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## Violating Due Process: The Case For Changing Texas State Trafficking Laws For Minors

Cristina M. Becker

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# Violating Due Process: The Case For Changing Texas State Trafficking Laws For Minors

*Cristina M. Becker\**

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## *I. Introduction*

Analyzing laws of a state that possesses one of the highest trafficking rates provides a glimpse into the difficulties of reconciling existing state laws with the goal of protecting juvenile trafficked victims.<sup>1</sup> As they currently stand, Texas laws do not provide a streamlined approach to minor human trafficking victims. Conflicting Texas family and human trafficking laws result in disjointed legal actions that strip minor victims of their due process rights. Although Texas substantially developed its policies on human trafficking in the last two years to protect minors,<sup>2</sup> the statutes still fail to effect a clear protocol for minor victims, leaving them legally

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\* J.D., 2013, Washington and Lee University School of Law; B.A., The College of William and Mary. I would like to thank Professor Johanna Bond for her help and good advice, as well as my husband, Daniel, for his infinite patience.

1. *See State Map*, POLARIS PROJECT, <http://www.polarisproject.org/state-map> (last visit Sept. 11, 2013) (displaying the rates of human trafficking hotline calls and reports for each state. Texas has the second highest number of reported incidences and calls).

2. *See* H.R. 4009, 81st Gen. Assemb., Reg. Sess. (Tex. 2009) (creating a new Texas human trafficking task force educated in identifying victims and traffickers).

unprotected. Its new bill, House Bill No. 4009 (Bill), bolsters law enforcement intervention in human trafficking cases, but identifying victims is still difficult.<sup>3</sup>

Texas human trafficking laws conflict with its existing criminal and family laws, obfuscating the approach to minor trafficking victims. Texas continues to view minor prostitutes initially as criminals rather than victims, and in so doing, ensnares the victims in a legal grey area that requires both criminalization and protection of the victim.<sup>4</sup> The federal Trafficking Victims Protection Act of 2000 defines human trafficking as forced sex acts that are particularly severe if the victim is under eighteen.<sup>5</sup> However, under Texas law, treating a minor prostitute automates a criminal response.<sup>6</sup> The Texas Criminal Code defines a prostitute—minor or adult—as one who “(1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or (2) solicits another in a public place to engage with him in sexual conduct for hire.”<sup>7</sup> Based on this definition, it follows that Texas law does not require intent as an element of the crime of prostitution. The act of prostitution alone suffices to prove criminal activity. This may provide insight into Texas’s punitive approach to minor prostitutes.

Texas defines trafficking victims and prostitutes differently. A “trafficker” is one who “knowingly traffics another person with the intent that the trafficked person engage in forced labor or services.”<sup>8</sup> It logically follows that a trafficked person must be one who was forced into labor or services. The exclusive use of the word “force” is limiting. Texas’s “Compelling Prostitution” provision, however, expands the language to include “force, threat, or fraud.”<sup>9</sup> There is no mention of “coercion.”<sup>10</sup> In

3. See Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL’Y 309, 321 (2008) (explaining how most sex victims are out of sight and on the social periphery).

4. See *infra* Part II(C).

5. See Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102 (8)(A)–(B) (2000) [hereinafter *TVPA*] (indicating that severe forms of trafficking are “induced by force, fraud, or coercion” and victims under eighteen years of age).

6. TEX. PENAL CODE ANN. § 43.02 (a)–(c) (West 2011) (detailing the class of crime for acts of prostitution).

7. TEX. PENAL CODE ANN. § 43.02 (a)(1)–(2) (West 2007).

8. TEX. PENAL CODE ANN. § 20A.02 (West 2007) (listing the elements of a trafficking violation and mentioning Chapter 43 of the Texas Penal Code which gives more detail about soliciting).

9. Tex. Penal Code Ann. § 43.05 (West 2007) (describing how one can be illegally compelled to prostitute oneself).

10. See *id.* (listing only “force, threat, or fraud” as ways to compel prostitution).

the context of juveniles, coercion is a glaring missing component. In *Thompson v. Oklahoma*,<sup>11</sup> the U.S. Supreme Court found that:

less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult, since inexperience, less education, and less intelligence make the [child] less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.<sup>12</sup>

The Court recognized that a child's mind is malleable and susceptible to outside influences.<sup>13</sup> Excluding "coercion" as a form of compelled prostitution or trafficking ignores the special vulnerability of minor victims and their potential inability to consent. Therefore, due to their similarities, this Note may conflate minor trafficking victims with child prostitutes.

Not all Texas laws ignore the plight of child victims. Existing family law statutes protect children by requiring that certain agencies and individuals report abuse and conduct investigations.<sup>14</sup> These statutory requirements create due process rights for juveniles, and they are entitled to these rights bestowed by the State statutes.<sup>15</sup> Thus, failing to report or investigate abuse may result in due process violations. However, Texas's family law statutes do not extend to minor prostitutes. Although trafficking someone under the age of 18—whether she is of the State's consenting age under criminal law—is abuse, if she is categorized under criminal law, her right to have her abuse allegations investigated falls to the wayside.<sup>16</sup>

Rather than taking a reactionary approach to victims, the State can expand its legal protectionist policies to more minors by treating all—not just those under the legal consent age, as victims. Because most child prostitutes have pimps, it is easy to see most forms of child prostitution as

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11. *See* *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that Eighth and Fourteenth Amendments prohibited execution of defendant convicted of first-degree murder for offense committed when defendant was 15 years old).

12. *See id.* at 833–38 (1988) (finding that the mental capacity of juveniles to comprehend their own actions is lower than that of an adult).

13. *See id.*

14. *See* Tex. Family Code Ann. § 261.301 (West 2005) (stating that in certain circumstances, a state agency is required to investigate an abuser).

15. *See* *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (determining that state statutory entitlements created due process rights for individuals).

16. *See* H.R. 4009, 81st Gen. Assemb., Reg. Sess. (Tex. 2009) (detailing how persons forced into prostitution are victims).

trafficking.<sup>17</sup> Even if some children voluntarily prostitute, Texas's child and family policies seem to lean in favor of protection over prosecution.<sup>18</sup>

Part I of this Note introduces the current legal dissonance in Texas's human trafficking laws, and argues that in order to close the gap between policy and practice, Texas must change its criminal laws concerning child prostitution or risk running aground from due process violations. Part II parses the existing Texas criminal legal language and how its family code gives rise to liberty interests and due process rights to trafficked children. Although the courts have chosen to ignore the due process argument, given the surge in human trafficking laws in Texas, victims are likely to resurrect the claim with the momentum of policy changes behind them, particularly as the gap between the ideal State response and actual State response to human trafficking grows more visible.<sup>19</sup>

Part III of this Note suggests that one of the more easily applicable approaches is to mimic the federal laws, particularly the Trafficking Victims Protection Act of 2000 (TVPA). The Act's provisions reveal its child welfare policies. For example, the Act describes the trafficking of victims under age eighteen as a "severe form"; it establishes grants for the purpose of pursuing and investigating traffickers, makes social services available to minor victims, and requires that states report their cases to the federal government.<sup>20</sup> Some of this language is observable in H.B. No. 4009, but it falls short regarding vigorous investigations and reporting. In order for Texas to align itself with national policy and avoid due process claims stemming from its own state laws, it must amend their current child prostitution statutes.

