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## Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims

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# CRIMINALIZING THE VICTIM: ENDING PROSECUTION OF HUMAN TRAFFICKING VICTIMS

*Jessica Aycock\**

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*States are falling short in addressing the problem of human trafficking. States focus on punishing traffickers rather than restoring the lives of victims; however, to alleviate human trafficking, states must adopt more victim-centric statutes. This Comment argues that all states, specifically California, Texas, and Florida, should amend their human trafficking statutes to provide more victim-centric relief by adopting two measures: affirmative defenses and vacatur statutes. An affirmative defense statute that provides victims a defense for a broader range of crimes committed as a direct result of being trafficked is necessary because convicting victims is not within the five theories of punishment. The ideal vacatur statute would (1) not be limited to prostitution or prostitution-related charges; (2) provide a due diligence time limit; (3) provide for both vacatur and expungement of the victim's records; and (4) provide government agencies that come into contact with victims of human trafficking the power to promulgate regulations that require law enforcement, nonprofits, or human trafficking safe houses to inform victims of their judicial protection options once rescued. States could implement this regulation by adopting victims' assistance units in the state. Together, these amended statutes would provide victims with the ability to transition back into society successfully and prevent them from returning to their traffickers.*

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## I. INTRODUCTION

Human trafficking is a form of modern-day slavery that will take a multi-angled approach to solve. In fact, the National Human Trafficking Hotline (NHTH) defines human trafficking as “a form of modern-day slavery in which traffickers use force, fraud, or coercion to control victims for the purpose of engaging in commercial sex acts or labor services against his/her will.”<sup>1</sup> Human trafficking is a severe problem in the United States. The NHTH reported 5,147 human trafficking cases of the 14,117 calls received at their hotline in 2018 alone. Currently, many prosecutors are reluctant to bring charges against traffickers because there is a social stigma that men and women who work for pimps do so voluntarily.<sup>2</sup> Consequently, society treats victims as societal pariahs. This is a huge misconception among American jurors.

While jurors may believe that the men and women of these 5,147 cases are participating in human trafficking voluntarily, this perception is entirely false. In fact, victims of human trafficking frequently find themselves in these situations inadvertently.<sup>3</sup> G.M. met her husband D.S. while she had a tourist visa in the United States, and she decided to stay with him to earn money for her children in the Dominican Republic.<sup>4</sup> They later married in 1994, and soon afterward D.S. began to abuse the G.M.<sup>5</sup> As a result, G.M. returned to the Dominican

Republic.<sup>6</sup> In 1996, D.S. went to the Dominican Republic to beg G.M. to move back to New York, and in return, he would assist her in finding a job and getting her immigration papers.<sup>7</sup> Upon returning, G.M.’s husband continued to abuse her and threatened to harm her or her children if she did not engage in illegal activities such as prostitution or purchasing drugs for him.<sup>8</sup> In addition, G.M.’s husband would drive her to brothels and wait in his car while she went inside to work; if she did not make enough money, he would become angry and violent.<sup>9</sup> G.M.’s husband trafficked her for roughly eleven years, and law enforcement arrested her six times for prostitution, trespassing, and criminal possession of a controlled substance.<sup>10</sup> The court noted that G.M. “pleaded guilty on each of these cases, often at arraignments, resulting in two non-criminal convictions for disorderly conduct, a violation, and four class B misdemeanor convictions.”<sup>11</sup> G.M. is a victim of human trafficking, but because of her criminal convictions, she has problems leading a normal life.<sup>12</sup> For instance, G.M. obtained employment with the Department of Health but the Department of Health fired G.M. when the background check uncovered her criminal record.<sup>13</sup>

States currently focus on prohibiting and punishing offenders of human traffickers; however, in order to alleviate human trafficking and help victims like G.M., states should amend their human trafficking statutes to be more victim-centric.<sup>14</sup> This is a new and novel idea,

<sup>1</sup> *Human Trafficking*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/type-trafficking/human-trafficking>.

<sup>2</sup> Mark Lanier, *Justice for All*, 51 TEX. TECH. L. REV. 893, 902 (2019).

<sup>3</sup> *See, e.g.*, *People v. Gonzalez*, 927 N.Y.S.2d 567, 567 (Crim. Ct. 2011); *People v. L.G.*, 972 N.Y.S.2d 418 (2013).

<sup>4</sup> *People v. G.M.*, 922 N.Y.S.2d 761, 762 (Crim. Ct. 2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 762-763.

<sup>9</sup> *Id.* at 763.

<sup>10</sup> *Id.* at 762.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 763.

<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g.*, Morgan Smith, *Yet Again, Lawmakers Poised to Do Little to Help Sex-trafficking Victims*, THE TEXAS TRIBUNE (Mar. 23, 2017), <https://www.texastribune>.



and this Article suggests ways for the states to reduce human trafficking by adopting statutes that create affirmative defenses, vacatur statutes, and give human trafficking agencies the authority to regulate a Victims assistance unit that would provide judicial relief options to victims. Two victim-centric components should be mandatory in the state's statutes. First, states should implement affirmative defense options for victims whose traffickers force them to commit crimes. Second, state courts should allow victims to vacate their convictions. These changes would allow victims to maximize use of available resources and help them begin a new life without the stigma of a criminal record. Furthermore, these measures will create a holistic approach to human trafficking, which will help states alleviate the problem. Additionally, these statutes will prevent victims from returning to their traffickers.

This Article proposes that states should transform their human trafficking statutes through the use of affirmative defense and vacatur statutes, as well as giving agencies the authority to regulate a victim's assistance unit that would provide judicial relief options to victims. While focusing on California, Texas, and Florida, this Article proposes that all states adopt similar statutes. Part II of this Article provides a brief overview of human trafficking and its severity in the United States. Part II also discusses affirmative defenses and vacatur statutes, and it explains how various states have already adopted this type of legislation. Part III discusses the five theories of punishment in the criminal justice system, and how applying these theories to victims of human trafficking does not accomplish the purpose. Additionally, Part III proposes an affirmative defense statute that all states

should adopt and explains why this statute is fundamental to a more victim-centric solution to human trafficking. Lastly, Part IV proposes a vacatur statute and analyzes the importance of implementing this statute here and now.

## II. AN OVERVIEW OF HUMAN TRAFFICKING AND VICTIM'S RIGHTS STATUTES

The problem with human trafficking is similar to the story of the little Dutch boy patching leaks. States fix parts of the problem through a series of harsh penalties on the traffickers, providing education to law enforcement, and posting the national hotline in businesses.<sup>15</sup>

### A. History of Human Trafficking

The United States abolished slavery in 1865, but slavery has taken a new form through human trafficking.<sup>16</sup> Americans have only recently begun to realize the severity of the issue.<sup>17</sup>

<sup>15</sup> See Henricus Boli, *The Little Dutch Boy Who Saved Holland*, DR. BOLI'S CELEBRATED MAGAZINE (June 20, 2010), <https://drboli.wordpress.com/2010/06/20/the-little-dutch-boy-who-saved-holland-2/> (detailing the story of a little Dutch boy who found a leak in the dike and stuck his finger in it to stop the leak. The town found him a hero and felt that his finger solved the solution of the leak and decided that there was "no need for expensive government action." Thus, the town awarded him a prize, and the boy stayed there a few more days with his finger in the hole. Eventually, another leak came from the dike and the town residents decided that the boy's solution was so great that they found another little Dutch boy to put his finger in the second hole. However, these temporary solutions solved nothing, and soon dozens of holes began to spring from the dike. The residents of the town eventually learned that they must fix the entire issue instead of finding temporary solutions to the problem).

<sup>16</sup> U.S. CONST. amend. XIII, § 1; William Bell, *Modern Slavery: Why we have to stop human trafficking*, ALABAMA OPINION (Apr. 10, 2016), [https://www.al.com/opinion/index.ssf/2016/04/modern\\_slavery\\_why\\_we\\_have\\_to.html](https://www.al.com/opinion/index.ssf/2016/04/modern_slavery_why_we_have_to.html).

