Intercultural Human Rights Law Review

Volume 1 Article 14

2006

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I. Introduction

From the time when Congress passed and the President enacted the Trafficking Victims Protection Act of 2000 ("TVPA"), this innovative law has changed the contours of the U.S. legal landscape.[1] Given even more teeth by the subsequent passage of the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA"),[2] the law provides unprecedented tools for U.S. governmental agencies

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[1] *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.) [hereinafter VTVPA]. Division A of the VTVPA is further identified as the Trafficking Victims Protection Act of 2000 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000), which incorporates 18 U.S.C. §§ 1589-1594 (2000)) [hereinafter TVPA]. President Clinton signed the TVPA into law on Oct. 28, 2000.

[2] *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (signed into law by President Bush on Dec. 19, 2003) [hereinafter TVPRA]. The TVPRA both strengthened and amended the TVPA. Included among its provisions were measures to combat international sex tourism, strengthen border interdiction programs, allow state and local law enforcement officers to verify that victims of trafficking have cooperated in trafficking investigations and prosecutions, allow trafficking victims to sue their traffickers in federal courts, and make human trafficking crimes predicate offenses for RICO charges.

and non-governmental organizations ("NGOs") to combat trafficking in persons, both within the U.S. and abroad. While neither the law's format nor its implementation has been without problems, significant progress has been made since its enactment in countering trafficking and prosecuting traffickers. Such progress is noteworthy, given the proliferation of human trafficking throughout the U.S. and the diverse nature of the governmental and non-governmental partners brought together to combat it under the aegis of the TVPA. This article offers an assessment of both the law's conceptual framework and of its implementation in the field to date. It furthermore identifies challenges that remain on both the theoretical and practical levels, and also seeks to dispel a number of the misconceptions and stereotypes that continue to detract from America's vital efforts to abolish the modern-day slave trade.

II. A Law Unprecedented in Both Concept and Scope

Enacted in the final months of the Clinton Administration, the TVPA introduced a comprehensive approach to combating human trafficking that was without parallel anywhere in the world.[3] It defined new trafficking crimes, enhanced criminal penalties, and established anti-trafficking efforts as a major U.S. foreign policy objective.[4] Most importantly, in a move that distinguished it from international law, the TVPA also has provided benefits and remedies

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[3] *See generally* Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041 (2002) (describing the innovative approach adopted by the TVPA in which immigration remedies, rather than penalties, are utilized in order to achieve broader criminal law enforcement goals).

[4] While this third objective is beyond the scope of this article, it comprises yet another vital dimension of the TVPA for its implications in the international arena. *See* Mohamed Y. Mattar, *Monitoring the Status of Severe Forms of Trafficking in Foreign Countries: Sanctions Mandated Under the U.S. Trafficking Victims Protection Act*, 10 BROWN J. WORLD AFF. 159 (2003) (analyzing the emergence of anti-trafficking efforts as a U.S. foreign policy objective).

for victims of human trafficking.[5] Each of these accomplishments bears separate examination.

A. Criminal Offenses under the TVPA

Prior to the enactment of the TVPA, various lacunae existed in U.S. law that in the aggregate comprised a legal *petri dish* that proved sadly conducive to human trafficking.[6] At the time, criminal penalties for those who trafficked in drugs were actually more severe than for those who trafficked in human beings,[7] and in fact, the of-

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[5] International law on human trafficking has been largely confined to efforts aimed at criminalizing human trafficking. See Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, opened for signature Dec. 12, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Annex II at 60, art. 3, U.N. Doc. A/45/49 (Vol. 1) (2001) [hereinafter Protocol]. Whereas the Protocol mandates that signatory nations criminalize trafficking, it requires them only to consider providing protection for trafficking victims. Id. This focus on law enforcement, to the detriment of victim protection, owes in one part to the fact that the Protocol evolved through the crime prevention regime of the U.N. rather than its human rights organs. See generally Anne Gallagher, Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis, 23 HUM. RTS. Q. 975 (2001) (noting how sovereignty and security issues surrounding human trafficking provided the fundamental impetus for the Protocol).

[6] Amy O'Neill Richard, in a landmark pre-TVPA study of the trafficking of women to the United States, highlighted many such gaps that contributed to the proliferation of this crime. *See* AMY O'NEILL RICHARD, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 31-37 (2000), *available at* http://www.cia.gov/csi/monograph/women/trafficking.pdf. Richard noted how definitional differences of human trafficking between branches of the U.S. government, imperfect information sharing between agencies, limited law enforcement investigative funding, low penalties for traffickers, and lack of a uniform trafficking law all hampered the ability of the U.S. to eradicate this crime. *Id.*

[7] The federal legislators who drafted the TVPA were especially mindful of this inequity. *See* Trafficking Victims Protection Act of 2000--Conference Report, H.R. 3244, 106th Cong., 146 CONG. REC. S10164-02, S10168 (daily ed. Oct. 11, 2000) (statement of Senator Paul Wellstone of Minnesota, noting that "[t]he statutory minimum for sale into involuntary servitude is only 10 years, whereas the maximum for dealing in small quantities of certain drugs is life.").

fense of human trafficking did not exist under U.S. law.[8] Those who engaged in the modern slave trade typically faced prosecution only on lesser charges that rarely were commensurate with the toll in human suffering that their criminal activities caused.[9] In certain areas of the criminal code there were outright gaps altogether--such as trafficking in humans when done to provide victims for others to enslave.[10] In the judicial realm, court interpretations of longstanding anti-slavery statutes had further narrowed their effectiveness for combating modern trends in human trafficking.[11] A prime example of this was the limitation imposed by the Supreme Court in its 1988 *Kozminski* decision upon findings of involuntary servitude (under 18 U.S.C. § 1584).[12] The *Kozminski* Court ruled that involuntary servi-

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[8] *See* Richard, *supra* note 6, at 35 (summarizing the need for a comprehensive trafficking law that would cover existing gaps in the investigation and prosecution of traffickers).

[9] In the Congressional Findings that introduced the TVPA, legislators explicitly recognized that:

> Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment. . . . In the United States, the seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers.

TVPA, *supra* note 1, 22 U.S.C. § 7101(b)(14-15).

[10] *See* Conference Report on H.R. 3244, Victims of Trafficking and Violence Protection Act of 2000, 106th Cong., 146 CONG. REC. D1050-01, H9038 (daily ed. Oct. 6, 2000) (statement of Rep. Henry Hyde, Chairman of the House Committee on the Judiciary, "[This bill] will fill another gap in the law by punishing, for the first time, those who traffic in human beings in order to provide the supply of labor to those who will enslave them once they arrive on our shores.").

[11] *See* TVPA, *supra* note 1, 22 U.S.C. § 7101(b)(13) (Congress noting that pursuant to U.S. Supreme Court determinations, the federal statute criminalizing involuntary servitude should be narrowly interpreted).

[12] United States v. Kozminski, 487 U.S. 931 (1988) ("[T]he term ['Jinvoluntary servitude['] necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physi-

tude occurred only when a defendant used violence or threats of force to secure the labor or services of another--a definition that excluded much of the psychological coercion employed by modern day slavers and traffickers.[13] Mindful of these inequities, Congress through the TVPA enhanced the legal tools available to counter trafficking in humans, reinvigorating certain statutes and creating others that were completely new.[14]

Moving first to align criminal sanctions with the gravity of human trafficking crimes, Congress increased the maximum term from 10 to 20 years for the offenses of Peonage (debt servitude), Enticement Into Slavery, and Involuntary Servitude, providing for life

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cal injury or by the use or threat of coercion through law or the legal process."). *Id.* at 952.

