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Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking

Ankita Patel¹

INTRODUCTION

Human trafficking is modern-day slavery. Human trafficking cuts across international borders, often involving people who have been conned into exploitative situations. With millions migrating globally in hopes of finding a better life, international human trafficking gets folded into the much bigger issue of migration policy. However, the central issue of human trafficking is not the movement of people but the gross exploitation of people as commodities to be used for profit. The failure to make the distinction between migration and exploitation, as well as the failure to engineer public policy and services to end modern-day slavery, have had harmful repercussions for trafficking victims.

Victims are found in a range of places: working in people's homes,² on farms, in restaurants, and in nail salons.³ For example, after leaving her home to escape abuse from her father, Lydia N. paid smugglers⁴ to bring her to the United States. She was fifteen years old at that time. When she arrived in the United States, she was not free to go. The smugglers demanded more money from her, and they forced her to work in a strip club. When they tried to take her to a party where she would be forced into prostitution, Lydia ran away.⁵ Another victim, Diana O., was found by Border Patrol after being raped multiple times and abandoned by the people paying her traffickers.⁶ Martina O. was a widow with two children to support. She agreed to come to the United States to cook, clean, and take care of the children of a Nigerian couple. They promised to pay her \$300 a month, provide her a home, and pay tuition for her two children. However, when she came to the United States, she lived in the basement of the

couple's home, was made to work without a day off, and was not paid. When she demanded pay, the couple told her they would pay her when she was ready to go back to Nigeria. She spent twelve years in these conditions.⁷

Victims are often unaware of their rights, unsure of where to access help, or afraid of what will happen to them or their families if they leave their traffickers. They may have daily challenges, such as language, economic, and housing barriers. Other victims may be afraid of law enforcement because their traffickers tell them that they will be arrested or deported for engaging in criminal activity or being undocumented. Victims may also be afraid for their own physical safety and the safety of their families. When victims face all of these immense barriers to leaving trafficking situations, traffickers are emboldened to continue to use victims for economic profit.

To remedy the barriers trafficking victims face and provide a legal mechanism for prosecution of traffickers, Congress passed the Trafficking Victims Protection Act (TVPA) in 2000. However, the TVPA has many shortcomings that make it an ineffective tool to combat human trafficking. For example, the TVPA has taken a narrow focus to combating trafficking by relying largely on a criminal justice approach; this approach has not provided meaningful protection to victims, does not effectively prevent trafficking, limits the scope of much needed multi-disciplinary partnerships, and ultimately undermines the prosecution of traffickers by discouraging victims from coming forward. Furthermore, the TVPA functions within a larger body of immigration, labor, and criminal laws. Due to the substance of these laws and the way they interact, significant loopholes are created that work against the protection of victims.

In order to restore trafficking victims' health, dignity, and freedom, a human rights approach should replace the criminal justice approach currently employed by the TVPA to end trafficking. While the United States should be commended for fully complying with the minimum requirements of the TVPA,⁸ the United States must also uphold its human

rights obligations to restore the freedom of victims living within its borders. To do this, the United States must amend the TVPA to strengthen its focus on protection, prevention, and partnerships with the end goal being to develop ways to facilitate victim restoration and trafficker prosecution, not just prosecution. The United States must also improve laws, policies, and practices that will make the TVPA more effective. Correcting immigration policy and closing the loopholes that allow trafficking to prosper, decreasing tolerance for lax labor standards for immigrants, and strengthening relationships between migrant communities and law enforcement are all necessary steps to remedying the apparent ineffectiveness of the TVPA.

This article discusses the systemic gaps that allow human trafficking to prosper and prevent the adequate protection of victims, and it also proposes possible solutions to these issues. Part I of this article discusses the TVPA and provides an analysis of how heavy reliance on the criminal justice system has undermined victim protection and prevention of human trafficking. Part II discusses how victims are impacted by general immigration policies, exploitative labor practices, and strained relations with law enforcement. Part III proposes how to restructure and provide a vision to change policies and practices that impact victims.

I. EXAMINING THE TRAFFICKING VICTIMS PROTECTION ACT

In 2000, the United Nations member states adopted the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime.⁹ This became known as the Palermo Protocol. The United States enacted the TVPA, which mirrors the “3-P paradigm” of the Palermo Protocol by including protection of trafficking victims, prosecution of those persons trafficking in human beings, and the prevention of human trafficking.¹⁰ In the 2010 Trafficking In Persons (TIP) Report, the US Department of State recognized that it is essential to “work

together with civil society, the corporate sector, and across governments through the ‘fourth P’—partnership—toward a world in which every man, woman, and child is safe from the hands of traffickers.”¹¹ The 4-P paradigm serves as a framework to combat human trafficking.

The primary purpose of the TVPA is to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”¹² The TVPA states that this purpose is achieved when the United States “vigorously investigates and prosecutes acts of severe forms of trafficking,” “protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking,” and “has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, about the causes and consequences of severe forms of trafficking in persons.”¹³ The following subsections begin by laying the foundation for the TVPA’s four parts: prosecution, protection, prevention, and partnerships. Next, the analysis shows that a heavy prosecution focus has undermined protection, prevention, and partnerships.

A. The 4 Ps of the TVPA

1. Prosecution

The TVPA and subsequent legislation prohibits all forms of trafficking in persons and allows the United States to prosecute traffickers. TVPA trafficking offenses are primarily investigated by federal law enforcement agencies and prosecuted by the US Department of Justice (DOJ).¹⁴

The TVPA specifically categorizes “severe forms of trafficking.” Severe forms of trafficking are 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 the age of 18,”¹⁵ and also

include the “recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”¹⁶ In determining whether to proceed with prosecution, federal law enforcement and Assistant US Attorneys have to determine whether a person is a victim of a severe form of trafficking and whether a case rises to a level of severity that warrants criminal prosecution.¹⁷ Once someone is identified as a victim of a severe form of trafficking, then prosecutors have to rely in large part on victim cooperation¹⁸ for a successful conviction.¹⁹ The TVPA addressed the prosecutors’ need for victim cooperation by providing victims with legal alternatives to their immigration status when they have cooperated with investigation and prosecution efforts.²⁰

