ARTICLES

MISERY AND MYOPIA: UNDERSTANDING THE FAILURES OF U.S. EFFORTS TO STOP HUMAN TRAFFICKING

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INTRODUCTION

In an increasingly interdependent world, human migration is just another element of the global marketplace. While much migration occurs through legal channels and as an exercise of free will on the part of the migrant, not all migration is undertaken by choice. Various forms of irregular migration have been spurred by social conflict, civil war, and the global consolidation of economic power centers.[1]

The United States has never developed an immigration strategy that effectively grapples with the global forces that drive migration. Ad hoc efforts to respond to certain effects of global migration have consistently failed to deal realistically with the problems and blessings of migration. In this regard, the passage and enforcement of the Victims of Trafficking and Violence Protection Act of 2000 ("Trafficking Act," "TVPA," or "Act")[2] is

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1. Maggy Lee, *Human Trade and the Criminalization of Irregular Migration*, 33 Int'l J. Soc. Law 1, 1 (2005).

2. Victims of Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8 and 22 U.S.C (2000)). The Act was amended and reauthorized by the Trafficking Victims Protection Reauthorization Act of 2003 ("TVPAII"), Pub. L. No. 108-193, 117 Stat. 2875 (to be codified in scattered sections of 8, 18, and 22 U.S.C.). It was amended and reauthorized again by the Trafficking Victims Protection Reauthorization Act of 2005 ("TVPAIII"), Pub. L. No. 109-164, 119 Stat. 3558 (to be codified in scattered sections of 18 and 22 U.S.C.), which was signed into law on January 10, 2006. Because the 2005 reauthorization occurred shortly before this Article was to go to press, this Article does not attempt to assess the efficacy of the programs piloted in the most recent reauthorization. On the international level, the new law authorizes a joint State Department/United States Agency for International Development study of trafficking problems in situations of post-conflict and humanitarian emergency assistance, and requires increased monitoring of forced labor in

paradigmatic. The Trafficking Act is intended to offer statutory protection to the victims of severe forms of human trafficking, to increase criminal penalties for persons who commit such acts of trafficking, and to foster international cooperation in efforts to combat human trafficking.[3]

The Trafficking Act has inspired a great deal of scholarly comment and criticism.[4] Unfortunately, there is almost universal consensus that the Trafficking Act, while well-intentioned, has thus far failed to make sufficient strides in addressing the problem of human trafficking, either internationally or domestically. The most recent diagnoses of the domestic failure are tending to converge: Commentators note that the Act—particularly as it has been implemented—emphasizes the law enforcement

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countries that do not comply with minimum standards for the elimination of trafficking. *Id.* §§ 101, 105. Domestically, the law establishes a pilot program for residential rehabilitative facilities for trafficking victims in the United States, as well as expanded funding for other programs to protect victims; authorizes extraterritorial jurisdiction over trafficking offenses committed by U.S. government employees; requires research and statistical review of domestic trafficking and a biennial conference on "trafficking and commercial sex acts" that occur in the U.S.; and establishes a grant program to enhance state and local anti-trafficking initiatives. *Id.* §§ 201-04. Among its proposed aims is an increased focus on labor trafficking. *Id.* § 2.

3. TVPA § 102(a) ("The purposes of this division are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."); *see also* U.S. Dep't of State, Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report 5-6 (2005), *available at* http://www.state.gov/documents/organization/47255.pdf [hereinafter 2005 State Department Report].

4. *See* Michelle R. Adelman, *International Sex Trafficking: Dismantling the Demand*, 13 S. Cal. Rev. L. & Women's Stud. 387 (2004); Theresa Barone, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 Temp. Int'l & Comp. L.J. 579 (2003); Claire Bishop, *The Trafficking Victims Protection Act of 2000: Three Years Later*, Int'l Migration, Dec. 2003, at 219; Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. Third World L.J. 451 (2005); Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 Mich. J. Int'l L. 1143 (2003); Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 Hastings Women's L.J. 77 (2002); Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 Berkeley Women's L.J. 29 (2001); Suzanne H. Jackson, *To Honor and Obey: Trafficking in "Mail-Order Brides,"* 70 Geo. Wash. L. Rev. 475 (2002); Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 Hastings Women's L.J. 1 (2004); Ivy C. Lee & Mie Lewis, *Human Trafficking from a Legal Advocate's Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. Davis J. Int'l L. & Pol'y 169 (2003); Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. Legis. & Pub. Pol'y 131 (2002); Susan Tiefenbrun, *The Saga of Susannah, A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 Utah L. Rev. 107; Michael R. Candes, Comment, *The Victims of Trafficking and Violence Protection Act of 2000: Will It Become the Thirteenth Amendment of the Twenty-First Century?*, 32 U. Miami Inter-Am. L. Rev. 571 (2001); Note, *Developments in the Law—Jobs and Borders*, 118 Harv. L. Rev. 2171, 2180-2280 (2005) [hereinafter Note, *The Trafficking Victims Protection Act*].

components of anti-trafficking initiatives in a way that undercuts the Act's humanitarian goals of assisting trafficking victims.[5]

Much of the literature diagnosing the domestic shortcomings of the TVPA focuses upon the legal barriers to relief that are encountered by trafficking victims in the United States. The proposed solutions focus on improving the identification and assistance of trafficking victims in the United States. But the United States is not a passive recipient of trafficked human beings. Efforts to deal more effectively and humanely with the domestic manifestations of global human trafficking must take account of the role that the United States plays in generating a viable market for trafficking. This requires express recognition that specific elements of U.S. law and policy actually facilitate the trafficking of human beings into and within the United States. When the issue is framed in this way, it quickly becomes evident that the shortcomings of the Trafficking Act are neither new nor unique failures;[6] they are simply the most recent examples of the wider failure of U.S. law to successfully assess and grapple with the global and domestic forces that drive migration.

This Article argues that current labor and immigration law enforcement actually creates incentives for trafficking and other forms of migrant exploitation in the United States. This Article situates the Trafficking Act within the framework of its legal antecedents in an effort to illustrate the ways in which the inability of the TVPA to substantially meet its goals of preventing trafficking and protecting trafficking victims stems from more general failures of domestic immigration policy. By broadening the scope of the inquiry concerning the shortcomings of the TVPA, this Article seeks to clarify the ways in which the TVPA actually may be interacting in a detrimental way with other immigration and labor policy choices.

Border interdiction strategies, harsh penalties for undocumented migrant workers, and insufficient labor protections for all workers, but particularly undocumented migrants, all interact to facilitate trafficking, notwithstanding the TVPA. Furthermore, because Congress was anxious to

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5. *See, e.g.*, Dalrymple, *supra* note 4, at 472-73 (concluding that the humanitarian aims of the Act have been underemphasized in favor of prosecution); Hussein Sadruddin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 Stan. L. & Pol'y Rev. 379 (2005) (finding that the Act is more concerned with prosecution than victim protection); Note, *The Trafficking Victims Protection Act*, *supra* note 4, at 2194 (positing that overemphasis of prosecution-oriented components of the TVPA, relative to components of the Act dedicated to victim protection and global prevention, account for the Act's shortcomings).

6. Nor are the failures unique to U.S. anti-trafficking efforts. For a thoughtful analysis of the ways in which international anti-trafficking initiatives have similarly failed to deal with the multifaceted nature of the trafficking problem, see Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 Stan. J. Int'l L. 1 (2004); *cf.* LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 Geo. Wash. Int'l L. Rev. 227 (2003) (suggesting ways in which the United Nations and member states can more effectively combat trafficking in the wake of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children).

limit assistance under the TVPA to a narrowly defined subset of trafficking victims,[7] it deliberately chose to exclude a broad range of labor exploitation from the reach of the TVPA. This policy choice likely exacerbates workplace exploitation by constructively laying blame upon many noncitizen workers for their exploitation.

This Article is divided into three parts. The first part defines the scope of the trafficking problem. Although it seems a simple matter, the exercise of defining trafficking and distinguishing trafficking from human smuggling actually sets the parameters of the problem to be addressed. Indeed, the inability of the U.S. legal regime to effectively grapple with domestic manifestations of the international human trafficking crisis stems in part from the fact that U.S. lawmakers have relied upon unrealistic understandings of trafficking and its victims.[8] Thus, this Article begins by examining an internationally accepted definition of trafficking, and contrasting it to the more narrow definition adopted in the TVPA. Congress's efforts to limit the assistance available under the Act to purely "innocent victims" explains the substantial differences between these definitions.

The second part of the Article analyzes the TVPA. It begins with a brief overview of the history of the Act, and then looks in detail at the Act's provisions. The bulk of the TVPA actually consists of older laws. Therefore, this part surveys constitutional and legislative provisions barring involuntary servitude and protecting workers; legislation criminalizing "alien smuggling;" and legislation criminalizing interstate and international sex trafficking. In passing the TVPA, members of Congress recognized that existing laws were ineffective in preventing trafficking. Unfortunately, they largely refused to recognize and address the ways in which these laws actually contribute to the trafficking and more general exploitation of workers. Consequently, legislative revisions brought the crime of "trafficking" into the prosecutorial mainstream, but did nothing to address the ways in which the preexisting legal regime upon which the TVPA is built actually facilitates trafficking.

The third part of the Article explores the reasons for the limited nature of the Act's successes. The Act to date has been somewhat ineffectual. On the domestic level, few victims of trafficking have actually been identified and assisted. Similarly, the government has prosecuted only a small number of trafficking cases over the last five years. Moreover, there is no clear evidence that the Act is effectively preventing trafficking. This part illustrates the ways in which the shortcomings of the TVPA echo the failures of the anti-trafficking endeavors that existed prior to the passage of the TVPA. As before, current anti-trafficking efforts are characterized by: the presumptive criminality of migrants; a willingness to sacrifice the protection of migrants in the furtherance of criminal prosecutions; a

7. *See infra* Part III.B.1.
8. *See infra* Part III.B.1.

conflation of trafficking and prostitution; a racially biased conception of trafficking; and a dogged focus on interdiction efforts over internal enforcement and outreach. This part suggests that the Act has had a limited impact upon domestic trafficking because it did almost nothing to address the ways in which U.S. law and policy render migrants vulnerable to exploitation.

The Trafficking Act has undoubtedly made important strides toward assisting some of the most exploited victims of trafficking. The Act has also charted innovative waters in international policy by taking steps to combat social and market factors that promote or "push" international trafficking. At a minimum, the TVPA has played an important role in bringing attention to the trafficking issue at the domestic level for the first time in decades. Yet the reach of the TVPA has been limited. This Article underscores the importance of viewing the TVPA within the larger legal landscape, because its shortcomings are emblematic of, and cannot be solved without first addressing, much deeper and broader systemic flaws in our legislative approaches to immigration issues. The continued failure to address these issues may ensure that the Act does more to perpetuate systemic incentives for migrant exploitation than to remedy the domestic manifestations of trafficking.

I. UNDERSTANDING THE PROBLEM

The label "human trafficking" has been applied to the migration of certain individuals across and within national boundaries for purposes of performing labor[9]—including sex work—under "coercive conditions."[10] It may involve deception, abduction, or debt bondage.[11]

Estimates on the number of individuals trafficked each year vary, and because they involve undocumented migration, are necessarily imprecise.[12]

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9. As used here, labor includes sex work. Some scholars and activists take the position that prostitution or sex work is inherently coercive, while others posit that sex work is no more inherently coercive than any other form of labor. *See* Susan W. Tiefenbrun, *Sex Sells but Drugs Don't Talk: Trafficking of Women Sex Workers*, 23 T. Jefferson L. Rev. 199, 205-06 (2001) (explaining the difference between the two schools of thought). Current discussions about human trafficking are distorted by the focus on prostitution to the exclusion of other trafficking issues, *see infra* Part III.B.3, and the conflation of anti-trafficking efforts with efforts to criminalize prostitution have hampered rather than helped current anti-trafficking efforts. In treating sex work as a subset of labor, this Article seeks to avoid such distortions.

10. Answering the question of what constitutes coercion is also an important predicate to defining trafficking. The issue is complex, and has been one of the flash points surrounding both international and domestic debates on trafficking. *See, e.g.*, Jacqueline Bhabha, *Trafficking, Smuggling, and Human Rights*, Migration Info. Source, Mar. 1, 2005, *available at* http://www.migrationinformation.org/Feature/print.cfm?ID=294 (discussing the "consent/coercion seesaw").

11. Lee, *supra* note 1, at 6.

12. *See* Frank Laczko & Marco A. Gramegna, *Developing Better Indicators of Human Trafficking*, 10 Brown J. World Aff. 179 (2003) (discussing limits on the availability of reliable trafficking data due in part to reluctance of governmental organizations to share

Statistics compiled by the U.S. government estimate that between 600,000 and 800,000 men, women, and children are trafficked across international borders each year, that eighty percent of these people are women and girls, and that fifty percent of them are minors.[13] The International Labor Organization ("ILO") of the United Nations[14] estimates that at any given time, about 12.3 million people are trapped in situations of bonded labor, forced child labor, sexual servitude, and involuntary servitude.[15] A significant number of trafficking victims enter the United States each year. In 1999, the Central Intelligence Agency ("CIA") estimated that 50,000 women and children were trafficked into the United States each year.[16] This figure was subsequently revised downward, and the current estimate is that 14,500 to 17,500 people are trafficked into the United States each year,[17] but other estimates place the number closer to 100,000.[18]

A. *Defining the Problem*

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[19] ("U.N. Protocol") offers an

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information and proposing greater reliance on information gathered by the International Organization of Migration and victim-assistance nongovernmental organizations ("NGOs")).

13. 2005 State Department Report, *supra* note 3, at 6. Similarly, the United Nations Population Fund estimates that between 700,000 and 2 million women are trafficked across international borders annually. United Nations Population Fund, Trafficking in Human Misery, http://www.unfpa.org/gender/trafficking.htm (last visited Feb. 19, 2006). Adding internal domestic trafficking to this figure brings the number as high as four million. 2005 State Department Report, *supra* note 3, at 6.

14. The International Labor Organization ("ILO") is the United Nations ("U.N.") agency responsible for labor standards, employment, and social protection issues. 2005 State Department Report, *supra* note 3, at 7.

15. *Id.*

16. Francis T. Miko, Cong. Research Serv., Trafficking in Women and Children: The U.S. and International Response (2002), *available at* http://fpc.state.gov/documents/organization/9107.pdf.

17. U.S. Dep't of State, Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report 23 (2004), *available at* http://www.state.gov/documents/organization/34158.pdf [hereinafter 2004 State Department Report]. This estimate only counts those individuals who are presumed to meet the definition of "severe forms of trafficking in persons," set forth in the TVPA, 22 U.S.C. § 7102(8) (2000). The State Department explains that the reasons for the smaller number include "improvements in data collection and methodology rather than trends in trafficking." U.S. Dep't of State, Assessment of U.S. Activities to Combat Trafficking in Persons § III.A (2003), *available at* http://www.state.gov/documents/organization/23598.pdf [hereinafter 2003 State Department Report]. It is this change in data collection—keyed to a narrower definition of trafficking—that accounts for the rapid reduction in the overall number of estimated trafficking victims that enter the U.S. each year. It does not reflect any actual decline in the number of trafficking victims.

18. 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).

19. U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, at 31, U.N. GAOR, 55th Sess., U.N. Doc.

internationally agreed-upon definition of trafficking. The U.N. Protocol defines trafficking as

> (a) . . . the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs . . . .
>
> (b) The consent of a victim of trafficking in persons to the intended exploitation . . . shall be irrelevant where any of the means set forth [above] have been used.
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> (c) The recruitment, transportation, transfer . . . of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth [above].[20]

Because of its detailed and illustrative nature, the definition of trafficking in the U.N. Protocol is a useful place to start any discussion of trafficking. This definition contains an extensive list of the sorts of conduct that might constitute trafficking: threat or use of force or coercion; kidnapping, fraud, and deception; and even the "abuse of power" or an abuse of the "vulnerability" of the victim, whenever such conduct results in the exploitation of the victim. Exploitation may occur in the person's transport, but it may also occur in the person's recruitment, harboring, or receipt. This means that the movement of the individual, either within or across borders, is not a necessary component of trafficking. The definition also gives examples of the sorts of conduct that constitute exploitation, and such conduct includes sexual exploitation and other forms of involuntary servitude or forced labor, such as organ removal.

The U.N. Protocol drafters made two important definitional choices. First, they incorporated an expansive definition of coercion. Coercion does not require the use of physical force or threats; it can encompass many acts including abuse of a "position of vulnerability."[21] They took no position on whether prostitution inherently contains an element of coercion, as this topic was the subject of sharp disagreement among member states.[22] Second, they defined trafficking to require "exploitation," but leave that term undefined, instead providing examples of the many kinds of conduct that might be deemed exploitative.[23]

A/RES/55/25 (Jan. 8, 2001), *reprinted in* 40 I.L.M. 335, 384-85 [hereinafter U.N. Protocol]. The United States Senate ratified the U.N. Protocol on October 7, 2005.

20. *Id.* art. 3, paras. (a)-(c).

21. *Id.* art. 3, para. (a); Bhabha, *supra* note 10.

22. Bhabha, *supra* note 10.

23. U.N. Protocol, *supra* note 19, art. 3, para (a); Bhabha, *supra* note 10.

The definition of trafficking that was developing at the time for use in the U.N. Protocol provided an important template for the TVPA passed by the United States Congress in 2000. However, the TVPA does not contain a definition of trafficking that tracks the U.N. Protocol definition. The distinctions are important evidence of the policy considerations that shaped the TVPA.

The TVPA actually contains two tiers of trafficking. First, there is the act of "trafficking," which qualifies as trafficking for purposes of criminal liability, for international prevention measures, and for certain discretionary protective services for victims. However, a distinct definition is used to determine who is actually eligible for full relief under the Act's protective provisions—namely, victims of "severe forms of trafficking in persons."[24] Thus, one might be a trafficking victim, but still ineligible for certain relief under the Act. The TVPA does not provide its own definition of "trafficking."[25] The Act does include a definition of "severe forms of trafficking in persons." This is defined as

> 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
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> the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[26]

Because the U.N. Protocol envisions protection for all victims of trafficking (as that term is defined in the Protocol), but the U.S. law only guarantees such protections for victims of "severe forms of trafficking in persons," it is worth noting that there are important distinctions between the TVPA definition of "severe forms of trafficking in persons" and the definition of human trafficking provided by the U.N. Protocol.

First, the TVPA makes no specific provisions concerning the role of victim consent. It is an open question under the TVPA whether the consent

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24. The Conference report states,

> In various sections, the conference agreement uses more general terms such as "trafficking" or "trafficking in persons" rather than the more limited term "severe forms of trafficking in persons." In such contexts, these terms are intended to be used in a more general sense, giving the President and other officials some degree of discretion to apply the relevant provisions to a broader range of actions or victims beyond those associated with severe forms of trafficking in persons. . . . Where, however, this Act uses the term "victims of severe forms of trafficking," even in provisions related to protection and assistance, the application of such provisions is limited to such victims.

Victims of Trafficking and Violence Protection Act of 2000, H.R. Rep. No. 106-939 (2000) (Conf. Rep.).

25. It does include a definition of "sex trafficking," which is defined as "the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act." 22 U.S.C. § 7102(9) (2000).

26. *Id.*

of the individual to some element of the act of trafficking obviates the conclusion that the individual is a victim of a "severe form of trafficking." In contrast, the definition of trafficking set forth in the U.N. Protocol expressly excludes the victim's consent as a relevant factor.[27] The distinction between trafficking and smuggling under the U.N. Protocol rests solely on the presence of deception, coercion, or abuse of power. Where these elements are present, "the consent of the victim . . . to the intended exploitation . . . shall be irrelevant."[28] In other words, one cannot be seen to consent to slave-like conditions that are imposed through deception, coercion, or abuse of power under the U.N. Protocol.

Second, the TVPA definition of "severe forms of trafficking in persons" automatically includes all persons under eighteen who are forced into sex acts, but the blanket protection of children extends no further. Children pose particularly difficult cases, because it is not clear when, if ever, they can be treated as having "consented" to their trafficking. Because the Trafficking Act purportedly aims to protect all non-consenting victims, one might expect that all children in coercive labor arrangements would be treated as victims of "severe forms of trafficking in persons." But this is not the case.[29] In contrast to the U.S. approach, the U.N. Protocol includes all children who were "recruit[ed], transport[ed], transfer[red], harbour[ed], or receive[d]" by any means.[30] These differences have the overall effect of establishing a more restrictive definition of trafficking on the domestic level than that which is operative in the U.N. Protocol.

B. *Distinguishing Trafficking from Smuggling and Other Forms of Irregular Migration*

Over six years after the completion of the drafting of the U.N. Protocol and over five years after the passage of the Trafficking Act in the United States, the distinction between trafficking and smuggling is still frequently

27. U.N. Protocol, *supra* note 19, art. 3, para. (b).

28. *Id.*

29. Children who are smuggled across the borders into the United States can be deported rather than provided with assistance as trafficking victims. *See* Nina Bernstein, *Children Alone and Scared, Fighting Deportation*, N.Y. Times, Mar. 28, 2004, at A1 ("Immigration authorities have sought to deport many of the 5000 unaccompanied minors apprehended each year, and others separated from their families, arguing for strict enforcement of the rules to secure the nation's borders from illegal entrants."). Unaccompanied minors have been granted greater protection and access to counsel in recent years, as their care has been moved from the former Immigration and Naturalization Service ("INS") to the Office of Refugee Resettlement ("ORR"), but they are still frequently detained, unable to obtain counsel, and deported. *See* Christopher Nugent, *Protecting Unaccompanied Immigrant and Refugee Children in the United* States, 32 Human Rts. 9, 9-10 (2005). The Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005), which is currently pending before Congress, seeks to address some of these issues. But passage of the legislation would not ensure trafficking victim protections to all such children.

