

“IT’S 10:00 P.M. DO YOU KNOW WHERE
YOUR CHILDREN ARE?”

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INTRODUCTION

A 1960s public service announcement appeared on television that asked parents if they knew where their children were.¹ As might be

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¹ According to popular lore, WKBW, a Buffalo television station, started using this catchphrase as a public service announcement in the late 1960s. The announcement asks

expected, during the time the announcement ran it was grist for the mill for comedians, comic strips and television programs.² Ironically, the question has increased relevance today. A Department of Justice report estimates that 797,500 children were reported missing in a single year period.³ These children are potential victims of trafficking in children for sexual exploitation.

Although we now have a decade of experience in administering the federal statutes enacted to prevent trafficking in women and children and to punish traffickers when detected, American children remain vulnerable to trafficking for sexual exploitation. This Article briefly examines the federal statutory framework for addressing trafficking, particularly domestic trafficking in children, in Part I. It discusses how state statutes are supplementing that statutory framework in Part II. It concludes with a brief discussion of unresolved service issues and legal needs in Part III. Combating trafficking of our own children within the United States requires that comprehensive legislation dealing with victim identification, perpetrator prosecution, and victim aftercare is in place and operational throughout the fifty states before someone has to ask, “Do you know where your children are?”

I. OVERVIEW OF FEDERAL ANTI-TRAFFICKING STATUTES

The initial federal anti-trafficking statute, the Victims of Trafficking and Violence Protection Act (“VTVPA”) of 2000,⁴ was enacted a decade ago. The initial statute is reflective of the growing awareness of trafficking in persons as a global problem. Shortly before its enactment, a federal report was published by U.S. State Department analyst Amy O’Neill Richard, which provided a context for understanding the nature of trafficking, including information about the victims, the perpetrators, the trafficking process, and the gaps in the legal system that inhibited

“It’s 10 p.m. Do you know where your children are?” See Stuart Elliot, *Do You Know Where Your Slogan Is?*, N.Y. TIMES, Mar. 16, 2007, at C4; IceManNYR, *WNYW NY ID and 10pm News Intro 1986*, YOUTUBE (Aug. 6, 2006), http://www.youtube.com/watch?v=O_6a_MDP2kU.

² See, e.g., BILL WATTERSON, THE ESSENTIAL CALVIN AND HOBBS: A CALVIN AND HOBBS TREASURY 29 (1988) (Calvin: “Hello, Dad! It is now three in the morning. Do you know where I am?”); *Golden Girls: Older and Wiser*, IMDB.COM, <http://www.imdb.com/title/tt0589795/> (NBC television broadcast Feb. 16, 1991) (Estelle Getty’s character, Sophia, asks: “Hey everybody, it’s 10 o’clock—do you *care* where your children are?”) (emphasis added).

³ ANDREA J. SEDLAK ET AL., U.S. DEP’T OF JUSTICE, NATIONAL ESTIMATES OF MISSING CHILDREN: AN OVERVIEW 5 (Oct. 2002), available at http://www.missingkids.com/en_US/documents/nismart2_overview.pdf.

⁴ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 [hereinafter VTVPA] (codified as amended in scattered sections of Titles 8, 18, 20, 22, 27, 28 and 42 of the U.S.C.).

addressing the issue.⁵ Acknowledging the unavailability of reliable statistical information on trafficking of persons in the United States, Ms. Richard provided estimates of the magnitude of the problem. She indicated:

Trafficking in persons, particularly women and children, is significant on nearly every continent. Gauging the level of trafficking with precision, however, is difficult since it is an underground industry. Estimates of the trafficking problem in the United States vary, given differing definitions of what constitutes trafficking and research based on limited case studies. At present, no one [U.S.] or international agency is compiling accurate statistics. Nonetheless, government and non-governmental experts in the field estimate that out of the 700,000 to two million women and children who are trafficked globally each year, 45,000 to 50,000 of those women and children are trafficked to the United States.⁶

Ms. Richard's report is noteworthy in several respects. First, it provided a baseline for understanding the nature of the issue of trafficking in persons and the limitations of the existing legal system to deal with it.⁷ Second, despite her caution on the availability of statistics on trafficking, several years after her report was issued, the figures of 45,000 to 50,000 were used as the touchstone for measuring the magnitude of the problem in the United States in subsequent reports and legislative proceedings.⁸ Third, while her report focused on trafficking in women and children into the United States, it was silent on the issue of domestic trafficking; that is, children who are trafficked for exploitation within the United States. This trend would carry over into future discussions of combating trafficking.

A. The Victims of Trafficking and Violence Protection Act (VTVPA) of 2000

At the time that Congress enacted the VTVPA, the United States' initiatives to address human trafficking were policy-based. During the Clinton Administration, the Department of State initiated a policy of prevention, protection, and prosecution.⁹ Although the policy initiatives

⁵ See generally AMY O'NEILL RICHARD, CENTER FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME (2000).

⁶ *Id.* at 3 (citation omitted).

⁷ *Id.* at 35–36.

⁸ See, e.g., VTVPA § 102(b)(1) (“As the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.”).

⁹ See, e.g., *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near E. and S. Asian Affairs of the S. Comm. on Foreign Relations*, 106th

supplemented criminal statutes on the books that could be used to prosecute traffickers, such as the Mann Act, these statutes were not regarded as effective in addressing human trafficking.¹⁰

Through the initiatives of Senator Sam Brownback and Congressman Christopher Smith, legislation was introduced in both houses of Congress to address human trafficking. (Senator Brownback sponsored legislation in the Senate while Congressman Smith sponsored legislation in the House.)¹¹ As the legislation moved through the legislative process, it was expanded to encompass the issues of trafficking in persons and violence against women.¹² The initial trafficking legislation, as enacted, provided the current operating framework for preventing, interdicting, and prosecuting human traffickers.

The initial trafficking legislation achieved several important goals. In the section of the act addressing its purposes and findings, it acknowledged the magnitude of the problem and characterized the activity as a significant violation of “labor, public health, and human rights standards worldwide.”¹³ It provided a statutory framework for addressing “severe forms of trafficking in persons” in women and children which it defined as:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or

Cong. 7 (2000), (statement of Frank E. Loy, Under Sec’y of State for Global Affairs) (“Our strategy consists of what we call the three P’s, prevention of trafficking, protection of and assistance to its victims, and prosecution and enforcement against the traffickers.”).

¹⁰ A far-reaching U.S. trafficking law would assist the law enforcement effort against trafficking:

The [U.S.] currently does not have a comprehensive trafficking law. Law enforcement now relies upon a number of criminal, labor, and immigration laws to address activities involved in trafficking schemes. . . . Prosecutors feel the use of a combination of charges can create many plea and sentencing options to reward cooperation and/or reflect a defendant’s role in the conspiracy as well as result in longer sentences. . . .

Advocates for a specific trafficking law, however, argue that using numerous [statutes] may be more cumbersome as the prosecutor is required to prove each element of each crime whereas a trafficking [statute] would streamline the prosecutorial burden. The passage of a trafficking law provides an additional tool without losing the existing mechanisms.

RICHARD, *supra* note 5, at 35. The Mann Act addresses the interstate and foreign commerce of sex-related crimes. 18 U.S.C. §§ 2421–2428 (2006).

¹¹ S. 2449, 106th Cong. (2000); H.R. 3244, 106th Cong. (1999).

¹² S. 2449 §§ 6(a)(3), 10(d)(4), 106th Cong. (2000).

