

PROTECTING TRAFFICKING VICTIMS FROM PROSECUTION: REDEFINING DURESS



by Ross Jackson and Nikki Pressley

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Protecting Trafficking Victims from Prosecution: Redefining Duress

Ross Jackson and Nikki Pressley

Executive Summary

The current legal protections afforded to human trafficking victims in the State of Texas are inadequate. In a state with as many as 1,700 reported cases of human trafficking every year, legal reform aimed at protecting the victims is critical ([National Human Trafficking Hotline, 2021](#)). Many victims, including women and children, are prosecuted for actions they are forced to take pursuant to physical threats or abuse by their trafficker(s). However, defense attorneys cannot successfully raise the affirmative defense of duress because current Texas law requires that victims be actively threatened by traffickers during the commissions of the offenses ([Texas Penal Code, Section 8.05\(c\)](#)). This paper examines the impact of human trafficking in the State of Texas, the purpose of affirmative defenses, real-life anecdotes of trafficked minors being convicted of crimes under the coercion of their trafficker, and a comparison to legal protections afforded to victims in other states. This analysis will demonstrate the need to amend Texas' current definition of duress to include language that would allow human trafficking victims to introduce relevant histories of abuse and exploitation in the courtroom as evidence of coercion and the involuntary nature of their actions.

Introduction

The mission of the Texas Department of Criminal Justice (TDCJ) is comprised of four key objectives: “[to] provide public safety, promote positive change in offender behavior, reintegrate offenders into society and assist victims of crime” ([Texas Department of Criminal Justice, 2022](#)). Moreover, the Texas Code of Criminal Procedure, [Article 2.01](#), asserts that the primary duty of a prosecuting attorney is not to convict, but rather to see that justice is done. This is particularly important for victims of trafficking who might be coerced by their traffickers to commit crimes under threat of violence to themselves or their loved ones.

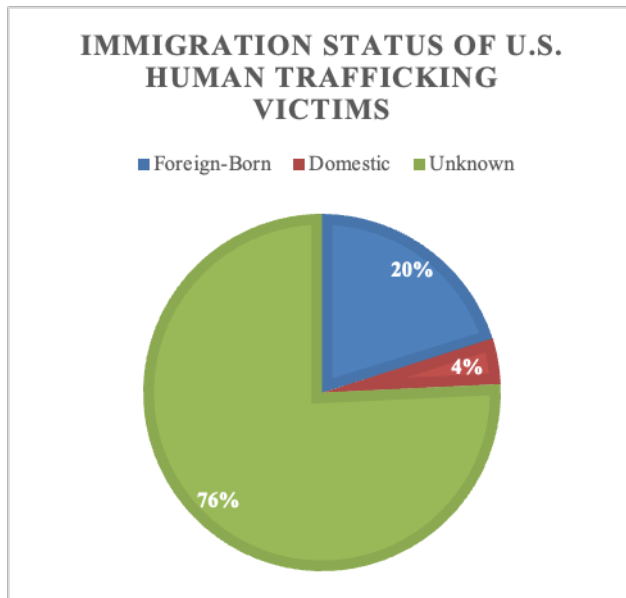
Ultimately, the prosecution should exercise their discretion by weighing any evidence that a defendant is a victim of human trafficking against the pursuit of charges. However, there must be a safeguard that ensures that such evidence of victimhood and coercion is presented to the court for adjudication.

To better protect human trafficking victims from prosecution for crimes committed under threat from their traffickers, the State of Texas should afford them access to a comprehensive affirmative defense of duress, which is when an actor engages in illegal conduct because they were compelled to do so through threats of violence against oneself or others. This would allow these victims to introduce into evidence relevant histories of violence, and threats of violence, against them or their families by their traffickers. Currently, the definition of duress is too narrow and only allows a trafficking victim—when she or he is facing charges as a defendant—to raise the affirmative defense of duress when there is a “threat of imminent death or serious bodily injury” by force or threat of force used against them that would “render

