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IMMIGRATION AND MODERN SLAVERY: HOW THE LAWS OF ONE FAIL TO PROVIDE JUSTICE TO VICTIMS OF THE OTHER

*Shannon E. Clancy**

I. INTRODUCTION

On the first Sunday in February, Americans across the country look forward to the game of the year—the Super Bowl.¹ Most sports fans would likely compare the anticipation and excitement of this game to that of a young child waking up on Christmas morning. This game brings in thousands of supporters to the host city each year and draws millions of television viewers.² With the flashy lights, spirited fans, and debuting commercials, this game would appear to be the highlight of any person’s day. But looking behind the scenes, that is not always the case. This vast crowd also appeals to “a sector of violent, organized criminal activity that operates in plain sight without notice”³ We call this human sex trafficking.⁴

According to the Department of State (DOS), human trafficking is defined as “the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion.”⁵ This “business” is sweeping the nation and is now considered “one of the most lucrative criminal enterprises in the world.”⁶ In 2015 alone, 5544 calls were

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1. Ann Oestreich, *Sex Trafficking and the Super Bowl*, WASH. POST (Feb. 3, 2012, 12:36 PM), https://www.washingtonpost.com/2011/02/25/ABjfuEJ_category.html?blogId=guest-voices&tag=catholicism.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Trafficking in Persons Report*, U.S. DEP’T ST. 7 (July 2015), <http://www.state.gov/documents/organization/245365.pdf>.

6. Erin N. Kauffman, *The Uniform Act on Prevention of and Remedies for Human Trafficking: State Law and the National Response to Labor Trafficking*, 41 J. LEGIS. 291 (2014); see *Human Trafficking Has No Place in Modern World, General Assembly President Says*, U.N. NEWS CTR. (Jul. 14, 2014), <http://www.un.org/apps/news/story.asp?NewsID=48271#.VDcf2hbCnh8> (stating

made to the National Human Trafficking Hotline Center reporting possible cases of trafficking.⁷ Of those 5544 calls, 4136 turned into cases involving sex trafficking victims.⁸

The possibility of immigration reform always increases during a presidential election year.⁹ However, politicians rarely discuss the victims who have been coerced and forced into the United States because it brings a depressing light onto the concept of reform.¹⁰ While some candidates believe that our borders should remain open as they were centuries before, others are firmly set on keeping restrictions and enforcement in place.¹¹ Those who impose our immigration policies currently provide very little protection to undocumented immigrants.¹² On the contrary, these officials also claim to make an exception for immigrants who can show they were victims of trafficking.¹³ But are these actions really providing the proper due process that victims of human trafficking deserve?

This Comment examines the barriers that our American immigration system causes victims of human trafficking when attempting to seek relief in removal proceedings. Part II establishes the foundational laws and policies that victims of human trafficking must satisfy in order to earn a visa to stay in the United States.¹⁴ Part II also addresses the issue of competency and representation of these

that the act of human trafficking is the third most profitable crime after illicit drug and arms trafficking).

7. *Hotline Statistics*, NAT'L HUM. TRAFFICKING RESOURCE CTR. (June 30, 2016), <https://traffickingresourcecenter.org/states>. Additionally, in 2015, "the NHTRC received a total of 24,757 signals nationwide" including phone calls, emails, and online tips regarding human trafficking. These tips come from a variety of sources, including victims, victims' families, law enforcement officials, and even medical professionals. *National Human Trafficking Resource Center Data Breakdown*, NAT'L HUM. TRAFFICKING RESOURCE CTR. (Feb. 2016), http://traffickingresourcecenter.org/sites/default/files/NHTRC%202015%20United%20States%20Report%20-%20USA%20-%2001.01.15%20-%2012.31.15_OTIP_Edited_06-09-16.pdf.
8. *Id.*
9. *See, e.g., Why Immigration May Decide the 2016 Election*, PARTNERSHIP FOR NEW AM. ECON., <http://www.renewoureconomy.org/immigration-may-decide-2016-election/> (last visited Sept. 18, 2016).
10. *Cf. Eleanor Goldberg, Human Trafficking Victim Shares Tragic Story at DNC, Praises Clinton's Efforts*, HUFFINGTON POST (July 27, 2016, 11:20 AM), http://www.huffingtonpost.com/entry/human-trafficking-survivor-shares-harrowing-story-at-dnc_us_5798ba6ae4b01180b530ff5a (praising Hillary Clinton for bringing attention to human trafficking, an issue that remains "largely hidden").
11. Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 145 (2011).
12. *Id.* at 144.
13. *Id.* The issue of consent is not a factor here. *See id.*
14. *See infra* Part II.

victims during removal proceedings.¹⁵ Part III will explain how the policies and procedures implemented by the U.S. government may not be in the best interests of the victims, and will propose possible solutions to help improve advocacy for victims of this heinous crime.¹⁶

II. BACKGROUND

A. *Due Process in Immigration Court Proceedings*

Immigration proceedings are civil, not criminal, in nature.¹⁷ The Fifth Amendment in immigration removal proceedings “entitles aliens to due process of law.”¹⁸ Included in those rights is that of a “full and fair hearing.”¹⁹ In other words, “procedural fairness is required” during all immigration removal proceedings.²⁰

The definition of “fairness” in removal proceedings is not necessarily what one would expect when discussing due process. Unlike the public defender system in criminal cases, there is no right to an attorney in immigration proceedings, which is similar to civil litigation cases.²¹ The Immigration and Nationality Act (the Act) emphasizes that aliens²² “shall have the privilege of being represented’ at no expense to the government.”²³ The Act also requires that each alien have a “reasonable opportunity to examine” and present evidence, including cross-examination, during their individual hearing.²⁴ Thus, an alien is expected to receive a full and

15. *See infra* Part II.