¹³ VTPA § 102(b)(3).

coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁴

The statute established an interagency task force composed of the Secretary of State, the Administrator of the United States Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, and the Director of Central Intelligence to monitor and combat trafficking.¹⁵ The responsibilities of the task force were explicitly delineated in the Act.¹⁶ A careful review of these responsibilities reveals that they are international, rather than intra-national, in emphasis.¹⁷

The VTVPA created a reporting mechanism to assess and report on the status of governmental efforts to interdict trafficking in countries of origin, transit, and destination.¹⁸ The Department of State is charged with preparing this report annually and individual countries are assessed to determine what efforts are being made to prohibit trafficking in persons.¹⁹ Based on this assessment, a country is ranked on one of three tiers.²⁰ A country that is ranked as Tier 1 is regarded as being highly effective in addressing trafficking.²¹ A country that is placed on Tier 2 is regarded as having deficiencies in its anti-trafficking efforts and may be subject to closer monitoring by the Department of State.²² A country that is placed on Tier 3 is regarded as having significant deficiencies in its efforts to address human trafficking.²³

The Department of State review which determines a country's placement on Tier 1, 2, or 3 will consider whether the government condones or participates in trafficking, whether efficacious penalties are currently in place to deter trafficking, whether the government provides assistance to victims of trafficking, and whether the individual country cooperates with other countries to extradite traffickers.²⁴

In addition to articulating standards and criteria for evaluating countries' efforts to eliminate human trafficking, the VTVPA also provides a means to enforce these standards. The President is authorized to provide assistance to countries for "programs, projects, and

¹⁴ *Id.* § 103(8).

¹⁵ *Id.* § 105(b).

¹⁶ *Id.* § 105(d).

¹⁷ *Id.*

¹⁸ *Id.* § 104.

¹⁹ *Id.*

²⁰ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 12 (June 2008).

²¹ *Id.*

²² *Id.*

²³ *Id.* For a more detailed description of the tier system, see U.S. DEP'T OF STATE, FACTS ABOUT HUMAN TRAFFICKING (2005).

²⁴ VTVPA § 104(a).

activities designed to meet the minimum standards for the elimination of trafficking.”²⁵ For countries that fail to make progress in attaining the minimum standards, the President may determine that a sanction in the form of withholding non-humanitarian, non-trade assistance should be imposed.²⁶

The VTVPA also altered existing domestic law in many respects. Prior to the enactment of this legislation as a result of the U.S. Supreme Court’s holding in *United States v. Kozminski*,²⁷ which determined that involuntary servitude included only forced labor that was a result of legal or physical coercion, the law did not encompass psychological coercion.²⁸ The VTVPA superseded the Supreme Court’s decision in *Kozminski* and expanded the definition of involuntary servitude to include psychological coercion.²⁹ It amended Title 18 of the U.S. Code to increase the jail terms for trafficking for purposes of sexual exploitation and other forms of involuntary servitude.³⁰ The federal sentencing guidelines were also amended to expressly address the issue of trafficking.³¹

The law explicitly mandates restitution for victims of trafficking to the full amount of their losses, and losses are defined to include “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)”³²

Since victims of trafficking are oftentimes illegal aliens, the VTVPA also has created a new visa, referred to as the “T” visa, which allows victims of a severe form of trafficking whose continued presence in the United States may be necessary to assist law enforcement authorities in investigating and prosecuting trafficking offenses to remain in the United States³³ and to petition for Permanent Resident Alien status at

²⁵ *Id.* § 109.

²⁶ *Id.* § 110(d)(1)(A)(i); see U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 41, 43, 53, 116, 161 (2003) (listing Cambodia, Cuba, Myanmar (Burma), North Korea, and Venezuela as either Tier 2 or Tier 3 countries).

²⁷ 487 U.S. 931 (1988).

²⁸ *Id.* at 949–50, 952.

²⁹ VTVPA § 102(b)(6).

³⁰ *Id.* § 112. As a result of the VTVPA, the following sections of Title 18 of the U.S.C. were amended: §§ 1581(a), 1583, 1584, 1589, 1590, 1591, 1592, 1593, and 1594 (2006).

³¹ U.S. SENTENCING COMM’N, 2010 FEDERAL SENTENCING GUIDELINES MANUAL 203–05 (2010), available at http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/2010_Guidelines_Manual_Full.pdf.

³² VTVPA § 112(a).

³³ *Id.* § 107(e)(1).

the end of the three-year period.³⁴ Barriers to participation in government benefit programs that were enacted pursuant to Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996³⁵ are removed. Consequently, victims of severe forms of trafficking are eligible to apply for benefits and services funded through Health and Human Services, Department of Labor, Legal Services Corporation, and other Federal agencies.³⁶

B. The Trafficking Victims Protection Reauthorization Act of 2003

In 2003, Congress reviewed and revised the provisions of the original VTVPA trafficking legislation.³⁷ Although the reauthorization clarified and extended coverage under the Act, the emphasis of the legislation remained on international rather than domestic trafficking in persons. According to the congressional findings, while progress had been made since enactment of the initial legislation, some problems were encountered in implementation.³⁸ Moreover, problem areas were identified that were not addressed in the initial legislation. Among the findings made in the 2003 reauthorization were that “[c]orruption among foreign law enforcement authorities continues to undermine the efforts by governments to investigate, prosecute, and convict traffickers.”³⁹ The reauthorization required the President to create programs of border interdiction outside the United States⁴⁰ and to promulgate regulations to ensure that materials were developed and disseminated to alert travelers to the dangers and legal risks of international sex tourism.⁴¹

From its inception, the anti-trafficking legislation provided a role for nongovernmental organizations (“NGOs”) to play in interdicting trafficking. In the 2003 reauthorization, there is an acknowledgment that there may be organizations that are engaging in trafficking in the guise of NGOs.⁴² Consequently, the legislation provided that an executive agency may include a condition of funding that authorizes termination of a

grant, contract, or cooperative agreement, without penalty, if the grantee or any subgrantee, or the contractor or any subcontractor (i)

³⁴ *Id.* § 107(f).

³⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400–51, 110 Stat. 2105, 2260–78 [hereinafter PRWORA].

³⁶ VTVPA § 107(b)(1)(A)–(B).

³⁷ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 [hereinafter TVPRA of 2003].

³⁸ *Id.* § 2(2)–(3).

³⁹ *Id.* § 2(5).

⁴⁰ *Id.* § 3(c).

⁴¹ *Id.* § 3(e)(1).

⁴² *See id.* § 3(b).

engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect, or (ii) uses forced labor in the performance of the grant, contract, or cooperative agreement.⁴³

The initial anti-trafficking legislation was not without critics. With regard to the new visa program, victim advocates were concerned that in order to secure a “T” visa a victim was dependent upon a certification by federal law enforcement that he or she had cooperated in the investigation or prosecution of the trafficker.⁴⁴ As a practical matter, traffickers often moved victims around frequently to disorient them and to keep them from identifying their location or making contacts with persons who might be of assistance to them, causing them to have little information to share with law enforcement.⁴⁵ Fear for their personal safety or that of their families might inhibit a victim’s willingness to cooperate with law enforcement.⁴⁶ Primary contact with law enforcement might be at the state or local level rather than at the federal level.⁴⁷

The 2003 reauthorization act addressed one of these concerns by authorizing the Secretary of Health and Human Services to certify victims of a severe form of trafficking for services on the basis of

statements from State and local law enforcement officials that the person . . . has been willing to assist in every reasonable way with respect to the investigation and prosecution of State and local crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking appear to have been involved.⁴⁸

The 2003 reauthorization also increased the remedies available to victims of trafficking. In the initial legislation, the primary focus was on strengthening efforts to apprehend and criminally prosecute traffickers. An inherent limitation of this approach is that the victim has no control over whether his or her case will be investigated and prosecuted; that determination lies with the prosecutor. According to Department of Justice statistics:

From 2001 to 2005, a total of 377 matters where human trafficking was the lead charge were closed by U.S. Attorneys. In the closed matters, U.S. attorneys prosecuted 146 suspects (39%) in U.S. district courts . . .

⁴³ *Id.*

⁴⁴ See, e.g., Ivy Lee, An Appeal of a T Visa Denial, 14 GEO. J. ON POVERTY L. & POL’Y 455, 457 (2007); Jennifer M. Wetmore, *The New T Visa: Is the Higher Extreme Hardship Standard Too High for Bona Fide Trafficking Victims?*, 9 NEW ENG. J. INT’L & COMP. L. 159, 161 (2002).