[13] *Kozminski*, 487 U.S. 931. In the wake of *Kozminski*, federal prosecutors were keenly aware of the limitations of the Involuntary Servitude statute for combating modern trafficking in persons. *See* Bharathi A. Venkatraman, *Human Trafficking A Guide to Detecting, Investigating, and Punishing Modern-Day Slavery*, THE POLICE CHIEF, Dec. 2003, *available at* http://policechiefmagazine.org/magazine/index.cfm. A Federal Prosecutor and Special Counsel for Trafficking in Persons for the Civil Rights Division of the Justice Department, Venkatraman observes:

> A conviction for involuntary servitude under 18 U.S.C. 1584 requires proof that the defendant knowingly and willfully held the victim in service against her will, and that the defendant did so through use of force, threats of force, or threats of legal coercion. Because involuntary servitude requires proof that the defendant used violence or threats of force to secure the labor or services of another, the statute is limited in its reach to the most egregious cases of violently enforced labor. This statute fails to reach the more nuanced forms of coercion often used by modern traffickers to force victims into service, such as brainwashing, psychological coercion, or emotionally blackmailing victims to believe that their family members back home would suffer some unspecified harm.

Id.

[14] *See* U.S. DEPARTMENT OF JUSTICE, ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 6, 26 (June 2004), *available at* http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf (annual assessment of U.S. anti-trafficking measures, noting how the TVPA created new crimes as well as enhanced criminal penalties under existing statutes) [hereinafter ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES].

sentences in cases that involved kidnapping, aggravated sexual assault, or attempted murder.[15] Inasmuch as the *Kozminski* ruling permitted prosecution of only the most extreme involuntary servitude cases, in which violence or the threat of violence was employed, Congress created an entirely new statute criminalizing Forced Labor (under 18 U.S.C. § 1589).[16] This new statute is critical to combating human trafficking, as it encompasses the more subtle forms of psychological coercion commonly employed by modern traffickers against their victims. Forms of coercion that could be prosecuted now under § 1589 include the physical restraining of victims (in ways that nonetheless fall short of violence), threats against victims' families in their homelands, threats that victims will be shunned by their families on account of work the victims have been forced to do (especially sex work), or threats that victims will be turned over to U.S. immigration authorities to be deported.[17] Because such tactics

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[15] *See* TVPA, *supra* note 1, 22 U.S.C. § 7109(a)(1) (section entitled "Strengthening Prosecution and Punishment of Traffickers").

[16] *Id.* § 7109(a)(2). The new statute on Forced Labor establishes that:

> Whoever knowingly provides or obtains the labor or services of a person—
> (1) by threats of serious harm to, or physical restraint against, that person or another person;
> (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
> (3) by means of the abuse or threatened abuse of law or the legal process,
> (4) shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, or imprisoned not more than 20 years, or both.

Id.

[17] *Id.* The threat of deportation would comprise a classic example of "threatened abuse of law or the legal process" by a trafficker. *Id.* Even though what the trafficker might say to the trafficking victim may be factually true (i.e., that the immigrant is illegally present in the U.S. and is therefore vulnerable to deportation) the new law on Forced Labor nonetheless criminalizes this type of threat when it is

are commonplace in trafficking cases, § 1589 is absolutely crucial to U.S. efforts to eradicate slave-like practices and forced labor.

The TVPA also created a new statute (18 U.S.C. § 1591) criminalizing the sex trafficking of children under any circumstances, and that of adults when it is accomplished through force, fraud, or coercion.[18] The statute has several noticeable limitations, including the fact that it deals only with commercial sex acts, and has the additional requirement that interstate commerce be implicated in some aspect of the criminal enterprise.[19] To its credit, the statute reaches *anyone* who benefits financially, or receives anything of value, from sex trafficking schemes. This arguably includes anyone along the trafficking continuum who knowingly profits from the venture--recruiters, smugglers, transporters, madams, advertisers, bouncers, and enforcers alike. Field research by Florida State University indicates that sex trafficking schemes in the U.S. frequently depend on the complicity of persons from local ethnic communities

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used to secure the labor or services of another. Federal Prosecutor Lou DeBaca has noted that prior to the TVPA, the U.S. government was often an "unwitting co-conspirator" with traffickers who made such threats, inasmuch as U.S. law provided no deportation relief that was specifically available to victims of trafficking. This gap in protective measures meant that traffickers' threats that their victims would be deported if caught by U.S. law enforcement invariably proved true. Lou DeBaca, U.S. Justice Department Training on Human Trafficking, Miami, Florida, May 11, 2004 (notes on file with author).

[18] TVPA, *supra* note 1, 22 U.S.C. § 7109(a)(2). The new statute on sex trafficking establishes that:

> (a) Whoever knowingly—
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> (1) in or affecting interstate commerce, recruits, entices, harbors, transports, provides, or obtains by any means a person; or
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> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing that force, fraud, or coercion . . . will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished . . . .

Id.

[19] *Id.*

in order to thrive.[20] Persons such as doctors, landlords, or others in the community who knowingly collude with sex traffickers and profit from such participation are also liable to prosecution under § 1591.

Congress also criminalized a third new offense--document servitude--that is likewise becoming a preferred tactic of coercion on the part of human traffickers worldwide. 18 U.S.C. § 1592 (Unlawful Conduct with Respect to Documents) now provides up to five years imprisonment for traffickers who coerce their victims by confiscating or withholding the victims' passports, immigration documents, or identification cards.[21] This statute criminalizes another form of non-violent coercion that the Involuntary Servitude statute had proved incapable of reaching. It is significant that § 1592 allows prosecution even of traffickers who confiscate a fraudulent identity

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[20] In 2002, the Center for the Advancement of Human Rights at Florida State University received a grant from the Florida Department of Children and Families to assess human trafficking in Florida. The resulting project allowed FSU interviewers privileged access to a number of the young Mexican females who had been exploited in the Cadena sex trafficking case between 1996 and 1997. Interviews with the women revealed that a South Florida resident who appeared to be a doctor had on numerous occasions visited the brothels and dispensed medicine to the women. FLORIDA STATE UNIVERSITY CENTER FOR THE ADVANCEMENT OF HUMAN RIGHTS, FLORIDA RESPONDS TO HUMAN TRAFFICKING 43 (2003) (survey of victims and perpetrators in Florida trafficking cases), *available at* http://www.cahr.fsu.edu/the%20report.pdf.

[21] TVPA, *supra* note 1, 22 U.S.C. § 7109(a)(2). The new statute on Document Servitude establishes that:

> (a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document of another person—
> (3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons . . . shall be fined under this title or imprisoned for not more than 5 years, or both.

Id.

document--it is a trafficker's coercive actions rather than the authenticity of a victim's documentation that is the focus of the law.

Another vital criminal provision of the TVPA is the new statute on Attempt (18 U.S.C. § 1594).[22] This statute allows federal authorities to prosecute attempts aimed at human trafficking to the same extent as completed offenses.[23] One of the legal anomalies of the TVPA is its requirement that for sex trafficking to be considered a "severe form of trafficking," the commercial sex act must already have been induced.[24] The *attempt* provision of § 1594 makes it possible to prosecute sex trafficking endeavors--as well as any other kind of human trafficking--even when the criminal act has not yet reached its culmination, but where the scheme or attempt can nonetheless be proved. This represents a vital tool for prosecuting criminal syndicates that may well be in the business of sex trafficking on a regular basis and that maintain a criminal support structure to sustain

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[22] *Id.* The newly created § 1594, entitled "General Provisions", provides that:

> (a) Whoever attempts to violate section 1581 [Peonage], 1583 [Enticement Into Slavery], 1584 [Involuntary Servitude], 1589 [Forced Labor], 1590 [Trafficking With Respect to Peonage, Slavery, Involuntary Servitude, or Forced Labor], or 1591 [Sex Trafficking of Children or by Force, Fraud, or [Coercion] shall be punishable in the same manner as a completed violation of that section.

Id.

[23] *Id.*

[24] TVPA, *supra* note 1, 22 U.S.C. 7102(8). In its Definitions section, the TVPA establishes that:

> The term "severe forms of trafficking in persons" means—
> (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.

