

# University of Michigan Journal of Law Reform

---

Volume 38

---

2005

## State Legislation and Human Trafficking: Helpful or Harmful?

Stephanie Richard

*American University, Washington College of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Criminal Law Commons](#), [Human Rights Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Stephanie Richard, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J. L. REFORM 447 (2005).

Available at: <https://repository.law.umich.edu/mjlr/vol38/iss2/5>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## STATE LEGISLATION AND HUMAN TRAFFICKING: HELPFUL OR HARMFUL?

---

Stephanie Richard\*

*Human trafficking is the modern day form of slavery. Despite the fact that thousands of people are trafficked into the United States each year, the majority of U.S. citizens are not aware of the nature and extent of this problem. In 2000, the U.S. government passed the Victims of Trafficking and Violence Protection Act (VTVPA) to combat this grave human rights abuse. This federal legislation takes a comprehensive approach to addressing the problem of human trafficking in the United States by acknowledging that effective prosecution cannot occur without safeguards and benefits for trafficking victims. To this end, the VTVPA enumerates many social services and individual rights to better protect victims. States, however, as they begin to pass legislation to combat the problem of human trafficking in their own jurisdictions, are not adopting the comprehensive approach to combating human trafficking taken by the VTVPA. State legislation has mainly focused on a mere criminalization approach, and this raises serious concerns about necessary victim protections and effective prosecutions of these cases.*

*This Note outlines the problem of trafficking of persons into the United States, how previous laws did not address the problem, and the essential provisions in the VTVPA that protect victims of human trafficking in the United States. It then examines current state legislation passed to combat the problem of human trafficking, and weighs the benefits and possible negative consequences for victims of the mere criminalization approach taken by states. This Note argues that state legislation, which thus far has not included any of the comprehensive protections for victims found in the VTVPA, raises serious concerns about victims' access to social service benefits, immigration status, witness protection, effective investigations, and legal remedies. Given these concerns, this Note concludes that states should tailor future legislation in this area to more fully meet the needs of victims. States should enact legislation criminalizing human trafficking only if the needs of victims are considered and should take a holistic approach in their own state legislation by adopting provisions similar to those found in the VTVPA.*

---

\* Stephanie Richard, B.A. 1998, Rice University; J.D. Expected 2005, American University, Washington College of Law. The author would like to thank Charles Song and all the staff at the Coalition to Abolish Slavery & Trafficking (CAST) for their continuing support. She would also like to thank Cynthia Bair for her incredible edits.

## I. INTRODUCTION

Acknowledging that slavery exists in the United States today is a shocking realization for many. However, the United States is one of the top three destination countries to which people are trafficked into modern day slavery<sup>1</sup> and no state or territory in the United States is exempt from this problem.<sup>2</sup> Due to the extent and growing public recognition of this problem, in 2000 the federal government passed the Victims of Trafficking and Violence Protection Act (VTVPA).<sup>3</sup> The VTVPA was the first comprehensive piece of legislation that directly addressed the issue of human trafficking in both the United States and abroad. As awareness and education surrounding the issue of human trafficking has increased, states also have begun to take legislative steps to address this grave human rights violation. This Note explores both the positive and negative consequences that may result from state legislation enacted to combat this national problem.

Part II of this Note gives an overview of the problem of trafficking in the United States. Further, it explores the inadequacy of United States law to combat this problem prior to the passage of the VTVPA in 2000. Part III analyzes the VTVPA's provisions that directly impact victims here in the United States. It also looks at The Trafficking Victims Protection Reauthorization Act of 2003 (Reauthorization Act) that recently enumerated more rights and benefits for victims of human trafficking. Following this analysis, Part IV looks at state legislative action surrounding the issue of human trafficking. Subsection A outlines state legislative efforts that have criminalized human trafficking. Subsection B provides a summary of the benefits of criminalizing human trafficking at the state level. Subsection C addresses the potential negative outcomes for trafficking victims that may occur when states criminalize human trafficking and urges states to carefully consider the multifaceted issues that must be addressed when drafting appropriate state legislation. Subsection D looks at innovative state legislative approaches that have more appropriately and fully addressed the needs of human trafficking victims in their states. In

---

1. INTERNATIONAL RESCUE COMMITTEE, *TRAFFICKING IN THE UNITED STATES: DEMOGRAPHICS AND STATISTICS* (Mar. 2004), at <http://www.theirc.org/index.cfm/wwwID/1886> (on file with the University of Michigan Journal of Law Reform).

2. U.S. DEP'T OF STATE, *ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS* 13 (Aug. 2003).

3. Victims of Trafficking & Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

conclusion, Part V acknowledges that effectively combating the problem of human trafficking in the United States will require both federal and state action. However, when considering legislation on this issue, states must carefully weigh the consequences of their actions. Any legislative action must not merely criminalize human trafficking at the state level but take a more comprehensive approach to protect the diverse needs of victims and ensure effective prosecution.

## II. BACKGROUND OF THE TRAFFICKING PROBLEM IN THE UNITED STATES

Never before in the history of the world have so many people been enslaved. The most recent United States government estimates indicated that between 600,000–800,000 individuals are victims of trafficking each year.<sup>4</sup> United States government estimates also indicated that of those numbers, 14,500 to 17,000 people are trafficked into the United States annually.<sup>5</sup> This number is far lower than previously published government estimates of 45,000 to 50,000 trafficked persons into the United States.<sup>6</sup> Nonetheless, either of these figures firmly establish that trafficking in persons is a prevalent problem in the United States.

There are many reasons for the prevalence of this problem. Worldwide trafficking of persons, after the sale of drugs and guns, is the third most profitable type of organized crime.<sup>7</sup> The increased penalties for trafficking of drugs and guns have made the trafficking of persons the relatively low-risk, highly profitable alternative.<sup>8</sup> People can be sold again and again so traffickers realize larger profits.<sup>9</sup> These profits are estimated at \$7–10 billion each year.<sup>10</sup> Additionally, the demand for forced human labor is easily met. Traffickers have little trouble victimizing individuals since multiple factors such as poverty, economic instability, lack of

---

4. U.S. DEP'T OF STATE, ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 9 (June 2004).

5. *Id.*

6. *Id.* at 7.

7. 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, 46–47 (2002).

8. Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1046 (2002).

9. *Id.*

10. Ryf, *supra* note 7, at 46.

education, political corruption, civil war, starvation, high infant death rates, and internal violence make individuals vulnerable to becoming trafficked persons.<sup>11</sup> Traffickers find victims through outright kidnapping, lures of phony job offers, use of marriage databases, advertisements in the local newspapers, or approaching family members with offers of money or other false promises.<sup>12</sup>

The particular dimensions of the trafficking problem in the United States remains largely unknown. The United States is still trying to grasp the full dimensions of this problem since research concerning those trafficked into the United States is incomplete.<sup>13</sup> Although there is not a common profile of a victim trafficked into the United States, it is known that many of the victims are minors and the majority come from countries facing desperate economic, social, and political conditions.<sup>14</sup> Currently, the majority of those trafficked into the United States come from Southeast Asia and the former Soviet Union.<sup>15</sup> The average age of a person trafficked into the United States is twenty years old.<sup>16</sup> About half are forced to work in sweatshops, domestic services, as peddlers or as agricultural field hands; the other half are forced into prostitution.<sup>17</sup> Individuals trafficked into the United States generally are taken to large cities in states such as California, Florida, and New York. However, this problem also exists in smaller cities and suburbs across the United States.<sup>18</sup>

It is likely that the problem of trafficking occurs in every state. Given the factors that motivate and create opportunities for traffickers to take advantage of individuals, human trafficking into the United States will not decrease anytime soon. Appropriate measures must be taken to combat this problem.

Although the problem of human trafficking in this country is not a new phenomenon, before 2000 the United States had no

---

11. CALIBER ASSOCS., INC., U.S. DEP'T OF JUSTICE NEEDS ASSESSMENT FOR SERVICE PROVIDERS AND TRAFFICKING VICTIMS 2 (2003), *available at* [http://www.calib.com/home/practice\\_areas/cfcs/pdf/traffick.pdf](http://www.calib.com/home/practice_areas/cfcs/pdf/traffick.pdf) (on file with the University of Michigan Journal of Law Reform).

