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Disparate Protections for American Human Trafficking Victims

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DISPARATE PROTECTIONS FOR AMERICAN HUMAN TRAFFICKING VICTIMS

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I.	INTRODUCTION	2
II.	THE TRAFFICKING VICTIMS PROTECTION ACT: CARROTS AND STICKS	4
	<i>A. The 3-P Paradigm and Protection.....</i>	9
III.	PROTECTIONS OFFERED TO INTERNATIONAL HUMAN TRAFFICKING VICTIMS IN THE UNITED STATES	12
IV.	FEDERAL PROTECTIONS OFFERED TO AMERICAN HUMAN TRAFFICKING VICTIMS IN THE UNITED STATES	16
	<i>A. Exclusion from TVPA-Funded Protections</i>	18
	<i>B. Limitations on Federal Protection Grants for Domestic Victims</i>	19
	<i>C. Limitations on NGO Protections Offered to Domestic Victims</i>	23
V.	STATE PROTECTIONS OFFERED TO AMERICAN HUMAN TRAFFICKING VICTIMS IN THE UNITED STATES	25
	<i>A. Failure to Identify Trafficking Victims</i>	25
	<i>B. Arresting and Prosecuting American Trafficking Victims</i>	27
	<i>C. Inadequate Housing for American Victims</i>	33
	<i>D. Inadequate Services Available to American Victims</i>	36
VI.	IMPLICATIONS OF THE UNITED STATES'S TWO-TIER PROTECTION SYSTEM	40
VII.	CONCLUSION	45

* Associate Professor, South Texas College of Law. I would like to thank Professors Kathy Cerminara, Samuel Vincent Jones, Njeri Rutledge Mathis, and Fran Ortiz for comments on earlier drafts of this article, the SEALS Conference for giving me an opportunity and a forum to present this Article as a New Scholar, and Tommy Choi for his research assistance. Finally, I would like to thank my husband Bret and my children Simon, Faith, Isaac, and Samuel for their love, patience, and understanding while I worked on this Article.

I. INTRODUCTION

The Trafficking Victims Protection Act (TVPA) is designed to combat human trafficking in America and abroad.¹ Through the TVPA, human trafficking victims qualify for government protections and services if they are adults who are forced, tricked, or coerced into labor or commercial sexual trafficking or they are minors who are induced to perform commercial sex acts.² The United States is a destination country for victims trafficked into America from abroad.³ It is also a source country for human trafficking; some victims are trafficked in the American towns and cities where they were born.⁴ The United States government, through the TVPA, extends the right to be protected to both international and American citizen victims.

International victims who qualify for protections include individuals like the abused teenage girl from Cameroon who was discovered endlessly working for a couple in Michigan as a nanny and housekeeper without compensation⁵ and the Thai man found working on a farm in Hawaii picking fruit without pay despite contractual promises of a generous salary.⁶ Several American populations have also been identified as human trafficking victims. Homeless, African-American men were forced to pick oranges in Florida,⁷ permanent residents and qualified aliens were

¹ Trafficking Victims Protection Act, 22 U.S.C.A. § 7101(b)(14) (West 2012) (“Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice.”).

² 22 U.S.C.A. §§ 7102(8) and 7105(b)(1)(A) (West 2012).

³ Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 406-07 (2006).

⁴ DUREN BANKS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010 6 (Apr. 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf> (identifying Americans, permanent residents, qualified aliens, and temporary workers among those who were certified human trafficking victims).

⁵ See *United States v. Djoumessi*, 538 F.3d 547, 549-50 (6th Cir. 2008).

⁶ See Teresa Watanabe, *Thai Workers Describe Being Lured into Slavery in U.S.*, L.A. TIMES, Sept. 10, 2010, available at <http://articles.latimes.com/2010/sep/09/local/la-me-0909-slave-labor-20100909>. The overwhelming majority of foreign victims (78%) are victims of labor trafficking, while the rest (22%) are victims of sexual slavery or a combination of sexual and labor slavery. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS, FISCAL YEAR 2010 29 [hereinafter 2010 ATTORNEY GENERAL’S REPORT], available at http://www.justice.gov/ag/annual_reports/tr2010/agreporhumantrafficking2010.pdf. “Four-fifths of victims in confirmed sex trafficking cases were identified as U.S. citizens (83%), while most confirmed labor trafficking victims were identified as undocumented aliens (67%) or qualified aliens (28%).” BANKS & KYCKELHAHN, *supra* note 4.

⁷ ANTHONY M. DEStEFANO, THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED 31 (2007) (detailing the plight of African-American homeless men who were trafficked for their labor in Florida orange groves). Men are victims of human trafficking more often than most people realize. In the United States, of the international victims who qualify to receive federal assistance, more men have been identified as trafficking victims than women, and ninety percent of all foreign trafficking victims are adults. 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 32 (reporting that in 2010, of the certified victims eligible to receive federal benefits, 57% were male and 43% were female).

identified as both labor and sexual trafficking victims in recent government reports,⁸ Native American women and girls were used in sex trafficking rings in several mid-western and north-western states,⁹ and American adults, boys, and girls have been recognized as sexual trafficking victims.¹⁰

The federal government places victims, for the purpose of receiving protections, into two categories: first, international victims and second, American citizens or permanent residents.¹¹ If an international trafficking victim qualifies to receive services as a result of having been trafficked, the United States will provide refugee-like protections through the TVPA.¹² These protections include housing, food, cash assistance, job training, counseling, medical care, legal assistance, and other services that are available for a period of several years.¹³ Victims who are Americans, on the other hand, must find protection elsewhere. The United States government specifically excludes its own trafficked citizens from receiving federally-funded TVPA protections.¹⁴ Though the United States government recognizes that there is a disparity in the services and protections offered to Americans,¹⁵ it has yet to provide

⁸ OFFICE OF SAFE & DRUG-FREE SCHOOLS, U.S. DEP'T OF EDUC., HUMAN TRAFFICKING OF CHILDREN IN THE UNITED STATES: A FACT SHEET FOR SCHOOLS (Dec. 17, 2010), *available at* <http://www2.ed.gov/about/offices/list/osdfs/factsheet.html> (“An unknown number of U.S. citizens and legal residents are trafficked within the country primarily for sexual servitude and, to a lesser extent, forced labor.”) (last modified December 17, 2010); BANKS & KYCKELHAHN, *supra* note 4.

⁹ Andrea L. Johnson, *A Perfect Storm: The U.S. Anti-Trafficking Regime's Failure to Stop the Sex Trafficking of American Indian Women and Girls*, 43 COLUM. HUM. RTS. L. REV. 617, 619-21 (2012) (stating that Alaska, Minnesota, Oregon, South Dakota, and Washington have investigated allegations of sex trafficking rings involving Native American women and girls and Minnesota identified 345 Native American sex trafficking victims over a three-year period).

¹⁰ BANKS & KYCKELHAHN, *supra* note 4 (identifying 83% of sex trafficking victims in the United States as Americans with the majority being female teenagers under the age of eighteen). American minors who are induced into commercial sex trafficking are more likely to be members of minority groups, come from impoverished households, and leave home before their primary or secondary education is complete. *Id.*; HEATHER J. CLAWSON ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 8-9 (Aug. 2009) [hereinafter HEALTH & HUMAN SERVICES LITERATURE REVIEW], *available at* <http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/index.shtml>.

¹¹ U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS, FISCAL YEAR 2007 20 (2007) [hereinafter 2007 ATTORNEY GENERAL'S REPORT], *available at* <http://www.justice.gov/archive/ag/annualreports/tr2007/agreporhumantrafficking2007.pdf>; 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6, at 28-29.

¹² Trafficking Victims Protection Act, 22 U.S.C.A. § 7105(b)(1)(A)-(B) (West 2012).

¹³ 2007 ATTORNEY GENERAL'S REPORT, *supra* note 11; 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6.

¹⁴ 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6, at 28.

¹⁵ *See, e.g.*, WILLIAM ADAMS ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, EFFECTS OF FEDERAL LEGISLATION ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 4 (July 2010) [hereinafter COMMERCIAL SEXUAL

a remedy. The purpose of this Article is to examine the protections both groups receive, highlight inconsistencies in federal law and the practical enforcement of the law, and discuss the implications of having a two-tier system of protection for human trafficking victims in America.

II. THE TRAFFICKING VICTIMS PROTECTION ACT: CARROTS AND STICKS

In order to understand the failings in America's two-tier approach, it is important to understand the requirements the TVPA places upon America and other nations when it comes to protecting trafficking victims. This section will provide background information on the TVPA, the Trafficking in Persons Report, and the element of protection.

The TVPA and its subsequent reauthorizations aim to prevent the trafficking of persons, increase penalties for traffickers, and protect victims of trafficking worldwide.¹⁶ The Act creates a collaborative network between American law enforcement agencies, other governmental agencies, and nongovernmental organizations (NGOs) in the fight against slavery.¹⁷ It strongly encourages foreign governments to do the same.¹⁸ As Kevin Bales, a noted expert on modern-day slavery has stated, "Governments can be encouraged to enforce their own laws in a number of ways, some involving carrots and some involving sticks."¹⁹ For human trafficking, the global carrot-and-stick approach comes via the Trafficking in Persons (TIP) Report, which is investigated,²⁰ reported, and authorized through the United States government.²¹

EXPLOITATION STUDY], *available at* <https://www.ncjrs.gov/pdffiles1/ojdp/228631.pdf> ("U.S. citizen and foreign . . . victims are treated differently when they are identified, characterized, and offered services."); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2012 363 [hereinafter 2012 TIP REPORT], *available at* <http://www.state.gov/j/tip/rls/tiprp/2012/index.htm> (recognizing a failure to serve all types of human trafficking victims equally and an inability to offer the same kind of comprehensive care to all victims of human trafficking).

¹⁶ 22 U.S.C.A. § 7101(a) (West 2012).

¹⁷ 22 U.S.C.A. §§ 7103 and 7106 (West 2012).

¹⁸ 22 U.S.C.A. § 7106 (West 2012).

¹⁹ KEVIN BALES, *ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES* 19 (2007).

²⁰ The U.S. State Department employs several individuals who work full-time on investigating and preparing the TIP Report. *About Us*, OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/about/index.htm> (last visited Jan. 26, 2013). The State Department also relies on information provided by U.S. embassy staff employees, foreign law enforcement intelligence, foreign government reports, liaison officers, journalists, nongovernmental organizations (NGOs), and victims of human trafficking. DEStEFANO, *supra* note 7, at 119; U.S. DEP'T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 4 (2001), *available at* <http://www.state.gov/documents/organization/4107.pdf>.

²¹ 22 U.S.C.A. § 7107(b)(1) (West 2012) (mandating a globally-focused annual report by the Secretary of State be compiled regarding severe forms of human trafficking); 22 U.S.C.A. § 7106 (West 2012) (stating that countries of origin, transit, or destination must demonstrate that they are making efforts to reduce and eradicate human trafficking). The office responsible for producing the annual TIP Report is the U.S. Department of State's Office to Monitor and Combat Trafficking in Persons. Kelly Hyland Heinrich, *Ten Years After the*

The TIP Report is a lengthy document released every June that grades other nations' efforts in their fight to end modern slavery. First released in 2001, a year after the TVPA's enactment,²² it includes victims' stories, global law enforcement data, international law provisions, the United States's annual goals in the fight against human trafficking, narratives that explain the trafficking problems, successes, and failures in countries worldwide, and much more.²³ Its authorization is grounded in sections of the TVPA that define how countries should attempt to end human trafficking and the consequences for their failure to do so.²⁴

Congress formulated minimum guidelines regarding international expectations on the fight against human trafficking²⁵ because it believed that a lack of international attention and the failure of nations to arrest and prosecute traffickers increased incidents of human trafficking.²⁶ These minimum guidelines apply to all nations, regardless of whether they are source, transit, or destination countries for human trafficking.²⁷ Countries are required, at a minimum, to prohibit slavery, punish traffickers, punish severe forms of trafficking more harshly, and attempt to eliminate all forms of modern-day slavery.²⁸ Those who fail to comply face sanctions from the United States government.

Congress instructs the President to withhold "nonhumanitarian, nontrade-related foreign assistance"²⁹ from countries that fail to meet the minimum standards set by

Palermo Protocol: Where are Protections for Human Trafficking Victims, 18 NO. 1 HUM. RTS. BRIEF 2, 2 (2010).

²² *Trafficking in Persons Report*, U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/rls/tiprpt/index.htm> (last visited Jan. 26, 2013).

²³ See generally 2012 TIP REPORT, *supra* note 15.

²⁴ See, e.g., 22 U.S.C.A. § 7106 (West 2012) (allowing the collection of human trafficking information from abroad); 22 U.S.C.A. § 7107 (West 2012) (creating a mechanism for ranking countries' performance in the fight against modern-day slavery); 22 U.S.C.A. § 7109b (West 2012) (recognizing heroes in the fight against human trafficking).

²⁵ 22 U.S.C.A. § 7103 (West 2012) (permitting the U.S. government to monitor other countries' progress on the global fight against human trafficking).

²⁶ DEStEFANO, *supra* note 7, at 14-15.

²⁷ 22 U.S.C.A. § 7106(a) (West 2012). A source country is the country of origin for the victim. The destination country is the country where the victim ends up—usually where he or she is bought (if that did not occur in the country of origin) and sold. Transit countries are those that victims travel through to reach destination countries.

²⁸ *Id.*

²⁹ According to the TVPA,

[t]he term "nonhumanitarian, nontrade-related foreign assistance" means—

(A) any assistance under the Foreign Assistance Act of 1961 [22 U.S.C. § 2151 et seq.], other than—

- (i) assistance under chapter 4 of part II of that Act [22 U.S.C. § 2346 et seq.] in support of programs of nongovernmental organizations that is made available for any program, project, or activity eligible for assistance under chapter 1 of part I of that Act [22 U.S.C. § 2151 et seq.];

the TVPA.³⁰ The Act also permits the U.S. to withhold government employees' participation in educational and exchange programs and to oppose assistance from

-
- (ii) assistance under chapter 8 of part I of that Act [22 U.S.C. § 2291 et seq.];
 - (iii) any other narcotics-related assistance under part I of that Act [22 U.S.C. § 2151 et seq.] or under chapter 4 or 5 [FN1] part II of that Act [22 U.S.C. §§ 2346 et seq., 2347 et seq.], but any such assistance provided under this clause shall be subject to the prior notification procedures applicable to reprogrammings pursuant to section 634A of that Act [22 U.S.C. § 2394-1];
 - (iv) disaster relief assistance, including any assistance under chapter 9 of part I of that Act [22 U.S.C. § 2292 et seq.];
 - (v) antiterrorism assistance under chapter 8 of part II of that Act [22 U.S.C. § 1349aa et seq.];
 - (vi) assistance for refugees;
 - (vii) humanitarian and other development assistance in support of programs of nongovernmental organizations under chapters 1 and 10 of that Act;
 - (viii) programs under title IV of chapter 2 of part I of that Act [22 U.S.C. § 2191 et seq.], relating to the Overseas Private Investment Corporation; and
 - (ix) other programs involving trade-related or humanitarian assistance; and
- (B) sales, or financing on any terms, under the Arms Export Control Act [22 U.S.C. § 2751 et seq.], other than sales or financing provided for narcotics-related purposes following notification in accordance with the prior notification procedures applicable to reprogrammings pursuant to section 634A of the Foreign Assistance Act of 1961 [22 U.S.C. § 2394-1].

