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ARTICLE

THROUGH THE LOOKING GLASS: FINDING AND FREEING MODERN-DAY SLAVES AT THE STATE LEVEL

Michelle Crawford Rickert[†]

I. INTRODUCTION

In Haiti, slavery is a way of life for many children. Some young boys are forced to sell unprotected sex for as little as \$1.75, and because having sex with a virgin is thought to cure AIDS, the cost of sex with a “pure” child can be as much as \$5.00.¹ Children as young as four years old are sold into slavery as *restaveks* or “stay withs.”² The Haitian government estimates that there are about 300,000 *restavek* children in Haiti.³ These children are forced to toil doing domestic or commercial tasks from dawn to dusk; they are whipped or burned if they do not perform well.⁴ When buying the child, one can specify if they want a boy who can work in the fields or a girl who will be used for baking, and, of course, one can specify that he or she would like a child who was *la-pou-sa-a* or “there-for-that,” which means they also would like to use the child for sex in addition to the daily chores.⁵ As one abolitionist explained, the *restavek* children are everywhere, and, if one looks carefully, they are easy to spot: they will be much shorter and will weigh less than children their own age due to the lack of nutrition; they will

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1. E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY 4 (2008).

2. SKINNER, *supra* note 1, at 6.

3. Tim Padgett, *Of Haitian Bondage*, TIME, May 4, 2001, at 50.

4. The stories of abuse include one young boy who was covered in burns because the Miami couple for whom he was a *restavek* would burn him whenever he did not iron properly. Padgett, *supra* note 3. Additionally, in the Haitian market, leather whips are sold for whipping children—the Haitians have a saying that “it is the whip which makes the little guy walk faster.” SKINNER, *supra* note 1, at 5.

5. SKINNER, *supra* note 1, at 7-9.

be walking barefoot or wearing ill-fitting shoes and clothes; and these children will not look you in the eyes.⁶ The parents of these children are typically from the poorest villages in Haiti, and the recruiters prey on the parents' hope that their child will have a better life. Sometimes the parents are compensated for giving their children to the slave traders, but in many instances, the parents give their children freely because they are promised that their children will be given an opportunity for education—of course, the promise is false.⁷

On September 28, 1999, a twelve-year-old Haitian girl was rescued from her life as a *restavek*.⁸ Since she was nine years old, she had been forced to spend her days cleaning a spacious home, and was fed only garbage.⁹ At night, as she slept on a mattress in the garage with feces and rotting food next to it, the girl was repeatedly raped by her master's twenty-year-old son.¹⁰ However, this young slave was not rescued from Haiti but from the suburban Miami home of Willy and Marie Pompee.¹¹ Today, slavery and abuses do not just occur only in poverty-stricken countries around the world, but also in communities throughout the United States.¹²

In the case against the Pompees, the prosecutors faced many challenges securing convictions against them, because in 1999 there were no human trafficking statutes enacted, so prosecutors had the arduous task of building a case utilizing only the existing involuntary servitude and rape statutes.¹³

6. *Id.* at 5-6.

7. *Id.* at 8. One young Haitian girl, Ania Derice,

recalls how her parents in rural central Haiti, who couldn't afford to feed and clothe her, sent her to a house in Port-au-Prince to be a *restavek*. When Ania was twelve years old, after six years of labor that included emptying bedpans and making six half-hour treks a day to gather water in a 5-gallon container, she was allowed to visit her parents for a week. She told them she wanted to return home for good. "But my mother told me that no matter how bad my life was in Port-au-Prince, it would be even worse there," says Ania. "She made me go back." Ania hasn't seen her family since.

Padgett, *supra* note 3.

8. SKINNER, *supra* note 1, at 8; Padgett, *supra* note 3.

9. SKINNER, *supra* note 1, at 9; Natalie P. McNeal, *Couple Accused of Enslaving Girl*, MIAMI HERALD, Mar. 24, 2004, at B1 (reporting on the grand jury indictment of the couple).

10. SKINNER, *supra* note 1, at 8-9, 275.

11. McNeal, *supra* note 9; Padgett, *supra* note 3.

12. Padgett exposes that the problem of Haitian immigrants to the United States continuing the practice of utilizing *restaveks* is growing. Padgett, as the director of social services for Miami's Little Haiti, exclaimed, "It's much more widespread here than any of us wants to admit." Padgett, *supra* note 3.

13. SKINNER, *supra* note 1, at 274-75. It took almost 5 years before the grand jury indicted the couple. See McNeal, *supra* note 9.

Arrest warrants took so long to be issued that the Pompees fled to Haiti before they could be taken into custody.

In November of 2009, Antoinette Nicole Davis reported her beautiful five-year-old, Shaniya Davis, missing. This story hit the national headlines overnight, and in a tearful press conference her father (who had raised the child until one month earlier when he allowed Shaniya to live with her mom) pleaded for her safe return.¹⁴ Shaniya was then spotted on a hotel's surveillance footage being carried by Mario Andrette McNeill to the elevator in the hotel.¹⁵ It was later determined that Shaniya's mother filed a false police report, and that she had actually given the little girl to Mario for the purpose of prostitution. Later, the girl's mother was charged with "knowingly provid[ing] Shaniya Davis with the intent that she be held in sexual servitude" for giving Shaniya to Mario.¹⁶ Shaniya's body was found six days later, and it was revealed that she had been assaulted.¹⁷ North Carolina is one of the states that has heeded the Department of Justice's urging and has enacted a comprehensive human trafficking statute at the state level. Therefore, since the Fayetteville Police Department had a powerful human trafficking statute in its arsenal of potential charges, the officers were able to charge the mother in the case with a crime that met the severity of the act that she committed when she gave her five-year-old daughter to a sex trafficker.¹⁸

14. Associated Press, *Authorities Acting on Tip Search for Missing Girl: Law Enforcement Officials Acting on Tip Search Area for Missing North Carolina Girl*, Nov. 15, 2009, available at <http://abcnews.go.com/US/wirestory?id=9087268&page=1> (last visited Feb. 8, 2010).

15. Fayetteville Police Department, Press Releases, Nov. 12, 2009, <http://police.ci.fayetteville.nc.us/pressreleases.aspx?do=display&id=11122009101258> (last visited Feb. 8, 2010).

16. Associated Press, *supra* note 14. According to the Fayetteville Police Department's Press Release, Shaniya's mother was charged with, "Human Trafficking, Felony Child Abuse—Prostitution, Filing a False Police Report, and Resist, Delay, or Obstruct." Fayetteville Police Department, Press Release, Mother Arrested in Missing Child Case (Nov. 14, 2009), <http://police.ci.fayetteville.nc.us/pressreleases.aspx?do=display&id=11152009111543> (last visited Feb. 8, 2010).

17. Fayetteville Police Department, Press Release, Additional Charges Filed in Shaniya Davis Case (Nov. 19, 2009), <http://police.ci.fayetteville.nc.us/pressreleases.aspx?do=display&id=11202009111955> (last visited Feb. 8, 2010).

18. The officers' authority was based on the following statute:

Human trafficking. (a) A person commits the offense of human trafficking when that person knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude. (b) A person who violates this section is guilty of a Class F felony if the victim of the offense is an adult. A

The video of the young girl with her curly hair surrounding her innocent angelic face being carried by a sex trafficker will eventually be forgotten by the public, but her story and death can serve as a catalyst for states that do not have adequate human trafficking laws. States must ensure that those who sell or give their children into human bondage will be met with the appropriate severity for the crime.

Ben Skinner, a leading abolitionist, stated that whenever he went to a new country where he knew that slavery existed, his greatest obstacle was to find anyone who was enslaved.¹⁹ However, the slaves were hidden in the open; he had to go “through the looking glass” to realize the slaves were all around him.²⁰

In the United States, the situation is no different. It is because of this secrecy that slaves continue to toil in the United States, and few even realize that they exist here. Kevin Bales, founder of Free the Slaves, puts it aptly: “Every day our newspapers carry stories of human trafficking, yet we remain oblivious. Through our ignorance and worse yet, our lack of interest, we enable the slavery. Unless we heed the wake-up call, slavery will continue to spread.”²¹ State legislators and local law enforcement need to go through the looking glass in their state and realize that America is not immune to this wretched abuse of human dignity.

Part II of this Article will demonstrate the ongoing atrocities of slavery and human trafficking that still exist today. Part II will further discuss the forms that slavery takes here in the United States and how the federal government has taken up the issue of trying to end it within the border of the United States and throughout the world. Part III will explain why the federal government alone cannot eradicate slavery even within the border of the United States, and it will also explain why the states are absolutely essential to waging this war. Most states have taken some steps toward recognizing the problem of human trafficking and modern-day slavery, and Part IV will discuss these states, specifically focusing on some of the more interesting state level provisions. Part IV will also dissect the five current model state anti-trafficking laws proffered to the states by the federal government and NGOs to assist the states in this process. Finally, Part V will focus on how Virginia can utilize this knowledge to create an

person who violates this section is guilty of a Class C felony if the victim of the offense is a minor.

N.C. GEN. STAT. § 14-43.11 (2007).

19. See SKINNER, *supra* note 1, at xvii.

20. *Id.* at xviii.

21. KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 16 (2009).

atmosphere of abolition within its borders, so that it can finally end the treachery of modern-day slavery and human trafficking.

II. BUT I THOUGHT SLAVERY WAS ABOLISHED

Although legal slavery was abolished in the 1800s, since its founding the United States has never had a day where it has been free of the evils of slavery.²² However, whereas once slavery was legal, open, and notorious, the current insidious form of modern-day slavery²³ is illegal; thus, those who participate in it keep it secret in the United States and around the world. Additionally, there is no longer merely one class who is subjected to slavery.²⁴ Traditionally, Americans have etched in their minds the image of families fresh off slave boats broken up and sold at auction to work harvesting cotton or as house servants on large southern plantations. Today, slaves can be of any race, class, nationality, or gender; the common thread is vulnerability.²⁵ Finally, slaves of times past were expensive investments;

22. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 53 (2008) (revealing how black men were convicted in the early 1900s for minor offenses and then subsequently sold to steel companies to provide slave labor for the steel and other industries); BALES & SOODALTER, *supra* note 21, at 7-12 (explaining the unbroken chain of bondage that has been found in the United States).

23. The term modern-day slavery is a compromise term used by the State Department to refer to the ongoing problem of slavery. SKINNER, *supra* note 1, at 107. The terms human trafficking and modern-day slavery are closely related, and some authors have explicitly stated that the terms are interchangeable. According to Free the Slaves:

Human trafficking is the modern day slave trade—the process of enslaving a person. It happens when someone is tricked or kidnapped or coerced, and then taken into slavery. If moving a person from one place to another does not result in slavery, then it is not human trafficking. The term “human trafficking” often has a specific legal definition based on the laws of countries or states or the conventions of international organizations, and those official definitions differ slightly from place to place. For example, under US law, anyone under 18 who is in prostitution is considered a trafficking victim.

Free the Slaves, *Frequently Asked Questions*, <http://www.freetheslaves.net/Page.aspx?pid=304> (last visited Feb. 8, 2010). It should be noted that under United States trafficking law, transport of the victim is not required; thus, with a few legal exceptions, such as the one noted above, the victims of trafficking would meet the definition of a modern-day slave proffered later in this Article. Therefore, for most of this Article the terms “trafficking victim” and “modern-day slave” can be used interchangeably.

24. *See generally* KEVIN BALES, *ENDING SLAVERY: HOW WE FREE TODAY’S SLAVES* (2007).

25. BALES & SOODALTER, *supra* note 21, at 6.

however, today's slaves are inexpensive, easily replaceable, and considered disposable commodities.²⁶

It is for these reasons that, for most people in the United States, slavery has not been recognizable, and victims of this crime continue to have their liberty and dignity stripped from them while the general public fails to recognize the problem. When a human trafficker subjects a person to the bondage and abuses of human trafficking, he perpetuates the same lie that underscored the transatlantic slave trade, namely that some human beings are inherently less human and thus worth less than others.²⁷ It is this lie that fuels the modern-day slavery that exists in the United States.

A. *Slavery Still Exists*

Congress has found that, "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."²⁸ It is illegal to own slaves in almost every country in the world;²⁹ however, this does not stop the unscrupulous predator from taking control of someone's life and compelling others, through violence or coercion, to work for no compensation. Congress, when enacting the Trafficking Victims and Protection Act, reiterated the following founding principles:

One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and

26. KEVIN BALES, *DISPOSABLE PEOPLE* (1999). In 1850 an average slave would cost the equivalent of \$40,000 (in terms of modern money), and modern slaves can be bought for a couple hundred dollars. BALES & SOODALTER, *supra* note 21, at 6. In E. Benjamin Skinner's book *A Crime So Monstrous*, he explains how he was able to negotiate for the purchase of a small child in Haiti to serve as a *restavek* ("stay with") slave for about \$50. SKINNER, *supra* note 1, at 9-10.

27. Ambassador Mark P. Lagon eloquently makes this point in his letter to the reader of the Department of State's annual Trafficking in Persons (TIP) Report. DEPARTMENT OF STATE, *TRAFFICKING IN PERSONS REPORT* (2008), at 42, available at <http://www.state.gov/documents/organization/105655.pdf> (last visited Feb. 8, 2010) [hereinafter 2008 TIP REPORT]. Per the TVPA, the Department of State is required to submit a TIP Report each year to evaluate progress of countries worldwide, and to raise awareness of the issues relating to human trafficking. *Id.* at 5.

28. 22 U.S.C. § 7101(b)(1) (2006 & Supp. 2008).

29. Chattel slavery can still be found in Sudan and Mauritania. Although slavery has been made illegal in Mauritania more than once, it continues to thrive. For a fuller discussion of some of the problems in these countries, see generally BALES, *supra* note 26. See also KEVIN BALES, *UNDERSTANDING GLOBAL SLAVERY: A READER* 5 (2005).

that they are endowed by their Creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.³⁰

In the modern world, many use the term *slave*, or *slave-like*, to mean something that is morally reprehensible or unjust, e.g., “My boss works me like a slave,” or “Her boss created slave-like conditions for the workers.” Thus, it is important to define the term slavery as a condition where the slaveholder exercises complete control over the slave based on fraud, violence, or coercion; the slave does not receive any payment for his or her work beyond subsistence; and the slave is exploited for the slaveholder’s economic gain.³¹

This working definition of slavery is helpful in distinguishing the types of human rights abuses that occur when dealing with modern-day slavery. Modern-day slavery refers not merely to cases where someone is paying a wage that seems too low, or when a child is working in a factory. While sometimes there are abuses in these situations, there are laws in the United States that deal with these issues. Modern-day slavery occurs only where someone is under the complete power of the trafficker and, despite not receiving any benefit (beyond perhaps food and shelter, which is frequently added to the debt incurred), the victim cannot leave the control of the trafficker. This definition of a slave would be given more contours in the United States upon passage of the Trafficking Victims Protection Act (the “TVPA”).³²

The use of the terms human trafficking and modern-day slavery also causes confusion. Some authors have claimed that the two terms are completely interchangeable; however, the term modern-day slave has the same definition no matter where one is in the world. On the other hand, the term human trafficking and what it entails depends on one’s location (the

30. 22 U.S.C. § 7101 (b)(22).

31. KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY: A READER 9 (2005); CREATING THE BETTER HOUR: LESSONS FROM WILLIAM WILBERFORCE xvii (Chuck Stetson ed., 2007) (summing up Bales’ three-prong test as “compelled to work, through force or fraud, for no pay beyond subsistence,” which Stetson also utilized in order to determine whether a person was a slave).

32. See 22 U.S.C. § 7101(a); see also *infra* Part II.C.

United Nations' definition is slightly different from the United States' definition), and even depends on which state within the United States in which one is located, as some states do not require a threat of force or coercion in order to prove a victim has been trafficked in sex trafficking cases.³³ Additionally, for some trafficking acts, the victim must be moved from one location to another in order to trigger the protection of the act (which would make trafficking more akin to the trading portion of slavery);³⁴ however, some, like the United States Federal Trafficking Act, do not require any movement of the victim, so these acts are more aimed at punishing the actual bondage of the victim of slavery.³⁵

B. The United Nations Recognized the Problem

There are examples of human trafficking and modern-day slavery around the world, from forced labor and debt bondage in India and Africa to sex trafficking in Thailand, Cambodia, and Moldova.³⁶ The United Nations has recognized this as a grave human rights, government corruption, and criminal justice problem, and with the assistance of the United States, it has acted to help solve the problem. In 2000, with the United States leading the way, the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* became part of the Convention Against Transnational Organized Crime.³⁷ According to the United Nations, trafficking in persons is

33. Compare CAL. PENAL CODE §§ 236.1–237 (West 2006), and N.Y. PENAL LAW § 230.34 (McKinney 2007) (sex trafficking), with 22 U.S.C. § 7101, and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. III, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Protocol].

34. For a more detailed exposition of the differences between slavery and trafficking, see Michelle Crawford Rickert, *Wilberforce's Work Is Not Done: Ending Human Trafficking and Modern Day Slavery*, OXFORD ROUND TABLE FORUM ON PUBLIC POLICY J. (Summer 2009), available at <http://forumonpublicpolicy.com/summer09/papers09summer.html>.

35. 22 U.S.C. § 7101.

36. BALES, *supra* note 24 (discussing slavery involved in the production of chocolate in Africa and of Pig Iron in Brazil); DAVID BATSTONE, NOT FOR SALE: THE RETURN OF THE GLOBAL SLAVE TRADE—AND HOW WE CAN FIGHT IT (2007) (discussing sex slavery in Cambodia, Thailand, and India, as well as forced labor in India's granite quarries and child soldiers in Uganda); SIDDHARTH KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY (2009) (discussing sex trafficking in Moldova, India, Nepal, Italy, and Western Europe).

37. Protocol, *supra* note 33, 2237 U.N.T.S. at 344.

recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.³⁸

C. The United States Acts To Rectify the Problem

Former President George W. Bush, in his speech before the United Nations, proclaimed:

There's another humanitarian crisis spreading, yet hidden from view. Each year, an estimated 800,000 to 900,000 human beings are bought, sold or forced across the world's borders. Among them are hundreds of thousands of teenage girls, and others as young as five, who fall victim to the sex trade. This commerce in human life generates billions of dollars each year—much of which is used to finance organized crime.

There's a special evil in the abuse and exploitation of the most innocent and vulnerable. The victims of sex trade see little of life before they see the very worst of life—an underground of brutality and lonely fear. Those who create these victims and profit from their suffering must be severely punished. Those who patronize this industry debase themselves and deepen the misery of others. And governments that tolerate this trade are tolerating a form of slavery.

This problem has appeared in my own country, and we are working to stop it.³⁹

Human trafficking is one of the most significant human rights and criminal justice challenges of this century. Ambassador Lagon, Director of the Office To Monitor and Combat Trafficking in Persons,⁴⁰ made the

38. *Id.*

39. Statement by His Excellency Mr. George W. Bush, President of the United States of America: Address to the United Nations General Assembly Sept. 23, 2003, *available at* <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm> (last visited Jan. 8, 2010).

40. The Office To Monitor and Combat Trafficking in Persons was created as part of the United States Department of State to focus solely on issues related to trafficking of persons domestically and internationally.

following statements when presenting the findings in the 2008 annual report,

In virtually every country around the world, including the United States, men, women and children are held in domestic servitude. They're exploited for commercial sex and coerced to work in factories and in sweatshops. In some, children are forcibly recruited as soldiers. These are forms of human trafficking, but more aptly put, these are forms of modern-day slavery. Estimates of the number of victims worldwide vary widely. But according to the U.S. Government, approximately 800,000 people are trafficked across international borders each year. Eighty percent of them are female. Some one-half of them are minors. And these figures don't include the millions more who are trafficked for the purposes of labor and sexual exploitation within the national borders of countries.⁴¹

Although human trafficking and slavery has always existed, in 1990 it began to flourish with renewed vigor after the Soviet Union crumbled and the borders in Europe became more porous. Routes used for trafficking in human beings mimic those used for narcotics and illegal weapons, but, unlike narcotics and weapons, a human being can be sold over and over again, creating wealth for the slave holder. Currently, it is estimated that there are between 14,500 and 17,000 victims trafficked into the United States each year.⁴²

The Trafficking Victims Protection Act (TVPA) was enacted in 2000 to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."⁴³ The TVPA was reauthorized and expanded respectively by the Trafficking

41. Ambassador Mark Lagon, Director, Office To Monitor and Combat Trafficking in Persons, U.S. Dept. of State, The 2008 Trafficking in Persons Report Speech (June 4, 2008), available at <http://2002-2009-fpc.state.gov/105548.htm>.

42. As John Miller put it, slaves do not line up to be counted. It is very difficult to ascertain the exact number of victims. In 1999, the Central Intelligence Agency estimated that 50,000 trafficking victims entered the U.S. each year, but that estimate has been decreased to current estimates of about 17,000. ANTHONY M. DEStEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED* xvii (2008).

43. 22 U.S.C. § 7101(a) (2006 & Supp. 2008). In the public laws, the Act is entitled Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1, 114 Stat. 1464 (2000). Therefore, at times this Act's abbreviation is VTPVA.

Victims Protection Reauthorization Act of 2003;⁴⁴ Trafficking Victims Protection Reauthorization Act of 2005;⁴⁵ and William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.⁴⁶ Severe human trafficking is defined by the TVPA 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 an 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 coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.⁴⁷

The TVPA focuses on a comprehensive approach to eradicating human trafficking through prevention, prosecution of traffickers, and protection of its victims (hereinafter referred to as the three P's approach).⁴⁸ The three P's approach is a victim-centered approach that has been able to strengthen and target the federal government's responses to the crime of human trafficking.⁴⁹ Human trafficking and modern-day slavery are not just contemptible abuses of human rights; they are also crimes. Therefore, the TVPA has taken an appropriate criminal justice approach in order to end the vestiges of slavery that still linger and are imported anew each day into the United States. The TVPA endeavors to protect vulnerable persons from becoming victims of trafficking, or from further victimization after being freed from the bondage of slavery, by providing education, training, shelters, and reintegration programs.⁵⁰ Federal protection for victims of

44. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 1, 117 Stat. 2875 (2003).

45. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 1(a), 119 Stat. 3558 (2006).

46. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 1(a), 122 Stat. 5044 (2008).

47. 22 U.S.C. § 7102(8)(A)–(B).

48. *Id.* § 7104 (providing guidelines for preventing human trafficking in the United States and internationally); *id.* § 7105 (providing for protection and assistance for victims of trafficking).

49. 2008 TIP REPORT, *supra* note 27, at 5 (explaining that the federal government is focusing not only on the three P's but also on the three R's—rescue, rehabilitation, and reintegration); *see also* DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2009), *available at* <http://www.state.gov/documents/organization/123357.pdf> [hereinafter 2009 TIP REPORT].

50. 22 U.S.C. § 7105(a)(1)(C)–(E).

severe human trafficking⁵¹ in the United States includes availability of the T-Visa (a non-immigrant status visa which protects the victims and sometimes their families from being removed from the United States), and federal victim services such as health benefits and witness protection (if needed).⁵² The law also mandates forfeiture of trafficking assets in some circumstances, and provides for restitution for victims.