12. FRANCIS T. MIKO, CRS REPORT FOR CONGRESS, TRAFFICKING IN WOMEN AND CHILDREN: THE U.S AND INTERNATIONAL RESPONSE 3 (Mar. 26, 2004), *available at* <http://www.usembassy.it/pdf/other/RL30545.pdf> (on file with the University of Michigan Journal of Law Reform).

13. U.S. DEP'T OF STATE, *supra* note 2, at 4.

14. Cooper, *supra* note 8, at 1046.

15. MIKO, *supra* note 12, at 7.

16. Cooper, *supra* note 8, at 1046.

17. MIKO, *supra* note 12, at 7.

18. *Id.*

comprehensive law against the trafficking of persons.<sup>19</sup> In the past, prosecutors had to use a variety of criminal laws to take legal action against traffickers. The majority of traffickers were prosecuted under statutes passed according to the provisions of the 13th Amendment, which outlawed slavery.<sup>20</sup> Prosecutors found these provisions highly inadequate to combat this problem, since the penalties given were not commensurate with the heinous nature of the crimes.<sup>21</sup> Additionally, in *U.S. v. Kozminski*, the Supreme Court held that under these provisions, involuntary servitude involved only compulsion through use of physical force or legal coercion or threats of physical force or legal coercion.<sup>22</sup> This narrow definition made it difficult to prosecute traffickers who used less direct methods of keeping victims, such as schemes that mentally trapped individuals.<sup>23</sup> Due to these limitations, few cases of human trafficking were prosecuted in the United States and the problem went largely unaddressed.

### III. THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000 AND THE TRAFFICKING VICTIMS REAUTHORIZATION ACT OF 2003

To combat this growing problem in the United States and correct the inadequacy of the past human slavery laws, the 106th Congress passed the VTPA. The Trafficking Victims Protection Act (TVPA), a provision of the VTPA, specifically addresses the problem of human trafficking. The TVPA is the first comprehensive federal law in the United States that tackles the issue of human trafficking through a three-tier approach of prevention, prosecution, and protection. Although the TVPA seeks to combat the problem of human trafficking on both an international and domestic level, this Note focuses on the provisions that impact the issue domestically. These include TVPA provisions that increase

---

19. Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 153 (2002-2003).

20. Michael R. Candes, Comment, *The Victims of Trafficking and Violence Protection Act of 2000: Will It Become the Thirteenth Amendment of the Twenty-First Century?*, 32 U. MIAMI INTER-AM. L. REV. 571, 583-588 (2001).

21. Until 1996, the maximum punishment for these crimes of involuntary servitude was only five years. 18 U.S.C. §§ 1581, 1583, 1584 (2004). From 1996 to 2000, the maximum punishment was ten years. Candes, *supra* note 20, at 571.

22. 487 U.S. 931, 952 (1988).

23. Stumpf & Friedman, *supra* note 19, at 154-55.

criminalization and penalties for traffickers, provide immigration status and social service benefits to victims, and enumerate specific victim's rights.

The TVPA strengthens the ability of prosecutors and law enforcement officers to prosecute and punish human traffickers. It explicitly defines involuntary servitude statutes to include cases that involve nonviolent coercion.<sup>24</sup> It also creates new crimes, which unlike the old laws, can more fully address the issue of human trafficking. These new crimes include: forced labor, trafficking with respect to peonage, slavery, or involuntary servitude, sex trafficking by fraud, force or coercion, or sex trafficking of children, unlawful conduct with respect to documents in furtherance of trafficking, and attempts to engage in the above listed behaviors.<sup>25</sup> Additionally, sentencing enhancements increase penalties for human trafficking offenses that involve large numbers of victims, a pattern of continued and flagrant violations, use of dangerous weapons, or bodily injury to victims.<sup>26</sup> Penalties for traffickers also were increased for certain pre-existing crimes,<sup>27</sup> and the TVPA mandates that restitution be granted to every victim.<sup>28</sup>

Congress also provided numerous provisions in the TVPA, which enhance protections for trafficking victims. The TVPA establishes two new immigration statuses for victims and enumerates specific rights and services available for trafficked persons.

Prior to the TVPA's enactment, traffickers benefited from their victims' status as undocumented immigrants.<sup>29</sup> Victims were often treated as criminals and deported before they could be identified as victims of human trafficking.<sup>30</sup> Often these individuals were ostracized at home and were even re-trafficked. The passage of the TVPA changed this reality for victims. In the congressional findings of the TVPA, Congress expressly acknowledged that victims of trafficking should be treated as victims and not punished because of their illegal status or because traffickers forced them to commit

---

24. 22 U.S.C. § 7101(b)(13) (2004).

25. 18 U.S.C. § 1589–1592 (2004).

26. 22 U.S.C. § 7109(b)(2)(C)(i–iv) (2004).

27. 18 U.S.C. §§ 1581(a), 1583, 1584 (2000). To increase penalties, Congress changed the language in 18 U.S.C. §§ 1581, 1582, and 1584 to increase maximum punishments for crimes of involuntary servitude. *Id.* In 2000, amendments changed the language in these statutes so that maximum sentences increased from ten to twenty years. *Id.* Also added at the end of each statute was the following language: "If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both." *Id.*

28. 18 U.S.C. § 1593 (2004).

29. Candes, *supra* note 20, at 580–81.

30. Ryf, *supra* note 7, at 51–52.

unlawful acts.<sup>31</sup> To legitimize a victim's status in the United States, the TVPA establishes a nonimmigrant visa under the Immigration and Nationality Act (INA) called the T-visa. A victim of human trafficking is also eligible for continued presence status.

Eligibility for the T-visa extends only to those who (1) have been a victim of severe forms of trafficking; (2) are physically present in the United States or port of entry; (3) have complied with reasonable requests for assistance in the investigation or prosecution of traffickers; and (4) would suffer extreme hardship upon removal.<sup>32</sup> Victims under the age of eighteen who will suffer extreme hardship if deported from the United States can qualify for a T-visa without assisting in the investigation or prosecution of their traffickers.<sup>33</sup> T-visas are valid for three years and holders may receive permanent resident status after this time if they have complied with requests for aid in the prosecution of their traffickers. A victim's spouse, children and parents for those under twenty-one years of age can also come to the United States and qualify for a T-visa if the government determines their presence is necessary to avoid extreme hardship to the trafficked person.<sup>34</sup> As of June 30, 2003, the Department of Homeland Security (DHS) has granted 172 T-visas and 238 applicants are currently waiting for a decision.<sup>35</sup>

In addition to eligibility for a T-visa, if it is necessary for prosecutorial efforts, a federal law enforcement officer can request that DHS allow a victim's "continued presence."<sup>36</sup> These victims receive temporary legal status. Although this status cannot be converted to permanent resident status like the T-visa, continued presence ensures that victims are not penalized for remaining in the country.

Besides establishing legal ways for trafficked persons to remain in the United States, the TVPA explicitly grants many rights and opportunities for assistance to victims of human trafficking. These provisions address the multifaceted concerns of trafficking victims and further acknowledge that prosecution alone cannot effectively combat this problem. The rights and services enumerated in the TVPA for the protection and assistance of victims of human trafficking include:

---

31. 22 U.S.C. § 7101(b)(19) (2004).

32. 8 U.S.C. § 1101(a)(15)(T) (2004).

33. *Id.*

34. Stumpf & Friedman, *supra* note 19, at 164.

35. H.R. REP. NO. 108-264, pt. 2, at 3 (2003), *reprinted in* 2003 U.S.C.C.A.N. 2408, 2423.

36. 22 U.S.C. § 7105(c)(3) (2004).



1. The right to social services and benefits available to refugees;<sup>37</sup>
2. The right to appropriate shelter not incompatible with their status as victims of a crime;<sup>38</sup>
3. The right to receive medical care;<sup>39</sup>
4. The right to witness protection;<sup>40</sup>
5. The right to access information about their rights and translation services.<sup>41</sup>

Under these provisions, once an individual has been certified by the Secretary of Health and Human Services as a trafficked person,<sup>42</sup> victims are eligible for medical and psychological assistance, food stamps, housing, job training, educational programs, translation services and legal assistance.<sup>43</sup> The TVPA grants victims access to physical, emotional, and monetary support to allow them to gain greater control of their own futures. It also helps to ensure their status as victims while they assist in efforts to bring criminals to justice.

