ing. 70 As early as 1999, however, the drafters foresaw what would ultimately be passed as the Act and warned us that “our nation can do better than giving the victims of sex trafficking and slavery immigration benefits on one hand, while denying them benefits on the other hand through unnecessarily narrow requirements and conditions.” 71 Although they were unable then to identify all of the ways in which this law would ultimately be narrowed, they understood that the intent of the law was already being distorted by the Congressional response to fears of opening the floodgates, evidenced by insistence that a cap of 5,000 be placed on the number of T-visas available to victims each year.

The intent of the TVPA was to assist victims of human trafficking. That intent, however, was not limited to the pragmatic desire to secure the testimony necessary for prosecuting the traffickers but then deport them after they were no longer useful for that purpose; rather, it was to acknowledge the particular horrors suffered by those victims by providing them with safety, security, and health care. At the level of the individual victim seeking relief, these same distortions play out. In Ahn’s case, the Department of Homeland Security’s analysis of whether she was entitled to be considered “a victim” sheds light on how statutory interpretation and regulatory practice continues to be driven by the fear of opening the floodgates.

1. “Cooperate with Law Enforcement” Interpreted To Mean “Law Enforcement Decides To Use the Information Provided By the Victim”

To be eligible to receive a T-visa, the law requires that the victim establish, among other things, that she has “cooperated with law enforcement officials.” 72 While the DHS insists that a Law Enforcement Certification (LEC)—a letter from a law enforcement official certifying that the individual has cooperated—is not obligatory, as a practical matter applications that do not contain such a certification appear to be denied to a greater extent than those that do. 73 Furthermore, law enforcement officials have the discretion not to certify a victim regardless of whether the victim did, indeed, offer informa-

71. Id. at 45.
72. “Certification” involves the process whereby a law enforcement official can provide a document attesting to the “cooperation with law enforcement.” Law enforcement can also “pre-certify” a victim, 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. TVPA, 22 U.S.C. § 7105(b)(1)(E). The certification is actually supposed to be issued by the Secretary of Health and Human Services after “consultation with the Attorney General.” Id. at § 7105(b)(1)(E)(i). The criteria is that the victim be “willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons,” that she is filing for a T-visa, and that she is a person whose continued presence in the United States the Attorney General is ensuring in order to effectuate a prosecution. Id. at § 7105(b)(1)(E)(i)(I).
tion and cooperate with law enforcement in furtherance of an investigation. The law enforcement officer, untrained in the law of human trafficking, gets to make the preliminary decision as to whether or not a victim can be considered a victim. The wording in the TVPA requiring that the victim show she “cooperated with law enforcement,” has come to mean that if law enforcement decides to use the information the victim provided by launching an investigation and issuing an LEC, then she will be deemed to have “cooperated.”

2. Burden Is Improperly Placed on the Victim To Prove the Intent of the Trafficker

The TVPA requires a showing that a person is a victim of a severe form of trafficking. The DHS has also apparently determined that the victim bears the burden of proving her traffickers’ intent to exploit her, although the TVPA is silent on this. In contrast, in other areas of immigration law in which our policy objective is to protect persons who have been subjected to or who could be subjected to harm, asylum for instance, courts have determined that it is impossible for the victim to enter the mind of her persecutors and therefore cannot properly be required to prove their intent.

In the case study presented, Ahn’s traffickers had already undertaken a series of exploitive and coercive actions designed to disorient and control her during the course of her movement through eight countries, namely taking her passport and threatening and beating her mother back home. Nevertheless, because she was arrested upon entry to the United States, DHS determined that it was Ahn’s burden to prove that her traffickers’ ultimate intent was to exploit her more than she had already been exploited. This requirement, that the victim prove her traffickers’ intent, suggests that unless the victim is “rescued” or found chained to a bed in a brothel, she will be forever unable to establish that her traffickers ultimately had something more “severe” and more “exploitative” in mind for her than the treatment she already received during her controlled movement.

3. Burden Is Set Inappropriately High at “Conclusive Proof”

While no burden of proof is set forth in the TVPA, DHS determined that

74. See, e.g., Ahn’s Story, Part III, infra, in which the victim met with FBI agents three times over the course of three months. At the conclusion of these meetings, the lead FBI agent was transferred, no investigation against the traffickers was launched, and no law enforcement certification was issued.

75. See TVPA, 22 U.S.C. §§ 7102(8) & (13), for definitions of both a severe form of trafficking and a victim of a severe form of trafficking.

76. Case on file with author in which the T-visa unit of DHS imposes such a burden.

77. Elias-Zacarias v. INS, 502 U.S. 478, 483 (1992); Ptichenskaia v. INS, 118 F.3d 641, 643 (9th Cir. 1997) (concluding that the Immigration and Nationality Act does not require an asylum applicant to prove that his or her persecutor harbored a subjective intent to harm or punish).

78. See supra Ahn’s Story, Part II.
not only is the burden on the victim to prove the intent of her trafficker, but that this burden is set at “conclusive proof.” 79 No combination of circumstantial evidence, apparently, will enable the victim to meet that burden, as “conclusive proof of the intent of the traffickers to exploit” means that the victim must have been found and rescued by objective others, like law enforcement, who can visually attest to the exploitation in order to satisfy that burden. In Ahn’s case, there was a wealth of circumstantial evidence, including evidence of what had befallen other women who came with the same traffickers, on her same route, who were told to contact the same U.S.-based traffickers upon arrival. There were threats of violence and actual violence perpetrated on her mother in an attempt to control her. There were names, addresses, and phone numbers of people involved in the trafficking, albeit never investigated by the FBI, as its agents chose not to launch an investigation. Nevertheless, DHS found that she failed to “conclusively” prove that her traffickers’ intent was to exploit her.