<sup>17</sup> William Bell, *Modern Slavery: Why we have to stop human trafficking*, AL.COM (Apr. 10, 2016), <https://www.>



Now, thanks to ever-increasing awareness, people are becoming more mindful to the issue.<sup>18</sup> Unfortunately, that is only one part of the solution. Human trafficking is a severe problem in the United States; statistically, about one in six runaways will become victims of human trafficking.<sup>19</sup> Prosecutors are reluctant to bring charges against traffickers because there is a “general perception within most American jurors that if you are selling yourself as a prostitute for a pimp, you must be doing it voluntarily.”<sup>20</sup> Thus, these cases are extremely difficult to win.<sup>21</sup> However, the federal government has taken specific steps to protect victims through victim-centric legislation.

Federal law classifies both sex trafficking and labor trafficking as “severe forms of trafficking in persons.”<sup>22</sup> Sex trafficking occurs when “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.”<sup>23</sup> Labor trafficking is “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>24</sup> States have also adopted various definitions of human trafficking.<sup>25</sup>

al.com/opinion/index.ssf/2016/04/modern\_slavery\_why\_we\_have\_to.html.

<sup>18</sup> *Id.*

<sup>19</sup> *The Facts*, POLARIS (2018), <https://polarisproject.org/human-trafficking/facts>.

<sup>20</sup> Lanier, *supra* note 2, at 902.

<sup>21</sup> *Id.*

<sup>22</sup> 22 U.S.C.A. § 7102.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See* TEX. PENAL CODE ANN. § 20A.02 (Vernon 2019) (defining the offense of trafficking of persons as “the person knowingly: (1) traffics another person with the intent that the trafficked person engage in forced labor or services; (2) receives a benefit from participating in a venture that involves an activity described by Subdi-

Along with the growing recognition that human trafficking is a severe issue in the United States, the federal government has begun to focus on victim recovery through implementing legislation.<sup>26</sup> In 2000, the federal government passed the Trafficking Victims Protection Act, comprised of a three-prong approach to combating human trafficking: (1) prevention, (2) protection, and (3) prosecution.<sup>27</sup> The goal of the Act is to prevent the criminal from trafficking, protect the victims by mandating restitution and prosecute the traffickers.<sup>28</sup> The Trafficking Victim’s Protection Act of 2000 provided the foundation for federal legislation in the United States.<sup>29</sup>

In addition to creating legislation to combat human trafficking, in 2015, President Obama passed the Justice for Victims of Trafficking Act, which linked the National Human Trafficking Hotline (NHTH) to the Department of Health and Human Services.<sup>30</sup> This allows for more immediate responses to victims, because the hotline is now directly linked to “3,000 federal, state, and local service providers and law enforcement contacts[.]”<sup>31</sup> The NHTH is a toll-free hotline that people can call to speak to an advocate about potential human trafficking re-

vision (1), including by receiving labor or services the person knows are forced labor or services; (3) traffics another person and, through force, fraud, or coercion, causes the trafficked person to engage in conduct prohibited[.]” such as prostitution).

<sup>26</sup> *See, e.g.*, 22 U.S.C. §§ 7104, 7105, 7109 (2012); *see also* Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 177, 181 (2016) (analyzing statutes that are focused on victim recovery).

<sup>27</sup> 22 U.S.C. §§ 7104, 7105, 7109 (2012).

<sup>28</sup> *See, e.g., id.*

<sup>29</sup> *See, e.g., id.*

<sup>30</sup> *Justice for Victims of Trafficking Act: One Year Later*, POLARIS (May 25, 2016), <https://polarisproject.org/blog/2016/05/25/justice-victims-trafficking-act-one-year-later>.

<sup>31</sup> *Id.*



ports.<sup>32</sup> Previously the NHTH was run by Polaris Project (Polaris) from 2007 to 2015.<sup>33</sup>

Since 2007, the NHTH has interacted with victims 178,971 times, either through calls, web forms, or emails.<sup>34</sup> Of these calls, 40,200 evolved into cases.<sup>35</sup> California, Texas, and Florida had the highest number of cases reported in 2017.<sup>36</sup> From 2016 to 2017, human trafficking increased by 13% in the United States.<sup>37</sup> This data shows that there is a significant human trafficking problem in the United States.<sup>38</sup> Because of how severe the problem is, states have begun to adopt laws to help mitigate it.<sup>39</sup>

While the Federal Government and other national organizations have worked to combat human trafficking, some states have also started to take a more holistic approach. Polaris tracks the steps states have taken to combat human trafficking and ranks the states based on what each state has done.<sup>40</sup> Polaris is the “leader in the global fight to eradicate modern slavery.”<sup>41</sup> Its goal is to provide comprehensive model acts on how to put victims at the center of the fight on human trafficking.<sup>42</sup> Polaris continues to be the leader in helping fight human trafficking after the NHTH trans-

ferred to the Department of Health and Human Services.<sup>43</sup> Since 2013, Polaris has tracked all fifty states’ human trafficking laws based on ten categories and ranked the states based on these categories.<sup>44</sup> Polaris is believed to be “critical to a basic legal framework that combats human trafficking, punishes traffickers and supports survivors.”<sup>45</sup> Polaris based these categories on sex trafficking provisions, labor trafficking provisions, victim assistance, access to civil damages, asset forfeiture, training/task forces, lower the burden of proof for minors in sex trafficking, posting the hotline number, safe harbor laws, and vacatur statutes.<sup>46</sup> Polaris then ranked all the states based on their laws.<sup>47</sup> Polaris has four levels of rankings: tier 1, tier 2, tier 3, and tier 4.<sup>48</sup> In Polaris’s last report, in 2014, three states received a perfect score: Delaware, New Jersey, and Washington.<sup>49</sup> A perfect score means that the states have passed all ten categories based on its report.<sup>50</sup> Polaris ranked California, Texas, and Florida in Tier 1.<sup>51</sup> Tier 1, which is the highest tier, means that states “passed significant laws to combat human trafficking,” but that they should continue to take steps to improve their laws.<sup>52</sup>

<sup>32</sup> *Report Trafficking*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/report-trafficking>.

<sup>33</sup> *Justice for Victims of Trafficking Act: One Year Later*, *supra* note 30.

<sup>34</sup> *Hotline Statistics*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/states>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (referring to fact that California had 1,305 cases reported, Texas had 792 cases reported, and Florida had 604 cases reported).

<sup>37</sup> *2017 Hotline Statistics*, POLARIS (2017), <https://polarisproject.org/2017statistics>.

<sup>38</sup> *See id.*

<sup>39</sup> *See generally State Laws & Issue Briefs*, POLARIS (2018), <https://polarisproject.org/state-laws-issue-briefs> (listing pdf files for 2011 to 2014 state ratings).

<sup>40</sup> *State Laws & Issue Briefs*, POLARISW

<sup>41</sup> *About*, POLARIS, <https://polarisproject.org/about>.

<sup>42</sup> *Id.*

<sup>43</sup> *Justice for Victims of Trafficking Act: One Year Later*, *supra* note 30.

<sup>44</sup> *A Look Back: Building a Human Trafficking Legal Framework*, POLARIS (2014), <https://polarisproject.org/sites/default/files/2014-Look-Back.pdf>.

<sup>45</sup> *State Laws & Issue Briefs*, *supra* note 40.

<sup>46</sup> *2014 State Ratings on Human Trafficking Laws*, POLARIS (2014), <https://polarisproject.org/sites/default/files/2014-State-Ratings.pdf>.

<sup>47</sup> *State Laws & Issue Briefs*, *supra* note 40.

