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# THE TRAFFICKING AND EXPLOITATION VICTIMS ASSISTANCE PROGRAM: A PROPOSED EARLY RESPONSE PLAN FOR VICTIMS OF INTERNATIONAL HUMAN TRAFFICKING IN THE UNITED STATES

MARISA SILENZI CIANCIARULO\*

*Powerlessness and isolation, rightlessness and degradation were the hallmarks of servitude, permitting slaveowners to use their slave possessions for whatever purposes they chose.<sup>1</sup>*

## I. INTRODUCTION

On July 18, 2006, Chief Judge A. Joe Fish of the Northern District of Texas sentenced the owner of a Korean brothel, Mi Na Malcolm, to ten years in prison and ordered her to pay a fine of \$460,000.<sup>2</sup> She pleaded guilty in March 2006 to “conspiracy to hold or harbor illegal aliens for purposes of prostitution, harboring illegal aliens for commercial advantage and private financial gain, and bulk cash smuggling.”<sup>3</sup> The U.S. Department of Justice lauded the sentence as a “loud and clear message that those individuals who abuse the most helpless and vulnerable members of our society will be aggressively investigated, swiftly prosecuted, and firmly punished.”<sup>4</sup>

Between late 2004 and mid-2005, Malcolm paid human traffickers to bring Korean women into the United States.<sup>5</sup> She then forced the women into prostitution in order to pay off their smuggling debts.<sup>6</sup> In order to ensure payment of the debts, Malcolm subjected the women to slave-like conditions: confiscating their passports, forcing them to work as prostitutes six and seven days a week, forcing them to be on call for sex at all times, and monitoring their movements “in person, through an escort, and through a video surveillance system.”<sup>7</sup>

The arrest and eventual sentencing of Malcolm and other brothel owners were the result of a raid conducted on August 12, 2005, by officers from the Dallas Police Department and the Department of Homeland Security’s Bureau of Immigration and Customs Enforcement (ICE).<sup>8</sup> One police officer involved in the raid called it “the

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1. KEITH BRADLEY, *SLAVERY AND SOCIETY AT ROME: KEY THEMES IN ANCIENT HISTORY* 29 (1994) (describing slave life in ancient Rome).

2. *Korean Woman Sentenced to 10 Years in Human Trafficking Case in U.S.*, AP WORLDSTREAM, July 19, 2006 [hereinafter *Korean Woman Sentenced*].

3. *Id.*

4. *Brothel Owner Sentenced to 10 Years for Coercing Korean Aliens into Prostitution*, [http://www.usdoj.gov/opa/pr/2006/July/06\\_crt\\_446.html](http://www.usdoj.gov/opa/pr/2006/July/06_crt_446.html) (last visited July 06, 2008) [hereinafter *Korean Brothels*].

5. See Miriam Rozen, *Seen, But Not Heard: Hussein Sadrudin Helps Human Trafficking Victims Find Their Voice*, TEXAS LAWYER, Aug. 7, 2006, at 2.

6. *Korean Woman Sentenced*, supra note 2. The brothels operated publicly as spas: the Ruby Spa, the Venetian Body Work spa, and the Palm Tree Relaxation spa. *Id.*

7. *Korean Brothels*, supra note 4.

8. Press Release, U.S. Dep’t of Justice, *Local Woman Pleads Guilty to Federal Charges of Harboring Korean Women to Work in Her Sexually-Oriented Businesses* (Mar. 3, 2006), available at <http://www.usdoj.gov>.

largest prostitution operation I've ever been a part of.”<sup>9</sup> The federal and municipal law enforcement officers encountered “hundreds of thousands of dollars in cash, at least 117 tubes of surgical lubricant, [and] more than 6,000 condoms.”<sup>10</sup> They also found forty-two women.<sup>11</sup>

Of the forty-two women found in the conditions described above, only four were present at Malcolm's sentencing.<sup>12</sup> What happened to the other thirty-eight “most helpless and vulnerable members of our society”? Thirty-four have been deported from the United States or are in removal proceedings.<sup>13</sup> Three faced no immigration or criminal charges.<sup>14</sup> Only five of the forty-two, including the four present at the sentencing hearing, were deemed potentially eligible for immigration benefits accorded to victims of human trafficking who cooperate with law enforcement officials.<sup>15</sup>

The United States Congress enacted the Trafficking Victims Protection Act (TVPA) in 2000.<sup>16</sup> The Act created a new visa, called the “T visa,”<sup>17</sup> for victims of “severe forms of trafficking.”<sup>18</sup> Severe forms of trafficking include “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age,” as well as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>19</sup> The law was passed as the result of a growing national awareness of the global epidemic of international trafficking in human beings, which is now tied with arms trafficking and second only to drug trafficking in terms of revenue.<sup>20</sup>

Why were the majority of the women apprehended during the Dallas raid deported rather than afforded the protection of the T visa? According to Ken Cates, the special agent (now retired) in charge of the Dallas Immigration and Customs Enforcement office at the time of the raid, “Many of them...knew that they

gov/usao/txn/PressRel06/malcolm\_ple\_pr.html. Brothel owners Kyong “Jackie” Roberts and her husband Sang Hyun Cho were also arrested in the August 12, 2005, raid. Roberts received a thirty-seven-month jail sentence, and her husband received a thirty-month sentence. Paul Meyer, *Leaders of Brothels Sentenced*, DALLAS MORNING NEWS, July 19, 2006, at B5. Another seven brothel operators were indicted throughout the late summer and fall of 2005, and raids continued in 2006. Tim Wyatt, *Madam's Fall Offers Look at Lucrative Sex Trade*, DALLAS MORNING NEWS, May 10, 2006, available at [http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-sexdallas\\_08met.State.Edition1.ce0d677.html](http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-sexdallas_08met.State.Edition1.ce0d677.html).

9. Wyatt, *supra* note 8.

10. Paul Meyer, *Sex Slaves or Capitalists?: Arrest of 42 S. Korean Women in Dallas Brothel Raids Stirs Debate on How Trafficking Laws Used*, DALLAS MORNING NEWS, May 8, 2006, available at [http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/DN-sexslaves\\_07met.State.Bulldog.7eae7bb.html](http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/DN-sexslaves_07met.State.Bulldog.7eae7bb.html).

11. *Id.*

12. See Rozen, *supra* note 5.

13. Meyer, *supra* note 10.

14. *Id.*

15. *Id.*

16. Pub. L. No. 106-386, § 2(a)(1), 114 Stat. 1464 (2000) (codified at 22 U.S.C. § 7101 (2000)).

17. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(T)(2000); Trafficking Victims Protection Act, 22 U.S.C. § 7101.

18. 8 U.S.C. § 1101(a)(15)(T)(i)(I).

19. 22 U.S.C. § 7102(8).

20. The Campaign to Rescue and Restore Victims of Human Trafficking, U.S. Dep't of Health and Human Services, Fact Sheet: Human Trafficking (September 30, 2008), [http://www.acf.hhs.gov/trafficking/about/fact\\_human.html](http://www.acf.hhs.gov/trafficking/about/fact_human.html) [hereinafter Fact Sheet].

voluntarily came to engage in this business with at least a bit of an understanding of the circumstances that you'll find when you get here."<sup>21</sup> Agent Cates's replacement, John Chakwin, echoed this sentiment: "The women arrested for prostitution at the spas were not teenagers—most were mature women in their 30s. A clear majority were professional prostitutes who knew exactly what they were doing."<sup>22</sup>

The circumstances in which the women were found and their subsequent treatment indicate that perhaps their situation was not quite as clear-cut as the Immigration and Customs Enforcement agents propound. The women reported that they "serviced a dozen customers a day," that they would work even "when sick, sore and bleeding," and that the brothel owners routinely refused permission to seek medical treatment.<sup>23</sup> They spoke little English, and had been trained, under threat of harm to family members back home, to provide vague answers to law enforcement officials and victims' advocates.<sup>24</sup> When legal counsel from Catholic Charities arrived to interview the women, they found that the "women were treated as criminals in an environment hostile to building trust or learning their histories."<sup>25</sup> After permitting limited interviews with the Catholic Charities representatives, Immigration and Customs Enforcement transferred the women to a detention center.<sup>26</sup>

Statistics demonstrate that this type of treatment of victims of international human trafficking is quite common. The Department of Health and Human Services estimates that 14,500–17,500 individuals per year are brought into the United States and forced, defrauded or coerced into providing sexual and labor services.<sup>27</sup> Extrapolating from the more conservative figure of 14,500, these figures indicate that at least 87,000 individuals have been trafficked into the United States in the seven years since the passage of the TVPA. As of March 2007, however, the U.S. government had certified only 1,175 individuals as victims of trafficking and by the end of fiscal year 2006, had issued only 729 T visas.<sup>28</sup>

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21. Meyer, *supra* note 10 (alteration in original) (internal quotation marks omitted).

22. *Id.* (internal quotation marks omitted).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. See Fact Sheet, *supra* note 20. Worldwide, the estimate is much higher: 800,000 people are victims of human trafficking each year. *Id.* According to the U.S. Department of State, the International Labor Organization (ILO) estimates that 12.3 million people are subject to "forced labor, bonded labor, forced child labor, and sexual servitude at any given time." U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 8* (2007), available at <http://www.state.gov/documents/organization/82902.pdf> [hereinafter TIP REPORT 2007]; see also Dina Francesca Haynes, (*Not*) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act, 21 GEO. IMMIGR. L.J. 337, 341 (2007) ("Reliable statistical information is extremely hard to find and dubious when it comes to quantifying almost any aspect of trafficking, from the number of people trafficked to the amount of money earned by traffickers....").

28. TIP REPORT 2007, *supra* note 27, at 49. This number does not include T visas issued to derivative beneficiaries such as spouses, parents, and children. *Id.*; see also *Examining U.S. Efforts to Combat Human Trafficking and Slavery: Hearing Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights, of the Senate Comm. on the Judiciary*, 108th Cong. 22–23 (2004) (statement of Charles Song, Coalition to Abolish Slavery and Trafficking) [hereinafter Statement of Charles Song] ("[N]early four years after the enactment of the TVPA, which authorized 5,000 T-visas per year, or nearly 20,000 over four years, only 371 T-visa applications have been granted since 2000."); Posting of Sally Kinoshita, sally@ilrc.org, to VAWAexperts@yahoo.com

The Dallas raid and subsequent deportation of the majority of the brothel workers discovered during the raid are illustrative of several problems that may be undermining the successful implementation of the T visa statute. All of these problems occur in the earliest stages of the T visa process. First, law enforcement officers are frequently in charge of situations more appropriate for victims' advocates to handle.<sup>29</sup> Second, possible victims of international human trafficking usually find themselves detained and treated as criminals rather than placed in supportive environments.<sup>30</sup> Finally, U.S. law enforcement officers often have unrealistic expectations regarding the type and extent of cooperation that an international human trafficking victim may provide.

The failure of U.S. officials to respond appropriately to victims of international human trafficking in the earliest stages may have several negative repercussions for international human trafficking victims and anti-trafficking efforts. First, it sends a message to traffickers and their customers that trafficking victims are not a priority within the U.S. justice system. Second, this ongoing failure to provide adequate protection and benefits to "the most helpless and vulnerable members of our society"<sup>31</sup> further victimizes them, and cultivates an environment in which the actions against them become invisible, and even acceptable. Finally, the failure to respond contributes to the mistrust and fear that trafficking victims already harbor towards law enforcement,<sup>32</sup> thereby encouraging them to remain silent rather than to cooperate in the pursuit and prosecution of individuals who are a danger to the entire community.<sup>33</sup>

This article critically examines the early stages of the T visa process and suggests a method to identify and meet the immediate needs of trafficking victims more effectively. Part II defines trafficking according to international and domestic law and describes how its practical realities are sometimes obscured by formal definitions. Part III discusses U.S. efforts to assist victims of trafficking, including the current system for identifying potential T visa beneficiaries, the visa application process, and weaknesses in the current T visa system. Part IV compares trafficking victims to asylum seekers and proposes a reform of the current T visa system that includes the establishment of a Trafficking and Exploitation Victims Assistance (TEVA) program. Part IV also proposes a regulatory change providing for a limited

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(Aug. 15, 2006, 2:21 PM) (on file with author) [hereinafter Posting of Sally Kinoshita] (Ms. Kinoshita is a staff attorney with the Immigrant Legal Resource Center in San Francisco, and her post reports that, according to George Murphy, representative of the Citizenship and Immigration Services Vermont Service Center, Citizenship and Immigration Services had issued only 600 principal T visas and 600 derivative T visas as of June 2006).

29. See *infra* notes 120–138 and accompanying text.

30. See *infra* notes 127–138 and accompanying text.

31. See *supra* note 4 and accompanying text.

32. See TVPA, 22 U.S.C. § 7101(b)(20) (2000) ("Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.").

33. This is contrary to the goals of the TVPA. See *id.* § 7101(b)(24) ("To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses.").

cooperation exemption for those T visa applicants whose overt cooperation with law enforcement will result in harm to themselves or to family members abroad. This article concludes that implementing the above recommendations will lead to a more humane and effective system for protecting international human trafficking victims and prosecuting traffickers, thereby reducing international human trafficking overall.

## II. INTERNATIONAL HUMAN TRAFFICKING: DEFINITIONS AND PRACTICAL REALITIES

### A. *The Evolution of International Human Trafficking*

Trafficking in humans has existed for hundreds of years and has taken many forms, but has traditionally been known as slavery.<sup>34</sup> It arises from the premise that human beings—like animals, agricultural products, and other fungible goods—are commodities whose value depends on the basic economic law of supply and demand. Thus, ancient conquerors such as the Romans, Vikings, and Egyptians, who needed human labor to support their growing economies, had a thriving trade in slaves from various conquered areas.<sup>35</sup> The elite of the Byzantine and Arab empires desired exotic women to fill their harems, fueling a centuries-long trade in European and other highly-valued women known as “white slavery.”<sup>36</sup> Probably the most well-known and infamous form of human trafficking was the African slave trade, which existed well into the nineteenth century. During this time, slaves from Africa were imported to support various economies, most notably (but certainly not exclusively) the agrarian economy of the southern United States.<sup>37</sup>

Today, the basic premise of humans as commodities is condemned as immoral, and slavery as a legally-sanctioned practice has all but disappeared.<sup>38</sup> Nevertheless, the law of supply and demand continues to make international human trafficking a practice that eludes eradication. The same demands that have supplied the slave trade for millennia—labor and sex—continue to be powerful market forces, even though that market has now been driven underground.

An important difference between historical and modern-day slavery is that international human trafficking often involves or is confused with voluntary migration.<sup>39</sup> International human trafficking usually originates in “sending

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34. See *id.* § 7101(b)(1) (“Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.”); see also MILTON MELTZER, *SLAVERY: A WORLD HISTORY* (comp. 1993).

