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**TRAFFIC STOP:  
HOW THE UNITED STATES CAN IMPROVE ITS EFFORTS TO  
HALT SEX TRAFFICKING**

*Timothy Fisher\**

**I. INTRODUCTION**

**Jane Doe's American Dream**

Jane Doe came to the United States from Honduras. She wanted to go to medical school and support her aging mother and father back home. She also hoped to start her own family in America. The people who brought her to the United States told her they would transport her safe and fast, but she could not afford to pay for their services. They said that she could pay them by working as a waitress in a certain Long Island bar.

While working as a "waitress," Jane was compelled to drink large amounts of alcohol, use drugs, and socialize with customers. Jane and the other waitresses, some of whom were under 18 years old, were required to bring customers to the basement where they would perform sex acts for money. The owner kept either all or most of this money.

The owner berated those waitresses who refused to perform such acts, calling them "whores," "wetbacks," and other derogatory terms. Other times, the owner threatened to report them to immigration officials who would deport them. If one of the waitresses tried to leave her employment, the owner threatened to tell her family that she was a prostitute, or to physically harm her and her loved ones. Sometimes, his actions went beyond threats.

Jane lived with most of the other waitresses in a small home under the owner's control, and their movements were severely restricted. If a waitress did not show up to work, the owner went to their home and forced her to come. On more than one occasion, the owner raped Jane and the other waitresses.

Jane was desperate, trapped in a horrifying situation with no hope of escape. She and the other waitresses came to the United States for an opportunity to pursue their dreams. Jane's "American dream" had spiraled into a living nightmare until federal officials arrested the owner for sex trafficking crimes.

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Jane Doe's account is based upon allegations made against Antonio Rivera.<sup>1</sup> A jury convicted Rivera of sex trafficking crimes in the United States District Court for the Eastern District of New York on May 26, 2011.<sup>2</sup> Jane's account exemplifies the experiences of many women in the United States and throughout the world who are victims of sex trafficking.<sup>3</sup>

Over the past decade, the international community and the United States have amplified efforts to combat human trafficking generally and sex trafficking specifically.<sup>4</sup> However, these efforts have not made a significant dent in the volume of sex trafficking, and while the United States has demonstrated a willingness to work with the international community to hamper human trafficking operations, much work still needs to be done. This paper analyzes U.S. anti-trafficking legislation in order to determine the weaknesses in it and its execution. Through considering the global efforts to quell trafficking – with an emphasis on legislation and action taken by the European Union – this paper recommends several additional steps that would benefit the U.S. fight against sex trafficking.

## II. SCOPE OF THE PROBLEM

### a. What is Sex Trafficking?

Sex trafficking is a type of human trafficking, or trafficking in persons, whereby the victim is forced or otherwise coerced into “prostitution . . . or other forms of sexual exploitation.”<sup>5</sup> “Both the United

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<sup>1</sup> See *Rivera v. United States*, No. 11-CV-5579(SJF), 2012 U.S. Dist. LEXIS 13534, at \*5 (E.D.N.Y. Feb. 1, 2012) (denying petitioner's motion to vacate his sentence on the ground that the petition was premature); see also Govt's Mem. of Law in Supp. of its Mot. in Limine at 2–3, *United States v. Rivera*, No. 09CR00619, 2011 WL 3107075 (E.D.N.Y. April 12, 2011) (setting forth the allegations on which the defendant was charged and convicted).

<sup>2</sup> See *Rivera v. United States*, No. 11-CV-5579(SJF), 2010 U.S. Dist. LEXIS 13534, at \*1 (E.D.N.Y. Feb. 1, 2012) (discussing Petitioner Rivera's prior conviction).

<sup>3</sup> See Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(6) (2012) [hereinafter “TVPA”] (explaining that trafficking is a modern form of slavery and that trafficking victims endure physical violence); see also 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, 232 (2007) (stating that sex trafficking victims are often women deceived into believing they will be taken to another country to work).

<sup>4</sup> See Frances P. Bernat & Tatyana Zhilina, *Human Trafficking: The Global Becomes Local*, 20 WOMEN & CRIM. JUST. 1, 2 (2010) (stating that the U.S. and other States have noticed how big a problem trafficking is and have joined attempts to stop trafficking); see also Karen E. Bravo, *Follow the Money? Does the International Fight Against Money Laundering Provide a Model for International Anti-Human Trafficking Efforts?*, 6 U. ST. THOMAS L.J. 138, 140 (2008) (noting that anti-trafficking enforcement actions have increased but global compliance has been unsuccessful).

<sup>5</sup> See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, annex II, art. 3(a), U.N. Doc.

States and the international community have separated the issue of trafficking for sexual exploitation from that of trafficking for labor exploitation . . . .”<sup>6</sup> Trafficking affects every nation in the world in some way, whether as a country of origin, transit, or destination for victims, or all three.<sup>7</sup>

Sex trafficking is different from migrant smuggling. Migrant smuggling is “[t]he procurement of the illegal entry of a person into a country of which the person is not a national or a permanent resident.”<sup>8</sup> There are several elemental differences between sex trafficking and migrant smuggling, most importantly the “lack of force, fraud, or coercion and lack of exploitation after the person has been transported.”<sup>9</sup> Further, trafficking in persons “does not necessarily involve a transnational element; it can exist at [sic] national level.”<sup>10</sup>

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A/RES/45/ (Jan. 8, 2001) (defining “trafficking in persons” as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation . . . includ[ing], at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation”); *see also* Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(2) (2012) (describing trafficking as a modern form of slavery which “involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services”).

<sup>6</sup> *See* Rebecca L. Wharton, Note, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 758 (2010) (explaining that the distinction between sex trafficking and labor trafficking has stalled efforts to end trafficking); *see also* Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J.C.R. & C.L. 317, 318 (highlighting how sex trafficking is given more attention than any other type of trafficking).

<sup>7</sup> *See* United Nations Office on Drugs and Crime (UNODC), *What is Human Trafficking?*, [www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menu](http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html?ref=menu) (last visited May 5, 2012) (discussing trafficking’s affects on all countries).

<sup>8</sup> *See* Wharton, *supra* note 6, at 755 (stating that entering a country without complying with necessary requirements constitutes an illegal entry); *see also* ANDREAS SCLOENHARDT, *MIGRANT SMUGGLING: ILLEGAL MIGRATION AND ORGANISED CRIME IN AUSTRALIA AND THE ASIA PACIFIC REGION* 14 (2003) (defining migrant smuggling as the illicit transporting or trading of migrants).

<sup>9</sup> *See* Wharton, *supra* note 6, at 755 (indicating that there are several differences between migrant smuggling and human trafficking); *see also* Samuel Vincent Jones, *Human Trafficking Victim Identification: Should Consent Matter?*, 45 IND. L. REV. 483, 488 (2012) (stating that smuggled migrants are treated as business allies, while trafficking victims are subjected to violence).

<sup>10</sup> *See* Council of Europe Convention on Action Against Trafficking in Human Beings, Explanatory Report, May 16, 2005, C.E.T.S. No. 197, 2569 U.N.T.S., at 27 [hereinafter “Council of Europe Explanatory Report”] (stating the purpose of trafficking is exploitation and not an unlawful cross-border transport); *see also* Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 409 (2011)

The majority of sex trafficking victims are female.<sup>11</sup> The victims are usually deceived about the type of labor services they will be providing.<sup>12</sup> Many victims find it difficult to escape their conditions.<sup>13</sup> Additionally, victims of sex trafficking are often difficult to identify – their need for assistance is not always obvious and they often hide from law enforcement officials and those trying to help them.<sup>14</sup> As a result, victims are often dismissed as merely prostitutes, illegal migrants, or homeless persons.<sup>15</sup>

### **b. The Problem with Statistics**

The U.S. Department of State estimates that 12.3 million adults and children around the world are trafficked into forced labor, bonded labor, and forced prostitution.<sup>16</sup> This is 1.8 out of every 1,000 individuals in the world.<sup>17</sup> Out of the victims, only 49,105 have been identified, or 0.4 percent.<sup>18</sup> In 2009, there were 4,166 successful prosecutions worldwide,<sup>19</sup>

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(estimating that about 93 percent of trafficking victims are exploited within their own country).

<sup>11</sup> See Bernat & Zhilina, *supra* note 4, at 2 (indicating that there are male sex trafficking victims as well); see also Rieger, *supra* note 3, at 231 n.3 (estimating that 80 percent of trafficking victims worldwide are women, 70 percent of those women are sex trafficking victims, and noting that women and children of both genders are trafficked at higher rates than men).

<sup>12</sup> See Michele Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101, 110 (2009) (stating that trickery may be used as a way to force individuals into sexual service); see also Bernat & Zhilina, *supra* note 4, at 2 (stating that many trafficking victims are deceived as to the labor services they are to provide).

<sup>13</sup> See Bernat & Zhilina, *supra* note 4, at 2 (indicating that victims of sex trafficking find it hard to escape); see also Claudine Chastain, Note, *The Nexus Between Free Trade Agreements and the Trafficking of Human Beings*, 5 WASH U. GLOBAL STUD. L. REV. 587, 607 (2006) (stating women are forced to work under inhumane conditions and are threatened in order to discourage escape attempts).

<sup>14</sup> See VIRGINIA M. KENDALL & T. MARKUS FRANK, CHILD EXPLOITATION AND TRAFFICKING: EXAMINING THE GLOBAL CHALLENGES AND U.S. RESPONSES 30 (2012) (stating that most trafficking victims are hidden from the view of society-at-large); see also Bernat & Zhilina, *supra* note 4, at 2 (stating that sex trafficking victims may not be seen as or recognized as needing assistance).

<sup>15</sup> See Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 113 (2008) (asserting that the U.S. is a global leader against human trafficking because of its legislation regulating law enforcement's dismissal of victims as criminals); see also Bernat & Zhilina, *supra* note 4, at 2 (explaining how victims are presumed to be illegal immigrants, prostitutes, or vagabonds).

<sup>16</sup> See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2010) [hereinafter "2010 TIP Report"] (reporting the approximate number of human trafficking victims globally for 2010).

<sup>17</sup> See 2010 TIP Report, *supra* note 16, at 7; see also Virginia M. Kendall, *Greasing the Palm: An Argument for an Increased Focus on Public Corruption in the Fight Against International Human Trafficking*, 44 CORNELL INT'L L.J. 33, 34 (2011) (stressing the need for an effective tool to quantify human trafficking victims).

<sup>18</sup> See 2010 TIP Report, *supra* note 16, at 7; see also Carin M. Bowes, "Male" Order Brides and International Marriage Brokers: The Costly Industry that Facilitates Sex Trafficking, Prostitution, and Involuntary Servitude, 18 CARDOZO J.L. & GENDER 1,

and in 2011 the U.S. Department of Justice alone initiated over 120 human trafficking cases.<sup>20</sup> This represents a 30 percent increase in U.S. prosecutions of human trafficking offenses.<sup>21</sup>

Human trafficking statistics, however, “are extremely unreliable.”<sup>22</sup> It is notoriously difficult to ascertain how many victims are trafficked into the U.S. each year and for what purpose.<sup>23</sup> For example, “[f]rom 1999 to 2005, the United States Government’s estimate of the number of victims trafficked into the U.S. ranged from as many as 50,000 to as few as 17,000.”<sup>24</sup> Some argue that those responsible for collecting these statistics and data inflate the numbers to reflect a higher number of victims than actually exists; or argue that alternatively a significant number of those purporting to be victims may be fabricating their victimhood out of reluctance or embarrassment to admit to actively

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30 (2011) (recognizing the U.S.’s response to international human trafficking and stating the number of identified victims listed in the TIP report).

<sup>19</sup> See 2010 TIP Report, *supra* note 16, at 7 (reporting the number of human trafficking prosecutions); see also Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 460 n.46 (2011) (arguing that a small percentage of human traffickers are prosecuted and referring to the TIP Report’s data on human trafficking prosecutions).

<sup>20</sup> See A. Marisa Chun, *Advancing Justice: The Fight Against Human Trafficking*, WHITE HOUSE BLOG (May 23, 2012, 9:00 AM), <http://www.whitehouse.gov/blog/2012/05/22/advancing-justice-fight-against-human-trafficking> (illustrating the Department of Justice’s leadership in the fight against human trafficking and a recent increase in prosecutions).

<sup>21</sup> See Jerry Seper, *Holder Touts Prosecutions of Trafficking of Humans: More Than 120 Cases Brought in '11, He Says*, WASH. TIMES, Mar. 16, 2012, at A04 (reporting a 30 percent increase in the number of forced-labor and adult sex-trafficking prosecutions); see also Secretary of State Hillary Rodham Clinton, Remarks at the Annual Meeting of the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons (Mar. 12, 2012), <http://www.state.gov/secretary/rm/2012/03/185905.htm> (revealing a dramatic 30 percent rise in 2011 U.S. prosecutions for forced labor and sex trafficking offenses).

<sup>22</sup> See Wharton, *supra* note 6, at 754 (discussing the difficulties of determining the amount of people trafficked each year due to undependable statistics); see also Jennifer Gustafson, Comment, *Bronze, Silver, or Gold: Does the International Olympic Committee Deserve a Medal for Combating Human Trafficking in Connection with the Olympic Games?* 41 CAL. W. INT’L L.J. 433, 439–40 (2011) (noting that human trafficking data is scarce and hard to quantify).

<sup>23</sup> See Eileen Overbaugh, Comment, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 638 (2009) (explaining the challenges in collecting accurate data for trafficking victims due to confusion over whether the victims were trafficked or smuggled into the country); see also Wharton, *supra* note 6, at 754 (2010) (quoting difficulties in assessing the reasons people are illegally brought into the United States).

