

ARTICLE

GOOD INTENTIONS ARE NOT ENOUGH: FOUR RECOMMENDATIONS FOR IMPLEMENTING THE TRAFFICKING VICTIMS PROTECTION ACT

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

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

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1. Trafficking Victims Protection Act, Pub. L. No. 106-386, 22 U.S.C. §§ 7101–7112 (2000).

2. By 390 percent, according to the U.S. Department of Justice (claiming the prosecution of 449 traffickers between 2001 and 2007, as opposed to 91 during the previous seven years prior to passage of the Act). *See* CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001–2005 (2006), available at http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf [hereinafter DOJ REPORT].

3. Workplace inspections are governed by OSHA and occasionally fire marshals’ offices. While these inspectors have received training on recognizing human trafficking, there are not

The law itself is both broad and specific enough to create some powerful tools for prosecutors. It allows prosecutors to charge with human trafficking any person who receives, harbors, transports, provides or obtains (or attempts to do any of the foregoing) a person through means of force, fraud, or coercion (including threatening to use the law to have them deported, for instance) for the purpose of either commercial sex or labor or services.⁴

Despite the powerful legal and victim service tools available through passage of this domestic legislation, a multitude of problems remains, primarily as a result of the lack of effective implementation of the law. As soon as the TVPA was passed, human trafficking was conflated with so many other political agendas that the true purpose and potential of the law was obscured. Following are four of the primary ways in which the implementation of the TVPA remains critically flawed, as well as recommendations for correcting those flaws.

I. THE LAW ENFORCEMENT FUNNEL STYMIES VICTIM PROTECTION

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

In order to perceive the ways in which the law is not being properly implemented, consider the following two similar human trafficking scenarios, both based upon real cases, which result in two utterly different outcomes.

enough inspectors to carry out this additional task of looking for human trafficking. ICE has been increasing its workplace raids, but only for the purpose of arresting unauthorized workers. It has thus far failed to screen those same employees as potential human trafficking victims before deporting them.

4. See generally Trafficking Victims Protection Act, 22 U.S.C. §§ 7101–7112 (2006).

5. See, e.g., Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 366 (2007) (describing a U.S. Attorney who, despite having correctly identified a victim of human trafficking, nevertheless first prosecuted her for “misuse of a passport,” even though the passport was known to have been provided to the victim by her trafficker for the purpose of trafficking her into the United States).

A. *Alma: Rescued by Law Enforcement*

Consider, for example, the case of Alma, a thirteen-year-old girl from Egypt, given into slavery by her parents after her older sister allegedly stole something from her sister's employer.⁶ The employer threatens to turn Alma's older sister over to the police unless the parents give the employer another of their children to serve in the household. Eventually, the employer and his family move to the United States, securing a false passport for Alma as a "family member." In the United States, Alma is forced to work fifteen-hour days, sleep in a windowless and airless garage, and take care of all household duties. She has no access to her own passport (which in any event is fraudulent), and is never permitted to leave the house over the course of four years. Eventually, acting on a tip, ICE (Immigration and Customs Enforcement, the immigration enforcement division of the Department of Homeland Security) raids the house and Alma is rescued. That night they send Alma to Catholic Charities, an agency in receipt of government funds earmarked exclusively for the purpose of assisting victims of human trafficking. Thereafter, ICE informs the Department of Justice Human Trafficking Protection Unit, and the family members are prosecuted for human trafficking. Alma works closely with law enforcement to secure the prosecution, and the ICE attorney present at the raid accompanies her through the process of obtaining a T visa. Ultimately, Alma is adopted by a foster family and obtains her permanent residence in the United States. The system has worked well to protect Alma, to see that she has been provided with the victim protection services she needs and is entitled to.

B. *Beti: Frees Herself*

Now look at this alternate scenario: Beti is a thirteen-year-old girl from Cameroon, sold into slavery by her father to pay off a bribe. Beti is forced to work in the household fifteen hours a day while living on a mattress in the pantry. She takes care of all of the household duties, cooking, cleaning, and caring for the family children. She has no access to her travel documents, which in any event are fraudulent; when the family came to the United States they submitted false documents, alleging that she was their natural child. She has never been permitted to go outside except to take out the trash. Now the male head of the household has started making sexual advances toward her. His wife has noticed his way of looking at Beti, and has started slapping her and screaming at her. Everything Beti does is wrong.