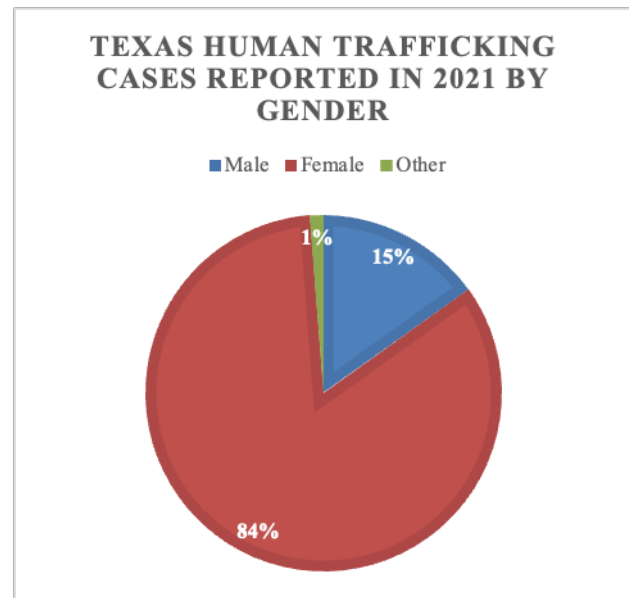
Key Points

- Many victims of human trafficking are prosecuted for crimes that occurred while under the control of their trafficker.
- Texas' current definition of duress fails to protect victims of human trafficking from prosecution by disallowing relevant histories of abuse to be used as an affirmative defense.
- Texas should amend the definition of duress to bring justice to both offenders and victims.

Figure 1
Human Trafficking Victim Demographics



Source: [The Polaris Project, 2022](#)



Source: [National Human Trafficking Hotline, 2021](#)

a person of reasonable firmness incapable of resisting the pressure” ([Texas Penal Code, Section 8.05\(c\)](#)). Duress refers to the victim’s inability to use free will because of the abusive history between a victim and their perpetrator. By limiting duress to those facing a threat of “imminent death or seriously bodily injury,” victims cannot use their history of relevant abuse that may have led to and influenced their actions. To prove duress under the current definition, there would need to be an active and immediate threat of violence, such as a gun to a victim’s head. This definition does not allow for the introduction of evidence to prove a history of abuse that would lead to a victim’s inability to assert their free will.

Background on Human Trafficking

Human trafficking, often referred to as modern-day slavery, occurs when “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” ([National Human Trafficking Hotline, n.d.](#)). While being trafficked, victims are subjected to isolation, economic and physical threats to themselves and/or others, and subtle or overt psychological and physical abuse ([The Polaris Project, 2017](#); [Department of Justice, 2023](#)).

Data from the Federal Bureau of Investigation estimates that there were approximately 2,395 active cases of sex trafficking and 548 cases of labor trafficking in 2022—an estimated total of 2,952 victims ([Federal Bureau of Investigation, n.d.](#)).¹ This number represents the number of cases and victims that were known by law enforcement and actively being investigated. However, in 2021, the National Human Trafficking Hotline identified over 10,000 cases and 16,000 victims, while another study estimates that 14,500 to 17,500 victims are trafficked into the U.S. annually ([National Human Trafficking Hotline, 2022](#); [Serita, 2012, p. 636](#)).

Although sometimes perceived as an issue affecting foreign-born individuals, data shows that many human trafficking victims are domestic. Unfortunately, the immigration status of many victims is largely unknown. According to the Polaris Project, of the over 16,000 identified trafficking victims in the U.S. in 2021, 20% were identified as foreign-born and 4% were identified as domestic ([The Polaris Project, 2022](#)). This equates to at least 699 domestic victims and at least 3,380 foreign-born victims. The immigration status of 12,475 (over 75%) victims is unknown ([The Polaris Project, 2022](#)).

¹ As of May 2023, “77% of the U.S. population is covered by NIBRS-reporting law enforcement agencies” ([Bureau of Justice Statistics, 2022](#)).

Texas has the second-highest number of reported human trafficking cases in the U.S. ([National Human Trafficking Hotline, 2022](#)). In 2021, the National Human Trafficking Hotline estimated that there were 917 trafficking cases in Texas, with 1,702 individual victims ([National Human Trafficking Hotline, 2021](#)). The majority of these identified cases (over 70%) were for sex trafficking, as opposed to labor trafficking ([National Human Trafficking Hotline, 2021](#)).

Incarcerated Women and Victimization

In Texas, about 84% of human trafficking victims are women and many are prosecuted for crimes committed under duress brought by their trafficker ([National Human Trafficking Hotline, 2021](#); [Texas Center for Justice and Equity, 2014](#)). Moreover, the Texas DPS reported that between July 2023 and July 2024, nearly 70% of domestic violence victims in the state were women ([Texas Department of Public Safety, 2024](#)). Texas also boasts one of the highest rates of incarceration for women in the country, ranking 15th out of all 50 states ([Kajstura, 2018](#)). As of 2023, over 10,000 women are in state custody ([Texas Department of Criminal Justice, 2023, p.1](#)). A 2016 report found that 64% of incarcerated women in Texas are serving time for committing non-violent offenses ([Texas Criminal Justice Coalition, 2016](#)). An additional study from 2023 found that, nationally, 82% of women in jails and 55% of women in state prisons are incarcerated for non-violent offenses ([Kajstura & Sawyer, 2023](#)).

