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**PERFECT VICTIMS AND REAL SURVIVORS: THE ICONIC  
VICTIM IN DOMESTIC HUMAN TRAFFICKING LAW**

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*Recent groundbreaking legislation created new immigration relief for victims of human trafficking, who would otherwise be subject to deportation after escape from exploitation. However, few trafficking victims have successfully obtained relief under its provisions. Existing critique has focused on international and domestic definitions of human trafficking and appraisal of the statutory language. This Article explores the problem through a new analytical lens. I suggest that federal agencies implementing the statute have restricted relief based on a flawed understanding of victim volition, under which victims who appear to be under the total control of a trafficker are viewed as worthy of relief, and other victims are rejected as undeserving. Drawing on criminal and domestic violence law as well as immigration legal history, the Article examines the forces animating the regulatory conception of deserving victims as “iconic victims” who are understood to be under a trafficker’s total control, both as to their entry into the United States and as to their subsequent exploitation for forced labor or sex. I posit that the current federal agency approach stems from concerns about differentiating victims from other undocumented migrants and mandating victim participation in the prosecution of traffickers. The Article concludes by suggesting an alternative approach that better engages in the complex factual task of identifying victims.*

#### INTRODUCTION

Antonio, an impoverished homeless boy, is approached by human traffickers in Mexico.<sup>1</sup> The traffickers promise Antonio lucrative employment at a restaurant in the United States. Antonio agrees, and the traffickers arrange for his illegal entry into the United States. Upon arrival, the boy – who speaks only Spanish – is told that he must work eighteen hours a day in a taqueria and live in an unfurnished apartment with other boys who work at the taqueria. Antonio is paid far less than minimum wage, and his “rent” is deducted from his meager earnings. The traffickers threaten to punish Antonio severely if he attempts to leave. The traffickers prohibit him from having guests or dating. After eight years of exploitation under these conditions, Antonio manages to escape and contact the authorities. He seeks protection as a victim of human trafficking. But law enforcement is not interested in his case: they do not see him as a true trafficking victim. As a result, Antonio becomes homeless and subject to deportation under the immigration laws.

Antonio is not alone. The government estimates that up to 17,500 people are trafficked into the United States annually to work as modern-day slaves.<sup>2</sup>

<sup>1</sup> “Antonio” is a fictional name. The story described above is that of the plaintiff in *Abrica v. Campestre Corp.*, No. 04-02723 (N.D. Cal. filed July 7, 2004).

<sup>2</sup> CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005, at 9 (2006), available at <http://www.usdoj.gov/crt/>

These individuals typically enter the United States unlawfully and upon their entry are exploited for forced labor or sex.<sup>3</sup> In 2000, Congress enacted the Trafficking Victims Protection Act (TVPA)<sup>4</sup> to protect trafficking victims by providing them with immigration relief. The TVPA created a new “T” visa that allows trafficking victims to apply to stay in the United States. To obtain the T visa, a trafficking victim must demonstrate that she suffered a “severe form of trafficking in persons,”<sup>5</sup> a term defined as trafficking for forced labor or sex through the use of force, fraud, or coercion.<sup>6</sup> The victim must also show that she “has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking.”<sup>7</sup>

The statutory requirements for the visa reflect a legislative compromise between the humanitarian and prosecutorial functions of the visa. The T visa is a hybrid: it both provides humanitarian assistance to individuals who are victims of a severe form of trafficking, and satisfies interests in prosecuting traffickers by requiring victim compliance with requests for assistance in investigations. The T visa is thus unlike purely humanitarian immigration relief, such as asylum or relief under the Violence Against Women Act (VAWA), which require only demonstration of victim status.<sup>8</sup>

Despite the availability of T visas since the enactment of the TVPA in 2000, only 616 victims have successfully obtained relief.<sup>9</sup> Existing critique has focused on the law enforcement cooperation requirement of the T visa and the TVPA’s trafficking definition.<sup>10</sup> While I agree with that critique in part, this Article suggests additional reasons for the failure of the visa that focus on federal agency implementation of the statute. I suggest that the implementing

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crim/trafficking\_report\_2006.pdf [hereinafter DOJ REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING].

<sup>3</sup> I use the term labor trafficking to mean trafficking for forms of work other than sex work. By sex trafficking, I mean all forms of trafficking for sex work.

<sup>4</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1466 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000)).

<sup>5</sup> 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2000).

<sup>6</sup> 22 U.S.C. § 7102(8) (2000).

<sup>7</sup> 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa).

<sup>8</sup> See *infra* notes 102-05 and accompanying text.

<sup>9</sup> OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP’T OF STATE, PUBL’N NO. 11335, TRAFFICKING IN PERSONS REPORT 53 (2006), available at <http://www.state.gov/documents/organization/66086.pdf>. The Department of Homeland Security (DHS) has also granted immigration relief to 573 family members of trafficking victims. *Id.*

<sup>10</sup> See, e.g., Joyce Koo Dalrymple, Book Note, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451, 454-56 (2005) (reviewing CRAIG MCGILL, HUMAN TRAFFIC: SEX, SLAVES & IMMIGRATION (2003)); Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 381 (2005). See generally Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 GENDER & SOC’Y 923 (2003).

agencies – the Department of Homeland Security (DHS) and the Department of Justice (DOJ) – have narrowed the availability of the T visa even beyond the statutory language of the TVPA.<sup>11</sup> Agency implementation has focused on the prosecutorial goals of the T visa, ignoring its humanitarian purposes. On a structural level, agency regulations place the responsibility of identifying trafficking victims and assessing victims' cooperation with law enforcement in the hands of prosecutors and agents responsible for investigating traffickers. The same agent or prosecutor who decides whether a victim would be a good witness also decides whether the individual is a victim for the purposes of the T visa. I suggest that this conflict results in a failure to identify as trafficking victims those who do not present themselves as good prosecution witnesses.<sup>12</sup> Placing the victim identification function in prosecutorial hands also leads to non-uniform results, with each prosecutor or investigator making determinations based on her own conception of who is a deserving trafficking victim.

The problem is compounded by political rhetoric surrounding human trafficking. To obtain passage of the TVPA, lawmakers repeatedly referred to trafficking victims as meek, passive objects of sexual exploitation. Victims of trafficking for forced labor were largely ignored. Even sex trafficking victims, moreover, were described as exercising no free will during their illegal entry into the United States and as passive during their subsequent sexual exploitation.<sup>13</sup> I suggest that this rhetoric has seeped into prosecutors' and investigators' identification of actual trafficking victims, with tragic consequences for victims of labor or sex trafficking who do not describe their stories consistently with it.

The stereotype of the trafficking victim as a passive victim of sexual exploitation can be traced to two sources. First, use of the stereotype creates a clear distinction between trafficking victims and unlawful economic migrants. Whereas undocumented "smuggled" economic migrants are vilified as "illegal aliens" who willfully enter the United States without authorization, stereotypically passive trafficking victims are thought to enter under the complete control of the trafficker. Second, this stereotypical victim story, involving a trafficking victim who is under the full control of traffickers during both entry and exploitation for sex work, is an effective prosecutorial story. A

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<sup>11</sup> Given the confidentiality of T visa applications and the absence of data about the nature and types of applications, the suggestions in this Article as to the flaws in agency implementation are hypotheses not based on empirical evidence.

<sup>12</sup> DHS regulations also go beyond the statute by preferring victims who await rescue from trafficking instead of escaping on their own. Unlike victims who are rescued by law enforcement, victims like Antonio, who escape their trafficker on their own, must meet a regulatory burden of demonstrating that they had no clear opportunity to have left the United States in the interim between escape and the moment they contacted law enforcement. *See* 8 C.F.R. § 214.11(g)(2) (2006).

<sup>13</sup> *See infra* notes 69-73 and accompanying text.

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passive and dominated trafficking victim allows prosecutors to describe the trafficker as maximally culpable.

Agency implementation of the TVPA based on a narrow trafficking victim stereotype is under-inclusive in many respects. The line between trafficking and smuggling is not a clear one: unlawful migrants (including trafficking victims) are typically motivated by various “push” factors, including economic instability, political upheaval, and family situations.<sup>14</sup> Trafficking victims experience the same push factors as other migrants from their countries of origin, but have the necessary additional catalyst of trafficker force, fraud, or coercion. Within an exploitative relationship with the trafficker, moreover, a victim may be able to exercise some amount of free will. This does not negate the physical and psychological control of the trafficker, but it may make the victim appear less meek or passive in the eyes of a prosecutor.

This Article draws from available empirical evidence, criminal law, immigration legal history, domestic violence law, and trauma psychology to explore the limitations of federal agency anti-trafficking efforts. Part I introduces the trafficking problem. It describes the global, criminal, and lucrative nature of trafficking and details three main destinations for trafficked persons in the United States: domestic work, the service and farm industries, and sex work. The Article then examines the scope of U.S. anti-trafficking legislation against the background of its legislative history and explains the statutory requirements of the T visa. In Part II, the Article explores regulatory and agency implementation of the statute. The Article explains how regulatory and agency implementation has resulted in practical barriers to T visa relief for many trafficking victims.

In Part III, the Article suggests that the current agency implementation envisions a stereotypical passive trafficking victim who is under the complete control of the trafficker. This approach is grounded in concerns about undocumented migration and is overly focused on prosecutorial goals, resulting in a narrow conception of the trafficking victim. This victim conception is also consistent with pre-existing stereotypes of foreign and immigrant women. The Article then explains that because the TVPA is still a relatively new law, policymakers still have time to adopt a more sophisticated and nuanced approach to identifying trafficking victims, thus expanding the popular and legal understanding of human trafficking to include a broader range of victims. The Article concludes by proposing a reconsideration of federal agency implementation of the TVPA, suggesting a revised standard that explores trafficking victims’ factually complex narratives.

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<sup>14</sup> See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts To Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2977 (2006) (“Various forms of irregular migration have been spurred by social conflict, civil war, and the global consolidation of economic power centers.”).

## I. TRAFFICKING AND LEGISLATION

A. *The Human Trafficking Phenomenon*

Trafficking is modern-day slavery. Men, women, and children from developing countries are trafficked to industrialized countries for forced prostitution, forced labor, and other forms of exploitation.<sup>15</sup> Increased globalization, including cheaper transportation and communication methods, has resulted in increased migration, including increased trafficking in persons.<sup>16</sup> According to U.S. government estimates, up to 800,000 people are trafficked across international borders annually, and up to 17,500 people are trafficked into the United States each year.<sup>17</sup> These victims include men,

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<sup>15</sup> See Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 68-73 (1998); Dalrymple, *supra* note 10, at 456-59; Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 31-42 (2001); 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, 5-9 (2004); Margaret Murphy, *Modern Day Slavery: The Trafficking of Women to the United States*, 9 BUFF. WOMEN'S L.J. 11, 11 (2001).

<sup>16</sup> See Ann D. Jordan, *Human Rights or Wrongs?: The Struggle for a Rights-Based Response to Trafficking in Human Beings*, in GENDER, TRAFFICKING, AND SLAVERY 28, 28-29 (Rachel Masika ed., 2002). Stricter immigration controls may increase trafficking. See Mark J. Miller, *The Sanctioning of Unauthorized Migration and Alien Employment*, in GLOBAL HUMAN SMUGGLING 318, 329 (David Kyle & Rey Koslowski eds., 2001) ("[T]here are ample reasons to suspect that efforts to curb and punish illegal entry and illegal alien employment have created greater incentives for criminals to organize illegal entry and employment, which results in greater victimization of aliens.").

<sup>17</sup> DOJ REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, *supra* note 2, at 9. International trafficking estimates vary. The International Labour Organization estimates that 2.45 million individuals were trafficked internationally and internally between 1995 and 2004. U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-06-825, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTI-TRAFFICKING EFFORTS ABROAD 12 (2006), available at <http://www.gao.gov/new.items/d06825.pdf>. The United Nations estimates that as many as four million women and children are trafficked worldwide on an annual basis. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective*, ¶ 5, U.N. Doc. E/CN.4/2003/NGO/40 (Feb. 22, 2003) (written statement submitted by Human Rights Advocates Inc.). Estimates of trafficking to the United States vary as well. In 2003, the State Department estimated that 18,000 to 20,000 trafficked persons enter the United States annually, while in 2004 the State Department reduced its estimate to 14,500 to 17,500, without explanation. Compare OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, PUBL'N NO. 11057, TRAFFICKING IN PERSONS REPORT: JUNE 2003, at 7 (2003), available at <http://www.state.gov/documents/organization/21555.pdf>, with OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, PUBL'N NO. 11150, TRAFFICKING IN PERSONS REPORT: JUNE 2004, at 23 (2004), available at <http://www.state.gov/documents/organization/34158.pdf>.

women, boys, and girls. The majority of trafficked persons are women and girls, who are more vulnerable to trafficking because of a greater susceptibility to poverty, illiteracy, and lower social status.<sup>18</sup> Individuals are typically trafficked from poor countries, often in the global South, to wealthier countries.<sup>19</sup> Trafficking is an extremely profitable international criminal enterprise, ranking third in profits after the arms and drug markets.<sup>20</sup> The International Labour Organization estimates that human trafficking generates \$31.6 billion in organized crime profits annually.<sup>21</sup>

Trafficked persons often leave situations of economic, political, religious, and military instability or tension.<sup>22</sup> In these circumstances, poverty renders individuals susceptible to trafficking.<sup>23</sup> Traffickers range from large-scale organized crime networks to “small-scale informal networks.”<sup>24</sup> Some trafficking victims are physically coerced into migrating; others are deceived through promises of gainful employment abroad or otherwise defrauded. When they arrive at their destination, they encounter exploitation for forced labor or sex.<sup>25</sup> Trafficking is often characterized by assault, kidnapping, sexual abuse, rape, torture, threats, and starvation.<sup>26</sup> Trafficking involves not only physical force, but psychological coercion as well, including cases where

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<sup>18</sup> See 22 U.S.C. § 7101(b)(4) (2000) (“Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin.”); Hyland, *supra* note 15, at 35-36 (identifying causative socioeconomic factors of trafficking in women).

<sup>19</sup> 146 CONG. REC. 16712, 16712 (2000) (statement of Sen. Brownback) (observing that women are generally trafficked “from poorer countries to richer countries”).

<sup>20</sup> See *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near Eastern and South Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 11 (2000) (prepared statement of Frank E. Loy, Under Secretary of State for Global Affairs).

<sup>21</sup> The Director-General, Int’l Labour Office, *Report of the Director-General: A Global Alliance Against Forced Labour*, ¶ 265 & tbl.2.1, delivered to the International Labour Conference (June 6, 2005).

<sup>22</sup> Suzanne Williams & Rachel Masika, *Editorial*, in GENDER, TRAFFICKING, AND SLAVERY, *supra* note 16, at 2, 5-6; Hyland, *supra* note 15, at 35-36.

<sup>23</sup> Williams & Masika, *supra* note 22, at 5.

<sup>24</sup> Carolina Johansson Wennerholm, *Crossing Borders and Building Bridges: The Baltic Region Networking Project*, in GENDER, TRAFFICKING, AND SLAVERY, *supra* note 16, at 10, 14.

<sup>25</sup> DOJ REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, *supra* note 2, at 24-32.

<sup>26</sup> 22 U.S.C. § 7101(b)(6) (2000); FRANCIS T. MIKO, CONG. RESEARCH SERV., TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE 4 (2004), available at <http://fpc.state.gov/documents/organization/31990.pdf>; see also Hyland, *supra* note 15, at 39-42 (describing the victimization of trafficked persons).

victims are made to believe that they or their family members will be harmed if they try to escape their traffickers.<sup>27</sup>

Trafficking to the United States is typified by three fact scenarios. The first is that of the domestic worker, a migrant who works as a maid, nanny, or housekeeper at the home of a U.S. resident. The second is that of a migrant working in the hotel, restaurant, factory, or farm industries. The third involves migrants trafficked for forced sex work.<sup>28</sup>

### 1. Domestic Workers

A major destination for low-wage migrant women workers is the home of another individual for work as a maid or child-care provider. Domestic work is popular in the United States and other wealthy countries, with upper- and middle-class families employing migrants from the developing world to perform household tasks such as cleaning, yard work, cooking, laundry, and child care.<sup>29</sup> A disproportionate number of domestic workers in the United States are immigrant women and women of color.<sup>30</sup>

Some domestic workers are victims of human trafficking and are held as virtual slaves. These workers are lured to the United States with promises of lucrative employment. Once here, their movements are restricted, and they are required to work long hours for little pay.<sup>31</sup> These workers are controlled through various forms of physical and psychological coercion.<sup>32</sup> Trafficked domestic workers may fear reporting exploitative conditions because of their precarious immigration status, particularly if they lack documentation.

While each trafficked domestic worker story is unique, the story of Alice B. is illustrative. Alice B., a native of Kenya who was employed there as a

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<sup>27</sup> See 22 U.S.C. § 7101(b)(7).

<sup>28</sup> See MIKO, *supra* note 26, at 7.

<sup>29</sup> There is a rich literature on the economics, politics, and law of domestic work. See, e.g., PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE, at xii (2001) (analyzing “the everyday organization of [domestic work] and the concerns of the women who do the work”); RHACEL SALAZAR PARREÑAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK 2 (2001) (considering “the experiences of migrant Filipina domestic workers through the lens of four key institutions of migration – the nation-state, family, labor market, and the migrant community”); MARY ROMERO, MAID IN THE U.S.A. 1 (10th anniversary ed. 2002) (examining “the importance of paid domestic labor as a window into race, class, and gender relations and reproductive labor”). Human Rights Watch has compiled an excellent report on the abusive treatment of domestic workers with temporary visas to work in the United States. See generally HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES (2001), available at <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf> (examining the failure of U.S. law and policy to offer adequate protection to domestic workers in the United States).

<sup>30</sup> ROMERO, *supra* note 29, at 101.

<sup>31</sup> See HUMAN RIGHTS WATCH, *supra* note 29, at 21.

