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# Student Comment: Exchange Cooperation for Visas: Flaws in U.S. Immigration System Criminalizes Trafficking Victims

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**EXCHANGING COOPERATION FOR VISAS:  
FLAWS IN U.S. IMMIGRATION SYSTEM  
CRIMINALIZES TRAFFICKING VICTIMS**

**Laurie Culkin**

**ABSTRACT:** This student comment explores the Palermo Protocol to the United Nation's Convention Against Transnational Organized Crime, and the United State's response, the Trafficking Victim's Protection Act (TVPA). Under the TVPA, the U.S. made a temporary, nonimmigrant visa, the T-Visa, available to trafficking victims illegally located in the U.S., provided that the victim cooperates with law enforcement to prosecute their trafficker. Though at first blush the T-Visa seems like a valuable resource to victims who would otherwise find no immigration relief for violations of criminal and immigration law as a result of their victimization, but in practice the flawed process to obtain a T-Visa criminalizes victims. This criminalization violates the intent of the Palermo Protocol.

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**EXCHANGING COOPERATION FOR VISAS:**

**FLAWS IN U.S. IMMIGRATION SYSTEM CRIMINALIZES  
TRAFFICKING VICTIMS**

**Laurie Culkin**

**INTRODUCTION**

The Palermo Protocol is a supplement to the United Nation’s Convention Against Transnational Organized Crime, which aims to prevent international human trafficking and the criminalization of trafficking victims.<sup>1</sup> The U.S. is a party to the Protocol, and enacted the Trafficking Victims Protection Act (TVPA) in 2000 as a response. The TVPA has three prongs: prevention, prosecution, and protection. The T – Visa, under the protection arm of the TVPA, allows undocumented trafficking victims, who are in the country illegally, to stay in the U.S. temporarily, if they cooperate with law enforcement in prosecuting their trafficker. If victims do not cooperate, or are not identified as victims, they are likely to be detained and then removed from the country.

Although removal (colloquially known as “deportation”)<sup>2</sup> is not a criminal sanction, removal proceedings bear many similarities to criminal justice proceedings. The removal process treats trafficking victims as if they are criminals, and reinforces the idea that the individual is being punished for being a victim of an international crime. Deportation due to ineffective immigration relief criminalizes trafficking victims, which is in direct conflict with the Palermo Protocol.

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1. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Dec. 13, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319, pmbl [hereinafter Palermo Protocol].
  2. Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, footnote 2 (2008).

## BACKGROUND

### A. Introduction to Trafficking

Trafficking in persons is defined as the recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, fraud, or deception to gain control over another person for the purpose of exploitation.<sup>3</sup> The main forms of trafficking are sexual exploitation and forced labor.<sup>4</sup> Human trafficking is different than human smuggling.<sup>5</sup> Trafficking requires no movement, just the presence of force, fraud or coercion for the purpose of exploiting the victim.<sup>6</sup> Though movement across international borders is not an element of trafficking, it often is incidental to trafficking crimes.<sup>7</sup>

Hard data about the prevalence of trafficking and the victims is difficult to come by because trafficking is illegal across the globe,<sup>8</sup> however, we know that women and children of low socioeconomic status are the predominant victims.<sup>9</sup> Victims of human trafficking who are in the U.S. illegally are most often from countries with rampant poverty and gender inequality.<sup>10</sup> These individuals are lured by traffickers to countries with better economies under the false pretense of employment in positions such as dancers, hostesses, or nannies.<sup>11</sup> Lack of resources, violence, the presence of armed conflict, and

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3. Palermo Protocol, art. 3.

4. *Id.*

5. *Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking*, U.S. DEP'T. OF STATE, (Apr. 2006).

6. *Id.* (“Although TIP is often an international crime that involves the crossing of borders, it is important to note that trafficking in persons victims can be trafficked within their own countries and communities. Traffickers can move victims between locations within the same country and often sell them to other trafficking organizations.”)

7. *Id.*

8. Alison Phinney, *Trafficking Women and Children for Sexual Exploitation in the Americas*, PAN-AMERICAN HEALTH ORG., 3, <http://www1.paho.org/English/ad/ge/TraffickingPaper.pdf>

9. *Id.* at 1; *Fact Sheet*, *supra* note 5.

