

The Trafficking Victims Protection Act

Has the Legislation Fallen Short of its Goals?

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A Story of Survival

“Anuja,” a client of the National Immigrant Justice Center, was trafficked from a village in India to a suburb of Chicago when she was only eleven years old. Unaware that her residence in the U.S. was unlawful, she hoped for an American education but was confined to a home and forced into domestic servitude. At fifteen years of age, she escaped with the help of a good samaritan neighbor.

Eager to see her traffickers punished and to begin a new life, Anuja was interviewed by authorities but was unwilling to provide all of the information that the U.S. government requested to corroborate her story. In tears, she concluded that she could not assist law enforcement because of threats from her captors that they would hurt her little sisters in India if she revealed any identifying information (Kaufka 2007, 6).

Introduction

Forms of psychological slavery, including sexual slavery, coercion, and threats of violence to the victim’s family, are not adequately included within U.S. criminal statutory law. In 1988, the U.S. Supreme Court held that “involuntary servitude” refers only to a situation in which the victim “is forced to work...by the use or threat of physical restraint or physical injury,” thus

allowing victims who are held in servitude through “psychological coercion or trickery” to fall through the cracks (*U.S. v. Kozminski*, 487 U.S. 931, 1988).

The purpose of this analysis is to examine the immigration status that the United States government affords to individuals who are willing to meet the requirements of the Victims of Trafficking and Violence Protection Act of 2000, commonly known as the Trafficking Victims Protection Act (TVPA) (P.L. 106-386, codified at 22 U.S.C. § 7101). This article presents the legislative history of the TVPA with an emphasis on the factors that heighten the tension between the interests of trafficking victims and those of the government. Available immigration relief is not truly “relief” unless it is accessible to those who need it, that is, those for whom Congress designated this type of visa status. Likewise, legislation that designates an action as *criminal* is fruitless unless it provides for effective investigations and enforcement. As crucial as it is to punish and deter traffickers, the special nature of this crime necessitates that the victims, who are central to the role of law enforcement, receive ample protection. In conclusion, I suggest seven policy recommendations to improve the government’s ability to punish and deter human traffickers while protecting the victims of these crimes.

Defining the Problem

Though the life experiences of trafficking victims most poignantly define the problem, the U.S. government, foreign governments, and the United Nations (U.N.) have promulgated useful legal definitions of trafficking. Now defined as a crime, human trafficking has been addressed as such, on the national and international levels, in the hopes of punishing the crime and eventually eliminating it. The U.N. defines human trafficking as follows:

The recruitment, transportation, transfer, harboring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud or deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person

having control over another person, for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude, or the removal of organs (United Nations 2006, 7).

The U.S. government's definition of human trafficking includes: 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...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 (P.L. 106-386, codified at 22 U.S.C. §7102).¹

Pervasiveness of Trafficking

Although the statistics on human trafficking are hotly contested because of the difficulty associated with acquiring accurate figures, each branch of the U.S. government has relied on statistics from the Department of Justice (DOJ), the Department of State (State), and the International Labour Organization (ILO). According to the ILO, 12.3 million people throughout the world currently work in forced labor conditions: women account for an estimated 56 percent of domestic and agricultural laborers while 98 percent of individuals subjected to prostitution and sexual exploitation are women (ILO 2005, 15). Government estimates indicate that nearly 17,500 foreign citizens are trafficked into the U.S. each year (Smith 2005, 1).

Individuals or gangs who are willing to exploit the lives and bodies of other human beings for personal gain have myriad coercive tactics for finding targets. Sometimes traffickers kidnap victims, forcibly taking them from one country to another. False job offers which traffickers use to lure victims into migrating in exchange for well-compensated work are even more common. Traffickers also reportedly use Internet marriage agencies,

match-making parties, and personal solicitation of families in order to secure female victims. These and other trafficking scenarios usually involve transportation and false documentation after which the trafficker creates a situation of debt bondage (Ribando 2007, 5). Traffickers often seize the victim's documentation, remind the victim that the new surroundings are unfamiliar and dangerous, and relate stories of deportation and torture that await those who attempt escape. It is also sometimes argued that the increased difficulties associated with obtaining lawful permanent residence in the U.S. and Western Europe have compelled many individuals to rely on traffickers or smugglers in order to gain entry to these countries (Cooan and Thompson 2005, 44).

