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Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act

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COMMENT

ELUSIVE EMPOWERMENT: COMPENSATING THE SEX TRAFFICKED PERSON UNDER THE TRAFFICKING VICTIMS PROTECTION ACT

*Theodore R. Sangalis**

Globally, hundreds of thousands—perhaps millions—are being forced or coerced into commercial sex acts. In the United States, this sex trafficking problem has become a lucrative illegal industry, and it is quickly growing. In response, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA) to eradicate the industry by prosecuting the perpetrators, protecting the victims, and preventing the practice. Through several reauthorizations, one federal strategy that has emerged is compensating the victims through mandatory criminal restitution and civil remedies. Collection of restitution damages has been lacking, however, and no civil suit filed for sex trafficking survivors has reached the merits. This Comment argues that the lack of access to compensation is a result of lawmakers’ failure to understand the victim’s experience. Most sex trafficking survivors have a host of issues that the TVPA, as currently authorized, does not accommodate. This Comment recommends modest changes to the TVPA that would help victims gain access to compensatory remedies without compromising collateral efforts to eradicate sex trafficking. Taking cues from stated U.S. policy objectives in the TVPA and other federal legislation, this Comment proposes expanding immigration relief, sharpening prosecutorial efforts, and heightening government accountability—all toward the goal of compensating and empowering survivors of sex trafficking.

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INTRODUCTION

When Sonia, a teenager from El Salvador, arrived in the United States, traffickers forced her into prostitution.¹ When she was fifteen years old, federal law enforcement agents discovered her in a brothel.² Fearful of retaliation from the traffickers and distrusting agents from the Department of Homeland Security (DHS), Sonia did not disclose what happened to her during an interrogation of several hours.³ The officers immediately placed her in deportation proceedings.⁴ While Sonia was in custody, representatives from a nongovernmental organization (NGO) met her and developed a rapport with her before they learned of her actual situation.⁵

1. *Legal Options to Stop Human Trafficking: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. 74 (2007) [hereinafter *Legal Options*] (statement of Katherine Kaufka, National Immigrant Justice Center).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 19.

With the prompting of the NGO, the Department of Health and Human Services (HHS) tried to identify Sonia as a victim of trafficking.⁶ To do so, HHS had to coordinate with the Department of Justice (DOJ) and the DHS, each of which had differing interests in her story and well-being.⁷ Senator Richard J. Durbin of Illinois succinctly stated the situation: “[A] frightened 15-year-old who has been enslaved in a brothel, finally comes forward to try to find some justice, and runs smack dab into three different [f]ederal agencies”⁸

The United States fails to adequately support survivors of sex trafficking.⁹ In 2000, after years of fact-finding and drafting, Congress enacted the Trafficking Victims Protection Act of 2000¹⁰ (TVPA) to prevent human trafficking, protect its victims, and bring its perpetrators to justice. Striking a balance between these objectives has proven harder in practice than in theory. Congress has reauthorized the bill three times in the past ten years in attempts to walk the fine line between prosecuting the criminals and protecting and assisting the victims.¹¹ These modifications have included adding and expanding a civil remedy provision¹² and expanding a restitution provision.¹³ These compensatory remedies serve the dual purpose of reimbursing the victims for their exploitation and deterring the criminals from engaging in further sex trafficking by seizing their assets gained through trafficking.¹⁴ Unfortunately, the goals of criminal prosecution can clash with those of victim protection and compensation; thus, the former has come at the expense of the latter.¹⁵

Since Congress allowed for a civil remedy in 2003, not a single suit filed in federal court by sex trafficking survivors under the TVPA has reached the merits.¹⁶ Restitution in connection with the criminal case—the only

6. *Id.* Identification as a victim of severe trafficking is required if the individual is to receive benefits and protections. *See infra* notes 30, 125–28 and accompanying text.

7. HHS viewed her as a minor in need of social services, DOJ viewed her as a potential witness for the prosecution, and DHS viewed her as an undocumented immigrant. *Legal Options, supra* note 1, at 19.

8. *Id.*

9. This Comment uses “sex trafficking” to refer to trafficking cases involving commercial sex acts and uses “labor trafficking” to refer to trafficking cases involving all forced labor other than commercial sex acts. It uses “human trafficking” to refer to both labor trafficking and sex trafficking cases.

10. Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18, 22, and 42 U.S.C.).

11. *See infra* Part II.B–D; notes 218–29 and accompanying text (describing the potentially divergent goals of prosecuting criminals and assisting victims).

12. *See* 18 U.S.C. § 1595 (2006 & Supp. 2009).

13. *See id.* § 1593.

14. *See* Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 253 (noting these and many other advantages of allowing victims to sue their oppressors).

15. *See infra* notes 218–19 and accompanying text.

16. *See* Kim, *supra* note 14, at 310 n.337 (noting that, as of 2009, approximately thirty civil suits have been brought under § 1595 and none of them alleged sex trafficking). To date, only one suit alleging sex trafficking has been filed. *See* Complaint, Plaintiff A v. Schair, No. 2:11-CV-145 (N.D. Ga. filed June 14, 2011). As of the writing of this Comment,

other statutory means of compensating these survivors—either has not been ordered, not been collected, or been woefully inadequate.¹⁷ In light of these problems, this Comment examines the issue of sex trafficking, assesses the adequacy of the provisions in the TVPA for compensating sex trafficking survivors, and recommends ways to enhance the likelihood that they receive compensation without compromising the prosecution of the traffickers.¹⁸

Part I of this Comment looks at the history of sex trafficking in the United States. It then attempts to identify the experience of the typical victim. Their experiences are not universal, but there are common circumstances, such as legal and socioeconomic statuses and physical and psychological problems, that victims are likely to share.

Part II analyzes the legislative history of the TVPA and its three reauthorizations to determine congressional intent behind creating and expanding victim compensation, and the concurrent interests and objectives affecting those purposes. This Comment focuses on the most recent reauthorization: the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.¹⁹ It also discusses commentary and criticisms of the TVPA by scholars and advocates. It then examines cases that have utilized the congressional scheme and the practical implications of fulfilling its stated objectives. It ends by analyzing the U visa²⁰ as a model for immigration relief.

Part III proposes amendments to the TVPA. In particular, this Comment advocates modifying the requirements for receiving benefits under the TVPA, increasing collaborative efforts to bring civil actions, and ensuring that restitution is not just ordered, but collected. These modifications would give sex trafficking survivors access to the compensation that they deserve.

I. THE ISSUE OF SEX TRAFFICKING

Part I surveys the landscape in which the TVPA operates. It first examines the definition of sex trafficking and the current scope of the problem. It then studies the factors that cause commercial sex trafficking from both the supply side and the demand side. Finally, it investigates the

the case has not reached the merits and likely will be stayed until parallel criminal proceedings are complete. *See infra* note 183 and accompanying text.

17. *See infra* notes 232–35 and accompanying text.

18. This Comment attempts to analyze the TVPA within its current framework, without considering a comprehensive reform of its stated objectives. This Comment also assumes, as the TVPA does, that victims of sex trafficking do not want to engage in prostitution without questioning the validity of such an assumption. *See* Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 123–24 (discussing briefly the two feminist sides of the debate). *Compare* Janice G. Raymond, *Sex Trafficking Is Not “Sex Work,”* CONSCIENCE, Spring 2005, at 45 (supporting this assumption), *with* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1705–25 (2010) (critiquing this assumption).

19. Pub. L. No. 110-457, 122 Stat. 5044 (codified at 18 U.S.C. §§ 1581–1596 (2006 & Supp. 2009)).

20. *See* 8 U.S.C. § 1101(a)(15)(U) (2006).

common experiences of the victims in the United States, including typical interactions with federal authorities and tactics that traffickers utilize to assert and sustain their dominance.

A. Definition and Facts

Human trafficking—sometimes called modern day slavery²¹—is an international problem.²² The definition of trafficking varies from nation to nation, however, and is “hotly contested.”²³ One international definition describes trafficking as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.²⁴

The United States adopted a similar definition in the TVPA, defining trafficking as the “recruitment, harboring, transportation, provision, or obtaining of a person . . . through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”²⁵ Some have argued that this language devotes too much consideration to the victim’s consent, instead of focusing on the ultimate exploitation as the international definition does.²⁶ Generally speaking, however, human trafficking is any activity whereby “one person obtains or

21. See Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN’S L.J. 29, 29 (2001).

22. See *id.*

23. Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 3 (2004).

24. G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/55/25, at 32 (Jan. 8, 2001) (adding that exploitation includes the “prostitution of others”).

25. 22 U.S.C. § 7102(8)(B) (2006 & Supp. 2009). It is important to recognize that, despite the name, a victim of trafficking need not be transported across borders to be defined as such. See U.S. DEP’T OF STATE, THE 2010 TRAFFICKING IN PERSONS REP. 8 [hereinafter 2010 TIP REP.], available at <http://www.state.gov/documents/organization/142979.pdf> (recognizing that victims can be exploited without being transported).

26. See Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451, 461 (2005); Ivy C. Lee & Mie Lewis, *Human Trafficking from a Legal Advocate’s Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT’L L. & POL’Y 169, 172 (2003) (asserting that the U.S. purpose in defining trafficking differs from the U.N. purpose in that Congress sought to limit the availability of services to avoid exploitation of that relief); see also Sarah Leevan, Note, *Comparative Treatment of Human Trafficking in the United States & Israel: Financial Tools to Encourage Victim Rehabilitation and Prevent Trafficking*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 773, 795 (2008) (asserting that the TVPA’s definition “skirt[s] the role of victim consent”); April Rieger, Note, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 250 (2007) (“[T]he TVPA’s definition . . . is directly at odds with the United Nations’ definition of trafficking that focuses on exploitation rather than coercion, and explicitly makes consent irrelevant to the determination of a trafficking victim.”).

holds another person in compelled service,”²⁷ and includes forced labor, sex trafficking, involuntary servitude, and debt bondage.²⁸

The TVPA also provides benefits and protections for sex trafficking victims. Sex trafficking is specifically defined in the TVPA as the “recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”²⁹ Victims are only entitled to benefits if they are subjected to “severe” trafficking.³⁰ This requires a showing of “force, fraud, or coercion,”³¹ unless the victim is less than eighteen years old.³² Recently, the requirement of “force, fraud or coercion” has been expanded to include non-physical forms, such as psychological coercion.³³ The extent of the coercion necessary to be identified as a victim of trafficking has been a point of conflict in the courts.³⁴

Trafficking, especially for commercial sex acts, is often covert, making it difficult to accurately determine the extent to which it occurs.³⁵ The most recent estimate places the total number of trafficked individuals at 12.3 million.³⁶ Approximately 800,000 of these victims are trafficked across

27. 2010 TIP REP., *supra* note 25, at 7.

28. *Id.* at 8–9. These forms of trafficking are continued relationships between the trafficker and victims. They are different from smuggling, which is the illegal act of sneaking someone into another country. *See* Kim & Hreshchyshyn, *supra* note 23, at 5. This Comment focuses specifically on sex trafficking.

29. 22 U.S.C. § 7102(9) (2006 & Supp. 2009). A “commercial sex act” is “any sex act on account of which anything of value is given to or received by any person.” *Id.* § 7102(3). Some scholars have argued that the definition of sex trafficking should be expanded to include not only commercial sex acts, but also forms of forced marriage. *See, e.g.*, Mohamed Y. Mattar, *Access to International Criminal Justice for Victims of Violence Against Women Under International Family Law*, 23 EMORY INT’L L. REV. 141, 149 (2009).

30. *See* 22 U.S.C. § 7105(b)(1)(A).

31. *Id.* § 7102(8)(A). This has proved to be a high standard in practice as federal authorities have “felt [that] allegations of abuse were not ‘severe enough’” to warrant social services under the TVPA. Free the Slaves & The Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 74 (2005) [hereinafter *Hidden Slaves*] (quoting an anonymous trafficking expert).

32. 22 U.S.C. § 7102(8)(A) (identifying minors as per se victims of severe sex trafficking).

33. *See* 18 U.S.C. § 1591(c)(2)(A) (2006 & Supp. 2009); Kim, *supra* note 14, at 278 (“Examples of psychological coercion include a victim’s cultural isolation, financial or emotional dependency on the trafficker, and threats to harm a victim’s family members.”).

34. *See* *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (deciding, under the predecessor statutes to the TVPA, that coercion is limited to actual or threatened use of physical harm). *But see* *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) (finding that the TVPA provisions were intended to overturn *Kozminski*). *See generally* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011) (promoting a more progressive analysis of coercion that considers the nuanced situations that can render a person vulnerable to exploitation).

35. *Hidden Slaves*, *supra* note 31, at 51–52 (asserting that most trafficking crimes are hidden).

36. 2010 TIP REP., *supra* note 25, at 7. Estimates vary widely on this. *Compare* U.N. ECON. & SOC. COUNCIL, INTEGRATION OF THE HUMAN RIGHTS OF WOMEN AND THE GENDER PERSPECTIVE ¶ 5 (2003), available at http://www.humanrightsadvocates.org/wp-content/uploads/2010/05/HRC_Intervention1_2003.pdf (estimating between 700,000 and 4 million trafficked people worldwide), with KEVIN BALES, DEFINING AND MEASURING MODERN SLAVERY 2 (2007), available at <http://www.freetheslaves.net/Document.Doc?id=21>

borders,³⁷ meaning that about 93 percent of trafficking victims are exploited within their own country.³⁸ It is also estimated that 80 percent of trafficking victims are female,³⁹ and 70 percent of those females are trafficked for commercial sex acts.⁴⁰ Most sex trafficking victims come from Southeast Asia, Latin America, Eastern Europe, and former Soviet states.⁴¹ The United States is one of the major destination countries for these victims.⁴²

Human trafficking is the fastest growing criminal industry, and is now tied with weapon trafficking as the second largest illegal enterprise in the United States behind drug trafficking.⁴³ The United States Department of State notes that money generated for human trafficking may be “as high as \$32 billion, if both the sale of individuals and the value of their exploited labor or services are taken into account.”⁴⁴ Sex trafficking alone generates an estimated \$7 billion per year, though some have said it is closer to \$19 billion.⁴⁵ Because of these exorbitant profits,⁴⁶ the United Nations anticipates that human trafficking will surpass drug and weapon trafficking to become the world’s largest illegal business.⁴⁷

The Department of State asserts that, in the United States, 14,500 to 17,500 people are trafficked every year.⁴⁸ American citizens are predominately victims of sex trafficking while foreign citizens in the United

(estimating 27 million trafficked people worldwide). The variation in these numbers is likely due to differences in political perspectives and inherent difficulties in obtaining information about an underground crime. See Kim, *supra* note 14, at 277.