Id. The TVPA defines sex trafficking in a subsequent section, establishing that "the term 'sex trafficking' means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." *Id.* § 7102(9).

such an illegal venture. Lastly, § 1594 has vital implications for the protection of trafficking victims in court as it appropriately shifts the focus of the legal inquiry from the victim's state of mind to the defendant's intent.

B. Victim Protections under the TVPA

As important as the criminal provisions of the TVPA are, it is the Act's victim protections that distinguish it from both international law on trafficking and other domestic laws worldwide.[25] The TVPA ushered in a sea-change in U.S. law: persons exploited by human traffickers--especially those without legal immigration status in the U.S.--are now treated not as deportable aliens or as criminals, but rather as victims of violent crime.[26] Certified trafficking victims are furthermore eligible for the same benefits as those afforded refugees,[27] and several immigration remedies—"continued presence"[28]

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[25] *See supra* note 5 and accompanying text.

[26] In its Findings introducing the TVPA, Congress noted:

> Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves. . . . Additionally, adequate services and facilities do not exist to meet victims' needs regarding health care, housing, education, and legal assistance . . . . Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation. . . . 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. . . .

TVPA, *supra* note 1, 22 U.S.C. § 7101(b)(17-19), (24). Congress further mandated that federal agencies "shall expand benefits and services to victims of severe forms of trafficking in persons in the U.S., without regard to the immigration status of such victims." 22 U.S.C. § 7105(b)(1)(B).

[27] *Id.* § 7105(b)(1)(A) (Eligibility for Benefits and Services). Victim benefits are available to any adult who has been certified as a "victim of a severe form of

and the new T visa[29]--are available to victims without legal immigration status who are willing to cooperate in the prosecutions of their traffickers. The provision of legal status and benefits is absolutely crucial to victim care as well as to successful prosecutions of traffickers. Lacking such protections prior to the TVPA, victims were merely deportable aliens, and as Congress noted, were often punished more harshly than the traffickers themselves.[30]

Financial restitution from their traffickers is also now available to victims under the TVPA--another critical remedy, given that virtually all trafficking victims have come to the U.S. first and foremost to work.[31] The TVPRA has recently given victims the additional right to sue their traffickers for damages in U.S. district

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trafficking in persons" by the Department of Health & Human Services ("DHHS"), or to minor victims under the age of 18. *Id.* § 7105(b)(1)(C).

[28] "Continued presence" is a short-term period of legal status granted to a trafficking victim during the investigation and prosecution of his or her trafficker. The TVPA establishes that: "Federal law enforcement officials may permit an alien individual's continued presence in the United States if after an assessment, it is determined that such individual is a victim of a severe form of trafficking and a potential witness to such trafficking, in order to effectuate prosecution of those responsible . . . ." *Id.* § 7105(c)(3) (Authority to Permit Continued Presence in the United States).

[29] *Id.* § 7105(e)(1)(C). The TVPA laid out the initial requirements for the new T visa:

> (1) that the alien applicant is or has been a victim of a severe form of human trafficking; (2) that the victim is physically present in the U.S., American Samoa, or the Commonwealth of the Northern Mariana Islands on account of human trafficking; (3) that the victim has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, (or was under 15); (4) that the alien (and certain immediate family members) would suffer extreme hardship involving unusual and severe harm upon removal. *Id.* The TVPRA subsequently exempted minors younger than 18 from the requirement of complying with reasonable requests for assistance from law enforcement. *See* TVPRA, *supra* note 2, § 4(b) (amending the Immigration and Nationality Act).

[30] TVPA, *supra* note 1, 22 U.S.C. § 7101(b)(17).

[31] TVPA, *supra* note 1, 22 U.S.C. § 7109(a)(2) (creating new provisions on "Mandatory Restitution" in 18 U.S.C. § 1593).

courts.[32] Along with provisions in the TVPA allowing for asset forfeiture (18 U.S.C. § 1594),[33] this has the potential to strike at the financial heart of criminal syndicates--groups that might otherwise be little deterred by the incarceration of a small number of their operatives. The benefits and remedies afforded trafficking victims under the TVPA and TVPRA distinguish these statutes as *victim-centered law*, and the TVPA itself goes so far as to mandate that the Attorney General and other government officials provide victims with referrals to NGOs that can assist them with access to benefits and legal representation.[34] In all, the TVPA is a landmark piece of legislation.

It is, of course, not without legal flaws. While the TVPA evidences strong human rights sensibilities, it falls short of being true human rights law in that it grants benefits only to victims of trafficking who are willing to cooperate in the prosecutions of their traffickers.[35] In a true human rights legal regime, rights are not contingent upon victim cooperation with law enforcement--they inhere rather because of basic human dignity. Such is not the case with the TVPA, and it would be most accurate to describe it as prosecutorial law that has certain incidental human rights protections. The immigration benefits themselves are at best problematic. Continued presence--the ability to remain legally in the U.S. only so long as proceedings against the trafficker are ongoing, and only so long as prosecutors have need of the trafficking victim's testimony--is arguably not only coercive but borders on legal exploitation. The mes-

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[32] TVPRA, *supra* note 2, § 4(a)(4) (creating new "Private Right of Action" in 18 U.S.C. § 1595).

[33] TVPA, *supra* note 1, § 22 U.S.C. § 7109(a)(2). The asset forfeiture provisions of the TVPA allow the government to seize all real and personal property of the traffickers that was either used in the criminal enterprise or gained as a result of it. *Id.*

[34] TVPA *supra* note 1, 22 U.S.C. § 7105(e)(4).

[35] The process by which an adult survivor is certified by the DHHS as "a victim of a severe form of trafficking in human beings" requires that he or she be "willing to assist in every reasonable way in the investigation and prosecution" of traffickers and have already been granted continued presence by the Attorney General, or have made a bona fide application for a T visa. *Id.* § 7105(e)(1)(C), (b)(1)(E)(i). The separate requirements for the "T" visa available to trafficking victims also mandate compliance "with any reasonable request for assistance in the investigation or prosecution of acts of trafficking." *See id.* § 7105(e)(1)(C).

sage from the U.S. government to the trafficking victim is as unmistakable as it is unsettling: "We are interested in your well-being only so long as you are useful to us in securing a conviction. After that you will be considered deportable." This is not the stuff of which genuine human rights law is made.

Even the newly created T trafficking visa, which the victim applies for on his or her own (ostensibly to avoid any suggestion that the testimony is given *quid pro quo* for immigration benefits) is nonetheless inextricably bound up with law enforcement. In order to qualify for the visa, applicants must demonstrate that they have complied with all reasonable requests to assist in the investigation or prosecution of the traffickers.[36] The T visa regulations issued by Bureau of Citizenship and Immigration Services ("BCIS") further reinforce this victim dependence upon law enforcement officials with their threshold requirement that the applicant demonstrate his or her victim status by either submitting a law enforcement agency ("LEA") endorsement or in the alternative, secondary evidence that includes an explanation of why an LEA endorsement has not been included.[37] Government control over T visa applicants extends far beyond the threshold issue of victim identification. At any point after their issuance such visas can be revoked by the law enforcement agency if it withdraws its endorsement or decides that a victim has unreasonably refused to cooperate in an investigation or prosecu-

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[36] *See id.*

[37] The T Visa Regulations establish that an alien may demonstrate that he or she has been a victim of "a severe form of trafficking in persons" in one of three ways: by submitting a law enforcement agency ("LEA") endorsement, by demonstrating that the Service has already arranged for the alien's continued presence, or by submitting sufficient credible secondary evidence. *See* New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 67 Fed. Reg. 4784, 4798 (Jan. 31, 2002) (to be codified at 8 C.F.R. pts. 103, 212, 214, 274a, and 299) [hereinafter T Visa Regulations]. The regulations make clear that an LEA endorsement is not required. *Id.* However, in the event that such an endorsement is not submitted, the alien is required to "demonstrate that good faith attempts were made to obtain the LEA endorsement, including what efforts the applicant undertook to accomplish these attempts." *Id.*

tion.[38] Such *de facto* government control over trafficking victims undermines any claim that victims submit T visa applications autonomously. Far more disturbingly, it creates potential scenarios in which victims who have been coerced and brutally exploited by human traffickers may subsequently find themselves vulnerable to a type of coercion on the part of U.S. law enforcement, prosecutors, or immigration officials. To term such an approach *human rights law* would be less than credible.

