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10-2009

# ON THE ROAD TO VICTORY IN AMERICA'S WAR ON HUMAN TRAFFICKING: LANDMARKS, LANDMINES, AND THE NEED FOR CENTRALIZED STRATEGY

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Payne, Valerie, "ON THE ROAD TO VICTORY IN AMERICA'S WAR ON HUMAN TRAFFICKING: LANDMARKS, LANDMINES, AND THE NEED FOR CENTRALIZED STRATEGY" (2009). *First Annual Interdisciplinary Conference on Human Trafficking, 2009*. 10.

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## ON THE ROAD TO VICTORY IN AMERICA'S WAR ON HUMAN TRAFFICKING: LANDMARKS, LANDMINES, AND THE NEED FOR CENTRALIZED STRATEGY

America is at war. Declared by the Clinton Administration in the late 1990s, then prioritized by the Bush Administration, the “war” on human trafficking represents America’s struggle to eradicate the phenomenon of modern-day slavery within its borders.<sup>1</sup> An army of legislators, law enforcement agents, and everyday abolitionists fight on legal, social, and political battlefields to liberate the hidden victims who suffer in bondage. The recent enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008<sup>2</sup> (“2008 TVPRA”), heralds significant victories in the battles to achieve better victim protection and increase prosecution of traffickers. But even as legislative battles are conquered, others continue to develop. The war suffers from incohesiveness, a lack of direction, and political discord. These problems point to a missing tactical element that is critical to the war’s ultimate success—a strategic framework that is both centralized and comprehensive. This Note proposes that publication of an annual United States Trafficking in Persons Strategy (“U.S. TIPS”), aptly directed by the nation’s Commander-in-Chief, could help solve these problems by establishing a well-defined mission, uniting all “soldiers” under a common purpose, and providing a means by which to measure progress toward a specified timeline of goals. In 2009, the task falls on the Obama Administration to pick up the war on trafficking where his predecessors left off: our newest President must provide the leadership necessary to rally the troops, cast a vision, and finish the fight.

This Note tracks the development of the war on human trafficking in America through the 2008 TVPRA and identifies emerging red flags that signal the need for a strategic framework. Part I explains the nature of human trafficking as a criminal enterprise and the context of

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<sup>1</sup> Human trafficking is a crisis that rages in countries throughout the world. In its broadest sense, the “war” on human trafficking, exists at a global level, but it can be dissected and evaluated on regional, national, or even state levels. Though much scholarship is dedicated to assessment of the war on human trafficking at the global level, the scope of this Note encompasses only the legal efforts to address human trafficking within American borders.

<sup>2</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I–III, 122 Stat. 5044, 5044–87 (to be codified in scattered sections of 6, 8, 18, 22, 28, and 42 U.S.C.), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ457.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ457.110.pdf). The bill passed in the House and Senate on December 10, 2008, and President George W. Bush signed it into law on December 23, 2008. *See* LIBRARY OF CONGRESS, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR07311:@@L&summ2=m&> (last visited May 10, 2009) (providing legislative history) [hereinafter TVPRA of 2008 Legislative History].

America's first anti-trafficking legislation, the Victims of Trafficking and Violence Protection Act of 2000<sup>3</sup> ("TVPA"). Part II addresses some of the critiques, obstacles, and pitfalls experienced in the early years of the TVPA's implementation. Part III acknowledges the impressive legislative strides that mended gaps identified in earlier legislation, focusing largely on the 2008 TVPRA amendments. Part IV illuminates the need for a strategic framework by addressing several potential landmines in the political battleground, where ongoing debate over the scope of trafficking, the effect of prostitution, and the role of competing agencies threatens to impede anti-trafficking efforts. Part V proposes an annually published U.S. TIPS as a means for the President to implement a centralized and comprehensive strategic framework that would define the parameters of human trafficking; establish the roles of concerned departments, agencies, and nongovernmental organizations ("NGOs"); position future goals in an aspirational timeline; measure progress on a state-by-state and national basis; and provide a centrally recognized document to report synthesized updates of ongoing research results.

#### I. HOW IT ALL BEGAN: THE HUMAN TRAFFICKING BATTLEGROUND IN AMERICAN BACKYARDS AND THE ENACTMENT OF THE TVPA

Despite increasing awareness about human trafficking, many—if not most—Americans would be shocked to know that slavery still exists, even in their own backyard. Known today as human trafficking, this phenomenon has become a "criminal enterprise involving both local scoundrels and sophisticated international syndicates" that generates billions of dollars each year.<sup>4</sup> Notably, "human trafficking is tied with the illegal arms industry as the second largest criminal industry in the world today [after drug dealing], and it is the fastest growing."<sup>5</sup> Under

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<sup>3</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1464–91 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

<sup>4</sup> DAVID BATSTONE, NOT FOR SALE: THE RETURN OF THE GLOBAL SLAVE TRADE—AND HOW WE CAN FIGHT IT 5 (2007). Some debate exists over the economic magnitude of the enterprise: "The Federal Bureau of Investigation (FBI) projects that the slave trade generates \$9.5 billion in revenue each year." *Id.* at 3–4 (citing U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 14 (2004) [hereinafter TIP REPORT 2004], available at <http://www.state.gov/documents/organization/34158.pdf>). "The International Labour Office (ILO) estimates that figure to be closer to a whopping \$32 billion annually." *Id.* at 4 (citing INT'L LABOUR OFFICE, A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 2005, at 55 (2005), available at [http://www.diversite.be/diversiteit/files/File/MH\\_TEH/documentatie/DECLARATIONWEB.pdf](http://www.diversite.be/diversiteit/files/File/MH_TEH/documentatie/DECLARATIONWEB.pdf)).

<sup>5</sup> ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., FACT SHEET: HUMAN TRAFFICKING, [http://www.acf.hhs.gov/trafficking/about/fact\\_human.html](http://www.acf.hhs.gov/trafficking/about/fact_human.html) (last visited May 10, 2009); see also TVPA, 22 U.S.C. § 7101(b)(8) (2006) ("Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. . . .

this modern day form of slavery, humans (predominantly women and children<sup>6</sup>) are lured by false promises of valid employment, traded and sold like commodities, and then forced into labor or sexually exploited.<sup>7</sup>

Recognizing the danger of this growing criminal enterprise, President Clinton issued a directive in March 1998 that formally condemned trafficking in women and girls as a “fundamental human rights violation.”<sup>8</sup> The directive established the familiar “3-P” prerogative—“a U.S. government-wide anti-trafficking strategy of (1) prevention, (2) protection and support for victims, and (3) prosecution of traffickers.”<sup>9</sup> In effect, the directive also served as the initial battle cry that declared America’s war on human trafficking.

The Clinton Administration’s call for prosecution of traffickers led to the swift enactment of the TVPA,<sup>10</sup> a landmark federal act that enjoyed overwhelming bipartisan support<sup>11</sup> as the first set of laws to criminalize sex and labor trafficking in America.<sup>12</sup> The TVPA not only

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Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law.”)

<sup>6</sup> The 2008 Trafficking in Persons Report, an annual authority published by the U.S. Department of State that monitors human trafficking worldwide, estimates that “80 percent of transnational victims are women and girls and up to 50 percent are minors.” U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2008) [hereinafter TIP REPORT 2008], available at <http://www.state.gov/documents/organization/105501.pdf>. These figures “do not include [the] millions . . . trafficked within their own national borders.” *Id.*

<sup>7</sup> TVPA, 22 U.S.C. § 7101(b)(2)–(3).

Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.

*Id.* § 7101(b)(4).

<sup>8</sup> Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, 34 WEEKLY COMP. PRES. DOC. 412, 412 (Mar. 11, 1998) [hereinafter Clinton Memorandum].

<sup>9</sup> CLARE RIBANDO SEELKE & ALISON SISKIN, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 38 (Cong. Research Serv., CRS Report for Congress Order Code RL 34317, Aug. 14 2008) [hereinafter CRS Report], available at <http://www.fas.org/sgp/crs/misc/RL34317.pdf>; Clinton Memorandum, *supra* note 8, at 412–13.

<sup>10</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1464–91 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

<sup>11</sup> “On October 6, 2000, the report resoundingly passed in the House by a vote of 371 to 1, despite the fact that it had been packaged with some unrelated measures that members found annoying. On October 11, the Senate voted 95 to 0 to . . . approv[e] the trafficking bill.” ANTHONY M. DE STEFANO, THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED 44 (2007).

<sup>12</sup> The TVPA enacted four new crimes specifically related to human trafficking: forced labor; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor; sex trafficking of children or by force, fraud or coercion; and unlawful conduct with

provided the ammunition the United States Department of Justice (“DOJ”) needed to prosecute human trafficking cases,<sup>13</sup> it answered the President’s call for victim protection by providing much needed assistance and immigration benefits such as the T visa.<sup>14</sup> Groundbreaking in its comprehensive tri-fold purpose of prosecution, protection, and prevention,<sup>15</sup> the TVPA set a firm national tone of intolerance for the crime of human trafficking and quickly became a model for other nations and states to follow.

The bad news? Countless instances of slavery still occur each day in America, often hidden in plain sight.<sup>16</sup> Though numbers are difficult to

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respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor. Victims of Trafficking and Violence Protection Act of 2000 sec. 112, §§ 1589–1592, 114 Stat. at 1486–88 (codified as amended at 18 U.S.C. §§ 1589–1592 (2006)). The Act also established a mandatory restitution provision. *Id.* sec. 112, § 1593, 114 Stat. at 1488 (codified at 18 U.S.C. § 1593 (2006)).

<sup>13</sup> Until this bill was signed into effect by President Clinton on October 28, 2000, federal convictions of this unique and heinous crime were difficult to prosecute to an appropriate level of punishment because “trafficking as a particular immigration crime was not defined or penalized as a separate offense,” and U.S. peonage laws from the 1880s were the closest analogous laws on the books. *See* DESTEFANO, *supra* note 11, at xvi, xix.

<sup>14</sup> *See generally* Victims of Trafficking and Violence Protection Act of 2000 sec. 107, 114 Stat. at 1474–80 (codified as amended at 22 U.S.C. § 7105 (2006)) (titled “Protection and Assistance for Victims of Trafficking”). Notably, the TVPA granted victims of severe forms of trafficking federal and state benefits “to the same extent as . . . a refugee” under immigration law. *Id.* sec.107(b)(1)(A) (codified as amended at 22 U.S.C. § 7105(b)(1)(A)). These benefits were to be extended “without regard to the immigration status of such victims.” *Id.* sec. 107(b)(1)(B) (codified as amended at 22 U.S.C. § 7105(b)(1)(B)). The TVPA also bestowed certain protections for victims in government custody concerning adequate facilities, safety, access to medical care, and information regarding their legal rights. *Id.* sec. 107(c)(1) (codified as amended at 22 U.S.C. § 7105(c)(1)). As discussed further in Parts II and III, the TVPA created the T visa category, which granted important immigration benefits to certain victims by granting temporary legal status to remain in the United States, thus protecting them from removal proceedings. *Id.* sec.107(e)(1) (codified as amended at 8 U.S.C. § 1101(a)(15) (2006)); *see infra* Parts II, III. Most of these benefits are predicated upon certification that the victim suffers or suffered from “a severe form of trafficking in persons, as defined in section 103[(8)].” *Id.* sec. 107(e)(1)(C) (codified as amended at 8 U.S.C. § 1101(a)(15)(T)).

<sup>15</sup> 22 U.S.C. § 7101(a) (“The purposes of this chapter are to combat trafficking in persons, . . . to ensure just and effective punishment of traffickers, and to protect their victims.”).

<sup>16</sup> “That’s the paradox: slavery is in reality not invisible. Except in rare circumstances, slaves toil in the public eye. The truth is we do not expect to find it in ‘respectable’ settings.” BATSTONE, *supra* note 4, at 7. At any given time, “20, or 50, or 100 victims could be locked behind the walls of an otherwise nondescript building, working for pennies and hoping for freedom—any kind of relief from their hard, forced labor.” Alberto R. Gonzales, U.S. Att’y Gen., Prepared Remarks at the 2006 National Conference on Human Trafficking (Oct. 3, 2006), *available at* [http://www.usdoj.gov/archive/ag/speeches/2006/ag\\_speech\\_061003.html](http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_061003.html).

calculate,<sup>17</sup> the U.S. government initially projected that of the estimated millions of persons trafficked worldwide for labor or sexual services,<sup>18</sup> about 50,000 crossed into the United States each year.<sup>19</sup> The circumstances surrounding these victims are varied—some are psychologically bound to pimps, some are physically forced into cheap manual labor, and some are threatened into domestic servitude.<sup>20</sup> But all victims share this in common: their profiting traffickers are desperate to keep their real stories hidden and employ coercive means to do so.<sup>21</sup> To further complicate the problem, many local law enforcement and immigration officials do not yet possess the training to recognize a victim of human trafficking when they encounter one.<sup>22</sup> All too frequently, victims are convicted of crimes associated with trafficking rather than the actual culprits—the traffickers themselves.<sup>23</sup>

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<sup>17</sup> The DOJ has acknowledged that “[t]he difficulty of developing accurate estimates reflects the challenges of quantifying the extent of victimization in a crime whose perpetrators go to great lengths to keep it hidden and whose victims are reluctant to self-identify for fear of being treated as criminals or illegal aliens . . .” U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2007, at 29 (2008) [hereinafter AG ANN. REP.], available at <http://www.usdoj.gov/ag/annualreports/tr2007/agreporthumantrafficking2007.pdf>.