2. Protection

The TVPA establishes minimum requirements that the United States must take to protect victims. Many victims are afraid to return to their home country for several reasons, including shame for being sold as prostitutes, ostracism from their community, continual threats from traffickers, the risk of being trafficked again, and a lack of support to deal with post-trafficking physical and mental health issues.²¹ Taking these fears into account, the TVPA provides protection in two ways: (1) legal alternatives to removing a victim to their country of origin and (2) ensuring that victims are not inappropriately incarcerated, fined, or penalized.²²

The TVPA provides legal alternatives to victims by offering immigration relief through T-visas. A T-visa is available to persons (1) who have been subjected to “severe trafficking,” (2) who are physically present in the United States due to trafficking, (3) who have complied with reasonable requests by federal, state, or local law enforcement agencies to assist in the investigation or prosecution of such trafficking,²³ and (4) who would “suffer extreme hardship involving unusual and severe harm upon removal.”²⁴

The third requirement for obtaining a T-visa—compliance with reasonable requests by federal, state, or local law enforcement—is troublesome because it gives law enforcement too much discretion. “Reasonableness” depends on the “totality of the circumstances taking into account general law enforcement and prosecutorial practices, the nature of the victimization, and the specific circumstances of the victim, including the fear, severe traumatization (both mental and physical), and the age and maturity of young victims.”²⁵ While some law enforcement agencies may interpret the phrase “reasonable request” to simply mean that a victim has availed himself or herself to law enforcement during investigations, many agencies have a much higher standard in determining whether a victim has really complied with law enforcement requests to assist in investigation, which includes testifying in court. This standard gives law enforcement and prosecutors great discretion in determining whether a victim has complied and, thus, whether a person is eligible for the law enforcement certification necessary²⁶ to obtain a T-visa.

The TVPA also provides protection by prohibiting the improper incarceration of victims who may have violated immigration or criminal laws as a result of being trafficked.²⁷ For instance, victims who may have engaged in prostitution under the control of their traffickers should not be criminally prosecuted. Also, victims who may be undocumented by virtue of being trafficked should not be detained or deported and, instead, should be provided with alternatives to remain in the United States legally.

3. Prevention

The TVPA establishes that prevention must include international efforts to address economic vulnerabilities of potential victims in their countries of origin as well as domestic efforts within the United States to increase public awareness about human trafficking and the availability of legal remedies for victims.²⁸ The TVPA considers the reality of why victims are leaving their countries and why they are susceptible to trafficking by encouraging the

United States to provide economic opportunities and alternatives to victims and potential victims in their countries of origin as a method to prevent and deter trafficking. The TVPA provides examples of these opportunities:

microcredit lending programs, training in business development, skills training, and job counseling; programs to promote women's participation in economic decision making; programs to keep children, especially girls, in elementary and secondary schools, and to educate persons who have been victims of trafficking; development of educational curricula regarding the dangers of trafficking; and grants to nongovernmental organizations to accelerate and advance the political, economic, social, and educational roles and capacities of women in their countries.²⁹

The TVPA has correctly acknowledged that trafficking victims tend to originate from countries with social and economic conditions that increase citizens' vulnerability to being exploited by traffickers. Ambassador Cynthia Shepard Perry stated in a relatively recent law review article that "trafficking is fostered, in part, by social and economic disparities that create a supply of victims seeking to migrate and a demand for sexual and other services that provide the economic impetus for trafficking."³⁰ For instance, Michelle R. Adelman observed in her article, *International Sex Trafficking: Dismantling the Demand*, that "sex trafficking allegedly thrives upon the powerlessness of women and girls to change the conditions of their existence and exploits the power imbalance that exists within developing countries."³¹ Often, women and girls in third world countries struggle financially due to the lack of jobs and opportunities for women, discrimination, and a lack of support for families. Either out of desperate need for better jobs or the promise of a better life by traffickers, victims often travel to countries with a reputation for a thriving economy and the prospect of a higher income. Ultimately, however, when victims reach these countries they become vulnerable to sexual exploitation as they remain in the control of their traffickers.³²

Recognizing that many victims are often isolated and unaware of their rights after arriving in the United States, the TVPA also emphasizes educating victims and communities about human trafficking as part of prevention campaigns. According to the annual US Department of State TIP report, examples of education initiatives include: (1) a “know your rights” brochure informing visa applicants of their employment rights once in the United States and how to obtain help, and (2) three extensive public awareness campaigns conducted by the Department of Homeland Security in 2009, spanning domestic urban areas, ports of entry, and foreign source countries.³³

4. Partnerships

“Partnerships” was recently added as the fourth “P” of the TVPA to supplement prosecution, protection, and prevention efforts due to a need for multidisciplinary professionals to work together to combat trafficking. The DOJ funds anti-trafficking task forces nationwide consisting of law enforcement, prosecutors, labor enforcement, and nongovernmental victim service providers. The DOJ made grants to thirty-seven victim assistance organizations working in conjunction with law enforcement task forces nationwide.³⁴ These grants focus on emergency assistance for foreign victims until an individual is certified or decides not to work with law enforcement.³⁵ The goal of these task forces is to coordinate on cases and train law enforcement on investigating human trafficking cases.³⁶ The DOJ funds these partnerships to promote cooperation between law enforcement agencies during investigations and across jurisdictions, to promote coalitions of nongovernmental organizations for the purposes of advocacy, to provide services, and to broaden the network of victims whose experiences inform the broader anti-trafficking movement.³⁷

These task forces must take on a victim-centered approach. The 2010 TIP report correctly identified that a victim-centered approach requires the expertise, resources, and efforts of many professionals, because human

trafficking is “a complex, multifaceted issue requiring a comprehensive response of government and nongovernment entities in such areas as human rights, labor and employment, health and services, and law enforcement. It requires partnerships among all these entities to have a positive impact.”³⁸

B. Criminal Justice Focus of TVPA Undermines Victim Protection, Prevention, and Partnerships

With dedicated DOJ funding being contributed towards prosecuting traffickers, it is evident that most efforts to combat human trafficking have focused on prosecution. While federal laws are in place to prosecute traffickers, a simple analysis of data illustrates that few prosecutions are occurring.

