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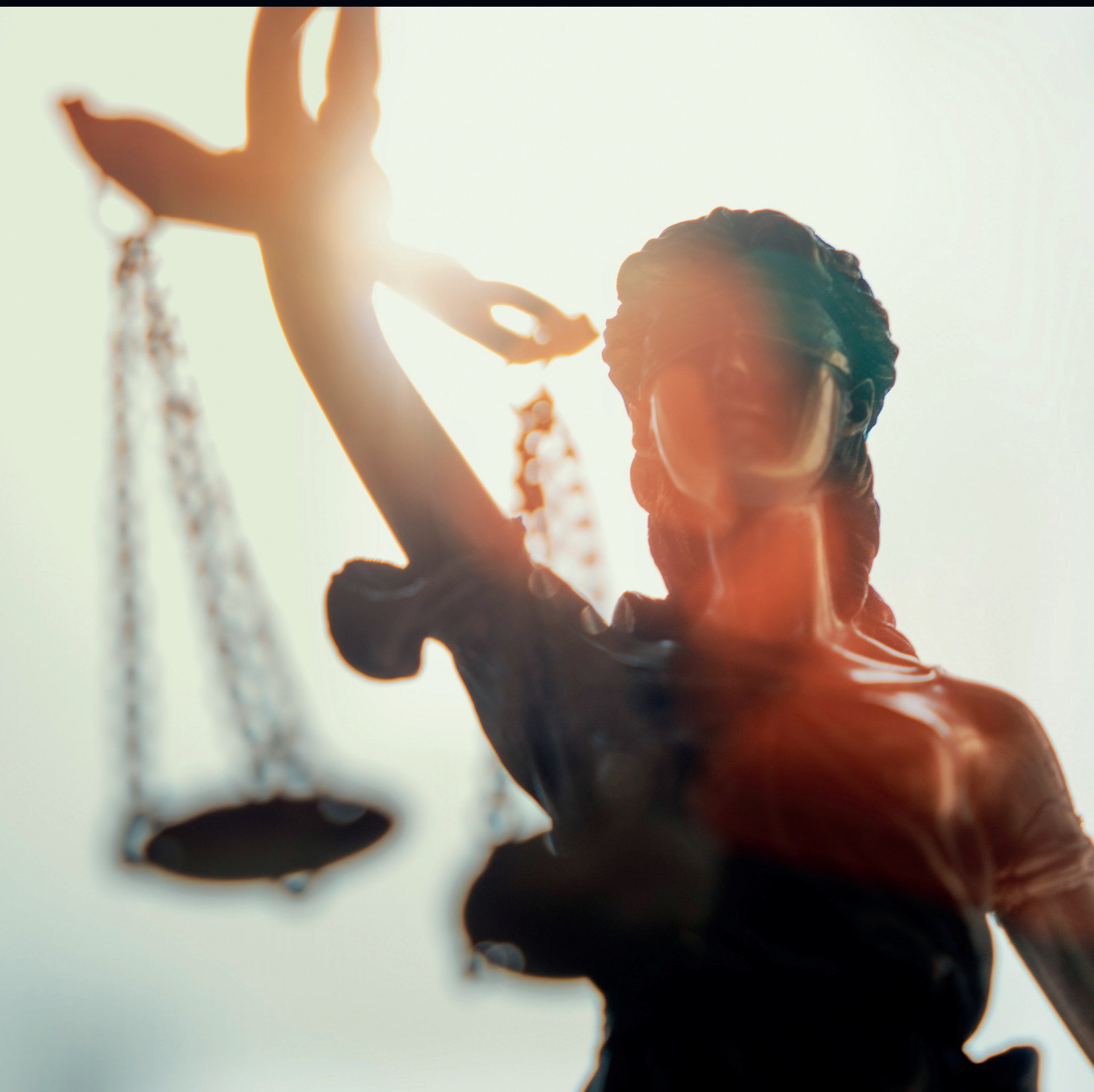

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FROM THE EDITOR-IN-CHIEF

Dear Readers,

Thank you for your continued support of the *Criminal Law Practitioner*. We strive to publish articles of the highest quality and to support practitioners, professors, and students in the criminal law community. Being the only student-run publication dedicated exclusively to criminal law issues at American University Washington College of Law, we appreciate your interest in our work and we hope you find this edition to be a stimulating combination of pieces. Various perspectives are represented through these articles, and we hope that they raise questions and thoughts for our readers.

This edition was possible through the hard work of our Executive Board and staffers, who are dedicated not only to editing these pieces, but also to writing their own thought-provoking blog pieces on our website.

We are excited to be able to share these pieces with the rest of the criminal law community, and we hope you enjoy reading them.

Sincerely,

Lisa Keshavarz

Lisa Keshavarz, Editor-in-Chief
Volume V, *Criminal Law Practitioner*

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Practitioners

CRIMINALIZING THE VICTIM: ENDING PROSECUTION OF HUMAN TRAFFICKING VICTIMS

*Jessica Aycock**

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

* J.D. Candidate, Texas Tech University School of Law, 2020. The author would like to thank her husband, John Aycock, for all his support and encouragement during the writing process; her faculty mentor, Professor Alyson Drake; Dr. Natalie Tarenko; her professors, Dean Jack Nowlin & Professor Jamie Baker; her friend and fellow law student, Avery Aiken; her law review comment editor, Joelle Gonzales; Student Writing Editor, Amanda Voeller, and her classmates from the Comment writing program at Texas Tech School of Law for their creative thinking and assistance during the writing process.

I. Introduction

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

While jurors may believe that the men and women of these 5,147 cases are participating in human trafficking voluntarily, this perception is entirely false. In fact, victims of human trafficking frequently find themselves in these situations inadvertently.[3] G.M. met her husband D.S. while she had a tourist visa in the United States, and she decided to stay with him to earn money for her children in the Dominican Republic.[4] They later married in 1994, and soon afterward D.S. began to abuse the G.M.[5] As a result, G.M. returned to the Dominican Republic.[6] In 1996, D.S. went to the Dominican Republic to beg G.M. to move back to New York, and in return, he would assist her in finding a job and getting her immigration papers.[7] Upon returning, G.M.'s husband continued to abuse her and threatened to harm her or her children if she did not engage in illegal activities such as prostitution or purchasing drugs for him.[8] In addition, G.M.'s husband would drive her to brothels and wait in his car while she went inside to work; if she did not make enough money, he would become angry and violent.[9] G.M.'s husband trafficked her for roughly eleven years, and law enforcement arrested her six times for prostitution, trespassing, and criminal possession of a controlled substance.[10] The court noted that G.M. "pleaded guilty on each of these cases, often at arraignments, resulting in two non-criminal convictions for disorderly conduct, a violation, and four class B misdemeanor convictions."[11] G.M. is a victim of human trafficking, but because of her criminal convictions, she has problems leading a normal life.[12] For instance, G.M. obtained employment with the Department of Health but the Department of Health fired G.M. when the background check uncovered her criminal record.[13]

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

1 *Human Trafficking*, Nat'l Hum. Trafficking Hotline, https://humantraffickinghotline.org/type-trafficking/human-trafficking.

2 Mark Lanier, Justice for All, 51 Tex. Tech. L. Rev. 893, 902 (2019).

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

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

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 762–763.

9 *Id.* at 763.

10 *Id.* at 762.

11 *Id.*

12 *Id.* at 763.

13 *Id.*

14 *See, e.g.,* Morgan Smith, *Yet Again, Lawmakers Poised to Do Little to Help Sex-trafficking Victims*, The Texas Tribune (Mar. 23, 2017), https://www.texastribune.

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

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

II. An Overview of Human Trafficking and Victim's Rights Statutes

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

A. History of Human Trafficking

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

org/2017/03/23/where-do-anti-sex-trafficking-measures-stand/.

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

[16] U.S. Const. amend. XIII, § 1; William Bell, *Modern Slavery: Why we have to stop human trafficking*, Alabama Opinion (Apr. 10, 2016), https://www.al.com/opinion/index.ssf/2016/04/modern_slavery_why_we_have_to.html.

[17] William Bell, *Modern Slavery: Why we have to stop human trafficking*, Al.com (Apr. 10, 2016), https://www.

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

Federal law classifies both sex trafficking and labor trafficking as "severe forms of trafficking in persons."[22] Sex trafficking occurs when "a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."[23] Labor trafficking is "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[24] States have also adopted various definitions of human trafficking.[25]

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

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

al.com/opinion/index.ssf/2016/04/modern_slavery_why_we_have_to.html.

18 *Id.*

19 *The Facts*, Polaris (2018), https://polarisproject.org/human-trafficking/facts.

20 Lanier, *supra* note 2, at 902.

21 *Id.*

22 22 U.S.C.A. § 7102.

23 *Id.*

24 *Id.*

25 *See* Tex. Penal Code Ann. § 20A.02 (Vernon 2019) (defining the offense of trafficking of persons as "the person knowingly: (1) traffics another person with the intent that the trafficked person engage in forced labor or services; (2) receives a benefit from participating in a venture that involves an activity described by Subdivision (1), including by receiving labor or services the person knows are forced labor or services; (3) traffics another person and, through force, fraud, or coercion, causes the trafficked person to engage in conduct prohibited[,]" such as prostitution).

26 *See, e.g.*, 22 U.S.C. §§ 7104, 7105, 7109 (2012); *see also* Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 Wash. & Lee J. Civ. Rts. & Soc. Just. 177, 181 (2016) (analyzing statutes that are focused on victim recovery).

27 22 U.S.C. §§ 7104, 7105, 7109 (2012).

28 *See, e.g., id.*

29 *See, e.g., id.*

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

31 *Id.*

ports.[32] Previously the NHTH was run by Polaris Project (Polaris) from 2007 to 2015.[33]

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

While the Federal Government and other national organizations have worked to combat human trafficking, some states have also started to take a more holistic approach. Polaris tracks the steps states have taken to combat human trafficking and ranks the states based on what each state has done.[40] Polaris is the "leader in the global fight to eradicate modern slavery."[41] Its goal is to provide comprehensive model acts on how to put victims at the center of the fight on human trafficking.[42] Polaris continues to be the leader in helping fight human trafficking after the NHTH transferred to the Department of Health and Human Services.[43] Since 2013, Polaris has tracked all fifty states' human trafficking laws based on ten categories and ranked the states based on these categories.[44] Polaris is believed to be "critical to a basic legal framework that combats human trafficking, punishes traffickers and supports survivors."[45] Polaris based these categories on sex trafficking provisions, labor trafficking provisions, victim assistance, access to civil damages, asset forfeiture, training/task forces, lower the burden of proof for minors in sex trafficking, posting the hotline number, safe harbor laws, and vacatur statutes.[46] Polaris then ranked all the states based on their laws.[47] Polaris has four levels of rankings: tier 1, tier 2, tier 3, and tier 4.[48] In Polaris's last report, in 2014, three states received a perfect score: Delaware, New Jersey, and Washington.[49] A perfect score means that the states have passed all ten categories based on its report.[50] Polaris ranked California, Texas, and Florida in Tier 1.[51] Tier 1, which is the highest tier, means that states "passed significant laws to combat human trafficking," but that they should continue to take steps to improve their laws.[52]

[32] *Report Trafficking*, Nat'l Hum. Trafficking Hotline, https://humantraffickinghotline.org/report-trafficking.
[33] *Justice for Victims of Trafficking Act: One Year Later*, *supra* note 30.
[34] *Hotline Statistics*, Nat'l Hum. Trafficking Hotline, https://humantraffickinghotline.org/states.
[35] *Id.*
[36] *Id.* (referring to fact that California had 1,305 cases reported, Texas had 792 cases reported, and Florida had 604 cases reported).
[37] *2017 Hotline Statistics*, Polaris (2017), https://polarisproject.org/2017statistics.
[38] *See id.*
[39] *See generally State Laws & Issue Briefs*, Polaris (2018), https://polarisproject.org/state-laws-issue-briefs (listing pdf files for 2011 to 2014 state ratings).
[40] *State Laws & Issue Briefs*, Polarisw
[41] *About*, Polaris, https://polarisproject.org/about.
[42] *Id.*
[43] *Justice for Victims of Trafficking Act: One Year Later*, *supra* note 30.
[44] *A Look Back: Building a Human Trafficking Legal Framework*, Polaris (2014), https://polarisproject.org/sites/default/files/2014-Look-Back.pdf.
[45] *State Laws & Issue Briefs*, *supra* note 40.
[46] *2014 State Ratings on Human Trafficking Laws*, Polaris (2014), https://polarisproject.org/sites/default/files/2014-State-Ratings.pdf.
[47] *State Laws & Issue Briefs*, *supra* note 40.
[48] *2014 State Ratings on Human Trafficking Laws*, *supra* note 45.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

B. The Current Status of Affirmative Defense Statutes

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

An excuse defense is a type of affirmative defense, defined as "**a** reason that justifies an act or omission or that relieves a person of a duty."[58] These excuse defenses allow the victim to admit his/her conduct is wrong, while at the same time informing the court that it should not hold the individual accountable because of certain circumstances.[59] Excuse defenses include long or short-term disabilities that individual had at the time of the crime.[60] Accordingly, the disability must have been the cause of the crime.[61] Many states have begun providing excuse defenses for victims; however, each state provides a different type.[62] Some states, such as Florida, have not even adopted affirmative defenses in their statutes for human trafficking victims.[63]

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

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

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53 Zornosa, *supra* note 26, at 187.

54 *Affirmative Defense*, Black's Law Dictionary (9th ed. 2009).

55 *Id.*

56 *Id.*

57 Model Penal Code § 1.12(3)(c) (Am. Law Inst. 2019).

58 *Id.*; *Excuse*, Black's Law Dictionary (11th ed. 2019).

59 Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 221 (1982).

60 *Id.*

61 Zornosa, *supra* note 26, at 187.

62 Colo. Rev. Stat. Ann. § 18-7-201.3 (West 2019); Conn. Gen. Stat. Ann. § 53a-82(b) (West 2016); 725 Ill. Comp. Stat. 5/115-6.1 (West 2015); Md. Code Ann., Crim. Law § 11-306 (West 2015); *see Human Trafficking State laws*, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx [hereinafter *Human Trafficking State Laws*].

63 *See* Fla. Stat. Ann. § 787.06 (West 2016); *See* Fla. Stat. Ann. § 796.07 (West 2016).

64 Allison L. Cross, *Slipping Through the Cracks: The Dual Victimization of Human- Trafficking Survivors*, 44 McGeorge L. Rev. 395, 407 (2013).

65 *See, e.g.*, Iowa Code Ann. § 710A.3 (West 2006).

66 *See* Cross, *supra* note 64, at 407–08.

67 *See id.*

68 Iowa Code Ann. § 710A.3 (2018).

69 *See* Cal. Penal Code § 236.23 (West 2017).

70 *Id.*

71 *Id.*

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

In addition, many states have enacted safe harbor laws for children.[76] These laws provide legal protection for children, as well as services.[77] States enacted safe harbor laws to fix the inconsistencies in how various states treat children.[78] The legal protection includes immunity from prosecution for the crimes victims are forced to commit.[79] There are also special service programs available for victims, such as psychological treatment, emergency housing, etc.[80] Although states have adopted these laws for minors, adults do not have the same protections.[81]

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

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

C. How States have Begun to Implement Vacatur Statutes

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

[72] *See* Cross, *supra* note 64, at 407–08.
[73] *See* Cross, *supra* note 64, at 408.
[74] People v. G.M., 922 N.Y.S.2d 761, 762-763 (Crim. Ct. 2011).
[75] *See e.g.,* Tex. Penal Code Ann. § 43.02 (West 2017); 725 Ill. Comp. Stat. Ann. § 5/115-6.1 (West 2015); La. Stat. Ann. § 46.2 (2017); Md. Code Ann., Crim. Law § 11-306 (West 2015); *see* Cross, *supra* note 64, at 419 n.197 (noting that that this type of defense does not apply to labor trafficking victims).
[76] *See Human Trafficking State Laws*, *supra* note 61; *Human Trafficking Issue Brief: Safe Harbor*, Polaris (2015), https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf.
[77] *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.
[78] *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.
[79] *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.
[80] *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.
[81] *Human Trafficking State Laws*, *supra* note 61; *see also Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.
[82] *See generally Human Trafficking: Victims' Affirmative Defense: Hearing on AB-1761 Before the S. Comm. on Senate Appropriations*, 2016 Leg., 69th Sess. (Cal. 2016).
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Cal. Penal Code § 236.14 (West 2017); Fla. Stat. Ann. § 943.0583 (West 2018).

