

SPEAKING A NEW LANGUAGE: IMMIGRATION AND CIVIL RIGHTS IN A GLOBAL ECONOMY

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INTRODUCTION

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

This paper examines the interplay between immigration and civil rights laws and its effect on labor markets in two contexts. First, we will discuss the role of civil rights in the Immigration Reform and Control Act of 1986, which prohibited employers from hiring employees whom the State had not authorized to work. The Act created civil rights protections for work-authorized immigrants and U.S. citizens to prevent and remedy discrimination based on citizenship status and national origin. We will address how this law uses civil rights to balance the negative effect that immigration policies may have on the labor market.

The second focus is the Victims of Trafficking and Violence Protection Act of 2000. This newly minted legislation prohibits trafficking in persons, and is currently being implemented within the United States. The law responds to the growing international market in human trafficking controlled by multinational criminal organizations. The paper will examine how the legislation interweaves immigration policy and civil rights to create a tool to combat the globalization of the market for trafficking in humans.

¹ Several incentives exist for the State to push back against such pressure. One is a desire to protect the labor market for those who currently support the State. Another is the potential that the incoming workforce would change the current political balance in predictable and unpredictable ways. Yet another is the fear that employees from cultures, races, and backgrounds different from the incumbent majority of the United States population may change the makeup and culture of the body of the State and therefore have more influence over it.

I. IMMIGRATION AND CIVIL RIGHTS LAW AND POLICY: LINKING TWO REALMS

The connection between immigration law and policy and civil rights is not immediately apparent. Immigration policy in the United States has, at least in recent history, been the province of the U.S. government as the sovereign State. Immigration law is a means for the State on a physical level to control the flow of people across its borders – essentially, defining and maintaining its geographical identity. On another level, immigration law is the means by which the State defines its membership – its cultural or sociological identity.

Civil rights laws can also have a self-defining role for the State. Civil rights reflect the legal attributes that the State uses to identify the people who comprise its community. In the way that the State defines the civil rights of its membership, it makes a statement about how it differentiates those who are members of its communities from those who are not. Those imbued with the strongest rights are those with the strongest claim to membership. Those with the weakest rights have the weakest claim – or none at all.

Yet civil rights and immigration law collide in several significant ways. Perhaps the greatest point of tension results from the fact that immigration law, by its very nature, requires discrimination on the basis of citizenship status and national origin.² In the context of the labor market, laws that prohibit non-U.S. citizens from working without authorization from the State erect divisions based on citizenship status between those who have rights to work and those who do not. Based on an individual's citizenship status, the State may confer or deny employment authorization, physically remove employees from the workplace, place employees in detention, and deport them from the country.

The ways that civil rights and immigration laws are enforced reflects a significant difference between those laws. Immigration law is sufficiently central to the identity of the State that the federal government retains exclusive control over immigration law and policy. Federal law, through the use of traditional mechanisms of the State, such as federal investigations, search warrants for workplaces suspected of having undocumented workers, and detention and deportation of employees found to be working without authorization, is central. It is the State that has sole jurisdiction over the entry of individuals into the United States, who may lawfully remain, and for how long.

² Discrimination on the basis of citizenship status is distinct from most forms of prohibited discrimination such as race, sex, or national origin, which are immutable characteristics. It is difficult to define whether citizenship status is a mutable or immutable characteristic. On the one hand, the immutable fact of one's place of birth, inside or outside the U.S. border (as determined at that time), determines whether one is a U.S. citizen by birth. On the other, citizenship status in the U.S. is mutable in that the State can confer a status, up to and including U.S. citizenship, on any individual, depending on the individual's circumstances and the laws of the State in existence at the time.

Significantly, the State defines how individuals may obtain citizenship, becoming full members of the State.

In contrast to the State-centered enforcement of immigration law, the enforcement of civil rights law has depended heavily on private actors. U.S. laws that prohibit discrimination in employment on the basis of race, national origin, gender, religion, disability, and age encourage private enforcement of their prohibitions by allowing individuals to bring suits against their employers and providing for attorneys fees for employees who prevail. Underlying this emphasis on private action is a concern that the State will be less likely to exercise its power on behalf of those who, lacking a majority in a democratic society, have less influence on the actions of the State.³ Civil rights statutes have been described as encouraging the creation of »private attorneys general« – individuals who act in the place of the State in order to increase the level of compliance with antidiscrimination laws.⁴

Despite these differences, civil rights and immigration policy have in common that they are tools that the State uses to affect labor markets. Immigration law traditionally limits labor markets by restricting the ease with which they can expand across international borders. Within those borders, civil rights laws restrict the ability of employers to divide employees across lines of race, sex, national origin and other arbitrary categories. In other words, immigration laws limit labor markets geographically and by nationality. Civil rights laws expand labor markets by removing artificial restrictions on the labor pool. By meshing immigration and civil rights laws, the State can use the private action focus of civil rights to affect State-centered immigration policy as it relates to labor markets.

II. THE PROHIBITION AGAINST IMMIGRATION-RELATED DISCRIMINATION

A. The Immigration Reform and Control Act of 1986

The interplay between immigration law and civil rights is nowhere more clear than in the Immigration Reform and Control Act of 1986. The law has three basic components. First, it legalized the status of undocumented immigrants who had lived in the country continuously since before 1982. Second, it prohibited employers from knowingly hiring undocumented workers, and set forth legal sanctions against employers that did. Third, the law created a new civil right against discrimination in employ-

³ *Carolene Products Co. v. U.S.*, 323 U.S. 18, 21 n.4 (1944) (suggesting that prejudice against discrete and insular minorities distorts the political process, rendering such minorities politically powerless).

⁴ *E.g., Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989) (discussing Congress' intention that individuals injured by racial discrimination act as »private attorney[s] general« to vindicate a policy that Congress considered of the highest priority).

ment on the basis of citizenship status. It also expanded protection against national origin discrimination by subjecting a greater range of employers to coverage. It conferred the new protection against citizenship status discrimination on U.S. citizens and certain categories of work-authorized immigrants. It also created a government office – the Office of Special Counsel for Immigration Related Unfair Employment Practices – to investigate charges of discrimination and litigate meritorious claims on behalf of victims of discrimination.

