The Three Ps of the Trafficking Victims Protection Act: Unaccompanied Undocumented Minors and the Forgotten P in the William Wilberforce Trafficking Prevention Reauthorization Act

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"Sadly, there are thousands who are trapped in various forms of enslavement, here in our country... It is a debasement of our common humanity." — President Barack Obama

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Introduction

Fourteen-year-old Jenny left her native home of Nigeria for the prospect of a better life. She thought she would be working for a couple in the United States as their nanny. Instead of watching over the couple’s children, she was repeatedly raped and physically assaulted for five years by them. Sometimes she would be beaten with a cane or even a high-heeled shoe. Ten-year-old Shyima Hall, a native of Egypt, faced a similar situation. At age ten she was sold to a wealthy Egyptian couple who brought her to California. She was forced to work as their domestic slave for twenty hour days and forty-five dollars a month. They forced her to iron their clothes, mop their floors, and dust their crystals. In some societies, the trafficking of children for domestic labor is a common practice among the upper classes.

Unfortunately, human trafficking is one of "the fastest growing criminal enterprise[s] in the world." The International Labor Organization (ILO) estimates there are at least 12.3 million victims of human trafficking worldwide. Approximately 14,000 to 18,000 men, women, and children

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3. See id. ("[Jenny] thought she would be paid to look after their children.").
4. See TIP Report 2007, supra note 2 and accompanying text.
5. See id. and accompanying text.
6. See id. and accompanying text.
8. See id. and accompanying text.
9. See id. and accompanying text.
10. See id. and accompanying text.
11. See id. ("The trafficking of children for domestic labor in the United States is an extension of an illegal but common practice among the upper classes in some societies.").
13. See TIP Report 2009, supra note 7, at 8 ("The International Labor Organization (ILO)—the United Nations agency charged with addressing labor standards, employment, and social protection issues—estimates that there are at least 12.3 million adults and children in forced labor, bonded labor, and commercial sexual servitude at any given time.").
are trafficked across the United States’ borders every year. Among those trafficked, at least one-third are unaccompanied minors. These children are commonly forced into child labor, bonded labor, involuntary domestic servitude, and the sex trade. Approximately seventy percent of all trafficked children are forced into the sex trade.

The main source behind human trafficking centers on poverty. Traffickers prey upon their victim’s economic desperation and exploit their dreams and fears. Children, especially girls, are lured with promises of a better life, a high paying job, and an education. Traffickers also use the internet as a form of recruitment. For example, some traffickers promise happy marriages with American men when in reality these websites act as a disguise for trafficking operations. Some children are forced into trafficking by their own families. In Asia, for example,
parents send their daughter into prostitution and pride her earnings as a form of their daughter’s loyalty and beauty. In contrast, some families sell their children into prostitution as a means of survival.

Once in the United States, the children are confronted with a harsh reality. Many sex-trafficked children end up in brothels, strip clubs, and escort services or massage parlors. They suffer physical and sexual abuse and are forced to service a large number of customers. Those trafficked into forced labor face long hours and little or no compensation. Traffickers control their victims through financial methods, terrorization, and manipulation.

Unaccompanied minors trafficked into the United States are even more vulnerable. The Department of Justice defines unaccompanied undocumented minors as "children, under the age of 18, who have no lawful immigration status in the United States and have no parent or legal guardian in the United States to care for them." The unaccompanied minors apprehended by immigration officials usually do not understand the nature of their legal proceedings, how to present evidence for their court case, or what is in their best interests. Under the Immigration and...
Nationality Act (INA), unaccompanied minors are also not recognized as children; to the contrary, the legal status of undocumented minors under the INA is defined by that of their parents. In 2000, Congress enacted the Trafficking Victims Protection Act (TVPA) to address human trafficking across international borders. The TVPA was later reauthorized in 2003, 2005, and 2008.

The purpose of this Note is to focus on the TVPA as it affects unaccompanied minors trafficked into the United States. Part I discusses the history and development of human trafficking in the world. The second Part of the Note explains the three goals of the TVPA and its subsequent Reauthorization Acts. Part III further analyzes the three goals of the TVPA, protection, prevention, and prosecution of human trafficking, and how the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 addressed these goals. In particular, the Note concludes that the Act succeeded in its focus to improve both prevention and protection, but failed to address adequately the prosecution of human traffickers. The House of Representatives had proposed a Reauthorization Act that would have greatly strengthened the criminal provisions against human trafficking. This Note proposes that the provisions suggested by the House should be implemented, but should be narrowly focused on the

to grasp the objective and abstract concept of ‘fear of persecution,’ even if a child can understand this concept, fear and embarrassment may prohibit the child from relaying his or her story.”; see also DEP’T OF JUSTICE, UNACCOMPANIED ALIEN CHILDREN IN IMMIGRATION PROCEEDINGS (Apr. 22, 2008) (noting issues immigration judges must keep in mind in order to account for an unaccompanied minor’s vulnerability).

38. See id. and accompanying text.
40. See generally id.
42. See infra Part III (discussing William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 effect on the three Ps of human trafficking).
43. See infra Part III.C.1 (discussing the House version of the Reauthorization Act).
trafficking of all undocumented minors, as opposed to adults, including those who are unaccompanied.

I. Development and Understanding of Human Trafficking

Human trafficking is not new; its origins can be found in slavery and the slave trade.\(^\text{44}\) Slavery and the slave trade themselves can be traced back as far as ancient civilizations in the Middle East and Mediterranean.\(^\text{45}\) Its usage became more prominent under the Roman Empire, during which the Romans commonly used slaves as maids, guards, cooks, and prostitutes.\(^\text{46}\) Hundreds of years later, the use of slavery was significantly expanded when Portugal reached West Africa for the first time in the fifteenth century.\(^\text{47}\) From then on, the idea of slavery and the slave trade of Africans spread to other parts of the world, including the United States.\(^\text{48}\) Although the United States abolished slavery in 1865 through the adoption of the Thirteenth Amendment, slavery still remains in the form of human trafficking.\(^\text{49}\)

Human trafficking was initially understood to be the illegal transportation of persons for the purposes of prostitution and sexual exploitation.\(^\text{50}\) The International Agreement for the Suppression of the White Slave Trade in 1904 was the first legal instrument directly related to human trafficking.\(^\text{51}\) The term "white slave traffic" primarily meant the procurement of women and girls abroad for purposes of prostitution.\(^\text{52}\) This

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\(^{45}\) See id. and accompanying text.

\(^{46}\) See id. and accompanying text.

\(^{47}\) See id. and accompanying text.

\(^{48}\) See id. and accompanying text.

\(^{49}\) See id. and accompanying text.

\(^{50}\) See id. at 13 ("Trafficking of human beings in the first part of Twentieth Century was understood to take place for the purpose of prostitution and/or sexual exploitation."); see also Elaine Pearson, Human Traffic, Human Rights: Redefining Victim Protection 14–17 (Anti-Slavery International 2002) (discussing early human trafficking treatise and the definition of human trafficking in international laws).

\(^{51}\) See Obokata, supra note 44, at 13–14 (discussing International Agreement for the Suppression of the White Slave Traffic 1904 and its impact on white women trafficked for the purpose of prostitution).

\(^{52}\) See id. and accompanying text.
agreement was later expanded by subsequent treaties, including the International Convention for the Suppression of the Traffic of Women and Children in 1921. Like the agreement of 1904, this treaty described trafficking mainly as forms of prostitution and sexual exploitation. This treaty was significant because it recognized that women and children of any race could be victims of trafficking. The Convention for the Suppression of the Traffic in Persons and of Exploitation of Prostitution of Others in 1949 consolidated the previous treaties on human trafficking. Unlike the other documents, this treaty was gender-neutral and defined trafficking as "solely the cross-border movement of persons into prostitution."

