

The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers

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On August 25, 2008, federal agents from Immigration and Customs Enforcement (“ICE”) raided the Howard Industries electronics factory in Laurel, Mississippi.¹ Five hundred and ninety-two immigrant workers were taken into custody, making it the largest workplace raid in U.S. history. The previous May, nine hundred ICE agents raided the Agriprocessors meatpacking plant in Postville, Iowa, detaining 389 immigrant workers.² Most of these workers were charged with immigration violations and have been or will be deported as a result.³ In the aftermath of these raids, pervasive labor violations existing in these worksites have been revealed. An underage worker at the Postville plant reported feeling “like a slave,” laboring excessive hours under his employer’s threat of deportation if he complained.⁴ At Howard Industries in Laurel, a worker in removal proceedings spoke of the factory’s “terrible working conditions,” which aggravated her asthma.⁵ The factory had been cited previously for health and

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¹ Kari Lydersen, *An Unfolding Crisis in the Wake of Mississippi ICE Raid*, In These Times (Sept 19, 2008), available at <www.inthesetimes.com/article/3928/an_unfolding_crisis_in_the_wake_of_mississippi_ice_raid> (last visited July 9, 2009) (describing the effects of a recent raid by ICE in Mississippi from the perspectives of undocumented workers and their advocates).

² Julia Preston, *After Iowa Raid, Immigrants Fuel Labor Inquiries*, NY Times A1 (July 27, 2008) (discussing labor violations brought to light as a result of interviews with undocumented workers detained during the Postville raid).

³ Id.

⁴ Id.

⁵ Lydersen, *An Unfolding Crisis in the Wake of Mississippi ICE Raid*, In These Times (cited in note 1).

safety violations and was also in dispute with the local union over better pay and benefits. An immigrant workers' rights advocate remarked that these raids and others like it followed an "interesting pattern: Four of the last major raids had a similar situation where union negotiations were going on or workers rights violations were being investigated."⁶ Although U.S. laws prohibit labor abuse against both citizen and non-citizen workers and provide civil remedies to all workers injured by such abuse, many of the workplace violations experienced by the undocumented workers at Howard Industries and Agriprocessors will remain unvindicated as a result of the workers' immigration detention and deportation.

These examples highlight the inherent tension between the restrictive goals of immigration laws, used to control the nation's borders, and the expansive civil rights laws, utilized within U.S. borders to remove discriminatory restrictions on the labor pool.⁷ The contrasting goals of immigration and civil rights laws are paralleled by contrasting enforcement mechanisms: immigration law is largely enforced by public bodies and civil rights by private actors. The Department of Homeland Security ("DHS") and its related agencies, particularly ICE, increases compliance with immigration laws by penalizing immigration violators. For civil rights enforcement, the State depends heavily on private actors to take on the responsibility of "private attorneys general"—private individuals who act in the place of the State in order to increase compliance with antidiscrimination laws."⁸

Undocumented immigrant workers who experience workplace exploitation are uniquely impacted by the divergent goals of immigration and civil rights laws. Due to their lack of regularized immigration status, these workers are the objects of the public enforcement of immigration laws. ICE raids have torn families apart, placed both documented and undocumented immigrants in detention, and deported many of these workers without meaningful judicial review.⁹ The federal government's

⁶ *Id.*

⁷ Juliet Stumpf and Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 NYU J Legis & Pub Pol 131 (2002–2003) (discussing how immigration law that is designed to reduce the impact of illegal immigration on the domestic labor market may simultaneously negatively impact immigrants both within and outside of the current domestic labor market).

⁸ *Id.* at 135 (comparing the enforcement of immigration law by the state, on the one hand, with private attorneys general, created by several recently-enacted civil rights statutes, on the other).

⁹ *Over-Raided, Under Siege: U.S. Immigration Laws and Enforcement Destroy the*

plenary power over immigration regulation provides the harsh justification for depriving immigrants of basic procedural due process rights against deportation.¹⁰ And while a new administration claims a reduction in high visibility raids, longstanding immigration policy aims to remove undocumented immigrants and the government continues to focus immigration enforcement efforts on the workplace through audits of employers suspected of hiring unauthorized workers.¹¹ Inevitably, these investigations will lead to the same result, the arrest and deportation of undocumented immigrants who may be victims of workplace civil rights violations.¹²

Yet, regardless of whether workers are foreign-born, the substantive guarantees of our civil rights laws are expansive enough to extend to the workplace and to protect all workers against exploitation. The Thirteenth Amendment guarantees freedom from slavery and involuntary servitude,¹³ the Equal Protection Clause of the Fourteenth Amendment provides all individuals with equal protection of the laws,¹⁴ and various civil rights statutes, most prominently the Civil Rights Act of 1964, prohibit discrimination in a variety of settings.¹⁵

Rights of Immigrants, National Network for Immigrant and Refugee Rights 1–46 (Jan 2008), available at <http://www.nnirr.org/resources/docs/UnderSiege_web2.pdf> (last visited July 9, 2009) (detailing violations of immigrants' human rights by federal and state governments, private employers, and citizen enforcement groups and recommending policy changes to prevent further violations).

¹⁰ See, for example, *Chae Chan Ping v United States*, 130 US 581, 603, 608 (1889) (holding that “the government of the United States, through the action of the legislative department, can exclude aliens from its territory” and that “[t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one”).

¹¹ Anna Gorman, *L.A. Employers Face Immigration Audits*, L.A. Times (July 2, 2009) available at <<http://www.latimes.com/news/local/la-me-immigemploy2-2009jul02,0,7434438.story?track=rss>> (last visited July 9, 2009).

¹² *ICE Fact Sheet* (April 30, 2009) available at <<http://www.ice.gov/pi/news/factsheets/worksites.htm>> (last visited July 9, 2009) (indicating that “ICE will continue to arrest and process for removal any illegal workers who are found in the course of these worksite enforcement actions”).

¹³ US Const Amend XIII, §§ 1–2 (“Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation.”).

¹⁴ US Const Amend XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁵ Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified as amended at 42 USC § 2000a et seq (2000) (prohibiting discrimination in “public accommodations”).

Violations of these rights injure not only the direct victims of the unlawful workplace practices, but also the national community at large, the norms of which inform the conduct that Congress wishes to proscribe. Hence, many civil rights statutes grant victims of civil rights violations private rights of action against their perpetrators in order to achieve individual relief as well as “to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.”¹⁶ In acting as a private attorney general, “a successful civil rights plaintiff often secures important social benefits [W]hen his day in court is denied him, the congressional policy which a civil rights plaintiff seeks to assert and vindicate goes unvindicated and the entire nation, not just the individual citizen suffers.”¹⁷

In theory, undocumented workers victimized by exploitive employment practices may act as private attorneys general in the enforcement of workplace harms and may sue their employers under many of the same civil rights laws that protect citizen workers.¹⁸ Yet, in practice, the goals of immigration enforcement largely take precedence over the individual rights of undocumented workers. When these workers are deported and deprived of access to civil courts, workplace violations are not prosecuted and as a result basic workplace protections are undermined. Consequently, both the workers and the nation suffer deterioration in civil rights.

This Article seeks to transform this reality into one that prioritizes the civil workplace rights of undocumented immigrants over the goals of immigration enforcement by placing primacy on the role of the immigrant undocumented worker as a private attorney general. In developing this theory, this Article borrows from the legal framework addressing human trafficking where the divergent goals of immigration law and civil rights law are ameliorated. In this context, undocumented workers forced to

¹⁶ *City of Riverside v Rivera*, 477 US 561, 575 (1986) (affirming an attorney fee award to a civil rights plaintiff under 42 USC § 1988 in excess of the amount of damages recovered by plaintiffs).

¹⁷ Pamela Karlan, *Disarming the Private Attorney General*, 2003 U Ill L Rev 183, 187 (citing *City of Riverside v Rivera*, 477 US at 575).

¹⁸ Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wis L Rev 955, 1006–40 (describing the ways in which the Immigration Reform and Control Act of 1986 (IRCA) highlighted the tension between the undocumented workers as outsiders and as members of the national community, and arguing that IRCA will have a negative impact on undocumented workers).

labor in exploitive conditions may sue their traffickers¹⁹ and may also obtain immigration status²⁰ pursuant to the Trafficking Victims Protection Act (“TVPA”).²¹

Congress passed the TVPA in 2000,²² to combat comprehensively the phenomenon of trafficking in persons, which broadly encompasses the recruitment and transportation of workers, mostly immigrants, into a wide array of industries through the use of force, fraud, or coercion. As indicated in the law’s purposes and findings, human trafficking involves significant labor violations and is an international phenomenon implicating both foreign commerce and the “nationwide employment network and labor market.”²³ The TVPA has a strong prosecutorial purpose and is designed to criminalize traffickers. Yet, it also protects a previously unrecognized class of undocumented workers by providing legal immigration status, realizing that trafficking victims are “often illegal immigrants in the destination country [and] are repeatedly punished more harshly than the traffickers themselves.”²⁴ In 2003, the TVPA was amended to include a private right of action thereby codifying a new class of private attorneys general and representing an effort to extend civil rights protections to trafficked persons.²⁵ In 2008, the TVPA’s civil remedy was expanded to cover a wider range of defendants and prohibited conduct.²⁶ Significantly, the 2008 amendments also grant “continued presence,” a form of temporary immigration status to trafficked persons who pursue civil suits against their traffickers. Thus, as private attorneys general, who may secure immigration status, trafficked plaintiffs represent a class of immigrant workers who are not merely objects of immigration en-

¹⁹ Trafficking Victims Protection Reauthorization Act of 2003, Pub L No 108-193, § 1595, 117 Stat 2875, 2878 (2003), codified as amended at scattered sections of titles 8, 18, 22, 42 (2006) (amending the TVPA as discussed below and appropriating funds for the TVPA for 2004 and 2005).

²⁰ 22 USC § 7101(b)(17) (2006).

²¹ Victims of Trafficking and Violence Protection Act of 2000, Pub L No 106-386, 114 Stat 1464, codified as amended at scattered sections of titles 18, 22, 27, 42 (2000) (describing the purpose of the Act as “combat[ing] trafficking in persons, especially into the sex trade, slavery, and involuntary servitude”).

²² *Id.*

²³ 22 USC § 7101(b)(12) (2006).

²⁴ 22 USC § 7101(b)(17) (2006).

²⁵ Trafficking Victims Protection Reauthorization Act of 2003, 117 Stat at 2878.

²⁶ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub L 110-457, 122 Stat 5044, codified at scattered sections in titles 6, 8, 18, 22, 28, 42 USC (2008) (describing the purpose of the Act as “[t]o authorize appropriations for fiscal years 2008 through 2011 for the Trafficking Victims Protection Act of 2000 [and] to enhance measures to combat trafficking in persons”).

forcement, but who are agents of enforcement of civil rights violations in the workplace.

This Article draws from the trafficking framework to propose a private attorney general model of workplace regulation for all undocumented workers victimized by labor exploitation. This Article is part of a larger project examining the substantive rights of undocumented immigrants. In a companion piece,²⁷ I critique the law's distinction between immigrant labor exploitation and human trafficking by exploring theories of coerced labor. The latter receives the law's protection as victims of involuntary servitude, while the former does not, since undocumented workers are perceived to be in a collusive relationship with their employers, freely complying with substandard working conditions and voluntarily present without legal status. I argue that the conceptual distinction between trafficked workers and immigrant victims of labor exploitation, if any, is ambiguous. In varying degrees, both are subjected to substandard working conditions and both may undergo coercion in the workplace that contributes to their compliance. In this Article, however, I acknowledge that in practice, the law continues to be implemented in a manner that distinguishes between trafficked workers and other immigrant victims of labor exploitation. I therefore explore the extent to which a trafficking victim's civil rights regime can be imported into the undocumented worker context.

This Article is divided into three parts. Part I provides a background on the development of the private attorney general and its traditional role in the enforcement of civil rights. Part I also describes the limited efficacy of the private attorney general in the undocumented worker context, where the goals of immigration enforcement supersede those of civil rights enforcement.

Part II discusses human trafficking as a phenomenon of global labor migration that violates the civil rights of immigrant workers to be free from coercive and exploitive work environments. Part II describes the human trafficking laws, focusing on the TVPA's private right of action, its recent expansion, and the immigration relief available which empowers trafficked plaintiffs to fulfill their roles as private attorneys general without risk of deportation.

Part III examines civil litigation on behalf of human trafficking victims, which incorporates the TVPA as well as the Thirteenth Amendment and other civil rights statutes. This Part de-

²⁷ Kathleen Kim, *The Coercion of Trafficked Workers*, forthcoming 2010.

scribes the ways in which the trafficked plaintiff fulfills the role of private attorney general not only by obtaining individual relief, but also by vindicating important societal interests in the advancement of constitutional and civil rights. A parallel analysis of litigation in the undocumented worker context demonstrates similar individual and social benefits. This comparative analysis supports an additional policy objective: The trafficked worker as private attorney general represents a model of civil rights enforcement. If replicated by other undocumented victims of workplace abuse, this model would allow these victims, unimpeded by restrictive immigration laws, to advance civil rights imperatives.

PART I

A. Civil Rights and the Private Attorney General

Private attorneys general may be created by statute, judicial decision, or executive order.²⁸ The basic premise of the private attorney general is that, by empowering private persons with causes of action to sue for their injuries, the individual not only obtains direct relief, but also accomplishes important public policy goals.²⁹ Interpreting the Civil Rights Act of 1964, the Supreme Court declared that when a plaintiff brings an action and obtains relief “he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”³⁰ In *City of Riverside v Rivera*,³¹ the Court further explained that this public policy goal is realized even when the private attorney general obtains individual compensatory damages rather than injunctive relief: “[U]nlike most private tort litigants, the civil rights plaintiff seeks to vindicate im-

²⁸ William Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 Vand L Rev 2127, 2130 (2004), providing an overview of the role of the private attorney general in the United States and drawing on the historical discussion of private attorneys general in *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240, 247–61 (1975). See also Michael Waterstone, *A New Vision of Public Enforcement*, 92 Minn L Rev 434 (2007) (describing the private attorney general theory and discussing the limits of private enforcement in the disability context, suggesting a more effective public enforcement scheme).

²⁹ Karlan, 2003 U Ill L Rev at 186–87 (cited in note 17) (briefly describing the importance of the private attorney general as an introduction to a discussion of four recent Supreme Court cases that sharply limit the power of private attorneys general).

³⁰ *Newman v Piggie Park Enterprises, Inc.*, 390 US 400, 402 (1968) (holding that plaintiffs can usually be awarded attorneys’ fees since plaintiffs would otherwise lack the resources to bring claims under the Civil Rights Act of 1964).

³¹ 477 US 561 (1986).

portant civil and constitutional rights that cannot be valued solely in monetary terms. . . . Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits.”³²

Most civil rights statutes explicitly provide for private attorneys general. To encourage individuals injured by civil rights violations to act as private attorneys general, a prevailing plaintiff typically may recover attorneys’ fees. This added incentive indicates congressional recognition that public enforcement alone may be insufficient to increase compliance with civil rights standards. This important role of the private attorney general has been recognized by the Supreme Court. In *Allen v State Board of Elections*,³³ the Court affirmed the private cause of action under § 5 of the Voting Rights Act of 1965 by noting that the guarantees of the Fifteenth Amendment would be “severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. . . . The Attorney General has limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government.”³⁴ The consequence of depending solely on governmental action is fewer enforcement actions, a reduction in compliance with civil rights regulations, and more rights violations.

Thus, the broad policy goals of promoting civil rights are prioritized over governmental discretionary measures through the private attorney general.³⁵ By explicating and giving force “to the values embodied in authoritative texts such as the Constitution and statutes,”³⁶ the private attorney general lawsuit elevates the significance of the litigation itself:

³² *Id.* at 574 (distinguishing civil rights actions from private tort suits).

³³ 393 US 544 (1969).

³⁴ *Id.* at 556 (reasoning that actions by private citizens are necessary to achieve the purposes of the Voting Rights Act (VRA), and holding that private citizens can invoke the jurisdiction of the district court under the VRA).

³⁵ Karlan, 2003 U Ill L Rev at 200 (cited in note 17) (citation omitted) (contrasting the purpose of § 602 of the Civil Rights Act of 1964, which allows federal agencies to “effectuate” the goals of the Act by promulgating rules and regulations, with the purposes of private attorneys general). According to Karlan, the private attorney general “elevates full enforcement of broad policy goals over formal political accountability for discrete enforcement decisions,” thereby more effectively promoting constitutional and civil rights standards. *Id.* But see Waterstone, 92 Minn L Rev at 436–37 (cited in note 28) (arguing for greater public enforcement of civil rights harms in the disability context given the recent cutting back of private attorney general lawsuits by the Supreme Court).

³⁶ Karlan, 2003 U Ill L Rev at 201 (cited in note 17).

[The private attorney general] vindicates the public interest by bringing that defendant into compliance with constitutional standards or statutory commands. . . [and] if a private attorney general obtains a judgment in her favor, that judgment will often be accompanied by a judicial decision that articulates a rationale for her victory that extends beyond her particular case. The creation of binding precedents is a beneficial byproduct of litigation . . .³⁷

Such binding precedents have been important in advancing civil rights in the workplace. For example, in *Griggs v Duke Power Co.*,³⁸ the Supreme Court extended Title VII of the 1964 Civil Rights Act to prohibit employer conduct that has a discriminatory impact on minorities and women.³⁹ In *Meritor Savings Bank v Vinson*,⁴⁰ the Court established sexual harassment as a form of unlawful job discrimination under Title VII and broadly defined sexual harassment as including an abusive or hostile work environment.⁴¹

Other federal employment and labor statutes provide broad protections against discrimination and other types of workplace exploitation such as wage and hour violations and employer retaliation for worker organizing activity.⁴² The last of the New Deal legislation, the Fair Labor Standards Act (“FLSA”), was

³⁷ *Id.* (contrasting the rather narrow vision of litigation described in *Marbury v Madison*, 5 US (1 Cranch) 137, 170 (1803), with the more expansive vision embodied in the private attorney general).

³⁸ 401 US 424 (1971).

³⁹ *Id.* at 436 (“What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.”).

⁴⁰ 477 US 57 (1986).

⁴¹ *Id.* at 66 (holding that “a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment”). Although Title VII may be enforced through the Equal Employment Opportunity Commission (“EEOC”), Title VII provides for a private right of action when the EEOC chooses not to pursue a Title VII complaint. The availability of the private right of action enables private litigants to sue for Title VII violations when governmental discretion prevents EEOC enforcement.

⁴² The National Labor Relations Act (“NLRA”) protects workers who organize from adverse employment actions. 29 USC §§ 151–169 (2006). Workers may utilize the NLRA to bring direct causes of action against employers who retaliate for a worker’s organizing activity. However, recovery for undocumented workers under the NLRA has been greatly limited by the Supreme Court decision in *Hoffman Plastics Compounds, Inc. v NLRB*, 535 U.S. 137 (2002). Section C below discusses the NLRA and *Hoffman* in greater detail.

signed into law in 1938 at the height of the Great Depression.⁴³ Its intent was to promote the protection of workers and economic fair play between employers and employees.⁴⁴ Like most civil rights statutes, the FLSA was enacted pursuant to Congress' power under the Commerce Clause, which authorizes Congress to regulate any activity related to interstate commerce.⁴⁵ Yet, the FLSA represented much more than commerce regulation. Its congressional history demonstrates that the FLSA embodied substantive constitutional values, specifically, the free and fair labor constitutional guarantee of the Thirteenth Amendment, which prohibits slavery and involuntary servitude.⁴⁶

The FLSA requires that workers receive a minimum wage and overtime pay. It also protects them against unfair labor practices.⁴⁷ While it created a Wage and Hour Division in the Department of Labor ("DOL") to enforce these new standards, workers who experience violations of the Act are also empowered to sue directly for damages and attorneys' fees.⁴⁸ Given the historically understaffed and underfunded resources of the DOL,⁴⁹ enforcement of FLSA's standards is necessarily reliant on private

⁴³ Fair Labor Standards Act of 1938, Pub L No 75-718, 52 Stat 1060, codified at 29 USC § 201 et seq (2000).

