child defences, several of which have been recognised as crimes directly linked to the criminal exploitation of victims, for example, offences under the MSA 2015 itself. In Parliamentary debates, emphasis was placed on the need to exclude 'certain serious offences' to which if a defence was allowed, unintended consequences would permeate. Concerns over unscrupulous 'serious criminals' using the defence to avoid being brought to justice and fears that extending the ambit to all offences would result in the increased use of victims to commit serious crimes were presented, even though genuine victims may be compelled to commit serious crimes.[1039] Arguably, the

[1039] Laird, 'Evaluating' (n 33) 397.

inclusion of Sch 4 in its current form is the most contested limitation of the provision for both adults and children with an abundance of criticism from Members of Parliament, practitioners in the field, NGOs, and scholars alike.[1040] On this matter evidence was presented to both independent reviews of the Act and the IASC's call for evidence on the statutory defence, yet no changes to the Schedule have been recommended. This thesis argued that a genuine victim-centred approach to non-criminalisation would envisage a broad application of a statutory defence for victims which would apply to all offences except murder. Where a victim of human trafficking and modern slavery commits murder, a partial defence should be available to them that would reduce murder to manslaughter. Subsection 7 and 8 should be amended as follows:

> ~~(7)~~ (5) ~~Subsections (1) and (4) do not apply to an offence listed in Schedule 4~~. **A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.**
>
> ~~(8) The Secretary of State may by regulations amend Schedule 4. This section applies to offences committed~~

The in-depth comparative analysis in Chapter 4 of the statutory defence for adults in E&W with the affirmative human trafficking defences in the US states of California, Kentucky, Oklahoma, Wisconsin, and Wyoming provided an insight into the operation of protective non-criminalisation frameworks in alternative common law systems that is largely absent from the

[1040] See for example, OSCE, *Policy and Legislative Recommendations* (n 181) 23; Jovanovic, 'The Principle of Non-Punishment' (n 44).

current literature in this area. The research addressed this gap in the literature and found that the emergence of human trafficking and modern slavery in the US and the move towards protecting victims and introducing statutory protective instruments was not that dissimilar to the progression of the movement in the UK. One key distinction, however, being the persistent focus by the US on framing human trafficking within the narrow confines of transnational sex trafficking. Although the broader nature and scope of human trafficking is increasingly being addressed in the US, this traditional narrative has somewhat skewed state approaches to addressing human trafficking and modern slavery and protecting victims which must be borne in mind when comparing the relevant statutory provisions. In order to counter this within the comparative analysis, the US states which adopt narrow prostitution-related affirmative defences, to which the majority do, were excluded from the analysis in this thesis. The comparison with the five remaining states found that the same limitations within the MSA 2015 defence for adults were largely present within parallel US provisions as they apply to victims of trafficking.

In particular, ambiguous language regarding the underpinnings of the defences mirrored that of regional non-punishment provisions and the language used in s 45 MSA 2015. California, for example, conflates the duress-based requirement of compulsion with that of the nexus requirement by limiting the scope of the defence to those who were 'coerced to commit the offense as a direct result of being a human trafficking victim' and so the same criticisms of provisions in the Trafficking Convention, Directive, and the MSA 2015 can be applied here. Similar criticisms with regard to offences excluded from the ambit of statutory protective frameworks can also be applied to some of the states within this comparative analysis. As mentioned above, over 130 offences are excluded from the ambit of s 45 by Sch 4 MSA 2015 in E&W. Similarly, the states of California and Kentucky in the US largely limit the application

of their affirmative defences to non-serious, non-violent and prostitution-related offences. Comparatively, however, Oklahoma, Wisconsin, and Wyoming do not exclude any offences from the ambit of their respective affirmative defences implying a potentially more victim-centred approach in that respect. Despite this, it was submitted that, under a plain reading, each of these affirmative defences are too broad without an explicit limitation of the offence of murder. Arguably, in the absence of a requirement for compulsion, only a partial defence to murder should be available to victims who kill as a result of their human trafficking and modern slavery victim status. Furthermore, this thesis argued that under a plain reading of the Oklahoma affirmative defence, too broad a defence was provided owing to the fact that no nexus requirement was present to safeguard against the defence being used by individuals whose trafficking situation was too far removed from the crime they committed. It is submitted that E&W should amend its statutory defence available to adult victims by adopting a similar causation-based approach to the ones adopted by Wisconsin and Wyoming state legislatures, with the caveat of murder being excluded from the ambit of the defence. Instead, a partial defence to murder for human trafficking and modern slavery victims should be established.

2.3 Protecting Child Victims from Criminalisation

The remaining part of this concluding chapter addresses the non-criminalisation of children who commit trafficking-dependant crimes as examined in Chapter 5. This thesis argued that the statutory provisions in E&W do not go far enough in protecting child victims of human trafficking and modern slavery who commit offences linked to their exploitation. The comparative analysis with the statutory provisions in California, Kentucky, Oklahoma, Wisconsin and Wyoming has revealed that the way in which the MSA 2015 is currently framed fails to provide a genuine victim-centred, human rights-based approach to protecting child human trafficking and modern slavery victims from being punished by the state. The statutory

defence under s 45(4) MSA 2015, the surrounding protective framework, and wider human trafficking and modern slavery policy, fails to reflect the experiences and 'lived realities' of children and young persons who endure human trafficking and modern slavery. Instead, children are treated as being volitional, complicit, and culpable in their own exploitation and the crimes they commit as a consequence of their criminal exploitation. The statutory defence is littered with ill-defined concepts and rhetoric that is indicative of a criminal justice-based approach that continues to condemn children and divert attention away from the true criminals in these scenarios: the traffickers and exploiters. A victim-centred approach should be adopted.

