

# THE UNITED STATES' RESPONSE TO HUMAN TRAFFICKING: SWORD OF JUSTICE OR PAPER TIGER?

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## INTRODUCTION

In 1910, Ernest Bell released a treatise entitled *Fighting the Traffic in Young Girls or, War on the White Slave Trade*, described as “a complete and detailed account of the shameless traffic in young girls.”<sup>1</sup> The contributors to this work included U.S. Attorneys, educators, pastors, and professors at medical schools.<sup>2</sup> Although written over a century ago, the introduction written by Edwin W. Sims, a United States District Attorney from Chicago, aptly describes human trafficking today:

The growth of this “trade in white women,” as it has been officially designated by the Paris Conference, was so insidious that it reached the proportions of an international problem almost before the people of the civilized nations of the world learned of its existence. The traffic increased rapidly, owing largely to the fact that it was tremendously profitable to those depraved mortals who indulged in it, and because the people generally, until very recently, were ignorant of the fact that it was becoming so extensive. And even at this time, when a great deal has been said by the pulpit and the press about the horrors of the traffic, the public idea of just what is meant by the “white slave traffic” is confused and indefinite.<sup>3</sup>

In the past fifteen years, as a result of media initiatives,<sup>4</sup> congressional hearings and public awareness initiatives by NGOs such as the Polaris Project,<sup>5</sup> the Protection Project,<sup>6</sup> and Free the Slaves,<sup>7</sup> there is a growing public awareness that commerce in human beings is not merely

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<sup>1</sup> ERNEST A. BELL ET AL., *FIGHTING THE TRAFFIC IN YOUNG GIRLS OR, WAR ON THE WHITE SLAVE TRADE* (General Books 2010) (1910).

<sup>2</sup> *Id.* at 1–2.

<sup>3</sup> *Id.* at 13.

<sup>4</sup> See Bridget Leininger, *CNN Freedom Project and Tony Maddox Honored by U.S. State Department as 2015 Trafficking in Persons Report Hero*, CNN (July 27, 2015, 12:29 PM), <http://cnnpressroom.blogs.cnn.com/2015/07/27/cnn-freedom-project-and-tony-maddox-honored-by-u-s-state-department-as-2015-trafficking-in-persons-report-hero/> (detailing how CNN’s Freedom Project was honored by the U.S. Department of State with the release of the 2015 Trafficking in Persons Report last year).

<sup>5</sup> See, e.g., *Human Trafficking*, POLARIS, <https://polarisproject.org/human-trafficking> (last visited Feb. 18, 2016) (providing up to date information on federal and state trafficking legislation as well as current trafficking statistics).

<sup>6</sup> See THE PROTECTION PROJECT, <http://www.protectionproject.org/> (last visited Jan. 18, 2016).

<sup>7</sup> See *Slavery Facts and Our Impact*, FREE THE SLAVES, <http://www.freethe-slaves.net/> (last visited Jan. 18, 2016).

a historical institution from our past.<sup>8</sup> In fact, it haunts our present and demands the public's attention. Trafficking in human beings continues to be a global enterprise generating billions of dollars of revenues and affecting over 600,000 people each year.<sup>9</sup> Some analysts have suggested that trafficking in humans is close behind the gun and drug trade as a criminal enterprise because of its profitability.<sup>10</sup> Although sexual trafficking of women and children has garnered the lion's share of the public attention focused on this issue,<sup>11</sup> other sectors of the economy host trafficked and exploited workers. Victims of trafficking are exploited not only as prostitutes but also as agricultural laborers, sweatshop workers

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<sup>8</sup> See Kara C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 CASE W. RES. J. INT'L L. 45, 45 (2002) ("Although both slavery and involuntary servitude were outlawed in the United States in 1865, over one million people remain in forced prostitution, sweatshop labor, and domestic servitude throughout the United States. Most of these individuals are held captive, physically beaten, sexually abused, and psychologically intimidated. They are not paid for their services, nor are they free to leave. Few Americans are aware of the scope and severity of the human trafficking industry and the extent to which this phenomenon occurs within our own borders.").

<sup>9</sup> 146 CONG. REC. 22,041, 22,043 (2000) (during the Senate debate on the Trafficking Victims Protection Act of 2000 (H.R. 3244), Senator Brownback stated: "Our government estimates that between 600,000 and 2 million women are trafficked each year beyond international borders. They are trafficked for the purpose of sexual prostitution by organized crime units and groups that are aggressively out making money off the trafficking of human flesh."). FRANCIS T. MIKO, CONG. RESEARCH SERV., RL30545, TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE 1 (2004) ("According to the latest U.S. Government estimates, some 800,000 to 900,000 people are trafficked across borders each year worldwide for forced labor, domestic servitude, or sexual exploitation. *Trafficking is considered one of the largest sources of profits for organized crime, generating seven to ten billion dollars annually according to United Nations estimates.*") (emphasis added).

<sup>10</sup> *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near E. and S. Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 11 (2000) (statement of Hon. Frank E. Loy, Under Sec'y of State, Global Affairs) [hereinafter *International Trafficking in Women and Children Hearings*] ("Alarming, the trafficking industry is one of the fastest growing and most lucrative criminal enterprises in the world. Profits from the industry are enormous, generating billions of dollars annually to organized criminal groups. Trafficking in women and children is now considered the third largest source of profits for organized crime, behind only drugs and guns. Traffickers know that throughout the world they can reap large profits while facing a relatively low risk of prosecution. Moreover, it has been observed that, unlike drugs or firearms, trafficking 'in women and children doesn't require capital to start.'").

<sup>11</sup> Ryan Goehring, *Sex: Drowning Out the Discourse on Trafficking*, HUMAN TRAFFICKING CTR. (Apr. 3, 2014), <http://humantraffickingcenter.org/posts-by-htc-associates/sex-drowning-out-the-discourse-on-trafficking/> ("Despite the fact that sex trafficking cases account for less than one quarter of all human trafficking cases globally – 21.5 percent according to International Labour Organization estimates – the focus of the media and many anti-trafficking organizations seems to suggest sex trafficking is the most widespread kind of exploitation. As a result, similarly egregious and much more common labor trafficking cases receive little public attention and notably fewer resources.").

and domestic workers.<sup>12</sup> Moreover, there is a segment of the population whose dire circumstances cause them to fall victim to trafficking for the removal of human organs.<sup>13</sup>

Nongovernmental organizations have been aware of the problem of trafficking and have been actively engaged in advocacy on behalf of victims of trafficking for over a decade. Starting with the policy initiatives of the Clinton administration,<sup>14</sup> these efforts have evolved into the anti-trafficking legislation enacted during the Clinton Administration and amended during the Bush Administration.<sup>15</sup>

The purpose of this Article is to examine the legislative response of the United States to human trafficking. Section I discusses the factors most frequently cited as contributing to the problem. Section II examines international authority for interdicting trafficking. Section III examines the United States' response to the problem. It discusses the context in which the public awareness of the issue of trafficking has evolved and the culmination of this awareness in the enactment of federal legislation to

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<sup>12</sup> *International Trafficking in Women and Children Hearings*, *supra* note 10 (“A trafficking scheme involves a continuum of recruitment, abduction, transport, harboring, transfer, sale or receipt of persons through various types of coercion, force, fraud or deception for the purpose of placing persons in situations of slavery or slavery-like conditions, servitude, forced labor or services. *Examples include, but are not limited to sexual servitude, domestic servitude, bonded sweatshop labor or other debt bondage.*”) (emphasis added). BO COOPER, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1045–46 (2002) (“Persons are trafficked into the sex trade by force, fraud, or coercion to engage in prostitution, pornography, sex tourism, and other commercial sexual services. *Others are required to perform forced labor as agricultural workers, domestic workers, maids in motels and hotels, and peddlers of trinkets on buses and in subways.*”) (emphasis added). AMY O’NEILL RICHARD, CTR. FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 3 (1999) (“A review of several illustrative trafficking and slavery operations – *involving sweatshop, agricultural, and other forms of labor – over the last eight years shows that these operations went unnoticed or were able to exist longer than trafficking operations involving the sex industry.*”) (emphasis added).

<sup>13</sup> Trafficking in human organs is distinguishable from trafficking for the removal of human organs. Typically in the latter case, individuals are either recruited with the pretext of a job or they are abducted. Once the individual reaches the location where the organ is to be removed, his compliance is forced with threats of violence which may extend to his family members. Once the organ is removed, the individual is minimally compensated and set loose with no provisions for aftercare. ARTHUR CAPLAN ET AL., COUNCIL OF EUROPE/UNITED NATIONS, TRAFFICKING IN ORGANS, TISSUES AND CELLS AND TRAFFICKING FOR THE PURPOSE OF THE REMOVAL OF ORGANS 55–58 (2009) (emphasis added).

<sup>14</sup> See MIKO, *supra* note 9, at 8.

<sup>15</sup> See *id.* at 8–10. In the 114th Congress, 92 bills were introduced that related to the subject of Human Trafficking. See generally *Human Trafficking*, GOVTRACK, [www.govtrack.us/congress/bills/subjects/human\\_trafficking/6210](http://www.govtrack.us/congress/bills/subjects/human_trafficking/6210) (last visited Feb. 27, 2016).

address the problem. It also briefly examines the strategies mandated by the legislation on a national and international level and the ongoing role to be played by nongovernmental organizations in implementing this legislation by assisting with the identification of victims of severe forms of trafficking and the provision of services to them. Last but not least, Section IV of this Article looks at some of the accomplishments of the legislation to date and lessons to be learned from its successes and its limitations.

## I. THE PROBLEM: AN OVERVIEW OF CONTRIBUTING FACTORS

### A. *Social, Economic and Political Factors*

There are both shared and unique factors that characterize countries from which people are trafficked. As one analyst noted:

Around the world people are looking closely at the lives of slaves and helping them to achieve their freedom. What have they learned that can help us? One of the first things they recognize is the role that poverty and vulnerability play in driving people to slavery. . . . Slavery is no longer based on broad categories of “race.” Slavery is fundamentally a question of power and specifically the power to use violence.<sup>16</sup>

Over time, researchers have identified a number of factors that contribute to the power dynamic that facilitates and sustains the trafficking and subsequent enslavement of individuals. These are briefly described in a congressional hearing on the international trafficking of women and children and are set forth below.

Social, Economic and Political Factors:	<p>“The trafficking industry is driven by poverty and economic desperation, most particularly among women and girls who have little or no access to economic opportunities, support services, or resources, including credit, land ownership and inheritance.”<sup>17</sup></p> <p>“The low social status of women in many countries contributes as well. Children, and girls in particular, are pulled out of school early, enhancing the likelihood that they will end up in the hands of traffickers.”<sup>18</sup></p>
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<sup>16</sup> KEVIN BALES, UNDERSTANDING GLOBAL SLAVERY: A READER 10 (2005).

<sup>17</sup> *International Trafficking in Women and Children Hearings*, *supra* note 10, at 11–12 (statement of Sen. Sam Brownback).

<sup>18</sup> *Id.* at 12.

	<p>“Penalties for trafficking humans for sexual exploitation are often relatively minor compared with those for other criminal activities like drug and gun trafficking.”<sup>19</sup></p> <p>“[G]overnments and law enforcement agencies particularly are not quite as sensitized to the danger and the horrific nature of the problem.”<sup>20</sup></p> <p>“The authorities do not have the resources or the interest in tracking down the organizations of individuals in the trafficking chain . . .”<sup>21</sup></p> <p>“In addition, there are corrupt law enforcement officials involved, because the process of getting . . . thousands of women who are being moved across borders, and keeping the brothels running, involves pay-offs to local border patrols in both countries, as well as to visa officials and police in the country of origin and in the destination country.”<sup>22</sup></p> <p>“Conviction rates for perpetrators of trafficking are generally low.”<sup>23</sup></p>
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<sup>19</sup> MIKO, *supra* note 9, at 3.

<sup>20</sup> *International Trafficking in Women and Children Hearings*, *supra* note 10, at 18 (statement of Wendy Chamberlin, Principal Deputy Assistance Sec’y, Bureau of Int’l Narcotics and Law Enf’t Affairs, Dep’t of State).

<sup>21</sup> *Id.* at 31 (statement of Dr. Laura J. Lederer, Dir., The Protection Project).

<sup>22</sup> *Id.* See *Wide Angle: Dying to Leave*, PBS, <http://po.pbs.org/wnet/wideangle/shows/dying/handbook2.html> (last visited Mar. 2, 2016) (“One of the most trafficked areas on earth lies between the coasts of Albania and Italy in the Adriatic Sea. It is an ideal route between the impoverished regions of Eastern Europe and more affluent European Countries like Italy, France and Germany. Albania is a gateway for migrants from Moldova, Romania and Bulgaria looking to travel West, but it is also a nation in economic turmoil, where unemployment has sparked a mass exodus of workers. Rampant government corruption and an entrenched organized crime network have made Albania a nearly ideal conduit for human trafficking.”).

<sup>23</sup> U.N. OFFICE ON DRUGS AND CRIME, *TRAFFICKING IN PERSONS: GLOBAL PATTERNS* 10 (2006) [hereinafter UNODC]; see Nilanjana Ray, *Looking at Trafficking Through a New Lens*, 12 *CARDOZO J.L. & GENDER* 909, 910 (2006) (“A number of initiatives have been launched internationally, regionally, and nationally to combat this human rights abuse, but recent evaluations paint a very pessimistic picture of the effectiveness of these efforts. While the number of individuals rescued from trafficked situations and the prosecution of their traffickers have increased, the number of persons being trafficked worldwide is still on the rise.”).

	“Civil wars, ethnic violence, and invasion create millions of refugees whose precarious situations make them susceptible to being enslaved.” <sup>24</sup>
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The impact of these factors is no longer limited to the countries in which they occur. They contribute to irregular migration in which people move from their home country (countries of origin), through other countries (countries of transit) to their ultimate destination.<sup>25</sup>

### B. Globalization

In the recent years there has been a marked transition from an international market to a global market.<sup>26</sup> As a result, there is an increased need for international cooperation and collaboration in regulating trade.<sup>27</sup> As a transaction that occurs within that changed market, “slavery is globalized.”<sup>28</sup> As Amy O’Neill Richard noted in her Report for the Center for the Study of Intelligence:

Trafficking in persons, especially women and children, this modern-day form of slavery, is prevalent across the globe and likely to increase in the United States. In this post-Cold War era, international borders and political entities mean less while economic issues mean more. . . . As Attorney General Reno has said repeatedly, “all crime is international in its consequences.”<sup>29</sup>

As a consequence of globalization, there are deficits in the institutions and mechanisms that would traditionally address the problem of trafficking from point of origin through country of transit to final destination. These deficits can be summarized as follows:

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<sup>24</sup> BALES, *supra* note 16, at 127.

<sup>25</sup> U.N. DEP’T OF INT’L ECON. & SOC. AFFAIRS, POPULATION DIV., INTERNATIONAL MIGRATION POLICIES: GOVERNMENT VIEWS AND PRIORITIES, at 91, U.N. Doc. ST/ESA/SER.A/342, U.N. Sales No. E.14.XIII.3 (2013).

<sup>26</sup> *International Trafficking in Women and Children Hearings*, *supra* note 10, at 3 (statement of Sen. Wellstone).

<sup>27</sup> *Id.* at 13–15 (statement of Hon. Frank E. Loy).

<sup>28</sup> BALES, *supra* note 16, at 9.

<sup>29</sup> RICHARD, *supra* note 12, at 1.



Global Factors:	<p>“[T]rafficking is international but all the laws addressing the problem are national. There are virtually no international laws with enforcement capability.”<sup>30</sup></p> <p>“[Traffickers] capitalize on weak law enforcement and poor international cooperation.”<sup>31</sup></p> <p>“Human trafficking is a global problem. . . . The traffickers’ web spans the whole planet: people are moved from poor communities in the southern hemisphere to richer countries in the North. There is also a lot of South-South trafficking and a sprinkling of South-bound trade. A global problem like this requires a global response.”<sup>32</sup></p> <p>“[T]he high demand, worldwide, for trafficked women and children for sex tourism, sex workers, cheap sweatshop labor, and domestic workers. Traffickers are encouraged by large tax-free profits and continuing income from the same victims at very low risk.”<sup>33</sup></p> <p>“[T]he globalization of the world economy has increased the movement of people across borders, legally and illegally, especially from poorer to wealthier countries . . . international organized crime has taken advantage of the freer flow of people, money, goods and services to extend its own international reach.”<sup>34</sup></p>
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## II. INTERNATIONAL RESPONSE TO THE PROBLEM

It would not be an exaggeration to say that prior to the first half of the nineteenth century the international attitude towards slavery was ambivalent at best, tolerant at worst. As Nicholas Kristof and Sheryl WuDunn observed in their book, *Half the Sky: Turning Oppression into Opportunity for Women*:

In the early 1780’s slavery was an unquestioned part of the global landscape—and then astonishingly, within a decade

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<sup>30</sup> *International Trafficking of Women and Children Hearings*, *supra* note 10, at 38 (statement of Dr. Laura J. Lederer).

<sup>31</sup> UNODC, *supra* note 23, at 10.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> MIKO, *supra* note 9, at 2.