35. See MELTZER, *supra* note 34, at 221, 231 (“Egypt sought males to fill the ranks of her army.”).

36. *Id.* at 255.

37. See PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 4–5, 27–28 (1997) (“Slavery had always existed in Africa, where it was operated extensively by local rulers, often with the assistance of Arab traders. Slaves were captives, outsiders, people who had lost tribal status; once enslaved, they became exchangeable commodities, indeed an important form of currency.”). Johnson also argued that slavery eventually replaced the system of indentured servitude in the American colonies. *Id.* at 27.

38. See generally *Still With Us*, *ECONOMIST GLOBAL AGENDA*, Mar. 9, 2005 (reporting that although the slave trade officially ended in the nineteenth century, when the United States and Brazil outlawed the trade and then the practice, slavery continues to thrive throughout the world).

39. See OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES (UNHCR), *THE STATE OF THE WORLD’S REFUGEES: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM* 24 (2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/template?pat=publ&src=static/sowr2006/toceng.htm> (“The combination of poverty, marginalization

countries" (nations with developing economies),<sup>40</sup> and terminates in "receiving countries" (wealthier nations such as the United States, Western Europe, Japan, and Arabian Gulf states).<sup>41</sup> This same pattern applies to voluntary migration, whereby market forces often drive people from developing countries to wealthier countries in search of employment and higher standards of living.<sup>42</sup> Thus, international human trafficking is often confused with alien smuggling, by which voluntary migrants pay to be brought into a receiving country illegally.<sup>43</sup>

Modern-day slavery thus tends to be far more complex than the commoditization of humans that occurred in earlier societies. Legal definitions of trafficking reflect this complexity in that they attempt to protect and aid trafficking victims, but also attempt to distinguish between individuals voluntarily and involuntarily present in a particular country. The United States' and the United Nations' definitions of trafficking illustrate this tension.

and politically induced displacement is critical in explaining the high levels of mixed migration in every part of the world. The phenomenon covers migrant workers uprooted by sudden changes in economic or political conditions in the country where they are working. It also includes internally displaced persons [people forced to leave their homes but who remain within their country's borders], refugees and other forced migrants moving on after their initial displacement to seek better protection and livelihood opportunities in other countries or regions."); see also JAMES O. FINCKENAUER & JENNIFER SCHROCK, NAT'L INST. OF JUSTICE, HUMAN TRAFFICKING: A GROWING CRIMINAL MARKET IN THE U.S. 4-5 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/218462.pdf> ("The global integration of technology and values, and the increase in world-wide opportunities for mobility and in resources, are factors that have helped to create this global demand. More and more people want to migrate, but cannot do this legally; most often, migration barriers cannot be crossed without help from traffickers.")

40. See U.N. OFFICE ON DRUGS AND CRIME, TRAFFICKING IN PERSONS: GLOBAL PATTERNS 18 (2006), available at [http://www.unodc.org/pdf/traffickinginpersons\\_report\\_2006ver2.pdf](http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf) [hereinafter UNODC, GLOBAL PATTERNS] (listing Albania, Belarus, Bulgaria, China, Lithuania, Nigeria, Moldova, Romania, Russian Federation, Thailand, and Ukraine as nations with the highest incidence of trafficking origination).

41. See *id.* at 20 (listing Belgium, Germany, Greece, Israel, Italy, Japan, Netherlands, Thailand, Turkey, and the United States as the countries most likely to be destination countries).

42. See SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOUR, INT'L LABOUR ORG., FORCED LABOUR, MIGRATION AND TRAFFICKING IN EUROPE 7 (2003), available at [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD\\_BLOB?Var\\_DocumentID=3241](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=3241) ("Economic analysis of labour migration has traditionally focused on 'push and pull' factors such as poverty and unemployment in the sending countries, and demand for migrant labour in the receiving countries."); see also Saskia Sassen, *Women's Burden: Counter-Geographies of Globalization & the Feminization of Survival*, 71 NORDIC J. INT'L L. 255 (2002) (discussing globalization and the resulting economic factors that nourish the international trade in human labor); Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137 (2006) (discussing the broader socioeconomic factors behind the trafficking phenomenon, principally the economic conditions in sending countries with weak or developing economies).

43. See INT'L LABOUR CONFERENCE, A GLOBAL ALLIANCE AGAINST FORCED LABOUR 46 (2005), available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/kd00012.pdf> ("In practice, the distinction between human smuggling and trafficking can be blurred."). For additional information, see INT'L ORG. FOR MIGRATION, BASELINE RESEARCH ON SMUGGLING OF MIGRANTS IN, FROM AND THROUGH CENTRAL ASIA 11-12 (2006), available at [http://tcc.iom.int/iom/images/uploads/Baseline%20Research%20on%20smuggling%20of%20Migrants%20in%20Central%20Asia1\\_1161347902.pdf](http://tcc.iom.int/iom/images/uploads/Baseline%20Research%20on%20smuggling%20of%20Migrants%20in%20Central%20Asia1_1161347902.pdf) stating that:

Establishing a clear-cut distinction between trafficking and smuggling is challenging. It often happens that a person leaves a country as a smuggled migrant, and in transit becomes a victim of an exploitative or abusive situation.

...

...The person smuggled pays the smuggler a fixed amount of money and the smuggler then facilitates the cross-border movement. The smuggled person is in general neither surprised by the facilitated illegal entry nor tricked about it.

...Trafficking victims either did not consent or their consent was nullified by the coercive, deceptive or abusive actions of the traffickers.

## B. Legal definitions

### 1. International Law

In 2000, the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.<sup>44</sup> The U.N. Trafficking Protocol (also known as the “Palermo Protocol”) includes the following definition of trafficking:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of 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 shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs....<sup>45</sup>

The U.N. Trafficking Protocol goes on to specify that “[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means” described above.<sup>46</sup>

The United Nations definition thus encompasses at least three distinct forms of trafficking: (1) involuntary transnational smuggling for the purpose of exploitation; (2) involuntary or voluntary transnational smuggling of children for the purpose of exploitation; and (3) voluntary transnational smuggling that evolves into trafficking. The latter occurs when a person voluntarily agrees to be illegally smuggled into another country but, once in the new country, finds that s/he is not free to leave or to discontinue the work.<sup>47</sup>

### 2. U.S. Law

The United States has adopted a definition of trafficking similar to, yet distinct from, the definition contained in the U.N. Trafficking Protocol. The first U.S. statute to address modern international human trafficking, the Victims of

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44. U.N. Office on Drugs and Crime, *Report of the Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions*, 53, U.N. Doc. A/55/383 (Nov. 2, 2000), available at [http://www.unodc.org/pdf/crime/final\\_instruments/383e.pdf](http://www.unodc.org/pdf/crime/final_instruments/383e.pdf) [hereinafter U.N. Trafficking Protocol of 2000]. Signatories to the Protocol must criminalize trafficking; consider providing victims with appropriate housing, medical care and job training; repatriate victims safely and preferably voluntarily; and take measures to prevent and combat trafficking. *Id.* at 55–57. See generally Anne Gallagher, *Human Rights & the New U.N. Protocols on Trafficking & Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975 (2001) (providing an explanation and critique of the protocols of the Convention Against Transnational Organized Crime, including the Trafficking Protocol of 2000).

45. U.N. Trafficking Protocol of 2000, *supra* note 44, at 54–55 Art. 3(a).

46. *Id.* at 55 Art. 3(c).

47. See TIP REPORT 2007, *supra* note 27, at 16 (describing exploitative recruiting and employment practices in which workers are promised certain work conditions and pay in order to lure them to the destination country). Practices such as imposing unfair debts upon workers and charging workers pre-departure fees and commissions place the workers in situations of involuntary servitude and debt bondage. *Id.*



Trafficking and Violence Protection Act of 2000 (TVPA),<sup>48</sup> recognizes two forms of trafficking: sex trafficking and other “severe forms of trafficking.”<sup>49</sup> The term “sex trafficking” refers to “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>50</sup> This definition can include voluntary as well as involuntary migration. The term “severe forms of trafficking” applies to two different sets of circumstances, both of which are forms of involuntary migration: (1) “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,”<sup>51</sup> or (2) “the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>52</sup>

The U.S. definition of trafficking is arguably as broad as the U.N. definition in that it does not distinguish between voluntary and involuntary migration. Use of the term “sex trafficking” may indicate that U.S. legislators consider crossing international borders for the purposes of engaging in the sex industry, even voluntarily, as involving a degree of exploitation. Sex trafficking, in other words, is more severe than other forms of alien smuggling even when the individual consented to being trafficked. However, as discussed in Part III.A, *infra*, U.S. law only provides relief to trafficking victims who can prove that the trafficking arose as a result of force, fraud, or coercion.

### *C. The Practical Realities of Modern International Human Trafficking: Illustrations of Force, Fraud, and Coercion*

Both the U.S. and U.N. definitions of trafficking contain the terms “force,” “fraud,” and “coercion.” These terms, especially when read in the context of statutory verbiage, do not always capture the horror which many victims of international human trafficking endure. Force often involves severe brutality. Beatings, burnings, rapes, and starvation are common means of forcing victims to comply with traffickers, to remain under traffickers’ control, and to refrain from seeking help.<sup>53</sup> Fraud is far more than an illegitimate contract or misrepresented working conditions; it is the duping of individuals seeking a better life for themselves or their families into situations of extreme exploitation and abuse.<sup>54</sup>

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48. 22 U.S.C. § 7101 (2000).

49. *Id.* § 7102(8)-(9).

50. *Id.* § 7102(9).

51. *Id.* § 7102(8)(A).

52. *Id.* § 7102(8)(B).

53. See FEDERAL BUREAU OF INVESTIGATION, HUMAN TRAFFICKING: AN INTELLIGENCE REPORT (2006), [http://www.fbi.gov/page2/june06/human\\_trafficking061206.htm](http://www.fbi.gov/page2/june06/human_trafficking061206.htm) [hereinafter FBI INTELLIGENCE REPORT]; see also UNODC, GLOBAL PATTERNS, *supra* note 40, at 35 (describing some trafficking organizations as “extremely violent”). One trafficking group in particular was described as “exceedingly violent and inhumane towards its trafficking victims.” *Id.* at 70.

54. See, e.g., TIP REPORT 2007, *supra* note 27, at 14 (relating the story of a Kenyan woman who left her country to join her boyfriend, who then confiscated her passport, denied her food for several days, informed her she was to be a sex slave, and subjected her to beatings and rapes); *id.* at 17 (detailing the use of international brokered marriages as tools to traffic women into commercial sexual exploitation or forced labor); *id.* at 24 (relating the story of a Kyrgyz woman who answered an advertisement for a Russian-speaking waitress to work in Dubai, but was forced into prostitution upon her arrival); *id.* at 26 (relating the story of a Ukrainian wife and mother who

Coercion often involves what the FBI describes as “isolation, psychological abuse, drug dependency, and threats against family members in home countries”<sup>55</sup> as well as “debt bondage and threats of deportation.”<sup>56</sup> Two incidents involving teenage U.S. citizens illustrate how effective traffickers are in using these mechanisms to terrorize their victims into compliance.

Miya, nineteen years old, was working at a shopping mall in Phoenix, Arizona, when a couple approached her and asked her if she was interested in modeling.<sup>57</sup> Flattered and intrigued, Miya agreed to pose for a photo shoot and travel with the couple to California.<sup>58</sup> Once in California, Miya saw the results of her “photo shoot”: pictures of her were posted on an Internet website for an escort service.<sup>59</sup> For the next six days, her traffickers prostituted her and forced her to perform degrading sex acts.<sup>60</sup> In order to keep her disoriented and isolated, they moved her at night from city to city, advertising her on the Internet as if she were on tour.<sup>61</sup> Far from home and terrified, Miya was too afraid of her captors to try to escape until they decided to put her on the streets of a particularly dangerous neighborhood in San Francisco.<sup>62</sup> It was then that Miya literally ran for her life, eventually asking a stranger where she was.<sup>63</sup>

Fifteen-year-old “Debbie” had an even more horrific experience. She was abducted by two strange men from her own driveway in suburban Phoenix, lured into their car by one of her friends.<sup>64</sup> That same night, she was taken to an apartment, drugged, and gang-raped.<sup>65</sup> For more than forty days, Debbie’s captors used various physical and emotional means, in addition to periodic gang rapes, to keep her as a sex slave and force her to perform sex acts of the most degrading kind.<sup>66</sup> Her captors starved her and then taunted her by putting a dog biscuit in her mouth.<sup>67</sup> They confined her in a dog crate.<sup>68</sup> They beat her, held her at gunpoint and threatened to go after her family, specifically threatening to harm her nineteen-

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traveled to Italy in response to an advertisement for a domestic worker, but was forced into prostitution upon her arrival).

55. FBI INTELLIGENCE REPORT, *supra* note 53; see also HUMAN RIGHTS CENTER, UNIV. OF CAL., BERKLEY, FREEDOM DENIED: FORCED LABOR IN CALIFORNIA 4 (2005), available at <http://www.hrcberkeley.org/pdfs/freedomdenied.pdf> [hereinafter FREEDOM DENIED] (reporting that trafficking victims “are often told that they will be arrested or deported, or their family members harmed or even murdered, if they contact the authorities or anyone outside the trafficking circle”).

56. FBI INTELLIGENCE REPORT, *supra* note 53; see also Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 90–94 (1998) (discussing whether the definition of “coercion” should encompass economic conditions that compel vulnerable populations to subject themselves to exploitative labor).

57. *Teen Girls’ Stories of Sex Trafficking in U.S.*, ABC NEWS, Feb. 9, 2006, <http://abcnews.go.com/Primetime/Story?id=1596778&page=1> [hereinafter *Teen Girls’ Stories of Sex Trafficking*].

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

month-old niece.<sup>69</sup> When police, acting on tips, found the Phoenix apartment where she was being held and called her name, Debbie was too scared and traumatized to respond.<sup>70</sup> Finally, a police officer found her tied up and stashed in a drawer under a bed.<sup>71</sup>

These incidents of trafficking of U.S. citizens<sup>72</sup> are illustrative of the physical and psychological power that traffickers wield over their victims. The victims above were never removed from their country. They had no language barrier. They had no cultural barrier. Yet nineteen-year-old Miya, once she escaped, did not immediately call the police, or even her family. Her first act upon escaping was to run, and then to ask a stranger where she was.<sup>73</sup> Debbie, after forty days of confinement and sexual torture, was too panic-stricken to reply to police calling her name.<sup>74</sup>

In cases of international human trafficking, language barriers and cultural differences compound the situation. Force, fraud, and coercion carry even more power when wielded against victims who do not speak the language of the country to which they have been trafficked. The story of Eva, a Hungarian national, illustrates this dynamic.