10. Phinney, *supra* note 8, at 1-2.

11. Dina Francesca Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 226 (2004); Ankita Patel, *Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking*, 9 SEATTLE J. FOR SOC. JUST. 813, 819 (2011).

natural disasters in home countries, coupled with gender inequality, leave women and children the most vulnerable to manipulation.<sup>12</sup>

Though the presence of trafficking around the world is widespread, it is kept relatively invisible through the control traffickers have over their victims: some are forcibly kept silent, and others are silenced by their fear of retaliation, police, and immigration officers.<sup>13</sup> Traffickers exercise different methods to maintain control over their victims, some physical and some psychological.<sup>14</sup> Common physical tactics involve restricting victim movement, often through confiscation of travel documents, physical beatings, and rape.<sup>15</sup> Traffickers also rely heavily on psychological tactics by creating situations of dependence and debt bondage.<sup>16</sup> In a typical debt bondage scenario, a trafficker places an initial debt on the victim – for foreign national victims it may be initial travel costs to the receiving country – and refuses to let the victim leave their forced employment until the debt is paid off. The trafficker then adds on additional fees, often for things such as food, rent, and other living expenses so the victim can never get ahead of their debt.<sup>17</sup> The trafficker also maintains control of the victim's money. This forces a sense of dependence on the trafficker.<sup>18</sup>

Further, traffickers often combine both physical and psychological manipulation techniques, which may result in “trauma bonding,” or what is frequently called “Stockholm Syndrome.”<sup>19</sup> A victim develops a dysfunctional attachment to their victimizer that occurs in the presence of danger, shame, or exploitation, and some physical danger or risk is present.<sup>20</sup> To accomplish this effect, traffickers in-

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12. Phinney, *supra* note 8, at 2.

13. *See id.* at 3.

14. *See id.* at 4.

15. *Id.* at 4-5. (Physical beatings and rapes are often used to initiate a person into the sex industry, forcing compliance from the victim. Physical beatings, rapes, and threats of beatings and rapes are often used after as punishment for not obeying their trafficker's demands).

16. *Id.* at 4.

17. Phinney, *supra* note 8, at 4.

18. Phinney, *supra* note 4, at 4.

19. *In their shoes: Understanding Victims' Mindsets and Common Barriers to Victim Identification*, POLARIS PROJECT, <http://www.nova.edu/hs/humantrafficking/forms/section3.pdf> (last visited Mar. 29, 2015).

20. Phinney, *supra* note 8, at 2.

tionally shower their victims with attention, affection and gifts to establish the victim's trust.<sup>21</sup> In particular, traffickers often seek out victims with abusive pasts who are emotionally vulnerable, and thus more susceptible to these techniques.<sup>22</sup> After the trafficker has established trust, the trafficker abuses the victim, often physically or sexually.<sup>23</sup> This emotionally breaks the victim, so they become completely dependent on their trafficker.<sup>24</sup> Minors are particularly vulnerable to trauma bonding with their captor.<sup>25</sup>

### B. The Palermo Protocol

The Palermo Protocol, also known as the "Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children," is a supplemental protocol to the UN Convention Against Transnational Organized Crime.<sup>26</sup> The purpose of the Protocol is to prevent and combat trafficking in persons, with a special emphasis on women and children.<sup>27</sup> It calls for an international, collaborative approach, and highlights the importance of protecting victims and their fundamental human rights.<sup>28</sup> Currently, there are 166 state parties to the Protocol, including the United States.<sup>29</sup>

The Protocol has two main provisions: protection of victims of trafficking in persons,<sup>30</sup> and prevention, cooperation, and other

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21. *Sex Trafficking of Children in the United States*, THE POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/policy-advocacy/prosecuting-traffickers/895-sex-trafficking-of-minors> (last visited Mar. 29, 2015).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Palermo Protocol, *supra* note 1, at pmb1.

27. Palermo Protocol, *supra* note 1, at pmb1.

28. *Id.* (Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights.")

29. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Status as at 5-12-2015, UN TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en) (last visited Mar. 29, 2015).

30. Palermo Protocol, *supra* note 1, at section II.

measures.<sup>31</sup> The protection provision enumerates several requirements designed to protect victims of trafficking, particularly those who are victimized in foreign countries, and emphasizes the importance of maintaining the victim's human rights.<sup>32</sup> This section encourages countries to implement immigration relief for victims as part of their rights. Specifically, the Protocol states that "each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases,"<sup>33</sup> and

When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national ... such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.<sup>34</sup>

The second provision encompasses both prevention and the steps to be taken by law enforcement and immigration enforcement when prosecuting trafficking-related crimes.<sup>35</sup> This section details the steps required to educate law enforcement and immigration agencies on trafficking, and to improve the competency of officers in identifying and interacting with victims.<sup>36</sup> Relevant sections require that "State Parties shall establish comprehensive policies, programs and other measures to protect victims of trafficking in persons ... from revictimization;"<sup>37</sup> "State parties shall take or strengthen measures ... to alleviate factors ... that make persons ... vulnerable to trafficking, such as poverty, underdevelopment, and lack of equal opportunity;"<sup>38</sup> and

States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protect-

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31. Palermo Protocol, section III.

