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**SEX SLAVERY IN THE LONE STAR STATE:
DOES THE TEXAS HUMAN TRAFFICKING LEGISLATION
OF 2011 PROTECT MINORS?**

*Cheryl Nelson Butler**

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But for all the progress that we have made, the bitter truth is that trafficking also goes on right here, in the United States.¹

Texas has always been, and continues to be, a leader in the modern day abolitionist movement, and this legislation is the first of its kind in the United States . . . Most people think human trafficking happens elsewhere in places like Thailand and Cambodia but the reality is that this is happening in our own backyard. In fact, the vast majority of the victims identified within Texas are actually our own citizens.²

I. INTRODUCTION

Human trafficking³ is “one of the world’s largest and fastest growing criminal enterprises”⁴—second only to the trade of illegal drugs.⁵ By most accounts, women and girls are the primary victims;⁶

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1. Barack Obama, President of the United States, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>.

2. *New Texas Law Establishes State Task Force and Victim Assistance for Domestic Victims of Trafficking*, THE HUMAN TRAFFICKING PROJECT (Aug. 26, 2009, 10:24 AM) [hereinafter *Human Trafficking Project*], <http://traffickingproject.blogspot.com/2009/08/new-texas-law-establishes-state-task.html>.

3. Human trafficking takes many forms including (1) forced labor, (2) bonded labor, (3) debt bondage, (4) involuntary domestic servitude, (5) forced child labor, (6) use of child soldiers, (7) sex trafficking, (8) child sex trafficking and (9) child sex tourism. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. § 7101 (2008)).

4. 22 U.S.C. § 7101(b)(8) (2008). OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 11, 35 (June 2012) [hereinafter TIP REPORT 2012], *available at* <http://www.state.gov/j/tip/rls/tiprpt/2012/> (estimating that globally, 27 million men, women and children are current victims of human trafficking). *See also* April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 231-32 (2007).

5. Bridgette Carr, *Sex Trafficking: An American Problem Too*, CNN (Nov. 25, 2009, 11:58 AM), <http://edition.cnn.com/2009/OPINION/11/25/carr.human.trafficking/index.html>; UNITED NATIONS OFFICE ON DRUGS & CRIME, 2007 WORLD DRUG REPORT 2-3 (2007), *available at* www.unodc.org/pdf/research/wdr07/WDR_2007.pdf.

yet, men and boys are targeted as well.⁷ Sex trafficking and labor trafficking are two major forms of human trafficking⁸ that fuel the growth of the more than twelve billion dollar per year trafficking industry.⁹ The United States is a “major destination country”¹⁰ for international trafficking; over 50,000 persons are trafficked into the United States from other countries each year.¹¹ Upon arrival, they join U.S. citizens and residents who are trafficked domestically.¹² To combat human trafficking, the federal government enacted the Trafficking Victims Protection Act (“TVPA”) in 2000 to address both international and domestic trafficking in persons.¹³ In the past few years, a growing

6. U.N. OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 11 (Feb. 2009) (estimating that sixty-six percent of trafficking victims are women, another thirteen percent are girls, and nine percent are boys); see Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 267-68 (2010-11) (“Research in the United States has pointed to juvenile girls as the primary victims of sex trafficking.”).

7. On the prevalence of trafficking among men and boys and the marginalization of this issue within anti-trafficking discourse, see Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 4 UTAH L. REV. 1143 (2010); Jonathan Todres, *Taking Prevention Seriously: Developing a Comprehensive Response to Child Trafficking and Sexual Exploitation*, 43 VAND. TRANSNAT’L L. REV. 1, 14 (2010); SHARED HOPE INTERNATIONAL, DOMESTIC MINOR SEX TRAFFICKING, FORT WORTH, TEXAS 73 (2010), available at http://www.sharedhope.org/Portals/0/Documents/FortWorth_PrinterFriendly.pdf (“Girls have long been recognized as the most common victims of DMST [domestic minor sex trafficking], but boys can also become victims as well as perpetrators. Not including them is a disservice to the youth and the community.”).

8. TIP REPORT 2012, *supra* note 4.

9. See Trafficking Victims Protection Act, 22 U.S.C. § 7102(9) (2000); Iris Yen, *Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand Through Educational Programs and Abolitionist Legislation*, 98 J. CRIM. L. & CRIMINOLOGY 653, 659 (2008) (“profits . . . are estimated to be \$7 to \$12 billion annually[.]”). See also AMY FARRELL, JACK MCDEVITT & STEPHANIE FAHY, INSTITUTE ON RACE AND JUSTICE, UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT (June 2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf> (the IRJ study estimates sex trafficking as a \$9.5 billion industry).

10. Rieger, *supra* note 4, at 233; Ellen L. Buckwalter, Maria Perinetti, Susan L. Pollet & Meredith S. Salvaggio, *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 407 (2006).

11. Rieger, *supra* note 4, at 233.

12. Smith & Vardaman, *supra* note 6, at 267-68 (“Research in the United States has pointed to juvenile girls as the primary victims of sex trafficking.”).

13. Trafficking Victims Protection Act, 22 U.S.C. § 7102(9) (2000) (“TVPA”). For articles discussing the federal TVPA and its reauthorizations, see Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247 (2011); Melissa Holman, Comment, *The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively*, 44 TEX. INT’L L.J. 99 (2008); Susan W. Tiefenbrun, *International Justice and Shifting Paradigms: Updating the Domestic*

movement has emerged among states to pass comprehensive anti-trafficking legislation of their own.¹⁴

This Article makes several contributions to the emerging legal scholarship on domestic human trafficking.¹⁵ First, the Article offers comprehensive analysis of the issues that state legislation must address to eradicate domestic child trafficking. Second, this Article highlights the need for effective legislation to combat not only the epidemic of child sex trafficking, but also the often ignored crisis of child labor trafficking. Third, this Article addresses the groundbreaking movement by states to enact “safe harbor provisions” for prostituted youth and considers whether Texas law follows this trend.¹⁶ Fourth, this Article

and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?, 38 CASE W. RES. J. INT’L L. 249 (2006-07).

14. See POLARIS PROJECT, 2012 STATE RATING MAP, available at <http://www.bbc.co.uk/news/world-us-canada-19169943>; FACT SHEET ON STATE ANTI-TRAFFICKING LAWS, CENTER FOR WOMEN POL’Y STUDIES 3 (2010) [*hereinafter* CWPS FACT SHEET], <http://www.centerwomenpolicy.org/documents/FactSheetonStateAntiTraffickingLawsJanuary2010.pdf>.

15. For recent scholarship on state legislation to combat human trafficking, see Ione Curva, *Thinking Globally, Acting Locally: How New Jersey Prostitution Law Reform Can Reduce Sex Trafficking*, 64 RUTGERS L. REV. 557 (2012); Derek Pennartz, *The Irony of the Land of the Free: How Texas is Cleaning Up Its Human Trafficking Problem*, 12 TEX. TECH. ADMIN. L.J. 367, 370 (2010-11) (discussing the work of the Texas Human Trafficking Prevention Task Force); Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83 (2009) (comparing New York and California to the Department of Justice Model Statute); Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635 (2009) (discussing the New Jersey statute); Kathleen K. Hogan, *Slavery in the 21st Century and in New York: What Has the State’s Legislature Done?*, 71 ALB. L. REV. 647 (2008). See also Melissa Dess, Note, *Walking the Freedom Trail: An Analysis of the Massachusetts Human Trafficking Statute and its Potential to Combat Child Sex Trafficking*, 33 B.C. J.L. & SOC. J. 1 (2012), available at <http://ssrn.com/abstract=2128097>; Jessica E. Ozalp, Comment, *Halting Modern Slavery in the Midwest: The Potential of Wisconsin Act 116 to Improve the State and Federal Response to Human Trafficking*, 2009 WIS. L. REV. 1391 (2009); Adam S. Butkus, Note, *Ending Modern-Day Slavery in Florida: Strengthening Florida’s Legislation in Combating Human Trafficking*, 37 STETSON L. REV. 297 (2007); John Tanagho, Comment, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with its Federal and State Counterparts*, 38 LOY. U. CHI. L.J. 895 (2007).

16. For analysis of the new safe harbor legislation addressing domestic child sex trafficking, see Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1 (2012); Tamar R. Birkhead, *The ‘Youngest Profession’: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055 (2011); Smith & Vardaman, *supra* note 6; Whitney J. Drasin, Note, *New York’s Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering It Up?*, 28 TOURO L. REV. 489, 505-18 (2012) (discussing New York’s Safe Harbor for Exploited Children Act and Vacating Prostitution Conviction Law); Melissa Golke, Note, *The Age of Consent: How Minnesota’s Safe Harbor for Sexually Exploited Youth Act of 2011 Falls Short of Fully Addressing Domestic Child Sex Trafficking*, 33 HAMLINE J. PUB. L. & POL’Y

uses the U.S. Department of State's "4P paradigm" as a framework for analyzing the Texas anti-trafficking legislation.¹⁷ The State Department's 4P's standard judges the effectiveness of anti-trafficking laws by considering whether the law (1) protects trafficking victims; (2) punishes traffickers; (3) prevents future crimes; and (4) creates partnerships between government, civil society, and the private sector to end trafficking.¹⁸

This Article argues that, while Texas has made great strides in its movement to combat child trafficking, there are three major areas in which further reform is needed.¹⁹ First, Texas should provide stronger protections for not only minors trafficked for sex, but also those trafficked for labor. Second, Texas law must shift its emphasis from prosecution of traffickers to a more balanced approach that also prioritizes the protection of minors and the prevention of future trafficking crimes against them. Third, Texas should adopt safe harbor provisions that reflect a child welfare response toward prostituted minors.

Part I discusses the need for effective legislation to combat domestic child trafficking. Part II argues that the Texas anti-trafficking statute focuses on child sex trafficking as opposed to child labor trafficking and considers the factors driving this focus. Part III analyzes how Texas law defines "trafficking" in terms that protect minors and acknowledges their status as crime victims. Part IV argues that the Texas anti-trafficking legislation undermines the focus on minors as victims because the legislation does not balance the punishment of traffickers with the protection of trafficked minors. Part V evaluates the new alternatives for adjudication for prostituted minors and argues that these provisions also compromise the treatment of trafficked minors as crime victims. Thus, Part V argues that these provisions should be

201, at 205-34 (2011); Shelby Schwartz, Note, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235 (2008).

17. The State Department's test was initially a three pronged test based on prevention, prosecution, and protection. More recently, the test was revised to reflect the importance of partnerships. See generally TIP REPORT 2012, *supra* note 4, at 5, 11. On the newest criteria, partnerships, see Maudisa McSween, *Investing in the Business Against Human Trafficking: Embracing the Fourth "P" – Partnerships*, 6 INTERCULTURAL HUM. RIGHTS L. REV. 283 (2011).

18. See generally TIP REPORT 2012, *supra* note 4, at 5, 11.

19. See LINDA A. SMITH, SAMANTHA HEALY VARDAMAN & MELISSA A. SNOW, SHARED HOPE INTERNATIONAL, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN (2009), available at http://www.sharedhope.org/Portals/0/Documents/SHI_National_Report_on_DMST_2009.pdf.

modified to create comprehensive safe harbors for sexually trafficked minors.

II. A LEGISLATIVE FRAMEWORK FOCUSED ON SEX TRAFFICKING

A. *The Emergence of the Texas Statute*

Texas, the Lone Star State,²⁰ is a major global destination for human trafficking.²¹ Twenty-five percent of all trafficking victims in the United States are found in Texas.²² At least thirty percent of the phone calls taken by the National Human Trafficking Hotline are pleas for help from victims or witnesses in Texas.²³ Likewise, twenty-five percent of foreigners certified as human trafficking victims by the United States Department of Health and Human Services (“DHHS”) each year were trafficked in Texas.²⁴ The U.S. Department of Justice (“DOJ”) recognized several Lone Star cities, including Houston, Dallas, and El Paso, as breeding grounds for trafficking and, as a result, funded five National Human Trafficking Task Forces in the State.²⁵ Domestic child sex trafficking has become a “hot topic” among legislators, advocates,

20. According to Wikipedia, The Free Encyclopedia, “Texas is nicknamed the *Lone Star State* to signify Texas as an independent republic and as a reminder of the state's struggle for independence from Mexico. The ‘Lone Star’ can be found on the Texas State Flag and on the Texas State Seal today.” WIKIPEDIA, http://en.wikipedia.org/wiki/Lone_Star_State (last visited Mar. 10, 2012). See generally RANDOLPH B. CAMPBELL, *GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE* (2004).

21. See HOUSTON RESCUE & RESTORE COALITION, *RAPID FIELD ASSESSMENT OF DOMESTIC MINOR SEX TRAFFICKING IN HARRIS AND GALVESTON COUNTIES, TEXAS* (Aug. 2011) [hereinafter HOUSTON RESCUE & RESTORE COALITION], available at <http://www.houstonrr.org/wp-content/uploads/2011/12/Executive-Summary-Domestic-Minor-Sex-Trafficking-Field-Assessment-Harris-Galveston-Counties.pdf>; DALLAS WOMEN’S FOUNDATION, *ADOLESCENT GIRLS IN THE TEXAS SEX TRADE: TRACKING STUDY RESULTS FOR NOVEMBER, 2010* (2010), available at <http://www.dallaswomensfoundation.org/sites/default/files/CSECNov10TX.pdf>; OFFICE OF THE ATT’Y GEN. OF THE ST. OF TEXAS, *HEALTH AND HUM. SERVICES COMM. REPORT TO THE 81ST LEGISLATURE, THE TEXAS RESPONSE TO HUMAN TRAFFICKING 8* (2008) [hereinafter TEXAS HHS REPORT]; SHARED HOPE INTERNATIONAL, *DOMESTIC MINOR SEX TRAFFICKING IN DALLAS* (2009), available at http://www.sharedhope.org/Portals/0/Documents/Dallas_PrinterFriendly.pdf; Shared Hope International, *San Antonio/Bexar County Assessment: Identification of domestic minor sex trafficking victims and their access to services* (May 2008), available at http://www.sharedhope.org/Portals/0/Documents/SanAntonio_PrinterFriendly.pdf.

22. TEXAS HHS REPORT, *supra* note 21; Nancy Arrigona, *Juvenile Victims of Human Trafficking*, Presentation at the BJS/JRSA 2010 National Conference (Oct. 28-29, 2010), http://www.jrsa.org/events/conference/presentations-10/Nancy_Arrigona.pdf.

23. THE STATE OF HUMAN TRAFFICKING IN TEXAS 10 (Robert Sanborn, et al., eds., 2010).

24. *Id.* See Pennartz, *supra* note 15, at 370.

