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# Chapter 636: Catching Those Who Fall, An Affirmative Defense for Human Trafficking Victims

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**Chapter 636: Catching Those Who Fall, An Affirmative Defense for Human Trafficking Victims**

*Isabella Blizard\**

*Code Sections Affected*

Evidence Code § 1107.5 (new). Penal Code § 236.23 (new).  
AB 1761 (Weber); 2016 STAT. Ch. 636.

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## I. INTRODUCTION

A 13-year-old girl named Holly was browsing Facebook when she noticed a new friend request from a girl she had never met before.<sup>1</sup> They chatted and quickly became friends.<sup>2</sup> In need of work, Holly accepted an offer from her new friend, who claimed that she had a well-paying job opportunity.<sup>3</sup> To Holly's horror, when she arrived at her friend's apartment, a strange man and her friend's boyfriend insisted that Holly have sex for money.<sup>4</sup> Holly refused, but the men threatened her and forced her to travel around different cities to have sex with customers.<sup>5</sup> Luckily, Holly was eventually able to escape and beg for help when her traffickers momentarily turned away.<sup>6</sup>

Holly's situation is common—it is known as human trafficking.<sup>7</sup> Human trafficking is the “act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion.”<sup>8</sup> It is also known as “modern day slavery,” as traffickers intend the relationship to produce labor only for monetary profit to the trafficker.<sup>9</sup> Victims include people from different demographics across the globe, both men and women, old and young.<sup>10</sup> Often what makes victims susceptible to human trafficking is their life situation; they want to migrate to escape conflict in their country of origin or desperately need economic support.<sup>11</sup> In Holly's case, she was tricked into sex trafficking by a promising job opportunity.<sup>12</sup>

Traffickers operate by more than one method; there are both small-scale trafficking groups and large-scale organizations.<sup>13</sup> Like what happened to Holly, these predators often lure new victims with promises of job opportunities, and they achieve compliance through threats to harm the victim or the victim's family.<sup>14</sup> Unfortunately, this problem has reached a global, epidemic scale.<sup>15</sup>

Assemblymember Weber introduced Chapter 636 to help protect victims of human trafficking, providing an affirmative defense to victims who have been

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1. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 36 (2016), available at <http://www.state.gov/documents/organization/258876.pdf> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. U.S. DEP'T OF STATE, *supra* note 1, at 30.

8. *Id.*

9. Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMENS L. J. 1, 5 (2004).

10. *Id.*

11. *Id.* at 6.

12. U.S. DEP'T OF STATE, *supra* note 1, at 36.

13. Kim et al., *supra* note 9, at 6.

14. *Id.* at 6–7.

15. *Id.* at 7.

charged with a crime.<sup>16</sup> California is not the first state to adopt an affirmative defense for trafficking victims, as 29 other states provide similar affirmative defenses.<sup>17</sup> According to proponents of Chapter 636, there is a need to remedy the situation: “too often [the] survivors of human trafficking are forced to commit crimes under threat from their traffickers . . . [and] we have compounded this trauma by arresting and charging [them].”<sup>18</sup>

## II. LEGAL BACKGROUND

Human trafficking is a big problem in the United States.<sup>19</sup> The justice system frequently charges victims with the crimes of prostitution, theft, drug sales, drug use, fraud, or truancy.<sup>20</sup> Under prior California law, human trafficking victims could not invoke an affirmative defense based on their situation.<sup>21</sup> The primary source of protection for victims is the California Trafficking Victims Protection Act (CTVPA), which was enacted in 2005 and criminalizes human trafficking while allowing for victims to receive restitution.<sup>22</sup>

Despite this legislation, some still fall prey to human trafficking without relief from the courts.<sup>23</sup> The victims frequently lie to law enforcement officers about their situation while the legal system simultaneously exposes them to dual victimization—making them victims of both the charged crime and victims of human trafficking.<sup>24</sup> Not only that, but the cost of arresting and charging a human trafficking victim is high.<sup>25</sup> The result is that the victims are often the ones with lengthy criminal records and the ones who spend time incarcerated, instead of the

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16. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 1 (Aug. 19, 2016).

17. Azra Halilovic & Jaclyn Crawford, *New State, Federal Laws to Protect Rights of Trafficking Survivors*, TRAFFICFREE BLOG (July 28, 2015), <http://www.traffickfree.org/new-state-federal-laws-to-protect-rights-of-trafficking/> (on file with *The University of the Pacific Law Review*).

18. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 3 (Aug. 19, 2016).

19. See AB 1761 *Human Trafficking Victims Affirmative Defense*, OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, available at [http://ncjwla.org/wp-content/uploads/2016/03/AB-1761-Affirmative-Defense-Fact-Sheet-Updated-4\\_21\\_16.pdf](http://ncjwla.org/wp-content/uploads/2016/03/AB-1761-Affirmative-Defense-Fact-Sheet-Updated-4_21_16.pdf) (July 8, 2016) [hereinafter OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER] (on file with *The University of the Pacific Law Review*) (explaining that trafficking victims often face multiple, costly, convictions).