Chart 1: Comparing Approximate Number of Victims Trafficked into the United States to the Number of Prosecutions (2000–2010)³⁹



*Underestimated Number⁴⁰

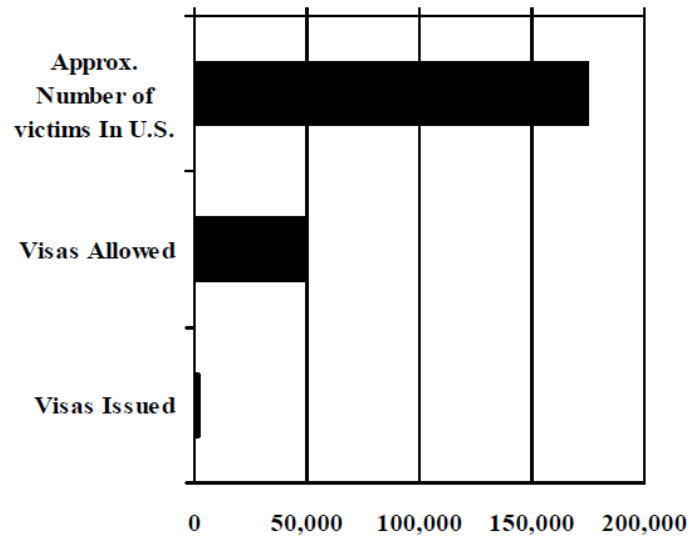
Between 2000 and 2010, it is estimated that approximately 175,000 people were trafficked into the United States.⁴¹ In comparison, there were roughly 294 prosecutions.⁴² It is evident that prosecuting traffickers is not addressing the enormity of the problem.

The heavy focus on prosecution has undermined the TVPA by (1) providing protection conditional on cooperation with prosecution without regard to the victim's readiness to do so, (2) failing to effectively address prevention of human trafficking within the United States, and (3) limiting the scope of partnerships by improperly placing law enforcement in a position of a jurist. When all these factors are being undermined within the TVPA, prosecution efforts become ineffective as well.

1. Protections are Conditional and Contradictory

Protection that is available to victims is conditioned upon their cooperation with law enforcement. This protection is available through immigration relief, specifically by way of obtaining a T-visa to remain in the United States legally. Data shows that the protections available to victims have been underutilized. The TVPA authorizes five thousand T-visas per year to be issued to victims of trafficking.⁴³ From late 2000 through 2010, if the US government issued five thousand visas per year to victims of trafficking, a total of fifty thousand victims would have received T-visas. However, only about 2,300 victims have actually received T-visas since 2000.⁴⁴

Chart 2: Comparing the Estimated Number of Victims in the United States to the Number of Victims Protected by the Issuance of T-visas (2000–2010)



There are a number of reasons for why these protections are not fully utilized. For example, victims may be afraid of law enforcement and the possible consequences of working with them, such as deportation by law enforcement and retaliation by traffickers. Additionally, victims may be mistakenly detained due to a lack of knowledge among law enforcement on how to identify and assist victims.

Conditioning protection on the victim's cooperation with investigation and prosecution efforts forces them to work with law enforcement, which they may or may not be ready to do. Criminal justice professionals have identified significant barriers to successful prosecutions including lack of victim cooperation, victims returning to traffickers, and unreliable testimony due to post-trafficking trauma.⁴⁵ Victims may not be willing to assist in prosecution efforts for several reasons, including lack of trust or

understanding of the role of federal law enforcement and prosecutors; lack of understanding of their rights and the process; fear of detention and deportation; continual influence and fear of traffickers; and psychological impacts from the trauma that they have experienced.

While the TVPA's intent was to encourage victim participation in the criminal prosecution of traffickers, a perspective purely focused on *criminal* justice is contradictory to the goal of protecting victims. When victims are faced with enormous barriers to assisting investigation efforts, they may be unwilling or unable to help law enforcement. In return, law enforcement cannot certify that the victim has complied with "reasonable requests" to cooperate with the investigation and will act accordingly, which may include denial of the necessary documentation to obtain a T-visa or even deportation. As a result, cooperation between law enforcement and victims becomes unattainable, which goes against the original intent of the TVPA—to address prosecution barriers.

Moreover, such actions are contradictory to the second goal of protection: the improper detention of victims. NGOs reported several instances of undocumented victims being detained. For example, when Lydia N. ran away from traffickers who wanted to prostitute her, she went to Boston to work. When she was seventeen years old, she was picked up by police on a traffic stop. They failed to identify her as a victim of trafficking. Instead, she was taken into immigration custody and held in detention for at least one month. Subsequent developments are unknown.⁴⁶ Similarly, Diana O. was taken into immigration detention after she had been raped multiple times and found abandoned by Border Patrol.⁴⁷ Examples like these serve only to confirm what victims have already been told by their traffickers—that law enforcement will not provide assistance, and people like themselves may face harsh criminal and/or immigration consequences. This reinforces the cycle of fear and victims' failure to cooperate.

From a human rights perspective, protections to victims should not be made conditional. Conditioning protection on cooperation without

addressing victims' fears of detention unjustly places the burden on the victim to be entirely responsible for overcoming their fear of traffickers and law enforcement in order to avail themselves of the TVPA's protections. When protection is conditional and uncertain, victims are unable to overcome the burden or their fears in cooperating with law enforcement. The prosecution goal under the TVPA has created an illusion of protection of victims, but the reality is that the TVPA's protection goals are contradictory to the purpose and framework of the TVPA.

The contradictory policy goals result in a host of negative consequences for victims. For example, the fact that law enforcement places the entire burden on trafficking victims only reinforces the perception that these victims will not get meaningful protections and will be detained if they leave their traffickers or assist in prosecution. Traffickers are then emboldened to continue exploiting victims by strengthening those perceptions. Ultimately, these practices undermine protection and fail to restore the freedom, dignity, and health of victims.