32. *See* Palermo Protocol, art. 6.

33. Palermo Protocol, art. 7(1).

34. Palermo Protocol, art. 8(2).

35. *See* Palermo Protocol, arts. 9-13.

36. *See* Palermo Protocol, arts. 9-13.

37. Palermo Protocol, art. 9(1)(b).

38. Palermo Protocol, art. 9(4).



ing the rights of the victims, including protecting the victims from the traffickers.<sup>39</sup>

### C. The Trafficking Victims Protection Act

#### i. Generally

The U.S. enacted the Trafficking Victims Protection Act of 2000 as a requirement of the Palermo Protocol as is required of all state parties.<sup>40</sup> The TVPA follows a three-prong approach modeled after the subsections of the Protocol: prosecution, protection, and prevention.<sup>41</sup> The prosecution arm of the TVPA allows the government to prosecute “severe forms of trafficking.”<sup>42</sup> This is defined as “sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age.”<sup>43</sup> In determining whether to proceed with prosecution, law enforcement has to determine whether the person is a victim as defined by the law, and whether or not the case is severe enough to warrant criminal prosecution.<sup>44</sup> If law enforcement decides to proceed with the case, prosecutors rely in large part on the victim’s cooperation.<sup>45</sup> In order to induce cooperation, the prosecution arm of the TVPA offers immigration incentives to foreign national victims residing in the U.S. illegally, which allow the victim to remain in the country temporarily, in exchange for their cooperation in prosecuting their trafficker.<sup>46</sup>

The protection arm of the TVPA establishes the minimum requirements for protection of victims.<sup>47</sup> The intention is to acknowledge the factors that lead individual to become victims of trafficking, and to recognize the collateral consequences victims face when returning to their country of origin, such as shame, ostracism, threats to physical safety, risk of re-trafficking, and lack of support in

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39. Palermo Protocol, art. 10(2).

40. Palermo Protocol, art. 16; *see* U.S. Dep’t. of State, Trafficking in Persons Rep. 29 (2014) [hereinafter TIP Report].

41. Patel, *supra* note 11, at 815.

42. Patel, *supra* note 11, at 816-17.

43. 22 U.S.C. § 7102(8) (2013).

44. Patel, *supra* note 11, at 817.

45. Patel, *supra* note 11, at 817.

46. Patel, *supra* note 11, at 817.

47. Patel, *supra* note 11, at 817.

recovery.<sup>48</sup> The protection arm offers two different kinds of protection for trafficking victims in the U.S.: legal alternatives to removal proceedings, through the T-Visa; and measures to ensure that victims are not inappropriately incarcerated, fined, or penalized.<sup>49</sup> Protection against inappropriate incarceration is intended to encompass both immigration and criminal law violations, and covers undocumented victims who violate immigration laws due to trafficking, who should instead be provided with alternatives to remain in the U.S. legally.<sup>50</sup>

The prevention arm sets out requirements for U.S. cooperation with international efforts to address the vulnerabilities of potential victims in their countries of origin, as well as coordinate domestic efforts to educate citizens on trafficking and relief available to victims.<sup>51</sup> The TVPA acknowledges that victims most often originate from countries with disparate social and economic conditions, and thrives on the powerlessness of women and girls to change their economic status.<sup>52</sup> Victims are often isolated and unaware of their rights after arriving in the U.S., so the prevention arm aims to educate victims and communities about trafficking through prevention campaigns.<sup>53</sup>

To aid in international anti-trafficking efforts, the U.S. Department of State issues the annual Trafficking in Persons (TIP) Report. The TIP Report evaluates the anti-trafficking efforts of every country across the globe, and categorizes them into different tiers based on their performance.<sup>54</sup> The Department of State uses the U.S. TVPA as the standard to judge each country, with subcategories for prevention, protection, and prosecution.<sup>55</sup> All countries are compiled into a chart based on region, which enumerates the numbers of victims identified, prosecutions, convictions, and new legislation.<sup>56</sup> As of 2014, the U.S. rated itself as a tier 1 country for fully complying with the TVPA's minimum standard.<sup>57</sup>

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48. Patel, *supra* note 11, at 817.

49. 22 U.S.C. § 7106 (2013).

50. Patel, *supra* note 11, at 818.

51. 22 U.S.C. § 7106.

52. Patel, *supra* note 11, at 819.

53. Patel, *supra* note 11, at 819.

54. TIP REPORT, *supra* note 40, at 57-64.

55. / TIP REPORT, *supra* note 40, at 57.

