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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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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

* B.A., cum laude, Harvard University; J.D., New York University School of Law. Assistant Professor of Law, Southern Methodist University Dedman School of Law. For detailed comments on earlier drafts, I am thankful to Leah Goodmark, Margareth Etienne, Suzette Malveaux, Merle Morris, and Tobi Tabor. I am thankful for the comments received during the presentation of an earlier draft of this paper at the works-in-progress session of the Fifteenth Annual LatCrit Conference, The Color of the Economic Crisis: Exploring the Downturn from the Bottom Up, at University of Denver School of Law. An earlier draft of this article also benefited from being presented as part of a panel discussion at the Lunchtime Law Session: Girls and the Criminal Justice System hosted by the University of Baltimore School of Law Center for Applied Feminism. I am grateful to Turkessia Arnold for her excellent editorial assistance.


yet, men and boys are targeted as well.\textsuperscript{7} Sex trafficking and labor trafficking are two major forms of human trafficking\textsuperscript{8} that fuel the growth of the more than twelve billion dollar per year trafficking industry.\textsuperscript{9} The United States is a “major destination country”\textsuperscript{10} for international trafficking; over 50,000 persons are trafficked into the United States from other countries each year.\textsuperscript{11} Upon arrival, they join U.S. citizens and residents who are trafficked domestically.\textsuperscript{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.\textsuperscript{13} In the past few years, a growing

\textsuperscript{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.”).

\textsuperscript{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.”).

\textsuperscript{8} TIP Report 2012, supra note 4.

\textsuperscript{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 Fahn, Institute on Race and Justice, Understanding and Improving Law Enforcement Responses to Human Trafficking: Final Report (June 2008), available at https://www.ncjrs.gov/pdfs1/nij/grants/222752.pdf (the IRJ study estimates sex trafficking as a $9.5 billion industry).

\textsuperscript{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).

\textsuperscript{11} Rieger, supra note 4, at 233.

\textsuperscript{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.”).

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


uses the U.S. Department of State’s “4P paradigm” as a framework for analyzing the Texas anti-trafficking legislation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
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\item \textsuperscript{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, \textit{Investing in the Business Against Human Trafficking: Embracing the Fourth “P” – Partnerships}, 6 INTERCULTURAL HUM. RIGHTS L. REV. 283 (2011).
\item \textsuperscript{18} See generally TIP REPORT 2012, supra note 4, at 5, 11.
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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, is a major global destination for human trafficking. Twenty-five percent of all trafficking victims in the United States are found in Texas. 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. 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. 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. Domestic child sex trafficking has become a “hot topic” among legislators, advocates,


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

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. The Texas-Mexico border is “North America’s number one supply site for young children exploited in sex and labor trafficking.” Twenty percent of all domestic human trafficking victims travel through Texas. In Texas, most trafficked minors are not foreigners. 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.”

To address these issues, the Texas legislature labored earnestly for years to enact anti-trafficking legislation. On September 1, 2003,
Texas became the second of forty-one states that criminalize human trafficking as a felony offense. In 2007, in 2009, and again in 2011, the Texas statute was revised and made more comprehensive. 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. The Texas legislature adopted many of these findings and, on May 25, 2011, substantially revised its anti-trafficking legislation. By enacting this new legislation, Texas has taken ground breaking steps to address child trafficking.

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. 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. Texas Penal Code § 20A establishes the separate crimes of “child labor trafficking” and “child sex trafficking.” Prior

35. CWPS FACT SHEET, supra note 14, at 3.
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).
41. See Smith & Vardaman, supra note 6, at 267-68 (discussing national reports and investigations about the problem of domestic minor sex trafficking).
43. A person commits child labor trafficking if the person “knowingly . . . traffic 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.” 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.”

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.” The statute is also violated if a person knowingly benefits from a venture involving child labor trafficking. 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.

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. For example, the Texas statute affords an unlimited statute of limitations for child sex trafficking.

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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)).


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).


50. Id.
trafficking cases only. 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. Child labor trafficking, on the other hand, is a second degree offense. 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.