The Statutory Initiative and Development of the TVPA

The statute that governs the legal status of individuals present in the U.S. as a result of human trafficking is the Trafficking Victims Protection Act (TVPA) of 2000 (P.L. 106-386, codified at 22 U.S.C. § 7101). The Act created the class of visa known as the T visa, codified at 8 U.S.C. § 1101(a)(15)(T) (codified in the Immigration and Naturalization Act at I.N.A. §101(a)(T)(i)). The enactment of the TVPA in 2000 reflects the first largely collaborative effort by Congress, the outgoing and incoming presidential administrations, and the greater community of non-governmental organizations (NGOs) to address human trafficking.

On March 11, 1998, President Bill Clinton issued a directive calling for legislative action to combat human trafficking through a three-pronged strategy that emphasized prevention, protection, and support for victims. The Clinton administration sought congressional support for a new non-immigrant visa classification for victims of trafficking in addition to preventive measures and humanitarian assistance for victims who, due to their unlawful presence in the U.S., were ineligible for aid of any kind. Likewise, sensing the dire need to improve the nation's ability to enforce its anti-trafficking efforts through more effective prosecutions of traffickers, the administration urged Congress to adopt harsher penalties for traffickers and for individuals who profit from trafficking schemes (Yeomans 2000,

77). This directive laid the groundwork for Congress' development of the TVPA.

The 106th session of Congress held several key investigatory hearings in 1999 that aided the development of the legislation. Examples of the legislation that came out of these hearings include the International Trafficking of Women and Children Victim Protection Act of 1999, sponsored by Congresswoman Louise Slaughter (D-New York) and Senator Paul Wellstone (D-Minnesota); the Freedom from Sexual Trafficking Act of 1999, raised by Congressman Christopher Smith (R-New Jersey) in 1999 as H.R. 1356; and identical versions of the Comprehensive Antitrafficking in Persons Act of 1999, introduced by Congressman Sam Gejdenson (D-Connecticut) and Senator Wellstone as H.R. 3154 and S. 1842.

Consideration of the resolution that would become the TVPA progressed through the House of Representatives and the Senate during the second session of the 106th Congress. Congressman Smith introduced H.R. 3244, which ultimately was enacted as the Trafficking Victims Protection Act. On May 9, 2000, H.R. 3244 was considered and passed by the House of Representatives, and passed with an amendment in the Senate on July 2, 2000. On October 28, 2000, the TVPA was passed to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims" (P.L. 106-386, codified at 22 U.S.C. § 7101). The Act amended the Foreign Assistance Act of 1961 and the Immigration and Nationality Act to strengthen efforts to counter trafficking in persons in response to Congress's concerns about criminal international trafficking networks that force or coerce individuals into involuntary servitude (U.S. House of Representatives Committee on International Relations 2000, 1).

Funding for the provisions of the TVPA was reauthorized in 2003 and again in 2005. In 2003, the Trafficking Victims Protection Reauthorization Act (TVPRA) provided civil remedies for victims, a bold addition to the restitution to victims that the TVPA had provided by means of criminal prosecutions. The TVPRA enabled victims to "bring a civil action against the perpetrator in an appropriate district court of the United States" and

to “recover damages and reasonable attorneys fees” (TVPRA, 18 U.S.C. § 1595). This reauthorization garnered significant public attention, as it not only assured appropriations for anti-trafficking programs in the U.S. but also increased federal humanitarian aid in specific areas including post-conflict situations (Smith 2005, 2). On January 10, 2006, President George W. Bush signed the TVPRA into law (P.L. 109-164, codified at 22 U.S.C. § 7101).

The T Visa Process

The purpose of the TVPA as enacted was twofold: “to ensure just and effective punishment of traffickers, and to protect their victims” (P.L. 106-386, codified at 22 U.S.C. § 7101). Both the TVPA and the TVPRA are consistent with the internationally accepted U.N. Convention against Transnational Organized Crime and the Convention’s protocols on human trafficking and the smuggling of migrants (Kaufka 2007, 71). To aid in the apprehension and prosecution of human traffickers, the TVPA offers victims an incentive to cooperate with a federal investigation. The government may issue a T visa if the applicant demonstrates willingness to cooperate with a “reasonable request for assistance in the investigation or prosecution of acts of trafficking” (8 U.S.C. § 1101(a)(15)(T)). Integral to this program, the T visa is a nonimmigrant visa because it grants only temporary status to successful applicants. Nonetheless, the TVPA creates a new and separate administrative path to legal residence for human trafficking victims.

