

“U” STANDS FOR UNDERUTILIZATION: THE U VISA’S VULNERABILITY FOR UNDERUSE IN THE SEX TRAFFICKING CONTEXT

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INTRODUCTION

Laura was in her twenties when she fell in love.¹ Her feelings for her boyfriend were so powerful that in spite of her family’s misgivings she decided to accompany him on a six-month trip to the United States.² Yet, while on the flight to the United States, Laura’s boyfriend informed her that once she arrived she would be working as a prostitute and that he would harm her family if she tried to call for help.³ Laura essentially became the “‘property’ of her trafficker;” she could not leave her trafficker’s control and she was forced to have sex with men for her trafficker’s profit.⁴ On the day that Laura describes as the “worst day in [her] life,” she was even forced to have sex with over one hundred men.⁵ Seven years later, Laura was eventually rescued in an Immigration and Customs Enforcement (“ICE”) raid on the brothel in which she was working.⁶ Initially suspicious of ICE agents, due to the fact that her trafficker had repeatedly told her to be distrustful of law enforcement officials, Laura lied and told the agents that she and the other girls were voluntary sex workers.⁷ Fortunately, ICE agents were eventually able to gain Laura’s confidence by granting her temporary status to remain in the United States and by helping her find employment, housing, and medical care.⁸ Consequently,

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¹ Azriel James Relph, *Potent Weapon to Stem Sex Slavery Often Left Unused*, NBC NEWS (July 11, 2011), http://msnbc.msn.com/id/43611445/ns/us_news-enslaved_in_america.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

her victimizer was convicted of human trafficking under the Trafficking Victims Protection Act (“TVPA”), the United States’ federal anti-trafficking statute.⁹

Irina was only sixteen years old when she was forced into sex work.¹⁰ After a family friend arranged a job for her as a waitress, Irina agreed to travel to the United States.¹¹ Upon arrival, Irina’s passport was taken from her and she was told that she would not be a waitress, but instead she would be working as a prostitute.¹² Irina managed to steal back her passport and some money in an attempt to escape but when she arrived at the airport she found one of her traffickers already waiting for her.¹³ Her trafficker informed the police that Irina had stolen her money, and consequently the police—without asking any questions—delivered Irina back into her trafficker’s control.¹⁴ Six months later, Irina once again tried to escape; this time she managed to contact the Russian Embassy and receive assistance.¹⁵

Both Laura’s and Irina’s stories are symptomatic of a worldwide sex trafficking problem. Sex trafficking is considered the third largest criminal enterprise,¹⁶ and it is estimated that 600,000 to 800,000 people—mostly women and children—are trafficked across international borders each year.¹⁷ Moreover, sex trafficking is a crime that is hard to detect since it takes various forms and occurs out of plain sight.¹⁸ Some sex trafficking cases resemble Laura’s and Irina’s stories, whereby the trafficking victim is tricked by a person she trusts—such as a friend or even a family member—and then sold into the sex industry.¹⁹ In other cases, the victim voluntarily consents to work in the sex industry but is not informed of the extreme conditions to which she will be subjected.²⁰ Although these two trafficking scenarios begin differently, both result in the eventual exploitation and de facto enslavement of the sex trafficking victim.

Starting in 2000, the United States Department of State has annually published the Trafficking in Persons Report (“TIP”).²¹ TIP, which reports on 177

⁹ *Id.*

¹⁰ Maria Melnikova, *Human Trafficking: Irina’s Story*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/newsletter/en/200501/page008.html> (last visited Nov. 2, 2011).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ April Rieger, Note, *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, 231-32 (2007). The drugs and arms trades respectively rank as the first and second largest worldwide criminal industries. *Id.*

¹⁷ LIANA SUN WYLER & ALISON SISKIN, CONG. RESEARCH SERV., RL 34317 TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 2 (2010).

¹⁸ See Rieger, *supra* note 16, at 245 (“The government itself agrees that ‘the greatest challenge,’ in terms of aiding sex trafficking victims, is ‘locating and identifying victims.’”).

¹⁹ See *id.* at 236.

²⁰ *Id.* at 232.

²¹ See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2010, available at <http://www.state.gov/g/tip/rls/tiprpt/2010/142746.htm> (last visited Nov. 2, 2011) [hereinafter TIP]. See also Annic Wu & Nicholas Zifcak, *U.S. Ranked on Human Trafficking for First Time*, THE EPOCH

countries, is an in-depth study that analyzes the international community's efforts to curtail and effectively respond to the crime of human trafficking.²² Each country is ranked based on the efforts its government employs to fight human trafficking.²³ A Tier One ranking signifies that the country's government has acknowledged the existence of a human trafficking problem, has taken actions in response, "and meets the TVPA's . . . minimum standards."²⁴ Tier Two countries have not met these standards but have taken steps toward doing so.²⁵ Lastly, Tier Three countries have neither met the standards nor taken steps to do so.²⁶

Despite the fact that the United States Department of State has been publishing the TIP Report for a decade, 2010 was the first year that the United States was itself ranked in the TIP report.²⁷ Secretary of State Hillary Clinton explained that ranking the United States in the TIP report is seen by the State Department as evidence of America's commitment to combating human trafficking:

The Report, for the first time, includes a ranking of the United States based on the same standards to which we hold other countries. The United States takes its first-ever ranking not as a reprieve but as a responsibility to strengthen global efforts against modern slavery, including those within America. This human rights abuse is universal, and no one should claim immunity from its reach or from the responsibility to confront it.²⁸

The TIP Report ranked the United States as a Tier One country based on the substantial actions the United States has taken to address the worldwide trafficking problem.²⁹ Congress established the TIP Report when it passed TVPA,³⁰ the most comprehensive piece of anti-trafficking legislation in the United States. TVPA provides "protection and assistance" for trafficking victims through the establishment of the T Visa, which allows successful applicants to remain in the United States under lawful status and potentially receive state and federal benefits.³¹ In addition to establishing the T Visa, TVPA also created the U Visa through its reauthorization of the Violence Against Women Act ("VAWA").³²

While both visas have a dual purpose of combating crime committed in the United States and assisting undocumented immigrants who have been victimized

TIMES (June 15, 2010), <http://www.theepochtimes.com/n2/content/view/37380/>.

²² Wu & Zifcak, *supra* note 21.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ HILLARY RODHAM CLINTON, *Letter from Secretary, in TIP, supra* note 21.

²⁹ Wu & Zifcak, *supra* note 21.

³⁰ 22 U.S.C. § 2151n(d) (2011).

³¹ 22 U.S.C. § 7105 (2011).

³² WYLER & SISKIN, *supra* note 17, at 24-25. The U Visa allows those that are eligible to remain in the United States under lawful status and to possibly receive state benefits. *See also infra* Part IV.A.

by these crimes,³³ unlike the T Visa, which is exclusively meant for trafficking victims,³⁴ the U Visa is broader in application. Non-citizens can potentially qualify for a U Visa if they have “suffered substantial, physical or mental abuse as a result of having been a victim of criminal activity.”³⁵ The individual requirements for the T and U Visas will be explored in more depth later in this Note.³⁶ Yet, despite the creation of T and U statuses, it is questionable whether the United States is doing enough to combat sex trafficking. Although the offering of these Visas to victims does demonstrate the United States’ commitment to fighting sex trafficking, the regulatory procedures that victims have to undergo to obtain a T or U Visa are problematic to the degree that many trafficking victims will be unable to qualify for either. Some victims—fearing that they will be unable to satisfy T or U Visa qualifications—may not even attempt to apply for either form of relief. This Note will focus particularly on the benefits and problems associated with the U Visa in the sex trafficking context. In most regards, the U Visa’s regulations allow for the visa to be used in a much more flexible fashion than the T Visa; however, the one main drawback associated with the U Visa is that it forces the sex trafficking victim to be wholly dependent on law enforcement cooperation.

Part I of this Note will summarize the sex trafficking problem in the United States and the steps that the United States government has taken to curtail trafficking within its borders. Part II will evaluate the alternate remedy of the T Visa and consider why this remedy is insufficient to effectively provide aid to sex trafficking victims. Part III will explain the history of the U Visa, the requirements for obtaining one, and the reasons why the U Visa is paradoxically both a more promising and more unlikely source of aid to sex trafficking victims than the T Visa. This part will also focus on the need for effective and enforceable state anti-trafficking laws to ensure that the U Visa is a more reliable source of relief for sex trafficking victims. The U Visa is heavily dependent on local law enforcers’ cooperation in starting an investigation that looks into a sex trafficking case. Because sex trafficking victims can in many circumstances be mistakenly labeled as consenting prostitutes, sex trafficking victims may have extreme difficulty in convincing law enforcers to start an investigation, as evidenced by the few number of sex trafficking-related arrests and prosecutions in New York. Unless there is a shift in perception in the way sex trafficking victims are seen by law enforcement officials, there is a danger that sex trafficking victims will not be taken seriously enough for an investigation to be undertaken, and the U Visa will continue to be underutilized in the sex trafficking context.

³³ See H.R. 3244, 106th Cong. (2000); Julie E. Dinnerstein, *The Not So New But Still Exciting U*, in NEW YORK PRACTICE SKILLS COURSE HANDBOOK SERIES 278-79 (2010).

³⁴ 8 U.S.C. § 1101(a)(15)(T) (2011).

³⁵ *Id.* § 1101(a)(15)(U).

³⁶ See *infra* Parts II.A-III.A.

I. SEX TRAFFICKING IN THE UNITED STATES: “PROSECUTION, PROTECTION AND PREVENTION”³⁷

A. Sex Trafficking in the United States: Background

TVPA does not define human trafficking outright but instead identifies “severe forms of trafficking in persons.”³⁸ These forms include:

[S]ex 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 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.³⁹

In particular, sex trafficking refers to “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”⁴⁰

The United States Department of Justice (“DOJ”) also differentiates between immigrants who are “smuggled” and those who are “trafficked” into the United States.⁴¹ Smuggling refers to the “facilitation, transportation . . . or illegal entry of a person(s) across an international border, in violation of one or more countries laws, either clandestinely or through deception . . . [and] is generally with the consent of the person(s) being smuggled.”⁴² Those who are smuggled into the United States can be subject to deportation and other criminal sanctions.⁴³ In contrast, trafficking involves “fraud, force, or coercion.”⁴⁴ Those who are

³⁷ *Introduction*, in TIP, *supra* note 21. The emphasis on Prosecution, Protection and Prevention, which are referred to as the “3P[s],” was established in 2000 at the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons (also known as the Palermo Protocol). *Id.* The Palermo Protocol was the first time that there was a push to illegalize all forms of human trafficking and for governments worldwide to focus on all aspects of the 3P criterion in combating human trafficking. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, (Nov. 15, 2000) G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess., U.N. Doc. A/55/383 (Nov. 15, 2000) [hereinafter Palermo Protocol]. The TIP report reflects the adoption of the Palermo Protocol; the analysis of each country featured in the TIP report is evaluated along the lines of “Prosecution, Protection and Prevention.” *Id.* *See also* Jay Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 169 (2007).

