

Seton Hall University
eRepository @ Seton Hall

Law School Student Scholarship

Seton Hall Law

5-1-2013

America, Land of the Free? The Moral and Practical Reasons for Expanding Proactive anti-Human Trafficking Efforts

J. Christopher Henschel

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Henschel, J. Christopher, "America, Land of the Free? The Moral and Practical Reasons for Expanding Proactive anti-Human Trafficking Efforts" (2013). *Law School Student Scholarship*. 235.
https://scholarship.shu.edu/student_scholarship/235

America, Land of the Free? The Moral and Practical Reasons for Expanding Proactive anti-Human Trafficking Efforts

“We see it as fundamental to our own interests to support a just peace around the world—one in which individuals, and not just nations, are granted the fundamental rights that they deserve.”¹

I. Human Trafficking in America

The State Department’s Trafficking in Persons report identifies human trafficking as the “Face of modern slavery.”² Human trafficking is the act of recruiting, harboring, transporting, providing, or obtaining of a person for labor or services through the use of force, fraud, coercion or other means, for the purpose subjection to involuntary servitude, peonage, debt bondage, or slavery.³

Human trafficking is the modern equivalent of colonial period slavery. Words such as abhorrent, incomprehensible, and repugnant only begin to scratch the surface. This paper will explore two aspects of human trafficking in America. First, an overview of human trafficking juxtaposed with the statutory framework used to combat human trafficking in the United States will show how the reactionary nature of the framework does not do enough to prevent human trafficking. Exemplified through this discussion will be the reasons why the very nature of the crime of human trafficking causes it to remain on the periphery of American awareness. Next, the paper will explore the national security implications of this crime, and how an increase in

¹ *National Security Strategy*, 5 (May 2010, The White House). available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf

² *Trafficking in Persons Report*, 33 (June 2012, Department of State). available at <http://www.state.gov/documents/organization/192587.pdf>

³ 22 U.S.C. § 7102(8)(B) (West 2012).

awareness coupled with a proactive governmental approach will serve the two-fold purpose of combating this crime while simultaneously improving our national security interests.

Recently, human trafficking gained more public attention from the President of the United States. In a September 25, 2012, speech to the Clinton Global Initiative, President Obama issued a resounding stance on human trafficking in America;

And today, I want to discuss an issue that relates to each of these challenges. It ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name -- modern slavery.

Now, I do not use that word, "slavery" lightly. It evokes obviously one of the most painful chapters in our nation's history. But around the world, there's no denying the awful reality. When a man, desperate for work, finds himself in a factory or on a fishing boat or in a field, working, toiling, for little or no pay, and beaten if he tries to escape -- that is slavery. When a woman is locked in a sweatshop, or trapped in a home as a domestic servant, alone and abused and incapable of leaving -- that's slavery.

When a little boy is kidnapped, turned into a child soldier, forced to kill or be killed -- that's slavery. When a little girl is sold by her impoverished family -- girls my daughters' age -- runs away from home, or is lured by the false promises of a better life, and then imprisoned in a brothel and tortured if she resists -- that's slavery. It is barbaric, and it is evil, and it has no place in a civilized world.⁴

That same day, the President signaled a recommitment to the fight, issuing Executive Orders designed to reach several initiatives: strengthening protection in federally issued contracts and

⁴ *Remarks by the President to the Clinton Global Initiative*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY (September 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>

subcontracts domestically and abroad;⁵ improving training and tools to identify and assist trafficking victims;⁶ increasing resources for victims of human trafficking; and laying out a framework for a future approach.⁷ At the time of this writing it is too early to tell what affect this executive order will have on human trafficking in America.

The U.S. Department of State began monitoring the trafficking of persons in 1994, when the issue was first covered by the Department's Annual Country Reports on Human Rights Practices.⁸ Subsequently, laws were passed, with the original coverage geared toward females (both women and children) being trafficked for sex purposes.⁹ Since then the law has expanded to include males and females, now embodied in the Victims of Trafficking and Violence Protection Act of 2000,¹⁰ the Trafficking Victims Protection Reauthorization Act of 2003,¹¹ the Trafficking Victims Protection Reauthorization Act of 2005,¹² and the Trafficking Reauthorization Act of 2008.¹³ Although the federal anti-human trafficking framework has made great strides in the area of human trafficking prevention, more must be done. Human trafficking remains out of the public eye and hence, out of America's mind.

⁵ *Fact Sheet: The Obama Administration Announces Efforts to Combat Human Trafficking at Home and Abroad*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (September 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/fact-sheet-obama-administration-announces-efforts-combat-human-trafficki>

⁶ *Fact Sheet: Executive Order Strengthening Protections Against Trafficking in Persons in Federal Contracts*, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (September 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/fact-sheet-executive-order-strengthening-protections-against-trafficking>

⁷ Executive Order – Strengthening Protections Against Trafficking in Persons in Federal Contracts, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (September 25, 2012) <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>

⁸ *Victims of Trafficking and Violence Protection Act of 2000 Trafficking in Persons Report 3* (July 2001, Department of State) available at <http://www.state.gov/documents/organization/4107.pdf>

⁹ *Id.*

¹⁰ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

¹¹ Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003).

¹² Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2005).

