

## **Good Intentions are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act**

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In the year 2000, Congress proudly signed into law the Trafficking Victims Protection Act (TVPA),<sup>1</sup> with one goal in mind—protecting victims of human trafficking by working to eliminate human trafficking in the United States and around the world. Fully eight years after the passage of the TVPA, while the law itself has the potential to be quite effective, it remains to be effectively implemented. Put simply, human trafficking appears to be increasing as traffickers discover how lucrative and easy it is to enslave another human being, and while prosecutions of traffickers in human beings have increased,<sup>2</sup> that slim risk of punishment has not been enough to make a dent in the phenomenon, touted in the media as “modern day slavery.”

With passage of the TVPA, Congress provided prosecutors, lawmakers and victim services providers with legal tools, as well as all-important funding, to make a significant impact in human trafficking, albeit one of the most difficult crimes to discover and prosecute, due to its inherent elusive and “private sphere” nature. The trafficking of human beings, as well as the labor those trafficked persons carry out, often occurs within homes or hidden away in factories, fields and workplaces which have not been inspected.<sup>3</sup> It is hard to find and harder still to prosecute.

The law itself is both broad and specific enough to create some powerful tools for prosecutors, however. It allows prosecutors to charge with human trafficking any person who receives, harbors, transports, provides or obtains (or attempts to do any of the foregoing), a person through means of force, fraud or coercion (including threatening to use the law to deport them, for instance), for the purpose of either commercial sex or labor or services.<sup>4</sup> The passage of the law also, crucially, created a broad endorsement for protecting victims of human trafficking, but in this area, the endorsement has failed to convince law enforcement that victims of human trafficking are legitimate or legitimately in need of protection and it is this particular failure which this article will address.

Despite the powerful legal and victim service tools available through passage of this domestic legislation, a multitude of problems remain, primarily as a result of the lack of effective implementation of and respect for the law. As soon as the TVPA was passed, human trafficking was conflated with so many other political agendas that the true

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<sup>1</sup> Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, Div. A, 22 U.S.C. § 7101 et seq.

<sup>2</sup> By 390%, according to the US Department of Justice [claiming the prosecution of 449 traffickers between 2001-2007, as opposed to 91 during the previous seven years prior to passage of the Act], CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005 (2006), available at [http://www.usdoj.gov/crt/crim/trafficking\\_report\\_2006.pdf](http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf) [hereinafter DOJ REPORT].

<sup>3</sup> Workplace inspectors are governed by OSHA and offices like fire marshals. While each have received training regarding recognizing human trafficking, there are not enough inspectors to carry out this additional job.

<sup>4</sup> See generally Sec. 106 (a) and (b) of the TVPA, supra note 1.

purpose and potential of the law was obscured. Following are four of the primary ways in which the implementation of the TVPA remains critically flawed. Because it is useless to speak of problems without recommending solutions, following, as well, are four recommendations for correcting those flaws.

## **1. The Law Enforcement Funnel Stymies Victim Protection**

The TVPA is a federal law, and those charged with human trafficking under the TVPA are prosecuted by federal attorneys. US Attorneys were recently joined by the Department of Justice's newly created Human Trafficking Prosecution Unit within the Criminal Section of its Civil Rights Division to spearhead those efforts. While US Attorneys are receiving more training and are generally more aware of the existence and purpose of the law than there were, say, five years ago, they are still not always either skilled at or comfortable enough to use it.<sup>5</sup> As a result, the purpose of the TVPA, protecting victims, is undermined not because of a lack of will or lack of law, but because of improper interpretation of the law, and a lack of certainty and confidence by those who apply it.

### **A. Alma: Rescued by Law Enforcement**

Take, for instance, Alma, a 13 year old girl from Egypt, sold into slavery by her parents after her older sister allegedly stole something from her employer. The employer threatened to turn Alma's older sister over to the Egyptian police unless the parents gave them another of their children to serve in the household. Eventually, the employer and his family move to the United States, securing a false passport for Alma as a "family member" and taking her with them to work as a domestic servant. In the US, Alma was forced to work 15 hour days, slept in a windowless and airless garage on a mattress on the floor, took care of all household duties, had no access to her own passport (which in any event was fraudulent) and was never permitted to leave the house over the course of four years. Eventually, acting on a tip, ICE (Immigration and Customs Enforcement, the immigration enforcement division of the Department of Homeland Security) raided the house and Alma was rescued. The rescuers immediately send Alma that night to Catholic Charities, an agency in receipt of government funds earmarked exclusively for the purpose of assisting victims of human trafficking. ICE immediately informed the Department of Justice Human Trafficking Protection Unit and the family members were prosecuted for human trafficking. Alma worked closely with law enforcement to secure the prosecution and the same ICE officers present at the raid assist her as she applies for and obtains a T-visa. Ultimately Alma is adopted by a foster family and obtains her

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<sup>5</sup> See, for example 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 Protect Act*, 21 GEO. IMMIGR. L.J. 337 (2007) [hereinafter Haynes, *(Not) Found*], at 23, describing a US Attorney who, despite having (correctly it turned out) identified a victim of human trafficking, nevertheless first prosecuted her for "misuse of a passport," even though the passport was known to have been provided to the victim by her trafficker for the purpose of trafficking her into the United States. The victim spent 18 months in a federal prison, first serving time for the criminal offense, and then remaining because DHS refused to release her given, ironically, her lack of identification documents.

permanent residence in the United States.<sup>6</sup> The system has worked well to protect Alma, to ensure that she has been provided with the victim protection services she both needs and is entitled to.

