

# THE UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING

Andrew Hall\*

*Almost 15 years after Congress passed the first contemporary anti-slavery legislation, the Trafficking Victims Protection Act, state anti-trafficking law and policy still lag far behind their federal counterparts in terms of prosecuting traffickers, protecting victims, and preventing trafficking. Regrettably, Arizona provides an ample case study in these inadequacies, from its prosecution of sex trafficking victims for prostitution to its inadequate victim assistance mechanisms. This Note maintains that the war on human trafficking will be won or lost at the state level. After a detailed analysis of federal and state law and policy, this Note argues that the Uniform Law Commission's new Uniform Act on Prevention of and Remedies for Human Trafficking provides states with a solid blueprint for comprehensive anti-trafficking reform. States should adopt the Uniform Act in its entirety, without delay, because nobody should be enslaved in the Land of the Free.*

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\* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2015. I wish to thank Nina Rabin, Jonathan Loe, Zachary Friedman, Suellyn Scarnecchia, Elizabeth Campbell, Reem Constantine, and the members of the *Arizona Law Review* for their important contributions to this Note. Also, thanks as always to my amazing wife, Chelsea. Naturally, all errors are my own.

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*The question is not, can slavery end? The question is, when? The answer is, as soon as we choose to end it. How long will it take? Martin Luther King answered this question when he said, “How long? Not long, because the arc of the moral universe is long, but it bends toward justice.” . . . We can be the generation that says: enough! We’ve had five thousand years of slavery, and now we’re bringing it to an end. Ending slavery will be humanity’s watershed, separating the time of the truth that we are one people from the millennia of the great lie that some people are subhuman. Ending slavery will free each of us.<sup>1</sup>*

—Kevin Bales

## INTRODUCTION

The year 2013 marked the 150th anniversary of the Emancipation Proclamation, which outlawed slavery in the United States.<sup>2</sup> Yet, tragically, most experts agree there are more people in slavery today than ever in human history.<sup>3</sup>

1. KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY’S SLAVES 232 (2007).

2. See, e.g., Luis CdeBaca, *Combating Modern Slavery 150 Years After the Emancipation Proclamation*, DIPNOTE (Sept. 22, 2012), <http://blogs.state.gov/stories/2012/09/22/combating-modern-slavery-150-years-after-emancipation-proclamation>.

3. See, e.g., KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 9 (1999); Melissa Hogenboom, *A Tipping Point in the Fight Against Slavery?*, BBC NEWS (Oct. 18, 2012, 7:11 PM), <http://www.bbc.com/news/magazine-19831913>; Ethan B. Kapstein, *The New Global Slave Trade*, FOREIGN AFFAIRS, Nov.–Dec. 2006, at

Estimates of the total number of slaves in the world today vary considerably,<sup>4</sup> from 2.4 million<sup>5</sup> to upwards of 29.8 million.<sup>6</sup> The International Labour Office's ("ILO") figure of 20.9 million<sup>7</sup> is a well-supported, conservative estimate, but 27 million slaves is the most commonly cited figure.<sup>8</sup> Slavery goes by a new name today—human trafficking. Yet it is still the same old affront to human dignity that it has always been.

Remarkably, until recently, policymakers and even activists regarded human trafficking as an almost exclusively foreign problem. It is true that slavery does persist all around the world.<sup>9</sup> Traffickers enslave men on Thai fishing trawlers, making them work for months in dangerous and violent conditions without pay.<sup>10</sup> Young girls are trafficked in brothels in Cambodia; they are given short skirts and numbers and are forced to sleep with dozens of men per day.<sup>11</sup> Indian brick kilns run on the forced labor of victims of all ages, who toil in captivity with no access to medical care or education.<sup>12</sup> But from about 2005 until the present day, there has been a growing recognition that human trafficking occurs every day right here in the United States.<sup>13</sup> For instance, undocumented

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103, 105, *available at* <http://www.foreignaffairs.com/articles/62094/ethan-b-kapstein/the-new-global-slave-trade> ("Whatever the exact number is, it seems almost certain that the modern global slave trade is larger in absolute terms than the Atlantic slave trade in the eighteenth and nineteenth centuries was.").

4. This variation occurs for at least two reasons: (1) it is inherently difficult to collect accurate data on an activity that is clandestine by design; and, (2) definitions of "trafficking" vary; thus, different operational definitions yield different figures. Accordingly, most numbers that get tossed around in the anti-trafficking world should be treated with some skepticism. But at the end of the day, even one person in slavery is a moral outrage meriting a response.

5. *U.N.: 2.4 Million Human Trafficking Victims*, USA TODAY, Apr. 4, 2012, <http://usatoday30.usatoday.com/news/world/story/2012-04-03/human-trafficking-sex-UN/53982026/1>.

6. WALK FREE FOUND., *THE GLOBAL SLAVERY INDEX 1* (2013), *available at* <http://www.globallslaveryindex.org/report/?download>.

7. INT'L LABOUR OFFICE, *ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 13* (2012), *available at* [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_182004.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf).

8. *See, e.g.*, BALES, *supra* note 3, at 8–9; U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (2013) [hereinafter 2013 TIP REPORT].

9. *See generally* 2013 TIP REPORT, *supra* note 8, at 65–403 (country reports on human trafficking).

10. *See generally* ENVTL. JUSTICE FOUND., *SOLD TO THE SEA: HUMAN TRAFFICKING IN THAILAND'S FISHING INDUSTRY* (2013), *available at* [http://ejfoundation.org/sites/default/files/public/Sold\\_to\\_the\\_Sea\\_report\\_lo-res-v2.pdf](http://ejfoundation.org/sites/default/files/public/Sold_to_the_Sea_report_lo-res-v2.pdf).

11. *See, e.g.*, CNN, *CNN Freedom Project: Cambodia Sex Trafficking Victims*, YOUTUBE (Jan. 17, 2014), [http://www.youtube.com/watch?v=C28JgO2\\_LnU](http://www.youtube.com/watch?v=C28JgO2_LnU).

12. *See, e.g.*, *IJM Chennai: Desperate Call from Slave Trapped in Brick Factory Leads to Freedom for 50*, INT'L JUSTICE MISSION (Apr. 29, 2013), <http://www.ijm.org/node/2121>.

13. *See, e.g.*, Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, sec. 2(3)–(4), 119 Stat. 3558, 3558–59; Kathleen A. McKee, "It's 10:00 P.M. Do You Know Where Your Children Are?," 23 REGENT U. L. REV. 311, 320–22 (2011).

Latin American immigrants labor in low-skilled jobs such as farm work, toiling long hours for little pay under debt bondage and threats of deportation.<sup>14</sup> And pimps groom runaway girls in the United States and sell them for both sex on the street and through classified ad websites like Backpage.com.<sup>15</sup> There is increasing awareness in the United States that human trafficking is happening, not just in faraway places, but also right “in [our] own backyard.”<sup>16</sup>

Reliable data on human trafficking in the United States is scarce, but perhaps the best data comes from the National Human Trafficking Resource Center (“NHTRC”), which operates a 24/7, nationwide, multilingual reporting hotline, and collects data on each call it receives.<sup>17</sup> From 2008 to 2012, the NHTRC received reports of 9,298 unique cases of potential human trafficking across the United States, referencing 19,281 potential victims.<sup>18</sup> A breakdown of the discrete cases of suspected human trafficking reported is in Table 1 below.

The U.S. federal government has worked to establish effective anti-trafficking policies for over a decade with modest success.<sup>19</sup> Congress’s efforts at fighting modern-day slavery are catalogued primarily in the Trafficking Victims Protection Act of 2000<sup>20</sup> and its subsequent reauthorizations.<sup>21</sup> Unfortunately, state policy has lagged far behind. Inconsistent and inadequate state anti-trafficking

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14. See, e.g., SHELDON X. ZHANG, LOOKING FOR A HIDDEN POPULATION: TRAFFICKING OF MIGRANT LABORERS IN SAN DIEGO COUNTY 11 (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240223.pdf> (finding that 31% of undocumented Spanish-speaking farm workers in San Diego County have experienced abuse that meets the federal definition of human trafficking).

15. See, e.g., Navideh Forghani, *2 Accused in Arizona Child Prostitution Case Involving 15-year-old Girl*, ABC15 (Oct. 21, 2011), [http://www.abc15.com/dpp/news/region\\_phoenix\\_metro/central\\_phoenix/2-accused-in-arizona-child-prostitution-case-involving-15-year-old-girl](http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/2-accused-in-arizona-child-prostitution-case-involving-15-year-old-girl); see also Letter from National Association of Attorneys General to Samuel Fifer, Counsel for Backpage.com (Aug. 31, 2011) [hereinafter Backpage Letter], available at <http://www.tn.gov/attorneygeneral/cases/backpage/backpageletter.pdf> (outlining problem of trafficking on Backpage.com and citing independent study showing Backpage makes approximately \$22.7 million annually from prostitution ads).

16. DAVID BATSTONE, NOT FOR SALE: THE RETURN OF THE GLOBAL SLAVE TRADE—AND HOW WE CAN FIGHT IT 1–3 (2007).

17. See generally National Human Trafficking Resource Center, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/national-human-trafficking-hotline/the-nhtrc/overview> (last visited Feb. 22, 2014).

18. POLARIS PROJECT, HUMAN TRAFFICKING TRENDS IN THE UNITED STATES: NATIONAL HUMAN TRAFFICKING RESOURCE CENTER 2007–2012 9 (2013), available at <http://www.polarisproject.org/resources/hotline-statistics/human-trafficking-trends-in-the-united-states>.

19. See *infra* notes 67–76 and accompanying text.

20. Trafficking Victims Protection Act, Pub. L. No. 106–386, 114 Stat. 1464 (2000).

21. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–164, 119 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, sec. 2, tit. XII, 127 Stat. 54, 136–60.

laws have resulted in patchwork problems, underenforcement, and backward policing policies, leaving the large majority of trafficking victims in the United States to suffer in the shadows.<sup>22</sup>

A 2013 model state statute aims to change that. The Uniform Act on Prevention of and Remedies for Human Trafficking (“the Uniform Act”)<sup>23</sup> would dramatically improve just about any state’s current anti-trafficking framework, or lack thereof.<sup>24</sup> By increasing and standardizing criminal and financial penalties for traffickers, by ensuring that trafficking victims are not treated as criminals, by providing trafficking survivors with tools to rebuild their lives, and by promoting collaboration among government, non-governmental organizations (“NGOs”), and others, the Uniform Act takes a comprehensive approach to combating human trafficking.<sup>25</sup> State legislatures should adopt the Uniform Act in its complete form as soon as possible, moving toward a day where no qualification will be necessary when describing America as the “Land of the Free.”

This Note proceeds in five parts. Part I outlines the federal legislative anti-trafficking framework, focusing on the Trafficking Victims Protection Act and its reauthorizations. It acknowledges the numerous critiques levied against the federal anti-trafficking framework, but also applauds that framework’s reasonable successes. Part II, in contrast, decries the inadequacies of state anti-trafficking regimes in general, and uses Arizona as a case in point, maintaining that even the state’s new 2014 anti-trafficking law does not go nearly far enough to address exploitation. Part III expositis why federal law and policy is not sufficient to effectively combat human trafficking, and demonstrates that improved state and local efforts are vital to tackling the problem. Part IV provides a close reading of the Uniform Act and its operative provisions and concludes that it is a solid and comprehensive antidote to feckless state laws. This Note concludes by exhorting Arizona and other states to adopt the Uniform Act immediately and completely.

## I. THE FEDERAL TRAFFICKING VICTIMS PROTECTION ACT AND ITS REAUTHORIZATIONS

In late 2000, Congress passed the first anti-slavery legislation of the contemporary era: the Trafficking Victims Protection Act (“TVPA”).<sup>26</sup> The TVPA came together almost contemporaneously with the similar United Nations’ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

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22. See *infra* Part III; see also 2013 TIP REPORT, *supra* note 8, at 7 (estimating that only 40,000 trafficking victims were identified in preceding year worldwide, out of an estimated 27 million).

23. UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (2013) [hereinafter UNIF. ACT].

24. See 2013 State Ratings on Human Trafficking Laws, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/state-ratings-on-human-trafficking-laws/2013-state-ratings-on-human-trafficking-laws> (last visited Jan. 24, 2014) [hereinafter 2013 Polaris Ratings] (finding only New Jersey and Washington to have fully satisfactory comprehensive anti-trafficking laws across ten categories of analysis).

25. See *infra* Parts V–VI.

26. Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

Women and Children, better known as the Palermo Protocol, which the United States was also heavily involved in creating.<sup>27</sup> The framers of the TVPA and the Palermo Protocol tackled the problem of human trafficking by creating a three-pronged framework known as the “three P’s” approach: *prosecution* of traffickers, *protection* of trafficking victims, and *prevention* of trafficking.<sup>28</sup>

The TVPA defines “severe forms of trafficking in persons” as:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) [labor trafficking, i.e.,] the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>29</sup>

This definition formulated what would become the most used taxonomy of human trafficking, which puts trafficking victims into “three buckets”<sup>30</sup>: (1) victims of labor trafficking; (2) adult victims of sex trafficking; and, (3) minor victims of sex trafficking. Note that while the first two buckets, labor trafficking and adult sex trafficking, require an element of force, fraud, or coercion, the third bucket, minor sex trafficking, does not. In other words, under the federal definition, any minor in commercial sex is a victim of sex trafficking, regardless of whether force, fraud, or coercion is demonstrable.<sup>31</sup>

With the TVPA, Congress intended to lower the high threshold for “coercion” established in *United States v. Kozminski*.<sup>32</sup> There, the Supreme Court held that psychological coercion alone was not enough to underpin a finding of involuntary servitude—only “physical or legal coercion” sufficed.<sup>33</sup> Congress deliberately rejected this holding as it formed the TVPA. The House Conference Report stated:

[18 U.S.C.] Section 1589[, the TVPA provision criminalizing forced labor,] is intended to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their

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27. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, G.A. Res. 57, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202237/v2237.pdf>; see also ANTHONY M. DE STEFANO, THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED 16–45 (2007).

28. See 22 U.S.C. § 7101(b)(24) (2012); DE STEFANO, *supra* note 27, at xix–xx.

29. 22 U.S.C. § 7102(9).

30. Bradley Myles, Exec. Dir. & Chief Exec. Officer, Polaris Project, Keynote Address at The Abolition Conference: Combating Modern Slavery (Tucson, Ariz., Jan. 14, 2012).

31. See 22 U.S.C. § 7102(9)(A), (10).

32. 487 U.S. 931 (1988).

33. *Id.* at 948.

victims without physical violence or injury, or threaten dire consequences by means other than overt violence. Section 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in [United States v.] Kozminski . . . [F]ederal prosecutors will not have to demonstrate physical harm or threats of force against victims.<sup>34</sup>

In addition to § 1589, the TVPA also criminalized sex trafficking as such for the first time.<sup>35</sup> Other notable provisions of the TVPA include a requirement that the State Department publish an annual Trafficking in Persons Report evaluating countries' compliance with "minimum standards for the elimination of human trafficking,"<sup>36</sup> and the creation of special nonimmigrant visas called T and U visas intended for foreign victims of trafficking and other serious crimes in the United States.<sup>37</sup>

Since 2000, Congress has passed four Trafficking Victims Protection Reauthorization Acts ("TVPRAs"): in 2003,<sup>38</sup> 2005,<sup>39</sup> 2008,<sup>40</sup> and 2013.<sup>41</sup> This Note provides only a brief summary of the reauthorizations' highlights.<sup>42</sup> The 2003

34. H.R. CONF. REP. NO. 106-939, at 101 (2000).

35. 18 U.S.C. § 1591 (2012). Of course, conduct substantially similar to sex trafficking was already illegal. *See, e.g.*, White-Slave Traffic Act (Mann Act), Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 *et seq.*). The Mann Act is still used to prosecute many sex traffickers today.

36. 22 U.S.C. § 7107. Countries that fail to meet the minimum standards to combat trafficking and are making no efforts to improve may be subject to U.S. sanctions. *See id.* § 7108; *but see* DEStEFANO, *supra* note 27, at 118–27 (noting that actual imposition of sanctions against failing nations has been both selective and suspiciously well-aligned with nontrafficking-related U.S. foreign policy objectives).

37. *See* 8 U.S.C. § 1101(a)(15)(T)–(U) (2012). At that time, Congress saw human trafficking as a problem almost exclusively affecting foreigners. *See* 22 U.S.C. § 7101(b)(1)–(5), (20) (2012); McKee, *supra* note 13, at 315–17 (noting that the 2000 TVPA and the 2003 TVPRA both reflect this assumption). A T-1 visa is the specific category for victims of trafficking. Visa categories T-2 through T-6 are for relatives of the trafficking victim who qualifies for a T-1 visa. *See* 8 U.S.C. § 1101(a)(15)(T). An in-depth analysis of the TVPA and its provisions is beyond the scope of this Note, but a good deal has already been written about it. *See, e.g.*, DEStEFANO, *supra* note 27, at 44–45; Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2984–85, 2989–93 (2006); McKee, *supra* note 13, at 313–17; 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, 165–75.

38. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

39. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558.

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

41. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 2, tit. XII, 127 Stat. 54, 136–60.

42. Other authors have examined them in more detail. *See, e.g.*, DEStEFANO, *supra* note 27, at 102–08 (discussing the 2003 TVPRA); McKee, *supra* note 13, at 317–24;

TVPRA created a federal civil cause of action for victims to sue their traffickers,<sup>43</sup> added trafficking to the list of crimes chargeable under RICO,<sup>44</sup> and allowed state and local law enforcement agents to provide the supplemental certification recommended for T visa applications in addition to federal law enforcement agents.<sup>45</sup> The 2005 TVPRA is notable as the first significant congressional recognition of the problem of domestic trafficking within the United States.<sup>46</sup> It also authorized grants for state and local law enforcement agencies to better deal with trafficking,<sup>47</sup> and provided funding to shelters for domestic minor sex trafficking victims.<sup>48</sup> The 2008 William Wilberforce TVPRA, named after the storied British abolitionist, expanded protections for T and U visa holders<sup>49</sup> and broadened authority to grant a special “holding-pattern” immigration status called continued presence (“CP”) for which trafficking victims are eligible before they get T visas.<sup>50</sup> The 2008 TVPRA also included new criminal provisions,<sup>51</sup> and ordered the Department of Justice to create a model state anti-trafficking statute, apparently in an effort to nudge state legislatures to improve their anti-trafficking laws to complement the federal anti-trafficking regime.<sup>52</sup>

Finally, the 2013 TVPRA, which was rolled into the reauthorization of the Violence Against Women Act, contained several more new provisions. It urged the President’s Interagency Task Force to Monitor and Combat Trafficking to increase federal efforts to publicize the phone number of the NHTRC reporting hotline and referral hub operated by the NGO Polaris Project.<sup>53</sup> It authorized block grants to combat domestic minor sex trafficking and create shelters.<sup>54</sup> It provided funding for training on human trafficking for local and state law enforcement agents,<sup>55</sup> and advocated that states pass “safe harbor laws”—laws which ensure that prostituted minors are immune from criminal prosecution because they are

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Kristian Bryant Rose, Comment, *Looking for Love in All the Wrong Places: A Call to Reform State Law on Sex Trafficking*, 65 OKLA. L. REV. 303, 335–38 (2013).

43. 18 U.S.C. § 1595 (2012).

44. *Id.* § 1961(1) (defining “racketeering activity” to include acts indictable under 18 U.S.C. §§ 1589–91, the TVPA criminal trafficking provisions).

45. 22 U.S.C. § 7105(b)(1)(E)(iv) (2012).

46. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, sec. 2(3)–(4), 119 Stat. 3558, 3558–59; McKee, *supra* note 13, at 320–22.

47. 42 U.S.C. § 14044c (2012).

48. *Id.* § 14044b.

49. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. 2, sec. 201, 122 Stat. 5044, 5052–55.

50. *Id.*, tit. 2, sec. 205, 122 Stat. 5044, 5060–63.

51. *Id.*, tit. 2, sec. 222, 122 Stat. 5044, 5067–71.

52. *Id.*, tit. 2, sec. 225, 122 Stat. 5044, 5072; *see also infra* Part III.

53. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 2, tit. XII, § 1203, 127 Stat. 54, 138–39; *see also National Human Trafficking Resource Center*, POLARIS PROJECT <http://www.polarisproject.org/what-we-do/national-human-trafficking-hotline/the-nhtrc/overview> (last visited Feb. 22, 2014).

54. Violence Against Women Reauthorization Act of 2013, § 1241, 127 Stat. 54, 149–53.

55. *Id.*, § 1242, 127 Stat. 54, 153–54; *see also infra* Part III.



victims, not criminals.<sup>56</sup> And, with its provisions about interagency cooperation and better trafficking data collection, the 2013 TVPRA helped solidify what then-Secretary of State Hillary Clinton had called for in 2009<sup>57</sup>—partnership: a “fourth P” beyond the “three Ps” framework.<sup>58</sup>

The TVPA and TVPRAs have had their fair share of critics. Many have argued that the TVPA and TVPRAs overly focus on sex trafficking—especially domestic minor sex trafficking—while paying less attention and devoting fewer resources to labor trafficking.<sup>59</sup> This over-focus may be the result of racist, sexist, and classist images of a “perfect” or “ideal” victim, i.e., a 13-year-old white American female sex trafficking victim abducted and chained to a bed, even though most trafficking victims do not fit such a mold.<sup>60</sup> Numerous advocates also decry a framework they say values prosecuting traffickers over protecting victims.<sup>61</sup> The difficult requirement that T visa applicants comply with all reasonable law enforcement requests for assistance in the trafficking investigation<sup>62</sup> is the usual target for such critics—they point to it as a key reason

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56. *Id.*, § 1243, 127 Stat. 54, 154; *see also* Stop Exploitation Through Trafficking Act of 2014, H.R. 3610, 113th Cong. § 2 (as passed by House, May 20, 2014) (giving preferential consideration for federal grants to states with safe harbor laws).

57. *See Four “P’s”: Prevention, Protection, Prosecution, Partnerships*, U.S. DEPT. OF STATE, <http://www.state.gov/j/tip/4p/index.htm> (last visited Jan. 24, 2014).

58. Violence Against Women Reauthorization Act of 2013 § 1202, 127 Stat. 54, 136–38.

59. Indeed, the U.S. government has admitted as much. As just one example, when assessing to what extent the TVPA’s goal of protecting victims in the United States has been realized, the State Department reported that “[e]xisting services for victims are often disproportionately available to female and child survivors of sex trafficking. Shelter and housing for all trafficking victims, especially male and labor trafficking victims, [are] insufficient.” 2013 TIP REPORT, *supra* note 8, at 385. A sex trafficking heavy bias is especially ironic in light of the fact that there are nine labor trafficking victims around the world for every one sex trafficking victim. U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 8 (2010).

60. *See, e.g.*, Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 53 (2009) [hereinafter *Exploitation Nation*] (“[A] story about forced prostitution reaches the mass media, while a story about an agricultural worker in debt peonage does not. Sex sells . . .”); Dina Francesca Haynes, (*Not*) *Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337 (2007); Erin O’Brien, *The Ideal Victim in Trafficking Awareness Campaigns*, in CRIME, JUSTICE AND SOCIAL DEMOCRACY: INTERNATIONAL PERSPECTIVES 315–26 (Kerry Carrington et al. eds., 2012); Robert Uy, *Blinded by Red Lights: Why Trafficking Discourse Should Shift Away From Sex and the “Perfect Victim” Paradigm*, 26 BERKELEY J. GENDER L. & JUST. 204 (2011).

61. *See, e.g.*, Chacón, *supra* note 37, at 3024–27.

62. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa) (2006). Cooperation with law enforcement is often painful, terrifying, and re-traumatizing for victims. *See Exploitation Nation*, *supra* note 60, at 69 (“When the option is to testify or be deported, the trafficked person is re-victimized and doubly coerced.”). Encouragingly, though, the 2008 William Wilberforce TVPRA loosened the law enforcement cooperation requirement by adding an exception for victims too traumatized to assist law enforcement. *See* 8 U.S.C.

why T visa issuances have not yet approached the annual cap of 5,000 visas.<sup>63</sup> Other critics lament a system that assists only those immigrants who have been “exploited enough.”<sup>64</sup> Still others see the fight against sex trafficking as a conservative Christian moral crusade against a sexualized culture in general, which conflates or equates sex trafficking, voluntary prostitution (these critics would call it “sex work”), pornography, and more.<sup>65</sup> And at least one author has argued that the TVPA’s conceptual paradigm of trafficking as a human rights issue has failed to deliver results; instead, trafficking should be conceived of as a labor issue.<sup>66</sup>

Notwithstanding these criticisms, and bearing in mind that there is always room for improvement, the TVPA and TVPRAs have been moderately successful.<sup>67</sup> Although the number of T visas issued has not yet reached the annual cap, it has increased just about every year since the TVPA was passed.<sup>68</sup> The Department of Justice prosecutes more and more traffickers each year,<sup>69</sup> though the volume still represents only a tiny fraction of the trafficking that occurs.<sup>70</sup> Dozens of interagency task forces that target human trafficking have formed in

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§ 1101(a)(15)(T)(i)(III)(bb) (2012). There is also now an exception for minor victims. *See id.* § 1101(a)(15)(T)(i)(III)(cc).

63. *See infra* Chart 1; *see also* 8 U.S.C. § 1184(o)(2) (2012) (establishing annual T visa cap of 5,000).

64. *Exploitation Nation*, *supra* note 60, at 6–7, 43, 51 (“Victims found not to have been ‘exploited enough’ are denied the status of victim and the benefits which attach to that status.”).

65. *E.g.*, DEStEFANO, *supra* note 27, at 108–17 (discussing the tendency of the George W. Bush administration to conflate prostitution and sex trafficking); Chacón, *supra* note 37, at 3027–32 (decrying conflation of trafficking and non-coerced “sex work”); *see generally* Rose, *supra* note 42, at 317–19. Frankly, it is hard not to conclude that at least some anti-trafficking activists are, in fact, on a moral crusade. *See, e.g.*, Cheryl George, *Jailing the Johns: The Issue of Demand in Human Sex Trafficking*, 13 FLA. COASTAL L. REV. 293 (2012) (recommending “prohibiting pornography” and arguing that sexy advertisements, *e.g.*, for liquor, fuel trafficking); *The Defenders’ Pledge*, SHARED HOPE INT’L, <http://sharedhope.org/join-the-cause/become-a-defender/take-action/the-defenders-pledge/> (last visited Jan. 24, 2014) (a pledge, promoted by Evangelical anti-trafficking NGO Shared Hope International, which men can take and promise “not [to] purchase or participate in pornography, prostitution or any form of the commercial sex industry”).

66. Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012). I am highly skeptical of the workability of the labor paradigm Professor Shamir advocates, and maintain that to expect trafficked workers to unionize and assert their own rights is largely fanciful in light of the harsh and often violent reality of the trafficker–victim relationship, and because, in many trafficking sectors, *e.g.*, domestic servitude, there is typically only one victim per trafficker. But Professor Shamir’s article is nevertheless worth reading as an interesting thought experiment.

67. *See, e.g.*, Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J.L. REFORM 447, 477 (2006) (arguing that the TVPA should be the basic model for holistic state anti-trafficking laws).

68. *See infra* Chart 1.

69. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., REPORT ON THE TENTH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT 5–8 (2010), *available at* [http://www.justice.gov/crt/about/crm/trafficking\\_newsletter/tvpaanniversaryreport.pdf](http://www.justice.gov/crt/about/crm/trafficking_newsletter/tvpaanniversaryreport.pdf).

70. *See also* 2013 TIP REPORT, *supra* note 8, at 7 (estimating that only 40,000 trafficking victims out of some 27 million were identified in preceding year worldwide).

cities around the country.<sup>71</sup> The State Department's Trafficking in Persons (TIP) Report and other efforts have noticeably improved protections against trafficking in numerous foreign countries.<sup>72</sup> And the "Know Your Rights" pamphlet<sup>73</sup> distributed by the State Department to certain employment- and education-based visa applicants as required by the 2008 William Wilberforce TVPRA<sup>74</sup> has quickly become a leading source of referrals to the National Human Trafficking Resource Center reporting hotline.<sup>75</sup> A recent report by the President's Interagency Task Force to Monitor and Combat Trafficking in Persons details an impressive array of other anti-trafficking initiatives across seventeen federal agencies.<sup>76</sup> These and other successes of the TVPA regime, however modest, are worth celebrating.

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71. See U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *supra* note 69, at 9–10.

72. See, e.g., DEStEFANO, *supra* note 27, at 121 (citing South Korea's dramatic improvements in anti-trafficking policy between 2001 and 2002 as just one example); Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 271 (2006–07) ("[T]here is no doubt that the TVPA, in general, and the Department of State TIP Reports, in particular, have had small but positive effect on many foreign governments by providing them with financial support and advice to meet the minimum standards set forth in the TVPA.").

73. U.S. DEP'T OF STATE, KNOW YOUR RIGHTS (2008), *available at* <http://travel.state.gov/content/dam/visas/LegalRightsandProtections/English%20Double%20Sided%205-20-2013.pdf>.

74. See 8 U.S.C. § 1375b (2012).

75. See NAT'L HUMAN TRAFFICKING RES. CTR., INCREASING AWARENESS AND ENGAGEMENT: STRENGTHENING THE NATIONAL RESPONSE TO HUMAN TRAFFICKING IN THE U.S. 5 (2012), *available at* [https://na4.salesforce.com/sfc/p/300000006E4S11Sv6mFa.D\\_CB10UueofejFjNL0=](https://na4.salesforce.com/sfc/p/300000006E4S11Sv6mFa.D_CB10UueofejFjNL0=) (showing that the "Know Your Rights" pamphlet accounted for over 14% of all hotline tips in 2011).

76. See *generally* PRESIDENT'S INTERAGENCY TASK FORCE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, PROGRESS IN COMBATING TRAFFICKING IN PERSONS: THE U.S. GOVERNMENT RESPONSE TO MODERN SLAVERY 5–24 (2014), *available at* <http://www.state.gov/documents/organization/224810.pdf>.

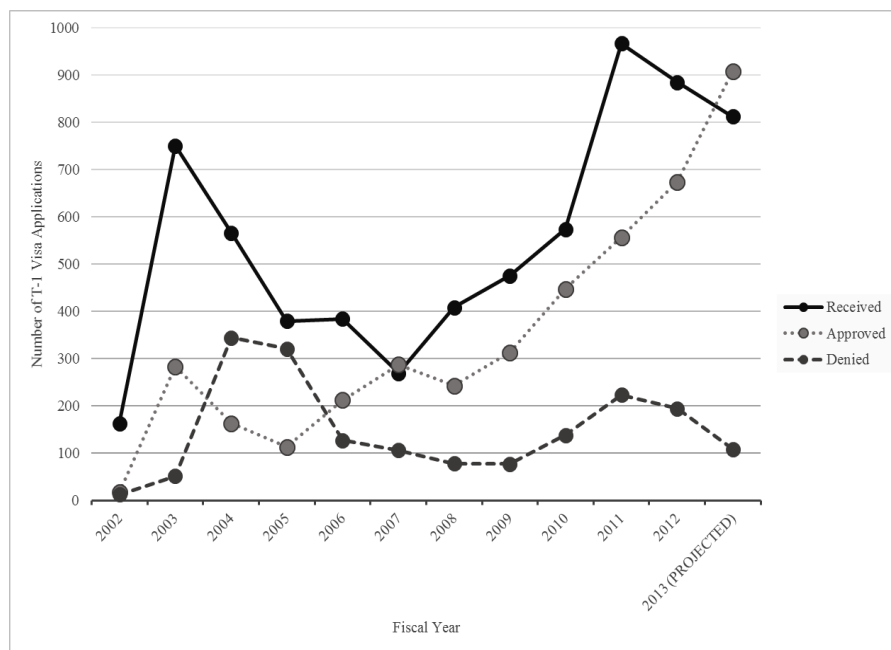


Chart 1: T-1 Nonimmigrant Visa Application by Fiscal Year\*\*

## II. STATE POLICY LAGGING BEHIND

In sharp contrast to the reasonably successful federal anti-trafficking framework, state anti-trafficking laws have been much less comprehensive and satisfactory, at least until very recently.<sup>77</sup> Indeed, it was only in February 2013 that Wyoming became the 50th state to criminalize human trafficking.<sup>78</sup> Even now that all states outlaw trafficking, many still lack basic victim protections and other key elements of a comprehensive anti-trafficking regime.<sup>79</sup>

\*\* Data from U.S. CITIZENSHIP & IMMIGR. SERVS., Form I-914 – Application for T Nonimmigrant Status, Form I-918 – Petition for U Nonimmigrant Status; Receipts, Approvals and Denials; Fiscal Year 2013, Through Third Quarter (October 2012 – June 2013) (Oct. 9, 2013), [http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t-I918u\\_visastatistics\\_fy2013\\_qtr3.pdf](http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I914t-I918u_visastatistics_fy2013_qtr3.pdf).

77. See generally *2011 State Ratings on Human Trafficking Laws*, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/policy-advocacy/national-policy/state-ratings-on-human-trafficking-laws/2011-state-ratings> (last visited Jan. 25, 2014); SHARED HOPE INT'L, PROTECTED INNOCENCE CHALLENGE (2013), available at <http://sharedhope.org/wp-content/uploads/2013/11/ProtectedInnocenceChallenge2013.pdf> (state-by-state report cards on child sex trafficking laws); but cf. 2013 Polaris Ratings, *supra* note 24 (showing improvement in many states).