Eva responded to an ad in a Hungarian newspaper seeking young women to work as housekeepers and babysitters for Hungarian families living in Canada, the United Kingdom, and the United States.<sup>75</sup> She interviewed with the agency and was offered a job working with Hungarian families in Toronto for three months.<sup>76</sup> Before arriving in Canada, Eva was told to sign a contract written in English, a language that she did not understand.<sup>77</sup> When she arrived, Canadian immigration officials detained and questioned her, as the contract and visa were for an exotic dancer, not a babysitter or housekeeper as she had indicated.<sup>78</sup> The officials ordered her back to Hungary on the next plane. Because the next flight was not until the following day, they released her to the Canadian strip-club agents named in the contract.<sup>79</sup> This is how she describes what happened next:

They took me to a motel not too far from the airport. I don't know how to describe it to you, but for me who is coming from a small country, I'd never seen highways like that before. I'd never seen so many cars. The whole country is a totally different scene than my country. Never mind that you are with strangers and you just don't have a clue what's going on around you. They take you to this motel; you've never seen a motel in your life, you don't even know how to open

69. *Id.*

70. *Id.* Debbie said that she "was just lying under the bed, stiff as a board, shaking," when the police found her. *Id.*

71. *Id.*

72. See generally Donna M. Hughes, *Enslaved in the U.S.A.: American Victims Need Our Help*, NAT'L REVIEW ONLINE, July 30, 2007, <http://article.nationalreview.com/?q=ZDU0OGNIMDcwM2JmYjk0N2M00TU4NGVIMTBIMmEyMjI=> (describing the plight of U.S. citizens trafficked within the United States, including the lack of federally-funded services for victims over the age of seventeen).

73. *Teen Girls' Stories of Sex Trafficking*, *supra* note 57.

74. *Id.*

75. *Sex Slaves: Interview "Eva,"* FRONTLINE, Feb. 7, 2006, <http://www.pbs.org/wgbh/pages/frontline/slaves/map/eva.html> [hereinafter *Sex Slaves, Interview "Eva"*].

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

the doors. Everything is just totally different. And nobody is explaining anything to you, it's basically like you don't exist anymore, you're just like a piece of meat.<sup>80</sup>

For the next two months, Eva lived under the control of Hungarian agents who provided exotic dancers to Canadian strip clubs. Eva described the threats and intimidation that kept her from trying to escape:

There was a lot of brainwashing involved, now that I look back. They told you seven billion different stories why you shouldn't leave the club, such as if you step out of the club the...cab drivers [will] take you and rape you and kill you. When you're in a new country and you have no idea what's going on, even though these people are your enemy, they speak your language and that's all you hear so you kind of believe them in a way.

...  
They were in our face all the time. It's basically 24-hour control. They told you when to eat, what to eat, when to go to the bathroom, do not leave the room without authorization, forget calling anyone in Hungary even if you did know how to use the phone, or even if you do have to make a phone call they are standing next to you so you don't say anything that you're not supposed to say....We were never alone, ever. They had their own room two rooms away from us so you can't really trick anyone and go anywhere, because they can see where you're going and what you're doing.

...  
So at first I thought about just walking away, but again, where am I walking to? Who am I going to go to? I don't even have my passport. I don't even speak the language. I don't even know what to use for the phone. Now, I know it's a quarter, but if I would send you to Hungary and put three coins in front of you how would you know which one to put in the phone, you know what I mean? So, yeah, I thought about escaping, but in the end when you just keep hearing that you and your family are going to get beaten up all the time, you just start to think about other options quickly.<sup>81</sup>

Eva's account demonstrates that the Hungarian traffickers used the same tactics employed by the traffickers in Debbie's and Miya's cases to keep Eva under their control. These tactics, which were compounded by being in a strange country, included changing hotel rooms frequently so that she and the other dancers did not have an opportunity to become familiar with their surroundings, forcing her to have sex; threatening to harm her mother and brother in Hungary, and reducing her to a commodity.<sup>82</sup>

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80. *Id.*

81. *Id.*

82. *Id.*

### III. PROTECTION FOR VICTIMS OF SEVERE FORMS OF TRAFFICKING IN THE UNITED STATES

#### *A. Victims of Trafficking and Violence Protection Act*

Congress passed the TVPA as part of the Victims of Trafficking and Violence Protection Act of 2000<sup>83</sup> in response to the growing international crisis of human trafficking.<sup>84</sup> The Department of State had been officially monitoring international human trafficking since 1994.<sup>85</sup> Its findings revealed that trafficking warranted Congressional action: “[B]etween one and two million women and children are trafficked each year worldwide into forced labor, domestic servitude, or sexual exploitation.... This is a major criminal enterprise generating billions of dollars annually.”<sup>86</sup>

Recognizing that the crisis of international human trafficking cannot be addressed adequately solely by focusing on the United States, the TVPA includes provisions for international as well as domestic initiatives to combat the problem. The international initiatives include the establishment of an interagency task force, headed by the Secretary of State, to work with foreign governments to monitor and combat trafficking;<sup>87</sup> authorizing the establishment of economic incentive programs designed to “enhance economic opportunity for potential victims of trafficking as a method to deter trafficking”;<sup>88</sup> and requiring the Department of State to collaborate with foreign governments and nongovernmental organizations to prevent

83. Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. § 7101 (2000)).

84. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 2* (2001), available at <http://www.state.gov/documents/organization/4107.pdf>.

85. According to the Department of State:

Our understanding of the problem has broadened over the years, and U.S. embassies worldwide now routinely monitor and report on cases of trafficking in men, women, and children for forced labor in agriculture, domestic service, construction work, and sweatshops, as well as trafficking for commercial sexual exploitation.

*Id.* at 3.

86. 146 CONG. REC. H9030 (Oct. 6, 2000) (statement of Ms. Pryce).

87. 22 U.S.C. § 7103 (2000). The TVPA charges the task force with measuring and evaluating the progress of the United States and other countries in the areas of trafficking prevention, protection, and assistance to victims of trafficking and prosecution and enforcement against traffickers, including the role of government corruption in facilitating trafficking; expanding interagency procedures to collect and organize data, including significant research and resource information on domestic and international trafficking; engaging in efforts to facilitate cooperation among countries by strengthening local and regional capacities to prevent trafficking, prosecute traffickers and assist trafficking victims; providing initiatives to enhance cooperative efforts between destination countries and countries of origin and assist in the appropriate reintegration of stateless victims of trafficking; examining the role of the international sex tourism industry in the trafficking of persons and in the sexual exploitation of women and children around the world; and engaging in consultation and advocacy with governmental and nongovernmental organizations, among other entities, to combat trafficking. *Id.* § 7103(d).

88. *Id.* § 7104(a). Congress suggested that such incentives include:

(1) microcredit lending programs [small loans to entrepreneurs too poor to qualify for traditional loans], training in business development, skills training, and job counseling; (2) programs to promote women’s participation in economic decision-making; (3) programs to keep children, especially girls, in elementary and secondary schools, and to educate persons who have been victims of trafficking; (4) development of educational curricula regarding the dangers of trafficking; and (5) grants to nongovernmental organizations to accelerate and advance the political, economic, social, and educational roles and capacities of women in their countries.

*Id.*

trafficking abroad.<sup>89</sup> The TVPA also mandates that the Secretary of State publish an annual Trafficking in Persons Report providing information on individual countries' efforts to combat trafficking.<sup>90</sup>

The Victims of Trafficking and Violence Protection Act, in addition to initiating efforts aimed at combating trafficking in other countries, also contains several provisions aimed at reducing trafficking within the United States and protecting individuals trafficked into the United States. These provisions include increasing the criminal penalties for traffickers,<sup>91</sup> making victims of international human trafficking eligible for the same federal benefits available to refugees (cash, social services and medical assistance),<sup>92</sup> and creating two new non-immigrant visas<sup>93</sup> for victims of trafficking and other crimes.<sup>94</sup>

The Victims of Trafficking and Violence Protection Act contains the Violence Against Women Act of 2000 (VAWA 2000),<sup>95</sup> which provides immigration relief in the form of a non-immigrant visa, known as a "U visa,"<sup>96</sup> to survivors of crimes including domestic violence, kidnapping, rape, torture, incest, and female genital mutilation.<sup>97</sup> The statute provides relief for an individual who "has suffered substantial physical or mental abuse"<sup>98</sup> and "has been helpful, is being helpful, or is likely to be helpful" in prosecuting the crime.<sup>99</sup> To date, no U visas have been issued due to a delay in regulations implementation.<sup>100</sup>

The TVPA provides immigration relief in the form of another nonimmigrant visa, known as a T visa, specifically for victims of international human trafficking. A T visa applicant must demonstrate that s/he is physically present in the United States on account of trafficking, is or has been a victim of a severe form of

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89. *Id.* § 7104(a).

90. *Id.* § 7111.

91. *Id.* § 7109 (amending 18 U.S.C. § 1584 by creating new trafficking-related felonies; increasing the length of incarceration for trafficking in humans from ten years to twenty years; and authorizing increased penalties up to life imprisonment for aggravated forms of trafficking that include "kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill.").

92. *Id.* § 7105(b)(1).

93. See 8 U.S.C. § 1101(a)(15)(T) (2000). A "non-immigrant visa" refers to a visa that is temporary in nature, as distinguished from an "immigrant visa," more commonly known as permanent residency or a "green card." *Id.*

94. 22 U.S.C. § 7105(e).

95. Pub. L. No. 106-386, Div. B, 114 Stat. 1464 (2000).

96. The letter "U" is a reference to the visa's statutory designation in the Immigration and Nationality Act, at 8 U.S.C. § 1101(a)(15)(U) (2000).

97. 8 U.S.C. § 1101(a)(15)(U)(i), (iii).

98. *Id.* § 1101(a)(15)(U)(i)(I).

99. *Id.* § 1101(a)(15)(U)(i)(III).

100. See Interim Rule, New Classification for Victims of Criminal Activity; Eligibility for "U" Non-immigrant Status, 72 Fed. Reg. 53,014 (Sept. 17, 2007), available at <http://edocket.access.gpo.gov/2007/pdf/E7-17807.pdf> (issuing interim regulations for U visa processing, seven years after the TVPA created the visa). Prior to the promulgation of the interim regulations, persons deemed to be prima facie eligible for a U visa were permitted to apply for interim U visa status. See Memorandum from William R. Yates, Associate Director of Operations, USCIS, to Director, Vermont Service Center, Centralization of Interim Relief for U Non-immigrant Status Applicants (Oct. 8, 2003) (on file with the author); Memorandum from Williams R. Yates, Associate Director, Operations, USCIS, to Paul E. Novak, Director, Vermont Service Center, Assessment of Deferred Action in Requests for Interim Relief from U Non-immigrant Status Eligible Aliens in Removal Proceedings (May 6, 2004) (on file with the author) (providing guidance to Citizenship and Immigration Services officers for granting interim relief to U visa applicants who make a prima facie showing of eligibility pending the promulgation of U visa regulations).

trafficking,<sup>101</sup> has assisted with the investigation or prosecution of the trafficker,<sup>102</sup> and would “suffer unusual and severe harm upon removal” from the United States.<sup>103</sup>

Unlike the U visa, the T visa has implementing regulations.<sup>104</sup> The regulations implementing the T visa enumerate the requirements for eligibility, most of which appear consistent with the statute.<sup>105</sup> The regulations set forth an application procedure and clear instructions for supporting an application.<sup>106</sup> The next section will describe this procedure.

### *B. T Visa Application and Adjudication Process*

The application process for a T visa involves submitting Form I-914 (Application for T Visa Nonimmigrant Status), proof of identity, and documents proving eligibility.<sup>107</sup> The regulations and I-914 instructions specify that an applicant, in order to prove that s/he has been a victim of severe form of trafficking, may submit an endorsement from a law enforcement agency<sup>108</sup> or secondary evidence such as “trial transcripts, court documents, police reports, [and] news articles.”<sup>109</sup> In addition to documentary evidence, the applicant must provide a detailed statement which describes:<sup>110</sup> (1) the circumstances of his/her entry into the United States, (2) the purpose for which s/he was brought to the United States, (3) how and when s/he became involved in the trafficking situation, (4) who trafficked him/her, (5) how long the traffickers detained him/her, (6) how and when s/he escaped or was rescued or otherwise became separated from the traffickers, (7) what s/he has been doing since becoming separated from the traffickers, (8) why s/he has not left the

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101. The statute defines “severe forms of trafficking” as:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

22 U.S.C. § 7102(8) (2000).

102. This requirement does not apply to victims under the age of eighteen. *See* 8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(bb) (2005).

103. *See id.* § 1101(a)(15)(T)(i)(IV).

104. *See* 8 C.F.R. § 214.11 (2007) (setting forth regulations governing the issuance of T visas).

105. *See id.* § 214.11(b) (requiring that an applicant be or have been a “victim of a severe form of trafficking”; be physically present in the United States on account of trafficking; have “complied with any reasonable request for assistance in the investigation or prosecution of” the trafficking case; and “would suffer extreme hardship involving unusual and severe harm upon removal”). *But see id.* § 214.11(g)(2) (requiring that T visa applicants who escaped the trafficking situation “before law enforcement officials became involved” show that they did not have a “clear chance” to leave the United States). The latter appears to deviate from the plain language of the TVPA with regard to presence in the United States. *See* 8 U.S.C. § 1101(a)(15)(T)(i)(II).

106. 8 C.F.R. § 214.11(d).

107. *Id.* § 214.11(d)(1)–(2). As of July 30, 2007, the \$270.00 fee for the T visa application has been abolished. Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29,851, 29,854 (May 30, 2007) (to be codified at 8 C.F.R. pt. 103).

108. 8 C.F.R. § 214.11(f)(2); *see also id.* § 214.11(f)(1) (providing explanation of and instructions for a law enforcement agency endorsement).

109. *Id.* § 214.11(f)(3).

110. *Id.* § 214.11(f).

United States since becoming separated from the traffickers, (9) what harm or mistreatment s/he fears if deported, and (10) why s/he fears harm or mistreatment.<sup>111</sup>

T visa applicants may also apply for certain family members to receive derivative immigration benefits. Married victims may apply for their spouses, parents may apply for their children and stepchildren, and victims under the age of twenty-one may apply for their siblings, parents and stepparents.<sup>112</sup> Like principal T visa applicants, eligible family members will qualify for derivative status only if they demonstrate that they will suffer extreme hardship if not granted T visa status.<sup>113</sup>

The VAWA Unit of the U.S. Citizenship and Immigration Services (USCIS) is located at the regional service center in St. Albans, Vermont, and is responsible for adjudicating the T visa applications.<sup>114</sup> The VAWA Unit's officers are specially trained to adjudicate T visas and other VAWA-based petitions and applications.<sup>115</sup> They review the applications and make determinations about eligibility based on the documentary evidence accompanying the application. Personal interviews with applicants are not required.<sup>116</sup>

Despite the efforts of the VAWA Unit's USCIS officers, relatively few individuals have received a T visa. The Department of Health and Human Services reports that 14,500–17,500 people are trafficked through and into the United States every year,<sup>117</sup> but immigration officials have found only 729 principal T visa applicants eligible since the enactment of the visa category.<sup>118</sup> Part of the reason is that only 1,175 individuals have been officially identified as victims of human trafficking.<sup>119</sup> This suggests that the lack of an effective early response plan aimed at identifying and meeting the immediate needs of trafficking victims may bear primary responsibility for the apparent failure of the T visa system.