In other areas of immigration law where it is understood that evidence may be difficult to obtain and that the goal is to protect the individual from harm, the victim is not required to establish the intent of her persecutor, let alone to establish it conclusively. 80 It is inappropriate and works against the express purposes of the Act to create a higher standard of proof for trafficking victims than for asylum applicants, neither of whom is in a position to read the mind of her trafficker-persecutor or supply evidence to that effect beyond their own testimony.

B. Conflation of Human Trafficking with Other Political Issues of the Moment

A second way that the intent of the TVPA has been distorted is through the conflation of trafficking by politicians and government officials with other issues which cycle through the political spotlight, including terrorism, foreign alliances and aid, prostitution, and illegal migration.

1. Terrorism

Before 9/11 some governments pursued anti-trafficking initiatives under the primary policy objective of preventing migrants from ending up in exploitative situations. Post-9/11, however, most governments squarely and unapologetically face the issue of trafficking through a filter of national security. “Combating” trafficking is linked directly to the war on terror by politicians, some of whom have the ultimate goal of keeping out all

---

79. As written in T-visa denial; case on file with Author.
80. 8 U.S.C. § 1158(b)(1)(B)(i) (2007) (requiring that an asylum applicant establish that his or her race, religion, nationality, membership in a particular social group, or political opinion is at least one central reason for the persecution he or she has suffered) (emphasis added); see also Elias-Zacarias, 502 U.S. at 483.
undesirables and potentially harmful individuals by controlling borders and migration.

In 2002, President George W. Bush signed into effect National Security Directive 22, linking human trafficking to terrorism and public health concerns.\(^{81}\) Whatever those specific links might be found upon is unclear and inscrutable, as the specific concerns that allegedly link trafficking to terrorism are cloaked under classified status and cannot be released to the public. Perhaps they deal with the facet of human trafficking that has been understood for a decade, which is that traffickers in human beings also traffic drugs and weapons, as once the routes and players have been set up, the goods, be they humans, drugs, or weapons, are interchangeable. In the 2005 Reauthorization of the TVPA, an interagency task force was established to study the “interrelationship between trafficking in persons and terrorism,” further entrenching both the link and the funding that will be allotted to ensuring that the link is found.\(^{82}\)

2. The Politics of International Alliances and Aid

Every year, in its Annual Trafficking in Persons Report, the DOS ranks every country in the world on their attempts and successes in combating trafficking and places them in tiers, with those in Tier 3 subject to economic sanctions.\(^{83}\) Early concerns appear to be well-founded that the rankings and attendant sanctions, through which all non-humanitarian aid is cut to those placed in Tier 3, might be susceptible to political manipulation having to do with factors other than lack of success with anti-trafficking initiatives. The countries placed in Tier 3 in 2004, for instance, were Burma, Cuba, Venezuela, Ecuador, Equatorial Guinea, Guyana, North Korea, Sierra Leone, and Sudan.\(^{84}\) Of the twenty-three countries ranked Tier 3 in 2003, only Burma, Cuba, Liberia, North Korea, and Sudan were sanctioned.\(^{85}\) While it is not clear that these three are the worst offenders in failing to institute anti-trafficking initiatives, it is clear that they are not political allies of the United States.

Furthermore, and perhaps not surprising, some of the “good practices” encouraged in the DOS annual TIP Report, the adoption of which could assist

---


83. See TVPA, 22 U.S.C. § 7107; see, e.g., 2005 TIP REPORT, supra note 9, at 29. For more on sanctioning power, see Chuang, supra note 53.


a foreign country in moving up to Tier 2 or Tier 1 and thus enable them to receive U.S. aid and financial assistance, are not practices required by the TVPA. In the year 2003, for example, the TIP office at the DOS put out a model law, which could be used as a guide by other countries as they drafted their anti-trafficking legislation.86 This model law has substantially more of a victim protection approach to trafficking than does the TVPA itself.87 In other words, the right hand (the Executive branch, through the DOS) asks other countries to provide more than the left hand (the Legislative Branch, through Congress) requires of the United States. The United States attempts to execute its unrelated international political goals by applying pressure through the sanctioning power of the TVPA, rather than by focusing exclusively on impacting trafficking at a global level.

3. Prostitution

Prostitution and trafficking are heavily conflated in the United States by our current administration’s political agenda to abolish prostitution. For example, under the auspices of the TVPA, gag rules have been imposed upon all organizations working with victims of trafficking in the United States or abroad.88 In order to receive U.S. government funding, these organizations must overtly express their refusal to aid prostitutes or support prostitution in any way, including such measures as sexual health education in brothels that may host both trafficked women as well as consensual sex workers.89

The gag rule cuts off all funding to NGOs, both domestic and international, that do not explicitly state that they do not assist or support prostitution. As a result, the grassroots NGOs working to assist sex workers by providing them with information about how to escape a coercive or abusive situation or slavery-like working conditions is no longer eligible to receive funding because some of those women may be “prostitutes.” Through the gag rules, anti-trafficking work has been co-opted by an agenda to abolish prostitution.

4. Illegal Migration

Much of the lack of implementation and the distortion of the TVPA could

87. Although the model law contains more victim protection measures, it too conditions them upon furtherance of prosecution efforts. Id. at §§ 300-12.
89. Id. Within the 2003 Reauthorization of the TVPA a gag rule was imposed by Congress, at the request of the executive, and enforced by the TIP Office within the DOS, as well as through USAID and the DOJ in the administration of their grants. See id.
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?” 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. After all, more than five years after the TVPA had entered into force in the United States, fewer than 491 T-visas have been granted in total while 17,500 to 50,000 new victims of trafficking enter the United States each year. 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. From the statistics issued for 2005, it appears that less than 600 applications were even received. To honor the intent of Congress and the Executive Branch, 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.

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....” 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.

