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Disposable Victims: How the TVPA Fails to Protect Victims of Human Trafficking

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Disposable Victims: How the TVPA Fails to Protect Victims of Human Trafficking

Amanda Lindberg-Aganga
Abstract

The TVPA does not sufficiently protect victims, especially victims caught up in large trafficking schemes. From identification of victims by law enforcement or ICE to the ability of the FBI to actually interview every victim to DHS’ willingness to grant Continued Presence to Victims and DOJ to support their T-visa application, victims are presented with barriers that they must overcome in order to pursue justice, receive restitution, gain protection and try to move forward with their lives. These barriers are unnecessary, and damage the TVPA’s mandate to protect victims and prevent trafficking.
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“Trafficking in persons is a human rights problem that requires a human rights response.”

- Senator Paul Wellstone

I. Introduction

Human trafficking is widely viewed to be the most severe form of human exploitation in the modern age. Men, women and children are coerced into performing labor or sex acts for little or no pay under often horrifying conditions. Some trafficking victims are moved across international borders, lured by the prospect of a job or forced through economic or physical threats. Others are recruited domestically, often already-marginalized individuals such as at-risk youth or homeless.

The concept of human trafficking developed largely over the last century, beginning with a number of international treaties aimed at preventing prostitution and the exploitation of white women into “sexual depravity”. In the 1990’s, significant pressure from activists across the political spectrum led to two major developments: the International Protocol to Prevent,

1 International Trafficking in Women and Children: Hearing Before the Subcomm. on Near Eastern and South Asian Affairs of the S. Comm. on Foreign Relations, 106th Cong. 4 [hereinafter Senate Trafficking Hearing] (statement of Sen. Wellstone, Member, S. Comm. on Foreign Relations).


3 Id.

4 See, e.g., International Agreement for the Suppression of White Slave Traffic, Mar. 18, 1904, 1 L.N.T.S. 84 (declaring that the signatory governments should do everything that they could to prevent the transport of women and girls abroad for “immoral” purposes, i.e., sex work or prostitution), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 (listing only involvement in enticing women into prostitution as an offense covered by the treaty), see also Anna Zalewski, Migrants for Sale: The International Failure to Address Contemporary Human Trafficking, 29 SUFFOLK TRANSNAT’L L. REV. 113, 114-115 (2005) (providing a historical context of the way that the idea of trafficking has developed with a focus on sexual exploitation).
Suppress and Punish Trafficking in Persons, Especially Women and Children\textsuperscript{5} ( Trafficking Protocol) and the United States’ Trafficking Victims Protection Act of 2000 (TVPA).\textsuperscript{6}

The TVPA forms the basis of U.S. domestic law aimed at addressing human trafficking and is conceptualized around a three-pronged approach. The three P’s: Prevention, Protection and Prosecution, are the foundation for the legislation.\textsuperscript{7} Each piece is stressed throughout Department of Justice and Department of State rhetoric about the legislation. The Department of State uses the three P’s as the basic structure of their analysis in the annual Trafficking in Persons Report (TIP Report) that evaluates the performance of every country in the world in their efforts to stop trafficking.\textsuperscript{8}

Despite naming victim protection as one of the three major goals of the TVPA, the reality has fallen far short of the kinds of protections that should and can be made available to victims in the United States. Victims who are identified and whose traffickers face prosecution may sometimes not be eligible for long-term T-visa status and other protections.\textsuperscript{9} Authorities fail to

\begin{footnotesize}
\begin{enumerate}
\item Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol] (providing a now nearly universal definition of trafficking and for the first time, including men and non-sexually exploited persons as possible trafficking victims).
\item Id.
\item See, e.g., U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2010) [hereinafter 2010 TIP REPORT] The TIP Report was created through the 2000 TVPA, which authorizes sanctions and public shaming for countries that do not meet the criteria of the United States. The TIP Report has been widely criticized as the United States acting as a “global sheriff” and attempting to impose domestic law and values on the rest of the world. See also Janie Chuang, The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking, 27 Mich. J. Int’l L. 437 (2005-06).
\item Interview with Department of Justice, Civil Rights Division prosecutor Susan French (April 27, 2011) (notes on file with the author).
\end{enumerate}
\end{footnotesize}
identify thousands of victims each year.\textsuperscript{10} Those that are identified still face red tape, and victims who have committed crimes or been forced to commit crimes through their trafficking experience may be prosecuted for those crimes, creating tension between the priority of prosecuting perpetrators of trafficking and often coerced immigration offences.\textsuperscript{11}