2. Prevention Does Not Address Root Causes

Some of the root causes of human trafficking in the United States include the exploitation of women and children, the exploitation of immigrants, and a failure to remedy exploitative conditions. Neither the Palermo Protocol nor the TVPA framework focuses on prevention as the primary goal. The TIP report correctly identified that both pieces of legislation fail to give a mandate in prevention activities beyond the obvious, including public awareness campaigns and law enforcement training or border security activity.⁴⁸ Education campaigns must extend beyond the criminal justice structure and must look beyond sharing basic information with communities.

As illustrated in the TIP report, the US government made considerable effort to train law enforcement on human trafficking. While this is an essential strategy to increase victim identification, centering education

efforts and trainings almost solely on law enforcement undermines the tremendous potential in a community's ability to prevent human trafficking. Communities are well situated to identify victims and traffickers through daily interactions and cultural contexts. When communities are not empowered to identify and assist victims, traffickers are able to continue to exploit victims. However, if communities are empowered to condemn trafficking in various forms—for example, by condemning the prostitution of women, rooting out and eliminating child labor, and calling out and changing exploitative work conditions—then traffickers will be unable to prosper.

Furthermore, an existing demand for victims is another root cause of human trafficking in the United States. Prevention efforts must also address this demand, which makes trafficking a highly profitable business.⁴⁹ Lawmakers have done very little to address the high demand for trafficked victims in the United States.⁵⁰ For example, instead of focusing on the arrest of traffickers and the “johns” who benefit from sex trafficking, many victims of sex trafficking are arrested for prostitution. In other words, while the sex industry contributes to the phenomenon of trafficking and yields an estimated \$1 billion per year business worldwide,⁵¹ the focus remains only on the illegality⁵² of prostitution rather than the demand for prostitution.⁵³ While prevention campaigns have made enormous strides in educating communities on human trafficking, lawmakers must also correct legislation to prevent victims from being unfairly prosecuted and, instead, focus on the traffickers and the “johns” who benefit from sex trafficking. This shift in thinking would address the root causes of human trafficking, and lawmakers would send a clear message that human trafficking will not be tolerated in the United States.

3. Partnerships Are Limited and Volatile

There is broad agreement that successful partnerships address systemic gaps in victim identification and protection; however, the scope of these

partnerships is limited when the partnerships focus on criminal investigation and prosecution of traffickers alone. The end goal of partnerships should not just be successful prosecution of traffickers but also increasing the avenues for victim identification and restoration.

Currently, partnerships are limited because more funding has been directed into task forces that focus on criminally prosecuting the traffickers than it has been to agencies or organizations that are equipped to restore the human rights of victims. While the TVPA calls upon law enforcement to have a victim-centered approach by involving advocates and service providers to assist victims, the end goal remains to successfully prosecute traffickers. This approach is not effective because law enforcement and prosecutors have been given the sole authority to restore the rights of the victim. Without giving authority to more professionals—such as counselors, advocates, and religious and community leaders—who may be better situated to identify victims, trafficking will continue to be underreported and victim identification will remain low.

Furthermore, since law enforcement and prosecutors are the only entities that are given the authority to offer legal protections to victims, the ability of other professionals to identify and assist victims is undermined. Advocates outside of law enforcement may be well-positioned to identify victims because they work within the victims' communities. While it is important to give law enforcement and prosecutors the ability to offer victims protection as an incentive to cooperate, without addressing the barriers that victims face in cooperating or trusting law enforcement, victims will continue to remain underground and unidentified. Thus, without giving more professionals the ability to offer protection, the capacity of victim advocates is undermined because victims are forced to cooperate with law enforcement regardless of their readiness to do so. According to the International Council on Human Rights Policy, a heavy criminal justice setup creates a volatile relationship between disciplines: “advocates of a criminal law approach may eschew human rights provisions

because, rather than strengthen the state's capacity to seal its borders, they require states to acknowledge obligations to non-nationals and thus divert attention and resources from law enforcement.⁵⁴ With the current infrastructure where only criminal justice professionals are given the authority to offer protections to victims, an imbalance exists within task forces, which may cause advocates to experience frustrations and may increase the potential for adverse relationships within task forces. While criminally focused, multidisciplinary partnerships are essential to prosecution, without increasing the status, authority, and funding for other professionals responsible for identifying victims, trafficking will continue to be underreported and traffickers will remain unprosecuted.

Furthermore, when law enforcement is the primary agency that determines who is a trafficking victim, law enforcement is improperly placed in the position of jurist, which probably explains the cause of frustrations among advocates, service providers, and community leaders. Under immigration law, noncitizens present in the United States have certain due process rights,⁵⁵ which include a hearing in front of an impartial decision-maker. However, law enforcement officers are not impartial decision-makers.

For example, the law presents Immigrations and Customs Enforcement (ICE) with a conflict of interest: the agency is responsible for detaining and deporting undocumented immigrants while also identifying and providing trafficking victims with the certification necessary to obtain a T-visa. These two responsibilities are in conflict because ICE is an investigative arm of the Department of Homeland Security (DHS)—an agency that is primarily responsible for identifying, detaining, and deporting undocumented immigrants, not providing a safe haven for them. However, DHS is also one of the federal entities responsible for investigating human trafficking, which includes identifying and providing certification to victims for cooperation. Undocumented victims are then able to use this certification to petition for immigration relief by way of a T-visa. Thus, ICE may be deporting

undocumented immigrants who are also unidentified trafficking victims. Yet, under the protection requirement of the TVPA, victims should not be detained or deported if they are present within the United States due to trafficking. Thus, both the current structure of the TVPA and its mechanisms for identifying victims perpetuate confusion among even the most well-meaning professionals.