<sup>48</sup> *2014 State Ratings on Human Trafficking Laws*, *supra* note 45.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



## B. The Current Status of Affirmative Defense Statutes

One way states have improved human trafficking is through the use of affirmative defenses.<sup>53</sup> An affirmative defense is “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.”<sup>54</sup> The defendant has the burden to prove that the affirmative defense applies.<sup>55</sup> For example, common affirmative defenses include duress in civil cases and self-defense criminal cases.<sup>56</sup> An affirmative defense “involves a matter of excuse or justification” for committing the crime.<sup>57</sup>

An excuse defense is a type of affirmative defense, defined as “a reason that justifies an act or omission or that relieves a person of a duty.”<sup>58</sup> These excuse defenses allow the victim to admit his/her conduct is wrong, while at the same time informing the court that it should not hold the individual accountable because of certain circumstances.<sup>59</sup> Excuse defenses include long or short-term disabilities that individual had at the time of the crime.<sup>60</sup> Accordingly, the disability must have been the cause of the crime.<sup>61</sup> Many states have begun providing excuse defenses for victims; however, each state provides a different type.<sup>62</sup> Some states, such as Florida, have not

even adopted affirmative defenses in their statutes for human trafficking victims.<sup>63</sup>

Depending on the statutory language, states may adopt broad or narrow affirmative defenses for victims.<sup>64</sup> A narrow statute is one that provides a defense only for (1) victims who have imminent fear of harm, (2) prostitution-related charges (compelling prostitution, promoting prostitution, or patronizing a person for prostitution, etc.), or (3) anything that happens as a direct result of being a victim.<sup>65</sup> A broad statute would provide a defense for victims on (1) any criminal charge, (2) while being a victim, (3) and without having to prove fear.<sup>66</sup>

Most states have adopted narrow statutes.<sup>67</sup> For example, Iowa Code § 710A.3 provides that for an affirmative defense to apply, the victim’s crime must stem directly from being a human trafficking victim and the victim must have been reasonably fearful of the threat of serious injury.<sup>68</sup> California’s law illustrates another example of narrow statutory language.<sup>69</sup> The statute allows victims to assert an affirmative defense if the crime is a direct result of being a victim and the victim experienced reasonable fear.<sup>70</sup> This statute is further narrowed because this defense does not cover serious felonies, violent felonies, or violations of human trafficking.<sup>71</sup>

<sup>53</sup> Zornosa, *supra* note 26, at 187.

<sup>54</sup> *Affirmative Defense*, BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> MODEL PENAL CODE § 1.12(3)(c) (AM. LAW INST. 2019).

<sup>58</sup> *Id.*; *Excuse*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>59</sup> Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 221 (1982).

<sup>60</sup> *Id.*

<sup>61</sup> Zornosa, *supra* note 26, at 187.

<sup>62</sup> COLO. REV. STAT. ANN. § 18-7-201.3 (West 2019); CONN. GEN. STAT. ANN. § 53a-82(b) (West 2016); 725 ILL. COMP. STAT. 5/115-6.1 (West 2015); MD. CODE ANN., CRIM. LAW § 11-306 (West 2015); see *Human Trafficking State laws*,

NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx> [hereinafter *Human Trafficking State Laws*].

<sup>63</sup> See FLA. STAT. ANN. § 787.06 (West 2016); See FLA. STAT. ANN. § 796.07 (West 2016).

<sup>64</sup> Allison L. Cross, *Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, 44 McGEORGE L. REV. 395, 407 (2013).

<sup>65</sup> See, e.g., IOWA CODE ANN. § 710A.3 (West 2006).

<sup>66</sup> See Cross, *supra* note 64, at 407-08.

<sup>67</sup> See *id.*

<sup>68</sup> IOWA CODE ANN. § 710A.3 (2018).

<sup>69</sup> See CAL. PENAL CODE § 236.23 (West 2017).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*



In contrast, broad interpretations would require that the crime is committed only while the victim is trafficked.<sup>72</sup> Some sex trafficking victims have charges that are not applicable under the affirmative defense for prostitution or related charges.<sup>73</sup> For example, G.M.'s husband not only forced her to engage in prostitution, but also forced her to purchase drugs for him.<sup>74</sup> However, Texas, in particular, provides affirmative defenses only for prostitution or prostitution-related charges.<sup>75</sup>

In addition, many states have enacted safe harbor laws for children.<sup>76</sup> These laws provide legal protection for children, as well as services.<sup>77</sup> States enacted safe harbor laws to fix the inconsistencies in how various states treat children.<sup>78</sup> The legal protection includes immunity from prosecution for the crimes victims are forced to commit.<sup>79</sup> There are also special service programs available for victims, such as psychological treatment, emergency housing, etc.<sup>80</sup> Although states have adopted these laws

for minors, adults do not have the same protections.<sup>81</sup>

People differ on their views about affirmative defenses for victims of human trafficking. For example, in California, the Senate debated the passage of California's recent statute § 236.23, which provides affirmative defenses for victims.<sup>82</sup> Those who supported the statute argued that "California must take proactive steps to protect these victims and create multiple pathways for them to be identified as the victims they are so that the real perpetrators can be prosecuted."<sup>83</sup> They further argued that this statute would help to ensure that courts do not convict victims for their traffickers' crimes.<sup>84</sup>

Those who opposed the bill argued that it would be bad public policy to carve out "new defenses for such a small number of potential criminal defendants when there are laws in place which adequately address the issue. . . ."<sup>85</sup> They argued that the duress defense is always available for victims; making the additional affirmative defense unnecessary.<sup>86</sup> Similar arguments occur in states across the United States when deciding whether to pass these statutes.<sup>87</sup>

### C. How States have Begun to Implement Vacatur Statutes

States have also begun to implement vacatur statutes as judicial relief options for victims.<sup>88</sup> The term vacatur "is the act of annul-

<sup>72</sup> See Cross, *supra* note 64, at 407-08.

<sup>73</sup> See Cross, *supra* note 64, at 408.

<sup>74</sup> People v. G.M., 922 N.Y.S.2d 761, 762-763 (Crim. Ct. 2011).

<sup>75</sup> See e.g., TEX. PENAL CODE ANN. § 43.02 (West 2017); 725 ILL. COMP. STAT. ANN. § 5/115-6.1 (West 2015); LA. STAT. ANN. § 46.2 (2017); MD. CODE ANN., CRIM. LAW § 11-306 (West 2015); see Cross, *supra* note 64, at 419 n.197 (noting that that this type of defense does not apply to labor trafficking victims).

<sup>76</sup> See *Human Trafficking State Laws*, *supra* note 61; *Human Trafficking Issue Brief: Safe Harbor*, POLARIS (2015), <https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf>.

<sup>77</sup> *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.

<sup>78</sup> *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.

<sup>79</sup> *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.

<sup>80</sup> *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.

<sup>81</sup> *Human Trafficking State Laws*, *supra* note 61; see also *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.

<sup>82</sup> See generally *Human Trafficking: Victims' Affirmative Defense: Hearing on AB-1761 Before the S. Comm. on Senate Appropriations*, 2016 Leg., 69th Sess. (Cal. 2016).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> CAL. PENAL CODE § 236.14 (West 2017); FLA. STAT. ANN. § 943.0583 (West 2018).





ling or setting aside.”<sup>89</sup> Courts require victims to show proof that their conviction occurred while being trafficked; however, courts do not typically require official government documentation.<sup>90</sup> Convictions can prevent victims from obtaining employment, or, as previously mentioned, cause them to lose their employment.<sup>91</sup> Convictions can also create issues with victims receiving public or private housing, obstacles for undocumented victims who are trying to get their citizenship, and issues with having a family because courts use criminal convictions as evidence to show that the victim is an unfit parent for the children.<sup>92</sup> States have begun trying to help survivors overcome these barriers by creating vacatur statutes that allow victims to vacate their convictions if their convictions occurred while they were under their traffickers’ control.<sup>93</sup>

Vacatur statutes allow individuals to file motions with the court to have their convictions removed.<sup>94</sup> Whenever a court vacates a conviction, it is stating that the court made an error, and is thus reversing the conviction.<sup>95</sup> To get the conviction reversed, victims are required to provide evidence that the conviction occurred as a result of being trafficked.<sup>96</sup> Many states vary in what is considered acceptable evidence, but victims typically do not have to show official

government documentation.<sup>97</sup> States vary in whether there must be both expungement and vacatur or just one.<sup>98</sup> Some states require that along with vacating the conviction there must be expungement, which will remove charges from criminal records.<sup>99</sup> Other states have created expungement statutes that will destroy or seal the records about the facts of the conviction, but the expungement does not signify that the defendant is innocent.<sup>100</sup>

A substantial difference exists between expungement and vacatur.<sup>101</sup> When defendants ask the court to expunge their convictions, they are not seeking to set aside or vacate their convictions.<sup>102</sup> “‘Expunge’ (to erase) and ‘vacate’ (to nullify or to cancel) denote very different actions by the court. When a court vacates a conviction, it sets aside or nullifies the conviction and its attendant legal disabilities; the court does not necessarily attempt to erase the fact of the conviction.”<sup>103</sup> However, when a defendant is seeking expungement, the defendant is asking the court to destroy or seal the records about the facts of the conviction, but not necessarily the conviction itself.<sup>104</sup> Consequently, expungement does not signify that the defendant is innocent of the crime committed.