20. *Id.*

21. *Id.*

22. Michael Payne, *The Half-Fought Battle: A Call for Comprehensive State Anti-Human Trafficking Legislation and a Discussion of How States Should Construct Such Legislation*, 16 KAN. J. L. & PUB. POL'Y 48, 57 (2006).

23. See Allison L. Cross, *Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, 44 MCGEORGE L. REV. 395, 396–397 (2013) (showing how victims often go unidentified by law enforcement, and are arrested and charged time and time again without help).

24. *Id.*

25. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19; Richard Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, ANNIE E. CASEY FOUNDATION, 19 (2011), available at <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf> (on file with *The University of the Pacific Law Review*).

real criminals.<sup>26</sup> Yet, in prior law, victims of human trafficking could not raise an affirmative defense for human trafficking as in other states.<sup>27</sup> The following section provides more details on these contemporary problems.

A. *Victims Hide from the Truth*

Trafficking victims tend to fear law enforcement officers.<sup>28</sup> They are often more susceptible and vulnerable than other people because fear led to their victimization in the first place.<sup>29</sup> Thus, traffickers control these victims through varying forms of leverage—from the victim’s lack of familiarity with the area to a lack of cultural understanding and awareness of the laws.<sup>30</sup> Many traffickers tell victims the police will not help them, and “will be interested only in arresting the victims for engaging in commercial sex acts or for being undocumented.”<sup>31</sup> In fact, undocumented victims are at times terrified about their immigration status and are in constant fear of being deported.<sup>32</sup> Trafficking victims may also be afraid that they have committed the crime of prostitution and refrain from seeking help.<sup>33</sup> Or, they may worry law enforcement officers are corrupt because they came from other countries with corrupt law enforcement.<sup>34</sup>

Not only are victims often too afraid to approach law enforcement, but also the traffickers themselves make it difficult for victims to access help.<sup>35</sup> Traffickers may confiscate victims’ money and any identification.<sup>36</sup> Additionally, the victims may not speak English fluently or know where they are because traffickers frequently move them to new locations.<sup>37</sup> Traffickers often make sure victims cannot communicate with any family or friends.<sup>38</sup> Many of the telltale signs of a victim include having few personal possessions, lacking any financial records or a bank account, not having control over any important identification

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26. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19.

27. *Id.*

28. *Id.*

29. *The Victims & Traffickers*, POLARIS PROJECT, <https://polarisproject.org/victims-traffickers> (last visited July 8, 2016) (on file with *The University of the Pacific Law Review*) (discussing the qualities of both victims and traffickers).

30. *Id.*

31. Robert Moosy, *Sex Trafficking: Identifying Cases and Victims*, 262 NAT’L INST. OF JUST. J. 2, 6–7 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/225759.pdf> (on file with *The University of the Pacific Law Review*).

32. *See, e.g.,* *People v. Gonzalez*, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011) (mentioning how a trafficking victim can be terrified of deportation because of fraudulent immigration documents).

33. Moosy, *supra* note 31, at 4–5.

34. *Id.*

35. *The Victims & Traffickers*, *supra* note 29.

36. *Id.*

37. *Id.*

38. *Id.*

documents, and not being able to speak for themselves.<sup>39</sup> These are just some of the ways that traffickers control their victims and inhibit them from pursuing help.<sup>40</sup> The end result is a situation where many human trafficking victims go their large numbers.<sup>41</sup>

### *B. Dual Victimization*

The justice system inflicts dual victimization upon the victims of human trafficking.<sup>42</sup> Dual victimization, sometimes known as second victimization, is when the justice system treats victims like criminals and punishes them for their engagement in crimes that traffickers coerced them to commit.<sup>43</sup> Dual victimization results in a criminal record, creating a ripple of negativity that follows victims for the rest of their lives.<sup>44</sup> A criminal record prevents victims from enjoying certain necessities of life: the ability to rent an apartment or to find employment.<sup>45</sup> This subsequent negativity occurs in addition to the “months or even years of brutality, sexual assaults by the traffickers and clients, false promises, and fear” victims face while in the hands of traffickers.<sup>46</sup> Without safeguards in place in the legal system, these traffickers are able to use coercion, force, and fraud to exploit victims and simultaneously escape conviction for criminal activities.<sup>47</sup> Meanwhile, victims suffer from the implications of a criminal record and further victimization.<sup>48</sup>

### *C. Costly Detention*

Arresting, charging, and convicting victims of human trafficking is costly.<sup>49</sup> The “cost of a single arrest is between \$896 and \$1000” per person.<sup>50</sup> The

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39. *Recognize the Signs*, POLARIS PROJECT, <https://polarisproject.org/recognize-signs> (last visited July 8, 2016) (on file with *The University of the Pacific Law Review*).

40. *See id.* (listing common indicators of human trafficking victims); *The Victims & Traffickers*, *supra* note 29.