One day, the man tells Beti to come to his room that night, stating she "doesn't want to know what will happen" if she refuses him. That evening, she flees through the back window, running through the streets until she

6. Although the name and details have been changed, this scenario is based on a true account, as related by a Senior Litigation Counsel at the U.S. Department of Justice.

sees a church. She runs inside and begs the church members to help her. They cannot understand her French, but when they tell her they will call the police to assist her, she begs them not to, thinking that she will be deported or jailed for entering with the false passport, as the family had always threatened. The church members call a domestic violence shelter which will take her for one night. On her second day at the shelter, when she hears the word “police” again, she begins shaking her head “no” and doesn’t stop shaking it even after the local police send someone to take a statement, asking her in English whether she would like to press charges against her assailant. The shelter lets her stay, but insists she see an attorney whom they sometimes work with, and that attorney calls her friend who does immigration work.

The following week, the immigration attorney, who had found someone to translate, realizes there is possibly a human trafficking situation, but thinks Beti is still too traumatized to speak about it to the police. The attorney finally finds a pro bono therapist to talk with Beti about how important it is to speak to the police. As soon as Beti agrees, the attorney calls the local FBI, who asks to speak to Beti directly. They meet with her five times for a total of seventeen hours over the course of a month, but think her story does not add up and, in any event, does not make a very good case for prosecution. The FBI thinks that the local U.S. Attorney cannot expend her precious resources on prosecuting this case above all of the others on her docket. Because they decline to prosecute it, the FBI will not issue a “pre-certification” letter or a “law enforcement certification” for Beti’s attorney to send along with her T visa application. The domestic violence shelter needs the bed that Beti has been occupying, and no one knows what to do with Beti.⁷

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

The law enforcement officers who rescued Alma were able to ensure that the U.S. Attorney’s office and eventually even the Department of Jus-

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

tice's own new Human Trafficking Prosecution Unit took note of and prosecuted the case. Because they believed her and believed in her, they worked closely with her, not only ensuring her emergency housing and services, but supplying her with the certification necessary to entitle her to longer-term shelter, food, job and language training, and, ultimately, the ability to apply for a T visa.⁸

Because the law enforcement officers who rescued Alma believed that she was a victim of human trafficking who deserved a much better life than the one from which they had personally rescued her, Alma is a healthy and happy young woman today. This was a successful case of which law enforcement and the U.S. government are justifiably proud.

But not every legitimate victim of human trafficking is or could possibly ever be rescued by law enforcement. In fact, very few are rescued. Estimates as to the number of persons trafficked into the United States each year have varied widely, but range between 17,500⁹ and 50,000¹⁰ new victims per year. As of 2008, there were seven prosecutors in the Human Trafficking Prosecution Unit, ninety-three U.S. Attorneys,¹¹ and thousands of ICE officers, whose primary responsibility is to look for, find and arrest undocumented immigrants. In the year 2007, as a point of reference, the DOJ's Human Trafficking Prosecution Unit, working with all of its U.S. Attorneys and their investigators combined, initiated 183 investigations, charged 89 defendants in 32 cases, and obtained 103 convictions involving human trafficking.¹²

If you put together the large number of victims estimated to enter the United States each year with the respectable, yet nevertheless small, number of prosecutors who have fewer still law enforcement officers working exclusively on human trafficking, it becomes easy to see that victims of human trafficking are not likely to be rescued. Nor, unfortunately, are they likely to have their particular case and story come to the attention of a federal prosecutor.

On this latter point, however, the system can be vastly improved in a number of ways. First, there is no reason that a victim of human trafficking who rescues him or herself should not be received and listened to with an

8. A T visa allows a victim of human trafficking to apply to remain in the United States if she has cooperated with law enforcement toward prosecuting her trafficker or is a minor, in which case she is exempt from the requirement that she cooperate.

9. DOJ REPORT, *supra* note 2, at 9. For a critique of the DOJ's methods and rationale for lowering the initial estimates, see Haynes, *supra* note 5, at 342.

10. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT JUNE 2002, 2 (2002), available at <http://www.state.gov/documents/organization/10815.pdf> [hereinafter individual annual reports will be referred to by their year, for example, 2002 DOS TIP REPORT].

11. U.S. Attorneys Mission Statement, available at <http://www.usdoj.gov/usao/index.html>.

12. Mark Kappelhoff, Chief, Criminal Section, U.S. Dep't of Justice, Keynote Address at the University of St. Thomas Law Journal Symposium: Human Trafficking: Global and National Responses to the Cries for Freedom (Sept. 25, 2008).

open ear and an open mind.¹³ In fact, if law enforcement officers and the U.S. government wish to improve their ability to assist victims of human trafficking and prosecute traffickers, then they need to considerably improve their willingness to receive potential victims of human trafficking and hear them out, while ensuring them and the community at large that they will not be arrested or deported. Second, in addition to failing to receive and hear potential victims who have not been rescued, some law enforcement officers seem to be making decisions not to support a potential victim because they believe that the victim's traffickers cannot be prosecuted, either because the case is too difficult, the evidence is too slim, or the priority is too low, given the prosecutor's other cases. But on this point, too, there is simply no justification for not certifying a potential victim.¹⁴ The potential victim should not be denied a modicum of victim services simply because resources may not be available to ultimately pursue the prosecution of the victim's traffickers. Victim protection is not contingent upon law enforcement actually choosing to prosecute her traffickers; it is only contingent upon the victim's willingness to cooperate with law enforcement. Those are two very different things.

