

# MISSING THE MARK: WHY THE TRAFFICKING VICTIMS PROTECTION ACT FAILS TO PROTECT SEX TRAFFICKING VICTIMS IN THE UNITED STATES

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## I. INTRODUCTION

One day I fell for their trap. I had a little dream of my own. It was to make some money and to buy my house. I arrived in [America] with such hopes and dreams. Who would have known what would be waiting for me there instead? Since the day I arrived, I had to live like an animal. [The karaoke bar] was a prison that was filled with nothing but curses, threats, and beatings.<sup>1</sup>

Trafficking in humans for sexual exploitation has reached epic proportions. Estimates of the total number of people trafficked across international borders each year vary from 700,000 to 2 million.<sup>2</sup> Of those people, an estimated 80% are female, and 70% of those females are trafficked for the purposes of sexual exploitation.<sup>3</sup> With profits reaching 7 to 10 billion U.S. dollars each year, the illegal sex industry is the third largest criminal

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<sup>1</sup> U.S. DEP'T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, FISCAL YEARS 2001–2005 11 (2006), available at [http://www.usdoj.gov/crt/crim/trafficking\\_report\\_2006.pdf](http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf) [hereinafter DOJ REPORT] (quoting testimony from “Ms. Kim,” a victim in the sex trafficking case of *United States v. Kwon Soon Oh* (D. N. Mar. I. 1999)).

<sup>2</sup> See AMY O'NEIL RICHARD, CTR. FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 3 (2000), available at <https://www.cia.gov/csi/monograph/women/trafficking.pdf> [hereinafter CIA REPORT]. These figures do not include internal trafficking within countries, which would likely increase these figures significantly.

<sup>3</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2005), available at <http://www.state.gov/documents/organization/47255.pdf> [hereinafter 2005 TIP REPORT]. Although sex trafficking victims include men and women of all ages, this Note focuses exclusively on adult women. Women are trafficked for sex at significantly higher rates than men. Children, both male and female, are trafficked at staggering rates as well. However, children have a unique set of needs and issues that should be discussed, at least in part, distinctly from adults. Of course, many adult trafficking victims were children when they were first trafficked, and therefore there will be some overlap in their stories.

enterprise in the world behind the trades in drugs and arms.<sup>4</sup> Accordingly, the United States Congress has declared, “[t]rafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.”<sup>5</sup>

Sex trafficking operates in a manner whereby women in relatively poor countries leave their homes and source countries—usually induced by force or deception into believing a certain job awaits—and are brought to relatively wealthier destination countries and forced to work in the sex industry.<sup>6</sup> Many women voluntarily come to work in the sex industry only to find themselves in unanticipated slave-like conditions. Some victims<sup>7</sup> find themselves in horrific, hopeless situations, forced to work as prostitutes to pay down the “debt” of their passages, while often enduring rape, beatings, and slave-like conditions.<sup>8</sup> Stripped of any documentation, disoriented in a foreign country, and immobilized by well-founded fears of violence and deportation, these women have nowhere to turn for help.<sup>9</sup> Their illegal status and financial vulnerability leave them at the mercy of their traffickers—they are, for all intents and purposes, sex slaves.

In order to understand sex trafficking, one must separate it from its components, including alien smuggling and prostitution. Although many women have been smuggled into a country and become prostitutes, they may nonetheless be sex trafficking victims if they have been forced or coerced to work under unanticipated slave-like conditions. Whereas smuggling is a transaction in which payment is received for the service of procuring illegal entry into a country, trafficking “involves [the broader] dynamic in which the traffickers use a particular means (force, fraud, or coercion) to establish control over the victim for a particular end (slavery, involuntary servitude, peonage, debt bondage, or a commercial sex act).”<sup>10</sup>

Although women are trafficked to and from every continent in the world, the major source areas have traditionally been Southeast Asia and

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<sup>4</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 9 (2003), available at <http://www.state.gov/documents/organization/21555.pdf> [hereinafter 2003 TIP REPORT]. See also *Country Reports on Human Rights Practices for 1999: Hearing Before the Subcomm. on Int’l Operations & Human Rights of the H. Comm. on Int’l Relations*, 106th Cong. 8 (2000) (statement of Hon. Harold Hongju Koh, Assistant Sec’y, Bureau of Democracy, Human Rights, & Labor, U.S. Dep’t of State).

<sup>5</sup> 22 U.S.C. § 7101(b)(1) (2000).

<sup>6</sup> Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 116 (2002) [hereinafter Tiefenbrun, *Saga of Susannah*].

<sup>7</sup> I acknowledge that some readers may object to the use of the term “victim” rather than “survivor,” because, among other reasons, it undermines the strength of women who have been sexually exploited and persevered. However, because the term “survivor” may be confused in this Bite to refer only to women who have freed themselves from sex trafficking situations, I use the traditional term “victim” for the sake of clarity.

<sup>8</sup> See Tiefenbrun, *Saga of Susannah*, *supra* note 6, at 116.

<sup>9</sup> See *id.*

<sup>10</sup> Boo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1047 (2002).

Latin America.<sup>11</sup> There has been a recent increase in sex trafficking originating in Central and Eastern Europe and The New Independent States.<sup>12</sup> As one of the major destination countries for sex trafficking, the United States is a key contributor to this epidemic.<sup>13</sup> Many women are trafficked into the United States and forced to work in the sex industry, including prostitution, pornography, and stripping. Sadly, the United States government estimates that between 45,000 and 50,000 women and children are trafficked into the United States every year for sexual exploitation.<sup>14</sup>

To help combat this growing epidemic both domestically and internationally, the United States Congress passed groundbreaking legislation: the Trafficking Victims Protection Act of 2000 (“TVPA”).<sup>15</sup> The stated purpose of the TVPA is to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are primarily women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>16</sup> The TVPA criminalizes and enhances the penalties for human trafficking, provides social services and legal benefits, including visas, to some trafficking victims, provides millions of dollars in funding to support programs for trafficking victims domestically and abroad, and includes provisions to monitor and eliminate trafficking internationally.<sup>17</sup> Recognizing that the vast majority of sex trafficking victims are not present in the country with an immigration status that would allow them access to government assistance, such as housing, food stamps, and cash assistance, the TVPA includes provisions for helping trafficking victims who are in the United States, which are the focus of this Note.

In the years since the passage of the TVPA, the laudable goal of protecting sex trafficking victims in the United States has not been adequately accomplished. Up to 50,000 women and children are trafficked into the United States every year for sexual exploitation,<sup>18</sup> and the vast majority of these women desperately want to exit the sex industry,<sup>19</sup> but only 228 victims received benefits under the TVPA in 2005.<sup>20</sup> Many victims who apply for benefits under the TVPA are denied, though it is not clear why, since the government has yet to disclose statistics and reports concerning

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<sup>11</sup> See CIA REPORT, *supra* note 2, at iii.

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* at 3.

<sup>15</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in various sections of the U.S.C.).

<sup>16</sup> 22 U.S.C. § 7101(a) (2000).

<sup>17</sup> 22 U.S.C. § 7101 (2000); see also Kevin Bales et al., *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 49 (2005) [hereinafter *Hidden Slaves*].

<sup>18</sup> See CIA REPORT, *supra* note 2, at iii.

<sup>19</sup> See, e.g., 2005 TIP REPORT, *supra* note 3, at 19 (documenting a 2003 study in the *Journal of Trauma Practice* that found that 89% of the women in prostitution want to escape prostitution).

<sup>20</sup> See *id.* at 241.

certification denials. Some answers, however, may lie in the text of the TVPA itself, as well as in the statute's enforcement.

Part I of this Note argues that despite the commendable goals of the TVPA, the eligibility requirements are overly rigid and enforcement is deficient, leaving many deserving sex trafficking victims unprotected. Part II is a detailed analysis of the mechanics of sex trafficking, as well as a discussion of the slave-like conditions many victims endure. Part III analyzes the various barriers victims must overcome in order to obtain the benefits provided in the TVPA, and offers possible solutions to these shortcomings. Among these barriers are victim identification, the difficulty of qualifying as a "severe trafficking" victim, and the requirement of cooperating with the prosecution of a victim's sex traffickers. Part IV discusses avenues of civil justice available to sex trafficking victims, including the recent amendment to the TVPA, which provides a civil remedy to trafficking victims.

