

# POLICY ESSAY

## PROSTITUTES OR PREY? THE EVOLUTION OF CONGRESSIONAL INTENT IN COMBATING SEX TRAFFICKING

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*Youth and elegance, beauty and innocence, are exposed for sale upon the auction block; while villainous monsters stand around, with pockets lined with gold, gazing with lustful eyes upon their prospective victims.*

– Frederick Douglass, Lecture on Slavery, No. 2, delivered in Corinthian Hall, Rochester, New York, December 8, 1850

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## I. INTRODUCTION

Sex trafficking is a form of slavery as old as the nation itself. It has not, however, always been a crime. Prior to emancipation, sexual slavery was effectively legal. The victims most obviously exploited in the country’s early years were African women and girls.<sup>3</sup> The purchase of enslaved women for rape, prostitution, and forced “breeding” with other slaves was common practice, particularly in the American South.<sup>4</sup> So-called “fancy-girl” auctions were ostentatious manifestations of this horrific practice.<sup>5</sup> Slave traders selected African girls to be sold to brothel owners and individual men at prices that proclaimed “the accursed purposes to which they are to be de-

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<sup>3</sup> Perhaps the earliest manifestation of the offense was the sexual exploitation of Native American women as Europeans entered North America in the 1600–1700s. Native American victims were sexually assaulted and forced into marriages and prostitution by colonists, soldiers, and miners as the Gold Rush drew settlers west. See Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides,”* 70 GEO. WASH. L. REV. 475, 483 (2002).

<sup>4</sup> Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L. J. 791, 797–98 (1993) (explaining that female slaves were sexually exploited during their sale, when “potential purchases could fondle and harass” them; when their masters molested and raped them; and when they were forced to have “intercourse with family or friends of the master, or with other slaves.”).

<sup>5</sup> *Id.* at 798.

voted.”<sup>6</sup> At these auctions, girls were paraded and even stripped before potential buyers.<sup>7</sup>

These victims were not recognized as victims; when their existence was recognized by society at all, they were characterized as voluntary prostitutes, luring men away from chastity.<sup>8</sup> Raising awareness of the true nature of sex trafficking was thus a cause close to the heart of abolitionists such as Frederick Douglass. Douglass candidly condemned the sanctioned and systematic sexual slavery inherent in the American slave trade during a public lecture given in December 1850:

*I hold myself ready to prove that more than a million of women, in the Southern States of this Union are, by the laws of the land, and through no fault of their own, consigned to a life of revolting prostitution; that by those laws, in many of the States, if a woman, in defence of her own innocence, shall lift her hand against the brutal aggressor, she may be lawfully put to death.*<sup>9</sup>

Congress abolished slavery by means of the Thirteenth Amendment in 1865, but sex trafficking persisted. Its victims continued to be misunderstood and mislabeled, and the violence and coercion inherent in the crime were largely unrecognized in federal law. Ignorance on a national scale meant that sex trafficking did not become an explicit federal crime until 2000.<sup>10</sup> Though Congress finally defined and criminalized sex trafficking, it still struggles with developing effective strategies to protect and serve victims, prosecute criminals, and prevent trafficking. This Essay illustrates that over the past 150 years Congress has repeatedly—and wrongly—allowed federal courts and agencies to misinterpret or ignore congressional intent in implementing sex trafficking laws.

To understand the difficulties of fighting sex trafficking through legislation, Part II of this Essay defines and examines the nature of the crime. Part III explores the efficacy—and failures in implementation—of federal sex trafficking legislation from the Thirteenth Amendment of 1865 to the *Trafficking Victims Protection Act of 2000*. Next, Part IV explains how the *Justice for Victims of Trafficking Act of 2015* was a necessary response to the inadequacies of previous legislation that did not address the causes of sex trafficking or prioritize the rescue of survivors. This section also delineates how Congress should proactively ensure proper implementation of the new law.

While the Justice for Victims of Trafficking Act helped construct a federal survivor-centered approach to sex trafficking, Part V describes how

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<sup>6</sup> See 1 FREDERICK DOUGLASS THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 142 (Philip S. Foner ed., 1987).

<sup>7</sup> Katyal, *supra* note 4, at 798.

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

<sup>9</sup> See DOUGLASS, *supra* note 6, at 142.

<sup>10</sup> See 18 U.S.C. § 1591 (2000 & Supp. I 2015).

Congress must fully realize congressional intent of this law through sustained oversight, explicit appropriations, and victim-centered policies. Part VI maintains that state legislative efforts and increased public awareness must complement federal efforts. Finally, Part VII concludes that Congress must recognize that no law addressing such a complex set of actors and crimes can enforce itself. Congress must learn from past failures and affirmatively fight for congressional intent—an intent that must evolve as our knowledge of the crime evolves—to expand civil rights and universal freedom to victims of modern day slavery.

## II. SEX TRAFFICKING DEFINED

Federal law defines sex trafficking as recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting a person to engage in a commercial sex act, or benefiting financially or otherwise from such a venture. Any minor used for a commercial sex act is a sex trafficking victim; for adults, sex trafficking must occur through means of force, threats of force, fraud, or coercion.<sup>11</sup>

This definition has its roots in the Mann Act of 1910 and has been revised by Congress as the nature of sex trafficking has become better understood. Worldwide, women and girls comprise 98% of sex trafficking victims.<sup>12</sup> It is often assumed that sex trafficking victims in the United States are non-citizens, but many victims are actually U.S. citizens and lawful permanent residents.<sup>13</sup> Although victims in the United States can be of any racial, ethnic, or socioeconomic background, runaway and homeless youth are especially vulnerable to sex trafficking. It is estimated that one in six runaway children are likely sex trafficking victims,<sup>14</sup> and studies have found that many runaway girls “are approached for commercial sex within 48 hours of appearing on the streets.”<sup>15</sup> There is also an enormous overlap be-

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

<sup>12</sup> KELLY HYLAND & KAVITHA SREEHARSHA, *FREEDOM FOR ALL: AN ATTORNEY’S GUIDE TO FIGHTING HUMAN TRAFFICKING* 12 (2015).

<sup>13</sup> While many anti-trafficking advocates believe there are more U.S. citizen and lawful permanent resident (LPR) victims, the exact breakdown between foreign national and U.S. citizen/LPR victims is unknown. See KRISTIN FINKLEA ET AL., CONG. RESEARCH SERV., R41878, *SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS* 27 (2015). See also BUREAU OF JUSTICE STATISTICS, *MOST SUSPECTED INCIDENTS OF HUMAN TRAFFICKING INVOLVED ALLEGATIONS OF PROSTITUTION OF AN ADULT OR CHILD* (2011), <https://www.bjs.gov/content/pub/press/cshti0810pr.cfm> (last visited Nov 9, 2016) (explaining that four-fifths of victims in confirmed sex trafficking cases were identified as U.S. citizens).

<sup>14</sup> NAT’L CENT. FOR MISSING & EXPLOITED CHILDREN, <http://www.missingkids.com/lin6> [<https://perma.cc/M53G-8YYV>].

<sup>15</sup> See MICHAEL SHIVELY ET AL., *ABT ASSOC., INC., DEVELOPING A NATIONAL ACTION PLAN FOR ELIMINATING SEX TRAFFICKING* 2-64 (2010), [https://www.demandabolition.org/wp-content/uploads/2011/07/2000\\_abtnactplan.pdf](https://www.demandabolition.org/wp-content/uploads/2011/07/2000_abtnactplan.pdf) [<https://perma.cc/T632-WLJ8>].

tween sex trafficking and the child welfare system.<sup>16</sup> Young, disenfranchised girls are easy targets for control and manipulation. These children may partake in survival sex, manipulated by adults—often much older men—into exchanging sex for meals, money, shelter, or material goods.<sup>17</sup>

Victims in the commercial sex industry face tremendous violence and abuse. One study showed that over two-thirds of pimps assault the prostitutes they control.<sup>18</sup> A telling 2006 study concluded that prostituted women “have the highest homicide victimization rate of any set of women ever studied.”<sup>19</sup> Another study found that women in the commercial sex industry have mortality rates almost 200 times greater than their peers.<sup>20</sup> In addition to sexual and physical abuse, victims experience post-traumatic stress disorder.

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<sup>16</sup> See SARAH GODOY ET AL., UCLA LUSKIN SCH. OF PUB. AFFAIRS LUSKIN CENT. FOR INNOVATION, *Shedding Light on Sex Trafficking: Research, Data, and Technologies with the Greatest Impact* 8 (2016), <http://innovation.luskin.ucla.edu/sites/default/files/Luskin%20HT%20Report.pdf> [<https://perma.cc/98PQ-HU7B>] (“It is estimated that anywhere between 50 percent and 98 percent of identified CSEC [commercial sexual exploitation of children] across the nation have a history in the child welfare system. During the 2013 Operation Cross Country, the FBI recovered sex trafficked youth from over 70 cities of which 60 percent were placed in foster care or group homes during the exploitation. In 2012, 98 percent (86 of 88 youth) of Connecticut’s CSEC population was not only system-involved but had the highest instances of reported abuse while in residential treatment or foster care. Traffickers recruit the most vulnerable youth with histories of abuse and neglect as they commonly prey on insecurities and capitalize on gaps in supervision. Placing youth in multiple foster care settings like group homes exacerbates their risk for further abuse due to the lack of consistent oversight and familial attachments, interactions with a multitude of people including traffickers, and an overall instability in care. System-involved youth who are dissatisfied or unsafe in their placement, wrongly placed in detention centers or homes they once ran from, or frequently run from foster care are at heightened risk for victimization. This data conveys the profoundly detrimental factors that inadvertently put youth in the child welfare system significantly more at-risk for commercial sexual exploitation than non-system involved youth.”) (citations omitted).

<sup>17</sup> See H.R. 919, 114th Cong. (2016). See also SHIVELY ET AL., *supra* note 15, at 5-5 (explaining that “runaway and homeless youth are too inexperienced, unskilled, drug involved, traumatized, and/or young to maintain legitimate employment, and turn to prostitution to survive.”); LEAGUE OF WOMEN VOTERS MINNEAPOLIS, *WHY SHOULD WE CARE ABOUT JUVENILE SEX TRAFFICKING?* 6 (Lauren Martin ed., 2013), <http://www.lwvmppls.org/wp-content/uploads/here.pdf> [<https://perma.cc/LW75-5PAP>]; Ronica Shannon, *Parents Indicted for Human Trafficking*, RICHMOND REG., May 20, 2011, <http://www.richmondregister.com/localnews/x350354682/Parents-indicted-for-human-trafficking> [<https://perma.cc/9H7L-M3DH>].

<sup>18</sup> See Katyal, *supra* note 4, at 793 n.13 (citing Mimi H. Silbert & Ayala M. Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. & BEHAV. 395, 397 (1981)).

<sup>19</sup> SHIVELY ET AL., *supra* note 15, at 2-53.

<sup>20</sup> See *id.* at 5-4 (“A recent study found that the vast majority of women and girls trafficked internationally are physically (95%) and sexually (59%) abused while being trafficked. A U.S. study of nearly 2000 prostituted persons followed over a 30-year period found them to have mortality rates almost 200 times greater than those found among other women with similar demographic profiles. In that study, the most common causes of death were, in order: homicide, suicide, drug- and alcohol-related problems, HIV infection and accidents. The homicide rate among women actively engaged in prostitution was seventeen times greater than the rate for age-matched females in the general population.”) (citations omitted).

der, anxiety and psychological distress, sexually transmitted diseases,<sup>21</sup> and other health problems.<sup>22</sup>

A lack of an accurate estimate of the number of trafficking victims in the United States poses a perennial obstacle to legislators. Domestic trafficking figures are unavailable due to the complexity of the crime and difficulty in identifying victims,<sup>23</sup> and government sources disagree on the scope of the problem. Some reports estimate that there are 100,000 to 300,000 child sex trafficking victims in the United States, though this number has been heavily criticized.<sup>24</sup> Others estimate 45,000 to 50,000 victims trafficked in the United States.<sup>25</sup> More recently, federal government estimates claim that 14,500 to 17,500 victims are sold into sex trafficking into the United States each year, not including those trafficked *within* the country.<sup>26</sup>

While there are no reliable figures on the number of trafficking victims, investigations have uncovered more reliable information on how victims are recruited. Victims can be forced or coerced into the industry in any number of ways. Victims trafficked from abroad—often from countries with weak

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<sup>21</sup> See SHIVELY ET AL., *supra* note 15, at 2-63 (“‘Customers’ or johns frequently seek and pay a premium for unprotected intercourse and oral sex, which greatly increases the risks of contracting and spreading STIs, HIV, hepatitis, tuberculosis and more. Surveys of prostituted women find that those insisting on always using condoms face income losses of up to 79%, because most customers prefer sex without condoms. Between 35% and 55% of samples of prostituted women said they had engaged in unprotected commercial sex, and 10% to 35% never use condoms while engaging in commercial sex. Disturbingly, surveys have found just 47% of prostituted women to know whether or not they are HIV-positive; less than half had had health screenings in the prior year despite having sex with an average of 17 different men per week, and 45% were infected with hepatitis C.”) (citations omitted).

<sup>22</sup> See SHIVELY ET AL., *supra* note 15, at 5-6 (“Involvement in prostitution is also linked to a variety of health problems, including tuberculosis, HIV, STDs, anemia, and hepatitis. Rates of infectious disease are from five to sixty times higher among providers of commercial sex than in general populations.”). See also *id.* at 2-53 (saying that “[p]ublic health professionals have long known that involvement in commercial sex places individuals at very high risk for infectious disease, injury, and death . . . rates of infectious disease are from five to sixty times higher among providers of commercial sex than in general populations.”) (citations omitted).

<sup>23</sup> For more background on the lack of estimates, see Al Kamen, *Is Human Trafficking Widespread in this Country?*, WASH. POST: POWERPOST, June 13, 2015, <https://www.washingtonpost.com/news/powerpost/wp/2015/06/13/is-human-trafficking-widespread-in-this-country> [<https://perma.cc/37HJ-EAF6>].

<sup>24</sup> See Emily Stanton, *Study: At Least 100,000 Children Being Used in U.S. Sex Trade*, U.S. NEWS & WORLD REP., July 8, 2013, <http://www.usnews.com/news/blogs/washington-whispers/2013/07/08/study-at-least-100000-children-being-used-in-us-sex-trade> [<https://perma.cc/5VTQ-EM3Q>]. See also ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS* (2010); but see Glenn Kessler, *The Bogus Claim that 300,000 U.S. Children are ‘at risk’ of Sexual Exploitation*, WASH. POST: FACT CHECKER, May 28, 2015, <https://www.washingtonpost.com/news/fact-checker/wp/2015/05/28/the-bogus-claim-that-300000-u-s-children-are-at-risk-of-sexual-exploitation> [<https://perma.cc/4HZX-25WM>] (criticizing this estimate and offering alternative data).

<sup>25</sup> See FRANCIS T. MIKO & GRACE (JEA-HYUN) PARK, CONG. RESEARCH SERV., RL30545, *TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE SUMMARY* (2001).

<sup>26</sup> See *What Is Human Trafficking*, STATE OF CAL. DEP’T OF JUSTICE OFFICE OF ATTORNEY GEN., <https://oag.ca.gov/human-trafficking/what-is> [<https://perma.cc/3EB5-ZGDJ>] (enumerating federal estimate).

legal systems—into the United States may be lured by promises of job opportunities. On arrival, they find that these pre-arrangements were false and they are trafficked into the commercial sex industry.<sup>27</sup> Some women, U.S. citizens or otherwise, initially agree to work in the industry but under the belief that they will be treated as equals and fairly compensated, not held in “slave-like conditions.”<sup>28</sup> Others are sold into trafficking by family members for drugs or money, or kidnapped by traffickers.<sup>29</sup> In the United States, it is common for children to be lured into commercial sexual exploitation by family members or family friends,<sup>30</sup> and it has been recently reported that a growing number of victims are being recruited by peers.<sup>31</sup>

Sex traffickers often recruit victims by acting as a boyfriend or fiancé, gaining trust by preying on the victim’s desire for belonging. These “Romeo” traffickers are possibly the most common type of trafficker, and are often affiliated with a gang.<sup>32</sup> After exploiting the victim’s vulnerabilities, the trafficker manipulates the victim into prostitution by force, deception, coercion, and drugs, sometimes convincing the victim that she needs to pull her own weight financially to make life together work.<sup>33</sup> In one study of survivors, 61% reported having a romantic relationship with their controller.<sup>34</sup>

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<sup>27</sup> Note, *Remedying the Injustices of Human Trafficking through Tort Law*, 119 HARV. L. REV. 2574, 2576 (2006).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See HEATHER J. CLAWSON ET AL., ICF INT’L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 1 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf> [<https://perma.cc/P4P9-8NTS>].

<sup>31</sup> See DEV. SERV. GRP., INC., COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN/SEX TRAFFICKING 5 (2014), <http://www.ojdp.gov/mpg/litreviews/CSECSexTrafficking.pdf> [<https://perma.cc/H6B9-LHDW>] (reviewing literature for the Office of Juvenile Justice and Delinquency Prevention).

<sup>32</sup> See GODOY ET AL., *supra* note 16, at 22 (explaining that “[t]he ‘Romeo’ style trafficker is often, but not always, gang-affiliated; under the facade of a ‘boyfriend’ this trafficker uses affection, charm, and positive attention throughout the ‘grooming process’ to manipulate girls and young women. Signs of grooming include: gifts, especially cell phones; sudden changes in appearance (e.g. attire and accessories) and attitude (e.g. hypersexualization); sense of secrecy and heavy influence regarding new friendships or relationships; truancy from school; and excessive nights away from home. The romance and manipulation are underscored by flattery, ‘acts of love,’ and material gifts (e.g. clothes, food, money). The trafficker creates a false sense of security then exploits the victim’s financial and emotional vulnerabilities. The victim typically has feelings of indebtedness for the trafficker’s perceived kindness, which ensures she will initially comply with desires for her to engage in commercial sex acts with his ‘friends’ or strangers. The grooming period can last for hours, months, or years before the trafficker systematically breaks down the victim’s self-esteem, social support systems, and resistance. As the affection and gifts diminish the trafficker then asks, persuades, or forces the victim into exchanging sexual activity for compensation. The victim’s loss of agency over their own body is routinely coupled with physical, emotional, and sexual violence; thus, reinforcing the ‘boyfriend’ dominance and unequal power dynamic and ensuring an omnipotent presence the victim cannot easily detach from.” (citations omitted)).

<sup>33</sup> HYLAND & SREEHARSHA, *supra* note 12, at 25.

<sup>34</sup> VANESSA BOUCHÉ, THORN: DIG. DEF. OF CHILDREN, A REPORT ON THE USE OF TECHNOLOGY TO RECRUIT, GROOM AND SELL DOMESTIC MINOR SEX TRAFFICKING VICTIMS 12 (2015), [https://www.wearethorn.org/wp-content/uploads/2015/02/Survivor\\_Survey\\_r5.pdf](https://www.wearethorn.org/wp-content/uploads/2015/02/Survivor_Survey_r5.pdf) [<https://perma.cc/S4KX-LTVT>].

Traffickers often use drugs and addiction, and gang rape, to initiate victims into the trade.<sup>35</sup> Psychological coercion and substance abuse are particularly destructive as they may inhibit victims from self-identifying as sex trafficking victims.<sup>36</sup>

Further complicating matters, the methods of recruitment and sale of victims are evolving with technology. Sex trafficking has moved from the auction blocks to the internet. The majority of victims still meet their trafficker for the first time in person,<sup>37</sup> but new research shows that underage victims are increasingly likely to first meet their trafficker online, namely through social media sites.<sup>38</sup> Today, the majority of underage victims have been advertised or sold online.<sup>39</sup> The internet has shaped the market and the commodities available for purchase.<sup>40</sup> While sex trafficking transactions still commonly occur on the street, online platforms like Backpage.com have provided sophisticated marketplaces where traffickers and buyers can anonymously post and respond to ads selling victims.<sup>41</sup>

Easier, less risky, and more anonymous access to victims has arguably created increased demand for certain prohibited trafficking acts, like the purchasing of very young girls for sex and the viewing of child pornography.<sup>42</sup> In one survey of child pornography offenders, 19% of offenders had

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<sup>35</sup> See SHIVELY ET AL., *supra* note 15, at 5-7 (stating that drugs are used to keep women and girls in commercial sex and explaining, “[t]hose who were not initially addicted to drugs often become so soon after becoming involved in prostitution. Drug addiction and poverty serve to keep prostituted women and girls destabilized and dependent. Substance abuse is a factor in both the initiation and persistence of prostitution. The trauma experienced by prostituted persons can result in greater dependence on drugs, both as a means of self-medicating and to support a drug habit, sometimes through exchanging sex for drugs.”) (citations omitted).

<sup>36</sup> See *id.* (“After years of manipulation and exploitation, women who have been controlled by pimps and traffickers can have difficulty separating. Pimps and traffickers will use combinations of force, manipulation, fraud, and intimidation to maintain control of what, for them, is a financial asset.”) (citations omitted).

<sup>37</sup> See GODOY ET AL., *supra* note 16, at 24 (explaining that traffickers may recruit victims by loitering around “common public areas includ[ing] in or around foster care group homes, detention centers, and runaway and homeless youth shelters.”).

<sup>38</sup> See BOUCHÉ, *supra* note 34, at 10.

<sup>39</sup> *Id.* at 19.

<sup>40</sup> The Internet has given criminals and buyers seeming anonymity and has enabled a wider scale of exploitation. See *id.* at 18–20.

<sup>41</sup> See *id.* (explaining that online posts use coded words and phrases to signal the sale of child sex trafficking victims, such as “fresh meat, young, virgin, prime, coochie (shaved), non-pro, new, barely legal/18, college student/girl, lovely, daddy’s little girl, sweet, 1986 Firebird, new in the life, liked girls, youthful, and fantasy.”).

<sup>42</sup> See DEV. SERV. GRP., INC., *supra* note 31, at 5. Pornography is a form of sex trafficking, and the *Justice for Victims of Trafficking Act of 2015* clarified that victims of pornography are eligible for the same services as victims of trafficking. See Catharine MacKinnon, *Speech: Pornography as Trafficking*, 26 MICH. J. INT’L L. 993 993–95 (2005) <http://www.prostitutionresearch.com/MacKinnon%20Pornography%20as%20Trafficking.pdf> (explaining that “In material reality, pornography is one way women and children are trafficked for sex. To make visual pornography, the bulk of the industry’s products, real women and children, and some men, are rented out for use in commercial sex acts. In the resulting materials, these people are then conveyed and sold for a buyer’s sexual use. . . . Although legitimate corporations increasingly



collected images of children younger than 3 years old; 39% had images of children younger than 6 years old; and 83% had images of children younger than 12 years old.<sup>43</sup> These images depicted children who had experienced brutal sexual assault.<sup>44</sup> Widespread internet access and wealth in the United States have allowed the United States to become one of the world's largest producers and consumers of internet child pornography,<sup>45</sup> and it is estimated that internet child pornography is growing at a rate of 150% per year.<sup>46</sup>

Despite a growing body of research on sex trafficking, prosecution rates are low, primarily because identification remains low.<sup>47</sup> Victims rarely self-identify and are not generally aware of the assistance offered by law. Some may fear being treated as criminals themselves were they to contact law enforcement. Victims are frequently drugged, manipulated, or threatened, and many are experiencing trauma, making it difficult to seek help.<sup>48</sup>

For their part, traffickers keep the industry hidden and strictly control the behavior and phone and internet access of their victims.<sup>49</sup> Moreover, many traffickers transport victims across state and county borders to confuse victims, meet demand, or evade law enforcement, though movement is by no means a requirement of the crime. Others, especially those with sexual or romantic relationships with their victims, have manipulated and coerced women into loyalty and silence. Traffickers may also bring foreign women into the lucrative U.S. market; these foreign victims do not know their rights

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traffic the materials, the pornography industry, like other means of human trafficking, remains at base an organized crime industry built on force, some physical, some not.”).

<sup>43</sup> Letter from F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism, & Homeland Sec., et al., to The Honorable Patti B. Saris, Chairwoman, U.S. Sentencing Comm'n 1 (Feb. 14, 2012), [http://sensenbrenner.house.gov/uploadedfiles/letter\\_to\\_sentencing\\_commission\\_2-14-2012.pdf](http://sensenbrenner.house.gov/uploadedfiles/letter_to_sentencing_commission_2-14-2012.pdf) [<https://perma.cc/5997-FMPE>].

<sup>44</sup> See *id.* There is a correlation between possession of child pornography and physical molestation of children. See Megan Westenberg, *Establishing the Nexus: The Definitive Relationship Between Child Molestation and Possession of Child Pornography as the Social Basis for Probable Cause*, 81 U. CIN. L. REV. 337, 338 (2012).

<sup>45</sup> See DEV. SERV. GRP., INC., *supra* note 31, at 17.

<sup>46</sup> See Sensenbrenner, *supra* note 43, at 1.

<sup>47</sup> The number of prosecutions is low, but has increased over time, with the U.S. Department of Justice charging sixty-two percent more trafficking cases—including forced labor, sex trafficking, and international sex trafficking—during 2010 to 2015, compared to 2005 to 2010. See *One Year After Enactment: Implementation of the JVTA of 2015: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 2 (2016) <https://www.judiciary.senate.gov/imo/media/doc/06-28-16%20Steinberg%20Testimony.pdf> [<https://perma.cc/C9BM-8G8U>] (statement of Jill Steinberg, Nat'l Coordinator, Child Exploitation Prevention & Interdiction) [hereinafter *Implementation*]. The U.S. Department of Justice prosecuted 257 federal human trafficking cases in Fiscal Year 2015. *Id.* Convictions are lower—only twenty-six percent more defendants were convicted over the later time period of 2010 to 2015. See *id.*

<sup>48</sup> See HYLAND & SREEHARSHA, *supra* note 12, at 3 (arguing that “trafficked persons are largely unable to reach out for help, so we need to reach out to them.”).

<sup>49</sup> See *id.* at 28. See also GODOY ET AL., *supra* note 16, at 21 (“Men overwhelmingly account for the majority of convicted traffickers worldwide. Roughly seventy-two percent of convicted traffickers are men and twenty-eight percent are women. In the United States between 2008 and 2010, men comprised eighty-one percent of suspected human traffickers with sixty-two percent of sex traffickers identified as Black and forty-eight percent of labor traffickers identified as Hispanic.” (citations omitted)).

under U.S. law and often have their immigration and identification documents confiscated. They have few or no contacts outside of their immediate environment, and are isolated linguistically, culturally, and physically.<sup>50</sup> In some cases, presumably to evade suspicion and keep a low profile, brothels restrict access. For example, only men of the same ethnicity and language can enter certain Chinese brothels in Chinatown in New York City.<sup>51</sup>

Sex trafficking is also difficult to detect because it is dominated by organized transnational crime networks. Trafficking in persons involves large or small-scale networks that include “recruiters, document forgers, transporters, and purchasers.”<sup>52</sup> The system is as complex and lucrative as trafficking in narcotics and weapons, and sex traffickers collaborate with transnational criminal groups on “safe and tested routes, access to cash, forged documents, and officials to bribe.”<sup>53</sup>

Low identification rates also partly stem from deeply ingrained misconceptions about the commercial sex industry. Instead of rescuing victims and helping them seek criminal and civil redress, law enforcement may identify them as willing participants or even accomplices. While many “prostitutes”

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<sup>50</sup> See HYLAND & SREEHARSHA, *supra* note 12, at 28–29. See also *id.* at 26–30 (explaining the many tools traffickers use to coerce their victims including social isolation, blackmail, shaming, inhumane treatment, withholding identity documents, criminal acts, religious and cultural beliefs, bonding and dependency, and economic coercion).

<sup>51</sup> See Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87, 94 (2005).

<sup>52</sup> Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L. J. 1, 6 (2004) (explaining that “The types of traffickers and the methods they employ are diverse. There are complex transnational crime rings that operate on the scale of any G-8 nation to carve up markets, and there are small-scale, family-style channels as well as individuals. Trafficking nearly always involves some sort of network, some organized and others not, including recruiters, document forgers, transporters, and purchasers.”).

<sup>53</sup> U.S. DEP'T OF STATE, PUBL'N 11057, TRAFFICKING IN PERSONS REPORT 11 (2003), <http://www.state.gov/documents/organization/21555.pdf> [https://perma.cc/B4EL-683T] (“Human traffickers are often highly successful because of links with other transnational criminal groups, such as arms dealers, drug traffickers, and car theft rings, which provide them with safe and tested routes, access to cash, forged documents, and officials to bribe.”). See Ben Leubsdorf, *Modern Forms of Slavery Generate \$150 Billion a Year in Profits for Exploiters*, WALL STREET J., May 19, 2014, <http://blogs.wsj.com/economics/2014/05/19/modern-forms-of-slavery-generate-150-billion-a-year-in-profits-for-exploiters/> [https://perma.cc/2E52-T7JR] (reporting on a 2014 ILO study on human trafficking showing that globally, “[s]exual exploitation alone generates \$99 billion in annual profits[,]” and “[p]rofits per victim are highest in forced sexual exploitation, which can be explained by the demand for such services and the prices that clients are willing to pay, and by the low capital investments and low operating costs associated with this activity . . . With a global average profit of US \$21,800 per year per victim, this sector is six times more profitable than all other forms of forced labour, and five times more profitable than forced labour exploitation outside domestic work.”). See also Karin Lehardt, *55 Little Known Facts about Human Trafficking*, FACT RETRIEVER, Sept. 20, 2016, <http://facts.randomhistory.com/human-trafficking-facts.html> [https://perma.cc/8N49-H4JA] (quoting Ludwig “Tarzan” Fainberg, a convicted trafficker, stating, “[y]ou can buy a woman for \$10,000 and make your money back in a week if she is pretty and young. Then everything else is profit.”) (citing BENJAMIN E. SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY (2008)).

are coerced or forced into prostitution, the law has been exceptionally slow at recognizing this. In order to identify victims, it is important that stakeholders realize that the commercial sex industry overlaps heavily with sex trafficking. One study found that up to 80% of women and girls in the commercial sex industry had been coerced or forced into prostitution by pimps or traffickers.<sup>54</sup> Women and girls in the commercial sex industry are “economically and emotionally vulnerable,” and many have experienced childhood sexual or physical abuse.<sup>55</sup> One heartbreaking study of a sample of prostituted women and girls found that nine in ten “had lost their virginity in an act of commercial sex.”<sup>56</sup> Data is unreliable, but it is believed that many women in the commercial sex industry entered as children, i.e., as sex trafficking victims. Numerous studies show that most women in the commercial sex industry are desperate to leave but believe they have no other means for survival.<sup>57</sup> They are also highly likely to experience rape and sexual assault. Studies demonstrate that the majority of women in prostitution are raped, and “over three-quarters are assaulted or robbed by customers, traffickers, and/or pimps.”<sup>58</sup> These crimes inherent in prostitution draw a brittle line between choice and force. Experts conclude that even the “choice” to enter the commercial sex industry is often a result of economic and psychological duress<sup>59</sup>—a state in which it is not possible to make an empowering choice about prostitution. And as scholar Catharine MacKinnon argues in the *Mich-*

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<sup>54</sup> SHIVELY ET AL., *supra* note 15, at 5–6. Moreover, “[i]n a comparison of female prostitutes with pimps to those without, Norton-Hawk (2004) found that pimp-controlled survivors of sexual exploitation were more likely to have an inadequate education, to be chronically unemployed, and to have been younger when they first had intercourse, tried drugs, and engaged in prostitution.” *Id.*

<sup>55</sup> *Id.* at 5–4; *see also id.* at 2–64 (“One cannot emphasize enough that, as opposed to what decriminalization advocates would have us believe, childhood sexual abuse is the typical start of life in the sex trade, and is the most common rather than the extreme scenario.”).