<sup>18</sup> “A wide range of estimates exists on the scope and magnitude of modern-day slavery”—ranging “from 4 million to 27 million” at any given time. TIP REPORT 2008, *supra* note 6, at 7.

<sup>19</sup> As of 2004, the government reduced this estimate to 14,500 to 17,500 per year, while admitting that an accurate estimate is nearly impossible to obtain due to the hidden nature of the crime. TIP REPORT 2004, *supra* note 4, at 23. For a fuller discussion of statistics on the scope of trafficking in the United States and their potential for inaccuracy, see *infra* note 36 and accompanying text.

<sup>20</sup> A concurrent House Resolution on March 27, 2007, “[s]upporting the goals and ideals of observing the National Day of Human Trafficking Awareness each year” acknowledged that

human traffickers use many physical and psychological techniques to control their victims, including the use of violence or threats of violence against the victim or the victim’s family, isolation from the public, isolation from the victim’s family and religious or ethnic communities, language and cultural barriers, shame, control of the victim’s possessions, confiscation of passports and other identification documents, and threats of arrest, deportation, or imprisonment if the victim attempts to reach out for assistance or leave.

H.R. Con. Res. 102, 110th Cong. (2007).

<sup>21</sup> See TIP REPORT 2008, *supra* note 6, at 7. “The common denominator of trafficking scenarios is the use of force, fraud, or coercion to exploit a person for profit. . . . The use of force or coercion can be direct and violent or psychological.” *Id.*

<sup>22</sup> See *infra* Part II.A.1.

<sup>23</sup> See 22 U.S.C. § 7101(b)(17) (2006). “Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves.” *Id.*; see also DONNA M. HUGHES, FACT SHEET: DOMESTIC SEX TRAFFICKING AND PROSTITUTION IN THE UNITED STATES 3–4 (2005), available at <http://www.uri.edu/artsci/wms/hughes/>

Though human trafficking continues to grow and remains hard to detect, Americans are organizing to fight against it. Under the leadership of President George W. Bush, human trafficking initiatives were labeled a serious legal issue meriting high priority.<sup>24</sup> Since 2000, Congress has amended and reauthorized the TVPA three times,<sup>25</sup> and most states have followed suit by initiating or enacting their own anti-trafficking legislation.<sup>26</sup> With unequivocal support from the President, Congress, a plethora of federal agencies, a growing number of states, and many impassioned NGOs that mobilized to support victims and raise awareness, the heart of America is indeed ready and willing to wage a twenty-first-century war against slavery. With the passing of the TVPA, the first legislative line was drawn and the combat began.

## II. THE SLOW START: BATTLING BUREAUCRACY AND “UNINTENDED OBSTACLES”

During the early years of TVPA’s implementation, a number of analysts essentially concluded that though the heart was willing, the body was weak.<sup>27</sup> America’s first anti-trafficking initiative was bold and inspiring; implementation, however, was slow and struggled at first.<sup>28</sup> Critics expressed specific disappointment at the unsatisfactorily low levels of convictions compared to the projected magnitude of the crime, the inexcusable delays of certain agencies in acting upon certain

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pubtrfrep.htm (last visited May 10, 2009) (demonstrating the gross disproportionality of statistics projecting the arrest ratio of pimps and johns versus prostitutes).

<sup>24</sup> While signing the second reauthorization of the TVPA into law, President Bush declared, “America is a compassionate and decent nation, and we will not tolerate an industry that preys on the young and the vulnerable. The trade in human beings continues in our time and we are called by conscience and compassion to bring this cruel practice to an end.” Press Release, The White House, President Signs H.R. 972, Trafficking Victims Protection Reauthorization Act (Jan. 10, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/01/text/20060110-3.html>.

<sup>25</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I–III, 122 Stat. 5044, 5044–87; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

<sup>26</sup> *Infra* note 48 and accompanying text.

<sup>27</sup> Consider, for example, the 2004 statement of one policy expert before the House Subcommittee on Human Rights and Wellness: “The standard I use to evaluate how well the [United States] is doing against trafficking is ‘Have the traffickers noticed yet?’ and particularly, ‘Have the victims noticed yet?’ The answer, overwhelmingly, even almost half a decade after the passage of the TVPA, is no.” *Trafficking in Persons: The Federal Government’s Approach to Eradicate This Worldwide Problem: Hearing Before the Subcomm. on Human Rights and Wellness of the H. Comm. on Gov’t Reform*, 108th Cong. 108 (2004) [hereinafter Ellerman Testimony] (statement of Derek P. Ellerman, Co-Executive Dir., Polaris Project).

<sup>28</sup> BATSTONE, *supra* note 4, at 239 (“Despite this strong legal framework, antitrafficking enforcement since the TVPA’s passage in 2000 has been tepid.”).

provisions, and the perceived imbalance of greater emphasis on prosecution rather than victim protection.<sup>29</sup>

#### A. Low Levels of Prosecution

In 2001, the first full year during which the TVPA's criminal trafficking provisions were enforced, only twenty-three of the thirty-eight defendants charged with human trafficking related federal crimes were convicted.<sup>30</sup> Over the next several years, the number of cases investigated increased,<sup>31</sup> but the rate of successful prosecutions did not quickly improve. In the five-year span from 2001 to 2005, the DOJ reported that "U.S. attorneys declined to prosecute suspects in 222 matters"—a figure that represents more than half of the trafficking matters that were closed during that period.<sup>32</sup>

Though critics expressed disappointment over what some called these "shockingly low"<sup>33</sup> numbers of prosecution under the TVPA that "pale in comparison" compared to the estimated number of victims,<sup>34</sup>

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<sup>29</sup> A number of articles that circulated in legal scholarship (predating the 2008 TVPRA amendments) identified these concerns—and more—while critiquing the TVPA's shortcomings. See, e.g., Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL'Y 309 (2008); 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 (2007); Natalia Walter, *Human Trafficking in the United States: Immigrant Victims Falling Through the Cracks*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 539 (Richard J. Link et al. eds., 2007); April Rieger, Note, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 Harv. J.L. & Gender 231 (2007).

<sup>30</sup> DESTEFANO, *supra* note 11, at 49. These low numbers reflect "a conviction rate of 60 percent, which is below average for federal prosecutors, who usually convict 80 to 90 percent of indicted defendants"—an indicator that U.S. attorneys encountered "special problems" prosecuting these cases. *Id.*

<sup>31</sup> "Between 2001 and 2005, U.S. attorneys investigated 555 suspects in matters involving violations of Federal human trafficking statutes." MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005, at 1 (2006) [hereinafter PROSECUTION STATISTICS 2001–2005], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fpht05.pdf>.

<sup>32</sup> *Id.*; see also *infra* note 55 (providing reasons for failure to prosecute).

<sup>33</sup> Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 391 (2005).

<sup>34</sup> BATSTONE, *supra* note 4, at 239. Policy analyst Derek Ellerman also brought this fact to Congress' attention in 2004, stating that

less than one percent of the estimated 17,000–20,000 international victims trafficked into the [United States] have been identified and assisted by the government, and almost half of those numbers came from a single case. If there is one statistic to remind us of how far we have to go, it is this one. . . . We must understand why we are failing . . .

Ellerman Testimony, *supra* note 27, at 108.



several external factors influence the analysis of these early statistics. First, the elusive nature of the crime makes human trafficking inherently difficult to discover and prosecute.<sup>35</sup> Second, since the initial outcries over human trafficking in the United States, studies have identified what some label the “Woozle Effect” of research statistics, calling the accuracy of initial estimates into question.<sup>36</sup> Third, the terrorist attacks of September 11, 2001, dramatically shifted government priorities and reallocated funding in a way that likely affected anti-trafficking initiatives until 2006.<sup>37</sup> The reality of these independent factors tempers the shock of the seemingly low number of prosecutions in the first few years of the TVPA’s enactment. Still, certain weaknesses in

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<sup>35</sup> A sure part of the continuing struggle to effectively implement the TVPA lies in the inherent dynamics of human trafficking itself—a carefully concealed and largely underground criminal infrastructure. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, sec.102(20), 114 Stat. 1464, 1468 (codified as amended in 22 U.S.C. § 7101(b)(20) (2006)) (expressly recognizing the inherent difficulties of detecting and prosecuting human trafficking); AG ANN. REP., *supra* note 17.

<sup>36</sup> See, e.g., NEIL A. WEINER & NICOLE HALA, VERA INST. OF JUSTICE, MEASURING HUMAN TRAFFICKING: LESSONS FROM NEW YORK CITY 8–10 (2008) [hereinafter MEASURING HUMAN TRAFFICKING], available at <http://www.ncjrs.gov/pdffiles1/nij/grants/224391.pdf>. Based on an allusion to a Winnie the Pooh story in which the character follows his own footprints,

[t]he Woozle Effect begins when one investigator reports a finding, often with qualifications (e.g., that the sample was small and not generalizable). A second investigator then cites the first study’s data, but without the qualifications. Others then cite both reports, and “the qualified data gain[s] the status of an unqualified, generalizable truth.”

*Id.* at 8 (alteration to the original in quoted text) (citing Richard J. Gelles, *Violence in the Family: A Review of Research in the Seventies*, 42 J. MARRIAGE & FAM. 873, 880 (1980)). The net result leads to “distorted and obscured measurements of human trafficking.” *Id.* at 10. At least one author has noted how the initial estimates, based on Amy O’Neill Richard’s April 2000 report, later proved “too high.” DESTEFANO, *supra* note 11, at 32 (citing AMY O’NEILL RICHARD, CTR. FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME iii (2000) [hereinafter A. RICHARD], available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/monographs/trafficking.pdf>); see also U.S. GOV’T, ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 7–9 (2004), available at [http://www.usdoj.gov/crt/crim/wetf/us\\_assessment\\_2004.pdf](http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf) (discussing how the government has “continued to improve [its] data analysis” and methodologies as it refines its statistics measuring how many victims are trafficked into the United States each year and clarifying that the differences “reflect improvements in data collection and methodology rather than trends in trafficking”).

<sup>37</sup> DESTEFANO, *supra* note 11, at xx. After the terrorist attacks, which “caused a massive shift in U.S. law enforcement priorities, redirecting attention and resources in the war against terrorism,” *id.*, “it took until 2004 for the trafficking center to become operational at even half-strength” *id.* at 51 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, COMBATING ALIEN SMUGGLING: OPPORTUNITIES EXIST TO IMPROVE THE FEDERAL RESPONSE 44 (2005), available at <http://www.gao.gov/new.items/d05305.pdf>).

the TVPA's original framework likely affected the DOJ's ability to prosecute a greater number of traffickers during the early years.

### 1. The Need for Victim Identification Training

Traffickers cannot be successfully prosecuted if the victims cannot be readily discovered. An important area of weakness often criticized during the initial years of the TVPA was a lack of victim identification training among law enforcement officials at all levels.<sup>38</sup> “[A]s first responders and the ‘eyes and ears’ of the local community, local law enforcement is in the best position to initially recognize, uncover, and respond to circumstances that may appear to be a routine street crime, but may ultimately turn out to be a human trafficking case[.]”<sup>39</sup> Of approximately one million first responders in the form of local and state police officers,<sup>40</sup> very few are equipped with the training necessary to

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<sup>38</sup> See, e.g., Ellerman Testimony, *supra* note 27, at 109 (identifying lack of victim identification as “one of the largest obstacles to progress so far” in government prosecution efforts). To illustrate the problem, a random nationwide survey of about 3,000 local (state, county, and municipal) law enforcement agencies discovered that “[t]he majority, between 73 and 77 percent, of local, county and state law enforcement in the random sample . . . perceive human trafficking as rare or non-existent in their local communities.” AMY FARRELL ET AL., NE. UNIV. INST. ON RACE & JUSTICE, UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 3 (2008) [hereinafter UNDERSTANDING AND IMPROVING], available at [http://www.humantrafficking.neu.edu/news\\_reports/reports/documents/Understanding%20and%20Responding\\_Full%20Report.pdf](http://www.humantrafficking.neu.edu/news_reports/reports/documents/Understanding%20and%20Responding_Full%20Report.pdf). “There is little difference in perceptions of sex trafficking versus labor trafficking among local law enforcement—both types are perceived as rare or non-existent.” *Id.*

Another recent government funded study that surveyed a random sample of sixty counties revealed that lack of victim identification often goes hand-in-hand with lack of awareness about trafficking legislation in general:

In states with anti-trafficking statutes, 44 percent of law enforcement respondents and 50 percent of prosecutors report that their states do not have or they are not aware of having anti-trafficking legislation. In general, law enforcement, prosecutors, and service providers respondents could not: (1) differentiate between severe and non severe forms of human trafficking; (2) distinguish trafficking from smuggling; (3) differentiate domestic and international trafficking; (4) identify types of trafficking (sexual and labor), or (5) state the elements of trafficking.