16. *See infra* Part III.

17. *In re M-A-M-*, 25 I. & N. Dec. 474, 478 (B.I.A. 2011).

18. *Id.* at 479 (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)).

19. *Id.*; *In re M-D-*, 23 I. & N. Dec. 540, 542 (B.I.A. 2002) (citing *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982)).

20. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (explaining that immigration proceedings must “conform[] to traditional standards of fairness encompassed in due process of law”); *In re M-A-M-*, 25 I. & N. Dec. at 479; *In re Beckford*, 22 I. & N. Dec. 1216, 1225 (B.I.A. 2000) (“A removal hearing must be conducted in a manner that satisfies principles of fundamental fairness.”).

21. *See In re M-A-M-*, 25 I. & N. at 478–79. The Sixth Amendment of the Constitution, which gives citizens involved in criminal proceedings the right to legal representation, is inapplicable in immigration proceedings. *Id.*

22. INA § 101(a)(3) (codified at 8 U.S.C. § 1101(a)(3) (2012)). According to the Immigration and Nationality Act, “[t]he term ‘alien’ means any person not a citizen or national of the United States.” *Id.*

23. *See In re M-A-M-*, 25 I. & N. at 479 (quoting INA § 240(b)(4)(A) (codified at 8 U.S.C. § 1229a(b)(4)(A) (2012))).

24. 8 C.F.R. § 1240.10(a)(4) (2016).

fair hearing throughout the progression of each case, even if the alien is unrepresented.²⁵

B. Competency

Competency goes hand-in-hand with the fairness aspect of due process during immigration proceedings, and lately, it has become a prominent issue that requires attention.²⁶ As a preliminary matter, “an alien is presumed to be competent to participate in removal proceedings.”²⁷ Thus, unless the alien raises the issue of competency during the initial hearing, “an [i]mmigration [j]udge is under no obligation to analyze an alien’s competency.”²⁸

Under section 1229a of the Act, removal proceedings where an alien may be incompetent can still move forward as long as the proceeding is conducted in a fair manner.²⁹ The test to determine whether an alien is competent to participate in his or her own hearing and defense is whether the alien: (1) has “a rational and factual understanding of the nature and object of the proceedings; (2) can consult with an attorney or representative if possible; and (3) has a reasonable opportunity to examine and present evidence and cross-examine witnesses.”³⁰ The Act contemplates what occurs if an alien is determined to be mentally incompetent and states the following: “If it is impracticable by reason of an alien’s mental incompetency for the alien to be *present* at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.”³¹

25. *Id.*

26. *In re M-A-M-*, 25 I. & N. Dec. at 477.

27. *Id.*; see *Muñoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008) (concluding that it is the alien’s burden to raise the issue of competency first); *United States v. Shan Wei Yu*, 484 F.3d 979, 985 (8th Cir. 2007) (stating that in criminal proceedings, “[c]ompetence is presumed ‘absent some contrary indication’ arising from irrational behavior, the defendant’s demeanor, and any prior medical opinions addressing the defendant’s competency” (quoting *United States v. Long Crow*, 37 F.3d 1319, 1325 (8th Cir. 1994))).

28. *In re M-A-M-*, 25 I. & N. Dec. at 477; *Muñoz-Monsalve*, 551 F.3d at 6 (holding that an immigration judge’s failure to *sua sponte* order a competency evaluation did not violate the alien’s due process rights where: (1) he was represented; (2) his attorney did not request an evaluation; and (3) the record did not contain evidence of a lack of competency); *Nelson v. INS*, 232 F.3d 258, 261–62 (1st Cir. 2000) (finding any health-related complaints including poor memory or headaches do not rise to the level needed for mental incompetency).

29. See 8 U.S.C. § 1229a(b)(4)(A)–(C) (2012); *In re M-A-M-*, 25 I. & N. Dec. at 479.

30. *In re M-A-M-*, 25 I. & N. Dec. at 479.

31. 8 U.S.C. § 1229a(b)(3) (2012) (emphasis added).