II. Human Trafficking in America, the TVPA, and Why America is Unaware

In discussing human trafficking, it is important to understand what human trafficking is, and how the federal statutory framework currently governing the prosecution and litigation of this crime operates. This section will explore a number of statistics involving human trafficking both domestically and abroad. This section will then discuss how the Trafficking Victims Protection Act (“TVPA”) defines human trafficking on the federal level, as well as discussing TVPA prosecution statistics. From there, the discussion will turn to the victims themselves, exploring who the victims are, what kind of labor they are subject to, and how victims are manipulated by their captors. Finally, the paper will explore the reactive nature of the TVPA and how the TVPA is designed to punish the traffickers through case law, while little proactive measure is taken to prevent the trafficking in the first place.

a. Human Trafficking: Staggering Statistics

The International Labour Organization estimates that 2.4 million people are lured into forced labor globally.¹⁴ The United Nations estimates that the total market value of illicit human trafficking is \$32 billion US dollars.¹⁵ Of that number, \$15.5 billion is made in industrialized countries,¹⁶ with \$9.7 billion made in Asia.¹⁷ In Europe alone, at any given time, roughly

¹³ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat 5044 (2008).

¹⁴ *Factsheet on Human Trafficking 1* (United Nations Office on Drugs and Crime) available at http://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf (last visited Dec. 5, 2012)

¹⁵ *Ibid.*

¹⁶ INTERNATIONAL LABOR OFFICE, *A Global Alliance Against Forced Labor: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, Report I(B) 55*, INTERNATIONAL LABOR CONFERENCE (93rd Session 2005). available at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf

¹⁷ *Ibid.*

140,000 people are estimated to be victims of trafficking.¹⁸ In 2011, the number of human trafficking victims identified around the world was 42,291.¹⁹ It is estimated that roughly three in every 1,000 people in the world are victims of human trafficking.²⁰ Roughly 4.5 million people are forced into sexual exploitation globally,²¹ and roughly 9.1 million people are moved either internally or externally for the purposes of forced labor.²² Further, it is estimated that 5.5 million children are trafficked globally.²³ Of the millions of victims of human trafficking, 55% are women and girls,²⁴ 26% in the United States are minors who are forced labor victims,²⁵ and 98% of sex trafficking victims in the United States are women and girls.²⁶

Although 116 countries have enacted legislation prohibiting human trafficking in its various forms,²⁷ 104 countries remain without laws, policies, or regulations to prevent victim deportations.²⁸ Clearly, the scourge of human trafficking is not limited to the United States, and international traffickers everywhere are easily enticed by the money to be made in the multi-billion dollar business. In order to help the fight against trafficking domestically, legislators passed the TVPA. The United States' goals with respect to trafficking are three fold: prevention,

¹⁸ *Factsheet on Human Trafficking*, *supra*. note 14, at 1

¹⁹ *Trafficking in Persons Report* 44 (June 2012, Department of State). *available at* <http://www.state.gov/documents/organization/192587.pdf>

²⁰ INTERNATIONAL LABOR ORGANIZATION, *ILO Global Estimate of Forced Labour* 13 (Special Action Programme to Combat Forced Labor, 2012). *available at*

http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_182004.pdf

²¹ *Ibid.*

²² *Id.* at 17

²³ *Id.* at 14

²⁴ *Ibid.*

²⁵ *Trafficking in Persons Report* 8 (June 2010, Department of State). *available at* <http://www.state.gov/documents/organization/142979.pdf>

²⁶ *Ibid.*

²⁷ *Id.* at 2

²⁸ *Id.*

prosecution, and protection of victims.²⁹ The passage of the TVPA is one way in which these goals are attempted to be satisfied.

The sheer volume of trafficking victims involved in these statistics show why the United States legislature felt that the TVPA was necessary to combat human trafficking. The next section will discuss how the TVPA itself defines human trafficking as well as providing some information on implementation of the Act.

b. The TVPA Framework

The lack of understanding of what constitutes human trafficking is apparent in the legislative history of the TVPA. From the TVPA's first enactment to its multiple revisions, every iteration reflects the expanding insight into the broad scale and surreptitious nature of this country's secret scourge. This section will explore the evolution of the TVPA, how the TVPA defines human trafficking and prosecutes traffickers, and why, despite all of this effort, the TVPA is largely ineffective in combating human trafficking as a reactive piece of legislation.

Trafficking in persons for the purpose of prostitution has been prosecuted under the auspices of the Mann Act since 1910.³⁰ The Mann Act makes the act of knowingly transporting women or girls into or around the United States with the intent to use them for prostitution or sexual activity a felony.³¹ Originally, the Mann Act specified that women and girls were covered, but Congress amended the act in 1986 to cover "individuals" in response to the requirement that

²⁹ *Trafficking in Persons Report* (2012) *supra* note 19

³⁰ The Mann Act, 18 U.S.C. § 2421 (1998)

³¹ *Ibid.*

all federal statutes be gender neutral.³² Although currently applicable to either sex, the Mann Act only applies to prostitution.³³ Unfortunately, this means just a specific type of victim of human trafficking is covered, and as such, the Mann Act is generally inapplicable and ineffective in combating human trafficking on the federal level.

