

CIVIL RIGHTS FOR TRAFFICKED PERSONS:
RECOMMENDATIONS FOR A MORE EFFECTIVE FEDERAL
CIVIL REMEDY

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INTRODUCTION

In response to increasing public awareness of human trafficking in the United States, the Victims of Trafficking and Violence Protection Act (TVPA) was signed into law by President Bill Clinton in October of 2000.¹ The TVPA consolidated existing legislation to create a comprehensive civil remedy; this ensures that trafficking victims are no longer forced to seek redress under multiple criminal and civil statutes that target only components of the human trafficking offense.² However, despite its status as the first comprehensive anti-trafficking legislation to be enacted in the United States, the TVPA fails to sufficiently address human trafficking concerns.³ It is suggested that the failure of the TVPA is a result of both the prosecutorial focus of the legislation,⁴ a focus which tends to overlook victims' civil rights,⁵ and the contingency of TVPA benefits upon adherence to the prosecutorial

* This note was written in the Fall of 2006 while Shannon Lack was a third-year law student at the University of Pittsburgh School of Law.

1. Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7102(9) (2000); Hussein Sadruddin, Natalia Walter & Joseph Hidalgo, Symposium, *Globalization, Security & Human Rights: Immigration in the Twenty-First Century: Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 380 (2005).

2. See Theresa Barone, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT'L & COMP. L.J. 579, 581 (2003); see Nidhi Kumar, *Reinforcing Thirteenth and Fourteenth Amendment Principles in the Twenty-First Century: How to Punish Today's Masters and Compensate Their Immigrant Slaves*, 58 RUTGERS L. REV. 303, 317 (2005); see Free the Slaves & Human Rights Center of the University of California, Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 69 (2005) [hereinafter *Hidden Slaves*].

3. Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2978 (2006).

4. Kathleen Kim & Kusia Hreshchychyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 14 (2004); see also Wenchi Yu Perkins, *December 2004 Trafficking Alert: U.S. Edition* (Dec. 2004), available at http://www.vitalvoices.org/DesktopDefault.aspx?page_id=162.

5. Chacon, *supra* note 3, at 2978.

process.⁶ In response to the shortcomings of the TVPA, the legislation was amended by the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA) to provide a civil remedy for trafficking victims.⁷ The civil remedy confers on trafficking victims the private right to vindicate their civil rights and hold their traffickers directly accountable for their exploitative acts.⁸ By directly compensating victims, the civil remedy acts as a financial deterrent against traffickers⁹ and provides a private enforcement anti-trafficking policy.¹⁰ In pursuing the civil remedy, trafficking victims possess several advantages over the prosecutorial process of the TVPA and other civil causes of action.¹¹ However, despite its advantages, the civil remedy is infrequently utilized thus frustrating congressional intent that victims advance anti-trafficking policy by enforcing a civil remedy against their traffickers.¹²

This Note proposes to amend the United States' extant anti-trafficking legislation to ensure greater utility of its civil remedy. As amended, the legislation will include a provision for treble damages to be awarded to trafficking victims who have pursued a civil remedy against their traffickers under the TVPRA. Further amendment is proposed to secure victims' access to traffickers' assets that have been seized by the federal government under sections 1594(b) and (c) to satisfy victims' treble damage awards.¹³ These amendments will secure the utility of the civil remedy, rendering it the most effective means by which a victim may vindicate their civil rights. As amended, the civil remedy will comprise the necessary incentives to encourage victims to hold their traffickers directly accountable through civil litigation that will serve to financially deter trafficking activity and privately enforce anti-trafficking policy.

Part I of this Note presents human trafficking as a violation of an individual's civil rights, discussing the methods employed by traffickers as well the socioeconomic factors responsible for the propagation of human

6. Kim & Hreshchyshyn, *supra* note 4, at 14.

7. *Id.* at 16; *see* Trafficking Victims Protection Reauthorization Act of 2003, H.R. DOC. 2620 (2003) [hereinafter TVPRA] (codified as amended at 18 U.S.C. § 1595).

8. Kim & Hreshchyshyn, *supra* note 4, at 16.

9. KATHLEEN KIM & DANIEL WERNER, CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING i, iv (Legal Aid Foundation of Los Angeles 2005).

10. *Id.* at iv.

11. Kim & Hreshchyshyn, *supra* note 4, at 16; *see generally* KIM & WERNER, *supra* note 9; *see* Barone, *supra* note 2, at 581; *see also* Kumar, *supra* note 2, at 317-18.

12. Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2579 (2006).

13. *See* 18 U.S.C. §§ 1594(b), (c).

trafficking in the United States and worldwide. Part II examines the existing legal framework of the TVPA, the United States' current domestic anti-trafficking legislation. This section will also review the tripartite framework of the TVPA, outlining its three stated objectives as well as its failure to adequately combat human trafficking. Part III discusses the civil remedy of the TVPRA, addressing its advantages over the prosecutorial process of the TVPA and other civil causes of action. This section will also review the infrequent use of the civil remedy and propose amendments to increase its utility in directly compensating victims, financially deterring traffickers, and privately enforcing anti-trafficking policy. Part IV explores the proposal to amend the civil remedy to provide for treble damage awards, using the United States' antitrust law and anti-racketeering legislation to demonstrate the role of treble damages as financial incentives to encourage the private enforcement of public policy. Part V explores the proposal to amend the civil remedy to secure victims' access to traffickers' assets that have been seized by the federal government under sections 1594(b) and (c) to satisfy victims' treble damage awards.

