CIVIL RIGHTS FOR VICTIMS OF HUMAN TRAFFICKING

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I. INTRODUCTION

"Anti-trafficking activists need to hook up with immigration-rights organizing. And with labor organizing, too." 1

The Trafficking Victims Protection Act of 2000 2 (TVPA)—the main anti-trafficking statute in the United States—links labor policy, civil rights, and immigration policy in an effort to combat the problem of human trafficking. 3 The law seeks to address a wide variety of situations involving forced labor and sexual exploitation, including debt bondage, involuntary servitude, forced child labor, sex work, and the exploitation of children for sex. 4 The TVPA takes a three-pronged approach to the problem of human trafficking by seeking to set in motion measures that prevent trafficking, 5 protect victims of trafficking, 6 and prosecute human

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traffickers.\(^7\)

While there is widespread recognition of the problem of human trafficking, there is very little focus on the rhetoric surrounding the problem or on the implications of American anti-trafficking policy. In response, in this paper I examine the TVPA from a critical perspective. I contend that the TVPA reflects an anti-labor, anti-immigrant social and legal heritage, but, I conclude that the private right of action provision in the TVPA is potentially productive.

In Part I of this paper, I examine the history of American legal consciousness leading up to the TVPA, as it relates to legal issues of political membership, civil rights, and labor policy. In Part II, I identify and describe the social movement responsible for America’s primary anti-trafficking law. In these sections, I examine the implications of the TVPA through a review of America’s immigration law regime, labor law regime, and civil rights law regime. Then, in Part III, I critically examine the Act in light of its legal heritage. Finally, in Part IV of this paper, I investigate the Act’s provision of a private right of action against human traffickers and suggest ways that this provision can be improved to promote an effective anti-trafficking strategy.

I-A. UNDERSTANDING THE HARM THE TVPA SEEKS TO ADDRESS

In creating the TVPA, the drafters of the statute weaved together two distinct visions of social ordering. The statute observes the strict and pressing interests associated with political membership by limiting the number of visas available to victims of trafficking to 5,000 per year,\(^8\) and by establishing programs designed to interdict potential victims of trafficking before they enter the United States.\(^9\) Yet, the statute also accepts the idea that some rights exist and are to be protected regardless of who acts to deny the exercise of the rights. The statute accomplishes this by referring to trafficking as a “contemporary manifestation of slavery,”\(^10\)

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\(^8\) See TVPA, 8 U.S.C. § 1184(o).

\(^9\) See TVPA, 22 U.S.C. § 7104(c).

and by providing both citizens and noncitizens with a private right of action against human traffickers.\footnote{\textit{Trafficking Victims Protection Reauthorization Act of 2003} (TVPRA), 18 U.S.C. § 1595.} As Loyola Law School Professor Kathleen Kim observed, "there is an inherent tension" between the restrictive character of the U.S. vision for full political membership and "the expansive civil rights laws, which the United States utilizes within its borders to remove artificial discriminatory restrictions on the labor pool."\footnote{Hreshchysyn \textit{et al., Private Right, supra} note 4, at 3.}

A number of writers and advocates have noted that the phenomenon of human trafficking results from social, economic, and political factors that are outside the control of any single entity.\footnote{See Smarajit Jana \textit{et al., A Tale of Two Cities: Shifting the Paradigm of Anti-Trafficking Programmes, GENDER \\& DEV,} Mar. 2002, at 69, 69 ("[I]nequality between classes, genders, and nations is the root cause of trafficking, and that the solution to the problem lies in a political struggle for the rights of marginalised people."); April Rieger, \textit{Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States,} 30 \textit{Harv. J.L. \\& Gender} 231, 235 (2007) ("Sex trafficking could not thrive if women were not systematically oppressed and marginalized."); Kara Ryf, \textit{The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000,} 34 \textit{Case W. Res. J. Int'l} \textit{L.} 45, 63 (2002) ("Economic desperation and lack of opportunities are the primary causes of trafficking."). \textit{But see Nisha Varia, Human Rights Watch, Human Rights News Archive, International Trafficking in Persons: Taking Action to Eliminate Modern Day Slavery,} (Oct. 17, 2007), http://hrw.org/english/docs/2007/10/18/usint17127.htm ("Contrary to popular belief, human trafficking is not necessarily an underground phenomenon run by criminal syndicates. Instead, trafficking is the clear and visible result of inadequate or faulty government policies that place certain groups of migrants and workers at greater risk of abuse and with little hope for redress.").} If the writers and advocates are correct—and in this paper I assume that they are—then properly evaluating the TVPA means understanding the way that the American legal regime 1) treats the relationship between political membership and civil rights; 2) understands public power and private actions; and 3) interprets the relationship between business and labor. In what follows, I examine the manner in which the American legal regime has historically taken account of political membership, labor, and civil rights. Additionally, I investigate the political and social developments that led to the TVPA.
I-B. American Legal History Leading Up to the TVPA

In the decades before the passage of the TVPA, Congress and the courts stitched together a distinctively American jurisprudence that shaped and contextualized the U.S. government’s treatment of political membership, labor, and civil rights. Perhaps the most important U.S. cases about political membership are the 1889 and 1893 Supreme Court cases *Chae Chan Ping v. United States*\(^{14}\) and *Fong Yue Ting v. United States*.\(^{15}\) They hold that Congress has the plenary authority to regulate immigration\(^{16}\) and therefore is empowered to exclude or remove noncitizens on grounds that would otherwise be unconstitutional. These cases have proven to be foundational in the field of citizenship and immigration law and continue to influence jurisprudence to this day.\(^{17}\)

The Court further supported its distinction between citizens and noncitizens in the *Insular Cases*\(^{18}\) in the early 1900s, holding that residents of United States territories do not necessarily enjoy full Constitutional protections.\(^{19}\) Through these cases, the Court made a sharp and lasting distinction between citizens and noncitizens, only guaranteeing full constitutional protections to citizens.\(^{20}\)

At the same time the Court established its vision of legitimate political membership in *Ping, Ting*, and the *Insular Cases*, the *Lochner* era of jurisprudence was in ascendance. The *Lochner* era, named after the

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\(^{14}\) *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

\(^{15}\) *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

\(^{16}\) Later, in the 1950 case, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the U.S. Supreme Court shifted its position and held that that both the executive and legislative branches have plenary power to regulate immigration. The Court stated, “[t]he right to [exclude aliens] stems not alone from legislative power, but is inherent in the executive power to control the foreign affairs of the nation.” *Id.* at 542.


\(^{18}\) See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (noting that residents of territories are not guaranteed the full protections of the Constitution).

\(^{19}\) Alexander Aleinikoff made the connection between *Ping, Ting*, and the *Insular Cases* in his book SEMBLANCES OF SOVEREIGNTY. See ALEINIKOFF, supra note 17, at 21–29.

\(^{20}\) At the time the *Insular Cases* were adjudicated, residents of the territories in question were not citizens of the United States. See ALEINIKOFF, supra note 17, at 21–29.
1905 flagship constitutional law case *Lochner v. New York*, which involved a New York statute that limited the number of hours bakers could work in a week. In *Lochner*, the Court, citing the Due Process Clause of the Fourteenth Amendment and noting that bakers were not “wards of the State” and were thus capable of individually contracting for labor protections, struck down the New York statute as an improper exercise of the state’s police powers. While there is nothing in the text of the Due Process Clause on its face that speaks to the question of early 20th century labor legislation, a majority of the *Lochner* Court enforced an articulation of social ordering. As Georgetown Law Professor Gary Peller notes:

The representational practice of the [*Lochner* era] assumed that the social world was divisible into ‘public’ and ‘private’ spheres of action, implicitly corresponding to the ‘presence’ or ‘absence’ of the individual’s free will. When conduct was ‘purely’ private, an expression of the autonomous free will of the affected parties, there was no basis for the imposition of legislative power. Legislation was limited to ‘public’ concerns.

Thus, when confronted with the New York statute, the majority of the Court understood itself to be striking down an unjustified, public intrusion into bakers’ private lives. In short, the *Lochner* decision was intended to honor the Due Process Clause of the Fourteenth Amendment by upholding bakers’ exercise of free will.