41. *See The Facts*, POLARIS PROJECT, <https://polarisproject.org/facts> (last visited July 8, 2016) (explaining that there are 20.9 million victims of human trafficking globally) (on file with *The University of the Pacific Law Review*).

42. U.S. DEP'T OF STATE, *supra* note 1, at 26.

43. *Id.*

44. *Id.*

45. *Id.*

46. Moosy, *supra* note 31, at 6–7.

47. U.S. DEP'T OF STATE, *supra* note 1, at 26.

48. *Id.*

49. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19.

50. *Id.*

average annual cost in California to incarcerate each inmate is \$47,421.<sup>51</sup> Since many victims are runaway and homeless youth,<sup>52</sup> human trafficking also impacts juvenile offender costs.<sup>53</sup> Additionally, detaining juvenile offenders in either a residential place or a correctional facility is much more expensive than the traditional adult probation or supervisory programs.<sup>54</sup> The average cost to incarcerate a juvenile for 9 to 12 months runs from \$66,000 to \$88,000.<sup>55</sup> Considering how often states rely on this kind of juvenile punishment, taxpayers face significant expenditures from juvenile incarceration.<sup>56</sup> Not only are costs high now, they are only continuing to increase, with existing laws unable to prevent human trafficking victims from contributing to such high costs.<sup>57</sup>

### III. CHAPTER 636

Chapter 636 creates an affirmative defense for human trafficking victims who commit non-trafficking, non-serious, and non-violent crimes, and identifies the standard of proof required when asserting such a defense.<sup>58</sup> When a person successfully raises the defense, the Chapter also provides specific relief for the victim.<sup>59</sup>

#### A. *Raising the Defense*

Specifically, Chapter 636 allows a criminal defendant to assert a coercion defense to any crime if he or she was a victim of human trafficking.<sup>60</sup> To assert this affirmative defense, the defendant must establish he or she committed the crime under coercion by a preponderance of the evidence, and assert the defense at a preliminary hearing, or at any time before entry of a plea or before the end of trial.<sup>61</sup> A defendant may present certified records from state, federal, tribal, or

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51. VERA INSTITUTE OF JUSTICE, FACT SHEET, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS (Jan. 2012), available at <http://archive.vera.org/files/price-of-prisons-california-fact-sheet.pdf> (on file with *The University of the Pacific Law Review*).

52. *The Victims & Traffickers*, *supra* note 29.

53. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19.

54. Mendel, *supra* note 25, at 19.

55. *Id.*

56. See Cross, *supra* note 23, at 396–398 (illustrating how human trafficking victims tend to amass “multiple arrests and criminal charges”).

57. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19.

58. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 1 (Aug. 19, 2016).

59. *Id.*

60. CAL. PEN. CODE § 236.23(a) (enacted by Chapter 636); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 1 (Aug. 19, 2016).

61. CAL. PEN. CODE § 236.23(b), (d) (enacted by Chapter 636); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 1 (Aug. 19, 2016).

local agencies to help establish the defense.<sup>62</sup> If the court finds that a juvenile delinquent committed the offense as a direct result of human trafficking, Chapter 636 provides that the court shall dismiss the case and automatically seal the court records.<sup>63</sup>

However, this defense does not apply to the offense of human trafficking, violent felonies, or any type of serious crime.<sup>64</sup> “Serious crimes” include violent crimes like murder or manslaughter and certain forceful sexual crimes, such as lewd acts on a child.<sup>65</sup> The definition of “violent felonies” similarly covers murder; rape; lewd acts; any felony punishable by death or life imprisonment; and forcible sodomy, or oral copulation, on a minor 14 years or younger.<sup>66</sup>

When a defendant asserts this defense in a criminal action, the prosecution or defense may provide expert testimony regarding the effects of human trafficking on victims, such as the general physical, mental, or emotional abuse on these victims experience.<sup>67</sup> Expert testimony must be made by a qualified expert and must be relevant in order to be introduced.<sup>68</sup>

### *B. Forms of Relief*

If a person succeeds in raising this human trafficking defense, he or she is entitled to multiple forms of relief.<sup>69</sup> For any actions committed by the defendant that led to the charge, the court would deem them not to have occurred.<sup>70</sup> This entitles the defendant to have his or her court records sealed<sup>71</sup> and to be released from all penalties and disabilities resulting from the charge.<sup>72</sup> The defendant is allowed to attest that he or she was not arrested or charged with the crime in all circumstances.<sup>73</sup> These circumstances include applications for loans, employment, financial aid, and housing.<sup>74</sup> In addition, a person who succeeds in

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62. CAL. PEN. CODE § 236.23(c) (enacted by Chapter 636); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 1 (Aug. 19, 2016).

63. CAL. PEN. CODE § 236.23(f) (enacted by Chapter 636); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 2 (Aug. 19, 2016).

64. CAL. PEN. CODE § 236.23(a) (enacted by Chapter 636); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 1 (Aug. 19, 2016).

65. CAL. PEN. CODE § 1192.7(c). The new provisions under Chapter 636 refer to the definitions in this section.

66. *Id.* § 667.5(c).