30. U.N. Protocol, *supra* note 19, art. 3, para. (c).

misunderstood or ignored.[31] Even those who know that there is a legal distinction between the terms disagree about how to define the differences. Furthermore, because of the changing nature of international migration, the line between smuggling and trafficking is becoming increasingly blurry.

As an initial matter, it is important to note that neither the U.N. Protocol definition nor the U.S. Trafficking Act's definition of human "trafficking" is synonymous with human "smuggling."[32] The journey may begin in the same way. Some trafficking victims begin their journey in an act of smuggling, as they freely undertake a decision to pay someone to assist them in crossing the border into the United States and possibly even to find a job within the United States. Others come into the United States through legal channels, often on temporary, nonimmigrant visas, which they overstay. Because each of these groups is legally understood to have crossed the border of their own volition, I shall refer to them as "voluntary migrants."[33] Trafficking victims include a subset of voluntary migrants who, once in this country, find themselves coerced into working under conditions to which they never would have consented.[34]

Trafficking victims also include individuals who are not a subset of the group of "voluntary migrants" previously identified, for it also encompasses those who are forcibly taken from their homes or sold by their own families

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31. *See, e.g.*, Solomon Moore, *LAPD Enlisted in Fight on Human Smuggling*, L.A. Times, Jan. 25, 2005, at B1 (discussing an anti-trafficking initiative, but referring to "human smuggling").

32. The U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, defines smuggling as "the procurement, in order to obtain, directly or indirectly, a financial or material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident." U.N. Protocol, *supra* note 19, Annex III, art. 3(a). Under U.S. law "alien smuggling" is prohibited by 8 U.S.C. § 1324a(1)(A)(i) (2000), which prohibits the conduct of

> any person who—knowing that a person is an alien, bring[s] to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien.

Id. As with the international protocol, there is no requirement that the smuggler be remunerated. Internal transportation and harboring are also prohibited. *Id.* § 1324a(1)(A)(ii), (iii).

33. Of course, the issue of "voluntariness" is not an easy one. Much "voluntary migration" occurs because economic or social conditions render migration the most viable alternative. *See* Mirium Jordan, *New Rules at the Border*, Wall St. J., Feb. 21, 2006, at B1. This can be particularly true for women. *See, e.g.*, Rhacel Salazar Parreñas, Servants of Globalization: Women, Migration and Domestic Work (2001) (discussing the factors that prompt women to leave the Philippines in search of work).

34. Implementing regulations for the TVPA provide that victims of "severe forms of trafficking in persons" exclude individuals who choose to enter the country in violation of immigration laws, even if those individuals are later subject to actions that constitute "trafficking" for purposes of the prosecution of their traffickers. *See* Protection and Assistance for Victims of Trafficking, 28 C.F.R. 1100 (2005); *see also* 8 U.S.C. § 1101(a)(13)(T)(ii) (2000) (limiting T-visa relief to those who are physically present in the U.S. "on account of such trafficking").

and placed in positions of forced labor. The latter group is typically evoked in discussions of human trafficking,[35] but the former—voluntary migrants who later become subject to coerced labor, including sex work—is actually the larger category.[36] This disconnect between perception and reality has resulted in a law that is too narrow to reach a significant portion of the domestic trafficking problem.[37]

C. *Dealing with Trafficking*

In the late 1990s, two high-profile stories of forced immigrant labor highlighted the existence of the trafficking problem in the United States. First, in September of 1995, the police department in El Monte, California, conducted a raid of a garment factory, discovering seventy-two Thai nationals working in slave-like conditions.[38] They had been lured to the country with promises of employment.[39] Upon arrival in the United States, they were forced to work in a garment shop up to eighteen hours a day, seven days a week, and were paid less than sixty cents an hour.[40] The owners restrained them by threats and physical violence.[41]

Two years later, the New York City Police Department unearthed an immigrant smuggling scheme involving as many as sixty-two deaf-mute Mexicans who had been persuaded to come to the United States with promises of jobs.[42] Upon arriving in the United States, these migrants were forced into a life of peddling and begging on the streets of New York City

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35. Senator John Cornyn (R-TX), for example, has expressed the view that unless people were "duped" into entering the country, they cannot qualify as victims of trafficking at all. *See* Michael Hedges, *Texans Tell of Trafficking Horror*, Hous. Chron., July 8, 2004, at 5A.

36. *See* Francis T. Miko, Cong. Research Serv., Trafficking in Women and Children: The U.S. and International Response 2-3 (2004), *available at* http://fcp.state.gov/documents/organization/31990.pdf; Daniel Kyle & John Dale, *Smuggling the State Back In: Agents of Smuggling Reconsidered*, *in* Global Human Smuggling: Comparative Perspectives 29, 34 (David Kyle & Rey Koslowski eds., 2001) [hereinafter Global Human Smuggling]; *cf.* Debbie Nathan, *Oversexed*, Nation, Aug. 29, 2005, at 27 (asserting that the little evidence that exists suggests that "most immigrants who work as prostitutes do so voluntarily"). Nora Demleitner has observed a parallel phenomenon in Western European trafficking: "Many media reports focus on the very small number of women who were forcibly abducted from their home country, transported to Western Europe, and there forced into prostitution. Although these cases do occur, they constitute the least likely scenario of sexual slavery. Nevertheless, they are frequently used as paradigmatic cases." Nora V. Demleitner, *The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution*, *in* Global Human Smuggling, *supra*, at 257, 264.

37. *See infra* Part III.A.

38. William Branigin, *Sweatshop Instead of Paradise: Thais Lived in Fear as Slaves at L.A. Garment Factories*, Wash. Post, Sept. 10, 1995, at A1.

39. *Id.*

40. Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 San Diego L. Rev. 397, 401 (1999).

41. Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. Gender Race & Just. 405, 406 (1998).

42. *Incidents: Mexico-USA*, 16 Trafficking in Migrants 3 (1997), *available at* http://www.iom.int/documents/publication/en/tm16.pdf.

for eighteen hours a day, seven days a week.[43] When they failed to meet their $600 per week quotas, they were subject to physical abuses such as beatings and electrocution, as well as mental abuse and sexual molestation.[44] While they saw very little of the benefit, their work was part of a much larger scheme that yielded over a million dollars a year in profits for the ringleaders.[45]

At the time the two events unfolded, the law had no coherent way of dealing with the many victims of the trafficking scheme. Under existing law, they were not legally authorized to work in the United States or to remain in the country.[46] Furthermore, in order to ensure that the perpetrators of these schemes were punished, prosecutors had to resort to a broad array of criminal provisions, and there were few provisions designed to assist the noncitizen workers who were the victims of these schemes.

In the El Monte case, the Department of Justice, through the U.S. Attorney's office in Los Angeles, charged the operators of the garment factory with involuntary servitude, criminal conspiracy, kidnapping by trick, and smuggling and harboring individuals in violation of U.S. immigration law.[47] Meanwhile, the workers filed a civil lawsuit in federal district court in Los Angeles, alleging false imprisonment, labor law and civil rights violations, and claims under the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") against the immediate operators of the El Monte compound.[48] Similar allegations were brought against the manufacturers and retailers.[49] This legal battle could not even begin until the workers won a legal battle with the Immigration and Naturalization Service ("INS") that freed them from imprisonment.[50] Only after that legal struggle were the workers issued S-visas, which allowed them to remain in the country lawfully to pursue their claims because the Attorney General had certified that they were capable of providing "critical, reliable information concerning a criminal organization or enterprise."[51]

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43. Mark Fineman, *Deaf Migrants' Families Had Feared Abuse*, L.A. Times, July 22, 1997, at A1; Deborah Sontag, *Poor and Deaf from Mexico Betrayed in their Dreams*, N.Y. Times, July 25, 1997, at A1.

44. Ian Fisher, *U.S. Indictment Describes Abuses of Deaf Mexican Trinket Sellers*, N.Y. Times, Aug. 21, 1997, at A1.

45. *Id.*

46. *See infra* Part II.C; *see also* Su, *supra* note 41, at 408-09 (discussing the tension inherent in the role played by the El Monte workers in legal developments arising out of the El Monte factory abuse).

47. Su, *supra* note 41, at 408.

48. *Id.*

49. *Id.*

50. *Id.*

51. The S-visa allows admission for up to three years for a noncitizen who receives such certification. The Attorney General must also certify that the "alien" is willing to testify; and that the "alien's" presence in the United States is essential to the criminal investigation. 8 U.S.C. §§ 1101(a)(15)(S), 1184(k)(3) (2000). Pursuant to 8 U.S.C. § 1255(j), the Attorney General may adjust the noncitizen witness's status to that of legal permanent resident (a precursor to citizenship) after three years, provided that he or she has provided information

In the case of the Mexican trafficking ring, Alfredo Rustrian Paoletti and his son, Renato Paoletti Lemus, both Mexican nationals, were charged with violations of criminal provisions of the U.S. immigration laws prohibiting the recruitment, smuggling, and harboring of "aliens."[52] Many of the Mexican nationals who had been enslaved in their scheme also received S-visa status, and were thus allowed to remain in the United States.[53]

In both of these pre-TVPA cases, there was a network of laws sufficient for charging the perpetrators with crimes arising out of their acts of trafficking. In both cases, however, there was general concern that available criminal punishments would not be severe enough to fit the crime. Furthermore, the victims in these cases had to fight their own detention and win the right to remain in the country before they were able to secure their own freedom, much less their protection.[54]

At the very time that these two events demonstrated the shortcomings of U.S. law for dealing with the problem of human trafficking, the international community was working to develop its revised legal framework for dealing with the problem. With attention focused on the issue at home and abroad, Congress took action to address the problem of human trafficking, and passed the TVPA on October 28, 2000.[55]

II. THE STRUCTURE AND ORIGINS OF THE TVPA

As previously noted, Congress passed the TVPA on October 28, 2000.[56] The TVPA was a compromise bill, based on three bills introduced during the legislative session.[57] The final version of the Act had broad bipartisan support, passing by a vote of 371-1 in the House and 95-0 in the Senate.[58] It was signed into law by President William Jefferson Clinton on October 28, 2000.[59] The stated purpose of the final version of the Act is "to combat trafficking in persons, a contemporary manifestation of slavery whose

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that substantially contributes to the criminal investigation or prosecution. The S-visa is often referred to as the "snitch visa." *See, e.g.*, *Abused Deaf Mexicans Allowed to Stay in U.S.*, News & Observer (Raleigh, N.C.), June 20, 1998, at A12.

52. On May 31, 2005, they were extradited by Mexico to the United States for trial, more than seven years after their initial arrest in connection with this matter. *See Mexico Extradites Two Deaf Men in Immigration Scandal*, Lawinfo.com, May 31, 2005, http://blog.lawinfo.com/2005/05/31/mexico-extradites-deaf-men-accused-of-exploiting-immigrants/. Their crimes predated the TVPA, so they were charged under 8 U.S.C. § 1324a. For further discussion of these anti-smuggling provisions, see *infra* Part II.A.

53. *See Abused Deaf Mexicans Allowed to Stay in U.S.*, *supra* note 51, at A12.

54. Su, *supra* note 41, at 407.

55. Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8 and 22 U.S.C.).

56. *Id.*

57. For detailed discussions of the similarities and differences of these three bills, see Hyland, *supra* note 4, at 60-71 (including a discussion of the three bills, the conference compromise, and the final Act); Jackson, *supra* note 4, at 518-19.

58. Bill Summary and Status for the 106th Congress, http://thomas.loc.gov/cgibin/bdquerytr/z?d106:HR03244 (last visited Feb. 10, 2006).

59. *Id.*

victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."[60]

In enacting the statute, Congress included prefatory language containing a finding that about 50,000 people were trafficked into the United States every year. This number was based on a 1997 CIA estimate.[61] Congress found that many of these individuals, trafficked through force, fraud, or coercion,[62] were working not just in the sex industry, but also in other kinds of forced labor, "involv[ing] significant violations of labor, public health, and human rights standards worldwide."[63] Congress recognized that existing laws often failed to protect these victims of trafficking, "and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves."[64]

These findings appear to signal congressional recognition of the need to change the relationship between the state and the victims of trafficking. Rather than punishing those who are trafficked, the Act is apparently intended to provide for the care and treatment of trafficking victims in accordance with their status as victims of crimes. Thus, it includes specific provisions to provide for their assistance in the United States.[65] This new framework for the humane treatment of trafficking survivors was supposed to be complemented by the prosecution of traffickers and by measures aimed at preventing trafficking at its source.[66]

Congressional action on the trafficking issue met with enthusiastic support from the Executive Branch. President Clinton signaled his support of the Act upon its passage.[67] Although the measure was passed during the final year of the Clinton Administration, President George W. Bush has been a vocal supporter of the goals of the Act in both terms of his presidency. Many high-ranking officials in the Bush administration have lauded current anti-trafficking efforts.[68] Anti-trafficking efforts have even

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60. 22 U.S.C. § 7101(a) (2000).
61. This estimate has been revised. *See* discussion *supra* notes 16-18.
62. 22 U.S.C. § 7101(b)(2).
63. *Id.* § 7101(b)(3).
64. *Id.* § 7101(b)(17).
65. 2003 State Department Report, *supra* note 17, § II.
66. *See infra* Part III.A.
67. Upon the passage of the TVPA, President Clinton issued a statement congratulating Congress "on its bipartisan work to pass the Victims of Trafficking and Violence Protection Act of 2000, which contains legislation to combat trafficking in persons, especially women and children," and observing that the Act's initiatives "have been important priorities of my Administration and I look forward to signing this bill into law." President William J. Clinton, Statement on Passage of Anti-Trafficking Law at Chappaqua, New York (Oct. 11, 2000), *available at* http://canberra.usembassy.gov/hyper/2000/1012/epf403.htm.
68. *See, e.g.*, John Ashcroft, Attorney Gen., Remarks to the International Conference: Pathbreaking Strategies in the Global Fight Against Sex Trafficking (Feb. 25, 2003), *available at* http://www.state.gov/g/tip/rls/rm/17987.htm ("The Department of Justice remains firmly committed to ensuring criminals who engage in human trafficking are aggressively investigated, swiftly prosecuted, and severely punished . . . . [T]he Justice Department works to ensure that victims of trafficking have the services they need from the moment we encounter them."); *Attorney General Gonzalez Affirms Justice Department's*

been linked with the campaign against terrorism that has been the centerpiece of the current Administration's foreign policy agenda after September 11, 2001. In a speech before the United Nations on September 23, 2003, President Bush dedicated a substantial portion of a speech otherwise dedicated to discussions of international terrorism, the wars in Iraq and Afghanistan, and the proliferation of weapons of mass destruction to a "humanitarian crisis spreading, yet hidden from view," by which he was referring to the issue of human trafficking, particularly the forced prostitution of women and children.[69] In keeping with the tone of the rest of his speech, which was aimed at the global threat of terrorism, Bush referred to the phenomenon as "a special evil."[70]

In short, both the Legislative and Executive Branches have indicated that anti-trafficking efforts are important, and such efforts have been funded accordingly. More than $82 million were allocated to anti-trafficking efforts in the past fiscal year alone.[71]

While there has been much discussion of trafficking, the issue has been cast as a foreign problem with unfortunate domestic manifestations. Perhaps as a consequence, domestic efforts to minimize human exploitation have never truly mirrored the zeal of the anti-trafficking rhetoric. The role of U.S. law in perpetuating trafficking simply has not been adequately addressed.

Commitment to Battling Human Trafficking, Anti-Trafficking News Bull. (U.S. Dep't of Justice Civ. Rights Div., Wash., D.C.), Apr. 2005, at 1 [hereinafter April Bulletin] ("In a February 28 speech at the Hoover Institution's Board of Overseers Conference, Attorney General Alberto R. Gonzales pledged to 'move aggressively' in the battle against human trafficking. Characterizing trafficking in persons as 'one of the most pernicious moral evils in the world today,' he underscored that eradicating this form of modern-day slavery remains a top priority of the Bush Administration.").

69. President George W. Bush, Statement to the United Nations General Assembly, United Nations, New York, NY (Sept. 23, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html.

70. *Id.* Nor did his enthusiasm for the topic taper off. On July 16, 2004, President Bush remarked,

> Human trafficking is one of the worst offenses against human dignity. Our nation is determined to fight that crime abroad and at home. . . .
>
> The American government has a particular duty, because human trafficking is an affront to the defining promise of our country. People come to America hoping for a better life. And it is a terrible tragedy when anyone comes here, only to be forced into a sweatshop, domestic servitude, pornography or prostitution.

President George W. Bush, Remarks Regarding First National Training Conference on Human Trafficking in the United States: Rescuing Women and Children from Slavery (July 16, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/07/20040716-11.html. The President proceeded to berate Cuba as "a major destination for sex tourism." *Id.* These comments exemplify a repeated theme: the conflation of legal prostitution, sex tourism, and trafficking. *See infra* Part III.B.3.

71. [Amended] Letter from Secretary of State Condoleeza Rice Accompanying 2005 State Department Report (June 3, 2005), *available at* http://www.state.gov/g/tip/rls/tiprpt/2005/46605.htm. The amended letter revised the aid figure down from $96 million to $82 million.

A. *The Timid Reforms: Revising and Supplementing Old Laws*

Because slave-like conditions are at the core of the trafficking problem, any effort to combat trafficking must address the issue of forced labor, and Congress made some efforts to do so. The 2003 State Department Report on trafficking states that the crimes that were added or altered by the Act included forced labor; trafficking with respect to peonage; slavery; involuntary servitude; sex trafficking of children; sex trafficking by force, fraud, or coercion; and unlawful conduct with respect to documents.[72] While the 2005 State Department Report presents an impressive list of changes to the criminal law wrought by the TVPA, in reality, the primary changes were increases in criminal sentences for forced labor crimes that were already in existence, including peonage,[73] operating vessels for slave trade,[74] enticement for slavery,[75] sale into involuntary servitude,[76] and forced labor.[77] Amplifying upon these preexisting laws, the Act also codified a new definition of involuntary servitude[78] and, importantly, provided a private right of action for those who have been forced into peonage, slavery, or involuntary servitude.[79] The Act did not, however, otherwise address the lack of adequate legal workplace protections for undocumented migrants.

The Act also expanded the available tools for prosecuting individuals who profit from forced labor even if they are not themselves the traffickers, provided that they do so "knowingly." The Act added a new prohibition on forced labor, which provides up to a twenty-year sentence for anyone who "knowingly provides or obtains the labor or services of a person" who has been coerced into performing labor or services.[80] In addition to these expansions of preexisting law, the Act also added a few new criminal sanctions for trafficking-related conduct. Specifically, the TVPA expressly criminalizes "trafficking" by legislating that any individual who "knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services" in violation of the TVPA is subject to a twenty-year sentence, or a life sentence if the victim is younger than fourteen years old.[81] And any individual who participates in or profits from the trafficking of children for commercial sex purposes is subject to the same sentences.[82] The Act also strengthens the government's hand against third parties by adding human trafficking as a predicate offense to RICO.[83]

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72. 2003 State Department Report, *supra* note 17, § II.
73. 18 U.S.C.A. § 1581 (West Supp. 2005).
74. *Id.* § 1582.
75. *Id.* § 1583.
76. *Id.* § 1584.
77. *Id.* § 1589; *see also supra* Part II.A.
78. 22 U.S.C. § 7102(5) (2000).
79. 18 U.S.C. § 1595(a) (West Supp. 2005).
80. 18 U.S.C.A. § 1589.
81. *Id.* §§ 1590, 1591(b)(1).
82. *Id.* § 1591(a).
83. *Id.* §§ 1591, 1961(1)(A).

The only other substantive change to domestic criminal law relates to documents. Because the seizure of legal documents is often the means by which victims are coerced into trafficking situations, the TVPA added a provision rendering punishable by up to five years in prison the seizure of another individual's governmental identification documents in the course of violating involuntary servitude or trafficking provisions.[84]

These provisions are the only "new" criminal provisions that were created by the TVPA. The remainder of the Act increases penalties for certain acts that were already criminalized:[85] increasing from ten to twenty years the penalty for violating 22 U.S.C.'s prohibitions on peonage, enticement into slavery, and sale into involuntary servitude;[86] allowing for life imprisonment in cases involving murder, kidnapping, or aggravated sexual assault;[87] and mandating restitution[88] and forfeiture.[89]

In other words, although the TVPA has often been billed as a major legislative breakthrough in domestic efforts to curb the problem of human trafficking, the TVPA is largely a set of incremental changes to an assortment of preexisting federal laws designed to address various elements of the human trafficking problem, including human smuggling, forced labor, and sex trafficking. Although the TVPA allowed for more seamless application of these laws, insufficient attention was paid to making existing laws more efficacious. The shortcomings of the preexisting legislation in the areas of labor, immigration, and sex trafficking have reappeared in the TVPA.