⁴⁵ See Lee, *supra* note 44, at 467–68.

⁴⁶ See U.S. DEP’T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 34–35 (2010).

⁴⁷ *But cf. id.* at 33 (explaining how the “transitory nature” of human trafficking makes building a case against the traffickers difficult even for local law enforcement).

⁴⁸ TVPRA of 2003 § 4(a)(3).

U.S. attorneys declined to prosecute suspects in 222 matters or 59% of the matters closed during this period, due to—

- lack of evidence of criminal intent (29%)
- weak or insufficient admissible evidence (28%)
- prosecution by other authorities or facing other charges in federal court (14%)
- no federal offense evident (9%)
- and other (20%) reasons.⁴⁹

As a result of an amendment to the original legislation, a civil remedy has been created for trafficking victims. A party alleging that he or she is a victim of a violation of Title 18, Section 1589, 1590, or 1591 of the U.S. Code may file a civil suit against the perpetrator in Federal District Court and in doing so may potentially receive damages and attorney fees.⁵⁰ There are still limitations, however, on the filing of a civil suit. The statute expressly provides that the civil suit will be “stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.”⁵¹ “Criminal action” is broadly defined and “includes investigation and prosecution and is pending until final adjudication in the trial court.”⁵² Consequently, the victim may have a degree of control of the filing of the suit but must still defer to the government with regard to the advancement of the suit if a criminal action is pending.

There are two provisions of the 2003 reauthorization that strengthen the attention given to the domestic trafficking of children. The first provision is Section 5 of the Act, “Enhancing Prosecutions of Traffickers.” This section expands jurisdiction under Title 18 U.S.C. Section 1591, “Sex Trafficking of Children or by Force, Fraud, or Coercion” by “striking [the words] ‘in or affecting interstate commerce’ and inserting ‘in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States[.]’”⁵³ thereby more clearly delineating between international and domestic, interstate trafficking. This expansion of emphasis is reinforced by the section of the 2003 reauthorization which directs the President to fund research initiatives on both domestic and international trafficking.⁵⁴

⁴⁹ MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005, 1–2 (2006).

⁵⁰ TVPRA of 2003 § 4(a)(4).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* § 5(a)(2).

⁵⁴ *Id.* § 6(g)(1).

C. The Trafficking Victims Protection Reauthorization Act of 2005

The 2005 reauthorization may be characterized as benchmark legislation on the issue of domestic trafficking in persons.⁵⁵ As in prior legislation, this statute assesses the current status of the government's anti-trafficking initiatives.⁵⁶ In addition, for the first time the "Findings" section acknowledges that "[t]rafficking in persons also occurs within the borders of a country, *including the United States*."⁵⁷ Moreover, the findings expressly identify children within the United States who are potential trafficking victims:

No known studies exist that quantify the problem of trafficking in children for the purpose of commercial sexual exploitation in the United States. According to a report issued by researchers at the University of Pennsylvania in 2001, as many as 300,000 children in the United States are at risk for commercial sexual exploitation, including trafficking, at any given time.

Runaway and homeless children in the United States are highly susceptible to being domestically trafficked for commercial sexual exploitation. According to the National Runaway Switchboard, every day in the United States, between 1,300,000 and 2,800,000 runaway and homeless youth live on the streets. One out of every seven children will run away from home before the age of 18.⁵⁸

The evolving nature of our anti-trafficking legislation requires ongoing efforts to clarify and strengthen provisions relating to perpetrators of international trafficking in persons. There is acknowledgement that natural and human disasters are exploited by traffickers and that efforts by federal agencies need to be enhanced to protect potential victims of trafficking in "post-conflict environments and during humanitarian emergencies."⁵⁹ Similarly, persons in positions of trust, i.e., "military and civilian peacekeepers,"⁶⁰ "employees and contractors of the United States Government and members of the Armed Forces,"⁶¹ may sometimes directly engage in—or facilitate—trafficking abroad.

To address these issues, several new initiatives are instituted in the reauthorization. The United States Agency for International Development (USAID) is authorized to conduct a pilot program to identify best practices in providing rehabilitative treatment to

⁵⁵ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 [hereinafter TVPRA of 2005].

⁵⁶ *Id.* § 2.

⁵⁷ *Id.* § 2(4) (emphasis added).

⁵⁸ *Id.* § 2(5)–(6).

⁵⁹ *Id.* § 2(8).

⁶⁰ *Id.* § 2(9).

⁶¹ *Id.* § 2(10).

trafficking victims in residential programs⁶² and to establish a pilot treatment program in foreign countries for victims of trafficking based on the best practices identified in the research initiative.⁶³ Additional activities are also authorized to monitor and combat forced labor and child labor.⁶⁴

Jurisdiction (and authority to prosecute criminal cases) is explicitly extended to offenses by federal government personnel who commit trafficking offenses abroad unless the perpetrator is being prosecuted for the same offense by a foreign government.⁶⁵ As a result of an amendment to Title 18 U.S.C. Section 1956(c)(7)(B), laundering profits earned from trafficking in persons and exploitation is addressed.⁶⁶ Forfeiture of property that was used in or acquired through funds traceable to trafficking activities is authorized.⁶⁷

Furthermore, Title II of the 2005 reauthorization expressly authorizes an initiative to reduce trafficking of persons and demand for commercial sex acts in the United States. Among the activities authorized by this Title of the legislation are: (1) comprehensive research and statistical review;⁶⁸ (2) a biennial conference addressing severe forms of trafficking within the United States;⁶⁹ (3) the establishment of a program to make grants to states, localities, Indian tribes, and non-profit organizations to assist victims of trafficking that takes place in whole or in part in the United States;⁷⁰ and (4) the establishment of pilot programs to ensure protection of juvenile victims of trafficking.⁷¹ Last but not least, this Title authorizes a grant program for state and local law enforcement authorities to strengthen activities relating to the investigation and prosecution of trafficking-in-persons offenses “that occur, in whole or in part, within the territorial jurisdiction of the United States.”⁷²

In short, while the focus of the 2005 reauthorization is not exclusively domestic trafficking, it does reflect an expansion of the anti-trafficking legislative focus. It expressly acknowledges the need to have better data on domestic trafficking as well as better-trained state and

⁶² *Id.* § 102(b)(1)(A).

⁶³ *Id.* § 102(b)(2).

⁶⁴ *Id.* § 105(b)(1).

⁶⁵ *Id.* § 103(a)(1).

⁶⁶ *Id.* § 103(d)(1).

⁶⁷ *Id.*

⁶⁸ *Id.* § 201(a)(1).

⁶⁹ *Id.* § 201(a)(2)(A).

⁷⁰ *Id.* § 202(a).

⁷¹ *Id.* § 203(a). This “juvenile victim” is inclusive of, but not limited to, children trafficked within the United States. *Id.* § 203(f).

⁷² *Id.* § 204(a)(1)(A).

local law enforcement personnel to identify potential victims of trafficking, and to increase capacity to provide services to domestic victims of domestic trafficking through governmental grants.