The 1986 law broke with the previous identification of immigration law as primarily a State function. Through the amnesty, the State used its power to define citizenship status to incorporate into its membership those who had shown a commitment to long-term residence, who were *de facto* members of the community already. Through employer sanctions for hiring undocumented workers, the State effectively made employers parties to enforcement of the immigration laws controlling the labor market. Employers themselves became the primary method of screening the labor pool for employees not authorized by the State to work. In this way, the State expanded the scope of its enforcement powers to include employers.

Converting employers into enforcers of immigration law has consequences for the civil rights of employees. Requiring employers to discriminate between those who the State has authorized to work and those who it has not requires employers to make determinations about employment based on an employee's citizenship status. The potential for sanctions against employers heightened their incentives to discriminate against those they perceived not to have a citizenship status commensurate with work authorization. The work-authorized employees who are most likely to experience discrimination based on citizenship status are those whom employers are most likely to associate with undocumented workers. Employers are likely to associate undocumented workers with certain ethnicities or national origins. Thus, as a consequence of expanding immigration law enforcement into the private realm, there is an increased potential for discrimination based on ethnicity or national origin by employers. In 1990, the General Accounting Office, a government agency that oversees the effectiveness of the government's implementation of the laws, found that employer sanctions had increased the incidence of discrimination against immigrants and those perceived as immigrants.⁵

Prior to the passage of the Immigration Reform and Control Act, civil rights protections against citizenship status discrimination, in contrast to national origin discrimination, were essentially nonexistent. Employees who had work authorization had no federal protections against employers who discriminated against them because of their immigration status. As a result, civil rights laws did not directly reach discrimination that related to how citizenship status was defined by the State, or how that definition affected immigrant employees.

The antidiscrimination provision was meant to counter the potential for greater

⁵ General Accounting Office, Immigration Reform- Employer Sanctions and the Question of Discrimination 3 (March 1990).

discrimination created by the employer sanctions provision. The law created civil rights-centered prohibitions against discrimination on the basis of citizenship status. It established enforcement mechanisms for those prohibitions in both the public and private realms. A government agency, the Office of Special Counsel, was imbued with the power to investigate potential discrimination and represent the State in lawsuits brought on behalf of the victims of discrimination. The law also turned to private enforcement by creating a private right of action: a way for individual victims to remedy discrimination through legal action independent of the State. The provision reflects an acknowledgment that a shift in enforcement of immigration law to private actors must be balanced with an increase in civil rights protections for the labor pool.

True to the remedial purpose that is the hallmark of civil rights legislation, the antidiscrimination provision shoulders a heavy mandate to prevent discrimination against work-authorized immigrants and U.S. citizens nationwide. True to immigration policy, the law limited the categories of citizens and non-U.S. citizens who are protected by the antidiscrimination protections. Under the law, U.S. citizens, certain permanent residents, asylees, refugees, and certain formerly undocumented immigrants received protection from discrimination in employment. Those not protected include undocumented workers and those without indefinite permission to reside in the United States.⁶

The antidiscrimination provision can also be seen as a way for the State to reduce the influx of undocumented workers. When the State endows certain employees with antidiscrimination rights enforceable against employers, it increases the risk to employers of hiring those without rights. When the State parcels those rights out along the lines of citizenship status, employers have less incentive to hire people outside of the protected citizenship status. In a way, this incentive is a negative benefit. Employers who fail to hire the protected class face the risk of lawsuit, and significant monetary damages being awarded against them.

Under the 1986 antidiscrimination law, those protections are given to U.S. citizens and individuals with indefinite permission to reside in the U.S., including permanent residents,⁷ refugees, and asylees. Thus, antidiscrimination protections are given to those who the State has already sanctioned to enter the U.S. and to work within the U.S. labor market. Securing and enforcing the rights of the approved employees disadvantages persons without such rights. Generally, those without those rights are individuals who do not have the right to enter or work in the U.S.

⁶ One way to view the scope of the protection of the law is as another way that the State defines its community – as a statement about who should be included in the community and who excluded. Those who the State endows with civil rights are those who are in some sense its members: those who reside permanently in the United States and who thereby have a more permanent relationship with the State.

⁷ The statute exempts from protection permanent residents who do not apply for U.S. citizenship within six months of becoming eligible. For better or for worse, this exemption removes civil rights from those who do not take steps to become citizens, i.e., those who decline membership in the State.

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

B. Evaluating State Control of the Labor Market: One Step Forward, Two Steps Back

Does this meshing of immigration law and civil rights law work? The effectiveness of immigration law and enforcement is usually measured using only one factor: its success in keeping undocumented workers from entering the labor market. In the context of IRCA, this measure of success asks whether the law reduces the incentives for employers to hire undocumented workers to a level that is lower than the incentives to hire work-authorized individuals.⁸

Yet, this measure of the effectiveness of the State's protection of the labor market is dangerously incomplete. It addresses only whether individuals that the State considers undesirable are successfully excluded. It does not measure the costs of immigration enforcement strategies when they result in the exclusion of portions of the labor pool that the State considers desirable, i.e., individuals that the State has authorized to work. If immigration control policies that the State implements to protect the labor market result in excluding certain populations that are a legitimate part of that labor market, those immigration policies cannot be considered effective. Thus, a critical part of evaluating the influence of immigration law on the labor market is evaluating the effectiveness of the antidiscrimination provision of IRCA.

As immigration controls tighten in the U.S. in response to globalizing markets, the potential for resulting discrimination intensifies. With higher levels of immigration enforcement, the State's response to heightened levels of discrimination must expand

⁸ Some would say that the State fails in protecting the labor market for the benefit of the incumbent work-authorized labor pool. Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 *Law & Society Review* 1041, 1046-55, 1067, 1060 (1990). The article posits that the devil is in the details of the laws prohibiting employment of undocumented workers. It argues that the law gives the employer a shield behind which it can hire undocumented workers with impunity. The employer sanctions provision provides employers protection from fines when they complete a form certifying review of employment authorization documents. The antidiscrimination provision prohibits unreasonable scrutiny of those documents. The result is that employers can hire undocumented employees without violating the law against knowingly hiring them.

equally. Whether the antidiscrimination provision effectively reduces discrimination on the basis of citizenship status depends on the effectiveness of its enforcement.

Consistent with its origins as a meshing of civil rights and immigration law, the enforcement of the antidiscrimination law is based in both private and State action. Evaluating the effect of the law on discrimination requires examining both levels.