25. TEXAS HHS REPORT, *supra* note 21, at 6.

and the media in that state.²⁶ Federal and state leaders have emphasized that child sex trafficking is an epidemic in Texas.²⁷ Slowly, but surely, more attention is also being brought to the plight of children trafficked for labor in Texas.²⁸

A combination of factors makes Texas an enticing venue for sex and labor trafficking. As a border state, Texas provides an easy entry point for persons smuggled or trafficked from Mexico.²⁹ The Texas-Mexico border is “North America’s number one supply site for young children exploited in sex and labor trafficking.”³⁰ Twenty percent of all domestic human trafficking victims travel through Texas.³¹ In Texas, most trafficked minors are not foreigners.³² The Texas Attorney General has reported that in Texas, “[t]he perception exists that only foreign nationals become human trafficking victims [yet] there are significant instances of domestic trafficking within Texas and between states.”³³

To address these issues, the Texas legislature labored earnestly for years to enact anti-trafficking legislation.³⁴ On September 1, 2003,

26. See Damali Keith, *New Strategy to Help, Not Punish Human Trafficking Victims* (Aug. 29, 2012), available at www.myfoxhouston.com/sotry/19411361/2012/08/29/new-strategy-to-help-not-punish-human-trafficking-victims?clienttype=printable; Greg Wright, “*Innocence Lost*” *Sex Trafficking Task Force Rescues 3 Girls in SeaTac*, THE SEATAC BLOG (Sept. 29, 2011, 10:12 AM), <http://www.seatablog.com/2011/09/29/innocence-lost-sex-trafficking-task-force-rescues-3-girls-in-seatac/>; Mimi Schwartz, *The Lost Girls*, TEXAS MONTHLY (Apr. 2010), <http://www.texasmonthly.com/cms/printthis.php?file=feature3.php&issue=2010-04-01.html>.

27. *Human Trafficking Project*, *supra* note 2.

28. See Pennartz, *supra* note 15, at 379 (discussing a Texas labor trafficking involving a woman and her three children).

29. See Sanborn et al., *supra* note 23, at 8; see also Rocio Garza, Note, *Addressing Human Trafficking Along the United States-Mexico Border: The Need for Bilateral Partnership*, 19 CARDOZO J. INT’L & COMP. L. 413, 418 (2011) (“The porous United States-Mexico border continues to be a significant entry for human trafficking victims.”); Tanagho, *supra* note 15, at 900 n.39 (discussing sex trafficking as a major problem in border states such as Texas, Florida, New York, and California).

30. Sanborn et al., *supra* note 23, at 8.

31. Brandi Grissom, *Abbott Launches Trafficking Task Force*, TEX. TRIBUNE TRIBBLOG (Jan. 21, 2010), <http://www.texastribune.org/texas-state-agencies/attorney-generals-office/abbott-launches-trafficking-task-force/>.

32. OFFICE OF THE ATT’Y GEN. OF THE ST. OF TEXAS, THE TEXAS HUMAN TRAFFICKING PREVENTION TASK FORCE REPORT 2011 TO THE TEXAS LEGISLATURE 3 (Jan. 2011) [hereinafter TASK FORCE 2011 REPORT], available at https://www.oag.state.tx.us/ag_publications/pdfs/human_trafficking.pdf.

33. TEXAS HHS REPORT, *supra* note 21, at 19; see Pennartz, *supra* note 15, at 370 (describing a Northeastern University study which found that nationwide, law enforcement officers think that human trafficking is “rare or non-existent”).

34. Press Release, Shared Hope International, AG Abbott to Receive U.S. Pathbreaker Award (Nov. 22, 2011), <http://www.sharedhope.org/Portals/o/documents/PathbreakerABBOTT.pdf> (discussing Texas Attorney General Greg Abbott’s ongoing efforts to fight human trafficking in Texas).

Texas became the second of forty-one states that criminalize human trafficking as a felony offense.³⁵ In 2007, in 2009, and again in 2011, the Texas statute was revised and made more comprehensive.³⁶ The 2007 legislation required that the Texas Human Trafficking Task Force (convened by the State Attorney General) and the Texas Department of Health and Human Services issue findings on how Texas state law could effectively address human trafficking.³⁷ The Texas legislature adopted many of these findings³⁸ and, on May 25, 2011, substantially revised its anti-trafficking legislation.³⁹ By enacting this new legislation, Texas has taken ground breaking steps to address child trafficking.⁴⁰

B. *Sex vs. Labor*

The Texas anti-trafficking legislation reflects the state's view that domestic minor sex trafficking is the most prevalent form of child trafficking.⁴¹ As discussed below, this legislative strategy has advantages and disadvantages and is not without controversy.

The Texas legislation bifurcates child sex trafficking and child trafficking crimes.⁴² Texas Penal Code § 20A establishes the separate crimes of "child labor trafficking"⁴³ and "child sex trafficking."⁴⁴ Prior

35. CWPS FACT SHEET, *supra* note 14, at 3.

36. TEX. PENAL CODE § 20A (2011).

37. See TEXAS HHS REPORT, *supra* note 21, at 15-16; see Pennartz, *supra* note 15, at 374-75 (discussing the creation of a statewide Human Trafficking Task Force, led by the OA, whose task is to issue findings and recommendations on how to address human trafficking in Texas).

38. See Press Release, Texas State Attorney General, Attorney General Supports Signing of Human Trafficking Legislation (May 25, 2011), available at www.oag.state.tx.us/oagnews/release.php?id=3737 ("The new law . . . implements legislative recommendations from the Texas Human Trafficking Prevention Task Force, which is chaired by Attorney General Abbott"). See TEX. PENAL CODE § 20A; TEX. PENAL CODE § 43.02(d) (2011).

39. Press Release, "Gov. Rick Perry ceremonially signed two bills creating stiffer penalties for individuals who commit human trafficking in Texas, House Bill 3000 and Senate Bill 24." Office of the Governor Rick Perry, Gov. Perry: Human Trafficking Legislation Speaks for the Voiceless (May 25, 2011), available at <http://www.governor.state.tx.us/news/press-release/16172/>.

40. For example, New York and Illinois preceded Texas in enacting safe harbor provisions that protected prostituted minors. On the New York Safe Harbor Act, see Schwartz, *supra* note 16, at 237-38; Kate Brittle, Note, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339 (2008). For the Illinois act, see SHARED HOPE INTERNATIONAL, PROTECTED INNOCENCE INITIATIVE: ILLINOIS CHILDREN ACT – HB 6462 (2010), <http://www.sharedhope.org/Portals/0/Documents/6462points.pdf>. See also Anitto, *supra* note 16, at 4-5.

41. See Smith & Vardaman, *supra* note 6, at 267-68 (discussing national reports and investigations about the problem of domestic minor sex trafficking).

42. See H.B. 2014, 82(R) Leg. Sess. (Tex. 2011).

43. A person commits child labor trafficking if the person "knowingly . . . traffics a child with the intent that the trafficked child engage in forced labor or services[.]" TEX. PENAL CODE §

to 2011, § 20A did not define labor and sex trafficking as distinct crimes; instead, the statute covered both crimes under the umbrella offense of “human trafficking.”⁴⁵ In addition to creating the distinct offenses of child sex trafficking and child labor trafficking, the 2011 law also includes the new offense of “continuous trafficking of persons.”⁴⁶

Under the 2011 statute, a person commits the offense of “child labor trafficking” where (s)he “knowingly traffics a child with the intent that the trafficked child engage in forced labor or services.”⁴⁷ The statute is also violated if a person knowingly benefits from a venture involving child labor trafficking.⁴⁸ Sex trafficking of a child occurs when a person “traffics a child” and “by any means causes the trafficked child to engage in, or become a victim of” any of the sex crimes enumerated in the statute.⁴⁹

The statutory scheme focuses on minors trafficked for sex. Under Texas law, children trafficked for labor do not receive various statutory protections reserved for victims of sex trafficking.⁵⁰ For example, the Texas statute affords an unlimited statute of limitations for child sex

20A.02(a)(5) (2011). The statute is also violated if a person knowingly benefits from a venture involving child labor trafficking. TEX. PENAL CODE § 20A.02(a)(6) (2011).

44. In contrast, sex trafficking of a child occurs when a person “traffics a child and by any means causes the trafficked child to engage in, or become a victim of” any of the sex crimes enumerated in the statute. S.B. 24, 82(R) Leg. Sess. (Tex. 2011) (revising TEX. PENAL CODE § 20A.02(a)(7)).

45. See TEX. PENAL CODE § 20A.02(a) (2009); S.B. 24 § 1.02, 82(R) Leg. Sess. (Tex. 2011). The 2009 version of Texas Penal Code Section 20A broadly criminalized “Trafficking of Persons.” In contrast to the federal statutes (18 U.S.C. §§ 1589-1592) which clearly define sex trafficking as a separate offense, the Texas state statute did not specifically distinguish between labor, as opposed to sex, trafficking. The statute is violated when a person(s):

(a) knowingly (1) traffics another person with the intent that the trafficked person engage in forced labor or services; or (2) intentionally or knowingly benefits from participating in a venture that involves an activity described by subdivision (a) including by receiving labor or services the person knows are forced labor or services.

S.B. 24 § 1.02, 82(R) Leg. Sess. (Tex. 2011). In addition to creating the distinct offenses of child sex trafficking and child labor trafficking, the 2011 law also includes the new offense of “continuous trafficking of persons.” H.B. 3000 § 1, 82(R) Leg. Sess. (Tex. 2011) (codified at TEX. PENAL CODE § 20A.03 (2011)).

46. H.B. 3000, 82(R) Leg. Sess. (Tex. 2011).

47. See TEX. PENAL CODE § 20A.02(a)(5) (2011). Section 20A.1(2) defines “forced labor or services” as “labor or services, other than labor or services that constitutes sexual conduct, that are performed or provided by another person and obtained through the actor’s use of force, fraud or coercion.” TEX. PENAL CODE § 20A.01(2) (2011).

48. TEX. PENAL CODE § 20A.02(a)(6) (2011).

49. S.B. 24, 82(R) Leg. Sess. (Tex. 2011).

50. *Id.*

trafficking cases only.⁵¹ Moreover, Texas law now makes it a first degree offense to involve a child in (1) sex trafficking, or (2) any trafficking offense that results in the death of the victim.⁵² Child labor trafficking, on the other hand, is a second degree offense.⁵³ Child sex trafficking is the only human trafficking crime for which the Texas anti-trafficking statute does not require proof of force, fraud, or coercion.⁵⁴

The creation of separate claims for sex and labor trafficking aligns Texas law with the TVPA.⁵⁵ The federal government has urged states to adopt definitions of trafficking that are analogous to the federal rule because “there is a strong need for uniformity in definitions and concepts across state lines.”⁵⁶ This is true in order to “minimize confusion as trafficking victims in state prosecutions begin to seek the victim protections” from federal agencies.⁵⁷

C. Concerns

Scholars and advocates have argued that the tendency of legislatures to on sex trafficking is ideologically motivated and fails to reflect the pervasiveness of labor trafficking in the United States.⁵⁸ The

51. S.B. 24 § 2.03, 82(R) Leg. Sess. (Tex. 2011); TEX. CODE CRIM. PRO. art. 12.01(1)(G) (2011). All human trafficking cases receive an extended statute of limitations beyond the standard three year limitation period for felony indictments. The 2011 legislation provides no statute of limitations for child sex trafficking cases. S.B. 24 § 2.03, 82(R) Leg. Sess. (Tex. 2011); TEX. CODE CRIM. PRO. art. 12.01(1)(G) (2011). In child labor trafficking cases, the limitations period runs ten years from the date of the child victim’s eighteenth birthday. TEX. CODE CRIM. PRO. art. 12.01(6)(A) (2011). All adult trafficking cases receive a ten year limitations period. TEX. CODE CRIM. PRO. art. 12.01(2)(G) (2011). The 2011 revision revised Texas Criminal Code article 12.01 to include Chapter 20A offenses on the list of offenses that can carry a limitation exceeding three years. S.B. 24 § 2.03, 82(R) Leg. Sess. (Tex. 2011). Those offenses otherwise not listed in article 12.01 must carry a three year limitation. TEX. CODE CRIM. PRO. art.12.01(7) (2011); TASK FORCE 2011 REPORT, *supra* note 32, at 49. The extended statute of limitations helps resolve several of the unique challenges that potentially undermine prosecutions in trafficking cases. The fact that trafficking cases often take longer than three years to investigate meant that a longer statute of limitations was needed. TASK FORCE 2011 REPORT, *supra* note 32, at 50-51.

52. TEX. PEN. CODE § 20A.02(B)(1)-(2) (2011).

53. TEX. PENAL CODE § 20A.02(a)(5) (2011).

54. *See* TEX. PENAL CODE § 20A.02. While the 2011 legislation also creates separate offenses for labor and sex trafficking of an adult, both of these offenses also require proof of force. *Id.* at (a)(1) & (3). Child labor trafficking also requires proof of force. S.B. 24, 82(R) Leg. Sess. (Tex. 2011) (revising TEX. PENAL CODE § 20A.01(5) (2011)).

55. *Id.*

56. DEP’T OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE 7 (2004). *See also* Ozalp, *supra* note 15, at 1399.

57. DEP’T OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE 7 (2004).

58. *See* Robert Uy, *Blinded By Red Lights; Why Trafficking Discourse Should Shift Away From Sex and the Perfect Victim Paradigm*, 26 BERKELEY J. GENDER L. & JUSTICE 204, 204-5 (2011) (arguing that the focus on sex trafficking is based on race and class bias toward white female

public perception is that state laws focus on sex trafficking because victims of sex trafficking suffer greater harms than their counterparts trafficked for labor.⁵⁹ There are several concerns with this viewpoint.

The separation of labor and sex trafficking potentially undermines “the intersecting strands of oppression” involved in labor trafficking cases.⁶⁰ In some cases, victims of forced or bonded labor, especially those in domestic service, are also sexually exploited in connection with their labor.⁶¹ As Professor Barnhardt argues, it is important to “recognize the multitudinous ways in which different forms of oppression affect women.”⁶² This argument has merit; labor trafficking cases often involve sexual exploitation and sexual abuse.⁶³

These types of intersectional cases are common in border states like Texas where both sex trafficking and labor trafficking are prevalent.⁶⁴ In Texas, these hybrid sex/labor cases also involve children.⁶⁵ The U.S. Court of Appeals for the Fifth Circuit upheld the conviction of Maximino Mondragon for his role in the largest sex trafficking case prosecuted in the United States in which Mondragon had forced over one hundred women and girls to perform sex acts for customers while being forced to work as waitresses in Houston.⁶⁶ They wore skimpy

victims and against the people of color who tend to be victims of labor trafficking); Janie Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-trafficking Law & Policy*, 158 U. PA. L. REV. 1655, 1695-96 (2010) (critiquing the efforts of neo-abolitionist feminists to advocate for legislation focused exclusively on sex trafficking at the expense of victims of labor trafficking); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 162-65 (2007) (arguing that policy approaches to trafficking are based on certain cultural based notions of the real victims of trafficking).