D. The William Wilberforce Trafficking Victims Protection Reauthorization

The most recent extension of the federal anti-trafficking legislation is the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.⁷³ This legislation builds upon the initial legislation and its subsequent reauthorizations. Once again, the primary focus is on international trafficking. This reauthorization addresses the following areas: (1) enhanced provisions for combating international trafficking in persons;⁷⁴ (2) combating trafficking in persons in the United States as a destination, not an origin country;⁷⁵ (3) ensuring assistance to all trafficking victims;⁷⁶ (4) clarification of federal penalties against traffickers and non-preemption of other federal and state statutes by the trafficking legislation;⁷⁷ (5) promotion of effective state enforcement;⁷⁸ (6) activities of the United States Government, particularly in the areas of unaccompanied alien minors;⁷⁹ and (7) prevention of conscription of child soldiers.⁸⁰

Title II of the 2008 reauthorization, “Combating Trafficking in Persons in the United States,” does not focus on domestic or intranational trafficking in persons. It focuses on immigrant victims for whom the United States is a country of destination. In particular, this portion of the Act clarifies the “T” visa program. It grants authorities discretion in processing “T” visa applications where an applicant is unable to satisfy the requirement of certification by a law enforcement agency that she has assisted in the investigation and prosecution of her case when unable to do so “due to physical or psychological trauma.”⁸¹ It also creates waiver authority for the requirement that an applicant for a “T” visa demonstrate good moral character if the act or acts that would keep her from satisfying this requirement are incidental to her being trafficked.⁸²

⁷³ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 [hereinafter Wilberforce Act of 2008].

⁷⁴ *Id.* §§ 101–111.

⁷⁵ *Id.* §§ 201–205.

⁷⁶ *Id.* § 213.

⁷⁷ *Id.* §§ 221–224.

⁷⁸ *Id.* § 225.

⁷⁹ *Id.* §§ 231–239.

⁸⁰ *Id.* §§ 401–407.

⁸¹ *Id.* § 201(a)(1).

⁸² *Id.* § 201(d)(3). For example, a victim of trafficking would not be disqualified from seeking a “T” visa and Permanent Resident Alien status if the crime for which she was

This legislation also encourages an increased state role in combating human trafficking in two ways. First, it clarifies that the federal anti-trafficking statute is not intended to preempt state prosecutions under state criminal statutes.⁸³ Second, it directs the Attorney General of the United States to “facilitate the promulgation of a model State statute that . . . furthers a comprehensive approach to investigation and prosecution through modernization of State and local prostitution and pandering statutes”⁸⁴ and to ensure the dissemination of the model state statute by posting it on the website of the United States Department of Justice⁸⁵ and distributing it to state attorneys general.⁸⁶

Fortunately, the anti-trafficking legislation is not the only federal legislation that addresses the sexual exploitation of American children. For example, in 2003 Congress enacted the PROTECT Act,⁸⁷ which “requires the Department of Justice . . . to formulate and implement a National Strategy to combat child exploitation.”⁸⁸ This national strategy is intended to address all the incidents which are often implicated in the trafficking of children, i.e., exploitation of children in child pornography, recruiting of children for sexual exploitation online, commercial sexual exploitation of children, and child sex tourism.⁸⁹

The point to be made here is simply that our knowledge is limited regarding how many American children are trafficked each year. In our society, it is easy for children to go missing and be unaccounted for. Through a variety of mechanisms, children are vulnerable to exploitation

convicted was prostitution and the prostitution was a consequence of having been trafficked.

⁸³ *Id.* § 225(a)(2).

⁸⁴ *Id.* § 225(b)(1).

⁸⁵ *Id.* § 225(c)(1).

⁸⁶ *Id.* § 225(c)(2).

⁸⁷ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. Among the provisions of the U.S. Code dealing with the exploitation of children are: 18 U.S.C. §§ 1466A (“Obscene visual representations of the sexual abuse of children”), 1470 (“Transfer of obscene material to minors”), 2251 (“Sexual exploitation of children”), 2251A (“Selling or buying of children”), 2252 (“Certain activities relating to material involving the sexual exploitation of minors”), 2252A (“Certain activities relating to material constituting or containing child pornography”), 2252B (“Misleading domain names on the Internet”), 2252C (“Misleading words or digital images on the Internet”), 2256 (“Definitions for chapter [18 U.S.C. § 2251 et seq.]”), 2258A (“Reporting requirements of electronic communication service providers and remote computing service providers”), 2260 (“Production of sexually explicit depictions of a minor for importation into the United States”), 2421 (“Transportation generally”), 2422 (“Coercion and enticement”), and 2423 (2006 & Supp. III 2010) (“Transportation of minors”).

⁸⁸ U.S. DEP’T OF JUSTICE, *supra* note 46, at 1.

⁸⁹ *Id.* at 2.

for pornography and commercial sex. While existing anti-trafficking legislation acknowledges the problem of domestic trafficking in children and creates implicit authority to address it, it does not communicate the same sense of urgency or mandate priority consideration in dealing with this issue.

If protection for children is to be maximized, the trafficking legislation needs to work in tandem with other federal legislation intended to protect children from predators. If these statutes are to work effectively, they need to be scrutinized carefully to assess the actual scope of coverage, potential gaps in coverage, and potential administrative and legal barriers to their enforcement, in a way that provides effective, comprehensive services for children. Collectively, the application of these laws needs to operate in a manner that achieves the overall goals of the federal anti-trafficking campaign of prevention, protection, and prosecution.

II. AN OVERVIEW OF STATE ANTI-TRAFFICKING INITIATIVES

Current federal anti-trafficking legislation contemplates that the states have an important role to play in interdicting this crime. This is acknowledged in several different ways. For example, the legislation acknowledges that federal legislation is not intended to preempt states from prosecuting trafficking and trafficking related crimes.⁹⁰ It also authorizes providing technical assistance to states in the form of training for state and local law enforcement officials.⁹¹ Funding is made available for victim assistance projects at the state and local level.⁹² States are encouraged to draft their own legislation by referencing a model statute template as a guide.⁹³

A. *The Rationale for State Initiatives*

There are several reasons why states need to be actively involved in efforts to combat trafficking.⁹⁴ Federal law enforcement resources are not

⁹⁰ Wilberforce Act of 2008 § 225(a)(2).

⁹¹ *Id.* § 212(b)(2).

⁹² *Id.* § 213(a)(3)(A).

⁹³ See *infra* Appendix B. For a discussion of the requisite elements of comprehensive anti-trafficking legislation, see Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357 (2006).

⁹⁴ Some concerns have been raised about whether the states should enact their own legislation. While it is beyond the scope of this Article to discuss the pros and cons of this issue, the following articles examine the topic in greater detail. Shashi Irani Kara, *Decentralizing the Fight Against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations*, 13 CARDOZO J. L. & GENDER 657 (2007); Kathleen K. Hogan,

adequate to detect, investigate, and prosecute trafficking activities, and provide the necessary level of services and aftercare for victims of trafficking. For example, the Trafficking Victims Protection Act of 2000 authorized appropriations of approximately \$95 million to implement the legislation for two years.⁹⁵ If, as the legislation assumed, an estimated 50,000 persons were trafficked into the United States each year, and all victims were served, that would break down into a per capita expenditure of approximately \$950.00 per year per trafficking victim for food, shelter, medical and aftercare, and job training. Given the trauma associated with being trafficked, many of these victims will require such assistance for a number of years. These resources are not sufficient to adequately serve identified victims of trafficking.

State and local law enforcement authorities are closer to the problem and are more likely, with proper training, to pick up on indicators that women and children are being trafficked into a particular community. Because of the local nature of law enforcement, the systems that are most likely to have some level of interaction with trafficked youth are the juvenile justice system, the social service system, the health care system,⁹⁶ and the public education system. These institutions are creatures of the state legislature. If they are not functioning effectively in protecting children against trafficking, it will require state legislative action to change them and make them more responsive to the problem. Moreover, mandatory expungement of victims' criminal records of crimes incidental to being trafficked and placement of convicted child traffickers on the child abuse and/or sexual predator registry maintained by states⁹⁷ may require additional state legislation.

Comment, *Slavery in the 21st Century and in New York: What Has the State's Legislature Done?*, 71 ALB. L. REV. 647 (2008); Stephanie L. Mariconda, Note, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151 (2009); Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J. L. REFORM 447 (2005).

⁹⁵ VTVPA, Pub. L. No. 106-386, § 113, 114 Stat. 1464 (2000).