*Lochner* is consistent with *Coppage v. Kansas*, a 1915 case in which the Court struck down a Kansas statute that prohibited employers from conditioning employment on an absence of union membership. The Kansas statute openly stated that it was meant to limit workplace coercion resulting from inequalities in bargaining power between employers and employees. The Court declared that it is natural for contracting parties to

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22 *Id.* at 57.
have unequal bargaining power and, as such, a finding of unequal bargaining power is an inappropriate reason for the state to interfere with private contractual agreements. Coppage dealt a devastating blow to industrial democracy, a cause that the Kansas legislature had rallied behind.

In addition, in Bradwell v. Illinois,\footnote{Bradwell v. Illinois, 83 U.S. 130 (1872).} the Court again used a Lochnerian public/private dichotomy in articulating the prevailing gender ideology of the late 19th century. Holding that the Fourteenth Amendment does not guarantee women the right to be admitted to the bar, the Court wrote that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life" and that "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother."\footnote{Id. at 141.} Thus, the Bradwell Court associated masculinity with strength and public life and linked femininity with weakness and private life. Although the Bradwell opinion was written with the intention of upholding liberty, it had the perverse effect of denying agency to women.

With the onset of the New Deal, the Supreme Court reversed its reasoning with respect to the proper role of government in many ways; I label this change in viewpoint "anti-Lochnerian." Although the Lochner Court understood the proper role of government to be as the protector of private interests, later Court decisions reasoned that private choices can be shaped by public events, power, and influences. For example, in Shelley v. Kraemer,\footnote{Shelley v. Kraemer, 334 U.S. 1 (1948).} the Court held that the Fourteenth Amendment forbids the government from enforcing racially restrictive property contracts. The Shelley Court recognized that privately agreed upon contracts are never simply matters of private agreement; rather, the Court recognized that contracts depend upon government coercion for their efficacy.

Similarly, the 1968 case Green v. County School Board of New Kent County\footnote{Green v. County School Board of New Kent County, 391 U.S. 430 (1968).} reversed the reasoning of the Lochner Court. In Green, the Court held that New Kent County's school board did not adequately comply with its responsibility under the Fourteenth Amendment to
integrate its school system under Brown v. Board of Education II. The school board installed a “freedom-of-choice plan” as a means of integrating the school system, leaving the racial composition of the district’s schools to the collective decisions of students’ parents. But, because the school board’s apparently racially-neutral policy resulted in inadequately integrated schools, the Court ruled that further government inaction was unacceptable. Because past state-sanctioned oppression had guided, infiltrated, and created the private decisions of the schoolchildren’s parents, the Court placed an affirmative duty on the school board to adequately integrate the schools in its charge.

When Chief Justice Earl Warren left the Court in 1969, the Court returned to a more Lochnerian understanding of power and liberty. The 1976 Burger Court case, Washington v. Davis, provides an excellent example of the Supreme Court’s legal consciousness after Justice Warren’s departure. Washington v. Davis involved a Fourteenth Amendment challenge to a verbal skills qualification test administered to police department applicants, which resulted in a disproportionate disqualification of African Americans. In contrast to the approach taken in Green, the Court in Washington held that a government test that disproportionately impacts African Americans is constitutional as long as the program is facially neutral and rationally related to a government purpose. Thus, compared to Green, the Washington Court scaled back its emphasis on the ability of public influences to affect seemingly private and autonomous behavior. In doing so, the Court in Washington signaled its return to Lochner-influenced legal reasoning.

29 Id. at 441 (citing Brown v. Board of Education II, 349 U.S. 294 (1955)).
30 Green, 391 U.S. at 445.
31 Gary Peller has written extensively about the shift in legal consciousness that occurred between the Lochner era and the Warren Court. See, e.g., Gary Peller, A Subversive Strand of the Warren Court, 59 WASH. & LEE L. REV. 1141, 1146–53 (2002).
33 The Supreme Court credited the District Court’s finding that the qualifying test had a “disproportionate racial effect” and that “a far greater proportion of blacks four times as many failed the test than did whites.” Id. at 244, 237.
34 Id. at 239 (ruling that a law without a facially discriminatory purpose is not unconstitutional merely because of its racially disproportionate effect).
While the Court’s Fourteenth Amendment jurisprudence evolved between \textit{Lochner} and \textit{Washington}, its approach to political membership never strayed far from the framework set out in \textit{Ting} and \textit{Ping}.\footnote{But see Wong Kim Ark v. United States, 169 U.S. 649 (1898) (affirming a broad birthright citizenship rule); Landon v. Plasencia, 459 U.S. 21 (1982) (holding that due process rights provided for aliens under final order of removal are weighed in light of the alien’s status and circumstance).} Specifically, in the 1950 case \textit{United States ex rel. Knauff v. Shaughnessy},\footnote{United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).} in the 1953 case \textit{Shaughnessy v. United States ex rel Mezei},\footnote{Shaughnessy v. United States ex rel Mezei, 345 U.S. 206 (1953).} and in the 2001 case \textit{Zadvydas v. Davis},\footnote{Zadvydas v. Davis, 533 U.S. 678 (2001).} the Court consistently held that Congress retains plenary power to regulate immigration. First, in \textit{Knauff}, the Court claimed that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”\footnote{\textit{U.S. ex rel. Knauff}, 338 U.S. at 544.} Second, in \textit{Mezei}, the Court ruled that the government may detain noncitizens at the border indefinitely.\footnote{See \textit{Mezei}, 345 U.S. at 215–16.} Third, in \textit{Zadvydas}, the Court held that a detention of a removable noncitizen that lasts longer than six months will carry with it a rebuttable presumption of unconstitutionality.\footnote{See \textit{Zadvydas}, 533 U.S. at 701.} However, the Court did not rule out indefinite detention altogether. Thus, the \textit{Zadvydas} Court preserved the government’s plenary power to regulate immigration, which made some Constitutional protections unavailable to noncitizens who reside within the United States’ territorial bounds.

Moreover, during the time that the Court’s Fourteenth Amendment jurisprudence progressed in one direction, its rulings with respect to labor remained remarkably steady since the Court’s 1915 anti-union decision in \textit{Coppedge}.\footnote{A few Supreme Court decisions of the New Deal era were supportive of labor rights, but the overall trend of Supreme Court has been to strengthen the bargaining power of business vis-à-vis labor. See Karl Klare, \textit{Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941}, 62 Minnesota L. Rev. 265 (1977).} In 1935, as grassroots workers’ rights movements gained strength, Congress passed the National Labor Relations Act\footnote{29 U.S.C. §§ 151–169.} (the Wagner Act). The Wagner Act repudiated \textit{Coppedge} by granting workers the right
to strike and bargain collectively. However, just as the Wagner Act began making inroads on the nation’s labor law regime, the Supreme Court rendered a decision that significantly weakened labor’s hand. In the 1938 case, National Labor Relations Board v. Mackay Radio & Telegraph Co., the Court articulated the Mackay Doctrine, which permits employers to replace workers—whether they are striking or not—temporarily or permanently. The Mackay Doctrine is out of sync with Article 23 of the Universal Declaration of Human Rights, which establishes the right of all workers to unionize, and has been criticized by the International Labour Organization (ILO). The Mackay Doctrine unacceptably weakens the right of workers to unionize by undermining the efficacy of strikes, by discouraging workers from striking and joining unions, and by subverting labor’s mutual interest in organizing.