59. Curva, *supra* note 15, at 560-61 (attempts to differentiate the two types of trafficking often result in a perception that sex trafficking is ‘worse’ since it ‘involves forced sex, *i.e.*, rape, and thus constitutes one of the most [morally reprehensible] crimes.”); Barnhart, *supra* note 15, at 89 (“The focus on sex trafficking by both structuralist feminists and popular media obscures the similar exploitation involved in all forms of trafficking.”).

60. Barnhart, *supra* note 15, at 103; *see* Chuang, *supra* note 58, at 1697.

61. TIP REPORT 2012, *supra* note 4, at 35.

62. Barnhart, *supra* note 15, at 103.

63. *Id.* at 92-93; Mattar, *supra* note 13, at 1286 (discussing the case of a 14 year-old girl from Cameroon who was trafficked as a domestic worker).

64. Sanborn et al., *supra* note 23, at 11.

65. *Id.* at 10-11.

66. United States v. Madragon, 340 Fed. Appx. 963 (5th Cir. 2009); FARRELL ET AL., *supra* note 9, at 238; SHARED HOPE INTERNATIONAL, RAPID FIELD ASSESSMENT OF DOMESTIC MINOR SEX TRAFFICKING IN HARRIS AND GALVESTON COUNTIES, TEXAS 12 n.16 (Aug. 2011) [hereinafter RAPID FIELD ASSESSMENT], available at <http://www.houstonrr.org/wp-content/uploads/2011/12/Domestic-Minor-Sex-Trafficking-Field-Assessment-Harris-and-Galveston-Cty.pdf>.

clothing, served drinks to customers, and allowed the customers to grope, fondle, and perform sex acts.⁶⁷

As the *Mondragon* case indicates, sex trafficking victims work in a variety of industries, such as the restaurant industry, domestic service, and agriculture. Victims of debt bondage who are trafficked primarily as agricultural workers or domestic workers are also subject to private sexual abuse or commercial sexual exploitation.⁶⁸ Despite the prevalence of the *Mondragon* case, legislators and advocates believe that the “primary forms of sex trafficking” include “prostitution, pornography, stripping, and modeling.”⁶⁹ Notwithstanding the intersections between and similarities to sex trafficking cases, child labor trafficking is continuously ignored and marginalized by legislators, the media, and the public.⁷⁰ By enacting legislative provisions that marginalize forced labor cases, child labor trafficking will remain a hidden crime.⁷¹ Furthermore, the fact that U.S. law provides other legal responses to exploitation for labor should not absolve legislators of the obligation to hold traffickers criminally, as opposed to civilly, liable.⁷² As the U.S. Department of State has explained, anti-trafficking laws can supplement traditional civil causes of action for violations of federal labor laws without replacing them. Traffickers “should not escape criminal punishment by taking weaker administrative responses to child labor practices.”⁷³

D. *The Need to Fight Child Sex Trafficking*

Notwithstanding these concerns, a strong legal response to sex trafficking is needed because domestic child sex trafficking is a growing

67. *Madragon*, 340 Fed. Appx. 963; FARRELL ET AL., *supra* note 9, at 238.

68. Sanborn et al., *supra* note 23, at 11. (“In particular, female workers may be subject to sexual exploitation in the context of debt bondage.”).

69. *Id.*

70. See Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUMAN RIGHTS L. REV. 1, 2 (2011) (“When it comes to the plight of children being exploited internationally, the horror stories commonly publicized are of children being trafficked into commercial sex work.”).

71. See ASS’N OF FARMWORK OPPORTUNITY PROGRAMS, CHILDREN IN THE FIELDS: AN AMERICAN PROBLEM 2 (2007) [hereinafter CHILDREN IN THE FIELDS], available at <http://afop.org/wp-content/uploads/2010/07/Children-in-the-Fields-Report-2007.pdf>; HUMAN RIGHTS WATCH, FIELDS OF PERIL: CHILD LABOR IN US AGRICULTURE (2010); Baradaran & Barclay, *supra* note 70.

72. TIP REPORT 2012, *supra* note 4, at 36.

73. *Id.*

epidemic.⁷⁴ Texas is a major hub for child sex trafficking.⁷⁵ Houston, the largest city in Texas and the fourth largest city in the United States, is a major gateway for sex trafficking in the United States.⁷⁶ Between 2007 and 2011, at least 369 children were identified as victims of sex trafficking in Texas.⁷⁷

Texas legislators have focused their anti-trafficking efforts on domestic sexual exploitation of minors because, in their view, this group represents a vast majority of human trafficking victims in the state.⁷⁸ Convictions have been secured in high profile cases such as *United States v. Salazar*, which involved child sex trafficking in Texas.⁷⁹

Furthermore, Texas has a child welfare crisis that places minors at great risk for sexual exploitation.⁸⁰ Minors are particularly vulnerable in states like Texas where the population of runaway youth is large.⁸¹ Dallas, for example, has six thousand reported cases of runaways annually.⁸² Each year, at least one third of them are lured into prostitution within two days of leaving home.⁸³ These runaways leave home often to escape prior sexual abuse.⁸⁴ As a result, these minors turn to traffickers for food, shelter, income, familial love, and affection.⁸⁵ Traffickers prey on these minors in part “because they are easily controlled.”⁸⁶ As an entry into prostitution, minors sometimes are raped, beaten, or tortured.⁸⁷

In Texas, minors are exploited in a variety of segments of the commercial sex industry, including prostitution, pornography, escort service, strip dancing, and are purchased as “mail order brides.”⁸⁸ To

74. Sarah Primrose, *Killing the Messenger: The Intersection Between Sex Trafficking, Planned Parenthood & the Marginalization of Youth Victims*, 22 U. FLA. J.L. & PUB. POL’Y 299, 305-09 (2011).

75. Sanborn et al., *supra* note 23, at 8.

76. James O. Finckenauer & Jennifer Schrock, *Human Trafficking: A Growing Criminal Market in the U.S.*, NAT’L INST. OF JUSTICE 3-4 (2000), <https://www.ncjrs.gov/pdffiles1/nij/218462.pdf>; see HOUSTON RESCUE & RESTORE COALITION, *supra* note 21, at 3-9.

77. SHARED HOPE INTERNATIONAL, PROTECTED INNOCENCE INITIATIVE, TEXAS STATE FACTS, available at www.sharedhope.org/portals/o/documents/texasfacts.pdf.

78. TASK FORCE 2011 REPORT, *supra* note 32, at 3.

79. See, e.g., *United States v. Salazar*, 287 Fed.Appx.330 (5th Cir. 2009).

80. See TASK FORCE 2011 REPORT, *supra* note 32, at 3.

81. *Id.*

82. Sanborn et al., *supra* note 23, at 9.

83. *Id.*

84. Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 22 (2002).

85. TASK FORCE 2011 REPORT, *supra* note 32, at 3.

86. *Id.* at 11.

87. Susan L. Pollet, *Child Prostitutes: Criminals or Victims*, NY L.J., Apr. 16, 2010, at 4.

88. FARRELL ET AL., *supra* note 9, at 68.

exploit minors for sex, traffickers in Texas use a variety of schemes, from small street corner operations to extensive international networks.⁸⁹ Houston, like other Lone Star cities, has “a significant economic sector in and demands for sex-related businesses including massage parlors, modeling studios, strip clubs and cantinas.”⁹⁰ The demand for sex with children is met by commercial sex businesses that employ minors.⁹¹

The internet is a major vehicle for many of these forms of child sexual exploitation.⁹² On a typical weekend night, almost 200 girls are sold for sex via online classified ads.⁹³ A recent report by the Dallas Women’s Foundation, for example, estimated that over seven hundred minors were featured on internet ads for sexual services during a one month period in that Dallas alone.⁹⁴

Creating a separate offense for child sex trafficking brings public awareness to the specific acts that give rise to this crime and thereby helps the public identify victims. Prior to 2011, the Texas anti-trafficking statute did not define labor and sex trafficking as distinct crimes; instead, the statute covered both such crimes under the umbrella offense of human trafficking.⁹⁵ Sex trafficking was defined narrowly to include far fewer sex crimes.⁹⁶ Arguably, these vague terms undermined public understanding of the nature and pervasiveness of child sex trafficking.

A separate statutory provision for child sex trafficking highlights the unique means used to sexually exploit minors. For example, the statute incorporates several of the state’s pimping and pandering provisions, thereby clarifying that where minors are involved, these acts amount to trafficking.⁹⁷ The list of criminal acts that can give rise to

89. Richard J. Estes & Neil Alan Weiner, *The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico: Abstract (of the U.S. National Study)* (2001), available at http://www.sp2.upenn.edu/restes/CSEC_Files/Abstract_010918.pdf.

90. FARRELL ET AL., *supra* note 9, at 100 (in 2008, Harris County, which includes Houston, was selected by the National Institute of Justice as one of the specific geographic areas for a case study on human trafficking crimes because of these “local geo-economic conditions.”).

91. *See id.*

92. Sanborn et al., *supra* note 23, at 7; DALLAS WOMEN’S FOUNDATION, *supra* note 21, at 10-11.

93. TEXAS STATE FACTS, *supra* note 77.

94. DALLAS WOMEN’S FOUNDATION, *supra* note 21, at 11-12.

95. S.B. 24 § 1.02, 82(R) Leg. Sess. (Tex. 2011).

96. TASK FORCE 2011 REPORT, *supra* note 32, at 48 (“The definitions of forced labor or services . . . do not list all of the potential sexual acts that could constitute human trafficking under the law.”).

97. The statute is violated where anyone “traffics a child and by any means causes the trafficked child to engage in, or become a victim of” certain state offenses including “indecency

“sex trafficking” is broad enough to capture the myriad of means used to exploit minors.⁹⁸ These offenses include prostitution, compelling prostitution, and child pornography.⁹⁹ In particular, the separate crime of child sex trafficking allows the legislature to focus on the unique legal issues surrounding prostituted minors, such as the need to create safe harbors that shield these minors from criminal liability and juvenile delinquency adjudication.

E. What About Children Trafficked for Labor?

The Texas statute’s focus on child sex trafficking marginalizes child labor trafficking. The lack of focus on child labor trafficking is problematic for several reasons. First, the federal trafficking laws have not adequately addressed child labor trafficking and thus, strong state laws are needed to fill in the gaps.¹⁰⁰ Second, labor exploitation remains a major issue in Texas and other states.¹⁰¹ The International Labor Organization reports that over 270 million kids under sixteen years old are subjected to forced labor and thereby comprise half of all labor trafficking victims.¹⁰² The U.S. Government Accounting Office estimates that over 500,000 children are trafficked for labor in the United States each year.¹⁰³

In 2011, several high profile federal labor trafficking cases have brought this epidemic out of the shadows and into the spotlight.¹⁰⁴ The U.S. Department of Justice recently prosecuted the largest farm worker

with a child;” “sexual assault;” “prostitution;” “sexual performance by a child;” and “possession or promotion of child pornography.” See TEX. PENAL CODE § 20A.02(a)(7)(A)-(K) (2011).

98. See TEX. PENAL CODE § 20A.02(a)(7)(A)-(K) (2011).

99. TEX. PENAL CODE § 20A.02(a)(7)(E), (H) & (K) (2011).

100. Mattar, *supra* note 13, at 1286; Baradaran & Barclay, *supra* note 70, at 28. (“The effectiveness of the TVPA in dealing with child labor has been quite limited for at least two reasons. First, it places a disproportionately heavy emphasis on sex trafficking, and it fails to recognize the more widespread issue of trafficking for labor.”).

101. *Child Trafficking in Texas*, CHILDREN AT RISK, <http://childrenatrisk.org/research/child-trafficking/texas-overview/> (“This (the Texas-Mexico) border is North America’s number one supply site for young children used in sex and labor trafficking.”); CHILDREN IN THE FIELDS, *supra* note 71, at 5 (discussing labor trafficking in Texas and other states); Susan Carroll, *Traffickers Force More Men into Servitude*, HOUSTON CHRONICLE, July 6, 2009.

102. See South Texas Labor Trafficking Conference, *available at* www.c4sa.org/our-work/human-trafficking/how-our-the-victims-identify/south-texas-labor-trafficking-conference/ (“But labor trafficking is far more prevalent” than sex trafficking.).

103. See Baradaran & Barclay, *supra* note 70, at 28.

104. See U.S. Equal United States, Employment Opportunity Commission, Press Release, EEOC Sues Marine Services Company for Labor Trafficking, Discrimination, <http://www/eoc.gov/4-20-11.a.cfm>.; Press Release, EEOC Files Its Largest Farm Worker Human Trafficking Suit Against Global Horizons Farms, <http://www/eoc.gov/4-20-11.b.cfm>.

human trafficking case in modern U.S. history.¹⁰⁵ There, Global Horizons, a California-based farm labor firm pled guilty to conspiring to recruit 600 Thai nationals to the United States to work on farms in Hawaii and Washington. When the nationals arrived in the United States, their passports were confiscated, they were denied wages, and were subjected to a myriad of other abuses.

Not surprisingly then, domestic labor trafficking cases in Texas also have begun to receive extensive attention.¹⁰⁶ The annual South Texas Human Trafficking Conference, which brings leading advocates from throughout the world to Texas to strategize anti-trafficking efforts, has for five years focused on sex trafficking; but, in 2011 for the first time focused its conference on labor trafficking.¹⁰⁷

Even with separated claims, the Texas anti-trafficking statute could be strengthened by defining child labor trafficking with the same clarity and detail that is attributed to the definition of child sex trafficking. A provision which defines and highlights the means by which children are trafficked in labor or hybrid cases could help recognize victims of these types of cases. Such efforts are important particularly because child labor trafficking cases do not receive the same high profile press coverage as child sex trafficking cases.¹⁰⁸ The fact that much of the literature on child labor trafficking focuses on abuses abroad suggests that this crime is still perceived as an international, as opposed to domestic, problem.¹⁰⁹

III. DEFINING “TRAFFIC” TO PROTECT MINORS

A. *Recognizing the Means of Exploitation*

Texas law defines “trafficking” in terms that consider the needs of exploited minors. The Texas anti-trafficking statute protects minors by defining “traffic” broadly. To “traffic” means “to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any

105. Jerry Seper, *Three Plead Guilty to Forced Farm Labor of Thais in the U.S.*, THE WASHINGTON TIMES, June 25, 2011, available at <http://www.washingtontimes.com/news/2011/jun/15/3-plead-guilty-to-forced-farm-labor-of-thai-in-U.S..html>.

106. See Lawrence Downes, *In an Ugly Human-Trafficking Case, Hawaii Forgets Itself*, THE NEW YORK TIMES, Sept. 20, 2010, available at <http://www.nytimes.com/2010/09/21/opinion/21tue4.html?pagewanted=print>.

107. See South Texas Labor Trafficking Conference, *supra* note 102 (“But labor trafficking is far more prevalent” than sex trafficking.).