Although not without fault, the TVPA undeniably represents a giant step forward in combating the issue of human trafficking in the United States by enhancing means of prevention, protection and prosecution. The Reauthorization Act of 2003 continues this three-tier approach to addressing human trafficking by further enhancing the protection and benefits available to victims through immigration, criminal law, and court provisions.<sup>44</sup> One important addition to the Reauthorization Act affecting the analysis in this Note is the fact that trafficked persons can qualify for social service benefits and T-visas by cooperating with federal agents, as well as

---

37. 22 U.S.C. § 7105(b)(1)(A) (2004).

38. 22 U.S.C. § 7105(c)(1)(A) (2004).

39. 22 U.S.C. § 7105(c)(1)(B) (2004).

40. 22 U.S.C. § 7105(c)(1)(C) (2004).

41. 22 U.S.C. § 7105(c)(2) (2004).

42. To receive certification, victims of trafficking must: (1) be a victim of a severe form of trafficking as defined by the TVPA; (2) be willing to assist with the investigation and prosecution of trafficking cases; and (3) have completed a bona fide application for a T-visa or have received continued presence status. If a victim meets these certification requirements, he or she will receive a letter of certification from the U.S. Department of Health and Human Services, Office of Refugee Resettlement (ORR). Victims of trafficking under the age of eighteen do not need to be certified to receive services. ORR will issue a letter indicating a child victim's eligibility for services as a victim of severe forms of trafficking. U.S. Dep't of Health and Human Services, Fact Sheet: Certification for Victims of Trafficking, at [http://www2.acf.hhs.gov/trafficking/about/cert\\_victims.html](http://www2.acf.hhs.gov/trafficking/about/cert_victims.html) (on file with the University of Michigan Journal of Law Reform).

43. Stumpf & Friedman, *supra* note 19, at 166.

44. See generally Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

state and local law enforcement agents investigating or prosecuting cases through relevant state laws such as anti-trafficking or kidnapping.<sup>45</sup> In the past, only individuals involved in federal investigations and prosecutions of their traffickers were eligible for certification.<sup>46</sup> The Reauthorization Act also further expands protections to victims by creating a civil cause of action that allows victims to file suit for actual and punitive damages, attorney's fees and other litigation costs, if they have been victims of forced labor, peonage, slavery, involuntary servitude or sex trafficking.<sup>47</sup>

As demonstrated above, the TVPA and the Reauthorization Act have provided measures that focus not just on criminalizing human trafficking in the United States, but also address the needs of those victimized by human traffickers. Combating such a complex issue requires the TVPA's multi-dimensional approach.<sup>48</sup> The lessons learned from failed past attempts to solve this problem through criminalization alone should not be ignored. To account for the diverse needs of victims, states considering their own trafficking legislation must take a holistic approach similar to the provisions found in the TVPA. Unfortunately, states which have enacted legislation criminalizing human trafficking thus far are not following this directive.

#### IV. STATE LEGISLATION CONCERNING HUMAN TRAFFICKING

The enactment of the TVPA in 2000 has increased awareness and outrage concerning the gravity of human rights violations caused by human trafficking. As a result, six states have passed legislation directed at combating this issue.<sup>49</sup> These state legislative efforts fall into three main categories: criminalizing human trafficking under state law; creation of state task forces to improve state, local, and private assistance for trafficked persons; and the

---

45. 22 U.S.C. § 7105(b)(1)(E)(iv) (2004).

46. 8 C.F.R. § 214.11(a) (2004).

47. 18 U.S.C. § 1595 (2004). Individuals who are victims of violations of § 1589 Forced Labor, § 1590 Trafficking with Respect to Peonage, Slavery, Involuntary Servitude, or Forced Labor, or § 1591 Sex Trafficking, may bring a civil action against the perpetrator.

48. See CALIBER ASSOCS., INC., *supra* note 11. This comprehensive report details the enormous and complex service needs of trafficking victims. *Id.*

49. CENTER FOR WOMEN POLICY STUDIES, FACT SHEET FROM NATIONAL INSTITUTE ON STATE POLICY ON TRAFFICKING OF WOMEN AND GIRLS, at <http://www.centerwomenpolicy.orgreport.cfm?ReportID=91>. (on file the University of Michigan Journal of Law Reform). Connecticut, Florida, Missouri, Hawaii, Texas, and Washington have passed legislative measures dealing with the issue of human trafficking.

implementation of legislation regarding foreign matchmaking services designed to protect potential spouses from abuse.<sup>50</sup> This section explores state legislation criminalizing human trafficking, considers the potential strengths and weakness of these measures when compared to the federal provisions provided in the TVPA, and makes recommendations to states seeking to pass future legislation criminalizing human trafficking. The final section reviews other state approaches to combating human trafficking that take a more comprehensive and preventative approach.

### *A. The Criminalization of Human Trafficking Under State Law*

Thus far Washington, Texas, Missouri, and Florida have enacted state legislation that specifically criminalizes human trafficking. Washington and Texas were the first states to enact laws in 2003<sup>51</sup> followed by Missouri and Florida in 2004.<sup>52</sup> Each of these four state laws makes trafficking a state felony, enumerates the elements of the crime, and provides guidance for sentencing. For example, Texas amended its penal code by adding chapter 20A. Trafficking of Persons to contain the following language:

#### Chapter 20A. Trafficking of Persons

##### Sec. 20A.01. DEFINITIONS. In this chapter:

- (1) "Forced labor or services" means labor or services that are performed or provided by another person and obtained through an actor's:
  - (A) Threatening to cause bodily injury to another;
  - (B) restraining another in a manner described by Section 20.01(1); or
  - (C) Withholding from another the person's:
    - (i) government records;
    - (ii) identifying information; or
    - (iii) personal property.

---

50. *Id.*

51. H.R. 2096, 78th Cong., Reg. Sess. (Tex. 2003); H.R. 1175, 2003 Leg., Reg. Sess. (Wash. 2003).

52. S.B. 1962, 2004 Leg., Reg. Sess. (Fl. 2004); S.B. 1210, 92nd Gen. Assem., 2d Reg. Sess. (Mo. 2004).

- (2) "Traffic" means to transport another person or to entice, recruit, harbor, provide, or otherwise obtain another person for transport by deception, coercion, or force.

#### Sec. 20A.02. TRAFFICKING OF PERSONS.

- (a) A person commits an offense if the person knowingly traffics another person with intent that the trafficked person engage in:
  - (1) forced labor or services; or
  - (2) conduct that constitutes an offense under Chapter 43 [Public Indecency, including prostitution (43.02), Promotion of prostitution (43.03), aggravated promotion of prostitution (43.02) (43.04), compelling prostitution (43.05), Sexual performance by a child (43.25) and employment harmful to children (43.251)].
- (b) Except as otherwise provided by this subsection, an offense under this section is a felony of the second degree. An offense under this section is a felony of the first degree if:
  - (1) the offense is committed under subsection (a)(2) and the person who is trafficked is younger than 14 years of age at the time of the offense; or (2) the commission of the offense results in the death of person who is trafficked.<sup>53</sup>

Similarly, Washington amended its penal code by adding the following language:

#### 9A.40.100. Trafficking

- (1)(a) A person is guilty of trafficking in the first degree when:
  - (i) Such a person:
  - (A) Recruits, harbors, transports, provides, or obtains by any means another person knowing that force, fraud, or coercion as defined in RCW 9A.36.070<sup>54</sup>

---

53. TEX. PENAL CODE ANN. § 20A.01-.02 (Vernon 2004).

54. The Washington statute defines coercion as follows:

will be used to cause the person to engage in forced labor or involuntary servitude; or

- (B) Benefits fiducially or by receiving anything of value from participation in a venture that has engaged in acts set forth in (a)(i)(A) of this subsection; and
- (ii) The acts or venture set forth in (a)(1) of this subsection;
- (A) Involve committing or attempting to commit kidnapping;
- (B) Involve a finding of sexual motivation under RCW 9.94A.835; or
- (C) Result in death.