I. HUMAN TRAFFICKING IN THE UNITED STATES

A. *Trafficking in Persons Defined*

The TVPA defines "severe forms of trafficking in persons" as:

- (A) sex trafficking¹⁴ in which a commercial sex act¹⁵ is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁶

In defining human trafficking from the perspective of its victims, the TVPA appropriately places the issue of trafficking within a human rights framework.¹⁷ By reframing human trafficking as such, the act of trafficking

14. 22 U.S.C. § 7102(9) (defining sex trafficking as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act").

15. 22 U.S.C. § 7102(3) (defining a commercial sex act as "any sex act on account of which anything of value is given to or received by any person").

16. 22 U.S.C. § 7102(8).

17. Kim & Hreshchyshyn, *supra* note 4, at 12.

becomes a genuine violation of human rights.¹⁸ Emphasis is thus placed on the enforcement of trafficking victims' civil rights: it is not prosecutorial effectiveness which is paramount but rather, it is the effectiveness of the TVPA in providing victims with the means to seek redress for violations of their civil rights which is vital.¹⁹

B. The Commerce of Human Trafficking

As one of the fastest growing criminal enterprises in the United States, human trafficking has taken its place as the third largest source of revenue for organized criminal enterprises, behind trafficking in drugs and trafficking in firearms.²⁰ The United States Federal Bureau of Investigation estimates that some 600,000 to 800,000 victims are trafficked across international borders each year, generating annual revenues equaling 9.5 billion dollars.²¹ Approximately 80% of trafficking victims are women and girls while 50% of trafficking victims are minors.²² An estimated 50,000 of these human trafficking victims are trafficked into United States each year.²³ Profits generated from human trafficking contribute substantially to the expansion of organized crime in the United States and worldwide.²⁴ Victims of trafficking thus become market commodities of one of the most lucrative commercial enterprises in the world; they are treated as an "inexhaustible natural resource."²⁵ Traffickers exploit the lives of their victims maximizing their short-term gain.²⁶ To a trafficker, a victim's life is without inherent value.²⁷

18. *Id.*

19. *Id.*

20. 22 U.S.C. § 7101(b)(8); *see also* Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 150 (2002).

21. U.S. DEP'T OF STATE, PUBL'N NO. 11335, TRAFFICKING IN PERSONS REPORT 1, 6, 13 (2006), <http://www.state.gov/documents/organization/66086.pdf> [hereinafter TIP REPORT 2006].

22. *Id.* at 6.

23. Trafficking Victims Protection Reauthorization Act of 2005, H.R. 972, 109th Cong. § 2(1) (2005) [hereinafter TVPRA 2005].

24. 22 U.S.C. § 7101(b)(8).

25. Kumar, *supra* note 2, at 307.

26. *Id.*

27. *Id.*

C. Socioeconomic Factors Behind Human Trafficking

A myriad of socioeconomic factors contribute to the propagation of human trafficking worldwide.²⁸ Encouraging a steady, if not increasing, supply of potential victims, these socioeconomic factors are “poverty, the attraction of perceived higher standards of living elsewhere, lack of employment opportunities, organized crime, violence against women and children, discrimination against women, government corruption, political instability, and armed conflict.”²⁹ Men are particularly vulnerable to traffickers seeking illegal sources of forced labor³⁰ while women and children, often disproportionately affected by socioeconomic factors such as poverty, chronic unemployment, discrimination, low social status, illiteracy, and economic crises, are traffickers’ primary targets.³¹

D. The Methodology of Traffickers

The tactics employed by traffickers range from complex transnational organized crime rings to small scale, family operations.³² These trafficking networks comprise recruiters, document forgers, transporters, and purchasers³³ that deliberately target the vulnerabilities of victims by using force, fraud, or coercion to facilitate their exploitation.³⁴ Victims are lured with false job opportunities guaranteeing higher wages and more favorable working conditions, or by promises of marriage, educational opportunities, or the promise of an overall higher standard of living elsewhere.³⁵ However, more traditional tactics such as kidnapping, the sale of individuals by their families, and mail-order brides are still the primary means employed by traffickers to obtain victims.³⁶ Trafficking recruiters often attempt to gain the trust of potential victims; they may be family members, friends, a well-respected

28. U.S. DEP’T OF STATE, PUBL’N NO. 11252, TRAFFICKING IN PERSONS REPORT 1, 17 (2005), <http://www.state.gov/documents/organization/47255.pdf> [hereinafter TIP REPORT 2005].

29. *Id.*

30. Kim & Hreshchyshyn, *supra* note 4, at 6.

31. 22 U.S.C. § 7101(b)(4); Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN’S L.J. 29, 35 (2001).

32. Kim & Hreshchyshyn, *supra* note 4, at 6.

33. *Id.*; see also Hyland, *supra* note 31, at 37.

34. 22 U.S.C. § 7101(b)(2).

35. Kim & Hreshchyshyn, *supra* note 4, at 6; TIP REPORT 2005, *supra* note 28, at 15.

36. Kim & Hreshchyshyn, *supra* note 4, at 6.

individual of the victim's community, or associated with an employment or model agency.³⁷

The exploitation of victims ranges from sexual exploitation, *e.g.*, prostitution and commercial sex, to forced labor, *e.g.*, domestic servitude, begging, sweatshops, maid services, and marriage.³⁸ Once an individual's freedom is compromised, traffickers force their victims to submit to such exploitation.³⁹ A victims' submission is often achieved by forcible threats.⁴⁰ Traffickers may threaten to physically harm a victim or members of a victim's family, they may threaten to turn a victim over to law enforcement or immigration officials of the destination country, they may confiscate a victim's identifying documents, or they may exert psychological torture over a victim such as isolated confinement.⁴¹ Traffickers may also employ a system of debt bondage where victims are told they must repay their traffickers a fabricated debt often claimed to consist of costs incurred by traffickers from forging victims' documents and transporting victims to the destination country.⁴² Traffickers insist this fabricated debt can only be repaid by the continued exploitation of their victims; however traffickers never credit victims' wages against their debt.⁴³ The most abhorrent compliance tactic is the execution of physical abuse by traffickers against their victims in the form of starvation, beatings, and sexual assault.⁴⁴

II. VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000

Prior to the enactment of the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), punishment of human trafficking offenses was fragmented, "possible only through legislation aimed at the components of the offense."⁴⁵ The TVPA is the first comprehensive anti-trafficking legislation enacted in the United States⁴⁶ and a bold departure from traditional legislative approaches to combating human trafficking and forced labor.⁴⁷ By

37. *Id.*

38. *Id.* at 7.

