BETWEEN A SHARP ROCK AND A VERY HARD PLACE: THE TRAFFICKING VICTIMS PROTECTION ACT AND THE UNINTENDED CONSEQUENCES OF THE LAW ENFORCEMENT COOPERATION REQUIREMENT

CHARLES SONG AND SUZY LEE*

I. Introduction

Today, slavery is illegal in nearly every country of the world. Yet, 600,000[1] to two million[2] people are trafficked across international borders annually, and millions more are trafficked within borders. In addition, an estimated 27 million people worldwide toil under conditions of slavery.[3] In fact, human trafficking has become one of the largest sources of profit for organized crime, generating billions of dollars each year.[4]

In December 1865, the Thirteenth Amendment to the United States Constitution abolished the legalized practice of holding people "to service or labor," as referred to in Article I, § 9 of the United States Constitution.[5] However, in 2000, the U.S. Congress found

* Charles Song is the founder and director of the Legal Advocacy Program at the Coalition to Abolish Slavery & Trafficking (CAST) in Los Angeles, California. Suzy Lee is a Staff Attorney and Equal Justice America Legal Services Fellow at CAST. The views expressed in this article are the authors' and do not represent the views of CAST.

[1] UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 6 (2005) *available at* http://www.state.gov/documents/organization/47255.pdf.

[2] United Nations Population Fund, *Trafficking in Human Misery*, http://www.unfpa.org/gender/trafficking.htm (last visited Feb. 16, 2006).

[3] KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 8–9 (1999).

[4] *See* 146 CONG. REC. S7788 (daily ed. July 27, 2000) (statement of Senator Brownback). *See also* FRANCIS T. MIKO, TRAFFICKING IN WOMEN AND CHILDREN: THE U.S AND INTERNATIONAL RESPONSE 4, CRS REPORT FOR CONGRESS (2004).

[5] *See* U.S. CONST. amend. XIII, §§ 1-2. The Thirteenth Amendment to the United States Constitution provides:

that "at least 700,000 persons annually" are trafficked within or across international borders,[6] "[a]pproximately 50,000 women and

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

President Abraham Lincoln signed the Emancipation Proclamation on January 1, 1863, which stated that, "all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free." However, slavery was not legally ended until the Thirteenth Amendment--which was passed by the Senate on April 8, 1864, and by the House on January 31, 1865--was ratified on December 6, 1865. The Thirteenth Amendment was proposed to the legislatures of the several States by the Thirty-eighth Congress, on the 31st day of January, 1865, and was declared, in a proclamation of the Secretary of State, dated the 18th of December, 1865, to have been ratified by the legislatures of twenty-seven of the thirty-six States. The dates of ratification were: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; Pennsylvania, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Indiana, February 13, 1865; Nevada, February 16, 1865; Louisiana, February 17, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865; Tennessee, April 7, 1865; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, July 1, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865; North Carolina, December 4, 1865; Georgia, December 6, 1865.

The amendment was subsequently ratified by Oregon, December 8, 1865; California, December 19, 1865; Florida, December 28, 1865 (Florida again ratified on June 9, 1868, upon its adoption of a new constitution); Iowa, January 15, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 18, 1870; Delaware, February 12, 1901 (after having rejected the amendment on February 8, 1865); Kentucky, March 18, 1976 (after having rejected it on February 24, 1865). The amendment was rejected (and not subsequently ratified) by Mississippi, December 4, 1865. U.S. CONST. amend. XIII (historical note).

[6] *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.) [hereinafter VTVPA]. Division A of the VTVPA is further identified as the Trafficking Victims Protection Act of 2000 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000), which incorporates 18 U.S.C. §§ 1589-1594

children are trafficked into the United States each year,"[7] and trafficking victims are in desperate need of safe "integration or resettlement."[8] It is estimated that at least ten thousand people are currently *forced* to work in the U.S.[9]

With the intention of helping to protect survivors of these violent crimes, Congress enacted[10] the Trafficking Victims Protection Act ("TVPA"),[11] amended by the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPRA 2003"),[12] and by the Vio-

(2000)) [hereinafter TVPA]. President Clinton signed the TVPA into law on Oct. 28, 2000.

[7] *Id*. S*ee also* AMY O' NEILL RICHARD, U.S. CENTRAL INTELLIGENCE AGENCY, CENTER FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME iii (1999). In 2004, the United States Department of State estimated that 14,500 to 17,000 people, the majority of them women and children, are trafficked into the United States each year. *See* UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2004).

[8] *See* TVPA, *supra* note 6, 22 U.S.C. § 7105(a)(1)(E).

[9] *See* FREE THE SLAVES & HUMAN RIGHTS CENTER UNIVERSITY OF CALIFORNIA, BERKELEY, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 10 (2004). *See also* HUMAN RIGHTS CENTER UNIVERSITY OF CALIFORNIA, BERKELEY, FREEDOM DENIED: FORCED LABOR IN CALIFORNIA (2005).

[10] In addition to the creation of international economic development programs, the United States must consult and cooperate with nongovernmental organizations to establish public education initiatives to increase awareness of human trafficking and the protections available for victims. *See* TVPA, *supra* note 6, 22 U.S.C. § 7104(b), (f). The TVPA also created a federal Interagency Task Force to Monitor and Combat Trafficking. The Task Force is charged with collecting and organizing data and information on trafficking, which will guide efforts to combat trafficking and help trafficking victims within the United States. *See* TVPA, *supra* note 6, 22 U.S.C. § 7103(d)(3). Complementing this effort, federal agencies must provide research grants to nongovernmental organizations to examine the economic causes and consequences of trafficking and the effectiveness of anti-trafficking and victim assistance programs, among other issues. *See* TVPA, *supra* note 6, 22 U.S.C. § 7109(a).

[11] *See* TVPA, *supra* note 6.