(b) Trafficking in the first degree is a class A felony.

(2)(a) A person is guilty of trafficking in the second degree when such a person:

- (i) Recruits, harbors, transports, provides, or obtains by any means another person knowing that force, fraud, or coercion as defined in RCW 9A.36070 will be used to cause the person to engage in forced labor or involuntary servitude; or
- (ii) Benefits financially or by receiving anything of value from participation in a venture that has engaged in acts set forth in (a)(i) of this subsection.

(b) Trafficking in the second degree is a class A felony.<sup>55</sup>

What is troubling about these provisions is that they focus exclusively on prosecution and punishment of traffickers. The laws enacted in Missouri and Florida penal codes are similarly limited.<sup>56</sup>

---

(1) A person guilty of coercion if by use of a threat he compels or induces a person to engage in conduct which the latter has a legal right to abstain from, or to abstain from conduct which he has a legal right to engage in.

(2) "Threat" as used in this section means:

(a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or

(b) Threats as defined in RCW 9A.04.110 (25)(a), (b), or (c).

(3) Coercion is a gross misdemeanor.

WASH. REV. CODE § 9A.36.070 (2004).

55. WASH. REV. CODE § 9A.40.100 (2004).

56. S.B. 1962, 2004 Leg., Reg. Sess. (Fla. 2004); S.B. 1210, 92nd Gen. Assem., 2d Reg. Sess. (Mo. 2004).

Although these specific provisions may benefit prosecutorial efforts at the state level, their limited provisions have potential negative consequences for victims if adequate protections are not enumerated in the legislation.

*B. Potential Benefits of State Legislation  
Criminalizing Human Trafficking*

Potential benefits of state legislation criminalizing human trafficking include assisting prosecutorial efforts, identifying greater numbers of victims, and marshalling state resources to more effectively combat the problem.<sup>57</sup> Further, criminalizing human trafficking at all levels of law enforcement sends a clear message to traffickers that their actions will not be tolerated anywhere in the United States.<sup>58</sup>

Enumerating a specific state offense for human trafficking simplifies the prosecution of these cases. Without specific state trafficking provisions, prosecutors instead must use multiple offenses and prove each element of these crimes.<sup>59</sup> For example, without provisions like those found under Texas and Washington's laws, a state's only option would be prosecuting traffickers for offenses such as assault and battery, kidnapping, false imprisonment, sexual battery, and child abuse.<sup>60</sup> This hybrid approach greatly complicates prosecutorial efforts. Prosecutions under these types of provisions are also inadequate because often penalties are not as severe as those established under the TVPA and similar state statutes.<sup>61</sup> Ultimately, a piecemeal approach to prosecuting human trafficking cannot address the gravity of the crime as a whole. State legislation specifying human trafficking as an offense could more effectively punish the root and heart of the problem.

State laws that specify human trafficking as a criminal offense could also assist in identifying victims and increasing the number of trafficking prosecutions by involving state and local law enforcement. The Department of State's 2003 Assessment Report of United States Activities to Combat Human Trafficking (2003 US

---

57. Terry S. Coonan, *Human Rights in the Sunshine State: A Proposed Florida Law on Human Trafficking*, 31 FLA. ST. U. L. REV. 289, 294–295 (2004).

58. *Id.*

59. *Id.* at 297.

60. *Id.*

61. *Id.*

Assessment) indicated that the government's greatest challenge for the immediate future was to identify and bring forward more victims.<sup>62</sup> A state law criminalizing human trafficking could assist federal identification efforts since it would empower state and local law enforcement with greater knowledge about this problem and provide enforcement mechanisms within their jurisdiction.<sup>63</sup> States with specific human trafficking provisions would be more likely to implement training and outreach with their own law enforcement personnel.<sup>64</sup> Since local law enforcement officers encounter the majority of human trafficking victims, a state provision criminalizing this offense could mean that victims would be more frequently identified because of the increased awareness of the issue at the state level.<sup>65</sup>

Additionally, given the labor-intensive and resource-driven nature of human trafficking investigations, if more responsibility is spread to states for investigation and prosecution of human trafficking cases, it is more likely that significant numbers of traffickers can be stopped. The United States has assisted about 450 trafficking victims since the TVPA's enactment, while current estimates indicate that approximately 17,500 people are trafficked into the United States each year.<sup>66</sup> Presently, the federal government is investigating only 153 trafficking cases.<sup>67</sup> Since January 2001, they have charged, convicted, or sentenced only 113 human traffickers.<sup>68</sup> Although these figures represent a significant increase from earlier years, the enormous gulf between the estimated number of people trafficked into the United States and the number of open investigations and convictions show that the federal government has only touched the tip of the iceberg when it comes to adequately addressing the problem of human trafficking in the United States. Following the September 11th disaster, many federal resources are necessarily committed to combating domestic and international terrorist activities. With the Federal Bureau of Investigation (FBI) and other federal investigators focusing on combating terrorists, human trafficking investigations may not receive the attention and manpower it needs and deserves.<sup>69</sup> States empowered by trafficking

---

62. U.S. DEP'T OF STATE, *supra* note 2, at 7. The 2004 U.S. Department of State, Assessment of U.S. Activities to Combat Trafficking in Persons reiterated this concern. U.S. DEP'T OF STATE, *supra* note 4, at 22.

63. Coonan, *supra* note 57, at 294.

64. *Id.*

65. *Id.*

66. U.S. DEP'T OF STATE, *supra* note 2, at 7.

67. U.S. DEP'T OF STATE, *supra* note 4, at 23.

68. INTERNATIONAL RESCUE COMMITTEE, *supra* note 1.

69. Coonan, *supra* note 57, at 294.

legislation may be more likely to use their own resources to fill this gap. There are 17,000 state and local law enforcement agencies in this country.<sup>70</sup> Given these numbers, state initiatives can greatly assist in more effectively addressing the distressingly large nature of this problem.

Finally, criminalizing human trafficking at every level of the government makes intuitive sense. Human trafficking is perhaps one of the gravest human rights violations of the modern world, and our society should criminalize this exploitation at every level to send a clear message to traffickers that this type of degradation of fellow human beings is intolerable. In a paper calling for Florida State legislation criminalizing human trafficking, the author persuasively argues:

[T]o criminalize human trafficking is at heart a moral one; the offense constitutes one of the most egregious and systemic human rights violations of the new century, and should be countered at every turn. For most Americans, it is unthinkable that such exploitation could be occurring within our own shores, and indeed within blocks of where we live and work. In order to deter this trafficking in human beings, the practice should be criminalized in every way possible.<sup>71</sup>

The strength of this argument is undeniable. Few would question the United States' moral obligation to help eradicate this gross human rights violation. However, is state criminalization really the best way to protect those that are being exploited? Do the positive prosecutorial impacts of state legislation criminalizing human trafficking outweigh the possible negative impacts to the victims? The next part of this Note will address these questions.

### *C. Potential Negative Consequences of State Legislation Criminalizing Human Trafficking*

On its surface, enacting legislation that criminalizes human trafficking at the state level feels intuitively correct. However, a closer analysis of the consequences of state legislation criminalizing human trafficking reveals potential dangers in enacting legislation

---

70. H.R. REP. NO. 108-264, *supra* note 35, at 15.

71. Coonan, *supra* note 57, at 295.



that does not take a more holistic approach to addressing the problem. The TVPA was a landmark piece of legislation because its approach to combating human trafficking centers not just on law enforcement and prosecution, but also ensures that victims receive the proper legal protection they need and deserve.<sup>72</sup> Trafficking scholars overwhelmingly agree that a criminal definition of trafficking alone provides only one of many necessary components to address this problem.<sup>73</sup> Therefore, state legislation emphasizing crime control to the exclusion of all other factors effectively ignores a crucial issue—the victims' human rights.

