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Modern-Day Slavery and Cultural Bias: Proposals for Reforming the U.S. Visa System for Victims of International Human Trafficking

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MODERN-DAY SLAVERY AND CULTURAL BIAS: PROPOSALS FOR REFORMING THE U.S. VISA SYSTEM FOR VICTIMS OF INTERNATIONAL HUMAN TRAFFICKING

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I. Introduction

In San Diego, California, hundreds of Mexican girls, aged seven to eighteen, were forced to provide sex to agricultural workers who paid their captors for the use of the girls' bodies. Over a period of ten years, the "reed camps," as they came to be known, grew in number to about two dozen agricultural and home-based camps, and were supplied by regular shipments of girls kidnapped and lured from Mexico City and poor Mexican towns and villages. When fifty johns and traffickers were eventually arrested in a 2001 federal law enforcement raid, most of them avoided prosecution because their child victims were too afraid to testify against them, and most of the victims were deported.¹

In Plainfield, New Jersey, a conventional-looking home in a neighborhood was actually a squalid prison for four Mexican girls aged fourteen to seventeen. When police raided the house, they found "rancid, doorless bathrooms; bare, putrid mattresses; and a stash of penicillin, 'morning after' pills and misoprostol, an antiulcer medication that can induce abortion. The girls were pale, exhausted and malnourished."²

These are only two examples of the thousands of international human trafficking victims living in the United States. Like the girls in the reed camps and the Plainfield house, trafficking

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¹ Libertad Latina, *About the Child Rape Camps of San Diego County, California: A Crime Against Humanity Inside the U.S.A.*, http://www.libertadlatina.org/LatAm_US_San_Diego_Crisis_Index.htm.

² Peter Landesman, *The Girls Next Door*, N.Y. TIMES MAG. Jan. 25, 2004, at 30, 32.

victims are often held captive in or near heavily populated areas – sometimes literally in one’s own backyard. Many trafficking victims are forced to work in the sex trade. Kevin Bales, president of Free the Slaves, an anti-trafficking organization, estimates that a sex trafficking victim will last about two to four years. After that, “[s]he may be killed in the brothel. She may be dumped and deported. Probably least likely is that she will take part in the prosecution of the people that enslaved her.”³ Often, however, taking part in the prosecution is the only way to obtain protection from the U.S. government.

In 2000, in an effort to combat trafficking and encourage trafficking victims to assist in the prosecution of traffickers, the United States enacted the Victims of Trafficking and Violence Protection Act (“VTVPA”),⁴ which created a new visa, called the T visa,⁵ for victims of “severe forms of trafficking.”⁶ Severe forms of trafficking include “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age” as well as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”⁷ In order to be eligible for a T visa, a trafficking victim over the age of eighteen must have “complied with any reasonable request for assistance in the . . . investigation or prosecution of acts of trafficking.”⁸ In addition, the trafficking victim must demonstrate that she

³ *Id.* at 75.

⁴ Pub. L. No. 106-286, 114 Stat. 1464 (2000), *reauthorized by* Pub. L. 108-193, 117 Stat. 2875 (2003).

⁵ The trafficking visa statute has been codified at 8 U.S.C. § 1101(a)(15)(T) (2000), thereby earning the nickname “T visa.”

⁶ 22 U.S.C. § 7102(8) (2000).

⁷ 22 U.S.C. § 7102(8)(A)-(B).

⁸ 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa); I.N.A. § 1101(a)(15)(T)(i)(III)(aa).

“would suffer extreme hardship involving unusual and severe harm” if deported from the United States.⁹

Although the law was passed as the result of a growing national awareness of the global epidemic of international trafficking in human beings (which is tied with arms trafficking and second only to drug trafficking in terms of revenue)¹⁰, accessing the protections the law provides has proven difficult. The Department of Health and Human Services estimates that 14,500-17,500 individuals per year are brought into the United States and forced, defrauded or coerced into providing sexual and labor services.¹¹ Extrapolating from the more conservative figure of 18,000, the United States presumably has had at least 108,000 individuals trafficked into the country in the six years since the passage of the VTVPA. As of August 2006, however, immigration officials had approved only 600 principle T visa applications since the enactment of the visa category.¹² This low number suggests a failure in the T visa system.

This Essay critically examines the T visa process and suggests means to improve it. Part II provides background on the VTVPA and its legislative history. Part III explores the problems plaguing the T visa system: law enforcement officers in charge of situations more appropriate to victims’ advocates; unrealistic expectations regarding the type and extent of cooperation an international human trafficking victim may provide to law enforcement officials; and a culturally skewed understanding of what constitutes “force, fraud or coercion.” Part IV proposes a reform of the current T visa system. First, the Department of Homeland Security should establish a Trafficking and Exploitation Victims Assistance (TEVA) program similar to the Asylum Pre-

⁹ 8 U.S.C. § 1101(a)(15)(T)(i)(IV); I.N.A. § 1101(a)(15)(T)(i)(IV).

¹⁰ U.S. Dept. of Health and Human Services, *About Human Trafficking*, <http://www.acf.hhs.gov/trafficking/about/index.html> [hereinafter *Human Trafficking*].