[12] The Trafficking Victims Protection Reauthorization Act of 2003 created a new trafficking cause of action that permits trafficking victims to file specific trafficking claims against their traffickers in federal court, made family members of victims of severe forms of trafficking eligible for federal benefits and services, and requires the Attorney General to report on U.S. efforts to combat trafficking to Congress every year beginning on May 1, 2004. Trafficking Victims Protection

lence Against Women and Department of Justice Reauthorization Act ("VAWA"),[13] as well as the Trafficking Victims Protection Reauthorization Act of 2005 ("TVPRA 2005").[14] The TVPA was the first comprehensive federal legislation to address the problem of human trafficking, using a three-tiered approach consisting of protection, prosecution, and prevention.[15] This legislation dramatically improved the ability of prosecutors to punish traffickers by creating new trafficking crimes and increased sentencing requirements, as well as providing the critical protection mechanisms survivors needed in order to assist in the investigation and prosecution of their traffickers.[16] Most importantly, by enacting the TVPA, Congress recognized that the effective prosecution of human traffickers required survivors to testify, risking their lives and the lives of their families. In return, essential immigration protections are provided for trafficked persons in the form of "T Nonimmigrant Status" ("TNS").[17]

However, more than five years after enactment of the TVPA, which authorized 5,000 TNS allocations per year,[18] less than seven hundred TNS designations have currently been issued.[19] In light of

---

Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (Dec. 19, 2003) [hereinafter TVPRA].

[13] Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

[14] Pub. L. No. 109-164, 19 Stat. 3558 (Jan. 10, 2006).

[15] *See* 146 CONG. REC. S10164-02, S10180 (daily ed. Oct. 11, 2000) (statement of Sen. Wellstone).

[16] *See* TVPA, *supra* note 6. *See also* 146 CONG. REC. S10164-02, S10180 (daily ed. Oct. 11, 2000) statement of Sen. Wellstone).

[17] *See* TVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T).

[18] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1184(o)(2); TVPA, *supra* note 6, 22 U.S.C. §§ 7101-7110, 8 U.S.C. §§ 1101(a)(15), 1184 (2000), *amended by* 22 U.S.C. 7105(e)(1)-(2). This amendment, among other things, limits the "total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year . . . [to] 5,000." *See also* Alien Victims of Severe Forms of Trafficking in Persons, 8 C.F.R. § 214.11(m) (2002). A few Representatives even argued against the 5,000 visa limit in conferences on H.R. 3244, the TVPA as introduced in the House of Representatives. *See* Appointment of Conferees on H.R. 3244, Trafficking Victims Protection Act of 2000, 146 CONG. REC. H7628, H7629 (2000).

[19] According to a presentation by H.G. Wetherby of the United States Citizenship & Immigration Service at the Freedom Network Conference in Chicago, Illi-

the fact that thousands of people are trafficked into the U.S. on an annual basis,[20] this unacceptably low number of TNS designations is clearly contrary to Congress' original intended outcome.[21] What these results essentially mean is that traffickers are not being prosecuted and survivors are not being provided services, as Congress had originally planned.

One of the primary reasons for this discrepancy is that some of the provisions of the TVPA were drafted too narrowly by Congress, out of the precautionary fear that TNS designations may be abused.[22] With less than seven hundred out of a possible twenty thousand TNS designations being granted, it appears safe to conclude

---

nois on March 14, 2006, 620 applications for TNS have been approved, 151 are pending, and 562 have been denied. 568 applications for derivative TNS have been approved, 145 are pending, and 79 have been denied.

[20] *See* UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2004).

[21] Legislators' primary intent in passing the TVPA was to protect victims of these violent crimes. Representative Chris Smith (R-NJ), one of the authors of the VTVPA, unequivocally confirmed this was the case in his keynote address at the State Department conference on trafficking in February 2003:

> While it was the intent of the legislation [the *Trafficking Victims Protection Act of 2000*] that victims of trafficking should help in the investigation or prosecution of trafficking cases, there should be no doubt that the T Nonimmigrant Status was primarily intended as a humanitarian tool to facilitate the rehabilitation of trafficking survivors.

http://www.state.gov/g/tip/rls/rpt/20834.htm (last visited Feb. 11, 2006). *See also* 146 CONG. REC. H8855-02, H8856 (daily ed. Oct. 5, 2000), on the Act (§ 102(b)(24), which provides that "[t]rafficking in persons is a transnational crime with national implications. To deter international trafficking ... nations including the United States must ... protect[ ] rather than punish[ ] the victims of such offenses.").

[22] *See* 146 CONG. REC. H7628, H7629 (daily ed. Sept. 14, 2000) (statement of Rep. Watt). *See also* Theresa Barone, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT'L & COMP. L.J. 579, 594 (2003) (stating that the "most serious flaw of the [TVPA] stems from the definition of trafficking. By limiting its scope to 'severe forms of trafficking,' the [TVPA] implicitly recognizes that other forms of trafficking exist, although it makes no attempt to define those forms."); Jennifer M. Wetmore, *The New T Visa: Is the Higher Extreme Hardship Standard Too High for Bona Fide Trafficking Victims?,* 9 NEW ENG. J. INT'L & COMP. L. 160 (2003); Ryf, *infra* note 76, at 67-8.

that Congress' narrow construction of the TNS provisions in the TVPA have successfully prevented such abuse of the system. But is this how Congress intended critical victim protections to be implemented, and if so, at what cost?

This article will examine whether it should be mandatory for victims of severe forms of trafficking to cooperate with law enforcement agencies in order to be eligible to receive critical victim protections. As part of this examination, this article will introduce the landmark TVPA, as amended by the TVPRA and VAWA, and in particular TNS, otherwise known as the T Visa provisions.[23] Second, this article will analyze the practical application of the requirement, which mandates that victims of severe forms of trafficking must comply with all reasonable law enforcement requests to be eligible for a T Visa. Finally, this article will argue that survivors of trafficking, who have proven to authorities that they escaped the threat of violent criminals, demonstrated their previous enslavement, and established that they will face extreme hardship involving severe and unusual harm if removed from the U.S., should not be required to cooperate with U.S. law enforcement in order to receive critical services and protection.