PHYLLIS J. NEWTON ET AL., NAT'L OPINION RESEARCH CTR. (NORC), FINDING VICTIMS OF HUMAN TRAFFICKING, at v (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/224393.pdf>.

<sup>39</sup> *Department's Anti-Trafficking Efforts Featured at International Association of Chiefs of Police Annual Conference*, ANTI-TRAFFICKING NEWS BULL. (U.S. Dep't of Justice Civil Rights Div.), Nov./Dec. 2004, at 5, available at [http://www.usdoj.gov/crt/crim/trafficking\\_newsletter/antittraffnews\\_novdec04.pdf](http://www.usdoj.gov/crt/crim/trafficking_newsletter/antittraffnews_novdec04.pdf). The 2006 Trafficking in Persons Report also recognized that “[a] child's first contact with authorities in destination countries could be the best opportunity to stop the trafficking chain.” U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 18 (2006) [hereinafter TIP REPORT 2006], available at <http://www.state.gov/g/tip/rls/tiprpt/2006>.

<sup>40</sup> AG ANN. REP., *supra* note 17, at 35.

recognize a victim when encountered.<sup>41</sup> Early training efforts existed primarily at the federal level, whereas critics argued that the urgent, immediate need for training existed at the state and local levels.<sup>42</sup>

Not only did the original TVPA fail to sufficiently address the issue of victim identification regarding procedures, research, or training, but potential victims also suffered from existing anti-immigration prejudices among law enforcement, where officers untrained in human trafficking occasionally demonstrated a misguided<sup>43</sup> and negative<sup>44</sup> attitude toward enforcement of certain TVPA provisions.

## 2. The Need for State Anti-Trafficking Legislation

Early prosecution efforts under the TVPA also suffered for lack of adequate resources. After the bill passed and awareness of human trafficking swept across America, limits on federal resources—notably the deficiencies of manpower and funding<sup>45</sup>—quickly illuminated the

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<sup>41</sup> “[G]overnment personnel . . . particularly outside of task forces headquartered in Washington, D.C., have little or no understanding of the obligations the nation undertook in passing the TVPA and, as a consequence, U.S. personnel are working contrary to the purposes of the Act.” Haynes, *supra* note 29, at 339. “[O]nly a few highly ranked agency officials seem to understand how to recognize a victim of trafficking or what should be done with her when she is found.” *Id.* at 365.

<sup>42</sup> In the early years, TVPA funding for training programs was “underutilized” and although the DOJ launched federal training programs for its investigators, there existed “few, if any, comparable training programs for officials at the state and local levels.” Rieger, *supra* note 29, at 246 (citing Kevin Bales et al., *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 75 (2005)). As local police and immigration officers are essentially the foot soldiers in America’s war against trafficking, training for the use of a simple yes-or-no questionnaire could elicit the telling piece of information that transforms an everyday street criminal into a victim of a serious federal crime deserving of government protection. *Id.*

<sup>43</sup> See Bales, *supra* note 42, at 79 (“[F]ederal officials often refuse to issue endorsements of T visa applications. One service provider attributed this reluctance to the mistaken belief among law enforcement that the benefits are too generous and that ‘they are giving away a green card’ by providing certification.”).

<sup>44</sup> See Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 157 (2002) (reporting claims by immigration agents that “sex trafficked victims are in the United States illegally and must be treated in the same manner as other undocumented workers” and “it is unfair to ‘play favorites’ because there are other illegal aliens who are also exploited by unscrupulous employers” (quoting A. RICHARD, *supra* note 36, at 36)).

<sup>45</sup> Federal resources are often “unavailable, limited, or inadequate.” Ellen L. Buckwalter et al., *Modern Day Slavery in our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 425 (2006) (reporting, for example, that only 0.0022% of the federal budget was focused on anti-trafficking efforts in fiscal year 2004). Federal prosecution efforts, moreover, generally focus on large-scale trafficking cases that involve numerous victims, large rings of traffickers, multiple federal agencies, and even international investigations. Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J.L. REFORM 447, 469 (2005) [hereinafter S. Richard]. The U.S. government

need for state anti-trafficking measures and local enforcement.<sup>46</sup> Strong advocacy for state legislation led the DOJ to release a Model State Anti-Trafficking Criminal Statute in 2004,<sup>47</sup> and almost every state has since enacted or initiated criminal provisions outlawing human trafficking.<sup>48</sup> This positive trend, however, opened the door for potential pitfalls that could inadvertently deny certain benefits to victims. Legal scholars have noted that incongruities between state legislation and the TVPA may negatively impact a victim's opportunity to receive federal benefits and protections.<sup>49</sup> Misalignment with the TVPA's definitions, criminal elements, or certification requirements might cause victims who pursue state remedies to fall through the cracks and miss out on certain federal protections. This particularly poses a problem in light of the TVPA's immigration-related benefits.<sup>50</sup> Ironically, if state legislation does not work together with the TVPA and its progeny, it could actually work *against* victims—the very persons the legislation aims to protect.

### 3. Difficult Standard of Proof

Prosecutorial difficulties revealed “special problems” with the TVPA's criminal statutes.<sup>51</sup> The DOJ recognized that two of the primary reasons U.S. attorneys declined to prosecute suspects in open investigations of trafficking matters from 2001 to 2005 were due to “lack of evidence of criminal intent” and “weak or insufficient admissible

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reports that “human trafficking cases are among the most labor- and time-intensive criminal investigations that the United States government undertakes,” putting an additional strain on already limited federal resources. *Id.* (citing U.S. GOV'T, ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 10–11 (2003), available at <http://www.state.gov/documents/organization/23598.pdf>).

<sup>46</sup> See Ellerman Testimony, *supra* note 27, at 110 (“The bottleneck that is constraining increased prosecution of traffickers is the resource constraints on federal law enforcement, the lack of state laws against trafficking, and the lack of enforcement of existing state laws related to trafficking.”). State legislation complements the TVPA by enabling the prosecution of smaller-scale trafficking offenses and adapting to the unique needs of certain localities.

<sup>47</sup> MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE (U.S. Dep't of Justice 2004), available at [http://www.usdoj.gov/crt/crim/model\\_state\\_law.pdf](http://www.usdoj.gov/crt/crim/model_state_law.pdf).

<sup>48</sup> See POLARIS PROJECT, HUMAN TRAFFICKING REPORT-ALL PENDING LEGISLATION, <http://www.trendtrack.com/texis/cq/viewrpt?event=49f99ef0e9&run=y> (last visited May 10, 2009) (providing an up-to-date synopsis of all state and federal anti-trafficking legislation).

<sup>49</sup> See, e.g., S. Richard, *supra* note 45, at 472–73.

<sup>50</sup> For instance, if an undocumented woman smuggled into America from another country was certified as a victim of human trafficking by state officials under state law, but failed the certification process under the TVPA, she would not be eligible to apply for a T visa or federal aid. Moreover, her dilemma is enhanced by concern over the lack of victim services and protection provisions in state legislation that fails to adopt the TVPA's comprehensive, victim-oriented approach. See *id.* at 462–75.

<sup>51</sup> DESTEFANO, *supra* note 11, at 49.

evidence.”<sup>52</sup> Since authorization of the TVPA in 2000, and through its amendments in 2003 and 2005, the criminal intent standard for the four trafficking-related crimes created by legislation had been “knowingly.”<sup>53</sup> By inference, federal prosecution efforts were likely hampered by the TVPA’s heightened culpability standard.<sup>54</sup> For example, the “knowingly” requirement could easily frustrate conviction of a culprit in the trafficking chain whose role was limited to a particular aspect—such as physical transportation or financial backing—in such a way that subjective awareness would be difficult, if not impossible, to prove.<sup>55</sup>

In addition, the “knowingly” standard became a potential obstacle in the prosecution of sex traffickers in cases involving minors because the statute, as written, could be construed to require proof that the trafficker had knowledge of the victim’s age.<sup>56</sup> At the time, the TVPA did not allow

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<sup>52</sup> PROSECUTION STATISTICS 2001–2005, *supra* note 31, at 1. “U.S. attorneys declined to prosecute suspects in 222 matters or 59% of the matters closed during this period . . . .” *Id.* The “lack of evidence of criminal intent” problem surfaced in 29% of those cases. *Id.* Other evidentiary problems represented 28% of the reasons given for failure to prosecute. *Id.*

<sup>53</sup> See 18 U.S.C. §§ 1589–1592 (2006).

<sup>54</sup> The Model Penal Code, for example, designates a subjective awareness component into “knowingly” standard, which must be proved beyond reasonable doubt:

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is *aware* that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is *aware* that it is practically certain that his conduct will cause such a result.

MODEL PENAL CODE § 2.02(2)(b), 10A U.L.A. 94–95 (2001) (emphasis added).

<sup>55</sup> In this hypothetical, a smuggler of a trafficking victim may concede awareness of the fact he illegally facilitated movement of an undocumented person across the border but deny knowledge that the movement was for the purpose of, or resulted in, slavery. The trafficking chain usually involves an initial recruiter, who hands the victim over to a transporter, who hands the victim over to a handler, who hands the victim over to a customer who purchases a form of labor or service. Task Force on Human Trafficking, *Chain of Trafficking*, [http://www.tfht.org/index.php?section=article&album\\_id=9&id=28](http://www.tfht.org/index.php?section=article&album_id=9&id=28) (last visited May 10, 2009). There may be even more culpable parties along the chain who simply harbor victims or receive profits. *Id.* With so many culprits involved for short stints of time, often with limited roles, it is easy to imagine how a participant could feign ignorance of the end goal, which is slavery.

<sup>56</sup> See 18 U.S.C. § 1591(a) (2006). According to a coalition comprised of prominent anti-trafficking NGOs, this knowingly standard proved to be a problematic provision and an “obstacle” to the prosecution of sex traffickers. THE ACTION GROUP, ACTION GROUP RECOMMENDATIONS FOR THE REAUTHORIZATION OF THE TRAFFICKING VICTIMS PROTECTION ACT, <http://www.theactiongroup.org/legislation/reauthorization.htm> (last visited May 10, 2009) [hereinafter ACTION GROUP RECOMMENDATIONS] (concerning the 2008 TVPRA). “Because minors in sex trafficking often have false identification or no identity documents, it is difficult for prosecutors to prove knowledge of their age.” *Id.*

for prosecution under a lesser standard of “recklessly.”<sup>57</sup> Moreover, while the TVPA included an attempt provision,<sup>58</sup> it did not yet provide a statutory avenue to prosecute for conspiracy to commit a trafficking-related offense.

*B. Unreasonable Delays: Battling the Slow-Turning Wheels of Bureaucracy*

Bemoaned by critics, unreasonable bureaucratic delays in implementing certain TVPA provisions contributed to disappointment over the slow-starting legislation that seemed so promising on paper. A national news story that published on October 19, 2007, illustrates the problem particularly well: it announced the good news that since the creation of the “U” visa in 2000,<sup>59</sup> the government was finally getting around to processing the very first one.<sup>60</sup> It only took seven years and a class-action lawsuit to get the ball rolling.<sup>61</sup> Although the news called for

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<sup>57</sup> In contrast to the difficult-to-prove subjective analysis of the “knowingly” standard, see *supra* note 54, the Model Penal Code definition for “recklessly” would allow prosecutors to consider an objective element as well:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard *involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.*

MODEL PENAL CODE § 2.02(2)(c), 10A U.L.A. 95 (2001) (emphasis added).

<sup>58</sup> 18 U.S.C. § 1594(a).

<sup>59</sup> Violence Against Women Act of 2000, Pub. L. No. 106-386, div. B, § 1513(a)–(b), 114 Stat. 1491, 1533–35 (codified as amended at 8 U.S.C. § 1101(a)(15)(U) (2006)). The U visa was designed to offer immigration benefits and temporary legal status to noncitizen victims of crimes—including trafficking victims—who assist prosecutorial efforts. See *id.* §1513(a)(2)(A) (codified as amended 8 U.S.C. § 1101 note).