The lack of capacity for federal investigations and prosecutions is creating a bottleneck, such that lower level federal attorneys and investigators are unwilling or unable to investigate cases, particularly those which may at first seem weak. Lack of capacity to prosecute alone, however, does not explain the unwillingness to move forward with investigating claims of potential trafficking victims. Instead, there is a lack of understanding about the law and what it means to have been trafficked, a lack of willingness to recognize and believe victims who were not rescued by law enforcement officers, and a basic lack of will to prioritize the protection of victims of human trafficking. The right to assess the strength of a case for prosecution belongs solely to the prosecutor, but in the case of human trafficking, law enforcement officers are wrongly pretermittting potential investigations. They prematurely decide that a case has too little evidence, that the likeli-

13. "I reported it [the trafficking] to the police but they didn't believe me, they wouldn't arrest them," (statement of human trafficking victim, later certified, about her unfavorable experience with police when she self-reported). "My status is just waiting for me to get an interview with the government—even to talk to local police it hasn't happened yet. Right now [agency] staff is trying to get an interview with local police and until that happens both of us don't know what to do with my case or legal status." THE URBAN INST., *COMPREHENSIVE SERVICES FOR SURVIVORS OF HUMAN TRAFFICKING: FINDINGS FROM CLIENTS IN THREE COMMUNITIES* 28 (2006), available at http://www.urban.org/UploadedPDF/411507_human_trafficking.pdf.

14. Certification is a process whereby a law enforcement official certifies to a victim services provider that the individual has been deemed by law enforcement to be a potential victim of human trafficking and therefore entitled to receive victim benefits, such as bed and shelter and medical care. Precertification is available when law enforcement are not yet certain, but think that the person might be a victim, however precertification also requires that a law enforcement official believes her to be a potential victim of human trafficking. Certification will be discussed further below.

hood of a successful prosecution is too slim, or that prosecutors will not be interested in the case. They then fail to assist the victim, wrongly acting as if the ability or willingness of a prosecutor to ultimately go forward with investigating or prosecuting a case is a precondition to listening to and then certifying the victim for victim protection services. This is not the case.

This unwillingness or inability of law enforcement to investigate results in a failure to hear or reach or follow up on the cases of human trafficking which, like Beti's case, were not initiated with a raid and rescue. Even assuming the U.S. government had the interest in, and was able to massively increase the number of prosecutors and law enforcement devoted exclusively to this horrific crime, such an increase would only scratch the surface of the estimated numbers of trafficked persons in the United States.¹⁵ Furthermore, the existing prosecutors and law enforcement are not fully utilizing the legal tools granted to them under the TVPA. Whether this is due to a lack of confidence or certainty about how to use the law, or because their perceptions of the "criminal actions" of the victim (being in the country illegally, using false documents, being illegally employed, being a sex worker—all crimes these same law enforcement officers are much more accustomed to prosecuting than to seeing as evidence of being a *victim* of human trafficking) are obscuring their willingness to apply the law, few of the victims the U.S. government believes are in the United States are rescued by law enforcement,¹⁶ and fewer still of their traffickers are prosecuted. Resources to prosecute more traffickers should be increased, but far more importantly, attitudes must be changed such that police and prosecutors see it as their duty to assist in placing victims with victim services providers, regardless of whether police and prosecutors are prepared to go forward with an investigation or a prosecution.

15. At 17,500 to 50,000 new victims per year there would be hundreds of thousands if not millions of victims. Even if half managed to escape their circumstances each year, over the course of one decade, there would still be 100,000 to 250,000 victims in the United States alone, according to the U.S. government's own statistics. It should be noted that the government estimates only include foreign victims of human trafficking, not U.S. citizens. If citizens were included, the estimated numbers would be in the hundreds of thousands. *See, e.g.,* Free the Slaves, available at <http://www.freetheslaves.net/NETCOMMUNITY/Page.aspx?pid=375&srcid=348> (providing an interactive map identifying victims of human trafficking in all fifty states and in ninety-one U.S. cities).

16. Haynes, *supra* note 5, at 347–72 (describing a survey of trafficking victim service providers) [hereinafter Survey]. I conducted a simple, nonempirical survey of trafficking victim advocates and service providers. The survey was designed to find out more about how victims actually come to be identified as such and by whom, and whether they are rescued and by whom. Four individual and eight organizational advocates responded, discussing experiences with twenty-nine trafficking victims. Only six victims were found by law enforcement; of those six, five were then arrested for criminal or immigration violations and jailed or detained, two by the FBI and three by local police. The remaining twenty-three were not rescued or found by law enforcement, but rather escaped their situations on their own and made their way to social services providers, domestic violence shelters, or trafficking victim advocates. *Id.* at n. 30.