<sup>24</sup> See Wharton, *supra* note 6, at 754 (citing the disparate U.S. government estimates for human trafficking from 1999 to 2005); see also Overbaugh, *supra* note 23, at 638 (noting that Congressional findings estimate 50,000 victims are trafficked yearly while the U.S. Department of Justice estimates around 17,500 victims per year).

pursuing or consenting to commercial sex activity.<sup>25</sup> Most analysts agree that sex trafficking victims account for about half of all reported human trafficking in the U.S.,<sup>26</sup> but the International Labor Organization (ILO) estimates the ratio of sex trafficking victims to those trafficked into forced labor is 1 to 9.<sup>27</sup> However unreliable, even at its lowest estimate, sex trafficking victims are still prevalent and require protection.<sup>28</sup>

### III. AN INTERNATIONAL HISTORY OF COMBATING SEX TRAFFICKING

Modern state policies to combat sex trafficking have grown out of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>29</sup> The Trafficking Protocol supplements the United Nations Convention against Transnational Organized Crime.<sup>30</sup> The Trafficking Protocol was adopted in 2000 and currently 152 states have ratified it.<sup>31</sup> While it is the first international effort to combine all

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<sup>25</sup> See e.g., LAURA MARÍA AGUSTÍN, SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY 31 (2008) (discussing possible reasons that trafficking victims reply less than honestly when interviewed); see also Elzbieta M. Gozdziaik & Elizabeth A. Collett, *Research on Human Trafficking in North America: A Review of Literature*, in DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY 99, 107–08 (2005) (asserting that unclear trafficking definitions result in uncertain statistics that have methodological problems).

<sup>26</sup> See *The Trafficking Victims Protection Act*, 118 HARV. L. REV. 2180, 2187 (2005) (explaining that roughly half of U.S. trafficking victims are forced into the commercial sex industry while the other half are subjected to forced labor); see also Wharton, *supra* note 6, at 756 (finding sex trafficking accounts for half of all human trafficking in the United States).

<sup>27</sup> See 2010 TIP Report, *supra* note 16 (citing ILO estimates for sex and labor trafficking); see also Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 2, 37 (2011) (estimating 9.5 million trafficking victims in Asia are subjected to forced labor while less than 10 percent of that number are trafficked for commercial sex).

<sup>28</sup> See Bo Cooper, *A New Approach to Protection and Law Enforcement Under the Victims of Trafficking and Violence Protection Act*, 51 EMORY L.J. 1041, 1045–46, 1057–58 (2002) (observing the high estimated number of trafficking victims in need of protection despite criminal acts); see also INT'L LABOUR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOUR, 12–14 (2005), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf> (using forced labor statistics to indicate the need for protecting trafficking victims).

<sup>29</sup> For example, compare Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter referred to as the “Trafficking Protocol”] (illustrating the model set forth by the United Nations suggested protocols to prevent sex trafficking), with Sex Trafficking of Children or by Force, Fraud, or Coercion, 18 U.S.C.A. § 1591 (2008) (detailing the United States’ sex trafficking law which differs in organizational structure).

<sup>30</sup> See The United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209 (adopting the Trafficking Protocol); see also Trafficking Protocol, *supra* note 29 (declaring the supplemental nature of the Trafficking Protocol to the United Nations Convention Against Transnational Organized Crime).

<sup>31</sup> See Trafficking Protocol, *supra* note 29 (listing the countries who are parties to the Trafficking Protocol); see also Kelly E. Hyland, Note, *The Impact of the Protocol to*

facets of human trafficking into one instrument, and the first to provide a general definition for trafficking in persons,<sup>32</sup> it is not the first to address the issue of sex trafficking.

**a. Rooted in White Slavery**

The global campaign against “white slavery” marks the international community’s first concerted efforts to put an end to sex trafficking.<sup>33</sup> The “white slavery” movement combined the aspirations of the national movement against prostitution with the movement against slavery.<sup>34</sup> Put simply, “white slavery” was the act of forcing women or girls into prostitution.<sup>35</sup> This description – after discounting the racial distinction<sup>36</sup> – is not all that distinguishable from the description of sex trafficking today.

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*Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 No. 2 HUM. RTS. BRIEF 30, 31 (observing that the United Nations General Assembly adopted the Organized Crime Convention which contains the Trafficking Protocol).

<sup>32</sup> See Elizabeth F. Defeis, *Protocol to Prevent, Suppress and Punish Trafficking in Persons—A New Approach*, 10 ILSA J. INT’L & COMP. L. 485, 488 (2004) (noting that the Trafficking Protocol was the first time the international community agreed on a definition of trafficking); see also Wharton, *supra* note 6, at 766 (2010) (citing the Trafficking Protocol as the first instrument to consolidate all instances of human trafficking).

<sup>33</sup> See, e.g., International Convention for the Suppression of the “White Slave Traffic”, May 4, 1920, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20, *as amended by* Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, 2 U.S.T. 1999, 30 U.N.T.S. 23, *entered into force* June 21, 1951, *available at* <http://www1.umn.edu/humanrts/instreet/whiteslavetraffic1910.html> (pronouncing the main purpose of the United Convention to suppress “White Slave Traffic” for the purpose of immorally pleasuring another person); see also Wharton, *supra* note 6, at 760 (noting that white slavery was the precursor to anti-trafficking initiatives).

<sup>34</sup> See Marlene D. Beckman, Note, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1111-14 (1984) (detailing the history of the White Slave Traffic Act); see also Kristiina Kangaspunta, *A Short History of Trafficking in Persons*, FREEDOM FROM FEAR MAGAZINE, no.1 (2011), [http://www.freedomfromfearmagazine.org/index.php?option=com\\_content&view=article&id=99:a-short-history-of-trafficking-in-persons&catid=37:issue-1&Itemid=159](http://www.freedomfromfearmagazine.org/index.php?option=com_content&view=article&id=99:a-short-history-of-trafficking-in-persons&catid=37:issue-1&Itemid=159) (providing background on the trafficking of women and children and the impact of the White Slave Traffic Act).

<sup>35</sup> See *United States v. Beach*, 324 U.S. 193, 197 (1945) (Murphy, J., dissenting) (defining white slaves as only those women who are literally sexual slaves) (quoting H.R. REP. NO. 47, at 10 – 11; S. REP. NO. 886, at 11); see also Wharton, *supra* note 6, at 760 (describing white slavery as “an international slave market comprised of young, white women, kidnapped from their homes and forced into the brothels of Europe”).

<sup>36</sup> See MARGIT STANGE, *PERSONAL PROPERTY: WIVES, WHITE SLAVES, AND THE MARKET IN WOMEN* 94 (2002) (stating that the white slave label is a misnomer since women of all races are victims); see also Wharton, *supra* note 6, at 760 (noting that the label of “white” slavery is inappropriate as non-white women were regularly included as victims of this trade as well).



In 1904, the League of Nations advanced the International Agreement for the Suppression of the White Slave Traffic to address international concern over white slavery.<sup>37</sup> This agreement was the first to call for international action against “the criminal traffic known as the ‘White Slave Traffic.’”<sup>38</sup> While the agreement vaguely defined the crime as “the procuring of women or girls for immoral purposes abroad,”<sup>39</sup> this laid the groundwork for future anti-trafficking agreements.

The International Convention for the Suppression of the White Slave Traffic was adopted in 1910.<sup>40</sup> This agreement was based on the 1904 White Slave Traffic Agreement, but made some improvements. For example, the White Slave Traffic Convention made the consent of the woman irrelevant.<sup>41</sup> Also, the Convention forbade fraud, violence, threats, abuse of authority, and “other means of constraint” to hire, abduct, or entice a woman or a girl.<sup>42</sup> Finally, the White Slave Traffic Convention “provided for punishment of the trafficker, unlike the 1904 White Slave Traffic Agreement.”<sup>43</sup>

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<sup>37</sup> See International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 92 U.N.T.S. 19 [hereinafter the “1904 Agreement”]; see also Wharton, *supra* note 6, at 760 (describing concerns leading up to the decision to address sex trafficking).

<sup>38</sup> See 1904 Agreement, *supra* note 37; see also EDMUND JAN OZMANCZYK, ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 2344 (Anthony Mango ed., 3d ed. 2004) (stating that the 1904 Agreement was the first global attempt to combat international prostitution).

<sup>39</sup> See 1904 Agreement, *supra* note 37, at art. 1.

<sup>40</sup> See International Convention for the Suppression of the White Slave Traffic art. 1, May 4, 1910, 98 U.N.T.S. 101 [hereinafter the “1910 Convention”]. While the United States did not join this treaty it did enact its own anti-white slavery legislation in the form of the Mann Act, discussed in further detail in IV: The United States’ Anti-Trafficking Policy, *infra*, at 15.

<sup>41</sup> See 1910 Convention, *supra* note 40, at art. 1 (emphasizing that a woman’s consent would not exempt perpetrators from punishment); see also Wharton, *supra* note 6, at 761 (noting that the Convention did not take the woman’s consent into account when considering punishment).

<sup>42</sup> See 1910 Convention, *supra* note 40, at art. 2; see also Carmen M. Argibay, *Sexual Slavery and the “Comfort Women” of World War II*, 21 BERKELEY J. INT’L L. 375, 382 (2003) (stating that the use of violence, threats, abuse of authority, or any other means of constraint to engage in the trafficking of women was punishable under the International Convention for the Suppression of the White Slave Traffic).

<sup>43</sup> See 1910 Convention, *supra* note 40, at art. 2; see also Roza Pati, *States’ Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Grounds in Rantsev v. Cyprus and Russia*, 29 B.U. Int’l L.J. 79, 105–06 (2011) (commenting that punishing violators of the agreement was the focus of the International Convention for the Suppression of the White Slave Traffic).

**b. Post-White Slavery: 1921–1949**

In 1921, the League of Nations introduced the International Convention for the Suppression of the Traffic in Women and Children.<sup>44</sup> This agreement required all parties to ratify the 1904 White Slave Traffic Agreement, as well as the White Slave Traffic Convention, while (unceremoniously) abandoning the “White Slave” parlance.<sup>45</sup> Article 2 of the 1921 International Convention of Women and Children calls for the prosecution of those who traffic children of either sex, rather than only girls.<sup>46</sup> Article 3 notably extended the list of punishable trafficking offenses to include attempts to traffic and certain preparatory acts.<sup>47</sup> Also, Article 5 increased the age of those to be protected from twenty to twenty-one years old.<sup>48</sup>

In 1933, another convention was adopted under the auspices of the League of Nations: the International Convention for the Suppression of the Traffic in Women of Full Age.<sup>49</sup> Article 1 strengthened the language, providing punishment for attempts of, and acts in preparation of,

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<sup>44</sup> See International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 53 U.N.T.S. 39 [hereinafter the “1921 International Convention of Women and Children”] (stating that the International Convention for the Suppression of the Traffic in Women and Children concluded on September 30, 1921); see also Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, 36 DENV. J. INT’L L. & POL’Y 9, 13 (2007) (listing the 1921 International Convention of Women and Children among trafficking-specific treaties concluded by the League of Nations).

<sup>45</sup> See 1921 International Convention of Women and Children, *supra* note 44, at art. 1 (directing parties to ratify the 1904 and 1910 agreements if they had not already done so); see also Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 SANTA CLARA L. REV. 605, 640–41 (2009) (noting that the International Convention for the Suppression of the Traffic in Women and Children abandoned the term “White Slave” because it failed to cover people of color).

<sup>46</sup> See 1921 International Convention of Women and Children, *supra* note 44, at art. 2 (stating that the states ratifying the treaty agreed to prosecute those engaged in trafficking male and female children); see also Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 168 (2006) (commenting that the International Convention of Women and Children also criminalized trafficking boys).

<sup>47</sup> See 1910 Convention, *supra* note 40, at art. 3 (agreeing to punish attempts to commit trafficking, including preparatory acts); see also Lehti & Aromaa, *supra* note 46, at 168 (explaining that the 1921 International Convention of Women and Children reinforced and built upon the agreements established in the 1910 Convention).

<sup>48</sup> See 1910 Convention, *supra* note 40, at art. 5 (changing the wording from the 1910 Convention from twenty years of age to twenty-one years of age); see also Pati, *supra* note 43, at 106–07 (noting the 1921 Convention also raised the age of majority to twenty-one years of age).

<sup>49</sup> See International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 53 U.N.T.S. 49 [hereinafter the “1933 International Convention”]; see also NITZA BERKOVITCH, *FROM MOTHERHOOD TO CITIZENSHIP: WOMEN’S RIGHTS AND INTERNATIONAL ORGANIZATIONS* 78 (1999) (stating that the new committee followed the precedent set by the previous convention).

trafficking.<sup>50</sup> Additionally, the covered areas were extended to include colonies, protectorates, and territories belonging to the signatory states.<sup>51</sup> Only thirty-nine states ratified or acceded to this treaty.<sup>52</sup>

The United States has not ratified the 1933 International Convention, nor any of the trafficking treaties preceding it.<sup>53</sup> The United States did, however, join the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic and the International Convention for the Suppression of the White Slave Traffic of 1949.<sup>54</sup> This was also the inaugural anti-trafficking act for the United Nations.<sup>55</sup> The Protocol Amending Agreements to Suppress White Slave Traffic, however, does not add any substance to either the 1904 White Slave Traffic Agreement or the White Slave Traffic Convention; rather, the amendments it makes are procedural, such as transferring the oversight authority from the French Government to the United Nations.<sup>56</sup>

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<sup>50</sup> See 1933 International Convention, *supra* note 49, at art. 1 (establishing that attempts and preparation of human trafficking for immoral purposes was a punishable offense); see also Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163, 171 (1994) (stating that preparatory acts, attempts and actual procurement of women for immoral purposes was not excused by a woman's consent).