<sup>32</sup> See *id.*

domestic worker, came to the United States on a temporary worker visa with her employer in 2002.<sup>33</sup> Once in the United States, Alice B.'s employer confiscated her passport and required her to work sixteen hours per day, rarely giving her a day off.<sup>34</sup> She "was expected to clean the house every day, cook all the meals," and care for her employer's child "at any hour of the day or night."<sup>35</sup> Her employer required her to wash clothes and linens by hand, even though the home was equipped with a washer and dryer.<sup>36</sup> Alice B. was paid between \$50 and \$120 per month for her work.<sup>37</sup> Her employer verbally insulted her on several occasions and threatened that the immigration authorities would deport her if she ventured too far from the household.<sup>38</sup>

## 2. Migrant Workers in Restaurants, Hotels, Farm Work, or Factories

Migrant workers form a large component of the work force in the restaurant, hotel, farm, and factory sectors. These sectors are notorious for their exploitative conditions, including low wages and poor working environments.<sup>39</sup> In some cases, migrant workers are trafficked and subjected to forced labor.

One example of such exploitation involves the story featured in the introduction to this Article. The Avila family owned and operated taquerias throughout Northern California. The family recruited monolingual Spanish-speaking boys between the ages of thirteen and sixteen from Mexico to work in their taquerias.<sup>40</sup> Upon arrival in the United States (typically undocumented entry facilitated by an Avila-paid *coyote*), the boys were required to work from 6:00 a.m. to 11:00 p.m. for six to seven days per week (without breaks) in the family's taquerias, some of which were in mobile homes.<sup>41</sup> The boys were housed in an unfurnished two-bedroom apartment, and their "rent" was deducted from their below-minimum wage salary.<sup>42</sup> The boys were subjected

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<sup>33</sup> See Bernice Yeung, *Enslaved in Palo Alto*, SF WKLY., Feb. 18, 2004, available at <http://www.sfweekly.com/2004-02-18/news/enslaved-in-palo-alto> (reporting that Alice B. entered the United States on "a B-1 visa for domestic workers").

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* Alice B. ultimately filed a civil lawsuit against her employer.

<sup>39</sup> See generally Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).

<sup>40</sup> Complaint at 8-9, *Abrica v. Campestre Corp.*, No. 04-02723 (N.D. Cal. filed July 7, 2004).

<sup>41</sup> *Id.* at 7-8.

<sup>42</sup> *Id.*

to various forms of psychological coercion and were prohibited from dating, having guests, or leaving their apartment, except for work.<sup>43</sup>

### 3. Forced Sex Work

The typical forced sex work case in the United States involves women and girls trafficked from the developing world for prostitution.<sup>44</sup> The trafficking network itself may be large- or small-scale, and involves selecting and recruiting women in the source country, facilitating victims' entry into the United States, transporting victims upon arrival, and exploiting them for sex work.<sup>45</sup> Larger-scale operations may run over long periods of time, involving many women who may be exploited not only for sex work but for other types of labor as well.<sup>46</sup>

In "Operation Gilded Cage," a federal investigation uncovered one such large-scale trafficking enterprise in Northern California. On the night of June 30, 2005, approximately four hundred law enforcement agents raided approximately fifty brothels, residences, and businesses, and arrested twenty-seven people.<sup>47</sup> Twenty-nine individuals were indicted in relation to the trafficking operation.<sup>48</sup> Scores of women were detained and questioned.<sup>49</sup> According to a DOJ press release, one indictment charged that at least two women were smuggled from Korea, and that "force, fraud or coercion [was used] to cause the two female Korean nationals to engage in a commercial sex act."<sup>50</sup>

## B. Anti-Trafficking Legislation

### 1. International Efforts

Human trafficking has long been of concern to the international community. In the late nineteenth and early twentieth centuries, European countries entered into multilateral treaties to criminalize and investigate trafficking in women for

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<sup>43</sup> *Id.* at 8-9. The boys eventually filed a civil lawsuit.

<sup>44</sup> See generally JANICE G. RAYMOND ET AL., COAL. AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS (2001), available at [http://www.ojp.usdoj.gov/nij/international/programs/sex\\_traff\\_us.pdf](http://www.ojp.usdoj.gov/nij/international/programs/sex_traff_us.pdf) (presenting the results of a sex trafficking study and arguing for the treatment of sex work as non-consensual).

<sup>45</sup> See *id.* at 21-22.

<sup>46</sup> See Wennerholm, *supra* note 24, at 11, 13-14.

<sup>47</sup> Press Release, U.S. Dep't of Justice, 29 Charged in Connection with Alien Harboring Conspiracy (July 1, 2005), available at [http://www.usdoj.gov/usao/can/press/2005/2005\\_07\\_01\\_Gilded\\_Cage.html](http://www.usdoj.gov/usao/can/press/2005/2005_07_01_Gilded_Cage.html).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

prostitution.<sup>51</sup> “[T]hese early treaties,” one scholar notes, “focused on the so-called ‘white slave trade,’” a sensationalist term referring to the coercion of European and North American women to enter into the sex trade in the colonies and developing world.<sup>52</sup> Although images of a white slave trade captured the imagination of the international community, the number of white women involved was actually very low. The vast majority of women trafficked at that time for sex work were women of color.<sup>53</sup>

International attention once again turned to human trafficking in the 1970s, with greater migration due to globalization and the rise of the global women’s rights movement.<sup>54</sup> Over the next thirty years, various international documents condemned human trafficking as exploitative of women.<sup>55</sup> In 2000, the United Nations adopted the *Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (“Trafficking Protocol”).<sup>56</sup> The recent international debate has been defined by various perspectives, including that of nations intent on restricting immigration and fighting organized crime in an increasingly globalized world (“law enforcement perspective”); that of “abolitionist” organizations intent on eliminating prostitution in all its forms (“abolitionist perspective”); and that of labor and human rights groups seeking broad protections for all migrant workers (“human rights perspective”).<sup>57</sup> The

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<sup>51</sup> See Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 7-9 (2004); Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT’L L. 1143, 1143-45 (2003).

<sup>52</sup> Fitzpatrick, *supra* note 51, at 1144; see also Bruch, *supra* note 51, at 7-8 (describing international responses to perceived “white slave traffic”); Eileen Scully, *Pre-Cold War Traffic in Sexual Labor and Its Foes: Some Contemporary Lessons*, in GLOBAL HUMAN SMUGGLING, *supra* note 16, at 74, 83-87 (describing “white slave trade” hysteria at the turn of the twentieth century).

<sup>53</sup> Scully, *supra* note 52, at 87 (reporting that “99 percent of traffic victims were in fact women of color – broadly defined by contemporaries to include Jews – distributed throughout the world but concentrated in colonial areas”).

<sup>54</sup> Bruch, *supra* note 51, at 11-15 (describing the “second wave” of international anti-trafficking efforts).

<sup>55</sup> See *id.* at 11-12 nn.53-57.

<sup>56</sup> Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Jan. 8, 2001). The first draft of the Trafficking Protocol was introduced by the United States in January 1999. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions To Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 442 (2006).

<sup>57</sup> For further discussion of these three approaches and their implications, see BRIDGET ANDERSON & JULIA O’CONNELL DAVIDSON, *TRAFFICKING – A DEMAND LED PROBLEM? (PART 1: REVIEW OF EVIDENCE AND DEBATES)*, at 13-16 (2004); Viti Muntarbhorn, *Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS*

Trafficking Protocol, which was considered and adopted concurrently with the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*,<sup>58</sup> is based in a law enforcement perspective on fighting trafficking and addresses the concerns of developed countries about increased migration.<sup>59</sup> As Anne Gallagher explains, “Wealthy states [were] increasingly concerned that the actions of traffickers and migrant smugglers interfere with orderly migration and facilitate the circumvention of national immigration restrictions.”<sup>60</sup>

## 2. Background to U.S. Legislation

Human trafficking first garnered mainstream attention in the United States when President Clinton issued an anti-trafficking directive on March 11, 1998.<sup>61</sup> Subsequently, and concurrent with international discussions regarding an anti-trafficking protocol, Congress began a flurry of legislative activity on the subject.<sup>62</sup> In general, the various anti-trafficking bills enjoyed wide bipartisan support and speedy consideration.

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151, 154-58 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003); Bruch, *supra* note 51, at 15-40; Chuang, *supra* note 15, at 94-96.

<sup>58</sup> Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

<sup>59</sup> See Bruch, *supra* note 51, at 14 (stating that the Trafficking Protocol “comes as part of an explicit law enforcement regime”); Fitzpatrick, *supra* note 51, at 1151 (“The focus [of the Trafficking Protocol] remains on crime control and deterrence of unlawful migration.”); Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 976 (2001) (“While human rights concerns may have provided some impetus (or cover) for collective action, it is the sovereignty/security issues surrounding trafficking and migrant smuggling which are the true driving force behind such efforts.”).

<sup>60</sup> Gallagher, *supra* note 59, at 976. Because of the vigorous lobbying of human rights activists, the Trafficking Protocol urges (but does not require) states to ensure protections for trafficking victims, and contains a “savings clause” maintaining “pre-existing obligations under international . . . human rights law.” Fitzpatrick, *supra* note 51, at 1152.

<sup>61</sup> At approximately the same time, the Clinton administration created the Workers’ Exploitation Task Force, chaired by the Civil Rights Division of the DOJ and the Solicitor’s Office in the Department of Labor. FRANCIS T. MIKO & GRACE (JEA-HYUN) PARK, CONG. RESEARCH SERV., *TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE* 9 (2002). This effort was complemented by efforts at the State Department to study and propose international responses to human trafficking globally. See *id.* Prior to these efforts but after the 1995 Beijing Women’s Conference, President Clinton had established an Interagency Council on Women to lead U.S. policy on trafficking in women and children. See *id.*

<sup>62</sup> In March 1999, Senator Paul Wellstone (D-Minn.) and Representative Louise Slaughter (D-N.Y.) introduced identical bills entitled the International Trafficking of Women and Children Victim Protection Act of 1999. S. 600, 106th Cong. (1999); H.R. 1238, 106th Cong. (1999). On March 25, 1999, Representative Christopher Smith (R-N.J.) introduced the Freedom from Sexual Trafficking Act of 1999. H.R. 1356, 106th Cong.

The trafficking legislation centered on a partnership of strange bedfellows: feminist abolitionists and conservative politicians joined forces in opposition to all prostitution, including trafficked sex work.<sup>63</sup> Simultaneously, a separate group of legislators focused on the human rights perspective, advocating protection for all trafficked individuals, whether trafficked for sex or labor.<sup>64</sup> The bills that emerged from the legislative effort promoted the “three Ps” – protection (of victims), prosecution (of traffickers), and prevention (in the source country).<sup>65</sup> The various bills all provided temporary immigration protections for victims of trafficking.

Not surprisingly, given the different ideological perspectives of the lobbyist and legislator groups, the bills differed in certain respects. First, some applied only to sex trafficking while others covered labor trafficking as well.<sup>66</sup> Second, the bills varied with respect to the level of coercion that a trafficked individual must have endured (ranging from “abuse of authority” to physical force) in order to be considered a “victim of trafficking” and thus entitled to immigration protections.<sup>67</sup> Third, some bills additionally required fear of retribution if removed (deported), while others focused on whether the victim had suffered physical or mental abuse as a result of trafficking.<sup>68</sup>

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(1999). On October 27, 1999, Representative Sam Gejdenson (D-Conn.) introduced the Comprehensive Antitrafficking in Persons Act of 1999, and on November 2, 1999, Senator Wellstone introduced an identical bill in the Senate. H.R. 3154, 106th Cong. (1999); S. 1842, 106th Cong. (1999).

Finally, on November 8, 1999, Representative Smith introduced the bill that was later enacted into law as the Trafficking Victims Protection Act. H.R. 3244, 106th Cong. (1999). Around the same time, Senator Sam Brownback (R-Kan.) sponsored a similar bill in the Senate. S. 2449, 106th Cong. (2000). Prior to the introduction of this legislation, the House and Senate had passed several resolutions condemning trafficking and urging the State Department to take action. *See, e.g.*, H.R. Con. Res. 239, 105th Cong. (1998); S. Con. Res. 82, 105th Cong. (1998); S. Con. Res. 12, 104th Cong. (1995); H.R. Con. Res. 21, 104th Cong. (1995).

<sup>63</sup> *See generally* Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT’L & COMP. L. 269 (2006).

<sup>64</sup> *See infra* notes 75-77 and accompanying text.

<sup>65</sup> *See, e.g.*, Dalrymple, *supra* note 10, at 454 n.18 (discussing the “Three P” approach); John Miller, Dir., Office To Monitor & Combat Trafficking in Persons, U.S. Dep’t of State, Remarks at the Inter-American Development Bank (Nov. 15, 2005), *available at* <http://usinfo.state.gov/gi/Archive/2005/Nov/15-823471.html> (same).

<sup>66</sup> *Compare, e.g.*, H.R. 1356 § 2(a) (applying to “international sexual trafficking”), *with* S. 600 § 4 (applying to the trafficking of individuals for any type of “forced, bonded, or coerced labor”).

<sup>67</sup> *Compare, e.g.*, S. 600 § 4 (defining a trafficking victim as a trafficked individual who endures “deception, coercion, debt bondage, the threat of force, or the abuse of authority”), *with* H.R. 1356 § 3 (defining a trafficking victim as a trafficked individual who endures “fraud, force, or coercion”).

<sup>68</sup> *Compare, e.g.*, H.R. 1356 § 7(a)(3) (requiring that the victim “face a significant possibility of retribution or other hardship if removed from the United States”), *with*

The image that permeated the legislative record reflected the abolitionist/conservative perspective, centering on the female “innocent victims” of sex trafficking whose participation was “involuntary” and who would “face retribution or other serious harm upon return.”<sup>69</sup> The legislative history is replete with stories of girls and women who were trafficked for forced sex, and whose entry into sex trafficking was forcible or fraudulent – they were either physically coerced or “lured” into it against (or without) their will.<sup>70</sup> These stories often used terms like kidnapping and abduction to describe the trafficker’s actions in the source country,<sup>71</sup> and focused almost

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H.R. 3154, 106th Cong. § 7 (a)(3) (1999) (requiring the victim to have “suffered significant physical or mental abuse as a result of the criminal or other unlawful activity”).

<sup>69</sup> *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on International Operations and Human Rights of the H. Comm. on International Relations*, 106th Cong. 56 (1999) (prepared statement of Rep. Smith); see also Chapkis, *supra* note 10, at 925.

<sup>70</sup> See, e.g., *Trafficking of Women and Children in the International Sex Trade*, *supra* note 69, at 41 (prepared statement of Gary A. Haugen, President and Chief Executive Officer, International Justice Mission) (“[A] 17-year-old girl named Jayanthi from India . . . was sold into forced prostitution at the age of 14. She was drugged, abducted off a train, sold into a brothel. She was held in a windowless room for 3 days and beaten with iron rods, plastic pipe, and electrical cords until she agreed to have sex, and then she proceeded to have sex with about 20 customers a day over a 3-year period and was forced to have three abortions over that time.”); *id.* at 35 (prepared statement of Anita Sharma Bhattarai, trafficking survivor) (relating her experience as a Nepalese woman who had been drugged, lied to, and taken across the border to a brothel in India where she was beaten and raped and forced to work as a prostitute); 146 CONG. REC. 7293, 7293 (2000) (statement of Rep. Pitts) (“I would like to share . . . the story of a young girl from a very poor family in a developing country who had hopes for a better life in a wealthier land. . . . When she got where she was going, she could tell something was wrong. She was led to a hot, dirty trailer and locked inside with a handful of other women, women with emotionless faces and broken spirits. It was there that her life as a sex slave began. At first, she refused to do what she was told, but she could only take so many beatings. Then 30 men a day entered her trailer and raped her, sometimes beating her, always robbing her of her dignity and self-respect, almost constantly abused, crying until tears would no longer flow, month after month. She could not escape because she was locked in a trailer.”); see also *Trafficking of Women and Children in the International Sex Trade*, *supra* note 69, at 37-38 (statement of Laura J. Lederer, Research Director and Project Manager, The Protection Project, Harvard University, Kennedy School of Government) (telling the story of “Lydia,” an “amalgamation of several true stories of women and girls who have been trafficked in the Eastern European area in recent years”).

<sup>71</sup> See, e.g., *International Trafficking in Women and Children*, *supra* note 20, at 72 (statement of Sen. Brownback) (“International sex trafficking is the new slavery. It includes all the elements associated with slavery, including being abducted from your family and home, taken to a strange country where you do not speak the language, losing your identity and freedom, being forced to work against your will with no pay, being beaten and raped, having no defense against the one who rules you, and eventually dying early because of this criminal misuse.”); 146 CONG. REC. 22053, 22054 (2000) (statement of Sen. Mikulski) (“[G]irls as young as ten years old are kidnaped [sic] from their villages. Or unsuspecting

exclusively on victims of trafficking for sex.<sup>72</sup> The characterization of Senator Brownback is typical of these legislative stories:

One of two methods, fraud or force, is used to obtain victims. Force is often used in the cities wherein, for example, the victim is physically abducted and held against her will, sometimes in chains, and usually brutalized through repeated rape and beatings. Regarding fraudulent procurement, typically the “buyer” promises the parents that he is taking their daughter away to become a nanny or domestic servant, giving the parents a few hundred dollars as a “down payment” for the future money she will earn for the family. Then the girl is transported across international borders, deposited in a brothel and forced into the trade until she is no longer useful having contracted AIDS. She is held against her will under the rationale that she must “work off” her debt which was paid to the parents, which usually takes several years, if she remains alive that long.<sup>73</sup>

Some of the stories had a second chapter, in which the victim was “rescued” by law enforcement or other agencies. For instance, one of the anonymous victims who testified before Congress stated that “[o]ur enslavement finally

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families allow their daughters to leave – with promises of good jobs and better lives. These women are taken to brothels or sweatshops – where they are imprisoned. They are forced to work as prostitutes.”); 146 CONG. REC. 21328, 21329 (2000) (statement of Rep. Pryce) (“Victims of trafficking are first acquired in a number of different ways. Some are forcibly kidnapped and taken out of their own countries. Others are deceived with offers of good work or a better life. But no matter how they are taken, trafficking victims are universally subject to cruel mental and physical abuse, including beatings, rape, starvation, forced drug use, confinement and seclusion.”); 146 CONG. REC. 16712, 16713 (2000) (statement of Sen. Brownback) (characterizing Nepalese trafficked girls as “beautiful, illiterate, extremely poor with no defenders, and compliant,” and describing Eastern Asian trafficking victims as “abductees [who] are simple tribal girls . . . forced into sexual service”); 146 CONG. REC. 7619, 7619 (2000) (statement of Rep. Carolyn B. Maloney) (“Many of these women are kidnaped [sic], sold, or tricked into brothel captivity.”); 146 CONG. REC. 7295, 7295 (2000) (statement of Rep. Abercrombie) (“Traffickers buy young girls from relatives, kidnap children from their homes or lure women with false promises of legitimate employment. Traffickers use rape, starvation, torture, extreme physical brutality and psychological abuse to force victims to work in horrible conditions as prostitutes . . .”). Senator Wellstone was more expansive in his description of trafficking survivors. *See, e.g.*, 146 CONG. REC. 22045, 22045 (2000) (“Many [victims] in their naivete believe nothing bad can happen to them in the rich and comfortable countries such as Switzerland or Germany or the United States. Others are less naive, but they are desperate for money and opportunity. But they are no less hurt by the trafficker’s brutal grip.”).