In order to establish whether safeguards are necessary in each individual case, the immigration judge needs to determine whether sufficient good cause exists to believe that, without the assistance of these safeguards, the alien's incompetency would hinder his or her right to due process.³² Specifically, the safeguards the immigration judge must implement range from reviewing the record to ascertain whether any of the evidence demonstrates that the alien suffers from a mental illness, to directly assessing the alien's mental health through observation.³³ Based on prior statutory parameters, "[i]mmigration [j]udges have discretion to determine which safeguards are appropriate" on a case-by-case basis.³⁴

C. *T-Visas*

Trafficking victims are eligible for relief in the immigration system through a T-visa.³⁵ Each year, the total number of T-visas that can be issued cannot exceed 5000.³⁶ All aliens who are not issued a T-1 nonimmigrant visa are placed on the waitlist;³⁷ priority is decided by the date the application was filed.³⁸ In order to seek this relief, an alien must submit an appeal and "evidence [that] demonstrate[s] the applicant is a victim of a severe form of trafficking."³⁹

Along with providing evidence to show he or she is a victim of a severe form of trafficking, the alien also must show that extreme hardship would undoubtedly occur if the alien were removed from the United States.⁴⁰

32. *In re M-A-M-*, 25 I. & N. Dec. at 479.

33. *Id.* ("For example, the Immigration Judge or the parties may observe certain behaviors by the respondent, such as the inability to understand and respond to questions, the ability to stay on topic, or a high level of distraction.")

34. *Id.* at 481–82 (finding that "the regulations provide guidance regarding safeguards to protect aliens who otherwise lack sufficient competency to meaningfully participate in proceedings").

35. SHANE DIZON & NADINE K. WETTSTEIN, *IMMIGRATION LAW SERVICE* § 6:317 (2d ed. 2016).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at § 6:322 (2d ed. 2015). This includes a completed I-914 form, application for non-immigrant status, and additional supporting documentation, including the application fee (or fee waiver form if applicable), three photographs, and fingerprints. *Id.* at §§ 6:317, 6:322.

40. This standard of "extreme hardship" is an even higher standard than that of "exceptional and extremely unusual hardship," which is required for certain types of relief sought during removal proceedings. This type of hardship "may not be based upon current or future economic detriment, or the lack of, or disruption to, social or economic opportunities." *Id.* at § 6:342

The factors that satisfy a showing of extreme hardship are quite complex. They include:

- (1) The age of the applicant and personal circumstance;
- (2) Mental illness or physical injury that requires treatment not readily available in the alien's home country;
- (3) The consequences of the psychological and physical harm that the victim has endured;
- (4) Whether or not the victim could receive justice without access to the United States courts system, which includes prosecution, restitution, and protection;
- (5) That it is reasonably expected if the alien were to return to his/her country the current existence of laws, customs, etc. would allow the country's government to penalize the alien severely for falling victim to trafficking;
- (6) Likelihood of re-victimization;
- (7) Likelihood the abuser would have the ability to find and severely harm the applicant; or
- (8) The possibility that civil unrest in the alien's country would contemplate the applicant's safety.⁴¹

In order to successfully prove this extreme hardship, the applicant should document and describe every factor that the State Department could find relevant when reviewing his or her case because there is no guarantee that the hardship the alien may endure is "unusual or severe enough" to meet the standard.⁴²

One disparity when seeking relief through a T-visa includes cooperation with law enforcement during the investigation,⁴³ unless the trafficked person is under the age of 15 or unable to assist because of previous physical or psychological trauma.⁴⁴ However, while this requirement may appear on its face to be beneficial to the victim as well as a way to exploit the abuser in a criminal proceeding, this approach can still be traumatizing for the victims.⁴⁵

41. *Id.*

42. One difference regarding the hardship requirement for victims attempting to obtain a T-visa involves the need for the hardship to apply directly to the applicant; other forms of relief sought during removal proceedings allow this exceptional and extremely unusual hardship requirement to apply to someone other than the applicant, including a spouse, child, or other family member. 8 C.F.R. § 1240.58(c) (2015); see also DIZON & WETTSTEIN, *supra* note 35, at § 6:322.

43. DIZON & WETTSTEIN, *supra* note 35, at § 6:338.

44. *Id.*

45. *Trafficking in Persons Report*, *supra* note 5, at 26.

III. THE LACK OF DUE PROCESS PROVIDED TO VICTIMS OF HUMAN TRAFFICKING DURING IMMIGRATION PROCEEDINGS CREATES SUBSTANTIAL BARRIERS REQUIRING EXTENSIVE ALTERATION AND REFORM

A. *Attorney Representation and Competency*

The laws that govern our immigration system are far from simple.⁴⁶ Many have often compared them to a maze that only lawyers who specialize in immigration proceedings could understand.⁴⁷ The complexity of these rules and procedures is one of the foremost reasons why the right to counsel should be instituted during removal proceedings.⁴⁸

As stated above, the courts agree that, when it comes to mandating the right of due process during immigration proceedings, the Sixth Amendment has no bearing at all as the proceedings are civil in nature, not criminal.⁴⁹ The distinction between civil and criminal cases arises from the remedy imposed when a mistake occurs during a proceeding.⁵⁰ In civil cases, if a mistake is made during the trial, the party members could sue for damages, but would not have the opportunity to retry the case.⁵¹ In criminal cases, however, if there is a mistake of some sort by an attorney, the judge should declare a mistrial and allow the defendant the opportunity to retry the case.⁵²

Immigration proceedings, although characterized as a type of civil litigation, do allow “a second bite of the apple”⁵³ if the alien believes he or she was a victim of ineffective assistance of counsel.⁵⁴ Most courts tend to accept that, even though the Fifth Amendment provides

46. See Emmanuel S. Tipon & Jill M. Marks, Annotation, *Ineffective Assistance of Counsel in Removal Proceedings—Legal Bases of Entitlement to Representation and Requisites to Establish Prima Facie Case of Ineffectiveness*, 58 A.L.R. Fed. 2d 363 (2011).