78. *Wyoming Becomes 50th State to Outlaw Human Trafficking*, POLARIS PROJECT (Feb. 27, 2013), <http://www.polarisproject.org/media-center/news-and-press/press-releases/742-wyoming-becomes-50th-state-to-outlaw-human-trafficking>.

79. See 2013 Polaris Ratings, *supra* note 24; ABA Ctr. for Human Rights, Uniform Law Commission Project Proposal: Uniform Human Trafficking Law 3–9 (2010),

### A. Human Trafficking in Arizona

Unfortunately, Arizona provides a ready case study of the inadequacy of state anti-trafficking regimes to date. Both sex trafficking and labor trafficking are major problems in Arizona.<sup>80</sup> While no reliable estimate of the overall number of trafficked people in Arizona exists, the reports of sex trafficking<sup>81</sup> and labor trafficking<sup>82</sup> that make headlines in Arizona are likely just the tip of the iceberg.

There is serious demand for sex trafficking in Arizona. For instance, about 4.9% of all adult males in Phoenix (over 78,400 men) seek prostitution via online classified ads alone.<sup>83</sup> The story is much the same in Tucson—the Author has spoken to one Tucson police officer who reports that so many “johns” (buyers

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available at [http://www.uniformlaws.org/shared/docs/Human%20Trafficking/PRHT\\_Final%20Report%20v%20\(5\)\\_Jul10.pdf](http://www.uniformlaws.org/shared/docs/Human%20Trafficking/PRHT_Final%20Report%20v%20(5)_Jul10.pdf) (surveying state laws’ inadequacy and proposing Uniform Act creation as solution); *infra* Table 2.

80. See generally GOVERNOR’S TASK FORCE ON HUMAN TRAFFICKING, FINDINGS AND FINAL RECOMMENDATIONS 4–7 (2013) [hereinafter TASK FORCE REPORT], available at [http://www.azgovernor.gov/HTTF/documents/Materials/HTTF\\_092613\\_HTTFReport.pdf](http://www.azgovernor.gov/HTTF/documents/Materials/HTTF_092613_HTTFReport.pdf); LINDA A. SMITH ET AL., DOMESTIC MINOR SEX TRAFFICKING: CHILD SEX SLAVERY IN ARIZONA (2010), available at <http://sharedhope.org/wp-content/uploads/2012/09/ArizonaRA.pdf>; POLARIS PROJECT, NATIONAL HUMAN TRAFFICKING RESOURCE CENTER (NHTRC) DATA BREAKDOWN: ARIZONA STATE REPORT 12/07/2007-9/30/2013 (2013), available at [https://na4.salesforce.com/sfc/p/300000006E4S/a/600000004Tn0/DIjFwxRKB9zXAC3gPDSYR0FVDJkwh\\_1UJxsoE3bEWw=](https://na4.salesforce.com/sfc/p/300000006E4S/a/600000004Tn0/DIjFwxRKB9zXAC3gPDSYR0FVDJkwh_1UJxsoE3bEWw=).

81. E.g., Rikki Mitchell, *TPD Undercover Operation Rescues Juvenile Sex Trafficking Victims*, KGUN9 (May 6, 2014), <http://www.jrn.com/kgun9/news/TPD-undercover-operation-rescues-juvenile-sex-trafficking-victims-258221161.html>; Dennis Wagner, *Phoenix Pimp Draws 15-year Sentence*, AZ CENTRAL (May 10, 2013), <http://www.azcentral.com/community/phoenix/articles/20130510phoenix-pimp-draws-15-year-sentence.html>.

82. E.g., Larry Hendricks, *4 Arrests in Forced Labor Case at Flagstaff Wedding Boutique*, AZ DAILY SUN (July 22, 2011), [http://azdailysun.com/news/local/crime-and-courts/arrests-in-forced-labor-case-at-flagstaff-wedding-boutique/article\\_90ce7e0a-3d56-5021-b81b-14723137b338.html](http://azdailysun.com/news/local/crime-and-courts/arrests-in-forced-labor-case-at-flagstaff-wedding-boutique/article_90ce7e0a-3d56-5021-b81b-14723137b338.html).

83. DOMINIQUE ROE-SEPOWITZ ET AL., INVISIBLE OFFENDERS: A STUDY ESTIMATING ONLINE SEX CUSTOMERS 11–13 & tbls. 1–3 (2013), available at <https://copp.asu.edu/college-news/research-docs/invisible-offenders-a-study-estimating-online-sex-customers>; accord MEREDITH DANK ET AL., ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES (2014), available at <http://www.urban.org/UploadedPDF/413047-Underground-Commercial-Sex-Economy.pdf> (exhaustive multi-year study examining demand for commercial sex in other major cities). Although not all of these men will end up paying for sex with trafficking victims as opposed to self-identified “voluntary” prostitutes, the demand for trafficked people and “voluntary” prostitutes is largely interchangeable. See, e.g., Seo-Young Cho et al., *Does Legalized Prostitution Increase Human Trafficking?*, 41 WORLD DEV. 67, 69, 75–76 (2013) (discussing substitution effects from trafficked people to voluntary prostitutes when prostitution is legalized); but see *infra* note 298 (undermining the conclusion that prostitution should thus be legalized).

of sex) are responding to online prostitution ads in the city that police officers can barely get a sting operation in edgewise.<sup>84</sup>

To meet this demand for commercial sex, traffickers are constantly generating a new “supply” of trafficked people—often very young girls. Sadly, the average age of entry into prostitution in Arizona is 14.74 years.<sup>85</sup> And commercial sex in Arizona does not only happen on the street or online, either. For example, 42 of the 112 massage parlors in Mesa, or 37.5%, provide sexual services, leading an expert to estimate that between 169 and 252 women are sex-trafficked in Mesa massage parlors alone.<sup>86</sup>

Concrete data on labor trafficking in Arizona is virtually nonexistent, but what little evidence there is suggests that it too is a fast-growing problem. The Phoenix-based Arizona League to End Regional Trafficking (“ALERT”), which assists foreign victims of human trafficking, has seen its caseload skyrocket in the last couple of years: ALERT served as many clients from 2012 through April of 2014 as it had for the entire decade from 2003 to 2012.<sup>87</sup> About 75% of ALERT’s clients have been trafficked for labor only, about 20% have been trafficked for both labor and sex, and only about 5% have been trafficked exclusively for sex.<sup>88</sup>

### ***B. Human Trafficking Law and Policy in Arizona***

Even as other states made real progress in their anti-trafficking efforts,<sup>89</sup> the Arizona legislature showed little interest in improving the state’s often-backwards laws, at least until very recently. Indeed, some lawmakers actively blocked such progress.<sup>90</sup> Although Arizona took steps to outlaw human trafficking

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84. Interview with Anonymous Police Officer, Tucson Police Department, in Tucson, Ariz. (Feb. 28, 2014).

85. CANDACE LEW, SEX TRAFFICKING OF DOMESTIC MINORS IN PHOENIX, ARIZONA: A RESEARCH PROJECT 3 (2012), *available at* <http://nebula.wsimg.com/55b27a351b8a32862b196355f35e8f96?AccessKeyId=B7F744EA294B7224FE18&disposition=0&alloworigin=1>.

86. Charles M. Katz, Professor, Ariz. State Univ., Presentation to Governor’s Task Force on Human Trafficking: Responding to Sex Trafficking in Arizona (Sept. 4, 2013), *available at* [http://www.azgovernor.gov/HTTF/documents/Materials/HTTF\\_090413\\_ASU.pdf](http://www.azgovernor.gov/HTTF/documents/Materials/HTTF_090413_ASU.pdf).

87. Email from Reem Constantine, Anti-trafficking Case Manager and Training Coordinator, Ariz. League to End Reg’l Trafficking, to Author (Apr. 11, 2014, 15:16 MST) (on file with Author).

88. *Id.*

89. See 2013 Polaris Ratings, *supra* note 24 (showing improvement in many states).

90. See Cindy McCain, Op-Ed., *McCain: State Must Combat Human Trafficking*, AZ CENTRAL (Mar. 15, 2013), <http://www.azcentral.com/opinions/articles/20130313mccain-state-must-combat-human-trafficking.html> (recounting how Arizona House Judiciary Committee Chairman Eddie Farnsworth singlehandedly killed H.B. 2569, a 2013 effort to close the “age loophole” in Arizona’s child prostitution law). Ironically, less than one year later, Farnsworth changed his tune and became the sponsor of a multifaceted anti-trafficking bill—presumably as penance after his 2013 opposition led to public outrage. See *id.*; see also H.B. 2454, 51st Leg., 2d Sess. (Ariz. 2014).

as early as 2005,<sup>91</sup> by mid-2013 it had made no headway in other key areas such as enacting a safe harbor law, or closing the infamous “age loophole,”<sup>92</sup> through which johns of victims ages 15–17 years old would get far lower sentences than those soliciting victims ages 14 and under.<sup>93</sup> And Arizona trafficking victims were, and still are, misidentified and treated like criminals in the absence of a comprehensive victim-protection regime.<sup>94</sup> Not surprisingly, Arizona received consistently poor ratings in two prominent annual NGO reports on state anti-trafficking laws: Arizona tied for third-worst anti-trafficking regime among all 50 states in the 2013 Polaris Project ratings,<sup>95</sup> which broadly examine anti-trafficking laws across 10 categories of analysis, and Arizona got its third straight “C” grade in Shared Hope International’s 2013 state-by-state report cards on child sex trafficking laws.<sup>96</sup>

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91. 2005 Ariz. Legis. Serv. Ch. 2 § 2 (S.B. 1372) (West) (codified as amended at ARIZ. REV. STAT. §§ 13-1306 to -1309). However, as of April 11, 2014, not one of these Arizona criminal trafficking provisions shows a single Note of Decision in WestlawNext, inspiring little confidence that they are being widely enforced and prosecuted in practice.

92. See generally Pei Li, *Advocates: Fix ‘age loophole’ in Arizona’s child prostitution law*, ARIZ. DAILY STAR (Oct. 14, 2013), [http://azstarnet.com/news/state-and-regional/advocates-fix-age-loophole-in-arizona-s-child-prostitution-law/article\\_bf702593-d5ee-54b6-ba39-c27c7feac104.html](http://azstarnet.com/news/state-and-regional/advocates-fix-age-loophole-in-arizona-s-child-prostitution-law/article_bf702593-d5ee-54b6-ba39-c27c7feac104.html).

93. Compare ARIZ. REV. STAT. § 13-3212(B)(1), (F) (2013), and § 13-705(C) (2013) (imposing a 20-year presumptive sentence for first offense for johns of victims ages 14 and under), with § 13-3212(B)(2), (G) (2013) (imposing a 10.5-year presumptive sentence for first offense for johns of 15-to-18-year-old victims). Such a distinction flies in the face of reason, especially since in similar contexts, such as statutory rape, no minor can consent to sex. See also Rebecca Carroll Sager, Note, *An Anomaly of the Law: Insufficient State Laws Fail to Protect Minor Victims of Sex Trafficking*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 359, 363–65 (2012).

94. See, e.g., Megan Cassidy, *Study points to problems in aiding sex-traffick [sic] victims*, AZ CENTRAL (May 27, 2014, 8:58 PM), <http://www.azcentral.com/story/news/arizona/2014/05/27/study-points-problems-aiding-sex-traffick-victims/9655135/> (discussing recent Arizona State University study finding 161 minor sex trafficking victims in Arizona juvenile justice system, over 80% of whom had also been involved with Child Protective Services); Beth Jacobs, Op-Ed., *Former sex slave: Arizona can do more to stop abuse*, AZ CENTRAL (Jan. 22, 2014), <http://www.azcentral.com/opinions/articles/20140122-human-trafficking-victims-not-criminals-jacobs.html> (discussing barriers to employment a survivor faces because she cannot vacate wrongful prostitution convictions incurred while a minor sex trafficking victim).

95. 2013 Polaris Ratings, *supra* note 24; see also James L. Dold, *Strengthening Legal Responses to Human Trafficking in Arizona*, <http://nebula.wsimg.com/e6bd7f41a6497e1d21a6f98b3b7641a8?AccessKeyId=B7F744EA294B7224FE18&disposition=0&alloworigin=1> (last visited May 14, 2014) (presentation by Polaris Project Senior Policy Counsel on specific inadequacies in Arizona’s laws as of early 2013).

96. *Protected Innocence Challenge: Arizona Report Card 2013*, SHARED HOPE INT’L, [http://sharedhope.org/PICframe3/reportcards/PIC\\_RC\\_2013\\_AZ.pdf](http://sharedhope.org/PICframe3/reportcards/PIC_RC_2013_AZ.pdf) (last visited Apr. 11, 2014).

Spotty laws have not been the only problem in Arizona. As in many states,<sup>97</sup> inadequate law enforcement training has also been a substantial obstacle.<sup>98</sup> Nowhere is this more starkly apparent than in the following statistic: between 2005 and 2009, at least 136 child sex trafficking victims were arrested as criminals in Arizona.<sup>99</sup> Sadly, this is consistent with state and local law enforcement across the United States. In 2011 alone, state and local law enforcement nationwide reported to the Federal Bureau of Investigation that they had arrested 190 males and 581 females under age eighteen for prostitution and commercialized vice.<sup>100</sup> These numbers should be zero.<sup>101</sup> There simply is no such thing as a “child prostitute”—there is only a prostituted child.<sup>102</sup> A minor cannot consent to sex as a matter of law; ergo a minor cannot commit the crime of prostitution as a matter of law; ergo no minor should ever be arrested for the crime of prostitution.<sup>103</sup> Not only is arresting a minor for prostitution terrible policy and contrary to law; it may also be unconstitutional—preempted by the federal TVPA regime and its central purpose of protecting trafficking victims.<sup>104</sup>

### *C. The Governor’s Task Force and H.B. 2454: Encouraging, But Still Inadequate*

In April 2013, after years of legislative inaction, Arizona Governor Jan Brewer issued an executive order creating a temporary task force assigned to review Arizona human trafficking laws and regulations and provide recommendations for reform.<sup>105</sup> After six meetings featuring testimony from local and national trafficking experts and victim service providers,<sup>106</sup> the task force

97. See Kelly Heinrich & Kavitha Sreeharsha, *The State of State Human-Trafficking Laws*, 52 No. 1 JUDGES’ J. 28, 29–30 (2013) (pointing out that mere passage of a state anti-trafficking law is futile if investigators and prosecutors do not use it).

98. There is currently no Arizona law mandating law enforcement training on human trafficking—just one of many shortcomings that would be remedied if Arizona passed the Uniform Act. See UNIF. ACT, *supra* note 23, § 19(c)(5).

99. SMITH ET AL., *supra* note 80, at i.

100. 2013 TIP REPORT, *supra* note 8, at 385.

101. See Heinrich & Sreeharsha, *supra* note 97, at 30 (“Training is at the root of [trafficking victim] identification.”).

102. See Malika Saada Saar, Op-ed, *There is no such thing as a child prostitute*, WASH. POST, Feb. 17, 2014, [http://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03\\_story.html](http://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03_story.html).

103. See *In re B.W.*, 313 S.W.3d 818, 822 (Tex. 2010) (“Because a thirteen-year-old child cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute . . .”); see also Sager, *supra* note 93.

104. See Susan Crile, Comment, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783 *passim* (2012) (arguing that state laws allowing prosecution of minors for prostitution frustrate a central victim-protection purpose of the federal TVPA framework, and are thus preempted).

105. Ariz. Exec. Order No. 2013-04 (Apr. 8, 2013), available at [http://www.azgovernor.gov/HTTF/documents/ExecutiveOrder\\_2013-04.pdf](http://www.azgovernor.gov/HTTF/documents/ExecutiveOrder_2013-04.pdf).

106. Agendas, minutes, and handouts for all six meetings are available at <http://www.azgovernor.gov/HTTF/Agendas.asp>. One notable presenter, at the September 4,



issued its recommendations in September 2013.<sup>107</sup> Most relevant to the purposes of this Note is the task force's recommendation that Arizona should consider adopting the Uniform Act on Prevention of and Remedies for Human Trafficking.<sup>108</sup> Many more of the task force's particular recommendations, such as enhanced penalties against johns, a civil cause of action victims could use to sue their traffickers, a measure allowing victims to have their low-level criminal records vacated, and more, could be realized in one fell swoop if Arizona were to adopt the Uniform Act.<sup>109</sup>

The task force's recommendations are a step in the right direction for Arizona, but still show a troublingly incomplete understanding of the true scope and character of human trafficking in Arizona.<sup>110</sup> The report virtually ignores labor trafficking (it tellingly suggests use of the term "forced sexual servitude" in public awareness campaigns "in order to help define the issue of human trafficking").<sup>111</sup> Also, through advocating "a zero tolerance policy toward human trafficking, especially with regard to the sex trafficking of minors,"<sup>112</sup> the report treats domestic minor sex trafficking as an especially terrible type of trafficking that should be of more pressing concern than other types. One cannot help but wonder why the state should have any less of a zero-tolerance policy with regard to sex trafficking of adults or labor trafficking.

