ARTICLES

(NOT) FOUND CHAINED TO A BED IN A BROTHEL: CONCEPTUAL, LEGAL, AND PROCEDURAL FAILURES TO FULFILL THE PROMISE OF THE TRAFFICKING VICTIMS PROTECTION ACT

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Ahn’s Story,¹ Part I

Ahn was sixteen-years-old the first time her mother sent her out of her country in an attempt to save her from her father’s continual physical and emotional abuse. Ahn’s mother made contact with people who promised Ahn a better life, but who then sent her on a frightening journey through eight countries, threatening along the way to harm her or her mother if she did not follow their directives. From day to day, they never let Ahn know where she was going next or what would happen when she got there. They took her passport, supplying her with a new and false one at each country. They let her know, and then never let her forget, that she already owed them upwards of $70,000 for her ‘transportation’ and that she would be paying that debt back to them through labor—whatever sort they demanded she do. At each new country, they made sure to let her know that she was under their control even if her handlers changed. They made clear to her that they operated together, and that as a pretty young girl, they would force her to “do immoral things” if she did not behave herself.

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¹ “Ahn’s Story” is a composite of trafficking cases. Identifying details have been changed to protect those involved.
After weeks of travel, she arrived in the United States, where she was interviewed briefly at the airport by an immigration inspector and immediately deported. The inspector never recognized her attempts to tell him that she was being trafficked.

Deported back to her country, she was jailed by her government for months, without trial, for the crime of departing without permission. She was finally released back into the care of her abusive father, who informed her that he had already sold her to a "businessman" to be his third concurrent wife. She fled her father's home, but her mother soon sent word that the businessman was coming to claim his debt of free sex and domestic labor from the "wife" he had purchased. Ahn went to the police and asked for their help, but they only laughed and told her they would not interfere with another man's property.

Then her mother informed her that the people who had transported her the first time had come to her house, kicking in the front door and demanding that the family pay them the $70,000 they claimed she owed from the first failed trafficking scheme, or they would start killing members of their family.

Fearing she would be forced to have sex and bear children with the man to whom her father had sold her, and believing that she must go with the traffickers to protect her mother from the threats, she left again with her traffickers. The only way she could possibly pay the debt was to go work for them. She traveled through many countries for many weeks, this time with more frequent and more threatening comments from her traffickers regarding what foul things they would do to her if she did not cooperate. She knew that they might force her into sex work and they had already told her she would be forced into debt peonage when she reached her destination, but she also believed she had no choice but to go; her own safety and her mother's safety were at stake.

INTRODUCTION

In the year 2000, Congress proudly signed into law the Trafficking Victims Protection Act (TVPA),\(^2\) with two goals in mind—protecting victims of human trafficking and prosecuting their traffickers. Yet years after the passage of the TVPA, trafficking victims found in the United States are still too often treated like criminals by those charged with protecting them. Victims are deported at the borders for attempting to enter with documents traffickers have foisted upon them, detained by the Department of Homeland Security (DHS) for immigration-related offenses, and prosecuted by Department of Justice (DOJ) attorneys. DHS Inspection Officers fail to observe when they are questioning victims of human trafficking, even when clear

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signals are given by victims in fear of their lives. 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. 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, as a consequence, U.S. personnel are working contrary to the
purposes of the Act.

Each year, the Department of State (DOS) ranks the response and implementa-
tion of every country as to performance in combating human traffick-
ing. In 2002 for example, when Serbia was undergoing considerable transi-
tion within its political, economic, and legal systems, it was considered
unfortunate but understandable that Serbian border police regularly denied
entry to or deported women who were likely victims of traffickers. Similarly, it was deemed undesirable but forgivable that a Serbian judge would
criminally punish a victim of human trafficking for committing an immigra-
tion or illegal labor offense. After all, the transitioning socialist system and
the recent war had left Serbia with a top-heavy government structure, in
which resources and attention were focused upon those highest up in the
governmental structure, with few resources devoted to training of persons in
the field. In contrast, when an airport inspector in the United States deports a
victim of trafficking—years after the passage of the TVPA—even after she
indicates that she is destined at the very least for a life of indentured servitude, it is not forgivable. Neither is it as understandable when an
immigration judge (IJ), an employee of the DOJ, questions whether the sale
of a girl by her own father to another man is not a simple “private”
contractual matter, best addressed outside of the immigration court.

In February 2006, the DOJ released its Report on Activities to Combat
Human Trafficking, Fiscal Years 2001-2005, in which it reviews the many achievements of the DOJ since the TVPA’s passage and two reauthorizations. The United States and the DOJ do have much to be proud of in continuing to identify gap-filling measures to perfect the nation’s ability to prosecute traffickers and protect victims, yet there remains ample room for improvement. A careful reading of the DOJ Report combined with case studies taken from those working directly with victims of human trafficking, for example, will reveal existing interagency tensions and a lack either of awareness or concern by persons tasked to carry out the implementation of the Act.

Six years after the passage of the TVPA, practical and procedural problems, as well as more abstract political and theoretical concerns, continue to impede the nation’s ability to protect victims of human trafficking. The two primary problems thwarting Congress’ intent to protect victims and prosecute their traffickers are: (1) lawmakers and law enforcement officials are ignoring or obscuring the root causes of trafficking, in favor of conflating trafficking with other issues of political interest; and (2) by misreading or misapplying some provisions and failing to apply others, agencies are not properly implementing the statute. Despite tremendous progress, the implementation of the TVPA remains extraordinarily top-heavy, resulting in continued lack of understanding in the field on the part of persons most likely to encounter a trafficking victim or trafficker. Conflation of trafficking with other political agendas has either confused those who are in the best position to “certify” a trafficking victim or has made them fearful of erroneously certifying someone who might not really be a victim of trafficking—someone who might be a terrorist, a “simple” illegal migrant, a prostitute, or another criminal—assuming (incorrectly) that victims cannot also have engaged in criminal behavior. Perpetual insistence on highlighting the perceived links between trafficking and terrorism, trafficking and prostitution, and trafficking and illegal migration continues to distort and dilute the work of combating trafficking itself. Particularly troubling are those issues that were identified many years ago and remain unresolved, due to this conflation of political agendas with anti-trafficking initiatives.