II. The Trafficking Victims Protection Act of 2000

As its title denotes, the TVPA approaches human trafficking through the application of comprehensive protections for victims of severe forms of trafficking.[24] The law strengthens the ability of the federal government to combat human trafficking by providing explicit protections to victims,[25] including immigration status, social service benefits,[26] and specific legal rights.[27] The TVPA also man-

[23] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15) (2000), amended by 22 U.S.C. § 7105(e)(1). The TVPA, *supra* note 6, amended Section 101(a)(15) of the INA by, among other things, adding new subparagraph (T).

[24] *See* TVPA, *supra* note 6.

[25] Federal officials are required to receive training to identify these victims and provide them with the protections provided by federal law. *See* TVPA, *supra* note 6, 22 U.S.C. § 7105(c)(4).

[26] *Id.* 22 U.S.C. § 7105(b)(1)

dates forfeiture of trafficking assets,[28] restitution for victims,[29] and creates newly defined crimes pertaining directly to trafficking offenses.[30] The comprehensive protections of the TVPA attempt to

[27] *Id.* 22 U.S.C. § 7105(c). TVPRA 2005 amended 22 U.S.C. 7105(c)(2) by adding: "To the extent practicable, victims of severe forms of trafficking shall have access to information about federally funded or administered anti-trafficking programs that provide services to victims of severe forms of trafficking."

[28] *See* TVPA, *supra* note 6, 18 U.S.C. §1594.

[29] *See* TVPA, *supra* note 6, 18 U.S.C. § 1593.

[30] These new crimes include: forced labor; trafficking with respect to peonage; slavery or involuntary servitude; sex trafficking by fraud, force or coercion; sex trafficking of children; unlawful conduct with respect to documents in furtherance of trafficking; and attempts to engage in the above listed behaviors. 18 U.S.C. §§ 1589 – 1592 (2004). In advocating for these new crimes, a senior Department of Justice official testified:

> [W]e must expand the types of coercion that can be used to demonstrate involuntary servitude and peonage under Federal [sic] law. One of the biggest enforcement hurdles we face is that the U.S. Supreme Court requires a showing that the defendant used actual force, threat of force, or threat of legal coercion to enslave the victim. As a result, Federal [sic] law suffers from gaps in coverage. Law enforcement cannot reach and prosecute those who intentionally use more subtle, but no less heinous, forms of coercion that wrongfully keep the victim from leaving his or her labor or service.

Trafficking in Persons: Hearings on International Trafficking of Persons Before the Subcomm. on Near Eastern and South Asian Affairs Committee on Foreign Relations, U.S. Senate, 106th Cong., (2000) (Statement of William R. Yeomans, Chief of Staff, Civil Rights Division, United States Department of Justice), http://usinfo.org/wf-archive/2000/000405/epf312.htm.

Additionally, sentencing enhancements increased penalties for offenses that involve large numbers of victims, a pattern of continued and flagrant violations, use of dangerous weapons, or bodily injury to victims. *See* TVPA, *supra* note 6, 22 U.S.C. § 7109(b)(2)(C)(i–iv) (2004). Penalties were also increased for peonage, 18 U.S.C. § 1581(a) (2000), enticement into slavery, 18 U.S.C. § 1583 (2000), and sale into involuntary servitude, 18 U.S.C. § 1584 (2000). To increase penalties, Congress changed the language in 18 U.S.C §§ 1581, 1582, 1584 to increase maximum punishments for crimes of involuntary servitude. Maximum sentences increased from 10 to 20 years. Also added to the end of each statute was the following language: "If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant

address the specific needs of trafficking victims and recognize the importance of effectively combating trafficking in today's modern society.[31]

Most importantly, the TVPA amended the Immigration and Nationality Act ("INA")[32] to establish two critical immigration protections specifically for victims of severe forms of trafficking: a temporary legal status, known as "continued presence"[33] and a nonimmigrant status called TNS, which is more commonly referred to as a T Visa.[34]

---

shall be fined under this title or imprisoned for any term of years or life, or both." 18 U.S.C. §§ 1581(a), 1583, 1584 (2000).

[31] *See* TVPA, *supra* note 6.

[32] *See generally* VTVPA, *supra* note 6, 8 U.S.C. § 1101.

[33] *See* TVPA, *supra* note 6, 22 U.S.C. § 7105(c)(3).

[34] *See* TVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T). The number of T Visa applications reported by the Vermont Service Center, which processes all T Visa applications, is less than 1200 for the five years since the TVPA's 2000 passage; fewer than 700 principals have been granted T nonimmigrant status. These numbers show that less than .01% of the 14,500 to 50,000 persons trafficked into the United States each year are granted immigration relief under the TVPA. And because social services to trafficking victims are contingent upon certification, which can only be obtained through the T Visa or continued presence, the numbers of trafficked persons receiving the assistance intended by the TVPA are equally small. Compare these numbers with the response to the Violence Against Women Act ("VAWA") of 1994, Pub. L. 103-322, 108 Stat. 1796. VAWA offers immigration relief for battered immigrant women. In the first four years of its implementation, over 11,000 applications were submitted, and over 6,500 were approved. Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Reponses*, 10 AM. U.J. GENDER SOC. POL'Y & L. 95, 117 (2001) (*citing* the statement of Barbara Strack, Acting Executive Associate Commissioner, INS, *in Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 106th Cong. 91 (2000)). This comparison is significant because the elements required for immigration relief under VAWA were similar to those required for T nonimmigrant status, with the exception of the law enforcement cooperation requirement. As in the T Visa, an applicant for immigration relief under VAWA needed to show that she was the type of victim intended to be protected under the relevant law, and that removal would result in extreme hardship. 8 U.S.C. § 1154(a)(2)(A)(i)(II) (1994). In fact, but for the law enforcement cooperation requirement, VAWA immigration relief was more restrictive than the TVPA in that it required the additional showing of "good moral character." *Id.* § 1154(a)(1)(C)(iii). Although exact numbers on