¹¹ *Id.* Worldwide, the estimate is much higher: 800,000. *Id.*

¹² E-mail from Sally Kinoshita, Staff Attorney, Immigrant Legal Resource Center, to VAWA Experts listserv (Aug. 15, 2006) (on file with author). In addition to 600 principle T visas, CIS has also issued 600 derivative visas. *Id.*

Screening Office (APSO) program in place for asylum seekers apprehended at ports of entry. TEVA would require that all possible international human trafficking victims, including individuals arrested in brothel and workplace raids, be interviewed by specially trained, non-ICE personnel. Second, CIS, the agency ultimately responsible for adjudicating T visas, should find that applicants have reasonably complied with efforts to prosecute perpetrators if applicants can provide evidence that there is at least a reasonable possibility that overt cooperation with law enforcement will result in harm to themselves or to family members abroad. Finally, CIS should find that “force” or “coercion” includes compulsion by economic and social conditions within the country of origin. This Essay concludes that implementing the above recommendations will lead to a more humane and effective system for protecting international human trafficking victims and prosecuting traffickers.

II. Victims of Trafficking and Violence Protection Act

Congress passed the VTVPA in response to the growing international crisis of human trafficking. Beginning in 1994, the Department of State officially began to monitor international human trafficking.¹³ The Department of State’s findings revealed that trafficking warranted Congressional action:

[B]etween one and two million women and children are trafficked each year worldwide into forced labor, domestic servitude, or sexual exploitation Of these, approximately 50,000 individuals are trafficked to the United States every year. This is a major criminal enterprise generating billions of dollars annually. Trafficking is now considered the third largest source of profits for organized crime, behind only drugs and guns.¹⁴

Recognizing that the crisis of international human trafficking cannot be addressed adequately by focusing solely on the United States, the VTVPA includes provisions for international as well

¹³ DEP’T ST. TRAFFICKING IN PERSONS REP. at 3 (2001) [hereinafter *Trafficking Report*].

¹⁴ 146 Cong. Rec. 21328, 21329 (2000) (statement of Rep. Pryce). *See also Trafficking Report, supra* note 13, at 3 (stating that an estimated “45,000-50,000 people, primarily women and children, are trafficked into the United States annually”). Over the course of six years, human trafficking has become as profitable as the arms trade. *Human Trafficking, supra* note 10.

as domestic initiatives to combat the problem. The international initiatives include the establishment of an interagency task force, headed by the Secretary of State, to work with foreign governments to monitor and combat trafficking;¹⁵ authorizing the establishment of economic incentive programs designed to “enhance economic opportunity for potential victims of trafficking as a method to deter trafficking;”¹⁶ and requiring the Department of State to collaborate with foreign governments and nongovernmental organizations to prevent trafficking within those countries.¹⁷ The VTVPA also mandates that the Department of State publish an annual Trafficking in Persons Report.¹⁸

The VTVPA, in addition to initiating efforts aimed at combating trafficking in other countries, also contains several provisions aimed at reducing trafficking within the United States and protecting individuals trafficked into the United States. These provisions include increasing

¹⁵ 22 U.S.C. § 7103 (2006). The VTVPA charges the task force with (1) measuring and evaluating the “progress of the United States and other countries in the areas of trafficking prevention, protection, and assistance to victims of trafficking, and prosecution and enforcement against traffickers, including the role of public corruption in facilitating trafficking”; (2) expanding “interagency procedures to collect and organize data, including significant research and resource information on domestic and international trafficking”; (3) engaging in “efforts to facilitate cooperation among countries of origin, transit, and destination” by strengthening “local and regional capacities to prevent trafficking,” prosecuting “traffickers and assist trafficking victims,” and providing “initiatives to enhance cooperative efforts between destination countries and countries of origin and assist in the appropriate reintegration of stateless victims of trafficking”; (4) examining “the role of the international ‘sex tourism’ industry in the trafficking of persons and in the sexual exploitation of women and children around the world”; and (5) engaging in “consultation and advocacy with governmental and nongovernmental organizations, among other entities,” to combat trafficking. *Id.* § 7103(d).

¹⁶ 22 U.S.C. §.7104(a) (2000).. Congress suggested that such incentives include:

- (1) microcredit lending programs, training in business development, skills training, and job counseling;
- (2) programs to promote women's participation in economic decisionmaking;
- (3) programs to keep children, especially girls, in elementary and secondary schools, and to educate persons who have been victims of trafficking;
- (4) development of educational curricula regarding the dangers of trafficking; and
- (5) grants to nongovernmental organizations to accelerate and advance the political, economic, social, and educational roles and capacities of women in their countries.

Id. § 7104(a)(1)-(5).

¹⁷ 42 U.S.C. § 7105(a) (2000).