Part IV suggests another recommended approach to amending the laws. The TVPA models much of its policy on international protocols and conventions. Another possibility for Texas to comply with national public opinion is to amend its laws to reflect international authority. Although international conventions and protocols do not detail specific action, as a

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17. See Dep't of Justice, *Child Exploitation and Obscenity Section*, <http://www.justice.gov/criminal/ceos/subjectareas/prostitution.html> (last visited Jan. 7, 2013) (stating that pimps often groom children to become prostitutes); see also *Commercially Sexually Exploited Children*, HUMAN SVCS. DEP'T, Seattle.Gov, <http://www.seattle.gov/humanservices/domesticviolence/prostitutedyouth/nationalperspective.htm>, (last visited Jan. 7, 2013) (stating that seventy-five percent of child prostitutes have pimps).

18. See H.R. 4009, 81st Gen. Assemb., Reg. Sess. (Tex. 2009) (demonstrating that new human trafficking policies are in place).

19. See *id.*

20. See Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102 (9)(A)–(B) (2000) (describing the different forms of severe forms of trafficking).

signatory, the United States human trafficking legislation must incorporate the spirit of the treaty.<sup>21</sup>

While Part V suggests that integration of domestic laws could lead to a more streamlined approach and broader protection of minor trafficking victims, it also explains how to remedy due process violations. Weaving the family and penal codes together can create a safety net for child victims of trafficking and turn away from the State's general retributive approach to minor prostitutes. To ultimately protect minor trafficking victims, Texas must optimize their human trafficking laws to encompass both its criminal and family laws.

Finally, this Note will conclude that the current laws of Texas do not sufficiently protect minor victims—particularly those between the ages of fifteen and eighteen—who are not properly shielded by consent laws. This Note also advances that failing to report potential traffickers violates reporting mandates and state policies that encourage the pursuit and prosecution of child abusers, therefore violating the child's due process rights. Without amending the laws, Texas's treatment of minor trafficking victims will not match its progressive human trafficking policies.

## *II. Texas State Laws*

According to the Texas Attorney General's office, twenty-five percent of trafficking victims make their way across Texas state lines.<sup>22</sup> Its position near the Mexican border provides easy access for aliens who opt to enter into the United States. Many of Texas's trafficking victims, however, are domestic.<sup>23</sup> In fact, domestic victims comprised over fifty percent of the 369 trafficking victims Texas identified since 2007.<sup>24</sup>

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21. See United Nations Convention Against Transnational Organized Crime, Palermo Protocol, G.A. Res. No. 39574, U.N. Doc. A/RES/55/25 (Sept. 29, 2003), available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&lang=en) (showing that the United States became a signatory in 2005).

22. See OFFICE OF THE ATTORNEY GENERAL, THE TEXAS RESPONSE TO HUMAN TRAFFICKING REPORT TO THE 81ST LEGISLATURE 4 (2008), available at [https://www.oag.state.tx.us/AG\\_Publications/pdfs/human\\_trafficking\\_2008.pdf](https://www.oag.state.tx.us/AG_Publications/pdfs/human_trafficking_2008.pdf) (stating that many more victims are trafficked domestically than internationally).

23. See U.S. Dept. of Health and Human Servs., Rescue and Restore Campaign Results (2006) (stating that twenty-five percent of the 200,000 domestic trafficked victims in the U.S were in Texas).

24. OFFICE OF THE ATT'Y GEN., THE TEXAS HUMAN TRAFFICKING PREVENTION TASK FORCE REPORT 2011 TO THE TEXAS LEGISLATURE 1, 3 (Jan. 2011) [https://www.oag.state.tx.us/ag\\_publications/pdfs/human\\_trafficking.pdf](https://www.oag.state.tx.us/ag_publications/pdfs/human_trafficking.pdf) (indicating that the

The criminal and family laws of Texas not only deviate from the federal Trafficking Victims Protection Act, but also conflict with each other. As the Texas Criminal and Family Codes stand, the statutes cannot be reconciled under the title of human trafficking. The Texas courts recognize the vulnerability of children, pass laws that protect them, and yet ignore their victimhood if they facially commit a crime of prostitution.<sup>25</sup> What is more, there is no mandatory reporting requirement for children engaging in prostitution.<sup>26</sup> Instead, the State grasps at the low-hanging fruit—the child—for an easier prosecution. Rather than pursue the abuser, the State only focuses on the superficial component of actual prostitution.

#### A. Texas Family Code

The Texas Family Code is not exceptional. Like most state family codes, it encompasses standard topics such as child physical and sexual abuse and mandatory reporting by state agents.<sup>27</sup> A conflict arises when these statutes do not apply to child prostitutes. Criminalizing child prostitutes, particularly those who have been trafficked, ignores child abuse laws.

The Texas code prohibits substantial physical or emotional harm to a child.<sup>28</sup> Yet in the context of prostitution, children, a group that the Supreme Court recognizes as vulnerable, are deemed responsible for their sexual acts with adults.<sup>29</sup> The disparate treatment between child prostitutes and sexually abused children is legally absurd. Engaging in prostitution should not make a child a criminal per se. In fact, given existing family law and Texas's desire to increase protection of children, it is more palatable to suggest that being a legal minor should be an affirmative defense to prostitution.

The statutes also create liberty interests for children. Statute 261.301 states that a “department or designated agency shall make a prompt and

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State arrested 369 traffickers).

25. See *In re B.D.S.D.*, 289 S.W.3d 889, 899 (2009) (adopting a plain textual argument to prosecute the 16-year old defendant charged with prostitution).

26. See Tex. Fam. Code Ann. § 20A.02 (West 2010) (providing definitions and explanations of human trafficking without mention of reporting).

27. See Tex. Fam. Code § 2120–22 (West 2009) (describing mandatory reporting laws).

28. See Tex. Fam. Code § 261.001 (West 2009) (defining abuse offenses).

29. See *Roper v. Simmons*, 543 U.S. 551, 553 (2005) (determining that “juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment”).

thorough investigation of a report of child abuse or neglect allegedly committed...” by a parent or caregiver.<sup>30</sup> Most minor prostitutes are not under parental supervision but are runaways controlled by pimps.<sup>31</sup> As distasteful as it sounds, the pimps are essentially the caregivers. For instance, in *In the Matter of B.W.*, B.W lived with her pimp who was over twice her age, who provided her food and shelter.<sup>32</sup> Pimps may not be traditional, or even legal, caregivers, but the statute does not require it. If the State views a pimp as a caregiver, then there is a clear due process violation by failing to investigate the abuse.

The State defines a “caregiver” as “a person who traditionally is responsible for a child’s care, custody, or welfare.”<sup>33</sup> If the pimp supplies shelter, clothing, and food and is the only adult in the household, the State could view him as the legal caregiver. A glance at the Texas Family Code shows that it is doubtful the State would consider a pimp as a caregiver to be in the best interests of the child.<sup>34</sup> A proper assessment of a child’s home requires the State to consider whether a child “has been the victim of repeated harm” and “is fearful of living in or returning to the child’s home.”<sup>35</sup> Discovery of a child living under these circumstances must be reported to authorities, because Texas legally mandates the person in charge of the welfare of the child to report abuse.<sup>36</sup> However, if the pimp is “caring” for the child, it is unlikely that he will report his own abuse.