1. The TVPA Is Holistic in Its Approach

The TVPA and its subsequent reauthorizations have focused on all the different ways that trafficked individuals can be held in slavery in the United States. Due to the great economic gain that traffickers can achieve by selling humans, they have discovered many different ways to utilize their commodity. The federal law is flexible and broad enough to cover the majority of the ways that traffickers currently use their victims. There are multiple forms of modern-day slavery that can be found in the United States today, including: debt bondage, forced labor, forced prostitution, and child prostitution.⁵³

One form of modern-day slavery is debt bondage. According to the TVPA, debt bondage is defined as:

the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the

51. *Id.* § 7102(8)(A)–(B).

52. *Id.* § 7105(b)(1)(A)–(B).

53. *See* Rickert, *supra* note 34 (studying each of these forms and providing in-depth global examples of each). Another form of modern-day slavery that is not listed in the text is prison labor. This is a form of slavery in systems where labor is forced and there is lacking a proper legal system based on rule of law principles and due process rights. *See id.* at 19-20. For example, in the Chinese prison system, the slogan of choice is “Laogai,” which means “reform through labor.” There have been many claims that this system abuses prisoners who have been denied due process, because technically such prisoners are kept pursuant to administrative detention, which in the Chinese system can be used without the legal constraints of a full arrest and trial. *Id.* Then these prisoners are kept with little food and poor shelter, and they are forced to produce goods to sell on the open market. *See generally* HONGDA HARRY WU, LAOGAI: THE CHINESE GULAG (1992). These goods have been banned from importation to the United States; however, there have been claims that the slave prisons continue and that some of the products are incorporated into larger products and then exported.

liquidation of the debt or the length and nature of those services are not respectively limited and defined.⁵⁴

In short, debt bondage occurs when a trafficker utilizes a loan to hold the trafficked victim captive until the debt is paid off; however, the trafficker will utilize false accounting records and charge high interest rates on the debt. In addition, the meager amounts of food and the living expenses for the captivity are added to the debt. Thus, the victim is incapable of ever paying off the debt.

Debt bondage happens around the world, especially in India, where small loans sometimes bond entire families.⁵⁵ In the United States, debt bondage occurs when someone wants to enter the United States to work, and that entry (whether legal or smuggled) is financed by someone else. Typically, this happens with migrant workers, as well as with other specialized, skilled workers. For example, in Vietnamese nail salons, as recounted by one nail technician who has grown up in the nail business, if a person wants to come over to the United States, she will work with a family member in the United States who will finance the move. Once in the United States, she will live with the family member and pay about three-fourths of her paycheck as payment of the debt. The nail technician recounted this story to explain how Vietnamese nail salon owners help new immigrants out; however, one can see how this situation could easily be abused, and that there is a slippery slope between smuggling and trafficking.⁵⁶

In Pennsylvania, Lynda Dieu Phan recruited A.V. from Vietnam and held her in debt bondage without compensation for over three years.⁵⁷ Phan preyed upon the fact that A.V. could not read or write English and coerced

54. 22 U.S.C. § 7102(4).

55. One slaveholder held a loan for a group of relatives. He claimed that they would pay \$4.50 for every thousand bricks, but after six months of laboring one young woman asked how much her debt was and was shocked to find that her debt had doubled due to interest and money that he charged for their meager food and shelter. They were locked in and no one was allowed to leave except to run errands for the slaveholder; those who ran errands were told that if they did not come back, the remaining families would pay. After months of labor, the sexual abuse began. After a particularly horrific incident where the women of the family were raped in front of their husbands, they planned an escape. The slaveholder then tracked down three of their family members and tortured them to try to induce his slaves to return. The slaveholder was eventually arrested after a raid by International Justice Mission in coordination with local authorities. The slaveholder was released on bail. *BATSTONE*, *supra* note 36, at 75-83, 90-95, 97-100, 102, 105-09.

56. Interview with Anonymous Nail Technician, in Lynchburg, Va. (Jan. 8, 2010).

57. *United States v. Phan*, 628 F. Supp. 2d 562 (M.D. Pa. 2009) (deciding a motion concerning the validity of seizing certain documents while searching the house pursuant to a search warrant).

her into signing over all of her bank statements and checks.⁵⁸ A.V. worked six days a week for eleven hours a day and five hours on Sundays. She was not paid anything except some of the tips that were given to her by customers. Furthermore, she was forced to cook and clean at Phan's home where she lived. Phan brought over another young woman from Vietnam, and the two girls shared a room, sleeping on the floor.⁵⁹ After three years of A.V. working without pay, she had fulfilled her debt. However, Phan did not tell A.V. that she had fulfilled her debt; A.V. did not complain until 2007—seven years later.⁶⁰

A second form of modern-day slavery that occurs in the United States is forced labor, which occurs when the trafficker forces the trafficked victim to work for him for no pay.⁶¹ One form of forced labor is involuntary servitude,⁶² which includes where labor is induced by means of “any

58. *Id.* at 566.

59. *Id.*

60. *Id.*

61. A trafficker will be guilty of forced labor if—

(a) [He/She] knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint

(b) [He/She] knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means

18 U.S.C. § 1589(a)–(b) (2006 & Supp. 2008).

62. According to Congressional findings for TVPA,

Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.

22 U.S.C. § 7101(b)(13) (2006 & Supp. 2008) (citation omitted). Thus, the TVPA supplemented the Court's view and allowed for punishment of traffickers that use fraud or coercion to hold their victims.

scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal process.”⁶³ A victim can find himself in this predicament in many ways including being sold by a family member, being lured to the situation, being abducted, or willingly entering into the situation. The victims are promised that they will be able to make a living in the destination country,⁶⁴ but when the victims get to the destination country, they are held captive and forced to sleep on the floor, in the basement, or even outside.⁶⁵ Slaves are often fed only scraps from the family’s dinner, and many slaves have recounted eating out of the garbage to try to get enough to eat.⁶⁶

There are many different jobs in which the forced labor victims can be coerced to engage, ranging from domestic to agricultural work. According to Secretary of State Hillary Clinton in the 2009 Trafficking in Persons Report (2009 TIP Report):

As the ongoing financial crisis takes an increasing toll on many of the world’s migrants—who often risk everything for the slim hope of a better future for their families—too often they are ensnared by traffickers who exploit their desperation. We recognize their immense suffering, and we commit to aiding their rescue and recovery.⁶⁷

Those who are victims of forced labor are notoriously difficult to find, because they appear to work as everyone else, and because a slave’s employer may not be the slave’s owner (as in cases of sub-contracting).⁶⁸ Also, apprehension of all those involved in the criminal enterprise of trafficking is difficult, since one group may have sold an individual to another group to utilize for forced labor, so that when law enforcement

63. *Id.* § 7102(5)(A)–(B).

64. The origination country is the country from which the victim of human trafficking comes; the transient country is any country that the victim will traverse while being trafficked; and the destination country is the country to which the trafficking victim will be transported.

65. *See generally* ENSLAVED: TRUE STORIES OF MODERN DAY SLAVERY (Jesse Sage & Liora Kasten eds., 2008) (depicting several narratives by modern-day slaves).

66. *See generally id.* Hunger is a recurring theme in slave narratives. *See generally id.*

67. 2009 TIP REPORT, *supra* note 49, at 1, available at <http://www.state.gov/documents/organization/123357.pdf>.

68. *See id.* at 18.

finds the victims, they find only the secondary trafficker, and not the primary or initial trafficker.⁶⁹

The domestic servant cleans the house and/or takes care of the children in the home.⁷⁰ Domestic servants are normally forced to work long hours, and may sometimes be beaten or raped.⁷¹ Many domestic servants are members of cultures where keeping domestic slaves is common, such as the Haitian practice of keeping *restaveks*.⁷² For example, in *United States v. Paulin*, a fourteen-year-old Haitian girl was enslaved as a domestic servant for many years.⁷³

According to one expert, there are no large-scale domestic servant rings; instead, traffickers work small circles, selling one or two domestic servants at a time.⁷⁴ Frequently, servants enter the United States legally, and abuse occurs only after they are placed in the home.⁷⁵ Sometimes, the domestic servant is a child who has been sold or given to a family member or friend of the family who has immigrated to the United States with the promise that the child will receive education in the United States; nevertheless, once brought to the United States, the child is kept as a domestic slave in the home. For example, in 2008, a medical doctor and her husband were found guilty of human trafficking after forcing a fourteen-year-old Nigerian girl to act as a domestic servant in their Maryland home.⁷⁶ The young Nigerian girl was beaten with a shoe, a wooden cane, and other objects, and was threatened that if she tried to leave, she would be arrested, because she did not have proper “papers.”⁷⁷ She was also sexually violated by the husband,

69. *See id.*

70. *Id.*

71. BALES & SOODALTER, *supra* note 21, at 18-22, 39-40; JOYCE HART, HUMAN TRAFFICKING IN THE NEWS 9-10 (2009).

72. SKINNER, *supra* note 1, at 6.

73. *United States v. Paulin*, 329 F. App'x 232, No. 08-13124, 2009 U.S. App. LEXIS 11155 (11th Cir. May 27, 2009) (ruling that prosecuting defendant Paulin did not violate the prohibition on ex post facto laws, because she held a 14-year-old Haitian girl for three years after the TVPA was passed).

74. BALES & SOODALTER, *supra* note 21, at 18.

75. *Id.*

76. Department of Justice, Former Montgomery County Man Sentenced to Over 8 Years in Prison for Holding a Teenage in Involuntary Servitude: Brought a 14 Year Old Nigerian Girl to the U.S., Held Her Against Her Will and Sexually Abused Her (Oct. 7, 2008), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/FormerMontgomeryCountyManSentencedtoover8YearsforHoldingaTeenageGirlInInvoluntaryServitude.html. The doctor appealed her conviction for involuntary servitude and trafficking; however, the Fourth Circuit upheld the conviction and sentence of the District Court. *United States v. Udeozor*, 515 F.3d 260, 263 (4th Cir. 2008).

77. *Udeozor*, 515 F.3d at 263-64.

who threatened to tell her parents back in Nigeria that she became a prostitute if she ever told anyone of the sexual abuse.⁷⁸ In *United States v. Calimlim*, also from 2008, a Wisconsin couple was convicted of holding a Filipino woman as a domestic servant in their home for almost twenty years.⁷⁹ The couple was originally sentenced to four years in prison and ordered to pay \$960,000 in restitution.⁸⁰

In Kevin Bales' and Ron Soodalter's book, *The Slave Next Door: Human Trafficking and Slavery in America Today*, the authors explain the troubling prevalence of diplomats using domestic slaves to run their houses.⁸¹ In one example, Lakshmi traveled to the United States after being promised a salary of \$2,000 per month to care for a Kuwaiti diplomat's new baby.⁸² However, she was forced to work fifteen hours a day for no pay, and she was beaten and raped.⁸³ Eventually she fled, and, after some coaxing by a federal prosecutor, she agreed to testify against her former abuser.⁸⁴ However, the prosecutor declined to prosecute, citing diplomatic immunity.⁸⁵

78. *Id.* at 264. This is a common threat used against young foreign women, because in many villages, if a woman engages in prostitution—even if it is forced—the woman is considered stained and will be shunned.

79. *United States v. Calimlim*, 538 F.3d 706, 708-09 (7th Cir. 2008); *see also* ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2008, at 83 (June 2009), <http://www.justice.gov/ag/annualreports/tr2008/agreporhumantrafficking2008.pdf> [hereinafter 2008 ATTORNEY GENERAL'S ANNUAL REPORT].

80. The government argued in its brief before the Seventh Circuit that the trial judge erred in not enhancing the sentencing of the defendants because the victim was a vulnerable victim; furthermore, it also argued that the enhancement did not require the harboring of an illegal alien because even lawful permanent residents can be considered vulnerable. Reply Brief for Cross-Appellant at 3-4, *United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008) (2008 Nos. 07-1112, 07-1113, & 07-1281), available at http://www.justice.gov/crt/briefs/calimlim_reply.pdf. The Seventh Circuit agreed, and vacated the sentence and remanded the case for re-sentencing. *Calimlim*, 538 F.3d at 718.

81. BALES & SOODALTER, *supra* note 21. A diplomat from Mauritania brought a bonded servant to utilize in domestic servitude. *See* 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, 666 (2007) (discussing a New York case involving a child trafficked into the United States and working as a domestic servant for diplomats from Mauritania).

82. BALES & SOODALTER, *supra* note 21, at 21.

83. *Id.*

84. *Id.*

85. *Id.* at 21-22.

The second form of forced labor, in addition to the domestic servant, is that of the agricultural worker. These workers are typically forced to pick fruits and vegetables and to work the field to prepare it for planting.⁸⁶ Some of the trafficked individuals who work in the agriculture fields are migrant workers and are moved to different areas to harvest regional crops.⁸⁷ It is common for these workers to come to the United States voluntarily, upon the promise that they will be able to make a living doing this work and to send money they make back home to support their families.⁸⁸ However, once they arrive in the destination country, their travel documents are seized; they do not know the language; and they are forced to live in miserable conditions in trailers packed with many other migrant workers.⁸⁹ They are told that if they run away they will be jailed for being in a foreign country without papers, and they are threatened with violence against themselves and their families.⁹⁰

In Florida, this form of human trafficking has become readily apparent in the citrus and tomato growing industries.⁹¹ In 2004, a trafficker was sentenced on charges related to human trafficking for supplying undocumented Mexican agricultural workers to citrus growers in Florida and then threatening violence to prohibit their escape.⁹² The trafficker had forced the victims to work off their debts.⁹³ In a similar case, a trafficker paid his workers to make it appear that he was running a legitimate business; however, these workers were forced to sign the checks back over to the trafficker for payment of the “debt” without receiving any money.⁹⁴ It

86. *Id.* at 43-73 (describing the plight of the agricultural worker).

87. *Id.* It should be noted that not all migrant workers have been trafficked, or else they would be considered modern-day slaves. Migrant workers are sometimes exploited during the wage negotiations, but even though the agreed-upon wage may appear very low, it may not be exploitive. Each situation would need to be dealt with on a case-by-case basis to determine whether a worker was exploited. However, mere wage exploitation does not necessarily convert the status of a migrant worker to a trafficking victim.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 44-46, 62-65. *See generally* 2008 ATTORNEY GENERAL’S ANNUAL REPORT, *supra* note 79, at 84 (citing *United States v. Navarrete* (Florida), where five defendants pled guilty to forcing workers to participate in the agricultural industry through beating and threatening the workers).

92. Franklyn M. Casale, *United States House of Representatives Committee on Foreign Affairs: International Trafficking in Persons: Suggested Responses to a Scourge of Humankind*, 3 INTERCULTURAL HUM. RTS. L. REV. 343, 346 (2008).

93. *Id.*

94. *Id.* at 346 & n.13.

is apparent from these cases that there is a fine line between human smuggling and human trafficking.

The third form of forced labor is hard labor, including construction, landscaping, and mining.⁹⁵ In *United States v. Du Preez*, a successful businessman in Atlanta, Georgia, imported workers from South Africa to work long hours doing the heavy lifting that his upscale granite countertop business required.⁹⁶ Under the guise of a managerial visa, Du Preez falsified the visas for the victims and secured their entry into the United States.⁹⁷ In order to control the victims, the traffickers threatened to report the victims' illegal status and have them arrested.⁹⁸ The defendants plead guilty to conspiring to harbor aliens and were sentenced to terms of incarceration ranging from 24 to 108 months.⁹⁹ In addition, Johannes DuPreez and his wife Franciszka DuPreez were ordered to pay over \$500,000 in fines and restitution to the IRS.¹⁰⁰ Another defendant who plead guilty was sentenced to eight months' home confinement and fined \$2,000.¹⁰¹ Johannes DuPreez was facing up to fifteen years of incarceration after pleading guilty; however, he has since become a fugitive.¹⁰²

The fourth form of forced labor is when trafficked victims are used in the service industries: nail salons, hotels or restaurants, and the manufacturing of goods.¹⁰³ This is especially true with restaurants that focus on ethnic foods; however, even in these cases, many times the slaves are relegated to working in the "back of the house" cooking or doing dishes.¹⁰⁴ As noted

95. National Underground Railroad Freedom Center, *Slavery Today: Human Trafficking*, <http://www.freedomcenter.org/slavery-today/> (last visited July 10, 2009).

96. ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2006, at 51 (May 2007), <http://www.justice.gov/archive/ag/annualreports/tr2006/agreporthumantrafficking2006.pdf> [hereinafter 2006 ATTORNEY GENERAL'S ANNUAL REPORT] (documenting examples of the cases prosecuted by the federal government that were concluded in fiscal year 2006).

97. *Id.*; DEStEFANO, *supra* note 42, at 71-72.

98. 2006 ATTORNEY GENERAL'S ANNUAL REPORT, *supra* note 96, at 48; DEStEFANO, *supra* note 42, at 71-72.

99. 2006 ATTORNEY GENERAL'S ANNUAL REPORT, *supra* note 96, at 48, 51 (documenting examples of the cases prosecuted by the federal government that were concluded in Fiscal Year 2006).

100. *Id.*

101. *Id.*

102. DEStEFANO, *supra* note 42, at 72.

103. National Underground Railroad Freedom Center, *supra* note 95.

104. Shaun Boyd, *Restaurant Owners Accused of Human Trafficking* (May 13, 2008), <http://cbs4denver.com/crime/human.trafficking.Young.2.723436.html>; Andreas Ulrich, *Slaving over the Wok: Chinese Restaurants Accused of Human Trafficking*, Spiegel Online

above, these cases are sometimes very closely related to those of debt bondage, where an unwitting victim may volunteer for the initial smuggling or legal transport, but then once the victim arrives in the United States, wages are not paid to him or her because of the debt.¹⁰⁵ The differences between the “sweatshops” and those workplaces that utilize slave labor are subtle. According to Free the Slaves: “Sweatshop workers and migrant laborers are exploited by being paid very little, forced to work long hours and often abused at their workplace.”¹⁰⁶ Furthermore, “Slaves are subjected to all these conditions, but additionally they have lost their free will—they cannot walk away.”¹⁰⁷ Again, “Most slaves are paid nothing at all, and the physical and psychological violence used against them is so complete that they cannot escape their slavery.”¹⁰⁸

A fifth way that traffickers force victims to produce labor for commercial benefit is to utilize the trafficking victim to peddle, beg, or participate in other unregulated businesses. The quintessential peddling cases were the “Deaf Mexican” cases that occurred when traffickers in New York City coerced deaf people from Mexico to come to the city for education, and once they were there, the vulnerable, hearing-impaired Mexicans were forced to peddle trinkets and beg on the streets of New York.¹⁰⁹ Currently, the traffickers have been exploiting young Chinese children, forcing them to sell trinkets and peddle on New York subways.¹¹⁰

Another example of an unregulated business is church choirs. Pastor Grimes recruited young boys from Zambia to sing in choirs in the United States, and he promised the parents of the boys that they would receive a U.S. education, and that they would be able to send money back to help support their families.¹¹¹ However, none of this materialized: the boys were forced to work long hours and were not paid; they endured difficult living conditions; and they were not provided with proper nutritious food (what they were given they had to cook themselves and it was deducted from their

International (Aug. 20, 2009), <http://www.spiegel.de/international/germany/0,1518,643945,00.html>.

105. 2009 TIP REPORT, *supra* note 49, at 17.

106. Free the Slaves, *supra* note 23.

107. *Id.* (defining modern-day slavery).

108. *Id.*

109. DEStEFANO, *supra* note 42, at 6-7; Kathleen K. Hogan, *Slavery in the 21st Century and in New York: What Has the State's Legislature Done?*, 71 ALB. L. REV. 647 (2008) (discussing sixty deaf Mexican victims who were forced to beg in New York City).

110. Interview with United States Homeland Security Agent (July 17, 2009).

111. BATSTONE, *supra* note 36, at 232-35, 254-57.

“pay”).¹¹² In essence, slaveholders are often savvy criminals and inventive businesspersons who will look for opportunities to exploit their new, cheap, human commodity to make a profit in many different businesses.¹¹³

The third form of modern-day slavery that is covered by the federal human trafficking statute is forced prostitution and child prostitution.¹¹⁴ Over the last several decades, the sex industry has expanded to include pornography, sex tourism, and other commercial sexual services.¹¹⁵ Young boys have become a growing market for sex traffickers,¹¹⁶ but the traffickers’ main focus remains on young girls.¹¹⁷ Traffickers target women and children

who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin. Traffickers lure women and girls into their networks through false promises of decent working conditions and relatively good salaries as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.¹¹⁸

112. *Id.*

113. Child soldiers also fit into this category, but because this form of slavery fortunately does not occur in the United States, it is beyond the scope of this Article. *See generally* BATSTONE, *supra* note 36.

114. 18 U.S.C. § 1591(a)(1)–(2) (2006 & Supp. 2008). There are several ways that a trafficker can be found guilty of sexual trafficking under this statute. First, if the trafficker uses force, threats of force, coercion, or fraud to secure the victim’s performance in commercial sex, the trafficker will be guilty of sexual trafficking. However, a trafficker can also be found guilty of sexual trafficking if he or she knowingly “benefits, financially or by receiving anything of value, from participation” in the victimization of another. Finally, if the victim is under eighteen years old, the trafficker need not use force, fraud, or coercion in order to be found guilty under this provision. *Id.*

115. 22 U.S.C. § 7101(b)(2) (2006 & Supp. 2008).

116. Sometimes male victims, like their female counterparts, are raped as part of the “breaking-in process” and as part of the abuses in a forced labor situation. The 2008 TIP Report recounts the horrors experienced by a thirty-two-year-old man who was trafficked from Mexico and then repeatedly raped and forced to work at a construction job. 2008 TIP REPORT, *supra* note 27, at 8-9.

117. Of the 600,000–800,000 trafficking victims worldwide, 80% are women and children. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 2, 119 Stat. 3558 (Jan. 10, 2006).

118. 22 U.S.C. § 7101(4). In one case, the Cadena family trafficker focused her attention on a poor neighborhood in Mexico known as Barrio El Pilar. The trafficker promised to

Another way victims are lured into trafficking is by one conspirator in the trafficking scheme convincing the victim that he loves her; this tactic is called the “lover boy” tactic. For example, in *United States v. Jimenez-Calderon*,¹¹⁹ a New Jersey woman recruited several impoverished young girls from Mexico into her sex trafficking ring by using young men to pose as boyfriends.¹²⁰ Some of these young girls were actually promised marriage.¹²¹ Once in the United States, they were forced to participate in prostitution, and all their earnings were withheld.¹²² Sexual trafficking victims are subjected to physical and psychological force, including threats against family members that reside in a victim’s origination country.¹²³ These victims are exposed to many forms of deadly diseases, including HIV and AIDS.¹²⁴ Additionally, some of the girls in the sex industry are forced to undergo abortions when they inevitably become pregnant.¹²⁵

2. Some Argue That Federal Legislation Needs Reform

Although most scholars agree that overall the federal legislation is very helpful in the fight against human trafficking, some would argue the need for reform in certain areas of the legislation, in order to more effectively combat modern-day slavery within the borders of the United States. Such reform is especially needed because current legislation does not deal with the underlying issues of smuggling versus trafficking, the visa system, and the significant gaps in the criminalization statute.

a. Smuggling v. Trafficking

The differences between human smuggling and human trafficking can sometimes be confusing. In short, smuggling involves a facilitator helping a

smuggle girls into the United States where they would be able to work in the restaurant business and earn a good living; instead they were ushered into the life of a prostitute where up to 30 men per day would each pay \$20 to rape them. DESTEFANO, *supra* note 42, at 1-4.