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

Vacatur statutes allow individuals to file motions with the court to have their convictions removed.[94] Whenever a court vacates a conviction, it is stating that the court made an error, and is thus reversing the conviction.[95] To get the conviction reversed, victims are required to provide evidence that the conviction occurred as a result of being trafficked.[96] Many states vary in what is considered acceptable evidence, but victims typically do not have to show official government documentation.[97] States vary in whether there must be both expungement and vacatur or just one.[98] Some states require that along with vacating the conviction there must be expungement, which will remove charges from criminal records.[99] Other states have created expungement statutes that will destroy or seal the records about the facts of the conviction, but the expungement does not signify that the defendant is innocent.[100]

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

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

89 *Vacatur*, Black's Law Dictionary (11th ed. 2019).
90 *Id.*
91 *G.M.*, 922 N.Y.S.2d at 763; Alyssa M. Barnard, *The Second Chance They Deserve: Vacating Convictions of Sex Trafficking Victims*, 114 Colum. L. Rev. 1463, 1472 (2014).
92 Barnard, *supra* note 91 at 1472–73.
93 Cal. Penal Code § 236.14 (West 2017); Fla. Stat. Ann. § 943.0583 (West 2018).
94 *Human Trafficking Issue Brief: Vacating Convictions*, Polaris (2015), *available at* https://polarisproject.org/sites/default/files/2015%20Vacating%20Convictions%20Issue%20Brief.pdf. [hereinafter *Human Trafficking Issue Brief: Vacating Convictions*].
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 Vt. Stat. Ann. tit. 13 § 2658 (West 2012); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 94.
100 Colo. Rev. Stat. Ann. § 18-7-201.3 (West 2017) (providing for expungement of criminal records); Colo. Stat. Ann. § 24-72-706 (West 2014) (providing for sealing of criminal records); *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 94.
101 *See* United States v. Crowell, 347 F.3d 790, 792 (9th Cir. 2004).
102 *Id.*
103 *Id.*
104 *Id.*

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

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

There are three levels of vacatur statutes: (1) broad, (2) intermediate, and (3) narrow.[115] Narrow laws provide vacatur statutes for prostitution charges only.[116] For example, Washington's statute provides that victims of trafficking may vacate their prostitution convictions, as long as those charges resulted from the trafficker promoting prostitution, promoting commercial sexual abuse, or trafficking.[117] Intermediate laws provide that victims can vacate their convictions for prostitution and prostitution-related charges (e.g., loitering for the purpose of prostitution).[118] For example, New York's statute provides that the court can vacate a conviction when the conviction was for prostitution-related charges.[119] Lastly, broad laws provide that victims can vacate any conviction committed while being trafficked.[120] For example, Wyoming's statute provides that the court can "vacate the conviction if the defendant's participation in the offense is found to have been the result of having been a victim" of human trafficking.[121]

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

[105] Fla. Stat. Ann. § 943.0583 (West 2018).
[106] Cal. Penal Code § 236.14 (West 2017).
[107] Tex. Fam. Code Ann. § 58.256 (West 2017) (providing sealing of records for minors); *see Human Trafficking State Laws*, *supra* note 62.
[108] Tex. Fam. Code Ann. § 58.250 (West 2017).
[109] *See Human Trafficking State Laws*, *supra* note 62.
[110] *See id.*
[111] *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 94.
[112] *Id.*
[113] *G.M.*, 922 N.Y.S.2d at 765–66.
[114] *Human Trafficking Issue Brief: Vacating Convictions*, *supra* note 94.
[115] Nicholas R. Larche, *Victimized by the State: How Legislative Inaction Has Led to the Revictimization and Stigmatization of Victims of Sex Trafficking*, 38 Seton Hall Legis. J. 281, 299 (2014).
[116] *Id.*
[117] Wash. Rev. Code Ann. § 9.96.060 (West 2017); *see Human Trafficking State Laws*, *supra* note 62.
[118] N.Y. Crim. Proc. Law § 440.10 (McKinney 2016); Larche, *supra* note 115, at 300.
[119] N.Y. Crim. Proc. Law § 440.10 (McKinney 2016).
[120] Larche, *supra* note 115, at 300-01; *See* Fla. Stat. Ann. § 943.0583 (West 2018).
[121] Wyo. Stat. Ann. § 6-2-708 (West 2013).
[122] *See, e.g.*, Md. Code Ann., Crim. Proc. § 8-302 (West 2011) (stating the time period for a motion to vacate must be a reasonable period of time after conviction).

occurs later…"[123] Conversely, some states have no statutory time limit for filing the motion to vacate.[124]

Many state legislatures are introducing bills that would provide vacatur statutes for victims of human trafficking.[125] In Texas specifically, the 85th Legislative Session heard arguments for and against the passage of a vacatur statute.[126] Supporters of the bill argued that this bill would provide relief and allow victims to rebuild their lives.[127] With a criminal conviction on a victim's record, the victim faces many difficulties.[128] For example, convictions "can interfere with efforts to get a job, housing, or education, which can make it hard to break the cycle of offending."[129] Moreover, the trauma victims face while being trafficked makes this bill necessary.[130] Passing this bill would allow Texas to establish legislation that would begin a path to set aside victims' convictions and have records expunged.[131] Supporters acknowledge that the current law provides some relief for victims in certain circumstances; however, supporters argue that the law does not address the broad range of situations victims experience.[132] For example, if victims are still under the control of their trafficker when charged with prostitution, the victims will likely not want to raise an affirmative defense.[133] While people differ in their views on vacatur statutes, people also recognize that victims face many issues whenever criminal convictions are on victims' records.[134]

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

III. States Should Implement Affirmative Defense Statutes For Victims

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

[123] Cal. Penal Code § 236.14 (West 2017); *see also* Fla. Stat. Ann. § 943.0583 (West 2018).
[124] Wash. Rev. Code. Ann. § 9.96.060 (West 2017).
[125] *See, e.g.*, H. Comm. on Criminal Jurisprudence, Tex. H.B. 269, 85th Leg., R.S. (Tex. 2017).
[126] *Id.*
[127] S. Thompson et al., *House Research Organization Bill Analysis*, Texas Legislature Online 1, 3 (Apr. 17, 2017), https://hro.house.texas.gov/pdf/ba85r/hb0269.pdf#navpanes=0.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 4.
[132] *Id.*
[133] *Id.*
[134] Barnard, *supra* note 91, at 1472–73.
[135] Thompson, *supra* note 127, at 1, 4.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 5.
[139] *Id.*
[140] *See* Isabella Blizard, *Chapter 636: Catching Those Who Fall, An Affirmative Defense for Human Trafficking Victims*, 48 U. Pac. L. Rev. 631, 639 (2016).

terrence, rehabilitation, restorative, retribution, and incapacitation.[141]

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

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

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

[141] Cyndi L. Banks, Criminal Justice Ethics: Theory and Practice 105 (1st ed. 2004), *available at* https://www.sagepub.com/sites/default/files/upm-binaries/5144_Banks_II_Proof_Chapter_5.pdf.
[142] *Id.* at 106.
[143] *Id.* at 107.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *See, e.g.,* People v. Gonzalez, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011) (noting how victim continued to re-offend because she was fearful of what her trafficker might do to her).
[148] *See*, *e.g.*, *id.*
[149] *Id.*
[150] Banks, *supra* note 141, at 109.
[151] *Id.*
[152] *Id.* at 110.
[153] *Id*.
[154] *See also* Cross, *supra* note 64, at 396–97; *see generally* Kate Mogulescu, *The Public Defender as anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. Rev. 471, 483–84 (2012) (noting misconceptions about trafficking victims).
[155] *See, e.g.,* People v. L.G., 972 N.Y.S.2d 418, 423–24 (Crim. Ct. 2013).
[156] *See* Cross, *supra* note 64, at 413.
[157] Banks, *supra* note 141, at 117.
[158] *Id.*
[159] *See* Zornosa, *supra* note 26, at 183.

another victim.[160] Incapacitating the victim neither protects society from the crimes committed nor does it protect innocent citizens from becoming the trafficker's next victim.

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

Lastly, the trafficker is the individual who is in need of rehabilitation.[166] A rehabilitationist views crimes as a "symptom of a social disease and sees the aim of rehabilitation as curing that disease through treatment[]."[167] Essentially, their goal is to cure the offenders of their crime-focused behaviors and then send them back into society.[168] This is not applicable to victims of trafficking because they do not have a "social disease."[169] Victims are not committing crimes because they have crime-focused behavior, they have no other choice.[170] If victims do not listen to their pimp, they are beaten or traded to another trafficker who may be worse than their current pimp.[171]

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

A. Proposed Affirmative Defense Statute

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

[160] *See, e.g., L.G.*, 972 N.Y.S.2d at 420–421 (showing victim was consistently picked up by other traffickers through her life).
[161] Banks, *supra* note 141, at 118.
[162] *Id.* at 119.
[163] Banks, *supra* note 141, at 118.
[164] *See* Zornosa, *supra* note 26, at 183.
[165] *See, e.g., L.G.*, 972 N.Y.S.2d at 420-21 (noting that traffickers are continually trading victims to other traffickers).
[166] *See generally* Banks, *supra* note 141, at 116.
[167] *Id.*
[168] *See id.* at 116–17.
[169] *See id.* at 116.
[170] *See, e.g., L.G.*, 972 N.Y.S.2d at 420–21 (noting L.G. was fearful to leave her trafficker).
[171] *See, e.g., id.*
[172] *See generally* Zornosa, *supra* note 26.
[173] *Id.* at 187
[174] *Id.* at 190–91.
[175] Cross, *supra* note 64, at 403.
[176] *See* Blizard, *supra* note 140, at 635.
[177] Cross, *supra* note 64, at 403.

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

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

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

Due to the restraint states have in applying safe harbor laws to adults, states must look towards affirmative defenses as a way for the court system to prevent prosecutors from convicting victims of a crime they committed even if the facts are true.[180] These defenses provide victims the opportunity to avoid a conviction on their record because convictions create problems with rehabilitation for the victim.[181] Convictions bar victims "from enjoying certain necessities of life: the ability to rent an apartment or to find employment."[182] If a victim cannot rent an apartment or find a job, then the victim is more likely to go back to the only life he or she is familiar with.

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

> It is a defense to a charge of a crime that the person was coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm. This defense does not apply to a serious felony. . . or a violent felony. . . or a violation of [human trafficking].[183]

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

[178] *See generally* Blizard, *supra* note 140, at 639 (explaining that bottom girls refer to women who assist the trafficker in overseeing the girls).
[179] *Human Trafficking Issue Brief: Safe Harbor*, *supra* note 76.
[180] *See Defense*, Black's Law Dictionary (11th ed. 2019).
[181] *See supra* Part II.B. (analyzing affirmative defenses and how the defenses apply to victims).
[182] Blizard, *supra* note 140, at 635.
[183] Cal. Penal Code § 236.23 (West 2017).
[184] *Id.*
[185] *Id.*

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

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

Furthermore, states should still allow victims to use an affirmative defense if they commit the crime of human trafficking.[190] These are women who have been in the system for years, and traffickers force these women to traffic young girls.[191] These are not crimes the women/men choose to commit, but crimes that they are forced to commit by their trafficker.[192] If states did not include these men and women in the protection, then we would be leaving out a substantial portion of the woman called bottom girls.[193] Bottom girls are typically women who assist the trafficker in overseeing the girls.[194] These girls have typically been with the pimp the longest.[195] These women are victims just as much as any other victim. While it may appear worse that these women are participating in human trafficking, traffickers may victimize these women more than the victims working as prostitutes.[196]

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

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

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

[186] People v. G.M., 922 N.Y.S.2d 761, 762–763 (Crim. Ct. 2011).
[187] *See* Mogulescu, *supra* note 154, at 489.
[188] *Id* at 481–82.
[189] *See generally id.* at 484–85.
[190] *See generally* Blizard, *supra* note 140, at 640.
[191] *See generally id.* at 639–40.
[192] *See id.* at 633.
[193] *See id.* at 639.
[194] *Id.*
[195] *Id.*
[196] *See id*. at 635.
[197] *See id.* at 644.
[198] *Id.*
[199] *Id.*
[200] *See supra* Part II.B-C (discussing and explaining what affirmative defenses and vacatur statutes are).
[201] *See generally* Mogulescu, *supra* note 154, at 474; *see also* Cross, *supra* note 64, at 396.

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

As the trafficker has all the culpability, the trafficker should take all the blame.[211] An excuse defense that should be available to these victims is a disability.[212] Human trafficking is a disability that provides an excuse for crimes a victim commits.[213] This temporary condition forces victims to act under the control of their traffickers due to fear.[214] Typically, society is willing to excuse individuals when:

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

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

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

[202] People v. L.G., 972 N.Y.S.2d 418, 420–21 (Crim. Ct. 2013).
[203] *See*, *e.g.*, *id.*
[204] *See* Mogulescu, *supra* note 154, at 489.
[205] *See* Mogulescu, *supra* note 154, at 472; *see also* Cross, *supra* note 64, at 396–97.
[206] *See* Zornosa, *supra* note 26, at 189–90.
[207] Cross, *supra* note 64, at 396–97.
[208] *See* Zornosa, *supra* note 26, at 189.
[209] *See* People v. L.G., 972 N.Y.S.2d 418, 420–21 (Crim. Ct. 2013).
[210] *See* Zornosa, *supra* note 26, at 190.
[211] *See* Zornosa, *supra* note 26, at 190.
[212] Robinson, *supra* note 59, at 221.
[213] *See generally* Robinson, *supra* note 59, at 221–29.
[214] *See, e.g.*, People v. Gonzalez, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011).
[215] Robinson, *supra* note 59, at 222.
[216] *See* Zornosa, *supra* note 26, at 188.
[217] *See* Zornosa, *supra* note 26, at 188.
[218] Zornosa, *supra* note 26, at 188.

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

IV. States Must Vacate Convictions for Victims

Along with affirmative defenses, vacatur statutes are an important part of creating a more victim-centric state. Convictions create an undue burden on victims who are trying to get back on their feet.[223] Victims can have difficulty obtaining housing, employment, education, or public benefits. For example, whenever you apply for housing or employment, you are often asked about your criminal history.[224] Apartments don't want registered prostitute in their building because the apartment prides itself in having a safe, family-friendly environment.[225] Employers do not hire former prostitutes because they view these people as dirty.[226] This is why vacatur statutes are so important for victims. These statutes "grant victims 'a clean slate' and a 'desperately needed second chance they deserve.'"[227] Vacatur statutes provide post-conviction assistance after the system has failed to recognize these people as victims before their conviction.[228]

A. Proposed Vacatur Statutes

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

[219] Zornosa, *supra* note 26, at 188 (quoting Wayne R. Lafave, 2 Substantive Criminal Law § 9.1 (2d ed. 2014)).
[220] Zornosa, *supra* note 26, at 188.
[221] Mogulescu, *supra* note 154, at 474, 489.
[222] Mogulescu, *supra* note 154, at 483.
[223] *Human Trafficking Task Force e-Guide,* Off. For Victims Of Crime Training & Technical Assistance Ctr., https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/44-comprehensive-victim-services/legal-needs/criminal-defense/.
[224] *Id.*
[225] *See id.*
[226] *See id.*
[227] Barnard, *supra* note 91, at 1474 (quoting Letter from Thomas Duane, Chair, N.Y. Senate Comm. on Health, to David Paterson, Governor, N.Y. (Aug. 12, 2010), *in* Bill Jacket, Assemb. 7670, 233rd Leg. Reg. Sess., 8 (N.Y. 2010)).
[228] *See* Cross, *supra* note 64, at 403.
[229] Barnard, *supra* note 91, at 1472–73.
[230] Larche, *supra* note 115, at 301.

lation power given to human trafficking agencies.[231] Florida's statute reads:

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

Florida's statute is excellent in that it does not limit the statute to prostitution or prostitution-related charges alone but allows victims of labor trafficking to use the statute.[233] Furthermore, as stated above, there are victims of sex trafficking who are forced to commit crimes other than prostitution, and this statute allows those victims to use the statute as well.[234]

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

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

[231] Fla. Stat. Ann. § 943.0583 (West 2018).
[232] Fla. Stat. Ann. § 943.0583(c)(3)-(4)(West 2018).
[233] Barnard, *supra* note 91, at 1491–92.
[234] *See* Barnard, *supra* note 91, at 1491–92; *see, e.g.*, People. v. G.M., 922 N.Y.S.2d 761 (Crim. Ct. 2011).
[235] Barnard, *supra* note 91, at 1485; *see*, *e.g.*, Larche, *supra* note 115, at 301.
[236] Victims of Crime Act, 66 Fed. Reg. 27158, 27161 (May 16, 2001).
[237] *Id.*
[238] *Id.*

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

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

Victims assistance units would also assist with implementing time limits on the statute. States should implement a due diligence time requirement for human trafficking victims to preserve the integrity of the trial process while also protecting victims. The statute should state:

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

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

[239] Sexual Assault Response Teams, Nat'l Sexual Violence Res. Ctr., https://www.nsvrc.org/sarts/protocols-and-guidelines; *see also* Nat'l Sexual Violence Res. Ctr., Protocols & Guidelines for Sexual Assault Response Teams (2019).

[240] *See, e.g.*, Nat'l Sexual Violence Res. Ctr., *Denver Sexual Assault Response Protocol*, 1, 25 (2011).

[241] *See, e.g.*, *id.* at 24.

[242] *See, e.g.*, *id.* at 25.

[243] Furthermore, states should adopt human trafficking response teams; however, that problem is outside the scope of this Article. *See, e.g.*, Nat'l Sexual Violence Res. Ctr., *supra* note 239.

[244] *See, e.g.*, N.J. Stat. Ann. § 2C:44-1.1 (West 2013) (restating words of the statute to include a section about knowledge of the vacatur statute).

[245] *See* Larche, *supra* note 115, at 301.

[246] Barnard, *supra* note 91, at 1485.

[247] Barnard, *supra* note 91, at 1486.

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

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

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

Furthermore, courts should not punish victims for crimes committed under duress or coercion by their traffickers.[252] As stated previously, society would be willing to excuse victims who are trafficked because they lack the personal culpability required for the crimes they commit.[253] Victims are not committing these crimes because they desire to but because they fear they have no other option.[254] Thus, these statutes would create the clean slate that is needed for the victim to start over.