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111. DEP'T OF HOMELAND SECURITY, U.S. DEP'T OF CITIZEN AND IMMIGRATION SERV., OMB No. 1615-0099, INSTRUCTIONS FOR I-914, APPLICATION FOR T NONIMMIGRANT STATUS 3 (2007), available at <http://www.uscis.gov/files/form/i-914instr.pdf> [hereinafter I-914 INSTRUCTIONS].

112. 8 U.S.C.A. § 1101(a)(15)(T)(ii) (Supp. 2008); see also 8 C.F.R. § 214.11(o).

113. See 8 U.S.C.A. § 1101(a)(15)(T)(ii). Citizenship and Immigration Services considers a number of factors in making extreme hardship determinations for derivative cases, including the principal beneficiary's need for financial or family support, and the risk of harm to the derivative beneficiary from the traffickers. 8 C.F.R. § 214.11(o)(5).

114. See I-914 INSTRUCTIONS, *supra* note 111, at 6.

115. See Press Release, Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3038 Before the Subcomm. on Immigration and Claims, H. Comm. on the Judiciary, 106th Cong. 91 (July 20, 2000), available at <http://www.uscis.gov/files/pressrelease/7-20-00.pdf> (statement of Barbara Strack, Acting Executive Associate Commissioner, Office of Policy and Planning, Immigration and Naturalization Service on the centralized process at the Vermont Service Center for adjudicating VAWA-related petitions and applications). The Vermont Service Center's VAWA Unit "is a special team consisting of experienced adjudicators who have received extensive training to ensure they understand the dynamics of domestic violence." *Id.*

116. 8 C.F.R. § 214.11(d)(6). If an application is deficient, Citizenship and Immigration Services will issue a formal request for additional information or documentation. *Id.* § 214.11(k)(2).

117. See *supra* note 27 and accompanying text.

118. See TIP REPORT 2007, *supra* note 27, at 49; see also *supra* note 28 and accompanying text; U.S. DEP'T OF JUSTICE, ASSESSMENT OF U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2006 14 (2007), available at <http://www.state.gov/documents/organization/94809.pdf> (reporting that in fiscal year 2005, 112 of the 229 principal T visa applications filed were approved (48.9%), and that in fiscal year 2006, 182 of the 345 applications filed were approved (52.8%)).

119. TIP REPORT 2007, *supra* note 27, at 49.



## C. Weaknesses in the T Visa Process

### 1. Identification and Treatment of Possible Victims

Many victims of international human trafficking come to the attention of law enforcement agencies during workplace raids,<sup>120</sup> which are often spearheaded by Immigration and Customs Enforcement (ICE).<sup>121</sup> ICE is a law enforcement body with a law enforcement culture (as opposed to an advocacy or social services culture).<sup>122</sup> ICE is a separate agency from Citizenship and Immigration Services, whose mission is to adjudicate petitions for immigration benefits.<sup>123</sup> By definition, ICE approaches situations such as the Dallas raid discussed in the Introduction from a law enforcement rather than an advocacy perspective. Arguably, such a perspective is entirely proper for an agency charged with pursuing lawbreakers. In the case of trafficked individuals, however, exposing the victims to the skepticism and enforcement mentality of law enforcement officials has proven antithetical to the goals of the T visa.

In the best case scenario, a law enforcement task force specializing in trafficking will lead a raid with the joint purpose of apprehending traffickers and assisting victims. Trafficking task forces generally involve collaboration between law enforcement agencies and community-based organizations.<sup>124</sup> Community-based

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120. *Id.* at 30 (stating that while some trafficking victims escape on their own, many are rescued through workplace and brothel raids); see also Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victims in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 183 (2007) (noting the additional hardship faced by trafficking victims who escape on their own). Professor Srikantiah argues that

In addition to the challenges imposed by the [law enforcement agency endorsement] requirement, the regulations also grant preference to victims who are rescued by law enforcement over those who escape from trafficking, a preference that appears nowhere in the statute. Victims whose cases come to light because they escaped from traffickers not only must convince law enforcement to issue [a law enforcement agency endorsement], but also must convince DHS that they could not have left the country after escaping their traffickers. Given the psychological and physical control associated with trafficking, it is unrealistic to expect victims to buy airline or bus tickets to leave the country upon escaping from traffickers. Instead, victims are likely to approach shelters or aid organizations to seek assistance, and will only later approach law enforcement agencies to report the trafficking crime.

*Id.*

121. See, e.g., Russ Bynum, *Aftermath of Immigration Raid Angers Small Ga. town*, PITTSBURGH POST-GAZETTE, Sept. 6, 2006 (describing a series of Immigration and Customs Enforcement raids in a small town in Georgia, including a raid at a poultry plant); Eric Lipton, *U.S. Crackdown Set Over Hiring of Immigrants*, N.Y. TIMES, Apr. 21, 2006, at A1 (describing a workplace raid conducted by federal immigration agents); Elmer Ploetz, *Immigration Sweep Nets 28 on Farm*, BUFFALO NEWS, Oct. 5, 2006, at B3 (describing a raid conducted by Immigration and Customs Enforcement).

122. See U.S. Immigration and Customs Enforcement, About Us, <http://www.ice.gov/about/index.htm> (last visited Aug. 22, 2008) (describing the functions of Immigration and Customs Enforcement):

Created in March 2003, Immigration and Customs Enforcement (ICE) is the largest investigative branch of the Department of Homeland Security (DHS). The agency was created after 9/11, by combining the law enforcement arms of the former Immigration and Naturalization Service (INS) and the former U.S. Customs Service, to more effectively enforce our immigration and customs laws and to protect the United States against terrorist attacks. ICE does this by targeting illegal immigrants.

*Id.*

123. See U.S. Citizenship and Immigration Services, About Us, <http://www.uscis.gov/portal/site/uscis/menuitem> (follow "About USCIS" hyperlink) (last visited Aug. 22, 2008) (describing the duties of Citizenship and Immigration Services).

124. See Federal Bureau of Investigation, Human Trafficking—FBI Initiatives, [http://www.fbi.gov/hq/cid/civilrights/trafficking\\_initiatives.htm](http://www.fbi.gov/hq/cid/civilrights/trafficking_initiatives.htm) (last visited Aug. 12, 2007) (reporting that the FBI currently participates

organizations have the benefits of trust between themselves and the individuals they serve, and the ability to detect exploitation and abuse that may be tied to trafficking.<sup>125</sup> Federal law enforcement task force agents receive specific training on trafficking and the unique situation of trafficking victims, and work with the community-based organizations to identify victims.<sup>126</sup>

In many situations, however, a trafficking task force is not involved in a workplace raid. Trafficking victims caught up in a typical ICE raid of a brothel, sweatshop, or other place of forced labor first come into contact with U.S. law enforcement agents in a highly charged, potentially violent encounter involving armed officers and often resulting in the trafficking victims' arrest.<sup>127</sup> Although the law enforcement agents are theoretically on the side of the victims, their conduct during the raid (for example, their arrest of the victims) encourages a deeply-ingrained sense among victims that law enforcement is indifferent to them at best and hostile at worst.<sup>128</sup> Their initial contact with individuals who could potentially help them, therefore, is stigmatized.

Further exacerbating the situation is the fact that ICE officers who are not part of a trafficking task force are principally trained to apprehend violators of immigration law, not to identify trafficking victims. The thirty-nine days of training that ICE officers undergo cover only basic law enforcement subjects: "Immigration and Naturalization Laws; Detention Procedures; Fingerprinting; Detection and Discovery of Contraband; Interviewing; Cross-Cultural Communications; Defensive Tactics; Arrest Techniques; Baton Techniques; Officer Liability; Firearms Handling

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in thirty nine task forces comprised of "local, state, and federal law enforcement agencies and national victim-based advocacy groups"). Victim-based advocacy groups include faith-based organizations and community social service providers. See Press Release, U.S. Dep't of Justice, Department of Justice Announces Human Trafficking Task Force in the District of Columbia and Grants for Law Enforcement to Fight Human Trafficking and Assist Victims (Nov. 23, 2004), available at <http://www.usdoj.gov/criminal/ceos/Press%20Releases/humantraffickingtaskforce.pdf> [hereinafter DOJ Announces Trafficking Task Force].

125. See DOJ Announces Trafficking Task Force, *supra* note 124 (quoting Assistant Attorney General R. Alexander Acosta: "Local law enforcement and community-based organizations, particularly faith-based groups, are best situated to identify trafficking victims in their communities during the course of their field operations and delivery of social services." (internal quotation marks omitted)).

126. See Press Release, U.S. Dep't of Justice, Bush Administration Hosts First National Training Conference to Combat Human Trafficking (July 16, 2004), available at [http://www.usdoj.gov/opa/pr/2004/July/04\\_ag\\_489.htm](http://www.usdoj.gov/opa/pr/2004/July/04_ag_489.htm) (reporting that participants, including federal, state, and local law enforcement agents, received training in the following areas: uncovering and investigating cases, providing services to trafficking victims, and using a victim-centered and collaborative approach).

127. See RANDY CAPPS, ROSA MARIA CASTAÑEDA, AJAY CHAUDRY, ROBERT SANTOS, NAT'L COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 21-28 (2007), available at [http://www.urban.org/UploadedPDF/411566\\_immigration\\_raids.pdf](http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf) (describing workplace immigration raids conducted in several locations around the United States). According to the report, immigrants caught up in workplace raids "experienced long and difficult periods of detention and uncertainty about their future." *Id.* at 21. "There were conflicting reports about the degree to which ICE agents were armed and had their guns drawn during the raids." *Id.* at 22. "Arrestees were generally placed in handcuffs or had plastic bands tied around their wrists during their transportation from" the workplace to the ICE processing facilities. *Id.* at 23; see also Rick Ruggles, *Union Charges Rights Violated in ID Raids on Plants*, OMAHA WORLD-HERALD (Aug. 17, 2007) (reporting that ICE raids on six Swift meatpacking plants were described as "bullying" and "unprofessional" and included an agent dancing during the raid and singing "It's no fun to be an illegal alien," as well as "inhumane treatment" such as being detained for hours without access to bathrooms, water, phones, or attorneys.)

128. See FREEDOM DENIED, *supra* note 55, at 14 ("many police officers, sheriff's deputies, district attorneys, prosecutors, and other government officials have little experience with trafficking and forced labor cases and may treat victims as illegal immigrants and undocumented workers rather than as survivors of a serious crime.").

and Qualification; and Driver Techniques.”<sup>129</sup> Although these subjects are relevant and necessary for the job with which ICE officers are charged, it is clear that ICE officers are not trained to identify or treat victims of international human trafficking.

The Dallas raid discussed in the Introduction<sup>130</sup> is only one example of how ICE agents’ training and ICE’s culture hinder the identification of and provision of assistance to trafficking victims. In another raid, ICE agents apprehended more than 1,100 immigrants working at IFCO Systems North America (IFCO) plant sites in twenty-six states.<sup>131</sup> Plant supervisors in four states “were accused of conspiring to transport, harbor and induce illegal immigrants to come to the United States, charges that carry maximum sentences of up to 10 years in jail.”<sup>132</sup> Despite the gravity of the charges, no senior level executives were arrested.<sup>133</sup> ICE agents did, however, detain the workers.<sup>134</sup>

As the IFCO raids demonstrate, individuals who are equipped to identify and treat victims of international human trafficking—medical professionals, legal advocates, social workers, and psychologists—are usually completely absent from the process. Typically, an individual arrested in a workplace or brothel raid is subject to immigration and/or criminal proceedings if determined to be unlawfully present in the United States.<sup>135</sup> Only those individuals turned over to the criminal justice system for prosecution are entitled to legal representation. By contrast, persons in removal proceedings have a right to secure their own counsel, but they have no right to government-provided counsel.<sup>136</sup> In some cases, individuals who cannot prove that they have been in the United States for more than two years may be subject to expedited removal,<sup>137</sup> and consequently have no right to a hearing or

129. Federal Law Enforcement Training Center, Immigration & Customs Enforcement Deportation Integrated (ICE D), <http://www.fletc.gov/training/training-management/training-management-division/center-integrated-branch/immigration-customs-enforcement-detention-integrated-iced/> (last visited Aug. 13, 2007). Similarly, Customs and Border Protection Officers receive training in “Anti-Terrorism; Detection of Contraband; Interviewing; Cross-Cultural Communication; Firearms Handling and Qualification; Immigration and Naturalization laws; U. S. Customs Export and Import laws; Defensive Tactics; Arrest Techniques; Baton Techniques; Examination of Cargo, Bags and Merchandise; Border Search Exception; Entry and Control Procedures; Passenger Processing; and Officer Safety and Survival.” Federal Law Enforcement Training Center, Customs & Border Protection Integrated Training Program (CBPI), <http://www.fletc.gov/training/training-management/training-management-division/center-integrated-branch/customs-border-protection-integrated-training-program-cbpi/> (last visited Aug. 13, 2007).

130. See *supra* notes 2–15 and accompanying text.

131. Lipton, *supra* note 121. IFCO manufactures crates and pallets. See Associated Press, *Hundreds Nabbed in Immigration Raid*, MSNBC, Apr. 19, 2006, <http://www.msnbc.msn.com/id/12393925/>.

132. *Id.*

133. Lipton, *supra* note 121.

134. *Id.*

135. See CAPPS ET AL, *supra* note 127, at 24 (reporting that immigrants arrested during several raids who could not demonstrate lawful presence and who did not sign papers agreeing to voluntary departure or deportation were either “referred to federal or state authorities for trial on criminal charges,” detained “pending resolution of legal status and appeals,” or “released on their own recognizance pending an immigration hearing.”).

136. See 8 C.F.R. § 1003.16(b) (2007) (stating that an “alien may be represented in proceedings before an Immigration Judge by an attorney or other representative of his or her choice...at no expense to the government”).