37. U.S. DEP’T OF STATE, THE 2008 TRAFFICKING IN PERSONS REP. 7 [hereinafter 2008 TIP REP.], available at <http://www.state.gov/documents/organization/105501.pdf>; see also *supra* note 25.

38. In the United States, however, trafficking mostly affects immigrants. See Kim, *supra* note 14, at 251.

39. U.S. DEP’T OF STATE, THE 2004 TRAFFICKING IN PERSONS REP. 23 [hereinafter 2004 TIP REP.], available at <http://www.state.gov/documents/organization/34158.pdf>. This Comment will mostly discuss women and girls as the victims of sex trafficking, even though men and boys also can be exploited, because females are the “primary targets” of trafficking. See Hyland, *supra* note 21, at 29.

40. 2004 TIP REP., *supra* note 39, at 23.

41. See AMY O’NEILL RICHARD, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 3 (2000) (reporting findings to the Central Intelligence Agency); Rieger, *supra* note 26, at 232–33.

42. See Rieger, *supra* note 26, at 233.

43. *Fact Sheet: Human Trafficking*, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES (June 28, 2011), http://www.acf.hhs.gov/trafficking/about/fact_human.html.

44. 2008 TIP REP., *supra* note 37, at 34.

45. *Id.*

46. The profits are high because they are derived from reusable commodities—the victims’ bodies. See *infra* note 78 and accompanying text.

47. See Kim, *supra* note 14, at 277–78; see also Rieger, *supra* note 26, at 240 (noting that some crime rings are encouraged to facilitate human trafficking because it is “extremely profitable and low risk”).

48. 2004 TIP REP., *supra* note 39, at 23. This statistic is criticized because there is a lack of transparency with regard to its methodology. See *Hidden Slaves*, *supra* note 31, at 58 & n.12. During the original proposals of the TVPA, estimates suggested the number was closer to 50,000. See H.R. REP. NO. 106-487, pt. 2, at 2 (2000).

States are more often trafficked for labor.⁴⁹ Within the United States, trafficking occurs mostly in large metropolitan areas with significant immigrant populations—especially in cities in California, Florida, New York, and Texas.⁵⁰ Perpetrators of trafficking often share similar nationalities or ethnicities to those that they traffic—most often they are of Chinese, Mexican or Vietnamese origin.⁵¹ Victims therefore face ostracism and retribution from the traffickers in their communities.⁵² For those victims who are deported back to their country of origin, at least one study reports that almost 50 percent are re-trafficked.⁵³

B. Factors Causing Sex Trafficking

Because of the rise and prevalence of trafficking in recent years, it is important to examine situations that may perpetuate this illegal activity. Scholars have cited the following causes of human trafficking: poverty,⁵⁴ illiteracy,⁵⁵ armed conflicts,⁵⁶ economic crises,⁵⁷ globalization,⁵⁸ gender inequalities⁵⁹ and discrimination,⁶⁰ low social status of women,⁶¹ lack of educational opportunities,⁶² restrictive immigration policies,⁶³ lack of anti-

49. U.S. DEP'T OF STATE, THE 2011 TRAFFICKING IN PERSONS REP. 372 [hereinafter 2011 TIP REP.], available at <http://www.state.gov/g/tip/rls/tiprpt/2011/> (adding that federal and state information indicates sex trafficking is generally more prevalent, but that law enforcement data suggests that the occurrence of labor trafficking cases is higher).

50. See *Hidden Slaves*, *supra* note 31, at 58.

51. See *id.* at 59–60; see also Kim & Hreshchyshyn, *supra* note 23, at 22 (noting that, in one case, the similar ethnicities helped the trafficker obtain the trust of the victims). More recent statistics claim that most victims in the United States come from Thailand, followed by Mexico and the Philippines. See 2009 ATT'Y GEN. ANN. REP. TO CONG. & ASSESSMENT OF U.S. GOV'T ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 20 (2010) [hereinafter 2009 ATT'Y GEN. ANN. REP.], available at <http://www.justice.gov/ag/annualreports/tr2009/agreporhumantrafficking2009.pdf>.

52. See Rieger, *supra* note 26, at 243.

53. See *id.* at 243–44 (citing Cecilia M. Bailliet, *Responsibilities of the Destination Country*, 25 FORCED MIGRATION REV. 28, 28 (2006)) (discussing the aftermath of sex trafficking).

54. See Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 BUFF. HUM. RTS. L. REV. 5, 7 (2006); Dalrymple, *supra* note 26, at 458; Hyland, *supra* note 39, at 35; Kim & Hreshchyshyn, *supra* note 23, at 6; Tiefenbrun, *supra* note 18, at 131; Rieger, *supra* note 26, at 235.

55. See Hyland, *supra* note 39, at 35; Kim & Hreshchyshyn, *supra* note 23, at 6.

56. See Amiel, *supra* note 54, at 8; Hyland, *supra* note 39, at 35; Kim & Hreshchyshyn, *supra* note 23, at 6; Tiefenbrun, *supra* note 18, at 133.

57. See Amiel, *supra* note 54, at 8; Hyland, *supra* note 39, at 35; Kim & Hreshchyshyn, *supra* note 23, at 6.

58. See Amiel, *supra* note 54, at 7; Dalrymple, *supra* note 26, at 458; Kim & Hreshchyshyn, *supra* note 23, at 5; Tiefenbrun, *supra* note 18, at 131.

59. See Amiel, *supra* note 54, at 7; Rieger, *supra* note 26, at 235.

60. See Amiel, *supra* note 54, at 7; Hyland, *supra* note 39, at 36; Kim & Hreshchyshyn, *supra* note 23, at 6; Rieger, *supra* note 26, at 235.

61. See Hyland, *supra* note 39, at 35; Kim & Hreshchyshyn, *supra* note 23, at 6; Tiefenbrun, *supra* note 18, at 133; Rieger, *supra* note 26, at 235.

62. See Tiefenbrun, *supra* note 18, at 133; Rieger, *supra* note 26, at 235.

63. See Dalrymple, *supra* note 26, at 458; Rieger, *supra* note 26, at 235.

trafficking laws⁶⁴ (or lack of enforcement),⁶⁵ and the demand of male sex buyers.⁶⁶

Perhaps the most pervasive of these causes is global poverty, which disproportionately affects women and girls.⁶⁷ Trafficking has risen particularly quickly in the current era of globalization and industrialization.⁶⁸ In a globalized market, it is often citizens of developing countries that provide the cheap supply of commercial sex acts to citizens of developed countries.⁶⁹ Communities formerly built on subsistence agriculture now flock to outsourced industrial factories to produce goods for the world market.⁷⁰ This has increased, rather than decreased, the inequalities between men and women.⁷¹ The rapid change has led to decreased food subsidies and rising prices for those remaining in subsistence agriculture, exacerbating the divide between rich and poor.⁷² Impoverished people in subsistence agriculture, then, are forced to seek work in unfamiliar industries away from their homes, making them vulnerable to human trafficking.⁷³ The people in these vulnerable positions in impoverished countries usually seek opportunities in richer countries.⁷⁴ The increase in world population has exacerbated these issues, as people have overwhelmed available resources.⁷⁵

In addition, because traffickers often come from the same community and circumstances as their victims, they too are often seeking economic

64. See Amiel, *supra* note 54, at 8; Dalrymple, *supra* note 26, at 458; Tiefenbrun, *supra* note 18, at 132.

65. See Amiel, *supra* note 54, at 9; Dalrymple, *supra* note 26, at 458; Tiefenbrun, *supra* note 18, at 135; Michelle R. Adelman, Note, *International Sex Trafficking: Dismantling the Demand*, 13 S. CAL. REV. L. & WOMEN'S STUD. 387, 405–07 (2004).

66. See Amiel, *supra* note 54, at 7; Tiefenbrun, *supra* note 18, at 132; Adelman, *supra* note 65, at 405–06.

67. See Tiefenbrun, *supra* note 18, at 132–34 (asserting that the low status of women keeps them dependent on men and makes impoverished conditions more dire for them); Lindsay Strauss, Note, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL'Y 495, 507–08 (2010) (asserting that societal norms of wage disparities between men and women in the U.S. and abroad lead to fewer economic alternatives for women).

68. See Dalrymple, *supra* note 26, at 458 (“[T]he recent resurgence [of human trafficking] can be traced to industrialization.”). See generally Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN'S L.J. 31, 32–38 (2002) (discussing the effects of globalization and the industrial market on human trafficking).

69. See Tiefenbrun, *supra* note 18, at 132 (adding that the commercial sex trade is “an economic system which is sorely lacking in moral values”).

70. See Joshi, *supra* note 68, at 33–34; see also Dalrymple, *supra* note 26, at 458 (noting that millions of peasants have moved to cities).

71. See Joshi, *supra* note 68, at 34 (using gender-based allocation of work and the wage-gap between men and women as examples).

72. See *id.* at 36.

73. See *id.* at 36–38 (adding that “[w]omen are generally the ones affected the most profoundly in transition economies”).

74. See Amiel, *supra* note 54, at 8 (“The flow of trafficking tends to be directed from the poorer countries of the East toward the richer countries of the West”); Rieger, *supra* note 26, at 232 (remarking that sex traffickers often move women, under force or deception, from poor countries to richer countries).

75. Dalrymple, *supra* note 26, at 458.

opportunities.⁷⁶ The commercial sex trade is a quick way to earn money, as it involves the repeated sale of the same product as a service,⁷⁷ unlike drugs or weapons, which can only be sold once.⁷⁸ Because of this financial incentive, poverty plays a critical role in inducing someone to enter the business of trafficking.⁷⁹ Even if traffickers are caught, prosecuted, and forced to provide restitution to their victims, most traffickers are likely earning far more than the amount they must pay back—in some cases only having to pay a few months' worth of wages for many years of exploitation.⁸⁰

Sex trafficking has also risen due to the demand for cheap sex.⁸¹ Where women have no rights, men are permitted to take advantage of them in ways that would not otherwise be tolerated.⁸² A culture of devaluing females can cause family members to sell wives and daughters for money.⁸³ This insidious view also promotes a sense of male entitlement to do with women as they will, which can increase the demand for buying sex.⁸⁴

Another reason for the proliferation of the sex trafficking industry is the lack of enforcement of laws criminalizing or otherwise condemning the activity. The Department of State's annual Trafficking in Persons Report⁸⁵ (TIP Report) places countries in four different tiers that indicate whether

76. See Kim & Hreshchyshyn, *supra* note 23, at 6 (noting the multiple connections traffickers often have to the local community of their victims); Rieger, *supra* note 26, at 251 (noting the close ties traffickers often have to their victims' home country or hometown).

77. *International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery: Hearing Before the H. Comm. on Foreign Affairs, 110th Cong. 19* (2007) [hereinafter *International Trafficking*] (statement of Sharon Cohn, Senior Vice President, International Justice Mission); see also Kim & Hreshchyshyn, *supra* note 23, at 36 (“Traffickers take advantage of people in an outrageous denial of self-determination through commodification.”).

78. See *International Trafficking*, *supra* note 77, at 19; see also Hyland, *supra* note 39, at 38; Kim & Hreshchyshyn, *supra* note 23, at 8. Sex trafficking easily comports with these other illegal trades conducted by organized crime networks, however. See *Hidden Slaves*, *supra* note 31, at 61; see also Kim & Hreshchyshyn, *supra* note 23, at 6 (“Trafficking nearly always involves some sort of network, some organized and others not, including recruiters, document forgers, transporters, and purchasers.”).

79. See *supra* note 76 and accompanying text.

80. See, e.g., *United States v. Kozminski*, 487 U.S. 931, 934–35 (1988). *Kozminski* involved defendants who forced two mentally retarded men to work seventeen-hour days, at little to no pay, for a total of about fifteen years for one man and about ten for the other. *Id.* Upon remand, the defendants pled guilty and were ordered to jointly pay \$34,000 to the victims, compensating the men at a rate of about forty to eighty-five cents per hour. See Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides,”* 70 GEO. WASH. L. REV. 475, 527–28 (2002).

81. See *Hidden Slaves*, *supra* note 31, at 60–61; Adelman, *supra* note 65, at 389.

82. It should be noted that international law attempts to curb these cultural views from a legal standpoint with protocols and universal standards of rights and crimes. See generally G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/55/25, at 31–39 (Jan. 8, 2001) (focusing on eliminating the exploitation of individuals regardless of social status).

83. See *id.* at 116–18.

84. See VICTOR MALAREK, *THE JOHNS* 122–24 (2010) (detailing the views of certain buyers of sex that they are “treated better” by women in developing countries than by American women).