³⁸ 22 U.S.C. § 7102(8) (2011).

³⁹ *Id.*

⁴⁰ 22 U.S.C. § 7102(9) (2011). It is important to observe that while this Note only focuses on sex trafficking, the TVPA definition of human trafficking also encompasses acts where an individual is compelled into a situation of forced labor. 22 U.S.C. § 7102(8)(B) (2011).

⁴¹ WYLER & SISKIN, *supra* note 17, at 2.

⁴² HUMAN SMUGGLING & TRAFFICKING CTR., FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING 2 (2005), available at http://web.archive.org/web/20101128062423/http://www.justice.gov/crt/crim/smuggling_trafficking_fac_ts.pdf (last visited Nov. 2, 2011).

⁴³ WYLER & SISKIN, *supra* note 17, at 2.

⁴⁴ HUMAN SMUGGLING & HUMAN TRAFFICKING CTR., *supra* note 42, at 4.

trafficked are referred to as “victims,”⁴⁵ are potentially not subject to deportation proceedings, and are possibly eligible for state and federal benefits.⁴⁶ However, as the DOJ notes, “a person being smuggled may at any point become a trafficking victim” since trafficking “often includes an element of smuggling, specifically, the illegal crossing of a border.”⁴⁷ It is therefore often hard to differentiate between a person who has been smuggled into the United States and a trafficking victim, and this difficulty in differentiation can have repercussions on a T or U Visa applicant.

B. United States Efforts to Combat Trafficking

Each year the DOJ issues a report detailing the efforts the government has made to fight trafficking and to suggest improvements.⁴⁸ The report estimates that 14,500 to 17,500 persons are trafficked into the United States every year.⁴⁹ The United States has therefore made efforts to curtail human trafficking within its borders by taking an approach that focuses on the Palermo Protocol’s “3P”⁵⁰ criteria of prosecution, protection and prevention.⁵¹

In terms of prosecution, TVPA effectively “prohibits all forms of trafficking.”⁵² In addition, there are federal laws that proscribe suitable punishments for sex trafficking, providing penalties that can range from “up to life imprisonment with a mandatory minimum penalty of 10 years for sex trafficking of minors and 15 years for sex trafficking by force, fraud, or coercion or sex trafficking of minors under age 14.”⁵³ The DOJ conducts all the investigations for TVPA violations and in 2009, the Human Trafficking Prosecution Unit—a “specialized” branch of the DOJ—conducted forty-three human trafficking prosecutions, twenty-two of which involved sex trafficking, charged 114 individuals, and made forty-seven convictions.⁵⁴ Currently there are also forty-two states, including New York,⁵⁵ that have enacted their own trafficking statutes; however, most of these statutes are not enforced.⁵⁶

⁴⁵ *Id.*

⁴⁶ Trafficking victims are eligible for both T and U Status. See WYLER & SISKIN, *supra* note 17, at 20-28.

⁴⁷ HUMAN SMUGGLING & HUMAN TRAFFICKING CTR., *supra* note 42, at 2.

⁴⁸ WYLER & SISKIN, *supra* note 17, at 32. See also TIP, *supra* note 21.

⁴⁹ WYLER & SISKIN, *supra* note 17, at 19.

⁵⁰ See *Introduction*, in TIP, *supra* note 21.

⁵¹ TIP, *supra* note 21, at 338.

⁵² *Id.* at 339.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ As will be discussed later in this Note, New York in particular has constructed a sophisticated anti-sex trafficking statute that has not yet been enforced by law enforcement officials to its full potential. See *infra* Part IV.F.

⁵⁶ Marisa Nack, Note, *The Next Step: The Future of New York State's Human Trafficking Law*, 18 J.L. & POL'Y 817, 829 (2010) (noting that “state laws have gone largely unused as the majority of trafficking cases are prosecuted under federal laws.”). TIP, *supra* note 21, at 339.

The federal government has taken further action in terms of prosecution beyond enforcing statutory penalties against traffickers. The DOJ funds thirty-eight anti-trafficking task forces “comprised of federal, state, and local law enforcement investigators and prosecutors.”⁵⁷ The DOJ has also trained an estimated 13,000 “law enforcement officers and other persons likely to come into contact with human trafficking victims.”⁵⁸ In addition, the Department of Homeland Security (“DHS”) had ordered the training of all officers who work in United States Customs or Border Control in identifying sex trafficking.⁵⁹

The United States government has also worked on developing specific policies geared towards the protection of trafficking victims.⁶⁰ Local law enforcement officials have been trained in recognizing trafficking victims and instructed to refer them for “victim services.”⁶¹ Moreover, 250 Immigration Customs and Enforcement (“ICE”) officers were trained by the DHS in “identify[ing] and treat[ing] trafficking victims using approaches that focus on the needs of the victims.”⁶² The DHS also stationed twelve non-agent Victim Assistance Specialists across the United States.⁶³ Most importantly, Congress in passing TVPA provides forms of relief for trafficking victims.⁶⁴

In terms of curtailing future instances of human trafficking, the United States has been working on reducing the demand for commercial sex by allowing the names of men who were arrested for prostitution to be publicly released.⁶⁵ The government has also engaged in campaigns that educate the public about the causes and harms that are related to human trafficking.⁶⁶ Furthermore, DHS has begun to screen minors that seek to enter the United States alone to ensure that they are not vulnerable to becoming trafficking victims.⁶⁷ In addition, the United States has donated eighty-four million dollars to international trafficking prevention efforts that has so far aided at least eighty countries.⁶⁸

⁵⁷ TIP, *supra* note 21, at 340. In 2011, the Department of Justice released the Anti-Human Trafficking Task Force Strategy and Operations E-Guide, which “emphasizes a multidisciplinary, collaborative effort of law enforcement officials and victim service providers. The goal is to provide the broadest range of services and resources for victims and the most diverse range of investigation and prosecution options in response to perpetrators.” U.S. Dep’t of Justice, *Introduction: Purposes of the Guide*, ANTI-HUMAN TRAFFICKING TASK FORCE STRATEGY AND OPERATIONS E-GUIDE, <https://www.ovcttac.gov/TaskForceGuide/EGuide/Default.aspx> (last visited Nov. 2, 2011) [hereinafter E-GUIDE].

⁵⁸ TIP, *supra* note 21, at 340.

⁵⁹ *Id.*

⁶⁰ See E-GUIDE, *supra* note 57, at Victim Centered Response (“The victim is the core of the response to any crime.”).

⁶¹ TIP, *supra* note 21, at 340.

⁶² *Id.* at 342.

⁶³ *Id.*

⁶⁴ See *infra* Part II.

⁶⁵ TIP, *supra* note 21, at 344.

⁶⁶ *Id.* at 343.

⁶⁷ *Id.*

⁶⁸ *Id.*

C. Recommendations for the Future

Although the aforementioned efforts are admirable, there is room for much-needed improvement. The TIP report devotes an entire paragraph to recommending strategies that the United States government should implement in order to strengthen its efforts at fighting human trafficking.⁶⁹ Many of these recommendations focus on the relationship between the federal and state governments.⁷⁰ Although the federal government has TVPA as the main piece of legislation guiding it on how to handle trafficking victims, most states have not passed anything nearly as sophisticated. Only nine states provide benefits for trafficking victims or require trafficking victims' names and/or locations to be kept secret.⁷¹ TIP suggests that perhaps if the federal government placed more emphasis on prosecuting trafficking cases, then the state governments would also take trafficking more seriously.⁷²

The federal government can also greatly improve its efforts by increasing the training of federal agents in identifying trafficking victims and effectively investigating and prosecuting trafficking cases.⁷³ However, the trafficking problem in the United States is not simply due to a lack of agents who can effectively control the United States borders and investigate internal instances of sex trafficking;⁷⁴ trafficking can be fought along the lines of a different strategy that does not simply focus on the criminal element of human trafficking, but rather, emphasizes victim protection. One step is for the federal government to improve its services for trafficking victims.⁷⁵ This can partly be accomplished if the government begins using current remedies available to trafficking victims—the T and U Visas—in a manner that places a greater emphasis on the victim, rather than on the United States' interest in finding and prosecuting sex traffickers.⁷⁶

⁶⁹ *Id.* at 338.

⁷⁰ Recommendations include, “[i]mprov[ing] law enforcement data collection on human trafficking cases at the state and local level . . . enhanc[ing] federal government partnerships with state, local and tribal agencies . . . [and] augment[ing] training for state and local law enforcement operating under cooperative agreements with federal immigration authorities to increase anti-trafficking activities and better identify and protect trafficking victims.” *Id.* at 338-39.

⁷¹ *Id.* at 342.

⁷² *Id.* at 338.

⁷³ *Id.*

⁷⁴ Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1639 (2010).

⁷⁵ TIP, *supra* note 21, at 338.

⁷⁶ See Srikantiah, *supra* note 37, at 160. See also Chacón, *supra* note 74, at 1627.

II. ALTERNATE REMEDY: THE T VISA

A. Purpose and Qualifications

TVPA required that a new visa category be added to the Immigration and Nationality Act (“INA”).⁷⁷ As a result the T Visa was created. Its partial purpose is to provide aid for immigrant victims of sex trafficking.⁷⁸ An individual applying for a T Visa has to meet three main qualifications. First, the person has to have “been a victim of a severe form of trafficking in persons.”⁷⁹ Next, the victim has to have been “physically present” in the United States as a result of trafficking, which includes the victim’s entrance into the United States for the sole purpose of participating in an investigation or prosecution of a sex trafficker.⁸⁰ According to the T Visa’s regulations, physical presence in the United States entails the victim being in the United States “on account of” the victim’s trafficking experience, and therefore requires the victim to also demonstrate that she did not have an opportunity to depart the United States.⁸¹ Lastly, the victim has to cooperate “with any reasonable request for assistance in the federal, state or local investigation of [trafficking crimes],” and needs to demonstrate that she would experience “extreme hardship . . . upon removal.”⁸² A person who meets these requirements is entitled to federal and state “benefits and services,”⁸³ and is also permitted to work in the United States.⁸⁴ T status protection lasts for four years, but it can be extended if it is established that the victim’s availability is “necessary . . . [to] the investigation” of a trafficking related crime.⁸⁵

Five thousand T visas are available each year, not including spouses, children, or parents of those who are granted T status, who may be granted “derivative T status.”⁸⁶ Despite the liberal allowance of T Visas for sex trafficking

⁷⁷ 22 U.S.C. § 7105(2)(b)(1)(B) (2010) (providing that “an alien who is a victim of a severe form of trafficking in persons, or an alien classified as a nonimmigrant under section 1101(a)(15)(T)(ii) of Title 8, shall be eligible for benefits and services under and Federal or State program or activity funded or administered by any official or agency . . . to the same extent as an alien who is admitted to the United States as a refugee.” 22 U.S.C. § 7105(2)(b)(1)(A) (2010)).