But, all critiques aside, the release of the task force's report was one of the most promising moments in more than a decade of Arizona anti-trafficking advocacy. The report's recommendations, while not perfect, would indeed vastly improve upon current Arizona anti-trafficking policy.

In response to the task force's recommendations, in early 2014 the Arizona Legislature passed its first anti-trafficking bill in almost a decade: H.B. 2454.<sup>113</sup> The new law included some positive changes. It created an affirmative

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2013 meeting, was Steve Wilborn, Chair of the ULC's Committee on Prevention of and Remedies for Human Trafficking which drafted the Uniform Act discussed below.

107. TASK FORCE REPORT, *supra* note 80. At least one recommendation—the establishment of an ongoing state anti-trafficking council, *id.* at 8—was already implemented by a recent executive order. See Ariz. Exec. Order No. 2014-05 (Mar. 19, 2014), available at [http://azgovernor.gov/dms/upload/EO\\_2014-05.pdf](http://azgovernor.gov/dms/upload/EO_2014-05.pdf).

108. TASK FORCE REPORT, *supra* note 80, at 9.

109. Compare *id.* at 8–10 (identifying numerous missing pieces in Arizona anti-trafficking law, e.g., no civil cause of action against traffickers, no safe harbor law, no vacatur provision, etc.), with UNIF. ACT, *supra* note 23 (providing ready-made statutory fixes for these and other problems); see also *infra* Part IV (analyzing provisions of the Uniform Act).

110. For instance, the report concludes that "the vast majority of victims and perpetrators in Arizona are American." TASK FORCE REPORT, *supra* note 80, at 4. While it is likely true that the majority of sex trafficking victims are American, the report's near-total failure to examine labor trafficking at all helps explain how they might reach such a conclusion. The vast majority of labor trafficking victims in Arizona are likely foreign, and labor trafficking victims are thought to outnumber sex trafficking victims nine to one globally.

111. *Id.* at 9.

112. *Id.*

113. 2014 Ariz. Legis. Serv. Ch. \_\_\_\_ (H.B. 2454) (West).

defense to a charge of prostitution that the defendant is a victim of sex trafficking,<sup>114</sup> it established a state human trafficking victim assistance fund (though a rather flimsy one),<sup>115</sup> and it made human trafficking prosecutable as racketeering.<sup>116</sup> It also finally closed Arizona's "age loophole" by raising penalties for johns of child sex trafficking victims who "[knew] or should have known" the victim was a minor.<sup>117</sup> These are all encouraging steps.

But H.B. 2454 did not go far enough. Key elements of a comprehensive anti-trafficking regime remain elusive, even after the new law. For instance, Arizona lacks a provision allowing trafficking survivors to expunge, much less vacate, their wrongful criminal records.<sup>118</sup> There is still no statutory civil remedy for victims to sue their traffickers.<sup>119</sup> And minor sex trafficking victims are still at risk of unjust prosecutions in the absence of a safe harbor law in the state.<sup>120</sup> As the remainder of this Note will demonstrate, the quickest way to fix these and other gaping holes, just as the task force suggested, would be for the Arizona Legislature to adopt the Uniform Act.<sup>121</sup>

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114. *Id.* § 8.

115. *Id.* § 14. Fines from individuals who fail to display massage therapy and escort license numbers in ads for escort or massage services provide the revenue for this fund. *Id.* §§ 1, 12–14. These provisions are aimed at pimps posting sex ads, thinly veiled as "massage" or "escort" services ads, on websites like Backpage.com. Unless police are successful in vigorously enforcing these licensing requirements and collecting fines from these pimps, (or perhaps from Phoenix-based Backpage.com itself), then the victim assistance fund will be rather threadbare. The better approach would be to fund victim services through establishment of a "john school," following the lead of Portland, Oregon, and elsewhere. *See, e.g.*, Abbey Gibb, *Inside Portland's "john school,"* KGW (May 23, 2013), <http://www.kgw.com/news/Exclusive-Inside-Portlands-school-for-johns-208611971.html> (describing diversion program for johns that not only reduces recidivism by 30%, but also funds victim assistance and police vice operations with the \$1,000 program fee).

116. 2014 Ariz. Legis. Serv. Ch. \_\_\_ § 3. This is the only section of H.B. 2454 that even acknowledges the existence of labor trafficking.

117. *Id.* § 7.

118. As of this writing, the best that Arizona survivors can hope for is a set-aside of a nondangerous offense under ARIZ. REV. STAT. ANN. § 13-907 (2010 & Supp. 2013). But convictions still appear on one's record even after they have been set aside under this statute, and must still be reported if asked in certain circumstances. Stephanie Richard & Sara Von Hofwegen, Staff Attorneys, Coalition to Abolish Slavery and Trafficking (CAST), Continuing Legal Education Training: Human Trafficking 101: A Practical Guide for Attorneys Serving US and Foreign National Clients 176–82 (Apr. 25–26, 2014) (on file with Author). In light of this, set aside is a hollow remedy for many survivors, whose biggest concern is often getting their wrongful convictions off their record so potential employers will not see them during a background check. *See Jacobs, supra* note 94 (child sex trafficking survivor must still report her wrongful out-of-state prostitution convictions—including from when she was a minor—to potential Arizona employers over 30 years later).

119. 18 U.S.C. § 1595 (2012) is the federal equivalent.

120. The Supreme Court of Texas recently held, "[b]ecause a thirteen-year-old child cannot consent to sex as a matter of law, we conclude [the minor defendant] cannot be prosecuted as a prostitute under section 43.02 of the Penal Code." *In re B.W.*, 313 S.W.3d 818, 822 (Tex. 2010) (citations omitted). Arizona has no such protection as of this writing.

121. *See infra* Part III.

### III. WHY THE WAR AGAINST TRAFFICKING WILL BE WON OR LOST AT THE STATE LEVEL

The federal government wants state and local authorities to be more involved partners in the fight against human trafficking.<sup>122</sup> For instance, the 2005 TVPRA created a federal grant program to assist state, local, tribal, and nonprofit entities working with trafficking survivors.<sup>123</sup> In the 2008 William Wilberforce TVPRA, Congress ordered the Department of Justice to promulgate a model state anti-trafficking statute in hopes of improving state and local enforcement,<sup>124</sup> and called on the Attorney General and the Secretary of Health and Human Services to provide trafficking victim identification training to state and local officials.<sup>125</sup> More recently, the 2013 TVPRA expanded the 2005 TVPRA's block grant programs, reauthorized local law enforcement grants for investigation and prosecution of trafficking, and ordered the Department of Justice to add a safe harbor provision to its model state anti-trafficking statute.<sup>126</sup> And in May 2014, the U.S. House of Representatives unanimously passed a bill that, if enacted, would incentivize states to pass safe harbor laws by giving states with such laws preferential consideration for law enforcement grants.<sup>127</sup>

Although the federal government is a key player in the war on human trafficking, ultimately this war will be won or lost at the state and local levels.<sup>128</sup> This is true for at least three reasons. First, human trafficking is largely a mobile market,<sup>129</sup> and inconsistent state laws create significant patchwork problems.<sup>130</sup>

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122. See *infra* notes 123–127 and accompanying text; see also McKee, *supra* note 13, at 324–26 (discussing why state anti-trafficking efforts are critical notwithstanding federal efforts).

123. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 202, 119 Stat. 3558, 3569–70.

124. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. 2, § 225, 122 Stat. 5044, 5072. The result is the MODEL STATE CRIMINAL PROVISIONS ON PIMPING, PANDERING, AND PROSTITUTION (U.S. Dept. of Just. 2011), available at <http://www.justice.gov/olp/model-state-criminal-provisions.html>.

125. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. 2, § 212(b), 122 Stat. 5044, 5064.

126. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1241-43, 127 Stat. 54, 149–54.

127. Stop Exploitation Through Trafficking Act of 2014, H.R. 3610, 113th Cong. § 2 (as passed by House, May 20, 2014). The Senate has yet to consider the bill as of this writing.

128. See, e.g., Daniel Tichenor, *The Politics of Modern Slavery in America: Advocacy Groups and Human Trafficking Reform*, in MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING 43 (2007) (“The imperatives driving the pursuit of state-level trafficking legislation are largely about the distribution of resources: prosecutions of traffickers and victim identification depend heavily on the mobilization of state and local law enforcement.”); see also ABA Ctr. for Human Rights, *supra* note 79, at 2 (proposing a uniform state anti-trafficking law as a solution).

129. Sex trafficking is the most-cited example—frequently, victims are moved from city to city on an interstate circuit. Arizona anti-trafficking service providers and Phoenix police officers have noted such a mobile sex trafficking market among cities such as Phoenix, Tucson, Los Angeles, Las Vegas, and Houston. Labor trafficking can also be a

Traffickers, who can be aptly conceived of as rational businesspeople,<sup>131</sup> will gravitate toward those states or municipalities with the most lax trafficking laws, i.e., the lowest costs of doing business.<sup>132</sup> Anecdotal evidence within Arizona suggests that this is already occurring.<sup>133</sup> Second, because they have smaller jurisdictions to cover and are more intimately familiar with the day-to-day pulse of the communities they serve, state and local law enforcement agents are more likely to come into contact with victims of human trafficking than federal agents.<sup>134</sup> As Kathleen McKee has observed, “[b]ecause of the local nature of law enforcement, the systems that are most likely to have some level of interaction with trafficked [people] are the juvenile justice system, the social service system, the health care system, and the public education system. These institutions are creatures of the state legislature.”<sup>135</sup> And third, there is simply too much human trafficking going

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mobile market, e.g., farm laborers trafficked along the seasonal agricultural circuit. Some forms of trafficking may be less mobile, however, e.g., domestic servitude.

130. ABA Ctr. for Human Rights, *supra* note 79, at 2.

131. See Siddharth Kara, *Designing More Effective Laws Against Human Trafficking*, 9 NW. U. J. INT’L HUM. RTS. 123, 138–43, app. (2011) (analyzing the low-risk, high-reward economics of sex trafficking to show that traffickers are economically rational criminal entrepreneurs, and creating actual balance sheets of theoretical sex traffickers to illustrate their business model); see also INT’L LABOUR OFFICE, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 13, tbl. 2.1 (2014) (estimating total annual profits from human trafficking to be \$150.2 billion—\$99 billion from sex trafficking and \$51.2 billion from forced labor).

132. Other writers have noted the same phenomenon. *E.g.*, McKee, *supra* note 13, at 326 (“[I]t is apparent that traffickers look for states with more lenient laws.”).

133. I spoke to one Arizona sex trafficking survivor who now does outreach to prostituted people in Tucson, and she reports that Phoenix-based prostituted people are starting to come down to Tucson for work. This is, in part, because Phoenix police are among the nation’s most effective at combating sex trafficking, so these individuals know they are more likely to get caught prostituting in Phoenix than they are in Tucson. The co-director of Cactus Counseling, which runs the City of Tucson’s prostitution diversion program, corroborates this story, reporting that more than half of the prostituted people in the court-ordered diversion program are from Phoenix. Interview with Matthew Lenertz, Co-owner and Clinical Director, Cactus Counseling, in Tucson, Ariz. (Feb. 28, 2014).

134. Jim Finckenauer & Min Liu, *State Law and Human Trafficking*, in MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING 7 (2007) (noting that local police are more likely to come across trafficking cases than either federal or state authorities); Stephanie L. Mariconda, Note, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151, 174–77, n.204 (2009) (calling the TVPA “top-heavy” because high-level officials are best equipped to identify trafficking victims but are the least likely to actually come into contact with them); McKee, *supra* note 13, at 325 (same); see also App. A, in MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING 59 (2007) (“‘I tell law enforcement officers that they will never respond to a “call” on human trafficking,’ [New Jersey Statewide Human Trafficking Task Force founder Linda] Rinaldi said. ‘The call will be about domestic violence, sexual assault, or something odd and not directly related.’”).

135. McKee, *supra* note 13, at 325; see also *Study finds trafficking victims in Arizona courts*, AZ CENTRAL (May 26, 2013, 10:39 A.M.), <http://www.azcentral.com/story/news/local/phoenix/2014/05/26/study-finds-trafficking-victims-in-arizona-courts/9597873/> (discussing study finding 161 child sex trafficking victims in Arizona juvenile court system).

on in the United States for the federal government to handle it alone.<sup>136</sup> State and local anti-trafficking laws will encourage local law enforcement to look for and find trafficking, and will “provide the option of local jurisdiction where necessary or desirable.”<sup>137</sup> More prosecutions at the state and local levels would mean more convictions and greater overall deterrence.<sup>138</sup>

#### IV. THE UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING: A CLOSE-READ

In light of the foregoing, broad consensus has emerged in the anti-trafficking community that improving state anti-trafficking policy is the most pressing challenge in the fight against human trafficking in the United States. Several NGOs have reviewed and graded state human trafficking laws in hopes that “naming and shaming” could spur reform in laggard states,<sup>139</sup> an approach that has had some success in the international context.<sup>140</sup> Numerous groups have also proposed model state anti-trafficking statutes,<sup>141</sup> though none have gained widespread traction.

In July 2010, the American Bar Association (“ABA”) Center for Human Rights, LexisNexis, and Reed Elsevier proposed that the National Conference of

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136. Finckenauer & Liu, *supra* note 134, at 7 (2007); McKee, *supra* note 13, at 324–25; DOMINIQUE ROE-SEPOWITZ ET AL., EXPLORING SEX TRAFFICKING AND PROSTITUTION DEMAND DURING THE SUPER BOWL 4 (2014), available at <http://ssw.asu.edu/research/stir/exploring-sex-trafficking-and-prostitution-demand-during-the-super-bowl-2014> (“The sheer volume of illicit activity and potential for minor victims overwhelms the capacity of any single law enforcement agency to respond in a way that would discourage traffickers. . . . [A]ny solutions to the issue will require a multifaceted and multijurisdictional approach.”).

137. ABA Ctr. for Human Rights, *supra* note 79, at 2.

138. Mariconda, *supra* note 134, at 176, n.209 (2009); see Kara, *supra* note 131, at 142–43 (noting that even stringent penalties against trafficking have a real deterrent effect only when they are coupled with a significant possibility of getting caught); see also DANK ET AL., *supra* note 83, at 3 (finding that pimps generally believe human trafficking to be less risky than drug trafficking or other crimes).

139. See, e.g., 2013 Polaris Ratings, *supra* note 24; SHARED HOPE INT’L, *supra* note 77; *State Laws/Map of the United States*, CTR. FOR WOMEN POLICY STUDIES, [http://www.centerwomenpolicy.org/programs/trafficking/map/default\\_flash.asp](http://www.centerwomenpolicy.org/programs/trafficking/map/default_flash.asp) (last visited Jan. 25, 2014).

140. See *supra* note 72 and accompanying text (discussing the federal government’s international name-and-shame scheme under the TVPA that has in fact precipitated foreign anti-trafficking reform).

141. See, e.g., *Resource Guide for State Legislators: Model Provisions for State Anti-trafficking Laws*, CTR. FOR WOMEN POLICY STUDIES (2005), <http://www.centerwomenpolicy.org/pdfs/TraffickingResourceGuide.pdf>; GLOBAL RIGHTS, STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING (2005), available at [http://www.globalrights.org/site/DocServer/StateModelLaw\\_9.05.pdf?docID=3123](http://www.globalrights.org/site/DocServer/StateModelLaw_9.05.pdf?docID=3123); U.S. DEP’T OF JUSTICE, MODEL STATE CRIMINAL PROVISIONS ON PIMPING, PANDERING, AND PROSTITUTION (2011), available at <http://www.justice.gov/olp/model-state-criminal-provisions.html>; MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING (Polaris Project 2010), available at [http://www.polarisproject.org/storage/documents/Final\\_Comprehensive\\_ModelLaw\\_\\_8\\_2010.pdf](http://www.polarisproject.org/storage/documents/Final_Comprehensive_ModelLaw__8_2010.pdf).

Commissioners on Uniform State Laws (better known as the “Uniform Law Commission”, or “ULC”)<sup>142</sup> write a uniform comprehensive anti-trafficking statute for state legislatures to adopt.<sup>143</sup> The ULC appointed a study committee to consider the project, and that committee unanimously recommended appointing a drafting committee to write what would come to be known as the Uniform Act on Prevention of and Remedies for Human Trafficking.<sup>144</sup> After exhaustive legal research,<sup>145</sup> substantial debate, and several draft versions,<sup>146</sup> the final version of the Uniform Act passed 50-1 on the floor of the ULC, and passed the ABA House of Delegates unanimously.<sup>147</sup>

Examination of the Uniform Act’s specific provisions will help to illuminate its merits and show why states should adopt it.