This paper argues that Congress’ approach to and subsequent execution of victim protection through the TVPA and reauthorization bills has undermined one of the foundational purposes of the TVPA: to provide protection and assistance to victims of trafficking.\textsuperscript{12} This shortfall is the result of multiple factors, including insufficient training of immigration and law enforcement officials, unnecessary barriers between victims and services, and a tension between immigration policy and the aims of the TVPA vis-à-vis assisting victims. First, I will frame the issue of human trafficking in the United States today,\textsuperscript{13} and then will discuss the TVPA’s legislative background and text.\textsuperscript{14} Part IV will argue that mechanisms for gathering data and refining victim identification are insufficient.\textsuperscript{15} Part V proposes that even once victims are identified, there are unnecessary and unconscionable barriers to assisting many victims.\textsuperscript{16} Part VI concludes with recommendations to improve victim identification and services throughout the

\textsuperscript{10} Compare 2010 TIP REPORT, supra note 8 (estimating that up to 17,000 individuals were trafficked into the United States in 2009) with ATTORNEY GENERAL’S ANNUAL REPORT, supra note 2 (stating that in 2009, only 301 individuals requested Continued Presence as identified victims of trafficking).

\textsuperscript{11} See 2010 TIP REPORT, supra note 8 at 341.

\textsuperscript{12} See TVPA, supra note 6.

\textsuperscript{13} See infra Part II.

\textsuperscript{14} See infra Part III (focusing on the provisions that pertain specifically to victim identification and protections).

\textsuperscript{15} See infra Part IV.

\textsuperscript{16} See infra Part V.
victim’s contact with United States authorities and service providers, recalling that a victim’s experience does not end with the conviction of his or her trafficker.17

II. Modern Human Trafficking

The International Labor Organization estimates that there are at least 2.4 million trafficked persons across the globe, and the United States government states that between 600,000 and 800,000 people are trafficked globally each year.18 The 2010 Trafficking in Persons Report (TIP Report), published by the U.S. Department of State, reported that 17,000 individuals were trafficked into the United States in 2010.19 These individuals are trafficked for many reasons, but primarily for forced labor or sexual exploitation.20

Traffickers recruit victims in a variety of ways, but usually approach an economically or socially vulnerable individual, offering employment and opportunity in another country.21 Offers are made in person, through friends and family and through newspaper and online advertisement. Frequently victims agree to travel or work and only later find themselves forced into the sex trade or involuntary servitude.22 Sometimes traffickers simply kidnap victims or buy them from economically desperate families.

17 See infra Part VI.

18 See Brochure, ILO ACTION AGAINST TRAFFICKING IN HUMAN BEINGS 1, 4 (2008) [hereinafter ILO ACTION] (expressing both that this may be a conservative estimate, considering the clandestine nature of trafficking and the difficulty in obtaining accurate data about trafficking victims); U.S. GEN. ACCT. OFF., HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTI-TRAFFICKING EFFORTS ABROAD, GAO-06-825 1 (2006) (providing a detailed critique of the official U.S. estimates of global trafficking with a focus on the methodology used to arrive at the most-relied upon statistics).

19 2010 TIP REPORT, supra note 8.

20 See ILO ACTION, supra note 18 at 1 (indicating that individuals are also conscripted into military service).

21 ATTORNEY GENERAL’S ANNUAL REPORT 2010, supra note 2 at 1.

22 Id.
Traffickers used force or coercion to keep their victims from leaving or escaping.\textsuperscript{23} Victims are sometimes literally locked up. More often, they are kept from leaving or going to authorities through threats to their person or their families, through confiscation of their passports, or because they are told by their captors that if they go to authorities they will be arrested and jailed or deported.\textsuperscript{24} It is not uncommon for migrants and other internationally based trafficking victims to speak no English. Hailing from countries in which authorities are corrupt, victims may have no idea that they can ask a fellow citizen, religious authority or law enforcement official for help, even if they do speak English.

III. The Trafficking Victims Protection Act of 2000

The Trafficking Victims Protection Act of 2000 was the first comprehensive domestic legislation to address human trafficking head-on. The TVPA did not significantly change penalties for trafficking: it provided a single, clear definition and increased penalties for crimes that fall within trafficking, such as forced labor and peonage. The significant changes in the TVPA are in the creation of the Annual Trafficking in Persons Report, creation of Continued Presence and T visa status for trafficking victims, and in creating preventative and educational training mandates for officials and law enforcement involved in anti-trafficking work.\textsuperscript{25}

a. Legislative History

In 1988, the United States Supreme Court held in \textit{U.S. v. Kozminski}\textsuperscript{26} that “involuntary servitude” was limited to cases in which there was actual force, threat of force, or physical

\textsuperscript{23} 2010 TIP REPORT, \textit{supra} note 8 at 5.
\textsuperscript{24} \textit{Id.} at 338.
\textsuperscript{25} The significant changes in the TVPA, involving victim identification, protection and visas will be discussed in Parts IV and V, \textit{infra}.
\textsuperscript{26} 487 U.S. 931 (1988).
restraint used to procure labor. The Trafficking Victims Protection Act of 2000 was in part a response to the Kozminski holding, in that the TVPA expanded the definition of force in proving involuntary servitude for criminal prosecutions.

