

## COMMENT

### HALTING MODERN SLAVERY IN THE MIDWEST: THE POTENTIAL OF WISCONSIN ACT 116 TO IMPROVE THE STATE AND FEDERAL RESPONSE TO HUMAN TRAFFICKING

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The burgeoning global industry of human trafficking is now active in the midwestern United States. In 2008, Wisconsin passed legislation to criminalize this modern form of slavery, joining over forty other states. Yet both federal and state human-trafficking laws have remained virtually unused in Wisconsin, thus having minimal impact on the problem locally. Like many states, Wisconsin must improve its anti-trafficking law in order to successfully reduce human trafficking. Inadequate state legislation prevents identification of trafficking situations, appropriate allocation of state resources, prosecution and punishment of traffickers, and protection of human-trafficking victims.

This Comment explores ways to increase the potential usefulness of Wisconsin's new anti-trafficking law. It analyzes Wisconsin Act 116 in comparison with existing federal and international laws and model state laws, proposing three areas of improvement for the statute. The first key area is providing better definitions for each element of the crime. Second, the Wisconsin legislature should remove the words "without consent" from the definition of trafficking activities. The law already requires proof that the trafficker used coercion, thereby differentiating willing participants from trafficking victims. Removing the nonconsent element would draw the focus back from the victim to the perpetrator, and remove an unnecessary obstacle to prosecution. Finally, Wisconsin should mandate funding for essential state anti-trafficking initiatives such as victim services, law enforcement training, public education, and further research on the trafficking problem.

Introduction.....	1392
A. Human Trafficking: The Scope of the Problem in the Midwest .....	1392
B. The Need for State Laws to Supplement Federal Law ....	1396

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C. How Wisconsin’s Law Can Make a Better Contribution .	1400
I. Background .....	1401
A. Goals and Models of Anti-Trafficking Legislation .....	1401
B. The Provisions of Wisconsin Act 116 .....	1403
1. Criminalization and Elements of the Crime.....	1403
a. Actions and Purposes that Constitute Trafficking.	1404
b. Means of Coercion and the Consent Question ....	1406
2. Prevention of Trafficking and Protection of Victims .	1408
II. Improving Wisconsin Act 116’s Definitions .....	1410
A. Actions: Supplementing Federal Definitions .....	1411
B. Means: Defining Means of Trafficking.....	1412
C. Purpose: Defining “Sexually Explicit Performance” for Minors .....	1413
III. Removing the Nonconsent Element .....	1414
A. History and Context: Reconsidering the Nonconsent Requirement.....	1414
1. Problems with the Wisconsin Law’s Available Definitions of Consent .....	1415
2. Difficulties with Psychological Coercion.....	1417
3. Consent Language as an Obstacle in Prosecution .....	1419
4. A Minefield of Contentious Issues .....	1421
a. Smuggling and Consent .....	1421
b. Prostitution and Exploitation.....	1422
B. Nonconsent and Legislative Intent.....	1423
1. Exploitation as the Differentiating Factor .....	1424
2. Pitfalls of the Current Version .....	1424
3. Toward a Victim-Centered Law .....	1425
V. Funding for Anti-Trafficking Measures .....	1427
A. Victim Services .....	1428
B. Training Law Enforcement and Educating the Public .....	1430
C. Reporting and Research.....	1432
Conclusion.....	1433

## INTRODUCTION

### *A. Human Trafficking: The Scope of the Problem in the Midwest*

In May 2006, a Wisconsin couple was convicted on human-trafficking charges for holding a Philippine woman as their domestic servant through the use of physical restraint and threats of serious

harm.<sup>1</sup> Jefferson and Elnora Calimlim were both doctors and lived in a million-dollar home in Milwaukee.<sup>2</sup> For nineteen years, they forced Irma Martinez to stay in their basement and carry out housekeeping, childcare, and other duties.<sup>3</sup> Over the entire nineteen years, they sent her family a total of about \$19,000 while she worked sixteen hours a day, seven days a week, including most holidays.<sup>4</sup> Like many victims of human trafficking, the teenaged Martinez badly needed work, and initially agreed to come to the United States with her traffickers when they promised her employment.<sup>5</sup> But when she arrived, they stripped her of her travel documents and held her in involuntary servitude through various threats, promises of a green card, and other forms of coercion.<sup>6</sup>

Trafficking in persons for forced labor or sex work, often described as modern slavery, is alive and well in the midwestern United States.<sup>7</sup> The problem of human trafficking is increasingly urgent, even in states without large metropolitan centers or well-established international communities.<sup>8</sup> In Wisconsin alone, a recent survey shows as many as 200 trafficked persons have come into contact with service providers (such as domestic-violence shelters, organizations assisting victims of sexual assault, and child protection services) and the judicial

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1. *United States v. Calimlim*, 538 F.3d 706, 708–09 (7th Cir. 2008); *Wisconsin Couple Convicted on Human Trafficking Charges*, U.S. NEWSWIRE, May 26, 2006.

2. Vikki Ortiz, *Maid Lived 20 Years in Quiet Struggle*, MILWAUKEE J. SENTINEL, Jan. 14, 2007, at 1A.

3. *Id.*; *Wisconsin Couple Convicted*, *supra* note 1.

4. *Calimlim*, 538 F.3d at 708–09.

5. *Id.* at 708.

6. *Id.* at 708–09; Ortiz, *supra* note 2.

7. John Tanagho, Comment, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with its Federal and State Counterparts*, 38 LOY. U. CHI. L.J. 895, 895, 900 (2007). Secretary of State Hillary Clinton referred to a newly discovered “scheme to enslave foreign workers as laborers for hotels and construction sites in 14 Midwestern states” as she unveiled the 2009 Trafficking in Persons Report. *Remarks at Release of Ninth Annual Trafficking in Persons Report Alongside Leaders in Congress*, STATES NEWS SERV., June 16, 2009. Recently, a Wisconsin native made headlines when federally prosecuted for running a “brutal” trafficking prostitution ring nationwide. John Diedrich, *Ex-Milwaukeean Charged with Brutal Sex Trafficking*, MILWAUKEE J. SENTINEL, Aug. 4, 2009, at 1A.

8. *See Remarks at Release of Ninth Annual Trafficking in Persons Report*, *supra* note 7 (referencing recently discovered midwestern human-trafficking scheme). A recent Ohio task force report indicated 1,000 American-born children and 800 immigrants are enslaved in that state every year, due to its weak anti-trafficking law and growth in its international community. Matt Leingang, *Report: Hundreds Forced into Labor, Sex in Ohio*, ABCNEWS.COM, Feb. 11, 2010, <http://abcnews.go.com/US/wireStory?id=9803637>.

system.<sup>9</sup> The survey, which is the only data available on the scope of the problem to date, indicates trafficking occurs in both urban and rural parts of the state.<sup>10</sup> Considering that human trafficking has yet to find a place on the “radar screen” of the state’s law enforcement,<sup>11</sup> the identification of hundreds of possible victims already encountered *before* training or legislation in Wisconsin indicates a significant presence of the industry in that state.<sup>12</sup>

Limited understanding and experience with the definition of human trafficking seriously lowers the visibility of this problem in Wisconsin.<sup>13</sup> In the aforementioned study, Wisconsin justice system agencies estimated the number of “human trafficking” cases they had encountered.<sup>14</sup> They then estimated how many cases involved “commercialized sex with elements of force or forced labor,” a definition taken from federal anti-trafficking law.<sup>15</sup> The estimates were almost 3.5 times higher with this definition.<sup>16</sup> Federal law defines trafficking in persons to include various forms of involuntary servitude.<sup>17</sup> As federally defined, “severe” cases involve “adult commercial sex with elements of force, fraud or coercion[;] minors engaged in commercial sex[;] and labor/services under force, fraud or

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9. This figure is based on a survey conducted by an independent state agency. WIS. OFFICE OF JUSTICE ASSISTANCE, HIDDEN IN PLAIN SIGHT: A BASELINE SURVEY OF HUMAN TRAFFICKING IN WISCONSIN 1 (2008), *available at* [ftp://doafpt04.doa.state.wi.us/doadocs/Human\\_Trafficking\\_Report\\_Final.pdf](ftp://doafpt04.doa.state.wi.us/doadocs/Human_Trafficking_Report_Final.pdf).

10. *Id.* It has so far been impossible to estimate the relative depth of the problem in Wisconsin. According to officials involved in drafting Wisconsin Act 116 (codified at WIS. STAT. § 940.302), this survey shows the problem exists, but gives “no idea” of the relative severity of the trafficking problem compared with other states. Telephone Interview with Jeff Greipp, Assistant District Attorney for Milwaukee County, Captain of Domestic Violence Unit and Office of Justice Assistance VAWA Advisory Committee Member (Dec. 29, 2008).

11. Greipp Interview, *supra* note 10. Marianna Smirnova of the Wisconsin Office of Justice Assistance agrees: “The important thing is to get service providers and law enforcement trained. The majority of them do not know human trafficking is a problem in the state.” Kara Patterson, *Visitors Study Border Safety*, POST-CRESCENT (Appleton, Wis.), Oct. 18, 2008, at A02.

12. OFFICE OF JUSTICE ASSISTANCE, *supra* note 9.

13. From 2000 to 2007, only 7 percent of Wisconsin justice system agencies received any form of training (“training, conference and/or outreach event”) on human trafficking. *Id.* at 14.

14. *Id.* at 6. “Justice system agencies” included district attorney offices and law enforcement agencies. *Id.* at 7.

15. *Id.* at 6, 43.

16. *Id.* at 6.

17. Clare Ribando Seelke & Alison Siskin, *Trafficking in Persons: U.S. Policy and Issues for Congress*, CONG. RES. SERV. REP. & ISSUE BRIEFS, Jan. 1, 2008; *see also* OFFICE OF JUSTICE ASSISTANCE, *supra* note 9, at 43.

coercion.”<sup>18</sup> Once they referenced this definition, Wisconsin justice system agencies reported dealing with up to 122 cases of human trafficking since 2000, while service providers’ low end estimate was 134 cases.<sup>19</sup>

Both federal and state laws against human trafficking are virtually unused in Wisconsin. The extreme rarity of prosecutions and convictions in Wisconsin for trafficking crimes highlights the striking need for an improved response to the problem of trafficking in this state. The *Calimlim* case is the only reported prosecution under trafficking charges in Wisconsin to date.<sup>20</sup> The survey does not indicate that any of the referenced cases were investigated.<sup>21</sup> Only one Wisconsin victim of trafficking had been federally certified to receive protections and services at the time of the survey (April 2007), despite the fact that all victims under the definition in the survey would qualify as victims of *severe* trafficking under federal law.<sup>22</sup>

Modern slavery perpetrates “the most inhuman and degrading treatment imaginable.”<sup>23</sup> As the sponsors pointed out when introducing Wisconsin’s new anti-trafficking law, a distinct criminal identification befits the gravity of such a crime.<sup>24</sup> Human trafficking often involves conduct that falls under other criminal definitions such as kidnapping, false imprisonment, involuntary servitude, fraud, prostitution, or sexual assault. However, trafficking must be defined and addressed separately because it brings together these elements in unique ways.<sup>25</sup>

The significant policy reasons for anti-trafficking laws gain urgency from extremely pressing practical needs. As Wisconsin’s experience demonstrates, criminalization alone is not enough.

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18. OFFICE OF JUSTICE ASSISTANCE, *supra* note 9, at 21, 43.

19. *Id.* at 22. Service provider organizations included Wisconsin Coalition Against Sexual Assault, Wisconsin Coalition Against Domestic Violence, Milwaukee Rescue and Restore Coalition, Sexual Assault Nurse Examiners, and the Department of Health and Family Services’ Family Strengthening Projects, among others. *Id.* at 7.

20. *United States v. Calimlim*, 538 F.3d 706 (2008).

21. OFFICE OF JUSTICE ASSISTANCE, *supra* note 9, at 29–32, 83.

22. *Id.* at 26.

23. Press Release, Wis. State Legislature, Reps. Kessler, Jeskewitz; Sens. Grothman, Cogs to Introduce Anti-Human Trafficking Legislation (Sept. 30, 2007), available at <http://www.legis.state.wi.us/assembly/asm12/news/news/PBAItRevised%20Human%20Trafficking%20press%20release.pdf>.

24. *Id.*

25. The “multi-faceted nature” of human-trafficking activities makes it very difficult to prosecute under other criminal statutes, according to a policy specialist at the Wisconsin Coalition Against Sexual Assault. Francesca Brumm, *New Bill Seeks to Combat Human Trafficking in Wisconsin*, DAILY CARDINAL (Madison, Wis.), Oct. 2, 2007, available at <http://www.dailycardinal.com/new-bill-seeks-to-combat-human-trafficking-in-wisconsin-1.751957>.

Wisconsin law has not produced results against human trafficking in the state,<sup>26</sup> nor will it until the law goes through some important revisions. Wisconsin is one of many states whose lack of effective anti-trafficking laws hobbles federal efforts to crack down on trafficking in persons across state and national borders.

