INTRODUCTION

In mid-June in New York, Immigration and Customs Enforcement (“ICE”) agents appeared at a Queens Human Trafficking Intervention Court (“HTIC”), searching for a trafficking victim who was there to appear before a judge.\(^\text{[1]}\) The agents were unable to detain the woman, who had been arrested on charges of “working illegally as a masseuse,”\(^\text{[2]}\) but their appearance in the court quickly raised concerns that foreign national trafficking victims are the next to be caught in President Donald Trump’s “crackdown” on illegal immigration.\(^\text{[3]}\)

These fears may not be unfounded. The Executive Branch’s immigration policies,
promulgated to date, empower immigration agents to detain, with the aim of removal, those foreign nationals who commit or are charged with criminal offenses in the U.S., even minor ones. Indeed, trafficking victims who appear in HTICs have all been charged with committing offenses in the U.S., and many are also foreign nationals.

Without looking more closely at the circumstances of their victimization and the legal protections in place to protect them, some trafficking victims in the U.S. may effectively be described as “criminal aliens,” targeted as “a priority for removal” from the U.S. However, this article proposes that, even under these new policies, the advancement of protection for foreign national trafficking victims is possible and critical.

Part I provides a background on the issue of human trafficking and illustrates, in particular, the circumstances in which foreign national trafficking victims may become criminal defendants in the justice system. Part II discusses the legal protections and mechanisms currently in place to protect foreign national trafficking victims and to divert defendant-victims toward services. Part III discusses the implications of the new immigration policies of the Executive Branch and argues that these policies do not change the protections in place for foreign national trafficking victims, even those who may become criminal defendants. This Part also proposes three ways to counter the negative impact of the current immigration policies for foreign national trafficking victims.

This article concludes that maintenance and expansion of protections for all trafficking victims is essential to the global fight against trafficking, and this fight is one that should not slacken with a change of national administration.

1. HUMAN TRAFFICKING IN THE UNITED STATES

1. The Issue of Human Trafficking on a National Scale

Trafficking is a global economic crime of exploitation that occurs in jurisdictions around the world, including the U.S. The crime consists of two main types: labor and sex trafficking.

Sex trafficking is defined in the federal anti-trafficking legislation – the Trafficking Victim Protection Act (“TVPA”) – as the “recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.” A victim of sex trafficking under the TVPA is someone who was either “induced by force, fraud, or coercion” to perform the commercial sex act or who had not yet “attained 18 years of age” when made to perform the act.

Labor trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services,” through the use of force, fraud, or coercion, and for servitude, peonage, debt bondage, or slavery.

Accruing an estimated $150 billion in profits through the exploitation of over 20 million people worldwide, trafficking especially causes the victimization of those
“affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities.”[13] In addition to these risk factors, political upheaval, armed conflict, and natural disaster, can increase a population’s risk for trafficking.[14] To people made vulnerable by such events or circumstances, traffickers make promises of good work and good pay,[15] love and protection,[16] shelter,[17] or other assistance.

If a person succumbs to the lures of traffickers, the traffickers then often use threats or force to diminish the resistance of the victim and to ensure submission; they may isolate, demean, and demoralize the victim; they may intimidate, abuse, and deceive the victim; and they may use drugs or other tactics, such as denial of food or water, to disorient the victim.[18] Especially in cases of foreign national trafficking victims, traffickers may take away the victims’ visas, passports or other documents and threaten to report the victims to immigration authorities, in order to maintain control.[19]

2. **Foreign National and Immigrant Trafficking Victims**

While exact estimates of the number of foreign trafficking victims in the U.S. are difficult to obtain, foreign nationals made up 62.8 percent of labor trafficking victims and 9.6 percent of sex trafficking victims reported to the National Human Trafficking Resource Center in 2015.[20]

The stories of foreign national trafficking victims themselves are varied and tragic. They include that of an Eastern European woman kidnapped and forced to work in the commercial sex trade,[21] a Nigerian teenager promised a job as a nanny and instead forced into an abusive situation of domestic servitude,[22] a Chinese woman forced into commercial sex work in a “massage parlor,”[23] and an Egyptian child sold to work as a domestic slave.[24]

In many cases, these victims have originally been provided documentation to allow them to enter the U.S. Their traffickers may have given them fraudulent passports and visas.[25] In other cases, the traffickers obtain legitimate documents through illicit means,[26] such as by deceiving those who work in visa branches overseas into providing documentation for entry into the U.S.[27]