119. *United States v. Jimenez-Calderon*, 183 F. App’x 274 (3d Cir. 2006).

120. *Id.* at 276.

121. *Id.* at 279.

122. *Id.* The Third Circuit held that it was appropriate to utilize the vulnerable victim enhancement in this case. *Id.* at 279-81.

123. 22 U.S.C. § 7101(6)-(7).

124. *Id.* § 7101(11); *see also* Kara, *supra* note 81, at 661 (discussing how trafficking victims are subjected to psychological problems such as post-traumatic stress disorder and physical diseases).

125. HumanTrafficking.org, Houston, Texas Major Hub for Human Trafficking (Oct. 31, 2007), <http://www.humantrafficking.org/updates/807> (adapted from Susan Carroll, *Houston Major Hub for Human Trafficking: Large Ring Kept up to 120 Women in Virtual Slavery*, HOUSTON CHRONICLE, Oct. 28, 2007, at A1); *see also* DESTEFANO, *supra* note 42, at 3.

person across an international border; the smuggled person is complicit in the crime of smuggling, and once reaching the destination country, the smuggled person is free to leave the facilitator.¹²⁶ By contrast, human trafficking contains the element of force, fraud, or coercion; the trafficked person is not complicit but is rather a victim of a crime. The crime of trafficking does not require actual movement of the victim, and the victim is not free to leave the control of the trafficker.¹²⁷ Additionally, sometimes a situation will start out as smuggling and will turn into trafficking once the victim and the facilitator reach the destination country.¹²⁸ This is one of the problems with the federal legislation. Smuggled individuals are uniquely vulnerable both during the time they are smuggled and then after they reach the United States (or any destination country), due to their illegal status. Although one of the three P's is to protect the victims, the TVPA does not address how to protect this particularly vulnerable group once they are in the United States.¹²⁹

Additionally, sometimes it is difficult for prosecutors and law enforcement officers to comprehend that many of the slaves in the United States today started off as volunteers.¹³⁰ There are many lures that traffickers use in order to convince someone to volunteer to be smuggled into the United States. As mentioned above, the lures are many, including legitimate employment, the lover-boy tactic where a man will pretend to be the victim's boyfriend to get her out of the country, in addition to the promise of marriage and education.¹³¹ However, once the victim arrives in the United States, he or she is forced to work in places such as granite quarries, restaurants, brothels, agricultural farms, strip joints, or on the

126. 8 U.S.C. § 1324 (2006) (defining smuggling of persons); Jim Finckenauer & Min Liu, *State Law and Human Trafficking*, in MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING 3 (Dessi Dimitrova & Andrew Rachlin eds., 2007).

127. Finckenauer & Liu, *supra* note 126, at 3.

128. Amnesty International USA, *Trafficked Women and Girls: Questions and Answers*, <http://www.amnestyusa.org/violence-against-women/end-human-trafficking/trafficking-faq/page.do?id=1108432>.

129. See Jennifer Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts To Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3017-39 (2006) (explaining the reasons why the TVPA to date has had limited success). See generally SHELDON X. ZHANG, *SMUGGLING AND TRAFFICKING IN HUMAN BEINGS: ALL ROADS LEAD TO AMERICA* (2007).

130. BALES & SOODALTER, *supra* note 21, at 13.

131. See *supra* Part II.C.1. For a detailed explanation of each with examples, see Rickert, *supra* note 34.

street begging or trinket-selling, and victims do not make any profit from their labor.¹³²

b. Problem of Visas

Some victims come to the United States legally under a work visa provided by the trafficker. Before departing their own country, they are promised that they will make a good living and be able to send money back home to their families.¹³³ However, once they arrive, the trafficker will enslave them, force them to work, and not let them leave. The victims are bound to their employer, who holds all of the power with little to no government oversight, and the terms of their visas are violated if they seek other employment.¹³⁴ The traffickers use this to further coerce the victims and threaten them with intervention of law enforcement if they leave.¹³⁵

c. Gaps in TVPA

The TVPA and its accompanying statutes are fairly comprehensive; however, there are a few areas that remain under-represented by the federal statute. For example, one issue exists when men enslave women to use them as concubines rather than for commercial sex. In *United States v. Soto*, eight men were convicted in 2003 for their roles in smuggling women into the United States and then, through force and threats, utilizing the women as sexual concubines.¹³⁶ The leader of the smuggling ring in this case was sentenced to twenty-three years of incarceration following his guilty plea.¹³⁷ This is closely related to mail-order bride schemes that go wrong, in which the “bride” ends up being held captive by the “husband.”¹³⁸ Typically these cases are treated as domestic violence cases; however, at times they may be more egregious than the domestic violence

132. See Rickert, *supra* note 34.

133. Ragini Tripathi, *The H-2B Visa: Is This How We Treat a Guest?*, 11 SCHOLAR 519, 534-48 (2009) (explaining how the provisions in certain work visas can actually be used to bind the worker into slavery here in the United States).

134. *Id.*

135. *Id.*

136. *United States v. Soto*, No. 03-341 (S.D. Tex. 2004), as reported in United States Department of Justice, *Halting Human Trafficking with a Record Number of Successful Investigations and Prosecutions*, Fiscal Years 2001-2005, http://www.justice.gov/crt/crim/part_5.pdf.

137. This was not pursuant to the TVPA. There are questions as to whether this type of non-commercial sex could be considered forced labor under the TVPA.

138. David Maxey, Immigration Counselor for Refugee and Immigration Service of Virginia, Presentation at Liberty Abolishing Slavery Conference (Feb. 17, 2010).

laws can adequately address.¹³⁹ Another area that is not covered well is the plight of “bar girls” and dancers, who are not covered under the sex trafficking definition because there is no sexual act.¹⁴⁰ These are areas where the states can enact legislation to fill the gaps or to clarify the meaning of certain provisions. Nevertheless, the problem remains when the federal government has not determined that an act is considered severe trafficking, or whether the victims of trafficking as defined by state law receive federal benefits such as the T-Visas.

Since 2000, human trafficking has been considered a serious human rights violation, and combating this crime has been a top priority of the United States Department of Justice and many state and local governments.¹⁴¹ Although significant strides have been made to find the victims who have been stripped of their human dignity and to incarcerate their abusers, there is still much that can and should be done. To this end, federal prosecutors, non-governmental organizations, and other groups have all tried to identify areas that will help law enforcement identify victims and then aid prosecutors in successfully obtaining convictions.¹⁴² Moreover, since most victims are uncovered by local law enforcement, it makes sense that these improvements should be introduced at the state level. Likewise, it should be noted that the TVPA relies on a victim-centered theory of criminal justice, and all enhancements that are advocated for at the state level later in this Article should be read through the same victim-centered lens.

D. Human Trafficking Needs To Be and Can Be Stopped

Modern-day slavery and human trafficking must be eradicated. Former Attorney General Alberto Gonzales proclaimed, “Human trafficking is a violation of the human body, mind and spirit. For this vile practice to be taking place in a country that the world looks to as a beacon of freedom . . . is a terrible irony and an utter tragedy.”¹⁴³ Human trafficking touches many facets of humanity, as discussed in the 2008 Trafficking in Persons Report:

139. *Id.*

140. These cases can be covered under forced labor if they reach the requisite burdens of proof.

141. Robert Moossy, *Sex Trafficking: Identifying Cases and Victims*, 262 NAT’L INST. OF JUST. J. 2-3 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/225759.pdf>.

142. See, e.g., Moossy, *supra* note 141. Moossy, a federal prosecutor and Director of Human Trafficking Prosecution Unit in the Civil Rights Division of the U.S. Department of Justice, identifies areas that will aid in finding and investigating potential sex trafficking cases. *Id.*

143. 2006 ATTORNEY GENERAL’S ANNUAL REPORT, *supra* note 96, at 1.

Human trafficking is a multi-dimensional threat. It deprives people of their human rights and freedoms, it increases global health risks, and it fuels the growth of organized crime.

Human trafficking has a devastating impact on individual victims, who often suffer physical and emotional abuse, rape, threats against self and family, and even death. But the impact of human trafficking goes beyond individual victims; it undermines the health, safety, and security of all nations it touches.¹⁴⁴

III. THE FEDS CANNOT DO IT ALONE

Existing federal legislation is holistic and provides a good framework for the United States to begin its protection of human trafficking victims; however, the federal effort is not enough to rectify the thousands of human rights violations that are occurring in the United States each year.

A. *More Prosecutions Will Decrease the Problem*

The United States is the destination country for thousands of men, women, and children to be utilized in the market for humans.¹⁴⁵ Although the federal government has stated that there are between 14,500 and 17,500 trafficking victims who enter the United States each year, they have uncovered and prosecuted less than 1% of all of the cases of human trafficking.¹⁴⁶ According to the 2008 TIP Report, in 2007 the federal government conducted “182 investigations, charged 89 individuals, and obtained 103 convictions in cases involving human trafficking.”¹⁴⁷ Furthermore, traffickers can be sentenced to up to 20 years’ imprisonment and in some cases even more under the TVPA; however, in 2007, the average sentence for trafficking offenses was 113 months (9.4 years).¹⁴⁸

144. 2008 TIP REPORT, *supra* note 27, at 5 (stating that human trafficking raises a global health concern).

145. *Id.* at 51.

146. The problem is that there have been relatively few prosecutions. In 2006, Bales stated that although the state has claimed that there were 14,500–17,500 trafficking victims each year, only 111 people were prosecuted and 98 were convicted. By the state’s own numbers, that is fewer than 1% of all prosecutable cases. BALES & SOODALTER, *supra* note 21, at 7.

147. 2008 TIP REPORT, *supra* note 27, at 51.

148. *Id.* The Report does explain that the FBI is also engaging in initiatives to end child prostitution and to recover those children that have been subjected to performing in the arena of commercial sex. “The Federal Bureau of Investigation and DOJ’s Criminal Division continued to combat the exploitation of children in prostitution in the United States through

Trafficking cases are difficult to prosecute for a variety of reasons. First, victims of the crime are not readily found. As discussed at the beginning of this Article, although many of these victims work in local communities, they are hidden from view.¹⁴⁹ Furthermore, the victims are not eager to report the crime because of fear of retaliation from the trafficker, and at times because of fear of local law enforcement. Second, once a victim is uncovered, the case for human trafficking relies on that victim's ability to communicate the horrors that he or she endured during the time of captivity.

In order to abolish slavery in this generation, the incentive to participate in the crime of human trafficking needs to be decreased. Increasing prosecutions increases costs of doing business and decreases the profitability of committing the crime in several ways. First, if a brothel or a business is raided or shut down, and the traffickers prosecuted, the cost of conducting the business is increased. Human trafficking is a multibillion-dollar business. According to the Interpol Fact Sheet, it is estimated that the profit from human trafficking is as high as \$39 billion each year.¹⁵⁰ Human trafficking is second only to drug trafficking as the most profitable organized crime business.¹⁵¹ Given the fact that many traffickers are linked to organized crime, if a massage parlor is shut down in one area, it many times will re-organize and re-open in another area.¹⁵² In addition, at times traffickers have been able to successfully control their business while incarcerated,¹⁵³ therefore, the prosecutions of all recurrences of human trafficking need to be dealt with severely in order to decrease the profitability of the crime. Prosecutions will have an effect on trafficking crimes directly, but if prosecutions are consistent, they can have an even greater effect by preventing the crime through deterrence.

There are two different ways to stop crime—specific deterrence and general deterrence. Specific deterrence deals with the deterrence of the

the Innocence Lost National Initiative; in FY 2007, this Initiative resulted in 308 arrests, 106 convictions, and 181 recovered children." *Id.*

149. See *supra* notes 19-21 and accompanying text.

150. Interpol Trafficking in Human Beings Fact Sheet 1 (2009), <http://www.interpol.int/Public/ICPO/FactSheets/THB02.pdf>.

151. John C. Gannon, *The Role of Intelligence Services in a Globalized World* (May 21, 2001), http://www.dni.gov/nic/speeches_globalizedworld.html ("The U.S. Intelligence Community assesses that trafficking in women and children is likely to continue at high levels in the years ahead given the large profits, relatively low risk, and rare convictions for traffickers.").

152. Bradley Myles, *A Signal That the Days of Whack-a-Mole Are Over*, Polaris Project Blog, <http://www.blog.polarisproject.org/?p=1038#more-1038>.

153. SKINNER, *supra* note 1, at 140-46.

criminal at hand, because he or she will be incarcerated and unable to commit a criminal act.¹⁵⁴ General deterrence refers to the fact that if another criminal observes the convicted criminal, he will be less likely to commit the crime in the future.¹⁵⁵ As noted above, specific deterrence is helpful, but it will not increase costs enough to make a significant dent in a multibillion-dollar business—if the trafficker can get away with the crime, he or she will do so, because the pay-off is too great.

The only way to decrease the prevalence of human trafficking is to deter traffickers generally. The optimal criminal sanction is a fine or penalty that is just sufficient to deter the criminal from engaging in the harmful activity.¹⁵⁶ If the sanction is any harsher, then a criminal may not be constrained from committing a greater offense.¹⁵⁷ For example, if both robbery and murder are punishable by death, the robber who had committed the first crime may not be constrained from also committing the second—especially because if the robber kills the victim, the robber would be eliminating a witness, thus decreasing the probability of getting caught. An efficiently proportioned legal rule would be precise enough to make the crime unprofitable, allowing for the risk of non-detection.¹⁵⁸ For example, if the value of the theft to the criminal is \$100 and the probability of detection is 1/3, then the optimal penalty would be a fine of approximately \$301, or just enough to make the theft unprofitable.¹⁵⁹

This rule makes sense when dealing with a crime that is monetarily related; however, it becomes speculative when it is applied to a criminal whose crime cannot be measured in money. For example, criminals often obtain satisfaction from their crimes that are unrelated to any financial gain, such as rape. In these cases, the optimal sanction must deprive the criminal of an amount of utility that, when discounted by the risk of detection, will make the crime unappealing to the criminal. In the case of human trafficking, the main issue is monetary in nature. The trafficker wants the financial benefits reaped from the services of the trafficking victim. The line is blurred when the trafficker begins to use one of his trafficking

154. BLACK'S LAW DICTIONARY 481 (8th ed. 2004) (defining "Special Deterrence" as "[a] goal of a specific conviction and sentence to dissuade the offender from committing crimes in the future").

155. *Id.* (defining "General Deterrence" as "[a] goal of criminal law generally, or of a specific conviction and sentence, to discourage people from committing crimes").

156. See Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

157. *Id.*

158. *Id.*

159. *Id.*

victims as a personal sex slave, a domestic servant, a forced laborer, or a commercial sex worker. In this instance, the trafficker may be feeding some other desires as well as obtaining the monetary benefit. To increase deterrence, there are two areas one can enhance: first, enhance the punishment for the crime; second, increase the likelihood that the criminal will be caught and convicted. If a crime is particularly difficult to detect, then in order to properly deter criminals, the severity of the punishment must be increased.¹⁶⁰

There are several different aspects to ensuring that trafficking crimes are prosecuted. First, the crime must be detected. Human trafficking is particularly difficult to detect, because the victims are scared to come forward, and the crimes are often masked by other issues.¹⁶¹ The victims can toil in the open without anyone knowing. Furthermore, many who participate in human trafficking are members of organized crime. According to the TVPA:

Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law.¹⁶²

Trafficking in persons fuels the growth of organized crime.¹⁶³ Organized criminals are starting to prefer trafficking in humans rather than narcotics and weapons, because the commodity can be sold over and over again, and there are many legal avenues to transport people across borders.¹⁶⁴ Due to the fact that organized crime units are typically vertically integrated to

160. See Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311 (1990) (arguing for common law criminal prosecutions for environmental crimes).

161. Kathleen Davis, "Trafficking in Persons" Training Session for Polaris Project (Oct. 28, 2009).

162. 22 U.S.C. § 7101(8) (2006 & Supp. 2008).

163. 2008 TIP REPORT, *supra* note 27, at 5.

164. International Association of Chiefs of Police, *The Crime of Human Trafficking: A Law Enforcement Guide to Identification and Investigation*, at 1, available at <http://www.theiacp.org/LinkClick.aspx?fileticket=W7b9hV6wn%2bA%3d&tabid=372> (pamphlet) (discussing how human trafficking generates billions of dollars each year and how it is now on the same level as illegal guns and drugs). Human trafficking is second only to drug trafficking as the most profitable organized crime business.

avoid detection, the members utilize several sophisticated “Chinese walls” to separate aspects of the business in order to protect the members.¹⁶⁵ If one aspect of the unit is compromised, it is more difficult to ascertain the main perpetrators of the broader criminal enterprise. Moreover, many of those involved in trafficking organizations are family members, making it less likely that one member will betray his or her fellow co-conspirators, even if he or she knows the inner workings of the business.¹⁶⁶ This is why it is vital to have each state become dedicated to promoting public awareness of human trafficking within its borders, as this will help to increase the probability of detection.

Next, the trafficker must be subject to arrest, prosecution, and substantial prison time. As will be discussed below, the federal government cannot handle the volume of prosecutions on its own.¹⁶⁷ It is imperative that states be involved in investigating and prosecuting human trafficking cases, especially when these crimes occur solely within the border of one state. A trafficker should be assured that, in each state, if he or she engages in the crime of trafficking in persons, then he or she will be arrested and prosecuted for that crime. Moreover, a prosecution will likely not be successful unless the victims of the crime are cared for and feel safe to testify. For this reason, it will be important for the state to remain victim-centered in its approach to trafficking issues.

Finally, the trafficker must be subjected to a sentence that is high enough to deter criminals, despite the fact that the detection rate remains low. Such sentencing is imperative to the success of eradicating modern-day slavery in the United States. This is why it is important for each state to create a trafficking statute and not to rely on the aggregate of different crimes already on the books. One of the reasons for this need is that the existing sentences for each of those crimes do not take into consideration the loss of human dignity and the problems with detection that occur with human trafficking. Therefore, the sentences will by definition be too lenient to adequately deter potential traffickers.

There are still some human traffickers who will not be deterred by an increase in prosecutions. Some human traffickers have a different cultural view of bonded servants and are under the mistaken assumption that some

165. *Id.*

166. Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 642 (2009) (stating that trafficking rings often include family members and spouses, thus making investigation more difficult by decreasing the chances that one trafficker will cooperate with the police in exchange for leniency).

167. *See infra* Part III.D.

humans are born to be servants to others. For these traffickers, the sentences would need to be particularly certain and severe in order to deter them from trafficking. There is another subset of human traffickers that may not be able to be deterred—those with diplomatic immunity. As discussed earlier, this is a problem here in the United States, but for now, all that can be hoped for is to rescue the victims of trafficking.¹⁶⁸

In order to increase the probability of detection, the convictions, and the sentences for human traffickers, states should enact and enforce criminal statutes against human trafficking.¹⁶⁹ Congress understood this when it passed a resolution encouraging states to adopt the DOJ's Model Anti-Trafficking Criminal Statute (discussed below), and the DOJ urged states to join the fight against human trafficking.¹⁷⁰ The DOJ is encouraging the states to enact legislation in accordance with its model statute, to

expand anti-trafficking authority to the states in order to harness the almost one million state and local law enforcement officers who might come into contact with trafficking victims. Once states have adopted the statute, or at least their own versions of anti-trafficking laws, the total number of prosecutions nationwide will likely increase.¹⁷¹

For example, over the last twenty years as states began enacting civil rights laws that were complimentary and/or duplicative of federal civil rights laws, there was an increase in the prosecution of racially motivated crimes.¹⁷² The Chief Counsel for the Human Smuggling and Trafficking Center of the DOJ's Organized Crime and Racketeering Section has made it clear that prosecutions are important, stating:

While efforts to protect victims and prevent further victimization are clearly important goals . . . , effective prosecution is the linchpin to eradicating human trafficking.

168. See *supra* note 81 and accompanying text for a discussion of the problems posed to anti-slavery measures by diplomatic immunity.

169. "[E]ffective prosecution is the linchpin to eradicating human trafficking. Prosecution, combined with the imposition of significant penalties, not only provides protection by eliminating the perpetrator's immediate ability to exploit the victim, but also serves to deter future criminal acts." Cynthia Shepherd Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT'L & COMP. L. 503, 503-04 (2006).

170. See Department of Justice, Model State Anti-Trafficking Criminal Statute (Proposed Official Draft 2007), available at http://www.justice.gov/crt/crim/model_state_law.pdf (last visited Feb. 17, 2010) [hereinafter DOJ Model].

171. *Id.*

172. *Id.* at 66.

Prosecution, combined with the imposition of significant penalties, not only provides protection by eliminating the perpetrator's immediate ability to exploit the victim, but also serves to deter future criminal acts.¹⁷³

For these reasons, holistic state laws should be enacted and actively enforced against all human traffickers in order to eradicate this degrading abuse of human dignity.

B. Victim-Centered State Laws Are Needed To Supplement Federal Legislation

Some commentators have articulated reasons why the federal government is in a better position than the states to prosecute human trafficking cases. The first reason is that the federal government has the infrastructure to handle the needs of trafficking victims, including intra-agency support to handle issues such as witness protection, interpreters, and other unique issues arising in human trafficking cases.¹⁷⁴ Likewise, in a trafficking case the prosecutor may need to coordinate across multiple agencies, and engage in international fact-finding.¹⁷⁵ The federal government controls immigrant status and thus is in a better position to deal with undocumented immigrants, who are some of the most vulnerable victims of human trafficking.¹⁷⁶ Another reason some scholars favor exclusive jurisdiction for the federal government over human trafficking is that it has extensive jurisdictional reach and thus can deal better with issues related to the link between trafficking criminals and organized crime.¹⁷⁷ Another argument is that the federal government has more monetary resources than the state governments do. Additionally, so far the TVPA has been providing longer sentences for human trafficking.¹⁷⁸ Finally, there is

173. Torg, *supra* note 169, at 503-04.

174. *Id.* at 635. Overbaugh's thesis is that we do not actually enact state legislation, but rather that the state should be in an action-support role with an informal pact with federal prosecutors.

175. Micah N. Bump, *Panel: Treat the Children Well: Shortcomings in the United States' Effort To Protect Child Trafficking Victims*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 73, 80 (2009).