The distinction between those who migrate and those who are trafficked is a false one. People migrate. Some willingly, some forced through external

90. Journalist to author in telephone interview about nature of T-visas.
91. Neither has it been established that most people in the world would opt to live in the United States if given the opportunity.
93. Compare 2002 TIP REPORT, supra note 3, at 1, and 2003 TIP REPORT, supra note 9, at 7, and 2004 TIP REPORT, supra note 84, at 6, and 2005 TIP REPORT, supra note 9, at 6, with DOJ REPORT, supra note 6, at 9.
95. 2005 TIP REPORT, supra note 9, at 243.
circumstances, some because they have no choice (economically or because their home lives are untenable), and a very few are literally snatched by traffickers. Nevertheless, any of the foregoing could ultimately fall prey to traffickers who understand how to exploit each of those sets of circumstances. If the goal is really to eradicate trafficking, in part by protecting victims and prosecuting traffickers, then the distinctions between smuggling and trafficking, or trafficking and migration, are of little use. The real issues are, from the supply side, the disparities in the world that leave some groups of people exceptionally vulnerable, and from the demand side, the demand for labor and services from people “unable to freely retract from an exploitative situation because they are tied to their exploiter through some form of non-economic compulsion.”

IV. Failures of Implementation

Many of the gaps that exist in the current approach to eradicate trafficking can be ascribed to failures in implementing the law, and while some can be ascribed to broad distortions in carrying out Congress’s intent, others are or at least appear to be structural, mechanistic, and bureaucratic failures. First among these failures of implementation is the top-heavy and top-down approach the U.S. government has taken to deal with the problem, in which a only a few highly ranked agency officials seem to understand how to recognize a victim of trafficking or what should be done with her when she is found. Their status as highly ranked officials renders that knowledge theoretical and of little use, in that those at the top are not the persons most likely to encounter a trafficked person or a trafficker, and they have succeeded neither in transferring their knowledge to the field nor, and most importantly, in giving permission to and encouraging front-line personnel to make such a call on their own.

A. The Trouble with the Top-Down Approach

For much of the five-year period since the passage of the TVPA, attention and budget have been focused on interagency coordination at the highest federal levels. This top-down approach has ensured that themes of interest to the executive branch have been incorporated into the funding provided either for prosecuting traffickers or protecting victims. Those themes that have run through anti-trafficking initiatives have included anti-trafficking

97. Id.; see also discussion infra Part V (discussing migration as the underlying and overarching issue).
98. The President created a cabinet-level Interagency Task Force in 2002, and in 2004, the Task Force created a Senior Policy Operating Group to “implement its policies,” with senior officials from ten agencies meeting quarterly. DOJ REPORT, supra note 6, at 5.
99. See supra Part III.B.3.
initiatives as “combat,” 100 human trafficking as important to national security, 101 the fight against trafficking as the forum through which to abolish prostitution, 102 and human trafficking as being instantly recognizable and distinct from “simple” illegal migration and smuggling. 103

1. People in the Field Are Unable or Unwilling to Identify Victims

There are many factors that could explain the inability or unwillingness of government officials to recognize a victim of human trafficking when they see one. One factor is a lack of training for people in the field. Another is that the crime of trafficking has been conflated with so many other crimes, including immigration violations, prostitution, and terrorism, 104 that government officials are afraid of being accused of applying the label of victim to someone who might really be a criminal. The possibility that one might have broken some law and still be a victim is beyond current understanding. Finally, the private nature of the crime of human trafficking makes the ability to see the crime taking place especially difficult. Victims are exploited and forced or coerced to live out their days within homes, sweatshops, agricultural fields, and brothels, cut off from contact with the outside world.

With respect to the private-sphere nature of the crime, the DOJ lists aspects of the crime it thinks exacerbate this problem, including linguistic and social isolation, fear or threat of exposure and shame, threat of reprisals against loved ones, and the special set of circumstances that ensure that immigrant victims in particular “remain in the shadows of our communities.” 105 These are precisely the factors likely to obfuscate the crime and its victims. Of those victims who do escape the private sphere and tell their story, many tell it in a veiled way until they are certain that they are safe, and law enforcement would be well served by learning to recognize this latter group of victims as well. IJs and law enforcement officials, be they DHS, DOJ, DOS, FBI, or state police, 106 fail to identify victims of human trafficking who are standing right in front of them, even when the victims are hinting as broadly as they are willing or able that they have been trafficked. That “special set of circumstances” acknowledged by the DOJ to isolate immigrant victims is a tremendous understatement, in that the vast majority of victims are also illegal immigrants until differently labeled as victims (and then eligible for

100. Office of the Press Secretary, supra note 81.
101. Id.
102. The specific programs, contained within a three-point plan of action linking trafficking with the move to abolish prostitution, are put forward in the same above-referenced National Security Presidential Directive. Id.
103. See supra text accompanying note 96.
104. See supra Part III.B.
105. DOI REPORT, supra note 6, at 10.
106. Immigration Judges (IJs), who have jurisdiction to hear asylum claims related to human trafficking under the Refugee Act, are employees of the Executive Office for Immigration Review, a division within DOJ.
immigrant status). The immigrant victims are exploited all the more easily by traffickers because they are without immigration status, because they know that it is illegal to be without immigration status, because their traffickers know they fear being without status, and because the threat of deportation and criminalization is real.