<sup>51</sup> See 1933 International Convention, *supra* note 49, at art. 1 (indicating that the term "country" shall include colonies and protectorates of the parties signing the treaty); see also Berkovitch, *supra* note 49, at 77 (detailing the extension of the activities into other geographic regions).

<sup>52</sup> See 1933 International Convention, *supra* note 49, at art. 5 (allowing members of the League of Nations, and nonmember states represented at the conference, to sign the treaty); see also M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445, 471 (1991) (listing the member states that signed the treaty).

<sup>53</sup> See United Nations Treaty Collection, <http://treaties.un.org/pages/Treaties.aspx?id=7&subid=A&lang=en> (last visited Nov. 5, 2012) (listing the State parties to the 1933 Convention).

<sup>54</sup> See Protocol Amending the International Agreement for the Suppression of the White Slave Traffic and the International Convention for the Suppression of the White Slave Traffic, May 4, 1949, T.I.A.S. No. 2332, 30 U.N.T.S. 23 [hereinafter "Protocol Amending Agreements to Suppress White Slave Traffic"] (announcing the United States as a party to the Protocol).

<sup>55</sup> See Melissa Holman, Comment, *The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively*, 44 TEX. INT'L L.J. 99, 106 (2009) (noting that in 1949 the newly-formed United Nations assumed the duties previously held by the International Congress and signed the amended agreement in efforts to modernize its approach to sex trafficking); see also Wharton, *supra* note 6, at 761-62 (indicating that the 1949 Protocol was the first United Nations anti-trafficking treaty to enter into force in the United States).

<sup>56</sup> See Protocol Amending Agreements to Suppress White Slave Traffic, *supra* note 54 (discussing the French government's responsibility under the amended agreement to deposit the original agreement with the United Nations); see also Holman, *supra* note 55, at 106 (explaining that the amended agreement garnered criticism because it preserved the original definition of sex trafficking that included only sex work induced through force).

**c. Efforts by the United Nations: 1950–Present**

It was not until 1950 that the United Nations introduced new regulations to combat trafficking.<sup>57</sup> The International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others proclaims that trafficking in persons for the purpose of prostitution “is incompatible with the dignity and worth of the human person and endanger[s] the welfare of the individual, the family, and the community.”<sup>58</sup> The use of the term “person” instead of “woman” extends the coverage of this convention to include men.<sup>59</sup> It also “explicitly linked prostitution to trafficking and provided anti-prostitution provisions as well as general anti-trafficking provisions.”<sup>60</sup>

In 2000, the United Nations created the first instrument that addressed all aspects of trafficking in persons.<sup>61</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children provided the first globally accepted definition of trafficking in persons:

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

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<sup>57</sup> See Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 9 (2004) (noting that the UN adopted the 1950 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others as the first anti-trafficking treaty that provides measures for implementation); see also Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT’L L.J. 163, 172–74 (1994) (establishing that the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others introduced regulations aimed at abolishing prostitution).

<sup>58</sup> International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, pmbl, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 [hereinafter “Convention for Suppressing Trafficking and Prostitution”].

<sup>59</sup> See Convention for Suppressing Trafficking and Prostitution, *supra* note 58, at art. 1 (agreeing to punish anyone who exploited another person for prostitution); see also Wharton, *supra* note 6, at 762 (noting that the Convention for Suppressing Trafficking and Prostitution included men in its definition of “person”).

<sup>60</sup> See Wharton, *supra* note 6, at 762.

<sup>61</sup> See Trafficking Protocol, *supra* note 29 (depicting the first globally recognized definition of trafficking); see also Mohamed Y. Mattar, *Trafficking In Persons, Especially Women and Children, In Countries of The Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 FORDHAM INT’L L.J. 721, 721–22 (2003) (stating that the Trafficking Protocol requires nations to criminalize and prevent trafficking, protect and assist victims of trafficking and promote international cooperation to end trafficking).

minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs . . . .<sup>62</sup>

The Trafficking Protocol also makes the consent of the victim irrelevant so long as the trafficker utilizes any of the “means” outlined in Article 3(a).<sup>63</sup> Further, when the victim is under eighteen years old, the act does not require any of the aforementioned means in order to qualify as trafficking in persons.<sup>64</sup>

The Trafficking Protocol tackles a range of issues. Not only does it criminalize trafficking in persons,<sup>65</sup> it focuses on providing the victim with assistance and protection,<sup>66</sup> as well as addressing the victims’ status in the destination state<sup>67</sup> and repatriation.<sup>68</sup> The Protocol also discusses measures to prevent trafficking,<sup>69</sup> such as actions to discourage the demand for victims, exchanging information and training between nations,<sup>70</sup> and

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<sup>62</sup> Trafficking Protocol, *supra* note 29, at art. 3(a).

<sup>63</sup> *See id.*, at art. 3(b); *see also* Mattar, *supra* note 61, at 734 (noting that a victim’s consent is irrelevant under the Protocol).

<sup>64</sup> *See* Trafficking Protocol, *supra* note 29, at art. 3(c).

<sup>65</sup> *See id.*, at art. 5; *see also* Michelle Madden Dempsey, Carolyn Hoyle & Mary Bosworth, *Defining Sex Trafficking In International and Domestic Law*, 26 EMORY INT’L L. REV. 137, 139 (2012) (stating that the Trafficking Protocol criminalizes trafficking as it is defined in article 3).

<sup>66</sup> *See* Trafficking Protocol, *supra* note 29, at art. 6 (listing protections available to victims).

<sup>67</sup> *See id.*, at art. 7 (requiring State Parties to contemplate enacting procedures to permit trafficking victims to remain in their territory); *see also* Beth Lyon, *The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the “Brown Collar” Migration Paradigm*, 42 N.Y.U. J. INT’L L. & POL. 389, 476 (2010) (illustrating that Article 7 requires State Parties to consider the implementation of measures to protect victims of trafficking by allowing them to remain within their territory).

<sup>68</sup> *See* Trafficking Protocol, *supra* note 29, at art. 8 (addressing the return of trafficking victims to their place of origin); *see also* Meredith Flowe, Comment, *The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply and Demand*, 35 N.C. J. INT’L L. & COM. REG. 669, 701 (explaining that repatriation pursuant to article 8 of the Protocol takes into consideration legal proceedings concerning the victim and the trafficking).

<sup>69</sup> *See* Trafficking Protocol, *supra* note 29, at art. 9 (requiring States to establish programs or policies to go against trafficking and to prevent victims from being victimized again); *see also* Kalen Fredette, *Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation*, 17 CARDOZO J. INT’L & COMP. L. 101, 127 (2009) (listing comprehensive programs required under article 9 including protecting victims from re-victimization).

<sup>70</sup> *See* Trafficking Protocol, *supra* note 29, at art. 10 (stating that information should be exchanged between law enforcement and immigration authorities); *see also* Fredette, *supra* note 69, at 127 (maintaining that cooperation encompasses training investigators and victim support personnel and exchanging information about trafficked persons and their offenders).

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strengthening the effectiveness of border controls.<sup>71</sup> The Trafficking Protocol was ratified by the United States on November 3, 2005,<sup>72</sup> and it heavily influences the United States' primary anti-trafficking legislation, the Trafficking Victims Protection Act.<sup>73</sup>

#### IV. THE UNITED STATES' ANTI-TRAFFICKING POLICY

The evolution of anti-sex trafficking policies in the United States was not as linear as it was within the international community. This evolution, which spans 100 years, can be traced through the Mann Act,<sup>74</sup> and its heavy influence on the United States' primary anti-trafficking legislation, the Trafficking Victims Protection Act.<sup>75</sup>

##### a. Ninety Years of The Mann Act: 1910–2000

In 1910, Congress passed the Mann Act, originally known as the White Slave Traffic Act.<sup>76</sup> This act criminalized the transportation of a woman or girl across state lines “for either the purpose of prostitution or debauchery, or for any ‘other immoral purpose.’”<sup>77</sup> While the act was intended to combat forced prostitution, the ambiguity of “any other immoral purpose” allowed for prosecutorial abuse, leading to convictions for consensual sex acts such as extra-marital affairs where interstate travel was involved.<sup>78</sup> Further, even though Congress did not create a federal

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<sup>71</sup> See Trafficking Protocol, *supra* note 29, at art. 11 (requiring States to strengthen their borders to prevent trafficking).

<sup>72</sup> See Trafficking Protocol, *supra* note 29 (indicating that the United States signed the Protocol on December 13, 2000 and ratified it on November 3, 2005); *see also* Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1295 (2011) (establishing that the United States ratified the Trafficking Protocol in 2005).

<sup>73</sup> See Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2012); *see also* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2984-85 (2006) (noting that the Trafficking Protocol provided an outline for the Trafficking Victims Protection Act).

<sup>74</sup> See The Mann Act, 18 U.S.C. § 2421 (2012) (making it illegal to knowingly cross state lines for purposes of prostitution); *see also* Mattar, *supra* note 72, at 1250–51 (noting that even though the Mann Act does not require a showing that the accused used force, it remains in existence despite the creation of the Trafficking Victims Protection Act).

<sup>75</sup> See Trafficking Victims Protection Act, 18 U.S.C. § 1591 (2012) (making it illegal to forcibly compel women and children into prostitution).

<sup>76</sup> White Slave Traffic Act ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C.A. §§ 2421–2424 (2006)) (creating an all-encompassing statute prohibiting interstate prostitution).

<sup>77</sup> See White Slave Traffic Act ch. 395, at § 2.

<sup>78</sup> See *Cleveland v. U.S.*, 329 U.S. 14, 18 (1946) (upholding a conviction of a Mormon polygamist who traveled across state lines with several wives); *see also* UNFORGIVABLE BLACKNESS (Florentine Films and WETA Washington D.C. 2004), available at <http://www.pbs.org/unforgivableblackness/knockout/mann.html> (discussing

prohibition of prostitution – technically still leaving the decision to regulate it up to the states – prostitution was ripe for broad prosecution because of the vague language criminalizing it where it affects “interstate and foreign commerce.”<sup>79</sup>

In 1986, Congress addressed the issue of prosecutorial abuse with amendments to the Mann Act, tightening the language to resolve some of the discrepancies created by the ambiguous “any other immoral purpose” element. The statute now reads:

Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.<sup>80</sup>

This clarification now encompasses actual crimes, like child pornography, rather than enabling prosecution for anything that can be construed to have an “immoral” purpose.<sup>81</sup> However, the Act’s amendment to “any individual” instead of just “any woman or girl” brought male victims under its protective wing.<sup>82</sup> This had the effect of enabling a prosecutor to charge male defendants who crossed state lines to engage in consensual homosexual sex acts with a crime because, regardless of morality, such sexual activity was a criminal offense in at least some states.<sup>83</sup> After the U.S. Supreme Court’s decision in *Lawrence v. Texas*,<sup>84</sup> however, such charges can no longer be brought since the

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the charges brought against African-American boxer Jack Johnson under the Mann Act and noting the prosecutors’ use of the Act’s ambiguous language as “a tool for political persecution”).

<sup>79</sup> See Mann Act, 18 U.S.C.A. § 2421 (1998); see also *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) (reasoning that the Mann Act gains its constitutional sanction in the power of Congress over interstate commerce).

<sup>80</sup> Mann Act, 18 U.S.C. § 2421 (1998).

<sup>81</sup> See *United States v. Vang*, 128 F.3d 1065, 1073–74 (1997) (holding defendant violated the Mann Act by travelling across state lines to engage in sexual acts with a person under the age of 18); see also Michael Conant, *Federalism, The Mann Act, And The Imperative To Decriminalize Prostitution*, 2 CORNELL J.L. & PUB. POL’Y 99, 99–100 (1996) (discussing the impact of substituting “immoral purpose” for “any sexual activity for which any person can be charged with a criminal offense”).

<sup>82</sup> See Mann Act, 18 U.S.C. § 2421 (1986), amended by Pub.L. No. 99–628, 100 Stat. 3510 (1986); see also *U.S. v. Sabatino*, 943 F.2d 94, 99 (1st Cir. 1991) (emphasizing that the amended statute encapsulates interstate prostitution of males as well as females).

<sup>83</sup> See 16 GA. CODE ANN. § 16–6–2 (2011) (criminalizing sodomy in Georgia); see also *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding state laws criminalizing sodomy in the same year Congress amended the Mann Act).

<sup>84</sup> 539 U.S. 558, 576 (2003) (invalidating state laws that criminalized sodomy between consenting adults).

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Mann Act only authorizes prosecution for criminally offensive sexual activity.<sup>85</sup> Thus, the Act now has the effect of precluding an overzealous prosecutor from bringing charges against a defendant based on morality rather than illegality, making it more difficult to abuse the Act in order to persecute individuals.

**b. The Trafficking Victims Protection Act: 2000–Present**

In 2000 the United States implemented the Trafficking Victims Protection Act (TVPA) to address international sex trafficking concerns.<sup>86</sup> Congress found that “[e]xisting legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice. . . .”<sup>87</sup> Congress also recognized that:

[n]o comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.<sup>88</sup>

The TVPA, later amended to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,<sup>89</sup> defined sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>90</sup> A commercial sex act is defined as “any sex act on account of which anything of value is given to or received by any person.”<sup>91</sup> The victim’s consent is not mentioned in either definition.