¹⁸ 42 U.S.C. § 7107(b)(1) (2000).

the criminal penalties for traffickers,¹⁹ making victims of international human trafficking eligible for some federal “benefits and services,”²⁰ and creating two new nonimmigrant visas for victims of trafficking and other crimes.²¹

A. U Visa

The VTVPA provides immigration relief in the form of a nonimmigrant visa,²² known as a “U visa,”²³ to survivors of crimes including domestic violence, kidnapping, rape, torture, incest and female genital mutilation.²⁴ The statute provides relief for an individual who “has suffered substantial physical or mental abuse”²⁵ and “has been helpful, is being helpful, or is likely to be helpful” in prosecuting the crime.²⁶ To date, no U visas have been issued due to a lack of implementing regulations.²⁷

B. T Visa

The VTVPA provides immigration relief in the form of another nonimmigrant visa, known as a T visa, specifically for victims of international human trafficking. A T visa applicant must meet the following requirements: is or has been a victim of a severe form of trafficking;²⁸

¹⁹ 22 U.S.C. § 7109(b) (2000) (amending several sections of 18 U.S.C. by creating new trafficking-related felonies; increasing the length of incarceration for trafficking in humans from ten years to twenty years; and authorizing increased penalties up to life imprisonment for aggravated forms of trafficking that include “kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill”).

²⁰ § 7105(b)(1).

²¹ § 7105(e).

²² A “nonimmigrant visa” refers to a visa temporary in nature, as distinguished from an “immigrant visa,” more commonly known as permanent residency or a “green card.”

²³ The letter “U” is a reference to the visa’s statutory designation in the Immigration and Nationality Act, at 8 U.S.C. § 1101(a)(15)(U), I.N.A. § 1101(a)(15)(U).

²⁴ VTVPA, Pub. L. No. 106-386, 114 Stat. 1533 (2000).

²⁵ 8 U.S.C. § 1101(a)(15)(U)(i)(I); I.N.A. § 1101(a)(15)(U)(i)(I).

²⁶ 8 U.S.C. § 1101(a)(15)(U)(i)(III); I.N.A. § 1101(a)(15)(U)(i)(III).

²⁷ See Memorandum from William Yates, Assoc. Director of Operations, USCIS, to Director, USCIS Vermont Service Center (Oct. 8, 2003) (stating that regulations implementing the U visa have not been published and establishing a process for providing interim relief to potential U visa beneficiaries).

²⁸ The statute defines “severe forms of trafficking” as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

is physically present in the United States on account of trafficking; has complied with any reasonable request for assistance in investigation or prosecution (or is under 18); and would suffer extreme hardship involving unusual and severe harm upon removal.²⁹

Unlike the U visa, the T visa has implementing regulations.³⁰ The manner in which the T visa has been implemented, however, is at odds with Congress's stated intentions 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."³¹ Despite the Department of State's report that nearly 50,000 people are trafficked through and into the United States every year, only 600 T visas have been issued in the last six years, leading one to conclude that thousands of trafficking victims are not being afforded the protection which Congress sought to extend to them.³² An examination of the T visa process reveals possible reasons why this protection has eluded so many victims of international human trafficking.

III. A Case Study of the T Visa Process as It Functions Today: The 2005 Houston Raid

The case of a Houston trafficking ring illustrates the difficulties involved with obtaining a T visa. Between late 2004 and mid-2005, Korean brothel owner Mi Na Malcolm paid human traffickers to bring Korean women into the United States.³³ She then forced the women to work

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

22 U.S.C. § 7102(8).

²⁹ 8 U.S.C. § 1101(a)(15)(T); I.N.A. § 1101(a)(15)(T).

³⁰ See 8 C.F.R. § 214.11 (2007) (setting out definitions and procedures pertaining to the T visa). See also Form I-914, Application for T Nonimmigrant Status (providing instructions, fee information, and filing address). T visa applicants file Form I-914 with supporting documentation and a \$240 fee to the CIS Service Center in Vermont. *Id.* The Vermont Service Center may determine that an in-person interview is necessary, in which case one will take place at a location designated by CIS. 8 C.F.R. § 214.11(d)(6).

³¹ 22 U.S.C. § 7101(a) (2000).

³² See Sally Kinoshita, *supra* note 12 and accompanying text.

³³ Miriam Rozen, *Seen, But Not Heard: Hussein Sadruddin Helps Human Trafficking Victims Find Their Voice*, TEX. LAWYER (Aug. 7, 2006) [hereinafter *Seen, But Not Heard*].

as prostitutes at three brothels in order to pay off their smuggling debt.³⁴ In order to ensure payment of the debts, Malcolm subjected the women to slave-like conditions: confiscating their passports, forcing them to work as prostitutes six and seven days a week, forcing them to be on call for sex at all times, and monitoring their movements “in person, through an escort, and through a video surveillance system”³⁵

After an August 12, 2005 raid in which she was arrested, Malcolm pled guilty to “conspiracy to hold or harbor illegal aliens for purposes of prostitution, harboring illegal aliens for commercial advantage and private financial gain, and bulk cash smuggling.”³⁶ On July 18, 2006, Chief U.S. District Judge A. Joe Fish sentenced Malcolm to ten years in prison and ordered her to pay a \$460,000 fine.³⁷ The U.S. Department of Justice lauded the sentence as a “loud and clear message that those individuals who abuse the most helpless and vulnerable members of our society will be aggressively investigated, swiftly prosecuted, and firmly punished.”³⁸

Malcolm’s arrest and eventual conviction was not the only product of the August 2005 raid. Several other brothel owners³⁹ were arrested in the aftermath of what one police official called “the largest prostitution operation I’ve ever been a part of.”⁴⁰ Agents encountered

³⁴ News Release, U.S. Immigration and Customs Enforcement, Local Woman Sentenced to 10 Years in Federal Prison for Harboring Korean Women to Work in her Sexually Oriented Businesses (July 18, 2006) (*available at* <http://www.ice.gov/pi/news/newsreleases/articles/060718dallas.htm>). The brothels operated publicly as spas: the Ruby Spa, the Venetian Body Work and the Palm Tree Relaxation. *Id.*

³⁵ Department of Justice, Attorney General’s Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2006 (May 2007), *available at* <http://www.usdoj.gov/ag/annualreports/tr2006/agreporhumantrafficking2006.pdf>.