Histories of abuse resulting from human trafficking and domestic violence have led to many victims being convicted of offenses committed while under unlawful threat from another person ([Hunter Legal Center at Southern Methodist University, n.d.](#); [National Human Trafficking Hotline, 2021](#)). Although the Texas Department of Criminal Justice does not collect data on incarcerated women with histories of domestic violence, a 2014 survey by the Texas Center for Justice and Equity found that 82% of the 1,600 incarcerated women surveyed were victims of domestic violence, and 48% of those who disclosed their domestic violence victimization believed their conviction was related to their history of abuse ([Texas Center for Justice and Equity, 2014, p. 18](#)). Additionally, 25% of women in the same survey indicated that they were trafficked or forced to perform sexual acts in exchange for money, food, or other necessities ([Texas Center for Justice and Equity, 2014, p. 18](#)). A 2015 study by the National Survivor Network found that over 90% of the trafficking survivors surveyed reported being arrested, with over 40%

reporting being arrested over nine times or more ([National Survivor Network, 2016](#)).

To address concerns around the incarceration of trafficking victims, Texas Governor Greg Abbott streamlined the clemency program for survivors of trafficking and domestic violence ([Office of the Texas Governor, 2020](#)). Clemency is a form of record relief that happens after conviction and, oftentimes, after a person has already served a period of their sentence. While clemency is a valuable tool, broadening the existing definition of duress could prevent unjust convictions on the front end, which would limit stigmatization, avoid the waste of legal resources, and mitigate some potential negative impacts on a survivor's recovery and rehabilitation.

Children who are subject to trafficking also face prosecution for crimes they committed under duress from their traffickers. Below are three real accounts of minor girls in Texas who were charged and sentenced, despite having claimed their victimization was directly related to the offenses they were convicted for.

In 2018, a Texas high schooler who was allegedly groomed and trafficked since she was 12 years old was charged with robbery and murder at 16, four years after the alleged abuse began ([Chapin, 2019a](#)). Texas law did not allow her to raise the affirmative defense of duress because, as it is currently written, a victim must face a specific and immediate type of pressure—one that the victim did not meet the standard for ([Chapin, 2019a](#)). In the end, the high school girl was sentenced to 20 years in prison, despite her extensive history of victimization by a trafficker ([Chapin, 2019a](#)).

In 2016, a Texas 15-year-old runaway girl with an unstable home life was sentenced to 20 years in prison for aggravated robbery and kidnapping, despite being persuaded by an adult man who allegedly trafficked her to commit the crimes ([Chapin, 2019b](#)). The man convinced this young girl that he would sell her to adult men for sex and then he would rob them. After asking a 34-year-old man to give them both a ride to a park, her trafficker pulled out a gun and demanded money, firing rounds toward the man as he ran away. The girl and her trafficker fled the scene and later that night, she was taken into police custody ([Chapin, 2019b](#)). Unable to use duress as an affirmative defense, this girl is now serving time in an adult women's prison for crimes she allegedly committed under the influence of an adult trafficker ([Chapin, 2019b](#)).

In 2019, a 16-year-old girl was sentenced to 17 years in a Texas prison for murder and aggravated robbery ([McCoy, 2023](#)). She was charged as an accomplice when two men who sold her for sex attempted to rob two other men who were supposed to be buying sex from her. She was charged as an adult and faced a capital murder conviction. Despite meeting the federal definition of a trafficking victim, she was still charged and convicted of these crimes ([McCoy, 2023](#)).

Affirmative Defenses to Prosecution

Types of Affirmative Defenses

An affirmative defense is defined in Black's Law Dictionary as "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." To raise an affirmative defense, a defendant assumes responsibility for the unlawful act but argues that they are not culpable due to other mitigating factors. Three general types of affirmative defenses exist: justifications, excuses, and nonexculpatory offenses ([Zornosa, 2016, p. 187](#)). For the purposes of this paper, however, we are only concerned with "excuse" affirmative defenses.

