

**ADDRESSING HUMAN TRAFFICKING
FROM A COMPARATIVE LEGAL
PERSPECTIVE MEXICO - UNITED STATES**

A Special Reference to a Health Law Reform in the United States

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INTRODUCTION

One of the biggest misunderstandings about Human Trafficking is that it is thought to involve mainly kidnapping or physical violence to force someone to do something. In fact, that is not always the case, as traffickers sometimes use tricky psychological means such as defrauding, manipulating or threatening victims to provide commercial sex or labor exploitation.¹

This work on human trafficking represents a very small grain of sand among the mountains that have been done by many of my predecessors, colleagues and other persons. While in my view, enormous efforts have been made, these have sometimes been disconnected between sectors such as law enforcement, the law, the medical field, the victim or survivor’s social protection organizations, business partners, academia, and political and decision-making authorities. That is why we would like to promote the fight against human trafficking from a more federated, interconnected, and multidisciplinary approach that

1. *Human Trafficking*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking> (last visited July 26, 2020).

we hope will bring better results in narrowing, cornering, and, hopefully one day soon, ending human trafficking.²

As the National Institute of Justice states, human trafficking is a largely hidden crime,³ and that is precisely what makes it so complex to address. It is also known to be modern-day slavery, but even if we compare modern-day slavery with the old type of slavery, the antebellum slavery, we notice certain differences: slavery was legally sanctioned by law; it was made legal.⁴ Instead, human trafficking has been illegal since its inception.⁵ Slavery gave a form of social status to a slave holder and was publicly displayed, while in human trafficking, traffickers work to hide trafficking from public view.⁶ Antebellum slavery in the United States (not slavery that existed in Rome, at the time of the Agnatic and Cognatic types of families),⁷ only involved the Africans in the United States, the African-Americans, while human trafficking today (although not in its origin of White Slavery sex trade), discriminates against no one—people of every

2. See generally University of Houston Hobby School for Public Affairs, University of Houston Law Center & Center for U.S. and Mexican Law, *Human Trafficking 2018 & Beyond: A Multi-Factorial Practical Approach*, YOUTUBE (Nov. 16, 2018), <https://www.youtube.com/watch?v=1PMYCUlqOdg>.

3. *Overview of Human Trafficking and NIJ's Role*, NAT'L INST. JUSTICE (Feb. 25, 2019), <https://nij.ojp.gov/topics/articles/overview-human-trafficking-and-nijs-role>.

4. BRIDGETTE CARR, ANNE MILGRAM, KATHLEEN KIM & STEPHEN WARNATH, *HUMAN TRAFFICKING LAW AND POLICY* 1 (2014).

5. *Id.*

6. *Id.*

7. The Agnatic family in Ancient Rome was organized around the patriarchal role of the *paterfamilias*. The father was considered essential and the source of every decision. The *paterfamilias* was the only authority over the family that was composed of blood children, adopted children and slaves from every origin. The father was also responsible for any liability produced by the members of his family, and had duties over them, unless they would have been freed or emancipated. Women would leave their correspondent parental authority (*patria potestas*) to fall into the authority of their husbands (*manus maritalis*, similar to *patria potestas*, but for wives). This type of family evolved in Ancient Rome towards the *Cognatic* family, where the maternal blood filiation went to be the basis of the matriarchal family, exclusively formed by blood's children and that gained civil value, for inheritances for instance. The role of women became decisive in the family, motherhood being a sure proof of filiation and source of decisions. Slaves or non-blood children were not considered part of the *Cognatic* family, unless expressly adopted. To know more about these types of families from a legal point of view, see generally JUAN IGLESIAS, *DERECHO ROMANO: HISTORIA E INSTITUCIONES* (S.A. Ariel ed., 11th ed. 1994).

race, national origin, gender, or age can be affected by it.⁸ In the middle of the 19th century slaves had a high cost, had value and could be traded.⁹ Victims of human trafficking are not considered as having the same value, although they can be traded and also at some point can be considered useless.¹⁰

According to the dates of the first bills approved related to human trafficking in the United States (2000)¹¹ and in Mexico as well (2012),¹² we can see that this scourge has only gained integral attention from law enforcement, human rights advocates, legislators and policymakers, at the beginning of the 21st century—which is not really far back in time. Besides this importance given lately to human trafficking by the national legislators, we can say that it is not only a crime with a domestic dimension; it is transnational and international as well, and it must also be addressed from those dimensions. Therefore, a comparison between the legislation existing in the United States and Mexico can be helpful in finding ways to fight what is known to be the second most profitable illicit business in the world, after drug trafficking. Indeed, Mexico and the United States have something to contribute to the discussion as countries particularly affected by this scourge.

The rationale of the present article is to analyze human trafficking from a legal comparative perspective between the legal systems of two different countries, wherein one follows a Roman or codified legal tradition, and the other follows a common Anglo-Saxon legal tradition. At the same time, we will keep in mind that a multidisciplinary approach from all of the sectors involved can help to federalize the efforts done so far by the previously mentioned sectors of society: law and health law; law enforcement; academia; health; public health; policy

8. CARR ET AL., *supra* note 4, at 1.

9. *Id.*

10. *Id.*

11. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

12. Ley General Para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y Para la Protección y Asistencia a las Víctimas de estos Delitos, Diario Oficial de la Federación [DOF] 14-06-2012, últimas reformas DOF 19-03-2014 [hereinafter Mexico 2012 General Law].

makers; the business dimension of human trafficking; as well as from the victim and the societal perspective.

Unfortunately, Mexico and South Texas are known to be major labor and sex trafficking areas in North America. Statistics are complex in human trafficking, but numbers have it that Texas ranks first in the United States for active cases for this crime.¹³ Twenty percent of Human Trafficking existing in the United States occurs in Texas,¹⁴ and, according to the Department of Justice, approximately one in four women trafficked in the United States travels through Houston.¹⁵

Mexico is considered a transition country for traffickers bringing victims from Central America.¹⁶ In fact, Guatemala, Honduras, and El Salvador are among the most affected countries in the region.¹⁷ Their trafficked nationals go to the United States through Mexico. South America, the Caribbean, Asia, Eastern Europe and Africa are also regions affected by Human Trafficking, with victims sometimes in transit to the United States.¹⁸ To a lesser extent, Western Europe and Canada are also affected by it.¹⁹

Great efforts have been made in fighting human trafficking. Different sectors have worked at the center of the solution to

13. ALYSSA CURRIER & KYLEIGH FEEHS, 2018 FEDERAL HUMAN TRAFFICKING REPORT 42 (HUM. TRAFFICKING INST. 2019), <https://www.traffickinginstitute.org/> (“In 2018, the 10 states with the greatest number of active human trafficking defendants at the federal level were Texas (177), New York (126), California (102) . . .”).

14. *Trafficking in Texas*, TEX. ALCOHOLIC BEVERAGE COMMISSION, https://www.tabc.state.tx.us/enforcement/trafficking_in_texas.asp (last updated Dec. 28, 2017) (“Since 2001, more than 20% of the total number of identified trafficking victims nationwide has been located in Texas.”).

15. Statistics discussed with Minal Patel, Special Advisor to Houston Mayor Sylvester Turner and Assistant U.S. South District Texas Attorneys, Sherri Zack and Ed Gallagher. *See also Public involvement is key in combating human trafficking, experts agree during UH Law Center panel discussion*, U. HOUS. L. CTR. (Apr. 18, 2018), <https://www.law.uh.edu/news/spring2018/0418US-Mex.asp> (quoting Alfonso López de la Osa Escribano’s introductory remarks at “Human Trafficking 2018 and Beyond: A Multi-Factorial Practical Approach”).

16. U.N. OFF. ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2018, at 74, U.N. Sales No. E.19. IV.2 (2018) [hereinafter UNODC GLOBAL REPORT 2018].

17. *Id.* at 75.

18. *Id.* at 74.

19. *Id.* In developed countries, even if human trafficking numbers are proportionally lower than in developing countries, human trafficking still exists.

punish traffickers and to resituate the victims, helping them reassimilate into society. However, more needs to be done in terms of awareness, solidarity and civil collaboration. The basic strategies to end human trafficking are known to be the 3 *P*'s: *Prevention*, *Protection* and *Prosecution*, a framework created by the Trafficking Victims Protection Act (TVPA) in 2000,²⁰ the cornerstone of federal human trafficking law.²¹ One more "P" could be added to the line, *Partnership*, as the U.S. Attorneys Southern District of Texas team purports to fight this clandestine crime by applying the "see something, say something" rule.²² We might add *Payment* as well, in the sense of restitution, compensation or giving the victim's life back. Considering the nightmare victims experience, this can be attained.

What can we learn from the comparison between Mexico and U.S. legislation on Human Trafficking? Is there a transnational model that could be established to guide in the path of ending it? What are the recommendations we could draw?

With this article, I will try to go through the different legal notions surrounding human trafficking to better understand what it is and how to fight it. After analyzing the multisemantic legal definition of human trafficking (I), I will then expose the sometimes unknown realities of the crime (II). International treaties related to human trafficking will then be considered (III), as well as the relevant Mexican legislation (IV) and the relevant U.S. legislation (V). Additionally, I will discuss health care and

20. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

21. *Policy and Legislation*, POLARIS PROJECT, <https://polarisproject.org/current-federal-laws> (last visited Jan. 16, 2020); see also *3Ps: Prosecution, Protection, and Prevention*, U.S. DEPT STATE, <https://www.state.gov/3ps-prosecution-protection-and-prevention/> (last visited Jan. 16, 2020).

22. Law enforcement agencies (e.g. the Department of Homeland Security, the FBI, the U.S. Attorney's Office, and local police) promote the idea of a partnership between the government and the public, using the slogan "See Something, Say Something." See generally *See Something Say Something*, DEPT HOMELAND SEC., <https://www.dhs.gov/see-something-say-something> (last visited Feb. 24, 2020); see also *Human Trafficking: If You See Something, Say Something*, ACAMS TODAY (Jun. 6, 2014), <https://www.acamstoday.org/human-trafficking-if-you-see-something-say-something/>. It is not a legal duty, but rather a strong recommendation based on the hope that the public will help protect their own communities. See generally *See Something Say Something*, DEPT HOMELAND SEC.; see also *Human Trafficking: If You See Something, Say Something*, ACAMS TODAY.

health law, including a suggestion regarding how to reform the Health Insurance Portability and Accountability Act ("HIPAA") (VI). Finally, I will draw conclusions and recommendations that could be useful for the different actors trying to fight human trafficking (VII).