<sup>72</sup> Indeed, the bill that ultimately became law as the Trafficking Victims Protection Act, H.R. 3244, was incorrectly referred to as the Sexual Trafficking Victims Protection Act by some legislators as late as the date of the roll call vote for the bill. *See* 146 CONG. REC. 22692, 22692 (2000) (personal explanation of Rep. Ballenger); 146 CONG. REC. 22097, 22097-98 (2000) (statement of Sen. Torricelli).

<sup>73</sup> 146 CONG. REC. 16712, 16713 (2000).

ended when the INS, FBI and local law enforcement raided the brothels and rescued us.”<sup>74</sup>

Despite the rhetorical focus on sex trafficking of helpless girls, the statute that ultimately passed reflected a compromise with legislators from the labor and human rights camp, who urged a broader understanding of trafficking that would encompass trafficking for forced labor.<sup>75</sup> The Clinton administration and some House and Senate Democrats – particularly Senator Wellstone – urged Congress to consider that “trafficking into the sex industry is only one part of a broader trafficking phenomenon.”<sup>76</sup> Many of these voices also urged a broader understanding of the trafficking victim – one that encompassed individuals who may have exercised some amount of decision-making power to consent to some part of the trafficking arrangement, but not to the full extent of the exploitation they subsequently suffered.<sup>77</sup> The language ultimately adopted by Congress provided protection not only to sex trafficking victims,

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<sup>74</sup> *International Trafficking in Women and Children*, *supra* note 20, at 92 (statement of an anonymous survivor); *see also Alien Smuggling/Human Trafficking: Sending a Meaningful Message of Deterrence: Hearing Before the Subcomm. on Crime, Corrections and Victims’ Rights of the S. Comm. on the Judiciary*, 108th Cong. 26 (2003) (statement of Jane J. Boyle, United States Attorney, Northern District of Texas) (referring to the “rescue” of trafficking victims).

<sup>75</sup> A principal report relied upon by Congress was AMY O’NEILL RICHARD, *INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME* (1999), *available at* <http://www.vawnet.org/Intersections/OtherViolenceTypes/Trafficking/ciatraffic.pdf>. The report recognized that women are trafficked to the United States not only for sex work but also for various types of labor, including sweatshop labor and domestic work. *Id.* at 3.

<sup>76</sup> *Trafficking of Women and Children in the International Sex Trade*, *supra* note 69, at 83-84 (prepared statement of Theresa Loar, Director, President’s Interagency Council on Women and Senior Coordinator for International Women’s Issues, U.S. Department of State); *see also* 146 CONG. REC. 22045, 22046 (2000) (statement of Sen. Wellstone) (“Trafficking in persons for labor is an enormous problem as well.”); 146 CONG. REC. 21329, 21329 (2000) (statement of Rep. Slaughter) (“It is also important . . . to be aware that people are being illegally smuggled across borders to work in sweatshops, domestic servitude or other slavery-like conditions.”).

<sup>77</sup> H.R. REP. NO. 106-487, pt. 2, at 42 (2000) (minority views) (“The requirement that the victim not have voluntarily agreed to any trafficking arrangement is also potentially problematic. The problem is that the term ‘voluntary’ could sweep in victims who agreed to a particular improper arrangement, but not to the full extent of sex trafficking or involuntary servitude ultimately imposed upon them. For example, under the committee-reported bill – to cite a real life horror story – consider a case where 5 Latvian women voluntarily agree to serve as exotic dancers in Chicago in exchange for a salary of \$60,000 per year. When they arrive their passports are taken, and their lives and their families’ lives are threatened if they don’t agree to involuntary servitude. Under the committee-reported bill, we are concerned the voluntary requirement could prevent victims of this type of arrangement from receiving visas.” (footnote omitted)).

but also to victims of trafficking for forced labor if the trafficking victim was “subject[ed] to involuntary servitude, peonage, debt bondage, or slavery.”<sup>78</sup>

### 3. The Statute

As presently enacted, the TVPA’s provisions can be divided into three categories: prosecution, prevention, and protection. As to prosecution, the TVPA added new crimes and increased penalties for existing crimes related to trafficking.<sup>79</sup> Among other things, the TVPA created crimes punishing sex trafficking in children,<sup>80</sup> forced labor,<sup>81</sup> and the confiscation of a victim’s passport or other documents in furtherance of a trafficking scheme.<sup>82</sup> Significantly, the new forced labor felony offense allows for prosecution even where coercion is non-physical and psychological,<sup>83</sup> superseding the Supreme Court’s decision in *United States v. Kozminski*.<sup>84</sup> The trafficking crimes created by the TVPA are punishable by a maximum sentence of twenty years,<sup>85</sup> or forty years in the case of sex trafficking in children,<sup>86</sup> and the TVPA increased the penalty for existing trafficking crimes (explicit prohibitions on slavery dating from the Reconstruction era) from ten to twenty years.<sup>87</sup> In addition, the TVPA authorized mandatory restitution in trafficking cases.<sup>88</sup>

The prevention provisions of the TVPA target source countries, encouraging such countries to comply with “minimum standards” to eliminate trafficking.<sup>89</sup>

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<sup>78</sup> 22 U.S.C. § 7102(8)(B) (2000). Nevertheless, after the enactment of the TVPA, during the legislative discussions that preceded the enactment of the Trafficking Victims Protection Reauthorization Act of 2003, the majority of the Congressional debate was devoted to a discussion of sex trafficking. See, e.g., H.R. REP. NO. 108-264, pt. 2, at 49 (2003) (statement of Rep. Conyers, Jr.); 149 CONG. REC. H10239, 10284 (daily ed. Nov. 4, 2003) (statement of Rep. Smith); *id.* at 10287 (statement of Rep. Watson).

<sup>79</sup> See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1466, 1486 (codified in scattered sections of 18 U.S.C.).

<sup>80</sup> See 18 U.S.C. § 1591 (2000 & Supp. IV 2004).

<sup>81</sup> See *id.* § 1589.

<sup>82</sup> See *id.* § 1592.

<sup>83</sup> See *id.* § 1589 (criminalizing forced labor obtained by threatening victims).

<sup>84</sup> 487 U.S. 931 (1988). In *Kozminski*, the Supreme Court held that involuntary servitude under the Thirteenth Amendment required the threat or use of legal or physical force, and that compulsion through psychological coercion did not suffice. *Id.* at 952-53. By contrast, involuntary servitude under the TVPA encompasses exploitation through psychological coercion. See 22 U.S.C. § 7101(b)(13) (2000) (disapproving of the narrow interpretation of involuntary servitude taken by the Court in *Kozminski*); *id.* § 7102(2), (5) (defining coercion and involuntary servitude).

<sup>85</sup> 18 U.S.C. §§ 1589-1590 (2000).

<sup>86</sup> *Id.* § 1591 (Supp. IV 2004).

<sup>87</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 112(a)(1), 114 Stat. 1466, 1486 (codified at 18 U.S.C. §§ 1581, 1583-1584).

<sup>88</sup> 18 U.S.C. § 1593 (2000).

<sup>89</sup> See 22 U.S.C. § 7106.

The TVPA also requires the State Department to issue an annual report on the anti-trafficking efforts of foreign countries.<sup>90</sup> Countries that fail to comply with the TVPA's minimum anti-trafficking standards and do not make "significant efforts" towards compliance are ineligible for U.S. "nonhumanitarian, nontrade-related foreign assistance."<sup>91</sup>

As to the protection prong, which is the focus of this Article, the TVPA created both immigration relief and social services for trafficking victims.<sup>92</sup> Two forms of immigration relief are now available: "continued presence"<sup>93</sup> and the T visa.<sup>94</sup> Law enforcement officials may request "continued presence," a temporary legal status for witnesses during a trafficking prosecution.<sup>95</sup> "Continued presence" status does not provide a pathway to lawful permanent residence. The T visa, by contrast, is a three-year temporary visa with a pathway to permanent legal status.<sup>96</sup>

Both forms of immigration relief require that the survivor be a victim of a "severe form of trafficking in persons," a term defined as:

sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>97</sup>

The statute imposes three additional requirements for the T visa: victims must demonstrate that they (1) are "physically present in the United States . . . on account of . . . trafficking"; (2) have "complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking"; and (3) "would suffer extreme hardship involving unusual and severe harm upon

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<sup>90</sup> *Id.* § 7107(b).

<sup>91</sup> *Id.* § 7107(a).

<sup>92</sup> *See* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 107, 114 Stat. 1466, 1474 (codified in scattered sections of U.S.C.).

<sup>93</sup> *See* 22 U.S.C. § 7105(c)(3).

<sup>94</sup> *See* 8 U.S.C. § 1101(a)(15)(T) (2000).

<sup>95</sup> *See* 22 U.S.C. § 7105(c)(3).

<sup>96</sup> *See* 8 U.S.C. §§ 1101(a)(15)(T), 1255(l).

<sup>97</sup> 22 U.S.C. § 7102(8); *see also id.* § 7102(9) ("'[S]ex trafficking' means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."); *id.* § 7102(5) ("'[I]nvoluntary servitude' includes a condition of servitude induced by means of . . . any scheme . . . intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint . . ."); *id.* § 7102(4) ("'[D]ebt bondage' means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services . . . as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.").

removal.”<sup>98</sup> The TVPA limits the number of T visas issued annually to five thousand.<sup>99</sup> Upon filing an application for continued presence or a T visa, a victim of a severe form of trafficking is eligible (to the same extent as refugees) for social service benefits from the Department of Health and Human Services (HHS), if she certifies a willingness “to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons.”<sup>100</sup> An individual who obtains a T visa is eligible, after three years, to adjust status to lawful permanent residence and, subsequently, to naturalize and become a U.S. citizen.<sup>101</sup>

The T visa is one of the few forms of permanent humanitarian relief available to individuals without legal immigration status, the other main forms being asylum and immigration relief for survivors of domestic violence under the VAWA.<sup>102</sup> Asylum is available to individuals who demonstrate “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>103</sup> Relief under VAWA is available to non-citizens who suffered battery or extreme cruelty at the hands of a spouse or parent who is a U.S. citizen or lawful permanent resident.<sup>104</sup> The T visa is similar to VAWA and asylum relief in that immigration relief is conditioned on demonstrating victim status. But unlike VAWA and asylum, the T visa also requires cooperation with law enforcement. The visa is thus a hybrid form of relief, incorporating both humanitarian and law enforcement elements, in accordance with both the protection and prosecution prongs of the TVPA.<sup>105</sup>

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<sup>98</sup> 8 U.S.C. § 1101(a)(15)(T)(i). Children under eighteen are not required to cooperate with law enforcement for T visa eligibility. *See id.* § 1101(a)(15)(T)(i)(III)(bb) (Supp. IV 2004). In January 2006, Congress amended the TVPA to state that “if the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance described in clause (i)(III)(aa), the request is unreasonable.” 8 U.S.C.A. § 1101(a)(15)(T)(iii) (West 2006).

<sup>99</sup> 8 U.S.C. § 1184(o)(2) (Supp. IV 2004).

<sup>100</sup> 22 U.S.C. § 7105(b)(1)(A), (E)(i).

<sup>101</sup> 8 U.S.C. § 1255(l).

<sup>102</sup> *See id.* § 1158 (governing asylum); *id.* § 1154(a)(1)(A)(iii)-(iv) (providing immigration relief to victims of domestic violence). In addition, undocumented migrants who are longtime residents in the United States are eligible for “[c]ancellation of removal” relief if they can demonstrate that their removal would cause “exceptional and extremely unusual hardship” to a spouse, parent, or child who is a U.S. citizen or lawful permanent resident. *Id.* § 1229b(b).

<sup>103</sup> *Id.* § 1101(a)(42)(A) (defining “refugee”); *id.* § 1158(b)(1) (requiring that an alien qualify as a refugee to be eligible for asylum).

<sup>104</sup> *Id.* § 1154(a)(1)(A)(iii)-(iv).

<sup>105</sup> Along with the T visa, the TVPA also created the U visa, which is available to victims of crime who are helpful to law enforcement. *See id.* § 1101(a)(15)(U). A full exploration of the U visa is outside the scope of this Article.

## II. IMPLEMENTATION OF THE STATUTE'S IMMIGRATION PROVISIONS

The two federal agencies charged with implementing the TVPA's T visa provisions are the DOJ and the DHS. DOJ is charged with investigating and prosecuting trafficking crimes. DHS adjudicates applications from trafficking victims seeking T visa relief. In implementing the TVPA, DHS and DOJ have imposed restrictions beyond the statutory language, presenting practical barriers for victims seeking T visas.

### A. *Language of Regulations*

Regulations implementing the T visa provisions of the TVPA impose two main restrictions that extend beyond the statute. First, the regulations direct T visa applicants to obtain a law enforcement agency (LEA) endorsement, which certifies that they were victims of a severe form of trafficking in persons and that they assisted in the investigation or prosecution of the trafficker.<sup>106</sup>

Through the LEA endorsement, DHS implements statutory language requiring that T visa applicants be victims of a severe form of trafficking in persons and cooperate with any reasonable request from law enforcement.<sup>107</sup> The LEA endorsement restriction goes beyond the language of the statute, which does not specify how such cooperation should be assessed, who should make such an assessment, or the level of cooperation sufficient for a T visa. Individual law enforcement agents and prosecutors issue the endorsements, deciding whether a particular victim has suffered sufficiently severe trafficking and has cooperated sufficiently with law enforcement. DHS advises victims that these elements of their application "may be difficult to establish" without the endorsement, and "strongly advise[s]" submission of the endorsement.<sup>108</sup> A T visa may be revoked if "[t]he LEA providing the LEA endorsement withdraws its endorsement."<sup>109</sup>

If a victim cannot obtain an LEA endorsement, she must provide "sufficient credible secondary evidence,"<sup>110</sup> which may include "trial transcripts, court documents, police reports, news articles, and copies of reimbursement forms for travel to and from court."<sup>111</sup> A victim without an LEA endorsement must also provide a statement "describing what [she] has done to report the crime to an LEA," and must "demonstrate that good faith attempts were made to obtain the LEA endorsement, including what efforts the applicant undertook to accomplish these attempts."<sup>112</sup>

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<sup>106</sup> 8 C.F.R. § 214.11(f)(1), (h)(1) (2006); *see also* U.S. Citizenship & Immigration Serv., Dep't of Homeland Sec., I-914, Application for T Nonimmigrant Status (Jan. 19, 2007), available at <http://www.uscis.gov/files/form/i-914.pdf>.

<sup>107</sup> *See supra* notes 97-98 and accompanying text.

<sup>108</sup> U.S. Citizenship & Immigration Serv., *supra* note 106, at 3.

<sup>109</sup> 8 C.F.R. § 214.11(s)(1)(v).

<sup>110</sup> *Id.* § 214.11(f).

<sup>111</sup> *Id.* § 214.11(f)(3); *see also id.* § 214.11(h)(2).

<sup>112</sup> *Id.* § 214.11(f)(3); *see also id.* § 214.11(h)(2).

The second burden imposed by the regulations is a requirement that a victim show that “she did not have a clear chance to leave the United States in the interim” between her escape from her traffickers and law enforcement involvement.<sup>113</sup> In other words, once a survivor escapes, she is expected to leave the United States. If she fails to leave, she must demonstrate why “she did not have a clear chance to leave.”<sup>114</sup> To do so, she may provide information about “circumstances attributable to the trafficking in persons situation, such as trauma, injury, lack of resources, or travel documents that have been seized by the traffickers.”<sup>115</sup> A survivor who is “liberated” by law enforcement does not have to satisfy this requirement.<sup>116</sup>

The penalties for failing to meet the rescue and LEA endorsement restrictions of the T visa regulations are severe. Under the immigration laws, a survivor who fails to meet these requirements is subject to removal for being in the United States without documentation, and is potentially subject to other immigration sanctions as well.<sup>117</sup>

#### B. Agency Implementation

Federal agencies further limit the availability of T visas by focusing on victims of sex trafficking over victims of trafficking for forced labor. According to DOJ reports, the overwhelming majority of the federal government’s trafficking investigations and prosecutions have been directed at sex trafficking of women.<sup>118</sup> In fiscal year 2004, for example, twenty-six of twenty-nine investigations were for sex trafficking.<sup>119</sup> Fifty-two of fifty-nine defendants charged with trafficking-related crimes, and forty of forty-three convicted of such crimes, were charged and convicted for sex trafficking.<sup>120</sup> In fiscal year 2005, twenty-six of thirty-four trafficking cases filed by the DOJ were sex trafficking cases, and twenty-five of thirty-five convictions obtained

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<sup>113</sup> *Id.* § 214.11(g)(2).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *See id.* § 214.11(g), (g)(2) (requiring only those victims who “escaped the traffickers before law enforcement became involved” to show that they had no opportunity to leave (emphasis added)).

<sup>117</sup> *See infra* notes 181-85 and accompanying text (discussing penalties for unlawful presence and illegal entry into the United States).

<sup>118</sup> This focus stems from the Bush administration’s anti-prostitution stance. *See infra* note 210 and accompanying text.

<sup>119</sup> U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS FROM ATTORNEY GENERAL ALBERTO R. GONZALES ON U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS IN FISCAL YEAR 2004, at 20 (2005), available at <http://www.usdoj.gov/ag/annualreports/tr2004/agreporhumantrafficking.pdf> [hereinafter AG TRAFFICKING REPORT FY 2004].