47. *Id.*

48. *Id.*

49. *In re M-A-M-*, 25 I. & N. Dec. at 478–79. Thus, because the Sixth Amendment limits the right to assistance of counsel to those in criminal prosecutions, it is generally recognized that “there is no statutory right to effective assistance of counsel in removal proceedings.” Tipon & Marks, *supra* note 46.

50. See Tipon & Marks, *supra* note 46.

51. *Id.*

52. *Strickland v. Washington*, 466 U.S. 668, 704 (1984).

53. Tipon & Marks, *supra* note 46

54. *Id.*; see also *In re Lazado*, 19 I. & N. Dec. 637, 638 (B.I.A. 1988) (“Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.”).

no constitutional right to counsel during immigration proceedings, an alien's right to due process can be justified if this ineffective assistance of counsel jeopardized the fundamental fairness that the alien is owed during his or her proceeding.⁵⁵

In 2013, the Central District Court of California heard *Franco-Gonzalez v. Holder*, a case that involved the "entitlement" of a qualified representative for aliens with mental disabilities.⁵⁶ The issue courts have struggled with is whether or not "legal representation for all mentally incompetent aliens detained for removal proceedings is far beyond a 'reasonable accommodation.'" ⁵⁷ To determine if an accommodation is reasonable, a "fact-specific individualized analysis" is required.⁵⁸ The plaintiffs' main argument concerning the right to due process involved the right to a fair trial.⁵⁹ The plaintiffs expressed the desire to defend themselves properly, which included examining the evidence against them, presenting evidence in defense, and having the opportunity to cross-examine witnesses called by the Government.⁶⁰

It is hard to believe how a traumatizing experience or language deficit is not sufficient to require the immigration system to provide representation during removal proceedings.⁶¹ Requiring aliens, who may not fully understand the English language, to defend their claim without representation should constitute a flagrant violation of due process.⁶² It is impossible to expect aliens who have no understanding of the law, let alone the laws of the immigration system, to defend themselves to the best of their ability when facing deportation.⁶³

One major difference between the immigration system and the criminal justice system, which could assist the United States Supreme

55. Tipon & Marks, *supra* note 46.

56. *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2013 WL 3674492, at *3 (C.D. Cal. Apr. 23, 2013). In this case, the plaintiff alleged that the Immigration and Nationality Act violated his due process rights under the Fifth Amendment and § 504 of the Rehabilitation Act. *Id.* at *1. According to the Rehabilitation Act, "legal representation [is required] as a reasonable accommodation for individuals who are not competent to represent themselves by virtue of mental disabilities." *Id.* at *3.

57. *Id.* at *5.

58. *Id.* In May 2011, the Court defined a "qualified representative" as (1) an attorney; (2) a law student or law graduate directly supervised by a retained attorney; or (3) an accredited representative. *Id.*

59. *Id.* at *9.

60. *Id.* at *4 (quoting 8 U.S.C. §1229a(b)(4)(B) (2006)).

61. During all removal proceedings, immigration court does provide interpreters for all respondents who are not fluent in the English language. *Id.* at *8.

62. *Id.* at *9.

63. *See id.* at *7.

Court in providing due process to all aliens, is the lack of a public defender arrangement.⁶⁴ Most of the aliens in immigration proceedings do not have the funds or communication skills to understand the charges against them and are left to plead their case *pro se*.⁶⁵ “Effective use of the justice system often depends on having an attorney,” regardless of the type of proceeding.⁶⁶ This is especially true in cases where English may not be the respondent’s first language.⁶⁷

As one might suspect, the most common problem reported in immigration matters is the lack of free legal assistance.⁶⁸ Statistics show that “[n]ationally, only 56 percent of individuals in immigration court were represented in 2012 in proceedings where a common outcome is deportation.”⁶⁹ One possible reason for this low percentage of involvement of legal service organizations is the lack of funding to help these undocumented immigrants.⁷⁰ Even though immigration cases are considered civil in nature, the possibility of being deported should be reviewed on the same level as criminal cases.⁷¹ Whether the result is imprisonment or deportation from the United States, both are outcomes that should involve proper due process as required by the U.S. Constitution.⁷²

The Executive Office of Immigration Review (EOIR) recognizes that the INA “bar[s] the use of federal funding to provide direct representation.”⁷³ The EOIR highlights that “there is no statute or regulation that specifically confers Immigration Judges with the power to appoint counsel for any unrepresented alien,” including those who are mentally incompetent.⁷⁴ The court in *Franco-*

64. Because immigration court is civil in nature, there is no right to representation and thus no need for a public defender system. *See In re M-A-M-*, 25 I. & N. Dec. at 478–79.