<sup>60</sup> Roxana Hegeman, *New US Visas Offered to Crime Victims*, USA TODAY, Oct. 19, 2007, available at [http://www.usatoday.com/news/nation/2007-10-19-1565903989\\_x.htm](http://www.usatoday.com/news/nation/2007-10-19-1565903989_x.htm).

<sup>61</sup> On March 6, 2007, plaintiffs (individuals and organizations on behalf of U visa applicants) filed a lawsuit against U.S. Citizenship and Immigration Services (“USCIS”) and Michael Chertoff, Secretary of the Department of Homeland Security (“DHS”), alleging that, “despite having six years to do so, defendants have unlawfully . . . failed to promulgate regulations, establish procedures, or publish application forms through which victims may apply for such visas.” *Catholic Charities CYO v. Chertoff*, No. C07-1307PJH, 2007 WL 2344995, at \*1 (N.D. Cal. Aug. 16, 2007). Plaintiffs sued under various statutory and constitutional provisions, *id.* at \*2–3, and the court ultimately delayed evaluation of the case because the agency was “in the process of enacting regulations,” *id.* at \*8. The court concluded, however, that it would “revisit this issue if regulations are not issued by January,” and ordered the government to “file a monthly status report on the 15th of every month outlining the status of the regulations at issue.” *Id.* Following this lawsuit, on October 17, 2007, the long-awaited regulations governing the U visa were promulgated by USCIS, which allowed the agency to begin processing the applications. See *Applications for the Exercise of Discretion Relating to U Nonimmigrant Status*, 72 Fed. Reg. 53,035 (Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 212).

celebration on behalf of at least 8,919 petitioners who had waited years for their U visa applications to be processed,<sup>62</sup> the story itself implicates the frustrations of a larger national nightmare—the ever-constant battle against the inherently slow-turning wheels of bureaucracy.<sup>63</sup> A similar concern that worried T visa holders until late 2008 involved the lack of regulations necessary to enforce the TVPA's adjustment of status provision that should have been available to victims after three years.<sup>64</sup>

As anti-trafficking initiatives compete with hundreds of other agency actions for attention, these types of unreasonable bureaucratic delays represent just one of the struggles that federal agencies face as they rely and depend on each other to implement the goals of the TVPA.

### *C. Imbalanced Emphasis on Prosecution and Victims' Struggle for Relief*

Before the 2008 TVPRA amendments, critics argued that the TVPA's design to protect victims was failing largely because of a skewed emphasis on prosecution and prevention rather than victim protection.<sup>65</sup> Especially in context of the T visa, victims suffered from a “you help us

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<sup>62</sup> “At least 8,919 aliens have requested U visa status, and approximately 7,494 have been granted interim relief, and approximately 630 cases are pending.” *Catholic Charities*, 2007 WL 2344995, at \*7. The interim relief equates to “quasi-legal temporary status . . . which is no more than an exercise of prosecutorial discretion not to seek a crime victim's immediate deportation or removal and confers no legal status.” *Id.* at \*1.

<sup>63</sup> One likely reason for such an unreasonable delay is that the provisions creating the U visa did not include a mandatory timeframe in which the DHS must issue regulations. *See* Violence Against Women Act, div. B, § 1513(b)(3), 114 Stat. at 1534–35. Absent statutory pressure, it was too easy for the U visa regulations to slip through the crack—for seven years. Trafficking victims also lack the necessary resources and political presence to demand legal enforcement of their rights. Hegeman, *supra* note 60 (“‘Because it was a largely poor, vulnerable population with no political clout, it took seven years,’ said Peter A. Schey, lead counsel in the [*Catholic Charities*] lawsuit.”).

<sup>64</sup> In its recommendations for the 2008 TVPRA, the Action Group advocated a statutory deadline for issuance of regulations concerning the T visa, emphasizing that [m]any victims have had their T-visas for three to four years. The delay in the issuance of adjustment regulations has deprived these individuals of many rights a T visa holder would have already had as a legal permanent resident, including freedom of travel in and out of the [United States]. Additionally, the delay . . . may add unnecessary waiting time for the T visa holder's path to citizenship.

ACTION GROUP RECOMMENDATIONS, *supra* note 56. This recommendation, however, became moot just two days before Congress passed the 2008 TVPRA. On December 8, 2008, USCIS finally announced an interim final rule that would allow T visa holders to adjust their status. U.S. CITIZENSHIP & IMMIGRATION SERVS., FACT SHEET: USCIS PUBLISHES NEW RULE FOR NONIMMIGRANT VICTIMS OF HUMAN TRAFFICKING AND SPECIFIED CRIMINAL ACTIVITY (Dec. 8, 2008), [http://www.uscis.gov/files/article/t\\_u\\_fs\\_8dec2008.pdf](http://www.uscis.gov/files/article/t_u_fs_8dec2008.pdf) [hereinafter USCIS FACT SHEET]. The rule implemented TVPA provisions that had been authorized eight years earlier. *Id.*

<sup>65</sup> *See, e.g.,* Green, *supra* note 29, at 313 (“While the legislators may intend to address avenues for immediate protection for child sex victims in the TVPA, the protection program is practically treated as the least significant of the three.”).

before we will help you” attitude<sup>66</sup> built into the TVPA’s overly restrictive procedures for receiving assistance.<sup>67</sup>

Victims were often thrust into the decision-making dilemma of whether to pursue the T visa, along with its accompanying federal benefits. Though designed to provide help and protection, the T visa initially contained some serious shortfalls, and the process of obtaining one involved such overly complex and contradictory mandates<sup>68</sup> that the daunting application process could take upwards of nine months to complete.<sup>69</sup> Victim advocates quickly realized that the T visa is not a golden ticket or cure-all solution for victims of severe trafficking who are caught in the web of a dangerous ring of criminals.<sup>70</sup> For some victims, the ramifications of applying for a T visa may have put them in a *more* dangerous position, “increasing their vulnerability” in several ways<sup>71</sup> and creating “a chilling effect’ on survivors who wish to apply for T visas but are reluctant to place themselves at greater risk.”<sup>72</sup>

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<sup>66</sup> The “you help us before we will help you” attitude was best reflected by the statutory strings attached to the certification process, which imposed a so-called “cooperation condition” requiring certain victims to be “willing to assist in every reasonable way in the investigation and prosecution” of their trafficker. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, div. A, sec.107(b)(1)(E)(i)(I), 114 Stat. 1464, 1476 (codified as amended at 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2006)); *see also* Green, *supra* note 29, at 330–31. The TVPA elaborated: “For the purpose of a certification under this subparagraph, the term ‘investigation and prosecution’ includes—(I) identification of a person or persons who have committed severe forms of trafficking in persons; (II) location and apprehension of such persons; and (III) testimony at proceedings against such persons.” Victims of Trafficking and Violence Protection Act of 2000 sec. 107(b)(1)(E)(iii), 114 Stat. at 1476 (codified as amended at 22 U.S.C. § 7105(b)(1)(E)(iii)). These restrictions have since been tempered by the 2008 TVPRA amendments. *See infra* Part III.

<sup>67</sup> At the time, the T visa required “that a person not only be a victim of a severe form of trafficking but also collaborate with law enforcement, be present in the United States as a result of being trafficked, and show that he or she would suffer severe harm upon removal.” ACTION GROUP RECOMMENDATIONS, *supra* note 56 (labeling these requirements “too onerous”).

<sup>68</sup> *See* Walter, *supra* note 29, at 555. Even Congress later recognized that the original TVPA incorporated “unintended obstacles” that blocked victims from obtaining relief and “needed assistance,” particularly concerning the T visa. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, sec. 2(3), 117 Stat. 2875.

<sup>69</sup> ACTION GROUP RECOMMENDATIONS, *supra* note 56.

<sup>70</sup> *See* Haynes, *supra* note 29, at 378–79 (titling one section: “Acknowledge the TVPA’s Dirty Little Secret: The Grant of a T-Visa or Asylum Does Not Necessarily Obviate the Exploitation or End the Extortion”).

<sup>71</sup> Bales, *supra* note 42, at 99.

First, by alerting law enforcement to their presence, survivors without legal immigration status risk deportation if their account is found to lack credibility. Second, alleged perpetrators who are defendants in criminal proceedings have a right to review information provided by survivors to federal investigation. As a result, survivors and their families may be at a greater risk for retaliation.

*Id.* at 99–100.

<sup>72</sup> Bales, *supra* note 42, at 100.



To some victims, after evaluation of the complexities of the process, it was not worth the time or hassle to apply for the temporary immigration relief. To others, the application would not be possible without the fortuitous happenstance of pro bono legal counsel. And still, for the vast majority of trafficking victims in the United States, application was not an option due to lack of awareness concerning their rights and available benefits under federal law.

### III. GAINING MOMENTUM: THE 2003, 2005, AND 2008 TVPRA AMENDMENTS

The reauthorization acts in 2003, 2005, and most recently in 2008, have done much to put teeth in the TVPRA. Though initial statistics measuring the TVPRA's success in implementation seemed unsatisfactory, subsequent amendments have addressed various statutory weaknesses and paved the way for increased effectiveness. In particular, the amendments have helped fulfill the TVPA's aims of prosecution and protection by continually enhancing prosecutorial tools and increasing victim benefits.

The Trafficking Victims Protection Reauthorization Act of 2003 ("2003 TVPRA"), among other things, extended T visa benefits to siblings of victims,<sup>73</sup> raised the age requirement for victim certification from fifteen to eighteen,<sup>74</sup> granted victims a private right of action to sue traffickers civilly for damages and attorneys' fees,<sup>75</sup> and required an annual report from the Attorney General to track trafficking case statistics and enforcement progress.<sup>76</sup> In an effort to increase coordination between the various federal agencies, the 2003 TVPRA created the Senior Policy Operating Group ("SPOG").<sup>77</sup> Another provision revising the certification process responded to concerns that victims may

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<sup>73</sup> Trafficking Victims Protection Reauthorization Act of 2003 sec. 4(b)(1)(B), 117 Stat. at 2878 (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(ii)(I) (2006)). This provision allowed "unmarried siblings under [eighteen] years of age" to accompany or follow to join a T visa holder who is under twenty-one. *Id.* Previously this benefit extended only to the trafficking victim's "spouse, children, and parents." 8 U.S.C. § 1101(a)(15)(T)(ii)(I) (2000).

<sup>74</sup> Trafficking Victims Protection Reauthorization Act of 2003 sec. 4(b)(1)(A), 117 Stat. at 2878 (codified as amended at 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb) (2006)).

<sup>75</sup> *Id.* sec. 4(a)(4) (codified as amended at 18 U.S.C. § 1595 (2006)).

<sup>76</sup> *Id.* sec. 6(a), 117 Stat. at 2880 (codified as amended at 22 U.S.C. § 7103(d)(7) (2006)) (requiring the Attorney General to submit an annual report including information measuring the TVPA's progress, such as the number of victims receiving benefits, the number of traffickers charged, and the type of law enforcement training conducted).

<sup>77</sup> *Id.* sec. 6(c), 117 Stat. at 2881 (codified as amended at 22 U.S.C. § 7103(f) (2006)). SPOG "consist[s] of the senior officials designated as representatives of the appointed members of the Task Force" and is "chaired by the Director of the Office to Monitor and Combat Trafficking of the Department of State." 22 U.S.C. § 7103(f)(2)(A)–(B). Its main purpose is to "coordinate activities of [f]ederal departments and agencies regarding [trafficking] policies." *Id.* § 7103(f)(3).

unintentionally “fall through the cracks” of the TVPA due to the increasing prevalence of state anti-trafficking laws and local enforcement efforts.<sup>78</sup>

Two years later, the Trafficking Victims Protection Reauthorization Act of 2005<sup>79</sup> (“2005 TVPRA”) again purposed to “close loopholes” in the TVPA.<sup>80</sup> Toward the aim of victim protection, it contained “provisions to increase U.S. assistance to foreign trafficking victims . . . including access to legal counsel and better information on programs to aid victims.”<sup>81</sup> To enhance prosecution, the 2005 TVPRA added a forfeiture provision to the toolbox for federal attorneys,<sup>82</sup> which should also serve to increase deterrence because the nature of the crime involves great financial benefit to the traffickers involved. Along the lines of deterrence, and as a somewhat controversial matter of public policy,<sup>83</sup> the 2005 TVPRA also made significant efforts to decrease the demand for human trafficking.<sup>84</sup> And again, legislative efforts encouraged increased state and local involvement.<sup>85</sup>

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<sup>78</sup> Previously, the certification process considered statements only from *federal* officials that the victim cooperated with *federal* investigations; the 2003 TVPRA expanded the TVPA so that the

Secretary of Health and Human Services shall consider statements *from State and local law enforcement officials* that the person . . . has been willing to assist in every reasonable way with respect to the investigation and prosecution of *State and local crimes* . . . where severe forms of trafficking appear to have been involved.