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

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

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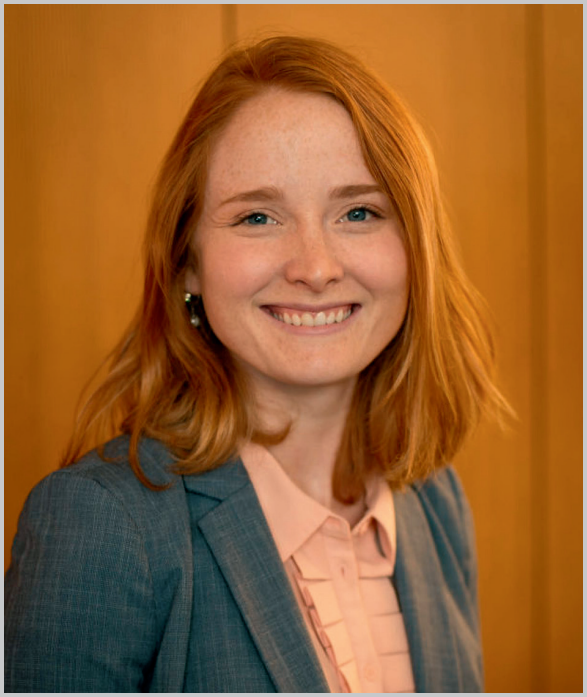
[248] *See* People v. G.M., 922 N.Y.S.2d 761, 763 (Crim. Ct. 2011).
[249] *See id.*
[250] *See id.*
[251] *Id.*; *see* Barnard, *supra* note 91, at 1472.
[252] Barnard, *supra* note 91, at 1493.
[253] Zornosa, *supra* note 26, at 187; *see* Robinson, *supra* note 59, at 222.
[254] *See* Mogulescu, *supra* note 154, at 478–79; *see*, *e.g.*, People v. Gonzalez, 927 N.Y.S.2d 567, 568 (Crim. Ct. 2011).
[255] *See* Cross, *supra* note 64, at 403.
[256] Cross, *supra* note 64, at 403.
[257] *See* Cross, *supra* note 64 at 403.
[258] *See* Cross, *supra* note 64, at 403.
[259] *See* Saurav Ghimire, *The Three Rs of Justice to Human Trafficking Victims (Rescue, Rehabilitation and Reintegration)*, 1 Kathmandu Sch. L. Rev. 104, 109 (2012).
[260] Nat'l Sexual Violence Res. Ctr., *Assisting Trafficking Victims: A Guide for Victim Advocates* 1, 18 (2012), https://www.nsvrc.org/sites/default/files/publications_nsvrc_guides_human-trafficking-victim-advocates.pdf.
[261] *See* Ghimire, *supra* note 259, at 109.
[262] *See* United States v. Crowell, 347 F.3d 790, 792 (9th Cir. 2004).

V. Conclusion

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

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

About the AUTHOR



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The BB Gun: A Harmless Toy or Deadly Weapon? Practical Guidance for Objective Fact Finding in a Criminal Case

Steven N. Gosney[*] and John Zak[**]

BB guns (and the larger set of projective firing non-powder guns ("NPG")) occupy an interesting niche in the law. They look like firearms and fire a projectile however the power of a BB gun is generally much less than that of a firearm. Most attorneys rarely deal with BB guns in their cases, and when the odd case does arise they are unprepared to tackle the issues involved.[1] This article provides a brief overview for the Florida[2] criminal law practitioner dealing with a BB gun case. The author further proposes an objective test based on the energy power of the specific NPG involved in any litigation for determining whether that NPG is capable of causing serious bodily harm.

The law in Florida. As outlined below, the law in Florida requires the State to establish the deadly nature of a BB gun, and states that this is a fact question for the fact finder.[3] In Florida, BB guns arise in various criminal contexts. Often, the presence of a BB gun is used by the prosecutor as a "deadly weapon" enhancement to an existing crime.[4] Common examples of these types of crimes with the enhancement attached are robbery with a deadly weapon,[5] aggravated assault deadly weapon,[6] aggravated battery (deadly weapon),[7] and armed burglary with a dangerous weapon.[8] The most commonly used statutes referencing BB guns are found in Florida Statute § 790.[9] Section 790.22 prohibits minors under

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1 *See*, *e.g.*, State v. Plummer, 228 So. 3d 661, 668 (Fla. Dist. Ct. App. 2017) (holding that counsel was ineffective for failing to present evidence of the difference between a BB gun and an air pistol, which cannot be used as deadly weapon).

2 This article is limited to the State of Florida, but the analysis described herein should be transferable to other state jurisdictions.

3 *See infra* pp. 4–5.

4 *See infra* notes 5–8.

5 *See*, *e.g.*, McCray v. State, 358 So. 2d 615, 616–17 (Fla. Dist. Ct. App. 1978).

6 *See* Duba v. State, 446 So.2d 1167, 1167–68 (Fla. Dist. Ct. App. 1984) (holding that in cases of aggravated assault it is a question of fact for the jury to determine whether a BB gun is a deadly weapon); *but see* Mitchell v. State, 698 So. 2d 555, 562 (Fla. Dist. Ct. App.), *aff'd*, 703 So. 2d 1062 (Fla. 1997) (issue of whether the gun was deadly based on threat of its use in manner likely to cause great bodily injury was to be viewed from victims' perspective); *see also c.f.* J.W. v. State, 807 So. 2d 148,149 (Fla. Dist. Ct. App. 2002) (holding that the evidence did not show that the lighter in its design was likely to cause great bodily harm and the defendant did not use it in a manner likely to cause harm that it was not a deadly weapon).

7 State v. Jeffers, 490 So. 2d 968 (Fla. Dist. Ct. App. 1986).

8 Santiago v. State, 900 So.2d 710, 711–12 (Fla. Dist. Ct. App. 2005).

9 Fla. Stat. Ann. § 790.22 (West 2019).

the age of 16 from possessing or operating a BB gun or other air-powered weapon without the supervision of an adult or the consent of the minor's parent under the supervision of that adult.[10] A Florida Appellate Court ruled that a BB gun qualifies as an "other deadly weapon."[11] Section 790.115 classifies the possession of a weapon on school property as a third-degree felony.[12] This is particularly relevant due to the fact that many BB gun cases involve minors bringing BB guns onto school property. These statutes can result in charges for carrying a concealed weapon,[13] possession of a deadly weapon on school property,[14] and exhibiting a deadly weapon.[15] Note that this article does not address the issue of a BB gun's use as a bludgeon, only as a projectile firing device.

The leading case dealing with BB guns in Florida is *Dale v. State*.[16] The key holding in *Dale* is that the issue of whether a BB gun is a deadly weapon is a fact question determined by the jury.[17] In *Dale*, a defendant entered a bread store and proceeded to rob the store with an unloaded BB gun tucked into his pants, claiming it to be a real firearm.[18] The defendant was arrested shortly after leaving store where a BB gun resembling a 9-millimeter Beretta pistol was confiscated by law enforcement.[19] Dale was charged with armed robbery with a deadly weapon.[20] The Florida Supreme Court held that the issue of whether or not a BB gun is a deadly weapon is a fact question to be determined by the jury.[21] Applying this rule, the court opined that the evidence supported the jury's finding that the BB gun in evidence was a deadly weapon.[22]

The *Dale* case contains a significant dissent by Justice J. Overton. Justice Overton argues that the characterization of an unloaded BB gun being a deadly weapon is illogical and not based on reasonable interpretation of the law.[23] Justice Overton declared that a BB gun is not a deadly weapon because it is unlikely to produce death or serious bodily harm by itself.[24] For example, in 2017, 10,128 persons were killed by firearms[25] and 1,591 people were killed as a result of knives or other cutting devices.[26] In contrast, between 1990 and 2000, 39 people died from BB guns, an average of only four deaths annually.[27] Justice Overton argued that in light of these statistics, BB guns should not be considered a deadly weapon in the same category as firearms.[28] Justice Overton's statistics show that it is illogical to equate BB guns with firearms since they vary so widely in capability.[29] Unstated in the Overton dissent is that public policy should weigh against classifying a low power NPG as deadly weapons since by blurring the distinction, there would be no rational reason for a bad actor to downgrade his weapon type.[30] Do we really want

[10] *Id*. at § 1.
[11] Depasquale v. State, 438 So. 2d 159, 160 (Fla. Dist. Ct. App. 1983).
[12] Fla. Stat. Ann. § 790.115(1) (West 2019).
[13] *Id*.; E.S. v. State, 886 So. 2d 311, 312 (Fla. Dist. Ct. App. 2004).
[14] *See*, *e.g.*, J.T. v. State, 47 So. 3d 934, 936–37 (Fla. Dist. Ct. App. 2010).
[15] Fla. Stat. Ann. § 790.10 (West 2019); M.J. v. State, 100 So. 3d 1286, 1286 (Fla. Dist. Ct. App. 2012).
[16] Dale v. State, 703 So. 2d 1045 (Fla. 1997).
[17] *Id*. at 1046.
[18] *Id*.
[19] *Id*.
[20] *Id.*
[21] *Id*. at 1047.
[22] *Id*.
[23] *Id*. at 1048 (Overton, J., dissenting).
[24] *See id*. at 1049.
[25] FBI, *Crime in the United States 2018: Expanded Homicide Data Table 8, 2014-2018*, U.S. Dep't of Justice (2018), https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-8.xls.
[26] *See id.*
[27] Danielle Laraque, *Injury Risk of Nonpowder Guns*, 114 J. Am. Acad. Pediatrics 1357, 1359 (2004).
[28] *See* Dale, 703 So. 2d at 1048.
[29] *See id*.
[30] *Cf*. *id*.

our armed robbers to have real firearms rather than BB guns? Note that the Florida approach seems to be the majority approach among the States, with many States requiring the prosecution prove deadliness on a case by case basis.[31] Some states take the Justice Overton approach that BB Guns are not deadly as a matter of law, although usually based on that particular State's statutory interpretation.[32]

Applying the Law in a Case. As stated at the beginning of the article, the law in Florida requires the State to establish the deadly nature of a BB gun, and that this is a fact question for the fact finder.[33] First, a defense attorney must hold the State to its burden of proof, and demand dismissal when they fail in presenting evidence supporting the deadly nature of a BB gun.[34] If the State does put on such evidence, the Florida criminal defense attorney should be prepared to cross examine the State witness. This requires an understanding of the different type of BB Guns and their relative capabilities. Successfully defending against the lethal nature of BB guns often hinges on whether the prosecution proved beyond a reasonable doubt that the actual BB gun used in a case was a deadly weapon.[35] It is not enough for the State to prove that BB guns generally are merely "capable" of inflicting serious bodily harm– the specifics of the weapon used may allow a practitioner to downgrade charges to a lesser category.[36] A defense attorney must be dogged in holding the State to their burden. Thus, it is important to understand the different aspects of "deadliness" in a BB gun context.

If at all possible, the actual BB gun used in a situation should be examined and identified before trial so that its actual power capability can be determined. Because BB guns can differ so greatly in power based on the actual model used, it is critical to identify the actual model of BB gun used if at all possible. As discussed below, BB guns can vary in terms of their muzzle velocities, operations, ammunition used, and effectiveness in relation to environmental factors that impact the potential lethality of the weapon. Utilizing this information, a BB gun's energy projection ability can be directly related to its potential to inflict injury.

The attempt to create a model equating potential energy with injury severity seems to be very problematic since injuries seem to be caused by the seemingly infinite and random collaboration of causal factors that describe the specific circumstances of the incident. However, one researcher has developed a useful theoretical basis for predicting injury severity in relation to car accidents.[37] A physician and leader in highway accident research, William Haddon, Jr., asserted that injuries should be defined by their fundamental cause, hazard energy, or more specifically, the release of hazard energy and contact by an individual.[38] Under this explanation, there must be a form of energy exchange in excess of the body's vulnerability in order for an injury to be sustained.[39] Haddon's

[31] *See* People v. Ackah-Essien, 874 N.W.2d 172, 182–83 (Mich. Ct. App. 2015); *Richardson v. State*, No. 0550, 2016 WL 3127656 at *3 (Md. Ct. Spec. App. June 3, 2016); *see e.g.*, Adame v. State, 69 S.W.3d 581, 582 (Tex. Crim. App. 2002).

[32] *See* People v. Davis, 766 N.E.2d 641, 647 (2002); People v. Thorne, 817 N.E.2d 1163, 1170–72 (2004).

[33] *See* Dale, 703 So. 2d at 1047.

[34] E.S. v. State, 886 So. 2d 311, 312 (Fla. Dist. Ct. App. 2004); J.M.P. v. State, 43 So. 3d 189, 191 (Fla. Dist. Ct. App. 2010); *cf.* K.C. v. State, 49 So. 3d 841, 842 (Fla. Dist. Ct. App. 2010).

[35] *Cf. Dale*, 703 So. 2d at 1046.

[36] *Cf.* Florida Standard Jury Instructions 790.001(3)(a) and (13).

[37] William Haddon, *Advances in the Epidemiology of Injuries as a Basis for Public Policy*, 95 Pub. Health Rep. 411, 418 (1980).

[38] *Id*. at 411.

[39] *Id*. at 414.

work resulted in a decrease in highway related deaths and injuries, primarily due to the adoption of additional restraint systems such as automobile air bags.[40] Note that Haddon's energy transfer theory has been confirmed and extended to workplace accidents.[41] Applying the Haddon energy transfer theory to the BB gun situation, (i.e. in order to determine its "deadliness" of a BB Gun or NPG), the muzzle velocity of a BB gun must be combined with the projectile it fires to determine the potential energy projection of a given NPG.

If you recall from your high school physics class, the joule is the unit that measures energy.[42] A joule is equal to kilograms times meters squared divided by seconds squared or J = kg * [m(m)] * [s(s)].[43] This calculation of energy determines how much energy a given BB Gun can potentially transmit to a human body by its projectile. To see the importance of considering both the projectile being fired as well as the muzzle velocity, imagine a peppercorn striking the skin at 100 miles an hour. Now imagine a beer bottle striking the skin at that same velocity. One situation clearly is more deadly than the other. For energy comparison purposes, a .22 short, usually considered the weakest commonly used firearm round, regularly generates energy of 100 joules.

Analogously, a BB gun or NPG firing a projectile generating 100 joules of energy would be considered capable of inflicting serious bodily harm in most situations. The question then becomes at what energy level a projectile needs to meet to become capable of inflicting serious bodily harm. There is no magic threshold number of joules energy that becomes deadly, as shot placement and complex projectile physics affects the equation. According to one expert, the critical velocity for penetration of human skin by an air gun pellet is between 38 and 70 m/sec (125–230 ft/sec).[44] Using the heaviest BB weight of 7.7 grains, this translates into a relatively low energy number of 1.22 joules.

However, penetration of human skin does not necessarily equate to serious bodily harm, so this study is less useful in a legal context. Some researchers have equated a high energy threshold of 590 joules as sufficient to cause death in certain accidental injury situations, but this was in a workplace context and this high energy number does not account for the focused energy a projectile produces.[45]

Most commonly, NPGs fire .177 caliber BBs or pellets weighing between 5.1 and 7.7 grains (.33 and .5 grams).[46] It is important to note that despite the considerably higher velocities at which these projectiles can be fired, the geometry of a BB or pellet, the lower range, and

[40] *See* Leon S. Roberton, *Behavioral and Environmental Interventions for Reducing Motor Vehicle Trauma*, 7 Ann. Rev. Public Health 13, 15 (1986), https://www.annualreviews.org/doi/pdf/10.1146/annurev.pu.07.050186.000305.

[41] Matthew R. Hallowell, Dillon Alexander & John A. Gambatese, *Energy-Based Safety Risk Assessment: Does Magnitude And Intensity Of Energy Predict Injury Severity?*, 35 Constr. Mgmt. & Econ.1, 64-77 (2017), https://www.tandfonline.com/doi/pdf/10.1080/01446193.2016.1274418?needAccess=true.

[42] *Joule*, Encyclopedia Britannica (2019).

[43] Ambler Thompson & Barry N. Taylor, *Guide for the Use of the International System of Units (SI)*, Nat'l Inst. of Standards & Tech. 5 (2008), https://physics.nist.gov/cuu/pdf/sp811.pdf.

[44] H. Ceylan et al., *Air weapon injuries: a serious and persistent problem*, Archives of Disease in Childhood 234, 234 (2002), https://adc.bmj.com/content/archdischild/86/4/234.full.

[45] Hallowell et al., *supra* note 41, at 74.

[46] *A Comprehensive Guide to the Pellet Gun*, Your Pellet Guns, https://yourpelletguns.com/pellet-gun-guide/ (last visited Dec. 20, 2019) (utilizing the highest BB or pellet weight of 7.7 grains for all joules calculations as this is the highest weight combined with the highest reported velocity. The joules energy in the examples herein are probably calculated high.).

decreased accuracy makes them less dangerous compared to projectiles fired from a firearm.[47] Distance may or may not be relevant depending on the particular factual circumstance of a case. However, some specialized NPGs can fire heavier ammunition such as .20, .22, .35, and .45 caliber projectiles, and this should be taken into account when calculating the possible energy projection of a particular weapon.

A threshold question is whether a particular type BB-gun is a deadly weapon by itself. NPGs fire a variety of projectiles including steel pellets, BBs, paint balls and air soft pellets.[48] Because of the design and physics, a paint-ball or an air soft NPG should rarely if ever be considered a deadly weapon as a matter of law, since these projectiles are designed not to inflict injury, the energy transmitted by these guns is low, and are generally incapable of serious injury or great bodily harm.[49] The manner in which BB guns are used may also be relevant when considering how it impacts its effectiveness. For example, distance to target can greatly impact the energy of the projectile. Therefore, distance from target may need to be factored in when considering deadliness in a particular case.