## II. THE MECHANICS AND CONDITIONS OF SEX TRAFFICKING

Sex trafficking is a multifaceted and complex form of violence against women. Many forms of subordination, including gender, class, race, and immigration status, dangerously intersect to create the experiences of sex trafficking victims. Violence against women and subordination of women in the sex trafficking context is undoubtedly shaped by many dimensions of a woman's identity; when analyzing the problem in order to craft solutions to the problem, no dimension can be overlooked.<sup>21</sup> What follows is an attempt to explain how sex trafficking occurs, and to expose the horrific circumstances and effects of sex trafficking on its victims.

### A. *How Sex Trafficking Occurs*

In order to understand how millions of women are victimized by sex traffickers, one must understand how they are first procured by the industry. This section discusses some of the various techniques of procurement, including kidnapping, sale, and coercion. Crucial to the understanding of this issue is that regardless of the technique ultimately employed, the primary situation that enables sex trafficking is always the same: the global oppression of women.

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<sup>21</sup> See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

### 1. *The Root Cause of Sex Trafficking*

Sex trafficking could not thrive if women were not systematically oppressed and marginalized.<sup>22</sup> As one author stated:

Traffickers successfully lure women into sex work because these women are victims of poverty, of the social practice of marginalizing women, of the failure of some cultures and societies to place a value on traditional women's work, and of the lack of education and employment opportunities for women in developing and transition countries.<sup>23</sup>

Similarly, another author explained, “[t]raffickers have taken advantage of the unequal status of women and girls in the source and transit countries, including harmful stereotypes of women as property, commodities, servants, and sexual objects.”<sup>24</sup> Traffickers, overwhelmingly men, capitalize on the abuse and subordination of women, and profit at the expense of women. Around the world, “[w]omen’s sexuality is, socially, a thing to be stolen, sold, bought, bartered, or exchanged by others.”<sup>25</sup> Additionally, gender- and class-biased immigration and asylum laws that “privilege male-dominated public activities over the activities of women which take place in the private sphere” further facilitate this exploitation.<sup>26</sup> In short, “[t]hese women are ‘victims of complex, social, cultural, economic and political factors, which are exploited by their traffickers,’ which must be accounted for when developing strategies to end trafficking and help its victims.”<sup>27</sup>

### 2. *Procurement by Force*

Sex traffickers<sup>28</sup> are shrewd and resourceful, and their techniques for procuring women vary. Some women are kidnapped and forced into sex

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<sup>22</sup> Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN’S L.J. 137, 164 (2004) (citing U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 4 (1995)) (“Of the 1.3 billion people living in poverty, seventy percent are women.”).

<sup>23</sup> Susan W. Tiefenbrun, *Sex Sells But Drugs Don’t Talk: Trafficking of Women Sex Workers and an Economic Solution*, 24 T. JEFFERSON L. REV. 161, 170 (2002) [hereinafter Tiefenbrun, *Sex Sells*].

<sup>24</sup> See CIA REPORT, *supra* note 2, at 1.

<sup>25</sup> CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989).

<sup>26</sup> Becki Young, *Trafficking of Humans Across United States Borders: How United States Laws Can be Used to Punish Traffickers and Protect Victims*, 13 GEO. IMMIGR. L.J. 73, 74 (1998).

<sup>27</sup> Crystal Y. Twitty, *Pretty Pennies for Pretty Faces: Trafficking of Women for the International Sex Trade*, 2 REGENT J. INT’L L. 115, 122 (2003–2004).

<sup>28</sup> In this Note, “sex traffickers” refers generally to all the persons primarily involved in trafficking including recruiters, transporters, document forgers, fake employment agencies, pimps, and brothel owners.

trafficking.<sup>29</sup> In these instances, members of organized crime networks forcibly take women off the streets or drug them and sell them to traffickers.<sup>30</sup> It is often harder for kidnapped women to escape sex trafficking because they seemingly disappear and no one knows what has happened to them.<sup>31</sup>

Similarly disturbing is that family members also sell women to sex traffickers. In these cases, it is often the woman's father, uncle, or husband who sells her to an organized crime network or local pimp.<sup>32</sup> For example, shortly after a young woman was married off to a man in Cambodia in an effort to give her a better life, she traveled to a fishing village with her new husband.<sup>33</sup> The next morning, her husband was gone and the owner of the hotel notified her that her husband had sold her for \$300 and that she was actually in a brothel.<sup>34</sup> After five years of being beaten and raped every day by four to seven men, she contracted HIV.<sup>35</sup> The brothel owners kicked her out, and she died, in a shelter, from AIDS.<sup>36</sup> Sadly, this is not an unusual fate for many trafficking victims.

### 3. *Procurement by False Promises*

Many other women are convinced to strike a deal with traffickers whereby they incur debts in exchange for entry and transportation into a country where specific jobs await, but instead, upon arrival, they are forced into sex slavery to pay off the debts.<sup>37</sup> These employment scams are especially tempting to women who have no meaningful economic opportunity in their home countries.<sup>38</sup> Members of organized crime rings and other traffickers lure women with the false promises of legitimate jobs that pay decent wages, such as maids, nannies, dancers, and models.<sup>39</sup>

Recruiters often visit towns to prey on economically vulnerable women and pitch these seemingly prosperous opportunities to them and their families.<sup>40</sup> To increase the appearance of legitimacy, traffickers may give women fake contracts for employment along with a list of fake contacts in the United States.<sup>41</sup> Other women answer false advertisements for employment,

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<sup>29</sup> See *Developments in the Law—Jobs and Borders: The Trafficking Victims Protection Act*, 118 HARV. L. REV. 2180, 2184 (2005).

<sup>30</sup> See Sarah Shannon, *Prostitution and the Mafia: The Involvement of Organized Crime in the Global Sex Trade*, in *ILLEGAL IMMIGRATION AND COMMERCIAL SEX* 119, 121 (1999).

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* at 122.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See Shannon, *supra* note 30, at 122.

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

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

<sup>40</sup> CIA REPORT, *supra* note 2, at 5.

<sup>41</sup> Shannon, *supra* note 30, at 122.

including modeling and matchmaking.<sup>42</sup> Technological advancements make it easy for traffickers to reach many more women.<sup>43</sup> For example, many online mail-order bride services are no more than sex trafficking enterprises in disguise.<sup>44</sup> Traffickers use the internet as an easy and inexpensive way to catalogue women and girls for sale into “marriage” by displaying pictures and personal information.<sup>45</sup>

Traffickers are able to repeatedly use the same fraudulent means of procurement from the same villages and cities because families and friends remain unaware of the scams and the realities of trafficking.<sup>46</sup> Typically, only the “success stories,” and sometimes money, ever make their way back to the villages.<sup>47</sup> Because of the intense shame involved in sex trafficking, victims often cannot go home or tell their families of the horrors through which they have lived.<sup>48</sup> This shame works to maintain the plausibility of the traffickers’ lies in the eyes of economically vulnerable women and their communities.

#### 4. *Consensual Migration*

Another way in which women become sex trafficking victims is by agreeing to go to the United States with the understanding that they will be working in the sex industry.<sup>49</sup> Despite their initial consent, they are nonetheless considered sex trafficking victims if they ultimately find themselves working under slave-like conditions to which they never agreed and never would have agreed.<sup>50</sup> For example, in 1999, a Russian American trafficker recruited Latvian women to go to the United States to work in sophisticated Chicago nightclubs for \$60,000 a year dancing in bikinis.<sup>51</sup> When they arrived, the traffickers confiscated the women’s passports, and forced them to dance topless or nude in order to get their passports back and to repay a debt of \$64,000 each, which was charged—unbeknownst to the women—for bringing them to the United States and providing them with work.<sup>52</sup> This case illustrates well the coercive aspect of sex trafficking; traffickers gain control of the women by effectively holding their passports and documentation hostage.

