

Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap between U.S. Immigration Laws and Human Trafficking Laws

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Table of Contents

I. Introduction.....	312
II. The Human Sex Trafficking Scheme: Where Victims’ Vulnerability Collides with Victims’ Hopes.....	316
A. A Perpetual Cycle of Inhuman Abuse.....	316
B. Cyclical Harms –Psychological and Emotional Abuse..	321
C. The Economics of Child Sex Trafficking.....	323
III. Enactment of the Human Trafficking Legislation: A Comprehensive Response That Renders an Incompetent Impact.....	324
A. An Overview	324
B. Prevention and Prosecution of Traffickers Heralded by the TVPRA as the Linchpin of Human Sex Trafficking.....	325

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C. Protection of Child Sex Victims: Prevention and Prosecution In Disguise.....	328
1. T-Visa Status as Protection from Removal: Treatment for Child Sex Victims under the TVPA 2000.....	331
D. Current TVPRA Treatment: Legislatively Constructed Roadblocks to Protection for Child Sex Victims	333
E. Nonimmigrant T-Visa Classification for Child Sex Victims under the Immigration Regulations: A Viable Solution or An Administrative Delusion?.....	336
IV. The Special Immigrant Juvenile Provisions: An Invitation to a Doctrinal Battle	340
A. Change Is Not Always A Good Thing: The 1997 Amendments to the SIJ Provisions	342
B. Federal Preemption Issues When Determining SIJ Status for Child Sex Victims-A Foundation for Conflict Laid Under the Pre-1997 Amendments.....	344
1. Pre-1997 Case Law: Whose Law Governs Jurisdictional Authority For Making Dependency Determinations?	346
2. State Law Authority for Making Dependency Determinations That Is Incorporated into Federal Legislation is Still Preempted	351
C. Deference and Judicial Review-The Aftermath of the 1997 Amendments to the SIJ Provisions	356
1. Judicial Review Under the Administrative Procedures Act	357
V. Kids Are Different: Justification in United States Immigration Policy for Presumptive Lawful Permanent Residency Status of Child Sex Victims	362
A. U.S. Compassion for Haitian Refugee Children: Historical Relief for Alien Children Justifies Presumptive Lawful Permanent Residency Status for Child Sex Victims.....	363
B. Human Sex Trafficking Is Persecution: How Historical and Present-Day Relief For Cuban and Nicaraguan Refugees Support Lawful Permanent Residency Status For Child Sex Victims	364
1. Social and Legal Reform for Cuban Refugees....	364

2. The Policy That Supports Mandating Lawful Permanent Residency Under NACARA Supports Taking Similar Measures For Child Sex Victims	367
C. Legislation Regarding Unaccompanied Alien Children Represents Favorable Political Sentiment Toward Greater Protection of Child Sex Victims	368
VI. International Human Rights Law and Policy Support Presumptive Lawful Permanent Residency for Child Sex Victims	372
A. UN Protocol vs. Human Trafficking Legislation: How Defining the Problem Directs the Policy and the Outcome .	372
B. Protection of Children Is An Internationally Recognized Principle	375
VII. From Justification To Implementation	377
VIII. Conclusion.....	379

I. Introduction

*“Children Have a Very Special Place in Life Which Law Should Reflect”*¹

Even further, children who suffer at the hands of human sex traffickers deserve a safe place once they find themselves within the borders of the United States. Human sex trafficking is one of the greatest internationally and nationally recognized travesties known to mankind since slavery.² While this issue has garnered an appropriate amount of attention from lawmakers and legal scholars, there has been less focus on the specific challenges faced by child sex victims of human trafficking and the available protections afforded them. Children comprise an especially vulnerable sub-population of human sex trafficking victims that suffer exceptional harms. Accordingly, the U.S. must initiate exceptional measures to eradicate those harms. This article strives to construct a picture of human trafficking through the eyes of children and to describe the obstacles that they confront when seeking protection in this country.

Each year thousands of children who have been forcibly placed into illegal sex and slave trade systems arrive in the United States, one of the top three destination countries for human trafficking.³ We must query, as implied in the

¹ *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

² See generally, AMBASSADOR MARK P. LAGON, SENIOR ADVISOR ON TRAFFICKING IN PERSONS, RELEASE OF THE SEVENTH ANNUAL TRAFFICKING IN PERSONS REPORT, , at 1-2, available at www.state.gov/g/tip (last visited Mar. 12, 2008). The Report comments on major countries such as India, Mexico, Russia, Armenia, China and South Africa who have ignored the warnings given as part of the U.S. government commitment to end human trafficking. The Report provides the most comprehensive worldwide data on governmental efforts to combat trafficking in persons.

³ Stephanie Richard, *State Legislation and Human Trafficking: Helpful or Harmful?* 38 U. MICH. J.L. REFORM 447, 448 (2005). See also, Janie Chuang, *The United States As Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L., 437, 449 (2006) (where the author points to the series of high level trafficking cases prosecuted during the 1990s as evidence of the U.S. response to the every increasing presence of human trafficking). See generally, Ellen L.

opening quote, whether the laws of this country will offer a special place that is safe for child sex victims from other countries, or whether we will allow them to become entangled in a legal, doctrinal quagmire that is embedded in our current immigration laws. The United States' current response to human trafficking is comprehensively detailed in the Trafficking Victims Protection Reauthorization Act (TVPRA).⁴ Within this legislation, one can see that the primary legislative focus regarding human trafficking is on prosecution and prevention.

In the Trafficking Victims Protection Act of 2000(TVPA), the first human trafficking legislation, congressional sponsors coined the "three Ps"-prosecution, prevention and protection-as representative of the legislature's intent.⁵ While the legislators may intend to address avenues for immediate protection for child sex victims in the TVPA, the protection prong is practically treated as the least significant of the three. This article will demonstrate how the immigration code provisions, specifically those providing protected status through the T-visa and the Special Immigrant Juvenile visa, were enacted to address the much needed protection for human trafficking victims, but ultimately fail the most vulnerable ones- child sex victims.

Under the TVPA of 2000, protection of human trafficking victims was addressed through enactment of the T-visa;⁶ however, obtaining T-visa status presents limitations for unaccompanied minors who lack the emotional stamina to self-navigate through the immigration law procedures. In the absence of an effective remedy, child sex victims seek

Buckwalter, Maria Perinetti, Susan L. Pollet & Meredith S. Salvaggio, *Modern Day Slavery In Our Own Backyard*, 12 WM. & MARY J. WOMEN & L. 403, 407 (2006).

⁴ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006).

⁵ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 14(2000).

⁶ *Id.* at § 107 (e)(1) (2000) (amended Section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15) to include protection from removal for victims of a severe form of trafficking in persons as that term is defined in the TVPA of 2000).

protected status in the Special Immigrant Juvenile (SIJ) provisions of the U.S. Immigration Code.⁷ Based on its legislative construction, the SIJ provision generates a doctrinal battle over preemption of federal law in the face of state law dependency guidelines.⁸ Furthermore, the SIJ provisions are rendered useless when issues of judicial review and deference to the administrative decisions made by the head of the Office of Homeland Security (formerly known as “Immigration and Naturalization Service”) arise as a by-product of immigration law enforcement. As a result, both the T-visa and the SIJ visa are worthless pieces of legislation for child sex victims seeking safe harbor in this country. The procedural entanglements and limitations of these provisions warrant a more accessible and adequate remedy given the harms faced by child sex victims.

This article depicts compelling conditions faced by child sex victims that overwhelmingly command a humanitarian response from the United States under our immigration law and policies. More specifically, it identifies the gap which has been created between the social and political policies embedded in the human trafficking legislation and those immigration law provisions that were intended to provide protections for child sex victims.

Furthermore, this article argues that extending the adjustment of status provisions in the immigration code to include a rebuttal presumption of lawful permanent residency status or, alternatively, a rebuttable presumption of the dependency standard for child sex trafficking victims is imperative. As a nation historically inclined to render aid to oppressed citizens from all nations, this country will be instituting a remedy for the most vulnerable humans of all nations who seek protection in the United States. In addition, the general requirement for obtaining an immigrant visa

⁷ 8 U.S.C.A. § 1101(a)(27)(J) (West 2006).

⁸ 8 U.S.C.A. § 1101(a)(27)(J)(i) (West 2006) requires that the immigrant be declared dependent on 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 long term foster care due to abuse and neglect.

before making application for lawful permanent residency⁹ would be waived for child sex victims since this process, alone, presents obstacles that obviate an effective solution for obtaining protection from human traffickers.

Accordingly, Part II paints the face of human sex trafficking by describing a cycle of abuse through which children are continually reprocessed for the economic benefit of the industry. Part III discusses the U.S. government response and the policies governing enactment of the human trafficking legislation. Unfortunately, prevention and prosecution take priority over the most practical and human component of the legislation-protection of child sex victims. Congress may have intended to provide protection from removal under the T-visa provisions. Instead, statutory and regulatory language results in administrative entanglements. In effect, the law constructs a roadblock rather than a resolution.

Part IV identifies a doctrinal battle specifically created under the SIJ provisions of the immigration code when a child seeks protected status. Under the statutory language, state courts must resolve federal preemption issues that arise when making state law dependency status determinations. After examining the courts' application of the SIJ provisions in conjunction with concepts of deference and judicial review, this article concludes that the obstacles generated by application of the T-visa and SIJ visa support a rebuttable presumption of lawful permanent residency status (or a rebuttable presumption of dependency) in order to achieve meaningful protection for removal for child sex victims. Part V articulates U.S. immigration law that has historically recognized and implemented policy in response to the hardships suffered by citizens from all nations. In light of those suffering, Congress took appropriate measures to modify the immigration code so that aliens would receive some form of protected status. The present-day tragedy of child sex trafficking, by analogy, presents the opportunity for Congress to employ the same policies for, at least, the most vulnerable

⁹ See generally, 8 U.S.C.A. § 1255(a) (West 2006).

victims. This section also highlights the proposed legislation regarding Unaccompanied Alien Children as representative of the political sentiment needed for adequate legal protection of child sex victims.

Likewise, international human rights law and policy discussed in Part VI compel this country to do more than just “prosecute” and “prevent”, but also “protect” as consistent with longstanding, national recognition of children’s rights. Finally, Part VII suggests specific measures for modifying the adjustment of status provisions in the immigration code to accomplish this goal.

II. The Human Sex Trafficking Scheme: Where Victims’ Vulnerability Collides with Victims’ Hopes

On any given day in the halls of congressional offices, one might hear discussion surrounding the latest and hottest political battle. Invariably, someone references an acronym of one kind---the “three Ps”, or “TVPA”, or “PROTECT”, or perhaps, even “SIJ” depending on the context of the conversation. We, as a nation, often relegate political issues to acronyms. These acronyms denote political and legislative response to very serious societal problems. But, in reality, like many other sensitive matters that we confront in this country, the brevity of the acronyms masks the harsh realities. Behind the perceived simplicity of these acronyms hide the faces of millions of children and the bondage of psychosocial harms imposed by the human trafficking industry. This section generally describes what might be viewed as a “cyclical scheme” or series of repeated and interconnected occurrences that begin with domestic servitude and end with sexual exploitation. Its ultimate goal is to fuel the human trafficking industry.

A. A Perpetual Cycle of Inhuman Abuse

Human trafficking is one of the most pervasive evils known by modern man because it touches all nationalities in

virtually every place in the world.¹⁰ In fact, human trafficking can be depicted as a cyclical scheme which includes various forms of exploitation.¹¹ In describing the complexities and depth of sexual exploitation, this section describes how trafficked children unknowingly promote the aggrandizement of organized crime groups throughout the world.¹² In describing the cyclical scheme, the reader will appreciate, not only the emotional and functional aspects of human trafficking, but also the perpetual harm that is suffered by the children as they are recycled from one form of exploitation to another¹³ with the resulting impact of progressive abuse and neglect.

To quantify the problem, between 700,000 to 2 million people are trafficked across international borders every year.¹⁴ Of this number, women comprise approximately 80% and 70% of those women are placed into the sex trafficking industry each year.¹⁵ In order to provide perspective on this

¹⁰ Trafficking in Persons 2006 Report is prepared by the Department of State annually and submitted to Congress as required by law. OFFICE OF THE UNDER SECRETARY FOR GLOBAL AFFAIRS, TRAFFICKING IN PERSONS REPORT 2006, at 8, 26 (2006), available at <http://www.state.gov/g/tip/rls/tiprpt/2006/> (last visited Mar. 12, 2008) [hereinafter Trafficking in Persons 2006 Report]. The Report provides the most comprehensive worldwide data on governmental efforts to combat trafficking in persons. The Report is prepared in order to accomplish several objectives which include expansion of global awareness and encouragement of foreign government intervention.

¹¹ *Id.* at 16. See also, Richard, *supra* note 3, at 450.

¹² Vanessa B. M. Vergara, *Looking Beneath the Surface: Illinois' Response to Human Trafficking and Modern-Day Slavery*, 38 U. TOL. L. REV. 991, 993 (2007) (where the author describes human trafficking as the fastest growing source of profit making for organized crime next to drug and illegal arms sales).

¹³ Jennifer Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2986-87 (2006) (where the author discusses trafficking victims who are initially placed into homes for forced labor or domestic servitude but are later coerced into the sex trade).

¹⁴ April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J. L. & GENDER 231 (2007).

¹⁵ *Id.*

quantification, the number of trafficked victims nearly equals the entire population of the state of Vermont.¹⁶ More importantly, fifty percent of the trafficked victims are minors.¹⁷ These statistics describe an elaborate scheme that is fueled by the traffickers' heinous nature. Its characterization as a cycle of abuse¹⁸ is founded in the victims' hope.¹⁹

Consider how traffickers supply the domestic child labor market. They seek a child victim whose family will agree to the child's departure from their home country with hopes of securing low-skilled jobs or education.²⁰ The traffickers engage in a pattern of deceit by, first, placing the child into domestic servitude²¹ which ultimately renders him completely vulnerable to further exploitation and abuse in the sex slavery portion of the cycle.²² Since child domestic servitude is a component of the cycle and the largest employment category in the world for children under age 16,²³ its labor base simultaneously supplies children for sexual

¹⁶ U.S. CENSUS BUREAU, CENSUS 2000 DATA FOR THE STATE OF VERMONT (2003), available at www.census.gov/census2000/states/vt.htm (last visited Mar. 12, 2008) (The U.S. Census Bureau reported in April 2000 a total population of 608,827).

¹⁷ Trafficking in Persons 2007 Report is prepared by the Department of State annually and submitted to Congress as required by law. OFFICE OF THE UNDER SECRETARY FOR GLOBAL AFFAIRS, TRAFFICKING IN PERSONS REPORT 2007, at 8 (2007) [hereinafter Trafficking in Persons 2007 Report].

¹⁸ Buckwalter, *supra* note 3, at 408 (where the authors refer to the causes of human trafficking as complex and often reinforcing each other).

¹⁹ See Rieger, *supra* note 14, at 236-37 (where the author describes false promises of economic opportunity such as modeling, dancing and nanny work); Trafficked victims also frame their hopes by seeking improved lifestyles through educational opportunity. Trafficking in Persons 2007 Report, *supra* note 17, at 8.

²⁰ *Id.*

²¹ See Richard, *supra* note 3, at 449-50, where the demand for forced human labor serves as the driving force for placement into domestic servitude.

²² *Id.* Richard comments on the ease of exploitation when victims are subject to poverty, corruption, civil war, starvation and internal violence.

²³ Trafficking in Persons 2006 Report, *supra* note 10, at 38.

exploitation.²⁴ The conditions of forced labor prevent the children from becoming educated, as oftentimes promised by the traffickers, and future opportunities for employment other than domestic work are limited.²⁵ Hence, the cycle of abuse commences with deceit in the home country in order to supply the domestic servitude market, and culminates with the child's fate sealed in sexual exploitation.

Furthermore, prostitution and sex tourism also fuel the cycle of abuse as by-products of sex trafficking.²⁶ U.S. Attorney General Alberto Gonzales accurately described one aspect of this cyclical scheme by stating, "...sex slavery is intrinsically linked to prostitution, which is inherently harmful and dehumanizing."²⁷ In fact, child prostitution, like child sex trafficking, impacts up to two million children every year,²⁸ of which 400,000 are prostituted into the United States.²⁹ Child sex victims are recruited from Latin American, East Asian, and Pacific and European countries, which are known as originating countries.³⁰ Traffickers utilize key tactics such as

²⁴ Trafficking in Persons 2007 Report, *supra* note 17, at 8. The report describes how trafficking victims can be exposed to both labor and sexual exploitation where they are required to work and provide sex.