39. *Id.*

40. *Id.*

41. *Id.*

42. Hyland, *supra* note 31, at 38.

43. *Id.*

44. Kim & Hreshchyshyn, *supra* note 4, at 7.

45. Barone, *supra* note 2, at 581; 22 U.S.C. § 7101(b)(14).

46. Kumar, *supra* note 2, at 317.

47. *Hidden Slaves*, *supra* note 2, at 69.

consolidating existing legislation to create a comprehensive civil remedy, the TVPA ensures that victims of trafficking are no longer forced to seek redress under multiple criminal and civil statutes that target only components of the human trafficking offense.⁴⁸

At the core of the TVPA is the notion that persons trafficked against their will are victims, not criminals, and should be treated accordingly.⁴⁹ The “legislation thus appropriately directs condemnation at the traffickers” by strengthening the prosecutorial tools necessary to protect and support victims⁵⁰ on a domestic as well as global level.⁵¹ Emphasizing the strong public policy interest behind the enactment of the TVPA, the legislation describes human trafficking as a “contemporary manifestation of slavery” contravening the principles of The Declaration of Independence and outlawed by the United States’ Constitution.⁵²

A. *The Objectives of the TVPA*

The TVPA advances three objectives. They are to punish and prosecute traffickers, prevent human trafficking, and protect victims of trafficking.⁵³ This tripartite framework was initially set forth in the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.⁵⁴

The TVPA aims to punish and prosecute traffickers by strengthening the available statutory mechanisms.⁵⁵ First, the TVPA creates new federal crimes.⁵⁶ By including the federal crimes of human trafficking, sex trafficking of children, document servitude, the withholding or destroying of travel documents, and forced labor,⁵⁷ the TVPA has “sharpened the legal teeth” of

48. Kumar, *supra* note 2, at 317-18.

49. *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2579.

50. *Id.*

51. See Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*, 55 CATH. U. L. REV. 141, 180 (2005).

52. See 22 U.S.C. §§ 7101(a), (b)(22).

53. Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87, 98 (2005).

54. Kim & Hreshchyshyn, *supra* note 4, at 12; see also Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/53/383 (2000) (standing as the first comprehensive international anti-trafficking in persons protocol).

55. Kandathil, *supra* note 53, at 98.

56. See 22 U.S.C. § 7109.

57. *Hidden Slaves*, *supra* note 2, at 70; see 22 U.S.C. § 7109.

existing sanctions for the perpetration of peonage, slavery, involuntary servitude, and forced labor.⁵⁸ Second, the TVPA broadened the definition of coercion to include not only physical but psychological coercion.⁵⁹ Traffickers can now be held accountable for both physically coercing their victims to perform exploitative services and for any emotional injury ensuing from their victims' exploitation.⁶⁰ Third, the TVPA not only encourages the investigation and prosecution of the ringleaders of trafficking networks but also of individuals in a position of complicity with trafficking operations, including recruiters, transporters, and other intermediaries.⁶¹ Finally, the TVPA increases sentencing guidelines for convicted traffickers to a maximum of twenty years in prison with the possibility of a life sentence if the trafficker is found to have kidnapped or attempted to kidnap, committed aggravated sexual abuse or attempted to do so, or has killed or attempted to kill a trafficked person.⁶²

The TVPA aims to prevent human trafficking through the federal Interagency Task Force.⁶³ It is the responsibility of the federal Interagency Task Force to evaluate and measure the progress of the legislation in preventing human trafficking, prosecuting traffickers, and protecting trafficking victims.⁶⁴ This Task Force operates in conjunction with the Secretary of State to prepare annual reports that assess the presence and severity of human trafficking in countries throughout the world.⁶⁵ In an effort to prevent human trafficking globally, the TVPA includes international monitoring provisions as well as provisions for sanctions to be imposed upon countries that fail to adequately address human trafficking issues within their borders.⁶⁶

The TVPA aims to protect victims of human trafficking by providing specific measures with which victims may meet their unique needs.⁶⁷ Of paramount importance is the offer of temporary immigration status to victims of a "severe form of trafficking," *i.e.*, those trafficked for commercial sex or forced labor through force, fraud, or coercion or any minor trafficked for

58. *Hidden Slaves*, *supra* note 2, at 70.

59. *Id.* at 71.

60. *Id.*

61. *Id.* at 72.

62. 18 U.S.C. § 1589; Kumar, *supra* note 2, at 317.

63. 22 U.S.C. § 7103; Kumar, *supra* note 2, at 319.

64. Kumar, *supra* note 2, at 319.

65. *Id.*

66. *Hidden Slaves*, *supra* note 2, at 73; *see also* Kumar, *supra* note 2, at 319.