2. A Case Study in Failure of Implementation: Ahn’s Case

The background and basic facts of Ahn’s case study were set forward previously in the story’s excerpts. Highlighted and critiqued in the sections that follow are the many points at which the relevant government officials had the opportunity to assist Ahn but failed to recognize her as a victim, provide her assistance, or use her information to investigate, arrest, or prosecute her traffickers. Each of the situations used to illustrate the points is fact.

a. Upon Arrival to the United States

Upon arriving in the United States, DHS airport inspectors, as the first people in the United States to come in contact with a potential victim of trafficking, must determine whether someone might be a statutorily protected individual, such as a potential asylee, a victim of torture, or a person trafficked into the United States. In Ahn’s case, they utterly failed to follow their own protocols, which might have allowed them to recognize her as a victim as she stood in front of them. Generally perceiving a person entering the country with a false passport as a criminal, even if a passport was given to a person by her trafficker, airport inspectors believe that their job is to look for illegal entrants and fail to consider that they might also be victims of human trafficking. The following is a part of the transcript from the interview, which occurred through an obviously under-trained or unskilled interpreter, between Ahn and her airport inspector upon her first attempted entry into the United States:

Q: What is the purpose of your trip to the United States today?
A: Look for jobs.
Q: What is our [sic] planned destination in the United States?
A: I don’t know.
Q: Do you have a job waiting for you in the United States?
A: They told me I had one.
Q: Did you present this fraudulent passport to gain entry to the United States?
A: Yes.
Q: Where did you obtain this fraudulent passport?
A: In Thailand. They made me go there. They took my passport and gave it to me.
Q: Who did you get this fraudulent passport from?
A: From a man at the Bangkok airport.
Q: How did you meet this person?
A: He found me at the airport like the rest of them.
Q: Did you pay any money for this fraudulent passport?
A: No, after they said after I am [sic] admitted into the U.S., then I will pay them $60,000 USD.
Q: Who was she [sic; at this point it is unclear whether the inspector is querying the interpreter about the interpreter’s personal knowledge of the practice, or asking the trafficking victim about her understanding of the situation] supposed to pay the $60,000 USD to?
A: I don’t know [unclear whether it is the interpreter who doesn’t know or the victim].
Q: How do you pay for [sic] the $60,000 USD?
A: They will have me work however they want to pay back the money and the interest. They tell me I must do the work for them.107

At no point did the airport inspector ask Ahn whether she had any fear of returning to her home country or follow up to find out more about the incredible debt that she already stated she owed. At the very least, the statements regarding the huge amount of money she already owed to the traffickers and the fact that she had no idea how she was going to pay it off should have triggered some questioning regarding whether she was being coerced or exploited. For all intents and purposes, Ahn told the DHS airport inspector as best she could that she was destined for at least debt peonage to someone in the United States. Instead of being protected and queried, however, she was deported, only to be abused and imprisoned in her home country, re-trafficked within the year, and then arrested and jailed by the U.S. government.

The above exchange exemplifies both the problems with lack of implementation of the law and insufficient training in the field, as well as the more subtle but entrenched problem: law enforcement personnel and IJs have a very difficult time seeing a woman who entered with false documents (that traffickers gave her) or who planned to work illegally (in a job traffickers would force her to do) as anything other than a criminal herself. They err on the side of guarding the floodgates, but ignoring or deporting a potential victim does nothing to further the goal of prosecuting traffickers and protecting victims to end the cycle of human trafficking.

b. Upon Arrest

Persons who enter with false passports, even those supplied to them or forced upon them by their traffickers, are arrested, prosecuted by U.S.

---

107. Transcript altered only slightly to protect identity.
Attorneys, and jailed. In Ahn’s case, even though the Assistant U.S. Attorney (USA) acknowledged a belief that Ahn was the victim of human trafficking, rather than exercise prosecutorial discretion, the USA convicted and jailed her for the entry with a false passport, before suggesting that she might have recourse as a victim of human trafficking or even acknowledging that she might have information to offer the FBI about her traffickers. This type of prosecution for entering with false documents is unnecessary and unethical when the USA knows that the person being prosecuted is a victim of human trafficking who entered with the passport she was forced by them to use. USAAs should exercise their prosecutorial discretion in such cases, to focus on the traffickers, not the victims.

c. When “Cooperating with Law Enforcement”

If a trafficking victim is lucky enough to learn from someone she encounters that she might be eligible for assistance if she is deemed to be a victim of trafficking, then she may be advised to speak with law enforcement officials about her trafficking experience. The ambiguity in status between being a victim and being deemed a victim renders the process of cooperation rather haphazard if its goal is to obtain information that might lead to prosecuting and thereby eradicating trafficking. Ambiguity in a victim’s status is not the only issue hindering the process of cooperation. To be eligible to receive a T-visa, a victim must first cooperate with law enforcement. However, if law enforcement officials and USAAs have not been properly trained to recognize a potential victim when they see one, the victim will lose the opportunity to seek a T-visa, and law enforcement will miss an opportunity to gather crucial evidence toward prosecuting her trafficker. Even more unfortunate, if law enforcement officials decide not to speak with the victim, decide not to initiate an investigation, or decide not to prosecute, the victim may be hard pressed later to meet her burden of proving that she “cooperated with law enforcement officials.”

Ahn was in detention when she finally initiated contact with the FBI. Having served her criminal sentence for entering with a false passport but having no immigration status, she, like thousands of others in similar situations, was held in custody at a regular jail facility for months at considerable taxpayer expense, dressed in an orange jumpsuit, and chained and handcuffed when she met with her attorneys or the FBI. She was indistinguishable from the hardened criminals around her, making it quite likely that once again she faced the more entrenched problem of the FBI agents looking at her and seeing a common criminal instead of a potential victim of human trafficking. There were at least three different agents.

involved in those meetings with Ahn. The first agent, the only one who had received any training in recognizing a victim of trafficking, was reassigned to a different post between the first and second meetings. At the conclusion of three meetings, despite the fact that the information Ahn offered provided specific details about her traffickers and their operations in another U.S. city, including names and contact information, no investigation was initiated either in the city where Ahn was detained or in the city where the traffickers were operating and for which Ahn was destined.

Few enough potential victims are willing to talk. When potential victims do provide information, investigations must be initiated and follow-up assistance provided to victims. FBI offices must communicate between cities of victim transit and destination, to allow the city in which the traffickers allegedly operate to make their own determination regarding initiating an investigation.\footnote{In October of 2005, the FBI initiated an operation in each of its fifty-six field offices to assess the trafficking threat, DOJ REPORT, supra note 6, at 24.} Law enforcement officials have enormous discretion in this area but have received too little training in how to exercise the power that comes with that discretion. The training they have received has clearly been ineffective.

d. Seeking Parole from DHS Detention

A victim who has been arrested and charged with entering on a false passport—such as Ahn, whose traffickers took her passport and replaced it with a false one—will be held in jail even after she serves her time, until or unless she becomes eligible to pay a bond and be released, because she has no immigration status. The local DHS Deportation Unit must first choose to set bond (in Ahn’s case at $5,000, for instance), and that choice is discretionary. If DHS chooses to set a bond, the victim must provide valid identification documents, provide proof that she is not a flight risk, and provide an address at which she can be located upon release. Each of these steps is exceptionally problematic for a real victim of human trafficking.