Trafficking Victims Protection Reauthorization Act of 2003 sec. 4(a)(3), 117 Stat. at 2877–78 (codified as amended at 22 U.S.C. § 7105(b)(1)(E)(iv) (2006)) (emphasis added); *see also id.* sec.4(b)(2), 117 Stat. at 2878 (codified as amended at 8 U.S.C. 1184(o)(6)) (adjusting the corresponding provision of the Immigration and Nationality Act).

<sup>79</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (codified as amended in scattered sections of 18, 22, and 42 U.S.C.).

<sup>80</sup> CRS Report, *supra* note 9, at 43.

<sup>81</sup> *Id.*; *see, e.g.*, Trafficking Victims Protection Reauthorization Act of 2005 sec. 102(a), 119 Stat. at 3560–61 (codified at 22 U.S.C. § 7105(c)(2)) (“To the extent practicable, victims of severe forms of [human] trafficking shall have access to information about federally funded or administered anti-trafficking programs that provide services to victims of severe forms of trafficking.”).

<sup>82</sup> *Id.* sec. 103(d), 119 Stat. at 3563 (codified at 18 U.S.C. § 2428(a)(1)–(2) (2006)) (requiring trafficking offenders to surrender to the government “any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation” as well as “any property, real or personal, constituting or derived from any proceeds that such person obtained, directly or indirectly, as a result of such violation”); *id.* sec. 104(b)(1)(A), 119 Stat. 3558, 3564 (codified as amended at 22 U.S.C. § 7106(b) (2006)) (mandating demand-reducing measures “for commercial sex acts and for participation in international sex tourism”).

<sup>83</sup> *See infra* Part IV.B.

<sup>84</sup> *See id.* sec. 201(a), (a)(2)(A), 119 Stat. at 3567–68 (codified at 42 U.S.C.S. § 14044(a), (a)(2)(A) (Supp. V 2006)) (implementing a “Program to reduce trafficking in persons and demand for commercial sex acts in the United States” that mandated comprehensive research reports and instituted an annual conference “addressing severe

The 2008 TVPRA, however, implements sweeping reforms to the TVPA and thus packs the most powerful punch in America's legislative battle over human trafficking.<sup>86</sup> The 2008 TVPRA continues to solve problems, mend gaps, and build bridges between government bodies. With its passing on December 10, 2008,<sup>87</sup> abolitionist advocates celebrated a promising victory in the fight for national anti-trafficking legislation that is not only comprehensive but *effective*.<sup>88</sup> Some notable revisions to the problems addressed *supra* include:

***Elimination of the "cooperation condition."*** Section 201 softens the former "you help us before we will help you" stance of the bill that essentially required victim cooperation in prosecution efforts to become eligible for important immigration benefits,<sup>89</sup> providing an important exception for victims who are deemed "unable to cooperate . . . due to physical or psychological trauma."<sup>90</sup>

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forms of trafficking in persons and commercial sex acts that occur, in whole or in part, within the territorial jurisdiction of the United States").

<sup>85</sup> See *id.* sec. 204, 119 Stat. at 3571 (codified at 42 U.S.C. § 14044c(a) (Supp. V 2006)) (authorizing grants "to establish, develop, expand, or strengthen" state anti-trafficking programs).

<sup>86</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I–III, 122 Stat. 5044, 5044–87 (to be codified in scattered sections of 6, 8, 18, 22, 28, and 42 U.S.C.), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ457.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ457.110.pdf).

<sup>87</sup> TVPRA of 2008 Legislative History, *supra* note 2.

<sup>88</sup> A U.S.-based legislative coalition comprised of ten prominent organizations "dedicated to abolishing modern-day slavery and human trafficking" published a news release "enthusiastically congratulat[ing] Congress for passing the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008." Press Release, Action Group, Congress Passes the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Dec. 11, 2008), available at [http://www.theactiongroup.org/legislation/TSG\\_News\\_Release.pdf](http://www.theactiongroup.org/legislation/TSG_News_Release.pdf). The Action Group celebrated the fact that the 2008 TVPRA amendments incorporated twenty and a half of the coalition's twenty-two legislative recommendations. *Id.*; see also ACTION GROUP RECOMMENDATIONS, *supra* note 56. Others from across the political spectrum also applauded the bill's passing. Compare Press Release, Am. Civil Liberties Union, ACLU Applauds Passage of Human Trafficking Legislation (Dec. 11, 2008), available at <http://www.aclu.org/womensrights/employ/38058prs20081211.html>, with Adele Banks, *Bush Signs Anti-Trafficking Bill*, SALT LAKE TRIB., Dec. 26, 2008 ("Religious leaders hailed President Bush's signing of a bill that continues [United States] efforts to combat human trafficking across the globe.").

<sup>89</sup> See *supra* note 66 and accompanying text.

<sup>90</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 201(a)(1)(D)(iii)(bb), 122 Stat. at 5052 (to be codified at 8 U.S.C. § 1101(a)(15)(T)). The Action Group explains that "[w]hile most victims of trafficking will readily comply with law enforcement requests, occasionally victims are unable to cooperate due to physical or emotional limitations or due to fear for their own safety or the safety of their family members." ACTION GROUP RECOMMENDATIONS, *supra* note 56.

**Less stringent T visa requirements.** Section 201 eases another of the previously “onerous” T visa requirements<sup>91</sup> by adjusting the physical presence condition.<sup>92</sup>

**Expanded T visa benefits.** Section 201 expanded immigration benefits by authorizing derivative T visas for parents and siblings of adult trafficking victims who may be at risk of retaliation due to the victim’s escape from trafficking or cooperation with law enforcement.<sup>93</sup>

**Facilitation of victim benefits and rights education.** Section 202 mandates the development and distribution of an information pamphlet that educates potential victims about their legal rights and available resources,<sup>94</sup> including telephone hotlines,<sup>95</sup> thus ameliorating the difficulty for victims to obtain necessary services under the TVPA due to lack of awareness. Notably, the mandate includes a translation provision<sup>96</sup> and sets a deadline of 180 days to distribute the pamphlet.<sup>97</sup>

**Facilitation of free legal services for child victims.** Section 235 guarantees that the Secretary of Health and Human Services will ensure “to the greatest extent practicable” that all unaccompanied child victims under their care “have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and

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<sup>91</sup> See *supra* note 67 and accompanying text.

<sup>92</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 201(a)(1)(C), 122 Stat. at 5052 (to be codified at 8 U.S.C. § 1101(a)(15)(T)) (modifying the physical presence on account of trafficking requirement by “including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking”).

<sup>93</sup> *Id.* sec. 201(a)(2)(C), 122 Stat. at 5053 (to be codified at 8 U.S.C. § 1101(a)(15)(T)) (extending the derivative T visa to “any parent or unmarried sibling under [eighteen] years of age” who risk retaliation). Previously, only minor victims could bring parents and siblings into the United States on derivative T visas, whereas adult victims were limited to their spouse or children. ACTION GROUP RECOMMENDATIONS, *supra* note 56. The Action Group advocated that

[t]he requirement for adult victims should be changed to enable them to bring parents and siblings in addition to their spouse and children for three reasons: 1) these family members often feel threatened in their home country though such threats are often hard to prove; 2) it will assist the victim’s recovery to know that close family members are safe; and 3) it will assist the victim to have the moral support of close family in the [United States] if the victim is a witness in a criminal or civil case against a trafficker.

*Id.*

<sup>94</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 202(a)(1), 122 Stat. at 5055 (to be codified at 8 U.S.C. § 1375(b)).

<sup>95</sup> *Id.* tit. II, sec. 202(b)(5)(A)–(B), 122 Stat. at 5055 (to be codified at 8 U.S.C. § 1375(b)).

<sup>96</sup> *Id.* tit. II, sec. 202(c), 122 Stat. at 5055–56 (to be codified at 8 U.S.C. § 1375(b)).

<sup>97</sup> *Id.* tit. II, sec. 202(d)(3), 122 Stat. at 5056 (to be codified at 8 U.S.C. § 1375(b)).

trafficking.”<sup>98</sup> The provision also requires the Secretary to “make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.”<sup>99</sup>

**Statutorily mandated deadlines.** The inclusion of statutorily mandated deadlines attached to many of the new provisions help combat the inherently slow-turning wheels of bureaucracy and provide an administrative remedy for enforcement if deadlines are missed and delays become unreasonable.<sup>100</sup>

**Gap-filling provisions for delayed issuance of regulations.** In several places, the 2008 TVPRA amendments mitigate the risk that unreasonable agency delay in issuing the regulations necessary to implement certain provisions would deny victims benefits.<sup>101</sup>

**Enhanced criminal provisions.** Prosecution efforts will be enhanced by helpful revisions to existing criminal statutes and the addition of new tools.<sup>102</sup> Several provisions ease the difficult-to-prove “knowingly” culpability standard by adding a “reckless disregard” alternative.<sup>103</sup> Section 222(b) adds a mechanism to punish obstruction of various trafficking crimes.<sup>104</sup> Section 222(c) supplies a new prosecutorial

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<sup>98</sup> *Id.* tit. II, sec. 235(c)(5), 122 Stat. at 5079 (to be codified at 8 U.S.C. § 1232).

<sup>99</sup> *Id.*

<sup>100</sup> *E.g., id.* tit. II, sec. 202(d)(3), 122 Stat. at 5056 (to be codified at 8 U.S.C. § 1375(b)) (imposing a 180-day pamphlet distribution deadline).

<sup>101</sup> *See, e.g., id.* tit. II, sec. 201(b)(1)(C), 122 Stat. at 5053 (to be codified at 8 U.S.C. § 1101(o)(7)) (addressing the situation where a T visa holder is eligible for adjustment of status but “is unable to obtain such relief because regulations have not been issued to implement such section”); *id.* tit. II, sec. 201(c), 122 Stat. at 5053 (to be codified at 8 U.S.C. § 1184(p)(6)) (extending nonimmigration status in certain cases where the applicant for admission meets eligibility requirements and “is unable to obtain . . . relief because regulations have not been issued to implement such section”); *id.* tit. II, sec. 211(b), 122 Stat. at 5063 (to be codified at 8 U.S.C. § 1641 note) (ensuring that amendments to certain work authorization benefits will be effective “without regard to whether regulations have been implemented to carry out such amendments”). Though USCIS published an interim final rule allowing T and U visa holders to adjust their status just days before the bill’s passing, *see* USCIS FACT SHEET, *supra* note 64, these provisions illustrate the TVPRA’s responsiveness to problems identified by the public and its adaptability in addressing unintended loopholes.

<sup>102</sup> *See generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 222, 122 Stat. at 5067–71 (to be codified in scattered sections of 8, and 18 U.S.C.).

<sup>103</sup> *See, e.g., id.* tit. II, sec. 222(b)(3), § 1589, 122 Stat. at 5068 (to be codified at 18 U.S.C. § 1589) (amending forced labor statute); *id.* tit. II, sec. 222(b)(5), § 1589, 122 Stat. at 5069 (to be codified at 18 U.S.C. § 1591) (amending sex trafficking of children statute).

<sup>104</sup> *Id.* tit. II, sec. 222(b), 122 Stat. at 5067–70 (to be codified in scattered sections of 18 U.S.C.) (amending five trafficking-related crimes); *e.g., id.* tit. II, sec. 222(b)(1), § 1583(a)(3), 122 Stat. at 5067–68 (“Whoever . . . obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned not more than [twenty] years, or both.”).

tool by adding a conspiracy provision specific to trafficking offenses.<sup>105</sup> Section 222(d) creates a new crime designed to punish those who financially benefit from “[p]leonage, [s]lavery, and [t]rafficking in [p]ersons,” even if the profiteer did not facilitate the underlying crime.<sup>106</sup>

**Clarified sex trafficking provisions.** Section 222(b)(5) added several definitional clarifications to the sex trafficking statute,<sup>107</sup> as well as a legal clarification that in cases of child sex trafficking, “the Government need not prove that the defendant knew that the person had not attained the age of [eighteen] years.”<sup>108</sup>

**Mandatory training provisions.** Several sections take important steps toward solving earlier criticisms of the bill that law enforcement agents are inadequately trained to identify victims and have demonstrated a misguided and negative attitude toward the enforcement of certain TVPA provisions.<sup>109</sup>

**Increased federal-state coordination.** Various provisions of the 2008 TVPRA seek to increase coordination of state anti-trafficking

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<sup>105</sup> *Id.* tit. II, sec. 222(c), 122 Stat. at 5070 (to be codified at 18 U.S.C. § 1594). This provision will be helpful to prosecutors who previously relied on a general conspiracy statute that imposed a maximum of five years imprisonment. *See* 18 U.S.C. § 371 (2006).