The contemporary view of human trafficking is not limited to prostitution and sexual exploitation. Although there is no internationally accepted definition of human trafficking, the United Nations in 2000 adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. Here, the United Nations defined trafficking in persons as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments

54. See id. at 15–16 (discussing the International Convention for the Suppression of the Traffic in Women and Children of 1921 and its impact on women and children trafficked for the purpose of prostitution and sexual exploitation).
55. See id. and accompanying text.
56. See id. and accompanying text.
58. See id. and accompanying text.
59. See Obokata, supra note 44, at 18 ("[T]here is no internationally accepted definition of the ‘the contemporary form of slavery.").
or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.\footnote{Id. at art. 3(a).}

The United States has taken a similar view when assessing human trafficking.\footnote{See generally TIP REPORT 2009, supra note 7.} The Trafficking in Persons Report of 2009 described human trafficking as "a crime that deprives people of their human rights and freedoms."\footnote{TIP REPORT 2009, supra note 7, at 5.} Unlike the early treaties of the twentieth century, trafficking as described today does not include just prostitution and sexual exploitation.\footnote{See TIP REPORT 2009, supra note 7, at 7 (describing "the scope and nature of modern-day slavery").} Labor exploitation, which claims the greatest number of victims, is also a form of trafficking, with or without sexual exploitation.\footnote{Id. at 7 (describing "the scope and nature of modern-day slavery").} Some examples of labor exploitation include "traditional chattel slavery, forced labor, and debt bondage."\footnote{Id.} Further, the TVPA defines "severe forms of trafficking" as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age,"\footnote{Trafficking Victims Protection Act, 22 U.S.C. § 7102(8)(A) (2009).} or "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."\footnote{Id. § 7102(8)(B).} While the primary focus of the TVPA is to "punish traffickers, protect victims, and prevent trafficking from occurring,"\footnote{See TIP REPORT 2009, supra note 7, at 5; see also Lopiccolo, supra note 12, at 860 ("The Clinton administration initiated the reform of human trafficking laws with the strategy of: (1) prevention; (2) protection and support for victims; and (3) prosecution of traffickers.").} human trafficking remains a significant issue, leaving many victims, particularly children, vulnerable to exploitation.\footnote{See The Ongoing Tragedy of International Slavery and Human Trafficking: An Overview: Hearing Before the Subcomm. on Human Rights and Wellness of the Comm. on Gov’t Reform, 108th Cong. 23 (2003), available at http://www.access.gpo.gov/congress/house/pdf/108hrg/93282.pdf ("Although many people believe that slavery and human trafficking are no longer a major problem, it is estimated that more than 27 million cases of human trafficking occur every year.").}
II. A Push Forward: The Trafficking Victims Protection Act

Congress passed the TVPA in 2000, partly in response to two large forced labor immigration rings. A California labor ring forced seventy-two Thai nationals to work in a garment factory every day for eighteen hours and for less than sixty cents an hour. The other forced labor immigration ring was based in New York. This organization forced at least sixty-two deaf Mexican immigrants to peddle and beg on the streets. The Mexican immigrants worked long hours and suffered both physical abuse and threats if they did not meet a certain quota. The government had difficulty prosecuting the traffickers because there was no codified law on human trafficking. The purpose of the TVPA was to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." The underlying theme and focus of the TVPA were addressing the "three Ps" of human trafficking: "punish traffickers, protect victims, and prevent trafficking from occurring."

Subsequent reauthorization acts in 2003, 2005, and 2008 have attempted to strengthen the TVPA’s tripartite focus on protection, prevention, and prosecution. The Trafficking Victims Protection
Reauthorization Act of 2003 strengthened the protection of trafficking victims.81 First, it allowed T-visa benefits to extend to the victim’s siblings.82 Previously these benefits were extended only to "spouse[s], children, and parents."83 T-visas are given to those who satisfy four requirements: (1) "[are] or have been a victim of a severe form of trafficking in persons"; (2) "[are] physically present in the United States, American Samoa, or the Commonwealth of Northern Mariana Islands"; (3) have either assisted the investigation of the trafficking act, are unable to cooperate due to trauma, or are under the age of eighteen, and; (4) would suffer extreme hardship if removed from the United States.84 Secondly, the 2003 Act increased the age requirement for victim certification,85 which is the qualification of a person to be considered a victim under the T-visa provision,86 from fifteen to eighteen.87 Thirdly, the Act created a private right of action to allow trafficked victims to sue their traffickers for civil damages.88 The Trafficking Victims Protection Reauthorization Act of 2005 "purposed to ‘close loopholes’ in the TVPA."89 This Act enhanced the protection of victims by increasing access to legal counsel and providing better information to the victims on assistance programs.90

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82. See id. at 450–51 (discussing the amendments added by the Trafficking Victims Protection Reauthorization Act of 2003).


85. See Payne, supra note 81, at 450 (discussing the raised age requirement for victim certification).


88. See Payne, supra note 81, at 450–51 (discussing the private right to sue amendment).

89. Id. at 451.

90. See id. (discussing the amendments added by the Trafficking Victims Protection Reauthorization Act of 2005).
Because there are enormous financial benefits to human trafficking, the Reauthorization Act also improved the prosecution and prevention of traffickers by adding a forfeiture provision.\textsuperscript{91} This provision requires traffickers to forfeit to the United States "any property, real or personal" that was used or intended to be used to commit the trafficking and any proceeds derived from trafficking activities.\textsuperscript{92} Although both the 2003 and 2005 Reauthorization Acts enhanced the protection, prevention, and prosecution of the TVPA, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 both dramatically strengthens the 2000 TVPA\textsuperscript{93} and "packs the most powerful punch."\textsuperscript{94}

III. The Three Ps of the TVPA

A. Protection of Unaccompanied Trafficked Minors

Prior to the Reauthorization Act of 2008, there was no provision focusing on the protection of unaccompanied minors trafficked into the United States.\textsuperscript{95} Unaccompanied minors, however, need protection against the hardship of both the immigration process and court proceedings. Pursuant to the passage of the Homeland Security Act, responsibilities such as apprehension, custody, placement, and the removal of unaccompanied minors were transferred from the Immigration and Naturalization Services (INS) to the Office of Refugee Resettlement (ORR).\textsuperscript{96} Congress recognized the conflict of interest the INS suffered by

\textsuperscript{91.} See id. and accompanying text.


\textsuperscript{94.} Payne, supra note 81, at 451.

\textsuperscript{95.} See generally Micah Bump, Treat the Children Well: Shortcomings in the United States’ Efforts to Protect Child Trafficking Victims, 23 NORTHEASTERN J. L. ETHICS & PUB. POL’Y 73, 74 (2009) (stating the "shortcomings of the current implementation of the TVPA as it pertains to the protection of children").

\textsuperscript{96.} See Office of Inspections and Special Reviews, U.S. DEP’T OF HOMELAND SEC., A REVIEW OF DHS’ RESPONSIBILITIES FOR JUVENILE ALIENS 4–6 (2005), http://www.dhs.gov/xoig/assets/mgmtrepts/OIG_05-45_Sep05.pdf [hereinafter REVIEW OF DHS’ RESPONSIBILITIES] (discussing the assignment of juvenile-related responsibilities from the Immigration and Naturalization Service to the Office of Refugee Resettlement).
having to play the multiple roles of police officer, prosecutor, and guardian of the children.97 It was difficult for the INS to balance between policing and child welfare.98 Under the former INS process, approximately one-third of unaccompanied minors were placed in secured juvenile delinquent facilities as opposed to less restrictive options.99 These children are commingled with juvenile offenders, subject to abusive treatment,100 and are held for a period of a few days to several months.101

In contrast to the INS, the ORR tries to place unaccompanied minors in less restrictive options,102 such as "foster care, group homes, transitional housing, mental health centers, detention facilities, juvenile and adult jails, and locked hotel rooms."103 Unaccompanied minors are only placed in secured detention facilities if they meet a certain set of strict requirements.104 Currently, the Customs and Border Protection


98. See id. and accompanying text.

99. See Nugent, supra note 97, at 223–24 (discussing the restructuring of the custody process after the enactment of the Homeland Security Act (HSA) and pursuant to the HSA, the ORR tries to place children in the least restrictive facilities).