II. RESTRICTIVE IMMIGRATION POLICIES, POOR LABOR PRACTICES, AND STRAINED COMMUNITY RELATIONSHIPS WITH LAW ENFORCEMENT UNDERMINES THE EFFECTIVENESS OF THE TVPA

According to the International Council on Human Rights Policy:

Instead of reaping the benefits of a coherent and interrelated legal approach, governments find themselves applying laws and administrative policies that contradict or even cancel one another out. Nowhere is this situation more marked than in the handling of migrants in irregular situations, who remain the most vulnerable and least protected of non-nationals.⁵⁶

From a broad perspective, historical struggles of immigrants, women, and other vulnerable classes show that the United States has failed to develop well-balanced and coherent policies to protect people in these classes.⁵⁷ This failure sets the perfect conditions for trafficking to flourish. Today, victims continue to be impacted by: (1) restrictive immigration policies, contributing to the challenges of combating trafficking from a victim-centered approach as intended within the TVPA; (2) poor and exploitative working conditions that are harmful for undocumented immigrants, creating difficulties in identifying victims and a facade for human trafficking to flourish; and (3) strained relationships between immigrant communities and law enforcement, allowing traffickers to capitalize on exploitative tools.

A. Restrictive Immigration Practices Foster Human Trafficking

Restrictive immigration policies are contradictory to the purpose and intent of the TVPA, which includes prevention and protection. As is true

with victims of trafficking, many immigrants continue to come to the United States for better opportunities.⁵⁸ Instead of managing immigration by taking into account the general nature of migration, immigration laws unrealistically set out policy objectives to end illegal immigration. When immigration policies are restrictive, immigrants' "illegal" status "simply enhances their vulnerability to human rights abuses, discrimination, marginalization, and exclusion."⁵⁹ More specifically, these conditions simply enhance human trafficking and economic activity that is exploitive, unregulated, and abusive.⁶⁰

The overall effect of restrictive immigration policy puts immigrants at risk. When policies are focused on restricting the entry of immigrants, the TVPA actually undermines the prevention of trafficking. Human trafficking is a highly profitable business for traffickers who thrive on poor government policies and the failure to protect victims.⁶¹ Sadly, immigrants, especially victims of trafficking, often find themselves in dangerous and exploitative situations during transit and when they reach their destination.⁶² Traffickers are able to demand higher smuggling fees given strict border security, which increases the likelihood that a smuggling situation could turn into a trafficking situation. For instance, when there are strict border controls, traffickers develop sophisticated underground networks to transport immigrants.⁶³ Traffickers are enabled to make profits by charging more for smuggling fees citing danger to travel across the border. As a result, traffickers "use ever more perilous routes to evade detection"⁶⁴ and more immigrants are susceptible to abusive practices during travel, leading to more immigrants becoming injured or even killed. For example,

[W]hen U.S. border controls tightened after September 2001, the price that Mexican migrants paid to 'coyotes' to take them across the border into Arizona reportedly tripled. As these services become more complex as well as dangerous, prices will rise. This produces a situation in which, by some estimates, . . . generates up to \$10 billion a year worldwide.⁶⁵

Further, when smuggling fees are high, undocumented immigrants become more vulnerable to becoming victims of trafficking as they are often forced to pay off smuggling debt through exploitative labor.

Moreover, when immigration laws and practices set out nuanced, restrictive distinctions within the class of undocumented immigrants—affording some individuals protections (such as victims of trafficking or asylum seekers) and others detention (such as smuggled immigrants)—it perpetuates the confusion among victims about what protections are available to them. While victims have to overcome significant barriers and meet very specific requirements to obtain protection, law enforcement officials are enforcing immigration laws arbitrarily and punitively. When immigration policy ignores the risk of harm and the protection of the human rights of migrants,⁶⁶ it undermines the effectiveness of the TVPA. Without a firm human rights framework of immigration laws and practices, victims are more susceptible to trafficking. This, unfortunately, strengthens the barriers between victims and prosecution efforts within the TVPA.

B. Poor Working Standards Assumed for Undocumented Workers

The assumption that undocumented immigrants will face poor working standards decreases victim identification and protections available to victims under the TVPA. According to Human Rights Watch:

Migrants form the backbone of many economies, performing the labor and services that people in their host countries won't do themselves Instead of getting respect and the freedom and wages they are owed, they are treated as security threats, and in general, as undesirables to be pushed out of sight.⁶⁷

The range of “acceptable” exploitation in work sites dominated by migrant workers obscures and effaces the number of individuals who are in forced labor situations.⁶⁸ When there is widespread exploitation where migrants labor—in restaurant kitchens, fields, and factories—it obscures how many people may be in a trafficking situation.⁶⁹ John B., for example, was

brought to the United States and forced to perform masonry and paving work. He was not allowed to have relationships outside of work and was physically abused when he tried. When he attempted to escape, traffickers threatened to kill him and his family. He was moved every week, along with other workers, from one hotel to the next. When John was finally successful in escaping his traffickers, he was apprehended and detained by immigration authorities. He was eventually ordered to be removed from the United States.⁷⁰

If we look at these sites where migrants work, we will likely find settings in which forced labor is inevitable, particularly due to the fact that many migrants are undocumented.⁷¹ When there are minimal labor protections for immigrants and an assumption is made that undocumented immigrants will work in poor, exploitative conditions, forced labor can blend into the background of trafficking and abuse.⁷² The widespread norm of exploitation blends the expectation of poor working conditions for undocumented immigrants with human trafficking, making it more difficult to identify victims and undermine the effectiveness of the TVPA.

C. Criminalizing Immigrants Causes Strained Relationships with Law Enforcement

A heavy emphasis on the criminal justice approach within the TVPA, coupled with the treatment of immigrants as criminals, has undermined the effectiveness of all the protections available to victims. The increasing criminalization of immigrants for violating immigration law is a serious cause for concern because immigrants who violate immigration law “have committed administrative infringements rather than criminal offenses.”⁷³

For instance, the Working Group on Arbitrary Detention has noted that “criminalizing irregular entry into a country exceeds the legitimate interest of a State to control and regulate irregular immigration, and can lead to unnecessary detention.”⁷⁴ When law enforcement focuses on identifying

undocumented immigrants, the objectives of law enforcement are at odds with protection goals of the TVPA.⁷⁵

The *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council* states, “trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”⁷⁶ The TIP report confirms that detention of victims of trafficking is “not only at odds with the Palermo Protocol, but is counterproductive to effective rehabilitation and criminal prosecution alike.”⁷⁷ So long as law enforcement continues to enforce immigration laws punitively and treat immigrants as criminals, immigrant trafficking victims are bound to remain unidentified and unprotected.