This thesis argued that, as well as the significant problems with the language used in the MSA 2015, the language that is omitted from the Act is also problematic and does not provide a truly victim-centred, human rights-based approach to child victims. Currently, there is no mention, nor definition, of child labour exploitation in the Act in line with relevant ILO Conventions, despite it being recognised that the concept is vastly different from that of 'forced labour'. The enslavement, separation from family, exposure to serious hazards and illnesses, and abandonment of children left to fend for themselves that encapsulates ILO definitions of the worst forms child labour,[1041] must be reflected in national legislation in order to ensure that statutory protections reflect the real situations in which some children find themselves. In 2017, the UK agreed to ratify and implement relevant ILO Conventions, protocols and frameworks as well as develop and accelerate implementation of domestic legislation to ensure that forced labour, human trafficking, modern slavery, and the 'worst forms' of child labour are never

[1041] ILO, Worst Forms of Child Labour Convention 1999 (No 182) Art 3.

tolerated.[1042] In order to comply fully with this agreement, the Government should amend the current MSA 2015 to include the worst forms of child labour, as defined by ILO Conventions, by explicitly defining modern slavery as conduct which would constitute, *inter alia*, 'the worst forms of child labour, as defined in Article 3 of the ILO Convention (No 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, sone at Geneva on 17 June 1999 ([2007] ATS 38)'.[1043]

This thesis argued that, with the appointment of the Home Office as the leading department responsible for human trafficking and modern slavery policymaking in E&W in 2006, the underpinnings of the anti-modern slavery movement in the UK were in line with a criminal justice-based approach as opposed to a genuine victim-centred approach. With the launch of the UK Human Trafficking Centre – a police-led investigative unit – in that same year, and the subsequent release of the Home Office *Action Plan on Tackling Human Trafficking*,[1044] the anti-human trafficking and modern slavery framework was formed from the underpinnings of criminal justice. The focus remained on strengthening borders, ensuring compliance with immigration laws, and tackling transnational organised crime as the NRM was established with the UK Visas and Immigration agency being employed as a 'competent authority' tasked with dealing with trafficking victim referrals. In 2013, the Government vowed to adopt a more victim-centred approach to human trafficking and modern slavery, with a view to 'always keeping the plight of victims at the very heart of our policies and in everything we do',[1045] yet

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[1042] Department for International Development, 'A Call to Action to End Forced Labour, Modern Slavery and Human Trafficking' (2017).

[1043] This wording is taken from the Australian Modern Slavery Act 2018.

[1044] Home Office, *UK Action Plan on Tackling Human Trafficking* (2007).

[1045] Home Office, *Draft Modern Slavery Bill* (n 243).

as this research has found, child victims of human trafficking and modern slavery continue to be treated as criminals and criminalised for offences related to their trafficking, indicating a failure by legislatures to provide a genuine approach that places victims at the heart of non-criminalisation measures. As Gearon notes, 'child trafficking strategy, policy-making and practice have been shaped without knowledge from children directly'.[1046] This is also despite the UK Government being committed to paying 'due regard'[1047] to the UN Convention on the Rights of the Child (CRC) that establishes rights and protections for children and facilitates a space for their voice to be heard when new policy and legislation is proposed. This is not indicative of a human-rights-based approach that recognises the vulnerability of child victims.

This thesis argued that, in order to resolve the injustice created by the criminal justice-based approach of the current statutory defence for children, an approach that centres on the experiences of trafficked children, their needs and rights to protection is paramount. At a policy level, this could include the depoliticising of child trafficking by reframing the language of child human trafficking and modern slavery from 'trafficked children' and 'smuggled children' to 'Children in Need' in order to better reflect the needs of children and young persons facing difficulties in complex situations.[1048] At a statutory level, this would involve legislation being guided by applicable human rights standards, including the rights and protections in the CRC and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to 'ensure that responses to child trafficking at all levels are always based on the best interests of

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[1046] Alinka Gearon, 'Child Trafficking: Young People's Experiences of Front-Line Services in England' (2019) 59(2) The British Journal of Criminology 481, 481.

[1047] Department for Education, *Listening to and Involving Children and Young People* (2014) 1.

[1048] Alinka Gearon, 'Child Trafficking: Young People's Experiences of Front-Line Services in England' (2019) 59(2) The British Journal of Criminology 481, 498.

the child'.[1049] This would ensure a truly victim-centred approach to the non-criminalisation of child victims of human trafficking and modern slavery.

Section 45 of the MSA 2015 affords child victims a distinctly broader Modern Slavery Defence in recognition of the general acceptance that children are inherently vulnerable to being influenced to commit crimes. It does this by placing an evidential burden of proof on a child victim/ offender whereby they must provide evidence, rather than proof,[1050] that they were a victim of human trafficking and modern slavery and that the crime they committed was a 'direct consequence' of their exploitation.[1051] This interpretation of the Act and where the burden of proof lies is clearly a move towards a more victim-centred approach, yet despite this, the formation of the provision itself does not go far enough to ensure that all children and young persons exploited by traffickers will be able to benefit from the defence. Significantly, the Act is silent on the meaning of 'direct consequence' which has raised concern and recommendations for further clarity and/or enhancement of the term, and indeed the process by which s 45(4) is raised and applied more generally, since its enactment.[1052] This thesis argued that, in the absence of a definition of 'direct consequence', compulsion and causation have become intertwined, as is the case with the adult defence, meaning that children are required to prove compulsion, an unscrupulously high threshold not present in any international or regional instruments, nor national provisions. And one that is recognised as simply wrong owing to the fact that a child should not have to prove compulsion to achieve protection because

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[1049] United Nations, *Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons* (2009) para 13(h).

[1050] *R v MK; R v Gega* [2018] EWCA Crim 667.

[1051] Modern Slavery Act 2015, s 45(4)(b).

[1052] Caroline Haughey, *Modern Slavery Act 2015 Review: One Year On* (2016) 9, 27, 28.

they are in a position of innate vulnerability and cannot consent to their own exploitation.[1053] In order to adequately protect child victims, 'direct consequence' should be defined broadly to encompass each category of offence committed by victims: status, consequential, and liberation offences.[1054]

As with the adult defence, the offences exempt from the ambit of s 45(4), and the requirement of the reasonable person test, is also problematic in terms of affording a genuine victim-centred approach to protecting child victims from criminalisation. This thesis urges the Government to amend the current child statutory defence by defining 'direct consequence', omitting the reasonable person test, and removing all offences other than murder from Schedule 4. Section 45(4) and s 45(5) of the MSA 2015 should be amended as follows:

> (4) A person is not guilty of an offence if—
>
> (a)the person is under the age of 18 when the person does the act which constitutes the offence,
>
> (b)the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, ~~and~~
>
> ~~(c)a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.~~
>
> (5) For the purposes of this section—
>
> … "direct consequence" means in connection with, or in relation to, or as a result of.