Public awareness and understanding of trafficking in persons has evolved and expanded, and as such, Congress passed the original TVPA in 2000 (“TVPA of 2000”).³⁴ This was the first legislation designed to target trafficking in persons. Specifically, it targeted forced labor, trafficking with respect to peonage, slavery, involuntary servitude, sex trafficking of children, and trafficking by force, fraud, coercion, unlawful conduct with respect to documents, or attempting to commit any of these acts.³⁵ With the assistance of a deeper knowledge of human trafficking and more reporting on human trafficking, the Trafficking Victims Protection Reauthorization Act of 2005 (“TVPRA of 2005”) created a new crime: trafficking in persons offenses committed by federal contractors outside of the United States.³⁶ Later, in an attempt to reach out and prosecute more traffickers, the William Wilberforce Trafficking Victims Protection Reauthorization of 2008 (“TVPRA of 2008”) criminalized any financial benefit from peonage, slavery, or trafficking in persons, conspiring in an act of trafficking in persons, and fraud in foreign labor contracting.³⁷

³² Michael Conant, Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution, 5 Cornell J.L. & Pub. Pol’y 99, 118 fn. 1 (1996)

³³ 18 U.S.C. § 2421

³⁴ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000)

³⁵ *Ibid.*

³⁶ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 103(a)(1), 119 Stat. 3558 (2005)

³⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008)

The current iteration of the TVPA includes several important definitions that shape the enforcement of the Act and its applicability. Under the TVPA, coercion involves threatening or physically restraining someone with the intent to cause that person to believe that they will be harmed if they do not obey you.³⁸ Furthermore, coercion also includes the abuse or threatened abuse of the legal process.³⁹

Debt bondage, another form of victim manipulation, is where the victim becomes indebted to their trafficker. For instance, the trafficker in a debt bondage situation promises to get the victim across the border and then the trafficker uses this indenture as a means to exploit work from the victim.⁴⁰ After the exploitation has begun, the trafficker often comes up with new ways to keep the victim indebted to the trafficker (for instance telling the victim that their work has not paid off the debts, or that the victim has incurred new debts, such as living expenses, which outweigh the old debt).⁴¹ Involuntary servitude is a similar means of manipulating victims, whereby a trafficker intends the victim to believe that if they do not continue to do as the trafficker says, the victim or even the victims family will suffer harms.⁴²

In addition to debt bondage and involuntary servitude, another form of trafficking under the TVPA is indentured servitude. This is where the trafficker controls the victim to do as they say with by threatening to subject the victim or the victims' family to legal ramifications, such as

³⁸Trafficking Victims Protection Act, 22 U.S.C. § 7102(2) (2008) (“threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process”)

³⁹ *Ibid.*

⁴⁰Trafficking Victims Protection Act, 22 U.S.C. § 7102(4) (2008) (“the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined”)

⁴¹ *Ibid.*

⁴² Trafficking Victims Protection Act, 22 U.S.C. § 7102(5) (2008) (“any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into continue such condition, that person or another person would

deportation.⁴³ Sex trafficking is where a trafficker victimizes a person for the purpose of exploiting them to perform a commercial sex act, such as prostitution.⁴⁴ A commercial sex act, as defined by the TVPA, is “any sex act on account of which anything of value is given to or received by any person.”⁴⁵

With these definitions in mind, the TVPA defines “severe forms of trafficking in persons” 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,”⁴⁶ or “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.”⁴⁷ While the TVPA defines what constitutes a violation, the definition it provides inherently requires the prosecuting authority to act in a purely reactive manner. The requirement of the inducement of “force, fraud, or coercion”⁴⁸ means that an abhorrent act has already taken place. At that point, the victims have already been subjected to the very conditions the enactment of the TVPA sought to prevent.

Furthermore, the reactive nature of the TVPA is limited in its application when compared to the staggering statistics showing the hundreds of thousands of trafficking victims.⁴⁹ In 2011, 125 trafficking cases were brought under the TVPA.⁵⁰ A total of 118 defendants were charged in

suffer serious harm or physical restraint; or the abuse or threatened abuse of the legal process”)

⁴³ *Ibid.*

⁴⁴ Trafficking Victims Protection Act, 22 U.S.C. § 7102(9) (2008) (“the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act”)

⁴⁵ Trafficking Victims Protection Act, 22 U.S.C. § 7102(3) (2008)

⁴⁶ Trafficking Victims Protection Act, 22 U.S.C. § 7102(8)(A) (2008)

⁴⁷ Trafficking Victims Protection Act, 22 U.S.C. § 7102(8)(B) (2008)

⁴⁸ Trafficking Victims Protection Act, 22 U.S.C. § 7102(8)(A) (2008)

⁴⁹ Factsheet on Human Trafficking, *supra* note 14, at 1

⁵⁰ *Trafficking in Persons Report* (2012) *supra*. note 19, at 361

forced labor and adult sex trafficking, the highest number ever.⁵¹ Of those defendants, 151 convictions were gained.⁵² From those, 70 convictions were for forced labor and adult sex trafficking, of which about half were for labor trafficking and the other half for adult sex trafficking.⁵³ As a point of reference, the number of trafficking cases prosecuted from 2001 to June 2007 under the TVPA was 139, of which 39 were for labor trafficking and 100 were for sex trafficking.⁵⁴ At first glance, these numbers could appear to show that the TVPA is effective in combating human trafficking. A high prosecution rate relative to the number of cases brought (118 defendants in 125 cases for a 94.4% prosecution rate), however, provides false hope. Taking the global statistic of three in every 1,000 people being victims of human trafficking,⁵⁵ and the population in the United States being 314,859,091 people,⁵⁶ a conservative guess of the number of victims of human trafficking in America today is 944,577. As put by the Polaris Project, one of the nation's leading NGOs involved in human trafficking, "with 100,000 children estimated to be in the sex trade in the United States each year, it is clear that the total number of human trafficking victims in the U.S. reaches into the hundreds of thousands when estimates of both adults and minors and sex trafficking and labor trafficking are aggregated."⁵⁷ Suddenly, a conviction rate of 94.4 percent on a mere 125 cases seems utterly inadequate.