<sup>120</sup> *Id.* Defendants convicted in fiscal year 2004 “are not necessarily the same” as those charged. *Id.* at 22.

involved sex trafficking.<sup>121</sup> According to one DHS official located in Northern California, the agency does “mostly sex cases and not a lot of labor cases.”<sup>122</sup>

C. *Practical Challenges with the Regulations and Implementation*

Government data reveals that few victims have applied for a T visa, and even fewer have successfully obtained one. Through February 2005, DHS granted only 616 T visas.<sup>123</sup> This number represents a small fraction of both the five thousand annual T visa cap set by Congress and the 14,500 to 17,500 people that the government estimates are trafficked into the United States annually. Similarly, few survivors have accessed social service benefits through HHS certification, which requires either a bona fide T visa application or continued presence status (which can only be obtained by prosecutors). From fiscal years 2001 to 2004, HHS granted certification for benefits to only 611 individuals.<sup>124</sup> In fiscal year 2005, HHS issued an additional 230 certifications.<sup>125</sup>

The government is aware of the implementation problem suggested by only 616 T visa grants in six years, in contrast to its estimates that at least 14,500 individuals are trafficked into the United States annually. A recently issued DOJ report states, for instance, that “[t]he Department realizes that it must address the incongruity between some estimates and the fewer than 1,000 victims who have been assisted through the efforts of federal, state, and local law enforcement since 2001.”<sup>126</sup> This Article suggests explanations for the incongruity, offering both practical and theoretical hypotheses for the failure of U.S. anti-trafficking policies. I suggest that, on a practical level, agency efforts and regulations are inconsistent with available information about human trafficking. At an overlapping but distinct theoretical level, the regulatory approach reflects an inaccurate and problematic concept of the trafficking victim.

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<sup>121</sup> U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2005, at 16 (2006), available at <http://www.usdoj.gov/ag/annualreports/tr2005/agreporhumantrafficking2005.pdf> [hereinafter AG TRAFFICKING REPORT FY 2005].

<sup>122</sup> See Yeung, *supra* note 33.

<sup>123</sup> See *supra* note 9 and accompanying text. Through fiscal year 2004, DHS received only 1015 applications for T visas, 454 of which were granted. AG TRAFFICKING REPORT FY 2004, *supra* note 119, at 15. DHS denied 286 applications, and the remaining 275 were pending. *Id.* In fiscal year 2005, 229 victims applied for T visas; DHS approved 112 applications and denied 213 (including some applications filed in previous years). AG TRAFFICKING REPORT FY 2005, *supra* note 121, at 12.

<sup>124</sup> AG TRAFFICKING REPORT FY 2004, *supra* note 119, at 8.

<sup>125</sup> AG TRAFFICKING REPORT FY 2005, *supra* note 121, at 5.

<sup>126</sup> DOJ REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, *supra* note 2, at 9. DOJ offers three possible explanations for this incongruity – inaccurate numbers, difficulties in identifying victims, and lack of communication between federal and local law enforcement – and promises further government research. *Id.* at 9-11.

### 1. The Regulatory Burdens, in Practice

The regulatory requirement of the LEA endorsement and the preference for rescue over escape impose barriers for trafficking victims seeking to avail themselves of the T visa. The LEA endorsement requires victims to obtain the approval of prosecutors or law enforcement agents as a condition of obtaining the T visa.<sup>127</sup> Agents and prosecutors evaluate witnesses for the LEA endorsement simultaneously with their investigation of a trafficking case involving the same victim. In their role as prosecutor or agent, these individuals are required to assess the victim vis-à-vis her ability to serve as a good witness. At the same time, the same individuals must decide whether to issue an LEA endorsement to the victim. The powerful benefit of the LEA endorsement for victims creates incentives for prosecutors to use the endorsement primarily as a tool in their prosecution without regard for the humanitarian purposes of the visa.<sup>128</sup>

An individual who has suffered from trafficking, but who is assessed to be a poor witness, may fail to secure an LEA endorsement. Even where a law enforcement agent expresses interest in a victim's case, the agent may investigate the case, only to abandon her investigation when the victim is unable to present herself as a good witness. Agents may delay decisions on whether to issue LEA endorsements until after their investigation is complete, and then upon completion fail to issue an endorsement based on witness assessments.<sup>129</sup> These assessments are complicated by a myriad of language and cross-cultural issues in trafficking cases.<sup>130</sup>

It would be impossible to ensure any sort of uniformity in decision making among the thousands of local, state, and federal agents and prosecutors charged with investigating and prosecuting trafficking cases nationwide.<sup>131</sup> Each law enforcement agent or prosecutor has her own view of what constitutes a

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<sup>127</sup> See *supra* notes 106-09 and accompanying text.

<sup>128</sup> Cf. FREE THE SLAVES & HUMAN RIGHTS CTR., U.C. BERKELEY, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 30 (2004), available at [http://www.hrcberkeley.org/download/hiddenslaves\\_report.pdf](http://www.hrcberkeley.org/download/hiddenslaves_report.pdf) [hereinafter HIDDEN SLAVES] (“According to one top-level federal prosecutor, attitudes among prosecutors toward forced labor victims vary from ‘humanitarian’ – where the focus is to alleviate the suffering of the victim – to ‘instrumental’ – where victims are seen as necessary to win criminal cases.”).

<sup>129</sup> HEATHER J. CLAWSON ET AL., CALIBER ASSOCS., NEEDS ASSESSMENT FOR SERVICE PROVIDERS AND TRAFFICKING VICTIMS 27 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/202469.pdf> (“Some respondents mentioned that it might not be in the best interest of the law enforcement agency to offer their endorsement prematurely before they have ensured continued cooperation from the victim.”).

<sup>130</sup> See *Alien Smuggling/Human Trafficking*, *supra* note 74, at 25 (statement of Jane J. Boyle, United States Attorney, Northern District of Texas) (asserting that obtaining victim cooperation was difficult due to “a formidable cultural barrier”).

<sup>131</sup> Cf. Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 261-64 (2006) (detailing risks associated with expansive agency discretion).

trafficking victim, resulting in disparate designations in cases of similar victims. As two practitioners observe,

the decision regarding whether or not an individual is a victim of a severe form of human trafficking . . . can [be] an arbitrary and highly subjective exercise since each Assistant U.S. Attorney, Federal Bureau of Investigation agent, or immigration officer has his or her own conception of the type of situation and events that would warrant being called severe trafficking.<sup>132</sup>

Law enforcement agents may make incorrect victim designations if a victim is frightened, numb, confused, or still under the psychological control of the trafficker when the agent makes her decision.<sup>133</sup> Other agents simply are not knowledgeable about trafficking at all.<sup>134</sup>

The government's recent investigation in the Operation Gilded Cage case illustrates the challenges presented by the LEA endorsement restriction when applied in the context of a large trafficking raid involving multiple victims. Four hundred law enforcement agents raided several brothels and "rescued" scores of potential trafficking victims, who were taken to a "non-detention location" pending interviews with law enforcement.<sup>135</sup> Victims identified

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<sup>132</sup> 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, 192 (2003).

<sup>133</sup> These kinds of snap determinations are common in large-scale raid cases. The U.S. Attorney in charge of the prosecution in a large-scale sex work case testified that "we detained 93 individuals out of the arrests and search warrants; 34 of those we determined to be actually the smuggling victims." *Alien Smuggling/Human Trafficking*, *supra* note 74, at 25 (statement of Jane J. Boyle, United States Attorney, Northern District of Texas). She further testified that the victims were granted continued presence, entitling them to remain in the United States pending the prosecution of their traffickers; it is unclear whether they subsequently obtained T visas. *See id.* at 26.

<sup>134</sup> *See* Lee & Lewis, *supra* note 132, at 183 ("Presently, a large number of state and federal law enforcement personnel remain unaware that human trafficking even exists, or of how to identify victims, and how to assist victims they do encounter."); *see also* HIDDEN SLAVES, *supra* note 128, at 25 (quoting a former Human Rights Watch researcher who states that "[p]olice don't know trafficking when they see it").

<sup>135</sup> Press Release, *supra* note 47. Although the DOJ referred to the location to which victims were sent as a "non-detention location," the reality is that after a trafficking raid, the government typically holds victims in some sort of detention from which they are not free to leave. *See* Jaxon Van Derbeken & Ryan Kim, *Alleged Sex-Trade Ring Broken Up in Bay Area*, S.F. CHRON., July 2, 2005, at A1 (observing that over a hundred potential trafficking victims discovered during Operation Gilded Cage were removed from the brothels "in handcuffs," taken "into custody," and were "being held . . . at an undisclosed location" (emphasis added)). As an FBI agent stated in the context of another large trafficking raid, "[w]e couldn't let the witnesses loose because they want to go home – we'd lose them all." *See* HIDDEN SLAVES, *supra* note 128, at 30; *cf.* Lee & Lewis, *supra* note 132, at 194 (arguing

during Operation Gilded Cage were housed in a strange location, unclear on whether they were free to leave and suffering the psychological consequences of both the “rescue” and the exploitation at the hands of their traffickers. Various agents interviewed victims in order to investigate the case. At the same time, victims sought LEA endorsements from the very same agents. Under these circumstances, victims who do not appear to be good witnesses may fail to secure LEA endorsements.<sup>136</sup> Victims with similar stories and demeanor may fare differently with different interviewing law enforcement agents.

Some victims may decide not to participate in law enforcement investigations for fear that the trafficker’s network will retaliate against family members in their home countries.<sup>137</sup> The TVPA provides few tools for law enforcement agents to ensure the safety of victims’ families abroad.<sup>138</sup> In addition, given the psychological coercion and trauma that typically accompany trafficking, victims might not participate in investigations because they are still psychologically under the trafficker’s control, or because they fear that they will be prosecuted or deported, particularly if they were discovered during the confusion and stress of a law enforcement raid.<sup>139</sup> Such victims may be denied an LEA endorsement even if their decision not to cooperate was reasonable under the circumstances.<sup>140</sup> Victims who might later cooperate are not given the opportunity to obtain an LEA endorsement if they fail to present as cooperative witnesses during an initial interview with law enforcement agents or prosecutors. The LEA endorsement restriction transforms victim identification into a prosecutorial matter, not an assessment of a victim’s trafficking experience.<sup>141</sup> The victim protection function of the

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that a “non-detention-like setting” should be provided by “community-based groups” rather than law enforcement authorities).

<sup>136</sup> See Jaxon Van Derbeken, *Deportation Sought in Brothel Probe*, S.F. CHRON., July 13, 2005, at B4 (reporting that “material witnesses” might be allowed to remain in the United States while other potential trafficking victims uncovered during Operation Gilded Cage would be deported).

<sup>137</sup> HIDDEN SLAVES, *supra* note 128, at 31-32.

<sup>138</sup> See *id.* at 32.

<sup>139</sup> See *id.* at 31 (“Jennifer Stanger, at CAST [Coalition to Abolish Slavery and Trafficking], estimates that only fifty percent of their clients wish to cooperate in the prosecution of their perpetrators.”).

<sup>140</sup> See CLAWSON ET AL., *supra* note 129, at 26 (reporting that many social service providers think “the TVPA structurally places law enforcement in a gate-keeping role, in which officers can essentially determine whether or not a trafficking victim receives services and is certified”).

<sup>141</sup> Congress recently enacted an amendment to the TVPA to mitigate the cooperation requirement for victims suffering from physical or psychological trauma. If DHS, in consultation with DOJ prosecutors, determines that a victim cannot cooperate because of psychological or physical trauma, the victim is not required to demonstrate cooperation with law enforcement investigation. 8 U.S.C.A § 1101(a)(15)(T)(iii) (West 2006). It remains to

TVPA is subsumed by an implementation of prosecutorial goals that grants individual prosecutors and investigators maximum discretion in granting relief.<sup>142</sup>

Regulations impose a tough standard on victims who fail to obtain the LEA endorsement. These victims lack primary evidence of victim status and cooperation with law enforcement and must rely instead on secondary evidence in their T visa applications.<sup>143</sup> Yet documentation and witnesses of victimhood in the trafficking context are difficult to obtain. Trafficking victims are often isolated from public view, and there are rarely witnesses or physical evidence corroborating the victim's story.<sup>144</sup> It is also challenging for a survivor to document threats and intimidation in the source country, where police reports may not have been made.<sup>145</sup> Demonstrating cooperation with law enforcement is equally burdensome. The regulations suggest that victims provide, among other things, "trial transcripts, court documents, police reports, news articles, and copies of reimbursement forms for travel to and from court."<sup>146</sup> Such evidence may be difficult to obtain in practice. Some cases may not be reported in the news, and victims – who are typically isolated before escaping from their traffickers – may not have filed police reports in advance of the trafficker's arrest. Even if a victim attempts to file a police report after escape, law enforcement may not investigate her case. Some investigations may never lead to prosecution. In those that do, criminal evidence may never become public (if information is filed under seal), or may take months or years to become public, by which time the survivor's T visa application may be denied.<sup>147</sup>

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be seen how DHS will implement this statutory mandate. If it is implemented consistently with the LEA endorsement requirement, as is likely, then prosecutors and investigators will continue to serve in a gate-keeping function as to identification of trafficking victims.

<sup>142</sup> See Kim & Hreshchyshyn, *supra* note 15, at 16 ("[A] prosecutorial focus poses some restrictions to trafficked persons' full recovery."). An understanding of the T visa as a purely prosecutorial tool to ensure witness cooperation in trafficking cases misses the humanitarian rationale for the visa. See *supra* Part I.B.3.

<sup>143</sup> See 8 C.F.R. § 214.11(f), (h) (2006).

<sup>144</sup> See Kim & Hreshchyshyn, *supra* note 15, at 15 ("Where a prosecutor decides not to pursue an investigation, a worthy candidate may face complications in receiving a T visa due to the absence of law enforcement supporting evidence that the applicant is eligible for such relief.").

<sup>145</sup> See CLAWSON ET AL., *supra* note 129, at 26 ("Because threats, intimidation, false promises, and other behaviors of the trafficker in foreign countries are often not recorded or documented, [social service providers] assert that [the TVPA's] high burden of proof imposes a serious hindrance to victims.").

<sup>146</sup> 8 C.F.R. § 214.11(f)(3); see also *id.* § 214.11(h)(2).

<sup>147</sup> Feminists have criticized the requirements imposed on battered immigrant women under the Violence Against Women Act (VAWA) for similar reasons. To obtain relief, a non-citizen survivor of domestic violence must demonstrate that she was abused, in a valid marriage with a qualifying spouse, and has good moral character. 8 U.S.C.

The victim's efforts to compile the necessary secondary evidence are complicated by the fact that, without an LEA endorsement or continuing presence status, victims are not entitled to federally funded social services and must instead rely on charity.<sup>148</sup> The need for these services is severe immediately upon escape, when victims require the most intense stabilization and care,<sup>149</sup> and continues with the uncertainty of waiting for immigration status and social service benefits.<sup>150</sup>

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

The story of "Antonio" from the introduction to this Article is illustrative of the regulatory burdens placed on trafficking victims. After eight years of exploitation, Antonio escaped and sought assistance, but he could not interest law enforcement in his case.<sup>151</sup> He was forced to live off charity and could not compile sufficient secondary evidence. Ultimately, although he filed a civil

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§ 1154(a)(1)(A)(iii) (2000). Linda Kelly has criticized these requirements as imposing a unique challenge on immigrant survivors, given the batterer's control of records necessary for the survivor to meet the VAWA standard. Linda Kelly, *Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 HASTINGS L.J. 557, 578-79 (2000).

<sup>148</sup> CLAWSON ET AL., *supra* note 129, at 20, 26-27.

<sup>149</sup> See Joanna Shapland, *Victim Assistance and the Criminal Justice System: The Victim's Perspective*, in FROM CRIME POLICY TO VICTIM POLICY 218, 221 (Ezzat A. Fattah ed., 1986) ("Immediately after the offense, victims [of violent crime] suffered considerable physical and emotional effects.").

<sup>150</sup> See CLAWSON ET AL., *supra* note 129, at 27 ("[A]s the lag time increases between the point of initial identification and receiving the certification letter, uncertainty of what is going to happen to them builds in the minds of the victims, and some [social service] providers believe that this may lead to increased anxiety and fear."). Many social service providers have "indicated a desire to have a more direct influence on the 'certification' process and not be so dependent on law enforcement." *Id.* at 26.

<sup>151</sup> *Successes and Shortcomings of the Victims of Trafficking and Violence Protection Act of 2000: Briefing Before the H.R.*, 108th Cong. (2004) (prepared statement of Kathleen Kim, Staff Attorney at the Lawyers' Committee for Civil Rights of the San Francisco Bay Area) (on file with author).

lawsuit against his traffickers,<sup>152</sup> he could not obtain a T visa and was homeless and without legal immigration status after his escape.<sup>153</sup>

Empirical research is necessary to prove the connection between the regulatory restrictions – preferring rescue over escape and imposing the LEA endorsement restriction – and the low number of T visa applications and approvals. Such research is difficult because T visa applications are (and should be) confidential in order to protect victims’ safety. Available government data about T visas only confirms overall numbers and is not divided by type of applicant or by whether applicants have obtained LEA endorsements. Given the limited data, this Article does not attempt to provide complete empirical evidence, but rather offers suggestions for why T visa numbers remain low through a critique of federal agencies’ implementation of the TVPA.

## 2. Focus on Trafficking for Sex Work

Available data and anecdotal accounts from service providers who assist trafficking victims suggest that non-sexual, labor trafficking comprises a large proportion of total trafficking cases.<sup>154</sup> According to one recent study, surveying “131 reported incidents of human trafficking in the United States between 1998 and 2003[,] . . . 46 percent involved forced sexual exploitation, while the remaining 54 percent involved forced labor exploitation.”<sup>155</sup> The

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<sup>152</sup> See *Abrica v. Campestre Corp.*, No. 04-02723 (N.D. Cal. filed July 7, 2004). The lawsuit was ultimately settled out of court.

<sup>153</sup> *Successes and Shortcomings of the Victims of Trafficking and Violence Protection Act of 2000*, *supra* note 151.

