

ADVANCING CIVIL RIGHTS THROUGH IMMIGRATION LAW: ONE STEP FORWARD, TWO STEPS BACK?

Juliet Stumpf
*Bruce Friedman**

INTRODUCTION

The migration of the labor pool across international borders forces nations to face conflicting pressures to maintain the cultural and economic status of the current population, while at the same time responding to the demand for more labor. In the United States, the response to this problem is immigration law—the primary tool that the government, as a sovereign state, employs to define its political community and control its borders.¹ In its efforts to reduce undesired immigration,² the United States fortifies its defenses by enacting new laws and implementing new strategies to control the effects of immigration, particularly unlawful immigration, on the domestic labor market. However, when these strategies are implemented without adequate protections for the civil rights of individuals within the labor pool, they may have the effect of harming the very labor pool that the laws are designed to protect. These strategies may also harm individuals outside the labor pool in unforeseen and negative ways.

* Juliet Stumpf is Acting Assistant Professor of Lawyering at the New York University School of Law. Bruce Friedman is the Special Policy Counsel with the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, U.S. Department of Justice. The views expressed in this paper are those of the authors and do not purport to represent the views of any federal agency.

1. See ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 30–31 (1997) (positing that citizenship laws establish criteria for membership in a political community).

2. There are several reasons why a State would perceive immigration as undesirable: one is to protect the labor market for those who support the current incarnation of the State. Another is the potential that the incoming workforce might change the current political balance in both predictable and unpredictable ways. Yet another is the fear that employees from cultures, races, and backgrounds different from the incumbent majority of the State's current population may change the makeup and culture of the body of the State and assert more influence over it.

Civil rights and immigration law are both tools that the State uses to affect labor markets. Immigration law traditionally has limited labor markets by restricting the ease with which those markets can expand across international borders. Within those borders, civil rights laws restrict the ability of employers to divide employees across lines of race, sex, national origin, and other subjective categories. In other words, immigration laws restrict labor markets by geography and nationality, while civil rights laws expand labor markets by removing artificial restrictions on the labor pool. By meshing immigration and civil rights laws, the State attempts to use the private action focus of civil rights to affect State-centered immigration policy as it relates to labor markets.

In this article, we seek to examine the uneasy relationship between civil rights and immigration laws and the way in which joint enforcement of civil rights and immigration laws plays out in the labor market. Our vehicles to explore this relationship are the Immigration Reform and Control Act of 1986 (IRCA)³ and the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA).⁴ These distinct legislative efforts each embody a melding of immigration and civil rights concerns. Driving this intermingling of civil rights and immigration law is the goal of heightened enforcement of immigration and civil rights laws. However, when immigration enforcement receives a greater priority than enforcement of civil rights, the delicate balance struck between them is threatened.

In Part I, we briefly describe the relationship of civil rights and immigration law to each other and to the State and discuss the central role that each plays in identifying and defining those who are members of the State. We then examine the interplay between immigration and civil rights law in the labor market in the context of the two statutes. In Part II, we discuss the role of civil rights in IRCA, which prohibits employers from hiring employees whom the State has not authorized to work.⁵ IRCA creates civil rights protections for work-authorized immigrants and U.S. citizens to prevent and remedy discrimination based on citizenship status and national origin.⁶ We ad-

3. Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 5, 7, 8, 20, 26, 29, 40, and 42 U.S.C.).

4. Pub. L. No. 106-386, 2000 U.S.C.C.A.N. (114 Stat. 1464) (codified in scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.).

5. 8 U.S.C. § 1324a(a)(1) (2000).

6. *Id.* § 1324b(a); see also Eric J. Smith, *Citizenship Discrimination and the Frank Amendment to the Immigration Reform and Control Act*, 35 WAYNE L. REV. 1523, 1531-46 (1989).

dress how this law uses civil rights to balance the negative effect that immigration policies may have on the labor market.

In Part III, we discuss the TVPA, newly-minted legislation that prohibits trafficking in persons⁷ and that is currently being implemented within the United States.⁸ The law responds to the growing international market in human trafficking controlled by multinational criminal organizations.⁹ We examine how the legislation interweaves immigration policy and civil rights to create a tool to combat the globalization of the market for trafficking in humans.

I.

IMMIGRATION AND CIVIL RIGHTS LAW AND POLICY: LINKING TWO REALMS

Immigration and civil rights laws are not easy companions.¹⁰ Still, the two are inexorably intertwined. Immigration policy in the United States has, at least in recent history, been the province of the U.S. government as the sovereign State.¹¹ Immigration law is a means for the State on a physical level to control the flow of people across its borders—essentially, defining and maintaining its geographical identity. On another level, immigration law is the means by which the State defines its membership—its cultural or sociological identity.¹² Civil rights laws also can play a defining role for the State. Civil rights in the United States reflect the legal attributes that the State employs to identify the people who comprise its community.¹³ In the

7. 18 U.S.C. § 1589 (2000) (prohibiting forced labor); *id.* § 1590 (prohibiting trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); *id.* § 1591 (prohibiting sex trafficking of children by force, fraud, or coercion); *id.* § 1592 (prohibiting destruction or other alteration of documents in furtherance of trafficking); *see also* President's Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 3 PUB. PAPERS 2352 (Oct. 28, 2000).

8. *See, e.g.*, 8 C.F.R. §§ 103, 212, 214, 274a, 299 (2002).

9. ANDREAS SCHLOENHARDT, AUSTRALIAN INST. OF CRIMINOLOGY, ORGANIZED CRIME AND THE BUSINESS OF MIGRANT TRAFFICKING 2 (Nov. 10, 1999) (on file with the *New York University Journal of Legislation and Public Policy*).

10. An inference about the nature of this relationship may be drawn from the Table of Contents of Title 8 of the United States Code, which governs Aliens and Nationality. The sections under the heading "Civil Rights" have been transferred to other sections or repealed. 8 U.S.C. §§ 41–56 (2000).

11. U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to establish uniform naturalization laws); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (observing that "Congress and the executive branch have broad and often exclusive authority over immigration decisions").

12. *See* SMITH, *supra* note 1, at 30–31.

13. *See* Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1069 (1994). Bosniak discusses the effects of con-

way that the State defines the civil rights of its membership, it makes a statement about how it differentiates those who are full members of its communities from those who are not. Those imbued with the strongest rights are those with the strongest claim to membership. Those with the weakest rights have the weakest claim—or none at all.¹⁴

Yet civil rights and immigration law collide in several significant ways. Perhaps the greatest point of tension results from the fact that immigration law, by its nature, discriminates on the basis of citizenship status and national origin.¹⁵ In the context of the labor market, laws that prohibit non-U.S. citizens from working without authorization from the State erect divisions based on citizenship status between those who have rights to work and those who do not. Based on an individual's citizenship status, the State may confer or deny employment authorization,¹⁶ place employees in detention,¹⁷ and deport them from the country.¹⁸

The way in which civil rights and immigration laws are enforced reflects a significant difference between those laws. Immigration law is enforced primarily by public entities, while civil rights laws are enforced primarily by private actors. Immigration law is sufficiently central to the identity of the State that the federal government retains exclusive control over immigration law and policy.¹⁹ The State enforces this federal immigration law using the traditional tools of the sovereign, including: federal investigations;²⁰ federal subpoena power;²¹ and arrest, detention, and deportation of employees found to be working without State authorization.²² The sovereign federal State has sole jurisdiction over the entry of individuals into the United

ceptualizing immigration law as a way of defining a community in her examination of the work of Michael Walzer. Walzer asserts that the members of a community may shape their membership admissions policy according to their own preferences, and that such a policy is fundamentally political and desirable. Michael Walzer, *The Distribution of Membership*, in *BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS* 1, 1–36 (Peter G. Brown & Henry Shue eds., 1981).

14. Walzer, *supra* note 13, at 27–28.

15. See 8 U.S.C. § 1324b(a)(1) (2000) (allowing discrimination in employment practices against unauthorized aliens); see also, e.g., Bosniak, *supra* note 13, at 1073–74 (discussing discriminatory treatment of non-citizen Metics in ancient Athens).

16. 8 U.S.C. §§ 1226(a)(3), 1324a(a).

17. *Id.* § 1226(a).

18. *Id.* § 1227.

19. Motomura, *supra* note 11, at 547.

20. 8 U.S.C. § 1324a(e)(1).

21. *Id.* § 1324a(e)(2).

22. *Id.* §§ 1226, 1227.

States.²³ The State decides who may lawfully remain and for how long.²⁴ Most importantly, the State defines how individuals may obtain citizenship, thereby becoming full members of the State.²⁵

In contrast to the State-centered enforcement of immigration law, the enforcement of civil rights law has depended heavily on private actors. U.S. laws that prohibit discrimination in employment on the basis of race, national origin, gender, religion, disability, and age encourage private enforcement of their prohibitions by allowing individuals to bring suits against their employers and by providing for attorneys' fees for employees who prevail.²⁶ Underlying this emphasis on private action is a concern that the State will be less likely to exercise its power on behalf of those who, lacking a majority in a democratic society, have less influence on the political process.²⁷ Civil rights statutes have been described as encouraging the creation of "private attorneys general"—private individuals who act in the place of the State in order to increase the level of compliance with antidiscrimination laws.²⁸

A common thread in both IRCA and the VTVPA is the expansion within immigration law of the class of lawful members of the State

23. The Supreme Court has explained:

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.

Takahashi v. Fish Comm'n, 334 U.S. 410, 419 (1948) (citation omitted); *see also* *United States v. Ginsberg*, 243 U.S. 472, 474–75 (1917) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress."); *United States v. Tittjung*, 235 F.3d 330, 338 (7th Cir. 2000) (quoting *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) ("Congress alone has the constitutional authority to prescribe rules for naturalization.")).

24. *Takahashi*, 334 U.S. at 419.

25. *Id.*

26. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989) (discussing civil rights cases as exceptions to American rule of not awarding attorneys' fees in civil cases).

27. *Carolene Prods. Co. v. United States*, 304 U.S. 144, 152 n.4 (1938) (suggesting that prejudice against discrete and insular minorities distorts political process, rendering such minorities politically powerless).