⁴⁴ Id ("The Congress hereby finds that: the existence, in industries engaged in commerce or in the production of goods or commerce of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general wellbeing of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. It is hereby declared to be the policy of this Act, through, the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.").

⁴⁵ US Const Art I, § 8, cl 3 ("The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states.").

⁴⁶ See generally, James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 Colum L Rev 1 (2002). See also Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U Pa L Rev 437, 438 (1989-1990) (finding evidence in the congressional record and the history of the Thirteenth Amendment, that the FLSA stood for "a much broader idea of employee autonomy and independence"); James Gray Pope, *Labor's Constitution of Freedom*, 106 Yale L J 941 (1996-1997).

⁴⁷ 29 USC §§ 206 (2006) (mandating a minimum wage) and 207 (establishing overtime pay).

⁴⁸ 29 USC §§ 204(a) (2006) (establishing the Wage and Hour Division) and 216(b) (allowing employees to sue directly).

⁴⁹ Robert J.S. Ross, *Slaves to Fashion: Poverty and Abuse in the New Sweatshops* 150-52 (Michigan 2004).

plaintiffs' actions. Additionally, the FLSA specifies a procedure for collective actions, allowing injured plaintiffs to sue on behalf of themselves as well as "other employees similarly situated."⁵⁰ FLSA's collective requirements are less onerous⁵¹ than Rule 23 class actions, in which plaintiffs must prove typicality, commonality, numerosity and adequacy of representation to receive class certification.⁵² Furthermore, while Legal Services Corporations are prohibited from bringing class actions, they are permitted to bring collective actions.⁵³ This indicates that Congress intended to give FLSA protections to a wide range of plaintiffs. The inclusion of private lawsuits for FLSA enforcement conserves public resources and also amplifies the voices of workers by allowing them to direct their own lawsuit.

B. Civil Rights and the Undocumented Worker

This combination of anti-discrimination and fair labor protections under the Civil Rights Act of 1964 and the FLSA provide workers with direct causes of action to protect both themselves and workers similarly situated from exploitation, while also promoting the policy goals of free labor and equal protection derived from the Thirteenth and Fourteenth Amendments. The extension of these rights to immigrants—both lawfully and unlawfully present in the United States—indicates that these rights exist independently of citizenship-based rights.⁵⁴ However,

⁵⁰ 29 USC § 216(b) (2006).

⁵¹ See 29 USC § 216(b) ("An action to recover [unpaid overtime] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."). See also *Wage & Hour: As Overtime Lawsuits Renew FLSA Debate, Attorneys Advise Learning the Wage Law*, Daily Labor Rptr (BNA June 25, 2002); *Discrimination: Wage Hour Collective Actions Jumped 70 Percent Since 2000, Analysis Shows*, Daily Labor Rptr (BNA Mar 26, 2004).

⁵² FRCP 23 (providing the rules for class action certification). The class action lawsuit traditionally has epitomized the private attorney general action. The comparison between FLSA collective actions and class actions is not intended to criticize the efficacy of the class action as a significant civil rights tool. The comparison is intended to highlight the purpose of the FLSA to promote broad worker protections.

⁵³ Legal Services Corporation Regulations, 45 CFR Part §§ 1617.1–1617.4 (1996)-Class Actions, available at <<http://www.lsc.gov/lscgov4/45cfr1617.PDF>> (prohibiting class actions, but not providing the same prohibition on FLSA collective actions) (last visited July 9, 2009).

⁵⁴ See, for example, *Espinoza v Farah Manufacturing Co*, 414 US 86 (1973) (holding that undocumented workers are included within the meaning of "employee" under Title VII of the Civil Rights Act of 1964). See also *Plyler v Doe*, 457 US 202, 213–15 (1982) (holding that the undocumented immigrant "is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the

in practice, there is often a strained relationship between immigration policy and civil rights. The constant threat of deportation alienates workers with precarious immigration status from access to justice for workplace violations.⁵⁵ Undocumented workers who complain about working conditions are met with retaliation by employers reporting the workers to immigration authorities.⁵⁶ Employer retaliation, while prohibited as a policy matter, may still provide a legitimate basis for removal.⁵⁷ This reality reduces employer accountability for workplace violations against undocumented immigrants, thereby producing additional incentives for unscrupulous employers to employ and to exploit an undocumented workforce.⁵⁸

United States—he is entitled to the equal protection of the laws that a State may choose to establish.”); *In re Reyes*, 814 F2d 168, 170 (5th Cir 1987) (“[T]he protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant.”). See generally *EEOC: Undocumented Workers Entitled To Same Remedies As Authorized Workers*, 13 Immigrants’ Rights Update 7 (Nat’l Immigration L Center Nov 17, 1999), available at <<http://www.nilc.org/immsemplymnt/emprights/emprights008.htm>> (last visited July 9, 2009).

⁵⁵ See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 Harv CR–CL L Rev 345, 360 (Summer 2001) (describing the relationship between the INS and employers of undocumented workers as establishing “cooperative industry-wide approaches” for immigration sanctions and concluding that these “workplace strategies . . . focus not on the border but on creating an unemployed underclass within our borders, often inflicting economic harm on employers and draining community resources. The unemployed, nondeported, discharged workers remain a part of our society, and are pushed further underground, where they are that much more vulnerable to exploitation by unscrupulous employers seeking to circumvent labor laws.”).

⁵⁶ *Rivera v Nibco, Inc.*, 364 F3d 1057, 1064 (9th Cir 2004) (“While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution.”). See also *Singh v Julta & C.D. & R’s Oil, Inc.*, 214 F Supp 2d 1056, 1059–62 (N D Cal 2002) (denying defendant employer’s motion to dismiss where plaintiff undocumented alien employee stated a claim for retaliatory reporting under the FLSA); *Contreras v Corinthian Vigor Ins Brokerage, Inc.*, 25 F Supp 2d 1053, 1059–60 (N D Cal 1998) (denying defendant’s motion to dismiss where plaintiff employee sought punitive damages and alleged that her employer violated FLSA by reporting her to the INS in retaliation for her suit to collect unpaid wages); 8 USC § 1227(a)(1)(B) (Supp V 2006) (making individuals who are present in the United States without lawful status deportable).

⁵⁷ See, for example, *Montero v INS*, 124 F3d 381, 384–85 (2d Cir 1997) (reasoning that “[w]hether or not an undocumented alien has been the victim of unfair labor practices, such an alien has no entitlement to be in the United States,” and holding that information about immigration status from employers in violation of labor laws can form a basis for deportation). See also *Nessel*, 36 Harv CR–CL L Rev at 361 (cited in note 55) (“[T]he only workers at risk of deportation for unauthorized employment are those reported by the employer in retaliation for protected organizing activities or ‘that kind of stuff.’”).

⁵⁸ See Christopher Ho and Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the*

As a result of this reduction in employer accountability, undocumented workers typically experience a greater number of unlawful working conditions, such as substandard wages, overtime violations, and health and safety violations.⁵⁹ While there is little comprehensive national data, due to the clandestine nature of undocumented workers' employment, one report found a 22 percent general wage penalty for being undocumented, controlling for length of U.S. work experience, education, English proficiency, and occupation.⁶⁰ Other region and industry specific research provides a broader picture of the general working conditions of undocumented immigrants. For example, a study on Chicago's undocumented immigrant population revealed that 26 percent of undocumented workers received no payment or underpayment of wages⁶¹ and while many of these workers reported unsafe work conditions,⁶² they were significantly underrepresented in filing claims with OSHA. Their reasons for not reporting safety issues to OSHA included the belief that OSHA would not do anything, fear of employer retaliation and fear of deportation.⁶³ The day laborer population, 75 percent of which is undocumented, also face employment abuses.⁶⁴ Almost half of this population experiences wage theft⁶⁵ and denial of food and water while on the job.⁶⁶ Many of these workers are verbally and phys-

Title VII Context and Beyond, 22 Hofstra Lab & Emp L J 473, 477 (2004–2005) (“[T]he conditions under which these persons work are—owing to their precarious circumstances—typically substandard, rife with exploitation by avaricious employers and, sometimes, astoundingly appalling in the extent and depth of their cruelty.”).

⁵⁹ See, for example, Annette Bernhardt, Siobhán McGrath, and James DeFilippis, *Report: Unregulated Work in the Global City: Employment and Labor Law Violations in New York City* (Brennan Center for Justice at NYU Law School 2007), available at <http://nelp.3cdn.net/cc4d61e5942f9cfdc5_d6m6bgaq4.pdf> (researching unregulated industries and labor violations in New York City and focusing on the immigrant workforce) (last visited July 9, 2009).

⁶⁰ Demetrios G. Papademetriou, et al, Migration Policy Institute, *Observations on Regularization and the Labor Performance of Unauthorized and Regularized Immigrants 14* (2004), available at <http://ec.europa.eu/employment_social/employment_analysis/docs/regularisation5.pdf> (last visited July 9, 2009).

⁶¹ Chirag Mehta, et al, *Chicago's Undocumented Immigrants: An Analysis Of Wages, Working Conditions, and Economic Contributions* 29 (University of Illinois, Center For Urban Economic Development Feb 2002), available at <http://www.uic.edu/cuppa/uicued/publications/recent/undoc_full.pdf> (last visited July 9, 2009).

⁶² *Id.* at 27.

⁶³ Mehta, *Chicago's Undocumented Immigrants* at 29 (cited in note 61).

⁶⁴ Abel Valenzuela Jr., et al, *On the Corner: Day Labor in the United States* 17 (UCLA Center For the Study of Urban Poverty Jan 2006), available at <http://www.ssnnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf> (last visited July 9, 2009).

⁶⁵ *Id.* at 14, table 7.

⁶⁶ *Id.*

ically harassed by their employers and threatened with deportation.⁶⁷

High concentrations of undocumented workers also exist in meat and poultry processing plants, which are notorious for pervasive employment abuses.⁶⁸ In a multi-part series uncovering worker exploitation at poultry processing plants in the Carolinas, the Charlotte Observer estimated that 80 to 90 percent of the workers at these plants were Latino and that most were undocumented.⁶⁹ Former supervisors at a plant stated that the plant preferred undocumented workers because they were “less likely to question working conditions for fear of losing their jobs or being deported.”⁷⁰ The goal of worker compliance is unsurprising given the harsh and dangerous working conditions. The poultry processing industry's death and injury rates are higher than those for manufacturing as a whole. Over the last decade, more than three-hundred thousand workers have been injured and approximately one hundred poultry workers have died on the job.⁷¹ In spite of these dangers, these factories continuously violate basic wage and hour laws. For example, a DOL report found that virtually all poultry plants were non-compliant with wage and hour laws.⁷² Human Rights Watch determined that governmental agencies failed to prosecute basic labor rights violations against the immigrant workers at these factories and further concluded that “[f]ederal law and policy on immigrant workers

⁶⁷ *Id.*

⁶⁸ Lance Compa, *Blood, Sweat and Fear: Workers Rights in U.S. Meat and Poultry Plants* (Human Rights Watch 2004). See also Franco Ordonez, Kerry Hall, and Ames Alexander, *Misery on the Line: Some Managers Knew Workers Were Illegal, Former Employees Say*, Charlotte Observer (Sept 30, 2008), available at <<http://www.charlotteobserver.com/595/story/223444.html>> (last visited July 9, 2009). (“One 2006 study estimated more than a quarter of meat-processing workers nationwide are undocumented. Some experts say even more work in poultry because its jobs are less skilled.”).

⁶⁹ See generally *The Cruellest Cuts Series: The Human Cost of Bringing Poultry to Your Table*, Charlotte Observer (Feb 10–15, 2008), available at <<http://www.charlotteobserver.com/poultry>> (last visited July 9, 2009). See also Rick Thames, *Poultry Series Exposes a New, Silent Subclass*, Charlotte Observer (Sept 30, 2008), available at <<http://www.charlotteobserver.com/595/story/223508.html>> (last visited July 9, 2009).

⁷⁰ Ordonez, Hall, and Ames, *Misery on the Line*, Charlotte Observer (cited in note 68).

⁷¹ *The Perils of Processing*, Charlotte Observer (Sept 30, 2008), available at <<http://www.charlotteobserver.com/595/story/223426.html>> (last visited July 9, 2009).

⁷² US Department of Labor, *Fiscal Year 2000 Poultry Processing Compliance Report 3* (2000). See also US Department of Labor, *Poultry Processing Compliance Survey Fact Sheet* (Jan 20, 2001), available at <<http://www.ufcw.org/docUploads/Usdept~1.pdf?CFID=7005606&CFTOKEN=63042914>> (last visited July 9, 2009) (describing additional statistical data on the working conditions at poultry processing plants).

are a mass of contradictions; at worst they contain incentives for employers to violate their rights.⁷³

Egregious working conditions are not limited to the undocumented workforce. Rampant abuses against temporary workers have also been documented.⁷⁴ In particular, the H-2A nonimmigrant visa program has been characterized as akin to slavery because workers are especially vulnerable to employment abuses due to the restrictive terms of their visa status.⁷⁵ Moreover, discrimination against immigrants, even those who have legal permanent residency, seems to have an overall impact on working conditions.⁷⁶

Notwithstanding the difficult issues facing legal immigrant workers in this country, the focus of this Article is undocumented workers, not only because they aptly illustrate the tension between the goals of immigration law and civil rights law, but because they make significant contributions to the U.S. economy and society that should not be ignored.⁷⁷ There are an estimated twelve million undocumented immigrants currently residing in the U.S.; these immigrants make up 30 percent of the nation's foreign-born population⁷⁸ and 5 percent of the nation's labor

⁷³ Compa, *Blood, Sweat, And Fear* at 4 (cited in note 68).

⁷⁴ *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the US* (Human Rights Watch 2001); Mary Bauer, *Close to Slavery: Guestworker Programs in the United States* (Southern Poverty Law Center Feb 2007), available at <<http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>> (last visited July 9, 2009); *Litany of Abuses: More—Not Fewer—Labor Protections Needed in the H-2A Guestworker Program* (Farmworker Justice Dec 2008), available at <http://www.fwjustice.org/Immigration_Labor/H2abDocs/LitanyofAbuseReport12-09-08.pdf> (last visited July 9, 2009).

⁷⁵ Bauer, *Close to Slavery* at 2 (cited in note 74); *Litany of Abuses* at 6–9 (cited in note 74).

⁷⁶ See Roger Waldinger and Michael I. Lichter, *How the Other Half Works: Immigration and the Social Organization of Labor* 141–80 (California 2003). See also Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 Ohio St L J 961, 962 (2006) (arguing that the “brown collar [Latino] labor pool is presumed to be undocumented,” and low-wage Latino workers face negative employment treatment “regardless of documentation status”); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale L J 2179, 2183 (1993–1994).

⁷⁷ *Assessing the Economic Impact of Immigration at the State and Local Level* (Immigration Policy Center Apr 28, 2009), available at <<http://www.immigrationpolicy.org/images/File/factcheck/State%20and%20Local%20Study%20Survey%2004-27-09.pdf>> (last visited July 9, 2009).

⁷⁸ Jeffrey Passel and D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* at 2, 3 (Pew Hispanic Center Apr 14, 2009), available at <<http://pewhispanic.org/files/reports/107.pdf>> (last visited July 9, 2009). See also Jeffrey Passel and D’Vera Cohn, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow* (Pew Hispanic Center Oct 2, 2008), available at <<http://pewhispanic.org/files/reports/94.pdf>> (last visited July 9, 2009).

force.⁷⁹ Industries such as agriculture, cleaning, construction and hospitality heavily depend on these workers.⁸⁰ In addition to filling jobs, undocumented workers support the U.S. economy as consumers and taxpayers of state and local sales taxes, real estate taxes, and income tax.⁸¹ Because they are ineligible for almost all government public assistance programs, their net contribution exceeds their cost to the economy.⁸² A 2008 report found that “the immediate effect of eliminating the undocumented workforce would include an estimated \$1.757 trillion in annual lost spending, \$651.511 billion in annual lost output, and 8.1 million job losses.”⁸³

As Professor Jennifer Gordon has stated, one basic normative argument for recognizing the rights of undocumented workers is “about human dignity: if you give up your labour, you're benefiting the country that you're in, so you deserve to be treated with respect and paid fairly.”⁸⁴ Professor Alexandra Natapoff has discussed the exploitation of undocumented workers within the general context of under-enforcement of violations against marginalized groups to suggest a deeper problem presented to liberal democracies:

When underenforcement affects socially vulnerable groups, fairness concerns are at their height. It also be-

⁷⁹ *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the U.S. with Estimated Effects by State and by Industry* (The Perryman Group Apr 2008), available at <<http://www.ilw.com/articles/2008,1008-perryman.pdf>> (last visited July 9, 2009).

⁸⁰ Jeffrey Passel, *Unauthorized Migrants: Numbers and Characteristics, Background Briefing Prepared for Task Force on Immigration and America's Future* 27 (Pew Hispanic Center June 14, 2005), available at <<http://pewhispanic.org/files/reports/46.pdf>> (last visited July 9, 2009; see also Passel and Cohn, *A Portrait of Unauthorized Immigrants in the United States* at 16 (cited in note 78)).

⁸¹ *An Essential Resource* at 35 (cited in note 79) (“50% and 75% of undocumented immigrants pay federal, state, and local taxes. Furthermore, their Social Security and Medicare contributions directly support older Americans as undocumented immigrants are not eligible to receive these services. Available evidence suggests that undocumented workers pay far more in overall taxes than they receive in benefits from various governments.”).

⁸² Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, NY Times A1 (Apr 5, 2005).

⁸³ *An Essential Resource* at 40 (cited in note 79).

⁸⁴ Peter Costantini, *Rights: Anti-Immigrant Surge Tramples Intl Norms*, Inter Press Service News Agency (Dec 9, 2007), available at <<http://www.ipsnews.net/news.asp?idnews=40398>> (last visited July 9, 2009). See also Jennifer Gordon, *Transnational Labor Citizenship*, 80 S Cal L R 503, 511 (2006–2007) (“[T]he effort to build labor citizenship is at once an effort to create a strong democratic internal culture, and to exercise power in the workplace, the community, and the political arena in order to achieve recognition of and compensation for workers’ economic contributions to society.”).

comes a strong form of inegalitarian redistribution as public resources are channeled away from impoverished and politically weak groups or communities. . . . When this responsiveness failure leads in turn to the inegalitarian distribution of one of society's most valuable resources—the protection of the law itself—this is a harm of significant democratic proportions.⁸⁵

The under-enforcement of violations against undocumented workers deprives these workers of individual relief and also threatens to harm the bedrocks of our nation's civil and constitutional obligations to protect freedom and equality.