*B. The Need for State Laws to Supplement Federal Law*

The importance of state anti-trafficking laws arises from the severity of the problem of human trafficking and the shortcomings of federal efforts to eradicate it. Both nationally and internationally, the crime of trafficking in persons is attracting greater attention and accelerated countermeasures.<sup>27</sup> This results partly from the large increase in human trafficking, which recently moved from the third- to the second-most profitable illegal enterprise in the world, after trade in drugs.<sup>28</sup> According to the latest estimates, up to twenty-seven million individuals around the globe are currently in a state of enslavement resulting from trafficking.<sup>29</sup> Human trafficking is also one of the fastest-growing illegal industries.<sup>30</sup>

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26. For example, in a recent human-trafficking case, prosecutors initially chose to pursue charges of prostitution across state lines—with lesser penalties—instead of using the new Wisconsin trafficking law. John Diedrich, *Father, Son Charged as Pimps*, MILWAUKEE J. SENTINEL, Jan. 31, 2009, at 3B, available at <http://www.jsonline.com/news/milwaukee/38709522.html>. A father-and-son team held women as young as sixteen in the father's home, using physical violence and threats to force them into prostitution. *Id.* Weeks after the case was opened, the men were charged with violating federal trafficking law. Press Release, U.S. Attorney's Office, Grand Jury Indicts Two Milwaukee Men for Sex Trafficking of Minors (Feb. 26, 2009), <http://milwaukee.fbi.gov/dojpressrel/pressrel09/mw022609.htm>. A plea agreement was reached in which the son pled guilty to one count of sex trafficking of a child. Bruce Vielmetti, *Plea Deal Filed in Father-Son Prostitution Case*, MILWAUKEE J. SENTINEL, Sept. 11, 2009, available at <http://www.jsonline.com/news/crime/59055287.html>.

27. Political momentum behind this issue surged significantly following the passage of U.S. federal anti-trafficking legislation in 2000. Since 2001, the U.S. government has committed more than \$500 million to anti-trafficking measures in over ninety countries. In addition, it created forty-two task forces in twenty-five states and spent \$23 million on domestic anti-trafficking programs. Press Release, Ambassador Patricia P. Brister, United States Representative to the Commission on the Status of Women (Feb. 27, 2008), [http://www.un.org/womenwatch/daw/csw/csw52/statements\\_missions/USA.pdf](http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/USA.pdf).

28. UNITED NATIONS OFFICE ON DRUGS & CRIME, 2007 WORLD DRUG REPORT 3 (2007), available at [http://www.unodc.org/pdf/research/wdr07/WDR\\_2007.pdf](http://www.unodc.org/pdf/research/wdr07/WDR_2007.pdf).

29. Kalen Fredette, *Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation*, 17 CARDOZO J. INT'L & COMP. L. 101, 102 (2009).

30. *Id.*

2009:1391

*Human Trafficking*

1397

Despite the gravity and scope of the problem worldwide, American enforcement efforts against human trafficking are surprisingly low. While federal efforts against drug trafficking have brought down over 2,000 “priority target” narcotics-trafficking organizations since 2001,<sup>31</sup> the U.S. Department of Justice (U.S. DOJ) has convicted only 342 human traffickers since criminalizing human trafficking in 2000.<sup>32</sup> Yearly, human trafficking affects millions of victims,<sup>33</sup> with tens of thousands in the United States.<sup>34</sup> Yet the U.S. DOJ began only 154 new investigations into human-trafficking activity in 2007<sup>35</sup> and 183 in 2008.<sup>36</sup>

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31. The Priority Targeting Program was implemented in 2001; by 2007, 30 percent of these 6,861 targeted organizations were dismantled. *Hearing Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the H. Comm. on Appropriations*, 110th Cong. 121 (2008) (statement of Hon. Michele M. Leonhart, Acting Administrator of the Drug Enforcement Administration), available at <http://www.justice.gov/dea/pubs/cngrtest/ct031208.html>.

32. *Department of Justice Announces Grants to Enhance Efforts to Fight Human Trafficking*, PR NEWSWIRE, Sept. 10, 2008.

33. The number of victims trafficked across international borders is estimated at 600,000 to 800,000 per year. Press Release, U.S. Customs and Border Protection, Dep’t of Homeland Security, CBP, ICE Launch Effort to Raise Awareness of Human Trafficking (Sept. 9, 2008), [http://cbp.gov/xp/cgov/newsroom/news\\_releases/archives/2008\\_news\\_releases/sep\\_2008/09092008.xml](http://cbp.gov/xp/cgov/newsroom/news_releases/archives/2008_news_releases/sep_2008/09092008.xml). However, it is important to note that while this is the most cited number in U.S. discourse, it does not include intra-country victims of human trafficking. Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 631 (2009). The total annual number (accounting for intra-country victims) is from two to four million. *Id.* “Domestic trafficking networks exist in the United States to feed the demand of the commercial sex industry and exploitative labor settings. However, the narrative in the United States on human trafficking suggests that the problem is ‘over there’ . . . [F]ocusing on the international number . . . feed[s] public perception that the problem is elsewhere.” *Id.* at 630–32.

34. Victims trafficked *within* U.S. borders are not counted in any government estimates, which focus on victims brought into the U.S. *See* Todres, *supra* note 33, at 631. The U.S. Department of State provides the figure 14,500–17,000 on its Web site in the section “Human Trafficking and Transnational Organized Crime.” Seelke & Siskin, *supra* note 17, at 18. In 2000, a Central Intelligence Agency-commissioned report estimated that 45,000 to 50,000 trafficking victims are brought to the United States per year, and that number “drove policy debate and law enforcement priorities for years.” Anthony M. Destefano, *Anti-Trafficking Effort Slammed*, NEWSDAY, Aug. 15, 2006, at A14. As far as the extent of trafficking worldwide, the U.S. State Department cites 600,000 as the number of victims trafficked annually; much higher estimates (especially by international bodies) also exist, but hard numbers are very difficult to obtain due to the hidden nature of the crime. Interview with Marianna Smirnova, Program and Planning Analyst, Wisconsin Office of Justice Assistance, VAWA Unit (Dec. 30, 2008).

35. *Department of Justice Announces Grants*, *supra* note 32.

36. Jan Biles, *Trafficking Task Forces Prevailing*, TOPEKA CAPITAL-J., June 27, 2009, available at [http://cjonline.com/news/state/2009-06-27/trafficking\\_task\\_forces\\_prevailing](http://cjonline.com/news/state/2009-06-27/trafficking_task_forces_prevailing).

Congress passed the Victims of Trafficking and Violence Protection Act (“TVPA”) of 2000<sup>37</sup> to remedy the inadequacy of previous U.S. laws applicable to human-trafficking crimes.<sup>38</sup> The TVPA provided more effective prosecution tools, as well as certain types of assistance and protections for trafficking victims.<sup>39</sup> In addition, the TVPA set up preventive measures, such as protocol for monitoring the activities of other countries and penalizing their noncompliance with international mandates for controlling trafficking.<sup>40</sup>

The TVPA facilitated significant improvements in prosecution by removing the need for federal prosecutors to rely on disparate statutes.<sup>41</sup> It also imposed tougher punishment for traffickers commensurate with the seriousness of the crime.<sup>42</sup> The TVPA mandated life imprisonment for trafficking children under fourteen and for causing the death of a trafficking victim, and at least twenty years in prison for trafficking children ages fourteen to eighteen.<sup>43</sup> Further, it allowed for financial remedies: hefty fines, asset forfeiture, and even full restitution paid to victims.<sup>44</sup> These measures reduce the profitability of the crime. Human-trafficking organizations amass millions of dollars a year in assets that may be seized by the government.<sup>45</sup>

Despite the improvements, a huge gap still exists between federal prosecution of human traffickers and the estimated magnitude of the problem.<sup>46</sup> Not only have traffickers gone free, but trafficking victims

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37. The TVPA was just reauthorized for the third time. President Bush signed the 2008 reauthorization, H.R. 7311, on December 23, 2008. *Migration Committee Chairman Lauds Enactment of Anti-Trafficking Legislation*, STATES NEWS SERV., Dec. 23, 2008. See also Trafficking Victims Re-authorization Act of 2005, 22 U.S.C. § 7101 (2006).

38. 22 U.S.C. § 7101(b)(14) (2006); Michael C. Payne, Comment, *The Half-Fought Battle: A Call for Comprehensive State Anti-Human Trafficking Legislation and a Discussion of How States Should Construct Such Legislation*, 16 KAN. J.L. & PUB. POL’Y 48, 50 (2006).

39. Payne, *supra* note 38, at 51.

40. *Id.* at 51–52.

41. Federal prosecutions of human traffickers have increased by at least 300 percent since the 2000 passage of the TVPA. Tanagho, *supra* note 7, at 915.

42. *Id.* at 913–14.

43. Trafficking Victims Protection Act, 22 U.S.C. § 7109(a) (2006).

44. *Id.*

45. Tanagho, *supra* note 7, at 932.

46. Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J.L. REFORM 447, 460 (2005) (stating the “enormous gulf” between the size of the problem and the number of prosecutions shows federal measures have “only touched the tip of the iceberg”). There is such a disparity between the estimates and the number of cases identified and pursued by authorities that some question the estimates, claiming that the problem must be “blown way out of proportion” and that anonymous government sources believed the

have received very little assistance. Only about 1,000 of trafficking have been freed by U.S. law enforcement in the last eight years.<sup>47</sup> Experts, advocates, and scholars have noted that no real headway can be made against the “contemporary slave trade” without intense, coordinated initiatives and funding from federal, state, and local government.<sup>48</sup> The TVPA has drawn criticism for its restrictive definition of human trafficking and the resulting limited implementation of the law.<sup>49</sup>

For all these reasons, federal agencies and Congress have urged states to pass and “aggressively implement” anti-trafficking legislation.<sup>50</sup> Recognizing that state legislation will need more specific parameters to work in conjunction with the federal definition, the U.S. DOJ drafted and promoted a model state law (DOJ model) to facilitate compatible and uniform law throughout the nation.<sup>51</sup> Over forty states have responded to the federal call by passing anti-trafficking legislation.<sup>52</sup>

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methodology for the estimates was unscientific. Jerry Markon, *How Widespread is Human Trafficking?; U.S. Estimates Thousands of Victims, but Efforts to Find Them Fall Short*, WASH. POST, Sept. 23, 2007, at A01. But while exact numbers are elusive, experts and practitioners agree that federal efforts are nowhere near catching up with the incidence of human trafficking. See, e.g., Jini L. Roby et al., *U.S. Response to Human Trafficking: Is it Enough?*, J. IMMIGRANT & REFUGEE STUDS. 508, 508, 522 (2008).

47. Kevin Bales & Steven Lize, *Investigating Human Trafficking: Challenges, Lessons Learned, and Best Practices*, FBI L. ENFORCEMENT BULL., Apr. 2007, at 24, 25.

48. Cynthia Shepherd Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT'L & COMP. L. 503, 504 (2006).

49. Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 943 (2007).

50. U.S. DEP'T OF JUSTICE, ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2005, at 2 (2006).

51. In the “Explanatory Notes: Purposes” section of the Model State Anti-Trafficking Criminal Statute, the U.S. DOJ states that the model law resulted from “a strong need for uniformity in definitions and concepts across state lines to minimize confusion.” DEP'T OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE 7 (2004), available at [http://www.justice.gov/crt/crim/model\\_state\\_law.pdf](http://www.justice.gov/crt/crim/model_state_law.pdf).

52. As of January 2009, seven states plus the District of Columbia still have no anti-trafficking legislation: Alabama, Delaware, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming. Kelly M. Cotter, *Combating Child Sex Tourism in Southeast Asia*, 37 DENV. J. INT'L L. & POL'Y 493, 509 (2009). Alabama, Washington D.C., and Vermont have pending legislation. Vanessa Mizell, *Working to Shed Light on Very Dark Practices*, WASH. POST, Oct. 8, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/07/AR2009100701204.html>; Polaris Project Action Center, *Urge Alabama State Delegates to Support Comprehensive Anti-Human Trafficking Legislation*, Feb. 2, 2010, <http://actioncenter.polarisproject.org/component/content/article/35-action/800-alabama->

Wisconsin finally joined this group when its legislature passed Wisconsin Act 116 (Wisconsin Act).<sup>53</sup> In late 2007, while the Baseline Survey of Human Trafficking in Wisconsin was underway, Representative Sue Jeskewitz proposed anti-trafficking legislation in the Wisconsin Senate.<sup>54</sup> A revised version of the proposal, the Wisconsin Act, went into effect on March 19, 2008.<sup>55</sup>

### *C. How Wisconsin's Law Can Make a Better Contribution*

This Comment explores the potential of Wisconsin Act 116 in comparison with existing anti-trafficking laws, and suggests three areas of improvement for the statute: clarifying definitions, removing the consent language, and mandating funding for anti-trafficking efforts. First, this Comment analyzes the Wisconsin Act in terms of its contributions toward each of the three major prongs of anti-trafficking efforts articulated in the TVPA. This Comment also explores another source of federal language: the model state legislation drafted by the U.S. DOJ. Second, this Comment compares the Wisconsin Act to the United Nations Trafficking Protocol, the first legally binding international instrument on human trafficking with a globally accepted definition of the crime.<sup>56</sup> Finally, it draws on other model state anti-trafficking laws and commentaries created by anti-trafficking service organizations and nonprofits. Particularly helpful are materials by Polaris Project, one of the largest anti-human-trafficking organizations operating on local, national, and international levels.<sup>57</sup>

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state-delegates-to-support-ht-leg; *Vt. Lawmakers Weigh Human Trafficking Bill*, RUTLAND HERALD, Feb. 4, 2010, <http://www.rutlandherald.com/article/20100204/THISJUSTIN/100209970/-1/RSS10>.

53. WIS. STAT. § 940.302 (2007–08).

54. *Statement of Rep. Sue Jeskewitz, Anti-Human Trafficking: Hearing on AB 544 Before the Assembly Comm. on Criminal Justice* (Dec. 5, 2007), available at [http://www.legis.state.wi.us/lc/comtmats/old/07files/ab0544\\_20071207120857.pdf](http://www.legis.state.wi.us/lc/comtmats/old/07files/ab0544_20071207120857.pdf).