⁷⁸ 106 H.R. 3244, 106th Cong. (2000) (stating “the purposes of this Act are to combat trafficking in persons . . . whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”).

⁷⁹ 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2010).

⁸⁰ 8 U.S.C. § 1101(a)(15)(T)(i)(II) (2010).

⁸¹ 8 C.F.R. § 214.11(g) (2010).

⁸² 8 U.S.C. § 1101(a)(15)(T)(i)(III) (2010). An exception is made for trafficking victims who are either under eighteen years old or who have approval from the Attorney General to not cooperate with the investigation because of “physical or psychological trauma.” *Id.*

⁸³ 22 U.S.C. § 1705(2)(b)(1)(B) (2010). These services include “immigration benefits . . . medical services, pro bono and low cost legal services, victim service organizations, victims compensation, the right to restitution and the rights of privacy and confidentiality.” WYLER & SISKIN, *supra* note 17, at 22.

⁸⁴ WYLER & SISKIN, *supra* note 17, at 22.

⁸⁵ *Id.* at 22, n.59.

⁸⁶ *Id.* at 21.

applicants, these visas are rarely taken advantage of by trafficking victims. In 2009, only 222 applications were made for T Visas, and of these applications only 186 applications were approved.⁸⁷ Perhaps more shocking is that since 2002 there have only been 2,370 applications made for T status and only 1,431 approved applications.⁸⁸ Thus, although 5,000 T Visas are available per year, not even half of this figure has been granted over the course of seven years. What is even more troublesome is that over this time period not even 5,000 *applicants* have sought T Status.

B. T Visa's Criticism

There are numerous theories regarding why the T Visas have so far been an underutilized remedy in providing assistance to sex trafficking victims. One theory posits that part of the problem with extending remedies to immigrants is that protecting immigrants—some of whom entered the United States illegally—is not currently a top priority for American society.⁸⁹ Indeed, American immigration history is marked by hesitancy and at times open hostility towards liberal immigration policies.⁹⁰ Currently, American immigration legislation tends to emphasize “prosecution over victim protection,”⁹¹ and it is generally designed to make it difficult for immigrants to enter the country. Rather than facilitate safe immigration, federal immigration laws instead focus on establishing strict quotas for family members of United States citizens and Lawful Permanent Residents (“LPRs”), and immigrant workers who wish to enter the country.⁹² These quotas are nowhere near high enough to satisfy the demand of those who wish to enter the United States from countries such as Mexico, China, India, and the Philippines.⁹³

⁸⁷ *Id.* at 23.

⁸⁸ *Id.*

⁸⁹ See Chacón, *supra* note 74, at 1631-35. The trafficking problem has been portrayed as a “foreign evil perpetrated by minorities and migrants.” *Id.* Americans and the federal government thus believe that the solution is to keep immigrants out of the country and toughen border security rather than to address the internal trafficking problem within the United States. *Id.* See also Anna Hanson, Note, *The U-Visa: Immigration Law's Best Kept Secret*, 63 ARK. L. REV. 177, 178 (2010).

⁹⁰ Immigration has been a controversial topic in American history as early as 1882 when the Chinese Exclusion Act was enacted. Furthermore, from 1921 to 1943 the United States sought to limit the number of immigrants entering the country through the enactment of numerous policies that set quotas on immigrant categories deemed “inferior.” ROGER DANIELS, *GUARDING THE GOLDEN DOOR* 3-4 (Hill & Wang ed., 1st ed. 2004). Most recently, after the September 11 attacks, the media often associates immigrants with crime and terrorism. Consequently, segments of the public believe that immigrants are a real threat to national security and that undocumented immigrants should be deported and not afforded due process rights. See Hanson, *supra* note 89, at 181-82.

⁹¹ Chacón, *supra* note 74, at 1625.

⁹² 8 U.S.C. § 1153(a) (2010) sets out the categories of family sponsored immigrants that are admissible into the United States each year and the quotas for each category. 8 U.S.C. § 1153(b) (2010) outlines the categories of employment-sponsored immigrants and their corresponding quotas.

⁹³ See U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS, *VISA BULLETIN* (July 2011), available at http://travel.state.gov/visa/bulletin/bulletin_1360.html. The Visa Bulletin is posted monthly and lists the availability of immigrant visas that are available as of that month. *Id.* Categories from countries that have available visas are listed as current. More often than not—especially in the family based categories—a date is listed indicating the most recent date of an application that is eligible for a

Because the wait can be so long for an immigrant who wishes to legally enter the United States, some immigrants will resort to illegal means.⁹⁴

The position of a sex trafficking victim is complex in the sense that most of the time the trafficking victim has broken the law.⁹⁵ Trafficking victims legally or illegally enter the United States but regardless of legality of entry, are then forced to engage in prostitution.⁹⁶ Consequently, trafficking victims are often perceived by society as criminals who have broken the law and are therefore not deserving of relief.⁹⁷ In order to obtain relief, a trafficking victim must first attempt to provide useful information to law enforcement officials because the first purpose of the T Visa is “to ensure just and effective punishment of traffickers.”⁹⁸

The T Visa’s dual purpose and the fact that the Visa was not solely designed for the welfare of a sex trafficking victims suggests a second reason as to why the T Visa has so far been an ineffective remedy. What differentiates the T Visa from other forms of immigration relief, such as asylum—which only provides “humanitarian assistance” and depends solely upon proof of the applicant’s victimization—is that the T Visa also requires evidence of the victim’s compliance with a criminal investigation.⁹⁹ Therefore, in addition to proving that one is a victim of sex trafficking, the applicant also has to show reasonable assistance with requests made by law enforcers.¹⁰⁰ However, as will be discussed, the T Visa’s regulatory provisions establish procedures that complicate a victim’s ability to fulfill this requirement.¹⁰¹

The T Visa’s regulations provide an applicant several ways of proving attempted compliance with law enforcer request for assistance; however, the best piece of evidence that the applicant can offer is a Law Enforcement Agency (“LEA”) endorsement.¹⁰² Although the LEA endorsement is not mandatory for a

visa. Dates can reach as far back as the early 1990s. *Id.*

⁹⁴ See Hanson, *supra* note 89, at 178 (“Given the legal difficulty surrounding immigration, it is not surprising that there are a significant number of undocumented immigrants.”). See also Melissa Ditmore, *The Use of Raids to Fight Trafficking in Persons*, SEX WORKERS PROJECT (2009), <http://www.sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf>.

⁹⁵ Chacón, *supra* note 74, at 1627.

⁹⁶ See Terry Coonan, *Anatomy of a Sex Trafficking Case*, 5 INTERCULTURAL HUM. RTS. L. REV. 313, 349 (2010). Two forms of sex trafficking victims are those who never agreed to engage in prostitution but consented to enter the United States through illegal means and those who agreed to engage in prostitution but “whose consent was arguably overcome by the reality of what awaited them [such as] 35-45 sex acts nightly, isolation, debt servitude and control of their freedom of movement.” *Id.* See also *supra* Part I.

⁹⁷ Srikantiah, *supra* note 37, at 188.

⁹⁸ 106 H.R. 3244, 106th Cong. (2000).

⁹⁹ Srikantiah, *supra* note 37, at 159.

¹⁰⁰ See 8 U.S.C. § 1101(a)(15)(T)(III) (2010); 8 C.F.R. § 214.11(f) (2010).

¹⁰¹ See Rieger, *supra* note 16, at 252-53; Jocely Hipolito, *Illegal Aliens or Deserving Victims?: The Ambivalent Implementation of the U Visa Program*, 17 ASIAN AM. L.J. 153, 173 (2010).

¹⁰² 8 C.F.R. § 214.11(h)(1) (2011). A LEA endorsement is a document that is filled out by the law enforcement official who the sex trafficking victim provided assistance to and is submitted with the victim’s T Visa application. 8 C.F.R. § 214.11(f) (2011). The endorsement includes detailed information about the victimizing experiences that the applicant had undergone. *Id.* The decision to

successful T Visa application, the inclusion of one substantially increases the likelihood that the application will be approved;¹⁰³ without the LEA endorsement, a victim will have to rely on secondary evidence,¹⁰⁴ which can often be hard for the victim to accumulate.¹⁰⁵ Furthermore, the credibility and weight accorded to the secondary evidence is left to the discretion of the agency.¹⁰⁶ Thus, because the LEA endorsement is so crucial to an applicant's successful application, law enforcement agencies have tremendous influence over the outcome of a T Status application.

Critics of the T Visa regulations contend that a major problem in allowing law enforcement personnel so much power over a sex trafficking victim's application is that the decision on whether a LEA endorsement should be granted to a particular victim is often left to the discretion of the prosecutor, who is the same individual that decides whether the applicant qualifies as a sex trafficking victim and whether the applicant would make a good witness for the purposes of an investigation.¹⁰⁷ This system is vulnerable to "non-uniform results" since the prosecutor's decision to designate an applicant a sex trafficking victim may be erroneously linked to the prosecutor's perception of which applicants will make compelling witnesses.¹⁰⁸ The ideal witness in a sex trafficking case is the "iconic victim"—one who has been "forced, defrauded, or coerced into trafficking for forced sex . . . [and] remain[ed] passive until rescued by law enforcement . . . [and] then fully reveal[ed] her story to law enforcement upon rescue."¹⁰⁹ Laura closely mirrors this description of an "iconic" victim since she was deceived into entering the United States, was then forced into sex work, and was unable to free herself until ICE rescued her. The issue is that most trafficking victims do not resemble this rigid form of the "iconic" victim.

Many trafficking victims often voluntarily break American immigration laws by consenting to being smuggled into the United States and in many cases even

submit a LEA endorsement is entirely left to the officer's discretion. *Id.*

¹⁰³ 8 C.F.R. § 214.11(h)(1) (2011). The regulations provide that the inclusion of a LEA endorsement "will be considered [as] primary evidence that the applicant has complied with any reasonable request in the investigation or prosecution of the severe form of trafficking in persons of which the applicant was a victim." *Id.* On the other hand, an applicant who has never made an attempt to work with a LEA will automatically not be eligible for T status. 8 C.F.R. § 214.11(h)(2) (2011).

¹⁰⁴ Secondary evidence includes affidavits submitted by the applicant that contain "an original statement by the applicant that indicates the reason the LEA endorsement does not exist or is unavailable . . . The statement or evidence should demonstrate that good faith attempts were made to obtain the LEA endorsement . . . In addition, the applicants may submit their own affidavit and the affidavits of other witnesses." 8 C.F.R. § 214.11(h)(3) (2011).

¹⁰⁵ Srikantiah, *supra* note 37, at 182 (explaining that it is often difficult "in the trafficking context" to find witnesses and documentation attesting to an applicant's victimization).