Private enforcement of the antidiscrimination provision is complicated by the nature of the immigrant population and the nature of the industries that depend on immigrant labor. Recent immigrants are more likely to experience discrimination than U.S. citizens or immigrants who have resided longer in the U.S. Recent immigrants often start at the bottom of the labor market, where wages are low and unskilled labor is needed. This is also the area where discrimination is least costly for the employer because unskilled employees tend to be more fungible. Rejecting an unskilled applicant because of concerns about that person's citizenship status does little harm to the employer when that employer can hire another unskilled applicant perceived as less risky. Employers are more likely to associate recent immigrants of Latino or Asian origin with undocumented workers based on their appearance, accent, or fluency in a language other than English.

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

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

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

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

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

The structure of the antidiscrimination provision reflects an awareness of the difficulties inherent in private enforcement in this area. It establishes mechanisms by which the State may intervene to combat discrimination. The approach embodied in the Act is likely unique among nations because of its particularized focus on protecting the rights of immigrants, who have no voting rights and little political influence. Primarily, by establishing the Office of Special Counsel, the statute set up a government body, representing the State, specifically charged with the enforcement of the provision.

The creation of this Office addresses several of the problems presented by private enforcement. First, as an agency mandated to address discrimination, the Office does not face the hurdle of lack of information about the law that individual victims of discrimination do. Rather, victims of discrimination benefit from the information and expertise the Office has gathered in this area when the Office brings enforcement actions on their behalf.

In addition, to address the barrier created by lack of information, the statute mandates that the Office perform outreach and education about the rights of employees and the responsibilities of employers under the statute. This outreach function reduces information costs for victims of discrimination, but also has a prophylactic effect by educating employers in ways that will reduce discriminatory conduct.

Perhaps the most powerful aspect of the statute is its provision for independent investigations by the agency. This independent investigatory power directly addresses the concern that the level of private enforcement may be too low. By allowing the Office to bring independent investigations, divorced from any individual initiative, the statute increases the enforcement capabilities on the State level to the greatest extent that the agency's resources allow.

The result is that, compared with the focus on private enforcement of many civil rights statutes, this statute emphasizes enforcement on the State level. This shift in the

burden of enforcement of the antidiscrimination laws towards State action parallels the shift in enforcement of the immigration laws towards private action.

The heavy reliance on State enforcement of civil rights is an appropriate and necessary response to the impracticality of private enforcement. However, the current level of State enforcement does not go far enough to remedy the effects of the changes in the immigration laws since 1986 because of the limitations of the agency charged with enforcement. As globalization has led to increasingly heightened controls on immigration, the need for more comprehensive efforts to combat discrimination has increased, beyond the current capacity of the State to address.

In sum, in evaluating the strategies that the State has established to enforce the immigration laws in a way that protects the labor market, it is critical to determine whether the antidiscrimination provision has been effective in ensuring that those the State has allowed to work are not excluded. This calculus must take into consideration that by setting up employers as enforcers of immigration law, the State increases the potential for discrimination against those most likely to be taken for undocumented workers: recent work-authorized immigrants of color. Without effective enforcement of the antidiscrimination laws, the burden of immigration enforcement falls on that population. And, absent adequate enforcement, the population that receives the greatest protection within the labor market is the population least likely to need it – employees whom employers are most likely to perceive as U.S. citizens because of their skin color, accent, or language.

III. DE-GLOBALIZING THE MARKET FOR HUMANS: IMMIGRATION POLICY AS A STATE-SANCTIONED TOOL AGAINST HUMAN TRAFFICKING

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

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

A new law, passed in 2000, employs an approach similar to IRCA in that it combines immigration and civil rights law to address a problem that the State had been unable to effectively address up to that point. This new law uses immigration and civil rights law as a tool to do two things: (1) differentiate victims from traffickers and (2) remove the traffickers' bargaining power over victims by conferring legal status on victims and offering the legal workplace as an alternative.

A. Buying and Selling Human Beings

1. *The problem*

Human beings are sold into slavery every day throughout the world. Men, women and children are trafficked for their labor primarily for agricultural work, sweatshops, domestic servitude, and the sex industry. The number of individuals trafficked each year is staggering. The United Nations estimates that 4 million women are trafficked throughout the world.⁹ The International Organization for Migration estimates that five hundred thousand women are trafficked into Western Europe.¹⁰ The United States Central Intelligence Agency (»CIA«) estimates that approximately 50,000 women and children are trafficked to the United States,¹¹ but other estimates double that figure.¹² The victims who are trafficked into the United States are increasingly coming from the new independent countries within the old Soviet Union, and Central and Eastern Europe, in addition to Southeast Asia and Latin America.¹³ Due to the very nature of this global industry, it is impossible to know the full extent of the illegal market for human beings.

Nonetheless, there is little disagreement concerning the growth potential of the trafficking industry given the weak economies and internal strife of the source countries, the enormous profit potential for the traffickers, economic globalization, and the traditionally low risk of prosecution.¹⁴ Trafficking in humans is the fastest growing and third largest source of profits for organized criminal enterprises behind only drugs and firearms.¹⁵ Profits from this multi-billion dollar industry,¹⁶ whose commodities are people, are not shared with its victims, but rather pad the pockets of criminal enterprises throughout the world.¹⁷ The trafficking industry ranges from complex criminal enterprises to smaller mom and pop smuggling rings.¹⁸ Typically, the scheme requires many actors covering different stages of the process, including recruitment or abduc-

⁹ Integration of the Human Rights of Women and the Gender Perspective, United Nations Economic and Social Council, at 24 (February 2000) (UN).

¹⁰ UN at 24.

¹¹ Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime*, Central Intelligence Agency, at iii (November 1999) (Richard).

¹² Department of State Fact Sheet: *Trafficking in Women and Children* (<http://secretary.state.gov/www/pics/trafficking/def.htm>) (DOS Fact Sheet).

¹³ Richard at iii; Department of State Fact Sheet: *Source Countries* (<http://secretary.state.gov/www/pics/trafficking/source.htm>).

¹⁴ Department of State Fact Sheet: *Trafficking Industry's Rapid Expansion, Contributing Factors*; Donna M. Hughes, *The »Natasha« Trade – Transnational Sex Trafficking* at 9, *National Institute of Justice Journal* (January 2001)(Hughes); UN at 6.