The TVPA also highlights two “severe” forms of human trafficking. It distinguishes between “sex trafficking in which a commercial act is induced by force, fraud, or coercion” and trafficking “of a person for labor or services, through the use of force, fraud, or

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<sup>85</sup> See Mann Act, *supra* note 74, at § 2421; see also U.S. v. Hitt, 473 F.3d 146, 150 (5th Cir. 2006) (providing a description of the contemporary aims and breadth of the Mann Act).

<sup>86</sup> See Trafficking Victims Protection Act, 22 U.S.C. § 7101 (2012) (providing a complex set of laws aimed at stopping international human sex trafficking); see also Harvard Law Review Association, *Developments In The Law – Jobs and Borders II. The Trafficking Victim’s Protection Act*, 118 HARV. L. REV. 2180, 2188 (2005) (explaining that after becoming the first anti-trafficking statute in the United States in 2000, the TVPA was amended in 2003).

<sup>87</sup> 22 U.S.C. § 7101(b)(14).

<sup>88</sup> *Id.*

<sup>89</sup> See 22 U.S.C. §§ 7101–7200, amended by Pub. L. No. 110-457, § 1(a), 122 Stat. 5044 (2008) (reauthorizing the TVPA and enhancing the measures used to halt international sex trafficking).

<sup>90</sup> 22 U.S.C. §§ 7102(9) (pointing out that, interestingly, human trafficking or trafficking in persons is not explicitly defined in the statute).

<sup>91</sup> 22 U.S.C. §§ 7102(3).



coercion.”<sup>92</sup> The Mann Act’s focus on prostitution seems to have influenced the distinction between sex trafficking and other forms of trafficking in persons that persists today,<sup>93</sup> but the TVPA has not inherited the Mann Act’s strict liability standard.<sup>94</sup> The United States criminalized sex trafficking in concurrence with passing the TVPA<sup>95</sup> and, while the TVPA defines sex trafficking without regard to the victim’s consent, the penal statute only criminalizes sex trafficking of adults by “means of force, threats of force, fraud, [or] coercion.”<sup>96</sup> There is no language in the criminal statute to make the consent of the victim irrelevant, despite the Trafficking Protocol’s calls to do so.<sup>97</sup>

### c. The “3P” Paradigm

The United States’ policies for combating trafficking in persons both domestically and abroad can be summarized into the “3P Paradigm”: prosecution of traffickers, prevention of further trafficking, and protection for trafficking victims.<sup>98</sup>

#### i. Prosecution

To assist with federal and state prosecution, the TVPA allows for victims to receive certain federal and state benefits.<sup>99</sup> One of these is the T-Visa, which enables the victim and family members to remain in the United States and apply for permanent residency.<sup>100</sup> Eligibility for the T-

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<sup>92</sup> 22 U.S.C. § 7102(8)(A), (B) (clarifying the differences between the two types of severe trafficking); *see also* Rebecca Carroll Sager, *An Anomaly of the Law: Insufficient State Laws Fail to Protect Minor Victims of Sex Trafficking*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 359, 365 (2012) (noting that the TVPA originally only made reference to sex trafficking with regard to the elements of forcible rape and the coerced participating of another person, but that was later amended).

<sup>93</sup> H.R. REP. NO. 61-47, at 10 (1909) (stating the Mann Act’s goal is to prevent traffickers from forcing women into a life of prostitution).

<sup>94</sup> *See* White Slave Traffic Act, *supra* note 76, at § 2-3, 36 Stat. 825 (detailing the elements for criminal transport for illegal sexual activity, where consent of the victim is not necessary); *see also* *Gebardi v. U.S.*, 287 U.S. 112, 118–19 (1932) (holding that the Mann Act was made to encompass situations where the woman consents to her transportation for the purposes of prostitution).

<sup>95</sup> 18 U.S.C. § 1591.

<sup>96</sup> *Id.*, at § 1591(a).

<sup>97</sup> *See* The Trafficking Protocol, *supra* note 29, at art. 3(b) (stating that the consent of the victim to such exploitation is entirely irrelevant); *see also* Susan Tiefenbrun, *Copyright Infringement, Sex Trafficking, and Defamation in the Fictional Life of a Geisha*, 10 MICH. J. GENDER & L. 327, 365–66 (2004) (explaining that since sex trafficking is considered a type of slavery, the issue of consent is not that significant in relation to trafficking laws).

<sup>98</sup> 2010 TIP Report, *supra* note 16, at 12–13 (suggesting that the governmental response should incorporate this paradigm).

<sup>99</sup> *See* Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7105(b)(1)(A) (2012) (noting that aliens classified as victims of severe trafficking may be eligible for federal and state benefits).

<sup>100</sup> *See* Press Release, Dep’t of Justice, Department of Justice Issues T Visa to Protect Women, Children and All Victims of Human Trafficking (Jan. 24, 2002),

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Visa, however, hinges upon the victim's willingness to assist prosecutors in convicting the trafficker.<sup>101</sup> Other benefits are similarly dependent upon the victim's cooperation in either the federal or state prosecution.<sup>102</sup>

***ii. Prevention***

Under the "prevention" portion of the paradigm, the U.S. Government acknowledges that "neither the [Trafficking] Protocol nor the TVPA as amended give much guidance in setting forth prevention activities beyond the obvious: public awareness campaigns, addressing root causes, and conducting law enforcement-related or border security activities."<sup>103</sup> As far as deterrence goes, the TVPA calls for a minimum sentence of fifteen years for sex trafficking offenses, with life imprisonment being the maximum.<sup>104</sup> The TVPA empowers the Executive Branch to prevent sex trafficking within the United States and abroad. In addition to the aforementioned, "the President shall establish and carry out international initiatives to enhance economic opportunity for potential victims of trafficking as a method to deter trafficking."<sup>105</sup> These include lending programs and business training, programs promoting women's involvement in economic decisions, programs to keep children in school and educate former victims of trafficking, the development of education curricula on trafficking, and grants to NGOs to "accelerate and advance the political, economic, social, and educational roles and capacities of women in their countries."<sup>106</sup>

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[http://www.justice.gov/opa/pr/2002/January/02\\_crt\\_038.htm](http://www.justice.gov/opa/pr/2002/January/02_crt_038.htm) (last visited Nov. 9, 2012) (noting that this initiative is done to protect the victims).

<sup>101</sup> See 22 U.S.C. § 7105(b)(1)(E)(i)(I) (explaining that only those who cooperate in prosecuting the person or persons responsible for the trafficking are eligible for a T Visa).

<sup>102</sup> See 22 U.S.C. § 7105(b)(1)(E)(iv) (noting that victims who thoroughly assist in the investigation and prosecution may be approved by the Secretary of Health and Human Services for federal and state benefits); see also Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 333 (2005) (explaining that a severe trafficking victim who is shown to have cooperated in investigating and prosecuting the trafficker is entitled to refugee benefits).

<sup>103</sup> 2010 TIP Report, *supra* note 16, at 14; U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* (2011) [hereinafter "2011 TIP Report"].

<sup>104</sup> See 18 U.S.C. § 1591(b)(1) (stating that severe human trafficking offenders may face a life sentence in prison).

<sup>105</sup> 22 U.S.C. § 7104(a).

<sup>106</sup> See *id.* (providing five possible initiatives that the President may utilize including creating microcredit lending programs, educating women and children on the dangers of trafficking, and granting nongovernmental organization funds to advance the roles of women in society); see also U.S. DEP'T OF STATE, *PROGRESS IN COMBATING TRAFFICKING IN PERSONS: THE OBAMA ADMINISTRATION'S ACCOMPLISHMENTS* (AS OF FEB. 2012) (Mar. 19, 2012), available at <http://www.state.gov/j/tip/rls/reports/pitf/185971.htm> (explaining that the Department of

As for preventing sex trafficking offenses committed by U.S. citizens abroad, further efforts to combat sex tourism were warranted.<sup>107</sup> Additionally, the executive branch is to terminate grants, contracts, or cooperative agreements between federal departments or agencies and private entities where that party “engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect.”<sup>108</sup> The executive branch is also empowered with assisting and providing aid to foreign governments to improve their own anti-trafficking efforts.<sup>109</sup>

Lastly, the executive branch is responsible for collecting data on sex trafficking victims and operations both in the United States and foreign countries.<sup>110</sup> The TVPA mandated the establishment of an Interagency Task Force to Monitor and Combat Trafficking.<sup>111</sup> The Secretary of State delivers a mandated report to Congress, which summarizes findings and statistics regarding trafficking in all its forms.<sup>112</sup> The Department of State also releases the annual Trafficking In Persons

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Homeland Security provides training and outreach on child sex tourism to foreign officials to encourage foreign governments to combat trafficking).

<sup>107</sup> See 22 U.S.C. § 7104(e)(1) (noting that the President must alert travelers about the illegality of sex tourism through the dissemination of appropriate materials); see also Michael J. Garcia, Assistant Secretary U.S. Immigration and Customs Enforcement, Conference at the 19th Annual San Diego International Conference On Child and Family Maltreatment (Jan. 26, 2005), *transcript available at* <http://www.ice.gov/doclib/news/library/speeches/garcia012605.pdf> (noting that the “PROTECT Act” boosts penalties for child sex tourism as a further deterrent and those convicted face up to 30 years in jail).

<sup>108</sup> 22 U.S.C. § 7104(g) (highlighting that grants issued by a Federal department or agency will be terminated if the entity in receipt of the funds engaged in severe forms of trafficking during the grant period); Chacon, *supra* note 73, at 3031–32 (highlighting the fact that the U.S. exceeds its mandate under § 7104(g) by providing aid only if an organization pledges that it will abolish prostitution in addition to supporting anti-trafficking).

<sup>109</sup> See 22 U.S.C. § 7104(i) (describing the programs the President institutes to prevent and deter trafficking in foreign governments); see also Meril Eugene Anthes, Jr., *Regarding Women & Children: Using International Trade Relations to Stem the Growing Tide of the Sexual Exploitation of Women and Children*, 14 CURRENTS INT’L TRADE L.J. 69, 76–78 (2005) (noting that the TVPA gives the President the authority to enact trade sanctions against countries that refuse to act on the sexual exploitation of woman and children within their borders).

<sup>110</sup> See 22 U.S.C. § 7103(d)(2) (noting that the Task Force shall measure the progress of both the United States and foreign countries in the prevention, protection, and assistance to victims of trafficking); see also 22 U.S.C. § 7107 (describing the reports the Secretary of State will prepare in tandem with the task force identified in § 7103(d), including a mandatory annual report to Congress providing information on emerging issues in human trafficking).

<sup>111</sup> See 22 U.S.C. § 7103 (noting that the President must establish an Interagency Task Force and appoint members to the task force to monitor and combat trafficking).

<sup>112</sup> See 22 U.S.C. § 7111 (outlining the contents of the report the Secretary of State submits to Congress); see also 22 U.S.C. § 7107(b)(1) (detailing how the Secretary of State shall submit a status report to the appropriate congressional committees no later than June 1 each year).

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(TIP) report, a similar report that summarizes findings and statistics on trafficking and conveys them to the public.<sup>113</sup> The TIP also contains “Country Narratives” that detail the individual anti-trafficking efforts and data of each nation-state, including the United States.<sup>114</sup>

***iii. Protection***

The third “P” of the 3P Paradigm, “protection,” is grounded in the U.S. Government’s assertion that “law enforcement alone without victim protections is an inadequate response.”<sup>115</sup> The TVPA affords various protections to victims inside and outside the United States.

The aforementioned T-Visa allows victims and family members to remain in the United States for three years before they may apply for permanent residency.<sup>116</sup> The federal government issues T-Visas, and recommendations from the state and local levels (based on the victim’s cooperation in state and local investigations and prosecutions) are given high regard.<sup>117</sup>

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<sup>113</sup> See 2010 TIP Report, *supra* note 16, at 20; see also 2011 TIP Report, *supra* note 103, at 1 (stressing that the goal of the TIP report is to determine the efficiency of sex trafficking laws implemented by governments); see also *Report and Analysis of Immigration and Nationality Law*, 88 No. 3 INTERPRETER RELEASES 222, 222 (2011) (commenting that the TIP Report conveys information on the efforts of foreign governments against trafficking persons).

<sup>114</sup> See 2010 TIP Report, *supra* note 16 (showing the information in each tier ranking and country narrative); see also 2011 TIP Report, *supra* note 103, at 1 (remarking that the 2011 version of the report includes more than 180 country narratives); see also Luis CdeBaca, U.S. Ambassador-at-Large, Office To Monitor and Combat Trafficking in Persons, Statement before the Subcommittee on Africa, Global Health, and Human Rights of the House of Foreign Affairs Committee: The Trafficking in Person Report 2011: Truth, Trends, and Tier Rankings (Oct. 27, 2011), *available at* <http://www.state.gov/j/tip/rls/rm/2011/176343.htm> (stating that the narratives utilize information from civil society groups, foreign governments, and reporting officers from the U.S. State Department in assessing each country).

<sup>115</sup> 2010 TIP Report, *supra* note 16, at 13.