55. WIS. STAT. § 940.302 (2007–08) (introduced in 2007 as Senate Bill 292).

56. The U.N. adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, in 2000. It is often referred to as the Trafficking Protocol. It went into effect at the end of 2003, and 110 states had ratified it by 2006. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND ITS PROTOCOLS 41–52 (2004), available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. See also United Nations Office on Drugs and Crime, United Nations Convention Against Transnational Organized Crime and its Protocols, <http://www.unodc.org/unodc/en/treaties/CTOC/index.html> (last visited Oct. 31, 2009).

57. See Polaris: About Polaris Project, <http://www.polarisproject.org/content/view/13/42/> (last visited Jan. 7, 2010). Polaris' model state law was referenced

2009:1391

*Human Trafficking*

1401

Part I of this Comment provides background information regarding national and international standards and context, for reference in analyzing Wisconsin's law. Part II explains that without clarifying certain definitions, the Wisconsin Act will have limited effectiveness. Part III explores the nonconsent element of the crime and its detrimental effect on the statute's potential usefulness. Part IV addresses the necessity of funding to enable progress toward the three goals of anti-trafficking legislation: prevention, protection, and prosecution.

## I. BACKGROUND

*A. Goals and Models of Anti-Trafficking Legislation*

Federal anti-trafficking law provides important criteria to shape and measure state laws. The TVPA's three major prongs are often called the "three Ps": prosecution, protection, and prevention.<sup>58</sup> This also accords with the international community's three-pronged approach expressed in the U.N. Trafficking Protocol.<sup>59</sup> As discussed above, each of these larger aims requires the participation of all U.S. states to make better headway against human trafficking. Accordingly, the "three Ps" serve as guideposts for the goals of state laws, general areas that an anti-trafficking law must address.

Experts emphasize that better contribution to federal efforts requires effective state legislation covering all the "three Ps."<sup>60</sup> With inadequate state laws, state and local enforcement fail to assist federal prosecutions.<sup>61</sup> The federal government is able to bring down large trafficking rings, but is not in the position to locate and identify smaller operations. Doing so requires noticing individual victims hidden in local communities.<sup>62</sup> Because traffickers are adept at hiding victims, local law enforcement or service providers (rather than federal agents) usually encounter victims first.<sup>63</sup> Local law enforcement must serve as

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by the legislators who crafted Wisconsin Act 116. *See* Wis. Legislative Reference Bureau Drafting File, LRB-2066 (2007-08) (on file with author).

58. Kara C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000*, 34 CASE W. RES. J. INT'L L. 45, 53 (2002).

59. Fredette, *supra* note 29, at 112.

60. Greipp Interview, *supra* note 10.

61. *Id.*

62. NORTHEASTERN UNIV. INST. ON RACE & JUSTICE, UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 3 (2008); Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 425 (2006).

63. NORTHEASTERN UNIV. INST. ON RACE & JUSTICE, *supra* note 62.

the eyes and ears for nationwide anti-trafficking efforts. This calls for readiness to look deeper and react accordingly to situations that could, at first, resemble a simple, routine street crime.<sup>64</sup>

State laws also must address the protection of victims, the TVPA's third goal for eliminating human trafficking.<sup>65</sup> Congress's aim here encompasses both human rights and effective prosecution.<sup>66</sup> Identifying and successfully prosecuting traffickers requires heavy reliance on testimony from victims who have endured various kinds of humiliation, coercion, threats, and abuse.<sup>67</sup> Unless a victim can access reliable protection for herself and her family, the real threat of retaliation is likely to make her hesitate to assist investigation and prosecution efforts against traffickers.<sup>68</sup> While the TVPA establishes victim protections and essential services, they have proven difficult to access for most victims discovered by and cooperating with state and local officials, rather than federal agents.<sup>69</sup> State anti-trafficking legislation that provides local services and access to federal services will ensure more victims receive the necessary assistance.

Finally, prevention and deterrence of human trafficking are key to successful state anti-trafficking legislation.<sup>70</sup> Lack of uniformity in laws across the nation weakens the deterrent effect of criminalization. That is, states without anti-trafficking laws risk becoming "safe havens" for traffickers, due to lack of local agents with the necessary tools to investigate and prosecute them.<sup>71</sup>

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64. *Id.*

65. Payne, *supra* note 38, at 51. Congress indicated this in the Findings section of the TVPA. 22 U.S.C. § 7101(b)(24) (2006).

66. § 7101(b)(24).

67. Richard, *supra* note 46, at 462 (explaining that trafficking victims "have complex immigration, medical, psychological, social service and legal needs that states must meet in order to effectively address the human trafficking problem"). See also David Segal & Edith Ajello, *Criminalizing Prostitution Will Make Things Worse*, PROVIDENCE J.-BULL., July 21, 2009, at 6 (stating that a trafficking victim "would likely be traumatized, poor, of foreign origin, limited in English language skills, and with an over-worked public defender as her only guide to the legal system").

68. Richard, *supra* note 46, at 462. As one victim psychologist put it, "[i]f that trafficker is not in jail or dead, there's always a chance he or she will hurt [the victim], . . . [the trafficker] says, 'You can run, but you can't hide from me. I will find you and I will kill your family.'" Laura Bauer, *Sex Slaves Often Victimized Twice in U.S. Trafficking War*, KANSAS CITY STAR, Dec. 14, 2009, available at <http://www.mcclatchydc.com/crime/story/80588.html>.

69. Richard, *supra* note 46, at 462.

70. States with lower penalties may draw trafficking operations to their jurisdiction. POLARIS PROJECT, TOP 15 PROBLEM AREAS IN STATE BILLS ON TRAFFICKING IN PERSONS (2006), available at <http://www.polarisproject.org/images/docs/Top%2015%20Problem%20Areas%20in%20State%20Bills%20on%20Trafficking.pdf>.

71. *Id.*

*B. The Provisions of Wisconsin Act 116*

The strengths and weaknesses of the Wisconsin Act are highlighted by similarities to and differences from the sources already introduced. This Section gives a larger context for the Wisconsin Act by describing its provisions with reference to these other sources, with special attention to the “three Ps” targeted by the TVPA. Prosecution is the prong addressed most thoroughly by the Wisconsin Act, but it also makes certain provisions for prevention and protection.

## 1. CRIMINALIZATION AND ELEMENTS OF THE CRIME

In defining and punishing human trafficking, the Wisconsin Act closely follows the TVPA’s tripartite definition. The three parts of the definition are *actions* that may constitute trafficking, *purposes* that make those actions trafficking, and *means* used to accomplish the purpose.<sup>72</sup> Also, the Wisconsin Act sets up two separate human-trafficking statutes, one for adult victims and one for children.<sup>73</sup> The penalties are stiffer for trafficking children, and no form of force or coercion is included in the definition of child sex trafficking.<sup>74</sup> Similar to the statutory rape law,<sup>75</sup> a minor cannot consent to involvement in trafficking for sexual exploitation.<sup>76</sup> Essentially, this means the two statutes for adults and minors share similar *action* and *purpose* elements, while the use of coercive *means* is irrelevant when the victim is a minor.

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72. 22 U.S.C. § 7102 (2006); WIS. STAT. § 940.302 (2007–08). In the 2008 Trafficking in Persons Report, the U.S. Department of State clarified the definition of human trafficking with a chart dividing “criteria” into “process, means, and goal,” which correlate with what I call actions, means, and purpose. Under the chart it states “if one condition from each category is met, the result is trafficking. For adults, victim consent is irrelevant if one of the [coercive] Means is employed. For children consent is irrelevant with or without the Means category.” U.S. Department of State, Trafficking in Persons Report, Human Trafficking Defined, June 4, 2008, <http://www.state.gov/g/tip/rls/tiprpt/2008/105487.htm>.

73. WIS. STAT. §§ 940.302, 948.051 (2007–08).

74. § 948.051.

75. WIS. STAT. § 948.01 (2007–08) (definitions); § 948.02 (2007–08) (sexual assault of a child), § 948.09 (2007–08) (sexual intercourse with a child age 16 or older).

76. Polaris Project identifies this as a common problem in state anti-trafficking laws. POLARIS PROJECT, *supra* note 70. It is unclear why some states do not specify the incapacity of a child to consent, as recognized in federal and international definitions.

*a. Actions and purposes that constitute trafficking*

The TVPA defines only “severe forms” of trafficking in persons.<sup>77</sup> The actions that constitute severe trafficking include: (1) sex trafficking (inducement of a commercial sex act) through force, fraud or coercion; (2) sex trafficking of minors; and (3) involvement in subjecting someone to involuntary servitude through force, fraud or coercion.<sup>78</sup> For the purposes of labor exploitation—the third category—proscribed actions are to recruit, harbor, transport, provide, or obtain a person.<sup>79</sup> The inclusion of both sexual servitude and forced labor is key in all modern definitions of human trafficking.

Like the TVPA, the Wisconsin Act defines the *action* of human trafficking to include both sex and labor exploitation.<sup>80</sup> The Act also includes a comprehensive *purpose* element that encompasses both labor and sex trafficking, mirroring the TVPA’s definition.<sup>81</sup> The DOJ model state law is not as clear as the Wisconsin Act in this respect, because it does not separate out the actions from the purposes that constitute trafficking.

The Wisconsin Act limits its definition of sex trafficking to “commercial sexual acts,” so in crimes against adults it would not include sexually explicit performance.<sup>82</sup> Including both types of sexual exploitation (no matter the age of the victim) would be more comprehensive,<sup>83</sup> but the Wisconsin Act does include performance in

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77. The TVPA defines “severe forms of trafficking” in 22 U.S.C. § 7102(8) and “sex trafficking” in § 7102(9). Although it gives no general trafficking definition, the use of general terms like “trafficking” in parts of the law is intended to have broader application than the “severe trafficking” definition. Victims of Trafficking and Violence Protection Act, H.R. CONF. REP. NO. 106-939 (2000), *reprinted in* 2000 U.S.C.C.A.N. 1380, 1381–83.

78. 22 U.S.C. § 7102(8) (2006).

79. *Id.*

80. WIS. STAT. § 940.302 (2007–08).

81. WIS. STAT. § 940.302(2)(a)1 (2007–08). According to critics, some state laws have criminalized only sex trafficking, or only trafficking of minors. *See* POLARIS PROJECT, *supra* note 70. Wisconsin avoids this mistake.

82. WIS. STAT. § 940.302(1)(a) (2007–08). Just as in its sexual assault law, Wisconsin defines “commercial sex act” as a sex act for which “anything of value” (not just money) is exchanged or promised. *Id.* This is the language recommended by Polaris. POLARIS PROJECT, *supra* note 70.

83. POLARIS PROJECT, *supra* note 70. The Illinois law, recognized as one of the most comprehensive state laws and referenced by the Wisconsin Legislature in writing our law, includes both “commercial sexual activity” and “sexually explicit performances” as “forms of services” constituting “forced labor or services” in the definition of trafficking. H.B. 1469 § 10A-5(8), 94th Gen. Assem., 2005–06 Sess. (Ill.) (defining services); § 10A-10(a) (defining involuntary servitude). *See* Wis. Legislative Reference Bureau Drafting File, *supra* note 57.

the definition for crimes against children.<sup>84</sup> There is, however, no definition of “sexually explicit performance” in the statute.<sup>85</sup>

While the Wisconsin Act defines some terms by borrowing from the TVPA and the DOJ model, it leaves certain key terms inadequately defined. Some of these undefined terms have counterpart definitions available in the federal or model law, and some are not defined in current federal language or practice. The only terms defined in the Wisconsin Act relevant to trafficking crimes are: “debt bondage,” “commercial sex act,” and “services.”<sup>86</sup> Furthermore, the Wisconsin Act defines one of these terms differently than the TVPA, suggesting the legislature did not intend to adopt the federal definitions for all terms.<sup>87</sup> This hints at the insufficiency of federal interpretation and case law to assist prosecutors to apply these terms.<sup>88</sup>

In general, like many states, Wisconsin now has a strong criminal statute that furthers the first “P” of anti-trafficking efforts, prosecution. The Wisconsin Act makes human trafficking of adults a Class D felony, and trafficking of minors a Class C felony.<sup>89</sup> It provides maximum sentences commensurate with the sentences mandated for these crimes by the TVPA.<sup>90</sup> It enhances the penalty for trafficking of minors, which will apply to any minor involved in commercial sex.<sup>91</sup> It also makes it a

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84. WIS. STAT. § 948.051 (2007–08).

85. In the legislative history record, the copy of the first preliminary draft (P1) of the statute has “commercial sex acts” and “sexually explicit performance” underlined by hand, with a handwritten note underneath: “definitions,” and in the margin, “follow Polaris model.” The Polaris model law is in the file, indicating it was referenced by the legislators and drafters. It is unclear from the record who made this notation (presumably a drafter in conference with the legislators who requested the draft). Beginning in the next draft (P2), “commercial sex acts” in § 948.051(1) is defined by reference to § 940.302(1), but a “sexually explicit performance” definition was never added. *See* Wis. Legislative Reference Bureau Drafting File, *supra* note 57.

86. WIS. STAT. § 940.302 (2007–08).

87. The Wisconsin Act’s definition of “debt bondage” does not include the pledge by a debtor of services of “a person under his or her control,” but only the pledge of a debtor’s own services, as a security for debt. WIS. STAT. § 904.302(1)(b) (2007–08). The TVPA, by contrast, includes the pledge by a debtor. There are numerous other differences in the language although some parts of the definition closely mirror each other. 22 U.S.C. § 7102(4) (2006).