¹⁵ Andreas Schloenhardt, *Organized Crime & the Business of Migrant Trafficking*, *Australian Institute of Criminology* at 3.7.2 (November 1999) (Schloenhardt); DOS Fact Sheet.

¹⁶ Hughes at 9, 13; Schloenhardt at 3.7.2.

¹⁷ Hughes at 9, 13.

¹⁸ Richard at 13, 35.

tion, transportation, harboring, transferring, sale and receipt.¹⁹ In contrast to the unlimited profits realized by traffickers, the cost of the trafficking industry is staggering: while local communities receive no benefits of the traditional marketplace,²⁰ the costs to the victim, the victim's family, and the community are immeasurable, and long term.

Thus, the trafficking industry is a labor market, albeit an illicit one, that operates on a global scale. Like a labor market in any other context, it involves a demand side, i.e., the trafficker or those the trafficker provides with the trafficked labor, and a supply side, i.e., the victim. Yet trafficking constitutes a labor market taken to an extreme, in which the traffickers obtain such complete control over their victims as to convert them into commodities. The trafficker effectively takes the place of the victim as the supplier of the victim's labor, usurping the profits of the victim's labor and co-opting the victim's ability to choose the labor market in which he or she will compete. By means of unlawful coercion, the trafficker wields sufficient bargaining power over the victim to restrain him or her from exiting the illicit labor market that the trafficker supplies.

Historically, the immigration and criminal laws and policies of States have fostered the labor market in the trafficking industry. Traffickers use the immigration policies of States to obtain control over their victims by placing them in a vulnerable immigration status. In many countries, victims are prosecuted for undocumented entry and presence in the country, even though their entrance was obtained by force, deception or coercion. In Canada and Italy, for example, illegal border crossings are punishable by up to two years imprisonment.²¹ In other countries (including Poland), victims are prosecuted upon their return home because they did not receive prior permission to leave the country.²²

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

Aside from the consequences victims suffer from immigration and criminal law prosecution, including deportation, local prosecution for sex offenses, and prosecution in their home country for illegal emigration, victims of trafficking usually have no

¹⁹ Testimony of Theresa Loar, Director, Office of the Senior Coordinator for International Women's Issues Before Representative Christopher Smith, House Subcommittee on International Operations and Human Rights (September 1999); Testimony of Regan Ralph, Executive Director Women's Rights Division, Human Rights Watch, before the Subcommittee on Near Eastern and South Asian Affairs, Senate Committee on Foreign Relations (February 2000).

²⁰ Hughes at 13.

²¹ UN at 22

²² UN at 22.

effective legal recourse against their abductors either in their home country or in the country to which they were trafficked.

Traffickers are aided in their work by public opinion within the State. In many countries, undocumented individuals are viewed as criminals, and are convenient scapegoats for the community's ills, including unemployment, budget deficits, crime and declining school systems. Racism and xenophobia fuel the hostility and scorn.²³ Sex industry workers are stigmatized in their home country, by their families and communities, and in the destination country – keeping them under the power of traffickers because they are labeled prostitutes.

Traffickers make full use of local laws to threaten and coerce their victims. They do this by telling their victims that escape will lead only to prison and deportation.²⁴ In fact, victims may serve jail sentences for sex crimes and undocumented entry, be deported, and then serve additional jail sentences in their home country.²⁵ In at least one country (Israel), victims are often jailed for sex crimes, and then must pay the costs of their own deportation.²⁶ Victims may also be afraid of local police because their traffickers were assisted or ignored by corrupt police in their home country. Many victims of trafficking have never traveled outside their home community, let alone their home country. Language and cultural differences discourage them from seeking assistance.²⁷ Even if victims do not suffer prosecution, their work in the sex industry may make them pariahs with their families and in their home communities.²⁸

Traffickers also make use of laws in countries that issue non-immigrants visas to work for a specific employer,²⁹ in effect limiting access to the labor market to a single employer. For example, foreign diplomats and employees of international organizations (i.e., the World Bank) in the United States, may obtain special visas to bring domestic workers into the country. These workers are ripe for exploitation, because many are from their employer's home country, do not speak English, are unaware of the customs, laws and rights in the United States, and are permitted to work only for their sponsor. All too often, newspapers report that domestic workers are held in slave-like conditions, with little or no pay for extended work hours, minimal food, and living conditions not fit for family pets.

2. *The use of trafficked persons in the United States*

Trafficked workers are found in many industries. In the United States, the reach of traffickers is extensive. Women and girls are trafficked for the sex industry, includ-

²³ UN at 16.

²⁴ Richard at 5.

²⁵ UN at 28; Ralph Testimony.

²⁶ UN at 28.

²⁷ Ralph Testimony.

²⁸ Donna M. Hughes, *The »Natasha« Trade – The Transnational Shadow Market of Trafficking in Women*, *Journal of International Affairs*, 53(2)(Spring 2000).

²⁹ Richard at 26.

ing work as prostitutes in brothels and massage parlors, and exotic dancers. Men, women and children are forced to work in agriculture and garment industry sweatshops. The breadth of work is without limitation; and includes domestic workers, restaurant workers, asbestos removal, and individuals required to beg for handouts on the streets and other public places.³⁰

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

Before October 28, 2000, U.S. law and policy failed to adequately protect victims of trafficking. The law lumped together the victims and the traffickers. Criminal law treated victims like criminals. Immigration law treated victims as undocumented immigrants. The deficiencies of these laws, in combination with the traffickers use of them, kept victims from being able to leave the illegal labor market.

There was no comprehensive law in the U.S. against trafficking in human beings.³¹ Existing laws did not adequately provide for modern day slavery, either in coverage or in punishment.³² Similarly, services for victims were largely non-existent.³³ There was little incentive for victims or the public to come forward, and the traffickers took advantage of the failure of law enforcement to treat victims as victims rather than criminals and undocumented immigrants. Criminals served short prison sentences, victims were prosecuted for sex crimes and ultimately deported.³⁴ In criminalizing the conduct of the victims, sanctioning more lightly the conduct of traffickers and others who benefitted from victim's labor, and excluding victims under the immigration laws, the State placed the costs of trafficking squarely on the victims.