65. THE ADVOCATES FOR HUMAN RIGHTS, MOVING FROM EXCLUSION TO BELONGING: IMMIGRANT RIGHTS IN MINNESOTA TODAY 76 (2014), http://www.theadvocatesforhumanrights.org/uploads/chapter_2_access_to_justice.pdf. Defending *pro se* means without legal representation.

66. *Id.* at 77.

67. *Id.* Navigating the justice system is difficult enough for defendants when English is their first language.

68. *Id.* at 77–79.

69. EXEC. OFF. FOR IMMIGR. REVIEW, U.S. DEP’T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK A1 (2013); THE ADVOCATES FOR HUMAN RIGHTS, *supra* note 65, at 80.

70. THE ADVOCATES FOR HUMAN RIGHTS, *supra* note 65, at 80.

71. *See id.*

72. *See id.*

73. *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG (DTBx), 2013 WL 3674492, at *6 (C.D. Cal. Apr. 23, 2013).

74. *Id.*

Gonzalez disagreed with this interpretation.⁷⁵ According to section 1229a(b)(4) of the Act, there is no language that prohibits the EOIR from using discretionary funds for representation of aliens.⁷⁶ Thus, the court held that the statutes “cannot reasonably be interpreted to forbid the appointment of a Qualified Representative to individuals who otherwise lack meaningful access to their rights in immigration proceedings as a result of mental incompetency.”⁷⁷

B. *Victimizing the Victims*

In 2000, Congress passed the Trafficking Victims Protection Act (TVPA).⁷⁸ The two major goals of this Act were to protect victims of human trafficking and prosecute their traffickers.⁷⁹ However, with our current immigration system, many of these victims are “still too often treated like criminals by those charged with protecting them.”⁸⁰ Thus, it is very likely that officials will place a survivor of severe human trafficking into removal proceedings without question.⁸¹

The men, women, and children who fall victim to human trafficking are often charged with immigration-related offenses, deported at the borders for attempting to enter with documents that traffickers have foisted upon them, or arrested, detained, and prosecuted by the Department of Justice.⁸² It has become clear as time goes on that “the people tasked with recognizing and assisting victims and prosecuting traffickers exhibit a considerable lack of understanding about the nature of trafficking and [thus] fail to achieve the purpose of the TVPA.”⁸³

To make matters worse, victims are usually forced to represent themselves.⁸⁴ For those victims who can afford representation, there are very few types of relief possible when facing deportation.⁸⁵ In

75. *See id.*

76. *Id.*

77. *Id.*

78. Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 338 (2007).

79. *Id.*

80. *Id.*

81. *See id.* at 338–39. This is true even when the victims express clear signals that they are in fear for their lives. *Id.*

82. *Id.* at 338.

83. *Id.* at 340–41.

84. *Comprehensive Legal Services for Trafficked Persons*, FREEDOM NETWORK USA 1, <http://freedomnetworkusa.org/wp-content/uploads/2012/05/FINAL-April-2015-Comprehensive-Legal-Services-for-Trafficked-Persons.pdf> (last updated Apr. 2015). Most trafficked victims entered the United States illegally. *See id.*

85. *See, e.g., supra* Sections II.C, III.B.

practice, when seeking immigration relief for trafficked persons, there is great variance in how to interpret what constitutes victimization.⁸⁶ However, the relief available, including an application for a U-visa and T-visa, may do more harm than good to the survivor in the long run.⁸⁷

T-visa and U-visas were created to provide immigration relief to victims of severe forms of human trafficking.⁸⁸ While these may seem like the perfect fix for those facing deportation, there are a few requirements that should be eliminated for the purpose of protecting the victim.⁸⁹

Both visas only last (at most) up to four years.⁹⁰ The only way in which these visas can be renewed is if the certifying law-enforcement agency “confirms that the visa holder is required to remain in the United States to assist the investigation or prosecution.”⁹¹ As mentioned above, in order to obtain a T-visa or U-visa, the victim must cooperate fully in prosecuting the trafficker or abuser.⁹² According to the 2015 Trafficking in Persons Report, “[v]ictim testimony can be crucial to human trafficking prosecutions, but recounting exploitation and directly confronting traffickers can be traumatizing.”⁹³ This is especially true “when traffickers threaten retaliation or psychologically manipulate victims to distrust authorities and avoid seeking assistance.”⁹⁴ While the TVPA suggests its foremost goal is to protect the victims, it is apparent that combating trafficking and ensuring effective punishment of traffickers is the actual priority of Congress.⁹⁵

86. See, e.g., *supra* notes 40–42 and accompanying text.

87. See, e.g., *supra* text accompanying note 45.

88. *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, AM. IMMIGR. COUNCIL 1 (May 7, 2012), <http://www.immigrationpolicy.org/just-facts/violence-against-women-act-vawa-provides-protections-immigrant-women-and-victims-crime>. The T-visa “protects recipients from removal and gives them permission to work in the United States.” *Id.* at 3. Similarly, the U-visa, though used mainly for victims of spousal abuse or domestic violence, also “grants the victim permission to live and work in the United States and may result in the dismissal of any case in immigration court filed against the immigrant.” *Id.* at 2.