Even allowing for the cross-purposes at which the TVPA operates, further problems with the law are encountered in certain outright legal anomalies that it creates. The insistence of U.S. lawmakers to allow certification and benefits only to victims of "severe" forms of human trafficking raises questions as to whether there are *any* forms of human trafficking that are by definition "not severe." Additional problems with this distinction lie in the fact that the TVPA's delineation of "severe forms of trafficking in persons" encompasses two types of trafficking that are defined quite differently. Section 103(8) of the TVPA establishes that the term "severe forms of trafficking in persons" is defined 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 yet attained 18 years of age; or

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[38] T Visa Regulations, *supra* note 37, 67 Fed. Reg. at 4802. The T visa regulations identify two circumstances in which the Service may revoke an approved T visa:

> (iv) In the case of a T-1 principal alien, an LEA with jurisdiction to detect or investigate the acts of severe forms of trafficking in persons by which the alien was victimized notifies the Service that the alien has unreasonably refused to cooperate with the investigation or prosecution of trafficking in persons and provides the Service with a detailed explanation of its assertions in writing; or
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> (v) The LEA providing the LEA endorsement withdraws its endorsement or disavows the statements made therein and notifies the Service with a detailed explanation of its assertions in writing.

Id. 67 Fed. Reg. at 4802, 8 C.F.R. § 214.11(s)(1)(iv)-(v).

(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.[39]

Sex trafficking is defined separately in section 103(9) as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."[40] For purposes of victim certification and benefit eligibility, the dissimilarities between the two forms of "severe forms of trafficking in persons" set out in section 103(8) are striking.[41] To begin with, this definition recognizes forced labor offenses as "severe forms of trafficking," at any point along the *continuum* of separate actions that can constitute this crime: i.e., when a victim is recruited, harbored, transported, sold, exploited, etc. In contrast, sex trafficking is only deemed a "severe form of trafficking" when the ultimate sexual exploitation of the victim has already been induced, and what is more, has occurred in a commercial context. The TVPA offers no explanation for the variance in these definitions, nor is there any logical reason for distinguishing between these offenses from a victim's perspective. Why would victims recruited for forced labor in a non-sexual context be eligible for certification and for benefits throughout the trafficking continuum, while victims recruited for sexual exploitation not be eligible until the moment that a forced commercial sex act has actually occurred?

The separate definition of sex trafficking provided by Congress is also curious. As defined in TVPA section 103(9), sex trafficking would include *any* act in which a person is recruited, harbored, transported, or provided for the purpose of a commercial sex act. By the literal terms of this provision, even one who knowingly agrees to be recruited, transported, harbored, etc. in order to participate in prostitution--with his or her full consent--is included in this definition of sex trafficking. Because the definition conflates voluntary movement into sex work by adults with forced sex trafficking of

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[39] TVPA, *supra* note 1, 22 U.S.C. § 7102(8).
[40] *Id.* § 7102(9).
[41] *Id.* § 7102(8).

victims, it introduces an unnecessary element of confusion into the realm of U.S. law. Given the international debate that continues to rage as to whether persons, especially women, who voluntarily participate in prostitution should be treated as victims, such a legal ambiguity in the TVPA is problematic.[42]

If the TVPA's definition of "severe forms of trafficking in persons" is generally more solicitous of forced labor victims than of sex trafficking victims, the same is not true in offenses involving minors. In incidents involving the commercial sex trafficking of persons under the age of 18, there is no legal requirement to demonstrate that force, fraud, or coercion has been employed to induce the sex act.[43] In other words, the law treats the commercial sex trafficking of minors much as it does statutory rape. The same is not true, however, of cases involving labor trafficking of minors. The burden of proof in cases of child labor trafficking still requires that these victims demonstrate that traffickers subjected them to force, fraud, or coercion as a means to achieve the trafficking end.[44] Again, this disparate treatment of similarly situated child victims is neither explained nor justified in the TVPA.

III. The TVPA as Applied Law

After its implementation, the TVPA remains relatively new. In this short period of time, however, it has borne impressive results. Vigorous administration of the law by the Department of Justice ("DOJ") has resulted in a significant increase in trafficking cases in-

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[42] *See* Gallagher, *supra* note 5, at 984-85 (noting the division this issue caused during the drafting of the U.N. Protocol on Human Trafficking). One school of thought holds that all prostitution is inherently coercive, while another contends that the right to privacy and to sexual autonomy necessitates societal recognition of choices by consenting adults to engage in prostitution. *Id.* at 984 n.61; *see generally* Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing The United Nations Trafficking Protocol,* 44 HARV. INT'L L.J. 473 (2003); Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137 (2004).

[43] *See* TVPA, *supra* note 1, § 22 U.S.C. § 7102(8) (definition of "Severe Forms of Trafficking in Persons").

[44] *See id.*

vestigated and in convictions secured.[45] Moreover, the government-nongovernmental partnership fostered by the TVPA is unprecedented and increasingly effective.[46] Community task forces have been organized throughout the country--at times as a result of state or com-

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[45] Justice Department statistics indicate that as of April 2004, the Criminal Section of the Civil Rights Division of the Justice Department had 153 open human trafficking investigations--twice as many as had been open at that time in Fiscal Year 2001. *See* ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES, *supra* note 14, at 25. Such trafficking investigations are not confined to border states or large populations centers; they have been initiated in 46 U.S. states as well as every U.S. territory. *See id.* at 26. Between fiscal years 2001 to 2003, the federal government charged 56 defendants under the TVPA, securing 28 convictions to date with numerous cases ongoing. *See id.* at 28.

[46] In its own self-assessment for 2004, the U.S. Government acknowledged the key role that nongovernmental organizations (NGOs) play in the campaign to eradicate trafficking in the U.S.:

> Non-governmental organizations have been vital to the U.S. Government's efforts to identify and help trafficking victims as well as to prosecute trafficking cases. The U.S. Government engages in extensive outreach to non-governmental organizations, which are often the first point of contact with trafficking victims. These contacts foster good relations with groups that receive and shelter trafficking victims and are often in a position to encourage victims to come forward and report their abuses. Additionally, in those situations in which law enforcement is actively involved in liberating victims from servitude, some non-governmental organizations can provide safe houses for the victims. . . . U.S. Government personnel have been working closely with non-governmental organizations around the country to train service providers on the victim services and criminal provisions of the TVPA and amendments under the TVPRA. Through such training, federal prosecutors, Federal Bureau of Investigation and U.S. Immigration and Customs Enforcement agents, U.S. Citizenship and Immigration Service officials, and Health & Human Services personnel have forged good relationships with non-governmental organizations, learned about potential new cases, acquired non-governmental organizations' assistance in procuring refuge and support for trafficking victims, educated non-governmental organizations on the requirements for identifying a victim of a severe form of trafficking, and trained service providers on the roles that they can play to contribute toward the success of trafficking investigations and prosecutions.

Id. at 40-41.

munity initiatives, and now increasingly under the aegis of local U.S. Attorney Offices--and service provider networks have been established to meet the needs of prospective victims.[47] As law, the TVPA has also developed its own progeny. A growing number of states have enacted statutes to prosecute human trafficking under their respective state criminal codes.[48] Given the reality that trafficking cases can be time intensive, and that the *War on Terror* often poses a prior claim on federal resources, such state efforts will be increasingly vital to combating human trafficking.