I. A MULTISEMANTIC LEGAL DEFINITION OF HUMAN TRAFFICKING

A. *Towards a Legal Definition of Human Trafficking*

In Mexico, the notion of human trafficking has been historically known as *Trata de Blancas*, etymologically translated as *Trade of Whites*; this is termed the *white slavery* in the United States, which is a synonym for enforced prostitution. The trade of white women became a social problem recognized as such at the end of the 19th century. This sexual exploitation trade was exclusively of white women who were considered more sexually valuable than women from other races. The *Trata de Blancas* implied the mobility of white European and American women to be traded and aimed to exploit them sexually. Persons from Afro-Mexican, Afro-American, native-American, or indigenous backgrounds, were not included in this trade; however, the latter were exploited for labor purposes. The issue became so relevant worldwide that the United Nations adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), requiring signatories "to punish any person who . . . [e]xploits the prostitution of another person."²³

In the United States, these social issues were present as well. On June 25, 1910, a federal law was passed, the White Slave Traffic Act (also known as the Mann Act), which criminalized the interstate transport of women for prostitution, debauchery or immoral purposes.²⁴ The White Slave Traffic Act was invoked

23. G.A. Res. 317 (IV), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, art. 1 (Dec. 2, 1949).

24. Named after James Robert Mann, the Congressman from Illinois who promoted it. See *What is the Mann Act?*, FINDLAW [hereinafter *What is the Mann Act?*], <https://criminal.findlaw.com/criminal-charges/what-is-the-mann-act.html> (last visited

to punish men for moving women between states for sexual purposes.²⁵ The law made it illegal to “transport . . . any woman or girl” across state lines “for any . . . immoral purpose.”²⁶ The law was designed to protect women against the scourge of “white slavery,” the term used in the United States to refer to sex trafficking in the early 20th century.²⁷ This law would also punish black men who had relationships with white women, going against the racial *status quo* at that time in the United States.²⁸

As of today, the Mann Act is still in force, but it is only applicable to sexual activity that is considered criminal.²⁹ It was amended in 1978 and again in 1986;³⁰ most notably, the 1986 amendments replaced the phrase “any other immoral purpose” with “any sexual activity for which any person can be charged with a criminal offense.”³¹ After World War I, the term “white sexual slavery” was no longer used, as the scourge spread and became interracial.³² Today, the term is no longer used, as it is anachronistic and not representative of the crime; it would not be correct to use the term “white slavery” to talk about human trafficking. The precision of the legal terms defined is very relevant to our discussion.

Jan. 16, 2020); *see also* White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)).

25. *What is the Mann Act?*, *supra* note 24.

26. Mann Act § 2, 36 Stat. at 825. At that time, the law punished extramarital and immoral affairs conduct, such as premarital sex and interracial relationships. *See What is the Mann Act?*, *supra* note 24.

27. *What is the Mann Act?*, *supra* note 24.

28. *Id.*

29. *Id.*

30. *Id.*

31. White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)); *What is the Mann Act?*, *supra* note 24. The Mann Act was later amended to replace the vague “immoral purpose” language with “any sexual activity for which any person can be charged with a criminal offense.” *See* Child Sexual Abuse and Pornography Act, Pub. L. No. 99-628, § 2422, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2422 (2006)).

32. Laura Lammasniemi, ‘White Slavery’: *The Origins of the Anti-Trafficking Movement*, OPEN DEMOCRACY (Nov. 16, 2017), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/white-slavery-origins-of-anti-trafficking-movement/>.

I consider the definition of human trafficking to be complex, due to the fact that it is both multisemantic and multifactorial. Although sex trafficking and labor trafficking are both included within the broad definition of human trafficking, and both take advantage of vulnerable persons, they each follow a different rationale and target (sex versus labor). Fraudulent, forced, and coercive behavior may be illegal and part of the crime, but are identified also under other criminal categories tangent to human trafficking, but not all included in the definition. To understand the notion of human trafficking and seek what needs to be done by the legislature to facilitate its discontinuance, we need to break down the notion. This can be done not by using a Socratic method, but an exegetic one—asking questions and interpreting or explaining ideas objectively by deconstructing them. This Cartesian methodology of doubting allows us to move on with critical thinking and can be of assistance to know what we are, or should, be talking about.

Besides this first differentiation between sex and labor trafficking, their ultimate targets, we find several other offenses that can be included and juxtaposed; these legal notions are sometimes considered close and even overlap. This phenomenon can get legally confusing when legislation aims to be as omnicomprehensive as possible. In fact, there are cases we will see where the notions included are not even considered synonymous, but can be aggravating circumstances of the principal crime. The role of lawyers and prosecutors demands special skills and dexterity to navigate these tides in the most certain way. Justices must, by their decisions, help in setting the definition and basis of what could be a clear legal framework to fight human trafficking in the United States, Mexico, and abroad.

Human trafficking is known to be a *process* through which individuals are placed or maintained in an exploitative situation for economic gain.³³ It is committed through the use of force, fraud and coercion,³⁴ but when a child is the victim, it is a crime

33. United Nations Office of the High Commissioner for Human Rights, Human Rights and Human Trafficking Fact Sheet No. 36, at 1 (2014) [hereinafter OHCHR Fact Sheet No. 36], https://www.ohchr.org/Documents/Publications/FS36_en.pdf.

34. *What is Human Trafficking?*, DEP'T HOMELAND SEC., <https://www.dhs.gov/blue-campaign/what-human-trafficking> (last visited Jan. 24, 2020).

regardless of whether force, fraud and coercion is used. The known and applicable legal principle is that minors cannot consent, which gives a different dimension to human trafficking in U.S. law. The distinction between whether we are dealing with minors or adults is not always justified in our view, as it leaves adults less protected. We will approach this matter further in this article. Human trafficking is the compelling acquisition of labor, services, or commercial sex against the will of women, men, and children worldwide. More recently, transgender and members of the LGBTQI community are exposed as well. Overall, persons that are in a situation of special vulnerability are susceptible to human trafficking.

We can consider individuals victims of human trafficking regardless of whether they were born into a state of servitude or dependence, or later brought into the exploitative situation, as well as whether they previously consented to work for a trafficker (adult victims), or are participating in the crime as a direct result of being subjected to human trafficking. Nothing justifies the crime. We have to mention that human trafficking can be domestic or international, which means that it can happen within a country or can involve international or transnational movement across borders. Technically, no movement is required in human trafficking; it can be committed against a person who has never left his hometown. This situation can still be considered human trafficking because of its association with a number of related crimes.³⁵

As Kofi Annan stated in the prologue of the United Nations Convention against Transnational Organized Crime, human trafficking “is one of the most egregious violations of human rights that the United Nations . . . confronts.”³⁶ For the United Nations Office of Drugs and Crime, the notion of human trafficking includes forced and exploitative labor (in factories, in farms and in private households); sexual exploitation;

35. *Myths & Facts*, HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/what-human-trafficking/myths-misconceptions> (last visited Jan. 25, 2020).

36. Kofi A. Annan, *Foreword* to UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, at iv (2014), <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCbook-e.pdf>.

kidnappings for organ removals and forced marriage. The United Nations Office of the High Commissioner for Human Rights echoes these elements.³⁷ Additionally, human trafficking affects all regions and most countries of the world.³⁸

B. Legal Offenses around the Notion of Human Trafficking in the United States and Mexico

In this endeavor of defining human trafficking, we would like to approach the notion from a strictly legal point of view, and from both an indirect and direct perspective. The following are the legal offenses of interest to us in the United States and Mexico that relate to human trafficking:

United States

From an *indirect* point of view, *human smuggling* is a broad term that can be associated with human trafficking. The term includes helping people to cross American borders and enter the United States to be harbored illegally. According to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the term includes those who help, or attempt to help, undocumented immigrants remain in the United States.³⁹ In fact, the law seeks to define several distinct offenses related to aliens; the offenses are discussed herein.⁴⁰ *Alien smuggling* means to knowingly bring or attempt to bring into the United States an alien at any place other than an official point of entry to the country, such as a port, airport, or land immigration checkpoint.⁴¹ *Domestic Transporting* occurs when a person with knowledge or reckless disregard of the alien's illegal immigration status transports or moves an alien within the United States.⁴²

37. OHCHR Fact Sheet No. 36, *supra* note 33, at 1–2. The United Nations Office of the High Commissioner for Human Rights is the institutional author of UNODC text.

38. *Id.*; see generally UNODC GLOBAL REPORT 2018, *supra* note 16, at 11.

39. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 8 U.S.C. § 1324(a)(1)(A)(iii) (2005)).

40. *Id.* § 1324(a); see also *Federal Laws on Human Smuggling and Harboring Illegal Aliens – 8 USC 1324*, WALLIN & KLARICH (Oct. 15, 2015), <https://www.wklaw.com/practice-areas/federal-crimes/federal-human-smuggling-laws-8-usc-1324/>.

41. Illegal Immigration Reform and Immigrant Responsibility Act § 1324(a)(1)(A)(i).

42. *Id.* § 1324(a)(1)(A)(ii).

Harboring is a criminal act wherein a person that knows or recklessly disregards an alien's illegal immigration status conceals, or attempt to conceal, harbor or give shield from detection an alien in any place (building or transportation).⁴³ Under the law, *encouraging/inducing illegal immigration* is an offense in which one "encourages or induces an alien to come to, enter, or reside in the United States," knowingly or recklessly disregarding that this entry is in violation of the law.⁴⁴ *Conspiracy/Aiding or abetting* makes it an offense to participate or engage in a conspiracy to commit any of the mentioned offenses.⁴⁵ Also, *bringing aliens into the United States* an offense to wherein one brings or attempts to bring an alien into the country, knowing or disregarding the fact that he has not been previously authorized to enter or reside in the country.⁴⁶

A new offense was also introduced: *Unlawful Employment of Aliens*, which refers to when any person during any 12-month period, employs "at least 10 individuals with actual knowledge that the individuals are [unauthorized] aliens."⁴⁷ This offense is distinctive of any official action that would be taken later on with respect to such alien.

Also related to the offense of human trafficking is *child abuse*. However, we must mention that not every child abuse case, although illegal, can be considered a human trafficking situation; and related elements of the offenses can bring confusion to human trafficking cases. Federal legislation provides the foundation to identify a minimum set of behaviors regarding child neglect and abuse. Child abuse has been considered to be "any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an

43. *Id.* § 1324(a)(1)(A)(iii).

44. *Id.* § 1324(a)(1)(A)(iv).

45. *Id.* § 1324(a)(1)(A)(v).

46. *Id.* § 1324(a)(2).

47. H.R. REP. NO. 104-828, at 19 (1996) (Conf. Rep.) (codified as amended at 18 U.S.C. § 1324 (a)(3)(A)); *Federal Laws on Human Smuggling and Harboring Illegal Aliens* - 8 USC 1324, *supra* note 40.

imminent risk of serious harm.”⁴⁸ After these minimum standards, each state has to provide its own definition of child abuse, which can change from state to state. In all of the states, child abuse is a crime. It can be considered a felony or a less serious offense, depending on the situation.

Broken down from the federal legislation on child maltreatment, abuse and neglect, we find the crime of *child sex abuse*. It is also illegal in every state. Related to sexual activity, the principle is the minor’s inability to consent, even when they assent.⁴⁹ Severity of offenses may vary among states according to the age of the minor, for example between 16–18 years old, and under 12–13 years old. Criminal penalties vary and may include imprisonment, fines, registration as a sex offender or restrictions on probation and parole.⁵⁰ In relation to both health law and child sexual abuse, where laws impose mandatory reporting

48. Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 110, 110 Stat. 3063, 3078 (codified at 42 U.S.C. § 5106g) (repealed 2010). The definition of child abuse and neglect was later struck entirely from 42 U.S.C. § 5106g and added as a statutory note under 42 U.S.C. § 5101. Child Abuse Prevention and Treatment Reauthorization Act of 2010, Pub. L. No. 111-320, § 142, 124 Stat. 3459, 3482 (amended 2015). The definition of child abuse and neglect was amended in 2015 to include sexual abuse as determined by 42 U.S.C. § 5106g. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 802, 129 Stat. 227 (codified as amended at 42 U.S.C. § 5101). The current law under 42 U.S.C. § 5106g considers a child a victim of child abuse if a State or local government employee identifies the child as a victim of sex trafficking according to the Trafficking Victims Protection Act of 2000. See 42 U.S.C. § 5106g(b)(1); see also Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103(8)(B), 114 Stat. 1464, 1470 (defining sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”).