22 U.S.C.A. § 7102 (7)(A)-(B) (West 2012).

³⁰ 22 U.S.C.A. § 7102 (West 2012) (defining what types of foreign aid can and cannot be withheld from countries that refuse to meet minimum requirements set by the U.S. Congress); 22 U.S.C. § 7103 (2012) (giving the President power to create an executive committee to monitor anti-trafficking measures in other countries); 22 U.S.C.A. § 7104 (West 2012) (creating economic alternatives to prevent and deter trafficking in other countries); 22 U.S.C.A. § 7106 (West 2012) (listing the minimum requirements for countries to be in good standing for attempting to combat human trafficking violations); 22 U.S.C.A. § 7107 (West 2012) (requiring the Secretary of State to provide Congress findings on the compliance of lack thereof of countries' efforts in ending human trafficking). The TVPA requires the Secretary of State to collect data to determine whether the number of trafficked persons has increased or decreased in the last year and to determine whether traffickers are being prosecuted and punished for their crimes. 22 U.S.C.A. § 7106(b) (West 2012). Nations are given assistance—in the form of guidance and economic assistance—to help them meet the minimum requirements. Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RES. J. INT'L L. 249, 271 (2007).

the International Monetary Fund (IMF) and a number of global banks.³¹ These consequences can have devastating effects on countries that rely upon outside monetary support.³²

In order to determine which countries are at risk of losing monetary aid, Congress established a three-tier system that ranks anti-trafficking efforts abroad.³³ According to the TVPA, first-tier countries are those that have made efforts to comply with the Act's minimum requirements.³⁴ Second-tier countries are those whose governments are not currently, but are attempting to be in compliance with the TVPA.³⁵ The second-tier watch list, which was included for the first time in the 2004 TIP Report³⁶ and later codified in the TVPA,³⁷ includes countries that have fallen in rank in the past year, those whose trafficking victims have increased in number, those with decreased prosecutions of traffickers or protections offered to victims, or those who made pledges to comply with minimum standards, but failed to do so over the last year.³⁸ Finally, third-tier countries are those whose governments are not in compliance or are not making significant efforts to be in compliance with the minimum requirements.³⁹ Countries in this third-tier category are those at risk of receiving financial sanctions.⁴⁰

³¹ 22 U.S.C.A. § 7107(d)(1)(B) and (d)(6) (West 2012). Other countries were given two years to comply with the minimum standards before they were sanctioned for the first time in 2003. Tiefenbrun, *supra* note 30, at 268.

³² Of concern to some is the potential economic or resource devastation that innocent citizens of sanctioned countries might suffer. In fact, one of the sponsors and drafters of the TVPA, Senator Paul Wellstone, was adamantly opposed to the President and Congress attaching any mandatory, sweeping, economic sanctions to countries with lackluster anti-trafficking records. DEStEFANO, *supra* note 7, at 34-35. This was primarily because he thought poor citizens in underperforming countries would pay a higher price than their sanctioned governments. *Id.* The President may, however, waive these sanctions if their implementation adversely affects populations in countries who would consequently be more vulnerable to becoming enslaved. 22 U.S.C.A. § 7107(d)(5)(B) (West 2012). A waiver can also be made once a country comes into compliance with the minimum standards set out in the TVPA. 22 U.S.C.A. § 7107(d)(3) (West 2012).

³³ 22 U.S.C.A. §§ 7106 and 7107 (West 2012).

³⁴ 22 U.S.C.A. § 7107(b)(1)(A) (West 2012).

³⁵ 22 U.S.C.A. § 7107(b)(1)(B) (West 2012).

³⁶ DEStEFANO, *supra* note 7, at 124.

³⁷ 22 U.S.C.A. § 7107 (b)(3) (West 2012).

³⁸ 22 U.S.C.A. § 7107 (b)(3)(A) (West 2012). Countries that have been included on the special watch list for two consecutive years will subsequently be placed on the third-tier list. 22 U.S.C.A. § 7107 (b)(3)(D) (West 2012).

³⁹ 22 U.S.C.A. § 7107 (b)(1)(C) (West 2012).

⁴⁰ The President of the United States may exercise some grace in this rankings system towards countries that are trying to end human trafficking but are not successful. For example, countries can receive a waiver if they have a written plan to end slavery that would be successful if implemented and are devoting significant resources towards the battle. 22 U.S.C.A. § 7107 (b)(3)(D)(ii) (West 2012). They may receive this waiver from the President with approval by both the Senate's Committee on Foreign Relations and the House's Committee on Foreign Affairs. *Id.* This type of waiver is evidenced in the 2011 TIP Report

This carrot-and-stick approach seems to work.⁴¹ The first TIP Report, released in 2001, placed twelve countries in the first tier, forty-seven in the second tier, and twenty-three in the third tier.⁴² The following year, several countries in the second and third tiers moved up in the rankings.⁴³ The report has motivated some countries to comply with the TVPA's minimum standards.⁴⁴ Over the years, the number of first-tier countries has grown and the number of third-tier countries has decreased.⁴⁵

by the notation "Special Case" for the following countries: Cote d'Ivoire, Haiti, and Somalia. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2011, TIER PLACEMENTS (2011) [hereinafter 2011 TIP REPORT], <http://www.state.gov/j/tip/rls/tiprpt/2011/164228.htm>.

⁴¹ U.S. SEC. OF STATE HILLARY RODHAM CLINTON'S, U.S. DEP'T OF STATE, REMARKS AT THE RELEASE OF THE 2012 TRAFFICKING IN PERSONS REPORT (June 19, 2012), <http://www.state.gov/secretary/rm/2012/06/193368.htm> (stating that twenty-nine countries had moved up the tier lists in 2012 from the previous year); Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop it Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 330, 347-48 (2005) (suggesting that before the TVPA's enactment, human trafficking incidents rose with a low level of prosecutions but after its enactment, prosecutions and protections have steadily increased).

⁴² U.S. DEP'T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT, JULY 2001 15 (July 2001), available at <http://www.state.gov/documents/organization/4107.pdf>. The list included the following countries: Albania, Bahrain, Belarus, Bosnia-Herzegovina, Burma, Democratic Republic of Congo, Gabon, Greece, Indonesia, Israel, Kazakhstan, Lebanon, Malaysia, Pakistan, Qatar, Romania, Russia, Saudi Arabia, South Korea, Sudan, Turkey, United Arab Emirates, and the Federal Republic of Yugoslavia. *Id.* The first-tier countries numbered 12 while the second-tier countries numbered 47. *Id.*

⁴³ U.S. DEP'T OF STATE, 2002 TRAFFICKING IN PERSONS REPORT, TRAFFICKING IN PERSONS LISTS (June 5, 2002), <http://www.state.gov/j/tip/rls/tiprpt/2002/10678.htm> (18 in the first tier, 53 in the second tier, and 19 in the third tier).

⁴⁴ Tiefenbrun, *supra* note 30, at 276 (stating that frequent movement between tiers indicates the sanctions are having an effect on anti-trafficking activity abroad). It should be noted that the TIP Report not only shames countries that are falling short in the global war against human trafficking, but it also praises people and countries for their admirable efforts in the fight. For example, recent TIP Reports have included a list of individuals dubbed "heroes" who have made amazing strides in the battle against modern-day slavery. *See, e.g.*, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 42-44 (10 ed. June 2010) [hereinafter 2010 TIP REPORT], available at <http://www.state.gov/documents/organization/142979.pdf>. The 2010 report listed heroes in Mauritania, Uzbekistan, Mongolia, and Burundi among others. *Id.* The 2011 TIP Report listed a different set of heroes in countries like Bosnia and Herzegovina, Guatemala, Namibia, and Nepal, among others. 2011 TIP REPORT, *supra* note 40, at 46-49.

⁴⁵ *See, e.g.*, U.S. DEP'T OF STATE, 2006 TRAFFICKING IN PERSONS REPORT, TIER PLACEMENTS (June 5, 2006), <http://www.state.gov/j/tip/rls/tiprpt/2006/65985.htm> (listing 26 countries in the first tier and 12 in the third tier). Some countries in the third tier, who have a hostile relationship with the United States, do not provide information to the United States (e.g., Cuba, Iran, North Korea, Syria, and Venezuela) while others may not need or request any outside monetary aid and are therefore less threatened by sanctions (e.g., Saudi Arabia). *Id.*

The TIP Report and the ranking system have their critics.⁴⁶ For example, one observer said, “Throughout its history the United States has not been shy about behaving like a moral leader and using its clout and dollars to set an agenda. After passing the TVPA, the U.S. government used its bully pulpit to influence other nations’ efforts at dealing appropriately with trafficking.”⁴⁷ Another critic condemned the United States for taking a decade to include itself in the rankings,⁴⁸ the United States released nine TIP Reports before evaluating its own efforts at ending human trafficking.⁴⁹

Some nations’ anti-trafficking efforts may be motivated by fear of losing rank and financial support from the United States. Others may be motivated by the public shaming that comes from not doing enough.⁵⁰ Regardless, since the advent of the TIP Report, and possibly because of it, more countries have cooperated in the anti-trafficking campaign and have experienced a modicum of success in ending modern slavery. But the TVPA and TIP Report are not merely concerned with global rankings. They, along with international laws, establish global anti-trafficking policy.

A. The 3-P Paradigm and Protection

President Clinton, who signed the TVPA into legislation, his administration, the Act, and the United Nations’s Palermo Protocol⁵¹ created what has been dubbed “the

⁴⁶ See, e.g., Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1717-18 (2010) (suggesting that the demand for more U.S. dollars has encouraged deceitfulness or manipulation from service providers who assist international victims); Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 926 (2006) (“It is shameful that the United States has promulgated objectives for other countries to fight sex trafficking, but has failed to protect its own domestic juvenile prostitutes.”).

⁴⁷ DEStEFANO, *supra* note 7, at 118.

⁴⁸ Amanda Kloer, *2010 U.S. Trafficking Report Grades Self for First Time Ever*, CHANGE.ORG (June 15, 2010), <http://www.everydayjustice.net/2010/06/15/u-s-trafficking-report/> (asserting that the United States’s tier-one ranking is deserving and came about only because NGOs proud of America’s efforts pressured the country to rank itself).

⁴⁹ 2010 TIP REPORT, *supra* note 44, at 338-45 (showing the United States in the country narratives for the first time).

⁵⁰ See, e.g., BALES, *supra* note 19, at 111-13 (detailing Japan’s embarrassment at landing on the Tier 2 watch list in 2004 and its subsequent lukewarm attempts to resume its traditional Tier 2 placement).

⁵¹ The Palermo Protocol was initially a supplement to the United Nations Convention against Transnational Organized Crime entitled the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children. OFFICE OF DRUGS AND CRIME, UNITED NATIONS, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME & THE PROTOCOLS THERETO, iii, 41-51 (2004), [hereinafter CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME], available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>; Ankita Patel, *Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking*, 9 SEATTLE J. FOR SOC. JUST. 813, 815 (2011). Argentina and the United States were responsible for creating the first draft of the Palermo Protocol. DEStEFANO, *supra* note 7, at 19, 23; see also *id.* at 18-29 (describing the progression of the United States’s TVPA and its influence on the

three Ps:” prevention of human trafficking, prosecution of traffickers, and protection of trafficking victims.⁵² These three goals are core to the fight against modern slavery and are embedded in human trafficking rhetoric and laws.

Each element of the “3-P” paradigm⁵³ is included in anti-trafficking laws world-wide. The paradigm has been codified in the TVPA.⁵⁴ It is part of the U.N.’s Palermo Protocol,⁵⁵ which was the first modern-day international anti-trafficking convention.⁵⁶ The 3Ps have laid the foundation for anti-trafficking plans worldwide.⁵⁷ And they are heavily relied upon in the TIP Report to evaluate other countries’ efforts to end modern-day slavery.⁵⁸ Though prevention⁵⁹ and

Palermo Protocol). As of 2010, 141 countries had adopted the Palermo Protocol. Heinrich, *supra* note 21, at 2. The Palermo Protocol is not the only international law aimed at suppressing or preventing trafficking in humans. See Tiefenbrun, *supra* note 41, at 317-18, 327-28 for a brief discussion on other international conventions and protocols dedicated to ending modern slavery.

⁵² DEStEFANO, *supra* note 7, at xix.

⁵³ U.S. DEP’T OF STATE, THE 3PS: PREVENTION, PROTECTION, PROSECUTION (June 27, 2011), <http://www.state.gov/j/tip/rls/fs/2011/167228.htm>. A fourth “P” was added a decade after the first: partnership. See *infra* notes 289-94 and accompanying text.

⁵⁴ See, e.g., 22 U.S.C.A. § 7105 (West 2012) (requiring countries to create programs—through both nongovernmental organizations (NGOs) and through governmental efforts—to protect men, women, and children who have been trafficked after they have been victimized); 22 U.S.C.A. § 7104(b) (West 2012) (explaining among other efforts to prevent human trafficking, incentivizing countries to create “programs to increase public awareness, particularly among potential victims of trafficking, of the dangers of trafficking”); 22 U.S.C § 7109 (2012) (focusing on strengthening prosecution and punishment of traffickers).

⁵⁵ CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, *supra* note 51, at 43.

⁵⁶ Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 150 (2006). The Palermo Protocol has aided other nations in drafting their own anti-trafficking legislation. *Id.* (“In practice, the priorities set forth in the Palermo Protocol are mirrored in counter-trafficking law and policy initiatives undertaken across the globe.”).

⁵⁷ See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT: VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000 3 (2001), available at <http://www.state.gov/documents/organization/4107.pdf>.

⁵⁸ See, e.g., 2012 TIP REPORT, *supra* note 15, at 60.

⁵⁹ In order to prevent human trafficking, the TVPA encourages nations to offer microloans, encourage the growth of local business, allow girls to get an education, and encourage women to participate in making financial decisions. 22 U.S.C.A. § 7104 (West 2012). Other non-economic prevention methods include decreasing illegal border crossings and combating sex tourism. *Id.* The TIP Report lists the following prevention efforts: producing public awareness campaigns aimed at vulnerable populations; strengthening and protecting international labor markets; creating identification documents such as birth and marriage certificates in countries where they do not exist; and working with NGOs to identify ways to prevent human trafficking. *Prevention*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/4p/prevent/> (last visited Jan. 27, 2013).

prosecution⁶⁰ are critical to anti-trafficking efforts, protection is the focus of this article.

The protections victims qualify to receive through the TVPA are designed to restore trafficked persons from the horrors of their trafficking experience.⁶¹ They are also provided as a way of ensuring the victim, who may be susceptible to being trafficked again, is not re-victimized.⁶² In this way, the protection element is the humanitarian aspect of the paradigm.

Protection may apply to a human trafficking victim during several distinct stages during and after his or her identification. It can apply at the time of rescue, during the prosecution of traffickers, and when the victim is recovering from the trauma of having been trafficked.⁶³ Protection encompasses safe repatriation for foreign victims of trafficking and security for their families.⁶⁴ It includes all of the services and resources that victims need to heal and recover from the trauma of being trafficked.⁶⁵ And it shields victims from prosecution for criminal acts committed at the request of traffickers.⁶⁶

The 3-P paradigm affects policy, legislation, and the practical fight against modern-day slavery. While the United States has done an admirable job of crafting the paradigm, its protections have neglected American citizen victims. The next section will address how the United States has protected international victims trafficked to America.

⁶⁰ The minimum standards of the TVPA require that countries create laws to punish traffickers for their actions. 22 U.S.C.A. § 7106 (West 2012). The TVPA suggests that more egregious forms of trafficking be punished with harsher sentences. 22 U.S.C.A. § 7106(a)(2) (West 2012). Countries that fail to report data on the number of trafficking investigations, criminal trials, convictions, and sentences are presumed not to be adequately prosecuting traffickers. 22 U.S.C.A. § 7106(b)(1) (West 2012). Finally, nations are expected to extradite or allow extradition for known traffickers and strictly enforce immigration laws. *Id.*

⁶¹ Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 13 (2008).

⁶² Cherish Adams, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT'L L. REV. 201 (2011) (stating that the "failure to be treated as a victim and receive support causes many victims to be re-trafficked."); Johnson, *supra* note 9, at 691 (asserting that the lack of protections offered to Native American trafficking victims has resulted in some of them being re-trafficked).

⁶³ *Protection*, U.S. DEP'T OF STATE, <http://www.state.gov/j/tip/4p/protect/> (last visited Jan. 27, 2013).

⁶⁴ *Id.*

⁶⁵ *Id.* The Palermo Protocol identifies housing, medical and psychological care, counseling, living expenses, education, and job training as necessary services trafficking victims need. CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, *supra* note 51, at 44.

⁶⁶ 22 U.S.C.A. § 7105 (West 2012). Criminal and immigration laws may not protect victims from criminal acts committed outside the hands of traffickers or crimes that were committed after the rescue and rehabilitation process.

III. PROTECTIONS OFFERED TO INTERNATIONAL HUMAN TRAFFICKING VICTIMS IN THE UNITED STATES

Before the TVPA's enactment, alien human trafficking victims were barred from receiving federal benefits.⁶⁷ The enactment of the TVPA changed that. Now victims who meet the TVPA's requirements for human trafficking victim status⁶⁸ qualify for the same benefits the United States gives refugees once they are certified.⁶⁹ These benefits apply regardless of immigration status.⁷⁰

Adult international victims receive assigned case managers who help them navigate legal, medical, dental, and mental health services.⁷¹ They receive housing, clothing, food stamps, cash assistance, and transportation services.⁷² They are taught English and can receive a General Education Diploma (GED) if they wish.⁷³ Before they are proficient in English, they are provided with translators to help them understand their rights under the TVPA and any services and programs that are available to them.⁷⁴ Through assistance from the Department of Labor, international

⁶⁷ 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6, at 28.