<sup>56</sup> *See id.* at 5–6.

<sup>57</sup> *See id.* at 5–7 (citing one study that found eighty-eight percent of female providers of commercial sex in San Francisco want to leave prostitution). *See also* MELISSA FARLEY & EMILY BUTLER, PROSTITUTION RESEARCH & EDUC., PROSTITUTION AND TRAFFICKING — QUICK FACTS 3 (2012), <http://www.prostitutionresearch.com/Prostitution%20Quick%20Facts%2012-21-12.pdf> [<https://perma.cc/F7JZ-FQUU>] (stating that “85% to 95% of those in prostitution want to escape it.”).

<sup>58</sup> SHIVELY ET AL., *supra* note 15, at 2–65. *See id.* at 5–6 (explaining that fifty-nine percent of trafficked women and girls internationally are sexually abused and ninety-five percent are physically abused).

<sup>59</sup> *See id.* at 2–22. Moreover, many women first enter the commercial sex industry as minors—many with a history of child physical or sexual abuse. *See* Catharine MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 298 (2011), [http://www.prostitutionresearch.com/pdfs/MacKinnon%20\(2011\)%20Trafficking%20Prostitution%20and%20Inequality.pdf](http://www.prostitutionresearch.com/pdfs/MacKinnon%20(2011)%20Trafficking%20Prostitution%20and%20Inequality.pdf) (“What those seem to miss who care only about prostituted children . . . is that in the sex trade, adults and children are not two separate groups of people. They are the same group of people at two points in time. Too, this is why nothing effective can be done for one without doing it for both. Those children for whom nothing was done who managed not to die yet are most of today’s prostituted women. One consequence of childhood sexual abuse can be to feel valued and approved when being sexually violated in a context of feeling fundamentally worthless.”).

*igan Journal of Gender and Law*, “If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?”<sup>60</sup>

Victims who receive just treatment by law enforcement still face an uphill battle in accessing assistance and services. “Rescued” women may be criminalized and face potential detention or deportation.<sup>61</sup> In many cases, women return to the commercial sex industry—and pimps actively recruit previously trafficked women—due to threats from traffickers, distrust of law enforcement, or a belief that they have no other options for survival. Taken together, these factors help explain why globally, less than one percent of trafficked victims have been identified.<sup>62</sup>

The use of the internet to expand access to sex trafficking has made the need for modern tools and resources to identify and combat sex trafficking all the more pressing. But deconstructing trafficking networks, rescuing victims, and reducing demand for the trade are problems that have had to wait decades for congressional action. Congress has had to learn through slow trial and error what trafficking is, where it occurs, and what actors are involved. The next section explores the evolution of how Congress has grappled with the complexities of this sophisticated crime and how law in this area has been subject to recurring setbacks in enforcement and interpretation.

### III. HISTORY OF U.S. SEX TRAFFICKING LEGISLATION

The first congressional action applicable to sex trafficking cases was undoubtedly the Thirteenth Amendment, enacted in 1865. But narrow legal interpretation of the Amendment in its early years restricted the extrapolation of the Amendment to cover all forms of slavery. Over the next 150 years, legislation to combat sex trafficking was limited by neglect of the Reconstruction-era Amendments—which guaranteed basic civil rights—combined with a crippling failure to understand, identify, and investigate sex trafficking cases. Congress first misidentified trafficking as a primarily “foreign” crime with foreign victims. This was partly due to federal concern about the relationship between immigration, transnational crime, and commercial sex. Over the period of 1875–1907, Congress explicitly addressed sex trafficking through immigration laws that prevented the importation of women into the United States for forced prostitution.

By 1910, Congress had begun to realize that U.S. citizens, not just immigrants, were victims of human trafficking. The White Slave Traffic Act of 1910, known as the Mann Act, used the Commerce Clause to criminalize the

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<sup>60</sup> Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993).

<sup>61</sup> See Kandathil, *supra* note 51, at 112. See also Note, *supra* note 27, at 25, 78–79.

<sup>62</sup> See HYLAND & SREEHARSHA, *supra* note 12, at 2.

sex trafficking of women across state lines.<sup>63</sup> The invocation of the Commerce Clause meant that sex trafficking became the first crime in America to be regulated by the federal government. But reliance on the clause created an undue legislative focus on the intersections between forced prostitution, physical and interstate movement, and immigration—a focus that led to misinterpretation of the Mann Act and misinformed efforts to prosecute cases and assist victims. When courts misinterpreted the law to allow prosecutors to target noncommercial sex acts, and when the Department of Justice (DOJ) green-lighted discriminatory cases, Congress did not step in to reassert its original intent.

Throughout the twentieth century, prosecutors who brought sex trafficking cases were forced to use a confusing array of immigration and criminal law that offered relatively weak penalties. Lack of a proper legal framework to address sex trafficking restricted the number of cases that were pursued. Once again, focus on the transnational nature of the crime—namely, the discovery of Asian trafficking rings in the Western United States in the 1990s and passage of a UN protocol on trafficking in 2000—helped prompt action. In 2000, Congress enacted the Trafficking Victims Protection Act of 2000 (TVPA), which finally provided more comprehensive tools for prosecuting sex traffickers. Through the TVPA, Congress made progress toward understanding the role psychological coercion can play in trafficking. But victim assistance provisions discriminated against U.S. citizen victims, prosecution rates remained abysmally low, and sex purchasers were given free passes for their role in sustaining demand for sex trafficking. Congress still did not fully understand the overlap between the domestic commercial sex industry and trafficking, or what actors perpetuated the trade. Yet in order to understand how far Congress had come—and how it repeated some of its old mistakes—a review of the past is helpful.

#### *A. Limitations on Freedom: The Thirteenth Amendment*

##### *a. Early Interpretation*

The groundbreaking Thirteenth Amendment of 1865 federalized the guarantee of human freedom. Section 1 of the Thirteenth Amendment abolished slavery and involuntary servitude. Section 2 of the Amendment held that “Congress shall have power to enforce this article by appropriate legislation.” However, the courts quickly stripped Congress of its Section 2 powers, crippling federal efforts to prosecute slavery and protect victims.

Congress had realized from the beginning that passage of the Thirteenth Amendment was just the first step in fully enforcing the end of slavery, and

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<sup>63</sup> The Commerce Clause of the U.S. Constitution gives Congress authority “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3.

Republicans moved swiftly to pass laws that would guarantee all men the civil rights inherent to a free society. Congressional action was needed to discredit the Black Codes that were enacted in Southern states in 1865 and 1866.<sup>64</sup> These laws directly threatened the Thirteenth Amendment by withholding equal rights from freedmen and establishing a system of second-generation slavery.<sup>65</sup> To counter the Black Codes, Congress enacted new legislation pursuant to Section 2 of the Thirteenth Amendment, including the Civil Rights Acts of 1866 and 1875 and Anti-Peonage Act of 1867, which criminalized debt bondage.<sup>66</sup> These laws exerted federal authority over the guarantee of civil rights and “left enforcement primarily for the federal courts.”<sup>67</sup>

But federal courts were uncooperative. The Supreme Court’s early rulings in the famous Slaughter-House Cases (1872)<sup>68</sup> and Civil Rights Cases (1883)<sup>69</sup> rejected Congress’s authority to use the Thirteenth Amendment to not only abolish slavery and involuntary servitude but to promulgate affirmative rights.<sup>70</sup> These rulings defied clear congressional intent. During the

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<sup>64</sup> The Black Codes were largely repealed from 1866 to 1868 during Reconstruction, and were a precursor to Jim Crow laws that were passed later in the 19th century. See *The Southern “Black Codes” of 1865–66*, CONSTITUTIONAL RIGHTS FOUND., <http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> [<https://perma.cc/KCR8-9FLH>].

<sup>65</sup> See Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 987 (2002) (explaining that “second generation slavery or involuntary servitude was a product of Reconstruction-era Black Codes that held American blacks—and eventually immigrant whites—to long periods of debt bondage, known as peonage.”) See also *id.* at 1015 (explaining that “Southern legislators enacted a series of laws—Black Codes—to stabilize emancipated black work force and retain their labor cheaply.”).

<sup>66</sup> See *id.* at 1020. The Anti-Peonage Act of 1867 criminalized peonage—or debt bondage—in newly acquired New Mexico, where peonage had been a common practice, and the rest of the country.

<sup>67</sup> See *id.* at 1023 (explaining that “The Civil Rights Act [of 1866] authorized federal district attorneys, marshals and Freedman’s Bureau officials to bring suit to remedy violations of the Act’s broad natural rights guarantees and made all persons, including local officials, liable to fine or imprisonment. It did not create a permanent national police force. Rather, it left enforcement primarily for the federal courts. The federal government had previously been considered by many to have the greatest potential for tyranny and the states the greatest bulwark against it. As part of the constitutional revolution rendered by the Civil Rights Act and later, the Fourteenth Amendment, the Federal Government would become, in Senator Sumner’s words, the new ‘custodian of freedom.’”).

<sup>68</sup> *Slaughter-House Cases*, 83 U.S. 36 (1872).

<sup>69</sup> *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>70</sup> The Court’s majority opinions in the *Slaughter-House* and *Civil Rights Cases* “limited freedom to its narrowest sense,” see Azmy, *supra* note 65, at 1006. This castrated the Thirteenth Amendment in constitutional law, see *id.* at 1000. The *Slaughter-House Cases* (1873) determined that the Thirteenth Amendment was a “simple” statement that guaranteed emancipation for former slaves in the African slave trade but did not require states to affirm the civil rights of these former slaves. See *id.* at 983. Meanwhile, Congress passed the Civil Rights Act of 1875, which prohibited private acts of discrimination. The *Civil Rights Cases* (1883), which dismantled that act, can be viewed as part of the “broad-based national decision to end Reconstruction.” See Katyal, *supra* note 4, at 1007. The Court “limited the reach of the Civil War Amendments in order to accommodate the rigid political compromise” of 1877. *Id.* The Court ruled that the Thirteenth Amendment only banned private actors from owning slaves, not from practicing discrimination. *Id.* In a dissenting opinion, Justice John Marshall Harlan argued that

original ratification debates of the Thirteenth Amendment and the Civil Rights Act of 1866, Republicans in Congress argued that the sustainment of freedom required more than mere emancipation; slavery must be defeated “not in form only, but in substance.”<sup>71</sup> The Civil Rights Act was enacted to “give effect” to the Amendment’s “abstract truths and principles” and to secure “practical freedom” for all people.<sup>72</sup> Congress’s sweeping vision of free labor for a free nation intended to not only abolish slavery—after all, the Emancipation Proclamation had already been issued in 1863—but to restore the promises of the Declaration of Independence to all persons.<sup>73</sup>

That Congress intended the Amendment to apply not only to the African slave trade but all forms of slavery was also clear. From the 1830s and 1840s, labor leaders had used the term “white slave” to describe the hardships faced by those in wage labor.<sup>74</sup> Republicans believed that the Constitution should provide full rights for former slaves, but also free blacks, white laborers, and any other kind of slave.<sup>75</sup> Forced prostitution was also considered a form of slavery and a deprivation of natural rights; both before and

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the majority had adopted an “unrealistically narrow view” of the Thirteenth Amendment—an amendment that had been enacted under the premise of natural rights and equality. *Id.*

<sup>71</sup> See Azmy, *supra* note 65, at 1013 (stating that the supporters of the Thirteenth Amendment “believed they were attempting much more than providing a negative right against the physical compulsion to work. Rather, they considered the Amendment “the crowning act” or the “capstone upon the sublime structure” of the Constitution; it was “the final step” to full freedom, which included a positive guarantee to all persons the equal enjoyment of all fundamental rights.”).

<sup>72</sup> See *id.* at 1017.

<sup>73</sup> See *id.* at 1011 (illustrating that Republican framers believed that “[S]lavery committed innumerable, deeply corrupting crimes against the “life of a free nation.” It had undermined “democratic institutions” and “the dignity of free labor”; it had prevented the realization of every Republican principle espoused by the Founders and trampled the Declaration of Independence.”).

<sup>74</sup> See BRIAN DONOVAN, *WHITE SLAVE CRUSADES: RACE, GENDER, AND ANTI-VICE ACTIVISM, 1887–1917* at 18 (2005).

<sup>75</sup> See Azmy, *supra* note 65, at 999 (arguing, based on the original ratification debates of the Amendment, that the Amendment “was meant to do far more than free four million slaves from bondage or guarantee workers the right to quit their jobs. Rather, the Amendment was heroically championed as the “final step” towards “full freedom” in the country for former slaves, free blacks and white laborers.”). Republican Senator Henry Wilson explained, “we have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country . . . . The same influences that go to keep down and crush down the rights of the poor black man bear down and oppress the poor white laboring man.” *Id.* at 1019; see *Slaughter-House Cases*, 83 U.S. at 72 (holding that while “negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.”). Justice Stephen Field’s dissent in the *Slaughter-House Cases* argued, “the language of the [Thirteenth] amendment is not used in a restrictive sense. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form.” *Id.* at 90. Moreover, the Anti-Peonage Act was primarily enacted to address not Black bondage, but the common practice of debt bondage in New Mexico, which had been acquired in 1848. See Azmy, *supra* note 65, at 1020.

after the Civil War, members of Congress and abolitionist leaders had compared forced prostitution and slavery.<sup>76</sup>

Not everyone agreed that Congress should create federally protected rights. The opposition of Democrats and some Republicans further proved that Congress intended the Amendment to affirm civil rights, not merely to end the African slave trade. Democrats in Congress recognized that “the Amendment would mean much more than the elimination of physical human bondage.”<sup>77</sup> They believed that the Thirteenth Amendment would grant too much power to the central government and “go too far in granting blacks equality and revolutionizing federalism.”<sup>78</sup> President Andrew Johnson, a Republican, vetoed the Civil Rights Act, arguing that it would give too much power to the federal government over civil rights.<sup>79</sup>

While a Republican majority overrode his veto, congressional attempts to affirm civil rights would ultimately fail. The Supreme Court’s subsequent rulings gutted the authority and scope of the Reconstruction Amendments and undermined congressional authority to guarantee freedoms to America’s disenfranchised populations.<sup>80</sup> These rulings had lasting ramifications on the fight against sex trafficking. The Thirteenth Amendment has provided neither historical nor modern victims with a remedy for enslavement and involuntary servitude.<sup>81</sup> Problematically, Congress did not fight back against these rulings; in fact, legislators ceded to them. While the *Slaughter-House* and *Civil Rights Cases* rulings were gradually eroded in years to come, they disincentivized Congress from enacting laws pursuant to the Thirteenth and Fourteenth Amendments. Legislation to address sex trafficking and remedy civil rights violations in the coming decades would be formulated and enacted pursuant to the Commerce Clause instead of the Reconstruction Amendments that Congress had explicitly passed to affirm the natural rights of all people.<sup>82</sup>

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<sup>76</sup> See Katyal, *supra* note 4, at 797 (stating that “It was not uncommon for observers at the time to define slavery as prostitution”); see also *id.* at 805 (explaining that “After the ratification of the Thirteenth Amendment, many abolitionists turned their attention to women forced into prostitution. The postbellum antiprostitution movement employed abolitionist symbols to attract former antislavery activists and used old lists of antebellum abolitionists to enlist new members”); see also DOUGLASS, *supra* note 6, at 141–42 (condemning the legality of forced prostitution as slavery in the pre-emancipation era by stating that “every slaveholder is the legalized keeper of a house of ill-fame.”).

<sup>77</sup> See Azmy, *supra* note 65, at 1012.

<sup>78</sup> See *id.* at 1003.

<sup>79</sup> See *id.* at 1024 (quoting President Johnson’s warning that the bill represented “an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the states.”).

<sup>80</sup> See *id.* at 1007 (stating that “the Slaughter-House Cases and the Civil Rights Cases enshrined an understanding of the Thirteenth Amendment that barely resembles the richness and promise its ratifiers intended.”)

<sup>81</sup> See *id.* at 983.

<sup>82</sup> See *id.* at 986.



Enactment under the Commerce Clause would complicate Congress's justifications of human rights-related legislation. The use of the Commerce Clause would legally portray human trafficking as a crime of movement and borders rather than a violation of federally guaranteed civil rights. The Mann Act of 1910, the Civil Rights Act of 1964, the Trafficking Victims Protection Act of 2000, and even the Justice for Victims of Trafficking Act of 2015 were all enacted pursuant to the Commerce Clause.

*b. Modern Implementation*

Because the Supreme Court undermined enforcement of the Thirteenth Amendment, the Amendment's enabling statutes became the primary prosecutorial tools in sex and labor trafficking cases in the 20th century.<sup>83</sup> These enabling statutes criminalized peonage (18 U.S.C. 1581), enticement into slavery (18 U.S.C. 1583), and sale into involuntary servitude (18 U.S.C. 1584).

Despite the Senate Committee on Immigration's assertion in 1910 that victims forced into prostitution are "practically slaves in the true sense of the word,"<sup>84</sup> sex trafficking cases were generally brought up only under the involuntary servitude and peonage statutes. Trafficking cases were rarely, if ever, charged under the slavery statute.<sup>85</sup> Prominent court decisions in 1966 and 1981 expanded the Thirteenth Amendment's applicability to trafficking cases. In *United States v. Price* (1966), a civil rights case unrelated to sex trafficking, the Court broadened its understanding of the Thirteenth Amendment, arguing that "we must accord [the Amendment] a sweep as broad as its language."<sup>86</sup> In *United States v. Booker* (1981), the Court reversed its *Slaughter-House* opinion and widened interpretation of the Amendment to include modern slavery. The Booker opinion ruled that the Amendment was intended to address not only the African slave trade but its "Twentieth Century counterpart" as well.<sup>87</sup>

Still, penalties under the Amendment's enabling statutes were illogically weak. A criminal who forced multiple persons into involuntary servitude under 18 U.S.C. 1584 faced a maximum of ten years in prison or a

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<sup>83</sup> See Michael R. Candes, *The Victims of Trafficking and Violence Protection Act of 2000: Will it Become the Thirteenth Amendment of the Twenty-First Century?* 32 U. MIAMI INTER-AM. L. REV. 571, 576 (2001); see generally *Pierce v. United States*, 146 F.2d 84 (5th Cir. 1944); *Bernal v. United States*, 241 F. 339 (5th Cir. 1917). Other criminal statutes not enacted pursuant to the Thirteenth Amendment have also been used to prosecute trafficking cases. See 18 U.S.C. 2421-2424 (Mann Act), 8 U.S.C. § 1324 (2016) (criminalizing recruiting, smuggling, and transporting aliens), 8 U.S.C. § 1328 (2016) (criminalizing harboring for prostitution), 18 U.S.C. § 894 (2016) (criminalizing the extortionate collection of extension of credit). See also MARY DE CHESNAY, SEX TRAFFICKING: A CLINICAL GUIDE FOR NURSES 88 (2013).

<sup>84</sup> H.R. REP. NO. 61-886, pt. 2, at 15 (1910).

<sup>85</sup> See Katyal, *supra* note 4, at 808.

<sup>86</sup> *Id.* at 807 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

<sup>87</sup> *Id.* at 807 (quoting *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981)).

\$10,000 fine.<sup>88</sup> Compare this to the kidnapping statute, under which a criminal could receive life imprisonment. Low penalties decreased motivation to bring trafficking cases, and a handful of high-profile plea bargains showed that federal prosecutors were even willing to negotiate away all serious charges.<sup>89</sup>

More contentiously, not all victims counted as victims under the Thirteenth Amendment's enabling statutes. The courts had failed to define a standard for the applicability of trafficking cases to these statutes.<sup>90</sup> Congress did not step in to define the parameters of sex trafficking, and over time, courts derived that sex trafficking cases could be charged under the enabling statutes only if the case contained elements of deprivation of free will, actual or threatened physical restraint or injury, or legal coercion.<sup>91</sup> The Supreme Court solidified this limited understanding of manipulation as physical force or legal coercion in *United States v. Kozminski* (1988). In its ruling, the Court narrowly interpreted involuntary servitude to *exclude* persons who were victimized through psychological and economic coercion—tactics that are frequently used to recruit and control sex trafficking victims.<sup>92</sup> This

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<sup>88</sup> *Id.* at 807.

<sup>89</sup> See Kandathil, *supra* note 51, at 106; Carri Geer Thevenot, *Felony Tax Charge: Rizzolo Enters Guilty Plea*, L.V. REV. J., June 2, 2006, [https://web.archive.org/web/20060615172322/http://www.reviewjournal.com/lvrj\\_home/2006/Jun-02-Fri-2006/news/7739649.html](https://web.archive.org/web/20060615172322/http://www.reviewjournal.com/lvrj_home/2006/Jun-02-Fri-2006/news/7739649.html) [<https://perma.cc/L2GN-EZ6A>]. See also 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, 160 (2002) (explaining that “Trafficking cases are unattractive to assistant United States attorneys because these cases require enormous amounts of paperwork and do not result in a just sentence for the perpetrator. The light sentences for traffickers currently provide inadequate retribution for the horrific human and civil rights violations inflicted upon the victims. Traffickers and brothel owners sometimes end up being prosecuted simply for the offense of hiring illegal aliens, immigration fraud, and/or violations of the Mann Act-crimes with penalties that are light compared to the more serious crimes of kidnapping, RICO violations, peonage . . . money laundering, and collection of extension of credit by extortion, all of which carry harsher penalties. Prosecutors in the United States claim that they use all the legal tools at their disposal to convict and sentence sex traffickers, but the high standards of proof in current involuntary servitude prosecutions prevent them from inflicting harsher sentences. Some prosecutors claim that they prefer to enter plea agreements “in order to avoid having the victims testify at trial against their traffickers out of concern for the trauma that would result from public testimony and cross-examination. Since the criminal provisions of the labor statutes, which are possible alternatives to the involuntary servitude prosecutions, also carry weak penalties, it would not be effective to prosecute traffickers of women for slave labor.”)

<sup>90</sup> See Katyal, *supra* note 4, at 808 (explaining that courts have failed to “delineate a standard for determining Thirteenth Amendment violations. What emerges from the majority of Thirteenth Amendment cases, however, are two common elements. First, the plaintiff must prove some deprivation of free will; coerced labor lies at the center of the Amendment. Second, recent Court rulings require a plaintiff to prove actual or threatened physical or legal coercion.”)

<sup>91</sup> See *id.*; see also Jackson, *supra* note 3, at 524-5.

<sup>92</sup> In *Kozminski*, the Court found that “‘compulsion through psychological coercion’ could not establish a crime of involuntary servitude” and that “other forms of coercion, including economic coercion, deception, or threats of harm to another, would be considered “psychological” coercion.” Moreover, “coercion through the law or legal process,” which could be used to demonstrate involuntary servitude, “was narrowly construed.” See *id.* at 524-5. In contrast,

meant in practice that the applicability of involuntary servitude was too narrow to prosecute a wide range of sex trafficking cases. The definition excluded traffickers who ensnared their victims by developing a manipulative power relationship over the victim, threatened the safety of the victim's family members, threatened to deport the victim, or threatened to tell the victim's family members that she had sex with many men.

A minority opinion offered by Justices John Paul Stevens and Harry Blackmun in *Kozminski* argued that coercion could also be psychological or economic. The inclusion of involuntary servitude in the Thirteenth Amendment, they wrote, demonstrated that the framers meant to address the economic coercion of "transported or colonial laborers who, under contract or by custom, rendered service with temporary and limited loss of political and personal liberty."<sup>93</sup> But the framers were not heeded in 1988 any more than they were in 1865.

### B. *Race and Prostitution: The Page Act*

The Thirteenth Amendment banned slavery, but legal and cultural restrictions on the Amendment meant that the crime persisted. In the South, Black Codes and Jim Crow laws held American blacks in second-generation slavery, and black women continued to suffer from sexual exploitation and assault. Other disenfranchised groups, including European and Asian immigrants and poor rural women migrating to urban centers, were also subject to sexual exploitation.

Organized sex trafficking in Chinese women became rampant in the mid- to late-1800s in the Western United States. By 1850, 1,500 Chinese prostitutes lived in San Francisco's Chinatown, and the practice quickly turned into a profit machine.<sup>94</sup> Steamship companies, U.S. immigration offices in Hong Kong, Chinese gangs,<sup>95</sup> and other actors became stakeholders in an extensive ring that lured, kidnapped, and forced Chinese women into exploitation in California.<sup>96</sup> By 1870, anywhere from 63 to 90% of the Chi-

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Justices Brennan and Marshall's opinion argued that "certain psychological, economic, and social means of coercion can be just as effective as physical or legal means, particularly where the victims are especially vulnerable." However, the two justices concurred with the majority because they argued that the Thirteenth Amendment was intended only to prohibit involuntary labor that reached the level of "a condition of servitude resembling that in which slaves were held before the Civil War." *See id.* at 526-7.

<sup>93</sup> *United States v. Kozminski*, 487 U.S. 931, 961 (1988).

<sup>94</sup> *See* EILEEN P. SCULLY, *Pre-Cold War Traffic in Sexual Labor and Its Foes: Some Contemporary Lessons*, in *GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES* 112 (David Kyle & Rey Koslowski eds., 2d ed. 2011); *see also* BENSON TONG, *UNSUBMISSIVE WOMEN: CHINESE PROSTITUTES IN NINETEENTH-CENTURY SAN FRANCISCO* 15 (1994) (stating that 2,157 Chinese prostitutes lived in California in 1870, which was 61 percent of the total Chinese female population in the state).

<sup>95</sup> Chinese "tongs," or gangs, controlled the trade, paying for transport, bribing police, and negotiating with landlords. *See id.* at 8, 10.

<sup>96</sup> *Id.* at 52-54.

nese female population of San Francisco were involved in the commercial sex industry.<sup>97</sup>

Concerns over this epidemic, combined with anxiety about rising Chinese labor immigration, prompted Congress to pass the Alien Prostitution Importation Act, or the Page Act, in 1875. The Page Act was an unprecedented move by the federal government to regulate immigration, which throughout the 19th century had been controlled by states.<sup>98</sup> It was also the first federal law to regulate the commercial sex industry.

The legislation specifically targeted immigration from “China, Japan, or any other Oriental country.”<sup>99</sup> The bill forbade and criminalized “knowingly and willfully” importing or holding women for the “purposes of prostitution.”<sup>100</sup> Contracts or agreements relating to the importation of women for prostitution were declared void. The Page Act also banned the importation of convicts and Chinese indentured laborers, but the penalty for importing prostitutes was by far the highest in the bill with a maximum of five years in prison and a fine of up to \$5,000. *U.S. v. Johnson* (1881) established that the provisions relating to the importation of women for prostitution and the importation of convicts were applicable to “all countries, oriental and other.”<sup>101</sup>

The law required consular officers stationed at ports to certify that vessels did not have unlawful categories of people on board, and detailed the process by which vessels would be searched.<sup>102</sup> Enforcement fell on the shoulders of immigration officers at ports like the one in Hong Kong, through which many women departed to the United States. Immigration officers screened Asian women to ensure they were not entering into prostitution.<sup>103</sup> While Chinese immigration declined for a few years following 1875, enforcement in Hong Kong seems to have loosened after the late 1880s because immigration bounced back.<sup>104</sup>

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<sup>97</sup> *Id.* at 97.

<sup>98</sup> See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 665 (2005) (“[T]he federal government was relatively inactive in the immigration area until it passed the Page Law in 1985.”); see also NAT’L ACAD. OF SCI., ENG’G, & MED., *THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY* 62 (Mary C. Waters & Marisa Gerstein Pineau, eds., 2015) (“The federal government did little to regulate immigration, citizenship, and integration in the first century after the nation’s founding . . . . [I]n 1875 Congress passed the first restrictive federal immigration law, the Page Act . . . .”).

<sup>99</sup> Page Act of 1875, ch. 141, §§ 1, 3, 18 Stat. 477, 477 (1875) (repealed 1974).

<sup>100</sup> *Id.*

<sup>101</sup> *U.S. v. Johnson*, 7 F. 453 (C.C.N.Y. 1881).

<sup>102</sup> Page Act of 1875 § 5.

<sup>103</sup> See Abrams, *supra* note 99, at 695-6 (explaining that “American consuls in foreign ports had an obligation to screen Chinese and Japanese women before they even left their home countries, and refuse to grant them an immigration certificate if they suspected them of prostitution, a hurdle not imposed on immigrants from other ports, such as those in Europe.”)

<sup>104</sup> See Jackson, *supra* note 3, at 487 (explaining that “Attempts by U.S. officials to stop trafficking were thwarted by pervasive corruption purchased with the trade’s significant profits. U.S. immigration officers in Hong Kong were part of the problem. At best, they granted visas without meaningful inquiry into the voluntariness of an applicant’s travel; at worst, they know-

*C. Importing Prostitutes: 1903 and 1907 Immigration Laws*

The Page Act was the only federal law related to sex trafficking that passed before the turn of the century. Advocates, however, were not silent. In the years leading up to 1900, social reformers fought to raise awareness about trafficking. The Woman's Christian Temperance Union, New York Committee for the Prevention of the State Regulation of Vice, and other groups campaigned to reform state age of consent laws, many of which placed consent at age ten.<sup>105</sup> These efforts would protect minors and affect the penalties and applicability of laws regarding statutory rape, sexual assault, and procurement for prostitution. Most significantly, social reformers organized against the ills of the "white slave traffic." The term "white slavery" was first used in reference to forced prostitution in London in the 1830s to describe English girls being trafficked into Belgium and France.<sup>106</sup> By 1880, the term referred to the trafficking of all white women across foreign borders.<sup>107</sup>

Trafficking of European women over borders became an international concern. In Europe, officials began collaborating on a project to address the "white slave traffic" in July 1902.<sup>108</sup> These discussions resulted in the Paris Agreement of May 18, 1904.<sup>109</sup> Paris Agreement signatories agreed to investigate sex trafficking within their borders, designate an authority to centralize information on the procurement of women and girls "for immoral purposes abroad," and repatriate women and girls who wished to return to their home countries.<sup>110</sup> The U.S. Senate consented to the agreement on March 1, 1905.

By then, immigration into the United States was booming. Professional sex traffickers were reportedly procuring women emigrants straight from Ellis Island and sending them to urban centers across the country.<sup>111</sup> To address this problem, Congress passed "An act to regulate the immigration of aliens into the United States" on March 3, 1903.<sup>112</sup> This law explicitly banned importation of all women for prostitution and made importing and holding any

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ingly ignored coercive or deceptive trafficking of thousands of women and girls while pocketing rising examination fees.")