⁹⁶ See OHIO TRAFFICKING IN PERS. STUDY COMM'N, REPORT ON THE PREVALENCE OF HUMAN TRAFFICKING IN OHIO TO ATTORNEY GENERAL RICHARD CORDRAY 46 (2010) [hereinafter OHIO TRAFFICKING COMM'N REPORT].

⁹⁷ See *Combating Trafficking In Persons: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 26 (2005) (statement of Tina Frundt, Street Outreach Specialist, Polaris Project), available at <http://financialservices.house.gov/media/pdf/109-22.pdf>. When asked about the most effective measures that the U.S. government could take in combating trafficking at home and abroad, Ms. Frundt testified:

I think one of them would be that sex-offenders registry, because the pimps and johns are pedophiles. They are abusers, they are rapists. Adding them to the sex registry, because they move from state to state, and flagging them for what they truly are, as pimps [and] johns, will make everyone aware and put them in the spotlight and show[] that this is glamorized, that these are sex abusers who are preying on our children and women.

State laws are sometimes the weak link in the chain. The Ohio Trafficking in Persons Study Commission suggests in its report that traffickers are aware of the potential risk of doing business in a particular state:

State laws do play a role in the decision making of human trafficking organizations that are sophisticated and networked. Those more sophisticated trafficking rings are aware of the laws and potential risk of doing business in a particular U.S. state. In a quote from Raymond and Hugh[e]'s (2001) report, it is apparent that traffickers look for states with more lenient laws.

In the Midwest, women are trafficked around the region, as well as to the East and West Coast: from Minneapolis to Tampa, Memphis, New York, Chicago, Seattle, Denver, St. Louis and Las Vegas. Law enforcement officials in this region reported that large numbers of U.S. women are domestically trafficked to other states, because Minnesota laws are stricter than in these states, and the sex businesses move to more permissive regions.⁹⁸

This highlights two issues that states need to address. First, there is a need for all states to have criminal anti-trafficking legislation in place to ensure that no state provides a safe harbor for trafficking activities. Second, when states enact legislation, it is important that there be consistency among state statutes. A weak or limited statute still has the potential to attract traffickers into a state to avoid another state's more stringent, comprehensive statute. As the Ohio Trafficking in Persons Study Commission suggests in its report,

Ohio has not passed a stand-alone law, but instead passed a *specification* in the law that provides the capacity to enhance the charges against would be traffickers. After a comprehensive look at all state anti-trafficking laws to date[,] Bouche & Wittmer (2009) argue that "any and all human trafficking legislation is a step in the right direction", however[,] "it is important to recognize that there is a large variation in the comprehensiveness of anti-trafficking legislation across the states."⁹⁹

Further progress on comprehensive trafficking legislation across all states is crucial; however, there are some encouraging signs that states are taking this problem more seriously.

Id.

⁹⁸ See OHIO TRAFFICKING COMM'N REPORT, *supra* note 96, at 13 (quoting JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 56 (2001)).

⁹⁹ *Id.* (quoting VANESSA BOUCHE & DANA WITTMER, HUMAN TRAFFICKING LEGISLATION ACROSS THE STATES: THE DETERMINANTS OF COMPREHENSIVENESS 16 (2009)).

B. Summary of State Initiatives

The number of states that have enacted some form of anti-trafficking legislation increases from one year to the next. According to the Center for Women Policy Studies, as of January 1, 2010, forty-four states had enacted laws addressing trafficking in persons.¹⁰⁰ Legislative initiatives ranged from enacting criminalization statutes to creating statewide task forces, regulating international marriage brokers, and regulating travel service providers.¹⁰¹ Among the handful of states that had not enacted some form of anti-trafficking legislation as of January 2010 were Alabama, Massachusetts, South Dakota, Vermont, West Virginia, and Wyoming.¹⁰² During the 2010 legislative session, Alabama and Vermont enacted legislation that criminalizes trafficking under state law for the first time.¹⁰³

III. UNRESOLVED ISSUES AND NEEDS

A. Victim Identification

One of the challenges of interdicting trafficking in children is victim identification. There is not a great deal of data available on this segment of the victim population. As in the case of trafficking in adults, it is a highly underreported crime. As a result of the authorization by federal legislation for the appropriation of funds for research projects,¹⁰⁴ current, more reliable data is being developed. For example, in May 2009, Shared Hope International released a study funded through the United States Department of Justice entitled *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children*.¹⁰⁵ Based on original research, the key findings of the report address the following issues: (1) victim misidentification; (2) criminalization of the victim through misidentification; (3) criminalization of the victim because of a lack of placement options; (4) lack of appropriate services or access to support

¹⁰⁰ CTR. FOR WOMEN POLICY STUDIES, FACT SHEET ON STATE ANTI-TRAFFICKING LAWS FROM [U.S.] PACT (Policy Advocacy to Combat Trafficking) 2 (2010) [hereinafter U.S. PACT], <http://www.centerwomenpolicy.org/programs/trafficking/facts/documents/FactSheetonStateAntiTraffickingLawsJanuary2010.pdf> (last visited Mar. 13, 2010); see also *infra* Appendix A.

¹⁰¹ U.S. PACT, *supra* note 100, at 1; see also *infra* Appendix B for a state legislative summary chart.

¹⁰² U.S. PACT, *supra* note 100, at 2.

¹⁰³ Jennifer Kimball, *Anti-Trafficking Legislation 2010*, THE HUMAN TRAFFICKING PROJECT (May 26, 2010, 7:03 PM), <http://traffickingproject.blogspot.com/2010/05/anti-trafficking-legislation-2010.html>.

¹⁰⁴ See VTVPA, Pub. L. No. 106-386, § 113, 114 Stat. 1464 (2000).

¹⁰⁵ LINDA SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN (2009), http://www.sharedhope.org/Portals/0/Documents/SHI_National_Report_on_DMST_2009.pdf.

services for victims; (5) undue dependence on victim assistance for investigation and prosecution; (6) lack of protective, therapeutic shelter for victims of trafficking; and (7) lack of adequate emphasis on combating demand.¹⁰⁶

Victim identification is a pivotal issue. Children who come from unstable or dysfunctional homes, have parents who abuse alcohol or drugs, or experience physical and sexual abuse at home are clearly at risk of falling prey to traffickers. It would be a mistake, however, to assume that children who come from middle class homes with these problems are not also at risk. As Shared Hope points out in its report, “[d]omestic child victims of sex trafficking come from a variety of socioeconomic backgrounds, geographic areas, and ethnicities.”¹⁰⁷ Moreover, “[m]any victims are youth in the child welfare system and/or runaways, but some are recruited from middle-class homes as well.”¹⁰⁸ One common denominator among victims, regardless of socioeconomic background, that makes them vulnerable to sex traffickers is their age.¹⁰⁹

Just as there is a risk that adult victims of trafficking for sexual exploitation will be perceived as criminals rather than as victims, there is a risk that children who are trafficked within the United States will be perceived as runaways, throwaways, and delinquents rather than as victims of trafficking. As one article on sex trafficking observed:

The charged language and unsavory imagery associated with sex trafficking can make it difficult for many to relate with the circumstances of exploited women. “We make so many assumptions about the morality of young women involved in the sex trade,” Alameda County Deputy District Attorney Sharmin Bock told me this afternoon. Sometimes it takes real-life examples to drive home how normal people can get sucked into this expansive underworld.¹¹⁰

The United States Department of Education has posted a fact sheet on its website to help concerned members of the public identify children who are victims of trafficking. While the list acknowledges that it is by no means comprehensive, it suggests the following as markers for identifying a child that is being trafficked:

A victim:

- Has unexplained absences from school for a period of time, and is therefore a truant
- Demonstrates an inability to attend school on a regular basis
- Chronically runs away from home

¹⁰⁶ *Id.* at v–vi.

¹⁰⁷ *Id.* at 9.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Ali Winston, *Explainer: What Sex Trafficking Looks Like*, THE INFORMANT (Aug. 10, 2010), <http://informant.kalwnews.org/2010/08/explainer-what-sex-trafficking-looks-like/> (last visited Mar. 31, 2011).