³⁶ *Supra* note 34.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Brothel owners Kyong “Jackie” Roberts and her husband Sang Hyun Cho were also arrested in the August 12, 2005 raid. Roberts received a thirty-seven-month jail sentence her husband received a thirty-month sentence. Paul Meyer, *Three Leaders of Asian Brothels Get Prison Terms*, DALLAS MORNING NEWS, July 19, 2006. Another seven brothel operators were indicted throughout the late summer and fall of 2005, and raids have continued in 2006. Tim Wyatt, *Madam’s Fall Offers Look at Lucrative Sex Trade*, DALLAS MORNING NEWS, May 10, 2006.

⁴⁰ Wyatt, *supra* note 39.

“hundreds of thousands of dollars in cash, at least 117 tubes of surgical lubricant, [and] more than 6,000 condoms.”⁴¹ They also found forty-two women.⁴²

Of the forty-two women found in the conditions described above, only four were present at Malcolm’s sentencing.⁴³ What happened to the other thirty-eight “most helpless and vulnerable members of our society”? Thirty-four have been deported from the United States or are in removal proceedings.⁴⁴ Three faced no immigration or criminal charges.⁴⁵ Of the forty-two, only five, including the four present at the sentencing hearing, were deemed potentially eligible for immigration benefits accorded to victims of human trafficking who cooperate with law enforcement officials.⁴⁶

A. The Law Enforcement Culture of the Bureau of Immigration and Customs Enforcement

The fact that the majority of the victims found during the Houston raid were deported could be explained in part by the training and attitudes of Immigration and Customs Enforcement officers. ICE is a law enforcement body with a law enforcement culture.⁴⁷ It is a separate agency from Citizenship and Immigration Services, whose mission is to adjudicate petitions for immigration benefits.⁴⁸ Immigration enforcement agents are not necessarily interested in identifying, or trained to identify, victims of international human trafficking. ICE officers

⁴¹ Paul Meyer, *Sex Slaves or Capitalists?*, DALLAS MORNING NEWS, May 7, 2006 [hereinafter *Sex Slaves*].

⁴² *Id.*

⁴³ *Seen, But Not Heard*, *supra* note 33.

⁴⁴ *Sex Slaves*, *supra* note 41.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See U.S. Immigration and Customs Enforcement, *About Us*, <http://www.ice.gov/about/index.htm> (last visited Apr. 12, 2007) (describing the functions of ICE). “Created in March 2003, Immigration and Customs Enforcement (ICE) is the largest investigative branch of the Department of Homeland Security (DHS). The agency was created after 9/11, by combining the law enforcement arms of the former Immigration and Naturalization Service (INS) and the former U.S. Customs Service, to more effectively enforce our immigration and customs laws and to protect the United States against terrorist attacks. ICE does this by targeting illegal immigrants” *Id.* See also U.S. Immigration and Customs Enforcement, *Careers*, <http://www.ice.gov/careers/index.htm> (last visited Apr. 12, 2007) (describing ICE as “primarily a law enforcement agency”).

⁴⁸ See U.S. Citizenship and Immigration Services, *About Us*, <http://www.uscis.gov/aboutus/> (last visited Apr. 12, 2007) (describing duties of the Citizenship and Immigration Services bureau).

undergo thirty-nine days of training in basic law enforcement subjects, including “Immigration and Naturalization laws; Detention Procedures; Fingerprinting; Detection and Discovery of Contraband; Interviewing; Cross-Cultural Communications; Defensive Tactics; Arrest Techniques; Baton Techniques; Officer Liability; Firearms Handling and Qualification; and Driver Techniques.”⁴⁹ Although these subjects are relevant and necessary for the job with which ICE officers are charged, they are not conducive to identifying or properly treating victims of international human trafficking.

ICE, by definition, approaches situations such as the Dallas raid from a law-enforcement rather than an advocacy perspective. Arguably, such a perspective is entirely proper for an agency charged with pursuing lawbreakers. In the case of trafficked individuals, however, exposing the victims to the skepticism and enforcement mentality of law enforcement officials has proven antithetical to the goals of the T visa.