[1053] Bird and Southwell, 'Does the New w 'Slavery' Defence Offer Victims of Trafficking any Greater Protection? (2015) 9 Archbold Review 1, 8.

[1054] Schloenhardt and Markey-Towler, 'Non-Criminalisation' (n 164) 13.

In conclusion, the proposed broader definition of 'human trafficking' and the new modern slavery defences outlined above, would provide a genuine victim-centred, human rights-based approach to protecting victims from criminalisation and address the inadequacies and injustices caused by the current prescriptive provisions, whilst ensuring that the system of trial by jury remains in place to prevent the misuse of the defences. It should be noted here that these reforms would not provide a complete solution to the non-criminalisation of human trafficking and modern slavery victims in the broadest sense. The statutory defence only provides protection to those who have already been arrested, detained, and prosecuted; the defence does not protect victims from being prosecuted in the first instance. This is an essential layer in the protective framework, but one which, in its current form, merely provides a partial safety net for victims. More needs to be done to prevent criminalisation from occurring in the first place. These reforms, if implemented, would go some way to providing a more victim-centred, human rights-based approach to the non-criminalisation of human trafficking and modern slavery victims, however, legislation in itself is not enough. Ultimately, the only way to ensure that the true essence of the non-criminalisation principle is captured in practice is to implement a holistic protective framework, at both a legislative and policy level, which encompasses proactive victim identification, greater emphasis on prosecutorial discretion, and a more humanising statutory defence for adult and child victims. Implementing such a strong protective framework would further aid in raising greater awareness about the experiences of victims, how to identify them and the principle of non-criminalisation, not only within the criminal justice system, but also in wider society. If the recommendations and reforms proposed here are implemented, domestic states will be one step closer to providing a truly victim-centred approach to addressing modern slavery.

Appendix I

Modern Slavery and Prosecutorial Discretion: When Is It in the Public Interest to Prosecute Victims of Trafficking?

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R v GS [2018] EWCA Crim 1824

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On 9 February 2007, a Jamaican national (GS) was stopped at Heathrow airport carrying a large amount of cocaine on her person. Her mobile phone was found to have a missed call from a male (B). A second person, also found to be illegally importing drugs, was intercepted at the airport and claimed that the offence was committed due to threats made by B. GS maintained that she too was forced by B to carry drugs into the UK. At trial, GS's defence of duress, involving threats of serious injury or death to her and/ or her young son, was rejected by the jury. Post-conviction, it became apparent that B had been involved in the use of three British girls to import cocaine from the Bahamas.

On 30 November 2007, GS was convicted of being knowingly concerned in the fraudulent evasion of the prohibition of a controlled drug of Class A. She was sentenced to seven years' imprisonment and recommended for deportation. Following her release from prison, GS applied for asylum and the First Tier Tribunal (FTT) found her to have been a victim of trafficking (VOT) on the occasion that she had entered the UK carrying drugs. The Competent Authority (CA) decided that, on the balance of probabilities, she was a VOT for the purposes of forced criminality.

The present proceedings concerned an application for an extension of time (EOT) for leave to appeal against conviction and adduce fresh evidence, pursuant to s. 23 Criminal Appeal Act 1968 (The 1968 Act). The fresh evidence application was twofold: first, the conclusion that GS had been a VOT; and secondly, GS's mental state, as supported by medical evidence, indicating that she was 'vulnerable to exploitation and less able to resist pressure' (at [46]). It was submitted that the law should protect VOTs rather than criminalise them. GS argued that her newfound status as a VOT, alongside the medical evidence, rendered the conviction unsafe.

Held, leave to appeal refused, Gross LJ outlined three principal issues for consideration: Is this a 'change in law' case so that the grant of leave requires substantial injustice to be shown? Is the fresh evidence admissible? and Was the conviction unsafe? (at [48]). Answering the first question in the affirmative and in response to the second, admitting the fresh evidence relating to the FTT Decision and the CA Minute (though not the medical evidence), the court concluded that the conviction was not unsafe. In the context of the importation of Class A drugs, the court was not satisfied that GS was under such a level of compulsion that her criminality or culpability was reduced to or below a point where it was not in the public interest (on the law in either 2007 or 2018), to prosecute her (at [77]). The court emphasised that the gravity of the offence should not be minimised, and, although GS was no more than a 'drugs mule', she committed a serious offence (at [78]).

The overarching question concerned the true level of compulsion affecting GS. GS was a VOT at the time of the offence, however, this fact alone did not render the conviction unsafe (at [80]). VOT status represented a starting point for considering whether the conviction was unsafe. GS's factual account was tested before the jury and, in rejecting the defence of duress, the jury concluded that the common law threshold was not met. This did not exclude the possibility that what she did was done under some lesser form of compulsion (at [79]).

The court accepted that GS was acting under some level of compulsion, however, her actions leading up to and after the offence committed spoke volumes as to her true resilience. It could not be said that there were no reasonable alternatives available to her, including escaping, as she did on two occasions. Prior to the incident for which she was convicted, GS had used her own money to escape to Miami; and, following her conviction, she assisted the police with regard to four other drug importation prosecutions.

The court could not conclude that GS's culpability was extinguished such that a prosecutor, properly applying the law in 2018 (let alone in 2007), would or might not continue with a prosecution in the public interest. The application for leave to appeal was refused alongside the EOT.