- Makes references to frequent travel to other cities
- Exhibits bruises or other physical trauma, withdrawn behavior, depression, or fear
- Lacks control over her or his schedule or identification documents
- Is hungry-malnourished or inappropriately dressed (based on weather conditions or surroundings)
- Shows signs of drug addiction

Additional signs that may indicate sex-related trafficking include:

- Demonstrates a sudden change in attire, behavior, or material possessions (e.g., has expensive items)
- Makes references to sexual situations that are beyond age-specific norms
- Has a “boyfriend” who is noticeably older (10+ years)
- Makes references to terminology of the commercial sex industry that are beyond age specific norms; engages in promiscuous behavior and may be labeled “fast” by peers.[.]¹¹¹

In addition to establishing a means of proper victim identification, it is also important to better understand the tools that traffickers use to lure unsuspecting minors.

B. Access to Victims: The Role of the Internet

Traffickers are able to entice and snare their young victims in a variety of ways. “Traffickers have been reported targeting their minor victims through telephone chat-lines, in clubs, on the street, through friends, and at malls, as well as using girls to recruit other girls at schools and after-school programs.”¹¹² The most powerful recruitment tool, however, is probably the Internet. It allows traffickers to communicate with a prospective victim without active adult surveillance or supervision. An adult preying on a child can conceal his true identity more effectively on the Internet. Moreover, it allows the trafficker to operate without a fixed, identifiable physical location.

As Shared Hope observes in its 2009 National Report, “[t]he Internet and other technological advancements have opened an avenue to commercial sexual exploitation previously unattainable by most people. Individuals viewing child pornography have found comfort in the cyber-community This anonymity and community aspect to the Internet makes it a powerful tool for traffickers, buyers, and facilitators.”¹¹³ This conclusion is confirmed by the Department of Justice in its August 2010 report to the Congress:

¹¹¹ U.S. DEP’T OF EDUC., HUMAN TRAFFICKING OF CHILDREN IN THE UNITED STATES: A FACT SHEET FOR SCHOOLS 1, http://www.covenanthousepa.org/who_we_serve/studies/Human%20Trafficking%20Fact%20Sheet.pdf (last visited Apr. 8, 2011).

¹¹² *Id.*

¹¹³ SMITH ET AL., *supra* note 105, at 19.

The anonymity afforded by the Internet makes the offenders more difficult to locate, and makes them bolder in their actions. Investigations show that offenders often gather in communities over the Internet where trading of these images is just one component of a larger relationship that is premised on a shared sexual interest in children. This has the effect of eroding the shame that typically would accompany this behavior, and desensitizing those involved to the physical and psychological damage caused to the children involved. . . .

. . . Child predators often use the [I]nternet to identify, and then coerce, their victims to engage in illegal sex acts. These criminals will lurk in chat rooms or on bulletin board websites that are popular with children and teenagers. They will gain the child's confidence and trust, and will then direct the conversation to sexual topics. . . . Often, the defendants plan a face-to-face [meeting] for the purpose of engaging in sex acts.¹¹⁴

The initial contact is not exclusively via the Internet. It may be face-to-face, through an acquaintance like a school classmate or a distant relative, or a contact made through a social setting like the local mall. By the time the child victim is entrapped, the Internet will play some role in advancing the trafficking enterprise.

A cursory review of information releases on recent cases prosecuted by the U.S. Department of Justice illustrates the degree to which traffickers have utilized the Internet and social media to advance their trafficking enterprise for either recruiting or marketing their victims. The following table summarizes several sex trafficking cases investigated by the Maryland Human Trafficking Task Force in the summer of 2009:

Case	Charges	Means of Contact
<i>United States v. Corey</i> ¹¹⁵	Sex trafficking of a minor; Conspiracy related to interstate prostitution	Online classified ads; Social networking websites
<i>United States v. Bell, a/k/a "Ebony"</i> ¹¹⁶	Conspiracy to commit sex trafficking of a minor;	Internet erotic and personal ads; Craigslis

¹¹⁴ U.S. DEP'T OF JUSTICE, *supra* note 46, at 3.

¹¹⁵ No. 1:09-cr-00512-JFM, Judgment at 1 (D. Md. Apr. 28, 2010); *see also* Press Release, U.S. Dep't of Justice, U.S. Army Private and Three Other Men Indicted on Sex Trafficking and Drug Charges (Sept. 29, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/U.S.ArmyPrivateandThreeOtherMenIndictedonSexTraffickingandDrugCharges.html.

¹¹⁶ No. RDB-1-09-CR-0271-2, Second Amended Judgment at 1 (D. Md. Jan. 6, 2010); *see also* Press Release, U.S. Dep't of Justice, Second Defendant Pleads Guilty in Sex Trafficking Conspiracy Involving Three Minor Girls (June 28, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/SecondDefendantPleadsGuiltyinSexTraffickingConspiracyInvolvingThreeMinorGirls.html.

	Sex trafficking of a minor	
<i>United States v. Thompson, a/k/a "B"</i> ¹¹⁷	Conspiracy to commit sex trafficking of a minor Sex trafficking of a minor	Erotic Internet ads; Craigslist postings
<i>United States v. Frock</i> ¹¹⁸	Sex trafficking of a minor	Recruited by distant family member and marketed on the Internet

In a report to Congress in 2009, the Federal Trade Commission assessed children's access to sexually explicit or violent content on "virtual worlds"—computer-simulated environments that are home to online communities on the Internet.¹¹⁹ It is noteworthy that in its report, the Federal Trade Commission describes current efforts by operators of teen- and adult-oriented "virtual world" websites to monitor and regulate Internet behavior as dependent upon community and industry policing.¹²⁰ The Commission does not suggest the enactment of further federal legislation to restrict the access of children to certain Internet content. Acknowledging "important First Amendment considerations," it "supports virtual world operators' self-regulatory efforts to implement these [Report] recommendations."¹²¹ Efforts to reduce the incidence of recruiting and marketing of children for the purposes of sexual exploitation face the challenge of regulating the use of the Internet by both victims and victimizers in a way that is not defeated by constitutional challenges for overbreadth.¹²²

¹¹⁷ No. RDB-1-09-CR-0271-1, Second Amended Judgment at 1 (D. Md. Jan. 6, 2010); *see also* Press Release, U.S. Dep't of Justice, Reisterstown Man Pleads Guilty in Sex Trafficking Conspiracy Involving Three Minor Girls (July 16, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/ReisterstownManPleadsGuiltyinSexTraffickingConspiracyInvolvingThreeMinorGirls.html.

¹¹⁸ No. WDQ-09-0093, Amended Judgment at 1 (D. Md. Sept. 9, 2010) *aff'd* No. 09-4618 (4th Cir. July 9, 2010) (per curiam); *see also* Press Release, U.S. Dep't of Justice, Westminster Woman Sentenced to 10 Years for Sex Trafficking of a Child (June 23, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/WestminsterWomanSentencedto10YearsforSexTraffickingofaChild.html.

¹¹⁹ FED. TRADE COMM'N, VIRTUAL WORLDS AND KIDS: MAPPING THE RISKS, A REPORT TO CONGRESS i (2009).

¹²⁰ *Id.* at ii.

¹²¹ *Id.* at iii.