C. Immigration Law and the Undocumented Worker

Immigration law has also been traditionally under-enforced, particularly in the workplace.⁸⁶ Previous to the passage of the Immigration Reform and Control Act of 1986 ("IRCA"), "federal law permitted employers to hire undocumented immigrants."⁸⁷ With the objective to eliminate unauthorized migration, thought to be driven largely by employment opportunities in the U.S., Congress passed IRCA in 1986, reversing this implicit federal policy by transferring immigration enforcement to the workplace. Employers who knowingly hire illegal aliens can be sanctioned under IRCA's immigration regulatory regime.⁸⁸ Employers must therefore verify the legal immigration status of their employees upon hiring. In theory, immigration status verification and the threat of sanctions provide an incentive to employers to screen out potential immigration violators as employees,⁸⁹ thereby deterring illegal immigration.⁹⁰

⁸⁵ Alexandra Natapoff, *Underenforcement*, 75 *Fordham L Rev* 1715, 1753 (2006–2007).

⁸⁶ *Id.* at 1736. See also Hiroshi Motomura, *Immigration Outside the Law* 108 *Colum L Rev* 2037, 2049 (2008) ("The reason is that chronic and intentional underenforcement of immigration law has been de facto federal policy for over a century.")

⁸⁷ Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 *U Chi Legal F* 193, 193.

⁸⁸ Immigration and Nationality Act (INA), Ch 477, § 274A(a)(1)(A), 66 Stat 228 (1952), codified as amended by IRCA (1986) at 8 USC § 1324(a) (2006). See also Doris Meissner and Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course* 27 (Migration Policy Institute Feb 2009).

⁸⁹ See generally Stephen Lee, *Private Immigration Screening in the Workplace*, 61 *Stan L Rev* 1103 (2009).

⁹⁰ Richard M. Stana, Director, Homeland Security and Justice, *Statement: Immigration Enforcement: Preliminary Observations on Employment Verification and Worksites Enforcement Efforts* at 1 (GAO 2005) ("As we and others have reported in the past, the

In addition to its enforcement provisions, IRCA implemented a broad amnesty to certain undocumented immigrants who had resided continuously in the United States for a number of years.⁹¹ IRCA also included provisions against national origin and alienage discrimination to protect lawful workers from adverse employment decisions based on a worker's foreign appearance.⁹² However, IRCA did not contemplate substantive civil rights protections for unlawful workers, since its chief goal was to bring an end to unauthorized migration.

In the twenty years that followed IRCA's passage, the demand of the U.S. economy has perpetuated the hiring of undocumented labor and "immigration officials openly acknowledge that they do not enforce [IRCA's] provisions, but rather that the government 'turns a blind eye' to immigration violations in the workplace."⁹³ IRCA's enforcement scheme has largely failed at curbing unauthorized migration—evidenced by the marked increase in the population of undocumented immigrants in the U.S. and in the labor force in the years following IRCA's passage.⁹⁴ Ironically, IRCA has not only been ineffective at accomplishing its purported goals, but its enforcement framework has also facilitated the exploitation of undocumented workers by abusive employers. According to immigrants' rights scholars, IRCA's employer sanction and verification provisions empower employers to act as immigration enforcers by requiring them to investigate the immigration status of their workers.⁹⁵ In turn, IRCA confers "a

opportunity for employment is one of the most important magnets attracting illegal aliens to the United States. To help address this magnet, in 1986 Congress passed the Immigration Reform and Control Act (IRCA), which made it illegal for individuals and entities to knowingly hire, continue to employ, or recruit or refer for a fee unauthorized workers."

⁹¹ INA 245A.

⁹² INA 274B.

⁹³ Natapoff, 75 *Fordham L Rev* at 1736 (cited in note 85). See also Stana, *Statement: Immigration Enforcement* at 12 (2005) (cited in note 90) ("Worksite enforcement was a low priority for INS and continues to be a low priority for ICE. In the 1999 INS Interior Enforcement Strategy, the strategy to block and remove employers' access to undocumented workers was the fifth of five interior enforcement priorities. We have reported that, relative to other enforcement programs in INS, worksite enforcement received a small portion of INS's staffing and enforcement budget and that the number of employer investigations INS conducted each year covered only a fraction of the number of employers who may have employed unauthorized aliens."); Wishnie, 2007 *U Chi Legal F* at 209 (cited in note 87) (discussing statistics indicating low government enforcement of IRCA's employer sanction provisions).

⁹⁴ Meissner and Kerwin, *DHS and Immigration* at 28 (cited in note 88). See also Peter Brownell, *The Declining Enforcement of Employer Sanctions* (Migration Policy Institute Sept 1, 2005, available at <<http://www.migrationinformation.org/Feature/display.cfm?ID=332>> (last visited July 9, 2009).

⁹⁵ Wishnie, 2007 *U. Chi. Legal F.* at 215 (cited in note 87).

broad coercive power on employers,” which allows them to threaten workers with the verification of their immigration status or reporting workers’ unauthorized status to ICE when immigrant workers “seek to form a union, demand overtime pay, resist sexual harassment, or otherwise defend their interests in the workplace.”⁹⁶

Furthermore, pursuant to IRCA’s prohibition against the hiring of unauthorized workers, the Supreme Court cemented the vulnerability of undocumented workers by denying backpay and reinstatement to an undocumented worker who was wrongfully terminated in retaliation for his organizing activity. The Court prioritized IRCA’s immigration enforcement goals over the rights of the worker, holding that back pay under the NLRA “is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986.”⁹⁷ *Hoffman* has had a lasting impact on the immigrant community. While most remedies for undocumented workers under federal anti-discrimination laws⁹⁸ and FLSA⁹⁹ remain intact, *Hoffman* has chilled immigrant workers, even those with legal status, from reporting workplace violations for fear of employer reprisals without a remedy.¹⁰⁰

Immigrants’ rights advocates uniformly criticize *Hoffman* and IRCA’s employer sanction regime as allowing employers to exploit workers with impunity.¹⁰¹ This is not a new phenomenon.

⁹⁶ *Id.*

⁹⁷ *Hoffman Plastic Compounds, Inc v NLRB*, 535 US 137 (2002).

⁹⁸ *Rivera v Nibco, Inc*, 364 F3d 1057 (9th Cir 2004) (upholding a protective order against discovery into a plaintiff’s immigration status and finding that even in light of *Hoffman*, immigration status is not relevant to determining whether an employer engaged in national origin discrimination under Title VII).

⁹⁹ *Patel v Quality Inn South*, 846 F2d 700, 704–05 (11th Cir 1988) (“[T]he FLSA’s coverage of undocumented aliens . . . is [] fully consistent with the objectives of the IRCA.”). See also *Flores v Albertson’s, Inc*, 2002 US Dist LEXIS 6171, *18–20 (C D Cal); *Liu v Donna Karan Intl, Inc*, 207 F Supp 2d 191 (S D NY 2002) (holding that the *Hoffman* decision had no bearing on the recovery of backpay for undocumented plaintiffs filing suit under the FLSA); *Singh v Jutla & C.D. & R’s Oil, Inc*, 214 F Supp 2d 1053 (N D Cal 1998).

¹⁰⁰ Amy Sugimori, et al, *Assessing the Impact of the Supreme Court’s Decision in Hoffman Plastic Compounds v. NLRB on Immigration Workers and Recent Developments* (Natl Employment Law Project and Natl Immigration Law Center), available at <http://www.nilc.org/immsemplmnt/Hoffman_NLRB/Hoffman_NELP_NILC_FINAL.PD.F> (last visited July 9, 2009). See also Wishnie, 2007 U Chi Legal F at 213 (cited in note 87) (“[T]he decision and statute have deterred immigrants from communicating with labor and employment agencies about unlawful activity they have suffered or witnessed.”).

¹⁰¹ Wishnie, 2007 U Chi Legal F at 215 (cited in note 87) (citing a broad consensus of labor, civil and immigrants rights groups opposed to IRCA’s sanctioning regime).

The history of immigration law and policy as well as its current developments both created and perpetuated the position of undocumented immigrants as an underclass in American society.¹⁰² As stated by Justice Brennan in *Plyler v Doe*, which predated IRCA:

[T]he confluence of Government policies has resulted in “the existence of a large number of employed illegal aliens . . . whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state’s natural citizens and business organizations may wish to subject them.”¹⁰³

D. Immigration Enforcement and the Subversion of Workplace Civil Rights

IRCA has failed to curb unauthorized migration and the hiring of unauthorized immigrant workers, and has exacerbated the vulnerability of undocumented workers to employer abuse. The shortcomings of IRCA coupled with post-9/11 anti-terrorism efforts and a newly-invigorated emphasis on the deportation of “criminal aliens” have fueled political pressure on ICE to expand its interior enforcement strategy.¹⁰⁴ Through initiatives such as the National Fugitive Operations Program and Operation Return to Sender, ICE’s internal directives are aimed at “targeting criminal and fugitive aliens; eliminating the magnet of illegal employment; and dismantling the infrastructure that supports illegal immigration including the criminal organizations engaged

¹⁰² *Plyler v Doe*, 457 US 202, 218–19 (1982) (recognizing the “shadow population of illegal migrants—numbering in the millions—within our borders” and that they constitute “a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under the law”).

¹⁰³ *Id.* See also Motomura, 108 Colum L Rev at 2054 (cited in note 86) (highlighting Justice Brennan’s statement and noting that “fundamentally, the Supreme Court’s reasoning in *Plyler* was both perceptive looking back and prescient looking forward . . .”).

¹⁰⁴ Nina Bernstein, *Target of Immigrant Raids Shifted*, NY Times A1 (Feb 4, 2009), available at <<http://www.nytimes.com/2009/02/04/us/04raids.html>> (last visited July 9, 2009) (“[T]he memos obtained . . . reflected the Bush administration’s effort to appear tough on immigration enforcement . . . amid rising anger over illegal immigration.”) (quoting Peter L. Markowitz).

in wide-spread identity theft and document fraud.”¹⁰⁵ ICE has implemented these initiatives through area sweeps and raids of homes, communities, and workplaces populated by undocumented immigrants. From January of 2006 through November 2008, approximately three hundred and fifty sweeps and raids took place throughout the nation.¹⁰⁶ Many of these enforcement actions were implemented pursuant to the National Fugitive Operations Program (“NFOP”), which apprehended more than ninety-six thousand individuals between 2003 and 2008.¹⁰⁷ While the purported goal of the NFOP was to detain and remove dangerous fugitive aliens—defined as criminal aliens with outstanding removal orders—approximately three-quarters apprehended through the program have been non-criminals.¹⁰⁸

ICE’s “multi-faceted” interior enforcement strategy has extended to the workplace in an effort to “eliminate the magnet of illegal employment” by giving “teeth” to IRCA and mandating compliance with employment verification laws.¹⁰⁹ Identifying worksite enforcement as a “crucial facet” of its overall strategy,¹¹⁰ ICE targets organizations that pose national security risks “such as airports, seaports, nuclear plants, chemical plants and defense facilities;” worksites that “support illegal immigration” through utilization of identity theft; document fraud and/or human smuggling;¹¹¹ and worksites that rely on unauthorized labor. ICE claims to focus on criminal and other egregious employers who exploit their workforce with substandard working conditions and

¹⁰⁵ US Immigration and Customs Enforcement, *ICE Multifaceted Strategy Leads to Record Enforcement—Results Removals, Criminal Arrests, and Worksite Investigations Soared in Fiscal Year 2008* (Oct 23, 2008), available at <<http://www.ice.gov/pi/nr/0810/081023washington.htm>> (last visited July 9, 2009).

¹⁰⁶ *Comprehensive Documentation of Immigration Enforcement Operations* (Centro Legal, Inc Nov 25, 2008), available at <http://www.centro-legal.org/index.php?option=com_wrapper&Itemid=117> (last visited July 9, 2009). See also *ICE Raid Map* (Centro Legal, Inc Nov 25, 2008), available at <http://www.centro-legal.org/index.php?option=com_wrapper&Itemid=119> (last visited July 9, 2009).

¹⁰⁷ Margot Mendelson, Shayna Strom, and Michael Wishnie, *Collateral Damage: An Examination of ICE’s Fugitive Operations Program* at 3, 7 (Migration Policy Institute Feb 2009).

¹⁰⁸ *Id.*

¹⁰⁹ Meissner and Kerwin, *DHS and Immigration* at 31–32 (cited in note 88) (“[O]ver the last three years, ICE has carried out a succession of high-profile raids at a variety of locations against many targets.”). See also *Comprehensive Documentation of Immigration Enforcement Operations* (cited in note 106).

¹¹⁰ US Immigration and Customs Enforcement, *ICE Multifaceted Strategy Leads to Record Enforcement Results* (cited in note 105).

¹¹¹ US Department of Homeland Security, *Myth vs. Fact: Worksite Enforcement, Leadership Journal Archive* (July 9, 2008), available at <<http://www.dhs.gov/journal/leadership/2008/07/myth-vs-fact-worksite-enforcement.html>> (last visited July 9, 2009).

who utilize coercion and threats of deportation “to keep the unauthorized alien workers from reporting the substandard wage or working conditions.”¹¹² By focusing on unscrupulous employers who exploit undocumented workers, ICE purports to protect the workers themselves: “Illegal workers frequently lack the employment protections afforded those with legal status and are less likely to report workplace safety violations and other concerns. . . . ICE’s efforts . . . prohibit employers from taking advantage of illegal workers.”¹¹³

Comporting with ICE’s overarching priority to remove criminal aliens, ICE’s heightened worksite enforcement has resulted in the apprehension of some criminal aliens. Criminal arrests associated with workplace investigations rose from twenty-two in 2002 to eleven hundred in 2008. One hundred thirty-five of those arrested in 2008 “were business owners, managers, supervisors or human resource employees.”¹¹⁴ However, the overwhelming majority of apprehensions were comprised of administrative violators, those unlawfully present either because of an expired visa or because they entered without one. In 2002 “ordinary status violators” constituted 485 of the total arrests at worksites. In 2008, this number reached 5,173. Overall, ICE captured 6,273 individuals through workplace raids in 2008. Extrapolating from ICE’s data, over six thousand of these apprehensions were comprised of workers and not employers—seemingly contrary to ICE’s policy of “focus[ing] on egregious employers involved in criminal activity or worker exploitation” and “prohibit[ing] employers from taking advantage of illegal workers.”¹¹⁵ ICE explains that the disparity between employer versus employee arrests is due to the small number of top-level managers at the worksites and the increased complexity of cases against them.¹¹⁶ Such observations may be true, but still do not adequately explain ICE’s actual practice of arresting non-criminal employees, which amounted to nearly thirteen thousand between 2006 and 2008.¹¹⁷

¹¹² US Immigration and Customs Enforcement, *Worksite Enforcement Advisory—Know Your Workforce, the Key to Immigration Compliance* (Mar 25, 2009), available at <<http://www.ice.gov/pi/worksite/index.htm>> (last visited July 9, 2009).

¹¹³ *Id.*

¹¹⁴ US Immigration and Customs Enforcement, *ICE Multifaceted Strategy Leads to Record Enforcement Results* (cited in note 105).

¹¹⁵ *Id.*

¹¹⁶ US Department of Homeland Security, *Myth vs. Fact: Worksite Enforcement* (cited in note 111).

¹¹⁷ US Immigration and Customs Enforcement, *ICE Multifaceted Strategy Leads to*

A report from the Migration Policy Institute confirms that the workplace raids have had the heaviest impact on the workers, rather than criminal employers: “Although prosecutions continue, the raids have mostly affected workers, not employers.”¹¹⁸ The report further concludes that workplace raids have been an ineffective strategy at fulfilling ICE’s goal to dismantle the criminal infrastructure that facilitates illegal immigration: “Rather than uprooting human smuggling syndicates, false document rings, and scofflaw employers, ICE has linked unauthorized *employees* to the criminal infrastructure that supports illegal migration, characterizing the mere *use* of false documents as identity theft or aggravated identity theft.”¹¹⁹ Overall, ICE’s worksite enforcement actions have fallen short of its objectives to target criminal employers and criminal syndicates and to protect vulnerable workers from egregious working conditions.

Critiques raised by proponents of immigration reform emphasize that ICE executed the raids inhumanely, victimizing undocumented workers and their families.¹²⁰ The raid of Agriprocessors in Postville, Iowa invoked particularly serious due process concerns. Professor Erik Camayd-Freixas’s detailed account of the Agriprocessors raid explains that most of the arrested workers were held on criminal charges of document fraud and aggravated identity theft and coerced into accepting guilty pleas and jail time followed by deportation.¹²¹ The plea agreements were “fast-tracked,” depriving the workers of adequate due process and judicial review.¹²² According to Camayd-Freixas, ICE’s actions amounted to “an undemocratic doctrine of expediency, at the core of a police agency, whose power hinges on its ability to capitalize on public fear.”¹²³ In the many other workplace raids that have taken place, thousands of undocumented workers have been arrested for administrative immigration violations. While not criminally prosecuted, these workers are nonetheless detained and placed in removal proceedings. The

Record Enforcement Results (cited in note 105).

¹¹⁸ Meissner and Kerwin, *DHS and Immigration* at 32 (cited in note 88).

¹¹⁹ *Id.*

¹²⁰ *Over-Raided, Under Siege* (cited in note 9). See also Randy Capps, et al, Urban Institute, *Paying the Price: The Impact of Immigration Raids on America’s Children* at 15–20 (Nat’l Council of La Raza 2007).

¹²¹ Erik Camayd-Freixas, *Interpreting the Largest ICE Raid in U.S. History: A Personal Account* at 5 (June 13, 2008), available at <<http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf>> (last visited July 9, 2009).

¹²² *Id.* at 7–8.

¹²³ *Id.* at 15.

deportation of these workers has had severe consequences on their families and the communities in which they reside. For example, nearly two-thirds of children who lost their parents through raids were U.S. citizens.¹²⁴ Further, in small cities like Postville—where the economy depends on the presence of these workers—the sudden removal of them has had the immediate effect of leaving “businesses . . . empty” and raising concerns that the town would be devastated.¹²⁵

There are compelling arguments that legitimize the actions of ICE. The goal of ICE is to enforce compliance with immigration laws. This goal necessarily encompasses holding liable all violators of immigration law, including civil violators, such as undocumented workers. Additionally, ICE is encouraged to follow humanitarian guidelines during the course of a raid. These guidelines include considering the availability of immigration relief for certain eligible undocumented individuals and the impact on children dependent on detained undocumented parents.¹²⁶ As a result, some undocumented individuals arrested during raids have been released on humanitarian grounds while pending removal proceedings. Some members of the public also believe that ICE raids are a proper implementation of a governmental policy that prohibits the unlawful presence of undocumented workers. Furthermore, many believe that undocumented workers take away jobs from U.S. based workers and depress the wages and working conditions in certain low-wage industries. Finally, ICE raids may have the effect of putting out of business unscrupulous employers engaged in criminal activity and worker exploitation.

While both critics and supporters of the raids are important to acknowledge, the broad debate over the general merits of immigration enforcement practices and whether the U.S. should adopt a stricter or a more liberal immigration policy is beyond the scope of this Article. Rather, as previously stated, the primary concern for this Article is the impact of ICE’s worksite en-

¹²⁴ Capps et al, *Paying the Price* at 15–20 (cited in note 120).

¹²⁵ Stephen Lendman, *Targeting Immigrants—The Largest Ever U.S. ICE Raid* (Global Research Aug 11, 2008), available at <www.globalresearch.ca/PrintArticle.php?articleId=9792> (last visited July 9, 2009).

¹²⁶ US Immigration and Customs Enforcement, *Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations*, (Nov 2007), available at <http://www.nilc.org/immsemplymnt/wkplce_enfrmcmt/ice-hum-guidelines.pdf> (last visited July 9, 2009).

forcement on the civil workplace rights of undocumented immigrants whose labor is exploited by their employers.