²⁵ See generally, *id.*

²⁶ Kelly Schwab, *The Sexual Exploitation of Children: Suppressing the Global Demand and Domestic Options for Regulating Prostitution*, 13 TUL. J. INT'L & COMP. L. 333, 334 (2005). See also, Trafficking in Persons 2006 Report, *supra* note 10, at 24. The report defines child sex tourism as part of the global commercial sex trade industry where people travel from their own country to other countries in order to engage in sex acts with children.

²⁷ Alberto R. Gonzales, Attorney General, Prepared Remarks at the Freedom Network USA Conference in Chicago, Illinois (Mar. 15, 2006). Transcript available online at: http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_0603151.html.

²⁸ See generally *supra* note 17.

²⁹ Mia Spangenberg, *Prostituted Youth in New York City: An Overview*, ECPAT-USA (2001), available at <http://www.ecpatusa.org>, at 1 (last visited Mar. 12, 2008).

³⁰ Buckwalter, *supra* note 3, at 407.

force and deception³¹ to supply the U.S. prostitution industry.³²

Pimps from all ethnic backgrounds recruit Mexican teenagers who are transferred within an internal circuit of cities from California to New York to service the sex industry³³ in New York where ethnic communities have their own secluded areas of sexual exploitation. It seems not only logical, but also morally compelling to argue that if child sex victims from other countries are injected and exploited within the sex industry in U.S. cities like New York,³⁴ then they become a part of this nation's problem. Our immigration law policy should, therefore, extend to accommodate safe haven for these child sex victims.

An extension of the adjustment of status provisions under the immigration code to include a presumption of lawful permanent residency status is warranted. Some may view this recommendation as incongruent with present day immigration law policy where today's political conservatives advocate closing our country's borders³⁵ in the name of homeland security. Comprehending the magnitude of child sex trafficking beyond the cycle of abuse allows us to focus our efforts on its resulting harms. In doing so, perhaps an extension of the immigration law policy will appear more palatable.

³¹ Alison Cole, *Reconceptualizing Female Trafficking: The Inhuman Trade In Women*, 26 WOMEN'S RTS. L. REP. 97, 104 (2005) (where the author identifies organized crime gangs who employ deception and force to lure women into prostitution).

³² Richard, *supra* note 3, at 450 (where the author discusses how the majority of persons trafficked from countries such as Asia and the former Soviet Union are placed in domestic servitude and prostitution).

³³ *Id.*

³⁴ *Id.*

³⁵ See Michael J. Trebilcock and Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. REV. 234, 271-72.(2006). The author explains how the general public operates out of fear that opening our borders without restrictions on participation will cascade into the ultimate destruction of the welfare system in this country. This article suggests that economic fears do not override humanitarian principles when failure to act amounts to neglect of child sex victims.

B. Cyclical Harms –Psychological and Emotional Abuse

Specific data on trafficking of child sex victims and the corresponding abuse that they suffer can only be identified in general terms since modern technology and international organized crime promote sequestration of the industry's operation.³⁶ Identifying quantifiable harms of sexually exploited child sex victims through prostitution is not always readily available since children are not commonly seen wandering the streets of our cities. Instead, anonymity of the sex industry consumers³⁷ is preserved through use of the internet, cell phones and pagers.³⁸ When the U.S. Department of State (hereinafter referred to as "State Department") assesses the efforts of other countries in combating trafficking, it describes the difficulty in distinguishing sexually exploited victims from smuggling victims because the illegal and underground nature of the industry promotes consuming fear and silence.³⁹ One story of a prostituted child through human trafficking channels depicts the multiple layers of abuse.

For the 13 year old Azerbaijani girl who was afflicted with the AIDS virus after being sold to traffickers in Dubai when she was 9 years old, human sex trafficking harms are unmistakably evident. After being prostituted, she eventually gave birth to an HIV-positive baby.⁴⁰ Although this child sex victim was not trafficked into the United States, her story signifies the magnitude of abuse suffered by her counterparts in the industry. We can not ignore the profound physical and emotional damage endured by child sex victims and the

³⁶ Alexandra Amiel, *Integrating A Human Rights Perspective Into The European Approach To Combating The Trafficking Of Women For Sexual Exploitation*, 12 BUFF. HUM. RTS. L. REV. 5 (2006) (where the author describes the connection between organized crime and trafficking and how modern technology facilitates continual abuse).

³⁷ Trafficking In Persons 2007 Report, *supra* note 17, at 23. The report describes how tourist travel to developing countries seeking the services of child prostitutes while maintaining anonymity.

³⁸ *Id.*

³⁹ Trafficking in Persons 2006 Report, *supra* note 10, at 12-13.

⁴⁰ *Id.* at 12-13.

inevitably permanent harms.⁴¹ The Azerbaijani girl initially suffered emotional and psychological harm after the death of her father. Later, her mother sold her to traffickers who ripped the girl from her homeland. Eventually, she succumbed to her sexually abusive captors when placed into a prostitution ring where presumably the girl lost her virginity. After being robbed of her virginity, she faced even more physical and psychological harm through infection of a deadly disease. In the end, this Azerbaijani girl is responsible, at a pre-pubescent age, for an AIDS infected child to whom she transmitted the deadly virus.

And so, the cyclical nature of the child sex industry in this country is further depicted through the psychological harms of children who are deceived and coerced⁴² into leaving their familiar surroundings only to be subsequently forced to survive in an unfamiliar American culture. Once here, the language barriers coupled with isolation by the traffickers⁴³ prevent any connection with a lifestyle outside the industry. Child prostitutes face life threatening risks in the form of physical violence and repeated rape⁴⁴ committed by clients and pimps. The psychological and physical oppression of children as a particularly vulnerable group heightens the likelihood of continued re-trafficking since return to their home communities will most likely result in them being ostracized by the family and community with which they

⁴¹ *Id.* at 12.

⁴² Amy Fraley, *Child Sex Tourism Legislation Under the PROTECT Act: Does It Really Protect?*, 79 ST. JOHN'S L. REV. 445, 450 (2005).

⁴³ Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 COLUM. J. ASIAN L. 371, 376 (2004) (where the author depicts the exploitation of undocumented workers who become victims of trafficking from other countries and held captive based on, among other things, their inability to communicate).

⁴⁴ Rieger, *supra* note 14, at 232. In describing the operation of sex trafficking, the author discusses how many women are forced into prostitution to pay for their passage into the U.S. Rape, beatings and slave like conditions is the high price paid by these victims. Likewise, the mail order bride industry forces young female children into sexual exploitation and rape. See Suzanne H. Jackson, *To Honor and Obey: Trafficking in "Mail Order Brides"*, 70 GEO. WASH. L. REV. 475, 501 (2002)

initially identified.⁴⁵ Consequently, the oppressive cycle of abuse reveals the pure insidiousness of the industry.

C. The Economics of Child Sex Trafficking

Like any commercial enterprise, the human sex trafficking industry is based on supply and demand.⁴⁶ The supply source is borne out of the realities of poverty, corruption, desperation, and ignorance present in the origination countries⁴⁷ where inherently vulnerable children serve as prey for traffickers.⁴⁸ Their bodies are sought by purchasers in the destination countries where the demand of male sex buyers⁴⁹ create a strong multi-billion dollar profit incentive for traffickers.⁵⁰ By illustration, consider that human sex trafficking as a major business fuels organized crime up to an amount that approaches the value placed by the United States Department of Education on funding initiatives to aide disadvantaged children.⁵¹ The economics alone plainly suggest extreme action to combat the operation of human sex trafficking in this country.

⁴⁵ Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon In The Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195, 197 (2006).

⁴⁶ Hanh Diep, *We Pay—The Economic Manipulation of International And Domestic Laws To Sustain Sex Trafficking*, 2 LOY. INT’L L. REV. 309 (2005)

⁴⁷ *Id.* at 310. The author identifies the disparities in political, economic and legal conditions as the source of supply and demand for traffickers to exploit their victims.

⁴⁸ Michelle Adelman, *International Sex Trafficking: Dismantling The Demand*, 13 S. CAL. REV. L. & WOMEN’S STUD. 387, 394 (2004).

⁴⁹ Diep, *supra* note 46, at 309.

⁵⁰ Rieger, *supra* note 14, at 231. Profits for the sex trafficking industry are estimated to range between \$7 to 10 billion dollars each year.

⁵¹ Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-149, 119 Stat. 2833, Title 3 (Dec. 30, 2005). The U.S Department of Education published an overview of the fiscal year 2006 Appropriations, *available at* <http://www.ed.gov/about/overview/budget/budget08/justifications/a-edfordis.pdf>.

III. Enactment of the Human Trafficking Legislation: A Comprehensive Response That Renders an Incompetent Impact

A. An Overview

Like many of the known tragedies of modern times, child sex trafficking has not escaped the attention of our nation's government. In fact, recognition of the problem has generated a comprehensive piece of legislation designed to combat this modern day form of slavery.⁵² Although U.S. legislation has previously addressed the issue of human trafficking,⁵³ the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005⁵⁴ stands as the U.S. Government's most recent law mandating an end to the demand for commercial sexual exploitation of children. This provision is preceded by the initial legislation enacted in October 2000.⁵⁵ In response to the magnitude and international impact of sex trafficking, Congress compiled the most comprehensive federal law to confront the issue.⁵⁶ The legislation spans the full spectrum of resources and policy attending any major political and social issue.

Generally, the TVPRA and its predecessor, TVPA, prescribes specific actions to be taken by our government to

⁵² Richard, *supra* note 3, at 447.

⁵³ Trafficking cases were traditionally prosecuted under the Mann Act of 1910, which prohibited transportation of individuals in interstate or foreign commerce with intent to engage those individuals in prostitution or any sexual activity. Though the Mann Act is still in effect, it is rarely used to prosecute and was followed by the Illegal Immigration Reform and Immigration Responsibility Act of 1996. The IRIRA increased the maximum penalty for alien smuggling from five to ten years. Sasha L. Nel, *Victims of Human Trafficking: Are They Adequately Protected in the United States?*, 5 CHI.-KENT J. INT'L & COMP. L. 3, 18 (2005).

⁵⁴ 22 U.S.C.A. § 7101, *et seq.* (2006).

⁵⁵ Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 (Oct. 28, 2000). Subsequent amendments were made in 2003, Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) and in 2005, Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006).

⁵⁶ Richard, *supra* note 3, at 451.

educate, inform, assist, and finance all efforts to combat human sex trafficking.⁵⁷ The TVPRA sets forth government policy and anticipated actions to be taken toward other nations with regard to their practices in eliminating or condoning, as the case may be, human sex trafficking.⁵⁸ The comprehensiveness of the TVRPA and the degree of detail used to address its related issues signifies not only the magnitude and importance of human sex trafficking, but also the necessary extent to which this country must complete our commitment to its child victims. This Part will examine the T-visa as a legislatively constructed means of protecting human sex trafficking victims. By identifying its shortcomings, this Part lays the groundwork for examining an even greater legislatively constructed failure found in the SIJ provisions.

B. Prevention and Prosecution of Traffickers Heralded by the TVPRA as the Linchpin of Human Sex Trafficking

In order to properly attack human sex trafficking,⁵⁹ the TVPRA provisions centralize on three primary concepts—prosecution, prevention, and protection.⁶⁰ Under the prosecution prong, the U.S. develops minimum standards for prohibiting and punishing any act of sex trafficking.⁶¹ The prosecution provisions delineate specific criteria for identifying those governments who actively participate in the investigation and prosecution of sex traffickers.⁶² A system of

⁵⁷ See generally, 22 U.S.C.A. § 7101 (West 2000).

⁵⁸ See generally, 22 U.S.C.A. § 7106 (a) (West 2003) (the minimum standards promulgated by the U.S. government require that nations involving a significant number of victims of severe forms of trafficking attempt to prohibit and punish such acts; sanctions for not complying with the minimum standards includes withholding of non-humanitarian, non-trade related assistance).

⁵⁹ Jennifer Wetmore, *The New T-Visa: Is The Higher Extreme Hardship Standard Too High For Bona Fide Trafficking Victims?*, 9 NEW ENG. J. INT'L & COMP. L. 159, 165-66 (2003).

⁶⁰ *Id.* This article generally summarizes the three prongs and highlights only those areas of specific relevance to the issue of protections under the immigration laws as indicated by the human trafficking provisions.

⁶¹ See generally, 22 U.S.C.A. § 7106(a) (2003).

⁶² See 22 U.S.C.A. § 7106(b) (West 2006).

accountability identifies those countries who do *not* comply with the minimum standards.⁶³ And, the State Department publishes an annual report⁶⁴ that specifies how those countries failed to comply with the minimum standards. When a country fails to comply with eradicating human trafficking, or, at least, make significant efforts to do so, it is subject to the U.S. statement of policy that eliminates all provision from the government for nonhumanitarian or nontrade-related foreign assistance.⁶⁵

Moreover, the TVPRA puts forth an even deeper level of commitment by granting authority to the President to, generally, investigate, regulate, and prohibit foreign exchange transactions or other transfers of money and credit involving the interests of a foreign country.⁶⁶ The President may exercise his authority against any foreign person that significantly or materially assists in or acts on behalf of foreign traffickers.⁶⁷ The power to interfere with financial transactions incident to trafficking in persons is granted under the TVPRA notwithstanding times of unusual and extraordinary threat to national security.⁶⁸ Overall, the provisions that comprise the prosecution prong demonstrate this country's vow to eradicate human sex trafficking. Nevertheless, the efforts taken to prosecute traffickers are unequal to the efforts taken for prevention of this travesty.

One way to prevent human trafficking is to address the needs of its victims. The prevention prong⁶⁹ outlines specific initiatives that target potential victims of sex trafficking by affording them various opportunities through participation in the initiatives⁷⁰ that strive to provide support for training programs aimed at promoting business skills, education, and

⁶³ See 22 U.S.C.A. § 7106(a)(1)-(4) (West 2006).

⁶⁴ See 22 U.S.C.A. § 7107(b) (West 2006).

⁶⁵ 22 U.S.C.A. § 7107(a) (West 2006).

⁶⁶ 22 U.S.C.A. § 7108(a)(1) (2000). See also, 50 U.S.C.A. § 1701, 1702 (2007).

⁶⁷ 22 U.S.C.A. § 7108(a)(1)(A)-(C) (West 2006).

⁶⁸ 50 U.S.C.A. § 1701.

⁶⁹ See generally, 22 U.S.C.A. § 7104 (West 2006).

⁷⁰ 22 U.S.C.A. § 7104(a)(1)-(5) (West 2006).

economic advancement.⁷¹ The prevention prong also provides for increased public awareness in both the U.S. and other countries by requiring establishment of programs that inform citizens about the dangers of trafficking, its slave-like practices, and other human rights abuses.⁷²

Heightened public awareness of the trafficking industry constitutes an essential step toward its obliteration, but prevention measures must also provide for improved border interdiction⁷³ where traffickers enter the United States. This means providing grants to fund foreign non-governmental organizations or NGOs⁷⁴ that integrate assistance for victims with education of border guards and officials.⁷⁵ If the victims are treated in an appropriate manner when they reach the borders, then they can help identify the traffickers before leaving the destination countries.

And so, as demonstrated in the prosecution and prevention prongs of the TVPRA, the U.S. has pledged to utilize resources and power to end human sex trafficking industry. Ultimately, however, the protection prong, particularly as it relates to children, bears the greatest level of social and political responsibility.

⁷¹ 22 U.S.C.A. § 7104(a)(1)-(3) (West 2006).

⁷² See 22 U.S.C.A. § 7104(b), (d) (West 2006).

⁷³ See 22 U.S.C.A. § 7104(c) (West 2006)..

⁷⁴ The United Nations Department of Public Information defines the term as, "...a not-for-profit, voluntary citizens' group, which is organized on a local, national or international level to address issues in support of the public good. Task-oriented and made up of people with a common interest, NGOs perform a variety of services and humanitarian functions, bring citizens' concerns to Governments, monitor policy and programme implementation, and encourage participation of civil society stakeholders at the community level. They provide analysis and expertise, serve as early warning mechanisms and help monitor and implement international agreements. Some are organized around specific issues, such as human rights, the environment or health." NGOs and the United Nations Department of Public Information: Some Questions and Answers, available at <http://www.un.org/dpi/ngosection/brochure.htm>.