1. Criminal Law Did Not Cover All Forms of Slavery

Prosecutors in the United States faced an uphill struggle to prosecute traffickers by using a patchwork of criminal laws, including the Mann Act,³⁵ laws against involuntary servitude and slavery,³⁶ kidnapping,³⁷ extortion,³⁸ conspiracy,³⁹ the Racketeer In-

³⁰ DOS Fact Sheet on Cases and Law (secretary.state.gov/www/pics/trafficking/def.htm).

³¹ Richard at 35.

³² Richard, at 33, 34; Testimony of William R. Yeomans, chief of staff, Civil Rights Division, U.S. Department of Justice, before the before the Subcommittee on Near Eastern and South Asian Affairs, Senate Committee on Foreign Relations (April 2000) (<http://secretary.state.gov/www/picw/trafficking/tyeo.htm>).

³³ Richard at 40.

³⁴ Yeomans Testimony.

³⁵ 18 U.S.C. § 2421.

³⁶ 18 U.S.C. §§ 1581, 1584.

³⁷ 18 U.S.C. § 1201(a)(1).

³⁸ 18 U.S.C. § 894.

³⁹ 18 U.S.C. §§ 241, 371.

fluenced and Corrupt Organization Act,⁴⁰ money laundering,⁴¹ labor laws governing wages, child labor, and agricultural workers,⁴² and immigration laws governing recruiting, smuggling, and transporting aliens and harboring for prostitution.⁴³ These laws do not focus specifically upon the act of trafficking, impose difficult if not impossible elements of proof upon prosecutors, fail to address common trafficking scenarios, fail to provide for the needs of victims, and provide lenient sentences for traffickers, even for brutal conduct.⁴⁴

Perhaps the major defect of criminal law in the United States was the failure of the law against involuntary servitude (slavery) to cover situations where a victim was coerced to act through psychological coercion. Title 18, Section 1584 of the United States Code, provides that an individual is guilty of involuntary servitude if he or she requires another individual to work against their will. Title 18, Section 1581 of the United States Code, provides that an individual is guilty of peonage if he or she requires another individual to work against their will, and such act is tied to the discharge of a debt. The United States Supreme Court in *United States v. Kozminski*⁴⁵ interpreted the involuntary servitude statutes conservatively, and required prosecutors to prove that servitude was brought about through the use or threatened use of physical or legal coercion, and excluded other conduct that had the same purpose and effect.⁴⁶ In effect, prosecutors had to establish coercion through force or threat of force.

Prosecutors could not reach employers who used more »subtle,« albeit deliberately coercive, forms of coercion to keep control of their victim. For example, the United States Department of Justice investigated a case involving a domestic helper. The woman's passport was taken upon arrival, she was forced to work 16 hours per day, 7 days a week, and was given only small rations of food. When she complained, her employer threatened to have her deported, and told her that if she left the house they would call the police and have her put in jail. Under such circumstances, because the employer used psychological and economic coercion to keep the victim trapped, prosecution for involuntary servitude was unlikely.⁴⁷ In short, the law did not cover situations »where the use of fraud, deceit, or misrepresentation toward any person exists in an effort to wrongfully obtain or maintain the labor or services of that person, where the person is a minor, mentally disabled, or otherwise susceptible to coercion.«⁴⁸

The laws in the United States also permitted those who knowingly benefitted from forced labor to avoid prosecution. For example, land owners who contracted out

⁴⁰ 18 U.S.C. § 1961.

⁴¹ 18 U.S.C. §§ 1956, 1957.

⁴² 29 U.S.C. §§ 201, 1801.

⁴³ 8 U.S.C. §§ 1324, 1328.

⁴⁴ Yeomans Testimony.

⁴⁵ 487 U.S. 931 (1988).

⁴⁶ Victims of Trafficking and Violence Protection Act of 2000, Section 102(b)(13) (Findings).

⁴⁷ Yeomans Testimony; Ralph Testimony.

⁴⁸ Yeomans Testimony.

for labor to farm their fields, but nonetheless knew how such labor was obtained, were not open to prosecution. Thus, although the contractor might be subject to arrest and prosecution, the economic incentive continued to exist for the landowner to use exploitative labor.⁴⁹ The laws of the United States did not address the common scenario where traffickers took victims' papers (identification documents, passport, and immigration papers) as a means of control and coercion.⁵⁰

Finally, although labor laws prohibit certain criminal acts related to wages and working conditions, these laws provide for minimum prison sentences and fines, and are rarely prosecuted except in the most egregious cases. For example, the Fair Labor Standards Act⁵¹ provides for a fine of not more than \$10,000 and imprisonment for not more than six months, but only for second offenders.⁵²

2. Weak Penalties for Traffickers

An additional significant flaw with the pre-2000 criminal laws involved inadequate penalties for traffickers. The penalties imposed simply did not meet the severity of the crime, and did little to deter traffickers. The statutory maximum for sale of a human being into involuntary servitude was only ten years per count.⁵³ In contrast, certain crimes related to controlled substances are punishable with life in prison.⁵⁴ In short, the punishment for trafficking in women was less than the punishment for trafficking in drugs.⁵⁵ A number of examples of real cases prosecuted by the United States and discussed in the Richard CIA report (at 33-34) show that the penalties are much less severe than would be expected of the crime committed by the traffickers.

In Los Angeles, traffickers kidnapped a woman, raped her, forced her into prostitution, posted guards to control her movements, and burned her with cigarettes. The lead defendant received a prison sentence of four years and the other defendants received prison sentences of two to three years. In another case where women were kept physically confined for years with metal bars on the windows, guards, and an electronic monitoring system and were forced to submit to sex with as many as 400 customers to repay their smuggling debt, the traffickers received prison sentences of between four and nine years.

In New York City, 70 deaf individuals from Mexico were forced to peddle trinkets. They were frequently beaten, and in some cases tortured. The ringleader received a

⁴⁹ Yeomans Testimony; Richard at 34.

⁵⁰ Yeomans Testimony.

⁵¹ 29 U.S.C. § 216(a).

⁵² Richard at 34.

⁵³ Richard at 33; 18 U.S.C. § 241. However, the collection of extensions of credit by extortionate means can lead to imprisonment not to exceed twenty years, 18 U.S.C. § 894, and conspiracy against rights secured by the United States Constitution can result in life in prison, or the death penalty, if death results to the victim. 18 U.S.C. § 241.