Once in the U.S., foreign national victims face isolation, “economic instability and dependency on the new employer or trafficker.” [28] Traffickers exploit the fact that foreign nationals are not familiar with the country, the laws, their rights, the language, or the culture.[29] In fact, in addition to taking away documents,[30] traffickers use the law, such as threatening to report victims to immigration authorities, “to exert pressure on another person to perform services,” including labor services or commercial sex acts.[31] The fears, insecurity, and abuse of foreign national victims is often so acute that victims will not report the exploitation for fear of arrest, prosecution, and deportation.[32]

3. **Trafficking Victims as Criminal Defendants**
Arrest, detention, and even deportation of foreign national trafficking victims is not uncommon. Victims may be arrested for working without a visa, for prostitution-related charges, such as “practicing massage without a license,” or for a range of other crimes, including theft and drug sales. Trafficking victims often appear as criminal defendants as an unfortunate result of the “nature of trafficking” whereby victims are often forced or “coerced into the commission of crimes” by their traffickers.

However, criminalization and incarceration of trafficking victims is considered “double victimization,” whereby victims first suffer at the hands of their trafficker and then at the hands of the state. This punishment of trafficking victims for crimes they were coerced into committing is uniformly denounced across ideological and political lines.

2. Existing Laws and Protections for Foreign National Trafficking Victims

Few issues have as wide bipartisan political support as the issue of trafficking and the protection of its victims. The first major anti-trafficking bill proposed in the U.S. was sponsored by a Republican Congressman and co-sponsored by forty-one Democrat and Republican representatives. This initial legislation would eventually lead to the development and passage of the TVPA, which was enacted in 2000, also with wide bipartisan support. Such bipartisan support has also not waned in the decades since the enactment of the TVPA: In May 2017, the Put Trafficking Victims First Act, which aims to increase protections for all trafficking victims, unanimously passed the House.

Through such bipartisan efforts, the initial TVPA, its subsequent reauthorizations, and related laws ensure that protections exist in law for all trafficking victims in the U.S.

1. Why Protection is Paramount

Under the TVPA, protection of trafficking victims is one the four pillars of the U.S. trafficking response, a standard to which other nations are also held to account. In fact, it is in a large part due to U.S. anti-trafficking legislation that “it is now almost universally accepted that . . . trafficked persons should be provided immediate supported protection and not be re-victimized by the state.”

Protection for trafficking victims, particularly foreign nationals and immigrant trafficking victims was omnipresent in early discussions of the U.S. anti-trafficking legislation. In the hearings on the Freedom from Sexual Trafficking Act of 1999, Republican Representative Christopher Smith dubbed the double victimization caused victims through arrest and deportation a form of “cruelty” that “frightens other victims from coming forward.” In another hearing, Representative Smith criticized the fact that “women who are trafficked . . . end up being arrested in brothels raids, locked up, and then deported as illegal immigrants.” He argued, “[W]hy not go the max in terms of providing protection” to foreign national
trafficking victims.[50] Others affirmed that the “granting of special visas . . . is an appropriate way to begin to address the protection problem.”[51]

Indeed, protection of foreign national trafficking victims from punishment and deportation was seen as an important way to protect victims and empower them to come forward to assist in the prosecution of their traffickers.[52] Many also advocated that foreign trafficking victims should be able to obtain legal status in the U.S. and access federal benefits[53] even where unable to assist in the prosecution of their traffickers, due physical and psychological trauma.[54]

As protection mechanisms for trafficking victims developed in the U.S., from 2000 to the present, an early clarion call rang through: “It seems that if we don’t spell out in real detail what we mean—that we want these people protected—it won’t happen.”[55] To this end, that fundamental concept, “protection,” drove the development of a system that affords foreign national victims relief and assistance under the law.