Following, therefore, are two alternative solutions which the U.S. government and federal and state law enforcement should implement to fix the broken law enforcement procedures and protocols that have failed to properly protect victims of human trafficking.

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

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

If it is the goal of the U.S. government and of law enforcement to prosecute traffickers in human beings, how can they hope to accomplish that goal if Beti and people like her are forced to live on the streets? In this scenario, the directors of a domestic violence shelter stretched their mandate to accommodate Beti, housing her for a few days, even while other well-funded shelters and programs exist solely for the purpose of assisting victims of human trafficking. The only way those federally funded shelters admit victims, however, is if they receive a certification from law enforcement telling them that the person is being considered a potential victim of human trafficking. Without that certification, there is no place for the victim to go. How many victims of human trafficking never even make their way to speak to police and tell them their story because they have no safe place to stay for even one night? How many opportunities to prosecute have been missed because a federal law enforcement officer does not have the time or interest to sit with a traumatized victim and wait for her to tell her story?¹⁷ How many law enforcement officers, actually trained in interviewing victims of trauma, do not apply that training to people like Beti, because they already doubt their story from the first time they meet them, and choose to

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

see them, instead, as illegal immigrants? How many potential victims are not heard or protected because federal law enforcement decided early on that it could not commit resources to prosecuting the case?¹⁸ These questions should be viewed less as a critique and more as a call to arms by law enforcement to assist more victims by altering its perception of who a victim is or is not.

1. *The Decision to Investigate an Allegation of Human Trafficking Should Not Be Dependent upon Law Enforcement's Assessment as to the Ultimate Success of the Prosecution*

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

Two different agencies estimate the number of persons trafficked into the United States each year to be between 17,500 and 50,000.¹⁹ Yet, the current total of victims receiving certification as of March 2007 was 1,175,²⁰ and the current total of victims receiving T visas was 729.²¹ At the very least, these low victim certification and T visa grant figures, as compared to the total numbers of estimated victims entering the United States, tend to suggest that more victims exist and could be found if law enforcement listened with an open mind when victims or their advocates approach law enforcement. Additionally, the statistics suggest that there is little risk of being overinclusive (certifying a potential victim so that she can receive a bed for the night and later determining that she is not a victim), as the total number of T visas granted has not even come close to the yearly cap of five thousand specified in the TVPA.²² While DOJ states that “self-report-

18. The prosecutors in Alma's case, for instance, flew to Egypt to interview her family and to speak with local authorities. This type of expense might be possible for the high-level DOJ unit devoted to securing prosecutions of human traffickers, but would not ordinarily be possible.

19. Compare DOJ REPORT, *supra* note 2, with 2002 DOS TIP REPORT, *supra* note 10.

20. Kappelhoff, *supra* note 12.

21. *Id.*

22. Trafficking Victims Protection Act, Pub. L. No. 106-386, § 107(e)(2)(B) (amending Immigration and Nationality Act, 8 U.S.C. § 1184(o)(2) (2000)).

ing is rare,"²³ which may be true in the grand scheme of things (certainly the 17,500 to 50,000 alleged by DOJ to be entering the United States each year are not reporting each year that they are victims), it is not unheard of. In fact, the research carried out by this author would establish that, while indeed rare, self-reporting occurs with much greater frequency than do rescues.²⁴ The problem is that those who self-report are not believed or are themselves arrested, or both. They do not count in the eyes of law enforcement.

2. *The Department of Homeland Security Must Stop Considering as Legitimate Only Those Applications for T Visas that Are Accompanied by a Law Enforcement Certification*

Victims of human trafficking apply for T visas in order to secure assistance in recovering from their abusive situation. A successful T visa ultimately allows a victim of human trafficking to remain in the United States and become a permanent resident. If an applicant for a T visa has a letter from a police officer indicating the extent to which she cooperated with law enforcement or aspects of the investigation which have been verified, these letters can provide useful evidence in support of a T visa applicant. However, such letters are not required by law for a T visa to be granted. The Department of Homeland Security's Vermont Service Center (VSC) Unit, tasked with adjudicating T visa applications, admits that law enforcement does not always get the law right. Nevertheless, the VSC still regularly grants T visas more often when they are accompanied by letters of support or certification from a police officer.²⁵

Although not strictly required for the granting of a T visa, at present such a letter is necessary for the pre-designated agencies which receive federal funding to provide victims of human trafficking a bed for a night or for several nights. It may seem like a small thing, but without a bed for a night, the legitimate human trafficking victim, like Beti, who manages somehow to escape her horrific situation, will never be assisted by law enforcement, will never be heard, and her traffickers will never be prosecuted. In fact, she becomes highly at risk for re-trafficking. There is no rationale or justification for this, and there is no excuse for this unnecessary limitation.