<sup>34</sup> H.R. Con. Res. 258, 109th Cong. (2005) (as referred to the H. Comm. on Int’l Relations).

slavery was at the top of the British national agenda. The tide turned, and Britain banned the slave trade in 1807 and in 1833 became one of the first nations to emancipate its own slaves. For more than half a century, the British public bore tremendous costs for their moral leadership. On the eve of the British abolition of slave-trading, British ships carried 52 percent of the slaves transported across the Atlantic, and British colonies produced 55 percent of the world's sugar. Without new slaves, the British colonies in the New World were devastated, and Britain's great enemy, France, benefitted enormously. . . . The British navy led the way in trying to suppress the slave trade, both in the Atlantic and in Africa itself. This led to the loss of some five thousand British lives, plus higher taxes for the British people. And such unilateral action was costly diplomatically, enraging other countries and putting Britain in open conflict with rival military powers. The British antislavery efforts led to a brief war with Brazil in 1850 and to war scares with the United States in 1841 and with Spain in 1853, as well as to sustained tense relations with France.<sup>35</sup>

It is the late nineteenth and early twentieth century before international efforts result in agreements to address the slave trade emerge.<sup>36</sup>

#### A. *The League of Nations*

There have been some initiatives to abolish slavery and free slaves dating back to the eighteenth and nineteenth centuries. However, the focus of these initiatives was "first, to end the slave trade and, second, to

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<sup>35</sup> NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN* 234–35 (2010).

<sup>36</sup> ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 55 (2010) ("[I]t is sufficient to note that the raft of international agreements on slavery, which were concluded in the latter part of the nineteenth century and the first decades of the twentieth century, did not purport and were never considered to cover the practices that are now associated with trafficking, including sexual exploitation, forced labor, debt bondage, and child labor. However, the international movement to abolish the transatlantic slave trade provided the framework within which another battle – this time for the virtue of white women – would be waged. The concept of 'white slavery' was originally developed by activists[] intent on abolishing systems of regulated prostitution in Europe. It served to distinguish 'female sexual slavery' from the enslavement of Africans, while at the same time serving to draw a moral comparison between the two different types of exploitation. In its original form, the term referred to migrant prostitution. By the second half of the nineteenth century, the concept of 'white slavery' was associated with the recruitment to prostitution by force or fraud.").

emancipate all slaves”<sup>37</sup> through the enactment of national legislation.<sup>38</sup> In the twentieth century, a number of international conventions and covenants were also adopted that provide a conceptual framework for addressing slavery both implicitly and explicitly. For example, in 1926 the League of Nations adopted the Slavery Convention of 1926.<sup>39</sup>

This convention provided a working definition of “slavery” and “slave trade.”<sup>40</sup> It committed signatories to “prevent and suppress the slave trade” in all territories under their jurisdiction<sup>41</sup> and “[t]o bring about progressively and as soon as possible, the complete abolition of slavery in all its forms.”<sup>42</sup> Signatories to the Convention also committed “to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.”<sup>43</sup> The signatories were to provide each other with assistance in abolishing slavery and slave trade.<sup>44</sup>

The Convention was more than aspirational. It required signatories to take affirmative action to abolish the institution of slavery and working under slave-like conditions. The Convention encouraged the parties to the Convention to prevent compulsory or forced labor but permitted it to “be exacted for public purposes.”<sup>45</sup> In signing the Convention, signatories were committing themselves to adopt whatever measures were necessary to ensure that infractions of national laws and regulations implementing the Convention were subject to “severe penalties.”<sup>46</sup> Jurisdiction over disputes arising among parties to the Convention regarding its interpretation was assigned to the Permanent Court of International Justice.<sup>47</sup> Parties to the Convention also had the right to exclude its application to some or all of their territories.<sup>48</sup> The Convention remained open for signature by member states of the League of Nations until April 1, 1927.<sup>49</sup> However, as one analyst noted, the Convention “did not establish procedures for determining the existence of slavery in the

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<sup>37</sup> BALES, *supra* note 16, at 71.

<sup>38</sup> *Id.*

<sup>39</sup> Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 254.

<sup>40</sup> *Id.* art. 1.

<sup>41</sup> *Id.* art. 2(a).

<sup>42</sup> *Id.* art. 2(b).

<sup>43</sup> *Id.* art. 3.

<sup>44</sup> *Id.* art. 4.

<sup>45</sup> *Id.* art. 5(1).

<sup>46</sup> *Id.* art. 6.

<sup>47</sup> *Id.* art. 8.

<sup>48</sup> *Id.* art. 9.

<sup>49</sup> *Id.* art. 11.

countries signing the Convention, nor did it create an international body that could evaluate and pursue allegations of violations.”<sup>50</sup>

### B. *The United Nations*

#### 1. The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

Following the establishment of the United Nations, the Slavery Convention of 1926 remained in effect.<sup>51</sup> However, in 1949 the U.N.’s Ad Hoc Committee of Experts on Slavery determined that the scope of coverage of the Convention was not adequate to “cover the full range of practices related to slavery”<sup>52</sup> and was passive in its commitment to abolish slavery.<sup>53</sup> A Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery was issued in 1956.<sup>54</sup> This convention broadened the definition of slavery embodied in the 1926 Convention.

The Supplementary Convention elaborated on the Convention on Slavery in several respects. First, it extended the definition of institutions and practices similar to slavery to include debt bondage,<sup>55</sup> serfdom,<sup>56</sup> coerced marriages,<sup>57</sup> and exploitation of minors by parents or guardians.<sup>58</sup> It encouraged States Parties to prescribe suitable, minimum ages of marriage.<sup>59</sup> It required signatories to make slave trade or accessory to slave trade a criminal offense subject to “severe penalties” and to ensure that airfields as well as ports are not used for the conveyance of slaves.<sup>60</sup> Moreover, any slave who “takes refuge on board any vessel of a State Party to this Convention shall *ipso facto* be free.”<sup>61</sup> Marking a “slave or a person of servile status in order to indicate his status” was designated as a

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<sup>50</sup> BALES, *supra* note 16, at 45.

<sup>51</sup> Nina Lassen, *Slavery and Slavery-Like Practices: United Nations Standards and Implementation*, 57 NORDIC J. OF INT’L L. 197, 200–01 (1988).

<sup>52</sup> BALES, *supra* note 16, at 46.

<sup>53</sup> *Id.* at 46–47.

<sup>54</sup> *Id.* at 47.

<sup>55</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1(a), *opened for signature* Sept. 7, 1956, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957) [hereinafter Supplementary Convention].

<sup>56</sup> *Id.* art. 1(b).

<sup>57</sup> *Id.* art. 1(c).

<sup>58</sup> *Id.* art. 1(d).

<sup>59</sup> *Id.* art. 2.

<sup>60</sup> *Id.* art. 3.

<sup>61</sup> *Id.* art. 4.

criminal offense.<sup>62</sup> The Convention prohibits enslaving another person or inducing that person to submit to enslavement.<sup>63</sup> States continue to be obligated to assist each other and to share information.<sup>64</sup> Unlike its predecessor, this convention does not permit reservations<sup>65</sup> and extends to all non-self-governing “trust, colonial and other non-metropolitan territories” for which the State party is responsible.<sup>66</sup>

## 2. The International Covenant on Economic, Social and Cultural Rights

In 1966 the United Nations adopted the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR).<sup>67</sup> While both Covenants contain provisions pertaining to slavery and its prohibition, they differ in certain material respects. The International Convention on Economic, Social and Cultural Rights (ICESCR) focuses on the rights of workers.<sup>68</sup> It does not explicitly prohibit slavery and slave-like conditions but affirms the right of the individual to do “work which he freely chooses or accepts.”<sup>69</sup> It also acknowledges the right of everyone to “just and favourable conditions of work,”<sup>70</sup> such as fair wages,<sup>71</sup> safe and healthy work conditions,<sup>72</sup> equal opportunity for promotion,<sup>73</sup> and the right to form unions or labor associations.<sup>74</sup> This Convention also mandates providing the widest possible protection and assistance to the family,<sup>75</sup> recognizes the right of everyone to an adequate standard of living for himself and his family,<sup>76</sup> and acknowledges the right of everyone to education.<sup>77</sup>

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<sup>62</sup> *Id.* art. 5.

<sup>63</sup> *Id.* art. 6.

<sup>64</sup> *Id.* art. 8.

<sup>65</sup> *Id.* art. 9.

<sup>66</sup> *Id.* art. 12, ¶ 1.

<sup>67</sup> International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>68</sup> *See generally* ICESCR, *supra* note 67.

<sup>69</sup> *Id.* art. 6, ¶ 1.

<sup>70</sup> *Id.* art. 7.

<sup>71</sup> *Id.* art. 7(a)(i).

<sup>72</sup> *Id.* art. 7(b).

<sup>73</sup> *Id.* art. 7(c).

<sup>74</sup> *Id.* art. 8, ¶ 1(a).

<sup>75</sup> *Id.* art. 10.

<sup>76</sup> *Id.* art. 11, ¶ 1.

<sup>77</sup> *Id.* art. 13.

In sum, “[t]he ICESCR, unlike the ICCPR, includes mainly positive rights (things the government must do for you).”<sup>78</sup>

### 3. The International Covenant on Civil and Political Rights

While the ICCPR also affirms the right of the individual to self-determination,<sup>79</sup> it also explicitly lists those actions in which states may not engage. For example, slavery and the slave trade are prohibited,<sup>80</sup> as are involuntary servitude<sup>81</sup> and forced or compulsory labor.<sup>82</sup> It prohibits the deprivation of liberty without due process.<sup>83</sup> In sum, it “contains mainly negative rights (actions the government cannot take against you).”<sup>84</sup> While the United States is not a signatory to the Covenant on Social, Economic and Cultural Rights, it is a signatory to this Covenant.<sup>85</sup>

### 4. The Convention Against Transnational Organized Crime

On November 15, 2000, the General Assembly of the United Nations opened the Convention Against Transnational Organized Crime (UNTOC) for signature.<sup>86</sup> To date, 147 countries have signed it and 186 countries have ratified it.<sup>87</sup> The adoption of this Convention is contemporaneous with the enactment of the United States’ Victims of Trafficking and Violence Protection Act of 2000. The Convention commits States Parties to enact constitutional amendments, legislation, and/or administrative regulations to address the conduct of international, organized crime.<sup>88</sup> Subsequent to the adoption of the Convention, three protocols were

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<sup>78</sup> Amy Howlett, Note, *Getting “Smart”: Crafting Economic Sanctions that Respect All Human Rights*, 73 *FORDHAM L. REV.* 1199, 1205 (2004).

<sup>79</sup> ICCPR, *supra* note 67, art. 1, ¶ 1.

<sup>80</sup> *Id.* art. 8, ¶ 1.

<sup>81</sup> *Id.* art. 8, ¶ 2.

<sup>82</sup> *Id.* art. 8, ¶ 3(a).

<sup>83</sup> *Id.* art. 9, ¶ 1.

<sup>84</sup> Howlett, *supra* note 78, at 1203.

<sup>85</sup> *Id.* at 1204.

<sup>86</sup> U.N. Convention Against Transnational Organized Crime, *adopted* Nov. 15, 2000, 2225 U.N.T.S. 209 [hereinafter UNTOC]. See United Nations Convention Against Transnational Organized Crime, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12.en.pdf> [hereinafter UNITED NATIONS TREATY COLLECTION: UNTOC] (noting that the Convention was open for signature from December 12, 2000 until December 12, 2002).

<sup>87</sup> UNITED NATIONS TREATY COLLECTION: UNTOC, *supra* note **Error! Bookmark not defined.** (providing an up-to-date list of each country to have ratified the Convention, as well as the dates of same).

<sup>88</sup> UNTOC, *supra* note **Error! Bookmark not defined.**, art. 5, ¶ 1.

adopted that elaborate upon the framework for addressing manifestations of international organized crime including human trafficking.<sup>89</sup>

The UNTOC articulates the framework for addressing trans-border, organized crime as an institution in addition to interdicting its activities which include but are not limited to trafficking in persons.<sup>90</sup> It provides a platform for international cooperation in the areas of sharing information,<sup>91</sup> coordinating investigations,<sup>92</sup> extradition of defendants,<sup>93</sup> and pooling of funds derived from assets seized from criminal defendants and subsequently subjected to forfeiture.<sup>94</sup> UNTOC also encourages nations to enter into bilateral and multilateral treaties to carry out its goals.<sup>95</sup> Only nations who have signed and ratified the UNTOC have the opportunity to sign and ratify the Protocols if so desired.<sup>96</sup> One of the benefits of ensuring that nations sign the UNTOC regardless of whether they sign the Protocols is that it provides a uniform set of definitions of key terms for the signatories.<sup>97</sup>

##### 5. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

A helpful way of analyzing the UNTOC and its three supplemental protocols is to view them from the perspective of the trafficking process. The trafficking process involves the recruitment or enticement, transportation, harboring, and marketing of victims for exploitation.<sup>98</sup> The UNTOC focuses on the criminal, *i.e.* the originator and controller of

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<sup>89</sup> See generally Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *adopted* Nov. 15, 2000, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Protocol to Prevent Trafficking]; Protocol Against the Smuggling of Migrants by Land, Sea and Air, *adopted* Nov. 15, 2000, 2241 U.N.T.S. 480 (entered into force Jan. 28, 2004) [hereinafter Protocol Against Smuggling]; Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, *adopted* May 31, 2001, 2326 U.N.T.S. 211 (entered into force July 2, 2005) [hereinafter *Protocol Against Illicit Manufacturing*].

<sup>90</sup> UNTOC, *supra* note **Error! Bookmark not defined.**, art. 5, ¶ 1, art. 6, ¶ 1.

<sup>91</sup> *Id.* art. 18, ¶ 4.

<sup>92</sup> *Id.* art. 18, ¶¶ 1–3.

<sup>93</sup> *Id.* art. 16, ¶¶ 1, 8, 16.

<sup>94</sup> *Id.* art. 13, ¶¶ 1–3.

<sup>95</sup> *Id.* art. 30, ¶¶ 2(d), 3–4.

<sup>96</sup> *Id.* art. 37, ¶ 2.

<sup>97</sup> See *id.* art. 2.

<sup>98</sup> Protocol to Prevent Trafficking, *supra* note 89, art. 3(a).

the trafficking scheme. Its emphasis is prosecutorial.<sup>99</sup> The Supplemental Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children recognizes that women and children who are trafficked are victims, as opposed to persons engaged in criminal immigration, and focuses on how to protect them as victims and restore them.<sup>100</sup>

#### 6. The Protocol Against the Smuggling of Migrants by Land, Sea and Air

The Protocol Against the Smuggling of Migrants by Land, Sea and Air focuses on the transportation element of the trafficking process.<sup>101</sup> Traffickers may not assume direct responsibility for the transportation of their victims.<sup>102</sup> Rather, they may work with smugglers to move victims across national borders.<sup>103</sup> As compared to the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, the Protocol Against the Smuggling of Migrants represents a delineation between smuggling and trafficking and provides for treatment for smugglers that is different from the treatment suggested for traffickers.<sup>104</sup> Use of guns and illegal sales in guns contributes to the activities of criminal organizations.<sup>105</sup> It is also possible that the illegal sales of guns provides the monies to bankroll a trafficking operation.<sup>106</sup> Once a victim is trafficked, guns certainly play a role in coercing the victim and ensuring that he or she submits to exploitation as well as to subdue competitors.<sup>107</sup>

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<sup>99</sup> See *United Nations Convention Against Transnational Organized Crime and Protocols Thereto*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/treaties/CTOC/> (last visited Feb. 29, 2016).

<sup>100</sup> See Protocol to Prevent Trafficking, *supra* note 89, art. 2(a)–(b), 3(b).

<sup>101</sup> See generally Protocol Against Smuggling, *supra* note 89.

<sup>102</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, *ISSUE PAPER: ORGANIZED CRIME INVOLVEMENT IN TRAFFICKING IN PERSONS AND SMUGGLING OF MIGRANTS* 40–42 (2010).

<sup>103</sup> *Id.* at 55–57 (describing how this process occurs within organized criminal groups in order to maximize profits).

<sup>104</sup> Compare Protocol to Prevent Trafficking, *supra* note 89, art. 2, 4–5, 9, 11, with Protocol Against Smuggling, *supra* note 89, art. 2, 6, 8–9, 11.

<sup>105</sup> *A Global Problem: Illicit Firearms as a Threat to Global Security*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/firearmsprotocol/introduction.html> (last visited Mar. 1, 2016).

<sup>106</sup> Regina E. Rauxloh, *No Air to Breathe: Victims of Sex Slavery in the U.K.*, 13 *TEX. WESLEYAN L. REV.* 749, 763 (2007).

<sup>107</sup> See Daan Everts, *Human Trafficking: The Ruthless Trade in Human Misery*, 10 *BROWN J. WORLD AFF.* 149, 153 (2004).



### III. THE UNITED STATES' RESPONSE

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

##### 1. Pre-VTVPA Policy

The emergence of human trafficking as a human rights issue of national and international concern may be attributed to the efforts of a number of different organizations. Some intergovernmental and regional organizations began their advocacy work in this area in the late 1980's.<sup>108</sup> Interest in the issue spread to the university community. During the 1990's, university-based advocacy organizations began to emerge.<sup>109</sup> At that time, articles on trafficking also began to surface in the press.<sup>110</sup>

In time, these organizations appear to have reached out to governmental entities, such as the United States Congress and Department of State, as a part of their efforts to educate the public on the problem of human trafficking.<sup>111</sup> In 1999, legislation was introduced into

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<sup>108</sup> See U. N. HIGH COMM'R FOR REFUGEES, HUMAN TRAFFICKING LEAFLET (2010); Andrea M. Bertone, *Transnational Activism to Combat Trafficking in Persons*, 10 BROWN J. WORLD AFF. 9, 13 (2004).

<sup>109</sup> See, e.g., *About HRC*, HUMAN RIGHTS CENTER, <https://www.law.berkeley.edu/research/human-rights-center/about-hrc/> (last visited Feb. 6, 2016) (noting that the Human Rights Center was established in 1994 as part of the UC Berkeley School of Law); *Our Mission*, THE PROTECTION PROJECT, <http://www.protectionproject.org/> (last visited Feb. 6, 2016) (mentioning The Protection Project's founding in 1994); see also *United States of America: The Protection Project*, HUMANTRAFFICKING.ORG, <http://www.humantrafficking.org/organizations/341> (last visited Mar. 1, 2016) (noting that The Protection Project is based at Johns Hopkins University School of Advanced International Studies).