28. *Indep. Fed'n of Flight Attendants*, 491 U.S. at 759 (discussing Congress' intention that individuals injured by racial discrimination act as "private attorney[s] general" to vindicate policy that Congress considered of highest priority).

and a concomitant strengthening of the civil rights of that class. Both statutes redefine formerly unrecognized classes of individuals as being eligible for legal immigration status.²⁹ Both erect enforcement mechanisms that encourage individuals susceptible to exploitation to vindicate statutorily-conferred rights. We contend that these two statutes represent the product of the intersection of civil rights and immigration law. Both, however, offer glimmers of the dangers of this merging of civil rights with immigration law; when legislation springs from a dual desire to increase civil rights protections and restrict immigration, enforcement of such laws may emphasize restrictions on immigration at the expense of civil rights.

II.

THE PROHIBITION AGAINST IMMIGRATION-RELATED DISCRIMINATION

The structure of IRCA reveals a balancing of immigration restrictions and antidiscrimination protections. In Section A, we describe how IRCA combines civil rights and immigration law to influence the labor market and redefine those who comprise the membership of the State. In Section B, we critically examine whether that combination succeeds in achieving the dual purpose of strengthening civil rights and increasing immigration restrictions in the labor market.

A. The Structure of the Immigration Reform and Control Act of 1986

In a single statute, IRCA³⁰ embodies several of the defining characteristics of both civil rights and immigration law. First, IRCA combines the private enforcement characteristic of civil rights laws with the federalized public enforcement of the immigration laws. Second, similar to a civil rights law, it defines certain protected classes and establishes rights against discrimination. Like an immigration law, it encourages discrimination against other classes based on the citizenship status of those classes. Third, through this combination of civil rights and immigration law, IRCA redefines the classes of individuals who are considered members of the State.

The interplay between immigration law and civil rights is nowhere more clear than in IRCA. The law has three basic components.

29. 8 U.S.C. §§ 1101(a)(15)(T)–(U), 1255(i), 1255a (2000); 8 C.F.R. § 214.11(o)–(p) (2002).

30. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 5, 7, 8, 20, 26, 29, 40, and 42 U.S.C.).

First, it legalizes the status of undocumented immigrants who have lived in the country continuously since before 1982.³¹ Second, it prohibits employers from knowingly hiring undocumented workers and establishes legal sanctions against employers that do.³² Third, the law creates a new civil right against discrimination in employment on the basis of citizenship status.³³ It also expands protection against national origin discrimination by subjecting a larger range of employers to coverage.³⁴ It confers the new protection against citizenship status discrimination on U.S. citizens and certain categories of work-authorized immigrants.³⁵ Finally, it establishes a federal agency—the Office of Special Counsel for Immigration Related Unfair Employment Practices—to investigate charges of discrimination and litigate meritorious claims on behalf of victims of discrimination.³⁶

The 1986 law broke with the previous conceptualization of immigration law as primarily a public function.³⁷ Through the law's first component, the amnesty for previously undocumented workers, the State uses its power to define citizenship status to incorporate into its membership those who have shown a commitment to long-term residence, i.e., those who were *de facto* members of the community already.³⁸ Through its second component, employer sanctions for hiring undocumented workers, the State effectively makes employers parties to enforcement of the immigration laws affecting the labor market. Employers themselves become the primary method of screening the labor pool for employees that the State has not authorized to work.³⁹

31. 8 U.S.C. § 1255a(a)(2)(A) (2000); see also Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J., 343, 353 & n.85, 354 (1994) (critiquing reach of amnesty provisions of IRCA).

32. 8 U.S.C. § 1324a; Espenosa, *supra* note 31, at 359–64.

33. *Id.* § 1324b(a)(1)(B); Espenosa, *supra* note 31, at 364–69.

34. *Id.* § 1324b(a)(1)(A).

35. *Id.* § 1324b(a)(3).

36. *Id.* § 1324b(c).

37. Espenosa, *supra* note 31, at 359–64 (discussing actions employer must take to ensure compliance with IRCA).

38. The legalization program requires each applicant to establish first that he or she entered the United States “before January 1, 1982, and that [s]he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed” 8 U.S.C. § 1255a(a)(2)(A). The applicant is also required to prove “continuous physical presence.” *Id.* See also Espenosa, *supra* note 31, at 353–54.

39. Eustace T. Francis, *Taking Care of Business: The Potential Impact of Immigration Reform on Corporate Strategic Planning*, 5 GEO. IMMIGR. L.J. 79, 92 (1991) (explaining that “IRCA implicitly imposes on corporate policy makers a duty to seek out and remedy violations of the Act”).

In this way, the State expands the scope of its public enforcement powers to include private employers.

Converting employers into enforcers of immigration law has consequences for the civil rights of employees. Requiring employers to discriminate between those whom the State has authorized to work and those whom it has not requires employers to make determinations about employment based on an employee's citizenship status. The potential for sanctions against employers who hired undocumented workers creates an incentive for employers to discriminate against those perceived not to have a citizenship status commensurate with work authorization.

This form of discrimination is most likely to affect employees of color.⁴⁰ The work-authorized employees who are most likely to experience discrimination based on citizenship status are those whom employers are most likely to associate with undocumented workers, i.e., workers of certain ethnicities or national origins.⁴¹ Thus, a consequence of expanding immigration law enforcement into the private realm is an increased potential that employers will discriminate based on ethnicity or national origin. In 1990, the General Accounting Office, a government agency that oversees the effectiveness of the government's implementation of the laws, found that employer sanctions had in fact increased the incidence of discrimination against immigrants and those perceived as immigrants.⁴²

The third component of IRCA, the antidiscrimination provision, reflects an acknowledgment that a shift in enforcement of immigration law to private actors must be balanced with an increase in civil rights protections for the labor pool. Prior to the passage of IRCA, civil rights protections against citizenship status discrimination, in contrast with national origin discrimination, were essentially nonexistent.⁴³

40. Sarah M. Kendall, *America's Minorities Are Shown the "Back Door" . . . Again: The Discriminatory Impact of the Immigration Reform and Control Act*, 18 Hous. J. INT'L. L. 899, 932 (1996) (describing IRCA as "the perfect 'backdoor' for discrimination based on race, ethnic background, national origin, or alienage").

41. Espenozza, *supra* note 31, at 348. Espenozza posits, "Employers who make decisions based on appearance might not wait to find out if a potential worker has proper authorization. Employers instead may rely upon the physical characteristics of Hispanic and Asian job applicants to exclude them from job opportunities. Thus legal immigration has created a shift in the racial composition of the labor market that causes employers to treat the prospective employees as foreign." *Id.* at 353.

42. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, REPORT TO CONG., IMMIGRATION REFORM, EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 3, 5-7 (March 1990).

43. In *Espinoza v. Farah Manufacturing Co.*, the Supreme Court drew a distinction between national origin and alienage discrimination. 414 U.S. 86, 95 (1973). The Court held that, although Title VII prohibited discrimination against an alien when it

Employees who had work authorization had no federal protections against employers who discriminated against them because of their immigration status.⁴⁴ As a result, civil rights laws did not directly reach discrimination that related to how the State defined citizenship status, nor how that definition affected immigrant employees.

The antidiscrimination provision of IRCA was meant to counter the potential for greater discrimination that the employer sanctions created.⁴⁵ The antidiscrimination provision created civil rights-centered prohibitions against discrimination on the basis of citizenship status.⁴⁶ It established enforcement mechanisms for those prohibitions in both the public and private realms.⁴⁷ A government agency, the Office of Special Counsel, was imbued with the power to investigate potential discrimination and represent the State in lawsuits brought on behalf of the victims of discrimination.⁴⁸ The law also turned to private enforcement by creating a private right of action as a method for individual victims to remedy discrimination through legal action independent of the State.⁴⁹

Although the antidiscrimination provision was conceived primarily as a civil rights law, it reflects aspects of its context within immigration law. True to the remedial purpose that is the hallmark of civil rights legislation,⁵⁰ the antidiscrimination provision shoulders a heavy burden to prevent discrimination against work-authorized immigrants and U.S. citizens nationwide. True to the nature of immigration policy, the law limits the categories of individuals who are protected by the antidiscrimination protections. Under the law, U.S. citizens, certain permanent residents, asylees, refugees, and certain formerly undocumented immigrants receive protection from discrimination in

was based on national origin, “nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.” *Id.* See also Linda Sue Johnson, *The Antidiscrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059, 1081 (1988).

44. *Espinoza*, 414 U.S. at 95.

45. Kendall, *supra* note 40, at 910 (detailing legislative history of antidiscrimination provision and concluding that “Congress’ legislative intent in passing IRCA’s employer sanctions and anti-discrimination provisions can be summarized in two parts: (1) the sanctions were seen as a viable means of reducing illegal immigration; and (2) the legislators were apprehensive as to the possible discriminatory effects of the sanctions”).

46. 8 U.S.C. § 1324b(a) (2000).

47. *Id.* §§ 1324b(b), (d).

48. *Id.* § 1324b(c)(2).

49. *Id.* § 1324b(d)(2).

50. See, e.g., *McKennon v. Nashville*, 513 U.S. 352, 357, 358 (1995) (discussing remedial nature of Age Discrimination in Employment Act).

employment.⁵¹ Those not protected include undocumented workers and those without indefinite permission to reside in the United States.⁵²

These categories are consistent with the membership-defining functions that civil rights and immigration policy have in common. By defining the protected class in a certain way, the antidiscrimination provision of IRCA indicates who is recognized as a member of the community for immigration purposes. Under the 1986 antidiscrimination law, civil rights protections reside with U.S. citizens and individuals with indefinite permission to reside in the United States, including permanent residents,⁵³ refugees, and asylees.⁵⁴ Thus, the law imparts antidiscrimination protections to those whom the State already has sanctioned to enter the United States and to work within the U.S. labor market.

The interaction between civil rights and immigration law appears most plainly in the dual role that the antidiscrimination provision plays as a civil rights law that effects a restraint on immigration. The antidiscrimination provision also can be seen as a way for the State to reduce the influx of undocumented workers. When the State endows certain employees with antidiscrimination rights enforceable against employers, it increases the risk to employers of hiring those without rights.⁵⁵ When the State parcels those rights out along the lines of citizenship status, employers have less incentive to hire people outside of the protected citizenship status classes. Employers who fail to hire the protected class face the risk of lawsuit and the prospect of significant monetary damages.⁵⁶ Moreover, securing and enforcing the rights of the approved employees disadvantages persons without such rights. Generally, those without such rights are individuals who do not have the right to enter or work in the United States.

51. 8 U.S.C. § 1324b(a)(3).

52. *Id.* One way to view the scope of the protection of the law is as another way that the State defines its community as a statement about who should be included in and excluded from the community. Those whom the State endows with civil rights are those who are in some sense its members—those who reside permanently in the United States and who thereby have a more permanent relationship with the State.