2. The Existing Protection System For Foreign National Trafficking Victims

The protection system developed under the TVPA specifically provides for a stay of removal, a visa called the T-visa, and, in some cases, eventual permanent residence status for the trafficking victim and some family members. Outside the TVPA, other avenues for victims to receive assistance and legal status in certain cases are the U-visa, Special Immigrant Juvenile Status, Continued Presence, asylum, or a Violence Against Women Act (“VAWA”) self petition. [56] In some cases, victims may wish to return to their home country, in which case, they may be voluntarily repatriated.[57]

The T-visa is a central part of relief provided to foreign national trafficking victims established under the TVPA.[58] To obtain this visa, a victim must be a victim of trafficking, as defined under the TVPA, have complied with “reasonable requests” for assistance in the investigation or prosecution of the trafficker, and would suffer extreme hardship if required to return to his or her country.[59] The exceptions to compliance with the investigation or prosecution of a trafficker are two-fold: minors are not forced to comply with law enforcement to obtain T-visa benefits,[60] and adult victims may still get T-visa protection if they cannot cooperate with an investigation or prosecution due to “physical or psychological trauma.”[61]

Once issued, a T-visa allows the foreign national to access public benefits and employment authorization in the U.S. for four years.[62] The T-visa system also allows for victim-centered reunification whereby T-visa applicants may also request that family members be also granted T-visas.[63] After three years, T-visa holders may apply for permanent residence status and be “lawfully admitted for permanent residence” in the U.S.[64] Just over 1200 T-visas were issued between 2014 and 2015 combined.[65]

A victim might also be certified to receive public benefits where a “bona fide application for a T visa” is still pending.[66] To receive certification, an adult
A trafficking victim must be a victim of trafficking, as defined by the TVPA, be willing to assist in investigation and prosecution of the trafficker, unless unable to assist due to trauma.[67] For minors, they are able to access benefits and services merely with “credible information” indicating the child is a victim of trafficking and an Eligibility or Interim Assistance Letter has been provided on their behalf.[68]

However, T-visas themselves remain difficult to obtain and far fewer are issued each year than are available.[69] Service providers report continuously that, at times, “law enforcement fail[ed] to provide support for T visa applications, effectively delaying the application process and survivors’ access to federal benefits and employment.”[70] Law enforcement agencies themselves report that an equal number of foreign national trafficking victims are deported each year as are granted T-visas.[71] Failure in identification of victims and erroneous denial of benefits still occur.[72]

Other avenues toward obtaining legal status in the U.S. are also available to foreign national trafficking victims. The U-visa is a lesser-sought form of protection[73] that is similar to a T-visa in many respects. It is issued for 4 years, during which time the holder has employment authorization; it is also available to certain immediate family members of the victim; and after three years, a holder may apply for permanent resident status.[74] To obtain this visa, the victim must be a victim of a qualifying crime, such as trafficking, have suffered substantial abuse from the crime, have information about the crime, and be able to assist in the investigation or prosecution of the crime.[75]

Continued Presence is renewable “short-term immigration relief” issued for one year at a time.[76] It allows victims to remain in the U.S., access public benefits and services and obtain employment authorization for each year it is valid.[77] For this protection, victims need not cooperate with law enforcement, but as “only law enforcement can file an application for Continued Presence,” a victim must cooperate with law enforcement to the extent necessary to determine the victim’s eligibility for Continued Presence.[78] In 2015, Continued Presence was issued for over 170 victims and renewed for another 223.[79]

Special Immigrant Juvenile Status is available to foreign national children who are unmarried and under 21 and who have been abused, abandoned, or neglected.[80] A juvenile court must declare the child a dependent and placed the child in the custody of a person or agency because reunification with a parent is not possible, due to the abuse, neglect, or abandonment.[81] The court must also find that it is not in the best interest of the child to return the trafficked child to her country of origin.[82]

Trafficking survivors are also entitled to asylum in the U.S. in certain situations specifically related to their experience of trafficking.[83] Specifically, if the victim is fleeing the country to escape bondage or fear being trafficked again in their home country, they may be granted asylum.[84] Once granted asylum, they may receive permanent resident status after one year.[85]
Finally, the VAWA self-petition is available to the spouses, parent, or children of abusive U.S. citizens or permanent residents. In situations of trafficking, a spouse may have forced the victim into labor or sex trafficking as part of an abusive marriage. The petition allows for these victims “to file for legal status without having to rely on [the abuser] . . . to sponsor their immigration applications.” Once approved for VAWA status, a victim may apply for permanent resident status.

For those victims who wish to be voluntarily repatriated, the U.S. must ensure a safe and expedient return to their home country.

### 3. The Reactive Protection Provided in HTICs

In addition to the availability of visa protection, HTICs have also been developed in certain states to help divert trafficking victims charged with criminal offenses, committed as a result of their exploitation at the hands of traffickers, toward services and to, eventually, dismiss the charges against them.

