

The Need for an Affirmative Defense for Victims of Sex Trafficking in Georgia

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Copelenn McMahon, UGA '23

In 2020, Georgia Governor Brian Kemp signed SB 435, also known as “The Survivors First Act,” into law.¹ SB 435 allows survivors of sex or labor trafficking, as defined by O.C.G.A. §16-5-46,² an opportunity to “either vacate their conviction if the conviction was a direct result of the trafficking or restrict access to their record if the arrest occurred while being trafficked.”³ In 2022, SB 565 further updated the Act to eliminate waiting periods.⁴

A 2016 study conducted by the National Survivor Network found that over 90% of survivors of trafficking had been charged with a crime in connection with their trafficking and over half of survivors believed that 100% of their arrests were directly related to their trafficking experience.⁵ The collateral consequences of such criminal convictions have been shown to affect a survivor’s life across a number of arenas such as the ability “to

obtain future gainful employment, find affordable and safe housing, be able to begin or continue their education at college, obtain financial aid for tuition, retain custody of their children, and can affect an individual's access to crucial government benefits.”⁶

While SB 435 has created a process for vacatur or expungement after conviction, it failed to allow a pathway for victims of sex trafficking to avoid criminalization in the first place. Victims are seemingly forced by this gap in the legislation to be convicted and fulfill their sentence before being given the opportunity to raise the lack of culpability due to their victimization. Survivors must serve sentences and pay fines related to the conviction. This isolates survivors from their communities, causes financial burden, and further deepens the mistrust that many survivors feel towards law enforcement and judicial systems. Additionally, the survivor may be left grappling with the collateral consequences of a conviction for months or years while they attempt to use SB 435 to clean their record. While Georgia amended the Act to eliminate an official waiting period between conviction and filing a vacatur or expungement motion,⁷ this required chain of events offers a procedural disadvantage for survivors. In the time that a trafficking victim is convicted and files a motion, their trafficker has an opportunity to hide evidence or create burdens for the survivor.⁸

This flaw could be alleviated if Georgia created an affirmative defense for victims of sex trafficking. An affirmative defense of trafficking victimization would allow survivors charged with crimes to establish the interrelationship between the criminal conduct of which they are being charged and their trafficking victimization, therefore showing that they lacked the criminal intent to commit the crime.⁹ Some affirmative defenses may already be applicable to victims of sex trafficking. For example, a sex trafficking victim who is forced under physical or psychological torment of her trafficker to have sexual relationships with others for the financial gain of her trafficker may be eligible for a duress defense. However, in many cases, trafficking victims are not eligible for such a defense because they were not facing imminent threat of physical injury at the time of the crime.

A trafficking-specific affirmative defense is responsive to the nuances of the dynamics of trafficking such as the “nature and extent of control exerted by sex traffickers, and the influence of trauma on the decision-making process and behavior of sex trafficking survivors.”¹⁰

This proposed affirmative defense specific to victims of trafficking will grant victims an opportunity to focus on rehabilitation and healing from the complex trauma associated with trafficking rather than branding them as criminals. The criminal justice system operates under five theories of punishment, none of which have a connection to victims of human trafficking because the victims lack the personal culpability for their criminal acts.¹¹ Rather than appropriately connecting victims with resources and therapeutic programs, law enforcement may use the criminal legal system to detain victims to keep them away from traffickers and/or ensure they remain accessible in an ongoing investigation.¹² Often, interaction with the criminal justice system causes more harm than good, putting survivors at a high risk for retraumatization and lessening their willingness to interact with the system in the future.¹³

The need for an affirmative defense is especially important for juvenile victims of trafficking. In 2015, Georgia committed to the fight against criminalizing youth victims of trafficking. The Georgia General Assembly noted that “arresting, prosecuting, and incarcerating victimized children serves to retraumatize children and increases their feelings of low self-esteem” and that “exploited children are the victims of crime and should be treated as victims.”¹⁴ When survivors are not properly identified and instead are criminalized, their “abusers are shielded from accountability, and the trauma that is the underlying cause of the behavior is not addressed. The choice to punish instead of support sets in motion a cycle of abuse and imprisonment that has harmful consequences for victims of trauma.”¹⁵ While the full scope of trafficking victimization of children is largely

unknown, the National Human Trafficking Hotline estimated in 2021 that minors were involved in approximately 28% of trafficking cases reported in the U.S., and 26% of cases reported in Georgia.¹⁶

Georgia falls short of supporting trafficking survivors in comparison to the rest of the United States. Georgia is one of only twelve states that have failed to pass affirmative defenses for trafficking survivors since 2010.¹⁷ In 2022, Shared Hope International Institute for Justice and Advocacy scored Georgia an “F” and noted gaps in a variety of areas related to supporting trafficking victims including “services through a non-punitive system” and “non-criminalization.”¹⁸ Given that Georgia is home to one of the country’s top hubs for human trafficking,¹⁹ Georgia must step up to support survivors of trafficking and connect them to resources rather than funnel them through the criminal justice system. The creation and implementation of an affirmative defense for trafficking survivors is an essential step in Georgia’s commitment to fighting human trafficking and a way to bring Georgia up to par with the majority of states across the country.

