

Duress – The Affirmative Defense that Does Not Defend Victims

I. The Texas Duress Statute Betrays Victims

Every day in the State of Texas, Victims are treated as criminals. The current definition of duress in Texas severely limits the judiciary: courts may only accept the affirmative defense of duress when a victim faces one kind of pressure. Mia and Zephi were victims who did not fit within this limited definition. These young Texas women were forced into sex trafficking at a young age.¹ Yet, under the current law, judges and jurors were mandated to call them criminals, as the duress statute did not allow them to consider the psychological control that traffickers have over their victims. The affirmative defense of duress is intended to absolve victims who are forced to commit a crime; however, existing law ignores the context of the coercion that victims of domestic violence and sex trafficking face. Instead, Texas is locking up victims like Mia and throwing away the key.

II. The Texas Duress Statute Misconstrues the True Definition of Duress

The aim of duress is to recognize that people who are coerced to commit a crime are not as culpable as those who freely commit the same crime. In fact, courts have held that “[a]n act done under duress is not a crime.”² Thus, duress is inherently subjective, as culpability depends on the actor’s state of mind rather than the objective circumstances that surround them.³ The current Texas duress statute misconstrues the true definition of duress and does not reflect this subjectivity.⁴ The statute provides an affirmative defense to prosecution if the actor engaged in criminal conduct because he or she was “compelled to do so by threat of imminent death or serious bodily injury.”⁵ The statute further explains that a person is only “compelled,” if the force or threat of force would render “a person of reasonable firmness” incapable of resisting the pressure.⁶ A “person of reasonable firmness” does not include someone who has become more susceptible to coercion because of a traumatic event like sex trafficking or intimate partner violence.⁷

This narrow definition of compulsion severely limits the application of the duress statute and prevents courts from considering the complete picture of a duress-inducing threat.⁸ For example, a victim of sex trafficking on trial for committing a crime that she was coerced into committing by her trafficker may not introduce evidence of the history of victimization.⁹ She would be forbidden from explaining how being abducted, drugged, beaten, raped, and trafficked over a period of time created a situation where she was compelled to listen to her trafficker and do as told.¹⁰

The Texas Court of Criminal Appeals recently addressed this issue in *Moreno v. State of Texas*, wherein, because of the existing language of the duress statute, it was forced to find that the defendant’s diagnosis of Post-Traumatic Stress Disorder (PTSD) was not relevant to his defense of duress.¹¹ In *Moreno*, the defendant argued that evidence of PTSD he developed from witnessing the shooting death of his father during a home invasion would have demonstrated that he was more susceptible to duress than an ordinary person.¹² The appeals court applied the current statute and found that because evidence of PTSD would show that the defendant had a greater sensitivity to compulsion than a person of “reasonable firmness” it could not be introduced. *Moreno* brought to light the dangerous implications of such a narrow duress statute.¹³

A duress statute that allows for a defendant's history of victimization, including a history of human trafficking and abuse, to be introduced at trial would remedy this issue. In order to include this history, the current definition of compulsion within the duress statute must be amended to consider whether the force or threat of force would render a "reasonable person in the situation of the defendant" incapable of resisting the pressure.¹⁴ This language creates a subjective, rather than objective, standard that permits courts to consider whether a defendant's history allowed them to be coerced more easily.¹⁵ Allowing the defendant to introduce subjective evidence that contextualizes their state of mind at the time of coercion would restore the inherently subjective meaning of duress, and by default, would produce a fairer result for the defendant. Therefore, the change proposed within the amendment to the duress statute is mild: this amendment simply calls for Texas legislators to restore the meaning of duress.

III. The Duress Statute Harms Survivors of Gender-Based Violence

The current Texas duress defense does not allow juries to consider the coercion that victims of trafficking and domestic violence face. It is potentially devastating to survivors of gender-based violence. The abuse and exploitation of human trafficking and domestic violence has led victims to be convicted of crimes.¹⁶ Since 1980, the number of women incarcerated in Texas has increased by 986%.¹⁷ Texas recognized this problem when it established a customized clemency application for survivors of trafficking and domestic violence.¹⁸ Although clemency can help alleviate the pain of a criminal conviction, every effort must be made to avoid unnecessary and unjust convictions in the first place.