<sup>154</sup> Unfortunately, the available data on the prevalence of sex trafficking – including that collected by the U.S. government – is notoriously inaccurate. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 17, at 2 (commenting that U.S. government trafficking estimates are “questionable” due to “methodological weaknesses, gaps in data, and numerical discrepancies”). The International Labour Organization estimates that 43% of trafficking victims are exploited for sex work, 32% for forced labor, and 25% for other work or mixed labor and sex work. *Id.* at 12 tbl.2. The U.N. Office on Drugs and Crime estimates that 28% of trafficking victims are exploited for forced labor and 87% for forced sex. *Id.* The U.S. government estimates that 34% of trafficking victims are exploited for forced labor and 66% for forced sex. *Id.* The International Organization for Migration tracks victims in select countries (and thus does not track global statistics), and has reported that of the victims it has assisted, 14% are victims of forced labor, 81% are victims of forced sex, and 5% are victims of other work or mixed labor and sex work. *Id.* Data collection is hampered by the hidden nature of the trafficked population and the definitional issues underlying any analysis. Until better data are collected and analyzed, this Article’s arguments are necessarily preliminary.

<sup>155</sup> Alexandra Webber & David Shirk, *Hidden Victims: Evaluating Protections for Undocumented Victims of Human Trafficking*, IMMIGR. POL’Y IN FOCUS (Immigration Policy Ctr., Am. Immigration Law Found., Washington, D.C.), Dec. 2005, at 1, 2-3 (citing HIDDEN SLAVES, *supra* note 128, at 58).

State Department estimates that “[a]bout half” of the individuals trafficked into the United States annually “are forced into sweatshop labor and domestic servitude.”<sup>156</sup> Additional research is required as to the distribution between sex and labor trafficking in unreported cases.<sup>157</sup> Anecdotal reports suggest, however, that labor trafficking cases comprise a significant proportion of unreported trafficking cases as well. Social service non-profit agencies that work with trafficking victims report that a large proportion – if not a majority – of their clients are victims of forced labor, not sex trafficking.<sup>158</sup>

In my view, the federal agency focus on sex trafficking has resulted in the failure to discover victims of trafficking for forced labor.<sup>159</sup> A hallmark of trafficker behavior is isolation of vulnerable victims through violence and threats of violence.<sup>160</sup> Traffickers place restrictions on freedom of movement, confiscate passports, limit contact with friends, family, and the outside world, and subject victims to psychological abuse.<sup>161</sup> Isolation is particularly acute in domestic worker cases, where workers toil alone in the domestic sphere, free from government intrusion and inspection.<sup>162</sup> The result is that many victims

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<sup>156</sup> MIKO, *supra* note 26, at 7 (citing *International Trafficking in Women and Children*, *supra* note 20, at 11 (prepared statement of Frank E. Loy, Under Secretary of State for Global Affairs)).

<sup>157</sup> Cf. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 2-3 (acknowledging that there is a “considerable discrepancy between the numbers of observed and estimated victims of human trafficking”).

<sup>158</sup> See, e.g., Debbie Nathan, *Oversexed: Anti-Trafficking Efforts Too Often Neglect Other Forms of Forced Labor*, NATION, Aug. 29/Sept. 5, 2005, at 27, 29 (reporting that the lawyer in charge of the Immigrant Women and Children Project of the New York City Bar Association estimates that as few as one third of her cases relate to sex trafficking); Yeung, *supra* note 33 (“The Freedom Network (USA), a coalition of 20 groups that work with trafficking victims, sees primarily labor-related cases.”).

<sup>159</sup> See Webber & Shirk, *supra* note 155, at 3 (“[T]he government devotes greater resources to the investigation of sex trafficking cases by the Department of Justice than it does to the investigation of labor trafficking cases by the Department of Labor.”).

<sup>160</sup> See, e.g., Civil Rights Div., U.S. Dep't of Justice, *Trafficking in Persons: A Guide for Non-Governmental Organizations*, <http://www.usdoj.gov/crt/crim/wetf/trafficbrochure.html> (last visited Feb. 1, 2007) (“It is believed that most victims who are trafficked are isolated and remain undetected by the public because 1) the strategies used by the perpetrators isolate victims and prevent them from coming forward, and 2) the public and the victim service providers have only recently become aware of this issue and may not be familiar with how to recognize or respond to trafficking victims.”).

<sup>161</sup> HUMAN RIGHTS WATCH, *supra* note 29, at 12-13, 18-19. The Human Rights Watch report characterizes only “the most egregious cases” as creating a situation of involuntary servitude or forced labor. *Id.* at 20. In practice, however, the distinction between involuntary servitude/forced labor and exploitative labor not rising to that level is a difficult one to draw. This is particularly true because, as acknowledged by the report, many workers feel trapped and fear retaliation for leaving their exploitative work situation. *Id.* at 21.

<sup>162</sup> *Id.* at 6.

do not have the opportunity or resources to escape. Without aggressive police investigation, these victims may never come to light.

Proactive investigation is also necessary to overcome the effect of traffickers' threats to report victims to law enforcement and the immigration authorities.<sup>163</sup> If victims are in the United States illegally, they live in constant fear of the authorities. Many victims are particularly susceptible to threats of deportation because they have experience with corrupt, unresponsive, or nonexistent law enforcement in their countries of origin.<sup>164</sup> Such victims also would not escape exploitation without the active investigation of law enforcement, particularly given the linguistic and social isolation of many trafficking victims.

Even those victims of labor trafficking who escape their traffickers and approach law enforcement agents may fail to interest law enforcement in their cases if the agents have been trained to focus on sex trafficking cases. Human Rights Watch has found that even when a domestic worker initiates contact with law enforcement, "it is unlikely that her rights will be protected" because government agents "are not likely to enter her workplace independently."<sup>165</sup> If agents do not investigate such cases, they may never discover domestic workers who have suffered from trafficking but incorrectly frame their complaints as demands for additional wages, instead of as human trafficking cases.<sup>166</sup> Anecdotal accounts from social service providers suggest that few labor trafficking cases are selected for federal prosecution. For instance, Jennifer Stanger, formerly of the Coalition to Abolish Slavery and Trafficking (CAST), the only U.S. agency that works solely with trafficking survivors, states that "only three or four of the agency's twenty or thirty [forced labor] trafficking cases have been chosen for federal prosecution."<sup>167</sup> Stanger attributes this statistic to prosecutors' failure to see trafficking as a labor issue.<sup>168</sup> Victims of trafficking for forced labor are not only undiscovered, but also go uncounted.<sup>169</sup> The DOJ's focus on sex trafficking affects the setting of

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<sup>163</sup> See Lee & Lewis, *supra* note 132, at 183.

<sup>164</sup> *Id.*; see also HIDDEN SLAVES, *supra* note 128, at 25.

<sup>165</sup> HUMAN RIGHTS WATCH, *supra* note 29, at 2.

<sup>166</sup> When fielding calls from potential trafficking victims, the DOJ focuses on victims of trafficking for sex over victims of trafficking for forced labor. The National Worker Exploitation Task Force Complaint Line – an anti-trafficking hotline funded by the DOJ – only refers cases to DOJ staff when "a caller alleges an egregious situation such as physical abuse, trafficking, or employer threats preventing a worker from leaving the premises," and not when a caller alleges "'wage and hour' violations" that are not "'abusive . . . enough to warrant civil rights attention.'" *Id.* at 28-29 (alteration in original) (summarizing a telephone interview with the Complaint Line's sole staffer).

<sup>167</sup> See HIDDEN SLAVES, *supra* note 128, at 28.

<sup>168</sup> See *id.*

<sup>169</sup> See Nathan, *supra* note 158, at 29 (describing the lack of accurate estimates of the number of forced labor trafficking victims in the United States). Even when the government does investigate forced labor cases, the focus may be on sexualized labor, such as exotic

future enforcement priorities: if forced labor trafficking victims are undercounted, they are unlikely to be the focus of future enforcement goals.

### III. EXPLAINING THE RESTRICTIVE REGULATORY APPROACH

#### A. *The Iconic Victim*

The regulations and agency implementation of the TVPA envision a prototypical victim with several characteristics: (1) the victim is a woman or girl trafficked for sex; (2) law enforcement assesses her to be a good witness; (3) she cooperates fully with law enforcement investigations; and (4) she is rescued instead of escaping from the trafficking enterprise. These attributes, taken together, contemplate a victim of sex trafficking who passively waits for rescue by law enforcement, and upon rescue, presents herself as a good witness who cooperates with all law enforcement requests.

At the beginning of the iconic victim narrative, the victim is forced, defrauded, or coerced into trafficking for forced sex, not forced labor. The force, fraud, or coercion must be severe enough for an investigator or prosecutor to subsequently deem the victim a good witness for prosecuting the trafficker. Once in the trafficking enterprise, the victim must remain passive until rescued by law enforcement, as reflected in the regulatory preference for rescue over escape. She must then fully reveal her story to law enforcement upon rescue, given the regulatory requirement of the LEA endorsement.<sup>170</sup>

The remainder of this Article is devoted to an analysis of the iconic victim concept, examining the concept in light of other immigration stereotypes and federal agencies' enforcement-oriented anti-trafficking approach.

#### B. *Trafficking Versus Illegal Entry and Smuggling*

Many trafficking victims enter the United States in undocumented status, either by using false immigration papers or by crossing the U.S. border without inspection.<sup>171</sup> Undocumented migrants are typically understood to be male "illegal aliens" who knowingly violate the law and enter the United States in order to work.<sup>172</sup> The iconic victim concept distances trafficking victims from

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dancing. Of the four forced labor cases featured in a recent DOJ trafficking report, for example, three described servitude involving strip clubs, bars, and "nudity and sexually explicit acts." See AG TRAFFICKING REPORT FY 2005, *supra* note 121, at 18-21.

<sup>170</sup> This, of course, is not the only iconic victim narrative. See *infra* note 213. Even in the trafficking context, this narrative was preceded by stereotypes and narratives describing the women involved in the "white slave trade." See *supra* note 52 and accompanying text.

<sup>171</sup> Some trafficking survivors enter on temporary work visas such as the B-1 or a diplomatic visa. HUMAN RIGHTS WATCH, *supra* note 29, at 4.

<sup>172</sup> As explained below, see *infra* text accompanying note 243, undocumented female migrants are stereotyped as maids or nannies; however, the primary stereotype of the "illegal alien" is that of a male migrant.

the “illegal alien” stereotype, thus avoiding any association with economic migration.

1. “Illegal Aliens”

Commentators have characterized the undocumented migrant or “illegal alien” as occupying the lowest rung on a community membership ladder that culminates in citizenship.<sup>173</sup> As Kevin Johnson explains, “Lawful permanent residents and others who entered through lawful channels are ‘good aliens’ who receive more favorable treatment by the courts than undocumented noncitizens, ‘bad aliens,’ who are ‘uninvited guests, intruders, trespassers, law breakers.’”<sup>174</sup>

The concept of the “illegal alien” was born in the 1920s when Congress imposed numerical immigration quotas.<sup>175</sup> The term “alien smuggling” – a practice characterized as dangerous – simultaneously took root. In 1925, the Immigration Service characterized “smuggled aliens” as a “great percentage of our population . . . whose first act upon reaching our shores was to break our laws by entering in a clandestine manner – all of which serves to emphasize the potential source of trouble, not to say menace, that such a situation suggests.”<sup>176</sup> According to historian Mae Ngai, the Immigration Service in 1927 reported that “[t]he bootlegged alien is by all odds the *least* desirable. Whatever else may be said of him: whether he be diseased or not, whether he holds views inimical to our institutions, *he at best is a law violator from the outset.*”<sup>177</sup> The subsequent creation of the land Border Patrol and the imposition of criminal penalties for unlawful entry further cemented the association of undocumented migrants as criminal aliens, an association that persists to this day.<sup>178</sup> The term “illegal alien” now also carries undeniable

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<sup>173</sup> See Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 276-79 (1996-1997).

<sup>174</sup> *Id.* at 276 (quoting T. Alexander Aleinikoff, *Good Aliens, Bad Aliens and the Supreme Court*, in 9 IN DEFENSE OF THE ALIEN 46, 47 (Lydio F. Tomasi ed., 1987)). The community membership model does not provide a full picture of the rights of undocumented migrants, who do have some rights under state and federal law, including tort, contract, and criminal law. See generally Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955.

<sup>175</sup> See Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 74 (2003) (“A new regime in immigration policy, that of numerical restriction, commenced in the 1920s.”).

<sup>176</sup> *Id.* at 78 (alteration in original) (emphasis omitted) (quoting INS ANNUAL REPORT 12-13 (1925)).

<sup>177</sup> *Id.* at 79 (quoting INS ANNUAL REPORT 15-16 (1927)).

<sup>178</sup> See *id.* at 76. Ngai contends that the creation of the Border Patrol also created the border itself, as we understand it today. See *id.* at 85-86. The racialization of the border, see *id.* at 88, followed from this and other legislative and administrative acts that preferred

racial overtones and is typically associated with the stereotype of an unskilled Mexican male laborer.<sup>179</sup> As Johnson observes, “The stereotypical ‘illegal alien,’ the term that replaced ‘wetback,’ is a Mexican who has snuck into the United States in the dark of night. The image in the minds of many is that of a poor, brown, unskilled, young male.”<sup>180</sup>

Numerous violations of immigration laws involving undocumented migrants are now also crimes.<sup>181</sup> These provisions reflect the general trend toward the criminalization of undocumented migrants.<sup>182</sup> Undocumented migrants also face serious civil immigration penalties. In 1996, federal amendments to the Immigration and Nationality Act imposed three- and ten-year bars to admission based on unlawful presence in the United States,<sup>183</sup> and five-year bars for individuals who have been previously removed (or twenty years for those who have been removed twice).<sup>184</sup> Non-citizens who accrue more than one year of unlawful presence and who later enter without inspection are subject to a permanent bar.<sup>185</sup>

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European immigration – including those that made it possible for Europeans to become legal even if they originally began their stay in the United States illegally. *See id.* at 107. By contrast, Mexican illegal entry by crossing the border was an act that could not be undone, a fact that, “[c]ombined with the construction of Mexicans as migratory agricultural laborers (both legal and illegal) in the 1940s and 1950s . . . gave powerful sway to the notion that Mexicans had no rightful presence on United States territory, no rightful claim of belonging.” *Id.*

<sup>179</sup> *Id.* at 89 (“The undocumented Mexican laborer who crossed the border to work in the burgeoning industry of commercial agriculture emerged as the prototypical illegal alien.”); *see also* Johnson, *supra* note 173, at 282-88 (describing the popular and legal conflation of “illegal aliens” and Mexican immigrants).

<sup>180</sup> Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1545 (1995) (footnotes omitted).

<sup>181</sup> Individuals who enter the United States without authorization can be charged with a misdemeanor. *See* 8 U.S.C. § 1325(a) (2000). Those who re-enter after previously entering illegally may be charged with a felony. *See id.* If a non-citizen was previously deported, and then re-enters illegally, she can be imprisoned for two years. *Id.* § 1326(a). The penalty for this crime is ten years if the individual was removed on criminal grounds and twenty years if the criminal ground was an aggravated felony. *Id.* § 1326(b). It is a crime to knowingly bring an alien into the United States, transport an alien within the United States, harbor an alien in the United States, induce an alien to enter the United States, or “engage[] in any conspiracy to commit any of the preceding acts.” *Id.* § 1324(a)(1)(A).

<sup>182</sup> *See* Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 639-42 (2003).

<sup>183</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 301, 110 Stat. 3009, 3009-576 (codified as amended at 8 U.S.C. § 1182(a)(9)(B)).

<sup>184</sup> *Id.* (codified as amended at 8 U.S.C. § 1182(a)(9)(A)).

<sup>185</sup> 8 U.S.C. § 1182(a)(9)(C). The same is true for non-citizens ordered removed who later re-enter without inspection. *Id.*

The undocumented migrant is characterized as an economic migrant who takes jobs from U.S. residents, and drains welfare and other social services. This characterization can be seen in Supreme Court decisions from the 1970s onwards.<sup>186</sup> “Illegal aliens” are legally and culturally characterized as “uninvited guests, intruders, trespassers, law breakers.”<sup>187</sup> Undocumented migrants were further demonized as partially responsible for the recession of the 1980s. The Immigration Reform and Control Act of 1986 followed from this characterization, reflecting a conception of undocumented migrants as lawbreakers and imposing criminal penalties on employers who hired them.<sup>188</sup> During the early 1990s, undocumented migrants continued to be blamed for taking jobs from U.S. citizens, misusing public benefits, and failing to assimilate.<sup>189</sup> In 1994, California residents voted Proposition 187 into law, restricting public benefits and services available to undocumented migrants.<sup>190</sup>

Popular characterizations of “illegal” aliens reflect their low legal status. As Peter Schuck explains,

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<sup>186</sup> See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting) (“[T]he attractive force of employment . . . like a ‘magnet’ pulls illegal immigrants toward the United States.”); *INS v. Delgado*, 466 U.S. 210, 223 (1984) (Powell, J., concurring) (“One of the main reasons [undocumented migrants] come – perhaps *the* main reason – is to seek employment.”); *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976) (stating that the presence of undocumented migrants in the workforce decreases unionization, depresses wages and working conditions, and aggravates unemployment); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975) (stating that undocumented migrants “create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services”); *United States v. Ortiz*, 422 U.S. 891, 901-04 (1975) (Burger, C.J., appendix to concurring opinion) (reprinting *United States v. Baca*, 368 F. Supp. 398, 402-08 (S.D. Cal. 1973)) (observing that undocumented migrants are primarily Mexicans driven to the United States by poor economic conditions in Mexico, the entry of whom has affected the public health, safety, and economy of the United States); see also *Plyler v. Doe*, 457 U.S. 202, 238 (1982) (Powell, J., concurring) (contrasting undocumented migrant parents with their “innocent” children).

<sup>187</sup> See *supra* note 174 and accompanying text.

<sup>188</sup> See Francisco L. Rivera-Batiz, *Underground on American Soil: Undocumented Workers and US Immigration Policy*, 53 J. INT’L AFF. 485, 485 (2000).

<sup>189</sup> See generally Juan F. Perea, *Introduction to IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 1* (Juan F. Perea ed., 1997).