After the decision in Mackay, the Court significantly undermined the interests of labor in a series of decisions, including the 1965 case Textile Workers Union v. Darlington Manufacturing Co., the 1992 case

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44 29 U.S.C. §§ 158(a)(1), (3).
45 Karl Klare, Professor of labor and employment law at Northeastern University, asserted that the NLRA is one of the most radical pieces of legislation ever passed by the U.S. Congress. Klare, supra note 42, at 318.
47 Id. at 345-46.
49 International Labour Organization Committee on Freedom of Association, Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), ¶ 92, Report No. 278, Case No. 1543 (1991) (“The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. The Committee considers that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker.”).
50 See id.
51 Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263, 268 (1965) ("[A]n employer has the absolute right to terminate his entire business for any reason he pleases,").
Lechmere, Inc. v. National Labor Relations Board,52 and the 2002 case Hoffman Plastic Compounds v. National Labor Relations Board.53 In Hoffman, the Court held that when undocumented workers are fired for unionizing they are not entitled to reinstatement and back-pay, which are guaranteed to similarly situated documented workers.54 As a result of Hoffman, whether a worker is protected against discrimination on account of union activity depends upon her immigration status.55

The Hoffman decision harms labor because, as was noted in the 1940 labor case C.S. Smith Metropolitan Market Co. v. Lyons, “the employment relations of every employer affect the working conditions and bargaining power of employees throughout the industry in which he competes.”56 In the Hoffman decision, the Court permanently enhanced employers’ bargaining power by creating a permanent, domestic pool of workers that may be played against organized labor in a kind of “whipsaw activity.”57

While the majority Court in Hoffman couched its reasoning in terms of favoring restrictive immigration policies over a conflicting labor law regime, the dissenting opinion and the agencies charged with administering the immigration and labor law regimes at the time of the decision saw no conflict. The immigration-related agencies thought that preventing undocumented workers from unionizing would lead to further exploitation and also fail to promote the government’s efforts to enforce immigration laws. The labor-related agencies thought that preventing undocumented workers from unionizing would seriously weaken all

52 Lechmere, Inc. v. National Labor Relations Board, 502 U.S. 527, 537 (1992) (holding that employers have a right to exclude non-employee union organizers from their property).
54 Id. at 151 (holding that awarding back-pay “would unduly trench upon explicit statutory prohibitions critical to federal immigration policy[,]”). Undocumented workers continued to be statutory “employees” entitled to some protections under the NLRA. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).
workers’ ability to affect industrial democracy. The Court, however, ignored both points of view in reaching its decision.

Between Shelley and Washington, the Court’s jurisprudence shows that its anti-Lochnerian legal reasoning often takes an approach to securing liberty that is consonant with Green. During the same time period, the Court revealed that its Lochnerian approach to securing liberty is in the mold of Washington. Further, between Ping and Hoffman, the Court evinced a relatively stagnant jurisprudence with regards to political membership and labor. One of the results of the interacting strands of the Court’s jurisprudence was Hoffman, a case that favors restrictive immigration policies over the interests of labor.

In Sections II and III, I argue that the Trafficking Victims Protection Act reflects a Bradwell gender ideology and shares Hoffman’s legal heritage.

II. Political Events Leading up to the TVPA

The social movement that served as the driving force behind the TVPA consisted of a political alliance that was “an amazing, somewhat vulnerable, but remarkably cohesive coalition of [anti-prostitution] feminists and church groups.” 58 The anti-prostitution feminist organizations that were involved with the movement were the Coalition Against Trafficking in Women, Equality Now, the Protection Project, and Standing Against Global Exploitation. 59 The groups on the religious right included Concerned Women for America, Focus on the Family, National Association of Evangelicals, Catholic Bishops Conference, Traditional Values Coalition, International Justice Mission, and others. 60 Notably missing from this coalition were feminist groups that either avoided taking a stance on the morality of sex work or that saw it as “just one of many onerous

60 Id.
and often sexist jobs available to poor women . . . "61 Feminist and anti-trafficking advocacy groups ideologically opposed to the anti-prostitution feminists included the Network of Sex Work Projects, the Sex Workers Outreach Project, the Global Alliance Against Trafficking in Women, and the Sex Workers Project.62

The ideological difference between the anti-prostitution groups and the excluded feminist groups is striking. The excluded feminist groups, who primarily work directly with sex workers, support anti-trafficking measures that empower sex workers as workers. This framework does not necessarily assert that all sex work is inherently degrading.63 Further, these groups view underemployment, poor working conditions, hunger, sexism, racism, political instability, and poverty to be potential sources of denigration that cannot unequivocally be deemed more or less degrading than sex work.64 Some excluded feminist groups work to de-stigmatize sex work in the public imagination by advancing the idea that sexual contact is not necessarily “utterly different from other kinds of body contact,” and that policymakers need not “isolate sex work from other types of services providing care for the body, such as hairdressing, nursing, or massage.”65

In contrast, the anti-prostitution feminists are led by a group of thinkers who have made a number of bold generalizations about the

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61 See Nathan, supra note 1, at 1–2 (discussing the disagreement between “abolitionist” feminists and other feminists regarding prostitution and the creation of a coalition between abolitionist feminists and evangelicals).
62 Weitzer, Social Construction of Sex Trafficking, supra note 59, at 450.
63 See id. (noting that the primary concern of these groups is the empowerment of sex workers and harm reduction); Nathan, supra note 1, at 1 (these feminists “reject the idea of singling (prostitution) out for opprobrium if it’s done voluntarily, by adults.”); About the Sex Workers Project, http://www.sexworkersproject.org (last visited February 13, 2009) (“the SWP protects the rights and safety of sex workers who by choice, circumstance, or coercion remain in the industry.”).
64 See Vandita Sharma, Anti-Trafficking Rhetoric and the Making of a Global Apartheid, 17 NAT’L WOMEN’S STUD. ASS’N J. 88, 91 (2005) (articulating the feminist viewpoint and arguing that antitrafficking campaigns do not recognize that migrants have been displaced by economic situations resulting in the loss of their land and/or livelihood.).
morality of sex work. Anti-prostitution feminists assert that sex work is inherently degrading, equating sex work with victimhood. They claim that sex work is a form of violence against women whether physical force is used or not. Additionally, anti-prostitution feminists claim that the only purpose of sex work is to subject women to “cruel and brutal treatment.” Under the anti-prostitution feminist set of assumptions, no right-thinking woman would want to be a prostitute, which implies that women who claim to choose to engage in sex work are afflicted with a false consciousness. As a consequence, anti-prostitution feminists believe that liberating women requires the elimination of sex work. As researcher Laura Agustin has argued, contemporary anti-prostitution rhetoric denies agency to sex workers and treats them as “passive subjects rather than as normal people looking for conventional opportunities, conditions and pleasures[.]”

Anti-prostitution feminists contend that a strong, paternalistic,

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66 See Nathan, supra note 1, at 1-2 (noting that for groups like Concerned Women for America commercial sex is “far worse than other exploitative work poor people do—forced or not,” and arguing that for abolitionist organizations “[t]here’s no such thing as consent.”).


68 Catharine MacKinnon, Prostitution and Civil Rights, 1 MICH. J. OF GENDER & L. 13, 13 (1993). Kathleen Barry, a scholar and a leader in the anti-prostitution feminist movement, has gone even further, stating that “[f]emale sexual slavery includes not only women in prostitution who are controlled by pimps but wives in marriages who are controlled by husbands and daughters who are incestuously assaulted by fathers. My definition ... breaks away from traditional distinctions between ‘forced’ and ‘free’ prostitution and between wives and whores.” KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 199 (New York University Press 1996).

69 See Weitzer, Flawed Theory, supra note 67, at 935; Outshoorn, supra note 65, at 145.

70 See MacKinnon, supra note 68, at 151 (“Women in prostitution are denied every imaginable civil right in every imaginable and unimaginable way, such that it makes sense to understand prostitution as consisting in the denial of women’s humanity, no matter how humanity is defined.”); Barry, supra note 68, at 11 (Prostitution is the most extreme form of sexual exploitation and “[s]exual exploitation is a political condition, the foundation of women’s subordination and the base from which discrimination against women is constructed and enacted.”).

public ban on sex work will resolve the issue. However, the anti-prostitution feminist position is one that coalesces with the conservative Christian suspicion of non-procreative sex and its operating language of sin, repentance, and redemption. Moreover, the anti-prostitution feminist position comports with a strand of American legal consciousness that extends back to the Lochner-era Bradwell Court. Like the Bradwell Court, the anti-prostitution feminist lobby seeks to protect women through coercive public means that inhibit all women's agency. In light of the fact that the anti-prostitution, anti-trafficking movement relies on a Bradwellian gender ideology, it is a Lochnerian social movement at its core.