67. *See, e.g.*, *Hidden Slaves*, *supra* note 2, at 71.

sex.⁶⁸ Temporary immigration status is referred to as the T visa and is available to victims who are physically present in the United States, who reasonably assist in the investigation and prosecution of their traffickers, and who would undeniably suffer extreme hardship including severe harm against their person if deported.⁶⁹ The T visa allows victims to remain in the United States for a period of three years at which point they are eligible for permanent residency subject to certain statutory criteria.⁷⁰ The T visa also confers certain social benefits and work authorization to victims who have proven their willingness to cooperate with law enforcement.⁷¹ In addition, the TVPA requires mandatory restitution upon conviction of traffickers for the “full amount of victim’s losses” in addition to the “greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act.”⁷² The “full amount of victim’s losses” as defined by section 2259(b)(3) includes medical services related to physical, psychiatric, or psychological care, physical or occupational therapy or rehabilitation, necessary transportation, temporary housing, child care expenses, lost income, attorney’s fees, as well as other costs incurred, and any other losses incurred by the victim as a proximate result of the offense.⁷³

B. Failure of the TVPA to Punish, Protect, and Prevent

Despite the advances the TVPA has made in the development of domestic anti-trafficking legislation, “there is almost universal consensus that the [TVPA] . . . has thus far failed to make sufficient strides in addressing the problems of human trafficking. . . .”⁷⁴ It has been noted that the failure of the TVPA to sufficiently combat human trafficking is a result of law enforcement’s tendency to undercut the humanitarian aim of protecting and assisting the victims in anti-trafficking initiatives.⁷⁵ For instance, even upon being identified as a victim of trafficking, availability of the benefits under the TVPA are contingent upon victims’ meeting three eligibility requirements.⁷⁶

68. *Id.*; 22 U.S.C. §§ 7102(8), 7105(b).

69. Kim & Hreshchyshyn, *supra* note 4, at 14.

70. *Id.*

71. *Id.*

72. 18 U.S.C. §§ 1593(b)(1), (b)(3).

73. 18 U.S.C. § 1593(b)(3); 18 U.S.C. § 2259(b)(3).

74. Chacon, *supra* note 3, at 2978.

75. *Id.*

76. Kandathil, *supra* note 53, at 99-100.

First, victims must demonstrate that they have suffered a “severe form of trafficking.”⁷⁷ Second, victims must be willing to cooperate with law enforcement in the investigation and prosecution of their trafficker.⁷⁸ Third, victims must acquire temporary immigration status through the T visa.⁷⁹ A general mistrust of the prosecutorial process compounded by a fear of deportation and deep feelings of humiliation hinders the willingness of trafficking victims to fulfill the first two eligibility requirements.⁸⁰ The third eligibility requirement, obtainment of a T visa, is procedurally onerous as it places the burden of proving eligibility on the victims.⁸¹ The T visa’s inadequacy as a protection for victims is further evidenced by the fact that only 750 T visa applications have been submitted since the enactment of the TVPA in 2000.⁸² Overall, the stringent eligibility requirements fail to recognize contemporary modern trafficking schemes and as a result, disregard the needs of victims.⁸³ By conditioning social services and immigration status on the victims’ willingness to cooperate with the prosecution, trafficked persons become instruments of law enforcement as opposed to victims deserving of protection and vindication of their individual human rights.⁸⁴ Victims have little to no control over the restoration of their own lives. Even a victim’s access to restitution is contingent upon the prosecutor’s willingness to investigate and charge traffickers, despite the mandatory restitution provision of the TVPA.⁸⁵ Since prosecutors are primarily concerned with imprisoning traffickers, they may fail to seek restitution for victims.⁸⁶ Even when a prosecutor does seek restitution for a victim, damage awards as defined by the mandatory restitution provision of the TVPA “grossly understate the harms suffered by victims.”⁸⁷ The prosecutorial process thus bars victims from pursuing compensation that will hold their traffickers directly accountable for their exploitative actions.

Although the TVPA enhances the prosecutorial tools available to combat trafficking, “the prosecutorial focus of the law makes benefits contingent upon

77. *Id.*

78. *Id.*

79. *Id.*

80. Kim & Hreshchyshyn, *supra* note 4, at 15; Kandathil, *supra* 53, at 100.

81. Kim & Hreshchyshyn, *supra* note 4, at 14.

82. *Id.*

83. *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2581.

84. *Hidden Slaves*, *supra* note 2, at 74.

85. *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2583.

86. *Id.*; *see also* Kim & Hreshchyshyn, *supra* note 4, at 16.

87. *See also* Kim & Hreshchyshyn, *supra* note 4, at 16.

the prosecutorial process and therefore poses substantial barriers to full recovery.”⁸⁸ In response to inadequacy of the prosecutorial process of the TVPA, Congress enacted The Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA) to provide a civil remedy for trafficking victims.⁸⁹

III. TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2003 AND ITS CIVIL REMEDY

The TVPRA confers upon victims of forced labor,⁹⁰ trafficking into servitude,⁹¹ or sex trafficking,⁹² the private right to pursue a civil remedy against traffickers in district court to recover damages as well as reasonable attorney’s fees.⁹³ The civil remedy empowers victims with a means to vindicate their human rights.⁹⁴ By holding traffickers directly accountable to their victims, the civil remedy acts as a powerful financial deterrent against traffickers.⁹⁵ Thus, “[c]ivil action, in contrast to the prosecutorial approach, can provide more appropriate compensation to people who have suffered unconscionable exploitation, while allowing the trafficked person to control and direct the legal process.”⁹⁶ In amending the TVPA, it was Congress’ intent that victims advance anti-trafficking policy by enforcing a civil remedy against their trafficker through private litigation.⁹⁷ Civil litigation pursued by victims under the TVPRA thus strengthens the mandate of the federal government to combat human trafficking.⁹⁸

A. *Advantages of a Civil Remedy*

In pursuing civil relief, trafficking victims avail themselves to several advantages over the prosecutorial process regarding eligibility, compensation, deterrence, accountability, and control.⁹⁹ First, to bring a civil suit against a

88. *Id.* at 14; *see also* Perkins, *supra* note 4.