By way of introduction to the problems faced by trafficking victims and their advocates, and to illustrate the points discussed within the article, Ahn’s story is presented throughout the text. Ahn’s story touches on the multitude of problems experienced by a victim attempting to be recognized as one; it makes clear that the people tasked with recognizing and assisting victims and

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7. “Certification” involves the process whereby a law enforcement official can provide a document allowing a potential victim to be provided with temporary benefits such as shelter, lodging, and medical assistance, while the government decides whether to use the information the victim is providing against her traffickers. In essence, the official certifies that the victim is entitled to ask that she be considered a victim. See TVPA, 22 U.S.C. § 7105(b)(1)(E).
prosecuting traffickers exhibit a considerable lack of understanding about the nature of trafficking and fail to achieve the purpose of the TVPA. Part I of this article provides an overview of the approach the United States has taken to combating human trafficking and details some of the meta-problems that continue to undermine the full effectiveness of the Act. Part II discusses the ways in which the root causes of trafficking have been obscured, in service to a focus on sex and victim-hood. Part III reviews misapplications of the law both by those tasked to interpret it, and by politicians who have tacked their own political agendas onto anti-trafficking initiatives, leading the nation away from a hardnosed and honest look at the problems of causation in trafficking. Part IV discusses, in part through Ahn’s story, procedural and structural problems that arise from this distorted view of trafficking, which result in non-implementation of the TVPA. Finally, Part V presents an alternate view of trafficking, which involves reframing the trafficking issue through the lens of migration. It would require U.S. government personnel to approach trafficking with the understanding that being victimized by traffickers and yet still demonstrating personal will and agency are not only not mutually exclusive, but tantamount to surviving the crime. The Part then concludes with some recommendations for moving forward, to aid those working to protect victims and prosecute traffickers to fully and properly implement the TVPA.

I. THE U.S. APPROACH TO ADDRESSING HUMAN TRAFFICKING

The title of the Trafficking Victims Protection Act suggests that its primary purpose is to protect victims of human trafficking. The more accurate rank 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.8 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.

A. The Trouble with Statistics

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; and yet, it is important to proffer some statistical information in order to put the issue into perspective and demonstrate the perceived magnitude of the problem.

1. Worldwide

Although there is little empirical data to substantiate the estimates, statistics as to the number of persons trafficked ranged, until 2005, anywhere from 700,000 to 4 million new victims worldwide per year. These statistics cannot be confirmed, but are based on estimates and often made by people who may have their own agenda in offering the figures. In 2005, the DOS offered a new estimate of 600,000 to 800,000 people trafficked across international borders annually, adding that 80 percent of the total number of victims is composed of women and 50 percent is composed of minors. The International Labor Organization estimated that, at any given time, there are 12.3 million people in forms of involuntary servitude.

Likewise, it is presumed that trafficking in human beings is an extremely lucrative business, earning traffickers 5 to 10 billion dollars per year. Traffickers are attracted to trafficking in human beings, as opposed to arms or drugs, in part because people can be sold and resold, and because the victims typically are forced to pay back their purchasers for the costs incurred in their transport and purchase, in addition to whatever they earn within the context of the labor they are ultimately forced or coerced to perform. Again, statistical data is weak, but a study commissioned in the mid-1990s estimated that traffickers earn about $250,000 for each woman trafficked for sex slavery. In Austria, for instance, in the year 1999 alone, an estimated 40,000 persons trafficked in earned traffickers $100 million.

What is known is that trafficked persons originate where the conditions are ripe for exploitation: where there is structural economic and social pressure on the victims to migrate; where there are few educational or employment opportunities; where there is an unstable family structure (perhaps also due in part to economic, political, or social structure); and where gender, racial, or caste stigma or marginalization exists. Traffickers are getting smarter and
know how to target both the most vulnerable and least visible people. They understand how to exploit the desire that these people, their future victims, have to improve their lives, and they know how to make their own fingerprints in the process virtually undetectable.

2. Within the United States

In its 2002 Report, the DOS estimated that as many as 50,000 new victims are trafficked into the United States each year.\(^{15}\) By the following year, the estimate had been lowered to 18,000 to 20,000 annually.\(^{16}\) In 2005, the DOJ lowered those estimates yet again, down to a maximum of 17,500 per year.\(^{17}\) None of the government reports specifies who has made the estimates, let alone divulged the methodology behind the statistics they offer.

It also bears noting that the reports do not speculate as to whether any of those persons trafficked here annually somehow find their way home or out of their exploitative situation by themselves. Assuming they do not, then there are potentially hundreds of thousands of persons in the United States who were trafficked here, at the rate of 17,000 to 50,000 entering per year, who have not managed to find their way out of their exploitative situations. The DOJ does note “the incongruity between some estimates [of victims trafficked into the United States] and the fewer than 1,000 victims who have been assisted through the efforts of federal, state, and local law enforcement since 2001, when services for trafficking victims were first made available under the TVPA.”\(^{18}\) The figure of 1,000 persons assisted appears to combine (1) those persons assisted through Health and Human Services certifications (authorizations from law enforcement officials entitling potential victims to temporary assistance such as shelter and medical care during their time of “cooperation”), the total number of which were 611 since 2003;\(^{19}\) (2) those victims assisted through the DOJ Office for Victims of Crime, which served 741 persons since inception in 2003;\(^ {20}\) and (3) DHS grants of T-visa applications (136 approved in 2004) to arrive at the figure of about 1,000 persons “assisted” during a five year period.\(^{21}\)