<sup>116</sup> See Press Release, Dep’t of Justice, Department of Justice Issues T Visa to Protect Women, Children and All Victims of Human Trafficking (Jan. 24, 2002), *available at* [http://www.justice.gov/opa/pr/2002/January/02\\_crt\\_038.htm](http://www.justice.gov/opa/pr/2002/January/02_crt_038.htm) (addressing the eligibility of trafficking victims to apply for permanent residency after 3 years); see also Mark P. Lagon, U.S. Ambassador-at-Large and Dir., Office to Monitor and Combat Trafficking in Persons, William V. O’Brien Lecture in International Law and Morality: Trafficking in Persons (Apr. 9, 2008), *available at* [http://fora.tv/2008/04/09/Mark\\_P\\_Lagon\\_Law\\_and\\_Morality\\_of\\_Human\\_-Trafficking](http://fora.tv/2008/04/09/Mark_P_Lagon_Law_and_Morality_of_Human_-Trafficking) (discussing how victims of trafficking may remain in the U.S. even though they came into the country under illicit circumstances).

<sup>117</sup> See 22 U.S.C. § 7105(b)(1)(E)(i) (providing that the Secretary of Health and Human Services grants assistance after consultation with the Secretary for Homeland Security and the Attorney General); see also 22 U.S.C. § 7105(b)(1)(E)(iv) (requiring the Secretary of Health and Human Services to consider statements from state and local law enforcement officials regarding the cooperation of trafficking victims in their investigation and prosecution of trafficking-related crimes); see also Adjustment and Change of Status, 8 U.S.C. § 1255(l)(1)(C)(i) (2012) (considering a victim’s compliance

The Department of Homeland Security sometimes screens victims in deportation centers for T-Visa eligibility.<sup>118</sup> From 2000 to 2008, slightly more than two thousand T-Visas were issued to victims and their families.<sup>119</sup> This low number is attributed to the victims' lack of awareness of such protections and rights.<sup>120</sup>

As the State Department acknowledges, “[a] victim-centered approach does not mean assisting a potential witness just long enough to get his or her testimony.”<sup>121</sup> An ideal response “should focus on all victims, offering them the opportunity to access shelter, comprehensive services, and in certain cases, immigration relief.”<sup>122</sup> The TVPA also allows victims of sex trafficking to receive benefits “to the same extent as an alien who is admitted to the United States as a refugee.”<sup>123</sup> These benefits can be extended “without regard to the immigration status of such victims.”<sup>124</sup> Further, victims of trafficking may seek damages from the perpetrator or a beneficiary of the trafficking violation in a district

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with a reasonable request for assistance in a trafficking investigation when contemplating the adjustment of the victim's immigration status).

<sup>118</sup> See 2011 TIP Report, *supra* note 103, at 375 (noting that unaccompanied children in detention centers who are potential trafficked victims are referred to the anti-trafficking division for eligibility determination); *see also* Mark P. Lagon, *Law and Morality of Human Trafficking*, FORA.TV (Apr. 9, 2008), [http://fora.tv/2008/04/09/Mark\\_P\\_Lagon\\_Law\\_and\\_Morality\\_of\\_Human\\_Trafficking](http://fora.tv/2008/04/09/Mark_P_Lagon_Law_and_Morality_of_Human_Trafficking) (explaining that detention centers are increasingly using screening mechanisms to identify T-Visa candidates).

<sup>119</sup> See ALISON SISKIN & LIANA SUN WYLER, *TRAFFICKING IN PERSONS* 27 (2010) (showing that a total of 2,313 T-Visas were approved for victims and their families from 2002 to 2008); *see also* Mark P. Lagon, *Law and Morality of Human Trafficking*, FORA.TV (Apr. 9, 2008), [http://fora.tv/2008/04/09/Mark\\_P\\_Lagon\\_Law\\_and\\_Morality\\_of\\_Human\\_Trafficking](http://fora.tv/2008/04/09/Mark_P_Lagon_Law_and_Morality_of_Human_Trafficking) (stating that the Department of Homeland Security issued about 2,000 T-Visas to trafficked victims and their families from 2000 to 2008).

<sup>120</sup> See Karl Krooth, Sheila Neville & Sheila Stuhlman, *Practice Pointers for U and T Visas*, AM. IMMIGR. LAW ASS'N 595, 601 (2011–12 ed.) (explaining that trafficking victims are less likely to identify themselves as such because they are unaware that a crime has been committed); *see also* Lagon, *supra* note 119 (stressing that trafficking victims must be educated as to their rights, because many victims are unaware of the protections available).

<sup>121</sup> See 2010 TIP Report, *supra* note 16, at 13.

<sup>122</sup> See *id.*, at 14.

<sup>123</sup> See 22 U.S.C. § 7105(b)(1)(A) (establishing that trafficked victims will receive the same assistance as certain refugees within the United States); *see also* SUZANNE B. SELTZER ET AL., *IDENTIFICATION AND LEGAL ADVOCACY FOR TRAFFICKING SURVIVORS A-9* (3d ed. 2009) (stating that trafficking victims ultimately get the same benefits as someone who has entered the country as a refugee).

<sup>124</sup> See 22 U.S.C. § 7105(b)(1)(B); *see also* Nat'l Immigration Law Ctr., *Congress Creates New “T” and “U” Visas for Victims of Exploitation*, NAT'L IMMIGRATION LAW CENTER 3, 3 (2000) (stressing that trafficking victims' immigration status is irrelevant when determining whether they qualify for the extended benefits that are given to refugees within the United States).

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court.<sup>125</sup> Such a civil remedy has a ten-year statute of limitations<sup>126</sup> and the victim may remain in the United States to pursue the action.<sup>127</sup>

To assist victims outside of the United States, the executive branch is empowered to “establish and carry out programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement” of victims.<sup>128</sup> These initiatives include providing support to NGOs. NGOs, in turn, provide hotlines, shelters, networks and databases on trafficking, provide legal and other services to victims (especially those that are detained),<sup>129</sup> and facilitate communication between NGOs and foreign governments.<sup>130</sup> Other initiatives include educating and training female victims, assisting families of victims, and protecting refugees and internally displaced persons from becoming victim to traffickers.<sup>131</sup> Up to \$185.5 million has been devoted to anti-trafficking measures.<sup>132</sup>

In order to receive assistance from the United States, however, a country, program, or organization has to formally affirm that it “does not

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<sup>125</sup> See 18 U.S.C. § 1595(a) (2012) (permitting victims to bring civil actions against anyone who knowingly benefits from participation in an act that violates this chapter); see also *Ditullio v. Boehm*, 662 F.3d 1091, 1094 (9th Cir. 2011) (holding that the TVPA allows recovery of punitive damages because it creates a tort action).

<sup>126</sup> See 18 U.S.C. § 1595(c); see also *Ditullio*, *supra* note 125, at 1093–94 (holding that the TVPA does not apply retroactively).

<sup>127</sup> See Trafficking Victims Protection Act, 22 U.S.C. § 7105(c)(3)(A)(iii) (staying any immigration proceedings against aliens until the action brought against the trafficker concludes).

<sup>128</sup> See 22 U.S.C. § 7105(a)(1); see also Andrea L. Johnson, Note, *A Perfect Storm: The U.S. Anti-Trafficking Regime’s Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 655–56 (2012) (noting that criminal sanctions, foreign aid and awareness programs are all part of U.S. anti-trafficking efforts).

<sup>129</sup> See 2010 TIP Report, *supra* note 16, at 13; see also *In re Y.M.*, 144 Cal. Rptr. 3d 54, 66–67 (Cal. App. 4th Dist. 2012) (discussing the federal government’s decision to grant the plaintiff, a human trafficking victim, refugee status so that she would be eligible for federal and state programs to facilitate reunification with her family).

<sup>130</sup> See 22 U.S.C. § 7105(a)(1) (stating that the United States shall work with nongovernmental organizations to create programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement of human trafficking victims).

<sup>131</sup> See 2010 TIP Report, *supra* note 16, at 14 (describing recent reports on trafficking that have the potential to inform policies and programs within the United States); see also Theresa Barone, Note, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT’L & COMP. L.J. 579, 586–87 (2003) (detailing domestic and international programs for outreach and education on assisting victims of trafficking).

<sup>132</sup> See *Trafficking Victims Protection Reauthorization Act of 2011*, H.R. DOC. NO. 112-96, at 27 (2011–2012) (minority views from Senators Kyl, Sessions, Lee and Coburn) [hereinafter “Congressional Report”] (finding that “[t]he amount of money authorized to combat human trafficking increased from \$31.8 million in 2001 to \$185.5 million in 2010”); see also Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 470 (2006) (mentioning that in 2004 alone, the U.S. provided \$82 million in anti-trafficking grants and played a strong role in combating trafficking).

promote, support, or advocate the legalization or practice of prostitution.”<sup>133</sup> Organizations that do not comply with this requirement may still use U.S. aid and assistance to provide services to trafficking victims, but not until “after the [victims] are no longer engaged in activities that resulted from such victims being trafficked.”<sup>134</sup> Programs, unlike organizations, may assist “victims while they are being trafficked” even if the program has not made an abolitionist statement.<sup>135</sup> However, the TVPA “does not clarify the difference between a program aiding prostitutes while they are being trafficked and an organization aiding prostitutes in general.”<sup>136</sup>

Laudable as they are, U.S. anti-trafficking efforts have room to improve. The issue of consent remains a point of contention, as the U.S. Department of State estimates that, in Germany for example, “approximately 45 percent of identified sex trafficking victims reported that they had agreed initially to engage in prostitution.”<sup>137</sup> Under the Trafficking Protocol, however, consent of a victim is supposed to be irrelevant.<sup>138</sup> The Mann Act comes close to viewing consent as irrelevant, but only insofar as the trafficking consists of interstate travel.<sup>139</sup> The

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<sup>133</sup> See 22 U.S.C. § 7110(g) (allowing organizations to make such an affirmation in grant applications or grant agreements); see also Wharton, *supra* note 6, at 771 (observing “that the United States government would not award funding to [NGOs] if they ‘promote, support, or advocate the legalization or practice of prostitution’”). Compare Foreign Assistance, 22 U.S.C. § 2152d (2008) (authorizing the President to “provide assistance to foreign countries directly, or through [NGOs] and multilateral organizations, for programs, projects, and activities designed to meet the *minimum standards for the eliminations of trafficking*”) (emphasis added), with 22 U.S.C. 7106(b)(11)(A) (listing “serious and sustained efforts to reduce the demand for commercial sex acts” as indicia of conforming to minimum standards for the elimination of trafficking).

<sup>134</sup> See 22 U.S.C. § 7110(g)(2) (providing an exception for organizations); see also Wharton, *supra* note 6, at 771–72 (noting that “aid organizations may not help prostitutes until the prostitutes have stopped the commercial sexual activity”).

<sup>135</sup> See 22 U.S.C. § 7110(g)(1) (allowing programs to aid trafficking victims while trafficking is still underway); see also Wharton, *supra* note 6, at 772 (describing the differences between programs and organizations under the TVPA).

<sup>136</sup> See Wharton, *supra* note 6, at 772 (noting also that the word program is not defined by the TVPA); see also 22 U.S.C. § 7110(g) (establishing no discernible difference between a “program” and an “organization”).

<sup>137</sup> See 2011 TIP Report, *supra* note 103, at 169 (describing a demographic of trafficking victims in Germany); see also Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87, 89–90 (2005) (raising the issue of victims that initially consent to being trafficked and the problems associated with this group).

<sup>138</sup> See 2011 TIP Report, *supra* note 103, at 37 (establishing that the consent of a victim of trafficking in persons is irrelevant); see also Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137, 162 (2004) (stating that the 2001 Protocol only considers consent irrelevant when traffickers use certain methods such as fraud and abuse of power or vulnerability).

<sup>139</sup> See Mann Act, 18 U.S.C. § 2421 (1998) (establishing that consent is irrelevant when trafficking consists of interstate travel); see also *Mortenson v. United*

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TVPA and the penal statute criminalizing trafficking require force, fraud, or coercion, but neither expressly states that consent is irrelevant.<sup>140</sup>

Additionally, the lack of education provided to victims of their rights and protections preclude them from taking advantage of services like the T-Visa.<sup>141</sup> Further, the requirement for abolitionist affirmations can deprive victims in need of services. Sex trafficking victims exist in areas where prostitution is legal<sup>142</sup> and requiring such a broad mission statement from countries, programs, and organizations deprives some of these victims of much-needed assistance.

**d. The Tier System**

One of the responsibilities the TVPA bestows upon the United States executive branch is to collect data on each country and make an annual report on the anti-trafficking practices and statistics based on its findings.<sup>143</sup> The State Department's report, the Trafficking in Persons report (TIP), arranges countries into a tier system.<sup>144</sup> Tier One is comprised of those states whose governments are in full compliance with the TVPA's minimum standards.<sup>145</sup> "While Tier 1 is the highest ranking, it

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States, 322 U.S. 369, 374 (1944) (stating that the dominant motive for interstate travel was the intention that the women would engage in conduct outlawed by Section 2 of the Mann Act).

<sup>140</sup> See The Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7102(8); see also 18 U.S.C. § 1591 (establishing that consent of a trafficking victim is not wholly irrelevant).

<sup>141</sup> See Chacon, *supra* note 73, at 3025 (stating that narrow regulations governing the issuance of T-visas make it difficult for victims to be eligible); see also Lagon, *supra* note 119 (arguing for greater awareness of protections available to trafficking victims).

<sup>142</sup> See RONALD B. FLOWERS, *THE PROSTITUTION OF WOMEN AND GIRLS* 21 (1998) (reporting that prostitution is legal in several countries including the Netherlands, Germany, Brazil, England, and Hungary); see also Seo-Young Cho, Aexel Dreher & Eric Neumayer, *Does Legalized Prostitution Increase Human Trafficking*, COURANT RESEARCH PAPERS: POVERTY, EQUITY AND GROWTH (Courant Research Ct. ed., 2012) (investigating the effect of legal prostitution on sex trafficking, and ultimately concluding that legalized prostitution often increases human trafficking inflows.)

