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Examining the Reality of Foreign National Child Victims of Human Trafficking in the United States

Bridgette Carr*

Human traffickers prey on the vulnerabilities of other people. Poverty, lack of education, and language barriers are keys that human traffickers use to successfully exploit others. For foreign national children[1] who have been trafficked in the United States, these same vulnerabilities are often ignored by the immigration system.

From its inception, the Trafficking Victims Protection Act (TVPA) has been touted as a tool to combat grave human rights violations that affect children.[2] In fact, the TVPA's legislative history

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* Bridgette Carr is a Clinical Assistant Professor and Director of the Human Trafficking Clinic at the University of Michigan Law School. Jane Khodarkovsky and Susan Goldis provided invaluable research assistance on this Article, thank you. All of the case examples in this Article are real. Identifying information such as names, dates, countries of origin, and locations within the United States have been changed to protect the identities of the clients. However, none of the details concerning the victim's experience have been exaggerated or modified. This Article would not be possible without the voices of these clients: Jacqueline, Sally, and Miles. It has been an honor to be your lawyer, thank you.

1. The plight of U.S. citizen children trafficked in the United States is beyond the scope of this Article. Federal funding and services for victims is only available to a few U.S. citizen minors. In 2008, three cities received federal funding to provide services to U.S. citizen victims. This is the only federal funding available to U.S. citizens under the Trafficking Victims Protection Act, 22 U.S.C. §§ 7101–7112 (2011). Three agencies, the Salvation Army in Chicago, Standing Against Global Exploitation in San Francisco, and Safe Horizon in New York City receive this funding to provide services to U.S. citizen child victims of trafficking. *See* Posting of Bradley A. Mitchell, Team Lead, Human Trafficking Services Program, Bradley.Mitchell@usdoj.gov, to QVC'S Trafficking Guarantee's Listserv, *Announcing the Awardees from QVC's Services for Domestic Minor Victims of Human Trafficking Grant Program*, OFFICE FOR VICTIMS OF CRIME, http://www.salvationarmyusa.org/usn/www_usn_2.nsf/0/88A27DECA1EA357C852576B800656581/$file/AnnouncingOVCAwardees.pdf (last visited Nov. 3, 2011).

2. 22 U.S.C. §§ 7101–7112 (2011). The legislative history of the TVPA usually focuses on both women and children, but this Article only considers the impact of these laws on foreign national children.

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is rife with stories, statistics, and anecdotes involving children—often young girls.[3]

The TVPA has always recognized the failure of a one-size-fits-all approach for victims of trafficking, and that the needs of child victims can be quite different than the needs of adult victims. In light of this reality, a number of TVPA provisions make special exceptions or accommodations for children.[4] On paper, these accommodations may seem satisfactory. Unfortunately, for trafficked children within the immigration system, like the ones described below, the reality can be quite different.

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3. The stated purpose of the TVPA is to combat human trafficking, to protect victims, and to guarantee the punishment of traffickers. TVPA, 22 U.S.C. § 7101(a) (2011). When passed in 2000 the TVPA found that "[a]t least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year." *Id.* § 7101(b)(1). The Trafficking Victims Protection Reauthorization of 2003 (TVPA Reauthorization of 2003) affirmed that human trafficking continued to oppress countless people both domestically and abroad. TVPA Reauthorization of 2003, sec.2(1), 117 Stat. at 2875 (2003). The Trafficking Victims Protection Reauthorization of 2005 (TVPA Reauthorization of 2005) estimated that between 600,000–800,000 people are trafficked internationally each year and that 80 percent of such victims are female. TVPA Reauthorization of 2005, sec.2(2), 119 Stat. at 3558 (2006). The 2005 reauthorization also cited a report stating that "as many as 300,000 children in the United States are at risk for commercial sexual exploitation, including trafficking, at any given time." *Id*. at sec.2(5), 119 Stat. at 3559. Moreover, the 2005 reauthorization explained that there are between 1.3 and 2.8 million runaway and homeless children living on the streets each day in the United States and that this population is extremely susceptible to domestic commercial sex trafficking. *Id*. at sec.2(6). Finally, during the discussions about the TVPA, the majority of stories told on the House and Senate floors about human trafficking involved children. *See, e.g.*, *Domestic Minor Sex Trafficking: Hearing Before the H. Comm. On the Judiciary*, 111th Cong. 12-16 (2010) (statement of Rep. Jackie Speier), *available at* http://judiciary.house.gov/hearings/pdf/Speier100915.pdf (stating that "as many as 300,000 children are sexually enslaved in our country every year;" and "[t]oday, we live in a country where a person is more likely to serve time for selling marijuana than a 14 year old girl").

4. *E.g.*, TVPA, 22 U.S.C. §§ 7102(8), 7105(b)(1)(c) (2010) (requiring victims to have been induced by force, fraud, or coercion in order to constitute a severe form of sex trafficking, unless the victim is under eighteen years old). The TVPA Reauthorization of 2005 increased punishments for anyone who engages in the sex trafficking of children. *Id.* § 7109. Victims under eighteen years of age are not required to cooperate with law enforcement in order to obtain immigration relief as a trafficking victim. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(T)(i)(III)(cc) (2011). Victims under the age of twenty-one may bring their parents to the United States. *Id.* § 1101(a)(15)(T)(ii)(I). Foreign national child victims of human trafficking may also qualify for a federal foster care program, the Unaccompanied Refugee Minors Program (URM Program). For a description of the URM Program, see *Unaccompanied Refugee Minors*, ADMIN. FOR CHILD. & FAMS., http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_refugee_minors.htm (last updated Jan. 31, 2011).