However, the DOJ Report attempts no explanation for the first rather dramatic reduction in the total estimated number of victims entering the United States;\(^ {22}\) nor for the more gradual annual reductions since, to arrive at the current DOJ estimate of 17,500. Nor did the DOJ explain its methodol-
ology, whether new and more reliable statistics were gathered or whether, on the contrary, the government might have simply lowered the estimated number of victims entering each year in order to discount the fact that it only assisted 1,000 victims. The most likely explanation is that the government receives few applications for help, and that of those few applications, fewer still are granted. In 2004, DHS received only 520 applications for T-visas and approved only 136 of those applications, while it denied 292 (92 were then still pending).23 Given the disparity in those figures, between the 17,500 to 50,000 victims estimated to enter each year, and the 500 applications made (half of which were denied) for T-visas, a logical question becomes—why are we reaching so few of the victims of human trafficking estimated to be entering the United States each year, and how can we improve that outreach? The DOJ does not directly consider this question either.

Instead, the DOJ offers four preferred explanations for the disparity in numbers, none of which acknowledges that there might really be up to 50,000 new victims per year who we do not find or assist, nor that there might be systemic problems which seriously limit the ability or willingness of U.S. government officials to label a victim a “victim” and offer her benefits, accordingly. First, the number of real victims is actually overestimated because many of the “victims” are actually not victims of trafficking, but merely smuggled persons or “illegal aliens . . . with the related crime of migrant prostitution.”24 Second, identifying and assisting victims is hard—although the DOJ Report then refers to the private sphere aspect of trafficking, which should have prompted them to consider that the number of victims could be even higher given that it occurs out of sight. Third, when the DOJ arrests a trafficker, the dismantling of that ring indirectly benefits many other victims who are not directly assisted or accounted for. Last, local and state officials might be in a better position to do the counting than the federal government.

The first justification is an attempt at political obfuscation, the second is true but still must be dealt with, and the third is positive but irrelevant if the goal is to assist victims directly. The final point makes sense, and it is in this direction that the DOJ should and apparently intends to head. In providing rationalizations for prior statistics and failing to address discrepancies, the DOJ missed the opportunity to understand more about whether the dual purposes of the statute—to prosecute crimes and protect victims—are being met or undermined. The rationalizations do, however, set the stage for a discussion of why it really is hard to catch and prosecute traffickers and prevent victims from being exploited in the first place. Only through engaging in honest discussion of the issue, free of politics and rationalizations, can we hope to address it squarely.

23. 2005 TIP REPORT, supra note 9, at 243.
24. DOJ REPORT, supra note 6, at 9.
B. The Trouble with Multi-Agency Responsibilities

The TVPA breaks down the activities Congress believes are important in carrying out the objectives behind its drafting and implementation, and it divides responsibility among three primary federal agencies: the DOJ, DHS, and DOS; the Department of Health and Human Services also has a role to play. The DOJ, as primary prosecutorial agency, is charged with prosecuting traffickers; it assigns a large budget to carrying out that task, and in the interest of securing a safe and healthy witness for the prosecution, it reserves funding for victim assistance measures pertaining to witness protection. The DOJ also makes funds available for shelters and nongovernmental organizations (NGOs) specializing in victim assistance and witness protection. The DHS, through its Citizenship and Immigration Services (USCIS) division, is separately charged with adjudicating applications for T-visas, the visas for which victims of severe forms of trafficking may be eligible if they cooperate with law enforcement officials. The DHS handles the victim immigration benefits side, again with an emphasis on protecting a victim who has assisted law enforcement in order to support the prosecution of traffickers.

Finally, the DOS ranks every nation in their efforts to eradicate human trafficking. Through its foreign affairs mandate, DOS is responsible for improving anti-trafficking initiatives elsewhere in order to minimize the impact it has on the United States. Those countries deemed to have made the least attempt to combat trafficking in a given year are placed in the lowest tier and can have their monetary foreign aid cut. Three separate agencies with three separate mandates, each interpreting the Congressionally imposed anti-trafficking mandate through the filters of their own internal agency goals and objectives, has yielded a fractured approach to combating human trafficking that requires attention and modification if victims are to be assisted and the expressed goals of the statute are to be realized.

C. The Trouble with the Law Enforcement Perspective

The United States approaches its efforts to combat trafficking in human beings from a law enforcement perspective, with the justification for victim assistance emerging from the willingness and ability of victims to cooperate with law enforcement. It may be natural for governments to approach human trafficking from a law enforcement perspective. After all, governments are sovereign entities with strong interest in maintaining sovereign borders. Nevertheless, pretending to have a primary objective of victim protection (to wit, the title: Trafficking Victims Protection Act), but tying that protection to

25. TVPA, 22 U.S.C. § 7105(e) (2000). The TVPA, as passed in 2000, made reference only to the DOJ and DOS, as the Immigration and Nationality Service was at that time a division within the DOJ. In 2002, DHS took over those functions formerly carried out by the INS.
the will, ability, and desire of a law enforcement official to prosecute a crime, renders the TVPA a law enforcement-oriented piece of legislation and the title of the Act a misnomer.