Florida is one of the few states that provides for both vacatur and expungement. Its law provides that “[a] conviction expunged un-

<sup>89</sup> *Vacatur*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>90</sup> *Id.*

<sup>91</sup> *G.M.*, 922 N.Y.S.2d at 763; Alyssa M. Barnard, *The Second Chance They Deserve: Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1472 (2014).

<sup>92</sup> Barnard, *supra* note 91 at 1472–73.

<sup>93</sup> CAL. PENAL CODE § 236.14 (West 2017); FLA. STAT. ANN. § 943.0583 (West 2018).

<sup>94</sup> *Human Trafficking Issue Brief: Vacating Convictions*, POLARIS (2015), available at <https://polarisproject.org/sites/default/files/2015%20Vacating%20Convictions%20Issue%20Brief.pdf>. [hereinafter *Human Trafficking Issue Brief: Vacating Convictions*].

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> VT. STAT. ANN. tit. 13 § 2658 (West 2012); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 94.

<sup>100</sup> COLO. REV. STAT. ANN. § 18-7-201.3 (West 2017) (providing for expungement of criminal records); COLO. STAT. ANN. § 24-72-706 (West 2014) (providing for sealing of criminal records); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 94.

<sup>101</sup> *See* United States v. Crowell, 347 F.3d 790, 792 (9th Cir. 2004).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*



der this section is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings”<sup>105</sup> California also provides that after finding that the victim was trafficked and the crime was committed as a direct result of being trafficked, the court can “vacate the conviction and expunge the arrest and issue an order.”<sup>106</sup> Some states provide only victims the opportunity to seal their record.<sup>107</sup> For example, Texas provides opportunities for minors only to have their records sealed.<sup>108</sup>

At least twenty-seven states have created vacatur statutes for victims to annul their criminal records.<sup>109</sup> States have given victims the opportunity to expunge, vacate, or seal their records as they relate to being trafficked.<sup>110</sup> New York was the first state to enact a vacatur statute in 2010.<sup>111</sup> Initially, the New York law allowed victims to vacate only prostitution charges; however, the state expanded the scope through case law.<sup>112</sup> In *People v. G.M.*, the court vacated not only G.M.’s prostitution charges but also the trespassing and possession of controlled substance charges.<sup>113</sup> This was a huge victory for victims of human trafficking; however, not all courts interpret this legislation as broadly.<sup>114</sup>

There are three levels of vacatur statutes: (1) broad, (2) intermediate, and (3) narrow.<sup>115</sup> Nar-

row laws provide vacatur statutes for prostitution charges only.<sup>116</sup> For example, Washington’s statute provides that victims of trafficking may vacate their prostitution convictions, as long as those charges resulted from the trafficker promoting prostitution, promoting commercial sexual abuse, or trafficking.<sup>117</sup> Intermediate laws provide that victims can vacate their convictions for prostitution and prostitution-related charges (e.g., loitering for the purpose of prostitution).<sup>118</sup> For example, New York’s statute provides that the court can vacate a conviction when the conviction was for prostitution-related charges.<sup>119</sup> Lastly, broad laws provide that victims can vacate any conviction committed while being trafficked.<sup>120</sup> For example, Wyoming’s statute provides that the court can “vacate the conviction if the defendant’s participation in the offense is found to have been the result of having been a victim” of human trafficking.<sup>121</sup>

Additionally, many states have limited the amount of time victims have to move the court to vacate convictions.<sup>122</sup> Other states, like California, provide that the victim must move the court “within a reasonable time after the person has ceased to be a victim of human trafficking, or within a reasonable time after the petitioner has sought services for being a victim of human trafficking, whichever

<sup>105</sup> FLA. STAT. ANN. § 943.0583 (West 2018).

<sup>106</sup> CAL. PENAL CODE § 236.14 (West 2017).

<sup>107</sup> TEX. FAM. CODE ANN. § 58.256 (West 2017) (providing sealing of records for minors); see *Human Trafficking State Laws*, *supra* note 62.

<sup>108</sup> TEX. FAM. CODE ANN. § 58.250 (West 2017).

<sup>109</sup> See *Human Trafficking State Laws*, *supra* note 62.

<sup>110</sup> See *id.*

<sup>111</sup> *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 94.

<sup>112</sup> *Id.*

<sup>113</sup> *G.M.*, 922 N.Y.S.2d at 765–66.

<sup>114</sup> *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 94.

<sup>115</sup> Nicholas R. Larche, *Victimized by the State: How Legislative Inaction Has Led to the Revictimization and Stigma-*

*tization of Victims of Sex Trafficking*, 38 SETON HALL LEGIS. J. 281, 299 (2014).

<sup>116</sup> *Id.*

<sup>117</sup> WASH. REV. CODE ANN. § 9.96.060 (West 2017); see *Human Trafficking State Laws*, *supra* note 62.

<sup>118</sup> N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2016); Larche, *supra* note 115, at 300.

<sup>119</sup> N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2016).

<sup>120</sup> Larche, *supra* note 115, at 300–01; See FLA. STAT. ANN. § 943.0583 (West 2018).

<sup>121</sup> WYO. STAT. ANN. § 6-2-708 (West 2013).

<sup>122</sup> See, e.g., MD. CODE ANN., CRIM. PROC. § 8-302 (West 2011) (stating the time period for a motion to vacate must be a reasonable period of time after conviction).



occurs later...<sup>123</sup> Conversely, some states have no statutory time limit for filing the motion to vacate.<sup>124</sup>

Many state legislatures are introducing bills that would provide vacatur statutes for victims of human trafficking.<sup>125</sup> In Texas specifically, the 85<sup>th</sup> Legislative Session heard arguments for and against the passage of a vacatur statute.<sup>126</sup> Supporters of the bill argued that this bill would provide relief and allow victims to rebuild their lives.<sup>127</sup> With a criminal conviction on a victim's record, the victim faces many difficulties.<sup>128</sup> For example, convictions "can interfere with efforts to get a job, housing, or education, which can make it hard to break the cycle of offending."<sup>129</sup> Moreover, the trauma victims face while being trafficked makes this bill necessary.<sup>130</sup> Passing this bill would allow Texas to establish legislation that would begin a path to set aside victims' convictions and have records expunged.<sup>131</sup> Supporters acknowledge that the current law provides some relief for victims in certain circumstances; however, supporters argue that the law does not address the broad range of situations victims experience.<sup>132</sup> For example, if victims are still under the control of their trafficker when charged with prostitution, the victims will likely not want to raise an affirmative defense.<sup>133</sup> While people differ in their views on vacatur

statutes, people also recognize that victims face many issues whenever criminal convictions are on victims' records.<sup>134</sup>

Opponents of the bill argued vacatur statutes are similar to clemency, which is a function of the executive branch and not the judicial branch.<sup>135</sup> Thus, opponents argue that vacatur statutes are unnecessary for multiple reasons.<sup>136</sup> First, opponents noted there is already an affirmative defense available for prostitution charges, and thus, a vacatur statute is unnecessary.<sup>137</sup> Second, victims can have their probation reduced or terminated for being a victim of human trafficking.<sup>138</sup> From the viewpoint of the opponents, there are already current appropriate measures available for victims.<sup>139</sup>

### III. STATES SHOULD IMPLEMENT AFFIRMATIVE DEFENSE STATUTES FOR VICTIMS

States are treating victims as criminals.<sup>140</sup> Instead of charging the pimp for human trafficking, states are charging the victim for prostitution. This does not conform with the five theories of punishment, and thus, states should provide defenses for victims. None of the theories of punishment explain why states are charging victims. In fact, when analyzing each theory of punishment, there is no apparent connection between the theory and punishing the victim. There are five theories of punishments in the criminal justice system: de-

<sup>123</sup> CAL. PENAL CODE § 236.14 (West 2017); *see also* FLA. STAT. ANN. § 943.0583 (West 2018).