<sup>105</sup> JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 23 (2014). Some reformers also campaigned against local regulation of prostitution, such as a policy in Wisconsin that had doctors certify that prostitutes were free of venereal disease. *Id.* at 25–26. These social purity advocates believed that municipal regulation might lead to state-sanctioned prostitution. *Id.*

<sup>106</sup> *Id.* at 15; *see also* SCULLY, *supra* note 95, at 118.

<sup>107</sup> *Id.* at 131.

<sup>108</sup> Agreement between the United States and other Powers for the repression of the trade in white women, May 18, 1904–Mar. 1, 1905, 35 Stat. 1979, 1 L.N.T.S. 83.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Marlene D. Beckman, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L. J. 1111, 1116 (1984).

<sup>112</sup> An Act To regulate the immigration of aliens into the United States, ch. 1012, 32 Stat. 1213 (1903).

woman or girl for the purposes of prostitution after importation a felony.<sup>113</sup> Congress eliminated the “knowingly and willfully” language that had been used in the similarly-worded Page Act. This small but significant change perhaps indicated that Congress did not intend law enforcement to use a mens rea standard, which would require proof that the perpetrator had criminal intent.

On February 20, 1907, Congress revised this law by passing a sequel, also titled “An act to regulate the immigration of aliens into the United States.”<sup>114</sup> The law banned non-naturalized women from practicing prostitution in the United States within three years of their entry into the country, and continued the country’s strategy of fighting prostitution through immigration control.<sup>115</sup> It increased the penalties for “directly or indirectly” importing women for prostitution. It expanded the spectrum of those who could be held culpable for sex trafficking by making it a felony to “keep, maintain, control, support, employ, or harbor in any house or other place” any alien for prostitution or any other immoral purpose within three years of her entry into the United States.<sup>116</sup> These provisions recognized that trafficking involved a network of actors, each of whom may have direct culpability.

The 1907 law notably prohibited the importation of women and girls for “any other immoral purpose” in addition to prostitution. The “other immoral purpose” provision was added at the suggestion of administration officers to cover deceptive pretenses through which women were sold into sex trafficking.<sup>117</sup> Commissioner Robert Watchorn, immigration commissioner of New York from 1906 to 1909 who supervised enforcement of the 1907 law, had testified before the Senate on the importation tactics of sex traffickers—tactics that included pretending that imported women and girls were the traffickers’ mistresses.<sup>118</sup> In a committee report, Congress explained that

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<sup>113</sup> Unlike the Page Act, this 1903 law criminalized importing a “woman or girl.” *Id.* at 1112 (emphasis added). It also eliminated the “knowingly and willfully” language in the Page Act. *See* H.R. 10384. The felony of importing women for prostitution was punishable with a minimum one year in prison and maximum five years in prison and a fine of not more than \$5,000. *Id.*

<sup>114</sup> An Act To regulate the immigration of aliens into the United States, ch. 1134, 34 Stat. 898 (1907).

<sup>115</sup> PLILEY, *supra* note 106, at 34.

<sup>116</sup> The law also authorized the deportation of any alien who was either an inmate or employed by, managing, or profiting from prostitution, or anyone employed in connection with “any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes.” H.R. 10384. The 1907 bill did not mention the minimum penalty of one year. *Id.*

<sup>117</sup> Beckman, *supra* note 112, at 1114.

<sup>118</sup> *Id.* (explaining that Commissioner Watchorn testified that “he had proof that thousands of young women were being induced by professional procurers to come to America, where vicious men would rob them and put them over the border in a destitute condition. The Commissioner reported incidents in which the procurer would attack a young girl and hold her captive in a hotel room with threats to her life if she dared to attempt escape. Adding the words “any other immoral purpose” would cover these complicated practices of the white slave trade. As a result of the Commissioner’s testimony, Congress added the language to provide a means to prosecute procurers employing such techniques.”)

the “other immoral purpose” phrase was meant “to prevent undesirable practices alleged to have grown up in relation to the immigration of prostitutes.”<sup>119</sup> The intent of this provision was to better regulate the importation of women into the commercial sex industry, not regulate noncommercial acts. While congressional intent in this primary source is clear, Congress’s failure to spell out the purpose of this vague language in the law itself provided a degree of discretion to prosecutors, and it was soon brought to court.

*a. Implementation*

As it had done after passage of the Thirteenth Amendment, the Supreme Court disregarded congressional intent and decided that the “other immoral purposes” provision of the 1907 law should be applied to private sexual acts outside the commercial sex industry. In *United States v. Bitty* (1908), the Supreme Court ruled that a “concubine” imported from Europe was entering the United States for an “immoral purpose” under the immigration law.<sup>120</sup> Congress did not attempt to redress this misuse of the law. It wasn’t until *Hansen v. Hoff* (1934) that the Supreme Court limited its *Bitty* decision and held that importing mistresses did not qualify as an “immoral purpose” under the law.<sup>121</sup>

While Congress had not mastered how to clearly regulate the commercial sex industry, the 1903 and 1907 laws showed that legislators were to some degree learning about the tactics and existence of sex trafficking. These laws made the importation of foreigners into the United States for prostitution a federal crime at a time when there were very few federal crimes on the books, and gave prosecutors tools with which to combat trafficking. Congress did not, however, authorize resources to fund proper enforcement.

Though cases were certainly investigated, prosecutors and law enforcement faced numerous limitations in enforcement.<sup>122</sup> A January 1910 report

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<sup>119</sup> See Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J. L. & PUB. POL’Y 99, 107 (1996).

<sup>120</sup> *United States v. Bitty*, 208 U.S. 393, 400 (1908); see also Beckman, *supra* note 112, at 1114 (explaining that the Court held that a man who brought a foreign woman to the United States as his private mistress violated the Mann Act, and that the importer was subject to the penalty of the statute and the woman to deportation. The *Bitty* Court went no farther than holding that “any other immoral purpose” applied to the importation of a woman to be a mistress or concubine. In retrospect, this narrow holding should not have led to the interpretation of the language “any other immoral purpose” in the Mann Act to apply to acts of immorality unrelated to importation or commercial procurement.”)

<sup>121</sup> *Hansen v. Hoff*, 291 U.S. 559, 561–62 (1934); see also Conant, *supra* note 121, at 108 (holding that there was a distinction between *Hansen* and *Bitty*, because in *Bitty*, the concubine lived with the defendant, whereas in *Hansen*, the mistress stopped “short of concubinage” because she had a different place of residence and was not fully supported by him).

<sup>122</sup> See H.R. REP. NO. 61-886, pt. 2, at 14 (“The white-slave trade has been so prevalent that prosecuting officers, both State and Federal, even under inadequate and insufficient laws, have been able to secure many notable convictions.”); LEONARD TERRITO & NATALIYA GLOVER, *CRIMINAL INVESTIGATION OF SEX TRAFFICKING IN AMERICA* 17 (2013) (detailing one

by the Commissioner-General of Immigration on the challenges of implementation stated that while “the bureau is putting forth the best possible efforts to strictly enforce the law and carry out the purpose of the [Paris] treaty,” officials did not have the financial resources to conduct undercover investigations on a large scale.<sup>123</sup> The report also described difficulties with procuring evidence of unlawful importation, due in part to traffickers’ tactics of entering the country overland through Canada.<sup>124</sup> The Commissioner argued that existing immigration laws were “not extensive and drastic enough in terms to effectually prevent further additions to the already large numbers of alien prostitutes and procurers in this country” and did not effectively regulate “the free passage to and fro of those engaged in [trafficking].”<sup>125</sup> The Commissioner complained that the “practically worthless” Paris Agreement did not hold European immigration ports accountable for sending illegal migrants to the United States.<sup>126</sup>

The report condemned the “undue leniency of certain courts in imposing sentences,” arguing that Congress should impose a minimum sentence to ensure felons were not let off lightly and to impose a deterrence effect.<sup>127</sup> The Commissioner also contended that *Keller v. United States* (1909)—which ruled that Congress had no constitutional authority to federally regulate the crime of harboring or maintaining women for sex trafficking—was a “severe handicap and almost nullified the endeavor to prosecute” criminals.<sup>128</sup>

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investigation led by Assistant U.S. District Attorney Parkin); VICE COMM’N OF CHL., THE SOCIAL EVIL IN CHICAGO 183 (1911) (detailing an indictment of a man who imported women from France and other investigations of trafficking).

<sup>123</sup> S. Doc. No. 58, 61st Cong., 12 (1910). Despite lack of resources, “considerable success has been made in prosecutions for illegal importation.” *Id.* at 8.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 14.

<sup>126</sup> *Id.* The 1907 act was “in some respects, broader than the [Paris] treaty” because the treaty only condoned deportation for women and girls brought to the United States for “purposes of debauchery” while the 1907 act enabled the U.S. Department of Immigration to deport nine classes of people, including persons who attempted to import prostitutes. *Id.* at 3. But the 1907 act was narrower than the treaty in that it only allowed officials to deport aliens within three years of their entry, and when such entry is “shown to have been unlawful,” or “when the woman or girl is found an inmate of a house of prostitution or practicing prostitution.”)

<sup>127</sup> *Id.* at 8. The Department of Immigration complained about “one court in particular customarily inflicting sentences of less than thirty days’ imprisonment and \$5 or \$10 fine, when the maximum imposed by law is five years’ imprisonment and \$5,000 fine.” Congress today struggles with this same frustration, as courts still give widely varying fines and sentences for sex trafficking crimes.

<sup>128</sup> *Id.* The *Keller/Ullman* decisions struck down a portion of the 1907 law, ruling that although Congress has the authority to regulate immigration, it has no constitutional authority to punish criminals who harbor or maintain women for prostitution. *Keller v. United States*, 213 U.S. 138, 144 (1909) (“While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the state. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress.”).



The Commissioner's insightful report unveiled the need for fiscal and human resources, better sentencing provisions, and cross-agency cooperation. Moreover, Congress still had much to learn in the field of victim protection. The Paris Agreement stated that victims should be brought to charity institutions, but the 1903 and 1907 immigration laws did not mandate any services or safeguards for victims. To the contrary, women and girls found practicing prostitution within three years of entry would be deported, and any alien who attempted to reenter the U.S. after deportation would be guilty of a misdemeanor. The practice of summarily deporting victims has continued into the 21st century. The 1907 law has been revised and lives on through codification as 8 U.S. Code § 1328 (importation of alien for immoral purpose), which is still used to prosecute trafficking cases.<sup>129</sup>

#### D. Federalizing Crime: The Mann Act

Between 1907 and 1910, empirical investigations began unveiling the scope of the U.S. commercial sex industry to Congress and other stakeholders. An investigation by the Immigration Bureau estimated that 50,000 foreign prostitutes and 10,000 procurers and pimps—largely “French, Belgian, and Jewish”—were in the United States in 1908.<sup>130</sup> In January 1910, the Chicago Federation of Churches—in collaboration with U.S. District Attorney Edwin Sims and other professionals—published an evocative report titled “The social evil in Chicago” to inform anti-prostitution efforts in Chicago.<sup>131</sup> Responding to new information, states passed statutes to curb the sex trade,<sup>132</sup> and by 1910, most states had criminalized prostitution. Laws

<sup>129</sup> 18 U.S.C. § 1328 (2012).

<sup>130</sup> PLILEY, *supra* note 106, at 37. The investigation's findings rejuvenated enforcement against immigrants forced into prostitution, increasing the “the number of foreign prostitutes barred from entering the United States or deported from it.” *Id.* at 35. See also S. Doc. No. 58, 61st Cong., 7 (1910) (listing the arrest and deportation statistics from the first half of 1909).

<sup>131</sup> See VICE COMM'N OF CHI., *supra* note 123, at 183. The Chicago report offers remarkable insight into the nature of the commercial sex industry of the time. It reveals the existence of organized, lucrative, highly professional sex trafficking networks supported by a range of actors, including “wealthy and prominent businessmen.” *Id.* at 88. The report argues that the term “white slave” used by other reformers and the U.S. government is a “misnomer” as women and girls forced into prostitution are of all colors, races, and nationalities. *Id.* at 177. The report takes care to note the racial injustices caused by the forced relocation of brothels into colored neighborhoods and called on law enforcement to stop driving vice into these areas. *Id.* at 38-9. It argued that “[c]olored children should receive the same moral protection that white children receive” and that the city “should provide more wholesome surroundings for the families of its colored citizens.” *Id.* at 39. The Chicago report also made a case for victim services, arguing that immigrant women are coerced into prostitution in part because “there is no adequate protection and assistance” for the new arrivals. *Id.* at 40. The commission believed that detaining these women “would only tend to degrade them still lower and send them back to a life of shame in some other community in a worse condition than they were before” *Id.* at 46. Instead of being imprisoned or fined, women should be placed under the care of other women and given opportunities to seek gainful employment. *Id.* at 47.

<sup>132</sup> H.R. REP. No. 61-886, pt. 2, at 14 (“It is an evil which many State Legislatures have attempted to regulate within the past two or three years by means of the enactment of State statutes.”).

like the Illinois Pandering Act prohibited any person from inducing or accompanying a woman to enter “an immoral place.”<sup>133</sup> Other local governments experimented with regulation and legalization of prostitution. Wisconsin passed a law that allowed for third-party profit of commercial sex if the prostitute did not have a “previous chaste character.”<sup>134</sup> The city of St. Louis experimented with decriminalizing prostitution with an 1870 law that confined prostitutes to a certain area of the city, required them to register with local authorities, and quarantined them if infected with a sexually transmitted disease.<sup>135</sup> Pushback forced the city to end the project in 1874.<sup>136</sup>

State laws were important because the Constitution generally reserved police power to the states. The controversial question raised in *Keller v. United States* over the constitutionality of prosecuting persons who harbor or maintain prostitutes at the federal level would soon split Congress down partisan lines. In 1909, a congressional commission investigating white slave traffic under Senator William Dillingham presented its findings.<sup>137</sup> The commission concluded that women and girls were being forcibly trafficked both from foreign nations and domestically across state lines “from the country districts to the centers of population.”<sup>138</sup> In matters of interstate crime, states lacked authority.

This quandary ultimately resulted in the White Slave Traffic Act of 1910, otherwise known as the Mann Act, after Illinois Congressman James Mann. The Mann Act exercised federal jurisdiction over the domestic commercial sex industry, which was previously regulated on the state level.<sup>139</sup> The Mann Act was in fact one of the nation’s first laws to regulate any crime

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<sup>133</sup> See VICE COMM’N OF CHI., *supra* note 123, at 41.

<sup>134</sup> PLILEY, *supra* note 106, at 10.

<sup>135</sup> *Id.* at 12. This also led to the creation of a St. Louis hospital that treated sexually transmitted diseases. See *St. Louis Legal Prostitution And The Social Evil Hospital*, KPLR11 ST. LOUIS, Feb. 17, 2012, <http://kplr11.com/2011/07/27/st-louis-legal-prostitution-and-the-social-evils-hospital/> [<https://perma.cc/AU9E-XHKD>]. Many cities segregated prostitution and brothels in red-light districts that “typically overlapped with racially segregated districts.” PLILEY, *supra* note 106, at 12. Meanwhile, modernization of transportation and militarization “produced large populations of men that could support larger populations of prostitutes, meaning that prostitution could be found side by side with colonial projects and the mobilization of a large number of male laborers and soldiers.” *Id.*

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

<sup>137</sup> For more on the Dillingham Report, see Jessica R. Pliley, Any Other Immoral Purpose: The Mann Act, Policing Women, and the American State, 1900–1941 79 (2010), [https://etd.ohiolink.edu/etd.send\\_file?accession=osu1281537489&disposition=inline](https://etd.ohiolink.edu/etd.send_file?accession=osu1281537489&disposition=inline) [<https://perma.cc/83B7-QWLJ>] (unpublished Ph.D. dissertation, The Ohio State University) (on file with The Ohio State University).

<sup>138</sup> H.R. REP. NO. 61-886, pt. 2, at 14 (“Inasmuch, however, as the traffic involves mainly the transportation of women and girls from the country districts to the centers of population and their importation from foreign nations the evil is one which can not be met comprehensively and effectively otherwise than by the enactment of Federal laws.”). In a book published by social and religious activist G.S. Ball, the author, Ernest A. Bell, wrote that imported girls “are certainly but a mere fraction of the number recruited for the army of prostitution from home fields, from the cities, the towns, the villages of our own country.” ERNEST A. BELL, FIGHTING THE TRAFFIC IN YOUNG GIRLS OR WAR ON THE WHITE SLAVE TRADE 49–50 (1911).

<sup>139</sup> MELISSA DITMORE, PROSTITUTION AND SEX WORK 77 (2011).

on the federal level, and implementing the law was one of the first responsibilities of the newly established Federal Bureau of Investigation. In order to justify federal intrusion into state policing, Congress passed the Mann Act pursuant to the Commerce Clause.<sup>140</sup> A report by majority members on the Senate Committee on Immigration argued that while the act of prostitution itself was not committed in connection with interstate transportation, the transfer of persons across state borders constituted interstate commerce and Congress alone had the authority to act.<sup>141</sup> The members argued that this authority did not interfere with the police power of the state.<sup>142</sup>

The Mann Act was also the first federal legislative action to address U.S. citizens in domestic sex trafficking. Unlike previous laws that pertained exclusively to trafficking in immigrants, the Mann Act criminalized the interstate trafficking of both immigrant and citizen women and girls. The Senate Immigration Committee majority report clarified that Congress aimed only to regulate the commercial sex industry and situations where women and girls were compelled “against their will and desire to enter and continue in a life of prostitution.”<sup>143</sup> Congress made clear that it did not intend to regulate voluntary prostitution.

The Mann Act criminalized the transport of women and girls in interstate or foreign commerce for the purpose of “prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute.”<sup>144</sup> The Mann Act criminalized knowingly “persuading, inducing, enticing, or coercing any woman or girl” with or without her consent, and doubled the maximum criminal penalties to ten years in prison and a \$10,000 fine if the victim was under eighteen years old. Through use of the terms “induce,” “entice,” “coerce,” and “persuade,” Congress demonstrated its understanding that psy-

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<sup>140</sup> The Commerce Clause is contained in Article I, Section 8 of the United States Constitution, which gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

<sup>141</sup> H.R. REP. NO. 61-886, pt. 2, at 12–13.

<sup>142</sup> *Id.* at 12. The Mann Act has been controversial since before its enactment, with the minority members of the Senate Committee on Immigration arguing that the main provisions of the bill were not constitutional under the commerce clause. *Id.* at 20–2. The minority referenced *Keller*, where the Supreme Court had ruled that the 1907 immigration law provision criminalizing those who “keep, maintain, control, support, or harbor” women for the purposes of prostitution could not be enforced in a case where the alien was a voluntary prostitute because jurisdiction over the offenses of the defendants in housing a prostitute—which would ostensibly occur within one state—lay with the state, not the federal government. *Id.* at 22.

<sup>143</sup> *Id.* at 14.

<sup>144</sup> *Id.* at 2–3. It also holds any person who helps transport by procuring or obtaining a ticket or any form of transportation with the intent to induce, entice, or compel a woman or girl to engage in prostitution in interstate or foreign commerce guilty of a felony, along with any person who would “knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl” for the above purposes “whether with or without her consent.” *Id.* Maximum penalties are five years in prison and/or a \$5,000 fine if the victim is eighteen or older and ten years in prison and/or a \$10,000 fine if the victim is under eighteen years old. *Id.*

chological manipulation was an important instrument of the commercial sex industry.

The Senate report debunked misconceptions about the commercial sex industry to educate the public and other members of Congress on the need for legislation. It explained that trafficked women “are practically slaves in the true sense of the word” and “that force, if necessary, is used to deprive them of their liberty.”<sup>145</sup> Victims of white slave trafficking “are those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens.”<sup>146</sup> The report described the compulsion inherent in white slave traffic, stating that “liquor, trickery, deceit, fraud, and the use of force are resorted to by the procurer to place the girl under his power.”<sup>147</sup> Some women may have been deceived into trafficking through a pretended marriage to a man who turned out to be a pimp, or tricked by the “promise of legitimate employment.”

The Mann Act enabled the United States to comply with the Paris Agreement by appointing a Commissioner General of Immigration to monitor the trafficking of women from abroad. The Commissioner was tasked with receiving and keeping on file statements from persons who “keep, maintain, control, support, or harbor” alien women or girls from any nation that was party to the Paris Agreement.<sup>148</sup> These statements detailed the age, nationality, parentage, and immigration information of the allegedly willing alien prostitute. Anyone who failed to submit a filing was guilty of a misdemeanor, but this provision was rarely enforced except insofar as it could be used by state prosecutors to file prostitution charges or shut down local brothels.<sup>149</sup>

The Mann Act remains in law today, though it has been amended. In 1978, the Mann Act was amended to protect underage boys in addition to women and girls. In 1986, through the Child Sexual Abuse and Pornography Act, it was amended to add gender-neutral language and to replace “immoral purpose” with “any sexual activity for which any person can be charged with a criminal offense.”<sup>150</sup> Moreover, it has long been established that the name of the “White Slave Traffic Act” was a grave misnomer; wo-

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<sup>145</sup> *Id.* at 15.

<sup>146</sup> *Id.* (defining white slave trafficking as “the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes.”).

<sup>147</sup> *Id.* at 15–16 (explaining that women are “first introduced to the house of prostitution under the influence of liquor” and that the “sole means of livelihood [of pimps] is the money received from the sale and exploitation of women” through force, restraint, and compulsion). Furthermore, the procurement of women “was brought about by men who are in the business of procuring women for that purpose—men whose sole means of livelihood is the money received from the sale and exploitation of women and who, by means of force and restraint, compel their victims to practice prostitution.” *Id.*

<sup>148</sup> See H.R. REP. NO. 61-886, pt. 2, at 2–3.

<sup>149</sup> See DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 64 (1994). This section (section 6) of the Mann Act had much less impact on Americans than other sections. *Id.*

<sup>150</sup> Child Sexual Abuse and Pornography Act of 1986, 18 U.S.C. § 2251 (2012).

men and girls forced into prostitution are of all colors, races, and nationalities.<sup>151</sup>

*a. Implementation*

The Mann Act resulted in the arrest of hundreds of pimps.<sup>152</sup> From 1910 to 1922, there were 3,526 convictions under the Mann Act, and a total of \$389,743.63 was assessed in fines.<sup>153</sup> Mann Act violations dwarfed the enforcement of other laws like the peonage statute<sup>154</sup> and represented the largest category of the Federal Bureau of Investigation's caseload prior to World War II.<sup>155</sup>

The law was meant to apply only to forced prostitutes in the commercial sex industry,<sup>156</sup> but its language granted law enforcement and prosecutors undue discretion. Though Congress had been clear that the law was only intended to apply to commercial sex acts, the Supreme Court ruled that the Mann Act could be applied to noncommercial sex acts.<sup>157</sup> *Caminetti v. United States* (1917) held that the law could be used against married men who brought their mistresses across state lines.<sup>158</sup> The Department of Justice repeatedly urged prosecutors to tread carefully in cases involving noncommercial sex and in cases that might involve blackmail, but this guidance was not always followed.<sup>159</sup> In certain cases, the law was used inappropriately to

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<sup>151</sup> See VICE COMM'N OF CHI., *supra* note 123, at 177.

<sup>152</sup> Katyal, *supra* note 4, at 806.

<sup>153</sup> 1922 ATT'Y GEN. ANN. REP. 71.

<sup>154</sup> See *id.* at 115 (reporting that 468 Mann Act prosecutions were pending at the close of June 30, 1922, compared to only 19 pending peonage cases).

<sup>155</sup> See PLILEY, *supra* note 106, at 8; see also SCULLY, *supra* note 95, at 121-3 (explaining that during World War I, Justice and Immigration officials slowed implementation of the Mann Act due to constitutional challenges and fiscal constraints. The war also slowed trafficking itself given decreased immigration and obstacles to transportation, but the "reopening of commerce and frontiers provided fertile ground for a dramatic increase" in sex trafficking in the postwar years.).

<sup>156</sup> Justice Lamar stated in the dissenting opinion of *United States v. Holte*, 236 U.S. 140 (1915), "Congress had no power to punish immorality, and certainly did not intend by this Act of June 25, 1910 (36 Stat. 825), to make fornication or adultery, which was a state misdemeanor, a federal felony, punishable by \$5,000 fine and five years' imprisonment. But when it appeared that there was a traffic in women to be used for purposes of prostitution, debauchery, and immoral purposes, Congress legislated so as to prohibit their interstate transportation in such vicious business . . . . The statute does not deal with the offense of fornication and adultery, but treats the woman who is transported for use in the business of prostitution as a victim—often a willing victim, but nevertheless a victim . . . ." *Id.* at 146-47.

<sup>157</sup> Beckman, *supra* note 112, at 1118-9 (stating that the Court "[i]gnored legislative history entirely" and "analogized the provision ["any other immoral purpose"] to the language of the 1907 immigration statute considered by the Court in *Bitty*).

<sup>158</sup> *Id.* at 1119 (stating that the Supreme Court declined to overrule *Caminetti* despite opportunities to do so). In *Cleveland v. United States*, 329 U.S. 14 (1946), the Court held that a Mormon practicing polygamy could be charged under the Mann Act for bringing his multiple wives across state lines; *Cleveland* "reaffirmed *Caminetti*." *Id.*

<sup>159</sup> Beckman, *supra* note 112, at 1122-3 (stating that DOJ circulars "cautioned prosecutors to exercise discretion carefully in noncommercial cases" given the Attorney General's

regulate adultery and to prosecute women and immigrants.<sup>160</sup> There were also high-profile instances where the law was used vengefully in politically-charged cases and gang-related blackmail.

In addition, while the Mann Act was first interpreted to exclude prosecution of the women who were transported across state lines, its reach was eventually expanded. *Diggs v. United States* (1915) held that transported women could not be held liable under the Mann Act.<sup>161</sup> But in *United States v. Holte* (1915), the Court decided that a woman who was a willing participant could be guilty of conspiratorial consent in crossing state lines for prostitution.<sup>162</sup> The dissenting opinion in *Holte* argued that lawmakers had been clear that transported women should be treated as victims, and that prosecuting these women “would make the law of conspiracy a sword with which to punish those whom the traffic act was intended to protect.”<sup>163</sup> The *Holte*

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concern with “federal courts [that] allow themselves to be turned into ordinary police courts”). See also LANGUM, *supra* note 150, at 87.

<sup>160</sup> Beckman, *supra* note 112, at 1111 (on the “ironic twist in the enforcement of the Mann Act—the prosecution of the women victims whom the Act was designed to protect”). Courts used the Mann Act to become “a censor of the nation’s sexual morals,” and the Mann Act was used to prosecute cases such as “the interstate transportation of a woman to work as a chorus girl in a theatre where the woman was exposed to smoking, drinking, and cursing. . . [and] two students at the University of Puerto Rico who had sexual intercourse on the way home from a date.” *Id.* at 1119. Approximately 180 women, almost all of whom were white, were convicted under the Mann Act from 1927 to 1937. *Id.* at 1129. Because this period was intersected by *Gebardi v. United States*, 287 U.S. 112 (1932), which ruled that women could not be charged for conspiracy in their own transportation over state lines, it is probable that the vast majority of these convictions of women were handed down before 1932. *Id.* at 1121.

<sup>161</sup> *Id.* at 1120 (the *Diggs* Court “analogized the position of a transported woman in a Mann Act violation to a woman who obtains a criminal abortion, stating that “it is universally held that a woman on whom an abortion is committed is not an accomplice although she consents to the act.” This policy of declining to establish accomplice liability for “victims” of criminal acts was held to apply to the Mann Act.”).

<sup>162</sup> *Id.* (the *Holte* Court held “that a woman may actively conspire to “commit an offense against the United States” within the meaning of the Act, even though the objective of the conspiracy is her own transportation in interstate commerce for the purpose of prostitution. In so holding, the Court took issue with the Progressive Era view of the prostitute solely as the innocent victim.”).

<sup>163</sup> *Holte*, 236 U.S. at 147 (1915) (Lamar, J., dissenting) (“The act either applies to women who are willingly transported or it does not. If it does not apply to those who willingly go (47 H.R. 61st Cong., 2d Session, p. 10), then there was no offense by the man who transported her, or in the woman who voluntarily went—and, in that event, there was, of course, no conspiracy against the laws of the United States in her agreeing to go. The indictment here, however, assumes that the act applies not only to those who are induced to go, but also to those who aid the panderer in securing their own transportation. On that assumption, every woman transported for the purposes of the business stands on the same footing, and cannot by her consent change her legal status. And if she cannot be directly punished for being transported, she cannot be indirectly punished by calling her assistance in the transportation a conspiracy to violate the laws of the United States. For if she is within the circle of the statute’s protection, she cannot be taken out of that circle by the law of conspiracy, and thus be subjected to punishment because she agreed to go. The statute does not deal with the offense of fornication and adultery, but treats the woman who is transported for use in the business of prostitution as a victim—often a willing victim, but nevertheless a victim. It treats her as enslaved, and seeks to guard her against herself as well as against her slaver; against the wiles and threats, the compulsion and inducements, of those who treat her as though she was merchandise and a subject of interstate transportation. The woman, whether coerced or induced, whether willingly

decision was an upheaval of the congressional assumption that women would not be criminalized. In a 1916 letter to the Senate Committee on the Judiciary, the Attorney General asked Congress to amend the Mann Act to ensure that women who agreed to testify would be immune from prosecution for conspiracy.<sup>164</sup> While legislation was introduced to this effect, Congress did not vote on it. The Attorney General acted alone, crafting a clear policy that prosecutors should grant immunity to essential witnesses.<sup>165</sup>

The Court limited the *Holte* decision in *Gebardi v. U.S.* (1932). *Gebardi* ruled that women could not be charged for conspiracy in their own transportation over state lines if they exhibited “mere acquiescence,” and the Department of Justice issued an advisory explaining that a consenting woman who travels across state lines does not violate the conspiracy provision.<sup>166</sup> Over time, the Court also limited the application of the “immoral purpose” clause that prosecutors had used to target adultery and other non-commercial acts.<sup>167</sup> In 1962, the Department of Justice severely restricted U.S. Attorneys from prosecuting noncommercial cases. Mann Act cases declined in number but prosecutors continued to charge violators; the law is still used today to prosecute domestic sex trafficking of minors.<sup>168</sup> One unsavory legacy of the law is that trafficked victims have been themselves charged with conspiracy to commit a Mann Act violation when pimps force them to transport other, underage victims across state lines.

#### *E. Sex Trafficking Statute: Trafficking Victims Protection Act of 2000*

By 1920, the United States had begun retreating from activism on the white slave issue.<sup>169</sup> In 1922, the Attorney General issued a report stating that the “white slave traffic act [sic] is being more vigorously enforced than ever before” and that the “interstate transportation of women and girls for commercial prostitution has been greatly diminished.”<sup>170</sup> Congress was

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or unwillingly transported for purposes of prostitution, debauchery, and immorality is regarded as the victim of the trafficker, and she cannot therefore be punished for being enslaved, nor for consenting and agreeing to be transported by him for purposes of such business. To hold otherwise would make the law of conspiracy a sword with which to punish those whom the traffic act was intended to protect.”)