89. 18 U.S.C. § 1595; *see* Kim & Hreshchyshyn, *supra* note 4, at 16.

90. 22 U.S.C. § 1589.

91. 22 U.S.C. § 1590.

92. 22 U.S.C. § 1591.

93. 18 U.S.C. § 1595; KIM & WERNER, *supra* note 9, at 20.

94. Kim & Hreshchyshyn, *supra* note 4, at 35-36.

95. KIM & WERNER, *supra* note 9, at iv.

96. Kim & Hreshchyshyn, *supra* note 4, at 2.

97. KIM & WERNER, *supra* note 9, at iv.

98. McKee, *supra* note 51, at 190.

99. Kim & Hreshchyshyn, *supra* note 4, at 16.

trafficker under the civil remedy of the TVPRA, a victim need only demonstrate that they are a victim of forced labor, trafficking into servitude, or sex trafficking.¹⁰⁰ This requirement is substantially less stringent than the three eligibility requirements of the prosecutorial process under the TVPA.¹⁰¹ Second, the civil remedy empowers victims to pursue greater damage awards that reflect the egregious nature of their exploitation.¹⁰² Such civil relief may take the form of compensatory and/or punitive damages.¹⁰³ In contrast, a prosecutor in a criminal prosecution under the TVPA may fail to seek restitution for a victim and in the rare cases where restitution is sought, compensation is limited.¹⁰⁴ Third, the potential for greater damage awards in civil litigation under the TVPRA acts as a substantial financial deterrent to trafficking activity.¹⁰⁵ A civil suit against a trafficker results in direct restitution to the victim and globally deters trafficking by financially disabling traffickers.¹⁰⁶ Larger third parties, unindictable in a criminal prosecution yet complicit in the act of trafficking, may be held liable in a civil action and thus become sources of payment for the greater damage awards.¹⁰⁷ Fourth, the civil remedy of the TVPRA allows victims to hold their traffickers directly accountable for their crimes.¹⁰⁸ Finally, in a civil suit, the victim is in control.¹⁰⁹ Victims are able to exercise control over the direction of the legal case, they will never be excluded from the court room, and they will have final approval over all settlement proposals.¹¹⁰ This is in direct contrast to the lack of control afforded to a victim in a criminal prosecution.¹¹¹

B. Benefit of Civil Remedy Under the TVPRA as Compared to other Civil Remedies

Prior to the TVPRA and its civil remedy, victims of trafficking unable to meet the eligibility requirements of the TVPA were forced to seek redress

100. KIM & WERNER, *supra* note 9, at 20.

101. *E.g.*, PERKINS, *supra* note 4, at 2.

102. KIM & HRESHCHYSHYN, *supra* note 4, at 16.

103. *Id.*

104. *Id.*; see also *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2583.

105. *Id.*

106. *Id.*

107. *Id.* at 16-17.

108. *Id.* at 17.

109. *Id.* at 17-18.

110. *Id.*

111. *Id.*

from their traffickers through multiple civil causes of action.¹¹² These strategies included civil causes of action under the Thirteenth Amendment and its enabling statute, The Alien Tort Claims Act, Federal Racketeer Influenced and Corrupt Organizations Act (RICO), Fair Labor Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, Title VII of the Civil Rights Act, as well as intentional tort, negligence, and contract claims.¹¹³ However, these civil causes of action targeted components of the human trafficking offense such as racketeering, immigration offenses, and violations of involuntary servitude and were incapable of fully restoring victims by providing a legal remedy that addressed the specific offense of human trafficking.¹¹⁴ In contrast, the civil remedy under the TVPRA provides redress for victims based on the traffickers' violation of the specific act of human trafficking.¹¹⁵ The TVPRA and its civil cause of action thus builds upon the elements of other civil cause of actions, providing the most comprehensive means by which victims may seek civil redress from their traffickers.¹¹⁶

C. Recommendations for Amendment of the Civil Remedy under the TVPRA

Despite its advantages, the civil remedy of the TVPRA is infrequently utilized by trafficking victims.¹¹⁷ In enacting the civil remedy, Congress intended to facilitate the enforcement of anti-trafficking policy through private litigation undertaken by victims against their traffickers.¹¹⁸ As such, victims' infrequent use of the civil remedy frustrates congressional intent. To increase its effectiveness as a tool by which victims assert not only their civil rights but effectuate a greater, social regulatory purpose, the civil remedy must be amended.¹¹⁹ As amended, the legislation should entitle victims to treble damages on proof of actual damages in a civil action brought under the TVPRA as well as secure victims' access to traffickers' assets that have been seized by the federal government under sections 1594(b) and (c) to satisfy

112. *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2584-85.

113. *See generally* KIM & WERNER, *supra* note 9.

114. *See* Barone, *supra* note 2, at 581; *see also* Kumar, *supra* note 2, at 317-18.

115. 18 U.S.C. § 1595.

116. McKee, *supra* note 51, at 190.

117. *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2584.

118. KIM & WERNER, *supra* note 9, at iv.

119. Ronald A. Brand, *Private Law and Public Regulation in U.S. Courts*, in 2 CILE STUDIES: PRIVATE LAW, PRIVATE INTERNATIONAL LAW AND JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP 115, 119-20 (Ronald A. Brand & Mark Walter eds., 2005)

victims' treble damage awards.¹²⁰ Treble damages have traditionally been an integral part of the United States judicial system, a system designed to encourage private enforcement of public policy.¹²¹ Equaling triple the amount awarded for actual damages, treble damages act as a financial incentive to encourage citizens to bring civil suits for violations of offenses that pose a significant threat to society as a whole.¹²²

The civil remedy under the TVPRA currently allows victims to recover "damages and reasonable attorneys fees."¹²³ The provision for the recovery of damages, *i.e.*, compensatory and/or punitive, is insufficient to adequately compensate a trafficking person for their exploitation and fails to serve as a financial deterrent to traffickers, especially considering the lucrative nature of the human trafficking industry. By amending the civil remedy of the extant anti-trafficking legislation to provide for treble damages and by making available traffickers' assets that have been seized by the federal government to satisfy victims' treble damage awards, victims will be ensured adequate compensation, traffickers will be financially deterred, and the civil remedy will better fulfill its social regulatory purpose of advancing anti-trafficking policy through private litigation.