Commentary

The present case provides an opportunity to consider the fundamental issues that can arise when addressing applications for leave to appeal by VOTs prosecuted for their alleged crimes. Currently, there is no clear Crown Prosecution Service (CPS) guidance regarding the approach to be adopted when a person claims to be a VOT post-conviction. In most cases where VOT status has been determined post-conviction, appeals have been raised on the grounds of an abuse of process at trial. Now, cases concerning convictions predating current obligations to safeguard VOTs may be approached differently owing to material changes in law and practice. Applications to adduce fresh evidence continue to be problematic as medical evidence is often inadmissible since the psychological profile of the accused is often produced subsequent to the offence being committed. Thus the mental and emotional effects of being a VOT are overlooked. Furthermore, whether VOT status is acknowledged at trial, prosecutors may still

exercise their discretion to prosecute if it is in the public interest. The court's conclusion that the conviction was not unsafe, despite GS being recognised as nothing more than a 'drugs mule' is, arguably, wanting (see Felicity Gerry et al., '*Is the Law an Ass When It Comes to Mules? How Indonesia Can Lead a New Global Approach to Treating Drug Traffickers as Human Trafficked Victims*' [2018] Asian JIL 8, 166–188).

Under international and EU law, the UK is obligated to ensure that VOTs are not punished for offences committed during the course, or as a consequence, of being trafficked. Article 2(b) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons 2000 (the Palermo Protocol) requires participating States to 'protect and assist the victims of … trafficking with full respect of their human rights'.

Subsequent instruments, namely Article 26 of The Council of European Convention on Action Against Trafficking in Human Beings 2005 (the Convention) and Article 8 of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (the Directive), developed this requirement further by recognising an obligation of non-punishment for victims. In England and Wales, where the common law defence of duress is unavailable, compliance with Article 26 is achieved through the exercise of prosecutorial discretion or the court intervening in individual cases through a sanction of a stay of proceedings, that is, an abuse of process (*R v N, R, LE* [2012] EWCA Crim 189; *R v M(L) and others* [2010] EWCA Crim 2327 at [7]–[12]).

In 2007, the Director of Public Prosecutions published legal guidance on how the CPS should deal with suspects who may be VOTs. Further guidance was announced in 2013 which called for a 'three-stage approach' to the prosecution decision. The court considered the 2007 Guidance to be embryonic (though valuable), in clear contrast to the detailed and structured approach of the 2013 Guidance (at [61]).

The protection of victims is now set out in Part 5 of the Modern Slavery Act 2015 (MSA 2015). Building on the international conventions and domestic authorities, s. 45 and Sched. 4 provide two statutory defences for VOTs who commit an offence. Schedule 4 provides a list of 140 (serious) offences to which the defence does not apply. With regard to adult victims:

> A person is not guilty of an offence if—the person is aged 18 or over when the person does the act which constitutes the offence, the person does that act because the person is compelled to do it, the compulsion is attributable to slavery or to relevant exploitation and a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act. (s. 45(1) (a)–(d))

Modelling the defence upon the ancient common law defence of duress, and the Sched. 4 exclusions, significantly limits its scope. '[I]t is troubling that the statutory defences of the [MSA 2015] may not enhance the previous protection offered because of its prescriptive nature' (Paramjit Ahluwalia, 'Modern Slavery' (Counsel Magazine, January 2016) <https://www.counselmagazine.co.uk/articles/modern-slavery> accessed 16 January 2019). The inclusion of the statutory defences neither nullifies the CPS's discretion to prosecute nor erases the option to raise an abuse of process argument; and the continued over-reliance upon prosecutorial discretion remains problematic (Karl Laird, 'Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?' [2016] Crim LR 6, 397).

Section 45 was not drafted to provide retrospective protection and thus offered no assistance to GS. In cases where the defence can be raised, the defendant bears an evidential burden of proof and must provide evidence of every element of the defence. It is then for the prosecution to disprove one or more of those elements beyond reasonable doubt (*R v MK*; *R v Gega* [2018] Crim 667 at [45]). Had the offending in the present case not predated the MSA 2015, it remains the case that the defendant would likely have no defence. A raised defence would likely be disproved at the fortitude requirement (s. 45(1)(d)) due to the questionable 'reasonable person' test with regard to the avoidance of the threat (Laird (2016) 401). When addressing cases that fall outside the scope of the defence, the courts must continue to follow the safeguards against prosecuting VOTs that already exist, alongside the domestic law regime that has been developed through subsequent common law (*R v Joseph (Verna)* [2017] EWCA Crim 36 at [4]).

> In cases where (a) there was reason to believe the defendant who had committed an offence had been trafficked for the purpose of exploitation, (b) there was no credible common law defence of duress or necessity but (c) there was evidence the offence was committed as a result of compulsion arising from trafficking, the prosecutor has to consider whether it is in the public interest to prosecute. (*R v LM* at [10])

As the Convention and Directive were not ratified in the UK until 2008 and 2011, respectively, the provisions within them were not in force during GS's trial in 2007. Following the Palermo Protocol and the CPS Guidance at that time, the Court of Appeal found that the prosecution of GS was lawful and not an abuse of process, thus a successful application (and any appeal) would depend on a change in law (at [64]).

Since 2008, the vast majority of successful appeals have been approached as abuse of process cases, with the Court routinely urging practitioners to consider the possibility of trafficking and familiarise themselves with Article 26 of the Convention (*R v O* [2008] EWCA Crim 2835; *R v LM* [2010] EWCA Crim 2327; and *Joseph*). The law in 2007 was correctly applied, so the appeal hinged on a change in the law. GS's case is the first VOT conviction appeal to have been treated (in principle) as a change in law case, requiring leave to appeal out of time to be characterised as 'exceptional', applying the more stringent 'substantial injustice' test as established in *Jogee* [2017] AC 387 and *Johnson* [2017] 1 Cr App 12 (at [52]). The Court of Appeal accepted that there had been a material change in the legal recognition of the rights of VOTs between 2007 and the present time which was more than simply a development in the existing law (see *Joseph* at [8]–[22]). At the time of trial, there was limited awareness of such rights as the provisions of Article 26 and Article 8 were yet to be ratified. The difference between the CPS Guidance in 2007 and 2013 is stark (at [64]).

The Court stressed that where an applicant can demonstrate an arguable case as to the safety of the conviction, they ought not to fail at the hurdle of obtaining exceptional leave. As in most VOT cases, the conviction and sentence impacted upon GS's immigration status (s. 32 UK Borders Act 2007) which would constitute a substantial injustice where leave was not granted. Despite the Court ultimately rejecting the application due to GS's culpability, it is an important concession for future VOT cases that where grants of further Leave to Remain in the UK would be at risk, the 'substantial injustice' test is satisfied. In contrast with the change in law issue, the application to introduce fresh evidence was met with a mixed response.