I. THE CHILD VICTIM

Jacqueline was born in a small town in West Africa. She loved going to school and dreamed of getting a good education. Her trafficker took advantage of her dream. When Jacqueline was thirteen, her trafficker convinced Jacqueline's parents that she could receive an education in the United States. The trafficker promised to provide Jacqueline with an education and a quality of life in the United States comparable to the level that the trafficker provided to her own daughter. Jacqueline was sad to leave her family but excited about the educational opportunities awaiting her in America. Jacqueline was fourteen when she arrived in the United States. Unfortunately, her education was in the form of enslavement. Jacqueline was forced to work twelve to sixteen hours a day, she had to hand over all of her money to her traffickers, and she was never allowed to go to school.

Jacqueline was rescued almost two years after she arrived in the United States. Immediately after her rescue she lied about her identity and age when questioned by law enforcement. She was still afraid of her traffickers and worried about what would happen to her and her family if she told the truth. Eventually she told law enforcement agents about her life working against her will for the trafficker. Fortunately, the agents believed her.

Jacqueline's encounter with law enforcement—in her case, Immigration and Customs Enforcement (ICE)—is one of, if not the most, pivotal points in her case. If the agents had not believed her story or if they had identified her as a noncitizen living in the United States without permission[5] rather than as a victim of human trafficking, all the benefits built into the TVPA for children would be irrelevant because she would not have access to them.[6]

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5. Jacqueline was brought in on a fraudulent document. She was in the United States without permission and could have been issued a Notice to Appear in removal proceedings and removed from the United States. *See Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=02ed3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=02ed3e4d77d73210VgnVCM100000082ca60aRCRD (last updated Apr. 8, 2011).

6. I refer to this initial encounter moment between my clients and law enforcement as a "snapshot moment." These "snapshot moments" often determine whether a child is considered a

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But because Jacqueline was classified as a child victim of human trafficking, she had access to a number of social services and legal benefits. She was provided with housing,[7] a caseworker,[8] medical care,[9] and therapeutic services.[10] Jacqueline also had access to an attorney.[11] For the first time since she arrived in the United States, she was enrolled in school.

But being rescued was only the first step. Jacqueline had a variety of legal needs: her traffickers were being prosecuted in federal court; she wanted to apply for a trafficking visa (T visa); and she wanted to be reunited with her family.

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victim or a criminal. The risk of being classified as a criminal rather than a victim exists regardless of the nationality of the child victim. In cases involving U.S. citizen children in the commercial sex industry, there is a risk that the child will be identified as a prostitute and charges such as solicitation, truancy, and curfew violations are common. *See* Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 ST. THOMAS L. REV. 96, 97 (2008) ("In almost all fifty states, a minor's selling of him or herself for sex, or prostitution, is a criminal offense."). For foreign national children the same type of criminal classification is possible. In addition, foreign national children risk being identified as noncitizens and being placed in removal proceedings rather than receiving services as a victim.

7. Regardless of the victim's immigration status, the TVPA provides victims of a severe form of trafficking with an array of benefits and services to the same extent as refugees. TVPA, 22 U.S.C. § 7105 (2010). These victims are therefore entitled to foster care management payments, which include room, board, and clothing. Refugee Resettlement Program, 45 C.F.R. § 400.116(a) (2009). According to the individual child's needs, victims are placed in licensed foster care homes through the URM Program. *See Unaccompanied Refugee Minors*, *supra* note 4.

8. The URM Program provides victims with an array of assistance, including "intensive case management by social workers." *See Unaccompanied Refugee Minors*, *supra* note 4.

9. The TVPA provides victims of a severe form of trafficking with "necessary medical care and other assistance." TVPA, 22 U.S.C. § 7105(c)(1)(b) (2010). Moreover, the Refugee Resettlement Program's child welfare services allow victims of a severe form of trafficking access to medical assistance. 45 C.F.R. § 400.116(a) (2011).

10. The URM Program allows victims access to mental health services. *See Unaccompanied Refugee Minors*, *supra* note 4. The U.S. Department of State further advises the government to provide trafficking victims with "psycho-social counseling, and assistance in integrating back into their original community or into a new community so that they can rebuild their lives." REBECCA BILLINGS ET AL., TRAFFICKING IN PERSONS REPORT, U.S. DEP'T OF STATE 1, 37 (June 2007), *available at* http://www.state.gov/documents/organization/82902.pdf.

11. Legal services are not provided to victims of human trafficking by the TVPA, nor are they provided by the URM Program. Yet, once a victim is assigned a social worker, the social worker should then try to arrange for pro bono attorneys to help with the child's case. The child will also be represented in dependency proceedings by a court-appointed attorney or guardian ad litem. *See Frequently Asked Questions About Services to Trafficked Children*, U.S.C.C.B. MIGRATION AND REFUGEE SERVICES (2004), *available at* http://www.nccbuscc.org/mrs/childtrafFAQ3-7-05.pdf. Jacqueline was assigned a social worker that was aware of the services of the Clinic. Her social worker contacted the Clinic and the students agreed to represent her.

II. VICTIMIZED AS A CHILD, RESCUED AS AN ADULT

Sally, like Jacqueline, was a young girl in West Africa. She too dreamed of attending school in the United States. Sally and Jacqueline were both trafficked by the same traffickers. In fact, the girls even lived under the same roof at times, but Sally was not at the apartment when the ICE agents rescued Jacqueline.

Long before Jacqueline was rescued, Sally had publicly challenged the trafficker and threatened to call for help. The trafficker responded swiftly with physical violence and sent Sally back to West Africa. The trafficker shamed Sally within her home community and then forced Sally to teach girls—recruited by the trafficker—the hair braiding trade so that the recruits would immediately be ready to work when they arrived in the United States. Sally was devastated and tried to tell members of her family the truth about the traffickers. But only one family member believed her and helped her escape.

Sally's escape route brought her back to the United States. She was unable to remain in her home country because the trafficker was powerful there and Sally had already been ostracized and shamed due to the trafficker's lies. To return, Sally had to use the fraudulent visa that the trafficker had forced her to use during her initial entry into the United States. This time however, she had to live the life connected to that visa. This meant that Sally, a fifteen-year-old from West Africa, would now be forced to live as the wife of a thirty-five-year-old man in the United States.