Although the government's approach is unfortunate, this article does not go into depth arguing that linking victim assistance to a prosecutorial outcome is, in fact, not victim-centered, nor will it reach into all of the problems inherent in addressing human trafficking from a law enforcement perspective. Suffice it to say that protecting the victim can also increase the likelihood of a successful prosecution, but that providing "conditioned" victim protection is not the sort of real victim protection that victims need. Rather, this article will focus on two key problems which arise from approaching human trafficking as a combat mission. First, there are consequences to having such an emphasis on prosecution that not only works to the detriment of victims but also undermines the intent of the TVPA. One example is apparent in the ramifications of the DOJ as the source of funds for victim support services. Another can be seen by acknowledging the inefficiency of the prosecution approach; the number of traffickers prosecuted remains relatively low and, if quantity is an indicator of effectiveness, that result is not optimal. Second, government officials appear to subscribe to several myths and imperfect syllogistic reasoning which prevent them from seeing a victim when he or she is standing in front of them. The myths are that most trafficking victims are rescued by law enforcement officials; that they are rescued from actively and visibly abusive environments; that only those who are rescued are really victims and those who escape or are arrested or detained are not; that if a person is not visibly a victim, she is probably a criminal; and that someone who has broken the law cannot also be a victim of trafficking. This black and white response to addressing human trafficking has contributed to the problems discussed herein.

1. Department of Justice Controls Funding for Victim Support Services

Though it is laudable that the Congress provided funding toward victim protection services, it was an error to direct that funding to the DOJ to hand out. The funding is not doled out without 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 toward prosecution. 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

27. For more on the problems with approaching trafficking from a law enforcement perspective and the inherent limitations of such a model in offering true victim-centered protection, see generally Haynes, supra note 4.
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 ever served: 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. This system only makes sense if you believe that law enforcement officials really find and rescue most victims. In fact, the opposite is true.

The funding structure might be more reasonable if the DOJ were especially skilled at or well-situated to recognize and then rescue victims of trafficking. The agency, however, is not, in spite of the fact that the DOJ considers itself to be taking a “victim-centered approach” to its prosecutions,28 “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.”29 The vast majority of victims are not found by federal law enforcement.30 This narrow DOJ policy of providing funding for services for law enforcement-certified victims only has served to preclude virtually all work with non-certified victims. In other words, unless a victim is found by ICE or the FBI, and is referred by ICE or the FBI to an NGO that receives funding from DOJ (or Health and Human Services), that victim is unlikely ever to receive legal or social services assistance. In fact, 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.

2. Prosecutions are Few

The Justice Department’s lack of aptitude in recognizing victims is matched by its lack of proficiency in prosecuting traffickers. Not even the

28. DOJ REPORT, supra note 6, at 12.
29. Id.
30. 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 arrested for criminal or immigration violations and jailed or detained, two by the FBI and three by local police. The remaining twenty-three managed to escape their situation by themselves and made their way to social services providers, domestic violence shelters, or trafficking victim advocates. This observation is also proven by DOJ’s own statistics. With between 17,000 and 60,000 victims trafficked into the United States each year, fewer than 1,000 even apply for protection.
DOJ emphasis on "aggressively combating human trafficking" has done enough to significantly improve the number of prosecutions of traffickers. With regard to the law enforcement statistics put forward by the DOJ on the prosecutions of traffickers it is certainly true as well as laudable that the number of prosecutions have increased drastically since the passage of the TVPA. The DOJ claims to have increased prosecutions by over 300 percent, presumably since the passage of the TVPA in 2000, which rendered the activity of human trafficking a specific crime and conferred upon DOJ specific tools for prosecuting the crime. Still, the filing of ninety-one trafficking cases represents a limited number of prosecutions, considering estimates of either 17,500 or 50,000 people trafficked into the United States each year.

The low number of prosecutions could be explained by many factors, not all of them laudable. The type of cases prosecuted by DOJ have been heavy on trafficking involving sex exploitation, where the most visibly recognizable victims can be found, even though it has been suggested by some scholars that the vast majority of human trafficking involves other forms of forced or coerced labor. Between 2001 and 2005, the DOJ filed 91 trafficking cases, 68 of which involved "sex trafficking." While 68 cases for sex trafficking were filed, 189 defendants were charged. It is unclear whether each case involved multiple defendants or whether three times as many defendants were charged as cases ultimately filed, although it is likely a combination of the two. The DOJ states that it "obtained the convictions"—for which crimes is unclear—against 109 of the sex traffickers between 2001 and 2005.

A close reading of the DOJ Report reveals that many of the prosecutions are for "trafficking-related offenses" and not trafficking itself, even after the TVPA created the specific offense of trafficking. People convicted of crimes of or related to trafficking receive sentences, from eight to fifteen years, that are surprisingly short considering the gravity of the physical, psychological,

32. The Civil Rights Division and the U.S. Attorney’s Office filed ninety-one trafficking cases between 2001 and 2005, subsequent to the passage of the TVPA. DOJ Report, supra note 6, at 2.
33. DOJ Report, supra note 6, at 1.
34. Id. at 25.
35. The DOJ offers the figure of 17,500. DOJ Report, supra note 6, at 9. The figure of 50,000 comes from the State Department. 2002 TIP Report, supra note 3, at 2. For more on the trouble with statistics, see supra Part I.A.
37. DOJ Report, supra note 6, at 25.
38. Id.
39. Id.
and emotional abuse they perpetrate. Further, some of the cases showcased by the DOJ as evidence of improved anti-trafficking attempts since the passage of the TVPA were actually prosecuted in other countries, by other governments, or prosecuted well before the TVPA went into effect. In fairness to the DOJ and to the government attorneys prosecuting these cases, it is extremely difficult to secure a prosecution for the crime of trafficking. It is hard to find witnesses who are willing to speak, difficult to corroborate witness testimony, and evidence is often located in multiple jurisdictions and multiple countries. That, however, does not make DOJ efforts acceptable, nor does it begin to justify such low numbers of prosecutions.