In Ahn’s case, even after she was able to procure identification documents, secure money to pay a bond, and satisfy the flight risk components, she was detained for another six months. The DHS would not allow her to post bond even after she provided the foregoing, because she could not provide them with an address at which to find her. Ahn faced two problems. No shelter receives the funding for which a potential victim is eligible unless law enforcement is willing to sign off and certify that the person is a victim. If law enforcement decides that the person is not a victim or otherwise chooses not to move forward with its investigation, then no shelters will take her in, because they will not receive federal funds for doing so. In this case, Ahn’s pro bono legal representatives managed to secure shelter for her in a
domestic violence shelter. However, even after her advocates found her this shelter, DHS continued to detain her, because the DHS Deportation Unit could not be convinced that the shelter in which a bed had been secured was a place “at which she could be located by DHS” if necessary. Because domestic violence and witness protection shelters only provide addresses of their main offices, not the actual residences of the shelter inhabitants (to protect them from their abusers), the DHS Detention Unit had to be convinced that an actual witness protection shelter was a viable location to which she could be released. The multiple levels of involvement within each federal agency and between those agencies, combined with total discretion on the part of each as to whether to offer assistance in the first place, renders accessing victim benefits virtually impossible.

e. Seeking Relief from Deportation

Because Ahn was convicted of entering with a false passport, she would be deported again unless she could make a successful argument as to why she should remain in the United States. One avenue could be to seek asylum. Another could be to seek a T-visa.

i. The Asylum Claim in Immigration Court

The IJ, upon first hearing her case, stated that the aspects of Ahn’s asylum claim that related to trafficking and sale into marriage constituted “a personal matter” between the victim and her father and not a matter for adjudication under asylum law. IJs should become familiar with the growing international and domestic case law recognizing certain types of trafficking victims as members of a particular social group for the purposes of attaining asylum. Furthermore, it should not be incumbent upon an advocate to explain to a judge why selling one human being to another is not a commercial act under any law, but rather violates both the U.S. Constitution and recognized principles of jus cogens under international law. Judges need to understand what human trafficking is and what laws and human rights principles are violated through this conduct.

ii. The T-Visa Application Before DHS

Ahn’s T-visa application was denied in a decision in which the T-visa Unit, a unit within DHS tasked with adjudicating T-visa applications, denied the application as a matter of law, as discussed above, holding that she failed to meet her burden of proving that her trafficker intended to exploit her.

112. The T-visa Unit at the Vermont Service Center, under USCIS, a division of DHS, was tasked with gaining expertise in T-visas and their applicants, in order to adjudicate claims. Practitioners
Because Ahn was arrested and prosecuted upon entry before she could be rescued by law enforcement (or more likely before she could escape or fail to escape and therein be exploited), she could not meet her burden. Surely this is one of those occasions when it makes sense not to deny a victim a T-visa: when the system worked, at least to the extent that Ahn was “rescued,” by virtue of her arrest, from further exploitation. If Ahn’s T-visa should not unambiguously have been granted, then this is the clearest example that the law has become distorted and that a victim of human trafficking can only be recognized as a victim when she is found chained to a bed in a brothel. The unexpressed fear of opening the floodgates to those who supposedly would seriously endanger themselves in order to have the chance of obtaining immigrant status in the United States is not a sufficient basis for misconstruing the requirements of the TVPA in this way.

In reviewing the problems experienced within just one attempt by one victim to be recognized as a victim of human trafficking in the United States, it becomes clear that, at the very least, there is a considerable lack of understanding regarding the nature of trafficking on the part of the people tasked with recognizing and assisting victims and prosecuting traffickers. At worst, there is collusion to deny recognition to potential victims of human trafficking for fear of opening the floodgates to those who would allegedly be willing to subject themselves to degradation and harm in order to secure immigrant status in the United States.

B. Not Enough Focus on Field Training

Even when anti-trafficking laws are written and adopted, which is still not the case in many countries, they will only be effective if the persons most likely to encounter a trafficked person or a trafficker know how to identify them, believe that it is their duty to identify them, know what to do when they find them, and feel confident carrying out those duties.\textsuperscript{113}

representing T-visa applicants have recently noted rejections based on errors of law and fact, as well as a marked increase in the Unit engaging, essentially, in investigation, by sending “Requests for Evidence” (RFEs) back to applicants, asking them to prove the nature of their claims, often in ways that cannot be proven. Of course, no statistics are issued on this practice, beyond the number of applications made and grants and denials issued, cited earlier in this article.

\textsuperscript{113} For example, in Serbia, Bosnia, and Croatia, between 1998 and 2002, I was not able to find a policeman or border policeman on duty who had any awareness of his own country’s laws on trafficking, nor could I find one who had any idea about how recognize a trafficked person or what to do with him or her when found. Low-level government officials were completely unschooled regarding any domestic and international legal obligations undertaken by their superiors and leaders.
In 2001, for instance, on the very day that a group of high-level government and international officials were gathering in Belgrade to discuss the opening of a shelter for trafficked persons, local police raided three brothels outside of the city and immediately deported the women they found there as “illegal migrants and sex workers.” They had no idea that their superiors had months before signed onto a law that would require them to send potential trafficking victims for screening and counseling at the shelter. The best laid top-down plans will be wholly ineffective if front-line workers are unschooled and untrained as to the existence and mandates of those plans. Personal experiences of author, working in Serbia, Bosnia, and Croatia from 1998 to 2002.
In the United States, Ahn’s case demonstrates a lack of understanding among law enforcement officials and within the administrative and judicial systems regarding both the nature of the crime of trafficking and the requirements within the law to identify and assist victims. The DOJ has identified field training and dissemination of responsibilities to state and local law enforcement as a solution to the problem. This is certainly a step in the right direction, although it will take intense commitment on the part of the executive branch and Congress to commit the time and funds necessary to teach the personnel most likely to encounter victims and traffickers how to recognize them when they see them. More importantly, it will take a clear message from the top that law enforcement officials are expected to prioritize protecting victims over guarding the floodgates.