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<sup>42</sup> Tiefenbrun, *Saga of Susannah*, *supra* note 6, at 119.

<sup>43</sup> See CIA REPORT, *supra* note 2, at 5.

<sup>44</sup> Tiefenbrun, *Saga of Susannah*, *supra* note 6, at 119.

<sup>45</sup> See *id.*

<sup>46</sup> See 2003 TIP REPORT, *supra* note 4, at 7.

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *Developments in the Law—Jobs and Borders: The Trafficking Victims Protection Act*, *supra* note 29, at 2184.

<sup>50</sup> See *id.*

<sup>51</sup> Hanh Diep, Student Article, *We Pay—The Economic Manipulation of International and Domestic Law to Sustain Sex Trafficking*, 2 LOY. U. CHI. INT’L. L. REV. 309, 319 (2005).

<sup>52</sup> *Id.*

### 5. *Gaining Entry into the United States*

The easiest and most common way to traffic victims into the United States is for women to enter legally and then overstay their visas.<sup>53</sup> These women obtain time-specific visas, enter the United States legally, and then fail to return to their home countries once the visa expires.<sup>54</sup> Other means include obtaining long-term visas or student, fiancée, or entertainment visas.<sup>55</sup> In these situations, traffickers often prepare the victims for the visa interview and give them false supporting evidence to help them obtain approval for the visas.<sup>56</sup>

Women are also trafficked into the United States by sea travel as “human cargo.”<sup>57</sup> Traffickers often prefer the ocean-voyage method because it is less expensive, no documents are needed, and little bribery is involved. It is not dependent on the victim having to convince border or other government officials that she is entering legally, and many victims—sometimes hundreds—can be moved at a time in one trip. For traffickers who charge each woman a fee to smuggle them into the United States (which becomes the “debt” to be worked off), the human cargo method is extremely profitable.<sup>58</sup> For the victims, however, it can be the most deadly method, as some women perish from starvation, disease, or drowning.

Another means of entry, trafficking by air, requires false documentation, including visas and passports.<sup>59</sup> The major airports of entry in the United States are Los Angeles International, John F. Kennedy Airport in New York, Miami International, and San Francisco International Airport.<sup>60</sup> The document operations utilized are highly sophisticated and turn out deceptively legal-looking papers.<sup>61</sup> Once a victim uses the false documents, her trafficker takes them away before she reaches her destination city and the documents are either recycled for use by another victim, or destroyed.<sup>62</sup>

Once the victims gain entry into the United States, they are often moved around the country within a sophisticated network of brothels in New York City, Miami, Los Angeles, Houston, Reno, Seattle, and other cities.<sup>63</sup> The constant movement serves to keep the victims isolated and

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<sup>53</sup> CIA REPORT, *supra* note 2, at 7.

<sup>54</sup> *See id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Margaret E. Beare, *Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?*, in *ILLEGAL IMMIGRATION AND COMMERCIAL SEX* 11, 30 (Phillip Williams ed., 1999).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* Traffickers employ other air travel schemes, such as plane-switching, where after the victim clears customs, she switches boarding passes with another person once inside the boarding area, and then boards for the United States with a false passport. *Id.* at 33.

<sup>60</sup> CIA REPORT, *supra* note 2, at 11.

<sup>61</sup> Beare, *supra* note 57, at 32.

<sup>62</sup> *Id.*

<sup>63</sup> CIA REPORT, *supra* note 2, at 11.

disorientated, decreasing their likelihood of escape.<sup>64</sup> It also provides “fresh faces” in brothels to keep repeat customers satisfied.<sup>65</sup>

#### 6. Document Confiscation and Debt Bondage

Upon arrival, victims often become slaves with no identity and no freedom. They are stripped of most of their personal belongings and money.<sup>66</sup> All documents, including visas and passports, are confiscated.<sup>67</sup> Women whose traffickers coerced them with promises of false employment are told that their “contracts” were bought and that another employer now owns them until they repay the debt from their passage.<sup>68</sup> Other women who are forced into sex trafficking simply become slaves, “without the illusion of working their way.”<sup>69</sup>

The debt passage consists of the costs advanced for entry into the country, for which traffickers demand compensation. The amount varies by the woman’s country of origin.<sup>70</sup> For example, one study found that the average debt for Chinese victims was \$40,000 to \$47,000, \$35,000 for Korean victims, and \$2,000 to \$3,000 for Mexican victims.<sup>71</sup> Not only must victims work to pay down this debt, but more debt and interest continuously accrues for costs associated with food, boarding, and other essentials.<sup>72</sup> Many victims also become dependent on drugs to get them through the hellish experience, pushing them deeper into debt.<sup>73</sup> Many women are required to repay this debt by servicing a certain number of “customers.” But the debt is rarely ever paid off, no matter how many men the victims service,<sup>74</sup> because the traffickers do not pay the victims as promised, because the traffickers pay them far less than necessary to free themselves of the debt, or because they are resold, thereby incurring another debt that must be worked off.<sup>75</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Shannon, *supra* note 30, at 122.

<sup>67</sup> CIA REPORT, *supra* note 2, at 5.

<sup>68</sup> Shannon, *supra* note 30, at 122. Sadly, “[t]he formality of the agreement, combined with the women’s ignorance of their legal rights in a foreign country, contributes to their belief that they must work off debts of thousands of dollars.” Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN’S L.J. 77, 89 (2002).

<sup>69</sup> Kathryn E. Nelson, *Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches*, 24 Hous. J. INT’L L. 551, 557 (2002).

<sup>70</sup> See Janice G. Raymond & Donna M. Hughes, *Sex Trafficking of Women in the United States: International and Domestic Trends* 53 (2001), [http://www.ojp.usdoj.gov/nij/international/programs/sex\\_traff\\_us.pdf](http://www.ojp.usdoj.gov/nij/international/programs/sex_traff_us.pdf).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> In this Note, “servicing” refers to having sexual relations for money. This term is not meant to overshadow the fact that in many, if not all, instances, it is also rape.

<sup>75</sup> See Raymond & Hughes, *supra* note 70, at 53. Some trafficking victims kept journals documenting how many customers they serviced so they would know when their debts

### 7. *Organized Crime and Corruption*

Most of the world's human traffickers are part of, or have strong ties to, organized crime networks.<sup>76</sup> Trafficking is appealing to these rings because it is extremely profitable and low risk.<sup>77</sup> The sex trafficking crime rings are highly sophisticated and can handle all aspects of the illegal entry including transportation, documentation, transit accommodation, and guided border crossings.<sup>78</sup> In the United States, sex trafficking is typically carried out by smaller crime rings and "loosely connected criminal networks."<sup>79</sup>

The power and pervasiveness of organized crime in international trafficking was well-illustrated in Cambodia in 2004, when police raided a brothel that was notorious for enslaving sex trafficking victims.<sup>80</sup> Police rescued eighty-three women and girls and took them to a nearby shelter that housed and assisted trafficking victims.<sup>81</sup> Eight pimps were arrested and immediately released.<sup>82</sup> The next day, thirty armed gunmen, who were part of a large organized crime network involved in sex trafficking, stormed the shelter's security gates and kidnapped all eighty-three rescued victims and eight other victims previously at the shelter.<sup>83</sup> None of the women or girls ever returned to the shelter.<sup>84</sup> Organized crime traffics with impunity in some areas of the world, despite the best efforts of the local police and community organizations.

Corruption also plays a significant role in sex trafficking.<sup>85</sup> In the rare cases in which victims seek police assistance, they often find that police are complicit in sex trafficking.<sup>86</sup> In source and destination countries around the world, there are documented cases of corruption and complicity by law enforcement and government officials; traffickers often bribe police officers, visa officials, and border patrollers.<sup>87</sup> Rather than receiving help from local authorities, victims are ignored or arrested for being illegal aliens, held in deportation centers, and ultimately deported.<sup>88</sup>

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had been paid down. When the brothel owner found them, he destroyed them. *See also* Diep, *supra* note 51, at 319.

<sup>76</sup> CIA REPORT, *supra* note 2, at 7.

<sup>77</sup> 2003 TIP REPORT, *supra* note 4, at 10.