56. TIP REPORT, *supra* note 40, at 59-64.

57. TIP REPORT, *supra* note 40, at 58.

## ii. The T-Visa Under Protection Arm

In response to the TVPA. of 2000, the T-Visa was created for victims of “severe forms of trafficking in persons,” who are physically present in the U.S. or a port of entry as a result of trafficking.<sup>58</sup> Victims over the age of eighteen must cooperate with “any reasonable request” for assistance in the investigation or prosecution of trafficking in order to obtain the non-immigrant visa.<sup>59</sup> If the person cooperates, law enforcement certifies that they are a “victim” both under the law and for purposes of immigration relief.<sup>60</sup> The statute does not give any guidance as to what constitutes a “reasonable request,” providing broad discretion to the individual law enforcement agency.<sup>61</sup> In some jurisdictions “reasonableness” means simply complying with an investigation; while in others “reasonableness” includes total cooperation with police and prosecutors through the entire litigation process, including testifying in court against their trafficker.<sup>62</sup> In order to obtain immigration relief, the victim must also demonstrate “extreme hardship involving *unusual and severe* harm upon removal.”<sup>63</sup> A maximum of 5,000 T-visas are allowed per year.<sup>64</sup> However the visa is greatly underutilized, and significantly less than 5,000 are issued annually.<sup>65</sup> Only 2,300 total were issued in first 10 years since the creation of the T-Visa.<sup>66</sup>

## PROBLEM

The Palermo Protocol intends to prevent the criminalization and revictimization of trafficking victims. Thus, having ratified the Protocol, the U.S. expressly prohibits criminalizing victims through its domestic criminal law and immigration law systems, and offers undocumented victims of trafficking remedies to remain in the U.S. legally. However, in order to access these remedies, undocumented trafficking victims must cooperate with law enforcement in prosecut-

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58. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(T) (2014) [hereinafter INA].

59. *Id.*

60. 22 U.S.C. § 7105 (2013).

61. See *id.*; Patel, *supra* note 11, at 817.

62. Patel, *supra* note 11, at 818.

63. Patel, *supra* note 11, at 818.

64. Patel, *supra* note 11, at 822.

65. Patel, *supra* note 11, at 822.

66. Patel, *supra* note 11, at 818.

ing their trafficker, or they will be subject to removal proceedings back to their country of origin, under a violation of immigration law. The strict constraints of the T- Visa means many victims will not meet the statutory requirements. Further, those who meet the statutory requirements still may not satisfy the standards of local law enforcement, failing to provide whatever assistance is deemed “adequate cooperation” in that particular jurisdiction. Though relief is available to a few victims who manage to jump through the various bureaucratic hoops, many other undocumented victims are being criminalized by the flaws in the system, and are subject removal proceedings that are indistinguishable from criminal law proceedings.

### **ANALYSIS**

The Palermo Protocol and U.S. law calls for the decriminalization of trafficking victims. To this end, the TVPA established T-Visas, which allow undocumented trafficking victims the opportunity to remain in the U.S. legally for a period, as long as they aid law enforcement in prosecuting their trafficker. However, there are limited numbers given out annually, and, as noted above, the visa is drastically underutilized.

In order for an individual to be eligible for a T-Visa, the government must identify the person as a “victim” of a “severe form of trafficking,” and the victim must meet certain statutory requirements. Specifically, individuals must cooperate with law enforcement to prosecute their trafficker in order to be certified as eligible for relief; however, this certification is at the discretion of the law enforcement organization involved. Victims must also demonstrate that sending them back to their country of origin would amount to “unusual and severe” harm.<sup>67</sup> Even if a victim meets all of the statutory requirements, the T-Visa is a temporary, non-immigrant visa, which still leaves her vulnerable to removal proceedings once the visa expires.<sup>68</sup>

#### **The Criminalization of Immigration Removal Proceedings**

Removal proceedings are the primary mechanism by which the government expels noncitizens from the U.S., or prevents their ad-

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67. INA, 8 U.S.C. § 1101(a)(15)(T)(IV) (2014).

68. INA, 8 U.S.C. § 1101(a)(15) (2014). (Section 101(a) enumerates all non-immigrant visas available to noncitizens of the U.S).

mission under the Immigration and Naturalization Act.<sup>69</sup> Deportation is traditionally a civil matter; however, for those going through removal proceedings, the experience is often indistinguishable from traditional criminal proceedings.<sup>70</sup> The history of expulsion, the procedural parallels to the criminal justice system, the methods of enforcement, and recent Supreme Court jurisprudence have led scholars to argue that deportation is more akin to criminal proceedings rather than a civil, administrative function.