V. REVAMPING THE U.S. APPROACH TO HUMAN TRAFFICKING

Many of the problems in responding effectively to human trafficking are procedural and administrative in nature, and they might easily be resolved when proper attention is paid to them and when trafficking is unbound from conflation with other political issues. Beyond those practical problems, however, there remains one large conceptual problem: the failure of governments to respond to or even acknowledge that trafficking is a byproduct of labor and migration. Victims of human trafficking are people who determined to improve their lives but had that desire exploited. Only the very rare few have been literally kidnapped or stolen by traffickers. While the concept of trafficking victims as persons with agency and a will to migrate, who had that agency exploited is a notion dismissed by U.S. lawmakers and law enforcement, other professionals have addressed it.

A. The Economic Rights Perspective

An emerging perspective on trafficking, more often discussed in Europe and among anthropologists and sociologists than in the United States or among lawmakers, looks at the interrelationship between gender, migration, and economic disparity as a basis to explore the supply and demand sides of trafficking. This economic rights perspective asks whether trafficking flourishes, in large part, because all of the work done by trafficked persons is “private sphere” work—work that is hidden away or done in the home or on the margins of society. Even in countries where domestic violence laws and child abuse laws are thoughtfully written and implemented, the average citizen still feels that certain matters—those involving familial relationships or sex or matters in the home—are “private matters,” governed not by the laws of the nation, so much as by the societal, religious, and cultural values of

114. DOJ Report, supra note 6, at 14.
the population.

The economic rights perspective is unimpressed by polarization over the issue of sex work. From the economic rights perspective, the two polar perspectives on prostitution can be summarized as follows: the "abolitionist" perspective contends that all sex work is exploitation because sex work reduces the workers to commodities, precluding any distinction between consensual and non-consensual, while the "libertarian" view sees little moral or political distinction between sex work and other personal services. Anderson and O'Connell Davidson conclude that both of these perspectives start from the wrong premise. Their pragmatic—and hence, the more useful and correct—starting point is in recognizing that the sex industry has expanded rapidly in the last two decades, and while there is no automatic correlation between the sex market's expansion and the demand specifically for trafficked persons, the expansion does legitimately raise concern that the increased demand for sex workers is being met by trafficked persons. Anderson and O'Connell Davidson also point out that consumers of such labor—that is, both clientele of sex workers and users of domestic workers—are interested in both the person as well as the actual labor output, which distinguishes these types of labor from other types. Thus, that special interest by consumers leaves sex work and domestic labor "more closely related to the phenomenon of 'trafficking/forced labour than in other sectors, such as the carpet or garment industries" and further supports the conclusion that expanded demand for sex workers and domestic workers is being met by trafficked persons.

The economic rights perspective also elucidates the complexities of the "private sphere" nature of the work. Users of live-in migrant domestic labor and migrant or unfree sex workers imagine a personal relationship with their "employee" specifically because the relationship takes place in the private sphere. Because domestic work and sex work is done in the home or in private, users believe that the work done is governed not by the market or economic concerns, but by "mutual dependence and affective relations." Users of migrant domestic servants perceive the workers as "objects of, rather than subjects to, a contract," thus allowing them to see the "situation" of a trafficked domestic worker as "something quite external to their own role.

115. The polarization has occurred in particular among feminists. For more on the feminist perspective on trafficking and polarization among feminists, see Janie Chuang, Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, Contexts, 11 Harv. Hum. Rts. J. 65 (1998); see also Haynes, supra note 4.


117. Id. at 11. For more on the polarization around the issue of prostitution in the combat to eradicate trafficking, see generally Haynes, Human Trafficking and Migration, in A. BULLARD ED., HUMAN RIGHTS IN CRISIS (Ashgate Press, London) (forthcoming); Haynes, supra note 4; and Chuang, supra note 115.

118. Id. at 12.

119. Id. at 33.
as employer.”

Thus, users of domestic workers distinguish themselves from users of sex workers, who often want to believe that the sex worker is a free and equal participant in the act. The tendency of users of domestic labor to objectify their “employees” is exacerbated when domestic labor is engaged through an agency or subcontracted.

Anderson and O’Connell Davidson conclude that there are three factors key to explaining the exploitative conditions inherent in migrant sex work and domestic work: (1) the unregulated nature of those markets; (2) the abundant supply of persons to be exploited; and (3) “the power and malleability of social norms regulating the behavior of employers and clients.”

From an economic rights perspective, all people are complicit in the existence of human trafficking, because supply and demand do not simply exist: they are forces created through action and inaction on the part of state actors and interest groups. Until there is what Anderson and O’Connell Davidson refer to as a fundamental re-visioning in society, in which migrants, sex workers, and domestic workers truly are fully recognized members of the public sphere with full rights, they will be vulnerable to exploitation, and societies will be complicit in it.

B. Concluding Recommendations from a Pragmatic Perspective

If we could reframe the issues to allow victims of human trafficking to talk about their desire to migrate and encourage law enforcement officials to explore the ways in which that desire to migrate leads to the victims’ exploitation and economic marginalization, much of the residual work of improving our approach to human trafficking would then involve relatively straightforward mechanistic improvements to and restructuring of the processes already in place. Those efforts must, of course, be intellectually honest attempts at implementing the TVPA as passed by Congress. Some concrete recommendations along these lines follow.