⁶⁸ According to the TVPA, a victim of human trafficking must be a victim of a "severe form[] of trafficking" to receive the benefits offered pursuant to the Act. 22 U.S.C.A. § 7105(b)(1)(A) (West 2012). The TVPA defines the phrase as follows:

The term "severe forms of trafficking in persons" means—

(A) 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; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

22 U.S.C.A. § 7102(8) (West 2012). This standard has been condemned for not being inclusive enough and inconsistent with human rights. *See, e.g.*, Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 427-28 n.251 (2011) (noting criticisms that the standard is an unreasonably high standard and that it favors law enforcement officers, not victims).

⁶⁹ 22 U.S.C.A. § 7105(b)(1)(A) (West 2012).

⁷⁰ 22 U.S.C.A. § 7105(b)(1)(A)-(B) (West 2012).

⁷¹ 2007 ATTORNEY GENERAL'S REPORT, *supra* note 11, at 20; 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6, at 29.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 22 U.S.C.A. § 7105(c)(2) (West 2012).

victims receive career counseling, job skills training, and help finding a job.⁷⁵ The goal of these services is to restore victims and help them become self-sufficient.⁷⁶

If victims want to remain in the United States, they may stay temporarily, provided they cooperate with law enforcement officials investigating their case.⁷⁷

⁷⁵ 2007 ATTORNEY GENERAL'S REPORT, *supra* note 11, at 20; 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6, at 29.

⁷⁶ Tiefenbrun, *supra* note 30, at 261. Not all international victims, however, qualify to receive protections. Victims unable to meet the "force, fraud, or coercion" criteria set out in the TVPA may not qualify for services. 22 U.S.C.A. § 7102(8) (West 2012) (defining "severe forms of trafficking," to include exploited labor by "force, fraud, or coercion"); 22 U.S.C.A. § 7105(b)(1)(A) (West 2012) (offering protections to victims who meet the "severe form of trafficking" definition). Victims who consented to do illicit work, regardless of the unforeseen conditions of their employment, may be barred from qualifying for protections. April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 248-49 (2007). *But see* Samuel Vincent Jones, *Human Trafficking Victim Identification: Should Consent Matter?*, 45 IND. L. REV. 483, 500 (2012) (recognizing a difference between agreeing to migrate illegally and consenting to perform illegal work). Finally, some victims who refuse to cooperate with law enforcement officers investigating their case may be excluded from receiving protections. 22 U.S.C.A. § 7105(b)(1)(E) (West 2012). Individuals who are unable to cooperate due to psychological trauma are excused from cooperating with law enforcement yet may still remain in the United States. 22 U.S.C.A. § 7105(b)(1)(E)(i) (West 2012); Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1683 (2007) (suggesting that the trauma of enduring the trafficker's trial, inability particularly traumatized victims have in assisting investigators, and the complexity of the victim certification process are all barriers to victim cooperation with law enforcement). These exclusions to protections have been widely criticized by scholars and advocates working with human trafficking victims. *See e.g.*, 2012 TIP REPORT, *supra* note 15, at 362 (stating that NGOs who work with foreign victims complain that far fewer immigration protections are offered than the number of trafficking victims identified in the United States each year); Nam, *supra* note 76, at 1685-87 (criticizing prosecutors for referring trafficking victims to immigration officials to start the process of applying for protections and using an inordinate number of sex trafficking victims to make up those referrals, due to prosecutorial bias on behalf of the Department of Justice); Rieger, *supra* note 76, at 248-49 (arguing that those who enter the United States willingly to work in the commercial sex trade should qualify for benefits, provided there is indicium of coercion present); Patel, *supra* note 51, at 823 ("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.").

⁷⁷ 8 U.S.C.A. § 1101(a)(15)(T) (West 2012). Other countries do not make this a requirement to remain in the destination country. For instance, Italy's assistance to foreign human trafficking victims is based upon the social needs of the victim, not his or her cooperation with law enforcement officials. *See, e.g.*, UNITED NATIONS OFFICE ON DRUGS & CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 123 (2006), available at http://www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf ("Italy grants protection to victims independently of their readiness to testify. This approach focuses upon the victim's need for protection, rather than on the victim's contribution to the State's prosecution efforts. From a human rights perspective, this approach, which also includes the right of trafficked persons to work and to reintegrate into society, is the most effective response."). America's cooperation requirement has been described by critics as a "you help us and we will help you" approach. Valerie S. Payne, *On the Road to Victory in America's War on Human Trafficking:*

They are given a temporary visa available to human trafficking victims called a T-Visa, which allows them to stay in America for four years.⁷⁸ They may request a “continued presence” stay⁷⁹ or apply for permanent residency.⁸⁰ And they may petition for family members, particularly those who are at risk of being harmed by traffickers in their home country, to join them in the United States.⁸¹ Finally, they

Landmarks, Landmines, and the Need for Centralized Strategy, 21 REGENT U. L. REV. 435, 448-49 (2009).

⁷⁸ The T-Visa is available to victims of a severe form of human trafficking who are present in the United States, have assisted in the investigation or prosecution of their traffickers, and demonstrate that return to their home country would result in a severe hardship. 8 U.S.C.A. § 1101(a)(15)(T)(i) (West 2012). There are exceptions to the assistance requirement for victims under the age of eighteen and for those that are unable psychologically to give assistance. 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 53. This standard has been criticized as being too exclusive. *See, e.g.*, Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1152, 1160-61 (2010). Congress has approved the granting of up to 5,000 T-Visas per year, but far fewer have been applied for and granted than Congress at first anticipated. DE STEFANO, *supra* note 7, at 41; ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 27 (Dec. 23, 2010), available at <http://www.fas.org/sgp/crs/misc/RL34317.pdf> (stating that between 2002 and 2010, there were 2,968 applications for T-Visas; of those, only 1,862 were approved).

⁷⁹ *See* 22 U.S.C.A. § 7105(b)(1)(E)(i)(II)(bb), 7105(b)(1)(E)(ii), 7105(c)(3), 7105(c)(3)(A)(iii), and 7105(3)(c)(1) (West 2012).

⁸⁰ 8 U.S.C. § 1184(p)(6) (2006). Not all victims want to remain in America, however. Foreign victims may return to their home countries if they choose. The United States has always supported effortless, voluntary repatriation for human trafficking victims, even when other countries did not. DE STEFANO, *supra* note 7, at 24-27 (stating that the United States fought with the international community for the right of victims to repatriate). There are dangers in involuntary repatriation. For example, victims may be returned to families who sold them into slavery or be returned only to be trafficked again. Rieger, *supra* note 76, at 243-44 (stating that some studies suggest that involuntary repatriation (i.e. deportation) puts the victim at risk of re-trafficking fifty percent of the time).

The TVPA ensures their safe repatriation and mandates they not be prosecuted for breaking immigration or criminal laws upon return. 22 U.S.C.A. § 7105(a)(1)(D)-(F) (West 2012). Foreign trafficking victims sometimes must forge immigration documents, create fraudulent identification documents, bribe officials, or commit other infractions to escape from their own country. However, the majority of international victims decide to remain in the United States rather than return home. 2011 TIP REPORT, *supra* note 40, at 376 (stating that only three of 165 victims reunified with family members returned to their home countries).

⁸¹ 8 U.S.C.A. § 1101(b)(T)(ii)(III) (West 2012); 22 U.S.C.A. § 7105(c)(3)(B) (West 2012). Family reunification has long been an immigration priority for the United States. Fernando Colon-Navarro, *Familia e Inmigracion: What Happened to Family Unity?*, 19 FLA. J. INT’L L. 491, 492 (2007). In 2010, the Department of State spent nearly half a million dollars to reunite eligible family members with international victims of trafficking living in the United States. 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 47.

are provided with pro-bono legal assistance to help with immigration issues that arise.⁸²

Foreign child trafficking victims are also treated generously by the United States government. Unaccompanied child trafficking victims receive the same benefits as child refugees.⁸³ They are provided with food, clothing, housing in a foster home, an education, an attorney, a caseworker, medical care, therapy, English classes, recreational opportunities, social integration training, and support to help them maintain their culture and religion.⁸⁴ If they are unaccompanied minors, they may qualify for the Unaccompanied Refugee Minor Program, which “ensure[s] that unaccompanied children receive the full range of assistance, care, and services available to all foster children in the State.”⁸⁵ This program works with them into adulthood by helping them with living expenses, food, housing, medical care, life skills training, college and career training, and job counseling if they choose to remain in the United States and want to pursue permanent residency.⁸⁶

There are criticisms of the protections that foreign victims receive and the process they must go through to obtain them. Critics believe the process of getting certified to receive protection and obtain residency is difficult and does not follow a victim-centered approach.⁸⁷ Scholars have suggested the goal of protecting international victims clashes with the law-enforcement goal of prosecuting traffickers.⁸⁸ Others believe too many victims are prevented from qualifying to receive protections.⁸⁹ Finally, victims’ advocates complain that international victims escape poverty in their own countries only to be trapped in minimum wage jobs here, which produces “new members of the working poor.”⁹⁰ This Article does not seek to minimize the many challenges and hurdles that foreign victims face in qualifying and receiving protections, but the United States is benevolent to certified

⁸² 22 U.S.C.A. § 7105(a)(1)(B) (West 2012) (providing legal support to victims in detention facilities); 22 U.S.C.A. § 7105(b)(1)(B) (West 2012) (offering legal assistance to those with nonimmigrant status).

⁸³ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 32-33.

⁸⁴ *Id.*; Bridgette Carr, *Examining the Reality of Foreign National Child Victims of Human Trafficking in the United States*, 37 WASH. U. J.L. & POL’Y 183, 186 (2011).

⁸⁵ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 32-33.

⁸⁶ *Id.*; Carr, *supra* note 84, at 190-91. Unlike their adult counterparts, human trafficking victims under the age of eighteen are not required to cooperate with law enforcement officials in order to obtain a T-Visa. *Id.* at 202.

⁸⁷ Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 131 (2006); M. Margaret McKeown & Emily Ryo, *The Lost Sanctuary: Examining Sex Trafficking Through the Lens of United States v. Ah Sou*, 41 CORNELL INT’L L.J. 739, 771-72 (2008).

⁸⁸ Dina Francesca Haynes, *(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 GEO. IMMIGR. L.J. 337, 345-52 (2007) (analyzing the problems with a law enforcement and prosecution perspective to aiding human trafficking victims).

⁸⁹ *Id.* at 351.

⁹⁰ Denise Brennan, *Key Issues in the Resettlement of Formerly Trafficked Persons in the United States*, 158 U. PA. L. REV. 1581, 1600 (2010).

international trafficking victims.⁹¹ The same generosity is not extended to American citizens who find themselves victimized in their own country.

IV. FEDERAL PROTECTIONS OFFERED TO AMERICAN HUMAN TRAFFICKING VICTIMS IN THE UNITED STATES

Though the United States recognizes both international persons and citizens as human trafficking victims,⁹² citizens are treated disparately. American citizens receive fewer protections, may have to deal with greater bureaucracy to access what assistance is available, and may be prosecuted for sexual criminal offenses like prostitution in greater numbers than their foreign counterparts.⁹³ Furthermore, the federal government spends the bulk of protection-assistance funds on foreign and international victims, not American victims.⁹⁴

The disparity may be based in part on the government's historical view of each group. The TVPA presumes trafficked persons are from other countries.⁹⁵ This presumption is understandable. The media and reports from abroad in the late 1990s, just before the TVPA was enacted, suggested that it was foreigners who were being sold into slavery and smuggled across borders.⁹⁶ As a result, domestic trafficking was scarcely considered by Congress in the drafting of the TVPA.⁹⁷

Before the Act's enactment, Senators focused on the international brand of trafficking, most often sex trafficking, and its effects bleeding onto America soil.⁹⁸

⁹¹ Tamar R. Birkhead, *The "Youngest Profession:" Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1115 (2011).

⁹² See, e.g., 2012 TIP REPORT, *supra* note 15, at 359 ("The United States is a source, transit, and destination country for men, women, and children—both U.S. citizens and foreign nationals—subjected to forced labor, debt bondage, involuntary servitude, and sex trafficking.").

⁹³ See *infra* notes 109-288 and accompanying text.

⁹⁴ See *infra*.

⁹⁵ See, e.g., 22 U.S.C.A. § 7101(b)(1) (West 2012) (focusing on the people who are trafficked into the United States); 22 U.S.C.A. § 7104(a) (West 2012) (establishing prevention efforts abroad to assist potential human trafficking victims); 22 U.S.C.A. § 7104(d) (West 2012) (stating that persons at risk live overseas); 22 U.S.C.A. § 7105(b)(1)(A) (West 2012) (describing individuals that qualify to receive assistance as "aliens").

⁹⁶ DEStEFANO, *supra* note 7, at 13-14 (detailing media reports in the 1990s about sex slaves from abroad that "capture[d] public attention").

⁹⁷ Only when the TVPA was reauthorized five years later did Congress hear from an American citizen human trafficking victim. *Exploiting Americans on American Soil: Domestic Trafficking Exposed: Hearing on H.R. 972 Before the Comm'n on Sec. and Cooperation in Eur.*, 109th Cong. 22-23 (2005).

⁹⁸ See, e.g., DEStEFANO, *supra* note 7, at 32-41 (stating that Congress was concerned about people being trafficked into the United States); Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3029-30 nn.311-12 (2006) (recounting some of the many characterizations of sex trafficking scenarios on the Senate floor). Some have suggested the Act protects the "'iconic victim,' . . . described and perceived to be a female of European descent, trafficked for sex, waiting helplessly for law enforcement officials to rescue her." Jones, *supra* note 78, at 1143.

Senator Sam Brownback stated “[V]ictims are routinely forced against their will into the sex trade, transported across international borders, and left defenseless in a foreign country.”⁹⁹ When he introduced the Act, Senator Paul Wellstone stated that trafficked person were “brought into the United States” by force, that some of these individuals came from collapsed political regimes in the former Soviet Union, and that corrupt officials overseas were complicit in the international trafficking problem.¹⁰⁰ While all of these statements are true, they indicate that Congress’s focus was on international victims, not citizen victims. Indeed, few remarks suggest legislators recognized that victims could be Americans.¹⁰¹

Not only was international trafficking the primary concern in Congressional hearings, but it took center stage in the drafting of the TVPA as well.¹⁰² Congress focused on the idea that foreign women were being kidnapped to be sexual slaves in the United States and abroad.¹⁰³ In the first few subsections of the TVPA, which detail the Act’s purpose and congressional findings, phrases like “throughout the world,” “international sex trade,” and “transnational crime” appear, making it clear that Congress was attempting to protect the international sex slave.¹⁰⁴ Unfortunately, this international focus has adversely affected citizen victims.¹⁰⁵

While the Act’s definition of human trafficking victim has never expressly excluded domestic victims, American victims were and still are, in both policy and practice, an afterthought. In fact, American citizen victims were largely ignored until the TVPA was reauthorized in 2005.¹⁰⁶ As a result, “the bulk of [the United States’s] attention and resources has been directed at the international sex trafficking of adults and children, rather than the growing numbers of preteens and adolescents

⁹⁹ 146 CONG. REC. S10137 (daily ed. Oct. 10, 2000) (statement of Sen. Brownback).

¹⁰⁰ 146 CONG. REC. S2414 (daily ed. Apr. 12, 2000) (statement of Sen. Wellstone).

¹⁰¹ Birckhead, *supra* note 91, at 1079 (highlighting two comments made—one by New York Representative Christopher Smith and the other by Minnesota Congressman Paul Wellstone—about domestic trafficking victims).

¹⁰² See, e.g., 22 U.S.C.A. § 7101(b)(1) (West 2012) (emphasizing human trafficking as a global phenomenon crossing international borders that results in approximately 50,000 people being trafficked into the United States annually); 22 U.S.C.A. § 7101(b)(5) (West 2012) (stating that traffickers often transport victims from their home countries to foreign countries); 22 U.S.C.A. § 7101(b)(20) (West 2012) (“[V]ictims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked.”).

¹⁰³ DEStEFANO, *supra* note 7, at 38.

¹⁰⁴ 22 U.S.C.A. § 7101(b)(1)-(3) (West 2012).