⁵⁴ 21 U.S.C. § 848(a).

⁵⁵ Richard at 33.

prison sentence of 14 years and the other traffickers received prison sentences from 1 to 8 years.

In the state of Maryland, Russian and Ukrainian women had answered ads to be au pairs, sales clerks, and waitresses, but were forced to provide sexual services and live in a massage parlor. The owner of the massage parlor was fined. He entered a plea bargain and charges were dropped with the restriction that he would not operate a business again in that particular county. The women, who had not been paid any salary and were charged for their housing, were deported or left the United States voluntarily.

In Los Angeles, over 70 laborers were held against their will, systematically abused, and made to work 20-hour shifts in a sweatshop. The seven defendants received prison sentences ranging from four to seven years, with one defendant receiving a prison sentence of seven months.

In many cases, prosecutors accept plea bargains from defendants based upon less serious offenses, such as immigration violations concerning fraud or the hiring of illegal immigrants. They do this for many reasons, including the strength of the case, resources available to prosecute larger cases, workload, and the burden a trial places upon the victims, who must testify against their abductors in open court.⁵⁶

3. *The Fate of Victims*

The fate of trafficking victims, once within the grasp of law enforcement, also encouraged the traffickers, and discouraged attempts at escape by their victims. All too often, victims were arrested on charges involving sex crimes, became subject to adverse immigration consequences for their undocumented stay in the country, and were ultimately deported back to their country of origin. Either law enforcement did not recognize that the victim was indeed a victim and not a criminal, or law enforcement was unable — through lack of knowledge, time, or ability — to secure valid immigration status for the victims as an alternative to deportation. In one recent case reported in the newspapers, the INS conducted a criminal investigation of Nebraska Beef, a meat packing plant in Nebraska. The INS charged human resource personnel with knowingly smuggling undocumented workers into the plant. Although approximately 200 undocumented employees were deported to Mexico within days, the alleged criminals were back to work the next day after posting bail.

Current law did not provide a viable alternative for law enforcement and trafficking victims. First, the bureaucracy of obtaining the special visa for even a single crime victim (known as the S Visa) was time consuming and unwieldy. Prosecutors simply did not have the time or inclination to complete the many forms and follow the many procedures required of them, both before and after issuance of the visa. In the case involving many victims, the S visa provided the ultimate bureaucratic nightmare. The S visa also failed to provide any relief for victims of civil violations; victims were eligible for the S visa only if they possessed critical and reliable information that was essential

⁵⁶ Richard at 34.

to a criminal case. Even if the S visa was seen as a valuable tool by law enforcement, the Immigration and Naturalization Services was limited by law to issuing only 200 per year, with an additional 50 available for immigration with significant information tied to terrorist actions.⁵⁷ The value of the S visa can be summed up in one short fact: the INS has never issued the maximum number of visas permitted in any year.

Choices between deportation and issuance of an S visa were few and far between. Victims could obtain deferred action, but this status did not guarantee employment authorization. Further, the victim would accrue »bad time,« which delayed when they could return to the United States after deportation, if at all. The government could also withhold deportation for a set period of time, but, again, bad time would accrue. Finally, the government could parole the individual into the country, but this option proved difficult for prosecutors, because the victim was required to leave and then re-enter the country.

Even if the government succeeded at obtaining lawful status for the victim to assist with the prosecution, the victim was frequently unable to access needed benefits and services because recent federal legislation overhauling the welfare system severely cut back benefits afforded to immigrants.⁵⁸ Other than certain basic services provided by shelters and clinics, unauthorized workers and many lawful immigrants (largely those who do not have lawful permanent resident, asylee, or refugee status) were unable to access basic services. This meant that prosecutors had to arrange for food, shelter and protection, at the prosecuting agency's expense.

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

⁵⁷ Richard at 41-42.

⁵⁸ On August 22, 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Personal Responsibility Act), Pub. L. 104-193, became law. Section 401(a) of the Personal Responsibility Act provides that, subject to limited exceptions, only »qualified aliens« may receive Federal public benefits, including retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, and unemployment benefits, among others. The term »qualified alien« means following six groups of aliens: (1) aliens who are lawfully admitted for permanent residence under the Immigration and Nationality Act (Act); (2) aliens who are granted asylum under section 208 of the Act; (3) Refugees admitted into the United States under section 207 of the Act; (4) aliens who are paroled into the United States under section 212(d)(5) of the Act for a period of at least 1 year; (5) aliens whose deportation is being withheld under section 243(h) of the Act; and (6) aliens who are granted conditional entry.

C. A Renewed Effort to Combat Trafficking in Human Beings

On October 27, 2000, President Clinton signed into law the Victims of Trafficking and Violence Protection Act of 2000,⁵⁹ which contains two significant subparts. The first is the Trafficking Victims Protection Act of 2000 and the second is the Violence Against Women Act of 2000. This law is significant because it addresses the issue of global trafficking by legitimizing and legalizing the previously unlawful and undocumented status of trafficked victims, in addition to creating new criminal laws to combat traffickers and increasing criminal penalties against traffickers. The law liberalizes the immigration policies of the State to encourage victims to come forward and to weaken the power of traffickers over victims, and strengthens the criminal laws to counter the profit potential of trafficking. By de-criminalizing the victims and liberalizing the immigration laws to redefine victims as lawfully present in the U.S., the law endows victims with the civil rights that the State parcels out to all lawful immigrants. The law's provision of employment authorization, access to benefits and services, and freer access to information opens the door to the legal labor market. Effectively, the law is directed at deconstructing the network of control that the traffickers held over their victims while at the same time providing the full range of alternatives to the coercive labor market for trafficked victims.

1. Congressional Findings

In support of the new law, the United States Congress made explicit findings regarding the trafficking of human beings in the United States.⁶⁰ These findings covered both the limitations of existing criminal law, and the failure to provide for the victims of trafficking. Concerning the limitations in criminal law, the Congress found that the existing laws and enforcement were inadequate to deter trafficking and to bring traffickers to justice,⁶¹ including weak penalties that were not proportionate to the crime⁶².

More significantly, however, the Congress found that the victims of trafficking should not be punished solely because of their unauthorized status or unlawful acts committed as a result of being trafficked. The Congress also recognized that victims hesitate to report crimes or to assist in investigations and prosecutions. Specifically, the Congress found that:

Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.⁶³

⁵⁹ 114 STAT. 1464, Public Law 106-386, 106th Congress.