53. 8 U.S.C. § 1324b(a)(3)(B). The statute exempts from protection permanent residents who do not apply for U.S. citizenship within six months of becoming eligible. This exemption effectively forfeits the civil rights of those who do not take steps to become citizens, i.e., those who decline membership in the State. *Id.*

54. *Id.*

55. See Francis, *supra* note 39, at 93 (“In the context of immigration reform, to the extent that it imposes compliance and other costs on the corporation, immigration law directly affects the bottom line.”).

56. *Id.*

The result of this scheme is that work-authorized employees themselves would indirectly enhance enforcement of immigration law. When work-authorized employees exert their rights against employers that hire undocumented immigrants, they aid the State in controlling the entry of undocumented workers into the labor market. The result is an expansion of the State's enforcement of immigration law and its control over labor markets by pressing into service as enforcement agents both the supply and demand sides of the labor market: employers and work-authorized employees. Thus, the antidiscrimination provision becomes a tool by which the State indirectly controls—and attempts to check—the expansion of the labor market across international lines.

B. *Evaluating State Control of the Labor Market*

Does this meshing of immigration law and civil rights law work? The effectiveness of immigration law and enforcement is usually measured using only one factor: its success in keeping undocumented workers from entering the labor market.⁵⁷ In the context of IRCA, this measure of success asks whether the law reduces the incentives for employers to hire undocumented workers to a level that is lower than the incentives to hire work-authorized individuals.⁵⁸ This measure of the effectiveness of the State's protection of the labor market, however, is dangerously incomplete. It addresses only whether individuals that the State considers undesirable are successfully excluded. It fails to measure the costs of immigration enforcement strategies when they result in the exclusion of portions of the labor pool that the State considers desirable, i.e., individuals that the State has authorized

57. *E.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-33, REPORT TO CONG. COMMS., ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED EMPLOYMENT EXIST 16 (April 1999); *see also* Charles C. Foster, *Immigration Act: Its Impact on U.S. Legal Residents and Undocumented Aliens*, 34 Hous. Law. 28, 30–34 (Jan./Feb. 1997) (describing legislation subsequent to IRCA that focused on heightening enforcement against undocumented workers and increasing penalties against employers who hire them).

58. It has been argued that the State fails altogether in protecting the labor market for the benefit of the incumbent work-authorized labor pool. Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & Soc'y REV. 1041, 1058 (1990). Calavita posits that the devil is in the details of the laws prohibiting employment of undocumented workers. She argues that the law gives the employer a shield behind which it can hire undocumented workers with impunity. The employer sanctions provision provides employers protection from fines when they complete a form certifying review of employment authorization documents. The antidiscrimination provision prohibits unreasonable scrutiny of those documents. The result is that employers can hire undocumented employees without violating the law against knowingly hiring them. *Id.* at 1056–61.

to work.⁵⁹ If immigration control policies that the State implements to protect the labor market result in excluding certain populations that are a legitimate part of that labor market, those immigration policies cannot be considered effective. Thus, a critical part of evaluating the influence of immigration law on the labor market is evaluating the effectiveness of the antidiscrimination provision of IRCA.

As immigration controls tighten in the United States in response to globalizing markets and terrorism,⁶⁰ the potential for resulting discrimination intensifies. With higher levels of immigration enforcement, the State's response to heightened levels of discrimination must keep pace. Whether the antidiscrimination provision effectively reduces discrimination on the basis of citizenship status depends entirely on the effectiveness of its enforcement. Consistent with its origins as a meshing of civil rights and immigration law, the enforcement of the antidiscrimination law is based in both private and State action. Evaluating the effect of the law on discrimination requires examining both levels.

We conclude in this Section that there are significant barriers to private enforcement of the antidiscrimination provision, including the vulnerability of recent immigrants in low-wage markets to higher levels of discrimination, lack of information and resources, and high turnover in market sectors that tend to employ immigrant labor. We also discuss the potential that purely private enforcement of the antidiscrimination provision could weaken both the civil rights of the protected classes and the prohibitions under immigration law against hiring undocumented workers. We describe ways in which the public enforcement mechanisms of the antidiscrimination provision address many of the barriers to effective private enforcement. However, if enforcement of the immigration laws is not balanced by effective protection against discrimination, the aims of both immigration law and antidiscrimination protection will suffer.

1. Private Enforcement of the Antidiscrimination Provision

Private enforcement of the antidiscrimination provision is complicated by the nature of the immigrant population and the nature of the industries that depend on immigrant labor. Recent immigrants are more likely to experience discrimination than U.S. citizens or immi-

59. See generally Kendall, *supra* note 40, at 909–10 (emphasizing State's interest in protecting employment rights of certain legal immigrants).

60. See Tamar Jacoby, *Immigration Reform and National Security*, N.Y. TIMES, May 9, 2002, at A34; Robert Pear, *Bill on Border Security and Immigration Passes in House*, N.Y. TIMES, Sept. 16, 2002, at A17.

grants who have resided longer in the United States.⁶¹ Recent immigrants often start at the bottom of the labor market, where wages are low and unskilled labor is needed. Hence discrimination is least costly for the employer because unskilled employees tend to be more fungible.⁶² Rejecting an unskilled applicant because of concerns about that person's citizenship status does little harm to the employer when that employer can hire another unskilled applicant perceived as less risky. Employers are more likely to associate recent immigrants of Latino or Asian origin with undocumented workers based on their appearance, accent, or fluency in a language other than English.

While recent immigrants are more likely to experience discrimination, they are less likely to enforce prohibitions against it.⁶³ The first barrier to enforcement is lack of information. Before victims of discrimination can exert their rights, they have to know about them. Due to their status as newcomers to the country and unfamiliarity with the law and the processes of government, immigrants are less likely to know about the prohibition against citizenship status discrimination or how to go about acting on it.⁶⁴ Cultural unfamiliarity or discomfort with using the legal system to address issues such as these also contributes to a suboptimal level of enforcement.⁶⁵ Also, because the immigrant population is ever-changing, adding new members and losing others to repatriation or naturalization, there is an ever-replenishing sector of the immigrant population that does not have this information.

61. *EEOC v. Consol. Serv. Sys.*, 989 F.2d 233, 238 (7th Cir. 1993) (Posner, J.) (“Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent.”); Michael Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249, 255 n.12 (1999) (“[U]nlike Irish- or Italian-Americans who are now well established and unlikely to be subject to palpable discrimination, recent immigrants from Central or South America often experience much discrimination and poverty.”).

62. Christian Zolniski, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 YALE L.J. 2305, 2321–22 (1994) (discussing low-wage posts occupied by recent immigrant workers “who can be easily replaced in order to keep labor costs down”).

63. Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1930 (1993).

64. See generally Lu-in Wang, *The Transforming Power of “Hate”: Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 57 (1997) (hypothesizing “Calculating Discriminator” who targets grocery stores owned by recent immigrants from Asia “because he believes that their difficulty with the English language and isolation from the mainstream community will render them less likely to report the crime or to gain the assistance of the police”).

65. *Id.* at 57–58 (positing several reasons why victims of discrimination may be hesitant to go to authorities).

The second hurdle is a fundamental one. Immigrants at the bottom of the labor market have fewer resources to enforce rights against discrimination.⁶⁶ Fewer resources means more difficulty in obtaining legal representation and pursuing litigation. In addition, the immigration population at that lower level of the labor market tends to be very mobile,⁶⁷ and turnover in employment is high.⁶⁸ It is more difficult for an individual to enforce his or her rights against an employer when moving from one place to another.

High turnover rates in parts of the labor market that have a large immigrant workforce create another barrier to private enforcement.⁶⁹ High turnover means employees invest less time and resources in a particular job. Employees who are less invested in a job will have less incentive to enforce their rights through the legal process if resolving the issue by moving to another job takes less effort and the gain from enforcement is small. The result is that employers with relatively high levels of discrimination do not experience the same level of private enforcement actions than if its labor pool were fully informed, had more resources, and were more stable.⁷⁰

Finally, although the prohibition against discrimination is meant to weigh in favor of hiring work-authorized employees, there are ways in which it may not. Due to labor market pressures, the undocumented workforce leaks around the restrictions on entry into the United States and grows larger.⁷¹ The result is a population of undocumented workers unprotected by certain civil rights or lacking the information or incentives to enforce any rights they do have.

66. See Robert L. Bach, *Building a Community Among Diversity, Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 646 (1995).

67. Milagros Cisneros, *H.B. 2659: Notorious Notaries—How Arizona Is Curbing Notario Fraud in the Immigrant Community*, 32 ARIZ. ST. L.J. 287, 315 (2000).

68. See Zlolniski, *supra* note 62, at 2321. Zlolniski notes:

[A]s the result of the restructuring process, janitorial work is an occupation for recent immigrant workers who can be easily replaced in order to keep labor costs down. Consequently, minority (e.g., Chicano) and immigrant workers who had been living and working in the United States for a long time have been largely replaced by a new cohort of recent Mexican immigrants, many of whom are undocumented. The latter, because of their vulnerable legal position, can be easily exploited by their employers, thus facilitating the high-turnover strategy.

Id. at 2315 (footnote omitted).

69. *Id.* at 2315.

70. Tanya Kateri Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 755–59 (1997) (discussing limitations on effectiveness of IRCA's antidiscrimination provision).

71. Sam Dillon, *Agua Prieta Journal: Boom Turns Border to Speed Bump*, N.Y. TIMES, Jan. 18, 2000, at A4.

This situation creates a civil rights vacuum. Employers have incentives to hire workers with fewer rights—to the extent they can avoid sanctions from the State—because employees without rights accept lower wages and cannot bring costly enforcement actions.⁷² The result is an employer preference for undocumented workers. The effect of such a preference is that employees with rights have incentives not to assert them in order to increase their ability to compete for jobs. In other words, to the extent that the level of enforcement of civil rights is dependent upon employee vigilance, it may be severely undermined.

2. *Public Enforcement of the Antidiscrimination Provision*

This is where public enforcement comes into play. The structure of IRCA's antidiscrimination provision reflects an awareness of the difficulties inherent in private enforcement in this area. IRCA established mechanisms by which the State may intervene to combat discrimination.⁷³ The approach embodied in the Act is likely unique among nations because of its focus on State protection of the rights of immigrants, who have no voting rights and little political influence.⁷⁴ By establishing the Office of Special Counsel (Office), the statute set up a government body, representing the State, and charged it with the enforcement of the provision.⁷⁵

The creation of this Office addresses several of the problems presented by private enforcement. First, as an agency mandated to address discrimination, the Office does not face the hurdle of lack of information about the law that individual victims of discrimination do. Rather, victims of discrimination benefit from the information and expertise the Office has gathered in this area when the Office brings enforcement actions on their behalf. In addition, to address the barrier created by lack of information, the statute mandates that the Office perform outreach and education about the rights of employees and the responsibilities of employers under the statute.⁷⁶ This outreach func-

72. See Hernandez, *supra* note 70, at 757.

73. 8 U.S.C. §§ 1324b(b)–(d) (2000).