Under the program, the Bureau of Citizenship and Immigration Services (CIS), a component of the Department of Homeland Security (DHS), may authorize the issuance of T visas. Issuance of a T visa allows a trafficking victim to remain in the U.S. for three years, during which time he or she has legal work authorization and access to benefits and services coordinated by the Department of Health and Human Services (HHS). During that period, the victim must maintain continuous presence in the U.S., remain in “good moral character,” demonstrate that he or she will “suffer extreme hardship involving unusual and severe harm upon removal,” and cooperate with requests for assistance with prosecutions (8 U.S.C. § 1101(a)(15)(T)). If a victim satisfies those conditions, he or she may re-

main in the U.S. and receive public benefits for four years, and after three years, may apply for an adjustment of status, an administrative process that allows the applicant to gain status as a legal permanent resident (8 U.S.C. § 1101(a)(15)(T)(i)). In contrast, aliens whose circumstances do not afford them any immigration relief in the U.S. are subject to detention and removal proceedings which also are initiated by DHS through its Immigration and Customs Enforcement (ICE). Removal proceedings are handled administratively by DOJ in immigration courts, under the authority of Immigration Judges (IJs), and may be appealed to the Board of Immigration Appeals, and then to the Circuit Court of Appeals for the jurisdiction in which the original proceedings were brought.

The government opened 210 investigations between FY 2001 and FY 2003, and prosecuted 110 traffickers under this program during that period. The success of the initiative is due to cooperation among three executive agencies: HHS, DHS, and DOJ. The Human Smuggling and Trafficking Center, established in July 2004, was designed to gather the expertise and involvement of law enforcement, intelligence, and diplomacy. Yet even within DHS and DOJ, several divisions are necessarily involved in addressing the various aspects of aliens' claims to T visa eligibility. The departments have also promulgated independent programs to address trafficking, such as the hotline designed by HHS through which victims can contact the government to gain access to assistance and possible, eventual escape from their traffickers. The hotline has received approximately 600 calls since its implementation in April 2004 (White House n.d.).

The possibility of a successful prosecution—one that apprehends, convicts, and punishes all participants in a given trafficking group—does not conflict with the interests of trafficking victims to the extent that the interests of the prosecutor and the victim cancel each other out. Yet they are not such well-aligned interests that they can realistically be balanced. The U.S. government prosecutes traffickers, and though it does not do so directly to the detriment of trafficking victims, relief for victims from the U.S. government is conditioned upon assisting the prosecutor. The TVPA offered victims the hope of freedom, not only through escaping conditions of servitude and exploitation, but also through potentially gaining

legal permanent residence in the U.S. The question however, is whether the TVPA has achieved its purposes. Are there more prosecutions now than before the TVPA became law? Has the number of victims seeking assistance increased?

Terms of Enslavement:

How Victims' Circumstances Obstruct Access to Aid²

As stated previously, between 14,500 and 17,500 individuals are trafficked into the U.S. annually. Since the passage of the TVPA, approximately 400 trafficking-related prosecutions have been opened with the issuance of around 1,500 T visas. The T visa entitles holders to obtain services, witness protection, and the legal rights to mandatory restitution and to file civil actions. However, relief under the TVPA is by no means an automatic or quick process for trafficking victims. Victims continue to face practical problems, obstacles to gaining even the most basic of human rights—freedom from forced conditions including labor, imprisonment, and abuse (Kaufka 2007, 72).

The text of the TVPA reflects findings that “[v]ictims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked,” that victims “are often subjected to coercion and intimidation including physical detention and debt bondage,” and perhaps most significantly, that victims “often fear retribution and forcible removal to countries in which they will face retribution or other hardship” (P.L. 106-386, codified at 22 U.S.C. §7102). Consequently, victims “often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes” (22 U.S.C. § 7102).

The predicament in which victims find themselves clearly makes it difficult for the U.S. government to pursue successful trafficking prosecutions and to afford relief even for victims who might be willing to cooperate. The available statistics provide some impression of the difficulties. Immigration courts across the nation adjudicate hundreds of claims per day, yet the government opened only 210 investigations over a three-year period

(FY 2001–2003). A mere 32 investigations resulted in the filing of trafficking prosecutions over that period, and only 21 prosecutions relied on the TVPA as the legal avenue for the victim's relief and the defendant's charge (Zakhari 2005, 125).