176. Overbaugh, *supra* note 166, at 636.

177. *Id.*

178. See GAO Report to Congressional Requestors, *Human Trafficking: A Strategic Framework Could Help Enhance the Interagency Collaboration Needed To Effectively Combat Trafficking Crimes* 50-54 (July 2007), available at <http://www.gao.gov/new.items/d07915.pdf> (detailing some of the trafficking cases); 2008

trepidation regarding a federal conviction—it is the weight of the federal government against the human trafficker.¹⁷⁹

While federal prosecutions are crucial in order to eradicate human trafficking and modern-day slavery, the federal government cannot and should not embark on this journey alone, due to the overwhelming aspect of the problem of trafficking.¹⁸⁰ The first argument against having only the federal government involved in trafficking cases is that federal prosecutors do not always charge criminals for human trafficking, even when the facts warrant the charge, and due to various reasons federal prosecutors many times accept guilty pleas to lesser charges.¹⁸¹ Second, federal prosecutors typically pick and choose only cases that they are confident they are going to win. One reason why federal prosecutors cannot take chances on trying all human trafficking cases is the simple fact of limited resources and funding, which sometimes results in only the highest profile cases getting attention.¹⁸²

These limitations are important not only because criminals who deprive their victims of their dignity are not getting a just punishment, but also because victims under the TVPA are not getting the benefits they deserve. In order to get benefits under the TVPA, a victim of human trafficking needs to be certified as a victim of severe trafficking.¹⁸³ This certification can be given to a victim even if there is no prosecution in a given case; however, in practice, victims rarely receive certification if the federal prosecutor chooses not to prosecute.¹⁸⁴ Therefore, duplicative efforts in such cases are important to ensure that all those who engage in trafficking are prosecuted. More victims may get certified and receive benefits if the states' laws are written properly, so that trafficking is defined to be compatible with the TVPA. Finally, on the other extreme, it has been

ATTORNEY GENERAL'S ANNUAL REPORT, *supra* note 79, at 36, 42-43 (assessing U.S. Government activities to combat trafficking in persons for the fiscal year of 2008).

179. See Overbaugh, *supra* note 166, at 646, 652-53.

180. To end modern slavery, assertive and coordinated efforts must be funded on the federal, state, and local level. Torg, *supra* note 169, at 504.

181. Overbaugh, *supra* note 166, at 642. This cuts against the argument that state prosecutors do not charge for human trafficking, but the federal prosecutors do.

182. Johanna Coats, *The Role of the State Attorney General in Combating Human Trafficking* 8 (Jan. 22, 2007) (unpublished note, on file with Columbia University School of Law), available at http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=13176&rtcontentdisposition=file.

183. 22 U.S.C. § 7105 (b)(1)(A) (2006 & Supp. 2008).

184. Bump, *supra* note 175, at 78. Additionally, there is some evidence that, in practice, victims are not certified if they are not uncovered by a law enforcement raid; the problem is that only a handful of trafficking victims are uncovered by a police raid. *Id.* at 79.

argued that, despite the inability of federal prosecutors to prosecute certain trafficking cases, federal prosecutors do feel high incentives to apprehend and prosecute cases.¹⁸⁵ Sometimes this leads to an attempt to manipulate the requirements of the TVPA, such as the rules explaining that minors do not need to testify in order to get benefits under the TVPA, in order to secure a conviction.¹⁸⁶ In at least one case, the federal prosecutors used a subpoena to circumvent the exemption that was intended to prevent forcing a minor to testify.¹⁸⁷

For these reasons, the state should not abrogate its police power completely to the federal government in this area.¹⁸⁸ It is interesting that this Article needs to address the fact that the states should use their police power to prosecute crimes that occur solely within their own borders. It is clear that normal criminal offenses fall within the purview of the states' police powers, and that "federalization of crime threatens the very foundation of our dual system of government."¹⁸⁹ For normal criminal activity, like guns in a school district, even if a state agrees that the behavior should be prohibited, this "does not legitimize the macrocosmic approach."¹⁹⁰ Chief Justice Rehnquist maintained in *United States v. Lopez*¹⁹¹ that when Congress criminalizes conduct that is already proscribed by the states, it impacts the "sensitive relation" between state and federal jurisdictions.¹⁹² In his concurring opinion in *Lopez*, Justice Kennedy explained that the United States' dual system of sovereignty allows States to act as "laboratories" to formulate innovative solutions to problems of traditional state concern, like criminal law.¹⁹³ While under a normal federalism model, one would expect states to be reluctant to let the federal government take control of the crime enforcement within their borders,

185. *See id.*

186. *See id.* at 90.

187. *Id.*

188. Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENT'G REP. 123 (1998) (discussing the troubling prospect of increased federalization of local crimes and general police powers).

189. Lauren Bianchini, *Comment: Homegrown Child Pornography and the Commerce Clause: Where To Draw the Line on the Intrastate Production of Child Pornography*, 55 AM. U. L. REV. 543, 577 (2005); *see* *United States v. Morrison*, 529 U.S. 598 (2000); *see also* *United States v. Lopez*, 514 U.S. 549 (1995) (emphasizing the importance of preserving States' autonomy over the area of criminal law).

190. Bianchini, *supra* note 189, at 578; *see also Lopez*, 514 U.S. 549.

191. *Lopez*, 514 U.S. 549.

192. *Id.* at 561 n.3.

193. *Id.* at 581 (Kennedy, J., concurring); Bianchini, *supra* note 189, at 578.

when it comes to human trafficking, it is the states that are reluctant to enforce the crime within their borders.

State law enforcement officers and prosecutors seem to be hesitant to become involved in policing trafficking within their borders under the mistaken assumption that such matters constitute a purely federal issue dealing with immigration.¹⁹⁴ Human trafficking is sometimes thought of as a federal problem and thus not within the purview of the state system.¹⁹⁵ In a small-scale questionnaire of local law enforcement, sixty-one percent of respondents indicated that human trafficking was not a local law enforcement officer issue, and seventy-five percent stated that trafficking was best handled by federal law enforcement officers.¹⁹⁶ However, this survey was conducted over only seventy-nine different law enforcement agencies and was conducted at least three years ago, before most of the state laws were enacted.¹⁹⁷ Despite the reluctance of some state prosecutors, if a state does not deal with intrastate criminal activity, it strains the already clogged federal court system.¹⁹⁸ The overburdening of the federal systems is quite problematic:

A 1998 American Bar Association task force “concluded that ‘inappropriate federalization’ causes ‘long-range damage to real crime control and to the nation’s structure.’” In a 1998 report on the federal judiciary, Rehnquist warned that a crisis would result if nothing limited the growth of federal crimes.

The overburdening of the federal system threatens the very quality of the federal courts. For example, the increase in criminal cases has clogged federal court dockets. The federal prison population more than doubled between 1980 and 1990; and between 1990 and 1995, it nearly doubled again. Federal prosecutors and federal police agencies also feel the strain of this trend. And unfortunately, this trend has created an interesting paradox: federalization “creat[es] the illusion of greater crime control, while undermining an already over-burdened criminal justice system.”¹⁹⁹

194. See Overbaugh, *supra* note 166, at 635 (explaining that local prosecutors are tentative about using laws).

195. Finckenaue & Liu, *supra* note 126, at 7.

196. *Id.*

197. See *id.*

198. Bianchini, *supra* note 189, at 578.

199. Bianchini, *supra* note 189, at 578-80 (footnotes omitted).

Due to the unique and complicated nature of trafficking, this is one of the few criminal provisions where it is beneficial to have a strong federal presence. The TVPA is important, because it covers more than just the manifestation of trafficking in persons as it exists in the United States. In contrast, the TVPA focuses on assisting the governments in the origination and transient countries to stop human trafficking, because in order to stop the influx of these “workers” into the United States, their victimization must stop in the origination and transient countries.²⁰⁰

The next reason why the federal government should be joined by every state in its fight against human trafficking is that the federal government focuses much of its efforts on the international manifestations of trafficking. According to the findings of Congress in the 2005 TVPA reauthorization, since the TVPA was first enacted in 2000, the federal government has focused on international persons who have been trafficked into the United States.²⁰¹ However, Congress further found that trafficking occurs with persons within the United States.²⁰² The extent of the problem with trafficking of individuals in the United States is unclear. Nevertheless, according to one study, at any given time, as many as 300,000 children in the United States are at risk for commercial sexual exploitation and human trafficking.²⁰³ Runaway children are especially vulnerable to becoming prey to human traffickers.²⁰⁴ Additionally, human trafficking victims often will cross multiple state borders during their bondage.²⁰⁵ Nonetheless, the states should retain responsibility to ensure the safety of those within their borders. Furthermore, in contrast to what might appear at first blush, state and local officers are the most likely to come into contact with the victims of this crime, and thus are uniquely positioned to intervene in this criminal

200. 22 U.S.C. § 7106 (2006 & Supp. 2008).

201. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2005), at 5, available at <http://www.state.gov/documents/organization/47255.pdf>.

202. 22 U.S.C. § 7101(b)(1).

203. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 2(5), 119 Stat. 3558 (2006).

204. *Id.* § 2(6).

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.

Id.

205. *MSNBC Undercover: Sex Slaves in America* (MSNBC television broadcast Dec. 3, 2007), available at <http://today.msnbc.msn.com/id/22083762/>; see also *Sex Slaves in America: The Teen Trade* (MSNBC television broadcast Feb. 15, 2009).

activity.²⁰⁶ Even the federal Wilberforce Reauthorization Act encourages states to modernize their prostitution statutes, and it specifically authorizes states to enact and implement state-level trafficking laws.²⁰⁷ Fortunately, at the time of this Article's writing, most states had finally enacted anti-trafficking laws, but many of these laws are not adequate to deal with the unique problems involved in trafficking and seem to be more symbolic in nature.²⁰⁸ Furthermore, those states that do have better laws have not been utilizing these laws to their fullest extent.²⁰⁹

IV. STEPPING UP TO THE CHALLENGE—MOST STATES ENACT TRAFFICKING LAWS

As of January 2010, the vast majority of the states have enacted at least some legislation related to human trafficking at the state level.²¹⁰ Additionally, as of early 2010, Washington, D.C. is in the final stages of

206. Kathleen Davis, "Trafficking in Persons" Training Session for Polaris Project (Oct. 28, 2009).

207. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 225, 122 Stat. 5072 (2008).

208. See *infra* Part IV.

209. See, e.g., Cal. Penal Code §§ 236.1–237 (West 2006); see also BATSTONE, *supra* note 36, at 1.

210. ALASKA STAT. §§ 11.41.360–365 (2006); ARIZ. REV. STAT. ANN. §§ 13-1306–1309 (2007); ARK. CODE ANN. § 5-11-108 (West 2005); CAL. PENAL CODE §§ 236.1–237 (West 2006); COLO. REV. STAT. § 18-13-127 (West 2006); CONN. GEN. STAT. § 53a-192a (2006); DEL. CODE ANN. tit. 11, § 787 (2007); FLA. STAT. ANN. § 787.06 (West 2007); GA. CODE ANN. § 16-5-46 (West 2006); IDAHO CODE ANN. §§ 18-8601–8605 (2006); 720 ILL. COMP. STAT. 5/10A-10 (2007) (statute repealed on Jan. 1, 2010, replaced by 2009 Ill. Laws 710 § 10-9); IND. CODE § 35-42-3.5-1 (2006); IOWA CODE §§ 710A.1–5 (2007); KAN. STAT. ANN. §§ 21-3446–3447 (2005); KY. REV. STAT. ANN. §§ 529.100–110 (West 2008); LA. REV. STAT. ANN. § 14:46.2 (2005); ME. REV. STAT. ANN. tit. 5 § 4701 (2007); MD. CODE ANN., CRIM. LAW § 11-303 (West 2007); MICH. COMP. LAWS §§ 750.462a–462i (2007); MINN. STAT. §§ 609.281–284 (2007); MISS. CODE ANN. § 97-3-54.1–4 (2006); MO. REV. STAT. §§ 566.200–223 (2004); MONT. CODE ANN. § 45-5-306 (2008); N.C. GEN. STAT. ANN. §§ 14-43.10–13 (West 2006); N.D. CENT. CODE § 12.1-40-01–02 (2009); NEB. REV. STAT. §§ 23-830–832 (2006); NEV. REV. STAT. §§ 200.467–468 (2007); N.H. REV. STAT. ANN. § 633:6–7 (2010); N.J. STAT. ANN. § 2C:13-8 (West 2005); N.M. STAT. §§ 30-52-1–3 (2008); N.Y. PENAL LAW § 135.35 (McKinney 2007) (labor trafficking); *id.* § 230.34 (sex trafficking); OHIO REV. CODE ANN. §§ 2929.01 (AAA)(1)–(2), 2941.1422 (2009); OKLA. STAT. tit. 21, §§ 748–748.2 (2007); OR. REV. STAT. § 163.266 (2008); 18 PA. CONS. STAT. ANN. §§ 3001–3004 (West 2006); R.I. GEN. LAWS §§ 11-67-(1)–(5) (2007); S.C. CODE ANN. § 16-3-930 (2006); TENN. CODE ANN. § 39-13-308 (2008); TEX. PENAL CODE ANN. §§ 20A.01–02 (Vernon 2007); UTAH CODE ANN. §§ 76-5-308–310 (2008); WASH. REV. CODE § 9A.40.100 (2003); WIS. STAT. § 940.302 (2007).

enacting legislation making it a crime to participate in human trafficking.²¹¹ As noted above, when the states enact human trafficking legislation, it will increase the prosecutions of the crime; however, if the legislation is inadequate, it can do more harm than good.²¹² There are a number of issues with which legislators grapple at the state level when determining what type of human trafficking legislation to offer, including: how broadly or narrowly human trafficking should be defined; who should be regarded as a victim; what services should be provided and who should provide them; whether subjects are victims or accomplices; whether a victim's sexual history or prior charges for prostitution can be introduced as evidence; and whether that history can be introduced to defend against a charge of human trafficking.²¹³ Of course, in the current economy, one of the most important questions to any legislature is how much a new provision will cost. This Part deals with these questions and others as it analyzes the different types of provisions that legislators need to consider before either enacting law on the state level or further enhancing the trafficking legislation they have already enacted. The traffickers will continue to conjure up new ways to exploit their fellow human beings without being caught, so each state must continue to be vigilant in closing down opportunities the traffickers can use to circumvent the law. Human trafficking is one of the most profitable criminal activities, so the criminals will test the limits of these laws. However, by being inventive and resourceful, the state can stay a step ahead of the criminal and secure the freedom of all persons within the state.

A. My Model's Better Than Your Model

The Department of Justice and several non-governmental organizations have created model state human trafficking statutes to guide the states in the arduous task of creating these new laws. Many of the provisions overlap between the models; nevertheless, each model has provided at least some creative legislative solutions to some of the difficulties in dealing with human trafficking cases.

211. Polaris Project, District of Columbia Prohibition Against Human Trafficking Act of 2009 Summary, <http://www.polarisproject.org/images/dc2009billpolarissummary.pdf> (last visited Jan. 10, 2010); *see also* The Prohibition Against Human Trafficking Act of 2009, Bill No. 18-70, 2009 Council (D.C. 2009) (amending titles 23 and 14 of the District of Columbia Official Code).

212. *See supra* Part III.A.

213. Questions adapted from Finckenaue & Liu, *supra* note 126, at 4-5.

1. Department of Justice: Model State Anti-Trafficking Criminal Statute

The Department of Justice utilized the experience of federal prosecutors when determining the provisions to include in the DOJ's model state statute concerning "trafficking in persons."²¹⁴ While the TVPA is holistic in nature, and focuses on the three P's (prevention, prosecution, and protection), the DOJ's Model State Statute focuses exclusively on prosecution. Although the DOJ's model is good, it only covers criminalization, and it has some gaps and inconsistencies.²¹⁵ States considering implementation of this model statute would benefit more if the DOJ would produce a general model anti-trafficking statute rather than an exclusively criminal model statute. The DOJ model's focus on only the criminal justice aspects of the problem of human trafficking is both beneficial and confusing. One benefit is the model statute's advocacy that states must provide definitions of "trafficking in persons," rather than merely relying on statutes that are already in place. Another benefit is that the DOJ model focuses on both labor and sex trafficking to an equal degree; this approach treats both forms of trafficking adequately. Another benefit of the model is that it includes sexually explicit performances and commercial sexual activities as part of the definition of services.²¹⁶ Unlike this beneficial definition of services in the DOJ model, the distinction in the TVPA seemed artificially drawn.

Despite these benefits, the DOJ model does contain confusing aspects. One goal of creating state statutes is to identify more human trafficking victims, and to provide them with services under the victim-centered TVPA.²¹⁷ However, the DOJ's model is at places too narrow, and may inadvertently not cover certain victims. For example, the definitions section of the model specifies six different ways traffickers can hold people when subjecting them to forced labor. This enumeration is different than the TVPA's broad language that includes "force, fraud, or coercion" as ways that traffickers subject people to forced labor or services.²¹⁸ According to the Model State Anti-Trafficking Criminal Statute:

214. See DOJ Model, *supra* note 170, at 6.

215. Freedom Network, STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING 1, available at <http://www.sexworkersproject.org/downloads/FN2005StateModelLaw.pdf> [hereinafter Freedom Network Model].

216. DOJ Model, *supra* note 170, § XXX.01(08).

217. 22 U.S.C. § 7105 (2006 & Supp. 2008).

218. DOJ Model, *supra* note 170, § XXX.01(4); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(2), 114 Stat. 1464. The model statute reads:

“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 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.”²¹⁹

Traffickers are continually thinking of new ways to keep their victims in line. An example of this would be a trafficker telling a victim, “The police officer you see driving by is here watching you to make sure you do not leave.” Even though this example is simple fraud, it arguably is not covered by one of the six provisions in the DOJ’s model statute. As a result, it seems that the use of broader terms would be preferable to more precise terms in such circumstances. Furthermore, the DOJ’s model has differing

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- (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 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.

Id. “Services” includes “[c]ommercial sexual activity and sexually-explicit performances.” *Id.* at 8.

219. DOJ Model, *supra* note 170, § XXX.01(4).

elements for involuntary servitude and for forced labor.²²⁰ Given the nature of the crimes, these elements should be more consistent.

Additional confusing aspects include areas where the DOJ's model is so broad that it encompasses more victims than would be covered by the TVPA. One overly broad area that the DOJ's model covers is an "attempt" to traffic a person for forced labor or services. Specifically, the model states: "Whoever . . . 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, [shall be subject to up to fifteen years' imprisonment]."²²¹ Perhaps some aspects of trafficking would be conducive to an attempt charge, but the touchpoint for a trafficking claim is that the victims' freedom has been curtailed to such a degree that they can no longer exercise it. Two problematic situations are where the victim does not feel compelled to stay or go with the trafficker, or where the trafficker unsuccessfully attempts to lure an individual. In such situations, can the potential trafficker be found guilty for what he might have done had the victim gone with him? The establishment of a bogus modeling agency in order to lure girls to the agency may be a scenario where an "attempt to traffic" charge would be appropriate. The police would have to raid the agency while the potential trafficker was still in the process of convincing the girls that the "agency" was legitimate. However, without special evidentiary requirements, it would be problematic to punish someone based only on assumptions of how he or she would treat a worker.

In a second overly broad area, the model states that anyone who knowingly benefits financially or otherwise from the forced labor arrangement is also guilty of trafficking and can be imprisoned for up to fifteen years.²²² This provision is too weak, because it allows only for defendants whose mens rea reaches the level of knowledge that would not include a parent corporation that recklessly disregarded the truth.²²³ For example, a contractor may not know explicitly that the subcontractor is using slave labor, but he or she may recklessly choose to disregard the fact that the subcontractor's bid is well below costs.

Despite the weak provision, the common law and the Model Penal Code both provide that willful blindness does not exculpate the defendant from a

220. *Id.*; see also *infra* note 225.

221. DOJ Model, *supra* note 170, § XXX.02(3).

222. *Id.*

223. Currently, only one state allows for punishment for trafficking in the second degree for a person who "obtains a benefit from the commission of human trafficking . . . with reckless disregard that the benefit is a result of the trafficking." ALASKA STAT. § 11.41.365 (2006).

finding of knowledge.²²⁴ Nonetheless, in the previous example, the contractor is in the best position to find out whether there is a problem with one of his subcontractors. Clearly, the contractor should be incentivized to take the extra step to make sure his subcontracted employees are working of their own free will. Therefore, the contractor should be responsible to investigate when there is a substantial risk that harm is occurring.²²⁵ As a result, recklessness is the appropriate level of mens rea for culpability in order to write a clear statute that charges all the proper individuals. Such a statute may even include individuals that receive direct financial benefits from trafficking.

Such caution is also needed due to the fact that this weak provision may be overly broad as written. The provision could be used against a consumer who should have known that he bought a counterfeit bag on the streets of New York City, because the cost of materials and labor to make that bag is not reflected in the bag's price tag. While this may be good from a prosecutor's standpoint and for those attempting to secure the T-Visa or other services for victims, the weak provision could be problematic when the crime perpetrated against the victim does not qualify as severe trafficking as per the TVPA.

Finally, the model proffered the following punishments for anyone who forces another person into 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;

224. *See* *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (holding that if a defendant has a secret compartment in his car and he avoids knowing what is in it in the hope that he cannot be found guilty of knowingly transporting drugs across a border, then "his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth"); *see also* MODEL PENAL CODE § 2.02(7) (1981) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

225. MODEL PENAL CODE § 2.02(7).

- (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.²²⁶

While these provisions may deter a trafficker from escalating from blackmail to using violence against the victim, there are several types of abuses that are not identified. These deficiencies include such abuses as food withholding, improper or unsanitary sleeping conditions, or the duration of servitude. These abuses may be more dehumanizing than the abuses that are listed. Thus, the sentence enhancements contained in the DOJ's model statute do not necessarily seem to be logically tied to the severity of the crime, because they are based on the means by which the trafficker secured the servitude, rather than on what actually happened to the victim.

2. The National Institute on State Policy on Trafficking of Women and Girls of the Center for Women Policy Studies: Resource Guide for State Legislators—Model Provisions for State Anti-Trafficking Laws

This “National Institute” Model is not set up as a fully comprehensive statute. Instead, it provides suggested language and explains why the language is important. The National Institute Model highlights that there should be several different aspects to a statute, including: the criminalization of trafficking; mandatory training for law enforcement; victim assistance programs; provision for a private right of action; and provision for a human trafficking task force.²²⁷ The Model also focuses on adding provisions in order to regulate both the mail-order bride industry and sexual tourism.²²⁸ The criminal statute comprehensively defines both labor trafficking and all forms of sexual exploitation as human

226. DOJ Model Code, *supra* note 170, § XXX.02(1).

227. *See generally* The National Institute on State Policy on Trafficking of Women and Girls of the Center for Women Policy Studies, Resource Guide for State Legislators—Model Provisions for State Anti-Trafficking Laws (Proposed Official Draft 2005), available at <http://www.centerwomenpolicy.org/pdfs/TraffickingResourceGuide.pdf>.