After the ICE agents rescued Jacqueline they learned about Sally and quickly found and rescued her. When Sally was rescued, she was eighteen years old and had spent the previous three years being forced to support her "husband" and bear his children.[12] After four-and-a-half years, Sally was finally free.

Like Jacqueline, Sally had a variety of legal needs: her traffickers were being prosecuted in federal court; she wanted to apply for a T visa; she needed a valid work authorization to support her children;

12. At the time Sally had her first child she was only fifteen. In her words: "it was not my idea to have a child. When the doctor told me I was pregnant, I felt very strange. . . . I didn't know I could be pregnant and there was a lot I still wanted to do in life." Interview by Clinic student attorney with Sally (Winter 2009).

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she wished to reunite with her mother; and she wanted her real name on her children's birth certificates.

III. EXPLOITED BUT DENIED RECOGNITION AS A VICTIM

Jacqueline was not the only child in the apartment on the morning the ICE agents entered. There were other girls who, like Jacqueline, were classified as victims by the ICE agents. In addition to the girls inside the apartment, there was also a five or six year old little boy, Miles. Like Jacqueline and Sally, Miles was brought to the United States under a fraudulent visa. Unlike the girls who admitted that they were forced to work for the traffickers, Miles denied that he worked for the traffickers.[13] Based on this answer, the agents determined that Miles was not a victim of human trafficking.[14]

Thus, Miles was considered a noncitizen living in the United States without permission. As such, Miles was served with a Notice to Appear[15] in removal (deportation) proceedings. In addition to being charged with being in the United States without permission, Miles was also charged with procuring his own admission or visa to the United States by "fraud or by willfully misrepresenting a material fact."[16] Miles, an infant when he received his visa, was nevertheless charged with using fraud or willful misrepresentation to obtain the visa. The ICE agent who served Miles with the Notice to Appear was, ironically, also the victim witness specialist for the local ICE office.

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13. The traffickers owned a shop in which the girls were forced to work. While it is true that Miles never did the same work as the girls, Miles was forced to clean the shop on some occasions. It is unclear whether the ICE agents ever asked Miles if he cleaned the shop. This information came to light much later during the Clinic's representation of him.

14. This is another illustration of the "snapshot moment." In representing Miles, I have had numerous conversations with the agents to try and understand why Miles was not treated as a victim. I was repeatedly told that it was because Miles had not worked in the shop. If Miles had told the agents that he cleaned the shop after hours, I believe that the agents would have treated him as a victim. Unfortunately, by the time this information came to light, Miles' deportation process had begun and the agents could not stop the proceedings.

15. In order to initiate removal proceedings against a noncitizen, the Department of Homeland Security will serve a Notice to Appear document upon the noncitizen. The Notice to Appear states the nature of proceedings against the individual, the charges, and the time and place at which proceedings will be held. 8 U.S.C. § 1229(a)(1)(A)-(G) (2011).

16. This charge is based on the inadmissibility ground found at 8 U.S.C. § 1182(a)(6)(C)(i) (2011).

While Jacqueline and the other girls were provided with services under the TVPA including safe housing, caseworkers, therapists, and lawyers, Miles was sent to an immigration detention center for children.[17] Miles had a variety of legal needs, not least of which was fighting his deportation.

The stories of Jacqueline, Sally, and Miles offer a unique opportunity to evaluate the TVPA in practice. All three children were brought into the United States under fraudulent visas procured by the same traffickers. All three lived together in an apartment owned by the same traffickers. All three worked, in some capacity, for the traffickers in their shops. Though the facts are similar, the impact of the law is not.

IV. JACQUELINE

As a foreign national victim of a severe form of human trafficking,[18] Jacqueline could request an eligibility letter from the Department of Health and Human Services.[19] This letter qualifies foreign national child victims for a wide array of benefits.[20]

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17. *See, e.g.*, 8 U.S.C. § 1101(a)(27)(J)(i) (requiring juvenile immigrants to be placed into an immigration detention center unless declared dependent in a juvenile court located in the United States or legally committed to or placed under the custody of a state agency and be deemed eligible for the long term foster care due to abuse and neglect). ICE formed the Office of Detention and Removal Operations in 2003, which is part of the correctional system and operates similarly to prisons: attorneys can visit their clients only during certain hours; the detainees are kept in prison-like facilities; all family or social visits are non-contact; and all visitors are subject to search. For examples of the rules in such a facility, see Detroit Field Office, *Calhoun County Correctional Center*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *available at* http://www.ice.gov/doclib/dro/facilities/pdf/calhomi.pdf (last visited Nov. 3, 2011).

18. The TVPA defines a severe form of human trafficking as either "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age," or "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." TVPA, 22 U.S.C. § 7102(8) (2011). Jacqueline fits into the latter category of the definition. Victims of severe forms of human trafficking who are U.S. citizens do not have access to the same social service benefits as foreign national victims unless they are minors and are in one of three cities in the United States. § 7105(b)(1)(C). *See also supra* note 1.

19. *Id*. §§ 7105(b)(1)(A)–(G).