¹⁰⁵ See Jones, *supra* note 78, at 1143 (asserting that the neglect of boys and men in the human trafficking discussion and battle have had devastating effects on male victims); Cavalieri, *supra* note 16, at 502 (arguing that though American trafficking laws are neutral towards human trafficking in the agricultural sector, law enforcement has often overlooked victims in this area).

¹⁰⁶ HEALTH & HUMAN SERVS. LITERATURE REVIEW, *supra* note 10, at 3 (“While most of the anti-trafficking efforts within the United States have historically focused on trafficking foreign nationals into the country, the 2005 reauthorization of the TVPA highlighted the need to address the trafficking of U.S. citizens and permanent residents, in particular minor victims of sex trafficking or the prostitution of minors, within U.S. borders.”).

who are prostituted within its borders.”¹⁰⁷ The majority of domestic victim research—both academic and government-sponsored—has focused on this category of victims: underage, sexually trafficked persons.¹⁰⁸ This Article will highlight the protections aimed at serving this population. The author will include research regarding protection deficiencies to other groups of Americans or permanent residents where it is available. The following sections will examine the dearth of protections and funding available to domestic trafficking victims.

A. Exclusion from TVPA-Funded Protections

American victims are specifically barred from receiving TVPA-funded protections. In his 2010 annual Congressional human trafficking report, United States Attorney General Eric Holder, who oversees the Department of Justice, expressly excluded Americans from receiving TVPA-financed protections.¹⁰⁹ He stated, “[t]he funds provided under the TVPA by the federal government for direct services to victims are dedicated to assist non-U.S. citizen victims and may not be used to assist U.S. citizen victims.”¹¹⁰ Attorney General Holder stated instead that domestic trafficking victims might legally qualify for other general, publicly available crime victim benefits or other programs.¹¹¹ This sentiment is echoed in Congress as well. Since it first legally recognized that Americans were being trafficked in 2005, Congress has limited TVPA protection to international victims.¹¹² Moreover, promised allocations directed at services for domestic victims in subsequent reauthorizations of the Act have not materialized.¹¹³

Recent attempts at passing legislation to expand TVPA-style protections to domestic victims were stalled. The Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2010, which, among other things, would have created a

¹⁰⁷ Birckhead, *supra* note 91, at 1059; *see also* Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L. J. 96, 116 (2008) (suggesting the problem of treating victims differently stems from the practice of labeling victims differently).

¹⁰⁸ *See, e.g.*, 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 43 (“The majority of youth identified have been victims of sex trafficking; however, the sites continue to work in their communities to raise awareness about the possibility of labor trafficking of youth who are U.S. citizens or lawful permanent residents.”); BANKS & KYCKELHAHN, *supra* note 4, at 6 (identifying only six permanent resident victims from 2008-2010 as sexual trafficking victims); Johnson, *supra* note 9, at 622-24 (identifying itself as the first and only law review article aimed at analyzing Native American human trafficking victims); HEALTH & HUMAN SERVS. LITERATURE REVIEW, *supra* note 10, at 40 (stating that the United States has limited information on domestic victims of trafficking, particularly male victims of trafficking).

¹⁰⁹ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 28.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Regina Bernadin, *The Evolution of Anti-Slavery Laws in the United States*, 17 ILSA J. & COMP. L. 507, 511 (2011).

¹¹³ *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. 16 (2010) [hereinafter *Domestic Sex Trafficking Hearing*] (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services, New York, New York).

national database to identify at-risk victims of human trafficking and would have strengthened the protections offered to them, died in committee.¹¹⁴ The same Act, which was put before Congress in 2011, has yet to make it beyond its committee.¹¹⁵

Because federal legislation focuses so heavily on foreign victims, service providers have reported “service gaps and questions about the identity of U.S. citizen victims,” which results in difficulties securing social services for domestic victims.¹¹⁶ This has created a paradox: the global anti-trafficking watchdog fails to adequately fund protections to its own citizens. Not only do domestic victims have problems receiving protections funded by the TVPA, but domestic services funded through federal grants are limited as well.

B. Limitations on Federal Protection Grants for Domestic Victims

Due to the TVPA’s funding exclusion, if domestic victims are to receive federal protections,¹¹⁷ they must qualify for other programs supported by federal grants. However, the United States protects only a handful of victims with temporary grants or other funding measures. The 2012 TIP Report stated that Department of Justice grants assisted merely 107 minor victims in 2010 and 2011 combined.¹¹⁸ In other words, a little more than fifty victims were served by non-TVPA funded federal grants in each of those two years. This is a fraction of the number of foreign victims assisted during a similar period¹¹⁹ and a small percentage of the number of youth arrested for prostitution annually nationwide.¹²⁰

Even when the United States has provided federal funds towards domestic anti-trafficking efforts, the dollars spent on domestic trafficking pale in comparison to those offered to international causes and foreign victims. For example, the United

¹¹⁴ H.R. 5575 (111th): *Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2010*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/hr5575> (last visited Jan. 28, 2013) (stating that the Act designed to “establish a grant program to benefit domestic minor victims of sex trafficking” died and was referred back to the committee); *Domestic Sex Trafficking Hearing*, *supra* note 113, at 5 (statement of Sen. Ron Wyden) (with this Act, domestic victims would have received housing, mental and medical care, drug abuse treatment, sexual abuse counseling, food, clothing, necessities and other services).

¹¹⁵ S. 596(112th): *Domestic Minor Sex Trafficking Deterrence and Victims Support Act of 2011*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s596> (last visited Jan. 28, 2013) (“A bill to establish a grant program to benefit victims of sex trafficking.”).

¹¹⁶ COMMERCIAL SEXUAL EXPLOITATION STUDY, *supra* note 15, at 7.

¹¹⁷ ECPAT INT’L, GLOBAL MONITORING REPORT ON THE STATUS OF ACTION AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: UNITED STATES OF AMERICA 12 (2006), available at http://www.ecpat.net/A4A_2005/PDF/Americas/Global_Monitoring_Report_USA.pdf (“While much attention has been paid to the problem by federal law enforcement, in general less effort has been invested by the Government in fighting within the country.”).

¹¹⁸ 2012 TIP REPORT, *supra* note 15, at 363.

¹¹⁹ SISKIN & WYLER, *supra* note 78, at 27 (617 foreign victims received T-Visas in fiscal years 2009 and 2010). The number of foreign victims who received services from 2003 to 2010 was 3,221. 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 42.

¹²⁰ 2012 TIP REPORT, *supra* note 15, at 363 (according to Federal Bureau of Investigation (FBI) reports, states reported there were 654 youth arrested for prostitution in 2010 and 791 youth arrested for prostitution nationwide in 2009).

States pledged a maximum of \$8 million dollars in grants per year from 2008 to 2011 to both governmental and nongovernmental organizations that assisted citizen and permanent resident human trafficking victims.¹²¹ In comparison, it has set aside hundreds of millions of dollars to fund the TVPA¹²² and more than half a billion dollars to other countries with human trafficking problems.¹²³ In 2010 alone, the Department of State spent nearly half a million dollars to reunite eligible family members with international victims of trafficking living in the United States.¹²⁴ Meanwhile, several sections of the TVPA and subsequent reauthorizations of the Act meant to fund domestic anti-trafficking efforts are still unfunded.¹²⁵ These unsubsidized sections included provisions to serve and protect domestic victims.¹²⁶

In the most recent TIP Report, the United States recognized that because of the structure of federal funding and available grants, it has not been able to serve all victims of human trafficking, it has treated victims unequally, and it has failed to provide “comprehensive care options for all types of victims.”¹²⁷ The failure of the federal government to provide services to domestic trafficking victims has left many of them without the types of protections that their international counterparts receive.

Not only are fewer American trafficking victims able to qualify for protections through grants, but their success often hinges upon where they live. After spending three years determining what services domestic victims needed,¹²⁸ the federal government awarded a handful of American cities grants in 2009 and 2010 that were used to assist both foreign and domestic victims.¹²⁹ In 2010, Attorney General Holder reported to Congress for the first time that seven cities in the United States received federal grants targeted at prosecuting traffickers and providing services to American victims.¹³⁰

Federal grants are often awarded to service providers that are located in large, metropolitan areas like New York City, Chicago, and Houston.¹³¹ This is a problem

¹²¹ 42 U.S.C.A. § 14044(a)-(d) (West 2012).

¹²² U.S. DEP’T OF HEALTH & HUMAN SERVS., TRAFFICKING VICTIMS PROTECTION ACT OF 2000 FACT SHEET 2, *available at* http://archive.acf.hhs.gov/trafficking/about/TVPA_2000.pdf (Jan. 28, 2013) (stating that the TVPA’s 2003 reauthorization Act authorized \$200 million to fund the protections offered to international victims in the United States).

¹²³ Chuang, *supra* note 46, at 1723-24.

¹²⁴ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 47.

¹²⁵ Johnson, *supra* note 9, at 694-95 (2012).

¹²⁶ *Id.*

¹²⁷ 2012 TIP REPORT, *supra* note 15, at 363.

¹²⁸ OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2008 9 (2009), *available at* <http://www.state.gov/documents/organization/125840.pdf>.

¹²⁹ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 42.

¹³⁰ *Id.* at 42-44 (cities include New York City, Chicago, Houston, San Francisco, Anaheim, Seattle, and Portland).

¹³¹ *Id.* One grant program specifically designed to serve American trafficking victims served approximately forty-five youths in New York City, Chicago, and San Francisco. *Id.* at

for American victims living outside the geographical areas served by these grants. Though urban areas may have larger populations of trafficked persons, the federally-funded programs available in those cities are unable to provide services to all of the victims who qualify for them.¹³² Mid-sized and smaller cities in the United States are often left without any federally-funded grants despite the fact that human trafficking occurs there too.¹³³ This practice contradicts the TVPA directive that nations make services available through mobile service centers that “extend beyond large cities.”¹³⁴ The current system fails to deliver uniform protection to all victims. In a 2004 congressional hearing, Jessica, a former victim of sexual exploitation remarked that few cities are equipped to serve domestic victims: “Basically, there is a location in Chicago; there is a location in New York; there’s one in Minnesota and California, but what about Colorado? What about Arkansas? What about Florida? What about New Mexico?”¹³⁵

Though grants are few in number and are frequently awarded to large metropolitan areas, the federal government has attempted to protect American victims of human trafficking, albeit unevenly. For example, it used recession stimulus funds to assist American victims of human trafficking. The Department of Justice’s Office for Victims of Crime gave local government organizations and NGOs working with domestic victims in three cities—New York City, Seattle, and Portland—stimulus funds.¹³⁶ The funds were used to investigate and develop a program for the rehabilitation of teenage victims of sexual slavery, help victims access existing benefits, and provide services to victims that included “crisis

42. The three cities’ programs offered a variety of services to domestic human trafficking victims, including “intensive case management; safety planning; crisis intervention; medical and dental care; mental health treatment; transportation; life skills training; and educational assistance.” *Id.* at 42-43. The pilot programs also conduct research into domestic trafficking, educate the community about the prevalence of human trafficking, and attempt to collaborate with local agencies working with youths to determine best practices in treating domestic victims. *Id.* at 43. However, the protections given do not mirror the protections offered to international victims. *Id.*

¹³² Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 53 (2011).

¹³³ See, e.g., *Rescuing Child Sex Slaves in Minnesota*, CNN (June 19, 2012), http://www.cnn.com/video/?hpt=hp_t2#/video/us/2012/06/19/cfp-feyerick-us-midwest-trafficking.cnn (stating that Midwestern girls are trafficked out of Minnesota on nearby interstates); LOGAN MICHEEL ET AL., WASH. COAL. OF SEXUAL ASSAULT PROGRAMS, THE COMMERCIAL SEXUAL EXPLOITATION OF YOUTH IN WASHINGTON STATE: 2010 SURVEY RESULTS AND RECOMMENDATIONS 4 (Jan. 2011), available at <http://www.wcsap.org/sites/www.wcsap.org/files/uploads/documents/CSECSureeyReport2010.pdf> (identifying a disparity in resources between urban and rural areas in Washington and concluding that “there is a limited understanding of how this problem is manifesting in rural areas, as almost all of the trainings and materials have approached the topic from an urban context”).

¹³⁴ 22 U.S.C.A. § 7105 (a)(1)(A) (West 2012).

¹³⁵ Jim Lobe, *Exploited Girls in U.S. Seek Same Protection Afforded Foreign Women*, COMMONDREAMS.ORG (Mar. 5, 2004), <http://www.commondreams.org/headlines04/0305-07.htm>.

¹³⁶ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 43-44; American Recovery and Reinvestment Act of 2009 (Stimulus Bill), Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

intervention, safe and secure housing, age-appropriate victim advocacy during the criminal justice process, physical/wellness treatment, mental health treatment, education, child protection, and other support services.”¹³⁷ But again, victims living in only three cities benefitted from these grants.

Other federally-funded protections available to domestic victims are shared with foreign victims. The United States has served both foreign and domestic human trafficking victims through special federal prosecution task forces.¹³⁸ Three United States Attorney’s Offices in Chicago, Houston, and Anaheim received grants from 2010 to 2012 that allowed them to investigate and prosecute human trafficking cases.¹³⁹ These offices work with local law enforcement agencies and NGOs to rescue and protect victims.¹⁴⁰ Six victim service organizations working with these task forces received nearly \$3 million in grants to provide protections to both foreign and domestic trafficking victims.¹⁴¹ Cities with federal task forces may be the only places in the nation where domestic and international victims are given equal protection and services.¹⁴² Unfortunately, these grants may soon expire.¹⁴³ Whether the federal government will renew these grants remains unclear.¹⁴⁴

Other federal programs’ protections to American citizens are more ambiguous. For example, the FBI’s Innocence Lost National Initiative has rescued 2,100 children from sexual trafficking since it began in 2003.¹⁴⁵ The FBI works with local law enforcement agencies to rescue victims and convict traffickers, but, according to the Federal Bureau of Investigation’s (FBI) website, it is unclear that victims receive TVPA-style services and protections through the Initiative.¹⁴⁶ During congressional

¹³⁷ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 43-44.

¹³⁸ See, e.g., U.S. ATTORNEY’S OFFICE, S. DIST. OF TEX., HOUSTON’S SUCCESS STORY: WORKING TOGETHER FOR HUMAN TRAFFICKING VICTIMS 26 (2012) [hereinafter HOUSTON’S SUCCESS STORY] (on file with author) (stating that from 2004 to 2011, 192 international victims of human trafficking were identified, 187 domestic victims were rescued, and several human traffickers of both foreign and domestic victims were prosecuted).

¹³⁹ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 42.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² The United States Attorney’s Office for the Southern District of Texas, with offices located in Houston, is one of the three federally-funded task force units designed to combat both foreign and domestic human trafficking. The task force, called the Human Trafficking Rescue Alliance (HTRA), enlists three NGOs as its “core training group” and fourteen service providers in an effort to provide comprehensive services to domestic trafficking victims. U.S. ATTORNEY’S OFFICE, S. DIST. OF TEX., HUMAN TRAFFICKING RESCUE ALLIANCE—HTRA, 2 (2012) (on file with author); HOUSTON’S SUCCESS STORY, *supra* note 138, at 20.

¹⁴³ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 42.

¹⁴⁴ HOUSTON’S SUCCESS STORY, *supra* note 138, at 11-12 (explaining that the future of federal task force funding that began in 2004 and continued until 2012 is uncertain).

¹⁴⁵ *Crimes Against Children: Innocence Lost*, FED. BUREAU OF INVESTIGATION (FBI), http://www.fbi.gov/about-us/investigate/vc_majorthefts/cac/innocencelost/ (last visited Jan. 29, 2013).

¹⁴⁶ *Id.* U.S. Attorney Beth Phillips stated before Congress that the Initiative “employ[s] a multi-faceted, victim-centered strategy designed to identify . . . child victims, provide them

hearings, Ernie Allen, the President and CEO of the National Center for Missing and Exploited Children, stated that “[i]n some communities when victims were rescued as a result of Innocence Lost operations, the choices were stark: either send them to juvenile detention facilities or release them with no services or support.”¹⁴⁷ Allen’s statement demonstrates that the goal of the Initiative is to rescue minors and prosecute traffickers, not protect victims after their rescue.¹⁴⁸ Where there are no local services for domestic victims, there are no post-rescue protections available. Whereas international victims are guaranteed protections once they qualify under the TVPA, the same cannot be said for American victims.