### **i. Purpose of Criminal and Immigration Law**

Boiled down to the core, criminal and immigration law serve the same function.<sup>71</sup> Both serve to control physical inclusion or exclusion from society in the United States, and create rules that establish lesser levels of citizenship.<sup>72</sup> Modern American law further intertwines criminal law and immigration law, where noncitizens that have committed past crimes may not be admitted in to the U.S., immigration law violations themselves are crimes, and many criminal law violations are deportable offenses for lawful permanent residents.<sup>73</sup>

Looking to the history of deportation, which has its roots in banishment, sheds light on the intent of current law.<sup>74</sup> Throughout history, banishment from one's community has been used as a punishment for serious violations of society's mores.<sup>75</sup> Under English common law, banishment was used as a criminal punishment imposed on both subjects and foreigners.<sup>76</sup> In 1718, English Parliament enacted the Transportation Act, which allowed criminals to be sentenced to "transportation" out of the Kingdom for major crimes, and allocated

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69. Markowitz, *supra* note 2, at 290.

70. *Id.* at 289.

71. Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 *AM. U. L. REV.* 367, 380-381 (2006).

72. *Id.* at 396-397 (quoting Nora V. Demleiner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *STAN. L. & POL'Y REV.* 153, 158 (1999), "Both systems act as gatekeepers in our society, determining whether an individual should be included or excluded from society.").

73. *Id.* at 380.

74. See Markowitz, *supra* note 2, at 300.

75. See Markowitz, *supra* note 2, at 322.

76. See Markowitz, *supra* note 2, at 322.

public funds to transport the criminals to the United States.<sup>77</sup> Criminal transportation was the only type of expulsion available, with no civil expulsion provisions.<sup>78</sup> The English Model set the precedent for expulsion in the American colonies, which followed suit, and used banishment as a punishment imposed for criminal violations.<sup>79</sup> Under President John Adams' administration, the United States enacted the Alien and Sedition Acts in 1798, which allowed for the expulsion of any alien who committed a crime in America after the alien went before a criminal court.<sup>80</sup>

## ii. Procedural Parallels

There are striking procedural parallels between criminal law and immigration law enforcement. In both, a judge's decision in a case directly impacts the subject's physical liberties, either by incarcerating the individual or by forcibly removing them from the country.<sup>81</sup> An individual suspected of violating immigration law is subject to a hearing in court before a judge, and may be represented by a lawyer; however, in immigration law one will not be provided by the court. In an immigration hearing, the respondent has the opportunity to present witnesses, and in many cases there is also a prosecuting attorney pursuing the rights of the U.S.<sup>82</sup>

## iii. Enforcement Parallels

Prior to 2002, the Department of Commerce and Labor handled immigration enforcement, responsibilities then shifted to the Department of Justice, and eventually to the Department of Homeland Security at present.<sup>83</sup> This change in departments shifted immigration enforcement towards a more law enforcement like structure.<sup>84</sup> Immigration law enforcement officers are uniformed, and, like criminal law enforcement officers, are permitted to conduct surveillance,

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77. See Markowitz, *supra* note 2, at 323.

78. See Markowitz, *supra* note 2, at 323.

79. See Markowitz, *supra* note 2, at 325.

80. An Act Respecting Alien Enemies, 1 Stat.570 (1798) available at [http://avalon.law.yale.edu/subject\\_menus/alsedact.asp](http://avalon.law.yale.edu/subject_menus/alsedact.asp).

81. Stumpf, *supra* note 71, at 390.

82. Stumpf, *supra* note 71, at 390.

83. Stumpf, *supra* note 71, at 387-88.

84. Stumpf, *supra* note 71, at 387-88.

execute warrants, make arrests, and detain those suspected of violating immigration law.<sup>85</sup> In 2001, to aid domestic officers, Immigration and Naturalization Service began to enter civil immigration information into the Federal Bureau of Investigation database that state police frequently use in day-to-day investigations and arrests.<sup>86</sup>

Detention is the immigration law equivalent to incarceration in criminal law.<sup>87</sup> Noncitizens, including women and children, may be held at detention centers awaiting their hearing or during investigation periods.<sup>88</sup> Undocumented people in the U.S. may be detained for seven days without cause,<sup>89</sup> and administrative rules have been expanded to permit detention for a “reasonable period of time” under extraordinary circumstance.<sup>90</sup> The U.S. Supreme Court has distinguished detention from incarceration, saying that the purpose of detention in an immigration context is to ensure that the individual facing deportation attends their administrative hearings, and to guarantee ease of removal from the country.<sup>91</sup> Despite this distinction, noncitizens are often held in the same detention centers as criminals.<sup>92</sup>

Under U.S. immigration law, there is also mandatory detention of noncitizens for violations of certain crimes.<sup>93</sup> Prostitution is one of these crimes, and is also the charge most often given to victims of trafficking who are being sexually exploited.<sup>94</sup> The law further allows noncitizens to be deported if the person has committed prostitution within ten years prior to admission or application for a visa.<sup>95</sup> There is only one exception that allows for the victim to be released, and similar to the T-Visa, it also requires the victim to cooperate with law enforcement.<sup>96</sup>

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85. Stumpf, *supra* note 71, at 390.