49. Although the principle remains the same in other fields where there is exchange of information between minors and adults, assent can be used to assess that minors have understood the information and acknowledged the lawful acts that would be performed on them (e.g. informed assent given by minors on certain medical acts, connected to the maturity of the minor to understand). *E.g.*, 45 C.F.R. § 46.408 (2007) (allowing assent from minors in the medical field after considering factors such as age, maturity and psychological state of the child).

50. See *State Civil Statutes of Limitations in Child Sexual Abuse Cases*, NAT’L CONF. ST. LEGISLATURES (May 30, 2017), <http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx> (comparing statutes of limitations in child sexual abuse cases); see also Mark Theoharis, *Child Abuse: Laws & Criminal Penalties*, CRIM. DEF. LAW., <https://www.criminaldefenselawyer.com/crime-penalties/federal/Child-Abuse.htm> (last visited Jan. 26, 2020).

requirements, failure of a large group of persons (mostly health professionals) to report child abuse cases can result in penalties. In regard to offenses against children and more specifically to the statute of limitations of such offenses, “[n]o statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.”⁵¹

From a *direct* point of view related to human trafficking, the critical and principal offense that we can mention is sex trafficking of children or sex trafficking by force, fraud or coercion, established by the Trafficking Victims Protection Act of 2000 (“TVPA”). The TVPA provided a separate federal offense to deal with the most common forms of sexual trafficking, including forced prostitution of men and women and the prostitution of children in the United States.⁵² Even if this offense could be brought under the involuntary servitude statute of the Mann Act, the enactment of the TVPA in 2000 expanded the reach of law and the action of law enforcement to better address the offense.⁵³ I would like to highlight the “or,” as by this redaction this crime is split in two: *sex trafficking of children*, on one hand, and *sex trafficking by force, fraud or coercion*, on the other hand. Sex trafficking by force, fraud or coercion is the crime associated with adult victims. Although a plain reading of the law leads us to understand that these are two crimes in the same sentence, I would like to encourage the federal legislature to be more clear in addressing the crime of human trafficking of adults. This clarification would not put as much pressure on a simple grammatical conjunction to sort crimes differently treated, whether children or adults are involved, and therefore put pressure on the reader in reference to such a horrendous crime. This is the only expressly federal crime that mentions and is directly connected to human trafficking.

51. 18 U.S.C. § 3283 (2006).

52. Victims of Trafficking and Violence Protection Act § 1591(a).

53. CARR ET AL., *supra* note 4, at 288.

Also linked with human trafficking, we find *commercial sex act*, a term referring to any sex act in exchange for anything of value given to or received by a person.⁵⁴ *Involuntary servitude* includes a condition of servitude in which a plan exists to make one believe that not entering into a situation, or not continuing in it, will result in him or another person suffering serious harm or physical restraint, resulting in abuse through trafficking.⁵⁵ By *debt bondage*, we understand the condition of a debtor as one that arises from a pledge to pay a debt with his/her personal services or with services from other persons, specifically when the value of those services reasonably assessed are not applied towards the debt, or when the length and nature of services are not limited nor defined.⁵⁶ Under these circumstances, traffickers can illegally create a situation with victims by controlling them.⁵⁷

Coercion, along with fraud and force, is one of the basic elements of human trafficking. We understand coercion as “threats of serious harm to or physical restraint against” someone; or, alternatively, a plan in which failing to perform an act would result in serious harm for the person or any person (similar to *involuntary servitude*).⁵⁸

The provision of *peonage*, similar to *debt bondage*, was strengthened by the TVPA.⁵⁹ By this violation we understand *peonage* to mean the service or labor given voluntarily or involuntarily by any person in exchange of a debt or liquidation.⁶⁰ This payoff of debt in exchange for work is also called *debt slavery* or *debt servitude* (in between of *debt bondage* and *involuntary servitude*).⁶¹

Enticement to slavery can also be understood today as slavery in a general or broader sense; it refers to the violation in which

54. 22 U.S.C. § 7102(4) (2010).

55. *Id.* § 7102(8).

56. *Id.* § 7102(7).

57. *Id.*

58. *Id.* § 7102(3).

59. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464, 1487.

60. 42 U.S.C. § 1994 (2006).

61. 18 U.S.C. § 1581 (2000); see also *Involuntary Servitude, Forced Labor, and Sex Trafficking Statutes Enforced*, DEP'T JUSTICE, <https://www.justice.gov/crt/involuntary-servitude-forced-labor-and-sex-trafficking-statutes-enforced> (last visited Jan. 27, 2020).

someone “kidnaps or carries away” a person to “be sold [under] involuntary servitude, or held as a slave.”⁶² The violation also includes the induction or persuasion to be transported with the intention to be a slave, or obstruction to avoid enforcement of this law.⁶³ The obstruction of a trafficking investigation can be found in other violations, such as *sale into involuntary servitude*,⁶⁴ or in the *confiscation or destruction of documents in furtherance of a trafficking offense*.⁶⁵ Also related to human trafficking violations are a number of *attempts and conspiracies to commit a trafficking offense*.⁶⁶

Forced labor was also included in the TVPA after the statute’s reform in 2008 expanded the law, answering the call by the Supreme Court to Congress to include “non-physical[,] . . . non-legal forms of coercion in trafficking cases.”⁶⁷ These stratagems include psychological oppression; coercion; and “climate of fear,” making victims believe that them or their families will suffer harm.⁶⁸ These actions would go beyond involuntary servitude to more subtle forms of coercion. This provision includes elements to fight labor trafficking that do not always involve physical violence, threats, and threats of deportation.⁶⁹ The TVPA reform “greatly expanded the [scope] of the law,” giving a tool to law enforcement in prosecuting traffickers.⁷⁰

Transporting of minors with the intention to engage in criminal or illicit sexual activities, even to foreign places, is also a crime that can be related to human trafficking.⁷¹ The *transportation of child pornography* can be associated with human trafficking as well.⁷²

62. 18 U.S.C. § 1583(a)(1).

63. *Id.* § 1583(a)(2)–(3).

64. *Id.* § 1584(b).

65. 18 U.S.C. § 1592(c) (2008).

66. 18 U.S.C. § 1594(a)–(c) (2008).

67. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5068; CARR ET AL., *supra* note 4, at 227.

68. CARR ET AL., *supra* note 4, at 227.

69. *See id.* at 227–28.

70. 18 U.S.C. § 1589(d) (2008); CARR ET AL., *supra* note 4, at 228.

71. 18 U.S.C. § 2423 (2018).

72. 18 U.S.C. § 2252A(a)(7), (b)(1) (2018).

Mandatory restitution for victims by the trafficker is among the penalties available to retribute or pay the victim for the harm done, if one can consider that a victim can be materially compensated for the moral and psychological impact potentially caused by being a victim of human trafficking.⁷³

As a recent example of the combination of some of the crimes mentioned above, *United States v. Gandy* was a federal trial held in December 2018, prosecuted in Houston, Texas by U.S. Assistant Attorneys Sherri L. Zack and Kimberly Ann Leo, and judged by Chief U.S. District Judge Lee Rosenthal.⁷⁴ In *Gandy*, the defendant attempted to traffic a minor male child during the 2012 London Olympics and was eventually charged with transporting minors, sexual exploitation of children, transportation of child pornography and sex trafficking of minors with intent to engage in sexual activity or prostitution.⁷⁵ The defendant was ultimately found guilty and received 360 months in prison and supervised release for life.⁷⁶

Let us see what the notion is related to human trafficking that exists in Mexico.

Mexico

In a very positive effort of promulgating a law that would include as many violations related to the crime of human trafficking as possible under an omni-comprehensive but tentacular crime, Mexico took decisive steps in granting legal certainty to fight human trafficking when it adopted the 2012 General Law to prevent, sanction, and eradicate human trade and the protection of victims from those crimes.⁷⁷ In Article 10, human trafficking is defined as:

73. 18 U.S.C. § 1593(a), (b)(1), (b)(3) (2018).

74. *United States v. Gandy*, 795 F. App'x 225, 225 (5th Cir. 2019) (per curiam); *Houston Man Gets 30 Years for Trafficking Children for Commercial Sex*, U.S. ATT'Y'S OFF. S. DIST. TEXAS (Dec. 18, 2018), <https://www.justice.gov/usao-sdtx/pr/houston-man-gets-30-years-trafficking-children-commercial-sex>.

75. *Gandy*, 795 F. App'x at 225.

76. *United States v. Gandy*, No. 4:12-cr-00503 (S.D. Tex. Dec. 26, 2018) (sentencing *Gandy* to 360 months on six counts and 240 months on one count, to run concurrently). The decision then went to the Court of Appeals for the Fifth Circuit. See *Gandy*, 795 F. App'x at 225.

77. Mexico 2012 General Law, *supra* note 12, at pmb1.

Any act or intentional omission of one or several persons to capture, engage, transport, transfer, retain, deliver, receive or harbor one or more persons for the purpose of exploitation, will be imposed from 5 to 15 years in prison and from 1,000 to 20,000 fee per day, without prejudice to the sanctions that correspond to each one of the crimes committed, planned and sanctioned in this Law and in the corresponding criminal codes.⁷⁸

Moreover, disposition 10 of the 2012 General Law gives content to the notion of exploitation by specifically exposing what terms are considered so. Forms of exploitation include:

Slavery, (in accordance with Article 11); the *condition of a servitude*, (in accordance with Article 12); the *prostitution of others or other forms of sexual exploitation* (in the terms of Articles 13 and 20); *labor exploitation* (in the terms of Article 21); *work or forced services* (in the terms of Article 22); *forced begging* (in the terms of Article 24); the use of persons under the age of eighteen years in criminal activities (under the terms of Article 25); the *illegal adoption of a person under the age of eighteen* (under the terms of Articles 26 and 27); the *forced marriage* (in the terms of Article 28, as well as the situation foreseen in Article 29); *trafficking of organs*, tissues and cells of living human beings (in the terms of Article 30); *unlawful biomedical experimentation on human beings* (under the terms of Article 31).⁷⁹

The correctness of the technical aspects of the law in Mexico have to be praised in this 2012 statute that reformed the prior 2007 legislation.⁸⁰ From a comparative standpoint, the Mexican

78. *Id.* at art. 10.

79. *Id.* at art. 11–13, 21–22, 24–31.