<sup>190</sup> Proposition 187 was directed specifically at undocumented Mexican migrants, the group blamed for California’s economic woes. See Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1451 (1995). For a thoughtful discussion of the intersection between immigration and public benefits, see generally Johnson, *supra* note 180. Proposition 187 never went into effect because of a successful legal challenge. See Janice Alfred, Note, *Denial of the American Dream: The Plight of Undocumented High School Students Within the U.S. Educational System*, 19 N.Y.L. SCH. J. HUM. RTS. 615, 625-26 (2003).

the general public . . . draw[s] a rather sharp distinction between “good” immigrants and “bad” immigrants. In this view, good immigrants enter the U.S. legally, work hard, learn English, become naturalized citizens, raise strong families, and stay out of trouble, while bad ones enter (or remain) illegally, rely on welfare and other taxpayer-supported benefits, fail to learn English and assimilate, and commit crimes.<sup>191</sup>

Bill Ong Hing observes that undocumented migrants are demonized and ultimately criminalized in a manner that “renders punishment of aliens a part of the American psyche.”<sup>192</sup> Stereotypes of undocumented migrant workers reflect public ambivalence about migrant labor; migrant workers both support our economy and are demonized for violating the immigration laws.<sup>193</sup>

## 2. Iconic Victims and Illegal Border Crossings

Concerned about fraudulent applications from smuggled economic migrants, agencies implementing the TVPA have tried to draw a clear distinction between trafficking victims and smuggled migrants.<sup>194</sup> INS, the predecessor to DHS, stated that “[i]n most cases, aliens who are voluntarily smuggled into the

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<sup>191</sup> Peter H. Schuck, Lecture, *Immigration at the Turn of the New Century*, 33 CASE W. RES. J. INT’L L. 1, 7 (2001).

<sup>192</sup> Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN’S L.J. 79, 86 (1998).

<sup>193</sup> See Bosniak, *supra* note 174, at 956. Rollbacks in protections for migrant workers are reflected in legislation like the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of U.S.C.), and cases like *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

<sup>194</sup> The agencies that implemented the TVPA’s provisions were preoccupied with avoiding claims from undocumented migrants falsely claiming to be trafficking victims. For example, during the administrative rulemaking process, the INS (which was then in charge of regulating immigration matters) expressed concern about fraudulent applications by smuggled aliens. The INS warned that “there will be additional costs for adjudicating benefits and investigating claims, particularly those deemed fraudulent.” New Classification for Victims of Severe Forms of Trafficking in Persons Eligible for the T Nonimmigrant Status, 66 Fed. Reg. 61,219, 61,219 (Dec. 3, 2001) (analyzing the costs and benefits of a final rule establishing T visa requirements).

These regulatory concerns were previously debated during the TVPA’s passage. The House Judiciary Committee, for example, imposed an annual cap of five thousand T visas “[i]n order that this bill never become a general amnesty program for smuggled aliens.” H.R. REP. NO. 106-487, pt. 2, at 18 (2000). Representative Chris Smith, the bill’s sponsor, explained that the cap was necessary to “prevent this form of relief from being abused” and “prevent large numbers of aliens from falsely claiming to be trafficking victims.” 146 CONG. REC. 18056, 18056-57 (2000). By contrast, minority members of the Judiciary Committee criticized the majority for narrowing the bill “to satisfy unrealistic concerns that the bill would somehow enable persons to fraudulently obtain a lawful status by claiming that they were a victim of sex trafficking or involuntary servitude.” 146 CONG. REC. 18055, 18056 (2000) (statement of Rep. Melvin Watt); *see also* 146 CONG. REC. 7296, 7296 (2000) (statement of Rep. John Conyers).

United States will not be considered victims of a severe form of trafficking in persons.”<sup>195</sup> A 2005 DOJ fact sheet entitled “Distinctions Between Human Smuggling and Human Trafficking” concludes that “[p]ersons smuggled are violating the law. They are not victims.”<sup>196</sup>

However, agencies implementing the TVPA provide no explicit guidance on distinguishing trafficking victims from other undocumented migrants, other than by reference to the statutory requirement that trafficking victims be induced to enter into the trafficking enterprise through force, fraud, or coercion. The DOJ fact sheet states, for example, that “it may be difficult to quickly ascertain whether a case is one of human smuggling or trafficking,” but that “key components that will always distinguish trafficking from smuggling are the elements of fraud, force, or coercion.”<sup>197</sup> Whereas undocumented migrants are presumed to exercise free will in making the decision to cross the border illegally, trafficking victims are presumed to cross the border under the control of the trafficker.

The difficulty is that smuggling and trafficking are hard to distinguish from one another.<sup>198</sup> The typical undocumented economic migrant is propelled by various forms of atmospheric “push” factors, ranging from dire economic conditions and political instability to strained family circumstances.<sup>199</sup> The difference between the typical economic migrant and the trafficking victim is that the trafficking victim is influenced not only by these factors, but also by the actions of an individual wrongdoer: the trafficker. Determining whether a victim was defrauded or coerced by the trafficker (beyond the typical push factors) requires a complex and detailed factual examination of the victim’s state of mind and the trafficker’s actions. As to fraud, the inquiry turns on, among other things, an examination of trafficker disclosure (or failure to

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<sup>195</sup> New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for “T” Nonimmigrant Status, 67 Fed. Reg. 4784, 4787 (proposed Jan. 31, 2002) (to be codified at 8 C.F.R. pts. 103, 212, 214, 274a, 299).

<sup>196</sup> HUMAN SMUGGLING & TRAFFICKING CTR., FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING 4 (2005), available at [http://www.usdoj.gov/crt/crim/smuggling\\_trafficking\\_facts.pdf](http://www.usdoj.gov/crt/crim/smuggling_trafficking_facts.pdf). Peter Andreas argues that increased border enforcement has generated “a more organized and sophisticated [smuggling] enterprise.” Peter Andreas, *The Transformation of Migrant Smuggling Across the U.S.-Mexican Border*, in GLOBAL HUMAN SMUGGLING, *supra* note 16, at 107, 119. These sophisticated businesses levy greater fees on poor migrants, increasing the likelihood that the migrants will be exploited during their border crossing or upon their entry into the United States. See *id.* at 116.

<sup>197</sup> HUMAN SMUGGLING & TRAFFICKING CTR., *supra* note 196, at 4 (emphasis omitted).

<sup>198</sup> Cf. Chapkis, *supra* note 10, at 930 (arguing that the tension between smuggling and trafficking resulted in statutory language that provides only symbolic protection to trafficking victims).

<sup>199</sup> See Chacón, *supra* note 14, at 2977.

disclose) and source country socioeconomic power dynamics.<sup>200</sup> The inquiry must constantly change and adjust to new trafficker methods.<sup>201</sup> The fraud determination is further complicated by the transnational nature of trafficking, which necessitates examination of decisions made outside the United States.

A hypothetical illustrates the difficulty of making a clear distinction between trafficking victim and economic migrant.<sup>202</sup> Imagine a poor young woman from the developing world whose friends have left for better opportunities abroad. She and her family have been impoverished by recent civil war. She must find a way to support her children. She is aware that some of her friends have been subjected to exploitation for forced labor; others have been more fortunate and have been able to send money to family members abroad. When a trafficker approaches her, promising work abroad, she is not naïve as to the possibility of exploitation, but hopes for better opportunities. The trafficker suggests that she accompany him to obtain false immigration papers. He does not threaten or physically harm her when they go to the local embassy to arrange for travel to the United States. She flies with him to the United States. He then informs her that she must work sixteen-hour days in a factory for five dollars per day and confiscates her passport. She is concerned that he will report her to the immigration authorities if she tries to leave.

When making the decision to migrate, the victim was motivated by the need to support her family in the wake of political instability. She knew the nature of the work, but not the nature of the compensation, or that her passport would be confiscated upon arrival.<sup>203</sup> Her migration was partially influenced by the typical push factors (she wished to leave and seek better opportunities), but also induced by false promises from the trafficker. The hypothetical illustrates the challenges in drawing a clear distinction between smuggling and trafficking. As two commentators recently explained, “contrary to the conventions of enforcement agencies and news reporting, which tend to identify ‘the bad guys’ and their victims, much migrant smuggling or trafficking operates in an ambiguous area that is neither purely voluntary nor involuntary from the perspective of the migrant.”<sup>204</sup>

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<sup>200</sup> These are only some of the relevant considerations. A complete exploration of fraud in the trafficking context is outside the scope of this Article.

<sup>201</sup> Cf. Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1988 (2006) (examining historical sources and concluding that “fraud has a chameleon-like quality”).

<sup>202</sup> The hypotheticals in this Article are derived from conversations with attorneys and social workers who assist trafficking survivors.

<sup>203</sup> “Many contemporary slaves know that they will be smuggled illegally across borders to work, and they sometimes know the nature of the work – what they often do not know is the terms of the ‘contract.’” David Kyle & Rey Koslowski, *Introduction to GLOBAL HUMAN SMUGGLING*, *supra* note 16, at 1, 9.

<sup>204</sup> *Id.*; see also ANDERSON & DAVIDSON, *supra* note 57, at 19-20 (“It would be naïve to imagine that migrant workers can be divided into two entirely separate and distinct groups – those who are trafficked involuntarily into the misery of slavery-like conditions in an illegal or unregulated economic sector, and those who voluntarily and legally migrate into the

The iconic victim concept obviates the need to examine this ambiguity by contemplating a victim at one end of the migrant-victim spectrum. The iconic victim crosses the border *solely* because of force, fraud, or coercion by the trafficker, and not because of the typical push factors propelling undocumented economic migration. The iconic victim concept assumes situations where the necessary force, fraud, or coercion is so extreme as to overwhelm the typical situational push factors. Because the iconic victim crosses the border completely under the trafficker's control, she is easily distinguishable from the smuggled alien.<sup>205</sup>

What kind of victim is completely under the trafficker's control? From the perspective of abolitionists, one who is trafficked for sex work. The abolitionist perspective, which recalls the heated debate about the "white slave trade" that prompted the passage of the Mann Act in 1910,<sup>206</sup> is that meaningful consent to sex work is impossible, and prostitution is "necessarily degrading" to women.<sup>207</sup> Under the abolitionist view, consent to sex work is meaningless because sex work is a human rights violation that should be eliminated.<sup>208</sup> The abolitionist perspective dovetails nicely with the anti-prostitution views of fundamentalist religious groups, who were instrumental in lobbying for the TVPA's passage.<sup>209</sup> The abolitionist perspective is now reflected in the Bush administration's implementation of the TVPA.<sup>210</sup> Under

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happy and protected world of the formal economy. Violence, confinement, coercion, deception and exploitation can and do occur within both legally regulated and irregular systems of migration and employment.").

<sup>205</sup> In the asylum context, David Martin observes that "refugees are so much like illegal migrants. . . . [M]ost of those applying in the United States today were both drawn and driven, and they chose to come in response to a complex mix of political and economic considerations." David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1275 (1990).

<sup>206</sup> See *supra* note 52 and accompanying text.

<sup>207</sup> ANDERSON & DAVIDSON, *supra* note 57, at 15-16.

<sup>208</sup> Kim & Hreshchyshyn, *supra* note 15, at 10-11; see also ANDERSON & DAVIDSON, *supra* note 57, at 16; Berman, *supra* note 63, at 278-79.

<sup>209</sup> See Berman, *supra* note 63, at 273-78; Nathan, *supra* note 158, at 1-2.

<sup>210</sup> President Bush has issued National Security Presidential Directive 22, which advocates the abolition of prostitution "as integral to the abolition of human trafficking." DOJ REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, *supra* note 2, at 6. Furthermore, the Bush administration requires agencies to adopt policy statements explicitly opposing prostitution as a precondition to receiving federal anti-trafficking funds. Berman, *supra* note 63, at 275; see also Letter from Henry A. Waxman, Ranking Member, Comm. on Gov't Reform, U.S. House of Representatives, to Alberto Gonzales, Attorney Gen. (Apr. 13, 2005), available at <http://www.democrats.reform.house.gov/Documents/20050512094218-07313.pdf> (protesting the funding condition as a free speech violation that hinders the operations of grantee organizations). The funding restriction stems from the Bush administration's interpretation of the Trafficking Victims Protection Reauthorization Act, which states that "[n]o funds made available to carry out this chapter . . . may be used to promote, support, or advocate the legalization or practice of prostitution." 22 U.S.C. §

the Bush administration's view, and as reflected in the iconic victim concept, consent to sex trafficking is not possible, and therefore victims of sex trafficking are under the complete control of the trafficker.<sup>211</sup>

In short, the iconic victim concept contemplates a victim totally under the trafficker's control and trafficked for sex. Unlike the "illegal alien," who is stereotyped as an economic migrant willfully entering the United States for work and better economic opportunity, the iconic victim is passively trafficked for sex work. Unlike the "illegal alien," characterized as a lawbreaker who evades the immigration system, the iconic victim has been robbed by the trafficker of all free will through force, fraud, or coercion, and thus is blameless for any illegality surrounding immigration status. The iconic victim is the counterpoint to the iconic lawbreaker.

### C. *The Iconic Victim as Prosecution Witness*

The iconic victim concept is shaped not only by concerns about undocumented migration, but also by the statutory and regulatory focus on victims as prosecution witnesses. This focus affects the conception of trafficking victims in two ways. First, victims are framed in contrast to traffickers. In order to paint traffickers as most deserving of punishment, prosecutors have an incentive to seek victims who appear innocent and passive. Second, the regulatory focus on victim as witness emphasizes the law enforcement goals of the T visa to the exclusion of its humanitarian purposes.<sup>212</sup>

#### 1. Iconic Victims in Contrast to Traffickers

The current regulatory structure places the identification of trafficking victims in the hands of prosecutors and investigators, who are simultaneously tasked with using those victims as witnesses in the prosecution of traffickers. Characterizing trafficking victims as completely blameless allows full blame

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7110(g)(1) (Supp. IV 2004). The Bush administration's funding policies have been the subject of a successful challenge in federal court on First Amendment grounds. *See* DKT Int'l, Inc. v. USAID, 435 F. Supp. 2d 5, 18 (D.D.C. 2006).

<sup>211</sup> Cf. Chapkis, *supra* note 10, at 924 (explaining the language of the TVPA in the context of the anti-prostitution movement and contending that its provisions offer only "symbolic support to the notion that all prostitution is sexual slavery"); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1664 (2006) (asserting that laws like the TVPA "were not only aimed at the protection of women but also at the enforcement of ideas about the moral propriety of certain forms of sexual behavior").

<sup>212</sup> Although the statute requires victim cooperation, the regulations go further, imposing the LEA endorsement requirement that grants prosecutors and law enforcement agents the power to determine who qualifies as a victim. This Article focuses on issues of regulatory implementation; however, some of the critique in this section applies as well to the statutory requirement of victim cooperation.

for the trafficking enterprise to be placed on traffickers.<sup>213</sup> The contrast between victim blamelessness and criminal culpability has been explored by criminal law scholars, most recently in the context of critiquing the victims' rights movement, which seeks enhanced participation of victims in the prosecution of criminal defendants. Although a detailed exploration of that critique is outside the scope of this Article, one aspect of it bears mention. Critics of the movement have observed that painting victims as entirely blameless allows wrongdoers to be framed as entirely morally culpable.<sup>214</sup> In the real world, these critics observe, victims are not perfectly innocent and perpetrators are not perfectly evil.<sup>215</sup> Lessons from this critique are applicable in the trafficking context as well.

The culpability of the trafficker stems from his exploitation of the victim. The crime of sex trafficking requires, for example, knowingly participating in or financially benefiting from a venture involving "recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], or obtain[ing] by any means a person . . . knowing that force, fraud, or coercion . . . will be used to cause the

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<sup>213</sup> The idea that thoroughly blameless victims are the ones who deserve relief is nothing new. In various contexts, including welfare, domestic violence, violent crime, disaster relief, and discrimination cases, our society reifies the thoroughly blameless victim as the individual entitled to relief. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 106-07 (1995) (examining the views of individuals who believe that "deviant mothers" are not blameless and therefore do not deserve welfare benefits); Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 *FORDHAM URB. L.J.* 567, 581 (1992) ("'Good' battered women are passive, loyal housewives, acting as loving companions to their abusers. These women must have flawless characters and continually appeal to the police and courts for help, regardless of the futility of their efforts."); Kelly, *supra* note 147, at 580 ("In U.S. domestic laws governing not only domestic violence but others [sic] forms of gender violence such as rape and sexual harassment, the successful good victim is helpless, virginal, and completely without fault."); Michele L. Landis, *"Let Me Next Time Be 'Tried By Fire'": Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 *NW. U. L. REV.* 967, 971 (1998) ("[I]t is the very ability of claimants to narrate themselves as the morally blameless victims of a sudden catastrophe – a disaster – that has largely determined the success or failure of a given claim."); Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 *UTAH L. REV.* 247, 252 ("In order to prove that the client has been harmed in such a way that compensatory damages are appropriate, the client may be required to portray (or adopt) a 'victim' identity . . ."). The stereotypical perfect victim is one who suffered harm through no fault of her own. See Nils Christie, *The Ideal Victim*, in *FROM CRIME POLICY TO VICTIM POLICY*, *supra* note 149, at 17, 19. This individual is the one deserving of pity, compassion, and legal remedy. See Martha Minow, *Surviving Victim Talk*, 40 *UCLA L. REV.* 1411, 1413-15 (1993).

<sup>214</sup> See generally Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 *BUFF. L. REV.* 433 (2004); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 *STAN. L. REV.* 937 (1985).

<sup>215</sup> See, e.g., Gruber, *supra* note 214, at 438-39.

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person to engage in a commercial sex act.”<sup>216</sup> For the trafficker to be culpable, the victim must have been forced, defrauded, or coerced. The more a victim appears to exert no free will of her own, the more she is understood to be under the trafficker’s total control. The iconic victim provides the simplest case for prosecution: a victim completely under the trafficker’s control and lacking in free will, unable even to escape until she is rescued by law enforcement. Her blamelessness stems from her passivity. The iconic victim achieves this complete passivity by being exploited by the trafficker for sex work. As explained above, the abolitionist view espoused by the Bush administration is that sex work is inherently non-consensual. Victims of sex trafficking are passive as to their exploitation because the nature of sex work is such that consent is impossible.

Focus on iconic victims who are completely helpless victims of sex trafficking leaves little room for victims of trafficking for forced labor. The iconic victim concept also does not contemplate victims of sex work who are not completely passive, but instead exercise agency in a variety of ways even while enslaved. Both types of trafficking victims may take actions to protect their families from harm, to protect other victims from further harm, to pressure the trafficker for more independence or pay, to ask for phone privileges, to request a vacation day, or to demand medical care. A victim may act within a larger environment of psychological and physical coercion but still exercise some limited will nonetheless.