⁷⁵ See 22 U.S.C.A. § 7104(c) (West 2006).

C. Protection of Child Sex Victims: Prevention and Prosecution In Disguise

The pure vulnerability of human sex trafficking victims compels humanitarian protection. If we fail to protect the victims, then the prosecution measures are exercised in vain, and until prevention becomes a reality, many will continue to endure untold suffering. The problem cannot be instantly eradicated. Therefore, the process must, in the interim, effectively attend to its victims. When evaluating the protection prong of the TVPRA, one recognizes that, in practice, the expressed priority for prevention and prosecution measures actually detracts from any efforts to shield child sex victims who arrive in the United States. A substantive analysis of the protection prong in the human trafficking legislation reveals subtle failures.

Under the protection prong,⁷⁶ the TVPRA addresses victims of trafficking in other countries as well as in the United States.⁷⁷ Perhaps, most notably, several provisions prescribe an elaborate scheme for receipt of benefits and services that builds upon the statutory language defining “victims of severe forms of trafficking in persons.”⁷⁸ Based on

⁷⁶ See generally, 22 U.S.C.A. § 7105 (2006).

⁷⁷ 22 U.S.C.A. § 7105 (a), (b) (West 2006). Under subsection (a), the legislation provides for assistance of victims in other countries by establishing programs for reintegration and resettlement of victims of trafficking into their communities as well as providing support services, education, and training for women and girls. 22 U.S.C.A. § 7105(a)(1) (2006).

⁷⁸ See generally, 22 U.S.C.A. § 7105(b)(1)(A), (B), (C) (West 2006). The statute defines a “victim of a severe form of trafficking in persons” as an individual who qualifies under either of 2 sets of criteria. Under the first criteria, one is a victim within the meaning of the statute if he has been recruited, harbored, transported or obtained by use of force or coercion to participate in commercial sex acts to commercial sex acts as described in 22 U.S.C.A. § 7102(8) and he has not attained 18 years of age. Under the second criteria, one can become “certified” as a “victim of a severe form of trafficking” by the Secretary of Health and Human Services in conjunction with the Secretary of Homeland Security and the Attorney General if they determine that his continued presence in the U.S. means that he will effectively assist in the investigation and prosecution of traffickers in persons. See generally, 22 U.S.C.A. § 7105(b)(1)(E) (West 2006).

the prescribed definition of this term, we see how the human trafficking provisions intermingle with the immigration law provisions in a somewhat necessary, yet incongruent manner.⁷⁹ This article intends to show how the link between the two areas of law misappropriates U.S. congressional focus on prevention and prosecution rather than protection for child sex victims. But, first, let's examine identified problems in the initial legislation, Trafficking Victims Protection Act of 2000, as it applies to adult human sex trafficking victims, in general.

An alien who is a "victim of severe form of trafficking in persons" is eligible to receive benefits and services under federal and state programs.⁸⁰ Likewise, the TVPA of 2000 requires expanded benefits and services to be provided *without regard to their immigration status*.⁸¹ The receipt of expanded benefits and services is subject, however, to a victim's qualification under the definition for a "victim of a severe form of trafficking". At this point, it appears as though human trafficking victims can receive benefits and services without regard to any determination as to their legal or illegal presence in the country. But, the statutory language as it relates to adults defining a "victim of severe form of trafficking in persons" is limited to, "...only a person who has been subject to an act or practice described in section 7102(8)..."⁸² and (emphasis added) "who is the subject of a certification under (E)".⁸³

The certification provision under subparagraph (E) describes a process by which the Secretary of Health and

⁷⁹ See generally, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 3244 (2000), from which certain provisions of the law now referred to as the Trafficking Victims Protection Act were later codified under Title 22 of the United States Code.

§ 107(e) of the Public Law No. 106-386 also amended the immigration law provisions under Title 8 of the United States Code, § 1101(a)(15).

⁸⁰ 22 U.S.C.A. § 7105(b)(1)(A) (West 2006). This provision was amended by Pub. L. No. 108-193, 2003 HR 2620 to include, in the disjunctive, "an alien classified as a nonimmigrant under section 101(a)(15)(T)(ii)".

⁸¹ 22 U.S.C.A. § 7105(b)(1)(B) (West 2006).

⁸² 22 U.S.C.A. § 7105(b)(1)(C)(i) (West 2006).

⁸³ 22 U.S.C.A. § 7105(b)(1)(C)(ii)(II) (West 2006).

Human Services, after consulting with the Department of Homeland Security and the Attorney General, identifies the victim as one who is willing to assist in the investigation and prosecution of their trafficker and has made a bona fide application under the immigration law for protected status in the form of a T-visa. If the victim has not applied for T-visa, he can still be “certified” as one who can receive benefits and services if the Attorney General determines that his continued presence aids in the prosecution of traffickers.⁸⁴ Consequently, the receipt of benefits and services for adult human trafficking victims is directly tied to the immigration law provisions in that the victims must be “certified” as one who cooperates in the investigation and prosecution of their traffickers.⁸⁵

Certainly, the human trafficking legislation was generally written in such a manner to qualify sex trafficking victims for protections under the immigration laws, however, to the extent that the immigrant law provisions and policies ultimately influence the victims’ lawful status in the country without granting them more than “continued presence” in the United States as conditioned upon cooperation in the prosecution of the traffickers, then the victims can, at any time, be potentially removed.⁸⁶

⁸⁴ 22 U.S.C.A. § 7105(b)(1)(E)(i) (West 2006).

⁸⁵ 22 U.S.C.A. § 7105(b)(1)(E) (West 2006). Certification is determined by the Secretary of Health and Human Services, after consultation with the Attorney General and the Secretary of Homeland Security. The Secretary determines that the person 1) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons; and 2) has made a bona fide application for a visa under section 1101(a)(15)(T) of Title 8 that has not been denied; or is a person whose continued presence in the United States the Attorney General and the Secretary of Homeland Security is ensuring in order to effectuate prosecution of traffickers in persons.

⁸⁶ 8 U.S.C.A. § 1184(a) (1) (2006) provides, “the admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond...to insure that **at the expiration of such time** (emphasis added) or upon failure to maintain the status under which he was admitted,...such alien will depart from the United States.” Furthermore, an alien is subject to “removal” based on the

Even though the immigration law provisions were amended to include protection from removal in the form of a T-visa, the cooperation condition reflects a priority for prosecution. It is impractical and dysfunctional especially for younger victims when the traumatic circumstances of the human trafficking culture preclude meaningful cooperation. As a result, Congress amended the TVPA requirements to exclude cooperation by victims under the age of 18.⁸⁷

1. T-Visa Status as Protection from Removal:
Treatment for Child Sex Victims under the
TVPA 2000

While Congress initially contemplated protections for adult human trafficking victims in the T-visa provisions of the TVPA, it did not consider particular problems with the legislative construction of the governing provisions.⁸⁸ An examination of the TVPA as it relates to protections afforded to *all* victims will demonstrate how the legislation purports to offer “certification” for receiving benefits and services, but, at the same time, excludes protection from removal for those victims unless they cooperate in the prosecution of their traffickers.⁸⁹ For these reasons, protections for child sex victims in the form of presumptive lawful permanent residency status under section 1255 of the immigration code cures the legislative oversights.

discretion of the immigration judge and his application of Section 240 of the Immigration Nationality Act. 8 C.F.R. §1240.1.

⁸⁷ Pub. L. No. 108-193, 117 Stat. 2875, § 4 (2003).

⁸⁸ TVPRA 2003 addresses the obstacles faced by victims of trafficking under TVPA of 2000, but does not specifically outline issues faced by juvenile trafficking victims. *Id.* at § 2. Under the 2005 amendments, Congress establishes a pilot program to provide benefits and services to juveniles subjected to trafficking, including shelter, psychological counseling, and assistance in developing independent living skills. TVPRA '05 also requires the Secretary of the Department of Health and Human Services to partner with organizations with expertise in handling juveniles subjected to sexual abuse or exploitation. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, § 203 (a), (b), (d) (2006).

⁸⁹ *See generally*, 22 U.S.C.A. § 7105(b)(1)(E) (West 2006).

Initially, Congress was amenable to requiring younger victims to cooperate with immigration officials.⁹⁰ The TVPA of 2000 provided for protection from removal for “certain crime victims”⁹¹ by amending the Immigration and Nationality Act⁹² to include those aliens who the Attorney General determines generally meets the following four criteria:⁹³ (1) the alien is or has been a victim of a severe form of trafficking in persons as defined under the TVPA, (2) the alien is physically present in the United States, (3) the alien has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, and (4) the alien would suffer extreme hardship involving unusual and severe harm upon removal. The TVPA of 2000 exempted, however, an alien who “has not attained 15 years of age” from the third requirement of providing investigative assistance in the prosecution of traffickers for purposes of obtaining protection from removal.

Based on the original language, children who attained the age of 15 and older were required to cooperate with the immigration officials in assisting with prosecution of their captors. It became clear that, for many reasons, children would be unable to effectively comply, or, in any way, meet this requirement in order to obtain protection from removal.⁹⁴ Accordingly, the TVPRA 2003 amended the INA § 101(a)(15)(T),⁹⁵ T-visa provisions, to provide for an increase in the age requirement from those who have not attained the

⁹⁰ In fact, the Committee on International Relations recommended language amending a 1999 version of the trafficking legislation that required assistance with investigation of traffickers from victims who have attained the age of 14 or older. H. R. REP. NO. 106-487(I) (1999).

⁹¹ Pub. L. No. 106-386, 114 Stat. 1464, 1477, § 107(e)(1) (2000).

⁹² See generally, 8 U.S.C.A. § 1101(a)(15) (West 2008); see also, 22 U.S.C.A. § 7105(e) (West 2006).

⁹³ Pub. L. No. 106-386, 114 Stat. 1464, 1477, § 107(e)(1) (2000).

⁹⁴ Even children over 15 years of age may be unwilling to aid in investigations because of fear of reprisals, intense shame, or psychological trauma. Devon A. Corneal, *On The Way To Grandmother's House: Is U.S. Immigration Policy More Dangerous Than The Big Bad Wolf For Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609 (2004).

⁹⁵ Codified under the United States Code as 8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(bb) (West 2006).

age of 15 to include those who have not attained 18 years of age.⁹⁶ While increasing the age to 18 years for cooperation in the prosecution of traffickers, the amended legislation still presented further concerns in securing protect for younger sex victims notwithstanding their cooperation.

D. Current TVPRA Treatment: Legislatively Constructed Roadblocks to Protection for Child Sex Victims

This section will illustrate how exclusion from the cooperation requirements means that child sex victims are barred, at least under statutory construction, from obtaining T-visa protected status. The current human trafficking legislation considers victims who have not attained the age of majority in the following manner. First, the definition, “victim of a severe form of trafficking in persons” divides aliens into two groups under the following provision:

(C) Definition of victim of a severe form of trafficking in persons

For the purposes of this paragraph, the term "victim of a severe form of trafficking in persons" means only a person

(i) who has been subjected to an act or practice described in section 7102(8)⁹⁷ of this title as in effect on October 28, 2000; and

(ii) (I) who has not attained 18 years of age; or
(II) who is the subject of a certification under subparagraph (E).

⁹⁶ Pub. L. No. 108-193, 117 Stat. 2875, 2878, § 4(b)(A) (2003).

⁹⁷ This provision defines the term "severe forms of trafficking in persons" as (A) 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 (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. 22 U.S.C.A. § 7102(8) (West 2003).

The law sets forth one group comprised of (1) those who have been subjected to commercial sex acts by force, fraud or coercion under section 7102(8), **and** (2) those who have not attained 18 years of age.⁹⁸ The other group is comprised of (1) those who have been subjected to commercial sex acts by force, fraud or coercion under section 7102(8), and (2) those who are the subject of a certification under subparagraph (E).⁹⁹ The statutory construction bifurcates adult victims under (C)(i) from children (child sex victims) under (C)(ii)(I). Then, the disjunctive language, “or”, separates child sex victims under (C)(ii)(I) from those subject to certification under subparagraph (E).¹⁰⁰

This means that when subparagraph (E) references, “...the person referred to in subparagraph (C)(ii)(II)”, child sex victims are effectively excluded from its certification requirements that link the definition of a “victim of a severe form of trafficking” to assistance in the investigation and prosecution of traffickers.¹⁰¹ Consequently, children are considered victims of a severe form of trafficking as defined under the TVPRA and can receive benefits and services without assisting in the investigation and prosecution of traffickers. At first glance, the legislation seems to correct the previously identified obstacle of cooperation for younger trafficking victims; however, Congress injected another obstacle in its place.

Even though child sex victims are eligible to receive benefits and services, they are still subject to removal if they have not obtained some form of protected status that is offered to their adult counterparts under the subparagraph (E) certification requirement from which they are specifically excluded. The TVPRA certification provisions specifically exclude persons who have not attained the age of 18 as identified in the discussion above.¹⁰² In effect, subparagraph

⁹⁸ 22 U.S.C.A. § 7105(b)(1)(C)(ii)(I) (West 2006).

⁹⁹ 22 U.S.C.A. § 7105(b)(1)(C)(ii)(II) (West 2006).

¹⁰⁰ 22 U.S.C.A. § 7105(b)(1)(C)(ii)(I), (II) (West 2006).

¹⁰¹ 22 U.S.C.A. § 7105(b)(1)(E)(i) (West 2006).

¹⁰² 22 U.S.C.A. § 7105(b)(1)(E)(i) (West 2006) of the certification provisions states, “. . . the certification referred to in subparagraph (C) is a

(C) purports to offer benefits and services for child sex victims unencumbered by a requirement for cooperation in prosecuting their traffickers; but through application of subparagraph (E), they are excluded from protection.

The certification provisions of subparagraph (E) condition “certification” on, not only assisting in the investigation and prosecution of traffickers,¹⁰³ but also on making “bona fide application for a visa under section 101(a)(15)(T) of the Immigration and Nationality Act” -- Title 8.¹⁰⁴ Consequently, child sex victims must obtain protection from removal independent of the TVPRA provisions that, for adult victims, link T-visa status with certification and cooperation in the prosecution of traffickers. Perhaps Congress intended for young sex victims of human trafficking to seek T-Visa status outside the legislatively constructed TVPRA certification requirements as they are linked to cooperation. Unfortunately, seeking T-visa status presents its own obstacles for child sex victims. It becomes necessary, therefore, to closely examine another crucial link between the human trafficking provisions and the immigration code provisions where the sentiment driving one set of legislation is compromised by the less considerate policies of another set of legislation.

When Congress enacted the human trafficking legislation, certain provisions, quite necessarily, had to provide protection from removal for the victims of the industry if, for nothing else, but to further the prosecution objective. But, once an individual protected under the human trafficking legislation becomes less useful for prosecuting

certification . . . that the person referred to in subparagraph (C)(ii)(II)” By exclusion, this provision applies only to those victims of a severe form of trafficking who are NOT 18 years of age as referenced in subparagraph (C)(ii)(I).

¹⁰³ 22 U.S.C.A. § 7105(b)(1)(E)(i)(I) (West 2006).

¹⁰⁴ 22 U.S.C.A. § 7105(b)(1)(E)(i)(II)(aa) (West 2006). This section offers an alternative for securing T-visa status by gaining an “endorsement” from the Secretary of Homeland Security that his continued presence in the United States is necessary to effectuate prosecution of traffickers. 22 U.S.C.A. § 7105(b)(1)(E)(i)(II)(bb) (West 2006).

traffickers, it is less important to reconcile his treatment under the TVPRA with his treatment under the immigration code provisions. Accordingly, if children can not cooperate in prosecuting traffickers, then query whether securing T-visa protection for child sex victims under the immigration laws functionally affords them the protections presumably contemplated by the human trafficking legislation.

As we will see, obtaining T-Visa status for any victim of human trafficking is conditioned upon restrictions for duration of stay, an annual cap on the amount of T-visas granted,¹⁰⁵ and other administrative entanglements that ultimately compromise any protective measures contemplated by the human trafficking legislation. Let's, first, consider the unique impact that the T-Visa regulations have on children and their ability to satisfy them.