88. *See infra* Part II.

89. WIS. STAT. §§ 940.302(2)(a), 948.051(1), (2) (2007–08). Prison time for a Class C felony is up to 25 years, and for a Class D felony it is up to 15 years. WIS. STAT. § 973.01(2)(b)3, 4.

90. According to Polaris (among others) this is important in accordance with the gravity of the crime, and also for avoiding a “safe haven” for traffickers. POLARIS PROJECT, *supra* note 70.

91. WIS. STAT. §§ 939.615(1)(b)1 (lifetime supervision of serious sex offenders) and 939.62(2m)(a)1m.a (increased penalty for habitual criminality) are amended by the Act to include § 948.051, child trafficking.

crime not only to engage in trafficking, but to benefit from it.<sup>92</sup> The Wisconsin Act's business provisions strike at the support structure of trafficking by business entities. If a business profits from trafficking it is subject to penalties, although not explicit criminal liability.<sup>93</sup> The Wisconsin Act's criminal punishment provisions are in line with federal and expert recommendations and guidelines.

*b. Means of coercion and the consent question*

The Wisconsin Act encompasses several means of accomplishing trafficking crimes, including psychological coercion.<sup>94</sup> Importantly, this broadens the means of control beyond simply physical bondage in order to recognize that different behaviors can be "coercive" for the purposes of committing this crime.<sup>95</sup> In fact, Wisconsin's list of means is more comprehensive than that of the DOJ model.<sup>96</sup>

Wisconsin's definition of means parallels the role of coercion in the TVPA's trafficking definition, but with a twist. Coercion is defined in the TVPA to include threat of serious harm or physical restraint; a "scheme, plan, or pattern" used to make someone fear serious harm or physical restraint; or abuse of or threat to abuse the legal process.<sup>97</sup> But the Wisconsin Act's definition, unlike the TVPA or the DOJ model, adds "without consent of the individual."<sup>98</sup> There are two places in the Wisconsin Statutes that define "consent" and "without consent": the general criminal code and the sexual assault statute.<sup>99</sup> The general

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92. WIS. STAT. § 940.302(2)(b) (2007-08).

93. Sections 11-19 of the Wisconsin Act amend chapters 178-181 of the Wisconsin Statutes to include trafficking as a crime triggering revocation of a foreign business license or the dissolution of partnerships or corporations.

94. WIS. STAT. § 940.302(2)(a)2 (2007-08).

95. POLARIS PROJECT, *supra*, note 70.

96. The DOJ model lists the activities that are either benefited from or done to a person "intending or knowing that the person will be subjected to forced labor or services." The "forced" aspect is subsumed into the criminal definition of involuntary servitude in a list of means used to obtain labor or services: physical harm or restraint, abuse of legal process, confiscation or destruction of travel documents, or financial control. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, *supra* note 51, at § XXX.02(1), (3).

97. 22 U.S.C. § 7102(2) (2006).

98. In the legislative history record, the copy of the first preliminary draft (P1) of the statute has "without the consent of the individual" stricken by hand, with a handwritten note to replace the words with "for the purpose of commercial sex acts or labor or services," and a margin note: "restructure- see Polaris." The Polaris model law is in the file, indicating it was referenced by the legislators and drafters. It is unclear from the record who made this notation (presumably a drafter in conference with the legislators who requested the draft) and why the change was never made in any subsequent drafts. *See* Wis. Legislative Reference Bureau Drafting File, *supra* note 57.

99. *See infra* notes 160-163 and accompanying text.

definition applies to the human-trafficking law because it applies to all statutes in chapter 940.<sup>100</sup> But neither definition sufficiently indicates how this element should be interpreted or applied in the context of human trafficking.

Internationally, consideration of consent is distinct from establishing coercion in anti-trafficking law. In contrast to earlier U.N. definitions,<sup>101</sup> by the current U.N. Protocol definition there can be no valid consent to trafficking.<sup>102</sup> Consensual, illegal assisted migration falls under the U.N. definition of smuggling,<sup>103</sup> so trafficking is distinguished by the characteristic of exploitation. This treatment of consent in the Protocol definition emerged as a compromise from serious controversy among participating nations.<sup>104</sup> Consent has proven a particularly thorny question in shaping coercion as an element of human trafficking, both because it defies easy definition and because it inspires intractable policy disagreements.

The U.S. Department of State's Web site, in a section on the 2008 *Trafficking in Persons Report*, defines human trafficking such that the use of coercive means makes victim consent irrelevant, quoting the U.N. Protocol.<sup>105</sup> However, in application, the TVPA narrows the international (U.N. Protocol) definition by including the consent consideration. The TVPA's text includes a significant contribution to the evolution of the national response to human trafficking in that it expands the means of coercion to include psychological methods of control.<sup>106</sup> Yet federal prosecutions have had such difficulty with its "force, fraud, or coercion" element—interpreted to include the lack of

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100. WIS. STAT. § 939.22 (2007–08) introduces the general definitions with this preface: "In chs. 939 to 948 and 951, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction or the word or phrase is defined in s. 948.01 for purposes of ch. 948."

101. Theresa Barone, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT'L. & COMP. L.J. 579, 589 (2003).

102. "The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used." UNITED NATIONS, PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS (2000), available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_traff_eng.pdf).

103. The Protocol Against the Smuggling of Migrants by Land, Air, and Sea went into effect in early 2004. Like the Trafficking Protocol, it was the first internationally agreed definition of the crime. United Nations Office on Drugs and Crime, *supra* note 56.

104. See *infra* notes 193–195 and accompanying text.

105. See Trafficking in Persons Report, *supra* note 72.

106. Kim, *supra* note 49, at 962–63.

consent—that a new version of the TVPA was proposed in 2007 with the consent question removed.<sup>107</sup> The reauthorization bill proposed that the means used to procure labor or services (fraud, coercion, or force) become penalty enhancers rather than elements of the crime.<sup>108</sup> However, the 2007 bill died after passing the House of Representatives.<sup>109</sup> The version reintroduced in December 2008 restored the “force, fraud, coercion” element of the crime.<sup>110</sup> The 2007 version would have probably prompted a new DOJ model, possibly spurring revision of state laws following its approach to consent.

The DOJ model’s treatment of consent has influenced many states to require proof of lack of consent,<sup>111</sup> even though the model itself does not do so. The model defines trafficking as forced labor or services “obtained *or maintained*” through threats, force, abuse of legal process, confiscation of identification documents, etc.”<sup>112</sup> Theoretically, this language leaves room for fine distinctions recognizing that *initial* consent does not preclude *subsequent* exploitation, but states such as Wisconsin have not made such distinctions explicit in their laws—and more importantly, in applying them.<sup>113</sup>

## 2. PREVENTION OF TRAFFICKING AND PROTECTION OF VICTIMS

The Wisconsin Act takes certain measures toward victim protection. It gives victims an affirmative defense to prosecution for illegal acts committed “as a direct result of” the trafficking situation.<sup>114</sup> It also provides for court-ordered restitution to victims, and in some

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107. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (1st Sess. 2007); Statement to the New York City Council (June 11, 2008) (Jessica Neuwirth, President, Equality Now), *available at* [http://www.equalitynow.org/english/pressroom/press\\_releases/presidentstatement\\_2008\\_0613\\_en.html](http://www.equalitynow.org/english/pressroom/press_releases/presidentstatement_2008_0613_en.html).

108. H.R. 3887, § 221.

109. H.R. 3887: William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h110-3887>.

110. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2d Sess. 2008); *Migration Committee Chairman Lauds Enactment*, *supra* note 37.

111. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, *supra* note 51, at § XXX.01(4) (definition of forced labor or services), § XXX.02(3) (criminalization of trafficking for forced labor or services).

112. *Id.* (emphasis added).

113. As with the federal language, arguably the Wisconsin law would technically allow for a broad understanding of circumstances invalidating consent, but practically this is too constrictive for reasons discussed further *infra* Part III.A.1.

114. Amendment to WIS. STAT. ANN. § 939.46(1m) (West Supp. 2009). Victim immunity is lacking in some state legislation. POLARIS PROJECT, *supra* note 70.

cases, restoration such as psychological services.<sup>115</sup> It includes victims of trafficking in Wisconsin's Crime Victim Compensation Program.<sup>116</sup> Finally, it creates a private right of civil action against the trafficker on the part of the victim.<sup>117</sup>

The Wisconsin Act does not, however, mandate funding for victim services and protections, nor require that officials assist victims to access federal programs.<sup>118</sup> The TVPA protects and benefits victims of human trafficking, and funds both federal and local programs with grants.<sup>119</sup> Federal funding for anti-trafficking measures has not been lacking, but there have been serious problems with the accessibility of services and benefits.<sup>120</sup> Victims must rely on supplemental state laws providing local services and access to federal programs. The Wisconsin Act merely allows that the Department of Health and Family Services "may provide or fund emergency services or assistance" for trafficking victims, subject to the availability of funds, until after the trial is over (or up to sixty days for victims who do not serve as witnesses).<sup>121</sup>

A key tool for prevention—reporting requirements—is also missing from the Wisconsin Act as it was removed by a Senate amendment before passage.<sup>122</sup> Reporting is a component of effective anti-trafficking law usually bundled with funding for victim services and protections. The Wisconsin Act departs in this sense from the DOJ model. The DOJ model includes provisions that require the state Attorney General to issue a report on what the state needs to respond to trafficking and provide victim assistance.<sup>123</sup> The model also requires reporting on the interplay of state programs with federally funded programs for victims.<sup>124</sup> Thus, like many states, Wisconsin's law is more thorough

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115. Amendments to WIS. STAT. ANN. § 973.20(4) (West Supp. 2009). The Polaris standard includes greater detail in restitution and asset forfeiture. POLARIS PROJECT, *supra* note 70.

116. Amendment to WIS. STAT. ANN. § 948.13(1)(b) (West Supp. 2009). This was also recommended by Polaris. POLARIS PROJECT, *supra* note 70.

117. WIS. STAT. ANN. §§ 940.302(3), 948.01(3) (West Supp. 2009).

118. Wisconsin Anti-Trafficking Legislative Work Group, Minutes of Meeting (Feb. 2, 2007) (noting the need for these measures). The group probably opted to leave them out because "a lot of the protective and service-related provisions have budget implications, and the more costly they are, the less likely it is they will be passed." *Id.*

119. 22 U.S.C. § 7105(b)(2) (2006).

120. Congress recognized in the 2003 TVPA findings that victims faced "unintended obstacles" in accessing assistance, particularly immigration benefits, granted by the original TVPA. 22 U.S.C. § 7101(3) (2006).

121. WIS. STAT. § 250.04(14)(a) (2007–08).

122. Wis. Legislative Reference Bureau Drafting File, Senate Amendment 1 to LRBa1201 (adopted Feb. 26, 2008).

123. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, *supra* note 51, at § (B)(1).

124. *Id.*

with regard to the first goal of anti-trafficking legislation (prosecution) than the other two (protection and prevention).

## II. IMPROVING WISCONSIN ACT 116'S DEFINITIONS

Clearer, more useful definitions would make the Wisconsin Act a better tool against human trafficking in Wisconsin.<sup>125</sup> Unclear definitions hamper successful investigation, prosecution, and conviction for several reasons. A better statewide response requires the clarification of legislative intent through more specific definitions of each action constituting trafficking.

First, unclear definitions prevent officers from identifying trafficking situations. Without a clear understanding of what activities may constitute trafficking, it is nearly impossible for local law enforcement to view familiar problems and crimes—such as prostitution—from an entirely new perspective (for example, a prostitute may be a victim instead of an offender).<sup>126</sup>

Failure to separate victims of human trafficking conceptually from offenders significantly impairs anti-trafficking efforts.<sup>127</sup> Resistance to spending stretched enforcement resources on trafficking often stems from a belief that these victims are at least partially responsible for their victimization.<sup>128</sup> Common misperceptions of law enforcement officials regarding trafficking—particularly on a local level—tend to undermine efforts to combat this crime,<sup>129</sup> making it critical to define the crime as clearly as possible. Effective law enforcement training requires standards established by the legislature that carry the force of law.

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125. Greipp Interview, *supra* note 10.

126. NORTHEASTERN UNIV. INST. ON RACE & JUSTICE, *supra* note 62, at 1.

127. The law should correct the misperception that a trafficked person cannot have participated in any illegal act during the course of trafficking—part of a larger dynamic whereby “othering” shades the interpretation and implementation of the law. Both individual and collective perceptions tend to paint the quintessential victim of human trafficking as a passive young woman forced into prostitution and rescued by law enforcement. This “profile,” at least subconsciously, leads to governments consistently overlooking male victims, victims trafficked for labor rather than sex, victims who escape the trafficking situation rather than being rescued, victims not seen as innocent of any participation or wrongdoing, and victims who are not deemed useful to law enforcement as witnesses. Todres, *supra* note 33, at 634–35.

128. NORTHEASTERN UNIV. INST. ON RACE & JUSTICE, *supra* note 62, at 10.

129. A national survey found that a large majority of local officers thought trafficking was rare or nonexistent in their jurisdictions. NORTHEASTERN UNIV. INST. ON RACE & JUSTICE, *supra* note 62, at 3. In a Wisconsin survey, this same pattern is reflected. OFFICE OF JUSTICE ASSISTANCE, *supra* note 9, at 10.