3. **Myths Inform Law Enforcement Practice**

Law enforcement officials make their job even more difficult by employing a particular type of myopia in which they only see a person as a victim if they, themselves, have rescued her. Officials subscribe overtly or covertly to unhelpful myths about the nature of victims and criminals. In fact, viewing the trafficking act through the law enforcement filter may itself exacerbate the tendency of U.S. government personnel to treat trafficked persons as criminals, particularly when the victim does not fit into the expected mold of being rescued after being found chained to a bed in a brothel. In order to achieve the purpose of TVPA, some myths must be debunked.

a. **Fact: The True Victim Might Not Be Rescued by Law Enforcement Officials Who Find Her Chained to a Bed in a Brothel**

The first stated goal of the DOJ, to "remove victims from the abusive setting," provides some insight into the role that DOJ has assigned to itself—that of rescuer. The government assumes that 'real' victims of human trafficking will be found when they are liberated from their exploitation by

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40. See United States v. Satia, 68 Fed. App'x 428 (4th Cir. 2003) (sentencing defendant to a nine-year jail sentence and restitution for involuntary servitude after imprisoning, beating, and threatening a fourteen-year-old girl forced into domestic indentured servitude); United States v. Zavala, No. 04-962 (E.D.N.Y. 2004), cited in DOJ REPORT, supra note 6, at 3 (sentencing defendant to fifteen years for extortion, falsifying documents, and enslaving workers); United States v. Reddy, No. 00-4028 (N.D. Cal. 2000), cited in DOJ REPORT, supra note 6, at 4 (sentencing defendant to eight years and restitution under the charge of "foreign commerce for illegal sexual activity," when the underlying crime was bringing many young girls to the United States over a ten-year period to act as private family sex slaves and indentured servants); DOJ REPORT, supra note 6, at 26 (describing the story of a husband and wife who received five years and were ordered to pay $516,150 in restitution after bringing Uzbeki women to Texas under the guise of a student exchange program and forcing them to work in sex clubs).

41. DOJ REPORT, supra note 6, at 3 (discussing cases related to United States v. Cadena, 207 F.3d 663 (11th Cir. 2003)).

42. Id.

43. As this article went to press, a high-level official for the Executive informed the author that DOJ will create a unit of prosecutors specializing in and focusing solely on prosecution of traffickers in human beings.

44. Id. at 12.
law enforcement officials. It is a noble goal of DOJ to prioritize removing
victims from abusive settings, but most victims will not be “removed” from
those abusive settings by DOJ agents. Stating their first goal in this manner
also highlights one of the ways in which the government links its “victim-
centered approach” directly to the outcome of prosecution. Advocates for
victims of human trafficking are beginning to see that those who are
“rescued” by FBI or ICE officers have a significantly better chance of then
being “pre-certified” by those same law enforcement officials as being
potential victims of human trafficking—and therefore eligible for immediate
shelter and protection assistance—than do those who in essence rescue
themselves by fleeing their abusive situation and then seeking assistance.
Furthermore, victims who cooperate with law enforcement officials and who
are fortunate enough to have those law enforcement officials choose to then
initiate an investigation of their traffickers on the basis of that cooperation are
much more likely to be “certified” as victims of human trafficking by the
same officials.

In other words, the practice of the DOJ and DHS demonstrates their belief
that a victim of human trafficking somehow is more legitimately a victim (or
at least more likely to be perceived as a victim by them) if she happens to
have been rescued by U.S. government officials. If she never receives the
benefit of being rescued, as few victims do, but rather manages to free herself
and then seek assistance, she is more likely to be perceived by law
enforcement as not a victim and not “certifiable.” Sometimes victims not
rescued by officials are even susceptible to being viewed as criminals
themselves—“simple” illegal immigrants trying to concoct a tall tale to
secure immigration benefits, a prostitute, for instance, and therefore worthy
of deportation. The law enforcement officials then might not even hear the
story out, or might hear it with extreme skepticism, which makes law
enforcement officials similarly unlikely to initiate an investigation against
the traffickers, further decreasing the likelihood that the non-rescued victim
will receive certification.

The DOJ Report also states that federal agents and other federal officers
“immediately refer a victim to victim-witness coordinators who begin to
provide the appropriate referrals to victim services providers, [who are] often
grantees that are funded through the Office for Victims of Crime and the
Department of Health and Human Services’ Office of Refugee Resettle-

45. See, e.g., Survey, supra note 30, and accompanying discussion. Of the twenty-nine victims
discussed in the survey, only one was “rescued” by law enforcement; the five others found by law
enforcement during raids were arrested themselves. Id.

46. In fact, elsewhere in its Report, the DOJ clarifies that it is “victim-centered prosecutions” that
are essential to its agenda, not being victim-centered generally. DOJ REPORT, supra note 6, at 12-13.

47. Again, note that of the twenty-nine victims discussed, the only one who was certified by the
FBI was “rescued” and not arrested herself. Survey, supra note 30.
What the Report does not state is that federal agents only refer victims to victim services providers, and only those providers which receive government funding, if and when they decide to pre-certify them as victims, typically after rescuing them. If a victim frees herself and law enforcement officials are reluctant to certify her, even if she has no other place to stay, she will not qualify for a victim services shelter because that shelter will not be reimbursed for sheltering her. If law enforcement officials were always accurate in their initial assessment, this system might make sense, but in fact law enforcement officials are not well-suited to make assessments about whether an applicant is truly a victim of human trafficking.

Most victims of human trafficking are not “rescued” by anyone. They are not found by law enforcement, chained to a bed in a brothel. They are not rescued in law enforcement raids of restaurants or sweat shops. Many victims of human trafficking find their own way out of their situation after much psychological, emotional, physical or sexual abuse, and some eventually make their way to a shelter, a hospital, an advocate, or a victim services provider. The false assumption that real victims are those who are rescued by anyone, let alone by a federal agent, and the converse assumption that those who rescue themselves are not or are less likely to be real victims, distorts the government’s ability to understand the true nature of the problem. Certainly nothing in the TVPA requires that a victim be rescued by law enforcement agents in order to be considered a victim; rather, the TVPA requires only that the victim “cooperate” with law enforcement at some point.