Indeed, in the aftermath of the raids, numerous employment abuses have been uncovered and the undocumented workers injured by these abuses have been prevented from enforcing their civil rights against these harms. For example, an ICE warrant for the Agriprocessors raid states that a witness observed a “floor supervisor blindfolded an immigrant with duct-tape” and then “took one of the meat hooks and hit the Guatemalan with it.”¹²⁷ According to an attorney who interviewed some of the detained Agriprocessors’ workers, the company consistently underpaid the workers claiming that the workers owed debts of immigration fees.¹²⁸ The company also denied the workers breaks and prohibited them from using restrooms during ten-hour shifts.¹²⁹ Workers reported physical abuse and female workers reported sexual abuse by company supervisors.¹³⁰ Agriprocessors also allegedly violated numerous child labor laws by forcing under-age employees to labor up to seventeen hours per day in prohibited occupations and under dangerous conditions.¹³¹ A New York Times article stated that the child labor violations may be investigated by government officials; however, there is no indication that the other reported abuses will be investigated. Moreover, the workers themselves face deportation, and therefore are unable to access civil justice for the alleged workplace exploitation they may have suffered.¹³²

In a similar scenario, in June 2007, ICE raided three Fresh Del Monte Produce plants in Portland, Oregon,¹³³ taking into custody one hundred sixty-seven workers for the administrative violation of unlawful presence.¹³⁴ After the raid, it was revealed that the “Oregon Occupational Safety and Health Division had opened two separate investigations into safety practices at the plant.”¹³⁵ In retaliation, employers fired the workers who had

¹²⁷ Preston, *After Iowa Raid*, NY Times at A1 (cited in note 2).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Jennifer Jacobs, *Advocates: Workers Allege Sexual Abuse*, Des Moines Register 7A (May 20, 2008).

¹³¹ Preston, *After Iowa Raid*, NY Times at A1 (cited in note 2).

¹³² *Id.* The article states that the underage workers may attempt to seek U visas.

¹³³ U.S. Immigration and Customs Enforcement, Fact Sheets, Worksite Enforcement (Aug 9, 2007) available at <http://www.ice.gov/pi/news/factsheets/worksite_operations.htm> (last visited July 9, 2009).

¹³⁴ *Id.*

¹³⁵ *Giving Workers a Voice*, Willamette Faculty (July 1, 2007) available at <<http://>

made the complaints. The health and safety violations included unsanitary living and working conditions on the farms, such as a lack of bathrooms and drinking water and improper exposure to pesticides. Complaints to the Oregon Bureau of Labor also revealed minimum wage and overtime violations, unconscionably long work shifts, and denial of rest breaks.¹³⁶ Despite these allegations, “none of the workers detained in the ICE raids were allowed to file or pursue claims against their employer.”¹³⁷

ICE has conducted enforcement actions at several workplaces with ongoing labor disputes.¹³⁸ When workers at the Woodfin Hotel in Emeryville, California began protesting for a living wage in compliance with the city’s ordinance, the employer retaliated by firing twelve workers. The workers organized and continued to advocate for a living wage. The hotel’s management contacted ICE to investigate the immigration status of the workers. ICE provided the hotel with a list of unauthorized workers and arrested one undocumented worker.¹³⁹ The raid of Howard Industries in Mississippi silenced the ongoing labor dispute over wages and working conditions.¹⁴⁰

The timing of the raids with worker complaints of employment abuse and organizing activity suggests that employers utilize immigration enforcement as a tool to retaliate. A Memorandum of Understanding (“MOU”) between the DOL and DHS encourages the two agencies to “develop and implement policies . . . that avoid inappropriate worksite interventions where it is known or reasonably suspected that a labor dispute is occurring and the intervention may, or may be sought so as to, interfere in the dispute.”¹⁴¹ However, implementation of the MOU is discre-

www.willamette.edu/people/archives/2007/07/giving_workers.html> (last visited July 9, 2009).

¹³⁶ Brent Hunsberger, Previous Coverage: Del Monte Settlement Considered Victory for Low-wage Workers, *The Oregonian* (Aug 10, 2006), available at <http://blog.oregonlive.com/oregonianextra/2007/06/past_coverage_del_monte_settle.html> (last visited July 9, 2009); Brent Hunsberger, Will Del Monte Raid Keep Workers from Reporting Abuses? *The Oregonian* (June 14, 2007), available at <http://blog.oregonlive.com/atwork/2007/06/will_raid_quell_worker_outcry.html> (last visited July 9, 2009).

¹³⁷ Monica Guizar, *ICE Conducted I-9 Audit to Help Employer Retaliate against Workers*, 21 Immigrants’ Rights Update 6 (July 20, 2007), available at <<http://www.nilc.org/immsemplymnt/ircaempverif/eev013.htm>> (last visited July 9, 2009).

¹³⁸ Lydersen, *An Unfolding Crisis in the Wake of Mississippi ICE Raid*, In *These Times* (cited in note 1).

¹³⁹ *Over-Raided, Under Siege* (cited in note 9).

¹⁴⁰ Lydersen, *An Unfolding Crisis in the Wake of Mississippi ICE Raid*, In *These Times* (cited in note 1).

¹⁴¹ *Issue Brief: Immigration Enforcement During Labor Disputes* at 2 (Nat’l Immigration Law Center Apr 2007), available at <http://nilc.org/immsemplymnt/IWR_Material/

tionary and does not prohibit immigration enforcement in cases where there are labor disputes in progress.¹⁴² Thus, in ICE's zeal to target unscrupulous employers, worker complaints have initiated ICE investigations and enforcement actions. Yet, the workers' unlawful presence takes precedence over the labor abuse they may have experienced and their employers are allowed to continue to disregard fair labor standards.

Recent political will has encouraged some restraint on high profile raids.¹⁴³ However, worksite enforcement continues to be a priority of ICE and ICE's official policy promotes a strategy that addresses "both employers who knowingly hire illegal workers as well as the workers themselves."¹⁴⁴ Thus, in addition to the criminal prosecution of employers who violate immigration laws, "ICE will continue to arrest and process for removal any illegal workers who are found in the course of these worksite enforcement actions."¹⁴⁵ An increase in the auditing of employers suspected of hiring unauthorized labor¹⁴⁶ and pressure to implement E-Verify,¹⁴⁷ which electronically verifies an employee's immigration status, demonstrate the government's continued push to execute IRCA's prohibition on the employment of undocumented workers. As immigrants' rights advocates note, the enforcement of IRCA's employer sanction provisions through these more "politically palatable" methods, will have the effect of perpetuating the vulnerability of undocumented workers to employer abuse and will subject these workers to ICE arrest without civil recourse.¹⁴⁸

By detaining and deporting undocumented workers, ICE not only fails to protect them from egregious employment abuses, but

Advocate/labordispute_infobrief_2007-04-23.pdf> (last visited July 9, 2009).

¹⁴² Id.

¹⁴³ Spencer S. Hsu, *DHS Signals Policy Changes Ahead for Immigration Raids*, Washington Post (March 29, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/29/AR2009032901109_pf.html> (last visited July 9, 2009).

¹⁴⁴ ICE Fact Sheet (April 30, 2009) available at <<http://www.ice.gov/pi/news/factsheets/worksites.htm>> (last visited July 9, 2009).

¹⁴⁵ Id.

¹⁴⁶ Anna Gorman, *L.A. Employers Face Immigration Audits*, L.A. Times (July 2, 2009) available at <<http://www.latimes.com/news/local/la-me-immigemploy2-2009jul02,0,7434438.story?track=rss>> (last visited July 9, 2009).

¹⁴⁷ Julia Preston, *Government to Require Verification of Workers*, NY Times (July 8, 2009) available at <http://www.nytimes.com/2009/07/09/us/politics/09immig.html?_r=5> (last visited July 9, 2009).

¹⁴⁸ Bill Ong Hing and David Bacon, *Rights, Not Raids*, The Nation (May 18, 2009) available at <http://www.thenation.com/doc/20090518/hing_bacon?rel=hp_currently> (last visited July 9, 2009).

also actively prevents the workers from holding their unscrupulous employers directly accountable in civil court. Workers are denied the civil relief to which they are entitled. While the bad faith employers may be found criminally liable for immigration-related violations such as “alien harboring” and “alien smuggling,” they escape liability for the civil and employment violations that they committed against their workers. And society’s condemnation of these workplace-related civil rights violations also falls short because the primary mechanism by which these rights are enforced—the private attorney general lawsuit—must be brought by the injured undocumented worker who, as a result of immigration enforcement, is unable to access the civil courts.

The next Section describes human trafficking in the U.S. and the laws designed to combat it, paying special attention to the trafficking private right of action, and immigration relief for trafficked persons. Granting of immigration status to trafficked plaintiffs empowers them to fulfill the role of private attorney general to enforce workplace-related civil rights violations. Thus, the trafficked worker as private attorney general presents a model for the civil rights enforcement by all undocumented workers harmed as a result of workplace exploitation.

PART II

A. Human Trafficking in the United States

Descriptions of workplace conditions for undocumented workers are remarkably similar to well-known human trafficking cases in the U.S. In 2001, workers escaped from the Daewoosa garment factory in American Samoa, leading to the investigation of the largest human trafficking case ever prosecuted by the U.S. Department of Justice (“DOJ”).¹⁴⁹ Two hundred fifty men and women, recruited from China and Vietnam, involuntarily labored in the Daewoosa sweatshop for minimal pay and under abusive conditions. In 2002, a court convicted agricultural crew leaders for trafficking Mexican farm workers to Florida, forcing them to “work off” their transportation debts and subjecting them to constant surveillance and threats of violence.¹⁵⁰ In 2004, a landscape

¹⁴⁹ See generally US Department of Justice, *Report on Activities to Combat Human Trafficking, Fiscal Years 2001-2005* at 75 (Feb 24, 2006) [hereinafter *Combat Human Trafficking Report*], available at <http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf> (last visited July 9, 2009).

¹⁵⁰ *Id.* at 76.

maintenance contractor in Hawaii was convicted of slavery and harboring offenses after forcing Tongan males to work in his business twelve hours per day for menial pay under threats and violence.¹⁵¹ The reach of traffickers extends throughout industries, including domestic service, restaurants, construction, agriculture, garment, and commercial sex.¹⁵²

Recruitment methods often involve luring people with misrepresented job opportunities. A trafficking recruiter can be a family friend, an employment agency, or even someone trusted and well known within the community.¹⁵³ People may accept jobs that they know to be risky¹⁵⁴ and become trafficked when exploitative working conditions replace the promised employment terms. Traffickers achieve compliance of a trafficked person through numerous ways including threats to harm the family of the trafficked person, threats to turn a trafficked person over to authorities,¹⁵⁵ confiscation of documents, psychological abuse, including intimidation or restriction of movement, the creation of artificial debts purportedly owed to the trafficker, and physical abuse, such as beatings and sexual assault.¹⁵⁶

Globalization and international migration play key roles in the creation of populations vulnerable to trafficking.¹⁵⁷ A variety

¹⁵¹ Id at 80.

¹⁵² Stumpf and Friedman, 6 NYU J Legis & Pub Pol at 153 (cited in note 7).

¹⁵³ US Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* at 7, 47 (June 2009) [hereinafter 2009 Trafficking in Persons Report], available at <<http://www.state.gov/g/tip/rls/tiprpt/2009/index.htm>> (last visited July 9, 2009); US Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* at 10, 13 (June 2008) [hereinafter 2008 Trafficking in Persons Report], available at <<http://www.state.gov/g/tip/rls/tiprpt/2008/index.htm>> (last visited July 9, 2009); US Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* at 26 (June 2007) [hereinafter 2007 Trafficking in Persons Report], available at <<http://www.state.gov/g/tip/rls/tiprpt/2007/index.htm>> (last visited July 9, 2009)

¹⁵⁴ See Linda R. Hirshman and Jane Larson, *Hard Bargains: The Politics of Sex* at 23–28 (Oxford 1998) (discussing game theory and rational choices that individuals make in difficult circumstances with few options). “To take the classic example, when a captive agrees to slavery rather than be killed, the choice of enslavement is the making of a bargain.” Id at 26. In the case of coercion or fraud, not only may options be few, but misinformation negates the meaningfulness of any bargain struck. Id.

¹⁵⁵ Traffickers may accurately or inaccurately portray law enforcement as unsympathetic to the trafficked person’s situation.

¹⁵⁶ 2009 Trafficking in Persons Report at 26, 36; Leroy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 Geo Wash Intl L Rev 227, 229–30 (2003). See also Margaret Murphy, *Modern Day Slavery: The Trafficking of Women to the United States*, 9 Buff Women’s L J 11, 14 (2000–2001).

¹⁵⁷ Aiko Joshi, *The Face of Human Trafficking*, 13 Hastings Women’s L J 31, 36–37 (2002).

of factors may “push” trafficked persons from their countries of origin and “pull” them into destination countries. Trafficked persons are often in precarious life situations in their country of origin.¹⁵⁸ Their situations pressure them to migrate for economic reasons or “to escape gender discrimination, armed conflict, political instability, and poverty.”¹⁵⁹ They are then particularly vulnerable for recruitment to labor in sweatshops and other jobs characterized as three D-jobs—dirty, difficult, and dangerous.¹⁶⁰

The demand for cheap labor in destination countries draws migrants susceptible to trafficking. Tight border controls and rigid immigration enforcement ironically facilitates their exploitation rather than prevents it: “A lack of viable and legal migration options leads people into trafficking; fear of deportation keeps them there.”¹⁶¹ Thus, the relationship between human trafficking and global labor migration is inextricable: “Trafficking is a corrupted mode of migration, that transforms very specific migratory projects, such as the desire to accumulate savings or support one’s dependants by migrating to work, the dream of securing a better future . . . into nightmares.”¹⁶²

According to the United Nations Office on Drugs and Crime, “trafficking in human beings has reached epidemic proportions” in the last decade.¹⁶³ Further, no country is immune from the effects of this highly profitable industry.¹⁶⁴ “Illegal migrants and

¹⁵⁸ See Kelly E. Hyland, Comment, *The Impact of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children*, 8 No 2 Hum Rts Brief 35-6 (2001), available at <<http://www.wcl.american.edu/hrbrief/08/2protocol.cfm>> (last visited July 9, 2009) (citing several causative socioeconomic factors behind the vulnerability to being trafficked). See also Joshi, 13 *Hastings Women’s L J* at 36–38 (cited in note 157) (discussing the impact of industrialization in the post-colonial era and modern globalization on the displacement of people that leads to trafficking, particularly the trafficking of women who are especially vulnerable due to their subordination within the socioeconomic pressures created by privatization and liberalization of markets).

¹⁵⁹ Joshi, 13 *Hastings Women’s L J* at 30 (cited in note 157).

¹⁶⁰ UN Office on Drugs and Crime, *FAQ on Trafficking in Human Beings*, available at <<http://www.unodc.org/unodc/en/human-trafficking/faqs.html>> (last visited July 9, 2009).

¹⁶¹ Dina Francesca Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 *Hum Rts Q* 221, 257 (2004).

¹⁶² Bridget Anderson and Julia O’Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, 15 *Migration Research Series 8* (Intl Organization for Migration 2003), available at <http://www.compas.ox.ac.uk/fileadmin/files/pdfs/Non_WP_pdfs/Reports_and_Other_Publications/Anderson04.pdf> (last visited July 9, 2009).

¹⁶³ U.N. Office on Drugs and Crime, UN Office on Drugs and Crime Leaflet on Trafficking at 2, available at http://www.unodc.org/documents/human-trafficking/HT_GPA_Tleaflet07_en.pdf (last visited July 9, 2009).

¹⁶⁴ *Id.*

trafficking victims have become another commodity in a larger realm of criminal commerce involving other commodities, such as narcotic drugs and firearms or weapons and money laundering.”¹⁶⁵

Published numbers on the global scope of human trafficking vary widely. The U.S. State Department’s 2003 Trafficking in Persons Report (“TIP Report”) estimates that approximately eight-hundred thousand to nine-hundred thousand people are traded worldwide.¹⁶⁶ The 2004 report inexplicably reduced that range to six-hundred thousand to eight-hundred thousand people.¹⁶⁷ The 2005 through 2008 TIP Reports maintain the six-hundred thousand to eight-hundred thousand figure while also acknowledging the existence of other estimates.¹⁶⁸ The United Nations, for instance, approximates as many as four million people are trafficked annually worldwide.¹⁶⁹ Finally, the International Labor Organization calculates both internal and transnational modern-day slavery at 12.3 million people in forced or bonded labor or sexual servitude at any given time.¹⁷⁰ The disparity in numbers may be due to political differences of opinion or methodological difficulties in obtaining accurate information about an underground industry. However, there are widespread reports that trafficking is one of the “fastest growing illegal businesses.”¹⁷¹ Moreover, due to the very high revenue-to-risk ratio and because humans are “expensible, reusable, and re-sellable cheap commodities,” the U.N. predicts human trafficking will

¹⁶⁵ UN Office on Drugs and Crime, *FAQ on Trafficking in Human Beings*, available at <<http://www.unodc.org/unodc/en/human-trafficking/faqs.html>> (last visited July 9, 2009).

¹⁶⁶ US Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* at 7 (June 2003) [hereinafter 2003 Trafficking in Persons Report], available at <<http://www.state.gov/g/tip/rls/tiprpt/2003/index.htm>> (last visited July 9, 2009).

¹⁶⁷ US Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* (June 2004) [hereinafter 2004 Trafficking in Persons Report], available at <<http://www.state.gov/g/tip/rls/tiprpt/2004/index.htm>> (last visited July 9, 2009).

¹⁶⁸ US Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* at 6 (June 2005), available at <<http://www.state.gov/g/tip/rls/tiprpt/2005/index.htm>> (last visited July 9, 2009). See also 2008 Trafficking in Persons Report at 6.

¹⁶⁹ UN Economic & Social Council, *Integration of the Human Rights of Women and the Gender Perspective* ¶ 5 (Feb 22, 2003), available at <[http://www.unhcr.ch/huridocda/huridocda.nsf/AllSymbols/68B98DB9CB4CBEA9C1256CFB004C53AD/\\$File/G0311186.pdf](http://www.unhcr.ch/huridocda/huridocda.nsf/AllSymbols/68B98DB9CB4CBEA9C1256CFB004C53AD/$File/G0311186.pdf)> (last visited July 9, 2009).

¹⁷⁰ US Department of State, *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* at 6 (June 2009), available at <<http://www.state.gov/g/tip/rls/tiprpt/2009/index.htm>> (last visited July 9, 2009).