<sup>143</sup> See The Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7102 (2000) and 18 U.S.C. § 1591 (2008); see also 2010 TIP Report, *supra* note 16; 2011 TIP Report, *supra* note 103; see also JOHN WINTERDYK ET AL., *HUMAN TRAFFICKING: EXPLORING THE INTERNATIONAL NATURE, CONCERNS, AND COMPLEXITIES* 239 (2012) (asserting that this report is the most comprehensive worldwide report on the efforts of governments to combat severe forms of trafficking).

<sup>144</sup> See 2011 TIP Report, *supra* note 103, at 13 (noting the Tier system established by the Department of State); see also 2010 TIP Report, *supra* note 16, at 47 (further explaining the Tier system); see also Mary Catherine Hendrix, Note, *Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting Change in India and China*, 43 CORNELL INT'L L.J. 173, 186 (2010) (explaining the categorical tier system).

<sup>145</sup> See 2011 TIP Report, *supra* note 103, at 13 (noting the requirements for Tier 1); see also 2010 TIP Report, *supra* note 16, at 47 (explaining the Tier 1 requirements);



does not mean that a country has no human trafficking problem. Rather, a Tier 1 ranking indicates that a government has acknowledged the existence of human trafficking, has made efforts to address the problem, and meets the TVPA's minimum standards."<sup>146</sup>

Tier Two consists of states whose governments, while not fully compliant, are "making significant efforts to bring themselves into compliance with those standards."<sup>147</sup> The Tier Two Watch List is reserved for states that do not fully comply with the TVPA's minimum standards, but are making significant efforts to achieve compliance, and:

- a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;
- b) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or,
- c) the determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.<sup>148</sup>

Finally, countries placed into Tier Three are those "whose governments do not fully comply with the minimum standards and are not making significant efforts to do so."<sup>149</sup> There are three additional factors the State Department uses to determine whether a state should be placed in Tier Two or the Tier Two Watch List as opposed to Tier Three: first, the extent to which the country qualifies as a state of origin, transit, or destination for victims of severe trafficking; second, the extent of the government's failure to comply, with an emphasis on government officials' complicity in severe forms of trafficking; and third, what

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*see also* Liana Sun Wyler & Alison Siskin, CONG. RESEARCH SERV., RL 34317, *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 12* (2010) (defining Tier 1 as the best ranking countries on the basis of their efforts to combat Trafficking in Persons).

<sup>146</sup> *See* 2011 TIP Report, *supra* note 103, at 17; *see also* 2010 TIP Report, *supra* note 16, at 47; *see also* Hendrix, *supra* note 144, at 186 (outlining other factors that the Tier 1 ranking takes into consideration).

<sup>147</sup> *See* 2011 TIP Report, *supra* note 103, at 13 (explaining compliance requirement for Tier 2); *see also* 2010 TIP Report, *supra* note 16, at 47 (defining the Department of State eligibility for Tier 2); *see also* Liana Sun Wyler & Alison Siskin, CONG. RESEARCH SERV., RL 34317, *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 12* (2010) (quoting the requirements for a Tier 2 accreditation).

<sup>148</sup> *See* 2011 TIP Report, *supra* note 103, at 13; *see also* 2010 TIP Report, *supra* note 16, at 47; *see also* *In re Y.M.*, 144 Cal. Rptr. 3d 54, 65 (4th Dist. 2012) (listing the additional requirements needed for a country to be listed under the Tier 2 Watch List category).

<sup>149</sup> *See* 2011 TIP Report, *supra* note 103, at 14; *see also* 2010 TIP Report, *supra* note 16, at 47.

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reasonable measures need to be taken to bring the state into compliance with the TVPA's minimum standards.<sup>150</sup> The 2008 amendment to the TVPA provided that any state ranking in the Tier Two Watch List for two consecutive years and would otherwise rank for the Tier Two Watch List for a third year would instead be placed into Tier Three.<sup>151</sup>

**V. EFFORTS TAKEN TO COMBAT SEX TRAFFICKING BY THE EUROPEAN COUNCIL**

The U.S. can improve its own anti-trafficking efforts by observing and integrating some of Europe's more successful methods. Members of the European Union generally rank favorably in the U.S. tier system. Out of its twenty-seven members, eighteen states are within Tier One.<sup>152</sup> Six states are in Tier Two, and only three – Cyprus, Estonia, and Malta – fall within the Tier Two Watch List.<sup>153</sup> None qualify for Tier Three status.<sup>154</sup>

**a. The Council of Europe Convention Against Trafficking**

The Council of Europe Convention on Action against Trafficking in Human Beings is a regional treaty within the European Union calling for action against sex trafficking and human trafficking in general.<sup>155</sup> The Council of Europe Convention against Trafficking takes the Trafficking Protocol as its “starting point,” along with other international agreements – “whether universal or regional” – and “seeks to strengthen the protection afforded by those instruments and to raise the standards which they lay down.”<sup>156</sup>

The Convention explicitly represents “that trafficking in human beings constitutes a violation of human rights”<sup>157</sup> and seeks to “design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution.”<sup>158</sup>

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<sup>150</sup> See 2011 TIP Report, *supra* note 103, at 14 (addressing additional factors through which to determine whether a country should be on Tier 2 or Tier 2 Watch List versus Tier 3); see also 2010 TIP Report, *supra* note 16, at 47.

<sup>151</sup> See 2011 TIP Report, *supra* note 103, at 14 (stating that the 2011 TIP report marks the first time this provision comes into effect).

<sup>152</sup> See 2011 TIP Report, *supra* note 103, at 14.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*; see also *id.*, at 52 (presenting a chart of all tier placements).

<sup>155</sup> See Council of Europe Explanatory Report, *supra* note 10; see also Council of Europe, [www.coe.int/t/dghl/monitoring/trafficking/Flags-sos\\_en.asp](http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos_en.asp) (last visited Nov. 10, 2012) (listing the signatories of this convention).

<sup>156</sup> See Council of Europe Explanatory Report, *supra* note 10, at 27.

<sup>157</sup> See *id.*, at pmb1.

<sup>158</sup> See *id.* at art. 1(1)(b).

The Council of Europe Convention against Trafficking utilizes the definition of human trafficking provided by the Trafficking Protocol.<sup>159</sup> Like the Trafficking Protocol, the Council of Europe Convention against Trafficking also makes the issue of a victim's consent irrelevant where force, coercion, abduction, fraud, deception, or abuse of power have been used.<sup>160</sup>

The Council of Europe Convention against Trafficking mirrors the 3P Paradigm of the TVPA: several of the provisions address Prosecution,<sup>161</sup> Prevention,<sup>162</sup> and Protection.<sup>163</sup> The Convention also mandates international cooperation (among the European Union member States)<sup>164</sup> and cooperation with civil society (cooperation between State authorities and public officials, and NGOs and other relevant organizations and members of civil society).<sup>165</sup> It is interesting to note that there are no provisions explicitly mandating cooperation with the international community. The Convention further establishes an internal

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<sup>159</sup> See *id.*, at art. 4(a) (defining "trafficking in human beings"); see also Trafficking Protocol, *supra* note 29, at art. 3(a) (providing a definition for "trafficking in persons").

<sup>160</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 4(b) (describing the consent of a victim of "trafficking in human beings"); see also Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 225 (2007) (stressing that a victim's consent to his exploitation is irrelevant); see also Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(2) (revealing that human trafficking in the international sex trade is often by force, fraud, or coercion).

<sup>161</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 18 (discussing the criminalization of human trafficking); see also Council of Europe Explanatory Report, *supra* note 10, at 28 (focusing on the prosecution of offenses in human trafficking); see also Jennifer M. Chacon, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1618–19 (2010) (acknowledging the bolstering of international prosecutorial efforts to enhance international human rights).

<sup>162</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 5 (focusing on the prevention of trafficking human beings); see also Symposium, *Successes and Failures in International Human Trafficking Law: Essay: Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT'L L. 53, 69–70 (2011) (showing that education is a key element in reducing the vulnerability of individuals who might end up at risk for trafficking).

<sup>163</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 10 (addressing measures to protect and promote the rights of victims of human trafficking); see also Loftus, *supra* note 163, at 183–85 (illustrating that offering victims assistance instead of incarceration protects them).

<sup>164</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 32 (demonstrating the Convention's emphasis on international cooperation to combat human trafficking within Europe); see also *Rantsev v. Cyprus*, 2010 Eur. Ct. H.R. 38 (quoting Convention article 32).

<sup>165</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 35 (indicating the Convention's requirement of cooperation between signatories and members of civil society); see also Nathan Godsey, *The Next Step: Why Non-Governmental Organizations Must Take a Growing Role in the New Global Anti-Trafficking Framework*, 8 REGENT J. INT'L L. 27, 46 (2011) (describing the role played by NGOs under the provisions of the Convention).

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mechanism to monitor the members' implementation of the Convention's provisions: the group of experts on action against trafficking in human beings (GRETA).<sup>166</sup>

A final note on the Council of Europe Convention against Trafficking regards a unique provision: the recovery and reflection period.<sup>167</sup> This provision requires each member state to provide a 30-day recovery and reflection period where the victim will be immune to expulsion from the state.<sup>168</sup> This period is designed to protect the victim from the traffickers while allowing her to make an informed decision on whether or not to cooperate with authorities.<sup>169</sup>

**b. Case Study: Germany's Anti-Sex Trafficking Efforts**

While Germany is a Tier One State,<sup>170</sup> it is also a source, transit, and destination State for victims of sex trafficking.<sup>171</sup> Eighty-five percent

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<sup>166</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 36 (presenting the Convention's application of an internal mechanism to monitor execution of required provisions); see also Mattar *supra* note 61, at 1363 (summarizing the role played by the GRETA monitoring system under the Convention).

<sup>167</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 13 (remarking on the unique recovery and reflection period included within the Convention); see also Sembacher, *supra* note 158, at 449 (recognizing the existence of the recovery and reflection period within the provisions of the Convention).

<sup>168</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 13 (detailing the requirement to provide limited immunity status under the recovery and reflection provision of the Convention); see also Cindy Braspenning, *Human Trafficking in the Netherlands: The Protection of and Assistance to Victims in Light of Domestic and International Law and Policy*, 1 INTERCULTURAL HUM. RTS. L. REV. 329, 364 (2006) (commenting on the thirty-day limited immunity status under the recovery and reflection provision of the Convention).

<sup>169</sup> See Council of Europe Explanatory Report, *supra* note 10, at art. 13 (explaining the purpose of the recover and reflection provision of the Convention); see also Federico Lenzerini, *International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: What Gaps Are to Be Filled?*, 4 INTERCULTURAL HUM. RTS. L. REV. 205, 221–225 (2009) (expressing the reasoning for the recovery and reflection period as derived from the text of the Convention). Such a service resembles the U.S. T-Visa granted to victims of trafficking that are willing to cooperate with prosecution of their traffickers, but the reflective period is given with the explicit purpose of giving the victim time to decide whether she wishes to cooperate with law enforcement rather than as a reward for cooperating or as a bargaining chip to obtain the victim's cooperation. See Marisa Silenzi Cianciarulo, *The Trafficking and Exploitation Victims Assistance Program: A Proposed Early Response Plan For Victims of International Human Trafficking in the United States*, 38 N.M. L. REV. 373, 385–386 (2008) (discussing the requirements for a victim of human trafficking to receive a T-visa under U.S. law).

<sup>170</sup> See 2011 TIP Report, *supra* note 103, at 169 (asserting that a tier-one state complies with the minimum standards for the elimination of human trafficking that the U.S. State Department sets out); see also Sara Birkenthal, *Human Trafficking: A Human Rights Abuse with Global Dimensions*, 6 IINTERDISC. J. HUMAN RTS. L. 27, 32 (2011-2012) (identifying that Germany ranks in the first tier of the Trafficking Victims Protection Act of 2000).

of identified sex trafficking victims worldwide originate in Europe,<sup>172</sup> and the U.S. State Department estimates that twenty-five percent of those victims come from within Germany.<sup>173</sup> However, Germany's efforts place it within Tier One and provide some guidance for improving U.S. efforts.

*i. Prosecution*

Germany has criminalized all forms of trafficking in persons. Section 232 of Germany's penal code punishes sex trafficking offenders with a prison term commensurate with penalties prescribed for such serious offenses as sexual assault.<sup>174</sup> In fact, sex trafficking has been a criminal offense in Germany as early as 1992.<sup>175</sup>

The German government cooperates closely with Romania, Bulgaria, Poland, and other governments in investigating trafficking offenses.<sup>176</sup> Germany partners with NGOs to provide various specialized anti-trafficking training programs to law enforcement officials including

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<sup>171</sup> See 2011 TIP Report, *supra* note 103, at 169 (noting that Germany, despite being a tier-one state, has a long way to go in terms of the TVPA goals of decreasing transnational human trafficking); *see also* Holman, *supra* note 55, at 116 (conveying how the 2002 legalization of prostitution in Germany resulted in the rise of illicit trafficking of sex slaves into the country).

<sup>172</sup> See 2011 TIP Report, *supra* note 103, at 169 (affirming that Germany plays a major role in human trafficking across Europe and how Europe is a major route of transport for the modern slave trade); *see also* Gail Kligman & Stephanie Limoncelli, *Trafficking Women After Socialism: From, To and Through Eastern Europe*, 12 SOC. POLITICS: INT'L STUDIES IN GENDER, STATE and SOC'Y 118, 126 (2005) (stating that Europe as a whole represents a key destination for the shipping of illegally-trafficked individuals and that 90 percent originate from Central and Eastern Europe).