108. See generally CHILDREN IN THE FIELDS, *supra* note 71.

109. *Id.*

means.”¹¹⁰ Under this definition, Texas law does not require that “traffic” include proof of “transport.”¹¹¹ In contrast, the original 2003 Texas statute did equate traffic with transporting a victim and therefore, by this narrow definition, excluded from prosecution many cases not involving transport of victims that otherwise were within the scope of trafficking.¹¹² The provision was revised in 2007¹¹³ and the 2011 legislation maintained this new approach.

The new definition reflects the public policy goal of recognizing certain distinctions between domestic trafficking and international trafficking.¹¹⁴ Domestic trafficking, unlike smuggling and international trafficking, does not require interstate travel or transportation.¹¹⁵ While some traffickers move victims to and from various locations in different cities,¹¹⁶ this is not true in every case.¹¹⁷ While some traffickers move victims from various locations, often in different cities, this is not true for every domestic trafficking case. Domestic minors may be exploited at school and in their own homes, without leaving their communities.¹¹⁸ For example, middle school students have been trafficked for sex by their classmates and without leaving their neighborhood.¹¹⁹ Likewise, while some domestic labor trafficking victims are foreigners, others are

110. S.B. 24, 82(R) Leg. Sess. (Tex. 2011) (revising TEX. PENAL CODE § 20A.01(4) (2011)).

111. See *infra* notes 107-18 and accompanying text.

112. H.B. 2096, 78th Leg. § 2 (Tex. 2003); TEX. PENAL CODE § 20A.01(2) (2003). Originally, Section 20A.01(2) defined “traffic” as “to transport another person or to entice, recruit, harbor, provide, or otherwise obtain another person for transport by deception, coercion or force” (emphasis added). Thus, the essential elements of proving “traffic” were (a) to transport or entice, recruit, harbor, provide or obtain someone for transport; (b) by deception, coercion or force. Thus, the statute required proof that the defendant “transported” the victim as well as proof that the defendant used “deception, coercion or force.”

113. H.B. 1121, 80(R) Leg. Sess. § 4 (Tex. 2007).

114. TASK FORCE 2011 REPORT, *supra* note 32, at 21; see POLARIS PROJECT, TOP 15 PROBLEM AREAS IN STATE BILLS ON TRAFFICKING IN PERSONS, http://www.polarisproject.org/storage/documents/policy_documents/Top%2015%20Problem%20Areas%20in%20State%20Bills%20on%20Trafficking.pdf.

115. *Id.*

116. JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 23 (Mar. 2001).

117. *Id.*

118. See Raymond et al., *supra* note 117 and accompanying text.

119. See Laura Sessions Stepp, *Unsettling New Fad Alarms Parents: Middle School Oral Sex*, WASH. POST, July 8, 1999, at A1; Nakota Ashstare, *Stop Sex Trafficking*, YAMBILL VALLEY NEWS-REGISTER, Jan. 7, 2012, <http://www.newsregister.com/article?articleTitle=nakota+ashstare+-+stop+sex+trafficking--1325893212--2384>.

Americans.¹²⁰ By excluding the latter victims from its definitions, the “transport” requirement undermined the effectiveness of the statute.¹²¹

By eliminating the “transportation” requirement, the Texas statute is consistent with federal anti-trafficking law and policy as well as each of the model statutes set forth by the DOJ, and two leading advocacy organizations, the Center for Women Policy Studies (“CWPS”) and the Polaris Project.¹²² The State Department emphasizes that under federal law, “[a] victim need not be physically transported from one location to another in order for the crime” to be actionable under the TVPA.¹²³ This new definition of “traffic” reflects the public policy that “the heart of the concept of ‘trafficking in persons’ is the denial of liberty of another,” not “the movement of the victim.”¹²⁴ This adoption of the federal policy will help create a uniform definition of trafficking which in turn, consistently protects minors.¹²⁵

B. Defining “Child” Broadly to Identify Victims

The 2011 anti-trafficking legislation also broadens the statutory definition of “child,” thereby increasing the number of exploited minors within its reach.¹²⁶ In doing so, the statute addresses a major defect within domestic anti-trafficking legislation throughout the nation—the failure to enact provisions which effectively recognize sexually exploited minors as “trafficking victims”.¹²⁷ As discussed below, the

120. See CHILDREN IN THE FIELDS, *supra* note 71, at 2.

121. *Id.*

122. See U.S. DEP’T OF JUSTICE MODEL STATE CRIMINAL PROVISIONS ON PIMPING, PANDERING, AND PROSTITUTION (2011) [hereinafter DOJ MODEL STATUTE], <http://www.justice.gov/olp/model-state-criminal-provisions.html>; see also THE NATIONAL INSTITUTE ON STATE POLICY ON TRAFFICKING OF WOMEN AND GIRLS OF THE CENTER FOR WOMEN POLICY STUDIES, RESOURCE GUIDE FOR STATE LEGISLATORS: MODEL PROVISIONS FOR STATE ANTI-TRAFFICKING LAWS 2 (July 2005) [hereinafter CWPS MODEL STATUTE], available at <http://www.humantrafficking.org/uploads/publications/TraffickingResourceGuide.pdf>; POLARIS PROJECT, MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING 4 (Aug. 2010) [hereinafter POLARIS PROJECT MODEL STATUTE], http://www.polarisproject.org/storage/documents/policy_documents/state_policy/Final_Comprehensive_ModelLaw__8_2010.pdf.

123. TIP REPORT 2012, *supra* note 4, at 7.

124. DOJ MODEL STATUTE, *supra* note 122, at 3.

125. These include the model set forth by the DOJ, the Center for Women Policy Studies (CWPS), and the Polaris Project. DOJ MODEL STATUTE, *supra* note 122; see also CWPS MODEL STATUTE, *supra* note 122, at 2; POLARIS PROJECT MODEL STATUTE, *supra* note 122, at 4.

126. See TEX. PENAL CODE § 20A.01(1) (2011).

127. See, e.g., CWPS FACT SHEET, *supra* note 14; see also; TIP REPORT 2012, *supra* note 4, at 12-14 (on the challenges to proper victim identification); Golke, *supra* note 16, at 207-08

broadening of the definition of “child” advances several public policy goals with respect to child trafficking.

As of September 2011, the Texas statute defines “child” as “a person younger than 18 years of age.”¹²⁸ The new statute specifically includes the word “child” in order to remind the public that a victim who is under eighteen years old is, in fact, a child.¹²⁹ By using the word “child,” as opposed to “minor,” the Texas law underscores the fact that even older teen victims are still under-aged victims.¹³⁰

The Texas statute does not allow traffickers to use “ignorance of age” as a defense.¹³¹ In cases involving sexually exploited minors, Texas law elevates the penalty from a second degree felony to a first degree felony “regardless of whether the actor knows the age of the child at the time the actor commits the offense.”¹³² Likewise, the TVPA reaches additional perpetrators by lowering the knowledge requirement for violations involving minors.¹³³

The adoption of a broad definition for “child” advances the policy goal of recognizing all prostituted minors as victims of trafficking. First, by defining “child” as broadly as possible to include any person under eighteen, the statute protects a larger class of people from exploitation.

Second, this definition of “child” is progressive because minors over age fourteen make up the largest number of child sex trafficking victims.¹³⁴ Texas lawmakers recognize that the average age in which children enter prostitution is twelve, and therefore the majority of victims are teenagers between fourteen and eighteen.¹³⁵ Thus, a larger group of minors now have the opportunity to receive services.¹³⁶

(discussing barriers to victim identification); Annitto, *supra* note 16, at 6-9 (discussing the difficulty faced by law enforcement and advocates in recognizing prostituted minors as trafficking victims).

128. TEX. PENAL CODE § 20A.01(1) (2011).

129. *See* TEX. PENAL CODE § 20A (2011).

130. *See* TASK FORCE 2011 REPORT, *supra* note 32, at 41.

131. *See* TEX. PENAL CODE § 43.05(A)(2) (2011).

132. TEX. PENAL CODE § 20A.02(b)(1) (2011) (The defendant must “knowingly” traffic another person and have the intent that the trafficked person commit an act defined under the statute as “forced labor and services.”). It is a felony in the first degree to traffic “a child” under eighteen years old at the time of the offense “regardless of whether the actor knows the age of the child at the time the actor commits the offense.” *Id.*

133. *See* 18 U.S.C. § 1591(c) (2011). The 2008 revisions to the TVPA provide that, when the defendant had “reasonable opportunity to observe” a child, then actual knowledge that the victim is an under-aged minor need not be proven. Instead, the prosecutor only has to show only that the trafficker had “reckless disregard” that the minor engaged in sex trafficking. *Id.* at (a)(2).

134. TEX. PENAL CODE § 43.02(b)(3); TASK FORCE 2011 REPORT, *supra* note 32, at 3 (indicating that 369 of 480 victims are minors).

135. Hanna, *supra* note 84, at 12. *See also* TASK FORCE 2011 REPORT, *supra* note 32, at 13.

136. *See infra* Section IV.B.

The use of an objective test such as “age” as a determinant for consent protects those children who do not recognize that they are being emotionally manipulated, coerced, or sexually exploited. The control and manipulation by adults prevents children from identifying as victims and cooperating with law enforcement officials and others who offer help.¹³⁷ By defining “child” as any person under eighteen years old, Texas law furthers the policy goal of facilitating victim identification through uniformity in definitions.

Furthermore, a broader definition of “child” helps overcome several obstacles to accurately identifying child sex trafficking victims. The Texas Human Trafficking Prevention Task Force recently acknowledged that “Texas has only begun to scratch the surface in identifying victims.”¹³⁸ There are a myriad of barriers to properly identifying victims of child trafficking, including the unwillingness of victims of report abuse, particularly if they fear violent retaliation, as well as the lack of experience of law enforcement in recognizing that a child is being trafficked.¹³⁹ Local law enforcement officers, along with local NGOs play a vital role in identifying and assisting trafficking victims.¹⁴⁰ Local police officers are often the first responders in those prostitution and assault cases which trigger trafficking investigations.¹⁴¹

A uniform standard is also important because social attitudes toward age and sexual consent present unique issues in child sex trafficking cases. Specifically, law enforcement agents use a subjective determination of whether the child consented to prostitution as a tool for identifying whether a child is a “victim” of trafficking.¹⁴² There is also a “culture of tolerance” surrounding commercial sexual exploitation of minors such that society does not recognize American prostituted minors as victims of crime or abuse.¹⁴³ According to the Texas Attorney General, “[a] common misconception is the notion that human trafficking victims are all international victims.”¹⁴⁴

137. Hanna, *supra* note 84, at 24-25.

138. TASK FORCE 2011 REPORT, *supra* note 32, at 8, 15-16.

139. See, e.g., Golke, *supra* note 16, 207-08 (discussing barriers to victim identification); Annitto, *supra* note 16, at 7-9.

140. TASK FORCE 2011 REPORT, *supra* note 32, at 9, 22

141. Barnhart, *supra* note 15, at 87.

142. See Maria Silenzi Cianciarulo, *What is Choice? Examining Sex Trafficking Through the Lenses of Rape Law and Prostitution*, 6 U. ST. THOMAS L.J. 54, 67-76 (2008).

143. See Smith & Vardaman, *supra* note 6, at 268 (emphasizing the culture of tolerance within the trucking community towards the prostitution of children as young as twelve years old at interstate trucking stops throughout the United States).

144. TEXAS HHS REPORT, *supra* note 21, at 8.

Thus, the use of age to define sex trafficking victims also shields sexually exploited children from cultural and social biases associated with prostitution and human trafficking, shared by police officers or other first responders who believe that minors exercise informed consent to be prostituted.¹⁴⁵ Officers tend not to believe that American teens, in particular, are victims because they do not meet the stereotype of an iconic victim.¹⁴⁶ American kids bear the stereotype of a defiant, empowered person who has chosen to engage in prostitution. In contrast, age is an objective, as opposed to subjective, standard that replaces the use of subjective assessments about which minors are victims.¹⁴⁷ Instead, like rape shield laws, age presumes consent.¹⁴⁸

C. *Eliminating Force, Fraud, or Coercion (“FFC”)*

The Texas legislature has taken a huge step by eliminating the force, fraud, or coercion (“FFC”) requirement as an element of child sex trafficking. Texas is one of the few states to eliminate proof of FFC as a requirement in child sex trafficking cases.¹⁴⁹ Prior versions of the Texas statute required proof of FFC in cases involving child trafficking. The 2003 statute, for example, identified only a narrow list of acts that met the definition of FFC.¹⁵⁰ The 2007 statute expanded the list of proscribed acts that met the statute’s definition of “coercion” but the list still failed to reflect the extensive means used to traffic minors.¹⁵¹ For example, the 2007 statute provided that “forced labor or services” only meant “causing or threatening to cause bodily injury to another.”¹⁵² The 2009 statute further revised the definition of “forced labor or services” to recognize psychological coercion as a means of trafficking victims.¹⁵³

145. TASK FORCE 2011 REPORT, *supra* note 32, at 3, 5. For further discussion on the role of societal biases in assessing sexual consent in rape, prostitution and trafficking cases, see generally Cianciarulo, *supra* note 142, at 67-76.

146. TASK FORCE 2011 REPORT, *supra* note 32, at 3, 5.

147. TASK FORCE 2011 REPORT, *supra* note 32, at 5; see Srikantiah, *supra* note 58, at 205.

148. See TEX. PENAL CODE § 22.011(a)(2); (c)(1); (e)(B)(1-2).

149. Mandi Sheridan Kimball, MSW Director of Public Policy and Law Center and Government Affairs, Texas and Federal Human Trafficking 82nd Legislative Update, Slide 5 (presentation transcript available at <http://www.slideshare.net/freethetravellersconference/texas-and-federal-human-trafficking-82nd-legislative-update>).

150. TEX. PENAL CODE § 20A.01 (2003). See Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 407-08 (2011).

151. See H.B. 1121, 80(R) Leg. Sess. § 4 (Tex. 2007).

152. H.B. 2096, 78th Leg. (Tex. 2003).

153. See Ozalp, *supra* note 15, at 1417-18.

This 2011 amendment aligns Texas law more closely with the TVPA and a burgeoning movement among states to remove the requirement from their anti-trafficking statutes.¹⁵⁴ Under the TVPA, sex trafficking of any person under eighteen years old is a felony offense regardless of whether FFC is proven.¹⁵⁵

The debate over whether “trafficking” should be defined in terms of “force, fraud, or coercion” is one of the most contested issues in the anti-trafficking movement.¹⁵⁶ Advocates on either side of the debate rarely address the unique issues involved in applying the test in cases involving minors. Texas prosecutors had argued that the FFC requirement undermined successful prosecutions in state child sex trafficking cases.¹⁵⁷ The 2003 version, which did not define trafficking in terms of FFC, facilitated prosecutions.¹⁵⁸ In contrast, after the statute was revised in 2007 to include proof of FFC as an element of trafficking, the statutory change “brought prosecutions to a stop.”¹⁵⁹ Instead, prosecutors brought human trafficking offenses under other Texas Penal

154. However, whereas Texas still requires proof of force in cases involving domestic trafficking of minors, the TVPA does not apply the requirement to any cases of trafficked minors. See Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 11-14 (2008).