85. The report is mandated by the TVPA. See 22 U.S.C. § 2151n(f) (2006 & Supp. 2009).

each country's laws and enforcement practices meet sufficient standards to combat trafficking.⁸⁶ The TIP Report also details prosecutorial efforts in each country to gauge the effectiveness of law enforcement.⁸⁷ Scholars believe that if anti-trafficking laws are actually enforced, and traffickers are imprisoned, fined, or both, the illicit trade in humans will dwindle.⁸⁸ As it stands, however, trafficker arrests, prosecutions, and convictions fall well short of the total number of traffickers involved in the sexual exploitation of women and children.⁸⁹

Some scholars say that, in the United States, this gap comes from a lack of will by law enforcement to “expend the effort necessary to inquire into trafficking cases.”⁹⁰ As a result, traffickers conduct highly profitable illicit businesses, with few consequences for their activities.⁹¹ Moreover, although U.S. law contains a provision that arguably allows prosecution of the purchaser,⁹² the federal government has not prosecuted any buyer of sex.⁹³ Nor has there been any federal effort to decrease the demand through public awareness campaigns.⁹⁴ At least one scholar asserts that if the United States continues to ignore the demand for illegal sex, then sex trafficking will continue to thrive.⁹⁵

C. Victim Experience

While each individual's experience as a victim of sex trafficking differs, there are common themes, which can help determine appropriate remedies. Congress summarized this “human calamity” as one where “women and girls are sold [and] forced to commit commercial sex acts day after day for little or no pay, and are subject to coercion and violence.”⁹⁶ Victims tend to endure physical and psychological trauma from their ordeal.⁹⁷ Traffickers

86. See 2011 TIP REP., *supra* note 49, at 11, 13–14.

87. See *id.* at 30–39 (reporting the general methodology and findings of investigations into each country's attempts to prosecute trafficking crimes).

88. See, e.g., USA—The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: 50 Key Provisions, WOMEN'S UNITED NATIONS REP. NETWORK, http://www.wunrn.com/news/2008/12_08/12_15_08/121508_usa2.htm (last visited Sept. 21, 2011) [hereinafter *WUNRN Report*] (discussing the strengths of the legislation).

89. See generally 2011 TIP REP., *supra* note 49, at 30 (revealing that worldwide, there were only 6,017 trafficking prosecutions and 3,619 convictions in 2010).

90. Lee & Lewis, *supra* note 26, at 183.

91. See Kim & Hreshchyn, *supra* note 23, at 7 (noting the attractiveness of a high return-to-risk ratio).

92. See 18 U.S.C. § 1591(a)(2) (2006 & Supp. 2009) (criminalizing those who knowingly benefit from trafficking, financially or otherwise).

93. See Leevan, *supra* note 26, at 797–98. Though, in certain circumstances, a commercial sex buyer may be prosecuted for sex tourism. See 18 U.S.C. § 2423 (2006).

94. See Adelman, *supra* note 65, at 398.

95. See *id.* at 391.

96. H.R. REP. NO. 110-430, pt. 1, at 34 (2007). For one example of this calamity in action, see Nicholas Kristof, Op-Ed., *A Woman. A Prostitute. A Slave.*, N.Y. TIMES, Nov. 28, 2010, at WK8.

97. Hussein Sadruddin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 381 (2005) (noting that victims of trafficking are commonly “raped, tortured, or

usually recruit the victims through misleading employment offers.⁹⁸ Some abduct or kidnap the victims, promise marriage, or even buy the victims from their family members.⁹⁹ Often, the recruiting trafficker is a family friend of the victim or a well-respected member of the same community.¹⁰⁰ Victims may know that the employment offers are risky, but are often not aware of—and would not agree to—the level of exploitation once at the destination.¹⁰¹ When transporting the victims across borders, traffickers often require payment for the costs of smuggling.¹⁰² Once traffickers bring the victims to the destination, they force the women to perform sex acts with numerous buyers.¹⁰³ For victims that resist, the traffickers deploy a range of physical and psychological techniques to force or coerce them into exploitative acts.¹⁰⁴ Forms of physical coercion can include assault, burning, or rape.¹⁰⁵ Because victims often come from impoverished areas, which lack adequate health care, many have untreated prior afflictions¹⁰⁶ and become increasingly dependent on the trafficker for basic health needs.¹⁰⁷ Traffickers seize this opportunity to break their will by forcing them to work in dangerous environments and depriving them of necessary medical care.¹⁰⁸ Traffickers may even force their victims to take drugs,

otherwise brutalized”); *see also* 2010 TIP REP., *supra* note 25, at 12 (noting that victims suffer “long-lasting physical and psychological trauma” and may also encounter “disease (including HIV/AIDS), drug addiction, unwanted pregnancy, malnutrition, social ostracism, and possible death”); 2004 TIP REP., *supra* note 39, at 15–16 (detailing the health risks suffered by trafficked children); *Hidden Slaves*, *supra* note 31, at 49–50 (noting that sex trafficking victims are “especially at risk of contracting HIV or other sexually transmitted diseases”).

98. *See* Amiel, *supra* note 54, at 9; Kim & Hreshchyshyn, *supra* note 23, at 6 (adding that the offers are often made “through a network of acquaintances or [by] advertis[ing] in the media”); Rieger, *supra* note 26, at 236–37 (noting that traffickers use fake contracts and contacts in the United States, and are increasingly utilizing the internet to “prey on economically vulnerable women”).

99. *See* Amiel, *supra* note 54, at 9; Kim & Hreshchyshyn, *supra* note 23, at 6; Rieger, *supra* note 26, at 235–36. Multiple international law resolutions have recently focused on exposing trafficking for the purposes of various types of forced marriage. *See* Mattar, *supra* note 29, at 143.

100. Kim & Hreshchyshyn, *supra* note 23, at 6.

101. *Id.* at 6–7. Traffickers also reuse the same scams because families and friends of the victims are usually unaware of this exploitation. *See* Rieger, *supra* note 26, at 237.

102. *See* Amiel, *supra* note 54, at 10. Expenses are incurred gaining entry to the United States, which often occurs by obtaining short-term visas and then overstaying the allotted time, or by falsifying documentation to obtain long-term visas. *See* Rieger, *supra* note 26, at 238 (describing the various means of trafficking victims into the United States).

103. *See id.* at 241 (noting that twenty-five buyers per day is not uncommon).

104. *See* Sadruddin et al., *supra* note 97, at 383 (stating that coercive techniques of human traffickers are “[s]imilar to [those of] torturers”).

105. *Id.*; *see also* *Hidden Slaves*, *supra* note 31, at 91–92 (noting that traffickers may force victims to have unsafe abortions, resulting in gynecological complications); Rieger, *supra* note 26, at 241–42 (adding that traffickers will usually not rape a victim until they have sold her virginity at a high price).

106. *See* *Hidden Slaves*, *supra* note 31, at 86–87 (describing the link between poverty and physical health).

107. *See id.* at 87 (noting that trafficked people are “exposed to grave risks of injury or death” during transit to the United States).

108. *Id.* at 49–50.

causing the victims to become dependent on the traffickers to support their addiction.¹⁰⁹ In general, victims of sex trafficking are often malnourished and hungry.¹¹⁰

To psychologically coerce their victims, traffickers take the victims' personal documents, threaten harm to their families, and threaten to report the victims to authorities for prostitution or undocumented presence.¹¹¹ The threat to kill their families is particularly potent because United States law enforcement lacks the power to protect the families.¹¹² Because traffickers usually operate in some sort of organized crime network¹¹³ and are often part of the same ethnic group as the victim,¹¹⁴ their threats to family members are credible.¹¹⁵

Sex trafficking victims are also unfamiliar with the language and culture of the United States¹¹⁶—especially when traffickers constantly move them within a nationwide network of brothels to keep them isolated and disoriented.¹¹⁷ These immigrant victims are usually working off some form of debt for having gained access to the United States, exposing them to forceful collection of the cost of the trip.¹¹⁸ Having been cut off from the outside world, victims often lose their sense of worth and control as they increasingly rely on their trafficker for survival.¹¹⁹ During this time, victims often feel isolated, ashamed, and betrayed by those they trusted.¹²⁰ Many victims may develop “learned helplessness” and become attached to

109. See Hyland, *supra* note 39, at 41 (explaining that women who resist prostitution may be drugged, but also that others voluntarily turn to drugs to escape their ordeal).

110. See *Hidden Slaves*, *supra* note 31, at 92 (adding that traffickers may withhold food as a form of punishment); Kim & Hreshchyshyn, *supra* note 23, at 7 (mentioning starvation as part of the physical abuse victims may sustain).

111. See Sadrudin et al., *supra* note 97, at 383 (noting traffickers will also threaten “arrest, detention, or deportation”); see also *Hidden Slaves*, *supra* note 31, at 87–88 (noting that traffickers usually take the victim’s identification and travel documents to prevent escape).

112. Dalrymple, *supra* note 26, at 466. The Witness Security Program, however, can protect qualifying family members. See generally U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-21.000 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/21mcrm.htm.

113. See Amiel, *supra* note 54, at 9 (“Trafficking activities are often orchestrated by transnational organized crime networks.”).

114. See Rieger, *supra* note 26, at 251 (mentioning that the threat of retaliation is serious because “traffickers are often men from the victim’s home country or even hometown”).

115. See *International Trafficking*, *supra* note 77, at 38 (statement of Msgr. Franklyn M. Casale, President, St. Thomas University).

116. See Amiel, *supra* note 54, at 12 (noting these barriers keep the victim from reporting their ordeal to law enforcement officials); Dalrymple, *supra* note 26, at 466. One study found that 73 percent of international sex trafficking victims in the United States had little to no English language proficiency. JANICE G. RAYMOND & DONNA M. HUGHES, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 42 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf>.

117. See Rieger, *supra* note 26, at 238–39.

118. See Amiel, *supra* note 54, at 10; Hyland, *supra* note 39, at 38 (explaining that their wages are never credited against debts); Kim & Hreshchyshyn, *supra* note 23, at 7 (asserting that these debts may be “artificial”); Rieger, *supra* note 26, at 239 (recognizing that these debts continually accrue interest for living costs).

119. *Hidden Slaves*, *supra* note 31, at 50.

120. *Id.* at 89.

their oppressors.¹²¹ Thus, even after they escape, victims can suffer “depression, recurring nightmares, and panic attacks,”¹²² making post-traumatic stress disorder a common consequence.¹²³

Victims of sex trafficking are treated as criminals under prostitution or immigration laws.¹²⁴ This is so despite the protections of the TVPA, because of the exceptionally slow process for identifying people as victims.¹²⁵ Part of the identification problem comes from the confusion among law enforcement officials as to the definition of a trafficking victim.¹²⁶ Identification is also complicated by the fact that many law enforcement authorities view prostitution as a victimless crime and deprioritize it.¹²⁷ In some cases, both internationally and domestically, these same authorities are complicit in the illegal trade through corruption and bribes.¹²⁸

Thus victims receive little assistance from the United States.¹²⁹ The federal government has attempted to address this issue with the passage of the TVPA,¹³⁰ but, as demonstrated above, reporting their experiences to law enforcement can be a difficult and intimidating prospect for many victims.¹³¹ As some social service providers note, immigrants “often lack legal permission to remain in the country [and] fear reprisals if they escape” their oppression.¹³² The threat of deportation is constant because federal agencies may abandon their investigation and deport the victim at any time.¹³³ This threat, compounded by corruption in foreign law

121. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3026 (2006).

122. *Hidden Slaves*, *supra* note 31, at 50.

123. See Angela A. Jones, *Post-Traumatic Stress Disorder and Victims of Sex Trafficking: A Perpetuation of Chronic Indignity*, 4 INTERCULTURAL HUM. RTS. L. REV. 317, 327–28 (2009) (noting that “[d]epression, anxiousness, loss of sleep and loss of appetite are symptoms” typically associated with violent acts).

124. Sadruddin et al., *supra* note 97, at 384; see also Dalrymple, *supra* note 26, at 466 (noting that traffickers use this to generate fear in victims).

125. Sadruddin et al., *supra* note 97, at 391; see also Rieger, *supra* note 26, at 247–48 (detailing the identification and certification process and advocating for a simpler process that poses fewer difficulties for victims).

126. See Rieger, *supra* note 26, at 245–46 (citing Richard Danzinger, *Where Are the Victims of Trafficking?*, 25 FORCED MIGRATION REV. 10, 10 (2006)) (adding that money allocated to training federal authorities to recognize victims is underutilized).

127. See *Hidden Slaves*, *supra* note 31, at 79; see also Rieger, *supra* note 26, at 246 (clarifying that prostitutes may be viewed as accomplices instead of victims).

128. See Amiel, *supra* note 54, at 9 (revealing that government and law enforcement authorities can aid the crime networks by providing legal documents, destroying evidence, or failing to pursue punishment for the crime); Tiefenbrun, *supra* note 18, at 118 (asserting that there is documented complicity by law enforcement at each step of the trafficking process).

129. See, e.g., *supra* notes 1–8 and accompanying text.

130. See *infra* Part II.

131. Sadruddin et al., *supra* note 97, at 384; see also *International Trafficking*, *supra* note 115, at 37 (statement of Msgr. Franklyn M. Casale, President, St. Thomas University).

132. Sadruddin et al., *supra* note 97, at 384.

133. See *id.* at 396 (detailing the way in which the federal agencies coordinate efforts to explore alleged cases of trafficking).

enforcement, creates a general distrust of law enforcement officials among victims of human trafficking.¹³⁴

Even without these complications, many trafficking victims are simply ill-equipped to testify.¹³⁵ In some cases, victims may be too traumatized to recall the facts reliably, or if they can, recalling their experience leads to re-traumatization.¹³⁶ In recounting events, they may lose track of time or forget significant portions of their days.¹³⁷ Sometimes they have simply suppressed the memories of their abuse and need time and care to recount their story.¹³⁸

If and when survivors assist with criminal prosecutions of their traffickers, they are still left with few, if any, resources to rebuild their lives.¹³⁹ It is therefore no surprise that most victims do not come forward out of their own volition, and instead require the assistance of others in the rescue and identification process.¹⁴⁰

II. THE TVPA: OBJECTIVES, PROVISIONS, AND PRACTICES

Having recognized the prevalence of human trafficking in the United States, legislators worked to combat the illicit trade. Part II explores the federal legislation enacted to curb the problem. Part II.A–D examines the provisions and legislative history of the TVPA and its three subsequent reauthorizations. Part II.E recounts commentary by scholars and advocates on the legislation. Part II.F explores two cases implementing the provisions of the TVPA. Part II.G analyzes the collaborative efforts by federal authorities and local advocates to help sex trafficked people. Finally, Part II.H compares the immigration policies of the U visa with the T visa.