The creation of separate claims for sex and labor trafficking aligns Texas law with the TVPA. 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.” This is true in order to “minimize confusion as trafficking victims in state prosecutions begin to seek the victim protections” from federal agencies.

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. 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.

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 sixteenth 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. PENAL CODE § 20A.02(b)(1)-(2) (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.
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. 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. In some cases, victims of forced or bonded labor, especially those in domestic service, are also sexually exploited in connection with their labor. As Professor Barnhardt argues, it is important to “recognize the multitudinous ways in which different forms of oppression affect women.” This argument has merit; labor trafficking cases often involve sexual exploitation and sexual abuse.

These types of intersectional cases are common in border states like Texas where both sex trafficking and labor trafficking are prevalent. In Texas, these hybrid sex/labor cases also involve children. 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. 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.
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.
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
Rights Watch, Fields of Peril: Child Labor in U.S. Agriculture (2010); Baradaran &
Barclay, supra note 70.
72. TIP Report 2012, supra note 4, at 36.
73. Id.
Texas is a major hub for child sex trafficking. 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. Between 2007 and 2011, at least 369 children were identified as victims of sex trafficking in Texas.

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. Convictions have been secured in high profile cases such as United States v. Salazar, which involved child sex trafficking in Texas.

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

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.”

75. Sanborn et al., supra note 23, at 8.
78. TASK FORCE 2011 REPORT, supra note 32, at 3.
80. See TASK FORCE 2011 REPORT, supra note 32, at 3.
81. Id.
82. Sanborn et al., supra note 23, at 9.
83. Id.
85. TASK FORCE 2011 REPORT, supra note 32, at 3.
86. Id. at 11.
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

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. These offenses include prostitution, compelling prostitution, and child pornography. 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. Second, labor exploitation remains a major issue in Texas and other states. 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. The U.S. Government Accounting Office estimates that over 500,000 children are trafficked for labor in the United States each year.

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


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.”).


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

human trafficking case in modern U.S. history.  

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.  

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.

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. 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.

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


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

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.”
115. Id.
117. Id.
118. See Raymond et al., supra note 117 and accompanying text.
By excluding the latter victims from its definitions, the “transport” requirement undermined the effectiveness of the statute.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{124} This adoption of the federal policy will help create a uniform definition of trafficking which in turn, consistently protects minors.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{127} As discussed below, the

\begin{itemize}
  \item[120.] See CHILDREN IN THE FIELDS, supra note 71, at 2.
  \item[121.] Id.
  \item[123.] TIP REPORT 2012, supra note 4, at 7.
  \item[124.] DOJ MODEL STATUTE, supra note 122, at 3.
  \item[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.
  \item[126.] See TEX. PENAL CODE § 20A.01(1) (2011).
  \item[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
\end{itemize}
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.”\(^\text{128}\) 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.\(^\text{129}\) 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.\(^\text{130}\)

The Texas statute does not allow traffickers to use “ignorance of age” as a defense.\(^\text{131}\) 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.”\(^\text{132}\) Likewise, the TVPA reaches additional perpetrators by lowering the knowledge requirement for violations involving minors.\(^\text{133}\)

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.\(^\text{134}\) 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.\(^\text{135}\) Thus, a larger group of minors now have the opportunity to receive services.\(^\text{136}\)
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.”\(^{144}\)

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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
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. Officers tend not to believe that American teens, in particular, are victims because they do not meet the stereotype of an iconic victim. 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. Instead, like rape shield laws, age presumes consent.

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. 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. 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. For example, the 2007 statute provided that “forced labor or services” only meant “causing or threatening to cause bodily injury to another.” The 2009 statute further revised the definition of “forced labor or services” to recognize psychological coercion as a means of trafficking victims.

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).
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. Under the TVPA, sex trafficking of any person under eighteen years old is a felony offense regardless of whether FFC is proven.

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. 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. The 2003 version, which did not define trafficking in terms of FFC, facilitated prosecutions. 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.” Instead, prosecutors brought human trafficking offenses under other Texas Penal

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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).