<sup>124</sup> WASH. REV. CODE ANN. § 9.96.060 (West 2017).

<sup>125</sup> *See, e.g.*, H. Comm. on Criminal Jurisprudence, Tex. H.B. 269, 85th Leg., R.S. (Tex. 2017).

<sup>126</sup> *Id.*

<sup>127</sup> S. Thompson et al., *House Research Organization Bill Analysis*, TEXAS LEGISLATURE ONLINE 1, 3 (Apr. 17, 2017), <https://hro.house.texas.gov/pdf/ba85r/hb0269.pdf#navpanes=0>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 4.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Barnard, *supra* note 91, at 1472-73.

<sup>135</sup> Thompson, *supra* note 127, at 1, 4.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.*

<sup>140</sup> *See* Isabella Blizzard, *Chapter 636: Catching Those Who Fall, An Affirmative Defense for Human Trafficking Victims*, 48 U. PAC. L. REV. 631, 639 (2016).



terrence, rehabilitation, restorative, retribution, and incapacitation.<sup>141</sup>

Deterrence does not apply to human trafficking victims. Deterrence occurs when individuals refrain from committing a crime because of the potential consequences they will face.<sup>142</sup> There are two types of deterrence: individual versus general. Individual deterrence is used to deter an offender from reoffending.<sup>143</sup> General deterrence is used to persuade individuals not to commit a crime in general.<sup>144</sup> The criminal justice system uses individual deterrence to give offenders a sample of the punishment they will receive if the offender reoffends.<sup>145</sup> Similarly, general deterrence functions by creating penalties that will prevent individuals from committing those specific offenses.<sup>146</sup> Consequently, individual deterrence would not apply to human trafficking victims because victims only continue to re-offend out of fear of their traffickers.<sup>147</sup> General deterrence does not apply to traffickers because victims are more fearful of the trafficker than the potential punishments given to individuals who commit similar crimes.<sup>148</sup> For instance, some victims would rather be in prison than on the streets with their traffickers.<sup>149</sup>

Retribution is also not applicable to human trafficking victims. Retribution is the the-

ory that criminals deserve punishment, which is therefore justified.<sup>150</sup> It runs under the basic principle of *lex talionis* which is an “eye for an eye” or a “life for a life” argument.<sup>151</sup> Retributivists believe that offenders should have inflicted on them the same punishment the victims suffered.<sup>152</sup> Retributivists state that offenders are merely paying what offenders owe to society.<sup>153</sup> This theory is not applicable to victims of trafficking because the victims are not willfully harming society.<sup>154</sup> If anything, states should punish traffickers for the crimes they force their victims to commit because traffickers are willfully harming society.<sup>155</sup>

Incapacitation may take victims away from their traffickers; however, incapacitation only harms victims further through dual victimization.<sup>156</sup> Incapacitation is used to prevent offenders from committing crimes by placing them into the custody of the state for an extended period of time.<sup>157</sup> The people who support this form of punishment do so because it removes the offender from the community and consequently protects the community from future offending.<sup>158</sup> However, in the case of human trafficking victims, the victim is not the one intentionally committing the crime.<sup>159</sup> Furthermore, if the traffickers do not have a victim, then the trafficker will be on the hunt for

<sup>141</sup> CYNDI L. BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 105 (1st ed. 2004), available at [https://www.sagepub.com/sites/default/files/upm-binaries/5144\\_Banks\\_II\\_Proof\\_Chapter\\_5.pdf](https://www.sagepub.com/sites/default/files/upm-binaries/5144_Banks_II_Proof_Chapter_5.pdf).

<sup>142</sup> *Id.* at 106.

<sup>143</sup> *Id.* at 107.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., *People v. Gonzalez*, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011) (noting how victim continued to re-offend because she was fearful of what her trafficker might do to her).

<sup>148</sup> See, e.g., *id.*

<sup>149</sup> *Id.*

<sup>150</sup> Banks, *supra* note 141, at 109.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 110.

<sup>153</sup> *Id.*

<sup>154</sup> See also Cross, *supra* note 64, at 396–97; see generally Kate Mogulescu, *The Public Defender as anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 483–84 (2012) (noting misconceptions about trafficking victims).

<sup>155</sup> See, e.g., *People v. L.G.*, 972 N.Y.S.2d 418, 423–24 (Crim. Ct. 2013).

<sup>156</sup> See Cross, *supra* note 64, at 413.

<sup>157</sup> Banks, *supra* note 141, at 117.

<sup>158</sup> *Id.*

<sup>159</sup> See Zornosa, *supra* note 26, at 183.



another victim.<sup>160</sup> Incapacitating the victim neither protects society from the crimes committed nor does it protect innocent citizens from becoming the trafficker's next victim.

The trafficker should be forced to restore justice to the community, not the victim. Restorative justice focuses on restoring the victim, community, and the offender.<sup>161</sup> Offenders must focus on repairing their relationships between themselves and the community, themselves and the victims, and between victims and the community.<sup>162</sup> Restorative justice is used to restore the sense of security in communities.<sup>163</sup> Two issues exist with applying this theory to human trafficking victims. First, the offenders in these cases are victims themselves.<sup>164</sup> Second, punishing victims of human trafficking will not bring a true sense of security because traffickers will continue to find more victims to be their offenders.<sup>165</sup> Consequently, the victim will not be able to restore justice in society; however, punishing traffickers would fit this theory.

Lastly, the trafficker is the individual who is in need of rehabilitation.<sup>166</sup> A rehabilitationist views crimes as a "symptom of a social disease and sees the aim of rehabilitation as curing that disease through treatment[]."<sup>167</sup> Essentially, their goal is to cure the offenders of their crime-focused behaviors and then send them back into society.<sup>168</sup> This is not applicable to victims of trafficking because they do

not have a "social disease."<sup>169</sup> Victims are not committing crimes because they have crime-focused behavior; they have no other choice.<sup>170</sup> If victims do not listen to their pimp, they are beaten or traded to another trafficker who may be worse than their current pimp.<sup>171</sup>

These theories of punishment do not fit victims of human trafficking because they are just that: victims.<sup>172</sup> They do not have personal culpability for the crimes they commit.<sup>173</sup> This is the main reason states need to apply a holistic approach to this problem. Providing an affirmative defense "allow[s] victims to bypass the criminal justice system, thus allowing them to utilize—and allowing government and non-governmental actors to provide—options that focus solely on rehabilitation and that are entirely separate from the penal goals of the criminal justice system."<sup>174</sup>

### A. Proposed Affirmative Defense Statute

Victims of human trafficking experience dual victimization, first by their traffickers and then by law enforcement.<sup>175</sup> Dual victimization occurs when law enforcement treats a victim as a criminal and charges the victim with a crime committed while under the control of the trafficker.<sup>176</sup> Affirmative defenses do not prevent dual victimization, but they do provide relief after dual victimization has already occurred.<sup>177</sup> Affirmative defenses give victims a second chance. Thus, states need an affirmative defense statute that covers a broad range

<sup>160</sup> See, e.g., *L.G.*, 972 N.Y.S.2d at 420–421 (showing victim was consistently picked up by other traffickers through her life).

<sup>161</sup> Banks, *supra* note 141, at 118.

<sup>162</sup> *Id.* at 119.

<sup>163</sup> Banks, *supra* note 141, at 118.

<sup>164</sup> See Zornosa, *supra* note 26, at 183.

<sup>165</sup> See, e.g., *L.G.*, 972 N.Y.S.2d at 420–21 (noting that traffickers are continually trading victims to other traffickers).

<sup>166</sup> See generally Banks, *supra* note 141, at 116.

<sup>167</sup> *Id.*

<sup>168</sup> See *id.* at 116–17.

<sup>169</sup> See *id.* at 116.