<sup>164</sup> See LANGUM, *supra* note 150, at 82.

<sup>165</sup> *Id.*

<sup>166</sup> See Beckman, *supra* note 112, at 1121, 1124. Since *Gebardi*, most of the women prosecuted under the Mann Act have been procurers or madams. *Id.* at 1124, 1134.

<sup>167</sup> See *id.* at 1133-4. See also *Mortensen v. United States*, 322 U.S. 369 (1944) (which decided that “To punish those who transport inmates of a house of prostitution on an innocent vacation trip in no way related to the practice of their commercial vice is consistent neither with the purpose nor the language of the Mann Act.”).

<sup>168</sup> See FINKLEA, *supra* note 13, at 16.

<sup>169</sup> See SCULLY, *supra* note 95, at 123. The United States had also stopped using the misleading term “white slavery.” *Id.* at 121.

<sup>170</sup> See 1922 ATT’Y GEN. ANN. REP. 71. This report also—without explanation—declared that the “organized white-slave gangs which formerly existed have been very thoroughly broken up.” *Id.*

seemingly placated and would not seriously address sex trafficking again until 2000.

In 1949, the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others urged nations to pass legislation to address traffickers and victims. But weak enforcement and self-reporting measures enabled countries like the United States to “gain the moral high ground by loudly proclaiming that they have signed a document condemning the buying and selling of women’s bodies, when in reality prostitution continues unchecked in their own countries.”<sup>171</sup>

In the 1970s and 1980s, sex worker rights advocates and pro-sex feminists emerged on the scene, arguing that prostitution was a legitimate form of labor and should be decriminalized. They argued that the existence of sex trafficking was overblown and that government could end trafficking if it were to get out of the business of regulating prostitution. This movement led to a deep division among feminists and advocates that stalled efforts to combat domestic trafficking.<sup>172</sup> In the 1990s, the Clinton Administration resisted addressing sex trafficking under the belief that prostitution was voluntary and not enslavement.<sup>173</sup>

Throughout the 1980s and 1990s, awareness of sex trafficking was increasing, especially as the sex tourism industry began to develop and Americans were identified as criminals at home and abroad.<sup>174</sup> But the official response from the U.S. government was ineffective and frustrating. When raids rounded up women or pushed them into other areas of the city, victims—not the buyers and traffickers—were usually the ones who were penalized or deported. Law enforcement released victims back to pimps who

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<sup>171</sup> See Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking Women*, 2 MICH. J. GENDER & L. 83, 92 (1994).

<sup>172</sup> See Lindsay Strauss, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL’Y 495, 498–99, 521 (2010).

<sup>173</sup> See 146 Cong. Rec. 82, 12356 (2000) (“Prostitution is an exploitation of women and a violation of their dignity and basic human rights. To my great dismay, while the Clinton administration may pay lip service to this same idea, their actions do not show it. Despite the horrors of the sex trafficking industry throughout the world, this administration has promoted the position that voluntary prostitution is okay and sex traffickers, who are somehow able to obtain the consent of their victims, should be immune from prosecution. This is unconscionable and unacceptable. Mr. Chairman, I support this amendment because I do not believe the State Department ought to be able to use the taxpayers’ dollars to send representatives of the United States to the U.N. conference where they take the stance that voluntary prostitution is okay and a legitimate form of labor.”) (quoting then-Congressman Jim DeMint).

<sup>174</sup> RICHARD H. FRIMAN & SIMON REICH, HUMAN TRAFFICKING, HUMAN SECURITY, AND THE BALKANS 6–7 (2007); see also Associated Press, *US envoy regrets Philippine sex tourism remarks*, SAN DIEGO UNION-TRIBUNE, Oct. 8, 2011, available at <http://www.sandiegounion-tribune.com/sdut-us-envoy-regrets-philippine-sex-tourism-remarks-2011oct08-story.html> (explaining that U.S. military bases in the Philippines created a market for sex tourism in the 1980s and early 1990s).



posted bail.<sup>175</sup> One 1980s observer wrote that the “political, financial, and real estate interests” that keep prostitution running “remain essentially untouched” by law enforcement.<sup>176</sup>

The discovery of a string of high profile West Coast human trafficking rings in the 1990s broke this stalemate.<sup>177</sup> The attention afforded to these cases led the U.S. to study the intersection between transnational crime, international migration, and human trafficking, which spurred efforts to pass the 2000 UN Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Convention offered detailed requirements on criminalization and prosecution, along with prevention and victim services. This helped prompt Congress to address the issue through domestic legislation, and in 2000, Congress passed the Trafficking Victims Protection Act (TVPA).<sup>178</sup> This was the first comprehensive trafficking law in the nation’s history. While the TVPA focused on and made momentous steps in combating international trafficking, this Policy Essay focuses on the domestic features of the act: prosecution, protection (or victim services), and prevention.

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<sup>175</sup> LAN CAO, C. OF WM. & MARY, *ILLEGAL TRAFFIC IN WOMEN: A CIVIL RICO PROPOSAL* 1306 (1987); *see also id.* at 1304 (arguing that some police officials in the 1980s were “susceptible to bribery”).

<sup>176</sup> *Id.* at 1306.

<sup>177</sup> In the 1990s, trafficking rings victimizing persons from Asia, the former Soviet Union, and Latin America were uncovered on the West Coast. A well-known report titled “International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime” helped shine light on the existence of the crime and the transnational and local criminal networks that helped perpetuate it. It also exposed the law enforcement practice of treating victims as visa fraud conspirators that led to deportation of victims, weakening evidence against traffickers. *See generally* Amy O’Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime*, CENTER FOR THE STUDY OF INTELLIGENCE, November 1999, available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf>. West Coast cases included the 1995 Thai garment slavery case concerning 72 Thai men and women imprisoned in a sweatshop in El Monte, California. *See* Leslie Berenstein Rojas, *El Monte Sweatshop Slavery Case Still Resonates 20 years Later*, KPCC, (July 31, 2015), <http://www.scpr.org/news/2015/07/31/53458/el-monte-sweatshop-slavery-case-still-resonates-20/> [<https://perma.cc/AW54-K2TL>]; *see also* Patrick J. McDonnell & Maki Becker, *7 Plead Guilty in Sweatshop Slavery Case*, L.A. TIMES, (July 10, 1996), [http://articles.latimes.com/1996-02-10/news/mn-34318\\_1\\_sweatshop-operators](http://articles.latimes.com/1996-02-10/news/mn-34318_1_sweatshop-operators) [<https://perma.cc/JBM4-D2FM>]. Trafficking cases were not limited to the West Coast, however. *See* Mireya Navarro, *Group Forced Illegal Aliens Into Prostitution, U.S. says*, NEW YORK TIMES, (April 24, 1998), available at <http://www.nytimes.com/1998/04/24/us/group-forced-illegal-aliens-into-prostitution-us-says.html> (discussing the sex trafficking ring victimizing Mexican women run by the notorious Cadena family).

<sup>178</sup> Victims of Trafficking and Violence Protection Act of 2000, 18 U.S.C. §§ 1701 et seq. (“Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.”). *Id.* § 1701(b)(14).

Most significantly, the TVPA created section 1591,<sup>179</sup> a federal sex trafficking statute that defined sex trafficking as causing a person to engage in a commercial sexual act by force, fraud, or coercion,<sup>180</sup> or causing any person under 18 years old to engage in a commercial sex act, as minors are “incapable of giving meaningful consent.”<sup>181</sup> Sex trafficking included any person who “in or affecting interstate commerce, recruits, entices, harbors, transports, provides, or obtains” victims to engage in a commercial sex act,<sup>182</sup> and criminalized financially benefitting from sex trafficking.<sup>183</sup>

Twelve years after *Kozminski* had narrowly interpreted involuntary servitude, the sex trafficking statute’s standard of “force, fraud, or coercion” was broad enough to admit the psychological coercion so common in trafficking cases. The TVPA also proffered a new forced labor statute (18 U.S.C. 1589) that allowed a more expansive definition of coercion.<sup>184</sup> The TVPA increased maximum penalties for human trafficking under the involuntary servitude, enticement into slavery, and peonage statutes from 10 years to 20 years. The defendant could be imprisoned for more than 20 years under certain circumstances, such as if the crime involved kidnapping, aggravated sexual abuse, attempt to commit aggravated sexual abuse, or attempt to kill.<sup>185</sup>

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<sup>179</sup> Other statutes created by TVPA include those that criminalize document seizure, *see id.* at § 1592, and forced labor, *see id.* at § 1589.

<sup>180</sup> Coercion is defined as “threats of serious harm to or physical restraint against any person; 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 the abuse or threatened abuse of law or the legal process.” *Id.* § 1591(e)(2).

<sup>181</sup> *See id.* at § 1591(e)(3) (“The term ‘commercial sex act’ means any sex act, on account of which anything of value is given to or received by any person.”). Other statutes created by TVPA include those that criminalize document seizure, *see id.* § 1592, and forced labor, *see id.* § 1589. On age of consent, *see id.* § 108.

<sup>182</sup> *See id.* at § 1591(a)(1).

<sup>183</sup> *See id.* at § 1591(a)(2).

<sup>184</sup> *Id.* at § 112 (defining forced labor). *See* § 1701(b)(6) (The TVPA recognized that psychological abuse and coercion are used to force victims to engage in sex acts: “Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.”). *See id.* § 1701(b)(13). (“Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.”). *See also* Note, *supra* note 27, at 2579 (explaining that “in response to modern trafficking practices, for the new crimes of forced labor and sex trafficking, the law extends the definition of “coercion” to include psychological manipulation, which had previously fallen below the threshold for proving sale into involuntary servitude. As a result, traffickers may face liability if their words or actions cause victims to believe that failure to comply with directives would result in serious harm.”).

<sup>185</sup> *See* 18 U.S.C. § 1591(a)(1). *See also id.* § 1590 (“If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.”); 22 U.S.C.

The TVPA was significant in that it provided victims with federal assistance.<sup>186</sup> But victims aged 18 or older must receive certification that they are victims of a severe form of trafficking in order to be eligible for benefits and services. This certification requirement would eventually create a range of problems, as agencies only set up programs to certify immigrant victims, not citizen victims. The TVPA provided for mandatory restitution for victims and criminal forfeiture of trafficker assets, provisions that have not been enforced in court.

The TVPA created a special “T” nonimmigrant visa to allow foreign national victims to remain in the United States. Before the TVPA, immigrant victims who were not material witnesses could be arrested and deported and were not entitled to protection.<sup>187</sup> The T visa program gave victims who comply with an investigation or prosecution of trafficking, and who would “suffer extreme hardship involving unusual and severe harm”<sup>188</sup> upon deportation, an avenue to apply for temporary status, and eventually, permanent resident status. Victims under age fifteen were not required to comply with the trafficking investigation. Immediate family members were also given the option to apply for the visa.

*a. Trafficking Victims Protection Act Reauthorizations*

Over time, Congress has improved the TVPA. The *Trafficking Victims Protection Reauthorization Act of 2003* enacted a federal, private right of action that gives victims an opportunity to seek proper compensation including actual and punitive damages and attorney fees from their traffickers. The 2003 bill also explicitly extended federal jurisdiction over sex trafficking cases that affect interstate or foreign commerce,<sup>189</sup> and required the At-

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§ 7106(a)(2) (“For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.”).

<sup>186</sup> The TVPA also instructed the DOJ to implement the following protections while victims are in custody. See 22 U.S.C. § 7105(c)(1) (“(1) Protections while in custody. Victims of severe forms of trafficking, while in the custody of the Federal Government and to the extent practicable, shall—(A) not be detained in facilities inappropriate to their status as crime victims; (B) receive necessary medical care and other assistance; and (C) be provided protection if a victim’s safety is at risk or if there is danger of additional harm by recapture of the victim by a trafficker, including—(i) taking measures to protect trafficked persons and their family members from intimidation and threats of reprisals and reprisals from traffickers and their associates; and (ii) ensuring that the names and identifying information of trafficked persons and their family members are not disclosed to the public.”).

<sup>187</sup> See Candes, *supra* note 81, at 594.

<sup>188</sup> See 22 U.S.C. § 7105.

<sup>189</sup> See Trafficking Victims Protection Reauthorization Act of 2003, PUB. L. NO. 108-193, § 5, 117 Stat. 2875, 2879. See also H.R. 2620, 108th Cong. (2003) (“Amends the Federal criminal code to extend jurisdiction of sex trafficking offenses to acts of trafficking in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States.”).

torney General to submit annual reports to Congress on U.S. efforts to combat human trafficking.<sup>190</sup>

The *Trafficking Victims Protection Reauthorization Act of 2005* authorized appropriations to the Secretary of Health and Human Services to establish a \$10 million annual grant program to organizations and local government agencies for establishing or expanding assistance programs for victims. The bill provided a pilot program to offer specialized services to underage victims, and authorized a \$5 million per year (2006–2007) pilot program to establish treatment facilities for juvenile victims and an annual \$25 million grant program for state and local law enforcement agencies to establish or expand anti-trafficking programs.<sup>191</sup> It also directed the Attorney General to conduct biennial statistical reviews of sex trafficking and unlawful commercial sex acts using data from state and local authorities, including the demographic characteristics of persons purchasing commercial sex.<sup>192</sup>

The *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008* increased services to child trafficking victims. The bill directed the Secretary of Health and Human Services to provide 90-day interim assistance to child victims of sex trafficking and determine eligibility for long-term assistance. It authorized a grant program through the Secretary of Health and Human Services and the Attorney General to develop and expand victim service programs for U.S. citizen and lawful permanent resident victims.<sup>193</sup> It also required a study to identify the extent of a victim services gaps between citizen and noncitizen victims, and directed the Attorney General to generate a model state statute that develops a “comprehensive approach to investigation and prosecution through modernization of state and

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<sup>190</sup> See § 6, 117 Stat. at 2880 (requiring federal agencies to report to Congress on the number of persons who received benefits or services, the number of persons who have applied for, been granted, or been denied a “T” visa, the number of persons charged or convicted of trafficking offenses, and other statistics).

<sup>191</sup> See *Trafficking Victims Protection Reauthorization Act of 2005*, PUB. L. NO. 109-164, § 203, 119 Stat. 3558, 3570 (2006).

<sup>192</sup> See *id.* at § 201. This study was supposed to include “the number of investigations, arrests, prosecutions, and incarcerations of persons engaged in sex trafficking and unlawful commercial sex acts, including purchasers of commercial sex acts, by States and their political subdivisions;” and “a description of the differences in the enforcement of laws relating to unlawful commercial sex acts across the United States.” *Id.* The bill also requires the Human Smuggling and Trafficking Center to report to Congress on research initiatives on domestic trafficking. See *id.* § 104.

<sup>193</sup> See *William Wilberforce Trafficking Victims Protection Act of 2008*, PUB. L. NO. 110-457, § 213, 122 Stat. 5044, 5065 (2008). These grants would go to states, Indian tribes, local government, and nonprofit victims’ service organizations. *Id.* The bill authorized \$2.5 million for this program in 2008 expanding to \$7 million by 2011. *Id.* The bill amends the TVPA to direct HHS, “upon credible information that a child has been a trafficking victim, to provide 90-day interim assistance to the child and determine eligibility for long-term assistance; (2) federal and state and local officials to notify the Secretary within 24 hours of learning of such a child; and (3) the Secretary and the Attorney General to provide appropriate training for state and local officials.” See *id.* § 212.

local prostitution and pandering statutes.”<sup>194</sup> Additionally, the bill made T visas easier to obtain,<sup>195</sup> and made victims applying for T visa status eligible for public benefits. The bill also clarified that coercion can include compulsion by nonphysical, psychological, financial, or reputational harm.

The 2013 reauthorization primarily centered on foreign national victims and perpetrators, ensuring that unaccompanied alien children from Mexico or Canada are “housed and screened by an immigration officer with expertise in child welfare in separate child-friendly facilities conducive to disclosing information related to human trafficking or exploitation.”<sup>196</sup> The bill amended the Social Security Act to require that “state plans for foster care and adoption assistance describe prevention measures and victim assistance concerning human trafficking and commercial sexual exploitation of foreign, U.S. citizen, and legal resident children.”<sup>197</sup> The bill also included efforts to publicize the National Human Trafficking Hotline that was established in 2004 through an anti-trafficking grant program run by the Department of Health and Human Services (HHS).<sup>198</sup>

#### *b. Implementation*

The TVPA and its reauthorizations represented a monumental step forward in addressing human trafficking. But deficiencies in prosecutions, victim services, and prevention remained. In addition, Congress struggled to ensure proper implementation.

##### *1. Prosecution*

Partly because the TVPA was the first of its kind, implementation went slowly. In fact, there may have been no convictions whatsoever under the TVPA sex trafficking statute from 2000 to 2004.<sup>199</sup> The first case *prosecuted*

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<sup>194</sup> § 225, 122 Stat. at 5072. The model statute is based in part on the provisions of An Act For the Suppression of Prostitution in the District of Columbia of August 15, 1935, which relates to prostitution and pandering. *Id.*

<sup>195</sup> § 201, 122 Stat. at 5052–55. It ensures that parents or unmarried siblings under 18 who may face retaliation for the victim’s escape or cooperation with law enforcement are eligible for a “T” visa. *Id.* at 5052. It allows T visa status to be extended at the Secretary of Homeland Security’s discretion and under certain circumstances. *Id.* at 5053.

<sup>196</sup> Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. § 222 (2013).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* The hotline began in in April 2004, and at that time it was called the Trafficking Information and Referral Hotline. Polaris began operating the hotline in 2007 and it was renamed the National Human Trafficking Resource Center. As of October 1, 2016, the hotline is called the National Human Trafficking Hotline. In addition to the TVPA reauthorizations, Congress also passed *The Preventing Sex Trafficking and Strengthening Families Act of 2014* to address the sex trafficking of youth in the foster care system. The bill required child welfare agencies to screen children for sex trafficking, develop protocols for finding missing children, report missing children to the National Center for Missing and Exploited Children, and report sex trafficking incidents to law enforcement.

<sup>199</sup> See Kandathil, *supra* note 51, at 89.

under the sex trafficking statute concerned criminals who were prosecuted for trafficking Russian women into Alaska. The case was disappointing: prosecutors plea-bargained away the TVPA's higher penalties and instead charged defendants with minor offenses.<sup>200</sup> The case showed that while giving prosecutors proper tools was important, whether or not prosecutors used these tools would determine the efficacy and legacy of the TVPA.

In the years following, prosecutions remained low, indicating that traffickers were not being taken off the streets. The Department of Justice initiated prosecutions against just 59 traffickers in Fiscal Year 2004, all of which involved sexual exploitation, then an all-time high.<sup>201</sup> This number has improved, with the Department initiating 190 predominately sex trafficking cases in Fiscal Year 2014.<sup>202</sup> But given that the Department estimates that there are approximately 17,500 sex trafficking victims in the United States, these numbers are disappointingly low.<sup>203</sup>

A notable criticism of the TVPA was that the law should have explicitly excluded traffickers from using the defense of consent in line with the UN Protocol of 2000, which holds that consent is irrelevant to determining victimization.<sup>204</sup> The TVPA did not make the defense of consent inadmissible,

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<sup>200</sup> See *id.* at 106–08 (“With this strong evidence to support anti-trafficking charges, it seemed that the first prosecutions undertaken with the TVPA’s escalated penalty scheme would prove the new legislation a profound success.”). But serious charges were ultimately dropped when a defense investigation alleged that the victims had originally consented to dancing nude before coming to the United States. Although the victims protested that this was false, prosecutors agreed with the defense’s argument that initial consent would negate the trafficking charge. The case sparked concern that the TVPA did not safeguard women who had either given initial consent or women who were accused of giving consent. The Crazy Horse decision was particularly upsetting because some of the victims were underage, and, under the TVPA, could not legally provide consent. See *id.* (Unfortunately, “the commercial sex industry has attempted (successfully, it appears) to create a defense against prosecution of these crimes by highlighting the controversial issue of whether victims are forced or coerced if they have given initial consent. Here, in the Crazy Horse case, the very insinuation of “consent” devalued the victims’ account of abuse, prompting the women to defend themselves publicly, exposing them to further trauma, while also influencing prosecutors to plea bargain away the higher penalties available under the TVPA.”).

<sup>201</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 243 (2005).

<sup>202</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 353 (2015) (“During Fiscal Year 2014, DOJ secured convictions against 184 traffickers, compared with 174 convictions obtained in FY 2013. Of these, 157 involved predominantly sex trafficking and 27 involved predominantly labor trafficking, although several involved both. These totals do not include child sex trafficking cases brought under non-trafficking statutes. Penalties imposed on convicted traffickers ranged from five years to life imprisonment. For the first time, the government used an extraterritorial jurisdiction provision of the law to convict a trafficker for sex trafficking that took place in another country.”).

<sup>203</sup> Data reporting is insufficient, as there is no uniform, formal method to track prosecutions at the state and local levels. See *id.* at 354.

<sup>204</sup> See Kandathil, *supra* note 51, at 90 (arguing that “the issue of a victim’s agreement is legally irrelevant. A person cannot consent to enslavement or any type of forced labor. The Thirteenth Amendment forbids slavery; an individual may not sell herself into bondage . . . Focusing on a victim’s purported consent has tended to obscure the prominent human rights issues that lie at the heart of trafficking offenses, and has created a hierarchy between innocent victims who deserve protections (non-consenting women) and morally corrupt non-victims who do not deserve protections (consenting/initially consenting women).”).

and there have been cases where defense attorneys have successfully used the victims' initial or alleged consent to reduce charges.<sup>205</sup>

## 2. Victim services

Many critics argue that despite the title of the act, the TVPA focused too heavily on law enforcement and prosecution instead of victims. Where the TVPA did address victims, it directed services toward international and foreign national victims, not victims who were U.S. citizens.<sup>206</sup> This was due in part to the federal government's lack of research and awareness of domestic victims, and an overemphasis on addressing the nexus between illegal immigration, smuggling, and trafficking.

*Domestic victims:* Before the TVPA, there was "little, if any, relief" for trafficking victims—citizens and noncitizens—in the United States.<sup>207</sup> The TVPA authorized a range of programs to be administered by the Department of Justice and the Department of Health and Human Services, but these discriminated in practice against U.S. citizen victims and child victims.<sup>208</sup> The inequity between citizen and noncitizen victims can be traced to the TVPA's vague requirement under 22 U.S.C. 7105(b) that enables HHS to assist victims who have been granted certification through applying for a T visa, cooperating with law enforcement, and being granted continued presence from the Department of Homeland Security (DHS). The Department of Health and Human Services, guided by the statute, subsequently developed certification programs for foreign national victims. Because HHS only certified foreign national victims, U.S. citizen and lawful permanent resident victims

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<sup>205</sup> See *id.* at 106.

<sup>206</sup> See Strauss, *supra* note 175, at 497.

<sup>207</sup> See April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J. L. & GENDER 231, 244 (2007) (explaining that "Prior to the passage of the TVPA, there was little, if any, relief for trafficking victims in the United States. If discovered, these women were labeled criminals for participating in prostitution and illegal immigration. They were held in detention centers and usually deported. Trafficking itself, on the other hand, was a punishable crime, but penalties were relatively slight and prosecutors had to be creative."). Lack of services affects prosecutions because victims without access to housing or other services during trial may not have the social resources and stability to cooperate with law enforcement. See U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 34 (2010), <https://www.justice.gov/psc/docs/natstrategyreport.pdf> [http://perma.cc/M83M-4QZB].

<sup>208</sup> See FINKLEA, *supra* note 13, at summary ("Despite language that authorizes services for citizen, lawful permanent resident, and noncitizen victims, appropriations for trafficking victims' services have primarily been used to serve noncitizen victims. U.S. citizen victims are also eligible for certain crime victim benefits and public benefit entitlement programs, though these services are not tailored to trafficking victims."). Youth victims also had limited access to specialized services, though reauthorizations have since expanded specialized juvenile programming. See *id.* ("Of note, specialized services and support for minor victims of sex trafficking are limited. Organizations specializing in support for these victims may have fewer beds than might be needed to serve all victims. Other facilities, such as runaway and homeless youth shelters and foster care homes, may not be able to adequately meet the needs of victims or keep them from pimps/traffickers and other abusers.").

were unable to receive services from HHS.<sup>209</sup> Meanwhile, the Department of Justice required citizen and noncitizen adult victims to report to law enforcement to be eligible for services,<sup>210</sup> though the Department claims that no victim has been denied services over being unable to cooperate with law enforcement services. This requirement was obstructive because law enforcement is unable to independently identify many victims and victims are not always able to self-identify or willing to communicate with law enforcement. Law enforcement or child welfare agencies may not identify these persons as sex trafficking victims; underage victims in particular may be treated as delinquents, rather than assisted.<sup>211</sup>

The government's failure to serve all victims undermined the TVPA's goal to combat trafficking.<sup>212</sup> Congress ultimately acknowledged this services gap, and TVPA reauthorizations included provisions for minors, citizens, and lawful permanent resident victims. But the shocking reality was that Congress did not appropriate funds toward these programs, and generally speaking, DOJ and HHS did not appear to reallocate funds to implement

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<sup>209</sup> See FINKLEA, *supra* note 13, at 21-22 (explaining that while a TVPA statute—22 U.S.C. 7105(b)—enables HHS to provide assistance to certified victims and any child victim, the Department of Health and Human Services has mainly “provided services only to non-citizen children”).

<sup>210</sup> See 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, 346-47 (2007). The DOJ amended this policy in March 2016 “so that cooperation with law enforcement was no longer an eligibility requirement for accessing DOJ-funded victim services.” See U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 390* (2016). In Fiscal Year 2015, the DOJ “funded 21 victim service providers offering comprehensive and specialized services across the United States, totaling approximately \$13.8 million, compared with \$10.9 million in FY 2014 and \$11.2 million in FY 2013.” *Id.* These grantees “reported that 51 percent of victims served during the reporting period were U.S. citizens or lawful permanent residents and 49 percent were foreign nationals.” *Id.* See also FINKLEA, *supra* note 13, at 22 (explaining that “For services authorized under 22 U.S.C. §7105(b)(2), DOJ can use funds to provide services to “victims of trafficking,” which appears to include both citizens and noncitizens as well as both adults and minors. Of the money it has received to combat trafficking in persons prior to FY2015, DOJ had targeted funds toward the Grants for Victim Services. Until FY2010, these grants had exclusively been used to provide emergency services to victims as soon as they have been identified, prior to certification by HHS, but since then some funds have been used for victims post-certification. In addition, in FY2012 DOJ changed its policy so that federal funding for victims services could support U.S. citizen victims as well as foreign national victims.”).

<sup>211</sup> See Haynes, *supra* note 208, at 338-39 (explaining that “years after the passage of the TVPA, trafficking victims found in the United States are still too often treated like criminals by those charged with protecting them . . . In short, government personnel charged with protecting victims of human trafficking and prosecuting their traffickers, particularly outside of task forces headquartered in Washington, D.C., have little or no understanding of the obligations the nation undertook in passing the TVPA and, as a consequence, U.S. personnel are working contrary to the purposes of the Act.”). See also *id.* at 366-67; *The Sexual Abuse to Prison Pipeline: The Girls’ Story*, RIGHTS4GIRLS.ORG (2015), [http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015\\_COP\\_sexual-abuse\\_layout\\_web-1.pdf](http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf) [https://perma.cc/GPY8-XW6M] (discussing the nexus between juvenile delinquency and sexual assault and how girls are detained for status offenses that may be related to trafficking).

<sup>212</sup> See Strauss, *supra* note 212, at 497-98.



them.<sup>213</sup> Congress has given federal agencies excessive discretion to decide which TVPA programs should be funded, choosing not to exercise oversight. The legacies of these funding and certification issues still shape how services are granted, though Congress did significantly increase funding for victim services in Fiscal Year 2015.<sup>214</sup>

Numbers are useful to understand the scope of service programs. The federal government reported that 228 victims received services from April 2004 to March 2005 under the TVPA; this figure was double the number of victims identified during the previous year.<sup>215</sup> The number of victims served has increased over time. The Department of Justice provided services to 1,009 new victims in Fiscal Year 2013 and 1,366 new victims in Fiscal Year 2014.<sup>216</sup> But these numbers are still low given the estimate of victims trafficked into the United States each year. Moreover, certain types of services, including adequate shelter and housing for victims, are still lacking.<sup>217</sup>

*Immigrant victims:* Foreign victims in the United States also face difficulties in accessing services and may experience deportation. While the law established a special T visa for foreign national victims, the victims themselves must initiate this process—a problematic requirement given that sex trafficking victims are difficult to identify, rarely self-identify, have been traumatized, likely cannot advocate on their own behalf, are not familiar with U.S. law, and do not know about the T visa. To complicate matters, there is evidence that the Department of Homeland Security has determined that victims must provide conclusive proof that traffickers intended to sell them into a severe form of trafficking.<sup>218</sup> Moreover, eligibility for the T visa presumes that law enforcement will take up the victim's case, though it is technically possible to get a visa without an investigation. Victims who engage in investigations face barriers such as trauma, fear of retaliation, and a

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<sup>213</sup> See FINKLEA, *supra* note 13, at 4. See also *id.* at 12–14, 23 (stating that the TVPA 2005 HHS pilot program for juvenile treatment facilities never received appropriations; the TVPA 2005 and 2008 grant programs for stakeholders to establish and expand trafficking victim services for U.S. citizen and lawful permanent residents also never received appropriations). It is unclear how the DOJ used increased FY2015 funds and whether these programs have since been implemented. *Id.* at 15.

<sup>214</sup> Congress has significantly increased victim services appropriations to stimulate implementation of authorized programs. In Fiscal Year 2015, Congress appropriated \$42.3 million to DOJ and \$15.8 million to HHS. In comparison, Congress appropriated \$14.3 million to DOJ in Fiscal Year 2014, and \$13.8 million to HHS. See *id.* at 12–13. While funding increased, “it is unknown how the appropriated money will be allocated between DOJ anti-trafficking grant programs in FY2015.” *Id.* at 22, fn 94. DOJ does not issue line item reports stating which programs were funded, though Congress has asked the DOJ to provide such a report for 2017. As for HHS, the agency provided some new funding to serve domestic victims in Fiscal Year 2014, though “lack of training on the HHS certification process for employees of public benefits offices resulted in the erroneous denial of benefits for some victims and their families.” See S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 354 (2015).

<sup>215</sup> See TRAFFICKING IN PERSONS REPORT 2005, *supra* note 202, at 24.

<sup>216</sup> See TRAFFICKING IN PERSONS REPORT 2015, *supra* note 203, at 354.

<sup>217</sup> See *id.* at 355.

<sup>218</sup> See Haynes, *supra* note 210, at 360–61.

lack of some needed services such as secure housing.<sup>219</sup> The 2008 TVPA reauthorization created a carve out to exempt victims experiencing “physical or psychological trauma”<sup>220</sup> from participating in an investigation, but this may not be adequate protection.