Law enforcement officials should welcome the back-end contact that comes when a victim who has freed herself then approaches law enforcement, usually through the middleman assistance of an advocate (most often a victim services provider, lawyer or social worker), and wants to talk to law enforcement in order to assist with the potential prosecution of her traffickers. After all, law enforcement officers who raid an establishment already have in mind the possibility that trafficking is occurring. When a victim, one who was earlier unknown to law enforcement, approaches law enforcement herself, she is opening the door for an entirely new line of potential prosecutions. Law enforcement officials must expand their perspective and be willing to accept that not all “real victims” of trafficking will be rescued by them, and that, in fact, men and women not rescued by them may have testimony useful for prosecuting traffickers, not to mention the fact that they might need victim protection.

48. DOJ REPORT, supra note 6, at 13.
49. See, e.g., Survey, supra note 30.
50. Id.
51. Id.
b. **Fact: Those Not Rescued are Not More Likely to be Criminals, and People Who Engage in Criminal Activity Can Still be Trafficked Persons**

Making the assumption that only people rescued by law enforcement can be victims is paternalistic. This culture of paternalism leads law enforcement officials to favor those they rescue and to miss seeing other ‘real victims’ of human trafficking who have not been rescued. Perhaps even more disturbing, however, for both advocates and victims, is knowing that the non-rescued victim who announces herself to law enforcement and seeks assistance risks being charged with being a criminal herself. Victims who rescue themselves have additional hurdles to overcome. Not only do they not get the benefit of a rescue, but they then have to prove that they are really victims, worthy of the time and attention of law enforcement. They also have to overcome the presumption (not a legal presumption, but still present in the eyes of law enforcement) that they are criminals themselves—after all, they are likely to be in the country without status, are likely to have engaged in unlawful employment or activities, and are likely to be in possession of false documents supplied to them by their traffickers. Then, they must further convince law enforcement that even if they did engage in illegal activity, they might also be victims of human trafficking. In truth, the criminal activity in which they engaged might itself be proof of their victimization. For instance, traffickers frequently force their victims to carry or present false documents, to engage in prostitution, and to work without authorization, but the foregoing can provide proof of the elements of exploitation for profit necessary to obtain a conviction against a trafficker.

The crime with which law enforcement officers are supposed to be concerned is the crime of human trafficking, which is characterized in many instances by forcing the victims to engage in unlawful activity. Several years after passage of the TVPA, and in particular after law enforcement officials have received training in other areas in which they are expected to have passing familiarity with victim-perpetrator dynamics, such as domestic violence, sexual abuse of minors, and rape, and which contain similar issues of control, exploitation, and power differentials, law enforcement officials have little excuse to be making such clear errors of judgment and character when a victim of human trafficking is standing in front of them.

II. **Ignoring and Obscuring the Root Causes of Trafficking**

In the decade or so during which the world has come to understand human trafficking as a distinct and significant crime, the attention of governments

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52. *See, e.g., id.*

and lawmakers has been focused first on describing and then on identifying and combating the crime. Far less attention has been paid by lawmakers and law enforcement to the persons exploited, both at the point of destination and at the outset of the process in their places of origin. As a consequence, we still understand too little about the victims of human trafficking and fail to view them holistically as people with particular motivations to migrate and improve their lives.

On the contrary, the law seems to discourage allowing the victim to discuss her motivations and desire to improve her life, in favor of the story that bears a single-minded focus on the exploitation. This failure to recognize, literally and legally, the motivations that drive people to seek a better life is a crucial omission, as the victim’s motivation to migrate contributes to her vulnerability to exploitation. At present, admissions on the part of the victim to having had the motivation or desire to migrate only proves, in the mind of the law enforcement official, that she was not exploited. There continues to be a false dichotomy applied to victims of trafficking, that one can either have some agency and will to improve one’s life or be exploited and thus be a “victim” of trafficking, but not both.

**Ahn’s Story, Part II**

After three weeks of threats and closely controlled travel, Ahn arrived for the second time in the United States by plane. This time, rather than being immediately deported, she was immediately arrested by the U.S. government and charged with the federal offense of entering with the false passport that her traffickers gave her when they took hers. Instead of being recognized as a trafficking victim and assisted by the DHS inspector, she was detained, arrested, and held in a federal prison facility. Although the U.S. Attorney who prosecuted the case expressed the belief that Ahn was indeed a victim of human trafficking, and actually later contacted a victim advocate on Ahn’s behalf, he first prosecuted Ahn for the federal passport offense. After Ahn was charged, convicted, and jailed, she met several times with FBI agents, providing them with the names, phone numbers, and contact information of everyone she believed was involved in the trafficking scheme, including people in the United States, whom she had been told she must contact upon arrival or face grave consequences. Despite cooperating with the FBI and completing her federal criminal sentence, she remained in detention for a further eighteen months because she had no identification documents, as required by the Department of Homeland Security to be eligible to apply for a bond.

The FBI agents never launched an investigation into the criminal activity that had brought Ahn to the United States nor into the criminal activity existing in the United States for which she was destined. Because the agents had not launched an investigation, they would not certify Ahn as a victim of
trafficking—when she was finally able to secure her release after eighteen months of post-conviction immigration detention, she had no place to stay and no victim support services available to her, although she was seriously psychologically vulnerable and in need.

Her advocates applied for asylum and a T-visa on her behalf. Her request for a T-visa was denied when the Department of Homeland Security determined that it was her burden to prove that her traffickers intended to exploit her. She could not prove their intent, DHS found, because she was arrested by the U.S. government before she could be found chained to a bed in a brothel. At her first asylum hearing, the Immigration Judge queried whether trafficking was a plausible ground for asylum or a simple contractual matter gone awry.