In *B.W.*’s case, she divulged the abuse and the pimp’s information to a state psychologist<sup>37</sup>. However, the State decided not to pursue the alleged trafficker, but to prosecute a thirteen-year old child prostitute<sup>38</sup>. Although the court in *B.W.* found in favor of the defendant because she was under the

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30. See Tex. Fam. Code Ann. § 261.301(a)–(b) (West 2005).

31. See *Commercially Sexually Exploited Children*, *supra* note 13 (stating that seventy-five percent of child prostitutes have pimps).

32. See *In the Matter of B.W.*, 313 S.W.3d 818, 827–28 (Tex. 2010) [hereinafter *B.W.*] (describing the thirteen-year-old defendant’s background and home life).

33. TEX. FAM. CODE ANN. § 261.001(5) (West 2005).

34. See TEX. FAM. CODE ANN. § 263.307(b) (West 2005) (detailing thirteen factors that the State considers to determine whether a child’s environment is in her best interests).

35. *Id.*

36. See TEX. FAM. CODE ANN. § 261.101 (West 2005) (stating that a person who has a cause to believe that a child’s physical or mental health has been affected by abuse is legally mandated to report).

37. See *B.W.*, 313 S.W.3d at 819 (describing what B.W. told the State psychologist regarding her experience with her pimp.)

38. Brief for Petitioner at 14–22 *In the Matter of B.W.*, 313 S.W.3d 818 (Tex. 2009) (No. 08-1044) (pointing out the lack of investigation on the part of law enforcement).



legal age of consent, it chose not to address the due process claim, or expand the criminal code to protect children aged fourteen to seventeen.<sup>39</sup>

In cases where someone other than a caregiver or parent abuses the child, the State has prosecutorial discretion whether to pursue the alleged perpetrator.<sup>40</sup> The statute gives guidelines, however, regarding which situations to investigate. The State shall investigate a “report to the department that alleges that a child has been or may be the victim of conduct that constitutes a criminal offense that poses an immediate risk of physical or sexual abuse of a child that could result in the death of or serious harm . . . .”<sup>41</sup> Yet, in deconstructing the statute, it is unclear whether the State considers prostitution to fall under this category, or just sexual abuse directly by the perpetrator. And if the provision covers prostitution, does its protection extend only to minors under the age of consent, even though the family code views a person under eighteen as a minor? The result is legal obscurity.

If the provision above is too specific to encompass prostitution, the State’s definition of “abuse” is not. The Code defines abuse as “[f]ailure to make a reasonable effort to prevent sexual conduct harmful to a child . . .” and “compelling or encouraging the child to engage in sexual conduct . . . .”<sup>42</sup> This places Texas’s unwillingness to view all minor prostitutes under eighteen as victims on unsure footing. The legal age of consent is a clear demarcation onto which the State can grasp, but it draws a superficial line. The Family Code indicates that victims do not have to prove forced prostitution but can point to an adult’s encouragement of or failure to prevent it.<sup>43</sup> Therefore, even if a minor above the age of consent allegedly voluntarily prostituted herself, any adult involved—be it a caregiver or pimp—would be implicated. This statutory construction casts a light on the future of childhood as an affirmative defense to prostitution, trafficked or not.

Once the minor falls into the lap of the family court, liberty interests regarding privacy and security arise. State liberty interests are imbedded in

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39. See *In the Matter of B.W.*, 313 S.W.3d 818 (Tex. 2010).

40. See TEX. FAMILY CODE ANN. § 261.301(c) (West 2005) (stating that the state has the discretion to investigate anything not pertaining to caregivers or severe case).

41. *Id.* at § 261.301(f) (West 2005).

42. See TEX. FAM. CODE ANN. § 261.001(1)(F)–(G) (West 2003) (giving one of the definitions for “abuse”).

43. See *id.* (“A person commits an offense if, knowing the character and content of the material, he produces, directs, or promotes a performance that includes sexual conduct by a child younger than 18 years of age.”).

the Fourteenth Amendment of the Constitution.<sup>44</sup> The Amendment does not enumerate liberty rights, but instead states create them through local statutes. The Texas codes create liberty interests for children by providing a safety net and remedial structure through its family codes. If it requires reporting, and in the case of a caregiver an investigation, then the reporting and the investigation both become liberty interests that create avenues for remedies. For example, if a child asserts an abuse claim, the State is statutorily required to report and investigate the allegation.<sup>45</sup> If it does not, then the State violates liberty interests it created through its statutes.

In B.W.'s case, she reported that the adult she lived with sexually abused her.<sup>46</sup> Given that the State mandates an investigation of abuse allegations caused by a caregiver, the State should have pursued an investigation. The statute gave B.W. a liberty interest in having her abuse case investigated, and in failing to do so, the State violated those interests. Without these actions, the child loses a future remedy. A right without a remedy violates the child's substantive due process rights.

The Family Code is not comprehensive, but its policies are clear. Texas views children as vulnerable and seeks to protect them against abuse.<sup>47</sup> The Code provides services to children to deal with the abuse, such as a psychologist, a social worker, and housing.<sup>48</sup> Additionally, the State links abuse of children to the Penal Code and punishment.<sup>49</sup> The State has undergone an evolving standard of decency and has moved away from criminalizing victims, particularly minor victims, and placing the blame on the actor. This change is especially prevalent in the new House Bill 4009 dealing with human trafficking.<sup>50</sup>

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44. U.S. CONST. amend. XIV (listing interests protected under the due process clause).

45. *See* TEX. FAM. CODE ANN. § 261.301(a)–(b) (West 2005) (stating that abuse claims made against caregivers and facilities require investigation by the State).

46. Brief for Petitioner at 2 In the Matter of B.W., 313 S.W.3d 818 (Tex. 2009) (No. 08-1044) (noting that B.W. informed the State psychologist that she was living and sleeping with a 32-year old man).

47. *See* TEX. PENAL CODE ANN. § 43.25 (West 2003) (providing protections against minor abuse victims).

48. *See id.* § 261.001 (describing services offered to minors of abuse).

49. *See* TEX. FAM. CODE ANN. § 261.000 (West 2005) (cross-referencing the penal code to supplement the strength of the family code).

50. H.R. 4009, 81st Gen. Assemb., Reg. Sess. (Tex. 2009) (demonstrating that new human trafficking policies are in place).

*B. House Bill 4009*

The Texas legislature took a tougher stance on human trafficking and passed House Bill 4009 at the end of 2009.<sup>51</sup> The bill addresses human trafficking violators, victims, and law enforcement involvement.<sup>52</sup> It develops a human trafficking task force dedicated to “investigation” and “prosecution.”<sup>53</sup> These two words are found scattered throughout the statute. This indicates that the State saw the need to change its perspective on criminalizing prostitutes, and turned towards the traffickers themselves.