100. See id. at 222–23 (describing the placement of children under the INS).

101. See AMNESTY INT’L, UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 21 (2003), http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf (discussing the conditions and placement of unaccompanied and accompanied minors in juvenile jails while their immigration case is pending).

102. See Nugent, supra note 97, at 223 (describing the least restrictive options that the ORR seeks to place unaccompanied minors in, including the various foster care programs).


104. See CHAD C. HADDAL, CRS REPORT FOR CONGRESS: UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 9 (2007), http://trac.syr.edu/immigration/library/P1642.pdf (explaining the various factors that must be satisfied before the child can be placed in a secured facility).

[T]he FSA held that a juvenile may only be held in secure facilities under one or more of the following conditions: [a] child is charged or chargeable with criminal or delinquent actions; [a] child threatens or commits violence; [a] child’s conduct becomes unacceptably disruptive in a shelter facility; [a] child presents an escape risk; [a] child is in danger and is securely detained for their own safety; or [a]n emergency, or influx of minors, results in insufficient bed space at non-secure facilities.

Id.
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(CBP), a division of the Department of Homeland Security (DHS), apprehends and processes almost all undocumented minors before transferring them to the ORR. 105

DHS’s treatment of unaccompanied minors in custody has been severely criticized. 106 First, there is a concern that the DHS may determine the child’s age erroneously. 107 DHS has used dental and wrist bone forensics, but the margin of error in this technique spans several years. 108 Thus, some children are placed in the wrong facilities and no longer have access to attorneys and advocates who can help them. 109 Secondly, the DHS repatriation process has been described as a "black hole" 110 because there are "no published, publicly available regulations, protocols or standards to ensure the safe and secure repatriation of the children to their country of origin." 111 Lastly, the DHS has been criticized for its overall lack of knowledge on child welfare. 112 For example, in the Review of DHS’ Responsibility for Juvenile Aliens Report, DHS personnel purportedly demonstrated their efficient knowledge of child caretaking by purchasing baby formula, canned foods, and packaged snacks. 113 Yet unaccompanied minors were still being detained in tiny holding cells for up to several days before being transported to the ORR. 114 Christopher Nugent, a senior pro bono counsel with the Community Services Team at Holland and Knight, pointed out, "[f]rom a child’s perspective, even seventy-two hours in jail-like conditions,

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105. See Review of DHS’ Responsibilities, supra note 96, at 10 ("CBP apprehends and processes almost all juvenile aliens.").

106. See generally Nugent, supra note 97.

107. See Nugent, supra note 97, at 229 (discussing the issues in determining an unaccompanied minor’s age and how it results in the commingling of adults and juveniles).

108. See id. (describing the weaknesses found in the techniques used to ascertain a child’s age).

109. See id. (discussing the negative consequences of the methods used to discover whether a child is a minor).

110. Id. at 234.

111. Id.

112. See id. at 229–32 (discussing the DHS role as the gatekeeper regulating immigration of children into the United States).

113. See Review of DHS’ Responsibilities, supra note 96, at 12–15 (describing the varying confinement conditions of unaccompanied and accompanied minors).

114. See id. at 15 (“There are inconsistencies in meeting the requirement to transfer accompanied and unaccompanied detained juveniles to longer-term DRO or ORR detention facilities within the 3-5 day limit.”).
without access to education and recreation, feels like an eternity and can have adverse mental health consequences.\footnote{115}

Once apprehended by the DHS, the unaccompanied minor is processed and may either go through a removal hearing or is granted voluntary departure.\footnote{116} Generally, in voluntary departure situations, an accompanied minor is released back to her family in her home country, while an unaccompanied minor is "turned over to the immigration authorities of [his or her] cross-border country."\footnote{117} If the unaccompanied minor is not granted voluntary departure, the DHS is responsible for providing the child with a list of free legal services in that jurisdiction\footnote{118} and contacting the ORR.\footnote{119} The ORR is then responsible for the care of the unaccompanied minor, her placement in juvenile facilities, and her transportation to her immigration hearings.\footnote{120}

If the DHS determines the unaccompanied minor should go through a removal hearing, she should not be forced to go through court proceedings alone. In court proceedings, undocumented minors are held to the same standard as adults.\footnote{121} The child may try to avoid deportation by seeking refugee or asylum status.\footnote{122} Under the INA, if a person is seeking refugee or asylum status she must satisfy a four-prong test: (1) the refugee or asylum seeker must have a fear of persecution in her home country; (2) that fear must be well-founded;\footnote{123} (3) the fear must be based on "race,
TRAFFICKING VICTIMS PROTECTION ACT

religion, nationality, membership in a particular social group or political opinion," and (4) the refugee or asylum seeker cannot return to her country because of persecution or well-founded fear of persecution. Children with a parent or guardian do not have to satisfy the test. Instead, they are able to apply through their parents or guardian, and the courts will apply the four-prong test to those adults. Unaccompanied minors do not have a parent or guardian to apply through. Yet the unaccompanied minor is held to the same standard as the adult and must satisfy the test alone. The unaccompanied minor could also apply for a T-visa, a nonimmigrant visa, if she is a victim of sex trafficking. To be eligible for a T-visa, the child must show she is a victim of "severe form of trafficking." Under the TVPA, a sex trafficked child is classified as a victim of a "severe form of trafficking" if she is under eighteen and is physically present in the United States. The total number of T-visas that may be issued each year, however, is capped at five thousand and as many as seventeen thousand children are trafficked into the United States for sexual exploitation annually.

124. Id.
125. Id.
126. See Uram, supra note 35, at 951 and accompanying text.
127. See id. ("If the adult applicant can prove their case for relief, the child is automatically granted asylum or refugee status as well.").
128. See id. (discussing the inability of unaccompanied minors to apply through their parents or guardian).
129. See id. at 951–52 ("When an ‘unaccompanied minor’ enters the United States and independently seeks refuge or asylum, the child applicant is held to the exact same test as adults.").
130. See Cianciarulo, supra note 17, at 64–65 (describing the requirements to be eligible for a T-visa).
131. See Maciel-Matos, supra note 18, at 335–38 (discussing the different guidelines set forth by the TVPA and the eligibility requirements for a T-visa).
132. See Hussein Sadruddin, Natalia Walter & Jose Hidalgo, Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witness, 16 STAN. L. & POL’Y REV. 379, 387 (discussing the requirements to be considered a victim of severe form of sex trafficking).
134. See Maciel-Matos, supra note 18, at 335 ("Currently, the TVPA caps the number of T visas that can be issued at only five thousand per year."); see also 8 U.S.C. § 1184(o)(2) ("The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year under section 1101(a)(15)(T) of this title may not exceed 5,000.").
135. See Bump & Duncan, supra note 15, at 203 ("The most comprehensive research on trafficking victims in the United States, carried out by the University of Pennsylvania,
Unaccompanied minors should also not face these legal proceedings alone because they are particularly vulnerable and often do not possess the ability to grasp and understand the legal proceeding. The child may suffer from such fear and embarrassment that she is unable to relay her story to the court or court officials. The child also carries the same burden of proof as an adult and is up against a trained DHS lawyer. In these situations, legal counsel and guardians ad litem play a crucial role. A lawyer is important because the lawyer can support, inform, advise, and assist the trafficked victim through the criminal proceeding against the trafficker. The lawyer builds a level of trust with the victim and protects her human rights. Guardians ad litem typically act independently of government agencies and focus on "ensur[ing] [that] the best interests of the child are protected." Unfortunately the United States does not require the appointment of a lawyer or a guardian ad litem. Thus, eighty percent of all unaccompanied minors going through immigration proceedings do not have any type of adult assistance.

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136. See Uram, supra note 35 (discussing the hardship for unaccompanied minors going through the refugee and asylum seeking process); see also Bump, supra note 95, at 73–74 ("The particular vulnerability of child victims, related to bio-physiological, social, behavioral, and cognitive phases of the maturation process, distinguishes them from adult victims and underscores the necessity of special attention to their particular needs.").