137. See 8 U.S.C. § 1225 (2000) (applying the expedited removal provision to aliens “who [have] not affirmatively shown, to the satisfaction of an immigration officer, that [they have] been physically present in the United States continuously for the 2-year period immediately prior to the date” that the determination is made that they entered the United States unlawfully). The Commissioner of Immigration has the authority to determine whether such an individual shall be subject to expedited removal. 8 C.F.R. § 235.3(b)(1)(ii) (2007).

to counsel prior to being removed from the United States.<sup>138</sup> Thus, there is no formal mechanism in place to ensure that possible victims ever speak to someone who can help them.

## 2. Cooperation Requirement

Even when trafficking victims are identified and referred to legal counsel or other advocates who can help them apply for the T visa, the lack of a flexible cooperation requirement often precludes any further progress. Law enforcement and immigration officials expect willing cooperation from rescued trafficking victims, whereas the victims often fear retribution. The lack of an early response plan that provides counseling and a safe haven for trafficking victims contributes to victims' fear and reluctance to cooperate. Ultimately, each party may fail to live up to the expectations of the other, resulting in a failure to achieve either of the TVPA's main goals—prosecution of traffickers and protection for trafficking victims.<sup>139</sup>

Law enforcement officers operate within a criminal justice system that reflects the cultural norms of the United States, norms that are grounded in the principle of the rule of law. Although the U.S. criminal justice system is not without its flaws, victims who report crimes can usually rely on the criminal justice system, at least to some extent, for redress and protection. Despite the fact that the criminal justice system often fails to achieve perfect justice, cases in which the courts or law enforcement agencies are collaborating with criminals are considered aberrations rather than cultural norms.<sup>140</sup>

The opposite is often true for victims of international human trafficking. Many victims hail from countries where organized crime rings<sup>141</sup> are just as powerful as, more powerful than, or working together with, the governments of the countries in

138. See 8 C.F.R. § 235.3(b)(2)(ii) (stating that aliens subject to expedited removal are "not entitled to a hearing before an immigration judge...or to an appeal of the expedited removal order").

139. See 22 U.S.C. § 7101(a) (stating that Congress's intentions in passing the TVPA are "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").

140. See Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 384 ("[T]he criminal justice system operates effectively only with the cooperation and acquiescence of those who participate in the system, on both sides of the law, and that cooperation and acquiescence exist only because the criminal law is generally perceived as just and fair." (citing Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984))); Ronald C. Smith, *The First Thing We Do, Let's Kill All the Terrorists*, 16 CRIM. JUST. 1, 1 (Winter 2002) ("The moral authority of the criminal justice system today is that the greater society perceives that the process, while imperfect, is fair."). See generally Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105 (2005) (discussing the factors that affect a society's perception of its criminal justice system).

141. U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, 4, U.N. Doc. A/RES/55/25 (Jan. 8, 2001) (defining "organized criminal group" as "a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit"); see also Sarah Shannon, *Prostitution and the Mafia: The Involvement of Organized Crime in the Global Sex Trade*, in *ILLEGAL IMMIGRATION AND COMMERCIAL SEX: THE NEW SLAVE TRADE* 119, 140 (Phil Williams ed., 1999) (explaining that criminal organizations find trafficking lucrative, show no signs of abandoning the business, operate increasingly transnationally and in cooperation with each other, and exhibit "similarly callous and brutal attitudes" towards their victims); Louise Shelley, *Trafficking in Women: The Business Model Approach*, 10 BROWN J. WORLD AFF. 119, 123-27 (2003) (describing various models of trafficking businesses employed by post-Soviet, Chinese, Balkan, and African organized crime groups).

which they operate.<sup>142</sup> When victims know or suspect that their traffickers are affiliated with organized crime, they must consider not only the U.S. government's ability to protect them from retaliation by their perpetrators, but also their own country's ability and willingness to protect their loved ones from such retaliation. In addition to the danger that victims may face when they cooperate with U.S. law enforcement against powerful criminal enterprises,<sup>143</sup> such cooperation could also have disastrous consequences for loved ones living in a country where the government is unable or unwilling to provide protection from powerful criminals seeking revenge.<sup>144</sup>

Moreover, victims of international human trafficking are unlikely to know of the United State's commitment to eradicating trafficking. Victims of human trafficking are typically taught to fear and avoid law enforcement.<sup>145</sup> Their traffickers instill in them the belief that attempting to seek help from the authorities will lead to criminal

142. See TIP REPORT 2007, *supra* note 27, at 50–223 (reporting incidents and evidence of official complicity in trafficking in source countries such as Afghanistan, Argentina, Armenia, Azerbaijan, Bangladesh, Belize, Bolivia, Bosnia and Herzegovina, Brazil, Burma, Cambodia, China, Costa Rica, Cuba, Dominican Republic, Guyana, Honduras, India, Indonesia, Iraq, Kazakhstan, Kenya, Laos, Madagascar, Malta, Mexico, Moldova, Mozambique, Nicaragua, Pakistan, Philippines, Serbia (including Kosovo), Sri Lanka, Tajikistan, and Ukraine); see also JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 9 (2001), available at [http://action.web.ca/home/catw/attach/sex\\_traff\\_us.pdf](http://action.web.ca/home/catw/attach/sex_traff_us.pdf) (reporting that, according to the majority of law enforcement officials interviewed, “76–100 percent of the sex enterprises in the Northeast, Metro New York, the Southeast, and Metro San Francisco are controlled, financed, or backed by organized crime groups”).

143. See FREEDOM DENIED, *supra* note 55, at 5 (explaining that “[e]ven when victims do cooperate, obtaining that determination can be a bureaucratic, time-consuming and frustrating process, one that frequently leaves forced labor victims and their family members open to retaliation and revenge from gangs associated with their former captors.”); see, e.g., Press Release, U.S. Dep’t of Justice, Livonia Man Sentenced to 14 Years in Prison and \$1.5 Million in Restitution for Forcing Eastern European Women to Work at Detroit Area Strip Clubs (June 25, 2007), available at <http://detroit.fbi.gov/dojpressrel/pressrel07/de062507.htm> (reporting that a trafficker in Detroit set fire to the car of a victim who escaped from him and his associates); Free the Slaves, Washington, D.C., and The Human Rights Center of the University of California, Berkeley, *Hidden Slaves’ Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47 (2005) (describing several incidents of retaliation by traffickers against victims who cooperated with law enforcement, including one incident in which armed men dressed as police officers attempted to gain entry to a California domestic violence shelter housing two recently rescued trafficking victims).

144. TIP REPORT 2007, *supra* note 27, at 29; see also FREEDOM DENIED, *supra* note 55, at 5:

After California law enforcement officials rescued [an international human trafficking victim named] Lucita, her traffickers warned her family in Mexico that she would be in danger if she cooperated in the investigation. ‘The woman who hired me in Mexico threatened my mother and told her that if I said anything up here she was going to make me disappear, that she would have me taken care of,’ said Lucita. ‘She told my mother that if I said anything I would be sorry. It scared my mother very much. I was between a rock and a hard place.’

145. See GRAEME R. NEWMAN, U.S. DEP’T OF JUSTICE, THE EXPLOITATION OF TRAFFICKED WOMEN 35 (2006), available at <http://www.cops.usdoj.gov/files/RIC/Publications/e02061007.pdf> (report prepared for U.S. Dep’t of Justice Office of Community Oriented Policing Services). Newman states that

It is particularly difficult to overcome the deep-seated fear and distrust that many such women have of police and other government officials. And in fact, until the passage of TVPA this fear was well grounded, because women who were identified as trafficked were arrested and deported. Furthermore, many trafficked women are trained in what to say to police by their exploiters. They may also be fearful of reprisals by their exploiters for speaking to police, or anyone outside their organization for that matter.

*Id.* (internal citations omitted); see also *id.* (identifying “women who appear fearful of collaboration between traffickers and police” as an “indication of possible trafficking”); Raymond & Hughes, *supra* note 142, at 71 (stating that several interviewed female sex workers “reported that police officers or undercover cops had asked for sex in exchange for dropping charges against them”).

prosecution and deportation.<sup>146</sup> This belief, combined with the conduct and atmosphere of a raid, poses significant obstacles to securing the trust and cooperation of international human trafficking victims.

#### IV. REFORMING THE T VISA SYSTEM

In order for international human trafficking victims in the United States to access the immigration benefits to which they are statutorily entitled, the T visa system must have the capacity to respond to their unique situations. It is possible that, due to the lack of an early response plan and flexible cooperation requirement, many potential T visa beneficiaries are falling through the cracks of the current T visa system. This article proposes a two-part reform of the T visa system: (1) the establishment of a victim-centered program to identify and assist possible trafficking victims, and (2) a victim-centered approach to the cooperation requirement.<sup>147</sup>

##### A. *The Trafficking and Exploitation Victims Assistance Program (TEVA)*

The U.S. Department of State urges nations to develop “formalized system[s] for identifying victims of trafficking or referring them to organizations that provide protective services.”<sup>148</sup> Consistent with the Department of State’s exhortation, this Article proposes that the Departments of Justice and Homeland Security create a collaborative system that responds to the unique needs of international human trafficking victims, called the Trafficking and Exploitation Victims Assistance program (TEVA). TEVA would be a joint agency of the Departments of Justice and Homeland Security and its primary goal would be to identify, house, protect, assist and reintegrate victims of international human trafficking. TEVA staff would consist primarily of Citizenship and Immigration Services officers, but the program would rely heavily on formal collaboration with specially trained law enforcement officers, mental health professionals, social workers, community-based organizations, and legal representatives. TEVA would be responsible for conducting victim-centered interviews, housing T visa applicants in appropriate settings<sup>149</sup> and referring credible T visa applicants to legal representatives.

146. See U.S. DEP’T OF HEALTH AND HUMAN SERVS., RESOURCES: IDENTIFYING THE CRIME OF HUMAN TRAFFICKING 1 (2006), available at [http://www.acf.hhs.gov/trafficking/campaign\\_kits/tool\\_kit\\_law/identify\\_crime.pdf](http://www.acf.hhs.gov/trafficking/campaign_kits/tool_kit_law/identify_crime.pdf) (listing the technique of “[t]elling victims they will be imprisoned or deported for immigration violations if they contact authorities” as a method traffickers use to “keep victims enslaved”).

147. See TIP REPORT 2007, *supra* note 27, at 37 (“A government should provide efficient access to justice for [trafficking] victims, if they so chose, and access to shelter, medical care, legal aid, psycho-social counseling, and assistance in integrating back into their original community or into a new community so that they can rebuild their lives. Such an approach strikes a careful balance between the security needs of the state and society’s need for the restoration of human rights to the victim.”).

148. See *id.* at 73. The Department of State also urges governments to “establish formal victim identification procedures to screen at-risk populations such as persons apprehended for violations of immigration laws, prostitution laws, and begging or labor laws.” See *id.* at 36; see also UNIV. COLLEGE OF THE FRAZIER VALLEY ET AL., HUMAN TRAFFICKING: REFERENCE GUIDE FOR CANADIAN LAW ENFORCEMENT 35 (2005), available at [http://www.icclr.law.ubc.ca/Publications/Reports/human\\_trafficking\\_2005.pdf](http://www.icclr.law.ubc.ca/Publications/Reports/human_trafficking_2005.pdf) (stating that “[t]he early identification of trafficked persons is a prerequisite for their recognition as victims and, consequently, their access to assistance and protection”).

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

## 1. Interviewing Possible Victims

The details of the Dallas brothel raid described in the Introduction indicate that if a breakdown in the T visa process indeed occurred, it happened at one of the most crucial stages: the post-raid interrogations of the possible trafficking victims. The ICE agents in charge of the raid had already made a determination that the prostitutes were not victims, but rather willing participants in the prostitution industry. The attorneys who later interviewed the women did not have the time or resources to build a trusting relationship with them.

Immigration officials have been contending with a similar issue for over two decades in the context of political asylum. A person fleeing his or her own country who arrives in the United States without proper entry documents is in danger of being immediately returned to the country from which s/he last arrived. The Immigration and Customs Enforcement and Customs and Border Protection agents at the ports of entry are mainly concerned with apprehending individuals in violation of U.S. immigration law; humanitarian protection is not their priority. Recognizing this, the Immigration and Naturalization Service (INS) implemented a program, called the Asylum Pre-Screening Officer Program (APSO), to ensure that individuals possibly in need of protection from persecution would not be summarily deported. The T visa system could benefit from a similar program.

### a. Asylum Pre-Screening Officer (APSO) Interviews

In 1996, in response to concerns that the U.S. immigration system was vulnerable to fraud and abuse, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>150</sup> IIRIRA made significant changes to the U.S. immigration system, one of which was the establishment of a new deportation procedure by which immigration officers at the port of entry were empowered to deport summarily any individual who did not have a valid passport and/or visa.<sup>151</sup> This process, called expedited removal, includes a five-year ban on returning to the United States.<sup>152</sup>

Expedited removal does not apply to individuals fleeing persecution.<sup>153</sup> In order to ensure that individuals who may face harm upon return to their countries are not subjected to expedited removal, the INS established the Asylum Pre-Screening Officer (APSO) system<sup>154</sup> to conduct evaluations known as "credible fear interviews."<sup>155</sup> Officers of the specially trained Asylum Corps<sup>156</sup> conduct the

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150. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 546-724 (1996).

151. See 8 U.S.C. § 1225(b)(1) (2000) (mandating that immigration officers order any applicant for admission to the United States who has arrived at a port of entry without proper entry documents to be removed from the country).

152. 8 U.S.C. § 1182(a)(9)(A)(i).

153. *Id.* § 1225(b)(1)(A)(ii).

154. The program is also known as the Asylum Pre-Screening System (APPS), but the more commonly used acronym is APSO.

155. 8 U.S.C. § 1225(b)(1)(B)(ii).

156. See 8 C.F.R. § 208.1(b) (2007) (mandating that "asylum officers receive special training in international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles" and that asylum officers receive "information concerning the persecution of persons in other

interviews and determine whether the individuals demonstrate a "significant possibility...that [they] could establish eligibility for asylum."<sup>157</sup>

The credible fear interview takes place after an individual has been denied entry to the United States. Once an ICE officer determines that the individual does not have authorization to enter the country, the officer must ask the individual if s/he is afraid to return to her/his country.<sup>158</sup> If the individual articulates a fear, the ICE officer arranges to have the individual transported to a detention facility for further processing.<sup>159</sup> ICE notifies the local Asylum Office<sup>160</sup> of the need for a credible fear interview. The Asylum Office assigns an APSO officer to the case, and the APSO officer usually tries to enlist a pro bono attorney to represent the detained individual.<sup>161</sup> Depending upon various factors such as the availability of the APSO officer and counsel for the individual seeking to apply for asylum, the credible fear interview may take place anywhere from one to ten days after the individual's arrival at the port of entry.<sup>162</sup> The U.S. government is responsible for providing adequate language interpretation, usually consisting of a telephonic interpretation company.<sup>163</sup>

The credible fear interview is primarily a dialogue between the individual claiming a fear of harm and the APSO officer. Counsel's role is limited to observing and providing a summation at the end of the interview.<sup>164</sup> The officer asks the individual a series of questions about why s/he fled her/his country, what happened to the individual or her/his family members in the country of origin, and why s/he is afraid to return.<sup>165</sup> The interviews last on average from one to two hours.