BB guns are extremely diverse and thus the model used matters. There are many different types of NPGs. Covered below are 1) spring loaded, 2) Carbon Dioxide ("CO2") cartridge–air propelled, 3) pneumatic pump–air propelled, and the special categories of 4) airsoft and 5) paint-ball.[50] Within each category, there is tremendous variation in power, with BB gun rifles generally having a much higher power than BB gun handguns. Be aware that it is a particularly deceptive tactic to mix the two types by arguing that "BB guns" can achieve very high powers when the actual gun used was a low power handgun style BB gun.

1) **Spring-loaded.** Spring-loaded BB guns generally feature a compression chamber separate from the barrel of the BB gun.[51] A lever connects to a steel spring coil in the chamber and must be manually cocked by the user.[52] Once the trigger is pulled, the lever pushes forward releasing the pressure in the chamber forcing the projectile out of the barrel.[53] Spring loaded air guns, the most commonly purchased, will typically have velocities of about 250 to 350 feet per second ("FPS"). Using common .177 caliber BBs, this translates to a potential muzzle energy of 2.83 joules. Examples of spring-loaded BB guns:

A. Crosman PSM45 Spring Powered Air Pistol:[54] Resembling a real firearm and costing twenty-five dollars, the PSM45 is a typical handgun type used in criminal acts.[55] The PSM45 fires .177 caliber BBs at a maximum of 190 FPS.[56] This results in a projection capability of .84 joules.

B. Umarex DX17 BB Pistol: Also resembling a real firearm and even less

[47] Max Vanzi, *Pellet Guns and BB Guns: Dangerous Playthings on the Open Market*, Cal. Senate 5–9 (2005), https://sor.senate.ca.gov/sites/sor.senate.ca.gov/files/%7BBB066D5C-2823-47A2-A0FC-5775B8B96C-D5%7D.PDF.

[48] *Id.* at 2–3.

[49] *Cf.* State v. Coauette, 601 N.W.2d 443, 447 (Minn. Ct. App. 1999).

[50] *Types of Airguns*, Crosman, www.crosman.com/discover/airguns/types-of-airguns (last visited Dec. 20, 2019).

[51] Jim Carmichel, *The Often Underrated Compressed Air Gun*, Mother Earth News (1981), https://www.motherearthnews.com/homesteading-and-livestock/compressed-air-gun-zmaz81mjzraw.

[52] *Id.*

[53] *Id.*

[54] *Crosman PSM45 Spring Powered Air Pistol*, PyramydAir, https://www.pyramydair.com/s/m/Crosman_PSM45_Spring_Powered_Air_Pistol/3975 (last visited Dec. 20, 2019).

[55] *Id.*

[56] *Id.*

expensive than the PSM45 costing about eighteen dollars, the DX17 can fire a .177 caliber BB at a maximum of 200 FPS.[57] This results in a potential energy projection of .92 joules.

2) **CO2 cartridge–Air Propelled.** Another common type of BB gun are those utilizing the CO2 cartridge. These air propelled carbon dioxide cartridges provide pressure within chamber of the BB gun that results in the release of the BB or pellet.[58] Note that CO2 pressure can fluctuate depending on atmospheric temperature.[59] Generally, CO2 guns can generate muzzle velocities of 350-450 FPS.[60] Using common .177 caliber BBs, this translates to a potential muzzle energy of 5 joules. Examples of powerful Non-powder CO2 handguns:

A. H&K MP5 K-PDW CO2 BB Gun: This BB gun is made to physically resemble an actual firearm–the H&K MP5. The actual muzzle velocity of the BB gun is much less than the firearm, as can be expected, with the BB gun having a projectile velocity of 400 FPS compared to the firearm having a projectile FPS of 1,335 per second.[61] Further, the BB gun fires .177 caliber BBs while the firearm fires 9 mm Luger.[62] The firearm can project 617 joules of energy, compared with 3.71 joules for the BB gun. The actual muzzle velocity of the BB replica coupled with the significantly lighter weight and kinetic energy involved in the discharge of BB pellets demonstrate that the two weapons are not comparable in deadliness.

B. Glock CO2 Air Pistol: This air pistol can fire a steel BB at a rate of 410 FPS, using a 12 gram CO2 cylinder with .177 caliber BBs.[63] This air pistol can project a total kinetic energy of 4.1 joules.

C. SIG Sauer P226. 177-Cal. Air Pistol: This CO2 powered air pistol fires .177 caliber pellets at an exit velocity of 450 FPS.[64]This weapon can project a combined kinetic energy of roughly 5 joules.

D. Smith and Wesson BB Repeater Air Pistol: Using .177 caliber rounds, this CO2 powered air handgun can shoot at a maximum velocity of 480 FPS.[65] This weapon can project a potential kinetic energy of 5.7 joules.

3) **Pneumatic pump – Air Propelled.** Another type of air propelled BB gun is the pneumatic pump. There are different types of pneumatic pump BB guns, and most guns using this design are rifles rather than handguns. There are pre-charged pneumatics that come with air reservoirs and tanks that can be filled with

[57] *Umarex DX17 BB Pistol*, PyramydAir, https://www.pyramydair.com/s/m/Umarex_DX17_BB_Pistol/4289 (last visited Dec. 20, 2019).

[58] Tom Warlow, Firearms, the Law, and Forensic Ballistics 107 (3d ed. 2011).

[59] *Id*.

[60] *Id*.

[61] *H&K MP5 K-PDW BB Submachine Gun*, Air Gun Depot, https://www.airgundepot.com/hk-mp5-k-pdw.html (last visited Dec. 20, 2019).

[62] *Id*.; *MP5 Technical Data*, Heckler-Koch, https://www.heckler-koch.com/en/products/military/submachine-guns/mp5/mp5/technical-data.html (last visited Dec. 20, 2019).

[63] *Glock 19 Gen. 3 BB Pistol*, Air Gun Depot, https://www.airgundepot.com/glock-19-gen-3-bb-pistol.html (last visited Dec. 20, 2019).

[64] *SIG Sauer P226 CO2 Pellet Pistol*, PyramydAir, https://www.pyramydair.com/s/m/SIG_Sauer_P226_CO2_Pellet_Pistol_Black/3691 (last visited Dec. 20, 2019).

[65] *Smith & Wesson M&P .177-Cal BB Repeater Air Pistol*, Cabela's, https://www.cabelas.com/product/S-W-M-P-PELLET-PISTOL/2225547.uts (last visited Dec. 20, 2019).

pellets.[66] An air tank pressurizes the weapon which releases the pellet.[67] While tank capacity can vary, a tank based BB gun can generally take between 20-80 shots before needing to be refilled.[68] In contrast, single stroke pneumatics require one pump before each shot, are considered extremely accurate, and are often used in Olympic air shooting.[69] With multi-pump pneumatics, air must be pumped into the weapon to generate energy to release pellets.[70] Pneumatic air guns, generally the most powerful NPG category, can fire projectiles with velocities of up to 350 to as high as 950 FPS, depending on model and sometimes the number of times the gun is pumped.[71] Examples of Air Propelled by Pneumatic Pump BB guns:

A. Crosman M4-177 Multi-Pump Air Rifle: The M4-177 is a commonly seen pneumatic pump rifle that resembles an AR-15, and is capable of firing typical .177 caliber BBs at 660 FPS.[72] The sixty-dollar gun must be pumped three to ten times between each discharge, with additional pumps resulting in higher energy at discharge.[73] Maximum pumps can result in a relatively high energy projection of 10.7 joules. A typical AR-15 can project 1800 joules.[74] Thus, when compared to an AR-15, the difference in deadliness is vast.

B. Air Arms S510 Xtra FAC Sidelever Air Rifle: This pneumatic air gun can fire BBs at 1,050 FPS, rivaling the threshold of firearms at 1,200 FPS.[75] Ammunition for the S510 used includes metal pellets of .177 caliber.[76] This air rifle can project energy of 27.7 joules.[77] Again, with the price tag of $1,200 and 43.5" long, the S510 is not the go to weapon for your average criminal.

C. Benjamin Bulldog .357 Bullpup Air Rifle: Moving up to the most powerful of all NPGs, the Benjamin Bulldog represents a relatively new class of extremely powerful air rifles. This air gun typically uses pellets for its ammunition.[78] This pneumatic pump air rifle is capable of firing between 900 and 670 FPS depending on ammunition used.[79] The weapon uses 95 grain projectiles that can travel at 900 FPS while 145 grain travels at 800 FPS.[80] The rifle style air gun is designed to be lightweight, at 7.7 pounds, and must be refilled with air after 10 shots.[81] This air rifle also has a kinetic energy using the 95 grain pellets equal to 176 joules while 145 grain pellets equals 241 joules of en-

[66] Warlow, *supra* note 58, at 107.
[67] *Id.*
[68] *Id.*
[69] *Which Airgun Poweplant is Right for You*?, Crosman, https://www.crosman.com/connect/which-airgun-powerplant-is-right-for-you/ (last visited Dec. 20, 2019).
[70] *Id.*
[71] *Id.*
[72] *Crosman M4-177 Multi-Pump Air Rifle*, PyramydAir, https://www.pyramydair.com/s/m/Crosman_M4_177_Multi_Pump_Air_Rifle_Adj_Stock/2631 (last visited Dec. 20, 2019).
[73] *Id.*
[74] Warren Redlich, *Projectiles, Kinetic/Muzzle Energy and Stopping Power*, Warren Redlich (Jan. 23, 2013, 6:13 PM), http://wredlich.com/ny/2013/01/projectiles-muzzle-energy-stopping-power/.
[75] *Air Arms S510 Xtra FAC Sidelever*, Air Gun Depot, www.airgundepot.com/air-arms-s510-xtra-fac-sidelever-air-rifle.html (last visited Dec. 20, 2019).
[76] *Id.*
[77] *Id.*
[78] *Benjamin Bulldog Bullpup*, Air Gun Depot, www.airgundepot.com/benjamin-bulldog-357.html (last visited Dec. 20, 2019).
[79] *Id.*
[80] *Id.*
[81] *Id.*

ergy.[82] Priced at $760 and 36" long, the Benjamin Bulldog is probably not the criminal's first choice.[83]

D. The most powerful air gun of any type is the AirForce Texan SS 457 Air Rifle.[84] This air rifle is capable of producing a max exit velocity of 960 FPS and comes with a variety of calibers such as .308, .357, and .457.[85] The exit velocity of this air gun varies by weight of ammo used, as the heaviest ammo weighing 147 grain peaks at 960 FPS while 405 grain ammo has 785 FPS (grain=0.6 grams roughly). Common projectiles fired by this air gun are the Air Venturi 405 grain flat-nose bullets and the AeroMagnum 259 grain Lone Star Hollow Points.[86] This air rifle, using its 405 grain ammo, has a kinetic energy of 750 joules while its 147 grain ammo has 406.7 joules of energy. While cleverly designed and very powerful, the AirForce Texan price exceeds $1000.[87] The price combined with the rifle style and relative rarity makes this weapon's appearance in a criminal episode highly unlikely.

4) **Airsoft guns.** Airsoft guns, along with spring loaded BB handguns, may be the most commonly used weapons in criminal activities because of their extremely low price and resemblance to actual firearms. Along with paintball guns, airsoft guns are intended to be used in recreational activities and are commonly used to shoot other people in target games. While capable of causing welts and burns without protective clothing, these guns are designed not to cause serious bodily injury. Further, airsoft guns are often used by criminals since they are also designed to mimic common firearms but are distinguished often with orange markings most commonly on the muzzle of the weapon. When this orange is removed, airsoft guns can be indistinguishable from a real firearm without close inspection. Criminals often use these items because they are very inexpensive and easy to purchase compared to real firearms. Airsoft guns do not fire steel BBs but instead shoot 6-millimeter plastic pellets weighing 3.09 grains.[88] Airsoft guns typically have muzzle velocities between 200 and 410 FPS.[89]

Comparing the kinetic energy of generic airsoft handguns, they cannot realistically be considered a deadly weapon as the three examples listed below have kinetic energies that could not by themselves cause death. Comparing the kinetic energy of the real firearms with their analogous airsoft handgun yields starkly different energy capability. While the Beretta airsoft handgun has a kinetic energy of .13 joules, the actual Beretta firearm has a kinetic energy of 540.7 joules. This underscores how although these NPGs are similar to firearms in

[82] *Id.*
[83] *Id.*
[84] *Texan SS*, Airforce Airguns, https://www.airforceairguns.com/The-TexanSS-by-AirForce-Airguns-s/136.htm (last visited Dec. 20, 2019).
[85] *Id.*
[86] *Air Venturi Flat Point .45 Cal, 405 gr.*, Air Gun Depot, https://www.airgundepot.com/air-venturi-457-caliber-405-grain-flat-point-50-count-pellet.html (last visited Dec. 20, 2019); *Aeromagnum Lone-Star HP .457 Cal*, 259 gr., Air Gun Depot, https://www.airgundepot.com/am-lone-star-hp-light-457-cal-245-gr-50-ct.html (last visited Dec. 20, 2019).
[87] *Texan SS*, Airforce Airguns, https://www.airforceairguns.com/The-TexanSS-by-AirForce-Airguns-s/136.htm (last visited Dec. 20, 2019).
[88] B.B. Pelletier, *Everything You Need to Know about Airsoft BBs*, PyramydAir (Mar. 25, 2005), https://www.pyramydair.com/blog/2005/03/everything-you-need-to-know-about-airsoft-bbs/
[89] *FPS Chart for Airsoft Guns*, Airsoft Master, https://www.airsoftmaster.com/fps-chart-for-airsoft-guns/ (last visited Dec. 20, 2019).

physical appearance, they cannot be more different in terms of lethality and ability to inflict deadly harm. Those specific types of guns are relevant because they replicate common handguns that would most likely be used by a perpetrator in the committing of a crime. This results from a matter of practicality, as most crimes involving weapons would not involve assault rifles as they are difficult to conceal, and often more expensive. Due to the power of NPG handguns, power should carry the most weight in determining statutory law regarding NPGs.

The following NPGs listed are handguns that are modeled off of generic handgun firearms. These types of NPGs would likely be involved if someone were to commit a crime using these NPGs to give the impression they were an actual firearm, as their physical appearance is based off the real fire arm models.

A. Beretta 92 FS Electric Air soft pistol: This NPG is a handgun that fires 3.09 grain pellets capable of traveling at 150 FPS from a sixteen-round magazine.[90] Its force of kinetic energy equals a total of 0.2 joules. This compares with the actual Beretta 9 mm firearm that can project 540 joules of energy.

B. Lancer Tactical MK25 Electric Air soft AEP pistol: This electric powered air soft gun is capable of firing 3.09 grain airsoft pellets at a rate of 220 FPS.[91] This equals a kinetic energy of 0.45 joules.

C. WG M9 CO2 Metal Blowback Air soft pistol: This NPG handgun is CO2 powered and is capable of firing 3.09 grain airsoft pellets from a 15 round magazine at a rate of 500 FPS equaling a total of 2.33 joules of kinetic energy.[92]

5) Paintball guns. Like airsoft guns, paint-ball guns typically used for recreation. A paint-ball gun fires balloon type balls filled with paint and can cause bruising or welts in absence of protective gear.[93] Fired using CO2 tanks or compressed air, a large CO2 tank atop the gun contains small paint filled balls.[94] Depending on the size of the tank, different guns can store different quantities of paint-balls. Paint-ball guns typically feature a muzzle velocity of 280 FPS.[95] For example, a 9 oz. bottle can shoot 350 paint-balls, while a 12 oz. can shoot 500 and 20 oz. 900 paint-balls at a rate of up to 350 FPS.[96]

The first paintball guns bore little resemblance to actual firearms and would not be mistaken for a real gun by anyone but the most novice spectator. However, these NPGs have evolved, with some models more closely resembling actual firearms. Regardless, paintball guns are often clustered together with BB guns.[97] Because of their obvious outward ap-

[90] *Beretta 92FS Electric Airsoft Pistol, Black AEP,* Airsoft Station, www.airsoftstation.com/beretta-92fs-electric-airsoft-pistol-black-aep/ (last visited Dec. 20, 2019).

[91] *Lancer Tactical MK25 Electric Airsoft AEP Pistol,* Airsoft Station, https://www.airsoftstation.com/lancer-tactical-mk25-electric-airsoft-aep-pistol/ (last visited Dec. 20, 2019).

[92] *WG M9 CO2 Metal Blowback Airsoft Pistol,* Airsoft Station, https://www.airsoftstation.com/wg-m9-co2-metal-blowback-airsoft-pistol/ (last visited Dec. 20, 2019).

[93] *How Does a Paintball Gun Work?*, The Elite Drone, https://www.theelitedrone.com/how-does-a-paintball-gun-work/ (last visited Dec. 20, 2019).

[94] *Id.*

[95] Gary Dyrkacz, *A Theoretical Treatment of Paintball Dynamics*, Results Section, http://lennon.csufresno.edu/~nas31/nsa/pballResults.html (last visited Dec. 20, 2019).

[96] *Paintball CO2 Tanks*, Tippman Parts, https://www.tippmannparts.com/Paintball-CO2-Tanks-Bottles-s/66.htm (last visited Dec. 20, 2019).

[97] Robert E. Walker, Cartridges and Firearm Identification 226 (1st ed. 2012).

pearance, paint-guns are rarely used in criminal episodes to emulate firearms. Regardless, the paint-ball gun is often clustered together with BB guns.