As reactionary legislation, the TVPA can only help victims who are discovered and can only prosecute those traffickers who are caught. By the time this occurs, most of the damage to

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ GOVERNMENT ACCOUNTABILITY OFFICE, *Human Trafficking: A Strategic Framework Could Help Enhance the Interagency Collaboration Needed to Effectively Combat Trafficking Crimes* 14, GAO-07-915 (2007). available at <http://www.gao.gov/new.items/d07915.pdf>

⁵⁵ ILO *Global Estimate of Forced Labour*, *supra*. note 20, at 13

⁵⁶ UNITED STATES CENSUS BUREAU, *U.S. POPClock Projection*, <http://www.census.gov/population/www/popclockus.html> (last visited December 5, 2012)

⁵⁷ POLARIS PROJECT, *Human Trafficking*, <http://www.polarisproject.org/human-trafficking/overview> (last visited

the victims has been done, the trafficking has been completed, and the very harm the Act is seeking to prevent has already occurred. The next section of this paper focuses on the victims of human trafficking, and provides insight into why fear, manipulation, abuse, and the nature of many victims work cause the victims of human trafficking to remain invisible.

c. Unseen Victims in America

Understanding who the victims of human trafficking are gives insight into both how human traffickers operate and why victims of human trafficking are so difficult to find and assist. Additionally, understanding how human traffickers operate and why victims are so difficult to find and assist further explains why the American public is generally ignorant of the gross human rights abuses taking place in their own backyards.

Typically, victims of human trafficking have been “tricked, lied to, threatened, assaulted, raped, or confined,” and, in many cases, a combination of the above occurs.⁵⁸ The primary reason people so easily fall victim to traffickers is the promise of a better life, often through money and a prospective job.⁵⁹ Many victims merely desire for a better life for themselves and their family.⁶⁰ Traffickers use this mindset to their advantage.

Labor trafficking, as opposed to sex trafficking, usually results in the victims working in a limited range of jobs. It should be noted that victims of labor trafficking can still be subject to sexual crimes such as rape and harassment. The labels are not mutually inclusive or mutually exclusive, but merely generalizations used in discussing human trafficking. Labor trafficking jobs include domestic workers (for example, nannies and housemaids) or workers in small

Dec. 5, 2012)

⁵⁸ *Trafficking in Persons Report* (2012) *supra*. note 19 at 11

business operations (such as landscaping, nail salons, restaurants, industrial cleaning, construction, and hospitality services).⁶¹ Other jobs include magazine sales crews, and flower or candy sales crews.⁶² These jobs have relatively low exposure to the outside world, and enable traffickers to keep victims close and under watch. In some cases, the victims have no contact with the outside world at all. A housemaid or nanny, for example, can be locked in a basement, with the rest of the neighborhood none the wiser. Restaurant basements and kitchens can serve a similar purpose, where, despite hundreds of customers a day, the employee remains totally hidden. Industrial cleaning and construction jobs are frequently jobs with little to no interaction with the rest of the community, as the crews can be made entirely of trafficking victims with close oversight by either the traffickers themselves or bosses who know where their crews came from.

Other labor cases can be on a larger scale, such as factories, farms, or other similar environments.⁶³ These environments allow for jobs that can be totally self-contained within the property, out of sight of any prying eyes and out of mind of the American public.

Sex trafficking jobs posing as legitimate businesses are usually bar and strip club operations utilizing inflated price schemes.⁶⁴ Often, these are strip clubs, “go go” clubs, and other similar sort of establishments, which create the perfect venue to hide trafficking victims.⁶⁵ Engaging in commercial sex is facilitated by the very nature of the business, where the job is already highly sexualized and many of the jobs are not that far from a commercial sex act as it is.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ POLARIS PROJECT, *Types of Trafficking Cases in the United States*. available at <http://www.polarisproject.org/resources/resources-by-topic/human-trafficking> (last visited Dec. 5, 2012)

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

Highly sexualized jobs in highly sexualized environments make it easier to hide the commercial sex acts, as sleazy behavior and sordid environments are already the norm.

However, less menacing establishments, such as karaoke clubs and cantina bars, can also serve as fronts for the traffickers.⁶⁶ Even if commercial sex acts do not occur, these businesses can operate as fronts for labor trafficking, similar to a restaurant.⁶⁷ Residential and underground brothels based in homes, apartments, motels, hotels, trailer parks, and other outdoor locations also serve as fronts for sex trafficking.⁶⁸ Similar to labor trafficked domestic maids, sex trafficking victims can be kept out of sight and out of mind in these domestic type settings. Homes, apartments, motels, and hotels can operate sex rings⁶⁹ without disrupting or causing suspicion in the neighborhood, as everything occurs behind closed doors and on private property. Remote locations and trailer parks⁷⁰ can be even less suspicious, as there are rarely people to observe any untoward behavior. Escort services serve as another borderline front for sex trafficking, similar in use to a strip club in that the business and environment is already highly sexualized.⁷¹ Finally, many victims of sex trafficking end up in a prototypical pimp-prostitute relationship.⁷² Victims are often found in this prototypical pimp-prostitute relationship in street prostitution, where a pimp controls the victim and forces them to perform commercial sex acts through abuse, threats, lies, manipulation, and false promises.⁷³ Oftentimes, victims are expected

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ POLARIS PROJECT, *Street Prostitution*, <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us/street-prostitution> (last visited Dec. 5, 2012)

to earn a nightly quota, all of which is confiscated by the pimp.⁷⁴ While the pimp-prostitute relationship can be difficult to couch in a specific definition or set of circumstances, it is best analogized to Justice Stewart’s definition of obscenity that, “I know it when I see it.”⁷⁵