### **B. Beti: Frees Herself**

Now look at this alternate scenario: Beti is a 13 year old girl from Cameroon, sold into slavery by her father to pay off a bribe. Beti is forced to work in the household of the family to which her father sold her 15 hours a day while living on a mattress in the pantry. She takes care of all of the household duties, cooking, cleaning and caring for the family children. She has no access to her travel documents which in any event are fraudulent; when the family came to the United States they submitted false documents, pretending that she was their natural child. She has never been permitted to go outside except to take out the trash. Now the male head of the household has started making sexual advances to her and, noticing his way of looking at Beti, his wife has started slapping her and screaming at her telling Beti everything she does is wrong. One day, the man tells Beti to come to his room that night, stating she “doesn’t want to know what will happen” if she refuses him. That evening, Beti flees through the back window, running through the streets until she sees a church. She runs inside and begs them to help her. They cannot understand her French but when they tell her they will call the police to assist her, she begs them not to, thinking that she will be deported or jailed for entering the United States with the false passport, as the family had always threatened in order to ensure her obedience and compliance. The church members call a domestic violence shelter which will take her for one night. On her second day at the shelter, when she hears the word police again, she begins shaking her head “no” and doesn’t stop shaking it even after the local police send someone to take a statement, asking her in English whether she’d like to press charges against her assailant. The shelter lets her stay on, but insists she see an attorney whom they sometimes work with, who calls her friend who does immigration work. The following week, the immigration attorney, who had found someone to translate, realizes there is possibly a human trafficking situation going on, but thinks Beti is still too traumatized to speak about it to the police. The attorney finally finds a pro bono therapist to talk with her about how important it is to speak to the police. As soon as Beti agrees, the attorney calls the local FBI who ask to speak to Beti directly. They meet with her five times over the course of 17 hours, but think her story doesn’t add up, and in any event, it doesn’t make a very good case for prosecution, they say. There is no evidence. The local US Attorney cannot expend her precious resources on prosecuting this case above all of the others on her docket. Because they decline to prosecute it, the FBI will not issue a “pre-certification” letter or a “law enforcement certification” for Beti’s attorney to send along with her T-visa application. The domestic violence shelter needs the bed that Beti has been occupying, and no one knows what to

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<sup>6</sup> Although the name and details have been changed, this scenario is based on a true account, as related by a Senior Litigation Counsel at the US Department of Justice in a training regularly given to federal law enforcement and prosecutors.

do with Beti.<sup>7</sup> Because she is deportable for entering the United States without documentation, she is placed in DHS custody and a removal order is issued.

The crucial difference between Alma and Beti's cases is the raid by ICE who were on hand to witness Alma's gruesome situation, but not Beti's. At the moment ICE raided Alma's house and rescued her from the employers who had enslaved her in indentured servitude, ICE law enforcement officers *believed* that Alma was a victim of human trafficking. Because they believed her, having rescued her and seen her indentured servitude with their own eyes, they also believed *in* her, and wanted to assist her with securing all of the assistance they could and which they thought she deserved. Because they believed her and believed in her, they strove to access the aspects of the law on her behalf which would be most beneficial to her.

They were able to ensure that that the US Attorney's office and eventually even the Department of Justice's own new Human Trafficking Prosecution Unit took note of and prosecuted the case. Because they believed her and believed in her, they worked closely with her, not only ensuring her emergency housing and services, but supplied her with the certification necessary to entitle her to longer term shelter, food, job and language training and ultimately the ability to apply for a T-visa. Because they believed her and believed in her, they actively supported her T-visa application. Because the law enforcement officers who rescued her believed that she was a victim of human trafficking who deserved a much better life than the one from which they had rescued her, Alma is a healthy and happy young woman today who wants to be a police officer when she grows up. This was a successful case of which law enforcement and the US government are justifiably proud.

But not every legitimate victim of human trafficking is or could possibly ever be rescued by law enforcement. In fact, very few are rescued. Estimates as to the number of persons trafficked into the United States each year have varied widely, but range between 17,500<sup>8</sup> and 50,000<sup>9</sup> new victims per year. As of 2008, there were seven (7) prosecutors in the Human Trafficking Prosecution Unit, ninety-three (93) US Attorneys,<sup>10</sup> and thousands of ICE Officers, whose primary responsibility is to look for, find and arrest undocumented immigrants. In the year 2007, as a point of reference, the DOJ's Human Trafficking Prosecution Unit, working with all of its US Attorneys and their investigators combined, initiated 183 investigations, charged 89 defendants in 32 cases, obtaining 103 convictions involving human trafficking.<sup>11</sup>

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<sup>7</sup> Based upon a composite of two cases which this author has worked on. Name and identifying information have been changed. At a minimum, victim protection would include not only a bed for the first nights after being free from traffickers, but also: transitional and long term housing; both emergency and long term medical and mental health care; legal services; clothing and food; language or literacy assistance; employment assistance and a modicum of witness protection assistance.