The success rate for credible fear interviews is high: Approximately 93 percent of credible fear applicants are permitted to remain in the United States and apply

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countries on account of race, religion, nationality, membership in a particular social group, or political opinion, torture of persons in other countries, and other information relevant to asylum determinations").

157. 8 U.S.C. § 1225(b)(1)(B)(v) (2000).

158. See 8 C.F.R. § 235.3(b)(2)(i) (requiring inspections officers to read the information and questions contained in INS Forms 867A & 867B when conducting an expedited removal proceeding); see also U.S. Dept. of Justice, Immigration and Naturalization Service, INS Form 867B (Apr. 1, 1997) (containing the following three questions regarding fear of return: "Why did you leave your home country or country of last residence?"; "Do you have any fear or concern about being returned to your home country or being removed from the United States?"; and "Would you be harmed if you are returned to your home country or country of last residence?").

159. See 8 C.F.R. § 235.3(b)(4)(ii) (mandating detention of credible fear applicants).

160. There are eight asylum offices nationwide, located in (1) Newark, New Jersey, (2) New York City, New York, (3) Arlington, Virginia, (4) Miami, Florida, (5) Houston, Texas, (6) Chicago, Illinois, (7) Los Angeles, California, and (8) San Francisco, California. *Id.* § 100.4(f).

161. The Executive Office for Immigration Review maintains a list of free legal service providers. *Id.* § 1003.61(a). However, the conditions of detention make securing counsel for a credible fear interview, or any immigration proceeding, quite difficult. See *infra* notes 195–224 and accompanying text.

162. See 8 C.F.R. § 208.31(b) (requiring that, absent exceptional circumstances, credible fear interviews be conducted within ten days of the case being referred to the APSO program).

163. *Id.* § 208.31(c); see also CENTER FOR HUMAN RIGHTS AND INT'L JUSTICE, UNIV. OF CAL., HASTINGS COLLEGE OF LAW, THE EXPEDITED REMOVAL STUDY, REPORT ON THE SECOND YEAR OF IMPLEMENTATION OF EXPEDITED REMOVAL: CURRENT OCCURRENCES AND TRENDS 105–106 (1999), available at <http://w3.uchastings.edu/ers/reports/1999/issues.pdf> (identifying several problems with telephonic interpretation, including interpreters lacking familiarity with terms material to the asylum claims, inaccurate interpretations, failure to provide literal translations, hostility on the part of interpreters, and poor sound quality).

164. 8 C.F.R. § 208.30(d).

165. Dep't of Homeland Security, U.S. Citizenship and Immigration Servs., Form I-870, Record of Determination/Credible Fear Worksheet.



for asylum.<sup>166</sup> Those cases which receive a negative credibility determination (one to two percent) are entitled to review by an immigration judge.<sup>167</sup> Immigration judges reverse the negative credibility finding in approximately ten percent of cases referred to them.<sup>168</sup> The high approval rate and the immigration review process help to ensure that asylum seekers are given access to the full asylum process instead of being returned to a potentially dangerous situation in the interests of expeditious enforcement of immigration law.<sup>169</sup>

It is important to note that the credible fear interview is only the first step in asylum seekers' quest for safety. They must then present their case to an immigration judge in a contested hearing and meet the higher standard and burden of proof of asylum hearings,<sup>170</sup> often without a lawyer or any logistical support.<sup>171</sup> Even if the APISO officer finds that the asylum seeker has a credible fear of return to her/his country, the asylum seeker often remains in detention for lengthy periods.<sup>172</sup> Those asylum seekers to whom the government does not grant parole remain in detention for the duration of their removal proceedings, which can go on for years.<sup>173</sup> Only about 25 percent of detained asylum seekers with counsel will succeed in establishing their eligibility for asylum.<sup>174</sup>

166. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 168 (2005), available at [http://www.uscifr.gov/images/stories/pdf/asylum\\_seekers/ERS\\_RptVolII.pdf](http://www.uscifr.gov/images/stories/pdf/asylum_seekers/ERS_RptVolII.pdf) [hereinafter USCIRF EXPEDITED REMOVAL REPORT]. APISO officers make negative credible fear determinations in approximately one to two percent of cases, and three to eight percent of applicants withdraw their credible fear application prior to a determination. *Id.* at 169.

167. 8 C.F.R. § 208.31(g).

168. USCIRF EXPEDITED REMOVAL REPORT, *supra* note 166, at 172.

169. See 142 CONG. REC. S11491 (Sept. 27, 1996) (statement of Mr. Hatch) (cautioning that the credible fear standard "is intended to be a low screening standard for admission into the usual full asylum process"). But see USCIRF EXPEDITED REMOVAL REPORT, *supra* note 166, at 171–72 (indicating that the high rate of approval may reflect a bias towards approval resulting from a mandatory 100 percent Asylum Headquarters review of negative credible fear findings as opposed to infrequent review of positive credible fear determinations).

170. Asylum applicants must prove that there is a reasonable possibility, or at least a 10 percent chance, that they will experience harm rising to the level of persecution should they return to their home country. Cf. 8 C.F.R. § 208.13(b)(2)(i)(B) (requiring an asylum applicant to prove a "reasonable possibility" of suffering persecution in order to establish that s/he has a well-founded fear of returning to her/his home country); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (indicating that an asylum applicant proving that s/he has a one in ten chance of being persecuted upon returning to her/his home country is adequate to establish a reasonable possibility of persecution). The burden of proof is on the asylum seeker, and while in rare cases his or her testimony alone may suffice to establish the claim, at least some corroborating evidence is required in most cases. 8 U.S.C.A. § 1158(b)(1)(B)(ii) (2005). These standards are relaxed at the credible fear stage, resulting in the vast majority of credible fear applicants being found to have demonstrated a significant possibility of establishing eligibility for asylum before an immigration judge. See *supra* notes 166–169 and accompanying text.

171. See HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY 39 (2004), available at [http://www.humanrightsfirst.org/asylum/libertys\\_shadow/Libertys\\_Shadow.pdf](http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf) [hereinafter IN LIBERTY'S SHADOW] (discussing the logistical difficulties asylum seekers face when attempting to obtain access to counsel).

172. See 8 U.S.C. § 1225 (b)(1)(B)(iii)(IV) (2000) (mandating detention of credible fear applicants); see also 8 C.F.R. § 235.3(b)(4)(ii) (mandating detention of credible fear applicants).

173. See IN LIBERTY'S SHADOW, *supra* note 171, at 14 (reporting that there is no limit on the length of detention of asylum seekers, and that asylum seekers may spend up to five years in prison awaiting the outcome of their cases).

174. CHARLES H. KUCK, STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL AS AUTHORIZED BY SECTION 605 OF THE INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998, LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATIVE PRACTICES, in USCIRF EXPEDITED REMOVAL REPORT, *supra* note 166, at 239. Only about two percent of unrepresented asylum seekers will prevail. *Id.*

Nevertheless, the APSO program provides a crucial safety net within the U.S. asylum system. APSO prevents enforcement-focused immigration officers from having the final say on the eligibility of asylum seekers to apply for protection in the United States. Given the similarities between asylum seekers and victims of international human trafficking,<sup>175</sup> developing and implementing a system similar to APSO could eliminate some of the conditions that may be precluding many international human trafficking victims from accessing immigration relief.

## b. Similarities Between Asylum Seekers and Trafficking Victims

### i. Fear of Harm

Asylum seekers come to the United States because they fear persecution in their home countries.<sup>176</sup> The nature of the persecution from which asylum seekers flee is varied, as are the underlying reasons for the harm. Examples of harm that asylum seekers have suffered or fear that they will suffer in the future include physical and psychological violence such as beatings, rape, torture, mutilation, incommunicado detention, severe economic deprivation, retaliatory harm to family members, and death. The reasons for the harm include race, religion, ethnicity, and political opinion as well as membership in various social groups, such as women, homosexuals, or particular tribes, clans, families, or professions.

Trafficking victims also fear and/or have experienced severe harm. As discussed above, many trafficking victims have endured physical and psychological violence designed to force them into the trafficking situation, to ensure their compliance, and to prevent them from seeking help.<sup>177</sup> Rape, beatings, confinement, starvation, and threats against family members are all abuses to which traffickers subject their victims. Like victims of persecution, many trafficking victims have been sought out because of particular characteristics: individuals from disadvantaged socio-economic groups, individuals with physical or mental disabilities, women, and children.<sup>178</sup>

There is one important difference between asylum seekers and trafficking victims in this regard—a difference that makes an early intervention plan even more crucial in the trafficking context. Asylum seekers have been harmed on foreign soil, and in most cases make an affirmative decision to come to the United States and seek protection. In the case of trafficking victims, the harm they have suffered has

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175. See *infra* notes 176–187 and accompanying text (detailing the similarities between asylum seekers and trafficking victims).

176. See 8 U.S.C.A. § 1101(a)(42) (defining a refugee as person who is “unable or unwilling to return to [his or her country of origin] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, or membership in a particular social group or political opinion”).

177. See *supra* Part II.C (describing conditions to which traffickers subject their victims in order to maintain complete control of them and maximize profits).

178. An important distinction between the harm suffered by refugees and the harm suffered by trafficking victims is the motivation for the harm. Generally, refugees are targeted because they have a particular characteristic that the persecutor finds offensive. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987) (requiring asylum applicants to prove that their persecutors seek to overcome a belief or characteristic by means of punishment). Trafficking victims, on the other hand, are targeted because their particular characteristic or set of characteristics makes them vulnerable to exploitation. See TIP REPORT 2007, *supra* note 27, at 8 (“Human traffickers prey on the vulnerable. Their targets are often children and young women, and their ploys are creative and ruthless, designed to trick, coerce, and win the confidence of potential victims. Very often these ruses involve promises of a better life through marriage, employment, or educational opportunities.”).

occurred at least in part on U.S. soil. Even in situations where victims voluntarily came to the United States and are subjected to exploitation subsequent to their arrival, the United States is not perceived as the haven it represents for asylum seekers. On the contrary, the United States is the country where trafficking victims were imprisoned, tortured, and threatened with death.

Despite this significant difference between asylum seekers and victims of human trafficking, early intervention could prove crucial to overcoming the fear that currently prevents many trafficking victims from disclosing their situations to law enforcement and immigration officials.

## ii. Suffering from Trauma-Related Illnesses

Many asylum seekers and trafficking victims suffer from trauma-related illnesses such as depression and anxiety, both of which may be present as part of post-traumatic stress disorder (PTSD).<sup>179</sup> PTSD occurs in individuals who have experienced or witnessed a traumatic event.<sup>180</sup> In addition to depression and anxiety, PTSD sufferers may experience a range of other symptoms, such as dissociation, nightmares, flashbacks, difficulty sleeping, lack of concentration, loss of interest in previously enjoyable activities, inability to recall traumatic events with specificity, exaggerated startle response, irritability, and flat affect.<sup>181</sup>

179. See TIP REPORT 2007, *supra* note 27, at 33, stating that:

A 2006 study of women trafficked for prostitution into the European Union found that 95 percent of victims had been violently assaulted or coerced into a sexual act, and over 60 percent of victims reported fatigue, neurological symptoms, gastrointestinal problems, back pain, and/or gynecological infections. Additional psychological consequences common among prostituted women include dissociative and personality disorders, anxiety, and depression. A 2001 study revealed that 86 percent of women trafficked within their countries and 85 percent of women trafficked across international borders suffer from depression.

As with sex trafficking, those who are trafficked for labor suffer physical and mental health problems, such as post-traumatic stress disorder due to physical assaults and beatings, and depression that elevates the risk of suicide.

*Id.*; see also JANICE G. RAYMOND ET AL., A COMPARATIVE STUDY OF WOMEN TRAFFICKED IN THE MIGRATION PROCESS: PATTERNS, PROFILES AND HEALTH CONSEQUENCES OF SEXUAL EXPLOITATION IN FIVE COUNTRIES (INDONESIA, THE PHILIPPINES, THAILAND, VENEZUELA AND THE UNITED STATES) 5 (2002), available at <http://action.web.ca/home/catw/attach/CATW%20Comparative%20Study%202002.pdf> (stating that the experience of "prostitution can be as traumatic as going to war" (citing Melissa Farley, Baral Isin, Kiremire Merab, and Sezgin Ufuk, *Prostitution in Five Countries: Violence and Post-Traumatic Stress Disorder*, 8 FEMINISM AND PSYCHOLOGY 405-425 (Nov. 1998))); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 396 (2003) ("The psychological effects of traumatic events can hamper a refugee's ability to communicate why he or she is afraid to return home, and make it difficult for some of the most vulnerable refugees to establish claims that would give them legal protection.").

180. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed. 2000). Traumatic events that can trigger PTSD include "direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person" in which the person's response involves "intense fear, helplessness, or horror." *Id.*

181. *Id.* at 464; see also Mental Health America.net, Fact Sheet: Dissociation and Dissociative Disorders, available at <http://www.nmha.org/index.cfm?objectId=C7DF8D4E-1372-4D20-C86C22067E838DF0> (last visited Dec. 30, 2007) (defining dissociation as a "mental process that causes a lack of connection in a person's thoughts, memory and sense of identity"); MedicineNet.com, Definition of flat affect, <http://www.medterms.com/script/main/art.asp?articlekey=26293> (last visited Dec. 31, 2007) (defining flat affect as "a severe reduction in emotional expressiveness").

Ironically, bona fide refugees and trafficking victims are likely to have PTSD, but, as a result of PTSD symptoms, may encounter difficulty establishing their legitimate need for protection. Credibility is crucial to making a threshold showing of eligibility for asylum and T visa status. PTSD symptoms such as flat affect, inability to recall traumatic events with specificity, lack of concentration, and disassociation, however, often prevent a persecution or trafficking victim from establishing credibility.<sup>182</sup> An asylum seeker who cannot remember the date he was imprisoned and tortured may appear not to be telling the truth. Similarly, a trafficking victim who describes her ordeal without a show of emotion may appear to be a "seasoned prostitute," not a victim of trafficking.

Early mental health intervention may help ensure that bona fide victims of international human trafficking have the opportunity to receive the protection to which they may be statutorily entitled.