¹⁰⁶ 8 C.F.R. § 214.11(h)(1) (2011).

¹⁰⁷ Srikantiah, *supra* note 37, at 160.

¹⁰⁸ *Id.* at 160, 179.

¹⁰⁹ *Id.* at 187. Essentially, from the moment of entry in the United States, the "iconic" victim is not at fault since she is always being lied to and thus is not complicit in breaking any American immigration laws. *Id.* at 195. Furthermore, because during the entire ordeal she is completely out of control and has no chance to escape, she must rely on law enforcement for relief. *Id.* at 197.

acquiesce to engage in some form of sex work.¹¹⁰ However, because there were no initial “elements of force, fraud or coercion,” the DOJ would most likely classify this individual as one who was smuggled into the United States and not a trafficking victim, regardless of her reasons for crossing the border illegally or her subsequent sufferings due to trafficking.¹¹¹ While in theory the T Visa regulations stipulate that both forms of sex trafficking victims would be eligible for T Status, the regulations’ confusing language of “force, fraud or coercion” may reasonably lead a law enforcement official to erroneously determine that an applicant who willingly broke the law was not coerced or tricked into sex work, and therefore would not qualify for T Status.¹¹² The fact that so many trafficking victims initially consented to engage in illegal activity may potentially explain why there are so few T Visa applications. Because the T Visa regulations create the large possibility that victims who have willingly broken the law will be labeled “illegal alien[s]” who are not entitled to government protection or T Status, many sex trafficking victims will not likely seek help from law enforcers because of their precarious legal situation.¹¹³

Another obstacle facing applicants who apply for T Status in regards to their difficulty in obtaining a LEA endorsement are the regulations’ additional requirements that an applicant must have had physical presence in the United States “on account of” her trafficking experience and that she did not have an “opportunity to depart” the United States.¹¹⁴ This requirement is not problematic for victims, such as Laura, who are rescued in law enforcement raids;¹¹⁵ however, the majority of trafficking victims are not found through raids but, like Irina, must escape through their own means.¹¹⁶ Such victims must then additionally prove that their current presence in the United States is out of necessity and not out of voluntary free will. Yet, the T Visa’s disparate treatment of sex trafficking victims based on their means of rescue seems inconsistent with the humanitarian aspect behind the T Visa’s creation, considering that all victims of sex trafficking—whether they are discovered through raids or were able to escape their trafficker’s control—suffer the same horrors associated with sex trafficking.

¹¹⁰ See Chacón, *supra* note 74, at 1627. Part of the reason why the T Visa is not so useful to sex trafficking victims is that while most victims may initially have broken American immigration laws in entering the United States, “policymakers are clearly reluctant to develop any antitrafficking [sic] policies that could potentially encourage unlawful immigration.” *Id.* See also *supra* note 96 and accompanying text therein.

¹¹¹ HUMAN SMUGGLING & HUMAN TRAFFICKING CTR., *supra* note 42, at 4. See also Srikantiah, *supra* note 37, at 192-94 (arguing that the “force, fraud or coercion” method of distinguishing between those who were smuggled into the United States and those that are trafficking victims ignores significant factors, such as what led the victim to consent to smuggling and the true intentions of the trafficker).

¹¹² See Reiger, *supra* note 16, at 249-51.

¹¹³ Chacón, *supra* note 74, at 1641.

¹¹⁴ 8 C.F.R. § 214.11(g) (2011).

¹¹⁵ Hipolito, *supra* note 101, at 174.

¹¹⁶ Srikantiah, *supra* note 37, at 160.

A third additional problem with the T Visa's procedural requirements is that trafficking victims must also comply with any "reasonable request" to assist with the investigation.¹¹⁷ Yet, it is often the case where the victim may not cooperate fully with trafficking investigations because she is either too traumatized from her experiences or fearful of reprisal.¹¹⁸ Moreover, sometimes further trauma is inflicted upon trafficking victims from the nature of their rescue; many trafficking victims are discovered through police raids, which can be a frightening experience for victims who in result feel "alienated" from law enforcers.¹¹⁹ Rather than focusing on the victim's psychological and emotional state of mind, refusal to cooperate with trafficking investigations can often be interpreted as an act that casts suspicion upon the trafficking victim.¹²⁰ Ironically, victims who would actually qualify as an "iconic victim" are the least likely to cooperate with law enforcement agents because of their severe trauma.¹²¹ For example, Laura initially did not cooperate with ICE agents and it was only because of her rescuer's patience and understanding of her present emotional state that Laura finally trusted the agents enough to testify against her trafficker. However, many trafficking victims are confronted by improperly trained law enforcement officials, who are not skilled in earning a trafficking victim's trust.¹²²

Lastly, the T Visa's final requirement for the applicant to demonstrate hardship upon removal—which mandates a showing of "extreme hardship involving unusual and severe harm"—¹²³is a potential problem for many T Visa applicants since the regulations do not account for the victim's current economic status or need in determining whether the victim has suffered "extreme hardship."¹²⁴ Instead, the regulations provide a non-exhaustive list of eight factors that may be considered in evaluating whether the victim has suffered extreme hardship including,

- (i) The age and personal circumstances of the applicant;
- (ii) Serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country;
- (iii) The nature and extent of the physical and psychological consequences of severe forms of trafficking in persons;
- (iv) The impact of the loss of access

¹¹⁷ 8 C.F.R. § 214.11(b)(3)(i) (2011).

¹¹⁸ This requirement can often be "one of the most difficult . . . for victims: deeply traumatized by what has been done to them, they are nonetheless expected to fully comply with the demands inherent in a law enforcement investigation." Coonan, *supra* note 96, at 325-26. Furthermore, providing "testimony at trial is exactly what many trafficking victims are most reluctant to provide" since the victims may still fear for their lives. *Id.* at 341.

¹¹⁹ Ditmore, *supra* note 94, at 10. Notably, those who are able to escape their traffickers through their own means and thus do not undergo the raid experience are actually more likely to cooperate with law enforcers. *Id.* at 11.

¹²⁰ Srikantiah, *supra* note 37, at 199.

¹²¹ *Id.* at 201.

¹²² See *infra* Parts IV.F-G.

¹²³ 8 C.F.R. § 214.11(i) (2011).

¹²⁴ 8 C.F.R. § 214.11(i)(1) (2011).

to the United States and the criminal justice system for purposes relating to the incident . . . including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection; (v) The reasonable expectation that the existence of laws, social practices of customs in the foreign country . . . would penalize the applicant severely for having been the victim of . . . [trafficking]; (vi) the likelihood of re-victimization and the need, ability, or willingness of foreign authorities to protect the applicant; (viii) the likelihood that the trafficker . . . in the foreign country would severely harm the applicant; and (viii) The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict.¹²⁵

This threshold of “extreme hardship involving unusual and severe harm” is a high one that many trafficking victims struggle to satisfy.¹²⁶

The T Visa's regulatory requirements' emphasis on cooperation with law enforcement officers and the amount of discretion given to these officers in deciding whether to grant the trafficking victim a LEA endorsement effectively undermine the dual purposes behind the T Visa.¹²⁷ The humanitarian goal to protect trafficking victims comes second to the other goal of reducing trafficking within American borders. This is demonstrated by the fact that victims of trafficking will not obtain T Status, regardless of their trauma, if it is determined that they have not made reasonable efforts to cooperate with policing authorities. Yet, because it is so hard to meet the requirements that would make one eligible for T Status, trafficking victims may be less inclined to approach law enforcement officers and offer information.¹²⁸ It is a real possibility that the T Visa regulations are resulting in a “chilling effect,” whereby trafficking victims who should qualify for T Status are too fearful of seeking help out of concern that they will not meet the high standard outlined in the T Visa regulations. Therefore, the second objective to crack down on trafficking is also not realized.

III. THE U VISA

A. *What is the U-Visa?*

The U Visa, which was created by TVPA as a part of VAWA in 2000,¹²⁹ is celebrated for having qualifying standards that are easier for trafficking victims to

¹²⁵ 8 C.F.R. § 214.11(i)(1)(i-viii) (2011).

¹²⁶ Hanson, *supra* note 89, at 201. Since whether one meets the extreme hardship standard is “based on the individual facts and circumstances,” it is hard to predict which applicants would qualify under the standard. Jennifer M. Wetmore, *The New T Visa: Is the Higher Extreme Hardship Standard Too High for Bona Fide Trafficking Victims?*, 9 NEW ENG. J. INT'L & COMP. L. 159, 173 (2002). Furthermore, the standard is ambiguous. While “[s]pecific knowledge of retribution may not be required . . . something more than a generalized concern or fear . . . [has] to be demonstrated.” *Id.* at 174.

¹²⁷ Srikantiah, *supra* note 37, at 160.

¹²⁸ See Chacón, *supra* note 74, at 1641.

¹²⁹ Dinnerstein, *supra* note 33, at 277.

satisfy in comparison to the T Visa.¹³⁰ However, the regulations clarifying the statutory requirements for the U Visa were not published until 2007.¹³¹ U Status is valid for up to four years, although after three years, the victim can apply for LPR status.¹³² Significantly, a person granted U Status can also obtain derivative U Status for certain qualifying family members.¹³³ Another notable aspect about the U Visa is that the victim will also be eligible for work authorization but not for other benefits.¹³⁴ At most, 10,000 U Visas can be granted each fiscal year.¹³⁵

8 U.S.C.A. section 1101(15)(U) stipulates four standards that would make a victim of sex trafficking eligible for U Status. First, the victim must have “suffered substantial physical or mental abuse as a result of having been a victim of criminal activity described in clause (iii).”¹³⁶ The list of crimes described in clause three are referred to as “qualifying crimes,”¹³⁷ and include trafficking, rape, sexual assault, abusive sexual contact, prostitution, sexual exploitation, kidnapping, abduction, and unlawful criminal restraint.¹³⁸ Physical or mental abuse is defined as “injury or harm to the victim’s physical person, or harm to or impairment of the emotional psychological soundness of the victim.”¹³⁹ To be considered a victim of a qualifying crime, the applicant must have suffered “direct and proximate harm” from the criminal activity.¹⁴⁰ The U Visa regulations provide a list of factors to determine if the harm suffered is “substantial” enough.¹⁴¹ Significantly, the victim’s harm need not have been caused by one “single act alone” but could have been caused by “[a] series of acts taken together.”¹⁴²

Second, the applicant must “[possess] information concerning criminal activity described in clause (iii).”¹⁴³ This requires the applicant to be knowledgeable about certain “facts regarding the criminal activity” to the extent that a law enforcement officer can conclude that the applicant “is [providing

¹³⁰ Hanson, *supra* note 89, at 202.

¹³¹ Michael Schuneman, Note, *Seven Years of Bad Luck: How the Government’s Delay in Issuing U Visa Regulations Further Victimized Immigrant Crime Victims*, 12 J. GENDER RACE & JUST. 465, 466 (2009).