74. See, e.g., April Chung, Comment, *Noncitizen Voting Rights and Alternative: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 ASIAN PAC. AM. L.J. 163, 164 (1996); Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 282, 284 (2000); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1393–94 (1993).

75. 8 U.S.C. § 1324b(c).

76. *Id.* § 1324b(1)(1).

tion reduces information costs for victims of discrimination and has the prophylactic effect of educating employers to reduce discriminatory conduct.

Perhaps the most powerful aspect of the statute is its provision for independent investigations by the agency.⁷⁷ This independent investigatory power directly addresses the concern that the level of private enforcement may be too low. By allowing the Office to bring independent investigations, divorced from any individual initiative, the statute increases the enforcement capabilities on the State level to the greatest extent that the agency's resources allow. The result is that, compared with the focus on private enforcement of many civil rights statutes, this statute emphasizes enforcement on the State level. The shift in the burden of enforcement of the antidiscrimination provision towards State action mirrors the opposite shift towards private action in enforcement of the immigration laws that the employer sanctions provisions represent.

The heavy reliance on State enforcement of civil rights is an appropriate and necessary response to the barriers to private enforcement. However, the antidiscrimination provision, while a welcome first step, does not prohibit all discrimination in employment based upon citizenship status. Employers still may legally discriminate against immigrants with respect to the terms and conditions of employment, including promotions and working conditions.⁷⁸ Employers may also legally discriminate against lawful permanent residents who have not applied for naturalization in a timely manner, and they may lawfully reject a permanent resident for employment solely because of his or her status.⁷⁹

These statutory limitations raise a basic question: whether the breadth of the law is adequate to remedy the effects of the changes in the immigration laws since 1986.⁸⁰ As globalization and terrorism have led to increasingly heightened controls on immigration, there has been no ameliorative legislation initiating a comprehensive effort to combat heightened discrimination against lawful immigrants.

In sum, when evaluating the strategies that the State has established in order to enforce the immigration laws in a way that protects the labor market, it is critical to determine whether the antidiscrimination provision has been effective in ensuring that those the State has

77. *Id.* § 1324b(d)(1).

78. *Bendig v. Conoco*, No. 20B00033, 2001 WL 1754725, at *15 n.12 (O.C.A.H.O.).

79. 8 U.S.C. § 1324b(a)(3)(B).

80. *Hernandez*, *supra* note 70, at 755–59.

allowed to work are not excluded.⁸¹ This calculus must take into consideration that, by setting up employers as enforcers of immigration law, the State increases the potential for discrimination against those most likely to be mistaken for undocumented workers—recent work-authorized immigrants of color. Without effective enforcement of the antidiscrimination laws, the burden of immigration enforcement falls on that population. Thus, absent adequate enforcement, the population that receives the greatest protection within the labor market is the population least likely to need it—employees whom employers are most likely to perceive as U.S. citizens because of their skin color, accent, or language.⁸²

IRCA has been in place since 1986, providing the opportunity for a sixteen-year retrospective on the efficacy—and the costs—of a statutory combination of immigration policy and civil rights. The recently-enacted VTVPA recalls this dual structure of IRCA. In the VTVPA, Congress has replicated the melding of immigration and civil rights policy that is IRCA's most striking feature. Like IRCA, the VTVPA uses this combination to address a problem that the State had been unable to resolve effectively. This new law uses immigration and civil rights law to both (1) differentiate victims from traffickers⁸³ and (2) remove the traffickers' bargaining power over victims by conferring legal status on those victims and offering the legal workplace as an alternative.⁸⁴ In keeping with the labor market focus of IRCA, the VTVPA seeks to affect unlawful labor markets by shifting the fo-

81. *Id.* at 757. Hernandez's discussion leaves no doubts about her view of the role of the antidiscrimination provision:

The benefit of maintaining an ineffective anti-discrimination immigration policy is the marginalization of the surplus labor supply. IRCA essentially authorizes employers to use the possible denial of employment because of employer concerns with violating the law as a mechanism for keeping all wages down and discouraging employees from making demands for appropriate working conditions. Specifically, IRCA places undocumented persons of color (more likely to be considered foreign than White immigrants who "look American") and documented workers of color (who are also considered to "look foreign") in the precarious position of having to feel thankful for employment at lower wages and sometimes unsafe conditions—thankful because they easily could be turned down for employment because they look foreign and have no effective recourse for such discrimination.

In short, IRCA uses an ineffective anti-discrimination provision to maintain the existence of a large marginalized population as a bottom-tier supply of surplus labor.

Id.

82. *Id.*

83. Compare 22 U.S.C. § 7105(b)(1)(A) (2000), with *id.* § 7109(b)(1).

84. See 22 U.S.C. § 7105.

cus from public enforcement of criminal and immigration law to private action founded on enhanced civil rights. By redefining the immigration status of those who have experienced exploitation in those markets, the VTVPA endows previously unprotected populations with civil rights and opens the door to the full spectrum of lawful employment opportunities. This endowment of a new immigration status and corresponding civil rights reflects the VTVPA's inclusion of trafficking victims in the membership of the State.

III.

DE-GLOBALIZING THE MARKET FOR HUMANS: CIVIL RIGHTS AND IMMIGRATION POLICY AS A STATE-SANCTIONED TOOL AGAINST HUMAN TRAFFICKING

Trafficking in humans is a market in which humans are commodities and the profits of labor are completely removed from the person providing that labor.⁸⁵ That trafficking is illegal does not diminish its status as an industry that is expanding across borders on a global scale and continues to increase in scope and sophistication.⁸⁶

Until October 2000, the criminal and immigration laws of the United States excluded trafficking victims from the protection of the State and denied them the civil rights accorded to U.S. citizens and legal immigrants.⁸⁷ These laws permitted traffickers to control their imported victims to the extent that victims had no viable alternative to remaining within the confines of the labor market defined by the trafficker.⁸⁸

In this Part, we describe how, like IRCA, the VTVPA was a response to an imbalance between civil rights and immigration law. We argue, first, that trafficking in humans can be viewed as an illicit labor market in which the immigrant victims are disempowered—in part by the immigration and criminal laws themselves. In Section A, we describe the ways in which trafficking victims are disempowered by traffickers, immigration and criminal laws, social perceptions, and cultural isolation. We conclude that the exclusion of trafficking victims from lawful citizenship status results in a lack of civil rights and

85. See Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 33, 38 (2001) (discussing exploitative nature of human trafficking and high profits made by traffickers and not victims).

86. Schloenhardt, *supra* note 9, at 2 (noting increasing number of trafficking victims and resultant sophisticated organized crime).

87. 22 U.S.C. § 7101(b)(17)–(20).

88. *Id.* §§ 7101(b)(7), (20).

other protections. In Section B, we discuss how the legal framework in existence before the VTVPA failed to control human trafficking because it did not address the exclusion of victims from recognition by the State, and thereby prevented them from exiting the coerced labor market. In Section C, we argue that, like IRCA, the VTVPA endows certain classes with civil rights and membership in the State to address the immigration-related problem of international human trafficking.

A. *Buying and Selling Human Beings*

1. *The Scope of the Trafficking Problem*

Human beings are sold into slavery every day on a global level. Men, women, and children are trafficked for their labor primarily for agricultural work, sweatshops, domestic servitude, and the sex industry. The number of individuals trafficked each year is staggering. The United Nations estimates that four million women are trafficked annually throughout the world.⁸⁹ The International Organization for Migration estimates that 500,000 women are trafficked into Western Europe.⁹⁰ The U.S. Central Intelligence Agency (CIA) estimates that approximately 50,000 women and children are trafficked into the United States,⁹¹ but other estimates double that figure.⁹² The victims who are trafficked into the United States increasingly are from the new independent countries within the former Soviet Union, Central and Eastern Europe, Southeast Asia, and Latin America.⁹³ Due to the nature of this global industry, it is impossible to know the full extent of the illegal market for human beings.

Nonetheless, there is little disagreement that there is great potential for growth of the trafficking industry because of the weak econo-

89. *Integration of the Human Rights of Women and the Gender Perspective*, U.N. ESCOR, 56th Sess., Agenda Item 12(a), at 24, U.N. Doc. E/CN.4/2000/68 (2000) [hereinafter *Gender Perspective*].

90. *Id.*

91. AMY O'NEILL RICHARD, CENTER FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME, at iii (Nov. 1999), available at <http://usinfo.state.gov/topical/global/traffic/report.pdf> (on file with the *New York University Journal of Legislation and Public Policy*); see also FRANCIS T. MIKO, CONG. RESEARCH SERV., REP. 98-649 C, TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE (May 10, 2000), available at <http://usinfo.state.gov/topical/global/traffic/crs0510.htm> (on file with the *New York University Journal of Legislation and Public Policy*).

92. Shelley Case Inglis, *Expanding International and National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 71 (2001).

93. RICHARD, *supra* note 91, at iii; MIKO, *supra* note 91.

mies and internal strife of the source countries, the enormous profit potential for the traffickers, economic globalization, and the historically low risk of prosecution.⁹⁴ Trafficking in humans is one of the fastest growing illegal businesses⁹⁵ and is the third largest source of profits for organized criminal enterprises, after only drugs and firearms.⁹⁶ Profits from this multi-billion dollar industry,⁹⁷ in which the commodities are human, are not shared with its victims, but rather enrich and empower international criminal enterprises.⁹⁸ The trafficking industry ranges from complex criminal enterprises to individually-run smuggling rings.⁹⁹ Typically, human trafficking employs many actors covering different stages of the process, including recruitment or abduction, transportation, harboring, transferring, sale, and receipt.¹⁰⁰ In contrast to the enormous profits realized by traffickers, the cost of the trafficking industry is staggering: while local communities receive no benefits of the traditional marketplace,¹⁰¹ the costs to the victim, the victim's family, and the community are immeasurable and long term.