Injuries from BB guns. Injury rates for BB guns have been steadily declining since the 1990's.[98] For those aged 19 or younger, the 1980's and early 1990's saw an increase in non-fatal injuries.[99] Peaking at 32.8 per 100,000 people in 1992 but steadily declining throughout the 1990's to 18.3 injuries per 100,000 in 1999.[100] From 1993-1999, an estimated 122,068 people 19 or younger were treated for non-fatal BB gun injuries in U.S. emergency rooms.[101] This calculates to an annual average of 20,345 cases of non-fatal injuries from BB guns. Also, between 1993 and 1999, 65.8% of BB gun injuries were unintentional for those between 15 and 19, only 13% were those used in an assault.[102] BB gun injuries among youth continued to decline throughout the 2000's.[103] By 2005, injuries were occurring at a rate of 17.5 injuries per 100,000 people.[104] By 2015, 11 per 100,000 people 18 or younger suffered non-fatal injuries as a result of BB guns.[105] Ninety percent of those 18 or younger afflicted with BB gun injuries did not require major treatment when taken to the emergency room.[106] Further, the majority of children are evaluated and discharged from the emergency department without treatment (90%), while children with more significant injuries are either admitted directly (5%) or transferred to a higher level of care (2%).[107]

Of course, the most common example of persons advocating for serious bodily injury capability is that a BB gun could "put an eye out" which would generally be considered serious bodily harm. While basketball, baseball, and softball injuries were more common, NPGs accounted for the more serious eye injuries and have been greatly increasing, probably due to the proliferation of NPGs in the marketplace as well as increasing power in newer models.[108] The most common sports and recreation activities and equipment associated with eye injuries were basketball (15.9%), baseball and softball (15.2%), and NPGs (10.6%).[109] According to one study, in 2012 roughly 3,161 children were treated in US emergency departments for NPG related eye injuries.[110] That study only looked at children "treated." Therefore, not all of these injuries can be said to have resulted in impairment or considered serious bodily harm.[111] Ultimately, the "put an eye out" possibility is very subjective and subject to confirmation bias of the listener, and therefore not useful to the practitioner.

98 M H Nguyen et al., *Trends in BB/Pellet Gun Injuries in children and Teenagers in the United States, 1985–99*, Injury Prevention 185, 185–91 (2002), https://injuryprevention.bmj.com/content/injuryprev/8/3/185.full.pdf.
99 *Id*. at 185.
100 *Id*.
101 *Id*. at 186.
102 *Id*. at 187, 190.
103 Erik G. Pearson et al., *Keeping an eye on Bb/pellet Guns and Children – United States Injury Patterns and Trends Between 2005-2015*, Pediatrics, Jan. 2018, at 1, https://pediatrics.aappublications.org/content/141/1_MeetingAbstract/71.
104 *Id*.
105 *Id*.
106 *See id.*
107 *Id*.
108 Krystin N. Miller et al., *Pediatric Sports–and Recreation–Related Eye Injuries Treated in US Emergency Departments*, 141 Pediatrics 1, 1 (Feb. 2018), https://pediatrics.aappublications.org/content/pediatrics/141/2/e20173083.full.pdf.
109 *Id*. at 4.
110 Rachel Lee & Douglas Frederick, *Pediatric eye injuries due to nonpowder guns in the United States*, 19 J. Am. Ass'n for Pediatric Ophthalmology and Strabismus 163, 163–64 (2015), https://www.jaapos.org/article/S1091-8531(15)00070-1/pdf (The treatment of roughly 3,161 children in 2012 could be characterized as a "crisis" or as "de minimis" depending on the bias of the speaker, and neither characterization could be falsified).
111 *Id*. at 167.

Crime statistics. As discussed earlier, many NPGs produced by manufacturers are designed to resemble real firearms. Law enforcement can often confuse these for real firearms and criminals can exploit the similar appearance of these BB guns to commit crimes. Unfortunately, the FBI does not track the use of NPGs in its uniform crime report. However, while an older study, the Bureau of Justice Statistics attempted to quantify the uses of NPGs in crime.[112] They found that between 1985 and 1989, 471 incidents have occurred where a police officer had warned or threatened the use of force because they believed a NPG possessed by a suspect to be a real firearm.[113] Crimes committed using NPGs most often involve handguns replicating the appearance of real firearms while rifles are more rare.[114]

Between 1985 and 1989, 5,654 robberies were reported involving imitation guns, for a total of 15 percent of all robberies in this time period.[115] Between 1985 and 1989, 4,329 assaults were committed involving NPGs.[116] During this same period, 19,107 NPGs were seized by law enforcement because they were involved in committing criminal activities or illegally owned.[117]

Potential Objective Test. The findings herein support an objective approach to determining if an NPG is a deadly weapon. A potential energy cutoff could distinguish between different types of BB guns. Any NPG with a muzzle energy of under 4 joules could be objectively considered incapable of serious bodily harm as a projectile firing device. For example, the Daisy Manufacturing Company has divided its NPGs into different categories of power based on muzzle velocities.[118] Daisy BB guns intended for "young shooters" have a muzzle velocity of 275 to 350 FPS, equating to approximately 2 joules of projected energy.[119] Daisy Powerline Models "not intended for children under 16," according to the company's website, have a muzzle velocity of 550 to 800 FPS" equating to a minimum of 7 joules of energy projection.[120] Hong Kong regulates NPGs using a very strict threshold of 2 joules, classifying any air gun discharging muzzle velocity greater than 2 joules as a firearm.[121] While the precise joules amount might be the subject of further refinement and study, the authors would suggest, that a number between 2 and 6 joules is appropriate given the distinctions between the different types of NPGs described herein. Using joules as a measure of capability provides an objective way to distinguish between high power and low power models. Of course, actual use as a bludgeon would place it in a different category, just as the use of any object as a bludgeon would place it in that category. This type of simple distinction would have the added benefit of being objectively determined – always an asset in the law that struggles with locating objective tests.

Conclusion. Unlike other deadly weapons (such as firearms), most BB guns are not designed to kill or inflict serious bodily harm. The law should recognize this distinction as

[112] Craig Perkins, *National Crime Victimization Survey, 1993-2001: Weapon Use and Violent Crime*, U.S. Dep't of Just. 3 (Sept. 2003), https://www.bjs.gov/content/pub/pdf/wuvc01.pdf.
[113] David L. Carter et al., *Toy Guns: Involvement in Crime and Encounters with Police*, U.S. Dep't of Just. 34 (June 1990), https://www.bjs.gov/content/pub/pdf/tg-icep.pdf.
[114] *See id*. at 31–32.
[115] *Id*. at 28–29.
[116] *Id*. at 32.
[117] *Id*. at 33.
[118] Sabrina K. Presnell, *Federal Regulation of BB Guns: Aiming to Protect Our Children*, 80 N.C. L. Rev. 975, 982–83 (2002).
[119] *Id*.
[120] *Id*. at 983.
[121] CL Tsui et al., *Ball Bearing (BB) Gun Injuries*, 17 H.K. J. of Emergency Med. 488, 491, (Nov. 2010), https://journals.sagepub.com/doi/pdf/10.1177/102490791001700510.

well as the significant differences between BB guns and firearms in terms of their power and damage capabilities. Most crimes committed with NPGs are handguns as a matter of practicality for the perpetrator. Since the energy projection capabilities of most common NPG handguns cannot be characterized as deadly, a defense attorney should scrutinize any government allegations that a handgun style NPG is "likely to cause death or inflict major bodily injury." Ultimately, the question of BB guns/NPGs and their lethal capabilities is treated as a question of fact to be decided by a jury or fact finder on a case by case basis. Those attorneys involved in cases involving NPGs must understand the complexities of these weapons and how diverse they are, in order to effectively advocate for their client.

About the AUTHOR

Steven N. Gosney is an Assistant Public Defender handling criminal appeals in the Fifth District of Florida. He was recently promoted to capital appeals handling direct appeals of indigent clients sentenced to death in the 5th District of Florida. He holds a Florida BAR board certification in criminal trial. His wide ranging experience includes six years as an Assistant State Attorney, six years in private practice handling civil litigation. Prior to law school, Mr. Gosney worked for seven years in nonprofit association management, including three and a half years as executive officer of the Volusia County Homebuilder's Association.

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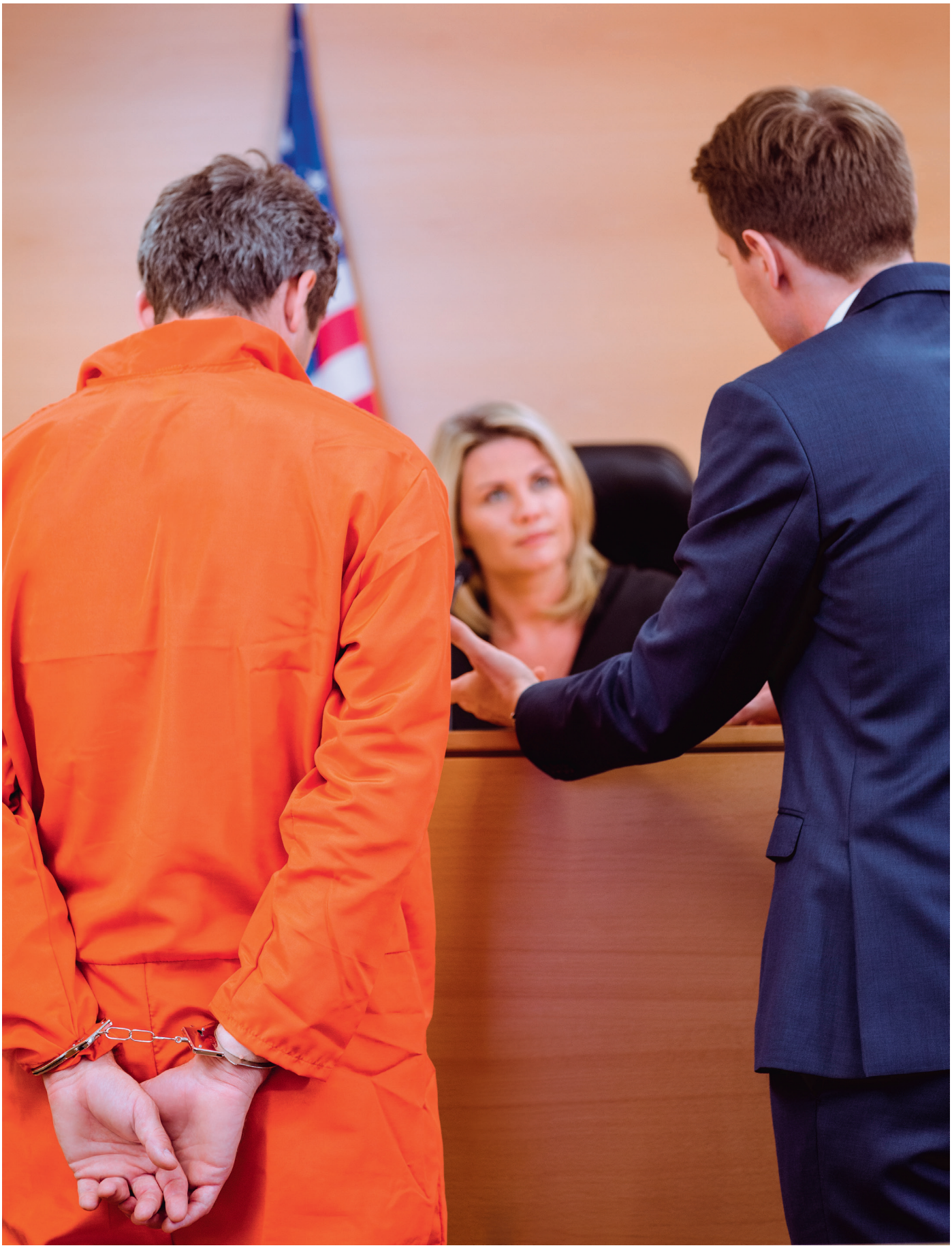

Punished For Poverty

Andrew Rock[*]

Ineffective assistance of counsel is rampant in death penalty cases. Lawyers defending capital cases are frequently inexperienced, overworked, and underfunded. This results in defendants receiving the death penalty not because of their crimes, but because of their lawyers. This is due in large part to the lax standards for effective assistance of counsel the Supreme Court established in Strickland v. Washington. Strickland *also imposes a massive burden upon defendants who seek relief for ineffective assistance of counsel. This enables ineffective assistance of counsel to continue unabated. This system violates the Sixth Amendment right to effective assistance of counsel and undermines the crucial moral imperatives of retributivism. Retributivism requires that each offender receive punishment for their individual deeds, not the failings of their attorney. These massive injustices violate the values of people on both sides of the political divide. Thus, this problem represents an opportunity for a fractured country to unite behind a common cause of justice. Solving it will require legislatures to fund public defenders and appointed defense counsel, and for the Supreme Court to modify* Strickland *and replace it with a new standard.*

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Introduction

"I have yet to see a death case, among the dozens coming to the Supreme Court on [the] eve of execution petitions, in which the defendant was well represented at trial."
—Justice Ruth Bader Ginsburg[1]

Justice Ginsburg made this remark in 2001, when speaking about the grave injustices inadequate defense counsel creates. This problem is even more serious in the context of capital punishment, as it is literally a matter of life and death. The death penalty represents the ultimate punishment for those who have committed the worst offenses. Unfortunately, the state often executes defendants who had the worst lawyer instead of those who committed the worst offenses.[2]

This violates the Sixth Amendment, which protects a defendant's right to effective assistance of counsel.[3] It also violates the moral requirements of retributivism, which demand that the state punish offenders for their heinous deeds and not for the incompetence of their lawyers.[4]

One striking example of this problem is the story of Jerry White, who was on trial for capital murder in Florida.[5] The judge required White's defense attorney to report for inspection in chambers each morning to see if he was drunk or on drugs.[6] A witness later reported that the defense attorney had used cocaine, methamphetamines, marijuana, and morphine during trial recesses.[7] He also drank frequently.[8] A man's life was at stake, and his defense was in the hands of a man who needed daily inspections to ensure he was not too drunk or high to function. Florida executed White in 1995.[9]

White is one of many defendants whose lawyers' incompetence had potentially lethal consequences.[10] Judy Haney went to trial in Alabama after having a hitman kill her abusive husband.[11] Hers was a sympathetic case—there were hospital records of his physical abuse of both her and their children.[12] It is also rare for someone who does away with their abusive spouse to receive the death penalty.[13] Despite these relatively favorable conditions, she received a death sentence.[14] This is likely due in part to the atrocious behavior of her lawyers.[15] One of them was so drunk the court had to temporarily delay Haney's trial and held him in contempt for his conduct.[16] The lawyers also failed to find extant hospital records demonstrating the abuse her husband had inflicted on the family.[17] In addition, they failed to put

1 Ruth Bader Ginsburg, J., In Pursuit of the Public Good: Lawyers Who Care (Apr. 9, 2001).
2 Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards*, 51 Wayne L. Rev. 129, 131 (2005).
3 U.S. Const. amend. VI.
4 Nelson T. Potter, Jr., *The Principle of Punishment is a Categorical Imperative*, *in* Autonomy and Community: Readings in Contemporary Kantian Social Philosophy (Jane Kneller & Sidney Axinn eds., 1998).
5 Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 Neb. L. Rev. 425, 426 (1996); *see* White v. Florida, 664 So. 2d 242, 243 (1995).
6 Kirchmeier, *supra* note 5, at 426.
7 Kirchmeier, *supra* note 5, at 426.
8 Kirchmeier, *supra* note 5, at 426.
9 Kirchmeier, *supra* note 5, at 426.
10 Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1837–41 (1994) [hereinafter Bright, *Counsel for the Poor*].
11 Bright, *Counsel for the Poor*, *supra* note 10, at 1835–36.
12 Bright, *Counsel for the Poor*, *supra* note 10, at 1835.
13 Bright, *Counsel for the Poor*, *supra* note 10, at 1836. *But see* Haney v. Alabama, 603 So. 2d 368 (Ct. Crim. App. 1991), *cert. denied*, 507 U.S. 925 (1993) (affirming a death penalty conviction for a defendant who hired a hitman to murder her husband).
14 Bright, *Counsel for the Poor*, *supra* note 10, at 1836.
15 Bright, *Counsel for the Poor*, *supra* note 10, at 1835–36.
16 Bright, *Counsel for the Poor*, *supra* note 10, at 1835.
17 Bright, *Counsel for the Poor*, *supra* note 10, at 1835.

the defendant in contact with their expert witness on domestic abuse until the night he was supposed to testify on their behalf.[18] This incompetence likely contributed to Haney receiving an unusual death sentence.[19]

A more recent example of the perils of capital attorney incompetence is *Maples v. Thomas*.[20] In this case, the defendant's lawyers quit and left their firm without filing his appeal.[21] The defendant was not aware of this until after the deadline for his appeal had expired.[22] His new attorney explained that Alabama might have executed this man for a careless bureaucratic oversight.[23] In 2012, the Supreme Court granted his habeas petition and remanded the case.[24] The Court held that he deserved another chance in court after his lawyers abandoned him.[25] His case remains ongoing.[26]

There are a litany of stories like these, tales of lawyers entrusted with matters of life and death who cannot be bothered to sober up or do basic research on their client's case.[27] There are also the well-meaning but hopelessly overworked public defenders who genuinely try to help their clients.[28] They are overrun with hundreds of indigent clients and simply lack the time and funding to prepare a proper capital defense.[29] Still other capital defendants receive appointed lawyers who know nothing about the unique intricacies of a capital case. They are thus woefully unprepared to adequately represent their clients.[30]

This problem has repeatedly appeared before the Supreme Court. The Court's jurisprudence surrounding effective assistance of counsel ultimately led to the case *Strickland v. Washington*. In *Strickland,* the Court held that a petitioner must demonstrate both incompetence by his attorney and that the incompetence likely prejudiced his trial in order to prevail on an ineffective assistance of counsel claim.[31] Courts are to measure deficiency by the standard of a reasonable lawyer in the attorney's field of practice.[32]