<sup>78</sup> *See* Beare, *supra* note 57, at 30.

<sup>79</sup> CIA REPORT, *supra* note 2, at 13.

<sup>80</sup> *See* Karen Louise Boothe, *Cambodia Shelter Jittery Year After Attack*, WOMEN'S ENEWS, Jan. 16, 2006, <http://www.womensenews.org/article.cfm/dyn/aid/2603>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See* Tiefenbrun, *Saga of Susannah*, *supra* note 6, at 118.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

## B. Conditions, Effects, and Aftermath of Sex Trafficking

### 1. Isolation and Control

Sex trafficking victims often work under slave-like and inhumane conditions.<sup>89</sup> Once in the United States, victims often find that their freedom is severely constrained by a combination of means including debt bondage, document confiscation, security guards, violence, and threats.<sup>90</sup> One woman recounted the control traffickers had over undocumented women:

In the strip clubs . . . they have a lot of girls there from outside without green cards, or illegal aliens. And they really work them like they were stupid, and with those girls they really recruit them to do porno. [The club manager] has a hold on them, because they don't have their green card.<sup>91</sup>

Traffickers use their victims' fears of deportation and arrest to keep them under their control.<sup>92</sup> Many victims are also vulnerable because they lack English proficiency. One study reported that 40% of the women who were sexually exploited in the United States had no English-language proficiency, and 33% reported very little understanding of or speaking ability in English.<sup>93</sup> Traffickers also use isolation to control their victims by forcing them to live where they work and by constantly moving them around the country.<sup>94</sup>

### 2. Rape

In the United States, many victims are forced to work in illegal brothels. In fact, the U.S. Bureau of Citizenship & Immigration Services ("USCIS," formerly the Immigration and Naturalization Services) has discovered over 250 brothels in 26 different cities—many of which are thought to be staffed by sex trafficking victims.<sup>95</sup> Many victims suffer rape and violence at the hands of their traffickers and customers, often repeatedly. Being forced to have sex with twenty-five men or more per day is not uncommon.<sup>96</sup> Rape is a frequently deployed tool used to initiate victims into the world of prostitution, although virgins are often not raped until

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<sup>89</sup> Nelson, *supra* note 69, at 555.

<sup>90</sup> See CIA REPORT, *supra* note 2, at 5–7.

<sup>91</sup> Raymond & Hughes, *supra* note 70, at 66.

<sup>92</sup> See CIA REPORT, *supra* note 2, at 5.

<sup>93</sup> Raymond & Hughes, *supra* note 70, at 44.

<sup>94</sup> See CIA REPORT, *supra* note 2, at 5.

<sup>95</sup> See *id.* at 13.

<sup>96</sup> See, e.g., Sean Gardiner & Geoffrey Mohan, *Smuggled for Sex: The Sex Slaves from Mexico*, NEWSDAY, Mar. 12, 2001, at A.05.

after their virginity has been “sold” at a higher price.<sup>97</sup> After being raped by “customers” all day long, many victims are raped by their traffickers at night. One victim reported, “In the first brothel, there were terrible guards . . . awful perverts. Once they gobbled some pills that prevent men from cumming quickly. They fucked me for five hours straight. I have never experienced anything like that.”<sup>98</sup> Similarly, a social services provider reported that Latinas trafficked into the South protected themselves by sleeping together, because the traffickers had “underlings who would rape them in the middle of the night.”<sup>99</sup>

### 3. *Physical Violence and Threats*

Physical abuse and even murder is a constant fear for many victims. One woman reported, “I had one pimp in the States who liked to whip me with thin belts and urinate on my body . . . Sometimes he would even invite his friends.”<sup>100</sup> Another victim described being punished by her pimp after a customer had raped her: “I’ve been beat with hangers, tied to a bedpost. Beaten for being with a trick for too long. I was robbed and raped by a trick and then beaten by the pimp for letting that happen.”<sup>101</sup>

Traffickers not only harm their victims, but they also threaten harm to the victims’ families.<sup>102</sup> Traffickers in the United States often have international organized crime connections that include connections in the victims’ home country. Traffickers make clear that they have the ability to carry out the threats on the victims’ families in their home countries. Thus, these threats are usually quite effective at maintaining control over victims. One victim recounted threats made to her family: “[I have been sold by] lots [of pimps]. So many that it’s scary. Pimps who resold me [globally] . . . I was like a dog on a short leash. When I pulled it just a little bit, they threatened to put me in jail . . . Last pimp in Turkey . . . described how he would . . . [kill my family]. I think at the end he could have.”<sup>103</sup> It is not uncommon for victims to be forced to participate in the violence against other trafficking victims. One woman described being one of many women from Asia whom her traffickers had enslaved and impregnated: “We were beaten and raped if we didn’t comply . . . I had to hold down women as he raped them . . . I saw five women being raped.”<sup>104</sup>

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<sup>97</sup> See Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN’S L.J. 29, 39 (2001).

<sup>98</sup> Raymond & Hughes, *supra* note 70, at 63.

<sup>99</sup> *Id.*

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

<sup>101</sup> *Id.* at 61.

<sup>102</sup> See CIA REPORT, *supra* note 2, at 5.

<sup>103</sup> Raymond & Hughes, *supra* note 70, at 68.

<sup>104</sup> *Id.* at 63.

#### 4. *Physical, Emotional, and Psychological Effects*

The physical and emotional effects of sex trafficking on victims are devastating. Protected sex is not an option for many victims; many women become pregnant and are forced to have abortions; and sexually transmitted diseases, especially HIV/AIDS, are common by-products of trafficking.<sup>105</sup> Unsanitary living conditions and overcrowding often lead to increased illness for victims.<sup>106</sup> Traffickers typically do not allow victims to seek health care—unless it is for an abortion, in which case, the cost of the abortion is added to any outstanding debt the woman owes. The trauma of sex trafficking leaves many women psychologically and emotionally damaged. Without support networks, many women turn to drugs and alcohol. One victim reported, “I would go to bed drunk because it was the only way I could fall asleep.”<sup>107</sup> Another victim reported, “I need a lot of help medically and I need therapy to deal with all the trauma I’ve suffered. I need plastic surgery and dental reconstruction (from when pimp/husband knocked my teeth out). . . . My self-esteem is so low and I have a complex about speaking with people.”<sup>108</sup>

#### 5. *The Aftermath of Sex Trafficking: Arrest, Deportation, and More Victimization*

Prior to the enactment of the TVPA (and still today to a lesser extent), when government officials discovered a sex trafficking victim, they typically labeled her an illegal alien, perhaps jailed her for prostitution, sent her to a detention center (not unlike a jail), and then deported her back to her home country.<sup>109</sup> Deportation is extraordinarily unsafe for trafficking victims because it often entails returning “to dysfunctional states where reintegration is difficult and security not easily guaranteed.”<sup>110</sup> Often, repatriation is dangerous because organized crime members associated with a victim’s traffickers will seek retribution.<sup>111</sup> Repatriation is also difficult for women who face ostracism from their communities and families for having engaged in prostitution. Some families disown women and some even kill them for bringing shame upon the family.

Once a victim is deported, the deporting nation typically does not monitor or follow up with organizations in her home country and “many

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<sup>105</sup> See *Hidden Slaves*, *supra* note 17, at 88.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 89.

<sup>108</sup> Raymond & Hughes, *supra* note 70, at 80–81.

<sup>109</sup> See Hyland, *supra* note 97, at 43.

<sup>110</sup> Cecilia M. Bailliet, *Responsibilities of the Destination Country*, 25 FORCED MIGRATION REV. 28, 28 (2006).

<sup>111</sup> Hyland, *supra* note 97, at 43 (noting that victims trafficked to California “feared returning home to Thailand after learning that their traffickers [were] looking for them”).

victims appear to disappear.”<sup>112</sup> Sadly, deportation to a victim’s home country often results in re-trafficking; some studies indicate a re-trafficking rate as high as 50%.<sup>113</sup>

### III. THE TRAFFICKING VICTIMS PROTECTION ACT: PROBLEMS AND SOLUTIONS FOR DOMESTIC VICTIMS

Recognizing the growing problem of trafficking and the inadequacy of existing laws, an overwhelming majority in Congress passed the Trafficking Victims Protection Act in 2000. Although the TVPA has shown progress in battling international sex trafficking, it has been less effective in aiding victims in the United States. The following discussion analyzes why many domestic sex trafficking victims do not receive the help they desperately need under the provisions and enforcement of the TVPA.