### iii. Fear of Law Enforcement/Detention

Compounding the problems caused by PTSD, both asylum seekers and victims of international human trafficking tend to fear government officials and law enforcement officers. Many asylum seekers arriving at a port of entry have recently suffered severe harm at the hands of government officials in their home countries. An armed, uniformed immigration official is therefore unlikely to inspire trust and confidence in an individual fleeing government-sponsored persecution, especially when that individual is suffering from trauma-related mental disorders.<sup>183</sup> Likewise, most trafficking victims have a dual fear of law enforcement: that which the traffickers have instilled in order to ensure compliance,<sup>184</sup> and that which their experience in their own countries has produced.<sup>185</sup>

In addition to a generalized fear of law enforcement, both trafficking victims and asylum seekers have a more particularized fear of law enforcement arising from the fact that both groups have violated U.S. law and are subject to arrest and detention. An individual who seeks asylum at a port of entry but does not have a valid entry document, such as a visa, will find herself arrested, shackled, and eventually transferred to a detention facility to await further processing.<sup>186</sup> Similarly, a trafficking victim's initial encounter with the law enforcement officers he has been trained to fear and distrust often occurs during the terrifying atmosphere of a workplace or brothel raid. The trafficking victim's subsequent arrest and detention reinforces what his traffickers and his own experiences have impressed upon him.

Fear of law enforcement is yet another basis for the argument that an early intervention plan is particularly necessary in the trafficking context. Whereas

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182. See Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 221 (1999) (explaining that the effects of PTSD "can lead to an adverse assessment of the asylum seeker's credibility on the witness stand").

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

184. See *supra* notes 143–146 and accompanying text (describing methods that traffickers use to maintain control over their victims, including instilling in victims a fear of law enforcement).

185. See *supra* note 142 and accompanying text (discussing governments' complicity in trafficking).

186. See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2000) (mandating detention for asylum seekers awaiting a final credible fear determination); see also *infra* Part IV.A.2.a (describing conditions of immigration detention).

asylum seekers may fear law enforcement as a result of their experiences in their home countries, trafficking victims fear law enforcement because their traffickers have indoctrinated them with that fear. That indoctrination, specifically against U.S. law enforcement personnel, has proven to be a significant obstacle in the current law enforcement-dominated T visa process.<sup>187</sup> The cooperation that T visa applicants must provide requires a trust in U.S. law enforcement that often cannot exist without significant time and resources dedicated to developing that trust. Without an early intervention plan in place to ensure that bona fide trafficking victims are not threatened with deportation or criminal prosecution as a result of fear and mental health issues, the chances of overcoming severe distrust of law enforcement officials remain slim.

#### b. Trafficking and Exploitation Victims Assistance Interviews

The similarities between asylum seekers subject to expedited removal and trafficking victims in the custody of law enforcement provide a basis for the creation of an intervention system that functions like the APSO program, but responds to the unique needs of international human trafficking victims. Under the proposed TEVA program, interviews would be conducted to determine whether there is a reasonable possibility that the individual is a victim of a severe form of human trafficking.<sup>188</sup> Like the APSO interview, the TEVA interview would act as a low-standard screening process designed to provide the applicant with the benefit of the doubt.

TEVA interviews would differ from APSO interviews in at least two significant ways. First, TEVA officers would be specially trained to deal with victims of the types of trauma common among trafficking victims.<sup>189</sup> Just as APSO officers receive extensive training in asylum law, the Citizenship and Immigration Services officers conducting TEVA interviews must have expertise in the dynamics of human trafficking, as well as expertise in determining whether a person might be suffering from trauma-related psychological disorders and/or the effects of coercion.

Second, TEVA interviews would follow the collaborative model of the TEVA program. Citizenship and Immigration Services officers would be encouraged, and in some cases required, to utilize the services of mental health professionals. A TEVA officer could make a finding of possible T visa eligibility without having a mental health professional interview the individual. However, a mental health evaluation would be a prerequisite for an issuance of a negative T visa eligibility determination.

If the TEVA officer, in collaboration with a mental health professional, determines that the individual is not a trafficking victim, the TEVA Office would refer

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187. See *supra* notes 139–146 and accompanying text (explaining the reasons behind the reluctance of many trafficking victims to cooperate with U.S. law enforcement officials).

188. See TIP REPORT 2007, *supra* note 27, at 36 (“Government agencies should establish formal victim identification procedures to screen at-risk populations such as persons apprehended for violations of immigration laws, prostitution laws, and begging or labor laws. Victims of trafficking should not be expected to identify themselves; proactive investigative techniques—such as interviews in safe and non-threatening environments with trained counselors and appropriate language services—should be used to identify possible trafficking victims.”).

189. See *id.* (“Once identified, a suspected victim of trafficking should be afforded temporary care as a victim of a serious crime. This could include shelter and counseling that allows a potential victim to recount his or her experience to trained social counselors and law enforcement personnel at a pace with minimal pressure.”).

the case to supervisory TEVA officers for automatic review. If the TEVA Office makes a final determination that the individual is not a victim of a severe form of trafficking, the TEVA Office would refer the case to ICE for issuance of a charging document placing the individual in removal proceedings. At this time, the individual could apply for alternative immigration relief such as asylum.

If the TEVA officer does find that the individual might be a victim of a severe form of trafficking, the TEVA Office would refer the applicant to nonprofit or pro bono counsel for pursuit of a T visa and/or other immigration relief. Individuals who receive a positive determination from the TEVA Office would also be eligible to remain in protective TEVA custody, discussed in detail in Part 2 below, or to apply for parole.<sup>190</sup>

## 2. Housing Possible Victims

The question of whether and how to detain possible victims of international human trafficking underscores yet another cultural discrepancy present in the current T visa system: security versus humanitarian concerns. On the one hand, the Department of Homeland Security has the right to detain individuals who violate its immigration and criminal laws,<sup>191</sup> and has a mandate to detain those lawbreakers who present a danger to society.<sup>192</sup> On the other hand, the Department of Homeland Security has statutory, and arguably humanitarian, obligations to protect victims of crimes and persecution.<sup>193</sup> These competing interests become even more contentious in the case of international human trafficking: it is not always clear who is a victim and who is a lawbreaker, as they are often one and the same. Approaching the problem from a strictly security-minded perspective undermines the protective mandate of the TVPA. Therefore, a necessary component of the TEVA program is a custodial system that, unlike immigration detention, attempts to achieve protection as well as security.<sup>194</sup>

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190. See 8 C.F.R. § 212.5 (2007) (setting forth the conditions for parole from immigration detention). Parole is granted "only on a case-by-case basis for 'urgent humanitarian reasons' or 'significant public benefit,' provided the aliens present neither a security risk nor a risk of absconding." *Id.* § 212.5(b).

191. See 8 U.S.C. § 1226(a) (2000) (authorizing the arrest and detention of aliens pending removal hearings, and permitting release of detained aliens at the Attorney General's discretion).

192. *Id.* § 1226(c).

193. See TVPA, 22 U.S.C. § 7101(a) (stating that one of the purposes of the Act is to protect victims of human trafficking); see also 8 U.S.C. § 1231(b)(3) (prohibiting the removal of an alien to a country where her/his "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion"); Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998) (adopting the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, thereby prohibiting the return of an alien to a country where there are substantial grounds for believing that s/he would be in danger of being subjected to torture); 8 U.S.C. § 1153(a) (permitting the abused spouse or child of a U.S. citizen or lawful permanent resident to petition for eligibility for permanent residency independently of the abusive spouse or parent).

194. See TIP REPORT 2007, *supra* note 27, at 36 (recommending that "[t]rafficking victims...not be detained in criminal detention facilities, except in extreme circumstances," but rather "be treated as victims").

### a. Immigration Detention

U.S. law authorizes, and in some cases mandates, immigration officials to detain immigration law violators present in or attempting to enter the country.<sup>195</sup> This practice has officially existed since 1891, when Ellis Island opened.<sup>196</sup> After sixty-three years of operation, the INS closed Ellis Island.<sup>197</sup> For the next twenty-six years it implemented a policy of detaining only those immigrants who posed a national security threat or danger to society.<sup>198</sup> The use of immigration detention increased significantly in the 1980s and 1990s with the arrival of large groups of Cuban and Haitian boatpeople, and the commencement of the “war on drugs.”<sup>199</sup> Today, the United States detains approximately 200,000 people per year.<sup>200</sup>

#### i. Detention of Adults

The Department of Homeland Security maintains its own detention centers operated by private corrections companies, but places most immigration detainees in bed space rented from local jails administered by government corrections officers.<sup>201</sup> Individuals who have merely violated administrative provisions of the immigration laws are detained in the same facilities as individuals subject to deportation because of criminal convictions, and immigration detainees are often commingled with the general prison population.<sup>202</sup> The officers and administrators in most of the jails and detention centers run the facilities in mostly the same fashion as a facility for individuals serving criminal sentences: detainees are subject to strip searches, restricted visiting hours, frequent transfers from facility to facility, punishment such as solitary confinement, and lack of privacy.<sup>203</sup> Medical and psychological care is often inadequate.<sup>204</sup>

Detention is also problematic because it inhibits legal representation. Statistics show that 95 percent of individuals who have successful immigration court cases have legal representation,<sup>205</sup> but that only 11 percent of immigration detainees have

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195. See 8 U.S.C. § 1226(a) (authorizing the arrest and detention of aliens pending removal hearings, and permitting release of detained aliens at the Attorney General's discretion); *id.* § 1226(c) (mandating the detention of aliens who have committed certain crimes); *id.* § 1225(b)(1)(B)(iii)(IV) (mandating the detention of aliens subject to expedited removal who have requested a “credible fear” interview).

196. See MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* 6 (2004).

197. Ellis Island had been described as a “grim detention center” and a “grueling detention-like penitentiary.” *Id.*

198. *Id.* at 6–7 (internal citations omitted).

199. *Id.* at 7–8 (internal citations omitted).

200. *Id.* at 9.

201. *Id.*

202. See HUMAN RIGHTS WATCH, *LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES* 19 (1998), available at <http://hrw.org/reports/pdfs/g/general/ins989.pdf> [hereinafter *LOCKED AWAY*] (“INS detainees languish in these criminal institutions where they may be held for years, sometimes commingled with accused or convicted criminal inmates, physically mistreated, subjected to excessive or inappropriate discipline, denied adequate medical care, deprived of outdoor exercise, and isolated from family and legal counsel. Individuals fleeing persecution and seeking asylum are not spared jail detention. Because the INS’s computer tracking system was created for enforcement purposes, it does not indicate which detainees are asylum seekers. They are simply mixed with other INS detainees and local inmate populations.”).

203. *Id.*

204. *Id.*

205. *Id.*

legal representation.<sup>206</sup> Many immigration detention facilities are in remote locations, which makes finding, paying and meeting with an attorney a much more difficult process than it is for non-detained individuals.<sup>207</sup> Those who represent themselves must rely on prison officials to grant them access to materials that they can use to build their case, such as the internet and legal publications. A recent study reported, however, that ICE restricts access to library time and online materials, often in violation of its own standards.<sup>208</sup>

These problems—inappropriate settings, inadequate medical and psychological care, and lack of access to legal representation—are often intensified when the detainees are children, families and asylum seekers.

## ii. Detention of Children and Families

Children and families are not exempt from detention, nor from the poor treatment that ICE detainees tend to receive. Prior to 2001, the INS maintained detention centers, termed “shelters,” for “unaccompanied minors,” children who are in the United States illegally without a parent or guardian.<sup>209</sup> The INS’s inappropriate treatment of children in its custody<sup>210</sup> led to a lawsuit that resulted in the establishment of guidelines for children’s detention.<sup>211</sup> The INS’s treatment of its minor detainees, however, continued to come under so much criticism that Congress transferred jurisdiction over unaccompanied minors from the INS and the Department of Justice to the Department of Health and Human Service’s Office of Refugee Resettlement (ORR).<sup>212</sup> Treatment of unaccompanied minors has improved since then, but concerns remain, mainly as a result of ICE’s continued involvement in the detention of children.<sup>213</sup> Moreover, as soon as a child in ORR custody turns

206. See generally DEP’T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES (2006), available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_07-01\\_Dec06.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf) [hereinafter DHS DETAINEE REPORT]; see also LOCKED AWAY, *supra* note 202, at 7 (noting that “many detainees do not have legal representation”).

207. For those who can afford to pay an attorney, the distance often increases legal fees; for those who cannot afford to pay an attorney, the distance decreases the availability of ample nonprofit representation.

208. DHS DETAINEE REPORT, *supra* note 206, at 16–17.

209. See OFFICE OF THE INSPECTOR GENERAL, UNACCOMPANIED JUVENILES IN INS CUSTODY, REPORT NUMBER I-2001-009 (2001), available at <http://www.usdoj.gov/oig/reports/INS/e0109/chapter1.htm#background> (stating that the “INS Juvenile Program is directed by the INS National Juvenile Coordinator, who reports to the Deputy Associate Commissioner for the INS Office of Detention and Removal (D&R) at INS headquarters”).

210. See Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1088 (1995) (detailing the mistreatment suffered by juvenile detainees of the INS, including strip searches, few opportunities for recreation, no educational programs, and being forced to share bathrooms with unrelated adults (citing *Flores v. Meese*, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., dissenting); *Reno v. Flores*, 113 S. Ct. 1439 (1993))).

211. See Stipulated Settlement Agreement, *Flores v. Reno*, 507 U.S. 292 (1997) (No. CV 85-4544-RJK(Px)), available at <http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749> (setting forth guidelines for the detention and parole of unaccompanied minors in immigration custody).

212. Homeland Security Act, Pub. L. No. 107-296, § 462, 116 Stat. 2135 (2002).

213. See WOMEN’S COMM’N FOR REFUGEE WOMEN AND CHILDREN & LUTHERAN IMMIGRATION AND REFUGEE SERVICE, LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES 8 (2007), available at <http://www.lirs.org/LockingUpFamilyValues.pdf> [hereinafter LOCKING UP FAMILY VALUES] (reporting that the Office of Refugee Resettlement notifies Immigration and Customs Enforcement when it is has released a child, and that Immigration and Customs Enforcement “uses this information to apprehend and redetain [sic] children, this time with their parents”); see also AMNESTY INT’L, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION 54 (2003), available at [http://www.amnestyusa.org/refugee/pdfs/children\\_detention.pdf](http://www.amnestyusa.org/refugee/pdfs/children_detention.pdf) (reporting that Immigration and Customs Enforcement has attempted to use the parole of children as bait to



eighteen, s/he may be subjected to the trauma of being transferred to ICE custody and placed in an adult jail or immigration detention center.<sup>214</sup>

Family detention centers have also been the subject of intense criticism. The Berks County Family Shelter in Leesport, Pennsylvania, and the T. Don Hutto Residential Center in Taylor, Texas, are the only two detention centers in the country designed specifically to house families. Despite the fact that both facilities house minors, they fall under the jurisdiction of ICE rather than ORR, and they are run according to standards developed for criminal inmates by the American Correctional Association.<sup>215</sup> A recent report stated that the following problems exist in the Berks and Hutto facilities:

- Both settings strip parents of their role as arbiter and architect of the family unit.
- Both facilities place families in settings modeled on the criminal justice system.
- There are no licensing requirements for family detention facilities because there is no precedent for family detention in the United States.
- There are no standards for family detention, but both facilities violated various aspects of existing standards for the treatment of unaccompanied children and adults in immigration proceedings.<sup>216</sup>

Many children and family detainees have experienced persecution and, in the case of children, abuse and abandonment. Their detention in prison-like facilities thus compounds the trauma they may have already experienced.<sup>217</sup>

### iii. Detention of Asylum Seekers

U.S. immigration detention policies and conditions have received a great deal of criticism, but the policy on the detention of asylum seekers has received the most vocal condemnation.<sup>218</sup> Among the 22,000 individuals detained by ICE at any given time, an unknown number, estimated at several thousand or approximately thirteen

apprehend their illegally present parents).