The FTT Decision and CA Minute (and Home Office Letter) as to GS's status as a VOT was accepted, but the medical evidence was refused. Applying s. 23 of the 1968 Act, the FTT and CA decisions were admitted as the Court found that both reports: (a) were capable of belief; (b) could potentially afford a ground for allowing the appeal; and (c) post-dated the trial so could not have been adduced at that time. It would not have been in the interests of justice to proceed without the evidence of victim status (at [68]). Mirroring the decision in *Joseph*, and declining to admit the medical evidence, however, it was concluded by the Court that there was no good reason why assessments of GS's mental capacity could not (and arguably more importantly, should not) have been adduced at trial. Several issues were highlighted as to the consideration of medical evidence when presented as fresh evidence in VOT cases; particularly where expert witnesses attempt to provide evidence where there is a long passage of time between the offence being committed and the evidence being obtained. This highlights the need for experts and defence representatives to take greater care in ensuring that medical assessments of potentially vulnerable offenders are carried out at trial and within the proper remit of expertise. A lack of adequate medical evidence leaves the courts detached from the true nature of modern slavery and the traits and characteristics commonly found amongst victims which can influence their motivations for offending.

The court accepted the evidence as to status but refused to acknowledge the psychological implications of being a VOT and, in doing so, neglect to adopt a holistic approach when considering the chronology of events. The recognition of an applicant being a VOT remains a crucial element in securing a successful appeal. The continued willingness by the Court to accept material depicting evidence of such, even where an applicant's account to the FTT goes essentially untested, is favourable (OSCE, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013) 33). In refusing the current appeal, however, the Court reiterated that the decisions of the FTT and CA will not automatically bind the court. Both the admissibility of the FTT and CA's decision, and the inadmissibility of the medical evidence emphasises the need for adequate identification and assessment of VOTs at early stages in proceedings. The mere fact that an applicant is found to have been a VOT at the time of conviction is not enough to render the conviction unsafe. Rather, it is the starting point for considering whether or not it was unsafe (at [80]). This is specifically the case where the offences committed are of a particularly serious nature.

As common law has concluded that neither Article 26 nor Article 8 provides blanket immunity from prosecution for VOTs, it falls to the CPS in exercising their careful and fact-sensitive discretion to determine whether or not it is in the public interest to prosecute. When exercising their discretion, the CPS must accord weight to the gravity of the offence committed and the nexus between the trafficking and the offence so as to extinguish culpability. The Court in *Joseph* emphasised the gravity of importing Class A drugs as being an offence serious enough to warrant it being in the public interest to secure a conviction, stating at [63] that:

> Class A drugs bring death and misery to the streets of the UK and those who involve themselves willingly in the supply chain must face the consequences of their actions. A distinction must be drawn between the individual put under some kind of pressure to become involved in drugs smuggling and the genuine victim of human trafficking.

In the instant case, the court maintained this view finding that the VOT must be under a particularly high level of compulsion so as to reduce their criminality or culpability to such an

extent that it would not be in the public interest to prosecute. Under the legal position today, the court concluded that the CPS had properly considered the offender's position as a VOT in accordance with the law and guidance, thus it would not be an abuse to prosecute and consequently GS's conviction was not unsafe.

The approach taken by the Court appears to be somewhat misplaced. Drug trafficking was explicitly noted in the Directive (para. 11) as one of the key criminal activities through which someone may be exploited and continues to be recognised as such by the Government and anti-slavery organisations alike (Home Office, *County lines: criminal exploitation of children and vulnerable adults* (2017); RACE, *Victim or Criminal? Trafficking for Forced Criminal Exploitation in Europe. UK chapter* (2014)). Furthermore, in the light of s. 45 MSA 2015, specifically the excluded offences within Sched. 4, of which drug trafficking offences do not appear, it is difficult to comprehend the tough stance adopted by the court following the decision by the Government not to prohibit such offences from the ambit of the defence. It is not disputed that importation of Class A drugs possesses grave consequences for the UK, however, VOTs who find themselves in such situations are often blinded as to the gravity of the offence owing to the compulsion experienced and, subjectively, a potentially graver outcome at the hands of their traffickers.

Arguably, it cannot be reasonable to expect a VOT to have 'any control over the particular offence [they are] compelled to commit', or expect them to develop a greater resistance or fortitude to a particularly serious crime (Susan Edwards, 'Coercion and compulsion – re-imagining crimes and defences' [2016] Crim LR 12, 889). Forced criminality is an umbrella term covering a vast array of crimes, often led by organised crime networks, leaving victims particularly vulnerable. This was acknowledged during various stages of Parliamentary debate on the MSA 2015, and concerns were raised as to the restrictions on the s. 45 defence being potentially unfair to VOTs (Modern Slavery Bill Deb 11 September 2014, col. 386; and HL Deb 17 November 2014, vol. 757, col. 247). A VOT is stripped of their basic humanity, 'whose will has been overborne, who has been ground down and who is vulnerable and compliant' (Edwards (2016) 895). The reality of their situation is often incomprehensible to individuals whose life experiences are far from the turmoil of trafficking.

The courts and fact finders, however, continue to apply an objective standard when considering elements of compulsion and fortitude requiring VOTs to behave reasonably and seek out opportunities to resist and escape. Emotions such as stress and fear are overlooked and actions or omissions are judged against that of a reasonable person leading to arguably unjust outcomes (*R v van Dao* [2012] EWCA Crim 1717). Edwards, in her analysis of compulsion, outlines the cultural factors that the courts may be required to adjudicate on which are usually outside the ambit of their comprehension ((2016) 896–98). Juju and witchcraft are recognised as significant factors in trafficking cases that instil unimaginable fear in victims, arguably making it impossible to assess those individuals against the 'artificiality of the normative construct of the reasonable person … and the legal construct of … a realistic alternative' (Edwards (2016) 898; see also Anti-Trafficking Consultants, 'What is Juju?' <http://www.antitraffickingconsultants.co.uk/juju/> accessed 16 January 2019).