B. *Labor: The Thirteenth Amendment and Workplace Protections*

Although the United States is a country whose foundation rested in part upon the institution of slavery, its laws have long contained numerous express prohibitions on forced labor. Many of these laws have their roots in the Thirteenth Amendment, which provides, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any

84. *Id.* § 1592.

85. Scholars have heralded the increased sentences, noting that prior to the enactment of the TVPA, the punishment for committing acts of trafficking, even acts of the most egregious kind, were very light. *See* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 Fordham L. Rev. 981, 1037 (2002); Hyland, *supra* note 4, at 49-50; Candes, *supra* note 4, at 572-73. As an expressive matter, it seems clear that the increased sentences send an important message: Whereas, before, victims of trafficking were treated as valueless outlaws, they now are ceded more appropriate respect as crime victims and their traffickers are therefore punished. *See* Note, *The Trafficking Victims Protection Act*, *supra* note 4, at 2199-2200 (theorizing that the harsher penalties of the TVPA may serve an important expressive function). That said, it is not clear whether the increased penalties are sufficient to deter crime, particularly given the low number of convictions obtained to date. *See infra* Part III.B.2.

86. TVPAII § 112(a)(2) (to be codified at 18 U.S.C. § 1590).

87. *Id.* § 112(a)(1)(B) (to be codified at 18 U.S.C. §§ 1581(a), 1583, 1584).

88. 18 U.S.C.A. § 1593 (West Supp. 2004).

89. *Id.* § 1594(b), (c).

place subject to their jurisdiction."[90] Others, including wage and workplace protections, are rooted in Congress's Commerce Clause authority.[91]

1. The Thirteenth Amendment and Ancillary Legislation

The Thirteenth Amendment has no state action requirement.[92] It places legal limits upon private social and economic relationships.[93] Unfortunately, it is unclear how effectively the Thirteenth Amendment itself could be deployed in anti-trafficking litigation because the U.S. Supreme Court has not squarely determined whether, in the absence of ancillary statutes, such action may be filed by a private actor against another private actor.[94] Only a few lower courts have accepted the argument that the Thirteenth Amendment provides such a right of action.[95]

Because of ambiguities regarding the existence of a right of action under Section 1 of the Thirteenth Amendment, the legal force of the Amendment mainly comes from Section 2 of the Thirteenth Amendment, which gives Congress "power to enforce this article by appropriate legislation."[96] A wave of restrictive judicial interpretations during Reconstruction restricted this ancillary legislation to laws aimed to prevent or end only the most literal instances of "slavery."[97] These limitations on the Thirteenth

90. U.S. Const. amend. XIII, § 1.

91. U.S. Const. art. I, § 8, cl. 3; *see infra* Part II.A.2.

92. *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 942 (1988).

93. Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 Colum. L. Rev. 973, 977-78 (2002).

94. *Id.*; *see also* Alexander Tsesis, The Thirteenth Amendment and American Freedom: A Legal History 89-91 (2004). For arguments supporting the existence of a private right of action against private actors under the Thirteenth Amendment, see Azmy, *supra* note 85, at 1049-57 (arguing that the reasoning of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971), supports such a right); Halem, *supra* note 40, at 417-18 (same). Although the TVPA initially failed to create a private right of action for victims of trafficking, the 2003 reauthorization of the Act added a private right of action for victims of severe forms of trafficking in persons. TVPAII § 4(a)(4), Pub. L. No. 108-193, 117 Stat. 2875, 2876 (2003) (to be codified as amended at 18 U.S.C. § 1595).

95. *See* Channer v. Hall, 112 F.3d 214, 219 (5th Cir. 1997) (allowing a victim of involuntary servitude to sue his masters directly for damages under the Thirteenth Amendment); Terry Props, Inc. v. Standard Oil Co., 799 F.2d 1523, 1534 (11th Cir. 1986) (recognizing a private right of action against a private defendant under the Thirteenth Amendment). *But see* Doe v. Gap, Inc., No. CV-01-0031, 2001 WL 1842389, at *1 (D. N. Mar. I. Nov. 26, 2001) (holding that plaintiffs could not sustain such an action); Turner v. Unification Church, 473 F. Supp. 367 (D.R.I. 1978) (same), *aff'd*, 602 F.2d 458 (1st Cir. 1979).

96. U.S. Const. amend. XIII, § 2.

97. In *In re Slaughterhouse Cases*, the U.S. Supreme Court declined Thirteenth Amendment relief to white butchers in Louisiana seeking such relief against a Louisiana law that granted a monopoly to a single slaughter company on the ground that the law violated the Thirteenth Amendment by prohibiting them from engaging in a lawful occupation. 83 U.S. (16 Wall.) 36, 93 (1872); *see also* United States v. Harris, 106 U.S. 629 (1882) (holding that the Thirteenth Amendment only prohibits involuntary servitude, and is not sufficiently broad to punish private individuals for conspiring to deprive another person of the right to enter into a contract, bring a suit or give evidence). The trend rejecting application of the Thirteenth Amendment to cases involving economic and contractual labor freedom

Amendment as a basis for regulating economic and contractual labor freedom prompted lawmakers to rely instead on the Commerce Clause[98] or the Fourteenth Amendment[99] as a basis for laws designed to protect workers from exploitation.

In spite of the limits on the scope of the Thirteenth Amendment, several ancillary laws prohibiting coercive labor practices did withstand constitutional scrutiny. These included prohibitions on peonage and involuntary servitude. In 1867, Congress used its Thirteenth Amendment, Section 2, power to pass the Anti-Peonage Act.[100] The statute established criminal penalties for holding or returning a person to a condition of peonage.[101] The constitutionality of the Act was upheld in 1905 in *Clyatt v. United States*,[102] in which the Court held that the law prevented a creditor from binding a debtor to service.[103] In *Clyatt*, the Court articulated a view of Thirteenth Amendment protection that was refreshingly expansive. The Court deliberately declined to consider the question of whether the individuals had "voluntarily" entered into peonage arrangements. "Peonage," the Court wrote, "is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of servitude . . . . [P]eonage, however created, is compulsory service, involuntary servitude."[104]

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continued with the *Civil Rights Cases*, in which the Court held that the Thirteenth Amendment did not provide Congress with the ability to legislate, as it had in the Civil Rights Act of 1875, that "all persons within the jurisdiction of the United States" were entitled to access to private and public accommodations, transportation, and entertainment. 109 U.S. 3, 16 (1883). The Court reasoned that the Thirteenth Amendment did not apply to "the social rights of men and races in the community," and concluded that to hold otherwise would be "running the slavery argument into the ground." *Id.* at 22, 24; *see also* Tsesis, *supra* note 94, at 62-74; Azmy, *supra* note 85, at 1006. This line of reasoning was brought to bear again in *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897). *See* Wolff, *supra* note 93, at 977-78.

98. U.S. Const. art. 1, § 8, cl. 3 (giving Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

99. *Id.* amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

100. March 2, 1867 Act, ch. 187, §§ 1, 14, 14 Stat. 546 (codified at 18 U.S.C. § 1581 (2000) (prohibiting peonage in the Reconstruction era) and 42 U.S.C. § 1994 (2000) (abolishing peonage and nullifying acts or laws maintaining peonage)). When the United States acquired the territory of New Mexico, a system of peonage was in place as a holdover from Spanish rule. In 1867, Congress criminalized peonage in New Mexico and all other parts of the U.S. with the federal Anti-Peonage Act. *See* Azmy, *supra* note 85, at 1020-21.

101. March 2, 1867 Act, ch. 187, §§ 1, 14, 14 Stat. 546.

102. 197 U.S. 207 (1905).

103. *Id.* at 216-18; *see also* United States v. Reynolds, 235 U.S. 133 (1914) (reaffirming the constitutionality of the Anti-Peonage Act under the Thirteenth Amendment); Bailey v. Alabama, 219 U.S. 219, 240-42 (1911) (same). *Bailey* and *Reynolds* are jointly known as the Peonage Cases.

104. *Clyatt*, 197 U.S. at 215. Professor Tobias Barrington Wolff praises the Supreme Court's decisions *Clyatt* and *Bailey*, because in finding that anti-peonage laws ought to prohibit the conduct at issue in those cases, the Court "definitively rejected the assertion that

The Supreme Court's analysis of the question of consent in *Clyatt* takes the same approach as embodied in the U.N. Protocol insofar as it sidelines victim consent as a relevant consideration.[105] In contrast, under the domestic TVPA, the distinction between a legally protected trafficking victim and a criminally smuggled undocumented worker now effectively turns not on the conditions of the person's employment, but on the "voluntariness" with which they entered into the employment arrangement.[106]

In addition to the anti-peonage law, U.S. law has also long contained prohibitions on conspiring to interfere with an individual's Thirteenth Amendment right to be free from "involuntary servitude,"[107] and prohibitions on "knowingly and willfully" holding another person "in 'involuntary servitude.'"[108] Unlike the anti-peonage provisions, the involuntary servitude provisions have been read fairly narrowly by the courts. For example, in a 1964 opinion in *United States v. Shackney*,[109] the Second Circuit Court of Appeals set forth a narrow vision of involuntary

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workers could bear complicity for their own enslavement by 'voluntarily' entering into arrangements of power and dominance." Wolff, *supra* note 93, at 985.

105. *See* discussion *supra* notes 19-23.

106. *See infra* Part III.B.1.

107. 18 U.S.C. § 241 (2000). Section 241 authorizes punishment when "two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." *Id.* Almost twenty-five years prior to the passage of the TVPA, the provision was interpreted to create no substantive rights, but rather, to establish prohibitions on interference with rights established by the Federal Constitution or laws. *See* United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

108. 18 U.S.C. §§ 1583, 1584 (2000). Section 1584 was enacted in 1948 as part of a larger revision to the criminal code. It was a consolidation of the Slave Trade statute as amended in 1909 (formerly 18 U.S.C. § 423), and the 1847 Padrone statute (formerly 18 U.S.C. § 1874). *See* United States v. Kozminski, 487 U.S. 931, 946-47 (1988). The original slave trade statute, Act of April 20, 1818, ch. 91, § 6, 3 Stat. 450, 452, authorized punishment of any persons who "hold, sell, or otherwise dispose of, any . . . negro, mulatto, or person of colour, so brought [into the United States] as a slave, or to be held to service or labour." The 1909 amendment removed the racial restrictions, thus extending the statute to the holding of "any person" as a slave. *Kozminski*, 487 U.S. at 946-47. The Padrone statute of 1847 took aim at Italian "padrones" who brought Italian boys to the U.S., putting them to work in the streets. *Id.* at 947. The statute provided,

> [W]hoever shall knowingly and wilfully bring into the United States . . . any person inveigled or forcibly kidnapped in any other country, with intent to hold such person . . . in confinement or to any involuntary service, and whoever shall knowingly and wilfully sell, or cause to be sold, into any condition of involuntary servitude, any other person for any term whatever, and every person who shall knowingly and wilfully hold to involuntary service any person so sold and bought, shall be deemed guilty of a felony.

Id. (citing Act of June 23, 1874, ch. 464, 18 Stat. 251). Section 1583 prohibits the kidnapping or carrying away of an individual with the intent to sell that person into involuntary servitude or to hold them as a slave.

109. 333 F.2d 475, 486-87 (2d Cir. 1964).

servitude—one which required the existence of physical violence, restraint or immediate imprisonment.[110]

The Supreme Court also hewed to a narrow interpretation of involuntary servitude with its 1983 decision in *United States v. Kozminski*.[111] The *Kozminski* holding was insufficiently attentive to the many types of coerced labor that the Thirteenth Amendment and its ancillary statutes might be designed to prevent.[112]

In *Kozminski*, the Court wrote "two mentally retarded men were found laboring on a Chelsea, Michigan, dairy farm in poor health, in squalid conditions, and in relative isolation from the rest of society."[113] The sexagenarians worked seven days a week, seventeen hours a day, first for $15 a week, and later for no pay at all.[114] The government argued that the men had been the victims of psychological coercion—that is, that they had been coerced into working for the Kozminskis through a variety of measures including "denial of pay, subjection to substandard living conditions, and isolation from others."[115] The operators of the farm were charged with conspiracy to deny the men their Thirteenth Amendment rights[116] and with knowingly and/or willfully holding the defendants in involuntary servitude.[117]

The Court determined that the phrase "involuntary servitude" previously had been interpreted to extend to "those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."[118] From this, the Court reasoned that for purposes of criminal prosecution, "the term 'involuntary servitude' necessarily means a

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110. John M. Cook, *Involuntary Servitude: Modern Conditions Addressed in* United States v. Mussry, 34 Cath. U. L. Rev. 153 (1984). Cook observes that a later Ninth Circuit decision, *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984), offered a broader vision of involuntary servitude that cognized other forms of coercion that might be used in the modern economy. Cook, *supra,* at 157. The Supreme Court took this matter into its own hands, however, in the case of *United States v. Kozminski*, 487 U.S. 931 (1988).

111. 487 U.S. at 931.

112. *See, e.g.*, Jackson, *supra* note 4, at 528 (The Supreme Court's attempt to narrow "the concept of criminally prohibited coercion to the use of force or the threat of force, and its attempt to eviscerate the concept of legal coercion by limiting it to instances in which state statutes actually allowed criminal prosecution for a debt or breach of a labor contract, were believed to make prosecution of human traffickers more difficult in several ways"); Stumpf & Friedman, *supra* note 4, at 154-55 ("The Supreme Court in *United States v. Kozminski* interpreted the involuntary servitude and peonage statutes conservatively . . . . 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."); Candes, *supra* note 4, at 588; *see also* Joey Asher, *How the United States Is Violating Its International Agreements to Combat Slavery*, 8 Emory Int'l L. Rev. 215, 220 (1994) (arguing that the U.S. courts' interpretation of "involuntary servitude" was too narrow to comply with international treaty obligations).

113. *Kozminski*, 487 U.S. at 934.

114. *Id.* at 935.

115. *Id.* at 936.

116. *Id.* at 934.

117. *Id.*

118. *Id.* at 942 (citing Butler v. Perry, 240 U.S. 328, 332 (1916)).

condition of servitude in which the victim is forced to work for the defendant by the use or threat of... coercion through law or legal process."[119] This language in *Kozminski* suggests that courts might look to a broad range of conduct in deciding whether coercion is present or absent in any given circumstance.[120] But this generous language sat uneasily next to the apparent prohibitions on consideration of psychological coercion from the perspective of the victim.[121] It is not plainly evident that previous interpretations of the term "involuntary servitude" had in fact been so narrow.[122]

As the *Kozminski* decision lays plain, though, by the time the TVPA was enacted, the Thirteenth Amendment was useful only in addressing the most obvious forms of slavery, and even then, only where there was evidence of certain kinds of coercion.

The TVPA might have revitalized the Thirteenth Amendment in two ways. First, following the historical lead of the Supreme Court in *Clyatt* and the contemporary example of the U.N. Protocol, the drafters of the TVPA might have defined trafficking in such a way as to give central importance to the coercion inquiry, rather than the victim consent inquiry, in determining whether an individual was a victim of trafficking. In other words, the Act could have focused on the conditions of the labor rather than victim consent. As previously noted, it does not do so.

Second, the TVPA could have codified a more expansive definition of coercion than the definition employed by the Court in *Kozminski*. In fact, the Act purported to do just that. The House Conference Report on the TVPA noted that the term "serious harm," used twice in the definition of "coercion"[123] and again in the definition of "involuntary servitude,"[124] was intended not only to cover physical violence and legal coercion, but also more subtle methods of coercion, "such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury,

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119. *Id.* at 952.

120. The Court stressed that the "holding does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant." *Id.* The Court relied on this type of evidence in finding that there was sufficient evidence of coercion in the record to remand the *Kozminski* case, rather than acquit the defendants. *Id.* at 953.

121. *Id.* at 949.

122. *See id.* at 955-59 (Brennan, J., concurring) (disputing the Court's interpretation of the legislative history and concluding that the statutes at issue were meant to penalize many types of coercion, not just physical and legal coercion).

123. 22 U.S.C. § 7102 (2000) ("The term 'coercion' means—(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process.").

124. *Id.* § 7102(5) ("The term 'involuntary servitude' includes a condition of servitude induced by means of—(A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process.").

or threaten dire consequences by means other than overt violence."[125] The term "serious harm" was meant to cover a wide array of harms, "including both physical and nonphysical."[126] The Conference Report states that known objective characteristics of the employee "such as youth, immigrant status or mental retardation, are relevant to the determination of whether the labor was obtained by forbidden means, since they may render the individual especially vulnerable to coercion."[127]

The TVPA thus codified the broad interpretation of coercion suggested by the language, if not the holding, of *Kozminski* at 18 U.S.C. § 1589.[128] Many heralded this provision of the TVPA as a marked evolution from the understanding of "involuntary servitude" mapped out in *Kozminski*. The real effects of the provision, however, are difficult to state. As a theoretical matter, after all, the Supreme Court had already recognized in the *Kozminski* decision the possibility of involuntary servitude effectuated through either "physical or non-physical harms." The Court made specific mention of the need to take into account the characteristics of the employee that might render the employee particularly susceptible to coercion.[129] Thus, while the change ensured that the interpretation of involuntary servitude would be as expansive as *Kozminski* would allow, it did not notably increase the breadth of that decision's interpretation of involuntary servitude.

If the TVPA does expand the definition of coercion, it is not clear that this message is filtering down to the lower courts that are applying the law. For example, in the recently decided case of *Zavala v. Wal-Mart Stores, Inc.*,[130] Wal-Mart and other defendants moved to dismiss claims brought against them by a class of undocumented migrants under common law tort, the Fair Labor Standards Act of 1938 ("FLSA"),[131] and RICO.[132] The plaintiffs had raised involuntary servitude as one of many alleged predicate

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125. H.R. Rep. No. 106-939, at 101 (2000) (Conf. Rep.).

126. *Id.*

127. *Id.*; *see also* United States v. Bradley, 390 F.3d 145, 153 (1st Cir. 2004).

128. 18 U.S.C. § 1589 (2000) provides, in relevant part,

> [W]hoever knowingly provides or obtains the labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) 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 serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both.

Id.

129. *See* Note, *The Trafficking Victims Protection Act*, *supra* note 4, at 2197-98 ("In fact, the Court acknowledged that 'evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities' was relevant in determining whether there was sufficient physical or legal coercion to make out a § 1584 claim. And as an example, it expressly included 'threatening . . . an immigrant with deportation' as a viable type of legal coercion." (citing United States v. Kozminski, 487 U.S. 931, 948, 952 (1988))).

130. 393 F. Supp. 2d 295 (D.N.J. 2005).

131. 29 U.S.C. §§ 201-219 (2000).

132. 18 U.S.C. §§ 1961-1968 (2000).

offenses for the RICO claim—a claim that was made possible when the TVPA made involuntary servitude a predicate offense for purposes of RICO.[133] But the court dismissed the RICO claims, finding insufficient evidence of coercion.[134] That portion of the court's decision was based entirely on case law that preceded the TVPA, and is devoid of any discussion suggesting that the TVPA requires a more expansive understanding of what constitutes involuntary servitude.

In short, the TVPA has only modestly expanded the legal parameters of the concept of "coercion," while simultaneously codifying an approach to forced labor that—contrary to earlier law—gives central importance to the question of victim consent. With respect to Thirteenth Amendment-based law, the TVPA appears to be a small step forward and a significant step back.

2. The Commerce Clause and Workplace Protection

In light of historically crabbed interpretations of the Thirteenth Amendment, the Commerce Clause has served as an important basis for legislation aimed at protecting workers. The Commerce Clause supplied the constitutional authority for the National Labor Relations Act ("NLRA"),[135] the FLSA,[136] and the Migrant and Seasonal Agricultural Worker Protection Act of 1983 ("MSPA").[137] All three of these statutes regulate the conditions of the workplace—public and private—and provide a scheme of criminal penalties and civil remedies for their enforcement.

While each of these three statutes provides some legal protection for workers, none is well equipped to remedy conduct that amounts to trafficking. There are at least three reasons for this. First, the protection of these laws does not apply to many trafficking victims. The Fair Labor Standards Act, which might be helpful for providing remedies to those who have been forced to work for little or no pay, excludes agricultural and domestic labor—two sectors that sweep in many exploited migrant laborers and other trafficking victims.[138] The National Labor Relations Act is most useful in unionized workplaces,[139] but the victims of trafficking are

133. TVPAII, Pub. L. No. 108-193, § 5(b), 117 Stat. 2875, 2879 (2003) (to be codified at 18 U.S.C. § 1961(1)(A)).

134. *Zavala*, 393 F. Supp. 2d at 312-13.

135. 29 U.S.C. §§ 151-169 (2000).

136. 29 U.S.C. §§ 201-219 (2000).

137. 29 U.S.C. §§ 1801-1872 (2000).

138. It does apply to manufacturing and service industry jobs.

139. National Labor Relations Act ("NLRA") protection is not strictly limited to union activity. *See, e.g.*, Epilepsy Found. of Ne. Oh. v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001) (extending to employees in nonunionized workplaces the right of an employee to have a co-employee present in certain meetings with managers), *cert. denied*, 536 U.S. 904 (2002); NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531 (6th Cir. 2000) (holding that a rule prohibiting employees from discussing their wages with each other violated the NLRA even though the employees were not represented by a union). However, it does address particular conduct more common in unionized workplaces.

frequently neither organized nor on the road to becoming organized. The Migrant and Seasonal Agricultural Worker Protection Act is specifically limited to certain workers. None of the Acts provide assistance to sex workers, who are performing work that has been widely criminalized.