23. Kappelhoff, *supra* note 12 (meaning that the DOJ contends that "real victims" rarely come forward to police on their own).

24. See Haynes, *supra* note 5, at 347-72 (discussing a survey of trafficking victim service providers). While it may be indeed rare for victims to self-report, they self-report far more often than they are rescued. Yet a significant number of those who self-report are then arrested or not believed by law enforcement when they tell their trafficking story, or both.

25. *Id.*

D. *Need State Laws with Teeth*

If victim protection is stymied by a lack of resources or interest at the federal level, then one obvious solution is to create state anti-trafficking laws, which is what many states are doing. Frustrated by waiting for federal law enforcement to act, state legislators, pushed by state law enforcement, state victim protection advocates, and state-level human trafficking task forces, are drafting and, on occasion, passing state laws. The most important impact of these laws would be to allow potential victims of human trafficking to be heard and cared for, even if federal law enforcement is unable or unwilling to certify them.

Currently, thirty-nine states have anti-trafficking criminal provisions.²⁶ Eighteen states have included victim protection provisions in their state anti-trafficking legislation.²⁷ The potential impact of these laws is enormous. If, for instance, Beti could not convince the FBI to listen to, believe, or take the time to investigate her story and initiate a prosecution, Beti could still attempt to speak with a victim's advocate in her local police department, who could certify that she is willing to cooperate with law enforcement officials, such that she would be able to receive a bed for the night. Furthermore, local law enforcement might have more resources to devote to listening to her story and investigating further. In any case, Beti would be in a position to recover and continue to work with her attorney to apply for a T visa and determine how to proceed. Nevertheless, the ability of local law enforcement to use state law will only benefit victims like Beti, for instance, if state law enforcement feels that it is its duty to ensure that she receives victim protection, regardless of whether the state prosecutor ultimately decides to prosecute her trafficker. State-based laws alone will not increase the likelihood that a victim of trafficking will be heard or believed by law enforcement. They will only increase the tools available to law enforcement should federal prosecutors have too little capacity or interest in a case to prosecute it.

The federal government clearly recognizes the limitations of dealing with human trafficking from the top down. In the 2005 TVPA Reauthorization Act, Congress authorized \$25 million per year in grants for state and local law enforcement to prosecute traffickers and educate users of traf-

26. POLARIS PROJECT, U.S. POLICY ALERT ON HUMAN TRAFFICKING: SUMMARY OF U.S. POLICY ACTIVITY – JUNE 2008, 1 (2008), available at <http://www.polarisproject.org/images/docs/alerts/policy%20alert%20final%20june%202008.pdf>.

27. POLARIS PROJECT, U.S. POLICY ALERT ON HUMAN TRAFFICKING: GRAPHICAL MAP SNAPSHOT – JUNE 2008 (2008), available at <http://www.polarisproject.org/images/docs/alerts/policy%20alert%20map%20final%20june%202008.pdf> (indicating that the states are California (pending), Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Massachusetts (pending), Michigan (pending), Minnesota, New Jersey, New Mexico, New York, Ohio (pending), Oklahoma, Oregon, Texas, and Washington).

ficked persons for commercial sex acts (“johns”).²⁸ For the state laws to be effective and useful, however, local and state law enforcement, just like federal law enforcement and the federal agencies tasked with carrying out the TVPA, must be encouraged to use the laws, and to open their eyes and their minds in order to actually recognize and protect victims with whom they cross paths, whether they have personally rescued them or not.

II. THE VICTIM PROTECTION FUNDING MECHANISM LIMITS SHELTER ACCESS AND STYMIES VICTIM PROTECTION

Funding for victim protection, according to the TVPA, starts with the victim’s “willingness to cooperate with law enforcement.” Nevertheless, the reality is that often victim assistance starts instead with law enforcement’s paper recognition of that willingness. Or even more inappropriately, as discussed above, with the law enforcement officer’s decision to believe the victim and pursue an investigation. Law enforcement officers are being unduly restrictive in carrying out their obligations under the law in regards to certification.

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

A person is considered eligible for precertification when “they have been identified by federal law enforcement as having been a victim of a severe form of human trafficking.”²⁹ In other words, you are a victim, even for the purposes of precertification, only when law enforcement identifies you as such. The NGOs providing services are only reimbursed by either federal grant program if they are providing services to someone who has been either precertified or certified as a victim of human trafficking. All of which is to say that the creation of the newer DOJ fund did nothing to help people like Beti who have not been rescued, and who have not been able to

28. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 204, 119 Stat. 3558 (2006), 42 U.S.C. § 14044(c) (2006).