<sup>106</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 222(d), 122 Stat. at 5070 (to be codified at 18 U.S.C. § 1593(A)). Notably, the culpability standard is knowingly or recklessly:

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section 1581(a), 1592, or 1595(a), *knowing or in reckless disregard of the fact that the venture has engaged in such violation*, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.

*Id.* tit. II, sec. 222(d), § 1593A, 122 Stat. at 5070 (emphasis added).

<sup>107</sup> For instance, the Section clarified two previously ambiguous terms in the definition of “coercion” for purposes of the crime. *Id.* tit. II, sec. 222(b)(5)(E)(iii), 122 Stat. at 5069–70 (to be codified at 18 U.S.C. § 1591(e)(1)) (defining “abuse or threatened abuse of law or legal process”); *id.* tit. II, sec. 222(b)(5)(E)(iv), 122 Stat. at 5070 (to be codified at 18 U.S.C. § 1591(e)(4)) (defining “serious harm” as encompassing “physical or nonphysical, including psychological, financial, or reputational harm”).

<sup>108</sup> *Id.* tit. II, sec. 222(b)(5)(D), 122 Stat. at 5069 (to be codified at 18 U.S.C. § 1591(c)); *cf. supra* note 56 and accompanying text.

<sup>109</sup> *E.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 203(b)(3), 122 Stat. at 5058 (to be codified at 8 U.S.C. § 1375(c)) (mandating training of consular officers who conduct interviews with certain at-risk visa applicants); *id.* tit. II, sec. 212(b)(2), 122 Stat. at 5064 (to be codified at 22 U.S.C. § 7105(c)(4)) (“The Attorney General and the Secretary of Health and Human Services shall provide training to State and local officials to improve the identification and protection of such victims . . . .”); *id.* tit. II, sec. 235(e), 122 Stat. at 5081 (to be codified at 8 U.S.C. § 1232) (“The Secretary of State, the Secretary of Homeland Security, the Secretary of Health and Human Services, and the Attorney General shall provide specialized training to all Federal personnel, and upon request, state and local personnel, who have substantive contact with unaccompanied alien children.”); *cf. supra* Part II.A.1.

efforts with federal efforts.<sup>110</sup> In particular, Section 225 seeks to ensure that that conflicting federal and state criminal laws will not “preempt, supplant, or limit” each other.<sup>111</sup>

Though the 2008 TVPRA heralds a number of significant victories—addressing legislative and policy concerns alike—there is yet room for improvement, particularly in the areas of the T visa requirements<sup>112</sup> and certain criminal statutes.<sup>113</sup> Moreover, the 2008 TVPRA raises subtle warning flags that reinforce the need for a strategic framework as a key tactical element to help in the fight against trafficking.

#### IV. TOO MUCH MOMENTUM?: POTENTIAL LANDMINES

Since the issue of human trafficking emerged on the national radar and started to gain political momentum in the late 1990s, legislators, lobbyists, researchers, scholars, and journalists mobilized on the issue relatively quickly.<sup>114</sup> Passion for combating this issue transcends party lines, race, and religious beliefs. The explosion of passion, however, has

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<sup>110</sup> *E.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 205(a)(1), 122 Stat. at 5060–61 (to be codified at 22 U.S.C. § 7105(c)(3)(C)) (“The Secretary of Homeland Security, in consultation with the Attorney General, shall—(i) develop materials to assist State and local law enforcement officials in working with Federal law enforcement to obtain continued presence for victims of a severe form of trafficking in cases investigated or prosecuted at the State or local level; and (ii) distribute the materials developed under clause (i) to State and local law enforcement officials.”).

<sup>111</sup> *Id.* tit. II, sec. 225(a)(2), 122 Stat. at 5072 (to be codified at 22 U.S.C. § 7101 note). In relevant part, the provision reads:

Nothing in this Act, the Trafficking Victims Protection Act of 2000, the Trafficking Victims Protection Reauthorization Act of 2003, the Trafficking Victims Protection Reauthorization Act of 2005, chapters 77 and 117 of title 18, United States Code, or any model law issued by the Department of Justice to carry out the purposes of any of the aforementioned statutes . . . shall preempt, supplant, or limit the effect of any State or Federal criminal law.

*Id.*

<sup>112</sup> Significantly, the two requirements that are likely the most time consuming and “onerous” in the process—the showings of a severe form of trafficking and severe harm upon removal—remain intact despite the 2008 TVPRA amendments. *See supra* note 67.

<sup>113</sup> Notably, though the 2008 TVPRA amendments revised the criminal intent standard for sex trafficking crimes by adding a “reckless” provision, the parallel labor trafficking provision still relies solely on a “knowingly” standard. *See* 18 U.S.C. § 1590 (2006); *supra* note 103 and accompanying text.

<sup>114</sup> Placed in context: during the past decade, national legislation has been drafted, passed, signed, enforced, and thrice amended. *See supra* notes 3 and 25 and accompanying text. Almost every state, as of this writing, has initiated or enacted local anti-trafficking provisions. *See supra* note 48. Journalists, researchers, and scholars have published thousands of pages of reports, articles, statistics, and books on the topic. *See, e.g., supra* note 29. Evidence of the explosion: a simple Google search on “human trafficking” and “America” yields more than one million results. Google Home Page, <http://www.google.com> (search “human trafficking” and “America”) (last visited May 10, 2009).

led to a snowball effect of sorts, as ideas evolve and ideals collide.<sup>115</sup> Amid the explosion, several landmines have cropped up that threaten to frustrate the progress of certain battles in America's war on human trafficking.

#### A. The Definition Debate

"What is human trafficking?" The answer to this foundational question is informed by one's personal, or even legal, framework.<sup>116</sup> Varying viewpoints invariably lead to varying definitions. In legislating the scope and boundaries of human trafficking as a crime, much hinges on the arrangement of particular wording in definitional provisions.<sup>117</sup> Anti-trafficking laws impacting the United States exist at three levels—state, federal, international.<sup>118</sup> Although these pieces of legislation cast "a kind of definitional anchor," none "define human trafficking or trafficking victimization in exactly the same way."<sup>119</sup> The definitional provisions at each level have triggered ongoing lengthy political debate<sup>120</sup>

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<sup>115</sup> The collision of politics with advocacy efforts to eradicate human trafficking necessarily leads to "various arguments and emotions of those who are intimately involved," which in turn leads to "problems in defining the dimensions of the trafficking problem and developing policies to deal with it." DESTEFANO, *supra* note 11, at xvii.

<sup>116</sup> If viewed narrowly as an immigration crime, for instance, human trafficking requires the illegal physical movement of persons across borders. If viewed more broadly as a human rights violation, however, emphasis on illegal travel decreases and emphasis on the end result of exploitation increases.

<sup>117</sup> For an illustration of how these criminal provisions can be categorized according to the process, means, and resulting goal, see TIP REPORT 2008, *supra* note 6, at 290 (providing a chart designed to help analyze a universal definition of human trafficking).

<sup>118</sup> In addition to the TVPA and the multiple versions of state laws that have developed over the past decade, see *supra* notes 3, 25, and 48 and accompanying text, the United States signed and ratified the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 40 I.L.M. 335, 377-84, available at <http://untreaty.un.org/English/TreatyEvent2003/Texts/treaty2E.pdf>; U.N. OFFICE ON DRUGS AND CRIME, SIGNATORIES TO THE CTOC TRAFFICKING PROTOCOL (Sept. 26, 2008), [http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-trafficking\\_protocol.html](http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-trafficking_protocol.html).

<sup>119</sup> MEASURING HUMAN TRAFFICKING, *supra* note 36, at 18.

<sup>120</sup> For instance, "battle lines" in the definition debate were drawn in Congress during the late 1990s in a way that "mirrored those in the concurrent U.N. deliberations." *Id.* The two main camps involved religious/feminist groups and human rights/labor rights/immigration advocates:

Religious and feminist groups insisted that trafficking for prostitution was a "special evil" that should be addressed separately from labor trafficking. Prostitution "abolitionists" objected particularly to the inclusion of the force, fraud, and coercion criteria in the definition of sex trafficking, considering prostitution criminally exploitative under any conditions and thus essentially different from work in other domains. On the other side, human rights, labor, and immigration advocates insisted that human trafficking be defined by internationally recognized and legally translatable elements—forced labor,



and vigorous disagreement,<sup>121</sup> which tends to delay the enactment process.<sup>122</sup>

Beyond slowing the legislative process, the implications of these definitional debates—and the differences between statutory provisions—are far reaching, impacting not only a victim’s ability to receive appropriate relief and government benefits,<sup>123</sup> but also methodologies for victim screening protocols<sup>124</sup> and gathering statistical research data.<sup>125</sup>

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slavery, and servitude—rather than by reference to the kind of work migrants might perform.

*Id.* (internal footnotes and quotation marks omitted).

<sup>121</sup> Disagreement over an early proposal for what eventually became enacted as the 2008 TVPRA, for instance, sparked intense debate about whether the proposed amendments would broaden the scope of human trafficking so much by definition that the TVPA would effectively encompass prostitution-related crimes traditionally reserved for state and local law enforcement. Compare BRIAN W. WALSH & ANDREW M. GROSSMAN, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, HERITAGE FOUNDATION LEGAL MEMORANDUM, Feb. 14, 2008, at 1, 1, available at [http://www.heritage.org/Research/LegalIssues/upload/lm\\_21.pdf](http://www.heritage.org/Research/LegalIssues/upload/lm_21.pdf) (“The TVPRA trivializes the seriousness of actual human trafficking by equating it with run-of-the-mill sex crimes—such as pimping, pandering, and prostitution—that are neither international nor interstate in nature. The net effect of this unconstitutional federalization of local crime would be to blur the respective lines of federal and state authority, assert federal supremacy without providing sufficient federal resources, and thus undermine the efforts of state law enforcement against both ordinary sex crimes and the local effects of human trafficking.”), with Press Release, Equality Now, Statement of Jessica Neuwirth, President of Equality Now, to the New York City Council (June 11, 2008), [http://www.equalitynow.org/english/pressroom/press\\_releases/presidentstatement\\_20080613\\_en.html](http://www.equalitynow.org/english/pressroom/press_releases/presidentstatement_20080613_en.html) (“Critics of the House bill claim that the bill ‘federalizes prostitution.’ It does no such thing. The crime of prostitution is nowhere in the bill. The House bill recognizes that many pimps are sex traffickers and integrates the crime of pimping into the sex trafficking legislative framework, that is a reflection of reality—not only the reality of sex trafficking but even the reality of the Justice Department’s sex trafficking cases to date. It is not the enormous expansion of the TVPA that [critics] claim[.]”).

<sup>122</sup> See MEASURING HUMAN TRAFFICKING, *supra* note 36, at 18, 23. The “[o]ngoing debate continues to delay the passage of legislation in a number of U.S. states,” and likely delayed the latest reauthorization to the TVPA, which, although first proposed in January 2007, did not pass until almost two years later in December 2008. See *id.* at 18; Edward Babayan, *Legislative Watch*, HUM. RTS. BRIEF, Spring 2007, at 53, 54, available at <http://www.wcl.american.edu/hrbrief/14/3legislative.pdf?rd=1>; TVPRA of 2008 Legislative History, *supra* note 2.

<sup>123</sup> See *supra* Part II.A.2.

<sup>124</sup> MEASURING HUMAN TRAFFICKING, *supra* note 36, at 18–23. One national survey identified “[a]mbiguous and sometimes contradictory definitions of human trafficking and new, untested laws” as obstacles encountered by anti-trafficking task forces. UNDERSTANDING AND IMPROVING, *supra* note 38, at 10. “These ambiguities result in disagreements among members about whether a person is a victim of human trafficking.” *Id.*

<sup>125</sup> MEASURING HUMAN TRAFFICKING, *supra* note 36, at 6 (“International data collection is hampered by differences in the way nations define human trafficking.”); *id.* at 11–12 (identifying seven different categories of victims); *id.* at 18 (“[D]efining key terms and understanding and applying them uniformly are at the heart of establishing

Overall, differences in definitions make it difficult to standardize certain tools that are vital to fighting the war on human trafficking. Just as it is difficult to fight a war against an enemy who is not clearly defined, lack of uniformity among statutory definitions can lead to confusion that impedes effectiveness in the war on human trafficking.