155. TASK FORCE 2011 REPORT, *supra* note 32, at 48; see 22 U.S.C. § 7101 (2011).

156. For articles addressing the debating on whether FFC or consent should be elements of a trafficking crime, see Samuel V. Jones, *Human Trafficking Victim Identification: Should Consent Matter*, 45 INDIANA L. REV. 483, 486 (2011-2012) (arguing “that consent may, in some cases, expire before the onset of fraud, force, or coercion, particularly in the face of unpalatable alternatives”); Elizabeth Kaigh, *Whores and Other Sex Slaves, Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139 (2009) (arguing in favor of the FFC test to distinguish trafficking and voluntary prostitution); see also Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence Based Theory and Legislation*, 101 J. CRIM. & CRIMINOLOGY 1337, 1338 (2011) (contrasting the paradigm of all sex work as “oppression” with the alternative “polymorphous paradigm [which] holds that there is a broad constellation of work arrangements, power relations, and personal experiences among participants in sexual commerce.”).

157. TEXAS HHS REPORT, *supra* note 21; see Pennartz, *supra* note 15, at 385 (discussing hesitancy by prosecutors to bring cases under the Texas anti-trafficking statute).

158. See NICOLE HAY, SHARED HOPE INTERNATIONAL, DOMESTIC MINOR SEX TRAFFICKING: DALLAS, TEXAS 4 (2008) [hereinafter SHARED HOPE DALLAS], available at http://www.sharedhope.org/Portals/0/Documents/Dallas_PrinterFriendly.pdf.

159. SHARED HOPE DALLAS, *supra* note 158, at 4. In 2007, prior to the revisions taking effect, for example, Dallas filed fifty-five domestic minor sex trafficking cases involving thirty-three suspects. *Id.* at 26. After the 2007 revisions, “the state statute is rarely utilized to prosecute human trafficking violations[]” even though Texas remains a major hub for human trafficking. TEXAS HHS REPORT, *supra* note 21, at 19.

Code provisions because the FFC element can be too difficult to prove.¹⁶⁰

The elimination of the FFC requirement in child sex cases will facilitate prosecutions. In cases involving children, prosecutors have faced many obstacles while trying to prosecute cases by proving psychological coercion.¹⁶¹ Because these children identified with their exploiter, they were unwilling or unable to corroborate the claim that they were forced to perform sex acts.¹⁶²

By requiring proof of FFC, state anti-trafficking laws perpetuate the myth that domestic minors presumably consent to be prostituted. Thus, state laws required proof of FFC to rebut this presumption. Underlying this policy is the cultural assumption that domestic minors do not fit the iconic prototype of a trafficking victim. Domestic minors actually are “easy targets” and “carry less risk for the traffickers and buyers than adults and foreign traffickers.”¹⁶³ Nevertheless, state trafficking laws marginalize domestic minors by acknowledging only international migrants as the iconic sex trafficking victims.¹⁶⁴ This is true for a variety of reasons. First, the iconic victim is a foreigner female; she is a “naïve, passive, ignorant, migrant.”¹⁶⁵ She is “tied to a bed in a brothel.”¹⁶⁶ In other words, she is from South Africa, but not from the South Bronx—a captive from a foreign land as opposed to the girl next door. She is locked away in a hidden place, not standing on the street corner. She is awaiting “rescue” during a massive brothel raid.¹⁶⁷ She is not walking seemingly at her own free will on the strip near her home.

160. TEXAS HHS REPORT, *supra* note 21, at 35 (Texas prosecutors insisted that, “because of the 2007 changes” the statute would not be used to prosecute human traffickers). Research by NGO’s produced various reports that echoed the Attorney General’s argument. *Shared Hope Dallas*, *supra* note 158, at 26. Texas District Attorneys reported to the Texas Attorney General that it was much more challenging for prosecutors to bring cases “as evidenced by state prosecutors filing 27 sex trafficking cases in 2007 before September, and only two cases in the following months.” *Id.* at 28.

161. TASK FORCE 2011 REPORT, *supra* note 32, at 48. Many child victims suffer from Stockholm Syndrome and refuse to testify against their abusers. See Annitto, *supra* note 16, at 12-13 (prostituted children experience “traumatic bonding” which “makes it more difficult for them to separate themselves from the person responsible for their harm.”).

162. SHARED HOPE DALLAS, *supra* note 158, at 28.

163. Anna Philpot, *Out of the Dark*, FORT WORTH MAGAZINE, April 2010, http://www.virtualonlineeditions.com/display_articles.php?id=351079.html.

164. See Srikantiah, *supra* note 58; Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Procedural and Legal Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 3, 9-10. (2007).

165. Chuang, *supra* note 58, at 1710.

166. Haynes, *supra* note 164, at 9-12.

167. *Id.* at 9-10.

In contrast, domestic teens are perceived as the opposite of the iconic victim. While the iconic victim is one who lacks agency, the American teen is presumed to choose prostitution as an exercise of her sexual liberty and right to choose. While the iconic victim is innocent and timid, the American prostituted teen is a “good girl gone bad.”¹⁶⁸ Domestic minors also are especially vulnerable to trafficking precisely because policy makers, lawyers and law enforcement officials perceive them as “teen prostitutes” instead of “trafficking victims.”¹⁶⁹

Scholars have recognized this process of “essentializing” and “othering” the trafficking victim. Jonathan Todres has argued that “othering” is “a root cause of both inaction and the selective nature of responses to the abusive practice of trafficking.”¹⁷⁰ Dina Francesca Hayes has argued that, in the context of international trafficking, “racism, prejudice, and ‘othering’ allow users of trafficked persons to convince themselves that using trafficked persons for forced or compelled labor is justified because the occupants of this position are the ‘natural . . . occupants of the lowliest positions in domestic or sex work.’”¹⁷¹

With respect to how state laws treat America’s own prostituted minors, the concept of “othering” is at play. The dichotomy between the historic treatment of prostitutes as criminals, delinquents, and marginalized members of society—even when those prostitutes are under-aged children—is a major cultural hurdle that must be overcome in order to prevent future trafficking of minors.¹⁷² The cultural presumption is that American minors involved in prostitution are responsible for their own predicament because they chose to break school rules, to run away, to become sexually active, or get involved in some other at risk behavior. As a result of mislabeling domestic prostituted minors as criminals and delinquents, these minors face unique barriers to rehabilitative services and other legal protections.¹⁷³

This need to shift the legal paradigm for child prostitution should resonate loudly in Texas following the Texas Supreme Court’s recent

168. See Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division & the Use of Material Witness Holds Against Teenage Prostitutes*, 57 CATHOLIC L. REV. 471 (2008).

169. See Hanna, *supra* note 84, at 110.

170. Haynes, *supra* note 164, at 14-15; see also Jonathan Todres, *Law, Otherness and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 607 (2009).

171. Haynes, *supra* note 164, at 15.

172. See Brown, *supra* note 168, at 5-10; J. Shoshana Erlich, *From Age of Consent Laws to the “Silver Ring Thing”: The Regulation of Adolescent Female Sexuality*, 16 HEALTH MATRIX 151, 152-54 (2006).

173. SMITH ET AL., *supra* note 19, at vi.

landmark *In re B.W.* case.¹⁷⁴ The Texas Supreme Court held that a child under fourteen cannot consent to sex.¹⁷⁵ In that case, a thirteen year old prostituted teenager waved down a car driven by an undercover officer.¹⁷⁶ She offered to provide oral sex in exchange for twenty dollars. The officer arrested the teen for prostitution.¹⁷⁷ The trial court found B.W. guilty of the misdemeanor offense of prostitution for having “knowingly agreed to engage in sex . . . for a fee.”¹⁷⁸ The Court of Appeals affirmed.¹⁷⁹

The Supreme Court of Texas reversed, holding that, in Texas, a minor cannot be prosecuted for prostitution.¹⁸⁰ The court reasoned that a child under fourteen cannot legally consent to sex and therefore, cannot satisfy the knowledge element of the state crime of prostitution.¹⁸¹ The court further reasoned that its decision upheld the intent of the applicable Texas statutes as well as Texas common law.¹⁸²

The movement among states to eliminate the FFC test in cases involving minors is gaining momentum. The Polaris Project and other groups advocate that all prostituted minors are victims of child abuse and trafficking regardless of whether a prosecutor can prove FFC was used in any given case.¹⁸³ Several state legislators agree with this reasoning and as a result, have adopted “safe harbor” provisions that both eliminate FFC as an element of child sex trafficking and mandate that sexually exploited minors cannot be prosecuted for prostitution.¹⁸⁴

174. *In re: B.W.*, 313 S.W.3d 818, 822 (Tex. 2010). See Rami S. Badawy, *Shifting the Paradigm From Prosecution to Protection of Child Victims of Prostitution*, 22 NDAA 1 (Nov. 18, 2010), <http://www.ndaa.org/pdf/update/22N8.pdf>.

175. *In re: B.W.*, 313 S.W.3d 818, 822.

176. *Id.*; POLARIS PROJECT, HUMAN TRAFFICKING LEGISLATIVE ISSUE BRIEF: SEX TRAFFICKING OF MINORS AND “SAFE HARBOR” 2 [hereinafter *Polaris Project Issue Brief*], http://www.polarisproject.org/storage/documents/briefs/issue_brief_safe_harbor_September_2012.pdf.

177. *In re: B.W.*, 313 S.W.3d 818, 822; *Polaris Project Issue Brief*, *supra* note 176, at 2.

178. *In re: B.W.*, 313 S.W.3d 818, 822; *Polaris Project Issue Brief*, *supra* note 176, at 2.

179. *In re: B.W.*, 313 S.W.3d 818, 822; *Polaris Project Issue Brief*, *supra* note 176, at 2.

180. *Polaris Project Issue Brief*, *supra* note 176.

181. *Id.* at 2.

182. *Id.*

183. *Id.*

184. See *Human Trafficking: Minors: Hearing to Amend AB 90 Before the California State Assembly Committee on Public Safety*, 2011-2012 Reg. Sess. (Apr. 26, 2011) (regarding the removal of the force, fraud or coercion requirement in child trafficking cases).

IV. THE TENSION BETWEEN PROSECUTION & PROTECTION

A. *The Focus on Prosecution & Penalties*

The strength of these statutory definitions that protect sexually exploited minors is undercut by the absence of guaranteed victim services. A major defect in the Texas anti-trafficking legislation is that it focuses disproportionately on prosecuting traffickers instead of protecting child victims and preventing future abuse.¹⁸⁵ The same criticism has been leveled on the TVPA; on the federal level, there is an overemphasis on prosecution and a less focused commitment to providing services and other protections for trafficked persons.¹⁸⁶

Enhanced criminal penalties are one of the major features of the 2011 revisions. Under Texas law, human-trafficking offenses carry first degree or second degree felony penalties.¹⁸⁷ Child sex trafficking is a first degree offense.¹⁸⁸ Stiffer penalties were added in cases involving an underlying offense other than human trafficking.¹⁸⁹ This strategy reflects the fact that in many cases involving human trafficking, another crime is the offense of record.¹⁹⁰ Thus, the Texas Penal Code was amended, for example, to make sex trafficking of a child an “aggravated factor” to justify stiffer penalties in aggravated sex assault cases.¹⁹¹

185. Baradaran & Barclay, *supra* note 70, at 27-28 (“The TVPA purports to take a three prong approach of prevention of trafficking, protection of victims, and prosecution of traffickers, but in practice, many commentators agree that the act focuses primarily on prosecution of traffickers.”). See Annitto, *supra* note 16, at 7 (discussing the tendency of legislatures to focus on penalties); Todres, *supra* note 7, at 28 (“[G]overnment strategies have not been prevention-orientated but rather have focused primarily on dealing with the after effects of such exploitation through criminal sanction and victim assistance.”).

186. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of the U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2978-79 (2006). See also Barnhart, *supra* note 15, at 96-97.

187. TEX. PEN. CODE § 20A.02(b). The punishment for a first degree felony conviction ranges from five to ninety nine years and a fine not to exceed \$10,000. TEX. PEN. CODE § 12.32(a)-(b). For a second degree felony the range is two to twenty years and a fine not to exceed \$10,000. TEX. PEN. CODE § 12.33(a)-(b). As an additional enhancement, if an actor “traffics” a person in order to commit acts proscribed by some other section of the Penal Code, then the defendant could be prosecuted “under either section or under both sections.” TEX. PEN. CODE § 20A.02(c) (2011).

188. TEX. PEN. CODE § 20A.02(B)(1)-(2) (2011).

189. TEX. PEN. CODE ANN. § 20A.02 (a)(7-8); (b)(2) (West 2011).

190. See TASK FORCE 2011 REPORT, *supra* note 32, at 2.

191. TEX. PEN. CODE § 22.021(2)(A)(ii)-(iii) (2011); TASK FORCE 2011 REPORT, *supra* note 32, at 53. Furthermore, human trafficking related offenses were added to the list of aggravated factors to the underlying charge for several state criminal offenses including “sale or purchase of a child;” “prostitution” and “criminal solicitation of a minor.” TEX. PEN. CODE § 25.08(c)(2011) (sale or purchase of a child); TEX. PEN. CODE 43.02(c)(3)-(4) (prostitution) (2011); TEX. PEN. CODE § 43.05(b) (2011) (compelling prostitution); TASK FORCE 2011 REPORT, *supra* note 32, at 53.

The Texas statute does not stagger penalties for minors of different ages and thus offers protection to a larger group of potential child victims.¹⁹² Under Texas law, all sex cases involving children require the same first degree felony penalties regardless of whether the child is over or under age fourteen.¹⁹³ Texas' new penalty provisions reflect a rejection of the 2003 Texas statute in which child sex trafficking was only treated as a first degree offense where the victims were fourteen years old or younger.¹⁹⁴ Instead, the current Texas law correctly reflects that sex trafficking is a grave offense regardless of the minor's age.

On the one hand, strong penalties are important in order to take trafficking seriously. Texas' strong penalties send the message that the punishment for child sex trafficking reflects the gravity of the crime. The extent to which the state statute provides a lower penalty than the federal statute may undermine the utility of the state statute. Prosecutors will prefer to bring suit under the TVPA if the latter provides stiffer penalties.¹⁹⁵ Texas' 2011 revisions attempt to resolve this problem. In comparison to other state laws, Texas's twenty-year maximum sentence is among the strongest penalties.¹⁹⁶ Only a few other statutes are more punitive.¹⁹⁷ By declining to stagger most penalties, the Texas statute is also more protective of minor victims than the federal statute.¹⁹⁸ Furthermore, under Texas law, child sex trafficking and compelling prostitution can form the basis of the crime of "continuous sexual abuse"

Finally, another example has been the amendment to the Texas Penal Code to include sex trafficking, prostitution and compelling prostitution as criminal acts that underlie a charge of criminal solicitation of a minor. TEX. PEN. CODE § 15.031(b) (2011); *see* TASK FORCE 2011 REPORT, *supra* note 32, at 54.