86. Stumpf, *supra* note 71, at 389.

87. Stumpf, *supra* note 71, at 391.

88. Stumpf, *supra* note 71, at 391.

89. Stumpf, *supra* note 71, at 391.

90. 8 C.F.R. § 287.3 (2006).

91. Stumpf, *supra* note 71, at 391.

92. Stumpf, *supra* note 71, at 391.

93. INA, 8 U.S.C. § 1226(c) (2014); *see also* INA, 8 U.S.C. § 1182(a)(2)(D) (2014).

94. INA, 8 U.S.C. § 1226(c) (2014); *see also* INA, 8 U.S.C. § 1182(a)(2)(D) (2014).

95. INA, 8 U.S.C. § 1226(c) (2014); *see also* INA, 8 U.S.C. § 1182(a)(2)(D) (2014).

96. INA, 8 U.S.C. § 1226(c)(2) (2014).

#### iv. Padilla v. Kentucky

In 2010, the U.S. Supreme Court issued an opinion that expressly confirmed what legal scholars have been asserting, that deportation is not strictly a civil, administrative action. In *Padilla v. Kentucky*, the Supreme Court acknowledged that deportation is uniquely difficult to classify, and is not a civil matter *per se*, but rather falls somewhere between civil and criminal law.<sup>97</sup> The case arose when a man, who had been a lawful permanent resident of the United States for 40 years, pled guilty to a felony drug charge under the suggestion of his legal counsel.<sup>98</sup> Mr. Padilla's counsel advised him that because he had been in the U.S. for so long, he would not be deported for pleading guilty.<sup>99</sup> However, the guilty plea put his immigration status in jeopardy.<sup>100</sup>

The Court held that an attorney is obligated to tell a noncitizen client that pleading guilty to a crime may result in forced removal from the United States.<sup>101</sup> Previously, the Supreme Court viewed deportation as a "collateral consequence" of a criminal plea.<sup>102</sup> In *Padilla*, the Supreme Court acknowledged that deportation is a severe and more direct consequence of pleading guilty, and effectively struck down this notion.<sup>103</sup> In practice, this holding had the effect of expanding the protections given to noncitizens in criminal proceedings.<sup>104</sup> In addition, this holding set a new standard for the effectiveness of counsel.<sup>105</sup> Legal scholars have interpreted this decision as the beginning of a tidal shift in immigration law jurisprudence. The Court began to recognize that deportation proceedings are quasi-

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97. Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. OF CONST. L. 1299 (2011).

98. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 796, 799 (2011).

99. *Id.*

100. *Id.*

101. Markowitz, *supra* note 101, at 1299.

102. Smyth, *supra* note 102, at 800.

103. *Id.* at 801. (As a severe penalty, intimately related to the criminal process, and nearly an automatic result of certain convictions, the Court found deportation "most difficult" to divorce . from the conviction.")

104. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

105. Smyth, *supra* note 102, at 805.



criminal in nature,<sup>106</sup> and these penalties are serious, often draconian, and lifelong.<sup>107</sup>

### **b. Implications of Deportation Unique to Trafficking**

According to the U.S. Department of State, more than 50,000 people are trafficked into the U.S. each year.<sup>108</sup> Although there is immigration relief for non-citizen victims in the United States, enacted law is only as good as its enforcement.<sup>109</sup> Today, T-Visas are drastically underutilized, and victims are slipping through the cracks in the system.<sup>110</sup> This discrepancy can be attributed to law enforcement's inability to identify victims, and victims who are unwilling to report trafficking to authorities for fear of deportation.<sup>111</sup>

Trafficking victims are more likely than many other kinds of victims to be misidentified, most often as unauthorized migrants or as criminals, when in reality they have only committed offenses the trafficker forced them to perform, such as prostitution or drug smuggling.<sup>112</sup> Even if individuals are identified as victims, they are often still detained if they choose not to cooperate with law enforcement.<sup>113</sup> This incarceration is re-traumatizing to victims and reinforces the notion that society sees them as criminals, though they are not going through criminal proceedings.<sup>114</sup> When deportation is the default response to lack of cooperation with a prosecution or investigation, it means that no one is assessing the dangers of returning victims to their country of origin.<sup>115</sup> This puts the victim at risk of retaliation and re-trafficking.<sup>116</sup> In addition, if cooperating with law enforcement is a victim's only option, and no other meaningful immigration

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106. See Markowitz, *supra* note 101, at 1360-61.