While it is a daunting task, any state legislation criminalizing human trafficking must address the complex needs of victims. State approaches should not be centered solely on law enforcement, but should instead provide a combination of prevention, prosecution, and protection for victims of human trafficking similar to the TVPA's approach. If states do not take this approach, victims potentially lose significant rights and benefits that they would have been entitled to receive if their case had been prosecuted under the TVPA. These include access to social services, immigration benefits, resources for investigation, adequate witness protection, mandatory restitution, and a right to civil action.

*1. Potential Negative Impacts on Victims Access to Social Services and Immigration Status*—Trafficked persons have complex immigration, medical, psychological, social service and legal needs that states must meet in order to effectively address the human trafficking problem. Many fear deportation since they may have entered the United States illegally.<sup>74</sup> Given that victims usually do not speak English, are unfamiliar with local customs, and often have been kept from any outside contact during their enslavement, they also face enormous language and cultural barriers and are frequently frightened by their environment.<sup>75</sup> Additionally, trafficked persons usually have no connections within the United States and therefore have no place to stay or means of support. They desperately need shelter, counseling, health services, and work. Access to counseling and health services is essential to victims because many have endured beatings, rapes and psychological abuses. They also may

---

72. Keely E. Hyland, Note, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 70 (2001).

73. Kara Abramson, Note, *Beyond Consent, Towards Safeguarding Human Rights: Implementing The United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 497 (2003).

74. Theresa Barone, Note, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT'L & COMP. L.J. 579–81 (2003).

75. *Id.*

have problems trusting others, experience flashbacks, be fighting drug addictions, or suffer from other illnesses.<sup>76</sup> Finally, victims face security risks, including trafficker's threats of reprisal against victims and their family members.

In theory, victims of trafficking whose cases are brought and prosecuted at the state level should have the same access to federal benefits and services as victims of trafficking whose claims are prosecuted at the federal level. However, this may not necessarily be the case. The TVPA authorizes any alien who is a victim of severe forms of trafficking in persons to be eligible for benefits and services to the same extent as an alien admitted to the United States as a refugee.<sup>77</sup> To access these benefits, the Secretary of Health and Human Services must certify a victim after consultation with the Attorney General.<sup>78</sup> To obtain this certification, the trafficked person must be willing to reasonably assist in the investigation and prosecution of severe forms of trafficking.<sup>79</sup> To qualify for certification the victim also must have applied for a T-visa, or be eligible for continued presence because their testimony is necessary to prosecute traffickers.<sup>80</sup> The TVPA defines "assistance with investigation and prosecution" as identifying, locating and apprehending human traffickers, and being willing to testify at proceedings against them.<sup>81</sup>

Prior to the passage of the Reauthorization Act in 2003, the United States Department of Health and Human Services, Office of Refugee Resettlement (ORR) only considered assistance to federal law enforcement agents as suitable support for certification. Recognizing that this hindered state investigatory efforts, the Reauthorization Act altered the TVPA's language to require the Secretary of Health and Human Services to consider statements from state and local law enforcement officials. These statements are considered if a trafficked person has assisted in the investigation and prosecution of state level crimes involving severe forms of trafficking.<sup>82</sup> This provision in the Reauthorization Act means that victims of trafficking investigated and prosecuted at the state level are theoretically no longer dependent on the instigation of federal level investigations to receive services. Nevertheless, since receiving

---

76. See Ryf, *supra* note 7, at 66.

77. 22 U.S.C. § 7105(b)(1)(A) (2004).

78. 22 U.S.C. § 7105(b)(1)(E)(i) (2004).

79. 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2004).

80. 22 U.S.C. § 7105(b)(1)(E)(i)(II) (2004).

81. 22 U.S.C. § 7105(b)(1)(E)(iii) (2004).

82. 22 U.S.C. § 7105(b)(1)(E)(iv) (2004).

this certification is dependent on a federal agency, it is unknown if state-level applications for certification will be granted as easily or efficiently. This potential problem can be more fully explored by looking at the similar concerns that arise when victims seek not only social services, but a change in immigration status when their case is prosecuted at the state level.

Perhaps the most pressing concern with state legislation criminalizing human trafficking is the issue of the victim's immigration status in the United States. States do not have the power to offer the benefits of legal status to victims prosecuted at the state level. Immigration issues always have and will continue to be the sole domain of the federal government. Therefore, states seeking to assist human trafficking victims through their own legislation need to consider how they can address this pressing problem for most victims of human trafficking.

Under the TVPA a victim of human trafficking can receive immigration status through a T-visa or continued presence. A T-visa can be adjusted to permanent residence status, and therefore may be particularly desirable for victims wishing to remain in the United States.<sup>83</sup> Prior to the Reauthorization Act, to meet the requirements for a T-visa, a trafficked person needed to show that he or she had complied with any reasonable request for assistance in a federal investigation or prosecution. Under the Reauthorization Act this definition expanded to include state and local investigations.<sup>84</sup> However, this expanded definition does not necessarily mean that state legislative provisions criminalizing human trafficking should not address victims' concerns about receiving access to immigration status. These concerns can be seen in the historical hesitancy of the Department of Justice (DOJ) to allow state level endorsements and its opposition to the new provision of the Reauthorization Act.

In January 2002, the DOJ published a regulation fully explaining the conditions under which the federal government would grant T-visas.<sup>85</sup> This regulation describes the criteria an individual must meet to qualify for the visa.<sup>86</sup> Individuals must complete Form I-

---

83. 8 U.S.C. § 1255(m)(1) (2004).

84. 22 U.S.C. § 7105(b)(1)(E)(iv) (2004).

85. New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 67 Fed. Reg. 47,804-01 (Jan. 31, 2002) (codified at 8 C.F.R. § 214.11).

86. 8 C.F.R. § 214.11(b) (2004). To qualify for T-1 nonimmigrant status, a person must demonstrate: (1) that he or she is a victim of severe form of trafficking of persons; (2) that he or she is physically present in the United States, America Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking in persons; (3) that, if fifteen years of age or older, he or she has complied with any reason-

914, Application for the T non-immigration Status. As part of their application, individuals must show that they meet the definition of severe forms of trafficking under the TVPA and that they have complied with the reasonable requests for assistance from law enforcement in the investigation or prosecution of acts of trafficking. To show this compliance, the regulation recommends that an applicant submit a Law Enforcement Agency (LEA) endorsement with the application. While LEA endorsements are not a mandatory part of the application process, language in the interim rule and on the I-914 Form strongly indicates that without such an endorsement, establishing compliance may be very difficult.<sup>87</sup>

The regulations limit the definition of LEA endorsements to federal law enforcement or prosecuting agencies, including the Federal Bureau of Investigation, the United States Attorneys' Offices, the Department of Justice's Civil Rights and Criminal Divisions, the United States Marshals Service, and the Department of State's Diplomatic Security Service.<sup>88</sup> It specifically excludes states and localities investigating and prosecuting crimes of trafficking in persons and limits LEA endorsements to those investigating federal offenses found in the TVPA.<sup>89</sup> If state or local law officials want to receive a LEA, those law enforcement officials must contact the appropriate federal law enforcement agency that investigates or prosecutes trafficking of persons.<sup>90</sup> The definitive exclusion of state enforcement efforts in this regulation demonstrates the federal agencies' distrust of state and local investigations and prosecutions. Even though the language in the regulations will have to be altered under the Reauthorization Act to allow individuals to petition for T-visa status through the endorsement of federal, state or local officers, there is likely to be

---

able requests for assistance in the investigation or prosecution of acts of trafficking in persons; and (4) that he or she would suffer extreme hardship involving unusual and severe harm if removed from the United States. *Id.*

87. See IMMIGRATION AND NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, OMB No. 1115-0246, APPLICATION FOR T NONIMMIGRANT STATUS, (Filing Instructions for Application for T Nonimmigrant Status (Form I-914)) § 3 (Jan. 22, 2002) ("An applicant for T non-immigration status need not necessarily file a Form I-914, Supplement B, to prove the claim. However, the endorsement of a Federal Law Enforcement Officer on the Form I-914, Supplement B, constitutes presumptive proof that the applicant is a victim and has complied with any reasonable request for assistance in the investigation and prosecution. These elements of the applicant's claim may be difficult to establish otherwise, and submission of the Form I-914, Supplement B, is strongly advised.").

88. 8 C.F.R. § 214.11(a) (2004).