Intimate partner violence ("IPV") is abusive behavior used in a relationship to gain or maintain power and control of the other partner.¹⁹ IPV encompasses more than just physical violence, but also sexual, emotional, economic, and psychological abuse.²⁰ These acts allow perpetrators to subordinate their victims and play a critical role in mentally manipulating the victim into believing they have no way out.

When an abuser decides that they want to use these tools of control to force their victim to commit crime, the victim is likely already so indoctrinated that they may truly believe they have no choice in the matter. The victim is compelled to believe that she must choose between certain violent consequences, or compliance with the crime. The context of the victim's past experiences matter—the consequences that the victim has faced for defying the abuser in the past contextualize why the victim feels compelled to comply.

If duress only accounts for the pressure faced at the precise time of the crime, a mere "snapshot" of the larger story, the victim appears more culpable than they really are because the history of abuse the victim has suffered is not considered. Unfortunately, duress in Texas is currently limited to this snapshot. In Texas, the question of duress turns, not on whether the defendant was reasonably under duress given the circumstances, but whether a reasonable person would be subject to duress from the instant pressure alone absent any of the key contextual elements that contributed to the defendant's perception of coercion. Duress is generally considered as a context-based inquiry, but the parameters of the current statute require jurors to erase all context from the defendant's situation—including the defendant's past experiences, and who the defendant knows the coercer to be.

Many imagine IPV as an abusive husband who hits his wife in their shared home, an act of seemingly private violence. However, IPV affects the lives of more than the abused partner; it

can affect society at large by increasing the rate of violent crime outside the home. For example, let's imagine a young woman named Beth, who met her boyfriend when she was 15. She fell in love, and as they grew older, she began to rely on him for financial support, care, and a home. He reassured her that he loved her in return and always told her that she should be grateful to have him as a provider. Years later, the person Beth loved became someone she feared, as her relationship became emotionally and physically abusive. However, she had nowhere else to go, as her boyfriend had isolated her from her family and friends in the course of his abuse.

Beth thought things could not get any worse, but when the couple began to have financial troubles, her boyfriend, did the unimaginable. He told her that she had to start "carrying her weight," and invited a john to come to their home and pay to rape her. Gun in hand, he told her she'd be "in a world of pain" if she resisted. The next day it happened again with a different man. Her boyfriend told her that this is how she needed to financially support them.

Weeks of this abuse continued. Johns continued to come over and Beth's boyfriend, turned pimp, also began dropping her off at other men's houses. Beth has become a victim of human trafficking.²¹ Ultimately, the sexual abuse wasn't enough for Beth's boyfriend. He told her that she must rob one of the johns, and if she refused, he would kill her. After the countless times she had been beaten and raped, she knew that he would make good on the threat. She was forced to comply with her boyfriend's command, resulting in her becoming an accomplice to robbery and attempted homicide. Even though she committed the crime at the direction of her trafficker, a court would have no choice but to find Beth guilty under the current law. A jury would not be permitted to consider all the events leading up to the event, but just the "snapshot" of what happened on the night of the incident. The abuse Beth suffered would not be considered relevant to their legal decision.

Texas could, however, prevent women and girls in situations like Beth's from being unjustly criminalized by changing the language of the current duress statute to include more subjective language. If the law were amended, survivors of human trafficking and intimate partner violence could introduce evidence of abuse for a jury to consider the perspective of someone who was/is more sensitive to compulsion and not just someone of "reasonable firmness." Such a change would bring Texas in line with other states, where courts have found that an objective standard does not accurately depict how someone who has in an abused woman's position has been influenced to commit a crime to survive.²²

IV. Texas Is Among A Minority Of States That Disregards The Instant Defendant's Circumstances

Texas' duress statute is one of only a few duress statutes nationwide that wholly disregards the actual defendant's state of mind, and instead chooses to measure duress from an objective "reasonable person" standard.²³ As the map attached in appendix A demonstrates, Texas is among a mere 17 states in the United States that measure duress from a strictly objective standard. By contrast, 33 states measure duress from a subjective standard—an overwhelming majority of states.