Section 103(8) of the TVPA defines "severe forms of trafficking in persons" as the following:

> (A) sex trafficking[35] in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[36]

Under the auspices of this statute, federal law enforcement officials can petition the Department of Homeland Security ("DHS") to grant victims of severe forms of trafficking the authority to remain within the U.S. ("continued presence"), if a victim's presence is necessary for subsequent prosecutorial efforts.[37] Victims granted *con-*

---

battered spouses of U.S. citizens and legal permanent residents are difficult to ascertain, a very rough, high estimate would put the persons eligible for VAWA relief at 100,000 per year. Exact statistics or even estimates on the numbers of battered immigrant women are not available. This estimate is derived from two different statistics. The U.S. Department of Justice ("DOJ") estimated that there were about 1 million incidents of intimate violence per year between 1992 and 1996. BUREAU OF JUSTICE STATISTIC, DOJ, VIOLENCE BY INTIMATES 3-4 (1998), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf (last visited Feb. 11, 2006) (cited in Sarah M. Wood, *VAWA's Unfinished Business: The Immigrant Women Who Fall Through the Cracks*, 11 DUKE J. GENDER L. & POL'Y 141, 141 (2004). The Congressional Budget Office estimates of the percentage of the foreign-born population hover around 10% during the 1990s, rising steadily. CONGRESSIONAL BUDGET OFFICE, A DESCRIPTION OF THE IMMIGRANT POPULATION (Nov. 2004) *available at* http://www.cbo.gov/showdoc.cfm?index=6019&sequence=0 (last visited Feb. 11, 2006). These numbers combined produce 100,000. This is only two to seven times the number of trafficked persons estimated to enter the U.S. each year. The number of VAWA applicants during a four-year period is over twelve times the number of T Visa applicants during a five-year period.

[35] The TVPA states that "[t]he term `sex trafficking' means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act." *See* TVPA, *supra* note 6, 22 U.S.C. § 7102(9).

[36] *Id.* § 7102(8).

[37] *Id.* § 7105(c)(3).

tinued presence are typically granted permission to remain in the U.S. for one year and are issued employment authorization documents valid for that specific period.[38] The individuals may remain only so long as the Attorney General determines that their presence within the U.S. is necessary for the investigation or prosecution of the pertinent trafficking case.[39] Under *continued presence* authority, a victim's status cannot be adjusted to permanent residency in the U.S.[40]

Within the definition of *continued presence* authority, eligibility for T Visa status extends only to those who meet the following criteria: (1) [The individual] has been a victim of severe forms of trafficking; (2) is physically present in the United States or port of entry; and (3) has complied with reasonable requests for assistance in the investigation or prosecution of traffickers;[41] and (4) would suffer extreme hardship upon removal.[42]

---

[38] 28 C.F.R. 1100.35. Although *continued presence* may be renewed by the federal law enforcement agency which requested the original *continued presence*, renewing *continued presence* is rare and requires that the investigation or prosecution is pending.

[39] *See* TVPA, *supra* note 6, 22 U.S.C. § 7105(b)(1)(E)(ii). VAWA recently clarified that "investigation or prosecution" includes "responding to and cooperating with requests for evidence and information." *Id.*

[40] *Id.* The TVPA only permits the Attorney General to adjust the status of T Nonimmigrants. *See* TVPA, *supra* note 6, 8 U.S.C. § 1255(l).

[41] Victims of a severe form of trafficking who have not attained 18 years of age are not required to comply with requests for assistance in the investigation or prosecution of acts of trafficking. *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb). Victims of a severe form of trafficking can meet this requirement by cooperating with state or local authorities in the investigation and/or prosecution of trafficking crimes or ancillary crimes. *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa). Furthermore, VAWA amended the VTVPA to provide:

> (iii) if the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance described in clause (i)(III)(aa), the request is unreasonable.

[42] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T). Victims of severe forms of trafficking can self-petition for T Nonimmigrant status. T Nonimmigrant Status is valid for four years or longer if a law enforcement official certifies the T

Pursuant to INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T), the Attorney General may grant TNS or T Visa status based on the following conditions:

> (i) subject to section 214(o),[43] an alien who the Secretary of Homeland Security, or in the case of subclause

---

visa holder's assistance is necessary for an investigation or prosecution. *See* VTVPA, *supra* note 6, 8 U.S.C. § 1184(o). The Attorney General may only grant 5,000 T visas per year. *See* VTVPA, *supra* note 6, 8 U.S.C. § 1184(o)(2).

[43] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1184(o), provides:

> (1) No alien shall be eligible for admission to the United States under section 1101(a)(15)(T) if there is substantial reason to believe that the alien has committed an act of a severe form of trafficking in persons (as defined in section 103 of the Trafficking Victims Protection Act of 2000).
>
> (2) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year under section 1101(a)(15)(T) may not exceed 5,000.
>
> (3) The numerical limitation of paragraph (2) shall only apply to principal aliens and not to the spouses, sons, daughters, or parents of such aliens.
>
> (4) An unmarried alien who seeks to accompany, or follow to join, a parent granted status under section 101(a)(15)(T)(i), and who was under 21 years of age on the date on which such parent applied for such status, shall continue to be classified as a child for purposes of section 101(a)(15)(T)(ii), if the alien attains 21 years of age after such parent"s application was filed but while it was pending.
>
> (5) An alien described in clause (i) of section 101(a)(15)(T) shall continue to be treated as an alien described in clause (ii)(I) of such section if the alien attains 21 years of age after the alien's application for status under such clause (i) is filed but while it is pending.
>
> (6) In making a determination under section 101(a)(15)(T)(i)(III)(aa) with respect to an alien, statements from State and local law enforcement officials that the alien has complied with any reasonable request for assistance in the investigation or prosecution of crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking in persons (as defined in section 103 of the Trafficking Victims Protection Act of 2000) appear to have been involved, shall be considered.
>
> (7) (A) Except as provided in subparagraph (B), an alien who is issued a visa or otherwise provided nonimmigrant status under

> (III)(aa) the Secretary of Homeland Security and the Attorney General jointly determines--
> (I) is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000 ("TVPA");
> (II) is physically present in the United States [. . .] or at a port of entry [. . .] on account of such trafficking;
> (III)(aa) has complied with any reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime; or
> (bb) has not attained 18 years of age; and
> (IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal . . . .[44]

> section 101(a)(15)(T) may be granted such status for a period of not more than 4 years. (B) An alien who is issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(T) may extend the period of such status beyond the period described in subparagraph (A) if a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking or certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity.