Prosecutors and judges, too, need legislative guidance as to what exactly trafficking means and how to prove it.<sup>130</sup> Prosecutors are justifiably hesitant to bring charges until they are certain that they can prove all elements of the crime.<sup>131</sup> Definitions occasionally have an unforeseen and unintended narrowing effect upon legal interpretations, and for this reason drafters may advise against adding them where the intended interpretation matches common usage and dictionary definitions.<sup>132</sup> At the same time, to the extent that any term is susceptible to more than one definition, defendants will have more arguments that make it difficult for prosecutions to be successful.

As seen above, the Wisconsin Act's definition of the crime of human trafficking consists of three parts.<sup>133</sup> These are the *actions* which may be trafficking, the *means* by which a trafficker accomplishes the act, and the *purposes* for which the victim is trafficked. Each of these three aspects of the crime needs clearer definitions in the Wisconsin Act.

#### *A. Actions: Supplementing Federal Definitions*

The Wisconsin Act should define "recruiting" as trafficking, which is not found in the federal definition of trafficking activities.<sup>134</sup> The Wisconsin Department of Justice provides ambiguous language regarding "recruiting" on its trafficking Web page. In a section on legal definitions, it uses passive, descriptive voice: "Victims *are recruited* through fraudulent employment offers posted in newspapers, by acquaintances promising opportunity abroad, through mail-order bride and other marriage arrangements and by the promise of the chance to earn large sums of money. Parents *are tricked* into relinquishing their child with a promise the child will be schooled, employed or otherwise

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130. This also applies to the issues surrounding the role of consent. *See infra* Part III.

131. *See Payne, supra* note 38, at 60–61. In states whose trafficking laws neglect to specify whether confiscating a victim's passport or other travel documents would be a means of coercion, for example, prosecution has struggled with whether this action would fit into the definition of the crime. *Id.* at 53.

132. Interview with Anne Sappenfield of the Wisconsin Legislative Council, in Madison, Wis. (Oct. 8, 2009).

133. *See supra* Part I.B.1.

134. Trafficking Victims Protection Act of 2006, 22 U.S.C. § 7102 (2006). According to Jeff Greipp, "enticement" will be understood by enforcement and prosecutors as it is defined in Wisconsin's child enticement statute (WIS. STAT. § 948.07), but the unique nature of trafficking circumstances warrants a particularized definition, especially since many trafficking victims are not children. Griep Interview, *supra* note 10.

cared for by the recruiter.”<sup>135</sup> While this is listed as a definition of “recruitment,” the wording is not definitive but only illustrative. If the boundaries of the targeted behavior are still unclear, justice agencies and prosecutors will likely continue to avoid spending resources testing those limits with cases that vary from the examples given.

To avoid the danger of unintentionally narrowing the range of behaviors which may qualify, the Wisconsin Act should not incorporate a strict definition of “recruiting” but it should build on the Wisconsin DOJ’s explanation of its meaning, clearly stating that the explanatory examples are not exhaustive. Perhaps the explanatory notes are the appropriate place to indicate any forms of “recruiting” specific to this context *in addition to* the common understanding of the word (broadly used, for example, in employment situations). For example, marriage arrangements or promises of matchmaking are potentially criminal when the situation meets the other criteria (means and purposes of trafficking). In a teleconference on the human trafficking bill before it was introduced, policymaker Mike Murray indicated that the bill did not “meet the national anti-trafficking models for legislation” and would need to “be built upon in future legislative sessions,” in part because the legislators wanted to exclude from the bill’s reach the problem of mail-order brides.<sup>136</sup>

### *B. Means: Defining Means of Trafficking*

Similarly, not all the listed means of trafficking have readily apparent definitions. “Fraud or deception” and “extortion” probably do not need definition, as their usage would be similar to other parts of the statutes where they have not been difficult to interpret.<sup>137</sup> The Wisconsin Department of Justice’s definitions Web page indicates some examples of fraud in the human-trafficking context.<sup>138</sup> One option is to clarify “extortion” by indexing to the state extortion, usury, and frauds

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135. Wisconsin Department of Justice, Trafficking in Persons, <http://www.doj.state.wi.us/cvs/trafficking.asp> (last visited Nov. 13, 2009) (emphasis added).

136. Office of Justice Assistance Human Trafficking Committee, Agenda from the 2007 Human Trafficking Bill Teleconference (July 11, 2007) (on file with author). Unfortunately, the scope of this Comment does not allow for discussion of the overlap between human trafficking and the mail-order bride industry.

137. WIS. STAT. § 940.302(2)(a)1.f–g (2007–08); Interview with Anne Sappenfield, Wisconsin Legislative Council, in Madison, Wis. (Oct. 12, 2009).

138. “Examples of fraud include false promises for specific employment, being promised a certain amount of money that is never paid, working conditions are not as promised, being told he or she would receive legitimate immigration papers or a green card to work but the documents are not obtained.” Wisconsin Department of Justice, *supra* note 135.

statutes,<sup>139</sup> as the federal DOJ model and the Polaris model both suggest.<sup>140</sup> However, another means is “using any scheme or pattern to cause an individual to believe that any individual would suffer bodily harm, financial harm, restraint, or other harm.”<sup>141</sup> Since “financial harm” is not a common term, it needs a definition similar to the one in Illinois’ anti-trafficking law: “Financial harm includes intimidation that brings about financial loss, criminal usury, or employment contracts that violate the Frauds Act.”<sup>142</sup>

The Wisconsin Act adds another undefined consideration with the inclusion of the words “without consent of the individual” between its list of actions and its list of means.<sup>143</sup> While a nonconsent requirement arguably indicates an element of the crime separate from the three aspects of actions, means, and purpose, it is also inextricably linked to the means of coercion. The nonconsent requirement should be deleted rather than defined, for reasons discussed in Part III.<sup>144</sup>

### *C. Purpose: Defining “Sexually Explicit Performance” for Minors*

Under the child trafficking section, it is imperative that the Wisconsin Act define “sexually explicit performance,” one of the two purposes that constitute trafficking.<sup>145</sup> The legislature has defined “commercial sex act,” the other purpose for trafficking children.<sup>146</sup> But prostitution is not the only form of sexual exploitation traffickers force on victims.<sup>147</sup> The Wisconsin Act’s inclusion of other types of exploitation—such as coerced participation in live strip shows or filmed

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139. WIS. STAT. § 943 (2007–08) (crimes against property).

140. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, *supra* note 51, at § XXX.01(3); POLARIS PROJECT, COMPREHENSIVE MODEL STATE LEGISLATION TO COMBAT TRAFFICKING IN PERSONS § 1.1(3), (4) (2006), *available at* <http://www.polarisproject.org/images/docs/Model-Comprehensive-State-Legislation.pdf>.

141. WIS. STAT. § 940.302(2)(a)2.j (2007–08).

142. 720 ILL. COMP. STAT. ANN. 5/10A-5(3) (West 2009). The Illinois law has been called the best state anti-trafficking law currently in existence, and was referenced by the drafters of the Wisconsin Act. THE RENEWAL FORUM, AN EXAMINATION OF STATE LAWS ON HUMAN TRAFFICKING, 2, 13 (2007), *available at* <http://renewalforum.org/theblog/wp-content/uploads/2007/11/statelawanalysis2.pdf>. *See also* Wis. Legislative Reference Bureau Drafting File, *supra* note 57.

143. WIS. STAT. § 940.302(1)(d) (2007–08).

144. *See infra* Part III.

145. WIS. STAT. § 948.051 (2007–08).

146. *Id.*

147. Trafficking in Persons Report, *supra* note 72, at 7.

pornography<sup>148</sup>—is incomplete without a definition of this second purpose.

The U.S. DOJ model state law defines “sexually explicit performance,”<sup>149</sup> recognizing that “such activity can have an impact on victims similar to sexual abuse” and that holding victims as strippers rather than prostitutes is becoming more popular among traffickers.<sup>150</sup> The Polaris model is more comprehensive than this DOJ language, including not only live acts but also acts recorded for the same uses.<sup>151</sup> Wisconsin already criminalizes using children to produce recorded acts,<sup>152</sup> but this form of exploitation is not included by reference in the child trafficking statute. To better facilitate prosecution of child traffickers, the Wisconsin Act should adopt a definition comprehensive enough to ensure that subsequent interpretation does not exclude recordings. Two such definitions are available. The Polaris model law substitutes “patrons or viewers” for “persons,” and adds: “whether public or private, live, photographed, recorded, or videotaped.”<sup>153</sup> The Illinois law defines sexually explicit performance as “a live, recorded, broadcast (including over the Internet) or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.”<sup>154</sup>

### III. REMOVING THE NONCONSENT ELEMENT

#### *A. History and Context: Reconsidering the Nonconsent Requirement*

The inclusion in the Wisconsin Act of the words “without consent of an individual”<sup>155</sup> in its definition of trafficking limits its effectiveness. The nonconsent language obfuscates the legislative intent by bringing up an ongoing, unresolved policy debate that has plagued

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148. WIS. STAT. §§ 940.302, 948.051 (no reference to stripping or filmed pornography).

149. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, *supra* note 51, at § XXX.01(9).

150. *Id.*; *see also id.* at Explanatory Notes, 9. I would also argue that “sexually explicit performance” belongs in the general trafficking statute (for adult victims) alongside commercial sex, but have chosen to limit the recommendations in this Comment to the most urgently needed changes.

151. POLARIS PROJECT, COMPREHENSIVE MODEL STATE LEGISLATION, *supra* note 140, at § 1.1(10).

152. WIS. STAT. § 948.05 (2007–08).

153. POLARIS PROJECT, COMPREHENSIVE MODEL STATE LEGISLATION, *supra* note 140, at § 1.1(10).

154. 720 ILL. COMP. STAT. ANN. 5/10A-5(9) (West 2009).

155. WIS. STAT. § 940.302(1)(d) (2007–08).

2009:1391

*Human Trafficking*

1415

anti-trafficking efforts both nationally and internationally.<sup>156</sup> Yet the statute raises these distracting policy questions without indicating how to approach them. This will most likely lead to reluctance on the part of prosecutors and courts to interpret the law's policy stance.

The Wisconsin Act expands on the means of control in the DOJ model state language,<sup>157</sup> but unfortunately limits itself at the same time by adding "without consent" to the definition of the actions constituting trafficking. Nonconsent raises more issues than it solves, especially since the Wisconsin Act fails to further specify the proper role and definition of consent in application. The Wisconsin Act as written risks remaining unused and becoming a wasted opportunity. The existence of the law promotes a false sense of security by appearing to address the problem when it has never actually produced a single conviction.

To address this, the legislature must refocus the law on the trafficker's objective actions and purposes. The removal of the nonconsent requirement would mean prosecutors need only prove that a trafficker deprived a victim of liberty or benefited from her exploitation. Slaves often have to cooperate with captors and abusers to survive.<sup>158</sup> A law requiring proof of nonconsent neglects to help such persons, instead treating them as criminals subject to prosecution and deportation.<sup>159</sup> The nonconsent requirement unnecessarily harms these victims and diminishes Wisconsin's prospects for combating human trafficking.

1. PROBLEMS WITH THE WISCONSIN LAW'S AVAILABLE DEFINITIONS  
OF CONSENT

Wisconsin law has no adequate definition of "consent" to address the many policy issues in the unique realm of human trafficking. Arguably, in cases of trafficking for sexual exploitation, Wisconsin law

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156. *See infra* Part III.A.4.

157. WIS. STAT. § 940.302(2) (2007-08). In its Model Law Explanatory Notes, the U.S. DOJ suggested that the model's list of means would need supplementing by states: "Certainly, experience at the federal level indicates that more comprehensive trafficking in persons statutes are needed to address the wide range of coercive tactics that traffickers use to obtain and maintain the labor and services of their victims." MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, *supra* note 51, at Explanatory Notes, 7.

158. *Successfully Prosecuting Sex Traffickers: Hearing on the Trafficking Victims Protection Act before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Dorchen A. Leidholdt, Director, Sanctuary for Families' Center for Battered Women's Legal Services), available at [http://action.web.ca/home/catw/readingroom.shtml?x=113289&AA\\_EX\\_Session=4fa2c4167a753a5a555fb8a6cf9338e0](http://action.web.ca/home/catw/readingroom.shtml?x=113289&AA_EX_Session=4fa2c4167a753a5a555fb8a6cf9338e0).

159. *Id.*

enforcement and the judiciary can look to the definition of “consent” in the state sexual-assault statute. This statute defines consent as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.”<sup>160</sup> However, this definition has proven problematic in cases with no witnesses to the act in question, devolving into “he-said-she-said” credibility contests.<sup>161</sup>

Furthermore, at least 40 percent of human-trafficking cases involve forced labor, not sexual services,<sup>162</sup> and the general definition of “without consent” in the criminal code is the applicable starting point for these cases. But this definition is too inflexible to accommodate the types of situations that commonly arise in trafficking cases. The definition acknowledges only certain limited forms of psychological coercion, invalidating consent given under three circumstances: “use or threat of imminent use of physical violence,” use of purported (false) legal authority, or failure of the victim to understand what she is consenting to (for reasons of ignorance, youth, or “defective mental condition”).<sup>163</sup> Adding these limitations hinders effectiveness by shifting the burden of proof to the victim. For instance, where a trafficker alleges consent as a defense, it is difficult for the victim to demonstrate failure to understand. In these situations, competence to give informed consent brings in special vulnerability considerations necessitating a fact-intensive, case-by-case determination.<sup>164</sup>

The validity of consent is one of the most complex and unique issues that arise in trafficking cases, making it effectively impossible to determine the proper way to apply consent to determinations of coercion. Accordingly, unless the legislature can provide better guidance on this issue in the Wisconsin Act, it should simply delete “without consent.” The Wisconsin Act should follow the United Nations Trafficking Protocol and make victim consent irrelevant where

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160. WIS. STAT. § 940.225(4) (2007–08).