V. The Texas Duress Statute Betrays the Fundamental Purposes of the Criminal Justice System

Texas' current definition of duress betrays the fundamental purpose of the criminal justice system entirely: "to convict the guilty and acquit the innocent."²⁴ Defendants are considered morally culpable when they *choose* to commit a crime. In situations where defendants are exercising their own freewill, they are choosing to commit the transgression, and policy rationales behind criminal punishment are justly applied. But defendants who commit a crime under duress are not exercising their own freewill. Specifically, there are three central reasons for criminal punishment, and Texas' current duress statute fails to meet any of the reasons.

The first reason for criminal punishment is deterrence which is the belief that punishment deters persons from committing crime for fear of incurring the adjacent punishment.²⁵ There is a logical cause-and-effect rationale that underlies deterrence policy: the threat of incarceration deters people who contemplate committing crimes.²⁶ When defendants *choose* to commit a crime despite this threat, deterrence supports punishing those defendants because they are considered morally culpable. By contrast, defendants who commit a crime under duress are not making a choice at all. Since "deterrence [itself] entails the impropriety of punishing those whose behavior is non-deterrable," the rationale that underlies deterrence opposes punishing defendants who commit crimes under duress.²⁷ This is because defendants who are forced crimes under duress do not have a choice in the first place. Defendants who meet the duress standard, even under the proposed amendment, act reasonably in their situation. That is, anyone in the defendant's shoes would have been under duress. Therefore, the situation that defendants find themselves in is non-deterrable.

The second reason is retribution, which is punishment imposed to vent society's sense of outrage and need for revenge. When threats of incarceration, "have no specific deterrent effect, the fulfillment of these threats is 'gratuitous cruelty--the infliction of needless and uncompensated evil.'" Said simply, punishing victims of duress is cruel because, "they lacked a fair opportunity to conform their conduct to the law."²⁸

The third reason is incapacitation which is protecting society from the criminal because the criminal is determined to be a dangerous person.²⁹ Duress victims do not present a danger to society. In contrast to their culpable counterparts, duress victims do not unilaterally plot to commit a crime: they are forced to do so by force or threat of force to themselves or a third party.

Instead, true culpability falls with the coercer who *exercised their choice* to not only plot the crime itself but to threaten human life to have the duress defendant do their bidding. Because the coercer is the one exercising free will, therefore actually choosing to commit the crime, deterrence, retribution, and incapacitation are accomplished when applied to the coercer. That is, it is the coercer who needs to be deterred from manipulating other human beings to commit crime; it is the coercer who warrants vengeance from society; and it is the coercer who presents a danger to society if they are not incarcerated. As it currently stands, Texas' duress statute treats the coercer the same as the duress victim, because the victim is unable to introduce the full context of the pressure that they faced.

V. The Texas Duress Statute Pressures Jurors to Incarcerate Defendants Who Are Not Culpable

When it comes to trials of defendants who acted under duress, the Texas duress statute asks jurors to perform a strict analysis of reasonableness which mars the very meaning of duress. Parameters are generally helpful—they help jurors focus on concrete factors in culpability—but the standard of duress that Texas jurors are mandated to apply deprives jurors of the opportunity to determine whether duress existed at all. Instead, the statute asks a question irrelevant to the duress inquiry: whether someone else, in an entirely different situation would have been under duress. Through this process jurors are invited to use their imagination to find culpability, rather than opining on whether the instant defendant was under duress. This erroneous inquiry places an unduly high burden on the defendant to prove that hypothetical “more reasonable” individuals would act as the defendant did. That is, the defendant is charged not with proving that *they were reasonably under duress*, but rather with proving to their fellow jurors whether the concept of duress exists at all. Thus, bolder, and less empathetic jurors are invited to say, “I would have acted differently; if it were me, I would have risked my life.” By contrast, due to the misleading parameters of the statute, even sympathetic jurors are unable to consider the defendant’s unique circumstances. Given this, it is no mystery why Texas has the fourth highest incarceration rate in the nation.³⁰ This amendment simply calls for the Texas legislature to untie the hands of the jurors and judiciary that it has inadvertently bound.