Thus, the trafficking industry can be viewed as a labor market, albeit an illicit one, that operates on a global scale. Like a labor market in any other context, it involves a demand side—those the trafficker provides with the trafficked labor—and a supply side—the victim. Yet trafficking constitutes a labor market taken to an extreme, in which the traffickers obtain such complete control over their victims as to convert them into commodities. The trafficker effectively takes the place of the victim as the supplier of the victim's labor, usurping the profits of the victim's labor and co-opting the victim's ability to choose the labor market in which he or she will compete. By

94. Donna M. Hughes, *The "Natasha" Trade—Transnational Sex Trafficking*, NAT'L INST. OF JUST. J., Jan. 2001, at 8, 10; *Gender Perspective*, *supra* note 89, at 6; MIKO, *supra* note 91.

95. Schloenhardt, *supra* note 9, at 25.

96. MIKO, *supra* note 91.

97. Hughes, *supra* note 94, at 9 (estimating market for trafficking in women and children at seven billion dollars).

98. *Id.* at 9, 13.

99. RICHARD, *supra* note 91, at 13, 35.

100. *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the Comm. on Int'l Relations*, 106th Cong. 75 (1999) (statement of Theresa Loar, Director, Office of the Senior Coordinator for International Women's Issues); *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near Eastern and South Asian Affairs of the Comm. on Foreign Relations*, 106th Cong. 44–45 (2000) [hereinafter *Trafficking Hearing (2000)*] (statement of Regan Ralph, Executive Director, Women's Rights Division, Human Rights Watch).

101. Hughes, *supra* note 94, at 13.

means of unlawful coercion, the trafficker wields sufficient power over the victim to restrain him or her from exiting the illicit labor market that the trafficker supplies.

Historically, the immigration and criminal laws and policies of States unwittingly have fostered the labor market in the trafficking industry. Traffickers use the immigration policies of States to obtain control over their victims by placing them in a vulnerable immigration status. In many countries, victims are prosecuted for undocumented entry and presence in the country, even though their entrance was obtained by force, deception, or coercion.¹⁰² In Canada and Italy, for example, illegal border crossings are punishable by up to two years imprisonment.¹⁰³ In other countries (including Poland), victims may be prosecuted upon their return home because they did not receive prior permission to leave the country.¹⁰⁴

In addition to immigration law violations, victims of trafficking are often prosecuted for violating criminal laws regulating the sex industry.¹⁰⁵ In the United States, for example, police raids on brothels and massage parlors frequently result in the arrest, prosecution, and detention under local law of the trafficked women.¹⁰⁶ After serving their sentences, the women are then deported by the Immigration and Naturalization Service (INS).¹⁰⁷

Aside from the consequences victims suffer from immigration and criminal law prosecution, including deportation, local prosecution for sex offenses, as well as prosecution in their home country for illegal emigration, victims of trafficking usually have no effective legal recourse against their abductors either in their home country or in the country to which they were trafficked.¹⁰⁸ Traffickers are aided in their work by public opinion within the State. In many countries to which victims are trafficked, undocumented individuals are viewed as criminals and as contributing to the community's ills, including unemployment, budget deficits, crime, and declining school systems.¹⁰⁹ Sex industry workers are stigmatized in their home country, by their

102. See *Gender Perspective*, *supra* note 89, at 22.

103. *Id.*

104. *Id.*

105. *Id.*; see also Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 66–67 (1998).

106. See 22 U.S.C. § 7101(b)(17), (19) (2000).

107. RICHARD, *supra* note 91, at 39.

108. Chuang, *supra* note 105, at 66–67; Susan W. Triefenbrun, *Sex Sells But Drugs Don't Talk: Trafficking of Women Sex Workers*, 23 T. JEFFERSON L. REV. 199, 203–204 (2001).

109. *Gender Perspective*, *supra* note 89, at 16.

families and communities, and also in the destination country.¹¹⁰ These perceptions isolate victims, raising the barriers to escape from traffickers or exit from the industry.

Local laws enable traffickers to threaten and coerce their victims. Traffickers tell their victims that escape will lead only to prison and deportation.¹¹¹ In fact, victims may serve jail sentences for sex crimes and undocumented entry, be deported, and then serve additional jail sentences in their home country.¹¹² In Israel, one group of victims were jailed for sex crimes and then were required to pay the costs of their own deportation.¹¹³

Victims may also be afraid of local police because their traffickers were assisted or ignored by corrupt police in their home country. Many victims of trafficking have never traveled outside their home community, let alone their home country. Language and cultural differences discourage them from seeking assistance.¹¹⁴ Even if victims do not suffer prosecution, their work in the sex industry may make them pariahs within their families and in their home communities.¹¹⁵

Traffickers also make use of laws in countries that issue non-immigrants visas to work for a specific employer.¹¹⁶ These visas effectively limit access to the labor market to a single employer. For example, in the United States, foreign diplomats and employees of international organizations (e.g., the World Bank) may obtain special visas to bring domestic workers into the country.¹¹⁷ These workers are ripe for exploitation, because many are from their employer's home country, do not speak English, are unaware of the customs, laws and rights in the United States and, under the law, are permitted to work only for their sponsor.¹¹⁸ U.S. newspapers have reported instances in which domestic workers are held in exploitative conditions, with little or no pay for extended work hours, minimal food, and unacceptable living conditions.¹¹⁹

110. Chuang, *supra* note 105, at 71–72.

111. See RICHARD, *supra* note 91, at 5.

112. *Gender Perspective*, *supra* note 89, at 28.

113. *Id.*

114. *Trafficking Hearing (2000)*, *supra* note 100, at 44–45 (statement of Regan Ralph, Executive Director, Women's Rights Division, Human Rights Watch).

115. Hughes, *supra* note 94, at 12.

116. RICHARD, *supra* note 91, at 28.

117. 8 U.S.C. § 1101(a)(15)(A)(iii) (2000).

118. See *United States v. Bonetti*, 277 F.3d 441, 445–48 (4th Cir. 2002).

119. Stephanie Armour, *Many Immigrant Workers Flee Abuse Only to Fall Victim Again*; USA TODAY, Nov. 20, 2001, at 1B, 3B; Ruben Castaneda, *Some Domestic Left Open to Abuse, Study Says*, WASH. POST, June 14, 2001, at B3; *Woman Kept in Servitude Is Owed Back Pay, Court Rules*, WASH. POST, Jan. 11, 2002, at B5.

2. *The Use of Trafficked Persons in the United States*

Trafficked workers are found in many industries. In the United States, the reach of traffickers is extensive. Women and girls are trafficked to supply the sex industry; they are forced to work as prostitutes in brothels and massage parlors, and as exotic dancers.¹²⁰ Traffickers supply men, women, and children for agriculture and garment industry sweatshops.¹²¹ Trafficked workers include domestic workers, restaurant workers, workers at construction sites, and even individuals compelled to beg for handouts on the streets and other public places.¹²²

B. Insufficiency of Existing Laws in the United States to Combat Trafficking

Before October 28, 2000, U.S. law and policy failed adequately to protect victims of trafficking. The law lumped the victims with the traffickers. Criminal law treated victims as criminals. Immigration law treated victims as undocumented immigrants. The deficiencies of these laws and the traffickers' ability to exploit those deficiencies have prevented victims from leaving the illicit labor market.

Prior to the VTVPA, there was no comprehensive law in the U.S. against trafficking in humans.¹²³ Existing laws did not adequately provide for modern-day slavery, failing to encompass or adequately remedy the conduct.¹²⁴ Similarly, services for trafficking victims were largely non-existent.¹²⁵ There was little incentive for victims or the public to come forward, and the traffickers took advantage of the failure of law enforcement to treat those trafficked as victims rather than as criminals or undocumented immigrants. Traffickers served short prison sentences, while victims were prosecuted for sex crimes and ultimately deported.¹²⁶ In criminalizing the conduct of the victims, sanctioning more lightly the conduct of traffickers and others

120. See Hyland, *supra* note 85, at 39–40.

121. See Inglis, *supra* note 92, at 55; see also U.S. DEP'T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 1 (June 2002), available at <http://www.state.gov/g/tip/rls/tiprpt/2002> (on file with the *New York University Journal of Legislation and Public Policy*).

122. U.S. DEP'T OF STATE, *supra* note 121, at 1, 29.

123. RICHARD, *supra* note 91, at 35.

124. *Id.* at 33, 34; See also *Trafficking Hearing (2000)*, *supra* note 100, at 77–78 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

125. RICHARD, *supra* note 91, at 40.

126. See *Trafficking Hearings (2000)*, *supra* note 100, at 77–78 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

who benefited from the victims' labor, and excluding victims under the immigration laws, the State placed the costs of trafficking squarely on the victims.

1. *Criminal Law Did Not Cover All Forms of Slavery*

Prosecutors in the United States faced an uphill struggle to prosecute traffickers using a patchwork of criminal laws, including the Mann Act,¹²⁷ laws against involuntary servitude and slavery,¹²⁸ kidnapping,¹²⁹ extortion,¹³⁰ conspiracy,¹³¹ the Racketeer Influenced and Corrupt Organizations Act,¹³² and money laundering statutes.¹³³ Prosecutors also employed labor laws governing wages, child labor, and agricultural workers,¹³⁴ and immigration laws governing recruiting, smuggling, and transporting aliens, and harboring for prostitution.¹³⁵ These laws do not focus specifically upon the act of trafficking, involve elements of proof inapplicable to trafficking, fail to address common trafficking scenarios, fail to provide for the needs of victims, and provide lenient sentences for traffickers, even for extreme conduct.¹³⁶

Perhaps the major defect of criminal law in the United States was the failure of the statutes prohibiting involuntary servitude (or slavery) to cover situations in which a victim's conduct was the result of psychological coercion. The statutes that prohibited involuntary servitude¹³⁷ and peonage¹³⁸ were not interpreted to cover most victims of trafficking. The Supreme Court in *United States v. Kozminski* interpreted the involuntary servitude and peonage statutes conservatively, requiring prosecutors to prove that servitude was brought about through the use or threatened use of physical or legal coercion.¹³⁹ The

127. 18 U.S.C. § 2421 (2000) (prohibiting transportation across state lines of persons with intent of prostitution).

128. *Id.* §§ 1581, 1584.

129. *Id.* § 1201.

130. *Id.* § 894.

131. *Id.* §§ 241, 371.

132. *Id.* § 1961–68.

133. *Id.* §§ 1956–1957.

134. 29 U.S.C. §§ 201–219, 1801–1872 (2000).

135. 8 U.S.C. §§ 1324, 1328 (2000).

136. *See Trafficking Hearings (2000)*, *supra* note 100, at 77–78 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

137. 18 U.S.C. § 1584 (2000).