The severity of trafficking a person under age eighteen is demonstrated by the way the bill elevates the class of the crime to a second degree felony, regardless of whether the trafficker knew the child’s age.<sup>54</sup> In fact, it treats trafficking as if it were a statutory rape law by adding a per se element.<sup>55</sup> Yet, it extends the punishment and protection to all legal minors rather than just those under the legal age of consent.<sup>56</sup> Again, the bill is leading in the direction of victimizing all minor prostitutes, but here, the legislature constrains the bill’s protection to trafficked victims only.<sup>57</sup>

The bill’s weakest point is that it requires that a child prostitute be trafficked.<sup>58</sup> The State does not fully embrace child prostitution as an involuntary act. However, trafficking is hard to prove, and victims, hard to identify.<sup>59</sup> Most victims are hidden from society to avoid detection and rarely self-identify.<sup>60</sup> They are also often more motivated to prostitute by

51. *See id.* (expanding protections for minor victims).

52. *See id.* § 2 (describing grants for new law enforcement groups).

53. *See id.* § 1 (describing the new task force on human trafficking).

54. *See id.* § 7 (stating that trafficking of children is severe enough to be a second degree felony).

55. *See id.* § 7 (informing on how the intent element of the crime is not needed when trafficking children).

56. *See id.* § 9 (extending protections to all children under eighteen).

57. *See id.* (narrowing the scope to human trafficking victims only).

58. *See id.* (addressing the treatment of only minor *trafficked* victims) (emphasis added).

59. *See Green, supra* note 2, at 321 (explaining how victims often stay out of sight of the public and the police).

60. *See Texas Facts on Human Trafficking*, RESCUE AND RESTORE (2006), <http://www.google.com/url?sa=t&rc=j&q=texas%20identify%20human%20trafficking%20victims&source=web&cd=5&ved=0CEQQFjAE&url=http%3A%2F%2Ftexasimpact.org%2FUMW%2FHumanTraffickFactSheet.doc&ei=FVUcUrPjJ7OgsQTV6ICYDw&usg=AFQjCNEiY77Mafq5hA5UamjGTLaUrduQFg&bvm=bv.51156542,d.eWU&cad=rja> (indicating that trafficked victims do not typically identify themselves as such).

their addictions.<sup>61</sup> Because they are imbedded in a multi-criminal lifestyle, it is less likely that the child will report to the police or be in publicly visible.<sup>62</sup> The bill recognizes the vulnerability of minors, but does not completely give way to involuntariness.

The bill introduces a new hope for Texas's minor prostitutes. Although the bill is limited to a narrowed perspective of trafficking, the bill views minors above the legal consent age as particularly vulnerable victims.<sup>63</sup> As Texas incrementally expands its definition of trafficking and protection of minor prostitutes in both its courts and legislature, the fate of child prostitutes inches closer to complete decriminalization.

### C. Texas Criminal Code

While Texas heads towards decriminalizing trafficked children, its criminal and family statutes that indirectly relate to minor trafficking victims have been left behind. Under the Texas Penal Code, one engages in prostitution if she "offers to engage, agrees to engage, or engages in sexual conduct for a fee."<sup>64</sup> This statute does not require intent to commit prostitution. This unfortunately works against child prostitutes over age fourteen who may not be fully aware of their actions, or are not obviously trafficked.<sup>65</sup> Again, the legislative intent behind the statute does not match the Family Code, irrespective of the inclusion of the trafficking provision.<sup>66</sup> Additionally, the lack of an intent element may thwart a routine look at the concepts of coercion and consent. Without the need for intent, at first glance a minor engaging in sexual acts in exchange for money automatically becomes a criminal before considering the contextual risk of trafficking.

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61. Amy Young, et al., *Prostitution, Drug Use, and Coping with Psychological Distress*, *J. of Drug Issues* 30(4), 789–790 (2000) (discussing the large percentage of prostitutes who enter into, or continue to engage in, prostitution).

62. See Office of Attorney General, *supra* note 18, at 30 (stating that victims often are taught to be fearful of police officers and therefore lie about their circumstances).

63. See *id.* (singling out trafficking of minors as more severe).

64. See TEX. PENAL CODE ANN. § 43.02(a) (West 2003) (defining what the state constitutes as an act of prostitution).

65. *Id.*

66. See TEX. FAM. CODE ANN. § 261.001(G) (West 2005) (stating that abuse includes compelling or encouraging a child to engage in sexual conduct, including trafficking and prostitution under the Penal code); see also TEX. FAM. CODE ANN. § 261.001(L) (West 2005) (including the stipulation that trafficking and failure to make a reasonable effort to prevent trafficking of children constitutes abuse).

What is more confusing is Texas's Code's statements regarding sexual performance of a child. The statute defines "sexual performance by a child" as "any performance or part thereof that includes sexual conduct by a child younger than 18 years of age."<sup>67</sup> A perpetrator commits an offense if "he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct or a sexual performance."<sup>68</sup> The Texas Penal Code in no way reconciles with the criminalization of minor prostitutes. Even if the child between the ages of fourteen and eighteen consented to prostitution, this language suggests that there is an affirmative defense hidden in the statute.<sup>69</sup> The statute does not fully decriminalize child prostitution, but again, recognizes all minors as vulnerable victims who are more likely mentally and emotionally disengaged or naïve.<sup>70</sup>

There is precedent for establishing vulnerability for minors. In *Roper v. Simmons*,<sup>71</sup> the Supreme Court of the United States ruled on the constitutionality of subjecting minors to the death penalty.<sup>72</sup> The defense offered social research supporting the mental fragility of minors, and their diminished culpability.<sup>73</sup> The Court, citing *Eddings v. Oklahoma*,<sup>74</sup> noted that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."<sup>75</sup> The Court in both cases also noted that youths' personality traits are transitory and are therefore susceptible to external

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67. See TEX. PENAL CODE ANN. § 43.25(b) (West 2003) (defining sexual performance by a child as "any performance or part thereof that includes sexual conduct by a child younger than 18 years of age").

68. See *id.* (stating that a person commits the offense of sexual performance by a child if he employs, authorizes or educes someone younger than 18 to engage in sexual conduct or performance).

69. See *id.* (emphasizing the criminalization of the person allowing the act, not the child committing the act).

70. *Id.*

71. *Roper v. Simmons*, 543 U.S. 551, 558 (2005).

72. See *id.* at 553. ("Juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.") (citing *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989)).

73. See *id.* at 571 ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.") (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

74. *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (determining that in issuing the death sentence for a minor, courts must consider unhappy upbringing and emotional disturbance as a mitigating circumstance).

75. *Id.* at 115–16 (describing the transient nature of youths).

pressure.<sup>76</sup> Though the Supreme Court used this argument to oppose the death penalty for minors and not trafficking, it supports courts' views on the vulnerability of minors and reasons for impulsive criminal action.<sup>77</sup> This is not to diminish the seriousness of trafficked children, but rather to consider the meaning and weight of what the State deems "consent" and "voluntary", and apply those meanings in a child prostitution context.<sup>78</sup> The State needs to determine whether encouragement is coercion in the case of a minor.<sup>79</sup> Looking back at the Family Code discussed above, it is a criminal act to coerce or encourage a child to engage in sexual conduct.<sup>80</sup> This should play a larger part in Texas's child prostitution discourse because it weakens the view that any minor, including teens, can voluntarily consent to prostitution.<sup>81</sup>

For children under fourteen, the recent passage of House Bill 4009 (Bill) aims at prosecuting traffickers and protecting child victims.<sup>82</sup> As of May 2009, under the new Bill, trafficking is an affirmative defense available to prostitutes under eighteen years of age.<sup>83</sup> However, it is not a guarantee.