<sup>170</sup> See, e.g., *L.G.*, 972 N.Y.S.2d at 420–21 (noting *L.G.* was fearful to leave her trafficker).

<sup>171</sup> See, e.g., *id.*

<sup>172</sup> See generally Zornosa, *supra* note 26.

<sup>173</sup> *Id.* at 187.

<sup>174</sup> *Id.* at 190–91.

<sup>175</sup> Cross, *supra* note 64, at 403.

<sup>176</sup> See Blizard, *supra* note 140, at 635.

<sup>177</sup> Cross, *supra* note 64, at 403.



of crimes, does not require imminent fear and allows bottom girls to use the statute.<sup>178</sup> States should adopt a statute, similar to California's statute, that reads:

It is a defense to a charge of a crime if the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense. This defense does not apply to a serious felony or a violent felony.

This statute uses language that: (1) includes a broad range of crimes while limiting more serious crimes; (2) does not require the victim to prove imminent fear; and (3) allows bottom girls to use it. This language is imperative because these three parts concern adult victims that states exclude from the use of the affirmative defense statutes. While some states have enacted safe harbor laws for children granting them immunity from prosecution charges, states preclude adults from this safety net.<sup>179</sup>

Due to the restraint states have in applying safe harbor laws to adults, states must look towards affirmative defenses as a way for the court system to prevent prosecutors from convicting victims of a crime they committed even if the facts are true.<sup>180</sup> These defenses provide victims the opportunity to avoid a conviction on their record because convictions create problems with rehabilitation for the victim.<sup>181</sup> Convictions bar victims "from enjoying certain necessities of life: the ability to rent an apart-

ment or to find employment."<sup>182</sup> If a victim cannot rent an apartment or find a job, then the victim is more likely to go back to the only life he or she is familiar with.

Affirmative defenses are an imperative form of relief for victims. Accordingly, every state must adopt a broader affirmative defense option. However, states need to avoid giving complete immunity to any victim for any crime he/she commits. Thus, some parameters are necessary to limit the scope; however, the scope should not be too narrow. There is a fine line between what is too broad versus what is too narrow. For example, the California statute provides that:

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. . . or a violent felony. . . or a violation of [human trafficking].<sup>183</sup>

This statute provides that there must be a direct link between being a victim of human trafficking and committing the crime.<sup>184</sup> California's statute also provides that the victim must be in reasonable fear of harm.<sup>185</sup> Though victims must not be given complete immunity to commit any crime, requiring the victims to show a reasonable fear of harm does make the affirmative defense element hard to prove. This is more difficult for victims of human trafficking because they are not always under fear of harm from the traffickers, who trick victims into be-

<sup>178</sup> See generally Blizard, *supra* note 140, at 639 (explaining that bottom girls refer to women who assist the trafficker in overseeing the girls).

<sup>179</sup> *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.

<sup>180</sup> See *Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>181</sup> See *supra* Part II.B. (analyzing affirmative defenses and how the defenses apply to victims).

<sup>182</sup> Blizard, *supra* note 140, at 635.

<sup>183</sup> CAL. PENAL CODE § 236.23 (West 2017).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*



believing that they could be arrested, deported, or even abused by law enforcement if they try to contact the police officers.

Accordingly, states should amend their statute to include a broader range of crimes that victims committed as a direct result of being a human trafficking victim. In some states, G.M. would be allowed to use an affirmative defense only for the prostitution charges and not the drug charges; however, G.M. was required to commit both crimes under her husband's control.<sup>186</sup> Additionally, the statute should not require proof of imminent fear at the time the crime was committed. Traffickers do not always coerce victims by fear of harm; traffickers sometimes coerce victims by fear of turning them over to the police.<sup>187</sup> Some women and men have immigration issues and are fearful of deportation if the police get involved.<sup>188</sup> Consequently, requiring proof of fear makes this affirmative defense too difficult for victims to prove.<sup>189</sup>

Furthermore, states should still allow victims to use an affirmative defense if they commit the crime of human trafficking.<sup>190</sup> These are women who have been in the system for years, and traffickers force these women to traffic young girls.<sup>191</sup> These are not crimes the women/men choose to commit, but crimes that they are forced to commit by their trafficker.<sup>192</sup> If states did not include these men and women in the protection, then we would be leaving out a substantial portion of the woman called bottom girls.<sup>193</sup> Bottom girls are typically wom-

en who assist the trafficker in overseeing the girls.<sup>194</sup> These girls have typically been with the pimp the longest.<sup>195</sup> These women are victims just as much as any other victim. While it may appear worse that these women are participating in human trafficking, traffickers may victimize these women more than the victims working as prostitutes.<sup>196</sup>

While these statutes are very important, affirmative defenses are difficult to bring because many victims are not willing to "out" their trafficker because they fear retaliation or fear returning to their trafficker.<sup>197</sup> Furthermore, victims of human trafficking tend not to actively look for law enforcement because of the type of trauma they have experienced.<sup>198</sup> It can take victims weeks to feel comfortable enough to cooperate and realize the cops will not return them to their trafficker.<sup>199</sup> However, it is important to provide an affirmative defense to the victims who are willing to speak out about their oppression. States need to provide victims pre-conviction relief (affirmative defenses) in addition to post-conviction relief (vacatur statutes).<sup>200</sup>

### B. Expanding the Scope of Affirmative Defense Statutes is Imperative to a Victim-Centric Solution

Victims of human trafficking commit crimes because they believe they have no choice: victims can either listen or be beaten.<sup>201</sup> In *People v. L.G.*, L.G.'s trafficker coerced L.G.

<sup>186</sup> *People v. G.M.*, 922 N.Y.S.2d 761, 762 763 (Crim. Ct. 2011).

<sup>187</sup> *See Mogulescu*, *supra* note 154, at 489.

<sup>188</sup> *Id.* at 481 82.

<sup>189</sup> *See generally id.* at 484 85.

<sup>190</sup> *See generally* Blizard, *supra* note 140, at 640.

<sup>191</sup> *See generally id.* at 639 40.

<sup>192</sup> *See id.* at 633.

<sup>193</sup> *See id.* at 639.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See id.* at 635.

<sup>197</sup> *See id.* at 644.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See supra* Part II.B-C (discussing and explaining what affirmative defenses and vacatur statutes are).

<sup>201</sup> *See generally* Mogulescu, *supra* note 154, at 474; *see also* Cross, *supra* note 64, at 396.



into the trafficking realm after being a part of the foster care system.<sup>202</sup> L.G. was scared to leave because she was afraid her trafficker would severely beat her as he beat other girls for speaking to other men.<sup>203</sup> Traffickers often threaten the victims by telling the victim they will call the police.<sup>204</sup> The trafficker also instills a belief that no one will believe the victims because they are prostitutes, or they threaten the victims with physical violence.<sup>205</sup> Affirmative defenses provide victims with a chance to excuse actions they commit while under the control of their traffickers.<sup>206</sup> Victims are not challenging the fact that they committed the crime, but instead, are seeking to justify why they committed the crime.<sup>207</sup> Similar to individuals who commit crimes under duress, victims of trafficking are often subject to the malice of their traffickers.<sup>208</sup> L.G. acted under the trafficker's orders, was subjected to psychological and physical torture by the trafficker, and it was all for the trafficker's financial gain.<sup>209</sup> It is possible that L.G. may not be able to use the defense of duress for all of the crimes she committed because the trafficker was not threatening imminent bodily harm. However, L.G. should still be allowed to qualify for an excuse defense because she has an excuse that should relieve her of responsibility: she was a victim of trafficking.<sup>210</sup>

As the trafficker has all the culpability, the trafficker should take all the blame.<sup>211</sup> An

excuse defense that should be available to these victims is a disability.<sup>212</sup> Human trafficking is a disability that provides an excuse for crimes a victim commits.<sup>213</sup> This temporary condition forces victims to act under the control of their traffickers due to fear.<sup>214</sup> Typically, society is willing to excuse individuals when:

[T]he actor perceives the conduct accurately and fully understands its physical consequences, and knows its wrongfulness or criminality, but the actor lacks the ability to control his conduct (e.g., because of an insane compulsion or duress) to such an extent that it is no longer proper to hold him accountable for it.<sup>215</sup>

Human trafficking victims lack personal culpability because they commit crimes under the control of their trafficker.<sup>216</sup> Therefore, society would likely be willing to excuse human trafficking victims because they lack the personal culpability required for the crimes they commit.<sup>217</sup>

States should implement the affirmative defense statute for human trafficking victims that is similar to the duress defense available to individuals under criminal law.<sup>218</sup> For the duress defense to be applicable, a person must threaten an individual, causing the individual to "reasonably believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal

<sup>202</sup> *People v. L.G.*, 972 N.Y.S.2d 418, 420 21 (Crim. Ct. 2013).