Only recently have NGOs and government entities begun to focus on forced labor as a form of exploitation. In addition, the language accompanying the TVPA specifically addresses the severe nature of sex abuse and forced prostitution, to which women and children are uniquely vulnerable. Each form of trafficking, and each type of exploitation, is independently egregious. Yet in addition to the characteristic of enslavement, all documented cases of human trafficking share the coercive tactics discussed previously. Consistent, too, are victims' reasons for remaining under the control of the trafficker. Female victims, regardless of the nature of their servitude, often recount sexual abuse used to shame them into staying quiet—and staying put (Vandenberg 2007, 41). The shame of returning home empty-handed and the potential consequences of escaping the trafficker, which range from homelessness to starvation, provide compelling incentives to endure known deprivations rather than unknown hardships. That fear of the unknown often impedes successful prosecutions by dissuading victims from coming forward.

Even if a victim is willing to accept unknown risks, the victim may not realize that his or her predicament is unlawful (Free the Slaves and Human Rights Center 2004, 25). After all, forced labor and sex abuse may not be crimes in a victim's country of origin. Furthermore, a victim in the U.S. has limited access to information that will help him or her to determine what constitutes criminal activity on American soil. Victims suffer from several limitations in this regard. Victims may not be proficient in English; they lack knowledge of American criminal laws; they may not have access to the Internet (and relevant websites may not be written in their native language); and, they even may not be aware of the ability to seek emergency help from law enforcement (40). Instead, victims rely almost solely on word of mouth from fellow victims, which naturally gives rise to myriad intimidating and conflicting accounts of how relief may be sought (31).

Victims who have given testimony often report having been told by

their traffickers that they will face certain imprisonment or deportation at the hand of the U.S. government if they ever attempt to escape (Free the Slaves and Human Rights Center 2004, 31). Victims who have contact with other immigrants also are familiar with the deportation process that faces aliens outside the T visa venue. Notably, it is not a fiction, fabricated by the trafficker for coercion, but a fact that renders some potential applicants unwilling to comply with law enforcement. Such victims know that the government opposes aliens who seek relief during removal proceedings in immigration courts, and they know that those proceedings may be instigated as soon as law enforcement officials are aware of the aliens' unlawful presence in the U.S. Whether local law enforcement officials may actually effectuate removal of aliens seeking legal status by virtue of having been trafficked into the U.S. is a contentious issue that will be addressed in the next section. However, the alien victim's initial fear of retribution specifically on the part of the U.S. government is an element that is propagated by the trafficker and at least partially corroborated by U.S. law (25-26).

An additional element that effectively halts a nascent T visa application is the degree of control, real or imputed, that the trafficker has over the victim and his or her family members in the country of origin. A trafficker's control over a victim can range from physical confinement and financial dependence to threats of violence, both to the victim and the victim's family. This issue has not gone unnoticed in Congress.³ NGOs and human rights organizations routinely find, through initial and confidential consultations with victims, that there exists a strong, pervasive fear that the lives and safety of the victims' families will be at stake if victims seek relief in the U.S. (Kaufka 2007, 6).

Similarly, many victims are exploited by members of their own family. The prevalence of this element is impossible to accurately measure. Cases of family-based sex trafficking can involve years of incest, from which victims never fully recover, if they are able to escape at all. Families involved in labor trafficking, particularly in securing domestic servitude for young women and manual labor for young men, maintain comparably effective control over the family members they exploit. The options for a victim of trafficking who has been exploited by his or her own family are understandably

quite limited. Though these victims did not consent to the treatment to which they were subjected, they often choose to forgo the pursuit of relief out of concern for the very family members who abused them (Kaufka 2007, 6).

Victims who gain relief through the T visa process constitute an extremely small percentage of individuals trafficked into the U.S. Many are never fortunate enough to extricate themselves from servitude. Many who escape are recaptured by the trafficker, sent elsewhere, or killed. Many manage to remain in the U.S. without legal immigrant status, and therefore are subject to removal proceedings at any time. The circumstances of their entry into the U.S. do not constitute a defense to removal unless they have applied separately for a T visa and have made an IJ aware of the pending investigation. Some trafficking victims eventually gain legal status in the U.S. through business, education, or family-based immigration. Many simply voluntarily depart the U.S. and with their destitution unchanged, are again vulnerable to exploitation (Vandenberg 2007, 75).