192. *See* TEX. PENAL CODE § 20A.02(b)(1)-(2) (2011).

193. *See id.*

194. TEX. PEN. CODE § 20A.02(b) (2011). All offenses were second degree felonies unless the victim was "younger than 14 years of age at the time of the offense" or "the offense result[ed] in death" of the victim. H.B. 2096, 78th Leg. § 2 (Tex. 2003).

195. *See* Pennartz, *supra* note 15, at 385 (discussing hesitancy by prosecutors to bring cases under the Texas anti-trafficking statute).

196. *See* CWPS FACT SHEET, *supra* note 14, at 3-15.

197. Idaho, Minnesota, Rhode Island, Mississippi, and Montana have penalties twenty five years or higher with Montana having a maximum penalty of one hundred year years plus a \$100,000 fine for trafficking including "sexual intercourse without consent." CWPS FACT SHEET, *supra* note 14, at 6, 9, 12; Tanagho, *supra* note 15, at 922 (Illinois's maximum penalty is thirty years for convictions of the crime of involuntary servitude.). At least one state, Florida, enhances its penalties where the trafficker is a parent, legal guardian or other custodian of a child victim. CWPS FACT SHEET, *supra* note 14, at 5.

198. 18 U.S.C. § 1591(b)(1)-(2) (2011) (Under federal law, if the victim is under fourteen years old, the penalty is fifteen years to life in prison. But, if the victim is between fourteen and eighteen years old, then the penalty is ten years to life in prison).

of a child which carries stiffer penalties.¹⁹⁹ Moreover, sentences for trafficking and compelling prostitution offenses cannot run concurrently with other offenses; this means a longer prison sentence for offenders.²⁰⁰ Now, the penalties for compelling prostitution are stiffer for cases involving children, as opposed to adults.²⁰¹ Penalties are also enhanced for employing or inducing children under fourteen to work in a commercial sex-related business.²⁰²

Traditionally, penalties for trafficking have been disproportionately lower than other high profit street crimes, and pimps take advantage of the discrepancies.²⁰³ As an officer in the Boston Police Department poignantly explained, “[g]angs used to sell drugs.”²⁰⁴ But “many of them have shifted to selling girls because it’s just as lucrative but far less risky.”²⁰⁵ Some states will prosecute the prostituted child and not prosecute the pimp, trafficker, or “john” who purchases sex with the child *at all*.²⁰⁶

B. *The Uncertainty of Victim Services*

On the other hand, this focus on punishment is not balanced with an equal concern for the protection of the actual child victims and the prevention of future crimes. The Texas 2011 legislation authorizes, but does not mandate, state funded social services for sexually exploited children.²⁰⁷

The absence of a funding mandate is problematic on several fronts. First, this a major concern because trafficking statutes too often fail to provide services to domestic victims at all, thereby feeding into the stereotype that only foreigners are trafficked. The statute’s failure to

199. TEX. PEN.CODE § 21.02(h) (2011).

200. TEX. PEN.CODE § 3.03(b) (2011). As a result of the 2011 amendments, Texas Penal Code § 3.03(b) now exempts Chapter 20A (trafficking of persons) and §43.05 (compelling prostitution) from the rule that criminal charges run concurrently. TASK FORCE 2011 REPORT, *supra* note 32, at 49.

201. TEX. PEN. CODE § 43.05(b) (2011); TASK FORCE 2011 REPORT, *supra* note 32, at 52.

202. See TEX. PEN. CODE §43.251 (2011) (employment harmful to a child); TASK FORCE 2011 REPORT, *supra* note 32, at 54.

203. See Ian Urbina, *For Runaways, Sex Buys Survival*, N.Y. TIMES, Oct. 27, 2009, at A1.

204. *Id.*

205. *Id.*

206. See, e.g., *In re: B.W.*, 313 S.W.3d 818 (Tex. 2010); Press Release, Shared Hope International, Shared Hope International Exposes Never-Before-Seen Look at Child Sex Trafficking Laws in America (Dec. 1, 2011), http://_www.sharedhope.org/PORTALS/o/Documents/PIIpostFINAL.pdf.

207. See 2011 Tex. Sess. Law Serv. ch. 515 (West) (amending TEX. GOV’T CODE § 772.006(e) (West 2011)).

guarantee services is troublesome because in Texas, a disproportionate amount of direct services, shelters, legal services, and other resources provided by advocacy groups have traditionally been reserved exclusively for international victims.²⁰⁸ The Texas Attorney General and the Texas State Department of Health and Human Services (“Texas HHS”) have published reports that call upon the Texas legislature to provide domestic victims with the same resources international victims already receive.²⁰⁹ For example, Texas HHS found that most of the Texas service providers provide most of their resources to foreign victims.²¹⁰

Second, prior versions of the Texas statute failed to provide funding for such services.²¹¹ Prior versions of the Texas anti-trafficking statute deprived sexually exploited children of needed services.²¹² The original 2003 Texas statute fell short in the same way as its Florida counterpart in that, “by merely criminalizing the act, the legislature failed to recognize the unique nature of the act.”²¹³

In 2009, Texas attempted to address this issue through House Bill 4009, which mandated that the Texas Human Trafficking Commission (“Commission”) create and operate a victim assistance program for domestic trafficking victims, i.e., those who are U.S. permanent residents or citizens.²¹⁴ The Commission was charged with creating and executing a program that included at least four specific components: (1) creation of a searchable database of victim assistance programs; (2) suggested training programs for lawyers, judges, and law enforcement to bring awareness about the nature of human trafficking; (3) outreach to teach the public about assistance programs for victims; and (4) a grant program to give funds to public organizations and NGOs who also assist victims.²¹⁵ The statute further required that the Commission submit reports every two years (on even years) to the legislature on the success

208. TEXAS HHS REPORT, *supra* note 21, at 48 (federally funded programs in Texas established to address the needs of human trafficking victims are restricted to servicing international victims); Sanborn et al., *supra* note 23, at 31-34. In Houston and other Lone Star cities, most legal and social service providers assist immigrants. But much fewer services exist in any of these Texas cities for domestic victims.

209. TEXAS HHS REPORT, *supra* note 21, at 48.

210. *Id.* See also Sanborn et al., *supra* note 23, at 43.

211. See TASK FORCE 2011 REPORT, *supra* note 32, at 13.

212. *Id.* at 56.

213. Butkus, *supra* note 15, at 327.

214. TEX. GOV'T CODE ANN. §§ 402.305(c), 531.382 (West 2009).

215. TEX. GOV'T CODE ANN. § 531.382 (West 2009); TEXAS HHS REPORT, *supra* note 21, at 14-15.

of the program with the first report submitted by December 1, 2010.²¹⁶ However, the effectiveness of HB 4009's provisions for services for trafficking victims was substantially undermined by the absence of a funding mandate.²¹⁷ Thus, several HB 4009 programs have not been implemented.²¹⁸

Some provisions of the 2011 anti-trafficking statute attempt to fill this gap by raising funds through civil penalties.²¹⁹ The need for effective measures to compensate trafficking victims is a major yardstick in judging the effectiveness of anti-trafficking laws.²²⁰ The 2011 legislation adds mandatory restitution for victims of child sex trafficking and compelled prostitution.²²¹ In addition, traffickers shall pay additional fines and court costs, fifty percent of which shall be deposited into a Trafficking of Persons and Compelling Prostitution Prevention Fund to finance prevention programs.²²² But, there is no state mandate to create such programs.

Texas law allocates revenue for sexual assault programs with funds from fees imposed on sexually oriented businesses. The legislature *may* appropriate funds from this account to pay for grants to faith-based organizations, community groups, schools, and the Department of Family and Protective Services to provide trafficking victim services.²²³ Likewise, the legislature *may* appropriate money to a Trafficking of Persons Investigation and Prosecution Account to fund grants to organizations that prevent, investigate, or prosecute trafficking offenses or provide comprehensive services in Texas for victims.²²⁴ In contrast,

216. TEX. GOV'T CODE ANN. § 402.305(g).

217. Report, Texas Advisory Committee to the United States Commission on Civil Rights, Human Trafficking in Texas: More Resources and Resolve Needed to Stem Surge of Modern Day Slavery 6-7, 11 (Aug. 2011), http://www.usccr.gov/pubs/TX_HT_Report--ver%2050--FINAL.pdf.

218. *Id.*

219. TEX. GOV'T CODE ANN. § 531.385(b) (West 2009).

220. *See* Sangalis, *supra* note 150.

221. 2011 Tex. Sess. Law Serv. art. 42.0372, § 2.02 (West) (amending TEX. CODE CRIM. PROC. ANN. art.102.0186 (West 2011)). Some states, including Arizona, Delaware, California, Indiana, Maine, Missouri, Nevada, and New Hampshire, mandate that convicted traffickers pay restitution to victims. CWPS FACT SHEET, *supra* note 14, at 3-15. Missouri expressly offers victims the same rights to restitution as set forth in the federal statute. *Id.* at 9. Some of these states, including California, Missouri, and New Hampshire, also demand forfeiture of assets as an additional penalty. *Id.* at 4, 9-10. The TVPA provides for restitution and asset forfeiture. 18 U.S.C. § 1594(d)-(e) (2011).

222. *Id.*

223. C.S.S.B. 23 § 1 (proposed) (2011) (amending Tex. Bus. & Com. Code § 102.054 (2008)), available at <http://www.legis.state.tx.us/tlodocs/82R/billtext/html/SB00023H.htm>.

224. These services may include "public awareness activities, community outreach and training, victim identification services, legal services, and other services designated to reach

California provides even non-citizen victims of trafficking with state-funded social services, including health care, employment, and public assistance.²²⁵ Florida, New Mexico, and North Carolina have similar provisions.²²⁶

Texas law also empowers trafficking victims by providing them with a civil right of action.²²⁷ The types of damages covered are “actual damages” (including damages from mental anguish), “exemplary damages” (which includes punitive damages), and reasonable attorney fees.²²⁸ The 2011 legislation extended the statute of limitations for civil claims based on human trafficking to five years from the date of the injury.²²⁹ The right to a civil remedy provides several advantages to victims in Texas.²³⁰ First, the threat of large civil damages should act as a deterrent.²³¹ Second, the burden of proof is lower in civil suits.²³² Third, victims can file a civil suit regardless of whether a criminal suit is ever brought.²³³ Fourth, the possible damages awarded in a civil suit generally exceed restitution.²³⁴ Finally, only a handful of other states provide this civil remedy.²³⁵

C. *Protecting Child Witnesses*

The 2011 statute includes provisions that protect victims in other ways. For example, Texas provides sex trafficking victims with the

victims.” 2011 Tex. Sess. Law Serv. ch. 515 (West) (amending TEX. GOV’T CODE § 772.006(e) (West 2011)).

225. CWPS FACT SHEET, *supra* note 14, at 3-4.

226. *Id.* at 5, 6, 10, 11. See also CTR. FOR WOMEN POLICY STUDIES, U.S. POLICY ADVOCACY TO COMBAT TRAFFICKING (US PACT) STATE LAWS/MAP OF THE UNITED STATES, http://www.centerwomenpolicy.org/programs/trafficking/map/default_flash.asp.

227. See TEX. PENAL CODE § 20A.02 (2011); S.B. 24, 82nd Leg., R.S. § 3.01 (Tex. 2011) (amending TEX. CIV. PRAC. & REM. CODE § 16.0045(a) (1995)).

228. “Exemplary damages” means “damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor non-economic damages.” TEX. PENAL CODE § 41.001(5) (2011). It is not a defense to civil suit that the defendant was acquitted of criminal wrongdoing, prosecuted under Chapter 20A or prosecuted under some other type or class of offense. TEX. CIV. PRAC. & REM. CODE § 98.002(a-b) (2011).

229. S.B. 24, 82nd Leg., R.S. § 3.01 (Tex. 2011), amending TEX. CIV. PRAC. & REM. CODE § 16.0045(a)(4) (2011).

230. For more discussion on the advantage of civil remedies for sex trafficking victims, see Rieger, *supra* note 4, at 253-54.

231. Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1665-66 (2007).

232. *Id.* at 1667.

233. *Id.* at 1666.

234. *Id.*

235. CWPS FACT SHEET, *supra* note 14, at 3-15. (The states offering civil remedies include Connecticut, Illinois, Kentucky, Maine, Nevada, Oregon and Wisconsin).

evidentiary safeguards afforded to other child abuse victims who testify in criminal trials against their abusers.²³⁶ Lack of cooperation by witnesses remains one of the most pervasive barriers to successful human trafficking prosecutions.²³⁷ Texas law adds child sex trafficking to the list of offenses that allow for the use of uncorroborated testimony to support a conviction in cases where the victim told any person, other than the defendant, of the abuse within one year of its occurrence.²³⁸ Similarly, child sex trafficking is also added to the list of offenses that permit the use of a recorded oral statement from a child under thirteen years of age for evidentiary purposes.²³⁹

Along these lines, the Texas anti-trafficking statute also makes victims of sex trafficking and compelling prostitution eligible for protective orders against offenders.²⁴⁰ This rule applies to cases involving both adult and child victims of sex trafficking, but not labor trafficking.²⁴¹ The Texas rule allows a victim, parent or guardian of a child victim, or prosecuting attorney acting on behalf of an adult or child victim to file the protective order.²⁴² The fact that an adult other than the parent can apply also benefits children who are trafficked by family members. The statute imposes fines or jail time for violating the order.²⁴³ A protective order could prevent a trafficker, facilitator, or john from taking any action that would cause further sexual abuse or other harm to the trafficked person.²⁴⁴

The use of protective orders, which allow various adults to act on a trafficked child's behalf, may prove particularly important in cases

236. See 2011 Tex. Sess. Law Serv. Ch. 1 §§ 2.05, 2.06 (West).

237. 2008 statutory amendments provide T-Visas to parents and siblings under 18 who are threatened with retaliation when a family member cooperates with law enforcement, or when the family members enter the U.S. to testify as witnesses. 22 U.S.C.A. § 7105(e) (2008).

238. 2011 Tex. Sess. Law Serv. Ch. 1 § 2.05 (West) (amending TEX. CODE CRIM. PRO.ANN.art.38.07(a) (West 2011)).

239. 2011 Tex. Sess. Law Serv. Ch. 1 § 2.06 (West) (amending TEX. CODE CRIM. PROC. ANN. art.38.071 (West 2011)).

240. 2011 Tex. Sess. Law Serv. Ch. 1 § 2.02(a)(2) (West) (amending TEX. CODE CRIM. PRO.ANN.art.7A.01 (West 2011)).