137. See Uram, supra note 35, at 952 (explaining some child victims have a "fear of persecution" and as a result, are very reluctant to speak with government officials).

138. See Nugent, supra note 97, at 222 ("These [immigration] proceedings are administrative and adversarial, and pit the lone child, carrying the same burden of proof as an adult alien, against a trained DHS trial attorney before an immigration judge.").

139. See PEARSON, supra note 57, at 55–56 (discussing the importance of lawyers to the victims of human trafficking).

140. See id. ("Lawyers play a crucial role in supporting, informing and advising trafficked persons and in facilitating their co-operation with law enforcement in the criminal prosecution of traffickers, so that the process is less traumatic for the trafficked persons.").

141. See id. ("A good rapport, sensitivity and level of trust between the lawyer and the trafficked person is essential for the role of the lawyers to be most useful in protecting trafficked persons’ human rights.").

142. See Unaccompanied Alien Child Protection Act, S. 844, 110th Cong. § 201 (2007) (describing the qualifications and role of a child advocate or guardian ad litem).

143. See Dalrymple, supra note 37, at 156–57 (noting that unlike Canada and the United Kingdom, the “United States does not require a designated representative or a panel of advisors” and the Immigration and Naturalization Services guidelines “do not require legal counsel or provide court-appointed counsel for unaccompanied minors”).

144. See id. at 157 ("About eighty percent of unaccompanied juveniles apprehended by DHS [Department of Homeland Security] do not have adult assistance of any kind, either..."
The appointment of a lawyer or guardian ad litem is particularly important because trafficked children also face pressure from prosecutors assigned to their respective cases.\textsuperscript{145} Under the TVPA, adults—those eighteen years old or older\textsuperscript{146}—are eligible for federal benefits if they are "willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons or [are] unable to cooperate with such a request due to physical or psychological trauma."\textsuperscript{147} Eligible benefits include "(1) the ‘continued presence’ temporary immigration benefit through which a witness to a trafficking crime can secure protection from deportation; (2) the temporary immigration benefit of T-visa status, which lasts up to three years; and (3) lawful permanent residence upon completion of the three-year T-visa."\textsuperscript{148} While this assistant requirement is not imposed on children, they are still subject to pressure by the prosecution.\textsuperscript{149} This is all the more true for unaccompanied minors, who are particularly vulnerable in legal proceedings.\textsuperscript{150} Micah Bump, a research assistant at the Georgetown University Institute for the Study of International Migration, found in his field research one instance in which a prosecutor used a subpoena to circumvent the TVPA and pressure two unaccompanied minor victims into testifying in front of a grand jury.\textsuperscript{151} Although the Reauthorization Act of 2008 did not fully solve the vulnerability unaccompanied minors face in court proceedings and the immigration process, the Act did strengthen the protection of these children.\textsuperscript{152} The Act added a section to the TVPA that focuses primarily on the trafficking of unaccompanied minors.\textsuperscript{153} First, the Act addresses

\textsuperscript{145} See generally Bump, supra note 95 (focusing on "shed[ding] light on the troubling practice of federal prosecutors and investigators pressuring child trafficking survivors and their child welfare professionals to aid in the investigations and prosecutions of traffickers").


\textsuperscript{147} Id. § 7105(b)(1)(E)(i)(I).

\textsuperscript{148} Maciel-Matos, supra note 18, at 335.

\textsuperscript{149} See generally, supra note 145 and accompanying text.

\textsuperscript{150} See, supra note 121 and accompanying text.

\textsuperscript{151} See Bump, supra note 95, at 81–91 (describing the story of two child victims who were subpoenaed by the Department of Justice to testify in front of the grand jury).

\textsuperscript{152} See Payne, supra note 81, at 435 ("The recent enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (‘2008 TVPRA’), heralds significant victories in the battles to achieve better victim protection and increase prosecution of traffickers.").

\textsuperscript{153} See generally William Wilberforce Trafficking Victims Protection Reauthorization
the need to provide legal counsel to unaccompanied minors. It requires the Secretary to "ensure, to the greatest extent practicable... that all unaccompanied alien children... have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking." Secondly, the Act requires that the custodians of unaccompanied minors participate in the Legal Orientation Program. Through this program, custodians are educated about the immigration process, the court proceedings, and basic legal information. At a minimum, the Act requires the custodians to be knowledgeable about their responsibility to ensure that the unaccompanied minor "appear[s] at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking." While this still does not grant court-appointed counsel, it shows that Congress recognizes the need to protect unaccompanied minors in immigration proceedings. In addition to access to counsel, the Act incorporates some of the principles of the failed Unaccompanied Alien Child Protection Act and adds a provision authorizing the Secretary of Health and Human Services (HHS) to appoint child advocates. The Unaccompanied Alien Child Protection Act was an unsuccessful bill that established a guardian ad litem program and


154. Id. at sec. 235, § (c)(5).

155. See id. at sec. 235, § (c)(4) ("The Secretary of Health and Human Services shall cooperate with the Executive Office for Immigration Review to ensure that custodians receive legal orientation presentations provided through the Legal Orientation Program administered by the Executive Office for Immigration Review.").


required all unaccompanied minors to have appointed legal counsel. As envisioned by the Unaccompanied Alien Child Protection Act, the Reauthorization Act of 2008 requires the child advocate to promote the best interests of the child. This provision also recognizes the need for trust between the child advocate and the unaccompanied minor by stating that child advocates "shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the minor" and by immunizing the advocates from civil and criminal liability. Secondly, the Act addresses the protection of unaccompanied minors in the immigration process. The Act requires the Secretary of HHS to develop an age determination procedure. The Secretary of HHS and the Secretary of Homeland Security are both required, at a minimum, to use multiple forms of evidence to determine the age of unaccompanied minors, and not to rely simply on dental or wrist bone testing.

§ 201(a) ("The Director may appoint a guardian ad litem, who meets the qualifications described in paragraph (2), for an unaccompanied alien child."); see also id. § 201(c) ("Not later than 180 days after the date of enactment of this Act, the Director shall establish and begin to carry out a pilot program to test the implementation of subsection (a)."").

161. See id. § 202(a) ("The Director should ensure that all unaccompanied alien children in the custody of the Office or the Directorate . . . have competent counsel to represent them in immigration proceedings or matters.").


163. Id. at sec. 235, § (c)(6).

164. See id. at sec. 235, § (c)(6) ("The child advocate shall be presumed to be acting in good faith and be immune from civil and criminal liability for lawful conduct of duties as described in this provision.").

165. See Payne, supra note 81, at 453 ("Section 235 guarantees that the Secretary of Health and Human Services will ensure ‘to the greatest extent practicable’ that all unaccompanied child victims under their care ‘have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.’" (quoting William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, sec. 235, § (c)(5), 122 Stat. 5044, 5078 (codified at 8 U.S.C. § 1232 (2009)))).

166. See id. at sec. 235, § (b)(4) ("The Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of an alien.").

167. See id. ("At a minimum, these procedures shall take into account multiple forms of evidence.").

168. See id. (stating that the multiple forms of evidence will include the "non-exclusive use of radiographs").
In order to ensure the proper care of the unaccompanied minor while she is in the presence of federal officials, the Act requires the Secretary of HHS to provide "specialized training to all Federal personnel . . . who have substantive contact with unaccompanied alien children."\footnote{169} The Act also attempts to improve the conditions of unaccompanied minors through safe placement.\footnote{170} It requires the Secretary of HHS to place the unaccompanied minor in the "least restrictive setting that is in the best interest of the child"\footnote{171} and forbids the placement of the child in a secured juvenile detention facility unless "the child poses a danger to self or others or has been charged with having committed a criminal offense."\footnote{172} Before the unaccompanied minor may be placed with a proposed custodian, the Secretary of HHS must determine that the proposed custodian is capable of providing for the child’s physical and mental well-being.\footnote{173} Even after placement, the HHS must conduct home studies and follow-up services.\footnote{174}