<sup>110</sup> See, e.g., William Branigin, *Sweatshop Instead of Paradise; Thais Lived in Fear as Slaves at L.A. Garment Factories*, WASH. POST, Sept. 10, 1995, at A1; Arthur H. Lubasch, *Family Accused in Taiwan-United States Prostitution Ring*, N.Y. TIMES, Apr. 26, 1986, § 1, at 31; *Teens Smuggled for Sex*, WASH. POST, Feb. 26, 1998, at A8; Ruben Castaneda, *Man Gets 6 Years for Enslaving Immigrant*, WASH. POST (Aug. 15, 2000), <https://www.washingtonpost.com/archive/local/2000/08/15/man-gets-6-years-for-enslaving-immigrant/c5d293bd-dbf5-4067-af8a-17689aa99d53/>.

<sup>111</sup> See *International Trafficking in Women and Children Hearings*, supra note 10, at 1 (statement of Sen. Brownback) ("As we begin the 21st century, the degrading institution of slavery continues throughout the world. I was introduced to this problem by the human rights advocacy work that we picked up and we started dealing with [in] the Sudan. . . . This advocacy prompted me to examine other forms of modern day slavery which still exist."); *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H.R. Comm. on Int'l Relations*, 106th Cong. 15 (1999) (statement of Theresa Loar, Dir., President's Interagency Council on Women, Dep't of State) [hereinafter *International Sex Trade Hearings*] ("[T]he issue of trafficking first came to my attention through the advocacy of NGO's in the United States and overseas NGO's, who have been strong advocates. They have courageously convened forums and produced moving documentaries to tell the stories.").

Congress to address the growing problem of human trafficking.<sup>112</sup> Testimony presented during the hearings on this legislation underscored what steps needed to be taken to provide an effective framework for interdicting trafficking. Legislation would need to be enacted that was specifically aimed at interdicting trafficking.<sup>113</sup> Any initiative to address trafficking would need to come from the highest levels of government.<sup>114</sup> There would need to be a shift away from treating trafficked persons as criminals and a concomitant move towards treating them as victims.<sup>115</sup> Identified victims of trafficking would require access to a wide array of services such as shelter, food, employment, medical and legal assistance.<sup>116</sup> They would need ongoing protection from their traffickers.<sup>117</sup> Equally important, any legislation enacted would need to impose more severe penalties on traffickers upon conviction.<sup>118</sup>

As witnesses from nongovernmental and governmental agencies and members of the Congress presented testimony on the problem of human trafficking, the complexity of the problem became clear.<sup>119</sup> It would take more than a simple prohibition like the Thirteenth Amendment of the U.S. Constitution to effectively interdict modern-day slavery.<sup>120</sup> Any legislation enacted would have to be both comprehensive and flexible enough to address the complex structure of trafficking enterprises, the varied social,

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<sup>112</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000); see also *Bill Summary & Status H.R. 3244*, THE LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r.03244>: (stating that on November 8, 1999, Representative Christopher Smith of New Jersey introduced H.R. 3244, the “Trafficking Victims Protection Act” joined by 37 cosponsors. Numerous other related bills and resolutions were introduced into the Congress as well, among them H. Res. 613, H.R. 894, H.R. 1248, H.R. 3485, S. Con. Res. 149 and S. 577. H.R. 3244 would ultimately be enacted with amendments from other bills as the “Trafficking Victims Protection Act of 2000”).

<sup>113</sup> See *International Trafficking in Women and Children Hearings*, *supra* note 10, at 14–15 (statement of Hon. Frank E. Loy).

<sup>114</sup> *Id.* at 14.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 101 (statement of Virginia P. Coto, Esq., Dir., Fla. Immigrant Advocacy Ctr.).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 15 (statement of Hon. Frank E. Loy).

<sup>119</sup> Alicia W. Peters, *Trafficking in Meaning: Law, Victims, and the State*, at 40 (2010), [http://www.ncdsv.org/images/TraffickingInMeaningLawVictimsAndTheState\\_3-2011.pdf](http://www.ncdsv.org/images/TraffickingInMeaningLawVictimsAndTheState_3-2011.pdf) (unpublished Ph.D. dissertation, Columbia University).

<sup>120</sup> See Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1035 (2002).

economic, and political contexts in which it operates, and the varied needs of the victims of trafficking.<sup>121</sup>

In the course of congressional hearings, certain recurrent themes began to emerge. For example, it became apparent that one of the challenges to be addressed was the lack of an adequate national or international database on the issue.<sup>122</sup> This was illustrated by the varied estimates of the number of victims trafficked into the United States which ranged from a low of 14,500<sup>123</sup> to a high of 50,000.<sup>124</sup> Similarly, a number of factors were cited as the causes of trafficking, *i.e.* poverty,<sup>125</sup> lack of educational opportunity,<sup>126</sup> inferior social status of women and children,<sup>127</sup> inadequacy of existing criminal statutes,<sup>128</sup> lack of enforcement of existing statutes,<sup>129</sup> political instability,<sup>130</sup> and disinterest and complicity of government officials in trafficking and economic globalization.<sup>131</sup> However, there was not a consensus on the interrelationship of these factors and the weight to be given to them as

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<sup>121</sup> See ALEXIS ARONOWITZ, ET AL., OSCE OFFICE OF THE SPECIAL REPRESENTATIVE AND CO-ORDINATOR FOR COMBATING TRAFFICKING IN HUMAN BEINGS, ANALYSING THE BUSINESS MODEL OF TRAFFICKING IN HUMAN BEINGS TO BETTER PREVENT THE CRIME 11 (2010).

<sup>122</sup> See UNODC, *supra* note 23, at 10 (“This Report by the United Nations Office on Drugs and Crime is our first attempt to close the knowledge gap. It uses information from open sources, both private and public, to map an impressionistic journey into global patterns of trafficking in persons. Complaining that accurate statistics are difficult to come by may sound like an excuse. But it is a fact, which is due only in part to the hidden nature of the crime. The lack of systematic reporting by authorities is the real problem. Information is available on certain countries, but worldwide comparative analysis – the kind of assessment the United Nations excels in – has so far not been possible.”); see also BALES, *supra* note 16, at 103 (“At this point one becomes involved in the history of a number. Being highly appreciative of the old computer programmer’s rule of GIGO, I was nervous about going on record with my estimate of 27 million slaves. So why do so? In part because the existing estimates for the number of slaves in the world ranged from the low millions to 200 million. These numbers were wildly divergent and apparently often groundless.”).

<sup>123</sup> U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2004 23 (2004).

<sup>124</sup> RICHARD, *supra* note 12, at iii (placing the number between 40,000 and 50,000 per year).

<sup>125</sup> *International Trafficking in Women and Children Hearings*, *supra* note 10, at 66 (statement of Ruchira Gupta).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* at 65–66.

<sup>131</sup> *Id.* at 58 (statement of Regan E. Ralph, Human Rights Watch).

primary causal factors of trafficking.<sup>132</sup> What emerged as a consequence of these hearings were common patterns of trafficking organizations and methods of operations. These are discussed briefly below.

Through the testimony offered at congressional hearings, it became clear that trafficking organizations and transactions are not monolithic but complex in structure. The countries that are impacted by trafficking may be characterized as countries of origin, transit and destination.<sup>133</sup> These categories are not mutually exclusive; however, victims of trafficking usually move from impoverished countries to countries with more stable economies.<sup>134</sup> The trafficking operation will be carried out through several interrelated components: recruiters,<sup>135</sup> agents or handlers,<sup>136</sup> escorts,<sup>137</sup> brokers<sup>138</sup> and enforcers.<sup>139</sup>

Witnesses also delineated how the traffickers employ a variety of strategies to ensnare their victims. These include: (1) the promise of jobs;<sup>140</sup> (2) the promise of placement, adoption or education of a minor child;<sup>141</sup> (3) the promise of a brokered marriage;<sup>142</sup> (4) the use of drugs and/or abduction;<sup>143</sup> (5) the use of mental and/or physical abuse to keep victims in servitude; (6) isolation and frequent relocation;<sup>144</sup> (7) threats to

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<sup>132</sup> See, e.g., *id.* at 11–12, 74–76 (showing that different speakers during the Congressional Hearing give more importance to different contributing factors of human trafficking: Hon. Frank E. Loy attributes human trafficking to the economic desperation of both current and potential victims; Senator Wellstone says the root factors are economic distress and the low status of women, and how these factors are compounded by international crime operations; William R. Yeomans states the explanation lies in several factors: economy, the ease of travel between borders, increased communication, and the lack of opportunity for women).

<sup>133</sup> See UNODC, *supra* note 23, at 10 (“Even though all human trafficking cases have their individual characteristics, most follow the same pattern: people are abducted or recruited in the country of origin, transferred through transit regions and then exploited in the destination country.”).

<sup>134</sup> See *International Trafficking in Women and Children Hearings*, *supra* note 10, at 88 (statement of Dr. Laura J. Lederer).

<sup>135</sup> See *id.* at 44 (statement of Regan E. Ralph).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> RICHARD, *supra* note 12, at 14.

<sup>140</sup> *Human Trafficking*, THE FREEDOM PROJECT, <http://www.thefreedomproject.org/human-trafficking/> (last visited Feb 6, 2016).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; *International Trafficking in Women and Children Hearings*, *supra* note 10, at 41 (statement of Regan E. Ralph).

<sup>144</sup> See *International Trafficking in Women and Children Hearings*, *supra* note 10, at 44 (statement of Regan E. Ralph).

harm the victim and/or the victim's family;<sup>145</sup> (8) confiscation of passports and immigration documents;<sup>146</sup> (8) and instilling fear of law enforcement and governmental authorities.<sup>147</sup>

In other words, to craft an effective response to human trafficking, Congress would need to draft legislation that addressed the problem on both a national and international level. This legislation would need to ensure the collaboration of numerous federal agencies in responding to the problem.<sup>148</sup> It would need to avoid the pitfall of unduly bureaucratizing data collection.<sup>149</sup> It would need to balance the need for a focused response benefiting women and children against a broad response that benefited all victims of trafficking.<sup>150</sup> Last but not least, it would need to provide mechanisms to encourage countries of origin to also aggressively address the problem whether through economic sanctions<sup>151</sup> or other collaborative efforts.

Prior to congressional enactment of anti-trafficking legislation, initiatives to address human trafficking were predicated on criminal statutes already on the books<sup>152</sup> and policies implemented by the Executive Branch. Specifically, in 1998 President Clinton announced his International Crime Control Strategy.<sup>153</sup> This strategy was based on three components: (1) prevention; (2) protection and support of victims; and (3) prosecution of traffickers.<sup>154</sup> While components (2) and (3) would require legislative action to be fully implemented,<sup>155</sup> the strategy was significant in several respects. First, it was to be implemented on a government-wide

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<sup>145</sup> *Id.* at 45.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 43 (statement of Gary A. Haugen, Dir., Int'l Justice Mission).

<sup>148</sup> *See id.* at 4 (statement of Sen. Brownback).

<sup>149</sup> *See Combating Human Trafficking: Achieving Zero Tolerance: Hearings Before the Subcomm. on Afr., Global Hum. Rts. and Int'l Rels.*, 109th Cong. 66–67 (2005) (statement of Julianne Duncan, Ph. D., Assistant Dir., Migration and Refugee Services, U.S. Conf. of Cath. Bishops).

<sup>150</sup> *See International Trafficking in Women and Children Hearings*, *supra* note 10, at 44 (statement of Regan E. Ralph).

<sup>151</sup> *See id.* at 57–59 (testimony of Sen. Wellstone and Regan E. Ralph about economic sanctions).

<sup>152</sup> Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL & C.R. L. REV. 195, 196–97 (2006).

<sup>153</sup> MIKO, *supra* note 9, at 8.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 8–9.

basis.<sup>156</sup> Second, it acknowledged that trafficked persons were victims rather than treating them as illegal immigrants.<sup>157</sup> Third, it resulted in the issue being raised in international forums by then Secretary of State, Madeline Albright.<sup>158</sup> As the Congressional Research Service report authored by Francis Miko noted, “[t]he strategy, as announced, had strong domestic and international policy components.”<sup>159</sup> Numerous activities were undertaken pursuant to this policy. For example, in the area of prevention, the Administration promoted increasing economic opportunities for potential victims as well as dissemination of information in other countries to increase public awareness of the dangers of trafficking.<sup>160</sup> It actively advocated for legislation to provide shelter and other support services to victims who were ineligible for assistance because of their illegal immigration status.<sup>161</sup> Through the Department of Justice, it urged laws “to more effectively go after traffickers and increase the penalties they can face.”<sup>162</sup> A Workers’ Exploitation Task Force was formed to “investigat[e] and prosecut[e] cases of exploitation and trafficking.”<sup>163</sup> Steps were taken to address the lack of quality data on trafficking with the Department of State’s funding the creation of “a database on U.S. and international legislation on trafficking.”<sup>164</sup>

When asked what they regarded as essential elements of any anti-trafficking legislation, witnesses testifying before Congress identified the following prerequisites: (1) active information sharing with other governments;<sup>165</sup> (2) providing protection to those individuals caught up in trafficking, such as “safe havens”;<sup>166</sup> and (3) creation of a special humanitarian visa.<sup>167</sup> Each of these measures would be needed to ensure collaboration among countries of origin, transit, and destination, to ensure that trafficking victims were treated as victims in all respects and insulated from possible retaliation from traffickers once freed. The

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<sup>156</sup> See *International Trafficking in Women and Children Hearings*, *supra* note 10, at 12 (statement of Hon. Frank E. Loy).

<sup>157</sup> See *id.* at 14.

<sup>158</sup> See *id.* at 7–8.

<sup>159</sup> MIKO, *supra* note 9, at 8.

<sup>160</sup> *Id.* at 9.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See *id.*

<sup>165</sup> See *International Trafficking in Women and Children Hearings*, *supra* note 10, at 15 (statement of Hon. Frank E. Loy).

<sup>166</sup> Senate Conference Report, *supra* note 9, at 22,054.

<sup>167</sup> See *id.* at 22,046.

measures also ensured that trafficking victims had the option of remaining in the country of destination if repatriation was not possible due to the risk of reprisal and/or re-trafficking.<sup>168</sup> These recommendations would be reflected in the initial legislation that was enacted by Congress.<sup>169</sup>

As a result of bipartisan efforts, the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) was passed by both houses of Congress and signed into law on October 28, 2000.<sup>170</sup> It reflects the input and concerns of governmental and nongovernmental witnesses that testified before Congress and affirms an ongoing role for nongovernmental organizations.<sup>171</sup> While this legislation is a work in progress and has been amended numerous times since its initial enactment,<sup>172</sup> it contains a number of provisions worthy of note. First, the legislation makes a strong, explicit acknowledgement that trafficking in humans is “evil,”<sup>173</sup> involves “grave violations of human rights,”<sup>174</sup> and is repugnant to the principles on which this country is founded.<sup>175</sup> Second, while it does not adopt the definitions set forth in the UNTOC, it sets out the legal parameters of trafficking for sexual exploitation and forced labor. The UNTOC also defines those terms central to implementing the legislation.<sup>176</sup> Third, it

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<sup>168</sup> See *International Trafficking in Women and Children Hearings*, *supra* note 10, at 53 (statement of Regan E. Ralph).

<sup>169</sup> See *id.* at 53–54.

<sup>170</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>171</sup> See Senate Conference Report, *supra* note 9, at 22044.

<sup>172</sup> See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (2003) (amending the original act to include a private cause of action for trafficking victims); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015).

<sup>173</sup> Victims of Trafficking and Violence Protection Act, § 102(b)(21).

<sup>174</sup> *Id.* § 102(b)(23).

<sup>175</sup> *Id.* § 102(b)(22) (“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 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.”).

<sup>176</sup> See *id.* § 103.

authorizes a strategy for deterring trafficking through national and international initiatives.<sup>177</sup>

## 2. National Initiatives Under the VTVPA of 2000

The VTVPA establishes a collaborative approach to deterring trafficking activities within the United States.<sup>178</sup> It allocates responsibility for its implementation among several different federal agencies. Five different federal agencies have responsibilities for implementing the Act.<sup>179</sup> The duties of the Department of Justice include conducting anti-trafficking training for federal prosecutors and law enforcement agents,<sup>180</sup> investigating and prosecuting traffickers,<sup>181</sup> developing working relationships with community-based organizations and initiating outreach programs to educate victims of trafficking about their rights,<sup>182</sup> working in tandem with the department of Health and Human Services to certify the eligibility of victims of severe forms of trafficking to federally funded benefits (such as food stamps, temporary assistance for needy families and legal aid)<sup>183</sup> and oversight of the “T” visa programs which allows victims of severe forms of trafficking to remain in the United States for up to three years to assist the government in prosecuting traffickers.<sup>184</sup>

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<sup>177</sup> See *id.* §§ 105(d), 107.

<sup>178</sup> U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., REPORT ON THE TENTH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT 3 (2010).

<sup>179</sup> OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, OVERVIEW OF THE ADMINISTRATION’S IMPLEMENTATION OF THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000 (2002), <http://2001-2009.state.gov/g/tip/rls/rpt/10531.htm> [<http://2001-2009.state.gov/g/tip/rls/index.htm>] (listing the five federal agencies as: The Department of State, Department of Justice, Department of Labor, Department of Health and Human Services, and the U.S. Agency for International Development).

<sup>180</sup> *Anti-Human Trafficking Task Force Initiative*, BUREAU OF JUSTICE ASSISTANCE, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=51](https://www.bja.gov/ProgramDetails.aspx?Program_ID=51) (last visited Feb. 19, 2016) (the Bureau of Justice Assistance is an arm of the Department of Justice that develops training).