[44] *Id.* § 1101(a)(15)(T). Senator Brownback of Kansas, an original sponsor of the TVPA, explained the hardship requirement as follows:

> This was raised in conference committee under thorough discussion about this new standard of "extreme hardship involving unusual and severe harm." There was a fear on the part of some conferees that some judicial interpretations over the term "extreme hardship" might be too expansive; specifically, the conferees objected to an interpretation that the applicant could prove "extreme hardship" by showing he or she would miss American baseball after being deported from the United States. So this language should be interpreted as a higher standard than some of these expansive interpretations of "extreme hardship." At the same time, however, this language should not exclude bona fide victims who would suffer genuine and serious harm if they were deported. There is no requirement that the harm be physical harm. I repeat, there is no requirement that the harm be physical

A victim's spouse and children may also be granted T Visa(s).[45] In the case of victims under twenty-one years of age, the parents of the victim and any unmarried siblings under the age of eighteen are also eligible to come to the U.S.[46] As of January 5, 2006, the DHS can now approve these reunification requests without a finding that the presence of these family members in the U.S. is necessary to avoid extreme hardship.[47]

T Nonimmigrants may apply to adjust their status to that of lawful, permanent U.S. residents.[48] In order to qualify for this ad-

---

> harm or that it be caused by the trafficking itself. The harm or the hardship does not have to be caused by the trafficking itself. The purpose of inserting the phrase "unusual and severe" is to require a showing that something more than the inconvenience and dislocation that any alien would suffer upon removal might occur. I wish to make it clear in future interpretations of this act, while this is higher than extreme hardship, it doesn't require physical harm; it doesn't require the harm be associated with the trafficking ... to qualify under this new definition within the act.

Trafficking Victims Protection Act Of 2000, Conference Report, 146 CONG. REC. S10164-02, S10179, (daily ed. Oct. 11, 2000 (Senate) (emphasis added).

The "unusual and severe harm" standard has remained controversial, and some proponents of trafficking victims protection question whether the standard is not unnecessarily high, denying protection to many trafficking victims who were intended to be benefited by the TVPA. *See, e.g.*, Wetmore, *supra* note 22, at 159; *see also* Leila Rothwell, *VAWA 2000's Retention of the "Extreme Hardship" Standard for Battered Women in Cancellation of Removal of Cases: Not Your Typical Deportation Case*, 23 U. HAW. L. REV. 555 (2001).

[45] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T)(ii)(II).

[46] *Id.* § 1101(a)(15)(T)(ii)(I).

[47] *Id.* § 1101(a)(15)(T)(ii).

[48] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1255(l). Although 8 U.S.C. § 1255(l) generally requires continuous presence for three years before a T Nonimmigrant can adjust to lawful permanent resident status, VAWA recently amended § 1255(l) to permit T Nonimmigrants who have been continuously present throughout the investigation and/or prosecution and whose investigations and/or prosecutions are complete to adjust to lawful permanent resident status without meeting the three-year continuous presence requirement. As most T Nonimmigrants will be able to meet these alternative continuous presence requirements, this amendment should help a significant number of survivors of trafficking obtain permanent resident status in a more timely manner once adjustment regulations are issued. As of this writing, adjustment regulations have yet to be issued. However, the Vermont Service Center is accepting T Nonimmigrant adjustment and employment authoriza-

justment in status, the trafficked person must have been physically present in the United States for a continuous period of at least three years since holding the T Nonimmigrant Status;[49] been of good moral character throughout that period; and complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or would suffer extreme hardship involving unusual and severe harm upon removal from the United States.[50]

Trafficked persons can qualify for social service benefits and TNS by cooperating with federal agents, as well as state and local law enforcement agents investigating or prosecuting cases through relevant state laws, such as anti-trafficking or kidnapping.[51] Victims of certifiable and severe forms of trafficking are eligible to receive benefits to the same extent as persons admitted into the U.S. as refugees.[52] In order to receive this assistance, survivors must be certified by the Secretary of Health and Human Services ("HHS") after consultation with the Attorney General and the Secretary of Homeland Security.[53] In such an event, HHS must certify that the trafficked person is a victim of a severe form of trafficking; is willing to assist in every reasonable way with the investigation and prosecution of severe forms of trafficking in persons; and has made a *bona fide* application for a T Nonimmigrant Status that has not been denied, or is a person whose continued presence in the United States has been deemed necessary by the Attorney General to ensure and effectuate prosecution of traffickers in persons.[54]

---

tion renewal applications and renewing employment authorization documents. Although the numerical limit on T Nonimmigrant adjustments is currently of no concern, applicants should be aware that the Attorney General may only adjust the status of 5,000 T Nonimmigrant Status holders per year. *Id.* § 1255(l)(4)(A).

[49] Id. § 1255(1)(1)(A). To meet the Physical Presence requirement T Nonimmigrants must not leave the United States for any period in excess of 90 days or for any periods that in the aggregate exceed 180 days. *Id.* § 1255(l)(3).

[50] *Id.* § 1255(l)(1).

[51] 22 U.S.C. § 7105(b)(1)(E)(iv) (2004).