Closely related to DOJ legal efforts, the Department of Health & Human Services ("DHHS") has launched a "Look Beneath the Surface" outreach campaign meant to both liberate more victims and foster a greater awareness of human trafficking on the part of the U.S. public.[49] In particular this campaign targets *intermediaries*, those professionals and citizens throughout the U.S. who may unknowingly interact with victims of trafficking in the course of their daily activities.[50] This campaign is a vital complement to legal efforts if more victims are to be identified and emancipated throughout the U.S.

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[47] A number of initial community task forces formed in response to human trafficking cases that occurred in their respective metropolitan or state areas, such as the New York City Community Response to Trafficking and the Florida State University Human Trafficking Working Group. More recently, task forces have evolved under the sponsorship of various U.S. Attorney Offices. To date, these include efforts in Miami, Tampa, Orlando, Phoenix, Philadelphia, Atlanta, Newark, Houston, St. Louis, and Northern Virginia. *See* U.S. Department of Justice Civil Rights Division, *New Anti-Trafficking Task Forces Formed in Florida,* 1 ANTI-TRAFFICKING NEWS BULL., Oct. 2004, at 2, 3. The evolving task forces include representatives from federal, state, and local law enforcement agencies, faith-based organizations, and social service and health care providers. *Id.* at 3.

[48] To date, three states (Texas, Florida, and Missouri) have enacted laws that parallel the TVPA, and efforts to implement similar laws are underway in Minnesota, New Jersey, California, Nebraska, Idaho, Massachusetts, and the Commonwealth of the Northern Marianas Islands. *See* U.S. Department of Justice Civil Rights Division, *State Anti-trafficking Legislation Effort Intensifies,* 1 ANTI-TRAFFICKING NEWS BULL., Nov.-Dec. 2004, at 1.

[49] *See* ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES, *supra* note 14, 41-42.

[50] *See id.*; *see also* U.S. DHHS, The Campaign to Rescue & Restore Victims of Human Trafficking, http://www.acf.hhs.gov/trafficking/ (last visited Feb. 19, 2006) (describing the "Look Beneath the Surface" outreach campaign).

NGOs have proven essential to every phase of both the DOJ and DHHS efforts to counter trafficking of persons.[51] Covenant House operates a 24-hour hotline that victims or intermediaries may call, and anti-trafficking NGOs provide victim assistance throughout every phase of the post-emancipation period.[52] NGO assistance is especially critical when victims are first identified, but before they are officially certified and eligible for federal benefits.[53] Victims have urgent pre-certification needs that law enforcement officials who liberate them may have little capacity to meet. Primary among these would be housing, followed by emergency medical and dental care, as well as counseling and legal assistance.[54] NGOs are better able to provide these, and in addition, often have foreign language capabilities that a law enforcement agency might lack.

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[51] *See* ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES, *supra* note 14.

[52] A toll-free number (888-373-7888) is run by the Covenant House, sponsored by the DHHS in collaboration with the Department of Justice, that allows victims of trafficking to be instantly referred to a pre-screened aid organization in the victim's area.

[53] The certification process is neither immediate nor rapid. It requires not only a willingness on the part of a victim to assist investigators and prosecutors "in every reasonable way," but furthermore mandates the additional step that a victim either already has been granted continued presence or has submitted a bona fide T visa application. *See supra* note 35 and accompanying text. In practice, this requires verification by the law enforcement agency investigating the case, processing next by Immigrations and Customs Enforcement ("ICE"), and finally the issuance of the certification by the DHHS. Thus, in the very time period when victim needs are most urgent and acute--immediately following emancipation--there are no federal benefits available. The *gap* in service provision that this creates is left almost entirely to the NGO community to bridge.

[54] Initial U.S. field studies have indicated that after protection from their traffickers, housing is the next most urgent need experienced by emancipated trafficking victims. *See* FREE THE SLAVES & THE HUMAN RIGHTS CENTER AT THE UNIVERSITY OF CALIFORNIA, BERKELEY, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 40 (2004), *available at* http://www.hrcberkeley.org/download/hiddenslaves_report.pdf (noting that the immediate needs of forced labor survivors who were interviewed were safety and housing) [hereinafter HIDDEN SLAVES]; Terry Coonan, *Human Trafficking: Victims' Voices in Florida*, 5 J. SOCIAL WORK & EVALUATION, 207, 212-14 (2004) (finding that among sex trafficking and domestic servitude victims interviewed in Florida State University project, physical safety was victims' first preoccupation, followed by housing, food, and medical services).

NGO victim assistance is proving critical in more than just the immediate post-emancipation period for victims--it is also vital in the long run for successful prosecutions of traffickers.[55] For victims to serve as effective witnesses, they require safety, care, and sustenance. Invariably, such needs can be better met by NGOs than by law enforcement, inasmuch as the provision of services is often fundamental to the mandates of NGOs. From a human rights perspective, NGOs serve a vital additional role: they can advocate on behalf of the best interest of the victim in ways that transcend whether or not a criminal conviction of the trafficker is secured in court.[56] Given the variance in their ultimate goals, the partnership between law enforcement and NGOs is not without its tensions.[57] Such tensions, however, should not be exaggerated. At the end of the day, U.S. law enforcement officials have shown deep concern over the well-being of trafficking victims, and NGOs, for their part, have proven deeply committed to the prosecution of traffickers.

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[55] Survivors of human trafficking become the lynchpins of human trafficking prosecutions in their key role of victim-witness. Absent their participation, convictions of traffickers are notoriously difficult to secure. In one case of slave labor in Florida's citrus groves, federal investigators initially declined to pursue the case because no victims were available to testify. *See* HIDDEN SLAVES, *supra* note 54, at 30. It was not until an NGO (the Coalition of Immokalee Workers) went undercover into the slave labor camp and facilitated the escape of four victim witnesses that a federal prosecution began. *See id.* Almost a year elapsed between the time that the federal authorities learned of the slave labor case to the point when prosecutors had evidence they regarded as sufficient to charge the slavers. *See id.*

[56] Researchers note that there is strong consensus between both governmental and non-governmental organizations alike--that all trafficking victims should have their own legal advocate. *See id.* at 46.

[57] NGO advocates are often frustrated by the selectivity that federal prosecutors demonstrate in deciding whether or not to pursue a trafficking case. *See id.* at 28 (advocate observing that of the 20-30 trafficking cases in which her NGO is involved, only 3-4 have been chosen for federal prosecution). Further frustration occurs when federal officials either refuse to issue endorsements of T visa applications or take months to do so. *See id.*

IV. Challenges on the Road Ahead

A. Legal Challenges

As with any new law, and especially one as ambitious as the TVPA, much remains to be worked out in terms of its optimal implementation. A number of these challenges lie squarely within the legal realm. Conceptually, the distinction between sex trafficking and forced labor trafficking should not be overemphasized, despite the fact that these offenses are defined separately under Section 103(8) of the TVPA.[58] *All* human trafficking is about forced labor and the profits that can be garnered from such labor in the 21st century global economy. Sex trafficking cases may remain more sensationalist for media purposes and may also be seen as more repugnant by certain religious or political groups. Much more attention should be paid, however, to the forms of non-sexual labor exploitation that have proliferated throughout the U.S. in the past decade.[59] It is likewise imperative to recognize that men and boys are also victims of trafficking, and not simply the *women and children* who have often been the focus of anti-trafficking efforts.[60]

In other areas of the law, greater distinctions need to be drawn. To begin with, it is necessary to distinguish between sex trafficking (forced prostitution) and prostitution in which participation is voluntary. Too often, the media and even federal efforts to combat trafficking have conflated these two offenses.[61] Sex trafficking and

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[58] *See* TVPA, *supra* note 1, 22 U.S.C. § 7102(8)-(9).

[59] In their survey examining incidents of forced labor in the U.S. between January 1998 and December 2003, Free the Slaves and the Human Rights Center at the University of California Berkeley determined that forced prostitution comprised 46% of the cases they documented. *See* HIDDEN SLAVES, *supra* note 54, at 1. Cases involving exploitation in domestic service (27%) agriculture (10%), sweatshops & factories (5%), and restaurant & hotel work (4%) made up the remainder of the cases. *See id.*

[60] In fiscal year 2003, the majority of the victims who received certification as victims of a severe form of trafficking from the DHHS' Office of Refugee Resettlement were male (54%). *See* ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES, *supra* note 14, at 15.