The Bill states that Texas amended its Penal Code by adding an affirmative defense provision: "[i]t is a defense to prosecution . . . that the actor engaged in the conduct . . . was the victim of conduct that constitutes" a trafficking offense.<sup>84</sup> It does not guarantee a defense to a child that is legally unable to consent to sex under Texas' statutory rape laws.<sup>85</sup> In

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76. *See id.* at 116 (noting the susceptible nature of youths to outside influences); *see also Roper* at 554 (discussing the unstable nature of adolescents).

77. *See Eddings*, 455 U.S. at 116 (determining that youth is a time and condition of life when "a person may be most susceptible to influence and to psychological damage"); *see also Roper*, 542 U.S. at 571 (noting that minors have diminished culpability).

78. *See Roper*, 543 U.S. at 571; TEX. PENAL CODE ANN. § 43.25(b) (West 2003).

79. *See* TEX. FAM. CODE ANN. § 261.001(G) (West 2005) (stating that "abuse" includes compelling or encouraging a child to engage in sexual conduct, including trafficking and prostitution); *see also* TEX. PENAL CODE ANN. § 43.25(b) (West 2003) (stating that one may not encourage a minor to engage in sexual conduct or performance).

80. *See* TEX. FAM. CODE ANN. § 261.001(G) (West 2005)

81. *Id.*

82. *See* H.R. 4009, 81 Gen. Assemb. Reg. Sess. §1(b) (Tex. 2009) (requiring the establishment of a trafficking task force).

83. *See id.* § 9(a)(2) (stating that a person commits an offense if they knowingly cause a child under 18 years to engage in prostitution regardless of if the actor knows the child's age at the time of the offense).

84. *See id.* § 8 (referencing TEX. PENAL CODE ANN. 43.02(d) (West 2003), which provides a defense against prosecution for trafficking).

85. *See* H.R. 4009, 81 Gen. Assemb., Reg. Sess. (Tex. 2009) (failing to mention the

Texas, the legal consenting age is seventeen, but the law also recognizes a special vulnerability for children under fourteen.<sup>86</sup> However, a child under the age of seventeen can be criminally prosecuted for prostitution.<sup>87</sup>

Prior to 2010, Texas also criminally prosecuted children under fourteen.<sup>88</sup> The decision from *B.W.* turned criminalization of child prostitutes on its head.<sup>89</sup> The court determined that “[i]n the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution when they lack the capacity to consent to sex as a matter of law, . . . a child under the age of fourteen may not be charged with that offense.”<sup>90</sup> The court here extended the statutory rape protection to instances of trafficking, but narrowed the decision to children under fourteen.<sup>91</sup> Although this was a momentous step for minor trafficking victims, it did not go far enough. The decision leaves the upper age range of minors open to criminal prosecution despite falling into a protected category under statutory rape laws.<sup>92</sup>

The court in *B.W.* noted the significant relationship between mandatory reporting of child abuse and the State’s authority to sanctioned protection.<sup>93</sup> It did not, however, directly link reporting to trafficked minors, or even more generally, to child prostitutes.<sup>94</sup> Yet, the mandatory reporting reference may not be a casual brush, but a suggestion that the state needs to shift its perspective on child prostitutes, particularly in trafficking situations.

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affirmative defense as automatic for minors).

86. See TEX. FAM. CODE ANN. § 21.11 (West 2005) (stating that an actor commits an offense if he has sexual relations with someone under seventeen years of age).

87. See *In re* B.D.S.D., 289 S.W.3d 889, 899 (Tex. Ct. App. 2009) (affirming the minor’s conviction of a prostitution charge).

88. See *In the Matter of B.W.*, 313 S.W.3d 818, 822 (Tex. 2010) (noting the dissent’s argument would allow children as young as ten to be prosecuted for prostitution (referencing Tex. Fam. Code §§ 51.02(2)(A)).

89. See *id.* at 826 (holding that a child under the age of fourteen may not be charged with prostitution under the statute).

90. See *id.* (recognizing that the state legislature passed laws that prohibit legal consent to sexual exploitation for children under fourteen).

91. See *id.* (stating that there is no clear indication that the legislature intended to prosecute children under fourteen for the crime of prostitution).

92. See *id.*

93. See *id.* at 825 (discussing the State’s broad power to create protective statutes for children, including reporting).

94. See Brief for Petitioner at 18, *In the Matter of B.W.*, 313 S.W.3d (Tex. 2009) (No. 08-1044) (describing the reporting requirement as a trigger for the petitioner’s due process rights).

Despite the legal setbacks, Texas has advanced in its views on sex victims and child prostitution. Prior to 1994, the State allowed promiscuity as an affirmative defense to sexual conduct with a child over fourteen.<sup>95</sup> The legislature abolished the defense, demonstrating that children over fourteen also deserve protection, even if the child seemingly voluntarily engaged in sexual conduct.<sup>96</sup>

Additionally, prior to *B.W.*, the State could prosecute child prostitutes under fourteen years of age without consideration to the age of consent.<sup>97</sup> As of June 2009, it surfaced in the cases of *B.W.* and in *In Re: B.D.S.D. (B.D.S.D.)*.<sup>98</sup> In *B.D.S.D.* the defendant was a 16-year old child prostitute.<sup>99</sup> Her scenario mirrored *B.W.*'s; she ran away from home and began prostituting.<sup>100</sup> *B.D.S.D.* made similar due process arguments as in *B.W.*, but the State ruled that there were no due process violations, despite the ambiguous and conflicting statutes.<sup>101</sup> Instead, the Court decided upon a textual approach.<sup>102</sup> The penal code, it stated, allowed the prosecution of anyone who commits prostitution, even juveniles.<sup>103</sup> The defense pointed out that this conflicted with the criminal code that prohibits any coercion of sexual conduct by a minor under eighteen.<sup>104</sup> The Court essentially ignored the contention, and ruled based on the plain language of the statute that did not single out minors.<sup>105</sup>

The Court decided *B.W.* one year after *B.D.S.D.*, but with different results.<sup>106</sup> The easiest explanation is the difference in age between the two

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95. See *In the Matter of B.W.*, 313 S.W.3d 818, 822 (Tex. 2010) (discussing how promiscuity is not a defense against sexual conduct with children younger than fourteen, and that the State abolished the rule years prior).

96. See *id.*

97. See *id.* at 826 (bringing up how the statute should now be interpreted to provide an affirmative defense to prostitution if the minor is younger than fourteen).

98. See *In re B.D.S.D.*, 289 S.W.3d 889, 899 (Tex. Ct. App. 2009) (holding that a juvenile may be adjudicated for engaging in delinquent conduct by committing the offense of prostitution).

99. See *id.* at 891.

100. See *id.* at 892 (describing B.D.S.D.'s background).

101. See *id.* at 899 (stating that there was no due process violation).

102. See *id.* (deciding to look at the plain meaning of the statute).

103. See *id.* at 893 (declaring that if the statutes are ambiguous, then will look at plain text of the penal statute regarding prostitution).

104. See *id.* at 892 (describing defendant's argument that the penal and family statutes conflict over whether a minor can give consent).