A. *The Trafficking Victims Protection Act of 2000*

Congress first enacted the TVPA as part of an ambitious endeavor to combat human trafficking in the United States and abroad.¹⁴¹ At the time,

134. See Dalrymple, *supra* note 26, at 466; Kim & Hreshchyshyn, *supra* note 23, at 15 (asserting the source of the distrust may be from “an absence of rule of law and government corruption in many victims’ countries of origin”); Shannon Lack, *Civil Rights for Trafficked Persons: Recommendations for a More Effective Federal Civil Remedy*, 26 J.L. & COM. 151, 160 (2006) (asserting that the distrust is compounded by “deep feelings of humiliation”); Lee & Lewis, *supra* note 26, at 183 (claiming that, due to the corruption of foreign law enforcement, “victims are unlikely to place trust in law enforcement agencies”); *supra* note 128 and accompanying text.

135. Chacón, *supra* note 121, at 3026.

136. See Sadruddin et al., *supra* note 97, at 405–06 (discussing various psychological responses of typical trafficking victims to “explain why so few trafficking victims come forward as witnesses”); Rieger, *supra* note 26, at 251 (calling testifying about rape “a revictimization”).

137. See Chacón, *supra* note 121, at 3026 (mentioning that “dissociation is a common response” and may make victims “seem emotionally numb”).

138. Dalrymple, *supra* note 26, at 469.

139. *Hidden Slaves*, *supra* note 31, at 85.

140. Dalrymple, *supra* note 26, at 466.

141. See H.R. REP. NO. 106-487, pt. 2, at 2 (2000). The originality of the provisions in the TVPA has been debated. Compare *Hidden Slaves*, *supra* note 31, at 69 (calling the

the most prominent statutes condemning the acts commonly committed by traffickers were those defining involuntary servitude, peonage, and slavery.¹⁴² With the passage of the TVPA, Congress classified the crime of trafficking as a separate violation, whether for forced labor or commercial sexual acts.¹⁴³ It took a decidedly victim-centered approach to the legislation.¹⁴⁴ Congress expressly treated all forms of prostitution as sexual oppression.¹⁴⁵ By prosecuting the traffickers, protecting the victims, and preventing the practice, the theory was that federal authorities would be equipped to eliminate human trafficking in the United States if the statute were vigorously implemented.¹⁴⁶ Congress also sought to prevent trafficking by requiring the State Department to publish the annual TIP Report.¹⁴⁷ The TIP Report must include an account of the nature and scope of trafficking in each country, as well as an analysis of each country's efforts to combat the problem.¹⁴⁸ TIP Reports have recently started evaluating the United States' own efforts to combat trafficking.¹⁴⁹ The TIP Report has proven to be an effective method of raising awareness.¹⁵⁰

1. The T Visa

Congress also recognized that undocumented immigrants were the most prevalent victims of trafficking, and thus sought to protect them by providing "T visas"—permits that allow trafficking victims to stay and work in the United States for a short time.¹⁵¹ Congress conditioned issuance of a T visa on four requirements: first, recipients of T visas must

legislation a "bold departure from prior approaches to trafficking"), with Chacón, *supra* note 121, at 3012 (arguing that the legislation is "proving to be an heir to th[e] tradition" of "anti-immigrant measures dressed in a cloak of morality").

142. See 18 U.S.C. §§ 1581–1584 (2006 & Supp. 2009) (criminalizing acts of overt enslavement of others).

143. See *id.* §§ 1581–1596.

144. See *Implementation of the Trafficking Victims Protection Act: Hearing Before the H. Comm. on Int'l Relations*, 107th Cong. 3 (2001) [hereinafter *Implementation*] (statement of Hon. Henry J. Hyde, Chairman, H. Comm. on Int'l Relations) (characterizing prostitution as a human rights problem); see also *infra* Part II.E (noting that commentators have observed that the practical effect of the legislation has, despite this approach, often failed to protect the victim or their interests).

145. See *Implementation*, *supra* note 144, at 3.

146. See *id.*

147. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 104, 114 Stat. 1464, 1471–73.

148. *Id.* The TIP Report is now divided into three parts: prosecution, protection, and prevention. See 2011 TIP REP., *supra* note 49, at 16 (discussing the "3P" paradigm used to analyze a country's compliance with international standards).

149. See 2010 TIP REP., *supra* note 25, at 7 (noting that the 2010 report was the first time the United States held itself accountable).

150. See *supra* notes 86–88 and accompanying text.

151. See 8 U.S.C. § 1101(a)(15)(T) (2006 & Supp. 2009) (defining the standards to be identified as a victim of trafficking); 8 C.F.R. § 214.11(p)(1) (2010) (allowing qualifying victims of trafficking to stay in the United States for four years); see also H.R. REP. NO. 106-487, pt. 2, at 17 (2000) (recognizing that many victims are "smuggled into the country").

have experienced “severe” forms of trafficking;¹⁵² second, the victim must be physically present in the United States “on account of such trafficking”;¹⁵³ third, the victim must cooperate with the investigation or prosecution of the trafficking, unless the victim is under fifteen years old when cooperation is requested;¹⁵⁴ and finally, that “extreme hardship involving unusual and severe harm” would attend the victims’ removal from the United States.¹⁵⁵ Congress set a limit of issuing 5,000 T visas every year¹⁵⁶ to allay fears that the provision would open the floodgates at the borders and allow many otherwise illegal immigrants to gain access to the United States.¹⁵⁷

2. Mandatory Restitution

While the main focus of the TVPA was the criminalization of trafficking, Congress also added a mandatory restitution provision.¹⁵⁸ The provision requires courts to order restitution to the victim for any criminal offense under Chapter 77 of Title 18 of the United States Code, which covers trafficking and slavery.¹⁵⁹ The restitution is to be paid to the victim,¹⁶⁰ and must be for the “full amount of the victim’s losses,”¹⁶¹ plus the greater of the value of the victim’s services or minimum wage under the Fair Labor Standards Act.¹⁶² A victim is expressly defined as anyone harmed by an act of sex trafficking, among other crimes.¹⁶³ Although the restitution order is to follow the procedures set forth in 18 U.S.C. § 3664,¹⁶⁴ several of those procedures allow for prosecutorial discretion in seeking restitution, whereas restitution is mandatory for trafficking crimes.¹⁶⁵

152. 8 C.F.R. § 214.11(b)(1); *see supra* note 31 and accompanying text (defining severe forms of trafficking). Congress added this requirement because it did not want to provide blanket amnesty to anyone claiming to be working off a smuggling debt. H.R. REP. NO. 106-487, pt. 2, at 17.

153. 8 C.F.R. § 214.11(b)(2).

154. *Id.* § 214.11(b)(3) (qualifying that the victim need only comply with “reasonable request[s]”).

155. *Id.* § 214.11(b)(4). This qualification is a “higher standard than that of extreme hardship,” which may be based on physical, mental, and civil detriments, but not economic or social hardships. *Id.* § 214.11(i)(1).

156. *Id.* § 214.11(m).

157. H.R. REP. NO. 106-487, pt. 2, at 17–18 (2000).

158. 18 U.S.C. § 1593 (2006 & Supp. 2009). The legislative history reveals no specific reason for this, but the statute does state a general purpose of “ensur[ing] just and effective punishment of traffickers” for their violent actions against victims. H.R. REP. NO. 106-487, pt. 2, at 2.

159. 18 U.S.C. § 1593(a). Chapter 77 crimes include, for example, involuntary servitude, peonage, slavery, forced labor, and sex trafficking. *Id.* §§ 1581–1596.

160. *Id.* § 1593(b)(1).

161. *Id.* § 1593(b)(3). This amount includes, among other things, medical services, lost income, and attorneys’ fees. *Id.* § 2259(b)(3).

162. *Id.* § 1593(b)(3); *see* 22 U.S.C. § 206(a) (2006).

163. *Id.* § 1593(c) (including other crimes from Chapter 77, such as involuntary servitude, peonage, and forced labor).

164. *Id.* § 1593(b)(2).

165. *See Thirtieth Annual Review of Criminal Procedure: IV. Sentencing: Restitution*, 30 GEO. L.J. ANN. REV. CRIM. PROC. 1731, 1732–33 (2001) (presenting several factors that the

Despite the broad range of these provisions, some questioned the adequacy of the compensation.¹⁶⁶ Certain members of Congress, led by Representative John Conyers, Jr., advocated for a lower standard in certifying victims of trafficking.¹⁶⁷ Their overriding concern was that those who needed the most protection—international victims of trafficking and their families—would have to meet the harshest requirements.¹⁶⁸ The legislation required victims to show that they did not “voluntarily agree” to trafficking and that, if deported, they would have a “well founded fear of retribution” and would suffer “extreme hardship.”¹⁶⁹ These members were not able to convince the requisite majority that the bill’s existing provisions would preclude many victims of trafficking from obtaining relief. Despite these alleged shortcomings, scholars generally praised the comprehensive criminalization scheme of the TVPA.¹⁷⁰

B. *The Trafficking Victims Protection Reauthorization Act of 2003*

Congress continued to monitor the effect of the bill in the early stages of its implementation and focused on two points: the punishment of the crime and the protection of the victims.¹⁷¹ After conducting several hearings to understand how the TVPA was used in practice, Congress decided to reauthorize and amend the bill.¹⁷² Its first change occurred in adjusting the TVPA’s stated purpose to what has been termed “the 3P paradigm”¹⁷³: prevention of trafficking, protection of victims, and prosecution of traffickers.¹⁷⁴ Congress enhanced certain criminal provisions to allow for more effective prosecution of human trafficking.¹⁷⁵ For example, the maximum sentence for sex trafficking was increased.¹⁷⁶ Congress also amplified the appropriations allocated to criminal prosecution and crime prevention, although it allocated little to direct victim compensation in this

government may consider in bringing restitution, but noting that once restitution is imposed by the court, the prosecution must seek the full amount of the victim’s losses).

166. See *infra* note 233 and accompanying text.

167. H.R. REP. NO. 106-487, pt. 2, at 40–45 (2000) (describing how the criteria that victims must meet to receive benefits under the bill does not consider their circumstances or U.S. policy, and may prevent relief).

168. See *id.* at 41 (asserting that the requirements imposed are too harsh and depart from the purpose of the legislation).

169. *Id.* at 42–43 (stressing that those terms could be interpreted to preclude protection of victims of trafficking).

170. See, e.g., Tiefenbrun, *supra* note 18, at 115 (praising the criminal aspects of the law as a possible “legislative example for other nations”).

171. See *Implementation*, *supra* note 144, at 3 (statement of Hon. Henry J. Hyde, Chairman, H. Comm. On Int’l Relations).

172. See H.R. REP. NO. 108-264, pt. 1, at 8 (2003), *reprinted in* 2003 U.S.C.C.A.N. 2408, 2408.

173. 2011 TIP REP., *supra* note 49, at 16.

174. *Id.*; see also H.R. REP. NO. 108-264, pt. 1, at 8, *reprinted in* 2003 U.S.C.C.A.N. at 2408.

175. H.R. REP. NO. 108-264, pt. 1, at 9–10, *reprinted in* 2003 U.S.C.C.A.N. at 2409–10.

176. 18 U.S.C. § 1591 (2006 & Supp. 2009).

new bill.¹⁷⁷ It also included, over the objection of the DOJ,¹⁷⁸ a civil remedies provision to afford a measure of protection for the victims without paying them outright.¹⁷⁹ Specifically, it gave victims a civil cause of action against their traffickers to seek compensation for their injuries, including emotional damages,¹⁸⁰ though it limited the availability of those actions to traffickers who had committed sex trafficking, labor trafficking, or forced labor.¹⁸¹ The civil remedy provision also included a comprehensive damages scheme, allowing for recovery of reasonable attorney's fees in addition to actual and punitive damages.¹⁸² Congress stipulated that civil actions brought during criminal proceedings must be stayed until the criminal case comes to a final judgment at the trial level.¹⁸³

Congress also realized that the debate on limiting the amount of T visas was moot: despite allocating 15,000 visas over the three years since the TVPA's enactment, only 172 victims had obtained the visa.¹⁸⁴ Accordingly, Congress lowered the minimum requirements to receive T visas.¹⁸⁵ It also expanded the definition of the victim from one who is "transported" to one who is "recruited, enticed, harbored, transported, provided, or obtained."¹⁸⁶ This gave prosecutors more leverage in convicting a trafficker, in addition to providing victims a greater opportunity to take advantage of the myriad social and administrative services afforded to them.¹⁸⁷ Nevertheless, victims still had to cooperate with law enforcement to obtain the visa, as the original bill required.¹⁸⁸ No changes were made to the mandatory restitution provisions.¹⁸⁹

177. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 7, 117 Stat. 2875, 2884–86; *see also* 2010 TIP REP., *supra* note 25, at 340–41 (noting various types of victim services funded by the federal government, but indicating that the allocations to legal service providers were severely limited).

178. H.R. REP. NO. 108-264, pt. 2, at 16–17, *reprinted in* 2003 U.S.C.C.A.N. at 2433–34 (noting that the right of action has the potential to hinder criminal proceedings).

179. *See* § 4(a)(4), 117 Stat. 2875, 2878.

180. KATHLEEN KIM & DANIEL WERNER, CIVIL LITIGATION ON BEHALF OF VICTIMS OF TRAFFICKING 1, 76 (2008), *available at* http://library.lls.edu/atlast/HumanTraffickingManual_web.pdf.

181. *Id.*

182. *See* § 4(a)(4), 117 Stat. 2875, 2878.