¹²² This tension between regulating the Internet and protecting First Amendment rights is illustrated by a number of cases dating back to the 1990s. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 849, 879 (1997) (challenge to the Communications Decency Act of 1996 ("CDA") on grounds of overbreadth); *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999)

*C. Providing an Effective Service and Legal Infrastructure
for Domestic Child Victims of Trafficking*

1. Access to Victim Services

Although the federal anti-trafficking legislation contains provisions to remove barriers to access to governmental services, these provisions primarily serve to benefit adult, alien victims.¹²³ They allow otherwise ineligible illegal aliens to apply for federal benefits such as subsidized housing, Food Stamps, Medicaid, and legal aid, provided they are certified as victims of a severe form of trafficking for sexual exploitation or forced labor.¹²⁴ These programs, however, are all structured to serve the adult population. Unless a child trafficking victim is an emancipated minor, he or she would probably not be able to apply for these programs in his or her own right.¹²⁵

As a result of the physical and emotional trauma of trafficking, child victims present a unique set of needs. They may not be able to return home. Foster parents may not be prepared to cope with the physical and psychological needs of a minor who has been trafficked. The residential placement system for minors may be equally maladapted to deal with their needs. It is likely that minors who have been trafficked, whether due to misidentification as delinquents or lack of appropriate facilities for juvenile victims, will be housed in jail facilities.¹²⁶ As Shared Hope points out in its Report:

Law enforcement officers report they are often compelled to charge a victim of domestic minor sex trafficking with a delinquency offense in order to detain her in a secured facility to keep her safe from the trafficker/pimp and the trauma-driven response of flight. The frustration of first responders with this maneuver was widely expressed; however, in the absence of better options, this stop-gap measure continues. The results are detrimental for the victim who rarely receives any services in detention, much less services specific to the trauma endured through sex trafficking. Also, the entry of the

(challenge to the Child On-Line Protection Act as violative of the First Amendment); *ApolloMedia Corp. v. Reno*, 19 F. Supp. 2d 1081, 1084 (N.D. Cal. 1998) (challenge to the CDA provision prohibiting the knowing transmission of indecent messages).

¹²³ As a result of limitations adopted pursuant to the PRWORA, Public Law No. 104-193, §§ 401, 411, 110 Stat. 2105, 2261–62, 2268–69 (1996), an adult who is convicted of a felony may be barred from participating in certain governmental benefit programs unless the state administering the program enacts legislation to remove the restriction. The associated provision of the VTVPA does not explicitly remove this program bar for domestic victims of trafficking.

¹²⁴ VTVPA, Pub. L. No. 106-386, § 107(b)(1)(a), 114 Stat. 1464 (2000).

¹²⁵ See *Emancipation of Minors*, NORTHWESTERN LEGAL SERVICES (Oct. 2008), http://www.nwls.org/emancipation_of_minors.htm (last visited Mar. 31, 2011).

¹²⁶ SMITH ET AL., *supra* note 105, at vi.

juvenile into the delinquency system can disqualify her from accessing victim-of-crime funds for services in some states.¹²⁷

This is a predictable outcome given the “lack of protective, therapeutic shelters for domestic minor sex trafficking victims.”¹²⁸ Among the findings of the Shared Hope International Report are that “[o]nly five residential facilities specific to this population exist across the country.”¹²⁹

2. Improving Handling of Child Victims of Trafficking by the Legal System

Just as the state service system needs to be reviewed and modified to more effectively address the needs of child trafficking victims, the legal system needs to be reviewed to make sure that trafficking defendants are not advantaged by the treatment of children. As noted previously, it is important that children who are being trafficked are accurately identified and are treated as victims. It is also important that diversion programs and facilities exist to serve these children once they are rescued from trafficking operations.

These are not the only issues that need to be addressed. Within the existing legislative framework, victims are expected to assist law enforcement in the investigation and prosecution of the trafficking case.¹³⁰ Child advocates, such as Christianna Lamb, have contended that this puts an undue burden on child victims of trafficking.¹³¹ To expect a child who has been physically and emotionally abused to assist in the prosecution of traffickers is both unrealistic and harmful to the victim.¹³²

If the exploitation of the child does not have a connection to interstate commerce, the case will be prosecuted in state courts. One challenge this presents is to make sure that there is uniformity among

¹²⁷ *Id.*

¹²⁸ *Id.*

At times, law enforcement purposely place a masking charge on a victim in order to hold the juvenile without realizing that the child qualifies as a trafficking victim. . . . This process of arresting youth on a masking charge is typically an effort to protect the child from the stigma of a criminal charge. . . . Masking charges re-victimize the child and thwart proper treatment, and in the case of a delinquency determination, these charges may have the negative long-term effect of preventing the youth from obtaining funding for education and hinder career opportunities.

Id. at 50–51.

¹²⁹ *Id.* at vi. These facilities are located in New York City, San Francisco, Los Angeles, Atlanta, and Dallas.

¹³⁰ *See id.* at 13.

¹³¹ Christianna M. Lamb, *The Child Witness and the Law: The United States’ Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the UN Convention on the Rights of the Child*, 3 OR. REV. INT’L L. 63, 70–71 (2001).

¹³² *Id.*

the states regarding the treatment of children who are domestic victims of trafficking. There are some mechanisms currently in place to facilitate that goal, but further steps are needed. For example, as research is conducted on domestic trafficking of children and best practices are identified, that information can be—and needs to be—shared through state attorneys general in addition to training provided by federal law enforcement authority to state and local law enforcement. Also, authority to make grants to states and NGOs to address domestic trafficking in children needs to be used to encourage grantees to address these issues. Where there is an anti-trafficking task force at the state level, these task forces need to be encouraged to assess the need for legal and policy reforms to address issues that child victims of trafficking face within the legal system.

The William Wilberforce Trafficking Victims Protection Reauthorization of 2008 includes specific protections for unaccompanied alien children.¹³³ Our own native children would benefit from the same protections. The 2008 reauthorization requires that an unaccompanied alien minor child “shall be promptly placed in the least restrictive setting that is in the best interest of the child.”¹³⁴ Moreover,

[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis¹³⁵

Permanent protection for certain at-risk alien children is authorized.¹³⁶ If a state provides foster care for such a child, the federal government must reimburse the state for the expense of the foster care.¹³⁷ In making suitability and placement determinations for the unaccompanied alien minor, the following services will be made available: (1) home studies;¹³⁸ (2) legal orientation presentations for custodians;¹³⁹ (3) access to counsel in legal proceedings;¹⁴⁰ (4) independent child advocates;¹⁴¹ (5) specialized training to federal personnel, and upon request, state and local personnel, who have significant contact with unaccompanied alien children;¹⁴² and (6) regular

¹³³ Wilberforce Act of 2008, Pub. L. No. 110-457 § 235(a)(2), 122 Stat. 5044.

¹³⁴ *Id.* § 235(c)(2).

¹³⁵ *Id.*

¹³⁶ *Id.* § 235(d).

¹³⁷ *Id.* § 235(d)(4)(B).

¹³⁸ *Id.* § 235(c)(3)(B).

¹³⁹ *Id.* § 235(c)(4).

¹⁴⁰ *Id.* § 235 (c)(5).

¹⁴¹ *Id.* § 235(c)(6).

¹⁴² *Id.* § 235(e).

follow-up visits to determine the suitability of such facilities, placements, and other entities.¹⁴³

While the federal government cannot force states to take these measures, it needs to encourage states and localities to do so through its training assistance and grant programs. We cannot rationalize providing these protections and services to alien children who are the victims of trafficking and not providing them for our own children.

CONCLUSION

“It’s 10:00 p.m. Do you know where your children are?” The question has renewed relevance today. We are living in a time when children move about with greater freedom and less adult supervision, especially in cyberspace. People who intend harm to our children make contact with them directly through peer acquaintances and at the mall and other social gathering places. Traffickers have demonstrated a facility in using the Internet both to make a connection to recruit a prospective child victim and to market that victim once ensnared. If we are to interdict domestic trafficking in children, we must make the authority to do so explicit, not implicit. Legislation, public policy, and funding initiatives must make it clear that interdicting domestic trafficking in children is no less important a priority than interdicting trafficking in children into the United States from abroad.

¹⁴³ *Id.* § 235(f)(1).