107. Smyth, *supra* note 102, at 802.

108. See Haynes, *supra* note 11, at 241.

109. Kelly Hyland Heinrich, *Ten Years After the Palermo Protocol: Where are Protections for Human Trafficking?*, 18 HUMAN RIGHTS BRIEF 2 (2010).

110. See Patel, *supra* note 11.

111. Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 192 (2011).

112. Heinrich, *supra* note 113, at 4.

113. Heinrich, *supra* note 113, at 4.

114. Heinrich, *supra* note 113, at 4.

115. Heinrich, *supra* note 113, at 4.

116. Heinrich, *supra* note 113, at 3.

protections or opportunities are available, it calls the voluntariness of the victim's compliance into question.<sup>117</sup>

### C. Comparative Legislation - Italy

Internationally, other countries have acknowledged that restrictive immigration laws in “destination” countries contribute to the growth of trafficking in persons.<sup>118</sup> Those vulnerable to trafficking are often enticed by the opportunity for a better life abroad, but have little means to get to that country legally, due to stringent immigration laws.<sup>119</sup> Vulnerable individuals rely on others to provide them with false documents, arrange their travel, and find them employment in the receiving country, which often leads to sexual exploitation and labor trafficking.<sup>120</sup>

Italy has been identified as a popular destination country in Europe, with a high population of “migrants” from other nations relocating to work.<sup>121</sup> Higher levels of migrants frequently means higher levels of trafficking.<sup>122</sup> To combat human trafficking, Italy, in conjunction with the International Organization for Migration, identified frequent migration routes and instituted programs to allow easy and legal immigration options to potential victims of trafficking.<sup>123</sup> Specifically, Italy issues 5,000 work visas annually to Albanians, acknowledging the Balkan Peninsula as its largest source country for trafficking and smuggling.<sup>124</sup> Having legal options means potential victims are less likely to rely on traffickers to migrate for better employment.<sup>125</sup>

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117. Heinrich, *supra* note 113, at 3.

118. See INT'L ORG. FOR MIGRATION, <http://www.iom.int/about-iom> (last updated Sept. 2014) [hereinafter IOM].

119. See Haynes, *supra* note 11, at 257.

120. Angelika Kartusch, *Reference Guide for Anti-Trafficking Legislative Review*, OFF. FOR DEMOCRATIC INSTITUTIONS AND HUM. RTS., 37 (2001).

121. *General Information: Region/Country: Europe and Central Asia/Italy*, IOM, <http://www.iom.int/countries/italy/general-information> (last updated Sept. 2014).

122. Kartusch, *supra* note 124, at 37.

123. *General Information*, *supra* note 125; Kartusch, *supra* note 124, at 37.

124. Haynes, *supra* note 11, at 257; Karusch, *supra* note 124, at 37.

125. Kartusch, *supra* note 124, at 37.

## CONCLUSION

### a. The U.S. is in Violation of the Palermo Protocol

In practice, current U.S. immigration law criminalizes victims of human trafficking, and therefore violates the intention of the Palermo Protocol. In the Supreme Court case, which made deportation a civil sanction, Justice Brewer famously dissented, saying:

But it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to distant land, is punishment, and that oftentimes most severe and cruel.<sup>126</sup>

The TVPA is the United State's implementation of the requirements of the Palermo Protocol.<sup>127</sup> The Palermo Protocol calls for all State Parties to consider adopting laws to permit victims of trafficking to remain in that territory,<sup>128</sup> and that if a State Party returns a victim to their country of origin they do so with "due regard" for the safety of the victim. The Protocol also specifies that the return should "preferably be voluntary."<sup>129</sup> The TVPA incorporates these ideals in its protection arm, which offers the T-Visa as protection from involuntary deportation, and aims to ensure victims are not improperly incarcerated, fined or penalized.<sup>130</sup>

Indeed, the U.S. acknowledges that trafficking victims should not be detained or penalized for acts associated with trafficking, and extends this protection to those who violate immigration laws as a result.<sup>131</sup> In the 2014 TIP Report, the theme is "The Journey from Victim to Survivor," and the introduction reads:

Another early step, while seemingly obvious, is nevertheless one of the greatest challenges to anti-trafficking efforts in general: finding the victims and getting them out of harm's way. The strongest victim protection scheme is useless if victims remain trapped in exploitation. Governments cannot

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126. *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J. dissenting).

127. Palermo Protocol, *supra* note 1, at art. 10(2).

128. Palermo Protocol, *supra* note 1, at art. 7.1.

129. Palermo Protocol, *supra* note 1, at art. 8(2).

130. 22 U.S.C. § 7106 (2013).