183. 18 U.S.C. § 1595(b)(1) (2006 & Supp. 2009). This is not insignificant as most criminal proceedings in trafficking cases usually last eight months to three years. *See Hidden Slaves*, *supra* note 31, at 82.

184. H.R. REP. NO. 108-264, pt. 2, at 3, *reprinted in* 2003 U.S.C.C.A.N. at 2422–23.

185. *See* § 4(a)(3), 117 Stat. 2875, 2877–78 (broadening the requirement that victims assist law enforcement by allowing them to assist local or state law enforcement, as well as federal).

186. 18 U.S.C. § 1591 (2006 & Supp. 2009).

187. H.R. REP. NO. 108-264, pt. 1, at 18–20, *reprinted in* 2003 U.S.C.C.A.N. at 2416–18.

188. *See Hidden Slaves*, *supra* note 31, at 72, 79 (claiming that benefits are "impossible to obtain without assistance from law enforcement personnel" even though having to testify about their experience can dissuade sex trafficking victims from cooperating).

189. *See* §§ 1–8, 117 Stat. 2875, 2875–87.

C. *The Trafficking Victims Protection Reauthorization Act of 2005*

Congress reauthorized the TVPA again only two years after modifying the bill in 2003.¹⁹⁰ The stated purpose of the amended provisions in this new bill was to enhance penalties against trafficking within the United States.¹⁹¹ For the first time, the reauthorization focused on domestic trafficking,¹⁹² requiring HHS to implement a program to address the demand for commercial sex acts.¹⁹³ It also established grants for the benefit of domestic victims of sexual exploitation.¹⁹⁴

At one hearing conducted after this reauthorization, Msgr. Franklyn Casale of St. Thomas University addressed the legislation's lack of attention to protecting the victims.¹⁹⁵ Concerned about the requirement that human trafficking victims cooperate with law enforcement and prosecutors, Casale noted that the overwhelming majority of victims "are scared to death to even ever think of challenging the perpetrator, let alone contacting the authorities."¹⁹⁶ Another scholar agreed, and specifically lamented the lack of protection for international and underage victims.¹⁹⁷

D. *The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*

In 2008, Congress amended the TVPA again, this time with an honoring nod to William Wilberforce, the Member of Parliament credited with championing the British legislation that commenced the abolition of the

190. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558.

191. H.R. REP. NO. 109-317, pt. 1, at 10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 1888, 1889; *see also* Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195, 206 (2006) (noting that the 2005 reauthorization sought to address services for trafficking victims within the United States).

192. *See* H.R. REP. NO. 109-317, pt. 1, at 11, *reprinted in* 2005 U.S.C.C.A.N. at 1890 (defining domestic trafficking as the "trafficking of United States citizens and permanent residents").

193. *See* § 201, 119 Stat. 3558, 3567–69 (recognizing demand as a domestic cause to international sex trafficking); *see also* Giampolo, *supra* note 191, at 209–10 (describing the process by which HHS is to implement the program).

194. *See* § 202(a), 119 Stat. 3558, 3569 (giving grants that will help empower victims to rebuild their lives); *see also* Giampolo, *supra* note 191, at 210–13 (exploring the need for funding of services for victims of trafficking in the United States, and how the reauthorization addresses that need).

195. *See International Trafficking*, *supra* note 195, at 34–45 (statement of Msgr. Franklyn Casale, President, St. Thomas University).

196. *Id.* at 37. Casale argued that the victims live in such fear because most of the perpetrators know the victims and their families well, making their threats credible and their power comprehensive. *See id.* ("Fear for their life, fear for the life of their family, fear of being alone and illegal in a foreign country, fear of the shame and contempt, additional hardships, retribution, or alienation if sent back to their country paralyze them and stop them from coming out in the open even if they have a chance to do so."); *see also supra* notes 111–15 and accompanying text.

197. Giampolo, *supra* note 191, at 215–17.

global slave trade.¹⁹⁸ With this enactment, at least one member of Congress seemed more satisfied that the bill had comprehensively implemented, and struck the proper balance between, the prosecution of traffickers, the protection of victims, and the prevention of trafficking.¹⁹⁹ Notably, Congress recognized the subtle and myriad ways in which a person might be coerced into sex trafficking,²⁰⁰ and sought to expand the scope of prosecution—namely, prosecutors now had the authority to indict a person who benefitted from trafficking.²⁰¹

Congress also amended the restitution provision to grant prosecutors broad authority to seize the property of human traffickers—similar to the authority they possess in drug trafficking cases.²⁰² It expanded the trademark “force, fraud, or coercion” clause—the standard of identifying “severe” forms of trafficking—to include “threats of force.”²⁰³ It defined “coercion” expansively as “threats of serious harm,”²⁰⁴ schemes that convince a person of the threat, or the “threatened abuse of law or the legal process.”²⁰⁵ It added “maintain[ing]” a victim as one of the prohibited actions.²⁰⁶ Finally, it added strict liability for trafficking minors, eliminating the need to show force, fraud, or coercion.²⁰⁷ The number of T visas issued annually has increased somewhat since these modifications,²⁰⁸ but is still far below the authorized cap of 5,000.²⁰⁹ These provisions and expanded definitions, particularly the broadened category of indictable offenses, were meant to demonstrate Congress’s commitment to protecting victims and prosecuting traffickers.²¹⁰

Most pertinent to this Comment, Congress expanded the civil remedy provision in § 1595.²¹¹ The provision now authorizes victims to sue those

198. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified at 18 U.S.C. §§ 1581–1596 (2006 & Supp. 2009)).

199. H.R. REP. NO. 110-430, pt. 1, at 33 (2007) (noting in a report by Rep. Tom Lantos that “[u]nlike previous reauthorizations, this reauthorization is for four years . . . recognizing that U.S. anti-trafficking programs have become more established”).

200. See 18 U.S.C. § 1591(e)(2), (e)(4) (2006 & Supp. 2009) (defining “coercion” and “serious harm” broadly); *supra* note 33 and accompanying text (explaining the non-physical forms of coercion recognized by the TVPA).

201. 18 U.S.C. § 1591(a)(2) (requiring that the criminal intent of beneficiaries be, at least, a reckless disregard that they are benefitting from sex trafficking).

202. See 18 U.S.C. § 1593(b)(4); 21 U.S.C. § 853 (2006 & Supp. 2009) (allowing seizure of real and personal property after criminal convictions, with comprehensive provisions for authority, jurisdiction, warrants, and substitute measures).

203. 18 U.S.C. § 1591(a); see also *supra* notes 29–30 and accompanying text (describing the significance of identifying “severe” forms of trafficking).

204. 18 U.S.C. § 1591(e)(2). The serious harm can be “physical or nonphysical,” including consideration of finances, reputation, and psychological state as means by which one might be coerced. *Id.* § 1591(e)(4).

205. *Id.* § 1591(e)(2).

206. *Id.* § 1591(a)(1).

207. *Id.* § 1591(a).

208. See 2011 TIP REP., *supra* note 49, at 374 (reporting that 447 certifications were issued to victims in 2010, compared to 313 in 2009).

209. See 8 C.F.R. § 214.11(m) (2010) (setting the cap).

210. See H.R. REP. NO. 110-430, pt. 1, at 33 (2007).

211. 18 U.S.C. § 1595.

who committed any of the criminal acts defined in Chapter 77, which include not only trafficking, but also various forms of slavery, peonage, and involuntary servitude.²¹² Even though these claims are based on violations of criminal statutes, no criminal proceeding is necessary to file a civil suit.²¹³ In addition, victims may bring civil suits not only against the perpetrators of the crime, but also against anyone who “knowingly benefits” from trafficking, even if that knowledge is constructive.²¹⁴ For immigrants, “continuation of presence” status²¹⁵ was granted to those pursuing the civil remedies under § 1595.²¹⁶ Congress also added a ten-year statute of limitations; the statute had not indicated one previously.²¹⁷

The TVPA as amended intends to combat human trafficking in strong and comprehensive measures. Congress made important policy decisions in seeking to prevent trafficking, prosecute traffickers, and protect victims. The legislative modifications have not significantly strayed from these choices and show a sustained commitment to the stated objectives.

E. Commentary on the TVPA and Its Reauthorizations

Despite the comprehensive criminal scheme that Congress established to combat trafficking, the TVPA has not been without its critics. The most pervasive critique of the legislation is its over-emphasis on prosecution and under-emphasis on protection.²¹⁸ This disparity in emphasis is seen most clearly in conditioning the victims’ qualification for benefits on their participation in criminal prosecutions.²¹⁹ Critics claim that linking the prosecution of the trafficker to the benefits provided to the victim is a

212. *Id.* § 1595(a). The statute expanded the provision by eliminating the enumerated crimes for which a plaintiff may recover, which at least one court has interpreted to provide a right of action for all violations of Chapter 77. *See Hernandez v. Attisha*, No. 09-CV-2257, 2010 WL 816160, at *2 (S.D. Cal. Mar. 5, 2010).

213. Kim, *supra* note 14, at 280; *see also supra* note 183 and accompanying text.

214. 18 U.S.C. § 1595(a) (holding liable those who benefit when they “knew or should have known” about the trafficking).

215. Continued presence is “a form of temporary immigration status to trafficked persons who pursue civil suits against their traffickers.” Kim, *supra* note 14, at 251.

216. 22 U.S.C. § 7105(c)(3) (2006 & Supp. 2009); *see also* Kim, *supra* note 14, at 252 (noting that continued presence allows immigrants to be “agents of enforcement of civil rights violations in the workplace”).

217. 18 U.S.C. § 1595(c); *see also Hernandez*, 2010 WL 816160, at *3 (holding that § 1595 explicitly provides for a ten-year statute of limitations).

218. *See, e.g.,* Chacón, *supra* note 121, at 3024 (remarking that this disparity makes the TVPA “an ineffective tool in aiding trafficking victims”); Rieger, *supra* note 26, at 253 (“The legal focus on sex trafficking has been on criminal prosecutions rather than on civil remedies.”).

219. *See* Chacón, *supra* note 121, at 3024–25 (noting that federal authorities will deny the T visa application of any victim that refuses to assist in the investigation or prosecution of the traffickers); *see also* Rieger, *supra* note 26, at 250 (analogizing sex trafficking victims to rape victims and remarking that “[i]t would be unheard of for a rape victim to be denied assistance such as safe housing and medical treatment simply because she chose not to testify against her rapists”). A victim can still obtain a T visa without testifying, however, if their participation is never sought. *See* Chacón, *supra* note 121, at 3025.

mistake because the two goals can “clash.”²²⁰ Given the physical and psychological effects that victims experience,²²¹ requiring them to recount traumatic events shortly after they occurred in a courtroom—especially in criminal procedures outside of their control—could cause further trauma.²²² In fact, in the first nine years of the TVPA, there have only been 466 criminal convictions.²²³

Conditioning social benefits on cooperation with the prosecution can be a substantial barrier to compensating the victims.²²⁴ The prosecutorial priority of obtaining a conviction may obscure a victim’s immediate need for housing or other services more immediately.²²⁵ One scholar summed up the critique by asserting that “the goal is no longer protection, but protection for the sake of prosecution.”²²⁶ According to one organization, only about half its clients wish to cooperate with the prosecution.²²⁷ Some scholars attribute this problem to the “criminal approach” of the TVPA,²²⁸ and instead recommend a human rights approach, which would primarily focus on serving the needs of the victims.²²⁹

Scholars have encouraged the use of the civil remedy, in addition to or in lieu of the criminal prosecution, for several reasons.²³⁰ First, a civil action can provide more appropriate compensation for the victims than restitution.²³¹ This is especially important because restitution under the

220. *Hidden Slaves*, *supra* note 31, at 81; *see also* Amiel, *supra* note 54, at 27 (explaining that when the focus of anti-trafficking laws is on the prosecution, the interests of the victims are “sidelined” in favor of the dominant interests of the prosecutors); Kim & Hreshchyshyn, *supra* note 23, at 12 (asserting that the TVPA creates a “problematic tension between criminal prosecution and civil action as enforcement mechanisms for ending modern slavery”).

221. *See generally supra* Part I.C.

222. *Hidden Slaves*, *supra* note 31, at 96 (describing the potentially hostile experience of having to testify in a criminal proceeding); *see also* Kim, *supra* note 14, at 290 (arguing that allowing survivors to file civil suits as “private attorneys general” may help empower the victims).

223. 2009 ATT’Y GEN. ANN. REP., *supra* note 51, at 48.

224. Kim & Hreshchyshyn, *supra* note 23, at 14.

225. *See* Amiel, *supra* note 54, at 32 (giving an example of how prosecution can neglect the needs of trafficking victims); *infra* note 248 and accompanying text (recognizing the more immediate needs of victims that are not prioritized over prosecutorial efforts).

226. *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2196 (2005) (arguing that even good faith efforts of prosecutors can fall short of helping the victim’s rehabilitation); *see also* Lack, *supra* note 134, at 160 (calling trafficked persons “instruments of law enforcement as opposed to victims deserving of protection and vindication of their individual human rights”); Leevan, *supra* note 26, at 796 (criticizing the focus on victims assisting prosecutions because they become “investigative tools rather than individuals deserving of human rights protections”).

227. *Hidden Slaves*, *supra* note 31, at 83 (quoting a director at the Coalition to Abolish Slavery and Trafficking); *see also supra* Part I.C (explaining why victims might be hesitant to testify).

228. Amiel, *supra* note 54, at 27–28, 33 (noting that this approach is important, but does not serve the interests of the victim).

229. *See id.* at 38–42; Dalrymple, *supra* note 26, at 461; Kim & Hreshchyshyn, *supra* note 23, at 36.