1. S.B. 435, 166th Gen. Assemb., Reg. Sess. (Ga. 2020).
2. Sex Trafficking is defined by Georgia law as “any sexually explicit conduct or performance involving sexually explicit conduct for which anything of value is directly or indirectly given, promised to, or received by any individual, which conduct is induced or obtained: (A) By coercion or deception; (B) From an individual who is under the age of 18 years; (C) From an individual whom the accused believes to be under the age of 18 years; (D) From an individual who has a developmental disability; or (E) From an individual whom the accused believes to have a developmental disability.” O.C.G.A. §16-5-46(a)(8). Labor Trafficking is defined by Georgia law as “work or service of economic or financial value which is performed or provided by another individual and is induced or obtained by coercion or deception.” O.C.G.A. §16-5-46(a)(5).
3. *Restriction and Vacatur Forms*, GA. OFF. OF THE ATT’Y GEN., [https://law.georgia.gov/key-issues/human-trafficking/restriction-and-vacatur-forms#:~:text=Specifically%2C SB 435 provides trafficking, arrest occurred while being trafficked](https://law.georgia.gov/key-issues/human-trafficking/restriction-and-vacatur-forms#:~:text=Specifically%2C%20SB%20435%20provides%20trafficking,arrest%20occurred%20while%20being%20trafficked)

(<https://law.georgia.gov/key-issues/human-trafficking/restriction-and-vacatur-forms#:~:text=Specifically%2C%20SB%20435%20provides%20trafficking,arrest%20occurred%20while%20being%20trafficked>) (last visited Feb. 8, 2023); see also *Criminal Record Clearing Remedies for Human Trafficking Survivors in Georgia*, GA. JUST. PROJECT (2022), <https://gjp.org/wp-content/uploads/2022/08/2022.8.4-Record-Clearing-for-Survivors-of-Human-Trafficking-2.pdf> (<https://gjp.org/wp-content/uploads/2022/08/2022.8.4-Record-Clearing-for-Survivors-of-Human-Trafficking-2.pdf>) (summarizing the two different pathways for survivors of trafficking to clean up their records).

4. S.B. 565, 168th Gen. Assemb., Reg. Sess. (Ga. 2022).
5. Beth Jacobs & Stephanie Richard, *National Survivor Network Members Survey: Impact of Criminal Arrest and Detention on Survivors of Human Trafficking* 5, NAT'L SURVIVOR NETWORK (August 2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf> (<https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf>).
6. *The Importance of Criminal Record Relief for Human Trafficking Survivors*, POLARIS PROJECT (March 20, 2019), <https://polarisproject.org/blog/2019/03/the-importance-of-criminal-record-relief-for-human-trafficking-survivors/> (<https://polarisproject.org/blog/2019/03/the-importance-of-criminal-record-relief-for-human-trafficking-survivors/>).
7. S.B. 565.
8. Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. OF C.R. & SOC. JUST. 177, 190 (2016).
9. SHARED HOPE INT'L, IDENTIFICATION OF AND RESPONSE TO VICTIMS ISSUE BRIEF 2.8 (Nov. 2021), https://reportcards.sharedhope.org/wp-content/uploads/2021/11/IssueBrief_2.8.pdf (https://reportcards.sharedhope.org/wp-content/uploads/2021/11/IssueBrief_2.8.pdf).
10. *Id.*
11. Jessica Aycock, *Criminalizing the Victim: Ending Prosecution of Human Trafficking Victims*, 5 CRIM. L. PRAC. 5, 10–12 (2019).
12. *Post-Conviction Advocacy for Survivors of Human Trafficking: A Guide for Attorneys*, AM. BAR ASS'N COMM'N ON DOMESTIC & SEXUAL VIOLENCE 1, 5 (2016),

https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/projects/srp/practice-guide.pdf

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13. Hannah Love, et al., *Justice in Their Own Words: Perceptions and Experiences of (In)Justice Among Human Trafficking Survivors*, URB. INST. 2 (Mar. 2018), https://www.urban.org/sites/default/files/publication/97351/justice_in_their_own_words.pdf (https://www.urban.org/sites/default/files/publication/97351/justice_in_their_own_words.pdf).
 14. S.B. 8, 161st Gen. Assemb., Reg. Sess. (Ga. 2015).
 15. Malika Saada Saar, et al., *The Sexual Abuse to Prison Pipeline: The Girls' Story*, CTR. FOR POVERTY & INEQUALITY 12 (2015), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls'-Story.pdf> (<https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls%E2%80%99-Story.pdf>).
 16. *Georgia*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/en/statistics/georgia> (<https://humantraffickinghotline.org/en/statistics/georgia>) (last visited January 29, 2023).
 17. Alaina Richert, *Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 MICH. L. REV. 315, 318 (2021) (listing the 38 states with trafficking victim specific affirmative defenses).
 18. *Georgia Report Card*, SHARED HOPE INT'L (2022), <https://reportcards.sharedhope.org/year2022/georgia/> (<https://reportcards.sharedhope.org/year2022/georgia/>).
 19. Tara M. Tripp & Jennifer McMahon-Howard, *Perception vs. Reality: The Relationship Between Organized Crime and Human Trafficking in Metropolitan Atlanta*, 41 AM. J. CRIM. JUST. 732, 741 (2016).
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