Second, these laws provide relatively light criminal penalties that are not viewed as well suited to remedy the sorts of egregious conduct involved in trafficking.[140] The FLSA, for example, only allows for fines and imprisonment for six months.[141]

Third, and perhaps most importantly, the undocumented noncitizen workers who comprise the bulk of trafficking victims are themselves unauthorized workers and, as such, are encountering greater and greater obstacles in pursuing remedies under federal workplace protection statutes and their state law analogues. The Supreme Court accelerated this trend with its decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.[142] In that case, the Court held that the National Labor Relations Board ("NLRB") was not authorized to award back pay to an undocumented worker who had been subject, in violation of the NLRA, to retaliatory discharge for his union-organizing activities.[143] A few district courts have applied the reasoning of *Hoffman Plastics* to bar relief under the FLSA.[144] Some state courts have also applied the reasoning of *Hoffman Plastic* to preclude the award of state court labor law remedies.[145]

Thus, in addition to the logistical problems of obtaining representation, finding resources to bring suits, struggling through language barriers in court proceedings,[146] and sometimes dealing with issues of psychological trauma,[147] undocumented migrants must also contend with the fact that they

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140. Azmy, *supra* note 85, at 1036; Candes, *supra* note 4, at 581-82.

141. 29 U.S.C. § 216(a).

142. 535 U.S. 137 (2002).

143. *Id.* at 151-52.

144. *See* Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. Pa. J. Lab. & Emp. L. 497, 503-04 (2004) (noting that district courts have applied the reasoning of *Hoffman Plastic* in FLSA claims arising from an employer's retaliatory communications with the (then) INS).

145. *Id.* (noting that some state courts are applying the reasoning of *Hoffman Plastic* to state labor law remedies). *But see* Bureerong v. Uvawas, 922 F. Supp. 1450, 1459-60 (C.D. Cal. 1996) (noting plaintiffs' state tort law claims of fraud, misrepresentation, intentional infliction of emotional distress, assault, and false imprisonment, as well as peonage and involuntary servitude, various labor violations, RICO violations, and violation of 42 U.S.C. § 1985(3), arising out of the El Monte factory case); Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 245-47 (Tex. Ct. App. 2003) (permitting the award of state common law remedies to unauthorized noncitizen workers). Baher Azmy argues that, while tort remedies might redress trafficking wrongs, they "would not vindicate the important *federal* values enshrined by the Thirteenth Amendment, nor do they communicate the appropriate level of moral condemnation required by the Amendment's prohibition on such conduct." Azmy, *supra* note 85, at 1038. Whether or not there is need for a remedy that performs an adequate expressive function, the simple fact is that tort litigation has been a difficult road for people—particularly noncitizens—who are trapped in slave-like conditions.

146. *See generally* Su, *supra* note 41.

147. *See* Sadruddin, Walter & Hidalgo, *supra* note 5, at 382.

are ineligible for back pay awards and other compensation under the law because of their undocumented status.

None of the Commerce Clause-based laws was addressed or amended by the TVPA. Indeed, there is nothing to indicate that Congress even considered these issues in debating the TVPA.

Even as the Supreme Court has limited the availability of Thirteenth Amendment-based and Commerce Clause-based workplace protections, these protections have been further constrained by the growth of contractual arrangements designed to shield some employers from criminal liability. For purposes of criminal liability under relevant statutory provisions, a person must engage in the prohibited acts "knowingly."[148] When large companies contract out to smaller companies to find and hire labor, this knowledge is difficult to prove. The practice of subcontracting had its origins in the turn of the century, as companies sought to avoid the costs and liabilities of increasing labor regulations.[149] For example, Bruce Goldstein explains, "The historical shift from inside production work to outside contracting work meant little in terms of the actual work performed by the workers and who ultimately supervised and controlled the work. Economically, it redounded to the benefit of the manufacturers who shielded themselves from the labor costs and liabilities."[150]

This practice is not limited to the manufacturing sector. It has also played an influential role in structuring agricultural work. As Maria Ontiveros has noted, "[t]he farm labor contractor system has grown substantially since 1986. . . . By securing labor through a farm labor contractor, the grower insulates himself from the legal (and, perhaps in his mind, moral) responsibility for the workers."[151]

Verizon Communications, Inc., recently denied any liability for unpaid workers hired by one of its subcontractors. Twenty-three workers who dug ditches for the laying of fiber-optic cable in Virginia allege that their employer, Anthony Maxwell, failed to pay them thousands of dollars for their labor. Maxwell had been hired by KCS Communications Inc., which had in turn been hired by S&N Communications Inc., which had in turn been hired by Verizon to oversee the installation of the fiber-optic cable in parts of Northern Virginia. "'I certainly feel badly if workers weren't paid,' said Verizon senior vice president for network services Chris Creager, but 'the responsibility lies directly with the person they are working for.'"[152] Of course, their unpaid labor redounds to the benefit of Verizon.

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148. *See, e.g.*, 18 U.S.C. §§ 1589-1592 (2000).

149. Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 998-99 (1999); Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. Int'l L. & Com. Reg. 507, 514-15 (2002).

150. Goldstein et al., *supra* note 149, at 998-99.

151. Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 Me. L. Rev. 157, 163 (2003).

152. Elissa Silverman, *Pay Fight in Tech's Trenches*, Wash. Post, Feb. 16, 2006, at D01.

Thus, the practice of contracting certain work out to smaller contractors and making those contractors responsible for labor management, can shield employers from criminal liability.[153] With the 2003 reauthorization of the TVPA, Congress made an apparent attempt to address the impunity certain employers enjoy as a consequence of their subcontracting policies by expanding criminal penalties for trafficking to those who profit from the labor of trafficking victims, provided that they do so "knowingly."[154] But the same argument of lack of knowledge that has shielded these employers from liability under the labor laws in the past will continue to shield them from criminal liability for acts of trafficking.

The only other significant step that the TVPA (as amended in 2003) takes to increase labor protection for trafficked workers is the creation of a private right of action allowing trafficking victims to seek damages and attorneys' fees,[155] and allowing victims access to free legal representation in the pursuit of these claims.[156] Nevertheless, recent legal developments suggest that workers will still encounter heavy barriers when seeking legal remedies under the TVPA.[157]

At the same time that the TVPA has done little to increase protection for exploited workers, immigration laws have exacerbated the problems of many vulnerable immigrant victims.

C. *Immigration: Prohibitions on "Alien" Smuggling*

Although trafficking and smuggling are distinct concepts, anti-smuggling laws are relevant to anti-trafficking efforts. Anti-smuggling laws were used as one tool in prosecuting traffickers in cases that unfolded prior to the enactment of the TVPA,[158] and they can still be used in prosecuting trafficking cases that involve acts of smuggling.

Ironically, however, anti-smuggling enforcement over the past half century has aggravated the trafficking problem, and continues to impede

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153. *See* Goldstein et al., *supra* note 149, at 998-99; Ontiveros, *supra* note 151, at 163; Volpp, *supra* note 149, at 514-15; *see also* Hyland, *supra* note 4, at 48-49 (noting that the Mann Act, RICO, the MSPA and the FLSA all fail to afford an opportunity to prosecute employers who use contractors and intermediaries to obtain and compel forced labor); *infra* Part III.B.4 (discussing recent litigation involving Wal-Mart and Tyson Foods).

154. TVPAII, Pub. L. No. 108-193, § 4(a)(4), 117 Stat. 2875, 2878 (2003) (to be codified at 18 U.S.C. § 1595(a)).

155. *Id.* A civil remedy was initially included in the Smith-Gejdenson anti-trafficking bill of 2000, but the Conference Committee removed it. 146 Cong. Rec. H8855, H8879 (daily ed. Oct. 5, 2000). *See generally* Kim & Hreshchyshyn, *supra* note 4.

156. This private right of action helps to fill the gap, noted by Azmy and others, which was created through the lack of a widely accepted private right of action under the Thirteenth Amendment. *See generally* Azmy, *supra* note 85. Of course, the right extends only to that narrow class of individuals defined as "severe victims of trafficking in persons." So it is not the same as a comprehensive Thirteenth Amendment private right of action, nor does it alter the Supreme Court's narrow vision of the kinds of labor protected by the Thirteenth Amendment.

157. *See, e.g.*, Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295 (D.N.J. 2005).

158. *See supra* Part I.C.

solutions to domestic trafficking. There are two significant reasons for this. First, anti-smuggling enforcement has placed a great deal of discretionary authority into the hands of employers just as the labor law regime has drastically reduced the legal protections available for noncitizens in the workplace—a formula for encouraging the coercive labor practices at the heart of human trafficking. Second, anti-smuggling efforts have privileged border enforcement over principled internal enforcement efforts in ways that also strengthen the hand of both human smugglers and human traffickers.

1. Employer-Driven Internal Anti-smuggling Enforcement

Laws prohibiting the smuggling of unauthorized migrants have been on the books since the Immigration and Nationality Act ("INA") was first enacted in 1952.[159] The statute prohibited individuals from bringing, transporting, or harboring undocumented noncitizens in the United States.[160] At the time of its enactment however, the INA expressly excluded employment of an undocumented person from the definition of "harboring an alien."[161]

The decision not to treat employers as "harborers" signaled a complete disregard for the role that employment opportunities play in drawing migrants into the country. Unsurprisingly, migrants continued to enter the country, but now, in greater numbers than before, they were "illegal."[162] While workers present without authorization were entitled to some protection under national labor laws, that protection was tightly circumscribed as a result of their unlawful status.[163]

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159. Immigration and Nationality Act § 274, Pub. L. No. 82-414, 66 Stat. 228-29 (1952) (codified as amended at 8 U.S.C. § 1324 (2000)).

160. The statute, in relevant part, made punishable the efforts of

> [a]ny person . . . who . . . (3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection . . . or (4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any [undocumented] alien . . . . Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

Id.

161. *Id.*

162. Mai Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 265 (2004). The lure of employment continued to generate a magnetic pull upon noncitizens seeking a better life, even as fewer noncitizens qualified for legal entry into the United States. *Id.* The Immigration and Nationality Act of 1965 (also known as the Hart-Celler Act, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.)) was seen as a liberalizing measure, but it, too, placed numerical restrictions on legal immigration from the Western Hemisphere, which meant that the number of migrants, particularly from Mexico, who came to be characterized as "illegal immigrants," continued to climb after that "liberalizing" measure was passed. *Id.*

163. Although undocumented workers were prohibited by law from entering into and working in the United States, they were generally viewed as entitled to at least some protection under the NLRA. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984). However, they were not entitled to the same monetary compensation as would be similarly

In 1986, with the enactment of the Immigration Reform and Control Act ("IRCA"),[164] the conduct of employers who willfully or knowingly[165] employed undocumented workers[166] was criminalized for the first time. Those who employed undocumented workers were no longer expressly excluded from the definition of "harboring" an undocumented person for purposes of criminal prosecution; the employer carve-out was written out of § 1324.[167] The IRCA added new criminal penalties expressly applicable to employers who employed undocumented workers;[168] employers were also subject to civil penalties for employing such workers.[169]

Congress's purported intent in enacting such reform was to take aim at the incentive that prompted many migrants to come to the country in the

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situated legal workers under the NLRA because they had to be deemed "unavailable" for work during any period after they had been deported. *Id.* at 902-05. This ruling created precisely the perverse incentive with which the majority had indicated it was concerned: "Once employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their 'incentive to hire such illegal aliens' will not decline, it will increase." *Id.* at 912 (Brennan, J., dissenting). For a discussion of *Sure-Tan* and subsequent INS policies as they relate to domestic labor laws, see Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345 (2001).

164. Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1985) (codified as amended in scattered sections of 8 U.S.C.).

165. Early in the life of the IRCA, courts rejected the notion that actual knowledge was required by the statute. *See, e.g.*, New El Rey Sausage Co. v. INS, 925 F.2d 1153, 1157-58 (9th Cir. 1991) (adopting a constructive knowledge standard). Nevertheless, the same courts were reluctant to infer constructive knowledge in the absence of very clear factual predicates. *See, e.g.*, Collins Foods Int'l, Inc. v. INS, 948 F.2d 549, 551 (9th Cir. 1991) (finding that the hiring of an employee over the telephone and failing to compare the back of his social security card with an INS model provided an insufficient basis for concluding the employer had constructive knowledge of the employee's ineligibility for employment). The legislative history of 8 U.S.C. § 1324a supported this judicial reluctance to infer knowledge or willfulness. *See* H.R. Rep. No. 99-682, pt. 1, at 61 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. Thus, even after 1986, the Act had very little bite as applied to employers. Employers faced only civil fines for hiring undocumented workers, and then, only if, applying a reasonable person standard, the courts had no basis to infer constructive knowledge that the employee was unauthorized to work in the United States. The true penalty—criminal sanctions for the use of false documents—continued to be directed only at the unauthorized employee. H.R. Rep. No. 99-682, pt. 1, at 61; *see also Collins Foods*, 948 F.2d at 554-55.

166. After the IRCA, a worker is required to possess a valid "social security account number card," 8 U.S.C. § 1324a(b)(C)(i) (2000), or "other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable," *id.* § 1324a(b)(C)(ii), in order to be "authorized" to work in the United States. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 & n.3 (2002).

167. 8 U.S.C. § 1324; *see also* H.R. Rep. No. 99-682, pt. 1, at 94 (indicating that the amendment was included "to eliminate [the] proviso[] which prevents employment from being considered as harboring an alien").

168. Employers may be fined up to $10,000 per violation for employing undocumented noncitizens and may receive sentences of up to six months in prison if they demonstrate a pattern of hiring undocumented noncitizens. 8 U.S.C. § 1324a(e)(4).

169. *Id.*

first place—the possibility of work. The House Report stated that the purpose of the legislation was

> to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions . . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.[170]

Although the IRCA ended the exemption of employers from the alien smuggling provisions, the law placed a significant share of enforcement in the hands of employers themselves.[171] The statute established an employment verification system requiring an employer to execute an I-9 form, attesting under penalty of perjury that it has verified that each employee is not an undocumented noncitizen.[172] Under the IRCA, employers were not even required to submit the I-9 form to a federal agency; they simply kept the documents on file. This meant there was no real means by which the government systematically monitored the use of false documents.[173]

As a consequence of the virtually self-regulatory nature of employer sanction provisions, the enforcement of anti-smuggling laws as against employers—particularly large, well-established employers—has been minimal.[174] Disturbingly, to the extent that U.S. immigration officials have targeted employers for investigation, this has often tended to occur in a manner more effective in undermining labor protections than in punishing lawless employers.[175] Given the small size of the penalties that they face,[176] it is generally cost-effective for employers to simply continue to

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170. H.R. Rep. No. 99-682, pt. 1, at 46. The legislative history of the IRCA expressly confirms that section 112 of that Act was enacted in order to "modify the existing law" and "expand the scope of activities proscribed." H.R. Rep. No. 99-682, pt. 1, at 65 (discussing section 112 of the IRCA).

171. *See* INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 & n.8 (1991); New El Rey Sausage Co. v. INS, 925 F.2d 1153, 1154 (9th Cir. 1991).

172. 8 U.S.C. § 1324a(b).

173. Nor has the situation changed greatly since the passage of IRCA. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.) established a five-state pilot program of computerized verification of social security numbers, mandated the development of counterfeit-resistant social security cards, and required the standardization of birth certificates and drivers licenses. *Id.* § 657 (requiring the Social Security Administration to harden the social security card). Through the present, the employer continues to be the prime monitor of the legality of that employer's own workforce.

174. *See* Nessel, *supra* note 163, at 359-61 (documenting the brief rise and almost immediate end to serious employer sanctions efforts by the Justice Department).

175. *Id.* at 361-63.

176. The regulatory fines that accompany findings of IRCA violations are small enough that they are often easily absorbed as a cost of doing business. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis. L. Rev. 955, 1015.

hire undocumented workers and then refuse to provide such workers with the wages and workplace safety guarantees that are afforded to citizens.

The Supreme Court decision in *Hoffman Plastic*, which severely constrained undocumented workers' access to remedies under Commerce Clause-based labor laws, has actually amplified these problems. In *Hoffman Plastic*, the Court reasoned that back pay awards to undocumented migrants "would unduly entrench upon explicit statutory prohibitions critical to federal immigration policy," as expressed in the IRCA by "encourag[ing] the successful evasion of apprehension by immigration authorities, condon[ing] prior violations of the immigration laws, and encourag[ing] future violations."[177]

Although IRCA enforcement has long drawn criticism for rendering labor law protections a legal fiction for undocumented workers,[178] the *Hoffman Plastic* decision ended even the pretense that undocumented workers might be entitled to adequate remedies under the NLRA. Thus, employers have an incentive to hire undocumented workers in violation of immigration laws, to provide them with inadequate pay and workplace protections in violation of labor laws, and to report them to immigration officials when these workers attempt to organize or seek better working conditions.[179] While the anomaly might at least arguably be addressed through uniform and vigorous prosecution of employers who violate the IRCA, enforcement measures have actually exacerbated the situation by focusing enforcement efforts on undocumented workers who seek redress for labor law violations.[180]

This is precisely the type of legal regime in which forced labor thrives. Indeed, years before the discussion on human trafficking took place on Capitol Hill, Jennifer Gordon had diagnosed the ways in which the existing legal regime actually exacerbated the exploitation of undocumented workers, writing,

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177. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 (2002).

178. *See generally* Nessel, *supra* note 163.

179. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 912 (1984) (Brennan, J., dissenting). For additional description and critique, see Christopher David Ruiz Cameron, *Borderline Decisions:* Hoffman Plastic Compounds, *the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. Rev. 1 (2003); Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc. *Produce Disposable Workers?*, 14 Berkeley La Raza L.J. 103 (2003); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. Mich. J.L. Reform 737 (2003).

180. *See* Nessel, *supra* note 163, at 350 ("While the INS currently gives lower priority to worksite enforcement, its willingness to commence deportation proceedings based upon information obtained through an unscrupulous employer's violations of labor law means that the IRCA remains a powerful tool of exploitation."); *see also* Jennifer Gordon, *American Sweatshops: Organizing Workers in the Global Economy*, Boston Rev., Summer 2005, at 1, 3-4, *available at* http://www.bostonreview.net/BR30.3/gordon.html (attributing the continued expansion of sweatshop labor in the U.S. to immigration and labor law enforcement policies).

> In practice, employer sanctions empower employers to terrorize their workers. Frequently, employers in the underground economy ignore sanctions or accept false documents when they hire their workers. Later, when immigrants attempt to organize or otherwise defend their rights, employers suddenly "realize" that they must comply [with the IRCA], and fire anyone who cannot provide valid documents to fill out an I-9 form. If the immigrants press matters any further, employers often threaten to turn them into the Immigration and Naturalization Service.[181]

In other words, the anti-smuggling provisions, and the manner in which they are enforced, actually created the ideal conditions for coercing labor from migrants.

In enacting the TVPA, Congress purported to recognize the fact that human trafficking is most successful in places where the victims of trafficking feel unable to avail themselves of legal protection when they are mistreated in their place of work.[182] Logically, any effort to address the problem of forced labor would require the revision of either labor or immigration laws to eliminate the gap between labor law rights and the actual remedies available to undocumented workers. Indeed, one possible legislative means for discouraging trafficking as manifested in migrant labor exploitation would be to allow undocumented workers to claim the full range of remedies available under the NLRA, the FLSA, and other labor protections, and allowing undocumented migrants sufficient legal protection to pursue those claims. Obviously, however, this solution was political poison for those lawmakers who view such remedies as creating incentives for "lawbreakers."[183]

So labor protections for migrants were not addressed. Instead, the TVPA took much more limited and indirect measures to address the workplace protection problem that is at the heart of human trafficking. These measures, which fail to address deep structural problems that encourage domestic reliance on unprotected immigrant laborers, cannot possibly put an end to forced labor given the existing structure of labor and anti-smuggling laws.

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181. Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407, 414 n.27 (1995).

182. Paragraph 17 of the prefatory language of the Act states, "Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves." 22 U.S.C. § 7102(b)(17) (2000).

183. In reality, portraying workplace protection as an incentive for lawbreaking is flawed because it overlooks the fact that such protections remove perverse incentives for hiring undocumented workers. Thus, the primary beneficiaries are actually legal workers, who would stand a better chance of being able to enforce their rights. Nessel, *supra* note 163, at 390-91.

2. Border-Centered Anti-smuggling Efforts

While the government has left internal workplace enforcement of anti-smuggling laws in the hands of employers, it has turned its attention and resources to interdiction efforts.[184] These efforts reached a sort of zenith in the mid- to late 1990s.[185] In August 1994, then-INS Commissioner Doris Meissner approved a new national strategy for the Border Patrol under which greatly expanded enforcement resources would be deployed in each major entry corridor, and the Border Patrol would increase the number of agents on the line and expand the use of technology in an effort to raise the risk of apprehension high enough to be an effective deterrent.[186] A series of regional enforcement efforts were initiated, including "Operation Gatekeeper," initiated south of San Diego, California, in October 1994; "Operation Safeguard," initiated in Arizona in October 1994; and "Operation Rio Grande," initiated in Brownsville, Texas, in August 1997.[187] As Professor Bill Ong Hing has summarized the plan, "[t]he idea was to block traditional entry and smuggling routes with border enforcement personnel and physical barriers."[188]

These border militarization efforts allowed government officials to demonstrate their attention to immigration issues through sheer physical presence and fiscal commitment.[189] Nonetheless, these measures have not been effective in preventing the flow of undocumented migration. Although they seem to have some success in preventing migration at the points of operation, the net effect seems to be a shift in migration away from heavily guarded areas to the less guarded (and much more dangerous) areas along the southern border.[190] Far from preventing trafficking, these

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184. *See generally* Wayne A. Cornelius, *Controlling 'Unwanted' Immigration: Lessons from the United States, 1993-2004*, 31 J. Ethnic & Migration Stud. 775 (2005).

185. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. Davis J. Int'l L. & Pol'y 121, 127-28 (2001).

186. *Id.* (quoting U.S. Border Patrol, Border Patrol Strategic Plan: 1994 and Beyond—National Strategy 17 (1994); *see also* Peter Andreas, *The Transformation of Migrant Smuggling Across the U.S.-Mexico Border*, *in* Global Human Smuggling, *supra* note 36, at 112-16.

187. Hing, *supra* note 185, at 128. The strategy behind these "Operations" stemmed from an independent effort undertaken in the greater El Paso, Texas, area. Silvestre Reyes, then regional Border Patrol supervisor (and now U.S. Congressman for the area), stationed his agents in tight intervals along the U.S.-Mexico border and kept them there twenty-four hours a day. Because it led to an immediate drop in border apprehensions, Congress began to pressure the INS to undertake similar measures elsewhere. *Id.* at 128 n.25; *see also* Andreas, *supra* note 186, at 114-15.

188. Hing, *supra* note 185, at 128.

189. Between 1993 and 1997, the INS budget for enforcement efforts along the southwest border doubled from $400 million to $800 million, and the number of Border Patrol agents along the southwest border increased from 3389 in October 1993 to 7357 by September 1998. *Id.* at 129.

190. Andreas, *supra* note 186, at 115; Cornelius, *supra* note 184, at 783 ("The main gates for illegal entry in the pre-1993 period were the San Diego, California and El Paso, Texas metropolitan areas, and the southern Rio Grande Valley in Texas. Apprehensions in these now-heavily-fortified sectors have fallen by a combined sixty-four percent since 1993, while

efforts actually cut against anti-trafficking initiatives. Increasing the cost of migration, rather than deterring many migrants, simply drives them into the arms of high-priced smugglers.[191]

In the past, hired smugglers—also known as coyotes—provided very basic services. They led their clients across the border, whereupon the contracted services ended.[192] As border security has increased, however, the role of the smuggler has become far more complicated. As sociologist Maggy Lee has written, services provided by the smuggler now often include

> passage out of a country of origin, a transit location or locations as the case requires, and transport to a final destination. These services are costly, and debts incurred leave migrants vulnerable to coercive labor arrangements. Smugglers may subject migrants to much worse conditions than they anticipated at the time of the agreement.[193]

In other words, migrants are increasingly caught in coercive trafficking arrangements as the border becomes more treacherous and crossing the border becomes more costly.

Furthermore, there is increasing evidence that migrants are less likely to return home as a result of border militarization; that is to say, migrants are trapped within the U.S., not outside of it.[194] As people find themselves trapped within the country, faced with increasing criminal penalties on account of their presence, they are even more beholden to their employers, again increasing the probability that these migrants will be subject to exploitative arrangements.

In short, while anti-smuggling efforts logically would seem to complement anti-trafficking efforts, enforcement of anti-smuggling laws in the United States has followed a path that seems more likely to increase rather than decrease the trafficking problem.

3. Changes to the Smuggling Laws

What does the TVPA do to alter the vulnerabilities of migrants created in part by the immigration laws? After all, one of the three stated overarching goals of the Trafficking Act is to provide protection for trafficking victims. In order to do so, legislators recognized that at least some people who might otherwise be classified as criminal under the smuggling provisions instead ought to be classified as victims of crime.[195] Thus, the act created a

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they have soared along the Arizona-Mexico border. The 260-mile Tucson sector has become the leading corridor for illegal entry, accounting for 490,827 apprehensions (forty-three percent of the south-west border total) in 2004"); Hing, *supra* note 185, at 130-44.

191. Andreas, *supra* note 186, at 116-20; Cornelius, *supra* note 184, at 779; Lee, *supra* note 1.

192. Andreas, *supra* note 186, at 108.

193. Lee, *supra* note 1, at 7 (citations omitted).

194. Cornelius, *supra* note 184, at 782.

195. Even in its initial findings, however, Congress signaled the limits to such assistance, stating that "[v]ictims of severe forms of trafficking should not be inappropriately

category of people—victims of "severe forms of trafficking in persons"—who would be eligible for protection under the Act, rather than punishment and deportation for their unlawful entry, unauthorized employment, or both, provided the illegal acts were a direct result of their being trafficked.[196]

For those individuals in the United States who are deemed to fall within the TVPA's somewhat restrictive definition of a "victim" of "severe forms of trafficking in persons," the Act offers certain special protections. First, the TVPA provides for the grant of up to 5000 visas to the victims of "severe forms of trafficking in persons."[197] T-visas allow the recipients to stay in the United States, but only if they cooperate in the prosecution of the individuals responsible for their trafficking, and can demonstrate that they will be subject to "extreme hardship involving unusual and severe harm" if they are returned to their countries of origin.[198] After three years on a T-visa, victims of trafficking may be able to stay in the United States permanently, and to bring their spouses and children with them if they have exhibited good moral character, and either have assisted in the investigation or prosecution of traffickers or would suffer extreme hardship upon removal.[199]

In short, the TVPA eliminates the threat of deportation for up to 5000 "severe victims of trafficking in persons" where such persons are willing and able to assist in the prosecution of their employers. In this way, the Act seeks to eliminate the ability of employers to manipulate undocumented workers by exploiting the vulnerability of these workers under U.S. immigration law. Furthermore, the TVPA allows both the government and the victims of "severe forms of trafficking in persons" themselves to seek damages from traffickers.[200]

This newly created remedy theoretically provides economic disincentives for traffickers that are otherwise absent under the law. In practice,

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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." 22 U.S.C. § 7102(b)(19) (2000).

196. *See supra* Part II.A-B.

197. The cap of 5000 visas each year is contained at 8 U.S.C. § 1184(n)(2) (2000). The spouses, children, and eligible parents (if the trafficking victim is under twenty-one) of the T-visa recipient do not count against the 5000 visa cap. *Id.* § 1184(n)(3). Nevertheless, the number of T-visas authorized by the statute clearly falls well below the number of estimated trafficking victims in the country. Because there does not appear to be any principled basis for the cap, and because the cap seems to belie Congress's seriousness in addressing the needs of trafficking victims, it has been roundly criticized. *See* 146 Cong. Rec. H7628, H7629 (daily ed. Sept. 14, 2000) (statements of Rep. Watt and Rep. Lofgren); 145 Cong. Rec. H2674, H2687 (daily ed. May 9, 2000) (statement of Rep. Conyers) ("Because estimates of the number of trafficking victims entering the United States are greater than 5000 per year, we see no reason not to provide protection to the 5,001st who has been the subject of such terrible acts."); *see also* Jackson, *supra* note 4, at 556-57; Sadruddin, Walter & Hidalgo, *supra* note 5, at 391-94. The number of T-visas issued to date has come nowhere near the 5000 cap.

198. 8 U.S.C. §§ 1101(a)(15)(T)(IV), 1184(n)(2).

199. *Id.* § 1255(l)(1).

200. 18 U.S.C.A. § 1595 (West Supp. 2005).

however, these small changes cannot hope to counterbalance the incentives for abuse that lie at the intersection of U.S. labor and immigration laws. This is particularly true because Congress defined T-visa eligibility so narrowly that it potentially excludes bona fide trafficking victims. Furthermore, there has been little concerted effort to focus on these aspects of the trafficking problem because the majority of rhetorical and enforcement efforts have been focused, not on forced labor, but on sex trafficking.

D. *Prohibitions on Sex Trafficking*

Even before the law prohibited human smuggling, there were laws to prohibit certain forms of sex trafficking. These laws were, at base, anti-immigrant measures dressed in a cloak of morality. The TVPA is, in distressing ways, proving to be an heir to this tradition. Most of the provisions of the TVPA aimed at offenses relating to sex trafficking are not new. The offenses of knowingly transporting a person with the intent that such person will engage in illegal sexual activity,[201] engaging in coercion and enticement,[202] engaging in the transportation of minors,[203] and failing to file the requisite filing factual statements about the entry of "aliens"[204] all existed prior to the passage of the TVPA.

The Alien Prostitution Importation Act of 1875, also known as the Page Law, was the first law enacted by Congress to address the problem of sex trafficking.[205] The 1875 Page Law prohibited the importation of noncitizen women for purposes of prostitution, and included criminal penalties of up to five years imprisonment or $5000 in fines.[206] The apparent moral agenda was intertwined with an anti-immigrant agenda: The law was designed as a means of excluding Chinese immigration at a time when the Burlingame Treaty expressly precluded such exclusion.[207] As Professor Kelly Abrams has written, "[t]he Page Law "was the first restrictive immigration law passed in direct response to the desire to exclude a particular group of people, and it did so by purportedly protecting the institution of monogamous marriage against a dangerous system of polygamy and prostitution."[208]

With the advent of the Progressive Era, and in the face of a rising tide of immigration at the turn of the century, Congress brought new zeal to

201. 18 U.S.C. § 2421 (2000).
202. *Id.* § 2422.
203. *Id.* § 2423.
204. *Id.* § 2424.
205. Alien Prostitution Importation Act, ch. 141, 18 Stat. 477 (1875) (amended 1903).
206. *Id.*
207. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641 (2005).
208. *Id.* at 702.

addressing moral issues such as prostitution.[209] The result was renewed attention to and revisions of the Alien Prostitution Importation Act, and ultimately, the enactment of the Mann Act.[210] In 1910, Congress enacted the Mann Act, also known as the White Slave Traffic Act.[211] The Mann Act was passed based in part upon a report by the Commissioner General of Immigration concerning the suppression of the "White Slave Traffic," which was transmitted to the Congress by President William H. Taft in response to a December 7, 1909, Senate resolution.[212] The report estimated that there were over 100,000 prostitutes of alien origin in the United States, and several thousand pimps. The report indicated that state and local governments were unable to control the thriving interstate traffic of prostitution, which the report argued was fed by a group of professional procurers who met immigrant girls at Ellis Island and lured them into brothels.[213]

On December 10, 1909, Congress's Immigration Commission, chaired by Senator William P. Dillingham of Vermont, submitted testimony to

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209. For a helpful summary of the moral debate over the issue, see Marlene D. Beckman, Note, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 Geo. L.J. 1111, 1115-17 (1984).

210. These efforts began in 1903 when the Alien Prostitution Importation Act was expanded to cover "girls" in addition to "women." Alien Prostitution Importation Act, ch. 1012, 32 Stat. 1213 (1903) (amending the Alien Prostitution Importation Act, ch. 141, 18 Stat. 477 (1875)). U.S. efforts to address these issues proceeded in tandem with international action. In 1904, the International Agreement for the Suppression of the White Slave Traffic was completed. Six years later, the 1910 International Convention for the Suppression of White Slave Traffic was completed. As with domestic legislation, international efforts focused not on forced labor generally, but on the much narrower issue of procuring women or girls for immoral purposes abroad. Bruch, *supra* note 6, at 8-10. Bruch writes, "The international agreements took a predominantly abolitionist approach to prostitution and were typically limited to issues of law enforcement and cooperation." *Id.* at 11.

211. White Slave Traffic Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)). The term "white slavery," which was the source of the title of the Act, is of disputed origin. The term might be an abbreviation of the French term "*Traites des Blanches*" (trade in whites), which was used at an international conference of fifteen European nations that was held in 1905 to discuss the problem of international trafficking in women and children. *See* Vern L. Bullough, Prostitution: An Illustrated Social History 245 (1978). Other sources conclude that the term was popularized by an article in *McClure's*, a popular magazine among Progressives at the turn of the century. In a 1907 article, George Kibbe Turner claimed that a "loosely organized association . . . largely composed of Russian Jews," operating with the aid of corrupt officials, supplied the prostitutes for Chicago brothels. A Chicago prosecutor, Clifford G. Rose, reportedly recovered a written message thrown from a brothel by a young prostitute who described herself as a "white slave." *See* Alan M. Kraut, *Prostitution and "White Slavery": 1902-1933*, *in* 5 Records of the Immigration and Naturalization Service, Series A: Subject Correspondence Files (1996), *available at* http://www.lexisnexis.com/academic/guides/immigration/ins/insa5.asp. Because the terms "white slavery" and "white slave trade" do not accurately define the problem the Act addressed, this Article will refer to the law as the "Mann Act" rather than the "White Slave Trade Act."

212. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, T.S. No. 496.

213. U.S. Immigration Comm'r, Importing Women for Immoral Purposes: A Partial Report from the Immigration Commission on the Importation and Harboring of Women for Immoral Purposes, S. Doc. No. 61-196, at 3 (1909).

Congress that referred to the importing and harboring of women and girls for immoral purposes as "the most pitiful and revolting phase of the immigration problem."[214] Eleven days later, the Mann Act was reported from committee.[215] Representative James Robert Mann, the Act's chief sponsor, was careful to note that the Act was not intended to impinge on the police powers of individual states to regulate prostitution and other moral vice.[216] Rather, he clarified that the Act was intended to apply to the interstate transportation of women against their will.[217] The Act provided that

> any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery or for any other immoral purpose, or with the intent or purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice . . . shall be deemed guilty of a felony . . . .[218]

Although there was a tremendous panic about "white slavery" at the time of the passage and early enforcement of the Mann Act provisions, the framers of the law generally misapprehended the problem. Some contemporary historians have concluded that the problem of "white slavery," as defined to involve an "innocent" victim coerced into sex work, was virtually nonexistent.[219] While it is true that the number of prostitutes of foreign origin was on the rise, many of the women involved had made a deliberate choice to engage in sex work.[220] Although coercion was sometimes involved, this tended to relate to the conditions, not the nature,

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214. *Id.*

215. H.R. Rep. No. 61-47 (1909).

216. *Id.* at 1-2.

217. Representative James Robert Mann stated that the term "white slave" only applied to "those women and girls who are literally slaves—those women who are owned and held as property and chattel." *Id.* at 10-11. In other words, it was intended to address the "innocent" victim. Theoretically, states were left to regulate the voluntary prostitution and vice as they saw fit. *Id.*; *see also* Beckman, *supra* note 209, at 1117-18.

218. White Slave Traffic Act, ch. 395, 36 Stat. 825, 825 (1910).

219. Jo Doezema, *Loose Women or Lost Women: The Re-emergence of the Myth of 'White Slavery' in Contemporary Discourse of 'Trafficking in Women'*, 18 Gender Issues 23, 23-50 (2000), *available at* http://www.walnet.org/csis/papers/doezema-loose.html (citing Edward J. Bristow, Prostitution and Prejudice: The Jewish Fight against White Slavery 1870–1939 (1982); Alain Corbin, Women for Hire: Prostitution and Sexuality in France After 1850 (Alan Sheridan trans. 1990); Donna J. Guy, Sex and Danger in Buenos Aires: Prostitution, Family and Nation in Argentina (1991); R. Rosen, The Lost Sisterhood: Prostitution in America, 1900-1918 (1982); Judith R. Walkowitz, Prostitution and Victorian Society: Women, Class and the State (1980)) (paper presented at the International Studies Convention, Washington, D.C., Feb. 16-20, 1999); *see also* Ariella R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 766 n.29 (2006) (noting that the question of the scope of the so-called white slave trade was contested even in the early twentieth century).

220. Doezema, *supra* note 219, at 29-31.

of the work.[221] Nevertheless, the trope of the "white slave" became a powerful force behind the passage and enforcement of the Mann Act.[222]

The debate around the Mann Act indicates that in passing the Act, Congress had something more in mind than simply stopping sex trafficking. Efforts to address the "white slavery" problem were inextricably intertwined with two other, more general concerns. First, they drew from and fed the debate over sexual morality, and particularly abolitionist efforts aimed at prostitution.[223] Second, as with the Page Law,[224] the "white slavery" debate also reflected, and helped to feed, the rising anti-immigrant sentiment of the time.[225]

Just as the Mann Act debate revealed a preoccupation with something much broader than sex trafficking, it soon became clear that the enforcement of the Mann Act would extend beyond the parameters of the plain language of the law. Soon after its enactment, the Mann Act was applied to men and women traveling together even where there was no evidence that there was a commercial component to their interaction, and no evidence that the women had been coerced into traveling with the men.[226] While the language and the legislative history of the Mann Act thus suggest that it was meant to apply to situations in which women were commercially trafficked against their will, increasingly over time, women were prosecuted under the Mann Act.[227] This result was at odds with the stated intent of the Mann Act, which was to protect immigrant women from interstate trafficking, not to serve as a tool to penalize prostitution or other moral vices.[228] From 1919 through 1929, in spite of circulars issued by the

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221. *Id.*
222. *Id.*
223. *Id.* at 27-28.
224. *See generally* Abrams, *supra* note 207.
225. Suzanne Jackson writes,

> As immigration to the United States increased to unprecedented levels, legislative proposals to impose new restrictions on immigration multiplied, and again focused upon prostitution. As Nancy Cott described it:
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> > A national hysteria over the international "traffic in women" was in the making . . . . Congressmen expended fulsome prose on the "soul-harrowing horrors" of the traffic . . . . Despite . . . contradictory evidence, policy-makers painted sex trafficking in simplistic, lurid tones, exploiting and fueling already strong anti-immigrant and anti-prostitute stereotypes.

Jackson, *supra* note 4, at 488-89 (quoting Nancy F. Cott, Public Vows: A History of Marriage and the Nation 146 (2000)).

226. *See, e.g.*, Cleveland v. United States, 329 U.S. 14 (1946) (applying the Mann Act to a Mormon who, in practicing polygamy, had frequently transported his plural wives across interstate lines); Caminetti v. United States, 242 U.S. 470 (1917) (applying the Mann Act in a case in which two women accompanied two men on a trip from California to Reno, Nevada, for the weekend).

227. *See, e.g.*, Gebardi v. United States, 287 U.S. 112 (1932) (holding that a woman who provided active assistance in her own transportation could be found guilty of conspiracy to violate the Mann Act); United States v. Holte, 236 U.S. 140 (1915) (holding that a woman could not be liable as an accomplice to a Mann Act violation, but could be indicted for conspiracy).

228. *See* Beckman, *supra* note 209, at 1118-24.

Department of Justice advocating the enforcement of the Mann Act only in situations involving commercialized vice and an unwilling participant, United States attorneys continued to prosecute individuals engaged in personal sexual escapades that involved neither commercial gain nor the exploitation of innocent victims.[229]

Enforcement of the Mann Act during this time also maintained a distinctly racial nature. The term "white slavery" is not accidental. Much of the zeal for the Mann Act arose out of growing concern with prostitution among white women; this was accompanied by the sense that white women, as opposed to women of color, would never willingly engage in acts of prostitution, and therefore must be "enslaved" innocent victims.[230] The innocence of the posited "white" female victim was also contrasted against the evil nature of her trafficker. In both Europe and the United States, "foreigners," especially immigrants, were targeted as responsible for the traffic.[231] Given the important role that racial rhetoric played in the drafting and passage of the Mann Act, it is not at all surprising that it was also frequently used by police as an excuse not only to arrest immigrant prostitutes, but also to persecute black men traveling or associating with white women.[232]

With the end of mass migration that accompanied the start of World War I, the number of women migrating to the U.S. declined, and not coincidentally, the issue of "white slavery" faded from prominence in the public mind.[233] Nevertheless, Mann Act prosecutions continued throughout the twentieth century and into the new millennium. In fiscal year 2001, 153 people were sentenced to prison under Mann Act offenses.[234] Many of these recent Mann Act prosecutions are human trafficking prosecutions. The Mann Act has simply been integrated into other anti-trafficking measures through the TVPA without substantive revisions. The TVPA does little to change the Mann Act provisions. The TVPA simply adds two new weapons to the anti-trafficking arsenal: It expressly criminalizes "trafficking" and "sex trafficking of children by force, fraud or

229. *Id.* at 1123. It was perhaps in response to these excesses that, in 1944, the Supreme Court required the prosecution to show that immoral purpose was the "dominant motive" of interstate movement in any Mann Act prosecution. Mortensen v. United States, 322 U.S. 369, 374 (1944).

230. Beckman, *supra* note 209, at 1123.

231. Doezema, *supra* note 219, at 30-31 (citing Bristow, *supra* note 219; Frederick K. Grittner, White Slavery: Myth, Ideology and American Law 96-102 (1990); Nat'l Vigilance Ass'n, The White Slave Traffic (1910)). Jews in particular were singled out for blame, and traffickers were depicted in an anti-Semitic light. *Id.*

232. *See* Grittner, *supra* note 231, at 96-102; David J. Langum, Crossing over the Line: Legislating Morality and the Mann Act (1994). For an anecdotal discussion of a blatantly racist application of the Mann Act, see Geoffrey C. Ward, Unforgivable Blackness: The Rise and Fall of Jack Johnson 334-38 (2004); *see also* Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 Texas L. Rev. 739 (2006) (criticizing the prosecution of black boxer Jack Johnson under the Mann Act as an example of pretextual prosecution commonly used by prosecutors).