E. Nonimmigrant T-Visa Classification for Child Sex Victims under the Immigration Regulations: A Viable Solution or An Administrative Delusion?

Under the immigration regulations governing alien victims of severe forms of trafficking in persons, a "victim of a severe form of trafficking in persons" is eligible for classification as a "T-1 nonimmigrant" if he is physically present in the U.S. and, as stated in the human trafficking provisions, has cooperated in the investigation and prosecution of traffickers.¹⁰⁶ We will see, however, that the eligibility requirements under the immigration code¹⁰⁷ as compared to the same under the regulations conflict. Although child sex victims are exempt from the requirement to assist in prosecution, the T-visa regulations have not been amended to

¹⁰⁵ See generally, 8 C.F.R. § 214.11(p) (2002); See also, 8 U.S.C.A. § 1184(o)(2) (2008) (provides the "total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year under section 101(a)(15)(T) of this title may not exceed 5,000."). See also, 8 U.S.C.A. § 1184 (o)(7)(A) (2008) that states, "except as provided in subparagraph (B), an alien who is issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(T) of this title may be granted such status for a period of not more than 4 years".

¹⁰⁶ 8 C.F.R. § 214.11(b)(1)-(2) (2008).

¹⁰⁷ See generally, 8 U.S.C.A. § 1101(a)(15)(T) (West 2006)

provide an exemption for child sex victims less than 18 years of age instead of 15 years of age under the prior law. Consequently, the immigration code provides an exemption for children, but the current regulations do not.¹⁰⁸ At a minimum, this conflict creates confusion amidst the already existing entanglements present in the eligibility provisions.

Confusion erupts when a child sex victim who seeks classification as a T-1 nonimmigrant must meet the following four classification requirements: (1) that the child applicant is a victim of a severe form of trafficking in persons, (2) that he is physically present in the United States on account of the trafficking, (3) that he is less than 15 years of age,¹⁰⁹ and (4) that he would suffer extreme hardship if removed from the United States.¹¹⁰ Each of these evidentiary items must be satisfied based on the application procedures for T-status that reference other paragraphs in the regulations.¹¹¹ For instance, filing deadlines apply¹¹² as well as fingerprinting procedures¹¹³ and personal interviews.¹¹⁴ The procedural rules may not appear egregious to most applicants. For a child sex victim, however, who may not benefit from the stewardship of a concerned adult, compiling an application package with supporting evidentiary documentation that the child applicant meets the regulatory requirements is monumental.

To illustrate, § 214.11(d) delineates the specific content of a complete application package.¹¹⁵ In addition to

¹⁰⁸ 8 C.F.R. § 214.11(b)(3)(ii) (2008).

¹⁰⁹ 8 C.F.R. § 214.11(b)(3)(i), (ii) (2008). Other victims who do not meet the age qualification must demonstrate reasonable compliance with assisting in the investigation and prosecution of traffickers.

¹¹⁰ *See generally*, 8 C.F.R. § 214.11(d)(2) (2008). The contents of the application package must include items like a Form I-914 (a proper fee) or fee waiver, current photographs, fingerprinting fee, and more importantly, evidence demonstrating that the child is a victim of a severe form of trafficking and will suffer extreme hardship if he is removed from the United States.

¹¹¹ *See generally*, 8 C.F.R. § 214.11(d) (2008).

¹¹² 8 C.F.R. § 214.11(d)(4) (2008).

¹¹³ 8 C.F.R. § 214.11(d)(5) (2008).

¹¹⁴ 8 C.F.R. § 214.11(d)(6) (2008).

¹¹⁵ 8 C.F.R. § 214.11(d)(2) (2008).

requirements such as photographs and fingerprinting fees, the applicant must include evidence that he has complied with any reasonable request for assistance in investigation and prosecution of traffickers.¹¹⁶ However, if the applicant can provide evidence that he has not attained 15 years of age, then he is exempt from this evidentiary showing.¹¹⁷ Thus, the child sex victim is **not** required to assist with the prosecution of traffickers under the immigration code if he is under 18 years of age,¹¹⁸ yet the regulatory provisions indicate that he is **not** required to assist if he is less than 15 years of age.¹¹⁹ Under the regulations, child sex victims are still required to provide evidence of their age in the form of either an official copy of their birth certificate, passport or certified medical opinion,¹²⁰ and evidence demonstrating that they face extreme hardship if removed from the United States.¹²¹ Several factors may be considered in satisfying the extreme hardship standard, and “in appropriate cases...the Service may consider evidence from relevant country condition reports and any other public or private sources of information.”¹²²

What’s problematic about these regulatory provisions is the practical implementation for satisfying the requirements when a child sex victim who is in a foreign country and unable to speak the language. Most often, he is unattended by a caring or responsible adult and, at the same time, traumatized by his circumstances. Children seeking T-visa protection might occasionally be stewarded by an adult acting on his behalf that may or may not have access to accurate data as to the child’s country of origin or birth records.

¹¹⁶ 8 C.F.R. § 214.11(d)(2)(vii) (2008).

¹¹⁷ *Id.*

¹¹⁸ 8 U.S.C.A. § 1101(a)(15)(T)(i)(III)(bb) (2006 West).

¹¹⁹ 8 C.F.R. § 214.11(d)(2)(vi) (2008).

¹²⁰ 8 C.F.R. § 214.11(h)(3) (2008).

¹²¹ 8 C.F.R. § 214.11(i) (2008).

¹²² 8 C.F.R. § 214.11(i)(3) (2008). See, 2004 Annual Conference of Lutheran Immigration and Refugee Services (LIRS), Arthur E. Dewey, Assistant Secretary for Population, Refugees and Migration, Remarks to the Conference, Atlanta, Georgia, June 18, 2004.

Nongovernmental Organizations (NGOs)¹²³ function in cities across the country taking stewardship over unaccompanied alien children who are discovered in abusive circumstances. Based on practical and legal considerations, we must question whether every child sex victim can be properly stewarded through the elaborate bureaucratic scheme set forth by the immigration provisions so that he attains appropriate protections from removal, or are they generally lost as one of millions of undocumented aliens in this country?

The bureaucratic entanglements alone are sufficient basis for reconsideration of our professed protections for child sex victims. With an estimated 50,000 women and children trafficked into this country for commercial sexual exploitation every year, protection must be afforded beyond an annual 5000 total T-1 nonimmigrant status visa cap.¹²⁴ It seems logical that our Congress would enact legislation addressing human trafficking without providing an effective protection for its victims. Yet, interestingly, the T-visa was legislatively designed to fulfill two primary purposes: to strengthen the ability of law enforcement personnel to detect, arrest, and prosecute traffickers and to empower them with the means for protecting trafficking victims.¹²⁵

This article suggests that the T-visa is nothing more than a “legislative remedy” rather than a meaningful redress offered by our country to rectify the most egregious harm committed against the world’s most vulnerable victims. One commentator appropriately observes, “the TVPRA has been such an ineffective tool in aiding trafficking victims...(because)..it overemphasizes prosecution, while underemphasizing protection...”¹²⁶

¹²³ See, 2004 Annual Conference of Lutheran Immigration and Refugee Services (LIRS), Arthur E. Dewey, Assistant Secretary for Population, Refugees and Migration, Remarks to the Conference, Atlanta, Georgia, June 18, 2004.

¹²⁴ 8 C.F.R. § 214.11(m) (2008).

¹²⁵ Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 332 (2005).

¹²⁶ Chacon, *supra* note 13, at 3024.

In the absence of T-visa status, child sex victims can, alternatively, seek protection from removal under the Special Immigrant Juvenile status provisions in the immigration code. Unfortunately, the SIJ provisions and the legal doctrinal battles generated in the process also fail to offer the extent of protections prescribed by the human trafficking legislation for unaccompanied minor children¹²⁷ or child sex trafficking victims. The failures of the T-visa and SIJ visa primarily support an alternative remedy in the form of a rebuttable presumption of permanent residency status for child sex victims.

IV. The Special Immigrant Juvenile Provisions: An Invitation to a Doctrinal Battle

Congress recognized the illegal presence of children in the United States who are in need of protection and care. As a result, the Immigration and Nationality Act of 1990 provides for a “Special Immigrant Juvenile” status (SIJ) for certain aliens declared dependent on a juvenile court.¹²⁸ Generally, in

¹²⁷ Once outside the human trafficking legislation, child victims of sex trafficking are functionally equivalent to “unaccompanied minors” as that term is used in other areas of the law. This term is referred to in the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat 2135, Title IV, § 462 (2002). Generally, this legislation was enacted as part of the Bush Administration’s response to terrorism following the attacks on this country in September 2001; James Nieland, *Executive Suspension of National Elections: Sacrificing An American Dream to Avoid A Spanish Nightmare*, 15 TRANSNAT’L L. & CONTEMP. PROBS. 389, 391-92 (2005); The administrative restructuring incident to the Homeland Security Act impacted the provision of benefits and services offered to children specifically under the TVPA provisions. Under the Homeland Security Act, the functions of caring for unaccompanied alien children that were previously performed by the Commissioner of Immigration and Naturalization were transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services. Pub. L. No. 107-296, 116 Stat 2135, Title IV, § 462 (a) (2002). The Director of the Office of Refugee Resettlement shall be responsible for coordinating and implementing care for unaccompanied alien children, maintaining statistical data on such children, and other enumerated functions related to the care and custody of such children. *Id.* at § 462 (b)(1)(A), (B), (J).

¹²⁸ Pub. L. No. 101-649, 104 Stat. 4978 § 153 (1990). By obtaining special immigrant juvenile status, a juvenile is deemed to have been paroled into

order to qualify for SIJ status under the original language, a child must establish that (1) he has been declared dependent on a juvenile court located in the United States, (2) he has been deemed eligible by that court for long term foster care, and (3) it has been determined in administrative or judicial proceedings that it would not be in his best interest to be returned to his previous country of nationality.¹²⁹

After growing concern over the implementation of the SIJ provisions, Congress amended the statute in 1997 for the express purpose of limiting the beneficiaries to abandoned, neglected, or abused children.¹³⁰ Apparently, some SIJ applicants were not truly in need of protection based on their abandonment or abuse, but were instead seeking the special immigrant classification as a means to obtaining lawful permanent residency or a green card.¹³¹

the U.S. 8 U.S.C.A. § 1255(h) (2006). This means that the juvenile's status may be adjusted by the Director in his discretion to lawful permanent residence if he meets certain requirements. 8 U.S.C.A. § 1255(a) (2006). In an Interoffice Memorandum issued by the Department of Homeland Security-U.S. Citizenship and Immigration Services as Field Guidance on SIJ petitions states, "[j]uveniles who adjust status as a result of an SIJ classification enjoy all the benefits of lawful permanent residence, including eligibility for naturalize after five years..." Memorandum from William R. Yates, Associate Director for Operations, to Regional Directors (May 27, 2004). This article advocates for a rebuttable presumption of lawful permanent residency for child sex victims of human trafficking in place of securing SIJ status based on the doctrinal and inevitable procedural entanglements that are embedded in the SIJ provisions. Support for the presumption is derived from the policies and intent of U.S. and international laws.

¹²⁹ Pub. L. No. 101-649, 104 Stat. 4978, § 153(a)(3)(1990). Congress subsequently amended the third criteria to require that alien youth be deemed eligible for long term foster care "due to abuse, neglect, or abandonment" in response to perceived abuse of the SIJ provisions. Pub. L. No. 105-119, 111 Stat. 2440, § 113 (1997).

¹³⁰ 143 CONG. REC. H10809-01, 1997 WL 705004, H. REP. NO. 105-405 (1997).

¹³¹ Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, Or How To Ameliorate The Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT'L L.J. 237, 244 (2006).

The amended provisions preclude the state court's exercise of jurisdiction to determine custody or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.¹³² Despite Congress' intent, the subsequent amendments to the SIJ provisions launched obstacles couched in terms of legal doctrine. By analyzing the impact of the amended SIJ provisions, we can appreciate the legal doctrinal conflicts that they provoke.

A. Change Is Not Always A Good Thing: The 1997 Amendments to the SIJ Provisions

The 1997 SIJ amendments bifurcate the population of eligible children to receive SIJ immigration status into two groups—the “in custody” group and the “not in custody” group.¹³³ If the unaccompanied minor is not in the custody of immigration officials, then the state juvenile court may exercise jurisdiction.¹³⁴ The applicant is, then, only required to obtain consent from the Attorney General as to the dependency order issued.¹³⁵ In his Field Guidance Memorandum to the Regional Directors, the Associate Director of Operations for the Immigration and Naturalization Services¹³⁶ refers to the consent requirements under the amended SIJ provisions as “specific consent” and “express consent”.¹³⁷ The specific consent refers to the Director's consent for a juvenile court to exercise jurisdiction in a dependency proceeding over an alien youth who is in custody while express consent refers to the Director's approval of the

¹³² Pub. L. No. 105-119, 111 Stat 2440 § 113 (1997).

¹³³ *Id.* (amending 8 U.S.C.A. § 1101(a)(27)(J)(i)).

¹³⁴ *Id.* (amending 8 U.S.C.A. § 1101(a)(27)(J)(iii)(I)).

¹³⁵ *Id.* See also, Vikram K. Badrinath, *Challenging the INS on State Court Juvenile Matters*, 2002 NAT'L IMMIGR. PROJECT-IMMIGR. CURRENT AWARENESS NEWSL. 9 (2002) (Author outlines the practical application procedures of the SIJ status. The application can be made by either the unaccompanied minor or by a person acting on his behalf who is not required to be a U.S. citizen or have lawful permanent residency). *Id.*

¹³⁶ Memorandum from William R. Yates, Associate Director for Operations, to Regional Directors (May 27, 2004).

¹³⁷ *Id.*

juvenile court's dependency order, assuming the exercise of jurisdiction is appropriate, as a precondition for obtaining SIJ status.¹³⁸

The Attorney General's consent occurs in the form of granting or denying the petition for SIJ status based on the applicant successfully establishing that (1) he has been deemed eligible for long term care due to abuse or neglect,¹³⁹ and (2) that the judicial proceedings resulted in the determination that his best interest is not to be returned to the country of origin.¹⁴⁰ Presumably, if either of these two requirements is not established, then the Attorney General will refuse to consent. And, if a juvenile court issues a dependency order in the absence of the Attorney General's express consent, then the determination is presumptively invalid.¹⁴¹ Obstacles, therefore, originate with the practical application of the current SIJ provisions for child sex victims.

Primarily, child sex victims cross the border into our states¹⁴² as abandoned, unaccompanied minor children. The appropriate State Protective Services agency¹⁴³ will typically take responsibility for shepherding children through the state law proscribed processes to secure legal custody or guardianship. By conditioning SIJ status on state juvenile court jurisdiction, the SIJ provisions directly inject state law function into an area of law traditionally within the province

¹³⁸ *Id.*

¹³⁹ *Id.* (amending 8 U.S.C.A. § 1101(a)(27)(J)(i)).

¹⁴⁰ *Id.* (amending 8 U.S.C.A. § 1101(a)(27)(J)(ii)).

¹⁴¹ Badrinath, *supra* note 135.

¹⁴² States who have significant issues with child trafficking so as to require the use of non-governmental organizations (NGOs) to combat the problem include Arizona, California, Florida, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington. A Web Resource For Combating Human Trafficking, *available at* http://www.humantrafficking.org/countries/united_states_of_america/ngos (last visited April 13, 2007).

¹⁴³ For example, in Florida, the Department of Children and Family Services establishes custody of unaccompanied refugee minors for placement in a state sponsored Unaccompanied Refugee Minor Program. The Department petitions the circuit court to establish custody of the child. FLA .STAT. ANN. § 409.953 (West 2007).

of federal law.¹⁴⁴ Once the Attorney General's consent is required under the federal immigration code for dependency orders pertaining to unaccompanied minors who are **in the custody** of immigration officials, the exercise of state court jurisdiction becomes subject to federal court review and interpretation. This article highlights the inevitable battle that results from statutorily created conflict generated by the administration of federal immigration law as intertwined with state juvenile law. Regrettably, the battle commenced before the 1997 SIJ amendments and laid the groundwork for subsequent controversies rather than remedies for unaccompanied alien minors seeking protected status.