105. See *id.* at 899 (ruling based on the plain meaning of the penal statute).

106. See *id.*; see also *In the Matter of B.W.*, 313 S.W.3d 818 (Tex. 2010) (showing that the court decided both cases on June 18, 2009).



defendants. B.W. was under the age of consent under statutory rape laws, and B.D.S.D. was not.<sup>107</sup> However, given their similar backgrounds, the age difference seems superficial given that they are both legal minors.

What is more frustrating is that the court took a backdoor out of the due process argument. It recognized the conflict between the different laws, but only looked at the text of one of those laws—the law with no mention of criminalizing minors.<sup>108</sup> The Court took this absence in language to mean that the statute applied to minors as well.<sup>109</sup>

These two cases represent Texas’s exercise of its prosecutorial discretion over minor prostitutes and their traffickers.<sup>110</sup> There are no criminal statutes requiring mandatory reporting of child prostitutes or their automatic referral to family courts. Yet, there are statutes detailing criminal abuse of minors that would veer minors toward family court. As Birckhead notes, Texas is “limited only by the vagaries of enforcement discretion rather than by the statutory language itself.”<sup>111</sup> If there is a trend toward decriminalizing trafficked minors, Texas needs clearer directives on dealing with minor prostitutes.

### *III. Trafficking Victims Protection Act of 2000 and Trafficking Victims Protection Reauthorization Act of 2008*

In the 20th century, the issue of human trafficking was largely seen as a foreign problem, particularly one of developing countries.<sup>112</sup> In 2001, the United States published its first Trafficking in Persons Report (TIP).<sup>113</sup> in

107. Compare B.W., 313 S.W.3d 818 (Tex. 2010) (stating the age of B.W. as thirteen at the time of offense), with *In re* B.D.S.D., 289 S.W.3d 889 (Tex. Ct. App. 2009) (stating the age of B.D.S.D. as sixteen at the time of offense).

108. See *In re* B.D.S.D., 289 S.W.3d 889, 899 (Tex. Ct. App. 2009) (looking only at the penal statute).

109. See *id.* at 894 (“By its very language, the statutory definition of ‘prostitution’ in section 43.02 [of the penal code] is not limited to conduct by adults.”).

110. See B.W., 313 S.W.3d at 824 (recognizing that the State typically has prosecutorial discretion in these cases and it is not infringed upon here).

111. Tamar R. Birckhead, *The “Youngest Profession:” Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1059 (2011).

112. See April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 244 (2007) (noting that the TVPA was more effective in battling overseas human trafficking).

113. See Trafficking in Persons Report (TIP), U.S. DEP’T OF STATE (2001), available at <http://www.state.gov/j/tip/rls/tiprpt/2001/index.htm>.

response to the Trafficking Victims Protection Act (TVPA).<sup>114</sup> Although, the first TIP report only focused on international statistics and excluded U.S. data<sup>115</sup> the TVPA set up federally funded programs that provided victims with training and special protective visas.<sup>116</sup>

The TVPA and Trafficking Victims Protection Reauthorization Act (TVPRA) are much broader than Texas law, and their aims more diverse. The approach is heavily focused on international victims, though it also addresses domestic persons.<sup>117</sup> The TVPA and TVPRA are successful at pinning down the different factors that contribute to a victim's special vulnerability.<sup>118</sup> This includes language and culture barriers, gender, and age.<sup>119</sup> Trafficked victims often find themselves in a country with a different language, culture and legal system—their expectations upended.<sup>120</sup> These barriers, compounded with youth, make for extreme vulnerability and an easy target.

More important, the TVPA and TVPRA set strict provisions regarding minors.<sup>121</sup> The TVPA defines anyone ““who has not attained 18 years of age”” a victim of a ““severe form of trafficking in persons.””<sup>122</sup> Punishment for severe forms of trafficking is stringent, and the Act suggests, ““the government of the country should prescribe punishment . . . to deter and that adequately reflects the heinous nature of the offense.””<sup>123</sup> Yet even the TVPRA creates a divide between children less than fourteen years of age and those between the ages of fourteen and seventeen, establishing different

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114. See Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2000) (being effective since its enactment in 2000) [hereinafter TVPA].

115. See *supra* note 113 (focusing solely on international trafficking and how it affects the United States).

116. See *id.* § 7105(b)(1) (2013) (discussing new visas set-aside specifically for trafficking victims).

117. See TVPA, 22 U.S.C. § 7101(b) (2000) (mentioning how internationally trafficked victims are especially vulnerable and provides protocols).

118. See *id.* (stating throughout the Act the distinctive classes of people and how they fit in the human trafficking context).

119. See *id.* (listing different factors that impact a victim's vulnerability).

120. See OFFICE OF THE ATTORNEY GENERAL, THE TEX. HUMAN TRAFFICKING PREVENTION TASK FORCE REPORT TO THE TEX. LEGISLATURE 3–39 (Jan. 2011) (displaying a table that shows that the State arrested 369 traffickers and discussing tactics the State will use to reach alien victims).

121. See TVPA, 22 U.S.C. § 7101 (2000); see also Trafficking Victims Protection Reauthorization Act 18 U.S.C. § 1591 (2008) [hereinafter TVPRA] (placing stricter sentencing on minor victims).

122. TVPA, 22 U.S.C. § 7102(9)(a) (2000).

123. *Id.* § 7106(a)(3).

tiers of punishment.<sup>124</sup> If the child is under fourteen, the trafficking may receive a fine and/or imprisonment for an indeterminate amount of years.<sup>125</sup> On the other hand, if the child is over fourteen, the trafficking may receive a fine and/or imprisonment up to twenty years.<sup>126</sup> The open-ended sentencing for the younger group is stricter; however, the sentencing structure for the older group is not by any means lenient. Most importantly, both groups are seen as minors and set aside as exceptional circumstances.

The provisions on minors heavily link children's ages with inability to consent. In fact, under the TVPA,<sup>127</sup> the federal government does not look at voluntariness or consent as factors if the victim is less than eighteen years old.<sup>128</sup> The government, it seems, assumes that coercion or force play a role. This attitude mimics the Supreme Court's rulings on juvenile death penalty laws and the accepted social science that children think differently than adults.<sup>129</sup> The legal system assumes children are more susceptible to suggestions and guidance from others, and therefore only need a low level of encouragement or coercion compared to that of adults.<sup>130</sup>

The TVPA also views minors as automatic victims and applies a strict liability standard to traffickers.<sup>131</sup> The Act does not require knowledge of age or intent to traffic a child.<sup>132</sup> As long as the trafficker observed the victim, the government may prosecute him.

Additionally, the Act provides grants for multiple States and agencies that investigate and pursue traffickers.<sup>133</sup> The grants allow for States to create task forces and for the proliferation of law enforcement to pursue

124. *See* TVPRA 18 U.S.C. § 1591(a)–(b) (dividing severity of punishment into different age ranges).

125. *See id.* (indicating that the punishment can be up to life in prison).

126. *See id.* (indicating that the punishment can be up to twenty years in prison).

127. *See* TVPA, 22 U.S.C. § 7101, § 7102(8) Sec. 108(a)(2) (2000) (acknowledging that some minors cannot give meaningful consent).

128. *See id.* § 7102(9)(a) (stating that one may be prosecuted for trafficking if coercion is applied *or* the victim is under eighteen) (emphasis added).

129. *See supra* notes 71–78 and accompanying text (comparing the culpability of minors versus adults).