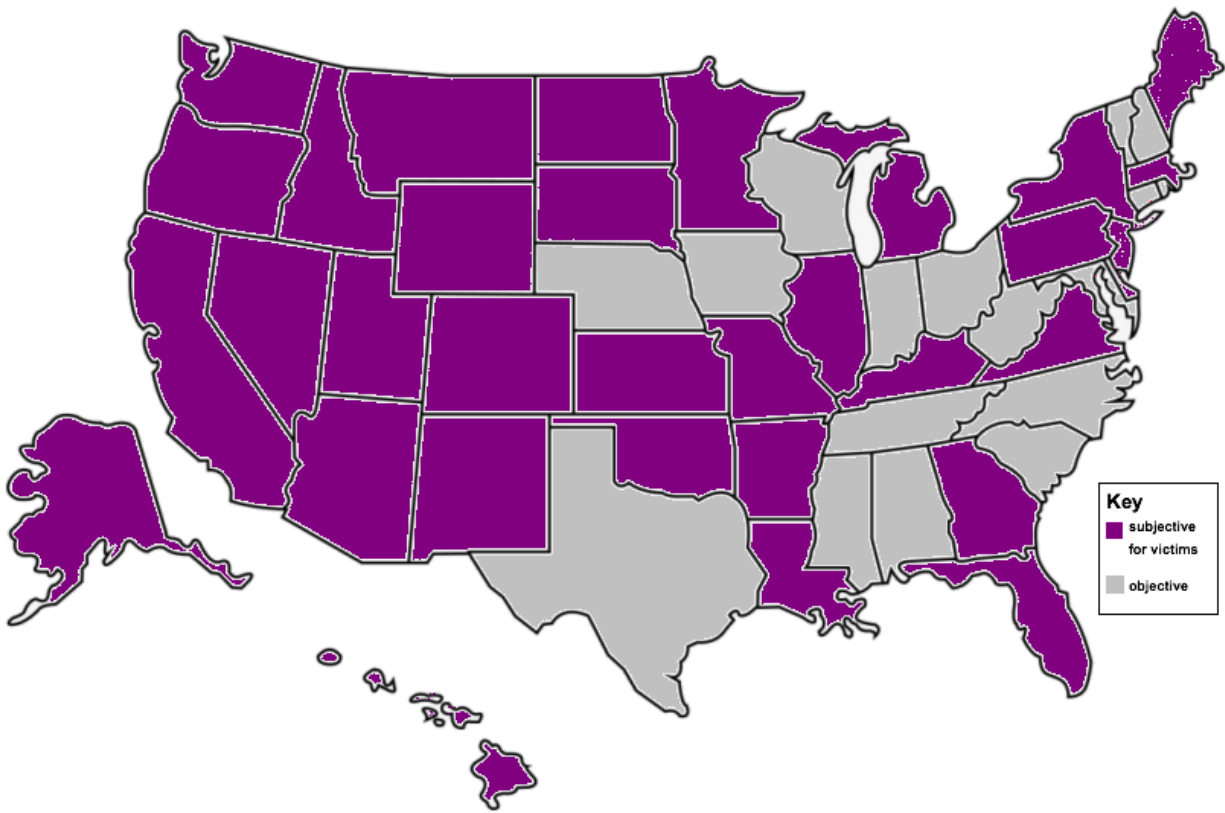
VI. The Texas Duress Statute Harms Texas Taxpayers

The heavy burden of duress harms Texas taxpayers. In 2014, Texans paid about \$50.79 per inmate per day, amounting to \$18,538 per year.³¹ In 2018, that number had risen to \$62.34 per inmate per day.³² In 2010, Texas taxpayers alone were charged a staggering \$3,283,213,997 for prisons.³³ By imprisoning offenders who do not present a danger to society, Texas continuously adds to the tab of its taxpayers. Defendants who financially support their families are ripped out of the Texas economy, and those family members often must turn to the state for additional support to prevent their own hunger and homelessness.³⁴ The current statute ties the hands of Texas jurors, and places a heavier burden on Texas taxpayers funding incarceration that, under the Texas duress statute today, seems inevitable for defendants.

VI. Conclusion

Texas’ narrow duress statute must expand its language because it does not sufficiently protect victims of trafficking and abuse. Victims coerced into specific actions should not be penalized due to their fear. Duress is an affirmative defense where the language should be subjective to help these victims. A defendant’s history of victimization is a crucial factor that should be introduced during a Texas trial as it now being done in other states.

Appendix A – States Recognizing Victims Under Duress



¹ https://www.huffpost.com/entry/youth-sex-trafficking-violent-crimes-legal-system_n_5df7f060e4b0ae01a1e59701.