<sup>203</sup> *See, e.g., id.*

<sup>204</sup> *See Mogulescu*, *supra* note 154, at 489.

<sup>205</sup> *See Mogulescu*, *supra* note 154, at 472; *see also* Cross, *supra* note 64, at 396 97.

<sup>206</sup> *See Zornosa*, *supra* note 26, at 189 90.

<sup>207</sup> Cross, *supra* note 64, at 396 97.

<sup>208</sup> *See Zornosa*, *supra* note 26, at 189.

<sup>209</sup> *See People v. L.G.*, 972 N.Y.S.2d 418, 420 21 (Crim. Ct. 2013).

<sup>210</sup> *See Zornosa*, *supra* note 26, at 190.

<sup>211</sup> *See Zornosa*, *supra* note 26, at 190.

<sup>212</sup> Robinson, *supra* note 59, at 221.

<sup>213</sup> *See generally* Robinson, *supra* note 59, at 221 29.

<sup>214</sup> *See, e.g., People v. Gonzalez*, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011).

<sup>215</sup> Robinson, *supra* note 59, at 222.

<sup>216</sup> *See Zornosa*, *supra* note 26, at 188.

<sup>217</sup> *See Zornosa*, *supra* note 26, at 188.

<sup>218</sup> Zornosa, *supra* note 26, at 188.





law,” and thus commits the crime.<sup>219</sup> However, the human trafficking defense would differ slightly because traffickers do not place all victims under imminent fear of serious bodily injury or death.<sup>220</sup> Sometimes traffickers threaten to call the police, and the victims fear this because they *have* committed criminal acts.<sup>221</sup> Traffickers “deceive [victims] into thinking that they lack any legal protections and that reporting will result in arrest, deportation, and even abuse by authorities.”<sup>222</sup> Because of the similarities between trafficking issues and the defense of duress, states should provide an excuse defense for victims of trafficking because they are essentially forced to commit crimes.

#### IV. STATES MUST VACATE CONVICTIONS FOR VICTIMS

Along with affirmative defenses, vacatur statutes are an important part of creating a more victim-centric state. Convictions create an undue burden on victims who are trying to get back on their feet.<sup>223</sup> Victims can have difficulty obtaining housing, employment, education, or public benefits. For example, whenever you apply for housing or employment, you are often asked about your criminal history.<sup>224</sup> Apartments don’t want registered prostitute in their building because the apartment prides itself in having a safe, family-friendly environment.<sup>225</sup> Employers do not hire former prosti-

tutes because they view these people as dirty.<sup>226</sup> This is why vacatur statutes are so important for victims. These statutes “grant victims ‘a clean slate’ and a ‘desperately needed second chance they deserve.’”<sup>227</sup> Vacatur statutes provide post-conviction assistance after the system has failed to recognize these people as victims before their conviction.<sup>228</sup>

##### A. Proposed Vacatur Statutes

Vacating convictions is essential because it removes barriers that prevent victims from obtaining housing, employment, loans, and financial aid for education.<sup>229</sup> Many states have started to implement forms of vacatur statutes; however, states could improve these statutes. The ideal vacatur statute that would provide the greatest benefits to victims of human trafficking is one that (1) is not limited to prostitution or prostitution-related charges; (2) provides a due diligence time limit; (3) provides for both vacatur and expungement of the victim’s records; and (4) provides human trafficking agencies the power to promulgate regulations that requires law enforcement, nonprofits, or human trafficking safe houses to inform victims of their judicial protection options once rescued.<sup>230</sup> With law enforcement, agencies could enforce this regulation through the use of a Victims Assistance Unit (VAU) in each state. Florida’s statute meets all of the requirements above except for the regu-

<sup>219</sup> Zornosa, *supra* note 26, at 188 (quoting WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 9.1 (2d ed. 2014)).

<sup>220</sup> Zornosa, *supra* note 26, at 188.

<sup>221</sup> Mogulescu, *supra* note 154, at 474, 489.

<sup>222</sup> Mogulescu, *supra* note 154, at 483.

<sup>223</sup> *Human Trafficking Task Force e-Guide*, OFF. FOR VICTIMS OF CRIME TRAINING & TECHNICAL ASSISTANCE CTR., <https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/44-comprehensive-victim-services/legal-needs/criminal-defense/>.

<sup>224</sup> *Id.*

<sup>225</sup> *See id.*

<sup>226</sup> *See id.*

<sup>227</sup> Barnard, *supra* note 91, at 1474 (quoting Letter from Thomas Duane, Chair, N.Y. Senate Comm. on Health, to David Paterson, Governor, N.Y. (Aug. 12, 2010), in Bill Jacket, Assemb. 7670, 233rd Leg. Reg. Sess., 8 (N.Y. 2010)).

<sup>228</sup> *See Cross, supra* note 64, at 403.

<sup>229</sup> Barnard, *supra* note 91, at 1472–73.

<sup>230</sup> Larche, *supra* note 115, at 301.



lation power given to human trafficking agencies.<sup>231</sup> Florida's statute reads:

A person who is a victim of human trafficking may petition for the expunction of a criminal history record resulting from the arrest or filing of charges for an offense committed or reported to have been committed while the person was a victim of human trafficking, which offense was committed or reported to have been committed as a part of the human trafficking scheme of which the person was a victim or at the direction of an operator of the scheme . . . A petition under this section must be initiated by the petitioner with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking, subject to reasonable concerns for the safety of the victim, family members of the victim, or other victims of human trafficking that may be jeopardized by the bringing of such petition or for other reasons consistent with the purpose of this section.<sup>232</sup>

Florida's statute is excellent in that it does not limit the statute to prostitution or prostitution-related charges alone but allows victims of labor trafficking to use the statute.<sup>233</sup> Furthermore, as stated above, there are victims of sex trafficking who are forced to commit crimes

other than prostitution, and this statute allows those victims to use the statute as well.<sup>234</sup>

States should adopt Florida's current statute and add a section that gives Human trafficking agencies the power to regulate an educational requirement for organizations and government agencies that come into contact with victims upon being rescued. The best possible way to implement this would be to provide a VAU in each state for victims of human trafficking. The regulation would require that law enforcement officers, hospital staff, or other parties call dispatch to have the VAU sent to speak with the victim. The educational requirement is crucial because many victims are unaware of or do not know how to use their judicial relief options and thus, victims do not generally use vacatur statutes.<sup>235</sup> However, if a state's human trafficking agency regulates an education requirement, then this requirement would be able to help ensure that victims are aware of the options available to them and how to use these options.

The regulation would run similarly to the victim's compensation programs. For states to be available to fund the victims' compensation grants, states must meet specific criteria.<sup>236</sup> The grantee has to be an "operational state-administered crime victim compensation program."<sup>237</sup> The Victims of Crime Act mandates that the grantee must "offer compensation to crime victims and survivors of victims of criminal violence . . . ."<sup>238</sup> States have implemented this by having a sexual assault response

<sup>231</sup> FLA. STAT. ANN. § 943.0583 (West 2018).

<sup>232</sup> FLA. STAT. ANN. § 943.0583(c)(3)-(4) (West 2018).

<sup>233</sup> Barnard, *supra* note 91, at 1491-92.

<sup>234</sup> See Barnard, *supra* note 91, at 1491-92; see, e.g., *People v. G.M.*, 922 N.Y.S.2d 761 (Crim. Ct. 2011).

<sup>235</sup> Barnard, *supra* note 91, at 1485; see, e.g., Larche, *supra* note 115, at 301.