20. *See* TVPA, § 7105(b)(1); *see also Unaccompanied Refugee Minors*, *supra* note 4 stating,

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As an unaccompanied[21] foreign national child victim of human trafficking, Jacqueline qualified for and was accepted into the Unaccompanied Refugee Minor (URM) Program. The URM Program includes specialized resettlement and foster care services for unaccompanied refugee minors and eligible child victims of human trafficking.[22] Children who enter the United States prior to age eighteen can remain in foster care/independent living until they complete high school or reach twenty or twenty-one years of age.[23] The foster care placements are based on the individual needs of each child. Particular considerations include: the cultural, linguistic, and religious backgrounds; special health, educational and emotional needs; and personalities and temperaments. Moreover, the foster parents receive special training on the adjustment needs of refugee and trafficked children.[24] A non-exhaustive list of services available through the programs include: indirect financial support for housing, food, clothing, and other necessities; medical care; intensive case management by social worker; independent living skills training; job skills training and career/college counseling; and mental health services.[25]

> The program establishes legal responsibility, under State law, to ensure that unaccompanied minor refugees and entrants receive the full range of assistance, care, and services which are available to all foster children in the State; a legal authority is designated to act in place of the child's unavailable parent(s). Reunification of children with their parents or other appropriate adult relatives is encouraged, through family tracing and coordination with local refugee resettlement agencies. Additional services provided include: indirect financial support for housing, food, clothing, medical care and other necessities; intensive case management by social workers; independent living skills training; educational supports; English language training; career/college counseling and training; mental health services; assistance adjusting immigration status; cultural activities; recreational opportunities; support for social integration; and cultural and religious preservation.

21. For purposes of this Article, a minor is unaccompanied if they are in the United States without a parent or a legal guardian to care for them.

22. *See Unaccompanied Refugee Minors*, *supra* note 4.

23. *See id.*

24. *See The Unaccompanied Refugee Minor Program*, U. S. CONFERENCE OF CATHOLIC BISHOPS, http://www.usccb.org/mrs/URMSummary02-23-2006.pdf (last updated Feb. 2006).

25. *See Unaccompanied Refugee Minors*, *supra* note 4.

Certain victims of human trafficking also qualify for a form of immigration relief called continued presence,[26] which requires an application to be filed by law enforcement. In Jacqueline's case, the ICE agents successfully applied for continued presence soon after her rescue. Continued presence gave Jacqueline permission to live and work in the United States for one year.[27]

Because Jacqueline was a child victim of a "severe form of human trafficking"[28] she was also eligible to apply for a T Visa. Children who have been victims of a severe form of human trafficking, are physically present in the United States on account of human trafficking,[29] who would face extreme hardship involving unusual and severe harm if removed,[30] and who meet certain immigration requirements[31] are eligible for a T Visa. A T Visa gives trafficking victims the right to live and work in the United States for four years.[32] A T Visa applicant may also bring certain family members to the United States.[33] The sooner of three years from the date of receipt of the T Visa or completion of the prosecution or investigation into

26. Individuals qualify for continued presence if (i) they have been identified as a victim of a severe form of human trafficking, and (ii) if they are a potential witness in the investigation or prosecution of the trafficker. TVPA, 22 U.S.C. § 7105(b)(1)(E) (2011).

27. Jacqueline did not work during this time as she was attending school. However, her employment authorization document was a crucial form of identification for her.

28. *See supra* note 18.

29. Physical presence is defined as one who "in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking." Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(T)(i)(II) (2011).

30. *Id.* § 1101(a)(15)(T)(i)(IV). A multitude of factors are considered on a case-by-case basis when determining whether extreme hardship exists, including personal information about the applicant and their circumstances, and in certain cases, evidence regarding the conditions in the applicant's home country. *See* 8 C.F.R. § 214.11(i) (2011).

31. *See* 8 C.F.R. § 214.11(b) (2011) individuals who are not admissible to the United States or who have committed a severe form of trafficking in persons are not eligible to apply for a T Visa.

32. *See* 8 C.F.R. § 214.11(p) (2011).

33. 8 U.S.C. § 1101(a)(15)(T)(ii) (2011) (allowing the spouse, children, parents, and unmarried siblings under 18 years of age, of victims under 21 years of age to come to the United States; for victims 21 and older, only the victim's spouse and children may enter the United States, unless the adult victim's parent or unmarried sibling faces a "present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement").

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the trafficking incident, a T Visa holder may apply for legal permanent residence.[34]

During the process of applying for her T Visa, Jacqueline agreed to be interviewed by federal law enforcement about her trafficking experience. She would eventually testify at the trial of her traffickers. Jacqueline's role in the prosecution highlighted one of the issues facing many child victims of human trafficking: they are both victims and witnesses. Many child victims want to move forward with their T Visa applications as soon as possible, however some prosecutors worry that a pending T Visa application will provide ammunition for defense attorneys to use during the prosecution against the trafficker.[35] This conflict often results in delaying the T Visa application process.

But waiting to file the T Visa application until the prosecution is complete can be problematic for many reasons. Three reasons frequently arise: first, prosecutions—especially federal—often take a long time;[36] second, child victims cannot bring in family members as derivatives on their T Visa if they are waiting to apply until the

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34. *See* Immigration and Nationality Act, 8 U.S.C. § 1255 (l)(I)(A)-(C) (2011) for an outline of who is eligible to adjust their status to permanent resident.

35. For example, if the T Visa application differs from the child's testimony during the prosecution, a defense attorney could use the T Visa application to imply that the child's testimony is not true. HEATHER J. CLAWSON, NICOLE DUTCH, SUSAN LOPEZ & SUZANNA TIAPULA, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES EXECUTIVE SUMMARY, NCJRS i, iv–v, vii, 16 (June 30, 2008), http://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf.

36. "Human trafficking investigations are often lengthier and more complex than other criminal investigations." STEPHANIE FAHY, AMY FARRELL & JACK MCDEVITT, THE INST. ON RACE AND JUSTICE AT NE. UNIV., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT, NCJRS 1, 10 (Dec. 2008), http://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf. The average length of time that government agencies spend investigating human trafficking cases before trial can be anywhere from under three months to over a year. *Id*. at 69. Approximately 47.3 percent of agencies reported taking less than three months to investigate an average case, 27.7 percent reported three to six months, and the rest reported seven or more months (or uncertain). *Id*. This time period combined with the period of time necessary to actually prosecute the case results in a very lengthy process. A 2001 to 2005 U.S. Department of Justice study on federal human trafficking cases found that the median length of time from when a case was filed until it was decided was ten months. TRACEY KYCKELHAHN & MARK MOTIVANS, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005, BUREAU OF JUSTICE STATISTICS (Oct. 2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/fpht05.pdf.