In Sections III and IV, I investigate the TVPA using the framework that it is an expression of a Lochnerian ideology and I suggest ways that the statute may be improved.

III. DISCUSSION OF THE TRAFFICKING VICTIMS PROTECTION ACT

The legal system is, fundamentally, a normative instance of history. It defines goals, decides what roads society must travel, and dictates the norms of social action. The legal system, therefore, has within its essence a profound political content . . . . Law always expresses a vision of society. It also expresses the groups behind this vision and the interests served by conceiving society in that particular form.

Under the authority of the Commerce Clause and the General Welfare Clause, the Trafficking Victims Protection Act of 2000 was signed into law on October 16, 2000. The bill was enacted with

72 See Soderlund, supra note 65, at 81.
bipartisan, near-unanimous support, "obtaining a 371-1 vote in the House and a unanimous 95-0 vote in the Senate." The TVPA was passed as part of a larger bill called the Victims of Trafficking and Violence Protection Act of 2000.

In Sections III-A to III-C, I explain why a careful reading of the TVPA reveals that the statute (A) is Lochnerian, (B) furthers restrictive immigration policies, and (C) ratifies anti-labor policies.

III-A. THE TVPA IS LOCHNERIAN

The TVPA contains sections that reflect a conservative Christian ethical vision, sections that rely on anti-prostitution feminists’ insights, and sections that mimic the paternalism inherent in the Lochner-era Bradwell decision. Consequently, the TVPA bears many of the marks of the legal reasoning behind the Washington decision, which revived Lochnerian principles.

The TVPA 22 U.S.C.A. §§ 7101 and 7102 replicate religious and ethical commitments that are linked to the movement responsible for the statute. Section 7101 is a statement of purpose and Section 7102 is a group of definitions. Section 7101 sets a general anti-trafficking and anti-prostitution agenda and invokes religious imagery by defining the act of trafficking as "evil."76

Section 7102 articulates the language by which transnational labor exploitation and sex work exploitation are given expression by the U.S. government. Section 7102(3) and Section 7102(9) work together to define "sex trafficking." Section 7102(3) defines a "commercial sex act" as "any sex act on account of which anything of value is given to or received by

(related to providing for the common defense and general welfare of the United States); Article I, section 8, clause 3 (related to the regulation of commerce with foreign nations); and Article I, section 8, clause 18 (relating to making all laws necessary and proper for carrying into execution powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof). H.R. Rep. No. 106-487, pt. 1, at §13 (1999).

75 Ryf. supra note 13, at 53.

76 22 U.S.C.A. § 7101(b)(21) ("Trafficking of persons is an evil requiring concerted and vigorous action by countries of origin, transit or destination, and by international organizations.").
any person.”77 However, not only is the term “sex act” not defined in the TVPA, but also, there appears to be no de minimis exception for the requirement that “anything of value” be exchanged. So, a sex act as reflected in the TVPA is both broad and vague. Further, Section 7102(9) of the TVPA defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”78 Consequently, the TVPA’s definition of trafficking necessarily requires that all sex workers are labeled trafficking victims, whether or not they consented to be sex workers and whether or not they are migrants. Together, Section 7102(3) and 7102(9) give new meaning to Section 7101(b)(21)’s declaration that trafficking is “evil.” These three sections work together to condemn all sex work as wrong for all persons at all times. Such logic is typical of religious commitments to good and evil, to anti-prostitution feminists’ commitment to the inherent wrongness of all sex work, and to the paternalism inherent in the Lochner-era Bradwell decision.

Moreover, three additional sections of the TVPA, 22 U.S.C.A. §§ 7104, 7106 and 42 U.S.C.A. § 14044, take a tone that is similar to that of Sections 7101 and 7102.

First, in Section 7104, the TVPA adopts measures that are meant to deter and prevent trafficking. The measures include an economic development plan and a public awareness campaign. The Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003) added a provision to Section 7104 that allows the President to terminate any grant or contract with a private entity if the contractor engages in trafficking of sex workers or procures a commercial sex act.79 The 2003 provision, like the TVPA’s definition of trafficking, serves to conflate sex work with trafficking.

Second, 22 U.S.C.A. § 7106 of the TVPA creates standards for the elimination of trafficking that the President must use to evaluate efforts by other countries to combat trafficking.80 The Trafficking Victims

77 22 U.S.C.A. §7102(3).
78 22 U.S.C.A. § 7102(9).
80 A later section, 22 U.S.C.A. § 7108(a), provides that when the President determines that a foreign country has not sufficiently complied with the United States’ anti-trafficking
Protection Reauthorization Act of 2005 (TVPRA 2005) amended Section 7106(b) by requiring the President to consider other countries’ “measures to reduce the demand for commercial sex acts and for participation in international sex tourism by nationals of the country . . .”.81 Thus, both 22 U.S.C.A. § 7104 and § 7106 link commercial sex and trafficking.

Third, the connection between sex work and trafficking in the TVPA is repeated in 42 U.S.C.A § 14044, which was added by The Victims Protection Reauthorization Act of 2005. Section 14044 addresses the need to combat and prevent domestic trafficking in persons through a “program to reduce trafficking in persons and demand for commercial sex acts in the United States.”82 The language in this section “blurs the line between trafficking and commercial sex.”83

The link between sex work and trafficking in these three provisions (22 U.S.C.A. §§ 7104, 7106, and 42 U.S.C.A. § 14044) is bolstered by numerous Bush Administration statements and State Department pronouncements84 claiming that sex work exacerbates the trafficking problem.85 In combination, TVPA Sections 7101, 7102, 7104, and 7106,

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82 Trafficking Victims Protection Reauthorization Act of 2005, 42 U.S.C.A. § 14044(a) (adding several sections to the TVPA of 2000).
83 Weitzer, Social Construction of Sex Trafficking, supra note 59, at 465.
85 If the claim that sex work increases trafficking is accurate, then it follows that areas in Nevada where sex work is legal should be “awash in foreign sex slaves.” David Feingold, Think Again: Human Trafficking, FOREIGN POL’y, Sept/Oct. 2005, at 28. Because to date there has been no finding that Nevada host inordinate numbers of trafficking victims, there is reason to doubt the link between sex work and trafficking. The U.S. Dep’t of State’s Trafficking in Persons Report 2007 (TIP Report 2007) further casts doubt on the link. See Weitzer, Social Construction of Sex Trafficking, supra note 59, at 457. Of the twenty-eight countries that met the TVPA’s highest compliance standard for combating human trafficking
and 14044 work together to define sex act vaguely and broadly, to define sex trafficking expansively, to conflate sex work with trafficking, and to announce that all sex work is wrong for all persons at all times. These Sections reflect the movement responsible for the TVPA because it considers voluntary commercial sex as qualitatively similar to coerced sex trafficking. The TVPA takes a Bradwellian, paternalistic approach to the liberty of women because the Act proclaims that all commercial sex acts are morally wrong for all people. Also, as a statute that revives a Lochnerian legal consciousness, the Act bears some similarity to Washington.

III-B. THE TVPA IS PART OF A RESTRICTIVE IMMIGRATION POLICY REGIME


According to the U.S. State Department, prostitution is legal in many countries, including Finland, Norway, Austria, Poland, France, Belgium, Luxembourg, Canada, Germany, Malawi, Spain, Colombia, Hong Kong, Sweden, the Czech Republic, Hungary, the Netherlands, Switzerland, Denmark, Italy, New Zealand, the United Kingdom, and some Australian states and territories. U.S. Dep't of State, Country Report on Human Rights Practices (March 6, 2007), available at http://www.state.gov/g/drl/rls/hrprt/2006/index.htm.

Because the government has presented no credible empirical research demonstrating that sex work exacerbates the trafficking problem, the claim that sex work and trafficking are linked appears to be ideological and premised on sex workers' imputed need for strong, public, paternalistic protection.