Implementation of the TVPA: A Host of Practical Problems

The requirement that the applicant comply with requests for aid in the prosecution of the trafficker is intrinsically linked to the purpose of the TVPA. The statutory provisions attempt to serve a twofold purpose, intended to strike a very delicate balance between ensuring the welfare of trafficked persons and the successful prosecutions of individual and group traffickers. Furthermore, actions from government agencies and the NGO community corroborate that the U.S. unequivocally opposes trafficking in persons. Moral opposition to slavery of any sort is no longer difficult to imagine. Yet the statutory language of the TVPA, when compared with the real obstacles to victims' eligibility for legal status under the T visa, underlines the fact that the primary objective of relief for trafficking victims is not the welfare of the victim.

Notably, to argue that the victim's welfare should be the only consideration, and that prosecutions ought to be abandoned, would be unwise. Notwithstanding the impracticability of providing immediate legal status

in the U.S. for all who claim to be victims of trafficking and the countless “floodgate” rebuttals that inevitably follow, U.S. law and policy have, from the framing of the Constitution, been fashioned such that criminal activity is prosecuted.⁴ We prosecute to punish and to deter. We prosecute for the sake of actual, present victims and for potential, future victims. We prosecute those activities that the collective conscience of the nation declares to be contrary to American ideals.

American ideals present a compelling defense for prosecution. At first blush, the TVPA and resulting visa requirements appear unproblematic for those survivors who make it to the visa application stage. Applicants are required to provide basic personal information on the application, a narrative account of the circumstances of their entry into the U.S. and the conditions under which they lived and worked, credible evidence that they would be subject to severe hardship if deported, and documentary proof of their willingness to cooperate with every reasonable request by law enforcement officials and prosecutors to aid in the apprehension of their trafficker. Yet a layperson who engages in even a cursory analysis of those requirements as juxtaposed with the probable mentality and practical impairments of a trafficking victim may reasonably foresee the first level of problematic elements associated with obtaining a T visa. The problems one might first suspect are similar to those that have already been noted as elements limiting victims’ awareness of the availability of legal relief. In the specific context of formulating a T visa claim, the following five issues preclude qualified persons from receiving relief under the TVPA.

1. Underreporting of Trafficking

As one might imagine, the prevalence of trafficking is extremely underreported, which is largely attributed to a general “lack of precision and methodological transparency” in locating victims throughout the U.S. (Gozdziaik and Collett 2005, 116). The U.S. Government Accountability Office (GAO) recently reported that the “U.S. government has not yet established an effective mechanism for estimating the number of victims or for conducting ongoing analysis of trafficking related data” and in doing so, called into question the government’s own estimates on the pervasiveness and

persistence of human trafficking (GAO 2006, 3). Underreporting poses a definitive blockade to victims' ability to receive assistance, for the government lacks a clear method of assisting an unknown number of survivors.

2. Diplomatic Immunity

Attorney Martina Vandenberg, author of two reports on trafficking in persons and *pro bono* legal representative of trafficking victims, testified before the U.S. Senate Committee on the Judiciary Subcommittee on Human Rights and the Law that the defense of diplomatic immunity provides a highly effective protective shield for diplomats who keep domestic servants in inhumane conditions in the U.S. Vandenberg (2007) affirmed that raising diplomatic immunity typically constitutes a full defense to prosecution for trafficking, noting that, "the court, should defendants prevail on an immunity claim, would dismiss the civil suit, leaving victims without any remedy" (82). However, the government's choice to extend immunity to diplomat perpetrators of human trafficking reflects a small minority of the tens of thousands of trafficking cases that occur in the U.S. each year.

3. Lack of Government Support for NGO Contributions

The NGO community shoulders the task of representing the vast majority of victims, assisting them in their legal claims, and in seeking shelter and medical assistance, even after the government elects to prosecute the trafficker. Worse yet, even after the TVPRA of 2003 allowed victims to bring their own cases against their traffickers, less than twenty such suits were brought by the end of 2005 (Vandenberg 2007, 10).

The NGO community faces a greater caseload than its funding and personnel resources can manage. Moreover, the lack of a coordinated effort among federal, state, and local NGO partners keep victims in vulnerable conditions. Victims of trafficking and exploitation, even ones who have come forward to solicit relief from the U.S. government, remain vulnerable to future exploitation in the absence of income, housing, medical care, and job skills.