B. Federal Preemption Issues When Determining SIJ Status for Child Sex Victims-A Foundation for Conflict Laid Under the Pre-1997 Amendments

The utility of the SIJ provision for child sex victims departs from its intended purpose.¹⁴⁵ As mentioned earlier, Congress recognized the hardships suffered by children who reside illegally in this country. The SIJ provisions were, therefore, designed to provide a means by which juveniles who are without appropriate adult care to adjust their status to lawful permanent residency status.¹⁴⁶ As the legal doctrinal battles are identified, it is imperative to keep this purpose in mind. What's most notable about the current SIJ provisions is the increased power and discretion of the immigration officials like the Secretary of Homeland Security who appears to usurp the authority granted to the states.¹⁴⁷ In fact, issues arose

¹⁴⁴ Katherine Porter, *In the Best Interest of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 442 (2001)(where the author opines how the amended law endows immigration officials with power to usurp well established state juvenile court function).

¹⁴⁵ Marisa Silenzi Cianciarulo, *The W Visa: A Legislative Proposal for Female and Child Refugees Trapped in a Post September 11 World*, 17 YALE J.L. & FEMINISM 459 (2005) (Author discusses Congress' intent for the SIJ visa to offer humanitarian assistance to children who do not have parental care and are products of abuse through forced labor and sex trade).

¹⁴⁶ Porter, *supra* note 144, at 441.

¹⁴⁷ *Id.*

regarding the dispensation of federal authority to effectively preempt the state court's authority prior to the 1997 amendments. The following discussion identifies the initial doctrinal battle over the authority to make determinations impacting children in the context of the SIJ provisions. This article suggests that U.S. immigration law policies as reflected in the current SIJ provisions fail to act in concert with the related commitment and responsibility assumed by this country when protecting child sex victims who are trafficked into our borders.

The simple procedure for obtaining SIJ status under the original language required that the unaccompanied minor obtain a dependency order from the juvenile court, a "best interest" ruling indicating that he should not be deported, and an eligibility finding for long-term foster care.¹⁴⁸ After submitting the appropriate documentation to the local immigration officials, the child awaited approval of SIJ visa status.¹⁴⁹ While the exact number of immigrant children who were granted SIJ status under the original statutory language is not available, it is clear that a substantial number of children received the intended protection through the SIJ law.¹⁵⁰

Despite theoretically simple administrative procedures for securing SIJ status, immigrant children still encountered obstacles prior to amending the law. It seems clear that the state juvenile court receives the grant of jurisdictional authority under the federal immigration law to make "best interest" determinations for unaccompanied **alien** minors. When the unaccompanied alien minor appeals the decision of the state juvenile court, however, the appellate court's review of the jurisdictional issue exposes a battle over whose law governs the decision for exercising jurisdiction over dependency determinations.

¹⁴⁸ *Id.* at 444.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

1. Pre-1997 Case Law: Whose Law Governs Jurisdictional Authority For Making Dependency Determinations?

In the case, *In re C.M.K.*, the Minnesota Court of Appeals reviewed a decision by the state court to deny a petition for a dependency order that was submitted by a foster family on behalf of C.M.K., an unaccompanied and undocumented Chinese alien youth.¹⁵¹ C.M.K. fled The People's Republic of China over fear of harassment and abuse from local government officials who had previously beaten and severely injured his father.¹⁵² Although C.M.K did not flee his country as a victim of child sex trafficking, but instead, with the assistance of a smuggler, his story as an unaccompanied minor in this country illustrates similar obstacles that his child sex victim counterparts may confront notwithstanding the circumstances of their arrival.

C.M.K. was taken into the custody of immigration officials after they had raided an apartment where the smugglers had beaten and imprisoned C.M.K for his failure to pay \$26,000 in fees.¹⁵³ Since C.M.K was a juvenile, there was no one to assume custody over him.¹⁵⁴ However, C.M.K was released to the Lutheran Immigration and Refugee Services (LIRS) pursuant to an agreement with the immigration officials. The LIRS subsequently secured a foster family who took physical custody of C.M.K while the immigration officials retained legal custody.¹⁵⁵ The foster family in *C.M.K*

¹⁵¹ *In re Welfare of C.M.K.*, 552 N.W.2d 768 (Minn. Ct. App. 1996).

¹⁵² *Id.* at 769.

¹⁵³ *Id.*

¹⁵⁴ Recall that prior to the 1997 SIJ amendments, there was no distinction under the law for treatment of juveniles who were or were not in the custody of immigration officials.

¹⁵⁵ *In re Welfare of C.M.K.*, 552 N.W.2d at 769. The arrangement between the government and the LIRS typifies similar scenarios occurring in other states where unaccompanied children may be taken into custody. Some may be detained in government facilities while others may be taken into custody by state officials who work with third parties to provide immediate care. Under the current organizational structure, the Office of Refugee Resettlement (ORR), through its Division of Community Resettlement, awards grants, contracts and special initiatives to non-profit

filed a petition in juvenile court seeking protected status under the SIJ provisions on behalf of the unaccompanied alien minor after the immigration officials obtained a deportation order from the immigration court. C.M.K. appealed the deportation order to the Board of Immigration Appeals who, then, remanded the case for transcript deficiencies. Meanwhile, the juvenile court in which the foster family filed a petition requesting the court to exercise jurisdiction over C.M.K. and determine that he needed long term foster care refused to proceed claiming denial of such jurisdiction.¹⁵⁶

This anecdote outlines the initial complications faced under the pre-amended SIJ provisions for any unaccompanied alien minor. It makes apparent the intensified need to provide protections for not only unaccompanied minors like C.M.K., but, even more, those who seek refuge in this country as victims of child sex trafficking. Even under the original SIJ language, state juvenile courts like the Minnesota court in *C.M.K.* examined their jurisdictional authority to make disposition of an unaccompanied minor in light of the federal law governing the child's immigration status. In that case, the child was the subject of deportation proceedings at the time the foster family filed a petition for juvenile court jurisdiction. The problem here is that the petition seeking SIJ status on behalf of C.M.K was permissible and, in fact, indicated under the federal immigration laws. Nevertheless, the juvenile court interpreted their jurisdictional authority to issue a dependency order required for SIJ status as preempted¹⁵⁷ by the immigration court deportation finding.¹⁵⁸

and community-based organizations who administer care to the unaccompanied minors. <http://www.acf.hhs.gov/trafficking/about/index.html>. (last visited May 12, 2008) The Division of Unaccompanied Children's Services within ORR assumes responsibility for care and placement of unaccompanied alien children by offering basic needs such as housing and other related services. <http://www.acf.hhs.gov/ebrochure/unaccompanied.htm>. (last visited May 12, 2008).

¹⁵⁶ *In re Welfare of C.M.K.*, 552 N.W.2d at 770.

¹⁵⁷ The doctrine of federal preemption provides that interests in uniformity and predictability require that certain issues and disputes should be resolved by deference to federal law. Stacey Allen Carroll, *Federal*

The irony, here, is that certainly Congress should have contemplated a scenario where an unaccompanied minor would face potential deportation under the immigration laws and, at the same time, seek protected status allowable under the same laws. What is unique about unaccompanied minors is that, unlike adults, state law typically exercises authority over minors to make determinations as to their custody. If the immigration laws providing for SIJ status incorporated language to that effect, then it seems procedurally contradictory to then engage in a doctrinal battle over whether the immigration court's disposition of the unaccompanied minor preempts the state court under which the minor seeks to obtain protected status.

The Minnesota Court of Appeals upheld the state juvenile court's decision to decline the petition for exercising jurisdiction over C.M.K.¹⁵⁹ The Court states, "The factual and statutory bases on which the Wiles (foster family) allege C.M.K. is in need of state court protection or services demonstrate that state court action here would be in direct conflict with the deportation proceedings."¹⁶⁰ The Court's analysis is fundamentally problematic. The Court reasoned that C.M.K. is not "abandoned" or "without parent, guardian, or custodian" based on the Minnesota state statute.¹⁶¹ But, if the court truly views its analysis as preempted by federal law, then its conclusions based on Minnesota's "abandonment" standard are flawed. The juvenile court and the state reviewing court should not base its determination under the state code, but under the federal SIJ language. The analytical confusion bespeaks the essence of the problem embedded in the SIJ provisions. In the absence of clarity regarding the

Preemption Of State Products Liability Claims: Adding Clarity And Respect For State Sovereignty To The Analysis Of Federal Preemption Defenses, 36 Ga. L. Rev. 797, 802 (2002). The doctrine takes effect when Congress indicates its intent to occupy a regulated field, preclude state regulation, or if there is a conflict between state and federal regulation. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

¹⁵⁸ *In re Welfare of C.M.K.*, 552 N.W.2d at 770.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

specific allocation of jurisdictional authority in the federal statutory language, the issue of preemption and misplaced analysis is inevitable.

What's more, the reviewing court in *C.M.K.* justified its decision to affirm the juvenile court ruling after concluding that the immigration officials as legal custodian and the foster family as physical custodians fulfilled the role of a parent or guardian. Hence, C.M.K. was not "abandoned" under their analysis.¹⁶² The Court also determined that C.M.K. left his country "on his own accord"¹⁶³ rather than as a result of abandonment. In addition to the jurisdictional battle raised under a preemption analysis, the SIJ provisions invite abuse by any state appeals courts like in *C.M.K.* where the Court essentially bases its decision on conclusions as to an unaccompanied minor's sufficiency of care in the hands of federal immigration officials and temporary volunteer custodians (foster family). If the purpose of the SIJ status originally sought in the case of *C.M.K.* is to secure his status in this country as a lawful permanent resident who is free from potential deportation,¹⁶⁴ then the Minnesota state appeals court and others similarly situated are effectively disregarding the spirit of the SIJ provisions. The interpretive battle over whose law to apply and which one preempts the other signifies the focus of their improper analysis.¹⁶⁵

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 8 U.S.C.A. § 1225 (b)(1)(A)(i) (2006 West) (provides "if an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.").

¹⁶⁵ The Minnesota Court of Appeals also denounced C.M.K.'s claim of physical abuse that would establish a need for protection under the Minnesota statute. The Court reasoned that since the foster family did not allege physical abuse subsequent to the immigration officials apprehended C.M.K., C.M.K. was not presently in need of protection or services. *In re Welfare of C.M.K.*, 552 N.W.2d at 770. Again, the problem here is that the state court is applying dependency standards under the state statute that

Furthermore, the Court's analysis seems to ignore some basic issues. Even if immigration officials and the foster family fulfill the role of parent or guardian based on the Court's analysis, C.M.K can not remain in this country absent some form of protected status. The professed role that the foster family fulfills is temporary until such time when the government chooses to relinquish its legal custody and return C.M.K. to his country of origin. The issue of his immigration status is, therefore, improperly linked to his custodial status as a minor. Hence, the C.M.K. court fails to recognize the importance of a dependency determination or the impact of their denial to exercise jurisdiction over C.M.K for making the determination. The case of *C.M.K* exemplifies the issues of federal law preemption over immigration matters as they conflict with traditionally state law determination. Accordingly, a remedy offering presumptive lawful permanent residency status for unaccompanied minors and child sex victims, especially, seeking to utilize the defunct SIJ provisions is indicated.

Finally, the Court relegates the issue of C.M.K's basic needs and care to a matter, "that is directly related to the issue of asylum, an issue that is not subject to state court

are not considered in light of the standards under the SIJ immigration provisions. If a child is seeking a dependency determination in order to satisfy the requirements for obtaining protected status under the SIJ provisions, then the child's past, present, and condition as to the need for "long-term" care must be considered. In fact, the Court states, with regard to C.M.K's future condition, "The alleged fact that C.M.K may be abused if he is deported is an issue for his asylum claim in the deportation proceeding, not an issue for state juvenile court, because such a state court decision would, as the juvenile court determined here, conflict with and circumvent the immigration process." *Id.* The Court's reasoning reflects the fundamental conflict embedded in the SIJ provisions that is evident before the juvenile court declined to exercise jurisdiction. A state court can not make a dependency determination required by the federal law in the face of a deportation proceeding instituted under the same federal law unless the law clearly provides for an appropriate hierarchy of application and analysis, thereby, obviating the preemption issue. Unfortunately, Congress wrote the SIJ provisions without recognizing, in practice, how the state court determination order would impede its jurisdictional authority.

jurisdiction”¹⁶⁶ and references the U.S. Supreme Court opinion in *Hines v. Davidowitz*.¹⁶⁷ Under *Hines*, federal immigration law preempts state law when state law creates, “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁶⁸ The problem here is that state law is not the originating source of the confusion that federal preemption is designed to resolve. Instead, the federal immigration provisions and procedures regarding special immigrant juvenile status are written in such a manner that fails to reconcile operation of state law determinations. The result is a vicious doctrinal cycle where the state courts battle in their application of their statutes regarding dependency determinations in connection to federal immigration status. When the dust settles, unaccompanied alien minors and child sex victim ultimately suffer.

2. State Law Authority for Making Dependency Determinations That Is Incorporated into Federal Legislation is Still Preempted

The decision rendered by the Minnesota Court of Appeals a few months after *C.M.K* further illustrates the misinterpretation and confusion caused by preemption issues prior to the 1997 amendments to the SIJ provisions. The Appeals Court reviewed substantially similar facts in *In The Matter of the Welfare of Y.W.*¹⁶⁹ where a Chinese born youth was smuggled to the United States without permission from the Chinese government. Y.W. fled the country after he had participated in a rally when he was eleven.¹⁷⁰ Like in *C.M.K.*, Y.W. was taken into custody by immigration officials after the smuggler’s house was raided. The government assumed legal custody of Y.W. and pursued deportation proceedings against him. Mr. Popken, a foster parent, filed a petition in Dakota County state district court to have Y.W. declared a child in need of state protection (dependency determination). Unlike

¹⁶⁶ *In re Welfare of C.M.K.*, 552 N.W.2d at 771.

¹⁶⁷ *Hines v. Davidowitz*, 312 U.S. 52 (1977).

¹⁶⁸ *Id.* at 67.

¹⁶⁹ *In re Welfare of Y.W.*, 1996 WL 665937 (Minn. Ct. App. Nov. 19, 1996).

¹⁷⁰ *Id.* at 1.

in *C.M.K.*, the state district court ordered a psychological evaluation of Y.W. that revealed he suffered from post-traumatic stress disorder (PTSD).¹⁷¹ Accordingly, the District Court ruled that Y.W. was in need of care and should be placed in long term care with Mr. Popken.¹⁷² The immigration officials appealed this ruling. The Appeals Court reviewed the issues of preemption and the statutory criteria for making a dependency determination finding that the facts were indistinguishable from those in *C.M.K.*¹⁷³

On the issue of preemption, the government argued that its exclusive control preempts a state court determination as to a child's need for protection and long term care. Yet, the original SIJ language specifically requires that a child **be declared dependent on a juvenile court** (emphasis added) located in the United States and be deemed eligible **by that court**¹⁷⁴ (emphasis added) for long term foster care. The state district court is, therefore, charged with the responsibility to determine whether it would not be in the child's best interest to be returned to his previous country of nationality. Yet, the state court operates at a disadvantage by interpreting the federal immigration laws as preemptive of their own state dependency determination statutes. The Appeals Court concluded, in citing to the court in *C.M.K.*, the following:

Where a child is already the subject of deportation proceedings and is in the legal custody of the Immigration and Naturalization Services, the state juvenile court lacks jurisdiction to subsequently find the child in need of protection or services based solely on allegations the child will be abused if deported to his country of origin; federal immigration law preempts state law under these circumstances.¹⁷⁵

¹⁷¹ *Id.*

¹⁷² *Id.* at 2.

¹⁷³ *Id.* at 2, 3.

¹⁷⁴ Pub. L. No. 101-649, 104 Stat. 4978, § 153 (1990).

¹⁷⁵ *In re Welfare of Y.W.*, 1996 WL 665937 at 2 (citing to *In re Welfare of C.M.K.*, 552 N.W. 2d at 768).

Interestingly, the Appeals Court prefaces its review on circumstances where a child is the subject of deportation (removal) proceedings. The issue of protected status under the SIJ provisions most frequently arises at such time when the alien becomes subject to deportation. The federal immigration law invites the exercise of state court jurisdiction by specifically incorporating a requirement into the statute for assessments to be made by the state court. However, the issue of preemption becomes the foundation for circular reasoning.