1996, \textsuperscript{88} which “mandated detention and deportation for tens of thousands of permanent residents.”\textsuperscript{89} Then, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, \textsuperscript{90} which included a number of anti-immigrant measures such as the creation of new grounds for exclusion and removal. Finally, after the passage of the TVPA, Congress passed the Real ID Act of 2005, \textsuperscript{91} which reduced immigrant access to asylum and habeas corpus relief, increased immigration enforcement mechanisms, and restricted temporary migrants’ access to driver’s licenses. In what follows, I argue that the TVPA is best understood as qualitatively similar to the restrictive immigration laws that preceded and followed its passage, even when accounting for the provision of T-Visa protection.

The TVPRA 2003 added to 22 U.S.C.A. § 7104 a requirement that the President “establish and carry out programs of border interdiction outside the United States.”\textsuperscript{92} Among the responsibilities of the President under Section 7104 are the provision of transit shelters near foreign borders and the provision of training for foreign border guards in the identification of victims of trafficking.\textsuperscript{93} According to the United States Department of Homeland Security, trafficking interdiction efforts are part of an overall effort to stem the flow of unauthorized immigration across U.S. borders.\textsuperscript{94}

In Sections 7105(c)(3) and 7105(e), the TVPA creates Continued Presence protection\textsuperscript{95} and T-Visa protection,\textsuperscript{96} respectively, for victims of human trafficking. Continued Presence protection is a temporary, seldom-used measure designed to facilitate access to T-Visas.\textsuperscript{97} The T-Visa

\textsuperscript{89} Wishnie, supra note 87, at 402.
\textsuperscript{92} TVPRA, 22 U.S.C. § 7104(c).
\textsuperscript{93} TVPRA, 22 U.S.C. § 7104(c).
\textsuperscript{95} TVPA, 22 U.S.C. § 7105(c)(3).
\textsuperscript{97} See Patricia Medige, The Labyrinth: Pursuing a Human Trafficking Case in Middle
allows otherwise removable aliens to stay in the United States during prosecutions if they were a victim of severe trafficking and if they assist prosecutors in investigating their victimizers. Further, T-Visas allow trafficking victims to apply for permanent residence if they would experience extreme hardship if removed. However, the trafficking victim must self-petition for the T-Visa and only 5,000 T-Visas are available per year.98

For a number of reasons, the T-Visa provision may be criticized as ineffective and a component of a larger restrictive immigration regime. First, the TVPA states that “[a]pproximately 50,000 women and children are trafficked into the United States each year.”99 If the authors of the TVPA believed this estimate, then limiting the number of T-Visas available per year to 5,000 is inadequate and morally objectionable.100 If lawmakers believed that 50,000 people were trafficked into the country annually or that the scope of the problem was unknown,101 then providing

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98 See Rieger, supra note 13, at 248.
100 See Ryf, supra note 13, at 69. The responsibilities of the United States with respect to other nations is outlined in 22 U.S.C.A. § 2151(a), which states “Congress reaffirms the traditional humanitarian ideals of the American people and renews its commitment to assist people in developing countries to eliminate hunger, poverty, illness, and ignorance.”
101 Although the TVPA and the State Department’s annual Trafficking in Persons Report (annual TIP Report) state specific estimates, the scope of the problem of human trafficking is not known. See Weitzer, Social Construction of Sex Trafficking, supra note 59, at 456. The estimates on the scope of the problem have in recent years fluctuated dramatically. Perhaps the slippery definition of a trafficking victim as codified in the TVPA is a source of some of the confusion.


The 2004 Trafficking in Persons Report estimated that between 14,500 and 17,000 people are trafficked into the country every year. TIP Report 2004, supra note 4. In commenting on the 2004 figure, White House Counsel Alberto Gonzales told Congress that the estimate was possibly inflated. See Jerry Markon, Human Trafficking Evokes Outrage. Little Evidence,
only 5,000 T-Visas each year indicates a broader push to restrict immigration into the country.\textsuperscript{102}


The prevailing numbers on the scope of the human trafficking problem have been criticized by a number of organizations and agencies. In a recent study, the United States Government Accountability Office looked at government estimates and non-governmental organization estimates and found that they were full of “methodological weaknesses, gaps in data, and numerical discrepancies” and that both the U.S. government and non-governmental organizations “[have] not yet established ... effective mechanism[s] for estimating the number of victims.” United States Government Accountability Office, Report to the Chairman, Committee on the Judiciary and the Chairman, Committee on International Relations, House of Representatives, Better Data, Strategy, and Reporting Needed to Enhance U.S. Anti-trafficking Efforts Abroad (July 2006), available at http://www.gao.gov/new.items/d06825.pdf. Further, a study conducted by UNESCO concluded that current statistics on the scope of the trafficking problem have been created through the use of “spurious authority” and feature “false precisions.” United Nations Educational, Scientific, and Cultural Organization, Poverty and Human Rights: UNESCO’s Anti-Poverty Projects, available at http://www.unescobkk.org/index.php?id=1022.

While the U.S. government estimates on the number of people trafficked into the country are troubling because they are inconsistent and likely methodologically flawed, they are even more troubling because of the paltry number of trafficking victims granted T-Visa protection. Between 2000 and September 2007, the government issued only 1,362 T-Visas. Jack Shafer, The Sex Slavery Epidemic That Wasn’t, Slate, September 24, 2007, available at http://www.slate.com/id/2174606/. But, if the government figures on the number of people trafficked into the United States are correct, then between 2000 and 2007 alone, at least 226,000 people were trafficked into the country. Therefore, if we take the government’s numbers at face value, then approximately 224,638 of 226,000 people trafficked into the country between 2000 and 2007 never received protection.

And, if the TIP Report 2007 is correct in stating that the majority of trafficking victims are sex workers, then, government figures indicate that at least 112,319 unprotected victims of sex trafficking have been introduced into the United States since 2000. TIP Report 2007, supra note 85.\textsuperscript{102} Even if far less than 50,000 people are trafficked into the United States per year, there may be serious problems with the administration of the T-Visa entitlement given that between 2000 and 2007, an average of only 179 people benefited from the T-Visa provision per year.
Second, the standard that trafficking victims must meet in order to obtain legal permanent residence is forbidding. A trafficking victim “must prove that she will suffer ‘extreme hardship involving unusual and severe harm’ if she is removed from the United States.” The same standard for eligibility is a part of suspension-of-deportation and cancellation-of-removal jurisprudence, and in those arenas, the standard has proven to be stringent. The high bar on T-Visa recipients’ eligibility for legal permanent residence evinces a focus on maintaining exclusionary notions of political membership and a focus on coercive social control over the social, political, and economic needs of trafficking victims and potential trafficking victims.

Third, according to Section 7101(b)(9), “[t]rafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion.” Yet, prior to the TVPRA 2003, no relief was available to adult victims of sex trafficking who could not or would not assist prosecutors in taking legal action against their victimizers. Lawyer and trafficking advocate April Rieger has noted:

It would be unheard of for a rape victim to be denied assistance such as safe housing and medical treatment simply because she chose not to testify against her rapists. Yet this is precisely what happens if that rape victim is an illegal immigrant engaged in forced sex work. Drawing a distinction between a woman who is a citizen and a woman who is an immigrant in terms of giving the former but not the latter choices concerning prosecution of their perpetrators is arbitrary and discriminatory.

Although a private right of action for victims of trafficking was provided for by the TVPRA 2003, it has only been used a few times and it has never

See Chang et al., Reconceptualizing, supra note 3, at 325.
105 Rieger, supra note 13, at 251.
been used for a sex trafficking case. Further, while the private right of action provides monetary relief to sex trafficking victims, it does not grant victims the ability to remain in the U.S. or provide other measures designed to ensure the safety of the victims. Thus, Rieger’s criticism is valid. In practice and by design, the T-Visa provision does not protect victims of sex trafficking and it has the de facto consequence of producing economies of political membership that are both restrictive and discriminatory.

Fourth, the ability of adult trafficking victims to receive T-Visa protection depends upon their willingness to cooperate with prosecutors. Reports from advocates indicate that prosecutors use the opportunity to question trafficking victims as a means of obtaining information about “holes in the border,” asking trafficking victims about how they entered the country, where they entered the country, and who helped them to enter the country. Among the policies furthered by such questioning is the denial of U.S. work opportunities to irregular migrants.