Given these restrictions, the T visa has been granted very sparingly. The original TVPA set a maximum quota of 5,000 T visas per year, but from 2000 to 2004, fewer than 500 total visas were granted.<sup>221</sup> In Fiscal Year 2014, the Department of Homeland Security issued T visas to 613 victims.<sup>222</sup> Critics argue that this is still too low. They also maintain that the quota is unnecessary and misdirects efforts that should be oriented toward assisting as many victims as possible, not counting victims and mandating cooperation with law enforcement.<sup>223</sup>

*Restitution and private action:* Another concern regarding victims is that the TVPA of 2000 did not provide adequate statutory remedies for victims. These gaps were addressed, though not wholly solved, by subsequent reauthorizations; most notably, the 2003 reauthorization gave victims a private right of action allowing them to seek civil remedies against their traffickers. While it was possible to seek remedy before the TVPA, there was no coherent framework under law.<sup>224</sup> The TVPA of 2000 provided mandatory restitution for victims, but restitution is not so “mandatory;” it depends on whether prosecutors investigate cases and earn convictions.<sup>225</sup> Low prosecution rates mean that very few victims have access to restitution. Restitution depends on the choices of the prosecutor during the plea bargain and trial

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<sup>219</sup> See Note, *supra* note 27, at 2582. Moreover, “victims who are without housing, income, or medical care are likely to prioritize securing basic life necessities above cooperation with law enforcement and may lack the time and energy to pursue both goals simultaneously.” *Id.*

<sup>220</sup> See William Wilberforce Trafficking Victims Protection Act § 201.

<sup>221</sup> For a complete listing of T visas issued between FY2002 and FY2012, see Siskin, *supra* note 24, at 21-2. In FY2012, 674 T visas were issued. Only 3,269 total visas were issued over the 10-year time period. 1,412 visas were denied. *Id.* See also Ambika Kandasamy, *U.S. Visas Help Trafficking Victims, If Applicants Can Vault Legal Hurdles*, S.F. Public Press (Feb. 21, 2012), <http://sfpublicpress.org/news/2012-02/us-visas-help-trafficking-victims-if-applicants-can-vault-legal-hurdles> [https://perma.cc/Z59N-4FAP]. Keep in mind that there may be 17,500–50,000 victims per year that the government is not finding or aiding. See HEATHER CLAWSON ET AL., *ESTIMATING HUMAN TRAFFICKING INTO THE UNITED STATES: DEVELOPMENT OF A METHODOLOGY 2* (2006).

<sup>222</sup> See *TRAFFICKING IN PERSONS REPORT 2015*, *supra* note 203, at 355. This figure constituted a decrease over the previous two years (Fiscal Year 2013: 848 visas; Fiscal Year 2012: 975). See *id.* U visas are also available for victims of qualifying crimes who help in investigation or prosecution, but the number of these visas granted to trafficking victims is negligible. *Id.* In Fiscal Year 2014, 17 U visas were categorized under trafficking. *Id.*

<sup>223</sup> See Haynes, *supra* note 210, at 364 (arguing “To honor the intent of Congress and the Executive Branch, we should be asking how to reach more potential victims in order to secure their protection, health and safety, and to let them know that the T-visa option even exists, rather than operate from concern about floodgates opening.”).

<sup>224</sup> See Note, *supra* note 27, at 2585–86 (stating that while the Thirteenth Amendment’s enabling statutes did not explicitly create private rights of action, courts have found implicit rights of action).

<sup>225</sup> See *id.* at 2583.

process, and prosecutors can fail to fight for restitution or bargain it away.<sup>226</sup> Between 2009 and 2012, federal courts ordered restitution in only 36% of human trafficking cases, and sex trafficking victims were much less likely than labor trafficking victims to receive restitution.<sup>227</sup> Moreover, restitution amounts are low and “exclude damages for emotional and physical injuries as well as punitive damages” that could provide a deterrent for a crime that most traffickers get away with.<sup>228</sup> Under the TVPA, in order to use civil asset forfeiture to provide restitution to victims or just to seize assets, prosecutors had to prove that assets were directly used in the trafficking act, a difficult and sometimes impossible burden.<sup>229</sup>

### 3. Prevention

One of the major failures of the TVPA and its reauthorizations was the lack of attention to the demand side of trafficking.<sup>230</sup> The sex trafficking market exists because people—almost entirely men—choose to buy sex.<sup>231</sup> However, the sex trafficking statute was explicitly written to prosecute traffickers, not sex buyers, or “johns,” who fuel the trade. While buyers of trafficked drugs and guns can be heavily penalized, sex buyers have largely escaped unscathed in the history of American sex trafficking.<sup>232</sup>

Approximately 16% of adult men admit to having purchased commercial sex.<sup>233</sup> Non-habitual buyers are similar to the rest of the population in demographics, attitudes, and propensity toward crime.<sup>234</sup> However, a disproportionate number of sex purchases are made by habitual offenders, also

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<sup>226</sup> See *id.*

<sup>227</sup> ALEXANDRA LEVY ET AL., WHEN “MANDATORY DOES NOT MEAN MANDATORY: FAILURE TO OBTAIN CRIMINAL RESTITUTION IN FEDERAL PROSECUTION OF HUMAN TRAFFICKING CASES IN THE UNITED STATES 3, [http://www.abajournal.com/files/mandatory\\_traffickingreport.pdf](http://www.abajournal.com/files/mandatory_traffickingreport.pdf) [<https://perma.cc/ZBS3-A9Y6>].

<sup>228</sup> See Note, *supra* note 27, at 2583.

<sup>229</sup> See CHILDREN AT WORK, THE SEX TRAFFICKING MARKETPLACE: ADDRESSING DEMAND THROUGH LEGISLATION AND TACTICS 22 (2015), <http://173.45.238.175/content/wp-content/uploads/2016/01/the-sex-trafficking-marketplace.pdf> [<http://perma.cc/2M4Q-8J85>] (explaining how the JVTA lessened burden of proof requirements for civil asset forfeiture).

<sup>230</sup> Addressing demand for sex trafficking falls under both prosecution and prevention, but it is categorized in this essay as prevention for clarity.

<sup>231</sup> See SHIVELY ET AL., *supra* note 15, at 5-1-5-22.

<sup>232</sup> See Kandathil, *supra* note 51, at 111 (noting that “legislators have long forbid the purchase of drugs and guns with harsh deterrent penalties that have effectively curbed easy acquisition,” but buyers of sex trafficking victims faced no explicit penalty under TVPA).

<sup>233</sup> See Martin A. Monto & Joseph N. McRee, *A Comparison of the Male Customers of Female Street Prostitutes with National Samples of Men*, 49 INT’L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 505, 3 (2005); see also SHIVELY ET AL., *supra* note 15, at 2-52 (finding that a “substantial portion of men in the U.S. admits to having purchased sex at some point in their lives, with most surveys finding between 10% and 20% admitting to this crime”).

<sup>234</sup> See SHIVELEY ET AL., *supra* note 15, at 2-52 (explaining that “[s]tudies of male consumers of commercial sex find them to be similar to the general population in most regards, and quite unlike most populations of criminal offenders. For example, a comparison of men who had been arrested for purchasing sex to a nationally representative sample of men (i.e., male respondents of a large-scale national survey) found that those who had purchased sex

called “high frequency buyers” or “hobbyists,” who trade tips, discuss commercial sex online, and sustain the market.<sup>235</sup> These buyers tend to be “whiter, richer, older, less likely to be married, more educated, more sexually liberal” than the general population and more likely to believe that prostitutes enjoy their jobs.<sup>236</sup> The aim of demand efforts should be to round up these habitual buyers.

Without an unambiguous directive from Congress that the sex trafficking statute should be used to prosecute the demand side of sex trafficking, the Department of Justice has only rarely prosecuted these crimes.<sup>237</sup> When the federal government does prosecute johns, the cases primarily target Americans buying sex overseas, not domestic sex buyers.<sup>238</sup> While it is extremely important to ensure that American sex buyers do not fuel sex trafficking overseas, the primary problem is at home.

One of the rare instances where the TVPA was used to prosecute buyers at home was a 2011 sting in South Dakota where two individuals were charged for responding to a fake ad for underage children. These men appealed their conviction under the defense that purchasing sex does not fall under section 1591, the sex trafficking statute. The 8th Circuit Court of Appeals ruled that the word “obtained” in section 1591 could be used to prosecute sex buyers in addition to suppliers, but confusion remained among prosecutors and few similar cases were charged.<sup>239</sup>

The TVPA was relatively silent on prosecuting johns, but it did promote other prevention initiatives.<sup>240</sup> One major outcome of the TVPA was the National Human Trafficking Resource Center and hotline, a domestic telephone number receiving calls from people across the United States reporting suspected incidents of human trafficking. The hotline received nearly 22,000

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were more likely to have attended college, and were just 15% less likely to be married (41% for arrested johns versus 56% in the national survey).”) (citations omitted).

<sup>235</sup> CHILDREN AT WORK, *supra* note 230, at 14.

<sup>236</sup> *Id.* at 15.

<sup>237</sup> *Id.* at 21–22.

<sup>238</sup> For example, in the 2015 Trafficking in Persons (TIP) Report, the federal government reports on several demand side prosecutions, but these activities solely involve child sex tourism offenders and military personnel who are buying sex overseas, not domestic sex buyers. See TRAFFICKING IN PERSONS REPORT 2015, *supra* note 203, at 357. The 2015 report explains, “U.S. laws provide extraterritorial jurisdiction over child sex tourism offenses perpetrated overseas by U.S. citizens. FBI made six criminal arrests resulting in six indictments and two individuals were convicted in child sex tourism cases in FY 2014. DHS took proactive steps to prevent child sex tourism in 2014 and shared information with foreign law enforcement counterparts about registered child sex offenders prior to their travel abroad (from the United States). DHS made more than 45 child sex tourism related arrests in FY 2014.” *Id.*

<sup>239</sup> See CHILDREN AT WORK, *supra* note 230, at 21–22.

<sup>240</sup> The TVPA includes many efforts to prevent international sex trafficking. These efforts include distributing pamphlets and information to foreigners applying for temporary work and exchange visitor visas to enter the United States, screening of applicants at embassies and consular offices, and distributing pamphlets and public awareness campaigns abroad. See TRAFFICKING IN PERSONS REPORT 2015, *supra* note 203, at 356–57.

calls in 2015.<sup>241</sup> Other federal efforts include an online program developed by the Department of Education to assist schools in identifying at-risk students, DHS efforts to raise awareness of trafficking during the Super Bowl, and an HHS “End Trafficking” website to help raise awareness.<sup>242</sup>

#### 4. Commerce Clause

On a constitutional level, the TVPA was enacted pursuant to the Commerce Clause, rather than the Thirteenth Amendment.<sup>243</sup> By 2000, Congress was using the clause so liberally across criminal and civil law that its use no longer meant that the law applied only to crimes that physically cross state lines, though actual interstate crimes and interstate financial transfers were certainly occurring. Still, the TVPA puts prosecutors and courts in a theoretical position where they may have to tenuously argue that sex trafficking impacts interstate commerce even in cases where the crime occurs in one state and money is not transferred out of state. Some defendants have made constitutional defenses arguing that their crime had no impact on interstate commerce.<sup>244</sup>

Congress’s unwillingness to recover from the Thirteenth Amendment’s early legal history and embrace it as an authority of its own has influenced anti-trafficking efforts. As with the Mann Act, the TVPA attempts to redress a *constitutional violation of human rights* that is occurring *nationally*. But the Commerce Clause makes the distance the victim is transported and the location of the crime the focal points of sex trafficking, rather than the nature of the crime itself. This has exacerbated misunderstandings of sex trafficking as a crime of transportation and movement, not as a deprivation of constitutional rights.<sup>245</sup>

### IV. THE JUSTICE FOR VICTIMS OF TRAFFICKING ACT

The TVPA is known as the cornerstone of federal human trafficking legislation, and rightly so, but its broad focus on international, domestic,

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<sup>241</sup> See *2015 Hotline Statistics*, Polaris (Jan. 2016), <https://polarisproject.org/resources/2015-hotline-statistics> [https://perma.cc/SFH7-8QW9].

<sup>242</sup> See *TRAFFICKING IN PERSONS REPORT 2015*, *supra* note 203, at 356–57.

<sup>243</sup> Congress did allude to its powers under both constitutional provisions, but it eventually reported out the TVPA under the Commerce Clause, art. I, § 8. See Jennifer Mason McAward, *The Thirteenth Amendment, Human Trafficking, and Hate Crimes*, 39 SEATTLE U. L. REV. 829, 831 (2016).

<sup>244</sup> One example is *United States v. Garcia*, No. 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088 4-10 (W.D.N.Y. Dec. 2, 2003), where the defendant argued that the law lacked the “requisite jurisdictional hook.” In that case, the U.S. District Court for the Western District of New York ruled that it did not matter since the TVPA would be constitutional under the Thirteenth Amendment. See *id.* at 4–10.

<sup>245</sup> Trafficking, particularly the domestic trafficking of adult victims, is often charged on the state level. States are responsible for providing services to victims, and victims across the country are subject to inconsistent application of trafficking laws and widely varying criminal codes. See Strauss, *supra* note 173, at 509–10.

labor, and sex trafficking eclipsed the unique needs of sex trafficking victims, particularly those who are U.S. citizens and lawful permanent residents.<sup>246</sup> Moreover, the law did not provide sufficient prosecutorial tools to target the sex buyers who sustain the industry.

### A. *A New Anti-Trafficking Strategy*

Advocates and members of Congress identified legislative priorities that required tailored action outside of the TVPA: specialized service provision for domestic sex trafficking victims; prosecutorial tools to address the demand for sex trafficking; training and resources for law enforcement to fight sex trafficking; protections to ensure victims are not treated as criminals; and better tools to guarantee victims' right to compensation. Beginning in 2013, Congress began piecing together laws that would finally fill these gaps. On May 19, 2015, the House passed the Justice for Victims of Trafficking Act (JVTA), an aggregation of ten House bills written to improve the nation's fight against sex trafficking.<sup>247</sup> The JVTA—enacted under the Commerce Clause—was signed into law on May 29, 2015. This section explores the JVTA's efforts to better equip victims, law enforcement, and prosecutors, and to improve national prevention initiatives.

#### 1. *Survivor-Centered Services*

The main goal of the JVTA was to create survivor-centered legislation that prioritizes the safety, rights, and wellbeing of victims. The JVTA seeks to provide victims with more assistance to reestablish their lives, and addresses the criminalization and arrest of human trafficking victims. Child sex trafficking victims are currently more likely to be arrested for prostitution offenses than are sex traffickers or sex buyers,<sup>248</sup> indicating that the United

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<sup>246</sup> See SHARED HOPE INT'L, JUSTICE FOR VICTIMS OF TRAFFICKING ACT SECTION-BY-SECTION ANALYSIS 2, [http://sharedhope.org/wp-content/uploads/2015/03/Justice-for-Victims-of-Trafficking-Act-2015\\_Section-by-Section\\_Reported.pdf](http://sharedhope.org/wp-content/uploads/2015/03/Justice-for-Victims-of-Trafficking-Act-2015_Section-by-Section_Reported.pdf) [<https://perma.cc/P66X-KWAD>] (explaining that “[u]nder current law, U.S. citizen human trafficking victims are placed at a disadvantage when seeking restorative services and protection. Under the Trafficking Victims Protection Act, non-citizen trafficking victims may become eligible for federally funded services and benefits after HHS or the Secretary of Homeland Security issues an official certification to them—but U.S. citizens and Lawful Permanent Residents are not eligible for this certification. This disparity in certification has led to confusion, and often has the effect of categorically excluding domestic human trafficking victim [sic] from receiving protective and restorative services.”).

<sup>247</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015).

<sup>248</sup> See U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 34 (2010), <https://www.justice.gov/psc/docs/natstrategyreport.pdf> [<http://perma.cc/M83M-4QZB>] (“Clients of child victims of prostitution are, in fact, child sex offenders; however, this form of child sexual exploitation often goes unpunished. In fact, the exploited child victim of prostitution is much more likely to be arrested for prostitution offenses than is the offender. For example, a 2005 study for Congress showed that in Boston, 11 female prostitutes (adult and child) were arrested for each male

States has performed poorly in protecting victims from being criminalized for the crimes committed against them.

To address inadequate victim services, the JVTA establishes a Domestic Trafficking Victims' Fund.<sup>249</sup> The fund is financed through a \$5,000 special assessment levied on offenders convicted of sex trafficking, labor trafficking, child pornography, sexual abuse, and other related crimes.<sup>250</sup> One advocacy group estimated that this fund should collect \$31 million per year.<sup>251</sup> Revenue from the fund is distributed to victim services programs, including \$2 million per year for services for victims of child pornography; and a block grant program to assist law enforcement officers, prosecutors, judicial officials, and victim services organizations "in collaborating to rescue and restore the lives of victims."<sup>252</sup>

Sufficient services are a huge determinant of whether victims will testify against their traffickers, whether cases will be successful, and whether victims will be able to reintegrate in society. As such, the JVTA clarifies that the Department of Justice should use existing and future grant funds to provide housing to victims, an area of service provision that has been under-resourced. Long-term housing options for trafficking victims are limited, and in some jurisdictions, victims may be housed in punitive residential placements for lack of other options.<sup>253</sup> The bill does not dismantle the victim certification process established by the TVPA, but it clarifies that U.S. citizen and lawful permanent resident victims do not need to receive official certification by HHS to be eligible to receive HHS-administered services.<sup>254</sup> In March 2016—as Congress was negotiating the JVTA—the DOJ amended its policy so that cooperation with law enforcement would no longer be a requirement for DOJ-administered victim services programs.<sup>255</sup>

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client arrest; in Chicago, the ratio was 9 to 1; and, in New York City, the ratio was 6 to 1. Part of the disproportionate arrest ratios are attributed to misinformation provided to officers by the children; that is, the children will represent themselves to be adults, and may provide false identification. Pimps typically provide child victims of prostitution with false identification that indicates an adult age and the pimps instruct the children to lie about their ages if arrested. Similar to client offenders, pimps usually evade arrest and prosecution, primarily by avoiding detection altogether. When they are arrested, they often serve a minimum amount of time in prison or have their cases reduced to misdemeanors.").

<sup>249</sup> Justice for Victims of Trafficking Act § 101

<sup>250</sup> This assessment is payable only after other fines and restitution have been paid. Currently, only 12% of federal child pornography and prostitution offenders and 6% of sexual abuse offenders are "ordered to pay any criminal fines at all in federal court." SHARED HOPE INT'L, *supra* note 247, at 1.

<sup>251</sup> *Id.* at 2.

<sup>252</sup> Justice for Victims of Trafficking Act § 203.

<sup>253</sup> For more on housing, see HEATHER J. CLAWSON & LISA GOLDBLATT GRACE, U.S. DEP'T OF HEALTH & HUMAN SERVICES, FINDING A PATH TO RECOVERY: RESIDENTIAL FACILITIES FOR MINOR VICTIMS OF DOMESTIC SEX TRAFFICKING (2007), <https://aspe.hhs.gov/basic-report/finding-path-recovery-residential-facilities-minor-victims-domestic-sex-trafficking> [<https://perma.cc/FM99-JPG6>]

<sup>254</sup> Justice for Victims of Trafficking Act § 102.

<sup>255</sup> See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 390 (2016).

The JVTa emphasizes victim protection by incentivizing states to pass safe harbor laws that treat minors engaged in commercial sex as victims; discourage or prohibit the prosecution of victims for prostitution or sex trafficking; and encourage diversion to appropriate service providers. Congress also incentivizes states to pass laws that allow trafficking victims to petition courts to expunge arrest and conviction records for non-violent offenses committed as a direct result of being trafficked.<sup>256</sup>

The JVTa further protects victims and witnesses by treating trafficking in persons as crimes of violence under the federal criminal code for purposes of federal pre-trial release, monitoring, and detention. This allows courts and authorities to prevent traffickers from harming victims and witnesses. The federal legislation also enhances victims' rights by extending the statute of limitations for civil suits and by ensuring that victims are able to sue sex buyers.<sup>257</sup> Moreover, it clarifies congressional intent that victims seeking relief in an appellate court should have the appeal subject to the ordinary appellate standard of review, which is a simpler standard than the higher "clear and indisputable error" standard sometimes used by courts.<sup>258</sup> It also protects mothers by incentivizing states to pass laws that allow the mother of any child conceived through rape "to seek court-ordered termination of the parental rights of her rapist with regard to that child, which the court is authorized to grant upon clear and convincing evidence of rape."<sup>259</sup>

Importantly, the JVTa recognizes the production of child pornography as a form of human trafficking; this ensures that child pornography victims have access to the support services available to other trafficking victims.<sup>260</sup> It also amends the federal definition of "child abuse and neglect" and "sexual abuse" to include trafficking.<sup>261</sup> This provision made inroads into articulating that child sex trafficking victims should be treated as all other victims of child sexual abuse, and should be treated as much as possible through the child welfare system instead of the juvenile justice system. Because identification is low and child victims do not self-identify, the JVTa requires state child protective services systems to implement screening and assessment programs to identify child sex trafficking victims entering the system.

Finally, the JVTa gives survivors a voice in federal policy through creation of the United States Advisory Council on Human Trafficking, composed of trafficking survivors. The Council is tasked with reviewing federal policy and programs related to human trafficking, including victim services programs.<sup>262</sup>

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<sup>256</sup> Justice for Victims of Trafficking Act § 1002.

<sup>257</sup> *Id.* § 120.

<sup>258</sup> *Id.* § 113.

<sup>259</sup> *Id.* § 404.

<sup>260</sup> *Id.* § 104.

<sup>261</sup> *Id.* § 802.

<sup>262</sup> *Id.* § 115.



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*2. Prosecutorial Tools*

In addition to assistance for law enforcement and judicial training programs through the Victims' Fund, the JVTAs develop prosecutorial tools to bring successful criminal charges against traffickers and to improve victims' rights in the justice system. One of the bills incorporated into the JVTAs is the Stop Advertising Victims of Exploitation (SAVE) Act, introduced by Congresswoman Ann Wagner. This provision criminalizes knowingly advertising commercial sex acts with sex trafficking victims, and aims to close online marketplaces that host advertisements for sex trafficking victims. The SAVE provision allows prosecutors to bring criminal cases against not only traffickers who post ads, but also websites that knowingly host sex trafficking ads.

The JVTAs also alleviate difficulties that prosecutors have faced in obtaining wiretaps from state courts by clarifying that wiretap warrants should be granted for investigations of sex trafficking, child pornography, and related crimes. It also clarifies that predators who transport a minor for child pornography production can be prosecuted under the Mann Act (18 U.S.C. § 2423) regardless of whether they had sexual contact with the victim.

The JVTAs attempt to address problems with prosecutorial discretion that may result in the trafficker receiving a lighter sentence or the victim not receiving compensation. The JVTAs require the Federal Judicial Center to provide training to judges on ordering restitution for victims and requires the Attorney General to collect data on mandatory restitution orders. The JVTAs allow law enforcement officials more authority to seize traffickers' assets and require law enforcement officials to prioritize the use of forfeited assets for restitution.<sup>263</sup> It also grants victims the right to be informed of any plea bargain or deferred prosecution agreement in their case, and clarifies that victims should be informed of their rights and the availability of certain services.

The JVTAs raise the standard by which buyers must prove that they were unaware that the victim was underage. Prior to the JVTAs, the Mann Act allowed buyers to establish a preponderance of the evidence to prove that they reasonably believed that the victim was of age; the JVTAs amend this to a "clear and convincing" standard where buyers must prove that it is highly probable that the victim was not underage.<sup>264</sup> This change places more

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<sup>263</sup> Previously, federal law required "convicted human traffickers to forfeit all property 'used or intended to be used to commit or facilitate the commission of such violation.' This standard can sometimes be used to shield human traffickers from broad asset forfeiture by requiring prosecutors to make a difficult distinction between the portion of criminal assets traceable to the underlying offense and the portion of the assets that are involved in the offense, but were not used for the actual facilitation of the offense itself." SHARED HOPE INT'L, *supra* note 247, at 3.

<sup>264</sup> Justice for Victims of Trafficking Act § 111.

responsibility on the buyer, who can no longer argue that the victim was of age merely because an advertisement falsely listed the victim's age.

### 3. *Prevention and Deconstructing the Marketplace*

Human trafficking is the “world’s most profitable criminal enterprise after drugs,” along with illegal arms.<sup>265</sup> The trafficking industry flourishes, of course, because predators purchase sex in a supply-and-demand market. A fundamental purpose of the JVTAs was to prioritize anti-demand, prevention, and deterrence initiatives at the national level. Purchasing sex exacerbates gender discrimination and harmful power relationships between the sexes, and capitalizes on the manipulation and poverty of, and force against, women and girls.<sup>266</sup> Undercutting demand for sex trafficking victims and preventing at-risk youth from entering the sex industry are thus key to deconstructing the crime.

#### a. *Demand*

While offenders who rape or sexually assault adults and children outside the commercial sex industry face stiff criminal penalties, offenders who purchase sex with adults and children generally face only minor penalties, if any at all. Members of Congress who spearheaded passage of the JVTAs believed that rape within the confines of sex trafficking should be as socially unacceptable as rape outside the confines of sex trafficking. A handful of jurisdictions across the country, including counties in Washington State and Illinois,<sup>267</sup> have developed advanced anti-trafficking strategies that prioritize the prosecution of buyers to punish them for their crimes and restrict demand for commercial sex. But this is not necessarily the norm; many state and local jurisdictions lack knowledge of how to implement effective

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<sup>265</sup> Swanee Hunt, *Deconstructing Demand: The Driving Force of Sex Trafficking*, 19 BROWN J. WORLD AFF. 2 (2013), [https://www.demandabolition.org/wp-content/uploads/2013/07/brown\\_journal\\_6\\_2013.pdf](https://www.demandabolition.org/wp-content/uploads/2013/07/brown_journal_6_2013.pdf) [<https://perma.cc/YW5S-AYCR>].

<sup>266</sup> See also *id.* at 5 (“Given that most buyers are male and most of those bought are female, the dynamic of gender imbalance is undeniable. Even when a woman chooses to offer herself as high-priced ‘escort,’ the power discrepancy still exists, since the man has the disposable wherewithal to buy her. The image of a psychologically healthy woman self-employed in prostitution with a six-figure income is the tiny exception: Since the crushing number of women and girls being bought were raped and otherwise sexually traumatized when they were younger, those who ‘choose’ a life of prostitution generally do so against a backdrop of severe inequality . . . . The advantage the average man has over most women and children in terms of physical strength, financial means, and social status is a factor in how voluntary the seller’s ‘choice’ really is.”).

<sup>267</sup> During the National Johns Suppression Initiative stings in summer 2016, the Cook County Sheriff’s Office arrested 230 Johns. The Seattle Police Department arrested 204. The next county with the highest arrests was one-hundred arrests lower. See Tim Moran, *Hundreds of Johns in Cook County Charged in National Sex Trafficking Sting*, PATCH (Aug. 10, 2016), <http://patch.com/illinois/chicago/hundreds-johns-cook-county-charged-national-sex-trafficking-sting> [<https://perma.cc/A45E-AXCV>].

stings and many others are still restricted by discriminatory state laws.<sup>268</sup> Federal law enforcement too, despite some encouragement in TVPA reauthorizations, had not prioritized efforts to reduce demand for sex trafficking.

Changing perceptions and penalties for these criminals necessitated a drastic change both in law and in enforcement. The JVTa revises section 1591 to clarify that anyone who “patronizes” or “solicits” victims of trafficking can be charged with sex trafficking. These tools alleviate the confusion under the TVPA over whether buyers of sex can be prosecuted under the statute. In case any confusion remained, the JVTa expresses the sense of Congress that sex buyers should be prosecuted as sex trafficking offenders, and directs the Attorney General to ensure that federal law enforcement officials are actively identifying, investigating, and prosecuting buyers.

Part of the reason why criminals who rape victims of trafficking face lesser penalties than criminals who rape children or adults outside the commercial sex industry is a persistent misunderstanding of the commercial sex industry. Media outlets still often describe child sex trafficking victims as “child sex workers” or “child prostitutes.” In order to increase understanding among law enforcement officials, the JVTa directs preexisting trafficking task forces under the Violent Crimes Against Children program, which includes the Innocence Lost National Initiative,<sup>269</sup> to train state and local law enforcement on how to investigate and prosecute offenders who patronize or solicit children for sex. The bill requires the Bureau of Justice Statistics (BJS) to issue annual reports on the arrests, prosecutions, and convictions of buyers in state courts. In addition, the JVTa requires the Department of Defense to report to the DOJ on military sex offenders for inclusion in the National Sex Offender Registry and the Dru Sjodin National Sex Offender Public Website.<sup>270</sup>

*b. Training and Resources*

The JVTa recognizes that increased identification of victims is necessary to rescue survivors and prosecute traffickers. In addition to training programs for law enforcement and federal judges, the bill requires the Department of Homeland Security to train a wide range of federal officials, including relevant Transportation Security Administration and U.S. Customs

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<sup>268</sup> Prosecutors face confusion over whether to charge sex buyers at all; the U.S. District Court for the District of South Dakota “erroneously granted motions to acquit buyers in two separate cases,” a misunderstanding of congressional intent to prosecute buyers. H.R. REP. NO. 114-7 at 6 (2015). This was overruled in *United States vs. Jungers*, 702 F.3d 1066 (8th Cir. 2013), in which the Eighth Circuit ruled that the sex trafficking statute, 18 U.S.C. § 1591, does apply “to persons who purchase illicit sexual acts with trafficking victims.” H.R. REP. NO. 114-7 at 6.

<sup>269</sup> The Innocence Lost National Initiative is a partnership between the FBI, DOJ’s Child Exploitation and Obscenity Section, and the National Center for Missing and Exploited Children that combats domestic minor sex trafficking.

<sup>270</sup> Justice for Victims of Trafficking Act § 502.

and Border Protection personnel, to “effectively deter, detect, and disrupt human trafficking.”<sup>271</sup> The JVTA also provides grants for programs that would train healthcare professionals on human trafficking.

Another way to increase identification, though challenging, is through outreach to adults and children in the commercial sex industry who do not self-identify as trafficking victims or who do not know the rights and services available to them. The JVTA codifies the National Human Trafficking Resource Center hotline to preserve the phone service as a federal priority.<sup>272</sup> The JVTA also directs the DOJ to post online information for survivors, law enforcement, foster parents, and advocates on available counseling and hotline resources; housing resources; legal assistance; and other services for trafficking survivors.

*c. Research*

The lack of statistical information on trafficking makes it difficult for federal, state, and local law enforcement to make decisions on where to direct resources. The JVTA looks to improve statistical collection by designating human trafficking as a Part 1 Violent Crime.<sup>273</sup> This is notable because the last addition to the Part 1 Violent Crime category was arson in 1982.<sup>274</sup> The designation requires law enforcement agencies to include human trafficking when calculating index crime rates and encourages law enforcement agencies to report human trafficking through the FBI’s Uniform Crime Reporting program.<sup>275</sup>

The JVTA also requires the Bureau of Justice Statistics to prepare annual reports on arrests, prosecutions, convictions, and sentences of sex trafficking offenders in state courts.<sup>276</sup> In addition, it directs the Interagency Task Force to Monitor and Combat Trafficking, established under the TVPA of 2000, to produce a review surveying federal and state anti-trafficking pre-

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<sup>271</sup> *Id.* § 902.