<sup>181</sup> U.S. DEP’T OF JUSTICE RIGHTS DIV., *supra* note 178, at 5, 9.

<sup>182</sup> DEP’T OF HEALTH & HUMAN SERVS., SERVICES AVAILABLE TO VICTIMS OF HUMAN TRAFFICKING: A RESOURCE GUIDE FOR SOCIAL SERVICE PROVIDERS 24–25 (2012).

<sup>183</sup> Press Release, The White House: President George W. Bush, Trafficking in Persons National Security Presidential Directive (Feb. 25, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030225.html> [<http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/>] [hereinafter National Security Directive].

<sup>184</sup> Press Release, Dep’t of Justice, Department of Justice Issues T Visa to Protect Women, Children, and All Victims of Human Trafficking (Jan. 24, 2002), [https://www.justice.gov/archive/opa/pr/2002/January/02\\_crt\\_038.htm](https://www.justice.gov/archive/opa/pr/2002/January/02_crt_038.htm) [<https://www.justice.gov/archive/opa/pr/2002/January/>].



The Department of State oversees the Office to Monitor and Combat Trafficking in Persons.<sup>185</sup> It encourages other countries to address the issue of trafficking by sponsoring anti-trafficking programs<sup>186</sup> and soliciting their cooperation in combating trafficking.<sup>187</sup> It is also responsible for compiling and publishing an annual report on trafficking in persons (“TIP”) which assesses the efforts of other governments to combat trafficking in persons based on a three tier system.<sup>188</sup> The placement on tiers is based on several criteria. A country will be ranked as Tier 1 whose government fully complies with the standards set forth in Section 108 of the VTVPA.<sup>189</sup> Countries “to which the minimum standards for the elimination of trafficking are applicable and whose governments do not yet fully comply with such standards are making significant efforts to bring themselves into compliance” will be ranked as Tier 2.<sup>190</sup> However, those countries to which “the minimum standards for the elimination of trafficking are applicable and whose governments do not full comply with such standards and are not making significant efforts to bring themselves into compliance,” will be ranked as Tier 3.<sup>191</sup> The ranking of a country as a Tier 3 country triggers the authority of the President to withhold “non-humanitarian, nontrade-related foreign assistance to the government for the subsequent fiscal year until such government complies with the minimum standards or makes significant efforts to bring itself into compliance.”<sup>192</sup>

The Department of Health and Human Services works in tandem with the Department of Justice and nongovernmental organizations to assist victims of severe forms of trafficking.<sup>193</sup> It certifies the eligibility of victims for forms of federal assistance such as food stamps, temporary assistance for needy families and legal aid.<sup>194</sup> (In the 1990’s, Congress enacted stricter eligibility requirements for these programs. As a result, aliens who could not demonstrate that they were lawfully admitted to the

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<sup>185</sup> *About Us*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/about/index.htm> (last visited Mar. 5, 2016).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 108, 114 Stat. 1464, 1480–81 (2000).

<sup>190</sup> *Id.* § 110(b)(1)(B).

<sup>191</sup> *Id.* § 110(b)(1)(C).

<sup>192</sup> *Id.* § 110(d).

<sup>193</sup> National Security Directive, *supra* note 183.

<sup>194</sup> *Id.*

United States were ineligible to participate in these programs.)<sup>195</sup> It also conducts public awareness campaigns. These take the form of providing information to victims of trafficking and the organizations that serve them<sup>196</sup> and providing grants to non-governmental organizations to conduct outreach and provide services to trafficking victims.<sup>197</sup> It coordinates the certification of trafficking victims for services who have already been certified for the T visa.<sup>198</sup>

The duties of the two other agencies, the Department of Labor and the Legal Services Corporation, are somewhat narrower in scope.<sup>199</sup> The Department of Labor works with the International Labor Organization (ILO) to eliminate child labor,<sup>200</sup> funds initiatives to “rehabilitate, and reintegrate former child soldiers,”<sup>201</sup> and, through its International Technical Cooperation Program attempts to address “the root causes of poverty.”<sup>202</sup> The Legal Services Corporation is authorized to provide civil legal assistance to victims of severe forms of trafficking through its grantees, local legal aid programs.<sup>203</sup>

Those who have had dealings with federal agencies might view these mandates with a degree of skepticism. Based on past experience, what is the likelihood that these agencies will collaborate with each other to carry out their respective mandates? This is not left to chance. Pursuant to Executive Order 13257, President George W. Bush established a Cabinet-level Interagency Task Force to Monitor and Combat Trafficking in Persons.<sup>204</sup> His Executive Order spells out who the member agencies of the Task Force are. The Task Force’s duties include but are not limited to

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<sup>195</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2261–2262 (1996) (describing eligibility requirements for Federal public benefits).

<sup>196</sup> See Wade F. Horn, *U.S. Human Service Agencies Respond to Trafficking*, 8 GLOBAL ISSUES 10, 11 (2003), [http://photos.state.gov/libraries/korea/49271/dwoa\\_120909/ijge0603.pdf](http://photos.state.gov/libraries/korea/49271/dwoa_120909/ijge0603.pdf).

<sup>197</sup> U.S. DEP’T OF JUSTICE RIGHTS DIV., *supra* note 178, at 10, 12.

<sup>198</sup> National Security Directive, *supra* note 183.

<sup>199</sup> See John R. Miller, *The United States’ Effort to Combat Trafficking in Persons*, GLOBAL ISSUES 8 (2003), [http://photos.state.gov/libraries/korea/49271/dwoa\\_120909/ijge0603.pdf](http://photos.state.gov/libraries/korea/49271/dwoa_120909/ijge0603.pdf).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-383, § 107(b)(1)(B), 114 Stat. 1464, 1475 (2000).

<sup>204</sup> Exec. Order No. 13257, 67 Fed. Reg. 33, 7259 (Feb. 19, 2002), *reprinted as amended in* Exec. Order No. 13333, 69 Fed. Reg. 13455 (March 18, 2004).

(1) coordination of VTVPA implementation;<sup>205</sup> (2) ongoing evaluation of progress of the United States and other countries in prevention, protection and prosecution;<sup>206</sup> (3) assistance in preparing the annual Trafficking In Persons Report;<sup>207</sup> and (4) facilitating coordination among countries of origin, transit and destination.<sup>208</sup>

More recently, an interagency Human Smuggling and Trafficking Center has been created by a charter signed by the Secretary of State, the Secretary of Homeland Security, and the Attorney General.<sup>209</sup> This Center “provides a mechanism to bring together federal agency representatives from the policy, law enforcement, intelligence and diplomatic areas to work together on a full-time basis to achieve increased effectiveness and to convert intelligence into effective law enforcement and other action.”<sup>210</sup>

### 3. International Initiatives under the VTVPA of 2000

In the international arena, the anti-trafficking legislation authorizes a two-prong approach. First, through the Department of State’s Office to Monitor and Combat Trafficking in Persons, annual reports are prepared and submitted to the Congress detailing “the anti-trafficking activities of governments of source, transit, and destination.”<sup>211</sup> “The annual report ranks countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 based on their efforts to combat trafficking.”<sup>212</sup> In order to be listed in Tier 1, a government must criminalize and have successfully prosecuted trafficking, and have provided a wide range of protective services to victims. Victims are not jailed or otherwise punished solely as a result of being trafficked, and they are not summarily returned to a country where they may face hardship as a result of being trafficked.<sup>213</sup> Governments listed in Tier 2 do not fully comply with the Act’s minimum standards but are making significant efforts to bring themselves into compliance with

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* § 2(b).

<sup>207</sup> *Id.* § 2(c).

<sup>208</sup> *Id.* § 2(e).

<sup>209</sup> U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS FROM ATTORNEY GENERAL ALBERTO R. GONZALES ON U.S. TRAFFICKING IN PERSONS IN FISCAL YEAR 2004, 31 (2005), <http://www.justice.gov/archive/ag/annualreports/tr2004/agreporhumantrafficking.pdf> [hereinafter REPORT TO CONGRESS FROM ATTORNEY GENERAL].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 33.

<sup>212</sup> *Id.*

<sup>213</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: JULY 2015, 45, 49 (2015), <http://www.state.gov/documents/organization/245365.pdf> [hereinafter TRAFFICKING IN PERSONS REPORT: JULY 2015].

those standards.<sup>214</sup> Since the inception of the Trafficking in Persons Report, a Tier 2 Watch list has been created.<sup>215</sup> Countries on the Watch List are at risk of being moved to Tier 3 of the list absent positive action to counter human trafficking.<sup>216</sup> As previously noted, countries listed in Tier 3 “do not comply with the minimum standards [of the Act] and are not making significant efforts” to bring themselves into compliance.<sup>217</sup> Some of these governments refuse to acknowledge the trafficking problem within their territory.<sup>218</sup> There are consequences to being placed on and remaining on Tier 3. It may cause the United States government to impose economic sanctions on non-compliant governments.<sup>219</sup> The sanctions require the withholding of non-humanitarian aid from the sanctioned country, including loans from world banking organizations.<sup>220</sup>

The second prong of the United States’ international strategy recognizes that its “activities abroad are of particular importance in the

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<sup>214</sup> *Id.* at 47.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> TRAFFICKING IN PERSONS REPORT 2015: TIER PLACEMENTS, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/rls/tiprpt/2015/243366.htm> (last visited March 15, 2016).

<sup>218</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2006, 100–01, (2006), <http://www.state.gov/documents/organization/66086.pdf> (indicating that in 2006, the government of Cuba was on the Tier 3 list because they did not comply with the minimum standards for the elimination of trafficking, did not aid trafficking victims whatsoever, and refused to officially admit that Cuba had a trafficking problem).

<sup>219</sup> See 22 U.S.C. § 7107(a)(1)–(2) (2009) (“Statement of Policy. It is the policy of the United States not to provide nonhumanitarian, nontrade-related foreign assistance to any government that—(1) does not comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance with such standards.”). It should be noted that the Trafficking in Persons (TIP) Reports have both fans as well as critics. Compare Ashley Feasley, *The Department of State’s Trafficking in Persons Report – What is it and Why is it Important?*, HUMAN TRAFFICKING SEARCH (June 29, 2015), <http://humantraffickingsearch.net/wp/the-department-of-states-trafficking-in-persons-report-what-is-it-and-why-is-it-important/> (noting that “[t]he economic consequences and international bad press of a negative TIP Report ranking has lead [sic] countries to adopt anti-trafficking measures and publically demonstrate their commitment to combatting human trafficking. . . . Such efforts demonstrate the importance of the TIP Report as a diplomatic tool in the global fight against human trafficking and illustrate the United States[] commitment to eradicating human trafficking.”), with Ashley Feasley, *Controversy Surrounding the U.S. Trafficking Report*, HUMAN TRAFFICKING SEARCH (August 11, 2015), <http://humantraffickingsearch.net/wp/controversy-surrounding-2015-tip-report> (subsequently noting that 2015’s TIP Report “received pushback for upgrading certain countries with poor human trafficking records, under the suspicion that the upgrades were based on political considerations instead of evaluating the countries on anti-trafficking prevention criteria. The upgrades of Malaysia and Cuba within the TIP Report have garnered particular criticism.”).

<sup>220</sup> TRAFFICKING IN PERSONS REPORT: JULY 2015, *supra* note 213, at 48.

prevention of human trafficking.”<sup>221</sup> Consequently, the U.S. government awards substantial international financial assistance “aimed at preventing trafficking in persons, protecting victims, and prosecuting traffickers abroad.”<sup>222</sup> For example, in fiscal year 2004, the United States awarded grants to 251 programs located in different 86 countries, totaling \$82 million dollars.<sup>223</sup> Through its awards, the government has funded anti-trafficking efforts ranging from “purchasing equipment to large-scale, multi-year programs to develop comprehensive regional and national strategies to combat the worst forms of child labor.”<sup>224</sup> In other words, the United States’ policy of publically shaming countries that have made little or no effort to combat trafficking is tempered with a willingness to extend technical and financial assistance to those countries who are making a concerted effort to address the problem.

#### 4. The Role of Nongovernmental Organizations

Nongovernmental organizations are an integral part of the United States’ strategy for combatting human trafficking for several reasons.<sup>225</sup> They have been instrumental in bringing the issue to the attention of Congress and in supporting proposed anti-trafficking legislation through their testimony.<sup>226</sup> They serve as the on-the-ground observers who can contribute to the annual TIP Reports, make input into guidelines for funding initiatives, and educate the public on victim identification.<sup>227</sup> They have provided services to victims of trafficking in the form of shelter, medical treatment and psychological counseling.<sup>228</sup> Without assistance of NGOs, it is not clear how many victims of trafficking would avail themselves of the services of law enforcement and other governmental agencies. Consequently, it should come as no surprise that nongovernmental organizations have an ongoing role in the

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<sup>221</sup> REPORT TO CONGRESS FROM ATTORNEY GENERAL, *supra* note 209, at 32.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 33.

<sup>224</sup> *Id.*

<sup>225</sup> Exec. Order No. 13257, *supra* note 204, at 7260 (authorizing the President’s Interagency Task Force to “engage in consultation and advocacy with governmental and nongovernmental organizations, among other entities, to advance the purposes of the Act.”).

<sup>226</sup> See TRAFFICKING IN PERSONS REPORT: JULY 2015, *supra* note 213, at 19.

<sup>227</sup> See, e.g., Suzanne Hoff, The Role of NGOs in Combating Human Trafficking and Supporting (presumed) Trafficked Persons, Address before the Council of Europe Project on Combating and Preventing Trafficking in Human Beings in Azerbaijan (Feb. 2011), [http://www.coe.int/t/dghl/cooperation/economiccrime/trafficking/Projects/THB%20Azerbaijan/REPORT\\_HOFF.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/trafficking/Projects/THB%20Azerbaijan/REPORT_HOFF.pdf).

<sup>228</sup> See U.S. Department of Justice Civil Rights Division: Criminal Section, TRAFFICKING WATCH (Int’l Rescue Comm., New York, N.Y.), Spring 2004, at 1.

implementation of the anti-trafficking statute. They are included as participants in the government sponsored conferences on formulating anti-trafficking strategies.<sup>229</sup> They are also the recipients of federal funding. According to a recent publication of the Immigration Policy Center,

In February 2003, the Office for Victims of Crime awarded twelve grants totaling more than \$9.5 million to help trafficking victims. Eight of the grants [went to] support comprehensive services to trafficking victims in a specific state or region. Three of the grants will support specialized services to trafficking victims in larger multi-state areas.<sup>230</sup>

Among the services to be provided to victims of trafficking with these funds were “emergency medical attention; food and shelter; vocational and English language training; mental health counseling; and legal support.”<sup>231</sup> In other words, NGOs provide the service infrastructure while current legislation works on building governmental and legal infrastructure to identify and assist victims of trafficking.

#### *B. The TVPA 2003 Reauthorization*

The VTVPA of 2000 laid the groundwork for the United States’ campaign against human trafficking. As the federal government has developed expertise in the administration of the VTVPA, it has identified gaps in the legislative scheme that need to be addressed.<sup>232</sup> The Trafficking Victims Protection Reauthorization Act of 2003 acknowledges that some progress had been made in combatting trafficking but that countless men, women, and children at home and abroad continued to be victimized.<sup>233</sup> Among the goals set by the reauthorization are “border interdiction,”<sup>234</sup> combatting sex tourism,<sup>235</sup> authority to terminate grants, contracts and cooperative agreements of recipients found to have engaged in “severe forms of trafficking” or to have procured a commercial sex act; or to have “use[d] forced labor in the performance of the grant, contract, or cooperative agreement.”<sup>236</sup>

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<sup>229</sup> *Id.*

<sup>230</sup> U.S. DEP’T OF JUSTICE, ACCOMPLISHMENTS IN THE FIGHT TO PREVENT TRAFFICKING IN PERSONS (2003), <http://2001-2009.state.gov/g/tip/rls/fs/17968.htm>.

<sup>231</sup> *Id.*

<sup>232</sup> See Trafficking Victims Protection Reauthorization Act of 2003, 108 P.L. 193 §4.

<sup>233</sup> *Id.* §§ 2(1)–(2).

<sup>234</sup> *Id.* § 3(a)(2).

<sup>235</sup> *Id.* § 3(a)(2).

<sup>236</sup> *Id.* § 3(b).

While the 2000 VTVPA addressed criminal penalties for convicted traffickers, the 2003 Reauthorization broadened remedies for victims of sections 1589, 1590 or 1591 of the law to bring a civil action to recover reasonable damages and attorneys' fees.<sup>237</sup> Consequently, victims were not dependent upon the government to bring a criminal proceeding in order to secure a remedy against the traffickers.<sup>238</sup>

The original legislation had created a special visa for trafficking victims referred to as the T visa. In order to secure this visa, the victims need an affidavit from federal law enforcement confirming that they are cooperating in the investigation or prosecution of a case.<sup>239</sup> The 2003 Reauthorization expanded this provision to include "statements from State and local law enforcement officials that the alien has complied with any reasonable request for assistance in the investigation or prosecution of crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking in persons appear to have been involved."<sup>240</sup>

Some changes were also implemented in the administrative structure to implement the Act. The Director of the Office to Monitor and Combat Trafficking within the Department of State was accorded the rank of "Ambassador-at-Large," an appointment by the President subject to the advice and consent of the Senate.<sup>241</sup> It also created a Senior Policy Operating Group made up of Senior Officials designated by E.O. 13257 as the Task Force.<sup>242</sup>

The minimum standards for the tier system used to rank countries were amended to create a rebuttable presumption of non-compliance with the standards by governments that are uncooperative in providing data on their efforts.<sup>243</sup> A Tier 2 Watch List is added to the existing three tier classification of state anti-trafficking efforts.<sup>244</sup> Incidental to these changes, numerous executive agencies are directed to carry out and to fund research on the economic causes of trafficking, the effectiveness of existing programs, and "the interrelationship between trafficking in

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<sup>237</sup> *Id.* § 4(a)(4)(A).