80. Ley Para Prevenir y Sancionar la Trata de Personas, Diario Oficial de la Federación [DOF] 27-11-2007, últimas reformas DOF 27-11-2007.

legislation is simplistic and precise. It has made an effort to synthesize the crime of human trafficking by grouping together related crimes under its definition of exploitation. On the other hand, due to its disaggregation of related crimes, the human trafficking laws of the United States are more complex to understand from a holistic perspective. Indeed, one can grasp the complexity of human trafficking offenses just by reading article 10 of the Mexico 2012 General Law.⁸¹

C. Difference between Human Trafficking and Smuggling: The Immigration Dimension

Human trafficking can have a domestic or an international dimension. When human trafficking deals with an international element, the different notions mentioned previously might be surrounded by an immigration perspective. In the latter situation, human trafficking violations can sometimes be confused with violations related to immigration. This is the case between two different notions that can sometimes be interconnected: on one side, the *smuggling of migrants*; on the other, *human trafficking*.⁸²

By smuggling, as mentioned above with reference to *alien smuggling*, one understands the definition as the transportation of a person across a country's border. Typically, the smuggler will provide the smuggled person with fake documents. In the United States, this crime is also associated with the transportation and harboring of the smuggled person. The smuggled person will voluntarily enter into the situation by an agreement with the smuggler that wants to make him enter the country illegally. The purpose of the agreement is normally over once the smuggler has passed the border with the person being smuggled and the payment of the debt has been made. Although this crime could stop there, sometimes transnational criminal organizations take advantage of the vulnerability of these persons and kidnap or

81. See generally Mexico 2012 General Law, *supra* note 12, at art. 10.

82. Elisa Ortega-Velázquez, Human Trafficking and Migration: The Mexican Case 2 (2020) (unpublished thesis, National Autonomous University of Mexico) (on file with the Houston Journal of International Law).

deceive them and force them into human trafficking networks.⁸³ It is at this point that smuggling and human trafficking crimes connect.

The rationale of a smuggled migrant is to seek a better life; to find working opportunities; sometimes to escape persecution or violence in their home country; and also to reunify with family members in the other country. Professor Ortega Velazquez provides a very insightful comparison between smuggling of migrants and human trafficking using three relevant elements: *consent*, *exploitation*, and *border crossing*.⁸⁴ First, *consent* of the person smuggled is required while the *exploitation* is not necessary as the person smuggled only targets to *cross the border*, and the purpose of border crossing, of course, is the transportation.⁸⁵ When a person is a victim of human trafficking, however, consent is not necessary; though consent can be an element present in the equation, the crime can continue to take place even in its absence. Exploitation is precisely the target of the trafficker who wants to take advantage of the person and gain an economic benefit from trafficking. With regard to border crossing, as mentioned, human trafficking is sometimes a domestic crime and sometimes an international crime. Therefore, border crossing is an element that is not necessary in order to confirm one is dealing with a human trafficking situation. In fact, not all trafficking victims are international migrants, refugees or smuggled migrants. As Professor Ortega states, while trafficking in persons is a crime that aims to exploit a person who may or may not be a migrant, the smuggling of migrants is always cross border and does not, by definition, involve the exploitation of the migrant.⁸⁶

II. HUMAN TRAFFICKING REALITIES

According to the Polaris Project, there are a number of human trafficking myths, and by dispelling them, academia can help

83. *Id.*

84. *Id.* at 4–5.

85. *Id.*

86. *Id.* at 4–5, 14 (explaining that the smuggling of migrants is always across national borders but does not always involve exploitation of said migrant).

mitigate the crime and generate the awareness necessary to fight it.⁸⁷

Human trafficking is not a violent crime, as stated previously. It might involve kidnapping, but it can also use psychological means or manipulation to threaten victims of exploitation. Human trafficking normally involves force, fraud, and coercion to make another person provide sex or labor services. Among the legal definitions described, human trafficking is most commonly associated with commercial sex crimes, although not every case of human trafficking is related to sex. Labor trafficking is a prevalent crime as well that is very much present in society—much more present than sex trafficking, though sex trafficking has a wider impact worldwide.⁸⁸

Human trafficking affects not only undocumented immigrants, but also can affect foreigners living legally in the United States, as well as nationals and those in sex trafficking and labor trafficking.⁸⁹ It also affects persons from very different economic backgrounds, from the wealthy to the more underserved. It is a myth that a higher level of education and purchasing power are signs that those persons might be protected from falling into human trafficking powers, when the reality is that human trafficking can affect persons from different layers of society—even wealthy ones.⁹⁰ Moreover, human trafficking happens in both developing countries and developed countries.

Human trafficking not only happens in illegal industries as a sort of crime tangent and adjacent to society. Human trafficking is also present in legitimate industries and businesses, such as restaurants, massage parlors, and any type of business that can serve as a platform for this clandestine crime.⁹¹ In terms of gender distribution, human trafficking affects men, women and other vulnerable populations.⁹² According to numbers from the Polaris

87. See generally *Human Trafficking Myths, Facts, and Statistics*, POLARIS PROJECT, <https://polarisproject.org/myths-facts-and-statistics/> (last visited Feb. 7, 2020).

88. *Id.*

89. *Id.*

90. *The Victims*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/what-human-trafficking/human-trafficking/victims> (last visited Feb. 7, 2020).

91. *Human Trafficking Myths, Facts, and Statistics*, *supra* note 87.

92. *Id.*

Project, in 2018 the statistics have shown that out of 23,078 cases reported through the National Human Trafficking Hotline, 15,042 were related to women (65%), 2,917 related to men (13%), 109 related to gender minorities (below 0.5%), and 5,010 unknown (22%).⁹³

Human trafficking does not require traveling or transporting victims. It can happen close by. Traffickers actually often know their victims well; they can be friends of the families, proper members of the family, or, for example, boyfriends.⁹⁴ Sometimes victims cannot physically leave their situation due to fear of retaliation, fear their loved ones or relatives will be harmed, or because they are being manipulated.⁹⁵

As we have mentioned concerning the lack of consent from minors, any commercial sex involving a minor is considered a crime of human trafficking, whether voluntary or involuntary.⁹⁶ Conversely, commercial sex involving an adult is precisely human trafficking if it is against his or her will, and if it is the result of force, fraud, and coercion.⁹⁷ Thus, it is not relevant that a person initially consented to human trafficking (commercial sex or labor) prior to acts of force, fraud, and coercion. It can still be considered a crime of human trafficking against the trafficker.⁹⁸

After exposing some myths and realities of human trafficking, it is important to see how the legislation existing around human trafficking has evolved and what have been the main international treaties of relevance.

III. INTERNATIONAL TREATIES RELATED TO HUMAN TRAFFICKING

The most relevant international text that, since its inception, has become the instrument that most strongly addresses the problem of human trafficking is the 2000 Palermo

93. 2018 Statistics from the National Human Trafficking Hotline, POLARIS PROJECT, https://polarisproject.org/wp-content/uploads/2019/09/Polaris_National_Hotline_2018_Statistics_Fact_Sheet.pdf (last visited July 27, 2020).

94. *Human Trafficking Myths, Facts, and Statistics*, *supra* note 87.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Convention (formally the United Nations Convention against Transnational Organized Crime), signed on November 15, 2000.⁹⁹ It was ratified by Mexico on March 4, 2003, and by the United States on November 3, 2005.¹⁰⁰ The two following protocols annexed were also ratified: Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol to Suppress, Prevent, and Punish Trafficking in Persons, Especially Women and Children.¹⁰¹

The Slavery Convention (1926), or the League of Nations Convention to Suppress the Slave Trade and Slavery, was the first international instrument to provide a definition of slavery.¹⁰² In Article 1, it defined slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”¹⁰³ The Slavery Convention especially committed and requested the High Contracting Parties to undertake steps “a) To prevent and suppress the slave trade,” and “b) To bring about . . . the complete abolition of slavery in all its forms.”¹⁰⁴ In fact, this Convention defined slavery in its 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; it included the practices similar to slavery including debt bondage, serfdom and institutions and practices that discriminated against women in the context of marriage, where the woman was treated as property.¹⁰⁵

99. G.A. Res. 55/25, annex, U.N. Convention Against Transnational Organized Crime (Nov. 15, 2000); Status of Ratification, G.A. Res. 55/25 U.N. Convention Against Transnational Organized Crime (Sept. 29, 2003), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12.en.pdf>.

100. Status of Ratification, *supra* note 99, at 2–3.

101. G.A. Res. 55/25, annex, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Nov. 15, 2000); G.A. Res. 55/25, annex, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Nov. 15, 2000).

102. Slavery Convention, Sep. 25, 1926, 212 U.N.T.S. 17.

103. *Id.* at art. 1.

104. *Id.* at art. 2.

105. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 1, Apr. 30, 1957, 266 U.N.T.S. 3.

In terms of slavery as well, the Universal Declaration of Human Rights (1948) is an obligatory marker to strengthen human rights protection at the international level. In Article 4, for example, "[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms."¹⁰⁶ Further, Article 5 acknowledges, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."¹⁰⁷

A very specific UN Convention that relates to the topic of this article is the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949). This Convention requires its parties to agree to punish any person who is involved in exploiting another person through prostitution.¹⁰⁸

Another specific agreement connected to the topic of this article is the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("ECHR"). Specifically, Article 4 states:

- (1) No one shall be held in slavery or servitude.
- (2) No one shall be required to perform forced or compulsory labour.¹⁰⁹

The ECHR is a fundamental text for the recognition and enforcement of basic rights and freedoms in Europe.¹¹⁰

There are two International Covenants from 1966, one of which deals with human trafficking and slavery: the International Covenant on Civil and Political Rights. This Covenant prohibits a number of practices directly related to trafficking, including slavery, the slave trade, servitude and forced labor. It is based on the acknowledgement that "inherent

106. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948).

107. *Id.* at art. 5.

108. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others art. 1, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271.

109. Convention for the Protection of Human Rights and Fundamental Freedoms art. 4, ¶¶ 1–2, Nov. 4, 1950, 213 U.N.T.S. 221.

110. *See, e.g., id.* at pmbl., art. 1.

dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹¹¹

In terms of human labor trafficking, the International Labor Organization has passed several conventions focused on forced labor services. As an example, the Forced Labour Convention No. 29 of 1930 and its adopted protocol defines forced and compulsory labor as, “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹¹² This Convention prohibits all forms of forced or compulsory labor and requires states to criminalize it.¹¹³ Also, the Abolition of Forced Labour Convention (1957) is worth mentioning here.¹¹⁴

Another UN Convention that can be related to human trafficking, but that implies a gender distinction, is the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW).¹¹⁵ The CEDAW requires states to take all appropriate measures to suppress all forms of discrimination, “traffic[king] in women and exploitation of prostitution of women.”¹¹⁶

In terms of minors and children, we have to consider the Convention on the Rights of the Child (1989).¹¹⁷ In Article 35, the Convention provides that “States Parties shall take all appropriate national, bilateral and multilateral measures to

111. International Covenant on Civil and Political Rights pmbl., *adopted* Dec. 16, 1966, 999 U.N.T.S. 171.

112. Int’l Lab. Org. [ILO], *Forced Labour Convention*, art. 1–2, Convention No. 29 (June 28, 1930), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

113. *Id.* at art. 2.

114. *See generally* Int’l Lab. Org. [ILO], *Abolition of Forced Labour Convention*, art. 1–2, Convention No. 105 (June 25, 1957), https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105 (requiring ratifying members of the ILO to abolish forced or compulsory labor).

115. G.A. Res. 34/180, *Convention on the Elimination of All Forms of Discrimination against Women*, art. 2, 6 (Dec. 18, 1979).