While it sounds functional on paper, in practice, this standard makes it nearly impossible for petitioners to demonstrate deficient performance by their attorney.[33] Ineffective assistance of counsel often means that attorneys fail to preserve errors for appeal, making it difficult for an appellate court to see their ineffectiveness.[34] Even if an appellant manages to demonstrate ineffectiveness of counsel, they

[18] Bright, *Counsel for the Poor*, *supra* note 10, at 1835–36.
[19] Bright, *Counsel for the Poor*, *supra* note 10, at 1835–36.
[20] *Supreme Court: Alabama Man Facing-Execution Because Attorneys Left Without Filing Appeal*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/supreme-court-alabama-man-facing-execution-because-attorneys-left-without-filing-appeal.
[21] *Id.*
[22] *Id*.
[23] *Id*.
[24] Maples v. Thomas, 565 U.S. 266, 289–90 (2012).
[25] *Id*. at 288–89.
[26] Maples v. Ala. Dep't of Corrections, 729 F. App'x. 817, 820 (11th Cir. 2018) (vacating the conviction and remanding the case).
[27] See Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel,* 35 Pepp. L. Rev. 77, 91 (2008), Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. Rev. L. & Soc. Change 59, 62–63 (1986), and Bright, *Counsel for the Poor*, *supra* note 10, at 1835, for heart-rending stories of lawyer incompetence that caused death or serious consequences.
[28] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 Geo. Wash. L. Rev. 1564, 1578–79, 1603 (2018).
[29] Karen Houppert, Chasing Gideon: The Elusive Quest for Poor People's Justice 234 (2013).
[30] Bright, *Counsel for the Poor*, *supra* note 10, at 1842.
[31] Strickland v. Washington, 466 U.S. 668, 698 (1984).
[32] *Id.* at 689.
[33] *See generally* Rigg, *supra* note 27, at 84–94 (detailing various key accounts of petitioners' struggle to overcome the *Strickland* threshold).
[34] Bright, *Counsel for the Poor*, *supra* note 10, at 1862.

still must prove that it prejudiced their trial.[35] Courts are loathe to find that even egregious errors prejudiced an accused. This means that defendants, in particular capital defendants, often have no recourse when their lawyers have given them a lukewarm and shoddy defense instead of a zealous and thorough one.[36]

Another problem with this system is that it violates the moral requirements of retributivism. Retributivism demands that society punish offenders according to their just deserts.[37] The key to this approach that each individual is responsible for his or her own actions and should receive punishment or reward accordingly.[38] Thus, to give someone less punishment than their crime warranted would be unjust, as would punishing them for something they never did.[39] To punish capital defendants for the ineptitude of their lawyer—the deeds of another individual—is thus abhorrent to a retributivist. It is no more logical than executing someone for a murder they did not commit. The current system often executes the wrong offenders because of inadequate lawyering, which makes it incompatible with retributivism.[40]

In addition to the injustice of punishing the innocent (or meting out overly-harsh punishments), it is also wrong to let those who deserve execution live.[41] Kant spoke extensively about the duty of a society to execute those who deserve death.[42] The massive injustices of the status quo create backlash against the death penalty, prompting over-zealous attempts at reform.[43] The result is that some of those who deserve to die live. The governor of Illinois once went so far as to stop the execution of every single inmate on Illinois' death row as a result of the flaws in the system.[44] While there were some on death row who deserved to live, there were also those whose deeds warranted death as retribution.[45] It was an injustice to spare them, and the present flawed system is to blame for this travesty of justice.[46]

Retributivism also mandates that the state restrict its punitive power to those who have voluntarily committed crimes.[47] This is because a society based upon personal liberty requires that restraint.[48] It is also because retributivism mandates that both institutions and individuals accept the consequences of their actions.[49] Since the state's actions have drastic effects on offenders' lives, it is responsible to them. This includes responsibility for providing them with a fair trial.

Thus, this article argues that the status quo of rampant ineffective assistance of counsel in capital cases violates both Sixth Amendment requirements and the moral demands of retributivism. The Sixth Amendment mandates assistance of counsel for criminal defendants.[50] Both logic and volumes of precedent dictate

35 Goodpaster, *supra* note 27, at 64.
36 *See* Goodpaster, *supra* note 27, at 78.
37 Arthur Shuster, Punishment In The History of Political Philosophy 11 (2016).
38 *Id*.
39 *Id*.
40 Williams, *supra* note 2, at 131.
41 Shuster, *supra* note 37, at 86.
42 Shuster, *supra* note 37, at 104.
43 *See, e.g.,* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutations of Death Row and the Abolition of the Death Penalty*, 40 Harv. C.R.-C.L. L. Rev. 407, 408 (2005) (detailing Illinois governor's controversial decision to commute several convicted criminals' sentences).
44 *Id.* at 408–09.
45 Shuster, *supra* note 37, at 41.
46 Shuster, *supra* note 37, at 43.
47 *See generally* Anthony Duff & Andrew von Hirsch, *Responsibility, Retribution and the Voluntary: A Response to Williams*, 56 Cambridge L.J. 103 (1997) (questioning whether universal morals should guide state activities and institutions).
48 Duff & von Hirsch, *supra* note 47, at 105.
49 Shuster, *supra* note 37, at 102.
50 U.S. Const. amend. VI.

that assistance of counsel means effective assistance of counsel, so systemic ineffective counsel for defendants is unconstitutional.[51] It is also morally abhorrent under retributivist penal principles. Retributivism calls for offenders' punishment to be a result of their deeds.[52] It also requires the state to take responsibility for those whose liberty it truncates. Since ineffective counsel results in offenders receiving punishment for another's incompetence, it is incompatible with retributivism. Failure to provide defendants with adequate counsel also means that the state is abdicating the duty it incurred when it took the defendant's liberty.

This is especially true in the context of the death penalty, because any errors in matters of life or death are final and irrevocable.[53] Indeed, the unique nature of death has prompted the Supreme Court to impose unique restrictions upon the death penalty in the past.[54] This enormous problem will require both Congress and state legislatures to provide adequate funding for the death penalty. It will also require the Supreme Court to overturn *Strickland* and implement a new standard for ineffective assistance of counsel claims. This standard will require the defendant to prove his lawyer made errors "reflecting counsel's lack of skill, judgment, or diligence."[55] The burden of proof will then be on the state to prove that these errors were not prejudicial to the defendant's trial.[56]

In Part I, this article will explore the current problems with ineffective assistance of counsel in capital cases. Part II will give a brief overview of Sixth Amendment jurisprudence and explain how current Sixth Amendment standards under *Strickland* are woefully lax and therefore unconstitutional. Part II will also demonstrate how this contributes to the problems in Part I by enabling them to continue. Part III will explain retributivism and why it makes effective assistance of counsel a moral imperative, especially in capital cases. Finally, Part IV will demonstrate how the depth and breadth of this problem mean that it tramples on both conservative and progressive values. This creates an incentive for a divided nation to unify in solving the problem. Both the constitutional and moral arguments against the status quo require legislatures to provide adequate funding for defense counsel. These arguments also require the Supreme Court to overturn *Strickland* and replace it with a new standard. This standard will make it easier for defendants to demonstrate incompetence by their attorneys. It will also require the government to prove a lack of prejudice to the defendant once he or she has established incompetence by their attorney.

I. The Problem of Ineffective Assistance

A. An Overview of the Problem of Ineffective Assistance of Counse

Fighting a criminal conviction in the United States without an attorney is akin to a ship navigating dangerous waters without proper maps or navigational equipment. The modern American legal system is complex and difficult to navigate, with arcane rules of procedure and evidence that would baffle even an in-

[51] McMann v. Richardson, 397 U.S. 759, 771 (1970).
[52] Duff & von Hirsch, *supra* note 47, at 107.
[53] *See* William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 Ohio St. L.J. 1109, 1111 n.3 (2010).
[54] Berry, *supra* note 53, at 1111.
[55] Haw. v. Aplaca, 837 P.2d 1298, 1305 (1992).
[56] William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 Wm. & Mary Bill Rts. J. 91, 165 (1995).

telligent and well-educated layman.[57] There is a significant risk that even someone who is innocent could receive a conviction simply because they had no idea how to defend themselves.[58]

The Founders recognized this problem when dealing with a far less complex legal system than the one in place today. They accordingly enshrined the right to counsel into the Sixth Amendment to the Constitution.[59] Ensuring the right to counsel is thus crucial to the legitimacy of a criminal conviction. Indeed, the Supreme Court has made it clear that this right is necessary to obtain a valid criminal conviction.[60]

Unfortunately, the current system often falls woefully short of the requirement of effective assistance, especially in capital cases. It is not uncommon for capital defendants to receive extremely poor assistance from incompetent lawyers, some of whom even admit their own incompetence and seek permission to withdraw.[61] Many attorneys defending capital cases have little experience with them. They therefore lack the specialized knowledge required to navigate the rules and procedures of a death penalty trial.[62] For example, a capital trial involves unique processes for juror selection. Juror selection is crucial for the outcome of a trial. An inexperienced lawyer who makes mistakes at this phase of the proceedings could thus condemn his client to death.[63]

The lawyers defending capital cases are often inexperienced. In some instances a judge appoints them to defend a capital case after they have only five days of legal practice behind them.[64] Even those attorneys who have trial experience may have such an overwhelming case load that they cannot devote nearly enough time to any individual case to adequately prepare for trial.[65] This state of affairs is shocking enough in non-capital cases, but in a death penalty case someone's life is on the line.

While poor lawyering is not the only problem in death penalty cases, the competence of a lawyer can often be the factor that determines whether someone lives or dies.[66] There are striking examples where two defendants have virtually identical cases but only the defendant with the better lawyer lives.[67] One such example is the case of John Eldon Smith.[68] Georgia executed him despite a violation of his Constitutional rights in the case.[69] His lawyer was apparently ignorant of this matter.[70] Conversely, his codefendant received a new trial because of the exact same constitutional issue.[71] He ultimately received only a life sentence, thanks in part to his lawyer's superior knowledge.[72]

Georgia bears the grim distinction of hosting another such injustice soon after Smith's case.[73] A mentally disabled defendant lost his case after a jury instruction that unconstitutionally flipped the burden of proof.[74]

57 Johnson v. Zerbst, 304 U.S. 458, 463 (1938).
58 Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).
59 Stephanos Bibas & Jeffrey L. Fisher, *The Sixth Amendment*, Constitution Center (last visited Dec. 20, 2019), https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vi/interps/127.
60 Zerbst, 304 U.S. at 467.
61 Bright, *Counsel for the Poor*, *supra* note 10, at 1862.
62 Houppert, *supra* note 29, at 35.
63 Williams, *supra* note 2, at 134.
64 Bright, *Counsel for the Poor*, *supra* note 10, at 1862.
65 Houppert, *supra* note 29, at 33–34.
66 Williams, *supra* note 2, at 133.
67 Williams, *supra* note 2, at 131.
68 Bright, *Counsel for the Poor*, *supra* note 10, at 1839–40.
69 Bright, *Counsel for the Poor*, *supra* note 10, at 1840.
70 Bright, *Counsel for the Poor*, *supra* note 10, at 1840.
71 Bright, *Counsel for the Poor*, *supra* note 10, at 1840.
72 Bright, *Counsel for the Poor*, *supra* note 10, at 1840.
73 Bright, *Counsel for the Poor*, *supra* note 10, at 1859.
74 Bright, *Counsel for the Poor*, *supra* note 10, at 1859.

Because his lawyer did not preserve the error for appeal, he did not receive relief and Georgia executed him.[75] His codefendant, who had a higher level of culpability, received a new trial over the same issue.[76] This is another situation where the defendants' lawyers, not their blameworthiness, determined their respective sentences. Another illustrative example of how a trial can hinge on quality lawyering is the trial of Robert Durst. A Texas jury acquitted Durst for killing and dismembering his elderly neighbor, then dumping the body in a river. Durst claimed self-defense. Durst was the son of a wealthy New York real estate magnate, and was able to hire an expensive legal team. This enabled him to escape charges that would have sent someone with lesser means to prison, if not death row.[77] Consider what would likely have happened if Durst had received an inexperienced and over-worked public defender instead of an expensive team of lawyers. It is highly unlikely that a jury would have acquitted him for killing his neighbor, chopping apart his body with an ax, then dumping it in a river in "self-defense" without elite lawyers to sell the story. This strange case helps to illustrate that the quality of one's lawyers, and not one's deeds, often determines the level of punishment afforded to a defendant.

Such cases serve to illustrate the problems within the death penalty system generally. The presence of a codefendant in some cases allows for precise side-by-side comparisons that demonstrate the danger of ineffective counsel. Other cases show that a good lawyer can sell a defendant's dubious self-defense claim after mutilating his elderly neighbor with an ax. These instances illustrate that "it is better to be rich and guilty than poor and innocent." When cases hinge on lawyer performance, incompetent lawyering can condemn someone to death regardless of their deeds.[78] A key factor enabling this problem to continue is the lax standards the Supreme Court set forth in *Strickland v. Washington*.[79]

B. How Strickland Enables Ineffective Assistance of Counsel

The Supreme Court held in *Strickland* that in order to prevail on an ineffective assistance of counsel claim, the petitioner must prove that his attorney acted in a manner that no reasonable attorney would, and that this incompetence so prejudiced his case that the results would likely have been different but-for this unreasonable behavior.[80] The Court made it clear from the start that they intended this standard to be "highly deferential" to lawyers, and that it would be a difficult burden for offenders to meet.[81]

Subsequent cases have entrenched this deference to lawyers. In *Harrington v. Richter*, the Court reiterated that their approach to lawyers is a "most deferential one," and that there is a "strong presumption" in favor of the lawyers whose performance they review.[82] This strong presumption makes prevailing on ineffective assistance of counsel claims a daunting task. In the decades following the decision, it became apparent that the burden of *Strickland* was almost impossible for defendants to over-

[75] Bright, *Counsel for the Poor*, *supra* note 10, at 1859.
[76] Bright, *Counsel for the Poor*, *supra* note 10, at 1859.
[77] Meghan Keneally et al., *Why Robert Durst Killed His Neighbor in His Own Words*, ABC News (Mar. 17, 2015), https://abcnews.go.com/US/robert-durst-killed-neighbor-words/story?id=29689667; Williams, *supra* note 2, at 129–31.
[78] Williams, *supra* note 2, at 130–31.
[79] Bright, *Counsel for the Poor*, *supra* note 10, at 1858.
[80] Strickland v. Washington, 466 U.S. 668, 699–700 (1984).
[81] *Id.* at 689.
[82] Harrington v. Richter, 662 U.S. 86, 105, 105 (2011) (quoting Yarborough v. Gentry, 540 U.S. 1, 8 (2003)).

come.[83] Justice Blackmun criticized *Strickland* for creating a high burden that fails to protect the rights of petitioners.[84] Other factors, such as the poverty of many defendants and difficulty of conducting appeals from prison make this situation even worse. Poor defendants often cannot afford counsel capable of navigating the appeals process. Even when good counsel is available, coordinating a case from prison is difficult, and deadlines are easy to miss.[85] All of this combined makes claims of ineffective assistance of counsel almost impossible to win.[86]

A case where the defendant successfully prevailed on an ineffective assistance claim demonstrates the extreme difficulty of doing so. The defendant's attorney in *Buck v. Davis* introduced an expert who testified that the defendant was more likely to reoffend because he was black.[87] The Supreme Court held that knowingly introducing evidence so incredibly damaging to one's own client was outside the bounds of what any reasonable lawyer would do.[88] The defendant's appeal thus satisfied the first prong of the *Strickland* test, and the Court found that he had received ineffective assistance of counsel.[89]

Although the outcome of *Buck v. Davis* was correct, it illustrates the extreme difficulty of prevailing under *Strickland*. It took the defendant's lawyer making an incredible blunder to reach this standard. It is also telling that the issue of race came up—this is an extremely sensitive topic. The fact that it required the lawyer to make such an obvious mistake with such a taboo issue to help the defendant succeed shows just how high a burden *Strickland* presents. What makes the situation even more worrisome is that numerous trial and appellate courts in Texas upheld this miscarriage of justice before it reached the Supreme Court.[90]

Other cases where the defendant's claim was unsuccessful further illustrate this point. In *Strickland* itself, the defendant's attorney decided not to present key mitigating evidence on his behalf.[91] The Court held that this arguable failure was a merely a strategic decision.[92] In *Wheat v. Johnson*, a psychiatrist found the defendant was delusional.[93] Subsequent MRI evidence revealed an empty cavity in a part of his brain regulating impulse and aggression.[94] The psychiatrist was willing to testify that the defendant was insane at the time of his crimes, and this was the "only viable defense available."[95] The lawyer decided not to have the psychiatrist testify, which occluded his client's best hope.[96] The Fifth Circuit held that this did not constitute ineffective assistance of counsel under *Strickland*.[97]

Even if one accepts the core assumption of *Strickland* and grants its unspoken premise that trial attorneys almost invariably deserve the benefit of the doubt, this situation would still be grim. Death is final and irrevocable, so even one instance of a defendant dying because of an attorney's incompetence would be a blight upon the justice system. But the situation is far worse—there is little basis for *Strickland's* key assumption that trial lawyers are overwhelm-

83 Williams, *supra* note 2, at 139.
84 Kirchmeier, *supra* note 5, at 438.
85 Goodpaster, *supra* note 27, at 79–80.
86 Goodpaster, *supra* note 27, at 79.
87 Buck v. Davis, 137 S. Ct. 759, 776–77 (2017).
88 *Id.* at 776.
89 *Id.* at 775.
90 *Id.* at 767–69.
91 Williams, *supra* note 2, at 138.
92 Williams, *supra* note 2, at 140.
93 *Id.* at 140; Wheat v. Johnson, 238 F.3d 357, 362–63 (5th Cir. 2001).
94 *Wheat*, 238 F.3d at 362–63.
95 *Id.* at 363.
96 *Id.*
97 *Id.*

ingly competent.[98] Indeed, even the justice who wrote *Strickland* conceded this point and wrote a scathing piece on the prevalence of trial lawyer incompetence.[99] Thus, *Strickland's* extreme deference to attorney performance is unwarranted, as it has no basis in fact.[100]

Strickland's false assumptions about attorney competence serve to enable deep-rooted problems in the criminal justice system. Recall the host of problems surrounding ineffective assistance of counsel in criminal cases—underfunded, overworked, and inexperienced lawyers—all of which point to deep flaws in the system.[101] By setting such an incredibly high bar for defendants to overcome and granting lawyers an unwarranted amount of deference, *Strickland* allows these problems to continue, which defrauds defendants of their right to counsel. This is a travesty when it occurs in any case. It is especially egregious in capital cases, when attorney incompetence can mean not only loss of liberty, but life itself.