<sup>8</sup> DOJ REPORT, *supra* note 2, at 9. For a critique of the DOJ's methods and rationale for lowering the initial estimates, see Haynes, (*Not*) *Found*], *supra* note 5 at 5.

<sup>9</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2002 109 (2002), *available at* <http://www.state.gov/documents/organization/10815.pdf> [hereinafter 2002 TIP REPORT] at 2.

<sup>10</sup> US Attorney Mission Statement, *available at* <http://www.usdoj.gov/usao/index.html>

<sup>11</sup> Presentation by Counsel for Human Trafficking Prosecution Unit of DOJ.

Putting together the large number of victims estimated to enter the US each year with the respectable, yet nevertheless small number of prosecutors who have fewer still law enforcement officers working exclusively on human trafficking, it becomes easy to see that victims of human trafficking are not likely to be rescued. Nor, unfortunately, are they likely to have their particular case and story come to attention of a federal prosecutor. On this latter point, however, the system can be vastly improved in a number of ways. First, there is no reason that a victim of human trafficking who rescues him or herself should not be received and listened to with an open ear and open mind.<sup>12</sup> In fact, if law enforcement officers and the US government wish to improve their ability to assist victims of human trafficking and prosecute traffickers, then they need to considerably improve their willingness to receive potential victims of human trafficking and hear them out, even while ensuring them and the community at large that they will not be arrested or deported.

Second, in addition to failing to receive and hear potential victims who have not been rescued, some law enforcement officers seem to be making decisions not to support a potential victim because they believe that the victim's traffickers cannot be prosecuted, either because the case is too difficult, the evidence too slim, or the priority too low, given the prosecutor's other cases. But on this point, too, there is simply no justification for not certifying a potential victim, for not allowing them to be provided with a modicum of victim services, simply because resources may not be available to ultimately pursue the prosecution of the victim's traffickers.

The lack of capacity for federal investigations and prosecutions of traffickers is unnecessarily and unjustifiably creating a bottleneck, such that lower level federal attorneys and investigators are unwilling or unable to investigate cases, particularly those which may at first seem weak or which at first look like "simple" immigration violations rather than human trafficking. The right to assess the strength of a case for prosecution belongs solely to the prosecutor, however, in this instance, law enforcement officers are wrongly acting as if the ability or willingness of a prosecutor to go forward with investigating or prosecuting a case is a pre-condition to listening to and then certifying the victim for victim protection services. This is not the case.

This unwillingness or inability of law enforcement to investigate is resulting in a failure to hear or reach or follow up on cases of human trafficking which do not initiate in a raid and rescue. Even assuming the US government had the interest in and was able to massively increase in the number of prosecutors and law enforcement devoted exclusively to this horrific crime, such an increase would only scratch the surface of the

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<sup>12</sup> "I reported it [the trafficking] to the police but they didn't believe me; they wouldn't arrest them," [statement of human trafficking victim, later certified, about her unfavorable experience with police when she self-reported]. "My status is just waiting for me to get an interview with the government – even to talk to local police it hasn't happened yet. Right now agency [shelter staff] is trying to get me an appointment with local police and until that happens we don't know what to do with my case or legal status." The Urban Institute, *Comprehensive Services for Survivors of Human Trafficking: Findings From Clients in Three Communities*, June 2006, available at [http://www.urban.org/UploadedPDF/411507\\_human\\_trafficking.pdf](http://www.urban.org/UploadedPDF/411507_human_trafficking.pdf)

estimated numbers of trafficked persons in the United States.<sup>13</sup> Furthermore, the existing prosecutors and law enforcement are not fully utilizing the legal tools they already have, granted to them under the TVPA. Whether this is due to a lack of confidence or certainty about how to use the law, or because their perceptions of the “criminal actions” of the victim (being in the country illegally, using false documents, being illegally employed, being a sex worker – all crimes these same law enforcement officers are much more accustomed to prosecuting than to seeing as evidence of being a *victim* of human trafficking) are obscuring their willingness to apply the law, the fact remains that few of the victims the US government believes are in the US are rescued by law enforcement,<sup>14</sup> and fewer still of their traffickers are prosecuted.

Following, therefore, are two alternative solutions which the US government and federal and state law enforcement should begin to work on and support immediately if they hope to fix what is currently broken in regards to law enforcement procedures and protocols being to blame for the failure to properly protect victims of human trafficking.

### **1. Law Enforcement Must Disaggregate Prosecution from Victim Protection and Ensure the Latter Even Where Resources or Will are Insufficient to Ensure the Former**

Consider the case of Beti, above. Assume she is telling the truth and apply the law, as described above, to her situation. She was clearly (or at least very arguably) obtained through coercion (to satisfy a bribe) and retained by threat (“you don’t want to know what will happen to you”) and by threatened abuse of law (she was led to believe, correctly as it turned out, that she would be arrested or deported when her entry via fraudulent documents was discovered), for the purpose of providing labor and services (housework). There is certainly nothing in the law which says that she is inherently less of a victim of human trafficking because she was not rescued from her situation, but rather finally fled her horrible situation on her own agency. Rather, it is the perception of the first law enforcement officers who encountered her (and perhaps their feelings about