IV. TREBLE DAMAGES AND THE SOCIAL REGULATORY PURPOSE OF CIVIL CAUSES OF ACTION

A. Enforcement of Public Policy Through Private Litigation

Historically, "American judicial institutions . . . were not designed merely to resolve civil disputes, but were fashioned for the additional purpose of facilitating private enforcement of what in other nations would generally be denoted as public law."¹²⁴ This purpose is achieved through private attorneys general, or private parties who advance policy inherent in public legislation by way of private litigation.¹²⁵ The need for private parties to advance public

120. See 18 U.S.C. §§ 1594(b), (c).

121. *Id.* at 126.

122. BLACK'S LAW DICTIONARY 419 (8th ed. 2004) (defining treble damages as damages that, by statute, are three times the amount that the fact-finder determines is owed).

123. 18 U.S.C. § 1595.

124. Paul D. Carrington, *The American Tradition of Private Law Enforcement*, 5 GERMAN L.J. 1413, 1413 (2005).

125. BLACK'S LAW DICTIONARY 1233 (8th ed. 2004) (defining private-attorney-general doctrine as the equitable principle that allows the recovery of attorney's fees to a party who brings a lawsuit that benefits a significant number of people, requires private enforcement, and is important to society as a

policy reflects American citizens' lack of confidence in the capacity of political institutions and government officials to properly enforce public law issues.¹²⁶ In general, there is a rejection of "top down regulation in favor of an approach that allows the common person to be involved in the regulatory process through private litigation."¹²⁷ In enacting a civil remedy for human trafficking, Congress demonstrated an intention to rely on trafficking victims, acting in their capacity as private parties, to individually enforce a civil remedy against their traffickers.¹²⁸ By initiating a civil suit, a trafficking victim is enforcing through private litigation Congress' anti-trafficking policy.

B. Integral Role of Treble Damages

The provision for treble damages is a critical element of the majority of public legislation that seeks enforcement primarily by way of private litigation.¹²⁹ Treble damages are the financial incentive for private parties to undertake civil litigation that will serve not only to compensate the private party but deter conduct contrary to public policy.¹³⁰ Because the civil remedy of the TVPRA does not include a provision for treble damage, it thus lacks the substantial financial incentive necessary to encourage victims to initiate civil litigation against their traffickers that will serve to deter trafficking activity.

The use of treble damages in statutory law to deter conduct contrary to public policy is evident in both federal antitrust law as well as anti-racketeering legislation. As such, United States antitrust law and anti-racketeering legislation are useful examples of the integral role of treble damages in statutes designed to encourage private parties, acting as private attorneys general, to engage in civil litigation for compensatory as well as social regulatory purposes.

C. Federal Antitrust Legislation

During the era of industrialization, it was acknowledged that regulation of federal antitrust law should not be left to the fledgling United States Justice

whole).

126. Carrington, *supra* note 124, at 1413.

127. Brand, *supra* note 119, at 116, 119-20.

128. KIM & WERNER, *supra* note 9, at iv.

129. Brand, *supra* note 119, at 126.

130. Carrington, *supra* note 124, at 1416.

Department.¹³¹ Congress, intending antitrust laws to achieve not only economic efficiency but to advance social and political goals as well, determined that antitrust law should be enforced primarily through private litigation brought by parties acting in the role of private attorneys general.¹³² In order to encourage parties to engage in a system centered on the private enforcement of public policy, section 15 of the Sherman Antitrust Act of 1890 was amended by section 4 of the Clayton Act of 1914 to provide for recovery of “threefold the damages” by any “person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.”¹³³ By amending federal antitrust law to provide for treble damages, Congress intended to assure litigants that a successful antitrust suit would yield substantial compensation for the plaintiff as well as deter violations of federal antitrust law and advance the public policy interest inherent in federal antitrust legislation.¹³⁴ It is now well understood that “. . . one great *prima facie* deterrent to the would-be violator of the Sherman Act [is that] the injured person may recover three times the amount of the injury suffered.”¹³⁵ As a result, federal antitrust law exists today as a nearly unscathed model of “public spirited regulation of business.”¹³⁶

Just as section 15 of the Sherman Antitrust Act was amended by section 4 of the Clayton Act to provide for the recovery of treble damage in an effort to encourage citizens to initiate private antitrust litigation,¹³⁷ the civil remedy of the TVPRA must also be amended to provide for the recovery of treble damage awards to ensure its utility for trafficking victims. It is clear that the provision for treble damage awards in the Sherman Antitrust Act had been incorporated to encourage private regulation of public antitrust policy.¹³⁸ A similar financial incentive is needed to encourage the predominantly impoverished trafficking victims to initiate civil suits against their traffickers under the civil remedy of the TVPRA. Damage awards under the civil remedy

131. *Id.*

132. *Id.*; John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy: Introduction*, 125 U. PA. L. REV. 1182, 1186 (1977).

133. Brand, *supra* note 119, at 126; *see also* Sherman Antitrust Act of 1890, 15 U.S.C. § 15 (1890) as amended by § 4 of the Clayton Antitrust Act of 1914.