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) (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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{163} Nevertheless, state trafficking laws marginalize domestic minors by acknowledging only international migrants as the iconic sex trafficking victims.\textsuperscript{164} This is true for a variety of reasons. First, the iconic victim is a foreigner female; she is a “ naïve, passive, ignorant, migrant.”\textsuperscript{165} She is “tied to a bed in a brothel.”\textsuperscript{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.\textsuperscript{167} She is not walking seemingly at her own free will on the strip near her home.

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\item \textsuperscript{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.
\item \textsuperscript{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 Anitto, 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.”).
\item \textsuperscript{162} SHARED HOPE DALLAS, supra note 158, at 28.
\item \textsuperscript{164} See Srikantiah, supra note 58; Dina Francesca Haynes, (Not) Found Chained to a Bed in a Brothel: Cocneptual, Procedural and Legal Failures to Fulfill the Promise of the Trafficking Victims Protection Act, 21 GEO. IMMIGR. L.J. 3, 9-10. (2007).
\item \textsuperscript{165} Chuang, supra note 58, at 1710.
\item \textsuperscript{166} Haynes, supra note 164, at 9-12.
\item \textsuperscript{167} Id. at 9-10.
\end{itemize}
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.”

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.”

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.”

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.’”

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. 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.

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

169. See Hanna, supra note 84, at 110.
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. The Texas Supreme Court held that a child under fourteen cannot consent to sex. In that case, a thirteen year old prostituted teenager waved down a car driven by an undercover officer. She offered to provide oral sex in exchange for twenty dollars. The officer arrested the teen for prostitution. The trial court found B.W. guilty of the misdemeanor offense of prostitution for having “knowingly agreed to engage in sex . . . for a fee.” The Court of Appeals affirmed.

The Supreme Court of Texas reversed, holding that, in Texas, a minor cannot be prosecuted for prostitution. 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. The court further reasoned that its decision upheld the intent of the applicable Texas statutes as well as Texas common law.

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. 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.
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. 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.

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. Child sex trafficking is a first degree offense. Stiffer penalties were added in cases involving an underlying offense other than human trafficking. This strategy reflects the fact that in many cases involving human trafficking, another crime is the offense of record. 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.

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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 Anitto, 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.”).


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”

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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. PENAL CODE § 15.031(b) (2011); see TASK FORCE 2011 REPORT, supra note 32, at 54.

193. See id.
194. TEX. PENAL 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. Moreover, sentences for trafficking and compelling prostitution offenses cannot run concurrently with other offenses; this means a longer prison sentence for offenders. Now, the penalties for compelling prostitution are stiffer for cases involving children, as opposed to adults. Penalties are also enhanced for employing or inducing children under fourteen to work in a commercial sex-related business.

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

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.

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(b) (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.
204. Id.
205. Id.
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. 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. For example, Texas HHS found that most of the Texas service providers provide most of their resources to foreign victims.

Second, prior versions of the Texas statute failed to provide funding for such services. Prior versions of the Texas anti-trafficking statute deprived sexually exploited children of needed services. 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.”

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. 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. The statute further required that the Commission submit reports every two years (on even years) to the legislature on the success

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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.


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. However, the effectiveness of HB 4009’s provisions for services for trafficking victims was substantially undermined by the absence of a funding mandate. Thus, several HB 4009 programs have not been implemented.

Some provisions of the 2011 anti-trafficking statute attempt to fill this gap by raising funds through civil penalties. The need for effective measures to compensate trafficking victims is a major yardstick in judging the effectiveness of anti-trafficking laws. The 2011 legislation adds mandatory restitution for victims of child sex trafficking and compelled prostitution. 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. 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. 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. In contrast,
California provides even non-citizen victims of trafficking with state-funded social services, including health care, employment, and public assistance.\textsuperscript{225} Florida, New Mexico, and North Carolina have similar provisions.\textsuperscript{226}