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<sup>13</sup> At 17,500 to 50,000 new victims per year there would be hundreds of thousands if not millions of victims. Even if half managed to escape their circumstances each year, over the course of one decade, there would still be 100,000 to 250,000 victims in the United States alone, according to the US government’s own statistics. It should be noted that the government estimates only include foreign victims of human trafficking, not US citizens. If citizens were included, the estimated numbers would be in the hundreds of thousands. See, e.g. Free the Slaves, interactive map identifying victims of human trafficking in all 50 states and in 91 US cities, available at

<http://www.freetheslaves.net/NETCOMMUNITY/Page.aspx?pid=375&srcid=348>

<sup>14</sup> Haynes, (Not) Found, supra note 5 at pp \_\_\_\_\_, describing survey of trafficking victim service providers, on file with author [hereinafter, Survey]. I conducted a simple, non-empirical survey of trafficking victim advocates and service providers. The survey was designed to find out more about how victims actually come to be identified as such and by whom, and whether they are rescued and by whom. Four individual and eight organizational advocates responded, discussing experiences with twenty-nine trafficking victims. Only six victims were found by law enforcement; of those six, five were then arrested for criminal or immigration violations and jailed or detained, two by the FBI and three by local police. The remaining twenty-three were not rescued or found by law enforcement, but rather managed to escape their situation on their own and made their way to social services providers, domestic violence shelters, or trafficking victim advocates.

her attorney who approached them, e.g. “she thinks everyone is a victim”) that resulted in Beti not receiving any immediate or long term victim protection assistance.

If it is the goal of the US government and of law enforcement to prosecute traffickers in human beings, how can they hope to accomplish that goal if Beti is forced to live on the streets? In this scenario, the directors of a domestic violence shelter stretched their mandate to accommodate Beti, housing her for a few days, even while other well-funded shelters and programs exist solely for the purpose of assisting victims of human trafficking. But the only way those federally funded shelters admit victims is if they receive a certification from law enforcement telling them that Beti, for instance, is being considered as a potential victim of human trafficking. Without that certification, there is no place for Beti and those like her to go. How many victims of human trafficking never even make their way to speak to police and tell them their story because they have no safe place to stay for even one night? How many opportunities to prosecute have been missed because a federal law enforcement officer does not have or take the time to sit with a traumatized victim and wait for her to tell her story?<sup>15</sup> How many law enforcement officers, actually trained in interviewing victims of trauma, fail to apply that training to people like Beti, because they already doubt her story from the first time they meet her? How many potential victims are not heard or protected because federal law enforcement decided early on that they cannot commit resources to prosecuting the case?<sup>16</sup> These questions should be viewed less as a critique and more as a call to arms by law enforcement to assist more victims by altering their perception of who a victim is or is not.

It is true that human trafficking cases are notoriously difficult to prosecute. Victims are reluctant to speak and often must overcome extreme trauma before they are able to act as witnesses. Victims of human trafficking do not arrive with evidence in hand, and evidence of trafficking, when it exists, is often located in more than one country and across many states, requiring extensive travel, funds, and international cooperation and communication among law enforcement officials. It is understandable, given these difficulties, that prosecutors and law enforcement must sometimes decide that a particular criminal case against a particular trafficker is not worth going forward with. However, this pragmatic and understandable decision should have *no bearing whatsoever* on the ability or willingness to offer protection to the potential *victim* of the human trafficking while law enforcement make that determination to prosecute or even thereafter.

Two different federal US government agencies estimate the number of persons trafficked into the United States each year to be between 17,500 and 50,000.<sup>17</sup> Yet, the

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<sup>15</sup> Alma, for instance, did not admit for several days that she was a victim of human trafficking, even after she was rescued by ICE, so powerful was her fear of the family which had exerted total control over her and her own family for so many of her formative years.

<sup>16</sup> The prosecutors in Alma’s case, for instance, flew to Egypt to interview her family and to speak with local authorities.

<sup>17</sup> Supra note 2, DOJ Report and DOS TIP Reports.

current total of victims receiving certification as of March 2007 was 1,175,<sup>18</sup> and the current total of victims receiving T-visas was 729.<sup>19</sup> At the very least, these low victim certification and T-visa grant figures, as compared to the total numbers of estimated victims entering, tend to suggest that more victims could be found by law enforcement or listened to with an open mind when they or their advocates approach law enforcement. Additionally, these statistics would suggest that there is little risk of being over-inclusive (accidentally certifying a potential victim so that she can receive a bed for the night), as the total number of T-visas granted in eight years has not even come close to the yearly cap of 5,000 specified in the TVPA.<sup>20</sup>

While DOJ states that “self-reporting is rare,”<sup>21</sup> which may be true in the grand scheme of things (certainly the 17,500 to 50,000 are not reporting each year), it is certainly not unheard of. In fact, the research carried out by this author would establish that while indeed far too rare, and in fact with little incentive to come forward given the prospect of arrest and deportation, self-reporting occurs with much greater frequency than do rescues by law enforcement.<sup>22</sup> The problem is that those who self-report are not believed, or they are arrested, or both.

The Department of Homeland Security’s Vermont Service Center (VSC) Unit tasked with adjudicating T visa applications admits that law enforcement do not always get the law right, and so certification from a law enforcement officer (that someone is cooperating with law enforcement to secure a prosecution or that the law enforcement officers believe her to be a victim of human trafficking) is not strictly required in order for a victim to apply for a T-visa (although the VSC sometimes fail to remember that fact).