4. Victims' Distrust of Law Enforcement

An inordinately small percentage of victims have secured public assistance, and countless others who have escaped involuntary servitude have no basis on which to establish a relationship of trust with American law enforcement and government attorneys. CIS strongly recommends that victims contact the police, call the Trafficking Information and Referral Hotline,⁵ or somehow communicate with DOJ prior to filing a T visa application. CIS also specifies that an initial interview may be scheduled at the discretion of the prosecutor upon a victim's submission of the application. By law, such interviews (as well as at interviews facilitated by law enforcement officials in cases where the victim initiated contact with local law enforcement) usually require a victim to meet with one or more police officers, an FBI agent, and a prosecutor.

An initial meeting exemplifies the twofold purpose of the TVPA's relief for trafficking victims. While local law enforcement may possibly provide temporary physical relief to the victim, the attorney and FBI agent gather information to make a determination about prosecution. Yet the victim may leave the interview terrified, with no choice but to return (at least temporarily) to the trafficker, and likely unwilling to participate any further in potential legal proceedings against the trafficker (Free the Slaves and Human Rights Center 2004, 28). Fear of the police, especially in immigrant communities, combined with the trauma of having to testify about the conditions in which they lived, easily renders victims reluctant to trust law enforcement (41).

5. Victims Sent to Immigration Court without Avenues for Relief

Charles Song, Director of Legal Services at the Los Angeles-based Coalition to Abolish Slavery and Trafficking (CAST), described an alarming trend that exemplifies the rather fluid boundary that exists between ICE and CIS. Shortly after the formation of the Human Smuggling and Trafficking Center, CAST and other NGOs that assist undocumented aliens with their claims received notice that clients were being required to sign Notices to Appear before an Immigration Judge (IJ), a step that effectively initiates removal proceedings against the alien (Song, personal communi-

cation, February 2007).

There is no way to guarantee that removal proceedings will not be initiated prematurely, and even if removal proceedings are initiated for proper cause, the victim no longer has the chance to present his case for T visa status before the adjudicatory body designed to judge the victim's eligibility for protection under the TVPA. The statute provides that, if the victim is unable to cooperate with the prosecutor's request for assistance due to the emotional repercussions of the abuse suffered, the victim may be temporarily or permanently relieved of that requirement at the discretion of the Administrative Officer. However, when the victim has not complied with some request, and has signed a Notice to Appear, an IJ is not required to address the question of whether the victim was capable of complying, or even whether the request was reasonable. The civil proceedings in an immigration court do not reach the criminal questions of law associated with trafficking, and the IJ may conclude that the trafficking claim simply may not be heard in that forum.

The U.S. legal system provides that suspects may raise defenses once in court. Yet victims of human trafficking, as aliens, become trapped if they are in immigration court for removal proceedings because the claim of trafficking is not an affirmative defense. Because the claims of T visa applicants are handled by a different adjudicatory body than the claims of all other aliens, immigration courts and appellate courts do not have the authority to review the claims of potential T visa applicants once removal proceedings have been initiated against the alien.

This problem is compounded by the alarming trend by which potential T visa applicants are in immigration court by local law enforcement officials who effectively function as ICE agents. For instance, Mayor Donald Cressitello of Morristown, New Jersey recently initiated a program under which local police officers may apprehend any individual they suspect to be in the U.S. unlawfully. The officer can bypass both the individual's potential claims and a prosecutor's interest in the person's circumstances by ordering the suspect to appear in federal immigration court. That initiative, backed by New Jersey Attorney General Anne Milgram, has resulted in a doubling of the number of suspects reported to immigration authorities by local po-

lice (Donohue 2008). It thus becomes highly likely that trafficking victims will be forced to appear before an IJ who can order deportation, prior to full review of the T visa claim.

Policy Recommendations

These recommendations for changes to the U.S. government's role stem from the trafficking victim's own fears that surround personal attempts at freedom from exploitation. Indeed, it is only through the victim's decision to seek the assistance of law enforcement that the prosecution of a trafficker can occur.

1. Assist Victims in Pursuing Civil Remedies and Enforce Criminal Restitution

As previously discussed, victims of human trafficking gained the right to bring civil claims against their traffickers and to receive mandatory monetary restitution in 2003. However, although 841 individuals have been certified as victims of trafficking by the Department of Health and Human Services, trafficking victims brought fewer than twenty civil trafficking suits over that time. Furthermore, while the government has achieved restitution for victims in criminal cases under the mandatory restitution provision, it is unclear how often victims actually receive any of those funds (Vandenberg 2007, 82).