<sup>272</sup> *Id.* § 603.

<sup>273</sup> The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, in effect since January 2013, required the FBI to designate human trafficking as a “Part 1” for purposes of the Uniform Crime Reporting program to collect offense and arrest data. The TVPA Reauthorization of 2013 also required the FBI to distinguish between prostitution, assisting or promoting prostitution, and purchasing prostitution. While human trafficking data was collected as Part I crimes, they were not reported in the UCR statistics on violent and property crimes until the JVTA designation. See *GODOY ET AL.*, *supra* note 16 at 5–6.

<sup>274</sup> See U.S. DEP’T OF JUSTICE, HUMAN TRAFFICKING IN THE UNIFORM CRIME REPORTING (UCR) PROGRAM 2, <https://ucr.fbi.gov/human-trafficking> [<https://perma.cc/Z3XC-3HN8>].

<sup>275</sup> The FBI’s Uniform Crime Reporting program is not mandatory, though many states require law enforcement to report to the program. *Id.* In 2013, the FBI received reports on human trafficking from law enforcement agencies in 13 states. See *id.* Agencies that participated reported a total of only 13 actual sex trafficking cases with a total of only 5 arrests. See *id.* at 3–4. The FBI explained that it takes time for agencies to develop effective reporting on the crime and reasons for such low reporting “include the time and resources it takes for agencies to implement technical changes, aligning state and local policies with the federal requirements, and the education and training of participants.” *Id.* at 9.

<sup>276</sup> Justice for Victims of Trafficking Act § 114.

vention strategies, surveying academic literature on prevention, and identifying best practices to deter trafficking.<sup>277</sup> Under the law, the Attorney General must implement a National Strategy for Combating Human Trafficking to increase coordination with federal, state, local, and tribal partners across the nation.<sup>278</sup> To improve implementation of the JVTA, the Government Accountability Office is mandated to report on federal and state law enforcement efforts to combat trafficking, and the Attorney General is required to submit annual details to the House and Senate Judiciary and Appropriations Committees on the use of JVTA grant funds.<sup>279</sup>

### *B. Implementation: Realizing the Law*

The JVTA delineates a survivor-centered approach to human trafficking, but implementation will depend on the effective use of resources and Congress's willingness to monitor federal agencies. Learning from the implementation mistakes of past legislators, members of Congress have demonstrated their intent to oversee implementation of the JVTA. In May 2016, 37 members of Congress wrote to Attorney General Loretta Lynch to hold the DOJ accountable for fully implementing the law.<sup>280</sup> Along with the letter, members hosted a press conference to inquire after specific provisions that had yet to be implemented and/or necessitated congressional oversight.<sup>281</sup> On June 30, 2016, the Senate Judiciary Committee held a hearing on the same topic.

Problems with implementation have already surfaced. The Trafficking Victims' Fund is the JVTA's hallmark tool to fund victim services and increased training. While advocates originally estimated that the Victims' Fund would result in \$31 million per year for victim services, the DOJ testified at a Senate hearing in June 2016 that only approximately \$100,000 had been added to the account as of May 2016. This low amount demonstrates that judges and prosecutors have not levied the mandatory assessment against applicable criminals.<sup>282</sup> This is unacceptable. Failure to levy the fine stone-

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<sup>277</sup> *Id.* § 115.

<sup>278</sup> *Id.* § 606.

<sup>279</sup> *Id.* § 121.

<sup>280</sup> See Letter from Members of Congress, to Loretta Lynch, Attorney General, Dep't of Justice (May 24, 2016), <https://wagner.house.gov/sites/wagner.house.gov/files/Joint%20Bipartisan%20Letter%20on%20JVTA%20Implementation.pdf> [<https://perma.cc/4LN7-LN5X>].

<sup>281</sup> See Press Release, Office of Congresswoman Ann Wagner, Members of Congress Urge DOJ to Fully Implement Human Trafficking Law (May 25, 2016), <https://wagner.house.gov/media-center/press-releases/members-of-congress-urge-doj-to-fully-implement-human-trafficking-law> [<https://perma.cc/7394-ZMT3>].

<sup>282</sup> Since passage of the JVTA, there have been many cases where judges have not ordered the full assessment amount and cases where judges have not issued the assessment at all. In fact, finding cases where the full \$5,000 has been assessed is a rarity. See, e.g., Press Release, Dep't of Justice, U.S. Attorney's Office, S. Dist. of Ill., Missouri Man Sentenced to Life in Prison for Sex Trafficking (Oct. 13, 2016), <https://www.justice.gov/usao-sdil/pr/missouri-man-sentenced-life-prison-sex-trafficking> [<https://perma.cc/AH9U-K5XS>] (sex trafficker was sentenced to life in prison on October 12, 2016, in Illinois, but the judge ordered only a \$200

walls the block grant programs that will serve victims and fund anti-trafficking initiatives. The DOJ must issue directives, guidance, and trainings to U.S. Attorneys and federal judges to apply the assessment in each and every case.

It is also critical to ensure that new and existing grant programs administered by the DOJ and HHS are inclusive of U.S. citizen and lawful permanent resident victims.<sup>283</sup> Congress must actively review mandated DOJ grant reports to assess whether the Department has properly implemented JVTA priorities, including service provision to U.S. citizen and permanent resident adult victims—including through HHS—shelter and housing, and resources to confront demand. The Advisory Council on Human Trafficking will be helpful in identifying needs, though advocates have expressed disappointment that the Administration did not exercise due diligence in making a diverse selection for the Council; only four representatives of eleven on the Council are sex trafficking victims, and all but three victims are foreign nationals.<sup>284</sup> In the future, Congress should write language that ensures that domestic victims and sex trafficking survivors are not underrepresented.

Congress must also watch victim compensation statistics. The JVTA gave prosecutors and courts tools to improve forfeiture of assets that enable trafficking and instructed the DOJ to hire an Assistant U.S. Attorney with expertise on “financial crimes, money laundering, and asset forfeiture” to work “specifically on financial aspects of human trafficking investigations and prosecutions.”<sup>285</sup> Despite these tools, as of June 2016, the DOJ had approved only two requests to transfer forfeited assets to victims as compensation. While the DOJ expects more requests in the future, sustained efforts to raise awareness among U.S. Attorneys’ offices, courts, and crime victim advocates are needed.<sup>286</sup>

Training and education efforts will also define the success of the implementation of the JVTA’s new prosecutorial tools. It is critical that the federal

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special assessment); News Release, U.S. Immigration and Customs Enf’t, Memphis Man Sentenced to Life for Sex Trafficking of Minors (Aug. 25, 2016), <https://www.ice.gov/news/releases/memphis-man-sentenced-life-sex-trafficking-minors> [https://perma.cc/XT28-8YCU] (trafficker sentenced to life in federal prison was assessed \$800); *Philly Man Gets 30 Year Sentence For Sex Trafficking*, CBS PHILLY (June 2, 2016), <http://philadelphia.cbslocal.com/2016/06/02/philly-man-gets-30-year-sentence-for-sex-trafficking/> [https://perma.cc/M4GL-4YX7] (man sentenced to 30 years in prison and assessed \$500); Forum News Service, *Wisconsin man sent to prison for sex trafficking 17-year-old girl*, JAMESTOWN SUN (Sep. 12, 2016), <http://www.jamestownsun.com/news/nation-and-world/4113222-wisconsin-man-sent-prison-sex-trafficking-17-year-old-girl> [https://perma.cc/YPC2-L4JP] (trafficker sentenced to 5.5 years and assessed \$400).

<sup>283</sup> The Department of Justice was originally slow to initiate grant programs and to transfer the required funds for child pornography victims, but these tasks were accomplished by June 2016. See *Implementation*, *supra* note 47, at 4.

<sup>284</sup> Office to Monitor and Combat Trafficking in Persons, *Biographic Information for Members of the United States Advisory Council on Human Trafficking*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/263099.htm> [https://perma.cc/Y4U8-ZZ9N].

<sup>285</sup> *Implementation*, *supra* note 47, at 11.

<sup>286</sup> How effective these efforts will be to provide restitution of victims remains to be seen, though it is clear that more attention is now being paid to the issue.

government exercise leadership in prosecuting johns and ensuring that state and local authorities have the tools to properly detect and investigate sex buyers. The DOJ has made a start in doing this. In *United States v. Charles Familetti, Jr.* (2016), for example, the defendant was convicted of attempting to engage in child sex trafficking.<sup>287</sup>

Unfortunately, this case is an anomaly. The DOJ testified in June 2016 in front of the Senate Judiciary Committee that it could not provide statistical information about the “number of customers” of sex trafficking victims it had prosecuted because it does not distinguish between crimes prosecuted under the same statute.<sup>288</sup> However, in order to demonstrate that it is making progress in prosecuting sex buyers, the DOJ submitted written testimony detailing demand cases that had occurred in over twenty U.S. districts. Every one of these cases involves *child* sex trafficking, demonstrating that the Department is having difficulty learning how to identify and prosecute traffickers and buyers who exploit *adult* trafficking victims.<sup>289</sup> Moreover, some of the sentences granted in these cases are lenient, such as a 2014 case in Oregon where an offender was sentenced to only 24 months for paying to have sex with a 14-year-old after he had engaged in sex trafficking and prostitution at least 20 to 30 times before.<sup>290</sup> Both the offender and the victim’s trafficker were charged under the Mann Act for transporting a minor for the purpose of prostitution, not the sex trafficking statute. This choice of charges, in addition to the fact that the judge referred to the victim as a prostitute,<sup>291</sup> suggests a lack of training and experience on the use of section 1591.<sup>292</sup> The DOJ’s wider list of cases, far from demonstrating that the Department is excelling at implementing the sex trafficking statute and the JVTa, shows that prosecutors are still relying on the Mann Act and charges related to travel and transportation, rather than section 1591.

In order to better understand prosecution efforts, Congress tasked the DOJ’s Bureau of Justice Statistics with completing a report on prosecutions and convictions of state trafficking crimes. The DOJ’s testimony states that the Bureau of Justice Statistics will face insurmountable difficulties in completing this task because only 35% of state and local law enforcement agencies report to the FBI Uniform Crime Reporting Program (UCR) in National Incident-Based Reporting Program (NIBRS) format, which provides data on convictions.<sup>293</sup> While the Bureau’s reports will be incomplete, it is working

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<sup>287</sup> *United States v. Familetti, Jr.*, No. 16-2334 (S.D.N.Y. filed July 1, 2016).

<sup>288</sup> *Implementation*, *supra* note 47, at 5.

<sup>289</sup> *Id.* at 5–10.

<sup>290</sup> *See id.* at 10; *see also* Taryn Offenbacher, *Oregon’s First Federal Sentencing of Buyer Who Purchased Sex with Minor Results in Two Years in Prison*, SHARED HOPE INT’L (NOV 20, 2014), <http://sharedhope.org/2014/11/oregons-first-federal-sentencing-of-buyer-who-purchased-sex-with-minor-results-in-two-years-in-prison/> [<http://perma.cc/99AP-3X28>].

<sup>291</sup> *See id.*

<sup>292</sup> *See id.*

<sup>293</sup> The UCR reporting has shortcomings. *See* LUSKIN, *supra* note 14, at 6 (“Some states like Indiana, Mississippi, and parts of Ohio report directly to the FBI due to the lack of UCR

on programs including the National Crime Statistics Exchange initiative and National Census of Victim Service Providers to increase data resources.<sup>294</sup> In order to better implement the JVTA, Congress should incentivize law enforcement reporting that extracts actionable data.

The DOJ's June 2016 written testimony also indicates that the DOJ has not prosecuted any cases against offenders who advertise human trafficking victims. Slow implementation of the JVTA's SAVE Act provision is understandable, given that Backpage.com—which hosts ads selling trafficking victims—filed a suit against the United States in December 2015 in the U.S. District Court for the District of Columbia on the grounds that the SAVE Act violates the First and Fifth Amendments.<sup>295</sup> Prosecutors will not want any opened cases thrown out should the court rule in favor of Backpage.com. But the SAVE Act will likely be ruled constitutional—alternatively, the court may find that Backpage.com has no grounds to challenge the constitutionality of the law—and the federal government must equip stakeholders to prosecute advertisers of trafficking once the case is resolved.

It is clear that law enforcement, prosecutors, and judges still have much to learn in figuring out how to best charge offenders to win heavier sentences, how to identify adult victims of trafficking and those who exploit them, how to secure restitution for victims, and how to levy the mandatory \$5,000 assessment against criminals. Congress must monitor, equip, and raise awareness among federal, state, and local agencies to improve JVTA implementation.

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data collection oversight; while other states have adopted the program even when local LEA [law enforcement agencies] lack the infrastructure to input data, UCR data collection is expected to increase as agencies devote more time and resources to human trafficking cases, assisting in a more holistic picture of the crime. Though relevant information is continuously entered into the database, to date, there have been no quantitative reports published offering little to no insight into the collected data. Nationwide, there is still no uniform mechanism or formal system for reporting prosecution at the local or state level. This poses a challenge when attempting to quantify human trafficking investigations and prosecutions at a local or national level.”) (citations omitted).

<sup>294</sup> See *Implementation*, *supra* note 47, at 13. The DOJ reports that the BJS is working with the FBI to expand NIBRS reporting “so that national estimates can be produced from these data” through its National Crime Statistics Exchange (NCS-X) initiative. *Id.* BJS is also working to conduct a National Census of Victim Service Providers to collect “information on victim assistance for human trafficking victims.” *Id.*

<sup>295</sup> Complaint for Declaratory and Injunctive Relief at 4, *Backpage.com, LLC v. Lynch*, No 1:15-cv-02155-RBW (D.D.C. Dec. 11, 2015), in Matthew Zeitlin, *Backpage.com Is Suing the Justice Department Over New Sex Trafficking Law*, BuzzFeed (Dec. 15, 2015), [https://www.buzzfeed.com/matthewzeitlin/backpagecom-is-suing-the-justice-department?utm\\_term=.wrm08Vbgx#.simeL8pMY](https://www.buzzfeed.com/matthewzeitlin/backpagecom-is-suing-the-justice-department?utm_term=.wrm08Vbgx#.simeL8pMY) [<https://perma.cc/6S3S-VBLS>]. Backpage argues that the SAVE Act is “unconstitutionally vague, overbroad and infringe[s] First Amendment rights” and seeks an injunction preventing enforcement. *Id.*



V. NEXT STEPS: AREAS FOR CONGRESS TO IMPROVE  
ANTI-TRAFFICKING EFFORTS

The Justice for Victims of Trafficking Act affirmed the rights of victims and articulated the need for law enforcement and the courts to identify and treat victims of trafficking fairly. The JVTA expressed that trafficked individuals should be treated as victims and should be given access to the same justice and respect that other crime victims receive. At the federal level, the JVTA ended debate over whether buyers of sex should be held accountable for their actions.<sup>296</sup> But realizing a survivor-centered approach to sex trafficking requires more than passage of the JVTA alone, even assuming perfect implementation. This section examines next steps Congress can take to ensure the implementation of the advances authorized in the JVTA, and to realize broader congressional intent to prioritize victims, end demand, and increase prosecutions. Congress must demonstrate its commitment through sustained oversight; use the appropriations process to direct federal agencies on which programs to prioritize; pursue policies and research regarding anti-demand initiatives; and invest in training, education, and human resources.

A. *Specific Appropriations*

In Fiscal Year 2016, Congress appropriated \$45 million to the DOJ for trafficking victim services programs,<sup>297</sup> an increase over the President's budget request. It also appropriated \$18,755,000 for trafficking services programs to HHS, including \$13 million for foreign national victims and \$5,755,000 to improve services for U.S. citizen and legal permanent resident victims.<sup>298</sup> As it had done in the past, Congress appropriated funding for DOJ as a block and did not direct the Department on how to prioritize this funding.<sup>299</sup> In contrast, Congress provided explicit direction in the HHS appropriations explanatory language to address the agency's historic underfunding of domestic victims.

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<sup>296</sup> The law clearly articulates that persons who purchase illicit sexual acts with trafficking victims should be charged under § 1591. *See* Justice for Victims of Trafficking Act § 109. Charges under the Mann Act are no longer enough, as the crime of trafficking is not primarily a crime of movement, but rather primarily a crime of exploitation of a victim.

<sup>297</sup> *See* Consolidation Appropriations Act, Pub. L. No. 114-113 129 Stat. 2307 (2016). The DOJ seems to interpret this appropriations language broadly and funds victims of trafficking, research and evaluation, task forces, and trainings under the victim services appropriation.

<sup>298</sup> *See* 161 CONG. REC. H10161, 10289 (daily ed. Dec. 17, 2015) (statement of Rep. Rogers) (delineating funding levels; and instructing HHS "to increase funding for the national human trafficking hotline to help respond to increased call volume and overall need for services" using the \$18,755,000); *see also* Consolidation Appropriations Act, *supra* note 298 (DOJ levels).

<sup>299</sup> *See* H.R. REP. NO. 114-130, at 50 (2016). The CJS Appropriations Committee did, however, instruct the DOJ "to support the victim-centered approach to recognizing and responding to human trafficking" that was laid out in the JVTA. *Id.*

Specifically allocating funds for under-resourced categories of victims is a step in the right direction, and it is important that Congress proactively allocate anti-trafficking funds to reflect congressional priorities. Congress should make use of explanatory language and explicitly direct funds to services for adult victims, housing, and other programs that are inadequately implemented. Congressional intent to fund adequate services for adult victims is, in practice, insufficient if it is not backed by instructive appropriations. Specific allocations also ensure that ineffective programs are ended or revised. As Congress faces limited resources and increased spending pressures, it is essential that programs prove their effectiveness and meet defined accountability standards. Active allocation of resources enforces congressional intent and maintains the balance of powers between Congress and the Administration under Article I of the Constitution.

### B. Services Oversight

Congress must exercise oversight over both HHS and DOJ in implementing grant programs. There are continuing concerns over inconsistent service provision and unorganized referral methods.<sup>300</sup> Moreover, grant deadlines sometimes mean that victims cannot continue receiving services after a procedural deadline passes. Congress should rethink how to address sustained service provision.

Congress should also carefully study and consider modifications to the certification system that requires agencies to certify that victims are victims of “severe forms of trafficking,” a restriction that has resulted in women being denied services and deported. Victims ages 18 and older must prove they were forced, defrauded, or coerced—distinctions that are ambiguous under the abusive power dynamic between victims and their pimps.<sup>301</sup> This categorization may theoretically deny services to victims who originally consented to working in commercial sex before experiencing abuse.<sup>302</sup> Some non-governmental organizations report that “lack of training for employees of public benefits offices on the HHS certification process resulted in the erroneous denial of benefits for some victims and their families and in survi-

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<sup>300</sup> See *TRAFFICKING IN PERSONS REPORT 2016*, *supra* note 256, at 390.

<sup>301</sup> See Rieger, *supra* note 208, at 248 (“By distinguishing between “sex trafficking” and “severe sex trafficking” and choosing to decriminalize and provide assistance to only the latter category of victims, Congress made a judgment about who is deserving of state protection . . . The victims most in danger of being wrongfully denied certification despite technically qualifying for benefits under the TVPA are victims who have consented to come to the United States and to work in the sex industry, but who find themselves in slave-like conditions—in other words, migrant sex workers . . . This dichotomy disregards the complexities of sex trafficking and leads to under-certification of trafficking victims. For example, in describing to the press how he would proceed with undocumented prostitutes arrested in a brothel raid, an Assistant United States Attorney said, “[t]he fate of the women will hinge on whether prosecutors determine they were forced to work against their will or whether they participated in the sex ring voluntarily.”).

<sup>302</sup> *Id.* at 249.

vors waiting long periods of time to access benefits.”<sup>303</sup> Another problem is that foreign national women are required under the TVPA to participate in the investigation and prosecution of their case in order to stay in the United States and access services. As April Rieger points out in the *Harvard Journal of Law & Gender*, it would be “unheard of” for a rape victim to be denied services “simply because she chose not to testify against her rapists.”<sup>304</sup> While the TVPA reauthorization of 2005 provides an exception for victims experiencing trauma, all victims should have a choice whether or not they want to testify without putting their benefits at stake.<sup>305</sup>

### C. Conscience Protections

Congress must ensure that federal grants to assist trafficking victims are open to the non-governmental organizations (NGOs) most qualified to effectively care for the victims; discriminating against highly qualified NGOs that do not perform or make referrals for abortion or offer abortifacient drugs hurts trafficking victims. In 2011, HHS ended a multi-million dollar, long-term contract with the U.S. Conference of Catholic Bishops (USCCB)—which ran an extremely successful trafficking services program and which independently contributed \$500,000 to the program—because the organization did not refer for abortion or provide abortifacient drugs.<sup>306</sup> Instead, HHS refused to make a religious accommodation for the USCCB and awarded grants to organizations that had scored significantly lower than the USCCB in an independent review, indicating bias.<sup>307</sup> Concerns of some HHS staff over the “unfair and politicized” grant process were brought to the HHS inspector general’s office.<sup>308</sup> That year, HHS diversified its grant program away from a single, large contractor to a handful of regional ones, and added the requirement that providers must offer “family-planning services and the

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<sup>303</sup> TRAFFICKING IN PERSONS REPORT 2016, *supra* note 256, at 390.

<sup>304</sup> Rieger, *supra* note 208, at 250.

<sup>305</sup> The DOJ amended its policy in 2016 so that cooperation with law enforcement would no longer be a requirement for services. See TRAFFICKING IN PERSONS REPORT 2016, *supra* note 256, at 390.

<sup>306</sup> See Joan M. Broder, *HHS Ends Contract With Church Program for Trafficking Victims, Stressing Need for Contraception*, NATIONAL CATHOLIC REGISTER (Oct. 17, 2011), <http://www.ncregister.com/daily-news/hhs-ends-contract-with-church-program-for-trafficking-victims-stressing-nee> [<http://perma.cc/93RL-MY35>]; see also Complaint, ACLU of Mass. v. Leavitt, No 1:05-cv-11000-JLT (Mass. Dist. Ct. May 16, 2005) (stating that the ACLU sued HHS for funding the trafficking program run by the U.S. Conference of Catholic Bishops because it did not provide abortion services).

<sup>307</sup> See Penny Starr, *Rep. Smith: ‘Obama Administration’s Bias Against Catholics Is an Affront to Religious Freedom’*, CNSNEWS.COM (Dec. 1, 2011), <http://www.cnsnews.com/news/article/rep-smith-obama-administrations-bias-against-catholics-affront-religious-freedom> [<https://perma.cc/M9GF-XZXF>].

<sup>308</sup> See Jerry Markon, *Health, abortion issues split Obama administration and Catholic groups*, WASH. POST (Oct. 31, 2011), [https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAXV5xZM\\_story.html](https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAXV5xZM_story.html) [<https://perma.cc/5AKG-FS3W>].

full range of legally permissible gynecological and obstetric care.”<sup>309</sup> Given that the federal government bans federal funding for abortion services and abortifacient drugs under the Hyde Amendment, religious providers that do not offer these services should not be discriminated against. Moreover, many officials and non-profit organizations working in the anti-trafficking field—including the former director of the human trafficking program at the Department of Health and Human Services—argue that funding for services should not provide for anything that might facilitate sex trafficking. Rather, providers should focus resources on stabilizing and reintegrating victims. This is an important debate, and Congress has the responsibility to ensure providers—religious and nonreligious—that choose not to provide or refer for abortion or abortifacient drugs for victims can exercise their right of conscience and access grant funding.

#### D. Funding Levels

It is critical that Congress continues to prioritize funding for trafficking-related resources that will help increase identifications, arrests, and prosecutions. Law enforcement is up against a serious industry that requires fiscal and human resources to defeat. Commercial sex exploitation intersects with criminal gangs, money laundering, and drug trafficking, and earns nearly \$100 billion in illegal profits worldwide each year.<sup>310</sup> It is estimated that globally, each sex trafficking victim generates an average of \$100,000 in annual profits.<sup>311</sup>

While there are no reputable national numbers for U.S. trafficking profits, an Urban Institute report looking at eight U.S. cities found that the underground sex economy in each city was worth between \$39.9 million (Denver) and \$290 million (Atlanta) in the mid-2000s.<sup>312</sup> In these cities, pimps and traffickers made between \$5,000 and \$32,833 per week.<sup>313</sup> A 2010 DOJ report states that child sex trafficking can generate several thou-

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<sup>309</sup> See *National Human Trafficking Victim Assistance Program*, FEDERAL GRANTS, <http://www.federalgrants.com/National-Human-Trafficking-Victim-Assistance-Program-29864.html> [https://perma.cc/X2G3-45H8] (“The Director of ORR [Office of Refugee Resettlement, HHS] will give strong preference to applicants that are willing to offer all of the services and referrals [including referrals for abortion] delineated under the Project Objectives. Applicants that are unwilling to provide the full range of the services and referrals under the Project Objectives must indicate this in their narrative on approach in *Section IV.2.*”).

<sup>310</sup> See *ILO Says Forced Labour Generates Annual Profits of US \$150 Billion*, ILO (May 20, 2014), [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_243201/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang-en/index.htm) [http://perma.cc/U2Z7-RYSP].

<sup>311</sup> See HUMAN RIGHTS FIRST, *Human Trafficking by the Numbers*, (Jan. 7, 2016), <http://www.humanrightsfirst.org/resource/human-trafficking-numbers> [http://perma.cc/5QEG-TEED].

<sup>312</sup> See MEREDITH DANK ET AL., ABSTRACT, ESTIMATING THE SIZE AND STRUCTURE OF THE UNDERGROUND COMMERCIAL SEX ECONOMY IN EIGHT MAJOR US CITIES (2014), <http://www.urban.org/research/publication/estimating-size-and-structure-underground-commercial-sex-economy-eight-major-us-cities> [http://perma.cc/D8Z7-2XHZ].

<sup>313</sup> *Id.*

sand dollars per day, and that “a single child can generate as much as \$1,000 on a weekend night.”<sup>314</sup> Some criminals are even turning to child sex trafficking after careers in drug dealing and robbery because child trafficking is more profitable, and because the internet has allowed pimps to reach a larger client base.<sup>315</sup> Advocates have specifically articulated a need for increased funding for DOJ’s Human Trafficking Prosecution Unit, which investigates trafficking cases. Congress appropriated a significant increase for victim services in Fiscal Year 2015, but funding for the prosecution unit has remained flat since 2010.<sup>316</sup> Meanwhile, the unit’s caseload has increased 62% in recent years.<sup>317</sup>

Further, there are over 17,000 local police departments in the United States, and these law enforcement officers are most likely to have first contact with trafficking victims.<sup>318</sup> Given the difficulty inherent in training 17,000 departments, Congress has directed each U.S. Attorney General to participate in human trafficking task forces.<sup>319</sup> The DOJ awards task force grants to local agencies and jurisdictions under the Enhanced Collaborative Model to Combat Human Trafficking Solicitation.<sup>320</sup> These task forces require collaboration between federal, state, and local law enforcement agencies and service providers to identify and assist victims and prosecute traffickers. It is critical that the DOJ continues the task force program; in recent years, the number of task forces receiving federal grants has de-

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<sup>314</sup> THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, *supra* note 249, at 32.

<sup>315</sup> See *id.* at 32–33.

<sup>316</sup> See Letter from Charles C. Krulak, General, to Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies (Mar. 18, 2016) in HUMAN RIGHTS FIRST (Mar. 23, 2016), <http://www.humanrightsfirst.org/resource/letter-appropriations-subcommittee-requesting-increased-funding-human-trafficking> [<http://perma.cc/NA2T-4XUZ>].

<sup>317</sup> See *id.*

<sup>318</sup> See Rieger, *supra* note 208, at 246.

<sup>319</sup> See H.R. REP. NO. 114-130, at 37 (2016).

<sup>320</sup> The FBI participates in three types of anti-trafficking task forces: Anti-Trafficking Coordination Team, FBI Human Trafficking Task Forces, and Enhanced Collaborative Model to Combat Human Trafficking (funded through the Office for Victims of Crime and the Bureau of Justice Assistance). Only the latter provides grants to local law enforcement agencies through DOJ anti-trafficking appropriations. See GMS AWARDS, BUREAU OF JUSTICE ASSISTANCE (2016), [https://www.bja.gov/funding/Awards\\_GMSnumbers-16.pdf](https://www.bja.gov/funding/Awards_GMSnumbers-16.pdf) [<http://perma.cc/XKC7-T8L6>]. In 2016, the BJA (Bureau of Justice Assistance) awarded eleven grants for anti-trafficking law enforcement task forces, including to seven jurisdictions that had not yet formed task forces. *Id.*; see also *Anti-Human Trafficking Task Force Initiative*, BUREAU OF JUSTICE ASSISTANCE, [https://www.bja.gov/ProgramDetails.aspx?Program\\_ID=51](https://www.bja.gov/ProgramDetails.aspx?Program_ID=51) [<http://perma.cc/Q99H-C2HU>] (“Since 2004 [and until 2009], BJA has funded a total of 48 Anti-Human Trafficking Task Forces. Those task forces have identified 3,336 persons as potential victims of human trafficking and had requested either continued presence or endorsed T-visa applications for 397 of those potential victims. The task forces have also trained 85,685 law enforcement officers and others in identifying the signs of human trafficking and its victims. BJA has four previously-funded, active task forces combatting human trafficking in the State of Ohio; Harris County, TX; City of Arlington, TX; and Fairfax County, VA. The FY 2015 task forces will bring the number of BJA-funded, operational task forces to 20, located in 17 states.”).

clined.<sup>321</sup> The DOJ should also invest in low-cost, online resources on how to conduct investigations and stings that can be distributed to law enforcement agencies across the nation.

It is also critical that Congress continues to fund victim services, which have become a major priority for lawmakers since the JVTA. Sufficient resources play a key role in determining whether victims are able to recover, but also whether they are able to testify and participate in the prosecution process, taking traffickers off the street.<sup>322</sup> Service organizations continue to report a lack of funding, and particularly before the influx of funding in Fiscal Year 2015, HHS spent down its victim services funding before the end of the year.<sup>323</sup> Congress has clarified that the DOJ can use money authorized for other victim services programs for human trafficking victims in instances where the victims have also experienced other crimes,<sup>324</sup> and Congress should ensure that the DOJ takes advantage of this clarification based on need. It is important that Congress also allocates funds toward at-risk populations, and regularly digests the JVTA's mandated reports to inform future appropriations.

#### *E. Training and Equipping Stakeholders*

Because victims are unlikely to report the identity of their traffickers or to testify against them, even trained prosecutors face an uphill battle to convict these criminals.<sup>325</sup> The difficulty in prosecuting these cases leads traf-

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<sup>321</sup> See LUSKIN, *supra* note 14, at 6 (“The Department of Justice (DOJ) Bureau of Justice Assistance (BJA) has since downsized the number of human trafficking task forces federally funded. In the 2015 Fiscal Year, the Attorney General awarded more than \$22.7 million to assist in the development or enhancement of 16 task forces around the nation . . . eight fewer task forces than the originally funded twenty-four.”).