At present, however, such a letter is necessary for the pre-designated agencies which receive federal funding to assist victims of human trafficking to provide a bed for a night or for several nights. It may seem like a small thing, but without a bed for a night, the legitimate human trafficking victim, like Beti, who manages somehow to escape her horrific situation, will never be assisted by law enforcement, will never be heard and her traffickers will never be prosecuted. She will simply disappear, most likely to run afoul of another trafficker looking to exploit someone just like her. There is no rationale or justification for this, and there is no excuse for this unnecessary limitation.

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<sup>18</sup> Presentation by Senior Counsel in DOJ Human Trafficking Unit [DOJ Human Trafficking Unit Presentation], on file with Author.

<sup>19</sup> *Id.*

<sup>20</sup> TVPA, *supra* note 1, Sec. 106 \_\_\_\_\_.

<sup>21</sup> *Supra* note 18, DOJ Human Trafficking Unit Presentation.

<sup>22</sup> See, Haynes, (Not) Found, *supra* note 5, discussing Survey of trafficking victim service providers, on file with author, *supra* note 14. In a sample of twenty-nine trafficking victims, only six victims were found (or “rescued”) by law enforcement. Of those six victims, five were then themselves arrested for criminal or immigration violations and jailed or detained, two by the FBI and three by local police. The remaining twenty-three victims (of 29, or 78%) managed to escape their trafficking situation by themselves and made their way to social services providers, domestic violence shelters, or trafficking victim advocates. So, while it may be indeed rare for victims to self-report, they self-report far more often than they are rescued. Yet a significant number of those who self-report are then arrested or not believed by law enforcement when they tell their trafficking story, or both.



## **2. Need for State Laws With Teeth**

If victim protection is stymied by lack of resources or interest at the federal level, then one obvious solution is to create state anti-trafficking laws, which is what many states are doing. Frustrated by waiting for federal law enforcement to act, state legislators, pushed by state law enforcement, state victim protection advocates and state level human trafficking task forces, are drafting, and on occasion passing, state laws. The most important impact of these laws would be to allow potential victims of human trafficking to be heard and cared for, even if federal law enforcement is not able or not willing to certify them.

Currently, 39 states have anti-trafficking criminal provisions, meaning they criminalize trafficking in human beings.<sup>23</sup> Eighteen states have included victim protection provisions in their state anti-trafficking legislation.<sup>24</sup> The potential impact of these laws is enormous. If, for instance, Beti could not convince the FBI to listen to or believe or take the time to investigate her story and initiate a prosecution, Beti could still attempt to speak with a local victim advocate in her local police department, who could certify that she is willing to cooperate with law enforcement officials, such that she would be able to receive a bed for the night. Furthermore, local law enforcement might have more resources to devote to listening to her story and investigating further. In any case, Beti would then be in a position to recover from her trauma and continue to work with her attorney to apply for a T-visa and determine how to proceed.

The federal government clearly recognizes the limitations of dealing with human trafficking from the top down, because in 2005, in the Re-Authorization of the TVPA that year, Congress authorized \$25 million per year in grants for state and local law enforcement to prosecute traffickers, and educate users of trafficked persons for commercial sex acts (“johns”).<sup>25</sup> For the state laws to be effective and useful, however, local and state law enforcement, just like federal law enforcement and the federal agencies tasked with carrying out the TVPA, must be encouraged to use the laws, and to open their eyes and their minds in order to actually recognize and protect victims with whom they cross paths; whether they are rescued or not.

### **2. The Victim Protection Funding Mechanism Limits Shelter Access and Stymies Victim Protection**

Funding for victim protection, according to the TVPA, starts with the victim’s “willingness to cooperate with law enforcement.” Nevertheless, more often victim assistance starts instead with law enforcement’s paper recognition of that willingness. Or

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<sup>23</sup> Polaris Project, US Policy Alert on Human Trafficking, Summary of U.S. Policy Activity, June 2008.

<sup>24</sup> Id. The states are: California (pending), Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Massachusetts (pending), Michigan (pending), Minnesota, New Jersey, New Mexico, New York, Ohio (pending), Oklahoma, Oregon, Texas, Washington.

<sup>25</sup> Trafficking Victim Protection Reauthorization Act [TVPRA] of 2005 \_\_\_\_\_.

even more inappropriately, with a law enforcement officer's decision to believe the victim and pursue an investigation.

Provision of assistance to victims, while included in the TVPA, is a complex and multi-tiered process which exhausts already stressed and traumatized victims. Initially, all victim protection funding was handled by grants to NGO's from the US Department of Health and Human Services' Office of Refugee Resettlement. For the funding victim protection to kick in, the victim had to be certified by law enforcement, and she would then become eligible for services. A gap was soon identified in that those awaiting certification, which can take a year or longer, were ineligible for victim services. DOJ's Office of Victims of Crime funding was created to fill a gap for those waiting for certification, providing funds to some NGO's to give beds to those in the "pre-certification" phase. Unfortunately, this did nothing to solve the problem for someone like Beti.