*B. The Demand Debate and the Infamous "Anti-Prostitution Pledge"*

As one's personal or legal framework colors the debate over how human trafficking should be defined, so it colors one's viewpoint on how it should be fought. The debate surrounding which battle strategy best fits the war on human trafficking derives from one simple equation:

$$\text{SUPPLY} + \text{DEMAND} = \text{HUMAN TRAFFICKING}$$

Though some prefer to tackle supply and demand equally and simultaneously,<sup>126</sup> others prefer to focus more heavily on the supply side.<sup>127</sup> The Bush Administration, however, made a policy decision to tackle the demand side of the equation and focused its attention specifically on eradicating the demand for sex trafficking.<sup>128</sup> This

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standardized data and of ensuring reliability of statistics." (quoting INT'L ORG. FOR MIGRATION (IOM), ASEAN AND TRAFFICKING IN PERSONS: USING DATA AS A TOOL TO COMBAT TRAFFICKING IN PERSONS 27 (2007), available at [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published\\_docs/books/lowres%20asean%20report-complete.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/lowres%20asean%20report-complete.pdf))).

<sup>126</sup> These advocates call for a merger of the interdependent battles against poverty and human trafficking. See, e.g., KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES 219 (2007) ("[N]ot only does combating poverty help to end slavery, but combating slavery helps to end poverty."); *id.* at 226 ("A great deal of thought, theory, and practice focuses on ending poverty, rather less on ending slavery. What is becoming clear is that these two goals should be harnessed together; their combined strength is greater than the sum of the parts.").

<sup>127</sup> See, e.g., DESTEFANO, *supra* note 11, at xxvii ("Powerful economic needs impel people to put themselves at risk by turning to traffickers. Only when governments address those needs will such risky behavior be reduced."). DeStefano advocates that "[i]t is better . . . to give victims places to turn to for help—refuges such as law enforcement protection, social services, and coveted green cards—rather than take on the hopeless task of mandating an end to sex work." *Id.* at xxvi.

<sup>128</sup> See *id.* at 107–17. In 2003, the Bush Administration, which had adopted a strong anti-prostitution stance, responded to pressure to "link" this policy with its anti-trafficking policies. *Id.* at 108–09. Various publications soon began to surface "linking" prostitution with sex trafficking. See, e.g., O'CONNOR & HEALY, *supra*. In turn, the 2005 TVPRA made significant amendments to the TVPA that addressed the problem of demand. See *supra* note 82. While signing the 2005 TVPRA, the President declared:

[W]e cannot put the criminals out of business until we also confront the problem of demand. Those who pay for the chance to sexually abuse children and teenage girls must be held to account. . . . So we'll investigate and prosecute the customers, the unscrupulous adults who prey on the young and the innocent.

demand-centered policy enjoyed the support of other U.S. government agencies<sup>129</sup> and many anti-trafficking advocates who view sex trafficking as inextricably linked to prostitution.<sup>130</sup> As it played out in legislation, however—most conspicuously in regard to the TVPA's so-called "Anti-Prostitution Pledge"<sup>131</sup>—it garnered controversy and debate,<sup>132</sup> polarizing

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Press Release, The White House, Remarks by the President at Signing of H.R. 972, Trafficking Victims Protection Reauthorization Act of 2005 (Jan. 10, 2005), *available at* [http://www.sharedhope.org/images/Presidential\\_Letter.pdf](http://www.sharedhope.org/images/Presidential_Letter.pdf).

<sup>129</sup> See BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004), *available at* <http://www.state.gov/documents/organization/38901.pdf> ("Prostitution and related activities—including pimping and patronizing or maintaining brothels—fuel the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate."); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 27 (2007), *available at* <http://www.state.gov/documents/organization/82902.pdf> ("Where prostitution is tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.").

<sup>130</sup> See, e.g., Beverly LaHaye Inst., Concerned Women for Am., *Dr. Janice Crouse Testifies Before Maryland Legislature*, Feb. 8, 2008, <http://www.cwfa.org/articles/14671/BLI/commentary/index.htm> ("Prostitution and sex trafficking are inextricably linked and the bond that cements them is demand."); MONICA O'CONNOR & GRAINNE HEALY, THE LINKS BETWEEN PROSTITUTION AND SEX TRAFFICKING: A BRIEFING HANDBOOK 3 (2006), *available at* <http://action.web.ca/home/catw/attach/handbook.pdf>; DONNA M. HUGHES, THE DEMAND FOR VICTIMS OF SEX TRAFFICKING 5 (2005), *available at* [http://www.uri.edu/artsci/wms/hughes/demand\\_for\\_victims.pdf](http://www.uri.edu/artsci/wms/hughes/demand_for_victims.pdf) ("Where prostitution is flourishing, pimps cannot recruit enough local women to fill up the brothels, so they have to bring in victims from other places.").

<sup>131</sup> A controversial provision of the 2003 TVPRA declared that "[n]o funds made available to carry out this division . . . may be used to promote, support, or advocate the legalization or practice of prostitution." Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, sec. 7(7), 117 Stat. 2875, 2885–86 (codified as amended at 22 U.S.C. § 7110(g) (2006)). It also attached a condition on funding, essentially requiring recipient organizations to adopt a legal policy opposing prostitution. *Id.* Though still in effect despite the 2008 amendments, the condition has been vigorously opposed by certain groups that advocate human rights for sex workers. See, e.g., Press Release, Urban Justice Ctr., The Sex Workers Project Welcomes Increased Protections for Trafficked Persons (Dec. 12, 2008), *available at* <http://www.sexworkersproject.org/downloads/20081212-tvpra-passage-pr.pdf> (labeling the condition the "infamous 'Anti-Prostitution Pledge'"); Film: Taking the Pledge (Network of Sex Work Projects 2006), *available at* <http://www.sexworkerspresent.blip.tv/file/181155> (labeling the funding restrictions a "prostitution gag rule," that, in effect, "prevent[s] sex workers from helping to create responses to trafficking and prostitution"). For sex worker advocates, "[t]he anti-prostitution pledge requirement . . . claims moral high ground while eclipsing the plight of many trafficked people and sex workers." *Id.*

<sup>132</sup> See, e.g., Laura Blumenfeld, *In a Shift, Anti-Prostitution Effort Targets Pimps and Johns*, WASH. POST, Dec. 15, 2005, at A01, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/14/AR2005121402539.html>; *Talk of the Nation, Authorities Target Customers to Curb Prostitution* (NPR Radio Broadcast Dec. 21, 2005), *available at* <http://www.npr.org/templates/story/story.php?storyId=5064700> (radio show debating the effectiveness of law enforcement's focus on the demand side of prostitution).

certain groups of activists<sup>133</sup> and even leading to litigation.<sup>134</sup> “The fight over prostitution as it related to sex trafficking . . . had become a moral battle.”<sup>135</sup>

The heated debate surrounding demand and concerning the “infamous” Anti-Prostitution Pledge only underscores the need for the current presidential administration to quell the bickering over the best tactic for fighting human trafficking. As our nation’s central authority figure, the President must clearly delineate a battle strategy that all government agencies and private organizations can rally around, despite individual disagreement.<sup>136</sup> Ideally, this long-term strategy should address *both* the supply and demand sides of the equation, though the President’s policy may elect to emphasize or prioritize one over the other in the short term.

*C. Whose Role Is It Anyway?: Friction Between Government Agencies and Differing Department Priorities*

The anti-trafficking movement calls for “an unprecedented degree of coordination between state and federal justice departments.”<sup>137</sup> The daunting task of governmental coordination poses both horizontal and vertical challenges. Horizontally, competing federal agencies tasked with enforcement of the TVPA and its amendments must coordinate their efforts to work together in an expedient fashion. Vertically, states must coordinate their efforts with the federal government in order to streamline effective enforcement of anti-trafficking laws and guarantee adequate protection of victims.<sup>138</sup>

The TVPA’s Interagency Task Force, uniting no less than nine different federal agencies or departments tasked with spearheading the implementation of the TVPA and its amendments,<sup>139</sup> is a prime example

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<sup>133</sup> DESTEFANO, *supra* note 11, at xxi (presenting his view that “by focusing so much attention on sex work . . . the U.S. debate about trafficking has become a way for anti-prostitution zealots to single out sex work as a particular evil. They have found ready allies in the Bush Administration, which has advanced legislation and policies to conform to the anti-prostitution agenda while further polarizing human rights advocates working on the trafficking issue”).

<sup>134</sup> See *DKT Int’l v. U.S. Agency for Int’l Dev.*, 435 F. Supp. 2d 5 (D.D.C. 2006), *rev’d*, 477 F.3d 758 (D.C. Cir. 2007).

<sup>135</sup> DESTEFANO, *supra* note 11, at 111.

<sup>136</sup> See *infra* Part V (suggesting that a timetable governing specifically delineated goals will help implement a long-term strategy).

<sup>137</sup> Bales, *supra* note 42, at 80.

<sup>138</sup> For discussion of this issue, see *supra* Part II.A.2.

<sup>139</sup> See 22 U.S.C. § 7103(b) (2006). This is no small task, as the Task Force members constitute representatives of a of a wide array of agencies, including “the Secretary of State, the Administrator of the United States Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, the Director of National Intelligence, the Secretary of Defense, [and] the Secretary of

of how coordination represents one of the main struggles in the implementation of anti-trafficking initiatives. Though on the surface, the collaborative approach of the Task Force appears to make significant headway toward the goal of streamlining implementation of the TVPA, government officials point to lingering challenges such as interagency rivalries,<sup>140</sup> inconsistent case approaches due to differing agency priorities,<sup>141</sup> and the logistical difficulties of coordinating large numbers of agency employees and participants. For example, DHS and the Department of Health and Human Services (“HHS”)—two government agencies heavily involved in the critical processes of apprehension and victim identification—have markedly different missions.<sup>142</sup> Even within the TVPA, friction between competing agencies—especially in light of certain provisions added by the 2008 TVPRA<sup>143</sup>—underscores the need to

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Homeland Security.” *Id.*; see also William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tit. I, sec. 101, 122 Stat. 5044, 5045 (to be codified at 22 U.S.C. 7103(b)) (amending Section 7103(b) to include the “Secretary of Education”).

<sup>140</sup> See Bales, *supra* note 42, at 78; Haynes, *supra* note 29, at 376.

<sup>141</sup> UNDERSTANDING AND IMPROVING, *supra* note 38, at 10 (identifying “[t]enuous relationships among task force members who operated with different and at times conflicting goals (i.e. immigration rights advocates and Immigrations and Customs Enforcement officials often must come to agreement about how to best intervene in situations involving potentially out of status immigrant groups)” as obstacles to overcome).

<sup>142</sup> Compare U.S. Dep’t of Health and Human Servs., HHS: What We Do, <http://www.hhs.gov/about/whatwedo.html> (last visited May 10, 2009) (“(HHS) is the United States government's principal agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves.”), and Admin. for Children & Families, U.S. Dep’t of Health and Human Servs., About Rescue & Restore: Campaign Overview, [http://www.acf.hhs.gov/trafficking/rescue\\_restore/index.html](http://www.acf.hhs.gov/trafficking/rescue_restore/index.html) (last visited May 10, 2009) (“The intent of the Rescue & Restore campaign is to increase the number of identified trafficking victims and to help those victims receive the benefits and services needed to live safely in the [United States].”), with U.S. Dep’t of Homeland Sec., Strategic Plan—One Team, One Mission, Securing Our Homeland, <http://www.dhs.gov/xabout/strategicplan> (last visited May 10, 2009) (“[The] Department of Homeland Security’s overriding and urgent mission is to lead the unified national effort to secure the country and preserve our freedoms.”).

<sup>143</sup> Notably, the 2008 TVPRA amendments to the TVPA vest increasing authority in the Secretary of HHS to screen illegal aliens to determine victim status and eligibility for benefits. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 tit. II, sec. 212, 122 Stat. at 5063 (to be codified at 22 U.S.C. § 7105(b)(1)) (vesting “exclusive authority” in the Secretary of HHS “to make interim eligibility determinations”); *id.* tit. II, sec. 235, 122 Stat. at 5074–75 (to be codified at 8 U.S.C. § 1232) (vesting authority for the Secretary of HHS to make determinations regarding unaccompanied alien children). Because these provisions “essentially distanc[e] law enforcement” from these unaccompanied minors, some conservative experts fear that an unlimited vesting of authority to HHS “could turn every minor’s case into victim advocacy, when law enforcement may have a legitimate role to play in some circumstances.” *Aid Approved*, WORLD, Dec. 27, 2008/Jan. 3, 2009, at 12.