Many people often question why the victims of human trafficking remain in the situations they are in once they have been trafficked. The answer is not as simple as it may seem. The next section of this paper explores why victims remain at the control of their traffickers and why so many victims fail to remove themselves from the situation.

d. Manipulation and Control of the Victims

The transit of human trafficking victims into the United States presents a question to the traffickers of how they will get across the border. A good amount of human cargo enters the United States undetected, often by plane or by sea, and sometimes on large cargo-carrying ships.⁷⁶ Sometimes, fraudulent documents are obtained for the victims to ease the border crossing.⁷⁷ However, the majority of victims enter the United States through Mexico, coming across the border by vehicle or by foot.⁷⁸

Once in the United States, traffickers use control methods to keep their victims dependant on them. Restriction of movement occurs through the confiscation of passports, visas, and identification documents, if any of these documents even exist.⁷⁹ Traffickers frequently

⁷⁴ *Ibid.*

⁷⁵ *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964)

⁷⁶ *Dying to Leave: Business of Human Trafficking – Trafficking Routes*, PBS: WIDE ANGLE LENS (Sept. 25, 2003), <http://www.pbs.org/wnet/wideangle/episodes/dying-to-leave/business-of-human-trafficking/trafficking-routes/1428/>

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Trafficking in Persons Report* (2012) *supra*. note 19, at 17

accompany their victims, and insist on answering questions and translating for the victims.⁸⁰ Other victims are isolated and required to both work and live in the same location, making the victim's exposure to the public and outside world essentially nonexistent.⁸¹ Often, those living conditions come with restricted access to food and clothing, zero access to hospitals and proper medical care, and deprivation of sleep.⁸² Many victims are told that in exchange for the opportunity to work, they are being charged an insurmountable fee that their work is being used to pay down.⁸³ Frequently, victims work long hours with no days off for little, if any, pay.⁸⁴ This results in physical and emotional trauma, furthering victims' sense of defenselessness.

Sometimes this trauma can result in Stockholm syndrome, causing a bonding to the trafficker that perpetuates the trafficking.⁸⁵ Stockholm syndrome is "the psychological tendency of a hostage to bond with, identify with, or sympathize with his or her captor."⁸⁶ This can cause victims to be psychologically incapable of freeing themselves from their captors. Fear also takes hold of victims, causing them to worry for their own health and safety, avoiding arrest, or harm to their loved ones.⁸⁷ Language and social barriers, combined with distrust of law enforcement, creates impossible barriers for many victims.⁸⁸ Traffickers take advantage of this by

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ POLARIS PROJECT, *In their Shoes: Understanding Victims' Mindsets and Common Barriers to Victim Identification*, available at <http://www.polarisproject.org/resources/resources-by-topic/human-trafficking> (last visited Dec. 5, 2012)

⁸⁶ Stockholm Syndrome – Definition, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/stockholm%20syndrome> (last visited Dec. 5, 2012)

⁸⁷ POLARIS PROJECT, *In their Shoes: Understanding Victims' Mindsets and Common Barriers to Victim Identification*, available at <http://www.polarisproject.org/resources/resources-by-topic/human-trafficking>

⁸⁸ *Ibid.*

“brainwashing” victims into a false distrust of government and government agents, usually through threats of arrest or deportation.⁸⁹

Manipulation of victims through document confiscation is exemplified in the case of *Ramos-Madrigal v. Mendiola Forestry Service, LLC*, where the plaintiffs were Mexican workers hired to work in Arkansas.⁹⁰ Once in Arkansas, the employers confiscated and concealed the workers H-2B visa extension documents and informed the plaintiffs that if they attempted to leave immigration authorities would be informed.⁹¹ The court held that these allegations were sufficient to support a claim under the TVPA statutory framework.⁹² The actions of the employer demonstrate how a fear of deportation and of the immigration authorities, who in actuality are the people trying to help these victims, is a powerful and effective means of controlling the victims of human trafficking.

The TVPA is largely reactionary in nature. The next section discusses a major way in which the TVPA is reactionary while still being useful through the vulnerable victim enhancement penalties. The enhancement penalties serve as a trebled punishment for traffickers,. Unfortunately, as will be discussed, this does little in the way of taking proactive measures against human trafficking, as the statute requires someone to actually be trafficked for their desired effect to take place.

⁸⁹ *Ibid.*

⁹⁰ *Ramos-Madrigal v. Mendiola Forestry Serv., LLC*, 799 F. Supp. 2d 958, 959 (W.D. Ark. 2011)

⁹¹ *Ibid.*

⁹² *Id.* at 960

e. The Vulnerable Victims Enhancement Penalties and the Invisible Victims

While the TVPA does not provide enough of a proactive framework, one area in which the TVPA appears to succeed is in its reactionary programs. One way in which the reactionary nature of the TVPA is useful is the implementation of vulnerable victim enhancement penalties. This section will explore cases applying these enhancements. Unfortunately, the only relief offered by the TVPA is after the trafficking has already occurred. As will be shown, the victims must have been subject to trafficking in order for these protections to apply, making them purely reactionary in nature.

The major difference between smuggling and human trafficking under the TVPA is that human trafficking under the TVPA requires proof of coercion, an element of involuntariness. A broad range of circumstance, however, satisfies the requirement of proof of coercion. This can be seen in the Eleventh Circuit case *United States v. Warren*.⁹³ Various forms of coercion include holding someone in involuntary servitude, or the use of or threatened use of physical force to create a “climate of fear.”⁹⁴ This assists in broadly applying the TVPA to many cases, and allows for judicially attacking trafficking.