<sup>238</sup> *Id.* (quoting the amendment to Chapter 77, part I of title 18 of the United States Code, section 1595(b), which indicated a caveat to this remedy: if a criminal action was pending, the civil action would be stayed until the criminal action was resolved).

<sup>239</sup> *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 1595, 117 Stat. 2875, 2878 (2003).

<sup>240</sup> Trafficking Victims Protection Reauthorization Act of 2003, § 4(b)(2)(B).

<sup>241</sup> *Id.* § 6(b)(1).

<sup>242</sup> *Id.* § 6(c)(1).

<sup>243</sup> *Id.* §§ 6(d)(1)(B), 6(d)(2)(B).

<sup>244</sup> *Id.* § 6(e)(2).

persons and global health risks.”<sup>245</sup> Restrictions are placed on funding to prohibit making grants if an organization’s purposes include to “promote, support, or advocate the legalization of prostitution.”<sup>246</sup> Organizations seeking funding must affirmatively state they do not promote, support, or advocate the legalization or practice of prostitution as a condition of grant.<sup>247</sup>

### C. *The TVPA 2005 Reauthorization*

Having created the basic framework for combatting human trafficking in the 2000 TVPA and its 2003 TVPA Reauthorization, the 2005 TVPA Reauthorization amplifies on the basic provisions of these two laws. It is not a single issue bill. Rather, it covers international trafficking with a specific focus on peace keeping forces<sup>248</sup> and populations being trafficked in post-conflict settings and humanitarian emergencies.<sup>249</sup> This enactment acknowledges that while efforts to date have focused primarily on international trafficking, <sup>250</sup>trafficking also occurs within the borders of the United States and recognizes the lack of known research studies to quantify the incidents of trafficking in children for the purpose of sexual exploitation within the United States.<sup>251</sup>

This Reauthorization mandates several studies. The focus of these studies remains primarily international in focus. For example, it mandates a study by the Secretary of State and Administrator for the U.S. Agency for International Development (AID), in consultation with the Secretary of Defense, regarding “the threat and practice of trafficking in persons generated by post-conflict and humanitarian emergencies in foreign countries.”<sup>252</sup> This study is to consider such factors as “vulnerabilities to human trafficking of commonly affected populations,”<sup>253</sup> and “the various forms of trafficking, both internal and trans-border, including both sexual and labor exploitation.”<sup>254</sup> Authority is conferred to establish pilot programs for residential rehabilitation facilities for victims

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<sup>245</sup> *Id.* § 6(g)(1).

<sup>246</sup> *Id.* § 7(7).

<sup>247</sup> *Id.*

<sup>248</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 104(e), 119 Stat. 3558, 3565–66 (2005).

<sup>249</sup> *Id.* § 101.

<sup>250</sup> *Id.* § 2(3).

<sup>251</sup> *Id.* § 2(4)–(5).

<sup>252</sup> *Id.* § 101(b)(1)(A).

<sup>253</sup> *Id.* § 101(b)(1)(B)(i).

<sup>254</sup> *Id.* § 101 (b)(1)(B)(ii).



of trafficking in foreign countries.<sup>255</sup> The 2005 Reauthorization also references the possible link between terrorism and trafficking in its directive to conduct research on “the interrelationship between trafficking in persons and terrorism, including the use of profits from trafficking in persons to finance terrorism.”<sup>256</sup>

In addition to these provisions which are aimed at better understanding the dynamics of trafficking and remediating its consequences, the 2005 Reauthorization also enhances the federal government’s authority to prosecute traffickers by creating jurisdiction over certain trafficking offenses. Specifically, title 18 of the United States Code is amended to provide that a civilian employee of the federal government,<sup>257</sup> whether as a contractor or subcontractor, or dependent of a civilian employee of the federal government, who commits an offense abroad that would be covered by Title 18, Chapter 77 or 117, if committed in the United States or within the special maritime or territorial jurisdiction of the United States, “shall be punished as provided for that offense.”<sup>258</sup> (This provision is subject to the limitation that if the foreign government where the offense occurs prosecutes the person for this offense in accordance with jurisdiction recognized by the United States, no prosecution will be commenced in the United States except upon approval of the Attorney General.)<sup>259</sup> Jurisdiction is extended to include money laundering<sup>260</sup> and the code mandates forfeiture of personal and real property that was used or intended to be used to commit an offense covered by Title 18, Chapter 117, Section 2428 of the code, as well as any real or personal property derived by “proceeds traceable to any violation of that chapter.”<sup>261</sup>

This reauthorization also signals an increased focus on forced labor and child labor. Noting that the list of countries that the 2005 Trafficking in Persons Report found were not complying with the TVPA’s minimum standards “was composed of a large number of countries in which the trafficking involved forced labor,”<sup>262</sup> Congress directs the Office to Monitor and Combat Trafficking to intensify its focus on those countries in

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<sup>255</sup> *Id.* § 102(b)(2).

<sup>256</sup> *Id.* § (c)(1)(C); *see also* Richard, *supra* note 12, at 1.

<sup>257</sup> *Id.* § 103(a)(1) (codified at 18 U.S.C. § 3271 (2006)).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* § 103(d) (codified at 18 U.S.C. § 2428).

<sup>262</sup> *Id.* § 105(a)(1); *see generally*, U.S. DEPT OF STATE TRAFFICKING IN PERSONS REPORT: JUNE 2005 50–230 (2005), <http://www.state.gov/documents/organization/47255.pdf>.

particular.<sup>263</sup> The Secretary of Labor, through its Bureau of International Labor Affairs, is directed to “carry out additional activities to monitor and combat forced labor and child labor in *foreign countries*.”<sup>264</sup> Among the activities mandated are: (1) the development and publication of a list of goods from foreign countries believed to be “produced by forced labor or child labor in violation of international standards;”<sup>265</sup> and (2) “work[ing] with persons who are involved in the production of goods on the list described . . . to create a standard set of practices that will reduce the likelihood that such persons will produce goods using the labor described,” *i.e.* forced labor or child labor.<sup>266</sup>

Title II of this Reauthorization addresses domestic trafficking. This section of the legislation takes up only two and one half pages of a seventeen page bill. It directs the Attorney General to:

[U]se available data from State and local authorities as well as research data to carry out a biennial comprehensive research and statistical review and analysis of severe forms of trafficking in persons, and a biennial comprehensive research and statistical review and analysis of sex trafficking and unlawful commercial sex acts in the United States, and shall submit to Congress separate biennial reports on the findings.<sup>267</sup>

In addition, the Attorney General, in consultation with the Secretary of Health and Human Services, is to hold annual conferences addressing severe forms of trafficking in persons and commercial sex acts occurring in whole or in part in the United States.<sup>268</sup> Apparently, the primary objective of the research and conferences is to train state and local law enforcement on enforcement of laws prohibiting trafficking and commercial sex acts as well as best methods and practices for collaborating with social service providers and nongovernmental organizations and establishing trust with trafficking victims. Reports mandated by this section of the Reauthorization are to be made available to the public by posting them and disseminating them through the

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<sup>263</sup> *Id.* § 105(a)(2).

<sup>264</sup> *Id.* § 105(b)(1) (emphasis added).

<sup>265</sup> *Id.* § 105(a)(b)(2)(C). This may not be easy to achieve. See BALES, *supra* note 16, at 22 (noting that oftentimes agricultural products that are produced with forced labor are intermingled with fair trade products, making it difficult if not impossible for the consumer to discern and avoid the purchase of products produced with forced labor).

<sup>266</sup> Trafficking Victims Reauthorization Act of 2005, § 105(b)(2)(D).

<sup>267</sup> *Id.* § 201(1)(A).

<sup>268</sup> *Id.* § 201(a)(2)(A).

websites of the Departments of Justice and Health and Human Services.<sup>269</sup>

Authority is also created for a pilot project to establish residential treatment facilities in the United States for juveniles subjected to trafficking.<sup>270</sup> Eligibility for grants is extended to:

States, Indian tribes, units of local government, and nonprofit, nongovernmental victims' services organizations to establish, develop, expand, and strengthen assistance programs for United States citizens or aliens who are admitted for permanent residence who are the subject of sex trafficking or severe forms of trafficking in persons that occurs, in whole or in part, within the territorial jurisdiction of the United States.<sup>271</sup>

A similar grant program is established to make grants to state and local law enforcement agencies as well.<sup>272</sup>

*D. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*

As in the case of the previous reauthorizations, the William Wilberforce Trafficking Victims Protection Reauthorization of 2008 (the 2008 Reauthorization) elaborates upon the existing legal framework. Although it addresses a broad range of procedural and substantive issues, the focus of the 2008 Reauthorization remains international, i.e. the trafficking of victims abroad and the trafficking of foreign victims into the United States.<sup>273</sup> It increases efforts in the following areas: prevention and prosecution of trafficking abroad;<sup>274</sup> prevention and prosecution of trafficking into the United States;<sup>275</sup> and extending efforts to protect children from trafficking.<sup>276</sup>

The programmatic sections of the 2008 Reauthorization that address human trafficking abroad provide for increased coordination of "all policy, funding, and programming decisions regarding funds made available for trafficking in persons programs that are centrally controlled by the Office to Monitor and Combat Trafficking" as well as other programs of the

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<sup>269</sup> *Id.* § 201(a)(2)(C).

<sup>270</sup> *Id.* § 203(a).

<sup>271</sup> *Id.* § 202(a).

<sup>272</sup> *Id.* § 204(a)(1).

<sup>273</sup> See generally William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

<sup>274</sup> *Id.* § 103.

<sup>275</sup> See e.g., *id.* §§ 203-05, 213, 221-22, 224-25, 236.

<sup>276</sup> See *id.* § 235(a)(2).

Department of State and the Agency for International Development not under the Office's control.<sup>277</sup> It mandates increasing effectiveness of these programs through "full and open competition" for "grants, co-operative agreements, and contracts."<sup>278</sup> Review and approval of awards is to be restricted to internal agency review; "ad hoc or intermittent review or influence by individuals or organizations outside the United States Government." is prohibited.<sup>279</sup> Moreover, applicants for funding to provide "legal services, social services, health services or other assistance" must certify that they have or will complete training in connection with trafficking in persons.<sup>280</sup> In keeping with these quality control measures, the President is directed to "establish a system to evaluate the effectiveness and efficiency of the assistance provided . . . on a program-by-program basis."<sup>281</sup>

With regard to trafficking abroad, the 2008 Reauthorization clarifies the minimum standards for elimination of trafficking,<sup>282</sup> makes training available to law enforcement and immigration officials in other countries regarding "the identification and treatment of trafficking victims using approaches that focus on the needs of victims,"<sup>283</sup> and clarifies treatment of a country that remains on the special watch list for two years absent evidence of "a written plan to begin making significant efforts to bring itself into compliance with the minimum standards for the elimination of trafficking"<sup>284</sup> as well as the devotion of "sufficient resources to implement the plan."<sup>285</sup>

Further research on domestic and international trafficking with the goal of creating an integrated data base to quantify "the victims of trafficking on a national, regional, and international basis" is mandated.<sup>286</sup> Multilateral efforts among "relevant international and nongovernmental organizations" are endorsed with a view "to establish a multilateral framework between labor exporting and labor importing countries to ensure that workers migrating between such countries are protected from trafficking in persons."<sup>287</sup>

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<sup>277</sup> *Id.* § 102(2).

<sup>278</sup> *Id.* § 105.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* § 106.

<sup>283</sup> *Id.* § 106(2)(B).

<sup>284</sup> *Id.* § 107(a).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* § 108(a)(1).

<sup>287</sup> *Id.* § 111.

The 2008 Reauthorization amends the T visa program previously established by the VTVPA of 2000. Securing a T visa is predicated upon being a victim of a severe form of trafficking who is cooperating with law enforcement officials to investigate and/or prosecute the traffickers.<sup>288</sup> This requirement is modified by providing authority to the Department of Homeland Security, in consultation with the Attorney General, to exempt a victim from this requirement who is unable to cooperate with a request to cooperate in investigative or judicial processes “due to physical or psychological trauma.”<sup>289</sup> In addition, the T visa provisions are extended to derivative victims, *i.e.* any parent or unmarried sibling under 18 years of age of a trafficking victim who “faces a present danger of retaliation as a result of the alien’s escape from the severe form of trafficking or cooperation with law enforcement.”<sup>290</sup>

This Reauthorization briefly addresses trafficking for the purposes of forced labor. It directs that the head of the Office to Monitor and Combat Trafficking,

[I]n coordination and cooperation with other officials at the Department of State involved in corporate responsibility, the Deputy Under Secretary for International Affairs of the Department of Labor, and other relevant officials of the United States Government, shall promote, build, and sustain partnerships between the United States Government and private entities (including foundations, universities, corporations, community-based organizations, and other nongovernmental organizations) to ensure that (i) United States citizens do not use any item, product or material produced or extracted with the labor from victims of severe forms of trafficking.<sup>291</sup>

It also specifically addresses protection for domestic workers, (*i.e.* workers brought to the United States to work as maids, housekeepers, and nannies) from exploitation.<sup>292</sup> Limits on A-3 and G-5 visas—the visas under which these workers enter the United States—and remedies for their abuse are also addressed.<sup>293</sup>

For trafficking victims brought into the United States, the 2008 Reauthorization provides for coordination of resources and providers of

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<sup>288</sup> *Id.* § 201(a)–(b).

<sup>289</sup> *Id.* § 201(a)(1)(D)(iii).

<sup>290</sup> *Id.* § 201(a)(1)(D)(iii)(II).

<sup>291</sup> *Id.* § 102(3).

<sup>292</sup> *See id.* § 202.

<sup>293</sup> *See id.* § 203.

existing programs, and the funding of grants “to develop, expand, and strengthen victim service programs.”<sup>294</sup> The Secretary of Health and Human Services is required, no later than one year after enactment of the Reauthorization, to submit a report to the appropriate congressional committees to identify “the existence and extent of any service gap[s],”<sup>295</sup> including factors relating to the legal ability of victims to access government-funded social services.<sup>296</sup> Penalties against traffickers are enhanced for enticement into slavery; forced labor, benefitting financially from peonage, slavery and trafficking in persons, and fraud in foreign labor contracting.<sup>297</sup> These offenses are defined broadly enough to include parties who obstruct the investigation of the offenses as well as those who knowingly benefit financially or receive something of value as well as those who actually carry out the offense.<sup>298</sup> The 2008 Reauthorization also allows up to ten years to maintain an action for restitution of forfeited assets.<sup>299</sup> In addition, the Federal Sentencing Guidelines are to be amended regarding persons convicted of harboring aliens to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a commercial sex act if the harboring was committed in furtherance of prostitution.<sup>300</sup> Furthermore, explicit extraterritorial authority is provided over United States nationals and aliens lawfully admitted for permanent residence who commit offenses enumerated in this Reauthorization abroad, unless the jurisdiction in which the offense occurred is prosecuting the individual.<sup>301</sup>

There are a number of provisions directed at protecting children from trafficking in the 2008 Reauthorization. These include enhancing efforts to combat trafficking of children,<sup>302</sup> provisions for care and custody of unaccompanied minor children at the borders and ports of entry,<sup>303</sup> and provision for permanent care of certain at risk children.<sup>304</sup> For the first time, the problem of child soldiers is addressed and forms of government assistance are interdicted for countries in which the use of child soldiers

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<sup>294</sup> *Id.* § 213(a)(1).

<sup>295</sup> *Id.* § 213(b)(1).

<sup>296</sup> *Id.* § 213(b)(2)(A).

<sup>297</sup> *Id.* § 222(b).

<sup>298</sup> *Id.* § 222.

<sup>299</sup> *Id.* § 221(2)(B).

<sup>300</sup> *Id.* § 222(g).

<sup>301</sup> *Id.* § 223(a).

<sup>302</sup> *Id.* §§ 235(a)–(b).

<sup>303</sup> *Id.* § 235(b)(1).

<sup>304</sup> *Id.* § 235(d).

occurs and is not addressed by the government.<sup>305</sup> In short, the breadth and depth of the federal anti-trafficking legislation is increasing as the Congress' knowledge of the issues presented by trafficking increases.

*E. The 2011 and 2013 Reauthorizations*

1. The TVPA Reauthorization of 2011

The 2008 Reauthorization lapsed without Congress' having completed action on the Reauthorization of 2011.<sup>306</sup> During the period following the expiration of the 2008 Reauthorization, authority to continue federal anti-trafficking activities was provided by appropriations legislation.<sup>307</sup> However, the proposed legislation provides a useful indicator of ongoing concerns and emerging issues in federal anti-trafficking policy. For example, this legislation would have given the Secretary of State the authority to limit the period of validity of or revoke the passport issued to a sex offender.<sup>308</sup> It would have authorized the President to carry out economic alternatives to combat and deter trafficking.<sup>309</sup> It also set a priority for potential victims of trafficking to be served such as stateless persons,<sup>310</sup> "refugees and internally displaced persons,"<sup>311</sup> persons otherwise marginalized,<sup>312</sup> regions of limited protections or economic options for women,<sup>313</sup> "persons from regions of high undocumented migration or displacement [due to] violent conflict or natural disasters,"<sup>314</sup> and "regions with high rates of child labor, child abandonment, or child sex tourism."<sup>315</sup> There is a continuing focus on the role of businesses in facilitating trafficking for forced labor or child labor.<sup>316</sup> The section of the proposed legislation entitled "Business Transparency on Trafficking Act" would require businesses to disclose on their websites any measures taken to identify and address conditions of "forced labor, slavery, human trafficking, and the worst forms of child

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<sup>305</sup> *Id.* § 404.

<sup>306</sup> H.R. 3589, 112th Cong. (2011) (as introduced in the H.R.).