67. CAL. EVID. CODE § 1107.5(a) (enacted by Chapter 636).

68. *Id.* § 1107.5(b) (enacted by Chapter 636).

69. CAL. PEN. CODE § 236.23(e)(2) (enacted by Chapter 636).

70. *Id.* § 236.23(e)(2) (enacted by Chapter 636).

71. *Id.* § 236.23(e)(1) (enacted by Chapter 636).

72. *Id.* § 236.23(e)(2) (enacted by Chapter 636).

73. *Id.* § 236.23(e)(3)(A) (enacted by Chapter 636).

74. *Id.* § 236.23(e)(3)(B) (enacted by Chapter 636).

bringing the defense is immune from a perjury charge for providing a false statement.<sup>75</sup>

### III. ANALYSIS

Weber introduced Chapter 636 to protect victims of human trafficking and to end the use of traffickers using victims as their shields.<sup>76</sup> This section weighs the advantages and disadvantages of the affirmative defense.<sup>77</sup> Part A of this section explains how the defense provided by Chapter 636 fails to address an important aspect of victims' trauma.<sup>78</sup> Part B examines how Chapter 636 fills important gaps left by other forms of human trafficking protections.<sup>79</sup> Part C explains how the nature of the victims' situation makes the defense difficult to assert.<sup>80</sup> And lastly, Part D notes the economic benefit from Chapter 636.<sup>81</sup>

#### A. Protection That Ignores Dual Victimization

Dual victimization occurs when victims are treated like criminals.<sup>82</sup> It is both a problem for law enforcement and for the victims alike because when the law treats victims like criminals, law enforcement is not able to make meaningful contact with victims.<sup>83</sup> More meaningful police contact leads to the victim's potential freedom, possibly avoiding charges for crimes like prostitution, and also provides an avenue for law enforcement to collect evidence and prosecute the trafficker.<sup>84</sup> Although some officers recognize the signs of human trafficking, the reality is that a large number of trafficking victims are charged and prosecuted, resulting in a need for a defense like the one provided in Chapter 636.<sup>85</sup>

In the dual victimization context, an affirmative defense is a form of relief that "is far from perfect."<sup>86</sup> By the time victims can raise the affirmative defense, they have already been arrested and charged with a crime.<sup>87</sup> Since Chapter 636 only provides an affirmative defense for victims, by the time they can assert this type of protection, they have already encountered the criminal justice system as

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75. *Id.* § 236.23(e)(3)(C) (enacted by Chapter 636).

76. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 3 (Aug. 19, 2016) (explaining how victims are charged with crimes, while their traffickers are shielded).

77. *Infra* Part III.A–D.

78. *Infra* Part III.A.

79. *Infra* Part III.B.

80. *Infra* Part III.C.

81. *Infra* Part III.D.

82. U.S. DEP'T OF STATE, *supra* note 1, at 26.

83. Cross, *supra* note 23, at 398.

84. *Id.*

85. *See id.* at 397 (officers often fail to recognize victims).

86. *Id.* at 408.

87. *Id.* at 409.

criminals.<sup>88</sup> Chapter 636 does not ameliorate the harm victims faced—there is no avenue to end their victimization sooner or to collect evidence and prosecute the traffickers.<sup>89</sup> The affirmative defense is beneficial to victims, but it does not protect against the painful dual victimization issues victims often must endure.<sup>90</sup>

Even worse, the defense created by Chapter 636 does not provide any benefits for one kind of victim: the “bottom girl.”<sup>91</sup> Bottom girls are women who work above a hierarchy of prostitutes, but who also answer to the trafficker personally.<sup>92</sup> As a bottom girl, a woman’s responsibilities include “work[ing] the track in [her pimp’s] stead, running interference for and collecting money from the pimp’s other prostitutes, [and] look[ing] after the pimp’s affairs if the pimp [is] out of town, incarcerated, or otherwise unavailable.”<sup>93</sup> This label is often given to prostitutes who have been with a trafficker for the longest time and who have made the most money.<sup>94</sup> Although bottom girls are seemingly “promoted” and given more authority and responsibilities, these women are actually buffers, intended to protect the real criminals from prosecution.<sup>95</sup> In this sense, bottom girls are both victims of the real criminals and yet also traffickers themselves.<sup>96</sup> Bottom girls may actually be the most victimized out of all of the prostitutes working for a particular trafficker—they are in the position of bottom girl because they are the most submissive, and the traffickers maintain control over them by delegating power.<sup>97</sup>

Chapter 636 affords an affirmative defense for crimes committed as a result of being coerced as a human trafficking victim, but it does not apply to the offense of human trafficking.<sup>98</sup> This means that if a bottom girl is arrested and charged with human trafficking, not only will she experience dual victimization, but also the Chapter 636 defense is completely inapplicable to her situation and may, at best, only afford partial protection for specific charges like prostitution or

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88. Cross, *supra* note 23, at 409; see ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 3 (Aug. 19, 2016) (the defense is meant to protect victims who have been arrested and charged with a crime);

89. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 3 (Aug. 19, 2016) (the affirmative defense can be used when victims are already arrested and charged).