The United States Supreme Court in *United States v. Kozminski* held that the standards for proving coercion may be affected by the specific victim’s “special vulnerabilities,” such as age or degree of physical or legal coercion.⁹⁵ This creates enhanced penalties for offenders known as the vulnerable victim enhancement doctrine.

⁹³*United States v. Warren*, 772 F.2d 827 (11th Cir. 1985)

⁹⁴*Id.* at 833-34

⁹⁵*United States v. Kozminski*, 487 U.S. 931, 948 (1988)

i. *United States v. Sabhnani*

In *United States v. Sabhnani*, the Second Circuit was forced to decide a case of peonage involving two Indonesian women brought to the United States illegally and forced into labor as maids. The Court also decided how the TVPA applies the vulnerable victim enhancement doctrine of enhanced penalties for offenders.⁹⁶

One of the maids agreed to come to the United States to work for the defendant as a domestic servant from 2002-2007, even though her visa expired in 2002.⁹⁷ The agreed upon wage was \$200 per month.⁹⁸ The maid was told that salary was being paid to her daughter who remained in Indonesia.⁹⁹ In reality, the daughter only received half of that, and the maid herself received nothing.¹⁰⁰ The maid was responsible for cooking, cleaning, laundry, and chores, and was forced to sleep on the carpet outside of the children's bedrooms, then later on a mat in the kitchen.¹⁰¹ She was often beaten, and had boiling water thrown on her at least three times as punishment, in addition to being provided very little food.¹⁰² In 2005, a second Indonesian woman, who did not speak English and had very little formal education, was brought to the house as a domestic servant.¹⁰³ This second servant was subject to the same conditions as the first and, at one point, was forced to stand in place for ten hours after being accused of stealing a couple pieces of chocolate.¹⁰⁴

⁹⁶ *United States v. Sabhnani*, 599 F.3d 215 (2d. Cir. 2010)

⁹⁷ *Id.* at 225

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Id.* at 226

¹⁰³ *Id.* at 227-228

¹⁰⁴ *Ibid.*

In addressing the applicability of the vulnerable victim enhancement doctrine, the Second Circuit acknowledged the TVPA’s congressional findings that most victims of human trafficking are vulnerable victims, stating that “[victims of human trafficking are often taken] from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable.”¹⁰⁵ The court details further findings that victims of human trafficking are often “unfamiliar with the laws, cultures, and languages of the countries in which they have been trafficked because they are often subjected to coercion and intimidation including physical detention and debt bondage.”¹⁰⁶ Compounded with problem of coercion is the issue that victims of human trafficking do not report these crimes to the authorities because of “fear [of] retribution and forcible removal to countries in which they will face retribution or other hardships...”¹⁰⁷ Importantly though, the Second Circuit concluded that the TVPA does not explicitly incorporate “vulnerability” into the definition of “victim”, and therefore victim vulnerability is assessed on a per case basis.¹⁰⁸

In the case of the Indonesian women, the court found that they were vulnerable victims under the vulnerable victim enhancement doctrine since neither of the women spoke English, neither had ever been in the U.S. before, both were completely dependant on the defendants for basic needs, and neither received direct payment for their services.¹⁰⁹

¹⁰⁵ *Id.* at 253 quoting TVPA, Pub. L. No. 106-386, § 102(b)(5), 114 Stat. 1464 (2000)

¹⁰⁶ *Id.* at 254 quoting TVPA § 102(b)(20)

¹⁰⁷ *Ibid.*

¹⁰⁸ *Id.* at 255

¹⁰⁹ *Ibid.*

Unfortunately, the application of the vulnerable victim enhancement doctrine only meant increased punishment for the offender. As this case shows, victims have already endured traumatic experiences by the time this doctrine comes into play.

ii. *United States v. Dann*

The Ninth Circuit explored similar penalty enhancements in the case *United States v. Dann*.¹¹⁰ The defendant, Dann, was an American of Peruvian descent who arranged for a woman to travel from Peru to the United States under fraudulent visas to serve as a nanny and a housekeeper.¹¹¹ At the time, Dann was unemployed and going through a divorce. Once the woman, Peña, arrived in the United States, Dann took her passport from her, forbade her from speaking with anyone outside of the home, and did not pay her for two years.¹¹² Dann repeatedly threatened to send Peña back to Peru.¹¹³ When Peña finally agreed, she was told she owed Dann \$8,000 because she had only worked off \$7,000 of the \$15,000 worth of “expenses” Dann paid to acquire her.¹¹⁴ Further, Dann requested that Peña sign a false statement that she was being paid minimum wage for her labor.¹¹⁵ This document was found along with Peña’s passport and identification by Immigration and Customs Enforcement (“ICE”) agents.¹¹⁶

While in America, Peña suffered the exact manipulating, abhorrent, and invisible conditions that many others in her situation face. Before being brought into the United States,

¹¹⁰ *United States v. Dann*, 652 F.3d 1160, 1162 (9th Cir. 2011)

¹¹¹ *Id.* at 1162

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

Dann wrote letters to Peña about coming to work for her.¹¹⁷ One letter included an order not to tell anyone in her family about the plan.¹¹⁸ Upon arrival, Peña slept on the floor of Dann's mother's house, where Dann also seized Peña's passport.¹¹⁹ Eventually, the two moved into a two-bedroom apartment along with Dann's three children.¹²⁰ Peña slept on the floor, in the corner of the living room, and was promised pay that never came.¹²¹ The court details Peña's schedule, which "worsened" over time:

[The] workday began at 6:00 a.m. when she made breakfast for Dann and the boys. Once the boys were off to school, she had until noon to clean the apartment, do laundry and ironing, and prepare lunch. At about 12:30 p.m., she walked thirty minutes to the twins' school to pick them up. She would feed them lunch and then supervise their homework until the elder son came home. She would take the children out to play, feed them dinner at 6:00 p.m., and then get them ready for bed at 8:00 p.m. After the children were asleep, she would tidy the house before retiring at about 10:00 p.m.¹²²

Eventually, Peña was banned from leaving the apartment without permission.¹²³ If company came over, Peña was forced to hide in the gym of the apartment complex.¹²⁴ Peña was told not to talk to anyone because Dann feared she would mention "the things here at home," and the property manager testified that Dann instructed the Spanish speaking personnel not to talk with Peña.¹²⁵ Eventually, Dann started restricting Peña's food intake through measuring and

¹¹⁷ *Id.* at 1164

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Id.* at 1164-65

¹²³ *Id.* at 1165

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

counting, and forbade eating fruit or drinking tea without permission to make sure Peña “was not eating more than her ration.”¹²⁶

After a particularly heated argument, Peña stood up to Dann and said she wanted to go home, which was met by Dann grabbing her by the neck.¹²⁷ Dann also frequently insulted Peña, calling her a “little girl,” a “shit,” and a “peasant.”¹²⁸ When Peña was asked why she stayed with Dann, she testified that she did not trust anyone in the United States and had nowhere to go, that Dann had her passport, that Dann was accusing her of taking her money, and that the children were her responsibility.¹²⁹ After being helped to escape by a few Spanish speakers in the school community who discovered her plight through brief conversations, Dann wrote to her sister in Peru that “[Peña] escaped, got away, left.”¹³⁰ Here, the court found that the totality of the situation created by Dann was enough to compel Peña to remain in her employ, and constituted a “serious harm” under the TVPA.¹³¹ This led to enhancements of Dann’s penalties and punishments.

Each of these cases exemplifies the harsh conditions suffered by hundreds of thousands of trafficking victims daily.

III. National Security Interests

The intricate web of problems created by human trafficking is not limited to the victims of human trafficking. Included among the multitude of problems is the direct and indirect threats

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Id.* at 1165-66

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Id.* at 1171

to our national security. The TVPA can only do so much as it is drafted in combating human trafficking. It is indisputable that the enhancement penalty doctrines and the available programs benefit the victims of human trafficking. As discussed above, though, by the time the TVPA is triggered, the trafficking and exploitation has already occurred. The victims have already suffered and the physical and emotional damage is done. If the American public became more acutely aware of the dangers and implications of human trafficking domestically, many problems could be reduced.

Acting preventatively by increasing the public awareness of human trafficking is undoubtedly a benefit to all trafficking victims. But, awareness serves a two-fold purpose. Human traffickers often are, or have close ties to, various non-state actors who pose threats to the security of the United States. Human traffickers have the knowledge and skill set to act as smugglers, drug runners, and terrorist transporters, serving to destabilize the United States. Increasing public awareness can serve to protect and assist the victims of human trafficking while at the same time bolstering the nation's homeland security interests.

Understanding the seemingly palpable nature of increasing public awareness, consider the New York/New Jersey Port Authority ("PATH") campaign to combat terrorism. At all of the PATH stations in New York and New Jersey, frequent announcements and ubiquitous posters, telling passengers that if they "see something" suspicious, they should "say something" to the police, can be found. The PATH is a major transportation hub into New York City, and would very likely be a high value target for somebody interested in damaging America's infrastructure.

The seemingly obvious policy "see something, say something" works for a major transportation hub because the thousands of passengers become the front line in combating

terrorism. The same concept can be applied to combating human trafficking. Yes, increasing public awareness is an important preventive measure for victims. But, it is also important to those of us who are not victims of human trafficking.

The reason increased awareness helps those of us who are not victims of human trafficking is that the environment surrounding many traffickers is toxic and threatening in other ways. Many Americans do not associate human trafficking with transnational gangs, drug trafficking, or terrorism. However, human trafficking is intrinsically linked with “money laundering, document forgery, drug trafficking, and international terrorism.”¹³² International criminal organizations are attracted by the profit margins and large market value of the trade.

Links between trafficking and terrorism have been made globally, including to the al-Qaeda terrorist network.¹³³ Human smuggling and trafficking into the United States has been identified as a “significant risk to national security and public safety” by John P. Torres, then the Deputy Assistant Director for Smuggling and Public Safety at ICE, in statements to the House Judiciary subcommittee on immigration and border security.¹³⁴ Mr. Torres points out that terror groups and those who wish to inflict harm on American soil can take advantage of the cross border pipelines used to sneak people into the country.¹³⁵ This means any number of terrorists could enter into the country, not under false papers, but through underground channels completely undetected. Those terrorists wishing to enter with false papers could do so as well

¹³² Allred, Keith J., *Human Trafficking: Breaking the Military Link*, CONNECTIONS: THE QUARTERLY JOURNAL, 63-64 (vol. IV no. 4, Winter 2005), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Fhawk.ethz.ch%2Fserviceengine%2Ffiles%2FISN%2F22801%2Fchaptersection_singledocument%2F79291872-7308-4dc3-931f-e7f6f5f777f2%2Fen%2F6_Allred_Militarylink.pdf&ei=6Q-dUPK-PMeQ0QG9n4HgDw&usq=AFQjCNFMf-EaTio-TRsZxD-2fuqudvF79A