C. Limitations on NGO Protections Offered to Domestic Victims

While the bulk of federal grants awarded to NGOs appear to favor organizations working with international victims,¹⁴⁹ some benefit domestic victims. The federal government began offering limited protections to domestic victims in 2009 by granting funds to NGOs and state and local law enforcement agencies.¹⁵⁰ These protections came nine years after the United States offered protections to foreign victims of human trafficking. Before these grants were made available, a small number of NGOs nationwide served domestic victims of human trafficking without the help of federal assistance.

In 2007, a federal study reported that the only programs rendering TVPA-like protections to domestic victims were offered through NGOs.¹⁵¹ Four programs located in four American cities—New York City, Atlanta, San Francisco, and Van Nuys (California)—offered 45 domestic trafficking victims housing and services.¹⁵²

the services they need, and ... prosecute the offenders.” *Domestic Sex Trafficking Hearing*, *supra* note 113, at 10 (statement of U.S. Attorney Beth Phillips, Western District of Missouri). However, while her testimony was detailed about the value of assets seized in sting operations, how many defendants were arrested, how many victims were rescued, and how many law enforcement agencies participated in the sting, she was vague about what, if any, protections were given to the victims after they were rescued. *Id.*

¹⁴⁷ *Domestic Sex Trafficking Hearing*, *supra* note 113, at 44 (statement of Ernie Allen, President and CEO, The National Center for Missing and Exploited Children).

¹⁴⁸ In the same way, the TVPA has been criticized for its overemphasis on prosecution and its under emphasis on protection. Chacon, *supra* note 98, at 3024 (“Yet another reason the TVPA has been such an ineffective tool in aiding trafficking victims is that it overemphasizes prosecution, while underemphasizing protection and prevention.”).

¹⁴⁹ See, e.g., Chuang, *supra* note 46, at 1715 (stating that four million dollars will be given to International Justice Mission, a faith-based organization engaged in anti-trafficking efforts abroad); HOUSTON’S SUCCESS STORY, *supra* note 138, at 18-19 (listing a total of 45 service providers receiving federal grants with only 14 of those serving domestic victims of trafficking).

¹⁵⁰ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 42-44 (explaining that stimulus and grant money supporting programs for domestic trafficking began in 2009).

¹⁵¹ HEATHER J. CLAWSON & LISA G. GRACE, U.S. DEP’T OF HEALTH & HUMAN SERVS., FINDING A PATH TO RECOVERY: RESIDENTIAL FACILITIES FOR MINOR VICTIMS OF DOMESTIC SEX TRAFFICKING 3 (Sept. 2007) [hereinafter HEALTH & HUMAN SERVICES RESIDENTIAL FACILITIES STUDY], available at [http://aspe.hhs.gov/hsp/07/Human Trafficking/ResFac/ib.pdf](http://aspe.hhs.gov/hsp/07/Human%20Trafficking/ResFac/ib.pdf).

¹⁵² *Id.* at 10.

While programs targeting this population may exist in greater numbers now than five years ago, no more than 100 placements for domestic victims are currently offered by nonprofit organizations.¹⁵³ If you add these victims to the 50 victims helped by the federal government each year,¹⁵⁴ approximately 150 American victims of human trafficking receive federal and NGO protections annually. In contrast, the federal government served 707 international victims in the United States in 2011, which was a thirty percent decrease from international victims served in 2010.¹⁵⁵

NGO assistance to domestic victims is limited in additional ways. First, NGOs serving domestic victims lack donations and resources to make up the federal assistance deficit.

[F]ew, if any, NGOs [are] able to assist victims outside of the parameters of DOJ funding; they cannot hire advocates and service providers because there are no funds to assist them The result is that only a very narrow group of trafficking victims is ever served: those identified and referred by the federal government.¹⁵⁶

Second, some NGOs decide that the hurdles they face in obtaining grant assistance are too great and therefore make a conscious choice not to apply for them.¹⁵⁷ Third, NGOs that engage in speech that contradicts federal policies and faith-based NGOs providing services to trafficking victims have expressed fears that grants might disappear based upon attacks made by political adversaries.¹⁵⁸ As a result, NGOs are not currently in a position to bridge the service gap to domestic victims left by the federal government. Nor should they be, given the fact that the United States, through the TIP Report, holds governments, not NGOs, responsible for protecting human trafficking victims.¹⁵⁹

¹⁵³ Birkhead, *supra* note 91, at 1110; *Domestic Sex Trafficking Hearing*, *supra* note 113, at 4 (statement of Sen. Ron Wyden) (noting that only 70 placements were available nationwide in 2010); Robert Sanborn & Dawn Lew, *Fighting Human Trafficking in Texas*, 75 TEX. B.J. 778, 780 (2012) (“When it comes to residential rehabilitation, approximately 100 beds exist for domestic minor sex-trafficking victims nationwide.”).

¹⁵⁴ 2012 TIP REPORT, *supra* note 15, at 363 (stating that a mere 107 domestic trafficking victims were assisted in fiscal years 2010 and 2011 combined).

¹⁵⁵ *Id.*

¹⁵⁶ Haynes, *supra* note 88, at 346-47.

¹⁵⁷ Johnson, *supra* note 9, at 696.

¹⁵⁸ See, e.g., Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 370-71 (2006) (“NGOs perceived to advocate the legalization of sex work have been visited with swift sanctions through the loss of international funding.”); Nathan Godsey, *The Next Step: Why Non-Governmental Organizations Must Take a Growing Role in the New Global Anti-Trafficking Framework*, 8 REGENT J. INT’L L. 27, 54 (2011) (expressing concern over the continued funding offered to faith-based NGOs serving trafficking victims in light of recent controversy over federal grants to such organizations).

¹⁵⁹ See, e.g., 2011 TIP REPORT, *supra* note 40, at 131-32 (sanctioning the Democratic Republic of the Congo for the fact that NGOs, not the Republic’s government, provided the bulk of protections to victims).

V. STATE PROTECTIONS OFFERED TO AMERICAN HUMAN TRAFFICKING VICTIMS IN THE UNITED STATES

Due to a lack of federal funds and the inability of NGOs to provide protections without an increase in federal grants, states, by default, are expected to provide the bulk of protections for domestic trafficking victims.¹⁶⁰ However, most state governments either do not make domestic victims' protections a priority or are otherwise unable or unwilling to serve them.¹⁶¹ States' inability to protect domestic victims begins with the failure to identify them as victims in need of protection and the inability to offer the protections and services this population needs.

A. *Failure to Identify Trafficking Victims*

In order to obtain state crime victim benefits that Attorney General Holder suggested domestic victims may qualify to receive,¹⁶² citizen victims must be viewed as crime victims worthy of receiving protection. Before a person can qualify as a victim of human trafficking, he or she must be identified as one. This is a particularly hard task for local law enforcement officers.

Victims are often unable to identify themselves as modern slaves.¹⁶³ "Human trafficking is an extremely unusual category of major crime in which the victims will not report to law enforcement what is being perpetrated against them. As a result, human trafficking defies traditional law enforcement methods [of identifying victims]."¹⁶⁴ Reasons victims do not report the crimes being perpetrated against them may include the fact they have been conditioned to be loyal to their traffickers through abuse and mistreatment and the victims may be engaged in criminal activity, which they fear may lead to their arrest.¹⁶⁵

¹⁶⁰ *Domestic Sex Trafficking Hearing*, *supra* note 113, at 3 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Human Rights and the Law) (asserting that state governments are on the "front line" and thus need to take a more aggressive approach to domestic trafficking).

¹⁶¹ 2012 TIP REPORT, *supra* note 15, at 363 ("Victim protection frameworks and principles were not codified in most state laws."); *Domestic Sex Trafficking Hearing*, *supra* note 113, at 16 (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services, New York, New York) (explaining that few states have the resources necessary to serve domestic victims).

¹⁶² 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6, at 28.

¹⁶³ While this is true for both international and domestic victims, the situation is particularly problematic for domestic victims because the public's attention has focused so heavily on international victims of human trafficking. As a result, domestic victims, law enforcement, and service providers sometimes believe only foreign persons can be human trafficking victims.

¹⁶⁴ IAN KITTERMAN ET AL., THE RENEWAL FORUM, AN EXAMINATION OF STATE LAWS ON HUMAN TRAFFICKING 4 (Jan. 27, 2012), available at <http://renewalforum.org/wp-content/uploads/2012/01/State-Law-Analysis.pdf>.

¹⁶⁵ Kate Brittle, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1345, 1350 (2008).

Legislation has also shaped how this population identifies itself.¹⁶⁶ One federal study reported that legal definitions and interpretations of laws aid foreign victims in identifying themselves as victims of human trafficking yet cause domestic victims to view themselves as criminals.¹⁶⁷ For these reasons, it is crucial that individuals who come into contact with this population be trained to identify them.¹⁶⁸

Though mandatory identification training came later to state and local law enforcement agents than federal agents,¹⁶⁹ the TVPA mandates that both federal and local authorities be trained on human trafficking victim identification.¹⁷⁰ However, a study funded by the United States Department of Health and Human Services determined that the foremost challenge in serving domestic victims was identifying them.¹⁷¹ The study found there was a “lack of standard protocol” among law enforcement officials for identifying this population.¹⁷² Law enforcement agencies’ failure to identify victims is still a problem today.¹⁷³ Because much has already been written by academics on the failure of law enforcement officers to identify trafficking victims,¹⁷⁴ this section will turn to the problem misidentification presents in guarantying protections to domestic victims.

Service providers may be better equipped at identifying victims and getting them the protections they need,¹⁷⁵ but they, like law enforcement officers, lack training and standard procedures for identifying human trafficking victims.¹⁷⁶ Recently, the federal government has begun to provide identification training to non-law enforcement personnel.¹⁷⁷

¹⁶⁶ COMMERCIAL SEXUAL EXPLOITATION STUDY, *supra* note 15, at 7.

¹⁶⁷ *Id.*

¹⁶⁸ Heinrich, *supra* note 21, at 4 (“NGOs are replete with examples of missed opportunities for victim identification in emergency rooms, immigration detention centers, at border entry points, and during labor inspections.”).

¹⁶⁹ Jones, *supra* note 78, at 1185-88; Tiefenbrun, *supra* note 30, at 260 (noting that federal identification training extends to numerous federal agencies and law enforcement personnel).

¹⁷⁰ 22 U.S.C.A. § 7105(c)(4) (Wet 2012).

¹⁷¹ HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 2.

¹⁷² *Id.*

¹⁷³ 2012 TIP REPORT, *supra* note 15, at 363.

¹⁷⁴ *See, e.g.*, Rieger, *supra* note 76, at 247 (“Agencies need to implement regular, systematic programs to ensure that officials both understand the definition of sex trafficking and are faithfully applying that definition to all potential victims with whom they come into contact.”); Jones, *supra* note 78, at 1185-86 (describing first responders’ identification of victims as “vital,” especially when the victim is not the iconic victim).

¹⁷⁵ Patel, *supra* note 51, at 827.

¹⁷⁶ MICHEEL ET AL., *supra* note 133, at 1 (explaining that over half of surveyed service providers in Washington had not developed any protocols for identifying trafficked youth and only thirty-four percent of them knew that trafficked youth were seeking services from their agencies).

¹⁷⁷ 2012 TIP REPORT, *supra* note 15, at 363 (highlighting that in 2012, the federal government continued to offer identification training to local law enforcement agencies, federal agencies, NGOs, and schools).

Just as biases and misconceptions exist in law enforcement regarding sexually trafficked minors,¹⁷⁸ they also exist with service providers. For example, one federal study found that “child protective services workers, and shelter providers believed that [sexually trafficked minors] had ‘chosen’ to become involved in prostitution and therefore should be held accountable for their ‘criminal’ actions.”¹⁷⁹ These same service providers expressed a belief that human trafficking only happens to foreigners and immigrants.¹⁸⁰ This bias had a dual affect: it resulted in a failure to provide services and protections to domestic victims and it affected the victims’ own ability to recognize their need for protection.¹⁸¹ Unfortunately, when domestic victims are not viewed as victims, they are treated like criminals.

B. Arresting and Prosecuting American Trafficking Victims

The TVPA mandates that human trafficking victims “shall not be detained in facilities inappropriate to their status as crime victims.”¹⁸² They should not be fined, jailed, or punished for criminal acts they committed at the time they were enslaved.¹⁸³ This non-arrest federal policy is in accord with international human rights principles¹⁸⁴ and the United Nations’s Palermo Protocol.¹⁸⁵ Protection from arrest and prosecution may be considered the most important protection.¹⁸⁶ However, the most recent TIP Report suggests that the TVPA’s mandate to treat

¹⁷⁸ Jones, *supra* note 78, at 1152, 1166-67 (stating that male victims are often not perceived by law enforcement officers as trafficking victims).

¹⁷⁹ HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 2.

¹⁸⁰ *Id.* But see MICHEEL ET AL., *supra* note 133, at 5 (explaining that even though only a third of service providers knew that trafficked minors were accessing services they provided, some programs were “adaptive and innovative” in providing services “despite existing resource and knowledge gaps”).

¹⁸¹ HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 2.

¹⁸² 22 U.S.C.A. § 7105(c)(1)(A) (West 2012).

¹⁸³ 2012 TIP REPORT, *supra* note 15, at 363.

¹⁸⁴ Patel, *supra* note 51, at 833 (citing 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).

¹⁸⁵ Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 194 (2011) (tracing this principle to the hearings that preceded the Palermo Protocol). Though the Palermo Protocol never specifically grants immunity from prosecution, it does imply in various provisions that trafficked persons are to be treated like victims, not criminals. Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, 36 DENV. J. INT’L L. & POL’Y 9, 22 (2007). The Palermo Protocol also encourages states to adopt its provisions, but adoption is discretionary. *Id.* at 20-21.

¹⁸⁶ Matthew Garber, *Chapter 240: Human Trafficking—Combating the Underground Slave Industry in California*, 37 MCGEORGE L. REV. 190, 196 (2006) (“[T]rafficking legislation that exclusively criminalizes trafficking activities may effectively ignore the problem of protecting victims’ human rights.”).

trafficked persons like victims of crime may not apply to Americans, particularly youth who are sexually trafficked.¹⁸⁷

In recent years, the FBI reported that between 650 and 1,500 youths were arrested for prostitution or other sexually-related criminal offenses.¹⁸⁸ Most American victims are identified as trafficking victims through their arrest.¹⁸⁹ The fact that minors are still being arrested for prostitution is disturbing, given the fact that the TVPA protects prostituted minors, unlike adult human trafficking victims, even when they have not been coerced, forced, or defrauded into sexual trafficking.¹⁹⁰

Arresting youth for prostitution has been a problem for years. Arrests for juvenile prostitution significantly increased throughout the late 1990s and earlier part of the 2000s.¹⁹¹ In 2008, approximately 1,500 American minors were prosecuted for prostitution or sexually-related offenses in the United States.¹⁹² The Internet is partially to blame for the increase in juvenile sexual exploitation; many teens are bought and sold online. Some media outlets have profited by the tens of millions from this explosion in online sexual exploitation even after they were made aware that minors were being marketed for sex on their websites.¹⁹³

America has had difficulty responding to juvenile sex trafficking appropriately. The federal government has reproached states for non-uniform responses to prosecuting American victims¹⁹⁴ but it also has been inconsistent in its own views

¹⁸⁷ 2012 TIP REPORT, *supra* note 15, at 364.

¹⁸⁸ *Id.* (stating that in 2010, 112 under-age males and 542 under-age females had been arrested whereas in 2009, 167 males and 624 females were arrested for sex-related crimes); CHARLES PUZZANCHERA, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE ARRESTS 2008, JUVENILE JUSTICE BULLETIN 1, 3 (Dec. 2009) [hereinafter JUVENILE ARRESTS REPORT] (documenting that 1,500 youth were arrested for prostitution in 2008).

¹⁸⁹ HEALTH & HUMAN SERVS. LITERATURE REVIEW, *supra* note 10, at 15.

¹⁹⁰ 22 U.S.C.A. § 7102(8)(a) (West 2012) (excluding victims of sexual exploitation who are younger than eighteen years of age from the “force, fraud, and coercion” element of the definition of “severe form of human trafficking”). Finding a case where force or coercion does not exist in the trafficking of minors is rare. Nicholas D. Kristof, *How Pimps Use the Web to Sell Girls*, N.Y. TIMES, Jan. 25, 2012 (stating that the majority of cases involving the sexual exploitation of minors involve coercion by “pretty vicious pimps”).

¹⁹¹ HEALTH & HUMAN SERVS. LITERATURE REVIEW, *supra* note 10, at 5.