¹³² Dinnerstein, *supra* note 33, at 279.

¹³³ 8 U.S.C. § 1101(15)(U)(ii) (2011).

¹³⁴ WYLER & SISKIN, *supra* note 17, at 25.

¹³⁵ 8 C.F.R. § 214.14(d) (2011).

¹³⁶ 8 U.S.C. § 1101(15)(U)(i)(I) (2011).

¹³⁷ 8 C.F.R. § 214.14(a)(9) (2011).

¹³⁸ *Id.* Other qualifying crimes include torture, incest, domestic violence, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice and perjury. *Id.*

¹³⁹ *Id.* § 214.14(a)(8).

¹⁴⁰ *Id.* § 214.14(a)(14).

¹⁴¹ *Id.* § 214.14(b)(1). Factors include, “[t]he nature of the injury inflicted or suffered; the severity of the perpetrator’s conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.” *Id.*

¹⁴² *Id.* § 214.14(b)(1).

¹⁴³ 8 U.S.C. § 1101(15)(U)(i)(II) (2011).

assistance], or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity.”¹⁴⁴ The third requirement mandates that the applicant must be “helpful or . . . likely to be helpful to a Federal, State, or local law enforcement official . . . prosecutor . . . judge . . . the Service, or to . . . local authorities.”¹⁴⁵ According to the U Visa regulations, this provision is satisfied when the applicant does not “[refuse] or [fail] to provide information and assistance [that is] reasonably requested.”¹⁴⁶ It is also crucial that the victim submit a “U Nonimmigrant Status Certification” that is signed by a “certifying official” attesting to the fact that the applicant has assisted with a criminal investigation.¹⁴⁷ Significantly, the certifying official’s act of signing a U Visa certification is wholly voluntary.¹⁴⁸ Finally, “the criminal activity described in clause (iii) [must have] violated the laws of the United States or occurred in the United States.”¹⁴⁹

B. History of Passing the U Visa’s Regulations

Although U Status was created in 2000, the U Visa could not be effectively utilized until regulations were passed in 2007.¹⁵⁰ While there is no set time requirement in which an agency has to issue regulations after Congress passes a piece of legislation, it is evident that the long delay of seven years in the passage of the U Visa regulations was unusual.¹⁵¹ Because of the delay, immigrants who would possibly qualify for U Status had their removal proceedings deferred.¹⁵² Instead, ICE issued a series of memoranda instructing potential U Visa applicants to apply for interim status; however, without regulations and a uniform application form, both applicants and immigration lawyers were unsure about what the victim had to show to qualify for U Status and what U Status even meant in terms of the benefits that would be granted upon the approval of interim status.¹⁵³

¹⁴⁴ 8 C.F.R. § 214.14(b)(2). Exceptions to this requirement are made for applicants who are under sixteen or those who are “incapacitated or incompetent.” In such cases a parent, guardian or friend can testify to the information regarding the qualifying crime. *Id.*

¹⁴⁵ 8 U.S.C. § 1101(15)(U)(i)(III).

¹⁴⁶ 8 C.F.R. § 214.14(b)(3) (2010). The exceptions for a sixteen year old, incompetent or incapacitated applicant apply to this provision as well. *Id.*

¹⁴⁷ 8 C.F.R. § 214.14(c)(2)(i).

¹⁴⁸ See Michael D. Patrick, *U Visa: Interim Final Regs for Immigration Crime Victims*, N.Y.L.J., Nov. 26, 2007 (“[C]ertifying agencies are under no legal obligation to complete certifications or to assign someone to address certifications.”).

¹⁴⁹ 8 U.S.C. § 1101(15)(U)(i)(iv) (2011).

¹⁵⁰ Schuneman, *supra* note 131, at 473. Originally the Immigration and Nationality Services (“INS”) was the agency in charge of issuing the regulations for the U Visa; however, in 2001 the DHS replaced the INS. The INS’s administrative functions were assigned to the DHS’s department of United States Citizenship and Immigration Services (“USCIS”). *Id.* at 476.

¹⁵¹ *Id.* at 474. USCIS attributes the delay in passing the regulations to the upheaval that resulted from the creation of the DHS in replacing the INS. *Id.* at 476.

¹⁵² *Id.* at 475.

¹⁵³ *Id.* at 477.

Moreover, interim status was not a sufficient remedy for many U Visa applicants.¹⁵⁴ Government officials were confused over when and how to procedurally grant U Status, which led to non-uniform results.¹⁵⁵ Consequently, potential U Status applicants were apprehensive about applying for U Status since they did not know what their chances were of having their application approved.¹⁵⁶ Without assurance that approaching law enforcement officials would not result in their deportation, applicants were understandably suspicious of the U Visa remedy and thus the U Visa was hardly used after its passage.¹⁵⁷ In fact, between the U Visa's creation in 2000 and the issuance of the regulations in 2007, a mere 5,800 applicants obtained interim U Status.¹⁵⁸ Considering that the present regulations authorize the grant of 10,000 U Visas per fiscal year, it is remarkable that only a little more than half this number was granted to U applicants over the course of a seven-year period. In order to compel the DHS to issue regulations, a lawsuit was brought against Michael Chertoff, the Secretary of the DHS.¹⁵⁹ Notably, the decision was decided on August 16, 2007,¹⁶⁰ and the regulations were finally issued only one month later on September 17, 2007;¹⁶¹ they contained no "significant differences . . . [from] the congressional qualifications for the U-Visa."¹⁶²

C. *The U Visa's Strengths in Comparison to the T Visa*

On its face, the U Visa has numerous similarities to the T Visa. Both were created with the dual purpose of encouraging victims to report instances of crimes that took place in the United States and aiding non-citizen victims who have suffered extreme hardship.¹⁶³ In addition, the requirements of the U and T Visas

¹⁵⁴ *Id.* at 481-82. The court in *Catholic Charities v. Chertoff*, No. C 07-1307 PJH, 2007 U.S. Dist. LEXIS 62732 (N.D. Cal. Aug. 16, 2007) described interim status as "no more than the exercise of prosecutorial discretion not to seek a crime victim's immediate deportation and confers no legal status." Although applicants were required to assist law enforcement officials in investigating the criminal activity in question, interim status "could not guarantee them protection from removal once the trial was over." *Id.* at *5. Schuneman, *supra* note 131, at 482.

¹⁵⁵ Schuneman, *supra* note 131, at 482.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 481.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 478. See also *Chertoff*, 2007 U.S. Dist. LEXIS 62732, at *3.

¹⁶⁰ Ultimately, the Court held that it could not force the government to speed up the issuance of the regulations, but instead the Court required the government to file monthly reports "outlining the status of the regulations." *Catholic Charities v. Chertoff*, No. C 07-1307 PJH, 2007 U.S. Dist. LEXIS 62732, at *23 (N.D. Cal. Aug. 16, 2007).

¹⁶¹ Schuneman, *supra* note 131, at 479.

¹⁶² *Id.*

¹⁶³ 106 H.R. 3244, 106th Cong. (2000). See also *supra* notes 78 and 98 and accompanying text therein for the dual purposes of the T Visa. See also Dinnerstein, *supra* note 33, at 278 ("The U nonimmigrant classification was created to 'facilitate the reporting of crimes to law enforcement officially by trafficked, exploited, victimized, and abused [noncitizens] who are not in lawful immigration status' and in accordance with 'the humanitarian interests of the United States,' to create 'a means to regularize the status of cooperating individuals.'").

mirror each other. The T Visa's requirement that the applicant experience "extreme hardship involving unusual and severe harm" is strikingly similar to the U Visa's requirement that the applicant must undergo "substantial physical or mental abuse" in order to be eligible for relief.¹⁶⁴ Furthermore, to qualify for both types of statuses the trafficking victim has to be willing to comply with a reasonable request made by a law enforcement agent.¹⁶⁵

Yet in spite of the two visas' similarities, it is easier for a sex trafficking victim to qualify for a U Visa than a T Visa. First, because the U Visa's application is not limited to trafficking victims but can also be used by victims of any crime listed by the U Visa regulations, its use is more flexible than the T Visa's.¹⁶⁶ Specifically, an individual who cannot prove that she was a victim of sex trafficking is not precluded from applying for a U Visa because she may still qualify if she can show that she was raped, physically assaulted, or is a victim of any other qualifying crime after arriving in the United States.¹⁶⁷ Second, the standard of proof for the harm suffered is lower under the U Visa than under the T Visa.¹⁶⁸ In contrast to the T Visa's high extreme hardship standard, the U Visa requires applicants only to show substantial physical harm or mental abuse.¹⁶⁹ Lastly, the U Visa does not have the requirement that the applicant must be present in the United States on the account of the qualifying criminal activity. Therefore, an applicant does not have to demonstrate that she had no opportunity to depart.

The creation of the U Visa was a positive step in aiding victims of sex trafficking due to its broad scope of applicability, low evidentiary standard, allowance of applicants to depart and re-enter the United States, and promise of substantial benefits to those who fall under U Status. However, U Status does not come without its own faults that may prove to be problematic in the sex trafficking context.

D. U Visa Drawbacks

The major potential problem associated with the U Visa is that the regulations pertaining to the third prong for U Status require the applicant to cooperate with an investigation into the qualifying criminal activity and for a certifying official to sign a certification attesting to the applicant's compliance.¹⁷⁰ Thus, before the applicant can be successful in obtaining U Status, there first has to be a criminal investigation; yet, if law enforcers decide not to pursue a criminal investigation, or to sign the U Visa Certification, through no fault of the applicant

¹⁶⁴ 8 C.F.R. § 214.11(i)(1) (2010); *id.* § 214.14(b)(1).

¹⁶⁵ *Id.* § 214.11(h); *id.* § 214.14(b)(2).

¹⁶⁶ See Hanson, *supra* note 89, at 201-03. See also *supra* note 138 and accompanying text therein.

¹⁶⁷ See Hanson, *supra* note 89, at 201-02.

¹⁶⁸ *Id.*

¹⁶⁹ See *supra* notes 125 and 126 and accompanying text therein; Hanson, *supra* note 89, at 190-91.

¹⁷⁰ 8 U.S.C. § 1101(a)(15)(U)(i)(III) (2011).

the victim will be unable to obtain U Status.¹⁷¹ This is especially a potential problem in the sex trafficking context where there is not always interest in pursuing a criminal investigation.¹⁷² In this regard, the T Visa regulations actually allow the applicant more flexibility than the U Visa regulations. As stated earlier, although the T Visa requires a sex trafficking victim to cooperate with a law enforcer's reasonable request for assistance, the T Visa does not mandate for there to be an investigation for an applicant to qualify for T Status.¹⁷³ Thus, unlike with the U Visa, the T Visa regulations do not require the automatic rejection of a victim's application if a T Status applicant is willing to comply with law enforcement efforts, but ultimately no investigation into the criminal activity is pursued.