29. Office for Victims of Crime Services for Trafficking Victims, Discretionary Grant Application Kit 2004, available at <http://www.ojp.usdoj.gov/ovc/fund/pdftxt/2004trafficking.pdf>.

get law enforcement to listen to or believe them yet (or ever), but who may very well still be victims of human trafficking.

Though it is laudable that Congress provided funding toward victim protection services, it was an error to limit funding to the NGOs that provide shelter to those in either the precertification or certification phase. The reason is that both precertification and certification come from government officials who continue to informally exclude those who have not been rescued, who have not yet come to the attention of those officials, or whom those officials do not believe.

Additionally, the funding is doled out with a multitude of conditions and strings attached, most having to do with the likelihood that someone predetermined—by DHS through ICE or by DOJ through FBI law enforcement—to be a victim will then be cared for while information is gathered which might be useful towards prosecution.³⁰ The DOJ narrowly defines the type of victim on whom this funding may be used (one certified by law enforcement), and the ripple effects of this limitation are far-reaching. There are few, if any, NGOs able to assist victims outside of the parameters of DOJ funding; they cannot hire advocates and service providers because there are no funds to assist them. NGOs lack funding independent of these federal grants for work that is costly: providing shelter and legal, medical, language, and job training services to victims. The result is that only a very narrow group of trafficking victims is reached: those initially identified and then referred by the federal government. The beds, medical care, and legal advocacy available are reserved for those the DOJ has already decided are victims, and only these “precertified” victims are, as a practical matter, then in a position to apply to DHS for immigration-related victim benefits.

At present, the U.S. Department of Health and Human Services governs the majority of federal funding to shelters prepared to offer assistance to victims of human trafficking. The rationale behind this funding structure was that this division within the federal government already controlled the funding for refugee resettlement services, and the needs of both refugees and victims of human trafficking would be similar (housing, medical and psychological assistance [particularly for victims of trauma], and language and job training to name a few).³¹ The DOJ also initiated a victim services

30. Another condition is that the NGO in receipt of funds not work with prostitutes. See Haynes, *supra* note 5, for more on conditions attached to funding. See also Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2005–2006) (describing the “Gag Rule” restricting funding to prostitution abolitionists).

31. In fact, the Office of Refugee Resettlement within HHS conducts trainings for agencies already in receipt of refugee assistance funds to deal with victims of human trafficking. See Remarks by Eric D. Hargan, Acting Deputy Secretary of Health and Human Services (Apr. 19, 2007), available at <http://www.hhs.gov/deputysecretary/depsecspeeches/070419.html>.

grant program geared toward securing witness testimony to prosecute traffickers, discussed above.³²

The present funding structure might be more reasonable if the DOJ were especially skilled at or well situated to recognize victims of trafficking, even if it could not increase the number of raids that are carried out for the purpose of finding victims of human trafficking. The agency, however, is not, in spite of the fact that the DOJ considers itself to be taking a “victim-centered approach” to its prosecutions,³³ “reflect[ing] the understanding that the mission of government is to remove victims from the abusive setting, place them into safe programs of restorative care, and hold the perpetrators accountable.”³⁴ The vast majority of victims are not found and rescued by federal law enforcement.³⁵ This narrow DOJ policy of providing funding for services for law enforcement-certified victims and the HHS policy of funding agencies who work with resettled refugees has led to an unanticipated travesty not supported under the TVPA. No one is funded or encouraged to work with noncertified victims, even though they may well be “real” victims of human trafficking who have not yet been heard or believed by law enforcement.

In other words, unless a victim is found by ICE or the FBI, and is referred to an NGO which receives funding from DOJ (or HHS), that victim is unlikely ever to receive legal or social services assistance. Despite the fact that ICE had conducted workplace raids resulting in the arrest and deportation of thousands of “illegal immigrants,” they are not effectively screened or questioned about whether they might also be victims of human trafficking.³⁶ In fact, that person is unlikely ever to surface. We will simply never know about her. If it is in the national interest to protect victims of trafficking, the DOJ cannot act as if the only victims of human trafficking are those who happen to be found and rescued by federal law enforcement officers.

III. THE CONFLATION OF HUMAN TRAFFICKING WITH OTHER LAW ENFORCEMENT AGENDAS STYMIES VICTIM PROTECTION

The title of the Trafficking Victims Protection Act suggests that its primary purpose is to protect victims of human trafficking. The more accurate ranking of priorities, however, is revealed in section 102 of the Act, describing Congress’s purposes: (1) combating trafficking; (2) ensuring just

32. The DOJ grant is administered through its Office for Victims of Crime. See Office for Victims of Crime, Trafficking in Persons, available at <http://www.ojp.usdoj.gov/ovc/help/tip.htm>.