A person is considered eligible for pre-certification when "they have been identified by federal law enforcement as having been a victim of a severe form of human trafficking."<sup>26</sup> In other words, you are a victim only when law enforcement identify you as such. The NGO's providing services are only reimbursed by either federal grant program if they are providing services to someone who has been either pre-certified or certified as a victim of human trafficking. All of which is to say that the creation of the newer DOJ fund did nothing to help people like Beti who have not been rescued, who have not been able to get law enforcement to listen to or believe them yet (or ever), but who may very well still be victims of human trafficking.

Though it is laudable that the Congress provided funding toward victim protection services, it was an error to limit funding the NGO's which provide shelter to those in either the pre-certification or certification phase. The reason is that both pre-certification and certification come from government officials, a decision which yields the result of excluding those who have not been rescued, who have not yet come to the attention of those officials, or whom those officials do not believe.

Additionally, the funding is doled out with a multitude of conditions and strings attached, most having to do with the likelihood that someone predetermined—by DHS through ICE or by DOJ through FBI law enforcement—to be a victim will then be cared for while information is gathered which might be useful towards prosecution.<sup>27</sup> The DOJ narrowly defines the type of victim on whom this funding may be used (one certified by law enforcement), and the ripple effects of this limitation in funding are far-reaching. There are few, if any, NGOs able to assist victims outside of the parameters of DOJ funding; they cannot hire advocates and service providers because there are no funds to assist them. NGOs lack funding independent of these federal grants for work that is costly: providing shelter and legal, medical, language, and job training services to victims. The result is that only a very narrow group of trafficking victims is reached: those identified and referred by the federal government. The beds, medical care, and legal advocacy available are reserved for those the DOJ has already decided are victims, and only these 'pre-certified' victims are, as a practical matter, then in a position to apply to DHS for immigration related victim benefits.

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<sup>26</sup> OVC Services for Trafficking Victims Discretionary Grant Application Kit 2004, available at <http://www.ojp.usdoj.gov/ovc/fund/pdfxt/2004trafficking.pdf>

<sup>27</sup> Another condition is that the NGO in receipt of funds not work with prostitutes. For more on conditions attached to funding, See Haynes, (Not) Found, supra note 5 at \_\_\_\_\_ and Janie Chuang, Global Sheriff \_\_\_\_\_ on the "Gag Rule" restricting funding to prostitution abolitionists.

At present the US Department of Health and Human Services governs the majority of federal funding to shelters prepared to offer assistance to victims of human trafficking. The rationale behind this funding structure was that this division within the federal government already controlled the funding for refugee resettlement services. The belief was that the needs of both refugees and victims of human trafficking would be similar (housing, medical and psychological assistance, particularly handling victims of trauma, language and job training to name a few).<sup>28</sup> The Department of Justice also initiated a victim services grant program, geared towards securing witness testimony for prosecution of traffickers, discussed above.<sup>29</sup>

The present funding structure might be more reasonable if the federal agencies were especially skilled at or well-situated to recognize victims of trafficking, even if it could not increase the number of raids that are carried out for the purpose of finding victims of human trafficking. However, they are not, in spite of the fact that the DOJ considers itself to be taking a “victim-centered approach” to its prosecutions,<sup>30</sup> “reflect[ing] the understanding that the mission of government is to remove victims from the abusive setting, place them into safe programs of restorative care, and hold the perpetrators accountable.”<sup>31</sup> Even when the federal government agencies conduct raids, they fail to look for trafficking victims. Despite the fact that ICE now regularly conducts workplace raids, for instance, these raids result only in the arrest and deportation of thousands of “illegal immigrants,” none of whom are screened or questioned about whether they might also be victims of human trafficking and deserving of assistance.<sup>32</sup>

Even with raids conducted by several federal agencies, the vast majority of human trafficking victims are not found by law enforcement.<sup>33</sup> This narrow DOJ policy of providing funding to give services only to law enforcement–certified victims, and the HHS policy of funding agencies who work with resettled refugees, has led to a travesty not anticipated by or supportable under the TVPA -- no one is funded to or encouraged to work with non-certified victims, even though they may well be “real” victims of human trafficking who have not yet been heard or believed by law enforcement.

In other words, unless a victim is found by ICE or the FBI, and is referred to an NGO which receives funding from DOJ (or HHS), that victim is unlikely ever to receive legal or social services assistance. If not rescued, that person is unlikely ever to surface. We will simply never know about her. If it is in the national interest to protect victims of trafficking, the DOJ cannot pretend that the only victims are those who happen to be found by federal law enforcement officers.

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<sup>28</sup> In fact, the Office of Refugee Resettlement within HHS conducts trainings for agencies already in receipt of refugee assistance funds to deal with victims of human trafficking. See Public Statement of HHS Acting Deputy Secretary, March 2007, available at

<http://www.hhs.gov/deputysecretary/depsecspeeches/070419.html>

<sup>29</sup> The DOJ grant is administered through its Office for Victims of Crime, see

<http://www.ojp.usdoj.gov/ovc/help/tip.htm>

<sup>30</sup> DOJ REPORT, *supra* note 6, at 12.