prosecution is complete;[37] and third, if child victims wait until the prosecution is complete they may turn eighteen in the process and then their T Visa application will require a showing that they cooperated with law enforcement.[38]

Jacqueline decided to go forward with the T Visa application even though the federal criminal proceedings were ongoing. She was sixteen years old when she filed for her T Visa. One requirement for receipt of a T Visa is that the victim show that she would suffer extreme hardship if she were returned to her country of origin. For many victims of human trafficking, returning home means being put in a dangerous or vulnerable position.[39] Because returning to their home countries is so dangerous, a victim's ability to bring in their family members as part of their T Visa process often represents the earliest opportunity to reunite with family.[40] When Jacqueline applied

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37. The normal process for applying for derivate application of a T Visa is as follows: after obtaining, or in conjunction with the initial T Visa application, a victim of trafficking can apply for immediate family members to join him/her in the United States. The victim's spouse, children, unmarried siblings under eighteen years old, or parents (the latter two categories only being applicable where the trafficking victim is under twenty-one years old) can obtain derivative nonimmigrant status. *See Victims of Human Trafficking*, *supra* note 5. The TVPA Reauthorization of 2008 added a provision that allows the victim's parents and siblings to be immediately paroled into the United States if a law enforcement official (in consultation with the Secretary of Homeland Security) determines that the qualifying family member is in danger of retaliation on account of the victim's escape from a severe form of human trafficking. *See* 8 U.S.C. § 1229b(b)(6)(A) (2011). The author believes that this action is a rare occurrence.

38. The primary evidence to make such a showing is the inclusion of an I-914B form as part of the T Visa application. This form requires law enforcement to certify that the victim cooperated with all reasonable requests. The author is not suggesting that a child who turns eighteen while waiting to apply is at a significant risk of not receiving certification. However, the reality that a victim must now meet an additional burden, of which the primary evidence needed to discharge that burden is available solely at the discretion (and timing) of law enforcement, must be acknowledged.

39. Victims of human trafficking often fear returning home for many reasons, including retaliation by the traffickers, being re-trafficked, or being acutely ostracized or discriminated against. *See* Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement*, 16 MICH. J. GENDER & L. 453, 464–65 (2010). In many human trafficking cases in the United States, law enforcement is able to arrest the traffickers in the United States but other participants remain free in a foreign land. *See Statement of "Katya" Trafficking Victim from Ukraine Before the H. Comm. on the Judiciary*, 110th Cong. (Oct. 31, 2007), *available at* http://judiciary.house.gov/hearings/pdf/1031071.pdf (describing Katya's fear that her mother, who is still living in Ukraine, is in danger of retaliation by one of her traffickers, Veniamin Gonikman, who was at large in Ukraine).

40. *See supra* note 37 (explaining how trafficking victims can apply to be reunited with family members).

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for her T Visa she also applied for her parents and eligible siblings to come to the United States.

A lot has changed in Jacqueline's life in the almost three years since she submitted her T Visa application and the derivative applications for her parents and siblings. The traffickers have either pled guilty or been convicted. All of them have been sentenced. Jacqueline was awarded her T Visa and is now enrolled in school full time. Though Jacqueline submitted the necessary information about her family members when she applied for her T Visa,[41] her family still remains in Africa. After submitting the applications, Jacqueline received notices requiring her family members to fill out and return fingerprint cards.[42] For some derivative applicants this request is a simple bureaucratic hassle, but for many this can be a significant obstacle. In Jacqueline's case, students in the Michigan Human Trafficking Clinic (Clinic) reached out to U.S. government agencies including the U.S. Department of State, non-governmental organizations (NGOs) such as Terre de Hommes and the International Organization for Migration (IOM), universities throughout the U.S., and law schools all over the world to see if someone in Africa could assist Jacqueline's family.[43] Eventually the Clinic found a Good Samaritan who brought Jacqueline's family to the nearest Embassy, where the Embassy staff helped her family complete the fingerprint cards and even mailed the documents back to the United States. Unfortunately, and despite the assistance of Embassy staff, only one of the fingerprint cards was readable. In lieu

41. *See* 8 U.S.C. § 1229b(b)(6)(A)(i); The form used to apply for derivatives is Form I-914(A). *Instructions for Form I-914, Application for T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, http://www.uscis.gov/files/form/i-914instr.pdf (last updated Feb. 1, 2011). A T Visa applicant may file concurrently for herself and qualifying family members, or wait until she obtains T nonimmigrant status and then file for qualifying family members. Different rules apply depending on whether or not the applicant is twenty-one years of age. *See id*.

42. The cards required Jacqueline's family members to go to the U.S. Embassy and have their fingerprints taken. Her family members then needed to mail the cards back by a certain date.

43. In order to fulfill this request, the family members had to be able to understand the requirements on the cards, travel to the U.S. Embassy, and pay the fees associated with sending the cards back to the United States. Many of our clients' families do not have phones and some are illiterate, even in their native language. These realities present huge difficulties when attempting to fulfill such requirements.

of fingerprints, Jacqueline was then sent a request for additional evidence. Each member of Jacqueline's family had to supply:

- A sworn affidavit regarding any criminal history, supported by police clearances or records from each place that the applicant has resided for at least six months.
- If police clearances, criminal background checks, or similar reports are not available for some or all locations, then the applicant must submit an explanation and other evidence in support of the affidavit. Evidence may include affidavits from responsible persons who can knowledgeably attest to any contact that the applicant has had with any law enforcement agency.
- If the applicant has been arrested or charged with a crime then the applicant must submit copies of the arrest report(s); copies of court documents showing the final disposition of the charge(s); and relevant excerpts of law for that jurisdiction showing the maximum possible penalty for each charge.[44]

The obstacles and barriers faced by Jacqueline's family with the fingerprint request seemed small in comparison with this new request.[45] The Clinic students began working on these requests immediately. The IOM assists in the reunification of families in human trafficking situations; however, this program only assists individuals who have approved derivative visas.[46] Thus, there was no

44. This language comes from the Notice of Action that Jacqueline received after the fingerprints were deemed not readable. The author has changed the language slightly to make it easier to read; however, the requirements are the same.