161. A juror recorded these impressions from participation in the 1993 Wisconsin sexual-assault case, *State v. Barry Brown*. WALTER DICKEY ET AL., 1 CRIMINAL JUSTICE ADMINISTRATION 66–71 (2009). In the context of trafficking, see the “Crazy Horse case,” *infra* notes 182–189.

162. Patrick Belser, *Forced Labor and Human Trafficking: Estimating the Profits* 5 (Int’l Lab. Off., Working Paper No. 42, 2005), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1016&context=forcedlabor>.

163. WIS. STAT. § 939.22(48) (2007–08).

164. See *infra* Part III.A.3.

a trafficker uses any listed means of securing cooperation.<sup>165</sup> The Wisconsin Act would likewise reduce distracting political considerations and improve effectiveness if it treated consent this way.

A trafficked person is not free to leave because of a trafficker's exploitative use of coercive means, as the international definition recognizes. It is this—not consent—that should differentiate human-trafficking cases. Wisconsin's law inherited its approach to consent from the federal approach, which is also too narrow compared to the international definition. Congress's (and states') goal to separate smuggled persons from trafficked persons can be accomplished through the concept of exploitation, the proper distinction between those activities.<sup>166</sup> While the TVPA Reauthorization was amended before reintroduction and adoption, the significant support for removing consent means Wisconsin will not be alone in conforming with international human-rights standards.<sup>167</sup>

## 2. DIFFICULTIES WITH PSYCHOLOGICAL COERCION

Removing consent as a consideration makes sense in the broader context of the development of anti-trafficking law. The treatment of consent has significantly changed during successive attempts to deal with problems of forced labor and sexual servitude. Prior to the current federal and international anti-trafficking laws created to address "modern-day slavery," the issue of consent implicitly played a part in defining the forms of coercion that constituted involuntary servitude in U.S. law.<sup>168</sup>

In the watershed case *United States v. Kozminski*,<sup>169</sup> a divided Supreme Court found psychologically coercive methods for procuring labor to be insufficient proof of involuntary servitude under 18 U.S.C. § 1584, the codification of the Thirteenth Amendment prohibition of slavery.<sup>170</sup> The TVPA specifically reversed this limitation, recognizing that modern forms of slavery such as trafficking involve more subtle

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165. U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), *available at* [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf).

166. INT'L ASS'N OF CHIEFS OF POLICE, THE CRIME OF HUMAN TRAFFICKING: A LAW ENFORCEMENT GUIDE TO IDENTIFICATION AND INVESTIGATION 3, *available at* <http://www.theiacp.org/LinkClick.aspx?fileticket=W7b9hV6wn%2bA%3d&tabid=372>.

167. *See supra* notes 107-110 and accompanying text.

168. Kim, *supra* note 49, at 946.

169. 487 U.S. 931 (1988).

170. Kim, *supra* note 49, at 946.

means of control. Thus its enumerated means of coercion included nonphysical methods of control.<sup>171</sup> This was a major reason the TVPA was hailed as groundbreaking. It supplied a new legal approach to respond to the developing realities of the trafficking industry.<sup>172</sup> However, there remains an uneasy tension in current anti-trafficking law to the extent it attempts to contemplate consent issues.<sup>173</sup> It is clearly possible to commit the crime of human trafficking without using physical restraint, but other means of coercion are difficult to adequately define. Neither international law nor the TVPA has found the right balance between considerations of the subjective reaction of the coerced victim and the objective actions of the person extracting the labor or services.<sup>174</sup>

It is very difficult to delineate the boundaries of psychological coercion considering that each person's particular characteristics create varying degrees of vulnerability.<sup>175</sup> Related to this is the fact that targeted persons are often vulnerable to traffickers due to desperate life conditions in their country of origin, such as poverty, lack of access to education, economic crises, natural disasters, and military or political instability.<sup>176</sup> Complicating factors also include the unique psychological circumstances of a trafficked person once she arrives in an unfamiliar new country. Cultural isolation, linguistic and economic challenges, lack of legal immigration or work status, fear for relatives back home whom traffickers threaten, and shame from being subject to

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171. *Id.* at 963. Congress indicated in the TVPA's Purpose and Findings section that it intended to recognize subtle methods of nonphysical coercion because under *Kozminski* involuntary servitude was interpreted narrowly to exclude these methods. 22 U.S.C. § 7101(b)(13) (2006).

172. Kim, *supra* note 49, at 959.

173. At the international level, critics have pointed out the ineffectiveness of laws which inherited from outdated approaches "a false dichotomization between the deceived, "innocent victim" and "those who consented." Misunderstandings over the issue of victim consent in trafficking definitions "continually hinders anti-trafficking discourse and promotes poor corrective policies." Fredette, *supra* note 29, at 111 (internal citations omitted). Because many victims have some degree of knowledge (and therefore, arguably, some degree of consent) regarding the specifics of the trafficking situation, "the classic deceived-woman profile is unhelpful" and worse, "may put the onus on victims to prove their complete innocence, e.g., their lack of knowledge, in order to receive the aid and protection normally afforded crime victims" based on their subsequent exploitation. *Id.* at 112.

174. Kim, *supra* note 49, at 959.

175. The Supreme Court has recognized the relative vulnerability of the victim as a factor in determining whether coercion occurred. *United States v. Kozminski*, 487 U.S. 931, 948 (1988). Congress also acknowledged that an individual's characteristics such as age, immigration status, or mental capacities could make the individual particularly vulnerable to coercion. 22 U.S.C. § 7101(b)(4) (2006).

176. Kim, *supra* note 49, at 958-59.

exploitation, all create dependence on the trafficker.<sup>177</sup> Because of the challenge of recognizing and defining psychological forms of coercion, nonconsent language has only detrimental effects when included in state anti-trafficking law.

### 3. CONSENT LANGUAGE AS AN OBSTACLE IN PROSECUTION

Wisconsin's troubles with the consent requirement in the context of sexual-assault law demonstrate the difficulties inherent in proving a lack of consent as an element of the crime.<sup>178</sup> Often the victim ends up on trial instead of the defendant because of the subjectivity involved, the proper balance of factors (such as the victim's state of mind and the defendant's understanding of signals), the lack of witnesses, and the effective shift of the proof burden to the victim.<sup>179</sup> Debate persists regarding the propriety of the definition of consent, the use of prosecutorial discretion, and the possibility of jury nullification based on disagreement with the legal standard of consent.<sup>180</sup> Again, this can complicate law enforcement efforts. In trafficking cases, as in sexual assault, the proof often essentially depends on a credibility contest between the victim and the accused offender.<sup>181</sup>

The first case prosecuted under the TVPA, known as the "Crazy Horse" case, highlights some of the consent pitfalls that bedevil prosecutors using trafficking laws.<sup>182</sup> Traffickers brought seven women as young as sixteen years old from Russia to Alaska on falsified visas.<sup>183</sup> The traffickers told the women they would perform native folk dances in cultural festivals, but on arrival forced them to dance nude in nightclubs.<sup>184</sup> The federal defenders and prosecutors had to examine

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177. H.R. REP. NO. 106-939, at 101 (2000), *reprinted in* 2000 U.S.C.C.A.N. 1380, 1392-93; Kim, *supra* note 49, at 964.

178. DICKEY ET AL., *supra* note 161, at 23-30, 66-71.

179. Wisconsin's "rape shield" law is an attempt to address these concerns, but difficulties in its application remain. *Id.* at 11-18.

180. *Id.*

181. 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, 102 (2005).

182. *Id.* at 104-05; *see generally* *United States v. Kennard*, 46 F. App'x 426 (9th Cir. 2002); Brief for the United States as Appellee, *United States v. Kennard*, No. 01-30346 (9th Cir. Mar. 5, 2002); *see also* *Four Charged With Forcing Russian Dancers to Strip*, CHI. TRIB., Feb. 25, 2001, at C7; Press Release, U.S. Dep't of Justice, Four Indicted in Alaska for Luring Russian Girls and Women to the United States and Enslaving them in a Strip Club (Feb. 22, 2001), <http://www.usdoj.gov/opa/pr/2001/February/076crt.htm>.

183. Kandathil, *supra* note 181, at 103.

184. *Id.*

reams of data for electronic evidence of arrangements made by e-mail and search out witnesses in Russia, postponing the trial for months.<sup>185</sup>

The defense then submitted a memo to the court claiming the women knew before leaving that they would be required to dance nude, and so no trafficking occurred.<sup>186</sup> The prosecution, upon learning of the memo, agreed to negotiate the charges down—even though the victims and other witnesses vehemently opposed this and testified that they had not known or consented to nude dancing.<sup>187</sup> Both the government and the defense assumed that knowledge would equal initial consent, obliterating the basis for trafficking charges.<sup>188</sup> The court expressed frustration with these events and gave a higher sentence than recommended on the lower charges. The traffickers received twenty-seven to forty-six months jail time, instead of the much longer sentence for trafficking.<sup>189</sup>

The roadblocks to prosecution created at the national level by consent requirements apply equally at the state level. The presence of nonconsent language in the Wisconsin Act is a distraction in the application of the statute. Without adequate guidance as to the application of the consent language, prosecution becomes less likely, because it is much less clear what prosecutors would have to prove.<sup>190</sup> Prosecutions also yield fewer convictions with a consent element.<sup>191</sup> Many states' new anti-trafficking laws have been sitting on the books

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185. *Id.* at 105.

186. *Id.* at 106.

187. *Id.*

188. Interestingly, this analysis was not explicit in either side's arguments, implying it was presumed by all the legal counsel. However, as discussed earlier, the international definition focuses on exploitation and deprivation of liberty. In this case, had the legal analysis left out the consent question, the traffickers would probably have been convicted. Their conduct included physically preventing the women from leaving a small room, denying them food, and otherwise forcing them to perform when they wanted to quit. *Id.* at 104. Thus the case serves as a good example of the widespread confusion regarding the potential for *both* initial consent *and* subsequent exploitation to occur.

189. *Id.* at 107.

190. At both the state and federal levels and also in Mexico (which has adopted the U.S. definition of the crime), the consent requirement in definitions of trafficking has led to a dearth of prosecution. *Successfully Prosecuting Sex Traffickers: Hearing on the Trafficking Victims Protection Act before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Dorchen A. Leidholdt, Director, Sanctuary for Families' Center for Battered Women's Legal Services), available at [http://action.web.ca/home/catw/readingroom.shtml?x=113289&AA\\_EX\\_Session=5382b1e2344aec8122a8039c47d6eacd](http://action.web.ca/home/catw/readingroom.shtml?x=113289&AA_EX_Session=5382b1e2344aec8122a8039c47d6eacd).

191. Enforcement and prosecution under the TVPA have been undermined because of the lack of clear guidance as to the contours of psychological coercion. Kandathil, *supra* note 181, at 89; Kim, *supra* note 49, at 955–68.

2009:1391

*Human Trafficking*

1421

unused.<sup>192</sup> The Wisconsin Act, like these other states' laws, will be much more useful without the consent requirement.

## 4. A MINEFIELD OF CONTENTIOUS ISSUES

The difficulties with the interplay of coercion and consent have created other problems in anti-trafficking law as well. Competing concerns specific to the two types of trafficking—forced labor and sexual services—have led to deep divisions between proponents and opponents of a consent element in anti-trafficking law. This led to intense definitional debates<sup>193</sup> in the process of creating the U.N. Trafficking Protocol, which has been ratified by the United States.<sup>194</sup> The Protocol's treatment of consent is in some ways a compromise.<sup>195</sup> Like the TVPA, it embodies a broad incorporation of psychological means of coercion, but unfortunately both instruments' lack of specific guidance has led to continued difficulties in application.<sup>196</sup>

*a. Smuggling and consent*

While trafficking for the purpose of sexual exploitation tends to get more attention, trafficking for forced labor accounts for about 40 percent of cases.<sup>197</sup> In these cases in particular, policymakers often fear potential overlap between human smuggling and human trafficking. It is difficult to determine at what point the initial voluntariness of a person's actions can be rendered meaningless by the exploitative

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192. For example, Washington has had its law for five years, yet has obtained zero convictions. Ruth Teichroeb, *Justice Appears Invisible for Some Victims After Five Years on Books, Human Trafficking Law Fails to Snag a Conviction*, SEATTLE POST-INTELLIGENCER, July 22, 2008, at A1, available at [http://seattlepi.nwsourc.com/local/371716\\_law22.html](http://seattlepi.nwsourc.com/local/371716_law22.html).

193. Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 474 (2003); Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195, 204 (2006).

194. U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_traff_eng.pdf).

195. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2983–85 (2006); Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, MIGRATION INFO. SOURCE (Migration Pol'y Inst., Washington, D.C.), Mar. 1, 2005, <http://www.migrationinformation.org/Feature/print.cfm?ID=294> (discussing the “consent/coercion seesaw”).