¹⁹² JUVENILE ARRESTS REPORT, *supra* note 188, at 1, 3. Seventy-six percent of people arrested for prostitution were female. *Id.*

¹⁹³ Kristof, *supra* note 190 (describing Backpage.com, a national online advertising website that generates more than \$22 million from prostitution advertisements, as “a godsend to pimps, allowing customers to order a girl online as if she were a pizza”); Daniel Fisher, *Backpage Takes Heat, but Prostitution Ads are Everywhere*, FORBES (Jan. 26, 2012), <http://www.forbes.com/sites/danielfisher/2012/01/26/backpages-takes-heat-for-prostitution-ads-that-are-everywhere/> (stating that prostitution ads are found on many other Internet sites including Craigslist, which promised to ban them after public outcry).

¹⁹⁴ *Domestic Sex Trafficking Hearing*, *supra* note 113, at 2 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Human Rights and the Law) (“We have created a legal dichotomy in America in which the Federal Government views prostituted children as victims, yet most States treat them as criminals.”); 2012 TIP REPORT, *supra* note 15, at 364 (“[O]nly

about charging minors with prostitution.¹⁹⁵ The federal government and most state governments are unwilling to decriminalize the actions of sexually trafficked minors.¹⁹⁶ As a result, these children are viewed as criminals by those in the justice system and society as a whole.¹⁹⁷ When they are labeled as criminals or delinquents,¹⁹⁸ they are less likely to be treated like victims of crime in need of protection.¹⁹⁹

Federal policymakers also fail to agree whether child prostitution should be decriminalized.²⁰⁰ Some within the legal community have opposed legislation that would offer greater protections to domestic victims.²⁰¹ As a result, the legal

eight states had passed laws that prevent charging children with prostitution, although under the TVPA minors induced to perform commercial sex acts regardless of force, fraud, or coercion are considered victims of trafficking.”)

¹⁹⁵ See Kittling, *supra* note 46, at 924-25 (detailing the government’s reservations, expressed at an international anti-trafficking meeting, about decriminalizing prostitution for minors).

¹⁹⁶ OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, DOJ POSITION ON H.R. 3887 2 (2007), available at <http://www.justice.gov/olp/pdf/doj-position-on-hr3887.pdf> (“Pimping, pandering, and other prostitution-related offenses are reprehensible crimes. But, along with other serious crimes, they have always been prosecuted at the state or local level unless some federal interest was present. Indeed, the nation’s more than 3,000 local district attorneys and 17,000 local police departments effect [sic] 100,000 prostitution arrests annually. Nothing suggests that federal intervention is necessary or would be more effective.”).

¹⁹⁷ See, e.g., *In re B.W.*, 313 S.W.3d 818, 825 (Tex. 2010) (stating that the dissent “emphasizes B.W.’s ‘long and sad history of delinquent behavior,’ presumably suggesting that her bad behavior is indicative of her mental capacity to commit this crime”).

¹⁹⁸ The United States criminal justice system has historically viewed girls who engage in sex, whether consensual or nonconsensual, as delinquents in need of reformation. See generally Lisa Pasko, *Damaged Daughters: The History of Girls’ Sexuality and the Juvenile Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1099, 1101-02 (2010) (detailing the history of how girls’ sexuality has been viewed by the juvenile justice system).

¹⁹⁹ *But see* Adelson, *supra* note 107, at 116 (expressing an alternative argument that “only when the juvenile justice system views prostituted children as delinquent will sufficient services flow to assist these children”).

²⁰⁰ Birckhead, *supra* note 91, at 1065 n.41 (a federal administrator who serves in the Office of Juvenile Justice and Delinquency Prevention said that though child sexual exploitation is “rape,” it should not be legalized because teenagers need to be warned “that they are doing something that’s wrong.”); Kittling, *supra* note 46, at 913 (“America cannot make up its mind: Are juvenile girls who have sex victims or criminals? Do they need protection or prosecution? The laws surrounding this issue reflect the country’s internal strife, as the United States takes two very distinct positions with respect to juvenile prostitution.”); Adelson, *supra* note 107, at 119-20 (one Florida official commented that “she might consider children as young as nine or ten years old as trafficking victims, but that young women who had reached sixteen years of age were prostitutes, not victims of trafficking”); HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 9 (the United States has historically criminalized prostitution).

²⁰¹ Annitto, *supra* note 132, at 47 (stating that New York’s Safe Harbor Act, which protects trafficked children from prosecution, was opposed by the District Attorneys Association of New York State).

framework often allows children to be prosecuted for prostitution.²⁰² The attitudes of their first line of defense—police officers, judges, attorneys, social service providers—shapes the way the rest of society views them.²⁰³

Few state governments have treated them like victims, though several states have recently begun to pass laws recognizing trafficked minors as victims.²⁰⁴ The District Attorney of Chicago, Anita Alvarez, expressed growing disillusionment with the established practice of prosecuting juveniles for prostitution in a 2010 hearing before Congress:

As a career prosecutor and newly elected State's Attorney, it has occurred to me that the traditional approach we have taken with juvenile prostitution has simply not been effective on many levels. We are not convicting [those who buy these children or buy sex with them]. Even more importantly, we are not able to effectively offer the services that these young women need to help them, keep them safe, and empower them to leave the sex trade once and for all.²⁰⁵

District Attorney Alvarez's view is not shared by all of her peers. Law enforcement groups around the country have insisted that the federal government should not impede their enforcement of prostitution laws.²⁰⁶ States assert they should be in charge of regulating prostitution laws without interference or restrictions from the United States government.²⁰⁷ This assertion clashes with the

²⁰² Birkhead, *supra* note 91, at 1059.

²⁰³ See COMMERCIAL SEXUAL EXPLOITATION STUDY, *supra* note 15, at 4 (definitions and labels assigned to domestic victims shaped the way prosecutors viewed them, with federal prosecutors believing that foreign victims of human trafficking were victims whereas domestic victims were prostitutes).

²⁰⁴ See Linda Smith & Samantha Healy Vardaman, *Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 292-93 (2011); Carrie N. Baker, *The Influence of International Human Trafficking on United States Prostitution Laws: The Case of Expungement Laws*, 62 SYRACUSE L. REV. 171, 179-80 (2012); HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 3; Njeri Mathis Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 251 (2011); *Domestic Sex Trafficking Hearing*, *supra* note 113, at 29; see, e.g., Amanda Kloer, *New Safehouses for Trafficking Survivors Open in California*, CHANGE.ORG (Mar. 29, 2010), available at <http://news.change.org/stories/new-safehouses-for-trafficking-survivors-open-in-california>; OKLA. STAT. ANN. tit. 21, § 748.2, (West 2012); MINN. STAT. ANN. § 30-52-2 (West 2012); N.Y. SOC. SERV. LAW § 447-b(1) (McKinney 2007); Toolsi Gowin Meisner, *Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution*, 43 PROSECUTOR 22, 24 (June 2009).

²⁰⁵ *Domestic Sex Trafficking Hearing*, *supra* note 113, at 12-13 (statement of Anita Alvarez, State's Attorney, Cook County, Chicago, Illinois).

²⁰⁶ Heiges, *supra* note 6, at 455.

²⁰⁷ *Id.*

TVPA's anti-incarceration right, which is granted to all victims of human trafficking.²⁰⁸

Not only are states defending the right to arrest trafficked persons for prostitution, but they have sometimes used arrest and prosecution to justify protection for domestic victims.²⁰⁹ Judges have stated that they must send domestic trafficking victims to juvenile detention centers because treatment alternatives in the community do not exist.²¹⁰ Others rationalize the incarceration-for-rehabilitation ideology by stating that without the threat of jail, some American victims will refuse protections offered by the State.²¹¹ This argument has been rejected by scholars²¹² and the Texas Supreme Court.²¹³

In *In re B.W.*, the Texas Supreme Court held that a minor cannot legally consent to sex and thus cannot be charged with prostitution.²¹⁴ In response to the argument that decriminalizing prostitution for minors would result in the inability to provide protections, the court stated that the juvenile justice system is not "the only portal" to protections for domestic victims.²¹⁵ Incarcerating and creating criminal records for victims on the belief that they will be forced to get help is harmful to victims.²¹⁶ Individuals who have had similar life experiences, like domestic violence victims, rape victims, or combat veterans with Post-traumatic Stress Disorder (PTSD), are not threatened with jail when they refuse to accept assistance from government services available to them.

Arresting, prosecuting, and incarcerating victims have costs: economic costs for governments²¹⁷ and personal costs for victims.²¹⁸ Eighty percent of people who are

²⁰⁸ *Id.* at 440. "Unfortunately, there are substantial inconsistencies between victim-centered federal policies on the one hand, and prostitute-targeted local enforcement practices on the other."

²⁰⁹ Birkhead, *supra* note 91, at 1059 (stating some officers prosecute minors in an effort to help them stay off the streets).

²¹⁰ Annitto, *supra* note 132, at 65.

²¹¹ *See, e.g., In re B.W.*, 313 S.W.3d 818, 825 (Tex. 2010) ("The dissent suggests that our decision bars the State from providing treatment, confinement, probation, counseling, or any other rehabilitation, implying that the juvenile justice system is the only portal to such services for [domestic trafficking victims]. That is simply not true.")

²¹² *See, e.g., Birkhead, supra* note 91, at 1082-83 (asserting that this argument is not used on victims of other crimes, much less criminals, to justify protection).

²¹³ *In re B.W.*, 313 S.W.3d at 825.

²¹⁴ *Id.* at 819.

²¹⁵ *Id.* at 825.

²¹⁶ Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 283 (2011) (suggesting that the money pimps spend on bailing out women and paying fees and fines associated with arrest make trafficking victims fall deeper into debt and saddle them with criminal records too).

²¹⁷ The average cost of incarceration in 2008 was approximately \$24,000 per year per inmate. *See, e.g., N.C. Aizenman, The High Cost of Incarceration*, DENVER POST, Feb. 29, 2008. This estimate does not include the costs associated with the investigation, arrest, and prosecution of individuals charged with criminal acts. Economic costs also include lost taxes, societal contributions, and human capital.

arrested for prostitution are rearrested.²¹⁹ Therefore, per capita economic and personal costs are magnified many times over. Unfortunately, “law, policy, and popular culture just wait for [trafficked minors] to live long enough to be written off as consenting adults.”²²⁰

At the end of 2011, only eight states had passed laws that prevent police officers and prosecutors from charging children with prostitution.²²¹ Recently enacted state human trafficking laws do not help victims avoid prosecution either. Many of these laws are merely “‘expressive’ legislation,” designed to express the legislature’s sentiment that human trafficking is evil.²²² The majority of anti-trafficking state laws lack funded protection provisions because though legislators have made it clear that they do not like trafficking, they are unwilling to spend any money on anti-trafficking protections.²²³ As a result, even though the majority of states have passed anti-trafficking legislation,²²⁴ few provisions within the various states’ legislation address the prosecution of trafficked citizen victims or protections available to them.²²⁵ A recent survey of anti-trafficking legislation gave only five states a C minus grade or better.²²⁶

Recently, states like New York, Washington, and Illinois have tried to create statutory alternatives to incarceration for minors engaged in commercial sexual exploitation.²²⁷ Other states are enacting expungement laws to allow victims of sex trafficking to clear their criminal records; however, some of these laws are difficult to access or require the victim to prove that he or she was trafficked at the time the offense was committed.²²⁸ Some states are enacting affirmative human trafficking defenses to prostitution, but these defenses also require victims to prove they were trafficked at the time of their arrest.²²⁹ In sum, diversions to incarceration, new

²¹⁸ Birckhead, *supra* note 91, at 1186 (arresting domestic victims increases their levels of trauma and their “sense of powerlessness”); Shay-Ann M. Heiser Singh, *The Predator Accountability Act: Empowering Women in Prostitution to Pursue Their Own Justice*, 56 DEPAUL L. REV. 1035, 1060 n.184 (2007) (citing a study that demonstrated that women arrested for prostitution left jail with fewer or no resources for addressing problems like homelessness, abuse, drug addictions, or trauma).

²¹⁹ Norma Hotaling et al., *The Commercial Sexual Exploitation of Women and Girls: A Survivor Service Provider's Perspective*, 18 YALE J.L. & FEMINISM 181, 184 n.7 (2006).

²²⁰ MacKinnon, *supra* note 216, at 298-99.

²²¹ 2012 TIP REPORT, *supra* note 15, at 364.

²²² Mark Sidel, *New Directions in the Struggle against Human Trafficking*, 17 J. TRANSNAT’L L. & POL’Y 187, 201-02 (2008).

²²³ *Id.*

²²⁴ See *West Virginia Becomes 49th State to Criminalize Human Trafficking*, POLARIS PROJECT (Apr. 5, 2012), <http://www.polarisproject.org/media-center/press-releases/589-west-virginia-becomes-49th-state-to-criminalize-human-trafficking>.

²²⁵ KITTERMAN ET AL., *supra* note 164, at 2.

²²⁶ *Id.* at 2, 5-6.

²²⁷ Smith & Vardaman, *supra* note 204, at 292-93.

²²⁸ Baker, *supra* note 204, at 179-80 (2012).

²²⁹ *Id.* at 180-81.

expungement laws, and affirmative defense laws do not yet offer trafficking victims adequate protections against arrest and prosecution. Rather they are only useful to some victims *after* they have been arrested or prosecuted.

C. Inadequate Housing for American Victims

Even when trafficked youth are properly identified and protected from arrest and prosecution, they may encounter challenges in receiving housing and services.²³⁰ American victims have fewer short-term and long-term housing options available to them after they have been identified as trafficking victims. Once a foreign-born victim has been certified, he or she obtains the same benefits that a refugee receives.²³¹ These benefits include housing and living expenses.²³² Unaccompanied foreign child victims are placed in foster homes.²³³ Unfortunately, domestic victims' housing options are not like their foreign counterparts'.

Americans who are able to escape their traffickers have stated that having a place to call home is critical to a life of freedom.²³⁴ However, most American minors have limited options about where they can go. They may come from families where they were physically or sexually abused and cannot return home,²³⁵ if they still have a home to call their own.²³⁶ Many victims find themselves living in a shelter or center that serves runaway youth, but not all shelters are equipped to deal with the special needs victims of trafficking present. There are also entry conditions that may prevent them from living there.

Many homeless shelters and run-away facilities refuse to house minors because of their age.²³⁷ Even facilities that admit minor residents may have "exclusion criteria" that prevent them from remaining there.²³⁸ Exclusion criteria include drug addictions, violent behavior, or mental health conditions, all of which are common

²³⁰ MICHEEL ET AL., *supra* note 133, at 4 (service providers who are able to identify victims may have problems providing housing and services to them due in part to funding and available community resources).

²³¹ 22 U.S.C.A. § 7105(b)(1)(A)-(B) (West 2012).

²³² 2007 ATTORNEY GENERAL'S REPORT, *supra* note 11, at 20; 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6, at 29.

²³³ 2010 ATTORNEY GENERAL'S REPORT, *supra* note 6, at 32-33.

²³⁴ HEALTH & HUMAN SERVS. LITERATURE REVIEW, *supra* note 10, at 13.

²³⁵ HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 8 (stating that many trafficked girls have "extensive abuse histories" and NGOs working with them must make sure they reconnect only with non-abusive family members); HEALTH & HUMAN SERVS. LITERATURE REVIEW, *supra* note 10, at 11 ("[W]hen minors leave their homes, it is to protect themselves, often because they view living on the streets as either less dangerous or no more dangerous than staying at home.").

²³⁶ KITTERMAN ET AL, *supra* note 164, at 3 (estimating that 57,000 youth are permanently abandoned each year).

²³⁷ See, e.g., MICHEEL ET AL., *supra* note 133, at 3 (several service providers in Washington stated they are unable to accommodate unaccompanied minors and of those that are able, their available beds are limited).