⁶⁰ Section 102 of the Trafficking Victims Protection Act of 2000.

⁶¹ Finding 14.

⁶² Finding 16.

⁶³ Finding 19.

Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.⁶⁴

In other findings supporting more humane treatment of victims of trafficking, the Congress found that victims were punished more harshly than traffickers because of the victims' unlawful status within the country.⁶⁵ The Congress found that in addition to inappropriate punishment, victims also failed to obtain needed services to meet their needs.⁶⁶ Finally, the Congress found that victims must be able to report crimes, and participate in the investigation and prosecution of the bad actors.⁶⁷

These findings are significant because they recognize that victims have more heavily borne the costs of trafficking. The findings provide justification for legalizing the status of victims to both counter the arsenal of traffickers and to support increased prosecution. The Congress expressly recognized the global nature of trafficking when it provided protection to victims of trafficking both on a national and an international scale.⁶⁸

2. Victims of Trafficking and Violence Protection Act of 2000

The Victims of Trafficking and Violence Protection Act of 2000 has a number of features designed to encourage victims to come forward. The discussion below will focus on the definition of »victim,« the new legal protection afforded victims, and finally, the services and benefits victims are entitled to under the new law.

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

The Trafficking Victims Protection Act of 2000 provides special protections to »victims of a severe form of trafficking.« A »victim of a severe form of trafficking« is defined as an individual who has been subjected to:

(1) »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 (2) »recruitment, harboring, transportation, provision or obtaining for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery,« and

(3) is less than eighteen years of age, or (4) is willing to assist in every reasonable way in the investigation and prosecution of traffickers, and is needed by the Government to effectuate prosecution of traffickers or has applied for a T (or victim's visa).

⁶⁴ Finding 20.

⁶⁵ Finding 17.

⁶⁶ Finding 18.

⁶⁷ Section 1513 of the Violence Against Women Act of 2000, Finding 1B.

⁶⁸ Finding 24 (Trafficking Victims Protection Act of 2000).

Although the language of the law is somewhat confusing, an abbreviated definition of a victim of a severe form of trafficking is an individual who has been induced to commit a commercial sex act, or forced to work against his or her will, and is willing to assist the government with the prosecution of the traffickers.

b. Positive Immigration Consequences

Victims of a severe form of trafficking are now eligible for a greater range of lawful immigration status. Most significantly, victims are eligible for two new non-immigrant visa classifications, the T visa under the Trafficking Victims Protection Act of 2000 and the U visa under the Violence Against Women Act of 2000.

T visas are available to victims of a severe form of trafficking if they satisfy the following conditions: (1) physical presence in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands on account of trafficking, (2) compliance with any reasonable request for assistance by prosecutors, and (3) would suffer extreme hardship involving unusual and severe harm upon removal.⁶⁹ The law also provides that the spouse, children and parents of victims who are less than twenty one years of age are eligible for the T Visa, as well as the spouse and children of victims who are twenty one years of age or older, if the government determines it necessary to avoid extreme hardship.

The Violence Against Women Act of 2000 also provides for an additional non-immigrant visa category, the U visa. The purpose of the U visa is to strengthen the ability of law enforcement agencies to combat domestic violence and sex crimes, including trafficking, and to »encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.«⁷⁰ Similarly, the U visa is intended to facilitate the reporting of crime to law enforcement by undocumented aliens and to provide law enforcement with a means to legalize the status of cooperating victims.

U visas are available to aliens who suffer substantial physical or mental abuse as a result of having been a victim of domestic violence or sex crimes, possess information concerning such criminal activity, and will be helpful to a Federal, State, or local law enforcement official. The U visa is also available to aliens if a law enforcement official certifies that an investigation or prosecution will be harmed without the assistance of the alien. U visas are also available to certain relatives of victims, if necessary to effectuate investigation or prosecution.

Victims (and their families) who obtain T and U visas may work lawfully in the United States and will receive employment authorization from the Immigration and Naturalization Service. The Government will also provide T and U visa holders with referrals to non-governmental organizations that will advise the victim of his or her options while in the United States and appropriate resources available to the victim.

⁶⁹ Victims who are less than 15 years of age are not required to comply with the requests of law enforcement agencies.

⁷⁰ Section 1513 of the Violence Against Women Act of 2000.

T visa holders (and their families) may adjust to lawful permanent resident status after three years if they have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, or would suffer extreme hardship involving unusual and severe harm upon removal. The U visa permits adjustment of status to lawful permanent resident if justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

There is a limit of 5,000 T visas and 10,000 U visas available each year to victims, not including their relatives. This number may or may not be adequate; but will be reviewed by the Congress in the event that it is not sufficient to protect victims.

In addition to the T and U visas, law enforcement officials may permit a victim's continued presence in the United States if necessary to effectuate prosecution. 107c. These victims will receive temporary legal status, and may receive employment authorization to work in the United States. Although the continued presence here is temporary, many such victims will be eligible to apply for a T or U visa.

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

The Trafficking Victims Protection Act of 2000 provides that the United States government will treat victims of a severe form of trafficking as victims of crime and not as criminals or undocumented aliens. Therefore, the government will expend its resources to ensure that victims are provided needed benefits and services, rather than focusing its efforts on prosecuting and deporting victims for violations of criminal or immigration law.

Victims of a severe form of trafficking are now eligible for the same federal, state and local benefits and services as lawful refugees, even though a comprehensive welfare reform law passed in 1996 bars undocumented and many legal aliens from receiving such benefits. Victims are eligible for medical care, food stamps, housing assistance, job training programs, educational assistance, legal assistance, and other public assistance.

Like IRCA, the new law recognizes the barrier that lack of information can erect for immigrants as a result of language and cultural barriers and unfamiliarity with the laws and processes of the U.S. government. It expressly provides that victims of a severe form of trafficking are entitled to access to information about their rights and translation services. This provision is critical because trafficking victims typically know little about the laws, rights, and customs in the United States. It will help ensure that victims make educated decisions on their own about their own future, and consider benefits and services available in the United States when deciding whether to stay permanently in the United States or travel back to their home country.

d. New Criminal Provisions

The Trafficking Victims Protection Act of 2000 provides new weapons for prosecutors against traffickers. These weapons include new criminal provisions, new penalties, and restitution for victims. Each plays a part in shifting the costs of trafficking from the victim to the trafficker.