In addition to the Kozminski holding, Congress also came under growing pressure from NGO’s and advocacy groups to do something about the exploitation of women and girls in the United States. In particular, activists who were trying to eradicate prostitution and other sex work saw targeting trafficking as an effective way to move towards their goals. Senator Paul Wellstone became very interested in the issue of trafficking. He and his wife Sheila began doing work to combat trafficking in their private lives, and he was a key proponent of the TVPA.

Aside from the TVPA, which was passed and signed into law by President Clinton in 2000, other bills titled “Freedom from Sexual Trafficking Act of 1999” and “International Trafficking of Women and Children Victim Protection Act of 1999” were proposed in the 106th Congress. The focus on “victim”, “women and children”, and an entire proposed bill focused on sex trafficking provide a telling outline of the priorities of activists and lawmakers. The goals of the sponsoring senators was clearly to achieve passage of a trafficking bill, but the iterations that they went through to find something palatable to a majority of lawmakers shows how important a focus on women, children and sexual exploitation was to many.

Throughout the legislative record, lawmakers and witnesses alike continually focus heavily on sex trafficking. The majority of examples given are girls or women trafficked for sex.

\footnote{Id. at 952.}
\footnote{TVPA, supra note 6, § 102(b)(13).}
\footnote{H.R. 1356, 106th Cong.}
\footnote{S. 600, 106th Cong.}
The TVPA is referred to repeatedly as a “sex trafficking” bill in reports and in testimony. By
the time it was passed, the TVPA was grouped with a re-authorization of the Violence Against
Women Act and Aimee’s Law, further emphasizing the legislative focus on women and children
who are victims of violence, particularly sexual violence. This focus on sexual violence and the
oft-cited phenomena of “women and children” has had long-term effects on public perceptions of
what a trafficked person looks like, whether trafficking victims can exercise their own agency
and still be victims, and whether men and individuals trafficked into involuntary servitude are
trafficking victims.

Although these background and legislative facts may have little or nothing to do with a
prosecutor’s decision to file charges and pursue a case, they have a great deal to do with whether
a victim or trafficker is identified and there is a case to pursue in the first place. For example, in
Florida, a farm group trafficked thousands of men, mostly homeless, from throughout the
Southeast for years before a full investigation was launched. It was a priest and a local labor
group that became suspicious and brought the case to the Department of Justice, which

31 See, e.g., CONG. REC. S10212 (daily ed. Oct. 11, 2000) (statement of Senator Helms), Senate
Trafficking Hearing, supra note 1, at 1, 28, 38.
32 See DEREK J. MARSH, HUMAN TRAFFICKING - RECENT TRENDS: A LOCAL LAW ENFORCEMENT
20090319100952-86886.pdf (addressing Congress on the issue of human trafficking in
California and focusing exclusively on sex trafficking, literally mentioning labor trafficking only
once, in passing). See also Senate Trafficking Hearing, supra note 1, at 26-28, 30-31 (featuring
several trafficking victim’s stories, all of which were women talking about their experience of
being trafficked for sex).
Zeitlin, Labor Camps Keep Workers in Servitude With Crack Cocaine, NAPLES NEWS, Sept. 23,
cocaine_homeless_ad/?print=1.
investigated and eventually brought charges.\textsuperscript{34} The traffickers were sentenced to 30 years and 20 years in prison on a variety of trafficking and drug-related charges.\textsuperscript{35}

b. **Trafficking Defined**

The TVPA contains provisions pertaining to defining human trafficking and the elements required prove the crime,\textsuperscript{36} setting out new and enhanced penalties for traffickers, protections for victims, prevention program authorization and requirements, and sets up an international monitoring scheme called the Trafficking in Persons Report, published annually by the Department of State.

The text of the TVPA states as its purpose “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”\textsuperscript{37} Recognizing that then-current law failed to sufficiently address the severity of trafficking and that victims were totally unprotected during a case, and often even prosecuted as criminals, the law set out to make prosecutions a bit simpler, with steeper penalties, and create protections for victims.\textsuperscript{38}

The statute divides trafficking into “sex trafficking” and “severe forms of trafficking.” Sex trafficking is defined as “the recruitment, harboring, transportation, or provision of obtaining of a person for the purpose of a commercial sex act.”\textsuperscript{39} Severe forms of trafficking is bifurcated into 1) sex trafficking of a minor, or trafficking an adult for sex by means of “force, fraud or

\textsuperscript{34} Zeitlin, *supra* note 31.