Fifth, because T-Visa recipients must self-petition, prosecutors do not help victims of trafficking with the complex application process. The self-petition requirement is inadequate given the observation in Section 7101(b)(20) that cultural and language differences make it difficult for victims of trafficking “to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.” If an objective of the TVPA is to protect people who have been trafficked into the U.S. and to assist migrants who are in the U.S., then requiring the victims to self-petition is counterproductive and ineffective policy.

In sum, there are two main reasons that the immigration controls enacted by the TVPA are of little benefit for migrants as a whole. First, the TVPA includes measures that facilitate U.S. policy of keeping irregular migrants from crossing the border. Second, despite proclaiming that 50,000 people are trafficked into the country per year, the TVPA

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107 Nathan, supra note 1, at 4.
108 See Medige, supra note 97, at 279–80.
arbitrarily limits itself to assisting 5,000 people every year. The immigration policy embedded in the TVPA does almost nothing to counteract the restrictive immigration policies enacted in the years before and after the passage of the TVPA, provides for the admission of only a handful of immigrants, and, as a result, is best understood as part of a broader restrictive immigration policy regime.

III-C. THE TVPA RATIFIES ANTI-LABOR POLICIES

In a manner that repeats the logic of Hoffman, the TVPA enables an economic system that is hostile to labor. Rather than following the logic of the Hoffman dissent, which viewed the protection of workers’ rights as consistent with the sound enforcement of immigration laws, the TVPA considers immigration enforcement and labor protections to conflict and emphasizes the former at the cost of the latter. The section of the TVPA that deals explicitly with labor, Section 112, overlooks measures that promote industrial democracy and focuses on prosecuting distinct instances of severe exploitative labor, with a heavy emphasis on punishing those who facilitate sex work.

Section 112 of the TVPA added several provisions to Title 18 of the U.S. Code: 18 U.S.C. §§ 1589–1594. These sections address coerced labor and coerced sex work and supplement the provisions in 18 U.S.C. §§ 1581 and 1588, which address slavery and peonage. The provisions in 18 U.S.C. §§ 1589 and 1591 have the cumulative effect of defining all situations recognized as trafficking by the TVPA where the laborer would be protected by law. These sections distinguish between coerced labor and coerced sex work and specify for each the conditions a person must labor under in order to garner this legally protected status.

Specifically, under 18 U.S.C. § 1591, sex trafficking becomes prosecutable when a person facilitates a commercial sex act by a minor, or when a sex act is compelled by means of force, fraud, or coercion.\textsuperscript{110} When 18 U.S.C. § 1591 and 22 U.S.C.A. § 7102(9)\textsuperscript{111} of the TVPA

\textsuperscript{110} TVPA, 18 U.S.C. § 1591.

\textsuperscript{111} 22 U.S.C.A. §7102(9) states, “[t]he term ‘sex trafficking’ means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”
operate together, the result is what journalist Debbie Nathan calls a “slick rhetorical maneuver.”112 While 22 U.S.C.A. § 7102(9) of the TVPA considers all migrant sex workers to be trafficking victims, 18 U.S.C. § 1591 only provides protection to sex workers who are under 18 or whose services were coerced. Consequently, many migrant sex workers who are labeled “victims of trafficking” by the TVPA are not eligible for relief and are thus removable.113 Assistance under the TVPA is limited to those who are labeled victims of severe forms of trafficking.114 Such a statutory scheme implicitly makes the condemnation of sex work a priority while ignoring sex workers’ legitimate needs, such as the ability to unionize or sue for unpaid wages.

The statutory framework that supports this “rhetorical maneuver” stands in contrast to a statutory scheme 1) to protect sex workers’ labor from exploitation through government oversight and regulation, 2) to strengthen industrial democracy in the sex industry by recognizing sex workers’ right to unionize, and 3) to recognize that immigration to the U.S. is the best means of respecting the legitimate interests of many sex workers. Overall, 18 U.S.C. § 1591 implicitly concentrates on condemning sex work and facilitating restrictive immigration policies but does almost nothing to empower sex workers in the workplace.

Moreover, while 18 U.S.C. § 1591 subtly prefers restrictive immigration policies over protecting the rights of sex workers, 18 U.S.C. § 1589, which defines and punishes for coerced labor, overtly misses the

112 Nathan, supra note 1, at 2. Perhaps the rhetorical maneuver is the source of some of the discrepancy between the estimated number of people trafficked into the United States, the number of T-Visas available per year, and the average number of people who actually receive T-Visa protection per year.

113 See Nathan, supra note 1. The rhetorical maneuver described by Debbie Nathan has the effect of using non-trafficked migrant sex workers as props in a social movement that exploits them. The anti-prostitution, anti-trafficking social movement exploits migrant sex workers in two ways. First, the movement counts migrant sex workers as victims when it comes to securing the movement’s political and financial support but counts them as removable aliens when it comes to immigration controls and labor rights. Second, the movement publicly condemns migrant sex workers’ professional decisions on moral grounds but doesn’t equally condemn policies that keep the workers subordinate to Western business interests.

114 See, e.g., TVPA, 22 U.S.C. § 7102(8); TVPA, 22 U.S.C. § 7102(13).
opportunity to affect industrial democracy. In the preamble to the TVPA, the authors repudiate the logic of the 1988 case United States v. Kozinski.\textsuperscript{115} Kozinski held that forced labor under 18 U.S.C. § 1584 included only labor obtained through violence, abuse of the legal system, or through threats of violence.\textsuperscript{116} While 18 U.S.C. § 1584 was passed pursuant to the Thirteenth Amendment, 18 U.S.C. § 1589 was authorized under the Commerce Clause and the General Welfare Clause; Section 1589 promised a fresh break from the narrow interpretation of forced labor under 18 U.S.C. § 1584. Specifically, 18 U.S.C. § 1591 provides that sex workers receive protection if they are minors or if their services are commanded by force, fraud, or coercion; but, 18 U.S.C. § 1589 specifies that laborers receive protection only if their labor was compelled by the means explicitly articulated in Kozinski. While the authors of the TVPA disagree with the court’s analysis in Kozinski, its logic was repudiated only as it applied to sex work.\textsuperscript{117}

The courts have buttressed the idea that the TVPA’s forced labor standards did not change the standards of the Kozinski Court. In the 2004 case Zavala v. Wal-Mart Stores, Inc.,\textsuperscript{118} Wal-Mart faced a class action suit brought by undocumented workers under the Racketeer Influenced and Corrupt Organizations Act (RICO), among other statutes. In order to succeed on the RICO claim, the workers had to prove that they were subjected to coerced labor. But, the court dismissed the RICO claim after determining that the evidence was insufficient to make such a finding. The part of the court’s decision that considered coerced labor “was based entirely on [Thirteenth Amendment-based] case law that preceded the [Commerce Clause- and General Welfare Clause-derived] TVPA, and is devoid of any discussion suggesting that the TVPA requires” an understanding of involuntary servitude that is more expansive than the Kozinski standard.\textsuperscript{119}

\textsuperscript{116} Kozinski, 487 U.S. at 952.
\textsuperscript{117} See Hreshchyslyn et al., Private Right, supra note 4, at 35. Surprisingly, coerced labor protections under the TVPA remain so minimal that children who are compelled to labor in exploitive conditions by means of fraud are not protected. See Chacón, supra note 84, at 2985.
\textsuperscript{119} Id. at 304. See Chacón, supra note 84, at 3000–01.
Considering the text of 18 U.S.C. § 1589 and its interpretation in Zavala, it is clear that the TVPA grants very few additional protections and rights for non-sex work laborers. The majority of new rights for workers in the TVPA are found in 18 U.S.C. § 1591, which protects some sex workers from continued exploitation. However, 18 U.S.C. § 1591 is a criminal provision that limits monetary relief, physical protection, and immigration benefits to those who meet T-Visa requirements. Consequently, the minimal labor and sex work protections enacted by the TVPA take a back seat to the restrictive immigration agenda embedded in the T-Visa and interdiction provisions.

The TVPA’s emphasis on restrictive immigration controls injures the interests of workers. In the face of free trade agreements and other policies that strengthen transnational corporations, restrictive immigration policies serve to entrench and isolate labor pools that can be played against one another. Ultimately, the restrictive immigration controls in the TVPA create regionally isolated labor pools that weaken the potential power of labor organization worldwide.