230. Kim & Hreshchyshyn, *supra* note 23, at 2–3.

231. *See id.* at 3, 16–17 (recognizing that civil suits offer non-economic damages for physical and psychological injuries as well as high punitive damages, and can hold third

TVPA, although mandatory, can be “easily forgotten,” whether because the prosecutor is focused on a conviction or the court fails to inform the defendant that restitution is an element of the sentencing.²³² Even when restitution is demanded, its adequacy largely depends on the prosecutor’s aggressiveness.²³³ In sex trafficking cases, restitution may be especially inadequate because a victim cannot recover fees for illegal activities such as prostitution.²³⁴ Furthermore, obtaining an order for restitution does not ensure that it is always collected.²³⁵ Second, a civil remedy gives the trafficked person control over the legal process, whereas the prosecutor controls criminal proceedings.²³⁶ This is vital because prosecutors exercise discretion in bringing the case and could preclude victims from obtaining justice and social benefits by declining to prosecute the traffickers.²³⁷ Third, a civil action can advance the civil rights of the victim in a public forum.²³⁸ Fourth, a civil proceeding requires a lower burden of proof than a criminal one, increasing the likelihood of success.²³⁹ Finally, substantial

parties—including large entities—liable for those damages); Rieger, *supra* note 26, at 253 (noting that “restitution awards do not allow recovery for physical or emotional damages”).

232. Kim & Hreshchyshyn, *supra* note 23, at 16; *see also* Elizabeth A. Plimpton & Danielle Walsh, *Corporate Criminal Liability*, 47 AM. CRIM. L. REV. 331, 349 (2010) (noting that mandatory restitution may also be foregone if “victims are unidentifiable or so numerous as to make compensation impracticable, or complication and delay of the sentencing process caused by mandatory restitution outweigh its value”); Leevan, *supra* note 26, at 782 (asserting that, despite the TVPA’s mandate, “victims often do not receive any restitution”).

233. *See* Kim & Hreshchyshyn, *supra* note 23, at 16–17 (adding that the interests of the state “may not be coterminous with those of the person who has been trafficked”); Lack, *supra* note 134, at 160 (asserting that the TVPA’s definition of restitution awards fails to account for the victims’ experiences); *infra* notes 272–75 and accompanying text (describing one case in which the victims felt the restitution order was inadequate).

234. At least one court was willing to order restitution that included profits made while in prostitution. *United States v. Sanchez*, No. CR-07-643 (E.D.N.Y. Mar. 25, 2010).

235. *See* Letter from Richard A. Hartling, Principal Deputy Assistant Att’y Gen., Dep’t of Justice, to Richard J. Durbin, Chairman, Subcomm. on Human Rights & the Law, Comm. on the Judiciary, U.S. Senate (June 7, 2007) (on file with the Fordham Law Review) (noting that the DOJ “does not maintain a formal system for tracking data on restitution awards”); *see also* 2009 ATT’Y GEN. ANN. REP., *supra* note 51, at 12 (recognizing that the tracking of financial restitution awards needs improvement). The Attorney General implemented a coordinated effort between several federal agencies “to ensure restitution on behalf of victims of trafficking,” but provided no further explanation, and did not report on the effectiveness of the coordination. *Id.*

236. Kim & Hreshchyshyn, *supra* note 23, at 2–3.

237. 22 U.S.C. § 7105(b)(1)(E) (2006 & Supp 2009); *see also* KIM & WERNER, *supra* note 180, at 1 (noting that restitution is not available without a criminal proceeding, leaving a civil suit as the only means to compensate victims of trafficking); Chacón, *supra* note 121, at 3025 (recognizing that obtaining a formal endorsement of cooperation by law enforcement, even when participation is not sought, is often critical to the application); Rieger, *supra* note 26, at 248 (asserting that, even when a trafficking victim is identified, prosecutorial discretion causes victims to wait longer for benefits).

238. *See* Kim & Hreshchyshyn, *supra* note 23, at 16.

239. *See id.* at 17 (listing the lower burden of proof as one reason civil suits are likely to be successful); Rieger, *supra* note 26, at 253–54 (asserting the same).

civil awards not only compensate the victims, but may also prove to be an effective deterrent to sex traffickers.²⁴⁰

Generally, scholars have applauded the TVPA's civil remedy and have seen few procedural or evidentiary problems with the provision.²⁴¹ In fact, advocates have brought many civil suits on behalf of victims of labor trafficking under § 1595.²⁴² For the most part, the cases that reach the merits have received favorable judgments and brought victims "closer to a holistic and fuller recovery."²⁴³ Yet, in the eight years since the federal civil remedy was enacted, there have been practically no suits brought by a victim of sex trafficking.²⁴⁴ To be sure, there are alternative remedies available to survivors of sex trafficking,²⁴⁵ but § 1595 codifies the most straightforward and comprehensive compensation scheme.²⁴⁶ It has "diminish[ed] some of the strategic complexities" involved in judicially created causes of action and provides a "complete remedy, rather than the piecemeal approach required by common law torts."²⁴⁷

Despite the robust civil remedy, scholars continue to criticize the alleged inability of the TVPA to protect its victims by empowering their recovery. Some critics suggest that those who survive sex trafficking are first and foremost in need of safe housing.²⁴⁸ Housing is not allocated or mentioned anywhere in the language of the TVPA.²⁴⁹ Scholars and practitioners have

240. See Lack, *supra* note 134, at 161 (asserting that civil litigation "strengthens the mandate of the federal government to combat human trafficking"); Rieger, *supra* note 26, at 254 (noting a lack of economic disincentives to trafficking women for commercial sex).

241. See, e.g., KIM & WERNER, *supra* note 180, at 29–35 (describing the provisions of the TVPA pertinent to civil litigation and finding several ways to file suit).

242. See, e.g., Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1696–700 (2007) (outlining the facts and details of cases brought in federal courts claiming damages under § 1595).

243. Kim & Hreshchyshyn, *supra* note 23, at 21.

244. See Nam, *supra* note 242, at 1673–76 (concluding that, up until 2007, none of the civil suits filed under § 1595 alleged sex trafficking violations); see also *supra* note 16.

245. For example, sex trafficking survivors may sue their oppressors under the Thirteenth Amendment, Alien Torts Statute, Title VII, Fair Labor Standards Act, Racketeer Influenced and Corrupt Organizations Act, and common law torts and contracts claims. See KIM & WERNER, *supra* note 180, at 35–73 (describing the mechanics of these and several other civil causes of action for human trafficking victims); Rieger, *supra* note 26, at 254–55 (mentioning several of these causes and others).

246. See KIM & WERNER, *supra* note 180, at 29–35 (describing the logistics of filing a claim under § 1595 for a victim of trafficking); Kim & Hreshchyshyn, *supra* note 23, at 16 (calling the private right of action a "powerful tool for recovery"); Lack, *supra* note 134, at 163 (asserting that § 1595 provides "the most comprehensive means" of recovery).

247. Kim & Hreshchyshyn, *supra* note 23, at 34.

248. See Dalrymple, *supra* note 26, at 455 (suggesting that "most victims need immediate secure shelter and access to legal resources"); *Hidden Slaves*, *supra* note 31, at 94 ("The most immediate needs of those who survive forced labor are safety and housing."); see also Rieger, *supra* note 26, at 247 (adding that the immediate needs of safety and housing may not be met for weeks or months due to a slow certification process).

249. See generally William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, §§ 301–04, 122 Stat. 5044, 5085–87 (codified as amended in various sections of 18, 22, and 42 U.S.C.) (providing social benefits such as continued presence, work visas, and civil remedies, but not housing); see also *Hidden Slaves*, *supra* note 31, at 96 ("[T]he job of providing basic social and legal services to

also seriously questioned the ability of the TVPA to provide physical safety to the victims and their families after federal authorities identify them.²⁵⁰ The requirement that a victim experience a “severe form” of trafficking to receive benefits has also been criticized as an “unreasonably high standard.”²⁵¹ Because such a high standard makes it difficult to receive immediate benefits and protections, one scholar suggests that “victims should be presumed to qualify as a victim of severe forms of trafficking until a contrary determination is made.”²⁵² Finally, critics have denounced immigration policies that prejudice undocumented individuals and expose them to exploitation.²⁵³

F. Case Examples Under the TVPA

As of the writing of this Comment, relatively few federal court cases have reached final judgments on the merits under the TVPA, and of those that have, nearly all have been criminal. This section will briefly review the facts of two cases—one for restitution in a criminal proceeding and one for damages in a civil suit—and analyze their implications. Both cases involve labor trafficking, but the principles apply to sex trafficking issues as well.

1. The Reddy Case

Lakireddy Bali Reddy, a real estate investor and restaurateur in Berkeley, California, had a sexual affinity for young girls.²⁵⁴ He also had several businesses and needed laborers to work for him.²⁵⁵ In 1986, Reddy began to traffic teenage girls from India to his estate in California for sex and labor exploitation.²⁵⁶ Reddy had extensive influence in his hometown in India and thus his offers of employment in Berkeley appeared credible to the girls, who were usually very young and of low caste.²⁵⁷ To get the girls

survivors has fallen squarely on the shoulders of NGOs and social service agencies.”) *But see infra* note 319 (asserting reasons why these services are best administered through NGOs).

250. *See, e.g., Hidden Slaves, supra* note 31, at 100 (noting that criminal procedure rules allow alleged traffickers to review the information provided by survivors to investigators, putting them and their families “at a greater risk for retaliation”).

251. Leevan, *supra* note 26, at 796 (citing 22 U.S.C. § 7105 (2006 & Supp. 2009)); *see also* Lee & Lewis, *supra* note 26, at 183 (asserting that the requirement of cooperating with law enforcement is not centered on the needs of the victims, but that of the federal authorities).

252. Dalrymple, *supra* note 26, at 462.

253. *See* Kim, *supra* note 14, at 248 (criticizing restrictive immigration policies as preventing exploited workers from deserved protection).

254. *See Hidden Slaves, supra* note 31, at 90.

255. *See* Kim & Hreshchyshyn, *supra* note 23, at 22.

256. *See* Press Release, U.S. Dep’t of Justice, California Man Admits He Brought Indian Girls to U.S. for Sexual Exploitation, Pleads Guilty to Federal Charges (Mar. 7, 2001), <http://www.justice.gov/opa/pr/2001/March/099crt.htm>; *see also* Kim & Hreshchyshyn, *supra* note 23, at 22–23 (noting that in this case “the line is blurred” between the two types of exploitation, and it shows that traffickers will oppress their victims through any means necessary).

257. *See Hidden Slaves, supra* note 31, at 90 (asserting that the girls had low social statuses and were “susceptible to the power and dominance of a higher caste male”); Kim &

into the United States, Reddy had a brother and sister pretend to be a married couple and had the girls pose as their children.²⁵⁸ Once in California, Reddy forced the girls to engage in sexual relations with him.²⁵⁹ He also built his businesses by exploiting their labor.²⁶⁰ Over fifteen years, Reddy brought at least twenty-five Indians to the United States under false pretenses.²⁶¹ Reddy cut the girls off from the outside world by keeping them out of school and prohibiting them from contacting anyone outside his network.²⁶² He assured their cooperation by rewarding subservient girls with gifts and favorable treatment, and withdrawing the special treatment when they exhibited maturity.²⁶³ He often beat the girls and threatened to report them to authorities.²⁶⁴ In an extreme instance of coercion, one of the girls helped to hold down others so that Reddy could rape them.²⁶⁵ As a result of this coercion, Reddy's victims experienced depression, nightmares, and panic attacks.²⁶⁶ Finally, in 1999, local law enforcement responded to a carbon monoxide emergency at one of Reddy's apartment buildings, where they discovered two Indian girls poisoned by the gas.²⁶⁷ In March 2001, following an investigation, the DOJ charged Reddy with trafficking women for sexual servitude under the TVPA,²⁶⁸ to which Reddy pleaded guilty.²⁶⁹ As part of the plea agreement, Reddy consented to serve over eight years in prison and pay \$2 million in restitution to the two victims affected by the carbon monoxide.²⁷⁰

This case is a good example of the TVPA's application of restitution as part of criminal sentencing.²⁷¹ Despite the successful outcome in this case, however, some people—including several of Reddy's victims—felt that the imprisonment of Reddy and the restitution were inadequate remedies.²⁷² The restitution only went to two of the twenty-five victims, leaving the

Hreshchyshyn, *supra* note 23, at 22 (explaining that he applied his wealth toward building projects in India).

258. See Press Release, *supra* note 256.

259. See *Hidden Slaves*, *supra* note 31, at 90; Kim & Hreshchyshyn, *supra* note 23, at 22.

260. See Kim & Hreshchyshyn, *supra* note 23, at 22.

261. See Press Release, *supra* note 256.

262. See *Hidden Slaves*, *supra* note 31, at 90.

263. See *id.*

264. See *id.*

265. See *id.* (noting that this confused investigators, who held the girl in jail for over a month because they considered her a perpetrator and did not realize that she was a victim).

266. See *id.* (noting this assessment in the court records).

267. See Press Release, *supra* note 256 (adding that one of them died later from carbon monoxide poisoning).

268. Fact Sheet, Worker Exploitation, U.S. Dep't of Justice (Mar. 27, 2001), <http://www.justice.gov/opa/pr/2001/March/126cr.htm>; see also Press Release, *supra* note 256 (mentioning that the charges also included conspiracy to commit immigration fraud and subscribing to a false tax return).