<sup>173</sup> See 2011 TIP Report, *supra* note 103, at 169 (acknowledging that Germany plays a major point of origin for the illegal trafficking of individuals); *see also* UNITED NATIONS OFFICE ON DRUGS AND CRIME, *TRAFFICKING IN PERSONS: ANALYSIS ON EUROPE* (2009) (stating that 184 out of 689 sex-trafficking victims found in Germany turned out to be German nationals).

<sup>174</sup> See 2011 TIP Report, *supra* note 103, at 170 (recognizing that punishment for human trafficking is commensurate with penalties for other serious crimes such as sexual assault); *see also* STRAFGESETZBUCH [STGB][PENAL CODE], NOV. 13, 1998, BUNDESGESETZBLATT[BGBL] 3322, as amended §236, para. 4 (stating that an individual who exploits others for prostitution or other sexual activities will receive between six and ten years in prison)

<sup>175</sup> See 2011 TIP Report, *supra* note 103, at 169 (stating how Germany criminalized the trafficking of individuals within the country); *see* END CHILD PROSTITUTION, CHILD PORNOGRAPHY & TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES, [GERMANY] COUNTRY PROGRESS CARD 12, 15 (2010) (stating that Germany ratified the Convention on the Rights of the Child in 1992, which affirmed that children require a special protection from human trafficking).

<sup>176</sup> See 2011 TIP Report, *supra* note 103, at 170 (conveying that the federal criminal police conducts international trafficking investigations in conjunction with other governments); *see also* UNITED NATIONS OFFICE ON DRUGS AND CRIME, *HUMAN TRAFFICKING IN THE BALTIC SEA REGION: STATE AND CIVIL SOC'Y ON VICTIMS' ASSISTANCE AND PROTECTION 2* (2010) (noting that Germany and other Baltic region States work together and use similar strategies to prevent human trafficking across State borders).

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judges, prosecutors, and police.<sup>177</sup> These programs include topics such as basic anti-trafficking and emerging challenges in trafficking.<sup>178</sup>

Germany's state police are responsible for investigating trafficking cases.<sup>179</sup> Germany acknowledges that securing testimony from victims is a challenge prosecutors face.<sup>180</sup> This testimony problem may have compromised some trials and contributed to the high rate of suspended sentences.<sup>181</sup> In 2010, however, Germany commissioned a "significant study" on identifying victims and securing victim testimony in trafficking cases in order to increase the amount of successful prosecutions.<sup>182</sup>

*ii. Prevention*

Germany's efforts to prevent sex trafficking are also effective. Some of the highlights include sustained funding for NGOs to produce public awareness campaigns to the German citizenry as well as potential

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<sup>177</sup> See 2011 TIP Report, *supra* note 103, at 170 (acknowledging the German government funded NGOs for training law enforcement officials); see also Clara A. Dietel, *Not Our Problem: Russia's Resistance to Joining the Convention on Action Against Trafficking in Human Beings*, 32 SUFFOLK TRANSNAT'L L. REV. 161, 170 (2008) (explaining that Germany is another example of a signatory country that uses NGOs to help fight human trafficking).

<sup>178</sup> See 2011 TIP Report, *supra* note 103, at 170 (illustrating that the German federal and state police used sophisticated methods to investigate trafficking); see also Katherine L. Morrow, Comment, *Soccer, Sex, and Slavery: Human Trafficking in the World Cup*, 17 TULANE J. INT'L & COMP. L. 243, 254 (2008) (depicting police efforts to deal with trafficking by raids of brothels, undercover investigations, and additional training for police officers).

<sup>179</sup> See COUNCIL OF EUROPE, GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, GRETA REPORTS RELEASED: GERMANY (2011) (affirming that Germany's state police are responsible for investigating trafficking cases); see also Victoria Hayes, Note, *Human Trafficking for Sexual Exploitation at World Sporting Events*, 85 CHI.-KENT L. REV. 1105, 1127 n.167 (2010) (affirming that the Federal Criminal Police Office in Germany investigated thirty-three cases of suspected sex trafficking during the 2006 World Cup).

<sup>180</sup> See 2011 TIP Report, *supra* note 103, at 170 (citing German officials who reported that securing victim testimony remained a challenge for prosecutions); see also Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop it Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 376 (2005) (detailing how Germany has developed a program between counseling centers and police for protection to trafficked victims who agree to testify).

<sup>181</sup> See 2011 TIP Report, *supra* note 103, at 170 (explaining that poor or withdrawn victim testimony impaired trials and contributed to the high rate of suspended sentences); see also COUNCIL OF EUROPE, GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, GRETA REPORTS RELEASED: GERMANY (2011) (noting that 70 percent of convicted traffickers received suspended sentences).

<sup>182</sup> See 2011 TIP Report, *supra* note 103, at 170 (reporting that in 2010, the German police commissioned a study on victim identification and testimony in trafficking cases); see also Nilanjana Ray, *Looking at Trafficking Through a New Lens*, 12 CARDOZO J.L. & GENDER 909, 919-920 (2006) (finding that trafficked victims may be re-traumatized by recounting their experiences repeatedly or in the presence of the perpetrator in court).

victims, in Germany and abroad.<sup>183</sup> These campaigns take the form of websites, postcards, telephone hotlines, pamphlets, and speaking engagements.<sup>184</sup>

“German police liaison officers are deployed in every important country of origin for human trafficking victims and perpetrators, to ensure fast and comprehensive information sharing.”<sup>185</sup> Germany also consulted and trained Nigerian and Bangladeshi government officials in anti-trafficking measures.<sup>186</sup> Nigeria is a Tier One State and Bangladesh is on the Tier Two Watch List.<sup>187</sup> Interestingly, Bangladesh has ranked within the Tier Two Watch List for three consecutive years,<sup>188</sup> but has not been placed into Tier Three as per the TVPA’s 2008 requirements.<sup>189</sup>

While Germany has not taken specific steps to mitigate the demand for commercial sex, especially within Germany’s “best known red light districts,” the TIP praised the German Government for funding NGOs that supported individuals leaving prostitution.<sup>190</sup> Germany has also assisted

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<sup>183</sup> See 2011 TIP Report, *supra* note 103, at 171 (confirming that the German government’s funding for NGOs created public awareness campaigns about human trafficking); see also JANA HENNIG ET AL., INT’L ORG. FOR MIGRATION, TRAFFICKING IN HUMAN BEINGS AND THE 2006 WORLD CUP IN GERMANY 14-15 (2006) (discussing how Germany used NGOs to implement four major information campaigns to address the possible rise in human trafficking during the 2006 FIFA World Cup).

<sup>184</sup> See 2011 TIP Report, *supra* note 103, at 171 (indicating that Germany’s public awareness campaigns used websites, postcards, hotlines, pamphlets and speakers); see also Anne Marie Tavella, Note, *Sex Trafficking and the 2006 World Cup in Germany: Concerns, Actions and Implications for Future International Sporting Events*, 6 NW. U. J. INT’L HUM. RTS. 196, 197 (2007) (noting that Amnesty International encouraged Germany to use NGOs to run hotlines, shelters and public campaigns to protest human trafficking).

<sup>185</sup> See EUROPEAN COMMISSION, TOGETHER AGAINST TRAFFICKING IN HUMAN BEINGS – GERMANY, <http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Germany#> (last visited Nov. 10, 2012).

<sup>186</sup> See 2011 TIP Report, *supra* note 103, at 171 (asserting that Nigerian and Bangladeshi officials received law enforcement training from German agencies).

<sup>187</sup> See 2011 TIP Report, *supra* note 103, at 52 (demonstrating that Nigeria is a Tier One state and Bangladesh is on the Tier Two Watch List).

<sup>188</sup> See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 74 (2009) (indicating that Bangladesh is on the Tier Two Watch list); see also Alexandra R. Harrington, *Prostituting Peace: The Impact of Sending State’s Legal Regimes on U.N. Peacekeeper Behavior and Suggestions to Protect the Populations Peacekeepers Guard*, 17 J. TRANSNAT’L L. & POL’Y 217, 243 (2008) (asserting that Bangladesh is still recognized as a major State for human trafficking, even though it remains on the Tier Two Watch list).

<sup>189</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 107(a)(D)(i), H.R. 7311, at 6 (2008) (establishing that any state that has been on the Tier Two Watch List for three consecutive years will be placed into Tier Three); see also 2011 TIP Report, *supra* note 103, at 14 (stating that the provision in the William Wilberforce Trafficking Victims Protection Reauthorization Act came into effect for the first time in the 2011 TIP).

<sup>190</sup> See 2011 TIP Report, *supra* note 103, at 171 (acknowledging that German Government-funded NGOs provided support to individuals leaving prostitution); see also Morrow, *supra* note 178, at 253–55 (listing the various types of campaigns conducted by German government-funded NGOs in support of anti-trafficking).

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Southeast Asian law enforcement officials in investigations of German citizens engaging in sex tourism, and prosecuting them in either Germany or the destination states.<sup>191</sup>

**iii. Protection**

Germany funds an umbrella organization, the Federal Association against Trafficking in Women and Violence against Women in the Migration Process (KOK), that represents 39 NGOs and counseling centers that provide victims in all German states with services such as shelter and counseling.<sup>192</sup> Germany also grants a three-month recovery and reflection period instead of the one-month period required by the Council of Europe Convention against Trafficking, allowing victims who agree to testify to remain in the state for the duration of the trial.<sup>193</sup> During this period, victims are able to seek educational and vocational training, so they may eventually enter the labor market.<sup>194</sup> Finally, the German Government allows victims to collect a civil remedy from their traffickers.<sup>195</sup>

**VI. LESSONS TO BE LEARNED BY THE UNITED STATES**

There are many similarities between United States anti-trafficking policies and the European Union's policies. This is most likely due to the

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<sup>191</sup> See 2011 TIP Report, *supra* note 103, at 171 (noting the German government cooperated with law enforcement officials in Southeast Asia to investigate and try German sex tourists); see also Eric Thomas Berkman, Note, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397, 398 (1996) (stating that Germany signed a domestic law proposal enabling it to prosecute its nationals for engaging in child sex crimes in Southeast Asia).

<sup>192</sup> See 2011 TIP Report, *supra* note 103, at 167 (reporting that such counseling centers helped facilitate shelter, medical, and legal support for adult female victims of sex tourism); see also Tavella, *supra* note 184, at 197 (recognizing that Germany instituted a prevention plan and emergency hotlines, among other things, in preparation for the expected increase in trafficking during the 2006 World Cup in Germany).

<sup>193</sup> See U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 167* (2012) [hereinafter "2012 TIP Report"] (noting that in 2011 the German Government extended the term of the reflection period from one month to three months); see also U.N. OFFICE OF DRUGS AND CRIME, *TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 330* (2008) (discussing the purpose and value of a reflection period for trafficking victims).

<sup>194</sup> See 2012 TIP Report, *supra* note 193, at 167 (acknowledging Germany for providing vocational support for trafficking victims in all German states); see also U.N. OFFICE OF DRUGS AND CRIME, *TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 328* (2008) (opining that during the reflection period, trafficked persons should have access to vocational training and education to recover and take control of their lives).

<sup>195</sup> See 2012 TIP Report, *supra* note 193, at 167; see also Katrin Corrigan, Note, *Putting the Brakes on the Global Trafficking of Women for the Sex Trade: An Analysis of Existing Regulatory Schemes to Stop the Flow of Traffic*, 25 *FORDHAM INT'L L.J.* 151, 175 (2001) (outlining the safeguards adopted by the Council of Europe which authorized organizations to issue judgments in claims brought by trafficking victims against their trafficker).



international scope of the problem and the fact that the United Nations and the international community have produced numerous instruments addressing this concern – after all, the evolution of anti-trafficking measures shows United States policies developing alongside international agreements.<sup>196</sup> Despite these similarities, however, there are some striking differences. While the United States has a rather comprehensive anti-trafficking scheme, there are still gaps and weaknesses that can be addressed and corrected by looking to foreign measures.<sup>197</sup>

#### a. Prosecution

Unlike the Trafficking Protocol and the Council of Europe Convention against Trafficking, United States law does not expressly make consent of the victim irrelevant.<sup>198</sup> The number of prosecutions against sex traffickers in the United States would almost certainly increase if a victim's consent became irrelevant in defining the offense.<sup>199</sup> For example, some estimates indicate that up to 45 percent of identified sex trafficking victims previously agreed to engage in prostitution.<sup>200</sup> The distinction between a sex trafficking crime and prostitution is the element of consent,<sup>201</sup> and that distinction determines whether or not federal charges can be brought.<sup>202</sup> While many States have criminalized sex

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<sup>196</sup> See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS (FY 2009) 90 (2010) (discussing the efforts taken by United States and the international community to implement the Trafficking Protocol); see also Loftus, *supra* note 163, at 151–59 (2011) (noting that both the U.S. and international organizations took steps to attack human trafficking in 2000).

<sup>197</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 604 (2005) (O'Connor, J., dissenting) (mentioning her disagreement with Justice Scalia over the place of foreign law in American jurisprudence).

<sup>198</sup> Compare Trafficking Protocol, *supra* note 29, and Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. No. 197, 8, with 18 U.S.C. § 1591(a); see also Dempsey, Hoyle & Bosworth, *supra* note 65, at 147–49 (discussing the difference between U.S. and international policies regarding the element of consent in the act of sex trafficking).