45. Issues of comprehension and access to mailing services were still present in this request yet an additional burden existed because Clinic students needed to understand how and if the family could access police clearances and had to learn the process in order to advise the family members. Affidavits presented their own difficulties if family members were illiterate.

46. The IOM assists victims of trafficking on a case-by-case basis through cooperation with law enforcement investigations or court proceedings along with the U.S. Department of State, Bureau of Population, Refugees, and Migration in support of the TVPA. The program requires, though, that the referring organization, in Jacqueline's case the Clinic, fill out and provide a specific application for assistance from the IOM, a copy of the victim's and derivative family members' T Visa approvals, a risk assessment form to conduct a safety assessment in the countries of origin and transit, and a travel assistance form to collect information to facilitate

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way for the Clinic to obtain IOM assistance in completing the derivative application process for Jacqueline's family members in Africa. Eventually, the Clinic students helped Jacqueline's family gather and submit the requested evidence.

Finally, in late 2010, the Clinic received the approval notices for the derivative visas. With the derivative visas in hand Clinic students immediately contacted the IOM in hopes of enrolling Jacqueline's family into their program. Unfortunately, the program was not accepting new applications and funding for future programming was questionable. Nevertheless, Clinic students helped Jacqueline with the next step, obtaining the necessary travel documents for her family. This process required her family members to go to the Embassy between 2:00 p.m. and 4:00 p.m. on Tuesdays only. During his first visit to the Embassy, Jacqueline's father was unable to complete the form—the DS-160 application—because he did not possess the required valid passport. Jacqueline's family had to make numerous trips to the Embassy before finally obtaining the documents needed to travel to the United States.

Eventually Jacqueline's family members had their derivative visas and their travel documents in hand; unfortunately one huge obstacle remained before they could reunite with Jacqueline: money. The total cost for Jacqueline's family to come to the United States including the passport fees, DS–160 application,[47] and airline tickets was almost $10,000.[48] This represents an almost insurmountable fee for Jacqueline and her family as the average yearly family income in Jacqueline's country is approximately $400 according to UNICEF's

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travel. *IOM Return, Reintegration, and Reunification Program for Trafficking Victims in the United States*, IOM INTERNATIONAL ORGANIZATION FOR MIGRATION, http://www.iom.int/unitedstates/ct/PDFs/US%20Program--Return,%20Reintegration,%20&%20Family%20Reunification/Application%20Guidelines.pdf (last visited July 24, 2011).

47. *See, e.g.*, *The DS-160: Online Nonimmigrant Visa Application*, TRAVEL.STATE.GOV., http://travel.state.gov/visa/forms/forms_4230.html (last visited Nov. 3, 2011). The Online Nonimmigrant Visa Application is an integrated online application form that is used to collect necessary application information from a person seeking a nonimmigrant visa for temporary travel to the United States. The process includes the visa application, combined with a personal interview at the consular office and includes paying a visa application fee.

48. To identify the total costs, we selected a travel date approximately four months in the future and searched for the cheapest ticket available. We added the costs of the tickets to the fees the family members had to pay to obtain their passports and visas. The total was approximately $10,000.

2008 country report.[49] The bitter irony is that Jacqueline earned more than enough money while working under the traffickers to pay these costs.[50]

V. SALLY

After Sally was rescued she was placed in the same URM Program as Jacqueline.[51] Though Jacqueline thrived in the URM Program's foster care placement, it was extremely difficult for Sally because she had previously supported her household, including two of her own children. Before her rescue, she was responsible for making all of the money and taking care of her children. Placing Sally in an environment where she was viewed as a child was a difficult adjustment. Sally did not fit the paradigm of a child victim because her enslavement had taken away her childhood. Unfortunately, the placement options within the URM Program did not recognize and serve Sally's complex reality.

Like Jacqueline, Sally received continued presence[52] status soon after her rescue. Continued presence only lasts for one year and must be renewed by law enforcement.[53] As an adult Sally could not immediately apply for her T Visa, she was eighteen when she was rescued and therefore was required to show that she cooperated with all reasonable requests of law enforcement in order to apply.[54] The ICE agents working on Sally's case refused to provide the

49. *See Togo-2008*, UNICEF, http://www.unicef.org/search/search.php?q=togo&hits=10&type=Main&navigation=%20pageyear:2008 (last updated Mar. 2, 2010).

50. The judge in Jacqueline's case found that the girls were owed over $3 million dollars based on the wages they earned during their servitude. This figure was calculated under the Fair Labor Standards Act, which provides for payment of minimum wage and overtime, as well as compensatory damages for the delay in receiving wages. Press Release, U.S. Attorney Dist. Of N.J., Dep't of Justice, Togolese Woman Sentenced to 27 Years in Prison for Forced Labor of Young West African Women in Hair Braiding Salons in Newark and East Orange, New Jersey (Sept. 20, 2010), http://www.justice.gov/usao/nj/press/press/files/pdffiles/Afolabi,%20Akouavi%20Kpade%20Sentencing%20PR.pdf.

51. Although Sally was eighteen at the time of her rescue, she was given special permission to enroll in the URM Program.

52. Individuals qualify for continued presence if they have been (i) identified as a victim of a severe form of human trafficking, and if they are (ii) a potential witness in the investigation or prosecution of the trafficker. TVPA, 22 U.S.C. § 7105(c)(3) (2011).

53. *Id.*

54. 8 U.S.C. § 1101(a)(15)(T)(i)(III)(cc) (2011).