Thirdly, the Act addresses the fears that an unaccompanied minor could fall into a "black hole" after being returned to her home country.\footnote{175} Before repatriation, the Secretary of Homeland Security must first determine whether the unaccompanied minor’s national or habitual resident country is contiguous with the United States.\footnote{176} If so, the Secretary must screen the unaccompanied minor to determine on a case-by-case basis that the child is not a victim of a severe form of trafficking, does not have fear of returning to the home country, and is able to make an independent decision to withdraw her application to stay in the United States.\footnote{177} If the unaccompanied minor meets those criteria, she is returned

\footnote{169. Id. at sec. 235, § (e).}
\footnote{170. See generally id. at sec. 235, § (c)(2).}
\footnote{171. Id.}
\footnote{172. Id.}
\footnote{173. Id. at sec. 235, § (c)(3)(A).}
\footnote{174. See id. at sec. 235, § (c)(3)(B) ("A home study shall be conducted for a child who is a victim of severe form of trafficking in persons.").}
\footnote{175. See id. at sec. 235, § (a)(1) ("The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated.").}
\footnote{176. See id. at sec. 235, § (a)(2)(A) (explaining the Secretary of Homeland Security must determine whether the unaccompanied minor "is a national or habitual resident of a country that is contiguous with the United States").}
\footnote{177. See id. at sec. 235, § (a)(2)(A)(i)–(iii) (listing the criteria that the Secretary of Homeland Security must use to assess on a case-by-case basis for each unaccompanied minor).}
back to her country of nationality or last habitual residence.\textsuperscript{178} If the child does not meet those criteria, the Act has established a Repatriation Pilot Program to "protect children from trafficking and exploitation"\textsuperscript{179} and to "ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence."\textsuperscript{180} The program requires the Secretary of Homeland Security to assess the conditions of the country and determine whether the unaccompanied minor should be repatriated.\textsuperscript{181} Lastly, every year, the Secretary of State and the Secretary of HHS must submit a report to the Committee on the Judiciary of the Senate and House on efforts to improve repatriation programs for unaccompanied minors.\textsuperscript{182} Thus, the Reauthorization Act ensures that nontrafficked unaccompanied minors are not later exposed to trafficking after repatriation and that unaccompanied minors who are victims of trafficking will not be immediately repatriated, but placed by ORR.\textsuperscript{183}

Protecting victims from slavery is one of the "obligations \textit{erga omnes} arising out of human rights laws,"\textsuperscript{184} or, in other words, "obligations owed by a State to the international community as a whole."\textsuperscript{185} The drafters of the Reauthorization Act recognized this need and further strengthened the protection of victims that was lacking in the original TVPA.\textsuperscript{186}

\begin{itemize}
  \item \textsuperscript{178} See id. at sec. 235, § (a)(3) (stating if the unaccompanied minor does not fall within the criteria of § (a)(2)(A), then the unaccompanied minor will be transported to ORR for placement).
  \item \textsuperscript{179} Id. at sec. 235, § (a)(5)(A).
  \item \textsuperscript{180} Id.
  \item \textsuperscript{181} See id. at sec. 235, § (a)(5)(B) ("The Secretary of Homeland Security shall consult the Department of the State’s Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.").
  \item \textsuperscript{182} See id. at sec. 235, § (a)(5)(C) (stating that a report must be submitted to the Committee of Judiciary for both the House of Representatives and the Senate on efforts to improve the repatriation program).
  \item \textsuperscript{183} See generally id. at sec. 235 (listing guidelines to ensure the safe repatriation of children).
  \item \textsuperscript{184} See TIP REPORT 2009, \textit{supra} note 7, at 3 (quoting a International Court of Justice’s opinion on importance for protection from slavery).
  \item \textsuperscript{185} Id.
  \item \textsuperscript{186} See id. at 7 (acknowledging the changes to the 2008 TVPA, and restating the Report’s mission statement by noting "[t]he purpose of the law is to punish traffickers, protect victims, and prevent trafficking from occurring. Freeing victims from this form of modern-day slavery is the ultimate goal of this report").
\end{itemize}
B. Prevention of Human Trafficking

The drafters of the TVPA also recognized the need to prevent trafficking and made efforts to do so with three main methods: "economic alternatives, public awareness, and consultation."187 The current economic crisis has made trafficking more prevalent by dramatically increasing the supply and demand.188 Some major prevention efforts were added with the Reauthorization Act of 2005.189 That Act added border interdiction, which provides funding for transit shelters at border crossings to help "educate and train border guards and officials"190 and "identify traffickers and victims of severe forms of trafficking."191 This Act also increased public awareness by establishing programs to support international media.192 However, the Act did not address all preventive methods, and the Reauthorization Act of 2008 enhanced some of the efforts made by its predecessor.193

The Reauthorization Act of 2005 was criticized for not considering the "cultures, traditions, and acceptable behaviors that help foster environments in which trafficking can take place."194 In particular, it did not consider the effectiveness of different approaches for dealing with individual countries.195 The Reauthorization Act of 2008 recognizes this need and creates an integrated database system to research and study the global patterns and trends of human trafficking.196 The integrated database combines "all applicable data collected by each Federal department and

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187. McClain, supra note 26, at 588.
188. See TIP REPORT 2009, supra note 7, at 32–33 (discussing the economic crisis and its effect on the poor and unemployed in Asia and noting ILO’s findings regarding the economic crisis).
189. See McClain, supra note 26, at 589–92 (discussing some of the major prevention amendments the Reauthorization Act of 2005 added to the TPVA).
191. Id.
192. Id. § 7104 (d).
194. McClain, supra note 26, at 590.
195. See id. at 590–91 ("One of the biggest problems with both the TVPA and the [Reauthorization Act of 2005] is that neither seems to consider that different approaches may be effective when dealing with different countries.").
TRAFFICKING VICTIMS PROTECTION ACT

agency represented on the Interagency Task Force to Monitor and Combat Trafficking, and "applicable data from relevant international organizations." Congress’s purpose was to create a uniform data collection system, to undertake a meta-analysis approach in analyzing patterns of trafficking "to develop and analyze global trends in human trafficking," and to identify emerging issues in human trafficking.

Considering the high number of unaccompanied minors who fall victim to human trafficking, this type of research and database will be helpful to combat the trafficking of children.

The Reauthorization Act of 2008 further addresses a significant issue of human trafficking—identifying the victims. Most importantly, the Act accounts for unaccompanied minors in its training programs. The Act specifically inserts "including juvenile victims" into the requirement that appropriate persons be "trained in identifying victims of severe forms of trafficking and providing for the protection of such victims." The Act also focuses on helping foreign governments identify trafficked children.

Under this provision, the President must "establish and carry out programs

197. Id. at sec. 108, § (b)(2).
198. Id.
199. See id. at sec. 108, § (b)(2)(A)–(E) (discussing the purpose of the database, including "promot[ing] uniformity...undertak[ing] a meta-analysis of patterns of trafficking in persons, slavery, and slave-like conditions to develop and analyze global trends in human trafficking...[and] identify[ing] emerging issues in human trafficking and establishing integrated methods to combat them").
200. See Piwowarczyk, supra note 122, at 265–67 (2006) ("The Numbers of unaccompanied youth are increasing around the world.").
201. See id. at 263–67 (stating "our immigration policy does not take into account the vulnerability of each individual child, their histories, potential victimization and resultant distrust..." and that no one really knows much about the unaccompanied minors' demographics or their stories).
203. See id. at sec. 212, § (b)(2) (amending the current training provision by adding "including juvenile victims").
to prevent and deter trafficking in persons, including . . . technical assistance and other support to improve the capacity of foreign governments to investigate, identify, and carry out inspections of private entities . . . particularly exploitation involving forced and child labor."\(^{206}\)

A major difficulty with identifying a trafficked victim is that often the victims themselves do not believe they are being trafficked.\(^{207}\) Some victims believe the forced labor and servitude are simply the price to pay for establishing themselves in a new country\(^ {208}\) or are a result of bad luck.\(^ {209}\) Thus, anti-trafficking programs and services must be provided to support and empower trafficked victims to think for themselves.\(^ {210}\) The Reauthorization Act of 2008 encourages the establishment and enhances the effectiveness of anti-trafficking programs.\(^ {211}\) The Act provides funds toward anti-trafficking programs through "grants, cooperative agreements, and contracts."\(^ {212}\) To be eligible for this funding, the program must provide assistance effectively and efficiently\(^ {213}\) and ensure that the people providing the assistance are well trained on working with trafficked victims.\(^ {214}\) In addition to providing funding, the Act incentivizes anti-trafficking programs by presenting the "Presidential Award for Extraordinary Efforts

\(^{206}\) Id.