131. Patel, *supra* note 11, at 818.

sit back and wait for victims to self-identify; rather, they must proactively seek victims out by investigating high-risk sectors, screening vulnerable populations, and training relevant government officials to recognize trafficking when they see it. *It is vital that victims not be treated like criminals or be subjected to arrest or deportation for other offenses.*<sup>132</sup>

T-Visas are the device created by the U.S. to protect victims from being exposed to immigration sanctions. Though the stated intention is to protect victims, T-Visas only offer incentives to those victims who cooperate in prosecution.

The immigration law statute governing the T-Visa requires an individual to comply with “any reasonable request” by law enforcement in order to qualify.<sup>133</sup> By forcing victims to either work with law enforcement to prosecute their trafficker, or go through removal proceedings, the U.S. is still forcing victims into the hands of law enforcement with their physical liberty on the line. Victims do not have a choice; they must go through the system one way or the other.

In addition, the small number of visas available annually,<sup>134</sup> and the even smaller number actually issued,<sup>135</sup> compared to the 50,000 people trafficked into the U.S. each year, shows that victims are slipping through the cracks in the system. This leads to disproportionate numbers of trafficking victims going through deportation proceedings. The Protocol requires that countries “shall” establish comprehensive measures to protect trafficking victims from revictimization.<sup>136</sup>

Removal proceedings criminalize victims, though they are still technically classified as non-criminals, because they are indistinguishable within the criminal justice system. Although the U.S. argues that deportation is civil and administrative in nature, we still force victims to go through a quasi-judicial hearing in front of a finder of fact. We also require that the individual defend him or herself

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132. TIP REPORT, *supra* note 40, at 7 (emphasis added).

133. See INA, 8 U.S.C. § 1101(a)(15)(T).

134. See Patel, *supra* note 11, at 818 (5,000 T Visas are available each year by the Department of Homeland Security).

135. See *id.* (Only 2,300 T-Visas were issued from 2000-2010).

136. Palermo Protocol, *supra* note 1, at art. 9(1)(b).

in that hearing, and encourage the victim to seek counsel, who can examine witnesses and put on evidence on their behalf.

The U.S. aims to encourage victims to come forward and report their traffickers, but we force those who do come forward to make the choice between cooperation and deportation. Corruption is rampant among police, border police, and other government officials that handle immigration and law enforcement in source countries with major trafficking problems.<sup>137</sup> By forcing victims in the U.S. to comply to obtain a visa, it reinforces noncitizen victim's distrust of law enforcement and fear that they will be deported. In the U.S., Immigration officials look and act the same as criminal law enforcement officials, and victims may face detention for extended periods of time while awaiting their hearing.

Finally, undocumented victims going through deportation proceedings are likely unfamiliar with the American judicial system. If deportation proceedings appear so closely related to the criminal justice system to American legal academics that study them, how could the American government expect a foreign victim of trafficking to tell the difference?

### **b. Switching to a Victim Centered Approach**

The U.S. Department of State in the 2014 T.I.P. Report, calls for a victim-centered approach to anti-trafficking programs, and specifically highlights the importance of victim identification and immigration relief.<sup>138</sup> The Protocol protection provisions are silent on the practice of required compliance with law enforcement, but overall encourage a compassionate and humanitarian response. Despite claims to the contrary, the U.S. follows a prosecutorial approach to anti-trafficking, which places prosecution of traffickers as the first priority.<sup>139</sup> Enforcement-dominated anti-trafficking strategies relegate victim protection to a secondary role rather than a complementary or necessary role.<sup>140</sup> Responses that arrest, detain and deport vic-

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137. Haynes, *supra* note 11, at 257.

138. TIP REPORT, *supra* note 40, at 7.

139. Haynes, *supra* note 11, at 238.

140. Heinrich, *supra* note 113, at 238.

tims thwart victim identification, and consequently disempower the victim.<sup>141</sup>

Switching from a prosecutorial approach to a victim-centered, human-rights approach would be congruent with the Protocol, would help victims begin to heal, and would lead to more successful prosecutions overall.<sup>142</sup> Trafficked people require alternatives to systems in which deportation is the default, such as services, work authorization, and legal immigration status.<sup>143</sup> Victim protections are not in conflict with tough law enforcement, and implementation of proactive identification of victims, funded victims services, and alternatives to detention would respect the trafficked persons' human rights and yield better prosecution results.<sup>144</sup>

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141. Heinrich, *supra* note 113, at 238.

142. See Haynes, *supra* note 11, at 257

143. Heinrich, *supra* note 113, at 2.

144. Heinrich, *supra* note 113, at 2.