For example, ICE Agent John Chawkin stated the following with respect to the Houston raid: “The women arrested for prostitution at the spas were not teenagers – most were mature women in their 30s. A clear majority were professional prostitutes who knew exactly what they were doing.”⁵⁰ The circumstances in which the women were found and their subsequent treatment indicate that perhaps their situation was not quite as clear cut as Agent Chawkin propounds. The women reported that they serviced dozens of customers a day; that they would

⁴⁹ Immigration & Customs Enforcement Deportation Integrated (ICE D), <http://www.fletc.gov/training/training-management/training-management-division/center-integrated-branch/immigration-customs-enforcement-detention-integrated-iced/> (last visited Apr. 12, 2007). Similarly, Customs and Border Patrol agents receive training in “Anti-Terrorism; Detection of Contraband; Interviewing; Cross-Cultural Communication; Firearms Handling and Qualification, Immigration and Naturalization laws; U. S. Customs Export and Import laws; Defensive Tactics; Arrest Techniques; Baton Techniques; Examination of Cargo, Bags and Merchandise; Border Search Exception; Entry and Control Procedures; Passenger Processing; and Officer Safety and Survival.” Customs & Border Protection Integrated Training Program (CBPI), <http://www.fletc.gov/training/training-management/training-management-division/center-integrated-branch/customs-border-protection-integrated-training-program-cbpi/> (last visited Apr. 12, 2007).

⁵⁰ *Sex Slaves*, *supra* note 41.

work even “when sick, sore and bleeding”; and that the brothel owners routinely refused permission to seek medical treatment.⁵¹ They spoke little English, and had been trained, under threat of harm to family members back home, to provide vague answers to law enforcement officials and victims’ advocates.⁵²

The treatment of the Houston women immediately after the raid further exemplified the skepticism and lack of empathy they encountered. When legal counsel from Catholic Charities arrived to interview the women, they found that the “women were treated as criminals” and detained in an environment that hindered legal counsel from building trust with the women and obtaining an accurate account of what had happened to them.⁵³ After permitting limited interviews with the Catholic Charities representatives, ICE transferred the women to a detention center.⁵⁴

B. Cultural Barriers to Trafficking Victims’ Willingness to Cooperate with Arrest and Prosecution Efforts

Like the women in the Houston raid, many victims of international human trafficking come to the attention of law enforcement agencies during workplace raids. A trafficking victim in a brothel, sweatshop or other place of forced labor first comes into contact with U.S. law enforcement agents in a highly charged, potentially violent encounter involving armed officers and often resulting in the trafficking victim’s arrest. Although the law enforcement agents theoretically are on the side of the victims, their conduct during the raid (for example, their arrest of the victims) encourages the deeply ingrained sense among victims that law enforcement is indifferent to them at best and hostile at worst. Their initial contact with individuals who could potentially help them, therefore, is stigmatized.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Moreover, law enforcement officers and ICE employees operate within a criminal justice system that reflects the cultural norms of the United States. The victims, however, must consider not only the U.S. government's ability to protect them from retaliation by their perpetrators, but also their own country's ability to protect their loved ones from such retaliation. Cooperating with U.S. law enforcement against powerful criminal enterprises could have disastrous consequences for loved ones (or themselves if they are ultimately deported) living in a country where the government is unable or unwilling to provide protection from powerful criminals seeking revenge.⁵⁵

C. "Force" and "Fraud" As Culturally Relative Terms

The same cultural norms that presuppose a willingness to cooperate on the part of trafficking victims also define "force" and "coercion." In a society in which employment and social services are plentiful, median incomes are among the highest in the world, and poverty is the exception to the rule, it is difficult to imagine a woman electing a life of prostitution. U.S. society in general views prostitutes as criminals who have chosen a degenerate lifestyle because of their corrupt morals.⁵⁶ For example, according to Ken Cates, the special agent in charge of the Dallas ICE office at the time of the raid (now retired), "Many of [the women in the Houston raid] . . . knew that they voluntarily came to engage in this business with at least a bit of an

⁵⁵ See Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2582 (2005-2006), (stating that "because traffickers often maintain significant influence in the countries from which they recruit, victims may be reluctant to offer assistance for fear of retaliation against themselves or their families"), citing Jacqueline Bhabha, *More Than Their Share of Sorrows*: *International Migration Law and the Rights of Children*, 22 ST. LOUIS U. PUB. L. REV. 253, 273-274 (2003), and Free the Slaves, Washington D.C. & the Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 49, 84-85 (2005).

⁵⁶ See, e.g., *United States v. Bitty*, 208 U.S. 393, 401 (1908) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885): "The lives and example of [prostitutes] are in hostility to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement."

understanding of the circumstances that you'll find when you get here."⁵⁷ Many trafficked women, however, originate from countries whose economic and social conditions often make prostitution a woman's only "choice," and thus not a choice at all.⁵⁸

IV. Proposed Reforms

The cultural barriers present in the T visa system have led to erratic, inadequate implementation of the T visa, which in turn has had several negative repercussions for international human trafficking victims and anti-trafficking efforts. First, it sends a message to traffickers and their customers: trafficking victims are not a priority within the immigration system. Second, this ongoing failure to provide adequate protection and benefits to "the most helpless and vulnerable members of our society" further victimizes them, and cultivates an environment in which the actions against them become invisible, and even acceptable. Finally, it contributes to the distrust and fear that trafficking victims already harbor towards law enforcement,⁵⁹ thereby encouraging them to remain silent rather than to cooperate in the pursuit and prosecution of individuals who are a danger to the entire community.⁶⁰

⁵⁷ *Sex Slaves*, *supra* note 41.