Congress should prioritize more coordination among federal officials, NGOs, and state and local law enforcement to ensure that the TVPA is effectively carried out. In addition, Congress should consider the array of obstacles facing victims to ensure that new laws and reauthorizations adequately address the range of trafficking-related human rights violations in the U.S. and abroad. While NGOs and attorneys do most to assist victims with their legal claims, the government must claim primary responsibility for allowing victims to pursue civil remedies to the fullest extent of the law and for enforcing criminal restitution orders.

2. Abandon Adversarial Approach to Victims during the Legal Process

To improve the prosecution prong of the T visa process, the government must establish a relationship of trust with victims. A major obstacle to establishing trust is the fact that the Department of Justice (DOJ) opposes immigrants' claims in deportation proceedings. Trafficking victims who are unfamiliar with the American legal system may have trouble differentiating their claims from the legal battles of other aliens. To resolve this tension, prosecutors should emphasize to victims, throughout the entire legal process, that their cases are substantially different from the cases of other aliens, and that their participation in the prosecution is a necessary step to gaining legal status in the U.S. In addition, the government should take steps to make it clear to the victim, from the initial interview with law enforcement officers to the end of the prosecution, that armed officers, federal, state, and local officials, and government attorneys are obliged to defend and protect the victim.

To the extent that the guidelines of the *Corpus Juris Secundum* aid the prosecutor in fostering non-adversarial communication between victims and the government, they should be prioritized within DOJ and should be reflected in future legislation. Presently, these guidelines are merely advisory statutory interpretation (Ytreberg 2008, sec. 883).

3. Provide Effective Protection against Retribution from the Trafficker

In order to promote trust between the victim and the government, and to facilitate the victim's continued access to the government for purposes of assisting with the prosecution, the government should take a more active role in protecting the victim from retribution from the trafficker. The government must do more than provide referrals to NGOs and leave it to the victim to make contact with these organizations.

Not only should the government increase the frequency and effectiveness of its measures taken to protect the identity of trafficking victims, it should make these measures available earlier in the proceedings. Access to protective measures should apply when the victim first comes forward, as opposed to after the commencement of formal legal proceedings against the trafficker. Furthermore, the availability of these measures should be

made known to all victims who contact government officials.

4. Extend Temporary Protection to Victims Whose Families are Endangered

Victims of trafficking who cooperate with law enforcement should have the option to be united with family to support them through the legal process. In investigative hearings, Congress has considered the possibility of affording temporary legal status (known as derivative continued presence) to the immediate families of trafficking victims who have established legal claims (Kaufka 2007, 73). However, this consideration has not yet been included in any legislative initiative. Such a measure would certainly aid in rehabilitating victims, establishing trust between victims and the government, and likely would result in more successful prosecutions of traffickers.

5. Provide Specialized Medical Services for Victims

The government must provide access to medical care to all victims who come forth, without conditioning that care on any additional action on the victim's part, as currently recommended but not required by DOJ guidelines. All victims of trafficking, regardless of whether that trafficking involves sex work, are at some degree of risk for medical problems. Not only will assured access to medical treatment establish trust between the victim and the government, but it will provide the victim both the ability and incentive to continue working with the government.

6. Abolish Diplomatic Immunity for Cases of Human Trafficking

The U.S. Attorney General currently is required to issue a report on the government's recent steps to combat human trafficking. However, despite several recent and highly publicized cases of human trafficking by diplomats in the U.S.,⁶ the current report does not address diplomatic immunity at all. The Attorney General should report on the government's response to trafficking by diplomats, at least regarding the status of victims' legal claims and circumstances. Attorney Martina Vandenberg suggested in a congressional hearing that the Government Accountability Office also should ini-

tiate a report on “the incidence and prevalence of trafficking by diplomats in the United States.” Such a study, Vandenberg noted, should include “interviews with trafficking victims, their civil attorneys and case workers, and the relevant Department of State and DOJ personnel,” and should cover how many cases of trafficking by diplomats have been registered with the Department of State and investigated by DOJ (Vandenberg 2007, 84). Reporting by federal agencies certainly would enhance accountability, and would give Congress a more accurate sense of the effect of diplomatic immunity on human trafficking violations.

7. Promote International Education on Risks and Repercussions of Trafficking

Beatriz Fernando, herself a victim of trafficking, testified to Congress in 2005 about the need for public awareness campaigns about the dangers of trafficking. “I got swept up in human trafficking because I did not understand the risks,” she said. “I needed to make money...I didn’t know my passport would get taken away, and I didn’t know that I wouldn’t get paid.” She advocated for the education of at-risk populations, not just in the U.S., but around the world (Fernando 2005, 33). The U.S. government should focus on fostering international relationships that will educate other governments on U.S. immigration policies and fair labor standards.