90. See *id.* at 1 (explaining that the affirmative defense provides protection against a crime for which a person was charged).

91. Steven Seidenberg, *New Legislative Strategy is Tougher on Human Trafficking and More Supportive of Victims*, ABA JOURNAL (Dec. 1, 2013, 8:00 AM), available at [http://www.abajournal.com/mobile/mag\\_article/new\\_approach\\_is\\_tougher\\_on\\_human\\_trafficking\\_and\\_more\\_supportive\\_of\\_victims](http://www.abajournal.com/mobile/mag_article/new_approach_is_tougher_on_human_trafficking_and_more_supportive_of_victims) (on file with *The University of the Pacific Law Review*).

92. Alexandra F. Levy, *Innocent Traffickers, Guilty Victims: The Case for Prosecuting So-Called ‘Bottom Girls’ in the United States*, 6 ANTI-TRAFFICKING REV. 130, 131–133 (2016).

93. *Id.*

94. *Id.*

95. Seidenberg, *supra* note 91; Levy, *supra* note 92.

96. Levy, *supra* note 92, at 131–133.

97. *Id.*

98. CAL. PEN. CODE § 236.23 (enacted by Chapter 636).

loitering.<sup>99</sup> Perhaps the most victimized out of all human trafficking victims, bottom girls, are still deprived of a crucial affirmative defense for human trafficking related crimes, and must continue to face dual victimization despite the enactment of Chapter 636.<sup>100</sup> The defense created by Chapter 636 provides little to no help for bottom girls, which is why some experts suggest that governments create an additional defense for these specific victims.<sup>101</sup>

*B. Effectiveness of an Affirmative Defense in the World of Human Trafficking*

Creating an affirmative defense has an obvious benefit for those who are able to assert it and also creates a positive ripple effect within the justice system.<sup>102</sup> An affirmative defense for human trafficking victims obligates professionals to investigate cases and determine if a person being charged with a crime is in fact a victim.<sup>103</sup> Such a defense also requires the implementation of policies on how to identify victims of trafficking.<sup>104</sup> This ripple effect can help law enforcement in tracking down the traffickers and finding trafficking victims who remain captive.<sup>105</sup>

However, the legislature did not draw the affirmative defense broadly, since it does not apply to serious or violent felonies, or to human trafficking crimes.<sup>106</sup> However, this scheme is consistent with some other states that have enacted an affirmative defense for human trafficking victims.<sup>107</sup> For example, a handful of states restrict their defense to apply only to prostitution and offenses related to prostitution.<sup>108</sup> The difference between a state with such a restrictive defense versus California's Chapter 636 is that when a victim is charged with resisting arrest in addition to prostitution, victims in California can use the defense for both charges.<sup>109</sup> However, a victim in Minnesota, for example, will only be able to defend against the prostitution charge.<sup>110</sup> Thus, compared to other states,

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99. Seidenberg, *supra* note 91.

100. *Id.*

101. Andrew Hall, *The Uniform Act on Prevention of and Remedies for Human Trafficking*, 56 ARIZ. L. REV. 853, 893 (2014).

102. See William Shepherd, *Resolution & Report*, A.B.A. Resolution 104G (Feb. 11, 2013) (victims can avoid convictions and also lead police to shut down trafficking rings).

103. *Id.*

104. *Id.*

105. See *id.* (an obligation of further investigation should lead to increased findings of victims and traffickers).

106. See CAL. PEN. CODE § 236.23(a) (enacted by Chapter 636) (restrictions on the type of crime committed do not allow a broad usage).

107. See Cross, *supra* note 23, at 407 (noting that, at the time, most states that had an affirmative defense had ones that were narrowly drawn and very restrictive).

108. *Id.*

109. CAL. PEN. CODE § 236.23 (enacted by Chapter 636).

110. See MINN. STAT. ANN. § 609.325 (providing an affirmative defense for engaging in or hiring a minor to engage in prostitution).

Chapter 636 allows victims in California a decent amount of protection and leniency before the court.<sup>111</sup>

There is no question that Chapter 636 confers a sizeable benefit to victims of human trafficking,<sup>112</sup> but it is one among other types of protection: from civil action, to stricter immigration laws, and to law enforcement intervention.<sup>113</sup> The next subparts analyze how this affirmative defense for trafficking victims impacts other protections used to combat human trafficking.<sup>114</sup>

### *1. Civil Action*

One form of protection for victims is civil action.<sup>115</sup> Victims can bring an action under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Fair Labor Standards Act (FLSA).<sup>116</sup> The FLSA regulates working conditions, such as child labor, minimum wages, and maximum hours.<sup>117</sup> And RICO allows a “private plaintiff to bring a civil action alleging a violation of certain state and federal laws, including the Mann Act and several labor laws.”<sup>118</sup>