130. *See* *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (discussing the susceptibility of children to external influences).

131. *See* TVPA, 22 U.S.C. §§ 7101, 7102(8) (2000) (disregarding consent as a factor and applying strict liability to the offender).

132. *See supra* note 102.

133. *See* TVPA, 22 U.S.C. § 7101 Sec. 1101(c)(2) (describing grants available to law enforcement).

sexual perpetrators.<sup>134</sup> Law enforcement agencies may apply for grants that encourage arrest policies—an incentive to a State to educate and ramp up its police force’s knowledge of human trafficking.<sup>135</sup> Not only do the grant provisions encourage arrest after the fact, but they also focus on prevention: law enforcement should seek out stalkers and administer protection orders and subpoenas.<sup>136</sup> The goal of these provisions is to provide protection for the victims, and establish a process so that the victims may have a remedy.<sup>137</sup>

The TVPA requires states to report cases and their findings to the federal government and creates a safe haven program for victims.<sup>138</sup> It also paves the way for victim involvement during the investigation and trial periods by encouraging victims to participate in the process.<sup>139</sup> Under section 1513, the Act reads “all women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.”<sup>140</sup> Through these policies, victims will feel freer to make claims against their traffickers, and police will receive clues on how to identify victims, possibly leading to more investigations and prosecutions.<sup>141</sup>

Under the TVPRA, reporting of minor victims to the Secretary of Health and Human Services is mandatory upon trafficking allegations.<sup>142</sup> The report sets the social services mechanism in motion.<sup>143</sup> Once law enforcement discovers the child, the officer’s report generates a list of

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134. *Id.*; see also Tamara Birckhead, *The Youngest Profession: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1080–81 (2011) (noting the TVPA’s focus on law enforcement and prosecution).

135. See TVPA, 22 U.S.C. § 7101 Sec. 1101(c)(2) (describing grants available to law enforcement for human trafficking-based programs).

136. See *id.* (describing the purpose of the grants).

137. *Id.*

138. See *id.* at § 7101 Sec. 1301(d) (detailing mandatory reporting to the federal government).

139. See *id.* at § 7101 Sec. 1513(a)–(b) (discussing how victims can participate in the investigation process).

140. *Id.*

141. See *id.* (detailing findings that such regulations will prompt victims to come forward about trafficking).

142. See TVPRA, 22 U.S.C. § 7104 Sec. 21(a)(2)(F)(i) (2008) (discussing mandatory reporting of cases).

143. See *id.* (describing available services to allegedly trafficked children).

services available for interim assistance, even if trafficking is not yet verified.<sup>144</sup> This is unlike the Texas Code, which views child prostitutes as criminals first despite its recent policies against this approach.<sup>145</sup>

The TVPA and TVPRA are far from perfect. However, they more accurately reflect the current national policy of decriminalizing trafficking victims. Their emphasis on liberal protections of minors addresses dissonance between criminal and family law policies.<sup>146</sup> The Acts provide better guidelines for law enforcement and States on managing expectations of child prostitutes in the federal legal system.

#### *IV. International Law*

International protocols and conventions also produce satisfactory policy models. In September 2003, The United Nations entered into force the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (The Protocol) under the United Nations (UN) Convention against Transnational Organized Crime is geared specifically towards trafficking.<sup>147</sup> The language is more vague than that in the TVPA and TVPRA because it cannot possibly reflect all domestic laws in place, particularly the ones regarding legal age. But, it summarizes the overarching policies to which the United States domestic law is trying to adhere.<sup>148</sup>

The purpose of The Protocol is to “prevent and combat trafficking in persons, paying particular attention to women and children . . . .”<sup>149</sup> Much like the TVPA and TVPRA, it clearly establishes women and children as

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144. *See id.* at Sec. 212 (stating that credible information that a child might be trafficked is sufficient).

145. *See* TEX. FAM. CODE § 261.001 (West 2009) (defining abuse offenses).

146. *See supra* notes 127–133 and accompanying text (describing the provisions of the TVPA); *see also supra* notes 134–136 and accompanying text (emphasizing the TVPRA regulations concerning trafficked women and children).

147. *See* United Nations Convention Against Transnational Organized Crime, Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the Trafficking Protocol or UN TIP Protocol), G.A. Res. 39574, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) available at [http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC\\_%20Convention/TOCebook-e.pdf](http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC_%20Convention/TOCebook-e.pdf) (offering practical help to states with drafting laws, creating national anti-trafficking strategies, and assisting with resources to implement them).

148. *See id.* art. 5 (noting that the protocols set forth are limited to the extent possible that they are applicable under a State’s domestic laws).

149. *See id.* art. 2 (indicating that the Protocol’s focus is trafficking).

vulnerable victims.<sup>150</sup> The signatories are asked to consider the victims' special needs, especially children; and provide services for healing and reintegration back into society.<sup>151</sup>

Although The Protocol may not give specific guidelines in dealing with minor victims, together with the TVPA and TVPRA, it helps form a cohesive policy that protects children and views them as victims. Also, the United States is a signatory to The Protocol, requiring domestic policy to adhere to its language and mission.<sup>152</sup> And in turn, Texas must also adapt its policies to The Protocol.

### V. Remedies for Texas

As previously discussed, Texas's laws, more so than its policies, deviate from the national discourse on child prostitution. Texas's passage of House Bill 4009 signifies a movement towards the federal law, but Texas will continue to fail if its policies are not reflected in its existing laws. Also, when faced with the problem of conflicting laws, it does not always choose to favor the minor.<sup>153</sup> Its retributive approach disadvantages child prostitutes.<sup>154</sup> Either the State is not ready to finalize an interpretation of its ambiguous family and criminal statutes because its policy is still fairly new, or Texas refuses to let go of its existing statutory interpretations for the sake of traditionalism.

This is best demonstrated in the two cases dealing with child prostitutes and due process claims—*In re. B.W.*<sup>155</sup> and *In re. B.D.S.D.*<sup>156</sup> In *B.W.*, the court did not rule on the defendant's due process claim that the family code established liberty rights under substantive due process.<sup>157</sup>

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150. *See id.* art. 9 (emphasizing the Protocol's consideration of women and children as vulnerable victims).

151. *See id.* art. 8 (discussing repatriation and services to children).

152. *See supra* note 147, Signatories to the Treaty, [http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-trafficking\\_protocol.html](http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-trafficking_protocol.html) (last visited Jan. 7, 2013) (showing that the United States is a signatory).

153. *See supra* notes 46–54 (establishing new human trafficking policies in H.R. 4009).

154. *See supra* notes 51–54 (stating that trafficking of children is a second degree felony and extending protections to all children under eighteen, but narrows scope to human trafficking and requires proof of trafficking).

155. *In re B.W.*, 313 S.W.3d 818 (2010).

156. *In re B.D.S.D.*, 289 S.W.3d 889 (Tex. Ct. App. 2009).

157. *See B.W.*, 313 S.W.3d at 835 (refusing to go into any depth about due process rights).

Rather, the court focused on the legal conflict between the statute that criminalized prostitution and legal consent laws that drew the line at fourteen years of age.<sup>158</sup> The court chose an easy out: resolving clearly conflicting laws that encompassed a popular policy.