89. See, e.g., *id.* at 2–3.

90. *Id.* at 3–4.

91. *Id.*

92. DIZON & WETTSTEIN, *supra* note 35, at §§ 6:338, 6:316.

93. *Trafficking in Persons Report*, *supra* note 5, at 26.

94. *Id.*

95. See *supra* notes 79–80 and accompanying text.

In 2002, the DOS estimated that around 50,000 victims are trafficked each year into the United States.⁹⁶ The TIP Report stresses the importance of providing comprehensive services to these victims throughout the investigation, “including medical and mental health care, legal services, and (if desired by the victim) case management support.”⁹⁷

As discussed above, there is no right to legal representation in immigration proceedings—immediately eliminating one of the above methods to help support and encourage victims to tell their story.⁹⁸ Other issues include finding the resources to fund these support programs: “The DOJ narrowly defines the type of victim on whom this funding may be used . . . and the ripple effects of this limitation in funding are far-reaching.”⁹⁹ Furthermore, “[t]here are few, if any, NGOs [Non-Government Organizations] able to assist victims outside of the parameters of DOJ funding”¹⁰⁰ Aliens are unable to hire advocates and service providers because there are no funds to assist them.¹⁰¹ Consequently, despite the fact that the DOJ believes itself to be following a “victim-centered approach,” its actions are not reflecting the understanding that “the mission of [the] government is to remove victims from the abusive setting, place them into safe programs of restorative care, and hold the perpetrators accountable.”¹⁰² That is to say, “unless a victim is found by ICE or the FBI, and is referred to by ICE or the FBI to an NGO that received funding from DOJ (or Health and Human Services), that victim is unlikely ever to receive legal or social services assistance.”¹⁰³

In addition, the DOJ’s Report on Activities to Combat Human Trafficking defends the actions of its officers in explaining how all victims found are immediately referred to a victim-witness coordinator, who then makes the appropriate referral to victim

96. Haynes, *supra* note 78, at 343. Of those 50,000, the Department of Homeland Security processed only 520 applications for T-visas in 2004, approving only 136 of those 520. *Id.* at 344. One possible reason for the large disparity in numbers is the lack of support provided for these victims during and after the process. *Id.*

97. *Trafficking in Persons Report*, *supra* note 5, at 26.

98. See discussion *supra* Section III.A.

99. Haynes, *supra* note 78, at 346.

100. *Id.* at 346–47.

101. *Id.*

102. *Id.* at 347 (quoting CIVIL RIGHTS DIV., DEP’T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING: FISCAL YEARS 2001-2005 12 (2006), <http://lincolngoldfinch.com/wp-content/uploads/2015/06/DOJ-Report-on-Activities-to-Combat-Human-Trafficking.pdf>).

103. *Id.*

services providers.¹⁰⁴ What the report fails to mention, however, is that these services are only provided once the DOJ decides to pre-certify the individuals as victims.¹⁰⁵ Therefore, “[i]f a victim frees herself and law enforcement officials are reluctant to certify her, even if she has no other place to stay, she will not qualify for a victim services shelter because that shelter will not be reimbursed for sheltering her.”¹⁰⁶

In order to properly provide this relief, the DOJ must adjust their mission to focus on what is best for the victim, instead of re-victimizing those already in their care by forcing testimony and cooperation with the police during an investigation.¹⁰⁷ Importantly, “[m]ost victims of human trafficking are not ‘rescued’ by anyone.”¹⁰⁸ Thus, police need to be open to the fact that there are men and women who are willing to testify even if they are not yet “certified” as a victim.¹⁰⁹ In order for this to work, open and readily available lines of communication need to be in place “in a language the victim understands [in order to] provide updates on the status of the case and information about available services.”¹¹⁰

First, “[p]rovid[ing] an opportunity for victims to consider their options and make an informed decision about participating in criminal proceedings” should be the very first step when dealing with an application for a T-visa or U-visa for a victim.¹¹¹ Second, “access to legal counsel for victims who wish to participate in the investigation and prosecution of their traffickers” is a necessity to make sure justice and due process are provided for those men and women placing their trust in the hands of our government.¹¹² To ensure this trust, “permit[ting] a professional . . . to accompany and support victims throughout [the] investigations and prosecutions,” will hopefully allow other victims to feel confident enough to step forward and assist in the future prosecution of their traffickers.¹¹³

104. *Id.* at 350–51 (quoting CIVIL RIGHTS DIV., DEP’T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT 13 (2010), <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/tvpaanniversaryreport.pdf>).

105. Haynes, *supra* note 78, at 351.

106. *Id.*

107. *Id.* at 359–60.

108. *Id.* at 351.

109. *See supra* notes 43–44 and accompanying text.

110. *Trafficking in Persons Report*, *supra* note 5, at 26.