\textsuperscript{35} Id.

\textsuperscript{36} 22 U.S.C. § 7102.

\textsuperscript{37} Id., § 102(a) (emphasis added).

\textsuperscript{38} See generally id.

\textsuperscript{39} Id., § 103(9).
coercion” and 2) trafficking “through the use of force, fraud, or coercion” for “the purpose of involuntary servitude, peonage, debt bondage, or slavery.” Beyond creating a specific definition for trafficking, the substance of the TVPA is in strengthening criminal statutes for forced labor, peonage, slavery, involuntary servitude, sex trafficking of children, forced sex work and unlawful conduct with respect to documents for the furtherance of trafficking.

c. Task Force

The TVPA created an interagency task force, made up of The Secretary of State, the Administrator of USAID, the Attorney General, the Secretary of Labor, the Secretary for Health and Human Services, the Director of the CIA and others designated by the President. The Task Force coordinates to implement the TVPA at both a domestic and international level.

Coordination between agencies such as DOJ, FBI, ICE and USCIS is crucial to effective prosecution of human trafficking offenses. This is because DOJ may receive a tip from local law enforcement and ask the FBI to investigate. ICE may get involved because frequently trafficking victims are immigrants, often undocumented. ICE also approved Continued Presence for victims of trafficking. USCIS will be involved in any visas issued and changes in immigration status of victims through the course of the prosecution and beyond.

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40 Id., § 103(8)(a).
41 Id., § 103(8)(b).
45 Id.
d. **Prevention**

TVPA spends very little time on domestic prevention but rather outlines extensively the burden that it places on foreign governments. The theory behind this approach may be that since the majority of trafficking victims hail from foreign countries, preventative measures should be focused on preventing recruitment and transportation out of the country of origin rather than a focus on stopping victims at the border.

Domestic prevention measures are taken each year, guided by the Task Force and the U.S. government as presented by the Attorney General in his Annual Report.\(^{48}\) Most mandated prevention training appears to be focused on training local law enforcement and NGO’s.

**IV. Victim Identification**

Appropriate identification of trafficking victims is the first step towards protecting and assisting victims and prosecuting their traffickers. The Continued Protection (CP) status and T visa requirements can be difficult for victims to meet, but the discourse surrounding human trafficking has made it difficult for victims to be even recognized as such in many cases. Law enforcement officials frequently lack both adequate training to recognize victims and a victim-centered approach.\(^{49}\) Unwillingness to look beyond a crime that a trafficking victim may have committed and see the larger exploitation can be difficult for law enforcement: seeing a suspect or “perpetrator” as a victim of a larger crime is not the way that most law enforcement officials are trained.\(^{50}\)


\(^{49}\) Funding in ICF (below)

\(^{50}\) *ICF International, Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices* vii (2008), *available at* [http://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf) [hereinafter *Prosecuting Human Trafficking Cases*] (indicating that 68% of state and local prosecutors did not consider trafficking to be a problem in their jurisdiction, and only 54% were familiar with the TVPA in 2008).
a. **Victim Advocacy Groups Write Some Victims Out of the Vision of a Trafficked Person**

As part of their push to eradicate both sex trafficking and prostitution in the United States, abolitionist groups often conflate the definitions and images of slavery versus trafficking. It is not that a trafficked individual *cannot* be enslaved, but slavery, legally defined in an international convention, is "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."\(^{51}\) This definition both goes beyond what is required to show that trafficking has occurred, but also illustrates that conflating trafficking and slavery both undermines the power of slavery-imagery and creates a false sense of what trafficking looks like. By portraying a pure and innocent victim literally held captive, neo-abolitionists undermine and marginalize the actual experiences of the majority of trafficking victims.

This imagery does not affect the statutory definition of trafficking, but it does affect the views of individuals who gauge whether a person is a victim of trafficking, “mere” labor exploitation, or perhaps an undocumented immigrant who will be otherwise deported. Accurate identification of trafficking victims is both exceedingly difficult and essential to effective prosecution of traffickers.

b. **Law enforcement is not sufficiently trained in identification of victims**

Local law enforcement officials and border officials may be the most effective tool available to combat trafficking. Local police are in a position of power within their communities and can coordinate with citizens, local advocacy groups, faith groups and larger nationwide groups and agencies to spot, report and capture traffickers. Border patrol and immigration

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\(^{51}\) International Convention to Suppress the Slave Trade and Slavery art. 1, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter 1926 Convention].
officials can be trained to identify individuals who meet characteristics of trafficked persons, including lack of papers, unclear about where they are going or what they will be doing, add more on details of identifying a trafficking victim.