[52] *See* TVPA, *supra* note 6, 22 U.S.C. § 7105(b)(1)(A).

[53] *Id.* § 7105(b)(1)(E)(i). VAWA recently amended this provision to require it to consult with DHS and DOJ before it can certify a victim of a severe form of trafficking for benefits. *Id.*

[54] *Id.* 22 U.S.C. § 7105(b)(1)(C).

Once individuals have been certified as victims of severe forms of trafficking they can gain access to medical and psychological assistance, food stamps, housing, job training, educational programs, translation services, and legal assistance.[55] The TVPA also explicitly grants many rights and opportunities for assistance to victims of human trafficking.

The rights and services enumerated in the TVPA for the protection and assistance of victims of human trafficking include the following: the right to appropriate shelter not incompatible with their status as victims of a crime,[56] the right to receive medical care,[57] the right to access information about their rights and translation services,[58] the right to witness protection,[59] the right to mandatory restitution,[60] the right to social services and benefits available to refugees,[61] and the right to civil action.[62]

While in the custody of the federal government, trafficking victims are guaranteed shelter appropriate to their status as victims of crime.[63] Regulations indicate that alternatives to formal detention must be considered in every case.[64] If detained in federal custody, efforts must be made to house victims separately from criminals.[65] Victims are also guaranteed necessary medical care, as well as other assistance, including referrals to nongovernmental organizations for advice regarding their legal rights.[66]

Under the TVPA, trafficking victims and their family members have an explicit right to protection from intimidation, harm, and

---

[55] *See* 28 C.F.R. § 1100.33(a).

[56] *See* TVPA, *supra* note 6, 22 U.S.C. § 7105(c)(1)(A).

[57] *Id.* § 7105(c)(1)(B).

[58] *Id.* § 7105(c)(2).

[59] *Id.* § 7105(c)(1)(C).

[60] *See* TVPA, *supra* note 6, 22 U.S.C. § 7109(a)(2); see also 18 U.S.C. §3663 (2004).

[61] *See* TVPA, *supra* note 6, 22 U.S.C. § 7105(b)(1)(A).

[62] *See* TVPRA, *supra* note 12, 18 U.S.C. § 1595.

[63] *See* TVPA, *supra* note 6, 22 U.S.C. § 7105(c)(1)(A).

[64] 28 C.F.R. § 1100.31(b).

[65] *Id*.

[66] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(i)(1).

threats of harm.[67] As a result, victims' and family members' names and identifying information are not disclosed to the public.[68] In addition, the TVPA provides victims with the right of privacy and protection under the Victims and Witness Protection Act of 1982 ("VWPA").[69]

The TVPA also grants mandatory restitution for victims of human trafficking.[70] Under this provision, courts must order the defendant to pay the victim the full amount of the victim's losses, which may include medical and psychological assistance, attorney's fees, and other losses suffered as a proximate cause of the offense.

In connection with the aforementioned losses, restitution equal to the value of the victim's labor may also be awarded. In such cases, restitution is calculated as the greater of the gross income or value to the defendant of the victim's services or labor, or the value of the victim's labor under the Fair Labor Standards Act.[71] Courts are required to enter restitution orders, regardless of the defendant's economic status, once a defendant has been convicted or has pled guilty to the charges.[72] The TVPRA also created a civil cause of action that allows victims to file suit for actual and punitive damages, attorney's fees, and other litigation costs if they have been victims of forced labor, peonage, slavery, involuntary servitude, or sex trafficking.[73]

---

[67] 28 C.F.R. § 1100.31.

[68] *Id*. Family members protected by the TVPA include spouses, children, parents, or siblings who have been targeted or are likely to be targeted by traffickers and for whom protection from harm may be reasonably provided. At the discretion of the responsible official, protection may be extended to other family members not included in the above definition. 28 C.F.R. § 1100.25.

[69] 28 C.F.R. § 1100.31.

[70] *See* TVPA, *supra* note 6, 22 U.S.C. § 7109(a)(2).

[71] *Id.*

[72] 18 U.S.C. § 2259(b)(4) (2004). The procedure for issuing restitution is set forth in 18 U.S.C. § 3664 (2004).

[73] *See* TVPRA, *supra* note 12,18 U.S.C. § 1595. Individuals who are victims of violations of Forced Labor, 18 U.S.C. § 1589, Trafficking with Respect to Peonage, Slavery, Involuntary Servitude or Forced Labor, 18 U.S.C. § 1590, or Sex Trafficking, 18 U.S.C. § 1591, may bring a civil action against the perpetrator. *See* TVPA, *supra* note 6, 22 U.S.C § 7109(b)(2).

III. The TVPA's Law Enforcement Cooperation Requirement

"[W]ould we send a woman or child who has been sexually abused and put into slavery in this country back into another country where that activity was going on . . . [?] [W]e should open our arms to these people."[74]

A. Contrary to Congressional Intent

The primary purpose of the TVPA is to protect victims of severe forms of trafficking.[75] With this in mind, Congress designed T Visa status to be one of the most important protections for victims and their family members.[76] However, as applied under the auspices of the TVPA, the requirement that victims of severe forms of trafficking comply with "any reasonable request for assistance in the investigation or prosecution of acts of trafficking"[77] in order to obtain a T Visa fails to adequately protect trafficking victims and their

[74] Representative Watt arguing against the arbitrary 5,000 cap on T Visas. 146 CONG. REC. H7628, H7629 (daily ed. Sept. 14, 2000) (emphasis added).

[75] *See supra* note 21.

[76] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T). *See also* Kara C. Ryf, *Introduction: The Scope and Severity of the World's Trafficking Problem*, 34 CASE W. RES. J. INT'L L. 45, 69 (2002) (stating that successful prosecutions turn on victims knowing they will be given protection and needed health and social services).