<sup>307</sup> Nathan Godsey, *The Next Step: Why Non-Governmental Organizations Must Take A Growing Role in the New Global Anti-Trafficking Framework*, 8 REGENT J. INT'L L. 27, 29 (2011).

<sup>308</sup> H.R. 3589 § 101(a).

<sup>309</sup> *Id.* §§ 103(a)(1)–(2).

<sup>310</sup> *Id.* § 103(a)(6)(3)(A).

<sup>311</sup> *Id.* § 103(a)(6)(3)(B).

<sup>312</sup> *Id.* § 103(a)(6)(3)(C).

<sup>313</sup> *Id.* § 103(a)(6)(3)(D).

<sup>314</sup> *Id.* § 103(a)(6)(3)(E).

<sup>315</sup> *Id.* § 103(a)(6)(3)(F).

<sup>316</sup> *Id.* § 106(b).

labor within such person's supply chains" and engage "in verification of product supply to evaluate and address risks of forced labor, slavery, human trafficking and the worst forms of child labor."<sup>317</sup>

The proposed legislation contains a sense of the Congress provision which is not unique. A similar provision was included in the 2008 Reauthorization. However, what makes this provision stand out is that, citing information from news sources, the 2011 TIP Report, and statements by the NGO Human Rights Watch, it singles out Cambodia for scrutiny as a magnet country "for those who sexually prey on the young."<sup>318</sup> Finding that Cambodia has not taken sufficient steps to combat trafficking, it directs that "[i]t is the sense of the Congress that . . . Cambodia should be designated as a Tier 3 country pursuant to section 110 of the Trafficking Victims Protection Act of 2000,"<sup>319</sup> a determination normally left to the Secretary of State.

Several ongoing problem areas are identified by this proposed legislation: (1) the prohibitions on peacekeeping operations assistance to countries that recruit and use child soldiers and (2) an amendment to the President's waiver authority of this prohibition.<sup>320</sup> "[T]he Senior Policy Operating Group, in coordination with the Office to Combat Modern Slavery," is directed to "submit to Congress a report on Internet-facilitated human trafficking," enumerating the factors to be considered in the report.<sup>321</sup>

The bill also requires a variety of reports from agencies regarding their anti-trafficking duties. For example, a report is required on activities of government contractors and subcontractors,<sup>322</sup> activities of the Bureau of Justice Assistance,<sup>323</sup> a report on the efforts of the United States to comply with minimum standards to eliminate trafficking,<sup>324</sup> and a report on "[t]he number of alien children encountered by U.S. Customs and Border Protection."<sup>325</sup> There are also provisions aimed at "improving local efforts to combat trafficking and sexual exploitation of children,"<sup>326</sup> "to publicize the National Human Trafficking Resource Center Hotline,"<sup>327</sup>

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.* § 108(a).

<sup>319</sup> *Id.* §§ 108(a)(7)–(b).

<sup>320</sup> *Id.* § 109.

<sup>321</sup> *Id.* §§ 110(a)–(b).

<sup>322</sup> *Id.* § 202(b).

<sup>323</sup> *Id.* § 202(c).

<sup>324</sup> *Id.* § 204.

<sup>325</sup> *Id.* § 221(a)(3).

<sup>326</sup> *Id.* § 222.

<sup>327</sup> *Id.* § 223.



and to clarify that faith-based organizations that are otherwise eligible for funding, “shall not be . . . required as a condition of receiving such assistance, to endorse, utilize, provide, make a referral to, become integrated with, or otherwise participate in any program, project, or activity to which the organization has a religious or moral objection.”<sup>328</sup> Since Congress adjourned the session in which this legislation was introduced without enacting it, the issues it raised would have to be taken up in the next reauthorization legislation introduced.

## 2. The Violence Against Women Reauthorization Act of 2013

The President signed the Violence Against Women Reauthorization Act (VAWA) into law on March 7, 2013.<sup>329</sup> It is worthy of note that many of the provisions of the proposed TVPA Reauthorization of 2011 that was never enacted were in turn carried over and included in this legislation instead.<sup>330</sup> A fair characterization of the 2013 VAWA Reauthorization would be that it strengthened the individual provisions for combatting trafficking and protecting victims as well as the relationships among the entities administering these provisions. For example, each regional bureau within the Department of State was directed to “contribute to the realization of the anti-trafficking goals and objectives of the Secretary of State.”<sup>331</sup> The United States Government is directed to promote collaboration between governments listed in the TIP Report,<sup>332</sup> “foreign governments,”<sup>333</sup> “civil society actors,”<sup>334</sup> “and private sector entities.”<sup>335</sup> Prior initiatives are continued to build partnerships among “the United States Government and private entities, including foundations, universities, corporations, community-based organizations, and other nongovernmental organizations” to ensure United States citizens do not

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<sup>328</sup> *Id.* § 303(a)(1)(A).

<sup>329</sup> Jodi Gillette & Charlie Galbraith, *President Signs 2013 VAWA – Empowering Tribes to Protect Native Women*, WHITE HOUSE BLOG (Mar. 7, 2013, 7:07 PM) <https://www.whitehouse.gov/blog/2013/03/07/president-signs-2013-vawa-empowering-tribes-protect-native-women>; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

<sup>330</sup> *Breaking News: Violence Against Women Act & Trafficking Victims Protection Reauthorization Act Passed*, NOT FOR SALE (Feb. 28, 2013), <https://www.notforsalecampaign.org/stories/2013/02/28/breaking-news-violence-against-women-act-passed/>.

<sup>331</sup> Violence Against Women Reauthorization Act § 1201(4), 127 Stat. at 136.

<sup>332</sup> *Id.* § 1202.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

use any products or materials produced from or extracted with the use and labor of victims of severe forms of trafficking.<sup>336</sup>

This reauthorization requires the Task Force established in the 2000 legislation to “make reasonable efforts . . . to enable all relevant Federal Government agencies to publicize the National Human Trafficking Resource Hotline on their websites.”<sup>337</sup> The minimum standards for the elimination of trafficking are refined to require “a transparent system for remedia[tion] or punishing such public officials as a deterrent”<sup>338</sup> and encouraging “effective bilateral, multilateral, or regional information sharing and cooperation arrangements with other countries, and effective policies or laws regulating foreign labor recruiters and holding them civilly and criminally liable for fraudulent recruiting.”<sup>339</sup> The protections in the 2008 TVPA Reauthorization are expanded to include videos as well as pamphlets to inform applicants for overseas work visas.<sup>340</sup>

Although prior legislation has dealt with child protection issues, this reauthorization introduces a new initiative: prevention of child marriage. The Secretary of State is required to implement a multiyear strategy to prevent child marriage, promote the empowerment of girls at risk of child marriage, and target areas in developing countries with a high incidence of child marriage.<sup>341</sup> The Department of State is also required to include in its individual country reports “a description of the status of the practice of child marriage in such countr[ies].”<sup>342</sup>

With regards to efforts to combat trafficking in the United States, one subtitle of the 2013 TVPA Reauthorization amends RICO (Racketeering Influenced Corrupt Organizations Act), to insert a section relating to fraud in foreign labor contracting.<sup>343</sup> A section is added to address the “destruction, concealment, removal, confiscation or possession of immigration documents,”<sup>344</sup> as it is a common practice for traffickers to take victims’ visas and passports and refuse to return them in order to prevent them from escaping.<sup>345</sup> The provision for civil remedies for

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<sup>336</sup> *Id.*

<sup>337</sup> *Id.* § 1203(a).

<sup>338</sup> *Id.* § 1204(1)(B).

<sup>339</sup> *Id.* § 1204(1)(C).

<sup>340</sup> *Id.* § 1206.

<sup>341</sup> *Id.* § 1207(a).

<sup>342</sup> *Id.* § 1207(b)(1).

<sup>343</sup> *Id.* § 1211(a).

<sup>344</sup> *Id.* § 1211(c)(1).

<sup>345</sup> *Trafficking*, ADVOCATES FOR FREEDOM, <http://www.advocatesforfreedom.org/trafficking.html> (last visited Mar. 7, 2016).

personal injuries is amended<sup>346</sup> along with certain key definitions such as “abuse or threatened abuse of law or legal process.”<sup>347</sup> Expanded reporting requirements are imposed on the Attorney General,<sup>348</sup> the Secretary of Labor,<sup>349</sup> the Secretary of State,<sup>350</sup> and the Comptroller General of the United States.<sup>351</sup>

Additional accountability requirements are imposed on grants awarded by the Attorney General pursuant to this legislation. For example, the Inspector General is required to conduct audits of grantees of the Department of Justice.<sup>352</sup> If a recipient of funds from the Department of Justice is “found to have an unresolved audit finding, [the recipient] shall not be eligible to receive grant funds under this title or an Act amended by this title during the first 2 fiscal years beginning after the end of the 12-month period,” which is to begin “on the date on which the final audit report is issued.”<sup>353</sup> Moreover, non-profit organizations receiving grants are required to disclose in their grant applications the process for determining the compensation of their officers, directors, trustees, and key employees.<sup>354</sup>

Opportunities for funding are expanded for state and local governments in areas where there is significant criminal activity, involving sex trafficking in minors.<sup>355</sup> Qualified nongovernmental organizations may also be eligible for this funding.<sup>356</sup> The Attorney General is given the authority to make block grants to four eligible entities located in different regions of the United States.<sup>357</sup> A wide range of activities is authorized under these grants: providing temporary or long-term residential care to minor victims of sex trafficking, 24-hour emergency social services for minor victims of sex trafficking, providing these victims with clothing and other daily necessities; and mental health counseling, and legal services.<sup>358</sup>

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<sup>346</sup> Violence Against Women Act § 1212(a), 127 Stat. at 143.

<sup>347</sup> *Id.* § 1212(b)(1)(B).

<sup>348</sup> *Id.* § 1231.

<sup>349</sup> *Id.* § 1232.

<sup>350</sup> *Id.* § 1233.

<sup>351</sup> *Id.* § 1235.

<sup>352</sup> *Id.* § 1236(1)(B).

<sup>353</sup> *Id.* §§ 1236(1)(A), (1)(C).

<sup>354</sup> *Id.* § 1236(2)(C).

<sup>355</sup> *Id.* § 1241(a).

<sup>356</sup> *See id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

There are increased grant opportunities for local law enforcement investigations and prosecutions of trafficking.<sup>359</sup> Provisions relating to model state law criminal law protections for child trafficking victims and survivors are amended.<sup>360</sup> The amendments protect “children exploited through prostitution by including safe harbor provisions,” i.e. provisions that treat minors who have been arrested for prostitution as victims when the conduct was a consequence of being trafficked.<sup>361</sup> Pursuant to these provisions, the minor victim will “not be required to prove fraud, force, or coercion in order to receive” the benefit of the safe harbor provisions.<sup>362</sup> Additional protections are also provided for unaccompanied alien children.<sup>363</sup> While these children are in custody, they are to be placed in the least restrictive environment.<sup>364</sup> “[A]t 3 new immigration detention sites,” they are to be “provide[d] independent child advocates for trafficking victims and vulnerable unaccompanied alien children.”<sup>365</sup> Access to federal foster care and unaccompanied minor protections for certain U Visa recipients are also authorized.<sup>366</sup> As in the case of other new initiatives, the Government Accountability Office is required to conduct a study of the effectiveness of border screenings by the Department of Homeland Security.<sup>367</sup>

Despite the refinements made in the original VTVPA of 2000, Congress would find it necessary to enact further refinements to it, as amended, with reauthorization legislation passed in 2015.

#### F. *The Justice for Victims of Trafficking Act of 2015*

The Justice for Victims of Trafficking Act of 2015 (JVTA) is the most recent anti-trafficking legislation enacted by Congress.<sup>368</sup> It is a collection of provisions aimed at diverse objectives, e.g. “clarifying the benefits and protections offered to domestic victims of human trafficking,”<sup>369</sup> streamlining trafficking investigations,<sup>370</sup> creating a “domestic trafficking

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<sup>359</sup> *Id.* § 1242.

<sup>360</sup> *Id.* § 1243.

<sup>361</sup> *Id.* § 1243(3).

<sup>362</sup> *Id.*

<sup>363</sup> *See id.* §§ 1261–1264

<sup>364</sup> *Id.* § 1261(2).

<sup>365</sup> *Id.* § 1262(3).

<sup>366</sup> *Id.* § 1263.

<sup>367</sup> *Id.* § 1264(a)(1).

<sup>368</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015).

<sup>369</sup> *Id.* § 102.

<sup>370</sup> *Id.* § 106.

victims fund,”<sup>371</sup> and providing “education and outreach to trafficking survivors.”<sup>372</sup> The provisions of the legislation fall into several categories: clarifying and extending existing legislation, protecting children and youth, and extending anti-trafficking awareness training to additional personnel.

Title I creates a domestic victims trafficking fund which assesses “\$5,000 on any non-indigent person or entity convicted of an offense . . . relating to peonage, slavery, and trafficking in persons.”<sup>373</sup> Payment of this amount is deferred until “the person subject to the assessment has satisfied all outstanding court-ordered fines, orders of restitution, and any other obligation related to victim-compensation arising from the criminal convictions on which the special assessment is based.”<sup>374</sup> The funds are to be used for awarding grants for victim programming<sup>375</sup> but not “to provide healthcare or medical items or services,”<sup>376</sup> which are funded under a separate section of the law, pursuant to the Patient Protection and Affordable Care Act.<sup>377</sup>

In addition to clarifying the benefits and protections made available to victims of trafficking,<sup>378</sup> increasing compensation and restitution for trafficking victims,<sup>379</sup> and enhancing human trafficking reporting,<sup>380</sup> this title of the legislation also contains a number of victim centered and child centered provisions. For example, the Attorney General is authorized to:

[A]ward block grants to an eligible entity to develop, improve, or expand domestic child human trafficking deterrence programs that assist law enforcement officers, prosecutors, judicial officials, and qualified victims services organizations in collaborating to rescue and restore the lives of victims, while investigating and prosecuting offenses involving child human trafficking.<sup>381</sup>

These grants may be used for:

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<sup>371</sup> *Id.* § 101(a).

<sup>372</sup> *Id.* § 119.

<sup>373</sup> *Id.* § 101(a).

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-142, § 2201(b)(1)(f), 124 Stat. 119, 290 (2010)

<sup>378</sup> Justice for Victims of Trafficking Act of 2015 § 102, 129 Stat. at 230.

<sup>379</sup> *Id.* § 105.

<sup>380</sup> *Id.* § 107.

<sup>381</sup> *Id.* § 103(a).

[T]he establishment or enhancement of specialized training programs for law enforcement officers, first responders, health care officials, child welfare officials, juvenile justice personnel, prosecutors, and judicial personnel to . . . identify victims and acts of child human trafficking; . . . address the unique needs of child victims of human trafficking; . . . facilitate the rescue of child victims of human trafficking; . . . utilize, implement and provide education on safe harbor law enacted by States, aimed at preventing the criminalization and prosecution of child sex trafficking victims for prostitution offenses.<sup>382</sup>

Block grant funds may also be used to establish or enhance “dedicated anti-trafficking law enforcement units and task forces,”<sup>383</sup> establish child witness and relocation programs,<sup>384</sup> fund “activities of law enforcement agencies to find homeless and runaway youth,<sup>385</sup> and establish or enhance “problem solving court programs for trafficking victim[s].”<sup>386</sup> Grants are to be evaluated based on their comprehensiveness and plan for sustainability after the expiration of the grant.<sup>387</sup> This legislation also amends the Victims of Child Abuse Act of 1990<sup>388</sup> to authorize direct services to victims of child pornography through specialized programs developed to address their needs.<sup>389</sup>

The legal infrastructure for combatting the victimization of children is enhanced by amending the Omnibus Crime Control and Safe Streets Act of 1968<sup>390</sup> to include in the violent crime reports severe forms of trafficking in persons.<sup>391</sup> The Act makes explicit its application not only to the sex trafficker but the person who purchases illicit sexual acts.<sup>392</sup> The Attorney General is directed to take steps to ensure that “task forces and working groups within the Innocence Lost National Initiative engage in activities, programs, or operations to increase the investigative capabilities of State and local law enforcement officers in the detection, investigation, and prosecution of persons who patronize, or solicit children

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<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.* § 104; 42 U.S.C. § 13001.

<sup>389</sup> Justice for Victims of Trafficking Act of 2015 § 104(2)(B), 129 Stat. at 236.

<sup>390</sup> *Id.* § 107; 42 U.S.C. § 3755.

<sup>391</sup> Justice for Victims of Trafficking Act of 2015 § 107, 129 Stat. at 238.

<sup>392</sup> *Id.* § 109(4).

for sex.”<sup>393</sup> Child pornography producers are designated as “Human Traffickers.”<sup>394</sup> The Victims’ Rights section of the United States Code is amended to confer on victims “[t]he right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.”<sup>395</sup> This clarifies existing Department of Justice policy.

[I]n 2010, the Justice Department’s Office of Legal Counsel issued an opinion concluding that the CVRA [Crime Victims’ Rights Act] does not confer rights on victims of Federal crimes until prosecutors initiate formal criminal proceedings via the filing of a complaint, information, or indictment. The result of this opinion is that Federal prosecutors are not required to notify crime victims of plea agreement or deferred prosecution agreement negotiations that occur prior to filing of a formal charge. This section clarifies Congress’ intent that crime victims be notified of plea agreements or deferred prosecution agreements, including those that may take place prior to a formal charge.<sup>396</sup>

This legislation also mandates that each human trafficking program that it operates include technical training on “effective methods for investigating and prosecuting covered offenders,”<sup>397</sup> as well as providing training to judges relating to ordering restitution for victims of trafficking offenses.<sup>398</sup> In addition to taking these steps to clarify victims’ rights and ensure that both prosecutors and federal judges are familiar with the right of the victim to restitution, this Act also creates an advisory council to “provide advice and recommendations to the Senior Policy Operating Group . . . and the President’s Interagency Task Force to Monitor and Combat Trafficking.”<sup>399</sup>

Emphasis on child victims of trafficking is reflected in the section of the Act entitled the “Bring the Missing and Exploited Children Home Act.”<sup>400</sup> Significantly, these provisions acknowledge a gap in accounting for children in foster care family homes or other childcare institutions by requiring that the National Center for Missing and Exploited Children is

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<sup>393</sup> *Id.* § 110(1).