[61] The recent national conference sponsored by the U.S. Department of Justice (July 15-17, 2004, in Tampa, Florida) was entitled the "National Conference on

prostitution are separate though not unrelated evils. The element of consent remains a vital distinction between them, especially for purposes of the law. In its treatment of consent, the approach adopted by the TVPA is absolutely correct: prostitution of adults becomes sex trafficking when the consent of participants is negated through force, fraud, or coercion.[62]

For law enforcement purposes, there also needs to be better understanding of the differences between human smuggling and human trafficking. Human smuggling is, in essence, an offense against the border of a sovereign nation (an illegal crossing or entry); human trafficking, in contrast, is an offense perpetrated against an individual (in which that person is exploited for labor and somehow rendered unable to break free from such exploitation).[63] It should be noted that no border crossing--or movement of any type, for that matter--is required for human trafficking under U.S. law. Vulnerable immigrants are most often those victimized by traffickers, but so too are U.S. citizens.[64] Law enforcement officers may at times have difficulty in distinguishing human trafficking from human smuggling, but they are not alone. Even well-intentioned advocates often confuse

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Domestic Trafficking and Prostitution." Notwithstanding its broader title, the focus of the event was on the specific crime of human trafficking.

[62] *See supra* note 18 and accompanying text.

[63] *See generally* BRIAN ISELIN & MELANIE ADAMS, U.N. OFFICE ON DRUGS AND CRIME, DISTINGUISHING BETWEEN HUMAN TRAFFICKING AND PEOPLE SMUGGLING (2003), *available at* http://www.iselinconsulting.com/Downloads/Dist_Trafficking_Smuggling.pdf; Alexis A. Aronowitz, *Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets That Drive It, and the Organisations That Promote It*, 9 EUR. J. CRIM. POL'Y & RES. 163 (2001). Under U.S. immigration law, smuggling is defined as "knowingly [having] encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States . . . ." 8 U.S.C. § 1227(a)(1)(E)(i).

[64] At its most fundamental level, human trafficking involves the exploitation of vulnerable people, and not simply immigrants. A growing number of trafficking prosecutions in the U.S. involve the exploitation of U.S. citizens. *See, e.g.,* Lou de Baca, *Working Together to Stop Modern-Day Slavery*, THE POLICE CHIEF, Aug. 2002, at 78, 79 *available at* http://policechiefmagazine.org/magazine/index.cfm (noting how federal law enforcement prosecuted U.S. pimps in Atlanta under provisions of the TVPA); *see also* HIDDEN SLAVES, *supra* note 54, at 12 (discussing forced prostitution ring in Detroit that exploited young Midwestern women and girls).

the two activities, and must learn that there are nuanced differences between the two offenses.[65]

Similar to prostitution and forced prostitution, human smuggling and human trafficking are separate though not unrelated offenses. Many human trafficking victims are immigrants who initially undertake an illegal border crossing and who only subsequently discover that they have come under the control of traffickers.[66] The dynamics of human smuggling and human trafficking, while perhaps difficult to discern at the moment of the border crossing, become increasingly distinguishable afterward.[67] Smugglers typically make

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[65] *See, e.g.*, Fara Gold, Comment, *Redefining The Slave Trade: The Current Trends in the International Trafficking of Women*, 11 U. MIAMI INT'L & COMP. L. REV. 99, 108-109 (2003) (conflating smuggling with trafficking in the assertions that "[t]rafficked women are forced against their will to cross international borders to perform services to which they did not agree" and "the United States government views trafficking of women as the use of force and deception to transfer women across borders so they may be exploited, sexually or otherwise.").

[66] The regulations issued regarding T visa eligibility describe how persons who initially enter the U.S. through smuggling operations may subsequently become victims of trafficking:

> [I]ndividuals who are voluntarily smuggled into the United States in order to be used for labor or services may become victims of a severe form of trafficking in persons if, for example, after arrival the smuggler uses threats of serious harm or physical restraint to force the individual into involuntary servitude, peonage, debt bondage, or slavery. Federal law prohibits forced labor regardless of the victim's initial consent to work.

T Visa Regulations, *supra* note 37, 67 Fed. Reg. at 4787. International commentators have for their part discerned the trend whereby smuggling leads to trafficking. *See* ISELIN & ADAMS, *supra* note 63, at 5 ("Victims of trafficking frequently consent to the initial movement, however this consent is later nullified by the victim's exploitation.").

[67] Commentators note the difficulty in initially distinguishing a trafficking victim from the "customer" of a smuggler:

> At first glance the trafficker's victim and the smuggler's customer may present as one and the same; they both may seek to move from their place of origin to another destination in the hope of securing employment and consequently a better future for themselves and their families. This is often as deep an analysis as is made of illegal migrants at point of detection—why so many trafficked victims end up being treated as illegal migrants

their money *upfront* from their clients, whereas traffickers *allow* their potential victims to pay off smuggling debts gradually.[68] The rela-

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> and confused for smuggled people. Investigations must go into much more depth to distinguish between the two.

ISELIN & ADAMS, *supra* note 63, at 5. The U.S. Government acknowledges the complexity of distinguishing between smuggling and trafficking:

> The differences between migrant smuggling and trafficking in persons can be confusing. This confusion can make it difficult to obtain accurate information, especially from transit countries. Trafficking often but not always involves smuggling; the victim may initially agree to be transported within a country or across borders. Distinguishing between the two activities often requires detailed information on the victim's final circumstances.
> Smuggling is generally understood to be the procurement or transport for profit of a person for illegal entry into a country. But the facilitation of illegal entry into or through a country is not, standing alone, trafficking in persons, even though it is often undertaken in dangerous or degrading conditions. Smuggling sometimes involves migrants who have consented to the activity. Trafficking victims, on the other hand, have either never consented or, if they initially consented, their consent has been negated by the coercive, deceptive or abusive actions of the traffickers. Trafficking victims are often unaware that they will be forced into prostitution or exploitative labor situations. Smuggling may therefore become trafficking. The key component that distinguishes trafficking from smuggling is the element of fraud, force, or coercion.

U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 19 (2004), *available at* http://www.state.gov/g/tip/rls/tiprpt/2004/ [hereinafter TIP REPORT 2004].

[68] U.N. commentators observe that the point in time in which the profit is gained distinguishes smuggling from trafficking. Smuggling is in a sense a business venture arranged between the migrant and the smuggler:

> The smuggler's profit is derived from the retail payments made by the customer for being transported across the borders. The amount of profit made is decided by the smuggler in negotiation with the intending migrant. The smuggler, in setting a price, will take into account transportation costs, bribery costs, the cost of forged documents and of course their profit margin.

ISELIN & ADAMS, *supra* note 63, at 7. The profit-generating mechanism of human trafficking is very different:

tionship between smugglers and their clients typically ceases the moment that the border has been crossed.[69] Traffickers, in contrast, continue to exercise control over the destination and freedom of movement of trafficking victims even after the border crossing.[70]

> Human traffickers make profits at several points along the trafficking chain. The first level and subsequent traffickers may make money directly from the sale of the victims. This sale is either to a higher level trafficker, or to a site for exploitation such as a brothel or factory. With trafficking it is critical to note that the most profit is generated from the continuing exploitation of the victim. The profit realized through this continuing exploitation is the *raison d'être* for the trafficking in the first instance, and reaps both the most significant and the longest lasting returns for the trafficker.

Id.

[69] Smugglers, with certain exceptions, have no continuing relationship with their clients once the contracted border crossing has been effected:

> [T]he person who buys the services of the people smuggler is free upon arrival at the destination to do and go where he/she pleases. The smuggler may try to provide additional services for the immigrant, for example, a safe house, work, etc., but after the payment of the transportation costs the immigrant is generally under no obligation to the smuggler. The migrant may use further services of the smuggler, and would pay for those services, but may already have his own contacts helping him to secure housing and work. . . . Upon arrival at destination, a smuggled migrant is generally free to choose their next course, constrained perhaps only by their illegal status.