\(^{207}\) See PEARSON, supra note 57, at 32 ("One of the main problems in identifying trafficked persons and treating them as such is that often they do not see themselves as ‘victims.’").

\(^{208}\) See id. at 31 ("Many migrants [trafficked victims] appear to regard a period of servitude as an acceptable cost to bear in order to establish themselves in a new country.").

\(^{209}\) See id. at 32 ("Despite [trafficked victim’s] experience of being trafficked they generally see themselves as migrants or workers who had some bad luck as a result of a bad decision or a bad contract.").

\(^{210}\) See id. at 31 (suggesting more must be done than simply rescuing victims and returning them to their home country, such as providing services to support and empower the victims in making their own decisions).


\(^{212}\) Id. at sec. 107A, § (a)(1).

\(^{213}\) See id. at sec. 107A, § (c)(1) (discussing that the Presidential evaluation of the anti-trafficking programs includes making sure the system is effectively and efficiently providing assistance).

\(^{214}\) See id. at sec. 107A, § (b)(1) ("An applicant desiring a grant, contract, or cooperative agreement under this Act shall certify that, to the extent practicable, persons or entities providing legal services, social services, health services, or other assistance have completed, or will complete, training in connection with trafficking in persons.").
to Combat Trafficking in Persons" to as many as five organizations or individuals annually.215

C. Prosecution of Human Traffickers: A Need for More

Although the TVPA, as amended, takes effective steps towards achieving the goals of protection and prevention,216 the Reauthorization Act of 2008 still fails to adequately address the prosecution prong envisioned by the original act. Tackling the prosecution of human trafficking is not an easy task, and many countries have avoided creating effective prosecution rules.217 However, this should not excuse Congress from also eluding the topic.

1. The House’s Version of the Reauthorization Act

The Reauthorization Act of 2008 is actually not the original draft.218 In December 2007, the House of Representatives attempted to pack a powerful punch by prosecuting human traffickers in its version, H.R. 3887.219 The House bill created an "aggravated sex trafficking"220 offense that would occur whenever a person:

[R]ecruits, entices, harbors, transports, provides, or obtains by any means a person; or benefits, financially or by receiving anything of value, from participation in a venture which has engaged in [such] act described . . . knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act, or, in the case of a

215. See id. at sec. 109, § 112B(a) (stating "the President is authorized to establish an award, to be known as the ‘Presidential Award for Extraordinary Efforts to Combat Trafficking in Persons’, for extraordinary efforts to combat trafficking in persons" and that the award will be given annually to at most five individuals and organizations).

216. See supra Part III.A–B (discussing both the protection and prevention efforts of the Reauthorization Act of 2008).

217. See PEARSON, supra note 57, at 13 ("Effective prosecution of traffickers for the crimes they commit against trafficked persons is something that has eluded most countries to date.").


219. See id. and accompanying text.

220. See generally H.R. 3887, 110th Cong. § 221(a) (2007).
person who has not attained the age of 18 years, that the person will be caused to engage in a commercial sex act, or attempts to do so.  

Under the offense of aggravated sex trafficking, the government would not have needed to prove that the defendant knew the child was under the age of eighteen. The House bill also expanded the definition of sex trafficking to include "whoever knowingly . . . persuades, induces, or entices any individual to engage in prostitution." The House bill addressed forced labor by creating an "unlawful compelled service" offense. Under this provision, "whoever knowingly, with intent to obtain or maintain the labor or services of a person or to obtain or maintain a person for use in a commercial sex act . . . destroy[ed], conceal[ed], remov[ed], confiscat[ed], or possess[ed] any actual or purported passport or other immigration document . . . of another person to prevent or restrict . . . the person’s ability to move or travel; . . . blackmail[ed] . . . or caus[ed] or exploit[ed] financial harm or a fear of financial harm" would be fined, imprisoned, or both. Thus, the House bill significantly addressed prosecution issues in sex trafficking and forced labor.

However, the passage of this bill by the House stirred a great deal of controversy. This controversy particularly surrounded the House bill’s creation of new trafficking offenses, such as aggravated sex trafficking, and expansion of sex trafficking to incorporate prostitution including adult women. The House asserted that all prostitution violated the human rights of women, as no woman can freely choose to engage in prostitution. Ultimately, the House bill provisions criminalizing sex

221. Id.
222. See id. ("[T]he Government need not prove that the defendant knew that the person had not attained the age of 18 years.").
223. Id. § 221(f).
224. See generally id. § 221(b).
225. Id.
226. See generally id. and accompanying text.
227. See Cianciarulo, supra note 17, at 65–66 (discussing the controversy sparked by the House version of the Reauthorization Act of 2008 (H.R. 3887)).
229. See Cianciarulo, supra note 17, at 66 (discussing the expansion of the trafficking definition in the House version to include prostitution).
230. See id. ("[The House] base their support on the assertion that all prostitution violates the human rights of women and that no woman freely chooses to engage in prostitution.").
trafficking and creating new federal crimes were struck out of the Act signed into law by President Bush in December 2008.231

Despite the House’s efforts to address prosecution, scholars criticized the bill.232 Opponents raised three principal arguments against it:233 (1) choice,234 (2) countering the goals of criminal law,235 and (3) constitutional violations.236 The first argument, choice, overlaps the debate on legalizing prostitution in that proponents argue that women have the choice regarding sex work and the law should provide protection to their choices.237 Critics of the House bill argued that it took away a woman’s choice by assuming that everyone chooses not to engage in prostitution.238

The second principal argument against the House bill opposed the removal of the defendant’s knowledge of the victim’s age.239 The Department of Justice argued that this provision would turn sex trafficking

231. See Kaigh, supra note 218, at 142–44 (explaining the Reauthorization Act 2008 did not include the provisions enhancing sex trafficking found in the House version of the bill).


233. See Kaigh, supra note 218, at 152–55 (finding the House version of the Reauthorization Act too broadly generalizes and punishes prostitutes by “equating prostitution with sex trafficking”); see also H.R. 3887, 110th Cong. § 221(f) (2007) (“Whoever knowingly . . . persuades, induces, or entices any individual to engage in prostitution for which any person can be charged with an offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.”).

234. See generally Cianciarulo, supra note 17.


236. See generally Walsh & Grossman, supra note 232.

237. See Cianciarulo, supra note 17, at 56 (discussing the debate between legalizing prostitution and the exploitation of women’s human rights).

238. See id. at 66 ("[The House] base[d] [its] support on the assertion that all prostitution violates the human rights of women and that no woman freely chooses to engage in prostitution.").