1. All Activities Related to Human Trafficking In One Department under One Agency

The bifurcation of responsibilities among the three agencies—DHS, DOJ,
and DOS—exacerbates the top-heavy approach to current responses to recognizing and assisting victims of human trafficking. It also renders the joint goal of eradicating human trafficking more difficult, in that each agency approaches the problem from its particular perspective—immigration and national security, law enforcement, and foreign affairs—making the issue particularly susceptible to each agency’s political agendas of the moment, including terrorism, prostitution, international politics, and illegal migration. One possible solution would be to place purview over the entire issue, including both the prosecution of traffickers and the protection of victims, within one department of one agency.\textsuperscript{125} The goal of the department should be to run the program in as bottom-up a fashion as possible, which means reaching out into the field for training, solutions, and problem-solving within local and regional groupings of law enforcement, advocates, and benefits-providers. Consolidating responsibility for trafficking under one department might yield concrete benefits in assistance and in enforcement by improving accountability and information-sharing, improving training through specialization, and lessening the influences of disparate agency perspectives and politics of the moment.

Currently, the agencies tasked to carry out anti-trafficking initiatives are compelled by Congress, through the legislation that conferred these responsibilities on them, to report on those activities annually; the reporting requirements are positive and should be retained. Transparency in the process will allow all who care about the eradication of human trafficking to analyze the data and the initiatives to see where improvements can be made, costs cut, gaps filled, and systems and processes made more efficient. Some information remains hidden or distorted, however, and some information gaps remain. Over the course of the next few years, the various agencies tasked with carrying out aspects of the TVPA should look critically at what is failing to happen within other agencies and within their own, they should attempt to disentangle their pieces of anti-trafficking initiatives from unrelated political agendas, and they should consider merging their work and priorities through their parallel efforts. Whether or not the responsibilities are consolidated, the most important change must be that all government employees who may encounter victims of human trafficking, in whatever department they may work, are encouraged to assist those victims without fear of being criticized by their superiors for having done so.

\textsuperscript{125} As this article went to press, a senior Executive branch official stated that an Ombudsperson’s Office will be created, presumably to receive and assist with the resolution of problems related to the multiple agency approach. This author would hope the office adds significantly more to the endeavor than has the DHS Ombudsman to immigration.
2. De-stigmatize Migration and Create Sufficient Immigration Solutions for Trafficked Persons

Real immigration solutions should be fundamental to any legislation or proposal that purports either to “combat” trafficking or “protect victims.” The alternatives—deporting trafficked persons, “repatriating” them, or conditioning their immigration options on the chance that law enforcement chooses to request and use their testimony for a prosecution—serve only to feed trafficked persons back into the realm of the traffickers and leave the trafficked persons doubly vulnerable. Anything other than providing an immigration solution results in victims being sent home, after which victims are at risk of being rejected within their own society and family as “tainted.” Additionally, as victims are likely to harbor unresolved medical and psychological issues resulting from the trafficking, they become perfect targets for repeat trafficking, for being coerced into assisting traffickers to tap other victims, or for retaliation if traffickers believe that they aided law enforcement officials. Insofar as U.S. agencies and law enforcement officials operate under any stated or unstated assumption that it is their duty to minimize the recognition of potential victims for fear of opening the floodgates to those who would allegedly be willing to subject themselves to forced sex, domestic labor, or other forms of indentured servitude in order to secure immigrant status in the United States, the self-defeating consequences and the veritable feedback loop facilitated by those false solutions must be squarely acknowledged and addressed.

In order to truly benefit the victims of trafficking, and to assist the prosecutors in accessing information to prosecute traffickers, all countries need to adopt domestic legislation that allows for at least a temporary residency permit. The permit should allow the trafficked person time to begin recovering from her ordeal, should not be conditioned upon a law enforcement officer’s willingness to launch an investigation, and should leave the victim free to consider whether to offer assistance to prosecutors without being coerced to do so. When the option is to testify or be deported, the trafficked person is re-victimized and doubly coerced. An offer that involves soliciting the testimony of the trafficking victim and then deporting her is

126. Most domestic anti-trafficking laws still call for “repatriation” as the preferred immigration solution. While the beneficiary of repatriation might be offered some money to get her started again, as well a free ride home, repatriation is really just a glorified form of deportation—deportation with benefits. Often times, repatriation is the only immigration option offered, even after the victim has provided witness testimony or evidence to prosecute her traffickers. Bulgaria and Romania, for example, rely heavily on repatriation. KRISTI SEVERANCE, CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, SURVEY OF LEGISLATIVE FRAMEWORKS FOR COMBATING TRAFFICKING IN PERSONS 56, 118 (2003).

127. See HUMAN RIGHTS WATCH, COMMENTARY ON THE EUROPEAN COMMISSION PROPOSAL FOR A COUNCIL DIRECTIVE 4 (2002), available at http://www.hrw.org/campaigns/migrants/docs/residence-permit.pdf (indicating that deportees or repatriated persons are likely to face further human rights violations in the form of reprisals or reincorporation into the trafficking network); see also Haynes, supra note 4, at 262.
even worse, and certainly cannot be considered part of a "victim-protection" approach to combating trafficking.

IJs and asylum officers in the United States regularly fail to accept the argument that a victim of human trafficking can be eligible for a grant of asylum. 128 An asylum applicant must establish that she has suffered persecution or has a well-founded fear of persecution on account of race, religion, nationality, political opinion, or social group. 129 The standard in both cases comes from the Refugee Act, which is directly derived from the Refugee Convention. 130 In the United Kingdom, a considerable number of women who seek asylum on the basis of trafficking are granted asylum at the appellate stage, under the terms of the Refugee Convention and the U.K. Human Rights Act. 131 Victims of trafficking applying for asylum typically claim that they suffered on account of their membership in a particular social group—for example, young Thai women exploited by traffickers. U.S. Attorneys and IJs, in contrast, most often agree that the victim suffered but conclude that exploitation during the trafficking process does not fall under one of the five U.S. statutory grounds. There is no reason for the United States to equivocate while other countries deem the Refugee Convention to pertain to trafficking victims.