89. See 8 C.F.R. § 214.11 (f) (4) (2004).

90. *Id.*

continuing distrust of the expansion of the use of state endorsements within federal agencies.

For example, the DOJ's clear opposition to this expansion demonstrates federal agencies' skeptical sentiments toward state and local investigations. The DOJ Office of Legislative Affairs, in a letter regarding the Reauthorization Act, expressed concern about broadening the availability of certification for trafficking victims based on endorsements made by state and local law enforcement agencies. In this letter the DOJ raised concerns about state-level investigations, and worries about efficiency and uniformity in determining whether victims are cooperating with investigation and prosecution.<sup>91</sup> Because of these concerns, arguably state-level LEA endorsements will not be as readily accepted by other federal agencies like the DHS, and could result in delay or denial of immigration status.

An additional concern raised in the DOJ letter is that victims assisting in state-level investigations and prosecutions may not meet the definition of "severe forms of trafficking" under the federal regulations.<sup>92</sup> To receive a T-visa, victims must meet the federal definition of severe forms of human trafficking. Thus states must ensure that their provisions concerning the definition of human trafficking match the federal regulations since differences might exclude or make it more difficult for a victim to qualify for a T-visa.

The concern that victims might not qualify for T-visas is magnified because continued presence status for victims is not available for state level investigations and prosecutions. This temporary form of relief is only available upon permission from the Attorney General or his designee. The joint regulations published by the DOJ and the Department of State in July 2001 concerning prosecution and assistance for victims of trafficking clearly state that authorization for continued presence can only be made through a federal law enforcement agency petition, not a state petition.<sup>93</sup> Local law enforcement officials that want to help victims remain in the United States through continued presence status must contact federal law enforcement officials to investigate the case and request this status from the DHS.<sup>94</sup> Although the Reauthorization Act allows state and local law enforcement officials to make LEA

---

91. H.R. REP. NO. 108-264, *supra* note 35, at 14-15.

92. *Id.* at 15.

93. See Protection and Assistance for Victims of Trafficking, 66 Fed. Reg. 38,514-01 (July 24, 2001) (codified at 28 C.F.R. § 1100.35) (stating that federal law enforcement officials may petition the I.N.S. for continued presence authorization, and containing no reference to state or local law enforcement petitions).

94. See *id.*

endorsements, the Reauthorization Act does not allow states to ask for continued presence.

While the above concerns rest on speculation about the willingness of federal agencies to accept state and local investigations and prosecutions, states need to be cognizant of these concerns. When proposing human trafficking legislation, states need to acknowledge how pivotal it is that victims receive both social services and immigration status to ensure successful state prosecution, and states should write appropriate provisions that will facilitate these ends. Even if victims with cases investigated and prosecuted at the state level are eligible for the same services and benefits as victims with cases at the federal level, states nevertheless should enumerate access to services and benefits in their own legislation. The TVPA successfully addresses the multifaceted concerns of trafficked persons by providing immigration status and access to many social service and legal benefits. Similarly, state legislation must explicitly recognize that victims have a right to these benefits.

2. *Potential Concerns Regarding Victim's Safety*—A victim's safety should be of paramount concern in any investigation and prosecution of a human trafficking case because traffickers often target victims and the families of victims when they testify against their captors. Victims and their families are not just targets in the United States, but also in their countries of origin.<sup>95</sup> Additionally, victims are unlikely to testify if they or their family members do not receive protection from their traffickers, and this can make effective prosecution impossible.<sup>96</sup>

Under the federal regulations of the TVPA, trafficking victims and their family members have a right to protection from intimidation, harm, and threats of harm.<sup>97</sup> Additionally, victims' and family members' names and identifying information are not disclosed to the public.<sup>98</sup> Family members protected by the TVPA include spouses, children, parents, or siblings who have been targeted or are likely to be targeted by traffickers and for whom protection from harm may be reasonably provided. At the discretion of the

---

95. See Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 161–62 (2002) (discussing the possibility that threats against witnesses and their families in their countries of origin will dissuade victims from testifying against their captors).

96. *Id.*

97. See 28 C.F.R. § 1100.31(d)(1) (2004).

98. See *id.* at § 1100.31(d)(2).

responsible official, protection may be extended to other family members not included in the above definition.<sup>99</sup>

To protect victims and their families, the TVPA provides victims with the right of privacy and protection under the Victims and Witness Protection Act (VWPA) of 1982.<sup>100</sup> The VWPA protects those individuals who are likely to have crimes of violence committed against them because of their participation as witnesses in proceedings concerning an organized criminal activity or other serious offenses.<sup>101</sup> Any human trafficking violation under the TVPA is considered to fall within the definition of an organized criminal activity or other criminal offense. Those trafficked persons who need witness protection qualify for financial assistance and other services to help the individual become independent.<sup>102</sup>

Similar protection is not available at the state level. In contrast to the well-developed federal witness protection program, most states do not even have such programs.<sup>103</sup> Therefore, similar to receiving social service benefits and immigration status, states depend on the federal system to offer protection to victims and witnesses in their cases. The Witness Security Reform Act of 1984 does authorize the Attorney General to provide protection to state and local witnesses.<sup>104</sup> However, requests from state or local authorities for this type of protection must go through the

99. 28 C.F.R. § 1100.25 (2004).

100. See 28 C.F.R. § 1100.31 (2004).

101. See THE PROTECTION PROJECT, PROGRAM OF SERVICES FOR VICTIMS OF TRAFFICKING: EXPLANATION OF THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000, at <http://www.protectionproject.org/training/commentary1.htm> (on file with the University of Michigan Journal of Law Reform).

102. See *id.*

103. NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, FIGHTING URBAN CRIME: THE EVOLUTION OF FEDERAL-LOCAL COLLABORATION 3 (Dec. 2003).

104. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-21.140 (Oct. 1997), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/21mcrn.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/21mcrn.htm) (on file with the University of Michigan Journal of Law Reform). Section 9-21.100 outlines eligibility for the Witness Security Program. A witness may be considered for acceptance into the Witness Security Program if they are an essential witness in a specific case of the following types:

- A. Any offense defined in Title 18, United States Code, Section 1961(1) (organized crime and racketeering);
- B. Any drug trafficking offense described in Title 21, United States Code;
- C. Any other serious Federal felony for which a witness may provide testimony that may subject the witness to retaliation by violence or threats of violence;
- D. Any State offense that is similar in nature to those set forth above; and
- E. Certain civil and administrative proceedings in which testimony given by a witness may place the safety of that witness in jeopardy.

*Id.* at § 9-21.100.

appropriate United States Attorney. If the U.S. Attorney grants the request, a state must reimburse the United States for expenses incurred in providing protection, and the state must agree to cooperate with the Attorney General in carrying out the provisions of the Witness Security Reform Act.<sup>105</sup> Given that states are dependent on federal programs, that states must be willing to fund this protection, and that states might be less likely than the federal government to understand and deal with threats to family members abroad, the victims' safety is a serious concern that states need to address when writing legislation criminalizing human trafficking. The absence of a provision addressing concern for victims' safety in state legislation could seriously compromise the bodily and mental health of individuals already greatly traumatized. The TVPA directly addresses this issue under the VWPA, acknowledging the gravity of this concern for victims. Any state legislation passed criminalizing human trafficking should similarly address concerns for victims' safety.

*3. Potential Concern Surrounding Resources for Investigations—*

There is also a concern that states may not have the means to effectively investigate human trafficking cases. The 2003 US Assessment reports that human trafficking cases are among the most labor- and time-intensive criminal investigations that the United States government undertakes.<sup>106</sup> These investigations often involve numerous victims, language and cultural barriers, multiple federal agencies, and international investigations.<sup>107</sup> Additionally, many victims suffer sexual, physical, or emotional trauma and require assistance from numerous professionals, such as counselors, psychologists, physicians and child specialists.<sup>108</sup> Unlike in the federal government where the Civil Rights Division of the DOJ centrally provides guidance and resources for all federal human trafficking cases, states may not have access to the same types of resources or take the time to develop the specialized skills that are needed for trafficking investigations. Given that investigations concerning human trafficking cases often extend beyond our national boundaries and command large investments of resources, states should acknowledge these issues by including provisions in any legislation criminalizing human trafficking that will assist in facilitating investigations. These provisions should make special

---

105. *Id.* at § 9-21.140.