228. *Id.* at 1.

trafficking.²²⁹ This Model does define how a trafficker may act via force, fraud or coercion by stating that:

A person commits the crime of human trafficking for forced labor or forced sexual exploitation if the person recruits, harbors, transports or obtains a person through the use of force, fraud or coercion by

- (a) threats of serious harm to, or physical restraint against, that person or another person;
- (b) destroying, concealing, removing, confiscating or possessing any passport, immigration document or other government identification document;
- (c) abuse or threatened abuse of the law or legal process; or
- (d) means of any scheme, plan or pattern intended to cause the person to believe that the person or another person would suffer serious harm or physical restraint²³⁰

The concern with this approach is that when a statute includes certain methods, it implies that they are an exclusive way of meeting the provisions of the statute. Given the unique methods that traffickers have been using to control their victims, it may be better to maintain flexibility concerning the statutory language dealing with coercion and fraud.

The National Institute Model also provides for an affirmative defense provision where the victim is protected from prosecution for any crimes she may have committed while under the control of the trafficker.²³¹ Although this type of provision is very useful in protecting the victim from such punishment, victims of a trafficking circle can be recruited and “promoted” to become a co-conspirator in the business. Thus, this affirmative defense should require an evidentiary component. An even better approach, however, may be one where the trafficked person has a rebuttable presumption of being an innocent victim unless she or he is the defendant in the case. As in some of the other Models, this approach allows liability for trafficking to fall not just on the individuals who participated in the trafficking, but also on any individual who may have benefited from the crime.

The National Institute Model contains many additional provisions. The Model specifically allows for corporate liability, providing for additional

229. *Id.* at 2.

230. *Id.*

231. *Id.* at 4.

liability for businesses that engage in human trafficking.²³² One of the best provisions in this Model is the mandatory training provision, which requires compulsory human trafficking training for all law enforcement officers.²³³ According to the Model, the training should be developed with the consultation of national and state experts in the field of human trafficking, and should include:

- (1) the state human trafficking law;
- (2) identification of human trafficking;
- (3) communicating with traumatized persons;
- (4) therapeutically appropriate investigative techniques;
- (5) collaboration with federal law enforcement officials;
- (6) rights and protections afforded to victims;
- (7) providing documentation that satisfies the I-914 Supplement B Declaration of Law Enforcement Officer for Victim of Trafficking in Persons required by federal law; and
- (8) the availability of community resources to assist trafficking victims. Where appropriate, the training presenters shall include human trafficking experts with experience in the delivery of direct services to victims of human trafficking.²³⁴

Unlike the DOJ Model, this Model has several explicit provisions created to protect and provide services for the victims of human trafficking. The National Institute Model provides for the following provisions, which are important to protect the victims of human trafficking because of the uniqueness of the crime:

Human trafficking victims shall

- (a) be housed in appropriate shelter as quickly as possible;
- (b) not be detained in facilities inappropriate to their status as crime victims;
- (c) not be jailed, fined or otherwise penalized due to having been trafficked;
- (d) receive prompt medical care, mental health care, food and other assistance;
- (e) have access to legal assistance, information about their rights and translation services;

232. *Id.* at 4-5.

233. *Id.* at 5.

234. *Id.*

- (f) be provided protection if a victim's safety is at risk or if there is danger of additional harm by recapture of the victim by a trafficker, including:
 - (i) taking measures to protect trafficked persons and their family members from intimidation and threats of reprisals and reprisals from traffickers and their associates; and
 - (ii) ensuring that the names and identifying information of trafficked persons and their family members are not disclosed to the public.²³⁵

Another innovative provision from the National Institute Model is one which directs law enforcement agencies to assist the victims of trafficking in securing the T-Visa within 15 days of encountering the victim.²³⁶

Finally, the Model has a series of provisions that relate to regulating marriage brokers and international matchmaking organizations.²³⁷ Such provisions should be enacted with due caution, since there is a legitimate reason for such brokerage sites. Finding a spouse through an intermediary is sometimes a cultural norm.²³⁸ Additionally, some of the provisions that are proffered, such as requiring criminal history of the prospective husband, will probably not eradicate the abuse of these sites. A criminal who is looking to use the site as a way to find a victim would also be the same type of unscrupulous person who would forge a criminal history or marital history document. Some regulation of these agencies may be warranted; perhaps information should mandatorily be provided to the bride as to what her rights are once entering the United States, so that she does not feel that she cannot flee from an abusive situation.²³⁹

235. *Id.* at 6.

236. *Id.* at 8 (deriving this proposed language from the California statute).

237. *Id.* at 13-16.

238. One example is the Indian culture. Even Indian men and women in the United States will at times use marriage websites to find a spouse. Rajini Vaidyanathan, *Indian Love: We Just Clicked*, BBC News (Mar. 10, 2010), available at http://news.bbc.co.uk/2/hi/south_asia/8558078.stm (explaining that unlike in Western cultures, sometimes even parents go on the matrimonial sites to help their grown children find a mate).

239. For example, women can self-petition for permanent residency under the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, §§ 811-817 (2006).

3. Renewal Forum:²⁴⁰ Model State Law To Abolish Human Trafficking

The “Renewal Project’s” Model begins with a statement of purpose, which states:

The purposes of this Act are to combat trafficking in persons; to protect victims of human trafficking, assist them in the rebuilding of their lives, and to restore them to their inherent dignity; to ensure the just and effective punishment of traffickers; and to create an environment in the State of [STATE] in which the abolition of human trafficking is effectuated.²⁴¹

This statement of purpose is helpful. It explains not only that the proposed law would cover more than just the criminal aspects of trafficking, but also that the law would have a victim-centered approach that focuses on assisting the victims of trafficking after they are rescued.

The Renewal Project’s Model also elucidates an important issue with the problem of relying on existing laws to combat the methods and elements of human trafficking without having a comprehensive law. This problem is that many traffickers have been able to circumvent the law, because they have benefited from the gap in the definition of coercion. At common-law, coercion requires the imminent threat of physical harm.²⁴² The proposed legislative findings contained in the Renewal Project’s Model clearly articulate the vulnerability of the victims of human trafficking and how the traffickers exploit these vulnerabilities in order to maintain control over the victim.²⁴³ These findings should be read and understood by all legislators who are contemplating enacting or amending their current human trafficking laws.

The Renewal Project’s Model precisely defines “coercion” to include “determining, dictating or setting the price” and place for prostitution, and the determination of where someone will live for purposes of forcing the

240. The Renewal Forum, <http://www.renewalforum.org/> (identifying its mission as one that “enhance[s] the respect and realization of human dignity in public policies at federal, state and local levels of government”). The Renewal Forum “actively pursue[s] research and analysis projects, and disseminate[s] findings, best practices, and effective techniques for raising public education and awareness.” *Id.*

241. The Renewal Forum, Model State Law To Abolish Human Trafficking, § 1, <http://renewalforum.org/theblog/wp-content/uploads/2007/12/rf-model-state-law-final.pdf> [hereinafter Renewal Forum Model].

242. *Id.* § 2(3).

243. *Id.* § 2(1)–(15).

victim to engage in prostitution.²⁴⁴ The rest of the definition is fairly standard, but clearly exemplifies that flexibility needs to be of primary importance when defining the term “coercion.” This flexibility is necessary in order to deal with the novel ways that traffickers use non-violent methods to control their victims.²⁴⁵ The term “commercial sex act” has a very limited definition in the TVPA, because it includes only the actual sex act.²⁴⁶ The Renewal Project’s Model expands the definition to include any “act intended to appeal to the sexual interests of any person or to arouse sexual excitement or gratification.”²⁴⁷ Although this definition fills the gap left in the TVPA when dealing with pornography and stripping, any state statute that includes this broadened provision must be worded so that the victims could still be considered victims of “severe” trafficking under the TVPA. Additionally, the Renewal Project’s Model defines the offenses of “commercial sex trafficking” and “labor trafficking” within the definitions section,²⁴⁸ and for ease of readability and enforceability, it would be better to parse these out and add them as separate provisions.

Another area of this Model that could help states as they add to their human trafficking statutes is the requirement of the establishment of a Director for Trafficking Victims.²⁴⁹ The Director, in conjunction with the state human services department, would establish policies to make sure that all of the proper agencies were trained in identifying victims.²⁵⁰ The Director would also be required to compile a list of services and programs available for the victims of trafficking.²⁵¹ These provisions are extremely helpful for states that are looking to bolster the effectiveness and organization of their trafficking statutes.

4. Polaris Project: Model Comprehensive To Combat Trafficking in Persons

The Polaris Project²⁵² heads up the National Human Trafficking Hotline and liaises with police agencies, federal investigators, policy analysts, and

244. *Id.* § AAA.01(2).

245. International Association of Chiefs of Police, *supra* note 164, at 7.

246. 22 U.S.C. § 7102(3) (2006 & Supp. 2008).

247. Renewal Forum Model, *supra* note 241, § AAA.01(3).

248. *Id.* § AAA.01(12)–(13).

249. *Id.* § EEE.05(C).

250. *Id.* § EEE.05(1)(A).

251. *Id.* § EEE.05(1)(B)(C).

252. Polaris Project, <http://www.polarisproject.org/content/view/13/42/> (identifying its vision as one “for a world without slavery”). The website further states: “Named after the North Star that guided slaves towards freedom along the Underground Railroad, Polaris

policy makers in their efforts to eradicate slavery.²⁵³ Although Polaris Project aims to eradicate slavery around the globe, its focus is at the national level. Polaris Project has analyzed the TVPA, the TVPA reauthorization acts, the DOJ Model, and recently enacted state laws to provide some guidance as to what legislators should avoid and how legislators might amend problematic language in their state codes. Polaris Project also has developed a comprehensive model for state legislation.

a. Analysis of Current State Laws

Polaris Project is currently undertaking a new analysis of laws. The initial analysis was published in 2006.²⁵⁴ Since that time, several states have enacted statutes to deal with trafficking, while other states have amended their existing statutes.²⁵⁵ At the time this Article was written, the new analysis was not yet available from Polaris Project. In the article, *Top 15 Problem Areas in State Bills on Trafficking in Persons*, Polaris Project details problematic language that is commonly found in state laws.²⁵⁶ Polaris Project details the problem, gives an example of a problematic formulation, suggests a reformulation, and provides some commentary as well.

The first problematic area that Polaris Project identifies is limiting the purposes of the exploitation.²⁵⁷ In order to avoid this, states should avoid limiting the definition of trafficking to “transport[ing]”; instead, state bills should address all forms of trafficking.²⁵⁸ Additionally, state bills should not refer to sex-trafficking as “services,” but rather as “commercial sexual acts or sexually-explicit performance[s].”²⁵⁹ Finally, the state should remove the term “prostitution” in favor of “causing or compelling another to engage in a specific commercial sex act or sexually-explicit performance.”²⁶⁰

Project has been providing a comprehensive approach to combating human trafficking and modern-day slavery since 2002.” *Id.*

253. *Id.*

254. Model Comprehensive State Legislation to Combat Trafficking in Persons § 1.2(1) (Polaris Project 2006), available at <http://www.polarisproject.org/images/docs/Model-Comprehensive-State-Legislation.pdf>.

255. See *supra* note 210 (collecting state statutes).

256. Polaris Project, *Top 15 Problem Areas in State Bills on Trafficking in Persons*, available at <http://www.polarisproject.org/images/docs/Top%2015%20Problem%20Areas%20in%20State%20Bills%20on%20Trafficking.pdf>.

257. *Id.* at 1.

258. *Id.*

259. *Id.* at 2.

260. *Id.* at 3.

The next area Polaris Project identifies as a problem in state statutes is when a state limits the means of control.²⁶¹ In short, the “means” the trafficker uses to control the victims should be defined in terms broader than “force or coercion.”²⁶² Additionally, sex trafficking of minors should not require coercion or force to be punishable.²⁶³

Next, the Polaris Project demonstrates that states must include appropriate remedies for the victim. These remedies include prevention and victim protection in addition to those already offered by the criminal code.²⁶⁴ Further, states should avoid low penalties to ensure that punishment is in accordance with the crime.²⁶⁵ States should strive to make victims whole; thus, states should provide for asset forfeiture and restitution for the victim. Additionally, to ensure that everyone who is culpable for the criminal behavior is held accountable, the state should include criminal or civil liability for business entities that profit from sex trafficking.²⁶⁶

The final problem in some states’ laws is their scope of application. States should avoid requiring that victims be transported across state lines for the perpetrator to be punished, because this will limit the number of victims the state can assist.²⁶⁷ Additionally, state law should avoid limiting the victims to foreign nationals only.²⁶⁸ States should also avoid restricting the required elements of the criminal statute to giving or receiving “money,” and should include a “promise clause.”²⁶⁹

b. Polaris Project’s Model State Code

Polaris Project created its *Model Comprehensive State Legislation To Combat Trafficking in Persons* to illustrate how states could pass anti-trafficking laws.²⁷⁰ The Model Code starts with a standard definitions section. Among its definitions, the Polaris Project Model defines trafficking to include knowingly subjecting another person to commercial sex or sexually explicit performance, sexual labor or services, or any of the other

261. *Id.* at 4.

262. *Id.*

263. *Id.* at 5.

264. *Id.* at 6.

265. *Id.*

266. *Id.* at 9.

267. *Id.* at 10.

268. *Id.*

269. *Id.* at 11.

270. Model Comprehensive State Legislation To Combat Trafficking in Persons (Polaris Project 2006), available at <http://www.polarisproject.org/images/docs/Model-Comprehensive-State-Legislation.pdf>.

variety of listed means.²⁷¹ The Polaris Project's Model then explains victim immunity from prosecution, and it lists a variety of "defenses" that are not available to the defendant in a trafficking case including:

- (a) a trafficking victim's sexual history or history of commercial sexual activity;
- (b) a trafficking victim's connection by blood or marriage to a defendant in the case or to anyone involved in the victim's trafficking;
- (c) consent of or permission by a trafficking victim or anyone else on the trafficking victim's behalf to any commercial sex act or sexually explicit performance;
- (d) age of consent to sex, legal age of marriage, or other discretionary age;
- (e) mistake as to the victim's age, even if the mistake is reasonable.²⁷²

To facilitate the prevention of human trafficking, the Polaris Project's Model provides a variety of provisions, such as the establishment of a state-wide task force and a data collection and publication method.²⁷³ The Model also provides that there should be mandatory training for law enforcement agencies, prosecutors, and other officials.²⁷⁴ Additionally, the state should cooperate with non-governmental organizations and prepare public awareness programs.²⁷⁵

Finally, the Polaris Project's Model has a well laid out section dealing with the protections each state should provide to the victims of human trafficking.²⁷⁶ Some of the provisions included in this section are witness protection programs²⁷⁷ and an evidentiary case-worker privilege akin to the privilege in California.²⁷⁸

Polaris Project is currently reworking this model to take into consideration some of the more recent developments in the understanding of human trafficking and what is currently working at the state level.²⁷⁹ Some of these changes will include punishing additional criminal means used to subject the victim to servitude, such as kidnapping, taking another's personal or real property, duress, coercion, or exerting financial control

271. *Id.* § 1.2(1).

272. *Id.* § 1.6.

273. *Id.* §§ 2.1–2.2.

274. *Id.* § 2.3.

275. *Id.* § 2.4.

276. *Id.* § 3.

277. *Id.* § 3.4.

278. *Id.* § 3.11.

279. The information regarding Polaris Project's revisions is based on the personal knowledge of the author.

over the victim. The revised model will also follow the TVPA 2008 revision and prohibit the defense of mistake of age when dealing with minor children. There are several other areas where the revised model will improve language and clarify provisions; however, there are three particular areas where this revised model will be on the cutting edge. First, the revised model suggests that all states require certain establishments that trafficking victims are likely to frequent (e.g., places that serve alcohol) to post the National Trafficking Hotline. Second, the revised model will add to the educational requirements the obligation to train public defenders, judges, juvenile detention officers, and others in the juvenile justice system concerning the problem of human trafficking and teach them how to recognize a victim. Third, several provisions are added that deal with sex trafficking, including “safe harbor laws” to protect child victims of prostitution. Additionally, the Polaris Project proposes that each state establish “John Schools,” which would be an alternative for those who are caught trying to solicit a prostitute.²⁸⁰ These “John Schools” would also educate the “Johns” regarding the issues involved in prostitution, including the potential victimization of the women involved.²⁸¹ All of these provisions should be seriously considered by any state that is enacting human trafficking laws or is amending its current laws to increase the holistic nature of those laws.

5. Freedom Network USA: State Model Law on Protection for Victims of Human Trafficking

The Freedom Network’s Model is the most comprehensive model, and it is written in such a way that state legislatures can easily adopt its language without many changes.²⁸² The Freedom Network’s Model corrects many of the ambiguities and gaps found in the Department of Justice’s (DOJ) model. The first important correction added by the Freedom Network’s Model is the definition of forced labor. The DOJ Model neglected to deal with all aspects of coercion or fraud that a trafficker might use in order to control the victim.²⁸³ In addition to the provisions listed in the DOJ Model, the

280. A “John school” is a program for sex offenders charged with soliciting prostitution. The schools are designed to teach offenders of the damaging effects of prostitution, as an alternative to a prison sentence on the solicitation charge. “*John Schools*”: *Can Men Who Hire Prostitutes Be Reformed?* (PBS television broadcast May 30, 2008), available at <http://www.pbs.org/now/shows/422/prostitution.html>.

281. *Id.*

282. Freedom Network Model, *supra* note 215.

283. The DOJ’s definition of forced labor is:

Freedom Network's Model adds a provision that a person can be found guilty of requiring forced labor if the person uses any scheme to cause the victim to believe that she must perform the labor or service.²⁸⁴ It is important for states to add psychological coercion and fraud to the involuntary servitude statutes, because prior to the TVPA, there was a "use of force" requirement to be found guilty of keeping someone in involuntary servitude; most state statutes unfortunately still have this antiquated language.

Another key definition provided by the Freedom Network Model is the definition of "financial harm" as including, but not limited to: "credit extortion as defined by [State extortion statute, if any], criminal violation of the usury law as defined by [State statutes defining usury], or employment contracts that violate the Statute of Frauds as defined by [State statute of frauds]."²⁸⁵ This definition is important because there are a number of ways that traffickers exploit or threaten to financially exploit their victims,²⁸⁶ and this definition ensures that all of these forms are covered. One definition that should be supplemented is the Freedom Network Model's definition of "sexually-explicit performance." The Model defines this only as "live or public acts";²⁸⁷ however, especially with the ease of internet use for exploitation of children, this provision should also cover video and still pornography.

The criminal provisions of the Freedom Network's Model are very clear, and the provisions adequately cover the crimes typically committed. One area in which this Model, in addition to the previous models, is weak is the

[L]abor, 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 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.

DOJ Model, *supra* note 170, at XXX.01(4).

284. Freedom Network Model, *supra* note 215, div. A § 2(f)(7).

285. *Id.* div. A § 2(e).

286. International Association of Chiefs of Police, *supra* note 164, at 7.

287. Freedom Network Model, *supra* note 215, div. A § 2(l).

required level of mens rea. This Model requires “knowingly” for all of the criminal acts; however, at some point those involved in the crime should not be able to escape criminal culpability. For example, the person who recruits for a migrant job in Mexico, or the driver who transports young girls to the same house night after night, should have an affirmative duty to find out what is happening to these individuals. From a law and economics standpoint in tort law, liability should be placed on the person who is in the best position to take the needed precautions.²⁸⁸ The same should be true here. The goal is to rescue the victims, and those who touch the victims’ lives are in the best position to save them; thus, incentivizing them to take the correct course of action should be one goal of the criminal law. Therefore, the level of mens rea should be “recklessness,” or as a compromise, perhaps there could be levels of trafficking based on whether the defendant involved committed the crime knowingly or recklessly.

The Freedom Network Model does provide for accomplice liability and for sentence enhancements. The addition of accomplice liability assures that all parties that participate in the crime are punished.²⁸⁹ Additionally, the sentence enhancements advocated in this Model seem to be the most logically related to the actual harm done to the victim and to the severity of the crime committed. The sentence enhancements proffered are based on bodily injury, time in servitude, vulnerability of the victim, the number of victims involved, and the ages of any minors involved.²⁹⁰ These enhancements create a strong statute that adequately reflects the abhorrent nature of human trafficking.

This victim-centered approach is exhibited in a variety of provisions that are suggested to protect the victims of human trafficking crimes. The first such provision allows victims to still receive benefits if the defendant pleads guilty or nolo contendere.²⁹¹ There is also an evidentiary provision that would not allow a victim’s prior sexual history to disprove a human

288. See, e.g., the Learned Hand formula, which states: Burden < Cost of Injury x Probability of Occurrence. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

289. Freedom Network Model, *supra* note 215, div. B § 5.

290. *Id.* § 6 (b)(1)–(5).

291. *Id.* § 7. This provision states:

(a) Any plea of guilty or nolo contendere entered by a defendant charged with a crime under Section B.1, B.2, B.3, B.4 or B.5 of this Division must fully state the offenses that justify prosecution under the applicable state law. (b) Any plea of guilty or nolo contendere entered under (a) will automatically entitle the victim of trafficking to all benefits and rights under this statute.

Id.

trafficking claim.²⁹² The provision expressly excludes evidence used to prove the victim engaged in other sexual behavior or evidence offered to prove the trafficker's sexual predisposition.²⁹³ This provision, however, does not address whether the trafficker-defendant can bring in evidence of the victim's prior participation in the commercial sex industry. Some commentators have argued that the defendant should not be permitted to argue that the victim participated in commercial sex in the past;²⁹⁴ however, this limitation seems to be unduly burdensome to the defendant, and the evidence, if reliable, would be very relevant to the case at hand. Although there would be some prejudice to the victim to allow past incidents of commercial sex participation, when dealing with this type of criminal case, the probative value outweighs any prejudicial effect.²⁹⁵ Attempting to make the victims whole, the Model provides for mandatory and discretionary restitution and a way to calculate the full amount of the victim's losses.²⁹⁶ The Model permits asset forfeiture of the trafficker to allow government seizure of assets used in the crime,²⁹⁷ a provision that complements the restitution statute. Finally, the Model provides for prosecutorial immunity in certain situations and proclaims that the victims shall not be housed in jails or detention centers during or after the criminal or civil proceedings.²⁹⁸

As part of its holistic approach, the Freedom Network's Model focuses on more than just the criminalization of human trafficking; it also provides benefits and services to the victims.²⁹⁹ These services include: protective measures, immediate medical care, legal services, contact information for service providers, notice of the status of the case, translation services, occupational therapy services, and other social services.³⁰⁰ Another provision that would be beneficial for the ongoing care for these victims is the creation of a shelter program.³⁰¹ Another innovative suggestion is the

292. *Id.* § 8.

293. *Id.*

294. *See, e.g., id.* div. B § 8.

295. This is required to meet the admissibility standard of Federal Rule of Evidence 403.

296. Freedom Network Model, *supra* note 215, div. C §§ 1-3. Further, section 4 deals with the issuance of the order of restitution, but it should also state how to handle restitution when the victim is no longer in the jurisdiction, as many of the victims will flee or be deported before the criminal case is concluded. *See id.* § 4.