241. *Id.*

242. 2011 Tex. Sess. Law Serv. Ch. 1 § 2.02(a)(3) (West) (amending TEX. CODE CRIM. PRO.ANN.art.7A.01 (West 2011)).

243. TEX. CODE CRIM. PRO. ANN. art.7A.06(a) (West 2011).

244. TEX. CODE CRIM. PRO. ANN. art. 7A.05 (West 2011); TASK FORCE 2011 REPORT, *supra* note 32, at 56 (Courts award protective orders after a showing of a “clear and present danger of a sexual assault . . . or other harm to the applicant[.]”); TEX. CODE CRIM. PRO.ANN.art.7A.02 (West 2011).

involving child sex trafficking.²⁴⁵ In such cases, the trafficked child may not have a parent available to act on his or her behalf. The child may not take the initiative to seek a protective order on her own as it is difficult for children to independently disassociate themselves from their abusers.²⁴⁶ Children who have run away and turned to prostitution, for example, depend on their traffickers for food, shelter, drugs, or emotional connections.²⁴⁷

D. Sex Offender Registry

Texas law now requires that the names of convicted sex traffickers be placed in its Sex Offender Registry.²⁴⁸ Texas law includes all trafficking crimes as well as “compelling prostitution” on the list of criminal offenses for which opportunities for bail, probation, or parole are substantially limited.²⁴⁹ As of 2011, the crime of human trafficking joins the list of related offenses, such as sexual assault and compelling prostitution, in the registry.²⁵⁰ As of 2011, repeated offenses involving sex trafficking of a child can result in automatic life sentences.²⁵¹ Such offenses are also exempt from early release and supervision programs.²⁵²

245. Prior to the amendment, Article 7A.01 of the Texas Code of Criminal Procedure awarded protective orders to victims of sexual assault. TEX. CODE CRIM. PRO. ANN. art. 7A.01 (West 2011). Yet, sexual assault is only one of several crimes that can give rise to sex trafficking. Under the Texas definition of trafficking, children can be victims of sex trafficking who have not been sexually assaulted. For example, child sex trafficking victims can include those who are forced to strip dance in a gentleman’s club for money or to perform sexual provocative dances in a pornography film. Under the new rule, victims of other types of sex trafficking can receive protective orders. 2011 Tex. Sess. Law Serv. Ch. 1 § 2.02 (West).

246. This psychological condition is known as Stockholm Syndrome. See Amy Fine Collins, *Sex Trafficking of Americans: The Girl Next Door* 4 (May 24, 2011) (stating that as many as 76 percent of prostituted minors have “Stockholm-syndrome-like ‘trauma bonds’ with their pimps”). On the need to acknowledge the psychological effects on sex trafficking on its victims, see TIP REPORT 2012, *supra* note 4, at 12-13.

247. When children feel compelled to provide sexual services in exchange for food and shelter, they are engaging in “survival sex.” See Jody M. Greene, Susan T. Ennett & Christopher L. Ringwalt, *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, 89 AM. J. PUB. HEALTH 1406 (1999); Laura Rillos, “Survival Sex” Lures Homeless Teens into Prostitution, KVAL NEWS, Feb. 10, 2010, available at <http://www.kval.com/news/local/83966797.html>; Andrew Greiner, *Chicago Girls Practicing “Survival Sex”* (Feb. 24, 2010, 10:43 AM), <http://www.nbcchicago.com/news/local/States-Attorney-Aims-at-Public-Officials-Who-Condone-Sex-Trafficking-85201752.html>.

248. TEX. PENAL CODE ANN. § 21.11 (West 2011).

249. TASK FORCE 2011 REPORT, *supra* note 32, at 49.

250. TEX. PENAL CODE ANN. § 21.11 (West 2011).

251. TEX. PENAL CODE ANN. § 12.42(c)(2)(A) (West 2011); TASK FORCE 2011 REPORT, *supra* note 32, at 50.

252. TEX. GOV’T CODE ANN. § 499.027(b)(2)(Z) (West 2011); TEX. GOV’T CODE § 508.149(a)(19); TASK FORCE 2011 REPORT, *supra* note 32, at 51.

E. *Protecting Immigrants*

The Texas statute assists minors and adults in obtaining T-Visas, and in doing so, helps foreign victims become eligible for federal social services.²⁵³ By helping foreign victims obtain T-Visas, Texas fills a gap that only a few other states, such as California and Iowa, have begun to fill in order to assist foreign victims.²⁵⁴ A state judge's affirmation of the victim's eligibility should help facilitate or hasten the process.²⁵⁵ First, the statute allows state judges to certify victims of "severe forms of trafficking" within the meaning of the federal statute.²⁵⁶ Victims could use the judge's finding of fact "as the basis of a claim that federal officials would weigh when deciding whether to grant a protective Visa" and trade "their cooperation with prosecutors into an opportunity to stay in the country legally."²⁵⁷ Texas is one of the few states that model the federal statute with provisions to assist with certification for immigration visas.²⁵⁸ Assistance with immigration T-Visas allows victims to become temporary citizens and, after three years, permanent citizens.²⁵⁹

Particularly beneficial to children, Texas law also follows federal law by allowing not only victims but also their family members to receive T-Visas.²⁶⁰ Revisions to the 2000 federal statute make it easier for family members of victims to receive T-Visas.²⁶¹ The 2008 TVPA amendments provide T-Visas to parents and siblings under eighteen years old who are threatened with retaliation when a family member cooperates with law enforcement, or when a family member enters the United States to testify as a witness.²⁶²

V. THE NEED FOR SAFE HARBOR PROVISIONS

Another positive component of the 2011 anti-trafficking law is of the adoption of diversion and/or alternatives to adjudication for prostituted minors. Under the traditional legal paradigm, prostituted

253. 22 U.S.C.A. § 7105(c)(3)(A)(i) (2011).

254. CWPS FACT SHEET, *supra* note 14, at 3, 4, 7, 8.

255. *Id.* at 13.

256. TEX. CODE CRIM. PROC. § 42.0191(a)(1) (2011).

257. TEXAS CRIMINAL JUSTICE COALITION, H.B. 1121: HOUSE RESEARCH ORGANIZATION BILL ANALYSIS 3 (May 8, 2007), http://www.criminaljusticecoalition.org/files/userfiles/1121_HRO.pdf.

258. Sanborn et al., *supra* note 23, at 31.

259. *Id.* at 18.

260. *Id.* at 31.

261. 22 U.S.C.A. § 7105(a)(1)(E) (2011).

262. 22 U.S.C.A. § 7105(a)(3)(A)(i) (2011).

minors are prosecuted for their own sexual exploitation.²⁶³ However, some states have shifted this legal paradigm by enacting safe harbor legislation which shields prostituted minors from criminal prosecution and delinquency adjudication and instead, provides these minors with child protective services.²⁶⁴ Illinois, for example, has enacted comprehensive safe harbor legislation which provides victim services to prostituted minors without subjecting any of them to the risk of juvenile court adjudication.²⁶⁵

According to the Polaris Project, a leading anti-trafficking advocacy organization, effective safe harbor legislation for sexually exploited minors should include three elements: (1) a guarantee that minors will not be held criminally responsible for their own sexual exploitation; (2) the removal of the requirement that force, fraud, or coercion be proven; (3) specialized services including housing.²⁶⁶ Applying these standards to the Texas anti-trafficking statute, we see that Texas has yet to enact comprehensive safe harbor legislation for its prostituted minors. As discussed above, the Texas anti-trafficking statute satisfies the second element because child sex trafficking cases do not require proof of FFC.²⁶⁷ Yet, Texas law does not guarantee that all minors will be shielded from criminal liability nor does the law mandate that all sexually exploited minors receive all of the crime victim services that they need.²⁶⁸ Instead, Texas law shields some, but not all, sexually exploited minors from criminal prosecution and likewise guarantees services to some, but not all, sexually exploited minors. In doing so, the Texas legislation has begun to develop important partnerships between law enforcement, state agencies, and advocacy organizations.²⁶⁹ However, Texas law and policy must be further refined to create comprehensive safe harbor provisions.²⁷⁰

263. *See, e.g.,* Curva, *supra* note 15, at 566 (“It is challenging to fully understand why . . . prostitutes are the only parties subject to criminal prosecution.”).

264. *Polaris Project Issue Brief, supra* note 176, at 1.

265. Press Release, Shared Hope International, Shared Hope International Exposes Never-Before-Seen Look at Child Sex Trafficking Laws in America, sharedhope.org/Portals/0/Documents/PIIpostFINAL.pdf (“only four states have a full package of non-punitive child protective responses, including shelter and services: Illinois, Minnesota, New York, Washington.”)

266. *Polaris Project Issue Brief, supra* note 176, at 1.

267. *Id.*

268. *Id.* at 2.

269. Arrigona, *supra* note 22, at 22.

270. *See generally* *Polaris Project Issue Brief, supra* note 176.

Texas has adopted a hybrid child welfare model for the diversion provision.²⁷¹ The provision includes two main components. First, the law protects children trafficked for sex by family members by revising the Texas Family Code to include child sex trafficking within the legal definition of “child abuse.”²⁷² Second, the safe harbor shields from prosecution some minors who are trafficked for sex.²⁷³

A. Reframing Trafficking as Child Abuse

The Texas anti-trafficking statute is progressive in its efforts to recognize that sex trafficking by parents is a pervasive form of child abuse in the United States.²⁷⁴ Specifically, the Texas statute amends the Family Code’s definition of “sexual abuse” to expressly include sex trafficking.²⁷⁵ The inclusion of commercial sexual exploitation of children within the statutory definition of “child abuse” protects children who are trafficked by family members or guardians.²⁷⁶ Defining trafficking and prostitution as forms of “child abuse” thereby requires that teachers, social workers, and other professionals report these crimes to the child welfare system rather than turn a blind eye.²⁷⁷

271. See Barton Child Law & Policy Clinic, Commercial Sexual Exploitation of Children in Georgia: Service Delivery and Legislative Recommendations for State and Local Policy Makers 40-41 (Jan. 2008), http://bartoncenter.net/uploads/fall2011updates/status_other/CSEC-recs-for-policy-makers.pdf; see also Brittle, *supra* note 40, at 1351-53. For a policy article on how states can address trafficking within the framework on the child welfare system, see generally Center for the Human Rights for Children, Loyola University Chicago, International Organization for Adolescents, Building Child Welfare Response to Child Trafficking (2011), <http://www.luc.edu/chrc/pdfs/BCWRHandbook2011.pdf>.

272. TEX. FAM. CODE ANN. § 261.001(1)(G) (West 2011).

273. *Id.*

274. UNITED STATES, DEPARTMENT OF HEALTH AND HUMAN SERVICES, FACT SHEET: CHILD VICTIMS OF HUMAN TRAFFICKING, available at www.egolink.com/public_documents/outreach%20resources/child_victims.pdf (“Children can be trafficked by close family members”); Ronica Shannon, *Parents Indicted for Human Trafficking*, THE RICHMOND REGISTER, May 20, 2011, <http://richmondregister.com/localnews/x350354682/Parents-indicted-for-human-trafficking.html>; Diedra Robey, *Shaniya’s Story Reveals Widespread Sex Trafficking in the Black Community*, THE GRIO (Nov. 18, 2009), <http://thegrio.com/2009/11/18/no-one-can-imagine-what/> (discussing the case of a mother who sold her five year old daughter for sex).

275. S.B. 24 § 6.04, 82(R) Leg. Sess. (Tex. 2011) (amending TEX. PEN. CODE § 21.02(c)(7)-(8)) (the revised definition of “sex abuse” includes committing child sex trafficking or threatening to commit child sex trafficking). See S.B. 24 § 6.05, 82(R) Leg. Sess. (Tex. 2011) (amending TEX. PEN. CODE § 22.021(a)(2)(A) (2011)).

276. See Arrigona, *supra* note 22, at 18.

277. PUBLIC POLICY AND LAW CENTER, CHILDREN AT RISK: REPORT ON LEGISLATION IMPACTING CHILDREN (July 25, 2011) [hereinafter CHILDREN AT RISK], available at <http://childrenatrisk.org/wp-content/uploads/2011/08/82nd-Texas-Legislative-Report-FINAL.pdf>.

A policy goal underlying these amendments is to ensure that children trafficked for sex by family members receive the same protective services that other child abuse victims traditionally receive.²⁷⁸ Prior to 2011, child sex trafficking victims did not fall within the jurisdiction of the Texas child welfare system. As a result, trafficked minors were not eligible for state funded shelters or other services.²⁷⁹ Sex trafficking of a child is also grounds under Texas law to sever parental rights to that child.²⁸⁰

B. *Alternatives to Adjudication in the Juvenile Court*

However, if the child is trafficked by someone other than a family member, the case is not automatically recognized as child abuse and thereby diverted to the child welfare system. Instead, minors trafficked by someone other than parents or close family members are still at risk for bearing some form of punishment for prostitution and related sexual offenses. To a limited extent, the Texas anti-trafficking legislation attempts to shift the legal paradigm away from criminal punishment of sexually exploited children and towards recognition of these minors as crime victims.²⁸¹ In particular, the 2011 anti-trafficking legislation changes the legal procedures for cases involving prostituted minors in Texas.²⁸²

Prior to the enactment of the 2011 legislation, a juvenile court judge would adjudicate a child as delinquent on the legal grounds that prostitution was a crime—a misdemeanor under the Texas Penal Code.²⁸³ The judge would then have the discretion to determine a

278. AMERICAN BAR ASSOCIATION SECTION OF LITIGATION CHILDREN'S RIGHTS LITIGATION COMMITTEE, REPORT ON THE LEGAL NEEDS OF HARRIS COUNTY CHILDREN 38 (2004) [hereinafter ABA REPORT] (citing TEX. GOV'T CODE ANN. § 24.601 (West 2004)), available at http://www.texasappleseed.net/pdf/ABA_Report.pdf.

279. Texas Family Code § 261.105 mandates that allegations of abuse “by a person responsible for a child’s care, custody or welfare” will be investigated by the police and the designated child welfare agency. TEX.FAM.CODE ANN. § 261.105 (West 2011).

280. S.B. 24 § 4.04, 82(R) Leg. Sess. (Tex. 2011) (amending TEX. FAM. CODE ANN. § 262.2015(b)(3)(N)-(O) (West 2011)).

281. See generally Tiefenbrun, *supra* note 13; RAPID FIELD ASSESSMENT, *supra* note 66, at 2 (“prevention requires identification on all levels, community to law enforcement, that prostituted and sexually exploited children are victims, not criminals.”). For scholarly treatment of the New York Safe Harbor Act, see Schwartz, *supra* note 16, at 237-38; Brittle, *supra* note 40; Annitto, *supra* note 16, at 4-5.