196. Kim, *supra* note 49, at 962; Bhabha, *supra* note 195.

197. Belser, *supra* note 162, at 5.

conditions of the continuing relationship.<sup>198</sup> Thus, consent becomes a sharply divisive point for labor cases. Legislatures are eager to prevent “opportunistic” migrants who consent to being smuggled from claiming protection as victims of trafficking so they can pursue immigration benefits.<sup>199</sup> Unfortunately this reinforces the tendency of immigration law to treat exploited workers as criminals instead of victims.<sup>200</sup>

The wider context of the consent-coercion debate underlines the difficulties in applying the Wisconsin Act’s requirement that action defined as trafficking must be nonconsensual.<sup>201</sup> With no specific guidance from the statute, law enforcement and prosecutors are sure to apply varying approaches on the determinative status of initial consent. A particularly contentious and needlessly confusing debate will ensue over whether it creates a dividing line between human smuggling and human trafficking. This distinction is already challenging enough for many inexperienced or untrained officials.<sup>202</sup>

More importantly, lack of consent is an unnecessary and inappropriate way to distinguish trafficking from smuggling. This is the mainstream view of consent in trafficking law. As seen above, the U.N. Protocol deliberately makes consent irrelevant where means of coercion are used.<sup>203</sup> The International Association of Chiefs of Police states in its handbook on trafficking that “an individual’s willingness to be smuggled into another country does not minimize the victimization” a trafficker may inflict, and that “slavery and involuntary servitude are illegal practices in the United States regardless of original consent.”<sup>204</sup>

*b. Prostitution and exploitation*

The issue of consent in sex-trafficking cases brings out another policy disagreement over whether prostitution is inherently exploitative. Some argue that consent to sex work by an adult—or implicit consent to be trafficked through knowledge that the “contract” would include sex work—is invalid in all circumstances, and should therefore be legally

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198. Kim, *supra* note 49, at 966.

199. Chacón, *supra* note 195, at 2980, 3022.

200. *Id.* at 3023. Congress referred to this problem obliquely in the TVPA Purposes and Findings. 22 U.S.C. § 7101(b)(17) (2006).

201. WIS. STAT. § 940.302(1)(d) (2007–08 & West Supp. 2009).

202. Chacón, *supra* note 195, at 2985–86.

203. U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), available at [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_traff_eng.pdf).

204. INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 166, at 3.

irrelevant.<sup>205</sup> These arguments against a consent requirement include various theoretical and practical approaches: gender inequality and commodification of women, congressional intent to broaden the definition of trafficking in the TVPA, the burden of proof that consent puts on a victim, and the unfair hierarchy of victims created by a view that initial consent makes a victim complicit and therefore undeserving of protection.<sup>206</sup> Opponents of a consent requirement point out that pressures such as poverty and cultural or legal conditions lessen the validity of a person's agreement by limiting his or her choices.<sup>207</sup>

On the other hand, arguments for recognizing the validity of consent in defining trafficking include appeals to self-determination, empowerment, and autonomy of all persons (particularly women).<sup>208</sup> Proponents of recognizing consent also cite rights to privacy, freedom of contract, and equal protection under the law.<sup>209</sup> Many proponents of this view support the recognition of a woman's right and ability to choose sex work freely, including migrating across borders to become prostitutes.<sup>210</sup>

These two conceptualizations of prostitution clash on the proper role of consent and coercion in defining human trafficking, because of fundamental differences in worldview and construction of the problem itself.<sup>211</sup> This may explain the ambiguity in the approach to consent in the U.N. Protocol. The Protocol goes only so far as to recognize the debate, but leaves the policy decisions to the nations implementing the Protocol.<sup>212</sup> The Wisconsin Act needlessly brings in the broader debate by including a nonconsent requirement.

### *B. Nonconsent and Legislative Intent*

The Wisconsin legislature should avoid mirroring the state's law enforcement, prosecutors, and judges in policy debates that are not necessary to the essential goals of anti-trafficking law. The state cannot

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205. See, e.g., Kandathil, *supra* note 181, at 89–90; Susan Tiefenbrun, *Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers*, 23 T. JEFFERSON L. REV. 199, 202, 205 (2001).

206. Kandathil, *supra* note 181.

207. Abramson, *supra* note 193, at 491.

208. *Id.* at 483.

209. *Id.*

210. *Id.* at 485–86.

211. There is also a lively debate as to whether and how to formulate human-trafficking laws such that they do not “criminalize prostitution.” In the state of Rhode Island, proposed legislation recently brought this debate to the fore. Segal & Ajello, *supra* note 67.

212. Abramson, *supra* note 193, at 477.

afford the lost energies and resources it will require to debate and interpret the “without consent” language in the Wisconsin Act. The vague and indeterminate boundaries of psychological coercion, the hurdles created for prosecution efforts, and the implication of larger contextual issues are compelling reasons to delete the nonconsent language. This is bolstered by the fact that the language adds nothing to the statute. Requiring nonconsent is superfluous and does not advance the legislature’s anti-trafficking goals.

#### 1. EXPLOITATION AS THE DIFFERENTIATING FACTOR

Removing “without consent” from the Wisconsin statute will not broaden the law to include persons willingly smuggled and not exploited, because the law specifies that another element of trafficking is the use of means of coercion.<sup>213</sup> After proving one of the means listed (physical or nonphysical coercion, fraud, etc.), it becomes unnecessary and illogical to also have to prove that the victim did not consent.<sup>214</sup> No one can consent to being coerced into an action. In other words, the law already requires the consideration of factors that show exploitation, which is at the heart of the definition of trafficking. The requirement to show means of coercion is sufficient to preclude use of the law in cases where a “victim” truly consented to an arrangement for illegal migration.

#### 2. PITFALLS OF THE CURRENT VERSION

As seen above, adding the consent element to trafficking cases only compounds the roadblocks to prosecution. These cases are lengthy and demanding on prosecution resources,<sup>215</sup> which causes prosecutors to use other statutes and charge crimes whose elements are easier to prove, such as kidnapping, peonage, or money laundering.<sup>216</sup> To reduce

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213. WIS. STAT. § 940.302(1)(d) (2007–08).

214. This is the logic of the U.N. Protocol. U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), *available at* [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf).

215. According to the DOJ’s Involuntary Servitude Coordinator in the Civil Rights Division, investigating and prosecuting trafficking and slavery cases normally takes a year and a half. AMY O’NEILL RICHARD, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 3 (1999).

216. Kandathil, *supra* note 181, at 110–11 (arguing that for this reason, and because the Crazy Horse case shows prosecutors are sometimes unaware that possible initial consent does not automatically obviate any question of trafficking, consent as a defense should be removed from the TVPA.)

the likelihood of having a statute that is never used, Wisconsin should remove consent from the equation and simplify its use.

Even if enforcement, prosecutors, and courts could agree on the proper interpretation and application of consent, in the absence of legislative guidance on the matter, such an exercise of discretion would violate Constitutional principles. The potential for such violations through broad interpretation of the meaning of coercion was a major concern of the Court in *United States v. Kozminski*.<sup>217</sup> The first danger is the failure to put criminal defendants on notice of the criminalized behavior.<sup>218</sup> The Calimlins (the Wisconsin couple convicted of trafficking in 2008) raised the unconstitutional vagueness argument on appeal of their sentence for trafficking charges.<sup>219</sup> The second concern is legislative supremacy.<sup>220</sup> It is constitutionally problematic for the legislature to delegate so much power without providing some guiding principle to constrain its application so that the elected legislative body makes the policy choices, and not those carrying out the statute.

Presumably the most important goal of the Wisconsin Legislature was to create a law that would improve investigation and prosecution of trafficking crimes and protect trafficked people. Since the Wisconsin Act itself does not give sufficient guidance to embody an approach that espouses one particular view on the ability to consent, perhaps the Wisconsin Act was intended as a compromise—like the U.N. Protocol and the TVPA. But if so, this goal can be better served by leaving out consent language altogether.

### 3. TOWARD A VICTIM-CENTERED LAW

A victim-centered Wisconsin act would facilitate effective use of the law by shifting the focus to the actions of the perpetrator (the means used) and away from questions about the victim's consent. The current wording suggests that there are two groups of trafficked people: those who did not consent (victims), and those who did consent at least initially, who have uncertain status under the law.<sup>221</sup> The failure to specify the status of these people, and how to identify them, leads to the

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217. 487 U.S. 931 (1988); Kim, *supra* note 49, at 968.

218. Kim, *supra* note 49, at 968. The *Kozminski* Court also expressed normative concerns that overreliance on a victim's state of mind in a legislative definition of coercion would lead to arbitrary enforcement and a lack of consistency in standards of criminality. 487 U.S. at 949–50.

219. *United States v. Calimlim*, 538 F.3d 706, 710 (2008).

220. Kim, *supra* note 49, at 968.

221. By analogy to the description of the TVPA in Abramson, *supra* note 193, at 500.

danger that non-consenting victims will be assigned to the consenting group by policy choices of enforcement and prosecution.<sup>222</sup>

By creating a victim-centered law, Wisconsin can better address the urgent human rights abuses occurring through the exploitation of labor and sexual services.<sup>223</sup> Scholars on both sides of the consent debate have emphasized this humanitarian need. At least one commentator has proposed addressing it with a broader definition of trafficking, by refocusing the law on the objective legality of actions taken by traffickers/smugglers.<sup>224</sup> This proposal argues that defining trafficking in negative terms—by what it is not—rather than trying to cover all possible exploitative means and forms, would allow for greater coverage of human rights abuses in migration situations.<sup>225</sup> The illegality of either trafficking activities (as currently defined, including transporting, harboring, etc.) or the purposes of trafficking (defined not as involuntary services, but as unregulated forms of labor) would be the focus of this approach.<sup>226</sup>

Such a definition makes consent irrelevant under all circumstances, in recognition of the impossibility of making consistently accurate consent determinations. It furthers the twin goals of combating crime and preventing human-rights violations.<sup>227</sup> This approach has the advantage of being compatible with both views of consent: it does not deny that adults can make free choices about migration, but it also avoids committing resources to futile struggles to define and prove consent. Therefore it maximizes the effectiveness of anti-trafficking efforts.<sup>228</sup>

Wisconsin needs a victim-centered law representing a considered choice about the place of consent, and the best way to reach this goal would be to remove the “without consent” language from the Act while keeping the list of means of coercion. The Wisconsin legislature reportedly did not consider potential situations in which consent would bring up these types of policy choices.<sup>229</sup> In considering revisions, the legislature should hear testimony on the subject and make conscious decisions as to the role of consent. A statute that circumvents the consent debate and refocuses on exploitation will serve Wisconsin best.

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222. Instead of settling the debate, this choice—like that of the U.N. Protocol—“open[s] the door to standardless discretion by law enforcers to impose their own understanding of consent.” *Id.*

223. *Id.* at 497.

224. *Id.* at 498–99.

225. *Id.* at 498.

226. *Id.* at 498–500.

227. *Id.* at 500.

228. *Id.* at 500–01.

229. Greipp Interview, *supra* note 10.

## V. FUNDING FOR ANTI-TRAFFICKING MEASURES

As with nearly any legislation, funding is critical to the successful implementation of the Wisconsin Act. Wisconsin's law should ensure that every possible source of funding is utilized for victim services, law-enforcement training, public-awareness campaigns, reporting and research. Unambiguous allocation of funds is necessary if the Wisconsin Act is to right the imbalance in funding availability. For-profit consultant firms or national faith-based organizations (e.g. USCCB and Salvation Army) are the recipients of most federal grants for anti-trafficking efforts, leaving local non-profit providers and law enforcement short on funds for victim services, health care and rehabilitation programs.<sup>230</sup> This would bring badly needed dollars to Wisconsin's service organizations and programs, since regionally most of the emphasis and funding goes to the Chicago area and Minnesota's Twin Cities (both areas are recipients of VOCA grants).<sup>231</sup>

The Wisconsin Act *allows* funds to be allocated, but it does not *mandate* funds to be set aside or services to be established.<sup>232</sup> The Wisconsin Act also fails to mandate that local law enforcement assist victims to access federally available benefits, by participating in the process of certifying them as officially eligible victims.<sup>233</sup> As originally proposed, the bill included some funding for data collection; but the line item did not make it into the final version of the bill, due to concerns that the law would not pass if it had any funds attached to it.<sup>234</sup> The Wisconsin Act needs to do more to make funds available because prosecution, protection and prevention (the "three Ps")<sup>235</sup> cannot be accomplished without cost.

With the national economy in recession,<sup>236</sup> state budgets are tighter than ever, and the relatively low visibility of trafficking in Wisconsin may lead some to question the state's ability to find funds for services and programs necessary to combat trafficking.<sup>237</sup> But at a minimum,

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230. Smirnova Interview, *supra* note 34.

231. *Id.*

232. WIS. STAT. § 250.04(14)(a) (2007-08).

233. *Id.*

234. Smirnova Interview, *supra* note 34.

235. 22 U.S.C. § 7101(24) (2006). *See also* Ryf, *supra* note 58, at 53.

236. Chris Isidore, *It's Official: Recession since December 2007*, CNNMONEY.COM, Dec. 1, 2008, <http://money.cnn.com/2008/12/01/news/economy/recession/index.htm>.

237. Like other states, Wisconsin is facing a budget shortfall upwards of \$5 billion for the next biennium through 2011. *Governor Says Wisconsin's Budget Deficit to Reach \$5 Billion*, WISN.COM, Nov. 11, 2008, <http://www.wisn.com/money/17958089/detail.html>.

shortfalls can be ameliorated by new federal funds for state and local agencies with anti-trafficking programs.<sup>238</sup> Funding options include grants from federal agencies for victim benefits and services provided to federally certified victims by non-governmental organizations, state and local agencies.<sup>239</sup> These benefits include building shelters for victims, as well as other services appropriate to the cultural and linguistic needs of the community.<sup>240</sup> The critical importance of victim services, training, and reporting as tools against human trafficking demand that the state both allocate its own funds to these measures and make federal funding accessible to local providers.