#### A. *What the TVPA Provides*

Prior to the passage of the TVPA, there was little, if any, relief for trafficking victims in the United States. If discovered, these women were labeled criminals for participating in prostitution and illegal immigration.<sup>114</sup> They were held in detention centers and usually deported.<sup>115</sup> Trafficking itself, on the other hand, was a punishable crime, but penalties were relatively slight and prosecutors had to be creative and use a “patchwork of criminal statutes.”<sup>116</sup>

The TVPA comprehensively criminalizes trafficking (all forms, not only sex trafficking) and enhances the penalties, including sentences ranging from twenty years to life in prison.<sup>117</sup> The TVPA includes a substantial international component focused on trafficking prevention, including foreign economic initiatives to increase opportunities for women, as well as economic penalties for countries that do not comply with minimal trafficking prevention and enforcement standards.<sup>118</sup> The focus of this Note, however, is the section of the TVPA that creates and provides relief to the “severe trafficking victim” by providing benefits to a certain class of women. The women who fall into this category are effectively transformed from “criminals” to “victims.”

Under the TVPA, sex trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose

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<sup>112</sup> Bailliet, *supra* note 110, at 28; *see also id.*

<sup>113</sup> Bailliet, *supra* note 110, at 28.

<sup>114</sup> *See* Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451, 454 (2005).

<sup>115</sup> *See id.*

<sup>116</sup> Nelson, *supra* note 69, at 568.

<sup>117</sup> 18 U.S.C. § 1590 (2000).

<sup>118</sup> *See* 22 U.S.C.A. §§ 7104–7107 (West 2006).

of a commercial sex act.”<sup>119</sup> However, only victims of “severe forms of trafficking” are eligible for benefits under the TPVA.<sup>120</sup> Severe trafficking is:

- (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
- (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.<sup>121</sup>

To be eligible for benefits under the TVPA, the victim must, *inter alia*, prove she suffered “severe trafficking,” which must be certified as such by the Department of Health and Human Services.<sup>122</sup> Once certified, the victim becomes eligible for benefits such as immigration relief in the form of continued presence, and in some cases, a T Visa, refugee benefits, shelter, food, protection, legal assistance, translation services, and restitution.<sup>123</sup> Unfortunately, however, identification and certification are significant barriers to receiving any assistance for many victims. A discussion of the problems associated with these processes follows.

### *B. Identification of Sex Trafficking Victims*

In order for the TPVA to aid trafficking victims, these women must be located and recognized as trafficking victims. There is a “grave problem of definition” of a “very practical” nature, which involves interpretation by people on the ground about who qualifies as a sex trafficking victim.<sup>124</sup> The government itself agrees that “the greatest challenge,” in terms of aiding sex trafficking victims, is “locating and identifying victims.”<sup>125</sup> Sex trafficking victims are already at an enormous disadvantage when they encounter law enforcement and other officials. Because they live and work at the margins of society, they are easily and quickly labeled illegal immigrants and prostitutes. It is essential that these officials receive the proper training to be able seek out trafficking victims by proper

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<sup>119</sup> 22 U.S.C. § 7102(9) (2000).

<sup>120</sup> 22 U.S.C.A. § 7105(b)(1)(a) (West 2006).

<sup>121</sup> 22 U.S.C. § 7102(8) (2000).

<sup>122</sup> Child trafficking victims, under the age of 18, do not need to be certified in order to receive benefits.

<sup>123</sup> 22 U.S.C.A. § 7105(b)(1)(a) (West 2003).

<sup>124</sup> Richard Danziger, *Where are the Victims of Trafficking?*, 25 FORCED MIGRATION REV. 10, 10 (2006).

<sup>125</sup> See U.S. DEP’T OF STATE, ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 7 (2003), <http://www.state.gov/documents/organization/23598.pdf> [hereinafter 2003 ASSESSMENT REPORT].

investigation and identification of these women as victims rather than criminals. The TVPA provides funding for training programs, but it is under-utilized.

That is not to say there is no training on the federal level. The Department of State recognizes that it “need[s] to do more to bring forward victims”<sup>126</sup> and therefore it participates periodically in interagency training programs with the Department of Justice’s (“DOJ”) National Advocacy Center where T Visas are processed, with the USCIS, the Department of Labor (“DOL”), the FBI, federal prosecutors, and non-governmental organizations (“NGOs”).<sup>127</sup> Similarly, the DOJ launched a federal training program to help its investigators working with the FBI, USCIS, and DOL detect forced labor operations, including sex trafficking.<sup>128</sup> There are few, if any, comparable training programs for officials at the state<sup>129</sup> and local levels.<sup>130</sup> This is highly problematic because local police officers are frequently the first to come into contact with trafficking victims. If the officers cannot identify them as victims, these women are typically detained and deported. The sheer number of police departments in the United States—over 17,000—would make such a training task daunting, but a targeted approach aimed at training local law enforcement officials in geographic areas with the greatest incidence of sex trafficking could be more effective.<sup>131</sup> Even simple procedures such as those provided in the “Look Beneath the Surface” screening guide described in the 2005 State Department Trafficking in Persons Report could be employed at local agencies that may come into contact with trafficking victims.<sup>132</sup> The guide includes simple and pointed questions such as, “has your identification or documentation been taken from you?” that can uncover hidden circumstances and lead to discovery of more trafficking victims.<sup>133</sup>

At the root of the identification problem is a more subtle, invidious problem. Law enforcement officials have been accused of de-prioritizing prostitution and related crimes because they view them as victimless crimes.<sup>134</sup> Police may tolerate and ignore illegal brothels, and focus resources instead on crimes with more obvious victims, such as drugs and gang warfare. They may also view prostitutes as accomplices rather than victims. Similarly, federal officials, including members of the FBI, have been accused of downplaying the severity of the crime and de-prioritizing

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<sup>126</sup> *Id.*

<sup>127</sup> See Tiefenbrun, *Sex Sells*, *supra* note 23, at 345.

<sup>128</sup> *Id.* at 350.

<sup>129</sup> For a discussion of state efforts to combat trafficking with legislation, see generally Stephanie Richard, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J.L. REFORM 447 (2005).

<sup>130</sup> See *Hidden Slaves*, *supra* note 17, at 75.

<sup>131</sup> See *id.* at 76.

<sup>132</sup> 2005 TIP REPORT, *supra* note 3, at 18.

<sup>133</sup> *Id.*

<sup>134</sup> See *Hidden Slaves*, *supra* note 17, at 79.

sex trafficking investigations by reassigning experienced investigators to “higher priority crimes.”<sup>135</sup> Some NGOs maintain that despite funding for outreach services on their end, and ample resources devoted to prosecution at the other end, there is nothing in the middle; no one is investigating sex trafficking.<sup>136</sup> Agencies need to implement regular, systematic programs to ensure that officials both understand the definition of sex trafficking and are faithfully applying that definition to all potential victims with whom they come into contact.

### C. Certification as “Severe Trafficking” Victim

To be eligible for benefits and services under the TVPA, one must be certified as a “victim of a severe form of trafficking.”<sup>137</sup> An adult victim has to prove that she was “subject to performing commercial sex acts” induced by “force, fraud, coercion.”<sup>138</sup> Furthermore, she must also be willing to assist “in every reasonable way” in the prosecution of her traffickers.<sup>139</sup> She must also either have made a bona fide application for a T Visa that has not yet been denied, or she must be necessary to the prosecution of her traffickers.<sup>140</sup> Each of these requirements, and the problems they pose for trafficking victims, will be addressed individually.