Additionally, when the roles of civil enforcement by immigration authorities blend with criminal law enforcement, immigrants are unable to seek or trust either for protection under the TVPA. This lack of trust causes a strained relationship between migrant communities and law enforcement. Specifically, in her article titled, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, Maria Fernanda Parra-Chico illustrates the negative impact of poor relationships between law enforcement and immigrant communities:

[T]he deputization of local police to enforce immigration laws and ICE raids on workplaces where undocumented immigrants may labor have clearly chilled the relationship between law enforcement and migrant communities. . . . There are more disincentives to come forward than ever before. With trust eroded between law enforcement and migrant communities, service providers have criticized the requirement that those seeking T-visa assist law enforcement as undermining a ‘victim centered approach.’⁷⁸

Migrant communities are afraid of deportation. When ICE's mandate is entangled with local law enforcement practices, migrant communities are afraid to rely on local and federal law enforcement to report crimes, including human trafficking. While these intertwined practices certainly impact people within jurisdictions where law enforcement agencies are partnering or cooperating with ICE, it also impacts communities where law enforcement is not cooperating with ICE as migrant communities are unable to ascertain which law enforcement agency does or does not cooperate with ICE. Consequently, migrant communities will refrain from calling on law enforcement for protection due to the overwhelming perception that contacting such groups, whether local law enforcement or federal law enforcement, will lead to deportation.

This fear is a huge barrier for victims of trafficking who may want to step forward to report criminal activities or violence. It is also a barrier for entire communities wishing to report suspicions of trafficking, especially if the community is predominantly undocumented. Ultimately, crime prevention and public safety suffers when entire communities are unable to trust local law enforcement—the only entity equipped to legally intervene and respond to crime.⁷⁹ Every time a person or community succumbs to the disincentives to reporting crime, the community misses an opportunity to identify and protect a victim of trafficking. These disincentives also encourage traffickers to use such barriers to control and threaten victims, compel them to accept the abuse and exploitation, and prevent them from seeking help.

III. LEGISLATION AND PRACTICES THAT INCREASE VICTIM PROTECTION AND PREVENT TRAFFICKING

The United States must uphold its human rights obligations by restoring the rights of victims living in the United States through amendments to the TVPA and strengthening the laws in which the TVPA is embedded. Given that the TVPA has taken a criminal justice approach to combating trafficking, criminally prosecuting traffickers is an important part of the

picture, but it is just one part. The current heavy focus on prosecution is a problem because: (1) the system only addresses the most severe cases, leaving most victims unidentified and without options for safety; and (2) the success of protection for victims and holding traffickers accountable for their actions relies too heavily on victims' cooperation, without addressing their barriers to cooperation.

The TVPA must be amended with an eye towards increasing victim protections and prevention. Protection commitments must be unequivocal and straightforward; prevention must address root causes; and partnerships must be formed to increase victim identification and restoration, while addressing the barriers that victims have in obtaining protections or cooperating with prosecution.

Further, the interplay between the TVPA and immigration, labor, and criminal laws grossly undermine the TVPA. Traffickers capitalize on the poor infrastructure of the laws and practices to exploit victims. To combat human trafficking, there needs to be a decreased tolerance of exploitative conditions of immigrants. Legislation, policies, and practices must enhance the effectiveness of the TVPA.

A. Amending the TVPA

The TVPA must be amended such that prosecution is not the *only* end goal. Rather, the end goal is and should be the restoration of victims' freedom. This can be done by maximizing protections available to victims, addressing the root causes of human trafficking through prevention, and expanding the scope of partnerships.

Protection for victims of trafficking must be given to victims based on remedying the harm done to victims instead of complying with conditions to cooperate with investigative efforts. When protection is made conditional, it only enables traffickers to exploit and intimidate their victims and prevent them from leaving the trafficking situation because of the overwhelming barriers that victims face in obtaining protection. While the

TVPA's legislative intent was to encourage the participation of trafficking victims in the prosecution efforts of their traffickers—given that victims are the best situated to provide key information to investigation efforts—this intent had negative unforeseen consequences. Giving law enforcement and prosecutors the sole authority to sign off on victim protection, consequently, limits identification and protection efforts. Either a neutral agency should be assigned to assist with victim protection, or more professionals, such as advocates and community leaders, must be involved in the identification and protection of trafficking victims. Ideally, US law should reflect, in word and in practice, that protection is available to all trafficking victims regardless of law enforcement cooperation, and protection efforts should encompass the restoration of victim stability through shelter, comprehensive services, and advocacy in resettling in the United States.⁸⁰

To effectively understand the scope of the problem and address its root causes, the United States must first implement better data collection processes to grasp the scope of human trafficking. As suggested by the TIP report,

Governments and other actors lack accurate and consistent data on migration, and should invest in its collection. . . . In addition, violations of migrants' rights are often underreported, because migrants fear the consequences of seeking redress and conventional data collection methods cannot easily monitor irregular migration or levels of smuggling and trafficking.⁸¹

With accurate data, legislatures can better understand human trafficking trends and implement measures to address its root causes within the United States (such as the demand for trafficked persons) instead of criminalizing victims for illegal activity.

Finally, the scope of partnerships must expand beyond the criminal justice system and involve non-law-enforcement professionals—especially advocates—in victim restoration. It is important to involve advocates as they are better able to gain the trust of victims and offer comprehensive

advocacy that makes victim restoration a smoother process. Ultimately, to increase identification and ultimately protection, more professionals must be authorized to offer protections to victims. This is important because victims are more likely to come forward to report traffickers to those they are able to trust. Non-law-enforcement professionals will likely be able to build trust with immigrant communities quickly because they do not have the same barriers to overcome as law enforcement does. By renewing trust with immigrant communities, these non-law-enforcement professionals will be able to effectively assist victims in restoring their lives.