¹⁷¹ Stumpf and Friedman, 6 NYU J Legis & Pub Policy at 150 (cited in note 7).

surpass the trafficking of both arms and narcotics to become the world's leading illegal industry.¹⁷²

Like the global figures, estimates of the scope of trafficking in the United States also vary widely. The 2003 TIP Report approximated that eighteen thousand to twenty thousand trafficked persons enter the United States annually;¹⁷³ the 2004 TIP Report reduced that estimate to 14,500 to 17,500.¹⁷⁴ Previous estimates placed the number of persons trafficked to the United States on an annual basis closer to fifty thousand.¹⁷⁵ The International Labor Organization estimates that human trafficking comprises over 75 percent of all forced labor cases in the United States.¹⁷⁶

The emergence of human trafficking as a multifaceted epidemic has required a new legal regime to combat it. Previous understandings of chattel slavery, debt bondage, and involuntary servitude—which required a relationship of ownership, indebtedness, or direct or threatened physical or legal force—proved inadequate to capture the conceptual complexity of human trafficking. Human trafficking refers to a broader global phenomenon involving the migration of workers for the purpose of exploitation. Exploitation may include previously recognized forms of unfree labor, however, more characteristic of human trafficking are new forms of exploitation that utilize psychological means to coerce labor. Examples of psychological coercion include a victim's cultural isolation, financial or emotional dependency on the trafficker, and threats to harm a victim's family members.¹⁷⁷

Furthermore, human trafficking is not simply migrant smuggling, which involves only the facilitation of movement across borders. Human trafficking requires a continued relationship of exploitation that profits the trafficker.¹⁷⁸ The boundary between smuggling and trafficking is crossed when a voluntary

¹⁷² Jennifer L. Enck, *The United Nations Convention Against Transnational Organized Crime: Is It All That It Is Cracked Up To Be?*, 30 *Syracuse J Intl L & Comm* 369, 374 (2003), quoting Susan W. Tiefenbrun, *Sex Sells But Drugs Don't Talk: Trafficking of Women Sex Workers*, 23 *T Jefferson L Rev* 194, 212–13 (2001).

¹⁷³ 2003 Trafficking in Persons Report at 7 (cited in note 168).

¹⁷⁴ 2004 Trafficking in Persons Report at 23 (cited in note 167).

¹⁷⁵ Annuska Derks, *Combating Trafficking in South-East Asia: A Review of Policy and Programme Responses* at 5 (IOM Intl Organization for Migration 2000), available at <<http://www.unesco.org/most/migration/ctsea.pdf>> (last visited July 9, 2009).

¹⁷⁶ *Report of the Director General: A Global Alliance Against Forced Labour* at 14 (Intl Labour organization 2005), available at <http://www.ilo.org/dyn/declaris/DECLARATION_WEB.DOWNLOAD_BLOB?Var_DocumentID=5059> (last visited July 9, 2009).

¹⁷⁷ See Potts, 35 *Geo Wash Intl L Rev* at 233 (cited in note 156).

¹⁷⁸ Murphy, 9 *Buff Women's L J* at 11–12 (cited in note 156).

migrant utilizes the services of a smuggler, but is then forced to work off newly accrued debt under subsequent threats of harm, such as exposure to law enforcement or deportation.¹⁷⁹ The trafficker's coercive or deceptive actions render the initial voluntariness of the trafficked person meaningless.¹⁸⁰

B. U.S. Anti-Trafficking Laws

The Trafficking Victims Protection Act of 2000 ("TVPA") was enacted to comprehensively combat human trafficking in the United States by strengthening criminal laws against the traffickers, establishing immigration relief for certain trafficking victims in the United States, and requiring the U.S. Department of State to study the global problem of trafficking and issue its findings in an annual report on the status of other states regarding their anti-trafficking efforts.¹⁸¹

The TVPA defines "severe forms of trafficking" as either:

(A) sex trafficking¹⁸² in which a commercial sex act¹⁸³ is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁸⁴

The definition acknowledges that the various purposes of trafficking in persons include exploitation in both the commercial

¹⁷⁹ See Anderson and O'Connell Davidson, 15 Migration Research Series at 50 (cited in note 162).

¹⁸⁰ UN Office on Drugs and Crime, *FAQ on Trafficking in Human Beings* (cited in note 160).

¹⁸¹ Pub L No 106-386, Division A, 114 Stat 1466, codified at 22 USC § 7101 et seq (describing the purpose of the act as "[t]o combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, [and] to reauthorize certain Federal programs to prevent violence against women"). See also Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 Mich J Intl L 1143, 1159-60 (2003).

¹⁸² 22 USC § 7102(9) (2000) (defining sex trafficking as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act").

¹⁸³ 22 USC § 7102(3) (defining a commercial sex act as "any sex act on account of which anything of value is given to or received by any person").

¹⁸⁴ 22 USC § 7102(8).

sex industry and other industries, such as agriculture, domestic service, garment manufacturing, construction, and restaurants.¹⁸⁵

The TVPA was reauthorized and amended in 2003, 2005, and 2008. In addition to appropriating funding for continued anti-trafficking efforts, the 2003 amendments included a private right of action.¹⁸⁶ The 2005 amendments included provisions to increase research and prevention efforts.¹⁸⁷ The 2008 reauthorization¹⁸⁸ greatly expanded the TVPA to reach a wider range of prohibited conduct and to confer additional civil rights to trafficked persons. Most significantly, the 2008 amendments specifically grant immigration status to trafficked persons who sue their traffickers in civil court.¹⁸⁹

Although the 2008 TVPA included numerous amendments, this Article focuses on the 2008 changes that relate to the trafficking private right of action and to the immigration relief associated with this civil claim. A trafficking civil action does not depend on the existence of a parallel criminal prosecution or criminal convictions against the defendant traffickers. However, the legal substance of the trafficking civil remedy is derived from violations of trafficking crimes. Therefore, an accurate understanding of the trafficking private right of action depends on familiarity with the trafficking criminal statutes.

Trafficking crimes are primarily prosecuted under the criminal statutes of “forced labor,”¹⁹⁰ “trafficking into servitude,”¹⁹¹ and “sex trafficking”¹⁹² enacted pursuant to the § 2 enforcement power of the Thirteenth Amendment. The addition of these criminal statutes to Thirteenth Amendment doctrine expands the law’s understanding of involuntary servitude to include labor forced by non-physical, psychological coercion.¹⁹³

¹⁸⁵ Hyland, 8 No 2 Hum Rts Brief at 33 (cited in note 158).

¹⁸⁶ Trafficking Victims Protection Reauthorization Act of 2003, 117 Stat at 2875 (amending the TVPA and appropriating funds for 2004 and 2005).

¹⁸⁷ Trafficking Victims Protection Reauthorization Act of 2005, Pub L No 109-164, 119 Stat 3558, codified at scattered sections of titles 18, 22, 42 (2006).

¹⁸⁸ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, HR 7311, 110th Cong, 2d Sess (Dec 9, 2008).

¹⁸⁹ HR 7311 at § 205.

¹⁹⁰ 18 USC § 1589 (2000 & Supp 2008).

¹⁹¹ 18 USC § 1590 (2000 & Supp 2008).

¹⁹² 18 USC § 1591 (2000 & Supp 2008).

¹⁹³ See generally Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting U.S. v. Kozminski and Understanding Human Trafficking*, 38 U Toledo L Rev 941 (2007) (Part II at 945–55 discusses the law under *Kozminski* while Part III at 955–68 discusses the law in the aftermath of the TVPA.).

This important addition to the Thirteenth Amendment's enforcement provisions is best exemplified by the new crime of "forced labor." The crime of "forced labor" was enacted to directly address previous obstacles to the enforcement of involuntary servitude violations under a restrictive definition set forth by the Supreme Court in *United States v Kozminski*.¹⁹⁴ The *Kozminski* Court narrowly interpreted the definition of involuntary servitude as servitude brought about through the use or threatened use of physical or legal coercion, excluding the use of psychological coercion as sufficient means to compel labor.¹⁹⁵

As explained in the TVPA's legislative conference report, the new crime of "forced labor" "provide[s] federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*."¹⁹⁶ The addition of this crime fulfills a main objective of the TVPA to reach cases of involuntary servitude "in which persons are held in a condition of servitude through nonviolent coercion."¹⁹⁷ By capturing non-physical coercion, the TVPA advances the mandate of the Thirteenth Amendment to prohibit slavery and involuntary servitude in all its forms.

Thus, the crime of "forced labor" prohibits labor compelled by physical coercion defined as "force, threats of force, physical restraint, or threats of physical restraint to that person or another person;" legal coercion defined as "abuse or threatened abuse of law or legal process;" and non-physical coercion defined as "serious harm or threats of serious harm to that person or another person . . . or any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint."¹⁹⁸ The 2008 amendments to the TVPA provide further definition to the concept of non-physical coercion and increased clarity to the types of conduct prohibited by the forced labor statute. First, the range of non-physical harms that are legally sufficient to make a showing of forced la-

¹⁹⁴ 487 US 931 (1988).

¹⁹⁵ *Id.* at 943 ("[O]ur precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.").

¹⁹⁶ Victims of Trafficking and Violence Protection Act of 2000, HR Rep No 106-939, 106th Cong, 2d Sess 101 (2000).

¹⁹⁷ 22 USC § 7101(b)(13).

¹⁹⁸ 18 USC § 1589(a) (2000 & Supp 2008).

bor include “psychological, financial, or reputational harm.”¹⁹⁹ To determine the seriousness of these harms, the statute instructs consideration of “all the surrounding circumstances” and an application of a “reasonable person” standard with the “same background” and “in the same circumstances.”²⁰⁰ Furthermore, with respect to legal coercion, the 2008 TVPA amendments clarify that compelling labor through threats of any legal proceeding whether “administrative, civil, or criminal”²⁰¹ also constitutes a violation of forced labor. Thus, threats of deportation—an administrative proceeding—also qualify as a prohibited means of legal coercion. The impact of the 2008 amendments are not yet known, but could cover a broad array of worker abuses, including those typically found in the cases of undocumented worker exploitation described in Part I.²⁰²

The trafficking private right of action (“TVPRA”) allows an individual who is a victim of a trafficking to bring a civil action in a district court to recover damages and reasonable attorneys’ fees.²⁰³ A civil action filed under § 1595 shall be stayed during the criminal action arising out of the same occurrence.²⁰⁴ A claim under § 1595 may be made even in the absence of a criminal investigation or prosecution.²⁰⁵

Prior to the 2008 amendments, in order to bring a viable claim under § 1595, the plaintiff must have been a victim of one of three specified trafficking crimes: forced labor, trafficking into servitude, or sex trafficking. After the 2008 amendments, any violation of a trafficking-related crime enumerated within Chapter 77 of Title 18 is grounds for civil relief:²⁰⁶

An individual who is a victim of a violation . . . may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of

¹⁹⁹ 18 USC § 1589(c)(2) (2000).

²⁰⁰ *Id.*

²⁰¹ 18 USC § 1589(c)(1).

²⁰² The Author explores the scope of coercion in light of the 2008 TVPA in her parallel project, *The Coercion of Trafficked Workers*.

²⁰³ 18 USC § 1595(a) (“An individual who is a victim of a violation may bring a civil action against the perpetrator . . . may recover . . . reasonable attorneys fees.”).

²⁰⁴ 18 USC § 1595(b)(1) (“Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.”).

²⁰⁵ 18 USC § 1595 (not conditioning a § 1595 claim on a criminal investigation or prosecution).

²⁰⁶ 18 USC § 1590.

value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter . . .) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.²⁰⁷

Thus, a private right of action now exists for the above described forced labor statute, which encompasses all forms of non-physically coerced labor as well as every provision of in Chapter 77 Title 18 of the U.S. Code including peonage under § 1581, document theft under § 1592,²⁰⁸ and even fraud in foreign labor contracting.²⁰⁹ The 2008 amendments also expand the pool of potential defendants to include not just the direct perpetrators of the trafficking crime, but also those who “knowingly” benefited, financially or otherwise, from the trafficking activity.²¹⁰ The range of defendants is further widened through the 2008 TVPA’s extra-territorial provisions which extend liability for trafficking violations to jurisdictions outside the U.S. where the alleged perpetrator is a U.S. citizen, lawful permanent resident, or present in the U.S.²¹¹ These changes increase the ammunition of trafficked plaintiffs and provide broad potential for the trafficked plaintiff to enforce a wider range of Thirteenth Amendment related harms.

Most significant among the 2008 amendments is the availability of “continued presence.” Continued presence is a temporary form of immigration relief for trafficking victims who pursue civil

²⁰⁷ 18 USC § 1595(a) (2003 & Supp 2008).

²⁰⁸ 18 USC § 1592 (2000 & Supp 2008) (“Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person—(1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a); (2) with intent to violate section 1581, 1583, 1584, 1589, 1590, or 1591; or (3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person’s liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000, shall be fined under this title or imprisoned for not more than 5 years, or both.”); 18 USC § 1594 (2000 & Supp 2008) (“[W]hoever knowingly benefits, financially or by receiving anything of value from participation in a venture which has engaged in any act in violation of section 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.”).

²⁰⁹ 18 USC § 1351 (imposing criminal liability on those who knowingly and with intent to defraud, recruit workers from outside the U.S. for employment within the U.S. by means of materially false or fraudulent representations).

²¹⁰ 18 USC § 1589(b); 18 USC § 1593(a) (2000 & Supp 2008).

²¹¹ HR 7311 § 1596.

litigation against their traffickers.²¹² The addition of “continued presence” for civil litigants indicates that Congress intended to increase trafficked persons’ empowerment as private attorneys general. Previously, continued presence could only be granted through a request by a federal law enforcement official to DHS if the victim’s presence in the U.S. was necessary for criminal investigation and prosecution purposes.²¹³ DHS may now grant continued presence to allow trafficked persons who have filed a civil action under § 1595 to remain in the United States until the conclusion of their civil case. Continued presence does not allow for adjustment to legal permanent residence, but it does provide work authorization and access to refugee benefits, thereby granting a valuable safety net for trafficked persons engaged in civil suits against their traffickers.

Continued presence supplements the two main forms of immigration relief provided by the TVPA: the T visa²¹⁴ and the U visa.²¹⁵ The T visa allows certain victims of human trafficking to live and work in U.S. for four years. T visa recipients can petition to have their spouses and children join them in the U.S. T visa recipients also receive refugee benefits, including cash assistance for eight months and may obtain an adjustment to legal permanent residency. Eligibility for the T visa requires that the applicant is or has been a victim of a severe form of trafficking in persons; is present in U.S., American Samoa, or Northern Marianas on account of trafficking; has complied with reasonable requests for assistance in the investigation or prosecution of acts of trafficking;²¹⁶ and would suffer extreme hardship upon removal. The 2005 TVPA reauthorization provided for a hardship exception to the requirement that the T visa applicant demonstrate compliance with requests for assistance in the criminal investigation and prosecution of the trafficking.²¹⁷

²¹² HR 7311 at § 205.

²¹³ 22 USC § 7105(c) (2008).

²¹⁴ INA § 101(a)(15)(T) (2000).

²¹⁵ INA § 101(a)(15)(U) (2000).

²¹⁶ INA § 101(a)(15)(T) (2000) (children under eighteen who are sex trafficking victims do not need to meet the criterion of complying with assistance in the investigation or prosecution of the trafficking crime).

²¹⁷ Violence Against Women and Department of Justice Reauthorization Act of 2005, HR 3402 § 801(b), 109th Cong, 1st Sess (July 22, 2005); 8 USC § 1101(a)(15)(T)(iii) (2006) (“[I]f the Secretary of Homeland Security, in his or her discretion and with the consultation of the Attorney General, determines that a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance described in clause (i)(II)(aa), the request is unreasonable.”). To date, the Author is unaware of any cases that have successfully used this provision.

The U visa may also provide trafficking victims with immigration relief. It provides work authorization, allows recipients to petition to have their spouses and children join them in the U.S. and permits adjustment to legal permanent residency. Unlike the T visa, it does not provide refugee benefits. In order to receive a U visa, the applicant must show that he or she is a victim of a crime specifically enumerated in the U visa statute. Trafficking is a qualifying crime, as well as domestic violence, rape, sexual assault and torture.²¹⁸ The U visa applicant must also show that he or she suffered substantial physical or mental abuse as a result of the crime and has been, is being, or is likely to be helpful to law enforcement in the investigation or prosecution of the crime. Since there were no U visa implementing regulations until last year, there is currently no data on the number of U visas that have been or will be awarded. However, prima facie eligible U visa applicants have received “interim relief,” a temporary form of relief that provides work authorization. To receive interim relief, an applicant must be “certified” as eligible by “the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated to issue U nonimmigrant status certifications . . . or a Judge.”²¹⁹ With the issuance of the U visa regulations, interim relief recipients are now instructed to apply for the U visa according to the regulations.

Regulations for T visas have been implemented since 2001. The most recent data shows that through fiscal year 2008, 1,245 T visas had been approved at an estimated 50 percent approval rate.²²⁰ Yet, the TVPA allows for five thousand T visas per year for principal applicants, excluding family derivatives. Therefore, from 2001 to 2008, there were an allowable forty-five thousand T visas available. Advocates and scholars have scrutinized the low number of T visas awarded. Many have critiqued the government’s general anti-trafficking strategy which places primary

²¹⁸ Other qualifying crimes include: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

²¹⁹ 8 CFR § 214.14(a)(3).

²²⁰ This number was calculated from tallying the reported number of T visa approvals from the *Attorney General’s Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons 2001-2005, 2006, 2007 and 2008*, available at <http://www.usdoj.gov/whatwedo/whatwedo_ctip.html> (last visited July 9, 2009).

emphasis on the criminal prosecution of traffickers as the reason for the low numbers.²²¹ Some commentators have argued that the link between T visa eligibility and cooperation with law enforcement in the investigation and prosecution of the trafficking is too onerous, subjecting trafficking victims to further trauma if they must ultimately participate in criminal proceedings against their traffickers.²²² Others contend that the government's focus on criminal enforcement makes protection measures for trafficked individuals contingent upon federal law enforcement choosing to investigate and prosecute trafficking violations.²²³ The inherent selectivity in the prosecutorial process and its utilization of trafficking victims as witnesses for the criminal process leave many trafficked persons excluded from protection benefits and ultimately from full access to justice. Another major criticism of U.S. anti-trafficking policy is its conflation of prostitution with trafficking. Human rights activists report that anti-trafficking policies under the Bush Administration focused funding and resources on enforcement of only sex trafficking crimes, thereby withholding protection and alienating trafficked persons in other labor sectors.²²⁴

This Author has explored these arguments in other works.²²⁵ Notwithstanding these critiques, this Article posits that the availability of various forms of trafficking-related immigration relief ultimately supports the role of trafficking victims as private attorneys general. As explored in the next Section, trafficked plaintiffs have sued their perpetrators in civil court and

²²¹ Grace Chang and Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 Stan J CR CL 317 (2007); Jennifer Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 Fordham L Rev 2977 (2006); Haynes, 26 Hum Rts Q at 257 (cited in note 161).

²²² Hussein Sadrudin, Natalia Walter, and Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 Stan L and Pol Rev 379, 381 (2005).

²²³ Consider Chang and Kim, 3 Stan J CR CL 317 (cited in note 221); Chacon, 74 Fordham L Rev 2977 (cited in note 221); Haynes, 26 Hum Rts Q at 257 (cited in note 161).

²²⁴ *Id.* See also Debbie Nathan, *Oversexed*, Nation 27 (Aug 29, 2005); Bernice Yeung, *Enslaved in Palo Alto*, SF Weekly (Feb 18, 2004), available at <<http://www.sfweekly.com/2004-02-18/news/enslaved-in-palo-alto/>> (last visited July 9, 2009). Out of 196 cases prosecuted since the passage of the TVPA, over two-thirds have involved sex trafficking.

²²⁵ Chang and Kim, 3 Stan J CR CL 317 (cited in note 221); Kathleen Kim, Charles Song, and Sri Panchalam, *Conversations with Two Anti-Trafficking Advocates*, Los Angeles Public Interest Law Journal (2009), available at <www.lapilj.org>; Kim, 38 U Toledo L Rev 941 (cited in note 193); Kathleen Kim and Kusia Hreschshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 Hastings Women's L J 1 (2004).

have also received TVPA-related immigration relief, allowing them to assert their civil rights unimpeded by immigration restrictions. The pursuit of civil relief diverts attention away from the criminal process, allows trafficked plaintiffs to direct their own legal case, and vindicates civil rights violations left unvindicated by law enforcement. The next Section considers the benefits of these civil actions both for the individual seeking relief and for the national interest in upholding civil rights imperatives. The next Section also shows that similar benefits may be gained in the undocumented worker context if the laws enabling the trafficked worker as private attorney general were extended to all undocumented workers who suffer civil rights violations in the workplace.