116. *Id.*

117. *Convention on the Rights of the Child* art. 35, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”¹¹⁸

In 1994, the Organization of American States signed the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).¹¹⁹ This instrument seeks to establish, in the Americas, a mechanism of protection and defense for women’s rights; combat violence against women; and grant their physical, sexual and psychological integrity in any sphere of life, private or public.¹²⁰

Regarding forced labor of minors, we should mention the International Labour Organization’s Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (1999) (Worst Forms of Child Labor Convention). Among other things, this Convention asks Members to take into account the importance of education in eliminating child labor and to take effective measures to prevent the engagement of children in the worst forms of labor.¹²¹ The Convention prohibits:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and

118. *Id.*

119. Org. of American St. [OAS], *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (June 9, 1994) [hereinafter *Convention of Belém do Pará*], <https://www.oas.org/juridico/english/treaties/a-61.html>.

120. *Id.* at art. 1, 3, 7.

121. Int’l Lab. Org. [ILO], *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor*, art. 7, ¶ 2, Convention No. 182 (June 17, 1999) [hereinafter *Worst Forms of Child Labor Convention*], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182.

trafficking of drugs as defined in the relevant international treaties;

- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.¹²²

Therefore, it prohibits trafficking perpetrators from using children under 18 years old for all forms of slavery or practices similar to slavery, trafficking, debt bondage, servitude, forced or compulsory labor and prostitution.¹²³

Last but not least, we should mention the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.¹²⁴ This Optional Protocol prohibits trafficking in children for any purpose, including for sexual exploitation and forced labor. Additionally, this Optional Protocol aims at protecting the child from economic exploitation by generating awareness, and from work that could be “harmful to the child’s health or physical, mental, spiritual, moral or social development.”¹²⁵ This instrument is situated in the strong concern of international traffic of children in terms of prostitution (sex tourism), and the growing availability of child pornography on the Internet.¹²⁶

Following this summary of international treaties and instruments associated with or foundational to fighting human trafficking internationally, we now approach the specific legislation in Mexico targeted at ending this crime.

IV. MEXICO LEGISLATION ON HUMAN TRAFFICKING

Mexico is among the most active countries in America to take decisive steps, legally and from the judiciary, to fight human trafficking. In fact, after the United States and Canada,

122. *Id.* at art. 3.

123. *Id.* at art. 2.

124. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, art. 3 ¶ 1, May 25, 2000, 2171 U.N.T.S. 227.

125. *Id.* at pmbl.

126. *Id.*

Mexico is among the three countries in Americas with the most judicial decisions condemning human traffickers.¹²⁷ In recent years, for instance, there have been more convictions in Mexico than in previous years, resulting in less posterior actual cases.¹²⁸

Mexico has created a legal framework around human trafficking for the purpose of obtaining convictions. Mexico's legal structure created around human trafficking is actually very advanced. In fact, the Mexican legislator has made efforts to clarify the criminal context existing around the notion, with twenty-six crimes pertaining to human trafficking.¹²⁹ Such effort would be welcomed in the United States at federal and state levels to simplify the apprehension of the crime and, therefore, the legal fight against human trafficking.

The Constitución Política de los Estados Mexicanos (Mexican Political Constitution) was strengthened in July 2011 in terms of mandatory preventive prison for traffickers and protection of the

127. *México Tiene una Ley de Vanguardia para Combatir la Trata de Personas* [Mexico Has an Avant-Garde Law to Combat Human Trafficking], FORO JURÍDICO (Jan. 2, 2018), <https://forojuridico.mx/mexico-una-ley-vanguardia-combatir-la-trata-personas/>. In a 2018 analysis of trafficking cases in Mexico, 87% of judicial decisions convicted traffickers, but 13% of judicial decisions resulted in acquittals. *Análisis de las Sentencias en Casos de Trata de Personas* [Analysis of Sentences in Cases of Trafficking in Persons], PODER JUDICIAL DE LA CIUDAD DE MÉXICO (Aug. 24, 2018), https://www.poderjudicialcdmx.gob.mx/presidente_24082018/; *Presentan el Análisis de Sentencias en Casos de Trata de Personas* [Presentation of the Analysis of the Sentences in Cases of Trafficking in Persons], FORO JURÍDICO (Aug. 24, 2018), <https://forojuridico.mx/presentan-el-analisis-de-sentencias-en-casos-de-trata-de-personas/>.

128. See *Mexico Has an Avant-Garde Law to Combat Human Trafficking*, *supra* note 127. For a discrepancy in a numbers analysis solely done on a year-by-year basis, not reflecting with perspective the difference between investigation, prosecution and conviction, and most of all, overlooking the dissuasive legal framework that Mexico created, see U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Trafficking in Persons Report 324 (June 2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>. This report notes a trend in Mexico of decreasing investigations, prosecutions, and convictions; there was an increase in convictions from 2015 to 2016 and a decrease in convictions from 2016 to 2017 and from 2017 to 2018. *Id.* In our view, this decrease comes from fewer cases of human trafficking investigated, prosecuted and convicted overall. However, the threat keeps on existing and Mexico needs to keep on being vigilant.

129. *Presentation of the Analysis of the Sentences in Cases of Trafficking in Persons*, *supra* note 127.

identity of survivors.¹³⁰ Article 19 of the Mexican Political Constitution states: “The judge will order the preventive detention, informally, in cases of organized crime, manslaughter, rape, kidnapping, *human trafficking* . . . crimes committed with violent means such as weapons and explosives . . . as well as serious crimes determined by law against the security of the nation, the free development of personality and health.”¹³¹ Also, Article 20 of this same instrument states that victims or the offended have the right to “protect their identity and other personal data in the following cases: for minors; in case of rape crimes, *human trafficking*, kidnapping or organized crime; and when according to the judge’s decision it would be necessary for their protection, safeguarding in any case, the rights of the defense.”¹³²

The Código Penal Federal (Federal Criminal Code) deals with the prohibition of bail for traffickers (Article 85.2 of the Federal Criminal Code), according to the specific disposition of Articles 5 and 6 of the 2012 General Law to Prevent, Sanction and Eradicate Human Trafficking Crimes.¹³³ Also, Chapters V and VI of the Federal Criminal Code are specifically dedicated to human trafficking.¹³⁴ From a criminal procedure point of view, Article 194.16 of the Código Federal de Procedimientos Penales (Criminal Procedure Federal Code) qualifies human trafficking as a serious crime and redirects to the Mexico 2012 General Law mentioned.¹³⁵ This legislative mechanism expressly mentions human trafficking and gives a solid foundation for the legal

130. *Reinforcing Mexico’s Response to Human Trafficking: President Calderón Recognizes Role of Blue Heart Campaign*, U.N. OFF. ON DRUGS AND CRIME (Aug. 4, 2011), <https://www.unodc.org/unodc/en/frontpage/2011/August/reinforcing-mexicos-response-to-human-trafficking-president-calderon-recognizes-role-of-blue-heart-campaign.html>.

131. Constitución Política de los Estados Unidos Mexicanos [CPEUM], art. 19, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 20-12-2019 (emphasis added).

132. *Id.* at art. 20, frac. C, pfo. V (emphasis added).

133. Código Penal Federal [CPF], tit. 4, cap. 3, art. 85, frac. 2, Diario Oficial de la Federación [DOF] 14-08-1931, últimas reformas DOF 08-11-2019; Mexico 2012 General Law, *supra* note 12, art 5–6.

134. Código Penal Federal [CPF], *supra* note 133, at tit. 8, cap. 5–6.

135. Código Federal de Procedimientos Penales [CFPP], tit. 5, cap. 4, art. 194, frac. XVI, Diario Oficial de la Federación [DOF] 30-08-1934, últimas reformas DOF 20-08-2009.

framework at the federal level regarding criminal law and criminal procedure rules.

At this point, we have to mention the specific anti-human trafficking law in Mexico: *Ley General Para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y Para la Protección y Asistencia a las Víctimas de Estos Delitos* (General Law to Prevent, Punish and Eradicate Crimes in Trafficking in Persons and for the Protection and Assistance to Victims of These Crimes), promulgated in 2012.¹³⁶ In Chapter II, *De los Delitos en Materia de Trata de Personas* (Of Crimes in the Field of Trafficking in Persons), Article 10 gives a specific definition of human trafficking. This definition is more detailed than the definition included in Article 5 of Mexico's 2007 law on human trafficking (now repealed). It is also more graphically presented with individual provisions. Below is a replication of Article 10 from the 2012 law, included here to show the Mexican legislature's synthesis of the many activities that are considered human trafficking:

Article 10: Any malicious action or omission of one or more people to capture, engage, transport, transfer, retain, deliver, receive or accommodate one or more people for exploitation purposes will be subjected to prison between 5 to 15 years, and from one thousand to twenty thousand days fine, notwithstanding the sanctions that correspond to each of the crimes committed, provided for and sanctioned in this Law and in the corresponding criminal codes.

136. Mexico's Law on Human Trafficking on Prevention and Conviction of Human Trafficking, enacted November 27, 2007, was repealed on June 14, 2012. See generally *Ley Para Prevenir y Sancionar la Trata de Personas*, Diario Oficial de la Federación [DOF] 27-11-2007, últimas reformas DOF 01-06-2011, ley abrogada DOF 14-06-2012. The law regulated human trafficking on the federal level. *Id.* at art. 5 ("Commits the crime of human trafficking, who promotes, requests, offers, facilitates, obtains, transfers, delivers or receives, for himself or for a third party, a person, through physical or moral violence, deception or abuse of power to subject it to sexual exploitation, forced labor or services, slavery or practices analogous to slavery, servitude, or the removal of an organ, tissue or its components.").

Exploitation of a person means:

- I. Slavery, in accordance with article 11 of this Law;
- II. Servitude status, in accordance with article 12 of this Law;
- III. The prostitution of others or other forms of sexual exploitation, under the terms of articles 13 to 20 of this Law;
- IV. Labor exploitation, under the terms of article 21 of this Law;
- V. Forced labor or services, under the terms of article 22 of this Law
- VI. Forced begging, under the terms of article 24 of this Law;
- VII. The use of minors under eighteen in criminal activities, in the terms of article 25 of this Law;
- VIII. The illegal adoption of minors under eighteen, under the terms of articles 26 and 27 of this Law;
- IX. Forced or servile marriage, under the terms of article 28 of this Law, as well as the situation provided for in article 29;
- X. Organs trafficking, tissues and cells of living human beings, under the terms of article 30 of the present law; and
- XI. Unlawful biomedical experimentation in human beings, in the terms of article 31 of the present law.¹³⁷

The Mexico 2012 General Law includes, in Chapter I, Article 2, the integral reparation for the victims of human trafficking in a comprehensive, effective, reliable and adequate manner, in proportion to the severity of the harm that was provoked.¹³⁸

Although the Mexican federal legislature has made far-reaching efforts in synthesizing the notion of human trafficking,

137. Mexico 2012 General Law, *supra* note 12, tit. 2, cap. 2, art. 10.

138. *Id.* at art. 2, frac. 6 ("Reparar el daño a las víctimas de trata de personas de manera integral, adecuada, eficaz y efectiva, proporcional a la gravedad del daño causado y a la afectación sufrida.").

there is still an extended body of laws in the country, both at the federal level and the state level.¹³⁹ That context can give an aspect of some disaggregation. Indeed, there are several laws at the federal and state levels, and not all of them are homogenous or harmonized. It would be advisable that the effort done by the federal legislature would be replicated at the state level by adapting the federal law as a frame to create consistency throughout the entire country.