B. Addressing Limits Through the Larger Body of Laws

In addition to the fact that the focus of the TVPA undermines victim protection, trafficking victims are also part of a vulnerable class of people who lie outside the law's protection—immigrants, women, and people of color. Victims range from poor farm workers who are exploited by employers to vulnerable women who are prostituted and raped by men. To address these varying forms of exploitation, a broader approach to combating human trafficking is necessary.

First, legislation and policy should focus on managing immigration instead of restricting migration by explicitly drawing on human rights standards that the US government has already committed to uphold.⁸² In order to take a human rights approach, the US government should discard policies that discourage migration and punish immigrants for violating immigration laws because “such objectives are likely to be operationally unachievable and expose governments to political criticism.”⁸³ Strong anti-immigration policies also perpetuate a bias against immigrants, and ultimately victims, which causes both lawmakers and the public to become incapable of envisioning trafficking victims as victims. This view additionally affects whether victims are identified and whether their traffickers are brought to justice.

Second, the US government should implement policies that decrease tolerance for poor working conditions for immigrants. One primary way to do this is giving undocumented immigrants a path to legalization because this would allow them to come out of the shadows of exploitative labor practices. According to the International Human Rights Policy Council report, *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*:

Commitment to policies that protect migrants from abuse should not be perceived to be in contradiction with a government's commitment to law enforcement or a country's economic interest. On the contrary, it should be argued that such policies are in the interests of the state and its citizens, as well as migrants.⁸⁴

Third, there is also a need for aggressive policies and efforts to improve the relationship between immigrant communities and law enforcement. Improving this relationship requires dispelling the myths and confusion within immigrant communities that law enforcement's only role is to deport undocumented immigrants. This can be done by not only increasing communities' knowledge about human trafficking, but also using community education to clarify the role of law enforcement regarding victims. That is, law enforcement cannot be responsible for both protecting undocumented victims and deporting undocumented immigrants; they also cannot be responsible for enforcing criminal law and enforcing civil laws punitively.

In conclusion, the TVPA is ineffective because it is focused on criminal prosecution. It is also impractical when considered in the context of the other laws, policies, and practices that it interacts with. The TVPA must be amended to reflect a focus on not just criminal prosecution, but also on victim restoration and the belief that laws and practices should reflect an intolerance of human trafficking within the United States.

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² Sara Lerner, *Human Trafficking: "A Nightmare I Just Bumped Into,"* KUOW.ORG, Mar. 17, 2010, www.kuow.org/program.php?id=19524.

³ Sara Lerner, *Human Trafficking: Farm Labor, Forced Labor,* KUOW.ORG, Mar. 18, 2010, <http://www.kuow.org/program.php?id=19525>.

⁴ Human smuggling is the facilitation, transportation, attempted transportation or illegal entry of a person(s) across an international border, in violation of one or more countries laws, either clandestinely or through deception, such as the use of fraudulent documents. Unlike smuggling, which is often a criminal commercial transaction between two willing parties who go their separate ways once their business is complete, trafficking specifically targets the trafficked person as an object of criminal exploitation. The purpose from the beginning of the trafficking enterprise is to profit from the exploitation of the victim. It follows that fraud, force or coercion all plays a major role in trafficking. *Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking 2006*, US DEPT. OF STATE (Jan. 1, 2006), <http://www.state.gov/m/ds/hstcenter/90434.htm>.

⁵ Alison Parker & Meghan Rhoad, *US: Victims of Trafficking Held in ICE Detention—Letter to the US Dept. of State on 2010 Trafficking in Persons Report*, HUM. RTS. WATCH (Apr. 19, 2010), <http://www.hrw.org/en/news/2010/04/19/us-victims-trafficking-held-ice-detention>.

⁶ *Id.*

⁷ David Gonzalez, *When American Dream Leads to Servitude*, NY TIMES (Apr. 24, 2007), http://www.nytimes.com/2007/04/24/nyregion/24citywide.html?pagewanted=1&_r=1&ref=humantrafficking.

⁸ *Trafficking in Persons Report 2010*, US DEPT. OF STATE, available at, <http://www.state.gov/documents/organization/142979.pdf> [hereinafter TIP Report 2010].

⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25/Annex II (Nov. 15, 2000), available at, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf [hereinafter Palermo Protocol].

¹⁰ Victims of Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (current version at 22 U.S.C. § 7101 et seq (West 2010)).

¹¹ TIP Report 2010, *supra* note 8.

¹² 22 U.S.C. § 7101(a) (West 2011)

¹³ 22 U.S.C. § 7106(b)(1)-(3) (West 2011).

¹⁴ See *Human Trafficking Prosecution Unit Overview*, US DEPT. OF JUST., <http://www.justice.gov/crt/about/crm/htpu.php>.

¹⁵ 22 U.S.C. § 7102(8) (West 2011).

¹⁶ Alien Victims of Severe Forms of Trafficking in Persons, 8 C.F.R. § 214.11(a).

¹⁷ A victim may fit within the definition of “victim of a severe form of trafficking,” but the standards to proceed with prosecution are higher.

¹⁸ Victims may be identified by law enforcement but, it is not until victims are willing to cooperate with law enforcement before they can be “certified” as victims. Victims who are under the age of eighteen are not required to cooperate with law enforcement.

¹⁹ Heather J. Clawson, et al., *Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices, Executive Summary and Final Report*, p. vi (Jun. 30, 2008) NAT’L CRIM. JUST. REFERENCE SERV., available at, <http://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf>.

²⁰ 22 U.S.C. § 7105 (West 2011).

²¹ *Return and Reintegration, Understanding the Challenges for Returnee Victims of Trafficking*, in TRAINING MANUAL FOR COMBATING TRAFFICKING IN WOMEN AND CHILDREN, available at, http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-3.pdf.

²² 22 U.S.C. § 7105 (West 2011).

²³ The rest of this element: “or in the investigation of crimes where acts of trafficking are at least one central reason for the crime; or who are unable to cooperate in the investigation or prosecution due to a physical or psychological trauma; or who are under 18.” 8 C.F.R. § 214.11(a).

²⁴ INA § 101(a)(15)(T)(i), 8 U.S.C. § 1101(a)(15)(T) (West 2010).