III-D. SECTION III CONCLUSION

There is no doubt that the exploitation of migrant workers is a grave problem and that some laborers—including sex workers—are tricked or forced into situations in which they are compelled to work against their will, but the principle that people have a right to be free from forced servitude does not provide the President, Congress, or non-governmental organizations with a definitive strategy for understanding and combating the problem. Although the TVPA was a good-faith attempt to address the exploitation of labor, the Act actually codifies a Lochnerian social vision and bears a striking resemblance to Hoffman. The TVPA follows the logic of Hoffman by emphasizing restrictive immigration controls at the cost of labor rights and, on an international scale, ratifies Hoffman’s effect of allowing employers to play one immobile labor force against another. Neither Hoffman nor the TVPA enact measures that counteract transnational corporations’ ability to respond to a strike in one area with increased production in another area. As a result, both Hoffman
and the TVPA weaken the bargaining strength of labor on a global scale.

If the goal of the TVPA is to empower exploited migrant workers to secure liberty for themselves and their families, then, with the possible exception of 18 U.S.C. § 1595 discussed below, the statute holds little promise of sufficiently and fairly addressing the needs of exploited workers.


IV-A. The Section 1595 Private Right of Action

The Trafficking Victims Protection Reauthorization Act of 2003 created 18 U.S.C. § 1595, which allows trafficking victims to privately sue traffickers for violations of 18 U.S.C. §§ 1589 and 1591. As a civil right created pursuant to the Article I Commerce and General Welfare clauses, 18 U.S.C. § 1595 bears some resemblance to the Green-era Civil Rights Act of 1964, which was passed pursuant to the Commerce Clause. The Civil Rights Act of 1964, similar to 18 U.S.C. § 1595, protects laborers by deterring employers from engaging in abasing conduct. Further, because Section 1595 was passed pursuant to the Article I clauses, it avoids the fate of the Fourteenth Amendment-derived anti-discrimination measure in United States v. Morrison, which was struck down on state action grounds.

Although Section 1595 is seldom used, its private enforcement mechanism makes it a potential benefit to trafficked laborers who have been overlooked in trafficking prosecutions. By 2005, over two-thirds of trafficking prosecutions involved sex trafficking. Yet, according to United Nations Educational, Scientific, and Cultural Organization (UNESCO) researcher David Feingold, the available evidence on

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121 United States v. Morrison, 529 U.S. 598 (2000) (striking down the civil remedy provision of the Violence Against Women Act on the grounds that Congress lacked the authority under the Commerce Clause and the enforcement clause of the Fourteenth Amendment.).
122 See Nam, supra note 106, at 1695.
123 Chang et al., Reconceptualizing, supra note 3, at 324–25.
trafficking in labor suggests that sex work is not the most common form of coerced servitude.\(^ {124} \)

U.S. trafficking service providers' data support Feingold's claim. Two California service providers report that sex trafficking cases make up seventeen and thirty-three percent of their caseloads, respectively.\(^ {125} \) Additionally, both a New York service provider and a Washington, DC service provider reported that trafficking cases account for one-third of their caseloads.\(^ {126} \) Feingold's claim is supported by data on the nature of U.S. trafficking litigation. To date, the majority of T-Visa applicants and all Section 1595 litigants have complained of being trafficked laborers rather than trafficked sex workers.\(^ {127} \)

Feingold's claim is further bolstered by statements made by officials from the U.S. Department of State and the United Nations. An analyst from the State Department recently reported that because so many undocumented workers are arrested each year, and because so many of the workers have been exploited by employers to varying degrees, it is difficult to determine who merits protection under the TVPA's forced labor provisions.\(^ {128} \) In a similar vein, the International Labour Organization noted in 2005 that "[i]t can be difficult to determine when the generalized breach of labour contracts, together with poor terms and conditions of work, degenerates into actual forced labour."\(^ {129} \) Taken together, the State Department and the ILO observations suggest that there is no shortage of potential labor trafficking litigants.

In addition to providing all trafficked workers with a means of seeking redress, the Section 1595 private right of action potentially provides both undocumented laborers and migrant sex workers with otherwise unavailable redress for workplace abuses. Undocumented workers may find the Section 1595 private right of action to be useful

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\(^{124}\) See Feingold, supra note 85, at 26.

\(^{125}\) Chang et al., Reconceptualizing, supra note 3, at 324–25.

\(^{126}\) Nathan, supra note 1, at 3.

\(^{127}\) See id.; Nam, supra note 106, at 1657.

\(^{128}\) See Chapkis, supra note 58, at 930.

because a number of U.S. labor policies work together to create a culture in which undocumented workers are systematically exploited.

First, because *Hoffman* renders undocumented people powerless to self-organize, undocumented workers cannot 1) collectively bargain for better workplace conditions; 2) engage in concerted activities for the purpose of strengthening their coworkers’ bargaining power; or 3) engage in concerted activities for the purpose of aiding and protecting non-coworkers. 130 Consequently, U.S. industrial democracy cannot and does not extend to undocumented workers. Second, the Wagner Act does not protect domestic workers, agricultural workers, or sex workers against retaliation from employers for unionizing. 131 So, even if *Hoffman* is overturned, undocumented workers will not be guaranteed the ability to collectively bargain for better workplace conditions.

Third, workers may be terminated for cause if it is found that they misrepresented their immigration status on employment applications. Because undocumented workers often feel compelled to misrepresent their immigration status in order to gain employment, this policy has the effect of silencing undocumented workers as to questioning workplace conditions and procedures. Fourth, the Fair Labor Standards Act of 1938 (FLSA) does not guarantee overtime pay to sex workers, most domestic workers, or agricultural workers. 132 As a consequence, regardless of their legal status, many currently undocumented workers face the prospect of laboring for long hours for insufficient pay. Fifth, in civil actions for withheld wages, most states classify sex work as non-compensable labor. 133 As a result, employers of sex workers—documented or not—may economically exploit their workers with relative impunity.

Because U.S. labor and immigration policies have a cumulative negative effect on undocumented workers, Section 1595 is a potentially valuable workplace protection for undocumented laborers and undocumented sex workers. The possible protective effect of Section 1595 is amplified by the liberal procedural norms inherent in civil litigation. For

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131 See Compa, supra note 48.
133 See Nam, supra note 106, at 1691.
example, burden-of-proof standards and evidentiary rules are more lenient in civil proceedings than in criminal prosecutions. The result is that "[p]laintiffs can name larger entities as joint employer defendants that may be 'indictable due to the government's burden of proof in a criminal action.'"

In November 2007, an empirical study of Section 1595 claims revealed that there had "not yet been a single successful lawsuit decided on the merits under Section 1595" and there had only been "a small number of filings at all under that section." In her article, The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims, Jennifer Nam identified several factors that may affect the number of filings under Section 1595. Some of Nam's insights were foreshadowed in 2004 by trafficking advocates Kathleen Kim and Kusia Hreshchysyn.

According to Nam, the relatively recent enactment of the provision may have limited the number of claims brought forward to date. Further, according to Nam, it's possible that non-governmental organizations—the groups most likely to represent trafficked persons in civil proceedings—have had trouble identifying victims of trafficking. If such difficulties exist, a predictable result would be the underutilization of Section 1595. Additionally, the complexity of legal proceedings in general may dissuade potential litigants from pursuing Section 1595 claims.

For undocumented trafficking victims, the threat of having their immigration status revealed during the course of litigation may act as a further deterrent to pursuing Section 1595 claims. After Hoffman, a number of employers have analogized a variety of labor-related disputes to

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134 See Hreshchysyn et al., *Private Right, supra* note 4, at 18.
135 Id.
136 Nam, *supra* note 106, at 1695.
137 See id. at 1657–95.
138 See Hreshchysyn et al., *Private Right, supra* note 4.
139 See Nam, *supra* note 106, at 1671.
140 See id. at 1679.
141 See id. at 1682.
142 See id. at 1685; Hreshchysyn et al., *Private Right, supra* note 4, at 19.
the case in attempts to reveal workers’ immigration status during trial. Employers seek to reveal workers’ immigration status in order to limit their liability in non-Wagner Act matters “such as wage and hour and employment discrimination cases” and tort cases. Therefore, under the current Section 1595 regime, a plaintiff’s fear of having his or her immigration status revealed is legitimate.