Each year, the U.S. federal government puts more money and resources into education about trafficking in persons. The Attorney General’s Annual Report lays out annual recommendations and summarizes goals met for training law enforcement officials, NGO’s and citizens. The Report lists an overview of the training provided to and by the agencies involved in ending trafficking in persons. For fiscal year 2009, trainings took place through multiple agencies for countless NGO groups, local prosecutors, witness-advocates, domestic violence providers, religious groups and local law enforcement. However, a close look at the trainings listed shows clearly that the majority of trainings are geared towards issues such as how to effectively prosecute a human trafficking case, cultural awareness in working with victims, technical assistance, and investigation. Although these are incredibly important aspects to any human trafficking case, it is unclear how much time is spent specifically training border patrol agents, local police officers and religious leaders to look for potentially trafficked individuals.

Putting in time and energy on this kind of “front end” identification has incredible potential. If a trafficked or potentially trafficked individual is identified before they are actually exploited, the trafficker can be prosecuted and one less victim has to endure the horrors of being trafficked. All too often, however, border agents or local police officers encounter trafficked individuals and dismiss, arrest, or deport them instead of taking the time to recognize that the

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52 See ATTORNEY GENERAL’S ANNUAL REPORT 2010, supra note 2 at 58-60.
53 Id.
problem is deeper than a fake passport, or driving without a license, or being in the country without a visa.\textsuperscript{54}

It is not sufficient, however, to simply train law enforcement officials to identify signs that an individual may be trafficked. Trafficked individuals often have a host of characteristics that will make them resistant to cooperating with law enforcement: they may not speak English, they may come from a corrupt society in which cooperating with the police can be trouble, they may believe that the police are corrupt and will report their actions to their traffickers. They may have been told that their family will be hurt or killed if they cooperate with law enforcement.

There are a number of training programs out there - some are nuanced and comprehensive, and some come in the form of 60-second PSA’s.\textsuperscript{55} Over the past several years, information has improved significantly, with more nuanced and less stereotypical information being disseminated to law enforcement. These programs must continue to improve and be expanded so that as many law enforcement officials as possible have the benefit of their information.

V. Victim Protections in the TVPA and Reauthorizations

The TVPA and its subsequent reauthorizations provide for a number of victim protections. There is funding provided so that local service providers can offer shelter, food, counseling, legal services and other aid. There is a temporary immigration status called

\textsuperscript{54} See, e.g., Dina Francesca Haynes, \textit{(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act}, 21 GEO. IMMIGR. L.J. 337 (2007) (describing the story of a woman who was trafficked, arrested upon entry into the United States, spent time in jail, was released without assistance from the U.S. government, threatened by her trafficker, and eventually sold herself into captivity to pay off a family’s debt to her trafficker).

Continued Presence (CP) available to victims who are part of an investigation or prosecution. Victims working with a prosecution can also apply for T visas, which can potentially lead to permanent residency and eventually citizenship.\(^{56}\) Victim’s family members may be eligible for T visa status as well.\(^{57}\)

The flip side of these protections is that when they are not available, a victim may simply be deported and sent back into the exact same situation. They are then at risk of violence or re-trafficking at the hands of their exploiters. In many cases, the victim is in debt to the trafficker and they may threaten the victim or their family.

a. Service Providers

When the TVPA was first passed and DOJ began their first prosecutions, the promise of victims protection and assistance was in place but none of the reality had been implemented. Prosecutors and FBI agents spent a significant amount of time working out logistics and services for victims. For example, one of the first cases prosecuted was in American Samoa and involved hundreds of victims.\(^{58}\) There were no services in American Samoa, and prosecutors needed to move a number of the victims from American Samoa to Hawaii so that they could serve as witnesses for the prosecution.\(^{59}\) They were told that there were no funds to move victims to Hawaii and no services or money for services once the victims arrived. Through contacting NGO’s, religious groups and private donors, prosecutors were able to move many of the victims from American Samoa to Hawaii, secure them temporary house and support, and proceed with the case, eventually securing a significant conviction.


\(^{59}\) Interview with Susan French, supra note 9.
The Lee case demonstrates the need for the actual implementation of social, economic and mental health services to victims. Currently, some areas of the United States have excellent services available to victims and some have few or even none. Caring, competent services are essential for witnesses for two major reasons. First, victims may have just come away from the most horrifying, degrading and abusive situation that they have ever experienced. They need support and help. Second, if victims are not cared for and given a safe place to stay, they may end up back in the hands of traffickers or, if they are foreign nationals, they may leave to go home.