297. *Id.* div. B § 10.

298. *Id.* div. B § 9.

299. *Id.* div. D § 1 (providing that provisions of services under the law "shall not be contingent on the trafficked person's immigration status or on the prosecution of the trafficking victim's trafficker").

300. *Id.* §§ 4-7.

301. *Id.* § 8.

creation of a privileged relationship between the trafficking victim and the “trafficking victim counselor.”³⁰² This could be a key provision, because of the victim’s distrust of authority, and providing a “safe” person for the victim to talk to might encourage the victim to discuss the crimes more freely with law enforcement agents. The only problem with this provision is that from a legal standpoint, it does not state the type of privilege it is creating, so it is unclear under what circumstances this privilege could be set aside by a court.

The Freedom Network’s Model provides a section similar to the provision in the Renewal Project’s Model that ensures training for local law enforcement.³⁰³ It also suggests the formation of a permanent taskforce to coordinate efforts to maintain and integrate human trafficking data. This provision is one that every state should implement, enabling it to have a centralized taskforce that coordinates the agencies involved, supervises data collection, and oversees victims’ services. Furthermore, the taskforce should provide annual reports to determine the progress and the areas of improvement.

6. Models Not a One Stop Shop—They Should Be Adapted to Varying State Needs

It is clear that governmental and non-governmental organizations dedicated to seeing the eradication of modern-day slavery within the borders of the United States have provided state legislators with a plethora of solid guidance for how to accomplish these goals. However, no one model will fit the needs of all states, and the states should carefully and thoughtfully consider their own unique situations and creatively enact legislation that will meet their specific needs. The first matter each state should consider is its geographic location. States that share a border with Mexico or Canada need to be especially vigilant in dealing with the issues of human trafficking versus human smuggling.³⁰⁴ With large events, such as the Canadian Olympic Games, the states that share the border with Canada may see an increase in trafficking across their borders. Also, there is currently a movement to legalize prostitution in certain Canadian provinces, and if that happens, there may be a trickledown effect of trafficked women who were smuggled into Canada being brought across the border to the United States. Therefore, these border states should ensure that their laws

302. *Id.* § 9 (defining “trafficking victim counselor”).

303. *Id.* div. F § 2.

304. The key distinction between “trafficking” and “smuggling” is the “individual’s freedom of choice.” International Association of Chiefs of Police, *supra* note 164, at 3.

are up to date to deal with this influx. Additionally, any time there is an access point in a state from an international source, whether across a border or via an international airport, the state should pay special attention to raising awareness in the general area of the point of entry and on the highways leading away from the point of entry. Those who might come in contact with a victim should know how to identify victims of human trafficking. This goal can be achieved through public awareness campaigns, targeted training offered to a variety of service industry workers, and law enforcement officers in these areas.³⁰⁵

Another issue that may differ among states is the respective amount of urban and agricultural areas, both of which foster human trafficking. In urban areas, there is a high demand for commercial sex that fuels brothels and “massage parlors.”³⁰⁶ Additionally, if the state has vast agricultural areas, it may have more of a need for seasonal workers; due to the nature of the work and the visa requirements, this situation can be fraught with coercive and fraudulent actions.³⁰⁷ Furthermore, even if the migrant workers themselves have not been trafficked, often makeshift “brothels”³⁰⁸ will be created near migrant villages to “service” migrant workers who are working of their own free will.

Another difference among states that should be considered is whether the state contains a port (military or commercial) or a resort area. Sex trafficking and other forms of trafficking increase near military and commercial ports, and in areas where people gather for vacations, such as beach towns.³⁰⁹ Sometimes the ocean resort town is the “lure” where trafficking victims are promised a legitimate job, but once they land in the destination, they are quickly shuffled to another location where they are coerced into forced labor or commercial sex.³¹⁰ This happened to one group of young Eastern European girls who were promised jobs at Virginia Beach

305. See Davis, *supra* note 161.

306. International Association of Chiefs of Police, *supra* note 164, at 6.

307. *Id.*

308. These “brothels” sometimes consist of an outdoor area where the girls stay and wait for the men, and the entire sexual act occurs outdoors. These brothels continue to be raided by law enforcement and the sex traffickers arrested. See U.S. Immigrations and Customs Enforcements, *Federal Jury Convicts Previously Deported Man on Sex Trafficking Charges: Joint Investigation Dismantles Family-Operated Outdoor Brothel* (Jan. 13, 2009), available at <http://www.ice.gov/pi/nr/1001/100113sandiego.htm>.

309. See *supra* note 205 (citing MSNBC investigative journalism reports); see also Amanda Kloer, Sex Trafficking High Around U.S. Military Bases Abroad (Feb. 9, 2010), http://humantrafficking.change.org/blog/view/sex_trafficking_high_around_us_military_bases_abroad.

310. See *supra* note 205 (citing MSNBC investigative journalism reports).

as waitresses. Once they arrived, they were quickly forced to work as “bar girls” under treacherous conditions for no pay.³¹¹

There are many other differences among the states, but one other difference that may influence legislation dealing with human trafficking is the proximity to areas where those who have diplomatic immunity would work, such as, for example, the World Bank, the United Nations, and embassy locations. Thus, states such as New York and New Jersey, as well as Washington, D.C. and its bordering states of Maryland and Virginia, should expect increased levels of those kept in domestic servitude. Domestic servitude is one of the most difficult forms of human trafficking to uncover, because as mentioned above, the master of the house keeps the victims in the home and allows them to go out only after exerting enough psychological or physical control over the victims that he or she is sure the victims will not flee or tell the authorities.³¹² Other states that may have high levels of domestic servants may include states with populations that come from countries where domestic servitude is acceptable.

B. Some State Laws Are More Successful Than Others

Many states have enacted, or are in the final stages of enacting, some legislation related to human trafficking at the state level;³¹³ nevertheless, only a handful of statutes are holistic in nature. When the states enact human trafficking legislation, it will increase the prosecutions of the crime; however, if the legislation is inadequate, it can actually do more harm than good.³¹⁴ There have been two published surveys of state trafficking legislation, each with a different focus, and while both are dated, they are still informative.³¹⁵ The Renewal Project’s report focused on whether a state

311. *MSNBC Undercover*, *supra* note 205; *see also* Grace Kahng, *Sex Slaves, Human Trafficking . . . in America?* (MSNBC television broadcast Dec. 3, 2007), *available at* <http://today.msnbc.msn.com/id/22083762/>.

312. *See supra* note 81 and accompanying text.

313. Washington, D.C. is in the final stages of enacting legislation making it a crime to participate in human trafficking. Polaris Project, *District of Columbia Prohibition Against Human Trafficking Act of 2009 Summary* (2009), <http://www.polarisproject.org/images/dc2009billpolarissummary.pdf>; *see also* The Prohibition Against Human Trafficking Act of 2009, Bill No. 18-70, 2009 Council (D.C. 2009) (amending titles 23 and 14 of the District of Columbia Official Code).

314. *See supra* Part II.A.

315. Center for Women Policy Studies, Report Card on State Action To Combat International Trafficking 3 (2007), *available at* <http://www.centerwomenpolicy.org/documents/ReportCardonStateActiontoCombatInternationalTrafficking.pdf> (based on data collected as of December 2006, when just about half of the states had enacted human trafficking legislation); Renewal Forum, Renewal Forum Analysis: An Examination of State

had a comprehensive statute that focuses on criminalizing all forms of trafficking, protecting the trafficking victims and fostering an environment of anti-trafficking within its borders, and making the trafficking victim whole.³¹⁶ The other survey, the Center for Women Policy Studies, looked at some of these same issues, but a large portion of the grade it allocated to each state came from whether the state statute included provisions that would regulate international marriage brokers and travel service providers that facilitate sex tourism.³¹⁷ Sadly, in both studies, no state was a stellar example for having effective human trafficking laws, and although the surveys differ, most states received very poor marks.³¹⁸

As stated by the Renewal Project, “The proliferation of state anti-trafficking statutes is an important advancement in the anti-trafficking movement, but a state having an anti-trafficking law is not as important as having a good law.”³¹⁹ Some of the areas of deficiencies the Renewal Project has identified are:

- failure to define both labor and commercial sexual exploitation as human trafficking; or failure to recognize the full range of psychological bondage techniques employed by traffickers;
- inadequate support for the restoration of victims, and failure to provide for restitution, civil rights of action, and other support for care provision;
- failure to shield victims of trafficking from acts committed while in the trafficked condition;

Law on Human Trafficking (2007), available at <http://renewalforum.org/theblog/wp-content/uploads/2007/11/statelawanalysis2.pdf> (at the time of this analysis, thirty-six of the states had anti-trafficking legislation).

316. Renewal Forum, *supra* note 315, at 4.

317. Center for Women Policy Studies, *supra* note 315, at 3-5. The five areas that states were graded on in this report were: (1) criminalization statute, (2) victim protection and assistance, (3) statewide interagency task force, (4) regulating international marriage brokers, and (5) regulating travel service providers that facilitate sex tourism. *Id.*

318. The Renewal Project’s highest overall grade “received by any state for its anti-trafficking statute is a B-. That state is Illinois. Only five states received a C- or better.” Renewal Forum, *supra* note 315, at 2. The Center for Women Policy Studies only gave out a handful of A’s across all of the categories, and the vast majority of states surveyed received F’s in most categories. Center for Women Policy Studies, *supra* note 315, at 7.

319. Steven Wagner, *Renewal Forum Releases Analysis of State Anti-Trafficking Laws* (Nov. 6, 2007), available at <http://www.renewalforum.org/theblog/index.php>.

- failure to do more than merely criminalize human trafficking.³²⁰

The states that have the best pieces of legislation are those who utilized the TVPA's three-prong focus—prosecution, protection, and prevention.³²¹

1. Prosecution

In order for there to be a successful prosecution for human trafficking at the state level, the state must criminalize all forms of human trafficking. All of the models discussed above have one distinctive in common: they each advocate that all forms of human trafficking should be covered by statutes at the state level. The models do differ, however, in the way they propose that states accomplish this goal. For example, the DOJ's Model proposes a definition of forced labor that, unlike the TVPA, incorporates both traditional labor and commercial sex.³²² Meanwhile, the Renewal Project's Model provides that trafficking in commercial sex and labor should be parsed out into two separate criminal provisions.³²³ Many states have followed this approach and have bifurcated the two provisions.³²⁴ Additionally, it is important for the statutes to define human trafficking by force, fraud, and coercion as discussed in the TVPA, in order to circumvent the traditional meaning of coercion.³²⁵ However, human traffickers use many forms of manipulation in order to secure a victim's bondage, and as some of the model provisions have done, many states have defined the means of securing the bondage broadly.³²⁶ On January 1, 2010, New

320. *Id.*

321. See *supra* Part II.C for a discussion of the TVPA's three-pronged approach.

322. See *supra* note 218.

323. Renewal Forum Model, *supra* note 241, § AAA.01(3), (5).

324. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-1306–1309 (2007); FLA. STAT. ANN. § 787.06 (West 2007); IND. CODE ANN. § 35-42-3.5-1 (West 2006); KY. REV. STAT. ANN. §§ 529.100–110 (West 2008); MINN. STAT. ANN. §§ 609.281–284 (West 2007); N.J. STAT. ANN. § 2C:13-8 (West 2005); N.C. GEN. STAT. ANN. §§ 14-43.10–.13 (West 2006); OKLA. STAT. tit. 21, § 748.2 (2007); R.I. GEN. LAWS §§ 11-67-1–5 (2009); TENN. CODE ANN. § 39-13-308 (West 2008); TEX. PENAL CODE ANN. §§ 20A.01–.02 (Vernon 2007); WIS. STAT. ANN. § 940.302 (West 2007).

325. See *supra* Part II.C for a discussion of the TVPA.

326. The following are examples of statutes that have defined force, fraud, and coercion at the state level; any interesting additional provisions are noted in a parenthetical after the citation. ARIZ. REV. STAT. ANN. §§ 13-1306–1309 (2007) (adding confiscation of immigration documents); DEL. CODE ANN. tit. 11, § 787 (2007) (adding taking or destroying passport or identification or blackmail or threatened financial harm); FLA. STAT. ANN. § 787.06(2)(b)(3) (West 2007) (adding “[u]sing lending or other credit methods to establish a debt by that person or another person when labor or services are pledged as a security for the

Hampshire's new human trafficking law went into effect, and its provisions concerning forced labor and the means used to secure the involuntary labor are particularly good. First, in its definitions section, New Hampshire explains that even if the labor begins as consensual, as soon as the victim wants to leave the job, the labor becomes involuntary if the employer does not permit the victim to leave.³²⁷ Then, in its sections dealing with involuntary servitude, New Hampshire prohibits forced labor through the following means:

- (1) Causing or threatening to cause serious harm to any person.
- (2) Confining the person unlawfully as defined in RSA 633:2, II, or threatening to so confine the person.

debt . . . , if the value of the labor or services as reasonably assessed is not applied toward the liquidation of the debt, the length and nature of the labor or services are not respectively limited and defined"); IOWA CODE ANN. § 710A.2 (West 2006); MINN. STAT. ANN. § 609.281 (West 2007); NEB. REV. STAT. § 28-831(1)(a)-(d) (2006); N.H. REV. STAT. ANN. § 633:6 (2010); N.J. STAT. ANN. § 2C:13-8 (West 2005); N.C. GEN. STAT. ANN. § 14-43.10(a)(1)(b) (West 2006) (adding "[e]xposing or threatening to expose any fact or information that if revealed would tend to subject a person to criminal or immigration proceedings, hatred, contempt, or ridicule"); OKLA. STAT. ANN. tit. 21, §§ 748-748.2 (West 2007); R.I. GEN. LAWS § 11-67-1 (2007); TEX. PENAL CODE ANN. §§ 20A.01-02 (Vernon 2007); WIS. STAT. ANN. § 940.302 (West 2007). One salient example is Georgia, which defined the word "deception" as:

- (A) Creating or confirming another's impression of an existing fact or past event which is false and which the accused knows or believes to be false;
- (B) Maintaining the status or condition of a person arising from a pledge by that person of his or her personal services as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined, or preventing a person from acquiring information pertinent to the disposition of such debt; or
- (C) Promising benefits or the performance of services which the accused does not intend to deliver or perform or knows will not be delivered or performed. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this Code section.

GA. CODE ANN. § 16-5-46(2) (West 2006).

327. N.H. REV. STAT. ANN. § 633:6 (2010).

"Involuntary servitude" means a condition of compulsory service or labor, including commercial sex acts or sexually explicit performances, performed by one person, against his or her will, for the benefit of another. If a person willingly begins to perform the labor or service but later attempts to withdraw and is forced to remain and perform against his or her will, the service becomes involuntary. The payment of a wage or salary is not determinative of the question as to whether that person has been held in involuntary servitude.

Id.

- (3) Abusing legal process or threatening to bring legal action against the person relating to the person's legal status or potential criminal liability.
- (4) Destroying, concealing, removing, confiscating, or otherwise making unavailable to that person any actual or purported passport or other immigration document, or any other actual or purported government identification document.
- (5) Threatening to commit a crime against the person.
- (6) False promise relating to the terms and conditions of employment, education, marriage, or financial support.
- (7) Threatening to reveal any information sought to be kept concealed by the person which relates to the person's legal status or which would expose the person to criminal liability.
- (8) Facilitating or controlling the person's access to an addictive controlled substance.
- (9) Engaging in any scheme, plan, or pattern, whether overt or subtle, intended to cause the person to believe that, if he or she did not perform such labor, services, commercial sex acts, or sexually explicit performances, that such person or any person would suffer serious harm or physical restraint.
- (10) Withholding or threatening to withhold food or medication that the actor has an obligation or has promised to provide to the person.
- (11) Coercing a person to engage in any of the foregoing acts by requiring such in satisfaction of a debt owed to the actor.³²⁸

On the other hand, some states do not provide any definition for what constitutes human trafficking.³²⁹ Others have conflicted definitions on the books concerning human trafficking. For example, in its definitions section, Michigan allows for a variety of means to secure a person's forced labor, including:

328. N.H. REV. STAT. ANN. § 633:7(I)(a)(1)–(11) (2010). Another interesting provision New Hampshire provided for was that there was no intent to criminalize “actions of a parent or guardian who requires his or her child to perform common household chores under threat of typical parental discipline.” *See id.* § 633:7(I)(b).

329. KY. REV. STAT. ANN. §§ 529.100–.110 (West 2008). Nevada also does not provide any definition of terms for forced labor or the means that a trafficker can employ in the actual statute; however, Nevada did recognize that traffickers did routinely use force, fraud, and coercion in the preamble to the statute. *See* NEV. REV. STAT. §§ 200.467–.468 (2007); NEV. REV. STAT. ANN. tit. 15, ch. 200 Note (preamble). The preamble is not binding law.

(i) Causing or threatening to cause serious physical harm to another person; (ii) Physically restraining or threatening to physically restrain another person; (iii) Abusing or threatening to abuse the law or legal process; (iv) 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; (v) Blackmail; (vi) Causing or threatening to cause financial harm to any person.³³⁰

However, in the next section, the code defines forced labor only in terms of physical violence or the threat of violence.³³¹

Most states' definitions of trafficking are consistent with the definition of "severe human trafficking" that is found in the TVPA. However, some states are using this opportunity to fill the gaps found in the TVPA, and to protect victims who may not be adequately protected by the TVPA. For example, Delaware and a few other states criminalize human trafficking in order to harvest body parts,³³² which, although not found in the TVPA, is a provision found in the UN Protocol. There is also a debate as to how the states should deal with sex trafficking. As noted above, several states follow the TVPA and separate out sex trafficking and labor trafficking.³³³ Nonetheless, many argue that commercial sex and other sexual acts (like stripping and pornography) are just a form of forced labor, and thus the victims of sex trafficking should be treated the same as victims of other forms of forced labor or involuntary servitude.³³⁴ In *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, Melynda H. Barnhart explains the difference between the Intersectional Model as provided for by the DOJ's Model State Law, the Individualist Model as it is enacted by California, and the Structuralist Model as it is enacted by New York.³³⁵ Barnhart explains that at first examination, sex trafficking and labor trafficking may look very different, but when one investigates below the surface, the similarities are revealed. Both deal with exploitation of persons, and even labor trafficking often uses sexual abuse to control the

330. MICH. COMP. LAWS § 750.462a(e)(i)-(iv) (2006).

331. *Id.* § 750.462b(1) (2006) ("A person shall not knowingly subject or attempt to subject another person to forced labor or services by causing or threatening to cause physical harm to another person.").

332. 11 DEL. CODE ANN. § 787(b)(4) (2007); *see also* MINN. STAT. § 609.281 (2007).

333. *See generally supra* note 210.

334. *See* DOJ Model, *supra* note 170.

335. Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 101-20 (2009).

victims.³³⁶ In the DOJ Model and some of the other models discussed above, sex trafficking and labor trafficking are treated the same, and this forces law enforcement and prosecutorial efforts to focus on the means of exploitation, not necessarily on the underlying form of the exploitation.³³⁷ According to Barnhart, “This shift forces law enforcement to place their efforts behind ending exploitative practices of traffickers, rather than allowing them to focus their efforts on the more familiar territory of sex trafficking.”³³⁸ The other two models are distinct, because they have differing views as to whether prostitution can ever be considered labor.³³⁹ The California statute (the Individualist model) focuses on the means that the trafficker uses to control the victim, rather than on how the victim came to be within the control of the trafficker. The California statute does not mention sex or prostitution in the statute.³⁴⁰ The Structuralist model proclaims that women can never voluntarily exchange sex for money in the context of the abusive patriarchal male society.³⁴¹ In the New York statute, sex trafficking is disproportionately represented in the criminal statute.³⁴² Barnhart concludes that:

States should ensure that their anti-trafficking laws contain a unified definition of human trafficking, encompassing both sex and labor exploitation, with sentencing enhancements to take into account the gendered nature of many aspects of trafficking without downplaying or erasing the very real exploitation of all forms of labor and all types of people that trafficking represents.³⁴³

336. *Id.* at 91.

337. *Id.* at 107.

338. *Id.*

339. *Id.* at 112.

340. *See generally* CAL. PENAL CODE §§ 236.1–237 (West 2006).

341. *Id.* at 114–19. The proponents of these two models also have fundamental differences as how or if prostitution should be dealt with in the legal system. Those who promote the Structuralist Model tend to be an advocate for the Swedish Model for legalization of prostitution. The Swedish Model is a relatively new model that basically focuses on criminalization of the demand side of prostitution, i.e., the Johns and the pimps, but it legalizes prostitution for the women involved. According to proponents of the Swedish Model, this will lessen the exploitation of the women and children involved by lessening demand, and if women and children are involved it will not further exploit them by charging them with the crime of prostitution.

342. N.Y. PENAL LAW § 135.35 (McKinney 2007) (labor trafficking falling under a class D felony); *id.* § 230.34 (sex trafficking falling under a class B felony).

343. Barnhart, *supra* note 335, at 132.

Many states continue to revisit their human trafficking statutes and continue fine tuning their laws.³⁴⁴ Nonetheless, when a state does criminalize additional forms of abuses such as human trafficking, it may be difficult for the victim to get benefits under federal law, and this should be considered by the state.

2. Protection

The statutes proffered by the states must have an adequate focus on victims, to protect them during the adjudication process and afterwards. One aspect on which states should focus is dealing with victim aftercare. Victims of labor and sex trafficking suffer from overwhelming psychological issues, including depression and post-traumatic stress disorder.³⁴⁵ Additionally, some children who were trafficked at a very young age may suffer from an inability to love, and this can lead to issues such as future deviant behavior.³⁴⁶ Victims also suffer from physical ailments and disease, such as HIV/AIDS.³⁴⁷ Therefore, states should make sure that victims have access to proper health care and a safe environment.³⁴⁸ Oklahoma has enacted an exemplary guideline for how to treat human trafficking victims, stating:

Human trafficking victims shall: 1. Be housed in an appropriate shelter as soon as practicable; 2. Not be detained in facilities inappropriate to their status as crime victims; 3. Not be jailed, fined, or otherwise penalized due to having been trafficked; 4. Receive prompt medical care, mental health care, food, and other assistance, as necessary; 5. Have access to legal assistance, information about their rights, and translation services, as necessary; and 6. Be provided protection if the safety of the victim is at risk or if there is a danger of additional harm by recapture of the victim by a trafficker, including: a. taking measures to protect trafficked persons and their family members from intimidation and threats of reprisals, and b. ensuring that

344. 720 ILL. COMP. STAT. 5/10A-10 (2007) (statute repealed on Jan. 1, 2010, replaced by 2009 Ill. Laws 710 § 10-9).

345. Overbaugh, *supra* note 166, at 639; *see* DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 35 (2007), *available at* <http://www.state.gov/documents/organization/82902.pdf> [hereinafter 2007 TIP REPORT].

346. *See* Rickert, *supra* note 34. *See generally* JENNIFER ROBACK MORSE, LOVE AND ECONOMICS: IT TAKES A FAMILY TO RAISE A VILLAGE (2008).