PART III: THE TRAFFICKED WORKER AND UNDOCUMENTED WORKER AS PRIVATE ATTORNEYS GENERAL

On February 27, 2008, ICE raided Audubon Pointe, a construction worksite in New Orleans that employed undocumented workers to repair apartments that were damaged by Hurricane Katrina.²²⁶ ICE took into custody seven workers, who, through counsel, had issued a demand letter to their employer citing violations of the FLSA for consistent non-payment and underpayment of wages for labor they had performed.²²⁷ The workers believed that ICE initiated the raid after receiving a tip from their employer who had previously threatened the workers with law enforcement arrest for complaining about their working conditions. On March 17, 2008, while detained at the Orleans Parish Prison without bond and facing deportation, the workers gave their attorneys consent to file a civil complaint on their behalf and those “similarly situated,” seeking relief for violations of the FLSA and the TVPA.²²⁸ The complaint further alleged that the employer housed the workers in unfurnished substandard apartment units at the construction site in order to “maintain access to and control over the workforce.”²²⁹ The employers also threatened to evict the plaintiffs and on different occasions had locked the workers out of their apartments as a scheme to force the workers to comply with the working conditions.²³⁰

²²⁶ Complaint, *Garcia v Audubon*, No 08-01291, at 16 (E D La Mar 17, 2008).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 13

²³⁰ *Id.* at 14–15.

With deportation imminent, the continuation of the civil case was logistically impracticable. On April 18, 2008, based on the allegations in the civil complaint, a federal judge “certified” the workers as victims of human trafficking and therefore eligible for TVPA related immigration relief.²³¹ The judge ordered the termination of the removal proceedings, and ICE released the workers from immigration detention. With the security of immigration status, the workers pushed forward with their civil action.

As this example illustrates, trafficked workers who act as private attorneys general to enforce civil rights violations against their unscrupulous employers tell a different story than the exploited, yet deportable, undocumented workers described in Part I. The conferral of immigration status to trafficked workers supports their role as private attorneys general while the unlawful status of undocumented workers often takes precedence over their civil claims against abusive employers.

This Part discusses the law’s support of the trafficked worker as private attorney general and argues that similar support should be extended to undocumented immigrants injured by exploitive employers. Drawing from Professor William B. Rubenstein’s delineation of a private attorney general continuum, which evaluates the public and private functions of private attorneys general, this Part explains that the strong public policy role exercised by trafficked plaintiffs justifies the laws that enable them. This Part contends that similar public policy reasons justify the law’s endorsement of other exploited undocumented workers to act as private attorneys general.

A. The Private-Public Functions of the Private Attorney General

As discussed in Part I, the private attorney general seeks to obtain not only individual relief, but also accomplishes important public policy goals, thereby assuming both private and public roles. According to Professor Rubenstein, this mix of “public and private functions” occurs in many ways that can be mapped onto a “lawyering spectrum that runs from private lawyering on one side to public lawyering on the other.”²³² The private attorney general falls in the middle; within the middle, there are three types of private attorneys general: substitute, supplemental, and

²³¹ Order, *Garcia v Audubon*, No 08-01291 (E D La Apr 14, 2008).

²³² Rubenstein, 57 Vand L Rev at 2171 (cited in note 28).

simulated.²³³ Each type has varying levels of public and private functions. The substitute attorney general serves a strong public role. These are private attorneys hired by the government to “literally perform the exact functions of the attorney general’s office though they themselves are not attorneys general.”²³⁴ The simulated attorney general serves a strong private function; by representing a private interest, he may obtain “a fund that will benefit an entire group of individuals, even if the case was not actually prosecuted on behalf of the whole group or as a representative action.”²³⁵ The fund may have the consequence of benefiting a larger group, but this benefit was not contemplated as a goal of the litigation.²³⁶

The supplemental private attorneys general are those whose work “contributes to the public interest by supplementing the government’s enforcement of laws and public policies.”²³⁷ Within this category, the mix of public versus private functions also differs in quantity:

Some supplemental attorneys general perform significant public functions with only scant private interests at stake (such as environmental citizen-suit plaintiffs) while others perform incidental public functions with significant private interests at stake (such as mass tort class action plaintiffs).²³⁸

Between the strong public and the strong private supplemental private attorneys general lies the traditional account of

²³³ *Id.* at 2142 (“The private attorney general concept is deployed in the legal literature in at least three distinct ways, each of which presents a different mix of the public and private features of lawyering: (1) some private attorneys general substitute for the public attorney general; (2) some private attorneys general supplement the public attorney general; and (3) some private attorneys general simulate an attorney general, acting as the advocate for a group, but solely for a group of private persons.”). It should be noted that Professor Rubenstein’s framework includes all types of private attorneys general, including those who pursue litigation on behalf of an organization or a cause and not an individual plaintiff. I apply his framework to individual plaintiffs.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Rubenstein, 57 *Vand L Rev* at 2155 (cited in note 28) (“In this sense of the term, the private attorney general is truly a private attorney general—that is, an attorney general for a private group of plaintiffs, not for the public interest generally. I refer to this private attorney general as a simulated attorney general since she is performing a function—recouping a fund for private parties—not typically associated with a public attorney general. She is not substituting for the attorney general, nor is she generally rewarded because her actions contribute to a public good.”)

²³⁷ *Id.* at 2146.

²³⁸ *Id.*

the private attorney general—as described by the Supreme Court: “[U]nlike most private tort litigants, the civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. . . . Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits.”²³⁹

The traditional account regards the private attorney general as essential to “supplement” government enforcement of wrongdoing because “private attorneys general might be better at either discerning or pursuing private wrongdoing, or they may simply supplement public enforcement by increasing the intensity of the penalty wrongdoers must pay.”²⁴⁰ The supplemental private attorney general is better equipped to rectify certain violations because they are free from the constraints of government attorneys whose actions may be limited by scarce resources and political pressures.²⁴¹

Professor Rubenstein argues that determining the relative mix of a private attorney general’s private and public functions is important to inform the ways in which the law should bolster or restrict a private attorney general action: “How much a particular type of private attorney general is thought to be an agent for public ends, in addition to private ones, *“critically affects the rules by which we should enable (and constrain) her.”*”²⁴²

Commentators and courts have discerned the various private and public goods generated by private litigation. Individual benefits largely come in the form of monetary damages compensating the plaintiff for his or her actual losses and awarding punitive damages for a defendant’s willful or malicious conduct. There may be additional individual gains such as a plaintiff’s empowerment from directly holding perpetrators accountable and the ability to exercise control over the legal case.²⁴³

²³⁹ *City of Riverside v Rivera*, 477 US at 574.

²⁴⁰ Rubenstein, 57 Vand L Rev at 2150 (cited in note 28).

²⁴¹ *Id.* (“The private attorney general doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions and that, without some mechanism authorizing the award of attorneys fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.”). See also Cal Civ Pro Code § 1021.5 (West 2009).

²⁴² Rubenstein, 57 Vand L Rev at 2171 (cited in note 28).

²⁴³ Kim and Hreschyshyn, 16 Hastings Women’s L J 1 (cited in note 225) (discussing the benefits and complexities of utilizing civil litigation as a tool to complement prosecutorial actions against human traffickers pursuant to TVPRA).

Public benefits of private attorney general lawsuits include the promotion of substantive law norms, deterrence of wrongdoing, and furtherance of accountability by avoiding the politics of selective government enforcement.²⁴⁴ The private attorney general lawsuit—at least in the context of the class action—has also been described as embodying a public good in and of itself, producing “positive externalities” beyond deterrence.²⁴⁵ One “positive externality,” is precedent, which is “valuable not only as a source of certainty, but also as a reasoned elaboration and visible expression of public values.”²⁴⁶ Even in the absence of precedent-setting court decisions, the litigation alone may promote legislative and social change.²⁴⁷ Professor Owen M. Fiss, for example, contends that contemporary litigation serves a social function to identify and give meaning to the values that “stand as the core of a public morality.”²⁴⁸

B. The Private-Public Functions of the Trafficked Private Attorney General

Application of Professor Rubenstein’s framework to the trafficking context would place the trafficked worker in the category of the traditional supplemental private attorney general. The trafficking private right of action is derived from the criminal statutes enforcing trafficking crimes, thereby supplementing the “government’s enforcement of laws and public policies.”²⁴⁹ The award of attorneys’ fees signifies congressional recognition that

²⁴⁴ Elizabeth Chamblee Burch, *Cafa's Impact on Litigation as a Public Good*, 29 *Cardozo L Rev* 2517 (2007–2008) (arguing that positive externalities created by class litigations, including private attorney involvements promoting public good, are negated by the Class Action Fairness Act allowing federalization of class action suits).

²⁴⁵ *Id.* at 2554, citing William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 *UMKC L Rev* 709, 711 (2005–2006).

²⁴⁶ David Luban, *Settlements and the Erosion of the Public Realm*, 83 *Georgetown L J* 2619, 2626 (1994–1995) (discussing the contrasting roles of adjudication and settlement in the public interest context and avenues by which to obtain a realistic balance between the two).

²⁴⁷ Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy Some Preliminary Thoughts on a New Research Project*, 51 *DePaul L Rev* 493, 495 (2001–2002) (explaining a research approach to the examination of new social policy torts involving public and private attorneys general in forming social policy through litigation rather than legislation).

²⁴⁸ Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 *Law & Hum Behav* 121, 124 (1982) (discussing the problems with the shift in the form of adjudication from an embodiment of public values to an instrument of political organization through privatization of ends).

²⁴⁹ Rubenstein, 57 *Vand L Rev* at 2146 (cited in note 28).

“privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions.”²⁵⁰ Yet, in addition to promoting the public policy of enforcing violations of human trafficking, the trafficked worker also seeks individual relief in the form of compensatory and punitive damages and therefore exercises both public and private functions.

The relative quantities of public and private functions can be ascertained by analyzing trafficking civil cases to date. Since the private right of action was amended to the TVPA in 2003, approximately thirty cases have been filed.²⁵¹ Each case has supplemented the current anti-trafficking criminal enforcement framework. Many have proceeded in the absence of a criminal prosecution; where there has been a parallel criminal prosecution, the civil litigation has increased the penalties for which traffickers may be liable in the form of monetary damages.

Trafficking civil cases have provided both private and public benefits. As to individual relief, trafficked plaintiffs have received a wide range of monetary damages through settlement, court judgment, or jury verdict. For example, in one case involving a trafficked domestic worker from Tanzania, the court ordered \$1,059,348.79 in damages and attorneys’ fees against the defendant traffickers for approximately four years of work without compensation.²⁵² In another case, a jury awarded approximately \$70,000 in damages to a trafficked domestic worker from the Philippines.²⁵³ Another court ordered a default judgment in favor of twelve agricultural laborers amounting to almost \$9,000,000 against the defendant tree farm operators.²⁵⁴ As an alternative to criminal enforcement—which has been critiqued as inadequate in vindicating the interests of trafficking victims—civil litigation has been characterized as a source of empowerment for victims who exercise discretion over the direction of their case and can utilize the civil case to express their own narratives.²⁵⁵

²⁵⁰ Cal Civ Pro Code 1021.5 (West 2009).

²⁵¹ See Appendix.

²⁵² *Mazengo v Mzengi*, 542 F Supp 2d 96 (D DC 2008).

²⁵³ *Cruz v Toliver*, 2007 WL 1031621 (W D Ky Mar 30, 2007). See also Blair Jackson, *Enslaved Maid Wins \$800,000*, Daily Journal (Aug 31, 2004) (awarding a substantial judgment to a trafficked domestic worker).

²⁵⁴ *Aguilar v Imperial Nurseries*, No. 3-07-cv-193 (D Conn May 28, 2008).

²⁵⁵ Kim and Hreshchyshyn, 16 *Hastings Women’s L J* 1 (cited in note 225).

Trafficking lawsuits have also generated public benefits of the sort described above. Out of thirty-one cases, twenty-three have proceeded in the absence of a parallel criminal action.²⁵⁶ This increases accountability for wrongdoing and vindicates harms left unvindicated by government enforcement agencies. Trafficking lawsuits also increase overall deterrence by creating financial disincentives for traffickers,²⁵⁷ who are subject to both compensatory and punitive damages if found liable for trafficking violations.

Trafficking litigation has also produced important precedent. In *Garcia v Audubon*, the case described above, a federal judge certified the plaintiffs for U visas and affirmed their eligibility as victims of human trafficking for TVPA-related immigration relief.²⁵⁸ The court recognized that “legal coercion was used against the Plaintiffs to continue working without pay” and that the defendants engaged in a “pattern of conduct . . . to force the plaintiff-employees to work by taking advantage of the plaintiff-employees undocumented immigration status.”²⁵⁹ The court noted that a parallel criminal investigation was not necessary to establish the plaintiffs’ eligibility for U visas because “the regulations contemplate the future helpfulness of the applicant(s)” and that it was therefore sufficient to show that the plaintiffs “may be helpful at some point in the future.”²⁶⁰ Finally, the court explained that the U visa criteria of substantial physical or mental abuse did not require a showing of battery or extreme cruelty. The court found that the plaintiffs demonstrated sufficient physical or mental suffering based on “the living conditions they were forced to endure,” which included needing “to find food ‘in the trash,’” making them feel ashamed and distressed from malnourishment.²⁶¹ This published opinion provides a legal foundation for all trafficked plaintiffs in removal proceedings to seek U visa certification through civil courts. Moreover, the opinion reinforces the scope of trafficking laws to protect workers subjected to legal coercion in the form of threats of deportation and affirms that protection is neither contingent on an ongoing criminal investigation nor evidence of physical abuse.

²⁵⁶ See Appendix describing civil cases to date.

²⁵⁷ *Id.*

²⁵⁸ Order, *Garcia v Audubon*, No 08-01291, 2008 WL 1774584 (E D L Apr 14, 2008)

²⁵⁹ *Id.* at *5.

²⁶⁰ *Id.* at *6.

²⁶¹ *Id.* at *7.

In another trafficking civil case, *Mazengo v Mzenzi*,²⁶² a federal court rejected a defendant's motion to vacate a default judgment against him. The Minister-Counselor at the Embassy of Tanzania to the United States, trafficked a domestic worker from Tanzania and forced her to work as a domestic worker for four years. The defendant argued that his position as a foreign diplomat provided him with immunity from civil, criminal, or administrative liability within the United States.²⁶³ The court held that without proof from the State Department establishing his status as a diplomat, the defendant remained liable for the civil damages assessed in this case.²⁶⁴ The court's reluctance to recognize diplomatic immunity provides workers trafficked by diplomats with the possibility for relief and also allows civil courts to condemn this conduct publically.

Additionally, trafficking civil litigation has promoted important substantive law norms. Trafficking complaints list a number of causes of action, including the TVPA private right of action as well as employment violations under the FLSA and civil rights statutes. Utilizing the TVPA private right of action advances the Thirteenth Amendment's prohibition against involuntary servitude. The inclusion of FLSA-related relief in all trafficking lawsuits to date highlights the important relationship between the Thirteenth Amendment's guarantee of free labor and the FLSA's protection of fair labor standards. Trafficking lawsuits also further the anti-discrimination mandates of certain civil rights statutes including Title VII,²⁶⁵ § 1981,²⁶⁶ and § 1985.²⁶⁷ Title VII of the 1964 Civil Rights Act prohibits employers from discriminating against employees on the basis of race, color, religion, na-

²⁶² 542 F Supp 2d 96 (D DC 2008).

²⁶³ Article 31 of the Vienna Convention on Diplomatic Relations (1961). See also, *Hidden in the Home* at 34–35 (cited in note 74).

²⁶⁴ 542 F Supp 2d at 4.

²⁶⁵ Title VII of the Civil Rights Act of 1964, 42 USC § 2000e (2000).

²⁶⁶ 42 USC § 1981(a) (2000) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).

²⁶⁷ 42 USC § 1985(3) (2000). (“If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.”).

tional origin, or sex.²⁶⁸ Section 1981 is an additional discrimination cause of action that prohibits race discrimination in the making of contracts and terms of employment.²⁶⁹ Section 1985 arises out of the Conspiracy Act of 1861,²⁷⁰ amended in 1871,²⁷¹ for the purpose of enforcing Fourteenth Amendment protections.²⁷²

Trafficking lawsuits have successfully pursued these claims. *Chellen v John Pickle Co, Inc.*,²⁷³ involved fifty-two workers trafficked from India to labor in an Oklahoma pressure valves manufacturer. Compared to the non-Indian employees at the factory, the Indian workers received egregiously substandard working and living conditions. The Indian workers experienced physical separation from the non-Indian workers and harassment from their supervisors based on their ethnicity and national origin. The workers sued their employer for gross labor violations and Title VII discrimination. Prompted by the workers' lawsuit, the EEOC intervened and the cases were consolidated adding a § 1981 claim.²⁷⁴ A federal court upheld the charges and assessed compensatory and punitive damages at \$1.24 million. In doing so, the court extended § 1981 to reach claims of discrimination based on not only race, but also ancestry and ethnicity:

²⁶⁸ 42 USC § 2000e-2(a) ("It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

²⁶⁹ 42 USC § 1981(a) (2000).

²⁷⁰ Conspiracy Act of 1861, Ch 33, 12 Stat 284 (describing the purpose of the act as "[t]o define and punish certain Conspiracies"), codified as amended at 42 USC § 1985(3) (2006).

²⁷¹ Act to Enforce the Provisions of the Fourteenth Amendment, Ch 22, 17 Stat 13, codified as amended at 42 USC § 1985(3) (2006).

²⁷² *Id.*

²⁷³ 434 F Supp 2d 1069 (N D Okla 2006).

²⁷⁴ *Id.* *Chellen* is not the only example of a trafficking civil case that initiated government enforcement action. See also *Ruiz v Jackson*, Cal No. SC076090, (Cal Super Ct Aug. 26, 2004) (trafficking civil case filed in state court). The trafficked plaintiff won a jury verdict of \$1.65 million. This prompted the attention of the Department of Justice who later criminally prosecuted the defendants in this case. See Elizabeth Santoro, *Woman Forced Into Slavery Wins Jury Verdict Against California Couple*, Law Reporter (Nov 2004), available at <http://findarticles.com/p/articles/mi_qa3898/is_200411/ai_n9462798/> (last visited July 9, 2009). Thus, an additional public benefit of trafficked private attorney general actions is to alert government authorities of unlawful conduct.