138. *Id.* § 1581.

139. 487 U.S. 931, 948–51 (1988).

decision excluded other conduct that had the same purpose and effect.¹⁴⁰

As a result, prosecutors had to establish coercion through force or threat of force. They could not reach employers who used more subtle, albeit deliberate, forms of coercion to maintain control of their victim. For example, the United States Department of Justice investigated a case involving a domestic worker whose passport was confiscated upon arrival, who was forced to work sixteen hours per day, seven days a week, and who was given only small rations of food. When she complained, her employer threatened to have her deported and told her that if she left the house, the employer would call the police and have her jailed. Under such circumstances, because the employer used psychological and economic coercion to keep the victim trapped, prosecution for involuntary servitude was unlikely.¹⁴¹ In short, the law did not cover situations “where the use of fraud, deceit, or misrepresentation toward any person exists in an effort to wrongfully obtain or maintain the labor or services of that person, where the person is a minor, mentally disabled, or otherwise susceptible to coercion.”¹⁴²

The laws in the United States also permitted those who knowingly benefited from forced labor to avoid prosecution. For example, landowners who contracted for farm labor knowing that the labor was coerced, were not open to prosecution.¹⁴³ Thus, although the contractor might be subject to arrest and prosecution, the economic incentive for the landowner to use exploitative labor continued.¹⁴⁴ The laws of the United States did not address the common practice of traffickers confiscating victims’ identification documents, passports, or immigration papers as a means of control.¹⁴⁵

Finally, although labor laws prohibit certain criminal acts related to wages and working conditions, these laws provide for minimal prison sentences and fines, and prosecution is rare except in the most egregious cases. For example, the Fair Labor Standards Act provides

140. 22 U.S.C. § 7101(b)(13) (2000).

141. Preceding story was recounted in *Trafficking Hearings (2000)*, *supra* note 100, at 80 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

142. *Trafficking Hearings (2000)*, *supra* note 100, at 80 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

143. *Id.* at 78 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

144. *See id.* (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice); *see also* RICHARD, *supra* note 91, at 34.

145. *Trafficking Hearings (2000)*, *supra* note 100, at 80–81 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

for a fine of not more than \$10,000 and imprisonment for not more than six months—with imprisonment available only for second-time offenders.¹⁴⁶

2. *Weak Penalties for Traffickers*

A significant flaw in the criminal laws prior to enactment of the VTVPA was the inadequacy of penalties for trafficking. The penalties imposed simply did not comport with the severity of the crime and did little to deter traffickers. The statutory maximum for sale of a human being into involuntary servitude was only ten years per count.¹⁴⁷ In contrast, certain crimes related to controlled substances are punishable by life in prison.¹⁴⁸ In short, the punishment for trafficking in women was less severe than the punishment for trafficking in drugs.¹⁴⁹ In a number of cases prosecuted by the United States, and discussed in a CIA report, the penalties were much less severe than would be expected in light of the harm resulting from the crime.¹⁵⁰

The examples from the CIA report are indicative of the way traffickers were dealt with before the VTVPA:

(1) In Los Angeles, traffickers kidnapped a woman, raped her, forced her into prostitution, posted guards to control her movements, and burned her with cigarettes. The lead defendant received a prison sentence of four years and the other defendants received prison sentences of two to three years.¹⁵¹

(2) In another case where women were physically confined for a period of years with metal bars on the windows, guards, and an electronic monitoring system and were forced to submit to sex with as many as 400 customers to repay their smuggling debt, the traffickers received prison sentences of between four and nine years.¹⁵²

(3) In New York City, seventy deaf individuals from Mexico were forced to peddle trinkets. They were frequently beaten, and in some cases tortured. The ringleader received a prison sentence of

146. 29 U.S.C. § 216(a) (2000).

147. RICHARD, *supra* note 91, at 33. Some forms of trafficking conduct have carried heavier penalties. The collection of extensions of credit by extortionate means can lead to imprisonment not to exceed twenty years, 18 U.S.C. § 894 (2000), and conspiracy against rights secured by the U.S. Constitution can result in life in prison, or the death penalty, if death results to the victims. *Id.* § 241.

148. 21 U.S.C. § 848(a) (2000).

149. *See* RICHARD, *supra* note 91, at 33.

150. *Id.* at 33–34.

151. *Id.* at 33.

152. *Id.*

fourteen years. The others received sentences ranging from one to eight years.¹⁵³

(4) In Maryland, Russian and Ukrainian women had answered ads to be au pairs, sales clerks, and waitresses. Instead of those jobs, they were forced to live in a massage parlor and provide sexual services. The owner of the massage parlor was only fined after entering a plea agreement in which charges were dropped with the restriction that he would not operate a business in that particular county. The women, who had received no payment and were charged for their housing, were deported or left the United States voluntarily.¹⁵⁴

(5) Over seventy laborers were held against their will, abused, and forced to work twenty-hour shifts in a sweatshop. The seven defendants received prison sentences ranging from seven months to seven years.¹⁵⁵

Another practice that reduces the penalties for human traffickers is plea bargaining. In many cases, prosecutors enter into plea agreements with defendants based upon less serious offenses, such as immigration violations concerning fraud or the hiring of illegal immigrants.¹⁵⁶ They do this for many reasons, including the strength of the case, the availability of resources to prosecute larger cases, the size of their workload, and the burden that a trial places upon the victims of testifying in public against their abductors.¹⁵⁷

3. *The Fate of Victims*

The fate of trafficking victims who came into contact with law enforcement enabled the traffickers to discourage their victims from attempting to escape. Victims often were arrested on charges involving sex crimes, became subject to adverse immigration consequences due to their undocumented status, and ultimately were deported to their country of origin.¹⁵⁸ Either law enforcement did not distinguish the victim from the trafficker, or law enforcement was unable—because of lack of knowledge, time, or ability—to secure valid immigration status for the victims as an alternative to deportation. In one recent case reported in the press, the INS conducted a criminal investigation of Nebraska Beef, a meat packing plant in Nebraska. The INS charged human resource personnel with knowingly smuggling un-

153. *Id.*

154. *Id.* at 33; *Massage Parlor Off the Hook*, WASH. POST, July 31, 1996, at B6.

155. RICHARD, *supra* note 91, at 33.

156. *Id.* at 34.

157. *See id.*

158. *See id.* at 31, 40.

documented workers into the plant. Although approximately 200 undocumented employees were deported to Mexico within days, the human resources personnel were back to work the next day after posting bail.¹⁵⁹

The law prior to 2000 did not provide a viable alternative for law enforcement and trafficking victims. First, obtaining a special visa (known as the S Visa)¹⁶⁰ for even a single crime victim was time consuming and unwieldy, requiring many forms and compliance with unfamiliar procedures, both before and after issuance of the visa.¹⁶¹ Cases involving many victims multiplied these hurdles. The S Visa also failed to provide any relief for victims of civil violations. Victims were eligible for the S Visa only if they possessed critical and reliable information that was essential to a criminal case.¹⁶² Even if the S Visas were valued by law enforcement, the maximum number the INS could issue was 200 per year, with an additional fifty available for immigrants with significant information about terrorist actions.¹⁶³ The value of the S Visa can be summed up in one short fact: at least since 1995, the INS has never issued the maximum number of visas permitted in any year.¹⁶⁴

Between deportation and issuance of an S Visa, the options were limited. Victims could seek deferred action from the INS, but this status did not guarantee employment authorization.¹⁶⁵ Further, the victim would accrue “bad time,” which delayed or precluded lawful return to the United States after deportation.¹⁶⁶ The government could also withhold deportation for a set period of time, but, again, bad time

159. Deborah Alexander, *Six Officials of Beef Are Indicted*, OMAHA WORLD HERALD, Dec. 15, 2000, at 21.

160. 8 U.S.C. § 1101(a)(15)(S) (2000).

161. RICHARD, *supra* note 91, at 41.

162. 8 U.S.C. § 1101(a)(15)(S)(i)(I).

163. RICHARD, *supra* note 91, at 41.

164. Before 1996, 125 S Visas could be issued annually. See 8 U.S.C. § 1184(j)(1) (1994). Two subsections (j) have been enacted in accordance with this act. The relevant cite is under subsection (j), titled “Numerical limitations; period of admission; conditions for admission and stay; annual report.” In 1995, Congress increased the maximum to 250 visas. See *id.* § 1184(k)(1) (1994 & Supp. II). Not including derivative visas offered to family members, which do not count against the maximum, only 59 S Visas were issued in 1995, 98 S Visas in 1996, 35 S Visas in 1997, 90 S Visas in 1998, 54 S Visas in 1999, 33 S Visas in 2000, 125 S Visas in 2001, and 24 S Visas in 2002 (fewer than usual as a result of the terrorist events of September 11, 2001). OFFICE OF PUBLIC AFFAIRS, IMMIGRATION AND NATURALIZATION SERV., S NONIMMIGRANT VISA STATISTICS (October 25, 2002) (on file with the *New York University Journal of Legislation and Public Policy*).

165. RICHARD, *supra* note 91, at 42; CHARLES GORDON ET AL., 2 IMMIGRATION LAW & PROCEDURE § 63.10[2][c] (2000).

166. RICHARD, *supra* note 91, at 42 n.127.

would accrue.¹⁶⁷ Finally, the government could parole the individual into the country, but this option proved difficult for prosecutors because it required the victim to leave and then re-enter the country.¹⁶⁸

Even if the government succeeded in obtaining lawful status for the victim to assist with the prosecution, the victim was frequently unable to access needed benefits and services because recent federal legislation overhauling the welfare system severely cut back benefits afforded to immigrants.¹⁶⁹ Other than minimal services provided by shelters and clinics, unauthorized workers and many lawful immigrants (largely those who do not have lawful permanent resident, asylee, or refugee status) were unable to access basic services. This meant that prosecutors had to arrange for food, shelter and protection for victims, at the prosecuting agency's expense.

The consequence was a complete loss of economic options for the victims. By criminalizing the victims' conduct, the State excluded them from its accepted community. By denying them lawful immigration status, the State declined to recognize their existence within its borders. In combination, the State effectively denied the victims the civil rights that the State provides to recognized members of its community, which results in denying the victims access to its legal labor markets. In addition, if State-sponsored benefits are considered an alternative to the labor market, by categorizing victims as undocumented immigrants, the State denied the victims access to such benefits and thereby denied access to an alternative to the unlawful market in which the traffickers operated.