However, victims are often reluctant to take civil action against their trafficker.<sup>119</sup> As previously explained, victims operate under the fears created by their traffickers—fear of deportation, language barriers, poverty, and powerlessness.<sup>120</sup> Victims are often reluctant to pursue action in the first place and refuse to testify.<sup>121</sup> Although similar to a civil action in the sense that a victim must still be willing to be forthcoming about information concerning their trafficker, the affirmative defense provided by Chapter 636 creates a protective net for those victims who are fearful to pursue legal action.<sup>122</sup> If a victim, because of his or her language barriers, does not know how to pursue a civil action, he or she is provided with a second-chance to “out” their trafficker if arrested and charged with a crime.<sup>123</sup>

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111. See Cross, *supra* note 23, at 408 (explaining that an affirmative defense is beneficial if not so narrowly drawn).

112. See CAL. PEN. CODE § 236.23 (enacted by Chapter 636) (providing a defense for victims).

113. See *infra* Parts III.B.1, III.B.2, III.B.3 (discussing these concepts).

114. *Infra* Parts III.B.1, III.B.2, III.B.3.

115. Becki Young, *Trafficking of Humans Across United States Borders: How United States Laws Can Be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMIGR. L.J. 73, 93 (1998).

116. *Id.*

117. *Id.* at 83–84.

118. *Id.* at 87.

119. *Id.* at 93.

120. *Id.*; see *supra* Part II.A. (explaining how trafficking victims are victimized).

121. Young, *supra* note 115, at 94.

122. See *id.* at 93 (victims can be “reluctant to take action for several reasons”); CAL. PEN. CODE § 236.23 (enacted by Chapter 636).

123. See Young, *supra* note 115, at 94 (victims are reluctant to bring a civil action); CAL. PEN. CODE § 236.23 (enacted by Chapter 636). Where pursuing a civil action requires the victim approach legal action independently, being charged with a crime means they will have contact with the justice system automatically.

## 2. *Strict Immigration Laws*

Immigration reform and efforts to strengthen the security of the United States' borders are often ways in which victims are actually driven into the arms of traffickers and smugglers.<sup>124</sup> The United States has often pushed for tighter border security to make crossing the border more difficult.<sup>125</sup> This creates a conflict in policy where the government tightens border security in hopes of reducing immigration, yet strict border security is a factor that increases human smuggling and human trafficking.<sup>126</sup> Controls on migration have the opposite effect on human trafficking than what policymakers intend.<sup>127</sup>

Strict immigration policies increase trafficking because they push people to take illegal routes to migrate—migrants travel without proper documents or use suspicious channels, inevitably encountering human traffickers as they contact brokers and other third parties.<sup>128</sup> For example, strict immigration policies in the European Union have left migrants more vulnerable and susceptible to irregular forms of migration, instead of decreasing migration as the policies intended.<sup>129</sup> In one case of human trafficking in the United States, 24 Mexican women were coerced by threats of violence into sexual exploitation after they paid smugglers to transport them into the United States.<sup>130</sup>

Because immigration policy increases the dangers of human trafficking,<sup>131</sup> the affirmative defense for victims provided by Chapter 636 is a necessary safety net.<sup>132</sup> As strict U.S. border security continually pressures migrants to take risky channels to cross the border, more people are susceptible to being threatened into forced labor<sup>133</sup>—and the affirmative defense provides a way to combat the negative effect of strict immigration policies.<sup>134</sup>

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124. Heather Randall, *Human Smuggling, Trafficking, and Immigration Reform: Recommendations for Policymakers*, HUM. TRAFFICKING CTR. BLOG (Mar. 27, 2014), <http://humantraffickingcenter.org/posts-by-htc-associates/human-smuggling-trafficking-and-immigration-reform-recommendations-for-policymakers> (on file with *The University of the Pacific Law Review*).

125. *Id.*

126. *Id.*

127. Rebecca Napier-Moore et al., *Beyond Borders: Exploring Links Between Trafficking and Migration* 11, Global Alliance Against Traffic in Women, Working Paper (2010), available at [http://www.gaatw.org/publications/WP\\_on\\_Migration.pdf](http://www.gaatw.org/publications/WP_on_Migration.pdf) (on file with *The University of the Pacific Law Review*).

128. *Id.*

129. *Id.*

130. Randall, *supra* note 124.

131. *Id.*

132. See CAL. PEN. CODE § 236.23 (enacted by Chapter 636) (providing additional protection for trafficking victims).

133. Napier-Moore et al., *supra* note 127.

134. CAL. PEN. CODE § 236.23(a) (enacted by Chapter 636) (providing protection for victims of trafficking).

### 3. Law Enforcement Identification

Another form of protection against human trafficking is law enforcement identification and prevention.<sup>135</sup> Under the Penal Code,<sup>136</sup> officers must exercise due diligence to identify human trafficking victims.<sup>137</sup> In an effort to identify victims, officers look at multiple factors, such as poor hygienic care, deprivation of personal liberty, and whether the person owes a debt to their employer.<sup>138</sup> If officers identify a victim, they can help by obtaining social services for him or her.<sup>139</sup>