[C]ourts have struggled with the distinctions between race and national origin in the context of § 1981 claims . . . it is appropriate to analyze § 1981 claims in terms of ancestry and ethnic characteristics where discrimination is not based solely on national origin . . . ancestry and ethnic characteristics . . . entitle [plaintiffs] to claim the protections of § 1981.²⁷⁵

In *Deressa v Gobena*,²⁷⁶ a trafficked domestic worker asserted a § 1985 claim against the defendant traffickers. The plaintiff needed to establish that discriminatory animus based on a “discrete, insular, and immutable characteristic . . . such as race, national origin, and sex,” motivated the defendants to conspire to interfere with the plaintiff’s Fourteenth Amendment right to equal protection under the laws.²⁷⁷ The claim survived the defendant’s motion to dismiss. The court allowed the plaintiff to bring a § 1985 claim motivated by defendants’ “desire to deprive Plaintiff [of] her rights to be free from slavery as a direct result of Plaintiff’s being an alien, female, and of African descent.”²⁷⁸ The court reasoned that each of “these attributes is a discrete, insular, and immutable characteristic deserving of heightened protection under the Constitution.”²⁷⁹ Even though the defendants were also of African descent, the court found that membership in the same class did not eliminate the possibility that the defendants could have a “discriminatory animus toward other persons due to alienage, sex, or African descent.”²⁸⁰

In another recent case, *David v Signal Intl, LLC*,²⁸¹ the plaintiff class of five hundred Indian workers trafficked to work in the defendant’s factory brought suit against their employer for various workplace violations including claims under the TVPA, FLSA, § 1981 and § 1985. The plaintiffs in this ongoing case sought a protective order prohibiting disclosure of their immigration status and other personal information. The court issued the protective order acknowledging the “[inherent] in terrorem effect

²⁷⁵ *Chellen*, 434 F Supp 2d at 1104.

²⁷⁶ 2006 WL 335629 (E D Va Feb 13, 2006).

²⁷⁷ *Id* at *5.

²⁷⁸ See *id* at *5 (E D Va Feb. 13, 2006). The plaintiff in this case also used 42 USC § 1985(3) as a mechanism to allege a cause of action for violations of the Thirteenth Amendment and 18 USC § 1584 (2006).

²⁷⁹ *Deressa*, 2006 WL 335629, at *5.

²⁸⁰ *Id*.

²⁸¹ 2009 WL 874520 (E D La Apr 2 2009).

of inquiring into a party's immigration status" and that "discovery of such information would have an intimidating effect on an employee's willingness to assert his workplace rights . . . seriously undermin[ing] the effectiveness of the FLSA."²⁸² The court concluded that the "public interest in allowing employees to enforce their workplace rights" outweighed the defendant's interest in discovery of this information.²⁸³

These cases have advanced the substantive guarantees of the Thirteenth and Fourteenth Amendments and related civil rights statutes. In addition to the promotion of substantive law norms, trafficking civil litigation has prompted legislative change. For example, a California trafficking private right of action was enacted in 2005.²⁸⁴ Section 52.5 provides that a trafficking victim may bring a civil action for actual, compensatory, and punitive damages as well as injunctive relief.²⁸⁵ Section 52.5 also provides for treble damages and attorneys' fees, costs, and expert witness fees to the prevailing plaintiff.²⁸⁶ Furthermore, the statute of limitations (of five years for adult plaintiffs²⁸⁷ and eight years for minors after they reach majority age²⁸⁸) may be tolled due to a variety of circumstances including a trafficked individual's disability, minor status, lack of knowledge, psychological trauma, cultural or linguistic isolation, inability to access victim services, and threatening conduct from a defendant preventing a trafficked individual from bringing a civil action.²⁸⁹

The 2008 changes to the TVPA also reflect the impact of trafficking lawsuits. As described in Part II, the 2008 TVPA expands trafficking-related civil claims to provide independent causes of action for each provision of Chapter 77 Title 18 of the

²⁸² *Id.* at *7, *9.

²⁸³ *Id.* at *8.

²⁸⁴ Sally Lieber, *Press Release: AB 22: Rare Show of Unity: Law Enforcement Leaders Join with Activists for Civil Rights and Women's Rights to Announce Governor's Signature of Comprehensive Human Trafficking Bill*, available at <<http://www.sfdistrictattorney.org/News.asp?id=25>> (last visited July 9, 2009).

²⁸⁵ Cal Civil Code §52.5(a) (West 2009) ("A victim of human trafficking . . . may bring a civil action for actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief.").

²⁸⁶ *Id.* ("A prevailing plaintiff may also be awarded attorney's fees and costs.").

²⁸⁷ Cal Civil Code § 52.5(c) ("An action brought pursuant to this section shall be commenced within five years of the date on which the trafficking victim was freed from the trafficking situation.").

²⁸⁸ *Id.* ("An action brought pursuant to this section shall be commenced . . . if the victim was a minor when the act of human trafficking against the victim occurred, within eight years after the date the plaintiff attains the age of majority.").

²⁸⁹ Cal Civil Code § 52.5(d–e).

U.S. Code, signaling a policy response to earlier cases that rejected such claims. For example, in the 2007 case *Cruz v Toliver*,²⁹⁰ the court dismissed the plaintiff's § 1581 (peonage) and § 1592 (document servitude) claims, finding that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."²⁹¹ The *Cruz* court reasoned that the 2003 trafficking private right of action specifically provided for private causes of action under §§ 1589, 1590, and 1591, but omitted private causes of action for §§ 1581 and 1592.²⁹² Therefore, the court argued that if it had been the intent of Congress to include private causes of action for §§ 1581 and 1592, it would have explicitly done so in § 1595.²⁹³ The 2008 addition of causes of action for each provision of Chapter 77 Title 18 increases the reach of trafficked private attorney generals to vindicate the full range of Thirteenth Amendment related harms.

The extra-territorial provision²⁹⁴ of the 2008 TVPA may also indicate a congressional response to legal obstacles raised in trafficking civil lawsuits against overseas defendants. In *Roe v Bridgestone*,²⁹⁵ the plaintiffs, workers in a Liberian rubber plantation, brought suit for forced labor against Bridgestone and Firestone corporations and holdings. Among other claims, plaintiffs alleged violation of § 1589 and sought relief pursuant to § 1595. The defendants sought to dismiss the claim arguing that even if the conditions on the plantation in Liberia amounted to forced labor, § 1589 did not apply to labor conditions outside the United States. Finding no previous case law on the issue, the court concluded that § 1595 did "not provide a remedy for alleged viola-

²⁹⁰ 2007 WL 1031621 (W D Ky March 30, 2007).

²⁹¹ *Id.* at *1, citing *Gozlon-Peretz v United States*, 498 US 395, 404 (1991).

²⁹² 18 USC § 1595 (2003).

²⁹³ The court also cited older cases in other jurisdictions which denied implied rights of action for § 1581. *Weiss v Sawyer*, 28 F Supp 2d 1221, 1227 (W D Okla 1997) (denying a private cause of action for § 1581); *Dolla v Unicast Co*, 930 F Supp 202, 205 (E D Pa 1996) (ruling similar to *Weiss* in denying a private cause of action under § 1581).

²⁹⁴ 18 USC § 1596 (2008). "In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 [18 USCS § 1581, 1583, 1584, 1589, 1590, or 1591] if—(1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 USC 1101); or (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender." *Id.*

²⁹⁵ *Roe v Bridgestone Corp*, 492 F Supp 2d 988 (S D Ind 2007).

tions of § 1589's standards that occur outside the United States.”²⁹⁶ The court relied on the general presumption derived from Supreme Court precedent that “[u]nless a contrary intent appears, [congressional legislation] is meant to apply only within the territorial jurisdiction of the United States.”²⁹⁷ The court recognized the international nature of trafficking, but contended that unless made explicit, § 1589 must be presumed to apply domestically: “The other closely related statutes addressing slavery and related practices in Chapter 77 of Title 18 show that Congress has been acquainted with the question of international reach in this context for more than 200 years. Congress knows how to legislate with extraterritorial effect in this field. It has done so expressly when it has intended to do so.”²⁹⁸ The District Court for the District of Columbia reached a similar conclusion in *Nattah v Bush*,²⁹⁹ referencing the *Bridgestone* decision.³⁰⁰ The 2008 TVPA codifies extra-territorial jurisdiction for trafficking violations, superseding these court decisions.

In sum, these legislative enactments indicate the strong public function served by the trafficked private attorney general to influence policy reform. Augmenting the public function of the trafficked private attorneys general is their role in addressing trafficking violations left unprosecuted by government actors. The precedents generated from trafficking lawsuits enlarge protections to other trafficked workers. And the trafficking litigation itself advances important constitutional and civil rights.

²⁹⁶ *Id.* at 999.

²⁹⁷ *Id.* at 1000.

²⁹⁸ *Id.* at 1002.

²⁹⁹ 541 F Supp 2d 233 (D DC Mar 31, 2008).

³⁰⁰ *Id.* at 234–35.

The Trafficked Private Attorney General³⁰¹

Private Benefits	Public Benefits
Monetary damages	Deterrence
Empowerment	Precedent
	Advancement of legal norms
	Legislative and social changes

The culmination of these private and public benefits weighs in favor of legal rules supporting the trafficked private attorney general. The 2008 TVPA comports with this objective by further “enabling” the trafficked private attorney general through the authorization of immigration status for all trafficked workers who sue their traffickers in civil court, thereby eliminating immigration restrictions and prioritizing the trafficked workers’ civil rights.³⁰²

As explained in the next Section, undocumented plaintiffs who experience workplace abuse would promote similar public benefits, thus, calling for the extension of an equivalent form of immigration relief to “enable”³⁰³ injured undocumented workers to act as private attorneys general.

C. The Private-Public Functions of the Undocumented Private Attorney General

At the outset, it is important to recognize that the TVPA, particularly in light of its recent expansion, may cover a broad spectrum of worker abuses, including those described in Part I.³⁰⁴ However, a distinction between trafficked workers and exploited undocumented workers continues to play out in the law. For example, while the Audubon workers were recognized as trafficking victims and deserving of immigration relief, the undocumented workers at Agriprocessors and Howard Industries, even though exploited, were detained and deported. Thus, this Section argues that notwithstanding the merits or arbitrariness of this

³⁰¹ This chart lists the identified private and public benefits of trafficked private attorney general lawsuits.

³⁰² The 2008 TVPA also provides for a ten year statute of limitations.

³⁰³ Rubenstein, 57 Vand L Rev at 2171.

³⁰⁴ Kim, *The Coercion of Trafficked Workers* (cited in note 27).

distinction, immigration relief should be extended to undocumented workers, because, similar to trafficked private attorneys general, they play an important role in the furtherance of substantive legal norms and societal values.

Like trafficked private attorneys general, the undocumented worker as private attorney general would be characterized as supplemental to the governmental structure in place for enforcing workplace violations. As described in Part I, labor protections in low-wage industries highly populated by undocumented workers are grossly underenforced. Undocumented workers injured by their employers could fill this gap by holding their employers directly accountable for workplace violations. As supplemental private attorneys general, undocumented workers would exercise a mix of private and public functions, the relative quantities of which would inform the rules that “constrain” or “enable” them.

Though lacking immigration status, some undocumented workers have courageously asserted their workplace rights, providing examples by which to assess the private and public benefits generated from undocumented worker civil litigation. Individually, successful lawsuits by injured undocumented workers against their employers result in monetary damages. For example, damages may include compensatory relief for wage and hour violations as well as punitive awards for an employers’ willful retaliation. In *Singh v Jutla & C.D. & R’s Oil, Co*, for example, a federal court awarded \$200,000 in punitive damages to the plaintiff, an undocumented worker who was held in INS detention after his employer reported him to INS in retaliation for making a wage and hour complaint.³⁰⁵ Civil litigation may also be a source of empowerment for injured workers who may utilize the civil process to hold their employers accountable for violating their rights.

Deterrence is one of the public benefits associated with these civil actions. As described in Part I, the prioritization of immigration enforcement and the absence of effective labor protections in the industries populated by undocumented immigrants allows unscrupulous employers to take advantage of workers with impunity. Similar to the trafficking context, the threat of a lawsuit for workplace violations creates significant financial dis-

³⁰⁵ See *Singh v Jutla & C.D. & R’s Oil, Inc*, 214 F. Supp. 2d 1056 (N D Cal 2002). See also 29 USC § 216(b) (2000) (providing that an employer who violates the FLSA’s anti-retaliation clause is liable for compensatory and potentially punitive damages).

incentives for an employer to engage in exploitive employment practices.

The injured undocumented worker acting as private attorney general also generates precedent reinforcing important substantive legal norms and public values. A line of cases has upheld undocumented workers' rights under the FLSA. The *Singh* court concluded that the employer violated the FLSA by reporting his undocumented employee to the INS in retaliation for a wage and hour complaint.³⁰⁶ In *Contreras v Corinthian Vigor Insurance Brokerage*, the court found that the employer violated the FLSA by reporting an undocumented employee to the INS in retaliation to a wage and hour complaint.³⁰⁷ In *Liu v Donna Karan Intl Inc*, the court held that immigration status was irrelevant to a claim of unpaid wages under the FLSA and prohibited the defendant's discovery of the plaintiffs' status.³⁰⁸ The *Liu* court explained that "the risk of injury to the plaintiffs if such information were disclosed outweighs the need for its disclosure" and that disclosure would risk a "danger of intimidation" and a "danger of destroying the cause of action," inhibiting plaintiffs from pursuing their rights.³⁰⁹

This reasoning has been echoed in Title VII actions brought by undocumented workers. In *Rivera v Nibco, Inc.*,³¹⁰ the Ninth Circuit upheld a protective order against the defendant's discovery request of the plaintiffs' immigration status. The court determined that "the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights . . . outweighed NIBCO's interests in obtaining the information."³¹¹ Were such discovery to be permitted, "countless acts of illegal and reprehensible conduct would go unreported."³¹²

³⁰⁶ See *Singh*, 214 F Supp 2d at 1056.

³⁰⁷ *Contreras v Corinthian Vigor Insurance Brokerage, Inc.*, 25 F Supp 2d 1053 (N D Cal Oct 26, 1998)

³⁰⁸ *Liu v Donna Karan Intl Inc*, 207 F Supp 2d 191, 192 (S D NY June 20, 2002). See also *In re Reyes*, 814 F2d 168, 170-71 (5th Cir 1987); *Montoya v S.C.C.P. Painting Contractors, Inc.*, 530 F Supp 2d 746, 749-50 (D Md Jan 14, 2008); *Recinos-Recinos v Express Forestry, Inc.*, 2006 US Dist LEXIS 2510, *43-45 (E D La Jan 23, 2006); *Galaviz-Zamora v Brady Farms, Inc.*, 230 FRD 499 (W D Mich Sept 23, 2005); *Garcia-Andrade v Madra's Cafe Corp.*, 2005 WL 2430195 (E D Mich Aug 3, 2005); *Topo v Dhir*, 210 FRD 76, 78 (S D NY Sept 13, 2002); *Flores v Amigon*, 233 F Supp 2d 462, 463-65 (E D NY Sept 20, 2002); *Flores v Albertson's, Inc.*, 2002 US Dist LEXIS 6171, *16-19 (C D Cal Apr 9, 2002).

³⁰⁹ *Liu*, 207 F Supp 2d at 192-93 (hearing tr at 12), citing *Ansoumana v Gristede's Operating Corp.*, No 00 Civ 0253(AKH) (S D NY Nov 8, 2000).

³¹⁰ 364 F3d 1057 (9th Cir 2004).

³¹¹ *Id* at 1067-68.

³¹² *Id* at 1068.

The court further found that allowing discovery would “unacceptably burden[]” the public interest by constraining the private attorney general.³¹³

In rendering its decision, the court cited Supreme Court precedent affirming the important public role assumed by the Title VII plaintiff: “Congress has cast the Title VII plaintiff in the role of ‘a private attorney general,’ vindicating a policy ‘of the highest priority’ . . . an essential means of obtaining judicial enforcement of Title VII. . . vindicat[ing] the important congressional policy against discriminatory employment practices.”³¹⁴ Similar to many of the trafficking civil cases described above, these decisions prioritize substantive civil rights and enable the undocumented private attorney general by minimizing the impact of immigration restrictions.

Like trafficking civil litigation, litigation on behalf of undocumented workers has also encouraged policy reform. The impact of the Supreme Court’s *Hoffman* decision prompted governmental agencies to prominently state their policies towards undocumented immigrants. The Department of Labor issued a fact sheet explaining that it enforces the FLSA “without regard to whether an employee is documented or undocumented.”³¹⁵ An EEOC notice affirmed that the “Supreme Court’s decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes.”³¹⁶ The California legislature also responded by passing Senate Bill 1818, which reinforced undocumented workers’ right to protection under state laws and also established that:

[A] person’s immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person’s immigration status except where the person

³¹³ *Id.* at 1069 (“Given Title VII’s dependence on private enforcement, we find that the national effort to eradicate discrimination in the workplace would be hampered by the discovery practices NIBCO seeks to validate here. We therefore conclude that discovery of each plaintiff’s immigration status constitutes a substantial burden, both on the plaintiffs themselves and on the public interest in enforcing Title VII and FEHA.”)

³¹⁴ 364 F3d at 1069.

³¹⁵ See US Department of Labor, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division* (Aug 19, 2002), available at <<http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>> (last visited July 9, 2009).

³¹⁶ See <www.eeoc.gov/docs/undoc-rescind.html> (last visited July 9, 2009).

seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.³¹⁷

Further, according to Professor Ontiveros, the *Hoffman* decision initiated a deeper understanding of core constitutional values: “*Hoffman* could be a jumping-off point for beginning to consider ways in which the treatment of undocumented immigrant workers could be considered a violation of the Thirteenth Amendment of the United States Constitution because the creation of a caste of workers of color laboring beneath the floor for free labor replicated the harms which the Thirteenth Amendment sought to eliminate.”³¹⁸ Thus, like trafficked plaintiffs, undocumented private attorneys general have provided multiple public benefits including the advancement of substantive legal norms, legislative change, and deterrence.

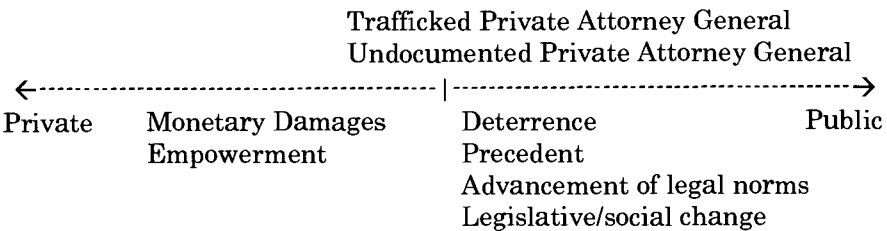
³¹⁷ Cal Civil Code § 3339(b) (2002); Cal Govt Code § 7285, et seq (2002); Cal Health and Safety Code § 24000, et seq (2002); Cal Labor Code § 1171.5 (2002).

³¹⁸ Maria Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending The Civil Rights of Low-Wage Workers*, 2009 U Chi Legal F 103, 134–35.

THE UNDOCUMENTED PRIVATE ATTORNEY GENERAL³¹⁹

Private Benefits	Public Benefits
Monetary damages	Deterrence
Empowerment	Precedent
	Advancement of legal norms
	Legislative and social changes

THE PRIVATE ATTORNEY GENERAL SPECTRUM³²⁰



These cases demonstrate that some undocumented workers have accessed the civil justice system and, in doing so, have generated both private and public benefits. However, these cases also illustrate the incredible challenges that undocumented workers face in suing their employers, including immigration detention and deportation resulting from their employer’s retaliation and intrusive discovery requests during litigation. With the exception of *Hoffman*, courts have held that a worker’s immigration status is irrelevant to claims under the FLSA and other civil rights statutes. Additionally, courts have found employers liable for unlawful retaliation where they report a worker’s undocumented status in response to a civil complaint. Yet, these court decisions do not alter immigration enforcement priorities to remove unlawfully present immigrants; and the mere threat of exposing a plaintiff’s undocumented status has a “serious chilling

³¹⁹ Similar to the chart above, this chart lists the identified private and public benefits generated by undocumented private attorney general actions.