282. STATE OF TEXAS, ATTORNEY GENERAL GREG ABBOTT, 2009 JUVENILE JUSTICE HANDBOOK: A PRACTICAL REFERENCE GUIDE INCLUDING UPDATES FROM THE 81ST LEGISLATIVE SESSION 1 (2009) [hereinafter JUVENILE JUSTICE HANDBOOK], https://www.oag.state.tx.us/AG_Publications/pdf/juvenile_justice.pdf.

283. *Id.* at 20.

remedy from several options, including probation or detention.²⁸⁴ If the child was under seventeen, she would be detained and then brought before the juvenile court for a hearing.²⁸⁵ Prostituted children who were adjudicated as delinquent could be placed on probation under the jurisdiction of the Texas Juvenile Probation Commission (“TJPC”).²⁸⁶ Advocates criticized the pre-2011 prosecution approach as further victimizing prostituted minors through the trauma and indignity of being arrested and otherwise treated as criminally responsible.²⁸⁷

Prostituted children in Texas are often “misidentified as sexual abuse victims or delinquents.”²⁸⁸ In August 2011, the U.S. Department of Justice, working with several NGOs to investigate child trafficking in Texas, determined that children who are trafficked are misidentified as criminals:

For a variety of reasons [,] including a lack of training on the specifics of trafficking and also no universal agreement on what these youth should be labeled. Some agencies still use the term “prostitution,” others “abuse victims,” and others “sex trafficking victims.” This causes confusion because some victims receive a duality of services and others receive no services as the agencies are not clearly communicating with each other in the language they understand.²⁸⁹

Shifting the paradigm from punishment to rehabilitation should change the language and discourse surrounding child trafficking to better reflect the reality that free children do not “choose” prostitution. In 2009, the state legislature called upon the Texas Juvenile Probation Commission to research alternatives to delinquent or criminal adjudication.²⁹⁰

A new component of the Texas child abuse model is the use of alternatives to adjudication for children who are detained by police on

284. *Id.*

285. *Id.* at 5, 31.

286. *Id.* at 2.

287. Sanborn et al., *supra* note 23, at 26. “Some of the flaws that such legislations aims to prevent are a lack of communication between governmental agencies regarding enforcement and prosecution of human trafficking, insufficient funding for research regarding important contributing factors that aggravate human trafficking, and improper training of individuals and agencies that are directly involved with victims of human trafficking.” *Id.* at 26.

288. RAPID FIELD ASSESSMENT, *supra* note 66, at 3.

289. *Id.* at 2.

290. See H.B. 653, 82nd Leg., Reg. Sess. § 221 (Tex. 2011), replacing TEX. HUM. RES. CODE § 141. The Commission published its report in January 2011. The statute also required training for law enforcement and service providers on how to properly identify and respond to victims. Moreover, in its 2011 report, the Texas Task Force recommended statutory revisions to change the treatment of child prostitution as a form of juvenile delinquency under the Texas Family Code. TASK FORCE 2011 REPORT, *supra* note 32, at 56.

suspicion of prostitution.²⁹¹ Under Texas law, any child who engages in prostitution is no longer adjudicated delinquent for committing the misdemeanor offense of prostitution.²⁹² Instead, the safe harbor provisions require that juvenile court judges designate child prostitution as “conduct indicating a need for supervision” (“CINS”).²⁹³ A CINS designation removes child prostitution from the category of criminal offense and reframes the behavior as a status offense.²⁹⁴ The child’s status offense is designated as CINS and she is initially placed on probation.²⁹⁵

The CINS designation shields minors from some of the defects of delinquency adjudication or criminal prosecution. The CINS designation prevents the prostituted child from being placed in a secured juvenile detention center or youth prison.²⁹⁶

According to sponsors of Texas H.B. 2015, designating offense child as CINS is the legal linchpin that potentially links the child to services including shelter, education, mental services, medical care, foster care, or other assistance.²⁹⁷ Texas law should mandate the creation of safe houses that provide child-centered programs for trafficking victims.²⁹⁸ Several states have already enacted such policies.²⁹⁹

Texas law shields prostituted children from the effects of criminal prosecution by sealing records that document their involvement in prostitution or related sex crimes.³⁰⁰ The safe harbor requires that the juvenile court judge, on her own motion and without a hearing,

291. CHILDREN AT RISK, *supra* note 277, at 28, 31.

292. H.B. 2014, 82(R) Leg. Sess. (Tex. 2011). *See also* H.B. 2015, 82(R) Leg.Sess. (Tex. 2011); TEX. PEN. CODE ANN. § 43.02(a)(1)-(2) (West 2011). H.B. 2015 does not change Texas Penal Code § 43.02. *See also* CHILDREN AT RISK, *supra* note 277, at 31; *In re: B.W.*, 313 S.W.3d 818 (Tex. 2010).

293. H.B. 2015 § 1, 82(R) Leg.Sess. (Tex. 2011).

294. TEXAS CRIMINAL JUSTICE COALITION, 82ND TEXAS LEGISLATIVE SESSION: 24 POLICIES SIGNED INTO LAW 7-8 (May 30, 2011) [hereinafter TEXAS CRIMINAL JUSTICE COALITION], http://www.criminaljusticecoalition.org/files/userfiles/TCJC82nd_Lege_Smart-On-Crime_Bills.pdf

295. *Id.*

296. *See* JUVENILE JUSTICE HANDBOOK, *supra* note 282, at 19 (citing TEX. FAM. CODE § 54.04(d)).

297. Judiciary & Civil Jurisprudence Committee Report, H.B. 2015 Bill Analysis 1 (2011), <http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/HB02015H.pdf#navpanes=0>. Conduct amounting to a CINS is covered under TEX. FAM. CODE ANN. § 51.03(b) (West 2011). Delinquent conduct is covered under Section 51.03(a).

298. Smith & Vardaman, *supra* note 6, at 276. *See* Stephanie L. Mariconda, Note, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151, 184 (2009) (discussing Massachusetts’ consideration of a safe house program).

299. *See* Mariconda, *supra* note 298, at 184.

300. *See* H.B. 2015 § 2, 82(R) Leg. Sess. (Tex. 2011).

automatically seal the records concerning the child's involvement in prostitution-related offenses.³⁰¹ By sealing a child's records, the statute helps children to escape the cycle of prostitution by preserving their chances to live productive lives after rehabilitation.³⁰² The CINS designation makes the prostituted child on probation eligible to receive social services administered by the juvenile court.³⁰³ Texas juvenile courts maintain jurisdiction over minors who have engaged in CINS while the child completes the rehabilitative programs.³⁰⁴

Yet, prostituted minors still remain under juvenile court supervision. A minor detained for prostitution is placed on probation and remains under the jurisdiction of the juvenile court until the conditions of probation are met. She is "placed under deferred prosecution or conditional supervision."³⁰⁵ This means that, similar to a delinquent youth, the child must be supervised by a probation officer and comply with the probationary plan.³⁰⁶ The conditions of probation can vary according to the court's discretion. As a condition of probation, the court has discretion to determine whether the child should be placed in foster care or some other facility.³⁰⁷ But, in any case, the child remains under the juvenile court's jurisdiction.

C. *Concerns about the Diversion Component*

Nevertheless, a major legitimate concern is that the Texas "alternative to adjudication" provisions fail to eradicate the practice of holding prostituted minors criminally responsible for their own sexual exploitation. A major concern is that, as discussed above, sexually exploited minors remain under the jurisdiction of the juvenile court.³⁰⁸ These prostituted minors are still at risk of being adjudicated as a delinquent or tried as a criminal if they fail to meet these program requirements.

301. *Id.*

302. ABA REPORT, *supra* note 278, at 20 (noting that "[o]ne of the primary reasons there is a separate court for juveniles is because the system seeks to give them a second chance at successful citizenship and does not want them to have to live under the weight of an act they committed as children.").

303. TEXAS CRIMINAL JUSTICE COALITION, *supra* note 294, at 8. The CINS designation "places the child in supporting probation programs and possibly places the child in a suitable foster home or other residential setting." *Id.*

304. *Id.* at 8.

305. Arrigona, *supra* note 22, at 25.

306. *Id.*

307. *Id.* at 19.

308. See POLARIS PROJECT, TOP 15 PROBLEMS, *supra* note 114.

These policies do not completely protect children from the psychological harms and traumas associated with being punished or penalized for their own exploitation.³⁰⁹ As the State Department has argued, treating them like criminals sabotages their healing process.³¹⁰ As one survivor explained: “I always felt like a criminal. I never felt like a victim. Victims don’t do time in jail. They work on the healing process. I was a criminal because I spent time in jail.”³¹¹ In other words, prostituted minors may not reconcile the fact that they are crime victims with the state’s decision to incarcerate them. Arguably, the same is likely true if minors have the threat of incarceration hanging over their heads if they fail to timely fulfill program mandates. These concerns are exacerbated by the fact that the Texas juvenile court system has adopted policies reflecting a punitive, as opposed to rehabilitative, approach to addressing juvenile delinquency; yet, child sex trafficking victims need rehabilitation, not additional punishment.³¹² In Harris County, which is the largest county in the state, eighty percent of the children who are adjudicated as delinquent have been sent to secured facilities (known as “youth prisons”) operated by the Texas Youth Commission.³¹³

Texas legislators must address the concern that many prostituted children traditionally do not receive specialized services while detained in juvenile court facilities.³¹⁴ For example, a recent investigative report conducted by the American Bar Association (“ABA”) concluded that juvenile courts in Texas are plagued by various problems, including the inability of children to gain access to mental health services—the very type of assistance that sexually exploited children need.³¹⁵ This report indicated that, in both the juvenile court and the child welfare system, there is a lack of advocacy for the services, particularly those for children.³¹⁶ As the report determined, in Texas and presumably in other

309. *Id.*

310. TIP REPORT 2012, *supra* note 4, at 37.

311. *Id.*

312. ABA REPORT, *supra* note 278, at 10.

313. *Id.* at 11. In recent years, the TYC has been ripped by scandals, the most notorious being those involving sexual abuse of children in TYC’s custody by TYC employees. See Emily Ramshaw, *1/5 of TX Youth Offenders Forced Into Sex Acts*, TEX. TRIBUNE, Jan. 7, 2010.

314. See Annitto, *supra* note 16, at 3 n.4. In Texas, prostituted children who have been adjudicated as juvenile delinquents have often gone without receiving any form of appropriate services. RAPID FIELD ASSESSMENT, *supra* note 66, at 2.

315. ABA REPORT, *supra* note 278, at 6, 22-25.

316. *Id.* at 6-9.

states, “[p]robation is not necessarily equipped to identify and address the mental health and special education needs of minors.”³¹⁷

These problems have persisted in the seven years since the ABA commissioned this report. Currently, one of the major issues facing the TJPC is the failure of the Texas juvenile court system to help victims who need mental health treatment and related services.³¹⁸ Moreover, the TJPC is faced with a shortage of certified treatment professionals to help youth under its jurisdiction.³¹⁹ The TJPC has committed, however, to explore community partnerships to increase the ability of the agency to meet the needs of youth in its care.³²⁰

Yet, Texas must contend with the reality that, at present, there are limited resources currently available to address their needs.³²¹ With respect to the basic need for shelter, there are far more beds in juvenile detention facilities across the country than there are child welfare facilities and other nonprofit programs.³²² Unlike other states, such as California and Georgia, there are no safe houses in Texas that provide long term shelter and other services for prostituted children.³²³

Advocates argue that the state juvenile probation system has some of these services already in place, including emergency shelters, and secure and unsecure longer-term shelters.³²⁴ Furthermore, by placing the child on probation, the juvenile court’s probation system has jurisdiction to compel the child to accept certain services including shelter.³²⁵

For example, the TJPC has partnered with the nationally recognized Letot Emergency Shelter in Dallas, Texas.³²⁶ Letot represents a collaborative effort between police, probation officers, and the shelter to provide secured short-term housing for prostituted children.³²⁷ Juveniles have been admitted to Letot after having been detained, prosecuted for

317. *Id.* at 24.

318. TEXAS JUVENILE PROBATION COMMISSION & TEXAS YOUTH COMMISSION, COORDINATED STRATEGIC PLAN: FISCAL YEAR 2010 13, 19-20 (2010) [hereinafter TJPC], <http://www.tjpd.texas.gov/publications/reports/RPTSTRAT201001.pdf>. In the words of the Commission, “many children who enter the juvenile justice system never received these [mental health] services, though they may have qualified for them. There is a substantial gap between identified mental health needs and services provided.” *Id.* at 13. See Arrigona, *supra* note 22, at 19.

319. TJPC, *supra* note 318, at 20.

320. *Id.*

321. CHILDREN AT RISK, *supra* note 277.

322. Anntito, *supra* note 16, at 34.

323. See CHILDREN AT RISK, *supra* note 277.

324. Arrigona, *supra* note 22, at 22.

325. *Id.*

326. *Id.*

327. *Id.*

misdemeanors, or given a CINS designation.³²⁸ As advocates in Texas have pointed out, as long as there is a shortage of agencies and nonprofits that can provide the specialized services that child victims need, juvenile court jurisdiction over these minors remains the only alternative to helping them receive services.³²⁹

VI. CONCLUSION

Texas has made great strides in its legislative efforts to address human trafficking.³³⁰ Additional steps are needed to better protect minors from trafficking. The Texas anti-trafficking statute has adopted several groundbreaking provisions that focus on punishing traffickers who exploit children in the commercial sex industry. First, Texas law incorporates statutory definitions that help the public to understand the nature of child sex trafficking and to thereby identify victims. Second, Texas has enhanced criminal penalties and other civil protections that address the seriousness of the crime of child sex trafficking. Third, Texas is one of the first states to enact alternative to adjudication provisions for prostituted minors.

But the work in Texas is not done. While special protections for children exploited in the child sex industry are warranted, advocates must also recognize the similar vulnerabilities and exploitation endured by children who labor in agricultural fields where many suffer the dual effects of both sex and labor abuses. Texas advocates must also address the placement of a disproportionate amount of resources toward prosecuting traffickers (and punishing victims) versus protecting victims and preventing crimes through much needed programming and other rehabilitation. Children trafficked for sex need safe harbor provisions that protect them from criminal punishment. In summary, the Texas model is not completely reconcilable with the notion that prostituted children are victims—not criminals or delinquents. Realistically, probation is a form of punishment.

If it does so, Texas will live up to its promise that its anti-trafficking statute will be one of the strongest in the country.

328. *Id.* at 23.

329. *See* CHILDREN AT RISK, *supra* note 277.

330. Shared Hope International recently recognized Texas for its legislative efforts to fight human trafficking. *See Texas Attorney General Receives Shared Hope International's Pathbreaker Award for his Human Trafficking Prevention Efforts*, ROWLETT LAKESHORE TIMES (Dec. 7, 2011, 6:47 PM), http://www.lakeshoretimes.com/articles/2012/01/04/rowlett_lakeshore_times/news/1772.txt.