There is often a fine line between the victim and the criminal when the issue of trafficking is

raised post-conviction and, particularly, in the context of serious criminal offences. Where appeals are brought based on fresh evidence of VOT status, and prosecutorial discretion is questioned, close scrutiny must be observed throughout. There is, however, a need for a more humanising approach to be adopted by the courts, particularly in relation to drug offences. In continuing to refuse to acknowledge the psychological effects of trafficking in such cases, and dismissing appeals, the court is arguably favouring the criminalisation of vulnerable individuals over protecting them (Ryszard W Piotrowicz and Liliana Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle' [2016] HRLR 16, 695). An individual may well be a VOT and be compelled to commit a serious crime, but it is 'wrong to assume from the fact someone has done the acts that fulfil the definition of a serious criminal offence that [they are] necessarily a serious criminal' (Laird (2016) 397). Taking into consideration the Court of Appeal's treatment of GS's case and Class A drug trafficking offences amongst VOTs, further guidance on the issues raised is welcomed.

Appendix II

The Reasonable Victim of Modern Slavery

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R v N [2019] EWCA Crim 984

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On 6 June 2016, the Applicant (N), a Vietnamese national, was charged with the production of a Class B drug (cannabis). He had been discovered alone inside the loft of a Birmingham property in which 411 cannabis plants were being cultivated. At trial it transpired that N had been brought to the UK via an agent and was instructed to feed the plants in order to repay costs incurred for his passage. He ate and slept in the property and was not allowed to leave. In mitigation, N's advocate referred to him as 'a relatively naïve 24-year-old who … was certainly exploited and coerced' (at [11]).

On 7 July 2016, following advice from his solicitor, N pleaded guilty and was sentenced to four months' imprisonment. In sentencing, the judge acknowledged that N was 'taken advantage of by the people who brought [him] here' and 'used … as a gardener for their cannabis factory' (at [12]). Despite this, the possibility of N being a victim of trafficking (VOT) was not raised.

Following conviction, N was served with a decision to deport. An application for asylum was made on the basis that he was a VOT. Asylum proceedings brought to light N's previous exploitation and it was discovered that he had a history of being trafficked and enslaved from the age of 13. He received a positive Reasonable Grounds decision and Conclusive Grounds (CG) decision, but was refused asylum. An appeal before the First Tier Tribunal (FTT) in N's favour found him to be a VOT and granted him limited leave to remain.

N sought an extension of time in which to apply for leave to appeal against conviction and adduce fresh evidence, including the CG decision and FTT report, pursuant to the Criminal Appeal Act 1968, s 23. It was submitted that the conviction was unsafe due to the fact that, as

a VOT he should not have been prosecuted; that he would have had a viable defence in law under the Modern Slavery Act 2015 (MSA 2015), s 45 had the clear signs of his victimisation been raised (at [26] and [28]). The grounds of appeal were twofold: (i) the CPS should not have made the original decision to charge or prosecute N; and (ii) when the possible trafficking concerns were raised at the Crown Court, proceedings should have been adjourned or stayed.

The Crown contended that the decision to prosecute was in the public interest; there was insufficient evidence to satisfy s 45(1)(d) of the defence, namely that N had no realistic alternative to committing the offence, citing several observations which would have justified him engaging with UK authorities (at [32]).

Held, allowing the appeal, Lady Justice Davies leading, granted the extension of time and accepted the fresh evidence. With regard to ground (i), there were no grounds to challenge the original decision to prosecute. N failed on this ground as no information was available to alert the CPS to modern slavery issues at the time of charge (at [36]).

On ground (ii) however, the information presented at trial 'was sufficient to raise an issue that the applicant was a possible credible victim of trafficking' (at [40]). Had the Crown followed the appropriate CPS Guidance, N's case should have been adjourned and referred to the National Referral Mechanism

(NRM). That referral would have resulted in N being recognised as a credible VOT (consistent with the CG and FTT decision).

On the facts, the defence provided under s 45 would have availed N and likely succeeded. The Crown's contention that s 45(1)(d) was not met failed to 'appreciate the reality of [N's] situation, and his circumstances' as a VOT (at [43]). The Court of Appeal concluded that 'no public interest consideration would outweigh such a determination', for that reason the conviction could not be considered safe and was quashed (at [45] and [46]).

Commentary

The case provides the latest contribution to the mounting number of Court of Appeal judgments addressing the safety of convictions of victims trafficked to the UK for the purpose of criminal exploitation (forced criminality). Whereas the majority of applications for leave to appeal have concerned adducing fresh evidence for convictions pre-MSA 2015 in order to stay proceedings as an abuse of process, the present case is the first appeal against conviction for production of a Class B drug (cannabis) committed subsequent to the enactment of s 45 MSA 2015. The overarching theme in these cases centres on VOTs being advised to plead guilty in situations where their victim status ought to have extinguished their culpability.

Notwithstanding the fact-sensitive nature of the decision, the ruling shines a spotlight on the application of the statutory defence, with a particular focus on s 45(1)(d). In attaching significant weight to the applicant's situation, the Court has been liberal in its application of the objective test within the defence. Unfortunately, the progressive approach by the Court in

applying the law is marred by the initial failings of other actors within the criminal justice system to adequately identify N as a potential VOT and protect him from further victimisation by the state.

Identifying Victims

Human trafficking of Vietnamese nationals to the UK to work as gardeners in cannabis factories is a well-established trend. The US State Department's Trafficking in Persons Report has discussed its prevalence every year since first identifying the problem in 2009. That report found that children are often 'trafficked to the UK and subjected to debt bondage … for forced work on cannabis farms' (USSD, *Trafficking in Persons Report 2009* (2009) 295). In 2012, a joint report by the UK Human Trafficking Centre and the Serious Organised Crime Agency identified that 96 per cent of people reported as potentially trafficked for cannabis cultivation were Vietnamese (UKHTC, *A Strategic Assessment on the nature and Scale of Human Trafficking in 2012* (2013) 25). Furthermore, between 2009 and 2016, 58 per cent of Vietnamese nationals identified as VOTs had been forced to cultivate cannabis (IASC, *Combating Modern Slavery Experienced by Vietnamese Nationals* en route *to, and within, the UK* (2017) 8).