Sections 8.01-8.08 of the [Texas Penal Code](#) currently provides eight "excuse" affirmative defenses that defendants can raise. They include 1) insanity, 2) mistake of fact, 3) mistake of law, 4) intoxication, 5) duress, 6) entrapment, 7) age (under 15), and 8) a child with a mental illness, disability, or lack of capacity. These defenses can lead to lesser charges or, in some cases, dismissal of charges. Some of these affirmative defenses are statutorily limited to specific crimes or specific groups of people (such as minors and persons with disabilities) and cannot be used broadly.

Human trafficking victims assert the "excuse" affirmative defenses because of their lack of voluntary participation in being trafficked ([Zornosa, 2016, p. 187](#)). The purpose of having an affirmative defense for trafficking victims is to prevent them from being convicted of crimes they committed involuntarily under threat of force, fraud, or the coercion of a trafficker or abuser ([Zornosa, 2016](#)). In exercising a presumption in favor of not prosecuting victims of human trafficking, the legal system avoids gross injustice and allows victims to focus on recovery and rehabilitation rather than punishment ([Zornosa, 2016](#)).

Opponents of providing victims with an affirmative defense argue that this policy encourages victims to commit crimes while under the influence of traffickers because there is less fear of legal repercussions ([Zornosa, 2016](#)). This argument

assumes that victims commit these acts voluntarily, and it fails to acknowledge histories of threats and abuse that deem the illegal acts involuntary ([Zornosa, 2016, p. 191](#)). Victims typically feel as if they have no say in their conduct when they are unlawfully compelled by another party to commit illegal acts. Opponents may also argue that by giving trafficking victims affirmative defenses, persons harmed as a result of their actions will not receive due justice. The goal of the affirmative defense is to provide justice to those who would have not committed crimes, but for their duress and to hold those truly responsible for the crimes accountable.

Affirmative Defense of Human Trafficking vs. Affirmative Defense of Duress

The affirmative defense of duress allows defendants to acknowledge that they broke the law, but only in order to avoid tangible threats of violence being perpetrated against them or their family ([Bedi, 2011](#)). Texas courts have favored the argument that "an act done under duress is not a crime" ([Harris v. State, 1922](#)). However, Texas courts have limited the applicability of the defense of duress by not allowing the introduction of histories of trauma or abuse ([Moreno v. State, 2020](#)). A state of duress is subjective and depends on the state of mind of the offender, rather than the circumstances surrounding the crime ([Hailey v. Fenner Beane, 1923](#)). Texas law does not allow for this subjectivity and prefers a narrower interpretation ([Moreno v. State, 2020](#); [Texas Penal Code, Section 8.05\(c\)](#)). Current Texas law only allows "a person of reasonable firmness incapable of resisting the pressure" to use the affirmative defense of duress, which excludes those who have been coerced through traumatic events like sex trafficking or domestic violence ([Moreno v. State, 2020](#); [Texas Penal Code, Section 8.05\(c\)](#)). It should be noted that in Texas, any defendant can attempt to use the affirmative defense of duress, as it is not designed specifically to help human trafficking or domestic violence victims. However, to use the affirmative defense, a defendant must introduce a history of trauma and abuse that can be linked to the crime committed to show the force from a third party that compelled the crime.

Alternatively, a handful of states have broader affirmative defenses for human trafficking victims, including Oklahoma, Wyoming, Kentucky, and Wisconsin. In addition to the general defense of duress that can be used by any defendant, they also provide human trafficking victims with a unique type of legal protection (the affirmative defense of being a victim of human trafficking). For example, an Oklahoma statute only requires that the defendant be a victim of human trafficking at the time the alleged

Table 1
Types of Affirmative Defenses by State

States with <u>Broad</u> Affirmative Defenses for Trafficking Victims (Prostitution and Non-Prostitution Offenses)	States with Affirmative Defenses for Trafficking Victims (Limited to Prostitution and Other Related Offenses)	States with <u>No</u> Affirmative Defenses for Trafficking Victims
IA, KY, OK, WI, WY	AL, AZ, AR, CA, CO, CT, DE, GA, IL, KS, LA, ME, MD, MA, MN, MS, MO, MT, NE, NH, NJ, NY, ND, OR, PA, RI, SC, SD, TN, TX, VT, WA	AK, FL, HI, ID, IN, MI, NV, NM, NC, OH, UT, VA, WV

Sources: [Hillborn, 2019](#); [Zornosa, 2016](#)

offense took place to use the human trafficking affirmative defense ([Hillborn, 2019](#)). This is different from the Texas affirmative defense of duress which requires the defendant to argue that they faced specific and immediate pressure from an abuser at the time of the defense (duress) ([Texas Penal Code, Section 8.05\(c\)](#)).