33. DOJ REPORT, *supra* note 2, at 12.

34. *Id.*

35. See Haynes, *supra* note 5 (discussing the survey referenced in footnotes 16 and 24).

36. See Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, NOTRE DAME J.L. ETHICS & PUB. POL’Y (forthcoming 2009).

and effective punishment of traffickers; and (3) protecting victims.³⁷ While the appeal in passing such an act may have arisen from the benevolent desire to protect victims from harm, the emphasis of the Act is squarely on prosecuting the crime, and no less than four executive branch agencies have been tasked with fulfilling that mission.

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

Trafficking victims found in the United States are still too often treated like criminals by those charged with protecting them. In large part, this is because the United States also prioritizes border control, and the same parties charged with controlling entry into the United States are tasked with identifying victims of human trafficking, who are very often, although not always, undocumented or fraudulently documented. Victims of human trafficking are all too often charged for immigration-related offenses, deported at the borders for attempting to enter with documents traffickers have foisted upon them, arrested and detained by the Department of Homeland Security (DHS), and prosecuted by Department of Justice (DOJ) attorneys. DHS inspection officers fail to observe that they are questioning victims of human trafficking, even when clear signals are given by victims in fear of their lives.³⁸ Victims are held in detention for months and sometimes years by the DHS at considerable taxpayer expense, and judges are unclear why trafficking is a human rights offense tantamount to slavery.³⁹ In short, government personnel charged with protecting victims of human trafficking and prosecuting their traffickers, particularly outside of task forces headquartered in Washington, D.C., have little or no understanding of the obligations the nation undertook in passing the TVPA, and, in consequence, U.S. personnel are working contrary to the purposes of the Act. A large part

37. Trafficking Victims Protection Act § 102(a), 22 U.S.C. § 7101(a) (2006).

38. See, e.g., Haynes, *supra* note 5, at 338 (providing transcripts of “Ahn’s” first arrival in the United States as a victim of human trafficking).

39. *Id.* at 354 (describing the Immigration Judge’s response).

of the problem is that those persons most likely to encounter a trafficking victim, the same persons charged with protecting her, are also charged with deporting undocumented persons, arresting prostitutes, and detaining and charging those working without authorization.

Prosecutors and law enforcement must be encouraged to entertain the notion that one can simultaneously be a victim of human trafficking and an offender (for example, an illegal immigrant, a prostitute, a person working without authorization). Better yet, prosecutors can and should exercise their prosecutorial discretion and elect not to prosecute an individual for, e.g., “misuse of a passport,”⁴⁰ particularly when the prosecutor knows that the fraudulent passport was given to the victim by her traffickers. Traffickers know how to manipulate and control their victims—through legal intimidation, taking travel documents, forcing them to break the law, threatening to report their activity, and so forth. At present, prosecutors and law enforcement are providing the traffickers with even more power and control over their victims by doing precisely what the traffickers threaten they will do—arresting and deporting them.

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

IV. THE FEAR OF OPENING THE FLOODGATES TO ILLEGAL IMMIGRATION STYMIES VICTIM PROTECTION

Much of the lack of implementation and the distortion of the TVPA could be ascribed to the unspoken but palpably omnipresent fear of opening the floodgates to the expected hordes of immigrants. After all, as one journalist queried, “if the law allows a victim to become a citizen, won’t everyone try to become a victim?”⁴¹ The answer is no; they are very unlikely to do so. Not only will few to no people willingly put themselves into the trafficking flow or present themselves to be violated in hopes of securing immigration status somewhere down the road, but even if that was their

40. *See id.* at 353 (detailing “Ahn’s” alleged “misuse of a passport”).

41. Telephone interview with journalist (2005) (discussing the nature of T visas).

goal, it is exceptionally unlikely that they would be successful.⁴² After all, more than five years after the TVPA had entered into force in the United States, fewer than 491 T visas had been granted in total,⁴³ even while the U.S. government projects that 17,500 to 50,000 new victims of trafficking enter the United States each year.⁴⁴

Congress already had a fear of floodgates in mind when they capped the number of T visas that could be granted each year at five thousand.⁴⁵ From the statistics issued for 2005, it appears that less than six hundred applications for T visas were even received, and each year roughly half of those applications are denied.⁴⁶ To honor the intent of Congress and the Executive Branch in passing the TVPA, we should be asking how to reach more potential victims in order to secure their protection, health, and safety, and to let them know that the T visa option even exists, rather than operating from an unsupportable concern about floodgates opening to admit too many people.