Although this discussion has focused on a comparative study between the legal aspects of fighting human trafficking in the United States and Mexico, Mexico must take regular and decisive actions. To fight human trafficking, Mexico must address the proper and compliant actions of law enforcement, national police, and, eventually, the military. The reinforcement of the rule of law by, for instance, standardizing the intervention of law enforcement throughout the entire country, has to be the target in addressing these issues. Existing laws must be reinforced in their correct execution. Additionally, there is a need to standardize methods to identify victims. Training law enforcement and other societal actors will help fulfill this need. By receiving training, persons in the capacity of doing something to fight human trafficking will know how to properly respond.

Below is a survey of existing U.S. laws related to human trafficking.

V. THE UNITED STATES LEGISLATION ON HUMAN TRAFFICKING

In order to understand the law today in the United States on human trafficking, it can be helpful to establish a chronology of related events and laws. It is worth mentioning that the

139. *See, e.g.*, Ley General de los Derechos de las Niñas, Niños y Adolescentes [LPDNNA], art. 31, 47, 103, DOF 04-12-2014, últimas reformas DOF 17-10-2019; Ley General de Víctimas [LGV], art. 88 frac. XXX, art. 93 frac. III, art. 111 frac. II, DOF 09-01-2013, últimas reformas DOF 03-01-2017; Ley General de Acceso de las Mujeres a una Vida Libre de Violencia [LGAMVLV], art. 47, 49, Diario Oficial de la Federación [DOF] 01-02-2007, últimas reformas DOF 13-04-2018.

legislation in the United States is fairly related to the history of slavery.¹⁴⁰ Below are some dates critical to our study:

- In 1619, the first African Slaves were brought to Jamestown, Virginia.¹⁴¹
- In 1776, the Declaration of Independence stated, “all men are created equal.”¹⁴²
- In 1787, the United States Constitution established a propriety right over slaves (art. IV § 2, cl. 3).¹⁴³
- The 1808 Slave Trade Statute banned the trade and importation of slaves: “[I]t shall not be lawful to import or bring into the United States or the territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose such negro, mulatto, or person of colour, as a slave, or to be held to service or labour.”¹⁴⁴
- The White Slave Traffic Act (Mann Act) (1910), mentioned above, addressed human sex trafficking and “white slavery.”¹⁴⁵
- In 1948, U.S. Federal Criminal Law was amended to ban peonage and involuntary servitude.¹⁴⁶ These amendments were done following the 1874 Padrone Statute that “aimed at preventing Italian children from being enslaved as street musicians and beggars” and already prevented “involuntary servitude of all foreign-born individuals.”¹⁴⁷

140. See generally CARR ET AL., *supra* note 4, at ix–xvii (providing a more extended chronology of slavery in the United States).

141. *Id.* at 1.

142. *Id.* at 2.

143. U.S. CONST. art. IV, § 2, cl. 3; CARR ET AL., *supra* note 4, at 2–3.

144. Act of Mar. 2, 1807, ch. 22, § 1, 2 Stat. 426, 426 (prohibiting the importation of slaves after January 1, 1808).

145. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)).

146. Crimes and Criminal Procedure Act, Pub. L. 772, c. 645, 62 Stat. 683, 772–73 (1948) (codified as amended at 18 U.S.C. §§ 1581–1584).

147. CARR ET AL., *supra* note 4, at xiii (discussing the Padrone Statute).

- In 1964, the Civil Rights Act was passed.¹⁴⁸
- In 1988, the Supreme Court decision in *United States v. Kozminski* prohibited *involuntary servitude*, considered a condition of servitude where the victims are forced to work by threat of physical restraint, physical injury, or coercion by the law or legal process.¹⁴⁹ At this point, involuntary servitude did not associate psychological coercion with physical or legal coercion.

The following texts and documents relate to human trafficking in the United States more specifically:

In 1998, under the Clinton Administration, the Presidential Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls was published on March 11, International Women's Day.¹⁵⁰ This Memorandum launched the government's comprehensive framework to address human trafficking and was considered the starting point of future legislation against human trafficking. It also created an inter-agency process to develop domestic and international law and policy on human trafficking.¹⁵¹ The Memorandum mentions the terms *prevention*, *prosecution* and the capacity of law enforcement to "ensure that traffickers are *punished*."¹⁵² These three Ps, *prevention*, *prosecution* and *punishment*, would eventually be promoted by the Victims of Trafficking and Violence Protection Act of 2000 (TVPA).¹⁵³

The TVPA "acknowledges the modern slave trade and provides criminal and civil remedies for victims, including immigration relief and access to social services, in addition to funding for other countries fighting human trafficking."¹⁵⁴ As a

148. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

149. 18 U.S.C. § 1584 (2008); *United States v. Kozminski*, 487 U.S. 931, 944 (1988).

150. Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, 1 Pub. Papers 358 (Mar. 11, 1998).

151. *Id.* at 359-60.

152. *Id.* at 359 (emphasis added).

153. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §§ 106, 112, 114 Stat. 1464, 1474, 1486.

154. CARR ET AL., *supra* note 4, at xv.

relevant issue to our study, we may mention that in this law, both perpetrators and victims were punished; being the victim was criminalized.¹⁵⁵ The TVPA acknowledges that human trafficking is an international matter, and it advocates treating the crime as such.¹⁵⁶

The TVPA broadened the *Kozminski* decision by expanding the criminal law on human trafficking beyond exclusively threats of force, actual force, and the legal process to enslave individuals.¹⁵⁷ It also protects victims from subtle psychological forms of coercion, such as non-physical and non-legal coercion.¹⁵⁸ The TVPA additionally created new offenses aimed to eradicate slavery in the United States, including crimes of forced labor beyond involuntary servitude and sex trafficking.¹⁵⁹

In 2003, Congress approved the Trafficking Victims Protection Reauthorization Act (TVPRA), reauthorizing the TVPA of 2000.¹⁶⁰ The TVPRA acknowledges that victims of trafficking are often illegal immigrants and therefore “are repeatedly punished more harshly than the traffickers themselves.”¹⁶¹ The most relevant aspect of this law is that it gives these illegal immigrants, who have been victims of human trafficking, the eligibility for T Nonimmigrant Visas (T-Visas) for protection.¹⁶² Children also benefit from this T-Visa expansion, which exempts them from complying with a “reasonable request for assistance” from law enforcement if they are under 18 years of age.¹⁶³ Additionally, the TVPRA creates a right of private civil action, including damages and attorney’s fees, for a victim of

155. Victims of Trafficking and Violence Protection Act § 111(a)(1)(C).

156. *Id.* at § 102(23)–(24).

157. CARR ET AL., *supra* note 4, at xv.

158. *Id.*

159. *Id.*

160. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); *see also* CARR ET AL., *supra* note 4, at xv.

161. 22 U.S.C. § 7101(b)(17) (2000); CARR ET AL., *supra* note 4, at xv.

162. CARR ET AL., *supra* note 4, at xv; *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-human-trafficking-t-nonimmigrant-status> (last updated May 10, 2018).

163. 8 U.S.C. § 1101(a)(15)(T)(i) (2014).

human trafficking against the trafficker.¹⁶⁴ It also expands the definition of “[s]ex trafficking of children” to reach activities of foreign commerce.¹⁶⁵

In 2005, TVPA was reauthorized once again.¹⁶⁶ This reauthorization created a pilot program for shelters and residential treatment facilities for trafficked juveniles.¹⁶⁷ The shelters for minor victims of human trafficking is an area of human trafficking which needs to be enhanced and properly addressed today—in certain cases, once the minor is taken away from the networks, their reintegration into society remains incomplete. The legislators, and decision makers in general, should take into account not only the prevention, prosecution, punishment and partnership, but also the reparation and integration of victims and survivors in society. The TVPRA of 2005 also created extraterritorial jurisdiction for trafficking offenses committed by employees or those accompanying the federal government outside the United States, including employees, federal contractors and subcontractors.¹⁶⁸ This law also created a grant program to assist both United States citizen and foreign national victims of human trafficking, including overall provisions to fight sex tourism.¹⁶⁹

The TVPA was again reauthorized in 2008 and in 2013 with several new inclusions.¹⁷⁰ In 2008, provisions for screening unaccompanied children as potential victims and enhancing criminal sanctions against traffickers were included.¹⁷¹ In 2013, dispositions avoiding purchase of products made by victims of human trafficking and protections to avoid child marriage were approved.¹⁷²

164. 18 U.S.C. § 1595(a) (2018).

165. 18 U.S.C. § 1591(a)(1) (2018).

166. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006).

167. *Id.* at §§ 102–03 (codified as amended at 22 U.S.C. § 7104).

168. *Id.* at § 103 (codified as amended at 18 U.S.C. §§ 3271–72).

169. *Id.* at § 202(a) (codified as amended at 42 U.S.C. § 14044a).

170. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended at 22 U.S.C. § 7104); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

171. William Wilberforce Trafficking Victims Protection Reauthorization Act § 104.

172. Violence Against Women Reauthorization Act § 1207.

In 2015, the Justice for Victims of Trafficking Act (JVTA) was approved and marked a decisive step in the protection of victims as the United States legislator initiated a change of perception from former laws, not always criminalizing the victims of human trafficking.¹⁷³ A number of important provisions of the JVTA strengthen the protection for victims, including the creation of a domestic trafficking fund to support victims assistance programs and implementation of a national strategy to combat human trafficking, among others.

Also in 2015, the Trafficking Awareness Training for Health Care Act was approved, and the Act requires the Agency for Healthcare Research and Quality to give an award to an accredited nursing or medical school that would develop best practices for health care professionals to recognize and respond appropriately to victims of severe forms of human trafficking.¹⁷⁴ More specifically, this law requires that the grantee develop materials to train healthcare professionals on best practices, to create a pilot program to test the best practices and training, and to analyze the results of pilot programs and determine which best practices are evidence-based.¹⁷⁵

VI. THE INVALUABLE PHYSICIANS' COLLABORATION IN FIGHTING HUMAN TRAFFICKING: THE NEED OF A HEALTH LAW REFORM OF HIPAA

When we speak about health and human trafficking, we usually make reference to the medical dimension of the scourge, range of abuses, and traumas the victims endure, as well as the consequences of acute, long-term physical and psychological problems.¹⁷⁶ The adverse physical outcomes can include injuries from violence (bruises, concussions, fractures, lacerations, perforations of vaginal and rectal walls); infections (sexually

173. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 102–03, 129 Stat. 227, 230–31 (codified as amended at 22 U.S.C. § 7105).

174. Trafficking Awareness Training for Health Care Act of 2015, H.R. 398, 114th Cong. § 2(a) (2015).

175. *Id.*

176. Holly G. Atkinson, Kevin J. Curnin & Nicole C. Hanson, *U.S. State Laws Addressing Human Trafficking: Education of and Mandatory Reporting by Health Care Providers and Other Professionals*, 2 J. HUM. TRAFFICKING 111, 112 (2016).

transmitted diseases); pelvic inflammatory disease (PID); HIV/AIDS; gynecologic issues (repeated unintended pregnancies/abortions, lacerations, hemorrhaging); untreated chronic conditions (diabetes); malnourishment and poor dental care.¹⁷⁷

There are also adverse psychological outcomes that can include complex trauma-related posttraumatic stress disorder (PTSD), anxiety disorder, major depressive disorder, suicidal ideation, psychosomatic illness, trauma-bonding and Stockholm syndrome, drug or alcohol addiction, and eating disorders.¹⁷⁸

In the relationship between physicians and patients, there is a bilateral dialogue that is built, based normally on three critical aspects:

1. Reciprocal confidence and trust;
2. Patient respect of privacy and confidentiality; and
3. Informed consent, a process in which information is provided by the physician, and the patient voluntarily consents to be treated after having provided the physician with true information for diagnosis and treatment.¹⁷⁹

If physicians try to approach victims of human trafficking using this bilateral dialogue at the outset, their patient is not likely to feel they are in a confident atmosphere with the physician. Due to the particular situation a patient victim of human trafficking is enduring, when provided information about their condition, the patient victim is likely to feel shame, fear

177. *Id.*

178. Cathy Zimmerman et al., *The Health of Trafficked Women: A Survey of Women Entering Posttrafficking Services in Europe*, 98 AM. J. PUB. HEALTH 55, 57 (2008); Mental Health Needs, OFF. FOR VICTIMS CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/4-supporting-victims/44-comprehensive-victim-services/mental-health-needs/> (last visited Mar. 23, 2020).