SIJ status will not be granted because the federal preemption doctrine causes state law and courts to defer to the federal law when conflict between federal and state law erupts. The conflict erupts when an unaccompanied minor initiates a proceeding in state court for protected SIJ status while battling contemporaneously a deportation proceeding in federal immigration court. Federal law indicates that state law must operate in order to satisfy its requirements under the SIJ federal immigration law provisions. Therefore, a cyclical quagmire results when the federal immigration law authorizes the immigration officials to pursue deportation proceedings against unaccompanied minors while those minors are pursuing protected status under another federal immigration provision that calls for the state court dependency determination. The dependency determination proceeding, then, arguably, stands in conflict with the deportation proceedings.

On the issue of the statutory criteria used in making the dependency determination, we see the same cyclical conflict. The Appeals Court's review of the state district court dependency determination highlights the doctrinal conflict that is statutorily created in the SIJ provisions. As mentioned earlier, the state district court's determination in *Y.W.* is distinct from *C.M.K.* in one crucial manner. A psychological evaluation of *Y.W.* revealed that he suffered from post-traumatic stress disorder. The state district court determined, as a result, that *Y.W.* is a child in need of care and dependent

on the juvenile court.¹⁷⁶ When the Appeals court reviewed the issue, they ruled that, assuming the exercise of jurisdiction was proper, the dependency determination was not.¹⁷⁷ Under the Minnesota statute specifically pertaining to the special care needed in cases of emotional trauma, the Appeals Court found that the absence of psychological care by the immigration officials or the finding that Y.W. suffered physical and emotional harm at the hands of the smugglers was insufficient evidence to support the conclusion that Y.W. is not receiving the special care needed for his PTSD by his physical custodians (the foster family).

The Appeals Court further concluded that since Y.W. did not suffer abuse under the custody of the immigration officials and there was no risk of future abuse at the hands of the smugglers, there is no basis for a dependency determination.¹⁷⁸ The Appeals Court quoted language from its decision in C.M.K. stating, “A finding that C.M.K. [or any unaccompanied minor/child sex victim] is in need of protection or services based on circumstances in China [or any originating country] would directly conflict with the immigration proceedings and, thus, is preempted by federal law.”¹⁷⁹

Under Y.W., obtaining a dependency determination as required for obtaining SIJ status would be practically impossible because once the immigration officials assume legal and physical custody of the unaccompanied alien minor, the state district courts will be unable to find that he is in need of care.¹⁸⁰ A dependency determination written into the

¹⁷⁶ *Id.* at 2.

¹⁷⁷ *Id.* at 3.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ *Id.* at 3.

¹⁸⁰ The irony in the Court’s reasoning regarding fulfillment of the youth’s protection and care based on the fact that he is in custody is that even if the youth were somehow able to achieve SIJ status, the government will subsequently denounce any responsibility for the youth’s care. The Associate Director of Operations for the U.S. Department of Homeland Security-U.S. Citizenship and Immigration Services stated in a 2004 Field Guidance Memorandum, “The granting of an SIJ petition or application for adjustment to a juvenile confers no Federal Government duty or liability

federal SIJ provisions would become moot. Query whether requiring a determination of need or dependency is warranted if it is effectively refuted whenever the government assumes custody over the unaccompanied minor. Certainly, Congress intended for the state court dependency determinations to consider the past and future conditions of the immigrant child. This is supported by the third requirement under the original language that requires the state juvenile court to determine in an administrative or judicial proceeding that it would not be in the child's best interest to be returned to his previous country of nationality.

Faulty reasoning embedded in judicial opinions like *C.M.K* and *Y.W.* demonstrate the injustice resulting from the interplay between legislative construction and legal doctrine. The conclusions made by the Minnesota reviewing courts illustrate the foundational problem. When Congress expressly amended the SIJ provisions in 1997 to incorporate the federal government in the process of securing protected status via consent requirements, the statutory construction generated a whole new set of problems. While federal preemption seemingly blocks federally proscribed state court involvement, issues of deference and judicial review are also looming. Such doctrinal battles obviate effective use of SIJ status for protection of child sex victims.

toward state child welfare agencies, even for those juveniles placed in foster care." Memorandum from William R. Yates, Associate Director for Operations, to Regional Directors (May 27, 2004). So, the "care" provided by the Federal Government while an alien youth is in custody effectively precludes his qualification under a state's analysis for determining the need for protection and services when he petitions for SIJ status. But, if the alien youth manages to bypass the Court's application like in *Y.W.* and obtains the protected status, then the Federal Government relinquishes any duty for his subsequent care provided by the state agency or foster family who was advocating on behalf of the alien youth. In practice, the government will stand in the way of an alien youth seeking protection from deportation under the U.S. immigration laws and, then denounce any responsibility for his future care. As a matter of policy, we must resolve these issues as it relates to the immigration laws impacting alien youth.

C. Deference and Judicial Review-The Aftermath of the 1997 Amendments to the SIJ Provisions

Congress created conflict and procedural entanglement in 1997 with the SIJ amendments further compromising the already questionable state court jurisdictional authority incorporated into the original language. Although it may appear as if the alien youth who is **not** in custody receives a “rubber stamp” from the government if he provides sufficient evidence to receive a dependency order from the state court, the issues existing before the language was amended still remain. Courts like in *C.M.K.* and *Y.W.* hesitate in exercising jurisdiction over alien youth based on preemption issues. The facts revealed in those cases that the alien youth were in the custody of immigration officials. However, the problems would still be present even if the alien youth was not taken into custody. The reality is that if a child or adult is in this country illegally, then they are subject to deportation unless he obtains an immigrant classification allowing for his lawful entry into the United States.¹⁸¹ This means that a child sex victim or unaccompanied minor who is **not** in the custody of immigration officials is most likely subject to being taken into custody as incident to deportation and removal proceedings pursued by the government in the absence of his appropriate immigrant classification.¹⁸²

Based on the original and amended language and the courts interpretation of the same, these issues require examination of remedies that obliterate or at least, minimize

¹⁸¹ 8 U.S.C.A. § 1225 (b)(1)(A)(i) (2006 West) (provides “if an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.”).

¹⁸² See 8 U.S.C.A § 1101 (a)(15) (2006 West) (defines an immigrant as every alien except an alien that falls into specific categories listed in the section); see also, 8 U.S.C.A. § 1229a (2006 West) (describes removal proceedings under the Immigration Code).

obstacles. As explained earlier, preemption issues precluded state court jurisdiction from making dependency determinations under the original SIJ language. Even after the SIJ provisions were amended, juvenile court judges still responded to petitions with fear that the exercise of jurisdiction over alien youth would not sustain scrutiny in the form of government challenges attacking whether a child was actually in custody when the juvenile court made disposition or whether the child was truly in an abusive or neglectful environment.¹⁸³ Regardless, the end result is, “confusion, mistrust and miscommunication.”¹⁸⁴ With the added consent requirement, the courts now battle interpretations of deference and judicial review in response to the challenges launched by alien youth.

1. *Judicial Review Under the Administrative Procedures Act*

In *Yeboah v. Immigration and Naturalization Service*,¹⁸⁵ the United States District Court considered the case of an eleven year old boy who arrived in a New York City airport from Ghana unaccompanied. As expected with any unaccompanied alien minor arriving into this country, the U.S. Immigration officials took Yeboah into custody and commenced removal proceedings for his return to Ghana.¹⁸⁶ This case represents the typical scenario for an illegal

¹⁸³ Porter, *supra* note 144, at 451.

¹⁸⁴ *Id.* at 452. Porter further identifies the problem of “aging-out” as one of the most common and unfortunate consequences of this bureaucratic and legal turmoil. *Id.* In this instance, alien youth who are seeking any means for avoiding deportation are often subject to the administrative delays of the government. In the meantime, some cease to qualify as a juvenile under the immigration laws. *Id.*

¹⁸⁵ *Yeboah v. I.N.S.*, 2001 WL 1319544 (E.D. Pa. Oct. 26, 2001). In this first decision, the Eastern District Court ruled that the court has subject matter jurisdiction to decide on the issue of whether the Attorney General has discretion to consent to the juvenile court’s jurisdiction. Thereafter, both Yeboah and the government filed cross motions for summary judgment. *Yeboah v. I.N.S.*, 223 F. Supp. 2d 650 (E.D. Pa. 2002). After the Court remanded the case for reconsideration of additional evidence, the government still rejected Yeboah’s petition and the parties refilled summary judgment motions that the Court considers here. *Id.*

¹⁸⁶ *Yeboah*, 2001 WL 1319544, at *1.

immigrant youth arriving into this country. Notwithstanding his need for care and protection, the unaccompanied alien minor is most likely subject to removal or deportation proceedings initiated by U.S. immigration officials. Notably, immigration laws like the SIJ provisions specifically provide for state court assessment of an unaccompanied alien minor's need for care and protection to be conducted by state court officials, yet the federal immigration law arguably preempts state law determinations incident to obtaining protected status.¹⁸⁷

When the unaccompanied alien minor challenges deportation, the courts engage in doctrinal battles such as the ones outlined in this article. Another battle ensues, however, when unaccompanied alien minors, like Yeboah, challenge the government's denial of consent to juvenile court jurisdiction by requesting judicial review¹⁸⁸ of the denial under the Administrative Procedure Act (APA).¹⁸⁹ The challenge

¹⁸⁷ See generally, *In re C.M.K.*, 552 N.W.2d at 771 (where the court determined that a juvenile court lacked jurisdiction to grant leave because federal immigration proceedings preempted state court proceedings where the sole basis for the CHIPS petition was the child's fear of deportation and the circumstances awaiting the child in his country of origin); See also, *In re Y.W.*, Nos. C8-96-715, 1996 WL 665937, at *2 (Minn. App. Feb. 26, 1997) (concluding that the federal government's control of illegal aliens preempts the district court's jurisdiction over the alien child in CHIPS proceedings).

¹⁸⁸ When seeking "judicial review", alien youth are challenging the policies and rules utilized by an administrative governmental agency like the Immigration and Naturalization Services (INS) in the *Yeboah* case.

¹⁸⁹ 5 U.S.C.A. § 706 (West 2007). The Administrative Procedure Act, section 706, outlines the scope of review that a court may utilize when examining administrative actions taken by an agency. 5 U.S.C.A. § 706 (West 2007). Specifically, it provides that the reviewing court shall compel agency action that is unlawfully withheld or unreasonably delayed and set aside agency action, findings and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C.A. § 706(1), (2)(A) (West 2007). Furthermore, if the agency action is contrary to constitutional powers and principles, outside the bounds of statutory jurisdiction and rights, without observance of procedure, unsupported by substantial evidence in certain cases or otherwise reviewed on record of an agency hearing, or unwarranted by the facts when they are subject to a trial de novo by the reviewing court, then

involves addressing two primary issues- subject matter jurisdiction and applicable standards of review. Initially, round one of the doctrinal battle involves obtaining government consent¹⁹⁰ to state court jurisdiction for purposes of determining dependency. When the unaccompanied alien minor in *Yeboah* challenged the government's denial of consent¹⁹¹ under the APA, the government filed a motion to dismiss arguing that their decision to grant consent as indicated under the SIJ provisions is not subject to judicial review under the APA.¹⁹²

The battle then revolved around the court's interpretation of subject matter jurisdiction and whether, in the context of the government's motion to dismiss, it has authority under an analysis of the provisions in the APA to conduct a judicial review of the government's denial of consent.¹⁹³ We must keep in mind that the time and resources to make these arguments over procedural and substantive legal doctrine is expended on behalf of the alien youth whose primary goal is to avert removal from this country. Even after the U.S. District Court in *Yeboah* ruled that it had subject matter jurisdiction to make judicial review of the government's denial of consent to state court jurisdiction, the next issue is

the reviewing court may also set aside such agency action. 5 U.S.C.A. § 706(2)(B)-(F) (West 2007).

¹⁹⁰ *Yeboah*, 2001 WL 1319544, at *1. In response to the government's initiation of removal proceedings, Yeboah sought immigrant classification under the SIJ provisions by filing a request for consent from the Attorney General to a state juvenile court dependency hearing.

¹⁹¹ *Id.* at *2. In Yeboah's case, he requested consent from the Attorney General to the exercise of state court jurisdiction for the purpose of determining his dependency and subsequent qualification for SIJ status. When the government refused consent, Yeboah sought declaratory and injunctive relief by asking that the court review the decision under the Administrative Procedure Act.

¹⁹² *Id.*

¹⁹³ After analyzing the statutory provisions under section 701(a) of the APA delineating when judicial review is precluded and their application to the court's review of the consent requirement and decision, the U.S. District Court held that government's decision to withhold consent under the SIJ provisions is subject to judicial review. The Government's motion to dismiss was, therefore, denied. *Id.* at *5.

whether the unaccompanied alien minor can overcome the applicable standard of review governing the court's analysis under the APA. Accordingly, unaccompanied alien minors commence round two of the battle when they attempt to establish that the government abused its discretion or acted arbitrarily and capriciously in denying consent to state court jurisdiction as required under the SIJ provisions.¹⁹⁴ Even though in *Yeboah*, the unaccompanied minor lost round two,¹⁹⁵ the court articulates an interesting observation that in many ways embodies the point made in this article. Judge Van Antwerpen states the following:

The INS evidence could reasonably lead to the conclusion that Julian (Yeboah) was not abused, neglected or abandoned,...and that in

¹⁹⁴ In a second opinion rendered by the U.S. District Court approximately 8 months after the first opinion decided on the issue of subject matter jurisdiction, the court held that the government's decision to deny consent was neither arbitrary and capricious nor an abuse of discretion. *Yeboah v. INS*, 223 F. Supp. 2d 650 (E.D. Pa. 2002). The government argued that the U.S. District Court should defer to its reasoning and methodology articulated in the agency field guidance memo addressing implementation of the consent requirement under the SIJ provisions. *Id.* at 653. In concluding that the court's deference to the field memo is not warranted, the court cited to similar cases such as *Yu v. Brown*, 92 F. Supp. 2d 1236 (D.N.M. 2000), where the U.S. District Court in New Mexico addressed the issue of retroactive application of the 1997 amendments to the SIJ provisions. In that case, an alien youth, Yu, sought declaratory and injunctive relief on behalf of himself and similarly situated persons who filed SIJ petitions and adjustment applications prior to the date that the 1998 appropriations bill that contained the 1997 SIJ amendments were signed by President Clinton and whose applications remained pending for more than one year without adjudication. *Id.* at 1238. Based on its rulemaking authority granted by Congress to the INS as the governing agency at the time, the INS had issued an Interim Field Guidance memo approximately 9 months after the bill was signed. The government argued that this memo should receive the court's deference on the issue of whether the amendments apply to Yu and the other plaintiffs. *Id.* at 1241. Once again, matters of judicial review, appropriate standards of review and deference to the governmental agency's rulemaking entangle alien youth as litigants in these cases where their barebones objective is merely to seek protection under the Immigration laws from the abusive and neglectful circumstances existing in their countries of origin.

¹⁹⁵ *Id.*

fact, Julian was hoping to utilize the SIJ opportunity to immigrate with his family. We reiterate that if we analyzed the case upon de novo review, we might well reach a different result. Dr. Forman’s (a highly qualified child psychiatrist) report provides credible evidence of abuse, neglect, and abandonment which would raise a triable issue of fact as to Julian’s qualification for SIJ status. But, the arbitrary and capricious standard we apply to the agency’s decision under the APA is vastly different from the common standard of review...¹⁹⁶

What’s notable here is the court’s acknowledgement that the law and the process that characterizes the doctrinal battle forces a result that is quite different from a review of the decision based on the facts. Acting as a reviewing court in *Yeboah*, the U.S. District Court did not make factual determinations like the government made acting in its administrative agency capacity. Instead, the court ruled solely on the legal battle over the appropriate “standard” applied by the government when evaluating Yeboah’s request for a dependency determination. Consequently, an unaccompanied alien minor who seeks protected status battles doctrine while his ultimate goal becomes smothered by the legal process.