⁵⁸ See Dorchen Leidholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L.J. 133, 136-141 (1993) ("Just as prostitution isn't about individuals, it isn't about choice. Instead, prostitution is about the absence of meaningful choices; about having alternative routes to survival cut off or being in a situation where you don't have options to begin with . . ."). See also Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 27-28 (1996) ("If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?").

⁵⁹ See 22 U.S.C. § 7101(b)(20) (2000):

Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

⁶⁰ This is contrary to the goals of the VTVPA. See § 7101(b)(24):

To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses.

To ensure that the victims of international human trafficking – who are brought to the United States to supply an illicit demand for their services – have access to the protection Congress intended, I propose several reforms to the T visa system. First, the Departments of Justice and Homeland Security should implement a system in which trafficking victims are exposed to federal law enforcement officers for the least possible duration. Rather than remain in the custody of and subject to the jurisdiction of law enforcement officers, trafficking victims should be housed in appropriate (i.e., secure but non-prison-like) settings⁶¹ and have immediate access to immigration officials specially trained to earn their trust and determine whether they are eligible for a T visa.⁶² Second, the T visa regulations should be amended to authorize the waiver of the cooperation requirement upon a showing that such cooperation on the part of the trafficking victim is more likely than not to result in severe harm to her or her family members abroad. Finally, the regulations should be amended to specify that poverty and domestic violence may constitute force or coercion.

A. Creating an initial interview process that responds to the unique situations of T Visa applicants

International human trafficking victims are not similarly situated to the majority of applicants for various immigration benefits. Even when compared to most asylum seekers, their trauma is often more recent and their likelihood of harm more imminent. For them to access the immigration benefits to which they are statutorily entitled, the T visa system must have the capacity to respond to their unique situations.

1. Asylum Pre-Screening Officer System (APSO)

⁶¹ See 22 U.S.C. § 7105(c)(1)(A) (2000) (mandating that trafficking victims in federal custody not be detained in facilities inappropriate to their status as crime victims).

⁶² See *Id.* at § 7105(c)(1)(B) (mandating that trafficking victims in federal custody receive necessary medical care *and other assistance*) (emphasis added).

In 1996, in response to concerns that the U.S. immigration system was vulnerable to fraud and abuse, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).⁶³ IIRIRA made significant changes to the U.S. immigration system, one of which was the establishment of a new deportation procedure by which immigration officers at the port of entry were empowered to deport summarily any individual who did not have a valid passport and/or visa.⁶⁴ This process, called expedited removal, includes a five-year ban on returning to the United States.⁶⁵

Expedited removal does not apply to individuals fleeing persecution.⁶⁶ To ensure that individuals who may face harm upon return to their countries are not subjected to expedited removal, the INS established the Asylum Pre-Screening Officer (APSO) system⁶⁷ to conduct evaluations known as “credible fear interviews.”⁶⁸ Officers of the specially trained Asylum Corps conduct the interviews and determine whether “there is a significant possibility . . . that the alien could establish eligibility for asylum.”⁶⁹

Credible fear applicants often find themselves in situations similar to those that victims of international human trafficking encounter. Having been apprehended by armed U.S. law enforcement officials for violating the law, they experience language barriers, cultural barriers, anxiety, and fear for their well-being. Many have experienced torture or other trauma prior to fleeing to the United States.⁷⁰ Like victims of international human trafficking, most credible fear

⁶³ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 to (1996).

⁶⁴ See 8 U.S.C. § 1225(b)(1) (2000); I.N.A. § 235(b)(1) (2000) (mandating that immigration officers order removed any applicant for admission to the United States who has arrived at a port of entry without proper entry documents).

⁶⁵ 8 USC § 1182(a)(9)(A)(1) (2000); I.N.A. § 212(a)(9)(A)(1) (2000).

⁶⁶ 8 USC § 1225(b)(1)(A)(ii) (2000); I.N.A. § 235(b)(1)(ii) (2000).

⁶⁷ Also known as Asylum Pre-Screening System (APPS), but more commonly used acronym is APSO.

⁶⁸ 8 U.S.C. § 1225(b)(1)(B); I.N.A. § 235(b)(1)(B).

⁶⁹ *Id.* § 1225(b)(1)(B)(v); I.N.A. § 235(b)(1)(B)(v).

⁷⁰ See Philip G. Shrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267, 271 (1997) (discussing asylum seekers’ “inability, following torture and the onset of post-traumatic stress syndrome, to tell their stories to advocates, much less official governmental authorities”).

applicants have been transferred to a prison-like detention center to await further processing. By the time they have their credible fear interview, many have spent several days or even weeks in detention.⁷¹ Even if the APSO officer finds them to have a credible fear of return to their country, they often remain in detention for lengthy periods. The credible fear interview is only the first step in their quest for safety – they must then present their case to an immigration judge in a contested hearing and meet the higher standard and burden of proof of asylum hearings,⁷² often without a lawyer or any logistical support.⁷³

Similarly, victims of international human trafficking are often detained at length. Their initial encounter with armed law enforcement officers often occurs during the terrifying atmosphere of a raid. Like many asylum seekers, most have endured or been threatened with horrific treatment prior to being arrested and detained, and have a deeply instilled fear of law enforcement. That fear, as well as the conditions of detention, anxiety, and linguistic and cultural barriers, creates a tremendous risk that potential T visa-eligible victims will not have the opportunity to seek the relief to which they may be entitled. Developing and implementing a

⁷¹ See 8 U.S.C. § 1225 (b)(1)(B)(iii)(IV); I.N.A. § 235(b)(1)(B)(iii)(IV) (mandating detention of credible fear applicants). See also 8 C.F.R. § 235.3(b)(4)(ii) (2007) (mandating detention of credible fear applicants).