Both the Department of Justice and the FBI have victim advocates and witness support personnel. Victims are likely eligible and plugged into these services as soon as a raid or investigation happens - these services are unlikely to be contingent upon cooperation. However, if the victim wishes to remain in the United State and avoid deportation, he or she must help law enforcement to be recommended for and receive CP.

b. Continuing Presence

The TVPA provides for a temporary protected US status for migrant trafficking victims called Continuing Presence (CP). The purpose of granting CP is to allow potential investigation or prosecution witnesses to stay in the United States for up to a year. It should be practice that most or all victims, even in a large case, will be granted CP while the investigation is ongoing unless and until they decide that they will not cooperate with law enforcement. However, local law enforcement officials, especially in state-based trafficking prosecutions, have a very mixed record of certification for victims of trafficking.

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61 Id.
62 2010 TIP REPORT, supra note 8, at 342.
c. **T visas**

T visas were created through the TVPA to help trafficking victims who are working with or have worked with prosecution of a trafficking case. In order to be eligible for a T visa, an individual must: 1) be a victim of a severe form of trafficking, 2) be in the United States because of that trafficking, 3) have complied with “reasonable requests for assistance” from prosecution, and 4) would suffer “extreme hardship involving unusual and severe harm upon removal (from the United States).”

Victim advocates reported in the 2010 TIP Report that law enforcement is not always helpful in requesting immigration assistance for trafficking victims. Victims must apply for a T visa on their own and it is important that they have legal counsel assisting them. There is currently insufficient funding to provide legal assistance to trafficking victims. Law enforcement does not have to sponsor or certify a victim eligible for the visa, but it is a significant benefit to the application to have their support. Additionally, trafficking victims must show that they will suffer “extreme hardship involving unusual and severe harm” if removed from the U.S. in order to secure a T visa. Once a T visa is secured the visa holder can work legally in the United States as well as secure public benefits, which are not normally available to non-citizens. Additionally, the 2008 TVPRA expanded T visa eligibility to certain victim’s

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64 *Id.*
66 *Id.* at 341.
67 *See* Henry Andrés Yoder, *Civil Rights for Victims of Human Trafficking* 12 U. PA. J.L. & SOC. CHANGE 133, 154 (2008-09) (arguing that this standard is ridiculously high for victims of a crime to meet simply in order to not be forced to return to the original scene of the crime).
68 2010 TIP REPORT, *supra* note 8 at 341.
family members, including spouses and children, if those family members are deemed in danger.\textsuperscript{69}

Similarly to obtaining CP, lack of support from local law enforcement and difficulty accessing legal and other support services seriously hurts the ability of victims to move on with their lives, recover and not be in serious danger of further exploitation, deportation or being re-trafficked.

d. Too Few Victims are Eligible for Services

If there is no prosecution case, trafficking victims are ineligible for most social, economic and health-related services. The Department of Justice does not prosecute many trafficking cases each year in light of the number of victims it is believed exist across the nation. In 2009, the number of cases filed by U.S. Attorney’s Offices (USAO’s) and the DOJ Civil Rights Division (CRT) was 43, with a total of 114 defendants charged.\textsuperscript{70} In 2010, the FBI opened 126 new investigations into human trafficking cases, and made 115 arrests.\textsuperscript{71} The Bureau of Justice Statistics (BJS) reports that between January 2008 and June 2010, 2,515 investigations of human trafficking were opened by federally-funded task forces.\textsuperscript{72} In 2008 and 2009, 2,251 new human trafficking investigations were opened, and the DOJ during that time filed 82 cases against accused traffickers.\textsuperscript{73} That works out to only a 3% rate of charges filed compared to


\textsuperscript{70} ATTORNEY GENERAL’S ANNUAL REPORT 2010, supra note 2 at 48.


\textsuperscript{73} ATTORNEY GENERAL’S ANNUAL REPORT 2010, supra note 2 at 48.
investigations opened,\textsuperscript{74} which is an incredibly low number by any stretch of the imagination. This concern is compounded with the assertion that there may be as many as 17,000 individuals trafficked each year into the United States.\textsuperscript{75}

The problem with eligibility for services is two-fold. First, there is not enough capacity at USAO’s and in the Civil Rights Division to prosecute more cases. In no small part due to budget cuts, the DOJ has not hired as many attorneys the past few years, and there are only a handful of attorneys who focus only on trafficking in CRT. Trafficking cases tend to be large, with a good deal of investigation and time put into each case by attorneys.