Given the prevalence of this manifestation of exploitation at the time N was charged, it is concerning that the Court upheld the original decision of the CPS to prosecute and dismissed the first appeal ground. Following the CPS Legal Guidance at the time N was charged, it is arguable that prosecutors should have been alert to particular circumstances of N's case giving rise to the possibility of him being a VOT from the outset of the proceedings. Indeed, the cultivation of cannabis was offered as an example of an indicator offence in the guidance, albeit for child victims. Nonetheless, referenced guidance published on indicators of trafficking which 'may also be of help to prosecutors', expressly recognised 'drug cultivation' as being a form of forced criminality (see CPS, *Human Trafficking, Smuggling and Slavery* (2016) <https://webarchive.nationalarchives.gov.uk/20160701150802>, <https://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling>; Home Office, *Victims of Modern Slavery—Frontline Staff Guidance* (2016) 26). The nature under which N was arrested should have been enough to warrant further investigation by both the police and CPS pre-charge.

Notwithstanding this apparent oversight by the Court, the critical treatment of both the counsel and trial judge in their failure to appreciate the potential for N being a VOT, following the advancement of his mitigation, is apposite. The decision stands in stark contrast to the ruling in previous appeals against cannabis cultivation offences, in particular *R v N* [2012] EWCA Crim 189. In circumstances not dissimilar to the present case, two Vietnamese minors had their appeals dismissed despite being assessed as credible VOTs by social workers and the UK Border Agency (UKBA). Unlike the present case, evidence of several exploitation indicators were present in both cases, yet despite this, the Court found that the CPS decision to prosecute was in the public interest.

In deviating from this stance, the Court of Appeal has been proactive in its power of review

and reiterates the necessity for advocates, as well as judges, to engage with modern slavery guidance. Had either of these responders acknowledged the significance of the mitigation evidence placed before the court, N's case would have been adjourned and, had the CPS proceeded with the prosecution, he would have been afforded protection from conviction pursuant to s 45 MSA 2015 (at [40] and [37]).

Protection from Criminalisation

Under the Council of Europe Convention against Trafficking in Human Beings 2005, Art 26 and the EU Trafficking Directive 2011/36/EU, Art 8, the UK is obligated to provide for the 'non-punishment' of VOTs for their involvement in unlawful offences, to the extent that they have been compelled to do so as a direct consequence of being trafficked. In England and Wales, these obligations are met via three safeguards: the common law defence of duress, prosecutorial discretion and the power to stay a prosecution as an abuse of process (*R v L(M)* [2011] 1 Cr App R 12 at [7], *R v Joseph (Verna)* [2017] EWCA Crim 36 at [4] and *R v GS* [2018] EWCA Crim 1824 at [76]). For offences committed by VOTs after 31 July 2015, a fourth mechanism is provided to prevent criminalisation: the s 45 defence(s).

Section 45 of the MSA 2015 provides two separate defences for modern slavery victims over and under the age of 18 (s 45(1) and (4), respectively) who commit offences not excluded by Sch 4. An adult is not guilty of an offence if: they were over 18 when they did the act; they did the act because they were compelled to do so; the compulsion is attributable to slavery or 'relevant exploitation' (including trafficking); and a reasonable person in the same situation and sharing the defendant's relevant characteristics would have no realistic alternative to doing the act (ss 45(1)(a)–(d)).

The defendant bears an evidential burden and must raise evidence of each of the four elements of the defence, the prosecution must then disprove one or more of those elements beyond reasonable doubt (*R v MK* [2018] EWCA 667 at [45]). The CPS Guidance recognises the objective test within s 45(1)(d) as a safeguard against unscrupulous use of the defence.

Statutory Interpretation

Section 45(1)(d) states that a person is not guilty if:

> a reasonable person in the same situation as the person and having the person's relevant characteristics would have no alternative to doing the act.

The problematic nature of this element and the scope of its practical applicability has been discussed at length since its enactment (see J Muraszkiewicz, 'Protecting Victims of Human Trafficking from Liability: An Evaluation of Section 45 of the Modern Slavery Act' (June 2019) JCL 10 <https://doi.org/10.1177/0022018319857497>; K Laird, 'Evaluating the Relationship Between Section 45 of the Modern Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?' (2016) Crim LR 395, 399; and S Edwards, 'Coercion and Compulsion: Re-Imagining Crimes and Defences' (2016) Crim LR 876, 895).

The standard of the 'reasonable person' has shaped various criminal defences (for discussion, see J Gardner, 'The Many Faces of the reasonable Person' (2015) 131 LQR 563). Section 45(1)(d) replicates the objective limb of the common law defence of duress set out in *Graham* (1982) 1 All ER 801 and approved in *Howe* (1987) 85 Cr App Rep 32, HL at 65–6 that:

> a sober person of reasonable firmness, sharing the defendant's characteristics, would have responded in the same way as the defendant.

Under s 45(5), 'relevant characteristics' are limited to 'age, sex and any physical or mental illness or disability' taken from the Court of Appeal ruling in *R v Bowen* [1996] 2 Cr App Rep 157 at 166, which confirms the characteristics to be considered when establishing duress as: age, sex, pregnancy, serious physical disability and recognised mental illnesses/psychiatric conditions. This restrictive approach has been condemned for failing to appreciate 'the actual circumstances under which the commission of an offence may be compelled … and risks to undermine substantially [the provision's] *effet utile*' (J Beqiraj in written evidence submitted to the House of Commons Public Bill Committee (MS 36) <https://publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/memo/ms36.htm> para15)

The reasonableness requirement within duress was justified by the Law Commission so as to not 'create too wide a defence' (Law Commission, *Criminal Law Report on Defences of General Application* (Law Com 83, 1977) para 2.28). Parallel to this was the justification for its inclusion in s 45 as 'an important safeguard against [the] defence being abused' (Modern Slavery Bill Debate (11 September 2014) col 368). Despite this, duress has been criticised for setting too high a standard for an excusatory defence and generating 'problems of unintelligibility and impracticality, [operating] on morally questionable foundations' (KJM Smith, 'Must Heroes Behave Heroically' [1989] Crim LR 622, 627). These criticisms can be transposed to the s 45 defence.