The law »creates new felony criminal offenses to combat trafficking with respect to slavery or peonage; sex trafficking in children; and unlawful confiscation [or destruction] of the victim's passport or other documents in furtherance of the trafficking scheme.«⁷¹ Further, the law creates a new »forced labor« felony criminal offense that allows for prosecution when »sophisticated forms of nonphysical coercion« are used to exploit victims.⁷² These forms of coercion include psychological coercion, trickery, and the seizure of documents,⁷³ and effectively overrule the Supreme Court's decision in *United States v. Kozminski*.

The new criminal penalties increase the earlier penalties of up to ten years in prison to a maximum of twenty years for involuntary servitude, forced labor, peonage and slavery.⁷⁴ Traffickers may be sentenced to life in prison if death results from a violation, or if the violation includes kidnapping, aggravated sexual abuse, or an attempt to kidnap, an attempt to commit aggravated sexual abuse or an attempt to kill.⁷⁵ Upon conviction, traffickers are required to pay restitution to the victim of the »full amount of the victim's losses,«⁷⁶ and are subject to mandatory forfeiture of their assets used in or gained from trafficking activities.⁷⁷

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

Victims of traffickers now have more power. While previously, victims were frequently prosecuted for criminal law violations, including prostitution, and then deported, victims now have a viable future in the United States. Victims are entitled to legal immigration status and the rights to work, with the potential for lawful permanent resident status. Victims are also entitled to benefits and services covering the complete spectrum of needs, including medical care, job training, and food, housing and legal assistance.

The law achieves this, first, by invoking its power to draw lines based on citizenship status in a way that includes victims within its protection. Second, it enhances those protections by conferring additional civil rights on victims and simultaneously lowering barriers to access to those rights. The intersection of immigration and civil rights policy in this new law is the vehicle by which the State restricts the illegal market in trafficking by providing its victims with viable economic alternatives. Victims who obtain legal status and work authorization through the T or U visa, or who are other-

⁷¹ Weekly Compilation of Presidential Documents, Vol. 36 (2000).

⁷² DOJ Fact Sheet on Worker Exploitation (Press Release, March 27, 2001). The law provides that individuals may not provide or obtain the labor or services of a person »by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.« 18 U.S.C. § 1589.

⁷³ DOJ Fact Sheet on Worker Exploitation.

⁷⁴ 18 U.S.C. § 1590.

⁷⁵ See, for example, 18 U.S.C. § 1590.

⁷⁶ 18 U.S.C. § 1593.

⁷⁷ 18 U.S.C. § 1594.

wise entitled to temporary status within the United States to assist with the prosecution of traffickers, will receive the full protection of the laws governing employment and labor rights, as well as other civil rights statutes' protection governing non-discrimination in housing and government services. These individuals will be entitled to work for full wages, to work in lawful working conditions, and to enjoy the benefits of legal immigrants without suffering unlawful discrimination. They will have legal standing to sue to protect their rights, and to obtain remedies for violations.

Victims now also have access to an alternative labor market – the legal workplace. Victims now have the chance to choose their employer; their options for legal employment far outweigh the limited choices of undocumented workers.

In turn, traffickers now have less power. Their actions are more roundly covered by criminal law, their prison sentences will be longer, and their profits and property will be forfeited. Perhaps most important, the threats of traffickers that escape will bring only more punishment at the hands of the Immigration and Naturalization Service and local police may become less effective at controlling victims. Of course, success in this area is dependent upon victims knowing about their new rights and having confidence in and comfort with the appropriate law enforcement agencies who will protect these rights.

CONCLUSION

The Immigration Reform and Control Act of 1986 and the Victims of Trafficking and Violence Protection Act of 2000 illustrate the complexity of the relationship between civil rights and immigration law, and the consequent effect on the labor market. When used judiciously, as with trafficking, it can be an effective tool to limit the negative effects of the labor market. However, when immigration law and civil rights are not carefully balanced, unexamined use of immigration law to influence labor markets carries a high risk of increasing discrimination in populations that the State is bound to protect.

POVZETEK

GOVORITI NOV JEZIK: IMIGRACIJE IN CIVILNE PRAVICE V GLOBALNI EKONOMIJI

Bruce Friedman in Juliet Stumpf

Migracije delovnih tokov preko državnih meja soočajo nacije s konfliktnimi razmerji vprašanj o kulturnem in ekonomskem statusu prebivalcev ob vse večji potrebi po delu. V ZDA je ta odgovor ponudil zakon o imigracijah - osnovni instrument vlade za kontrolo

meje svoje države. V obrambi pred nedokumentiranimi priseljenci je vlada ZDA sprejela vrsto zakonov in uveljavila nove strategije, da bi nadzorovala učinke priseljencev na domači trg delovne sile. Vendar, te strategije lahko povzročajo škodljive posledice na trgu dela, ki naj bi ga ščitile, če ne upoštevajo civilno pravnih pravic posameznikov znotraj istega trga delovne sile. Te strategije lahko prizadenejo tudi posameznika izven trga delovne sile na nepredvidljiv in negativen način. Tekst torej analizira medsebojne vplive imigracije in uzakonjenih civilnih pravic ljudi ter učinke tega odnosa na trgu dela, v dveh smereh. Prvo, odpiramo vprašanja vloge civilnih pravic posameznikov v reformi imigracijskega zakona (Act of 1986), ki je delodajalcem prepovedal zaposlovanje ljudi, ki jim država ne prizna pravice zaposlovanja. Druga pozornost je usmerjena na analizo položaja žrtev nedokumentiranega »transporta ljudi« ter Zakona Violence Protection Act of 2000 (Zakon o zaščiti ljudi pred nasiljem).

Juliet P. Stumpf dela za sodnika Richarda A. Paez-a na prizivnem sodišču ZDA v Devetem okrožju, Kalifornija, pred tem pa je bila advokatinja na Pravosodnem ministrstvu ZDA. Področje njenega dela je usmerjeno na različne vidike migrantskih problemov in legalne prakse. J. Stumpf je diplomirala na Georgetown University Law Center v Washingtonu D. C. in Oberlin College v Ohio.

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