Second, even if victims are freed through a raid or because their traffickers are arrested, there is no guarantee that they will receive CP, a T visa, or other services. In a small case with just a few individuals trafficked, it is more likely that every person will receive services and visas. However, large cases can have as many as 600 victims involved.\textsuperscript{76} Interviewing every single victim may not be a realistic possibility, much less having each testify or participate in prosecution in some other way. Because eligibility for CP status and DOJ recommendation for approval of a T visa are contingent upon participation and cooperation with law enforcement in the investigative and prosecution stages of a trafficking case, there are excluded individuals from protections.\textsuperscript{77}

This second problem underscores a fundamental problem with the TVPA: it is prosecution-focused to the detriment of victim services. The law reveals a desire to protect

\textsuperscript{74} Although the correlation is not exact, since cases being investigated would not be filed at the same time, the statistical difference is sufficiently significant to rely on as a rough estimate.

\textsuperscript{75} See 2010 TIP REPORT, \textit{supra} note 8.

\textsuperscript{76} Interview with Susan French, \textit{supra} note 9.

\textsuperscript{77} \textit{Id.} (explaining that there literally is not time in all cases to involve every victim in the case, and if the victim is not at all involved, DOJ cannot certify them for a T visa).
victims, but only so long as they are 1) victims of a sufficiently severe crime, 2) victims in a case where there is sufficient evidence to file charges and move forward with prosecution, 3) victims that actually participate in the investigation and/or prosecution, 4) willing to cooperate despite fears and dangers of cooperation. That is a lot of *ifs* for a traumatized victim to meet in order to receive services and assistance.

VI. **Recommendations for a More Victim-Centered Approach to Fighting Trafficking**

The ideals of the TVPA and its framers dictate striving for better victim protections while pursuing prosecution of perpetrators. Senator Paul Wellstone said “[t]rafficking in persons is a human rights problem that requires a human rights response.” These recommendations are not comprehensive - to truly address the needs of victims of trafficking, the socio-economic push factors need to be addressed at the source and global economic migration patterns and policies need to be addressed. That said, the ideal of preventing trafficking at the source should not preclude aggressive strategies to assist victims.

a. **Do Not Require Victim Cooperation for Services, Continuing Presence or Visa Approval**

Once officials have a good-faith belief that an individual is a victim of human trafficking, they should be able to certify or attest to USCIS that the individual has their backing in applying for a T visa. There should not be a cooperation requirement - forcing victims to face their trafficker, speak in public about their experiences, or even share details with investigators amounts to a re-traumatization for many victims, and can put the victim or their family in danger. Even reducing the requirement for the visa to remove the “extreme hardship” and “severe harm”

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78 *Senate Trafficking Hearing, supra* note 1, at 4 (statement of Sen. Wellstone, Member, S. Comm. on Foreign Relations).

79 *See* Haynes, *supra* note X at 342-343 (pointing out that traffickers recruit come from unstable places, and deliberately target already marginalized and invisible people).
requirements would make a significant difference in the lives of victims. This is a higher standard than most other immigration proceedings - exceptions being attempts to suspend a deportation or removal.\textsuperscript{80}

Current stringent measures to limit the number of trafficked individuals eligible for visa status stands in stark contrast to the purported victim-centered interests espoused during Congressional hearings on the initial passage of the TVPA.\textsuperscript{81} Critics of removing barriers to visa access claim that individuals will deliberately enter trafficking schemes or stage fake trafficking schemes to take advantage of visa opportunities.\textsuperscript{82} Despite Congressional rhetoric to the contrary, these fears were memorialized in the limitation of 5,000 T visas per year in the original TVPA, despite the Congressional finding in the same document that 50,000 individuals are trafficked into the United States each year.\textsuperscript{83} Trafficking victims and a number of scholars agree that people are exceedingly unlikely to subject themselves to systematic abuse, rape and forced labor in order to receive a visa to the United States.\textsuperscript{84}

b. Utilize the Centralized Human Trafficking Database

The difficulties created by the current lack of comprehensive and reliable data about human trafficking cannot be overstated. There is no reliable information about the number of

\begin{itemize}
\item \textsuperscript{80} Yoder, \textit{supra} note X at 154.
\item \textsuperscript{81} \textit{See}, \textit{e.g.} \textit{Senate Trafficking Hearing, supra} note 1 (statements of Senators Brownback, Wellstone, Leahy
\item \textsuperscript{82} \textit{See} Julie Marie Lopiccolo, \textit{Where are the Victims? The New Trafficking Victims Protection Act’s Triumphs and Failures in Identifying and Protecting Victims of Human Trafficking}, 30 WHITTIER L. REV. 851, 873-74 (arguing that that TVPA is in many ways a fundamentally anti-immigration document).
\item \textsuperscript{83} \textit{Compare} TVPA, \textit{supra} note 6 at § 102(b)(2) (articulating that 50,000 individuals are trafficked each year) with \textit{id.} at § 107 (capping the number of visas annually at 5,000).
\item \textsuperscript{84} \textit{See Senate Trafficking Hearing, supra} note 1, at 27 (testimony by Inez, a Mexican woman who was trafficked to Texas for sex work, indicating she would never volunteer for what she went through and she cannot imagine anyone every voluntarily entering such a situation).
\end{itemize}
individuals trafficked into and throughout the US annually, where those victims come from, which sectors they are trafficked into, how long they are kept in trafficking situations, how many criminal organizations are involved in trafficking, or the current effectiveness of prosecution efforts.