³²⁰ The trafficked and undocumented private attorneys general exercise strong public functions and so are placed closer to the “public” side on the spectrum. Their strong public functions weigh in favor of developing rules that support and enable their roles as private attorneys general.

effect” on those contemplating civil suit and those who have already filed suit.³²¹

Under the current immigration framework, the only recourse for undocumented workers who sue their employers is the Special Agent Field Manual (SAFM) 33.14(h), which instructs immigration authorities to refrain from responding to employers’ attempts to retaliate against undocumented workers.³²² As explained earlier, this manual is a discretionary guideline and does not prohibit immigration enforcement during a labor dispute. Nonetheless, at least one immigration judge has cited the instruction to terminate removal proceedings against undocumented workers who filed complaints against their employer for unpaid wages and interference with their union organizing rights.³²³ In that case, the employer retaliated by reporting the workers’ unlawful status to immigration authorities, who raided the garment factory, detained the workers and placed them in removal proceedings. The immigration judge ordered the release of the workers reasoning that the operating instruction “was designed to protect fundamental labor rights,” and “the [INS’s] failure to adhere to [the instruction] invalidat[ed] [the] removal proceedings.”³²⁴ Despite this ruling, undocumented workers who assert their workplace-related civil rights do not possess secure protection from deportation.³²⁵ As one immigrants’ rights organization explains, “[t]he issue of protecting workers’ right to assert their labor rights . . . is too important for it to be governed merely by inter-agency agreements and discretionary internal guidelines. Instead, whether and how DHS gets involved in labor disputes should be an issue governed by statute.”³²⁶

Simply put, undocumented workers who act as private attorneys general remain vulnerable to deportation, compounding the employer intimidation commonly experienced during litiga-

³²¹ See generally Rebecca Smith, et al, *Undocumented Workers: Preserving the Rights and Remedies after Hoffman Plastic v. NLRB* (Natl Employment Law Project 2002), available at <<http://www.nelp.org>> (last visited Aug 30, 2004).

³²² *Questioning Persons During Labor Disputes*, INS Special Agents Field Manual 33.14(h), available at <<http://uscis.gov/graphics/lawsregs/instruc.htm>> (last visited July 9, 2009).

³²³ *In the Matter of Herrera-Priego*, US DOJ EOIR (July 10, 2003); Immigration Judge Rules INS Agents are Bound by Former OI 287.3a Regarding Enforcement Actions During Labor Disputes, 17 No 5 Immigrants’ Rights Update (Natl Immigration Law Center Sept 4, 2003).

³²⁴ *In the Matter of Herrera-Priego*, US DOJ EOIR (July 10, 2003).

³²⁵ *Id.*

³²⁶ *Issue Brief: Immigration Enforcement During Labor Disputes* (cited in note 141).

tion. For other undocumented workers, immigration enforcement measures have prevented them from exposing and vindicating workplace-related civil rights violations.³²⁷ Most undocumented immigrants are chilled from enforcing workplace rights and are relegated to living in the shadows and complying with unconscionable working conditions. Like the trafficked private attorney general, the legal norms and values promoted by undocumented workers in their suits against unscrupulous employers support conferring them with immigration status to enable them as private attorneys general.

Several scholars have addressed the topic of immigration remedies for exploited undocumented workers. Professor Leticia M. Saucedo argues that the EEOC and the DOL should play a larger role in prosecuting unscrupulous employers and certifying victims of labor abuse for U visa relief.³²⁸ Professor Lori A. Nessel advocates for deferred action status to be provided to undocumented workers who assert their labor rights.³²⁹ Professor Jennifer Gordon's concept of transnational labor citizenship seeks to circumvent the problems associated with undocumented worker status by providing safe and legal international migrant worker mobility.³³⁰ My proposal for an immigration remedy to undocumented workers is normatively consistent with the recommendations of these scholars, as it seeks to ameliorate the exploitation of undocumented workers by easing the tension between immigration and civil rights laws. Yet, my suggested immigration remedy is distinct, since it is built upon the theory of the private attorney general. However, like the trafficked private attorney general, undocumented workers who sue unscrupulous employers advance important legal norms and values, thus justifying the conferral of immigration status to them to better equip them as private attorneys general.

My proposal draws from the 2008 TVPA, which authorizes continued presence for all trafficked workers who civilly sue their traffickers. Like the 2008 TVPA, I offer a statutory immigration remedy for undocumented workers who sue their employers for

³²⁷ See Part I.

³²⁸ Leticia M. Saucedo, *A New 'U': Organizing Victims and Protecting Immigrant Workers*, 42 U Richmond L R 891 (2008) (discussing the viability of the new U visa classification in protecting undocumented immigrant workers suffering from workplace abuse and eliminating labor exploitation).

³²⁹ Nessel, 36 Harv CR-CL L Rev 345 (cited in note 55).

³³⁰ Gordon, *Transnational Labor Citizenship*, 80 S Cal L Rev at 504-05 (cited in note 84).

workplace-related civil rights violations. These workers may request continued presence from the Secretary of the Department of Homeland Security. Continued presence would be available for lawsuits arising under those workplace constitutional and civil rights discussed in this Article—the Thirteenth Amendment, the Fourteenth Amendment, the FLSA, the NLRA, and related civil rights statutes, such as Title VII and §§ 1981 and 1985. In order to reduce the incidence of fraudulent claims to continued presence and frivolous civil suits, eligibility would be demonstrated by a well-pleaded civil complaint accompanied by an affidavit of support from the judge presiding over the civil case. Similar to the *Audubon* court's review of the plaintiffs' eligibility for U visas, a judge would examine the allegations in the record to determine the sufficiency of the undocumented workers' claims for purposes of obtaining continued presence. The courts' interest in administrative efficiency would be outweighed by the public interest in upholding these fundamental civil rights. Furthermore, undocumented workers without legitimate claims would be deterred from initiating this process as it would expose their unlawful status and leave them open to deportation.

My proposal is modest. Continued presence is a temporary form of immigration relief that provides work authorization. Yet, as a statutory provision, it is more stable than other forms of discretionary immigration relief currently provided by DHS. For example, deferred action has no statutory basis and is instead merely “an act of administrative convenience to the government which gives some cases lower priority.”³³¹ USCIS reports that “the vast majority of cases in which deferred action is granted involve medical grounds.”³³² Another form of discretionary immigration relief, “stays of removal,” require an “order of removal, deportation or exclusion,”³³³ and would therefore not apply to most undocumented individuals. By codifying continued presence for undocumented workers acting as private attorney general, undocumented workers would gain certainty with their status. This statutory remedy accompanied by regulations that call for a judge's affidavit of support would also reduce arbitrary immigra-

³³¹ See US Department of Homeland Security, *Recommendation from the CIS Ombudsman to the Director, USCIS 1* (Apr 6, 2007), available at <http://www.dhs.gov/xlibrary/assets/CISOmbudsman_RR_32_O_Deferred_Action_04-06-07.pdf> (last visited July 9, 2009).

³³² *Id.*

³³³ See US DOJ/EOIR, *Practice Manual 93* (July 30, 2004), available at <<http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap6.pdf>> (last visited July 9, 2009).

tion decisions. Over time, the positive externalities generated by undocumented private attorney general lawsuits may weigh in favor of longer-term immigration status for these individuals. If the relationship between trafficking litigation and the 2008 TVPA is any indication, then undocumented private attorney general actions will encourage legislative reform that further enables the undocumented worker with broader immigration and civil rights.

CONCLUSION

The inherent tension between immigration law and civil rights has come to full fruition with ICE's increased focus on workplace enforcement. The arrest and removal of undocumented workers is not an abuse of governmental authority. Rather it is a lawful execution of IRCA and our nation's immigration policy to prohibit unauthorized labor and migration. However, the implementation of ICE's worksite enforcement measures has also circumvented the civil workplace rights of undocumented workers victimized by labor exploitation. By detaining and deporting these individuals, the workplace violations they may have suffered remain unvindicated and unenforced.

I present the theory of the private attorney general as a useful normative framework for reversing the current prioritization of immigration enforcement over the civil rights of undocumented workers. This theory aims to empower individual litigants who advance interests that comport with our nation's commitment to constitutional and civil rights. In support of this theory, I suggest as a model, the trafficked worker as private attorney general, who is enabled to sue her trafficker through the conferral of immigration status. In this context, the divergent goals of immigration and civil rights laws are rectified, allowing the trafficked plaintiff to obtain not only individual relief, but to also promote the democratic ideals embodied by the Constitution and civil rights legislation: freedom from slavery, exploitation, and discrimination. A review of trafficking civil litigation illustrates the numerous public benefits gained through empowering the trafficked worker as private attorney general. A comparative analysis of litigation in the undocumented worker context reveals similar potential benefits. Thus, the trafficked worker as private attorney general represents a model of civil rights enforcement. If replicated by undocumented workers victimized by labor exploitation, this model would allow these workers to advance civil justice without the risk of deportation.

APPENDIX

TABLE 1: CASES PLEADING TRAFFICKING CIVIL REMEDY³³⁴

Court - Filing Date ³³⁵ <i>listed in chronological order</i>	Factual Allegations ³³⁶	Type of Labor ³³⁷	Criminal Investigation / Prosecution ³³⁸
E D La Dec 2008	Plaintiffs trafficked from Mexico and forced to work in defendant's strawberry farms in Louisiana. Plaintiffs' passports were confiscated and they were paid less than minimum wage under threats of deportation and serious harm.	Agricultural	Yes

(table continues)

³³⁴ Court cases pleading 18 USC § 1595 claim. See also Jennifer Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 Colum L Rev 1655-1703 (2007) (providing a similar table summarizing Section 1595 cases through August 2007).

³³⁵ Case names and numbers have been redacted to minimize the risk of future harm to the plaintiffs. Case names, case numbers and pleadings are on file with the author. Filing dates of complaints indicated by month and year.

³³⁶ This column briefly summarizes facts alleged in the complaints.

³³⁷ This column categorizes the type of labor at issue in each case. As this table indicates, the predominant forms of labor in civil trafficking cases include domestic work, agricultural work, and construction. Out of a total of thirty-one cases, domestic work comprised fourteen cases, agricultural work comprised nine cases, and construction comprised four. The remaining cases included restaurant, hotel, and other menial labor. Civil cases on behalf of sex trafficking victims have been rare. *Doe v Reddy*, No. 02 Civ. 05570, 2003 US Dist LEXIS 26120 at *31-37 (N D Cal 2003) provides one example of a case involving both trafficking for labor and sex that pre-dated the TVPRA. There are legitimate reasons for the relative absence of sex trafficking civil cases. Criminal prosecutions in sex trafficking cases are far more likely to occur than prosecutions in labor trafficking cases. As a result, the victims are often re-traumatized from their involvement in the criminal prosecution and are far more susceptible to retaliation from the traffickers who are frequently agents within a large criminal network and can utilize their networks to retaliate against victims. In addition, sex trafficking cases present unique factors that impact a potential civil lawsuit. First, since a criminal prosecution is likely in sex trafficking cases, if successful, victims may receive monetary compensation through criminal restitution. Second, the FLSA, which is applied in most civil cases to assess compensatory damages, excludes prostitution as a compensable form of labor due to its illegality. Finally, because of the clandestine nature of sex trafficking crimes, it may be more difficult to identify defendants and locate assets. See, generally, Kathleen Kim and Dan Werner, *Civil Litigation on Behalf of Human Trafficking Victims*, 3rd ed (2008), available at <<http://library.lls.edu/atlast/>> (last visited August 19, 2009). See also Nam, 107 Colum L Rev at 1655-1703 (cited in note 334).

³³⁸ This column indicates whether the civil docket or pleadings reveal an ongoing criminal investigation or prosecution by federal or state law enforcement authorities. Section 1595 authorizes a stay on the civil case in the event of a criminal investigation or proceeding. Thus, a stay order by a judge presiding over the civil case will be indicated in the case docket.

Table 1 Cont'd

Court - Filing Date <i>listed in chronological order</i>	Factual Allegations	Type of Labor	Criminal Investigation / Prosecution
E D Wis Sept 2008	Plaintiff, a Filipino woman, was forced to work as a domestic servant in the U.S. by defendants. Defendants confiscated her passport and exploited her undocumented status.	Domestic Work	Yes
C D Cal Aug 2008	Action for damages brought by the family members of 12 men and one surviving laborer who were trafficked across international borders to provide menial labor at a US military facility for defendants, which are US military contractors.	Menial Labor	No
D Conn June 2008	Six Ecuadorean family members filed suit against the owners of a bakery in Connecticut, for back wages and forced labor. Alleged employer misconduct included sexual harassment, sexual abuse, and threats of deportation.	Restaurant	Yes
S D Fl June 2008	Plaintiffs trafficked from Peru to provide domestic and childcare work under false promises of receiving legal immigration status. Defendants confiscated their passports, failed to pay the promised wages, provided substandard housing and threatened them with deportation.	Domestic Work	No
D Colo Apr 2008	Plaintiffs, Mexican citizens, incurred substantial expenses in reliance on defendants' promise of work in the United States. Defendants did not pay minimum wage and threatened the workers with immigration enforcement.	Agriculture	No

(table continues)

Table 1 Cont'd

Court - Filing Date <i>listed in chronological order</i>	Factual Allegations	Type of Labor	Criminal Investigation / Prosecution
E D La Mar 2008	Plaintiffs are a class of over 500 Indian men trafficked to work for defendant's construction company in the aftermath of Hurricane Katrina. Plaintiffs paid exorbitant fees upon false promises of receiving LPR status. Plaintiffs subjected to egregious working and living conditions and strictly monitored by guards.	Construction	No
E D La Mar 2008	Plaintiffs filed suit against their employer for forced labor and nonpayment of wages. Defendants provided plaintiffs with substandard housing and threatened them with eviction and law enforcement arrest.	Construction	No
D NJ Oct 2007	Plaintiff from Mexico, forced to labor on defendant's farm in New Jersey and live in substandard housing with limited access to food, under threats of physical abuse and immigration enforcement.	Agriculture	No
E D NC Aug 2007	Plaintiffs are Thai citizens, promised three years of steady work in the United States by defendants. Upon arrival, plaintiffs were not paid minimum wage, they lived in substandard housing, monitored by defendants, and their passports were confiscated.	Agriculture	No
LA Super Ct Aug 2007	Plaintiff, an Indonesian woman, forced to work as domestic worker in the United States without compensation. Defendants confiscated her passport and prohibited her from going outside or contacting anyone within the United States.	Domestic Work	Yes

(table continues)

Table 1 Cont'd

Court - Filing Date <i>listed in chronological order</i>	Factual Allegations	Type of Labor	Criminal Investigation / Prosecution
E D NY July 2007	Plaintiff, an Indian Hindu priest, was offered employment at a religious organization in the United States. Defendants deprived Plaintiff of his passport, failed to provide him with a habitable living space, and forced him to provide janitorial and maintenance services in addition to his religious and ministerial duties.	Ministerial and Janitorial	No
D DC Apr 2007	Plaintiff is a Tanzanian woman forced to work as a domestic worker without compensation, not permitted to leave the home alone, and subjected to physical and emotional abuse.	Domestic Work	No
N D Cal Apr 2007	Plaintiff, an Indonesian woman, was promised a simple housekeeping job, but was forced into domestic servitude upon her arrival for four years.	Domestic Work	Yes
E D NY Mar 2007	Plaintiff, a Bangladeshi woman, forced to serve as a domestic worker and nanny. Plaintiff's passport was confiscated and she was subjected to physical, emotional, and psychological harm.	Domestic Work	Yes
D Conn Feb 2007	Plaintiffs, Guatemalan citizens, trafficked to Connecticut to labor in defendants' tree nurseries. Plaintiffs were forced to work nearly 80 hours per week for far less than minimum wage. Defendants confiscated plaintiffs' passports, restricted their travel and communication, and threatened plaintiffs with arrest and deportation.	Agricultural	No

(table continued)

Table 1 Cont'd

Court - Filing Date <i>listed in chronological order</i>	Factual Allegations	Type of Labor	Criminal Investigation / Prosecution
D DC Jan 2007	Three female Indian plaintiffs brought civil suit against a Kuwaiti diplomat and his wife, alleging that they transported the plaintiffs into the U.S. and forced them to work as domestic servants in their home through physical and verbal abuse and under threats of harm and jail.	Domestic Work	Yes
D Or Nov 2006	Female plaintiff trafficked from Ethiopia to Oregon was forced to work for seven years under defendant's threats of jail and deportation.	Domestic Work	No
S D NY June 2006	Plaintiff, an Indian woman, sued a Kuwaiti diplomat for forced labor as a domestic worker, who was subjected to physical, sexual, and psychological abuse.	Domestic Work	No
D Colo June 2006	Six Chilean cattle herders brought suit against the owners of a ranch in Colorado. Four plaintiffs alleged they were forced to work under threats of serious harm or legal retaliation.	Agricultural	No
D Colo Apr 2006	Farm workers forced to work under threats of physical harm, extraordinary levels of control and intimidation, threatened abuse of the legal process, and a scheme of debt bondage.	Agricultural	Yes
S D NY Dec 2005	Plaintiff forced to work at a Bronx construction site by the defendant, who locked him in the construction site at night, seized his passports and other documents, and assaulted him.	Construction	No

(table continues)

Table 1 Cont'd

Court - Filing Date <i>listed in chronological order</i>	Factual Allegations	Type of Labor	Criminal Investigation / Prosecution
D N Mar I Dec 2005	Plaintiff brought from China to Saipan under false promises of employment. Upon arrival, she was forced to work as a housekeeper and childcare provider, under threatened and actual physical harm.	Domestic Work	Yes
C D Cal Nov 2005	Class action suit brought on behalf of 12 adult and 23 child plaintiffs forced to work on Firestone Plantation in Liberia to meet daily quotas of tapping rubber trees in exchange for a minimal salary.	Agricultural	No
C D Cal July 2005	Three Malian plaintiffs trafficked into Cote d'Ivoire as minors to work at cocoa bean plantations owned by defendant corporations. Plaintiffs allege they were beaten, never paid, and locked in guarded rooms.	Agricultural	No
E D NY July 2005	Plaintiff, an Ecuadorian woman, trafficked under false pretenses, forced to work as a domestic worker without pay and passport confiscated.	Domestic Work	No
W D Ky Dec 2004	Plaintiff trafficked to the U.S. from the Philippines as a domestic servant and forced to work to pay off \$8,000 smuggling debt.	Domestic Work	No
C D Cal Sept 2004	Sri Lankan woman brought to the U.S. upon false promises of paid work. Her personal documentation was confiscated and she was forced to work for two households, under threats of serious harm or deportation.	Domestic Work	No

(table continues)

Table 1 Cont'd

Court - Filing Date <i>listed in chronological order</i>	Factual Allegations	Type of Labor	Criminal Investigation / Prosecution
S D NY May 2004	Five female Latina plaintiffs hired as housekeepers for a New York mid-level hotel. They were subjected to harassment by managers and forced to work long hours at subminimum wage upon threats of force and deportation.	Hotel	No
D Minn Mar 2004	Plaintiff traveled from Nigeria to California upon false promises that she would receive a paying job and receive help in obtaining proper documentation to work. Instead, upon arrival, defendant confiscated her passport and forced plaintiff to work in defendant's home for no pay.	Domestic Work	No
E D La Jan 2004	Indian plaintiffs trafficked by defendants under false pretenses and debt bondage. Plaintiffs' passports confiscated and they were forced to work under threats of deportation and legal retaliation.	Construction	No