### A. Statutory Definitions

Perhaps surprisingly, the linchpin of the entire Uniform Act is its definition section.<sup>148</sup> Because these definitions effectively map out the contours of the Uniform Act, it is worth examining the more salient ones in some detail.

#### 1. “Coercion”

First, and most notably, the Uniform Act defines “coercion” very broadly<sup>149</sup>—more broadly even than the TVPA.<sup>150</sup> The drafters of the Uniform Act looked to the TVPA, the Palermo Protocol, and a wide array of state laws and model laws to piece together an expansive coercion structure.<sup>151</sup> Whereas the TVPA conceives of force and fraud as separate alternatives to coercion, the Uniform Act treats force and fraud as only two among many subcategories of

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142. The nonpartisan Uniform Law Commission is famous for composing the Uniform Commercial Code and numerous other uniform laws. *See generally About the ULC*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited June 12, 2014).

143. ABA Ctr. for Human Rights, *supra* note 79, at 1.

144. Memorandum from Michael J. Wilkins, Chair, Study Committee on Prevention of & Remedies for Human Trafficking, to Comm. on Scope & Program 7 (Feb. 1, 2011), *available at* [http://www.uniformlaws.org/shared/docs/human%20trafficking/PRHT\\_Final%20Report%20v\(3\)\\_020111.pdf](http://www.uniformlaws.org/shared/docs/human%20trafficking/PRHT_Final%20Report%20v(3)_020111.pdf).

145. *See* UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (Dec. 2011) (draft) [hereinafter 2011 UNIF. ACT DRAFT], *available at* [http://www.uniformlaws.org/shared/docs/Human%20Trafficking/prht\\_postcmtemtg\\_draft\\_dec11.pdf](http://www.uniformlaws.org/shared/docs/Human%20Trafficking/prht_postcmtemtg_draft_dec11.pdf) (citing a dizzying array of state, federal, and international legal materials).

146. Prior drafts and various other legislative history materials for the Uniform Act are available at <http://www.uniformlaws.org/Committee.aspx?title=Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking>.

147. *See* Steven Seidenberg, *New Approach Is Tougher on Human Trafficking and More Supportive of Victims*, 99 A.B.A. J. 58 (Dec. 2013).

148. *See* UNIF. ACT, *supra* note 23, § 2.

149. *See id.* § 2(3).

150. *Cf.* 22 U.S.C. § 7102(3) (2012).

151. *See* 2011 UNIF. ACT Draft, *supra* note 145, at 7, 14–20 (citing hundreds of source materials the drafters consulted and borrowed from to construct a broad definition of coercion).

coercion.<sup>152</sup> And although the first three subcategories of coercion listed in the Uniform Act closely parallel the TVPA's three-pronged definition of coercion,<sup>153</sup> the Uniform Act goes on to list at least six additional subcategories of coercion beyond those enumerated in the TVPA definition.<sup>154</sup> These extra subcategories reflect some more subtle forms of coercion that victim service providers have often encountered while dealing with human trafficking, such as controlling the victim's access to a controlled substance,<sup>155</sup> exploitation of the victim's physical or mental disability,<sup>156</sup> and confiscation of passports or other documents.<sup>157</sup> "[T]he abuse or threatened abuse of law or legal process" also constitutes coercion under the Uniform Act; the most common example being a wrongful threat of deportation.<sup>158</sup>

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152. Compare 22 U.S.C. § 7102(9) (requiring "force, fraud, or coercion" in the alternative), with UNIF. ACT, *supra* note 23, § 2(3)(A) & (H) (listing "the use or threat of force" and "civil or criminal fraud" among the subcategories of coercion); see also *United States v. Warren*, 772 F.2d 827, 833–34 (11th Cir. 1985) (pre-TVPA case noting that actual or threatened physical force creating a "climate of fear" is "the most grotesque example" of coercion for involuntary servitude).

153. Compare 22 U.S.C. § 7102(3) ("The term 'coercion' means — (A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process."), with UNIF. ACT, *supra* note 23, § 2(3)(A)–(C) ("Coercion' means: (A) the use or threat of force against, abduction of, serious harm to, or physical restraint of an individual; (B) the use of a plan, pattern, or statement with intent to cause an individual to believe that failure to perform an act will result in the use of force against, abduction of, serious harm to, or physical restraint of an individual; [or] (C) the abuse or threatened abuse of law or legal process....").

154. See UNIF. ACT, *supra* note 23, § 2(3)(D)–(H).

155. *Id.* § 2(3)(D); see also *Tackling Trafficking*, COLUMBUS DISPATCH (Sept. 17, 2013), <http://www.dispatch.com/content/stories/editorials/2013/09/17/tackling-trafficking.html> (noting that it is "very common for [prostituted people] to be put into and kept in prostitution by men who physically abuse them and hook them on drugs . . .").

156. UNIF. ACT, *supra* note 23, § 2(3)(G); see also *United States v. Kozminski*, 487 U.S. 931, 948 (1988) (noting that a "victim's age or special vulnerability," e.g., mental disability, may be relevant to determining whether a certain type or degree of coercion is sufficient to hold victim in involuntary servitude); Caroline Black, *Missouri Man Edward Bagley and Four Others Arrested for Torture, Sexual Abuse of Young, Disabled Woman*, CBS NEWS, Sept. 13, 2010, <http://www.cbsnews.com/news/missouri-man-edward-bagley-and-four-others-arrested-for-torture-sexual-abuse-of-young-disabled-woman/>; U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 39* (2012) (discussing disability as a risk factor for human trafficking).

157. UNIF. ACT, *supra* note 23, § 2(3)(E), (7); cf. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1211(c)(1), 127 Stat. 54, 142–43 (codified at 18 U.S.C. § 1597); 18 U.S.C. § 1592 (2012); see also *United States v. Townsend*, 521 F. App'x 904, 906–10 (11th Cir. 2013) (per curiam) (defendant confiscated sex trafficking victim's passport as one way to control her); *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1145–46 (C.D. Cal. 2011) (traffickers' control of victims' passports "restrict[ed] their ability to flee"). Document confiscation usually goes hand-in-hand with threats of deportation.

158. See, e.g., *Nunag-Tanedo*, 790 F. Supp. 2d at 1146; *United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002); see also *Exploitation Nation*, *supra* note 60, at 61 (quoting Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade and the*

The Uniform Act conceptualizes debt bondage as a form of coercion, rather than a result of coercion.<sup>159</sup> Put another way, whereas in the TVPA debt bondage is an end,<sup>160</sup> in the Uniform Act it is a means.<sup>161</sup> This approach better reflects the reality of trafficking. It is hard to imagine a trafficking situation that involves debt bondage (under the TVPA definition<sup>162</sup>) that does not also involve involuntary servitude. Debt bondage has little economic value to a trafficker in and of itself—it is valuable only insofar as it is a means of maintaining a victim’s condition of involuntary servitude, which is the real moneymaker. Debt bondage operates as one tool in a trafficker’s coercive toolkit, used to retain the victim’s involuntary labor or services indefinitely.<sup>163</sup>

The Uniform Act’s definition of debt bondage is substantially similar to that of the TVPA with respect to labor trafficking.<sup>164</sup> But a key difference between the debt bondage definitions appears in the context of sex trafficking. Under the TVPA, if commercial sex acts are the “personal services” the victim provides to pay off the debt, and if the reasonable value of those commercial sex acts is in fact applied toward the debt, and the length of that arrangement is in fact limited and defined, then, theoretically, that would not constitute debt bondage.<sup>165</sup> In contrast, the Uniform Act explicates that any “commercial sexual activity in payment

*Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 64 (2006)) (“[T]he ability to quit at any time is illusory if it means that you will be deported.”).

159. See UNIF. ACT, *supra* note 23, § 2(3)(F), (5); see also UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING 7 (Mar. 29, 2013) (draft), available at [http://www.uniformlaws.org/shared/docs/prevention%20of%20and%20remedies%20for%20human%20trafficking/2013mar29\\_PRHT\\_MtgDraft.pdf](http://www.uniformlaws.org/shared/docs/prevention%20of%20and%20remedies%20for%20human%20trafficking/2013mar29_PRHT_MtgDraft.pdf) (regarding “debt bondage as a means of committing the offense of forced labor”; thus “eliminat[ing] the need for a separate crime of debt bondage”).

160. See 22 U.S.C. § 7102(5), (9)(B) (2012) (trafficker acts for the purpose of ultimately subjecting victim to “involuntary servitude, peonage, *debt bondage*, or slavery” in the alternative) (emphasis added); *infra* Table 3.

161. See UNIF. ACT, *supra* note 23, § 2(3)(F), (5) (listing debt bondage as one of many ideations of “coercion” traffickers use for ultimate end: compelled labor or services or commercial sexual activity).

162. 22 U.S.C. § 7102(5).

163. Indeed, it is one of the oldest tricks in the book for the post-*bellum* slaveholder. See, e.g., DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 90–91 (2008) (noting debt bondage was used as early as the 1880s).

164. The drafters of the Uniform Act clearly looked to the language of the TVPA to define debt bondage in the labor trafficking context. Compare 22 U.S.C. § 7102(5) (“The term ‘debt bondage’ means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”), with UNIF. ACT, *supra* note 23, § 2(5)(B) (“‘Debt bondage’ means inducing an individual to provide . . . labor or services in payment toward or satisfaction of a real or purported debt if: (i) the reasonable value of the labor or services is not applied toward the liquidation of the debt; or (ii) the length of the labor or services is not limited and the nature of the labor or services is not defined.”).

165. See 22 U.S.C. § 7102(5).



toward or satisfaction of a real or purported debt” is debt bondage; that is, coercion.<sup>166</sup>

To illustrate the difference: imagine that a Ukrainian adult woman knowingly consents to being smuggled into the United States—where she knows that she will work as a prostitute in a brothel for one year to pay back a \$20,000 smuggling debt,<sup>167</sup> and then will be free to go. Perhaps she even signs a contract to this effect. Everything goes just as the parties agreed. Was the woman a victim of debt bondage? Under the TVPA, seemingly not—arguably, the value of her “services” was reasonably applied toward the liquidation of her debt, and the length and nature of the “services” was limited and defined.<sup>168</sup> But under the Uniform Act, she clearly would be a victim of coercion in the form of debt bondage, having satisfied a debt through commercial sexual activity.<sup>169</sup> Note that the woman is a victim under the Uniform Act whether or not the woman would self-identify as a victim of human trafficking or conceive of her own experience in those terms.

In broadening the definition of coercion, the drafters of the Uniform Act intended to include more types of conduct under the umbrella of human trafficking.<sup>170</sup> Just as Congress intended to broaden the definition of coercion espoused in *United States v. Kozminski*<sup>171</sup> by passing the TVPA,<sup>172</sup> the ULC intends to go well beyond even the TVPA’s definition with the Uniform Act.<sup>173</sup>

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166. UNIF. ACT, *supra* note 23, § 2(5)(A).

167. Assume for the purposes of this example that \$20,000 is a reasonable profit from one year of prostitution in the United States (a very conservative estimate).

168. See 22 U.S.C. § 7102(5).

169. See UNIF. ACT, *supra* note 23, § 2(5)(A).

170. See 2011 UNIF. ACT Draft, *supra* note 145, at 7 (What would become Section 2 of the Act “includes a definition for ‘coercion’ that contains not only the methods of coercion provided by the TVPA and the [Palermo] Protocol, but additional methods pulled from state statutes and model laws. Because coercion, deception, and fraud are key elements of the crime of human trafficking, they should be broadly interpreted so as to effectively prevent and punish the trafficking and exploitation of people.”); see also *id.* at 14–19 (discussing sources that drafters looked to in formulating the definition of “coercion”).

171. 487 U.S. 931 (1988).

172. See *supra* notes 32–34 and accompanying text (discussing congressional intent to broaden the definition of “coercion” beyond that of earlier case law by enacting TVPA); H.R. CONF. REP. NO. 106-939, at 100–01 (2000) (same); see also 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, 1303 (2011) (noting that whereas *United States v. Kozminski* required physical or legal coercion, the TVPA countenances psychological coercion as well).

173. See 2011 UNIF. ACT Draft, *supra* note 145, at 7–8 (“Because coercion, deception, and fraud are key elements of the crime of human trafficking, they should be broadly interpreted so as to effectively prevent and punish the trafficking and exploitation of people.”).

## 2. “Human Trafficking”

“Human trafficking” under the Uniform Act refers to any violation of §§ 3–7.<sup>174</sup> Notably, this includes not only the crimes of trafficking an individual, sexual servitude, and forced labor,<sup>175</sup> but also patronizing a victim of sexual servitude and patronizing a minor.<sup>176</sup> Simply put, under the Uniform Act, at least some johns are human traffickers; a point discussed further in Part IV.B below.<sup>177</sup>

## 3. “Labor or Services”

Unlike most of the Uniform Act, which broadens the umbrella of conduct constituting human trafficking, the definition of labor or services narrows it somewhat. The Uniform Act defines “labor or services” simply as “activity having economic value.”<sup>178</sup> This is a retreat from the Tenth Circuit Court of Appeals’ 2008 decision in *United States v. Kaufman*.<sup>179</sup> In that case, the court held that compelling severely mentally ill victims to masturbate and shave their genitals on camera as a form of quack “therapy,” although not “work in an economic sense,” nonetheless constituted “labor or services” for purposes of the TVPA.<sup>180</sup> The court favorably cited *United States v. Marcus*, in which a district court looked to the Webster’s Dictionary definitions of “labor” and “services” and found no mention of an economic aspect therein.<sup>181</sup> Under *Kaufman*, “coerced acts other than ‘work in an economic sense’” can constitute labor or services for the purpose of involuntary servitude under the TVPA.<sup>182</sup> This is not so under the Uniform Act.

To illustrate why this limitation matters, imagine that a young noncitizen teenager is coerced into playing amateur football. He is made to practice and play football 60 hours a week, has his passport confiscated, is forced to practice beyond the point of exhaustion by physical violence and threats of deportation, is routinely denied food and water, is never allowed to attend school, and is not free to leave. His trafficker-coach is not making any money off of this arrangement (amateur

174. UNIF. ACT, *supra* note 23, § 2(6).

175. *Id.* §§ 2(6), 3–5.

176. *Id.* §§ 2(6), 6–7.

177. *See id.*; *infra* notes 208–214 and accompanying text (discussing how Uniform Act crystallizes advocates’ efforts to create precedent that johns are “traffickers” under the TVPA framework).

178. UNIF. ACT, *supra* note 23, § 2(8).

179. 546 F.3d 1242 (10th Cir. 2008).

180. *United States v. Kaufman*, 546 F.3d 1242, 1260–63 (10th Cir. 2008).

181. *Id.* at 1262–63 (citing *United States v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007), *vacated on other grounds*, 538 F.3d 97 (2d Cir. 2008), *rev’d on other grounds*, 560 U.S. 258 (2010), *aff’d in part & rev’d in part on other grounds*, 628 F.3d 36 (2d Cir. 2010), *aff’d on other grounds*, 517 F. App’x 8 (2d Cir. 2013), *cert. denied*, 134 S.Ct. 135 (2013)) (referring to Webster’s Dictionary definitions of “labor” as “expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory,” and “services” as “useful labor that does not produce a tangible commodity”).

182. *Id.* at 1263. The court reasoned that “if an antebellum slave was relieved of the responsibility for harvesting cotton, brought into his master’s house, directed to disrobe and then engage in the various acts performed by the [victims] on the videotapes (e.g., masturbation and genital shaving), his or her condition could still be fairly described as one of involuntary servitude and forced labor.” *Id.* at 1262.

sports, by definition, do not involve financial gain). Rather, the trafficker-coach is doing this just because of his obsessive desire to be known in the community as a successful, winning youth football coach.<sup>183</sup> Under the TVPA as expounded in *Kaufman*, this would be labor trafficking. The “labor or services,” i.e. grueling football practice, may not be work in an economic sense, but is nevertheless fatiguing, difficult, and compulsory physical effort.<sup>184</sup> However, under the Uniform Act, this situation is probably not trafficking because the football practice does not have any clear-cut economic value to the trafficker-coach, and thus, cannot be labor or services. Even though the victim’s experience of compelled toil would be identical whether or not the trafficker-coach was making money off of the arrangement, the Uniform Act makes economic value dispositive.

#### 4. “*Serious Harm*”

The Uniform Act borrows the language of the TVPA’s definition of “serious harm” virtually jot for jot.<sup>185</sup> Accordingly, when applied, “serious harm” in the Uniform Act should cover the same scope of conduct it does in the TVPA—both physical and nonphysical harms, viewed through the lens of a reasonable person of the same background as the victim and in the same circumstances as the victim.<sup>186</sup> For example, physical restraint, financial harm, threats of deportation, seizure of immigration documents, and debt bondage have all been found to be serious harms under the TVPA in certain circumstances, just to name a few.<sup>187</sup>

#### 5. “*Commercial Sexual Activity*”

The Act’s definition of “commercial sexual activity” is virtually identical to the definition of a “commercial sex act” in the TVPA.<sup>188</sup> The only real

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183. This hypothetical might sound contrived or artificial, but, believe it or not, it is substantially identical to the real case of a T visa applicant of which the Author has personal knowledge.