The identified doctrinal battle supports the remedies suggested in this article including presumptive lawful permanent residency or, a rebuttable presumption of the “dependency” standard for making SIJ determinations. The rebuttable presumption of dependency would replace the consent requirement and, instead, place the burden to rebut the presumption on the government who is better equipped with the resources to determine whether, on balance, removing the minor from the country based on his ulterior motives or potential disqualification under the law outweighs affording

¹⁹⁶ *Id.* at 658.

him basic care and protection that we can aptly provide. These remedies are plausible based on analogous U.S. law and policies as well as international human rights concepts.

**V. Kids Are Different: Justification in United States
Immigration Policy for Presumptive Lawful Permanent
Residency Status of Child Sex Victims**

The United States government has historically altered immigration law and policy to accommodate the social, economic, and political reform of other nations. In fact, this country's propensity to modify policies and laws as an acknowledgment of hardships suffered by citizens of other countries denotes a willingness, or at a minimum, a desire to assume the lead role in eradicating the perceived ills and wrongs that citizens of all nations confront.

This section chronicles instances in U. S. immigration law policy where Congress has relaxed previously established legal standards or adopted new ones to accommodate aliens seeking protected status or lawful permanent residency status in the United States. These examples support the relief advocated in this article for child sex victims as a subpopulation of illegal aliens who present the most compelling incidence for preferential relief under our immigration laws. Before doing so, let's examine the adjustment of status provisions in the immigration law where Congress has historically made exceptions to implement policy.

Generally, the U.S. immigration code provides for adjustment of status of a nonimmigrant to that of a person admitted for permanent residence under Section 1255.¹⁹⁷ Section 1255(a) sets forth the circumstances under which status is generally adjusted. It states the following:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having approved petition for classification...may be adjusted by

¹⁹⁷ 8 U.S.C.A. § 1255 (West 2007).

the Attorney General, in his discretion...to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.¹⁹⁸

The adjustment of status criteria indicated above sets forth lofty requirements for *any* alien to meet in spite of the circumstances upon which he enters the country. However, we have, historically, provided for certain aliens who needed protection from removal under the adjustment of status provisions by granting presumptive lawful permanent residency status. Most conspicuously, we have extended compassion for similarly situated children like child sex victims of human trafficking who needed to secure their status in this country. The policy and sentiment generated in these exceptions must also operate to afford child sex victims protection from removal.

A. U.S. Compassion for Haitian Refugee Children: Historical Relief for Alien Children Justifies Presumptive Lawful Permanent Residency Status for Child Sex Victims

The United States' response to the political and social conditions in Haiti supports the policy we must adopt for the suggested immigration law remedies offered by this author. Under the provisions of the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA),¹⁹⁹ the Attorney General is specifically required to adjust the status to that of an alien lawfully admitted for permanent residence who is a Haitian child who has arrived into the United States without parents and for those who remain orphaned or, who are abandoned by parents or guardians and remained abandoned.²⁰⁰ Under the

¹⁹⁸ 8 U.S.C.A. § 1255(a).

¹⁹⁹ Pub. L. No. 105-277, 112 Stat. 2681 (1998).

²⁰⁰ 112 Stat. 2681-538, 539 § 902 (a), (b)(1)(C) (1998).

Act, adjustment of status applies generally to any alien who is a national of Haiti, was present in the United States on December 31, 1995 and who filed for asylum before December 31, 1995, and was paroled into the United States prior to December 31, 1995, after having been identified as having a credible fear of persecution, or paroled for emergent reasons.²⁰¹ The children who are eligible for adjustment of status under HRIFA must also meet certain date restrictions for entry into the country as well as continuous physical presence requirements.²⁰²

The language of the HRIFA reveals the underlying open-door immigration policy that was exceptionally called for at the time. Congress recognized that Haitian children fled their country under extreme persecution and adverse conditions. In some instances, these children would arrive unaccompanied seeking protection in the United States, or become subsequently abandoned and in need of basic care. Likewise, children who are trafficked into this country from all nations enter under similar, if not worse conditions than their Haitian counterparts. Consequently, what we have done for Haitian children can and *should* also be done for child sex victims of human trafficking. The HRIFA, however, does not stand alone in our history as a safe haven for victims fearing persecution. The United States has modified immigration law policy in response to similar conditions in Cuba and Nicaragua.

B. Human Sex Trafficking Is Persecution: How Historical and Present-Day Relief For Cuban and Nicaraguan Refugees Support Lawful Permanent Residency Status For Child Sex Victims

1. Social and Legal Reform for Cuban Refugees

Part II of this article painted an image of child sex trafficking where the most vulnerable members of any society are targeted, pursued, and harassed by their captives. They are

²⁰¹ *Id.* at § 902(b)(1).

²⁰² *Id.* at § 902(b)(1)(C).

persecuted. Citizens of Cuba also fled their country fearing persecution²⁰³ from the newly established political regime. In acknowledgement of these adverse circumstances, Congress relaxed U.S. immigration law policy allowing for Cuban immigrants to gain legal entry into without strict adherence to refugee status qualifications.²⁰⁴ In 1962, Congress enacted the Migration and Refugee Assistance Act of 1962 (MRAA)²⁰⁵ that established the Federal Cuban Refugee Program.²⁰⁶ The MRAA specifically authorized assistance to state and local public agencies that provided services for substantial numbers of “refugees” as that term was defined in the MRAA.²⁰⁷ The agencies provided health and educational services as well as special training for employment services.²⁰⁸

Thereafter, a procedural glitch erupted whereby increased numbers of Cuban refugees could not obtain lawful permanent residency status without, first, leaving the country and reapplying.²⁰⁹ So, Congress enacted the Cuban Refugee Act of 1966 (CRA),²¹⁰ which was touted as a “special humanitarian program” by the U.S. government.²¹¹

The CRA authorized adjustment of status of any alien who was a native or citizen of Cuba who (1) had been inspected and admitted or paroled in the U.S. subsequent to January 1, 1959, and (2) had been physically present in the U.S. for at least two years.²¹² The Attorney General had

²⁰³ Maryellen Fullerton, *Cuban Exceptionalism: Migration and Asylum in Spain and the United States*, 35 U. Miami Inter-Am. L. Rev. 527, 542 (2004)

²⁰⁴ *Id.* at 549-550.

²⁰⁵ Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 (1962).

²⁰⁶ H.R. REP. NO. 94-1553, at 12 (1976), reprinted in 1976 U.S.S.C.A.N. 6073.

²⁰⁷ Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121 §2(b)(4) (1962).

²⁰⁸ *Id.*

²⁰⁹ H.R. REP. NO. 94-1553, at 11 (1976), reprinted in 1976 U.S.S.C.A.N. 6073.

²¹⁰ Pub. L. No. 89-732, 80 Stat. 1161 (1966).

²¹¹ *Supra* note 209, at 12.

²¹² Pub. L. No. 89-732, 80 Stat. 1161 § 1 (1966).

discretion to adjust status once an alien submits an application and becomes eligible to receive an immigrant visa.²¹³ The U.S. response to the appeal for assistance made by the citizens of Cuba exemplifies the country's pattern of legal and social accommodation in the face of political reform. Before the CRA was passed facilitating lawful presence of Cubans in the country who fled their nations civil unrest, the government had already created the necessary programs and legal framework found in the MRAA to extend social services to the citizens of Cuba.

While the TVPRA, by analogy, represents an extensive effort by Congress to provide for the social and educational needs of child sex victims, the legislation fails to amend the immigration laws as they were amended for Cubans in 1966, to fully afford child sex victims protection from removal to their originating countries. In the case of Cuban refugees, compassions or just plain political wrangling persevered until Congress finally responded to the hardships faced by refugees through enactment of the MRAA and the CRA. The CRA represents a legislatively enacted remedy in direct response to a practical barrier for Cubans seeking lawful permanent residency in the U.S. Even though the Attorney General retained discretion in the process, rather than mandating adjustment of status, the series of legislative enactments exemplifies how U.S. immigration policy has historically supported measures that embraced the political and social woes of non-citizens. Sympathy for the social and political conditions of Cubans and Nicaraguans continued into the next three decades prompting an even more radical response.

²¹³ *Id.*

2. The Policy That Supports Mandating Lawful Permanent Residency Under NACARA Supports Taking Similar Measures For Child Sex Victims

Congress initiated reform in 1997 for the treatment of Cubans and Nicaraguans under the immigration laws.²¹⁴ The Nicaraguan Adjustment and Central American Relief Act (NACARA)²¹⁵ was signed by President Clinton in November 1997 as “one of the most significant pieces of immigration legislation favoring aliens to be enacted in this country in years.”²¹⁶ NACARA replaces Attorney General discretion with a mandate that resembles, as one author describes, as “close to a free pass as the INS grants.”²¹⁷ Under NACARA, the Attorney General **shall** (emphasis added) adjust the status of any alien who is a national of Nicaragua and Cuba to that of an alien lawfully admitted for permanent residence if (1) an application is made before April 1, 2000 and (2) the alien **is otherwise eligible to receive** an immigrant visa (emphasis added).²¹⁸

This means that Cubans and Nicaraguans can potentially obtain adjustment of status without regard to their status as indicated by the immigrant visa (T-Visa, SIJ Visa, or otherwise).²¹⁹ By merely submitting an application without any other supporting documents, Cubans and Nicaraguans avert removal and receive permanent residency status.²²⁰ According to the legislative history, NACARA represents a compromise between congressional negotiators on matters affecting the rules for immigration law treatment of Central

²¹⁴ Eli Coffino, *A Long Road to Residency: The Legal History of Salvadoran and Guatemalan Immigration to the United States With a Focus on NACARA*, 14 CARDOZO J. INT’L & COMP. L. 177, 191 (2006).

²¹⁵ Pub. L. No. 105-100, 11 Stat. 2160 (1997).

²¹⁶ Lourdes A. Rodriguez, *Understanding the Nicaraguan Adjustment and Central American Relief Act*, 5 ILSA J. INT’L & COMP. L. 501, 502 (1999) .

²¹⁷ Coffino, *supra* note 214, at 192.

²¹⁸ Pub. L. No. 105-100, 111 Stat. 2160 Title II, Div. A, Sect. 202(a)(1), (b)(1), (2) (1997).

²¹⁹ Coffino, *supra* note 214, at 192.

²²⁰ *Id.*

Americans and those similarly situated due to war and oppression in their own countries.²²¹

When President Clinton signed H.R. 2607 (NACARA),²²² he stated, "I am asking the Attorney General to consider...the unique history and circumstance of the people covered by (the Act)."²²³ In his remarks, President Clinton acknowledges the driving forces behind the legislation as "unique" in creating the need for preferential treatment under the U.S. immigration laws. Child sex victims are found by immigration officials after they have been beaten regularly by their captors and exploited for purposes of prostitution or other forms of human trafficking.²²⁴ If immigration law policy historically reflects a modicum of concern and compassion for refugees from other countries, then any articulated objection to modifying the immigration laws to include presumptive lawful permanent residency status for child sex victims must be reevaluated. These children, like Cubans and Nicaraguans, are targeted victims of political, social and economic harm. Amending the U.S. immigration law to reflect policy in consideration for these victims is exponentially justified when such victim is a child.

C. Legislation Regarding Unaccompanied Alien Children Represents Favorable Political Sentiment Toward Greater Protection of Child Sex Victims

Child sex victims who arrive in this country unattended by an adult receive the classification, "unaccompanied children."²²⁵ Like other victims of human

²²¹ Rodriguez, *supra* note 216, at 502.

²²² NACARA was signed into law under this bill entitled, The District of Columbia Appropriations Act of 1998.

²²³ Statement from President William J. Clinton on Signing of D.C. Appropriations Act (Nov. 24, 1997), available at 1997 WL 727883 *1.

²²⁴ Trafficking In Persons 2006 Report, *supra* note 10, at 18.

²²⁵ Christine Gordon, *Are Unaccompanied Alien Children Really Getting a Fair Trial? An Overview of Asylum Law and Children*, 33 DENVER J. INT'L L. & POL'Y 641 (2005); See also, Christopher Nugent, *Whose Children Are These? Towards Ensuring The Best Interest And Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 221 (2006)

sex trafficking, child sex victims or unaccompanied alien minors have captured the attention of Congress over the past several years in proposed legislation²²⁶ and, more recently, in the Homeland Security Act (HSA).²²⁷ The HSA addresses specific concerns over an identified conflict of interest for immigration officials, who serve as both caregivers and law enforcement agents. The conflict arise when officials provide respite for unaccompanied alien children, but they also ultimately determine whether the children remain protected in this country or repatriated to face shame from their home country.²²⁸

The HSA requires legal representation for children during the legal process for determining removal.²²⁹ Here, the law demonstrates the need for unaccompanied alien minors to receive protection and stewardship through the American court system by appointment of a legal counsel.²³⁰ Enactment of the HSA signifies governmental concern over placement and protection for unaccompanied alien children who are dependant on an unfamiliar and frightful judicial process.²³¹

(where the author identifies twenty-six percent of abused, unaccompanied alien children arriving in this country as below the age of 14).

²²⁶ Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001); Unaccompanied Alien Child Protection Act of 2003, H.R. 3361, 108th Cong. (2003); Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005); Unaccompanied Alien Child Protection Act of 2007, S. 844, 110th Cong. (2007).

²²⁷ Homeland Security Act, § 462, 6 U.S.C.A. § 279 (West 2002).

²²⁸ Erin E. O'Connor, *Unaccompanied Alien Child Protection Act of 2001*, 16 GEO. IMMIGR. L. J. 259 (2001). *See also*, Claire L. Workman, *Kids Are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 224 (2004)

²²⁹ *Id.* The author observes that children frequently do not benefit from legal representation when the government will not pay for the expense and even if counsel is obtained, attorneys fight for meaningful access to detention facilities to consult with the children.

²³⁰ *Id.* at 225.

²³¹ *Id.* at 223. The author describes the uncertainty that children face when taken into custody by the government and frightened by the legal climate which they must confront to determine their ultimate fate. *See also*, Jacqueline Bhabha, *"Not a Sack of Potatoes": Moving and Removing Children Across Borders*, 15 B. U. PUB. INT'L L. J. 197 (2006) (where the

Child sex victims, like unaccompanied alien minors, are likely to face similar fears after being discovered by immigration officials.

Additionally, Congress has considered proposed legislation that embodies the political sentiment for more comprehensive protection and care of unaccompanied alien minors.²³² The Unaccompanied Alien Child Protection Act of 2007 (UACPA)²³³ provides for amending the SIJ provisions to, first, allow for a dependency determination made by court order and supported by written findings of fact that is binding on the Secretary of Homeland Security.²³⁴ While the proposed legislation does not directly indicate that the state juvenile court make the determination, the language appears to eliminate the federal preemption issues practically raised in the state courts.²³⁵ Once the state court issues a dependency order for SIJ purposes, the federal immigration officials do not have the power to override that determination. Second, the UACPA amends the adjustment of status provisions to make inapplicable other immigration law provisions that may bar attaining protected status for unaccompanied alien children.²³⁶

author attributes an “adult-centered myopia” as the cause for neglect of children in the courtroom).

²³² Senate Bill 844 addresses treatment procedures for unaccompanied alien children from the time they are taken into government custody. Some, but not all, of the proposed issues include family reunification, access to counsel, and conditions for placement and detention.

²³³ Unaccompanied Alien Child Protection Act of 2007, S. 844, 110th Cong. (2007); Previous versions of the proposed legislation have been drafted over the preceding six years. *See generally*, Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001); Unaccompanied Alien Child Protection Act of 2003, H.R. 3361, 108th Cong. (2003); Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005)

²³⁴ §301, S. 844, 110th Cong. (2007).

²³⁵ See discussion, *supra* Part IV.B

²³⁶ §301(b). The UACPA amends §212(a) of the Immigration and Nationality Act to make inapplicable, for adjustment of status purposes, the requirement that disallows aliens who have not been admitted or paroled, the documentation requirements that make immigrants ineligible if they do not possess a valid, unexpired immigrant visa or other enumerated

If Congress enacts legislation like the HSA and entertains proposed legislation like the UACPA, it is congruent for our laws to acknowledge the extensive harm and exploitation of the human trafficking industry on alien children and to take action that prevents their removal from the United States. This article advocates for amending the adjustment of status provisions to include a rebuttable presumption of lawful permanent residency. The suggested amendments take the proposed UACPA a step further given the identified legal obstacles and entanglements currently present in the immigration code.²³⁷ After all, a presumption of lawful permanent residency is not unprecedented in this country's history of immigration law policy as discussed earlier in this article. The historical treatment of Cubans, Nicaraguans, Haitian children as well as current proposed unaccompanied alien minor legislation mark a pattern of political reform to our immigration laws.