Strickland's requirement that petitioners show prejudice to their case makes this situation even worse. Even if defendants can demonstrate that their lawyers were ineffective, *Strickland* requires them to prove that this prejudiced their case. This is a significant problem. It implicitly contradicts much earlier precedent, notably *Hamilton v. State of Alabama*.[102] In *Hamilton,* the Court explained that when someone lacks counsel (or, by logical extension, effective counsel), "the degree of prejudice can never be known."[103] That which "can never be known" is almost impossible to prove.[104] The Supreme Court therefore requires petitioners to prove something they admitted someone cannot prove.

One reason for this is that what is *missing* from the record is often the crucial factor that prejudiced a case.[105] For example, a major mistake of incompetent counsel is failing to preserve errors on the record for appeal.[106] If the error is not on the record, there is scant evidence of it, and little recourse for those it harms., This means that it is difficult to prove, and difficult to act upon if one can prove it. Another frequent error is failure to investigate important avenues of evidence or witness testimony.[107] Incompetent attorneys have failed to investigate alibi witnesses for their clients, damaging their cases irreparably.[108] Since the problem is what did not happen, there is little or no record of it.[109] Although these mistakes likely did prejudice the defendant's case, it will be almost impossible for the defendant to prove any of it on appeal.[110]

Strickland's problems thus mean in practice that defendants can only prevail on ineffective assistance of counsel claims in the most extreme cases.[111] Courts will rationalize an attorney's oversights as tactical decisions, even when the attorney stated that they were not.[112] Even if the defendant manages to overcome this prong of *Strickland*, he or she still must

98 Bright, *Counsel for the Poor*, *supra* note 10, at 1863.
99 Bright, *Counsel for the Poor*, *supra* note 10, at 1863.
100 Bright, *Counsel for the Poor*, *supra* note 10, at 1863.
101 Houppert, *supra* note 29, at 33–35.
102 Hamilton v. Alabama, 368 U.S. 52, 52 (1961).
103 *Id.* at 57.
104 *See id*.
105 Williams, *supra* note 2, at 138.
106 Williams, *supra* note 2, at 137.
107 Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. Soc'y 1, 17 (2010) [hereinafter Bright, *Right to Counsel*].
108 Williams, *supra* note 2, at 137.
109 Williams, *supra* note 2, at 137.
110 Williams, *supra* note 2, at 137.
111 Williams, *supra* note 2, at 137.
112 Richard L. Gabriel, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. Penn. L. Rev 1259, 1271 (1986).

prove that the errors prejudiced the case.[113] The Supreme Court has admitted that this is virtually impossible.[114] Justice Marshall pointed this out in his scathing dissent in *Strickland*.[115] Thus, claimants can only prevail in the most egregious cases such as *Buck v. Davis*, where the defense attorney calls an expert who testifies *against* the defendant.[116]

Conversely, claimants whose attorneys' performances were deficient, but not egregiously deficient enough to overcome the hurdles of *Strickland* will have no recourse.[117] If the attorney's performance was of dubious competence but not glaringly mistaken, the courts will likely rationalize any mistakes or oversights as strategic choices.[118] Even if the attorney's errors are so obvious that a court will acknowledge their existence, the defendant must still prove prejudice.[119] The Supreme Court has admitted that proving prejudice is nearly impossible.[120] The practical result of this is that courts brush over volumes of attorney error and treat defendants as if they are guilty either way.

Strickland's standard thus creates a massive burden for anyone seeking to prove ineffective assistance of counsel. By making its existence hard to prove, *Strickland* enables this problem to continue without recourse for those it harms.

II. *Strickland* Is Unconstitutional

Strickland enables a system that denies defendants effective assistance of counsel. The Sixth Amendment to the United States Constitution grants defendants the right to counsel, and this necessarily entails a right to effective assistance of counsel.[121] Thus, a criminal justice system that denies defendants the right to effective assistance of counsel is unconstitutional because it violates the Sixth Amendment. Since *Strickland* enables this unconstitutional status quo via its loose standards, it is therefore unconstitutional.

The right to effective assistance of counsel is a logical consequence of the right to assistance of counsel. To argue otherwise would be absurd—there is no purpose to assigning a defendant an attorney if that attorney does not effectively help the defendant. This would be akin to proclaiming that someone has the right to free speech, but not allowing them to say anything. Thus, the right to effective assistance of counsel is logically concomitant with the right to counsel.

The Supreme Court has repeatedly acknowledged this in numerous cases. Indeed, the Court even went so far as to reiterate it in *Strickland* itself.[122] Quoting *McMann v. Richardson*, the Court emphasized that "the right to counsel is the right to the effective assistance of counsel."[123] The Court in *McMann* explained, "defendants facing felony charges are entitled to the effective assistance of competent counsel" because "if the right to counsel guaranteed by the Constitution is to serve its purpose, de-

[113] Gabriel, *supra* note 112, at 1260.
[114] *See* Hamilton 368 U.S. at 55.
[115] Strickland v. Washington, 466 U.S. 668, 707–08 (1984) (Marshall, J., dissenting).
[116] Buck v. Davis, 137 S. Ct. 759, 777 (2017).
[117] Williams, *supra* note 2, at 139.
[118] Williams, *supra* note 2, at 139.
[119] Williams, *supra* note 2, at 139.
[120] *See* Hamilton, 368 U.S. at 55.
[121] Strickland, 466 U.S. at 686.
[122] *Id.*
[123] *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

fendants cannot be left to the mercies of incompetent counsel."[124]

Criminal defendants thus have a constitutional right to effective assistance of counsel.[125] Yet the current criminal justice system is rife with ineffective assistance of counsel. Indeed, the quality of one's lawyer has become determinative in many criminal cases.[126] The justice system consequently executes many capital defendants due to the poor quality of counsel their lawyers provided.[127] This denies them their Sixth Amendment right to counsel. This endemic ineffectiveness is unconstitutional, because each of those defendants had a right to effective assistance of counsel.[128]As demonstrated in Part I, *Strickland* enables this system to continue by making it difficult for defendants to prevail on ineffective assistance claims, even when their case is valid.[129] Strickland's two-prong test imposes an enormous burden of proof on defendants.[130] It requires them to prove ineffectiveness on the part of their lawyer.[131] Proving ineffectiveness by the lawyer post-facto is an incredibly difficult task. One of the key mistakes ineffective lawyers make is a failure to preserve key errors for appeal.[132] This makes it difficult to demonstrate their ineptitude, because the trial court's record will be devoid of the necessary evidence.[133]

Even if a defendant manages to adduce the necessary evidence, the Supreme Court was explicit that the *Strickland* standard is "highly deferential" to attorneys.[134] This means that courts will find that the attorney was not ineffective, even in the face of evidence to the contrary.[135] The deference to lawyers often results in appellate courts creating post-hoc rationalizations of attorneys' errors and neglect as tactical decisions.[136] Even if a defendant manages to overcome the first hurdle of *Strickland*, they must also demonstrate that their lawyer's errors prejudiced their trial. The Supreme Court previously acknowledged that prejudice from ineffective assistance of counsel is unknowable.[137] What one cannot know, one cannot prove. This tasks defendants with proving something that is impossible to prove. Even when defendants can adduce evidence to this effect, courts are hesitant to find that prejudice occurred.[138] This allows the flaws in the system to continue, with no consequences for anyone save for the hapless defendants whose inadequate lawyers doom them to death or incarceration.

Strickland thus places a massive burden upon petitioners who seek to demonstrate a violation of their rights. The result is that *Strick-*

[124] McMann, 397 U.S. at 771 n.14. The Court noted that, "[s]ince Gideon v. Wainwright (citation omitted), it has been clear that a defendant pleading guilty to a felony charge has a federal right to the assistance of counsel." *Id.*

[125] *Id*.

[126] Bright, *Counsel for the Poor*, *supra* note 10, at 1839–40.

[127] *See* Bright, *Counsel for the Poor*, *supra* note 10, at 1837–41. A similar problem exists in civil cases, and the Supreme Court has steadfastly refused to hold that civil litigants have a right to counsel. *See, e.g.* Lassiter v. Dep't of Soc. Serv., 452 U.S. 18 (1981). With many civil cases making life-changing determinations such as losing a home or even receiving jail time for civil contempt, this problem extends beyond the criminal justice side of the American legal system. *See* Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing* Lassiter v. Department of Social Services, 59 Cath. U. L. Rev. 1057 (2010) (arguing that due process concerns remain compelling reasons for court-appointed representation in civil cases).

[128] U.S. Const. amend. VI.

[129] Bright, *Right to Counsel*, *supra* note 107, at 18.

[130] Bright, *Right to Counsel*, *supra* note 107, at 22.

[131] Bright, *Counsel for the Poor*, *supra* note 10, at 1862.

[132] Bright, *Counsel for the Poor*, *supra* note 10, at 1862.

[133] Bright, *Counsel for the Poor*, *supra* note 10, at 1862.

[134] Strickland, 466 U.S. at 669.

[135] Williams, *supra* note 2, at 138.

[136] Williams, *supra* note 2, at 140–41.

[137] Hamilton, 368 U.S. at 55.

[138] Rigg, *supra* note 27, at 87.

land's harsh standard serves to deny defendants their Sixth Amendment rights, because it effectively blocks their recourse when their counsel was ineffective.[139]

This undermines the entire purpose of the Sixth Amendment. The Sixth Amendment exists to ensure that each defendant receives a fair trial.[140] James Madison made it clear that the "prerequisites" of a fair trial were necessary to secure the rights of the people.[141] These prerequisites included the right to assistance of counsel.[142] In other words, effective assistance of counsel is a necessary condition for a fair trial.[143] Thus, to deny a defendant effective assistance of counsel is to undermine the Founders' purpose of the Sixth Amendment—a fair trial to preserve the liberty of the people.[144]

Denying a defendant their Sixth Amendment rights creates a Constitutional problem extending far beyond the Sixth Amendment.[145] As Justice Brennan said, a key role of the Sixth Amendment is "to give substance to other constitutional and procedural protections afforded criminal defendants."[146] Due to the complex nature of today's legal system, asserting the protections of the Bill of Rights often requires the assistance of counsel.[147] Thus, denying a defendant effective assistance of counsel taints the criminal procedure with potential violations of numerous Constitutional rights.[148]

Strickland's harsh burden of proof serves to enable ineffective assistance of counsel by making it almost impossible to "prove" under *Strickland's* test.[149] This allows ineffective lawyering to continue unabated, with the consequent violation of ever-more defendants' rights.[150] *Strickland's* current test is therefore unconstitutional, because it allows the criminal justice system to continually undermine the entire purpose of the Bill of Rights.[151]

III. The Status Quo Is Incompatible With Retributivism

Not only does this system violate defendants' Constitutional rights, it is fundamentally immoral. Retributivism provides a moral basis for rejecting the status quo. This stems from retributivism's analysis of what it is to be human.[152] To a retributivist such as Immanuel Kant, an essential part of what made someone human was possessing the ability to reason.[153] A result of this rationality was the ability to appreciate the consequences of one's actions.[154] Man's capacity to reason thus demands that society treat every individual as a rational being (with obvious exceptions for people such as children and the mentally disabled) who is capable of making their own decisions and accepting the consequences.[155]

Thus, those who work should receive a wage, and those who commit crimes should receive punishment. To deny a worker their fairly earned wages would be unjust, because those wages are a consequence of that per-

[139] Rigg, *supra* note 27, at 87.
[140] Randolph N. Jonakait, *Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. Crim. L. & Criminology 713, 717 (1992).
[141] Gabriel, *supra* note 112, at 1268.
[142] Gabriel, *supra* note 112, at 1268. These prerequisites also included other rights encapsulated in the Sixth Amendment, such as the right to a jury trial. *Id.*
[143] Gabriel, *supra* note 112, at 1268.
[144] Gabriel, *supra* note 112, at 1268.
[145] Gabriel, *supra* note 112, at 1268.
[146] Gabriel, *supra* note 112, at 1268.
[147] Gabriel, *supra* note 112, at 1261.
[148] Gabriel, *supra* note 112, at 1268.
[149] Williams, *supra* note 2, at 133.
[150] Gabriel, *supra* note 112, at 1261.
[151] Gabriel, *supra* note 112, at 1261.
[152] Shuster, *supra* note 37, at 111.
[153] Shuster, *supra* note 37, at 111.
[154] Shuster, *supra* note 37, at 118.
[155] Shuster, *supra* note 37, at 133.

son's freely chosen actions. Likewise, to deny an offender their punishment is wrong, as the penalty is a consequence of their freely chosen actions.[156] Indeed, failing to properly punish an offender is dehumanizing, because to do so constitutes a refusal to accept their status as a rational being who chose the consequences of their actions.[157] This is akin to treating them as an animal that lacks the intelligence to make informed decisions.[158]

Retributivism therefore demands that the state give offenders the just deserts for their deeds, because punishing them for anything else is unjust.[159] This is because retributivism justifies punishment via the criminal's rational acceptance of the consequences of his actions.[160] Since the current American capital punishment system punishes offenders for having bad lawyers, it punishes them for the actions of another.[161] This is as unjust as locking someone up for a crime their neighbor committed. Further, it severs the causal chain between crime and punishment, which is the entire reason capital punishment is legitimate.[162] Retributivism justifies punishment as a fair and proportionate consequence that offenders rationally accept as a risk of committing crimes.[163]

Since retributivism incorporates proportionality as a key tenet of its justification of punishment, it follows that only proportionate punishments are just.[164] Proportional means that the punishment is neither too harsh nor too lax in relation to the crime in question.[165] Since death is a proportionate consequence for those who have deliberately taken the lives of others in particularly blameworthy ways, and people who commit these acts are aware of and accept the consequences, retributivism provides a legitimate basis for meting out capital punishment.[166] Since penalties must be both a result of and proportionate to offenders' crimes, it follows that those who commit particularly heinous crimes should receive the death penalty.[167]

This is because proportionality acts to moderate punishment ordinally. In other words, it does not provide its own complete framework, but can set upper and lower limits on a society's punishments.[168] Since Americans have chosen to keep death as the ultimate sanction, proportionality dictates that American society reserve it for the worst offenders.[169] Democratic principles of retribution warrant this use of societal norms to justify a punishment.[170] Scholars such as Dan Markel explain that democracy is a key aspect of retributivism.[171] This is because one element of retribution is communicating society's values to offenders.[172]

Conversely, offenders whose acts, while immoral, are relatively less blameworthy should not receive the ultimate sanction.[173] Thus, it is unjust when less culpable defendants like Judy Haney receive capital punishment based upon their lawyers' ineptitude, while murderers who committed much more atrocious crimes receive

156 C.S. Lewis, *The Humanitarian Theory of Punishment*, 13 Issues in Religion & Psychotherapy 147, 147 (1987), https://scholarsarchive.byu.edu/cgi/viewcontent.cgi?article=1271&context=irp.
157 Shuster, *supra* note 37, at 105.
158 Shuster, *supra* note 37, at 105.
159 Lewis, *supra* note 156, at 148.
160 Potter, *supra* note 4, at 106.
161 Bright, *Counsel for the Poor*, *supra* note 10, at 1839.
162 Johnson v. Zerbst, 304 U.S. 458, 469 (1938).
163 Shuster, *supra* note 37, at 104.
164 Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 Crime & Just. 55, 56 (1992).
165 von Hirsch, *supra* note 164, at 56.
166 von Hirsch, *supra* note 164, at 79.
167 von Hirsch, *supra* note 164, at 60.
168 von Hirsch, *supra* note 164, at 75.
169 von Hirsch, *supra* note 164, at 58.
170 Markel, *supra* note 43, at 432.
171 Markel, *supra* note 43, at 432.
172 Markel, *supra* note 43, at 415.
173 von Hirsch, *supra* note 164, at 62.

a mere life sentence.[174] There is no proportional relationship between the offense and punishment when the skill of one's lawyer determines the severity of one's punishment. Since this proportionality is a fundamental requirement of the punishment's legitimacy, this disconnect between offense and punishment delegitimizes the death penalty.[175]

Since the death penalty is a legitimate means of punishing offenders, it is detrimental to the justice system to allow flaws that delegitimize it to continue. Just as it is wrong to punish someone for something they did not do, it is wrong to allow them to receive less than their deserved punishment. The current problems in the system serve to delegitimize the death penalty and therefore prompt pushback against it. Another similar case is when the Illinois governor commuted the sentence of every offender on Illinois' death row.[176] This is wrong, as there are now offenders who deserve death but will never receive it.[177]

Another logical consequence of retributivism is that it imposes an obligation on the government to provide adequate defense counsel for those who cannot afford it.[178] This stems from the idea that individuals and entities are responsible for their own actions.[179] When someone does a deed, they accept the consequences and responsibilities that stem from that action.[180] Since the United States is a society predicated upon individual liberty, the government incurs a responsibility to defendants when it deprives them of their liberty.[181]

The government must only punish those who "voluntarily break the law" in a free society.[182] The state must restrict its use of coercive power to these wrongdoers because to do otherwise would trample on its citizens' liberty.[183] In an adversary system, effective counsel is necessary to determine whether the defendant has in fact transgressed the law.[184] Because of this system, the government accepts the responsibility to provide counsel to those who cannot afford it when it deprives them of their liberty.