The 2008 TVPRA called for a centralized human trafficking database. Stated goals for the creation of the database include improving agency coordination, perform meta-analysis of data, finding patterns and more effectively analyzing global human trafficking trends, identify priorities, and identify emerging trafficking issues. Completing a comprehensive database and utilizing the information to plan strategic approaches to prevention and prosecution are essential.

c. More Funding to DOJ and USAO Offices for Prosecutions

Prosecuting human trafficking requires more funds than has been allocated. With only a handful of dedicated prosecutors in the Civil Rights Division, United States Attorneys Offices must bear more of the burden of prosecuting trafficking cases. These cases have not always become a priority, nor is there always community and NGO support to identify victims or assist prosecutors with victim support. Available literature indicates that at the highest federal levels, prosecutors and agency officials have a fairly strong concept of what human trafficking is and what it takes to combat it.

However, in a 2008 study that surveyed a number of federal and state prosecutors around the country, many state prosecutors did not have a strong understand of the TVPA (46%) and

86 Id.
87 See PROSECUTING HUMAN TRAFFICKING CASES, supra note 43 at 19 (federal prosecutors reporting that NGO’s had only been involved in 57% of cases they had prosecuted, and they felt that only 43% of those relationships could be described as “very good” or “excellent”).
88 Id.
75% indicated that they felt that passage of the TVPA had made no impact on cases being brought to their attention.\(^{89}\) Although nearly all federal prosecutors surveyed felt comfortable with their understanding of the statute, many state prosecutors did not. Prosecutors need to understand the statute and be able to utilize both its criminal provisions as well as the victim support provisions, as prosecutors nearly unanimously agree that securing a conviction in a trafficking case hinges on cooperation at help from victims.\(^{90}\)

d. Put More Resources into Training Law Enforcement and Preventing Trafficking

Local law enforcement need to be consistently and thoroughly trained about both state labor and trafficking laws and federal trafficking laws. Lack of information at the local level leads to trafficking victims facing incarceration and prosecution, lack of resources for victims such as shelter care, counseling and other basic support, and a failure by law enforcement to certify victims for CP status.\(^{91}\)

Training is often conducted in a very top-down manner: higher officials receive more thorough briefings and more detailed information, while police actually patrolling a neighborhood may have seen a 60 second PSA and have a card in their pocket with quick tips for identifying trafficking victims. If time is not spent educating officers and bringing the possibility of encountering a trafficking victim to the forefront of their minds, then it will not occur to the officer to consider trafficking when encountering potential victims.

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.
e. Reach Out to Migrants and Workers in Labor Sectors That Are Most Prone to Trafficking

When potential migrant workers interview at an American embassy for temporary or visa positions in the United States, particularly those who plan to work in temporary, agricultural, or domestic sectors, embassy officials screen for potential trafficking signs.92 They also provide pamphlets to workers. However, these interviews are often conducted in the presence of the employer and so any potential benefit or ability to recognize a trafficking victim is substantially muted.93 Interviews should be conducted privately, and embassy officials should make very clear that workers should never have to give up their documents, they can and should tell someone if they are not paid, they have rights in the United States, and they will not be in trouble if they leave their employer because they are unhappy.

More difficult is reaching undocumented migrant workers, workers who enter the country and overstay a temporary visa, and generally workers involved in relatively unregulated sectors such as restaurants, agriculture, sex work and some construction. Here, federal agencies must work closely with local law enforcement and regulators as well as labor and community activists.

VII. Conclusion

It is possible to have a more victim-centered approach to trafficking cases without sacrificing prosecutions. Each of the various agencies: Labor, Immigration, Justice, and Health and Human Services have significant room for improvement in the delivery of victim protections and services. Reliance on a top-down approach to dissemination of information and training is futile. Police officers, immigration detention officers, airport screening officials, border patrol

93 Id.
agents, Department of Labor inspectors, and embassy officials must be well-trained to have a cognitive understanding of the signs to look for in a potential trafficking victim. More than that, though, they need to be able to understand that trafficking victims do not always appear to be victims or in trouble at first glance. One often needs to “look below the surface” to begin to gain a full understanding of what is going on.\textsuperscript{94}

\textsuperscript{94} Washington State Law Enforcement Training Powerpoint, supra note 48.