111. *Id.*

112. *Id.*

113. *Id.* These professionals include, but are not limited to, social workers, legal advocates, or counselors. *Id.*

Another way for the government to both prosecute and protect the needs of the victim is to allow testimony in a manner that is less threatening, such as testimonies that are “written or recorded, delivered via videoconference, or produced with audio or visual distortion.”¹¹⁴ Witness testimony is an important element of the immigration removal proceeding.¹¹⁵ Because evidence is often unattainable when seeking certain types of relief from deportation, the immigration judge is often left to rely on the credibility of the witness’s testimony.¹¹⁶ It seems very likely that testifying in an immigration court would be just as intimidating as testifying in a criminal court. Having the option to write an affidavit or some other form of testimony will allow victims proper due process in confronting their traffickers as well as explaining to the immigration judge why they fear returning to their home countries.¹¹⁷

C. Resolutions

While immigration reform is the ultimate goal, there are a few intermediate steps that can be taken to begin the transition. One recognizable solution to the lack of attorney representation is the formation of a pro bono center specifically for immigration removal cases.¹¹⁸ In 2014, the New York City Council approved a \$4.9 million grant to fund The New York Immigrant Family Unity Project.¹¹⁹ This project covered “all eligible low-income immigrant city residents” who could not afford representation.¹²⁰ Its purpose was to “address the backlogs and delays that result when immigrants without attorneys try to make their way through the system.”¹²¹

114. *Id.*

115. *Oshodi v. Holder*, 729 F.3d 883, 889–90 (9th Cir. 2013) (“The importance of an asylum or withholding applicant’s testimony cannot be overstated An applicant’s testimony of past persecution and/or his fear of future persecution stands at the center of his claim and can, if credible, support an eligibility finding without further corroboration.”).

116. *See, e.g., id.*

117. *Trafficking in Persons Report*, *supra* note 5, at 26.

118. A cost-benefit analysis would likely be performed by the Department of Justice to determine how much implementing a nationwide program similar to the public defender system in criminal cases would cost in order to ensure that immigrants and detainees are given proper due process during the removal proceedings. *See* Deepti Hajela, *Associated Press: NYC Immigrant Public Defender System Breaks Ground*, BRONX DEFENDERS (Sept. 7, 2014, 5:55 PM), <http://www.bronxdefenders.org/associated-press-nyc-immigrant-public-defender-system-breaks-ground/>.

119. *Id.*

120. *Id.*

121. *Id.*

Responses similar to New York's are needed nationwide to give those facing deportation after being forced into slavery a fighting chance at a fair hearing.¹²² The EOIR proposed a policy, which was enacted and revised as of January 1, 2016.¹²³ The Recognition and Accreditation (R&A) program was created to alleviate the chronic shortage of lawyers for a majority of immigration cases.¹²⁴ In placing this program into effect, the non-profit organizations and charities that make up the accredited representatives would have different procedures to follow to prevent fraudulent misrepresentations by organizations and individuals.¹²⁵

In 2016, Senator Harry Reid of Nevada introduced legislation to provide specific "vulnerable" illegal immigrants with lawyers to assist with their immigration matters.¹²⁶ This list would include children and abuse victims to aid in navigating the system.¹²⁷ While this bill, the Fair Day in Court for Kids Act, focuses mainly on providing representation for minors, this is the type of reform necessary to bring awareness to the lack of due process available to victims of trafficking, which often includes minors as well.¹²⁸

In September of 2015, the EOIR also announced a change allowing detained immigrants awaiting deportation hearings to have their attorneys from the criminal proceedings represent them for their bond hearing.¹²⁹ Prior to this, an attorney was required to sign up to provide legal representation for the entire case and could only discontinue representation after approval by the immigration court.¹³⁰ Allowing those immigrants in the detained docket to use their legal aid from the criminal proceedings provides a better opportunity to advocate why the court should not lock them up prior to the removal

122. *See id.*

123. Recognition of Organizations and Accreditation of Non-Attorney Representatives, 80 Fed. Reg. 59514 (proposed Oct. 1, 2015) (codified as 8 C.F.R. § 1292).

124. *Id.*

125. *Id.*

126. Caroline May, *Harry Reid Moves to Provide Illegal Immigrants with Government-Funded Lawyers*, BREITBART (Feb. 11, 2016), <http://www.breitbart.com/big-government/2016/02/11/harry-reid-seeks-to-provide-illegal-immigrants-with-government-funded-lawyers/>.

127. *Id.*

128. *Id.*

129. Kristin Macleod-Ball, *Immigration Courts Have New Rules Governing Legal Representation Processes*, IMMIGR. IMPACT (Sept. 24, 2015), <http://immigrationimpact.com/2015/09/24/immigration-courts-have-new-rules-governing-legal-representation-processes/>.