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

\begin{thebibliography}{9}
\bibitem{225} CWPS FACT SHEET, supra note 14, at 3-4.
\bibitem{226} Id. at 3, 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.
\bibitem{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)).
\bibitem{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 § 41.0015(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).
\bibitem{229} S.B. 24, 82nd Leg., R.S. § 3.01 (Tex. 2011), amending TEX. CIV. PRAC. & REM. CODE § 16.0045(a)(4) (2011). For more discussion on the advantage of civil remedies for sex trafficking victims, see Rieger, supra note 4, at 253-54.
\bibitem{231} Id. at 1667.
\bibitem{232} Id. at 1666.
\bibitem{233} Id.
\bibitem{234} CWPS FACT SHEET, supra note 14, at 3-15. (The states offering civil remedies include Connecticut, Illinois, Kentucky, Maine, Nevada, Oregon and Wisconsin).
\end{thebibliography}
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.259

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

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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. 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. Children who have run away and turned to prostitution, for example, depend on their traffickers for food, shelter, drugs, or emotional connections.

D. Sex Offender Registry

Texas law now requires that the names of convicted sex traffickers be placed in its Sex Offender Registry. 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. As of 2011, the crime of human trafficking joins the list of related offenses, such as sexual assault and compelling prostitution, in the registry. As of 2011, repeated offenses involving sex trafficking of a child can result in automatic life sentences. Such offenses are also exempt from early release and supervision programs.

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. PROC. 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.


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

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\(^{254}\) 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).
\(^{258}\) Sanborn et al., supra note 23, at 31.
\(^{259}\) Id. at 18.
\(^{260}\) Id. at 31.
minors are prosecuted for their own sexual exploitation. 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. 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.

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. 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. 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. 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. However, Texas law and policy must be further refined to create comprehensive safe harbor provisions.
Texas has adopted a hybrid child welfare model for the diversion provision. 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.” Second, the safe harbor shields from prosecution some minors who are trafficked for sex.

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. Specifically, the Texas statute amends the Family Code’s definition of “sexual abuse” to expressly include sex trafficking. 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. 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.


273. Id.


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

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.\textsuperscript{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.\textsuperscript{279} Sex trafficking of a child is also grounds under Texas law to sever parental rights to that child.\textsuperscript{280}

\textbf{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.\textsuperscript{281} In particular, the 2011 anti-trafficking legislation changes the legal procedures for cases involving prostituted minors in Texas.\textsuperscript{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.\textsuperscript{283} The judge would then have the discretion to determine a


\textsuperscript{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).


\textsuperscript{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; Anitto, supra note 16, at 4-5.


\textsuperscript{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,
automatically seal the records concerning the child’s involvement in prostitution-related offenses.\textsuperscript{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.\textsuperscript{302} The CINS designation makes the prostituted child on probation eligible to receive social services administered by the juvenile court.\textsuperscript{303} Texas juvenile courts maintain jurisdiction over minors who have engaged in CINS while the child completes the rehabilitative programs.\textsuperscript{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.”\textsuperscript{305} This means that, similar to a delinquent youth, the child must be supervised by a probation officer and comply with the probationary plan.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item 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.”).
\item 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.
\item Id. at 8.
\item Arrigona, supra note 22, at 25.
\item Id.
\item Id. at 19.
\item See POLARIS PROJECT, TOP 15 PROBLEMS, supra note 114.
\end{enumerate}
\end{footnotesize}
These policies do not completely protect children from the psychological harms and traumas associated with being punished or penalized for their own exploitation. As the State Department has argued, treating them like criminals sabotages their healing process. 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.” 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. 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.

Texas legislators must address the concern that many prostituted children traditionally do not receive specialized services while detained in juvenile court facilities. 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. 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. 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.”

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. Moreover, the TJPC is faced with a shortage of certified treatment professionals to help youth under its jurisdiction. 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.

Yet, Texas must contend with the reality that, at present, there are limited resources currently available to address their needs. 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. 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.

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. 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.

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

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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.tjjd.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 22.
319. TJPC, supra note 318, at 20.
320. Id.
321. Children at Risk, supra note 277.
322. Annitto, 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. 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.

VI. CONCLUSION

Texas has made great strides in its legislative efforts to address human trafficking. 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.