<sup>394</sup> *Id.* § 111(a)(1).

<sup>395</sup> *Id.* § 113(a)(1).

<sup>396</sup> H.R. REP. NO. 114-7, at 7 (2015).

<sup>397</sup> Justice for Victims of Trafficking Act § 114 (c)(1)(A)(i).

<sup>398</sup> *Id.* § 114(c)(1)(C).

<sup>399</sup> *Id.* § 115(b).

<sup>400</sup> *Id.* § 116(b)(3)(E).

to be notified of each report received regarding a child “missing from a foster care family home or childcare institution.”<sup>401</sup>

While the internet already has been identified as a tool used by traffickers to recruit children,<sup>402</sup> increased attention is now given to the role of the internet in producing and distributing child abuse imagery. The Secretary of Homeland Security is directed to operate within the Department’s Cyber Crimes Center a Child Exploitation Investigations Unit.<sup>403</sup> The Department is encouraged to use the skills of returning military personnel to assist law enforcement to combat global sexual and child exploitation.<sup>404</sup> The Secretary of Homeland Security is also directed to operate a Computer Forensics Unit within the Cyber Crimes Center.<sup>405</sup> The Computer Forensics Unit is to provide training and technical support in digital forensics to “Federal, State, local, tribal, military, and foreign law enforcement agency personnel engaged in the investigation of crimes within their respective jurisdictions, upon request.”<sup>406</sup>

The parental rights of men who fathered children as a result of rape are also addressed. The Congress makes a specific finding that “[m]en who father children through rape should be prohibited from visiting or having custody of those children”<sup>407</sup> and that only ten states have specific statutes “allowing rape survivors to petition for the termination of parental rights of the rapist based on clear and convincing evidence that the child was conceived through rape.”<sup>408</sup> The Attorney General is now authorized to increase funding to states under existing grant programs to states that have a law in place that allows any mother whose child was conceived through rape to seek a court-ordered termination of parental rights of the rapist regarding that child.<sup>409</sup>

This legislation also mandates that each human trafficking program that it operates include technical training on “effective methods for investigating and prosecuting covered offenders.”<sup>410</sup> There is increased emphasis on technical assistance and training for law enforcement and

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<sup>401</sup> *Id.*

<sup>402</sup> See Kathleen A. McKee, *It’s 10:00 P.M. Do You Know Where Your Children Are?*, 23 REGENT U. L. REV. 311, 329 (2010-11).

<sup>403</sup> Justice for Trafficking Victims Act § 302(b)(1).

<sup>404</sup> *Id.* § 302(a)(5).

<sup>405</sup> *Id.* § 302(b)(1).

<sup>406</sup> *Id.*

<sup>407</sup> *Id.* § 403(1).

<sup>408</sup> *Id.* § 403(7).

<sup>409</sup> *Id.* § 404.

<sup>410</sup> *Id.* § 114(e)(1)(A)(i).



other professionals, such as health care providers,<sup>411</sup> who come in contact with victims. Victims are now eligible for Job Corps training.<sup>412</sup> The Act also includes “Safe Harbor” incentives. These incentives direct funding to states that have safe harbor laws that treat minors who have engaged in a commercial sex act as a victim of a severe form of trafficking in persons<sup>413</sup> which encourages the diversion of such individuals to appropriate service providers. The training curricula developed by the Department of Homeland Security may be provided to State, local or tribal governments or private organizations to establish a program to identify human trafficking victims. Overall, the 2015 legislation combines several different bills into a single piece of legislation. The result is a law that further extends efforts among federal agencies and sub-agencies to combat trafficking, provides continued technical assistance and funding to state, local and tribal governments and non-government agency initiatives. It also steps up efforts to protect minors from sexual exploitation and pornography.

#### IV. ACCOMPLISHMENTS AND CONTINUING CHALLENGES

##### A. *Accomplishments*

In the past fifteen years, the United States has moved from an executive agency, policy-based approach to a legislative based approach to combat human trafficking. During that period, the federal government has acted in the administrative, legislative and judicial arena to reduce the incidence of trafficking in persons. While the initial emphasis in federal trafficking legislation has been on trafficking abroad and trafficking of foreign nationals into the United States, as the trafficking legislation has been subject to the reauthorization and amendment process, the number of federal agencies and agency divisions with specific anti-trafficking duties has increased.<sup>414</sup>

There also is an increased focus on the role of businesses in facilitating trafficking for forced labor or child labor. The Department of

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<sup>411</sup> *Id.* § 702(a)(1).

<sup>412</sup> *Id.* § 604.

<sup>413</sup> *Id.* § 601(1).

<sup>414</sup> U.S. DEP'T OF ST. BUREAU OF PUBLIC AFFAIRS, FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013-2017 (2014) <http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf>, [hereinafter FEDERAL STRATEGIC ACTION PLAN] (Among the agencies or divisions within agencies that have duties regarding combatting trafficking are the Department of Defense, Department of Education, Government Accountability Office, Department of Health and Human Services, Department of Homeland Security, Department of Justice, Department of Labor, and Department of State.).

State now issues an annual report on trafficking in persons which provides a useful source of information on this issue.<sup>415</sup> The Department of Labor maintains a list of companies that engage in forced labor practices and/or use child labor.<sup>416</sup> The hope is that once the public becomes aware of this list and how to access it, consumers will use it to inform themselves of the labor practices of domestic companies and multinational companies that produce their products outside the United States.<sup>417</sup>

The Department of Justice provides technical assistance to state law enforcement agencies in training personnel to identify victims of trafficking. Model legislation is posted on the Council of State Government's website that can be used by states as a starting point in drafting or modeling their own anti-trafficking statutes.<sup>418</sup> As the legislation has evolved, its focus has expanded to include trafficking of persons within the United States and the sexual exploitation of our own children.

The body of information available on human trafficking has increased along with the scope of the legislation. In addition to the Trafficking in Persons Report mandated by the 2000 VTVPA, the Attorney General and Secretaries of Labor and Health and Human Services are required to prepare and submit periodic reports to the Congress.<sup>419</sup> The Department of Justice, Office of Justice Programs, Bureau of Justice Statistics issues special reports on "Characteristics of Suspected Human Trafficking Incidents."<sup>420</sup> The Department of Homeland Security reports on applications of trafficking victims for the special T visa.<sup>421</sup> The

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<sup>415</sup> See *Trafficking in Persons Report*, U.S. Dep't of State, <http://www.state.gov/j/tip/rls/tiprpt> (last visited Mar. 25, 2016) (making the 2001-2015 reports easily accessible).

<sup>416</sup> U.S. DEPT OF LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR (2014), [http://www.dol.gov/ilab/reports/pdf/TVPRA\\_Report2014.pdf](http://www.dol.gov/ilab/reports/pdf/TVPRA_Report2014.pdf).

<sup>417</sup> See *id.* at 1.

<sup>418</sup> COMM. ON SUGGESTED STATE LEGIS., 66 SUGGESTED STATE LEGISLATION 7, 65 (2007), <http://ssl.csg.org/dockets/27cycle/2007printvol102306.pdf>.

<sup>419</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 201(a)(2)(C) 119 STAT. 3558, 3569.

<sup>420</sup> See DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STAT., CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010, (2011).

<sup>421</sup> See U.S. DEP'T OF HOMELAND SECURITY, NUMBER OF I-914 APPLICATIONS FOR T NONIMMIGRANT STATUS (VICTIMS OF SEVERE FORMS OF TRAFFICKING AND FAMILY MEMBERS) BY FISCAL YEAR, QUARTER AND CASE STATUS 2008-2015 (2015), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t\\_visastatistics\\_fy2015\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t_visastatistics_fy2015_qtr3.pdf).

Department of Labor issues a list of products produced by companies that utilize forced and/or child labor and encourages corporations to disclose company efforts to ensure supply chain transparency.<sup>422</sup>

Links have been forged between federal, state, local, tribal governments, and non-governmental organizations in the battle against trafficking by making technical assistance available from federal law enforcement as well as by providing federal funding to support projects of each of these organizations.<sup>423</sup> States have been encouraged to enact their own criminal anti-trafficking laws.<sup>424</sup> In addition, the model statute provided on the Council of State Government's web site for states to use as a template.<sup>425</sup> The Conference of Commissioners on Uniform State Laws recently proposed uniform, anti-trafficking legislation.<sup>426</sup> In fact, today each of the fifty states has some form of anti-trafficking legislation.<sup>427</sup>

During this same period of time, a body of law has developed interpreting the federal anti-trafficking statutes and identifying areas requiring further congressional or judicial clarification.

Challenges to the legislation have been brought on both constitutional and jurisdictional grounds, e.g., contentions that the legislation is void for vagueness, that it constitutes an *ex post facto* law, or that the courts have applied the law in a manner that exceeds its jurisdictional reach.<sup>428</sup> In order to address these challenges, the courts generally have examined the component parts of the trafficking scheme, i.e. recruitment or enticement, transporting, harboring, and exploitation.<sup>429</sup>

One court in reviewing the component parts of the defendant's conduct concluded that if a jury were to base its conviction primarily on conduct that preceded enactment of the 2000 VTVPA then the conviction

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<sup>422</sup> U.S. DEP'T OF LABOR, *supra* note 416.

<sup>423</sup> See FEDERAL STRATEGIC ACTION PLAN, *supra* note 414, at 6, 15.

<sup>424</sup> COMMI. ON SUGGESTED STATE LEGISLATION, *supra* note 418.

<sup>425</sup> *Id.*

<sup>426</sup> NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING 1, 1 (2013), [http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM\\_UPRHT\\_As%20approved.pdf](http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved.pdf).

<sup>427</sup> *State Stats: June 2014*, NAT'L CONF. ST. LEGISLATURES MAG. (June 1, 2014), <http://www.ncsl.org/bookstore/state-legislatures-magazine/statestats-june-2014.aspx>.

<sup>428</sup> Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1249, 1275–83 (2011) (discussing judicial interpretation of the criminal provisions of anti-trafficking statutes).

<sup>429</sup> 18 U.S.C. § 1591(a)(1).

could violate the prohibition against *ex post facto* laws.<sup>430</sup> In order for the conviction to be upheld, those elements of the crime that predated the enactment of the VTVPA would have to continue after its enactment to support a conviction. For example, in the case of *United States v. Marcus*,<sup>431</sup> the Defendant met the victim online and persuaded her to come from Maryland to New York. He held her captive from 1999 to 2001.<sup>432</sup> Since the only activity that post-dated enactment of the VTVPA of 2000 was the harboring, would a conviction that relied on the elements of recruitment and enticement contravene the constitutional prohibition against *ex post facto* laws?<sup>433</sup> In other words, would a conviction have to be based only upon those elements of the criminal offense that occurred after the enactment of the Victims of Trafficking and Violence Protection Act of 2000, i.e. the elements of harboring.

More recently, the issue was raised by a defendant charged with engaging in sex abroad of whether the foreign commerce clause authorized his prosecution. The language of the statute in question applied to:

Whoever knowingly (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).<sup>434</sup>

In this case, *United States v. Bollinger*, the Fourth Circuit Court of Appeals upheld Bollinger's conviction.<sup>435</sup> Bollinger, an ordained Lutheran minister, moved to Haiti to oversee a ministry outside Port-au-Prince which included a school serving children. In 2009, he began molesting young girls, including three eleven-year-old girls. Later that year, Bollinger returned to the United States and entered into therapy. He signed an informed consent form with the treating psychologist who advised him that he would have to report any injury to a child. The therapist subsequently reported Bollinger's disclosures to the National

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<sup>430</sup> *United States v. Marcus*, 628 F.3d 36, 43 n.7 (2d Cir. 2010).

<sup>431</sup> *Id.* at 39.

<sup>432</sup> *Id.* at 39–40.

<sup>433</sup> *Id.* at 43 n.7, 44 (quoting *U.S. v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999)).

<sup>434</sup> 18 U.S.C. § 1591(a).

<sup>435</sup> *United States v. Bollinger*, 798 F.3d 201, 203 (4th Cir. 2015).

Center for Missing and Exploited Children (NCMEC). Bollinger was eventually indicted and convicted of two counts of engaging in illicit sex with a minor after traveling in foreign commerce. Bollinger argued that he was not engaged in foreign commerce, perhaps on the rationale that his initial purpose for travel was not sex tourism and that he did not pay to have sex with the minor girls.<sup>436</sup>

The Court rejected this argument. In doing so, it noted:

As previously discussed, Congress may also regulate an activity when it is rational to conclude that the activity has a demonstrable effect on foreign commerce. It is eminently rational to believe that prohibiting the non-commercial sexual abuse of children by Americans abroad has a demonstrable effect on sex tourism and the commercial sex industry.<sup>437</sup>

The court held that amendments to the statute eliminated the requirement that a person had to travel in foreign commerce “*for the purpose of* engaging in any illicit sexual conduct”<sup>438</sup> in order to be prosecuted under this statute.

Similarly, the Court of Appeals for the Eighth Circuit was asked to interpret whether the anti-trafficking statute applied to buyers as well as traffickers in the case of *United States v. Jungers*.<sup>439</sup> Jungers was convicted as a result of a police sting operation in which he was attempting to procure sex with a minor child. Jungers moved to dismiss the charges against him and for entry of an acquittal. The Court granted his motion and the government appealed. On appeal, the Court of Appeals for the Eighth Circuit construed the statutory language “obtain” to apply to both traffickers and customers.<sup>440</sup>

In short, over the past fifteen years the federal anti-trafficking legislation has become more comprehensive and more complex to administer at both the judicial and the executive agency level. Through prosecution of trafficking cases, challenges to the 2000 VTVPA’s constitutionality and scope of applicability have been resolved. These decisions have either been codified or responded to in subsequent federal reauthorization legislation.<sup>441</sup> Despite this progress, much work remains to be done.

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<sup>436</sup> *Id.* at 203–04.

<sup>437</sup> *Id.* at 218.

<sup>438</sup> *Id.* (quoting 18 U.S.C. 2423(b)) (emphasis added).

<sup>439</sup> *United States v. Jungers*, 702 F.3d 1066, 1068 (8th Cir. 2013).

<sup>440</sup> *Id.* at 1072; Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 109(4) 129 Stat. 227, 239 (codifying *Jungers* by adding the words “solicits or patronizes” in the sex trafficking statute thereby clarifying Congress’ intent that 18 U.S.C. § 1591 criminalizes those who purchase sexual acts from human trafficking).

<sup>441</sup> 18 U.S.C. § 2423(b) (2014); Justice for Victims of Trafficking Act § 109(4).

## B. On-going Challenges

### 1. The Migration Crisis

Experience has taught us that natural disasters and civil unrest are among the factors that contribute to irregular migration. In turn, irregular migration exposes its participants to a heightened risk of trafficking. As one commentator noted:

Complex and protracted humanitarian and migration crises, such as armed conflicts, further increase vulnerabilities and in some cases, have led to an increase in human trafficking. In specific instances, the drivers of conflict may even lead to the emergence of specific forms of crises-related trafficking in persons . . . . Practice and the reality on the ground is revealing manifestation of human trafficking in a number of ongoing and previous crises. In early 2014, IOM Lebanon undertook a rapid assessment on the impact of the Syrian crisis on trafficking patterns across the country and identified a number of clear trafficking cases, some highly at-risk populations, and gaps within the needed response. So while we do need to continue to build the evidence base, we also need to respond.<sup>442</sup>

This is proving to be especially true as daily news reports document the thousands of migrants landing in Greece and Italy seeking passage through to other European Union countries.<sup>443</sup> The large numbers are challenging countries to question how many asylum seekers they have the capacity to take in and the degree to which they will place a strain on the resources of the destination countries.<sup>444</sup>

The migrant crises represents a convergence of the following factors: daily increasing numbers of migrants, lack of capacity to process the migrants expeditiously at their point of entry, lack of capacity of the

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<sup>442</sup> Sarah Craggs, *Trafficking Risks and Prevention of Exploitation in Times of Crisis: The Case of the Middle East and North Africa*, INT'L ORG. FOR MIGRATION: NEWSDESK (Nov. 20, 2014), <https://weblog.iom.int/trafficking-risks-and-prevention-exploitation-times-crisis-case-middle-east-and-north-africa>.

<sup>443</sup> Anthony Faiola, *The 'Black Route' to Europe, and the Story of a Syrian Family Who Braved It*, WASH. POST (June 26, 2015), <https://www.washingtonpost.com/graphics/world/exodus/black-route>.