269. See Press Release, *supra* note 256.

270. See Kim & Hreshchyshyn, *supra* note 23, at 23; see also Press Release, *supra* note 256.

271. See Kim & Hreshchyshyn, *supra* note 23, at 21 (noting that the case was a "landmark victory for the prosecution").

272. See *id.* (asserting, with Reddy as an example, that imprisoning traffickers "falls far short of the level of deterrence needed to stop trafficking entirely").

others with no economic compensation for their ordeal,²⁷³ and some involved in Reddy's trafficking network escaped punishment.²⁷⁴ His business, built partially on exploited labor, continues to thrive in Berkeley.²⁷⁵ Consequently, some victims and their family members filed a class action civil suit against Reddy and others in his network, seeking further damages.²⁷⁶ Because this suit was filed before the TVPA provided a private right of action, the court dismissed several of the victims' claims.²⁷⁷ The civil suit was ultimately settled for an undisclosed amount, though the victims were reportedly pleased with the resolution.²⁷⁸

2. *Baoanan v. Baja*

The *Baoanan* case,²⁷⁹ as with most of the § 1595 cases to date, ruled on procedural issues only and has not yet reached the merits.²⁸⁰ Marichu Suarez Baoanan, a citizen of the Philippines, had completed her nursing degree and sought employment in the United States as a nurse.²⁸¹ Through an acquaintance, she met Norma Castro Baja, wife of Lauro Liboon Baja, Jr., a former Philippine diplomat in the United States.²⁸² Mrs. Baja offered to help Baoanan travel to the United States through a travel agency that the Bajas owned, secure a work visa, and find employment.²⁸³ Baoanan paid half of the requested fee to the Bajas for this assistance, and in January 2006, she arrived in the United States.²⁸⁴ She was immediately driven from the airport to the Baja residence, where the Bajas took her passport and told her that she had to work six months to pay off the other half of her fee.²⁸⁵ Instead of finding Baoanan a nursing job, the Bajas forced her to perform all of their domestic work, including watching children and "monitor[ing] Mrs. Baja's diabetes and blood pressure," for 126 hours per week without pay.²⁸⁶ After three months, Baoanan left her situation and subsequently brought a civil action for § 1595 claims.²⁸⁷ Because Mr. Baja was formerly

273. *See id.* at 23.

274. *See id.*

275. *See id.* (asserting that limitations to the prosecutorial process allowed the business to survive).

276. *See Doe v. Reddy*, No. C 02-05570, 2003 WL 23893010, at *1 (N.D. Cal. Aug. 4, 2003).

277. *See id.* at *1, *14 (dismissing the implied causes of action claims brought under the Thirteenth Amendment and California state statutes).

278. *See Civil Lawsuit Settled in Reddy Sex-Slave Case*, THE BERKELEY DAILY PLANET, Apr. 9, 2004, available at <http://www.berkeleydailyplanet.com/issue/2004-04-09/article/18626>.

279. 627 F. Supp. 2d 155 (S.D.N.Y. 2009).

280. *See id.* at 160, 171.

281. *Id.* at 158.

282. *Id.* at 157–58 (explaining that Baoanan sought this contact).

283. *Id.* at 158.

284. *Id.* (adding that Baoanan had to sign a contract—which she was not allowed to read—to go to the United States).

285. *Id.*

286. *Id.* at 158–59.

287. *Id.* at 159 (listing the fifteen causes of action that Baoanan raised under federal and state laws).

a foreign diplomat, the court, *sua sponte*, raised the issue of diplomatic immunity,²⁸⁸ which applies if the contested activity or violation was “in the exercise of his function as a member of the mission.”²⁸⁹ The court decided Baja had no residual immunity from the civil allegations of human trafficking because those violations were “entirely peripheral to [Baja’s] official duties as a diplomatic agent.”²⁹⁰

The court’s *sua sponte* ruling is particularly noteworthy because it is well settled that diplomatic immunity exempts many foreign diplomats from domestic civil suits.²⁹¹ Nevertheless, the court explicitly held that, under the TVPA, human trafficking is an actionable claim that survives at least the residual immunity of a former diplomat.²⁹² While narrow, this decision created an exception to a significant obstacle to holding domestic traffickers accountable: immunities afforded to former diplomats.²⁹³ For victims of human trafficking who were oppressed by diplomats, § 1595 may provide an important means of compensation.²⁹⁴

Two other recent district court cases considered other procedural obstacles to bringing § 1595 claims for labor trafficking, although no legal commentary has substantially focused on the implications of either case. In *Hernandez v. Attisha*,²⁹⁵ the court denied the defendants’ motion to dismiss the § 1595 claims and held that the amended language of the TVPA clearly creates an express private right of action.²⁹⁶ In another case, *Adhikari v. Daoud & Partners*,²⁹⁷ the court denied the defendants’ motion to dismiss the § 1595 claims because it decided that victims may bring such claims against corporations that knowingly benefit from labor trafficking.²⁹⁸

G. Collaboration and Resources Needed to Obtain Compensation Under the TVPA

The human trafficking victim has a variety of needs that require a coordinated response across multiple disciplines.²⁹⁹ Often, the efforts of one agency or attorney are inadequate to handle all the civil needs of one

288. *See id.*

289. *Id.* at 161 (quoting Vienna Convention on Diplomatic Relations, art. 39(2), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95).

290. *Id.* at 170 (citing *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 521 (S.D.N.Y. 2009)).

291. *Id.* at 160 (calling the immunity “near-absolute” for current diplomats).

292. *See id.* at 170.

293. *See* Janie A. Chuang, *Achieving Accountability for Migrant Domestic Worker Abuse*, 88 N.C. L. REV. 1627, 1644–46 (2010) (explaining the obstacle of diplomatic immunity to certain trafficking cases and discussing *Baoanan* in light of these obstacles).

294. *See id.* at 1646 (suggesting that some victims oppressed by diplomats ought to pursue § 1595 claims).

295. No. 09-CV-2257, 2010 WL 816160 (S.D. Cal. Mar. 5, 2010).

296. *See id.* at *1–3 (allowing plaintiffs to sue individuals under § 1595 for all violations under Chapter 77, including peonage, involuntary servitude, and trafficking).

297. 697 F. Supp. 2d 674 (S.D. Tex. 2009).

298. *See id.* at 684–85 (allowing plaintiffs to sue a company that had allegedly known of the labor trafficking ordeal at issue, under the revised provisions of § 1595(a)).

299. *See* Dalrymple, *supra* note 26, at 470 (“Lawyers, nonprofit service providers, and federal and local law enforcement must work in tandem to combat trafficking in their community.”).

individual, particularly if she is a foreign citizen.³⁰⁰ Congress responded to this need with the creation of the Inter-Agency Task Force to Monitor and Combat Trafficking.³⁰¹ Its mandate is to create and implement a comprehensive federal strategy to eradicate human trafficking.³⁰² Prior to that, the DOJ and the Department of Labor formed the Worker Exploitation Task Force to effectively identify and prosecute traffickers through improved coordination.³⁰³ Still, obstacles such as interagency rivalries, divergent priorities, and the large number of agencies involved have hindered the progress of these task forces.³⁰⁴ Advocates generally support the efforts of federal agency collaboration, despite its apparent shortcomings.³⁰⁵

In addition to federal collaborations, agencies and organizations have also developed regional task forces to serve the specific needs of trafficking survivors.³⁰⁶ These include housing, medical services, job and language training, and counseling.³⁰⁷ Because these needs are varied, collaboration is instrumental in meeting them.³⁰⁸ This is especially true in cases that are not selected for federal prosecution, because it is difficult for victims to obtain benefits under the TVPA when there is no opportunity to assist the prosecutors.³⁰⁹

These task forces allow professionals in all areas to “share information and coordinate approaches” to specific cases.³¹⁰ For example, one team consisting of a law firm, a legal clinic, and various human rights organizations is working to provide civil remedies to trafficked people in the United States by pooling its resources.³¹¹ Practitioners claim that these networks of advocates and service providers have become an effective way

300. See *Hidden Slaves*, *supra* note 31, at 47 (“Because forced labor is *hidden, inhumane, widespread, and criminal*, sustained and coordinated efforts by U.S. law enforcement, social service providers, and the general public are needed to expose and eradicate this illicit trade.”); Lee & Lewis, *supra* note 26, at 193 (“It is next to impossible for a single advocate . . . to meet [the trafficked person’s] needs comprehensively.”).

301. See 22 U.S.C. § 7103 (2006); see also *Hidden Slaves*, *supra* note 31, at 77–78 (outlining the federal members of the task force and asserting that it provides more protection for trafficking survivors).

302. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 105, 114 Stat. 1464, 1471–73; *Hidden Slaves*, *supra* note 31, at 77–78.

303. See *Hidden Slaves*, *supra* note 31, at 77.

304. *Id.*; see also *supra* note 7 and accompanying text (describing how, in one case, three federal agencies had difficulty coordinating efforts due to different priorities).

305. See *Hidden Slaves*, *supra* note 31, at 78 (noting that advocates believe more coordination will lead to alternative forms of relief for victims).

306. See *id.*

307. See Lee & Lewis, *supra* note 26, at 193.

308. See *id.* at 194.

309. See *Hidden Slaves*, *supra* note 31, at 78–79 (noting the problem with identifying someone as a victim without bringing criminal charges).

310. *Id.* at 78.

311. See *Overview: Trafficking Victims Protection Act Civil Litigation Project*, WORLD ORG. FOR HUMAN RIGHTS USA, http://www.humanrightusa.org/index.php?option=com_content&task=view&id=226&Itemid=186 (last visited Sept. 21, 2011) [hereinafter *Overview*] (describing the collaboration between a law firm, a legal clinic, and several human rights groups in bringing civil suits for trafficked people under the TVPA).

to handle trafficking cases,³¹² and scholars assert that the task forces have been an “encouraging sign” in the advancement of the interests of trafficked people.³¹³

Federal agencies and authorities are beginning to recognize the importance of coordinating not only with different governmental agencies, but also regional NGOs.³¹⁴ This is critical because the government requires the cooperation of trafficking victims to accomplish its objectives under the TVPA.³¹⁵ For example, a local NGO may be able to help the government find an appropriate counseling resource for trafficking victims when they are reluctant to speak about their experience in court.³¹⁶ Also, if a civil suit is commenced, coordination between the prosecutor and the civil attorney can lead to the use of evidence from the criminal case in the civil suit.³¹⁷ Thus these task forces coordinate the efforts of government agencies and NGOs in a mutually beneficial way, allowing each to accomplish its goals more efficiently.³¹⁸

In addition to the collaborative efforts necessary to bring a civil action on behalf of victims of trafficking, allocating sufficient resources can be another challenge. The TVPA leaves nearly all of the responsibility for rendering social and legal services to NGOs.³¹⁹ Yet Congress has done little to sponsor and develop programs that can partner with NGOs to provide these services.³²⁰ Carrying a civil case to completion often requires the pro bono assistance of law firms that generally have more resources.³²¹

312. See Lee & Lewis, *supra* note 26, at 193.

313. *Hidden Slaves*, *supra* note 31, at 78.

314. See Lee & Lewis, *supra* note 26, at 194 (giving examples of the expertise the NGOs can offer governmental agencies tasked with handling the needs of trafficked persons).

315. See *id.*; see also ICF INTERNATIONAL, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 20 (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf> (claiming that the prosecutor needs the cooperation and testimony of the trafficked person to obtain a conviction).

316. Lee & Lewis, *supra* note 26, at 194.

317. See KIM & WERNER, *supra* note 180, at 2–8 (describing the coordination needed between civil and criminal proceedings).

318. See Lee & Lewis, *supra* note 26, at 194 (describing the interplay between agencies and how they can work to protect victims and accomplish federal objectives).

319. See Susan Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 332–33 (2005) (revealing that law enforcement does not assist with petitions for T visas, but instead leaves it to victims); Rieger, *supra* note 26, at 248 (asserting that offering little or no assistance in the application process burdens the victims). Of course, if the government were to assist in T visa applications, a conflict of interest would arise. Because the government would assist the victim’s entry into the country with the intention of using the victim’s testimony to prosecute the traffickers, the victim’s story may be subject to impeachment during a civil proceeding because there is an incentive to fabricate a story to gain legal status in the United States.

320. There is, however, a proposed amendment to the TVPA in the Senate that would allocate substantial funds to NGOs through state and local governmental agencies for the purpose of providing comprehensive care to trafficking survivors. See Trafficking Victims Protection Reauthorization Act of 2011, S. 1301, 112th Cong. (1st Sess. 2011).

321. See, e.g., Robin Thompson, *Help Wanted: Attorneys to Represent Victims of Human Trafficking*, INT’L BAR NEWS, Sept. 2007, at 15, 18 (recommending that firms and bar associations offer pro bono services to human trafficking victims); *Overview*, *supra* note 311.

Lawyers at those firms are inexperienced in this area, however, and must be trained in the nuances of representing trafficking clients and understanding the legal specifications of filing under § 1595 of the TVPA.³²²

H. Another Immigration Option: The U Visa

As an alternative to the T visa, trafficking victims, have recently sought immigration relief under the U visa. The U visa was originally authorized in the Violence Against Women Act of 2000³²³ (VAWA), which was part of the same bill authorizing the T visa in the TVPA but was only recently implemented.³²⁴ The reason for the provision was similar to that of the T visa: stabilizing alien victims who lacked legal status so that those victims would help in the investigation of crimes.³²⁵

There are four basic requirements for obtaining a U visa: first, the person must have suffered “substantial physical or mental abuse” resulting from an enumerated crime;³²⁶ second, the person needs to possess credible information regarding the crime;³²⁷ third, the person must be helpful in the investigation and prosecution of the crime;³²⁸ and finally, the United States must have jurisdiction over the crime.³²⁹ The U visa allows the victim to stay in the United States for up to four years.³³⁰ Congress affords recipients of U visas employment authorization³³¹ and derivative benefits for their immediate family members.³³² Congress capped the total visas issued each year at 10,000.³³³

322. Cf. Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, “Master Communities,” and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715, 759 (2010) (stating that training pro bono attorneys is one difficulty in handling nuanced housing cases).

323. Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533 (codified at 8 U.S.C. § 1101 (2006 & Supp. 2009)); see also Anna Hanson, Legislative Note, *The U-Visa: Immigration Law’s Best Kept Secret?*, 63 ARK. L. REV. 177, 184–87 (2010) (reviewing the legislative history of the U visa).

324. See 8 C.F.R. § 214.14 (2010) (listing the regulations); Hanson, *supra* note 323, at 187 (identifying the regulating authorities as the U.S. Citizenship and Immigration Services (USCIS), and later, the DHS).