### A. Victim Services

Properly funding victim services and protections is vital to the process of discovering, investigating and prosecuting traffickers.<sup>241</sup> The urgent needs of newly rescued trafficking victims include shelter, medical and psychological services, and economic and legal assistance.<sup>242</sup> While the Act allows funds to be allocated to such services,<sup>243</sup> in reality, “discretionary funds” mean “no funds;” and the burden to fill this gap shifts entirely to nonprofits and faith-based organizations, already overextended in their efforts to address domestic

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238. Press Release, U.S. Department of Health and Human Services, Administration for Children & Families, Programs to Reduce Human Trafficking Receive \$2 Million (May 6, 2009), [http://www.acf.hhs.gov/programs/orr/press/prg\\_reduce\\_human\\_trafficking.htm](http://www.acf.hhs.gov/programs/orr/press/prg_reduce_human_trafficking.htm). Congress voted in mid-December 2009 to significantly increase budgets for anti-trafficking efforts. See Senate Vote 374 – H.R. 3288: On the Conference Report, Inside Congress, N.Y.TIMES.COM, <http://politics.nytimes.com/congress/votes/111/senate/1/374> (last visited Feb. 12, 2010). See also Shashi Irani Kara, *Decentralizing the Fight Against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations*, 13 CARDOZO J.L. & GENDER 657, 676 (2007). The TVPA establishes a grant program for strengthening state and local anti-trafficking efforts—including investigation, prosecution, education and training. 22 U.S.C. § 7110 (2006).

239. Kara, *supra* note 238, at 679.

240. Examples of such funding agencies are the DOJ’s Office for Victims of Crime (OVC) and the Federal Crime Victim Assistance Fund, part of Immigration and Customs Enforcement’s Victim-Witness Assistance Program. *Id.*; see also Office for Victims of Crime, OVC-Funded Grantee Programs to Help Victims of Trafficking, <http://ojp.usdoj.gov/ovc/help/traffickingmatrix.htm> (last visited Dec. 18, 2008).

241. Tanagho, *supra* note 7, at 934–36.

242. After escape or rescue, victims are usually in a very vulnerable state and federal protections are too often unobtainable. “Triage” services needed immediately are numerous: food, clothing, shelter, transportation, immigration relief, and possibly similar assistance for family members that rely on the victim. *Id.* at 957 n.594.

243. WIS. STAT. § 250.04(14)(a) (2007–08).

violence, sexual assault and immigrant rights.<sup>244</sup> Low-cost legal assistance could be provided by law-school clinical or legal-aid programs, which have proven useful in twenty-one states already.<sup>245</sup> Effectively combating the problem is not possible without victim services, as federal experience and legislation demonstrates.<sup>246</sup>

In the last draft of the Wisconsin Act a limitation was added to prevent victims from accessing services beyond sixty days if not cooperating with a prosecution, or sixty days after the trial if she is cooperating.<sup>247</sup> Limiting benefits and conditioning assistance on prosecution efforts are unnecessary and unfortunate attempts to block spending. Trafficking victims' worries about being prosecuted makes them fear law enforcement, according to the director of the Human Trafficking Prosecution section of the U.S. DOJ, and it is important to avoid legitimizing and reinforcing this fear with measures designed to force cooperation.<sup>248</sup>

To lower the cost burden on Wisconsin and help more victims, the Wisconsin Act should guarantee victims access to federal victim protections, services, and benefits. A victim must be federally precertified to receive these forms of federal assistance, but often a victim in a local case has trouble securing the certification of federal agents. This creates a need for state officials to certify the victim's

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244. Smirnova Interview, *supra* note 34.

245. Payne, *supra* note 38, at 63–64. Immigration assistance for foreign victims is an example of an important service such programs could provide. Smirnova Interview, *supra* note 34.

246. “Federal experience has shown that prosecution without victim protection is unworkable.” MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, *supra* note 51.

247. This was added by Sen. Glenn Grothman. *See* Wis. Legislative Reference Bureau Drafting File, *supra* note 57.

248. “A victim should be able to freely decide if it is in her interest to cooperate, without the state hovering over her, its coercive cudgel drawn.” Segal & Ajello, *supra* note 67. This is especially unfortunate since in combination with the lack of affirmative immigration assistance, and the refusal to provide detention space outside prisons for victims in human-trafficking investigations, the effect is not only to deny victim services, but to create disincentives to come forward: “in addition to jail time, the state would hang potential deportation over the heads of the victims for whom we purport to have so much sympathy.” *Id.* This is not a theoretical problem: the Milwaukee “Guidelines for Responding to Trafficking in Persons” instructs the Milwaukee Police Department to contact ICE (immigration enforcement) whenever “illegal aliens” are involved in a suspected human-trafficking situation. *See* Milwaukee Human Trafficking Task Force, Guidelines for Responding to Trafficking in Persons (on file with author). The guidelines specify that “in cases involving illegal aliens, victims will be arrested and detained pending interviews.” *Id.* The authors of the Wisconsin Act “would not allow for victims to be held outside of prisons” because this would require funds for shelters. Agenda from the Human Trafficking Bill Teleconference, *supra* note 136.

status.<sup>249</sup> This is why it is important for Wisconsin to mandate certification, and teach officials how to certify victims for federal purposes.<sup>250</sup>

*B. Training Law Enforcement and Educating the Public*

Lack of funding severely limits training for law enforcement. The lack of prosecution to date belies the real presence of trafficking in the state of Wisconsin. What this reveals is not a lack of trafficking crimes, but a lack of training.<sup>251</sup> Training and education raise awareness of the problem of human trafficking and thereby increase the number of crimes uncovered and investigated by enforcement.<sup>252</sup> Anti-trafficking experts, law enforcement, and activists all emphasize training as an indispensable part of anti-trafficking efforts.<sup>253</sup> Two major reasons are that victims have undergone unique mental and physical trauma requiring special handling,<sup>254</sup> and that trafficking is uniquely difficult to uncover.<sup>255</sup> The nature of the crime of trafficking makes it particularly challenging to successfully investigate. Cultural and language dynamics include victims' unfamiliarity with their surroundings, the ability of traffickers to isolate and intimidate victims, the way traffickers train victims to mistrust police and officials, and victims' fear of prosecution for illegal acts they may have been forced to commit.<sup>256</sup>

The recent study of Wisconsin agencies shows a striking need for awareness and basic understanding of the problem of trafficking in Wisconsin among our law enforcement and service providers.<sup>257</sup> These local agents are almost always the first to encounter victims in the

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249. Kara, *supra* note 238, at 669; Richard, *supra* note 46, at 453.

250. Kara, *supra* note 238, at 669.

251. "That is, purporting to have a low incidence of trafficking in order to avoid affirmative requirements in this regard begs the question." *Id.* at 676 n.105. Until a state has trained enforcement and non-governmental organization personnel looking for instances of trafficking, armed with the knowledge of how this crime differs from similar crimes, that state "cannot properly assess the incidence of trafficking therein." *Id.*

252. Lack of proactive, informed investigation is the reason so few victims are discovered and rescued, according to experts. As Laura Lederer, sex-trafficking expert and senior State Department advisor, puts it: "We're not finding [trafficking] victims in the United States because we're not looking for them." Peter Landesman, *The Girls Next Door*, N.Y. TIMES MAG., Jan. 25, 2004, at 32.

253. Tanagho, *supra* note 7, at 945-47; Greipp Interview, *supra* note 10; Smirnova Interview, *supra* note 34.

254. Richard, *supra* note 46, at 462.

255. Tanagho, *supra* note 7, at 948.

256. *Id.*

257. See *supra* Introduction and accompanying notes.

community, and must have the information and background knowledge to recognize a potential trafficking situation.<sup>258</sup> They also need the tools to connect potential victims to essential services to ensure their safety and, hopefully, their ability to assist investigation and prosecution efforts as the federal government becomes involved. Without the trained eyes and ears of state and local law enforcement officers, national progress in slowing the flow of trafficked persons will be unacceptably limited.<sup>259</sup>

The current situation in places like Wisconsin works to traffickers' advantage. The missed opportunities that result from lack of training are hard to measure, but many examples nationwide illustrate that trafficking goes on "under the noses" of untrained enforcement. An example took place in a John Pickle Company plant in Oklahoma. The company recruited workers through an agency in India, then seized their travel documents on arrival to coerce them into living and working at the factory.<sup>260</sup> When one worker tried to escape by secretly seeking a job at a local hotel, the police questioned him for applying without any identification or passport.<sup>261</sup> Although he told the officers that the John Pickle Company was keeping his documents, they returned him to the factory instead of asking questions that would have uncovered this large-scale human-trafficking operation.<sup>262</sup> The factory could have been shut down much sooner had the officers been able to recognize elements of forced labor. This demonstrates the need for familiarity with situations and circumstances that could signal trafficking, to avoid having more victims continue to go unnoticed.

Without funding, only volunteers are available to train law enforcement and prosecutors, advocates, and service providers. The handful of experts and nonexperts in Wisconsin who have dedicated many unpaid hours to this effort deserve respect and gratitude, but relying on volunteers is at best a stopgap measure. The Office of Justice Assistance has conducted training events and released informative materials to try to fill the gap.<sup>263</sup> But these efforts, while undoubtedly beneficial to untrained personnel, are necessarily limited by lack of funds. Prosecutors and law enforcement cannot learn all they need to know about federal and state anti-trafficking law and the extent of the

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258. Tanagho, *supra* note 7, at 946.

259. Kara, *supra* note 238, at 669.

260. *Id.* at 663.

261. *Id.* at 668.

262. *Id.*

263. Wisconsin Office of Justice Assistance, Training, <http://oja.wi.gov/section.asp?linkid=711&locid=97> (last visited Feb. 12, 2010); Wisconsin Office of Justice Assistance, Document Library, <http://oja.state.wi.us/refcenter.asp?locid=97> (last visited Feb. 12, 2010).

problem in Wisconsin without expert training and the funding to make such efforts possible.

### *C. Reporting and Research*

Funding is also crucial to much-needed research on human trafficking. The Wisconsin Office of Justice Assistance (OJA) has done the only study to date on the experiences and challenges of local and state agencies (both law enforcement and service providers) with combating human trafficking in Wisconsin. This study showed that trafficking is a serious and growing problem in the state,<sup>264</sup> but further research is necessary to determine how the suggested changes to the Wisconsin Act could improve the (currently extremely low) rate of investigation, prosecution, and assistance to victims.

As time goes by, the state will need regular evaluation and reporting on how the new Act is working. The originally proposed Wisconsin Act mandated the OJA to continue to gather statistical data on trafficking in Wisconsin, but the law as adopted does not.<sup>265</sup> The OJA Violence Against Women Act (VAWA) unit has been voluntarily leading the research effort.<sup>266</sup> The TVPA's reporting requirement has been very valuable in highlighting continuing shortfalls and directing resources and efforts.<sup>267</sup> The Wisconsin Act should have such a requirement, along with funding to ensure its implementation, even if the OJA will continue to fulfill this function.

Furthermore, funds for services or training can be tied to reporting requirements, accomplishing two goals at once. Federal grants are often structured so that a law enforcement agency or victim advocate agency can receive training or funds in exchange for collecting and providing data on human-trafficking cases.<sup>268</sup> The Wisconsin legislature should adopt such a structure to foster both protection and prevention, giving

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264. OFFICE OF JUSTICE ASSISTANCE, *supra* note 9, at 1.

265. Wis. Legislative Reference Bureau Drafting File, Senate Amendment 1 to LRBa1201 (adopted Feb. 26, 2008). *See also* Wis. Dep't of Admin., Div. of Budget and Fin., Fiscal Estimate for LRB No. 07-2066/1 (2007) (stating that the OJA could not assume statistical responsibilities without funding for additional personnel, supplies, and services). Along with publishing costs for the reports, the estimate was a "minimum annual cost of \$81,550." *Id.* Unfortunately, a cost-free bill is also results-free. On the scale of the state's budget this is a worthwhile investment for freeing human beings from slavery.

266. OFFICE OF JUSTICE ASSISTANCE, *supra* note 9, at 2.

267. The TVPA requires reporting to congressional committees on research initiatives as directed. 22 U.S.C. § 2151n (2006). The Congressional findings for each reauthorization reflect considerations of progress based on these reports.

268. Greipp Interview, *supra* note 10.

2009:1391

*Human Trafficking*

1433

sufficient attention to these two goals in addition to prosecution of trafficking crimes.

## CONCLUSION

Wisconsin Act 116 is a significant improvement in Wisconsin's response to human trafficking in the state. To capitalize on the Wisconsin Act's potential for progress in combating these crimes, however, the statute needs to provide a retooled definition including clarification of important terminology and avoidance of the consent problem. Additionally, funding is necessary to give life to programming that will prevent human trafficking, promote effective prosecution, and protect trafficking victims.

As the experiences of neighbor states and Wisconsin agencies show, a better defined crime and better resources for adequate programs will lead to the identification of more trafficking situations. The ability of the executive and judicial branches to appropriately investigate, convict, punish, and deter traffickers will doubtlessly improve the quality of life for many residents of Wisconsin. In addition to better addressing the criminal problem, revisions in these aspects of the Wisconsin Act will also serve the equally important end of ensuring basic human rights and dignity. A more effective law will enable Wisconsin to responsibly contribute to the nationwide and worldwide fight against the scourge of human trafficking.