233. *See* Doezema, *supra* note 219, at 42-43.

234. 2003 State Department Report, *supra* note 17, § III.D.2.

coercion."[235] Generally, however, as with the other forced labor provisions, the Act represents only an increase in the harshness of criminal penalties for actions already criminalized.

While the passage and publicity of the TVPA brought trafficking issues into much greater focus, Congress did not systematically revisit the shortcomings of the Mann Act. Their failure to do so has allowed old problems to replicate themselves in contemporary anti-trafficking efforts. Specifically, the TVPA, like the anti-trafficking laws that preceded it, continues to operate more powerfully as a platform for antiprostitution efforts than actual anti-trafficking efforts, and, moreover, the law is enforced in a way that reflects and fuels anti-immigrant sentiment.

III. ASSESSING THE SHORTCOMINGS OF THE TVPA

While instrumental in bringing to public attention the gravity of the crime of human trafficking, the TVPA has failed to significantly address the ways in which existing laws may actually promote trafficking and other labor exploitation. The exploitation of immigrant workers is still rampant.[236] Yet only a small number of people in the United States have received help under the TVPA. Meanwhile, the fact that the Act exists, and that millions of dollars are spent to combat trafficking each year, diverts political pressure from the task of changing the legal regime to eliminate legal incentives for the exploitation of human beings.

A. *Modest Changes, Modest Improvements*

In light of the apparent widespread political support for the TVPA from both the legislative and executive branch, one would expect at a minimum that the TVPA would serve as an effective tool in rooting out the most blatant forms of human trafficking. However, widespread political support for the TVPA translated into only modest changes to existing laws. Those laws, in turn, create certain incentives that undercut anti-trafficking efforts. It is therefore unsurprising that in every area from protection to prosecution to prevention, the Act has fallen short of its promise.

1. Modest Strides Made in Protecting Trafficking Victims

One of the three stated overarching goals of the Trafficking Act is to provide protection for trafficking victims.[237] In certain cases, victims of trafficking in the United States are able to apply for temporary visas, certain

235. 18 U.S.C. § 1591 (2000).

236. *See, e.g.*, Human Rights Ctr., Univ. of Ca. Berkeley, Freedom Denied: Forced Labor in California 1 (2005), *available at* http://www.hrcberkeley.org/download/freedomdenied.pdf (identifying fifty-seven forced labor operations in almost a dozen cities in California between 1998 and 2003, involving more than five hundred individuals from eighteen countries).

237. *See supra* Part II.

benefits, and even legal permanent resident status. To date, however, very few victims have received any of these forms of assistance.

Between the passage of the Act in late 2000 and June 2003, the Department of Homeland Security had received only 453 T-visa applications.[238] Of the 453 T-visa applications, only 172 had been granted, thirteen were denied, and 238 were pending.[239] In fiscal year 2004, the Department of Homeland Security received 520 applications for T non-immigrant status, approved 136, denied 292, and, as of July 2005, continued to consider ninety-two.[240] In short, as of the end of 2004, fewer than 500 people had received T-visas.[241]

The number of people who had been certified by the Department of Health and Human Services ("HHS") as eligible for services as victims of trafficking was also stunningly low. The combined number of certifications and eligibility letters issued by HHS for the four fiscal years following the enactment of the TVPA was 611.[242]

In its 2003 report, the State Department attributed much of the shortfall to a failure in "outreach."[243] Specific measures were enacted after 2003 to improve outreach efforts. In addition to maintaining a toll-free hotline for victims,[244] HHS implemented a $2 million effort to identify and serve more trafficking victims through public service announcements and training of nongovernmental organizations ("NGOs").[245] As of February 2003, the HHS had awarded over $4.6 million in grants to twenty-two organizations for outreach and services geared toward trafficking victims, and in March 2003, HHS issued approximately $3.5 million to fifteen organizations to assist them in providing for the needs of trafficking victims such as temporary housing, education, living skills, and transportation.[246] In some cases, assistance includes mental health counseling, assistance in finding employment, and specialized foster care for children.[247] While these services were reserved for the "certified" victims of trafficking, $9.5 million in grant money was also made available to various NGOs for emergency services for victims as soon as they have been encountered.[248]

In addition, funds were allocated to train not only federal law enforcement officials on issues of trafficking, but also to inform state

238. 2003 State Department Report, *supra* note 17, § III.C.

239. *Id.*

240. 2005 State Department Report, *supra* note 3, at 244.

241. Even taking the lowest estimates, about 45,000 victims of trafficking would have entered the United States from 2000 to 2003, and this number would have been in addition to the victims of trafficking already present. *Id.*

242. *Id.* at 241.

243. 2003 State Department Report, *supra* note 17, § III.C.5.

244. This hotline provided the leads for about fifty percent of the trafficking investigations undertaken between 2000 and 2003. *Id.*

245. *Id.*

246. *Id.* § III.C.1.

247. *Id.*

248. *Id.*

officials of the implications of the Act.[249] And Congress has mandated that the Legal Services Corporation provide legal assistance to trafficking victims.[250]

But the 2005 State Department Report indicated that these efforts have not substantially increased the number of victims assisted by TVPA-based programs. The simple fact remains that, of the estimated number of trafficking victims who enter the country each year—a number that ranges from 14,500 to 50,000, not counting those already present[251]—fewer than 1000 people received HHS certification and T-visa protection during the first four years of the Act's existence.[252]

2. Modest Increases in Prosecutions

The Act does not significantly expand or revise preexisting criminal prohibitions on sex trafficking and forced labor.[253] Rather than create a comprehensive criminal prohibition on trafficking, the law adds another piece to the "patchwork" of trafficking-related criminal violations.[254] Thus, it should come as little surprise that only thirty-two trafficking cases were filed between 2001 and 2003, and of those thirty-two cases, eleven alleged violations of laws that existed prior to the passage of the TVPA.[255] The low number of prosecutions reflects the fact that, although penalties for trafficking have increased, the chance of being prosecuted for trafficking offenses is still quite low, undermining the deterrent value of the harsher sentences.[256]

As of March 2003, there were only 128 open trafficking investigations.[257] This was twice the number of cases as had been open in January 2001,[258] but it is nevertheless a small number. In fiscal year 2004, the Department of Justice initiated prosecutions against fifty-nine traffickers.[259] Only thirty-two of those defendants were charged with violations under the Trafficking Victims Protection Act of 2000.[260] All of those cases involved sexual exploitation.[261]

Of course, the prosecution of trafficking cases is extremely difficult, due to the multinational nature of some of the crime rings, the language differences that exist between victims and prosecutors, and the severe

249. *Id.* § III.D.3.
250. *Id.* § III.C.1.
251. *See supra* notes 16-17.
252. 2005 State Department Report, *supra* note 3, at 241.
253. *See supra* Part II.C.3.
254. Note, *The Trafficking Victims Protection Act*, *supra* note 4, at 2198.
255. *Id.* at 2198-99.
256. *Id.*
257. *Id.*
258. *Id.*
259. 2005 State Department Report, *supra* note 3, at 245.
260. *Id.*
261. *Id.*

trauma suffered by the witnesses.[262] Furthermore, these figures do constitute an increase in the prosecution of sex and labor trafficking prosecutions when compared to the numbers prior to the enactment of the TVPA. As the State Department proclaimed in June 2005,

> In the past four fiscal years (2001-2004), the Department of Justice has initiated more than three times the number of investigations (340 vs. 106), filed almost four times as many cases (60 vs. 16), charged more than twice as many defendants (162 vs. 69), and doubled the number of defendants convicted (118 vs. 59) than in the prior four year period.[263]

Nevertheless, given the estimated scope of the problem, these numbers remain troublingly low.

3. Prevention: Gains and Losses Internationally

The TVPA also mandates the establishment of programs designed to deter trafficking through the creation of positive financial alternatives to potential trafficking victims.[264] During fiscal year 2004, the United States provided $82 million to foreign governments and NGOs in an effort to fight trafficking on the international level.[265] While the international economic programs designed to fight trafficking are certainly commendable, these economic incentives are tiny in comparison to the massive problems of poverty and exploitation that give rise to trafficking. The State Department estimates that the trafficking industry is a $9.5 billion a year industry.[266] And while modest victories have been scored, international trafficking seems to be on the rise, not on the decline.

Pursuant to the TVPA, all countries that receive foreign assistance from the U.S. prepare reports regarding their own anti-trafficking initiatives, the treatment of trafficking victims under their laws and practices, and the countries' own cooperation with international trafficking efforts.[267] Countries that are deemed noncompliant with anti-trafficking efforts may be sanctioned. Although the sanctions provisions were widely debated, they are largely irrelevant at the moment. President Bush has been slow to order sanctions, and in fiscal year 2004, no country was sanctioned for its failures to meet the requirements of the Trafficking Act.[268]

B. *Diagnosing the Failures, or How History Repeats Itself*

Because the TVPA was not passed on a blank slate, the limitations of the preexisting laws aimed at coerced labor, including sex work, and migrant exploitation ought to have been systematically evaluated as part of the

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262. *Id.*
263. *Id.* at 243.
264. 22 U.S.C.A. § 7104(a)(1) (West Supp. 2005).
265. 2005 State Department Report, *supra* note 3, at 243.
266. *Id.* at 13-14.
267. 22 U.S.C.A. § 2151(f).
268. 2005 State Department Report, *supra* note 3, at 69.

process of enacting the TVPA. Had such an evaluation taken place, several systemic problems would have been clear. First, migrants caught in exploitative labor situations were further isolated and endangered by their presumptive criminality. Second, the prosecution of those who exploited migrants frequently took priority over protecting the victims of exploitation. Third, more prosecutorial energy and attention was lavished on stamping out prostitution than on eliminating coercive labor practices both in and out of the sex industry. Fourth, "sex traffickers" were depicted as men who were "foreign" (or racially "other") who sought to exploit innocent victims. Finally, immigration control efforts that focused on interdiction rather than on internal enforcement and outreach further isolated the victims of coercive labor arrangements. As the preceding discussion demonstrates, all of these were features of the legal landscape prior to the passage of the TVPA. Dishearteningly, all of them persist.

1. Unprincipled Limitations in Defining "Victims"

The U.N. Protocol clearly indicates that if exploitative conditions exist, the victim's consent at some stage of her trafficking does not mean that the individual is not a trafficking victim.[269] In contrast, the TVPA says nothing on the issue of victim consent. In light of Congressional silence on this issue, those charged with the enforcement of the TVPA could take an expansive view of trafficking—one which focuses on conditions of exploitation rather than upon the question of whether the apparent victim "consented" to that exploitation. The 2005 State Department Report actually advocates this approach to trafficking—at least in the global context—explaining,

> The means by which people are subjected to servitude—their recruitment and the deception and coercion that may cause movement—are important factors but factors that are secondary to their compelled service. It is the state of servitude that is key to defining trafficking. . . .
>
> A person may travel of his or her own volition to another location within his or her own country or abroad and still fall into a state of involuntary servitude later. The movement of that person to the new location is not what constitutes trafficking; the force, fraud or coercion exercised on that person by another to perform or remain in service to the master is the defining element of trafficking in the modern usage. The person who is trapped in compelled service after initially voluntarily migrating or taking a job willingly is still considered a trafficking victim.
>
> The child sold by his parents to the owner of a brick kiln on the outskirts of his rural Indian village is a trafficking victim. And, so is the Mexican man who legally or illegally migrates to the United States, only

269. *See supra* Part I.A (explaining that the U.N. Protocol does not take into account victim consent).

> to be threatened and beaten by his agricultural crew leader to keep him from leaving the job.[270]

The enforcement of trafficking laws in the United States to date has not reflected this broad understanding of trafficking. This is likely due in part to the fact that some members of Congress were quite vocal in their desire to exclude from the Act's protections any victim who consented to some aspect of his or her transportation or employment.[271] Their concern seemed to be that migrants might use the TVPA to obtain immigration benefits after participating in their own smuggling. These sentiments concretely affected the drafting of the TVPA. The decision to restrict the full protections of the Act to "severe victims of trafficking in persons" was a deliberate effort to deny immigration benefits to individuals who, while exposed to conduct that constitutes trafficking, gave consent at some point during the process of their transportation or employment.[272] The result is a law that limits the availability of protective services, but encourages broad use of the term "trafficking" in the context of prosecution. Thus, Congress's recognition that trafficking victims ought not be considered criminals[273] has been unnecessarily constrained by the unwillingness of many legislators to recognize that not all trafficking victims are completely "innocent," when "innocence" is understood to require the complete absence of consent at all stages of transportation and employment.

Congress's decision to narrow the class eligible for assistance under the Act has affected prosecution and outreach efforts under the TVPA. Assistance to individuals who may have played some volitional role in their transportation or employment, but who are now trapped in virtual slavery, is disfavored. Furthermore, because the TVPA provides the only available form of assistance to these individuals in a world where labor law enforcement turns a virtual blind eye to their exploitation, many of the trafficking victims in the State Department's annual statistics will never be aided by either the TVPA or the other laws that the TVPA was designed to supplement.[274] The present unwillingness to extend protections to "illegal

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270. 2005 State Department Report, *supra* note 3, at 9-10.

271. *See* 145 Cong. Rec. H2674, H2687 (daily ed. May 9, 2000) (statement of Rep. Conyers); Hedges, *supra* note 35, at 5A (noting Cornyn's view that an individual must enter the country against his will to qualify as a trafficking victim); *cf.* 145 Cong. Rec. H2675-87, H2683 (daily ed. May 9, 2000) (statement of Rep. Smith) (using narrative images of blameless victims). *But cf.* 145 Cong. Rec. H2684-85 (daily ed. May 9, 2000) (statement of Rep. Pitts) (telling the story of a young girl who "decided to take a chance" on a job offer, before finding herself enslaved in the sex industry). Under Senator Cornyn's definition of trafficking "victim," the woman in Pitt's story does not seem to qualify for assistance, but a broad reading of the letter of the law clearly allows her to be treated as such.

272. Thus, Congress was quite explicit about its decision to define the category of trafficking victims eligible for relief more narrowly than the category of actions that violate the trafficking laws. H.R. Rep. No. 106-939, at 90-91 (2000); *see also* Lee & Lewis, *supra* note 4, at 172; Candes, *supra* note 4, at 593-94, 596-97.

273. *See* 22 U.S.C. § 7101(b)(19) (2000).

274. And just as the Mann Act quickly became less a protective tool than a means of punishing immigrants and people of color, the TVPA appears to have become useful as a

workers" absent a showing of their "innocence" embeds into the TVPA the same immigration and labor law policies that have created a haven for trafficking and migrant exploitation. Immigration law has long categorized individuals who have been exploited in the workforce as criminals rather than victims.[275] These distinctions have been fueled by developments in labor law. Beginning well before *Hoffman Plastic*, but even more so after that decision, courts have interpreted the enforcement of IRCA provisions to require a clear distinction between legal workers, entitled to the full protection of labor laws, and undocumented workers who are not entitled to full restitution. Rather than allowing for a reassessment of these policies, the TVPA mirrors them.

Congressional debate over the TVPA also failed to acknowledge the complexities of identifying trafficking victims. Legislators tended to paint trafficking victims as ignorant and innocent victims, targeted by evil traffickers operating sophisticated international crime rings.[276] Unexamined in the debate over trafficking was the fact that the rigid distinction between trafficking and smuggling grows less and less viable. The militarization of the border has actually increased the power of smugglers, and increased the range of their criminal activity in such a way as to increase, rather than decrease, incidents of trafficking.[277] The line between smuggling and trafficking has blurred as heightened border security gives smugglers greater control over migrants and allows them to command larger fees. Ironically, then, the increased militarization of the border that has occurred over the past ten years has probably converted what might once have been a simple act of smuggling into a more abusive act of trafficking.[278] At the same time, the TVPA defines trafficking in a way that excludes many of these new victims from the Act's protections.

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tool for prosecuting these same groups. Continuing along this path, the TVPA may become another tool in speeding the deportation of "criminal aliens," rather than an effective means of providing relief to "aliens." *See infra* Part III.B.4.

275. *See supra* Part II.A-B.

276. *See* Lee & Lewis, *supra* note 4, at 174; *see also infra* note 311.

277. *See supra* Part II.B.

278. The military-style operations established at certain points along the southwestern border also have taken a tremendous human toll by pushing migrants into more dangerous areas of crossing and encouraging them to place themselves in the hands of smugglers. *See* Kevin R. Johnson, *Open Borders?*, 51 UCLA L. Rev. 193, 221-24 (2003). Reports of death along the southern border, particularly in the summer months, persist year after year. *See, e.g.*, *Deaths on Border of Arizona Strain Morgue's Capacity*, N.Y. Times, Sept. 4, 2005, at 21; Nick Madigan, *Early Heat Wave Kills 12 Illegal Immigrants in the Arizona Desert*, N.Y. Times, May 26, 2005, at A18; *National Briefing: Arizona: Death Along the Border*, N.Y. Times, Oct. 2, 2003, at A23 (reporting that the death toll for Mexicans crossing the U.S.-Mexico border had reached 151 in the year 2003, up from 145 in 2002). The stories involve horrible deaths, like the smothering death of eighteen Mexican migrants who were traveling in a trailer in excruciating heat across the southern border of Texas during the summer of 2003. Simon Romero & David Barboza, *Trapped in Heat in Texas Truck, 18 People Die*, N.Y. Times, May 15, 2003, at A1. The driver of the truck, a Jamaican immigrant, was charged and convicted, not of trafficking, but of smuggling, violation of the prohibitions on transporting and harboring an "alien," and related conspiracy charges. *See* Ralph Blumenthal, *Immigrant-Smuggling Case Against Driver Goes to Jury*, N.Y. Times, Mar. 19,

This simplistic understanding of the trafficking victim creates concrete problems: Advocates for clients who are potentially classifiable as victims of trafficking may be unable to readily determine which of their clients are eligible for relief under the TVPA and which of them will be subject to deportation. And because Congress has thus far failed to address the shortfalls of other labor protections for undocumented migrants, and has increased the likelihood that undocumented migrants will not have reliable legal means for remaining in the country, those migrants who do not qualify as trafficking victims seldom qualify for any other meaningful remedies against their employers, and are at high risk for removal. Current labor and immigration policies favor deportation as the remedy for ending the exploitation of undocumented workers and interdiction as the preventative strategy. These policies continue to cancel out many of the potential benefits of the TVPA. Until there is a willingness to provide more assistance—or at least enforce pertinent labor protections—for those "smuggled" noncitizens who toil in virtual slavery, most of the tens of thousands of "trafficking victims" who are included in the annual estimates will never actually be aided by the Act.

Many instances of trafficking could be effectively addressed through three simple steps. First, allow all workers to seek remedies under Commerce Clause-based and Thirteenth Amendment-based laws. Second, when necessary, provide workers with legal protection allowing them to remain in the United States while pursuing meritorious claims. Third, rather than guiding prosecutors to look for narrowly defined instances of trafficking, encourage them instead to press criminal charges against those employers who exploit their employees. In the absence of such policies, even bona fide "severe victims of trafficking in persons"—not to mention those workers whose exploitation constitutes something less in the eyes of the law—will continue to live at the mercy of their employers. In the quest for the innocent victims, we have left countless vulnerable individuals outside of the scope of the laws' protections.

2. Law and Order: Sacrificing Protection for Prosecution

Yet another reason the TVPA has been such an ineffective tool in aiding trafficking victims is that it overemphasizes prosecution, while underemphasizing protection and prevention.[279] This problem is manifested in at least two different ways. First, when "severe victims of

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2005, at A11. The survivors were not granted T-visas because they were not classified as trafficking victims. *See Smuggler Faces Death Penalty in New Trial*, N.Y. Times, Apr. 12, 2005, at A19. They were, however, able to obtain legal status though S-visas in exchange for their assistance in the prosecution of their smugglers. *Id.* The case of the migrants caught in the Texas truck illustrates the great circular irony of U.S. immigration laws: Border militarization, rather than decreasing alien smuggling, drives people into the hands of smugglers and traffickers.

279. Dalrymple, *supra* note 4; Sadruddin, Walter & Hidalgo, *supra* note 5; Note, *The Trafficking Victims Protection Act*, *supra* note 4, at 2194.

trafficking" are identified, the law requires their participation in criminal prosecutions as a condition of assistance. Second, the primary "prevention" strategy for trafficking in the United States has been border interdiction, which is in itself prosecutorial and which actually seems to facilitate rather than prevent trafficking.

The provisions governing eligibility for T-visas demonstrate the primacy of prosecution over protection. As previously noted, T-visas are available to those who "compl[y] with any reasonable request for assistance in the investigation or prosecution of acts of trafficking."[280] The language does not expressly bar the issuance of T-visas to those whose cooperation is not sought. The T-visa may be extended to any victims who would suffer "extreme hardship involving unusual and severe harm upon removal."[281] As a matter of practice, however, the regulations governing the implementation of the TVPA indicate that the Department of Homeland Security ("DHS") is strongly encouraged to obtain the formal endorsement of law enforcement prior to issuing a T-visa.[282] Furthermore, the text of the TVPA itself indicates that outright refusal to assist results in the denial of a T-visa application under the terms of the Act.