How Texas Law Compares with Other States

At least 37 states, including Texas, allow human trafficking victims to utilize affirmative defenses against prostitution-related criminal charges. The types and applicability of these affirmative defenses vary greatly ([Hillborn, 2019, p. 483](#)). Generally, most states allow victims to raise an affirmative defense like duress to excuse offenses related to prostitution. Only five states—Iowa, Kentucky, Oklahoma, Wisconsin, and Wyoming—have an affirmative defense for victims that can be applied against prostitution and non-prostitution-related offenses ([Hillborn, 2019](#); [Zornosa, 2016](#)).

Current Texas law requires defendants utilizing the affirmative defense of duress prove that, at the time of the offense, there was a “threat of imminent death or serious bodily injury” that would “render a person of reasonable firmness incapable of resisting the pressure” ([Texas Penal Code, Section 8.05\(c\)](#)). This statute, as written, severely restricts the ability of the defendant to use the defense of duress because the defendant must demonstrate being actively threatened during the commission of the crime. This prohibits the court from hearing relevant histories of abuse which may explain the context of the criminal acts committed by the defendant ([Hunter Legal Center at Southern Methodist University, n.d.](#)).

However, Texas Penal Code Section 43.02(d) does provide an affirmative defense for persons charged with prostitution if “the actor was engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under § 20A.02 or 43.05” ([Texas Penal Code Section 43.02\(d\)](#)). Section 20A.02 covers human trafficking offenses while Section 43.05 covers compelling prostitution.

Texas is in the minority when it comes to prohibiting victims to introduce evidence of trafficking and abuse to prove duress. Oklahoma, Arkansas, and Louisiana (all bordering and culturally similar states) allow victims to introduce histories of abuse to demonstrate duress ([National Conference of State Legislatures, 2020](#)). Oklahoma goes beyond duress and offers victims a broad human trafficking affirmative defense ([Hillborn, 2019](#)). Oklahoma also does not limit a defendant’s usage of the affirmative defense to certain crimes ([Hillborn, 2019](#); [Zornosa, 2016](#)). This does not guarantee a defendant’s success in the courtroom. It only means that the law does not prevent a defendant from raising it as a defense for any offense committed while under the control of human traffickers ([Galoob & Sheley, 2022](#); [Hillborn, 2019](#)). Wyoming, Iowa, and Wisconsin allow a defendant to use an affirmative defense for any offense, given they are connected to human trafficking ([Hillborn, 2019](#)). Kentucky law allows victims to raise the defense of being a human trafficking survivor for prostitution-related and other non-violent offenses ([Zornosa, 2016](#)). Wisconsin allows for the affirmative defense to be raised by a human trafficking victim for any type of offense, even if there is no conviction of the human trafficker related to the case ([Hillborn, 2019](#)). Wyoming law does not hold human

trafficking victims liable for any crimes committed as a result of being human trafficked ([Hillborn, 2019](#)).

Recent Texas Reform Efforts

In the 88th Texas Legislature, HB 327 was introduced. This piece of legislation would have amended Section 8.05(c) of the Texas Penal Code to read that a defendant may utilize the affirmative defense of duress in cases where force or the threat of force “would render a reasonable person in the situation of the defendant incapable of resisting the pressure” ([HB 327, 2023](#)). The bill passed the House Committee on Criminal Jurisprudence with a 7-2 vote. Additionally, HB 327 passed the House floor with a vote of 82-61-1 ([HB 327, 2023](#)). The bill was sent to the Senate but never received a committee hearing. A companion bill, SB 968, was introduced by Senator Judith Zaffirini and moved to committee but did not progress further ([SB 968, 2023](#)).

Recommendation

The Texas Legislature should amend Texas Penal Code, §8.05(c) to read, “Compulsion within the meaning of this section exists only if the force or threat of force would render *a reasonable person in the situation of the defendant* incapable of resisting the pressure.”

Conclusion

The Texas criminal justice system seeks to bring justice to offenders and victims. However, punishing victims for the crimes of their abusers does not accomplish this mission, nor does it get to the root cause of crimes committed. Amending the definition of duress would bring hope and dignity back to victims by acknowledging their complex histories of abuse, preventing improper prosecution, and providing an avenue to rehabilitation and recovery. ★

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Right On Crime is a national initiative of the Texas Public Policy Foundation supporting conservative solutions for reducing crime, restoring victims, reforming offenders, and lowering taxpayer costs.

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