¹³³ Vardi, Nathan, *Al-Qaeda's New Business Model: Cocaine and Human Trafficking*, FORBES (Dec. 8, 2009 5:05 PM), <http://www.forbes.com/2009/12/18/al-qaeda-cocaine-business-beltway-al-qaeda.html>

¹³⁴ *Human Smuggling a Security Risk*, THE WASHINGTON TIMES (May 18, 2004), <http://www.washingtontimes.com/news/2004/may/18/20040518-103934-8980r/>

through these groups. In addition, the immense profits made in the human slave trade end up back with the criminal organizations engaging in trafficking, allowing these networks to “grow stronger, more resilient, and more dangerous.”¹³⁶

Those who traffic in humans also traffic in drugs and weapons.¹³⁷ Once the trafficking routes are established, along with the infrastructure to carry out the acts, the manner in which traffickers can move drugs, weapons, or terrorists into the United States becomes identical.¹³⁸ Intelligence from 2005 indicated that al-Qaeda planned to infiltrate the United States through Mexico.¹³⁹

Of immediate concern is ties made between al-Qaeda and the Mexican gang Mara Salvatrucha, known as “MS-13.”¹⁴⁰ Former Assistant Director of the FBI’s Office of Intelligence Steven McCraw and current Director of the Texas Department of Public Safety points out that this relationship allows terrorists to move freely into the United States without triggering name-based watch lists.¹⁴¹ MS-13 is one of the most violent and dangerous transnational gangs in the world, is engaged in trafficking,¹⁴² and a synergistic relationship with al-Qaeda makes both organizations direct threats to the American public.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Haynes, Dina Francesca, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 FED. IMMIGR. L.J. 337, 362 (2007).

¹³⁸ *Ibid.*

¹³⁹ *The World Wide Threat: Hearing Before the S. Select Comm. On Intelligence*, 109th Cong. (2005) (statement of Admiral James M. Loy, Deputy Secretary, U.S. Dep’t of Homeland Security), available at http://www.fas.org/irp/congress/2005_hr/021605loy.pdf

¹⁴⁰ Prabhakar, Hitha, *Organized Retail Crime Goes Global*, FINANCIAL TIMES, 5 (December 8, 2011) <http://www.ftpress.com/articles/article.aspx?p=1768313&seqNum=5>

¹⁴¹ *Ibid.*

¹⁴² LaFranchi, Howard, *MS-13 Labeled Transnational Criminal Group, a First for US Street Gang*, THE CHRISTIAN SCIENCE MONITOR (October 12, 2012), <http://www.csmonitor.com/USA/Foreign-Policy/2012/1012/MS-13-gang-labeled-transnational-criminal-group-a-first-for-US-street-gang>

Proactive, preventative measures are one of the best ways to combat this threat, as opposed to the largely reactive measures in place now. An informed and aware American public can work to achieve this end. Just as the American public is at the front lines against terror attacks, the American public is at the front lines against human trafficking. Further, the connections between human trafficking and terror made the American public's interest in combating this scourge two fold.

IV. Recommendations

This paper argues that the largely reactive nature of the TVPA is insufficient to help victims in preventing human trafficking. The paper further argues that because of the intrinsic ties between human trafficking and transnational criminal and terrorist organizations, coupled with the recognition by our government on various levels that national security is threatened by human trafficking, a more proactive approach needs to be taken.

The first proactive step is raising the public awareness. Today, many Americans “are still ignorant to the fact that there are tens of thousands of slaves held captive in the United States at a given moment.”¹⁴³ Abroad, awareness campaigns should be launched about the dangers of dealing with employment opportunities offered in America.¹⁴⁴ Most importantly, these campaigns should encourage women to seek help from American authorities if they find themselves in such a situation.¹⁴⁵

At home, campaigns should be launched by Federal and State governments, in conjunction with NGOs and lobbying organizations, to heighten the public awareness. Such

¹⁴³ Tavano, Maria, *Trafficking in Persons: A Focus on Preventing Forced Labor*, 32 WOMEN'S RTS. LAW REPORTER 324, 346 (2011).

¹⁴⁴ *Ibid.*

campaigns have been successful for tobacco and, to a lesser extent, drugs. Blunt, direct, and informative commercials providing a contact number during primetime viewing hours on nationally syndicated channels will reach the desired effect. In light of President Obama's Fall 2012 remarks, this sort of campaign could probably find willing support from the executive branch. This is one of the few national issues that is beyond bipartisanship, and undoubtedly will find widespread support on both sides of the aisle.

The second proactive measure involves attacking the issue at the source. Mexico and the United States are already dealing with transnational gangs dominating the border. One way to hurt these gangs most is through their wallet, and beginning interdictionary task forces targeted at human trafficking can work this end. A war is already raging between the gangs and the combined effort of both governments, played out almost daily in the news. The CIA, FBI, Joint Special Operations Command, and the Border Patrol should begin joint efforts with their sister Mexican agencies and militaries and begin targeted attacks on routes and major trafficking players.

Similar to anti-insurgent combat in Afghanistan, the combination of brains from the intelligence agencies and brawn from the militaries can begin to attack the bottom line of the gangs. This proactive action will work to save countless victims of human trafficking, help stabilize our borders, combat terrorism, and assist in the war on drugs. Human trafficking victim's personal security and our national security are the same.

¹⁴⁵ *Ibid.*