Furthermore, declining to look carefully in order to properly identify and protect victims of trafficking for fear of being overinclusive and mistakenly offering benefits to someone who is really “just” a smuggled person or an illegal immigrant is the wrong approach. Researchers, more comfortable with looking at the trafficking issue as one part of a larger whole that involves migration and exploitation of labor, attest that “[v]iolence, confinement, coercion, deception and exploitation can and do occur within both regular and irregular systems of migration and employment [A]buses can vary in severity and thereby generate a continuum of experiences rather than a simple either/or dichotomy”⁴⁷

Shying away from recognizing a victim of human trafficking for fear of granting a benefit to someone who was not abused or exploited *enough*, or insisting on haggling over the often quite fine distinctions between smug-

42. Nor has it been established that most people in the world would opt to live in the United States if given the opportunity.

43. Alexandra Webber & David Shirk, *Hidden Victims: Evaluating Protections for Undocumented Victims of Human Trafficking*, IMMIGR. POL'Y FOCUS, Dec. 2005, at 1, 7, available at <http://www.caimmigrant.org/repository/?cat=26> (follow “Hidden Victims: Evaluating Protections for Undocumented Victims of Human Trafficking” hyperlink). In 2004, for instance, DHS received only 520 applications and denied 292 of them. It is difficult to ascertain why applications are denied, but in a survey conducted by this author, applications were denied most often for lack of a letter of corroboration from law enforcement, even though letters of certification are not required for T visa approval. Applications were also denied for failure of proof. For more on this, see Haynes, *supra* note 5, at 343–54.

44. Compare DOJ REPORT, *supra* note 2, at 1, and 2003 DOS TIP REPORT 7, available at <http://www.state.gov/documents/organization/21555.pdf>, and 2004 DOS TIP REPORT 6, available at <http://www.state.gov/documents/organization/34158.pdf>, and 2005 DOS TIP REPORT 6, available at <http://www.state.gov/documents/organization/47255.pdf>, with DOJ REPORT, *supra* note 2, at 9.

45. Trafficking Victims Protection Act, 22 U.S.C. § 7105(e)(2)(B)(2) (2000).

46. 2005 DOS TIP REPORT, *supra* note 44, at 243; see also Haynes, *supra* note 5, at 364.

47. B. Anderson & J. O'Connell Davidson, Address in Stockholm, Swed. (2004).

gling and trafficking, only does a disservice to the population in need—that is, people exploited during the migration process.

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

CONCLUSION

With each new Reauthorization of the TVPA, Congress and the U.S. government have another opportunity to get it right. They seem, however, not to be fully embracing that opportunity. While making some positive suggestions, such as proposing that persons under eighteen years of age be given immediate assistance without the prerequisite of law enforcement cooperation, the 2008 Reauthorization loses focus, and like the others before it, distorts the goal of protecting victims. Instead, it emphasizes tangential objectives such as protecting U.S. business interests. For instance, while acknowledging that U.S. businesses might be engaged in labor exploitation, which was a bold acknowledgement, to be sure, Congress nevertheless ultimately characterizes the problem as a contractual consent issue.

Middlemen have for years been notorious for engaging foreign laborers for employment in the United States, but then holding them in debt peonage until the costs associated with bringing them to the United States and securing jobs for them are repaid.⁴⁸ The 2008 Reauthorization lays the blame solely on foreign recruiters who mislead workers about the nature of their employment. Instead of making labor exploitation the issue and criminalizing that behavior, the 2008 Reauthorization amends chapter 63 of title 18 of the United States Code⁴⁹ as follows:

Whoever knowingly and with intent to defraud recruits, solicits or hires a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both.⁵⁰

48. See Haynes, *supra* note 36, for a discussion of the problem.

49. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5067–5070, 22 U.S.C.A. §§ 7101–7112 (Supp. 2009).

50. Fraud in Foreign Labor Contracting, 18 U.S.C. § 1351 (Supp. 2008).

It goes on to require that the laborers formally contract with their employers.

The provision does not prohibit the practice of “foreign labor contracting” itself; rather, it criminalizes those recruiters who tap a worker outside of the United States “by means of materially false or fraudulent pretenses.” This may fail to address the real problem. First, read in conjunction with sections (b)(4)(E) and (F) of the 2008 Reauthorization, the laws require the workers to be informed of the parameters of the contract. They do not require either the employer or the recruiter to refrain from offering exploitative contracts in the first place. Nor do the provisions correct the problem of U.S.-based recruiter companies, those sanctioned by the Department of Labor, that “blacklist” employees who attempt to organize or access their rights. The Department of Labor, unfortunately, has a long history of registering labor contractors, foreign and domestic, who use punishment, blacklisting, and threats to keep noncitizen laborers docile and in check. This new recognition of labor exploitation promises much. Ultimately, however, it will likely deliver little, unless there is an accompanying sea change in attitudes about the purpose of the law—to protect all people from severe exploitation.⁵¹

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

51. See Haynes, *supra* note 36, for a discussion of the problems with this draft bill.