²⁵ 8 C.F.R. § 214.11(a).

²⁶ Victims under the age of eighteen are not required to cooperate with law enforcement. Also, while victims may apply for T-visas without certification from law enforcement, they have to provide extensive corroborative/secondary evidence to show that they are a victim of trafficking. Law enforcement certification qualifies as primary evidence.

²⁷ 22 U.S.C. § 7106 (West 2011)

²⁸ 22 U.S.C. § 7104 (West 2011).

²⁹ 22 U.S.C. § 7104 (West 2011).

³⁰ Ambassador Cynthia Shepard Perry, *The Menace of Human Trafficking in Africa and the U.S. Congressional Response Through the Office of the United States Executive Director of the African Development Bank*, 2 LOY. U. CHI. INT’L L. REV. 179, 182 (2005).

³¹ Michelle R. Adelman, *International Sex Trafficking: Dismantling the Demand*, 13 S. CAL. REV. L. & WOMEN’S STUD. 387, 390 (2004).

³² Parker & Rhoad, *supra* note 5.

³³ TIP Report 2010, *supra* note 8, at 343.

³⁴ *Id.* at 341.

³⁵ *Id.*

³⁶ *Id.* at 340.

³⁷ *Id.*

³⁸ *Id.* at 15.

³⁹ Given the underground nature of human trafficking, it is unclear how many people are actually trafficked into the U.S. Different sources show different numbers. *See, e.g.*,

Human Trafficking Statistics, POLARIS PROJECT, available at <http://www.dreamcenter.org/new/images/outreach/RescueProject/stats.pdf>.

⁴⁰ See *id.*

⁴¹ See Polaris Project, *Human Trafficking Statistics*, <http://www.dreamcenter.org/new/images/outreach/RescueProject/stats.pdf>. Given the underground nature of human trafficking, it is difficult to estimate the number of trafficked victims into the United States; therefore, the figure used in this article of 175,000 people trafficked into the United States is a rough estimate based on the estimates in this source multiplied by a factor of 10. See *id.*

⁴² Clawson, et al., *supra* note 19, at 12.

⁴³ 8 C.F.R. § 214.11(m) (“the total number of principal aliens issued T-1 nonimmigrant status may not exceed 5,000 in any fiscal year”).

⁴⁴ Denise Brennan, *Key Issues in the Resettlement of Formerly Trafficked Persons in the United States*, 158 U. PA. L. REV. 1581, 1589-1590 (2010).

⁴⁵ Clawson, et al., *supra* note 19, at 20-21.

⁴⁶ Parker & Rhoad, *supra* note 5.

⁴⁷ *Id.*

⁴⁸ TIP Report 2010, *supra* note 5, at 14 (“While prevention is an important goal, neither the Palermo 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.”).

⁴⁹ Adelman, *supra* note 31, at 398.

⁵⁰ Using the Third World as a scapegoat, Americans are never confronted with their own social, political, and economic shackles, which invigorate the demand for the trafficking of women and children. Adelman, *supra* note 31, at 400.

⁵¹ Press Release, U.S. PRESIDENT’S OFFICE OF PRESS SECRETARY, *Trafficking in Persons National Security Presidential Directive*, (Feb. 25, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030225.html>.

⁵² Adelman, *supra* note 31, at 398.

⁵³ Prostitution can be caused by “dramatic economic windfalls, repressive culture, or severe unemployment rates.” Adelman, *supra* note 31, at 400.

⁵⁴ *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence*, INT’L COUNCIL ON HUMAN RIGHTS POLICY, 89 available at http://www.ichrp.org/files/reports/56/122_report_en.pdf.

⁵⁵ *Yamataya v. Fisher*, 189 U.S. 86 (1903).

⁵⁶ *Irregular Migration*, *supra* note 53, at 89.

⁵⁷ *From Nation of Immigrants to Anti-Immigration* (Timeline), EQUAL VOICE NEWSPAPER, available at http://www.equalvoiceforfamilies.org/document/Immigration_timeline.pdf.

⁵⁸ Immigrants come into the United States through legal means as well as unauthorized means, such as being smuggled into the United States. In contrast to human trafficking where victims are under the control of their trafficker in the country of destination, immigrants who are smuggled are free as soon as they arrive in the country of

destination. WARN Home Page, WASH. ANTI-TRAFFICKING RESPONSE NETWORK (“WARN”), <http://warn-trafficking.org/>

⁵⁹ *Irregular Migration*, *supra* note 53, at vi.

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 20–22.

⁶² *Id.* at 29.

⁶³ *Id.* at 28.

⁶⁴ *Id.*

⁶⁵ *Id.* at 21.

⁶⁶ *Id.* at 30.

⁶⁷ *2009 A Bad Year for Migrants: Deaths, Labor Exploitation, Violence, and Poor Treatment in Detention*, HUM. RTS. WATCH, Dec. 16, 2009, <http://www.hrw.org/en/news/2009/12/16/2009-bad-year-migrants>.

⁶⁸ Brennan, *supra* note 43, at 1589–90.

⁶⁹ *Id.*

⁷⁰ Parker & Rhoad, *supra* note 5.

⁷¹ *FLSNY’s Fight to End Modern Day Slavery—The Human Trafficking Project*, FARMWORKER LEGAL SERVS. OF N.Y., INC., available at <http://www.farmworkerlegalservices.com/trafficking/HTMainPage.aspx>.

⁷² Brennan, *supra* note 43, at 1586.

⁷³ *Irregular Migration*, *supra* note 53, at 29.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, OFFICE OF HIGH COMMISSIONER FOR HUM. RTS., 1, available at <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf> (Report was an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1)).

⁷⁷ TIP Report 2010, *supra* note 5, at 14.

⁷⁸ Brennan, *supra* note 43, at 1595.

⁷⁹ Maria Fernanda Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. FOR SOC. JUST. 321, at 336 (2008).

⁸⁰ TIP Report 2010, *supra* note 5.

⁸¹ *Irregular Migration*, *supra* note 53, at 92.

⁸² *Id.* at 89.

⁸³ *Id.* at 91.

⁸⁴ *Id.* at 90.