Migrants suffer more easily and endure more severe forms of exploitation when their immigration status rests in the hands of their employers, regardless of whether the possibility of deportation is real or only feared. The uncertainty about status and deportation works to the advantage of users and exploiters. The more the user has the potential to wield personal control over the worker, and the less access the worker has to a support system, the higher the potential for and degree of exploitation. It is clear that the employers understand that migrant and undocumented employees are cheaper, easier to control, and more exploitable, specifically due to their lack of immigrant status. 132 Expanding opportunities to immigrate and obtain status, ones that do not tie victims' statuses to their "employers," could reduce the propensity of potential users to exploit migrants for domestic or sex work.

3. Acknowledge the TVPA's Dirty Little Secret: The Grant of a T-Visa or Asylum Does Not Necessarily Obviate the Exploitation or End the Extortion

Victims of trafficking are not necessarily safer or more secure after a grant

128. The Second Circuit has just opened the door to claims that forced marriage can be the basis of an asylum claim. See Gao, 440 F.3d at 66-71.
132. See supra Parts II.B. & V.A.
of asylum or a T-visa alone. Take, for example, Ahn, whose traffickers demanded repayment for her transnational movement in the form of 70,000 U.S. dollars per movement. To compel her repayment, her traffickers regularly confronted her mother in her home country and threatened her with death. Although she is more vulnerable to control without immigration status, she can remain under their control even with it. Ahn was ultimately granted asylum in the United States, but she remains under threat of force or death if she fails to repay the debt.133 “Exploitation” is a subtle concept and may be culturally bound. Surely, Ahn is better off in the United States, where she is less likely to be abused or sold yet again as a commodity, but the extent to which she is more free or less exploited is relative. Subsequent to her grant of asylum, she was not immediately eligible for benefits because the U.S. government appealed that grant. During that period, she lost the faith and energy to pursue those benefits. When no benefits-conferring agency jumped in to offer her employment or training, and when her first phone call home yielded the information that her mother had been severely beaten for not paying off the debt to the traffickers, Ahn did not feel free to wait to take advantage of her newfound freedom. Her primary concern was to protect herself and her mother, and in order to do so, she needed to begin repaying her traffickers so that they would stop abusing and threatening her mother back home.

Similarly, when the trafficking ring is international—as they almost always are—the beneficiary of a T-visa does not necessarily have less to fear from traffickers. Carlos, for example, felt threatened and exploited by his traffickers and ultimately testified against them when they were charged in federal court with mail fraud and other crimes related to trafficking (though not for trafficking itself).134 The traffickers based in the United States are being tried in the United States. If they are not convicted, is Carlos really safe here? If they are convicted, but he is denied a T-visa, will he really be safe upon return to his home country from the traffickers there who now know that he has testified against them?135

Where individuals have exploited individuals, such as with indentured domestic servitude, the victims are arguably safer once they are free from the exploitative situation and have some degree of control over their lives, such as that which comes of having immigration status and security. But when the traffickers are part of an organized crime ring, how safe and protected are the victims once they flee and testify against their traffickers? Organized crime rings are unlikely to give up the money they know they are able to obtain by continually threatening trafficking victims and their family members back

133. See infra Ahn’s Story, Part III.
134. Name and certain facts have been changed to protect identity. Case on file with Author.
135. Carlos’s application for a T-visa was denied for “lack of severity,” despite his multi-year cooperation with law enforcement officials, who ultimately did prosecute his traffickers, using Carlos as a witness at the trial.
home, unless they fear the real threat of prosecution and punishment. Protecting victims inside the United States would necessitate the DOJ aggressively prosecuting the traffickers of persons who received immigration status and providing witness protection assistance for those victims. The DOS might well serve the cause of victim protection by coordinating international prosecution of parties in the home country in addition to funding alternatives to migration in the home country.

This international component leaves U.S. domestic efforts with the need to curtail trafficking at the point of origin, rather than to focus the bulk of our efforts and funding on hoping to assist victims after the fact, at the point of destination. Improving our ability to protect trafficked persons and to find and prosecute traffickers will take a change in perspective and attitude on the part of government personnel. At present, Congress has provided a relatively comprehensive piece of legislation in the form of the TVPA, but it is not fully used, nor is it applied in the spirit its drafters intended. Full enactment will require a sea-change in the message that goes out to all government employees in all three agencies charged with carrying out the TVPA. 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.

**Ahn’s Story, Part III**

Ahn was granted asylum. The Department of Homeland Security appealed the grant. During the appeal, Ahn was not eligible for any refugee assistance, had no place to live, no money, and no means to support herself. Her mother continued to have her life threatened by traffickers back home because the family was not paying off the debt owed to them while Ahn was in jail and then in immigration detention in the United States. Terrified for her mother’s safety, Ahn went to secure a “job” with the U.S.-based arm of her traffickers’ ring, at their insistence, despite the fact that she was now eligible to work legally, legitimately, above-board, and unexploited in the United States as an asylum grantee. She worked several months and was paid less than 1/20th of her promised wages, the remainder supposedly going back to repay her traffickers. She first lived in a dormitory with thirty other women similarly employed, working sixteen-hour days, with one day off every two weeks. After she went to work for her traffickers, she was not permitted by her “employers” to speak alone on the phone again. The traffickers still came to the family house in her home country, threatening the family to claim the
transportation debt. They let the family know that they “owned” Ahn. The government withdrew its appeal. Ahn was formally an asylee, but that status had no effect on the threats to her family. Ahn became increasingly agitated and concerned for her mother’s safety. She decided that the only way she could clear herself of the debt and end the threats was to marry one of her traffickers. In the end, Ahn traded herself to pay off her debt.