²³⁸ HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 4.

for victims of human trafficking to experience.²³⁹ Other factors that may prevent a domestic victim from receiving assistance include geographical restrictions (e.g., proof of residence in a specific county or state), no insurance, policies that prevent residents from running away and returning, prior criminal convictions, or rules related to length of stay.²⁴⁰ As a result of these exclusion criteria, it is hard for American victims to find short-term housing. Jennifer, a former American sex trafficking victim told a congressional panel “I couldn’t leave [my trafficker], you know, because there was nowhere to go, nobody cared.”²⁴¹

While it is difficult for underage victims to find shelter, it is often more challenging, if not impossible, for male and transsexual victims of human trafficking to find temporary living accommodations.²⁴² Many shelters are unable to house individuals of different ages, genders, and sexual orientation; males and transsexual youth are the groups most often excluded.²⁴³ Indeed, because shelters used solely for housing human trafficking victims are so few in number, trafficking victims are more likely to find refuge in domestic violence or sexual assault shelters.²⁴⁴ These kinds of shelters are likely to deny housing to males given the circumstances surrounding their female occupants’ stay, even if the men have been trafficked.²⁴⁵

Length of stay is yet another problem. Service providers who work closely with domestic victims suggest they need at least an eighteen-month stay at a facility with a specialized staff in order to be rehabilitated.²⁴⁶ However, many homeless shelters are forced to limit housing and services to days or weeks due to inadequate funding²⁴⁷ and do not employ individuals who are trained to work with trafficked

²³⁹ *Id.*

²⁴⁰ *Id.* at 4, 9; HEATHER CLAWSON & NICOLE DUTCH, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADDRESSING THE NEEDS OF VICTIMS OF HUMAN TRAFFICKING: CHALLENGES, BARRIERS, AND PROMISING PRACTICES 6 (2008) [hereinafter HEALTH & HUMAN SERVS. NEEDS OF VICTIMS REPORT], available at <http://aspe.hhs.gov/hsp/07/HumanTrafficking/Needs/ib.pdf>.

²⁴¹ Lobe, *supra* note 135.

²⁴² HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 3.

²⁴³ *Id.*

²⁴⁴ HEALTH & HUMAN SERVS. LITERATURE REVIEW, *supra* note 10, at 3.

²⁴⁵ There are other problems with using domestic violence shelters to house trafficking victims. While many sexually trafficked victims have what they might describe as a romantic relationship with a pimp who assaults them, they may be excluded from receiving assistance from domestic violence shelters because their pimp does not qualify as a boyfriend or spouse. In this way, the victim is not viewed as a “real” domestic violence victim. *Domestic Sex Trafficking Hearing*, *supra* note 113, at 29 (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services, New York, New York). The shelter may also fear the trafficker will visit the shelter after making contact with the victim, which poses problems for shelters whose location must remain secret. HEALTH & HUMAN SERVICES NEEDS OF VICTIMS REPORT, *supra* note 240, at 6.

²⁴⁶ HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 2 (“In some runaway and homeless youth shelter programs, the time restrictions on the length of stay imposed by funding sources made it impossible to build trust with the girls, let alone begin meaningful treatment.”).

²⁴⁷ *Id.* at 2, 4, 9; HEALTH & HUMAN SERVS. NEEDS OF VICTIMS REPORT, *supra* note 240, at 8.

persons. Trafficking victims may come and go from these shelters without the staff realizing they have been or are still being trafficked.²⁴⁸

Minor victims who are fortunate enough to be placed in foster homes may be placed with untrained foster parents. One federal study found that foster parents of trafficked minors were often unable to recognize them as human trafficking victims and were therefore unable to help them recover from the trauma of being trafficked.²⁴⁹ In addition, many of these victims were trafficked after running away from failed state child protective systems.²⁵⁰

Housing facilities with staff trained to recognize and treat American human trafficking victims are in short supply. In 2007, a Health and Human Services study identified only four residential facilities catering to American human trafficking victims; all of them were sponsored by NGOs.²⁵¹ These facilities borrow from the domestic violence “safe house” concept,²⁵² which houses and therapeutically treats traumatized and abused victims in a residential setting.²⁵³ These all-inclusive residential facilities are still few in number.²⁵⁴ Most are supported by NGOs, not

²⁴⁸ HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 3.

²⁴⁹ *Id.* at 2; *Domestic Sex Trafficking Hearing*, *supra* note 113, at 25-26 (statement of Luis CdeBaca, Ambassador-At-Large, Office to Monitor and Combat Trafficking in Persons, U.S. Department of State, Washington, D.C.) (“The things that happen to a child in prostitution are so grave that it is not necessarily something that a good-hearted person who has got a couple of foster kids in [the] house can really even fathom as to what that child needs. . . . [The] system is not designed for that child.”).

²⁵⁰ Brittle, *supra* note 165, at 1345, 1369; *Domestic Sex Trafficking Hearing*, *supra* note 113, at 25 (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services, New York, New York) (stating that over seventy percent of domestic victims served by one New York NGO have been in the child welfare system at one point in time).

²⁵¹ HEALTH & HUMAN SERVICES RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 3.

²⁵² While safe houses are not the only housing option available to trafficked minors, they more adequately address domestic victims’ needs because they are located in a secure (usually rural) location and provide a therapeutic setting for traumatized minors. One problem with urban homeless and runaway shelters is that pimps are aware of their location, unlike the whereabouts of a safe house. *Id.* at 2-3. Pimps and other traffickers have been known to find trafficking victims and even recruit new victims at centers that house runaways and homeless teens. *Id.* These centers and their staff members have to adopt numerous measures and provide constant security in order to avoid this problem. *Id.* at 5. As one victim stated, “It was really nice to be away from urban noise . . . the country is really therapeutic. [It was] nice to be home at night and not worry that I will bump into the pimp. You stay in the mindset of hustling in the city.” *Id.*

²⁵³ See Rutledge, *supra* note 204, at 251; see also *Domestic Sex Trafficking Hearing*, *supra* note 113, at 29 (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services, New York, New York) (suggesting that domestic violence and sexual assault advocacy groups need to work with American trafficking victims groups since domestic victims are often victims of both domestic assault and sexual assault criminal acts).

²⁵⁴ The locations of safe houses are kept secret so victims are protected from their traffickers. Many websites ask for donations for safe houses without revealing whether they are equipped to house victims. Therefore, it is challenging to determine how many safe houses are currently in operation.

states.²⁵⁵ Of the few states that have recently enacted laws that offer greater protections to domestic victims, commonly known as “Safe Harbor” laws, few have funded them.²⁵⁶ For example, New York’s Safe Harbor Act requires local governments to create short-term safe houses, but only “to the extent that funds are available.”²⁵⁷ As a result, housing options for domestic victims are limited and do not equal those provided to international victims.

D. Inadequate Services Available to American Victims

Before the TVPA was enacted, Congress found that “adequate services and facilities [did] not exist to meet victims’ needs regarding health care, housing, education, and legal assistance.”²⁵⁸ While this finding applied to other nations’ provisions and protections,²⁵⁹ it currently applies to the United States’s protections for Americans. Aside from English, culture training, and residency, most of the services offered to foreign victims are services that should be, but are not offered to domestic victims. The number of required protections and services needed by domestic and international victims is the same.²⁶⁰ Yet, the services provided to American victims are in short supply and are unevenly offered.

Housing may be the foremost protection victims need, but it is not the only one they need. Like their foreign counterparts, domestic victims need clothing, food, financial assistance, medical treatment, mental health treatment, legal assistance, substance abuse treatment, transportation, life skills training, education, work skills training, employment, and where appropriate, reunification with loving, supportive family members.²⁶¹ However, the services offered to citizen victims have been

²⁵⁵ Most safe houses are funded by public donations or faith-based organizations that work with foreign and domestic human trafficking victims. *See, e.g.,* Ivana Kvesic, *Members of Sex Trafficking Nonprofit Talk Faith, Hope and Restoration for Victims*, CHRISTIAN POST (Apr. 12, 2012, 3:17 PM), <http://global.christianpost.com/news/members-of-sex-trafficking-nonprofit-talk-faith-hope-and-restoration-for-victims-73110/>.

²⁵⁶ States like Oklahoma and New Mexico have created standards for the protection of trafficking victims, but funding for these protections is not clear. OKLA. STAT. ANN. tit. 21, § 748.2 (West 2011) (mandating that housing should be provided as soon as it is “practicable” and that a hotline should be set up as soon as funds are available); N.M. STAT. ANN. § 30-52-2 (West 2012) (stating that protections are only available until federal protections apply and that victims “may” qualify for some state services).

²⁵⁷ N.Y. SOC. SERV. LAW § 447-b(1) (McKinney 2007). Another criticism of New York’s Safe Harbor statute is that victims can be diverted from prosecution and arrest only if this is the first time they have been charged with prostitution. Meisner, *supra* note 204.

²⁵⁸ 22 U.S.C.A. § 7101(b)(18) (West 2012).

²⁵⁹ *Id.*

²⁶⁰ HEALTH & HUMAN SERVS. NEEDS OF VICTIMS REPORT, *supra* note 240, at 2-3. The only differences in suggested services were that domestic victims did not need translators whereas international victims did not need substance abuse treatment. *Id.* While some foreign victims do have substance abuse issues, they are less likely to seek help for them out of shame or fear. *Id.* American victims often have much more serious alcohol and drug addictions and are willing to seek help for them. *Id.*

²⁶¹ *Id.* at 2; HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 6-8. Medical care is a critical need for sexually trafficked victims. They may have sexually

described by experts as inadequate.²⁶² One federal study reported that “there is an assumption that U.S. citizen . . . victims have access to specialized services simply because of their citizenship status but . . . this is not really the case.”²⁶³

The disparity between services offered to domestic victims may start with the fact that they are rarely provided with case managers.²⁶⁴ After all, in order to receive services, victims must have help from individuals who know how to access government protections. The Department of Health and Human Services is responsible for getting foreign victims certified to receive federal assistance and paying for the services they receive.²⁶⁵ The federally funded Per-Capita Victim Services Contract “is designed to centralize services while maintaining a high level of care for victims of human trafficking through ‘anytime, anywhere’ case management.”²⁶⁶ This federal program provides accessible protection services to foreign victims.²⁶⁷ It is good policy. Given what victims of human trafficking have experienced on American soil, the United States should make the process of rehabilitation as effortless as possible.

In contrast, accessing government services is often a much greater challenge for domestic victims. Domestic victims do not receive the centralized customer-service approach that the Department of Health and Human Services and the Per-Capita Victim Services Contract provide. Government funding does not exist to give them case managers,²⁶⁸ which sets them apart from their foreign-born counterparts.²⁶⁹

Because federal protections are rarely offered, domestic victims apply to receive benefits through their state of residence.²⁷⁰ However, state application and documentation requirements make it difficult for citizen victims to retrieve state-offered protections.²⁷¹ The government procedures involved in locating and applying for services act as a barrier to state TVPA like protections promised to domestic trafficking victims.²⁷² One service provider who works with domestic

transmitted diseases that need immediate attention; many have experienced torture and severe abuse by their traffickers and those who buy their labor. Brittle, *supra* note 165, at 1369.

²⁶² HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 2.

²⁶³ COMMERCIAL SEXUAL EXPLOITATION STUDY, *supra* note 15, at 7.

²⁶⁴ HEALTH & HUMAN SERVS. NEEDS OF VICTIMS REPORT, *supra* note 240, at 9.

²⁶⁵ *Id.* at 3-4.

²⁶⁶ *Id.* at 4.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 9.

²⁶⁹ 2010 ATTORNEY GENERAL’S REPORT, *supra* note 6, at 29 (stating that foreign victims of trafficking receive case managers who help them navigate “through a network of service providers across the U.S.”).

²⁷⁰ HEALTH & HUMAN SERVS. LITERATURE REVIEW, *supra* note 10, at 16.

²⁷¹ *Id.*; see also 2012 TIP REPORT, *supra* note 15, at 363 (“NGOs reported that identified child trafficking victims faced difficulties accessing needed services.”).

²⁷² Bureaucracy has been cited as a problem for international victims’ protections as well. See, e.g., Payne, *supra* note 77, at 447-48 (the federal government took seven years to grant the first U-Visa).

victims described the daunting nature of dealing with government bureaucracy when it comes to accessing services for victims:

There is a general lack of knowledge and understanding of human trafficking and not enough service providers in the healthcare profession, local Social Security Administration offices, department of motor vehicles, and other key agencies are trained on this issue and know they can serve these clients. We are constantly having to take our clients to appointments because they are turned away when they try on their own.²⁷³

While domestic victims may be eligible for benefits through various state agencies and programs, accessing them is often difficult.²⁷⁴ Another service provider concluded, “I can barely navigate through all of these systems myself, so how can we expect [human trafficking victims] to take this on?”²⁷⁵ Yet this is exactly what domestic victims may have to do if they want the kind of protections granted to their international counterparts.

Biases and misconceptions about the definition of human trafficking victims among service providers further complicate matters. Untrained government employees have denied benefits to victims who qualify for them because they are unaware that the legal definition of human trafficking victim encompasses males and Americans.²⁷⁶ Service providers have mistakenly returned minor victims to an abusive home or back into the hands of their traffickers.²⁷⁷ The federal government is beginning to realize this problem and train service providers to better recognize domestic trafficking victims.²⁷⁸

Even if domestic victims are recognized as such, states still struggle to provide victims with adequate services. Few states offer benefits to victims of human trafficking. If services are offered at all, they generally include benefits capable of meeting only short-term needs. Whereas international victims can receive federal assistance throughout childhood and into adulthood,²⁷⁹ domestic victims are accessing services designed to meet immediate, not long-term, needs. One service provider stated,

When working with a domestic victim, I just need more time. I can’t stabilize a client with an extensive trauma history within 90 days or

²⁷³ HEALTH & HUMAN SERVS. NEEDS OF VICTIMS REPORT, *supra* note 240, at 5.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 6.

²⁷⁶ *Id.* at 5 n.4 (citing HEATHER CLAWSON & NICOLE DUTCH, U.S. DEP’T OF HEALTH & HUMAN SERVS., IDENTIFYING VICTIMS OF HUMAN TRAFFICKING: INHERENT CHALLENGES AND PROMISING STRATEGIES FROM THE FIELD (2008), available at <http://aspe.hhs.gov/hsp/07/HumanTrafficking/IdentVict/ib.htm> (last visited Jan. 30, 2013)).

²⁷⁷ *Id.* at 6. Another government report stated that some shelters where escaped victims were living were known to the trafficker and that some traffickers attempted to recruit or sent young, female workers to recruit shelter inhabitants. HEALTH & HUMAN SERVS. RESIDENTIAL FACILITIES STUDY, *supra* note 151, at 2-3.

²⁷⁸ 2012 TIP REPORT, *supra* note 15, at 363.

²⁷⁹ See *supra* note 86 and accompanying text.

transition them to permanent housing within 18-months. Many of my clients struggle to get [sober], get an education (or GED), learn life skills, obtain employable skills, and get employed. This is especially true if they have not begun to work on trauma recovery and this can take years.²⁸⁰

States that want to help trafficking victims have recently admitted their limitations in offering the kinds of services victims need. Texas was one of the first states to enact anti-trafficking legislation.²⁸¹ The Texas Supreme Court is the first Court in the nation to recognize the duplicity between statutory rape laws, that declare minors are incapable of consenting to sex, and prostitution laws, which are used to charge minors with consensual sex for a fee.²⁸² These anti-trafficking legal milestones reflect Texas's desire to protect victims. Yet, the state lacks the necessary funds and resources to appropriately serve victims. In a 2011 report to the federal government, Texas concluded that throughout the state,

there are few resources devoted to combating human trafficking. Although there are some 350 local law enforcement agencies in Texas, there are active and engaged anti-trafficking task forces in just four jurisdictions. In addition to limited law enforcement resources in the state to combat human trafficking, there are few social service agencies equipped to provide treatment for the victims.²⁸³

Other states share Texas's problem.²⁸⁴ Washington, which passed anti-trafficking legislation in 2003,²⁸⁵ has also struggled to fund services for domestic victims. At one time, Washington had merely one fifteen bed facility serving domestic trafficking victims, which was "the only place, other than a jail cell" where victims could "find respite, albeit brief."²⁸⁶ With the recent passage of a safe-harbor law for domestic victims, the state hopes to fund increased services through

²⁸⁰ HEALTH & HUMAN SERVS. NEEDS OF VICTIMS REPORT, *supra* note 240, at 8; Rami S. Badawy, *Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution—Part Two of Three*, 44 PROSECUTOR 40, 41 (June 2010) (quoting a Dallas law enforcement official as stating, "[i]t's impossible for us to try to solve 15 years of problems in 30 days"); *Domestic Sex Trafficking Hearing*, *supra* note 113, at 39 (Questions and Answers: Responses from Cook County State's Attorney Anita Alvarez) ("there is nowhere to send these children where they can be safe and receive long term, therapeutic services").

²⁸¹ Annitto, *supra* note 132, at 38 (Washington and Texas were the first two states to pass anti-trafficking legislation in 2003).

²⁸² See *supra* notes 213-15 and accompanying text.