347. 2007 TIP REPORT, *supra* note 345, at 37; 2009 TIP REPORT, *supra* note 49, at 22; Overbaugh, *supra* note 166, at 639.

348. OKLA. STAT. ANN. tit. 21, §§ 748–748.2 (West 2007).

the names and identifying information of trafficked persons and their family members are not disclosed to the public.³⁴⁹

New Mexico also provides a good standard to which other states can look for how to provide benefits and services at the state level to the victim of trafficking. The provisions provided for in the New Mexico statute are:

(1) case management; (2) emergency temporary housing; (3) health care; (4) mental health counseling; (5) drug addiction screening and treatment; (6) language interpretation, translation services and English language instruction; (7) job training, job placement assistance and post-employment services for job retention; (8) services to assist the victim and the victim's family members; or (9) other general assistance services and benefits as determined by the children, youth and families department.³⁵⁰

Other areas the states should consider when codifying human trafficking legislation are providing for restitution, forfeiture, and the ability to sue the trafficker civilly.³⁵¹ California has enacted several provisions that are focused on protecting trafficking victims before and during the trial. First, a relatively new addition to the statute provides an affirmative duty for law enforcement to use due diligence to identify victims of human trafficking.³⁵² Second, like the Polaris Project Model, it provides guidance for law enforcement as to specific ways to assist victims in getting federal benefits, by requiring that local law enforcement provide the necessary "law enforcement endorsement" needed to start the T-Visa process within 15 days.³⁵³ California is a very victim-friendly state; however, on the criminal side, the penalty for state-level human trafficking is very minimal—three to five years.³⁵⁴

349. *Id.* tit. 21, § 748.2.

350. N.M. STAT. § 30-52-2 (2008).

351. N.H. REV. STAT. ANN. § 633:6-7 (2010); N.J. STAT. ANN. § 2C:13-8 (West 2005); R.I. GEN. LAWS § 11-67-(1)-(5) (2007).

352. *See* CAL. PEN. CODE § 236.2 (West 2009) (providing that important factors to consider include signs of trauma, fatigue, injury, or other evidence of poor care, the person is withdrawn, afraid to talk, or his or her communication is censored by another person, the person does not have freedom of movement, the person lives and works in one place, the person owes a debt to his or her employer, security measures are used to control who has contact with the person, the person does not have control over his or her own government-issued identification or over his or her worker immigration documents).

353. *Id.*

354. *See id.* §§ 236.1-237.

3. Prevention

a. Training Local Police and Prosecutors

The statute should provide training for local police and prosecutors that is focused on the victim. According to a recent study conducted by Northeastern University, “agencies with a special unit, protocols or training are 2 to 3 times more likely to identify cases of human trafficking than those without such preparations.”³⁵⁵ As a member of the Polaris Project team stated while conducting a training session for a group of Virginia law enforcement officers, “we are not asking you to go out and investigate a set of new crimes, just to think differently as you investigate the crimes you are already working on.”³⁵⁶ Local law enforcement is the best tool for uncovering victims of human trafficking, especially if a jurisdiction engages in the community policing model of law enforcement.³⁵⁷ However, identifying victims is not as easy as it might appear to be on the surface, because as was discussed in the Introduction of this Article, many of the victims are concealed, and sometimes they are merely hidden in plain view. Thus, one must look at the world around him or her in a new way—go through the looking glass, so to speak—to uncover the secret torment of

355. The Action Group To End Human Trafficking and Modern-Day Slavery, *Recommendations for Fighting Human Trafficking in the United States and Abroad: Transition Report for the Next Presidential Administration* 24 (2008), available at <http://www.freetheslaves.net/Document.Doc?id=96>.

356. Polaris Project’s Law Enforcement Training, Fairfax County Criminal Justice Academy (Oct. 28, 2009). The author was present at this training.

357. According to one abolitionist group, local law enforcement is key to ending human trafficking. In its discussion of recommendations to the next President of the United States, the group stated that the next administration should seek financing to

promote the role of state and local law enforcement in addressing trafficking in persons effectively and appropriately. The Executive Branch must strengthen institutional processes and procedures to ensure seamless cooperation and collaboration among law enforcement at all levels of government in identifying, investigating and prosecuting human trafficking cases, while concurrently providing assistance and protection for victims. In the U.S. federal system, the bulk of police, prosecution and social service resources exist at the local level. Therefore, an effective strategy must focus on local law enforcement. Unfortunately, trafficking has not been made a priority at this level. Police departments around the country have dedicated and trained personnel to address the homicide epidemic but no such resources have been allocated to fight human trafficking. The anti-trafficking effort to date has been largely concentrated in the federal government.

See The Action Group To End Human Trafficking and Modern-Day Slavery, *supra* note 355, at 23-24.

these victims. For the law enforcement agent this becomes increasingly difficult, because at times the agent might need to re-adjust the typical view of who is a criminal and who is a victim. This is especially true when the victim of trafficking is engaging in illegal activity such as prostitution, or when the victim is a foreign national without appropriate documentation.³⁵⁸ Without the proper training, it is easy for a law enforcement agent to deal with the crime at hand rather than to dig deeper to find out that the “criminals” are actually the victims. In his article, *Sex Trafficking: Identifying Cases and Victims*, federal prosecutor Robert Moosy explains that although sex trafficking victims are in one sense hidden in massage parlors and brothels, these traffickers need to make their “product” public in order to garner clients.³⁵⁹ Therefore, with the proper training, there are ample opportunities for law enforcement to ascertain the whereabouts of victims and bring them to freedom. Moosy gives several suggestions as to how victims can be identified, including: (1) developing a training program concerning human trafficking for both law enforcement and others in the community;³⁶⁰ (2) developing a reporting relationship with law enforcement agents in neighboring jurisdictions; (3) regularly contacting non-governmental organizations and asking for leads; and (4) working with confidential informants.³⁶¹

Local law enforcement needs to be trained as to appropriate interviewing techniques to utilize with suspected victims of human trafficking, so that once a victim is identified, the law enforcement officer is prepared to properly interview the victim. Unlike victims of crime who are generally visibly excited to be rescued by law enforcement, the victims of human trafficking many times approach law enforcement with trepidation and suspicion. Sometimes the traffickers will utilize law enforcement as part of their techniques to gain power over their victims.³⁶² For example, the trafficker will point to a passing police car and say that he is paying that police officer to watch the victims, or he will say that if the victim tries to

358. JENNIFER FISHER, HUMAN TRAFFICKING LAW ENFORCEMENT REFERENCE GUIDE 35 (2009).

359. Moosy, *supra* note 141, at 3.

360. *Id.* (describing an example of a local law enforcement agent who made a vehicle stop and noticed that there was a scantily clad young woman in the van who appeared frightened of the driver; although the officer knew there was something wrong he did not know how to characterize the problem). Nevertheless, the driver of the van was arrested, and is now serving a life sentence for beating, raping, and forcing women to engage in prostitution. *Id.*

361. Moosy, *supra* note 141, at 3-4.

362. *See, e.g.,* DEStEFANO, *supra* note 42, at 76.

run, the victim will be arrested because he or she is here illegally (this is especially effective if the trafficker has confiscated all of the victim's documents upon the victim's arrival in the United States). Many victims are from countries where the police forces are corrupt, so these threats may seem valid to the trafficked victim. Additionally, if the victim is engaged in any illegal activity like prostitution, the victim may be worried that she would be arrested if she talked with police. Finally, although for domestic workers the trafficker typically is not involved in other organized crime, in the cases of sex trafficking and in other forced labor situations, sometimes the traffickers are part of organized crime or have powerful criminal influences in the origination country.³⁶³ As part of the bondage, sometimes the trafficker will threaten family members in the United States or abroad if the victim speaks to police.³⁶⁴ For all of these reasons, victims of sex trafficking need to be questioned differently than victims of other crimes.

Moosy gives guidance to law enforcement for questioning victims of human trafficking. First, officers should believe the victim unless the investigation shows otherwise, because truth is often stranger than fiction. Second, law enforcement must keep and interview the victims separately.³⁶⁵ Third, even when a victim lies, the investigator should not stop investigating. This is particularly important in the early stages of the investigation, since the "victims may be traumatized or fearful of law enforcement officers because the trafficker may have threatened to harm them or their families if they are truthful."³⁶⁶ Finally, officials must show patience with the victims of sex trafficking, because their captors will often instill in them a fear of law enforcement by telling them that they will be

363. Torg, *supra* note 169, at 505 (stating that organized criminal groups involved in human trafficking threaten the rule of law).

364. FISHER, *supra* note 358, at 22.

365. At times, the trafficker will "promote" one of the trafficked victims to be an enforcer, and the one-time victim will actually become one of the traffickers. In the context of the investigation, the "promoted victim" may actually try to exert influence over the other victims to coerce them into not cooperating with law enforcement agents. Moosy, *supra* note 141, at 6.

366. As discussed above, the victims might be fearful of law enforcement and may lie or try to mislead them at first. Additionally, some victims will develop Stockholm syndrome during their traumatic enslavement, and will be reluctant to "turn" on their captors because the captors were the victims' only source of food, shelter, etc. during the duration of captivity, and those who develop Stockholm syndrome will perceive even small gestures of kindness from their tormentor as grand. Moosy explains that at the beginning of an investigation officers should anticipate that because of all of these issues the victim might lie, and using a victim-centered model helps determine ways of ascertaining the truth of the situation. *Id.*

prosecuted for what they have done or for being in the country illegally. Law enforcement must gain the trust of the victims and show them that they will not be returned to those who held them in captivity.³⁶⁷

b. Public Awareness

Public awareness is key to helping end slavery in the United States.³⁶⁸ Each state should educate its citizens about the problems of human trafficking and how they can do their part to eradicate it. In many instances, the keen eye or ear of a Good Samaritan has brought a slave to freedom. One example is the case of Ruth, a fifty-two-year-old West African woman who came to the United States to work for the family of a man who was employed by the World Bank.³⁶⁹ Once Ruth arrived, the man forced her to care for his house and five children around the clock, which included sleeping with the one-year-old twins to care for them at night. She was not paid and was frequently abused.³⁷⁰ A neighbor heard her screams and called the police. A police officer came to the home; however, when Ruth tried to act out her beatings and explain the abuses to the police officer, the police officer turned to the abusers for a translation.³⁷¹ The abusers claimed she was acting out how she beats herself, and that she was crazy.³⁷² Ruth was taken to a local mental institution and sedated.³⁷³ Upon her return to the home, she was told that the security guard who was patrolling the area was watching her.³⁷⁴ Finally, a neighbor, upon hearing her continued screams, helped her escape the home.³⁷⁵

Louis Etongwe is another example of a Good Samaritan who helped to free an enslaved worker from an extended family member after noticing the girl during a Thanksgiving dinner at the relative's house.³⁷⁶ The girl

367. During the initial interaction with police, the victim might tell a "cover story" that was decided by the trafficker because the victim might be fearful of police or fear repercussions from the traffickers. International Association of Chiefs of Police, *supra* note 164, at 10.

368. *See generally* BALES, *supra* note 24.

369. BALES & SOODALTER, *supra* note 21, at 18-19.

370. *Id.* at 20.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.* Due to her traumatic experience, Ruth was too distressed to testify in court, and she returned to West Africa penniless.

376. BALES, *supra* note 24, at 5-9; BATSTONE, *supra* note 36, at 225-27 (discussing Louis Etongwe's role in freeing domestic servants in Northern Virginia).

explained how after being enslaved for five years, she was freed, and expressed that now she has high hopes for the future:

I consider myself a slave because I worked for so many hours without getting paid, and without going to school. And I couldn't leave. I feel like they stole my life from me. . . . It's like we were brainwashed so we didn't know the laws, we didn't know the rules. All we knew was what they were telling us. And we believed all that they were saying. . . . The people were found guilty. They pled guilty and they did some community service. They were asked to pay me some of the money for the years that I worked for them. . . . I'm proud of myself now because now I have a job, I have a roof over my head, I have a car, I can do whatever I want. . . . What I dream now is to be a registered nurse. I love helping people. With the help of God, I am going to do it and I'll be a registered nurse.³⁷⁷

Because modern-day slavery is hidden, it is important that those who might touch a slave's life be aware of the issues and understand the signs to look for to help determine whether a person has been trafficked. Some people who routinely have contact with trafficked victims are firefighters, postal delivery persons, health inspectors, nurses or doctors, cable television installers, and even the person who comes to read the electricity meter. Additionally, like Louis Etongwe, anyone might inadvertently peek through the looking glass and see the reality that a neighbor, family, or restaurant is holding victims against their will and forcing them to work. The warning signs to look for to determine whether further investigation is warranted are:

- [1] Is this person unable to move freely, or is [he or] she being watched or followed?
- [2] Does [he or] she seem frightened to talk in the presence of others?
- [3] Does the person look to be of school age, but [he or] she is regularly seen working during school hours?
- [4] Are there signs of assault—bruises, cuts, bandages, limping?
- [5] Does [he or] she seem disoriented, confused, malnourished or frightened?³⁷⁸

377. BALES & SOODALTER, *supra* note 21, at 41.

378. *Id.*

As part of public awareness, the public should be told to report any suspicious activity to the police or to a trafficking hotline for that state.

c. Task forces

Maryland developed a task force in 2007 to find and rescue victims of trafficking.³⁷⁹ The taskforce includes members of law enforcement, non-governmental organizations, social service agencies, prosecutors' offices, and a diverse variety of other governmental agencies.³⁸⁰ This task force has been very successful in recent years ferreting out labor and sex trafficking in Maryland.³⁸¹ The task force recently tracked down a human trafficker through his Craigslist.com post offering a "2-girl special."³⁸² In this case the trafficker forced three female children to engage in prostitution, including "walking" truck stops and streets in Baltimore City that are known for prostitution.³⁸³ The traffickers pled guilty and face a minimum of ten years in prison.³⁸⁴ Craigslist has been continually trying to clean up its database to

379. United States Attorney's Office for the District of Maryland, Human Trafficking, <http://www.justice.gov/usao/md/Human-Trafficking/index.html>.

380. As of January 2010, the members of Maryland's Human Trafficking Taskforce included: Victim and Public Services Committee, Law Enforcement Committee, Legislative Committee, and Training Committee. Participants in the task force included: the Office of the Attorney General of Maryland, Office of the State's Attorney for Baltimore City, U.S. Department of Homeland Security—Bureau of Immigration and Customs Enforcement, Federal Bureau of Investigation, Maryland State Police, Anne Arundel County Police Department, Baltimore City Police Department, Baltimore County Police Department, CASA of Maryland, City of Baltimore Mayor's Office, Johns Hopkins University School of Nursing, East Baltimore Community Health Center, International Refugee Committee, Legal Aid of Maryland, Lutheran Social Services of the National Capital Area, Maryland Sexual Assault Legal Institute, Maryland Transportation Authority, Maryland Department of Human Resources, Mercy Medical Center, SAFE Program, Montgomery County Police Department, Office of the Public Defender of Maryland, Office of the State's Attorney for Baltimore County, Office of the State's Attorney for Montgomery County, Office of the State's Attorney for Prince George's County, Polaris Project, Prince George's County Police Department, Shared Hope International, Salvation Army—Baltimore, U.S. Department of Justice, Vineyard Community Church, and YANA (You Are Never Alone), Inc. United States Department of Justice, Human Trafficking Taskforce, *available at* <http://www.justice.gov/usao/md/Human-Trafficking/index.html>.

381. *See infra* notes 382-86.

382. United States Department of Justice, Reisterstown Man Pleads Guilty in Sex Trafficking Conspiracy Involving Three Minor Girls: Maryland Task Force To Show "Zero Tolerance for Child Prostitution" (July 16, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/ReisterstownManPleadsGuiltyinSexTraffickingConspiracyInvolvingThreeMinorGirls.html.

383. *Id.*

384. *Id.*

prevent its use as a tool for sex traffickers; nevertheless, the criminals have been able to continue to use it to promulgate prostitution.³⁸⁵ As late as December 2009, the Maryland taskforce reported finding another sex trafficker utilizing Craigslist to garner more clients.³⁸⁶

V. IT TAKES A COMMUNITY TO SAVE A SLAVE—A FOCUS ON VIRGINIA’S LAWS

A. *The Problem of Trafficking in Virginia*

Human trafficking is a problem for every state in the Union, and there are areas of vulnerability that each state must consider. In her report before the Virginia Task Force for Human Trafficking, Dr. Louise Shelley reported that there is “considerable sex trafficking in Virginia,” and that the FBI has named the Northern Virginia area as one of the 14 major child sex trafficking centers in the United States.³⁸⁷ She explained that other major issues in Virginia are Internet child pornography that is produced in the Commonwealth, “labor trafficking, mail order brides, and trafficking for adoption.”³⁸⁸

In Virginia there are many areas that make the Commonwealth uniquely suited to be an ideal location for human traffickers. First, there are two major international airports located in Virginia and several interstates that connect these airports to the Eastern Seaboard.³⁸⁹ Second, the Virginia Beach resort area and the Norfolk Navy Port are areas that can be rife with

385. Craigslist provides a warning on its site not to use it for sexual trafficking, and it provides a way that one can report postings that appear to be sexually exploiting a minor. Craigslist.org, Craigslist Terms of Use, <http://www.craigslist.org/about/terms.of.use>.

386. United States Department of Justice, Second Ohio Man Pleads Guilty to Sex and Drug Trafficking: Used Craigslist, MySpace, YouTube and Other Social Networking Sites To Recruit Prostitutes and Sell Sexual Services (Dec. 23, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/SecondOhioManPleadsGuiltytoSexandDrugTrafficking.html; United States Department of Justice, Ohio Man Pleads Guilty to Sex and Drug Trafficking: Used Craigslist, MySpace, YouTube and Other Social Networking Sites to Recruit Prostitutes and Sell Sexual Services (Dec. 3, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/SecondOhioManPleadsGuiltytoSexandDrugTrafficking.html.

387. Virginia Division of Legislative Services, Meeting of the Commission on the Prevention of Human Trafficking, Sept. 30, 2008, *available at* <http://dls.state.va.us/GROUPS/trafficking/meetings.htm> (follow “meetings”; then follow “09/30/08 Summary”).

388. *Id.*

389. Virginia’s two major international airports are Richmond International Airport and Dulles International Airport.

both sex and labor trafficking, especially in the seafood processing industries.³⁹⁰ Third, Northern Virginia's proximity to Washington, D.C. is important for several reasons, including a large immigrant population, the residences of employees of the World Bank, and embassy employee residences. Additionally, as Delegate Jack Rust added in the Virginia Task Force Meeting, the multi-jurisdiction Gang Task Force is following human trafficking in Northern Virginia.³⁹¹ This is because many times where there is human trafficking, there is a link to organized crime.³⁹² Fourth, while the northern portions of the Commonwealth are urban and suburban, there are large agricultural areas in the southern portions of the Commonwealth.³⁹³ Finally, like every other state, Virginia has the same issues of labor trafficking in the form of domestic servants, restaurants, nail salons, bar girls, and sex trafficking hidden in places such as massage parlors.

B. *Make Sure the Laws Are Adequate*

In order to combat modern-day slavery in Virginia, the laws need to be adequate to deal with all aspects of human trafficking. On December 18, 2007, Virginia empanelled a Human Trafficking Commission to study the issues of human trafficking within its borders.³⁹⁴ This Commission met several times in 2008, and summaries of its meetings evidence that the Commission brought in several experts in the field to educate its members as to the problems of human trafficking.³⁹⁵ However, the Commission expired by its own terms earlier this year. Virginia legislators have

390. Virginia Division of Legislative Services, Meeting of the Commission on the Prevention of Human Trafficking, Oct. 20, 2008, *available at* <http://dls.state.va.us/GROUPS/trafficking/meetings.htm> (follow "meetings"; then follow "10/20/08 Summary").

391. Virginia Division of Legislative Services, *supra* note 387.

392. ALEXIS ARONOWITZ, HUMAN TRAFFICKING, HUMAN MISERY: THE GLOBAL TRADE IN HUMAN BEINGS 70-76 (2009).

393. Agriculturally, Virginia still produces a substantial amount of tobacco and several other crops. Virginia Department of Agriculture and Consumer Services (Feb. 9, 2010), <http://www.vdacs.virginia.gov/agfacts/top20.shtml>.

394. Virginia Division of Legislative Services, Meeting of the Commission on the Prevention of Human Trafficking, Dec. 18, 2007, *available at* <http://dls.state.va.us/GROUPS/trafficking/meetings.htm> (follow "meetings"; then follow "12/18/07 Summary").

395. Virginia Division of Legislative Services, Meeting of the Commission on the Prevention of Human Trafficking, Sept. 30, 2008; Oct. 20, 2008; Nov. 18, 2008, *available at* <http://dls.state.va.us/GROUPS/trafficking/meetings.htm> (follow "meetings"; then follow summary for appropriate date).

attempted to pass legislation to criminalize human trafficking on two different occasions; however, on both occasions the legislation failed.³⁹⁶

In 2007, Delegate Adam Ebbin introduced a comprehensive human trafficking bill.³⁹⁷ This Human Trafficking Act provided for the criminalization of all forms of human trafficking, and like the New Hampshire statute, it listed a variety of means that traffickers use in order to control those they hold in bondage.³⁹⁸ The bill also focused on protecting victims during the criminal process by providing that victims of human trafficking should not be liable for criminal activities that were coerced.³⁹⁹ Furthermore, the bill would have prohibited human traffickers from using as defenses the claims that the victim has a family connection, the victim initially consented, or another consented on behalf of the victim to the labor or services.⁴⁰⁰ Similarly, this bill would have provided a plan for the Commonwealth to prevent the atrocity of human trafficking within the borders of Virginia.⁴⁰¹ This plan would have included the establishment of an ongoing taskforce; the collection and publication of statistical data; law enforcement training; and a public awareness program.⁴⁰² The bill would have provided for rights and benefits that would account for the unique needs of the victims of human trafficking. The bill urged consultation with NGOs and other members of civil society in the coordination of these benefits that would include psychological counseling, witness protection, proper housing (i.e., not in detention centers), medical care, and legal assistance.⁴⁰³ Lastly, this bill would have also protected the communications between the victims of trafficking and a certified human trafficking counselor.⁴⁰⁴ In short, besides needing a few tweaks, this bill is an example of what a state should do when considering legislation directed to stamp out modern-day slavery within its borders. Nevertheless, the Virginia legislature rejected this bill.⁴⁰⁵

396. HB 2551, 2007 Sess. (Va. 2007); HB 2016, 2009 Sess. (Va. 2009) (passed in part).

397. HB 2551, 2007 Sess. (Va. 2007).

398. *Id.* § 18.2-76.4.C.1–10.

399. *Id.* § 18.2-76.6.

400. *Id.* § 18.2-76.7.

401. *Id.* § 18.2-76.10.

402. *Id.* § 18.2-76.10–13.

403. *Id.* § 18.2-76.15 (providing for a non-inclusive list of benefits that should be offered to the victims).