#### 1. Certification Process

The certification process itself poses many difficulties for sex trafficking victims. Victims usually need adequate housing and protection before or immediately after they leave their traffickers, but it typically takes weeks or months after they have left to become certified, and thus eligible for such services.<sup>141</sup> Exacerbating the problem even further are officials who often refuse to issue certifications or significantly delay in doing so.<sup>142</sup> Possible reasons for this include the belief among some law enforcement officials that benefits are too generous and that “‘they are giving away a green card’ by providing certification.”<sup>143</sup> Other officials may view sex trafficking victims as criminals who are undeserving of federal

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<sup>135</sup> *Id.* at 79–80.

<sup>136</sup> *See id.* at 79.

<sup>137</sup> 22 U.S.C.A. § 7105(b)(1)(a) (West 2003).

<sup>138</sup> 22 U.S.C. § 7102(8) (2000).

<sup>139</sup> 22 U.S.C.A. § 7105(b)(1)(a) (West 2003).

<sup>140</sup> 22 U.S.C.A. § 7105(b)(1)(e)(ii) (West 2006).

<sup>141</sup> *See Hidden Slaves*, *supra* note 17, at 79. The government is making an effort to alleviate this problem: In 2003, the DOJ’s Office of Victims of Crime (OVC) awarded grants to NGOs totaling approximately \$9 million for services during the “precertification” period. However, the government admits that these grants are not comprehensive and are limited to certain geographic regions, thereby excluding many victims. *See* 2003 ASSESSMENT REPORT, *supra* note 125, at 7.

<sup>142</sup> *See Hidden Slaves*, *supra* note 17, at 79.

<sup>143</sup> *See id.*

services or protection. For example, one anonymous USCIS official stated that “there are no victims” when it comes to illegal aliens in forced labor.<sup>144</sup> Fraud is also a key concern when it comes to deciding whether or not to certify a trafficking victim, and many officials wrongly overcompensate for this concern by strictly reading the “severe” requirements and erring on the side of non-certification.<sup>145</sup>

In 2004, the DOJ instituted a new policy to streamline certification of sex trafficking victims rescued in connection with the DOJ or Department of Homeland Security.<sup>146</sup> However, federal agents still have discretion to wait until the Department of Health and Human Services has determined that a victim is a “severe” victim of trafficking, or until prosecution has begun, to issue an endorsement for certification.<sup>147</sup> Many take advantage of this discretion, forcing victims to wait months before receiving much-needed benefits.<sup>148</sup> For some victims, this “dependency on federal authorities for immigration relief . . . does not serve their needs and dissuades them from cooperating with law enforcement.”<sup>149</sup>

Further complicating the certification process is that some victims must submit an application for a T Visa before they can be certified for any benefits. However, women must self-petition, rather than receive assistance from the DOJ.<sup>150</sup> A possible theory behind the regulation is to separate the issue of the victim’s residency plight from the Department’s prosecution so that no allegations can be made at trial regarding victim entrapment or victim testimony for the purposes of obtaining residency.<sup>151</sup> Although this trial strategy is likely to increase a victim’s credibility as a witness during the trial of her trafficker(s), the marginal benefits are unlikely to outweigh the burden on the victim who is left with little or no assistance in navigating a complex visa application process.

## 2. *The “Severe Trafficking” Standard*

Undocumented brothel workers and other sex workers who do not qualify as “severe” trafficking victims because they cannot prove “force, fraud, or coercion” into sex trafficking, will not be certified for protection under the TVPA and will be detained and deported.<sup>152</sup> By distinguishing between “sex trafficking” and “severe sex trafficking” and choosing to decriminalize

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<sup>144</sup> See CIA REPORT, *supra* note 2, at 80.

<sup>145</sup> See *Hidden Slaves*, *supra* note 17, at 79.

<sup>146</sup> See DOJ REPORT, *supra* note 1, at 35.

<sup>147</sup> See *Hidden Slaves*, *supra* note 17, at 79.

<sup>148</sup> See *id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Susan Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop it Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 332–33 (2005) [hereinafter Tiefenbrun, *Sex Slavery*].

<sup>151</sup> See *id.* (referring to a telephone interview with an anonymous DOJ employee).

<sup>152</sup> 22 U.S.C. § 7102(8) (2000).

and provide assistance to only the latter category of victims, Congress made a judgment about who is deserving of state protection. The categories of women who certainly fall into the “severe” category are those women who are kidnapped or sold into trafficking, taken to another country, and forced to work in the sex industry. Additionally, women who are tricked into believing that they will be doing a certain type of legitimate work, such as maid service, but instead find themselves working in the sex industry under slave-like conditions will also qualify.

The victims most in danger of being wrongfully denied certification despite technically qualifying for benefits under the TVPA are victims who have consented to come to the United States and to work in the sex industry, but who find themselves in slave-like conditions—in other words, migrant sex workers. The reality is that many women migrate to the United States to work in the sex industry because it offers better opportunities than what is available in their home country. To ignore that reality is harmful to these women. Some feminists argue that describing and portraying the average sex trafficking victim as an “innocent coerced” undermines the experiences of a large group of women who are not victims but have instead exercised agency in choosing to come to the United States to work the sex industry.<sup>153</sup> This kind of essentialism of what it means to be a sex trafficking victim is harmful because it defines the average victim in such a manner that it necessarily makes all women who choose sex work “bad” prostitutes who are not worthy of protection.<sup>154</sup> This dichotomy disregards the complexities of sex trafficking and leads to under-certification of trafficking victims. For example, in describing to the press how he would proceed with undocumented prostitutes arrested in a brothel raid, an Assistant United States Attorney said, “[t]he fate of the women will hinge on whether prosecutors determine they were forced to work against their will or whether they participated in the sex ring voluntarily.”<sup>155</sup> However, this federal prosecutor is wrong about the law, at least as the TVPA should be applied in this case. He is overlooking the possibility that some women may have originally agreed to participate, but may not have agreed to abusive and slave-like working conditions such as debt bondage.<sup>156</sup> That type of situation would fit into the language of the TVPA, meaning those women should be certified as trafficking victims, rather than prosecuted for prostitution and illegal entry. Part of the problem is that there is very little case law interpreting the TVPA. Therefore, prosecutors, such

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<sup>153</sup> See generally Joe Doezema, *Loose Women or Lost Women?: The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, 18(1) GENDER ISSUES 23 (2000).

<sup>154</sup> *Id.* at 33–34.

<sup>155</sup> Carol Leigh, *Behind the Moral Panic, An Opportunity to Work*, Open Forum, S.F. CHRON., July 22, 2005, at B-9, available at <http://www.bayswan.org/sittraffick>.

<sup>156</sup> *Id.*

as this one, are put in the difficult position of trying to parse the language themselves, often leading to misapplication and unjust results.

By contrast, migrant sex workers who knew and consented to the type of work and conditions they ultimately encountered are not considered “severe” sex trafficking victims worthy of protection under the TVPA. Instead, these women are viewed as prostitutes and illegal aliens and typically detained and deported. The apparent distinction is full knowledge and consent—if a woman agrees to be smuggled to the United States to work in a brothel in dangerous conditions, she cannot later claim to be an unwilling victim when arrested for prostitution because she was not “forced or coerced.” In this respect, the TVPA’s definition of “severe trafficking” is directly at odds with the United Nations’ definition of trafficking that focuses on exploitation rather than coercion, and explicitly makes consent irrelevant to the determination of a trafficking victim.<sup>157</sup> Similarly, many feminists argue that because one can never legally consent to slavery, even migrant sex workers who consent to slave-like conditions are trafficking victims.<sup>158</sup> Perhaps Congress agreed with those feminists who argue that to label these consenting women as trafficking victims is to undermine their agency over their bodies and economic choices. However, other feminists respond that privileging the woman’s right to consent, thereby excluding her from the class of protectable victims, is not only harmful, but also fictional.<sup>159</sup> After all, “[i]f prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?”<sup>160</sup>

#### D. Requirement To Assist in Prosecution of Traffickers

In order to receive benefits under the TVPA, trafficking victims must be willing to cooperate with the prosecution of their traffickers.<sup>161</sup> This requirement is one of the most problematic provisions of the TVPA and leads to many victims being ineligible for state protection and benefits, including a visa. It would be unheard of for a rape victim to be denied assistance such as safe housing and medical treatment simply because she chose not to testify against her rapists. Yet this is precisely what happens if that rape victim is an illegal immigrant engaged in forced sex work. Drawing a distinction between a woman who is a citizen and a woman who is an immigrant in terms of giving the former but not the latter choices concerning prosecution of their perpetrators is arbitrary and discriminatory.