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certification of her cooperation until the prosecution and sentencing of Sally's traffickers was completed. For Sally, this meant waiting over two years before she could even *apply* for a T Visa. As a result Sally's continued presence had to be renewed multiple times. During this two-year period the ICE agents failed to timely renew Sally's continued presence and Sally accrued unlawful presence.[55] It was not until 2010 that Sally received the law enforcement certification of her cooperation and was finally able to apply for her T Visa.

Still, Sally needed more legal assistance. For three years, Sally had lived a life in the United States under someone else's name.[56] She bore children under that name, held a job, and paid taxes. One of her first requests to the Clinic was to change the mother's name on her children's birth certificates. It upset Sally that the mother's name on both certificates was an identity foisted on her by her trafficker and used against her by her "husband." The Clinic is currently working to fix these birth certificates. Additionally, Sally hopes to reunite with her family. Due to the delay in obtaining her T Visa, it is unclear how long it will take for Sally's family to obtain derivative visas and enter the United States.

VI. MILES

Classifying Miles as a noncitizen living in the United States without permission meant that he would not be viewed as a victim of human trafficking and would not receive the same benefits as Jacqueline and Sally. As such, Miles was separated from the people he knew to be his family[57] and sent to an immigration detention facility.[58] Miles was put in federal custody and was ineligible for the URM Program; instead, he was placed into the Division of

55. Being unlawfully present in the United States is one ground for inadmissibility, and one that could have jeopardized Sally's chance to receive permission to remain in the United States. Immigration and Nationality Act, 8 U.S.C. § 1182 (2011).

56. The fraudulent identity Sally had been using was the one the trafficker forced her to use the first time she entered the United States.

57. Because one of the trafficker's raised Miles from a very young age, he believed that she was his mother and that the girls, like Jacqueline and Sally, were his sisters.

58. *See supra* note 17.

Unaccompanied Children's Services (DUCS) program.[59] Children in DUCS can be placed in a variety of settings, from detention centers to foster care placements and Miles was eventually moved into foster care after his initial placement in a detention facility.

Miles struggled in foster care. As a child in a DUCS foster care placement, he did not have access to the same level of support services as Jacqueline and Sally in the URM program. Yet he desperately needed those services.[60] He had never been to school nor had he interacted much with children his age or adults in the outside world. The person he identified as his mother had been taken away by the "police,"[61] and the girls he identified as his sisters went to foster homes. In addition to therapy, Miles' caseworker told Clinic students that he needed stability and permanency in his foster care placement. Neither of those goals could be accomplished until his immigration case was resolved because he was not eligible for adoption while in removal proceedings.

When the Clinic took on Miles' case, he was facing removal proceedings in another jurisdiction. The Clinic students had his case moved to the local immigration court. His case was extremely difficult. Miles' real identity, parentage, and country of origin were all unknown. The only name he knew was the name from the visa that the trafficker had purchased from someone else and used to bring Miles into the United States when he was an infant. The only thing

59. The Division of Unaccompanied Children's Services (DUCS) is part of the U.S. Department of Health and Human Services' Office of Refugee Resettlement (ORR). The DUCS program coordinates a nationwide effort to help children in shelters or detention centers who may have fled poverty, war, or other dangerous circumstances. In all decisions, DUCS tries to consider the best interests of the child and takes actions tailored to their individual needs. The majority of children are placed into foster care, group homes, or other forms of secure homes. *See Unaccompanied Refugee Minors*, *supra* note 4.

60. I had many conversations with the case worker assigned to Miles' case and asked why Miles could not access the same therapy services as the girls in the URM Program. The case worker recognized that Miles had similar needs but stated that since Miles was in the DUCS program he was not eligible for the same services. She worked hard to find pro bono therapy services for Miles but ultimately she could not secure any.

61. This is the word that Miles used to describe the armed law enforcement agents who showed up at his apartment, took away the person he believed to be his mother, and sent him to a detention facility.

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the Clinic knew was that Miles was not the person listed on the visa.[62]

The Clinic was representing a child who had no knowledge of his identity, parentage, or country of origin, who had received a Notice to Appear and who was charged with committing fraud or willful misrepresentation against the U.S. government as an infant.[63] The ICE agent who served the Notice to Appear on Miles initially told me over the phone that I should not worry because the Notice would never be filed and he would never have to appear in immigration court. She was wrong. She apologized but stated that it was out of her hands and that no one would deport a five year old. I was not comforted by her promises.

After a multitude of twists and turns,[64] and with the support and assistance of an understanding family court judge, the Clinic was able to obtain Special Immigrant Juvenile Status (SIJS) for Miles.[65] With the granting of SIJS, Miles was no longer in removal proceedings. Unfortunately, his identity, parentage, and country of origin were still unknown and this presented unique problems before he was eventually granted legal permanent resident status.

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62. The ICE agents working on the case confirmed this fact. During their investigation, the agents had interviewed the father of the real Miles. The father acknowledged selling his son's visa to the traffickers and confirmed that his son was still in Africa.

63. *See supra* note 16.

64. The twists and turns in Miles' case are beyond the scope of this Article.

65. Special Immigrant Juvenile Status (SIJS) is a form of immigration relief for certain undocumented children to obtain legal permanent residency. Persons under the jurisdiction of a juvenile court who are eligible for long term foster care due to drug abuse, abandonment, or neglect may qualify for SIJS and based on this classification, may apply for adjustment of status to a Lawful Permanent Resident. In order to qualify for SIJS, a juvenile court in the U.S. must have declared the child a court dependent, or have legally committed the child to a state agency or department. The court must have found that it was not in the child's best interest to be returned to their home country. 8 U.S.C. § 1101(a)(27)(J). The child should have proceeded to long-term foster care, adoption, or guardianship and the court must have made its findings based on the abuse, neglect, or abandonment of the child. The child must complete an immigration application for SIJS, obtain a special medical exam, and provide fingerprints, a photograph, proof of age, and complete an application interview. The application must also include an order from a dependency court that the child is eligible. The decision is usually made by the immigration agency after the interview. *See Special Immigrant Juveniles Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3d8008d1c67e0310VgnVCM100000082ca60aRCRD&vgnextchannel=3d8008d1c67e0310VgnVCM100000082ca60aRCRD (last updated July 12, 2011).