184. See *Kaufman*, 546 F.3d at 1262–63 (citing *Marcus*, 487 F. Supp. 2d at 289).

185. Compare 18 U.S.C. § 1589(c)(2) (2012) (“The term ‘serious harm’ means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.”), with UNIF. ACT, *supra* note 23, § 2(12) (“‘Serious harm’ means harm, whether physical or nonphysical, including psychological, economic, or reputational, to an individual which would compel a reasonable individual of the same background and in the same circumstances to perform or continue to perform labor or services or sexual activity to avoid incurring the harm.”).

186. See H.R. CONF. REP. NO. 106-939, at 101 (2000) (“The term ‘serious harm’ as used in [the TVPA] refers to a broad array of harms, including both physical and nonphysical,” and the victim’s “individual circumstances” such as age and background are relevant to an appropriately particularized serious harm analysis).

187. See *United States v. Calimlim*, 538 F.3d 706, 710–11 (7th Cir. 2008); *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1143–46 (C.D. Cal. 2011).

188. Compare 22 U.S.C. § 7102(4) (2012), with UNIF. ACT, *supra* note 23, § 2(4), (13).

difference is that the Uniform Act includes sexual activity<sup>189</sup> on account of which anything of value<sup>190</sup> is “promised to” any person, not just “given to” or “received by” any person.<sup>191</sup> This addition may make sting operations targeting johns somewhat easier in jurisdictions that have adopted the Uniform Act, since the money or other thing of value will not actually need to change hands to assure an eventual conviction—a mere promise is enough.<sup>192</sup>

#### 6. “Victim”

Finally, in a symbolically significant victory for survivors and advocates, the Uniform Act explicitly states that any person subjected to conduct constituting trafficking is a “victim” and not a criminal.<sup>193</sup> This is so whether or not a trafficker is ever identified or prosecuted.<sup>194</sup> For instance, any minor in prostitution is a victim under the Uniform Act, regardless of whether he has a pimp or trafficker, and regardless of whether he self-identifies as a victim or subjectively believes he is prostituting of his own free choice.<sup>195</sup> Under the Uniform Act, he falls under the definition of a victim in need of social services, not a criminal in need of punishment.<sup>196</sup> The same is true of any adult in prostitution involving coercion.<sup>197</sup> With respect to adults and minors alike, this definition has the potential to help

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189. “Sexual activity” is left for the states to define under the Act, by reference to existing state statutes defining it, by listing specific sexual activities, or both. UNIF. ACT, *supra* note 23, § 2(13), legis. n. Either way, the drafters specifically urge inclusion of “sexually-explicit performances” as one category of “sexual activity.” This could include, e.g., stripping, exotic dancing, pornography production, or even selling “Skype sex.” See UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING 4 (Mar. 29, 2013) (draft), available at [http://www.uniformlaws.org/shared/docs/prevention%20of%20and%20remedies%20for%20human%20trafficking/2013mar29\\_PRHT\\_MtgDraft.pdf](http://www.uniformlaws.org/shared/docs/prevention%20of%20and%20remedies%20for%20human%20trafficking/2013mar29_PRHT_MtgDraft.pdf). Though the Uniform Act delineates them as sex trafficking, coerced sexually-explicit performances often seem to blur the line between sex trafficking and labor trafficking. See, e.g., Press Release, Dep’t of Justice, Livonia, Mich., Man Sentenced to 90 Months in Prison and Over \$1 Million in Restitution for Civil Rights Violations (Aug. 17, 2007), available at [http://www.justice.gov/opa/pr/2007/August/07\\_crt\\_634.html](http://www.justice.gov/opa/pr/2007/August/07_crt_634.html) (describing the plight of Eastern European women forced to work as exotic dancers in Detroit-area strip clubs as both “commercial and sexual exploitation” and “involuntary servitude”).

190. E.g., money, drugs, food, a place to stay, etc. The Author learned from an anti-trafficking colleague about a case in which a Subway sandwich was exchanged for sex. That is enough.

191. Compare 22 U.S.C. § 7102(4), with UNIF. ACT, *supra* note 23, § 2(4).

192. See UNIF. ACT, *supra* note 23, § 2(4).

193. *Id.* § 2(15) (“‘Victim’ means an individual who is subjected to human trafficking or to conduct that would have constituted human trafficking had this [act] been in effect when the conduct occurred, regardless of whether a perpetrator is identified, apprehended, prosecuted, or convicted.”).

194. See *id.*

195. See *id.* §§ 2(15), 5(a)(1).

196. See *id.* § 2(15); see also Tanya Mir, Note, *Trick or Treat: Why Minors Engaged in Prostitution Should Be Treated as Victims, Not Criminals*, 51 FAM. CT. REV. 163 (2013).

197. See UNIF. ACT, *supra* note 23, § 2(15); see also *id.* § 2(3) (defining coercion).

dispel longstanding myths, such as the cliché that prostitution is a “victimless crime.”<sup>198</sup>

### *B. Criminal Provisions*

Article II contains the various criminal provisions of the Uniform Act.<sup>199</sup> Sections 3 through 7 define various subcategories of human trafficking.<sup>200</sup> Sections 4 and 5 proscribe the most familiar classes of human trafficking: forced labor and sexual servitude, respectively.<sup>201</sup> Forced labor simply means labor or services knowingly compelled by coercion, as the Uniform Act defines those terms.<sup>202</sup> Interestingly, unlike the TVPA,<sup>203</sup> the Uniform Act differentiates between the forced labor of adults and the forced labor of minors for the purposes of sentencing.<sup>204</sup> As for sexual servitude, one commits the crime by knowingly maintaining or making available a minor for the purpose of engaging the minor in commercial sexual activity, or knowingly using coercion or deception to compel an adult to engage in commercial sexual activity.<sup>205</sup> Notice that, as in the TVPA, no showing of coercion is required when the sex trafficking victim is a minor—any minor engaged in commercial sexual activity is a victim of human trafficking under the Uniform Act.<sup>206</sup> Mistake of age is no defense to sexual servitude of a minor, nor is the consent of the minor.<sup>207</sup>

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198. See generally JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, GRANT NO. 98-WT-VX-0032, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS *passim* (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf> (86% of American women in prostitution reported having been victims of physical violence by traffickers and by johns, 80% reported sexual assault by johns and 70% reported sexual assault by traffickers, 61% reported having weapons used against them, 34% reported that they or their family had been threatened with death, 88% reported psychological abuse, 65% reported being blackmailed with pornography made of them).

199. See UNIF. ACT, *supra* note 23, art. II.

200. *Id.* § 2(6); see also *infra* Table 4.

201. UNIF. ACT, *supra* note 23, §§ 4–5; cf. 18 U.S.C. §§ 1589, 1591 (2012).

202. UNIF. ACT, *supra* note 23, § 4(a); see also *supra* Part IV.A.1 (discussing statutory definitions). The Uniform Act’s definition of forced labor avoids using the word “slavery.” In fact, the word never appears in the Uniform Act at all.

203. See 22 U.S.C. § 7102(9)(B) (2012) (making no mention of victim’s age); 22 U.S.C. § 1589 (2012) (same).

204. UNIF. ACT, *supra* note 23, § 4(b)–(c). The TVPA only makes such a distinction for sex trafficking.

205. *Id.* § 5(a).

206. See *id.*; cf. 22 U.S.C. § 7102(9)(A); see also 18 U.S.C. § 1591(a).

207. UNIF. ACT, *supra* note 23, § 5(b). These provisions in particular are sorely needed in many states. See Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America’s Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 651 (2013) (arguing that mistake of age is no defense to statutory rape charges, and, thus, should be no defense to child sex trafficking charges either, whether for pimps or for johns); see also *United States v. Robinson*, 702 F.3d 22, 34 (2d Cir. 2012) (holding that the TVPA’s criminal sex trafficking statute, as amended by the 2008 Wilberforce TVPRA, imposes strict liability on all pimps who have had a reasonable opportunity to observe the victim, not just those who knew or recklessly disregarded victim’s age).

But the definition of “human trafficking” under the Uniform Act covers a broader range of criminal conduct than it does under the TVPA, as outlined in Tables 3 and 4.<sup>208</sup> For instance, it is not just the pimps and the forced labor taskmasters who are traffickers—in a huge symbolic statement, at least some johns are explicitly “traffickers” under the Uniform Act.<sup>209</sup> The idea that johns can be traffickers under the TVPA has only begun to gain traction within the last year or so,<sup>210</sup> but, in the Uniform Act, it is there plainly from the start. Prosecuting johns as traffickers rightly apportions a large share of the blame for sex trafficking to the johns, without whom sex trafficking “would not prosper or even exist.”<sup>211</sup>

The Uniform Act stops short of calling all johns traffickers. A john is a trafficker only if he patronizes one he knows to be a victim of sexual servitude,<sup>212</sup> or he patronizes any minor.<sup>213</sup> But with a little savvy police work,<sup>214</sup> that could easily be the majority of johns.

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208. As just one example, compare UNIF. ACT, *supra* note 23, § 3(a) (trafficker “recruits, transports, transfers, harbors, receives, provides, obtains, isolates, maintains, or entices an individual”), with 22 U.S.C. § 7102(9)(B) (trafficker “recruit[s], harbor[s], transport[s], provi[des], or obtain[s] . . . a person”). *See also infra* Tables 3 & 4.

209. *See* UNIF. ACT, *supra* note 23, §§ 2(6), 6–7.

210. Advocates have long suggested that johns might also be considered traffickers under the TVPA, because they arguably “obtain[]” a person through force or coercion for the purpose of subjection to involuntary servitude in the form of forced sex. *See* 22 U.S.C. § 7102(9)(B); 18 U.S.C. § 1591. This argument is too rarely invoked, but a 2009 plea by a john to trafficking was an early sign of its potential. *See* News Release, Office of the U.S. Att’y, W.D. Mo., Final Defendant Pleads Guilty to Sex Trafficking of a Child (Dec. 18, 2009), *available at* <http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm> (discussing john’s guilty plea to child sex trafficking charge in *United States v. Mikoloyck*, No. 4:09-CR-00036-GAF (W.D. Mo. Feb. 3, 2009)). More recently, in a landmark decision, the Eighth Circuit held definitively that at least some johns can in fact be traffickers under the TVPA: “[T]he TVPA definition of ‘sex trafficking’ . . . readily includes the actions of a purchaser whose sole purpose is obtaining a child for sex.” *United States v. Jungers*, 702 F.3d 1066, 1072 (8th Cir. 2013). And a 2014 federal bill would explicitly include “patroniz[ing]” or “solicit[ing]” a victim of sex trafficking in the list of processes that can lead to a criminal conviction for sex trafficking under the TVPA, removing any remaining doubt that all johns are “traffickers.” *See* Justice for Victims of Trafficking Act of 2014, H.R. 3530, 113th Cong. § 7 (as passed by House, May 20, 2014). As of this writing, the bill is awaiting Senate action after unanimous passage in the House.

211. George, *supra* note 65, at 295; Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. ST. THOMAS L.J. 28, 38–40 (2008) (citation omitted) (noting that demand for victims is “the driving force of sex trafficking”); *see also infra* note 298 and accompanying text (calling for prostitution reform targeting demand, rather than blanket legalization or criminalization).

212. UNIF. ACT, *supra* note 23, §§ 5–6.

213. *See id.* § 7(a)(2). Patronizing any minor is at least a class c felony regardless of *mens rea*, but if the john intends to engage in commercial sex with a minor and does so, then that is a class b felony. *Id.* § 7(b)–(c).

214. For instance, police can use a variant of the “web-based reverse sting.” *See* MICHAEL SHIVELY ET AL., GRANT NO. 2008-IJ-CX-0010, A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS: FINAL REPORT 47–48 (2012), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf>. First, officers set up a fake online prostitution ad. Then, when a john calls the number in the ad, a female

Finally, a business entity that knowingly engages in human trafficking, or knowingly allows its employees or agents to continue engaging in trafficking for the benefit of the entity, is also subject to penalties under the Uniform Act.<sup>215</sup> Examples of businesses that might fall under this category are strip clubs, massage parlors offering sexual services, foreign labor recruitment agencies, farms, factories, construction companies, hotels, and restaurants, to name just a few.<sup>216</sup> Even classified ad websites such as Backpage.com, which are corporate persons<sup>217</sup> knowingly<sup>218</sup> engaging in conduct that constitutes human trafficking<sup>219</sup> in the form of sexual servitude,<sup>220</sup> may well run afoul of this rule. Under the Uniform Act, businesses that engage in or knowingly condone trafficking can be subject to fines of up to \$1,000,000, and can also face disgorgement of profits and debarment from state contracts.<sup>221</sup>

### C. Financial Penalties

Encouragingly, the Uniform Act hits traffickers where it hurts them the most: their wallets.<sup>222</sup> Section 10 mandates restitution from anyone convicted of

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officer posing as a prostitute sets up a “date” with him over the phone. During the conversation, she asks him to pick up a pack of cigarettes for her on his way over because she “got carded.” Because a person who is too young to buy cigarettes is necessarily a minor, the john now knows she is a minor, and, by extension, a victim of sexual servitude. By continuing to go forward with the deal after that point, the john is manifesting an intent to engage in commercial sexual activity with one whom he knows to be a minor, and ultimately the prosecutor should be able to secure the higher class b felony conviction under section 7(a)(1) of the Uniform Act. *Accord* SCHAPIRO GRP., MEN WHO BUY SEX WITH ADOLESCENT GIRLS: A SCIENTIFIC RESEARCH STUDY 11–12 (2009), available at <http://prostitutionresearch.com/wp-content/uploads/2014/04/The-Schapiro-Group-Georgia-Demand-Study-1.pdf> (finding that even after researchers gave johns responding to fake sex ads three increasingly clear warnings that the prostituted person depicted in the ad was a minor, many johns were still ready to move forward with the commercial sex act anyway; and that overall, “42% of men who purchase sex either specifically seek out young females, or are willing to ignore all warning signs that the female they are about to have sex with is an adolescent”).

215. See UNIF. ACT, *supra* note 23, § 8(a); see also Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT’L & COMP. L. 357, 412 (2006) (calling for businesses that knowingly engage in trafficking to be fined or shut down or have their business licenses revoked).

216. See UNIF. ACT, *supra* note 23, § 8(a).

217. *Id.* § 2(10).

218. Backpage.com has long been on notice that its practices enable child sex trafficking. See, e.g., Backpage Letter, *supra* note 15.

219. See UNIF. ACT, *supra* note 23, § 8(a)(1).

220. See *id.* § 5(a)(1) (“mak[ing] available a minor for the purpose of engaging the minor in commercial sexual activity”).

221. *Id.* § 8(b).

222. See generally Kara, *supra* note 131, at 38–43 (2011) (conceiving of traffickers as rational agents seeking economic profit, and arguing that the best way to stop trafficking is to improve economic deterrence through higher conviction rates and more stringent financial penalties).

trafficking an individual, forced labor, or sexual servitude.<sup>223</sup> This amount includes the victim's expenses reasonably certain to result from the trafficking, reasonable attorney's fees and costs, and the highest of the following:

- (A) the gross income to the defendant for, or the value to the defendant of, the victim's labor or services or sexual activity;
- (B) the amount the defendant contracted to pay the victim; or
- (C) the value of the victim's labor or services or sexual activity, calculated under . . . the Fair Labor Standards Act, 29 U.S.C. Section 201 et seq . . . [whether or not it would typically apply.]<sup>224</sup>

Even if the victim is unavailable to accept the money, restitution is still mandatory, and the money is held for the victim for up to five years.<sup>225</sup> If, after that time, the victim is still unavailable, then the money goes to the state anti-trafficking task force or to the state crime victims' fund.<sup>226</sup> This restitution regime is not impervious to critique,<sup>227</sup> but it is a great start.

The Uniform Act also contains a broad asset forfeiture provision.<sup>228</sup> It allows the state to seize any real or personal property used or intended to be used in human trafficking, and any property constituting or derived from trafficking proceeds.<sup>229</sup> This could mean vehicles, real property, cash, guns, and much more.<sup>230</sup> The threat of asset forfeiture can be an even more effective deterrent than jail time for perpetrators.<sup>231</sup> For instance, recidivism rates for johns are

223. UNIF. ACT, *supra* note 23, § 10(a); *cf.* 18 U.S.C. § 1593 (2012).

224. UNIF. ACT, *supra* note 23, § 10(a)(2).

225. *Id.* § 10(b)–(c).