The widespread problem of the criminalization of victims at the hands of the state is the primary reason HTICs were developed. Although many criticize the founding premise that victims must be arrested in order “to connect them with services,” HTICs themselves are an important stopgap to help to de-incarcerate victims while directing them toward services and providing trauma-informed courtroom procedures.

In many cases, the cases of trafficking victims in HTICs are resolved with an alternative disposition, an “adjournment in contemplation of dismissal,” whereby “the judge continues the case for a period of time, with or without conditions, and if after that period of time, the defendant has no new offenses and has completed conditions, the case is dismissed and sealed.” This result means that there has been no finding or adjudication of guilt and the case, once dismissed, will never appear in a background check.

### 3. Implications of Immigration Policies on Protection Laws for Trafficking Victims

The current administration idealizes itself as the “law and order” administration. Its immigration policies have led to a mass expansion of immigration enforcement efforts, including the hiring of 10,000 officers and agents to enforce the immigration laws of the U.S., prioritizing the removal of those convicted or charged with crimes. The policies promote the detention of even those suspected of violating the law and prompt removal of all those suspected criminals whose claims to remain in the U.S. are rejected. It tightens asylum procedures to ensure asylum mechanisms “are not illegally exploited to prevent the removal of otherwise removable aliens.”

Many fear, rightfully, that such immigration policies have a negative effect on the
fight against trafficking and protection of victims. Experts warn that “[t]rafficking will skyrocket under President Trump,” as fear of deportation leverages traffickers’ power over victims, makes victims less willing to come forward, and pushes the crime further underground.\[100\] Others suggest that even existing visa options and protection under the TVPA are not enough to protect foreign national trafficking victims, as few T-visas are issued and their issuance “depends on the discretion of the law enforcement system, which is extremely hostile to and suspicious of immigrants.”\[101\]

Indeed, these experts and advocates are correct to note that the current immigration policies have negative implications for foreign national trafficking victims, as evidenced by events like the appearance of ICE officers in a HTIC in New York. However, few propose concrete solutions to these issues. As the “law and order” administration gives no indication of willingness to reverse these policies, the anti-trafficking movement is in dire need of constructive and critical solutions to push the current administration on the issue of protection of foreign national trafficking victims.

Three key solutions to stymie and reverse the negative impact of these policies are, first, to leverage the protections that exist under current laws, such as the TVPA, to hold the current administration accountable for ensuring protection of trafficking victims; second, to advance further trainings on trafficking for law enforcement and immigration officers in order to spread awareness of existing laws and to ensure protection, rather than criminalization, of victims; and third, to enact a newly proposed law that expands victim protection in the U.S.

First, the Executive Department’s current immigration policies make explicit that they are to ensure the proper enforcement of existing laws on immigration. To this end, the TVPA must also be enforced to the full extent of the law, including to the extent it amended immigration law to include visa relief and protection for foreign national trafficking victims. While the Executive Department is currently silent on protection of adult foreign national trafficking victims, one of its policies carves out the important exception through reference to the 2008 reauthorization act of the TVPA: The immigration policy states that “all Department of Homeland Security personnel” must be “properly trained on the proper application” of the anti-trafficking legislation, as it relates to “unaccompanied alien children.”\[102\] Otherwise, to date, no other policy of the Executive Branch suggests prioritization of protection of trafficking victims, including the anti-trafficking policy.\[103\]

However, as the above mention of the 2008 reauthorization act of the TVPA suggests, anti-trafficking laws remain in place and foreign national trafficking victims do have express protection under these laws. At this juncture, these laws can be leveraged before the current administration to advocate that the Executive Branch clarify, through a widely promulgated policy, that foreign national trafficking victims will not be targeted by immigration enforcement actions. The President also has the power to direct those tasked with immigration enforcement to protect and assist victims, not target them as removable aliens, and to indicate that relief and assistance available to trafficking victims, such as the T-visa, are still available.

Second, service providers and agencies must continue to advance trainings for law
enforcement and immigration officers to spread awareness of existing laws and to ensure protection, rather than criminalization, of victims. Trainings of law enforcement officers and immigration officials, who are tasked with making the initial choice between arrest or detention and identification of victims as victims, can help ensure that victims are protected at the initial encounter with law enforcement, rather than reactively dealt with in a HTIC. To this end, advocates must continue to push the current government and administration to ensure funding under the TVPA for service providers to train law enforcement and immigration officers on the law, on identification of victims, and on appropriate responses in an initial encounter with a victim.