Law enforcement officers often do not recognize victims of human trafficking during the course of their work.<sup>140</sup> In one extreme example, a woman named Silvia Gonzalez had been forced into sexual exploitation after handing over her immigration documents to a trafficker because she feared deportation; but she accrued 86 convictions for loitering and prostitution.<sup>141</sup> Each time Silvia was re-arrested and prosecuted, law enforcement officials failed to identify her as a victim of human trafficking.<sup>142</sup> Failure to identify victims is why experts urge for human trafficking training in order for officers to become more diligent in recognizing the signs of human trafficking.<sup>143</sup>

When law enforcement officers fail to recognize victims of human trafficking, those victims are treated as criminals.<sup>144</sup> They are sent through the criminal justice system, sometimes multiple times like Silvia.<sup>145</sup> Affording victims an affirmative defense is both an important buffer to help prevent victims from obtaining multiple convictions,<sup>146</sup> and also a safety net for victims when police officers fail to identify their situation and continue to treat them like criminals.<sup>147</sup> Victims like Silvia Gonzalez can use the defense to “out” their trafficker and avoid an expansive criminal record when the police fail to investigate.<sup>148</sup>

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135. See Cross, *supra* note 23, at 398 (explaining that law enforcement should identify and bring help to trafficking victims).

136. CAL. PEN. CODE § 236.2.

137. 1 WITKIN, CAL. CRIM. LAW 4TH *Crimes-Person* § 278 (2012).

138. *Id.*

139. Cross, *supra* note 23, at 397.

140. *Id.*

141. *People v. Gonzalez*, 927 N.Y.S.2d 567, 567 (N.Y. Crim. Ct. 2011); Cross, *supra* note 23, at 395–396.

142. See *Gonzalez*, 927 N.Y.S.2d at 568 (Silvia was arrested many times, but law enforcement did not provide help to prevent her victimization); Cross, *supra* note 23, at 395–96.

143. See, e.g., Moosy, *supra* note 31, at 3 (urging the implementation of victim identification training in multiple jurisdictions).

144. Cross, *supra* note 23, at 397.

145. See *Gonzalez*, 927 N.Y.S.2d at 568 (Silvia was repeatedly arrested).

146. See *id.* (Silvia did not assert an affirmative defense while accruing her many arrests).

147. Cross, *supra* note 23, at 397.

148. See *Gonzalez*, 927 N.Y.S.2d at 568 (Silvia had 86 convictions).

C. *The Difficulty in Bringing an Affirmative Defense: Convincing Victims to Climb Mountains*

Victims of human trafficking now have a defense, but the victims need to assert it to benefit. Victims must establish by a preponderance of the evidence that they were coerced under a reasonable fear of harm,<sup>149</sup> meaning they must likely incriminate their trafficker.<sup>150</sup> Unfortunately, affirmative defenses can be difficult to bring, and victims may not be willing to “out” their traffickers.<sup>151</sup> Although some victims will use the defense to provide information about their traffickers, the reason why victims are coerced by traffickers is the same reason that may prevent their cooperation and use of the defense.<sup>152</sup>

The ways in which traffickers coerce and control victims are the same ways that an investigation is impeded, and why a victim may be reluctant to be truthful and use an affirmative defense.<sup>153</sup> Some victims are in relationships with, or are in love with, their traffickers.<sup>154</sup> Being in love with their trafficker means it is unlikely that victims will intentionally incriminate the trafficker.<sup>155</sup> The same is true for victims who aren’t in love—they are unlikely to be truthful about their situation due to the coercion and fear the traffickers use to control them.<sup>156</sup> Victims may be afraid of returning to their trafficker and facing retaliation.<sup>157</sup>

Victims of trafficking are unlike victims of other crimes—they don’t actively seek to involve law enforcement due to their unique type of trauma.<sup>158</sup> They are not forthcoming about their situation, and it can take weeks or even months for victims to recover from the trauma and be cooperative.<sup>159</sup> As a result of the threats used by traffickers, trafficking victims become more comfortable when they know they will not be returned to their traffickers.<sup>160</sup> These circumstances make obtaining the truth from victims difficult and time consuming.<sup>161</sup>

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149. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 1 (Aug. 19, 2016).

150. Cross, *supra* note 23, at 409.

151. See Micah Schwartzbach, *Prostitution and Human Trafficking*, CRIMINAL DEFENSE LAWYER, available at <http://www.criminaldefenselawyer.com/resources/prostitution-and-human-trafficking.htm> (on file with *The University of the Pacific Law Review*) (mentioning that law enforcement faces challenges with getting victims to cooperate with them).

152. See Andrew Hall, *The Uniform Act on Prevention of and Remedies for Human Trafficking*, 56 ARIZ. L. REV. 853, 889 (2014) (describing that at least some victims who are provided the opportunity to raise an affirmative defense will do so instead of taking the blame for their trafficker).