134. Carrington, *supra* note 124, at 1414.

135. William Wright Daniel, *Enforcement of the Sherman Act by Actions for Treble Damages*, 34 VA. L. REV. 901, 902 (1948).

136. CLYDE WAYNE CREWS, JR., ANTITRUST POLICY AS CORPORATE WELFARE 2 (Competitive Enterprise Institute’s Antitrust Reform Project 1997), available at <http://www.cei.org/pdf/1615.pdf>.

137. Brand, *supra* note 119, at 126; Carrington, *supra* note 124, at 1414.

138. Brand, *supra* note 119, at 126.

are currently limited to actual damages, *i.e.*, compensatory and/or punitive damages.¹³⁹ The potential for an actual damage award to act an incentive for a victim is undermined by the financial and emotional difficulties inherent in initiating a civil suit against a trafficker. Considering the dependency of the civil remedy on private enforcement by victims, it is necessary that the provision for the recovery of damages adequately reflects the needs of victims. Absent a provision for treble damages, victims will continue to underutilize the civil remedy.¹⁴⁰ Consequently, the civil remedy of the TVPRA should be amended to include a provision for treble damages.

D. Racketeer Influence and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act (RICO), a federal statutory scheme enacted by way of the Organized Crime Control Act of 1970, prohibits persons from using or investing income derived from a pattern of racketeering in activities related to interstate or foreign commerce.¹⁴¹ It is the aim of RICO to strengthen the legal mechanisms necessary to combat organized crime in the United States.¹⁴² RICO provides a civil cause of action and the recovery of treble damages by private parties engaging in civil litigation under RICO.¹⁴³ This civil cause of action and its provision for treble damages is evidence of the “congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors . . . dedicated to eliminating racketeering activity.”¹⁴⁴ A private party, in initiating a civil suit under RICO, will be directly compensated for their injury while privately enforcing the public policy interest inherent in RICO legislation.

To establish a civil cause of action under RICO, a private party must prove that a person¹⁴⁵ has engaged in a “pattern of racketeering activity.”¹⁴⁶

139. 18 U.S.C. § 1595.

140. *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2584; KIM & WERNER, *supra* note 9, at iv.

141. McKee, *supra* note 51, at 165; KIM & WERNER, *supra* note 9, at 28.

142. McKee, *supra* note 51, at 165.

143. *Id.* at 167; *see also* KIM & WERNER, *supra* note 9, at 28-29; The Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1964(a), (c) (1994).

144. McKee, *supra* note 51, at 169.

145. 18 U.S.C. § 1961(3) (2006) (defining “person” as any individual or entity capable of holding a legal or beneficial interest in property).

146. McKee, *supra* note 51, at 169-70; 18 U.S.C. § 1961(5) (defining “pattern of racketeering” as

Establishing a “pattern of racketeering activity”¹⁴⁷ requires proof that a person has engaged in one of the predicate offenses constituting “racketeering activity” under RICO on two separate occasions occurring no more than 10 years apart.¹⁴⁸

RICO has recently been amended to include peonage, slavery, and trafficking in persons as predicate offenses for a RICO civil claim.¹⁴⁹ However, a civil suit under RICO for a violation of trafficking in persons is less effective than the civil remedy under the TVPRA. Under the civil remedy of the TVPRA, victims are entitled to recover actual damages, *i.e.*, compensatory and/or punitive, upon proving they are a victim of forced labor, trafficking in servitude, or sex trafficking.¹⁵⁰ Victims’ compensation thus reflects their status as victims of human trafficking, their recovery of damages is not qualified beyond victims proving their status as such. In contrast, under a RICO civil claim, an individual may only recover treble damages for “quantifiable injuries to business and property.”¹⁵¹ Victims are not entitled to compensation for personal injuries.¹⁵² Considering that most trafficking victims lack proprietary or business interests and that injuries suffered by victims are predominately personal injuries, victims may be unable to recover treble damages in a RICO civil suit. In addition, all damages alleged in a RICO civil suit must be quantifiable, *i.e.*, not of a speculative nature.¹⁵³ Quantifying damages alleged in a RICO civil suit is particularly difficult considering the immeasurable nature of the harm incurred by a trafficking victim.

Despite its failure to serve as an adequate substitute for the civil remedy under the TVPRA, RICO provides a useful example of the critical role treble damages play in statutory law designed to advance public policy.¹⁵⁴ Analogous to the role of treble damages in United States antitrust law, treble damages under RICO serve as a financial incentive to encourage private

requiring at least two acts of racketeering activity, one of which occurred after Oct. 15, 1970, and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity).

147. 18 U.S.C. § 1961(5).

148. McKee, *supra* note 51, at 171; *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2587.

149. KIM & WERNER, *supra* note 9, at 28.

150. *Id.* at 20.

151. McKee, *supra* note 51, at 168-69.

152. *Id.* at 178.

153. *Id.*

154. *Id.* at 167; *see also* KIM & WERNER, *supra* note 9, at 28-29.

parties to undertake civil litigation that will serve both to compensate the party and deter conduct contrary to the public policy interest inherent in the legislation.¹⁵⁵ The critical role of treble damages in both federal antitrust and civil RICO legislation is a result of the strong social regulatory purpose of the legislation and the reliance of such public legislation on enforcement through private litigation.¹⁵⁶ The current United States' anti-trafficking legislation serves an equally strong social regulatory purpose as evidenced by congressional intent to privately enforce anti-trafficking policy through the civil remedy of the TVPRA.¹⁵⁷ However, unlike United States antitrust law and civil RICO legislation, the civil remedy under the TVPRA lacks the financial incentive necessary to encourage victims to enforce anti-trafficking policy through private litigation.¹⁵⁸ Absent a provision for treble damages, the infrequent use of the civil remedy will continue, undermining its utility as a financial deterrent against traffickers and a means by which victims privately enforce anti-trafficking policy.¹⁵⁹ Consequently, the civil remedy of the TVPRA should be amended to include a provision of treble damage awards to ensure its utility for trafficking victims.