Conclusion

The very nature of the coercive, exploitative relationship between a trafficker and a victim vests the trafficker with control over the mind, body, and will of the victim. Unequal bargaining power is merely a legal euphemism for this degree of abuse. A victim may be someone who was kidnapped outright, or a laborer promised work under certain conditions only to be misled, or a woman who agreed to marry someone only to endure abuse by a stranger.

The TVPA has provided that victims in the U.S. ought to be freed from this exploitation and restored to liberty. Of course, the government

must have some measure by which it can be assured that an alien is a victim of trafficking; the mere claim that one has been trafficked cannot serve as a stand-alone guarantee of legal status in the U.S. Likewise, the government is within its right to promote its own goals, which include seeking out and punishing those who break its laws.

Ultimately, a victim of trafficking who seeks relief in the form of a T visa must meet the conditions of the TVPA in order to obtain any relief. Exploited victims face a choice that is but one—take that or none. And none, in this context, means that the victim must depart American soil, likely into the hands of a trafficker once more, and certainly into the situation that made him or her vulnerable to exploitation. As the TVPA currently is implemented, the interests of individuals whose lives and bodies have been exploited are not ones that can be fairly balanced with the interest of the government in prosecuting traffickers. The policy recommendations provided in this article clearly benefit victims, but in so doing, they substantially increase the possibility that more victims will come forward to the government and assist it in seeking out and punishing traffickers. The government's interests with respect to successful prosecutions will therefore be better met by the adoption of these measures.

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Notes

1. Trafficking is fundamentally different from asylum, another widely publicized human rights issue that also is closely intertwined with immigration law. The basis for asylum depends on the alien's status as a refugee—some-

one who is unable to return to his country of origin because of a well-founded fear of persecution there (8 U.S.C.A. § 1158(b)(1)). In contrast, the grounds for trafficking are less rigid, and do not implicate the issue of whether the individual has suffered persecution in his home country. Asylum may be granted, at the discretion of the Attorney General, for persecution in the country of origin on account of race, religion, nationality, membership in a particular social group, or political opinion (8 U.S.C.A. § 1101(a)(42) (A)). Trafficking involves abuse suffered here in the U.S., and by law, entails U.S. law enforcement action in order for the applicant to gain status as a trafficked person. Though both are rooted in human rights law, human trafficking and asylum raise entirely separate legal causes of action in the U.S.

2. The process of gathering information contained in this section was aided by the author's experience as a law clerk at the World Organization for Human Rights, USA. The victims of persecution and human trafficking, with whom the author worked on a *pro bono* basis, formed the inspiration for this article. These individuals provided stories during client intake interviews that corroborate the testimony cited herein that many other victims provided to Congress during the development and review of the TVPA.
3. See, e.g., 151 Cong. Rec. E2606 (daily ed. Dec. 18, 2005) (statement of Congressman John Conyers, Jr. (D-Michigan)) (stating "[r]esearch has found the financial dependence on an abuser is a primary reason that battered women are reluctant to cooperate in their abuser's prosecution").
4. In the Solicitor General's recent Petition for Certiorari in the case of *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), the "floodgate" metaphor is applied to support the argument that a practice—however heinous—that affects a very large population cannot be used as a basis for a persecution claim.
5. The Trafficking Information and Referral Hotline number is (888) 373-7888. The hotline connects callers with local service providers who may aid the victim with services such as emergency shelter, legal, mental, and health services and English-proficiency instruction. This hotline does not connect callers with DOJ to establish a T visa claim. A T visa claim can only be brought forward with an application and a \$270 application fee.
6. On January 18, 2007, the American Civil Liberties Union Women's Rights Project and three Indian women plaintiffs filed suit in federal court, alleging

that a Kuwaiti military attaché and the Embassy of Kuwait trafficked the women into forced labor in Washington, D.C. The plaintiffs stated that they had been forced to work as domestic employees until they escaped, and that during their captivity, the diplomat and his wife threatened them, refused to allow them to leave the house, subjected them to slavery-like conditions, and physically abused them. The defendants will most likely move to have the case dismissed, raising the defense of diplomatic immunity.

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The author would like to thank Eva DuGoff and Christine Brown for their constant support and dedication. Her paper is dedicated to the public servants whose sense of social justice ensures that there always will be compassion in the law.