<sup>444</sup> Holly Ellyatt, *Four Reasons Why Europe's Migrant Crisis Matters*, CNBC (Sept. 14, 2015), <http://www.cnbc.com/2015/09/14/four-reasons-why-europes-migrant-crisis-matters.html> ("While migrants could help boost the labor force, there are fears among more cautious observers of the migrant crisis in Europe that many migrants arriving from the Middle East and Africa are not skilled or educated, and therefore could be [a] burden on [the] states' pressed public finances.").

receiving country to provide basic services for large numbers of refugees awaiting initial processing, and lack of support by all European countries to take in a share of these migrants.<sup>445</sup> Consequently, these migrants are especially vulnerable to recruitment by traffickers and smugglers if they promise to deliver them to their desired country of destination.<sup>446</sup>

In recent months, a pattern has emerged in which smugglers/traffickers engage in “cargo dumping.”<sup>447</sup> Passengers are charged excessive fees to be transported to other countries without the necessary immigration documentation. The traffickers/smugglers use decrepit vessels of questionable seaworthiness. The vessels are loaded with passengers far beyond the vessel’s capacity. Once out to sea or near the intended destination, the smugglers/traffickers abandon ship leaving the passengers to be rescued by others or to perish at sea when the vessels capsize or sink.<sup>448</sup>

The challenge faced by all nations, including the United States, is how to formulate a coordinated policy to manage this crisis along the entire continuum of displacement as well as how to create protected havens to take these refugees in temporarily while determining their ultimate placement.<sup>449</sup>

## 2. The Need for Qualitative Data to Address the Problem

When Amy O’Neill Richard’s report was released in late 1999, she projected that 45,000 to 50,000 persons were trafficked into the United States each year.<sup>450</sup> That figure gained currency and was cited by Congress in its findings of fact in the VTVPA of 2000 as well as the Department of State’s TIP Report for 2001.<sup>451</sup> The 2003 TIP report

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<sup>445</sup> See *id.*

<sup>446</sup> See Damien Cave & Frances Robles, *A Smuggled Girl’s Odyssey of False Promises and Fear*, N.Y. TIMES (Oct. 5, 2014), [http://www.nytimes.com/2014/10/06/world/americas/a-smuggled-girls-odyssey-guatemala-migration-abduction.html?\\_r=0](http://www.nytimes.com/2014/10/06/world/americas/a-smuggled-girls-odyssey-guatemala-migration-abduction.html?_r=0).

<sup>447</sup> See Lizzie Dearden, *Migrant Boat Crisis: Human Smugglers ‘Throwing Pregnant Women and Children Overboard to Drown to Force Commercial Ships to Rescue Them,’* INDEPENDENT (June 1, 2015), <http://www.independent.co.uk/...rises-human-smugglers-throwing-pregnant-women-and-children-overboard-to-drown-to-force-10290183.html>.

<sup>448</sup> See, e.g., John Hooper, *Abandoned Ship Ezadeen With 450 Migrants on Board Being Towed to Italy*, GUARDIAN (Jan. 2, 2015), <http://www.theguardian.com/world/2015/jan/02/abandoned-cargo-vessel-migrants-towed-italy-traffickers>.

<sup>449</sup> See *Refugees in Europe: Exodus*, ECONOMIST, (Sept. 12, 2015) <http://www.economist.com/news/leaders/21664136-europe-should-welcome-more-refugees-and-economic-migrants-for-sake-world-and>.

<sup>450</sup> RICHARD, *supra* note 12, at 3.

<sup>451</sup> 22 U.S.C. § 7101(b)(1) (2014); U.S. DEP’T. OF STATE, TRAFFICKING IN PERSONS REPORT: JULY 2001 3 (2001), <http://www.state.gov/documents/organization/4107.pdf>.

reduced the number to an estimated 18,000 to 20,000 persons per year.<sup>452</sup> By 2005, the TIP Report did not cite a specific number for persons trafficked into the United States and acknowledged that:

The U.S. Government continues to learn about the scope and nature of human trafficking. We have tried in this Report to point out areas where information is sparse and to raise issues that merit further investigation. Given these qualifications, the 2005 TIP Report represents an updated, global look at the nature and scope of modern-day slavery, and the broad range of actions being taken by governments around the world in the campaign for its elimination.<sup>453</sup>

The issue of qualitative, reliable information has a twofold significance. First, numbers have a way of taking on a life of their own. When the basis of these figures is questioned and cannot be justified, it brings into question both the magnitude of the problem and whether the problem exists.<sup>454</sup> In his article entitled “Human Trafficking Evokes Outrage, Little Evidence,” Washington Post Staff Writer Jerry Markon noted that Congress was outraged by the testimony it heard in support of anti-trafficking legislation.<sup>455</sup> However, in the wake of the legislation enacted, he noted that:

As a part of the fight, President Bush has blanketed the nation with 42 Justice Department task forces and spent more than \$150 million – all to find and help the hundreds of thousands of victims of forced prostitution or labor in the United States. But the government couldn’t find them. Not in this country.<sup>456</sup>

This observation compounded with the disparity between the projected number of victims versus the number of cases brought, points to a possible risk that the general public will feel manipulated and will

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<sup>452</sup> U.S. DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT: JUNE 2003* 7 (2003), <http://www.state.gov/documents/organization/21555.pdf>.

<sup>453</sup> U.S. DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT: JUNE 2005* 10 (2005), <http://www.state.gov/documents/organization/47255.pdf>.

<sup>454</sup> See Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASH. POST (Sept. 23, 2007), [http://www.washingtonpost.com/wpdyn/content/article/2007/09/22/AR2007092201401\\_pf.html](http://www.washingtonpost.com/wpdyn/content/article/2007/09/22/AR2007092201401_pf.html).

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*



question whether the problem of human trafficking has been blown out of proportion.<sup>457</sup>

There is another reason why qualitative data collection needs to be an integral part of the anti-trafficking initiative. As it presently stands, data is not easy to come by, given the clandestine nature of the crime. Researchers are reliant on anecdotal information provided by victims as well as extraction of data based on newspaper accounts.<sup>458</sup> However, reliable data serves several purposes. It helps us to identify effective practices in screening for and identifying trafficking victims.<sup>459</sup> It also helps us to better understand victim and trafficker demographics.<sup>460</sup> It also helps us to anticipate the costs of investigation, prosecution and services to victims rescued from sex trafficking and forced labor.<sup>461</sup>

There may be a logical explanation for the lack of data. A study funded by the Department of Justice in 2008 noted that, study findings emphasize both confusion about how human trafficking is defined and a general lack of awareness of the issue.<sup>462</sup> In states with anti-trafficking statutes, 44 percent of law enforcement respondents and 50 percent of prosecutors report that their states do not have or they are not aware of having anti-trafficking legislation.<sup>463</sup> In general, law enforcement, prosecutors, and service providers respondents could not:

- (1) differentiate between severe and non-severe forms of human trafficking . . . ;
- (2) distinguish trafficking from smuggling;
- (3) differentiate domestic and international trafficking definition issue;
- (4) identify the types of trafficking (sexual and labor); or

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<sup>457</sup> *Id.* (quoting Ronald Weitzer, Criminologist Professor at George Washington University: “The discrepancy between the alleged number of victims per year and the number of cases they’ve been able to make is so huge that it’s got to raise major questions . . . It suggests that this problem is being blown way out of proportion.”).

<sup>458</sup> OHIO TRAFFICKING IN PERSONS STUDY COMMISSION, REPORT ON THE PREVALENCE OF HUMAN TRAFFICKING IN OHIO TO ATTORNEY GENERAL RICHARD CORDAY 7 (2010).

<sup>459</sup> LAURA SIMICH, ET AL., NAT’L INST. OF JUST., IMPROVING HUMAN TRAFFICKING VICTIM IDENTIFICATION – VALIDATION AND DISSEMINATION OF A SCREENING TOOL 238 (2014), <http://www.vera.org/sites/default/files/resources/downloads/human-trafficking-identification-tool-technical-report.pdf>.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*; Joseph S. Campbell, Deputy Assistant Director, Criminal Investigative Division, FBI, Joint Statement with Anne C. Gannon, National Coordinator for Child Exploitation Prevention and Interdiction (Sept. 23, 2013), <https://www.fbi.gov/news/testimony/combating-human-trafficking>.

<sup>462</sup> PHYLLIS J. NEWTON, ET AL., U.S. DEP’T OF JUSTICE, FINDING VICTIMS OF HUMAN TRAFFICKING viii (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/224393.pdf>.

<sup>463</sup> *Id.*

(5) state the elements of trafficking. Until certain ambiguities are removed . . . (e.g., . . . what is not “severe” trafficking), it will be difficult to inform the public and key stakeholders about what to look for and how to address it.<sup>464</sup>

When viewed from this perspective, any disparity between the projected number of potential victims versus investigations resulting in prosecutions<sup>465</sup> as well as the modest number of victims seeking T visas becomes more readily explainable.<sup>466</sup>

### 3. The Role and Challenges of the Internet in Combatting Trafficking

Since the onset of the United States’ campaign to combat human trafficking, the internet has played a role.<sup>467</sup> As a practical matter, both children and grownups can access the internet easily. In the case of minors, this access may take place without adult knowledge and supervision. Traffickers can easily access social media and chat rooms frequented by minors. Assuming the persona of an adolescent, the trafficker can engage the minor in conversations intended to lull the minor into a fake sense of security.<sup>468</sup> This in turn results in the minor’s release of personal information the trafficker can exploit to engage and subsequently entrap the minor.<sup>469</sup>

The internet is a powerful tool for recruiting adult victims as well as children. Judge Herbert B. Dixon, Jr. noted in his article, “Human Trafficking and the Internet,”<sup>470</sup> that

[S]ome trafficking cases start with the offender contacting the potential victims on social networking sites such as Facebook and MySpace. The techniques used by the offenders to gain trust

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<sup>464</sup> *Id.*

<sup>465</sup> U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2005 3 (2006), <http://www.justice.gov/archive/ag/annualreports/tr2005/agreporhumantrafficking2005.pdf>.

<sup>466</sup> *See id.* at 12.

<sup>467</sup> DONNA M. HUGHES, UNIV. OF R.I., PROSTITUTION ONLINE 115, 117 (2003), [http://works.bepress.com/donna\\_hughes/7/](http://works.bepress.com/donna_hughes/7/).

<sup>468</sup> NAT’L HUMAN TRAFFICKING RES. CTR., THE VICTIMS, <https://traffickingresourcetraining.org/what-human-trafficking/human-trafficking/victims> (last visited Mar. 25, 2016).

<sup>469</sup> *See* Angelyn Bayless, *How to Talk to Your Kids About Human Trafficking*, TRAINING AND RES. UNITED TO STOP TRAFFICKING, <http://humantraffickingsearch.net/images/teentrafficking/how-to-talk-to-your-children.pdf> (last visited Mar. 25, 2016).

<sup>470</sup> Herbert B. Dixon Jr., *Human Trafficking and the Internet\* (\*and Other Technologies, Too)*, 52 JUDGES’ J. 1, 36 (2013), [http://www.americanbar.org/content/dam/aba/publications/judges\\_journal/2013\\_win\\_jj\\_tech.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/judges_journal/2013_win_jj_tech.authcheckdam.pdf).

vary widely, including expressing love and admiration of the victim, promising to make the victim a star, and providing a ticket to a new location away from the victim's home. Another type of trafficking effort starts with an online employment search and results in an unsuspecting victim relocating from her home on the promise of an unbelievably good job.<sup>471</sup>

Once the victim has moved from a position of security and familiarity, the trafficker is in a position to isolate the victim and control his or her communication with the outside world.<sup>472</sup>

Efforts to regulate the internet and to minimize its use to recruit, entrap and victimize children and adults face significant challenges. First, the internet allows global and warp speed communication. It may implicate complex structures, the use of which present complex challenges to detection as well as questions regarding which judicial forum has jurisdiction over the issue.<sup>473</sup> As Judge Dixon noted,

A scheme demonstrating how technology was used to circumvent both international borders and specific national laws involved trafficking of Japanese women from Japan to Hawaii for the purpose of sexual exploitation. The traffickers advertised in Japan for "nude models" to work in the United States. Upon their arrival in Hawaii, the models were used to perform live Internet sex shows and make pornographic videos that would be shown to Japanese audiences via the Internet. To avoid running afoul of Japanese pornography laws, the traffickers conducted their operation, which was aimed at a Japanese market with all Web site material written in Japanese, outside Japan, in Hawaii. The live and recorded "performances" were transmitted to an Internet Service Provider in California, through which Japanese viewers would access them. In 2006, 89 percent of the estimated 270 million pornographic Web pages existing worldwide were produced in the United States.<sup>474</sup>

Despite the gains made by law enforcement in investigating and prosecuting cases in which the Internet has played a role, the regulation of the Internet to prevent or to minimize its use to recruit victims, particularly minors, remains a challenge. In a report submitted to Congress in 2009, The Federal Communications Commission

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<sup>471</sup> *Id.*

<sup>472</sup> Bayless, *supra* note 469.

<sup>473</sup> Dixon, *supra* note 470, at 36–37.

<sup>474</sup> *Id.*

characterized “virtual world’ websites to monitor and regulate Internet behavior as dependent upon community and industry policing.”<sup>475</sup> Apparently, that was effective with Craigslist. According to Judge Dixon, after frequent investigations, law suits and public criticism, Craigslist closed its Adult Services section in the United States, and later on a worldwide basis.<sup>476</sup>

However, efforts at both the federal and state level to regulate the Internet through legislation have not been as amicable or as cooperative. Almost two decades ago, the parties began to square off in court over federal attempts to regulate the Internet.<sup>477</sup> In 1997 the Supreme Court was asked to rule on the constitutionality of the Communications Decency Act of 1996.<sup>478</sup> The Court held that “the Internet is entitled to the broadest First Amendment protections accorded traditional media such as books and newspapers, and not merely to the more limited . . . broadcast media.”<sup>479</sup>

Whether the attempts to regulate the Internet originate at the federal level or at the state level, the federal courts have carefully scrutinized whether the legislation violates the protections extended to Internet Service Providers (ISP’s) by the Communications Decency Act of 1996 and whether the legislation violates any of ISP’s First Amendment rights.<sup>480</sup> There are three recent cases filed by Backpage.com, LLC that illustrate this point. Backpage.com filed in Washington State, Tennessee and New Jersey respectively to enjoin legislation enacted with the intent of preventing the use of the Internet to advertise minors for escort services.<sup>481</sup> It was generally understood that “escort services” is used as a code word for prostitution.<sup>482</sup> The statutes generally criminalized knowingly publishing, disseminating, or displaying or directly or indirectly causing content to be published, disseminated or displayed if it contains a depiction of a minor and any explicit or implicit offer of sex for

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<sup>475</sup> McKee, *supra* note 402, at 331.

<sup>476</sup> Dixon, *supra* note 470, at 37.

<sup>477</sup> Reno v. ACLU, 521 U.S. 844 (1997).

<sup>478</sup> *Id.* at 864.

<sup>479</sup> See *id.* at 866–67; *The First Amendment and the Internet*, NET LITIG., <http://www.netlitigation.com/netlitigation/firstamendment.htm> (last visited Mar. 25, 2016).

<sup>480</sup> See Backpage.com v. Hoffman, No. 13-CV-03952, 2013 WL 4502097, at \*1, \*8 (D.N.J. 2013); Backpage.com v. Cooper, 939 F. Supp. 2d 805, 828 (M.D. Tenn. 2013); Backpage.com v. McKenna, 881 F. Supp. 2d 1262, 1276 (W.D. Wash. 2012).

<sup>481</sup> Hoffman, 2013 WL 4502097, at \*1; Cooper, 939 F. Supp. 2d at 817; McKenna, 881 F. Supp. 2d at 1268.

<sup>482</sup> McKenna, 881 F. Supp. 2d at 1267.

something of value.<sup>483</sup> The statutes mirrored each other with minor differences in language.<sup>484</sup> In each instance, the court ruled in favor of Backpage.com, on both statutory and constitutional grounds and granted preliminary injunctive relief.<sup>485</sup> In doing so, each court found that Section 230 of the Communications Decency Act of 1996 exempted Backpage.com from being sued for material placed on its website by a third party.<sup>486</sup> The courts also reached the constitutional claims and found the legislation to be flawed in its drafting.<sup>487</sup> The legislation, as drafted, was found to have a potentially chilling effect on protected speech.<sup>488</sup> Moreover, it had the potential to regulate conduct which took place outside the state's borders, thereby infringing upon federal authority under the Commerce Clause.<sup>489</sup>

As the federal and state case law in this area presently stands, if the capacity of the Internet to recruit and exploit minors is to be minimized, that will have to come about through self-regulation of the industry.<sup>490</sup> Unless and until the Communications Decency Act of 1996 is amended, ISP's will continue to enjoy immunity from suit even though they are providing a forum for traffickers to prey on both grownups and children for purposes of sexual exploitation.

#### CONCLUSION

The Thirteenth Amendment to the Constitution was ratified in 1965. Slightly one hundred years later, the Supreme Court would find itself ruling on cases in which the plaintiffs alleged that discrimination acted as a badge of slavery.<sup>491</sup> While slavery may have been abolished in most nations of the world, conditions such as poverty, economic upheaval, political upheaval, and natural disasters, contribute to and facilitate modern day slavery in the form of human trafficking. If we are determined to eliminate human trafficking globally then we must be committed to

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<sup>483</sup> Hoffman, 2013 WL 4502097, at \*1; Cooper, 939 F. Supp. 2d at 817; McKenna, 881 F. Supp. 2d at 1268.

<sup>484</sup> *Id.*

<sup>485</sup> Hoffman, 2013 WL 4502097, at \*12; Cooper, 939 F. Supp. 2d at 845; McKenna, 881 F. Supp. 2d at 1286.

<sup>486</sup> Hoffman, 2013 WL 4502097, at \*6; Cooper, 939 F. Supp. 2d at 824; McKenna, 881 F. Supp. 2d at 1273.

<sup>487</sup> Hoffman, 2013 WL 4502097, at \*7-9, \*11; Cooper, 939 F. Supp. 2d at 845; McKenna, 881 F. Supp. 2d at 1284.

<sup>488</sup> *Id.*

<sup>489</sup> Hoffman, 2013 WL 4502097, at \*12; Cooper, 939 F. Supp. 2d at 845; McKenna, 881 F. Supp. 2d at 1286.

<sup>490</sup> McKee, *supra* note 402, at 331.

<sup>491</sup> Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

eradicate those factors which contribute to human trafficking, even though the battle may extend from this generation into the next.