106. U.S. DEP'T OF STATE, *supra* note 2, at 10–11.

107. *Id.* at 11.

108. *Id.*



allotments for human trafficking investigations, create specialized state police taskforces to investigate human trafficking cases, and facilitate cooperation between state and federal agencies to assist with international investigations.

4. *Potential Concerns Regarding Legal Remedies*—Finally, there is the concern that state legislation criminalizing human trafficking could create a system lacking uniform punishments for traffickers and failing to give victims the legal benefits available under the TVPA. One of the primary purposes of the TVPA was to strengthen criminal punishment so that sentences reflected the serious nature of the crime and made prosecutorial efforts worthwhile.<sup>109</sup> Under the TVPA, crimes involving human trafficking generally are punishable up to twenty years in prison. In cases of aggravated circumstances, such as death resulting from the trafficking or sex trafficking of a minor, the punishment increases to any term of years or life imprisonment.<sup>110</sup> In contrast, there is no way to ensure that states criminalizing human trafficking will give comparably serious punishments. For example, the Texas law criminalizing human trafficking defines trafficking as a second-degree felony and permits a sentence of up to twenty years. Under Washington's law, the crime is designated as a class A felony, which can result in a sentence of ten years to life imprisonment. Like the TVPA, both of these laws also allow for more severe penalties when aggravating circumstances are present. Although these two laws provide for comparably severe punishment to traffickers, sentencing increments commonly vary by state. For example, under Florida's law criminalizing human trafficking as a second-degree felony, the same classification as Texas, the maximum sentence is just fifteen years.<sup>111</sup> Similarly, Missouri's classification of human trafficking offenses as a Class B felony limits sentencing to a term of not less than five years but no more than fifteen years imprisonment.<sup>112</sup> These sentences are well below the twenty year sentences found in the TVPA. States, therefore, should be careful when enacting their own legislation to designate human trafficking as an appropriately grave offense under their state sentencing structure. Punishment should be commensurate with or more severe than the penalties provided for under the TVPA to increase deterrence and appropriately punish traffickers for their heinous crime.

---

109. See Ryf, *supra* note 7, at 51–53.

110. 18 U.S.C. §§ 1581–1584, §§ 1589–1592 (2004).

111. FL. STAT. ANN. § 775.082(c) (West 2004).

112. MO. REV. STAT. § 558.011(2) (2004).

State legislation should also provide victims with the same legal remedies as those found in the TVPA. For instance, the TVPA grants "mandatory restitution" for victims of human trafficking.<sup>113</sup> Under this provision courts must order the defendant to pay the victim the full amount of the victim's losses.<sup>114</sup> The full amount of a victim's losses includes such things as medical and psychological assistance, attorney's fees, and other losses suffered as a proximate cause of the offense. It also includes the value of the victim's labor as guaranteed under the Fair Labor Standards Act.<sup>115</sup> Under the TVPA, courts must enter restitution orders, regardless of the defendant's economic status once a defendant has been convicted or has plead guilty to the charges.<sup>116</sup> Traffickers have wrought egregious harms upon trafficking victims and the TVPA recognizes that mandatory restitution may help rectify these harms.

Unless states directly provide for mandatory restitution through their own state legislation, victims may not receive this form of compensation. Although every state presently gives courts the statutory authority to order restitution, and some states even mandate restitution in every criminal case, most states have conflicting restitution statutes that lack enforcement mechanisms and leave restitution to the discretion of the court.<sup>117</sup> Studies suggest that crime victims, even when eligible, are not awarded restitution. In fact, one study indicated that less than half of state crime victims surveyed were awarded restitution.<sup>118</sup> These studies demonstrate that the lack of an explicit mandatory restitution provision in a state statute criminalizing human trafficking is another way in which victims' rights might not be as effectively protected at the state level.

---

113. 18 U.S.C. § 1593 (2004).

114. 18 U.S.C. § 1593(b)(1) (2004).

115. 18 U.S.C. § 1593(a)(3) (2004). The full amount of victim's losses are found in the definition in § 2259(b)(3). Included in this definition are:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- attorneys' fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense. *Id.*

116. 18 U.S.C. § 2259(b)(4) (2004). The procedure for issuing restitution and for enforcing is set forth in 18 U.S.C. § 3664 (2004).

117. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, ORDERING RESTITUTION TO THE CRIME VICTIM 1-3 (Nov. 2002), available at <http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin6/welcome.html> (on file with the University of Michigan Journal of Law Reform).

118. *Id.* at 4.

To fully protect victims' rights, states should be sure to include a similar provision to the TVPA regarding mandatory restitution in their legislation.

A similar diminution of victims' rights could also result if states do not provide an explicit right to a civil action in their own state legislation criminalizing human trafficking. After the passage of the Reauthorization Act, the TVPA now guarantees a right to civil action for victims of human trafficking.<sup>119</sup> The civil action provision under the TVPA not only empowers victims to bring cases to ensure that they are fully compensated for the harm they have suffered and allows them to collect punitive damages, but it also creates an additional enforcement mechanism against traffickers. Therefore, to fully protect victim's rights, states that criminalize human trafficking need to include a provision granting a right to a civil action.

5. *Highlighting the Potential Problems of State Legislation Through Analysis of Present State Legislation*—A closer look at the provisions and language of the Texas and Washington legislation criminalizing human trafficking further highlights some of the problems discussed above. The language criminalizing human trafficking under both the Texas and Washington statutes approximates the elements of the crime found in the language of the TVPA. Both the TVPA and the state legislation require elements of force, fraud, or coercion. They also do not limit the definition of trafficking merely to the movement of persons, but include acts of enticement, recruitment, harboring, providing or otherwise using another person. However, the language of the state statutes is far less explicit in itemizing the different crimes that could constitute a human trafficking claim.<sup>120</sup> The TVPA outlines specific language for prosecution and punishment of those whom traffic individuals into forced labor, peonage, slavery, and involuntary servitude as well as specific language concerning sex trafficking of minors and trafficking by force, fraud, or coercion. Although the language of the Washington and Texas legislation likely encompasses all these crimes as well, only forced labor, involuntary servitude and forced prostitution are selectively mentioned in their human trafficking provisions.<sup>121</sup>

Perhaps more troubling than the limited language itself is the potential confusion that may result in the interpretation of the elements and definitions of these crimes. This confusion will only

---

119. 18 U.S.C. § 1595 (2004).

120. See TEX. PENAL CODE ANN. § 20A.01–20A.02 (Vernon 2004); WASH. REV. CODE § 9A.40.100 (2004).

121. *Id.*

worsen as additional states enact criminal legislation, each with slightly different provisions for these crimes. Of course states have the right to make additions or changes to their state provisions concerning human trafficking, but as discussed above, federal certification for services and immigration status is available only to those who meet the federal definition of a trafficking victim. States, therefore, should be aware of unwittingly writing legislation that could negatively impact a victim's opportunity to receive the services and immigration benefits that are explicitly granted to victims in the TVPA.

This potential problem is already visible in the Washington and Texas legislation. Neither state includes the TVPA's language that references "severe forms of trafficking in persons."<sup>122</sup> Although this language seems unnecessary since every incident of human trafficking by the nature of the offense itself could arguably be considered "severe," to receive initial certification for services requires a showing that a person is a victim of severe forms of trafficking.<sup>123</sup> Additionally, to qualify for a T-visa, the I-914 Form clearly requires a person to show that he or she is "a victim of severe form of trafficking in persons."<sup>124</sup> Although it is presently unknown how this omission of language may impact victims, this minor change in language is evidence of the potential problems victims may encounter in receiving benefits and immigration status when states either choose to broaden or narrow their own definition of what constitutes human trafficking.