²⁸³ TEX. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, HUMAN TRAFFICKING IN TEXAS: MORE RESOURCES AND RESOLVE NEEDED TO STEM SURGE OF MODERN DAY SLAVERY 11 (Aug. 2011), available at http://www.usccr.gov/pubs/TX_HT_Report-ver%2050-FINAL.pdf.

²⁸⁴ *Domestic Sex Trafficking Hearing*, *supra* note 113, at 14 (statement of Anita Alvarez, State's Attorney, Cook County, Chicago, Illinois) ("[O]ur greatest setback to date has not been a lack of vision or resolve but rather a lack of funding.").

²⁸⁵ Annitto, *supra* note 132, at 38.

²⁸⁶ Adelson, *supra* note 107, at 123-24.

impounded vehicle fees.²⁸⁷ Whether these fees actually pay for greater services, which are expected to include housing, medical and psychological treatment, education, vocational training, substance abuse therapy, and parenting classes, remains to be seen.²⁸⁸

The fact that at least one state has promised or has begun to budget services for domestic victims is a positive move in the right direction for state governments, but it is not enough. As long as there is inequality in the way victims are protected, inconsistency between what is practiced and what is mandated by federal law, and a distinction between other nations' standards and our own, there will be difficult implications related to this two-tier policy.

VI. IMPLICATIONS OF THE UNITED STATES'S TWO-TIER PROTECTION SYSTEM

The United States conceptualized the legal protection of human trafficking victims by creating victims' rights and humanitarian responses through the TVPA. Protection has both theoretical and practical applications. It is one thing to express an ideology that governments should act on behalf of all human trafficking victims; it is another to demonstrate a commitment to this belief through action. Though the United States has recognized Americans as trafficking victims since at least 2005, it has yet to prove it by providing systematic and equal protections to this group.

The United States's current two-tier approach to protection contradicts several American ideologies or legal principles that if not remedied, may have negative consequences not only for unprotected domestic victims, but also for the United States's reputation as anti-trafficking world leader. This section will analyze the contradictions in policy and practice when it comes to the foreign and domestic goals of partnerships, inclusiveness, and purposes for protections.

The first contradiction involves the concept of partnerships. Nine years after the United States introduced the 3-P paradigm, it introduced the fourth P: partnerships.²⁸⁹ Congress recognized that effective protection and rehabilitation requires coordination between government agencies, law enforcement groups, and NGOs.²⁹⁰ Not a single section in the TVPA is exclusively devoted to partnerships, unlike prevention, prosecution, and protection, which have all been codified.²⁹¹ However, various parts of the Act include the common refrain that governments, law enforcement agencies, and NGOs must work together in the fight against modern-

²⁸⁷ WASH. REV. CODE § 43.63A.740 (2010).

²⁸⁸ *Id.*; MICHEEL ET AL., *supra* note 133, at 3-4 (identifying shortages in housing and services for trafficked youth).

²⁸⁹ U.S. DEP'T OF STATE, FOUR "PS": PREVENTION, PROTECTION, PROSECUTION, PARTNERSHIPS, <http://www.state.gov/j/tip/4p/> (last visited Jan. 30, 2013); Ambassador Luis CdeBaca, U.S. Dep't of State, Address at St. Thomas University in Miami: The Fourth P: Combating Trafficking in Persons Through Public Private Partnership (Sept. 10, 2010).

²⁹⁰ *See, e.g.*, 22 U.S.C.A. § 7105(1)(A) (West 2012) (stating that NGOs work to create networks that help victims); 22 U.S.C.A. § 7105(1)(B) (West 2012) (stating that NGOs, legal advocates, and foreign governments should work together to assist victims, particularly incarcerated victims of human trafficking); 22 U.S.C.A. § 7105(1)(F) (West 2012) (requiring that international refugee organizations must assist displaced victims).

²⁹¹ 22 U.S.C.A. § 7104 (West 2012) (prevention); 22 U.S.C.A. § 7105 (West 2012) (protection); 22 U.S.C.A. § 7106 (West 2012) (prosecution).

day slavery.²⁹² The U.S. Department of State recognizes that, “[c]ombating human trafficking requires the expertise, resources and efforts of many individuals and entities.”²⁹³ Not only is the idea of partnerships a thread woven through the Act, but the United States government has taken action to promote partnerships through federal grants.²⁹⁴ Without partnerships, the other Ps in the paradigm cannot be realized.

While partnerships have been emphasized rhetorically, the United States has yet to create an effective partnership between its federal and state government systems. Human trafficking law has been, until recently, solely under the jurisdiction of the federal government. In contrast, state governments are charged with creating and enforcing laws that protect domestic trafficking victims while prosecuting their traffickers. However, many domestic trafficking victims, based upon their characteristics and experiences, must receive help from both government systems.

Instead of the federal government and state governments working together to resolve how both systems can partner to protect and serve domestic victims, each has waited for the other to act. The federal government has granted rights to domestic victims under federal law but has not funded federal protections or subsidized state protections to the extent that all domestic victims in the country receive protections similar to those offered to international victims. States have been unable or unwilling to fund services for American trafficking victims. The recession has made the problem worse by forcing governments to drastically cut state-funded social services. Thus, the stalemate between who should take responsibility for human trafficking victims continues.

The practice of the United States government contradicts its foreign anti-trafficking policy. The United States has sanctioned foreign governments that have not resolved intergovernmental partnership problems with the funding or delivery of human trafficking protections. For example, Equatorial Guinea was criticized for one governmental agency’s failure to fund another’s proposal for victim housing.²⁹⁵ Lebanon’s governmental agencies were cited for contradicting each other’s policies and practices regarding victim identification.²⁹⁶ And the Sudanese government was

²⁹² 22 U.S.C.A. § 7105 (b)(24) (West 2012) (“The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral for a [sic] to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.”); 22 U.S.C.A. § 7105(a)(1) (West 2012) (“The Secretary of State and the Administrator of the United States Agency for International Development, in consultation with appropriate nongovernmental organizations, shall establish and carry out programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement, as appropriate, of victims of trafficking.”).

²⁹³ *Partnerships*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/4p/partner/> (last visited Jan. 30, 2013).

²⁹⁴ 2010 TIP REPORT, *supra* note 44, at 341.

²⁹⁵ 2011 TIP REPORT, *supra* note 40, at 154.

²⁹⁶ *Id.* at 228-29.

condemned for failing to fund a governmental committee devoted to safely returning trafficked persons home.²⁹⁷

While the Department of State has publically shamed and sanctioned foreign governments through the TIP Report for failing to work together, it has been locked in a standstill with states over who will fund protections to domestic trafficking victims. States believe the federal government is better equipped to protect trafficking victims.²⁹⁸ The federal government has accused states of not doing enough.²⁹⁹ Considering the lack of protections available to domestic victims on both the federal and state levels, neither one is in a position to cast blame. The finger pointing has yet to solve the problem. If the United States wants to emphasize the importance of partnerships abroad, it must begin a meaningful and productive partnership at home.

The second contradiction relates to the inclusive nature of protection. One of the purposes served by having anti-trafficking legislation is guaranteeing the humanitarian treatment of every human trafficking victim. The United States has reiterated the fact that protections should be available to *all* victims of human trafficking, regardless of their form of trafficking,³⁰⁰ their citizenship status,³⁰¹ or whether they are men, women, boys, girls, heterosexual, transgendered, or homosexual persons.³⁰² Yet the United States's two-tiered system of protection has contradicted this all-inclusive definition by offering generous protections to one category of victims and, at worst, ignoring or at best, only partly protecting other groups. Furthermore, the United States undermines the TVPA's inclusive definition of victim by categorizing victims and distinguishing services available to them. In this way, the United States fails to uphold the policy of inclusive protections it helped create.

These exclusive practices have problematic consequences abroad. Because the United States was a frontrunner in drafting the world's first anti-trafficking legislation, many countries have followed its lead. This has produced mixed

²⁹⁷ *Id.* at 338.

²⁹⁸ Michelle Crawford Rickert, *Through the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level*, 4 LIBERTY U. L. REV. 211, 245 (2010) (citing a survey where the majority of local law enforcement officers reported that trafficking was not a state problem and that it was best handled by the federal government).

²⁹⁹ *Domestic Sex Trafficking Hearing*, *supra* note 113, at 2 (statement of Sen. Richard Durbin, Chairman, Subcomm. on Human Rights and the Law) ("State and local governments will have to take the lead role in changing the way we look at child sex trafficking, because they are on the front line.").

³⁰⁰ *See, e.g.*, 2011 TIP REPORT, *supra* note 40, at 240, 312 (sanctioning Madagascar, in part, for failing to eradicate child sex tourism and reproaching Saudi Arabia for failing to protect victims of sex trafficking).

³⁰¹ *See, e.g., id.* at 196, 240, 253 (condemning Iran and Mauritania for detaining foreign victims of trafficking and criticizing Madagascar for failing to recognize citizen victims as worthy of protection).

³⁰² *See, e.g., id.* at 106, 154, 216, 222 (citing Burma and Kuwait for failing to protect male victims of human trafficking, and Equatorial Guinea cited for failing to protect adult victims of trafficking and reprimanding North Korea for abusing and jailing women trafficking victims).

legislative and policy outcomes. Positively, countries have borrowed from legislation that was well-intentioned and comprehensive in its protections for international victims of human trafficking. Negatively, the emphases on sex trafficking to the exclusion of labor trafficking, on women and girl victims to the exclusion of men and boy victims, and on international victims to the exclusion of domestic victims have been perpetuated worldwide.³⁰³ In sum, other countries have done what the United States has done, which has resulted in inadequate protections to certain categories of victims worldwide.³⁰⁴ As a result, the United States is setting an unfortunate precedent for other nations to follow.

Finally, the purposes of offering protections to victims are undermined by inconsistent policies and practices. Protections are offered to victims based upon two premises. The first premise is that governments must protect trafficked persons who are otherwise unable to protect themselves. Human trafficking victims, regardless of their place of birth, are historically members of marginalized populations. When it drafted the TVPA, Congress focused on the protection of women and children,³⁰⁵ presumably because women and children needed greater protections against exploitation in places where they had no voice.³⁰⁶ Traffickers focus on finding vulnerable people to exploit and keeping them vulnerable.³⁰⁷ Traffickers are able to keep international victims complicit in the trafficking scheme by bringing them to another country, stripping them of travel documents, and threatening them with criminal consequences or worse if they fail to work. Through the TVPA, the United States has made it a policy to protect vulnerable foreign nationals in America and abroad.

Domestic victims are no less vulnerable. They lack authority and power. They are threatened with arrest and prosecution for the acts their traffickers force them to commit. Though they need as much protection as their foreign counterparts do, protection has eluded them. “Issues of race, class, and prior victimization have ensured that these [victims] are frequently invisible in our National dialog.”³⁰⁸ Though the United States has taken great lengths in protecting powerless, vulnerable

³⁰³ See, e.g., *id.* at 154, 180, 229 (sanctioning Equatorial Guinea, in part, for its failure to protect and fund services for adult victims of human trafficking, Guinea-Bissau for its failure to adequately identify victims, and Lebanon for its inability to fund protections for trafficking victims); Chuang, *supra* note 46, at 1706-07 (“Other countries have followed suit, more likely to adopt domestic laws on sex-sector trafficking than on non-sex-sector trafficking, and often passing anti-prostitution laws under the guise of ‘trafficking’ laws . . . which undermines the U.S. and international legal definitions of trafficking.”).

³⁰⁴ Chuang, *supra* note 46, at 1706 (stating that the United States has allocated more resources and written more laws that emphasize sex trafficking and other countries have followed this model to the detriment of slaves who do not fit in this category).

³⁰⁵ 22 U.S.C.A. § 7101(a) (West 2012).

³⁰⁶ Chacon, *supra* note 98, at 3027 (stating that women and children are most vulnerable to becoming trafficking victims because they lack economic resources and are politically and socially marginalized in nations worldwide).

³⁰⁷ Haynes, *supra* note 88, at 358.

³⁰⁸ *Domestic Sex Trafficking Hearing*, *supra* note 113, at 17 (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services, New York, New York).

populations abroad, it has not done the same for its own defenseless at-risk populations at home.

The United States's commitment to protecting vulnerable populations abroad is seen through the TIP Report. For example, the United States has attempted to protect foreign nationals on foreign soil who are at greater risk of imprisonment or deportation. Algeria was cited for failing to operate government-funded shelters and for arresting foreign trafficking victims for acts their traffickers forced them to commit.³⁰⁹ Kuwait treated trafficking victims differently based upon citizenship; foreign victims' cases were referred to federal officials for investigation before they faced deportation whereas citizen victims were excluded from this provision and were instead imprisoned while their cases pended investigation.³¹⁰ The United States has acted like the Algerian and Kuwaiti governments by failing to protect its own trafficked persons who are unable to protect themselves.

The second purpose for offering protections is that governments have a duty to protect and restore victims of crime. Under federal law, all trafficking victims are given the right to be treated like crime victims.³¹¹ That the United States has been apathetic about treating its own citizens as victims of crime reflects the inherent contradictions between federal and state policies. One scholar described the country's legal conflict as follows: "On one hand, the country has taken a strong stance against those who traffic juveniles across international borders. On the other hand, the Government criminalizes domestic juvenile prostitutes."³¹² In this way, the United States is developing a "do-as-I-say-not-as-I-do" reputation abroad.

The United States has sanctioned foreign governments for arresting and convicting trafficked persons and for failing to fund victim protections. The Burmese government inadequately served victims because it failed to fund long-term services.³¹³ Madagascar failed to offer systematic care to victims of trafficking.³¹⁴ Iran was criticized for prosecuting sex trafficking victims for the acts of prostitution their traffickers forced them to commit.³¹⁵ All of these actions have also been committed by the United States against citizen victims. Yet, all of the aforementioned countries received a third-tier ranking, along with sanctions, while the United States received a first-tier ranking (from itself).

That the United States asks other countries to fund services for victim protection while it has failed to fund services for American trafficking victims is remarkable. Foreign countries have expressed astonishment regarding the United States's criticism of anti-trafficking failures abroad.³¹⁶ This incredulity is justifiable. The

³⁰⁹ 2011 TIP REPORT, *supra* note 40, at 66.

³¹⁰ *Id.* at 221.

³¹¹ 22 U.S.C.A. § 7105(c)(1)(A) (West 2012).

³¹² Kittling, *supra* note 46, at 913.

³¹³ 2011 TIP REPORT, *supra* note 40, at 106.

³¹⁴ *Id.* at 240.

³¹⁵ *Id.* at 196.

³¹⁶ 151 CONG. REC. H11,570 (daily ed. Dec. 14, 2005) (statement of Rep. Bobby Scott) ("When we try to get cooperation of other countries to go after sex trafficking in their country, some point to our toleration of [domestic] prostitution in our country to suggest that we have no moral authority to criticize them.").

United States's hypocrisy is not. The United States' self-appointed responsibility of policing the world for anti-trafficking efforts may be a noble one. Its efforts have produced good fruit. But it must begin to protect its own citizen trafficking victims better before its anti-trafficking reputation is further damaged.

VII. CONCLUSION

Domestic victims of trafficking have always been and continue to be an afterthought in America. There is a procedure of neglect that began in congressional hearings, remained throughout the drafting and enactment of the TVPA, and continues in the current failure to subsidize protections for domestic human trafficking victims. Without funding, the government's protections are empty promises. The federal government, with its failure to protect domestic victims in the same way it does foreign victims "sends a clear message that the Government finds [them] . . . unworthy of protection. In the Government's eyes, these individuals are not victims."³¹⁷

The federal government must demonstrate through its actions that it cares enough about its own citizens to protect them from the effects of trafficking. Placing the blame on state governments does not solve the problem. The two-tier system approach, whereby qualifying foreign victims receive all-inclusive federal services and citizen victims are excluded from receiving the same is flawed. Federal and state governments must be held accountable for their failure to work together to achieve a national protection plan for domestic victims of human trafficking. They cannot approach protections with the notion that someone else will provide them, especially given the fact that domestic services are lacking in both the federal and state government systems.

Domestic victims need to be identified as victims, receive immunity from arrest and prosecution, and be eligible for all of the short-term and long-term housing and services foreign victims in America may qualify to receive. The United States government needs to begin allocating more international human trafficking aid to its own citizens. Charity begins at home. It is time for America to deliver the legal and rhetorical promises it has made to domestic victims of human trafficking. American victims are waiting and the world is watching to see whether the protection standards the federal government has set for other nations will be both adopted and applied to domestic trafficking victims here in the United States.

³¹⁷ Kittling, *supra* note 46, at 920.