Yet in *B.D.S.D.*, there was no bright spark of legal contention. So the court ignored the statutory vagaries in order to reach a conclusory decision. It focused only on the criminal statute that allowed the State to prosecute prostitutes, and did not acknowledge conflicting legal consent laws under the Texas Family Code.<sup>159</sup> According to the opinion, the court opted to take a plain textual approach—but only of one of the statutes.<sup>160</sup> If it had also attempted a textual interpretation of the consent statute, then it would have had to publicly deal with the legal white elephant. Perhaps the three-year age gap of the two minors made a difference, or maybe the court felt uncomfortable handling statutes that reflected old policies with guidance from newer unclear policies.<sup>161</sup> What is plain is that the court simply claimed that there was no substantive due process violation in this case, while completely avoiding the issue in the *B.W.* case that the court heard on the same day.<sup>162</sup>

Texas must therefore establish clear policies and legislate new statutes that encompass these new policies to avoid poorly executed decisions. There is a three-pronged remedial approach that could aid the process. First, the Texas legislature must establish clear policy goals on child prostitution in a human trafficking context. Texas policies and laws on human trafficking have changed drastically over the last three years. However, these new policies undoubtedly no longer reflect the legislative history of the current codes.

The State should determine if it desires full decriminalization of minor prostitutes and assume a trafficking element, or if it wants to use a case-by-case standard. And if so, the State must decide which aggravating and mitigating factors place the child prostitute on the trafficking victim side of the legal fence, or the criminal side. As it stands, Texas heavily focuses only on minor prostitutes under the age of fourteen.<sup>163</sup> If the fifteen to

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158. *See id.* at 836 (ruling that thirteen year-olds cannot consent to prostitution).

159. *See id.* at 899 (looking only at the penal statute).

160. *See id.* (deciding to look at the plain meaning of the statute).

161. *Id.* at 891.

162. *Id.* at 899.

163. *See* H.R. 4009, 81st Gen. Assemb., Reg. Sess. § 9 (Tex. 2009) (extending protections to all children under eighteen).

seventeen age range creates an aggravating factor, how can Texas reconcile that with their consent laws who still view those under eighteen as a minor?

The main factor to consider is age. Age has been an obstacle to judicial consistency in both *B.D.S.D.* and *B.W.* The State statutes are not clear about consent.<sup>164</sup> The statutory rape laws state the age of consent as fourteen, but the family code prohibits anyone from having or encouraging sexual contact with a minor under eighteen.<sup>165</sup> Although one probably would not argue with having different age tiers based on levels of vulnerability, Texas seems to only recognize the first tier—children under age fourteen. Yet the State essentially ignores those ages fifteen to seventeen when it comes to vulnerability, consent, and coercion in the context of prostitution. If prostitution is the starting point for human trafficking investigations, and Texas's human trafficking laws recognize minors as vulnerable victims, then it makes sense to consider trafficking immediately when confronting a minor prostitute of any age.

To address substantive due process, the legislature needs to clarify what liberty interests the state statutes create. Defendants will continually make due process claims and end up with conflicting or obscure precedent. Current Family Code indicates a right to an investigation under an abuse claim if the defendant is a minor.<sup>166</sup> Texas's progression toward viewing decriminalizing human trafficking victims points toward recognizing these legal interests and providing remedies for children. If this does not reflect state policy the legislature should change the statutes. Otherwise these rights either remain elusive and illusionary.

Second, Texas needs to reconcile its family and criminal codes. The court in *B.W.* resolved the conflict between the statutory rape laws and the law that criminalizes prostitution for children under the age of fourteen.<sup>167</sup> However, because the wavering legal age of consent is seventeen, and the criminal statute does not indicate whether the State's ability to prosecute prostitutes is broad or only includes adults, the conflict statutes create a legal limbo. Potential child trafficking victims above the age of fourteen have less remedies than their younger counterparts, although the State does

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164. See *In re B.D.S.D.*, 289 S.W.3d 889, 892 (Tex. Ct. App. 2009) (noting that the penal and family statutes conflict over whether a minor can give consent).

165. See TEX. FAM. CODE ANN. § 261.001 (West 2009) (stating that it is illegal to encourage or force a child under eighteen to commit sexual acts).

166. See TEX. PENAL CODE ANN. § 261.301(a)–(b) (West 2005) (stating that abuse claims made against caregivers and facilities require investigation by the State).

167. See *In re B.W.*, 313 S.W.3d 818, 836 (2010) (settling the legal conflict between the family and penal statutes).



not show that they are much less susceptible to being trafficked. The State should provide clearer remedies to children still under the legal age of consent, not matter how far under the threshold they are.

Once the State establishes clear policies, the courts will know better how to interpret existing statutes. Moreover, the courts could offer more judicial efficiency if the State made the statutes peacefully co-exist. Even if the State revealed a decisive legislative intent under the new policies, the statutory text of current laws will still conflict.

Third, Texas should adopt federal laws on human trafficking. The TVPA and TVPRA provide more comprehensive and keen goals than House Bill 4009.<sup>168</sup> 4009 assembles a task force and requires annual reporting of cases, but it does not directly address many of the challenges to human trafficking. For instance, the bill does not indicate an obvious policy on how to treat minor trafficking victims. And although it treats minor victims as particularly vulnerable, it does not try to reconcile itself with state laws. It seems an independent body without the weight of the state behind it—a quick fix to catch up with the rest of the country’s human trafficking legislature.

Nor does the bill provide a place for the criminal and family codes to coalesce. It seems to only add a complicated layer on top of the legal chaos. Law enforcement and the Texas judiciary would find the bill more useful if the legislature truly integrated the codes pertaining to trafficking victims throughout. This way, the State could develop a legal protocol for child prostitutes. Perhaps the State may want to treat child trafficking victims and child prostitutes differently, but converging the laws may bring the trafficking element to the forefront.

## *VI. Conclusion*

Texas laws contradict each other, yielding absurd results under age of consent and mandatory reporting laws. Under the Texas Family Code, a person under the age of eighteen is a minor, and one is prohibited from engaging in or encouraging sexual acts with the minor. However, under its criminal code, Texas may prosecute a child prostitute over the age of thirteen. The Family Code views a child younger than eighteen as vulnerable and unable to consent to sexual acts. Legal reason cannot withstand Texas’ conflicting laws.

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168. *See supra* part IV.

Additionally, Texas Family Code provides liberty rights for minors under abuse claims. If a minor claims an adult trafficked her for sex, a State agency must investigate and pursue the trafficker. Failure to pursue leads to substantive due process rights violations. Although there has yet to be a successful due process claim, as Texas manages more human trafficking cases, there could be more suits dealing with the lack of legal pursuit on behalf of the child.

For Texas to satisfy due process rights of trafficked minor victims under its own state laws, it should adhere to federal laws on human trafficking. The TVPA and TVPRA require mandatory reporting and decriminalization of victims, two aspects that align with Texas's goals under House Bill 4009. Texas needs to reconcile its criminal and family statutes to fall in line with its mandatory reporting laws, or risk violating due process rights of child victims. Using its Family Code as guidelines, Texas can conform its human trafficking and other criminal statutes to the same protective principles. These principles, which also motivate mandatory reporting laws, should drive the State's pursuit of human traffickers, leading them to codify mandatory reporting of traffickers and trafficked children.