[77] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa). While we applaud VAWA's recent clarification of the law enforcement cooperation requirement, *see supra* note 41, that if a trafficking victim is unable to cooperate with law enforcement requests for assistance "due to psychological or physical trauma," the request is unreasonable, we believe this clarification does not go far enough. Furthermore, the meaningfulness of this clarification will depend entirely on how it is interpreted and implemented. For example, the determination of whether a trafficking victim is "unable to cooperate with a request for assistance" "due to psychological or physical trauma" will be made by the "Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General." *Id.*

families and may be harmful to the investigation and prosecution of traffickers.[78]

As discussed above, victims of severe forms of trafficking,[79] who are physically present in the U.S. or at a port of entry on account of such trafficking,[80] may demonstrate the required criteria for T Visa status, including assistance in the investigation or prosecution of acts of trafficking.[81] However, where a trafficking survivor fails to meet the law enforcement cooperation requirement, that survivor, despite having endured unimaginable abuse, being physically present on account of trafficking, and facing extreme hardship involving severe and unusual harm, is ineligible for the T Visa, under the TVPA.[82]

Given these facts, it is clear the law enforcement cooperation requirement, combined with current immigration law, has presented unintended consequences that are contrary to the original intent of Congress. Many victims of severe forms of trafficking are undocumented and their only form of immigration relief is the T Visa. According to current immigration law, undocumented immigrants[83] are subject to arrest, detention, and removal.[84] Therefore, the intersection of these laws results in requiring victims of severe forms of trafficking, in particular those in removal proceedings, to cooperate with law enforcement agents in order to be eligible for T Visas, or other-

[78] Criminal defense counsels have used the T Visa's requirements to comply with "any reasonable request for assistance in the investigation or prosecution of acts of trafficking" and to impeach victims when they testify in court. For example, survivors have been accused of fabricating their stories to obtain T Visas and *making deals* with prosecutors in order to receive immigration benefits. According to recent reports from the Department of Homeland Security, this concern is one of the reasons they believe the majority of T Visa applications are filed without law enforcement agency declarations (I-914 supplement B).

[79] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(T)(i)(I).

[80] *Id.* § 1101(a)(15)(T)(i)(II).

[81] *Id.* § 1101(a)(15)(T)(i)(III)(aa).

[82] *Id.*

[83] Unfortunately, the only immigration relief the vast majority of survivors are eligible for is the T Visa. In many cases, the primary reason most of them were trafficked in the first place was because they could not come to work in the United States legally.

[84] 8 U.S.C. § 1227 (2004).

wise face extreme hardship involving severe and unusual harm upon removal. Ironically, this situation is disturbingly similar to the situations most survivors escaped from, where they toiled under the fear of arrest, incarceration, and deportation.[85]

Under certain applications of the law, victims of trafficking are essentially confronted with arrest, detention, deportation and the subsequent threat of death, serious bodily injury, or other extreme hardship, unless they cooperate with U.S. law enforcement. It is difficult to imagine that this is how Congress intended to protect survivors, prevent trafficking, and prosecute traffickers.

It is argued that amending this harsh rule will not result in a negative impact on law enforcement's ability to prosecute traffickers. The vast majority of survivors of trafficking willingly comply with reasonable law enforcement requests because they seek justice and want these violent criminals, who have destroyed their lives, to pay for their crimes. Another reason for voluntary cooperation is based on the desire by victims to prevent these criminals from preying on other vulnerable men, women, and children.

However, there are certain situations where victims will simply choose not to cooperate with law enforcement agencies. For example, many survivors suffer from physical, psychological, or emotional injuries, most often consequences of their trafficking experience, which hamper their ability to fully participate in the investigation and prosecution of their traffickers.[86] Other surviving victims choose not to cooperate because the act of working with law enforcement officials may produce swift and immediate reprisals against their families from vengeful criminal trafficking networks. In the eyes of a threatened victim of trafficking, already psychologi-

[85] *See U.S. v. Kozminski*, 487 U.S. 931, 952-53 (1988) (involuntary servitude necessarily means a condition in which a victim is forced to work by the use of or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process).

[86] As discussed *supra* at notes 41 and 77, the clarification that if a trafficking victim is unable to cooperate with law enforcement requests for assistance "due to psychological or physical trauma," the request is unreasonable, is a good first step but does not fully resolve the problem of conditioning critical protection and benefits on whether a victim of slavery cooperates with law enforcement requests for assistance. 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa)

cally and emotionally scarred from their enslavement, the opportunity to apply for a temporary nonimmigrant visa, lasting only 3 years, provides little comfort, given the ominous threat of reprisals to them and/or their families.

Survivors who have established that they are victims of severe forms of trafficking, and face severe and unusual harm if deported, should not be required to comply with law enforcement requests in order to obtain the critical protection and benefits they urgently need. To deny these survivors such protection is equivalent to subjecting them to further punishment. Survivors, who are in the U.S. only because they were illegally trafficked here, should be provided protection solely based on humanitarian grounds and regardless of whether they comply with law enforcement requests or face extreme hardship for that matter.

B. The Law Enforcement Cooperation Requirement Is Unnecessary

The law enforcement cooperation requirement of the TVPA is unnecessary, not only because trafficking survivors are usually willing to assist in the criminal cases against their traffickers, but because federal prosecutors already possess the power to compel uncooperative victim-witnesses to testify. Prosecutors can, through federal courts and grand juries, compel witnesses to testify in these proceedings through the use of their subpoena power, enforced through the threat of civil and criminal contempt charges. They may also take preemptive action by designating these victims as material witnesses, thereby requiring potentially uncooperative witnesses to post bond, report regularly to law enforcement officers, or even remain in detention until the relevant testimony is obtained.[87] These

[87] *See* 18 U.S.C. §3144 (2004):

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title.

Under § 3142, a judicial officer can issue an order that the victim-witness be "(1) [r]eleased on personal recognizance or upon execution of an unsecured appearance bond . . . ;(2) released on a condition or combination of conditions . . .

alternative methods may be more effective than the statutory law enforcement cooperation requirements, wherein critical immigration protections are conditioned upon reluctant victims testifying against their traffickers.