V. ACCESS TO TRAFFICKERS AND THEIR ASSETS

Amending the civil remedy of the TVPRA to include a provision for treble damages raises the question of how trafficking victims who have been awarded treble damages will gain access to traffickers' assets.¹⁶⁰ Victims' inability to locate their traffickers' assets to satisfy treble damage awards undermines the intent of amending the civil remedy of the TVPRA to include a provision for treble damages.¹⁶¹ An award for treble damages is able to directly compensate victims and act as a financial deterrent against trafficker only if traffickers' assets are accessible to satisfy the damage award.¹⁶² In order for the civil remedy of the TVPRA to be the most effective means by which a victim is able to vindicate their civil rights, the civil remedy should be further amended to assist victims in accessing traffickers' assets.

155. *Id.*

156. See Brand, *supra* note 119, at 126.

157. KIM & WERNER, *supra* note 9, at iv.

158. 18 U.S.C. § 1595.

159. *Remedying the Injustices of Human Trafficking Through Tort Law*, *supra* note 12, at 2584.

160. Kim & Hreshchyshyn, *supra* note 4, at 18.

161. *Id.*

162. See also BLACK'S LAW DICTIONARY, *supra* note 122, at 419.

The difficulty of locating and accessing traffickers' assets is mitigated by sections 1594(b) and (c) which allow for the federal government's forfeiture of traffickers' assets upon conviction of a violation of the TVPA.¹⁶³ However, the mitigating effect of sections 1594(b) and (c) is not sufficient to ensure a victims' access to traffickers' assets in a civil action brought under the TVPRA.¹⁶⁴ As such, the TVPA should be amended to provide access to traffickers' assets that have been seized by the federal government in a criminal prosecution under sections 1594(b) and (c) for the purpose of satisfying victims' treble damage awards.¹⁶⁵

The TVPA provides in section 1594(b) that a trafficker, upon conviction, shall forfeit to the United States "such person's interest in any property, real or personal, that was used or intended to be used to commit or facilitate the commission of such violation" and "any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation."¹⁶⁶ Further, section 1594(c) provides that "Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter" and "Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter" shall be subject to forfeiture by the United States and no property interest in such property shall remain.¹⁶⁷ Seizure of traffickers' assets by the federal government under these provisions renders such assets ascertainable, lessening victims' difficulty in locating traffickers' assets.¹⁶⁸ However, seizure of traffickers' assets by the federal government under sections 1594(b) and (c) does not render such assets available to victims for the purpose of satisfying their treble damage awards.¹⁶⁹ The current provisions of the TVPA do not provided access to traffickers' assets that have been seized under sections 1594(b) or (c) to victims seeking redress under the civil remedy of the TVPRA.¹⁷⁰ Amendment of the existing United States' anti-trafficking legislation to provide for treble damages is rendered less effective if victims are barred from accessing traffickers' assets that have been seized by the federal government to satisfy their treble damage awards.

163. 18 U.S.C. §§ 1594(b), (c); Kim & Hreshchyshyn, *supra* note 4, at 18.

164. *See* Kim & Hreshchyshyn, *supra* note 4, at 18.

165. *See id.*

166. 18 U.S.C. § 1594(b).

167. 18 U.S.C. § 1594(c).

168. *See* 18 U.S.C. §§ 1594(b), (c).

169. *Id.*

170. *Id.*

The current United States' anti-trafficking legislation should be amended to make available traffickers' assets that have been seized by the federal government under sections 1594(b) and (c) to satisfy the treble damage awards of victims seeking redress under the amended civil remedy of the TVPRA.¹⁷¹ Victims will be more likely to undertake private litigation against their traffickers if their traffickers' assets are both ascertainable and accessible for the purpose of satisfying treble damage awards. The amendment of the TVPA to secure victims' access to traffickers' assets that have been seized by the federal government under sections 1594(b) and (c) of the TVPA will serve, in conjunction with the amended provision for treble damages, as an incentive to encourage victims to initiate private litigation against their traffickers under the civil remedy of the TVPRA.¹⁷² By encouraging victims to enforce a civil remedy against their traffickers, these amendments serve to further the mandate of the federal government to advance anti-trafficking policy through private litigation.¹⁷³

CONCLUSION

The civil remedy of the TVPRA addresses the legislative deficiency of the prosecutorial process under the TVPA by conferring upon victims the ability to privately vindicate their human rights.¹⁷⁴ In holding traffickers directly accountable to their victims, the civil remedy acts as a financial deterrent to trafficking activity and provides for the private enforcement of anti-trafficking policy. However, the civil remedy of the TVPRA currently lacks a substantial financial incentive to encourage victims to pursue civil litigation against their traffickers. Consequently, the civil remedy is underutilized.

To improve the efficacy of the civil remedy, the existing anti-trafficking legislation of the United States should be amended to include a provision for treble damages as well as a provision to secure victims' access to traffickers' assets that have been seized by the federal government to satisfy victims' treble damage awards. Only when such amendments have been instituted will the civil remedy of the TVPRA maximize its effectiveness as a tool by which victims assert not only their civil rights but effectuate the greater, social

171. *Id.*

172. KIM & WERNER, *supra* note 9, at iv; see 18 U.S.C. §§ 1594(b), (c).

173. *Id.*

174. Kim & Hreshchyshyn, *supra* note 4, at 35-36.

regulatory purpose of combating human trafficking in the United States and worldwide.