214. See 8 C.F.R. § 236.3(a) (2007) (defining "juvenile" as "an alien under the age of 18 years").

215. LOCKING UP FAMILY VALUES, *supra* note 213, at 8–9.

216. *Id.* at 2.

217. See generally PHYSICIANS FOR HUMAN RIGHTS & THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION ON ASYLUM SEEKERS (2003), available at [http://www.pegc.us/archive/Organizations/PHR\\_detention.pdf](http://www.pegc.us/archive/Organizations/PHR_detention.pdf) [hereinafter FROM PERSECUTION TO PRISON] (detailing the effects of immigration detention on asylum seekers and unaccompanied minors).

218. See generally OPHELIA FIELD AND ALICE EDWARDS, U.N. HIGH COMM'R FOR REFUGEES, DIV OF INT'L PROTECTION SERVICES, LEGAL AND PROTECTION POLICY RESEARCH SERIES: ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS AND REFUGEES (2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/openssl.pdf?docid=4472e8b84> (discussing U.S. policy on asylum seekers); USCIRF EXPEDITED REMOVAL REPORT, *supra* note 166; FROM PERSECUTION TO PRISON, *supra* note 217; OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS (February 1999), available at <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf>; AMNESTY INT'L, SEEKING ASYLUM IS NOT A CRIME: DETENTION OF PEOPLE WHO HAVE SOUGHT ASYLUM 14 (2005), available at <http://www.amnesty.org/en/library/asset/EUR45/015/2005/en/dom-EUR450152005en.pdf>; Michael Welch & Liza Schuster, *Detention of Asylum Seekers in the US, UK, France, Germany, and Italy: A Critical View of the Globalizing Culture of Control*, 5 CRIMINOLOGY AND CRIMINAL JUSTICE 4, 331 (2005).

percent, are asylum seekers.<sup>219</sup> Many of them are torture survivors suffering from trauma-related mental disorders.<sup>220</sup> Some, including many of the children and families discussed above are awaiting the resolution of their asylum claims.<sup>221</sup>

The detention of asylum seekers raises several concerns. First, although the vast majority of detained asylum seekers have committed no criminal violations, they are often housed with criminals.<sup>222</sup> Detained asylum seekers who are survivors of torture generally do not receive appropriate medical or psychiatric care.<sup>223</sup> Detention also tends to have a severe negative psychological impact, resulting in many bona fide refugees giving up their asylum claims and accepting deportation rather than remaining incarcerated.<sup>224</sup>

Two principal reasons for the detention of illegally present immigrants, however, are to protect the community and prevent absconding.<sup>225</sup> These goals highlight one of the most difficult tensions present in the debate over the proper treatment of applicants for humanitarian immigration relief: how to prevent and deter fraud and absconding while at the same time protecting the rights of bona fide applicants. This dilemma becomes even more complicated in the context of international human trafficking.

#### b. TEVA Facilities

The nature of international human trafficking is such that the line between lawbreaker and victim is often blurred. Some individuals have been brought into the United States illegally against their will. Others have entered the United States illegally of their own free will, but have been forced to participate in criminal acts

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219. AMERICAN GULAG, *supra* note 196, at 313 n.15. Immigration authorities do not maintain precise statistical information regarding detained asylum seekers. *Id.*; see also FROM PERSECUTION TO PRISON, *supra* note 218, at 23 (reporting that the number of detained asylum seekers is estimated at 5,000).

220. See FROM PERSECUTION TO PRISON, *supra* note 218, at 8 (reporting that in a study of detained asylum seekers, 86 percent showed “[c]linically significant depression,” 77 percent suffered from anxiety, and 50 percent suffered from PTSD).

221. See LOCKING UP FAMILY VALUES, *supra* note 213, at 11 n.32 (reporting that Immigration and Customs Enforcement did not provide precise statistics regarding the number of asylum seekers in expedited removal proceedings at their facilities).

222. See FROM PERSECUTION TO PRISON, *supra* note 218, at 44 (reporting that “asylum seekers often shared prison cells with convicted criminals, including violent offenders”); see also USCIRF EXPEDITED REMOVAL REPORT, *supra* note 166, at 184 (“More than half (13/18) of the [surveyed detention] facilities where male aliens were detained reported that they housed detainees both with and without criminal convictions. Similarly, more than half of the facilities that housed female aliens (10/13) had detainees who had been convicted of one or more criminal offense as well as those who had none. Of the facilities that housed male or female detainees who had criminal convictions with detainees who had none, 11 not only allowed some contact or interaction between both groups but also provided for shared sleeping quarters where both groups were co-mingled. Among the 8 facilities that housed non-DHS jail inmates (either sentenced or awaiting trial), 7 permitted some contact between them and the detained aliens and, in the case of 4 facilities, this included shared sleeping quarters.”)

223. See generally FROM PERSECUTION TO PRISON, *supra* note 218, at 87–104 (describing the quality of mental and physical health care available to detained asylum seekers); see also USCIRF EXPEDITED REMOVAL REPORT, *supra* note 166, at 188 (reporting that “in only 2 of 19 [surveyed detention] facilities did mental health staff members conduct regular rounds or make any kind of effort to directly monitor the mental health status of the detainees”).

224. See generally FROM PERSECUTION TO PRISON, *supra* note 218 (documenting the mental health of detained asylum seekers, including suicidal thoughts, depression, and post-traumatic stress disorder).

225. See 8 U.S.C. § 1231(a)(6) (2000) (mandating the detention of noncitizens determined to be flight risks or dangers to the community).

(such as prostitution) against their will. Still others willfully entered the United States illegally and willfully engaged in criminal acts. In the initial stages of the T visa process, it is difficult to discern which individuals fit into which category.

Although detaining possible victims of trafficking is not a laudable practice from a humanitarian perspective, detention arguably serves at least two goals from a security standpoint: preventing non-victims from absconding and re-offending,<sup>226</sup> and protecting victims from harm perpetrated by their traffickers.<sup>227</sup> The TEVA program would therefore include a dual-phased housing component that initially serves the detention goals of protecting the public and preventing absconding, but ultimately emphasizes victim protection.

Phase I TEVA facilities, designed specifically for conducting TEVA interviews, would house non-citizen arrestees from brothel and sweatshop raids in secure but non-prison-like facilities more conducive than jails to earning the trust of and eliciting the truth from trafficking victims.<sup>228</sup> Unlike the federal detention centers and county jails where APSO interviews usually take place, the TEVA facilities would have social workers and other trained professionals on staff, and offer medical care, therapy, recreation and education in a supportive, non-threatening environment. The families of possible trafficking victims (except for adults suspected of being involved in the trafficking) would be eligible to reside there as well. The security needs to be met would be twofold: preventing TEVA applicants motivated by fear or fraud from absconding, and protecting TEVA applicants from pimps and traffickers intent on retrieving their "property." Phase I TEVA facilities would thus resemble the family detention centers, but without the correctional characteristics (razor wire, separated family units, inappropriate food, abbreviated meal time, etc.) that would likely inspire fear, resentment and distrust of officials.<sup>229</sup>

Under the proposed TEVA system, individuals who have passed a TEVA interview may apply for parole. Some, however, may fear for their safety once they are no longer in federal custody. Those individuals may elect to remain in Phase I TEVA facilities until more long-term solutions, such as placement in the Witness Protection Program,<sup>230</sup> can be arranged. For individuals who need assistance

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226. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (referencing the brief of the Immigration and Naturalization Service in which the Service stated that its detention goals are "ensuring the appearance of aliens at future immigration proceedings" and "[p]reventing danger to the community" (alteration in original)).

227. See *supra* notes 141–144 and accompanying text (noting incidents of retaliation by traffickers against escaped victims).

228. Possible T visa beneficiaries who are not initially detained may elect to enter a TEVA facility if they believe that doing so would be in their best interests, but they would not be required to do so.

229. See, e.g., LOCKING UP FAMILY VALUES, *supra* note 213, at 12–13 (describing the physical setting of the Hutto detention facility, characterized by razor wire, cells organized around pods, twenty-four-hour camera surveillance, and guards stationed at various points throughout the complex); *id.* at 14–15 (reporting that families detained at the Hutto detention facility are processed by the Corrections Corporation of America according to the following procedures: detainees must turn over their clothes and personal effects; all detainees, including children, receive three sets of scrubs and underwear; detainees may only receive additional hygienic products and snacks if they have money in their commissary account); *id.* at 16–17 (describing the living conditions in the Hutto detention facility: no privacy divider between toilet and sleeping area in cells, one hour of daily recreation, one hour of education, twenty minutes to eat, and limited shower time with limited privacy).

230. See TVPA, 18 U.S.C. § 1594(d) (2000) (designating trafficking offenses as organized criminal activity that may warrant federal protection for prosecution witnesses).

integrating into society and healing rather than continuous security, Phase II TEVA housing would be available.

Phase II TEVA facilities would provide more long term housing options for those individuals who have had successful TEVA interviews and are in the process of applying for a T visa or other immigration benefits. Phase II TEVA housing may include domestic violence shelters and subsidized apartments for adults and their families, and foster homes, group homes, and placement with family members for minors. The TEVA program would continue to partner with local nongovernmental organizations to provide education and therapy to TEVA participants until their immigration cases are complete.

### *B. Implementing a Reasonable Cooperation Requirement*

The establishment of the TEVA program would likely go a long way in improving identification of potential T visa beneficiaries. A significant obstacle to encouraging many such potential beneficiaries to apply for the visa would nevertheless remain: the cooperation requirement. The statute requires that a T visa beneficiary aged fifteen or over comply "with any reasonable request for assistance in the investigation or prosecution of acts of trafficking."<sup>231</sup> The regulations do not attempt to interpret reasonability.<sup>232</sup> This Article proposes that Citizenship and Immigration Services revise the regulations to permit a limited exemption from the cooperation requirement in certain circumstances.

As discussed above, trafficking in humans is akin to trafficking in arms and drugs—not only in profits generated but also in the fact that ruthless, powerful organized crime rings are often directly involved.<sup>233</sup> Even if U.S. law enforcement can protect a trafficking victim, there is no guarantee that it can protect the victim's family abroad if that victim is known to be collaborating with it.<sup>234</sup>

Such a limited exemption for those in danger is consistent with the letter and spirit of the TVPA, which was designed not only to apprehend traffickers, but also to protect trafficking victims.<sup>235</sup> It was not the intent of Congress to deny assistance to those trafficking victims whose cooperation with U.S. law enforcement would result in further harm.<sup>236</sup> To view the T visa solely as a tool to assist law enforcement officers and prosecutors to encourage the cooperation of trafficking victims is misguided. In those cases where such cooperation will likely lead to severe harm against the victim or the victim's family, an exemption is warranted.

The exemption may be limited in scope but should be accompanied by strict security measures. All trafficking victims must cooperate to some degree in that they must discuss what happened to them with sufficient detail to establish that they

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231. 8 U.S.C. § 1101(a)(15)(T)(i)(III) (2000).

232. See 8 C.F.R. § 214.11(h)(1) (2007) ("If the Service determines that the alien has not complied with any reasonable request for assistance, then the application will be denied....").

233. See *supra* Part III.C.2 (detailing the violence and coercion inherent in trafficking situations).

234. See *supra* notes 141–144 and accompanying text (noting incidents of retaliation by traffickers against escaped victims).

235. See *supra* note 139 and accompanying text (specifying the goals of the TVPA).

236. See TIP REPORT 2007, *supra* note 27, at 37 (stating that the "[c]ooperation of victims cannot be bought or forced, but through the consistent provision of assistance that is not tied to performance in court, victims assured of their rights regain the confidence to speak out for themselves.").

are indeed victims of trafficking.<sup>237</sup> However, requests which may seem reasonable from a U.S. law enforcement perspective—such as identifying traffickers, signing affidavits to be used in court and testifying in court or in depositions—could prove fatal in cases involving particularly brutal and powerful traffickers. In those cases, trafficking victims should not be forced to choose between their own safety and the safety of their loved ones.

The exemption could be incorporated into the regulations governing the T visa process as follows:

8 CFR § 214.11(h)(4). Exception for applicants who have demonstrated that providing assistance to LEA would result in severe harm to the applicant and/or his or her family members in the United States and/or abroad. A trafficking victim who demonstrates by clear and convincing evidence that assisting LEA would likely result in severe harm to himself or herself or to his or her family members in the United States or abroad shall be considered to have cooperated with LEA by providing those details proving that he or she is a victim of a severe form of trafficking. In order to demonstrate the likelihood of severe harm, applicants seeking the exemption may submit evidence including but not limited to newspaper articles, affidavits, and country reports.

Allowing this exemption in the limited circumstances described above and within the suggested parameters would assist government officials in meeting the dual of goals of prosecution of traffickers and protection of trafficking victims.

## V. CONCLUSION

The TVPA could be a powerful tool for combating trafficking if implemented properly. To date, the T visa provisions of the TVPA have served very few people. This Article has suggested that the reason for this lack of success is not the legislation itself, but the lack of effective measures in place to identify potential beneficiaries and meet their immediate needs. This Article has proposed reforms to the T visa process that reflect the reality of international human trafficking: victims suffering severe physical and emotional trauma; traffickers who often act with the tacit consent of foreign governments, or who are capable of evading law enforcement; the brutality and ruthlessness of an enterprise that is illegal but highly profitable; and the often blurry lines between forced and voluntary transnational migration. The proposed reforms—the TEVA Program combined with a limited cooperation exemption—attempt to honor the letter and the spirit of the TVPA by giving victims of international human trafficking a more realistic chance than they currently have to overcome the significant obstacles they face in gaining protection.

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237. *But see* STATE OF THE WORLD'S REFUGEES, *supra* note 39, at 23 (reporting that Italy does not require trafficking victims to cooperate with law enforcement; rather, all victims receive a six-month residency permit that is renewable if the victim decides to cooperate).