Third, the Put Trafficking Victims First Act of 2017, which calls for the advancement of trafficking victim protection in the U.S., must be passed. This law calls for funding for trainings to ensure, inter alia, that “law enforcement officers and prosecutors make every attempt to determine” whether an individual is not a trafficking victim “before arresting them for, or charging them with, an offense.”[104] It also encourages States to enact protections that allow victims “to have convictions and adjudications related to prostitution and nonviolent offenses vacated and such records cleared and expunged if offenses were committed as a direct result of the victim being trafficked” and to ensure that foreign national victims do not “lose[] any immigration benefit because of such conviction or arrests.”[105] This law, essentially, would add an extra layer of national commitment to the protection of all trafficking victims, especially foreign nationals.

Where the current immigration policies are dangerous and can push victims into the shadows, they also provide the opportunity for advocates to leverage the laws in force to push the administration on the issue of victim protection and on the advancement of practices that support victims to escape from trafficking situations and to heal.

CONCLUSION

The global fight against trafficking is far from over. In this fight, the role of the state in this fight is to ensure that victims are treated, rather than further traumatized, and assisted, rather than punished. Its role is to ensure law enforcement and those enforcing immigration policies understand the complex dynamics and signs of trafficking. Its role is to make progress toward a world where trafficking is understood and condemned and, eventually, eradicated. Only through steadfast commitment to this role, despite changes in the political climate, will the fight against this crime ever be won.


[2] Id.


[17] See, e.g., Homelessness, Survival Sex and Human Trafficking, Covenant House 15 (May 2013) (“[T]raffickers loiter in areas where homeless youth . . . gather and then tell them that the shelters are full and offer them a place to stay in lieu of sleeping on the streets.”).


[23] Whitford, supra note 5.

[24] Nguyen, supra note 22, at 188.


[26] Sex Trade, supra note 21, at 14 (Testimony of Steven R. Galster).

[27] See id. at 20, 30.


[29] Id.


[31] Criminal Defendants, supra note 18.
[32] See, e.g., Whitford, supra note 5.


[34] Sex Trade, supra note 21, at 20–21.


[36] Whitford, supra note 5.

[37] Criminal Defendants, supra note 18.

[38] Id. at 1369–70.


[41] See Gruber, supra note 5, at 1336 (“[T]here is one thing on which both sides agree: . . . trafficking intervention should not involve the state arresting, prosecuting, or incarcerating women.”); Wagner & Poe Host Special Order on Human Trafficking, Rep. Wagner (May 24, 2017), https://wagner.house.gov/media-center/press-releases/wagner-poe-host-special-order-on-human-trafficking (discussing initiative of Republican Representatives to enhance and advance protection of trafficking victims, in which they were joined by Democrats).


[46] Anne T. Gallagher & Janie Chuang, The Use of Indicators to Measure Government Responses to Human Trafficking, in Governance by Indicators: Global Power through Quantification and Rankings 341 (Kevin Davis, et al., eds. 2012). The other pillars include prevention, prosecution, and partnerships. See Trafficking in


[49] Sex Trade, supra note 21, at 1.


[51] Id. at 18, 84.

[52] See, e.g., International Trafficking In Women and Children Hearings Before the Subcommittee on Near Eastern and South Asian Affairs of the Committee on Foreign Relations, 106th Cong. 20 (Feb. 22 & Apr. 4, 2000) (statement of Hon. Harold Hongju Koh) (“[A] possibility of visa relief . . . [makes] it possible for [victims] to come forward to testify against those who . . . subjected them to this kind of atrocity.”).


[57] Id.


[67] Id.


[71] *Combatting Modern Slavery*, supra note 60, at 54 (statement of Amy Farrell).


[73] See id. (stating only 29 U-visa applicants had trafficking as the qualifying crime in 2015).


[75] Id.

[76] Id.

[77] Id.

[78] Id.


[81] Id.

[82] Id.

[83] Id.

[84] Id.
[85] Id.


[87] Immigration Needs, supra note 56.

[88] Id.

[89] Id.


[92] Some victims may still be incarcerated in HTICs “as a way of mandating safety” but the original aim of HTICs is to provide alternatives to detention for victims. See id. at 1375.


[94] Gruber, supra note 5, at 1362.

[95] Id. at 1362.


[102] Public Safety, supra note 4.


[105] Id.

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