The requirement of an actual investigation into a qualifying criminal activity, as opposed to just proof of the applicant's willingness to assist in a potential investigation, gives law enforcement officials tremendous power in ultimately determining who will get a U Visa.¹⁷⁴ Since the U Visa's evidentiary standard is a low one, it is likely that a U Visa will be granted once law enforcement pursues an investigation. Therefore, the most important and often the hardest part for sex trafficking applicants is obtaining support from local officials to start an investigation and to later sign the U Visa certification. Because the U Visa is heavily dependent on local law enforcement cooperation, the U Visa will only be an effective remedy for sex trafficking victims if there are carefully crafted state anti-trafficking statutes in place and if state officials are properly trained in both recognizing signs of sex trafficking and enforcing state anti-trafficking laws. For this reason, it is vitally important that individual states work on informing law enforcement officials of the sex trafficking problem and the existence of the U Visa remedy.

E. Importance of State Cooperation in Combating Sex Trafficking

There are three common arguments that form the basis for increased state involvement in sex trafficking cases. The first argument is based on the assertion that "incidents of trafficking are local by nature."¹⁷⁵ Local state enforcement officials are more familiar with the locations in which sex trafficking victims are

¹⁷¹ Schuncman, *supra* note 131, at 487 ("The law enforcement officer . . . is [the] key player in determining the fate of the U-Visa applicant."). Consequently, the U Visa regulations give a lot of discretion to law enforcers in deciding which applicants will obtain U Visas. *See id.*

¹⁷² *See infra* Part IV.F.

¹⁷³ An applicant can comply with the reasonable request for assistance requirement without having an official LEA endorsement. Instead the applicant can provide evidence showing that she attempted to cooperate with law enforcement officials and reasons why she could not obtain a LEA endorsement. 8 C.F.R. § 214.11(h)(2) (2011). *See supra* note 104 and the accompanying text therein.

¹⁷⁴ Schuncman, *supra* note 131, at 486.

¹⁷⁵ Shashi Irani Kara, Note, *Decentralizing the Fight Against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations*, 13 CARDOZO J.L. & GENDER 657, 667 (2007).

held and engaged for sexual acts and the identity of the traffickers and victims.¹⁷⁶ Furthermore, witnesses or victims of sex trafficking who wish to call for help will be connected to local police officers and not to federal agents.¹⁷⁷ Second, sex trafficking victims will more readily approach local police officers that “have a tangible presence in their communities”¹⁷⁸ and who are perceived as being more familiar and trustworthy than federal agents.¹⁷⁹ Lastly, involving states in combating sex trafficking will take some pressure off of federal anti-trafficking resources, which are “overtaxed.”¹⁸⁰ This argument is supported by the notion that state efforts to combat sex trafficking are not meant to “replace measures in the TVPA” but are instead to be used in a manner that supplements federal policies and efforts.¹⁸¹ Having police officers and local law enforcers involved will at the very least add manpower to the network of those who combat trafficking.¹⁸²

Despite the clear need for greater state action in combating sex trafficking and the benefits this involvement will bring, most states have so far not taken sufficient action to do so. The problem with many states’ lack of success in properly confronting sex trafficking does not necessarily lay in their failure or inability to construct their own anti-trafficking statutes, considering that forty-two states have enacted anti-sex trafficking legislation.¹⁸³ Rather, the concern is that these statutes are ineffective and underutilized.¹⁸⁴ In 2006, Polaris Project¹⁸⁵ conducted a study that analyzed current state anti-trafficking legislation.¹⁸⁶ Polaris Project found several common problems with current state anti-trafficking legislation. Most states limit trafficking to instances where “force or coercion” is exercised against the victim.¹⁸⁷ Moreover, state statutes usually are not broad enough in application since they often require that victims be of foreign nationality and transported across state lines in order to subject the trafficker to criminal charges.¹⁸⁸

¹⁷⁶ See *id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 667-68.

¹⁸⁰ *Id.* at 669.

¹⁸¹ *Id.* at 667.

¹⁸² See *id.* at 669 (“Training state and local law enforcement officers alone would add almost one million pairs of eyes and ears trained to focus on human trafficking.”).

¹⁸³ TIP, *supra* note 21, at 339.

¹⁸⁴ See Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 437 (2009).

¹⁸⁵ Polaris Project is “a leading [anti-trafficking] organization in the United States.” POLARIS PROJECT, <http://www.polarisproject.org/about-us/introduction> (last visited Nov. 3, 2011).

¹⁸⁶ Michelle Crawford Rickert, *Through the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level*, 4 LIBERTY U. L. REV. 211, 259 (2010).

¹⁸⁷ *Id.* at 260.

¹⁸⁸ *Id.*

Furthermore, in 2007, Renewal Forum¹⁸⁹ conducted a major study analyzing the effectiveness of current state anti-trafficking legislation.¹⁹⁰ Renewal Forum found that none of the existing anti-trafficking statutes were adequate.¹⁹¹ Overall, the report showed that no state anti-trafficking law provided sufficient protection from prosecution under state prostitution statutes to juvenile sex trafficking victims who are also the largest group of trafficking victims in the United States.¹⁹² Moreover, most states do not provide trafficking victims with sufficient defenses for any crime the traffickers compelled the victims to commit.¹⁹³ Instead, state anti-trafficking statutes could be improved if they would account for a broader definition of “means” that the trafficker employs to control the victims beyond force and coercion, would include a private right of action that the victim can bring against the trafficker, and would not require the victim to be a foreigner who was transported across state lines.¹⁹⁴ Moreover, the most effective state anti-trafficking laws are those that mirror TVPA’s emphasis on the Palermo Protocol’s three criteria of prosecution, protection, and prevention.¹⁹⁵ The Protocol requires state statutes to “criminalize all forms of human trafficking,”¹⁹⁶ emphasize victim welfare and protection by assuring victim safety, and provide training for local police officers and enforcement officials in finding and identifying trafficking victims.¹⁹⁷

The emphasis on training law enforcement officials is crucial in relation to non-citizen sex trafficking victims who are in need of U Visas. If local law enforcers are not trained properly, they will not only be inept in rescuing sex trafficking victims, but will also be unable to distinguish sex trafficking victims from criminal prostitutes for purposes of starting an investigation.¹⁹⁸ Law enforcement agents will often confront sex trafficking victims who are “engaging in illegal activity such as prostitution” and are undocumented immigrants, and therefore it is even more imperative for a law enforcement agent to have the ability

¹⁸⁹ Renewal Forum is a non-profit organization that focuses on the human trafficking problem in the United States. RENEWAL FORUM, <http://www.renewalforum.org> (last visited Nov. 3, 2011).

¹⁹⁰ Rickert, *supra* note 186, at 268-69. Since this study has been conducted, further states have enacted their own anti-trafficking statutes and others have amended their pre-existing statutes. *See id.* However, the Renewal Forum’s findings are still useful in observing general trends in state anti-trafficking statutes. *Id.*

¹⁹¹ *An Examination of State Laws on Human Trafficking*, RENEWAL FORUM (Nov. 2007), <http://renewalforum.org/theblog/wp-content/uploads/2007/11/statelawanalysis2.pdf> [hereinafter RENEWAL FORUM]. Of the thirty-six state anti-trafficking statutes that were contemplated for the purposes of the study, the state with the strongest anti-trafficking statute received the grade of a B-. *Id.*

¹⁹² *Id.* at 2.

¹⁹³ *Id.* at 2-3.

¹⁹⁴ *Id.* *See also* Rickert, *supra* note 186, at 260.

¹⁹⁵ Rickert, *supra* note 186, at 270.

¹⁹⁶ *Id.* *See also* Palermo Protocol, *supra* note 37, at art. 5.

¹⁹⁷ Rickert, *supra* note 186, at 275-77. *See also* Palermo Protocol, *supra* note 37, at arts. 6-7, 10.

¹⁹⁸ Nack, *supra* note 56, at 825. If trafficking victims are arrested under the faulty assumption that they are prostitutes, the traffickers will not be sought after and will most likely not undergo any form of punishment. *Id.*

to “re-adjust [his] typical view of who is a criminal and who is a victim” when approached by a sex trafficking victim.¹⁹⁹ Yet significantly, current state anti-prostitution laws muddle the lines between those who are victims and those who are prostitutes, and consequently, law enforcement officials struggle to distinguish between the two.²⁰⁰ What results is strong enforcement of anti-prostitution laws and weak enforcement of state anti-trafficking laws.²⁰¹ This phenomenon is readily noticeable in New York.

F. New York Anti-Trafficking Efforts

New York is celebrated as having “one of the most comprehensive human trafficking laws in the nation.”²⁰² One convicted of sex trafficking can be sentenced to a maximum of twenty-five years in prison.²⁰³ Under New York law,

A person is guilty of sex trafficking if he or she intentionally advances or profits from prostitution by: (1) unlawfully providing to a person who is patronized, with intent to impair said person’s judgment: (a) a narcotic drug . . . (2) making material false statements, misstatements or omissions to induce . . . the person being patronized to engage in . . . prostitution activity; (3) withholding, destroying, or confiscating any actual or purported passport, immigration document, or any other actual or purported government identification document of another person with intent to impair said person’s freedom of movement . . . (4) requiring that prostitution be performed to retire, repay or service a real or purported debt; (5) using force or engaging in any scheme . . . to compel or induce the person being patronized to engage in or continue to engage in prostitution activity by means of instilling a fear in the person being patronized. . . .²⁰⁴

This provision indicates the sophistication of New York’s anti-trafficking statute because it “specifies the methods of inducement and control used by traffickers” without limiting them to mere physical force.²⁰⁵ While New York still requires victims to prove force, fraud, or coercion, its anti-trafficking statute defines sex

¹⁹⁹ Rickert, *supra* note 186, at 278.

²⁰⁰ See Heiges, *supra* note 184, at 450-51 (“When faced with a schizophrenic body of federal and state law which simultaneously classifies prostituting persons as both potential victims and per se criminals, LEAs are more likely to rely on time-tested and clear-cut prostitution routines, as opposed to unfamiliar anti-trafficking mandates that hinge upon the elusive concept of ‘coercion.’”).

²⁰¹ *Id.* at 437.

²⁰² DENISE E. O’DONNELL & DAVID A. HANSELL, NEW YORK STATE INTERAGENCY TASK FORCE ON HUMAN TRAFFICKING 1 (2008), available at http://criminaljustice.state.ny.us/pio/humantrafficking/human_trafficking_rpt_aug08.pdf.

²⁰³ *Id.* at 7.

²⁰⁴ N.Y. PENAL LAW § 230.34 (McKinney 2010).