325. 8 C.F.R. §§ 103, 212, 214, 248, 274a, 299 (2010).

326. 8 C.F.R. § 214.14(b) (2010); see also Hanson, *supra* note 323, at 190–91 (describing the requirement). For the enumerated list, which includes any form of human trafficking, see 8 U.S.C. § 1101(a)(15)(U)(iii).

327. 8 C.F.R. § 214.14(b)(2).

328. *Id.* § 214.14(b)(3).

329. *Id.* § 214.14(b)(4).

330. *Id.* § 214.14(g)(1); see generally Tahja L. Jensen, Comment, *U Visa “Certification”: Overcoming the Local Hurdle in Response to a Federal Statute*, 45 IDAHO L. REV. 691, 696–99 (2009) (describing the requirements and application process for the U visa).

331. 8 C.F.R. § 214.14(c)(7); see also Jensen, *supra* note 330, at 694–95 (mentioning the benefits afforded to undocumented victims who meet U visa requirements).

332. See 8 C.F.R. § 214.14(f)(1) (allowing derivative status to spouses, children, parents of victims who are twenty-one years of age or younger, and unmarried siblings of victims who are eighteen years of age or younger).

333. 8 U.S.C. § 1184(p)(2)(A) (2006 & Supp. 2009).

The requirements and benefits of the U visa are therefore substantially the same as the T visa.³³⁴ The U visa allows for a broader range of applicants, however, including a lower evidentiary standard for trafficking, and it does not require a showing that extreme hardship would occur if removed.³³⁵ Thus, it is of little surprise that after two years of operation, U visas reached their annual maximum allocation in 2010.³³⁶ The U.S. Citizenship and Immigration Services (USCIS) attributed this milestone to an increased effort to train law enforcement officials and guide community advocates through the U visa process.³³⁷

III. IMPROVING THE SEX TRAFFICKED PERSON'S ACCESS TO COMPENSATION

As amended, the TVPA attempts to thoroughly prosecute human traffickers, comprehensively protect the victims, and broadly prevent the practice.³³⁸ It is clear that Congress has emphasized the prosecution of traffickers.³³⁹ Protection of the victims, however—especially through social benefits and economic compensation—seems to be Congress's lowest priority.³⁴⁰ This protection is important, and even critical, to the empowerment of survivors and the eradication of trafficking.³⁴¹

This part first suggests that Congress adjust the requirements of receiving benefits under the TVPA to account for the experience of the victims. It then recommends that advocates collaborate to make sex trafficked persons aware of civil litigation opportunities, and asserts that Congress should encourage that collaboration through public awareness and governmental partnerships with advocates. Finally, this part proposes that Congress hold prosecutors accountable to pursue and enforce restitution orders.

A. *Modify the Requirements to Receive Benefits Under the TVPA*

Congress should modify the requirements for receiving immigration relief through the T visa. Sex trafficking victims experience many physical and psychological maladies as a result of their ordeals.³⁴² Their troubles often leave them unwilling or unable to pursue remedies.³⁴³ If and when they escape their oppressive situations, their immediate needs can include

334. *See supra* notes 151–57 and accompanying text (describing the requirements of the T visa); *see also* Hanson, *supra* note 323, at 202 (“The U-visa appears to offer the same benefits and protections of the T-visa . . .”).

335. Hanson, *supra* note 323, at 202.

336. *See USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010: Questions and Answers*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <http://www.uscis.gov> (follow the “NEWS” hyperlink; then under “July, 2010” follow the “USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010 Questions and Answers” hyperlink).

337. *See id.*

338. *See supra* note 10 and accompanying text.

339. *See supra* notes 218–29 and accompanying text.

340. *See supra* notes 218–29 and accompanying text.

341. *See supra* notes 230–43 and accompanying text.

342. *See supra* Part I.C.

343. *See supra* note 196 and accompanying text.

physical safety, housing, counseling, immigration relief, and financial resources.³⁴⁴ But to receive any of these benefits under the TVPA, individuals must first be identified as a victim of a severe form of trafficking.³⁴⁵ This has proven difficult, given the struggle to define trafficking and the inexperience of law enforcement in recognizing it.³⁴⁶ When victims are so identified, they must then be willing to cooperate with all reasonable requests by law enforcement to receive help.³⁴⁷ The combination of identification and cooperation has precluded countless victims from receiving protections they otherwise could have obtained.³⁴⁸ Congress was careful to afford benefits only to victims of severe trafficking so as not to provide blanket amnesty to substantial numbers of otherwise illegal immigrants,³⁴⁹ but the government has only issued a fraction of the available T visas because the policy is too strict.³⁵⁰ In fact, some T visa applicants actually were trafficked but were not able to obtain T visas because their experience was not severe enough under the TVPA.³⁵¹

As an alternative to T visas, Congress allocates immigration relief to victims of various enumerated crimes through U visas, including trafficking.³⁵² The benefits of U visas are substantially similar to T visas, yet the United States issued the entire allocated amount of 10,000 U visas in 2010.³⁵³ The T visa should emulate the U visa in its requirements. Congress should discard the requirement that victims suffer “severe” forms of trafficking—which the U visa does not require—and allow all victims of trafficking to obtain T visa relief.³⁵⁴ Congress should also drop the requirement that T applicants show extreme hardship if removed—which the U visa also does not require.³⁵⁵ Neither of these changes will hinder the prosecution of criminals; in fact, victims would be more willing and able to assist prosecutorial efforts because more of them would be certified to remain in the United States and able to obtain the relief they seek. Nor would these modifications abandon the concerns of Congress in creating blanket amnesty, because there would still be a limit on the visas issued.³⁵⁶

As another option, Congress could remove the requirement that victims assist law enforcement and prosecution. Victims of severe trafficking are

344. *See supra* note 307 and accompanying text.

345. *See supra* notes 29–30 and accompanying text.

346. *See supra* notes 125–28 and accompanying text.

347. *See supra* note 154 and accompanying text.

348. *See supra* notes 125–28, 208–09, 224–27 and accompanying text.

349. *See supra* note 155–57 and accompanying text.

350. *See supra* notes 208–09 and accompanying text; *see also* Rieger, *supra* note 26, at 252 (calling the T visa requirements “overly strict”).

351. *See supra* note 31 (mentioning that federal authorities do not deem physical abuse to be severe enough to qualify).

352. *See supra* Part II.H.

353. *See supra* notes 334–36 and accompanying text.

354. *See supra* note 326 and accompanying text.

355. *See supra* notes 326–29 and accompanying text (showing that none of the requirements to obtain a U visa include a showing of extreme hardship if removed).

356. *See supra* notes 156–57 and accompanying text.

unlikely to come forward to demand relief and justice.³⁵⁷ Requiring them to cooperate with law enforcement and prosecutors is unrealistic.³⁵⁸ Therefore, Congress should not condition their ability to receive benefits on their cooperation with the criminal investigation and prosecution. It is unfair and unreasonable, especially in light of what most victims of severe forms of trafficking are willing or able to do.

Removing this requirement may encourage more victims to cooperate because the benefits and services they receive—such as staying in the country—give them a sense of safety in pursuing criminal justice. It is unlikely that some of these victims of severe forms of trafficking will assist prosecution without at least a guarantee that their more immediate needs³⁵⁹ will be met. Demonstrating a practical commitment to the interests of the victims, however, will likely rebuild victims' trust in authority figures. Given what they have experienced, it is difficult for victims of severe forms of trafficking to assist in a process that does not focus on their best interests. If the TVPA meets the needs and interests of a broader range of victims, it will empower victims and encourage them to pursue additional avenues of justice and prevention.

*B. Include Civil Litigation in Collaborative Efforts to Combat
Sex Trafficking*

Federal authorities and advocates should pursue civil remedies as part of their collaborative efforts. Labor trafficking victims have found success in obtaining this remedy,³⁶⁰ but no suits filed for sex trafficking victims under the new legislative scheme have reached the merits,³⁶¹ even though there appear to be few legislative obstacles to the civil remedy provision.³⁶² The only barrier to pursuing this remedy is that victims do not feel safe because the interests of the government supersede—and may preclude—those of the victim.³⁶³ It is noteworthy that of those few sex trafficked people who have cooperated with the prosecution of their traffickers and received immigration relief and other benefits, none have pursued civil remedies.³⁶⁴

Initiating these civil suits is no small task because significant resources and cooperation are necessary to successfully obtain relief.³⁶⁵ Many of the current collaborative task forces might not be able to pursue civil litigation on behalf of the trafficked people that they serve. Although the process takes a long time, civil suits can ultimately vindicate the rights and privileges taken from the victims, give them financial resources to help lead

357. *See supra* note 196 and accompanying text.

358. *See supra* note 196 and accompanying text.

359. *See supra* note 307 and accompanying text.

360. *See supra* note 243 and accompanying text.

361. *See supra* notes 16, 244 and accompanying text.

362. *See supra* note 241 and accompanying text.

363. *See supra* notes 218–29 and accompanying text; *see also supra* Part III.A.

364. *See supra* note 208 and accompanying text (revealing that some T visas have been issued, meaning that there are victims who have assisted federal authorities and received immigration relief).

365. *See supra* Part II.G.

lives of dignity, and deter traffickers from perpetuating the crime by increasing their liability for doing so.³⁶⁶ Additionally, working with task forces that are skilled at serving each of the victims' needs should ensure that the victims' experiences and interests are taken into account in any civil action.³⁶⁷ Civil remedies empower survivors by affording them the choice of when and how to hold their oppressors accountable.³⁶⁸ Some survivors will opt to pursue these remedies, which would accomplish all three goals of the TVPA: protecting the victims, punishing the traffickers, and preventing human trafficking.

Congress must encourage the efforts to aid civil remedies. To do so, it should establish task forces that will partner with organizations and agencies pursuing civil litigation on behalf of trafficking victims. To undertake the large task of obtaining economic relief, victim advocates will need the cooperation and support of the government—particularly in the coordination of criminal and civil proceedings.³⁶⁹ Economic compensation for the victims should be a criterion for creating these alliances. Such partnerships will more fully align state interests with private interests. Task forces can then effectively pursue civil remedies for trafficked persons, providing more relief and further ensuring their recovery.³⁷⁰

C. Ensure Collection of Restitution Damages

Congress should ensure that mandatory restitution ordered in criminal proceedings under the TVPA is collected. Restitution streamlines the recovery process by punishing traffickers and making the victims whole in one proceeding.³⁷¹ By the sentencing phase, the trafficker's assets have already been frozen,³⁷² which ensures that they cannot move their assets offshore and make them unreachable for a civil action. Even though restitution does not allow for non-economic damages such as emotional harm,³⁷³ compensation that seeks to make victims whole can be an important first step in their recovery.

Nevertheless, the restitution provisions, though mandated, are not always pursued.³⁷⁴ When they are pursued, they are often not collected.³⁷⁵ An uncollected order of restitution is purely nominal and gives a false sense that victims are being compensated.

Congress should therefore require the Attorney General to track the collection of restitution orders. The Attorney General already composes an

366. *See supra* notes 230–43 and accompanying text.

367. *See supra* notes 306–13 and accompanying text.

368. *See supra* note 236 and accompanying text.

369. *See supra* notes 314–18, 320, and accompanying text.

370. *See supra* note 243 and accompanying text.

371. *Cf. supra* notes 158–65 and accompanying text.

372. *See* 18 U.S.C. § 1593 (b)(2) (2006 & Supp. 2009) (referring to §§ 3663A–3664 for restitution procedures); *id.* § 3664(m)(1)(A) (2006) (authorizing courts to enforce the order through certain procedures).

373. *See supra* note 231.

374. *See supra* note 232 and accompanying text.

375. *See supra* note 235 and accompanying text.

annual report on the prosecution of trafficking cases, so adding another element should not be prohibitive. If collection of restitution orders is tracked, prosecutors will not get credit for simply obtaining an order, but will be held responsible for pursuing and collecting the compensation. This will ensure that prosecutors have incentive to pursue the collection of a restitution order. Holding prosecutors and other government officials accountable for pursuing the collection of restitution damages will ensure victims receive their compensation without drastically altering current legislation or policy.

Of course, this recommendation only applies to cases where the prosecutor has decided to bring charges. Therefore, this modification should be made in conjunction with this Comment's other recommendations for encouraging private actions, so that those victims whose oppressors are not involved in criminal proceedings may still obtain the compensation that they deserve. Private actions still offer additional advantages, especially empowerment of survivors, which may be missed when restitution is the only remedy.³⁷⁶ Nevertheless, ensuring the collection of restitution can be a stepping stone to empowering victims and encouraging further pursuit of compensation through civil actions.

These recommendations are relatively minor as they do not call for comprehensive policy changes. The recommendations are meant to fit within the stated goals of the TVPA. This Comment simply calls for a more demonstrated commitment to protecting victims of sex trafficking by allowing greater access to social services and economic compensation.

CONCLUSION

Sex trafficking is troubling, complex, and extensive. Many factors cause and perpetuate the practice, which victimizes people and inflicts serious harm on them. The Trafficking Victims Protection Act is groundbreaking, but it is not without its shortcomings. The provisions meant to compensate the victims for their suffering are difficult to utilize because some of the legislation's other goals take precedence. Balancing these goals by focusing more on empowering victims through economic compensation can advance the critical work of the TVPA. Lowering the requirements to obtain immigration relief and benefits will serve more victims and facilitate care for their most immediate needs. Encouraging the important pursuit of civil actions through heightened public awareness and key partnerships will further compensate and empower these survivors. Ensuring the collection of restitution will provide critical economic relief to the victims in an efficient and relatively prompt manner. These are only minor recommendations, and the problem is far bigger than what any piece of legislation can eradicate. Understanding the plight of many sex trafficked people and seeking to assist them in leading lives of dignity, however, are important steps in increasing the value of each human being and abolishing the exploitative practice of trafficking people.

376. *See supra* note 236 and accompanying text.