⁷² Asylum applicants must prove that there is a reasonable possibility, or at least a ten percent chance, that they will experience harm rising to the level of persecution should they return to their home country. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). The burden of proof is on the asylum seeker, and while in rare cases his or her testimony alone may suffice to establish the claim, at least some corroborating evidence is required in most cases. 8 C.F.R. § 208.13(a) (2007). These standards are relaxed at the credible fear stage, resulting in the vast majority of credible fear applicants being found to have a “significant possibility . . . [of] establish[ing] eligibility for asylum”), 8 U.S.C. § 1225(b)(1)(B)(v); I.N.A. § 235(b)(1)(B)(v). See Mark Hetfield, *Report on Credible Fear Determinations*, in 2 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 165, 173 (Feb. 2005) (reporting that from 1998-2004, 92% of credible fear applicants were found to have a credible fear of persecution).

⁷³ See Human Rights First, *IN LIBERTY’S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY* 39 (2004), available at http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf (discussing the logistical difficulties asylum seekers face when attempting to obtain access to counsel). Those to whom the government does not grant parole remain in detention for the duration of their removal proceedings, which can go on for years. See *id.* at 14 (reporting that there is no limit on the length of detention of asylum seekers, and that asylum seekers may spend more than five years in prison awaiting the outcome of their cases). Only about twenty-five percent of detained asylum seekers with counsel will succeed in their claims. Charles H. Kuck, *Legal Assistance for Asylum Seekers in Expedited Removal: A Survey of Alternative Practices*, in REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 232, 239 (2005). Only about two percent of unrepresented asylum seekers will prevail. *Id.*

system similar to APSO could eliminate some of the conditions that may be precluding many international human trafficking victims from accessing immigration relief.

2. Trafficking and Exploitation Victims Assistance Program (TEVA)

To respond to the unique needs of international human trafficking victims, I propose that CIS create an intervention system that functions similarly to the APSO program. The Trafficking and Exploitation Victims Assistance (“TEVA”) program would employ CIS officers (as opposed to ICE or CBP officers) specially trained to deal effectively with individuals who have experienced trauma, duress, kidnapping, and physical and sexual assault. TEVA officers, like APSO officers, would have access to potential T visa applicants as soon as possible after their apprehension by law enforcement officers.

TEVA interviews would differ from APSO interviews in at least two significant ways. First, unlike APSO interviews, which take place in detention centers, TEVA interviews would take place in a location more conducive to earning the trust of and learning the truth from trafficking victims. To ensure that potential T visa beneficiaries gain access to the application process, I recommend that all noncitizen arrestees from brothel and sweatshop raids be housed in secure but non-prison-like TEVA facilities similar to those where child and family asylum seekers are detained.⁷⁴ Like the child and family detention centers, the TEVA facilities would have social workers and other trained professionals on staff, and offer medical care, therapy, recreation and education in a supportive, non-threatening environment. It is in these facilities, rather than a jail, that TEVA interviews would take place.

⁷⁴ I do not intend to support or condone the detention of any asylum seekers, especially children and families. I do, however, recognize two concerns in the human trafficking context that I do not believe are present in the asylum context: (1) that traffickers may attempt to gain access to and harm their rescued victims; and (2) that the workers, regardless of whether they were trafficked or voluntary, may seek to flee out fear, traumatization, or lack of trust of officials. I submit that the law enforcement concerns and humanitarian concerns can be reconciled by housing potential T visa applicants in secure but comfortable, non-threatening facilities.

Second, TEVA officers would be specially trained to deal with victims of the types of trauma common among trafficking victims. Just as APSO officers receive extensive training in asylum law, TEVA officers must have expertise in the dynamics of human trafficking, as well as expertise in determining whether a person might be suffering from trauma-related psychological disorders and/or the effects of coercion. Based on the applicant's reported experiences and display (or lack thereof) of psychological and/or physical symptoms consistent with a victim of human trafficking, the TEVA officer would make a decision whether to refer the applicant to nonprofit or pro bono counsel for pursuit of a T visa claim.⁷⁵

B. Compliance with Law Enforcement Requests

The T visa regulations currently require that a T visa application be denied “[i]f the Service determines that the alien has not complied with any reasonable request for assistance....”⁷⁶ In general, cooperation with law enforcement is a valid requirement and one consistent with one of the goals of the VTVPA: bringing international human traffickers to justice. However, the failure to recognize that in some cases, providing such assistance may jeopardize the lives of the trafficking victims and/or their families, is inconsistent with another principal goal of the VTVPA: providing protection and assistance to victims of international human trafficking.