²⁰⁵ O’DONNELL & HANSELL, *supra* note 202, at 7. By constructing the means section in broader terms, it can be easier for an applicant to prove that she was a victim of sex trafficking since “[s]ex trafficking can be accomplished through . . . common means [such as] fraud . . .” Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 123-24 (2009).

trafficking more broadly than other states.²⁰⁶ In doing so, the New York law recognizes that there are a variety of reasons that a trafficking victim may choose to remain with the perpetrator, including threats of physical harm, inability to escape, and fear of deportation. Furthermore, New York law assures victims that they will not be prosecuted for any crime they had committed as a result of their victimized status during their trafficking experience.²⁰⁷ Moreover, in addition to directly criminalizing sex trafficking, the New York legislature—in recognizing the strong correlation between sex trafficking and prostitution—also modified its prostitution laws in the hope of curtailing sex trafficking.²⁰⁸ Patronizing prostitution in the fourth degree was upgraded from a Class B misdemeanor to a Class A misdemeanor.²⁰⁹ Lastly, New York is one of only five states to criminalize participation in the sex tourism business.²¹⁰

Despite the creation of an impressive anti-trafficking statute and related laws to help curb the spread of sex trafficking, the statute is hardly utilized. It took until December of 2009—two years after the passage of New York’s anti-trafficking law—for a conviction to be obtained against a sex trafficker.²¹¹ By contrast, in 2010, there were 502 convictions for prostitution.²¹² More striking are the limited number of arrests made in New York for sex trafficking. Over the past two years, only seventeen arrests have been made—ten in 2009 and seven in 2010.²¹³ This number is even more astounding when compared to the 1,173 arrests made for prostitution in just 2010.²¹⁴ One explanation for these figures is that prostitution is simply easier to prove than sex trafficking, since prostitution does not require a showing of “force, fraud and coercion.”²¹⁵ However, this explanation only pertains

²⁰⁶ Nack, *supra* note 56, at 832; Barnhart, *supra* note 205, at 121.

²⁰⁷ Nack, *supra* note 56, at 830.

²⁰⁸ O’DONNELL & HANSELL, *supra* note 202, at 9.

²⁰⁹ Patronizing a prostitute in the fourth degree is the “lowest level crime.” *Id.* Those convicted for patronizing a prostitute can be sentenced to a year in prison. *Id.*; see also N.Y. PENAL LAW § 230.04 (McKinney 2011). *But see infra* note 229.

²¹⁰ O’DONNELL & HANSELL, *supra* note 202, at 9. Participation in the sex tourism business entails “sell[ing] travel-related services knowing that such services include or are intended to facilitate travel for the purpose of patronizing a prostitute . . . to a foreign jurisdiction regardless of the legality of prostitution in said foreign jurisdiction” and is considered as promoting prostitution in the third degree. N.Y. PENAL LAW § 230.25 (McKinney 2010).

²¹¹ Nack, *supra* note 56, at 842. See also Joseph Berger, *Despite Law, Few Trafficking Arrests*, N.Y. TIMES (Dec. 3, 2009), <http://www.nytimes.com/2009/12/04/nyregion/04trafficking.html>. The defendant received the maximum sentence of twenty-five years in prison for forcing a 19-year-old victim to engage in prostitution. Press Release, Queens County District Attorney’s Office, Queens Man First in New York State to Be Sentenced Under Sex Trafficking Statute (Feb. 9, 2010), available at http://www.queensda.org/newpressreleases/2010/february/brown_scn_2_9_2010.pdf. This remains the only sex trafficking conviction to date. Nack, *supra* note 56, at 842.

²¹² New York State Division of Criminal Justice Services, Arrests for Selected P.L. 230 Offenses in New York State, as reported in the Computerized Criminal History System, Jan. 1, 2009-June 30, 2010, (on file with author).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Heiges, *supra* note 184, at 437. See also *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter

to why there are so few sex trafficking convictions; it fails to address why there are hardly any sex trafficking related arrests. This phenomenon can be linked to the insufficient training law enforcers receive in identifying trafficking victims. As indicated in Irina's story—where, due to law enforcement's failure to recognize her as a sex trafficking victim, Irina was actually returned to her victimizer—the role that policing officials play is crucial in securing a sex trafficking victim's safety and in apprehending her trafficker.

Yet, because police officers “do not recognize signs of exploitation” and fail to “ask the right questions at an opportune time . . . the police may [often] arrest someone for promoting prostitution” instead of perceiving that such a person is actually a sex trafficking victim.²¹⁶ Moreover, since trafficking victims are “taught, trained and manipulated by their exploiters not to cooperate with nor trust law enforcement” officials,²¹⁷ the impetus is on law enforcers to draw the necessary information from the sex trafficking victim.²¹⁸ Laura's case demonstrates the positive effects of law enforcers' persistence in asking a trafficking victim the right question, even when they suspect the victim to be lying about her experiences. Even though Laura initially lied about her complicity in sex work, due to ICE agents' understanding of her emotional state of mind, the true story surrounding her trafficking experience came to light and her victimizer was successfully prosecuted. Therefore, a law enforcer who suspects a victim of lying should continue the investigation in spite of the victim's dishonesty.²¹⁹ This is a pivotal step for law enforcers seeing as when “the right questions” are asked and investigations are pursued, resulting trafficking convictions are made.²²⁰

The findings of the 2009 study²²¹ illustrate how consequential it is for police officers to recognize signs of sex trafficking and indicate just how insufficiently trained police officials are in doing so. Raids, which “are modeled on military operations,” are the “primary method of addressing trafficking in persons and of policing sex work.”²²² While these raids often bring trafficking victims into contact with law enforcement personnel, they “are often violent, traumatic and humiliating experiences.”²²³ Because the purpose of these raids are “not premised upon the needs of trafficked people, but rather on the goal of prosecution,” both

Combating Modern Slavery] (statement of Dorchon A. Leidholdt, Director of Sanctuary for Families), available at <http://judiciary.house.gov/hearings/pdf/1031072.pdf>.

²¹⁶ Berger, *supra* note 211. See also Ditmore, *supra* note 94, at 7.

²¹⁷ Berger, *supra* note 211.

²¹⁸ Even law enforcement officials have recognized that it is partly their responsibility to gain trafficking victim's trust. One such law enforcer stated, “[y]ou need a victim to be willing to open up and tell you.” Ditmore, *supra* note 94, at 8. However, law enforcers acknowledge that because most victims are rescued through a raid, which can be an intimidating “overwhelming situation,” trafficking victims have no reason to trust their rescuers. *Id.* at 9.

²¹⁹ See Rickert, *supra* note 186, at 279.

²²⁰ See Berger, *supra* note 211.

²²¹ Ditmore, *supra* note 94, at 1.

²²² *Id.* at 17.

²²³ *Id.*

local and federal agents who participate in these raids often treat everyone they encounter as criminals, instead of ensuring that the people whom they arrest during the raids are not trafficking victims.²²⁴ Of fifteen trafficking victims surveyed, nine had been arrested in police raids; some of those nine had been arrested in raids on multiple occasions.²²⁵ Even though seven of the nine victims claimed to have been trafficked, none of them had been identified as a sex trafficking victim following a raid.²²⁶ In fact, only one victim was asked if she was forced into prostitution, and another victim was even jailed on prostitution charges before her defense attorney realized that she was a trafficking victim.²²⁷

G. Conflating Sex Trafficking and Prostitution and Its Implications for U Visa Applicants

Yet, the problem may be bigger than police officials' inability to recognize the difference between trafficking and prostitution. Another key factor is law enforcers' stigmatization of prostitutes.²²⁸ Although patronization and promotion of prostitution are just as illegal as the act of prostitution, prostitutes are much more likely to be arrested and convicted than their patrons or pimps.²²⁹ Furthermore, a study conducted in 2005 found that prostitutes—upon being arrested—felt that the treatment they received from the police had been “disrespectful and sometimes dangerous.”²³⁰ In addition, fourteen percent of those surveyed claimed they had “experienced incidents of police violence, and . . . felt they had no recourse,” and sixteen percent of those surveyed claimed to “have been involved in sexual

²²⁴ See *id.* at 9.

²²⁵ *Id.* at 8.

²²⁶ *Id.* at 8.

²²⁷ *Id.*

²²⁸ Law enforcers' stigmatization of prostitutes is a relatively recent trend. See *id.* at 18. Laws illegalizing prostitution were only initiated in 1910. *Id.* at 18. J. Edgar Hoover as head of the FBI in the 1930s further contributed to the vilification of prostitutes by conducting “highly publicized anti-prostitution raids.” *Id.* at 18-19. Ultimately, the effect of law enforcers' efforts to crack down on prostitution resulted in overall society adopting “a more punitive view that saw prostitutes as fringe or deviant members of society deserving of disdain.” *Id.* at 19.

²²⁹ Nicholas D. Kristof, *The Pimps' Slaves*, N.Y. TIMES (Mar. 16, 2008), <http://www.nytimes.com/2008/03/16/opinion/16kristof.html> (“Of the 100,000 prostitution-related arrests each year, the great majority of them are of women and girls; pimps and johns are much less likely to be arrested.”). Notably, in contrast to the high number of convictions obtained against prostitutes in 2010, only thirty-five convictions were made against patrons of prostitutes and just eighty-seven convictions made against promoters of prostitution. Furthermore, in 2010, only 678 arrests were made for patronizing a prostitute and just 185 arrests for promoting prostitution. New York State Division of Criminal Justice Services, *supra* note 212. See also Heiges, *supra* note 184, at 432-33; O'DONNELL & HANSELL, *supra* note 202, at 9.

²³⁰ SEX WORKERS PROJECT AT THE URBAN JUSTICE CENTER, BEHIND CLOSED DOORS: AN ANALYSIS OF INDOOR SEX WORK IN NEW YORK CITY 5 (2005), available at <http://www.sexworkersproject.org/downloads/BehindClosedDoorsES.pdf> [hereinafter BEHIND CLOSED DOORS]. The study interviewed fifty-two sex workers, four of which were sex trafficking victims. *Id.* The workers—despite the fact that they had come from different backgrounds—had “extremely similar” experiences. *Id.* at 3.

situations with the police.”²³¹ Moreover, only sixteen percent of the interviewees had gone to the police and found them helpful, while forty-three percent of the interviewees claimed they would consider approaching the police for help but still had “strong reservations about how helpful the police might be” and overall believed that the police were “unhelpful and untrustworthy.”²³²

The police targeting of prostitutes and the sex workers’ unsatisfactory experiences in interacting with law enforcement officials indicates that as of now the priority for New York law enforcers is not to aid sex workers but rather to criminalize them.²³³ Consequently, law enforcers’ willingness to help sex trafficking victims depends on whether they perceive those that are sex trafficked as victims deserving of help or as criminal prostitutes. Law enforcers will be more likely to help a small subset of victims that resemble the “iconic victim” who can be somewhat equated with the “ideal” rape victim—“a woman . . . who was attacked by a stranger, attempted to fight off her assailant during the entire rape, and immediately reported the rape to [the] police.”²³⁴ It is notable that while the “ideal” rape victim is not wholly passive and even uses physical force to protect herself, she is ultimately powerless to stop her victimization.