239. See Letter from Brian A. Benczkowski, supra note 235.
into a strict liability crime\textsuperscript{240} and that it ran "counter to the criminal law goal of punishing culpable states of mind."\textsuperscript{241}

Thirdly, opponents made two constitutional arguments against the House bill. Critics first argued that the inclusion of prostitution in the definition of sex trafficking does not fall within powers granted to Congress under the Thirteenth Amendment.\textsuperscript{242} In its simple incorporation of prostitution, the provision lacked the element of "force, fraud, or coercion" needed to satisfy the Thirteenth Amendment’s prohibition on slavery and involuntary servitude.\textsuperscript{243} The second constitutional argument claimed that the Commerce Clause does not grant Congress the power to regulate ordinary sex crimes, such as prostitution, because it does not substantially affect interstate commerce.\textsuperscript{244} Critics also maintained that the federal criminalization provisions infringed upon the states’ police power\textsuperscript{245} by ignoring the constitutional separation between federal law enforcement and state and local law enforcement.\textsuperscript{246} They maintained that the House bill’s provision defining sex trafficking to include whoever "persuades, induces, or entices any individual to engage in prostitution,"\textsuperscript{247} read with the House bill’s "unlawful compelled services"\textsuperscript{248} provision, made all pandering,  

\begin{itemize}
  \item 240. See id. (discussing how the change of law would create a strict liability crime with a harsh punishment of ten year mandatory minimum sentence).
  \item 241. Id.
  \item 242. See Walsh & Grossman, supra note 232, at 5 ("[T]he bill’s provisions on prostitution also fail to fit within the power granted [sic] the federal government in the Thirteenth Amendment to prohibit slavery and involuntary servitude.").
  \item 243. See Letter from Brian A. Benczkowski, supra note 235 (prioritizing "crimes in which victims have been trafficked as a result of force, fraud, or coercion, including the sex trafficking of children in which coercion is presumed, i.e., crimes that fall under the Thirteenth Amendment’s prohibition on slavery and involuntary servitude, and commercial act involving transportation in interstate commerce").
  \item 244. See id. (discussing the constitutional problems with the House bill and how the Commerce Clause still does not give Congress the power to regulate "run-of-the-mill sex crimes").
  \item 245. See Walsh & Grossman, supra note 232, at 1 ("The net effect of this unconstitutional federalization of local crime would be to blur the respective lines of federal and state authority, assert federal supremacy without providing sufficient federal resources, and thus undermine the efforts of state law enforcement against . . . human trafficking.").
  \item 246. See id. at 2 ("Indiscriminate federal criminalization disregards the constitutional separation of law enforcement by federal authorities from law enforcement that should be authorized and conducted under the jurisdiction of state and local governments.").
  \item 248. See id. § 221(b)(1) ("Whoever knowingly, with intent to obtain or maintain the labor or services of a person or to obtain or maintain a person for use in a commercial sex act . . . causes or exploits financial harm or a fear of financial harm on the part of that person.").
\end{itemize}
pimping, and prostitution-related offenses federal crimes,\textsuperscript{249} which traditionally have been prosecuted on a state level.\textsuperscript{250} The House bill’s federal criminalization was called highly unnecessary because existing state and local laws already enforced bans on prostitution.\textsuperscript{251} One commentator suggested that federal criminalization would erode and reduce the effectiveness and success of state and local law enforcement.\textsuperscript{252} Another maintained that state responsibility is likely sufficient to stop a significant number of human traffickers.\textsuperscript{253}

2. A Narrowly Tailored House Bill

As a result of this controversy, Congress became reluctant to take any substantial step in prosecution efforts. Something further must be done about the increase of trafficking children, and the Reauthorization Act of 2008 does not adequately address the prosecution prong of the TVPA. This Note proposes that Congress should adopt and slightly modify the prosecution provisions from the original House bill, H.R. 3887.

First, Congress should expand the definition of sex trafficking to include prostitution. The expansion, however, should be limited to include only the prostitution of children. While it has been argued that adult women may choose to enter into prostitution,\textsuperscript{254} the same cannot be said

\textsuperscript{249} See Walsh & Grossman, supra note 232, at 3 (discussing how the House bill can be read to “purportedly transform all pandering, pimping, and hiring of a prostitute into a federal crime”).

\textsuperscript{250} See Letter from Brian A. Benczkowski, supra note 235 (“At the same time, pandering, pimping, and prostitution-related offenses have historically been prosecuted at the state or local level.”).

\textsuperscript{251} See id. (“Furthermore, the Department is not aware of any reasons why state and local authorities are not currently able to pursue prostitution-related crimes such that Federal jurisdiction is necessary.”); see also Walsh & Grossman, supra note 232, at 4 (discussing different states’ individual ways of punishing prostitution and that having a federal crime against prostitution is unnecessary).

\textsuperscript{252} See Walsh & Grossman, supra note 232, at 6 (“Like existing federal criminal provisions that ignore constitutional federalism, the [House bill] would further erode state and local law enforcement’s primary role in combating common street crimes, thereby reducing the effectiveness and success of local prosecutors and law enforcement.”).

\textsuperscript{253} See Stephanie Richard, State Legislation and Human Trafficking: Helpful or Harmful?, 38 MICH. J.L. REFORM 447, 460 (2005) (“[G]iven the labor-intensive and resource-driven nature of human trafficking investigations, if more responsibility is spread to states for investigation and prosecution of human trafficking cases, it is more likely that significant numbers of traffickers can be stopped.”).

\textsuperscript{254} See Cianciarulo, supra note 17, at 67 (“Choice is at the center of the current debate over the definition of trafficking because choice determines whether a person is a victim or a
about children. A child does not have a choice when it comes to prostitution. The child’s young age and vulnerability makes the child particularly susceptible to being lured into trafficking. Some children are also pushed by their families to enter into prostitution as a means of survival and have no say in the matter. The Department of Justice recognizes this lack of choice and assumes coercion in the sex trafficking of children. The argument of choice is inapplicable when it comes to them.

Secondly, although the current TPVA defines sex trafficking as inducing a person who is under the age of eighteen to perform a commercial sex act, there is no strict liability provision regarding the defendant’s knowledge of age. Instead, the government must prove that the defendant had a "reasonable opportunity to observe the person" before the government is relieved of its duty to prove that the defendant knew the victim’s age. The House bill, H.R. 3887, proposed an aggravated sex trafficking offense that would eliminate the need to prove that the defendant knew of the child’s age. Congress should adopt this concept and remove the government’s burden to prove the defendant’s knowledge of age.

The expansion of sex trafficking to include prostitution of children, regardless of whether the defendant has knowledge of the child’s age, does not run contrary to the goal of criminal law. Disregarding whether the defendant knows of the child’s age in sex trafficking cases does not run contrary to the four goals of criminal law: deterrence, retribution, incapacitation, and rehabilitation. Deterrence is the most important goal of human trafficking. Prosecuting traffickers, regardless of whether they

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255. See id. at 58 (discussing the different lures traffickers use on children).

256. See McClain, supra note 26, at 583–84 (describing the different reasons why some children are forced into trafficking).

257. See Letter from Brian A. Benczkowski, supra note 235 (discussing how "coercion is presumed" in the sex trafficking of children).


260. Id. ("[T]he defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove the defendant knew that the person had not attained the age of 18 years.").

261. See H.R. 3887, 110th Cong. § 221(a) (2007) ("[T]he Government need not prove that the defendant knew that the person had not attained the age of 18 years.").


263. See id. at 1286–96 (discussing in depth each goal of criminal law).

264. See Enhancing the Global Fight to End Human Trafficking: Hearing Before the
know the child’s age, is an effective way to combat the activity. Oliver Wendell Holmes Jr., stated in The Common Law, "[S]ubstantive crime acts are rendered criminal because they are done under circumstances in which they will probably cause some harm which the law seeks to prevent," and "in such cases the mens rea, or actual wickedness of the party, is wholly unnecessary, and all reference to the state of his consciousness is misleading." The same holds true for trafficked children used for prostitution. Regardless of whether the trafficker knew the child was under the age of eighteen, the trafficker still engaged in an act that caused harm to the victim. The defendant’s knowledge of age does not change the fact that the victim is ultimately harmed. Charging the defendant with knowledge would serve the criminal law’s goals of deterrence, retribution, and incapacitation.

States also recognize this strict liability concept, with their passage of statutory rape laws. Currently all states have a form of statutory rape law, whether they call it statutory rape or not, that prohibits sexual intercourse with children under a certain age. For example, sexual assault under the Texas Penal Code is defined as any person conducting sexual acts on a child under the age of seventeen. In Washington, a person is guilty of a

Comm. On Int’l Relations, 109th Cong. 3, 7 (2006), available at http://www.foreignaffairs.house.gov/archives/109/30141.pdf (discussing the importance of increasing awareness so the public will motivate government to "shame those who are creating demand for trafficking victims, and ultimately stop those responsible for perpetrating these gross human rights violations").