To reconcile the apparent inconsistency between these two goals, I propose an amendment to the regulations. The amendment, which would be placed at 8 C.F.R. § 214.11(h)(4), would read:

⁷⁵ Those who do not appear to be eligible for a T visa may still pursue a claim but may not be eligible to remain in the TEVA facility; rather, they would be returned to ICE custody. Those who file T visa applications may remain in the TEVA facility or apply to TEVA for parole should they wish to reside with family or friends. Such parole applications would be subject to the same requirements applicable to other detainees. *See* 8 C.F.R. § 236.1(c)(8) (2007) (conferring discretion upon arresting immigration officers to release detainees who do not pose a danger to society and who are likely to appear for any future immigration proceeding).

⁷⁶ 8 C.F.R. § 214.11(h)(1) (2007).

Waiver of compliance with law enforcement requests. Applicants who demonstrate that it is more likely than not that their participation in a criminal investigation or prosecution of a trafficker would result in severe harm to the applicants and/or their family members in the United States and/or abroad are exempt from the requirements set forth at paragraphs (h)(1) and (h)(2) of this section.

The burden would be on applicants applying for the waiver to provide evidence of the likelihood of harm.⁷⁷ Such evidence might demonstrate, for example, that a waiver applicant's trafficker was a member of a powerful organized crime unit that enjoys immunity from apprehension and prosecution in their home country, and that the organized crime unit has been known to retaliate severely against those who attempt to escape and/or to assist law enforcement officers. A victim of international human trafficking who meets that burden should still be entitled to the protection afforded by the VTVPA.

C. "Force" and "Coercion"

Victims of international human trafficking are not always duped or physically forced into situations of forced labor. In many cases, poverty and/or the presence of domestic violence compel people to accept the terms offered them by human traffickers. Unfortunately, in cultures where such dire economic need is virtually unheard of and where resources exist for domestic violence victims, such actions are often judged to be free choices worthy of contempt rather than compassion.

The economic and social realities in many developing countries, in particular those that are source countries for international human traffickers, lend strong support to the proposal that poverty and domestic violence should be considered as perpetrators of force and/or coercion that force an individual to subject herself or himself to a trafficker in humans. In Albania, for example, a major source country for women trafficked abroad for sex work, "[t]here's a steady

⁷⁷ In the asylum context, the Supreme Court has held that "more likely than not" means there is at least a fifty percent chance that harm will occur. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

rise in emigration for voluntary prostitution abroad to escape poverty and a bleak future.”⁷⁸ In Nepal, many women fleeing domestic violence and poverty accept employment as street or bar prostitutes, citing the need for money as the reason for engaging in prostitution.⁷⁹ In Nigeria, women accept offers of supposedly legitimate employment, which they know or suspect are actually prostitution jobs, to help their families escape poverty.⁸⁰ In order effectively to afford protection to individuals without a choice, or whose choice is between poverty or violence and submitting to traffickers, as well as to prosecute those who prey on such individuals, T visa protection should be extended to those who are forced into trafficking situations by violence and poverty.

V. Conclusion

The VTVPA has the potential to alleviate and redress many of the human rights violations that inspired its passage. For it to live up to that potential, however, the government agencies responsible for administering it must be willing to recognize the unique circumstances of international human trafficking and alter their procedures and policies accordingly. A system must be developed that can overcome the cultural biases among law enforcement officers, immigration officers and trafficking victims that have severely curtailed the efficacy of the T visa program. Limiting contact between federal law enforcement officers (particularly ICE and CBP officers) and noncitizens arrested during workplace and brothel raids, establishing a TEVA program and promptly referring arrestees and other potential trafficking victims to TEVA

⁷⁸ DANIEL RENTON, CHILD TRAFFICKING IN ALBANIA 5 (2001), *available at* <http://www.savethechildren.it/2003/download/pubblicazioni/traffickingAlbania/traffickingAlbania.pdf>. *See also* SONDRHA HAUSNER, THE MOVEMENT OF WOMEN: MIGRATION, TRAFFICKING AND PROSTITUTION IN THE CONTEXT OF NEPAL’S ARMED CONFLICT 7 (2005), *available at* <http://www.humantrafficking.org/publications/110> (identifying violence and poverty as forms of “forced migration”) [hereinafter THE MOVEMENT OF WOMEN].

⁷⁹ THE MOVEMENT OF WOMEN, *supra* note 78, at 10.

⁸⁰ JORGEN CARLING, MIGRATION, HUMAN SMUGGLING AND TRAFFICKING FROM NIGERIA TO EUROPE 30. The report also points out that even women who know they are accepting prostitution jobs “often have no idea of the conditions they will work in, that they are to be street prostitutes, that they will be submitted to strict control, and that it may take them years to pay back their debt.” *Id.*

facilities, providing a waiver to victims whose compliance with law enforcement requests may prove deadly, and expanding the definition of what constitutes “coercion” and “force” are all ways in which the T visa program can be redesigned to overcome cultural bias. These reforms would not be a panacea, but they would be a step forward in making the U.S. T visa system an effective tool in the fight to eradicate modern-day slavery.