Law enforcement officials not only fail to see a victim if she also shows signs of having had a motivation to migrate, they also still perceive these exploited persons as criminals. As in Ahn’s case study, government personnel consistently fail to look beyond the “criminal act,” in her case entering the United States with the false passport her traffickers supplied to her, to ask questions appropriate to determining whether the “criminal” is also a victim. Similarly, IJs and immigration personnel still fail to understand the distinction between trafficking and smuggling or to acknowledge that concepts such as exploitation, coercion, and consent are subtle and may be either culturally bound or at least not universal in the black and white sense that adjudicators prefer.

When laws are invoked to protect or secure benefits to trafficked persons, another troubling element of trafficking must be addressed, which is that those laws themselves require the person requesting the benefit to describe herself as a victim and tell the victim story. For instance, a trafficked person who wishes to secure a T-visa in the United States must prove that she was a victim of trafficking and must tell that story to law enforcement officials.\(^{54}\) T-visas require that the trafficked person prove that she was the victim of a severe form of trafficking, and she must cooperate with prosecutors in telling that story of victimization.\(^{55}\) To secure the benefit she seeks, she must prove her victimhood—the exploitation, coercion, and force. The law itself forces the victim to offer herself up as an easily identifiable victim subject, without the clutter and complication of a story in which the victim also had some agency in her decision. Ahn, for instance, was asked repeatedly to explain

\(^{54}\) Similarly, a woman wishing to seek asylum on the basis of FGM or domestic violence must prove, among other things, that she was persecuted or will be persecuted and that she fears returning to her home country. 8 U.S.C. § 1101(a)(42)(A) (2006). The law is not only uninterested in her “survivor” story, the story about the strength and fortitude it required to leave her country and seek immigration relief, but her presentation of the survivor story can work against her, as she will then be perceived as an economic migrant with a choice in the matter, not a victim of persecution or abuse without choice.

\(^{55}\) TVPA, 22 U.S.C. § 7105(b)(1)(E) (2000); for further discussion, see supra note 25 and accompanying text.
how it would be possible that she could have been exploited by her traffickers when she decided to go with them in the first place. Where a police officer might understand that a victim of domestic violence does not become any less a victim by virtue of having married the abuser the first place, or even for having stayed with him or refusing to report the abuse, there is little corresponding understanding for trafficking victims.

These myths about the nature of victims and criminals, and the assumptions that being a criminal precludes being a victim, obscure the true nature of the crime, its victims, and the ways in which the victims are exploited. We would be in a better position to assess the reasons why and the ways in which people become susceptible to traffickers if trafficked persons were permitted and even encouraged to express all of the reasons they wound up as and survived being trafficking victims. The reasons are complex and often involve more than coercion, fraud, or force. Often they involve more subtle forms of exploitation in which the desire to migrate and improve one’s life is the very thing the trafficker was able to tap into and exploit in the first place. By focusing wholly on the victim aspect of the crime, as required to receive any benefits or protections that come with the label “victim,” we miss the opportunity to identify what might actually be driving the cycle of exploitation. As a matter of law, statutory interpretation, and practice, we must acknowledge that the desire to improve one’s life—a desire born of human nature, and a human characteristic lauded in other arenas—leads people to migrate. We must confront that fact head on, rather than mask it behind a rhetoric which suggests that agency and exploitation are mutually exclusive.

A. Trafficking Is Not Only About Sex

The stories we hear about trafficking on television, in movies, and in books are most often about sexualized forms of exploitation. In media portrayals of human rights issues in general, it has been argued that there is an inordinate focus on abuses that contain an element of sex, sexuality, and gender, because sex sells.\textsuperscript{56} We hear about sex slavery, forced marriage, child pornography, and female genital mutilation (FGM)—but rarely about the social and economic disparity issues that may give rise to the problems. In other words, a story about human trafficking for sex reaches the mass media, while a story about access to employment does not, and a story about trafficking for domestic servitude is not as “sellable” as a story about trafficking for sexual exploitation. Sex sells; indentured servitude does not. As we saw with regard

\textsuperscript{56} During a “Roundtable Session on Human Rights Programs” hosted by Harvard University, Upendra Baxi noted, accurately, I think, that the “less romantic” answer to the question of why we are more interested in human rights today than twenty years ago is that “human rights and suffering have become a mass media commodity that serve a function in the growth of capitalistic mass media throughout the world.” Upendra Baxi, The Role of the University in the Human Rights Movement, Interdisciplinary Discussion held at Harvard Law School (Sept. 18-19, 1999).
to DOJ’s own account of its prosecution focus, most of the general discussion about trafficking too focuses overwhelmingly on trafficking for purposes of sexual exploitation, regardless of whether statistics can reveal which type of forced labor is in highest demand.57 When the public is led to believe that only one aspect of trafficking is recognizable or relevant, we miss the opportunity to recognize and assist other types of trafficking victims.

B. “Essentializing” and “Othering” the Victim

In public discussions about human trafficking, we hear stereotyped accounts about “the type of person” who becomes a sex worker or a mail order bride, but little factual information to support it. By failing to understand enough about the people who are trafficked, and focusing media attention on the sex and victimization aspects of the crime, we risk “essentializing” and “othering” the victims. That is, we are reducing the victims, usually women from the southern or eastern hemispheres, to stereotypes based on race and gender, and those stereotypes are conflated with the sexualized nature of the crime.58 Then we are setting “them” at a distance from “us.” Both are counterproductive to recognizing a “true victim” of human trafficking.