266. Id.

267. See TIP REPORT 2009, supra note 7, at 5 ("Victims may suffer physical and emotional abuse, rape, threats against self and family, and even death."); see also Stephanie Mariconda, Breaking the Chains: Combating Human Trafficking at the State Level, 29 B.C. THIRD WORLD L.J. 151, 165–67 (2009) (explaining the effects of human trafficking on victims, including mental and physical injuries).

268. See id. (discussing the effects of human trafficking generally and including both adults and children).

269. See generally TIP REPORT 2009, supra note 7.


271. TEX. PENAL CODE ANN. § 22 011 (West 2010).
first degree rape if he has "sexual intercourse with another who is less than twelve years old... and the perpetrator is at least twenty-four months older than the victim." Arizona recognizes sexual conduct with a minor as any person who "intentionally or knowingly engages in sexual intercourse or oral sexual contact with any person who is under eighteen years of age." While the age in various state laws may vary, the various state strict liability statutory rape laws show that states themselves regulate child prostitution.

Thirdly, Congress should not have stricken the "unlawful compelled services" provision of H.R. 3887. The burden of proof is unequal between sex trafficking and involuntary servitude. Under the 2008 Act, there is no need to show "force, fraud, or coercion" for the sex trafficking of children. There is no similar exclusion, however, for involuntary servitude of children. In other words, the burden of proof remains with the child to demonstrate involuntary servitude by a showing of "force, fraud, or coercion." The provision in H.R. 3887 on "unlawful compelled services" addresses this issue. The "unlawful compelled services" provision creates an offense criminalizing those who "obtain or maintain the labor services of a person." Congress should include the House bill's "unlawful compelled services" provision, which removed the need to show "force,

272. WASH. REV. CODE § 9A.44.073 (2010).
274. See OLR RESEARCH REPORT, supra note 270 ("All 50 states have a law that criminalizes sexual conduct involving minors below a specified age, other than his or her spouse.").
275. H.R. 3887, 110th Cong. § 221(b) (2007).
276. Compare Trafficking Victims Protection Act, 22 U.S.C. § 7102(8)(A) (2009) ("Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age."), with Trafficking Victims Protection Act, 22 U.S.C. § 7102(8)(B) (2009) ("The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery.") (emphasis added)); see also Lopiccolo, supra note 12, at 862–63 (discussing the requirement to show "force, fraud, or coercion" in involuntary servitude cases, but not in sex trafficking for those under eighteen).
277. See Lopiccolo, supra note 12, at 862–63 and accompanying text.
278. See id. and accompanying text.
281. Id.
282. Id.
fraud, or coercion," but narrowly tailor the provision to children, particularly unaccompanied minors who have to fight their own legal battles.  

Narrowly tailoring the prostitution and the unlawful compelled services provisions to focus on children does not overreach Congress’ powers. The Thirteenth Amendment states, "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." Prostitution and the compelled services of children clearly fall within this definition. Coercion is already presumed in the sex trafficking of children, and children are vulnerable to trafficking into labor and services even in the absence of force.  

Congress certainly has the power to regulate human trafficking, including the prostitution and compelled services of children, through the Commerce Clause. This Note’s proposal would not create a conflict between the state and federal governments with respect to Congress’ valid exercise of its interstate commerce power. The Constitution grants Congress power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court has recognized that the Commerce Clause grants Congress the power to regulate three types of activities: (1) the use of channels of interstate or

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283. See supra Part III.A (discussing the issues unaccompanied minors face in the legal proceedings).
285. See Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 15 ("In the United States, constitutional equality encompasses equal protection of the laws under the Fourteenth Amendment and freedom from slavery or involuntary servitude under the Thirteenth Amendment. Prostitution implicates both.").
286. See Letter from Brian A. Benczkowski, supra note 235 (discussing how "coercion is presumed" in the sex trafficking of children).
287. See Bump, supra note 95, at 73–74 ("The particular vulnerability of child victims, related to bio-physiological, social, behavioral, and cognitive phases of the maturation process, distinguishes them from adult victims and underscores the necessity of special attention to their particular needs."); see also McClain, supra note 26, at 583–84 (explaining how some families send their daughters into prostitution as a means of survival and others pride their daughters being sold into prostitution because it is a symbol of their daughter’s loyalty and beauty).
289. U.S. CONST. art. 1, § 8, cl. 3.
foreign commerce, (2) instrumentalities of interstate commerce, and (3) activities that affect interstate commerce.290

The regulation of persons trafficked for the purposes of prostitution and compelled services are certainly activities affecting interstate commerce.291 Ever since Wickard v. Filburn,292 in 1942, the Supreme Court has been consistently willing to apply the aggregation principle for the purposes of delineating the scope of congressional power under the Commerce Clause.293 Those activities, which—though perhaps individually not economically significant—when taken together have a substantial effect on interstate commerce and are legitimate subjects for federal legislation.294 In Wickard, the Court stated, "even if appellee’s activity [is] local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" regardless of whether the economic effect is direct or indirect.295 Human trafficking is one of the fastest growing industries in the world.296 It is undisputable that the

290. See Perez v. United States, 402 U.S. 146, 150 (1971) (describing the three categories which the Commerce Clause reaches).

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnapped. Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce.

Id.

291. See Mariconda, supra note 267, at 153 ("Currently, human trafficking is the third largest criminal industry in the world behind drug and arms trafficking, generating approximately $9.5 billion in profit annually.").


293. See id. at 124 ("[T]he reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.").

294. See id. at 125 (describing the broad range of activity that may be reached by Congress).

295. See id. and accompanying text.

296. See Lopiccolo, supra note 12 and accompanying text.
principal driving force behind human trafficking is money, and according to the U.S. Federal Bureau of Investigation, trafficking results in an estimate of $9.5 billion in annual revenue.

Although most states regulate prostitution through state laws, this legislative activity does not preclude the federal government from also regulating the prostitution that results from human trafficking. The trafficking that Congress is concerned with involves persons coming across the United States’ border, which states are ill-prepared to handle. Such human trafficking is an important federal issue. The federal government should mount a strong front through adoption of a narrowly tailored statute patterned after H.R. 3887, as suggested by this Note.

IV. Conclusion

Human trafficking of children is a heinous crime and children are more vulnerable to the lure of trafficking than adults. Unfortunately, some children are forced across the borders without the guardianship of their parents and must face their situation alone. The passage of the Reauthorization Act of 2008 focuses primarily on the perils of unaccompanied minors through its protection and prevention efforts.

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297. See The Ongoing Tragedy of International Slavery and Human Trafficking: An Overview: Hearing Before the Subcomm. on Human Rights and Wellness of the Comm. on Gov’t Reform, 108th Cong. 2 (2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid =f:93282.pdf (“Because of this crime’s enormous profitability, slaveholders will stop at nothing to traffic as many slaves as possible.”).


299. Id.

300. Id.


303. Id.

304. See supra Part III.A (explaining the protection prong of the TVPA and how the Reauthorization Act of 2008 addressed it).
The Act fails, however, to address stronger prosecution efforts. As a result of controversy, Congress steered clear of making any real progress against the prosecution of traffickers in children. This Note has proposed narrowly tailoring the former House bill, H.R. 3887, to expand sex trafficking to include the prostitution of children, to punish those engaged in the sex trafficking of children regardless of whether the trafficker was aware of the child’s age, and to narrowly tailor its unlawful compelled services provision to children. By adopting this narrowly tailored revision of the original House bill, H.R. 3887, the "three Ps" of the TVPA would be satisfied: unaccompanied trafficked child victims would be protected; trafficking of the child would be prevented; and most importantly, her traffickers would be prosecuted.

305. See supra Part III.B (explaining the prevention prong of the TVPA and how the Reauthorization Act of 2008 addressed it).

306. See supra Part III.C (explaining the Reauthorization Act of 2008’s failure to address the prosecution prong of the TVPA).

307. Id.

308. See supra Part III.C.1 (discussing this Note’s proposal of a narrowly tailored House bill to address prosecution prong of the TVPA).