<sup>31</sup> *Id.*

<sup>32</sup> See Haynes, *Exploitation Nation: The Thin and Grey Legal Lines between Trafficked Persons and Abused Migrant Laborers*, (forthcoming) *Notre Dame Journal of Law, Ethics and Public Policy* at pp. 28-40.

<sup>33</sup> See Survey, *supra* note 14.

### **3. The Conflation of Human Trafficking with Other Law Enforcement Agendas Stymies Victim Protection**

The title of the Trafficking Victims Protection Act suggests that its primary purpose is to protect victims of human trafficking. The more accurate ranking of priorities, however, is revealed in section 102 of the Act, describing Congress's purposes: (1) combating trafficking, (2) ensuring just and effective punishment of traffickers, and (3) protecting victims.<sup>34</sup> While the appeal in passing such an Act may have arisen from the benevolent desire to protect victims from harm, the emphasis of the Act is squarely on prosecuting the crime, and no less than four executive branch agencies have been tasked with fulfilling that mission.

Because so many agencies are tasked with aspects of the TVPA, and because the primary focus of the law has been the law enforcement and prosecution aspect, the original purpose of protecting victims of human trafficking has become inextricably conflated with competing political objectives; primarily immigration enforcement, abolition of prostitution, anti-terrorism, and workplace enforcement of unauthorized labor. The competing objectives make it confusing for law enforcement officers to recognize human trafficking victims, who may also be immigration violators, prostitutes or people engaged in unlawful employment. Whereas the facts of entering the country fraudulently or without authorization, working without authorization or engaging in prostitution should be seen as corroborative proof of trafficking, if coupled with force, fraud or coercion, the enforcement officers fail to look beyond the crimes to see the trafficking. Thus, the relatively comprehensive piece of legislation that Congress provided in the form of the TVPA is not fully used, nor is it applied in the spirit its drafters intended.

Trafficking victims found in the United States are still too often treated like criminals by those charged with protecting them. In large part, this is because the United States also prioritizes border control, and the same parties charged with controlling immigration to the United States are tasked with identifying victims of human trafficking, who are very often, although not always, not properly documented. Victims of human trafficking are all too often charged for immigration-related offenses, deported at the borders for attempting to enter with documents traffickers have foisted upon them, arrested and detained by the Department of Homeland Security (DHS), and prosecuted by Department of Justice (DOJ) attorneys. DHS inspection officers fail to observe that they are questioning victims of human trafficking, even when clear signals are given by victims in fear of their lives.<sup>35</sup> Victims are held in detention for months and sometimes years by the DHS at considerable taxpayer expense, and judges are unclear why trafficking is a human rights offense tantamount to slavery.<sup>36</sup> In short, government personnel charged with protecting victims of human trafficking and prosecuting their traffickers, particularly outside of task forces headquartered in Washington, D.C., have little or no understanding of the obligations the nation undertook in passing the TVPA and, in consequence, U.S. personnel are working contrary to the purposes of the Act. A large part of the problem is that those persons most likely to encounter a trafficking victim, the same persons charged with protecting her, are also charged with deporting undocumented persons, arresting prostitutes, and detaining and charging those working without authorization.

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<sup>34</sup> TVPA, 22 U.S.C. § 7101(a).

<sup>35</sup> See, e.g. transcripts of "Ahn's" first arrival in the United States as a victim of human trafficking, Haynes, (Not) Found, supra note 5 at \_\_\_\_\_.

<sup>36</sup> See description of Immigration Judge's response, *Id.* at \_\_\_\_\_.

Prosecutors and law enforcement must be encouraged to either entertain the notion that one can simultaneously be a victim of human trafficking and an offender (an illegal immigrant; a prostitute; a person working without authorization). Better yet, prosecutors can and should exercise their prosecutorial discretion and elect not to prosecute an individual for, e.g., “misuse of a passport,”<sup>37</sup> particularly when the prosecutor knows that the fraudulent passport was given to the victim by her traffickers. Traffickers know how to manipulate and control their victims – through legal intimidation, taking travel documents, forcing them to break the law and threatening to report their activity, and so forth. At present, prosecutors and law enforcement are providing the traffickers’ with even more power and control over their victims by doing precisely what the traffickers threaten they will do – arrest and deport them.

Full enactment of the TVPA will require a sea-change in the message that goes out to all government employees in agencies charged with carrying out the TVPA, as well as law enforcement officers everywhere. If any of those three agencies transfer power to local agencies and law enforcement, then the same message needs to go out to personnel in the field. The message needs to be one of empowerment, encouragement, and commendation for those who recognize and assist victims of human trafficking. As long as the message (be it articulated, veiled, or unspoken) is one of fear -- of misidentification; of opening the floodgates; of being the one who let in the terrorist, the prostitute, the smuggled person, or the illegal migrant—the TVPA will never be effectively implemented.

#### **4. The Fear of Opening the Floodgates to Illegal Immigration Stymies Victim Protection**

Much of the lack of implementation and the distortion of the TVPA could be ascribed to the unspoken but palpably omnipresent fear of opening the floodgates to the expected hoards of migrants. After all, as one journalist queried, “if the law allows a victim to become a citizen, won’t everyone try to become a victim?”<sup>38</sup> The answer is no; they are very unlikely to do so. Not only will few to no people willingly put themselves into the trafficking flow or present themselves to be violated in hopes of securing immigration status somewhere down the road, but even if that was their goal, it is exceptionally unlikely that they would be successful.<sup>39</sup> After all, more than five years after the TVPA had entered into force in the United States, fewer than 491 T-visas had been granted in total,<sup>40</sup> even while the US government projects that 17,500 to 50,000 new victims of trafficking enter the United States each year.<sup>41</sup>

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<sup>37</sup> As was the case with “Ahn,” see Haynes, (Not) Found, Id. at \_\_\_\_\_.