Id. at 8.

[70] In contrast to migrants who participate in smuggling schemes, a very different fate awaits trafficking victims upon their arrival in the destination country:

> Upon arrival at destination, the victim of a human trafficker will be sold or put to work in the industry she/he was brought to service. She will continue to be owned by someone in a controlling position and will be dominated by that person. At destination, the victim cannot control where they go or what they do—their behavior and actions severely restricted by the traffickers. Further, trafficked victims will be deprived their liberty and often confined to the site of exploitation. Their travel documents, if they were needed, are almost always held by the traffickers . . . . Upon arrival at destination, a trafficked victim is captive.

It is the element of ongoing control maintained by traffickers over their victims--most often through a *debt*--that ultimately distinguishes smuggling from trafficking. In human trafficking cases intercepted near a border, these distinctions may not be readily apparent. In such instances, only careful and informed questioning by border patrol agents or law enforcement officials may provide evidence of trafficking (i.e., Have the undocumented persons relinquished control of their passports or identity documents to the potential traffickers? Is there an ongoing debt owed to those transporting the aliens, or to those awaiting the immigrants? Were the immigrants confined or abused by those moving them?). In instances where there has yet to be economic exploitation, answers to these questions will prove crucial to sustaining "Attempt" charges against would-be traffickers.[71]

B. Practical Challenges

Practical as well as legal challenges remain in the ongoing implementation of the TVPA. Despite the proliferation of high profile trafficking cases throughout the U.S. in recent years, and despite strong recent government responses, awareness of human trafficking remains minimal on the part of both the U.S. public and of America's rank and file law enforcement officials. The very strength of the TVPA--a clear federal mandate from Congress, with *buy-in* from the White House and the highest echelons of the DOJ--has not yet resulted in an adequate *trickle-down* effect.

Nowhere is this gap more apparent than at the level of local law enforcement. Initial research efforts in the field have found that it is most often state and local law enforcement officers who encounter trafficking cases and trafficking victims.[72] Given this fact, it is imperative that greater training be provided to non-federal law enforcement officials on the dynamics of this crime, and on the benefits for which victims are now eligible. Conversely, the federal govern-

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Id. at 7-8.

[71] *See supra* notes 22-24 and accompanying text.

[72] *See* HIDDEN SLAVES, *supra* note 54, at 25; Coonan, *supra* note 54, at 214; Elizabeth K. Hopper, *Underidentification of Human Trafficking Victims in the United States*, 5 J. SOC. WORK RES. & EVALUATION 125, 131-32 (2004).

ment itself must do more to empower and to recognize the vital role that state and local law enforcement officers play in combating trafficking. A step in the right direction is the change authorized by the TVPRA in which state and local law enforcement agencies, in addition to federal ones, may now verify that victims of trafficking have cooperated in the investigation or prosecution of trafficking crimes for purposes of victim certification and benefit eligibility. This vital change, however, has not yet been implemented by agency regulations.[73] Such a step is urgently required.

Even on the federal law enforcement level, much remains to be done. While upper echelon officials in the Beltway are well-apprised of new anti-trafficking laws and victim remedies, this is not always true of those in the field. Training of field officers and investigators is therefore also imperative. Closely related to this is the challenge of *institutional memory*. Because the TVPA is so new, many federal officials--in particular, Federal Bureau of Investigation ("FBI') and Immigrations and Customs Enforcement ("ICE") agents who acquire exceptional expertise in human trafficking through their fieldwork--are subsequently promoted or transferred. As a result, their local offices at the level of field operations lose vital practical expertise. This loss is especially frustrating for local NGOs who, by necessity, develop close relationships with particular officials only to see them move on.

At its most fundamental level, the training of law enforcement officers on human trafficking entails certain paradigm shifts as well. For many law enforcement officers, and especially for immigration officials, the concept that an undocumented immigrant should be treated first and foremost as a victim of violent crime--rather than as a deportable alien--is unprecedented. Recognition of trafficking victims requires that ICE officials, especially at the level of investigators and deportation officers, understand that their institutional mission transcends their *gatekeeper* function. To date, many potential trafficking victims are still initially incarcerated with little

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[73] *See* Memorandum *Re: Trafficking Victims Protection Reauthorization Act of* 2003, from William R. Yates, Associate Director of Operations, to Paul Novak, Director, Vermont Service Center (Apr. 15, 2004).

recognition that they may be victims of violent crime entitled to clear rights and remedies under the TVPA.

ICE has responded exceptionally well in cases where victims have been emancipated on a large scale as a result of raids preceded by intensive surveillance and inter-agency preparation. In such instances, a locked-down hotel is typically the preferred interview site for distinguishing victims from perpetrators, as well as victims from those who might have consented to prostitution schemes. In contrast, where there has yet to be adequate *trickle-down* effect are situations where potential victims are encountered by lower level immigration officials in circumstances other than pre-planned raids. Another unsettling trend is that whereby the agency detains potential victim/witnesses as material witnesses for ongoing investigations. In instances where this amounts to detaining victims who have just been emancipated from human trafficking captivity, it arguably violates the clear intentions of Congress.[74] The utilization of an *immigration hold* can be useful when deployed against suspected traffickers who lack proper immigration status, as it precludes their release on bond while a criminal trafficking investigation goes forward. However, as a tactic to strong-arm victim compliance with a trafficking investigation, it is decidedly inappropriate. So too is any decision to *mirandize*[75] trafficking victims during an investigation. Confronting a trafficking victim with the warning that "anything you say can and will be used against you in a court of law" is tantamount to a threat and embodies the very approach on the part of law enforcement--treating trafficking victims as criminals--that the TVPA sought to eliminate.

Yet another ICE policy that should be exercised only with great care is that of arresting all undocumented immigrants encountered in the course of a law enforcement operation, then waiting to issue the *Notice to Appear* (paperwork leading to removal proceedings) until after interviews. The complexity of interviewing traffick-

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[74] The TVPA is very explicit from the outset: "Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation." TVPA, *supra* note 1, 22 U.S.C. § 7101(b)(19).

[75] *See* Miranda v. Arizona, 38 U.S. 436 (1966).

ing victims, especially victims of sex trafficking, suggests that in most initial interviews victims do not disclose the full details of their exploitation, and often may respond first with rehearsed stories instilled in them by their traffickers. The failure of victims to fully disclose their exploitation or the further likelihood that they will even lie in initial interviews may result in a failure on the part of immigration field officials to recognize a human trafficking case.[76]

The failure to identify victims may occur even more readily if non-governmental groups are not part of such initial interviews. The presence of NGO advocates in the interview process does much to mitigate the possibility that victims who have already been brutally coerced by traffickers might perceive that they are about to be further coerced by law enforcement. At the initial interview stage, the very fears inculcated in trafficking victims by their traffickers--that U.S. immigration officials will merely deport them--can best be countered by the presence of NGO advocates. The willingness to include NGOs in such interviews, however, often runs counter to the enforcement instincts developed on the part of BCIS deportation officers and investigators over the years. Such unwillingness or reluctance must be overcome.

For their own part, state and local law enforcement officers must now recognize that undocumented immigrants they encounter in the course of their daily crime fighting operations are not merely a problem that can be *dumped* in the lap of ICE without further investigation or concern. It is now incumbent upon law enforcement investigators at all levels to recognize indicators of human trafficking as well as to be aware of the remedies to which human trafficking victims are entitled under law as victims of crime.[77]

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[76] One DHHS official has quietly observed that for all practical purposes, potential trafficking victims arrested by ICE have only 24-48 hours to fully disclose their victim status; failing to do so, they typically are placed in removal proceedings (Feb. 2005 interview, on file with author).