179. These three are, in my opinion, critical aspects of the doctor-patient relationship. To know more about the doctor-patient relationship, see Susan Dorr Goold, *The Doctor-Patient Relationship Challenges, Opportunities, and Strategies*, 14 J. GEN. INTERNAL MED. s26, s27 (1999). For Goold, the relationship has three functions: "gathering information, developing and maintaining a therapeutic relationship, and communicating information." *Id.*

retaliation, or be unwilling to identify themselves or share the origins of their suffering. They are in a vulnerable situation and may lack the education and knowledge to understand the help that physicians and the legal system can offer them.

There are a range of professionals that may be able to interact with a victim of human trafficking.¹⁸⁰ Physicians, nurses, and, in general, all health personnel, will be in a unique position at the intersection between health and the law.¹⁸¹ They are vitally important players who play a critical role because of their privileged witness situation in human trafficking cases. Physicians are normally able to detect that a person is a victim of human trafficking. Even so, with proper correspondent training, healthcare personnels can develop even more skills to detect the abuses, trauma, and wounds a victim might have. The intuition or *clinical eye* sometimes inherent to physicians can be decisive in helping victims escape the network of human trafficking in which they might be involved.

When assessing a situation, if physicians are suspicious, they are able to report their concerns to law enforcement or valid interlocutors who can then follow up with the patient. In those situations, cooperative physicians can play an amazing and helpful role in protecting victims; however, there are a number of legal issues that do not make it easy for physicians to assist.

Indeed, different legal issues arise in the physician-victim approach in the United States. The most relevant issue is related to data protection issues and professional confidentiality. In general, when information related to health is considered Protected Health Information (PHI), according to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), no disclosure of PHI is possible when an adult opposes it.¹⁸² HIPAA regulates “covered entities,” which are entities that have access

180. Without the intention of omitting anyone, these health personnel are: physicians; medical interns; hospital personnel engaged in the examination, care or treatment of persons; medical examiners; psychologists; emergency medical technicians; dentists; nurses; chiropractors; podiatrists; optometrists; osteopaths; allied mental health and human services professionals; drug and alcoholism counselors; or psychiatrists. See e.g., Clydetta Powell et al., *Training U.S. Health Care Professionals on Human Trafficking: Where Do We Go from Here?*, 22 MED. EDUC. ONLINE 1, 2 (2017).

181. *Id.* at 1.

182. 45 C.F.R. § 160.103 (2014); 45 C.F.R. § 164.502 (2013).

to and store PHI (hospitals, health plans, and healthcare clearinghouses), and specifies how these covered entities must safeguard medical information.¹⁸³

HIPAA was approved in the 1990s, when electronic health records were considered a new concept. The goal of HIPAA was to facilitate both the exchange of electronic health information and the continuity of insurance coverage, but in doing so, privacy and security rules could be jeopardized.¹⁸⁴ Obviously, human trafficking victims have the right to privacy as well, but how can we create a legal framework that protects these rights and simultaneously allows us to help victims of human trafficking that at some point will interact with a physician?

Since 1996, the situation has evolved dramatically in the field of health law, medical records, and protected information.

The HIPAA Privacy Rule specifies how covered entities may use and disclose PHI and patient rights with respect to this information.¹⁸⁵ PHI can be defined as any health information paired with at least one of the following 18 identifiers:

- (A) Names;
- (B) All geographical subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code . . . ;
- (C) All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death . . . ;
- (D) Telephone numbers;
- (E) Fax numbers;
- (F) Electronic mail addresses;

183. 45 C.F.R. § 160.103; 45 C.F.R. § 164.502; *see also Your Rights Under HIPAA*, U.S. DEPT HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html> (last visited Jan. 24, 2020).

184. *Summary of the HIPAA Privacy Rule*, U.S. DEPT HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html> (last visited Jan. 24, 2020).

185. 45 C.F.R. § 164.502.

- (G) Social Security numbers;
- (H) Medical record numbers;
- (I) Health plan beneficiary numbers.
- (J) Account numbers;
- (K) Certificate/license numbers;
- (L) Vehicle identifiers and serial numbers, including license plate numbers;
- (M) Device identifiers and serial numbers;
- (N) Web Universal Resource Locators (URLs);
- (O) Internet Protocol (IP) address numbers;
- (P) Biometric identifiers, including finger and voice prints;
- (Q) Full face photographic images and any comparable images; and
- (R) Any other unique identifying number, characteristic, or code [(note this does not mean the unique code assigned by the investigator to code the data)].¹⁸⁶

When the information can be paired with any of these identifiers, then it is confidential and its use is protected and regulated.¹⁸⁷ The main principle of the Privacy Rule is that PHI is confidential information and cannot be released without the patient's written authorization.¹⁸⁸ However, HIPAA allows a number of nine exceptions or situations for which a physician may disclose PHI without an individual's authorization.¹⁸⁹ Patients, though, have the opportunity to agree or object where possible, or emphasize proper data anonymization. However, the law, or almost all the categories below, would prevail based on public

186. *Id.* § 164.514(b)(2)(i).

187. *What is Protected Health Information?*, HIPAA J. (Jan. 10, 2018), <https://www.hipaajournal.com/what-is-protected-health-information/>.

188. 45 C.F.R. § 164.508 (2013); 45 C.F.R. § 164.510 (2013).

189. Dr. López de la Osa Escibano has dedicated three years to membership on Institutional Review Boards at the University of Texas Health Science Center and the University of Texas MD Anderson Cancer Center, located in Houston, Texas. For a discussion of several of the HIPAA exceptions, see 45 C.F.R. § 164.512 (2016). *See also Summary of the HIPAA Privacy Rule*, *supra* note 184.

interest and benefit activities. These disclosures, also considered 12 national priority purposes,¹⁹⁰ are:

- 1) Treatment;
- 2) Payment;
- 3) Hospital and Health Care operations;
- 4) Friends and family involved in the patient's care;
- 5) Directory purposes (among others, necessary clergy);
- 6) For research, when the Institutional Review Board (IRB) waives consent and authorization;
- 7) For preparatory to research purposes, with correspondent anonymization procedures;
- 8) In incidental use and disclosure otherwise permitted;
- 9) Public health, law enforcement, and legal process exceptions.¹⁹¹

The *Public health, law enforcement, and legal process exception* "permits use and disclosure of protected health information, without an individual's authorization or permission" as it falls in the 12 national priority purposes mentioned; these cover victims of abuse and law enforcement purposes.¹⁹² This exception could be used to allow the information of human trafficking victims to be disclosed in the case that the victim opposes it.

However, the reality is different for several reasons. First, the law does not mention any aspect related to unlawful situations, making it difficult to understand exactly what HIPAA seeks to address. Second, the procedure for disclosure is not clearly established, especially taking into account the crucial context, including the time sensitive nature of most cases, both for the victim and to capture the trafficker. Indeed, even when the

190. 45 C.F.R. § 164.512; *Summary of the HIPAA Privacy Rule*, *supra* note 184.

191. See López de la Osa Escribano, *supra* note 189. See also *Summary of the HIPAA Privacy Rule*, *supra* note 184

192. 45 C.F.R. § 164.512(a), (c).

patient is immersed in a human trafficking situation and gives the required permission to disclose their PHI, the procedure to report is complex and not clearly established, especially when coupled with the goal of preserving as much of the victim's confidentiality as possible. Finally, because of the situation that has been created by state laws connected to child sex trafficking, and because of the misconception that when a state law does not expressly mandate physicians to report, health professionals believe they are forbidden from reporting. We disagree with this belief as reporting is not prohibited. Therefore, it is possible to take advantage of health professionals' cooperation immediately while we wait for HIPAA to be amended in a clearer way.

Before HIPAA is amended, it is essential to understand that when the victim does not consent to a disclosure of information to third parties, there are ways of de-identifying the information and anonymizing it. De-identifying the PHI and protecting the victim's confidentiality requires stripping it of the victim's identifying information (address, personal situation, etc.) in an irreversible way, but this data and medical information are only useful for investigations and victim's services purposes if paired with the victim. Possible solutions to this problem would be codifying or disassociating the identifying information in a reversible way, while the patient victim is being taken care of and taken out of the human trafficking network. This could occur in the very same moment the medical appointment finishes and the trafficker is captured. Most importantly, the codification must allow the victim's information to be processed.

As mentioned, HIPAA provides specific examples of situations where a public health authority is permitted to disclose their patient's PHI; these include:

- (i) [F]or the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is

- acting in collaboration with a public health authority;
- (ii) A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect¹⁹³

HIPAA does not specifically mention human trafficking among the exceptions; however, it would be desirable that in a reform of this data protection legislation, human trafficking be expressly named as an exception to disclosure. Additionally, it would be beneficial to establish a clear and safe procedure for victims and health professionals to report cases that physicians consider human trafficking.

As stated, HIPAA is a federal law, but states also have laws related to human trafficking in the field of Health Law. These laws, however, are dispersed, non-homogenous, and sometimes confusing. At a state level, we can confirm this dispersion: some laws deal with sex and labor trafficking, some deal with child sex trafficking, some statutes and laws deal mainly with education and training of health professionals, and some laws deal with mandatory reporting of the abuses.¹⁹⁴ All fifty states and the District of Columbia have enacted legislation making human trafficking a felony offense.¹⁹⁵ What is clear across the board, however, is that there is a lack of training of health care providers regarding human trafficking.¹⁹⁶

There is an increase in legislation that specifically addresses physicians' and other health care providers' roles in addressing human trafficking, especially with regard to the problem of trafficking minors for commercial sexual exploitation. These laws impose reporting obligations on a wide range of health care providers and other professionals. This legislation also creates educational initiatives and mandates the reporting of minor human trafficking victims by physicians and other professionals,

193. *Id.* § 164.512(b)(1)(i)–(ii).

194. *See Atkinson, supra* note 176, at 114–19.

195. *Id.* at 113.

196. Frances. H. Recknor et al., *Health-care Provider Challenges to the Identification of Human Trafficking in Health-care Settings: A Qualitative Study*, 4 J. HUM. TRAFFICKING 213, 215 (2018).

focusing specially in the healthcare field. Also, some health care providers are now mandated reporters of trafficking in some states.