The drafting of s 45(1)(d) was heavily scrutinised during the Modern Slavery Bill's passage through Parliament (s 39(1)(c) in the draft Bill). The Immigration Law Practitioners' Association in its written evidence criticised the interspersing of an 'objective element … with a subjective twist' for being problematic when directing a jury to the correct approach. The clause was deemed unnecessary given that the tribunal of fact would have already considered the defendant's personal characteristics and background for the preceding elements. Further to this, it was argued by the anti-trafficking organisation, Hope for Justice, that the 'reasonable person' test within the clause went beyond the European and EU 'non-punishment' obligations, thus requiring more than the international standard of compulsion (reiterated in S Bird and P Southwell, 'Does the New 'Slavery' Defence Offer Victims of Trafficking any Greater Protection?' (2015) 9 Archbold Rev 7, 9).

Laird maintains that requiring VOTs 'to show the same level of fortitude as “normal people” is deeply problematic given the extreme nature of their circumstances' (Laird, 2016 at p 399). Evidence suggests that VOTs do not behave reasonably; they flee from authorities, refuse assistance and in some cases return to their traffickers through fear and vulnerability. US professor of law and philosophy, JL Hill suggests that exploitation by definition occurs when one takes advantage of another's vulnerability which in turn renders them unable to make

reasonable decisions (JL Hill, 'Exploitation' (1994) 79 Cornell LR 631, 636). Undeniably, judging the actions of a VOT against what is normatively acceptable fails to appreciate the severity of the exploitation endured by victims.

Despite this, the defence permits the reasonable person to be placed in the same situation as the defendant, perhaps providing a concession to human frailty that departs from the dogmatic nature of the reasonable man. Rather than holding the defendant to a standard well beyond what they could be expected to meet, the drafting of the provision seemingly allows for a degree of lenience when considering whether they had an alternative to committing the act. The Court's stance in the instant ruling appears to support this. In attaching significant weight to 'the applicant's situation, and his circumstances, which include his history … and resultant fears' (at [43]), the Court has applied a test beyond the scope of the purely objective test envisaged during the Bill's drafting. This aligns with the judgment in *R v L & Ors* [2013] EWCA Crim 991 at [13] and [19] which established that while VOTs should not be granted immunity from prosecution, 'the extent to which [a VOTs] ability to resist involvement in criminal activities has been undermined *is fact specific*' arising from their subjective response to the exploitative situation.

One might argue that N's situation is consistent with that of 'learned helplessness' resulting from repeat and chronic abuse of which many VOTs might suffer from (Laird (2016) 400). This would explain his failure to escape or seek help when in the UK, especially considering his previous attempts and successful escape in Germany (at [14]). If that were the case, it would be appropriate to assume that learned helplessness was considered in the application of s 45(1)(d) to N's case. This departs significantly from the restrictive approach taken in *R v Hurst* [1995] 1 Cr App 82 and *Bowen* in which learned helplessness was deemed not to be a relevant characteristic for the purpose of satisfying a defence of duress.

When considering whether the threshold of 'no realistic alternative' had been satisfied, the representative for the CPS meticulously relied on the fact that N had previously been able to escape and engage with authorities in Germany (at [32]). This analysis denotes a significant lack of consideration and understanding among advocates even where unfathomable facts of exploitation are present before the court. The mere fact that a VOT has previously shown courage in the face of extreme adversity does not denote the same level of fortitude throughout the entirety of their trafficking experience. Indeed, the consequences of his previous escape and his subsequent re-trafficking seek to entirely contradict the respondent's submission.

Conclusion

The instant ruling suggests that the Court is willing to recognise the fragility of human autonomy in certain cases, however, little clarity is offered pertaining to the application of the defence at trial. While attaching appropriate weight to a VOTs history of trafficking and resultant fears is favourable, the law, as confirmed during the Modern Slavery Bill Debate, requires an objective test whereby 'someone in the same situation as the defendant' must still remain a reasonable person (Laird (2016) 402). The defence as it stands unduly restricts the ambit of victims to those whereby the extent to which they could resist committing the criminal

act or escape is a manifestation of either their age, sex or a medically diagnosable illness/disability (s 45(5)). Fouladvand and Ward argue that 'the defence should reflect an understanding of human beings as vulnerable subjects, rather than the abstract individuals of traditional criminal law doctrine'. In positing a move away from the reasonable person test, they suggest a more apposite test might be 'whether the defendant was unable, as a result of slavery or exploitation, to see any reasonable alternative to acting as they did' (S Fouladvand and T Ward, 'Human Trafficking, Vulnerability and the State' (2019) 83(1) JCL 39, 51–2). Directing a jury on such a test would prove far less challenging than leading them through the minefield that is s 45(1)(d).

Since its enactment, the MSA 2015 has opened the floor to discussions about introducing equivalent statutory defences for victims of exploitation beyond the realms of modern slavery, such as victims of domestic violence and child criminal exploitation. While such provisions may, if enacted, fill lacunas in protective frameworks in these areas, care must be taken to recognise the inadequacies of the s 45 defence outlined above. The Prison Reform Trust has proposed a new statutory defence clause modelled on s 45 to be added to the draft Domestic Abuse Bill for persons whose offending is driven by their experience of domestic abuse (PRT, 'Prison Reform Trust briefing on the Draft Domestic Abuse Bill: Pre-legislative scrutiny' (April, 2019) 10). Attention is drawn to the 'pitfalls that currently exist in the defence of duress' pertaining to the 'reasonable person' test and the draft clause omits the parallel sub-section entirely (ibid, 11). The proposal, which is supported by the Criminal Bar Association, has been accepted by the Joint Committee who urge the Government to consider its inclusion (Joint Committee on the Draft Domestic Abuse Bill, *Draft Domestic Abuse Bill* (first report) (2017–19, HL 378, HC 2075) at [180]). Legislators would be wise to adhere to the Joint Committees recommendations so as to avoid the deficiencies present in the current protective mechanisms for victims of modern slavery.

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