226. *Id.*

227. Critics have argued that a fair-market-value-based restitution scheme chronically undercompensates trafficking victims in particular because, among other reasons, trafficking itself drives wages down. See Benjamin Thomas Greer, *What Is the Monetary Value of Slave Labor?: Restitution Based on a Traditional Fair Market Value Valuation Basis May Not Fully Compensate Human Labor Trafficking Victims*, 31 N. ILL. U. L. REV. 553, 570–75 (2011).

228. See UNIF. ACT, *supra* note 23, § 11; *cf.* 18 U.S.C. § 1594(d)–(e).

229. UNIF. ACT, *supra* note 23, § 11(a).

230. See *id.*

231. POLARIS PROJECT, HUMAN TRAFFICKING LEGISLATIVE ISSUE BRIEF: ASSET FORFEITURE 1 (2012), available at [http://www.polarisproject.org/storage/documents/issue\\_brief\\_asset\\_forfeiture\\_september\\_2012.pdf](http://www.polarisproject.org/storage/documents/issue_brief_asset_forfeiture_september_2012.pdf) (noting that “traffickers are often willing to serve [jail] time as long as they have their money waiting for them,” but that asset forfeiture helps to change that calculus); Rose, *supra* note 42, at 340 (quoting a prosecutor saying “[t]aking their cars and gold. That hurts them more than prison.”); Kara, *supra* note 131, at 141 (arguing that a 10–20-year prison sentence for trafficking should be “the punitive icing on the cake, as opposed to the prime source of potential deterrence and retribution,” that is, major financial penalties combined with a perceived high probability of arrest). Furthermore, “[e]ffective and early seizure of a trafficker’s assets can sometimes help ensure that restitution is not just ordered, but in fact paid.” U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 17 (2014), available at <http://www.state.gov/j/tip/rls/tiprpt/2014/index.htm> [hereinafter 2014 TIP REPORT].



dramatically lower in jurisdictions where the johns' cars are seized when they are caught.<sup>232</sup>

In addition, as discussed below, traffickers face the prospect of financial penalties through civil suits under the Uniform Act.<sup>233</sup> With sizeable punitive damages on the table,<sup>234</sup> civil suits could potentially have a powerful deterrent effect even where criminal prosecution of the trafficker is out of reach.<sup>235</sup>

#### *D. Victim Protections*

The victim protection provisions of the Uniform Act could be the biggest game changer of all for many adopting states. Though all states now at least criminalize human trafficking, many states still have few or no victim protection measures in place.<sup>236</sup> Only four states received full marks in the 2013 Polaris Project ratings for all four of the victim protection categories factored into those ratings: (1) safe harbor laws; (2) victim assistance; (3) access to civil damages; and, (4) vacating convictions for sex trafficking victims.<sup>237</sup>

The Uniform Act incorporates all four measures, such that, if enacted, the adopting state would be brought into compliance with the Polaris Project recommendations.<sup>238</sup> Further, it goes above and beyond the four Polaris Project victim protection categories, providing even more robust victim protections.

##### *1. Safe Harbor*

First, the Uniform Act contains a straightforward safe harbor provision—it provides total immunity from criminal and juvenile delinquency proceedings for any minor in prostitution and for any individual who was a minor at the time of a prostitution offense.<sup>239</sup> Far from being regarded as a criminal or a juvenile

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232. John L. Worrall, *Asset Forfeiture* 25 (2008), available at <http://www.cops.usdoj.gov/Publications/e1108-Asset-Forfeiture.pdf> (noting the success of Portland, Oregon's asset forfeiture regime in reducing demand for commercial sex); Rose, *supra* note 42, at 340–41; see also Raymond Peck & Robert B. Voas, *Asset Forfeiture Programs in California: Why So Few?*, 33 J. SAFETY RESEARCH 245, 247 (2002) (noting that recidivism in Portland for Driving While Intoxicated offenders whose vehicles were seized was 50% lower than for offenders whose vehicles were not seized).

233. See *infra* Part IV.D.3 (discussing the benefits of civil suits, including both increased deterrence and justice for victims where criminal convictions and restitution may be elusive); UNIF. ACT, *supra* note 23, § 18; cf. 18 U.S.C. § 1595.

234. UNIF. ACT, *supra* note 23, § 18(a) (explicitly allowing punitive damages in a civil action against a trafficker).

235. Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2590, n.116 (2006) [hereinafter *Remedying the Injustices*].

236. See *supra* Table 2; 2013 Polaris Ratings, *supra* note 24.

237. The states with full marks were Illinois, New Jersey, Vermont, and Washington. 2013 Polaris Ratings, *supra* note 24.

238. Compare POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 4, available at [http://www.polarisproject.org/storage/2013\\_State\\_Ratings\\_Analysis\\_Full\\_Report.pdf](http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf) (outlining succinctly the considerations factored into each victim protection category), with UNIF. ACT, *supra* note 23, §§ 15, 19(c)(1), 18, 17 (conforming to Polaris Project considerations).

239. UNIF. ACT, *supra* note 23, § 15(a)–(b).

delinquent, a prostituted minor “is presumed to be a [child in need of services]” under the adopting state’s child protection statutes.<sup>240</sup> Crucially, this definition opens the way for a minor victim to receive social services without a judge’s delinquency finding.<sup>241</sup> This is a radical reorientation for state child prostitution policy, but one that makes sense legally<sup>242</sup> and ethically,<sup>243</sup> and has proven effective in early-adopter states.<sup>244</sup> In addition to providing safe harbor from prosecution for prostitution, the drafters of the Uniform Act left room for mercy with respect to “other non-violent offenses” trafficked minors commit “as a direct result of being a victim of human trafficking.”<sup>245</sup> The most obvious category of such offenses is drug abuse. Often, traffickers will intentionally get their victims hooked on drugs (sometimes even by force), and then act as those victims’ only source of those drugs as a means of controlling them. However, “other non-violent offenses” could also include other petty crimes such as shoplifting.<sup>246</sup>

## 2. Victim Assistance

Second, the Uniform Act incorporates various victim assistance provisions aimed at helping victims become survivors. The state human trafficking council—an interagency anti-trafficking task force created by the Act<sup>247</sup>—is to develop a comprehensive victim assistance plan,<sup>248</sup> which may include grants to government agencies or NGOs “to develop or expand service programs for

240. *Id.* § 15(c) (brackets in original to denote suggested statutory language).

241. See Krystle M. Fernandez, Comment, *Victims or Criminals? The Intricacies of Dealing with Juvenile Victims of Sex Trafficking and Why the Distinction Matters*, 45 ARIZ. ST. L.J. 859, 872–73 (2013) (discussing the mechanics of New York’s groundbreaking provision to the same effect).

242. Sager, *supra* note 93, at 364–65 (analogizing safe harbor laws to statutory rape laws that sensibly employ a bright-line age test); see also 22 U.S.C. §§ 7102, 7105 (2012) (state safe harbor laws would bring states into conformity with the federal standard).

243. See, e.g., Mir, *supra* note 196, at 167 (“The overarching motivation behind passing Safe Harbor statutes is that the majority of minors engaged in prostitution are victims of sex crimes, and thus deserve legal protection and treatment through social services, rehabilitation, or supervision.”); POLARIS PROJECT, *supra* note 238, at 33–34, (“Chris Swecker, Assistant Director in the Criminal Investigation Division of the Federal Bureau of Investigation, described the federal law enforcement position on children exploited through prostitution as follows: ‘Children can never consent to prostitution. It is always exploitation.’”).

244. For a review of the contours of the laws of states that already have some form of safe harbor in place, see Fernandez, *supra* note 241, at 871–78; and POLARIS PROJECT, *supra* note 238, at 33–34.

245. UNIF. ACT, *supra* note 23, § 15(a)–(b); see also 2014 TIP REPORT, *supra* note 231, at 14 (discussing trafficking victims’ forced criminality).

246. Arizona trafficking experts report that a trafficker will often encourage a victim, especially a minor sex trafficking victim, to commit a petty crime like shoplifting early on in the relationship. Then, the trafficker will say to the victim something to this effect: “You’re a criminal now, so we’re in this together. If you ever try to leave me, I will call the police and tell them what you did, and they’ll put you in jail.” And so begins the cycle of coercion and sexual exploitation.

247. See UNIF. ACT, *supra* note 23, § 19.

248. *Id.* § 19(c)(1).

victims.<sup>249</sup> Also on the council's agenda will be trafficking data collection, training state and local employees to spot trafficking, and increasing public awareness of trafficking.<sup>250</sup>

Crucially, all trafficking victims are to be eligible for services regardless of their immigration status.<sup>251</sup> Although in theory any foreign victim of trafficking can receive an immigration pseudo-status called continued presence ("CP"),<sup>252</sup> the reality is that CP is "significantly underutilized,"<sup>253</sup> to put it mildly. Most law enforcement officers are still unaware of the program or are reticent to use it lest they be perceived as "soft on illegal immigrants." Under the Uniform Act, even if an undocumented victim of trafficking has not yet obtained CP, a T visa, or another form of immigration relief, she will still be able to receive services administered at the state level and tailored to confront state-specific trafficking trends.<sup>254</sup>

Better yet, the Uniform Act does its best to prevent this problem from arising in the first place. Section 22 requires law enforcement officers at all levels to provide foreign victims who have colorable T or U visa claims with the supporting documentation needed to apply for those visas "as soon as practicable after receiving the request," and then also to ask a federal law enforcement officer to request CP for the victims in the meantime.<sup>255</sup> If a law enforcement officer does not think a victim's T or U visa claim is colorable, then the officer must state her reasons for that opinion, and the victim may then submit additional evidence to the officer to show why his or her claims are colorable.<sup>256</sup>

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249. *Id.* §§ 19(c)(1), 23(a).

250. *Id.* § 19(c).

251. *Id.* § 21(a). This provision is included in order to try to encourage undocumented victims of trafficking to seek services. *See also* 2011 UNIF. ACT Draft, *supra* note 145, at 79 (quoting U.N. OFFICE ON DRUGS AND CRIME, MODEL LAW AGAINST TRAFFICKING IN PERSONS art. 18 (2009)) (a person "should be considered and treated as a victim of trafficking in persons, irrespective of whether or not there is . . . an official granting/recognition of the status of victim").

252. CP is a one-year renewable immigration pseudo-status allowing a person to stay in the United States during the investigation and prosecution of his or her trafficker and meanwhile receive both federal and state benefits. *See generally* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, CONTINUED PRESENCE: TEMPORARY IMMIGRATION STATUS FOR VICTIMS OF HUMAN TRAFFICKING (2010), *available at* <http://www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf>; 22 U.S.C. § 7105(c)(3) (2012); 28 C.F.R. § 1100.35 (2012).

253. *ATEST Seeks Guidance on Continued Presence*, ALLIANCE TO END SLAVERY AND TRAFFICKING (Jan. 11, 2012), [http://endslaveryandtrafficking.org/agency\\_updates/atest-seeks-guidance-continued-presence](http://endslaveryandtrafficking.org/agency_updates/atest-seeks-guidance-continued-presence); *see also* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 444 (2011) ("[F]rom 2005 through 2007, the Bureau of Justice Assistance Human Trafficking Task Force identified 2116 trafficking victims, yet only 289 victims had continued presence requested on their behalf by federal law enforcement."); M. Margaret McKeown & Emily Ryo, *The Lost Sanctuary: Examining Sex Trafficking Through the Lens of United States v. Ah Sou*, 41 CORNELL INT'L L.J. 739, 766 (2008).

254. *See* UNIF. ACT, *supra* note 23, § 21(a).

255. *Id.* § 22(a).

256. *Id.* § 22(b).

All in all, these provisions are likely to increase the number of foreign trafficking victims who have access to both federal and state social services significantly. This is because considerably more victims will get CP and T or U visas more quickly under § 22 of the Uniform Act, and even those who do not, and remain undocumented, are nevertheless eligible to receive state trafficking victim benefits and services under § 21(a) of the Uniform Act.

### 3. Civil Remedies

Third, victims of trafficking under the Uniform Act may bring civil suits against their traffickers for “any . . . appropriate relief” including punitive damages.<sup>257</sup> This cause of action is supplemental to any other federal or state remedies that may be available, e.g., tort claims like intentional infliction of emotional distress, false imprisonment, and fraud.<sup>258</sup> Although a civil judgment against a trafficker must be offset by any restitution amount the victim receives in a criminal proceeding,<sup>259</sup> the unfortunate reality is that this caveat will affect relatively few victims.<sup>260</sup> Restitution is available only upon a successful conviction, which means that “the vast majority of victims” will not receive it.<sup>261</sup> Civil suits can help to bridge that gap. In fact, civil suits are superior in some ways, such as the more victim-friendly burden of proof, the availability of punitive damages,<sup>262</sup> and the individual and societal benefits that accrue when trafficking survivors are given the role of “private attorney[s] general.”<sup>263</sup> The Uniform Act allows victims a generous ten-year statute of limitations,<sup>264</sup> and victims who prevail in a civil suit against their trafficker are awarded mandatory attorneys’ fees and costs.<sup>265</sup>

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257. *Id.* § 18(a).

258. *See Remediating the Injustices*, *supra* note 235, at 2591–95 (discussing these three particular torts’ potential to help trafficking survivors get justice).

259. UNIF. ACT, *supra* note 23, § 18(d).

260. *Remediating the Injustices*, *supra* note 235, at 2583.

261. *Id.* at 2583.

262. Punitive damages both give the victim some semblance of justice for the grave harms he or she has endured and promote economic deterrence of trafficking. *See* UNIF. ACT, *supra* note 23, § 18(a); *Remediating the Injustices*, *supra* note 235, at 2590 (noting the dual compensatory and deterrent potentials of punitive damages in the trafficking context).

263. *See* Kathleen Kim, *The Trafficked Worker As Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247, 287–300 (2009).

264. UNIF. ACT, *supra* note 23, § 18(c); *cf.* 18 U.S.C. § 1595(c) (2012) (TVPA statute of limitations also ten years); PROTECT Act, Pub. L. No. 108-21, § 202, 117 Stat. 650 (2003) (no statute of limitations for child sex trafficking). Statutes of limitations have often been a barrier to victims who want to sue their traffickers, since it typically takes at least a few years for a victim to be rehabilitated enough to even think about suing. Under the Uniform Act, the ten-year clock starts after the victim is freed from the trafficking situation or the victim turns 18, whichever is later. UNIF. ACT, *supra* note 23, § 18(c).

265. UNIF. ACT, *supra* note 23, § 18(b).

#### 4. Vacating Convictions

Finally, the Uniform Act contains a powerful vacatur provision, which allows a trafficking victim to apply to the appropriate court to have her criminal records vacated upon a showing that her participation in the crime was “a direct result of being a victim of human trafficking.”<sup>266</sup> While not required to seek vacatur, official documentation from a government agency indicating that the survivor was a victim at the time of the offense creates a presumption that her participation in the offense was the direct result of her victimization.<sup>267</sup> Chiefly, this section will be a lifeline to sex trafficking survivors, many of whom have been convicted of the crime of prostitution despite having been coerced into it. But one can imagine situations where other coerced crimes could merit vacatur, such as drug crimes that trace back to a trafficker forcing a victim to become addicted initially.<sup>268</sup> As of mid-2013, only 14 states had vacatur provisions in place, according to the Polaris Project ratings.<sup>269</sup> Thus, widespread adoption of the Uniform Act will significantly improve survivors’ outlook nationwide. “I cannot overstate how important [vacatur] is to empowering a trafficking victim to rebuild her life following unfathomable trauma,” emphasizes one Arizona survivor.<sup>270</sup>

Along the same lines, the Uniform Act allows individuals charged with prostitution (and, optionally, other nonviolent offenses) to assert an affirmative defense that they are victims of human trafficking.<sup>271</sup> In addition to helping prevent unjust convictions for coerced crimes, this provision could give law enforcement and prosecutors more tools to pursue the traffickers directly, because it will likely cause at least some additional sex trafficking victims to report their victimization and provide information on their traffickers, rather than taking the fall for them. In that way, the provision will operate as an intelligence-gathering mechanism, not just a victim protection measure.<sup>272</sup>

#### 5. Above and Beyond

The Uniform Act satisfies the four Polaris Project baseline victim protection categories and goes even further. Sensibly, the Uniform Act explicitly

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266. *Id.* § 17(a).

267. *Id.* § 17(b).

268. *See id.* § 17(a) (optional legislative text allowing for vacatur of “other non-violent offenses” directly resulting from victimization); *see also supra* notes 245–246 and accompanying text.

269. 2013 Polaris Ratings, *supra* note 24.

270. Jacobs, *supra* note 94.

271. UNIF. ACT, *supra* note 23, § 16. In April 2014, Arizona passed a new law creating an affirmative defense to a charge of prostitution that the defendant was a victim of sex trafficking, but stopped short of extending the affirmative defense to other crimes incident to the trafficking. *See* 2014 Ariz. Legis. Serv. Ch. 151, § 8 (West).