The government incurs this hefty responsibility when it deprives defendants of their liberty yet spares their lives. This responsibility increases when lives are on the line because, as the Supreme Court is wont to note, "Death is Different."[185] Death is an irrevocable punishment. Any responsibility one incurs from depriving someone of liberty (which one can at least partly restore) is magnified when death enters the equation.

Ineffective assistance of counsel in death penalty cases thus creates multiple moral travesties: Execution of innocent (and comparatively less guilty) defendants, and sparing offenders who deserve death.[186] Neither group is receiving punishment (or relative lenience) based upon their deeds. Retributivism also im-

[174] *See* Haney v. Alabama, 603 So. 2d 368, 379 (Ct. Crim. App. 1991).
[175] Markel, *supra* note 43, at 437.
[176] Markel, *supra* note 43, at 437. Again, Markel would almost certainly disagree with my contention that abolishing the death penalty is a negative thing. Nevertheless, the information in his article is useful.
[177] Shuster, *supra* note 37, at 102. As Kant said, even if a society were to voluntarily dissolve itself, it would be the duty of its members to execute the last murderer in their prison before they left. *Id.* However, given the existence of mitigating circumstances, a modern society might not wish to execute every murderer. Still, the idea that it is unjust to spare those who deserve death holds true.
[178] *See* von Hirsch, *supra* note 164, at 79.
[179] von Hirsch, *supra* note 164, at 79.
[180] Lewis, *supra* note 156, at 148.
[181] von Hirsch, *supra* note 164, at 74.
[182] Duff & von Hirsch, *supra* note 47, at 104.
[183] Duff & von Hirsch, *supra* note 47, at 103.
[184] Hamilton, 368 U.S. at 54.
[185] Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring); Berry, *supra* note 53, at 1111.
[186] Bright, *Counsel for the Poor*, *supra* note 10, at 1839.

poses a moral obligation on the government to provide assistance of counsel when it deprives offenders of their liberty.[187] Thus, retributivism requires effective assistance of counsel, especially in capital cases.

IV. A Solution That Offers Something For Everyone

As grim as the problem appears, its sheer enormity may be beneficial. The issue of ineffective assistance of counsel seems insurmountable, with so many disparate problems feeding into a complex and tangled nightmare of massive proportions. Yet the pervasiveness of this problem is a boon, because it is so extensive that it violates principles sacred to people on both the left and right of the political spectrum. Solving it therefore grants Americans an opportunity to bridge ideological differences and unite behind a common cause of justice.

A. Appeal to Conservatives

American conservatives deeply value following the Founders' beliefs for the Constitution and preserving the rights therein.[188] This group frequently speaks out when government overreach infringes on the rights in the First and Second Amendments. This stems from a strong belief in individual liberty and the accompanying suspicion of government power and its ability to tread on the rights of Americans.[189] Conservatives often speak out when government regulation interferes with someone's individual rights.[190]

The current criminal justice system deprives offenders of all three and does so in a manner that violates their constitutional rights.[191] Defendants' only line of defense between them and the leviathan of government power is often their attorney.[192] The Founders recognized this, and thus wrote the Sixth Amendment.[193] Anyone who claims to believe in individual liberty and values the Bill of Rights should thus oppose violations of the rights in the Sixth Amendment and vigorously support effective assistance of counsel.

In addition, conservatives often possess a strong sense of justice which corresponds with retributivism. Their individualistic belief system aligns with a penal philosophy that focuses on the merits of the individual.[194] They often support the death penalty because they believe that people who commit the worst offenses should receive the ultimate sanction as retribution for their actions.[195] With their strong belief in treating individuals according to their merits, conservatives will rankle at the thought of punishing people for their attorney's actions.

Conservatives can thus support the idea of reforming assistance of counsel. Indeed, to allow the status quo to continue should be anathema to them, as it entails a massive government overreach trampling upon the individual rights and Constitutional system the Founders established. It also means letting some offenders off, while those undeserving of

[187] von Hirsch, *supra* note 164, at 74.
[188] *See generally* Keith E. Whittington, *Is Originalism Too Conservative?* 34 Harv. J.L. & Pub. Pol'y 29 (1991) (arguing that originalism is a principled theory of constitutional interpretation).
[189] Rod Dreher, *Individualism and Conservatism,* Am. Conservative Online (Aug. 31, 2012), https://theamericanconservative.com/Dreher/individualism-and-conservatism.
[190] *Id*.
[191] Jonakait, *supra* note 140, at 746.
[192] Jonakait, *supra* note 140, at 732.
[193] Bibas & Fisher, *supra* note 59.
[194] Dreher, *supra* note 189.
[195] Matt K. Lewis, *The Conservative Case for Capital Punishment*, The Week (May 1, 2014), https://theweek.com/articles/447348/conservative-case-capital-punishment.

the ultimate punishment die unjustly, both of which offend conservative principles.

B. Appeal to Progressives

On the other side of the aisle, the progressive left has made criminal justice reform one of its key issues.[196] Progressive thinkers value equality in criminal justice and seek to make the legal system more accessible and equitable to the poor and minority groups.[197] The status quo of ineffective assistance of counsel creates massive inequalities in justice and has a particularly heavy impact on poor and minority defendants.[198]

A system that executes people who have not the worst records, but the worst lawyers, favors those who can simply buy their way out of justice. It also punishes lower-income defendants who cannot afford the high-priced lawyers one often needs to prevail.[199] Progressive groups value equal justice and equal treatment for all.[200] This system which blatantly favors the rich and disenfranchises the poor is thus antithetical to the social justice progressives seek in the justice system.[201]

In addition to the economic inequality that ineffective assistance of counsel promulgates, the flaws in the system hit minority groups particularly hard. African-Americans are far more likely to receive the death penalty than white offenders. Progressive thinkers see this as evidence of deeper racial inequalities and prejudices in the American system.[202] Ineffective assistance of counsel thus contributes to this issue, giving progressives ample incentive to support a solution.

Ineffective assistance of counsel is problem stemming from multiple issues that are deeply rooted in the justice system. The solution will thus require a multi-pronged approach, notably from legislatures and courts. It will first require extensive funding, and then the Supreme Court must overturn *Strickland* and establish a new standard for ineffective assistance of counsel.

C. Financial Solutions from Legislatures

Money remains one of the key problems with ineffective assistance of counsel. Many public defender offices are woefully underfunded, if they exist at all. Courts also sometimes appoint counsel which is not from a public defender office. This counsel is also heavily underfunded, in some cases paid below minimum wage.[203] The adversary system depends upon zealous advocacy from both sides if it is to function at all.[204] Given the sheer expense of investigating and trying a case, this requires well-funded attorneys on both sides. Hiring experts, paying paralegals to help with research, and simply compensating lawyers for their time soon adds up to thousands of dollars.[205] Pay below minimum wage, or the allocation of tiny amounts such as $500 for all experts and outside help, will not suffice. Indeed, no amount of strict standards for competence will matter

196 Hugo A. Bedau, *The Case Against the Death Penalty*, ACLU (2012), https://www.aclu.org/other/case-against-death-penalty.
197 *Id.*
198 *Id.*
199 Williams, *supra* note 2, at 131.
200 Bedau, *supra* note 196.
201 Bedau, *supra* note 196.
202 Bedau, *supra* note 196. The various political factions are likely to disagree as to *why* this is. That is immaterial to this argument. The point here is that the problem of ineffective assistance of counsel creates issues that are offensive to both sides' values.
203 Williams, *supra* note 2, at 146.
204 Gabriel, *supra* note 112, at 1270.
205 Houppert, *supra* note 29, at 5.

if there is no financial support to for good lawyers to remain in defense positions.

This means that state legislatures must allocate sufficient funds to underfunded public defenders where they exist. They must also create public defender offices where there are none, and then adequately fund them. There must be enough funds to keep public defenders in their jobs, to prevent the problem of experienced lawyers leaving as soon as possible. It also means that there must be enough public defenders so that they are not massively overworked.[206] This will in turn require hiring enough people for the job.

The exact pay amount must be a local matter. What might be enough to live comfortably in rural Alabama might not be enough for a small apartment in an expensive city like Washington, D.C. What matters is that public defenders (or external lawyers appointed to cases) receive pay sufficient to incentive them to remain in the position and prioritize defending their clients.

This aspect of the solution might require significant expenditure, especially in the beginning. However, it has the potential to save money in the long term. Botched cases result in clogging of the court system and a lengthy appeals process, both of which drain the public coffers. With competent counsel on both sides, the system would be far more efficient, which will result in fewer delays and fewer protracted appeals. In addition, both incarceration and executions are incredibly expensive. For example, Dr. Ernest Gost estimates that the death penalty costs states $23.2 million per year more than states without it.[207] Thus, not executing those whose deeds do not merit death will be a financial boon in addition to a moral obligation.

Even if funding defense counsel did not save the system any money, it is still a constitutional and moral obligation. The Constitution requires effective assistance of counsel as part of the defendants' Sixth Amendment rights (see Part II). There is no way to achieve this without sufficient funds.[208]

In addition, effective assistance of counsel is a moral requirement of retributivism. Since the adversary system depends upon both sides' zealous advocacy, and this in turn requires funding, reaching a just result that punishes offenders for the merits of their deeds necessitates adequate defense funding. Indeed, the government incurs this responsibility to defendants when it deprives them of their life or liberty (See Part III). Thus, retributivism requires adequate funding for defendants.

Adequate funding will go a long way towards solving the problem of ineffective assistance of counsel. One of the key problems in public defense work is that as soon as a lawyer gains any experience, he or she leaves for a more lucrative field as soon as possible.[209] Offering these young attorneys a competitive wage will ensure that they remain in the field after gaining the experience necessary to represent clients well.

Investigating a case is expensive. One of the recurring issues of ineffective assistance of counsel is that attorneys fail to investigate the case thoroughly. Providing adequate funding will allow them to thoroughly investigate cases, without having to work on unreasonable budgets.[210] Another problem with investigating cas-

[206] Houppert, *supra* note 29, at 13.

[207] Ernest Goss et al., The Economic Impact of the Death Penalty on the State of Nebraska: A Taxpayer Burden? 21 (2016).

[208] Williams, *supra* note 2, at 150.

[209] Houppert, *supra* note 29, at 250.

[210] Houppert, *supra* note 29, at 34.

es is the lack of time, as many of these attorneys are heavily overworked.[211]

Public defenders especially, often have caseloads twice those of other lawyers. This leaves them with precious little time to prepare or thoroughly investigate their cases. Indeed, they barely have time to address even the most rudimentary elements of a case, let alone parse out potential mitigating factors and other potential defense for capital clients. Sufficient funding for public defender offices will allow them to hire more attorneys, and thus relieve the workload. This, in turn, will give each attorney more time to invest in each case, and therefore they will be more able to investigate each defendant's case.

Adequate funding will therefore help solve the key issues of incompetent lawyers and inadequate investigation and preparation by the defense. It will allow public defender offices to retain experienced practitioners. Another benefit will be ensuring adequate funding and personnel to thoroughly investigate a case.

D. Court-Imposed Standards

Once there is available funding, courts will have a crucial role in the massive system overhaul needed to provide effective assistance of counsel. Although the problem extends far beyond lax standards, the low bar for effectiveness enables the problem. (See Parts II & III). To solve this, the Supreme Court must implement an approach closer to that of Hawaii than that of *Strickland*. This will require simultaneously lowering the burden of proof required for defendants to demonstrate ineffective assistance of counsel, and requiring the government to prove a *lack* of prejudice once they have done so. The Supreme Court must also outline clear minimum standards for attorneys defending capital cases.

An excellent model starting point for this is Hawaiian state precedent. Hawaii makes it easier for defendants to prevail in ineffective assistance of counsel cases than *Strickland*. Under the standard established in *State v. Antone*, Hawaii requires defendants to prove that their attorney committed errors "reflecting counsel's lack of skill, judgment or diligence."[212] Subsequent precedent has demonstrated that a crucial aspect of this is that "a decision not to investigate cannot be considered a tactical decision."[213] This will contribute to solving the issue of extreme and unwarranted deference to attorneys that *Strickland* implemented. This standard would help reverse many cases where courts invented post-hoc rationalizations of defense counsel's malfeasance as a deliberate tactic.

In one extreme instance, a lawyer explained that he slept during trial because he was elderly and enjoyed taking an afternoon nap.[214] The appellate court held that this did not constitute ineffective assistance of counsel because it could conceivably have been a ploy.[215] That the lawyer's explanation made no mention of a ploy was apparently immaterial. Under this standard, this would constitute behavior "reflecting counsel's lack of skill, judgement, or diligence," and there would be no op-

[211] Houppert, *supra* note 29, at 40.

[212] Hawaii v. Antone, 615 P.2d 101, 104 (1980). This standard also requires that "these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense." *Id.* The court should not adopt this half of the standard, because some malfeasance (like sleeping or being intoxicated at work) may not directly cause such specified problems.

[213] Hawaii v. Aplaca, 837 P.2d 1298, 1301 (1992).

[214] Williams, *supra* note 2, at 141.

[215] Williams, *supra* note 2, at 141.

tion for the court to fabricate a rationalization for it.[216]

A standard that the Supreme Court should implement would also require the government to prove *lack of* prejudice once the defendant has established errors "reflecting counsel's lack of skill, judgement or diligence."[217] Previous scholars have suggested this reversal of the burden of proof as a way of alleviating the extreme difficulty of showing prejudice by defendants.[218] Fusing this approach with Hawaii's system would go a long way towards solving this problem. Recall that the massive burden of proving prejudice is a driving factor behind *Strickland's* host of problems.[219] The Supreme Court has acknowledged that proving this is nearly impossible. Yet later jurisprudence demanded that defendants do just that.[220] This makes it nearly impossible for them to remedy the problems of ineffective assistance of counsel. Such an unjust state of affairs violates the Sixth Amendment right to counsel, as well as retributivism's demand that offenders receive the just deserts of their actions.

Removing the requirement that defendants prove prejudice would drastically reduce this problem. Instead, it will be incumbent upon the state to prove that the lawyer's deficient performance did not prejudice the defendant. This will take the burden off of the defendant, who is poorly equipped to shoulder such a high burden. The government is better positioned to make such a case. Such an arrangement will better balance the burden between the two parties, and thus make it easier for just claims to prevail. It will also allow the state to demonstrate a lack of prejudice, which addresses the concerns of those who fear that this will let too many guilty people go free. Since the government will have an opportunity to prove a *lack* of prejudice, small procedural errors that did not affect the case will not free guilty defendants. This is a far better way to balance the competing interests between the state and the rights of accused persons.

Conclusion

Ineffective assistance of counsel is a blight upon this country. It results in innocent and less-deserving offenders receiving death, while those who have better lawyers receive comparatively lighter punishments. This is unconstitutional under the Sixth Amendment and a moral travesty to under a retributivist penal philosophy. The sheer depth and breadth of the problem does mean that it violates both conservative and progressive values, which means that each side can unite behind the common cause of justice. This will involve expanding funding for indigent defense, and heavily modifying the problematic *Strickland* case.

[216] Antone, 615 P.2d at 101, 104.
[217] Antone, 615 P.2d at 101, 104.
[218] Geimer, *supra* note 56, at 165.
[219] Geimer, *supra* note 56, at 165.
[220] Geimer, *supra* note 56, at 165.

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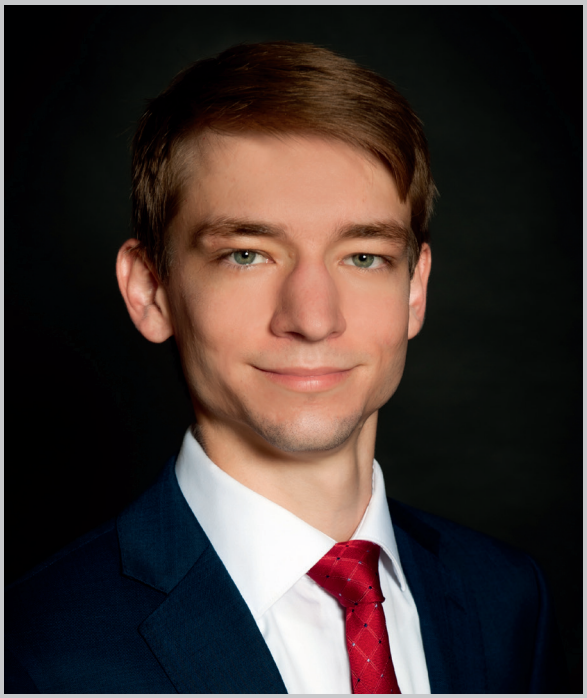

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