The regulations governing the issuance of T-visas and other victim assistance also make some difficult demands on trafficking victims.[283] The regulations governing the T-visa application process require that an applicant, who must be a victim of "severe forms of trafficking in persons,"[284] first comply with "any reasonable request for assistance in the investigation or prosecution of acts of trafficking [in persons];" and second, demonstrate that she would suffer from "extreme hardship involving unusual and severe harm upon removal [from the United States]."[285] Both of these prongs must be met to secure three-year legal residency through a T-visa.[286] The individual must also demonstrate either cooperation with law enforcement or demonstrate that she would suffer "extreme hardship involving unusual and severe harm" to secure lawful permanent resident status upon expiration of the T-visa.[287]

Similarly, obtaining the certification from the Department of Human Services that entitles the trafficking victim to social service benefits

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280. 8 U.S.C. § 1101(a)(15)(T) (2000).

281. *Id.*

282. 8 C.F.R. § 214.11(b)(3) (2005).

283. *See generally* Sadruddin, Walter & Hidalgo, *supra* note 5; Jennifer M. Wetmore, *The New T-Visa: Is the Higher Extreme Hardship Standard Too High for Bona Fide Trafficking Victims?*, 9 New Eng. J. Int'l & Comp. L. 159 (2003).

284. TVPAII § 107(e)(1), 8 U.S.C. § 1101(a)(15) (2000).

285. *Id.*; New Classification for Victims of Severe Trafficking in Persons: Eligibility for "T" Nonimmigrant Status, 67 Fed. Reg. 4784 (Jan. 31, 2002). The "severe harm" standard is much higher than the standard that is used in seemingly synonymous cases involving requests for political asylum on the basis of gender persecution. *See* Wetmore, *supra* note 283, at 175.

286. TVPA § 107(e)(1).

287. *Id.* § 107(f). An additional showing of three years permanent residence and good moral character must also be made at this stage. *Id.*

requires the person to certify that they will "assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons."[288]

Unfortunately, trafficking victims are often poorly equipped to serve as witnesses. Assisting in prosecution requires a person to be able to think clearly, to remember and give details, and to tell a consistent story.[289] Yet many of the most abused trafficking victims are ill-equipped to do these very things.[290] Because of the constant threat under which many victims find themselves, dissociation is a common response. Under the strain of their experiences, trafficking victims may lose track of time and may be unable to account for significant portions of their days. They may also seem emotionally numb, which means they will show no emotion in recounting traumatic events.[291] They may develop learned helplessness that ends the need for captors to exert any external coercion upon them, and they may even develop a traumatic attachment to their perpetrators.[292] When one or all of these situations occur, it may be impossible for a person to comply with a "reasonable request"[293] to assist in prosecution, although the medical issues at stake may be far from clear to government officials. Without access to skilled counsel—in itself a situation far from assured—it is clear that some trafficking victims will simply lose out on any possible protections because of the witness requirements.

The prosecutorial bent of the T-visa is not a new phenomenon. After all, the T-visa is modeled upon the S-visa, which has been used to provide immigration benefits to cooperators in criminal prosecutions. Prosecutors granted S-visas to the Mexican nationals victimized by one trafficking scheme that took place prior to the Act.[294] Thus, rather than marking a sea change in the way that victims are viewed, the administration of the T-visa reflects continuity with past immigration policies.[295] In this respect, it is

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288. *Id.* § 107(b)(1)(E)(i)(I). The Trafficking Victims Protection Reauthorization Act of 2003 § 4(b) eliminated the requirement of cooperation for children under eighteen. Prior to that time, the statute appeared to require this cooperation from children.

289. Sadruddin, Walter & Hidalgo, *supra* note 5, at 396.

290. *Id.* at 398-406.

291. *Id.* at 404.

292. *Id.*

293. TVPA § 107(e).

294. *See supra* Part I.C. S-visas have long been granted to immigrants classified as material witnesses for criminal prosecutions. They were granted to a group of women and teenage girls from Mexico who were forced to work as prostitutes in migrant camps in Florida and to a South Asian domestic worker abused by her employers. *See* Mireya Navarro, *Group Forced Illegal Aliens into Prostitution, U.S. Says*, N.Y. Times, Apr. 24, 1998, at A10; Mireya Navarro, *In Land of the Free, A Modern Slave*, N.Y. Times, Dec. 12, 1996, at A22; *see also* Volpp, *supra* note 149, at 514-15.

295. Many states have begun to enact their own state law anti-trafficking initiatives. But states are incapable of offering the immigration benefits that the federal government can provide, so it is perhaps no surprise that these statutes have also focused on criminalization rather than protection. Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. Mich. J.L. Reform 447 (2005) (arguing that state legislation designed to combat human trafficking has focused on mere criminalization, raising serious

once again apparent that although the Act promises bold new ways of dealing with trafficking victims, the steps toward providing more assistance to trafficking victims have, in fact, been quite measured. "When services and protections are conditioned on the victim's ability to meet difficult immigration eligibility standards and to cooperate with 'every reasonable request' by law enforcement, the law is not truly focused on protecting victims."[296]

Prosecution efforts also trump efforts to prevent trafficking. To date, border interdiction strategies have been the primary tool used to prevent trafficking in the United States. But border enforcement efforts have served to increase rather than decrease human trafficking.[297] These measures, which allow smugglers to charge ever-higher fees for their services, both increase the profits of transporting migrants across borders and make it more likely that the smuggled individual will be subjected to a peonage-style arrangement upon their arrival in the destination country.[298] Because those who pay for the services of smugglers do not fit the profile of the perfectly innocent victim, they are unlikely to receive the protections of the TVPA. Moreover, because Congress is now satisfied that the TVPA protects the only "true victims" of human trafficking, there is even less incentive to address the dearth of labor protections for all other undocumented workers in the United States.

Nora Demleitner has noted that immigration law has increasingly become "an adjunct to criminal law as it is being used to further punish criminal offenders and to reward those who cooperate in criminal investigations."[299] The TVPA provides another example of this trend.

3. Too Much Sex: Conflating Prostitution and Trafficking

Discussions around both domestic and international human trafficking frequently focus on the rights of women and children. There are many good reasons for this. Because of their social and political marginalization and lack of access to economic resources in many parts of the world, women and children are often the most vulnerable to trafficking.[300] Nevertheless, the focus on women and children should not be equated with an exclusive focus on sex work. Women and children are trafficked for a number of reasons. Child labor is in demand in agricultural and service sectors in many economies, and in some places children may also be

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concerns about necessary victim protection and effective prosecution in these cases, and urging more balanced state legislation).

296. Sadruddin, Walter & Hidalgo, *supra* note 5, at 398.

297. Andreas, *supra* note 186; Lee, *supra* note 1, at 12.

298. Lee, *supra* note 1, at 12.

299. Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the 'War' on Terrorism?*, 51 Emory L.J. 1059, 1059 (2002).

300. *See* Hyland, *supra* note 4, at 35-36; Lee, *supra* note 1, at 2; Alison N. Stewart, *Report from the Roundtable on the Meaning of "Trafficking in Persons": A Human Rights Perspective*, 20 Women's Rts. L. Rep. 11-19 (1998).

trafficked as soldiers.[301] Women are trafficked primarily into not only the sex industry or forced marriage, but also into sweatshop labor and domestic servitude.[302]

Historically, definitions of trafficking have been synonymous with sex trafficking. The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others focused attention solely on the use of coercion to secure prostitution.[303] One of the major breakthroughs of the U.N. Protocol is that it emphasizes the element of coercion rather than the type of work that the trafficked individual is coerced into performing.[304]

This shift was the result of pressure by a number of NGOs that, over the years, have urged that treating trafficking and sex work as synonymous is both over-inclusive and under-inclusive—over-inclusive because it sweeps in those who have consented to migrate within or among countries to perform sex work, and under-inclusive because it pays insufficient attention to those who are forced into other forms of labor. During the drafting of the U.N. Protocol this issue became a point of serious contention. Because of the seemingly irreconcilable differences of opinion on this issue, the final version of the U.N. Protocol takes no position as to whether prostitution itself constitutes exploitation.[305]

The TVPA tracks the U.N. Protocol in its emphasis on the manner in which labor is obtained rather than on the nature of the work. The definition of "severe forms of trafficking in persons" contemplates not just sex work but all coerced labor. But the TVPA's broad definition of "trafficking" has not been matched in the enforcement of the Act.

Indeed, it was not until 2005, almost five years after the passage of the Act, that the State Department placed an emphasis on forced labor in its annual report on trafficking. The 2005 report stated, "Over the next year, the Department of State intends to focus more attention on involuntary servitude and its related manifestations."[306] The report continued,

> With the passage of the TVPA and the drafting of the 2000 U.N. Protocol on trafficking, anti-trafficking efforts shifted from the paradigm of earlier international conventions, which focused largely on the international movement of women for prostitution, to one based on the denial of freedom and resulting victimization. The definition of

301. Lee, *supra* note 1, at 2.
302. *Id.*
303. *Id.* at 6.
304. Potts, *supra* note 6, at 238. *But see* Bruch, *supra* note 6, at 3 (questioning whether there has actually been a shift, and noting that "current approaches to human trafficking replicate many of the flaws of earlier approaches—namely, a focus on victimization, a fruitless cycle of debate on the role of prostitution, problematic definitional questions, and a process of decision-making that excludes critical voices").
305. Bhabha, *supra* note 10, at 2.
306. 2005 State Department Report, *supra* note 3, at 8.

> trafficking in persons in these instruments covers a wide array of exploitation that amounts to involuntary servitude.[307]

The report proceeds to elaborate on the history of U.S. prohibitions on forced labor, and the role that the TVPA plays in updating and improving the effectiveness of these prohibitions.[308] And in 2005, for the first time, the State Department designated several countries noncompliant with international anti-trafficking efforts, primarily as a result of the failure of these countries to address trafficking for forced labor.[309] That this is the first time illustrates all too plainly the fact that the international focus for anti-trafficking efforts has, until this year, been almost exclusively on sex trafficking.

The lack of attention to the more general question of the forced labor during the first four years of the life of the Trafficking Act is not surprising. The rhetoric surrounding the passage and implementation of the TVPA suggested that political leaders in both the executive and legislative branches were held captive to a historical conception of human trafficking—one that focused almost exclusively upon sex trafficking. Indeed, the bill initially introduced by Representatives Christopher Smith and Louise Slaughter would have limited the definition of trafficking to sex work—whether or not it was coerced—and limited relief to women and children.[310]

Although congressional understanding of trafficking expanded prior to the passage of the TVPA, stories involving sexual exploitation were, by far, the most common stories invoked during consideration of the Act.[311] Some

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307. *Id.* at 9.

308. *Id.*

309. *Id.* at 8.

310. The Freedom from Sexual Trafficking Act of 1999, H.R. 1356, 106th Cong. (1999); *see* Nathan, *supra* note 36.

311. The anecdotes that were highlighted during the floor debate on the legislation, some factual and some fanciful composites, included many examples of forced prostitution. Christopher Smith (R-NJ), one of the co-sponsors of the House bill, told the story of Lydia from "you can fill in the name of the country here, the Ukraine, Russia, Rumania, Lithuania, the Czech Republic," a girl who was enticed to dinner with the promise of a modeling job, was drugged at dinner, and awoke to find herself "here you can fill in another set of countries, be it Germany, the Netherlands, Italy, some Middle Eastern countries, even as far as Japan, Canada, and of course, the United States." There, she found herself "owned" by a man who claims she owes him thousands of dollars for her transportation and care. He used coercion, as well as physical force—including rape—to force her to work in the sex industry. When authorities finally uncovered the brothel where she worked, she was deported. 146 Cong. Rec. H2675, H2683 (daily ed. May 9, 2000) (statement of Rep. Smith). Representative Joseph Pitts from New Jersey told "the story of a young girl from a very poor family in a developing country who had hopes for a better life in a wealthier land." When someone (not identified in Pitts's narrative) offered her a job,

> she took the chance. When she got where she was going, she could tell something was wrong. She was led to a hot, dirty trailer and locked inside with a handful of other women, women with emotionless faces and broken spirits. It was there that her life as a sex slave began. At first, she refused to do what she was told, but she could only take so many beatings. Then 30 men a day entered her trailer and raped her . . . . [I]t happened in Florida.

members of Congress seemed convinced that they were enacting a sex trafficking bill.[312] As with the Mann Act that preceded the TVPA by almost a century, the debate often created a sense that the TVPA was not meant to protect people from contemporary slavery, but rather to serve as a tool to save innocent victims from sexual predators.

To date, the majority of the people who have applied for T-visas report being forced into labor, such as construction and domestic work.[313] But official accounts and public perception of trafficking are at odds with this reality.

As the 2005 State Department Report makes clear, this tendency to think about trafficking as synonymous with sexual exploitation has also influenced U.S. foreign policy. This is particularly unfortunate because the aspect of the TVPA that holds the most potential for fighting trafficking lies in its recognition that the trafficking problem is an international issue that requires international solutions. This recognition constitutes a clear break from past policy in the areas of smuggling and labor law, and to a lesser

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Id. at H2684-85. The woman spent two years in detention awaiting deportation to Mexico. *Id. R*epresentative Jan Schakowsy (D-IL) told the story of "a young girl named Nurjahan in Bangladesh" who "at 8, . . . was bought by a brothel in Pakistan probably for between $200 and $1,500. She finally escaped from a life as a sex slave," but bore acid scars, not to mention "invisible" psychological scars. *Id.* at H2686.

312. Representative Louise M. Slaughter (D-NY) was careful to emphasize the fact that the bill did not solely concern sexual slavery. She stated,

> The bill recognizes the fact that trafficking is not exclusively a crime of sexual exploitation. Taken independently, this action is an egregious practice in and of itself. It is also important, however, to be aware that people are being illegally smuggled across borders to work in sweatshops, domestic servitude or other slavery-like conditions.

146 Cong. Rec. H9029, H9030 (daily ed. Oct. 6, 2000) (statement of Rep. Slaughter). Representative Gejdenson was equally cautious. *See* 146 Cong. Rec. H2675, H2684 (daily ed. May 9, 2000) (statement of Rep. Gejdenson). But many other representatives who spoke in support of the bill continued to refer to the bill imprecisely. Representative Donald Payne from New Jersey declared, "Mr. Speaker, I rise in support of H.R. 3244, a bill on sex trafficking on the floor at this time." 146 Cong. Rec. H9036, H9043 (statement of Rep. Payne). Representative Carolyn Maloney of New York similarly declared,

> The International Sexual Trafficking Bill is important because not only does it take steps to eliminate the sex trafficking industry by punishing the predators that exploit women around the world, but it also takes steps to protect the victims of sex trafficking. The bill sets forth the minimum international standards for the elimination of sex trafficking. It establishes criminal and civil penalties. And it does many other things.

Id. at H9044 (statement of Rep. Maloney); *see also id.* at H9045 (statement of Rep. Radanovich) (referring to "the Sex Trafficking Conference Report"); *id.* at H9046 (statement of Rep. Udall) (describing the TVPA as an effort "to curb exploitation of women who are the victims of the international sex trade").

313. Nathan, *supra* note 36. Journalist Debbie Nathan also suggests that the Department of Justice may be erroneously classifying as instances of "sex trafficking" cases that involve instances of rape or sexual assault by the employers of women who are working as "cooks, waitresses and housekeepers," but notes that the charge is difficult to substantiate because the Department does not release a detailed narrative of each case. *Id.*

extent, sex trafficking.[314] Unfortunately, the international strategy has been substantially hindered by the conflation of prostitution and trafficking. This myopic view of trafficking lingers from the time of the adoption of the Mann Act.

The TVPA created an infrastructure for development programs aimed at some of the economic root causes of trafficking in source countries. The TVPA mandates the establishment of programs designed to deter trafficking through the creation of positive financial alternatives to potential trafficking victims.[315] These programs include job development, counseling, and training, as well as programs designed to keep children in school.[316] Additionally, funds are used to train international government officials and NGOs to recognize and fight trafficking. And there are funds specially designated to provide information on the illegality of sex tourism to travelers.[317] But the Act does not simply expand the availability of foreign aid; the Act also uses foreign aid to create pressure on foreign governments to address the international aspects of the trafficking problem.[318] All countries that receive foreign assistance from the U.S. prepare reports regarding their own anti-trafficking initiatives, the treatment of trafficking victims under their laws and practices, and the countries' own cooperation with international anti-trafficking efforts.[319]

Each year, the State Department categorizes every country into one of three tiers: Tier 1 countries are considered to be fully compliant with the minimum standards for the elimination of trafficking under the TVPA; Tier 2 countries are countries making "significant efforts" to meet the minimum

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314. As previously noted, the Mann Act was bound up with a broader international agenda concerning the "white slave trade," *see supra* Part II.C, but unlike the TVPA, it was not linked with any program of international aid or cooperation.

315. 22 U.S.C.A. § 7104(a)(1) (West Supp. 2004).

316. *Id.* § 7104(a)(3); *see also* Hyland, *supra* note 4, at 62; Note, *The Trafficking Victims Protection Act*, *supra* note 4, at 2189.

317. 22 U.S.C.A. § 7104(e)(1). Efforts against sex tourism and child prostitution have received an even greater boost from the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650 (2003) (to be codified in scattered sections of 18 U.S.C.), which was passed by the Congress in April 2003 and signed into law by President George W. Bush. The PROTECT Act allows law enforcement officers to prosecute American citizens and legal permanent residents who travel abroad and commercially sexually abuse minors without having to prove prior intent to commit this crime. The law also increases the sentences for child sex tourists from a maximum of fifteen years to a maximum of thirty years imprisonment. The PROTECT Act also expands the potential reach of federal sex trafficking prosecutions by extending federal jurisdiction to crimes committed in foreign commerce; establishes parallel penalty enhancements for the production of child pornography overseas; and criminalizes actions to arrange or facilitate the travel of child sex tourists. 2005 State Department Report, *supra* note 3, at 240. The most recent State Department Report on trafficking details many of the initiatives that have been funded as a result of the TVPA. *Id.*

318. 2005 State Department Report, *supra* note 3, at 240. These included assistance to foreign countries in drafting laws to combat trafficking, strengthen investigation and prosecution on traffickers, and create programs to assist victims. It also included an expansion of U.S. government exchange and international visitor programs focusing on trafficking. *Id.*

319. 22 U.S.C.A. § 2151(f) (West Supp. 2004).

standards; and Tier 3 countries are those whose governments are neither in compliance with the minimum standards nor are found to be making significant efforts to become compliant.[320] If a country has made insufficient efforts to combat trafficking—that is, if a country is designated Tier 3—that country is subject to sanctions.[321]

Countries receiving aid must also take an anti-trafficking pledge, as do the recipients of federal contracts, grants, and agreements with private entities receiving funds from the United States. Under the terms of the pledge, aid agreements and contracts are terminated if the other party engages in conduct that violates the TVPA.[322]

While efforts to ensure compliance surely deserve praise, the pledge exceeds its mandate: The anti-trafficking pledge now includes a promise pledge to preach abstinence and a refusal to provide aid to organizations that do not espouse the abolition of prostitution,[323] although very little research substantiates this link between prostitution and trafficking.[324] With echoes of the Mann Act, the anti-trafficking pledge demonstrates the conflation of morality-based legislation with anti-trafficking efforts.[325]

4. The Others: Anti-immigrant Sentiment and Racial Stereotyping

Corporations and the subcontractors retained by corporations sometimes engage in acts that might be classified as violations of the TVPA's prohibitions on involuntary servitude, forced labor, and peonage. But while such corporations are occasionally prosecuted for violations of alien smuggling laws and other labor violations, they escape charges of "trafficking" either because the workers who suffer exploitation are deemed

320. *New Publications*, Interpreter Releases (West), June 20, 2005, at 1044. The 2005 report also includes "Tier 2 watch countries." These are countries that fell to a lower tier from the 2004 report or evince other notable characteristics, such as a number of trafficking victims that are either very significant or significantly increasing. *Id.*

321. 22 U.S.C.A. § 7107(a) (legislating that countries that are not compliant with the United States' minimum anti-trafficking standards are ineligible for "nonhumanitarian, nontrade-related foreign assistance"). The President has the authority to waive such sanctions in limited circumstances. *Id.* § 7107(d)(5)(B). Indeed, Ambassador John Miller, the Senior Advisor on Trafficking in Persons at the Department of State, emphasized in his statements accompanying the release of the 2005 report that it was the State Department's intent to "motivate" Tier 3 countries to act, rather than to sanction them. *New Publications*, *supra* note 320, at 1045.

322. 22 U.S.C.A. § 7104(g).

323. Larry Rohter, *Prostitution Puts U.S. and Brazil at Odds on AIDS Policy*, N.Y. Times, July 24, 2005, at A3 (reporting that, in order to receive money for programs to fight AIDS, organizations in developing countries must pledge not only to support anti-trafficking initiatives but also must oppose prostitution); Matt Steinglass, *The Question of Rescue*, N.Y. Times, July 24, 2005, § 6 (Magazine), at 18 (explaining the link between anti-trafficking and anti-prostitution efforts, and noting that organizations carrying out these dual roles receive substantial U.S. aid money, while those that work with prostitutes do not). The pledge demonstrates how, once again, anti-trafficking initiatives have been bound up with—and in some senses overshadowed by—an agenda of sexual morality. *See infra* Part III.B.3.