Removing law enforcement authorities—such as the DHS, FBI, or DOJ—from the victim identification process has serious national security implications. Publishing its

clearly define the roles of specific agencies. These challenges illuminate a significant void—a lack of leadership and direction from a central authority figure.<sup>144</sup>

#### V. TIME TO RALLY THE TROOPS: THE NEED FOR A STRATEGIC FRAMEWORK TO FINISH THE FIGHT

“Whatever politics surround the trafficking issue, it is clear that the phenomenon will attract nations’ attention and energy for years to come.”<sup>145</sup> Though efforts to fight modern-day slavery are growing in scope, sophistication, and momentum, many traffickers remain elusive, shielded by a larger ring of underground criminals.<sup>146</sup> The generational nature of the war on trafficking means that abolitionists must dig into the trenches and settle in for the long battles ahead. A well-fought war requires a well-mapped strategy of attack—including specifically delineated battle plans and a timeline to achieve certain goals.<sup>147</sup> Looking ahead, others have recognized that a strategic framework is

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stance in opposition to similar provisions proposed in an earlier version of the bill, the DOJ made it clear that “[t]he Attorney General should be involved in any program that focuses on combating child trafficking at the border.” Letter from Brian A. Benzckowski, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to the Honorable John Conyers, Jr., Chairman of Comm. on the Judiciary, U.S. House of Representatives 11 (Nov. 9, 2007), available at <http://www.usdoj.gov/olp/pdf/dept-view-letter-hjc-on-hr3887.pdf>. In critiquing the bill, the DOJ expressed its strong opposition to any “language . . . that inappropriately remove[d] law enforcement from any initial determination of victim status or benefits eligibility.” *Id.* at 6.

Further, in light of “national security interests,” the DOJ argued that “DHS need[ed] more flexibility to handle gang members, terrorists, repeat offenders, and state offenders.” *Id.* at 11. National security concerns are only amplified by suggested relationships between human trafficking and terrorism. *See, e.g.*, Renee Sauerland, Human Trafficking: Application of Alternative Methodologies For Elimination as a Critical Component in the United States War on Terror 2 (2006) (unpublished M.A. thesis, Regent University) (on file with Regent University Library) (“It has been shown that organized crime organizations are directly associated with terrorist organizations, which use trafficking of humans as a source of income and increased ‘manpower’ support.”); TIP REPORT 2006, *supra* note 39, at 17 (“In some parts of the world, traffickers are distorting traditional Islamic customs to facilitate human trafficking.”). Just as victims’ rights advocates may argue that DHS is ill equipped to identify and facilitate prompt protection of trafficking victims encountered at the border, others may argue that HHS is not trained to identify criminal or terrorist threats in unaccompanied minors discovered within the borders. *See supra* note 142.

<sup>144</sup> *See infra* note 149.

<sup>145</sup> DESTEFANO, *supra* note 11, at xxvii.

<sup>146</sup> *See supra* notes 17, 35, and 55.

<sup>147</sup> Though comprehensive, the TVPA and its amendments alone do not accomplish these objectives. Linger questions beg answers from a central authority, such as: Should child sex trafficking be prioritized over other forms of trafficking, for example labor trafficking, and if so, to what extent? Which federal department or agency has the final say over which issues? Is there a hierarchy defining how departments and agencies should work together? How are the issues of prostitution and sex trafficking related? How broad should the definition of trafficking be, and what types of activities should it encompass?

essential to finish the fight.<sup>148</sup> This Note proposes that our nation's Commander-in-Chief,<sup>149</sup> along with his administration, should develop and implement this strategic framework, which can be accomplished by publication of an annual United States Trafficking in Persons Strategy called U.S. TIPS. Similar to the Department of State's annual TIP report, U.S. TIPS would provide a published, centralized, authoritative document that all departments and agencies can regard as a source of universal guidance and strategy.<sup>150</sup>

U.S. TIPS could serve at least five specific functions to help implement an effective strategic framework: 1) define the parameters of human trafficking;<sup>151</sup> 2) delineate the roles of concerned departments, agencies, and NGOs;<sup>152</sup> 3) position future goals in an aspirational

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<sup>148</sup> See, e.g., THE ACTION GROUP, RECOMMENDATIONS FOR FIGHTING HUMAN TRAFFICKING IN THE UNITED STATES AND ABROAD: TRANSITION REPORT FOR THE NEXT PRESIDENTIAL ADMINISTRATION 7 (2008) [hereinafter ACTION GROUP TRANSITION REPORT], available at [http://theactiongroup.org/issues/Action\\_Group\\_Transition\\_Memo\\_2008.pdf](http://theactiongroup.org/issues/Action_Group_Transition_Memo_2008.pdf) (“[T]he [United States] must ensure that its policies, laws, and implementing government agencies are properly coordinated in an integrated framework to combat human trafficking worldwide.”); U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), REPORT TO CONGRESSIONAL REQUESTERS, HUMAN TRAFFICKING: A STRATEGIC FRAMEWORK COULD HELP ENHANCE THE INTERAGENCY COLLABORATION NEEDED TO EFFECTIVELY COMBAT TRAFFICKING CRIMES 38 (2007) [hereinafter GAO FRAMEWORK], available at <http://www.gao.gov/new.items/d07915.pdf> (recommending “a strategic framework to coordinate [United States] efforts to investigate and prosecute trafficking in persons”); Derek Ellerman, *A Framework for Strategic Planning Against Trafficking in Persons* (Mar. 1, 2005), [http://www.ellerman.info/joomla/index.php?option=com\\_content&task=view&id=12&Itemid=29](http://www.ellerman.info/joomla/index.php?option=com_content&task=view&id=12&Itemid=29) (showing a strategic framework developed by Polaris Project).

<sup>149</sup> “No single department or agency is capable of wielding the interagency authority necessary to bring together the full range of anti-trafficking actors and activities across the Executive Branch adequately.” ACTION GROUP TRANSITION REPORT, *supra* note 148, at 17. Accordingly, this Note agrees with the Action Group's recommendation that “[t]he Office of the President needs to take an active and informed leadership role to improve interagency collaboration, provide oversight, and ensure accountability because of the broad and complex interagency jurisdictional nature of this issue.” *Id.* at 18; cf. GAO FRAMEWORK, *supra* note 148, at 38 (recommending that “the Attorney General and the Secretary of Homeland Security, in conjunction with the Secretaries of Labor, State, and other agency heads deemed appropriate, develop and implement a strategic framework”).

Despite legislative initiatives establishing the President's Interagency Task Force (PITF) and Senior Policy Operating Group (SPOG), past performance has shown that relevant agencies all too often do not work well together absent direction and leadership from the White House. Instead they have frequently functioned as independent actors, failing to maximize the [United States] investment of resources in this issue and too often working at cross-purposes. ACTION GROUP TRANSITION REPORT, *supra* note 148, at 18.

<sup>150</sup> Unlike the broad-based TIP report, however, which assesses international anti-trafficking measures on a nation-by-nation basis, the more localized U.S. TIPS would address internal anti-trafficking policies and directives within the United States, assessing both national and state-specific initiatives.

<sup>151</sup> See *supra* Part IV.A.

<sup>152</sup> See *supra* Part IV.C.

timeline;<sup>153</sup> 4) measure progress on a state-by-state and national basis and identify statutory weaknesses at both levels;<sup>154</sup> and 5) provide a centrally recognized document to report synthesized updates of ongoing research results.<sup>155</sup> U.S. TIPS would also be an ideal forum in which to publish, as appendices, a model protocol for victim identification<sup>156</sup> as well as the DOJ's model state law.<sup>157</sup>

Publication of U.S. TIPS would help address many of the problems identified in this Note by clarifying ambiguities, providing direction, mapping out both long-term and short-term objectives (effectively implementing a "war strategy"), and, ultimately, by rallying the troops under a common purpose by presenting a unified mission. In addition, it would serve as a point of reference from which to disseminate updated information and research, as a means from which to measure progress and identify weaknesses, and as a tool to help sharpen anti-trafficking legislation, victim identification protocols, and assistance methods.

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<sup>153</sup> This function would help quell some of the debate surrounding which "tactic" or strategy the United States should adopt as it tackles the equation of human trafficking, presented *supra* Part IV.B ("SUPPLY + DEMAND = HUMAN TRAFFICKING").

<sup>154</sup> This comparative function would help evaluate states on an individual basis in a manner similar to the TIP report's method of reporting on progress of individual nation-states. Importantly, it would serve as a motivational force to encourage states, by way of peer pressure, to implement and improve local anti-trafficking measures.

<sup>155</sup> Given the overwhelming amount of research being conducted and published on human trafficking—varying in both quantity and quality—the need for a centralized place of dissemination is paramount. *See, e.g.*, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, U.S. GOVERNMENT FUNDED RESEARCH PROJECTS ON TRAFFICKING IN PERSONS FY02-07 (BY AGENCY) (2008), <http://www.state.gov/g/tip/rls/other/2008/109866.htm> (providing a chart of government funded trafficking research projects in multiple countries, including the United States); Nat'l Inst. of Justice, U.S. Dep't of Justice, Publications Related to Human Trafficking, [http://nij.ncjrs.gov/publications/Pub\\_Search.asp?category=99&searchtype=basic&location=top&PSID=25](http://nij.ncjrs.gov/publications/Pub_Search.asp?category=99&searchtype=basic&location=top&PSID=25) (last visited May 10, 2009) (providing links to twenty-seven extensive research publications either published or sponsored by the National Institute of Justice ("NIJ")); *see also* ACTION GROUP TRANSITION REPORT, *supra* note 148, at 28 (suggesting that "[m]eta-analysis could combine data sets from all agencies and make possible a deeper understanding of the incidence and trends of human trafficking, thus helping to improve intervention methods").

<sup>156</sup> HHS, the agency charged with issuing certification letters to victims of human trafficking who are eligible for the federal benefits outlined in the TVPA, provides useful resources in its Rescue & Restore Campaign Tool Kit. Admin. For Children & Families, U.S. Dep't of Health and Human Servs., Rescue & Restore Campaign Tool Kits, [http://www.acf.hhs.gov/trafficking/campaign\\_kits/index.html](http://www.acf.hhs.gov/trafficking/campaign_kits/index.html) (last visited May 10, 2009). At the same time, however, independent organizations are also developing similar resources. Notably, one group, funded by a federal grant from the DOJ, has extensively researched best practices for effective questions during screening processes in New York City and created a screening tool and accompanying toolkit for identifying potential victims. MEASURING HUMAN TRAFFICKING, *supra* note 36. As research continues to enhance the screening process and increase its effectiveness in identifying victims, the need for a centralized location to approve and publish a uniform model protocol increases.

<sup>157</sup> *See supra* note 47 and accompanying text.



U.S. TIPS is a tangible solution that would help our current President pick up the fight where the previous administration left off<sup>158</sup> and would help ensure that the 3-P prerogative is not only progressing but achieving an appropriate measure of balance between its independent goals of prevention, protection, and prosecution.<sup>159</sup>

#### CONCLUSION

The war on human trafficking involves battles on many fronts,<sup>160</sup> fought on many different fields.<sup>161</sup> The 2003, 2005, and 2008 TVPRAs reflect a commendable succession of increasing victories on the legislative battlefield, significantly enhancing the federal government's ability to prosecute traffickers and protect victims. While tracking those victories, this Note endeavored to illustrate how America's war on trafficking still suffers from a critical gap in "war strategy," and suggests that the new presidential administration can organize the future fight by practical implementation of a strategic framework in the form of an annually published U.S. TIPS.

Since the Clinton Administration's 1998 "declaration of war" against human trafficking, progress over the past decade should not be downplayed or diminished, but acknowledged and celebrated. President Bush's successive administration did much to fund and prioritize the fight against human trafficking. Congress, as emphasized, has contributed to significant legislative victories. In the private sector, passionate abolitionists have organized to spread awareness of the cause, provide vital victim services, improve victim identification procedures, develop better research methods, organize lobbying efforts, and contribute to scholarship. The efforts of these private individuals, often in the form of NGOs, have tremendously advanced the fight against trafficking in America.

Despite these advancements, the war rages on. Many battles are yet to be won, many traffickers yet to be discovered and prosecuted, and many victims yet to be rescued and released from bondage. Even with an army of organizations, agencies, and individuals ready to pick up the fight, the war will suffer absent clear direction and a united purpose.

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<sup>158</sup> See ACTION GROUP TRANSITION REPORT, *supra* note 148, at 5 (explaining how "the Clinton Administration's policies established a foundation for combating human trafficking" and the George W. Bush Administration "supported and significantly expanded America's commitment to end human trafficking," particularly by way of funding); *supra* Part I.

<sup>159</sup> See *supra* note 9 and accompanying text.

<sup>160</sup> For example, legal, social, political, and individual.

<sup>161</sup> The war on trafficking is fought from local street corners to state legislatures, from national halls of Congress to international conventions.

The President's leadership in developing a cohesive, comprehensive, and authoritative strategy is necessary to finish the fight for freedom.

*Valerie S. Payne*