Without the law enforcement cooperation requirement, federal prosecutors could obtain the testimony of an uncooperative trafficking survivor through a subpoena, which prosecutors can issue with relative ease.[88] The power of the court to enforce a subpoena is broad, including the power to confine a witness until he or she provides the relevant information, or until the court proceedings have concluded.[89] However, because the subpoena is enforced through the judicial process, and not through a denial of immigration assistance and protection, trafficking victims are not forced to balance their personal safety and that of their families with the possibility of remaining safely in the United States.

Another step that the federal prosecutor can take to ensure the testimony of a trafficking survivor is to request the court to issue a material witness warrant.[90] Upon a showing that "it may become impracticable to secure the presence of the person by subpoena,"[91] the prosecutor can request the judge to impose a number of different restrictions to ensure that the witness appears at trial. These restrictions include detention, but also provide for much less severe measures, such as release upon personal recognizance, a bond, or other conditions.[92] As a condition of release, material witnesses may be required, for example, to "remain in the custody of a designated person,"[93] "abide by specific restrictions regarding . . . place of abode or

;(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion . . . ; or (4) detained." 18 U.S.C. § 3142 (a)(1) – (4)(2004).

[88] *See* Fed. R. Crim. P. 17. *See* Aaron M. Clemens, *Misuse of the Grand Jury, Forcing a Putative Defendant to Appear and Plead the Fifth Amendment*, 28 U. SEATTLE L. REV. 379 (2005).

[89] 28 USCS § 1826 (2004).

[90] 18 U.S.C. § 3144 (2004).

[91] *Id.*

[92] 18 U.S.C. § 3142 (2004).

[93] *Id.* at § 3142 (c)(1)(B)(i).

travel,"[94] or "report on a regular basis to a designated law enforcement agency."[95]

The judge in these cases may impose detention only if he or she finds that "no condition or combination of conditions will reasonably assure the appearance" of the witness.[96] At least two federal courts have held that the material witness provisions cover grand jury proceedings,[97] and in practice, prosecutors have sought and obtained material witness designations in al

United States, faces severe harm involving severe and unusual harm, and elects not to cooperate with law enforcement would not, thereby, be deprived of U.S. protection and the Department of Homeland Security would not be legally obligated to arrest, detain, and remove that victim exactly as many traffickers threaten. A victim's and their family's safety and the proffer of assistance in rebuilding their devastated lives should not be the proverbial *stick* by which the law compels a former slave, regardless of the trauma incurred, to do anything, much less cooperate in a traumatizing criminal case that will endanger the safety of the victim and his or her family.

Moreover, the law enforcement cooperation requirement of the T Visa is redundant where three other forms of immigration relief, the S Visa,[99] the U Visa,[100] and continued presence status[101] exist to assist law enforcement agencies in obtaining testimony from witnesses to serious crimes. Each of these forms of immigration relief may be granted to witnesses willing to cooperate with the federal law enforcement agencies. In fact, the S Visa and U Visa each provide relief similar to that of the T Visa, allowing family reunification[102] and eventual permanent resident status.[103] If legislators believe that law enforcement needs to provide incentives to induce trafficking victims to report their crimes, these three forms of immigration relief are sufficiently persuasive for those trafficking survivors who wish to remain in the United States.

Trafficking survivors and their families should be provided the critical protections they need and are entitled to regardless of whether they comply with law enforcement requests under the auspices of the TVPA. Requiring these victims to choose between cooperating with law enforcement authorities or face arrest, incarceration, and removal, is contrary to the goals of the TVPA and the humanitarian and anti-trafficking interest of the U.S. Laws designed

---

[99] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(S) (2004).

[100] *Id.* § 1101 (a)(15)(U).

[101] *See* VTVPA, *supra* note 6, 22 U.S.C. § 7105 (c)(3).

[102] *See* VTVPA, *supra* note 6, 8 U.S.C. § 1101(a)(15)(S), (U) (2004).

[103] *See* VTVPA, *supra* note 6, 8 U.S.C. §1255(j), (m) (2004). Because regulations for the implementation of U nonimmigrant status have not yet issued, persons applying for the U Visa cannot receive the visa itself, but may only receive deferred action.

to protect survivors should not deny them critical immigration protections and require their removal if they cannot or will not assist in the investigation and prosecution of their former abusers.[104]

IV. Conclusion

The TVPA was enacted to protect victims of severe forms of trafficking and to prevent them from being treated like criminals and/or illegal aliens. However, the application of the TVPA's law enforcement cooperation requirement does little to actually protect victims and instead makes victims worry that the cooperation requirement is nothing more than a means to arrest, detain, and remove them from the United States. The law enforcement cooperation requirement has created the unintended consequence of placing victims in the extremely difficult situation of cooperating with law enforcement or facing the removal their traffickers warned them about. Furthermore, the statistical data indicates that T Visas are not being effectively utilized by victims of trafficking. Consequently, victims of trafficking are not receiving much needed protection, and the prosecutorial means for punishing and preventing the crime of human trafficking may be suffering as well.

Therefore, the law enforcement cooperation requirement should be abolished. In the alternative, victims of severe forms of trafficking who are in the United States on account of trafficking should be eligible for T Nonimmigrant Status if they cooperate with law enforcement officials *or* they face extreme hardship involving severe and unusual harm. Victims of severe forms of trafficking have by definition suffered extreme hardship and unusual harm. The threat of arrest, incarceration, and removal from the U.S., due to a statutory requirement for cooperation with law enforcement, only adds to their victimization and may be one of the reasons T Visa protection has been so alarmingly underutilized.

---

[104] Conversely, must victims of severe forms of trafficking who are in the United States and risked everything to assist in the prosecution of their traffickers also bear the additional burden of showing that they would face extreme hardship involving unusual and severe harm upon removal from the United States? *See* Wetmore, *supra* note 22.