167. *Id.*

168. *Id.*

169. On August 22, 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), came into effect. Section 401(a) of the Act provides that, subject to limited exceptions, only "qualified aliens" may receive federal public benefits, including retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, and unemployment benefits, among others. Section 431(b) provides that the term "qualified alien" means: (1) aliens lawfully admitted for permanent residence under the Immigration and Nationality Act (Act); (2) aliens granted asylum under section 208 of the Act; (3) refugees admitted into the United States under section 207 of the Act; (4) aliens paroled into the United States under section 212(d)(5) of the Act for a period of at least one year; (5) aliens whose deportation is being withheld under section 243(h) of the Act; and (6) aliens granted conditional entry. *Id.*

C. *A Renewed Effort to Combat Trafficking in Human Beings*

On October 27, 2000, President Clinton signed into law the Victims of Trafficking and Violence Protection Act of 2000.¹⁷⁰ The Act consists of the Trafficking Victims Protection Act of 2000¹⁷¹ and the Violence against Women Act of 2000.¹⁷² In addition to creating new criminal laws to combat traffickers and increasing criminal penalties against traffickers, the VTVPA addresses the issue of global trafficking by legitimizing and legalizing the previously unlawful and undocumented status of trafficked victims.¹⁷³ The Act liberalizes the immigration policies of the State to encourage victims to come forward and to weaken the power of traffickers over victims. It strengthens the criminal laws to counter the profit potential of trafficking. By de-criminalizing the victims and liberalizing the immigration laws to redefine victims as lawfully present in the U.S., the law endows victims with the civil rights that the State provides to all lawful immigrants. By providing employment authorization, access to benefits and services, and freer access to information, the Act opens the door to the legal labor market. In addition, the Act seeks to deconstruct the network of control that the traffickers hold over their victims, while at the same time providing alternatives to the coercive labor market for trafficked victims.

1. *Congressional Findings*

In enacting the VTVPA, Congress made findings that reflect its awareness that the immigration laws disempowered victims because of their citizenship status and empowered their traffickers.¹⁷⁴ These findings addressed both that the limitations of existing criminal laws and levels of enforcement were inadequate to deter trafficking and to bring traffickers to justice,¹⁷⁵ and that the weak penalties were not proportionate to the crime.¹⁷⁶ More significantly, however, Congress found that the victims of trafficking should not be punished solely because of their unauthorized status or unlawful acts committed as a result of being trafficked.¹⁷⁷ Specifically, the findings revealed:

170. Pub. L. No. 106-386, 2000 U.S.C.C.A.N. (114 Stat. 1464) (codified in scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.).

171. *Id.* §§ 101–113.

172. *Id.* §§ 1001–1603.

173. H.R. REP. No. 106-487, pt. 1, at 1 (1999).

174. These findings are included in the statutory language and can be found at 22 U.S.C. § 7101(b) (2000).

175. *Id.* § 7101(b)(14).

176. *Id.* § 7101(b)(15).

177. *Id.* § 7101(b)(19).

Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.¹⁷⁸

Congress also recognized that victims hesitate to report crimes or to assist in investigations and prosecutions, stating that:

Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.¹⁷⁹

Other findings supporting more humane treatment of victims of trafficking reflected that victims often were punished more harshly than traffickers because of the victims' unlawful status within the country.¹⁸⁰ Congress found that in addition to inappropriate punishment, victims also failed to obtain needed services.¹⁸¹

These findings are significant because they recognized that victims have borne more heavily the costs of trafficking. The findings provided justification for legalizing the status of victims to both counter the arsenal of traffickers and to support increased prosecution. Congress expressly recognized the global nature of trafficking when it not only provided protection to victims of trafficking on a national level, but also "urge[d] the international community to take strong action."¹⁸²

2. *Victims of Trafficking and Violence Protection Act of 2000*

The central features of the VTVPA are those that incorporate victims into the membership of the State. This incorporation empowers the victims to disclose their circumstances. The discussion below will focus on these features, including redefining the citizenship status of the "victim," affording new legal protections for victims, and finally, entitling victims to new services and benefits.

178. *Id.*

179. *Id.* § 7101(b)(20).

180. *Id.* § 7101(b)(17).

181. *Id.* § 7101(b)(18).

182. *Id.* § 7101(b)(24).

a. The Definition of Victim under the Trafficking Victims Protection Act of 2000

The Trafficking Victims Protection Act of 2000 enhanced protections for “victims of a severe form of trafficking.”¹⁸³ A “victim of a severe form of trafficking” is defined as an individual who has been subjected to:

- (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 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.¹⁸⁴

For purposes of receiving benefits under the law, a victim of a severe form of trafficking is an individual who either is less than eighteen years of age or is willing to assist in every reasonable way in the investigation and prosecution of traffickers, and who is needed by the government to effectuate prosecution of traffickers or has applied for a T (or victim’s) Visa.¹⁸⁵

In short, a victim of a severe form of trafficking is an individual who has been induced to commit a commercial sex act or forced to work against his or her will, and is willing to assist the government with the prosecution of the traffickers. This definition is more expansive than previous definitions of trafficking victims.

b. Positive Immigration Consequences

Under the Act, victims of a severe form of trafficking are eligible for greater protection than they possessed under the existing immigration laws. Most significantly, victims are eligible for two new non-immigrant visa classifications: the T Visa under the Trafficking Victims Protection Act of 2000¹⁸⁶ and the U Visa under the Violence against Women Act of 2000.¹⁸⁷

183. *Id.* § 7102(13).

184. *Id.* § 7102(8).

185. *Id.* §§ 7105(b)(C), (E)(i).

186. 8 U.S.C. § 1101(a)(15)(T) (2000).

187. *Id.* § 1101(a)(15)(U).

i. T Visa

T Visas are available to victims of a severe form of trafficking.¹⁸⁸ The applicant must show that he or she: (1) is a victim of a severe form of trafficking,¹⁸⁹ (2) was physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands on account of trafficking,¹⁹⁰ (3) is in compliance with any reasonable request for assistance by prosecutors,¹⁹¹ and (4) would suffer extreme hardship involving unusual and severe harm upon removal.¹⁹² The law also provides that the spouse, children, and parents of victims who are less than twenty-one years of age are eligible for the T Visa, as well as the spouse and children of victims who are twenty-one years of age or older, if the government determines it necessary to avoid extreme hardship.¹⁹³

T Visas are valid for three years and are not renewable.¹⁹⁴ Victims (and their families) who obtain T Visas may work lawfully in the United States and will receive employment authorization from the INS for the duration of the visa period.¹⁹⁵ The government will also provide T Visa holders with referrals to non-governmental organizations that will advise the victim of his or her options while in the United States and of appropriate resources available to the victim.¹⁹⁶

188. *Id.* § 1101(a)(15)(T). Victims of acts that occurred before October 28, 2000, must apply for the T Visa by January 31, 2003. Children must file by that date or within one year of their twenty-first birthday, whichever is later. 8 C.F.R. § 214.11(b)(d)(4) (2002).

189. 8 U.S.C. § 1101(a)(15)(T)(i)(I). The regulations implementing the statutory provisions envision that applicants will obtain a law enforcement agency endorsement. 8 C.F.R. §§ 214.11(f)(1), (2) (declaring such endorsement “primary evidence of victimization”). Applications that do not contain the endorsement must contain credible evidence that the individual is a victim of a severe form of trafficking and should explain what good faith efforts were made to obtain the certification. *Id.* § 214.11(f)(3).

190. 8 U.S.C. § 1101(a)(15)(T)(i)(II). Victims who had a clear chance to depart the United States are not entitled to the visa. 8 C.F.R. § 214.11(g)(2). This question of fact, however, will be decided in light of the individual’s unique circumstances, including trauma and lack of travel documents. *Id.*

191. 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa). Again, the regulations envision that applicants will present a law enforcement agency endorsement containing this information. 8 C.F.R. § 214.11(h). Victims who are less than fifteen years of age are not required to comply with the requests of law enforcement agencies. 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb); 8 C.F.R. § 214.11(b)(3).

192. 8 U.S.C. § 1101(a)(15)(T)(i)(IV); 8 C.F.R. § 214.11(b)(4).

193. 8 U.S.C. § 1101(a)(15)(T)(ii); 8 C.F.R. § 214.11(o). The victim will receive a T-1 Visa, a spouse a T-2 Visa, children a T-3 Visa, or the parent of a child who is a victim, a T-4 Visa. *Id.* § 214.11(o)(1).

194. 8 C.F.R. § 214.11(p)(1).

195. 8 U.S.C. § 1101(i)(2); 8 C.F.R. §§ 214.11(o)(10), 274a.12(a)(15) (2002).

196. 8 U.S.C. § 1101(i)(1).

T Visa holders (and their families) may adjust to lawful permanent resident status after three years if they have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking or would suffer extreme hardship involving unusual and severe harm upon removal.¹⁹⁷

There is a limit of 5,000 T Visas available each year to victims, not including their relatives.¹⁹⁸ This number may or may not be adequate, but the limit may be reviewed by Congress in the event that it is insufficient to protect victims.

ii. U Visa

The Violence Against Women Act of 2000 also provides for an additional non-immigrant visa category, the U Visa.¹⁹⁹ The purpose of the U Visa is to strengthen the ability of law enforcement agencies to combat domestic violence and sex crimes, including trafficking, and to “encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.”²⁰⁰ Accordingly, the U Visa is intended to facilitate the reporting of crime to law enforcement agencies by undocumented aliens and to provide these agencies with a means of legalizing the status of cooperating victims.

U Visas are available to aliens who suffer substantial physical or mental abuse as a result of having been a victim of domestic violence or sex crimes, who possess information concerning such criminal activity, and who will be helpful to a federal, state, or local law enforcement official.²⁰¹ The U Visa is also available to certain relatives of the victim if a law enforcement official certifies that an investigation or prosecution will be harmed without the assistance of the alien.²⁰² U Visa holders may work lawfully in the United States and will receive

197. *Id.* § 1255(I)(1)(C). T Visa holders must apply for adjustment of status to lawful permanent resident status within ninety days preceding the third anniversary of being accorded T Visa status. Otherwise, the victims will be out of status at the end of the three-year period. Individuals who apply for adjustment of status will remain in T Visa status until a final decision is made on the adjustment application. 8 C.F.R. § 214.11(p)(2).

198. 8 U.S.C. § 1184(n) (2000).

199. *Id.* § 1101(a)(15)(U). The INS is issuing separate regulations governing the U Visa. As of the writing of this article, these regulations have not been published.

200. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 2000 U.S.C.C.A.N. (114 Stat. 1533–34) (codified at 8 U.S.C. § 1101).

201. 8 U.S.C. § 1101(a)(15)(U)(i)(I)–(III).

202. *Id.* § 1101(a)(15)(U)(ii).

employment authorization from the INS.²⁰³ The government will also provide victims with referrals to non-governmental organizations.²⁰⁴ The U Visa permits adjustment of status to lawful permanent residents if justified on humanitarian grounds, for family unity, or is otherwise in the public interest.²⁰⁵ There is a limit of 10,000 U Visas available each year to victims, not including their relatives.²⁰⁶

iii. Continued Presence

In addition to the new T and U Visa categories, law enforcement officials may request that the INS permit a victim's continued presence in the United States if necessary to effectuate prosecution.²⁰⁷ These victims will receive temporary legal status, and may receive employment authorization to work in the United States.²⁰⁸ The legal status provided to a victim will depend upon a number of factors, and can include parole, voluntary departure, stay of final order, or deferred action pursuant to section 107(c)(3) of the Trafficking Victims Protection Act of 2000.²⁰⁹ Although the continued presence in the U.S. is temporary, many such victims also will be eligible to apply for a T or U Visa.

c. Providing Benefits and Services to Victims of a Severe Form of Trafficking

The Trafficking Victims Protection Act of 2000 provides that the United States government will treat victims of a severe form of trafficking as victims of crime and not as criminals or undocumented aliens.²¹⁰ Therefore, the government will expend resources to ensure that victims are provided necessary benefits and services,²¹¹ rather

203. *Id.* § 1184(o)(3)(B). Two subsections (o) have been enacted in accordance with this act. The relevant cite is under subsection (o), titled "Requirements applicable to section 1101(a)(15)(U) visas."

204. *Id.* § 1184(o)(3)(A).

205. *Id.* § 1255(l)(1)(B). Two subsections (l) have been enacted in accordance with this act. The relevant cite is under subsection (l), titled "Adjustment of status for victims of crimes against women."

206. *Id.* § 1184(o)(2).

207. 22 U.S.C. § 7105(c)(3) (2000); 28 C.F.R. § 1100.35(a) (2002).

208. 28 C.F.R. § 1100.35(b)(1).

209. *Id.* § 1100.35(b).

210. 22 U.S.C. § 7105(c)(1); 28 C.F.R. § 1100.29(a); *see also id.* §§ 1100.27(a)(1), 1100.31(b) (requiring that victims be housed as crime victims while in federal custody).

211. *See, e.g.,* 28 C.F.R. § 1100.29(c) (requiring officer training in identifying victims, victims' rights, and appropriate services and protections); *id.* § 1100.31 (identifying necessary services for victims in custody); *id.* § 1100.37 (describing required training for identifying and protecting victims).

than focusing its efforts on prosecuting and deporting victims for violations of criminal or immigration law.

Victims of a severe form of trafficking who are certified by the Department of Health and Human Services are now eligible for the same federal, state, and local benefits and services as lawful refugees and are exempt from the 1996 welfare reform legislation that bars undocumented immigrants as well as many legal immigrants from receiving such benefits.²¹² Victims are eligible for medical care, food stamps, housing assistance, job training programs, educational assistance, legal assistance, and other public assistance.²¹³

Like IRCA, the new law recognizes the barrier that lack of information can erect for immigrants as a result of language and cultural barriers and unfamiliarity with the laws and processes of the U.S. government. It provides that victims of a severe form of trafficking are entitled to access information about their rights and translation services.²¹⁴ The regulations implementing the statutory provisions set forth additional information that must be made available to victims, including pro bono legal services, victim assistance and compensation programs, and protection against threats and intimidation.²¹⁵ These provisions are critical because trafficking victims typically know little about the laws, rights, and customs in the United States. The Act seeks to enable victims to make informed decisions about their future and to consider benefits and services available in the United States when deciding whether to stay permanently in the United States or return to their home country.

d. New Criminal Provisions

The Trafficking Victims Protection Act of 2000 provides new tools for prosecutors to combat trafficking, including stronger criminal provisions, new penalties, and restitution for victims. Each plays a part in shifting the costs of trafficking from the victim to the trafficker.

The law “creates new felony criminal offenses to combat trafficking with respect to slavery or peonage; sex trafficking in children; and unlawful confiscation of the victim’s passport or other documents in furtherance of the trafficking scheme.”²¹⁶ Further, the law creates a

212. 22 U.S.C. § 7105(b)(1)(A), (E); 28 C.F.R. § 1100.33(a)(2).

213. See 28 C.F.R. § 1100.33(a)(2).

214. 22 U.S.C. § 7105(c)(2); 28 C.F.R. § 1100.33 (requiring access to information about rights and translation services).

215. 28 C.F.R. § 1100.33(a) (listing types of services and information).

216. Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 36 WEEKLY COMP. OF PRES. DOC. 2662, 2663 (Nov. 6, 2000); see 18 U.S.C. § 1589 (2000) (forced labor); *id.* § 1590 (trafficking with respect to peonage, slavery,

new “forced labor” felony criminal offense that allows for prosecution when sophisticated forms of nonphysical coercion, including psychological coercion, trickery, and the seizure of documents, are used to exploit victims.²¹⁷ In this, the statute effectively supercedes the Supreme Court’s decision in *United States v. Kozminski*.²¹⁸

The new criminal penalties increase to twenty years the maximum sentence for involuntary servitude, forced labor, peonage, and slavery.²¹⁹ Traffickers may be sentenced to life in prison if death results from a violation, or if the violation includes kidnapping, aggravated sexual abuse, an attempt to kidnap, an attempt to commit aggravated sexual abuse, or an attempt to kill.²²⁰ Upon conviction, traffickers are required to pay restitution to the victim for the “full amount of the victim’s losses,”²²¹ and they are subject to mandatory forfeiture of any assets used in or gained from trafficking activities.²²²

3. *The Effect of the Victims of Trafficking and Violence Protection Act of 2000*

Victims of traffickers have gained the potential for lawful citizenship status that is effectively an entry into membership in the State. With this, they have obtained the civil rights protections that correspond to such recognition. Previously, victims were frequently prosecuted for criminal law violations, including prostitution, and then deported. Now, victims have a viable future in the United States. They are entitled to legal immigration status and the right to work, with the potential for lawful permanent resident status. Victims are also entitled to benefits and services covering the complete spectrum of needs, including medical care, job training, and food, housing and legal assistance.

involuntary servitude, or forced labor); *id.* § 1591 (sex trafficking of children or by force, fraud or coercion); *id.* § 1592 (unlawful conduct regarding documents).

217. Fact Sheet, Department of Justice, Worker Exploitation (March 27, 2001), at <http://www.usdoj.gov/opa/pr/2001/March/126cr.htm> (on file with the *New York University Journal of Legislation and Public Policy*). The law provides that individuals may not provide or obtain the labor or services of a person “by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer harm or physical restraint.” 18 U.S.C. § 1589(2).

218. *See* 22 U.S.C. § 7101(b)(13) (2000); *see also* *United States v. Kozminski*, 487 U.S. 931 (1988).

219. 18 U.S.C. § 1590.

220. *Id.*

221. *Id.* § 1593.

222. *Id.* § 1594(b)(1).

The law achieves this, first, by invoking its power to draw lines based on citizenship status in a way that includes victims within its protection. Second, it enhances those protections by conferring additional civil rights on victims and simultaneously lowering barriers to access to those rights. The intersection of immigration and civil rights policy in this new law is the vehicle by which the State restricts the illegal market in trafficking by providing its victims with viable economic alternatives. Victims who obtain legal status and work authorization through the T or U Visa, or who are otherwise entitled to temporary status within the United States to assist with the prosecution of traffickers, will receive the full protection of the laws governing employment and labor rights, as well as the protection of civil rights statutes governing non-discrimination in housing and government services. These individuals will be entitled to work for full wages under lawful working conditions and to enjoy the benefits of legal immigrants without suffering unlawful discrimination. They will have legal standing to sue to protect their rights and to obtain remedies for violations.

Victims now also have access to an alternative labor market—the legal workplace. With the legal right to determine who they will work for, their options for legal employment far outweigh the limited choices of undocumented workers.

At the same time, traffickers have less power. Trafficking conduct is now more completely covered by criminal law, prison sentences are longer, and trafficking-related profits and property may be forfeited. Perhaps most important, traffickers' threats to victims that escape will bring punishment from the INS and local police may become less effective in controlling victims.

However, in spite of these apparent benefits, the VTVPA, by employing the same sort of interaction between immigration law and civil rights law that IRCA does, will pose the same challenges. Its success is dependent upon victims having knowledge of their new rights and being confident that law enforcement agencies will protect these rights. Enforcement of the immigration laws restricting undocumented and trafficked labor must be counter-balanced with use of the elements of the VTVPA that permit the State to allow victims to assume lawful status. If those elements are underutilized or too narrowly interpreted, the carefully structured incentives for victims to exit the trafficking market will fail. As with IRCA, such failure could defeat both aims of stronger civil rights protections and increased enforcement of the immigration and criminal prohibitions against human trafficking.

CONCLUSION

The Immigration Reform and Control Act of 1986 and the Victims of Trafficking and Violence Protection Act of 2000 illustrate the complexity of the relationship between civil rights and immigration law, and the consequent effect on the labor market. We began this discussion with the similarity between civil rights and immigration law in that both play defining roles in the membership of the State. We set forth the tension between them, in that immigration law requires discrimination, whereas civil rights combats it.

It is this similarity and this tension that IRCA and the VTVPA have in common. As we have established, both IRCA and the VTVPA redefine through immigration law the citizenship status of the populations they protect in ways that permit the State to recognize those populations. Both redefine civil rights for those populations in ways that empower the victims to change their situations. Thus, the statutes redefine the affected populations in ways that incorporate them into the definition of State membership.

However, the tension between immigration law and civil rights reveals the weak link in both statutes. Each uses the public enforcement mechanisms that are characteristic of immigration law and the private enforcement mechanisms that are characteristic of civil rights laws to enhance their application. Should the State fail to strike an equilibrium between enforcement of immigration restrictions against undocumented labor and the enhancement of civil rights, the purpose of both statutes will be compromised.

When used judiciously, as with trafficking, the use of civil rights to effect immigration aims can be an effective tool to influence the labor market. However, when immigration law and civil rights are not carefully balanced, unexamined use of immigration law to influence labor markets carries a high risk of increasing discrimination in populations that the State is bound to protect.