<sup>236</sup> Victims of Crime Act, 66 Fed. Reg. 27158, 27161 (May 16, 2001).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*



team that is responsible for assisting victims “through the maze of community services available to them[.]”<sup>239</sup> Whenever an officer comes into contact with victims of domestic violence, the police officer, hospital, or other parties call dispatch, and the VAU is activated.<sup>240</sup> The VAU provides victims with support and brochures that explain to the victims their rights.<sup>241</sup> This includes information about victims compensation and programs available to assist victims in dealing with their crisis.<sup>242</sup>

Like victim’s compensation programs, the regulation this Article is proposing would require law enforcement to call dispatch anytime law enforcement believed it was dealing with victims of human trafficking. The VAU would then provide the victim’s information about victim’s compensation, as well as information about the different forms of judicial relief, including vacatur statutes and affirmative defense options. This would help to increase victims’ awareness about the different judicial relief options that are available. States could train their current sex crime advocates to also be advocates for human trafficking victims. This would help cut down the potential costs of a VAU.<sup>243</sup>

Victims assistance units would also assist with implementing time limits on the statute. States should implement a due diligence time requirement for human trafficking vic-

tims to preserve the integrity of the trial process while also protecting victims. The statute should state:

The application shall be made and heard within a reasonable time after the person has ceased to be a victim of human trafficking *and becomes aware of this vacatur statute*, or has sought services for being a victim of human trafficking *and becomes aware of this vacatur statute*, whichever occurs later, subject to reasonable concerns for the safety of the person, family members of the person, or other victims of human trafficking that may be jeopardized by the bringing of the application, or for other reasons consistent with the purposes of this paragraph.<sup>244</sup>

A time limit on the statute is a problem because it can counteract the benefit.<sup>245</sup> If victims do not learn about the statute until well after the time limit, the time limit could potentially hinder victims from bringing deserving motions.<sup>246</sup> However, courts put time limits in place to “balance concerns for justice with the integrity of the trial process and respect for the finality of the jury’s judgment.”<sup>247</sup> Therefore, the VAU would help to inform victims of the statute and hence assist with the due diligence time limit on the statute. Educational programs can also help time limit problems because more victims would know their options earlier. Moreover, amending the statute’s language to include “becomes aware of this vacatur statute” will al-

<sup>239</sup> Sexual Assault Response Teams, NAT’L SEXUAL VIOLENCE RES. CTR., <https://www.nsvtc.org/sarts/protocols-and-guidelines>; *see also* NAT’L SEXUAL VIOLENCE RES. CTR., PROTOCOLS & GUIDELINES FOR SEXUAL ASSAULT RESPONSE TEAMS (2019).

<sup>240</sup> *See, e.g.*, NAT’L SEXUAL VIOLENCE RES. CTR., *Denver Sexual Assault Response Protocol*, 1, 25 (2011).

<sup>241</sup> *See, e.g., id.* at 24.

<sup>242</sup> *See, e.g., id.* at 25.

<sup>243</sup> Furthermore, states should adopt human trafficking response teams; however, that problem is outside the scope of this Article. *See, e.g.*, NAT’L SEXUAL VIOLENCE RES. CTR., *supra* note 239.

<sup>244</sup> *See, e.g.*, N.J. STAT. ANN. § 2C:44-1.1 (West 2013) (re-stating words of the statute to include a section about knowledge of the vacatur statute).

<sup>245</sup> *See* Larche, *supra* note 115, at 301.

<sup>246</sup> Barnard, *supra* note 91, at 1485.

<sup>247</sup> Barnard, *supra* note 91, at 1486.



low the victims to utilize the statute's protections once they are aware of the statute, instead of being uninformed and losing the right. This will encourage greater usage of the statute and provide more victims the opportunity to have a clean slate on their record.

## B. Vacatur Statutes are Crucial to Help Victims Who Have Been Failed by the System

Vacatur statutes provide victims a new beginning that is essential because criminal charges create obstacles for victims on their path to rehabilitation.<sup>248</sup> Examples of these obstacles include victims whose employers have terminated their employment because of their criminal record.<sup>249</sup> G.M.'s case is a prime example of this; once her employer found out about her convictions, her employer fired her.<sup>250</sup> These convictions created barriers against essential aspects of life for G.M. to be able to rehabilitate and successfully return to society.<sup>251</sup>

Furthermore, courts should not punish victims for crimes committed under duress or coercion by their traffickers.<sup>252</sup> As stated previously, society would be willing to excuse victims who are trafficked because they lack the personal culpability required for the crimes they

commit.<sup>253</sup> Victims are not committing these crimes because they desire to but because they fear they have no other option.<sup>254</sup> Thus, these statutes would create the clean slate that is needed for the victim to start over.

Vacatur statutes are problematic because victims utilize these statutes after victims have been charged and convicted of crimes.<sup>255</sup> Thus, these statutes do not prevent dual victimization.<sup>256</sup> While preventing dual victimization is important, several victims have already been convicted and need help now. Thus, this statute should be put in place to catch victims when courts do not recognize them at the beginning of the process.<sup>257</sup> It should only be a backup plan in cases where courts do not identify victims before conviction.<sup>258</sup> It would also help victims who did not raise an affirmative defense due to fear of retaliation.

Rehabilitation is a needed part of recovery for human trafficking victims.<sup>259</sup> If states do not rehabilitate victims, they could end up back with their trafficker.<sup>260</sup> Victims need to be able to integrate back into society after being trafficked, and this means more than just providing victims with food and shelter.<sup>261</sup> Therefore, vacatur statutes would cancel out the victims' convictions and allow them to start afresh.<sup>262</sup>

<sup>248</sup> See *People v. G.M.*, 922 N.Y.S.2d 761, 763 (Crim. Ct. 2011).

<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> *Id.*; see Barnard, *supra* note 91, at 1472.

<sup>252</sup> Barnard, *supra* note 91, at 1493.

<sup>253</sup> Zornosa, *supra* note 26, at 187; see Robinson, *supra* note 59, at 222.

<sup>254</sup> See Mogulescu, *supra* note 154, at 478–79; see, e.g., *People v. Gonzalez*, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011).

<sup>255</sup> See Cross, *supra* note 64, at 403.

<sup>256</sup> Cross, *supra* note 64, at 403.

<sup>257</sup> See Cross, *supra* note 64 at 403.

<sup>258</sup> See Cross, *supra* note 64, at 403.

<sup>259</sup> See Saurav Ghimire, *The Three Rs of Justice to Human Trafficking Victims (Rescue, Rehabilitation and Reintegration)*, 1 KATHMANDU SCH. L. REV. 104, 109 (2012).

<sup>260</sup> NAT'L SEXUAL VIOLENCE RES. CTR., *Assisting Trafficking Victims: A Guide for Victim Advocates* 1, 18 (2012), [https://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_guides\\_human-trafficking-victim-advocates.pdf](https://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf).

<sup>261</sup> See Ghimire, *supra* note 259, at 109.

<sup>262</sup> See *United States v. Crowell*, 347 F.3d 790, 792 (9th Cir. 2004).



## V. CONCLUSION

While states have begun to implement more victim-centric statutes, few have adopted statutes that genuinely address the needs of victims. California, Texas, and Florida have the biggest human trafficking populations; yet these states are among those that have chosen to place their focus on punishment rather than restoring the lives of victims. This nonholistic approach to human trafficking is not working because human trafficking is on the rise. To return to the story of the little Dutch Boy, a holistic approach would essentially tear down the dike and rebuild it so that the leaking would cease.

This Article's proposed affirmative defense statute provides an ideal framework for California, Texas, and Florida. This type of statute would provide coverage for more offenses while still addressing the states' need to prevent felonies. States should also adopt this Article's ideal vacatur statute and give Human trafficking agencies the power to implement an educational obligation for law enforcement, nonprofits, or human trafficking safe houses that come into contact with the victims. This statute would provide victims with the ability to transition back into society successfully and give them an incentive not to return to their trafficker. It would dry up one of the wells from which the traffickers draw their victims for good. These statutes will prevent victims from being punished for crimes they lack culpability for and provide them with the ability to reintegrate into society.



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