Other nationals from Poland and Hungary,²³⁸ as well as Jewish nationals from Syria²³⁹ have received preferential treatment. Each enactment marks congressional cognizance of individuals suffering from political, social or economic tribulations. Consequently, a concrete solution for addressing these issues in light of the existing bureaucracy that inappropriately hampers all unaccompanied alien children/child sex victims is a presumption of lawful permanent residency status. International human rights principles reflected in guidelines for treatment of child asylum

document, and the provision making aliens who have been unlawfully present in the United States ineligible for adjusted status.

²³⁷ For child sex victims, in order to obtain a T-visa or SIJ visa, the emotionally and physically damaged child must, for T-visa purposes, navigate through bureaucratic entanglements and/or potentially risk being subject to the annual 5000 limitations. For SIJ status, the child sex victim must meet additional processing procedures while combating the doctrinal battle between federal supremacy laws and state sovereignty in order to obtain "dependency status". See discussion *supra*, section V.

²³⁸ Pub. L. No. 104-208, Sec. 646 (1) (1996).

²³⁹ Pub. L. No. 106-378 (2000).

seekers²⁴⁰ and other instruments also support this proposed solution.

VI. International Human Rights Law and Policy Support Presumptive Lawful Permanent Residency for Child Sex Victims

Human sex trafficking has received international attention over the years in an effort to combat this organized crime syndicate.²⁴¹ The international community responds by applying human rights principles that protect children. Recognition of children's rights must prevail when faced with one of the greatest social tragedies of this time.²⁴² Protecting children's rights need not become embroiled in political snares that detract from the primary issue.²⁴³ Instead, we must view protection of child sex victims as an expression of children's rights in a very basic sense as reflected by numerous human rights organizations and their adopted instruments.²⁴⁴

A. UN Protocol vs. Human Trafficking Legislation: How Defining the Problem Directs the Policy and the Outcome

The UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (UN

²⁴⁰ Gordon, *supra* note 225, at 642.

²⁴¹ Elizabeth M. Bruch, *Models Wanted: The Search For An Effective Response To Human Trafficking*, 40 STAN. J. INT'L L. 1, 15 (2004).

²⁴² David Weissbrodt, *Prospects for Ratification of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 209 (2006)(where the author chronicles a history beginning with the Geneva Declaration on the Rights of the Child in 1924).

²⁴³ *Id.* at 209. Oftentimes, political conservatives and religious groups view advocacy of children's rights as a direct intrusion obstruction of the privileges and protections enjoyed by the American family. *Id.* These views, however, demonstrate minimal consideration for those (like child sex victims) who are not so privileged to enjoy the benefits and protections of a family structure.

²⁴⁴ The Convention on the Rights of the Child (CRC) was included in the Universal Declaration of Human Rights, the Geneva Convention for the Protection of Civilian Persons in Time of War, the International Covenant on Economic, Social and Cultural Rights, and other instruments of specialized agencies and organizations. Weissbrodt, *supra* note 242 at 209.

Protocol) was written to, among other things, protect and assist the victims of human trafficking.²⁴⁵ The Protocol expands upon the principles articulated in the United Nations Convention Against Transnational Organized Crime of 2000²⁴⁶ that calls for each State Party to take appropriate measures to provide assistance and protection to victims of offenses, in particular, in cases of intimidation.²⁴⁷ The UN Protocol calls for all nations to join forces in addressing prevention and protection of human trafficking victims.²⁴⁸ The Protocol is also known as one of three international instruments embraced by several nations²⁴⁹ as a tool for eradicating known human rights abuse.

The definition of “human trafficking” has become the spotlight for debate over eradication measures taken by participating countries.²⁵⁰ The Protocol addresses human trafficking through an expansive definition²⁵¹ while the U.S.

²⁴⁵ G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, at 31, U.N. Doc. A/RES/55/25 (2001), available at <http://www1.umn.edu/humanrts/instree/trafficking.html> (last visited Mar. 12, 2008).

²⁴⁶ U.N. Convention Against Transnational Organized Crime (Dec. 15, 2000), available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf.

²⁴⁷ *Id.* at Art. 25.

²⁴⁸ Lisa Kurbiel, *Implementing the UN Trafficking Protocol to Protect Children: Promising Examples from East Asia*, 24 CHILD. LEGAL RTS. J. 73 (2004).

²⁴⁹ As of 4/23/2007, the Protocol had 117 signatories and 114 parties. U.N. Office on Drugs and Crime, UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children Status, available at <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>.

²⁵⁰ Bruch, *supra* note 241, at 7.

²⁵¹ Chacon, *supra* note 13, at 2983. The Protocol definition of “trafficking” incorporates several forms of conduct to include threats, coercion, and deception. *See also*, Kurbiel, *supra* note 248, at 75 (where the author considers how the Protocol eliminates the consent requirement so that any child who has been transported for exploitative work is regarded as a trafficking victim even if they have not been forced or deceived because of the presumption that children do not possess an appreciation of subsequent results to be able to give effective informed consent).

human trafficking laws more narrowly craft its definition.²⁵² Commercial sex acts induced by force, fraud or coercion describe sex trafficking²⁵³ in our laws. Unfortunately, these terms do not acknowledge strategies used by traffickers to procure a twisted notion of “consent” from its victims. Under the Protocol’s definition, traffickers can not exploit children’s vulnerabilities because it eliminates “consent” from the “trafficking” definition.

Children receive superior protection than their adult counterparts because the Protocol contemplates trafficker’s exploitation of children’s vulnerabilities.²⁵⁴ Because the human trafficking legislation disregards consent, it bars inclusion of some victims²⁵⁵ leaving child sex victims in this country particularly vulnerable. Perhaps policy considerations rooted in concern over misuse of TVPRA benefits by individuals participating in their own smuggling²⁵⁶ overshadow the coercive impact of the industry on children. Conversely, the Protocol closes the consent loophole by expressly stating, “the consent of a victim of trafficking in persons to the intended exploitation...shall be irrelevant...”²⁵⁷ The protection policy reflected in the UN Protocol is comprehensive because its drafters recognize that, “coercion does not require use of physical force or threats; it can encompass many acts including abuse of a ‘position of vulnerability’.”²⁵⁸

Children are the quintessential reflection of vulnerability in the human trafficking industry because they are naïve and powerless. They do not knowingly “consent” to abuse and exploitation.²⁵⁹ This article suggest that since

²⁵² Chacon, *supra* note 13, at 2983-85 (where the author distinguishes the Protocol language that specifically identifies exploitative conduct while the U.S trafficking laws intentionally avoids issues such as consent).

²⁵³ *Id.*

²⁵⁴ Kurbiel, *supra* note 248, at 75.

²⁵⁵ Chacon, *supra* note 13, at 2984-85.

²⁵⁶ *Id.*

²⁵⁷ 258 *Id.*

²⁵⁸ 258 *Id.*

²⁵⁹ Nel, *supra* note 53, at 8.

policy considerations have driven definitional differences between U.S. human trafficking legislation and U.N Protocol language, our immigration laws must be revisited to more closely align with international human rights principles. The international community conveys a strong message that promotes not only investigation and punishment of traffickers, but also protection for its victims. Consequently, modifying the U.S. immigration law is a measure that elevates our commitment to this subpopulation of human trafficking victims to internationally recognized standards that herald the legal and social rights of children.

B. Protection of Children Is An Internationally Recognized Principle

The rights of children bear such grand importance to the international community that the United Nations formulated the UN Convention on the Rights of the Child or “CRC” as an expression of international respect for the legal and social rights of all children.²⁶⁰ What’s most notable about this Convention is its widespread and rapid endorsement from the international community.²⁶¹ The United States, however, has refrained from ratifying the CRC based on concern over the treaty’s impact on state and national authority.²⁶²

Although U.S. objection to CRC ratification seems rooted in fear of obstructing traditional family values, we must first recognize that some children such as child sex victims have not benefited from common notion of parental rights and

²⁶⁰ Workman, *supra* note 228, at 249.

²⁶¹ With 192 States Parties’ ratification, the CRC is known as one of the most quickly and widely ratified human rights treaties in history. Weissbrodt, *supra* note 242, at 209.

²⁶² *Id.* at 210. The author notes that politically conservative organizations, such as Focus on the Family, Family Research Council, Eagle Forum, Christian Coalition, John Birch Society and Concerned Women for America, have voiced concerns that adoption of the Convention would usurp state and national authority and erode parental rights and “traditional” family values. Even further, in 1998, Senator Jesse Helms who was serving as the chair of the Senate Foreign Relations Committee introduced a resolution advising that the Convention could restrict the state and federal government in their efforts to protect children. *Id.* at 212.

family values. In fact, some child sex victims are inserted into the human trafficking industry by the parents who are responsible for protecting them.²⁶³ Therefore, obstruction of family values is not the issue. The widespread ratification of the CRC is the intended focus because the CRC signals a spirit of protection for child sex victims from the international community. Regrettably, the particular issues or disagreement over certain articles in the CRC reflect more on political values than on social needs. This article advocates for U.S. governmental intervention that may not be in direct accord with specific articles in the CRC, but would at least embody the appropriate spirit of protection for child sex victims from removal to the countries from which they were sold, traded or abandoned for purposes of human sex trafficking.

Some may criticize the inherent assumption underlying U.S. protection from removal that returning a child sex victim to their originating countries would result in continued harm and abuse. Based on what we know about the insidious operation of the human trafficking industry and its captives, it is reasonable to assume such harm will occur; thereby, justifying their presumptive residency status. Children are not dispensable such that this country can afford to treat any of them, citizens or otherwise, in a manner that threatens their personhood or exposes them to the threat of further harm, either real or perceived. Ultimately, our government can not deny its capacity to provide child sex victims with their greatest need, that is, protection from removal. The U.S. immigration law policies, “should...follow international principles...(and) take a more leading role in protecting the world’s children who arrive on its doorstep.”²⁶⁴ Whether it is compassion or political outrage that motivates our lawmakers toward exceptional legal reform, the historical groundwork in U.S. immigration law policy and international human rights law has been laid. All that remains is for the structure to be built.

²⁶³ Kurbiel, *supra* note 248, at 75 (where the author notes that a child cannot appreciate their fate when they blindly obey parents who deliver them into trafficking).

²⁶⁴ Workman, *supra* note 228, at 249.

VII. From Justification To Implementation

A presumption of lawful permanent residency status for child sex victims is most appropriately effectuated by either, a presumption of dependency standard under the SIJ provisions or, preferably through modification of Section 1255(a) of the Immigration Code. A presumption of dependency under the SIJ visa provisions may cure the identified doctrinal obstacles²⁶⁵ in securing a temporary residency status for child sex victims. But, SIJ visa holders would still need to gain lawful permanent residency as a more permanent residency status. Section 1255 generally governs adjustment of status of nonimmigrants to that of persons admitted for permanent residence.²⁶⁶ Specifically, sections 1255(h) and (l) address adjustment of status for special immigrant juveniles and victims of sex trafficking, respectively.²⁶⁷ In both cases, the law contemplates special circumstances for consideration by the Attorney General when adjusting the status of an alien.

For instance, Section 1255(h) governs applicants seeking protected status under section 1101(a)(27)(J), the Special Immigrant Juvenile provisions. Special immigrant juvenile applicants receive two primary considerations. First, in applying section 1255(h)²⁶⁸ to a special immigrant described in section 1101(a)(27)(J),²⁶⁹ the immigrant **shall be deemed** to have been paroled into the United States.²⁷⁰ The term, “paroled” generally refers to instances where a foreign national awaits further inspection after arriving into the United States, but the foreign national is allowed into the country or “paroled” pending the deferred inspection process.²⁷¹ A person is not lawfully admitted into the U.S. until he has been

²⁶⁵ See discussion *supra* Part IV.

²⁶⁶ 8 U.S.C.A. §1255 (West 2006).

²⁶⁷ 8 U.S.C.A. §1255(h), (l) (West 2006).

²⁶⁸ 8 U.S.C.A. § 1255(h)(1) (West 2006).

²⁶⁹ 8 U.S.C.A. § 1101(a)(27)(J) (West 2006).

²⁷⁰ 8 U.S.C.A. § 1255(h)(1) (West 2006).

²⁷¹ Stephen Yale-Loehr, *Overview of U.S. Immigration Law*, 158 PLI/N.Y. 49, 67 (2006).

inspected²⁷² and, subsequently, admitted based on the criteria provided under the law. Second, in determining the admissibility of the alien as a “special immigrant juvenile”, the Attorney General may waive certain grounds for inadmissibility under the law “in the case of individual aliens for humanitarian purposes or when it is otherwise in the public interest.”²⁷³ In effect, SIJ visa applicants already benefit from lenient standards for obtaining lawful permanent residency under the adjustment of status provision (Section 1255) by considering humanitarian purposes in this process.

Moreover, section 1255(l) governs the adjustment of status for victims of trafficking.²⁷⁴ Under this provision, the Attorney General may consider that the alien “would suffer extreme hardship involving unusual and severe harm upon removal from the United States.”²⁷⁵ This criterion is generally utilized as a benchmark for treatment of human trafficking victims under the immigration laws. Child sex victims who suffer unusual and severe harm should benefit from an extension of policy where the government bears the burden for refuting facts that are incident to the child’s captivity in the human sex trafficking industry. A primary benefit of the presumption of lawful permanent residency status for child sex victims is that they would not be subject to the existing fiscal year limitation of a total 5000 aliens who can receive adjusted status under section 1255(l)(4).²⁷⁶ This means that child sex victims will not become further victims of an administratively bureaucratic period limitation, but instead receive protection from removal, absent proof of cause,²⁷⁷ through lawful permanent residency status.

²⁷² *Id.* at 66. The author states, “When a foreign national arrives at a port of entry, whether at an airport, seaport or land border, an immigration inspector makes an independent determination whether the foreign national should be admitted to the United States. This process is known as “inspection”.”

²⁷³ 8 U.S.C.A. § 1255(h)(2)(B) (West 2006).

²⁷⁴ 8 U.S.C.A. § 1255(l) (West 2006).

²⁷⁵ 8 U.S.C.A. § 1255(l)(1)(C)(ii) (West 2006).

²⁷⁶ 8 U.S.C.A. § 1255(l)(4) (West 2006).

²⁷⁷ 8 U.S.C.A. § 1227(a)(1)-(6) (West 2006). In these provisions, classes of aliens subject to deportation are based on circumstances such as, but not

VIII. Conclusion

Mothers and fathers in our modern society generally assume their moral, social, economic, and religious responsibilities when caring for their children. If one fails, the state assumes the role of the parent²⁷⁸ to ensure that these responsibilities are met. Without the state to stand in the shoes of the parent, there would be even more children than are already present on our streets. This legal and social framework exists in this country because most of us genuinely understand, at a minimum, the limitations of children, but even more, the value of their precious innocence.

Children in the United States theoretically benefit from a private (the “family”), if not societal (“social services”) network. We must, therefore, consider how this nation can view an abused or neglected child who just so happens not to be a U.S. citizen, but instead a National from another country, with a diminished level of responsibility, sympathy, and care.

The message that we send as the wealthiest nation in the world to our youngest, most vulnerable victims of human sex trafficking is fragmented. We offer benefits and services, but not safe haven from removal back to the oppression, lies, and deceit that initially led to their presence in the United States. Child sex victims of the human trafficking industry deserve exceptional consideration because they are children. A presumption of lawful permanent residency status affords child sex victims opportunity to “outgrow” the conditions of abuse and neglect in a country where perhaps future hopes and successes will mask the pain of their childhood.

One author very appropriately observed, “these are children first and foremost, before their status as either aliens or unaccompanied.”²⁷⁹ Labels and status cloud the issue.

exclusive of, inadmissibility at time of entry, criminal offenses, unlawful voting, and security and related grounds.

²⁷⁸ See Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting To The States’ Legislative Abrogation of Juveniles’ Due Process Rights*, 110 PENN ST. L. REV. 233 (2005).

²⁷⁹ Nugent, *supra* note 225, at 220.

Instead, we must prioritize the lives of children who are continually abused throughout the human trafficking industry. Perhaps, then, a more plausible, yet less political solution can prevail.