A hypothetical is illustrative. Imagine a trafficking victim who is exploited for forced labor, made to work long hours as a domestic worker for almost no pay, under threat of physical harm to her family. Her employer requires her to maintain the garden, care for children, cook, and clean a large house. The victim is not given days off and must sleep on the floor of the kitchen every night. Her employer confiscates her passport and deducts rent from the victim’s meager salary, which the employer mails directly to the victim’s family abroad. The victim has no spending money. After a year, the victim asks for, and receives, one day off per week. Her employer also permits her to leave the house to buy groceries for the family. The victim also secretly calls her family abroad; she is initially punished for the call, but her employer ultimately allows her to make future calls. Several times, the victim walks out of the house, thinking she will contact a neighbor for help, but for fear of retaliation from her employer, she turns around and returns home.

The victim in this hypothetical does not appear to be completely passive. She asks for time off; she negotiates a phone call to her family; she attempts escape on a number of occasions. These actions do not negate the exploitation the victim suffers at the hands of her employer, particularly because of the psychological coercion she likely experiences. Psychiatrist Jose Hidalgo points out that “[e]ven where escape is physically possible, [trafficking] victims may be psychologically incapable of escape due to their constant

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<sup>216</sup> 18 U.S.C. § 1591 (2000).

terror.”<sup>217</sup> As Kevin Bales observes, “When slaves begin to accept their role and identify with their master, constant physical bondage becomes unnecessary.”<sup>218</sup> Consistent with this understanding, Congress recognized in the TVPA that trafficking not only involves physical coercion but encompasses more subtle forms of psychological control as well.<sup>219</sup>

A simple mythology that assumes naïve victimhood fails to grapple with the reality of the trafficking victim’s complex identity and psychological state – one in which the survivor may be both victim and individual actor.<sup>220</sup> The survivor might have suffered from physical, sexual, or labor exploitation and abuse at the hands of the trafficker, and in many cases may have been exploited solely for domestic work or other labor. However, simultaneous with her exploitation, the victim may behave as an individual actor, making a variety of decisions to protect herself or her family, including her children and family in her home country. These decisions are most likely influenced by the victim’s sociopolitical reality and psychological state. A trafficking victim’s exercise of choice in this context does not diminish the conditions of exploitation under which she chooses.<sup>221</sup>

Similarly, the exercise of agency to escape at some point in the trafficking exploitation does not indicate that a victim is somehow less authentic. Trafficking does not always involve chains and physical bondage. The questions of “how could she leave?” or “did she have the key to her cell?” do not always make sense in the modern trafficking context, which includes more subtle forms of psychological coercion. Martha Mahoney has examined questions about agency and women’s failure to exit in the contexts of domestic violence and sexual harassment, where victims are presumed to possess agency, and where the failure to exercise it to exit abusive or harassing relationships may reduce perceptions of victim legitimacy.<sup>222</sup> There, the “ideology of exit” assumes “mutual freedom to leave” abusive or harassing relationships and fails to recognize the gender inequality in such

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<sup>217</sup> Sadruddin et al., *supra* note 10, at 405.

<sup>218</sup> Kevin Bales, *The Social Psychology of Modern Slavery*, SCI. AM., Apr. 2002, at 80, 86.

<sup>219</sup> See *supra* note 83 and accompanying text.

<sup>220</sup> The individual actor–victim contrast has been developed in the context of domestic violence law by Professor Elizabeth Schneider. See generally Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN’S RTS. L. REP. 195 (1986).

<sup>221</sup> The tension between legal identities and individual behavior has been highlighted by critical scholars. See, e.g., Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 127 (1991) (“[U]nderestimating individuals’ latitude for choice despite their assigned identities, and failing to acknowledge the constraints on individuals despite the powers to choose, are two central mistakes in legal assessments of identity.”).

<sup>222</sup> See Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1287 (1992).

relationships.<sup>223</sup> Mahoney argues that requiring women to explain failure to exit ignores the fact that “in the course of shaping [their] lives under conditions of oppression, women both leave and stay.”<sup>224</sup> To avoid the exit inquiry, battered or harassed women must cast themselves as victims lacking in agency, a role “with which most women refuse to identify.”<sup>225</sup>

The trafficked person faces a similar dilemma. Because the iconic victim is assumed to be passive and in need of rescue, a victim who escapes risks losing the legitimacy associated with lack of volition. Here, the rhetoric of failing to exit assumes that the trafficking victim possesses no freedom of movement. This simplistic characterization ignores the complexity of the physical and psychological exploitation typical of trafficking. Different trafficked persons may have varied reactions to exploitation and oppression; victims may choose to resist or not depending on their personal assessments of the consequences of resistance. Further, a victim’s exercise of will is necessarily shaped by the gender, class, racial, and other dynamics at play in the individual circumstances of her exploitative situation. The exercise of free will, including choosing to escape, does not necessarily correlate to the severity of the exploitation or control, physical or psychological, exerted by the trafficker.

## 2. Cooperation with Prosecution

The iconic victim concept contemplates a victim who is passive until rescued, but whose free will is restored upon rescue. Just as blamelessness prior to rescue required demonstrated passivity, blamelessness post-rescue requires active cooperation with law enforcement. Once the victim is understood to possess the ability to choose, she must exercise that choice to cooperate with prosecutorial demands. If a victim fails to cooperate because she fears reprisals against herself or her family, or is still under the trafficker’s psychological control, her legitimacy as a victim is in question.<sup>226</sup>

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<sup>223</sup> *Id.* at 1289.

<sup>224</sup> *Id.* at 1307.

<sup>225</sup> *Id.* at 1309. To avoid this constraint, Elizabeth Schneider has advocated a “‘situated agency’” construct in the domestic violence context, under which women’s entire life circumstances are considered. Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 521-24 (1996).

<sup>226</sup> The connection between blamelessness and cooperation with law enforcement has been explored extensively in the domestic violence context, where mandatory arrest and prosecution policies have replaced victim choice in many states. See, e.g., Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 570-71 (1999) (stating that mandatory arrest and prosecution policies are often justified on the ground that “the survivor is suffering from a syndrome that prevents her from thinking for herself”). These mandatory policies have been criticized as disrespectful of the survivor’s wishes. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237, 243-44 (2005). But see Cheryl Hanna, *No Right To Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1909 (1996)

Contrary to the conception of victimhood embodied in the iconic victim narrative, a trafficking victim may still be under the psychological control of the trafficker when she is “liberated” by law enforcement. Although the narrative envisions rescue followed by trusting cooperation with law enforcement, victims may feel more loyalty to their trafficker than to law enforcement.<sup>227</sup> They may believe that the trafficker will not be prosecuted and that they will simply return to pre-raid exploitation after the law enforcement investigation is complete. In such cases, failure to cooperate stems from the ongoing effect of trafficker control. The idea that a “liberated” victim will exercise her newfound free will to cooperate with law enforcement may be inconsistent with the nature of the control she experienced during trafficking exploitation.

Imagine, for instance, a young woman trafficked for sex work who, after a decade of exploitation, is “rescued” by law enforcement during a large-scale raid. Over the preceding decade, the traffickers repeatedly told her that if the immigration authorities found her, they would jail and deport her. During the raid, as she is taken away by law enforcement, the traffickers tell her that they will provide her with lawyers and that she should be loyal to the trafficker or her family will be harmed abroad. Prosecutors and law enforcement agents take the woman to a federal facility, which she is not permitted to leave. Agents interview her through an interpreter, promising that she is safe and that her only role now is to cooperate in locking up the trafficker. The woman, still believing that the trafficker will provide her with a lawyer and get her out of custody, fearing harm to her family, and feeling loyal to the trafficker, lies to the agents, telling them that she voluntarily migrated and that the trafficker did nothing wrong. The agents see her as an accomplice to the trafficker and place her in removal proceedings. In their eyes she is not a victim.

A victim’s loyalty to the trafficker and refusal to cooperate with law enforcement is consistent with current understandings of trafficking victims’ post-exploitation psychological state. As psychiatrist Jose Hidalgo explains, many trafficking victims suffer “chronic traumatic stress” during their exploitation because “their lives and bodies are under constant threat.”<sup>228</sup> Traffickers “may alternate between kindness and viciousness; for psychological survival, the victim may form positive feelings for that part of

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(“[L]eaving the choice of prosecution to the victim . . . creates more problems than it solves.”).

<sup>227</sup> See Nathan, *supra* note 158, at 29-30 (“[Trafficking victims are] so used to being underground that ‘they’re more terrified of the government than of traffickers,’ says attorney Juhu Thukral, director of the New York City-based Sex Workers Project of the Urban Justice Institute.”).

<sup>228</sup> Sadruddin et al., *supra* note 10, at 403. Hidalgo and his co-authors observe that “[h]uman trafficking victims are at an extremely high risk for developing . . . mental health consequences from their trauma due to the types of horrific physical and psychological assaults they suffer and the circumstances under which they experience this trauma.” *Id.* at 405.

the perpetrator that is kind and ignore the vicious side.”<sup>229</sup> Hidalgo terms this syndrome “traumatic attachment” and suggests that the attachment can result in seemingly illogical victim behavior, where a recently rescued or escaped victim does not want law enforcement assistance.<sup>230</sup> Hidalgo observes that “[a] victim may even become protective of the perpetrator and excuse violent behavior as an aberration.”<sup>231</sup>

Particularly given the psychological state of trafficking victims post-rescue or escape, law enforcement’s assessment of cooperation is not a principled or accurate way to distinguish between trafficking victims and other undocumented migrants. The decision by a victim to cooperate does not necessarily correlate to her authenticity as a victim. The victims we might characterize as most worthy of relief – those most under the control of the trafficker, or those subjected to the most horrific abuse – may in fact be the least likely to cooperate with law enforcement.

The prosecutorial concern is a collective one: to reduce trafficking through prosecution and ultimately protect future victims. Even if linking the T visa to prosecutors’ assessment of victim cooperation functions to encourage such cooperation,<sup>232</sup> however, the visa is more than simply a law enforcement tool. It also serves a humanitarian purpose, allowing victims to recover from the trauma of trafficking, restore their autonomy, and begin new, independent lives. The prosecutorial interest in an individual victim is retrospective – the focus is on the victim’s past exploitation – whereas the humanitarian interest in the victim is mostly prospective: the focus is on victim rehabilitation and recovery. A regulatory implementation that centers on prosecutorial goals fails to balance the TVPA’s dual purposes of serving prosecutorial interests *and* protecting individual trafficking victims.<sup>233</sup>

#### D. *The Iconic Victim and Stereotypes of Foreign Women*

Reliance on an iconic victim standard that requires sexual exploitation is easily justified if practices in the source country are characterized as involving barbaric acts of male domination, including sexual exploitation of women and girls. The victim mythology begins with the source countries. Iconic victims

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<sup>229</sup> *Id.* at 404.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Mandating victim cooperation as assessed by law enforcement may in fact be less effective than granting victims time and support to make the decision to cooperate. *See infra* notes 262-64 and accompanying text.

<sup>233</sup> The operative question in T visa applications thus becomes whether the applicant satisfies the iconic victim standard, not whether the applicant satisfies the statutory definition of a trafficking victim. *Cf.* Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 817 n.23 (1991) (noting that “the ‘real’ subject of the trial of a battered woman [who claims self-defense] might not be whether *she* was at risk, but whether a socially constructed group (‘battered women’) is indeed at risk”).

originate from cultures in Asia, Latin America, or Africa stereotyped as suppressing the individuality of women and girls and rendering them simple prey for manipulation by clever traffickers.<sup>234</sup> The iconic victim concept is thus consistent with stereotypes of foreign women and women of color as meek, helpless, and belonging to repressive male dominant cultures.<sup>235</sup>

Even Justice Department officials who understand stereotypes of gender in trafficking may be locked into an overly constricted conception of victimhood by a regulatory model based on the iconic victim concept. Government literature regarding human trafficking depicts victims as suffering from “paralyzing fear” and being “meek.”<sup>236</sup> A Justice Department anti-trafficking news bulletin quotes Deputy Assistant Attorney General Schlozman:

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<sup>234</sup> Of course, not all trafficking victims in the United States are women of color – trafficking from Eastern Europe to the United States has recently increased. See Nora V. Demleitner, *The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution*, in GLOBAL HUMAN SMUGGLING, *supra* note 16, at 257, 258. For an overview of gender stereotypes of women trafficked into prostitution, see generally *id.* The legal mythology of the “other” has also been explored in the context of the relationship between gender, blameworthiness, and welfare. See, e.g., FINEMAN, *supra* note 213, at 114 (“Single mothers are still being blamed for much of societal ills.”). See generally WOMEN, THE STATE, AND WELFARE (Linda Gordon ed., 1990).

<sup>235</sup> This critique locates the iconic victim concept in critical theory, which explains that stock narratives can perpetuate stereotypes and exacerbate exclusion. See, e.g., Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1070-71 (relating that the stereotype embodied in battered woman syndrome excludes African American domestic violence survivors); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243-44 (1991) (explaining that the combination of marginalized race and gender status for women of color affected by violence led to their exclusion from representation by feminists or antiracists); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2438 (1989) (indicating the need for narratives about race from marginalized groups to counter the stock narratives of the dominant group that facilitate stereotypes); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 730 (1988) (exploring the use of narratives in the child custody setting); Leslie Reagan, *Victim or Accomplice?: Crime, Medical Malpractice, and the Construction of the Aborting Woman in American Case Law, 1860s-1970*, 10 COLUM. J. GENDER & L. 311, 314-15 (2001) (suggesting that stock narratives portraying women who had abortions as victims of the abortion provider evolved into a lack of trust for women’s testimony in such cases); Lucie White, *Representing “The Real Deal,”* 45 U. MIAMI L. REV. 271, 295-96 (1990-1991) (discussing how distinguishing the homeless from others in poverty led parts of society to attribute blameworthiness and further exclude homeless individuals). See generally Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (providing an overview of what stock narratives are and how they shape our basic understandings of the world around us).

<sup>236</sup> DOJ REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, *supra* note 2, at 10.

“It is nothing short of shocking to walk through the neighborhoods of Phnom Penh and see *children*, some of whom look like they are no older than nine or ten years old, being forced to prostitute themselves. You simply cannot forget those images, especially when you see American children of that same age safely attending fourth or fifth grade.”<sup>237</sup>

These incomplete descriptions highlight the trafficked person’s victimhood and ignore the complex sociopolitical reality of the victim’s experience. Ratna Kapur has observed in the larger context of violence against women that “the focus on the victim subject reinforces the depiction of women in the Third World as perpetually marginalized and underprivileged, and has serious implications for the strategies subsequently adopted to remedy the harms that women experience.”<sup>238</sup> A focus on victimhood, rather than a more nuanced understanding of foreign women of color, has powerful consequences in the immigration context. As Leti Volpp observes, “[t]he presumption that the United States and its fictive unified culture is *per se* more progressive and more protective of women and children than the culture of Asian and African immigrants is the most rehearsed United States cultural nationalism: ‘West is best.’”<sup>239</sup> Focus on foreign women victims oversimplifies questions of control by the trafficker and obscures the fact that traffickers are not only foreign men, but also U.S. citizens and U.S. corporations who exploit trafficked workers.<sup>240</sup>

Stereotypes of victims from the developing world are reinforced by existing stereotypes of immigrant women within the United States. Immigration law has been criticized by feminist scholars for its reliance on outdated gender stereotypes.<sup>241</sup> Among other things, the laws have developed with the understanding that men migrate for economic reasons, whereas women move

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<sup>237</sup> *Civil Rights Division Leaders Assess Trafficking Situation in Cambodia*, ANTI-TRAFFICKING NEWS BULL. (Civil Rights Div., U.S. Dep’t of Justice, Washington, D.C.), Apr. 2005, at 1, 1.

<sup>238</sup> Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6 (2002).

<sup>239</sup> Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1604-05 (1996).

<sup>240</sup> See Chacón, *supra* note 14, at 3035 (“[N]oncitizens are easier targets for harsh sanctions such as those required by the TVPA than are U.S. citizens or U.S. corporations.”).

<sup>241</sup> See generally Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991); Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23 (1997); Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT’L & COMP. L. REV. 47 (1998); Berta Esperanza Hernández-Truyol, *Las Olvidadas – Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 353 (1998); Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157 (2002).

“as passive companions of other family members.”<sup>242</sup> The few stereotypes of female migrant workers are typically from the domestic realm, where – consistent with the iconic victim narrative – domestic workers are prized for meekness. “Good” nannies and maids are characterized as docile, submissive, warm, and caring – willingly suppressing their own agency for the benefit of their employers’ families.<sup>243</sup> Although female migration has not been studied in enough detail (perhaps as a result of these stereotypes),<sup>244</sup> existing data suggests that the picture is more complex. One report confirms, for example, that over half of Mexican female migrants enter the United States with family members, but also suggests that the majority of female migrants from Mexico work upon entry to the United States.<sup>245</sup>

E. *Cultural Effect on Understandings of Human Trafficking*

The term “human trafficking” has only entered our cultural lexicon in the last decade. A shift in legal and popular conceptions of trafficking victims to incorporate a more nuanced understanding of the trafficking victim still has the potential to broaden cultural views of human trafficking.

Although the term “human trafficking” has long been used in the international context, it was not widely employed in the American context until recently. Prior to the mid-1990s, news stories about the transport of individuals for sexual or labor exploitation (to the extent they existed) used the terms “alien smuggling” or “slavery.”<sup>246</sup> The use of the term “human trafficking” only exploded with the enactment of the TVPA in 2000, after which media stories about human trafficking were regular fare, typically featuring children or women trafficked for sexual exploitation.<sup>247</sup>

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<sup>242</sup> Richard E. Bilborrow & Hania Zlotnik, *Preliminary Report of the United Nations Expert Group Meeting on the Feminization of Internal Migration*, 26 INT’L MIGRATION REV. 138, 140 (1992).

<sup>243</sup> See Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women’s Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809, 840-41 (2003).

<sup>244</sup> Kelly, *supra* note 147, at 559 (“A great deal has been written, for example, about the influence of race on immigration. Yet there has been virtually no attention to the pervasiveness of gender biases in immigration law.” (footnote omitted)).