153. Cross, *supra* note 23, at 408; Moosy, *supra* note 31, at 5.

154. Cross, *supra* note 23, at, 408.

155. *Id.* at 409.

156. *Id.*

157. *Id.*

158. Moosy, *supra* note 31, at 5.

159. *Id.*

160. *Id.*

161. *Id.*

Many victims also face language barriers, which is another way that traffickers control them.<sup>162</sup> Being from a foreign country, and constantly moving from place to place, these victims become confused and don't understand their rights.<sup>163</sup> These misunderstandings and language barriers often prevent victims from obtaining access to legal services.<sup>164</sup> The chances that victims will be open and forthcoming about their situation are dim because of the trauma their traffickers inflicted on them.<sup>165</sup> Asking a victim to raise the affirmative defense is like convincing them to climb a mountain.<sup>166</sup>

#### *D. Economic Impact*

Arresting and convicting trafficking victims is expensive for taxpayers.<sup>167</sup> Victims who often sit in jail cells, like Silvia Gonzalez,<sup>168</sup> are costly to the economy.<sup>169</sup> In California, there is a \$47,421 annual cost for each inmate,<sup>170</sup> and each arrest can cost as much as \$1,000.<sup>171</sup> When law enforcement officers fail to identify victims of human trafficking, law enforcement may arrest victims time and time again—multiplying the costs of arresting a single victim.<sup>172</sup>

Since asserting an affirmative defense means a victim cooperates with officials and provides evidence of the trafficker,<sup>173</sup> a single arrest can end the vicious cycle of victimization and the possibility of any future arrests.<sup>174</sup> The affirmative defense created by Chapter 636 has the potential to save taxpayers and the government large sums of money, avoiding repeat offender victims like Silvia Gonzalez, who was arrested and convicted 86 times.<sup>175</sup> There is, therefore,

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162. U.S. DEP'T OF STATE, *supra* note 1, at 8; *see supra* Part II.A. (explaining how traffickers take advantage of victims).

163. Cross, *supra* note 23, at 409; *see supra* Part II.A. (explaining how traffickers take advantage of victims).

164. U.S. DEP'T OF STATE, *supra* note 1, at 8.

165. *See* Cross, *supra* note 23, at 408–09 (explaining the many barriers victims must battle in order to claim an affirmative defense).

166. Given the harsh circumstances surrounding raising an affirmative defense this statement meant to provide emphasis on a victim's situation. *See* Cross, *supra* note 23, at 408–09 (it can be difficult for a trafficking victim to raise an affirmative defense).

167. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19.

168. *People v. Gonzalez*, 927 N.Y.S.2d 567, 568 (N.Y. Crim. Ct. 2011).

169. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19; VERA INSTITUTE OF JUSTICE, *supra* note 51.

170. VERA INSTITUTE OF JUSTICE, *supra* note 51.

171. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19.

172. *See supra* Part III.B.3 (explaining that officers often fail to recognize trafficking victims).

173. *See* Cross, *supra* note 23, at 398 (noting that meaningful contact with police means that a victim can help identify and prosecute the trafficker).

174. *See* OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19 (explaining that victims often sit in jail because of their own victimization).

175. *People v. Gonzalez*, 927 N.Y.S.2d 567, 567 (N.Y. Crim. Ct. 2011).

no question that the affirmative defense creates a large economic benefit when utilized.<sup>176</sup>

#### IV. CONCLUSION

“The trauma of being a victim of human trafficking is untold.”<sup>177</sup> For a young, innocent girl like Holly, who is roped into sexual exploitation through threats of bodily harm,<sup>178</sup> there is a legal shield available to prevent a vicious cycle of arrests and convictions.<sup>179</sup> Unfortunately, this defense does not help “bottom girls,” because they commit human trafficking crimes themselves, often used by the real criminals as shields.<sup>180</sup> In addition, the defense does not remedy the problem of dual victimization because victims are already treated as criminals by the time they can assert the affirmative defense in court.<sup>181</sup>

Regardless, Chapter 636 provides a valuable asset to protect victims.<sup>182</sup> It provides an additional safety net, filling important gaps left by other mechanisms used to combat human trafficking.<sup>183</sup> It is an important step along the journey to “abolishing slavery in all its forms and draw[ing] strength from the courage and resolve of generations past.”<sup>184</sup>

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176. OFFICE OF ASSEMBLYMEMBER SHIRLEY N. WEBER, *supra* note 19.

177. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 2 (Aug. 19, 2016).

178. U.S. DEP’T OF STATE, *supra* note 1, at 36.

179. *See Gonzalez*, 927 N.Y.S.2d at 568 (Silvia, with so many arrests and convictions, was an example of this vicious cycle).

180. Seidenberg, *supra* note 91.

181. Cross, *supra* note 23, at 409.

182. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1761, at 1 (Aug. 19, 2016) (Chapter 636 provides a new defense for trafficking victims).

183. *See supra* Part III.B. (showing how Chapter 636 overlaps with other protective measures victims have).

184. U.S. DEP’T OF STATE, *supra* note 1, at 4.