² *Harris v. State*, 91 Tex.Crim. 446, 241 S.W. 175.

³ *Hailey v. Fenner & Beane*, 246 S.W. 412 (Tex. Civ. App. Dallas 1922).

⁴ *See id.*; Tex. Penal Code Ann. § 8.05.

⁵ Tex. Penal Code Ann. § 8.05.

⁶ *Id.*

⁷ *Moreno v. State*, 605 S.W.3d 475 (Tex. Crim. App. 2020), reh'g denied (Aug. 19, 2020).

⁸ Tex. Penal Code Ann. § 8.05; *See also Moreno* 605 S.W.3d at 475.

⁹ *See* Tex. Penal Code Ann. § 8.05.

¹⁰ *Moreno*, 605 S.W.3d at 475.

¹¹ *Id.*

¹² *Id.*; <https://doi.org/10.1016/j.psyneuen.2005.04.009> (Because the Moreno defendant had PTSD from a previous life-threatening event, he was more likely to perceive the instant danger from the coercion to be just as life-threatening).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; *See also State v. Richter*, 245 Ariz. 1, 424 P.3d 402 (2018) (“which a reasonable person in the situation would not have resisted”); *Wonnum v. State*, 942 A.2d 569, 572 (Del. 2007) (“reasonable person in the defendant's situation would have been unable to resist”); *State v. B.H.*, 183 N.J. 171, 188, 189, 870 A.2d 273, 283, 284 (2005) (“which a person of reasonable firmness in his situation would have been unable to resist”) (commenting that “the ‘standard established by the Code is not wholly external’ in that the defense allows consideration of the defendant's ‘situation.’ ”); *State v. Williams*, 132 Wash. 2d 248, 937 P.2d 1052 (1997) (“That such apprehension was reasonable upon the part of the actor”).

¹⁶ <https://gov.texas.gov/news/post/governor-abbott-establishes-customized-clemency-application-for-survivors-of-human-trafficking-and-domestic-abuse>

¹⁷ <https://www.vera.org/publications/state-incarceration-trends/texas>; *See also*

<https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf>

¹⁸ <https://gov.texas.gov/news/post/governor-abbott-establishes-customized-clemency-application-for-survivors-of-human-trafficking-and-domestic-abuse>

¹⁹ <https://web.archive.org/web/20180409111243/https://www.justice.gov/ovw/domestic-violence>

²⁰ *Id.*

²¹ Tex. Penal Code Ann. § 20A.02 (West)(Trafficking is the obtainment of labor or, in this case, a commercial sex act that is committed under force, fraud or coercion).

²² *State v. Richter*, 245 Ariz. 1, 424 P.3d 402 (2018).

²³ *See* Appendix for state research.

²⁴ *State v. Gonzalez*, 302 Conn. 287, 306, 25 A.3d 648, 661 (2011); *See also* Texas State Records Website. (“Texas’s Criminal Justice system is responsible for providing public safety by deterring and preventing crime, punishing offenders, and reintroducing those who have served their time back into the community.”)

²⁵ Madeline Engel, *Unweaving the Dixon Blanket Rule: Flexible Treatment to Protect the Morally Innocent*, 87 Or. L. Rev. 1327, 1337 (2008).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1357.

²⁹ Andrew D. Leipold, Recidivism, Incapacitation, and Criminal Sentencing Policy, 3 U. St. Thomas L.J. 536, 541 (2006).

³⁰ <https://files.texaspolicy.com/uploads/2018/08/16095232/Corrections-Budget-and-Prison-Operations.pdf>

³¹ <https://files.texaspolicy.com/uploads/2018/08/16095232/Corrections-Budget-and-Prison-Operations.pdf>

³² <https://comptroller.texas.gov/economy/fiscal-notes/2019/aug/jails.php>

³³ <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending>; See also https://www.vera.org/downloads/Publications/price-of-prisons-what-incarceration-costs-taxpayers/legacy_downloads/price-of-prisons-updated-version-021914.pdf; See also https://www.vera.org/downloads/Publications/price-of-prisons-what-incarceration-costs-taxpayers/legacy_downloads/the-price-of-prisons-40-fact-sheets-updated-072012.pdf.

³⁴ <https://www.texasmonthly.com/politics/why-fewer-prisons-are-good-for-texas-economy/>