404. *Id.* § 18.2-76.16.

405. The House of Delegates referred the bill to committee and never acted on it. *See* Virginia General Assembly Bill Tracking for HB 2551 (2007), <http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+HB2551>.

In 2009, Virginia legislators took two very distinctive positions on human trafficking. On the one hand, Senator Steve Newman successfully introduced a resolution proclaiming that Virginia was committed to ending human trafficking.⁴⁰⁶ The Joint Resolution Denouncing Human Trafficking provides many of the statistics that have been discussed in this Article, including the facts that human trafficking is one of the fastest growing criminal enterprises, that there are over twenty-seven million humans in the bonds of modern-day slavery, and that all people, especially children, in all fifty states are vulnerable to human trafficking.⁴⁰⁷ It lists the myriad of ways that people are held in bondage, including mail order bride schemes, domestic service, migrant work, prostitution, child labor, and so forth.⁴⁰⁸ Indeed, the Joint Resolution deplors the despicable nature of slavery and involuntary servitude that is found around the world, and it explains that these ideals are repugnant to the ideals of the Commonwealth of Virginia. The Joint Resolution proclaims that:

WHEREAS, although human trafficking is pervasive, it is an underreported crime, and combating the problem requires global public awareness of the problem, coordination of anti-trafficking efforts both worldwide and domestically, the conscious and deliberate involvement of all citizens, and the unequivocal declaration that the despicable practice, wherever it may be found, will not be condoned or tolerated in the Commonwealth .
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These are the exact reasons why each state needs to step up and ensure that it is not the weak link in the fight against human trafficking. But when a state legislature uses words like these without also enacting legislation to stand behind them, this legislation becomes symbolic politics. Symbolic politics occurs when “perceptions trump substance,” where the appearance of action without any real action becomes the dominant intention of policy makers, and at times does reassure constituents.⁴¹⁰

On the other hand, in 2009, Delegate Ebbin introduced a new human trafficking bill that, while not as complete as the 2007 version, did properly

406. Virginia Senate Joint Resolution 412 (2009), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?091+ful+SJ412E>.

407. *Id.*

408. *Id.*

409. *Id.*

410. Finckenauer & Liu, *supra* note 126, at 5 (stating that some have argued that much of the trafficking laws have been merely symbolic knowledge, because the media coverage and the actual magnitude of the crime might be vastly different).

define human trafficking. House Bill 2016 defined and prohibited human trafficking, focusing on sex and labor trafficking.⁴¹¹ Although the legislature had recently passed the Joint Resolution stating that the Commonwealth of Virginia denounced human trafficking, all of the definitional components of this bill were gutted out of the version that eventually passed the Virginia legislature.⁴¹² Nonetheless, in 2009, Virginia finally took a step to stop human trafficking by supplementing some of its existing laws to allow for means to deal with human trafficking cases. For example, in the abduction statute the following provision was added:

Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to subject him to forced labor or services shall be deemed guilty of “abduction.” For purposes of this subsection, the term “intimidation” shall include destroying, concealing, confiscating, withholding, or threatening to withhold a passport, immigration document, or other governmental identification or threatening to report another as being illegally present in the United States.⁴¹³

Additionally, Virginia added this in its RICO statutes.

C. Virginia Legislators Need To Go Through the Looking Glass To See the Need for Human Trafficking Laws

Since Virginia does not have a comprehensive human trafficking statute, its citizens remain vulnerable to becoming victims of human traffickers. There are several areas of concern for Virginians that should be addressed by the legislature.

First, Virginia’s statute does not define human trafficking. Although the Virginia abduction statute was amended to cover abduction for forced labor through coercive means, it does not define it as human trafficking. The problem is that this may hinder victims’ ability to get federal and immigration benefits.⁴¹⁴ According to the State Legislators Guide to the Freedom Network’s State Model Law on Protection for Victims of Human

411. HB 2016, 2009 Sess. (Va. 2009).

412. VA. CODE ANN. § 18.2-47 (2009).

413. *Id.*

414. The U-Visa is available for to victims of trafficking who do not qualify for the T-Visa. The U-Visa does not provide as many benefits to the victims. For example, a U-Visa recipient can stay in the United States for up to four years, but is not eligible for publically-funded programs. International Association of Chiefs of Police, *supra* note 164, at 16.

Trafficking, “State laws should contain all of the elements, but need not mimic the language, of the federal law. In order to ensure that state trafficking victim-witnesses receive federal benefits, such as immigration status, and refugee benefits, it is extremely important for state laws to be consistent with federal law.”⁴¹⁵ Before the TVPA was enacted, a prosecutor had to prove that a victim of involuntary servitude was being held by use of force or threat of force; however, after the TVPA was enacted, it recognized that traffickers used a variety of means to hold a victim in bondage, including psychological coercion and fraud.⁴¹⁶

Therefore, Virginia needs to define the crime of human trafficking. Virginia should make sure that the criminal definition is complete. Additionally, Virginia can further increase protection for victims by following Alaska’s lead and lowering the mens rea requirement for human trafficking in certain situations where a trafficker acts with reckless disregard that he or she is benefiting from human trafficking.⁴¹⁷

Second, Virginia’s current act only covers some forms of human trafficking, for example, those covered in the newly defined abduction statute. Virginia should make sure that it provides adequate tools to its prosecutors and law enforcement officers by criminalizing all forms of human trafficking. As noted above, effective state laws will increase prosecutions and victim care. Furthermore, most cases require state collaboration,⁴¹⁸ which will be more forthcoming if the state is already enforcing state human trafficking laws.

Virginia did not enact the human trafficking legislation proposed, in part because it was determined that the Commonwealth already had laws dealing with the issues involved in human trafficking cases.⁴¹⁹ Like other states that have not enacted comprehensive trafficking legislation, Virginia’s legislature believed the existing laws proscribing prostitution, kidnapping, rape, involuntary servitude, etc., sufficiently covered human trafficking issues. However, these crimes do not address the unique issues

415. Freedom Network USA, *supra* note 215.

416. *Id.*

417. ALASKA STAT. § 11.41.365(a) (2006) (codifying “Human trafficking in the second degree”: “A person commits the crime of human trafficking in the second degree if the person obtains a benefit from the commission of human trafficking under AS 11.41.360, with reckless disregard that the benefit is a result of the trafficking.”).

418. Overbaugh, *supra* note 166, at 642.

419. Virginia State Crime Commission, *Crime Commission Projects: Review of 2007 General Assembly* (May 22, 2007), available at <http://vscc.virginia.gov/.../Crime%20Commission%20Meeting...%202007/2007%20General%20Assembly%20Review.ppt> (PowerPoint explaining all of the newly enacted crimes).

presented in human trafficking cases. These crimes do not offer protection to the victims, nor do they deal with the creative ways the traffickers come up with to victimize their modern-day slaves. In addition, the sentences related to these crimes do not reflect the horror and atrocious abuses that the victims of modern-day slavery have been forced to endure. As alluded to in the TVPA, it is unjust to utilize a statute for such a horrific crime when the statute was intended for a lesser offense.⁴²⁰

As the law currently stands in Virginia, there are many types of human trafficking cases that would not be covered by the existing laws or would not be covered at the level of severity appropriate to the loss of dignity associated with modern-day slavery. An example would be the case of five-year-old Shaniya Davis, which was discussed in the Introduction of this Article. In North Carolina, there was a human trafficking statute to charge a mother who gave her child to someone to use for sexual servitude; however, in Virginia there is no crime that would adequately reflect the horrific nature of the act.⁴²¹ How will the prostitute be treated who was forced to engage in commercial sex acts? Will she be charged with solicitation alongside her pimp? Additionally, should a sex trafficker who engages in the act of holding girls in sexual servitude be charged with the same offenses as a girl who engages in commercial sex? Under Virginia's Code there are practically no distinctions between the offenses. Also difficult to prosecute under Virginia's current law would be the case described above of the nail salon workers who were brought from Vietnam, who when they arrived, did not have the money they earned from working

420. See 22 U.S.C. § 7101(14) (2006 & Supp. 2008). The Congressional findings specifically were dealing with why the federal government should enact a law when there were other laws that could cover many of the crimes; however, the logic can be applied to the states as well. The text of the TVPA is as follows:

Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the *most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.*

Id. (emphasis added).

421. In Virginia, the same abduction statute that was amended to deal with some aspects of human trafficking may be applicable in this case, but it is only a Class 5 felony and it may not apply in the case of a mother who has legal control over those with whom her child visits. The pertinent Virginia statute reads: "Any person who . . . (3) assists or aids in the abduction of, or threatens to abduct, any female under sixteen years of age for the purpose of concubinage or prostitution, shall be guilty of a Class 5 felony." VA. CODE ANN. § 18.2-49 (1975).

applied to their debts.⁴²² Because they signed their paychecks over to the trafficker, many of the typical laws in place to protect workers would be difficult to apply because of evidentiary reasons. Also, it would be difficult to prove abduction as per even Virginia's new definition of "abduction" as including detainment, because the workers could move in the community, even though they were psychologically bound to the trafficker and had nowhere else to go.⁴²³ These same problems would occur with a domestic worker who was told that the police were watching her and who eventually accepted her fate that she would never be able to leave her trafficker. Although she may be able to go to the grocery store and move throughout the community, she is no less bound. Additionally, even if the evidence allows a Virginia prosecutor to prove the crime under the abduction statute, the crime is classified as a Class 5 felony.⁴²⁴ The Virginia Code punishes Class 5 felonies with

a term of imprisonment of not less than one year nor more than 10 years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.⁴²⁵

Virginia can remedy these inadequacies by criminalizing trafficking in a manner consistent with the definition of "severe human trafficking" found in the TVPA. Virginia can also utilize this opportunity to fill the gaps found in the TVPA and to protect victims who may not be adequately protected by the TVPA. Nonetheless, when a state does criminalize additional forms of abuses as human trafficking, it should realize that those victims may not be eligible for federal victim protections including the T-Visa. Thus, the state must be prepared to provide the victims with services and to counsel them on their other options, including other visa possibilities.

Another problem is that when one state in a region does not have a strong criminal human trafficking statute, it may actually increase the vulnerability of its citizens to the crimes that come with human trafficking. Shrewd traffickers may shift their enterprises to states with weaker laws. It is logical that this would be amplified in states where human trafficking is seen as a viable business option. There have been several human trafficking cases reported in Virginia.⁴²⁶ Some have been dealt with by federal

422. See *supra* note 56 and accompanying text.

423. VA. CODE ANN. § 18.2-47 (2001).

424. *Id.*; *id.* § 18.2-10.

425. *Id.* § 18.2-10(e).

426. See, e.g., Kirk Maltais, *Human Trafficking: "Modern-Day Slavery,"* VCU Capital News Service (May 27, 2009), available at <http://www.groundreport.com/Politics/Human->

prosecutors. There have been other cases where local police have raided “massage parlors” or have arrested pimps who may have been part of a human trafficking operation. However, due to Virginia’s lack of trafficking laws, the Commonwealth is unable to charge the offender appropriately and often does not make the connection to human trafficking, because Virginia lacks a central database to store, retrieve, and exchange information dealing with human trafficking.⁴²⁷

Third, Virginia should create rules addressing the evidentiary issues arising in human trafficking cases. The 2009 TIP Report’s *Debunking Common Trafficking Myths* states that:

A person may agree to migrate legally or illegally or take a job willingly. But once that work or service is no longer voluntary, that person becomes a victim of forced labor or forced prostitution Once a person’s work is recruited or compelled by the use or threat of physical violence or the abuse or threatened abuse of the legal process, the person’s previous consent or effort to obtain employment with the trafficker becomes irrelevant.

. . . .

Previous employment choices also do not exclude the possibility that a person may be a victim of trafficking. Some government officials fail to identify victims of sex trafficking because they may have willingly worked in the sex industry prior to being trafficked. Law enforcement may fail also to identify victims of labor trafficking because they are migrant workers and may have previously worked in difficult conditions, either legally or illegally. Whether a person is a victim of labor trafficking turns on whether that person’s service or labor was induced by force, fraud, or coercion.⁴²⁸

Another evidentiary rule that Virginia should consider adopting is a human trafficking case worker privilege. California provides a good example of an

Trafficking-Modern-Day-Slavery_6/2900029; Press Release, Department of Justice, Virginia Man Sentenced for Sex Trafficking of Minors and Transporting Minors Across State Lines for Prostitution in Virginia and Jacksonville (Oct. 26, 2009).

427. Polaris Projects Law Enforcement Training, Fairfax Police Academy (Oct. 28, 2009).

428. 2009 TIP REPORT, *supra* note 49, at 13.

evidentiary provision defining who holds the privilege, and when the court can compel the disclosure of the privilege.⁴²⁹

Fourth, Virginia needs to properly focus on a holistic approach to the crisis of human trafficking. A public awareness program could help identify victims and create awareness of the greater issues, since the issue of human trafficking is at some level an issue of the heart and of the nature of man. Adequate victim focus is another aspect that Virginia needs to consider in order to have a proper holistic approach. As in the 2007 proposed Virginia bill and the Model State Bills, it is imperative that a state provide adequate victim care. Focusing exclusively on prosecution can do more harm than good for trafficking victims. Virginia needs victim-centered legislation that focuses on adequate prosecution while also providing assistance to victims.

Child victims of human trafficking are particularly vulnerable. They may have a significant distrust of authority, especially if their parents took part in selling them into sex trafficking or forced labor,⁴³⁰ and as noted earlier, they are highly susceptible to psychological problems, such as the inability to love.⁴³¹ When children are not taught to love at an early age, this can be detrimental to the entire society, as these children may become deviants themselves.⁴³² Incidentally, at times the federal law has been applied in certain cases in a way that has actually harmed child victims of

429. CAL. EVID. CODE § 1038.1 (2009).

430. A child being sold into bondage is an unfortunately common phenomenon. In addition to the few communities already discussed in this Article, the 2009 TIP Report gives several other examples of children being sold into slavery, including:

Parents are often among the victims in child trafficking cases. Traffickers convince them to part with their children with false promises of schooling or prosperity. But in some cases parents may also play an active role in the trafficking of children.

In the last year, anti-trafficking police in Greece reported an increase in trafficking of children by their parents. Albanian Roma parents bring their children to Greece, where they force them to beg or sell goods on the street. According to some NGOs, Roma parents in Greece also rent or sell their children to third parties for forced labor.

A 2007 study by the International Organization for Migration (IOM) found that some Cambodian parents sell their children into prostitution or domestic servitude to repay debts. In Niger, boys trafficked for forced cattle herding sometimes escape their employers and return to their parents. The boys arrive home with visible signs of physical and psychological abuse. But many parents return their sons against their will to their employers, angry that the child has left an opportunity to learn a trade.

2009 TIP REPORT, *supra* note 49, at 7.

431. *See supra* note 346 and accompanying text.

432. *See* Rickert, *supra* note 34, at 16.

trafficking.⁴³³ Likewise, since victims suffer from fear, depression, or disease, victim care is important to protect the victims and to integrate them into the society at large.⁴³⁴

Similarly, prosecutions are more successful when the trafficking victim feels safe and secure.⁴³⁵ As explained by Ambassador Luis CdeBaca, Director of the Office To Monitor and Combat Trafficking in Persons,

Not all progress will come through programs or prosecutions . . . Culturally, we need to see through to each individual's humanity and recognize how traffickers exploit their victims' vulnerabilities to hold them in servitude, whether in fields, factories, homes, or brothels. . . .

Globally, there are countless persons who labor in bondage and suffer in silence, feeling that they are trapped and alone. For too many, when they think of police, it is with fear, not with the promise of rescue. If they think of escape, it is a jump into the unknown that they dare not take⁴³⁶

Next, Virginia should establish an ongoing Task Force to focus on the trafficking in persons. It is important to have a statewide body to monitor trafficking within the borders of Virginia.⁴³⁷ This Task Force should deal with data collection and sharing in a variety of different ways. The Task Force can also work to set up an open source website to post articles and updates about human trafficking, to raise awareness among the public in general and the law enforcement community in particular.⁴³⁸ Virginia law enforcement agents should also share all information on potential trafficking with federal law enforcement and with other localities within Virginia.⁴³⁹ Often what appears to be a single event may actually be linked to a larger criminal network, and inter-agency cooperation could help make these determinations. Additionally, if the victim is a non-documented

433. See generally Bump, *supra* note 175, at 73 (commenting that the TVPA as it has been applied in certain cases has harmed child victims of trafficking).

434. See Rickert, *supra* note 34, at 34.

435. Freedom Network Model, *supra* note 215, at 28.

436. 2009 TIP REPORT, *supra* note 49, at 2.

437. See *supra* notes 379-86 and accompanying text for a discussion of the Maryland Task Force on Human Trafficking as a possible model for Virginia.

438. See, e.g., United States Attorney's Office for the District of Maryland, *supra* note 379.

439. This may be able to be accomplished through the Virginia Fusion Center with the State Police. Also, Polaris Project has been gathering both news data and hotline tips on each state. These resources may be harnessed by the Task Force to assist in the endeavor.

immigrant, then law enforcement should be required to appropriately help the victim work with federal agencies, as the California statute provides.⁴⁴⁰ According to the State Legislator's Guide:

State legislators will have to consider the impact that state prosecutions of cases that would otherwise be prosecuted at the federal level can have upon trafficked persons. One of the main difficulties that states will face is how to ensure that witnesses and other undocumented trafficked persons in state cases will have access to the same right to regularized immigration status that is available in federal cases. Legislators should consider how to draft state laws that support victims' applications to regularize their immigration status. For example, legislators may consider mandating that state and local law enforcement agencies provide all necessary documentation in support of a trafficked person's application for regularized immigration status, such as statements certifying that, according to federal law, a person is a "victim of a severe form of trafficking" and has complied with reasonable requests for assistance in the investigation or prosecution of traffickers.⁴⁴¹

This is important so that the victim will not be in legal limbo and will feel secure about her status.

Another aspect of the 2007 Virginia bill that would be vital for successful eradication of modern-day slavery in Virginia is a training program for law enforcement and local prosecutors that would teach how to implement the new laws and how the federal benefits interact with the Commonwealth's criminal laws.⁴⁴² The Task Force could coordinate this with local NGOs like Polaris Project. Another area in which the taskforce could partner with local NGOs is assistance with victim aftercare. According to the 2009 TIP Report, Ambassador Luis CdeBaca proclaimed the importance of partnering with local NGOs:

440. CAL. PENAL CODE §§ 236.1–237 (West 2006).

441. Freedom Network Model, *supra* note 215, at 28.

442. State law enforcement is most likely to uncover victims and perpetrator of human trafficking crimes, because they are most familiar with the locations involved in trafficking cases. Kara points out that witnesses are most likely to call "911" to report crimes, not the federal agents. Kara, *supra* note 81, at 667. Increasing the number of people involved in the local law enforcement who are properly trained adds one million new eyes focused on human trafficking. *Id.* at 669 (citing 2006 ATTORNEY GENERAL'S ANNUAL REPORT, *supra* note 96, at 4, 17).

As a federal prosecutor, I have seen first-hand the impact of human trafficking. I saw the violence and greed of the traffickers, and the suffering and trauma of the victims. I came to understand that the survivors are not statistics—they are people who share not only the painful memories but also the joyful experience of healing. And I learned that when law enforcement authorities work with survivors and the NGOs who assist them, trafficking networks are dismantled and victims are empowered.⁴⁴³

Civil society and local governments can provide additional resources in the fight against human trafficking.⁴⁴⁴ The TVPA recognizes the value of civil society's cooperation in ending human trafficking in the United States by calling for collaboration between the states and the federal government, as well as between governmental and non-governmental organizations.⁴⁴⁵ While each state has fewer resources than the federal government, the collective power of adding that many more prosecuting offices and investigators would help lighten the workload.

In short, Virginia should enact the 2007 bill that was proffered by Delegate Ebbin with a few tweaks as outlined by this Article and the model state statutes examined above. One reason that scholars utilize to explain why states do not have comprehensive human trafficking statutes is that states do not have the money to investigate and prosecute human trafficking.⁴⁴⁶ It appears finances may have played a role in Virginia's decision not to enact the 2007 bill. The Department of Planning and Budget 2007 Fiscal Impact Statement determined that the fiscal impact of the interagency task force would be about \$200,000, and that it could not be determined how much of an impact the criminalization portion would have on the prison system.⁴⁴⁷ However, the states already do the bulk of investigation.⁴⁴⁸ Moreover, victims are not easily identifiable without the state investigator power.⁴⁴⁹ Also, if the victim has been working with a

443. 2009 TIP REPORT, *supra* note 49, at 4; Kara, *supra* note 81, at 659 (NGOs are important to help get the victims back on their feet).

444. *See* Coats, *supra* note 182.

445. Freedom Network Model, *supra* note 215, at 17.

446. Overbaugh, *supra* note 166, at 646-47.

447. DEPARTMENT OF PLANNING AND BUDGET, 2007 FISCAL IMPACT STATEMENT, to HBR 2551 (Va. 2007), *available at* <http://198.246.135.1/cgi-bin/legp504.exe?071+oth+HB2551F122+PDF>.

448. Finckenauer & Liu, *supra* note 126, at 7.

449. *See* Coats, *supra* note 182, at 8-9.

particular investigator, he or she may be more comfortable testifying in court if he or she continues to work with the same investigator.⁴⁵⁰

VI. CONCLUSION

Slavery still exists today, and unfortunately one must go through the looking glass to see that it is pervasive in our own communities. The United States Government has been doing an admirable job in combating the trafficking of persons both in the United States and around the world, but it cannot fight this battle alone. Each state and local civil society must step up to the plate and do its part to eradicate this atrocious human rights abuse. Citizens of each state will benefit from a resourceful, effective system, because human trafficking takes a toll not just on the victim but also on society at large. The spread of disease, the rise of organized crime, and the general loss of humanity that occurs when individuals are subjected to such unimaginable loss of freedom are consequences of human trafficking that affect everyone. This cannot be tolerated in a free society. Virginia must move from being a passive Commonwealth to being an active one that aggressively seeks to destroy modern-day slavery within its borders. It should do this by criminalizing human trafficking, using the definitions proffered by the model state laws discussed in this Article. If Virginia's legislators continue to embrace the idea that all crimes covered by the models are indeed already codified in Virginia, then perhaps Virginia could create a law defining human trafficking and then cross-reference the various codes. The Virginia law should define these behaviors as human trafficking, so the victims will be eligible for federal benefits. Additionally, Virginia should provide for steeper punishments for committing crimes already on the books in a manner that is consistent with the horrendous nature of human trafficking. This would make the punishments match the nature of the crimes perpetrated against the victims and would bring greater awareness to the issues involved. The Virginia law should include provisions that would afford victims adequate care. Finally, Virginia should focus on raising awareness. In essence, public awareness opens up the looking glass for everyone to see what is inside, so the traffickers have fewer places to hide. Only a nation of communities bonded together can end slavery—Virginia must make sure she is doing her part to adequately effectuate the elimination of slavery today.

450. See, e.g., Bump, *supra* note 175, at 90-96.