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<sup>157</sup> See U.N. GAOR, 55th Sess., Annex 2, Agenda Item 105, art. III, paras. (a)–(b), at 32, U.N. Doc. A/res/55/25 (2000).

<sup>158</sup> See Tiefenbrun, *Saga of Susannah*, *supra* note 6, at 122–23 (“The Thirteenth Amendment to the United States Constitution outlaws slavery and prohibits an individual from selling himself or herself into bondage.”).

<sup>159</sup> See Balos, *supra* note 222.

<sup>160</sup> Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993).

<sup>161</sup> 22 U.S.C.A. § 7105(b)(1)(E) (West 2006).

This requirement ignores the fact that many victims fear retaliation from their traffickers if they cooperate and have other legitimate reasons for not wanting to cooperate with the prosecution of their traffickers. Furthermore, even if a victim agrees to cooperate, she still can be denied benefits if the prosecutor decides not to pursue the investigation and prosecution.<sup>162</sup> Although victim cooperation is often essential to the prosecution of traffickers, certification should not be tied to the prosecution of the traffickers.

One NGO estimated that only half of its clients wished to cooperate in the prosecutions of their perpetrators.<sup>163</sup> There are a number of reasons victims may not want to participate in the prosecutions of their traffickers, which, on average, last twelve to eighteen months.<sup>164</sup> For many trafficking victims, it is not necessarily a priority to see their traffickers go to jail, especially in light of the very real threat of retaliation if they testify against their traffickers.<sup>165</sup> Retaliation against a victim and her family is a well-founded fear considering the illegal sex industry's deep ties to organized crime, with networks spread throughout the world. Even a victim from a smaller-scale trafficking ring may face serious risk because traffickers are often men from the victim's home country or even hometown who fraudulently brought her to United States with promises of legitimate work. Although the TVPA provides for some witness protection measures for victims, and occasionally for their families, these measures are shockingly insufficient.<sup>166</sup> For example, one victim who was forced to work in a Florida brothel servicing twenty-five to thirty men a day, including the guards, reported that years after the imprisonment of some of her traffickers, she "regularly bumps into" at least three of her former guards, either not prosecuted or already released from prison, who had kept her captive and repeatedly raped her.<sup>167</sup>

For some victims who have endured rape, often repeatedly, testifying is itself a revictimization: "Women who charge rape say they were raped twice, the second time in court. Under a male state, the boundary violation, humiliation, and indignity of being a public sexual spectacle makes this more than a figure of speech."<sup>168</sup> Furthermore, some victims are so traumatized that they may be unable to accurately recall the kinds of details the prosecutors demand and consider to be sufficient cooperation.<sup>169</sup>

The DOJ touts its approach to prosecuting sex traffickers as a "victim-centered approach" that reflects "the understanding that the mission

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<sup>162</sup> *Id.*

<sup>163</sup> See *Hidden Slaves*, *supra* note 17, at 83.

<sup>164</sup> See Hartsough, *supra* note 68, at 101.

<sup>165</sup> See *Hidden Slaves*, *supra* note 17, at 83.

<sup>166</sup> See 22 U.S.C.A. § 7105 (West 2006). See also Tiefenbrun, *Sex Sells*, *supra* note 233, at 186.

<sup>167</sup> Gardiner & Mohan, *supra* note 96.

<sup>168</sup> MACKINNON, *supra* note 25, at 180–81.

<sup>169</sup> See Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 *STAN. L. & POL'Y REV.* 379, 412 (2005).

of government is to remove victims from abusive settings, place them into safe programs of restorative care, and hold perpetrators accountable.”<sup>170</sup> In practice, however, the DOJ’s approach is prosecution-focused, with the victim’s needs, concerns, wishes, and goals coming second. When a prosecutor gets a case, “the goal is no longer protection, but protection for the sake of prosecution.”<sup>171</sup>

Requiring prosecutors to take a truly “victim-centered approach” could work within the existing framework of the TVPA. The TVPA requires cooperation with prosecution, but allows exceptions where it is “unreasonable” for the victim to cooperate. When a victim chooses not to cooperate based on fear of retaliation or discomfort with testifying, she should qualify for the “unreasonable” exception. Of course, this discretion is left to prosecutors, who often have very different goals than those of the victim.

### *E. T Visas*

The final requirement for certification is that the victim must either successfully petition for a T Visa, or must be granted continued presence on grounds that she is “necessary to effectuate prosecution.”<sup>172</sup> Even if she is “necessary” to the prosecution, she will have to successfully petition for a T Visa if she wants to remain in the country for any period longer than the duration of her traffickers’ trials. If a victim successfully obtains a T Visa, lives in the United States as a person “of good moral character” for three years, and has cooperated with prosecutors, her status may be adjusted to permanent residency.<sup>173</sup> The importance of the T Visa for some victims cannot be overstated. The alternative to the T Visa and permanent residency is deportation to the source country, and as discussed earlier, this may be tantamount to a death sentence for some women.

Unfortunately, the requirements for qualifying for a T Visa are overly strict—so much so that even the White House expressed such concerns before signing the TVPA into law.<sup>174</sup> To qualify, a woman must not only be a “severe trafficking” victim and cooperate with prosecutors, but she must also demonstrate “extreme hardship involving unusual and severe harm upon removal.”<sup>175</sup> Establishing extreme hardship for the purposes of a T Visa is not an easy task and many victims are unable to do so. The language of the regulations directs that the standard is higher than that used for “ex-

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<sup>170</sup> DOJ REPORT, *supra* note 1, at 12.

<sup>171</sup> *Developments in the Law—Jobs and Borders: The Trafficking Victims Protection Act*, *supra* note 29, at 2196.

<sup>172</sup> 22 U.S.C.A. § 7105(b)(1)(E) (West 2006).

<sup>173</sup> 8 U.S.C.A. § 1255(l) (West 2006).

<sup>174</sup> See Sadruddin, *supra* note 169, at n.249 (Memorandum from the Office of Management and Budget Congress, Clinton Administration, stating that “[t]he temporary residency visa is likely to be too restrictive”).

<sup>175</sup> 8 U.S.C.A. § 1101(a)(15)(T) (West 2006).

trreme hardship” in asylum applications.<sup>176</sup> Furthermore, there are various grounds for inadmissibility that could exclude many victims if they are not waived by the Attorney General, including “health-related, criminal, security, and public charge grounds.”<sup>177</sup> The Attorney General is not able to waive inadmissibility if there is any prostitution in the victim’s past (within ten years preceding the application) that is not connected with the current incident of trafficking; this would likely exclude a significant number of victims.<sup>178</sup>

Given these problems with the T Visa, advocates have been seeking alternative routes, such as applying for asylum, which has a lower standard of hardship. However, asylum is also a complex process, and its success with trafficking victims has yet to be determined.<sup>179</sup> A better solution may be to amend the TVPA to the standard reflected in asylum regulations: a well-founded fear of persecution if returned to their home countries.<sup>180</sup> This definition would likely include more of the victims that Congress intended, and would better reflect the TVPA’s goal of protecting trafficking victims.<sup>181</sup>

#### IV. SHIFTING THE FOCUS FROM CRIMINAL JUSTICE TO ECONOMIC JUSTICE

Once a trafficking victim has freed herself from her traffickers, she must begin to rebuild her life, whether in the United States or abroad. Most victims have few resources with which to do this. The fortunate few who qualify for TVPA benefits and services will have their most basic needs temporarily met, including food, shelter, and financial assistance. However, many of these benefits are only temporary, and, as discussed, many women will not qualify for these benefits. The legal focus on sex trafficking has been on criminal prosecutions rather than on civil remedies. Although restitution is available in some criminal prosecution of traffickers, restitution awards do not allow recovery for physical or emotional damages.<sup>182</sup> Because of the nature of sex trafficking, these are precisely the categories of damages that trafficking victims suffer most.