It is certainly true that foreign women, and in particular women from the southern and eastern hemispheres, are at present most often the victims of trafficking around the world. There are a multitude of possible reasons that could account for this. These women are seeking to migrate to improve their economic situations and secure jobs elsewhere; they are the ripest targets for exploitation because of their economic vulnerability. These women are particularly sought after by traffickers who perceive them as more easily taken advantage of at the point of origin because of their economic need and at the point of destination because they cannot speak a language in the new country.59 They do not have access to or understand the legal or social mechanisms available to them, and are also, for those reasons, presumed by their traffickers to be more compliant and less likely to flee.60 These women are sought after by potential users of their forced and exploited labor, who

57. See Bridget Anderson & Julia O’Connell Davidson, Save the Children, Trafficking—A Demand-Led Problem? (2004) (discussing the demand side of trafficking and commenting that in some countries domestic work is the largest female employment sector).
58. For further discussion about “othering” and “essentialism,” see Isabelle Gunning, Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Suturies, 23 Colum. Hum. Rts. L.Rev. 189 (1992); Rana Kapur, Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India, 10 Colum. J. Gender and L. 333 (2001).
59. See, e.g., Anderson & O’Connell Davidson, supra note 36, at 25 (“A 21-year-old Indian businessman commented that Nepali girls who had been sold into brothels are especially nice when they are new to the area. They don’t talk too much and are more helpful to the client. You can control them.”). Countering this view, however, is a Thai individual’s opinion that it is “hard to have sex without talking, because if you can’t talk, you lose the feeling.” Id. at 22.
60. In their study on use of prostitutes and sex workers, some of these opinions found empirical support. Among men who admitted buying sex from foreign sex workers, a “substantial number” believed that migrant prostitutes were “cheaper and more malleable than local women.” Id. at 21.
view them as more submissive and compliant because of their lack of understanding of their rights and their economic and immigration status vulnerability.\textsuperscript{61}

Recent studies on the demand side of trafficking suggest that users are very aware of the status, nationality, and relative power positions of those whose service they seek out,\textsuperscript{62} but sometimes view these characteristic as favorable and other times as unfavorable. For instance, some users view migrant sex workers as less desirable than sex workers from their own countries and nationalities because they do not share the users' language and may either have been forced into the work or have no other choice, perceiving them to be at the "cheap end of the prostitution market."\textsuperscript{63} The study also supports the conclusion that racism, prejudice, and "othering" allow users of trafficked persons to convince themselves that using trafficked persons for forced or compelled labor is justified because the occupants of the position are the "natural... occupants of the lowliest positions in domestic or sex work."\textsuperscript{64} In both instances, it is the perceived low status and minimal power of the migrant that makes her either desirable or undesirable to the user, depending on the user's interest and perspective.

In the context of domestic labor—that is, housekeepers, domestic servants, and in home childcare providers—stereotypes abound regarding the value of employing a particular caste or minority group.\textsuperscript{65} In domestic service, migrants (who may or may not be trafficked) are particularly valued for being "more flexible" about the amount of hours they will work and the fees they will charge because of their vulnerability and perceived need.\textsuperscript{66} Some employers specifically seek out the "otherness" of a migrant worker to resolve the discomfort of having someone sharing their house, one stating that it is more comfortable having someone from an entirely different race

\textsuperscript{61} Anderson & O'Connell Davidson, supra note 36, at 21. Anderson and O'Connell Davidson offer the explanation of one interviewee, a married man from India, who valued the qualities of unhappiness and isolation in unfree or trafficked sex workers, because it might make them seek warmth, support, and care from their clients. Id. at 25. Why are women most often victims of trafficking? In many parts of the world (or arguably in all parts of the world), women exist in or are perpetually relegated to the "private sphere," where it is easier to be bought, sold, and manipulated without anyone noticing. The private sphere is the home, the family, the culture, the religion, and their cumulative effects, as opposed to the public sphere, in which government and sovereignty reign. The crime of human trafficking is born in, flourishes in, and is carried out all within the private sphere, hidden away from the public.

\textsuperscript{62} See id. at 21; see also id. at 25 (looking at both prostitutes and sex workers who may also be trafficked).

\textsuperscript{63} Id. at 22-23.

\textsuperscript{64} Id. at 42.

\textsuperscript{65} For example, Indians valued tribal Christians for their perceived work ethic. Swedes prefer Baltic women, who they perceive as needing social and economic aid, and avoid Roma or gypsy employees, who they perceive as unreliable. Generally valued in domestic help are the qualities of being cheap, hardworking, and obedient. Id. at 29-30.

\textsuperscript{66} Id. at 30. Local employees were also perceived as being spoiled or demanding, while migrants were perceived as grateful and enthusiastic. Id.
working in the house because it makes the social gap more manageable.\textsuperscript{67} Still other employers appreciate the power they have over their employee precisely because of the power dynamic inherent in employing someone without immigration status.\textsuperscript{68} The vulnerability and otherness work together, as exemplified through this employer's comment:

They're foreign and they're illegal and they're scared and timid, and so they're not going to take up space. They're going to be very, very small, and that is generally easier to live with than someone who feels that this is their home. They're in really bad situations... they're terrified.\textsuperscript{69}

The traffickers, the users, and the U.S. government are all devaluing trafficked persons. The traffickers and users seek out persons who lack alternatives, lack language skills and knowledge of the legal system in their country of destination, and are therein generally compliant and more easily exploited. The laws of the U.S. government and the (mis)application of the TVPA support these perceptions in only allowing a victim of human trafficking to claim that status and any rights and benefits that might attach, when she fits a particular victim profile.

III. DISTORTING AND MISAPPLYING THE LAW

Despite the basic intent behind the drafting of the TVPA—to protect victims of human trafficking—the Act that was ultimately passed emphasized the protection of victim witnesses conditioned upon its usefulness in prosecuting the traffickers. It may be natural that laws necessarily beget a law enforcement—heavy approach, but the number of distortions and misinterpretations made by government officials in applying the intent and express wording of the TVPA appear to be on the rise in favor of severely curtailing the scope of who can be considered a victim of human trafficking.

A. Distortion of the Intent behind the TVPA

The impetus behind passage of the Trafficking Victims Protection Act was a bipartisan wish to protect victims of horrific acts linked to human traffick-