<sup>322</sup> See THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, *supra* note 249, at 34 (“The shortage of adequate resources for victims has an impact on the number of prosecutions. While obtaining a conviction against a pimp if the victim does not testify is possible, it is certainly much more difficult. The lack of adequate resources is a problem in its own right as it means the victims are not provided the treatment they need to begin the recovery process. In addition, if victims are not stabilized, they are much less likely to be able to participate effectively in the criminal justice process. If they cannot testify and the defendant is acquitted or is not prosecuted in the first instance, the defendant will be able to continue his exploitation of that child or of other children. Services are needed to ensure the victim can be involved in the prosecution, and the prosecution is needed to eliminate the defendant’s ability to keep hurting the child, so she can further her recovery.”).

<sup>323</sup> See TRAFFICKING IN PERSONS REPORT 2015, *supra* note 203, at 355.

<sup>324</sup> See FINKLEA ET AL., *supra* note 13, at 51.

<sup>325</sup> See THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, *supra* note 249, at 35; *see also* AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 74 (2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.pdf> [<http://perma.cc/24PR-4G99>] (stating that barriers to identifying victims include “the hidden nature of the crime and limitations of traditional policing methods, the failure of victims to recognize their own victimization and self-identify to law enforcement, victim fears of reporting and law enforcement attitudes toward victims.”).

fickers to view sex trafficking as a low-risk industry where “no one actually gets locked up for pimping.”<sup>326</sup> Low identification of trafficking incidents, inconsistent policing methods, and lack of prosecutorial experience on using state trafficking statutes are obstacles to increasing prosecutions.<sup>327</sup> Moreover, one study showed that three-fourths of local and state law enforcement leaders believe that human trafficking was “rare or non-existent in their community,” and only one in ten have “indicated investigating a human trafficking case.”<sup>328</sup> To further complicate investigations, traffickers operate in “insular” networks that share information about law enforcement and are often transitory.<sup>329</sup>

Congress must find messaging and legislative pathways to dispel myths about the commercial sex industry that inhibit law enforcement from investigating incidents. Misconceptions include beliefs that prostitution is a victimless crime, that victims are willing participants, that “real” victims are held in visibly abusive situations, that only those who are actively rescued are victims and persons who escape or are detained are not, that commercial sex is not violent or coercive, that a person who has broken the law cannot also be a victim, and that trafficking only involves illegal immigrants.<sup>330</sup> These myths make it difficult for law enforcement officials to distinguish between trafficking and prostitution.

Training for police officers on the front lines is crucial because “patrol officers and other first responders, not the detectives in Vice or another specialized unit,” are most likely to first make contact with trafficking victims.<sup>331</sup> In states without human trafficking task forces, patrol officers are unlikely to be trained at all. Trainings must include information about standard reporting protocols so that trafficking incidents reach the desks of appropriate investigative units. Trainings must also instruct police on how to interact with victims and conduct proper interview protocols. Law enforcement must learn how to both reactively identify (e.g. receiving tips from hotlines, the public, victim services organizations, or victims themselves)<sup>332</sup> and proactively identify (e.g. developing intelligence about trafficking networks and targeting resources to investigate)<sup>333</sup> trafficking incidents. The success of these investigations will hinge on law enforcement’s ability to

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<sup>326</sup> See DANK ET AL., *supra* note 313, at 288.

<sup>327</sup> See FARRELL ET AL., note 326, at 80. One dilemma that law enforcement reports is the need for “more resources for training, personnel, and investigations,” but they cannot justify these resources without identifying more cases. *Id.*

<sup>328</sup> *Id.* at 7.

<sup>329</sup> See THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, *supra* note 249, at 34.

<sup>330</sup> Haynes, *supra* note 212, at 349-352.

<sup>331</sup> See FARRELL ET AL., *supra* note 326, at 93.

<sup>332</sup> *Id.* at 78 (revealing that an Urban Institute survey of law enforcement found that “tips from non-governmental agencies or victim service hotlines were the primary method law enforcement used to identify victims of human trafficking and one-tenth of the identified cases came from self-reports by the victim to the police.”).

<sup>333</sup> See *id.* at 73.

interact with victims despite cultural, lingual, and social barriers.<sup>334</sup> Stakeholders must learn how to respond and interact with victims who may be guarded, experiencing trauma, and distrustful of law enforcement.

Over the years, the FBI has downplayed the importance of investigating sex trafficking by reassigning top investigators to “higher priority crimes.”<sup>335</sup> Investigators should take sex trafficking seriously. The U.S. Department of State has called human trafficking cases “the most labor and time-intensive matters undertaken by the Department of Justice” given the “complexity of these cases and the challenges police face working with highly traumatized victims.”<sup>336</sup> A report by the Urban Institute argues that trainings for law enforcement officials should include investigative techniques used in uncovering organized crime, drug trafficking, and gangs “to better uncover the level of organized crime” within the commercial sex industry.<sup>337</sup> Narcotics, sex, and weapons trade investigators should be cross-trained to recognize “circuits and overlaps” with the commercial sex industry.<sup>338</sup>

Training programs for law enforcement officials, prosecutors, and judges must stress the existence and applicability of the Trafficking Victims’ Fund to ensure that offenders convicted of relevant crimes are paying the required assessment into the Fund. Trainings should also highlight the importance of information sharing and collaboration with other law enforcement units, Attorneys General, and outside partners such as victim services providers, the child welfare system, and victim advocates. New and existing training programs should include appropriate information on the definition of sex trafficking;<sup>339</sup> the relationship between trafficking, prostitution, and

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<sup>334</sup> See *id.* at 89 (reporting that victims have vulnerabilities that can obstruct classification as a victim, which may include an “inability to speak English, status as a runaway, significant substance abuse or the presence of a disability.”).

<sup>335</sup> Rieger, *supra* note 208, at 247. Moreover, while the Department of Justice asserts that it charged 62% more trafficking cases during 2010–2015 than during 2005–2010, its numbers are still low; the Department of Justice charged 377 defendants in 257 cases at the federal level in Fiscal Year 2015. See *Implementation*, *supra* note 47, at 2.

<sup>336</sup> See FARRELL ET AL., *supra* note 326, at 8. Sex trafficking also interlinks with international crime and international terrorism investigations; the Islamic State has developed a sex trade of approximately 3,500 slaves, many of whom are Yezidi. See HUMAN RIGHTS OFFICE OF THE UNITED NATIONS & UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, REPORT ON THE PROTECTION OF CIVILIANS IN THE ARMED CONFLICT IN IRAQ: 1 MAY – 31 OCTOBER 2015 17–18 (2016), [http://www.uniraq.org/images/humanrights/UNAMI-OHCHR\\_%20POC%20Report\\_FINAL\\_01%20May-31%20October%202015\\_FINAL\\_11Jan2016.pdf](http://www.uniraq.org/images/humanrights/UNAMI-OHCHR_%20POC%20Report_FINAL_01%20May-31%20October%202015_FINAL_11Jan2016.pdf) [https://perma.cc/93R6-Z4AR].

<sup>337</sup> See DANK ET AL., *supra* note 313, at 288.

<sup>338</sup> *Id.* at Abstract.

<sup>339</sup> See SHIVELY ET AL., *supra* note 15, at 2-26 (“In our National Assessment research for the National Institute of Justice, Abt Associates researchers have found that most police and prosecutors do not regard women working for pimps necessarily to be sex trafficking victims. However, any reasonable definition of slavery or human trafficking (i.e., service compelled through force, fraud or coercion; lack of compensation beyond subsistence; inability to leave freely) makes any pimp a trafficker, and any women “working” for them to be a trafficking victim. Education and training is needed. One of the challenges is that law enforcement is wary of the anti-trafficking movement pushing the definition of slavery into street prostitution,



pimping; identifying victims; establishing trust with victims; providing services to victims; and sentencing traffickers. Training for prosecutors and judges should include education on using evidence to prove fraud or force, obtaining restitution,<sup>340</sup> and understanding the “evidentiary requirements needed to prove psychological coercion.”<sup>341</sup>

There is evidence that federal prosecutors on task forces sometimes refuse to bring human trafficking charges in cases that aren’t “slam dunk[s]” or “smoking gun[s];”<sup>342</sup> more encouragement is needed to bring complex cases under the statute. The good news is that human trafficking prosecutions are likely to result in convictions.<sup>343</sup> Congress must actively track investigations, prosecutions, convictions, and civil suits to determine prosecutorial barriers to holding traffickers liable. In order to understand how traffickers are sentenced, Congress should raise awareness among state and local jurisdictions about the FBI’s National Incident-Based Reporting Program.<sup>344</sup>

Congress should also prioritize research to establish evidence-based training models for health care officials, school officials,<sup>345</sup> child welfare providers, and private sector actors who interact with trafficked victims without knowing or recognizing it. One tailored way to do this is through the *Stop, Observe, Ask, and Respond (SOAR) to Health and Wellness Act of 2016*, which would codify a training program for health care providers to identify victims and develop response plans.<sup>346</sup> In general, stakeholder pro-

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and federalizing what is a local or state crime. The training would have to make it clear that compelled commercial sex or prostitution is sexual slavery, but that prostitution without a pimp or trafficker (although itself a serious crime) is not.”

<sup>340</sup> A 2014 study by The Human Trafficking Pro Bono Legal Center “found that federal prosecutors did not seek restitution in 37% of qualifying cases brought between 2009 and 2012. When the prosecutor did not seek restitution, it was granted in only 10% of cases.” SHARED HOPE INT’L, *supra* note 247, at 7.

<sup>341</sup> See Matthew Johnson & Meredith Dank, *The Hustle – Economics of the Underground Commercial Sex Industry*, URBAN INST. (2014), <http://apps.urban.org/features/theHustle/index.html> [<https://perma.cc/N5CN-CKUZ>].

<sup>342</sup> See FARRELL ET AL., *supra* note 326, at 207, 130–31.

<sup>343</sup> See CLAWSON ET AL., *supra* note 30, at viii.

<sup>344</sup> The President’s Fiscal Year 2017 budget requested \$10 million to support the National Crime Statistics Exchange (NSC-X). See U.S. DEP’T OF JUSTICE, FY 2017 BUDGET REQUEST 13 (2016), <https://www.justice.gov/jmd/file/820816/download> [<https://perma.cc/HJQ9-LVGX>]. This program would “recruit a sample of 400 additional law enforcement agencies into NIBRS so that BJS will be able to produce nationally-representative estimates of crimes known to the police that can be disaggregated by victim-offender characteristics, the circumstances of the event, victim-offender relationship, and other important elements of criminal events. When completed, nationally-representative NIBRS data will increase the nation’s ability to monitor, respond to, and prevent crime by allowing NIBRS to produce timely, detailed, and accurate national measures of crime incidents.” *Id.* Currently, “approximately 6,300 of the nation’s roughly 18,000 law enforcement agencies participate in the National Incident-Based Reporting System (NIBRS).” *Id.*

<sup>345</sup> Congress encouraged HHS to prioritize the development of educational materials on trafficking for educators in the FY 2017 Labor, Health and Human Services, and Education Bill’s Draft Committee Report. See H.R. REP. NO. 114-130, at 145 (2016).

<sup>346</sup> S. 1446, 114th Cong. (1st Sess. 2015). The majority of sex trafficking victims visit a healthcare professional at some point during their victimization.

grams should focus not only on identification of victims but also on prevention by engaging at-risk youth. Immigration officials handling visa applications should also be educated. Women and girls are often first trafficked using a legitimate visa, but when they reach their destination, traffickers confiscate their documents.<sup>347</sup> Identifying trafficking via immigration is made doubly difficult because transnational crime groups may traffic women and children through second countries with lax immigration standards before bringing them into the United States.<sup>348</sup>

#### F. Victim Outreach

Child sex trafficking victims are increasingly likely to be recruited on the internet. A 2015 survey of survivors shows that pimps sometimes require victims to edit or respond to ads selling themselves on websites such as Backpage.com.<sup>349</sup> Congress should strongly urge these websites to advertise the National Human Trafficking Hotline on their websites. Congress might encourage the DOJ to fund grant programs that research the effectiveness of strategies to reach victims through technology, such as help ads listing the hotline number on websites that victims frequent, or text short code.<sup>350</sup> Congress might also test the efficacy of campaigns that develop and post online advertisements to communicate the dangers to at-risk youth of meeting people online and available resources.<sup>351</sup> It is also important that Congress invest resources in understanding the victimization of males. The DOJ has reported that very few organizations provide services to boys and young men despite new evidence showing that males may make up a more significant portion of the victim population than previously thought.<sup>352</sup>

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<sup>347</sup> See Kandathil, *supra* note 51, at 93.

<sup>348</sup> *Id.* (explaining that “transnational crime groups traffic women and children from source countries, move them through a country of transit with lax immigration regulations, and ultimately, enslave them in a rich country of destination. Source countries are characterized by a low public awareness of the criminality of trafficking and also by a weak system of laws to punish traffickers, leaving young women vulnerable to easy deception. On the other hand, destination countries, like the U.S., are wealthy and provide the capital to keep the international market for sex trafficking profitable.”).

<sup>349</sup> See BOUCHÉ, *supra* note 34, at 19 (explaining that some victims were required to post, edit, and enter credit card information for ads). One survivor described the experience as follows: “I would have to copy and paste what he wrote and then repost. Cause I had to post a certain amount of times a day.”).

<sup>350</sup> See *id.* at 38–39.

<sup>351</sup> *Id.* (discussing internet stranger danger campaigns that “draw the attention of young people and send a clear message that meeting new people on the Internet is not always safe. These should be linked to resources individuals can access if they need help or are in an uncomfortable situation.”).

<sup>352</sup> See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN/SEX TRAFFICKING 4 (2014), <http://www.ojjdp.gov/mpg/litreviews/CSECSexTrafficking.pdf> [<https://perma.cc/H6B9-LHDW>].

*G. Victim Rights*

Congress should further develop adequate protections for sex trafficking survivors. Currently, victims are entitled to the general rights available to crime victims, including the “the right to full and timely restitution as provided in law,” and the “right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.”<sup>353</sup> But because victims face the real threat of being re-trafficked,<sup>354</sup> these protections may not be sufficient.

Given that sex trafficking victims may live under the radar of social and legal norms, survivors should be notified in writing of their rights, including the availability of victim compensation, mandatory restitution, and a civil cause of action; the availability of protective orders and policies related to their enforcement; and other services available to crime victims. Congress should pass *H.Res.919, Encouraging States to uphold the rights and dignity of human trafficking survivors* (also known as the Trafficking Survivors’ Bill of Rights), introduced by Congresswoman Ann Wagner, to articulate the protections that survivors should be able to access.<sup>355</sup> This bill encourages states to adopt comprehensive legal protections and rights for survivors. The most fundamental goal of federal, state, and local government should be to “truly recognize and identify survivors of human trafficking as victims of crime and treat these victims with the same justice, respect, and dignity as other crime victims.”<sup>356</sup>

The Survivors’ Bill of Rights urges states to grant victims access to “comprehensive trauma-informed, long-term, culturally competent care and healing services oriented toward emotional, physical, psychological, and family healing.”<sup>357</sup> Victims should also have access to “evidence-based

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<sup>353</sup> *Human Trafficking Prosecution Unit (HTPU)*, U.S. DEP’T OF JUSTICE (Nov. 20, 2015), <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> [<https://perma.cc/8JJY-88RL>] (“As mandated by the Attorney General Guidelines for Victim and Witness Assistance (2005), all victims of federal crime are entitled to certain rights under the law. These rights include: 1. The right to be reasonably protected from the accused. 2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused. 3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. 4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing, or any parole proceeding. 5. The reasonable right to confer with the attorney for the Government in the case. 6. The right to full and timely restitution as provided in law. 7. The right to proceedings free from unreasonable delay. 8. The right to be treated with fairness and with respect for the victim’s dignity and privacy.”); see also 18 U.S.C. § 3771 (2012); 42 U.S.C. § 10607(c) (2012).

<sup>354</sup> See SHIVELY ET AL., *supra* note 15, at 5-7 (2010) (explaining that “more than half of the women who tried to leave prostitution were threatened, stalked, abused, and/or forcibly returned.”).

<sup>355</sup> *Encouraging States to uphold the rights and dignity of human trafficking survivors*, H.Res. 919, 114th Cong. (2016).

<sup>356</sup> *Id.*

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

screening and assessment tools, treatment plans, and therapy” to address mental health issues.<sup>358</sup> Moreover, victims should have access to “safe and effective emergency and long-term housing; education, vocational, and job assistance and training; mentoring programs; language assistance; drug and substance abuse services; and legal services.”<sup>359</sup> Congress should ensure that federal grants are flexible enough to continue to serve victims in need of ongoing assistance once the grant deadline has been reached. Congress should ensure that victims are not held in punitive settings or “detained in facilities inappropriate to one’s status as a victim of crime.”<sup>360</sup>

Congress should also continue to incentivize state safe harbor and vacatur laws, and should pass federal versions of these laws. Under safe harbor laws, child trafficking victims should be entitled to the right to legal protection and immunity for offenses “related to prostitution and non-violent offenses if offenses were committed as a result of being trafficked, and the right to have charges dismissed as part of a specialized diversion program.”<sup>361</sup> Immunity cannot be an excuse to not identify child victims, but should be granted in combination with service provisions aimed at giving victims “the necessary resources to heal and reintegrate in their communities.”<sup>362</sup> Adult victims of trafficking are occasionally charged with immigration or tax offenses, prostitution, or conspiracy to commit a Mann Act violation—offenses that were a direct result of being trafficked. Under vacatur laws, victims should have the right to have convictions and adjudications related to prostitution and non-violent offenses vacated and criminal and arrest records expunged “if offenses were committed as a result of the victim being trafficked.”<sup>363</sup> Congress should pass the *Trafficking Survivors Relief Act of 2016*, a federal vacatur law that will give victims the opportunities to reestablish their lives without the criminal records that make it difficult to obtain employment, housing, education, and loans.<sup>364</sup>

#### H. Protecting Children

The JVTA made inroads in treating child sex trafficking victims as victims of other forms of child abuse. But Congress should resolve that its intent is to ensure that child trafficking victims are provided with the full range of protections—including, but not limited to, access to child welfare services, trauma-informed programming, and the same legal rights—afforded to other children who experience physical or psychological abuse, sexual abuse, rape, or incest. This includes ensuring that criminals who ex-

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<sup>358</sup> Id.

<sup>359</sup> Id.

<sup>360</sup> Id.

<sup>361</sup> Justice for Victims of Trafficking Act § 601.

<sup>362</sup> Id.

<sup>363</sup> See id.

<sup>364</sup> Trafficking Survivors Relief Act of 2016, S. 3441, 114th Cong. (2016).

exploit child sex trafficking victims are not given lighter penalties than criminals who exploit children outside the commercial sex industry.

Child sex trafficking victims must be treated as children in need of child protective services and should be served through the child welfare system, where appropriate, in place of the juvenile justice system. Congress should ensure that all children entering either the child welfare system or juvenile justice system are screened for signs of trafficking. Advocates report that unidentified child sex trafficking victims are still unwittingly arrested at the state and local levels for prostitution, status offenses, or other non-violent crimes that are direct results of the child being trafficked. These children may be placed in the juvenile justice system despite the fact that they are victims of trafficking, reinforcing the stigma of criminalization against them. Victims who are identified may be confined to restrictive or punitive detention facilities or residential placements when safe, secure shelter options are unavailable, even though the intention may be to protect these children from harm.

Punitive holdings—and, of course, outright criminalization for offenses related to the victim being trafficked—can subject victims to “decreased trust in law enforcement and re-traumatization.”<sup>365</sup> Without secure and specialized services, victims may be re-trafficked, as child victims are often unable to permanently escape traffickers, even when rescued.<sup>366</sup> Traffickers actively recruit rescued victims and will coerce children outside of recovery centers or facilities.<sup>367</sup> They may even send in other children to recruit or walk in and abduct children themselves.<sup>368</sup> Arrests, detention, and criminal records also make it challenging for victims to recover and reestablish themselves outside of the commercial sex industry.<sup>369</sup>

In order to fully protect children in the commercial sex industry, combating child pornography must become a major law enforcement priority. The criminal justice system, lawmakers, and the public are widely ignorant about child pornography’s prevalence, violent content, and inclusion of “increasingly graphic” images with younger and younger children, including infants and toddlers.<sup>370</sup> Heightened availability, easy online access, and social acceptance of pornography have facilitated the sense among offenders

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<sup>365</sup> TRAFFICKING IN PERSONS REPORT 2016, *supra* note 256, at 391.

<sup>366</sup> THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, *supra* note 249, at 35.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> See TRAFFICKING IN PERSONS REPORT 2016, *supra* note 256, at 389.

<sup>370</sup> DANK ET AL., *supra* note 313, at 289; see also Mark Foley, *We Have to Stop Child Pornography by Attacking the Source*, THE HILL (Jul. 13, 2006, 3:38 PM), <http://thehill.com/blogs/congress-blog/politics/30121-we-have-to-stop-child-pornography-by-attacking-the-source> [<https://perma.cc/K76C-2X9K>] (highlighting that “82% of all child porn cases prosecuted in the US involved images of children under the age of 12 engaged in sexual acts.”).

that child pornography is either not a crime or that it is a victimless crime because it does not include contact offenses.<sup>371</sup>

Child pornography is aided by organized criminal groups that produce and distribute content. Worldwide, it is estimated that there are 50,000 members of organized child pornography production rings, and the United States is a major producer.<sup>372</sup> Congress should raise awareness about the nature of this crime and support law enforcement investigations of habitual offenders and producers. The general public should be conscious that possessing and accessing child pornography is a serious federal crime. Congress can encourage technological safeguards that warn offenders who type in “certain search terms associated with child pornography that they are about to commit a crime and then direct them to a website that provides more information on child pornography crimes and offers resources regarding child pornography addiction,” as recommended by an Urban Institute report on commercial exploitation.<sup>373</sup> This involves cooperation with private sector search engines and peer-to-peer sharing providers; Bing has led the way and has “implemented a pop-up warning window for child pornography searches that links the individual to an organization that provides counseling for child pornography addiction.”<sup>374</sup>

### I. Rhetoric

Law enforcement, media, federal agencies, and elected officials often mistakenly describe child sex trafficking victims as “child prostitutes” and “underage sex workers.” These terms indicate that trafficked children are somehow responsible for the crimes committed against them. But minors involved in the commercial sex industry are by definition sex trafficking victims under section 1591; they are also below the age of consent. The purchase of sex from child victims is child rape; the exchange of money from buyer to trafficker does not change the reality of the criminal act. Congress should raise awareness to eradicate usage of terms such as “teen sex worker” and explain that there is no such thing as child prostitution.<sup>375</sup> Educating the public and law enforcement on this issue will help limit the stigmatization and criminalization of minors in the commercial sex industry. Police arrest over 1,000 children each year for prostitution and related offenses, the majority of whom are minorities.<sup>376</sup> To change how child traffick-

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<sup>371</sup> See DANK ET AL., *supra* note 313, at 291-92.

<sup>372</sup> See DANK ET AL., *supra* note 313, at 289.

<sup>373</sup> *Id.* at 290.

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

<sup>375</sup> Rights4Girls, a nonprofit advocacy organization, leads the official “No Such Thing” campaign to raise public awareness on this issue. See *There is No Such Thing as a Child Prostitute*, RIGHTS4GIRLS (2016), <http://rights4girls.org/campaign/> [https://perma.cc/XT3M-S2VH].

<sup>376</sup> See BUREAU OF JUSTICE STATISTICS, ARREST IN THE UNITED STATES, 1990–2010 2 (2012), <http://www.bjs.gov/content/pub/pdf/aus9010.pdf> [https://perma.cc/X5U2-5XU3].

ing victims are treated and described, Congress must first lead by example. The federal government itself currently uses the term “child prostitution” in law and in reports on commercial exploitation.<sup>377</sup> More broadly, the federal government should stop using the terms “sex work” or “sex workers,” which imply that prostitution is a legitimate occupation, rather than exploitation.<sup>378</sup>

### J. Backpage.com and Internet Ad Hosts

Congress must target advertisers of victims in order to curtail sex trafficking. It is estimated that revenue from U.S. online commercial sex advertising totaled \$45 million in 2013, and more than 80% of these profits were generated by Backpage.com.<sup>379</sup> Congress should direct the DOJ to investigate how often websites like Backpage.com are used for sex trafficking, what proportion of these websites’ profits are from commercial sex advertisements, and the intent of these websites.<sup>380</sup>

On October 6, 2016, Backpage.com CEO Carl Ferrer was arrested and charged with pimping a minor, pimping, and conspiracy to commit pimping.<sup>381</sup> This is a step in the right direction, and prosecutors should be certain to use all the tools available to them, including the SAVE Act, which criminalizes knowingly advertising victims of trafficking. Just as the JVTAs cleared wiretapping as a tool for human trafficking investigations, Congress must ensure that prosecutors have 21st century tools to ascertain the complicity of third-party facilitators that host advertisements for sex trafficking victims.

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<sup>377</sup> See THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION, *supra* note 249 (referring routinely to child prostitution). This term was even included in the JVTAs under section 211 that expands the categories of crimes that are covered under the National Center for Missing and Exploited Children’s tipline. The statute governing the tipline had previously used the term “child prostitution,” and while the JVTAs amended the statute to include sex trafficking, its amendment read: “child sex trafficking, including child prostitution.” Justice for Victims of Trafficking Act § 211.

<sup>378</sup> See SHIVELY ET AL., *supra* note 15, at 2-47 (“Proponents of decriminalization or legalization prefer the phrases “the sex trade,” “sex work,” or “the sex business,” and refer to the providers of commercial sex as “sex workers” or “providers,” and to the consumers of commercial sex as “clients” or “customers.” These terms seek to legitimate prostitution by describing it in the language of the conventional workplace. There was a strong consensus among those we interviewed that the term “sex work” is never appropriate, since it implies a legitimate form of labor, while the Campaign is based on the premise that selling sex is exploitation or slavery, and is never work.”) (citations omitted).

<sup>379</sup> See Offenbacher, *Anti Sex Trafficking Double Header: Amending the TVPA and CDA*, SHARED HOPE INT’L (July 24, 2013), <https://sharedhope.org/2013/07/anti-sex-trafficking-double-header-amending-the-tvpa-and-cda/> [<https://perma.cc/TJ5Z-E2VV>].

<sup>380</sup> See Monica J. Delateur, *From Craigslist to Backpage.com: Conspiracy as a Strategy to Prosecute Third-Party Websites for Sex Trafficking*, 56 SANTA CLARA L. REV. 531, 591 (2016).

<sup>381</sup> See Don Thompson & Terry Wallace, *Backpage.com raided, CEO arrested for sex-trafficking*, AP (Oct. 6, 2016) <http://bigstory.ap.org/article/2d89a01c2ff14106beeb7570747c46af/backpagecom-raided-ceo-arrested-texas> [<https://perma.cc/AC5Z-N8KL>].

Accordingly, the federal government must hold non-passive internet service providers liable for trafficking activities on their websites. This may mean contending with section 230 of the *Communications Decency Act of 1996* (CDA).<sup>382</sup> Over the years, courts have broadly interpreted section 230 to grant internet service providers immunity from essentially all content posted on their sites, with an exception for copyright violations.<sup>383</sup> Section 230 clearly subjects internet service providers to federal criminal liability. Unfortunately, federal prosecutors have not brought trafficking cases against providers. To compound matters, courts in some instances have even used the CDA to grant criminal immunity to providers.<sup>384</sup> These rulings have granted providers excessive room to maneuver around criminal compliance, violating original intent.

Section 230 gives immunity to publishers or speakers—“interactive computer services”—of user-generated content. But the provision does not protect “interactive computer services” acting as information content providers. In recent years, courts have recognized that section 230 must be interpreted more narrowly; internet service providers that contribute to unlawful content should not have safe harbor under section 230. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Ninth Circuit Court of Appeals ruled that immunity did not apply to websites when they were helping design and develop unlawful content.<sup>385</sup> A website that “induces” or “elicits” users to create illegal content, “contributes materially to the alleged illegality of the conduct,” or “makes aggressive use of it [illegal content] in conducting its business” is not entitled to immunity.<sup>386</sup> *Hill v. StubHub* found that StubHub had developed unlawful content by acting as a broker and creating a system for users to resell tickets at higher prices in violation of an anti-scalping law.<sup>387</sup> The court found that StubHub “materially contributed” to the pricing content posted by users.<sup>388</sup> Pay-to-play websites like Backpage.com that intentionally shape their services to profit from trafficking must also be held liable for their crimes.<sup>389</sup>

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<sup>382</sup> Communications Decency Act of 1996, 47 U.S.C. § 230 (2012).

<sup>383</sup> See Abigail Kuzma, *A Letter to Congress: The Communications Decency Act Promotes Human Trafficking*, 34 CHILD. LEGAL RTS. J. 23, 36 (2013), available at <http://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1034&context=lrj>.

<sup>384</sup> *Id.* at 38.

<sup>385</sup> *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008).

<sup>386</sup> *Id.* See Shea Rhodes, *Why Section 230 of the Communications Decency Act Does Not Bar Civil Lawsuits Brought By Sex Trafficking Victims Against Backpage.com*, VILLANOVA UNIVERSITY SCHOOL OF LAW CRIMINAL SEXUAL EXPLOITATION INSTITUTE POLICY PAPER, at 7, available at <http://cseinstitute.org/wp-content/uploads/2016/01/CDA-Backpage-Policy-Paper.pdf>.

<sup>387</sup> *Hill v. StubHub*, 219 N.C.App. 227, 238 (N.C. Ct. App. 2012).

<sup>388</sup> *Id.*

<sup>389</sup> See Rhodes, *supra* note 383, at 7-9 (explaining that Backpage.com “incentivizes and encourages illegal activity,” “enables pimps to evade law enforcement,” and “coaches posters” to create ads for child sex in a coded, not explicit, manner. It does not have age verification and it strips metadata from photographs, which prevents law enforcement from searching



Federal and state trafficking laws clearly prohibit profiting from (and in the case of federal and some state laws, advertising) trafficking, and Congress must defend the integrity of criminal law. Section 230 was never intended to create a lawless internet where people can commit crimes online that they cannot commit offline.<sup>390</sup> States have enacted laws that hold criminals accountable for advertising trafficking or financially benefitting from trafficking, but section 230(e)(3) has allowed courts to block states from applying state laws to service providers “that operate within their jurisdictions.”<sup>391</sup> It is essential that state prosecutors have the comprehensive tools they need to fight sex trafficking online. In 2013, a letter from 47 Attorneys General and the National Association of Attorneys General endorsed an amendment to remove the CDA’s barrier against state criminal prosecutions.<sup>392</sup> While the Attorneys General’s recommended language may arguably be too broad, Congress should clarify that state courts can bring criminal cases relating to sexual exploitation of children and sex trafficking, and that state criminal laws cannot be superseded by immunity for providers.