<sup>199</sup> See Flowe, *supra* note 68, at 688 (stating that establishing consent as irrelevant will increase the probability that traffickers will be prosecuted); see also Johnson, *supra* note 127, at 700–01 (recognizing that no longer considering consent in sex trafficking would end prosecutors' view of consent as a bar to the prosecution of sex traffickers).

<sup>200</sup> See 2011 TIP Report, *supra* note 103, at 169 (analyzing statistical data regarding sex trafficking victims in Germany).

<sup>201</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, 121 (2002) (noting that the term "consent" is key in defining sex trafficking because sex trafficking victims may not be successful in proving that a sex crime was committed if consent to prostitution is proven by the sex trafficker).

<sup>202</sup> See Elizabeth Kaigh, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139, 155 (2009) (noting that the existence of consent is an important component of successfully prosecuting a human trafficker); see also Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6

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trafficking,<sup>203</sup> the uniformity of federal prosecution of this crime is ideal to ensure justice is served and victims are protected.<sup>204</sup> The issue of consent should be addressed to achieve these goals as well, by opening the TVPA up to all sex trafficking victims – even to those who consent.

In at least some instances, the victim's participation in the sex industry is voluntary, willfully taken on to repay her debt to the one who expedited her immigration.<sup>205</sup> Other times, consent is disingenuous, such as where a victim develops Stockholm syndrome,<sup>206</sup> or the consent is coerced. In other words, there are numerous instances where a victim suffers from the effects of sex trafficking, but the law does not protect the victim because the victim consented to prostitution. This scenario is remarkably similar to the precarious position of a juvenile who consents to non-commercial sexual activity – an offense commonly referred to as statutory rape, which is outlawed in almost every state – yet it is not afforded the same justice.<sup>207</sup> In redressing this flaw in anti-sex trafficking policy, however, lawmakers must be cautious in order to avoid prosecutorial abuse similar to that experienced with the earlier version of the Mann Act,<sup>208</sup> where the TVPA becomes less a tool of prosecution and more a tool of persecution.

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U. ST. THOMAS L.J. 28, 50 (2008) (discussing the US government's lack of jurisdiction over state and local prostitution laws with regards to anti-trafficking policies).

<sup>203</sup> See *People v. Samatha R.*, 941 N.Y.S.2d 540, (N.Y. Crim. Ct. 2011) (finding that New York joined 29 states and the federal government in an effort to prosecute sex traffickers and provide their victims with various social services, when it passed the Anti-Human Trafficking Act of 2006).

<sup>204</sup> See *United States v. Brockett*, 420 F. App'x 106, 108 (2d Cir. 2011) (holding that a 287-month prison sentence for sex trafficking and transporting an individual across state lines was "substantively reasonable," and fell within the purview of the Federal Sentencing Guidelines); see also *United States v. Sanchez*, 433 F. App'x 44, 46 (2d Cir. 2011) (holding that a sentence of 240 months was consistent with sex trafficking sentencing guidelines).

<sup>205</sup> See LAURA MARÍA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY* 30 (2008); see also MIN LIU, *MIGRATION, PROSTITUTION, AND HUMAN TRAFFICKING: THE VOICE OF CHINESE WOMEN* 58 (2011) (stating that some women consent to commercial sex work because of social factors, including poverty).

<sup>206</sup> See MERRIAM-WEBSTER DICTIONARY (2012), available at <http://www.merriam-webster.com> (defining Stockholm syndrome as "the psychological tendency of a hostage to bond with, identify with, or sympathize with his or her captor").

<sup>207</sup> See *United States v. Brooks*, 610 F.3d 1186, 1199 (9th Cir. 2010) (holding that a statutory rape victim's consent is irrelevant and does not mitigate the offense of the sexual activity); see also Megan Anitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 31 (2011) (asserting that because adults can legally consent to sex, adult victims of sex-trafficking bear the burden of proving that they were subject to coercion or force to be considered victims of sex-trafficking).

<sup>208</sup> See IV(a): *Ninety Years of the Mann Act: 1910–2000*, *supra*, at 16.

**b. Prevention**

The United States could improve its prevention efforts by enhancing cooperation between federal and State authorities. Federal resources are generally deeper than individual state resources.<sup>209</sup> Some state attorneys general feel slighted by what they perceive to be an abundance of wealth devoted to federal anti-trafficking task forces as well as an overall reluctance to share that wealth with state law enforcement, who are better situated to detect sex trafficking and identify victims.<sup>210</sup> Part of the problem comes from a lack of state laws concerning trafficking in persons, but this seems to be improving as only a few states have yet to create anti-trafficking laws.<sup>211</sup>

Nevertheless, the number of States that have not implemented laws criminalizing sex trafficking can only retard the progress made by the States that have legislated against it. Not only might these states end up providing a safe haven for sex traffickers (in a scenario that could resemble the flaw in Germany's prosecution of trafficking where some convicted sex traffickers end up not serving time in prison),<sup>212</sup> but there

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<sup>209</sup> See LEAHY, *TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2011*, S. DOC. NO. 112-96, at 27 (1st Sess. 2011) *available at* <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt96/pdf/CRPT-112srpt96.pdf> (noting an increase of federal funds from \$31.8 million in 2001 to \$185.5 million in 2010 and commenting that Congress continues to neglect its duty to properly oversee various agencies and programs, resulting in a significant amount of wasted or mismanaged TVPA resources); *see also* TOM COBURN, M.D., *BACK IN BLACK: A DEFICIT REDUCTION PLAN 329-30* (2011) (indicating that the Economic Support Fund allocated \$25.3 million for anti-trafficking purposes, but could only account for \$18.6 million, while the Assistance for Europe, Eurasia, and Central Asia Fund could only account for \$6.22 out of the \$9.14 million it had allocated for trafficking).

<sup>210</sup> See LEAHY, *TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2011*, S. DOC. NO. 112-96, at 27 (1st Sess. 2011) *available at* <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt96/pdf/CRPT-112srpt96.pdf>; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD*, GAO-06-825, at 24 (2006) (explaining that the lack of a coordinated strategy and evaluation plan prevents the U.S. government from determining the effectiveness of its efforts to combat human trafficking abroad or to adjust its assistance to better meet needs).

<sup>211</sup> See Press Release, Polaris Project, *Polaris Project Releases the Nine Lagging Behind: Annual Ratings on all 50 States' Trafficking Laws* (Aug. 25, 2011), <http://www.polarisproject.org/media-center/press-releases/479-polaris> (providing that forty-five states, including the District of Columbia, now have sex trafficking criminal statutes); *see also* Press Release, Columbia Law School, National State Attorneys General Program Hosts Forum on Human Trafficking: Ambassador Luis CdeBaca Lays Out the Issues Law Enforcement Face, *available at* [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2011/october2011/attorneys-general-conference](http://www.law.columbia.edu/media_inquiries/news_events/2011/october2011/attorneys-general-conference) (commenting that all but a few states now have state human trafficking laws that puts trafficking issues squarely before all state attorneys general).

<sup>212</sup> See 2010 TIP Report, *supra* note 16, at 156 (revealing that in 2008 many sex traffickers received either a lenient punishment or no punishment at all for their crimes); *see also* COUNCIL OF EUROPE, *GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, GRETA REPORTS RELEASED: GERMANY* (2011) (explaining that 70

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will also be less protection for victims.<sup>213</sup> The lack of state penal measures against traffickers could be remedied by incentives provided by Congress for implementing the TVPA into state legislation, such as awarding larger amounts of federal highway funds to those states that comply with the TVPA.<sup>214</sup>

Additionally, like Germany, the United States could improve its prevention efforts by collaborating more with NGOs and foreign governments. Sustaining more funding for NGOs devoted to assisting victims and preventing sex trafficking would benefit United States efforts domestically and especially abroad. Further, by performing, consulting, and training in higher Tier States, the United States can mitigate the incidents of sex trafficking.

**c. Protection**

The United States could mirror the civil society cooperation requirement of the European Union<sup>215</sup> by de-emphasizing its abolitionist rhetoric in regards to awarding aid to NGOs. The United States restricts successful preventative and protective efforts by requiring all organizations to assert a stance against the legalization of prostitution.<sup>216</sup> Such a requirement hinders an organization's ability to assist victims until they cease commercial sex activity.<sup>217</sup> Victims, however, are often most in

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percent of convicted traffickers received suspended sentences, and in 2007, eight defendants were convicted of labor trafficking offenses but none served jail time).

<sup>213</sup> See Whitney Shinkle, *Protecting Trafficking Victims: Inadequate Measures?*, TRANSATLANTIC PERSPECTIVES ON MIGRATION, POLICY BRIEF 2, at 6–7 (2007) (stressing that few countries can offer protection programs, secure shelter, or family protection to satisfy victims concerns about theirs' and their families' safety).

<sup>214</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress' spending power enables Congress to attach reasonable conditions to funds it disburses to the states).

<sup>215</sup> See COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS 19–20, May 16, 2005, C.E.T.S. No. 197, 2569 U.N.T.S. (emphasizing the European Union's focus on encouraging cooperation between state authorities and public officials to establish strategic partnerships); see also COMM'N OF THE EUROPEAN COMMUNITIES, EUROPEAN GOVERNANCE: A WHITE PAPER 13–14 (2001) (suggesting civil society plays an important role in giving voice to the concerns of the citizens and delivering services that meet people's needs).

<sup>216</sup> See Trafficking Victims Protection Act, 22 U.S.C. § 7110(g); see also *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222, 234 (S.D.N.Y. 2006); see also Grace Chang & Kathleen Kim, Symposium: *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C. L. 317, 321–22 (2007) (explaining the TVPA legislation requirements for NGOs).

<sup>217</sup> See Edi C. M. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKELEY J. GENDER L. & JUST. 158, 160–61 (2006) (detailing the repercussions and harm to NGOs' abilities to help these people at risk); see also Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution*

need of such assistance while they are still engaged in this activity and under the control of the traffickers.<sup>218</sup>

Additionally, educating victims of their rights and protections is the first step in protecting them – if they are not aware of these rights and protections, they cannot take advantage of them. For example, in *People v. Gonzales*, a New York court explained the defendant's delay in seeking to vacate 86 convictions of prostitution or related offenses was due to her status as a trafficking victim because, "[a]t the time, the defendant's familiarity with U.S. law was minimal at best, her command of English was non-existent, and she was scared about her immigration status and did not want to be deported from the United States."<sup>219</sup> A strategy similar to Germany's public awareness campaigns<sup>220</sup> would help achieve not only improvements in protection but prosecution and prevention as well. For instance, cities like New York could easily engage in campaigns where post cards and pamphlets written in the victims' native languages and providing information regarding their rights and a contact number for more information are scattered throughout the streets and public transportation hubs.

## VII. CONCLUSION

### Jane Doe's Recurring American Dream

The United States' anti-sex trafficking efforts can be improved by looking to international efforts. Specifically, state and federal penal statutes can be enhanced by expressly making consent irrelevant to the elements of the crime. Both the Trafficking Protocol and the Mann Act pay no regard to the victim's consent, but the TVPA and the federal criminal statute require force, fraud, or coercion without expressing that consent is irrelevant.

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*Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1713 (2010) (explaining the collateral effects of these laws).

<sup>218</sup> See Tal Raviv, Symposium, *International Trafficking in Persons: A Focus on Women and Children – The Current Situation and the Recent International Legal Response*, 9 CARDOZO WOMEN'S L.J. 659, 663 (2003) (detailing the needs of such victims and showing how much care and attention is required to assist them); see also Iris Yen, Comment, *Of Vice and Men: A New Approach to Eradicating Sex Trafficking By Reducing Male Demand Through Educational Programs and Abolitionist Education*, 98 J. CRIM. L. & CRIMINOLOGY 653, 663 (2008) (detailing the provisions that were provided under the TVPA to rescued trafficking victims, including medical, psychological, social, and economic services).

<sup>219</sup> *People v. Gonzales*, 927 N.Y.S.2d 567, 570 (N.Y. Crim. Ct. 2011) (granting defendant's motion to vacate 86 convictions under N.Y. CPL § 440.10(1)(i), which allows vacatur of prostitution convictions and related offenses where the defendant's participation in such offenses was due to her status as a sex trafficking victim).

<sup>220</sup> See V(b): Case Study: Germany's Anti-Sex Trafficking Efforts, *supra*, at 34; see also Morrow, *supra* note 178, at 251–52 (discussing public awareness campaigns in Germany); see also State Dept.: NGOs Work to Eradicate Human Trafficking, Help Victims, U.S. FED. NEWS, June 12, 2007 (noting that in the build-up to the 2006 World Cup, soccer stars in Germany and South Africa called attention to human trafficking in a public awareness campaign).

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Additionally, the United States can decrease the number of sex trafficking victims domestically and worldwide by educating victims about their legal rights and protections. Most sex trafficking victims are victims because they do not understand or know of rights and protections like the T-Visa or exculpation from prostitution charges. The fear of being deported or prosecuted can deter a victim from reporting her exploitation as much as the abuse or threats the victim faces from traffickers.

Finally, by expanding programs and services to victims worldwide and enhancing cooperation with NGO's as well as origin or transit countries, the United States can reach and assist more sex trafficking victims. The TVPA's abolitionist restrictions on programs, services, and organizations supported by the U.S. only restrict the assistance that sex trafficking victims can receive. By implementing these proposed changes, the United States can improve American and global anti-trafficking efforts in order to reduce the number of Jane Does in the world, and allow them to realize their American dreams.