<sup>245</sup> See Marcela Cerrutti & Douglas S. Massey, *On the Auspices of Female Migration from Mexico to the United States*, 38 DEMOGRAPHY 187, 195-96 (2001). For an examination of the impact of gender on immigrants’ participation in the workforce, see Marion F. Houstoun et al., *Female Predominance in Immigration to the United States Since 1930: A First Look*, 18 INT’L MIGRATION REV. 908, 940-50 (1984).

<sup>246</sup> The actual phenomenon of human trafficking existed long before the use of the term “trafficking.” See generally Scully, *supra* note 52 (charting the history of trafficking for sex work from the 1840s through recent years).

<sup>247</sup> See, e.g., Gail Russell Chaddock, *Congress Takes Aim at Modern-Day Slavery*, CHRISTIAN SCI. MONITOR, Oct. 18, 2000, at 2 (announcing the passage of the TVPA to combat “trafficking”); Barbara Crossette, *Clinton Signs International Agreements To Help*

The popular idea of trafficking victims in the American context is being shaped by the legal approach to trafficking. The initiator in the complex and mutually reinforcing interaction between the legal and cultural definition of trafficking is, for the most part, the federal government. Federal prosecutors typically initiate trafficking stories through press releases. Although survivors and their advocates occasionally garner public attention, it is usually in response to a prosecutorial event – investigation, arrest, prosecution, conviction, or sentencing of the trafficker.<sup>248</sup> Consistent with the restrictive domestic anti-trafficking approach, these stories typically involve those who meet the iconic victim standard (or at least come close).<sup>249</sup> These stories have already begun to affect popular media portrayal of trafficking, which is usually depicted from a prosecutorial perspective. Examples include popular television shows like *Law & Order* running episodes about human trafficking;<sup>250</sup> a blockbuster Hollywood movie, *Lethal Weapon 4*, depicting trafficking victims from China;<sup>251</sup> and a cable television miniseries, featuring Mira Sorvino and Donald Sutherland, titled “Human Trafficking.”<sup>252</sup>

The cultural discourse about trafficking victims is further shaped by existing stereotypes of undocumented migrants. Imperfect trafficking victims who fail to meet the restrictive legal (and cultural) definition are not only non-victims, but they are placed in the category of “illegal aliens.” They are stereotyped as dangerous criminals who manipulate the law and drain U.S. resources.<sup>253</sup> These negative stereotypes influence the outer boundaries of the nascent cultural definition of trafficking victim, just as they shape the legal boundary between trafficking victim and undocumented migrant.

Media stories that depict iconic victims have far-reaching effects. As American law and society begin to grapple with the issue of trafficking victims

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*Protect Children*, N.Y. TIMES, July 6, 2000, at A7 (reporting the signing of an international agreement to protect children from “trafficking”). See generally David France, *Slavery’s New Face*, NEWSWEEK, Dec. 18, 2000, at 60 (chronicling human trafficking stories).

<sup>248</sup> See, e.g., Bill Rankin, *Man Pleads Guilty to Sex Trafficking*, ATLANTA J.-CONST., May 7, 2004, at 7C; *Woman Admits Forcing Niece into Prostitution*, L.A. TIMES, Dec. 7, 2005, at B4.

<sup>249</sup> A search of government press releases from January 2004 through December 2005 reveals that the overwhelming majority of them (fifteen of nineteen total) were about sex trafficking, sexual exploitation, or prostitution. Not surprisingly, the approximately 105 news articles generated by these nineteen releases likewise focus on trafficking as involving sex trafficking, sex exploitation, or prostitution.

<sup>250</sup> See, e.g., *Law & Order: Special Victims Unit: Debt* (NBC television broadcast Sept. 28, 2004).

<sup>251</sup> *LETHAL WEAPON 4* (Warner Bros. 1998).

<sup>252</sup> *Human Trafficking* (Lifetime television broadcast Oct. 24-25, 2005).

<sup>253</sup> See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1234 (arguing that meaningful social change to protect the rights of undocumented migrants requires new images of migrants as “good” people).

in the United States, media representations influence not only how society conceptualizes trafficking victims, but also how victims perceive themselves and their identity within society. These perceptions, in turn, reinforce and shape the legal standard. This process has already started. According to a recent government-funded study, victims of labor trafficking “are most likely to not access services because they fear deportation . . . and they fear retaliation against themselves or their family members,” whereas victims of sex trafficking “do not access services primarily because they fear retaliation . . . and . . . are not knowledgeable about available services.”<sup>254</sup> Given the current focus on sex trafficking in prosecutions (and likely T visa grants), it should come as no surprise that victims of trafficking for labor fear deportation.

In the domestic violence context, Martha Mahoney has observed that cultural assumptions about domestic violence affect substantive law and methods of litigation in ways that in turn affect society’s perceptions of women; both law and societal perceptions affect women’s understanding of our own lives, relationships, and options; our lives are part of the culture that affects legal interpretation and within which further legal moves are made.<sup>255</sup>

The same is true in the human trafficking context. The cultural definition of the term “human trafficking” is not only descriptive but normative as well.<sup>256</sup> If the Bush administration approach were retooled to rely on a broader conception of trafficking victims, a more diverse group of victims would garner protection. The legal engine that drives the cultural definition would produce more diverse images than that of the iconic victim. These images, in turn, could shape cultural discourse and future legal decisions regarding trafficking victims.<sup>257</sup>

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<sup>254</sup> CLAWSON ET AL., *supra* note 129, at 24.

<sup>255</sup> Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 2 (1991).

<sup>256</sup> See Renée Römkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions To Support Battered Women*, 13 YALE J.L. & FEMINISM 265, 284 (2001) (“The legal categorization of ‘battered women’ – or any other identity category for that matter – defines the class of rights holders in terms that are deeply normative, not just descriptive.”).

<sup>257</sup> See Lenni B. Benson, *The Invisible Worker*, 27 N.C. J. INT’L L. & COM. REG. 483, 484 (2002) (“[L]egal definitions [of undocumented migrant] go far beyond being mere labels, and instead become the building blocks of legal status, creating intentional and unintentional interactions with other laws such as criminal law, family law, tax law, and labor and employment law.”).

F. *A Modest Proposal for Change*

1. Centralized Decision Making

DHS should eliminate the LEA endorsement restriction and locate the victim-identification function solely with trained DHS adjudicators. This would eliminate the uniformity challenge posed by the current system in which thousands of law enforcement agents and prosecutors serve as gatekeepers to the visa. A much smaller group of highly trained DHS adjudicators could respond more uniformly and rapidly to changes in trafficking patterns and new trafficker methods.<sup>258</sup> These adjudicators would also be advantageously positioned to decide victim eligibility divorced from any investigation or prosecution duties. By de-coupling victim status determinations from prosecutorial involvement, the proposed model focuses on the credibility of victim narratives, not law enforcement assessments of victim suitability to serve as a witness. This de-coupling would also reduce the effect of the prosecutorial and investigative focus on sex trafficking victims, as long as DHS adjudicators were trained to recognize victims of trafficking for both labor and sex.

A centralized model based solely on victim demonstration of compliance with statutory standards is similar to that used to adjudicate petitions under the VAWA from non-citizen survivors of domestic violence. Domestic violence survivors typically submit evidence of abuse, including declarations, police reports, letters, and psychological evaluations.<sup>259</sup> Similarly, T visa applicants should be able to demonstrate attempts at cooperation solely through their own evidence and narratives.<sup>260</sup> In cases where the DHS intends to deny a T visa application because of the paucity of corroborating evidence, it should first interview the T visa applicant and judge her credibility firsthand.<sup>261</sup> If, after this interview, the victim is judged not to be credible, then her T visa application can be denied.

Although centralizing victim identification with DHS reduces prosecutorial control over T visas, it may actually result in additional victim participation in prosecutions. When the T visa is de-coupled from the LEA endorsement and prosecutorial approval, victims control the timing of their participation in any

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<sup>258</sup> Under current regulations, DHS adjudicators decide whether to grant T visa applications. However, they rely on the LEA endorsement as primary evidence of victim status and cooperation with law enforcement. *See* 8 C.F.R. § 214.11(f), (h) (2006).

<sup>259</sup> *See* CATHOLIC LEGAL IMMIGRATION NETWORK, INC. & IMMIGRANT LEGAL RES. CTR., THE VAWA MANUAL 4-2 to 4-21 (2006).

<sup>260</sup> In the domestic violence context, Elizabeth Schneider has explored the challenges and benefits of admitting expert psychological testimony about battered women in support of their cases. *See generally* Schneider, *supra* note 220.

<sup>261</sup> Current regulations provide for the possibility of a personal interview but do not specify that the interview should occur in the case of any denial. *See* 8 C.F.R. § 214.11(d)(6).

investigation. Additional time for reflection may result in more victim participation. In Belgium and the Netherlands, as trafficking survivors begin to recover from their experience with the assistance of social service agencies, they are granted a reflection period in which to make an informed decision about cooperation.<sup>262</sup> During this period (forty-five days in Belgium and three months in the Netherlands), survivors are granted temporary immigration status.<sup>263</sup> In both countries, more victims report their traffickers now than did before there was a reflection period.<sup>264</sup> These results are consistent with psychological understandings of trauma survivors. According to psychologist Judith Herman, trauma victims may actually be more stable witnesses if they are empowered to choose to participate in the investigation or prosecution of their persecutors.<sup>265</sup> Once a victim's life and psychological state have stabilized somewhat, she may be a more meaningful and directed participant in investigation or prosecution.

An approach that relies solely on a victim's own demonstration of compliance with the statute is consistent with encouraging survivor participation in the political struggle against human trafficking. Thus far, this struggle has been defined by feminists and religious leaders opposed to sex work, prosecutors and law enforcement agents interested in convicting traffickers, and advocates seeking to protect victims' rights in the current framework. The inclusion of survivor voices is crucial to re-examining and redefining the United States' anti-trafficking efforts. If a range of victims' voices becomes part of the anti-trafficking debate, our conception of

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<sup>262</sup> Elaine Pearson, *Half-Hearted Protection: What Does Victim Protection Really Mean for Victims of Trafficking in Europe?*, in GENDER, TRAFFICKING, AND SLAVERY, *supra* note 16, at 56, 57; *see also* MIKE KAYE, ANTI-SLAVERY INT'L, THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS' HUMAN RIGHTS 8-9 (2003), available at <http://www.antislavery.org/homepage/resources/the%20migration%20trafficking%20nexus%202003.pdf>.

<sup>263</sup> Pearson, *supra* note 262, at 57.

<sup>264</sup> *Id.*; *see also* KAYE, *supra* note 262, at 9-10 (acknowledging the effectiveness of these policies in encouraging prosecution of traffickers).

<sup>265</sup> *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 165 (1997). In her groundbreaking book on trauma, Herman explains that the trauma survivor "must be the author and arbiter of her own recovery. . . . No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest." *Id.* at 133. Herman draws from trauma literature in a variety of contexts to clarify that "[t]rauma robs the victim of a sense of power and control; the guiding principle of recovery is to restore power and control to the survivor." *Id.* at 159. The first stage of recovery, according to Herman, is restoring control over bodily and environmental safety to the trauma victim. *Id.* at 159-72. Control is also a key aspect of any decision to participate in prosecution of the wrongdoer. According to Herman, "[i]n the matter of criminal reporting, as in all other matters, the choice must rest with the survivor. . . . The survivor must make an informed choice with the full knowledge of risks as well as benefits; otherwise she will simply be retraumatized." *Id.* at 165.

trafficking victims will surely expand to encompass a wide range of experiences from a diverse group of victims.

## 2. The Applicable Standard

In addition to removing the LEA endorsement restriction, DHS should also eliminate the current regulatory preference for rescue over escape. DHS can then apply the remaining existing statutory and regulatory standards in adjudicating T visa applications. To determine which applicants qualify for the T visa, DHS officials should apply the “but for” test implicit in the force, fraud, or coercion standard of the TVPA. If, based on the totality of the circumstances, a victim would not have entered into the trafficking arrangement but for force, fraud, or coercion, or if the victim would not have remained under exploitation but for force, fraud, or coercion, then she is a victim of human trafficking.<sup>266</sup> This actual causation test, familiar from the criminal context,<sup>267</sup> would focus the inquiry on the trafficker’s behavior vis-à-vis the victim, most relevant at the start of the trafficking enterprise (when victims are recruited) and at the destination country (where the victim is exploited for sex or labor).<sup>268</sup> Other factors, particularly economic factors, may influence a victim’s decision making, but under the actual causation test, the ultimate inquiry would be about the effect of the trafficker’s behavior.

The standard would be easily met in cases involving kidnapping, abduction, or violence. It would also accommodate and include cases where traffickers use psychological and more complex methods to coerce and defraud victims. If the domestic violence context is any indication, we are only at the beginning stages of understanding the psychological aspects of trafficking. In recent decades, experts and advocates against domestic violence have developed and analyzed the battered woman’s syndrome and subsequent characterizations of the psychological effect of domestic violence on battered women.<sup>269</sup> Similar exploration is required in the trafficking context to better understand the

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<sup>266</sup> Current regulations fail to provide a detailed standard for the inquiry, instead repeating the statutory language regarding force, fraud, or coercion. See 8 C.F.R. § 214.11(f).

<sup>267</sup> See JOHN C. KLOTTER, *CRIMINAL LAW* 50 (6th ed. 2001) (“Federal courts and some state courts apply the ‘but for’ test when considering the causation element of the criminal offense.”).

<sup>268</sup> See Alison N. Stewart, *Report from the Roundtable on the Meaning of “Trafficking in Persons”*: A Human Rights Perspective, 20 *WOMEN’S RTS. L. REP.* 11, 16 (1998) (“[T]he consent given must be a *full and informed consent* as to *both* the movement *and* the end-conditions.”).

<sup>269</sup> Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 321, 322 (1992) (“As [the battered woman’s] defense gained in popularity, attorneys and mental health professionals became more familiar with the dynamics of battering and its psychological impact on victims.”). For subsequent examinations of the syndrome and the psychological effect of battering, see Mahoney, *supra* note 255, at 38-39; Schneider, *supra* note 220, at 214-15.

psychological consequences of trafficking, as well as to fully explore issues relating to consent and psychological coercion. As this exploration progresses, DHS adjudicators should incorporate guidance from mental health professionals in evaluating T visa applications.

DHS should take account of the totality of the circumstances, a requirement that recognizes that exploitation takes many forms and that victims' experiences vary widely even under similar conditions.<sup>270</sup> A victim's background, economic and political circumstances, age, and education should all be part of the inquiry, along with the nature of the trafficker's enterprise, stories of other victims of the same trafficker, and conditions in the country of origin. Victims are a diverse group of individuals, including women, men, and children from a wide range of countries, with a broad range of cultures, classes, and languages. Trafficking frequently involves domination based on gender, race, or ethnic group.<sup>271</sup> Within these categories, of course, individual experiences and stories vary broadly, and this diversity must be considered.<sup>272</sup> In some cases, a trafficker may threaten victims daily with violence and harm. In other cases, a trafficker may control victim behavior through more subtle forms of coercion. Trafficker behavior may also affect different victims differently.

Because trafficking is an aspect of migration, the analysis is complex at the margins between trafficking and economic migration more generally. However, DHS has experience in conducting such complex, fact-based inquiries. Similar to the refugee and VAWA contexts, which also involve survivors of trauma, the focus would be on a showing that the victim herself makes, based on the victim's credibility. To obtain refugee status, victims of persecution are required to demonstrate subjectively genuine and objectively well-founded fear of future persecution.<sup>273</sup> Similarly, to obtain relief under VAWA, a non-citizen survivor of domestic violence must demonstrate that she

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<sup>270</sup> Current regulations explicitly require a "totality of the circumstances" standard in evaluating victim cooperation, *see* 8 C.F.R. § 214.11(a), but not in assessing victim status. In the domestic violence context, Linda Mills has argued for a multi-faceted, survivor-specific response. *See* Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1250-52 (1996).

<sup>271</sup> *See* Demleitner, *supra* note 234, at 280.

<sup>272</sup> In evaluating domestic violence law, Elizabeth Schneider has contended that "the term 'battered woman' itself is rigid and static, and implies that there is one model, which excludes women with diverse experiences who do not fit a particular mold or stereotype." Schneider, *supra* note 225, at 497.

<sup>273</sup> 8 U.S.C. § 1101(a)(42)(A) (2000). Trafficking survivors may be eligible for asylum relief as refugees if they can meet the necessary statutory requirements. *See* Anna Marie Gallagher, *Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination*, 19 GEO. IMMIGR. L.J. 99, 104-23 (2004); Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN'S L.J. 77, 101-04 (2002).

“has been battered or subjected to extreme cruelty.”<sup>274</sup> The typical showing involves not only a description of the abuser’s behavior, but also the effect on the individual domestic violence survivor. Similarly, a trafficking victim’s showing should consist primarily of her declaration and supporting documents about the effects of being exploited for forced labor or sex through the trafficker’s use of force, fraud, or coercion, as well as a description of attempts to cooperate with law enforcement (or an explanation for the lack of such attempts).

#### CONCLUSION

Domestic anti-trafficking efforts are currently based on a constricted concept of victimhood, which captures the reality of only some trafficking victims. The iconic victim contemplated by these efforts is the opposite of the undocumented migrant. Whereas the undocumented migrant is a dangerous, manipulative criminal who drains social services, the iconic victim is innocent, helpless, and complies with law enforcement.

The iconic victim concept reflects troubling assumptions about immigrant women from the developing world and has practical consequences in real trafficking cases. In reality, women may exercise some amount of free will in trafficking scenarios; men may be trafficked; women may be trafficked for labor, not sex; and survivors may escape exploitation without rescue by law enforcement. Successful domestic anti-trafficking policy should be based on the full range of real trafficking stories.

As the United States continues to grapple with human trafficking, other countries are doing the same and, in many cases, are using the U.S. trafficking legislation as a model. Our trafficking approach could have global consequences. Unless we allow our approach to evolve as our understanding of trafficking evolves, we erroneously exclude trafficking victims from immigration relief.

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<sup>274</sup> 8 U.S.C. § 1229b(b)(2)(A)(i)(I). Commentators have urged further focus on credibility in the non-citizen domestic violence context. See, e.g., Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 702-05 (1998).