APPENDIX A

LIST OF STATES WITH ANTI-TRAFFICKING STATUTES THROUGH 2010¹⁴⁴

State	Criminalization Statute	Creation of Statewide Task Force	Regulation of International Marriage Brokers	Regulation of Travel Service Providers
Alabama	x			
Alaska	x			
Arizona	x			
Arkansas	x			
California	x	x		
Colorado	x	x		
Connecticut	x	x		
Delaware	x			
Florida	x	x		
Georgia	x			
Hawaii		x	x	x
Idaho	x	x		
Illinois	x			
Indiana	x			
Iowa	x	x		
Kansas	x			
Kentucky	x			
Louisiana	x			
Maine	x	x		
Maryland	x			
Massachusetts				
Michigan	x			
Minnesota	x	x		
Mississippi	x			
Missouri	x		x	x
Montana	x			
Nebraska	x			
Nevada	x			

¹⁴⁴ The chart was adapted from information compiled by the Center for Women Policy Studies. U.S. PACT, *supra* note 100, at 2; *see also* Kimball, *supra* note 103.

State	Criminalization Statute	Creation of Statewide Task Force	Regulation of International Marriage Brokers	Regulation of Travel Service Providers
New Hampshire	x	x		
New Jersey	x			
New Mexico	x	x		
New York	x	x		x
North Carolina	x			
North Dakota	x			
Ohio	x	x		
Oklahoma	x			
Oregon	x			
Pennsylvania	x			
Rhode Island	x	x		
South Carolina	x			
South Dakota				
Tennessee	x			
Texas	x	x	x	
Utah	x			
Vermont	x			
Virginia		x		
Washington	x	x	x	x
West Virginia				
Wisconsin	x			
Wyoming				

APPENDIX B

DEPARTMENT OF JUSTICE MODEL CRIMINAL STATUTE¹⁴⁵

MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE

AN ACT relating to criminal consequences of conduct that involves certain trafficking of persons and involuntary servitude.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF _____:

(A) TITLE _____, PENAL CODE, is amended by adding Article XXX to read as follows:

ARTICLE XXX: TRAFFICKING OF PERSONS AND INVOLUNTARY SERVITUDE

SEC. XXX.01. DEFINITIONS. In this Article:

(1) "Blackmail" is to be given its ordinary meaning as defined by [state Blackmail statute, if any] and includes but is not limited to a threat to expose any secret tending to subject any person to hatred, contempt, or ridicule.

(2) "Commercial sexual activity" means any sex act on account of which anything of value is given, promised to, or received by any person.

(3) "Financial harm" includes credit extortion as defined by [state extortion statute, if any], criminal violation of the usury laws as defined by [state statutes defining usury], or employment contracts that violate the Statute of Frauds as defined by [state statute of frauds].

(4) "Forced labor or services" means labor, as defined in paragraph (5), *infra* or services, as defined in paragraph (8), *infra*, that are performed or provided by another person and are obtained or maintained through an actor's:

- (A) causing or threatening to cause serious harm to any person;
- (B) physically restraining or threatening to physically restrain another person;
- (C) abusing or threatening to abuse the law or legal process;
- (D) knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration

¹⁴⁵ DEPT OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE (2004), available at <http://www.legislationline.org/documents/id/6805>.

document, or any other actual or purported government identification document, of another person;

(E) blackmail; or

(F) causing or threatening to cause financial harm to [using financial control over] any person.

(5) "Labor" means work of economic or financial value.

(6) "Maintain" means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the victim to perform such type of service.

(7) "Obtain" means, in relation to labor or services, to secure performance thereof.

(8) "Services" means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Commercial sexual activity and sexually-explicit performances are forms of "services" under this Section. Nothing in this provision should be construed to legitimize or legalize prostitution.

(9) "Sexually-explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

(10) "Trafficking victim" means a person subjected to the practices set forth in Sections XXX.02(1) (involuntary servitude) or XXX.02(2) (sexual servitude of a minor), or transported in violation of Section XXX.02(3) (trafficking of persons for forced labor or services).

SEC. XXX.02. CRIMINAL PROVISIONS.

(1) INVOLUNTARY SERVITUDE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services shall be punished by imprisonment as follows, subject to Section (4), *infra*:

(A) by causing or threatening to cause physical harm to any person, not more than 20 years;

(B) by physically restraining or threatening to physically restrain another person, not more than 15 years;

(C) by abusing or threatening to abuse the law or legal process, not more than 10 years;

(D) by knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, not more than 5 years,

(E) by using blackmail, or using or threatening to cause financial harm to [using financial control over] any person, not more than 3 years.

(2) **SEXUAL SERVITUDE OF A MINOR.** Whoever knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, sexually-explicit performance, or the production of pornography (see [relevant state statute] (defining pornography)), or causes or attempts to cause a minor to engage in commercial sexual activity, sexually-explicit performance, or the production of pornography, shall be punished by imprisonment as follows, subject to the provisions of Section (4), *infra*:

(A) in cases involving a minor between the ages of [age of consent] and 18 years, not involving overt force or threat, for not more than 15 years;

(B) in cases in which the minor had not attained the age of [age of consent] years, not involving overt force or threat, for not more than 20 years;

(C) in cases in which the violation involved overt force or threat, for not more than 25 years.

(3) **TRAFFICKING OF PERSONS FOR FORCED LABOR OR SERVICES.** Whoever knowingly (a) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services; or (b) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of Sections XXX.02(1) or (2) of this Title, shall, subject to the provisions of Section (4) *infra*, be imprisoned for not more than 15 years.

(4) **SENTENCING ENHANCEMENTS.**

(A) Statutory Maximum - Rape, Extreme Violence, and Death. If the violation of this Article involves kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life [or death].

(B) Sentencing Considerations Within Statutory Maximums.

(1) Bodily Injury. If, pursuant to a violation of this Article, a victim 3 Suffered bodily injury, the sentence may be enhanced as follows: (1) Bodily injury, an additional ____ years of imprisonment; (2) Serious Bodily Injury, an additional ____ years of imprisonment; (3) Permanent or Life-Threatening Bodily Injury, an additional ____ years of imprisonment; or (4) If death results, defendant shall be sentenced in accordance with Homicide statute for relevant level of criminal intent).

(2) Time in Servitude. In determining sentences within statutory maximums, the sentencing court should take into account the time in which the victim was held in servitude, with increased penalties for cases in which the victim was held for between 180 days and one year, and increased penalties for cases in which the victim was held for more than one year.

(3) Number of Victims. In determining sentences within statutory maximums, the sentencing court should take into account the number of victims, and may provide for substantially-increased sentences in cases involving more than 10 victims.

(5) RESTITUTION. Restitution is mandatory under this Article. In addition to any other amount of loss identified, the court shall order restitution including the greater of 1) the gross income or value to the defendant of the victim's labor or services or 2) the value of the victim's labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) and [corresponding state statutes if any].

(B) TRAFFICKING VICTIM PROTECTION

(1) ASSESSMENT OF VICTIM PROTECTION NEEDS

(A) The Attorney General, in consultation with the [Department of Health and Social Services] shall, no later than one year from the effective date of this statute, issue a report outlining how existing victim/witness laws and regulations respond to the needs of trafficking victims, as defined in XXX.01(8) of the Criminal Code, and suggesting areas of improvement and modification.

(B) The [Department of Health and Social Services], in consultation with the Attorney General, shall, no later than one year from the effective date of this statute, issue a report outlining how existing social service programs respond or fail to respond to the needs of trafficking victims, as defined in XXX.01(8) of the Criminal Code, and the interplay of such existing programs with federally-funded victim service programs, and suggesting areas of improvement and modification.¹⁴⁶

¹⁴⁶ For a model state statute that builds upon and amplifies the Department of Justice's model statute, see Global Rights, *State Model Law on Protection for Victims of Human Trafficking* (2005), available at <http://www.legislationline.org/download/action/download/id/1264/file/5b6fb5af473eb70407d29b957330.pdf>.

[Such inquiry shall include, but not be limited to, the ability of state programs and licensing bodies to recognize federal T non-immigrant status for the purposes of benefits, programs, and licenses.]