With his immigration issues resolved, Miles was now eligible for adoption, two-and-a-half years after he was found in the home of the traffickers. This did not have to happen to Miles. Had there been a chance to reconsider his status as a victim once the full facts of his experience were known, I have no doubt that the ICE agents would have considered Miles a victim of human trafficking. However in that critical moment when he was discovered in the trafficker's home, the ICE agents decided he was a noncitizen living in the United States without permission, a noncitizen who, as an infant, attempted to defraud the U.S. government. This decision meant that Miles spent the next two-and-a-half years fighting to stay safe in the United States, rather than healing from the abuse he had suffered.

VII. MAKING THE TVPA SUPPORTIVE OF CHILD VICTIMS

The plights of Jacqueline, Sally, and Miles highlight a number of areas where the TVPA must be improved. First, the "snapshot moment"[66] must be lengthened. The critical determination of whether a child is a victim of human trafficking or a noncitizen living in the United States without permission should not be left to a law enforcement agent in the heat of a rescue or raid. Ideally, a young child, like Miles, found in a home where all of the other minors were classified as victims of human trafficking, should be presumed to be a victim of human trafficking. In Miles' case the presumption seemed to be the opposite and the burden was on Miles to prove otherwise. Requiring a young child to provide the evidence necessary to prove that he was a victim of human trafficking immediately following a raid by armed law enforcement agents is unfair and unrealistic. Absent a presumption in favor of classifying such a child as a victim of human trafficking, the child should be provided access to an attorney before the decision is made. At a minimum, victim witness specialists who are trained to interview traumatized children should interview all children who might be victims of trafficking. The Department of Homeland Security should have trained child forensic interview specialists conduct these interviews.[67]

66. *See supra* note 6 and accompanying text.
67. Currently there are only two such forensic interview specialists. Telephone interview

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All individuals who are trafficked as children should be eligible to apply for a T Visa regardless of whether they cooperate with law enforcement. Currently, individuals who are under eighteen years of age at the time of the filing of their T Visa application are exempt from the requirement to provide evidence of cooperation with law enforcement.[68] This exemption should be extended to all individuals who were trafficked as children. Limiting the exemption to individuals who are rescued from their trafficker's control and who manage to file the T Visa before turning eighteen is an artificial distinction. All individuals who were trafficked as children need the ability to file the T Visa without a certificate of cooperation from with law enforcement. Individuals who were trafficked as children but who are unable to file until they are adults should not have their status, their ability to work, and their ability to reunite with family members delayed because of a lack of cooperation with law enforcement or law enforcement's decision to wait for the termination of a prosecution or investigation before providing certification.

Amendments must be made to the TVPA to prioritize family reunification. The bureaucratic hoops and prohibitive costs that currently stand in the way of this goal should be eliminated. The traffickers kept Jacqueline away from her family for two years and the process of trying to bring her family into the United States has kept them separated even longer; almost three years at the writing of this Article. And now, the costs associated with Jacqueline's family members' trip to the United States may result in Jacqueline being separated from her family indefinitely. Family members who are at risk of retaliation by the traffickers can be paroled[69] into the United

with Amy Allen, Victim Witness Specialist, Dep't of Homeland Security, (Feb. 25, 2011). Allen is one of the two trained forensic interview specialists. Either may be called in by Homeland Security agents to assist in investigations in branches around the country.

68. *See* TVPA, 22 U.S.C. § 7105(c) (2010).

69. Law enforcement officials may submit written requests to the Secretary of Homeland Security to permit the parole into the United States of certain relatives of a noncitizen who has continued presence and whose family members face retaliation as a result of the victim's escape from the severe form of trafficking or cooperation with law enforcement irrespective of age. *See* Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2011).

States and this provision should be revised to allow all individuals trafficked as children to reunite quickly with their family members.

At a minimum, once the underlying T Visa has been approved and the relationship between the derivative and the child victims has been established, family members should be admitted pending a biometrics check upon their arrival in the United States.[70] Requiring family members to navigate fingerprint cards and background checks for months on end before granting them an opportunity to reunite with their children is unreasonable when alternatives are feasible. One such alternative would be for the family members to go through an in-person interview at the closest U.S. Embassy at which time a biometric exam could be conducted. The interview could be conducted prior to the family members' flight out of the origin country and the biometrics check would provide adequate protection from identity fraud.

Finally, the cost of airfare should not be the ultimate barrier preventing child victims of human trafficking from reuniting with family. The United States must support the funding of programs like IOM's anti-trafficking projects to assist victims of trafficking, and reunite family members with victims like Jacqueline and Sally.[71] But the IOM program is not enough. Funding must be provided to all child victims of human trafficking who want to reunite with their family members. Without this funding, the ability to bring family members into the United States under the TVPA is an empty promise for many victims, especially children.

The goals of the TVPA, to protect and support child victims of human trafficking, can be realized by understanding the TVPA's failures in real cases. The TVPA must be amended to allow for more careful classification of whether a child is a victim. The TVPA must provide trafficked children with the opportunity to apply for a T Visa without making it contingent on cooperating with law enforcement. More importantly, the TVPA must provide a timely and realistic

70. Currently biometrics checks consist of filling out a short form and having your fingerprints taken. This information is then used to run a criminal background check.

71. *See generally* PROGRAMME AND BUDGET FOR 2011, INTERNATIONAL ORGANIZATION FOR MIGRATION, http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/99/MC_2297.pdf (last updated Oct. 7, 2010). This report describes programs and strategies for anti-trafficking and counter-trafficking efforts throughout the world. *See id*.

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route for child victims to reunite with family. Without these amendments the TVPA will continue to fail foreign national children who have been trafficked in the United States.