It is worth noting that seventeen states have enacted legislation on both sex and labor trafficking.¹⁹⁷ Among these states, Minnesota is the only one that has enacted a law that only deals with child sex trafficking (not labor).¹⁹⁸ Out of these seventeen states, thirteen have specifically addressed requiring “education of health care providers and other professionals about human trafficking;” seven require mandatory reporting for health professionals and other providers on the trafficking of minors; and three require both education and training of health personnel, and mandatory reporting of minors trafficked.¹⁹⁹

In terms of the specific mandatory reporting laws that seven states have enacted regarding human trafficking, reporting is only mandated for trafficking of minors: California only requires reporting of sex trafficking of minors;²⁰⁰ Colorado only requires reporting of sex trafficking of minors;²⁰¹ Florida addresses both sex and labor trafficking for mandatory reporting;²⁰² Illinois mandates sex and/or labor reporting, and also for residents of state facilities aged between eighteen and twenty-two years old to report;²⁰³ Maryland only requires reporting of sex trafficking of minors;²⁰⁴ North Carolina only requires reporting of sex trafficking of minors;²⁰⁵ and Massachusetts mandates reporting of child abuse and neglect, including human trafficking.²⁰⁶ Therefore only three States have both mandatory reporting laws

197. Atkinson, *supra* note 176, at 114.

198. MINN. STAT. § 145.4716 (2017); Atkinson, *supra* note 176, at 114.

199. Atkinson, *supra* note 176, at 114.

200. CAL. PENAL CODE § 11165.1(d)(1) (West 2019); Atkinson, *supra* note 176, at 119.

201. COLO. REV. STAT. §16-22-102(9)(j) (West 2019); Atkinson, *supra* note 176, at 119.

202. FLA. STAT. ANN. § 39.01(77)(g)(3) (West 2019); Atkinson, *supra* note 176, at 119.

203. 325 ILL. COMP. STAT. 5/3 (West 2019); Atkinson, *supra* note 176, at 119.

204. MD. CODE ANN. FAM. LAW §5-701(x) (West 2019); Atkinson, *supra* note 176, at 119.

205. N.C. GEN. STAT. ANN. § 7B-101(1) (West 2019); Atkinson, *supra* note 176, at 119.

206. MASS. GEN. LAWS ANN. ch. 119, § 51A(a) (West 2019); Atkinson, *supra* note 176, at 119.

for police and law enforcement, and education training laws: Colorado, Massachusetts and North Carolina.²⁰⁷

The fifty states and the District of Columbia have child abuse and neglect laws, with child abuse reporting, because federal funds for prevention and treatment programs are conditioned upon enactment of these laws under the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).²⁰⁸ These laws require several providers, including health care professionals, to report to law enforcement and welfare authorities that a child has suffered sexual, physical, or emotional abuse and neglect.²⁰⁹

Although every state has enacted legislation making human trafficking a felony offense, mandatory reporting is only related to minors that have been sexually abused. This could include human trafficking, though this is not always the case. For adult victims of human trafficking, reporting would require disclosure under HIPAA. This assumption that physicians must be mandated to be able to report suspected trafficking is flawed. In our view, physicians can report without being mandated to do so, according to HIPAA. Health professionals cannot believe that, before the existence of mandatory reporting, they were expressly prohibited from reporting. A mandate creates an obligation, but the lack of a mandate does not imply an express prohibition against reporting. Why? Because HIPAA, with the observations mentioned, allows the disclosures. We reject the idea that HIPAA allows reporting only when state law specifically mandates disclosure for suspected trafficking of minors.²¹⁰

That said, the reporting must be done immediately or as soon as possible, according to five states.²¹¹ In Massachusetts, the deadline to extend a written report is forty-eight hours; the rest

207. Atkinson, *supra* note 176, at 114.

208. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, §4(b)(2), 88 Stat. 4, 6 (1974).

209. 42 U.S.C. § 5106a(b)(2)(B)(i) (2019); U.S. DEPT OF HEALTH & HUMAN SERVS. CHILDREN'S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

210. Powell, *supra* note 1800, at 6–7 (recommending referral to law enforcement regardless of mandatory reporting when safety concerns arise).

211. California, Colorado, Illinois, Maryland and Massachusetts. See Atkinson, *supra* note 176, at 119.

of the communication can be verbal.²¹² Failure to report is subject to increasing penalties, including fines, criminal misdemeanor, and felony for persistent offenses.²¹³ In Massachusetts and California, lack of reporting results in a fine of \$1,000 U.S. dollars.²¹⁴ Furthermore, in Massachusetts, a willful failure to report child abuse or neglect that results in death or serious bodily injury carries a maximum fine of \$5,000 U.S. dollars and up to two and a half years in prison.²¹⁵ Massachusetts also has two very interesting provisions: on the one hand, it protects reporters from workplace retaliation for having reported in good faith; on the other, it requires the Department of Children and Families to give written notice to the reporter within thirty days of both the outcome of the report and any services provided to the victim.²¹⁶ Massachusetts' legislation lacks a consensus as to what type of information needs to be collected from the children, how to collect it, where to store it, or what to do with it.

Besides including adults as well as children in an eventual legislative reform, we also agree that the information collected from a victim of human trafficking must be information necessary to provide law enforcement with the possibility of stopping the situation, and to allow physicians and victims services to react and assist in the best way possible. It should be medical information that proves the crime and that helps in the reaction, including, among others, victim identification, address, age, extent of the abuse, employment, employment address, name of trafficker, phone number, and email address. In sum, these are among the different HIPAA identifiers of the victim. Every step should protect the victim from the trafficker, thus allowing the victim to try and repair from their experience.

As previously stated, a challenge might be that the victim that does not want his information to be disclosed. In our view, mandatory reporting legislation is too focused on the repressive

212. *Id.*

213. *Id.*

214. CAL. PENAL CODE § 11166(c) (West 2019); MASS. GEN. LAWS ANN. ch. 119, § 51A(c) (West 2012); Atkinson, *supra* note 176, at 119.

215. MASS. GEN. LAWS ANN. ch. 119, § 51A(c) (West 2012); Atkinson, *supra* note 176, at 119.

216. MASS. GEN. LAWS ANN. ch. 119, § 51A(h)(i) (West 2012).

and punitive dimension for health care professionals' negligent or intentional failure to report; this is not the way to properly address the problem. An extremely tense and sensitive situation should not be solved by adding more tension to the physician-patient relationship, which we know is often already in a context of defensive medicine. We need to create a context of solidarity and collaboration in reporting where physicians (and health professionals in general) understand their unique position to help the victim, as well as to help law enforcement officials address and do their part in ending human trafficking. In this context, the information of the patient will be protected by only transmitting the necessary information for the target pursued—not more, not less. Physicians would be protected when transmitting this information through a secured procedure.

VII. CONCLUSIONS AND RECOMMENDATIONS

Human trafficking is a gross violation of human rights and human dignity; further, it is a crime against humanity. It affects all genders, ages, and nationalities, but women and children are especially vulnerable. Indigenous people and undocumented immigrants are also especially vulnerable persons subject to human trafficking. Vulnerability is precisely what exposes them most. As we have seen, victims are more vulnerable to fraud, force and coercion, the three elements underlying human trafficking. Victims are estranged from their families under false promises and expectations of a better life. The hidden and clandestine dimension of human trafficking makes its prosecution by law enforcement difficult. The “see something say something rule” is to be applied, as cooperation and partnership of all is decisive. Civic cooperation and coordination between all levels of society is key. A partnership from a multidisciplinary dimension is essential: law; law enforcement; academia; political dimension; health, medical sciences, public health, and health law; business dimension of the scourge; the victims; and the society.

There is a connection between human trafficking and immigration, but not every trafficking victim is involved in an international context. There is also domestic human trafficking, and even with it there can be movement across states.

Additionally, the legal notion of human trafficking related to sex or labor is multisemantic and multifactorial and can be broken down into several crimes that could be associated. In human trafficking discussions, we need to generate more awareness from all the sectors of society involved, including academia. Education is the key to identifying victims, helping them escape from this scourge, and fighting to make the end of human trafficking a reality. The international treaties that deal with human trafficking can be a perfect structure to inspire the drafting of a more certain legislation in the United States, where more cohesion at national and state levels should exist. The United States is legally addressing the question with determination, but more needs to be done. Mexico has made a tremendous effort of systematizing and synthesizing the crime of human trafficking with a great deal of clarity by bringing specifically under its umbrella the different crimes that can be associated. But Mexico needs to adopt the federal law as a frame so that there is consistency throughout the entire country. Indeed, Mexico needs to keep working toward a more harmonized legislation at the state level, as well as a more decisive compliant empowerment of law enforcement and the military in implementing the rule of law.

In connection with the victims, two aspects are of extreme relevance in addressing human trafficking: identifying victims, and providing accurate and adapted services to them. To achieve this, health care professionals and providers are in a unique position, but the health law framework existing in the United States does not seem to be adapted to that context. In terms of healthcare in the United States, legislation should be more adapted to the realities of the healthcare world. Health law can be of tremendous assistance. HIPAA should be amended to expressly mention human trafficking among the exceptions to disclose PHI. HIPAA should also be amended to clarify that disclosures are possible and even necessary when physicians, nurses, and other providers can confirm clear signs of trafficking in victims, whether they are children or adults. The misunderstanding that HIPAA does not allow disclosure unless state law expressly mandates health professionals to report children (or even adult) victims of human trafficking is misrepresenting the principles under which, in our view, the law

should be formed and articulated. Physicians could report as of today under public health, law enforcement and legal process exceptions, even though this is a precarious HIPAA exception. They are not prohibited by the fact that a state law does not mandate it, as there is a federal law that allows it. Even if the mandatory reporting laws might be necessary for some professionals, they are not, in our view, the way to address the problem. Solidarity and cooperation under a clear frame of protection of victims' privacy (and of health professional activity), as victims of human trafficking also have the right to it, is the way to solve such a horrendous crime, that we want to see the end of.

Reflection about what type of health information would be disclosed, under which procedure, by whom or where, should be questions to address at the federal level in a consensual way. States should do their best to avoid any type of legislative competition or territoriality in the matter. The goal should be to create a common legal framework to fight human trafficking, in the context of joint work and solidarity to the most vulnerable persons of society. To fulfill this goal, we could create a national network on health information and human trafficking that, from an administrative point of view, would deal with the information processes.

To accomplish these objectives, we need funding and resources (both material and human) to allow a distribution of funds to all the actors. We also need to create an intermediate body (or use an existing one) between physicians and law enforcement that could process information. Overall, we need more training for law enforcement, government officials, physicians, and nurses. We also need more training for and throughout academia, students, and society in general. Knowledge, not mere information, is key to help identify and properly respond to human trafficking.

Below are some recommendations, as many uncertainties remain today:

- It is necessary to obtain reliable data and information in the field of human trafficking as it continues to evolve.

- Transnational and international cooperation is decisive in a crime that affects every country, and has an international dimension.
- We need to generate more awareness about the groups that are most vulnerable and modify the law to protect them more (to be able to get a minor out from a network; to help victims to integrate into society by deleting their criminal records; among other strategies).
- To fight with precision, we need to assess trends, as well as study both the mechanism of operations, and the patterns and characteristics of victims and perpetrators.
- In addition, the different actors involved (mainly physicians and law enforcement officials) must overcome substantial legal, cultural, and organizational barriers to assist, treat, investigate, and prosecute trafficking cases. For that, the creation of protocols according to discipline are a very useful tool
- With models, programs, and strategies that could be implemented, in some cases from an international and transnational cooperative approach, human trafficking could be as well addressed.