Similarly, the iconic sex trafficking victim is a woman who did not know that she was going to be sex trafficked, was forced into trafficking through some means of coercion or force, and remains passive throughout her ordeal until she is rescued by law enforcement.²³⁵ Because she completely lacked control, law enforcement officials are more likely to perceive her as blameless.²³⁶ Neither the iconic sex trafficking nor rape victim has a choice in the matter; however, as soon as a trafficking victim displays some form of control over her fate—such as a victim who escapes—she resembles less of an “ideal” rape victim deserving of aid and instead can be perceived as a voluntary sex worker.²³⁷ Ultimately, “[c]hoice is at the center of the current debate over the definition of trafficking because choice determines whether a person is a victim or a voluntary actor in a situation involving sex.”²³⁸ Law enforcers faced with victims who are perceivably less sympathetic than iconic victims, such as illegal migrants who had initially consented to prostitution, but did not know the extent of the conditions they would be subjected to, may just deem the victim a prostitute.

²³¹ *Id.* at 5.

²³² *Id.* at 6.

²³³ See Ditmore, *supra* note 94 at 17. Service providers and lawyers who were surveyed for the 2009 study on the effectiveness of police raids believe “that the use of raids to combat trafficking in persons is inherently not premised upon the needs of trafficked people, but rather on the goal of prosecution.” *Id.* at 9.

²³⁴ See Marisa Silenzi Cianciarulo, *What is Choice? Examining Sex Trafficking Legislation Through the Lenses of Rape Law and Prostitution*, 6 ST. THOMAS L.J. 54, 56 (2008).

²³⁵ Srikantiah, *supra* note 37, at 187.

²³⁶ *Id.* at 195.

²³⁷ *Id.* at 183.

²³⁸ Cianciarulo, *supra* note 234, at 67.

The “conflation of trafficking with prostitution” is even noticeable in the manner in which the government funds local efforts to combat trafficking; TVPRA of 2005 allowed for federal funds to be devoted to the “‘local law enforcement [efforts] to investigate and prosecute buyers of commercial sex.’”²³⁹ Because no distinction was made between funds to be used in targeting sex trafficking and prostitution, local enforcers also do not make the distinction, as demonstrated by the fact that “local law enforcement agencies have sought federal funding for ‘anti-trafficking task forces’” that actually function as “vice squads by another name.”²⁴⁰ Indeed, most raids are undertaken for the purpose of targeting prostitutes where aiding those who have been sex trafficked is only an afterthought.²⁴¹ Unsurprisingly, the trend is that it is more likely for those picked up in raids to be deported for violating United States immigration laws than to obtain assistance as sex trafficking victims.²⁴²

Breaking the perception that equates sex trafficking victims with prostitutes is particularly important since generally, “when [the] police view sex workers as legitimate members of society, they are more likely to offer the same level of assistance that they would offer another complainant and follow-through on appropriate procedures.”²⁴³ Granted, iconic sex trafficking victims would most likely be perceived as “legitimate members of society” due to their complete victimization; yet, a victim who willfully consented to being smuggled into the United States or to engage in sex work and then was subdued not with physical force but with threats of deportation or violence against herself or her family—which is the experience of many trafficking victims—²⁴⁴will be perceived by many law enforcers as an illegitimate, criminal member of society.²⁴⁵ In spite of the existence of federal and state laws that would still treat such individuals as sex trafficking victims, a local law enforcer who is not sufficiently trained and operating under an anti-prostitution stigma will most likely not take the victim’s

²³⁹ Ditmore, *supra* note 94, at 7.

²⁴⁰ *Id.* Vice squads target “victimless crimes” whereby “[p]olice units [are] assigned to enforce morality-based laws, such as those addressing prostitution, gambling and pornography.” LARRY J. SIEGEL, INTRODUCTION TO CRIMINAL JUSTICE 244 (12th ed. 2010), available at http://books.google.com/books?id=p5-Dx4h6obEC&dq=%22Javier+Ovando%22&ic=ISO-8859-1&source=gbs_gdata.

²⁴¹ Ditmore, *supra* note 94, at 17.

²⁴² *Id.*

²⁴³ BEHIND CLOSED DOORS, *supra* note 230, at 6.

²⁴⁴ Coonan, *supra* note 96, at 347. Moreover, an additional complication is that many sex trafficking victims have to put on a façade of cooperation with their trafficker’s demands, which can include “pos[ing] smilingly for pornographic pictures, danc[ing] with customers, sign[ing] prostitution contracts, and even marry[ing] their traffickers, all of which is later used . . . to prove that the victims were ‘willing prostitutes.’” *Combating Modern Slavery*, *supra* note 215, at 2-3.

²⁴⁵ See Heiges, *supra* note 184, at 451. One trafficking victim who was picked up in a police raid stated “[the police] didn’t tell us anything. They treated us like criminals during the arrest.” Ditmore, *supra* note 94, at 8 (quoting a sex trafficking victim who was arrested five times before being identified as a trafficking victim).

claim seriously enough to start an investigation.²⁴⁶ Thus, in order for the U Visa remedy to ever be a truly reliable source of relief for non-citizen sex trafficking victims, state anti-trafficking laws need greater enforcement and to be distinguished from state anti-prostitution laws.²⁴⁷

CONCLUSION

According to the Department of Justice, “[h]uman trafficking may be one of the least understood crimes in the United States. Often referred to as slavery without chains, it is . . . largely hidden from public view out of ignorance or denial of its existence in the United States.”²⁴⁸ Therefore, the United States human trafficking problem is not a new one, but has only recently been given deserved attention. In 2000, Congress began to publicly address the sex trafficking problem through the issuance of the TIP Report and the enactment of TVPA. By assessing its own anti-trafficking policies and ways in which these policies can be improved, Congress has demonstrated that it intends to take instances of sex trafficking seriously. Moreover, the fact that a great majority of states have also enacted their own anti-trafficking statutes indicates that the United States on both the federal and state level has acknowledged that there is a sex-trafficking problem present within the United States that is in dire need of remediation.

However, Congress’s unwillingness to relax its tough immigration policies and the emphasis placed on combating crime in the United States has overshadowed the T and U visas’ other purpose to aid trafficking victims. The T Visa—which was designed solely to aid trafficking victims within the United States—has proven to be an ineffective remedy, as evidenced by the low number of T Visas that have been granted and applied for since TVPA’s passage. The T Visa’s vulnerability can largely be attributed to its regulations’ focus on evaluating whether the trafficking victim will provide sufficient assistance to law officers in prosecuting a trafficker. Law enforcers that are preoccupied with finding a compelling witness against a trafficker may conclude that any trafficking victim who was debatably complicit in her victimization is an illegal non-citizen undeserving of relief. In addition, many trafficking victims struggle to satisfy the T Visa’s high burden of demonstrating that they had no opportunity to depart the United States or that they would suffer extreme hardship upon removal. Because of these hurdles facing a T Visa applicant, it is clear that another remedy is needed

²⁴⁶ All of the twenty-six service providers who were interviewed in the 2009 Sex Workers Report claimed that “[l]aw enforce[rs] did not consistently follow up on a trafficked persons’ willingness to cooperate with investigations or provide the necessary support for applications to adjust immigration status and for benefits and assistance.” Ditmore, *supra* note 94, at 9.

²⁴⁷ Heiges, *supra* note 184, at 451. “[T]he persistent failure of LEAs to identify and respond appropriately to victims demonstrates that sex trafficking can no longer be viewed as separate or merely supplementary to prostitution law. Rather, LEAs must learn to ‘re-categorize and re-prioritize [prostitution] behavior’ in light of modern trafficking realities.” *Id.* (alteration in original).

²⁴⁸ E-GUIDE, *supra* note 57, at Understanding Human Trafficking.

to provide a more likely source of relief to foreign sex trafficking victims. The U Visa is celebrated for being such a remedy.

The U Visa provides a more promising form of assistance than the T Visa since it has broader application and easier qualifying regulatory standards. Yet, the U Visa's reliance on law enforcers signing a U Visa certification can potentially be problematic for many sex trafficking victims. In general, local officials are in a better position to discover and aid sex trafficking victims; however law enforcers operate in an environment that heavily stigmatizes prostitutes and are not adequately trained in distinguishing between one who is a prostitute and one who is a sex trafficking victim. Consequently, it is potentially more difficult than it should be for sex trafficking victims to convince law enforcers to take an interest in their claims. State legislatures certainly have the ability to craft comprehensive anti-trafficking statutes; yet, without a shift in attitude among law enforcers these statutes will not be properly utilized. Indeed, the high number of arrests and convictions for prostitution and the corresponding low number for sex trafficking in New York evince that this concern is legitimate. Thus, while the U Visa is one of the most exciting recent remedies available to illegal non-citizens, it may never be utilized properly in certain contexts.

To facilitate an effective relationship between local law officials and sex trafficking victims that brings traffickers to justice and provides foreign victims with assistance, local law enforcers need to be trained in effectively distinguishing sex trafficking victims from prostitutes. Sophisticated state anti-trafficking statutes, such as the one available in New York, actually have to be enforced to their full potential. By focusing mostly on arresting and prosecuting prostitutes and largely ignoring the pimps and patrons who make prostitution possible, law enforcers will continue to perpetuate a trend that perceives the sex workers as the main problem in relation to the crime of prostitution. This will result in an unwillingness to extend aid to prostitutes, despite the fact that numerous sex workers are coerced into their position. Instead, local law enforcers need to be conscious of the fact that sex trafficking victims—even those who were initially complicit in breaking United States immigration and prostitution laws—are not criminals and are deserving of relief. The difference in the number of arrests made for prostitutes, pimps, patrons, and sex traffickers, in addition to the frequency in which police officers confuse sex trafficking victims for prostitutes, indicates that law enforcers are currently still only focused on targeting prostitutes and are not yet adept at differentiating between victims and consenting sex workers engaged in illegal activity.

Despite the hurdles that United States policy makers and law enforcers have to face in effectively combating sex trafficking, there are notable signs that these obstacles are in the process of being overcome. Just this past year the United States was ranked for the first time as a country in the TIP Report, demonstrating an intent on the part of Congress to continue focusing and raising awareness of the sex

trafficking problem within the United States. Furthermore, the recommendations made in the TIP Report primarily focused on federal-state collusion in combating trafficking, signaling that increasing state involvement is becoming a crucial strategy in fighting sex trafficking. The collaboration between federal and state officials will most likely result in increased training of local law enforcement officials on how to identify and approach trafficking victims. As the local and state law enforcers realize that foreign sex trafficking victims are not to be perceived as lawbreakers, investigations revolving around trafficking cases are more likely to result and the U Visa will hopefully steadily become a reliable and extremely effective remedy for numerous sex trafficking victims.