Interestingly, Nam contends that criminal prosecutions of alleged traffickers have the effect of reducing civil litigation under Section 1595. She argues that because criminal prosecutions require convicted traffickers to pay restitution to their victims, trafficking victims who have collected restitution payments in criminal proceedings have less of an incentive to go forward with a complementary civil litigation because they are often satisfied with the restitution payment. Moreover, Nam and others argue that trafficking victims often shrink from revisiting the emotional and painful experience of participating in civil litigation against their former victimizers. Nam further contends that potential advocates for trafficking victims often choose not to pursue civil trafficking claims against those who already have been found criminally liable.

Another possible deterrent to civil litigation is the trafficking victims’ fear of reprisals. According to Nam, many trafficking victims believe that if they sue their former trafficker, the trafficker may injure them or their families. The result is that many trafficking victims with *bona fide* civil claims are afraid to sue. Additionally, Nam, Kim, and Hreshchyshyn contend that civil litigation under Section 1595 may be underutilized because trafficking victims and their advocates are not aware that the provision exists. Lastly, Section 1595 may be underused due to difficulties with identifying responsible parties with assets.

A number of reforms would make Section 1595 more effective, more widely used, and more significant in practice. First, the definition of

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133 Hreshchyshyn et al., *Private Right*, supra note 4, at 19.
134 See Nam, *supra* note 106, at 1685; Hreshchyshyn et al., *Private Right*, supra note 4, at 19.
135 See Nam, *supra* note 106, at 1687.
136 See *id.* at 1688.
137 See Hreshchyshyn et al., *Private Right*, supra note 4, at 19; Nam, *supra* note 106, at 1695.
138 See Hreshchyshyn et al., *Private Right*, supra note 4, at 19.
coerced labor could be expanded. If the definition of coerced labor is expanded to line up with the definition of coerced sex work, then undocumented laborers would be more likely to benefit from Section 1595 and may be more likely to bring cases forward. Whether an expanded definition of coerced labor is politically viable depends upon anti-trafficking advocates’ willingness to concentrate on the plight of trafficked laborers. However, several factors may hinder a widespread effort to expand the definition of coerced labor. A primary impediment to a more holistic definition of coerced labor is the U.S. anti-trafficking movement’s commitment to condemn sex work. Additionally, the U.S. anti-trafficking movement has emphasized the plight of trafficked sex workers over the plight of trafficked laborers.

Second, sex work could be classified as compensable labor nationwide. Because sex work is not compensable labor in most states, civil litigants “must generally depend on emotional damages for compensation in civil suits, which are harder to estimate and more difficult to prove.” Recognizing sex work as compensable labor for the purpose of Section 1595 proceedings will increase the likelihood that trafficked sex workers would be able to collect damages from their victimizers. However, given the sustained opposition to all sex work by the U.S. anti-trafficking movement, it is all but certain that the majority of U.S. anti-trafficking advocates would oppose classifying sex work as compensable labor nationwide.

Third, Section 1595 litigants could be protected from having their immigration statuses revealed. Because undocumented workers are dissuaded from bringing labor-related claims forward when it is possible that their immigration status would be exposed during the course of litigation, Section 1595 litigation would be promoted by providing plaintiffs with Continued Presence status and by prohibiting any inquiries into their immigration status during the course of Section 1595 proceedings. Such an adjustment to the Section 1595 regime requires only a modest change to the current statutory framework that does not conflict with the social vision of the U.S. anti-trafficking movement. As a result,

\[149\] Nam, supra note 106, at 1691.
enacting measures that protect Section 1595 litigants from having their immigration statuses revealed during the course of litigation is a realistic and politically feasible goal.

Fourth, groups that seek to assist and represent trafficking victims in Section 1595 proceedings could be given government grants designed to allow advocates to devote more time to aiding trafficking victims. Government grants could be given to non-governmental organizations on the condition that the grant money is used to support certain circumscribed activities. The activities that would prove useful to potential Section 1595 litigants are 1) public awareness campaigns detailing trafficking victims’ rights, 2) investigative activities designed to reveal parties who may be liable under the provision, and 3) lobbying efforts aimed at modifying the Section 1595 regime in a manner that is favorable to potential Section 1595 litigants. Currently, the U.S. government provides non-governmental organizations with anti-trafficking-related grants. However, current grant money is issued without specific conditions designed to benefit potential Section 1595 litigants. Under the Bush Administration, much of the available anti-trafficking grant money has been funneled to organizations that place a priority on eradicating sex work. Consequently, specific efforts to utilize Section 1595 have been largely overlooked. Grant-giving policies that encourage Section 1595 litigation do not conflict with the overriding agenda of the U.S. anti-trafficking movement. A push to encourage the provision of such grants has a reasonable chance of success.

Finally, courts could draw on cases like Shelley and Green in reading a disparate impact standard into Section 1595. Such a reading of the provision would give Section 1595 an anti-Lochnerian inflection, allowing the provision to draw on a more progressive, Warren Court-era legal consciousness. In the context of Section 1595, a disparate impact standard would look to the history of the exploitation of labor in the U.S. and find that historic, pervasive, and systemic injustices create conditions that make some classes of U.S. workers much more vulnerable than others. Courts could then give employers an affirmative duty to ensure that they do not treat undocumented workers any differently than other workers on account of their immigration status. Such an affirmative duty

150 Nathan, supra note 1, at 2.
could act as a means of circumventing a host of anti-labor and anti-immigrant U.S. policies, such as those found in FLSA, Hoffman, and the TVPA. For example, an undocumented meat processor fired for joining a union cannot find relief under the Wagner Act as a result of Hoffman. However, under a robust, anti-Lochnerian, Section 1595 regime, such a worker could be awarded civil damages for the firing if a court finds that the employer also acted with a sufficient level of coercion.

The anti-Lochnerian implementation of Section 1595 is a potentially powerful use of the provision and can work in concert with a number of other reforms. However, because the current Supreme Court has shown no signs of returning to a Warren Court-era legal consciousness, it is unlikely that it will read Section 1595 in a manner that is anti-Lochnerian. Thus, it may only be possible to attain an anti-Lochnerian Section 1595 regime in a limited number of left-leaning federal district and circuit courts, but only for as long as a Section 1595 claim is not heard by the Supreme Court.151

IV-B. SECTION IV CONCLUSION

The TVPA seeks to combat the problem of human trafficking by enacting or ratifying a number of U.S. labor policies, civil rights guarantees, and immigration policies. The historically expansive arc of the U.S.’s civil rights regime with respect to labor conflicts with a number

151 If Alien Tort Statute (ATS), 28 U.S.C. § 1350, jurisprudence is any indication, it is possible to conduct significant litigation regarding a private right of action for violations of human rights norms without having a representative case reach the Supreme Court. Since the reemergence of ATS litigation in 1980, ATS litigation has remained the province of the federal circuit courts. Significant litigation has occurred in the First Circuit, e.g., Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); the Second Circuit, e.g., Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); the Ninth Circuit, e.g., John Doe I v. Unocal Corp., 2002 WL 31063976 (9th Cir. 2002); the Eleventh Circuit, e.g., Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Eastman Kodak Company v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997); and the D.C. Circuit, e.g., Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998).
of restrictive U.S. immigration policies and with the Supreme Court’s history of rendering anti-labor judgments. The TVPA, like *Hoffman*, addresses the conflict by elevating restrictive immigration policies over the rights of workers and the needs of immigrants and potential immigrants. Consequently, the statute strikes a blow to the causes of immigrants’ rights, industrial democracy, and international worker solidarity.

A possible exception to the anti-immigrant, anti-labor tenor of the TVPA is Section 1595, which provides a private right of action for victims of human trafficking. If this provision is read expansively, and revised in a way that encourages litigation under the provision, Section 1595 could stand as a measure that both protects workers and allows for the enforcement of immigration law.