[77] The Florida-based Institute for Intergovernmental Research ("IIR"), with funding from the Bureau of Justice Assistance ("BJA") has recently pioneered an instruction course on human trafficking for U.S. law enforcement officials. The course has been introduced at a variety of trainings for local, state, and federal law enforcement officers.

The very strength of the TVPA--the inter-agency approach that it mandates--is also a source of ongoing challenges in its implementation. Questions as to which federal agency should take the lead in anti-trafficking operations as regards decision-making and victim identification are becoming more compelling.[78] Such questions will only become more complex as states enact their own statutes criminalizing human trafficking and issues of state and federal criminal jurisdiction arise. The development of interagency law enforcement protocols and memoranda of understanding comprises the next vital step in the successful prosecution of human trafficking cases. The question of how to formally include NGOs in the law enforcement process demands similar attention. NGOs are often the means by which law enforcement discovers particular human trafficking rings or victims. Even given that resulting investigations may in large part be law enforcement sensitive, the government needs to formalize ways by which NGOs can appropriately be kept apprised of subsequent case developments and victim needs.

Finally, careful attention should be given to the training of the new community task forces currently being organized under the aegis of U.S. Attorney Offices nationwide. A number of prior community task forces evolved as a result of cases that occurred in their communities in the late 1990s—initiatives such as the Florida State University Working Group on Human Trafficking and the New York City Community Response to Trafficking, to name but two.[79] It was lessons learned from actual trafficking cases and victim care that informed the organization and activities of these initial groups. In contrast, community task forces now being formed pro-actively throughout the U.S. provide the vital function of creating support networks *prior* to the discovery of local trafficking victims and

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[78] Researcher Kevin Bales has noted that often there is no clear division of responsibility on trafficking cases, and that as many as 14 different federal agencies may sometimes be involved in a single case without coordination. Kevin Bales, International and Domestic Solutions to the Problem of Human Trafficking, St. Thomas University School of Law Working Symposium (Feb. 10, 2005).

[79] *See* U.S. Department of Justice Civil Rights Division, *supra* note 47. Both the New York City and Florida State University projects brought together social service providers and local, state, and federal law enforcement officials in an effort to coordinate anti-trafficking efforts and facilitate community outreach. *Id.*

cases. For such groups, however, knowledge about human trafficking cannot be presumed. These task forces will need training on the dynamics of human trafficking, on victim needs, and on how community-based responses can best operate. Ongoing training of such groups, and ongoing financial commitment to such training, will be absolutely imperative to their eventual success. In the same vein, ongoing federal funding for anti-trafficking NGOs will also be crucial to America's ongoing efforts to counter human trafficking.

At the most fundamental level, the ultimate challenge that remains for the U.S. in fighting human trafficking is to better embrace a human rights paradigm, rather than one premised upon law enforcement needs or immigration control. Effecting such an approach would not require completely rethinking or revamping the framework currently implemented by the TVPA and TVPRA. There are already strong human rights sensibilities that inform U.S. law in this area. Important correctives are needed, however, especially regarding the legal demands placed upon human trafficking victims. U.S. law imposes no obligations to cooperate with law enforcement upon persons who suffer human rights violations in their home countries, such as refugees, asylees, or victims seeking protection under the U.N. Convention Against Torture. That such a requirement should be imposed upon persons who have suffered brutalization in our own country runs counter to the humanitarian instincts that undergird U.S. human rights law and policy.

One initial corrective would be for the U.S. government to finally promulgate regulations to govern the issuance of the U visa that the TVPA created.[80] By the terms of the TVPA, Congress intended U visas to be available to undocumented immigrants who have been victims of any number of violent crimes, human trafficking included.[81] Equally important, the burden of proof regarding a vic-

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[80] *See* VTVPA *supra* note 1, Division B (Violence Against Women Act of 2000), 8 U.S.C. § 1101(c)(o)(3). [hereinafter Violence Against Women Act].

[81] Additional crimes include: rape, torture, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of

tim's collaboration with law enforcement is much lower in the U visa process. In contrast to requirements for a T visa (that victims have complied with all reasonable requests from law enforcement), a victim applying for U visa status is permitted to demonstrate that he or she "has been helpful," "is being helpful," or "is likely to be helpful" to a law enforcement investigation.[82] This difference is potentially a significant one and implementation of the U visa process would offer legal protection to a greater number of victims.

Beyond the issuance of the U visa regulations, the U.S. government should consider the creation of a new interim legal status for all victims of a "severe form of human trafficking" as currently defined by the TVPA. Such status should *not* be contingent upon cooperation with law enforcement and should be awarded in simple recognition of the violations that a victim has suffered. It could operate on the same fundamental premise as that which governs Temporary Protected Status ("TPS"): certain non-citizens should be allowed to remain temporarily in the U.S. for simple human rights reasons.[83] In practice, this interim legal status should comprise a type of stabilization period, perhaps of 3-6 months length, during which time the victim would be afforded the basic services and the protection of legal non-immigrant residence. This non-immigrant status could be conceptualized as a *protection and reflection period* analogous to that currently offered under Belgian and Dutch laws to victims of traf-

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justice, perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. *See id.* § 1101(b)(3)(iii).

[82] *Id.* § 1101(c)(o)(1).

[83] Temporary Protected Status ("TPS") is a temporary immigration status granted to eligible nationals of designated countries. *See* Immigration & Naturalization Act section 244A(b), 8 U.S.C. § 1254a(b)(1). In 1990, as part of the Immigration Act of 1990, P.L. 101-649, Congress established a procedure by which the Attorney General may provide protection to aliens in the U.S. who are temporarily unable to safely return to their home country because of ongoing armed conflict, natural disasters, generalized situations of violence, or other extraordinary conditions. During the period for which a country has been designated under the TPS program, TPS beneficiaries may remain in the U.S. and may obtain work authorization. However, TPS does not lead to permanent resident status. When the TPS designation of a country is terminated, beneficiaries revert to the same immigration status they maintained before TPS or to any other status they may have acquired while registered for TPS. *See* U.S.C.I.S. website, http://uscis.gov/graphics/services/tps_inter.htm#whatistps (last visited on Feb. 11, 2006).

ficking upon their emancipation.[84] Access to work authorization and more comprehensive benefits could still be made contingent upon cooperation with law enforcement, as this objective remains fundamental to the TVPA. At the conclusion of such a period, the victim at the very minimum will have been given the time to begin the recovery process and to weigh his or her future options in a more considered fashion. During that time period, or at its conclusion, the victim could choose to repatriate, to cooperate with U.S. law enforcement and to seek a T or U visa, or to pursue some other immigration remedy. Provision of this sort of interim protection would go far to countering the potentially coercive approach employed by the TVPA as regards victim care and benefit eligibility, and would bring the TVPA into greater conformity with human rights concerns.

Currently, it is baffling as to why so few human trafficking victims have come forward or have sought out the unprecedented benefits now available to them under the TVPA.[85] While many reasons may explain the current dearth of victims, it stands to reason that more survivors of trafficking might seek certification were the legal requirements for doing so less onerous. The TVPA is very good law that was made even better by insights that accrued from several years of field experience and were then concretized in the TVPRA. This process should be instructive. As the current *learning curve* of the U.S. continues to improve as a result of additional trafficking cases, the law must keep pace. The TVPA is best thought of as a work in progress rather than a finished product. Ongoing critical reflection and legal changes are imperative so as to enhance our ability to counter human trafficking in the 21st century.

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[84] Trafficking victims in Belgium are allowed a 45-day "reflection" period during which time they can decide whether they will assist in the prosecution of their traffickers. TIP REPORT 2004, *supra* note 67, at 124. Subsequent government protection is contingent upon a victim's willingness to testify against his or her traffickers. *Id.* In the Netherlands, victims of sex trafficking are allowed a 90-day "reflection" period to weigh the decision of whether they will testify, and are provided services during this time. *Id.* at 160.

[85] *See generally* Hopper, *supra* note 72.