Civil suits are also a means of giving control back to the victim. As discussed, victims have little to no control over the prosecutions of their traffickers. Civil suits, in contrast, are exclusively controlled and directed by the victims from beginning to end.<sup>183</sup> There is also a greater likelihood

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<sup>176</sup> 8 C.F.R. § 240.64 (1997).

<sup>177</sup> Hartsough, *supra* note 68, at 99.

<sup>178</sup> *See id.* at 100.

<sup>179</sup> *But see id.* at 116.

<sup>180</sup> *See Dalrymple, supra* note 114, at 463.

<sup>181</sup> 22 U.S.C. § 7101(a) (2000).

<sup>182</sup> *See Note, Remediating the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2583 (2006).

<sup>183</sup> Kathleen Kim & Kusia Hreshchysyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 4 (2004).

of success in civil suits, as opposed to criminal prosecutions, because the burden of proof is lower. If successful, these cases can provide thousands, sometimes millions, of dollars in compensation directly to the victims to help them begin to rebuild their lives. Financial compensation not only helps victims, but may also be an additional, and perhaps better, deterrent to sex traffickers.<sup>184</sup> Brothel owners, club owners, and organized crime syndicates who have to pay substantial damage awards will be less likely to engage in trafficking if they know that they will be held liable. Without civil damage awards, there is very little economic disincentive to engage in trafficking. What follows is a discussion of some of the civil tools legal advocates have at their disposal, each with varying degrees of effectiveness in the context of sex trafficking.

Tort law is one potential civil remedy tool. The advantage of tort claims is that they open the door to recover for the harm most often inflicted in sex trafficking cases, such as emotional, physical, and psychological harm.<sup>185</sup> Tort law is also useful in this context because it has “traditionally evolved in response to changing social circumstances.”<sup>186</sup> In other words, it has the ability to be more flexible and progressive when the law itself has not caught up to the changing demand of the social landscape. Commonly used tort claims include Intentional Infliction of Emotional Distress and False Imprisonment.<sup>187</sup> A drawback to tort claims is that most tort causes of action have a relatively short statute of limitations. For example, in New York, the statute of limitations for an action for Intentional Infliction of Emotional Distress is one year from the date of the injury. However, courts may be inclined to equitably toll such statutes of limitation.<sup>188</sup> Another drawback is that often it is necessary to bring multiple tort claims in order to fully compensate all of the wrongs suffered. Furthermore, each tort claim has multiple elements that must be proved individually, which can lead to lengthy litigation.

Another possible avenue is to bring an action for a breach of contract, written or oral. For example, the women discussed earlier who are lured into signing fake contracts for legitimate employment in the United States, only to find themselves in a sex trafficking situation, may have a valid claim for breach of contract.<sup>189</sup> Contract remedies are designed to be compensatory, unlike tort remedies that may also be punitive in nature. Consequently, victims may be able to put forth a variety of contract claims, such as unjust enrichment of her traffickers and expectation damages concerning the

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<sup>184</sup> *See id.*

<sup>185</sup> *See Remedying the Injustices*, *supra* note 182, at 2583.

<sup>186</sup> *Id.* at 2589.

<sup>187</sup> *Id.* at 2591–93.

<sup>188</sup> *See* Kathleen Kim & Daniel Werner, *Civil Litigation on Behalf of Victims of Human Trafficking*, Legal Aid Foundation of L.A., 14 (2005), available at <http://www.lafla.org/client-services/specialprojects/VictimsTrfficking0405.pdf>.

<sup>189</sup> *See supra* text accompanying note 41.

amount she was promised to make. The drawback to contract remedies, however, is that they cannot provide redress for a contract for illegal services, such as prostitution.

Occasionally, large trafficking rings involving many victims are uncovered. These victims may benefit from suing their traffickers in a class action capacity pursuant to Federal Rule of Civil Procedure 23.<sup>190</sup> Because a representative brings and pursues the claim on behalf of numerous victims in the same suit, more victims are able to recover damages with far less individual effort, including time and cost. However, because class action suits are not appropriate where highly individualized claims, such as psychological and emotional damages, are involved, they may not be useful in many cases. However, a similarly situated group of trafficking victims forced to perform legal work (such as the Latvian women forced to dance topless), that is underpaid or not compensated, could benefit from class action certification in a suit against their trafficker/employer for back pay.<sup>191</sup>

Given the strong ties and overlap between sex trafficking and organized crime, it is not surprising that the Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”) is another useful tool for civil redress of sex trafficking.<sup>192</sup> RICO makes it unlawful to use or invest income derived from a pattern of racketeering relating to interstate or foreign commerce.<sup>193</sup> When the TVPA was reauthorized and amended in 2003, it added human trafficking as a predicate offense upon which to base a RICO claim.<sup>194</sup> The advantages of RICO claims include that successful plaintiffs are entitled to treble damages, attorneys fees, and costs. The major challenge that sex trafficking victims face in making out a prima facie RICO claim is establishing the harm to business or property requirement.<sup>195</sup>

As one can see, the most effective strategy may require utilizing various legal theories in the same action, such as bringing an action for both tort claims and contract damages. This is not ideal in that pursuing multiple theories in one action can be complex, time consuming, and costly because each claim must be proved independently. Recognizing the need for a more efficient means of achieving economic justice for trafficking victims, Congress signed the Trafficking Victims Protection Reauthorization Act of 2003 (“TVPRA”), which included, *inter alia*, a new civil remedy for victims of trafficking.<sup>196</sup> The civil remedy provision allows victims to sue their traffickers for “damages and attorneys fees.”<sup>197</sup> This new provision

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<sup>190</sup> FED. R. CIV. P. 23.

<sup>191</sup> *See id.* They may also be able to bring a Fair Labor Standards Act claim in order to recover back pay. *See* 29 U.S.C. §§ 201–19 (2000).

<sup>192</sup> Federal Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 992 (codified as amended at 18 U.S.C.A. §§ 1961–1968 (West 2006)).

<sup>193</sup> *See id.*

<sup>194</sup> 22 U.S.C. § 7101 (2000).

<sup>195</sup> *See* Kim & Wemer, *supra* note 188.

<sup>196</sup> 18 U.S.C.A. § 1595 (West 2003).

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

enables victims to bring a civil suit against their traffickers to recover for their physical and psychological damages, including punitive damages.<sup>198</sup> Unlike other civil causes of action, the TVPA does not have a statute of limitations. However, this new provision cannot be applied retroactively, and therefore harm inflicted before its passage in 2003 is not redressable. Although it is too soon to accurately measure the impact this additional remedy has had on sex trafficking, it has the potential to be a powerful tool and undoubtedly deserves more attention from advocates seeking to help provide economic remedies and justice to trafficking victims.

#### V. CONCLUSION

It is disgraceful to report that in the year 2006, slavery is alive and thriving. Millions of oppressed women are trafficked for sex around the world, caught in a vicious cycle of exploitation. The passage of the TVPA in 2000 was a recognition of the scope and the severity of this problem, as well as an attempt to provide protection and relief to its victims globally and domestically. Unfortunately, domestic victims are not being served by its rigid provisions and unjust requirements that must be met before relief is granted. If Congress is serious about its goal of protecting trafficking victims in the United States, it will reexamine the certification procedures of the TVPA. Lawmakers and officials must recognize and understand the unique needs of trafficking victims and the complexity of their circumstances so they can accurately reflect this understanding in both the language and enforcement of the TVPA in order to better serve trafficking victims. Until this happens, sex slavery of women will shamefully continue to thrive, and survivors will only be further victimized by the system that is supposed to help them.

Violence against women is perhaps the most shameful human rights violation. And it is perhaps the most pervasive. It knows no boundaries of geography, culture, or wealth. As long as it continues, we cannot claim to be making real progress towards equality, development, and peace.

—UN Secretary General Kofi Annan, 1999

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<sup>198</sup> *Id.*