Other options to combat trafficking online include a requirement for internet service providers to remove ads of sex trafficking victims and child pornography when providers have been notified by law enforcement that there is probable cause these victims have been trafficked and/or are children. This process could be automated through facial recognition and other software to ensure that duplicate or similar ads are not reposted and to not create any unnecessary burden on providers.<sup>393</sup>

### *K. Anti-Demand Intervention*

The JVTA sent a clear signal that sex buyers should be prosecuted for their crimes; it is the duty of Congress to follow up on this threat with action. Lawmakers must encourage the development of anti-demand interventions tools that shatter the anonymity of purchasing sex. Most anti-demand initiatives are executed by law enforcement with the goal of changing the cost-benefit calculations of those who are considering purchasing sex. These

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for reposted photographs. Backpage.com requires “a phone number for ads for pets, boats, and motorcycles in order to prevent scams,” but it does not require a phone number for escort ads, thus evading law enforcement searches. It filters for words like “barely legal,” but it does not filter for known code words for underage victims like “girl,” “young,” or “fresh.” Backpage.com upgrades ads through fees and has developed risk-free, anonymous access for criminals. Moreover, “Backpage.com provides a 10% discount to anyone who pays using Bitcoin, incentivizing anonymity.”)

<sup>390</sup> *Id.* at 11.

<sup>391</sup> *Id.* See Communications Decency Act § 230(e)(3).

<sup>392</sup> See Letter from Chris Koster, Missouri Attorney General, et al., to Senator Rockefeller, Senator Thune, Representative Upton, and Representative Waxman (Jul. 23, 2013), in SHARED HOPE INT’L, <http://sharedhope.org/wp-content/uploads/2013/07/Final-AG-Letter-to-Congress-re-CDA-07-23-13.pdf> [https://perma.cc/BTA6-A2AK].

<sup>393</sup> See also Abigail Kuzma, *A Letter to Congress: The Communications Decency Act Promotes Human Trafficking*, 34 CHILD. LEGAL RTS. J. 23, 53, 55 (2013), available at <http://lawcommons.luc.edu/cgi/viewcontent.cgi?article=1034&context=clrj>.

programs require funding, research, and technical assistance. Congress should examine ways to equip law enforcement to develop and implement innovative and operational anti-demand interventions. Research suggests that anti-demand initiatives may look different in different places and should be tailored to “fit local needs, constraints, and opportunities, and to leverage the strengths and capacity of local partners.”<sup>394</sup> Anti-demand initiatives should be included in law enforcement trainings on human trafficking and other anti-trafficking curricula and campaigns offered by federal agencies.

A pivotal report commissioned by Demand Abolition titled “Developing a National Action Plan for Eliminating Sex Trafficking” identifies types of anti-demand efforts used by police. These include “street-level reverse stings; web-based reverse stings; print media reverse stings; publicizing identities of arrestees; neighborhood collaborations (such as tip lines and citizen patrols used to provide intelligence about sex buyers to police); auto seizure; community service programs; geographic restraining orders; letters sent to arrestees’ homes; john school programs; and driver’s license suspensions.”<sup>395</sup> While not all of these strategies have been evaluated, research demonstrates that of these approaches, arresting and educating sex buyers are effective.<sup>396</sup> The Demand report makes the case that the most effective law enforcement interventions are collaborative and bring together “police, public health, social service, community groups, and businesses” to proactively problem solve.<sup>397</sup>

A major obstacle to participating in anti-demand stings is a lack of training. Law enforcement agencies must learn how to execute stings that produce strong enough evidence that can result in convictions. Local leaders are critically important to inspiring anti-demand efforts. Over the past several years, Cook County Sheriff Tom Dart has led the way in creating the National Johns Suppression Initiative, a collaborative intervention network across the country. In 2016, 70 law enforcement agencies from 18 states participated in the initiative’s annual summer stings. Together, they arrested a record 1,358 sex buyers, including a 15-year-old trying to purchase sex.<sup>398</sup> They also made 71 human trafficking arrests and rescued at least 32 underage girls. 60% of these arrests were made through online reverse stings using decoy ads, 99% of which were posted on backpage.com.<sup>399</sup> Statistics from these stings shows that some jurisdictions are more advanced at tackling

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<sup>394</sup> See SHIVELY ET AL., *supra* note 15, at 6-1.

<sup>395</sup> *Id.* at 2-26.

<sup>396</sup> See *id.* at 4-10-4-11.

<sup>397</sup> See *id.* at 2-27.

<sup>398</sup> Moran, *supra* note 251.

<sup>399</sup> SHIVELY ET AL., *supra* note 15, at 7-12 (“The typical procedure [of an online reverse sting] is to post a decoy ad, and when potential johns respond with a phone call or an e-mail, the officers pose as prostituted persons and arrange for a meeting - usually at a hotel that has been prepared for a reverse sting. At the hotel, a female officer poses as a prostituted person, and once the john is face-to-face with the officer, the operation is essentially the same as that used in conventional reverse stings.”).

demand than others,<sup>400</sup> and it is critical that jurisdictions—especially those with a significant sex trafficking presence—invest time and resources into building out evidence-based intervention programs.

Congress should encourage the evaluation of “naming and shaming” methods as an effective deterrent to purchasing sex.<sup>401</sup> Though research is imperfect, surveys asking sex buyers what penalty would be most effective in deterring participation in commercial sex reveal that men are more fearful of being publicly shamed through publication of their photos or names than traditional penalties like fines and jail time.<sup>402</sup> Nearly 60% of the law enforcement jurisdictions that have conducted reverse stings do use naming and shaming.<sup>403</sup> Jurisdictions do this through different methods, including through news outlets, police websites, and even publicizing the court dates of sex buyers to encourage public turnout.<sup>404</sup> Some jurisdictions send “Dear John” letters to the homes of sex buyers in an attempt to notify the buyers’ partners.<sup>405</sup> Cook County, Illinois, posted infamous “Dear John” billboards warning sex purchasers that county law enforcement “is teaming up to bust

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<sup>400</sup> Moran, *supra* note 251 (“The Cook County Sheriff’s Office arrested 230 johns from July 1 to August 7, including 43 in cooperation with suburban police departments in Lansing, Matteson and Broadview. The law enforcement department with the next highest number of “john” arrests during that time was the Seattle Police Department with 204. The Columbus Police Department was the only other one to make more than 100.”).

<sup>401</sup> There is evidence that relatively minor penalties—including arrest, shaming, and john schools—that might not be effective for habitual offenders may be effective with the non-habitual sex purchaser population. See SHIVELY ET AL., *supra* note 15, at 52 (reviewing studies finding that “purchasing commercial sex is relatively common” and “the profiles of consumers of commercial sex are fairly mainstream and unlike those of other offender groups, although the population of johns also contains some dangerous criminals and sociopaths.”). High-frequency buyers who sustain the market are “whiter, richer, older, less likely to be married, more educated, more sexually liberal, more likely to believe that prostitutes enjoy their jobs, and more committed to participating in the commercial sex market . . . their higher social status, increased knowledge, and ability to pay for higher priced indoor prostitution largely insulates them from public shaming efforts or criminal prosecution. These high frequency buyers are also far more likely than both less active and non-buyers to be involved in other aspects of the commercial sex market, such as visiting strip clubs, and viewing pornography.” CHILDREN AT WORK, *supra* note 230, at 14–15.

<sup>402</sup> A 2008 study found that “87% of the men listed “photo and or name in local paper” in response to the question, “What would deter you from buying sex?” This was the most frequently cited potential consequence, followed by “jail time” and “photo and/or name on billboard” (both at 82%), “photo and/or name on the Internet” (82%), and “a letter sent to family saying you were arrested for soliciting a woman in prostitution” (79%). Four of the five consequences that men most frequently cite as deterrents involve others finding out that they have had sex with prostituted persons.” SHIVELY ET AL., *supra* note 15, at 5-22.

<sup>403</sup> *Id.* at 7-12.

<sup>404</sup> *Id.* at 7-13 (“The tactic is intended not only to shame offenders by bringing residents to witness them being accused in court, but also to encourage judges and prosecutors to follow through with charges and impose fair penalties.”).

<sup>405</sup> Police say the reasons for using this tactic are “(1) to alert partners of buyers of commercial sex so that they can protect themselves from contracting infectious disease, given the higher probability that the johns may be carriers, (2) to bring pressure to bear from whomever lives with sex buyers to discourage them from buying sex.” *Id.* at 7-14.

you.”<sup>406</sup> In 2016, H.R. 5970, the SHAME Act, was introduced to permit federal judges to publish the names and photographs of sex buyers.<sup>407</sup>

Educating sex buyers through “john schools” may be valuable in reducing recidivism.<sup>408</sup> The purpose of these programs—which do not include men who have exploited minors—is to deter sex buyers from buying again in the future. Participants are arrested sex buyers, most all of whom are caught through police stings.<sup>409</sup> Programs include education on the health and legal consequences of purchasing sex, and the impact of purchasing sex on communities and women who have been trafficked or prostituted. John schools are cost-effective in that the buyers are required to pay for the program, and fees can even generate over-the-top revenue for law enforcement. While about half of john schools function as diversion programs that allow law enforcement to drop charges after buyers complete the course, this isn’t always the case.<sup>410</sup> Some jurisdictions have developed comprehensive punitive and rehabilitative programs that do not dismiss charges.<sup>411</sup> Congress should encourage further research on the effectiveness of john schools and other deterrence and prevention measures.<sup>412</sup>

#### L. Restoration of the Thirteenth Amendment

For future legislation, Congress should begin to build out reliance on the applicability of the Thirteenth Amendment. As Loyola University Professor Alexander Tsesis argues, “[W]ith the Court’s trend away from its earlier deference to congressional Commerce Clause authority, however, the Thirteenth Amendment’s centrality has become manifest.”<sup>413</sup> He continues,

The Thirteenth Amendment is a more obvious source for civil rights protections than the Commerce Clause. The former protects individual au-

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<sup>406</sup> Katie Cordrey, *Chicago’s ‘Dear John’ Billboards Target Prostitution Customers*, TREND HUNTER (Sept. 9, 2010), <http://www.trendhunter.com/trends/dear-john-billboards> [https://perma.cc/KH4X-2N89].

<sup>407</sup> Shame Act of 2016, H.R. 5970, 114th Cong. (2016). This bill was introduced by Congressman Ted Poe. Congresswoman Ann Wagner is an original cosponsor.

<sup>408</sup> An evaluation of San Francisco’s john school program found a 40% reduction in recidivism. SHIVELY ET AL., *supra* note 15, at 5-20.

<sup>409</sup> *Id.* at 7-27.

<sup>410</sup> *Id.* at 7-26.

<sup>411</sup> “A model for being both punitive and rehabilitative is the Norfolk john school, which levies a fine of \$1,500, and seizes autos, and requires payment of an impound fee of \$300 to retrieve autos, and mandates community service, and charges a supervision fee of \$40 per day while doing community service, and requires attendance at a john school program . . . . The program provides both an educational intervention and applies relatively severe criminal sanctions – particularly for an offense classified as a misdemeanor, and far beyond what we have seen in other cities applied to those soliciting prostituted persons.” *Id.* at 7-28.

<sup>412</sup> This includes exploring measures such as establishing mandatory jail sentences for first offenses, requiring buyers to register as sex offenders, eliminating diversion programs in john schools, requiring arrested buyers to participate in law enforcement investigations of pimps. *Id.* at 2-23.

<sup>413</sup> Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B.C. L. REV. 307, 360–61 (2004).

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tonomy against state and private interference, and recent Supreme Court decisions indicate the latter principally concerns regulation of interstate economic transactions. The Thirteenth Amendment was ratified to increase the federal government's ability to assure universal freedom and general welfare.<sup>414</sup>

Misconceptions of trafficking as a crime of movement and transportation have been exacerbated by the usage of the Commerce Clause to underpin federal legislation. The federal government continues to lean on prostitution crimes like the Mann Act that involve explicit interstate travel rather than defaulting to the sex trafficking statute. The DOJ should build case law for the federal trafficking statute and not rely on laws like those implying or necessitating movement. It is time that Congress begins a dialogue on the restoration of the Thirteenth Amendment for sex trafficking and other legislation related to forms of slavery and involuntary servitude. While the Commerce Clause is relevant, it is not fully instructive. The Thirteenth Amendment acknowledges that sex trafficking is a moral crime that deprives the victim of fundamental civil rights. It is not primarily an economic crime. Tying sex trafficking to the interstate economy does not address the nature of the sex trafficking crime. Restoring the Thirteenth Amendment to its proper place as an authority for federal sex trafficking legislation would better communicate a federal commitment to protecting the liberty and civil rights of victims.

## VI. THE FEDERAL GOVERNMENT IS NOT ENOUGH

Federal legislation and oversight are important to curbing sex trafficking, but congressional engagement is not sufficient in isolation. An effective national strategy must also be predicated on the development, reform, and application of state laws, as well as on a public effort to raise awareness and promote education on misconceptions of the sex trafficking industry.

### A. *Importance of State Laws*

The federal government has much room for improvement and better leadership, but it is not alone. States play a central role in combating trafficking. Many sex trafficking victims are identified locally, often by police patrol officers, and states are developing advanced trafficking laws to address these heinous crimes. Beginning in 2002, states raced to create human trafficking statutes, and by 2014, every state had succeeded.<sup>415</sup> However,

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<sup>414</sup> *Id.* at 360.

<sup>415</sup> See *Human Trafficking Laws in the States*, NAT'L CONFERENCE OF STATE LEGISLATURES (2011), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws-in-the-states-updated-nov.aspx> [<https://perma.cc/A3GN-QC38>]. Washington State enacted its human trafficking statute first in 2002. See *Human Trafficking*, WASH. STATE OFFICE OF THE ATTORNEY GENERAL, <http://www.atg.wa.gov/human-trafficking> [<https://perma.cc/N5XQ->

identification of victims and traffickers and lack of funding for implementation have been a challenge for most states. According to 2012 numbers, twelve states had not made any investment into anti-trafficking efforts.<sup>416</sup>

While all states have human trafficking statutes, state laws pertaining to human trafficking—and also sexual exploitation and prostitution—vary widely.<sup>417</sup> In many states, trafficking victims are still treated as criminal offenders under the law. An enduring conflict is the inherent clash between trafficking and prostitution laws. Some states distinguish between buyers and sellers and have varying severities of penalties, but other states lump buyers and sellers of sex under one statute, making tracking arrests and prosecutions difficult. Notably, some cities use local ordinances to control prostitution. These ordinances, such as nuisance abatement orders and violations of local sexually-oriented business regulations, help local prosecutors fight against brick-and-mortar brothels.<sup>418</sup>

As states learn more about the force and abuse inherent in commercial sex, some are attempting to mitigate the prosecution of prostitutes who may have been forced, coerced, or manipulated in subtle ways that are not immediately identifiable as sex trafficking. Through grant incentives, the Jvta encouraged states to adopt laws that assist and protect victims. An estimated 18 states have established vacatur laws that typically allow victims to petition courts to expunge their criminal records or vacate convictions for offenses related to their being trafficked, such as drug trafficking, money laundering, and prostitution.<sup>419</sup> At least 34 states have passed safe harbor laws that typically provide immunity against prosecution for prostitution and non-violent offenses if the person is a minor.<sup>420</sup> These laws are essential in

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WBXS]. Wyoming enacted its human trafficking state statute last in 2014. Press Release, Polaris Project, Wyoming Becomes 50th State to Outlaw Human Trafficking (Feb. 27, 2013), <https://polarisproject.org/news/press-releases/wyoming-becomes-50th-state-outlaw-human-trafficking> [<https://perma.cc/3AFT-9669>].

<sup>416</sup> Jason Kornwitz, *Study Finds Human Trafficking is Judged Unevenly by Law*, Public, NEWS@NORTHEASTERN (Jan. 25, 2016), <http://www.northeastern.edu/news/2016/01/new-study-examines-effectiveness-of-human-trafficking-legislation/> [<https://perma.cc/8W43-ZADP>].

<sup>417</sup> See Strauss, *supra* note 173, at 510.

<sup>418</sup> CHILDREN AT WORK, *supra* note 230, at 29.

<sup>419</sup> Cynthia L. Cooper, *States Step Up the Fight Against Human Trafficking*, A.B.A. PERSPECTIVES (2015) [http://www.americanbar.org/publications/perspectives/2015/fall/states\\_step\\_the\\_fight\\_against\\_human\\_trafficking.html](http://www.americanbar.org/publications/perspectives/2015/fall/states_step_the_fight_against_human_trafficking.html) [<https://perma.cc/V4T9-L2WD>] (citing the 2010 New York vacatur law and an additional 17 states that followed suit).

<sup>420</sup> State harbor laws vary state by state. “[M]ost states that have passed safe harbor legislation have limited the scope of the protections to children that have been commercially sexually exploited (CSEC). This means that safe harbor provisions are applicable only to children that have engaged in commercial sex, thus the legal protections offered apply to prostitution and prostitution-related crimes. More recently, a growing number of states are including non-commercial sex, non-violent crimes in their version of safe harbor for minor trafficking victims.” POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: SAFE HARBOR 1 (2015), <https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf> [<https://perma.cc/5FXJ-WR9L>].

states where sex trafficking victims can still be considered juvenile offenders.

Other states have established “rebuttable presumptions” where minors cannot be prosecuted unless the state can prove the minor entered prostitution “completely on their own.”<sup>421</sup> Laws stating that children can enter prostitution are at odds with the federal affirmation that all minors in the commercial sex industry are child sex trafficking victims. It is essential that states continue to reform their criminal codes to protect minors. Some states have passed laws to decriminalize children in the commercial sex industry to ensure minors are not charged for prostitution.

A major inconsistency in state criminal codes is that some distinguish between crimes that involve having sex with children *within* the commercial sex industry and crimes that involve having sex with children *outside* of the industry. While Missouri has passed excellent laws to combat sex trafficking, there are still unjust codes on its books. For instance, it is a class C felony to have sexual intercourse with a child under age 17, which can result in seven years behind bars. But having sexual intercourse with a person in the commercial sex industry (or “patronizing a prostitute”) between ages 14 and 18 is a class A misdemeanor with just a one-year penalty. The fact that the child rape was purchased should not excuse the realities of the crime. Criminals should not be able to “purchase” their way out of a felony.

Just as on the federal level, implementation at the state level cannot be taken for granted. For instance, states with safe harbor laws have continued to report prostitution arrests of minors.<sup>422</sup> Awareness of these relatively new state trafficking laws is low, and some state trafficking statutes are “still completely untested.”<sup>423</sup> In a study of local law enforcement agencies based in states with human trafficking statutes, “44% of police respondents and 50% of prosecutors reported that their states do not have legislation or that they are not aware of legislation.”<sup>424</sup> A local study of police officers in Minnesota found that two-thirds of officers believe that “sex trafficking and prostitution were not problems in their local community.”<sup>425</sup> A DOJ-funded 2008 study of state and local prosecutors nationwide titled “Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices” found that more than two-thirds “felt that human trafficking was not a problem in their jurisdiction and only seven percent had prosecuted a trafficking case since 2000.”<sup>426</sup> Only around half of these prosecutors were familiar with the

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<sup>421</sup> CHILDREN AT WORK, *supra* note 230, at 28.

<sup>422</sup> Lauren Jakowsky, *Un-Safe Harbor: Why U.S. State Legislation is Ineffectively Addressing Sex Trafficking of Minors*, HUMAN TRAFFICKING CTR. BLOG (Mar. 10, 2014), <http://humantraffickingcenter.org/posts-by-htc-associates/un-safe-harbor-why-u-s-state-legislation-is-ineffectively-addressing-sex-trafficking-of-minors/> [https://perma.cc/2XH9-UVK9].

<sup>423</sup> HYLAND & SREEHARSHA, *supra* note 12, at 5.

<sup>424</sup> See FARRELL ET AL., *supra* note 326, at 6–7.

<sup>425</sup> *Id.* at 7.

<sup>426</sup> *Id.*

TVPA and only four percent “indicated the legislation was having an impact on the cases being brought to their attention.”<sup>427</sup>

Unsurprisingly then, state efforts to prosecute traffickers have been slow and unsteady. Most sex trafficking convictions are still federal, though state and local prosecutors do win convictions and are learning how to better bring successful cases.<sup>428</sup> A federally funded study titled “Identifying Effective Counter-Trafficking Programs and Practices in the U.S.: Legislative, Legal, and Public Opinion Strategies that Work” found that only some states have developed expertise in taking predators off the streets.<sup>429</sup> California charged 39% of all offenders in the study’s sample, indicating that some states are far more advanced in prosecuting trafficking crimes than others. State trafficking prosecutions are low in part because interstate trafficking cases are often referred to federal law enforcement and prosecutors with more resources for these cases. These referrals may be made quickly by local law enforcement, meaning that state or local prosecutors may never even be aware of the offense.<sup>430</sup> State prosecutors interviewed in the 2008 study explained that a lack of state trafficking cases could also be caused by a “lack of awareness of the issue” and an “inability to identify cases,” and because some prosecutors charge human trafficking cases under non-human trafficking statutes out of convenience or constitutional concerns.<sup>431</sup>

The 2008 study on prosecutors shows that prosecutors were more successful when collaborating with a task force and working with the State Attorney General’s office, along with service providers and victim advocates. Connecting victims with services such as shelter and translators was important in successful prosecutions, and prosecutors needed more resources in this regard. Local prosecutors were sometimes reluctant to charge criminals under state trafficking statutes out of inexperience or a lack of resources and precedents, and instead preferred to bring lesser charges such as kidnapping or prostitution that they had more experience with and were more confident would result in conviction.<sup>432</sup> Prosecutors articulated the need for better training to understand how to collect evidence and what evidence to collect,<sup>433</sup> how to interview victims, how to develop rapport with victims,<sup>434</sup> and

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<sup>427</sup> CLAWSON ET AL., *supra* note 30, at vii-viii.

<sup>428</sup> HYLAND & SREEHARSHA, *supra* note 12, at 4 (explaining that the U.S. has earned more federal than state trafficking convictions and that training professionals in the “health, education, immigration, labor and employment, social services, and corporate sectors” is critical to expanding identification).

<sup>429</sup> See Kornwitz, *supra* note 407.

<sup>430</sup> CLAWSON ET AL., *supra* note 30, at 24.

<sup>431</sup> *Id.* (“The most widely used statutes were sexual abuse and assault statutes and child sexual exploitation. For those interviewed, all of the cases they had prosecuted that would qualify as a human trafficking case involved young girls; none involved boys or adult victims. Most of the cases prosecuted at the state level according to half of those interviewed were domestic sex trafficking cases in which pimps were prosecuted for the crimes.”).

<sup>432</sup> See FARRELL ET AL., *supra* note 326, at 128–30.

<sup>433</sup> Helpful evidence includes “client and financial ledgers, Web site ads, Craigslist postings, certain kinds of clothing, bond receipts (where the trafficker or pimp bailed out the



how to bring charges under statutes that haven't been well tested. They also recommended training on understanding statutes and available tools, and general information such as how to recognize victims and understand trauma.<sup>435</sup>

Evidence shows that state investment has a significant impact on prosecution rates. States that invest in human and fiscal resources to combat trafficking have more arrests and prosecutions than states that merely have harsh criminal penalties.<sup>436</sup> The Identifying Effective Counter-Trafficking Programs study showed that training law enforcement, creating task forces, and publicly posting the National Human Trafficking Hotline all had "significant impact" on increasing arrests and prosecutions.<sup>437</sup> The passage of safe harbor laws and civil action provisions that allowed victims to sue their traffickers also helped predict increased arrests and prosecutions.<sup>438</sup>

Another helpful step state and local jurisdictions can take is to develop well-defined emergency response plans to provide victims with "immediate protection and support" when they are identified.<sup>439</sup> These plans may include "physically moving victims of trafficking to a place of safety, attending to the immediate medical and emotional needs of survivors, assessing whether survivors are under risk for harm, retaliation, or intimidation, and directly connecting survivors with victim advocates, housing, and service providers."<sup>440</sup> Creating a routine transition for newly rescued victims would help protect victims from being re-trafficked and establish useful collaboration between law enforcement, service providers, the child welfare system, and victim advocates.

States and/or local jurisdictions should consider implementing mandatory data collection through the FBI's National Incident-Based Reporting Program that records trafficking arrests, prosecutions, and convictions. Jurisdictions might also develop consistent ways to publicly report on prostitution cases that categorize data by buyer and seller.<sup>441</sup> Vigilant reporting would provide better state and national statistics that would help inform anti-trafficking efforts and improve arrest and prosecution strategies.

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victim), credit cards, cell phones with walkie-talkie functions, and phones that can connect a victim to the trafficker or pimp." CLAWSON ET AL., *supra* note 30, at 26.

<sup>434</sup> *Id.* at 25.

<sup>435</sup> *Id.*

<sup>436</sup> Kornwitz, *supra* note 407.

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

<sup>438</sup> *Id.*

<sup>439</sup> Encouraging States to uphold the rights and dignity of human trafficking survivors, H.R. Res. 919, 114th Cong. (2016).

<sup>440</sup> *Id.*

<sup>441</sup> See FARRELL ET AL., *supra* note 326, at 53.

*B. Importance of Public Awareness and Education*

Raising awareness and promoting public education on sex trafficking and the commercial sex industry must accompany and complement federal and state efforts to rescue victims and charge offenders. Citizens can help by reporting suspicious incidents to the National Hotline, identifying and serving at-risk youth and victims in communities, and compelling public mores against purchasing commercial sex and viewing child pornography. Just as the public fuels demand, it can also help reduce demand and put traffickers out of business through increased awareness.<sup>442</sup> Public engagement can result in local practices that protect at-risk persons; for example, some shopping malls, “recognizing that their facilities are being used to recruit young people into prostitution, have set curfews and other restrictions.”<sup>443</sup> ECPAT-USA, a non-profit anti-trafficking organization, has done remarkable private sector engagement among companies in the travel, tourism, hospitality, and conferencing/meeting sectors.<sup>444</sup> Public awareness has caused some companies in industries like transportation and travel where trafficking is particularly prevalent to train their employees to identify suspicious incidents and to post public sex trafficking notices for customers. Through awareness that many women in the commercial sex industry have entered prostitution through force, fraud, and coercion, the public can shape responses and treatment of victims, and influence the extent to which local, state, and federal actors prioritize the issue.

Research shows that there is still much work to be done in raising awareness about the nature and definition of trafficking. A 2016 survey polled a nationally representative sample of 2,000 Americans to analyze public opinion on human trafficking. The survey found that many people hold inaccurate conceptions of human trafficking. Despite sound public awareness that trafficking is related to modern day slavery, a majority of respondents believe that trafficking is “another word for smuggling” (71%), “requires movement across state or national borders” (59%), “involves mostly illegal immigrants” (62%), and “requires threats of or actual physical violence” (62%).<sup>445</sup> While 73% of the respondents believe trafficking is “widespread or occasional” domestically, only 20% believe it is widespread or occasional in their own local communities.<sup>446</sup> Police and prosecutors interviewed by the Urban Institute in a report on local trafficking efforts said that

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<sup>442</sup> CLAWSON ET AL., *supra* note 30, at 29.

<sup>443</sup> *Id.* at 26.

<sup>444</sup> See *Private Sector Engagement*, ECPAT-USA, <http://www.ecpatusa.org/private-sector-engagement/> [https://perma.cc/78G8-BHFB]; see also *About*, CODE OF CONDUCT FOR THE PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION IN TRAVEL & TOURISM, <http://www.thecode.org/about/> [https://perma.cc/TD6N-79KZ].

<sup>445</sup> VANESSA BOUCHE, ET AL., *Identifying Effective Counter-Trafficking Programs and Practices in the U.S.: Legislative, Legal, and Public Opinion Strategies that Work*, DEPARTMENT OF JUSTICE, iii, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/249670.pdf>.

<sup>446</sup> *Id.* at 31.

even in states with comprehensive trafficking laws, if members of the community lack understanding or concern about the existence and proximity of trafficking in their communities, they won't pressure local law enforcement and local bodies to prioritize anti-trafficking initiatives.<sup>447</sup> Police departments, which listen to community safety priorities, will then choose not to prioritize resources for anti-trafficking efforts. Public attention and education, then, are powerful tools that influence how well the country rescues victims and takes offenders off the streets.

## VII. CONCLUSION: REALIZING INTENT

Through federal law from the Mann Act to the JVTa, Congress has made legislative inroads into dismantling the misconceptions that prevent law enforcement, prosecutors, and other stakeholders from properly serving victims. Congress has only been able to do this from the inside out: namely, it has learned how to address the common misconceptions of others only after gradually dismantling its own misunderstandings of the nature of sex trafficking.

By adopting a victim-centered approach to anti-trafficking initiatives, Congress has come full circle—the vision of the Reconstruction-era amendments was to abolish slavery through affirming the civil rights of the victim. Despite failures, repeated mistakes, and entrenched passivity along the way, Congress has made significant progress over time in shaping a promising national response to sex trafficking. The JVTa is the 21st century manifestation of the Senate Immigration Committee report—in which Congress articulated a new understanding of the crime—that accompanied the Mann Act: victims of trafficking are real and they are in our own communities, and the forces that control them are often violent, often psychological, and always deeply complex.

Passage of the JVTa demonstrates that Congress has become attuned to the rights of victims and the urgent necessity to curb demand, but Congress cannot let history repeat itself. Congressional intent of early and modern sex trafficking laws has been time and again ignored, misinterpreted, mis-implemented, and misappropriated by the courts, federal agencies, and Congress itself. Historically, an unresponsive Congress has failed to intervene when federal agencies have defined their own rules of implementation, and failed to use the power of the purse to effect more immediate policy changes. It is time that Congress actualizes a new normal in sex trafficking engagement predicated on the reality that no law addressing such a complex crime can enforce itself. Whether or not the JVTa and the pending TVPA reauthorization of 2017 are successful in engendering a survivor-oriented approach to sex trafficking depends not on the text of the legislation but on the resolve of Congress to enforce implementation, exercise oversight, and lead creatively.

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<sup>447</sup> See FARRELL ET AL., *supra* note 32, at 90–92.

It is imperative that Congress appropriates instructively; maintains Article I balance of powers through supervision of the Administration; oversees obstacles and progress; and advocates for trainings, human resources, and a new mindset that victims of sex trafficking should be treated with the same dignity as other crime victims. Emphasizing the importance of partnerships with state and local officials, and raising public awareness, Congress should acknowledge that federal initiatives are toothless without partners who can identify victims in communities across the country and make anti-trafficking goals operational outside the constitutional scope of federal jurisdiction.

Leadership in this field requires collaboration and engagement, not passivity, and a vigilant Congress must create evolving tools to address an ever-evolving crime. Aiming to abolish all forms of slavery in the United States, Congress should consistently hold accountable all actors that sustain the commercial sex industry—an industry anchored in a dehumanizing sexism that lays shame and hardship on the victim instead of the exploiter. In the spirit of the Thirteenth Amendment, the needs of the most vulnerable among us must be our first priority. To guarantee civil rights and universal freedom to victims of sex slavery, the assembly of the people has an affirmative duty to embrace the long-term mission of helping survivors safely and successfully reintegrate into a more just American life.