324. Nathan, *supra* note 36.

325. *See infra* Part III.B.3.

to have consented to the terms of their employment, or because the actions of these corporations are not viewed as sufficiently egregious to constitute trafficking.

At least two prominent corporations have recently been involved in cases alleging workplace exploitation that might be viewed as trafficking. First, a 2001 indictment of Tyson Foods included allegations that the company paid coyotes to recruit ongoing streams of undocumented workers for its plants in Arkansas, Indiana, Missouri, North Carolina, Tennessee, Texas, and Virginia.[326] These immigrants allegedly were subject to higher production demands and less humane working conditions than legal workers.[327] The case was closely observed by immigration lawyers and labor leaders because they viewed methods used by Tyson Foods in recruiting and employing its undocumented workers as exemplifying the practices in many large food processing companies.[328] Although the charges against Tyson Foods were premised on the notion that the company exploited its workers' vulnerable legal status to coerce them into working in substandard conditions, no trafficking violations were alleged.

Second, following a four-year investigation, federal immigration officials detained more than 250 undocumented immigrants working at sixty Wal-Mart stores around the country in October of 2003.[329] The employees in question alleged that they had been subjected to severely substandard employment conditions. One worker explained that he worked fifty-six hours a week making $6.25 an hour, 363 nights a year.[330] Wal-Mart's labor practices allegedly included physically locking workers inside stores overnight—a practice also commonly used with immigrant workers in New York area supermarkets.[331] Nevertheless, no charges of trafficking were raised against either Wal-Mart or its subcontractors. Instead, Wal-Mart was charged with violations of smuggling laws, and those charges were dropped after Wal-Mart agreed to pay the government $11 million.[332]

The alleged actions of these corporations apparently would have justified trafficking charges. The companies, or at the very least their subcontractors, did not simply hire undocumented workers in violation of

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326. Indictment at 9, United States v. Tyson Foods, Inc., 2002 U.S. Dist LEXIS 26896 (E.D. Tenn. May 22, 2002) (No. 4:01-CR-61), *available at* http://www.tned.uscourts.gov/cases/401cr061/tyson.PDF.

327. *Id.*

328. Sherri Day, *Jury Clears Tyson Foods in Use of Illegal Immigrants*, N.Y. Times, Mar. 27, 2003, at A14.

329. Steven Greenhouse, *Wal-Mart Raids by U.S. Aimed at Illegal Aliens*, N.Y. Times, Oct. 24, 2003, at A1.

330. Steven Greenhouse, *Cleaner at Wal-Mart Tells of Few Breaks and Low Pay*, N.Y. Times, Oct. 25, 2003, at A10.

331. Steven Greenhouse, *Workers Say Late Shifts Often Mean Locked Exits*, N.Y. Times, June 18, 2004, at B1.

332. Steven Greenhouse, *Wal-Mart to Pay U.S. $11 Million in Lawsuit on Immigrant Workers*, N.Y. Times, Mar. 19, 2005, at A1; *see also* Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295 (D.N.J. 2005) (dismissing RICO claims predicated on trafficking claims against Wal-Mart).

immigration laws. These companies also used the threat of legal sanction to force those undocumented workers to labor harder, longer, and under more demeaning conditions than legal workers. Such acts should be publicly labeled "trafficking," but they are not. Mainstream corporate employers are seldom even charged with general immigration violations,[333] and of the few companies that have been so charged, none have been charged with violating the TVPA. These companies also continue to shield themselves from liability for other labor and immigration law violations by arguing that they were unaware of the violations committed by their subcontractors.[334]

At the same time that Wal-Mart and Tyson Foods faced and settled or defeated smuggling charges, the government was also prosecuting the case of *United States v. Kil Soo Lee* under the provisions of the TVPA.[335] That case involved two hundred Vietnamese and Chinese nationals, mostly young women, who had been forced to work in a Daewoosa garment factory in American Samoa. The workers were held in a guarded compound and were threatened with confiscation of their passports, false arrest, and other economic and legal punishments. On February 21, 2003, a jury convicted Lee, the owner of the factory, on nearly all counts.[336]

Kil Soo Lee is the most significant trafficking case to date, both in terms of the number of victims assisted, and the degree of publicity the case has received as a successful TVPA prosecution. It involved foreign defendants operating a factory outside of the U.S.[337] The cases involving Wal-Mart and Tyson Foods also included allegations of the exploitation of immigrant labor, particularly through the use of threats of legal punishment. But those companies were never even charged with, let alone convicted of,

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333. Cornelius, *supra* note 184, at 785. Indeed, since the passage of the TVPA, the number of investigations launched by the INS and its progeny has actually plummeted. In 1998, there were 7788 such investigations. Dep't of Homeland Sec., 2003 Yearbook of Immigration Statistics 157 tbl.39 (2004), *available at* http://uscis.gov/graphics/shared/statistics/yearbook/2003/Table39.xls. In 2000, that number fell to 1966. *Id.* In 2001, it was 1595. *Id.* Although it has risen slightly since then, by 2003 (the last year for which data is available), the number was 2194. *Id.* Preventing trafficking requires more, not less, government monitoring of employers. Yet the overall number of inspections is less than half of what it was seven years ago. *Id.*

334. Wal-Mart representatives claimed that Wal-Mart's "executives knew nothing about the employment of illegal immigrants before the raids and that the janitors were hired by contractors that Wal-Mart used to clean its stores late at night. Company officials said they used more than 100 contractors to clean more than 700 of its stores." Greenhouse, *supra* note 332, at A1. None of the contractors were charged with trafficking. *Id.* ("In a statement . . . federal officials announced that 12 janitorial contractors that worked for Wal-Mart had agreed to forfeit $4 million to the government and to plead guilty to criminal charges of employing illegal immigrants.").

335. United States v. Kil Soo Lee, 154 F. Supp. 2d 1241 (D. Haw. 2001); *see also* 2003 State Department Report, *supra* note 17, § III.D.1.

336. 2003 State Department Report, *supra* note 17, § III.D.1.

337. Another large investigation—this one a domestic case involving fifty-nine Peruvians who appear to have been working in slave-like conditions for as long as four years on Long Island, also involved immigrant defendants—Mariluz Zavala, her husband Jose Ibanez, and their daughter, Evelyn Ibanez. *See* Bart Jones, *Human Trafficking, 'Modern-Day Slavery,'* Newsday, Sept. 21, 2004, at A8.

trafficking. Why were the actions of the *Kil Soo Lee* corporate defendants readily identified as trafficking, while the actions of the Tyson Foods and Wal-Mart corporate defendants were not?

There are two related explanations. First, the harsh sentences and political rhetoric surrounding the TVPA may actually operate to limit prosecutions under the Act, even in cases where the conduct in question seems to violate the letter of the TVPA. Since the enactment of the TVPA, a trafficking charge carries a particular stigma, one that seems best reserved for the worst of the worst offenders. The lengthy prison sentences required for "trafficking" are harsher than those designed for smugglers and much harsher than those designed for violations of wage and hour or other labor laws. Because most people in the United States are not conditioned to view the general exploitation of migrant labor as an evil on par with sex trafficking, prosecutors may be reluctant to attach the harsh penalties and high stigma of the TVPA to all but the most unpopular and politically powerless offenders.[338]

Ironically, it is thus possible that the very success of the TVPA in generating the social notion that trafficking is, as President Bush has said, a "special evil," may actually explain why mainstream companies and high-profile actors are never charged with trafficking. As trafficking has been linked in the public imagination with child prostitution and sex tourism, it has been decoupled from workplace abuses that may indeed amount to peonage and involuntary servitude. Congress's failure to discuss the possible expansion of the Thirteenth Amendment and Commerce Clause-based remedies to undocumented migrants cemented the idea that, rather than operating on a continuum, the abuse of laborers fell into two clear camps: virtual or actual enslavement, particularly sexual slavery, and "common" workplace violations unworthy of substantial new criminal punishment or victim remedies.

Second, noncitizens are easier targets for harsh sanctions such as those required by the TVPA than are U.S. citizens or U.S corporations. U.S. law has already dehumanized noncitizens.[339] They have been criminalized in

338. *Cf.* Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 Stan. L. Rev. 1171, 1185-86 (2004) (concluding that when "increasing the penalty on a particular law is out of step with norms in a community, it may reduce deterrence instead of promoting it" because fewer prosecutions will be sought under the law).

339. *See, e.g.*, Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. Miami Inter-Am. L. Rev. 263, 267 (1997) (stating that the dehumanizing term "alien" forms the core around which the Immigration and Nationality Act is framed); *see also* Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. Rev. 1425, 1428 (1995); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 303 ("The very word, 'alien,' calls to mind someone strange and out of place, and it has often been used in a distinctly pejorative way.").

popular rhetoric.[340] The tendency to conflate noncitizens and criminals has become even more common on in the wake of September 11, 2001, as immigrants are increasingly depicted as a security threats. In the face of popular assumptions that "aliens" are "criminals," accusing such individuals of the "special evil" of trafficking does not seem like such a leap. President Bush's linkage of the trafficking problem with antiterrorism efforts also feeds the stereotype of the trafficker as a foreigner.

In light of the negative images of immigrants, it is perhaps unsurprising that a survey of trafficking cases publicized by the Department of Justice, suggests that the most common defendant in trafficking cases is a noncitizen, of Latin American, African, or Asian origin.[341] As with Mann Act enforcement, there seems to be a very noticeable prosecutorial bias about who a "trafficker" is. Thus, in the very rare instances that mainstream companies are found to abuse migrant labor, they are charged with smuggling, not trafficking. This is not to argue against pursuing trafficking charges against noncitizen defendants when those defendants are engaged in acts of trafficking. Because the trafficking problem is international in nature, defendants of many ethnic and national backgrounds may be prosecuted. But effective enforcement of anti-trafficking laws requires that these laws be enforced not just against politically unpopular noncitizens and immigrants, but also against U.S. citizen employers and

340. *See, e.g.*, David Brooks, *Two Steps Toward a Sensible Immigration Policy*, N.Y. Times, Aug. 14, 2005, at D12 ("[R]ight now immigration chaos is spreading a subculture of criminality across America.").

341. *See, e.g.*, April Bulletin, *supra* note 68, at 6, 8-9 (summarizing *United States v. Mubang*, resulting in a jury verdict against a naturalized citizen and former Cameroonian in a case involving the trafficking of an eleven-year-old Cameroonian citizen into domestic slavery; *United States v. Lopez-Torres*, involving a defendant of Mexican descent who pled guilty to Mann Act and weapons violations in connection with a smuggling ring bringing Mexican women to Austin, Texas, for sex work; *United States v. Udeozor*, involving a jury conviction of a Nigerian woman and her husband for holding a young Nigerian girl in conditions of involuntary servitude); Anti-Trafficking News Bull. (U.S. Dep't of Justice Civ. Rights Div., Wash., D.C.), Jan. 2004, at 8-9 (summarizing *United States v. Martinez-Uresti*, resulting in October 10, 2003, guilty pleas from two women of Mexican descent—at least one of whom, DeHoyos, was a Mexican citizen—in a case involving the operation of a ring to bring young Mexican girls into the U.S.; *United States v. Soto*, resulting in a January 2004 conviction of men of Mexican origin participating in a U.S.-Mexico smuggling ring in which the accused held four female aliens in conditions of sexual servitude in trailers; *United States v. Jimenez-Calderon*, an indictment accusing a Mexican family of smuggling Mexican girls into the U.S. for purposes of prostitution). *But see* United States v. Bradley, 390 F.3d 145 (1st Cir. 2004) (upholding the conviction of a New Hampshire couple charged with exploiting two Jamaican immigrant laborers); April Bulletin, *supra* note 68, at 8 (summarizing *United States v. Sutherland*, involving a citizen convicted of Mann Act and sex trafficking violations in connection with a Midwestern child prostitution ring). A survey of the titles and descriptions of cases summarized in the Civil Rights Division's 2004 Bulletins reveal at least twenty additional cases brought against nonwhite defendants; several of these cases involved multiple defendants. Only three additional cases appear to involve white citizen defendants. Of these, only one of these cases includes more than two defendants. All involved either domestic slavery or child sex rings. None involved the exploitation of workers in manufacturing, agriculture, or the service industry. None of these cases involve corporate defendants.

domestic corporations. Otherwise, the TVPA, like the Mann Act that preceded it,[342] runs the danger of becoming a tool used more often to incarcerate people of color and speed the deportation of noncitizens,[343] than to free members of vulnerable immigrant groups from the grips of criminally self-interested economic actors.

Furthermore, where employer conduct falls short of "severe forms of trafficking," thoughtful TVPA prosecutions of mainstream employers engaged in "trafficking" might generate important deterrent effects on the behavior of those who employ and exploit large numbers of undocumented migrants, including corporations. In the absence of stronger labor protections of the undocumented, this would seem to be the best and only way to reach the tens of thousands of trafficking victims in the country who are abused by mainstream employers in U.S. workplaces. There is little evidence that the TVPA is being leveraged to its full potential to stop workplace exploitation.

C. *Borderline: Allowing Interdiction to Eclipse Internal Enforcement Efforts*

Prior to the passage of the Trafficking Act, much of the government's efforts to prevent irregular migrants from entering the county, and the domestic workforce, focused upon border interdiction efforts.[344] A great deal of money and manpower has been poured into militarizing the southern border.[345] These interdiction measures generally have been marked by increased staffing of the Border Patrol, the addition of physical barriers to entry, and military-style campaigns.[346] They have been widely ineffective in stemming immigration, and have had harsh collateral consequences for migrants.[347]

The border interdiction efforts undertaken pursuant to the Trafficking Act offer at least some minor improvements over past policies. Border interdiction funds are dedicated to, among other things, providing grants to nongovernmental organizations to set up "transit shelters" for trafficking victims at high-trafficking border crossings.[348] Although these transit shelters are staffed by nongovernmental organizations, the organizations in

342. *See supra* Part II.C.

343. Noncitizens who are found or plead guilty to such offenses are subject to deportation and permanent exclusion from the United States. 8 U.S.C. § 1182(a)(2)(H) (2000); *see, e.g.*, Anti-Trafficking News Bull. (U.S. Dep't of Justice Civ. Rights Div., Wash., D.C.), Aug. Sept. 2004, at 4 (describing an anti-trafficking effort named "Operation Little Dragon" and writing that the "defendants were sentenced to jail terms between 24 and 33 months and have since been deported from the United States").

344. *See supra* Part II.A.

345. *See, e.g.*, Cornelius, *supra* note 184, at 785-88; Hing, *supra* note 185, at 127-28; Johnson, *supra* note 278, at 221-24.

346. *See supra* Part II.C.

347. *See generally* Hing, *supra* note 185; Johnson, *supra* note 278, at 221-24.

348. 22 U.S.C.A. § 7104(c) (West Supp. 2004).

turn provide training to government employees to enable them to better recognize and assist trafficking survivors.[349]

These improvements are commendable, but they are clearly insufficient to combat trafficking because they are not supplemented with adequate efforts to prevent trafficking within the borders of the United States. First of all, the Act originally did not create any significant programs focused on training domestic law enforcement officers to recognize the trafficking problems within the country, although belated efforts to accomplish this goal have since begun on a small scale.

Second, enforcement of the TVPA had needlessly focused on cross border trafficking rather than on internal trafficking problems. The text of the TVPA does not require this. Because both transportation and employment of trafficking victims are punishable under the TVPA, the TVPA allows prosecutors to focus not only on transborder movement, but also on purely internal trafficking and slave labor practices.[350] This is important, because trafficking operations frequently involve not only smugglers, but also employers at the end of the chain.[351]

Unfortunately, rather than break with the interdiction-focused approach of the past, anti-trafficking efforts have instead fallen into the same pattern. Prosecutions have focused primarily on the actors involved in transborder movement of labor while ignoring the domestic businesses that are sustained by the labor importation activities.[352] Instead of using the popular support for the Act as a means of tackling domestic workplace abuses, those charged with the Act's enforcement have instead continued to focus myopically on the border as the primary locus for anti-trafficking efforts.

This approach not only fails to take advantage of the flexibility of the Act, but it is also at odds with the TVPA provisions aimed at addressing the international economic forces undergirding the trafficking problem. The Act's provisions include programs designed to address the general lack of economic opportunity for many trafficking victims.[353] In providing for such programs, Congress demonstrated an awareness of the global market forces that are a root cause of trafficking. Naturally, the limited collection of programs designed to offset low wages and scarce job opportunities abroad cannot even begin to prevent all migrants from continuing to seek

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349. *Id.*

350. 2005 State Department Report, *supra* note 3, at 6.

351. *See* Kyle & Dale, *supra* note 36, at 33 ("Slave importing operations involve efforts to import vulnerable labor for ongoing enterprises by relatively stable criminal organizations or even semi-legitimate businesses in the destination country.").

352. The *Tyson Foods* case is a good example. Because the immigrant workers were recruited and came of their own free will, there was no focus on the coercive terms of their employment in the United States. *See supra* Part III.B.4; *see also supra* note 341 (describing trafficking cases prosecuted to date).

353. *See supra* Part III.B.3 (discussing international sanctions, efforts to train international NGOs); *see also* 22 U.S.C. § 7104(a) (2000) (directing the President to establish and carry out international activities to enhance economic opportunities for potential victims).

opportunities in more economically prosperous countries. But such efforts are even less likely to succeed if U.S. employers know that they can employ and exploit immigrant laborers with impunity. Unfortunately, this precisely sums up the current situation.

When primary receiving countries like the United States engage in policies that drive migrant workers underground, these countries leave workers ripe for abuse by their transporters and employers. Yet current anti-trafficking efforts all but ignore the role of the internal policies of receiving countries like the United States. Saskia Sassen diagnoses global efforts to address migration this way:

> The policy framework for immigration treats the flow of labor as the result of individual actions. The receiving country is represented as a passive agent; the causes for immigration appear to lie outside the control or domain of the receiving countries; immigration policy becomes a decision to be more or less benevolent in admitting immigrants.
>
> Absent from this understanding is the notion that the international activities of governments or firms of receiving countries may have contributed to the formation of economic linkages with emigration countries, linkages that may function as bridges not only for capital and politics but also for migration flow.[354]

The policy framework Sassen summarizes can be seen in the TVPA. Predictably, the Act pays insufficient attention to the role that U.S. actors, and actors in other economically powerful nations, play in promoting trafficking. Countries that are the primary recipients of trafficking victims are routinely designated by the State Department as fully compliant with anti-trafficking efforts, regardless of the stream of trafficking victims that enter their borders.[355] Much more attention needs to be paid to what is happening in workplaces within these borders.

CONCLUSION

The low numbers of traffickers prosecuted and victims protected under the Trafficking Act cannot simply be attributed to a failure of administrative will or a lack of resources. A great deal of time, money, and effort has been put into addressing the problem of trafficking over the past five years. Yet the number of cases prosecuted and the number of victims assisted remain low.

To remedy this problem, many incremental changes to the TVPA have been suggested. Some commentators have called for enhancing victim protection by making use of the Act's expansive definition of trafficking to encompass those who played some role in their own initial entry to the U.S. Other suggestions call for loosening the requirements that victims must

354. Saskia Sassen, Guests and Aliens 151 (1999).

355. *See, e.g.*, 2005 State Department Report, *supra* note 3, at 42 (classifying all Western primary receiving countries as Tier 1 countries, fully compliant with anti-trafficking efforts).

meet in order to garner protection, let alone benefits, expanding investigative efforts, and educating more federal and state local officials to recognize trafficking when they see it.

All of these suggestions are good, and all would certainly assist more exploited people than are helped by the law now. But the shortcomings of the Act stem from the much larger failures of U.S. immigration policy and related laws regulating labor and prostitution. The failure to protect workers who are the victims of abusive labor practices has been a feature of the U.S. legal landscape throughout history, and it has worsened in recent years. Rather than move to make work safer and more visible for everyone, U.S. immigration and labor policies have moved populations into the shadows through rigid border enforcement, lax labor law enforcement, and corporate practices that continue to allow companies that profit from trafficking to escape liability. Rather than protecting victims of sexual servitude, U.S. immigration and anti-trafficking efforts have equated immigrants with immorality and have worked to stop both at the borders. The TVPA did nothing to change these long-standing policy choices.

Moreover, enforcement of the Act has been even more narrowly focused than the language of the law requires. Officials have focused their efforts upon prostitution. Perhaps this is because addressing this problem garners more ready support than migrant labor protections in a country that is currently more concerned with morality and border control than enhancing the workplace protection of immigrants. Many of the old tropes of the Mann Act are playing out again in the national conversations about trafficking. Just as it was at the turn of the last century, this conversation is once again focused on efforts to keep "immoral" persons outside of the country, efforts to punish "foreign" men who take advantage of "innocent victims," and efforts to criminalize and deport any immigrant worker that does not fit the narrow profile of such a victim.

The failures of the TVPA to reach the estimated tens of thousands of trafficking victims in this country is far from surprising. In recent decades, the United States has increasingly limited the legal protections available to all workers—particularly the undocumented—and has hastened the deportation of "criminal aliens." To end the misery of human trafficking in the United States, what is needed is a law that protects and provides remedies for all workers—including those who may have deliberately broken the law to get here, or to stay here—but who nevertheless need all of the protections to which they ought to be entitled as workers and human beings. Citizen and noncitizen violators of the law must be subject to like punishment. Simply put, the law must take seriously all of the miseries of exploitation, and genuinely seek to remedy those ills.