Even more troubling is the fact that neither the Washington nor Texas legislation provides specific provisions that enumerate any rights for victims such as social services or any kind of legal immigration status.<sup>125</sup> Additionally, no provisions address measures ensuring victims' safety, and no provisions guarantee mandatory restitution or the right to a civil action for victims. In fact, the statutes in both Washington and Texas strictly criminalize the offense. If victims are not guaranteed the specific rights and services like those enumerated under the TVPA, it is questionable whether victims with cases prosecuted at the state level will receive the benefits

---

122. 22 U.S.C. § 7102(8) (2004) (defining severe forms of trafficking).

123. 28 C.F.R. § 1100.35 (2004).

124. U.S. DEP'T OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, APPLICATION FOR T NONIMMIGRANT STATUS, FORM I-914 INSTRUCTIONS 2, *available at* <http://uscis.gov/graphics/formsfee/forms/files/i-914.pdf> (on file with the University of Michigan Journal of Law Reform).

125. See TEX. PENAL CODE ANN. § 20A.01-20A.02 (Vernon 2004); WASH. REV. CODE § 9A.40.100 (2004).

the TVPA grants. At the very least, the benefits and services could be far more limited or more difficult for victims to access under these current state provisions.

The one-dimensional approach of Washington and Texas's legislation shows how carefully states must approach the issue of criminalizing human trafficking. The Florida and Missouri legislation, enacted one year later, followed this same one-dimensional approach and other states are likely to follow suit. The likelihood that states will enact similarly limited legislation can be seen most clearly in the fact that even the federal government is advocating that states take a criminalization approach to combating this problem and ignoring the need for more comprehensive legislation.

In July of 2004, the DOJ released a model state anti-trafficking criminal statute.<sup>126</sup> This model legislation enumerates definitions, sentencing provisions, and sentencing enhancements for state legislation on human trafficking. However, the model legislation lacks any real provisions outlining protections that should be granted to victims by the states. The model legislation addresses the question of protection for trafficking victims merely by suggesting that states should issue reports one year from the enactment of the statute on how existing victim/witness laws and social services address the needs of trafficking victims.<sup>127</sup> This limited approach taken by the DOJ has congressional endorsement. Shortly after the release of the DOJ legislation, an anti-trafficking resolution authored by Texas Senator John Cornyn, and unanimously approved by the United States Senate on July 21, 2004, encouraged states to consider the DOJ model legislation and adopt similar legislation in their own states.<sup>128</sup>

Although the current message being expressed by the federal government and other policymakers is that criminalizing human trafficking at both the state and federal level can only enhance enforcement mechanisms, this is not necessarily the case. In passing the TVPA, the United States acknowledged that a criminalization approach is insufficient to deal with the complexities of this problem. Therefore, states, when writing their own legislation criminalizing human trafficking, should create a multi-dimensional approach rather than apply a mere criminalization approach. Each state needs to act cautiously and consider how they can most

---

126. U.S. DEP'T OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE (July 2004), available at <http://www.usdoj.gov/trafficking.htm> (on file with the University of Michigan Journal of Law Reform).

127. *Id.* at 4.

128. S. Res. 414, 108th Cong. (2004).

effectively address the issue of human trafficking within its own jurisdiction.

6. *Innovative State Approaches*—From the above analysis it can be seen that before taking measures criminalizing human trafficking, states should thoroughly consider the approach they take. Because the TVPA is still in the early stages of implementation, it may be more useful for states to begin to combat this problem by first focusing on understanding the nature and scope of the human trafficking problem in their respective states and mobilizing services for victims. They should also implement legislation that seeks to take preventative measures to combat the problem within their state. These types of measures have already been taken in a few states and can provide guidance for other states seeking to address this problem.

In 2002, Washington established the “Washington State Task Force Against the Trafficking in Persons.”<sup>129</sup> This task force was charged with measuring and evaluating the progress of state trafficking prevention, identifying federal, state, and local services that could assist victims of trafficking, and making recommendations to coordinate state assistance to victims of trafficking.<sup>130</sup> In January 2004, Washington also introduced House Bill 2069.<sup>131</sup> This Bill calls for developing a protocol to improve local, state, and private responses to incidents of trafficking in persons, to better assist investigations and prosecutions, and to coordinate a system for identifying victims’ needs. The protocol would also provide procedures to enhance cooperation between government agencies and nongovernmental organizations. A database would be created to assist these cooperative efforts. This database would contain contact information for organizations that provide services to victims of human trafficking and be available to all agencies that deal with this problem. The protocol would also establish guidelines for providing social services for victims of trafficking of persons, including housing, health care and employment.<sup>132</sup>

Connecticut has also enacted legislation establishing a state trafficking task force.<sup>133</sup> The Washington and Connecticut legislation illustrates how states can efficiently use resources to protect victims of human trafficking and develop appropriate responses to this

---

129. WASH. REV. CODE § 7.68.350 (2004).

130. *Id.*

131. H.R. 3069, 58th Leg., Reg. Sess. (Wash. 2004).

132. *Id.*

133. H.R. 5358, 2004 Leg., Reg Sess. (Conn. 2004).

growing problem. These types of legislative actions, which focus on the needs of victims, should take place before, or at least in conjunction with, state efforts to criminalize human trafficking. States with task forces or protocols will more likely be able to identify victims, ensure that appropriate services are given to victims, and prosecute traffickers successfully for their criminal activities, whether it is under the TVPA or state provisions.

States, however, do not just have to follow the federal provision of the TVPA when addressing this problem. They can also be leaders in combating the problem of human trafficking by taking preventative approaches. This type of state leadership can be seen in the legislation passed in Washington, Texas, and Hawaii that addresses the trafficking-like abuses which may arise when individuals use mail-order-bride services.<sup>134</sup> Recognizing that persons living abroad who are considering marriage to United States citizens often do not have the means to verify personal history and other background regarding their prospective spouse, Washington, Texas, and Hawaii have implemented legislation requiring international matchmaking organizations conducting business in their respective states to give the criminal and marital history of the state resident to clients considering marriage to the state's resident. The matchmaking organizations must provide these histories in the inquirer's native language and must publicize to its clients that they have an opportunity to request this information. Washington was the first state to address this issue and to pass such helpful legislation.<sup>135</sup> Representatives from Washington have also spearheaded federal efforts to address this issue at a national level.<sup>136</sup> This example shows that states can not only adopt federal approaches on the issue of human trafficking, but can be leaders in the area as well.

## V. CONCLUSION

Undoubtedly, the problem of human trafficking should be an issue that the United States targets and attacks at every level and from

---

134. HAW. REV. STAT. § 489N1-5 (2004); TEX. GOV'T CODE ANN. § 411.084 (Vernon 2004); WASH. REV. CODE §§ 19.220.005, 19.220.010 (2004).

135. 8 U.S.C. § 1375 (2004).

136. Priscilla Long, *Washington State Senate Bill to Regulate "Mail Order Bride" Industry Becomes Law on September 1, 2002*, (Oct. 2003), at [http://www.washington.hostrylink.org/outputy.fm?file\\_id=5580](http://www.washington.hostrylink.org/outputy.fm?file_id=5580) (on file with the University of Michigan Journal of Law Reform) (noting that in July 2003, federal legislation regarding international matchmaking organizations was introduced by Senator Cantwell (S.B. 1455) and Representative Larsen (H.R. 2949), both from Washington State).

every angle possible. At present, this grave human rights violation is prevalent in our country to such an extent that we have only begun to address the problem. Effectively combating human trafficking in the United States will require the involvement of the federal and state governments. However, states should not address this issue in a reactionary manner by merely criminalizing this practice in their state codes. They should carefully consider their own legislative codes and ensure that victims have access to state social services, housing, translation services and any special protections given to crime victims under their laws. States should only enact legislation criminalizing human trafficking if they take the time to consider the needs of victims within the context of their own statutory codes and adopt a holistic approach similar to the federal provisions found under the TVPA.

States, unlike the federal government, have a unique opportunity to better study and understand the issue of human trafficking as it specifically relates to their state. Therefore, they are an invaluable resource to both federal prosecutorial efforts and to the trafficked persons themselves. By meeting the needs of victims as quickly and thoroughly as possible, states can assist victims in the process of recovery and also ensure effective prosecution of the criminals involved. Only through a multi-dimensional approach and cooperative efforts can states begin to assist in eradicating this problem in the United States.