130. *Id.* Implementing this new rule gives reformers the hope that representation for immigrants in detained cases will increase from the current low numbers. *Id.*

proceeding.¹³¹ Moreover, this would give those men and women in removal proceedings an opportunity to travel to different centers to explain his or her claim for relief in hopes of securing new representation in time for the individual hearing.¹³²

While several GOP presidential candidates during the 2016 debates stressed the importance of securing the borders of the United States to prevent border crossing, this actually may not prevent human trafficking.¹³³ Instead, immigration reformers need to find a way to bring those undocumented victims out of the shadows:¹³⁴ “Traffickers prey upon individuals who, in their desperation to enter the U.S. to escape extreme poverty, believe too-good-to-be-true promises of work and educational opportunities, only to be sold into slavery or prostitution and made to work under force, fraud, or coercion.”¹³⁵ Increasing border security, while making it harder for non-residents to enter the country, actually increases the risk of smugglers.¹³⁶ Often, human trafficking victims are helped across the border with a promise for a better life and future for them and their family.¹³⁷ Smugglers make a living by exploiting their vulnerable clients into forced sexual labor.¹³⁸ Accordingly, “[w]hen elements of force, fraud, or coercion are introduced, clients can easily find themselves in a position in which they have been trafficked.”¹³⁹

In order to make T-visas effective, as well as connect human trafficking reform with immigration reform, training procedures should be implemented to all officers, detectives, and attorneys handling these priority cases.¹⁴⁰ “Victims know that they are present in the U.S. in violation of the law.”¹⁴¹ Consequently, “they fear that

131. *Id.*

132. *Id.*

133. Heather Randall, *Human Smuggling, Trafficking and Immigration Reform: Recommendations for Policymakers*, HUM. TRAFFICKING CTR. (Mar. 27, 2014), <http://humantraffickingcenter.org/posts-by-htc-associates/human-smuggling-trafficking-and-immigration-reform-recommendations-for-policymakers/>.

134. See Stephan Bauman, *Immigration Reform Will Deter Human Trafficking, Not Increase It*, CHRISTIAN POST (Nov. 8, 2013, 10:09 AM), <http://www.christianpost.com/news/immigration-reform-will-deter-human-trafficking-not-increase-it-108365/>.

135. *Id.*

136. Randall, *supra* note 133.

137. *Id.*

138. See, e.g., *id.*

139. *Id.* (“In one example, U.S. Immigration and Customs Enforcement investigated a case where 24 Mexican women who paid coyotes to smuggle them into the U.S. were consequently exploited and forced into sexual exploitation on the East Coast through threats of violence.”).

140. *Id.*

141. Bauman, *supra* note 134.

reporting violence, threats, and labor abuse to law enforcement will result in only their own punishment, rather than their abusers’.”¹⁴² As discussed above, the Super Bowl is one of the largest events for traffickers and smugglers in the United States each year.¹⁴³ This is because “[h]igh-profile special events which draw large crowds become lucrative opportunities for trafficking and criminal activities.”¹⁴⁴ This is part of the reason why human trafficking is linked to human smuggling because both involve “document forgery, fraud, vehicle theft, and drug and arms trafficking.”¹⁴⁵ Statistics show that “[l]ess than 10 percent of the sex industry is represented by those choosing to sell themselves. Most are being forced against their will.”¹⁴⁶ Implementing a training policy as well as increasing public awareness of how prevalent human trafficking issues have become are huge steps in the right direction. “To put the community’s eyes and ears on this [topic]” helps give those victims a chance of survival.¹⁴⁷ Providing a pathway to legalization for these victims will assist in reducing their susceptibility to exploitation and abuse.¹⁴⁸

IV. CONCLUSION

Immigration reform is crucial to combating the issue of human trafficking and providing proper relief for the victims.¹⁴⁹ Coming to the United States through force or coercion often leaves these non-residents fearful of the local authorities because they know that they are in the country illegally.¹⁵⁰ Once faced with deportation, it is quite hard to find an ideal pathway to legalization without legal representation.¹⁵¹ This is especially true for non-residents who are unaware of how the immigration system works and who have little confidence in the justice system to provide the best form of relief available.¹⁵² Creating a pro bono program or some other method of

142. *Id.*

143. *See supra* notes 1–3 and accompanying text.

144. Ann Killion, *Human Trafficking Concerns Are Super Bowl’s Dark Underbelly*, S.F. CHRON. (Jan. 30, 2016, 9:45 PM), <http://www.sfchronicle.com/sports/article/Ann-Killion-6795804.php>.

145. Randall, *supra* note 133.

146. Killion, *supra* note 144.

147. *Id.*

148. FREEDOM NETWORK USA, *supra* note 84, at 2–3.

149. *See discussion supra* Parts II–III.

150. *See supra* notes 141–146 and accompanying text.

151. *See supra* Section III.A.

152. *See supra* Section III.A.

funding representation for these respondents elevates the level of due process afforded to trafficking victims.¹⁵³ Additionally, creating a strategy for training and implementing proper procedures when handling and enforcing human trafficking cases allows victims to have a voice and gain the confidence that relief is a possibility.¹⁵⁴ While there is still a long way to go, these types of transitional developments will significantly improve our immigration system as a whole.

153. *See supra* notes 122–132 and accompanying text.

154. *See supra* notes 133–142 and accompanying text.