<sup>38</sup> Journalist to author in telephone interview about nature of T-visas in 2005.

<sup>39</sup> Neither has it been established that most people in the world would opt to live in the United States if given the opportunity.

<sup>40</sup> ALEXANDRA WEBBER AND DAVID SHIRK, THE AMERICAN IMMIGRATION LAW FOUNDATION, HIDDEN VICTIMS: EVALUATING PROTECTIONS FOR UNDOCUMENTED VICTIMS OF HUMAN TRAFFICKING 7 (2005), available at [http://www.aifl.org/ipc/infocus/2005\\_hiddenvictims.pdf](http://www.aifl.org/ipc/infocus/2005_hiddenvictims.pdf).

<sup>41</sup> Compare 2002 TIP REPORT, *supra* note 3, at 1, and 2003 TIP REPORT, *supra* note 10, at 7, and 2004 TIP REPORT, *supra* note 83, at 6, and 2005 TIP REPORT, *supra* note 10, at 6, with DOJ REPORT, *supra* note 6, at 9.

Congress already had a fear of floodgates in mind when they capped the number of T-visas that could be granted each year at 5,000.<sup>42</sup> From the statistics issued for 2005, it appears that less than 600 applications for T-visas were even received.<sup>43</sup> To honor the intent of Congress and the Executive Branch in passing the TVPA, we should be asking how to reach more potential victims in order to secure their protection, health and safety, and to let them know that the T-visa option even exists, rather than operate from concern about floodgates opening or fearing that we might be admitting too many people.

Furthermore, declining to look carefully in order to properly identify and protect victims of trafficking for fear of being over-inclusive and mistakenly offering benefits to someone who is really “just” a smuggled person or an illegal migrant is the wrong approach. Researchers, more comfortable with looking at the trafficking issue as one part of a larger whole that involves migration and exploitation of labor, attest that “[v]iolence, confinement, coercion, deception and exploitation can and do occur within both regular and irregular systems of migration and employment . . . . [A]buses can vary in severity and thereby generate a continuum of experiences rather than a simple either/or dichotomy . . . .”<sup>44</sup>

Shying away from recognizing a victim of human trafficking for fear of granting a benefit to someone who was not abused or exploited *enough*, or insisting on haggling over the often quite fine distinctions between smuggling and trafficking, only does a disservice to the population in need—that is, people exploited during the migration process.

People migrate. Some willingly, some forced through external circumstances, some because they have no choice (economically or because their home lives are untenable). Any of them could ultimately fall prey to traffickers who understand how to exploit each of those sets of circumstances and vulnerabilities. If the goal of the US is really to eradicate trafficking, in part by protecting victims and prosecuting traffickers, then denying immediate and midterm protection to a potential victim because we fear that down the line she might not be able to prove that she was a victim of a severe form of human trafficking and eligible for a T-visa is the wrong approach.

## Conclusion

With the next Reauthorization of the TVPA currently being considered in Congress,<sup>45</sup> the US government has another opportunity to get it right. At present, however, they are not taking the opportunity to do so. While making some positive suggestions, such as proposing that persons under 18 be given immediate assistance without the prerequisite of law enforcement cooperation, the draft bill loses its focus and like the others before it, distorts the goal of protecting victim by focusing on a tangential objective of protecting US business. For instance, while acknowledging for the first time that US businesses might be engaged in labor exploitation, the bill merely requires that US businesses which use “foreign labor contractors” to procure labor, only do so with registered Department of Labor foreign labor contractors. The Department of Labor has a long history of registering labor contractors, foreign and domestic, who use tactics of punishment, blacklisting and threats to keep non-citizen laborers docile and in check.<sup>46</sup>

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<sup>42</sup> TVPA, 22 U.S.C. § 7105(e)(2)(B)(2).

<sup>43</sup> 2005 TIP REPORT, *supra* note 10, at 243.

<sup>44</sup> Anderson & O’Connell Davidson, *supra* note 38, at 9.

<sup>45</sup> H.R. 3887 William Willberforce Trafficking Victim Protection Act 2007 Reauthorization

<sup>46</sup> See Haynes, Exploitation Nation, *supra* note 33 for a discussion of the problems with this draft bill.

The US government would be best served by strongly encouraging its federal law enforcement officers to use the law, rather than parsimoniously withhold certification or investigations for fear of being over inclusive. The only way in which we will start to find and assist more victims of human trafficking is if both federal and state law enforcement officials, as well as DHS, DOJ and DOL employees know what to look for, have unclouded judgment when looking and are not afraid, but are rather encouraged to assist any and all potential victims of human trafficking. If US government employees and state law enforcement remain fearful of certifying for victim assistance a trafficking victim who might also be a criminal or an illegal migrant, we will never begin to find and assist the many victims of human trafficking present in the United States.