272. This is in accord with the experiences of certain existing victim-centered prostitution intervention and diversion programs such as Phoenix’s Project ROSE. *See* Dominique E. Roe-Sepowitz et al., *Project ROSE: An Arrest Alternative for Victims of Sex Trafficking and Prostitution*, 53 J. OFFENDER REHABILITATION 57, 64–65 (2014) (noting that prostituted people offered a holistic diversion program rather than jail often provided law enforcement with actionable information regarding traffickers and violent johns).

brings evidence about the victim's sexual behavior or sexual history that arises in criminal trafficking prosecutions and civil suits under the Uniform Act within the protection of the adopting state's rape shield evidence rules.<sup>273</sup> In addition, the Uniform Act insists upon confidentiality surrounding the identity and images of the victim in a criminal trafficking prosecution, except to the extent necessary to investigate, prosecute, comply with a law or court order, or ensure benefits and services for the victim and the victim's family.<sup>274</sup>

#### *E. Awareness-Raising Measures*

Lastly, the Uniform Act includes two primary measures designed to promote awareness and education about human trafficking in communities. First, the Uniform Act requires posting of the phone number of the National Human Trafficking Resource Center<sup>275</sup> at various locations around the state, such as rest areas, transportation stations, strip clubs and sexually-oriented businesses, job recruitment centers, hospitals and emergency care providers, and any "entity found to be a nuisance for prostitution[.]"<sup>276</sup> Second, it requires the state human trafficking council to collect data on human trafficking in the state and report its findings annually to the governor, legislature, or both.<sup>277</sup> This provision could help remedy the woeful lack of reliable data about the scope, demography, and mechanics of human trafficking in the United States.

### CONCLUSION

One hundred and fifty years after the Emancipation Proclamation, it is high time that state anti-trafficking policy catches up to its federal counterpart to tackle the crisis of twenty-first century slavery. Arizona and other states should pass the Uniform Act as soon as possible. Because Phoenix will host the 2015 Super Bowl, an event widely believed to be a magnet for sex trafficking<sup>278</sup> (though

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273. UNIF. ACT, *supra* note 23, § 14; *cf.* FED. R. EVID. 412.

274. UNIF. ACT, *supra* note 23, § 13.

275. The National Human Trafficking Resource Center (NHTRC) is a 24/7, multilingual reporting hotline operated by Polaris Project. The NHTRC's toll-free phone number is 1-888-373-7888. Callers anywhere in the United States can call this number to report suspected human trafficking, and operators then pass along these tips to the appropriate local anti-trafficking resources. The NHTRC recently began accepting tips by text message as well at the number 233-733 (BeFree). For more on the NHTRC, visit <http://www.polarisproject.org/what-we-do/national-human-trafficking-hotline/the-nhtrc/overview>.

276. UNIF. ACT, *supra* note 23, §§ 19(c)(3), 20(a)–(b).

277. *Id.* §§ 19(c)(2), 23(b).

278. *See, e.g.,* Derek Pennartz, Comment, *The Irony of the Land of the Free: How Texas Is Cleaning Up Its Human Trafficking Problem*, 12 TEX. TECH ADMIN. L.J. 367, 377 (2011) (noting traffickers "routinely flock" to host cities in run-up to Super Bowl); Sabena Auyeung, "How Much Are You Worth?" *The Effects of Human Trafficking on the Sex Trade in Illinois and the Remedies Designed to Eliminate It*, 18 PUB. INT. L. REP. 191, 191–92 (2013) (asserting that "hundreds of women and children" were sex-trafficked for 2012 Super Bowl).

perhaps unfoundedly<sup>279</sup>), many argue that the need for speedy adoption is particularly acute in Arizona.<sup>280</sup> But overall, the Uniform Act would improve the current anti-trafficking regime of almost every state—a dramatic improvement in most cases.<sup>281</sup> As of April 10, 2013, ten legislatures had introduced the Uniform Act in whole or part, but the Act has not yet been adopted in any state.<sup>282</sup> Proponents, however, are pushing hard for adoption in numerous states.<sup>283</sup>

Fighting human trafficking should be the world's most bipartisan issue.<sup>284</sup> After all, nobody but the slaveholder is proslavery. Additionally, from a practical standpoint, it is not naive to hope that partisanship will not prevent the Uniform Act's passage in most states. Comprehensive anti-trafficking legislation can be a political win-win for lawmakers: Republican supporters can be seen as getting "tough on crime" and promoting "morality" even as Democratic lawmakers cast their support as furthering "social justice."<sup>285</sup> Anti-trafficking activists lobbying for passage of the Uniform Act in their states would do well to pitch the law accordingly.

States should adopt the entire Uniform Act without alteration, as much as possible, for at least three reasons. First, the Uniform Act will be maximally

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279. See, e.g., ROE-SEPOWITZ ET AL., *supra* note 136, at 4 (the first major empirical study on sex trafficking around the Super Bowl, finding "no evidence indicating the 2014 Super Bowl was a causal factor for sex trafficking in the northern New Jersey area [where the game took place] in the days preceding the game"); Yamiche Alcindor, *Super Bowl On Guard for Human Trafficking Criminals*, USA TODAY, Jan. 18, 2014, <http://www.usatoday.com/story/news/nation/2014/01/18/super-bowl-human-trafficking-sex/4592381/> (noting that panicked claims leading up to recent Super Bowls that "thousands" of prostituted people would be brought in for prior Super Bowls turned out to be "exaggerat[ed]" or altogether unfounded, and quoting Polaris Project CEO Bradley Myles pointing out that "[t]here's not an enormous amount of data that [confirms] a giant spike in trafficking around the Super Bowl . . .").

280. *But see* 2014 TIP Report, *supra* note 231, at 20 ("Modern slavery is a 365-day-a-year crime that requires a 365-day-a-year response. Traffickers do not cease operations once a sporting event concludes . . .").

281. See *supra* Table 2; see also 2013 Polaris Ratings, *supra* note 24 (showing that most states are not even near compliance with Polaris Project minimum standards, which the Uniform Act meets and surpasses).

282. For an up-to-date map showing what states the Uniform Act has been proposed and/or adopted in, visit <http://www.uniformlaws.org/Legislation.aspx?title=Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking>. But note that the ULC apparently includes even introductions of just small parts of the Uniform Act in this list, so research particular jurisdictions separately for specific questions.

283. See Seidenberg, *supra* note 147, at 58 ("Proponents plan to initially push for enactment of the [U]niform [A]ct in about 15 states.").

284. And indeed, it has been—at least at the federal level. See, e.g., Justice for Victims of Trafficking Act of 2014, H.R. 3530, 113th Cong. (2014) (which passed a hyperpartisan House of Representatives *unanimously*).

285. Vanessa Bouche & Dana Wittmer, *Human Trafficking Legislation Across the States: The Determinants of Comprehensiveness*, First Annual Interdisciplinary Conference on Human Trafficking, 5, 13 (2009), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1005&context=humtraffconf>.

successful if it is just that: uniform.<sup>286</sup> Uniformity among states will help prevent patchwork problems and give traffickers no safe havens.<sup>287</sup> Indeed, the Uniform Act itself calls for its own application and construction to be as standardized as possible among adopting states.<sup>288</sup> Second, the central strength of the Uniform Act, even more so than the TVPA regime before it, is its comprehensiveness.<sup>289</sup> To pick and choose only certain provisions from the Uniform Act<sup>290</sup> would undercut its very strength, reversing an otherwise modestly encouraging trend toward increased comprehensiveness in state trafficking laws.<sup>291</sup> And third, the Uniform Act's various discrete provisions are designed to complement one another—they are “interdependent.”<sup>292</sup>

The Uniform Act should be regarded as a floor for state anti-trafficking policy, not a ceiling.<sup>293</sup> States adopting the Uniform Act should consider going beyond its minimum provisions if politically feasible. Anti-trafficking policies not addressed in the Uniform Act but worthy of state attention include: establishment

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286. Wilkins, *supra* note 144, at 5.

287. See McKee, *supra* note 13, at 326 (“[W]hen states enact [anti-trafficking] legislation, it is important that there be consistency among state statutes. A weak or limited statute still has the potential to attract traffickers into a state to avoid another state’s more stringent, comprehensive statute.”); see also *supra* Part III.

288. UNIF. ACT, *supra* note 23, § 24.

289. See, e.g., Cam Ward, *Alabama and the Uniform Law Commission*, 74 ALA. L. 398, 399 (2013) (“A comprehensive uniform act will enable federal, state and local agencies to better identify victims, provide needed services and facilitate prosecution.”).

290. See, for example, early drafts of H.B. 2454, 51st Leg., 2nd Sess. (Ariz. 2014), a bill advanced by conservative Arizona Representative Eddie Farnsworth that, as originally introduced, would stiffen criminal penalties for trafficking but do virtually nothing to help victims.

291. See Bouche & Wittmer, *supra* note 285, at 15–16 (“As more states adopt [anti-trafficking] legislation over time, other states tend to pass more comprehensive legislation. In other words, states are most likely learning from their neighbors, and late adopters are crafting more comprehensive legislation that [sic] earlier states . . . This finding presents an optimistic view for the future of human trafficking legislation.”).

292. 2011 UNIF. ACT Draft, *supra* note 145, at 9 (“This Uniform Law is multifaceted and comprehensive in that the different components of the law are interdependent. For example, without the training and awareness measures provided for in Article 4, victims will go unidentified and perpetrators will continue exploiting with impunity. Without benefits and services in Article 3, it is very unlikely that victims will be able to be witnesses, leaving prosecutors without convictions. Without collaboration between state agencies and civil society through the task forces provided in Article 4, victims will not be directed to the appropriate services and will fall through the cracks. Therefore, it is imperative that all of the articles and sections are implemented for this uniform law to be effective tool to combat human trafficking.”).

293. Seidenberg, *supra* note 147, at 58 (“[F]ew experts would argue that the [U]niform [A]ct should be the final legislative word on fighting human slavery at the state level . . . ‘With the uniform act, we are trying to set a baseline of legal standards that would minimize inconsistencies among current state human trafficking laws. Our intent is to do that and then build upon the act in each state,’ [says Shared Hope International’s Samantha Vardaman].”).



of specialty sex trafficking courts (not unlike drug courts);<sup>294</sup> creating an affirmative defense of victimization for “bottom girls” or “bottom bitches” who, though sex trafficking victims themselves, work for the pimp to manage other girls and thus often end up taking the fall for the main trafficker;<sup>295</sup> establishing and funding tattoo removal programs for victims, who are often “branded” with tattoos related to their trafficking or trafficker;<sup>296</sup> imposing requirements that businesses publicly report the steps they have taken, if any, to eliminate forced labor in their product chains;<sup>297</sup> and comprehensive prostitution reform patterned after the so-called “Swedish model”—making the sale of sex legal but the purchase of sex illegal, thus criminalizing the “demand” that drives sex trafficking, but not punishing the prostituted “supply,” trafficked or not.<sup>298</sup> But these are topics for another day.

Human trafficking is the antithesis of liberty. Its eradication is one of the great moral challenges of our time.<sup>299</sup> States can play a key role in combating human trafficking by passing the Uniform Act on Prevention of and Remedies for Human Trafficking. And for the millions of slaves in today’s world, it cannot happen soon enough.<sup>300</sup>

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294. See, e.g., William K. Rashbaum, *With Special Courts, State Aims to Steer Women Away From Sex Trade*, N.Y. TIMES (Sept. 25, 2013), <http://www.nytimes.com/2013/09/26/nyregion/special-courts-for-human-trafficking-and-prostitution-cases-are-planned-in-new-york.html>; Robert David Sanborn & Dawn Lew, *Fighting Human Trafficking in Texas*, 75 TEX. B.J. 778, 780 (2012).

295. Seidenberg, *supra* note 147, at 58.

296. See, e.g., Tattoos—Removal—Juvenile Delinquents and Dependents, 2012 Cal. Legis. Serv. Ch. 746 (A.B. 1956) (West).

297. See, e.g., California Transparency in Supply Chains Act, 2010 Cal. Legis. Serv. Ch. 556 (S.B. 657) (West).

298. See generally TEDx Talks, *Prostitution is not a Victimless Crime | Andy Hall | TEDxTucsonSalon*, YOUTUBE (July 8, 2014), <https://www.youtube.com/watch?v=tpJPGYWcgE>; Heather Monasky, Note, *On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, But Not the Victim—Sweden’s Sexköpslagen in America*, 37 WM. MITCHELL L. REV. 1989 (2011); Rose, *supra* note 42, at 329–30; see also Cho et al., *supra* note 83, at 67 (study concluding that decriminalizing prostitution altogether as some advocate actually increases the magnitude of sex trafficking).

299. NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* 237 (2009) (“Decades from now, people will look back and wonder how societies could have acquiesced in a sex slave trade in the twenty-first century that . . . is bigger than the transatlantic slave trade was in the nineteenth.”).

300. Hillary Rodham Clinton, *Letter to the Reader*, in U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT*, at 2 (2012) (“We know that this struggle will not truly be won until all those who toil in modern slavery . . . are free to realize their God-given potential.”).

## APPENDIX:

Table 1: NHTRC Call Data, 2008–2012<sup>‡</sup>

Potential Cases of Human Trafficking by Year			
	High Indicators	Moderate Indicators	Total
2008	724	292	1,016
2009	574	635	1,209
2010	664	819	1,483
2011	843	1,302	2,145
2012	1,315	2,130	3,445
Total	4,120	5,178	9,298
Trafficking Case Data			
	Number of Cases	Percent of Cases	
Sex Trafficking	5,932	63.80%	
Labor Trafficking	2,207	21.80%	
Sex & Labor Trafficking	234	2.52%	
Other / Not Specified <sup>***</sup>	1,105	11.88%	
Victim Demographics Overview <sup>****</sup>			
	Sex Trafficking	Labor Trafficking	
Adults	52%	77%	
Minors	33%	20%	
Male	5%	40%	
Female	85%	61%	
Transgender	<1%	<1%	
U.S. Citizen / LPR	41%	20%	
Foreign National	27%	66%	

<sup>‡</sup> Data from POLARIS PROJECT, *supra* note 18, at 9.

<sup>\*\*\*</sup> This typically occurs when a law enforcement agent or service provider contacts the NHTRC for resources and referrals but does not disclose details about the trafficking situation due to confidentiality.

<sup>\*\*\*\*</sup> These statistics are noncumulative. Cases may involve multiple victims and include males, females, and transgendered individuals, foreign nationals and U.S. citizens, adults and minors. In some cases, demographic information is not reported.

**Table 2: Number of States With Certain Anti-trafficking Provisions in Place as of 2013<sup>†</sup>**

Anti-trafficking Provision	Number of States
Labor Trafficking	51
Sex Trafficking	49
Lower Burden of Proof for Sex Trafficking Minors	43
Investigative Tools for Law Enforcement	38
Asset Forfeiture	37
Victim Assistance	33
Access Civil Damages	30
Training Requirement for Law Enforcement	29
Posting Human Trafficking Hotline	22
Human Trafficking Task Force	20
"Safe Harbor" Law (Protecting Sexually Exploited Minors)	18
Vacating Convictions of Sex Trafficking Victims	14

**Table 3: Human Trafficking Elements Under 22 U.S.C. § 7102(9)**

	Process	Means	End
Labor Trafficking	Recruiting Harboring, Transporting, or Obtaining	Force, Fraud, or Coercion	Involuntary Servitude, Peonage, Debt Bondage, or Slavery
Sex Trafficking (Adult)	Inducement	Force, Fraud, or Coercion	Commercial Sex Act
Sex Trafficking (Minor)	Inducement	N/A	Commercial Sex Act

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<sup>†</sup> Data from 2013 Polaris Ratings, *supra* note 24.

**Table 4: Human Trafficking Elements Under §§ 3–7 of the Uniform Act**

	<b>Process</b>	<b>Means</b>	<b>End</b>
Trafficking (Individual)	Recruiting Transporting, Transferring, Harboring, Receiving, Providing, Obtaining, Isolating, Maintaining, Enticing	N/A	To Further Forced Labor or Sexual Servitude
Forced Labor	N/A	Coercion	Compelled Labor or Services
Sexual Servitude (Minor)	Maintaining or Making Available a Minor	N/A	Commercial Sexual Activity
Sexual Servitude (Adult)	N/A	Coercion or Deception	Commercial Sexual Activity
Patronizing a Victim of Sexual Servitude	Giving, Agreeing, or Offering to Give Anything of Value	N/A	Individual May Engage in Commercial Sexual Activity with Another Individual Whom the Person Knows is a Victim of Sexual Servitude
Patronizing a Minor *****	Giving, Agreeing, or Offering to Give Anything of Value	N/A	Individual May Engage in Commercial Sexual Activity with a Minor

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\*\*\*\*\* With the exception of patronizing a minor, the *mens rea* for each of these charges is knowing. Patronizing a minor has no *mens rea* requirement, but carries a higher penalty for intending that an individual engage in commercial sexual activity with a minor.